SUPREME COURT OF MISSOURI

SC98262

MEHRDAD FOTOOHIGHIAM

Appellant,

v.

MARCIA GREEN,

Respondent

Appeal from the Missouri Circuit Court Thirteenth Judicial Circuit

Boone County Case No. 15BA-CV02239

The Honorable Robert Lawrence Koffman

SUBSTITUTE BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This appeal is from a judgment on a jury verdict in the principal amount of $2.75 Million, entered in the Circuit Court of Boone County, Missouri, the Honorable Robert L. Koffman, visiting judge, presiding.

This judgment was entered on September 11, 2018, in favor of the Respondent, Marcia Green, against the Appellant, Mehrdad Fotoohighiam.[1] D88 at 1-3, A5-7. Mehrdad (pronounced *Mer-dad*) timely filed a motion for new trial or judgment notwithstanding the verdict in the trial court on October 2, 2018. D90 at 1. The trial court denied that motion on November 29, 2018. D95 at 1, 4, A8-11. Mehrdad appealed to the Missouri Court of Appeals, Western District. The Court of Appeals exercised jurisdiction under its general appellate jurisdiction conferred by Mo. Const. Art. V § 3, and Section 512.020(5), RSMo. The Court of Appeals affirmed Marcia's judgment. A30. Mehrdad timely filed motions for rehearing and for transfer in the Court of Appeals. These were denied.

This case is now before the Court on transfer under Rule 83.04. This Court has jurisdiction on transfer under Mo. Const. Art. V § 10.

[1] Appellant uses the parties' first names in this brief for ease of reading, as he did in briefing at the Court of Appeals. He means no disrespect.

STATEMENT OF FACTS

Marcia's claims

Based on statements of unidentified persons "J.W.," "C.H.," and "S.C.," Marcia sued Mehrdad and three other defendants for conspiring to set fire to the mobile home where Marcia lived. D2 at 1. Two of the defendants were individuals, James Hall and David Reed. D2 at 1. A fourth defendant, ETI, LLC, is a Missouri limited liability company for which Mehrdad was registered agent. D2 at 2.

Marcia alleged that "S.C. stated he was present when [Mehrdad] offered S.C. and [Hall $500.00] to set [Marcia's] mobile home on fire," and that "Hall told S.C. that [Hall] set fire to [Marcia's] Mobile Home." D2 at 6.

Marcia's summary judgment motions

Marcia twice moved the trial court for summary judgment. Marcia's first motion for summary judgment was denied July 31, 2017. D47 at 1, 3.

On August 18, 2017, Marcia filed her second motion for summary judgment, asserting "there is no genuine dispute or issue of material fact in this action with regard to whether or not [Mehrdad] caused or contributed to cause the burning down of [Marcia's] trailer." D48 at 1.

Marcia's 49th statement of uncontroverted material fact asserts that "Defendant Fotoohighiam is currently charged in the Boone County Circuit Court

with a class A felony of arson for burning down or causing to be burnt down a structure owned by Marcia Green at Lot 16." D50 at 12.[2] Because of these pending charges, Mehrdad answered some of Marcia's deposition questions, and asserted the Fifth Amendment in not answering others. D54 at 14.

In support of her second summary judgment motion Marcia asserted two different and conflicting conspiracy theories. The trial court's order of partial summary judgment explains them thusly:

> The Court has read the statement of uncontroverted facts submitted by the plaintiff which recite that defendant Fotoohighiam admitted to a Mr. Louis Spano that he paid a Mr. Reed and defendant Hall to burn plaintiff's trailer. Mr. Scotty Christopher stated that defendant Fotoohighiam offered defendant Hall and himself $500.00 to set plaintiff's mobile home on fire. Defendant Fotoohighiam actually paid Mr. Christopher $500.00 to set plaintiff's mobile home on fire.

D62 at 3; A3. The trial court did not address the inconsistency between the two conspiracy theories set out in its order granting partial summary judgment.

Marcia's "Mehrdad, Christopher, Hall" conspiracy theory

Marcia's first theory was that Mehrdad conspired with Scotty Christopher and James Hall to burn Marcia's mobile home, and that Mehrdad actually paid

[2] By the time of the trial on Marcia's civil suit against Mehrdad, James Hall had been acquitted on criminal charges of first degree arson in connection with burning Marcia's mobile home. (D90 at 6). Since then, Mehrdad too has been acquitted on criminal charges against him over this same mobile home fire.

Christopher to do it. This theory is based on three statements of fact (25, 26, 31, 32) offered and supported by Marcia, as explained below.

Statement 25. Statement 25 alleges that "[Mehrdad] offered James Hall ("Hall") and Scotty Christopher ("Christopher") [$500.00] to set [Marcia's] mobile home on fire." D49 at 2, 7; D50 at 5.

In support of Statement 25, Marcia cited to Christopher's deposition testimony stating that Mehrdad directly and in person offered Christopher money to burn down Marcia's mobile home. D49 at 7; D50 at 5 (citing Christopher's deposition transcript, D55 at 1-4). The cited portion of Christopher's transcript included the following question and answer: Q. "…your testimony is that while you were in the trailer Mike Mehrdad told you that you needed to burn a trailer down to get $500.00." A. "Right." D55 at 4 (36:1-18).

Statement 26. Statement 26 states that "When asked how much he paid Christopher and Hall, Defendant Fotoohighiam invoked his Fifth Amendment right." D50 at 6.

In support of Statement 26, Marcia cited to Mehrdad's deposition testimony. D54 at 16-17.

Statement 31. In support of the "Mehrdad, Christopher, Hall" conspiracy theory, Marcia offered Statement 31, alleging "Defendant Fotoohighiam paid Hall

Five Hundred Dollars ($500.00) to set fire to Plaintiff's mobile home." D50 at 7 (citing Christopher's deposition at 35:19-36:18, D55 at 3-4). This deposition testimony describes what was said at an alleged meeting between Mehrdad, Christopher, and Hall. D55 at 4-5 (citing Christopher's deposition at 35:12-36:18).

Statement 32. In further support of the "Mehrdad, Christopher, Hall" conspiracy theory Marcia offered Statement 32, stating: "When asked whether he actually paid Christopher and Hall $500.00, [Mehrdad] invoked his Fifth Amendment right." D50 at 7 (citing Mehrdad's deposition transcript at 39:17-18, 52:9, D54 at 16-17). The questions asked and the answers given by Mehrdad do not support this statement of fact.

In support of Statement 32, Marcia cited Mehrdad's deposition at 39:17-18 (D54 at 16). Lines 17-18 of the transcript from Mehrdad's deposition consist only of Mehrdad's answer invoking his "5th Amendment right." D54 at 16. Lines 17-18 do not include the question answered in those lines. Mehrdad was asked, on lines 15-16: "That was the same amount that you paid James Hall to set the fire to my client's house?" This deposition testimony cited in support of Statement 32 does not support that statement of fact or the trial court's finding that Mehrdad "actually paid Mr. Christopher" to burn Marcia's mobile home. D62 at 3; A3.

