OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-198

TITLE CELOTEX CORPORATION, Petitioner V. MYRTLE NELL CATRETT, ADMINISTRATRIX OF THE ESTATE OF LOUIS H. CATRETT, DECEASED

PLACE Washington, D. C.

DATE April 1, 1986

PAGES 1 thru 46

ALDERSON REPORTING
(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

- -x

CELOTEX CORPORATION, :

Petitioner :

V. : No. 85-198

MYRTLE NELL CATRETT, ADMINIS- :

TRATRIX OF THE ESTATE OF LOUIS :

H. CATRETT, DECEASED :

- -x

Washington, D.C.

Tuesday, April 1, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:57 o'clock a.m.

APPEARANCES:

LELAND S. VAN KOTEN, ESQ., Towson, Maryland; on behalf of Petitioner.

PAUL MARCH SMITH, ESQ., Washington, D.C.; on behalf of Respondent.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Van Koten, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF LELAND S. VAN KOTEN, ESQ.

ON BEHALF OF PETITIONER

MR. VAN KOTEN: Thank you, Mr. Chief Justice, and may it please the Court:

This case is here on a writ of certiorari to the District of Columbia Circuit which, in a decision written by Judge Starr reversed the summary judgment granted by Judge Richey of the District -- of the U.S. District Court for the District of Columbia. Judge Bork dissented from that decision and held that the decision should have been affirmed.

The chronology of this case in the district court I think is quite important. The case was filed in September 1980. There were some preliminary, rather abortive efforts at discovery, but the first discovery which is truly relevant to this proceeding was propounded in February 1981, which was a joint Defense set of interrogatories, 52 in number, numbers 51 and 52 of which asked very specific questions about product exposure and asked very specific questions about witnesses who would testify to product exposure.

That joint Defense set of interrogatories was

not answered until June 1981. However, when they were finally answered, the interrogatories 51 and 52 were simply answered by saying that those answers would be supplemented at a later date. The Defense filed a motion to compel, timely in July. The answers were not supplemented, there was never an order on the motion to compel, the answers were not supplemented until February 1982 after Celotex had filed the motion for summary judgment which is the subject of this appeal. The supplementary answers still did not refer to any exposure to Celotex products. Interrogatories 51 and 52, as a matter of fact, were not supplemented at all.

Celotex had previously made a motion for summary judgment in September, which was withdrawn. Celotex renewed its motion in December. The fact that the trial judge would seriously be considering motions for summary judgment based upon the lack of product identification cannot possibly have been a surprise to Plaintiffs' trial counsel since the district court judge had already granted a number of such motions. However, the motion was pending from December 1981 until July 1982 when the judge finally ruled it.

There has been a lot of attention given in Respondent's brief to whether the motion went only to exposure to Celotex products in the District of Columbia

or to exposure anywhere. I would submit that although the language of the motion may not have been a model of clarity, the statement of undisputed facts certainly indicated that there was no evidence of exposure to Celotex products either in the District of Columbia or anywhere else.

QUESTION: That certainly was the view of the majority in the Court of Appeals.

MR. VAN KOTEN: It was the view of all three of the members of the Court of Appeals.

QUESTION: All three.

MR. VAN KOTEN: And it was the view of the district judge as well since he said that there was no admissible evidence of exposure in the District of Columbia or elsewhere.

QUESTION: Well, was there any inadmissible evidence of exposure anywhere else?

MR. VAN KOTEN: There was testimony of the decedent at his Workmen's Comp proceeding which was a proceeding at which Celotex was not a party and which counsel for Respondent concede at this point is inadmissible for any purpose.

QUESTION: How about that letter from Mr. -- what is it, Mr. Hoff?

MR. VAN KOTEN: The letter from Mr. Hoff, Your

Honor, certainly did not purport to be made on personal knowledge. It was not under oath. It also, I think, from reading the letter, pretty clearly indicates that it was not on personal knowledge. He refers to what we understand and our understanding repeatedly. Mr. Hoff is an Assistant Corporate Secretary of the corporation with offices all over the United States.

QUESTION: Let's suppose that -- let's suppose that Mr. Hoff -- he was out of state, I guess. He was in Illinois, was he? Where was he?

MR. VAN KOTEN: That's correct, Justice White.

QUESTION: Suppose his letter was unambiguous that he knew, he knew that, from personal knowledge that this man had been exposed to asbestos, and there he was, and you knew, the Plaintiff had at some point in this case had told you, had mentioned this letter, I take it. So you knew about the letter, didn't you?

MR. VAN KOTEN: The first time that the letter was produced was in response to Celotex's first motion for summary judgment.

QUESTION: Right, right, so you knew about it when you finally made your second motion.

MR. VAN KOTEN: That's correct, Celotex's trial counsel did.

QUESTION: Well, and suppose that -- suppose the Plaintiff had said we are going to call Mr. Hoff.

MR. VAN KOTEN: Well, the Plaintiff had said that, Justice White.

The point that I think is important to focus upon is that we only reached that question, that Celotex is correct on the first issue in this case and on the issue that's really the reason that the petition for cert was filed --

QUESTION: Which is what?

