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Missouri's New Green Standard or Gray Area? What Facts and Evidence Missouri Courts Must Consider in Summary Judgment Motions Green v. Fotoohighiam, 606 S.W.3d 113 (Mo. 2020) (en banc).

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NOTE

Missouri's New *Green* Standard or Gray Area? What Facts and Evidence Missouri Courts Must Consider in Summary Judgment Motions

Green v. Fotoohighiam, 606 S.W.3d 113 (Mo. 2020) (en banc).

Clayton A. Voss[*]

I. INTRODUCTION

Over the past three decades, it has become routine for Missouri litigators to cite *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.* as Missouri's summary judgment standard.[1] It has remained one of the Supreme Court of Missouri's most cited opinions regarding summary judgment despite revisions to Missouri Rule of Civil Procedure 74.04(c)(1)–(2) in 1994 – one year after *ITT* interpreted and applied the previous version of the rule.[2] In August 2020, the Supreme Court of Missouri revised *ITT*'s outdated guidance on what constitutes the record upon which trial courts must rely when deciding motions for summary judgment.[3] *Green v. Fotoohighiam* was the Supreme Court of Missouri's first time clarifying these rules and the first time that the court formally overruled parts of *ITT* and cases applying it.[4] In doing so, the court

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[1] ITT Com. Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371 (Mo. 1993) (en banc) (This case has over 13,000 citing references, including approximately 4,500 references in trial court documents, 4,500 references in appellate court documents, and 2,300 references in cases (last visited Sept. 19, 2021)).

[2] *See* Green v. Fotoohighiam, 606 S.W.3d 113, 116 n.5 (Mo. 2020) (en banc).

[3] *Id.* at 116–21.

[4] Street v. Harris, 505 S.W.3d 414, 416 (Mo. Ct. App. 2016) (main case applying *ITT*, which the *Green* court overruled, particularly because the appellant's argument rested on *Street*).

indicated that facts come into the summary judgment record *only* via reference in a Rule 74.04(c) statement of uncontroverted material fact or response thereto.[5]

Part II of this Note outlines the facts that led to the dispute in *Green* and the court's holding. Part III examines the development of summary judgment law in Missouri, specifically, Rule 74.04(c) and the amendments that led to its current form. It also discusses certain Missouri cases to highlight the split authority among Missouri courts after the 1994 amendments to Rule 74.04: some courts continued to apply *ITT*'s summary judgment standard, while others adopted the *Green* framework even before it superseded *ITT*. Part IV summarizes the *Green* holding and the court's analysis. Finally, Part V discusses the potential impact of *Green* on summary judgment practice in Missouri, including a comparison of Missouri's summary judgment practice under Rule 74.04 and *Green* with summary judgment practice in federal courts under Federal Rule of Civil Procedure 56. It argues that precluding courts from having the option to consider facts beyond only those properly referenced in Rule 74.04(c) paragraphs and responses may result in undesirable outcomes and incentives.

II. FACTS AND HOLDING

In *Green*, Plaintiff Marcia Green ("Plaintiff") brought suit against Defendants Mehrdad Fotoohighiam ("Defendant"), James Hall, David Reed, Electenergy Technologies, Inc., and ETI, LLC for allegedly conspiring to burn down her mobile home while she slept inside.[6] On December 15, 2014, Plaintiff awoke to noises coming from outside her door.[7] Once out of bed, Plaintiff realized her mobile home was on fire.[8] To escape, she broke a window in her bedroom and climbed through it.[9] Plaintiff sustained several injuries, including lacerations, burns, and respiratory complications attributable to smoke and carbon monoxide inhalation.[10] Additionally, her mobile home and all personal property inside it were destroyed.[11]

Plaintiff sued Defendant, the owner of a mobile home adjacent to Plaintiff's lot, and the other defendants for conspiracy to set her mobile

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[5] *Green*, 606 S.W.3d at 121.

[6] *Id.* at 114.

[7] *See* First Amended Petition, Green v. Fotoohighiam, 606 S.W.3d 113 (Mo. 2020) (en banc) (No. 15BA-CV02239), 2015 WL 13882186 [hereinafter First Amended Petition, *Green*].

[8] *Id.*

[9] *Id.*

[10] Green v. Fotoohighiam, 606 S.W.3d 113, 114 (Mo. 2020) (en banc).

[11] *Id.*

home on fire.[12] According to a witness, Defendant, angry after a "feud" with Plaintiff, offered to pay Hall to set Plaintiff's mobile home on fire.[13] Plaintiff alleged their actions caused her physical and emotional harm and property damage.[14] Specifically, Plaintiff's amended petition included claims for negligent and reckless conduct, assault, battery, intentional and negligent infliction of emotional distress, trespass, and conspiracy.[15]

At the close of discovery, Plaintiff moved for partial summary judgment on the question of liability, but not damages.[16] Pursuant to Rule 74.04, Plaintiff included with her motion a statement of uncontroverted material facts containing the following allegations in numbered paragraphs: (1) Defendant owns a mobile home adjacent to Plaintiff's lot; (2) Scotty Christopher and James Hall performed work on Defendant's property; (3) Defendant offered Hall and Christopher five hundred dollars to set Plaintiff's mobile home on fire; (4) Defendant told a former employee that he hired Hall and Reed to set Plaintiff's mobile home on fire; and (5) Plaintiff's mobile home was actually burned down, causing her damage.[17] Plaintiff supported each numbered paragraph by reference to deposition testimony or an affidavit.[18]

Although not cited or referenced by Plaintiff in her summary judgment motion, included in addition to the cited evidence in support of her statement of uncontroverted material facts were portions of Defendant's deposition testimony that contradicted some of Plaintiff's conspiracy allegations.[19] Specifically, Defendant stated that he never met the individuals allegedly involved in the conspiracy to burn down Plaintiff's mobile home:

Q: Have you ever met James Hall before?

A: Yes.

Q: Tell me when you first met James Hall?

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[12] *Id.*

[13] First Amended Petition, *Green*, *supra* note 7.

[14] *Green*, 606 S.W.3d at 114.

[15] First Amended Petition, *Green*, *supra* note 7.

[16] *Green*, 606 S.W.3d at 114.

[17] MO. R. CIV. P. 74.04(c)(1) (2008) ("A statement of uncontroverted material facts shall be attached to the motion. 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."); *Green*, 606 S.W.3d at 114.

