

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 REPLY BRIEF OF APPELLANT

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ARGUMENT

Marcia's shotgun approach to her conspiracy claim—more accurately, alternative conspiracy theories—creates sufficient doubt over the truth of her conspiracy-based allegations to create a genuine (triable) issue of fact, regardless of whether or how Mehrdad responded.¹ For that reason the trial court's judgment for Marcia should be reversed and a new trial ordered.

Marcia argues that changes to Rule 74.04—which were adopted after this Court's leading summary judgment decision, *ITT Commercial Finance Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371 (Mo. banc 1993)—require this Court to disregard defects in Marcia's *prima facie* case for summary judgment because Mehrdad's trial counsel did not timely or substantively respond to her motion as Rule 74.04(c)(2) requires. Respondent's Substitute Brief at 20-21 ("If trial courts were required to look beyond the Rule 74.04 framework of numbered statements of material fact and *specifically cited supporting evidence*, it would put courts in a position where they are called upon to act as advocates, deciphering every uncited word of every page...scouring...for any possible way to defeat a movant's motion." (Italics added for emphasis)).

¹ As in all prior briefing in this appeal, the appellant, Mehrdad Fotoohighiam, uses the parties' first names for ease of reading. He reiterates that in doing so he means no disrespect.

Rule 74.04 does not now nor has it ever required an appellate court to overlook the summary judgment movant's failure to present a record which establishes the movant's right to judgment as a matter of law, even when those defects were belatedly or never identified to the trial court. As of 2008, Rule 74.04(c)(6) has stated that "If *the motion, the response, the reply and the sur-reply* show 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, the court shall enter summary judgment forthwith." (Italics added for emphasis).

In this regard, appellate review of a summary judgment under Rule 74.04 is analogous to appellate review of any judgment, wherein the appellate court must determine whether the underlying petition stated a claim and cause of action. Failure of the petition initiating suit "to state a claim on which relief can be granted calls into question the trial court's jurisdiction and may therefore be raised for the first time on appeal...[and] the issue is appropriately raised *sua sponte*." *Commercial Bank of St. Louis Cty. v. James*, 658 S.W.2d 17, 21 (Mo. banc 1983)(citing Rule 55.27(g)(2)).

Stated differently, under Rule 74.04(c)(6) the onus is on the summary judgment movant, in the trial court and on appeal, to demonstrate that the movant is entitled to judgment as a matter of law. This is no greater or different than the burden

Rule 55.27(g)(2) places upon the pleader, in the trial court or on appeal, to demonstrate a right to judgment as a matter of law.

All of the Court's rules—including Rule 74.04—"should be construed...in such a way as to do substantial justice, and to secure the just, speedy, and inexpensive determination of cases." Rule 41.03, *Fireman's Fund Ins. Co. v. Panco Forwarding, Inc.*, 739 S.W.2d 543, 545 (Mo. 1987). Based on the entire record here, one cannot escape the conclusion that Mehrdad did not get substantial justice. To do justice for Mehrdad requires a trial on all issues pertaining to Marcia's conspiracy claims.

Regardless of when and how Mehrdad's counsel responded to Marcia's second motion for partial summary judgment, Marcia failed to establish her prima facie case for summary judgment under Rule 74.04 (Responding to Point I in Respondent's Brief at 14-26).

Marcia argues that Mehrdad's failure to comply with Rule 74.04 requires the Court to overlook Marcia's even more significant shortcomings. Marcia essentially argues for the Court to turn a blind eye to the deficiencies of her motion.

Marcia, as the summary judgment movant, failed to make a *prima facie* case showing that there are no genuine issues of material fact and that she is entitled to

judgment as a matter of law. That much is nothing more than Rule 74.04(c)(6) requires in its current form.

It is correct that the current revision to Rule 74.04 has some slightly different language than it did when this Court decided *ITT Commercial Finance Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371 (Mo. banc 1993). When the Court decided *ITT*, the Rule included the following language: “all facts that are not contradicted are taken as true.” Respondents point to a part of current Rule 74.04, as amended in 2007, which states: “A response that does not comply with this Rule 74.04(c)(2) with respect to any numbered paragraph in movant's statement is an admission of the truth of that numbered paragraph.” Respondent’s Substitute Brief at 17.