MR. VAN KOTEN: Which is that the holding of the majority below that the Plaintiff need produce nothing, the Plaintiff could have simply sat silent because Celotex did not affirmatively produce evidence of no liability. The majority below expressly said that Celotex, that it was not sufficient to point to the fact that Plaintiff had not indicated that there was any admissible evidence of liability, that Plaintiff had -- that Celotex had to show that the Plaintiff could not produce any admissible evidence of liability, that burden is a burden which it would be impossible for Celotex to meet because, let's say that Celotex went back and prevailed upon the problems of Mr. Hoff's letter. There would be no way to renew the motion because even if Mr. Hoff was clearly mistaken, Celotex

could not possibly file a motion saying that there was never any other exposure at any other point in the decedent's life.

QUESTION: It seems to me that it might be just a question if his letter really was a meaningful letter, was unambiguous, it might be just a question of who had to go take his deposition.

MR. VAN KOTEN: That may be correct, Justice White. I --

QUESTION: Who do you think would have to -- if this letter was a straightforward letter that really did give some credence to the Plaintiff's case, do you think, to make your motion, do you think you would have to go take his deposition?

MR. VAN KOTEN: Had I been trial counsel for Celotex, if the letter indicated that Mr. Hoff really knew something, I would have certainly been there taking the deposition in Chicago in any event.

QUESTION: The majority in the Court of Appeals expressly refused to pass on the admissibility of the evidence.

MR. VAN KOTEN: That's correct, Justice Rehnquist. They referred to it, they discussed it, but they did expressly refuse to pass on --

QUESTION: And they said, some of it, it was

partially curable.

MR. VAN KOTEN: That is correct. I don't think that that's at all clear from the record. And I would point out that counsel for Celotex, in argument on the motion for summary judgment, specifically called the Court's attention to the inadmissibility of the letter, to the fact that it was not unier oath, and as a matter of fact, Mr. Hoff, since his company had paid Workmen's Compensation benefits, may have indeed had a subrogation interest in the case, although that was not of record.

I think it is interesting, though, that trial counsel for the Plaintiffs didn't request additional time to put this evidence in admissible form, and even after the district court hai granted the motion for summary judgment and had thrown the Plaintiff out of court against Celotex, never filed a motion for reconsideration with an affidavit showing that Mr. Hoff really in fact knew anything about the facts of this case. And I would --

QUESTION: Mr. Van Koten, certainly the language in this Court's opinion in Adickes v. Kress & Company cuts against your argument, doesn't it?

MR. VAN KOTEN: There are a couple of sentences of language that I believe in fact do, Justice O'Connor. However, I think that if you read what the

state of the factual record was before this court in Adickes, the holding of this Court does not cut against our position. That was the position taken by the Fifth Circuit in Fontaneau which we cite in our reply brief, and it was the position taken by the Third Circuit in the In Re Japanese Electronics Products case which this Court just decided last week under the name of Matsushita Electronic.

I would point out that if the opinion of the majority in the D.C. Circuit was correct, I do not -- I don't believe that from the state of the record in the In Re Japanese Electronics Products case, that that case would have ever even been before the Court because at the trial court level and at the appellate court level, counsel for the Plaintiff in that case strenuously argued exactly what counsel for Respondents are arguing in this case, namely, that the trial court was incorrectly placing the burden upon the Plaintiffs to show that they had some admissible evidence with which to support their claim, and that the Defendants had not affirmatively negated the possibility that Plaintiffs could prove their claim.

The Third Circuit in that case discussed in some detail its view of the actual holding of this Court in Adickes and came to the conclusion that the real

question was not the question of who had the initial burden of producing evidence on a motion for summary judgment, at least where the motion for summary judgment was made by the party who had not had the burden of proof at trial, but that the real question is whether looking at all of the evidence in totality, the Court is persuaded that there is not in fact a genuine dispute of material fact, and in the opinion of the Third Circuit in that case, in the opinion of the Fifth Circuit in Fontaneau decided within the last couple of months, it's appropriate to consider who will have the burden of proof at trial. And I would submit, in fact, that reading what the record was before this Court in Adickes, that there was ample circumstantial evidence with which to support the Plaintiff's claim. The real compaint I believe of the defense there was that there was no direct evidence.

QUESTION: May I ask you to comment on one thing that I'm a little puzzled about?

The motion, as I read it, said -- directs the Court's attention to proximate cause as a result of distribution within the jurisdictional limits of the district courts, and then in your memorandum in support, the record is totally devoid of any such evidence within the jurisdictional confines of this Court.

I get the impression the motion was intended to say that if there wasn't anything thing the case to this particular federal district, that you would prevail.

Is that a correct reading of your motion?

MR. VAN KOTEN: Well, I wasn't trial counsel for Celotex, and my firm wasn't, Justice Stevens, so I can't say for sure. However, the statement of material facts which are not in dispute goes substantially further than that, I believe --

QUESTION: But it ends at the last sentence on that -- I'm trying to find it, 172, ends with the words "within the jurisdictional limits of this Court." So that seems to be consistent with the notion.

MR. VAN KOTEN: But it -- well, but I believe, Justice Stevens, it is phrased in the alternative. It says there is no evidence whatsoever that the decedent was ever exposed to any product containing asbestos designed, manufactured or distributed by Celotex Corporation, or that any such product was in any way the proximate cause of the decedent's death within the jurisdictional limits of the Court.

I'm not sure, frankly, what the last part of that sentence means, but it is clearly stated in the alternative.