[18] *Green*, 606 S.W.3d at 114–15.

[19] *Id.* at 115.

A: I take the 5th.

Q: Have you ever met David Reed?

A: No.

Q: Have you ever met Scotty Christopher?

A: Nope. [20]

Defendant did not respond to Plaintiff's motion, and the trial court entered partial summary judgment as to liability in Plaintiff's favor. [21] The court noted Defendant's failure to timely respond resulted in an admission to all facts set forth in Plaintiff's statement of uncontroverted facts.[22] The court also relied on the fact that Defendant asserted his Fifth Amendment right to remain silent when asked certain questions during his deposition; therefore, it assumed any answers that Defendant would have given would have been adverse to him.[23] Ultimately, the court held that because Defendant did not deny Plaintiff's evidence presented in the motion for summary judgment as required under Rule 74.04(c)(1), Plaintiff's asserted facts would be taken as true, and Plaintiff was entitled to judgment as a matter of law.[24]

After a trial on the issue of damages only, the jury returned a verdict of $250,000 in actual damages and $2.5 million in punitive damages.[25] Defendant appealed the trial court's grant of partial summary judgment, arguing that the court must consider Plaintiff's inclusion of Defendant's surplus, uncited deposition testimony. Defendant thus claimed that the contradiction in the Plaintiff's own filings created a genuine issue of material facts sufficient to defeat her summary judgment motion.[26] The Missouri Court of Appeals for the Western District denied Defendant's appeal and affirmed the trial court's decision.[27] The Supreme Court of Missouri affirmed the circuit court's grant of partial summary judgment on the issue of liability, holding that motions for summary judgment are decided only on the facts – along with properly cited pleadings, discovery, exhibits, or affidavits – referenced in Rule 74.04(c) paragraphs and

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[20] *Id.*

[21] *Id.*

[22] *See* Green v. Fotoohighiam, No. 15BA-CV02239, 2017 WL 11567312, at *2 (Mo. Cir. Oct. 26, 2017).

[23] *Id.*

[24] *Id.*

[25] *Green*, 606 S.W.3d at 115 ("The jury returned a verdict of $250,000 in actual damages and $2,500,000 in punitive damages.").

[26] *Id.*

[27] *Id.*

responses, not the *entire* trial court record.[28] The *Green* holding supersedes, or at least clarifies the meaning of, *ITT*'s longstanding rule that a "genuine issue" sufficient to defeat summary judgment exists "where the record contains competent materials that evidence two plausible, but contradictory, accounts of the essential facts."[29]

III. LEGAL BACKGROUND

The amendment of Missouri Rule of Civil Procedure 74.04 in 1994 – one year after the *ITT* decision – was meant to clarify and limit what constitutes the summary judgment record to make it easier on courts analyzing summary judgment motions. Instead, it created split authority among Missouri courts prior to *Green*.

A. The Evolution of Rule 74.04 and the ITT *Standard*

Summary judgment in Missouri is governed by Missouri Rule of Civil Procedure 74.04, which contains strict requirements for establishing the uncontroverted material facts that may support summary judgment.[30] In addition to requiring a movant to file a legal memorandum explaining why summary judgment should be granted, Rule 74.04(c) instructs the moving party to "state with particularity in separately numbered paragraphs each material fact 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."[31] If the non-movant wishes to deny one of the movant's facts, then they must support the denial with references to admissible evidence.[32] If a non-movant fails to do so, the facts are deemed admitted as true.[33]

Missouri courts have had different interpretations of what facts and evidence should be considered in deciding whether there are issues of material fact and a legal right to judgment.[34] The confusion is largely due

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[28] *Id.* at 118.

[29] ITT Com. Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 382 (Mo. 1993) (en banc).

[30] MO. R. CIV. P. 74.04. (2008).

[31] MO. R. CIV. P. 74.04(c)(1).

[32] MO. R. CIV. P. 74.04(c)(2).

[33] *Id.* ("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.").

[34] *Compare, e.g.*, Jones v. Union Pac. R.R. Co., 508 S.W.3d 159, 161 (Mo. Ct. App. 2016) (contending that "'summary judgment rarely if ever lies, or can withstand appeal, unless it flows as a matter of law from appropriate Rule 74.04(c) numbered paragraphs and responses alone'"), *with* Street v. Harris, 505 S.W.3d 414, 416 (Mo. Ct. App. 2016) (inconsistencies outside of Rule 74.04(c) numbered paragraphs and responses to create a dispute of material fact).

to the Supreme Court of Missouri's interpretation and application of Rule 74.04 in *ITT* and its influential role in Missouri summary judgment practice.[35] In *ITT*, the Supreme Court of Missouri explained the burden Rule 74.04 imposes on a movant for summary judgment.[36] The moving party must first show that there is no genuine dispute over the material facts by "reference to the record when appropriate."[37] This, along with a showing that the movant is "entitled to judgment as a matter of law," establishes the movant's right to summary judgment as required by Rule 74.04(c).[38] Then, the burden shifts to the non-movant to show that there are disputed material facts in the record that make summary judgment improper.[39] The non-movant will only succeed in proving a genuine factual dispute exists if the "record contains materials that evidence two plausible, but contradictory, accounts of the essential facts."[40]

Inconsistent authority in Missouri summary judgment practice leading up to *Green* emerged over the issue of when a genuine factual dispute exists.[41] In other words, what constitutes the "record" for the court to consider, and when does the record evidence "plausible, but contradictory, accounts"?[42] According to *ITT*, courts should view the record "in the light most favorable to the non-movant," which means that "*any evidence in the record* that presents a genuine dispute as to the material facts defeats the movant's prima facie showing."[43] The *ITT* court also noted that "*materials submitted by the movant that are, themselves, inconsistent* on the material facts defeat the movant's prima facie showing."[44] Thus, under *ITT*'s framework, courts analyzing summary judgment had an obligation to look to facts *anywhere* in the record in order to determine if any genuine disputes of material fact existed, even if neither the movant nor non-movant cited to such facts in their summary judgment filings.[45]

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[35] ITT Com. Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 380–82 (Mo. 1993) (en banc).

[36] *Id.* at 382.

[37] *Id.* at 380.

[38] *Id.* at 381.

[39] *Id.*

[40] *Id.* at 382.

