No. 14-1139

In The
# Supreme Court of the United States

ESTATE OF ADAM BROWN,

*Petitioner,*

v.

TIMOTHY THOMAS, *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

What initial burden does FED. R. CIV. P. 56 impose on a moving party seeking summary judgment on the ground that a non-moving party bearing the ultimate burden of proof at trial cannot prove its case as a matter of law?

## PARTIES TO THE PROCEEDING

The Petitioner is the Estate of Adam Brown. The Respondent is Brown County (Wisconsin). Brown County was a defendant in the district court and an appellee in the Seventh Circuit Court of Appeals. In filing its Petition, the Estate has dropped its claims against the other two defendants who were original parties in the district court: Sergeant Timothy Thomas and Deputy Matthew Secor.



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## INTRODUCTION

The Estate has presented no "compelling reasons" for its Petition for a Writ of Certiorari to be granted ("Petition"). *See* SUP. CT. R. 10. Specifically, the Estate fails to demonstrate that the Seventh Circuit's November 13, 2014 Opinion ("Opinion") is in conflict with a decision of this Court or that the Seventh Circuit decided an important federal question that has not already been settled by this Court. *See* SUP. CT. R. 10(a)-(c).

More particularly, the Estate incorrectly contends that this case is a proper vehicle for this Court to address allegedly inconsistent nuances in the adjudication of motions for summary judgment. Essentially, the Petition is a thinly veiled attempt to re-litigate *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), particularly with regard to this Court's clarification in *Celotex* of its ruling in *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). In light of the procedural history and the lack of admissible proof in the Petitioner's case, this matter is not an ideal vehicle for this Court to address summary judgment methodology.

Further, lower courts consistently apply FED. R. CIV. P. 56 and this Court's ruling in *Celotex* when addressing motions for summary judgment where the non-movant bears the burden of proof at trial. There is no widespread deviation from the methodology outlined in *Celotex* that warrants this Court's intervention.



Finally, in considering this case, the Seventh Circuit Court of Appeals diligently applied the familiar summary judgment methodology that is found in FED. R. CIV. P. 56 and more precisely articulated in *Celotex*.

## STATEMENT

A panel decision from the Seventh Circuit correctly determined that there were no material disputes of fact in this action and that the Estate could not establish its claims as a matter of law. Accordingly, the Seventh Circuit affirmed the district court's grant of summary judgment. Given the Seventh Circuit's consistent application of the summary judgment methodology outlined in *Celotex*, this case does not necessitate review by this Court.

1. Subsequent to *Celotex*, there is unanimity in the courts of appeals that in summary judgment cases, where the non-moving party bears the ultimate burden of proof at trial, the moving party does not incur the burden of uncovering every potential fact and refuting every potential opposing argument that could be raised by the non-movant in opposing summary judgment. Contrary to the Estate's argument at the Seventh Circuit and here, this Court held that "we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim." *Celotex*, 477 U.S. at 323.

2. On December 1, 2006, Brown County Sheriff's Department Sergeant Timothy Thomas obtained a search warrant for the duplex Adam Brown was renting, located at 804 7th Street #B, in Green Bay, Wisconsin. (Appellant's 7th Cir. App. 002.) Sergeant Thomas obtained the warrant in connection with the investigation of a burglary (a felony in Wisconsin) (7th Cir. App. 059); *see also* Wis. Stat. § 943.10.

The warrant was to retrieve pieces of personal property, including video game equipment, stereo and computer equipment, and a power tool that Sergeant Thomas believed that Stone Moreaux had stolen. (7th Cir. App. 002, 060.) Mr. Moreaux was believed to be staying with Adam Brown at the 804 7th Street residence. (7th Cir. App. 002, 038-039.) Mr. Moreaux had also recently escaped from serving his sentence as a Huber inmate at the Brown County Jail, and had a felony warrant for his arrest as an escapee, pursuant to Wis. Stat. § 946.42(3). (7th Cir. App. 012-013, 026, 049, 061, 064-067); *see also State v. Smith*, 214 Wis. 2d 541, 546-547, 571 N.W.2d 472, 475 (Ct. App. 1997).

