

SUPREME COURT OF MISSOURI

SC98262

MEHRDAD FOTOOHIGHIAM

Defendant/Appellant,

v.

MARCIA GREEN,

Plaintiff/Respondent,

**On Appeal from the Circuit Court of Boone County, Missouri
Honorable Robert L. Koffman, Special Judge
Case No. 15BA-CV02239**

SUBSTITUTE BRIEF OF RESPONDENT

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PROCEDURAL BACKGROUND

This lawsuit was filed in the Circuit Court of Boone County on July 6, 2015. After the parties conducted discovery, Plaintiff/Respondent, Marcia Green (hereinafter “Marcia”), filed a Motion for Summary Judgment (hereinafter “Marcia’s Motion”) against Defendant/Appellant, Mehrdad Fotoohghiam (hereinafter “Mehrdad”), on August 18, 2017. Mehrdad, by and through counsel, failed to respond to Marcia’s Motion within the time required by Rule 74.04. A hearing was held on October 23, 2017 on Marcia’s Motion, and counsel for Mehrdad also failed to appear at that hearing. Mehrdad then on October 26, 2017 filed a Motion for Leave to file his response out-of-time, which was not granted. The Honorable Robert Koffman sustained Marcia’s Motion on October 27, 2017, granting her a partial summary judgment with respect to liability against Mehrdad. The parties then tried the case before a jury on the issue of damages on September 7, 2018. Judgment was entered in favor of Marcia on September 12, 2018 in the amount of Two Million Seven Hundred Fifty Thousand Dollars (\$2,750,000) plus interest. Subsequent to the Trial Court’s judgment, counsel for Mehrdad filed a Motion for New Trial, which was denied on November 29, 2018.

Mehrdad appealed the Trial Court’s judgment to the Western District of the Missouri Court of Appeals (Case No. WD82344). After briefing and argument, the

Western District on October 29, 2019 affirmed the Trial Court's ruling granting summary judgment. Mehrdad now appeals the Western District's ruling.

STATEMENT OF FACTS

This appeal arises out of a lawsuit filed by Plaintiff/Respondent, Marcia Green, in the Circuit Court of Boone County alleging, among other things, that Defendant/Appellant, Mehrdad Fotoohighiam, arranged to have Marcia's trailer set on fire causing Marcia serious bodily and emotional injury, property damage, and other damages. (D3).

Marcia filed a Motion for Summary Judgment against Mehrdad on August 18, 2017. (D48). That motion offered, among others, the following statements of uncontroverted material fact:

Statement 2. On December 15, 2014, Marcia was in her mobile home she owned located at 1808 Grindstone Parkway, Lot 16, Columbia, Missouri 65203 ("subject lot and mobile home"). (D50, p. 1, ¶ 2)(D53, p.1, ¶ 2). **Statement 3.** Marcia was awakened from her sleep by sounds in her home, and when she opened the bedroom door saw that her mobile home was on fire, which immediately caused her to go into survival mode to save her life. (D50, p. 1, ¶ 3)(D53, p.1, ¶ 3). **Statement 4.** Marcia escaped the

fire by breaking a window in her bedroom and going out head first. (D50, p.2, ¶ 4)(D53, p.1, ¶ 4).

Statement 5. As a result of the fire, Marcia sustained several injuries, including but not limited to, lacerations, bleeding, first and second degree burns and respiratory complications associated with inhaling smoke and carbon monoxide. (D50, p.2, ¶ 5)(D53, p.2, ¶ 5). **Statement 6.** Marcia was transported to the hospital where she was treated for her injuries. (D50, p.2, ¶ 6)(D53, p.2, ¶ 6). **Statement 8.** Marcia's mobile home was completely destroyed by fire and her real property diminished in value in excess of Fifty Thousand Dollars (\$50,000.00). (D50, p.2, ¶ 8)(D53, p.2, ¶ 8). **Statement 9.** All of Marcia's personal property, personal health and financial records of over forty years, heirlooms, books, clothes in excess of Twenty-Five Thousand Dollars and Zero Cents (\$25,000.00) were destroyed by the fire. (D50, p.2-3, ¶ 9)(D53, p.2, ¶ 9).

Statement 12. Defendant/Appellant Mehrdad Fotoohighiam owns a mobile home on Lot 17, immediately adjacent to Marcia's Lot 16, located at 1808 Rock Quarry Road, Columbia, Missouri 65203. (D50, p.3, ¶ 12)(D54, p.3, lines 12-15)(D54, p.2, lines 1-5).