[41] *Compare* Jones v. Union Pac. R.R. Co., 508 S.W.3d 159, 161 (Mo. Ct. App. 2016) (contending that "'summary judgment rarely if ever lies, or can withstand appeal, unless it flows as a matter of law from appropriate Rule 74.04(c) numbered paragraphs and responses alone'"), *with* Street v. Harris, 505 S.W.3d 414, 416 (Mo. Ct. App. 2016) (inconsistencies outside of Rule 74.04(c) numbered paragraphs and responses to create a dispute of material fact).

[42] ITT Commercial Fin. Corp., 854 S.W.2d at 380.

[43] *Id.* at 382 (emphasis added).

[44] *Id.*

[45] *Id.*

It is important to note that when *ITT* was before the Supreme Court of Missouri, there was a different version of Rule 74.04 in effect than at the time of *Green*.[46] Unlike the current iteration of Rule 74.04, the prior version did not require the movant to submit a separate statement of uncontroverted material facts or to attach specific exhibits in support of the summary judgment motion.[47] Rule 74.04 was amended in 1994 to require the movant's motion to "state with particularity in separately numbered paragraphs each material fact as to which the movant claims there is no genuine issue, with specific references to the pleadings, discovery or affidavits that demonstrate the lack of a genuine issue as to such facts."[48] If a non-movant wishes to deny one of the movant's facts, they must support the denial with references to admissible evidence.[49] The 1994 amendments made clear that the consequence of failing to timely respond to a motion for summary judgment is that the movant's statement of uncontroverted material facts is deemed admitted.[50]

*B. Cases Applying Post-*ITT *Amendments to Rule 74.04 Created a Divergence in Authority on What Constitutes the Summary Judgment Record*

In a 2001 case, *Osage Water Co. v. City of Osage Beach*, the Missouri Court of Appeals for the Southern District explained the rationale behind the 1994 amendments to Rule 74.04.[51] The court stated that the desire to "clearly advise[e] opposing parties and the court of the basis for a motion for summary judgment" led the Supreme Court of Missouri to amend Rule 74.04 to "require particularity in motions for summary judgment with specific references to the pleadings, discovery or affidavits" that demonstrate the lack of a genuine issue of material facts.[52] The court noted that the amended Rule also required specificity in the response to the summary judgment motion, including that the non-movant's response must contain "a statement of each additional material fact that remains in

[46] Green v. Fotoohighiam, 606 S.W.3d 113, 116 n.5 (Mo. 2020) (en banc).

[47] *Id.*; MO. R. CIV. P. 74.04(c) (2008) ("The motion shall state with particularity the grounds therefor and shall be served at least ten days before the time fixed for the hearing. Prior to the day of hearing the adverse party may serve opposing affidavits. The judgment sought shall be entered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.").

[48] *Green*, 606 S.W.3d at 116 n.5; MO. R. CIV. P. 74.04(c)(1) (1994).

[49] MO. R. CIV. P. 74.04(c)(2).

[50] MO. R. CIV. P. 74.04(c).

[51] Osage Water Co. v. City of Osage Beach, 58 S.W.3d 35, 44 (Mo. Ct. App. 2001).

[52] *Id.*

dispute with references to where each such fact appears in the pleadings, discovery or affidavits."[53] The Southern District further clarified that "Rule 74.04(c)'s now-familiar format of numbered paragraphs and responses" was implemented after *ITT* "to assist the judge in ruling on summary judgment motions by requiring such motions to conform to a specific form that will reveal the areas of dispute."[54] Thus, the inconsistency regarding what body of facts courts should rely on when deciding motions for summary judgment stems from the fact that *ITT* – requiring judges to look through the entire record to identify factual disputes – guided summary judgment practice in Missouri for almost three decades, *despite subsequent amendments to Rule 74.04(c)* that sought to focus the court's attention to a summary judgment record consisting only of the facts properly referenced in Rule 74.04(c) paragraphs and responses.[55]

In 2016, the Missouri Court of Appeals for the Eastern District considered a situation similar to that in *Green*, where uncited portions of deposition testimony attached to the summary judgment motion contradicted the movant's statement of uncontroverted facts.[56] In *Street v. Harris*, the plaintiff sued homeowners after their dog allegedly knocked her down, causing a broken ankle.[57] The homeowners filed a summary judgment motion, which alleged in the statement of uncontroverted facts that the dog had never previously knocked anyone down and had an affidavit supporting that fact.[58] When the plaintiff failed to respond, the trial court deemed the fact admitted and entered judgment in the homeowners' favor.[59]

On appeal, the plaintiff argued that the trial court erred in granting summary judgment because two of the exhibits attached to the homeowners' motion contained contrary statements regarding whether the dog had ever knocked anyone down before and thus created a dispute of material fact sufficient to defeat summary judgment.[60] Accordingly, the court considered whether it was required to overlook any inconsistency in the exhibits attached to the homeowner's summary judgment motion when the plaintiff failed to respond, which constitutes an admission of the

[53] *Id.*

[54] Pemiscot Cty. Port Auth. v. Rail Switching Serv., Inc., 523 S.W.3d 530, 533 (Mo. Ct. App. 2017).

[55] ITT Com. Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 380–82 (Mo. 1993) (en banc); Green v. Fotoohighiam, 606 S.W.3d 113, 116 & n.5 (Mo. 2020) (en banc) ("Summary judgment practice in Missouri is governed by Rule 74.04 and this Court's decision in [*ITT*].").

[56] Street v. Harris, 505 S.W.3d 414, 416 (Mo. Ct. App. 2016).

[57] *Id.* at 415.

[58] *Id.* at 416.

[59] *Id.* at 415.