Sergeant Thomas contacted Sergeant Todd Delain to request assistance from the Brown County Drug Task Force (hereafter "DTF") in executing the search warrant at the subject residence. (7th Cir. App. 059.) Sergeant Delain agreed to enlist the assistance of the DTF because officers in that unit had significant experience in executing search warrants in a variety of circumstances. (7th Cir. App. 061, 074-075.) Prior to executing the warrant, the officers responsible, including Deputy Matthew Secor, met and were advised



by commanding officers that Adam Brown and his girlfriend, Jessica Peters, might be present in the home. (7th Cir. App. 061.) The officers were also advised that Stone Moreaux might be present and that he was an escapee from jail, serving time on charges that potentially involved violence. (7th Cir. App. 061, 073.)

At approximately 6:20 p.m., Deputy Secor started knocking on Brown's front door and yelled "Police – search warrant." (7th Cir. App. 053.) He also counted out loud "One-thousand-one, one-thousand-two," and so on. (7th Cir. App. 040.) The officers then observed Brown approach the door, look out a window towards the officers and then move away from the door as if attempting to hide. (7th Cir. App. 040-041, 053.) A second individual was then seen walking away from the door so that he also was out of sight. (7th Cir. App. 040-041.)

Based upon the conduct of these two individuals inside the residence, officers yelled, "Compromise." (7th Cir. App. 041, 053.) The officers did this because someone inside the house had observed the officers' presence and position. (7th Cir. App. 041.) Because their position had been compromised, the DTF officers were concerned that individuals inside the home could be arming themselves. (*Id.*)

After officers in the task force announced, "Compromise," the door was rammed open. (7th Cir. App. 53.) Three individuals were encountered inside, with two of them immediately cooperating by going down

to the ground as ordered. (7th Cir. App. 041, 053.) In contrast, Adam Brown ran through the living room towards the back of the residence and a staircase. (*Id*.)

Deputy Secor and Deputy Dernbach chased Adam Brown while the other officers covered the remaining occupants of the home. (7th Cir. App. 041.) As they chased Brown, Deputy Secor briefly lost sight of him when Brown turned a corner to go up the stairs. (*Id*.) While in pursuit, the officers commanded several times, "Police, stop." (*Id*.) The officers followed Brown up the staircase. (*Id*.)

Once they reached the top of the stairs, Deputy Secor immediately saw Adam Brown waiting in the corner of a bedroom pointing a long gun towards him. (7th Cir. App. 041, 053.) Deputy Secor felt threatened and believed that he and Deputy Dernbach were at risk of imminent death. (7th Cir. App. 054.) In response to that threat, Deputy Secor shot Brown four times. (7th Cir. App. 03.) Brown was taken to an emergency room where he was later pronounced dead from the gunshot wounds. (*Id*.)

Adam Brown possessed two guns: a sawed-off shotgun and a longer barreled gun. (7th Cir. App. 029.) Due to prior criminal convictions, Brown was not allowed under Wisconsin law to possess either of these guns. (*Id*.)

a. The complaint filed in this action alleged both individual and official capacity claims. (7th Cir. App. 003-004.) However, contrary to the Estate's



suggestion, there was no individual capacity unreasonable-search claim. The individual capacity claim was based solely on an unreasonable-seizure theory related to the use of deadly force. The Estate's official capacity claim was not clearly drafted and seemed to allege that the County's policies and practices regarding searches were unconstitutional. Based on that allegation, the County sought summary judgment on the official capacity claim by asserting that there was no evidence in the record that could be used to establish that the County maintained any unconstitutional policies or practices.

In responding to summary judgment at the district court, the Estate admits that it focused on the individual capacity deadly force claim. The Estate did not present admissible evidence to refute the County's position that its policies and practices regarding searches were in fact constitutional.

3. After a motion for summary judgment pursuant to FED. R. CIV. P. 56 was filed and fully briefed, the district court entered judgment in favor of the defendants and the Estate then appealed. (7th Cir. App. 079, 124, 175; App. 10a-32a; Appellant's Br., June 30, 2014.) On appeal, a panel of the Seventh Circuit Court of Appeals unanimously agreed that the Estate failed to identify any material fact that would have allowed the official capacity claim to proceed to trial. (App. 1a-9a.)

a. In applying summary judgment methodology, the circuit court recognized that the Estate potentially

could have presented evidence to create an issue of fact on the *Monell* claim through the use of an expert. However, the Estate failed to put expert opinions into admissible form and those opinions were therefore properly disregarded by the district court and the court of appeals. Based at least in part on this lack of admissible evidence, the Seventh Circuit affirmed the summary judgment.