QUESTION: You see, I was wondering if, although they didn't put in admissible evidence in response, if they said, well, we are going to try to prove our case by evidence of what happened elsewhere and therefore the motion is legally insufficient, and the district judge disagreed, that's not --

MR. VAN KOTEN: Well, Justice Stevens, I'm not sure, but it's also well settled that a district judge may grant a motion for summary judgment upon grounds other than those cited in the motion, and two cases to that effect are Broderick Wood Products v. U.S., 195 F. 2d 433 and Board of National Missions v. Smith, 182 F. 2d 362. Those are Tenth and Seventh Circuit cases, and I believe Wright and Miller also agree. The question is whether the district judge, in viewing the entire record, believes that summary judgment is appropriate, and so even if you are correct, Justice Stevens, in what perhaps Celotex's trial counsel meant by that language, I dont think that there's any authority that that would remove the discretion of the district court to grant summary judgment if it viewed it as appropriate.

Again --

QUESTION: Well, Mr. Van Koten, you say the discretion of the district court to grant summary judgment.

It is my understanding this question of summary judgment raises a question of law, and that it isn't review -- well, the district court might have gone either way appropriately, the same way you review kind of equitable decisions by the district court.

MR. VAN KOTEN: That's clearly correct, Justice Rehnquist, in a situation where the district court incorrectly grants a motion for summary judgment. I believe that where the district court in its discretion denies the motion, that the law may be otherwise.

QUESTION: Well, you can't appeal from a denial.

MR. VAN KOTEN: Certainly not an immediate appeal, that's correct.

QUESTION: So you don't have much case law on that.

MR. VAN KOTEN: Well, that's correct, and that's the point, that it's indeed -- that's why it's an area to that extent.

QUESTION: That's why it's discretion.

MR. VAN KOTEN: But the point I think is that the district judge -- and I think it's interesting that in their brief Respondents concede that had Judge Richey set up a formal discovery schedule and had the formal,

the time for discovery stated, and that formal schedule ended, that at that point, if the Plaintiffs had not produced admissible evidence of exposure to Celotex products, that the district court could have granted a motion for summary judgment on that basis.

In this case there never was a formal order entered stating when discovery must cease. A number of judges in the District Court for the District of Columbia, at any rate, don't typically enter that order, that type of an order. There -- it wasn't entered, but Judge Richey had made it very clear in ruling on previous summary judgment motions that he thought that the time to try to come up with some kind of admissible evidence to keep individual defendants in the case was rapidly disappearing.

QUESTION: Yes, but is that a fair -- I was just reading the colloquy before he ruled, when they produced the Hoff letter, he didn't reject that because it was inadmissible. He said, let me see the Hoff letter. Where does it say it was done in the District of Columbia, and I did not say in the District of Columbia. It had no contact with the District. For that reason he refused to rely on it, as I understand it.

So he was -- maybe I misread it, but he seemed

to be focusing on that issue and the concern with the locality of the exposure, and later on, they in effect represented they could prove exposure in other areas, and he in effect said I don't care about other areas.

MR. VAN KOTEN: Well, that is certainly a possible way, Justice Stevens, of reading that colloquy. If the only holding of the D.C. Circuit had been that it was troubled about that and wanted a more fully developed factual record because of that, we wouldn't be here. The reason that we are here is to --

QUESTION: Well, except if he thought -- if he thought that was a legal essential element of the Plaintiff's claim, exposure in the District, he wouldn't have asked for further discovery because the Plaintiff said we can't get you anything on that point. So he would just dismiss the case.

But, and you don't contend that that would make the case deficient, as I understand you.

MR. VAN KOTEN: I don't contend, certainly, that it would make for a ruling on the merits as was entered in this case.

The, again, the crux of our case is that the opinion of the majority below in holding that simply pointing to the failure of the party with the burden of proof at trial to produce any indications in discovery

that they had admissible evidence, makes --

QUESTION: That would have -- if they had obtained an affidavit from Hoff, for example, and he stated it on his own knowledge that there was exposure in Illinois, that would have satisfied the Plaintiff's requirement in your view, I suppose.

MR. VAN KOTEN: I think that -- I think that's correct. If Mr. Hoff had stated that there was exposure to Celotex products -- and that's another issue that was not briefed and argued in the district court, but I think it's quite clear that Plaintiffs could not possibly prevail upon exposure to Carey-Canadian Asbestos products. In any event, were they able to prove such exposure, and I think that the record in this case falls woefully short of showing that they could in fact produce evidence of exposure to those products, the rule that has been urged by pretty much unanimously the academic commentators and has been held by the Fifth Circuit in Fontaneau and Third Circuit in In Re Japanese Electronics Products, which would harmonize the burden on the motion for summary judgment with the burden at trial is a rule which will have salutary effects in permitting trial courts to narrow down the issues in the case to what are in fact the real issues, and my firm on occasion represents plaintiffs as well as defendants.

There are instances where I have seen were defense counsel will raise affirmative defenses, for example, of a decedent's contributory negligence without any evidence produced in the course of disovery that the Defendant -- that the decedent -- that the Plaintiff's decedent was contributorily negligent. The rule that we are urging would not be a rule that would just help defendants, it would help trial courts in that instance narrow down the real focus of the case to what were the real issues which were supported by the real evidence in the case.