[60] *Id.* at 416.

homeowners' statement of uncontroverted facts.[61] Relying on *ITT*'s interpretation of Rule 74.04, the court of appeals applied a broad view of what materials may be considered by the courts under Rule 74.04(c) and reversed summary judgment rather than confining its review of the facts to the numbered paragraphs in the statement of uncontroverted facts.[62] *Street* was not the only Missouri case to hold that even where a non-movant fails to respond, the motion and supporting evidence must still on its own establish a right to judgment before the trial court can properly grant summary judgment.[63]

A recent decision from the Missouri Court of Appeals for the Western District was critical of *Street*'s reliance on *ITT*'s interpretation of an outdated version of Rule 74.04.[64] In *Fidelity Real Estate Co. v. Norman*, a landlord sued two tenants after the tenants breached a residential lease contract.[65] The landlord filed motions for summary judgment against the tenants individually, both of which the circuit court sustained.[66] On appeal, the tenants argued, pursuant to *Street*, that the circuit court erred in granting summary judgment because an exhibit attached to the landlord's motion for summary judgment contained an inconsistency that created a genuine issue of material fact.[67] While *Fidelity Real Estate* differed from *Green* in that one of the tenants replied to the landlord's motion for summary judgment, her denials were insufficient – she failed to support her denials with specific references to discovery, exhibits, or affidavits as required by Rule 74.04(c)(2).[68] Because the tenants failed to properly respond, the *Fidelity Real Estate* court refused to look to the allegedly contradictory exhibit to determine if a genuine issue of material fact existed and affirmed the trial court.[69]

In its analysis, the *Fidelity Real Estate* court recognized that the 1994 amendments to Rule 74.04 limited a court's review from "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits,"[70] as allowed under the old version, to only "the

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[61] *Id.*

[62] *Id.* at 418.

[63] *See, e.g.*, Bank of Am., N.A. v. Reynolds, 348 S.W.3d 858, 862 (Mo. Ct. App. 2011) ("The inconsistency in the Bank's own documents attached to the motion, in and of itself is sufficient to establish a genuine issue of material fact as to the existence of a contract between Reynolds and the Bank and genuine issue of material fact as to what the terms of any alleged contract may be between the parties.").

[64] *See* Fidelity Real Est. Co. v. Norman, 586 S.W.3d 873 (Mo. Ct. App. 2019).

[65] *Id.*

[66] *Id.* at 877.

[67] *Id.* at 879.

[68] *Id.* at 886.

[69] *Id.*

[70] MO. R. CIV. P. 74.04(c) (1993).

motion, the response, the reply and the surreply."[71] Thus, *Street*'s reliance on *ITT*'s interpretation of an outdated version of Rule 74.04 was error.[72] The *Fidelity Real Estate* court also recognized that *Street*'s interpretation, which allowed consideration of the entire record, could potentially turn the court into an advocate.[73] The court went even further, stating that "*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."[74]

Peck v. Alliance General Ins. Co. is an example of such an Eastern District case prior to *Street*. There, the court strictly confined the summary judgment record to evidence properly referenced in Rule 74.04(c) paragraphs and responses.[75] The non-movant in *Peck* failed to file a response in compliance with Rule 74.04(c) because it contained "only unverified denials" and made no references to the record that showed the existence of a genuine fact dispute.[76] Therefore, all of the movant's factual assertions in the summary judgment motion were taken as true.[77] Furthermore, that court rejected the non-movant's argument that summary judgment was inappropriate because uncited portions of the movant's deposition, as well as uncited portions of the movant's petition in a separate lawsuit, contradicted the movant's claims.[78] The *Peck* court reasoned that the non-movant's failure to refer to the movant's deposition

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[71] *Fidelity Real Est. Co.*, 586 S.W.3d at 883 (quoting MO. R. CIV. P. 74.04(c)(6) (2019)).

[72] *Id.*

[73] *Id.* at 883 n.15 ("[R]equiring either the trial or reviewing court to examine the entire record, rather than just those facts identified in the motion and response, could easily place the court in the position of an advocate insofar as the court would have to identify not only the material facts but also those that are subject to genuine dispute.").

[74] *Id.* at 883; *see, e.g.*, Holzhausen v. Bi-State Dev. Agency, 414 S.W.3d 488, 494 (Mo. Ct. App. 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. Ct. App. 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 the 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 his work.).

[75] Peck v. All. Gen. Ins. Co., 998 S.W.2d 71 (Mo. Ct. App. 1999).

[76] *Id.* at 75.

[77] *Id.*

[78] *Id.*

or petition in its response to the summary judgment motion precluded both documents from being part of the record relevant at the summary judgment phase which, in turn, prevented the reviewing court from considering them on appeal.[79] The court held that "references to the record must appear in [a] response" that complies with Rule 74.04(c)(2) in order to be considered by a court in its summary judgment determination.[80]

As indicated in *Fidelity Real Estate*, further decisions by the Missouri Court of Appeals tended to demonstrate that *Street*, and other cases that relied on *ITT*'s interpretation of the old Rule 74.04, were "aberrations."[81] The *Fidelity Real Estate* opinion relied on a 2016 case from the Court of Appeals for the Southern District, *Great S. Bank v. Blue Chalk Constr., LLC*, in which the court adopted the strict application of Rule 74.04(c).[82] In *Blue Chalk*, Great Southern Bank ("GSB") filed suit against Blue Chalk, alleging it failed to pay the balance on various promissory notes and guaranties tied to loans GSB had extended to Blue Chalk.[83] After Blue Chalk answered the petition with a general denial and fifteen affirmative defenses, it also filed counterclaims essentially mirroring GSB's original claims.[84] GSB moved for summary judgment on all claims in its petition and all of Blue Chalk's counterclaims.[85] The trial court entered summary judgment in GSB's favor on all claims.[86]

On appeal, Blue Chalk argued the trial court erred in granting summary judgment because its counterclaims and affirmative defenses created genuine issues of material fact.[87] The *Blue Chalk* court affirmed the trial court's entry of summary judgment, reinforcing that the "summary judgment record" consists of Rule 74.04(c) paragraphs and responses.[88] *Blue Chalk* described any reference beyond the Rule 74.04(c) paragraphs as "analytically useless" for courts properly applying Rule 74.04, specifically noting that allowing reviewing courts to look outside Rule 74.04(c) paragraphs and responses to find issues of material fact would exceed *de novo* review by inviting courts to "look outside the…summary judgment record."[89]

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[79] *Id.* (citing MO. R. CIV. P. 74.04(c)(2), (e) (1994)).

[80] *Id.* at 75–76.

[81] Fid. Real Est. Co. v. Norman, 586 S.W.3d 873, 882 (Mo. Ct. App. 2019).

[82] Great S. Bank v. Blue Chalk Constr., LLC, 497 S.W.3d 825, 836 (Mo. Ct. App. 2016).

[83] *Id.* at 829.

[84] *Id.*

[85] *Id.* at 830.

[86] *Id.* at 832.

[87] *Id.*

[88] *Id.* at 836.