## REASONS FOR DENYING THE PETITION

The Opinion issued by the Seventh Circuit affirming the district court's summary judgment order does not present an ideal vehicle for this Court to address any issues of national significance. The summary judgment methodology outlined in *Celotex* has served to clarify this Court's prior ruling in *Adickes* and it has also provided a clear roadmap for practitioners and the lower courts to evaluate summary judgment motions where the non-movant has the burden of proof at trial.

In light of this clearly articulated summary judgment methodology and the lack of admissible evidentiary support within the record, this case does not warrant this Court's review.



### I. THIS CASE IS NOT THE IDEAL VEHICLE TO ADDRESS SUMMARY JUDGMENT METHODOLOGY.

The procedural history and state of the pleadings render this case a less-than-ideal vehicle to address summary judgment methodology. Contrary to the Estate's suggestion, this case did not include an individual capacity unreasonable-search claim. The only individual capacity claim was for an allegedly unreasonable seizure: Deputy Matthew Secor's use of deadly force. The complaint did not allege that the search itself violated the Fourth Amendment. As such, there was no need to address any individual capacity claim relative to the search in seeking summary judgment.

With regard to the official capacity claim, which did arguably assert municipal liability for allegedly unconstitutional search practices and policies, summary judgment was properly supported. In its moving brief, the County argued that "[t]he Estate cannot establish a *Monell* claim against . . . Brown County since [it] did not enact or maintain practices or policies that deprived Adam Brown of his constitutional rights." (7th Cir. App. 092.) Further, the County argued that "[e]ven assuming, *arguendo*, that any constitutional violation occurred regarding the execution of the search warrant at Adam Brown's residence, this still does not create an established policy. . . ." (7th Cir. App. 094.)

In its Petition, the Estate concedes that in responding to summary judgment, it focused on arguments related to the individual capacity unreasonable-seizure claim. However, the motion for summary judgment and supporting brief unquestionably sought dismissal on both the individual capacity claim and the official capacity claim.

In an effort to overturn the district court's summary judgment ruling at the Seventh Circuit, the Estate marshaled the expert report of Dr. William T. Gaut. The Petitioner again relies on Dr. Gaut's report in its Petition before this Court. Importantly, the Seventh Circuit did not disregard this argument and recognized that this expert report theoretically could have had an impact on the district court's summary judgment analysis on the *Monell* claim. However, the Estate failed to put an affidavit of Dr. Gaut into admissible form in order to dispute the County's argument. On this point, the Seventh Circuit recognized:

> Gaut's report severely criticizing the County's search policy might, if admissible (compare *Florek v. Village of Mundelein*, 649 F.3d 594, 601-03 (7th Cir. 2011)), entitle the estate to a trial, were it not for a fatal procedural error by its lawyer: failing to authenticate Gaut's expert report. It was filed with the district court but could not be admitted into evidence without an affidavit attesting to its truthfulness. FED. R. CIV. P. 56(e)(3); FED. R. EVID. 901(a); *Scott v. Edinburg*, 346 F.3d 752, 759-60 and n. 7 (7th Cir. 2003). There was no affidavit. Nor did the plaintiff's lawyer cite Gaut's report in opposing the defendants' motion for summary judgment. On appeal he made the convoluted argument that it was the defendants' burden to depose Gaut and that having failed to do that they admitted that everything in his report was true. Not so. Deposing a witness is optional. Anyway the report could not be used to oppose summary judgment because it was inadmissible. Without the report there is insufficient evidence to justify imposing liability on the County.

(App. 9a.)



While the Petitioner may wish to relitigate this Court's clarification of *Adickes* in *Celotex*, this case is not an ideal vehicle to address summary judgment methodology.