I think that that is the importance of this case. We have -- my office has been involved in over 1000 abestos cases in Maryland and the Distrtict of Columbia. It's by definition impossible to prove, for a defendant to prove that the plaintiff cannot possibly produce evidence of exposure or proximate causation. The best that the defense can ever do in any of these cases is say that simply at this point the plaintiff has not done so. And that's true in many other respects, in many products liability cases and other cases as well.

What -- the holding that we would urge would allow trial judges to control their dockets, to get rid of frivolous cases before putting not only the parties but the judicial system to the burden of a needless

trial, and to whittle the issues down to what are in fact the real issues in the cases.

As we discuss the holdings of the lower courts are unanimous that a motion for summary judgment, at least if you reach the issue of the respondents' evidence, can only be opposed with what would in fact be admissible evidence at trial. We have cited those cases in our brief, and they aren't really disputed.

The question really, as was pointed out by the district court, is whether they even need to get to that question, whether the plaintiff had to produce anything or whether the plaintiff, in response to Celotex's motion, could have stood there, filed nothing, said nothing, and still obtained a reversal. That was the holding of the majority below, and we would submit that there's nothing in this Court's opinions in Adickes or any other case which would require such a holding, and that such a holding largely eliminates the utility of Rule 56 in a great variety of cases.

If I could, I would like to reserve the rest of my time for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr. Smith?

ORAL ARGUMENT OF PAUL MARCH SMITH, ESQ.

ON BEHALF OF RESPONDENT

MR. SMITH: Mr. Chief Justice, and may it please the Court:

Our position in this case is a simple one. When Celotex moved for summary judgment, it relied solely on the state of the record as it then stood in the case. Such a motion is, we submit, perfectly appropriate where the record does show that the Plaintiff lacked sufficient evidence for trial. But here the record showed precisely the opposite. It showed that the Plaintiff had two pieces of evidence ready to use at trial. She had a witness, and she had sales records supplied by Celotex which corroborated that witness' specific allegations.

Now --

QUESTION: But that's not the ground that the Court of Appeals went on, Mr. Smith.

MR. SMITH: Your Honor, the Court of Appeals' ruling was that the motion was unsupported, and therefore there was no obligation on the part of the Plaintiff to come back with any sort of affidavits to substantiate her case, and that is essentially the point I'm making here as well. The motion was unsupported because, although these two types of trial evidence were listed by the Plantiff, the Defendant Celotex did nothing to offer -- did nothing in its motion to contest

or discredit those two types of evidence in any way.

QUESTION: Well, but that -- the Court of Appeals says at page 5A of your -- of the petition, we need not, however, reach the evidentiary issue inasmuch as the Defendant's moving papers were patently defective on their face.

I read the majority opinion, and I think it's hard to read it otherwise, as saying that we don't have to worry about whether the Plaintiffs made any showing at all because it was the Defendant who had to make a showing, and they did not make this negative showing.

MR. SMITH: Yes, they had to make a showing, but I think I want to clarify one point. They didn't have to make a showing of affirmative evidence that they were not liable on the tort. What they had to do in a case like this, and it's fair to expect them to do it, is they had to take the evidence that was listed by the Plaintiff in her interrogatory response and in some way show that the Plaintiff's trial case would not be sufficient once the case went to trial. That is the kind of support that a Plaintiff -- that a Defendant manufacturer in this kind of case has to offer before it can move for summary judgment.

QUESTION: Where do you find that language in the Court of Appeals' opinion that supports what you

just saids?

MR. SMITH: Well, Your Honor, I think that the Court of Appeals' opinion is somewhat vague on what kind of support you have to offer before your motion is valid, but they were quite clear that you didn't have to offer an affidavit, and they said several times, we are not going to tell you exactly what sort of support you have to offer.

But the law is quite clear that you have two choice when you move for summary judgment. Either you can produce affirmative evidence to show that you are not liable, or you can just ask the Plaintiff to preview his trial case, and when he does so, you can then try to show that that trial case won't do the job. And having done that, you still don't have to come up with affirmative evidence. That's enough.

QUESTION: Well, what if the Defendant moves for a summary judgment in a case like this and the Plaintiff says we don't have to prove anything because under the Court of Appeals ruling here, it is up to the Defendant to show that the Plaintiff has never been -- has never been exposed to asbestos.

MR. SMITH: Let me try to deal with this.

I think it is clear that -- and this rule survives the Court of Appeals decision that every

plaintiff in every case has a duty to identify evidence that he plans to use at trial. That will generally occur in an interrogatory response before the motion is even filed.

If the plaintiff totally fails to identify evidence that he plans to use at trial, and discovery has gone on for a long time and is closed, at that point his failure to identify evidence is itself support for the defendant's summary judgment motion.

QUESTION: Well, that sounds like a sensible rule, but I just didn't see the Court of Appeals as even mentioning a rule like that.

MR. SMITH: Well, Your Honor, I think, you know, it may be that the Court of Appeals ruling needs to be clarified in this Court, but I see nothing there that says that you have to have affirmative evidence.

QUESTION: Do you agree that the standard for granting summary judgment is basically the same as the -- whether a motion for directed verdict should be granted?

MR. SMITH: In the sense that you look at the burden of proof and determine.

QUESTION: Yes.

MR. SMITH: Surely that should be taken into account, but there is --

QUESTION: Well, you say it should be taken into account. What does that mean?