Statement 21. In the fall of 2014, Scotty Christopher (“Christopher”) and James Hall (“Hall”) performed work on Mehrdad’s property. (D50, p.5, ¶ 21)(D55, p.1, lines 3-8)(D55, p.2, lines 6-14). **Statement 25.** Mehrdad offered Hall and Christopher Five Hundred Dollars (\$500.00) to set Marcia’s mobile home on fire. (D50, p.5, ¶ 25)(D55, p.3, lines 19-24)(D55, p.4, lines 1-18). **Statement 28.** Mehrdad told a former Electenergy Technologies, Inc. employee Louis Spano (“Spano”) that Mehrdad hired Hall and Reed to burn down Marcia Green’s mobile home. (D50, p.6, ¶ 28)(D56, p.1, line 23). **Statement 31.** Mehrdad paid Hall Five Hundred Dollars (\$500.00) to set fire to Marcia’s mobile home. (D50, p.7, ¶ 31)(D55, p.3, lines 19-24)(D55, p.4, lines 1-18). **Statement 10.** Marcia never gave permission to Mehrdad Fotoohigham, Scotty Christopher, James Hall, David Reed or anyone else to enter her land to burn her home down. (D50, p.3, ¶ 10)(D53, p.2, ¶ 10).

Mehrdad did not file a timely response to Marcia’s Motion for Summary Judgment, and his attorney failed to appear for a hearing on Marcia’s Motion. On October 26, 2017 Mehrdad filed a Motion for Leave to file his response out-of-time. (D58). Mehrdad’s Motion for Leave was not granted, and the Trial Court issued a partial summary judgment on October 27, 2017, stating that the undenied

facts were that: (1) Defendant (Mehrdad) Fotoohigham paid others in a conspiracy to burn down the dwelling of Plaintiff (Marcia), (2) those co-conspirators did burn that dwelling down causing the Plaintiff (Marcia) damage. (D62, p.3-4). According to the trial court, there is no contravention on those ultimate issues, they are found to be true, and Marcia was therefore entitled to judgment as a matter of law. (D62, p.4).

Mehrdad initially filed his appeal with the Western District stating that the trial court's ruling on partial summary judgment was in error, and that Mehrdad's Motion for New Trial should have been granted on those grounds. The Western District affirmed Marcia's judgment and Mehrdad now appeals to the Missouri Supreme Court on similar grounds.

STANDARD OF REVIEW

This Court reviews an award of summary judgment *de novo*. *ITT Comm'l Finance Corp. v. Mid-American Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. 1993). The appellate review is based only on the record submitted to the trial court. *Id.* To be entitled to summary judgment, the moving party must establish that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *ITT Comm'l Finance*, 854 S.W.2d at 377.

This Court is to view the facts in the light most favorable to the party against whom judgment was entered. *Id.* at 382. The non-movant is given the benefit of all reasonable inferences to determine whether a genuine issue exists. *Id.* A genuine issue is a “dispute that is real, not merely argumentative, imaginary or frivolous.” *Id.* “Where the ‘genuine issues’ raised by the non-movant are merely argumentative, imaginary or frivolous, summary judgment is proper.” *Id.* at 382.

ARGUMENT

Before responding to the substantive arguments of Mehrdad, counsel must first draw this Court’s attention to several arguments made by Mehrdad in his current brief that seem to be attempts to poison this tribunal with information that is either misleading, irrelevant, or not properly before this Court.

First, it must be plainly stated, and clear for the record, that Mehrdad did not file a timely response to Marcia’s Motion for Summary Judgment, and also failed to appear at the hearing on Marcia’s Motion. Any attempt by Mehrdad to highlight certain denials, or arguments made by Mehrdad in response to Marcia’s Motion for Summary Judgment, are misleading. In fact, Mehrdad’s Motion for Leave (to file a response out-of-time) was filed more than two months after Marcia’s Motion. That Motion for Leave was not granted. As a result, Mehrdad did not have leave from the Trial Court to make any denial or argument in response to Marcia’s Motion,

and each paragraph of Marcia's Statement of Uncontroverted Material Facts is admitted. Mo. Sup. Ct. Rule 74.04(c)(2). Any reference to denials or arguments made against Marcia's Motion is an attempt by Mehrdad to inject into this appeal issues and arguments not properly before this Court.

Similarly, any arguments that the witnesses referenced herein are not credible is an improper attack. Because Mehrdad did not file a timely response to Marcia's Motion, the statements of those witnesses were not controverted. Accordingly, those statements are admitted facts and unimpeachable by any extraneous information. Mehrdad's attempt to attack the credibility of those witnesses is irrelevant and should not be tolerated.

Mehrdad also refers in his brief to an acquittal on the original criminal charge of first degree arson, but omits the fact that he still sits on jail on other charges including an alleged conspiracy to murder both his wife, and Boone County Circuit Judge Jeff Harris. Furthermore, as this Court well knows, the burden of proof in a criminal case is significantly heightened from that applicable to a civil case.

Additionally, his brief, Mehrdad made a thinly-veiled attempt to insert a new argument about the sufficiency of the evidence cited by Marcia in her Motion. Specifically, Mehrdad briefly argues that Marcia did not properly cite to the deposition testimony in order to support her Statements of Material Fact. Because

this argument was not raised in Mehrdad's initial appeal, it has been waived, and should be disregarded. Similarly, Mehrdad's fourth Point Relied On, was not submitted to the Western District during the original appeal, and cannot be considered by this Court.