In further support of Statement 32, Marcia cited to Mehrdad's deposition at 52:9 (D54 at 17). The quoted portion on page 52 of Mehrdad's deposition, like the quoted portion on page 39, is simply an answer: "I take the 5th." D54 at 17. The question immediately preceding was this: "You then stated that you wanted them [Christopher and Hall] to burn the trailer down, that's my client's trailer." D54 at 17. This deposition testimony offered in support of Statement 32 does not—standing alone—support Statement 32 or the trial court's finding that Mehrdad "actually paid Christopher" to burn the home. D62 at 2, 3, A3.

Mehrdad denied having met Christopher. Marcia filed deposition testimony by Mehrdad controverting Statements 25, 26, 31, and 32. When Marcia's counsel asked Mehrdad whether he "met Scotty Christopher while he and James Hall were cleaning a mobile home?", Mehrdad answered "No." D54 at 14 (citing Mehrdad's deposition transcript at 51:7-9). When Marcia's counsel asked Mehrdad whether he "ever met Scotty Christopher," Mehrdad answered "Nope." D54 at 14 (citing Mehrdad's deposition transcript at 51:16-17).

Marcia's "Mehrdad, Reed, Hall" conspiracy theory

Marcia's second theory is that Mehrdad conspired with David Reed and James Hall to burn Marcia's mobile home. This theory is based on one statement of fact, statement 28, offered and supported by Marcia as explained below.

Statement 28. Statement 28 asserts that "Defendant Fotoohighiam told a former Electenergy Technologies, Inc. employee Louis Spano ("Spano") that Defendant Fotoohighiam hired Hall and Reed to burn down Marcia Green's mobile home." D50 at 6.

Marcia supported Statement 28 with a one word answer cited on a single line of a Spano's deposition transcript, in answer to this leading question by Marcia's counsel to Spano: "…you understand what you believe happened that night when Marcia Green's trailer was burned down because Mehrdad Fotoohighiam told you that he had hired James Hall and David Reed to go burn it down. True?" D56 at 1 (citing Spano deposition 93:18-22). To which Spano answered "Yeah." D56 at 1 (citing Spano deposition 93:23). The trial court found, on the basis of Statement 28, that "defendant Fotoohighiam admitted to a Mr. Louis Spano that he paid a Mr. Reed and defendant Hall to burn plaintiff's trailer." D62 at 3.

Mehrdad denied knowing Reed. Marcia filed deposition testimony by Mehrdad controverting Statement 28. Mehrdad's testimony on the subject of knowing Reed is this: "Q. Have you ever met David Reed? A. No." D54 at 14 (citing Mehrdad's deposition at 51:14-15).

The summary judgment proceedings

Mehrdad was represented in the summary judgment proceedings by counsel, Daniel Miller. D59 at 33. In Mr. Miller's response to Statements 25, 28, and 31, he admitted the content of the deposition testimony of Christopher and Spano, but denied that it was "truthful, accurate or credible." D59 at 9, 10, 11.

In response to Statements 26 and 32 Miller admitted that Mehrdad invoked his rights under the Fifth Amendment, but denied that the Court was "free to assume that the statement is harmful." D59 at 9, 11. Miller argued that Mehrdad's exercise of his Fifth Amendment right was not sufficient to support summary judgment. D59 at 19-23.

In response to Statements 25 and 28 (supported by testimony of Christopher and Spano), Miller argued that to grant judgment for Marcia based on these statements required an impermissible credibility finding by the Court. D59 at 23-24.

The trial court sustained Marcia's motion, and made findings on the conspiracy issues. See D62 at 3, A3.

Among these trial court findings were:

1) "Defendant Fotoohighiam admitted to a Mr. Louis Spano that he paid a Mr. Reed and defendant Hall to burn plaintiff's trailer."

2) "Mr. Scotty Christopher stated that defendant Fotoohighiam offered defendant Hall and himself $500 to set plaintiff's mobile home on fire."

3) "Defendant Fotoohighiam actually paid Mr. Christopher $500 to set plaintiff's mobile home on fire."

4) "The undenied facts are that defendant Fotoohighiam paid others in a conspiracy to burn down the dwelling of the plaintiff. These co-conspirators did burn that dwelling down…".

D62 at 3 (emphasis added); A 3.

In connection with Mehrdad's exercise of his right to decline to answer questions on Fifth Amendment grounds, the trial court said: "The Court also considers the failure to answer deposition questions by defendant…and assumes that the answers are adverse to him." D62 at 3; A 3. Among the questions Mehrdad declined to answer were the question supporting Statements 26 and 32, which formed the basis for the trial court's "Mehrdad, Christopher, Hall" conspiracy theory. D50 at 6, 7.

The trial on damages and punitive damages

The issues of damages and punitive damages were tried to a jury on September 7, 2018. D79 at 1. Before trial Marcia dismissed all defendants but Mehrdad, including James Hall and David Reed. D 77 at 1. By the time of trial, James Hall

had been acquitted on charges of first degree arson in connection with burning Marcia's mobile home. D90 at 6; A12-13.

The trial court permitted Marcia's counsel to read statements to the jury from the Statements of Fact offered in her second motion for summary judgment. Over the objection of Mehrdad's counsel, the trial court admitted an exhibit outlining the statements of fact. D75 at 1-3 (Exhibit 1); Tr. 127-133, 141. The readings included, verbatim, Statements 25, 28, and 31.

In closing argument Marcia's counsel read the summary judgment Statements of Fact setting out her two conspiracy theories. "Defendant Fotoohighiam offered Hall and Christopher $500.00 to set Plaintiff's mobile home on fire." Tr. 275 (Which is Statement 25, D50 at 5). "Defendant Fotoohighiam told a former employee that Defendant Fotoohighiam hired Hall and Reed to burn down Marcia Green's mobile home." Tr. 275 (Which is Statement 28, D50 at 6).

During deliberations the jury sent back this question: "was there a criminal trial and what was the result?" Tr. 279. The trial court responded: "You are bound by the evidence as you recall it." Tr. 279.

The jury returned verdicts for actual and punitive damages in the combined amount of $2.75 Million, and the trial court entered judgment on the verdict on September 11, 2018. D88 at 1-3; A5-7.

Post-trial motions

Mehrdad timely filed a motion for new trial or jnov in the trial court on October 2, 2018. D 90 at 1.

In Mehrdad's motion for new trial or JNOV, Mehrdad's counsel asserted that "The [trial] Court erred in granting summary judgment in favor of the Plaintiff because there were controverted material facts and/or the Plaintiff was not entitled to judgment as a matter of law." D90 at 1.

In further support of that motion, Mehrdad's counsel filed suggestions on October 10, 2018, establishing that Marcia had filed deposition testimony in support of her second summary judgment motion wherein Mehrdad denied ever meeting David Reed and Scotty Christopher. D91 at 2. Mehrdad's counsel said:

> In other words, plaintiff put too much evidence in the record—Mr. Fotoohighiam's denials [of knowing Reed or Christopher] and evidence of inconsistent and conflicting conspiracy theories. These inconsistent and conflicting theories, alone, create a sufficient basis for denying summary judgment here, and reversing the underlying judgment premised upon a summary judgment on the issue of liability.