MR. SMITH: Well, there is one key difference between the two situations. At summary judgment, the plaintiff's evidence has never been presented; the witnesses have yet to testify, and so the defendant can't just stand up at the end of the process and say I think this is insufficient. At the summary judgment stage the defendant has to do something affirmative to undermine the plaintiff's listed evidence. If she has a witness, the plaintiff -- the defendant has to take the deposition.

QUESTION: Well, would you -- do you disagree with that word "admissible?" You must. You're just going to list -- you're just going to list some evidence, you say. Does it have to be admissible evidence?

MR. SMITH: Well, I think, Your Honor, if the evidence you list for trial is three inadmissible documents and you concede that that's all you have for trial, then you should -- then that's a valid basis for summary judgment.

QUESTION: What did you list in this case that you think satisfied your obligation?

MR. SMITH: The interrogatory responses listed

a witness with direct knowledge of the facts.

QUESTION: Who? Who?

MR. SMITH: Mr. Hoff.

QUESTION: How do you -- and what did it -- you listed him, and he said what about him?

MR. SMITH: The interrogatory that asked him -- that asked for him to be -- for witnesses, the one that he was listed for specifically said do you have a person with knowledge of the relevant facts, and he was listed. I would add that there's nothing in his letter that even suggests that he doesn't lack -- that he doesn't have requisite knowledge. All of this stuff about our understanding and everything was only in that portion of the letter that goes to which company, which corporation manufactured the product.

QUESTION: And you suggest that your obligation, if you had any, was to, is just to list the witness, and you don't need to get an affidavit from him and present it in opposition to any motion, and you don't need to take his deposition?

MR. SMITH: What this case is about is when a party opposing summary judgment incurs that further duty not just to list a witness but to present an affidavit from that witness, and the rule is clear that you have that further duty only where the motion itself is

supported in some way other than by the lawyers' mere assertions. Here the motion was essentially unsupported because it relied entirely on the existing record, and that record, those interrogatory responses didn't by any means suggest that the Plaintiff lacked a meritorious case; indeed, quite the contrary. So the motion was invalid on its face, and under our system, at that point the party opposing summary judgment --

QUESTION: And you think that once you listed that witness, if Celotex, if the Defendant was going to move for summary judgment, it had to deal with Mr. Hoff.

MR. SMITH: That's exactly right, Justice White. they had to do that because they had to provide some --

QUESTION: You could go take his deposition or present an affidavit or what?

MR. SMITH: There's a number of things they could do. They could depose him. They could get an affidavit from someone else saying he was never there at the time, or they could in some other way deny the claim. Obviously if a defendant has the capacity just to deny the claim on his own, that's enough to carry the initial burden at the summary judgment stage as well.

But here, Celotex never took any of these

steps.

Now, I think it's useful to review a few more of the factual events in the district court because they help to show why it really is hard to understand the failure of Celotex to do anything else in this case to support its motion.

First, well before the motion was filed, Plaintiff did tell Celotex every fact that she planned to prove at trial to establish the liability of Celotex. She told Celotex the time and place of the alleged exposure, the particular product involved, and the name of the person, Mr. Hoff, who had direct knowledge of all of these events. She did all this in her response to the earlier summary judgment motion which was later withdrawn by Celotex, and that response included both a deposition transcript of the decedent and the Hoff letter.

The Hoff letter and the deposition transcript both described the same set of exposures during 1971 when the decedent was working for Anning Johnston, a company in Chicago.

Now, from this point on -- and I think it is important to recognize -- everyone in the case proceeded with these specific allegations in mind. Celotex investigated the allegations and came up with the sales

records which conformed exactly to the story that had been told by the decedent and Hoff. It then filed for a change of venue, filing these sales records in support of its own motion and said the reason we should move to Chicago is because this case is all about these Anning Johnston exposures.

Then, nine days later we got this summary judgment motion, and that motion, peculiarly enough, doesn't say anything at all about the Anning Johnston exposures. It simply denies that there is evidence of exposures in Washington, D.C.

QUESTION: Is -- could you direct me to your interrogatory answer where you mention Mr. Hoff, your statement?

MR. SMITH: That is on page 200 and 201, Your Honor.

QUESTION: Do you think you have to at least say what Mr. Hoff will, what your witness will testify to?

MR. SMITH: I think that's certainly something that the defendant has a right to know. Here they had his letter for at least three or four months before this interrogatory response was filed, and they had had the time before this was filed to investigate the claim fully, produce these sales records, and they knew

exactly what Mr. Hoff was going to say. This, the reason that this wasn't all set out in more detail in the interrogatory responses probably was they thought the information had already been given.

QUESTION: Now, what page did you say it was?

MR. SMITH: The question is on page 200 of the Joint Appendix, and the answer is on page 201.

QUESTION: But all that does is give the witness' name, Mr. smith.

MR. SMITH: Yes, Justice O'Connor.

QUESTION: And where do we find in the record what it is that Mr. Hoff would have said?

MR. SMITH: The first information provided on that was provided back in October of 1981. The letter appears on pages 162 and 163 of the Joint Appendix. This was an attachment to the response to the earlier summary judgment motion, which along with the decedent's deposition transcript, set out the facts that Hoff did know and was prepared to testify to the use of this particular Celotex product, Firebar, during that particular time period.

Now --

QUESTION: And when was this filed in the case?