The Court of Appeals addressed the significance if this change in *Street v. Harris*, 505 S.W.3d 414 (Mo.App. E.D. 2016), stating:

We note this statement does not appear in the current version of Rule 74.04; however, the rule contains a substantially similar statement: “A response that does not comply with this Rule 74.04(c)(2) [requiring support for denials of statements of fact] with respect to any numbered paragraph in movant's statement is an admission of the truth of that numbered paragraph.” Respondents argue this language requires we accept as true the statement from

their motion that the dog had never knocked anyone down, but we find ITT directs us otherwise. We acknowledge that under Rule 74.04, non-movants may lose the opportunity to show the existence of a fact dispute if they fail to properly file and support a response to the summary judgment motion. However, this assumes that the movant's motion *on its own* is lacking in disputed facts. 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 his or her initial burden to show a right to judgment as a matter of law, and we do not see this authorized by the rule or by precedent. *Id.* at 417 n.1 (emphasis added).

When *ITT* was decided in 1993, the idea that a non-compliant response led to the admission of a fact statement was already in Rule 74.04. The holding of *ITT* has not been undermined by the rule changes Marcia cites.

The most salient language from *ITT*—then and now—explains that “[t]he adage that the record is viewed ‘in the light most favorable to the non-movant’ means that the movant bears the burden of establishing a right to judgment as a matter of law on the record as submitted; any evidence in the record that presents a genuine dispute as to the material facts defeats the movant's prima facie showing.” *ITT*, 854

S.W.2d at 382. This principle remains the same, and here it means Marcia failed to meet her burden to show a right to judgment.

Just as in *Street*, Marcia attached conflicting evidence to her motion when she attached Mehrdad's deposition testimony denying that he knew two of the three individuals he was accused of joining in conspiracy. And while Marcia argues that *Street* is distinguishable, evidence filed in support of summary judgment here, and in *street*, had the effect of putting one or more of the movant's statements of fact into dispute. In *Street*, two of the exhibits attached to the motion for summary judgment offered differing accounts of a crucial fact. *Street*, 505 S.W.3d at 415. This inconsistency was the basis for the Court of Appeals's conclusion that the movants failed to make a *prima facie* showing of entitlement to summary judgment. *Id.* 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. *Id.*

Marcia argues that because she does not have to prove the identity of every person involved in the conspiracy, no contradiction is created by Mehrdad's testimony, which she filed, that he did not know two of the three alleged co-conspirators, Reed and Christopher. Respondent's Substitute Brief at 26.

It may be that all co-conspirators need not be correctly identified for Marcia to plead and to submit to the jury a viable conspiracy theory of liability. However, that is a different issue from whether Marcia's filings create genuine issues of fact which negate her right to judgment as a matter of law under Rule 74.04(c)(6).

Mehrdad's testimony denying that he knew two of the three alleged co-conspirators negates her *prima facie* case for summary judgment, whether Mehrdad's counsel cited it to the court prior to moving for a new trial or not. Marcia's own Substitute Brief makes this point, at 25, citing to and characterizing the trial court's judgment thusly: "Again, the Trial Court found that: (1) Defendant (Mehrdad) Fotoohigham paid others in a conspiracy to burn down the dwelling of Plaintiff (Marcia), [and] (2) those co-conspirators did burn down that dwelling...". Respondent's Substitute Brief at 25 (underscoring added for emphasis).

It is inescapable that Marcia's summary judgment theory, or theories, asserted the existence of at least two "co-conspirators" in addition to Mehrdad. Marcia did not ever identify a conspiracy in her motion and supporting materials consisting exclusively of Mehrdad and one other person.

If as here Marcia's summary judgment filings undercut the theories as she has put them forward, Marcia has not made a *prima facie* case for partial summary judgment on either of her two conspiracy theories, and the resulting judgment in her

favor must be reversed. It is not an appellate court's obligation to fashion for Marcia different conspiracy theories than she presented in the trial court.