D91 at 4.

The trial court denied Mehrdad's post-trial motion on November 29, 2018. D95 at 1, 4; A8-11. Mehrdad filed notice of appeal five days later on December 4, 2018. D96 at 1.

POINTS RELIED ON

POINT I

THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT FOR THE PLAINTIFF/RESPONDENT, MARCIA GREEN, AND AGAINST THE DEFENDANT/APPELLANT, MEHRDAD FOTOOHIGHIAM, ON THE ISSUE OF MEHRDAD'S LIABILITY FOR CONSPIRING TO SET FIRE TO MARCIA'S MOBILE HOME, IN THAT MARCIA FAILED TO MEET HER BURDEN TO ESTABLISH HER RIGHT TO JUDGMENT AS A MATTER OF LAW UNDER RULE 74.04(c)(6), BECAUSE THE MATERIAL FACTS UPON WHICH SUMMARY JUDGMENT WAS GRANTED WERE IN FACT CONTROVERTED AND PUT INTO DISPUTE BY DEPOSITION TESTIMONY MARCIA FILED IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT, IN WHICH DEPOSITION TESTIMONY MEHRDAD DENIED KNOWING TWO PEOPLE MARCIA ACCUSED HIM OF CONSPIRING WITH AND PAYING TO SET FIRE TO HER HOME, SCOTTY CHRISTOPHER AND DAVID REED, ONE OF WHICH INDIVIDUALS, SCOTTY CHRISTOPHER, MARCIA ALSO USED AS A WITNESS TO STATEMENTS ALLEGEDLY MADE BY MEHRDAD, AND MARCIA THEREBY CREATED ONE OR MORE GENUINE ISSUES OF MATERIAL FACT NEGATING MARCIA'S *PRIMA FACIE* CASE FOR SUMMARY JUDGMENT

ITT Commercial Finance Corp. v. Mid–Am. Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993)

Martin v. City of Washington, 848 S.W.2d 487 (Mo. banc 1993)

Street v. Harris, 505 S.W.3d 414 (Mo. App. E.D. 2016)

Jordan v. Peet, 409 S.W.3d 553 (Mo. App. W. D. 2013)

POINT II

THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT FOR THE PLAINTIFF/RESPONDENT, MARCIA GREEN, AND AGAINST THE DEFENDANT/APPELLANT, MEHRDAD FOTOOHIGHIAM, ON THE ISSUE OF MEHRDAD'S LIABILITY FOR CONSPIRING TO SET FIRE TO MARCIA'S MOBILE HOME, IN THAT MARCIA FAILED TO MEET HER BURDEN TO ESTABLISH HER RIGHT TO JUDGMENT AS A MATTER OF LAW UNDER RULE 74.04(c)(6), BECAUSE THE MATERIAL FACTS UPON WHICH SUMMARY JUDGMENT WAS GRANTED WERE IN FACT CONTROVERTED AND PUT INTO DISPUTE BY DEPOSITION TESTIMONY MARCIA FILED IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT, WHICH DEPOSITION TESTIMONY SETS FORTH THE FACTUAL BASIS FOR TWO DIFFERENT, INCONSISTENT, AND CONFLICTING CONSPIRACY THEORIES, AND MARCIA THEREBY CREATED ONE OR MORE GENUINE ISSUES OF MATERIAL FACT NEGATING MARCIA'S *PRIMA FACIE* CASE FOR SUMMARY JUDGMENT.

ITT Commercial Finance Corp. v. Mid–Am. Marine Supply Corp., 854 S.W.2d 371 (Mo. banc 1993)

Martin v. City of Washington, 848 S.W.2d 487 (Mo. banc 1993)

Street v. Harris, 505 S.W.3d 414, 416 (Mo. App. E.D. 2016)

State v. Spilton, 315 S.W.3d 350 (Mo. banc 2010)

POINT III

THE TRIAL COURT ERRED IN OVERRULING THE MOTION FOR NEW TRIAL FILED BY THE DEFENDANT/APPELLANT, MEHRDAD FOTOOHIGHIAM, AND THE TRIAL COURT THEREBY ERRED IN ITS APPLICATION OF THE LAW, IN THAT ONCE MEHRDAD ASSERTED IN HIS POST-TRIAL MOTION THAT THE TRIAL COURT ERRED IN EARLIER GRANTING PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY BECAUSE OF GENUINE ISSUES OF FACT FOR TRIAL, THE TRIAL COURT WAS REQUIRED AS A MATTER OF LAW TO SET ASIDE THE JUDGMENT FOR MARCIA AND ORDER THE CASE TO BE RETRIED IN ITS ENTIRETY, BECAUSE THAT EARLIER ERRONEOUS SUMMARY JUDGMENT PREJUDICED MEHRDAD IN THE SUBSEQUENT TRIAL ON DAMAGES AND PUNITIVE DAMAGES.

Ivy v. Hawk, 878 S.W.2d 442 (Mo. banc 1994)

The Lamar Co., LLC v. City of Columbia, 512 S.W.3d 774 (Mo. App. W.D. 2016)

Talley v. Swift Transp. Co., 320 S.W.3d 752 (Mo. App. W.D. 2010)

POINT IV

THE TRIAL COURT COMMITTED PLAIN ERROR IN GRANTING PARTIAL SUMMARY JUDGMENT FOR THE PLAINTIFF/ RESPONDENT, MARCIA GREEN, AND AGAINST THE DEFENDANT/APPELLANT, MEHRDAD FOTOOHIGHIAM, IN THAT THE TRIAL COURT THEREBY COMMITTED ERROR THAT WAS EVIDENT, OBVIOUSS, AND CLEAR BECAUSE THE RECORD FILED BY MARCIA IN SUPPORT OF SUMMARY JUDGMENT SHOWED GENUINE ISSUES OF MATERIAL FACT FOR TRIAL ON THE ISSUE OF MEHRDAD'S LIABILITY FOR CONSPIRACY, THEREBY RESULTING IN MANIFEST INJUSTICE AND A MISCARRIAGE OF JUSTICE.

Rule 84.13(c)

Reed v. Kansas City Missouri Sch. Dist., 504 S.W.3d 235 (Mo. App. W.D. 2016)

Cooper v. Chrysler Grp. LLC, 361 S.W. 3d 60, 64 (Mo. App. E.D. 2011)

ARGUMENT

Mehrdad is mindful that in a substitute brief he "shall not alter the basis of any claim that was raised in the court of appeals brief." Rule 83.08(b).

In the Court of Appeals, Mehrdad briefed the allegation of error set out in Point I and Point II below as a single point, asserting that the trial court erred in granting partial summary judgment for Marcia because there was a genuine issue of material fact precluding summary judgment for two reasons. See Court of Appeals' Opinion at 4-5 (cited hereinafter as "Op."), A22-23. In reviewing that point of error, the Court of Appeals said that each of these two issues of fact should have been addressed in separate points, but decided the issue on the merits because the argument was "readily understandable." Op. at *5 n. 8, A23. For this reason Mehrdad here briefs this issue in two separate points. His claim of error asserted in Points I and II below is the same claim of error briefed as Point I in the Court of Appeals.