Regarding Mehrdad's other Points Relied On, all are centered around the argument that the Trial Court's partial summary judgment ruling was in error based on what Mehrdad characterizes as conflicts within Marcia's Motion. That argument is not supported by the evidence, law, or reason.

I. The Trial Court did not err in granting partial summary judgment for the Plaintiff/Respondent, Marcia Green, and against Defendant/Appellant, Mehrdad Fotoohighiam, on the issue of Mehrdad's liability for conspiring to set fire to Marcia's mobile home, in that Marcia met 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 not controverted and were not put into dispute by deposition testimony Marcia filed in support of her motion for summary judgment

a. Review of a Motion for Summary Judgment is limited to the numbered paragraphs contained in Marcia's Statement of Uncontroverted Material Facts and exhibits as specifically cited to

in order to determine if Marcia was entitled to judgment as a matter of law.

The approach to review a trial court's ruling on summary judgment articulated in the *Street v. Harris* case, cited by Mehrdad in support of his position that uncited portions of attached exhibits should be used to controvert Marcia's Statement of Uncontroverted Material Facts, has not been adopted by the Western District, nor the Southern District. In fact, the reasoning used by the Eastern District in *Street* has been repeatedly and explicitly rejected by other courts, including the Eastern District itself.

It is well-established in Missouri that the trial court grants or denies summary judgment only on the basis of what is contained in the motion for summary judgment and the responses thereto. *Holzhausen v. Bi-State Development Agency*, 414 S.W.3d 488, 494 (Mo. App. E.D. 2013). Under Missouri Supreme Court Rule 74.04 a motion for summary judgment shall summarily state the legal basis for the motion and a statement of uncontroverted material facts shall be attached to the motion. Mo. Sup. Ct. Rule 74.04(c). The statement shall state with particularity in separately numbered paragraphs each material fact as to which movant claims there is no genuine issue, with specific references to the pleadings, discovery, exhibits or affidavits that demonstrate the lack of a genuine issue as to such facts. *Id.*

Facts come into a summary judgment record *only* via Rule 74.04(c)'s numbered paragraphs and responses framework. *Columbia Mut. Ins. Co. v. Heriford*, 518 S.W.3d 234, 239 (Mo. App. S.D. 2017) (emphasis added). Affidavits, exhibits, and discovery generally play a role *only* as cited to support Rule 74.04(c) numbered paragraphs or responses. *Id.* (emphasis added). Only those material facts set forth in the parties' statement of facts may be considered in determining whether summary judgment is appropriate. *Id.* at 240. Once the movant has made a prima facie showing that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law, the burden shifts to the non-movant. *McNearney v. LTF Club Operations Co.*, 486 S.W.3d 396, 402 (Mo. App. ED 2016). Once the burden shifts, the non-movant may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in Mo. Sup. Ct. R. 74.04, *shall* set forth specific facts showing that there is a genuine issue for trial, Rule 74.04(e). *Id.* Thus, at that point the non-movant's *only* recourse is to show-by affidavit, depositions, answers to interrogatories, or admissions on file, that one or more of the material facts shown by the movant to be above any genuine dispute is, in fact, genuinely disputed. *Id.*(emphasis added).

The response to a summary judgment motion must be filed within “thirty (30) days after a motion for summary judgment is served” and a response and/or

failure to respond 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.” Mo. Sup. Ct. Rule 74.04(c)(2). *See also Mothershead v. Greenbriar Country Club, Inc.*, 994 S.W.2d 80, 85 (Mo. App. E.D. 1998).

When a non-movant fails to respond, the motion and supporting evidence must still establish a right to judgment. *Bank of Am. N.A. v. Reynolds*, 348 S.W.3d 858, 860 (Mo. App. W.D. 2011). However, the court will only consider in its analysis of whether judgment is proper the evidentiary materials attached to the motion if they are cited in a statement of uncontroverted material facts. *Davis v. Walgreen Co.*, 581 S.W.3d 619, 625 (Mo. App. W.D. 2019).

In *Davis v. Walgreen Co.*, the Western District elaborated on evidence that *cannot* be considered in review of a Motion for Summary Judgment. “Generally, neither the trial court, nor this Court, can be expected to pour over the exhibits submitted in support of, or in opposition to, a summary judgment motion...” *Id.* at 625. “Courts cannot sift through a voluminous record separating fact from conclusion, admissions from disputes, the material from the immaterial, in an attempt to determine the basis for the motion without impermissibly acting as advocates. Rule 74.04(c) aims at benefitting trial and appellate courts to expedite disposition of cases, noncompliance with these requirements is not a matter subject to waiver by a party.” *Citing Lackey v. Iberia R-V Sch. Dist.*, 487 S.W.3d 57, 62

(Mo. App. S.D. 2016) (citations and internal quotation marks omitted); see also *Pemiscot County Port Auth. v. Rail Switching Services, Inc.*, 523 S.W.3d 530, 532-34 (Mo. App. S.D. 2017); *Great S. Bank v. Blue Chalk Constr., LLC*, 497 S.W.3d 825, 834, 836 (Mo. App. S.D. 2016) (refusing to consider Appellant's citation to summary judgment exhibits "completely untethered from any particular numbered paragraph material fact in the summary judgment record"; holding instead that appellate review requires the Court to "[c]ompar[e] the movant's *specifically referenced* evidence in a particular numbered paragraph material fact to the *specifically referenced* evidence in the non-movant's denial of that particular material fact . . .") *Davis* at 625 (emphasis added)). Furthermore, less than a month after affirming the Trial Court's decision in the case at bar, the Western District again addressed this issue, more extensively than before.