## II. THE ISSUES RAISED BY THE ESTATE ARE NOT ISSUES OF NATIONAL SIGNIFICANCE WARRANTING THIS COURT'S INTERVENTION.

Courts conscientiously apply the standard outlined in *Celotex*, in considering motions for summary judgment where the non-movant bears the burden of proof at trial. Though the *Celotex* trilogy was decided over 25 years ago, this Court routinely reviews cases decided on summary judgment and has, when appropriate, offered lower courts additional guidance on summary judgment methodology. *See, e.g., Hana Financial, Inc. v. Hana Bank*, 135 S.Ct. 907, 911

(2015) (discussing summary judgment methodology in trademark infringement case involving defense of "tacking" defense in jury case); *Tolan v. Cotton*, 134 S.Ct. 1861, 1868 (2014) (discussing trial court's function in considering competing evidence); *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (refining summary judgment methodology regarding questions of qualified immunity); *Scott v. Harris*, 550 U.S. 372, 380 (2007) (facts viewed in light most favorable to non-movant only if "genuine" dispute as to those facts); *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (discussing summary judgment methodology regarding questions of qualified immunity); *Siegert v. Gilley*, 500 U.S. 226 (1991). There is no widespread disparity in the application of summary judgment methodology that warrants this Court's intervention.

Because the Estate had the burden of proof on its *Monell* claim, the County had no duty when filing for summary judgment to "canvass the evidence" and refute every potential argument that the Estate may potentially raise in support of its claim. Contrary to the Estate's contentions, the federal circuit courts of appeals are largely united on this point – particularly after this Court issued its ruling in *Celotex,* thereby clarifying *Adickes*. The County fulfilled its duty under Rule 56(c) by showing the district court that there was no evidence in the record that should preclude summary judgment on each of the Estate's claims.

The Estate's position is untenable under any circuit's procedures. Under the Estate's theory, the County had the burden in its summary judgment



papers to identify, consider, and discard each and every piece of evidence in (and outside) of the summary judgment record that could plausibly support the Estate's claims. This is directly contrary to this Court's clarification of *Adickes* in the *Celotex* ruling.

Contrary to the Estate's position, the County's summary judgment submissions satisfied the duty under prevailing law of a movant who did not have the burden of proof at trial. This prevailing law is not limited to the Sixth, Seventh, and Ninth Circuits. For example, in *Singletary v. Pennsylvania Dept. of Corrections*, the Third Circuit rejected the plaintiff's contention that summary judgment movants had the burden of showing a lack of a genuine issue of material fact as to the plaintiff's deliberate indifference claim. 266 F.3d 186, 192 n.2 (3d Cir. 2001). "This assertion, however, is clearly contrary to the Supreme Court jurisprudence on summary judgment. . . . [I]n order to survive a summary judgment motion in which the movant argues that there is an absence of evidence . . . the plaintiff must point to some evidence beyond her raw claim that [the defendant] was deliberately indifferent." *Id.* (citation omitted).

Similarly, in *Cray Communications, Inc. v. Novatel Computer Systems, Inc.*, the Fourth Circuit acknowledged that a leading treatise explained that "under *Celotex*, 'the moving party on a summary judgment motion need not produce evidence, but simply can argue that there is an absence of evidence by which the non-movant can prove his case.'" 33 F.3d 390, 394-395 (4th Cir. 1994) (citing 10A CHARLES

ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2720, at 10 (2d ed. Supp. 1994)).

In addition, the Eighth Circuit has recognized that a movant without the burden of proof at trial need only assert a lack of evidence in support of the non-movant's claims in order to prevail on summary judgment. In *Meterlogic, Inc. v. KLT, Inc.*, 368 F.3d 1017 (8th Cir. 2004), the court required only that "the moving party . . . point to the absence of any evidence satisfying a necessary element of a claim" in order for the moving party to discharge its initial burden on summary judgment. *Id.* at 1019. In *Pourmehdi v. Northwest Nat. Bank*, 849 F.2d 1145 (8th Cir. 1988), the Eighth Circuit also held that once the movant "pointed out to the trial court that there was no genuine issue as to the absence of probable cause, it became [the non-movant's] burden to set forth affirmative evidence, specific facts, showing that there [was] a genuine dispute on that issue." *Id.* at 1146. Without any mention of the movant's initial showing, the court immediately proceeded to discuss the non-movant's showing. *Id.*

The cases cited by the Estate fail to establish a meaningful, widespread circuit split worthy of review. The Estate offers lengthy string citations to cases purportedly representing case law supporting the Estate's contention that there exists a widespread circuit split in which a majority of the circuits require movants who do not have the burden of proof at trial to make some specific record-based showing demonstrating an



absence of any genuine dispute of material fact. This is simply not the case. Instead, the case law propositions to which the Estate relies are simply rote, black-letter law recited in the vast majority of summary judgment briefs and orders, having no bearing whatsoever on any matured circuit split or any issue relevant to the movant's burden.