POINT I

THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT FOR THE PLAINTIFF/RESPONDENT, MARCIA GREEN, AND AGAINST THE DEFENDANT/APPELLANT, MEHRDAD FOTOOHIGHIAM, ON THE ISSUE OF MEHRDAD'S LIABILITY FOR CONSPIRING TO SET FIRE TO MARCIA'S MOBILE HOME, IN THAT MARCIA FAILED TO MEET HER BURDEN TO ESTABLISH HER RIGHT TO JUDGMENT AS A MATTER OF LAW UNDER RULE 74.04(c)(6), BECAUSE THE MATERIAL FACTS UPON WHICH SUMMARY JUDGMENT WAS GRANTED WERE IN FACT CONTROVERTED AND PUT INTO DISPUTE BY DEPOSITION TESTIMONY MARCIA FILED IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT, IN WHICH DEPOSITION TESTIMONY MEHRDAD DENIED KNOWING TWO PEOPLE MARCIA ACCUSED HIM OF CONSPIRING WITH AND PAYING TO SET FIRE TO HER HOME, SCOTTY CHRISTOPHER AND DAVID REED, ONE OF WHICH INDIVIDUALS, SCOTTY CHRISTOPHER, MARCIA ALSO USED AS A WITNESS TO STATEMENTS ALLEGEDLY MADE BY MEHRDAD, AND MARCIA THEREBY CREATED ONE OR MORE GENUINE ISSUES OF MATERIAL FACT NEGATING MARCIA'S *PRIMA FACIE* CASE FOR SUMMARY JUDGMENT

A THE STANDARD OF REVIEW

Appeal from a trial court judgment granting summary judgment is an issue of law which is reviewed *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine*

Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is only appropriate when the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. *ITT,* 854 S.W.2d at 380. To uphold summary judgment in her favor, Marcia, as the claimant, "must establish that there is no genuine dispute as to those material facts upon which [she] would have had the burden of persuasion at trial." *Id.* at 391. "A factual question exists if evidentiary issues are actually contested, are subject to conflicting interpretations, or if reasonable persons might differ as to their significance." *Martin v. City of Washington*, 848 S.W.2d 487, 492 (Mo. banc 1993) (citations omitted).

In reviewing the trial court's summary judgment, this Court views the record most favorably to Mehrdad, the party against whom judgment was entered, and "accord[s] the non-movant the benefit of all reasonable inferences from the record." *Id.* at 376.

When, as here, the materials offered by the movant in support of summary judgment cast doubt on the facts necessary to support judgment as a matter of law, there is a genuine issue of material fact that negates a party's prima facie right to summary judgment.

B PRESERVATION OF ASSERTED ERROR IN THE TRIAL COURT

In Mehrdad's Motion for New Trial or Judgment Notwithstanding the Verdict, Mehrdad's counsel asserted that "The [trial] Court erred in granting summary judgment in favor of the Plaintiff because there were controverted material facts and/or the Plaintiff was not entitled to judgment as a matter of law." D90 at 1.

In support of that contention, Mehrdad's counsel filed suggestions pointing out to the trial court that in support of her second motion for summary judgment, Marcia filed deposition testimony wherein Mehrdad expressly denied ever meeting two of the three alleged co-conspirators involved in Marcia's two different conspiracy theories, and pointed out the existence of "evidence of inconsistent and conflicting conspiracy theories." D91 at 2.

In so moving and in so informing the trial court, Mehrdad preserved this point for appellate review.

C ANALYSIS

The trial court based its order of partial summary judgment for Marcia on a finding that Mehrdad's trial counsel failed to properly respond to Marcia's motion. D62 at 3; A3 ("The evidence presented has not been denied as required under Supreme Court Rule 74.04(c)(1).").

Accepting for purposes of discussion that the trial court was correct in finding Mehrdad's response deficient under Rule 74.04, Marcia still cannot prevail because her own filings in support of her summary judgment motion show at least one genuine dispute of material fact. "Even if the non-movant [Mehrdad] fails to properly respond to a summary judgment motion and all factual assertions are deemed admitted, however, the motion must still be denied if those factual assertions are not sufficient to entitle the movant [Marcia] to judgment as a matter of law." *Jordan v. Peet*, 409 S.W.3d 553, 558 (Mo. App. W. D. 2013).

1. The burden Rule 74.04 places on Marcia, as the movant.

The summary judgment movant must establish a right to judgment as a matter of law by establishing a prima facie case for summary judgment. This is so whether or not the non-movant responds to the motion as Rule 74.04(c)(2) requires. Most importantly for purposes of this appeal, "materials submitted by the movant that are, themselves, inconsistent on the material facts defeat the movant's prima facie showing." *ITT Commercial Fin. Corp.*, 854 S.W.2d at 382.

2. Marcia failed to meet her burden to establish her right to judgment.

In evaluating Marcia's burden to establish a prima facie right to partial summary judgment under Rule 74.04, it is important to keep in mind Marcia's burden of proof on the claim for which she sought partial summary judgment.

In Missouri, Marcia, as the plaintiff "ha[s] the burden of proving a conspiracy by clear and convincing evidence." *State Farm Mut. Auto. Ins. Co. v. Weber*, 767 S.W.2d 336, 337–38 (Mo. App. 1989)(citing *Nat'l Rejectors, Inc. v. Trieman*, 409 S.W.2d 1, 50 (Mo. 1966)("in this state [] a conspiracy must be proved by clear and convincing evidence.")).

Here, the conflicting evidence created by Mehrdad's testimony denying that he knew two of the co-conspirators in Marcia's two conspiracy theories creates a triable issue of fact. This is particularly so given that Marcia must prove her civil conspiracy theory by clear and convincing evidence.

When, as here, the movant's supporting documents show the existence of a genuine issue of fact for trial, summary judgment is inappropriate because the movant has not met her initial burden to show a right to judgment. *Street v. Harris*, 505 S.W.3d 414, 416 (Mo. App. E.D. 2016). In so ruling, the *Street* Court quoted *ITT Commercial Fin. Corp*., wherein the Court said that "*materials submitted by the movant that are, themselves, inconsistent* on the material facts defeat the movant's prima facie showing." *Street*, 505 S.W.3d at 417 (quoting *ITT*, 854 S.W.2d at 382) (italics added by the *Street* Court). Whether the non-movant responds or not, the movant's right to summary judgment still depends upon establishing a prima facie right to judgment, which in turn depends upon whether or not the movant's own

motion and supporting evidence present any genuine issues of material fact for resolution at trial. *Street*, 505 S.W.3d at 416.

The *Street* Court added:

> We find no authority for the proposition that we are to accept only the statement of fact in the motion when there is conflicting evidence attached to the motion showing that such fact is actually disputed. This would relieve a movant of [her] initial burden to show a right to judgment as a matter of law, and we do not see this authorized by [Rule 74.04] or by precedent.