In her effort to establish her prima facie case for partial summary judgment, Marcia's motion for summary judgment alleged two different alternative conspiracies, each negating the factual basis for the other (Responding to Point II in Respondent's Substitute Brief at 27-31).

Marcia argues that "whether the individuals conspiring to burn down Mehrdad's trailer were 'Mehrdad, Christopher, Hall', or 'Mehrdad, Reed, Hall', or both, is of little consequence." Respondent's Substitute Brief at 28.

That might be true if Marcia's judgment for conspiracy had come after a trial, wherein a jury or judge found a conspiracy based on that evidence. However, Marcia sought to establish her conspiracy theory by summary judgment. In so proceeding, she must meet her burden to establish the absence of a triable issue of fact. In here determining the existence of a genuine issue of material fact, the identity of the participants in Marcia's two alternative conspiracies is of great consequence. Marcia's unwillingness to settle on a single conspiracy theory demonstrates the logical weakness in each and creates a genuine dispute over a material fact, which negates her right to judgment as a matter of law.

A material fact is one from which the right to judgment flows. *Goerlitz v. City of Maryville*, 333 S.W.3d 450, 453 (Mo. banc 2011) (citing *ITT Commercial Fin. Corp.*, 854, S.W.2d at 378). As noted above, Marcia’s material facts asserted and the trial court addressed two specific theories of conspiracy liability. Marcia’s *prima facie* right to judgment depends upon persuading a fact finder that one of these conspiracies took place. And yet Marcia now asserts a conspiracy theory that was not even before the trial court: a “Mehrddad, Hall” conspiracy theory. Respondent’s Substitute Brief at 30.

To understand why Marcia’s alternative conspiracy theories create a genuine issue of fact, the Court need only consider this question: If Marcia had put forward evidence of five or six different conspiracy theories, instead of just two or three, what impact would that have had on the believability of the evidence supporting any one of them? Each, of course, makes the others less believable. The difference between two or three conspiracies, and five or six conspiracies, is only a matter of degree. This is of particular importance because Marcia must meet a clear and convincing evidence burden of proof.

Marcia further takes issue with Mehrddad’s argument that the conspiracy theories set out by Marcia are conflicting, arguing that Mehrddad has not sufficiently explained how the involvement of Christopher must exclude the

involvement of Reed. Respondent's Substitute Brief at 30. This argument misdirects focus upon Mehrdad—who has no burden to meet—instead of upon Marcia, who has a steep burden to hold summary judgment on appeal.

To reverse judgment for Marcia, Mehrdad need only identify evidence of record raising an inference that the theories Marcia put forth are not true because a reasonable juror could disbelieve them. Here, evidence of multiple conspiracy theories each makes the other less likely, and would justify a jury in disbelieving Marcia altogether.

The Court has authority to and should review the trial court's judgment for plain error (Responding to Point IV in Respondent's Substitute Brief at 35-36).

Mehrdad did not seek plain error review in the Court of Appeals because the errors resulting in the trial court's judgment for Marcia were preserved for review on appeal, or required no action to preserve them for review.

However, whether raised by Mehrdad previously on appeal or not, this Court has discretion to review an unpreserved allegations of error for plain error. *Mayes v. Saint Lukes' Hosp. of Kansas City*, 430 S.W.3d 260, 269 (Mo. banc 2014). Best explained by the Court of Appeals in *McGuire v. Kenoma, LLC*, 375 S.W.3d 157, 176 (Mo. App. W.D. 2000), plain error review is appropriate when the injustice is

“so egregious as to weaken the very foundation of the process and seriously undermine confidence in the outcome of the case.”

Here, the totality of the record leaves an objective reader with a strong discomfort that the process resulted in a highly doubtful outcome, calling for reversal on grounds set out in Mehrdad’s Substitute Brief, Points I, II, and III, or on grounds of plain error.

Conclusion

Marcia did not establish her prima facie right to summary judgment as a matter of law. The judgment of the trial court should therefore be reversed, and the case remanded for 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 24th day of April 2020.

/s/ Michael G. Berry

Michael G. Berry

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Rule 84.06(b) and contains 2,375 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