For instance, in *In re Schifano*, the First Circuit stated that "the moving party . . . bears the initial burden to demonstrate that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 378 F.3d 60, 66 (1st Cir. 2004) (internal quotations and citation omitted). "If the initial burden is met, the burden shifts to the non-moving party . . . to show that genuine issues of material fact exist." *Id.* (citation omitted). Despite the Estate's apparent reliance on *In re Schifano* to attempt to demonstrate a widespread circuit split, the *Schifano* Court conducts no analysis of the moving party's initial burden and instead immediately turns to the non-moving party's showing in response to summary judgment, finding that the non-movants failed to point to any specific evidence showing a genuine dispute of material fact. *Id.*; *see also Allen v. Board of Public Educ. for Bibb County*, 495 F.3d 1306, 1313, 1315 (11th Cir. 2007) (after stating "[t]he movant bears the responsibility for demonstrating the basis for the summary judgment motion," the court immediately considered the sufficiency of the non-movant's showing to determine whether a genuine dispute of material fact existed); *Parker v. Sony*

*Pictures Etm't Inc.*, 260 F.3d 100, 111 (2d Cir. 2001) ("A defendant need not prove a negative when it moves for summary judgment on an issue that the plaintiff must prove at trial."). This type of analysis has no bearing on establishing a widespread, mature circuit split, and is typical of the cases cited by the Estate.

This Court's well-reasoned ruling in *Celotex* is unambiguous, and lower courts have consistently applied it when considering motions for summary judgment where the non-moving party bears the burden of proof at trial. Any perceived disparity in the lower courts' evaluation of summary judgment motions is based on case-specific nuances, as opposed to any national trend deviating from the clear precedent set in *Celotex* and its progeny.

## III. THE CIRCUIT COURT PROPERLY APPLIED THIS COURT'S SUMMARY JUDGMENT METHODOLOGY PRECEDENT.

The Seventh Circuit Opinion utilized the methodology outlined in *Celotex* and properly affirmed the district court's summary judgment ruling. In the district court proceeding, the defendants moved for summary judgment on all of the Estate's claims on the basis that there were no material factual disputes and because the Estate could not establish its claims as a matter of law.

The County specifically argued that "[t]he Estate cannot establish a *Monell* claim against . . . Brown



County since [it] did not enact or maintain practices or policies that deprived Adam Brown of his constitutional rights." (7th Cir. App. 092.) Further, the County argued that "[e]ven assuming, *arguendo*, that any constitutional violation occurred regarding the execution of the search warrant at Adam Brown's residence, this still does not create an established policy. . . ." (7th Cir. App. 094.) The Estate had the burden at trial to prove a *Monell* violation and it utterly failed to overcome the County's arguments on summary judgment. The Estate ultimately did not identify any admissible evidence that disputed the County's contention that its policies and practices were constitutional.

The County's summary judgment materials satisfied its initial burden under FED. R. CIV. P. 56 and the requirement highlighted in *Celotex*. Specifically, the County satisfied its responsibility of "informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, *if any*,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323 (emphasis added).

In asserting its official capacity claim against the County, the Estate had the ultimate burden of proof at trial. Based on *Celotex* and its progeny, the County did not have the burden to conduct additional discovery and make the Estate's case for it. The County adequately moved for summary judgment on the official capacity claim and identified the Estate's

shortcomings in attempting to establish that the County's policies and practices were unconstitutional. Based on those arguments and the Estate's failure to identify any admissible evidence to refute the County's position, the district court properly granted summary judgment and the Seventh Circuit properly affirmed.

## CONCLUSION

Based on the foregoing, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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