[89] *Id.* at 835–36 ("[O]ur *de novo* decision on appeal must be in accordance with *all* the requirements of Rule 74.04 and, therefore, must be made in the very same manner the trial court should have applied that rule in the first instance.").

The inconsistency among Missouri courts regarding the scope of the summary judgment record made it ripe for the Supreme Court of Missouri to step in and provide guidance. In August 2020, the court took an opportunity to address this issue in *Green*.[90]

IV. INSTANT DECISION

In *Green*, Plaintiff filed a motion for summary judgment on the issue of liability and, in accordance with Rule 74.04(c), submitted a statement of uncontroverted material facts in which she alleged that Defendant offered five hundred dollars to two individuals to set her mobile home on fire.[91] Each numbered paragraph was supported by deposition testimony or an affidavit.[92] Because Defendant did not timely respond to the motion for summary judgment, the trial court considered each of Plaintiff's alleged facts as undisputed and granted summary judgment.[93] On appeal, Defendant pointed to his deposition testimony included in Plaintiff's summary judgment filings where he denied having ever met the two individuals who set the home on fire.[94] Relying on *Street*, he argued that a genuine issue of material fact existed because the deposition testimony contradicted Plaintiff's assertion that he knew the two individuals who burned the home down.[95] Thus, the issue before the Supreme Court of Missouri mirrored that of *Street* – whether the trial court erred in granting Plaintiff partial summary judgment because portions of Defendant's deposition testimony attached to Plaintiff's statement of uncontroverted material facts created an issue of material fact, even though Defendant failed to respond to the summary judgment motion.[96] Simply put, *Green* addressed what body of facts courts should rely on when considering summary judgment motions.[97]

The Supreme Court of Missouri began its analysis by noting that *ITT* and Rule 74.04 govern summary judgment practice in Missouri.[98] Pulling from *ITT*, the court reinforced that the movant has the burden of "establish[ing] that there is no genuine dispute as to those material facts upon which [she] would have had the burden of persuasion at trial."[99] To

[90] Green v. Fotoohighiam, 606 S.W.3d 113, 116 (Mo. 2020) (en banc).

[91] *Id.* at 114.

[92] *Id.* at 114–15.

[93] *Id.* at 115.

[94] *Id.*

[95] *Id.* at 117–18.

[96] *Id.* at 116.

[97] *Id.*

[98] *Id.*

[99] *Id.* (quoting ITT Com. Fin. Corp. v. Mid-Am. Marine Supply Corp. 854 S.W.2d 371, 381 (Mo. 1993)).

accomplish this showing, the moving party must attach to the summary judgment motion a statement of uncontroverted material facts that "state[s] 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."[100] The court stated that after the movant makes this submission, the non-movant must file a response either admitting or denying the movant's material facts.[101] Specifically, the court held that non-movants "must support denials with specific references to discovery, exhibits, or affidavits demonstrating a genuine factual issue for trial,"[102] and any "facts not properly supported under Rule 74.04(c)(2) or (c)(4) are deemed admitted."[103]

Based on the foregoing, the Supreme Court of Missouri concluded that summary judgment principles require a court to "determine whether uncontroverted facts established via Rule 74.04(c) paragraphs and responses demonstrate [movant's] right to judgment regardless of other facts or factual disputes."[104] The court referenced *Jones v. Union Pac. R.R. Co.*, a Southern District Court of Appeals decision from 2016, for an explanation of the summary judgment principles under Rule 74.04:[105]

> [1] Facts come into a summary judgment record only via Rule 74.04(c)'s numbered-paragraphs-and-responses framework. [2] Courts determine and review summary judgment based on that Rule 74.04(c) record, not the whole trial court record. [3] Affidavits, exhibits, discovery, etc. generally play only a secondary role, and then only as cited to support Rule 74.04(c) numbered paragraphs or responses, since parties cannot cite or rely on facts outside the Rule 74.04(c) record. [4] [S]ummary judgment rarely if ever lies, or can withstand appeal, unless it flows as a matter of law from appropriate Rule 74.04(c) numbered paragraphs and responses alone.[106]

Critically, the court explained that these summary judgment principles do not require the circuit court or any appellate court to sift through the *entire* record to identify disputed issues; a court would thus be

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[100] *Id.* (quoting MO. R. CIV. P. 74.04(c)(1)).

[101] *Id.* at 117.

[102] Green v. Fotoohighiam, 606 S.W.3d 113, 117 (Mo. 2020) (en banc) (quoting Cent. Tr. & Inv. Co. v. Signalpoint Asset Mgmt., LLC, 422 S.W.3d 312, 320 (Mo. 2014) (en banc) (citing MO. R. CIV. P. 74.04(c)(2), (4) (2020))).

[103] *Id.* at 116 (quoting Cent. Tr. & Inv. Co. v. Signalpoint Asset Mgmt., LLC, 422 S.W.3d 312, 320 (Mo. 2014) (en banc)).

[104] *Id.* at 118 (quoting Pemiscot Cty. Port Auth. v. Rail Switching Servs., Inc., 523 S.W.3d 530, 534 (Mo. Ct. App. 2017)).

[105] *Id.* at 117–18.

[106] *Id.* at 117–18 (quoting Jones v. Union Pac. R.R. Co., 508 S.W.3d 159, 161 (Mo. Ct. App. 2016)).

acting impermissibly as an advocate for a party.[107] The court ultimately held that because the trial court had no obligation to look outside the discovery, exhibits, and affidavits specifically referenced in Rule 74.04(c) paragraphs and responses, it correctly determined the uncontroverted material facts established Plaintiff's right to partial summary judgment on the issue of liability.[108] The fact that the contradictory deposition testimony was part of the entire record at the circuit court was irrelevant because "motions for summary judgment are decided only on those facts – along with properly cited pleadings, discovery, exhibits, or affidavits – referenced in Rule 74.04(c) paragraphs and responses, not the *entire* trial court record."[109]

The *Green* decision also took the opportunity to overrule *Street*.[110] The court discussed other Missouri Court of Appeals cases that applied Rule 74.04 in line with the *Green* framework and the current version of the rule, specifically citing *Fidelity Real Estate*, *Blue Chalk*, and *Peck*.[111] *Green*, like *Fidelity Real Estate*, recognized that the Eastern District of the Court of Appeals had correctly applied Rule 74.04 in cases before and after *Street*.[112] Thus, the court declared that *Street* overlooked *ITT*'s application of an outdated Rule 74.04 and that requiring a court to comb through the entire record to determine if any disputed issues of material fact existed would render the 1994 amendments to Rule 74.04 meaningless.[113] Thus, the *Green* court declared *Street* an outlier, among not only the other court of appeals districts, but also among the Eastern District Court of Appeals's own decisions.[114] The Supreme Court of Missouri ultimately held that "any court – whether it be the circuit court addressing summary judgment in the first instance or an appellate court reviewing an entry of summary judgment – need only consult what was properly put before it by way of Rule 74.04(c) paragraphs and responses."[115]

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[107] *Id.* at 118 (quoting Lackey v. Iberia R-V Sch. Dist., 487 S.W.3d 57, 62 (Mo. Ct. App. 2016)) (emphasis added).