505 S.W.3d at 417 n.1.

In *Street,* the court framed the issue in that appeal—which is the same issue as now before this Court—thusly: "does the failure of [the non-movant] to respond [to the summary judgment motion], constituting an admission of [movant's] statement of uncontroverted facts, require us to overlook the inconsistency in the exhibits attached to [movant's] motion?" *Id.* at 416.

"[N]o," held the Court in *Street*, "because [the movants] bear the initial burden of establishing a right to judgment as a matter of law based on the record before the court [and] any evidence in the record that presents a genuine dispute as to the material facts defeats the movant's prima facie showing." *Id.* at 416 (quoting *ITT*, 854 S.W.2d at 382).

Street was a case over a dog bite. The non-moving party failed to respond to defendant's motion for summary judgment. *Street*, 505 S.W.3d at 415. The moving

party's statement of uncontroverted facts included a statement that the dog had never attacked anyone previously. *Id.* at 416. Two of the exhibits attached to the motion for summary judgment offered differing accounts about whether the dog had ever knocked anyone down. *Id.* These two exhibits submitted by the moving party were inconsistent, which was the basis for finding that the movants failed to make a prima facie showing of entitlement to summary judgment. *Id.*

Street is directly on point. *Street* correctly interprets and applies *ITT*. *Street* and *ITT* require that the trial court's judgment for Marcia be reversed because her own motion for summary judgment and supporting materials establish the existence of at least one dispute of material fact.

The Western District recently declined to follow *Street*, calling it "wrongly decided and an aberration." *Fid. Real Estate Co. v. Norman*, 586 S.W.3d 873, 883 (Mo. App. W.D. 2019). The Western District held *Street* to be wrongly decided on the basis of *ITT,* because the Court in *ITT* was interpreting a different version of Rule 74.04 than the one that exists today:

> In light of the 1994 (and later) amendments to Rule 74.04, the *ITT* Court's emphasis on the importance of the materials attached to a summary judgment motion, as opposed to the statement of uncontroverted material facts supported by specifically referenced evidence, for determining whether a movant made a prima facie case is no longer applicable.

Fid. Real Estate, 586 S.W.3d at 882.

Unless this Court elects to overrule *ITT* in whole or part, or limits its applicability, the record as a whole filed by Marcia in support of summary judgment must be considered in determining whether to affirm partial summary judgment in her favor. On the record as a whole in this appeal—as viewed under the *ITT* and *Street* Standard—Marcia's summary judgment must be reversed.

Marcia negated her right to judgment under Rule 74.04 by filing Mehrdad's deposition testimony denying having ever met two of the three alleged participants in Marcia's two conspiracy theories, Scotty Christopher and David Reed. D54 at 14.

In deciding Mehrdad's appeal, the Court of Appeals for the Western District declined to follow *Street*, stating that…

> …this case does not involve similar defects in Marcia's *prima facie* showing….[because] the motion court was justified in finding a conspiracy between Mehrdad and Hall even if there was conflicting evidence as to who else may have participated.

Op. at *9-10, A27-28.

This reading of the record fails to account for the impact which Mehrdad's denial that he knew two of the three co-conspirators has on the believability of Marcia's entire case, and therefore, on Marcia's ability to prove her case to a jury

under a clear and convincing evidence standard. Put another way, a reasonable juror hearing all of the evidence Marcia put forward would be "justified in finding [no] conspiracy."

Whether or not Mehrdad ever met Christopher is crucial to either conspiracy theory, and to the third "Mehrdad and James Hall only" conspiracy theory. Christopher is an alleged co-conspirator and a witness to statements he alleges Mehrdad made to him.

Christopher is the individual the trial court found Mehrdad actually paid to burn Marcia's home. D62 at 3; A3. Christopher is the individual whose deposition testimony about a conversation with Mehrdad is the sole support for Statement 31, that Mehrdad "paid Hall…$500…to set fire to Plaintiff's mobile home." D50 at 7, D55 at 3, 4. Marcia used Christopher's testimony (alleging that he had a conversation with Mehrdad, in person, D55 at 4) to support the "Mehrdad, Christopher, and Hall" theory as found by the trial court. D62 at 3; A3. "Mr. Scotty Christopher stated that defendant Fotoohighiam offered defendant Hall and himself $500 to set plaintiff's mobile home on fire." Marcia's counsel asked a deposition question to Mehrdad about the amount he paid Christopher and Hall for arson, which Mehrdad did not answer, and which the trial court therefore deemed Mehrdad to have admitted. D50 at 6, Statement 26.

The only testimony supporting the "Mehrdad, Reed, Hall" conspiracy theory is from another person, Louis Spano, wherein Spano simply agreed in a one word answer to a leading question by Marcia's counsel that Mehrdad told Spano that "he had hired James Hall and David Reed to go burn [Marcia's mobile home] down. True?" D56 at 1. If Mehrdad never met Reed, that theory is disputed too.

Mehrdad's testimony denying that he knew Reed or Christopher "reasonably supports" an inference that none of Marcia's conspiracy theories are true. Mehrdad's testimony denying that he ever met Reed or Christopher raises a credibility issue with the testimony of witnesses, Spano and Christopher, whose testimony Marcia offered to support the two different conspiracies.

If a jury believed that Mehrdad never met Christopher or Reed, none of the facts found to be admitted by Mehrdad for summary judgment purposes by the trial court—and read to the jury as if admitted—can be true.

3. Apart from the testimony of Spano and Christopher, the only evidence supporting Marcia's summary judgment is Mehrdad declining on Fifth Amendment grounds to answer questions.

Because the testimony of Spano and Christopher is subject to a credibility dispute as explained above, the rest of the deposition testimony offered to support Marcia's summary judgment on liability consists of Mehrdad not answering deposition questions based on the Fifth Amendment.

The Court of Appeals declined to reach the issue of whether the trial court erred in giving Marcia the benefit of a negative inference from Mehrdad's decision to assert the Fifth Amendment in response to questions asked of him in his deposition. Op. at *3 n 7, A21. The Court of Appeals reasoned that the trial court had ample basis in the deposition testimony of Spano and Christopher to find for Marcia. *Id.*

However, if this Court agrees with Mehrdad that the testimony of Christopher and Spano alone cannot support summary judgment, then this Fifth Amendment issue becomes more important.

A litigant's failure to answer a deposition question on Fifth Amendment grounds permits a finder of fact to draw a negative inference from that response, but a negative inference is not mandatory. *State v. Spilton*, 315 S.W.3d 350, 356 n.8 (Mo. banc 2010); *Johnson v. Missouri Bd. Of Nursing Adm'rs,* 130 S.W.3d 619, 626 (Mo. App. W.D. 2004).

A cursory reading of *Spilton* and *Johnson* could lead to the conclusion that Mehrdad's decision against answering deposition questions on grounds of the Fifth Amendment permitted the trial judge, at the summary judgment stage, to grant Marcia an adverse inference. That is not the law and neither case so holds.