In *Fidelity Real Estate Company v. Norman*, 586 S.W.3d 873 (Mo App W.D. 2019), the Western District took its analysis of *Street* even further, and explored that case within the context of the changes to Rule 74.04 since 1993. *Fidelity* also involved a case where summary judgment was granted, which *Norman*, the Appellant, argued was improper based on documents attached to the motion for summary judgment which allegedly were inconsistent with respect to a material fact. In that argument, the Appellant relied upon the reasoning set forth by the Eastern District in the *Street* case. The Western District in its analysis

vociferously rejected that approach, opining that *Street* was “wrongly decided and is an aberration.” *Fidelity* at 882. In so ruling, the Western District noted that the *Street* Court based its analysis on *ITT Comm’l Finance Corp. v. Mid-American Marine Supply Corp.*, which was decided under a different version of Rule 74.04 than the one that exists today. *Id.* Elaborating on that issue, the Western District stated:

“At the time *ITT* was decided, Rule 74.04 required a trial court to review ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any’ to determine whether there was a ‘genuine issue as to any material fact.’ Rule 74.04(c)(1993). Now, however, the trial court’s review is limited to only ‘the motion, the response, the reply and sur-reply.’ Rule 74.04(c)(6). The trial court is no longer required to pore through the record to determine if the movant made a prima facie case because, under the current version of the Rule, the burden is now placed upon the parties to identify the true issues in dispute...‘In determining whether the motion makes a prima facie showing, the trial court should consider whether the movant’s *specifically referenced* evidentiary support actually supports the existence of each particular stated material fact giving rise to the movant’s right to judgment.” *Great S. Bank v. Blue Chalk Constr.*,

LLC, 497 S.W.3d 825, 833 n.6 (Mo. App. S.D. 2016)” *Fidelity* at 882-883 (emphasis added).

In support of this analysis, the Western District pointed to the rules of statutory interpretation, which are the same as those for the interpretation of rules. *Id.* at 883. Citing *Williams v. Mercy Clinic Springfield Communities*, 568 S.W.3d 396, 411 (Mo. Banc 2019). Under those rules, courts are to construe amendments to rules as if they intended to accomplish a purpose. *State v. Starkey*, 380 S.W.3d 636, 643-44 (Mo. App. E.D. 2012). Because the current version Rule 74.04(c)(1) now requires a statement of uncontroverted material facts that “state with particularity in separately numbered paragraphs each material fact as to which movant claims there is no genuine issue, with *specific references* to the pleadings, discovery, exhibits or affidavits,” it signals an intentional departure from the old rule that is meant to focus the Court’s summary judgment analysis on only numbered uncontroverted material facts, and specifically cited supporting evidence.

The purpose behind the change to Rule 74.04 is clear, and well-articulated in many of the decisions referenced above. 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

of the motion's exhibits, scouring that text (included only because it happened to be printed on the same page as the specifically cited evidence) for any possible way to defeat a movant's motion. Even in appellate courts, where the appellant is to be given the benefit of reasonable inferences, the approach championed by Mehrdad goes several steps too far.

As pointed out in *Fidelity*, on several other occasions the Eastern District has actually rejected the same approach it took in *Street*:

“We also believe *Street* is an aberration, as cases from the Eastern District both before and after *Street* emphasize that the scope of review at both the trial and appellate levels is limited to the record developed through the procedural requirements of Rule 74.04(c), i.e., the motion and response. See e.g., *Holzhausen v. Bi-State Dev. Agency*, 414 S.W.3d 488, 494 (Mo App. E.D. 2013) (“A trial court grants or denies motions for summary judgment on the basis of what is contained in the motion for summary judgment and the responses thereto...On appeal, our review is confined to the same facts and does not extend to the entire record before the trial court...We will not consider ‘facts’ that are not set out as ‘facts in dispute.’”); *Ackman. V. Union Pac. R.R. Co.*, 556 S.W.3d 80, 87 (Mo. App. E.D. 2018), transfer denied (Sept. 25, 2018) (In reviewing the grant of summary judgment to employer on employee's claim of work-related injury, the appellate court refused to

consider portions of employee's medical records attached to a motion for summary judgment where the employee/non-movant had not relied on those portions of medical records in opposing the grant of summary judgment and had admitted in his summary judgment response that the medical records did not link his injury to work.). Consequently, *Street* does not aid Tenant's claim." *Fidelity* at 884.

