1986 WL 727833 (U.S.) (Appellate Brief)
Supreme Court of the United States.

THE CELOTEX CORPORATION, Petitioner,
v.
Myrtle Nell CATRETT, Administratrix of the Estate of Louis H. Catrett, Deceased, Respondent.

No. 85-198.
October Term, 1985.
March 24, 1986.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Reply Brief for Petitioner

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***1 I. CELOTEX SATISFIED ITS LIMITED BURDEN BY ?? THAT PLAINTIFF HAD FAILED TO PRODUCE ANY ?? OF DECEDENT'S EXPOSURE TO CELOTEX PRODUCTS.**

Respondent's arguments concerning the showing made by Celotex in support of its motion for summary judgment consistently seek to obfuscate the chronology of discovery in the trial court. Respondent filed her Complaint on September 2, 1980. After some earlier discovery requests by various parties, including Celotex, the defendants filed a joint set of interrogatories on February 13, 1981. These ***2** interrogatories included requests for specific information on decedent's exposure to asbestos-containing products.

When the interrogatories were finally answered on June 29, 1981, the answers contained no exposure information; instead, plaintiff promised to supplement her answers with the requested information (J.A. 59-60). On December 23, 1981, when Celotex renewed its motion for summary judgment, plaintiff still had not supplemented her answers to interrogatories -- a failure which Celotex's motion specifically pointed out (J.A. 171-72). Plaintiff finally filed supplemental answers to interrogatories on February 1, 1982, but still provided no indication whatsoever of exposure by decedent to Celotex products (J.A. 200-03). As of July 21, 1982, when the trial court granted Celotex's motion, plaintiff still had not responded to interrogatories in any manner indicating exposure by decedent to Celotex products.

In the recent case of *Fontenot v. Upjohn Company,* 780 F.2d 1190 (5th Cir. 1986), the Fifth Circuit affirmed the district court's grant of summary judgment to the defendant, a drug manufacturer, and expressly endorsed the position taken by Judge Bork in the dissent below. 780 F.2d at 1197. The Fifth Circuit granted summary judgment because the plaintiff "after seven months of time for discovery ...," had not produced any evidence that the drug manufactured by Upjohn was capable of causing the heart defects suffered by the plaintiff's two children. *Id.* The motion was granted even though Upjohn did not produce affidavits or other evidentiary material negating the possibility of causation. *Id.* at 1193.

In its interpretation of the requirements under Rule 56 of a party who does not have the ultimate burden of proof at trial, the Fifth Circuit stated:

> If, however, it is evident that the party seeking summary judgment against one who bears the ***3** proof burden has no access to evidence of disproof, and ample time has been allowed for discovery, he should be permitted, as Upjohn did here, to rely upon the complete absence of proof of an essential element of the other party's case.

The significance of this proposition to litigants and trial courts is set forth in the following statements by Judge Bork in his dissent:

> The majority's decision in this case undermines the traditional authority of trial judges to grant summary

> judgment in meritless cases. Even though the plaintiff has *no* admissible evidence on an essential element of her case, the majority today allows her to survive a motion for summary judgment. This decision will probably lead to an unnecessary trial followed by a directed verdict for defendant Celotex. More generally, the precedent established today will waste trial court time and energy and unnecessarily add to the costs and procedural burdens faced by litigants. *Catrett v. Johns-Manville Sales Corp.,* 756 F.2d 181, 187 (J.A. 233).

As the Fifth Circuit in *Fontenot* pointed out, even excluding counsel fees, the public cost of the average jury trial in federal court is more than $7,000.00. *Id.* at 1195, n.10. There are strong public policy grounds for interpreting Rule 56 in such a fashion as to make the burden of proof on a motion for summary judgment consistent with the burden of proof at trial ?? burden of proof on a motion for summary judgment upon the party who will have the burden of proof at trial was also explained by Judge William Schwarzer in *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact,* 99 F.R.D. 465, 487-88 (1982).

The factual situation in the present case furnished even stronger justification for a summary judgment than did the facts in *Fontenot.* In the present case, the plaintiff had over twenty-two months for discovery when the trial court ***4** ruled on Celotex's motion for summary judgment. The joint defense interrogatories requesting information on product exposure had been outstanding for more than seventeen months. Furthermore, unlike the plaintiff in *Fontenot* who sought more time for discovery, Respondent did not request additional time for discovery from the trial court.

Celotex, in the papers supporting its motion for summary judgment, specifically called the trial court's attention to Respondent's long-continued failure to respond to any of the discovery requests designed to identify evidence concerning decedent's exposure history (J.A. 171-72). If such a showing is insufficient to require a plaintiff to demonstrate that she has admissible evidence with which to survive a motion for directed verdict, then the result will inevitably be to require that cases proceed to trial in circumstances where the lack of admissible evidence of an essential element of plaintiff's case will require a directed verdict. As has been repeatedly pointed out by the academic commentators, and as was recognized by the Fifth Circuit and by Judge Bork's dissent below, there can be no public policy justification for such a result. *See, e.g., Fontenot v. Upjohn Company, supra; Catrett v. Johns-Manville Sales Corp., supra;* Currie, *Thoughts on Directed Verdicts and Summary Judgments,* 45 U. Chi. L. Rev. 72 (1977); Louis, *Federal Summary Judgment Doctrine: A Critical Analysis,* 83 Yale L. J. 745, 752 (1974); Pielemeier, *Summary Judgment in Minnesota: A Search for Patterns,* 7 Wm. Mitchell L. Rev. 147, 158-59 (1981); Louis, *Summary Judgment and the Actual Malice Controversy In Constitutional Defamation Cases,* 57 S. Cal. L. Rev. 707, 716-17 (1984); American College of Trial Lawyers, *Recommendations on Major Issues Affecting Complex Litigation,* 90 F.R.D. 207, 229-31 (1981).