In *Spilton,* the State of Missouri was asserting a claim for civil Medicaid fraud, and based a motion for summary judgment against Spilton on copious business records and affidavits verifying written statements by Spilton admitting that she committed Medicaid fraud. *Spilton,* 315 S.W.3d at 305-06. "[I]n her response to the state's motion for summary judgment, Spilton asserted the Fifth Amendment privilege against self-incrimination." *Id.* at 353.

The State's right to summary judgment did not turn on Spilton's decision to assert the Fifth Amendment in response to the State's summary judgment motion. It turned on the fact that the State had independent evidence (300 claim files and affidavits verifying Spilton's prior confession) to support summary judgment. *Id.* at 355-56. The State's summary judgment was affirmed because Spilton failed to comply with Rule 74.04(c)(2), which required her to "admit or deny each of the movant's factual statements and 'support each denial with specific references to the discovery, exhibits, or affidavits that demonstrate specific facts showing that there is a genuine issue for trial.'" *Id.* at 356. The Court found that summary judgment was correctly entered for the State because "Spilton did not deny a single one of the state's allegations in her response." *Id.* In addition, the Court said "[w]hile a failure to deny does not automatically entitle summary judgment to the moving party, it does 'cause all factual assertions properly alleged and supported by the

moving party to be considered as true.'" *Id.* (quoting *Johnson v. Missouri Bd. Of Nursing Adm'rs,* 130 S.W.3d 619, 626 (Mo. App. W.D. 2004) (emphasis added)).

Summary judgment for the State in *Spilton* was properly entered and was affirmed because the State provided the trial court with an uncontroverted factual basis for granting summary judgment consisting of competent evidence independently of, and in addition to, Spilton's exercise of her Fifth Amendment rights.

Here that is not the case. The evidence presented by Marcia in support of summary judgment shows that Mehrdad denied knowing two of the three co-conspirators, and shows conflicting and different conspiracy theories, both of which raise issues of fact for trial.

The statements of fact premised upon Mehrdad's exercise of his Fifth Amendment rights do not establish that Mehrdad conspired with Hall, Reed, or Christopher to burn Marcia's home, even if the answers to deposition questions asked of Mehrdad are deemed to be adverse to Mehrdad. *See e.g.,* D50 at 6 (Statement of Fact 26 ("When asked about how much he paid Christopher and Hall, Defendant Fotoohighiam invoked his Fifth Amendment Right.")). The question does not ask for what the payment was made, and on the record here, Christopher certainly did not admit to getting paid or taking part in burning

Marcia's mobile home. *See also* D50 at 6 (Statement of Fact 26 ("When asked whether…he offered to add a $500 bonus to Hall's check if he set fire to Plaintiff's mobile home, Defendant's mobile home, Defendant Fotoohighiam invoked his Fifth Amendment right.")). The question does not ask whether Hall accepted, and on the record here Hall did not admit to accepting such an offer (Hall has in fact been acquitted of the arson charges against him).

The excerpts from Mehrdad's deposition offered in support of Marcia's statements of fact dance all around but do not confirm the conspiracy theories raised by the testimony of Spano and Christopher.

D. CONCLUSION

"Great caution must be exercised in granting summary judgment as it borders on denial of due process." *King General Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 499 (Mo. banc 1991) (internal quotes, citations, omitted). Even after *ITT* and the 1994 amendments to Rule 74.04, this principle of law still forms the foundation for appellate review of summary judgments. *See Energy Creates Energy, LLC v. Heritage Grp.*, 504 S.W.3d 142, 149 (Mo. App. W.D. 2016).

In short, Marcia failed to establish a clear right to summary judgment and the trial court therefore erred in granting her motion for partial summary judgment.

The trial court's order granting summary judgment on the issue of liability should be set aside for that reason.

POINT II

THE TRIAL COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT FOR THE PLAINTIFF/RESPONDENT, MARCIA GREEN, AND AGAINST THE DEFENDANT/APPELLANT, MEHRDAD FOTOOHIGHIAM, ON THE ISSUE OF MEHRDAD'S LIABILITY FOR CONSPIRING TO SET FIRE TO MARCIA'S MOBILE HOME, IN THAT MARCIA FAILED TO MEET HER BURDEN TO ESTABLISH HER RIGHT TO JUDGMENT AS A MATTER OF LAW UNDER RULE 74.04(c)(6), BECAUSE THE MATERIAL FACTS UPON WHICH SUMMARY JUDGMENT WAS GRANTED WERE IN FACT CONTROVERTED AND PUT INTO DISPUTE BY DEPOSITION TESTIMONY MARCIA FILED IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT, WHICH DEPOSITION TESTIMONY SETS FORTH THE FACTUAL BASIS FOR TWO DIFFERENT, INCONSISTENT, AND CONFLICTING CONSPIRACY THEORIES, AND MARCIA THEREBY CREATED ONE OR MORE GENUINE ISSUES OF MATERIAL FACT NEGATING MARCIA'S *PRIMA FACIE* CASE FOR SUMMARY JUDGMENT.

In Point I above, Mehrdad asserts that the deposition testimony Marcia filed but did not cite to the trial court negated her right to judgment as a matter of law because this uncited testimony included Mehrdad's testimony denying that he knew key members of the two conspiracies Marcia alleged.

Point II asserts that the materials Marcia filed and did cite, and the statements of fact they support, still negate her right to judgment as a matter of law.

A THE STANDARD OF REVIEW

Appeal from a trial court judgment granting summary judgment is an issue of law which is reviewed *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment is only appropriate when the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. *Id.* at 380. "A factual question exists if evidentiary issues are actually contested, are subject to conflicting interpretations, or if reasonable persons might differ as to their significance." *Martin v. City of Washington*, 848 S.W.2d 487, 492 (Mo. banc 1993)(citations omitted).

B PRESERVATION OF ASSERTED ERROR IN THE TRIAL COURT

In Mehrdad's motion for new trial or judgment notwithstanding the verdict, Mehrdad's counsel asserted that "The [trial] Court erred in granting summary judgment in favor of the Plaintiff because there were controverted material facts and/or the Plaintiff was not entitled to judgment as a matter of law." D90 at 1. Mehrdad's counsel filed suggestions pointing out that inconsistent and conflicting theories, alone, create a sufficient basis for denying summary judgment; D91 at 4.

In so moving and in so informing the trial court, Mehrdad preserved this point for appellate review.

C ANALYSIS

In addition to placing evidence in the record that Mehrdad did not know two of the individuals he allegedly conspired with (one of whom, Christopher, was a key witness to any conspiracy theory involving Mehrdad), Marcia also placed evidence into the summary judgment record which supported two different and conflicting conspiracy theories.

By presenting two different conflicting conspiracy theories, Marcia thereby presented the question of whether one, the other, neither, or any other conspiracy theory, is true.

In practical terms, whether Marcia was entitled to summary judgment on the issue of liability turns on the question of whether the record showed "a factual question that would permit a reasonable jury to return a verdict for [Mehrdad]." *See Martin v. City of Washington*, 848 S.W.2d at 492.