Mehrdad asks this Court to discard the approach taken countless times by Missouri courts, including the Eastern District, after the revision of Rule 74.04. As laid forth in the opinions of those courts, it is not the responsibility nor the province of a trial court (or an appellate court) to comb every uncited inch of every exhibit filed with a motion for summary judgment in order to create potential inconsistencies with the statement of uncontroverted material facts. That approach is particularly inappropriate when the non-movant lacks the diligence to even file a timely response to said motion. Doing so would be tantamount to shifting the burden to the Court as a result of the negligence of the non-movant. Such a practice would be unjust and should not be adopted.

b.The uncited portions of the deposition testimony of Mehrdad could not be considered when ruling on Marcia's Motion for Summary Judgment and, even if they were, those portions of that deposition testimony did not conflict with Marcia's Statement of Uncontroverted Material Facts

Mehrdad's argument related to the allegedly conflicting testimony attached as an exhibit to Marcia's Motion can be summarized as follows: Mehrdad in his deposition denied ever meeting Scotty Christopher¹ and David Reed, therefore he could not have conspired with them, and Marcia was not entitled to judgment as a matter of law. This argument fails for a myriad of reasons.

As stated in the section immediately preceding this, it is improper for this Court to consider any facts or evidence outside the 74.04 framework in determining whether a movant is entitled to judgment as a matter of law. *Columbia Mut. Ins.* at 239. The deposition excerpts referenced by Mehrdad are not contained within the numbered statements of material fact, nor are those excerpts cited anywhere within Marcia's Motion. As such, they are wholly irrelevant and immaterial to this Court's (and the Trial Court's) analysis under the law. However, even if this Court were to go against the litany of case law rejecting the approach championed by Mehrdad, it would still be required to affirm the Trial Court's ruling because the deposition testimony Mehrdad cites does not constitute a material fact, and does not conflict with the material facts necessary to enter judgment, which what the Western District Court of Appeals found in this case.

¹ Ironically, in the response to Marcia's Motion that Mehrdad attempted to file out-of-time, he actually admits Christopher did work for him. (D59, p. 8, ¶21).

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). Facts can also play secondary, supporting roles to material facts. *Columbia Mut. Ins.* at 240. Where a secondary or supporting fact's existence directly or inferentially tends to prove or disprove a material fact, it should be *specifically referenced* in support of or opposition to a material fact. *Id.* (emphasis added). "Conflating those two roles and categorizing an item of evidence in a primary role as a material fact when its only significance in the analysis is for its secondary role improperly injects that evidence into the Rule 74.04 analysis on par with an actual material fact and, because it is untethered from an actual material fact, ignores and omits from the analysis its supporting role as to any particular actual material fact. Such miscategorizations are a misapplication of Rule 74.04(c) and, at a minimum, should be ignored." See *Custer v. Wal-Mart Stores E. I, LP*, 492 S.W.3d 212, 215 (Mo. App. S.D. 2016) (mischaracterizing the existence of deposition testimony as a material fact "does not aid the trial court or this court in identifying the material facts or determining the existence of any genuine dispute as to those facts"). *Columbia Mut. Ins.* at 240-241.

The deposition testimony referenced by Mehrdad, on its own, does not constitute a material fact. In fact, that type of evidence is completely immaterial when that testimony is not cited in the motion for summary judgment, and

completely untethered to any material fact, as is the case here. Accordingly, it cannot be used for the purpose Mehrdad advocates.

Further, a plain reading of the Trial Court's ruling on Marcia's Motion shows that even if this Court were to consider that deposition testimony, it has no bearing on the Trial Court's findings. Again, the Trial Court found that: (1) Defendant (Mehrdad) Fotoohigham paid others in a conspiracy to burn down the dwelling of Plaintiff (Marcia), (2) those co-conspirators did burn that dwelling down causing the Plaintiff (Marcia) damage. (D62, p.3-4). As noted herein, in Missouri a conspiracy requires only two people (here, at a minimum, Mehrdad and Hall). *Envirotech, Inc. v. Thomas*, 259 S.W.3d 577, 586 (Mo. App. E.D. 2008). It is irrelevant whether Hall had assistance in carrying out the act.

Finally, from a purely logical perspective, Mehrdad's argument on this point is nonsensical. Mehrdad need not have met Christopher or Reed in person in order to have paid them. Mehrdad need not have met Christopher or Reed in order for them to be involved in the conspiracy. Indeed, Mehrdad's reasoning on this point does not even track the case he cites in support of his position.

In *Street v. Harris* (the primary case on which Mehrdad relies), a case arising out of a dog attack causing injury, the movant recited in a motion for summary judgment the material fact that the dog "had *never* run at, charged, *knocked anyone down*, or injured anyone" *Street v. Harris*, 505 S.W.3d 414, 416

(Mo. App. E.D. 2016) (emphasis added). Appellant on appeal attempted to attack that material fact with uncited deposition testimony included in the exhibits which stated that the dog *had knocked someone down before*. *Id* at 416 (emphasis added). In addition to running contrary to decisions in the Western and Southern Districts, that case is also distinguishable factually. There, the material fact referenced and the deposition testimony are completely incongruent. The dog cannot have “never...knocked anyone down” and also have “knocked someone down before.” Here, however, it is certainly possible that Mehrdad had never met Christopher or Reed (or if he did, that he did not know their names), but that Christopher and Reed were still involved in the conspiracy (and paid by Mehrdad or Mehrdad’s agent Hall). In Missouri, a plaintiff is not required to prove the legal name of each participant in the conspiracy with the defendant, and whether defendant knew the name of, or had ever met in person, each of the co-conspirators. *Envirotech* at 586. Yet, that is the standard Mehrdad asks this Court to impose on Marcia. As such, even if taken in the light most favorable to Mehrdad, the *Street* case is not analogous to the case currently before this Court and should not be followed.