[108] *Id.* at 118.

[109] *Id.* (quoting *Jones*, 508 S.W.3d at 161 (Mo. Ct. App. 2016)).

[110] *Id.* at 118–21.

[111] *Id.* at 119–21.

[112] *Id.* at 120 n.8; *see, e.g.*, Peck v. All. Gen. Ins. Co., 998 S.W.2d 71 (Mo. Ct. App. 1999); Fleddermann v. Casino One Corp., 579 S.W.3d 244 n.8 (Mo. Ct. App. 2019) ("applying the summary judgment principles set forth in *Jones*, *Pemiscot County Port Authority*, and *Lackey*.").

[113] *Green*, 606 S.W.3d at 118.

[114] *Id.* at 119, 120 n.8.

[115] *Id.* at 121.

AFTER *GREEN*, MISSOURI LAW SEEMS TO STRICTLY APPLY RULE 74.04(C): THE BODY OF FACTS UPON WHICH A TRIAL COURT MUST WEIGH A MOTION FOR SUMMARY JUDGMENT IS LIMITED TO PROPERLY SUPPORTED FACTS IN THE MOVANT'S STATEMENT OF UNCONTROVERTED FACTS AND PROPERLY SUPPORTED FACTS IN THE NON-MOVANT'S RESPONSIVE FILINGS.[116] SIMPLY PUT, *GREEN* SEEMS TO HAVE ESTABLISHED THAT THE SUMMARY JUDGMENT RECORD BEGINS AND ENDS WITH THE NUMBERED PARAGRAPHS IN THE STATEMENT OF FACTS,[117] CLARIFYING A GRAY AREA CREATED BY *ITT* AND THE SUBSEQUENT AMENDMENTS TO RULE 74.04.[118]

V. COMMENT

The Supreme Court of Missouri's *Green* decision left little doubt as to its intention to formally replace *ITT*'s directive that courts consider the entire record in summary judgment determinations.[119] However, by making vague statements such as that courts "need only consult … Rule 74.04(c) paragraphs and responses," the court left open whether courts must only consider a summary judgment record consisting of numbered paragraphs and responsive filings in compliance with Rule 74.04(c), or if courts have the option to consider the entire record in front of it to find a fact dispute that defeats summary judgment.[120] Giving courts the option to consider facts in the entire record would more closely align with summary judgment procedures in federal courts and avoid the stricter standard's potentially perverse incentives.

A. Green*'s Consequences and Its Potentially Perverse Incentives*

The Supreme Court of Missouri noted in *Green* that "summary judgment practice in Missouri is governed by Rule 74.04 and this Court's decision in [*ITT*]."[121] The fact that *ITT* is one of the most commonly cited opinions in Missouri regarding summary judgment validates this assertion.[122] It has been cited in 2,329 cases, 4,502 appellate court documents, and 4,482 trial court documents on Westlaw, indicating that Missouri litigators have become well-versed in citing to *ITT* as Missouri's summary judgment standard.[123] Now, after *Green* superseded portions of

[116] *Id.* at 116–17.

[117] *Id.* at 117 (citing Jones v. Union Pac. R.R. Co., 508 S.W.3d 159, 161 (Mo. Ct. App. 2016)).

[118] *See, e.g.*, Street v. Harris, 505 S.W.3d 414 (Mo. Ct. App. 2016).

[119] *Id.*

[120] *Id.*

[121] *Id.* at 116.

[122] ITT Com. Fin. Corp. v. Mid-Am. Marine Supply Corp. 854 S.W.2d 371 (Mo. 1993) (en banc) (13,438 citing references on Westlaw as of Sept. 12, 2021).

[123] *Id.* (13,438 citing references on Westlaw as of Sept. 12, 2021).

ITT, many Missouri lawyers will be surprised to see a "red flag" next to *ITT* on Westlaw the next time they go to draft a summary judgment motion.[124]

Green's framework may have created a new gray area that requires additional case law to resolve. Specifically, there is a need for clarity on what exactly *Green* tells courts they can and cannot consider in deciding summary judgment motions. Does *Green prevent* the court from looking at other evidence in the record that would show the alleged facts to be controverted after all, or does it say that the court *is not obligated to* consider such evidence, *but can* if desired? For example, the statement that courts "need only consult what was properly put before it by way of Rule 74.04(c) paragraphs and responses" seems to suggest that courts have the option of looking at other evidence in the summary judgment record, but are not required to do so.[125] However, support for the summary judgment standard used by the Missouri Court of Appeals in *Jones* and *Pemiscot County*, in addition to other cases cited in the *Green* decision, indicates that the court in *Green* intended to preclude courts from searching the record beyond Rule 74.04(c) paragraphs and responses for issues of material fact.[126]

The facts of *Green* support the view that the Supreme Court of Missouri did not intend to give courts an option to consider other evidence in the record. Because *Green* dealt with inconsistencies in Plaintiff's own exhibits that she filed to support her summary judgment motion, the Supreme Court of Missouri seems to say that courts should ignore contradictory statements in an exhibit that the movant has put in front of them, simply because the movant asserts something different in the statement of uncontroverted facts.[127] In other words, when analyzing a motion for summary judgment, a court not only may, but must, ignore affidavits that are already in the record, unless the facts from such affidavits are included in the moving or non-moving party's statement of facts. Under a strict reading of *Green*, this is true regardless of whether an affidavit clearly contradicts facts stated in the moving party's statement

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[124] *Id.* (accompanying the "red flag" is Westlaw's statement that *ITT* has been "[s]uperseded by Rule as Stated in *Green v. Fotoohighiam*, Mo., August 11, 2020.").