MR. SMITH: This was filed in October of 1981,

that is, about two months before the summary judgment motion was made and about three months or four months before Hoff was actually officially listed as a witness.

QUESTION: The date of the letter itself is October 15, so -- and then was field on October 19? Is that what that significance is?

MR. SMITH: Yes, that's about right.

QUESTION: Well, where does this letter suggest that there was exposure to asbestos?

MR. SMITH: Let's see here.

QUESTION: It just says he worked, he worked -- oh, in the -- he supervised and trained crews in the application of Firebar, is that it?

MR. SMITH: Yes. This letter may not use the words "asbestos." I think the --

QUESTION: Yes, I understand.

MR. SMITH: Now, I want, just a couple more points on the facts. After the second motion came in --

QUESTION: Does the letter tell us that there is evidence that Mr. Catrett was exposed to the product as opposed to supervising and training crews?

MR. SMITH: Well, the letter doesn't say anything specific about that, but the product, first of all, was a product that was sprayed into the air, so if

you're going to demonstrate it, the asbestos was floating around in the air, and the deposition transcript certainly set out all of that..

QUESTION: Well, it says he worked in new construction.

MR. SMITH: Yes. They were fireproofing the girders in buildings when they were doing this, and he would go out and train the crews, and then they would carry on with the product. He was a specialist in this product, which was called Firebar.

Now, the response again, the response to the second summary judgment motion,. the one that was dispositive in this case, again included this deposition transcript in the Hoff letter, and it was then a matter of about three weeks later that Hoff was officially listed as a witness.

QUESTION: You don't think the deposition transcript helps you much, do you?

MR. SMITH: Only in the sense that it helped to explain the particular facts that were going to be at issue at trial. I certainly don't suggest that that was a separate form of evidence. Indeed, when it was filed the plaintiff conceded that it was inadmissible under the hearsay rule.

I think that it's important to understand that

there was no suggestion at the time that these three documents, this letter, an additional letter, and the deposition transcript, represented the trial evidence of the plaintiff. They were more illustrative of what she intended to prove, and at all times the Plaintiff made clear that she was going to actually prove these facts through a witness.

Now, that's where matters stood when the issue was submitted to the district court, and the question here is whether on these facts Celotex satisfied its initial obligation to provide some concrete support for its motion. Clearly, I think the answer is no. The only support for the motion was the existing record, and that record, as I have explained, demonstrated that the Plaintiff had two uncontested forms of trial evidence available for use.

Now, this requirement that there be some support for a summary judgment motion is hardly controversial in itself. It is based directly in the language of Rule 56 and has been enforced in a multitude of decisions, most prominently, the Adickes decision that was discussed before. I want to make clear that these two recent Court of Appeals cases discussed by Celotex hardly do anything to change the rule. The first, the Matsushita case, the Court decided last

week. That was a case where both parties had submitted literally a mountain of evidence to the district court prior to the summary judgment ruling, so there could have been no suggestion that the motion by the moving party there was unsupported in the sense that we have here.

QUESTION: Well, as Justice Rehnquist was saying, the Court of Appeals really didn't concern itself with these things. It just said that -- it just said that the Defendant's motion was based on its face.

MR. SMITH: Unsupported I think was the language that was used.

QUESTION: Yes, unsupported, and it didn't seem to make any difference to the Court of Appeals whether the Plaintiff had made any showing at all.

MR. SMITH: Well, I think that there may be two ways to read the Court of Appeals decision. I think their reference to the fact that the inadmissibility of the documents was curable may at least be an implicit reference to the fact that Hoff was listed as a witness. They knew he was really a person out there.

QUESTION: So if we read the Court of Appeals opinion as saying that the plaintiff needs to show nothing in order to overcome this kind of a motion for summary judgment, you wouldn't defend that.

MR. SMITH: No, I think, I think there -- the plaintiff obviously deserves time to be able to come up with trial evidence. If you had an unsupported motion for summary judgment --

QUESTION: Well, I know, but you've had two or three -- you had two or three years.

MR. SMITH: Certainly there was enough time here. I'm just saying that, if we're talking in the abstract, you can't have a motion, unsupported motion for summary judgment filed by a defendant, saying --

QUESTION: And if the Court of Appeals said, said that the plaintiff needn't show anything, it was wrong you are saying.

MR. SMITH: Yes. I think that technically what it meant was here the motion was unsupported, so there was no need for an evidentiary response in the form of affidavits from a witness. Instead, the defendant should have taken the first step, and they were looking at it in that sort of sequential way saying the defendant's burden hadn't been carried; therefore, the plaintiff had a right not to submit affidavits.

QUESTION: Well, you say it wasn't carried also, but you say only because you hadn't made a sufficient showing, you are saying.

MR. SMITH: Absolutely. I think if we had

gone through the whole discovery process and never listed a witness or pointed to these sales records, that failure in itself would be a concession that we lacked evidence, and I think that would itself be a basis for the motion, a sufficient basis for the defendant's motion.

QUESTION: Do you think the Court of Appeals opinion says that?

MR. SMITH: Well, I see nothing in there that contradicts it. In the end, I guess it doesn't make that much difference how you read the Court of Appeals decision. If it needs to be clarified, it should be, but there's not really much controversy on the fact that it, about the fact that the defendant has two ways to go about it, either attack the sufficiency of the plaintiff's evidence that has been listed in discovery or supply affirmative evidence of his own.