For those reasons, the Court should not consider uncited portions of deposition testimony attached to Marcia’s Motion. However, even if this Court chooses to adopt that approach, Marcia is still entitled to judgment because those

uncited excerpts do not constitute material fact, and do not conflict with Marcia's Statement of Uncontroverted Statement of Material Facts.

II. The Trial Court did not err in granting partial summary judgment for the Plaintiff/Respondent, Marcia Green, and against the Defendant/Appellant, Mehrdad Fotoohghiam, on the issue of Mehrdad's liability for conspiring to set fire to Marcia's mobile home, in that Marcia met 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 not controverted or put into dispute by deposition testimony Marcia filed in support of her motion for summary judgment, which deposition testimony does not set forth two different, inconsistent, or conflicting conspiracy theories, and Marcia thereby did not create one or more genuine issues of material fact negating Marcia's prima facie case for summary judgment.

Mehrdad's second quarrel with the Trial Court's ruling relies on the fallacious argument that Marcia "asserted two different and conflicting conspiracy theories." The debate of "Mehrdad, Christopher, Hall" versus "Mehrdad, Reed, Hall" is simply an attempt to confuse the genuine issues, and create a straw man for Mehrdad to attack.

As a preliminary matter, whether the individuals conspiring to burn down Mehrdad's trailer were "Mehrdad, Christopher, Hall", or "Mehrdad, Reed, Hall", or both, is of little consequence. The undenied facts upon which the Trial Court based its ruling were: (1) Defendant (Mehrdad) Fotoohighiam paid others in a conspiracy to burn down the dwelling of Plaintiff (Marcia), (2) those co-conspirators did burn that dwelling down causing the Plaintiff (Marcia) damage. (D62, p.3-4)². The Trial Court found sufficient uncontroverted material facts in Marcia's Motion to find that there was a conspiracy, that Marcia sustained damages as a result of that conspiracy and, thus, correctly ruled in favor of Marcia.

It is important to note that Mehrdad is not contesting whether there was sufficient evidence in Marcia's motion to find that Mehrdad and Hall were

² On page 9 of Mehrdad's Appellant's Brief, he contends that the trial court issued a finding that "Defendant Fotoohighiam actually paid Christopher \$500.00 to set plaintiff's mobile home on fire." Although the text of that citation is correct, the context given by Mehrdad is not. The section of the Trial Court's judgment cited by Mehrdad is actually a recitation of portions of Marcia's Statement of Uncontroverted Material Facts. The Trial Court acknowledges that the statement cited by Mehrdad was not denied and was supported by deposition testimony. However, the only section that can truly be characterized as a finding of the trial court are the two "undenied facts" referenced here. (D62, p. 3).

engaged in a conspiracy to burn down the trailer of Marcia. Rather, Mehrdad argues that the question of who else was involved, whether it be Christopher or Reed, creates two conflicting conspiracy theories. This argument is logically flawed and ignores that Christopher and Reed are not mutually exclusive variables in the conspiracy. Either Christopher or Reed, or both, could have been involved in the conspiracy, and Mehrdad provides no argument regarding why the two “conspiracy theories” are conflicting. Mehrdad, or Hall on Mehrdad’s behalf, could have solicited hundreds, or even thousands, of co-conspirators to assist with the burning of Marcia’s trailer. Just because he solicited one, does not exclude the solicitation of another, and certainly does not relieve Mehrdad of culpability. Tellingly, in the time since Marcia’s Motion was granted and judgment was entered in this matter, Mehrdad has filed approximately 100 pages of motions and briefs (in the Trial Court, Western District, and Supreme Court) arguing that judgment was improper because of the alleged “conflicting” conspiracy theories. However, not once has he sufficiently explained how, logically, the involvement of Christopher must exclude the involvement of Reed.

Furthermore, the Trial Court would be justified in finding a conspiracy absent any involvement from Christopher or Reed. Under Missouri law, the elements of conspiracy require: (1) two or more persons³; (2) an object to be

³ Notably, the elements of this claim do not require a plaintiff to prove the identity of the

accomplished; (3) a meeting of minds on the object or course of action; (4) one or more unlawful acts; and, (5) damages. *Envirotech* at 586. Following the rubric set forth above, Mehrdad and Hall (element 1), agreed to burn the trailer of Marcia (elements 2 and 3), Mehrdad paid Hall \$500 to burn down Marcia's trailer (element 4) and Marcia's trailer was burned causing injuries to Marcia's person and property (elements 4 and 5). Accordingly, the Trial Court would be justified in finding a conspiracy even with Mehrdad and Hall as the only parties.