The Court of Appeals concluded that neither Mehrdad's denial of knowing Christopher and Reed, nor the conflicting conspiracy theories raised by Marcia's motion and supporting documents, negated Marcia's right to summary judgment because none of this evidence rules out the possibility of a third conspiracy between Mehrdad and James Hall only. Op. at *11, A29. ("The fact that one of the persons

named as a conspirator may not have been a member of the conspiracy is immaterial where there is a sufficient number of participants to form a conspiracy.").

This analysis was incorrect. It is not Mehrdad's burden at the summary judgment phase to rule out all conspiracy theories. It is only necessary that the record contain evidence raising an inference that the theories Marcia put forth are false. This is because Marcia, the plaintiff, has the burden of proof—a clear and convincing evidence burden of proof—to establish the conspiracy theories she asserted. *See State Farm Mut. Auto. Ins. Co. v. Weber*, 767 S.W.2d at 337–38.

A defendant's verdict would have been possible—even likely—based on the entire body of evidence Marcia submitted in support of summary judgment in the trial court.

Introducing evidence of two different liability theories plants doubt in any juror's mind about them both. Evidence supporting one theory renders the other less likely. That much is apparent from the record in this case, wherein the jury was not even charged with deciding the issue of liability.

In closing argument Marcia's counsel read the following statements to the jury, as taken verbatim from the Statements of Fact supporting her summary judgment motion: (1) "Defendant Fotoohighiam offered Hall and Christopher $500.00 to set Plaintiff's mobile home on fire." Tr. 275; and (2) "Defendant

Fotoohighiam told a former employee that Defendant Fotoohighiam hired Hall and Reed to burn down Marcia Green's mobile home." Tr. 275.

It is clear that the jury had reservations about liability because during deliberations, the jury sent back a note with this question: "was there a criminal trial and what was the result?" Tr. 279.

If Marcia had tried the issue of Mehrdad's liability for conspiracy to a jury, on the same evidence and on the same theories she submitted to the trial court in connection with her motion for partial summary judgment, it is likely a jury would have rejected her inconsistent and conflicting theories, and would not have bailed her out by finding a "Mehrdad and James Hall only" conspiracy theory.

D CONCLUSION OF POINT

Marcia filed a summary judgment motion which, as she supported it, does not demonstrate that she is entitled to judgment as a matter of law on the issue of liability on her conspiracy theories.

The trial court's order granting summary judgment on the issue of liability should be set aside for that reason.

POINT III

THE TRIAL COURT ERRED IN OVERRULING THE MOTION FOR NEW TRIAL FILED BY THE DEFENDANT/APPELLANT, MEHRDAD FOTOOHIGHIAM, AND THE TRIAL COURT THEREBY ERRED IN ITS APPLICATION OF THE LAW, IN THAT ONCE MEHRDAD ASSERTED IN HIS POST-TRIAL MOTION THAT THE TRIAL COURT ERRED IN EARLIER GRANTING PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY BECAUSE OF GENUINE ISSUES OF FACT FOR TRIAL, THE TRIAL COURT WAS REQUIRED AS A MATTER OF LAW TO SET ASIDE THE JUDGMENT FOR MARCIA AND ORDER THE CASE TO BE RETRIED IN ITS ENTIRETY BECAUSE THAT EARLIER ERRONEOUS SUMMARY JUDGMENT PREJUDICED MEHRDAD IN THE SUBSEQUENT TRIAL ON DAMAGES AND PUNITIVE DAMAGES.

Point III here is the same as Mehrdad's Point II in the Court of Appeals.

A THE STANDARD OF REVIEW

"The grant of a new trial based on legal errors is reviewed for an abuse of discretion." *Dick v. Children's Mercy Hosp*., 140 S.W.3d 131, 136 (Mo. App. W.D. 2004) (internal citation omitted). However, "[a] trial court has no discretion when ruling on an issue of law in a motion for new trial." *Ivy v. Hawk,* 878 S.W.2d 442, 445 (Mo. banc 1994). When the denial of a motion for new trial involves upholding summary judgment, review is *de novo. The Lamar Co., LLC v. City of Columbia*, 512 S.W.3d 774, 782 (Mo. App. W.D. 2016).

Here, every aspect of the subsequent jury trial cannot be untangled from the earlier order granting partial summary judgment. Thus, review is *de novo* to determine whether the trial court erred, as a matter of law, in denying Mehrdad's motion for new trial predicated upon the erroneous entry of partial summary judgment before trial.

B PRESERVATION OF ASSERTED ERROR IN THE TRIAL COURT

Motions for new trial are governed by Rule 78.01 et. seq. In Mehrdad's Motion for New Trial or JNOV, Mehrdad's counsel asserted that "The [trial] Court erred in granting summary judgment in favor of the Plaintiff because there were controverted material facts and/or the Plaintiff was not entitled to judgment as a matter of law." D90 p. 1.

In support of that contention, Mehrdad's counsel filed suggestions pointing out that in support of her second motion for summary judgment Marcia filed deposition testimony wherein Mehrdad expressly denied ever meeting two of the three alleged co-conspirators involved in Marcia's two different conspiracy theories. D91 p. 2.

In so moving and in so informing the trial court, Mehrdad preserved for appellate review his contention that the trial court erred in denying him a new trial.

C ANALYSIS

As explained in the discussion on Point I and Point II, the trial court erred in granting Marcia a partial summary judgment, and in proceeding to try only the issues of damages and punitive damages to a jury.

The resulting judgment—which included $2.5 Million in punitive damages (D87 at 2, A6)—was made possible because of the partial summary judgment. No jury ever held Marcia to her clear and convincing evidence burden of proof on the issue of liability. Rather, Marcia was allowed to read to the jury directly from statements of fact deemed to have been admitted and uncontroverted in connection with Marcia's second summary judgment motion. D75 p.1-3; Tr. 127-133, 141. Mehrdad was no doubt prejudiced.

The only way to remedy this error is to vacate the trial court judgment and order a retrial of all issues.

It is not possible to catalog all of the ways a jury could have interpreted the totality of evidence differently if Marcia had been required to try her case on the issue of liability. Two examples suffice.

First, unless she used Mehrdad as her sole liability witness at trial, Marcia would have had to present testimony from witnesses like Christopher, Spano, and Hall, and open them up to all sorts of easy and damaging impeachment. Marcia

would have risked infecting every part of her case and jeopardizing her own credibility by using these compromised liability witnesses. In a retrial, Marcia may well learn what the prosecutors who tried James Hall and Mehrdad for this same conspiracy now know—a case which depends on badly compromised witnesses isn't much of a case at all.