The other point I would make about this requirement, not only is it pretty well established, but it's not merely a technicality that we are trotting out here to try to save the plaintiff's case. The requirement that there be some support for an, for a summary judgment motion is a fundamental principle in our system of civil litigation. Under our system, a plaintiff who pleads a valid claim and can identify in

discovery evidence that she plans to use at trial generally has a right to have that case tried. If the opponent wants to cut the process short prior to trial, he has to come up with something other than his own lawyer's assertions to suggest that the plaintiff lacks a meritorious case. He can do that either by attacking the plaintiff's evidence or denying the claim in an affidavit, but he has to do something, and it is only then that the plaintiff incurs the additional obligation of reducing her trial evidence to affidavit form and submitting it to the Court prior to trial.

QUESTION: So you say at that first stage it is sufficient that you have identified the names of witnesses in answers to interrogatories.

MR. SMITH: Precisely, Your Honor.

QUESTION: Even though you don't say what the witnwsses are going to testify to.

MR. SMITH: Well, I think that there is certainly room for a motion to compel if there is not sufficienbt information --

QUESTION: Motion to compel what?

MR. SMITH: Motion to compel further answers to interrogatories, if they have gone unanswered and there is a real mystery about what these witnesses are gong to say.

QUESTION: Well, you said a while ago that the defendant was certainly entitled to your statement as to what the witness would testify to.

MR. SMITH: Absolutely, Your Honor. I would suggest here that the information was all given, albeit not in a formal interrogatory response, but if they wanted it to be set out in that way, they had a right to file a motion under Rule 37 and get that information restated in the interrogatory form.

On these facts there's just no basis for suggesting that the plaintiff lacked evidence, that this witness wasn't there to testify, or that they really didn't have any idea what he was going to say. All of that was clear in the record at the time.

Now, what the court below really said, I think, and we can differ about this, but in the end is that fundamentally, Celotex has to do something other than ignore all of the techniques that it had available, discovery depositions and all, and come up with something concrete to support its motion. Here Celotex simply ignored the trial evidence that was put forward by the plaintiff, even though it investigated it fully and itself confirmed that evidence through sales records. It filed this motion which was, in the end, completely unsupported.

Now, just in the last couple minutes here let me just refer to the second problem with the motion which I think is equally sufficient to justify affirming the Court of Appeals. Contrary to what Petitioner says this morning, there is no indication anywhere in this motion that they were raising the issue of exposures outside the District of Columbia. I think as the clear text shows, the only fact even discussed in the motion was whether there was evidence of exposures in Washington, D.C. Now, on its face, therefore, the motion clearly had to be denied.

QUESTION: But that again was not a ground the Court of Appeals relied on.

MR. SMITH: That's true, Your Honor, they did not rely on that ground although I don't think it's true that they read the motion in a different way. The first footnote in the opinion refers to the fact that the motion had this peculiar limitation. They just chose not to rely on it.

This limitation obviously does require a denial because a party, the most basic requirement when you are moving for summary judgment is to identify a set of undisputed facts that are sufficient to justify a judgment as a matter of law. Here, the only fact even being asserted by the motion, plaintiff's ability to

prove exposures in Washington, D.C., just wasn't a merits issue. It might have been relevant to choice of law or a change of venue or something, but it couldn't have justified a merits ruling.

Now, if you take the motion that way, you say the plaintiff, faced with that motion, did they have an obligation to come forward with affidavits from witnesses and all? No, clearly not. All the plaintiff at that point had to do was point out the facial deficiency of the motion, and that would certainly be enough to require its denial.

Here it would have been especially bizarre to require her to come forward with affidavits substantiating her allegations of exposures in Chicago since the motion on its face wasn't even contesting those allegations. Indeed, since Celotex was fully aware that that's what the case had ultimately come down to and had moved for a change of venue to Chicago for that reason, the fact that they didn't even address these allegations in the motion could easily be seen as a concession as to those, that they lacked any kind of a basis for summary judgment, any basis for contesting those allegations at that stage of the case.

In sum, it was doubly unfair on these facts for the defendant to put the initial burden on the

plaintiff to substantiate her case through some affidavit since the motion for at least the two reasons I have discussed here plainly was not sufficient to demand any sort of evidentiary response from the plaintiff.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Van Koten?

ORAL ARGUMENT OF LELAND S. VAN KOTEN, ESQ.

ON BEHALF OF PETITIONER -- Rebuttal

MR. VAN KOTEN: Thank you, Mr. Chief Justice. I will be very brief.

While Mr. Hoff's name was identified and while the letter was produced in response to first, to Celotex's first summary judgment motion, I think it bears emphasis that that was the first time that that was produced. Celotex asked two interrogatories which inquired in detail about people who had knowledge not of what Anning and Johnston purchased but of what the decedent was exposed to. Those were Interrogatories 51 and 52, which are at pages 59 and 60 of the Joint Appendix. Those interrogatories were never answered.

With respect to whether Celotex conceded on the point about any exposure in Chicago, I think I only have to refer to the argument of Celotex's trial counsel

before Judge Richey where he, where he referred to the answers to interrogatories and indicated those answers to date still would not satisfy the court as to product identification of any Celotex product or co-workers who would then identify on behalf of the decedent exposure to asbestos products manufactured by Celotex in this area or in any other area, including Chicago

I think that it was clear that that was before the court.