[125] *Green*, 606 S.W.3d at 121.

[126] *Id.* at 117–18 (quoting Jones v. Union Pac. R.R. Co., 508 S.W.3d 159, 161 (Mo. Ct. App. 2016) ("[1] Facts come into a summary judgment record only via Rule 74.04(c)'s numbered-paragraphs-and-responses framework. [2] Courts determine and review summary judgment based on that Rule 74.04(c) record, not the whole trial court record."); and Pemiscot Cty. Port Auth. v. Rail Switching Serv., Inc., 523 S.W.3d 530, 533 (Mo. Ct. App. 2017) ("Taken together, these summary judgment principles require a court to 'determine whether uncontroverted facts established via Rule 74.04(c) paragraphs and responses demonstrate [movant's] right to judgment *regardless of other facts or factual disputes*.'") (emphasis original).

[127] *Green*, 606 S.W.3d at 115.

of facts. If *Green* is in fact taking the extreme position that Missouri courts are *prevented* from looking at other evidence in the record that would show alleged facts to be disputed, then it is a departure from federal practice and may be problematic.[128]

This seems to allow moving parties to get away with directly misrepresenting the record and leaves appellate courts with little recourse to address such instances where the trial court purposely ignored supporting exhibits not referenced in Rule 74.04(c) paragraphs and responses. Worse yet, this would seem to encourage parties to stretch the truth in their statements of fact – as long as the other side does not properly respond, the moving party will get away with it. Fortunately, the potential for such abuse is limited; it only becomes an issue when the non-movant fails to catch the contradictory facts and bring them to the court's attention. However, if the non-movant fails to diligently respond, as in *Green*, then the court may essentially be forced to issue judgment on a patently defective record. A rule that prevents a court from considering obviously contradictory facts in the moving party's own submissions could be extremely problematic. There is likely a need for clean-up cases both to clarify *Green*'s intent and to carve out exceptions to avoid such potentially harsh results and perverse incentives.

Furthermore, it seems possible that *Green* will lead to even more expansive statements of fact. If parties are concerned that anything not referenced in a numbered paragraph of material fact will be strictly disregarded in the court's summary judgment decision, they may likely be overinclusive in separating the material from the immaterial. Missouri courts have lamented excessive statements of fact in the past.[129] For instance, in *Columbia Mut. Ins. Co. v. Heriford*, the majority stated that "very few claims or defenses have more than five or six material facts," but the court routinely sees statements of material facts with "well over one hundred purported material facts."[130] While Judge Scott noted in his dissent that he was "skeptical" of such a limited number, he noted that "bloated" statements of fact create unnecessary difficulties for parties and courts.[131]

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[128] FED. R. CIV. P. 56(c)(3) ("The court need consider only the cited materials, but it *may* consider other materials in the record.) (emphasis added).

[129] *See* Hon. Julian Bush, *How to Write a Motion for Summary Judgment*, 63 J. MO. BAR 68, 69–70 (2007).

[130] Columbia Mut. Ins. Co. v. Heriford, 518 S.W.3d 234, 240 n.6 (Mo. Ct. App. 2017).

[131] *Id.* at 244 (Scott, J., dissenting).

B. Green *May Create Notable Differences Between Summary Judgment Procedures in Missouri State Courts and Summary Judgment Procedures in Federal Courts*

While directly precluding Missouri state courts from searching the record for controverted facts would be contrary to federal summary judgment practice, it is possible that *Green* did, in fact, more closely align Missouri's summary judgment procedures with the federal system if courts are merely given the option. As in Missouri courts, federal practice requires that the non-movant set forth specific facts showing there is a genuine issue for trial to defeat a motion for summary judgment.[132] It is not enough simply to rely on evidence in the record to avoid summary judgment without specifically referring to the precise evidence that supports the respondent's claim.[133] Moreover, even when evidence exists in the record that would tend to support the respondent's claim, if the non-movant fails to refer to it, that evidence is not properly before the court.[134] However, in federal practice, "the court need consider only the cited materials, but it may consider other materials in the record."[135] The court is not obliged to search the record on the nonmovant's behalf for evidence creating an issue of fact.[136] In other words, the federal cases on this issue say that the court does not *have to* search the record for disputed facts, but the court is not specifically precluded from doing so.[137] Thus, *Green*'s

[132] *See* FED. R. CIV. P. 56(d); *see also* Hernandez v. Jarman, 340 F.3d 617, 622 (8th Cir. 2003) ("[I]n opposing a motion for summary judgment, a nonmoving party may not rely on mere denials or allegations in its pleadings, but must designate specific facts showing that there is a genuine issue for trial."); *Local Rules*, U.S. DIST. CT. FOR THE W.D. OF MO. 38 (Effective May 14, 2019), https://www.mow.uscourts.gov/sites/mow/files/Local_Rules.pdf [https://perma.cc/988R-G6KX].

[133] *Local Rules*, *supra* note 134, at 38; *see, e.g.*, Brandt v. Davis, 191 F.3d 887, 891 (8th Cir. 1999) (affirming grant of summary judgment in favor of defendants in an excessive force case because plaintiff failed to submit any evidence contradicting defendants' version of the incident).

[134] Malacara v. Garber, 353 F.3d 393, 405 (5th Cir. 2003).

[135] FED. R. CIV. P. 56(c)(3).

[136] Ragas v. Tennessee Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir.1998) (quoting Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 915–16 & n.7 (5th Cir. 1992) ("Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment.").

[137] *See, e.g.*, Skotak, 953 F.2d at 915–16 n.7 ("The district court was not prohibited from considering the articles. However, Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment."). It should be noted that in many of the cases on this issue, the "record" that the courts are talking about is not the specific attachments for the summary judgment motion, but documents attached to earlier motions. This is different from the situation addressed in *Green*. Green v. Fotoohighiam, 606 S.W.3d 113 (Mo. 2020) (en banc).

statement that Missouri courts need not sift through the record to find a factual dispute echoes the federal system's sentiment. However, whether the court must, or merely may, consider only what is properly included in the summary judgment motion and response will determine how closely Missouri's standard now falls in line with the federal summary judgment standard.