Secondly, Marcia would have faced the possibility that a jury would not reach an adverse inference from Mehrdad's exercise of his Fifth Amendment rights. Refusing to testify in a civil case on grounds of the Fifth Amendment permits, but does not require, the fact finder to reach an adverse inference against a party witness. That is discussed in Point I above. See *State v. Spilton*, 315 S.W.3d 350, 356 n.8 (Mo. banc 2010); *Johnson v. Missouri Bd. Of Nursing Adm'rs,* 130 S.W.3d 619, 621 (Mo. App. W.D. 2004) ("[A]lthough a negative inference *may* be drawn from a litigant's assertion of the Fifth Amendment privilege, it is not *required* to be drawn.") (internal citations omitted, emphasis in original). With nothing for liability evidence but deposition questions to Mehrdad, and "Fifth Amendment" answers from Mehrdad, a jury may have declined to find liability, or may have declined to award much if anything in the way of actual damages or punitive damages.

"[W]here the evidence on liability is conflicting, a new trial on all issues is desirable." *Talley v. Swift Transp. Co.*, 320 S.W.3d 752, 756 (Mo. App. W.D. 2010)(affirming a grant of new trial on all issues). *Talley* was a personal injury comparative fault case, wherein the Court noted that "it would be a rare case in which a jury would not consider the effect of its determination of percentages of fault in terms of the damages to be eventually awarded to the plaintiff." *Id.* (internal quotes, citation, omitted).

Although the issue of liability and the issue of damages are conceptually distinct, *Talley* correctly states that as a practical matter one often impacts the other at trial.

A case wherein Marcia must present or elect against presenting all of her liability evidence is a very different case than the one here under review.

D CONCLUSION OF POINT

The erroneous grant of partial summary judgment on the issue of liability can only be remedied by reversing the trial court's denial of Mehrdad's motion for new trial, and granting Mehrdad a trial on all issues.

POINT IV

THE TRIAL COURT COMMITTED PLAIN ERROR IN GRANTING PARTIAL SUMMARY JUDGMENT FOR THE PLAINTIFF/ RESPONDENT, MARCIA GREEN, AND AGAINST THE DEFENDANT/APPELLANT, MEHRDAD FOTOOHIGHIAM, IN THAT THE TRIAL COURT THEREBY COMMITTED ERROR THAT WAS EVIDENT, OBVIOUSS, AND CLEAR BECAUSE THE RECORD FILED BY MARCIA IN SUPPORT OF SUMMARY JUDGMENT SHOWED GENUINE ISSUES OF MATERIAL FACT FOR TRIAL ON THE ISSUE OF MEHRDAD'S LIABILITY FOR CONSPIRACY, THEREBY RESULTING IN MANIFEST INJUSTICE AND A MISCARRIAGE OF JUSTICE.

Mehrdad did not assert plain error in the Court of Appeals. Plain error review is the remedy for error which was not correctly preserved in the trial court. Mehrdad believes that the error asserted in Points I, II, and III is preserved for appellate review on the grounds asserted in each Point.

To the extent the Court holds that Mehrdad's trial counsel failed to timely or sufficiently respond to Marcia's motion for partial summary judgment, and that he thereby failed to preserve the issues asserted in Points I, II, and III for appellate review, it was plain error to fail to set aside the partial summary judgment for Marcia, and to deny Mehrdad a new trial on all issues.

A. PRESERVATION OF ERROR FOR APPELLATE REVIEW

In Mehrdad's Motion for New Trial or Judgment Notwithstanding the Verdict, Mehrdad's counsel asserted that "The [trial] Court erred in granting summary judgment in favor of the Plaintiff because there were controverted material facts and/or the Plaintiff was not entitled to judgment as a matter of law." D90 at 1.

In support of that contention, Mehrdad's counsel filed suggestions pointing out that in support of her second motion for summary judgment, Marcia filed deposition testimony wherein Mehrdad expressly denied ever meeting two of the three alleged co-conspirators involved in Marcia's two different conspiracy theories. D91 p. 2.

In so moving and in so informing the trial court, Mehrdad preserved Points I, II, and III asserted above for appellate review.

B. THE STANDARD OF REVIEW

To the extent the Court disagrees that Mehrdad's trial counsel preserved error for review, under Rule 84.13(c), the Court may, and here should, review the trial court rulings for plain error. This rule permits the Court to review for "[p]lain errors affecting substantial rights…in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." However, "plain error review is rarely applied in civil

cases. *Reed v. Kansas City Missouri Sch. Dist.*, 504 S.W.3d 235, 246 (Mo. App. W.D. 2016). Here plain error review is justified and right.

Plain error review is a two-step process. The Court first "consider[s] whether the trial court facially committed error that is evident, obvious, and clear. *Cooper v. Chrysler Grp., LLC*, 361 S.W.3d 60, 64 (Mo. App. E. D. 2011). If the error meets that threshold, "the error must [also] have prejudiced the appellant, except that such prejudice must constitute manifest injustice or a miscarriage of justice." *Wilson ex rel. Wilson v. Simmons*, 103 S.W.3d 211, 220 (Mo. App. W.D. 2003).

C. ARGUMENT

Mehrdad does not advocate a ruling which encourages a series of "do-overs"—in the trial court or on appeal—in connection with every summary judgment. The Court has taken pains to articulate a clear summary judgment standard and clear summary judgment procedures, both in the caselaw and in revisions to Rule 74.04. Mehrdad does not ask this Court to disregard that body law or to change it. He does ask the Court to recognize and remedy the fact that everything about the procedure which led to Marcia's $2.75 Million judgment against him was badly irregular. He was thereby denied the right to a meaningful trial.

Here, it is readily evident that the record on summary judgment presented one or more issues of fact for trial, which were pointed out to the trial court. One issue of fact arose, as discussed in Point I, out of testimony filed but not cited by Marcia, wherein Mehrdad denied that he knew co-conspirators, including the key witness, Scottie Christopher, who implicated Mehrdad with statements allegedly made to him by Mehrdad. The second issue of fact arose, as discussed in Point II, out of testimony filed by Marcia and cited by Marcia which presented conflicting conspiracy theories for resolution at trial. Both satisfy the first requirement for plain error relief—a readily apparent error. *Cooper v. Chrysler Grp., LLC*, 361 S.W.3d at 64.

It goes without saying that the error in connection with granting partial summary judgment for Marcia meets the second requirement for plain error review—prejudice to Mehrdad. *Wilson ex rel. Wilson v. Simmons*, 103 S.W.3d at 220. The result of granting Marcia partial summary judgment was a $2.75 Million verdict in a trial on the issue of damages and punitive damages only.

D. CONCLUSION OF POINT

The trial court committed plain error in granting Marcia partial summary judgment on the issue of liability thereby proceeding to trial on the issue of damages only.

CONCLUSION AND REQUEST FOR RELIEF

For reasons set out in each point above, the Court should reverse the trial court's judgment for Marcia, and remand with instructions for the trial court to vacate the order of partial summary judgment and grant Mehrdad a new trial on all issues.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served electronically upon all counsel of record on this 18th day of March 2020.

/s/ Michael G. Berry
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Rule 84.06(b) and contains 9,139 words, excluding the cover, certificate of service, certificate of compliance, signature block and appendix; and that the brief contains words in 14 point Times New Roman.

/s/ Michael G. Berry