Mehrdad has done little to address this short-coming in his argument, likely because the record does not leave room for a worthwhile attack. Mehrdad's only real criticism of the facts surrounding Hall's involvement in the conspiracy is that Louis Spano confirmed he was told by Mehrdad that Mehrdad paid Hall to burn down Marcia's trailer in response to what Mehrdad characterizes as a "leading question". Unfortunately for Mehrdad, even if the question was leading, no objection was levied at deposition, and thus any issue Mehrdad takes with said question was not preserved for review. *Adams v. Adams*, 108 S.W.3d 821, 827 (Mo. App. W.D. 2003). In addition, Hall's involvement in the conspiracy was also confirmed by Christopher in his deposition. (D55, p.3, lines 19-24)(D55, p.4, lines 1-18).

co-conspirators, or that the defendant knew the co-conspirators' identities.

Because proving the legal name of the co-conspirators is not an element of civil conspiracy, and because the involvement of Christopher does not exclude the involvement of Hall, Mehrdad's argument that there are conflicting conspiracy theories is without basis. For that reason, the Trial Court's finding is well-supported by the numbered paragraphs of Marcia's Statement of Uncontroverted Material Facts and, thus, Marcia was entitled to judgment as a matter of law.

III. The Trial Court did not err in overruling the Motion for New Trial or JNOV filed by the Defendant/Appellant, Mehrdad Fotoohghiam, and the Trial Court did not err in its application of the law, in that Mehrdad did not demonstrate in his post-trial motion that the trial court erred in earlier granting summary judgment on the issue of liability.

Mehrdad contends that the Trial Court should have granted his Motion for New Trial based on the prior argument that Marcia's Motion contained information that conflicted with Marcia's Statement of Uncontroverted Material Facts. As stated previously, that argument is not supported by evidence, law, or reason.

In the Supplemental Suggestions in Support of Point 1 of His Motion for New Trial, Mehrdad relied primarily on the same two arguments he currently relies upon. Namely, that Marcia allegedly posed two conflicting conspiracy theories,

and that uncited deposition excerpts from the exhibits attached to Marcia's Motion conflict with Marcia's Statement of Uncontroverted Material Facts. (D91).

As stated in the discussion on Point II, Mehrdad's argument that the "Mehrdad Christopher Hall" versus "Mehrdad Reed Hall" conspiracies were conflicting is nonsensical. In Missouri, only two parties are required for a conspiracy, and plaintiff is not required to prove the identities of the co-conspirators. *Envirotech* at 586. Accordingly, Christopher and Reed are not necessary components of the Trial Court's finding of conspiracy. If Mehrdad and Hall (the common threads in each part of Mehrdad's argument) were the only people involved, the Trial Court's finding would still be justified. Further, Christopher's involvement does not conflict with, or exclude, the involvement of Reed. Both could have been involved, just one could have been involved, or neither could have been involved. The result is still the same.

Additionally, Mehrdad asks this Court to take an approach in its review of this case that Missouri courts have repeatedly rejected. In review of a Motion for Summary Judgment, a trial court is required to observe the framework set forth in Rule 74.04. *Columbia Mut. Ins.* at 239. In the event that the non-movant does not respond to one of the movant's numbered statement of uncontroverted material facts, that is an admission of the truth asserted in that numbered statement. Mo. Sup. Ct. Rule 74.04(c)(2). When a non-movant fails to respond to a movant's

Motion, movant still must make a prima facie case that it is entitled to judgment of a matter of law. *Bank of Am. N.A. v. Reynolds*, 348 S.W.3d 858, 860 (Mo. App. W.D. 2011). However, the Trial Court's review on that issue is limited to a review of movant's Rule 74.04 Motion, and should not consider evidence not specifically cited to in the Motion. *Davis v. Walgreen Co.*, 581 S.W.3d 619, 596 (Mo. App. W.D. 2019).

Because those deposition excerpts referenced by Mehrdad fell outside Marcia's numbered paragraphs of material fact and specifically cited supporting evidence, it was appropriate for the Trial Court to ignore them. In addition, because Christopher and Reed were not important to a finding of conspiracy, Mehrdad's testimony on whether he ever met them is not a material fact. Even if this Court were to adopt the approach advocated by Mehrdad, and even if Christopher and Reed were necessary parties to the conspiracy here, Marcia would still be entitled to judgment because the logic dictates that Mehrdad did not need to meet with Christopher or Reed face-to-face in order to conspire with them. For that reason, Mehrdad's testimony on that issue does not conflict with Marcia's Statement of Uncontroverted Material Facts, and Marcia was entitled to judgment as a matter of law.

Mehrdad goes on to argue that without the Trial Court granting Marcia's Motion for Summary Judgment, Marcia would have faced a difficult fight on

liability at trial. Mehrdad points to his own testimony, and the fact that he took the fifth with such frequency, arguing that this approach would have thwarted Marcia's chances to prevail on liability at trial. This ignores the evidence.