***5** As was stated in the dissent below, the trial court may grant summary judgment *sua sponte* if it is satisfied that no genuine issue of material fact is present and if notice is given. 756 F.2d at 189 (J.A. 237). In the case of a *sua sponte* grant of summary judgment, there is obviously no supporting material other than the court's review of the record. Respondent acknowledges that the trial court has the power to grant summary judgment *sua sponte,* but argues that if a motion for summary judgment is made by a party, then the trial court's review of the record is an insufficient basis for summary judgment. *Resp. Br.* 23, n.34. As Judge Bork pointed out, it is illogical to hold that a trial judge is "stripped of his power to act solely b?? the defendant Celotex filed an unsupported motion." ?? F.2d at 189 (J.A. 238, n.6).

It is respectfully submitted that Celotex adequ?? supported its motion for summary judgment by point?? out plaintiff's failure to respond to discovery requ?? manner indicating any exposure of decedent to ?? products. The inquiry then properly shifted to ?? plaintiff made a sufficient showing to def?? the ??

II. RESPONDENT MADE NO SHOWING THAT SHE HAD ?? MISSIBLE EVIDENCE WHICH COULD P?? VERDICT.

Respondent strenuously argues that she ?? indicate that she had admissible evidence --?? witness -- available for use at trial." *Resp. B??* She then ?? not presented to the trial court in ?? Celotex's motion for summary judgment was??

In fact, however, it was not only the ??nt's showing which was deficient. She ?? to produce any indication that she could ?? missible evidence at the time of trial which ?? her to survive a directed verdict. The only ?? ***6** which Respondent points is, first, an unsworn letter from a person who did not purport to have any personal knowledge that decedent was exposed to Celotex products and, second, invoices indicating that "Carey-Canadian Asbestos" had made certain sales to one of decedent's employers.

Respondent acknowledges in her brief that she is not pressing the argument that decedent's deposition would be admissible either at trial or for ??poses of a summary judgment motion. *Resp. Br.* 12, n.1?? Moreover, Respondent has not pressed her argument that the letter to her attorney from a representative of decedent's employer's insurer has any probative value. Respondent's contention is thus that two documents -- the letter from Mr. Hoff, the Assistant Secretary of one of decedent's employers (J.A. 197-98) and the invoice showing a shipment of Firebar from Carey-Canadian Asbestos to decedent's employer (*Resp. Br.,* App. 1a) -- are sufficient to permit her to defeat Celotex's motion for summary judgment.

Respondent concedes that none of her evidence was admissible. *Resp. Br.* 12, n.17. Nor does she question the authority of the cases cited in Celotex's initial brief which held that a summary judgment motion may only be opposed with affidavits or other evidence which would be admissible at trial. She argues, however, without citing any authority to support her position, that her failure to produce admissible evidence should be excused on the basis that she somehow demonstrated that she would be able to produce admissible evidence at trial.

In fact, however, neither the letter of Mr. Hoff nor the Carey-Canadian Asbestos invoice provide any indication that Respondent's case could survive a motion for directed verdict. Not only is Mr. Hoff's letter not under oath, it does not even purport to be based upon personal knowledge. In fact, its references to what "we understand" and ***7** "our understanding" would appear to strongly suggest that it is *not* based upon personal knowledge.

The invoice from Carey-Canadian Asbestos similarly fails to show that decedent was exposed to a Celotex product. First, the appellate courts have repeatedly held that the fact that a manufacturer of asbestos-containing products has sold products to a plaintiff's employer is insufficient to support an inference that the plaintiff was exposed to the products. *See, e.g., Blackston v. Shook and Fletcher Insulation Co.,* 764 F.2d 1480, 1482 (11th Cir. 1985); and *Lohrmann v. Pittsburgh Corning Corp., et al.,* 782 F.2d 1156, 1161-64 (4th Cir. 1986). Furthermore, Respondent produced no evidence whatever that Celotex could be held liable as a result of sales by Carey-Canadian Asbestos.1

In short, Respondent's opposition to Celotex's motion for summary judgment was deficient in both form and substance. Despite having had nearly two years to discover admissible evidence to establish Celotex's liability, Respondent utterly failed to demonstrate that her evidence would be sufficient to survive a motion for directed verdict at the time of trial. Under the circumstances, it was appropriate for the trial court to grant Celotex's motion for summary judgment.

*8 CONCLUSION

For the reasons set forth above, Petitioner respectfully urges that this Court reverse the judgment of the Court of Appeals and reinstate the judgment of the District Court.

Footnotes

* *Counsel of Record*

1 Respondent attempts to excuse this failure by urging that Celotex did not demonstrate its lack of liability for products sold by Carey-Canadian Asbestos. This ignores the fact that Respondent would have to *prove* Celotex's liability at trial -- something which there is no indication she could do. Respondent has not denied Celotex's assertion that it has *never* been held liable as a result of products sold by Carey-Canadian Asbestos.

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