QUESTION: Yes, but right before that he said the only exposure, on page 211, to any Celotex product by the decedent was in Chicago, and by documents attached to their answers to interrogatories, the letter to Hoff and so forth, it seems to me they are assuming there that there was exposure in Chicago.

Now, it's true as you say later, the answers to interrogatories, apart from the letter, don't say that. But isn't that a concession that we will assume they were exposed in Chicago?

MR. VAN KOTEN: Well, I believe, Justice Stevens, that -- again, I didn't make the argument, but I --

QUESTION: Well, I understand, but we have to deal with what was before the district judge on the day he made his ruling.

MR. VAN KOTEN: That's correct, and it seems to me that a reasonable way of reading that is that the only exposure which Plaintiffs have even remotely contended took place was in Chicago, and then going on to the next page, where counsel --

QUESTION: Yes, but he doesn't say the only exposure claimed. He has -- it says the only exposure to any Celotex product by the decedent was in Chicago.

MR. VAN KOTEN: I'm trying to harmonize the inconsecutive pages, Justice Stevens. It is very clear from the next page that counsel for Celotex was not in fact conceding that there was exposure anywhere, specifically including Chicago.

With respect to what the real holding of the majority was below, I can only say that a number of lower courts appear to agree with the position of Celotex and not with the position of Respondents about what the majority below held. The Fifth Circuit in Fontaneau specifically said that they disagreed with the holding of the majority below and specifically endorsed the position taken by Judge Bork in his dissent.

With respect to what the majority below was holding, they -- on page 230 of the Joint Appendix specifically said that while Celotex -- while Ms. Catrett, rather, has not offered admissible evidence,

the movant and the court are entitled to conclude that she cannot offer admissible evidence if but only if the Respondent has -- the movant, rather, has supported its motion in accordance with Rule 56.

Again we get to the question of what kind of support is sufficient. By implication, the majority below is taking the position that referring to the total failure of Plaintiff in --

QUESTION: Well, what if the -- what if in answer to the interrogatory they had said we are going to call Mr. Hoff and here is what he will testify to, and --

MR. VAN KOTEN: And it had indeed shown exposure, Justice White?

QUESTION: Yes.

MR. VAN KOTEN: I believe in that case that at least unless Celotex took Mr. Hoff's deposition and demonstrated that he in fact was not in a position to --

QUESTION: So you agree that the -- if the plaintiff had answered that way, it would not have had to present an affidavit of Mr. Hoff or to go take his deposition.

MR. VAN KOTEN: At least not unless Celotex wished to go ahead and take his deposition.

QUESTION: Yes.

MR. VAN KOTEN: I think that's correct, Justice White.

I think that the real point --

QUESTION: So it comes down to, this comes down to whether this listing Mr. Hoff's name and this letter, whether that's enough of a showing to trigger any obligation on Celotex's part.

MR. VAN KOTEN: And indeed, in the opinion of the majority, whether Plaintiff had to produce anything unless Celotex showed that Plaintiff could never prove her case, and I think as the Fifth Circuit in Fontaneau said and as Judge Bork said in his dissent, what may have in fact bothered the majority below was the business about whether Plaintiff needed more time to get Mr. Hoff's evidence admissible, or to specifically indicate facts indicating that Mr. Hoff really had some personal knowledge.

QUESTION: Well, even if we, even if we accept your reading of the Court of Appeals opinion that it was just a -- that the Plaintiff needn't make any showing at all, you read the opinion that way, I take it.

MR. VAN KOTEN: I do reads the opinion, Justice.

QUESTION: Even if we accept that, the Respondent says we should affirm on some other grounds,

one, that there was enough showing.

MR. VAN KOTEN: Well, again, for the reasons stated by Judge Bork in his dissent, I think that that would have been wrong, but it would have been less damage to the body of law that is going to confront me in several thousand other asbestos cases and in other products liability cases. The Plaintiffs had ample time to put that evidence into admissible form. Certainly if there was not --

QUESTION: I know, but if they had listed him as a witness and said here's what he's going to testify to, that isn't putting it in admissible form.

MR. VAN KOTEN: No, but it's indicating that they, that it can be put in admissible form, and at that point, when there's that kind of a solemn representation by counsel on the record, I think that counsel for Celotex would be obligated to test the validity of that assertion.

In fact, that never happened in this case. There was never a request for additional time to put it in admissible form, despite the fact that under my reading of Celotex's moving papers, that was one of the bases upon which Celotex objected to it. Clearly at oral argument that was the basis upon which Celotex objected to it. Neither at the district court nor in a

motion for reconsideration, nor indeed before the Court of Appeals, did counsel for Plaintiffs ever ask for more time or indicate that they should have been given more time to put that evidence in admissible form.

The court -- the majority below's initial holding that Plaintiff need not produce anything I think, as Judge Bork pointed out, will largely destroy the utility of summary judgment proceedings, and as amici pointed out in their brief, will have a chilling effect on the willingness of district court judges anywhere to grant motions for summary judgment.

I believe for that reason the opinion below should be reversed.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

We will hear arguments next in Brock v. Pierce County.

(Whereupon, at 11:45 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-198 - CELOTEX CORPORATION, Petitioner V. MYRTLE NELL CATRETT, ADMINISTRATEIX OF THE ESTATE OF LOUIS H. CATRETT, DECEASED

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)