Although it is most often thought of in the criminal context, the fifth amendment privilege against self-incrimination can also be properly asserted in civil proceedings. *McCarthy v. Arndstein*, 266 U.S. 34, 40. However, as a consequence, reliance upon that privilege justifies an inference that: (a) if the person had answered truthfully, the answers would have been unfavorable to them, or (b) would have corroborated testimony given by the opposing side's witnesses on the subject matter of the questions. *Johnson v. Mo. Bd. of Nursing Adm'rs*, 130 S.W.3d 619, 631 (Mo. App. W.D. 2004).

As he has admitted in his brief, Mehrdad is not only facing civil liability arising out of his conduct but he is also in the custody of the Boone County Jail facing charges on an array of felonies (not just those relating to acts committed against Marcia). As a result, when questioned during his deposition on his involvement in this plot, Mehrdad invoked his fifth amendment privilege, as was his right. However, as a consequence, Mehrdad risked the inference that if he had responded, his testimony would have been unfavorable to him or, as is certainly the case here, it would have corroborated the testimony of Christopher and Spano that

he paid others to burn down Marcia's trailer. (D55, p.4, lines 1-18)(D55, p.4, lines 1-18)(D56, p.1, line 23).

That being the case, although it is of little consequence here, it seems that Mehrdad, not Marcia, would have faced significant obstacles at trial if the question of liability was posed to the jury.

IV. The Trial Court did not commit plain error in granting partial summary judgment for the Plaintiff/Respondent, Marcia Green, and against the Defendant/Appellant, Mehrdad Fotoohigham, in that the Trial Court did not commit error that was evident, obvious, and clear because the record filed by Marcia in support of summary judgment did not show issues of genuine material factor for trial on the issue of Mehrdad's liability for conspiracy, and thereby did not result in manifest injustice and a miscarriage of justice.

Mehrdad raises a new issue in the fourth point of his Substitute Brief, alleging that the Trial Court committed plain error in failing to set aside the partial summary judgement and refusing to grant Mehrdad a new trial on all issues. For the reasons already articulated herein, Mehrdad's fourth point is unfounded.

As the basis for this contention, Mehrdad argues that the procedure which led to Marcia's judgment was "badly irregular". Counsel agrees, but only to the

extent that any irregularities were the fault of Mehrdad's prior attorney at the Trial Court. Certainly, failing to file a timely response to Marcia's Motion and failing to appear at the hearing on Marcia's Motion was irregular, but the Missouri Supreme Court promulgated a Rule 74.04 to address that irregularity, and the Trial Court followed that rule with precision, entering partial summary judgment on the issue of liability.

Notwithstanding that irregularity, Mehrdad also argues that the Trial Court committed plain error based on Mehrdad's first and second points relied on. Again, as is thoroughly argued in the other sections of this brief, (1) pursuant to Rule 74.04, the uncited deposition testimony included with Marcia's Motion cannot be used to controvert Marcia's material facts, (2) even if that testimony could be used, it does not, in fact, controvert Marcia's material facts, (3) even if that testimony did controvert Marcia's material facts, she still has made her prima facie case based on the testimony regarding other co-conspirators, and (4) she did not present conflicting theories.

For those reasons, Mehrdad's fourth point relied on has no merit, and this Court should affirm the decision of the Western District.

CONCLUSION

Mehrdad's primary basis for appeal is premised on the argument that this Court should adopt an approach in its review of summary judgment rulings that is

impractical and that the Western, Southern, and Eastern District (at times) have rightfully rejected. That is, Mehrdad contends the Trial Court failed him in refusing to act as a white knight, scouring every uncited word of every uncited page of every exhibit in advocacy of Mehrdad's position, to create any possible inconsistency with Plaintiff's properly drafted Statement of Uncontroverted Material Facts. All of this because Mehrdad himself failed to file a timely response and act as his own advocate. This Court should not abide.

However, even if this Court were to ignore the plain reading of Rule 74.04 and the clear intent behind its amendments since 1993, the "conflicts" that Mehrdad argues defeat Marcia's Motion are either immaterial, or on their face not conflicts at all. Mehrdad ignores the substance of the Trial Court's ruling, the facts, the case law, and defies logic. He should not be awarded for his efforts.

Based on the foregoing, Respondent prays that this Court affirm the ruling of the Western District, the Order of the Trial Court sustaining Marcia's Motion for Summary Judgment, as well as the Order denying Mehrdad's Motion for New Trial, and the Trial Court's final judgment.

/s/ Matthew B. Woods
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he filed a true and accurate copy of the foregoing document with the Court's e-Filing system on April 3, 2020, and thereby served the same upon all attorneys of record.

*/s/ Matthew B. Woods*_____

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Missouri Supreme Court Rule 84.06(c), that this Brief complies with 84.06(b), in that this Brief contains 8,043 words (not counting the cover, certificate of service, certificate of compliance, and signature block) and that the brief contains words in 14 point Times New Roman.

*/s/ Matthew B. Woods*_____