Despite the similar language and interpretation of the respective summary judgment rules, any substantive comparison between summary judgment practice in Missouri and the federal system, specifically summary judgment grant rates, is limited. When Missouri adopted Rule 74.04 in 1960, it was practically identical to Rule 56 of the Federal Rules of Civil Procedure ("FRCP 56"), which governs summary judgment in the federal system.[138] Thus, Missouri courts considered federal decisions construing FRCP 56 as persuasive precedent in applying the Missouri rule, [139] and courts applied the federal rule and the Missouri rule nearly identically.[140]

Over time, however, the historical difference between "notice pleading" in the federal system and "fact pleading" in Missouri led to divergent roles of summary judgment.[141] The purpose of summary judgment under Missouri's fact-pleading regime is to identify cases (1) in which there is no genuine dispute as to the facts, and (2) the facts as admitted show a legal right to judgment for the movant.[142] Similarly, as the language of FRCP 56 states, federal summary judgment is meant to apply when there are no disputed material facts, and the moving party is entitled to judgment as a matter of law.[143] However, summary judgment also has historically had an additional function in federal litigation. Because federal courts used discovery to identify the triable issues and the facts upon which the plaintiff's claim rests, pleadings have played a more significant role in Missouri.[144] Consequently, disposing of factually insufficient claims tends to come at the motion to dismiss stage in Missouri litigation, whereas in federal courts that typically must occur at summary judgment.[145]

Because summary judgment has historically served a dual purpose in federal courts compared to a singular purpose in Missouri courts, it has

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[138] Cooper v. Finke, 376 S.W.2d 225, 228 (Mo. 1964).

[139] *Id.*

[140] ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 378 (Mo. 1993) (en banc).

[141] *Id.* at 380.

[142] *Id.*

[143] FED. R. CIV. P. 56(a).

[144] *ITT Commercial*, 854 S.W.2d at 379–80 (citing Conley v. Gibson, 355 U.S. 41, 47–48 (1957)).

[145] *Id.* at 380; Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

been difficult to compare federal cases construing FRCP 56 with Missouri cases construing Rule 74.04.[146] However, after two 2007 United States Supreme Court cases – *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* – heightened federal pleading standards, there may be a gradual convergence in the role of summary judgment in Missouri and in current federal practice.[147] A dramatic increase in the volume of federal motions to dismiss after *Iqbal* indicates more of a corresponding role among summary judgment in Missouri and in current federal practice.[148] The combination of both a similar application of the respective rules governing summary judgment practice and an increasingly similar role of summary judgment in Missouri courts and the federal system may soon afford opportunities to make more substantive comparisons, specifically between summary judgment grant rates. Such a substantive comparison of summary judgment practice between the two systems may shed more light on the merits of a strict interpretation of *Green* – courts *must* consider only what is properly included in Rule 74.04(c) paragraphs and responses – as opposed to a broad interpretation – courts have the *option* to consider facts in the record beyond those included in Rule 74.04(c) paragraphs and responses.

Regardless of how *Green* will impact the frequency of summary judgment motions and success rates in Missouri courts, *Green* reminds Missouri practitioners to tighten up summary judgment drafting to avoid *Green*'s potentially harsh effects. *Green* made it clear that courts are, at the very least, not obligated to scour the record to save a careless non-movant from an adverse judgment.[149] Because *Green* seems to go further and mandate that judges consider only the numbered paragraphs and the evidence specifically cited as support of each paragraph in determining whether the facts establish a right to judgment, a non-movant must take care to properly respond to each asserted fact and support any denials with

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[146] *ITT Commercial*, 854 S.W.2d at 379–80 ("As there is no need for our Rule 74.04 to fill in for an ineffectual motion to dismiss, the role of summary judgment in Missouri differs significantly from that in current federal practice.").

[147] Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009); *see* STEPHEN C. YEAZELL & JOANNA C. SCHWARTZ, CIVIL PROCEDURE 402 (Erwin Chemerisnky et al. eds., 9th ed. 2016) ("[A]fter *Twombly* and *Iqbal*, defendants might be more likely to file a motion to dismiss, believing the new standard increases their chances of success.").

[148] *See* William Hubbard, *The Empircal Effects of Twombly and Iqbal*, COASE-SANDOR INSTITUTE FOR LAW AND ECONOMICS, at 5 (2016) ("*Twombly* and *Iqbal* have led to a greater frequency in filings of motions to dismiss"); Ray Brescia, *Legal Scholarship Highlight: The Impact of* Ashcroft v. Iqbal *on Civil Rights Cases*, SCOTUSBLOG (Nov. 14, 2012, 11:56 AM), https://www.scotusblog.com/2012/11/legal-scholarship-highlight-the-impact-of-ashcroft-v-iqbal-on-civil-rights-cases/ [https://perma.cc/R8JX-CHDH].

[149] Green v. Fotoohighiam, 606 S.W.3d 113, 117 (Mo. 2020) (en banc) (citing Lackey v. Iberia R-V Sch. Dist., 487 S.W.3d 57, 62 (Mo. Ct. App. 2016)).

specific references to the evidence. Additionally, because any factual reference in a motion for summary judgment must be contained in the numbered paragraphs (or corresponding response),[150] it may be wise to make citations in the accompanying legal memorandum to the numbered paragraphs – as opposed to the depositions or other materials. Thus, while *Green* ultimately instructs trial court judges on what "record" to consult, it also reminds Missouri litigators of the critical role played by the statement of facts in summary judgment practice.

VI. CONCLUSION

ITT has governed summary judgment practice in Missouri for almost three decades, despite revisions to Missouri Rule of Civil Procedure 74.04(c)(1)–(2) in 1994.[151] Under *ITT*'s framework, trial courts analyzing summary judgment took on a quasi-advocacy role, looking at the *entire* record in order to determine if any genuine disputes of material fact existed, even if neither the movant nor non-movant cited to such facts in their summary judgment filings.[152] However, since the 1994 amendment to Rule 74.04, there had been conflicting case law among the courts of appeals regarding what comprises the summary judgment record upon which trial courts should rely in their summary judgment assessments.[153]

Green superseded the *ITT* framework by establishing that "any court – whether it be the circuit court addressing summary judgment in the first instance or an appellate court reviewing an entry of summary judgment – need only consult what was properly put before it by way of Rule 74.04(c) paragraphs and responses."[154] However, it is still unclear whether this standard prevents courts from considering other evidence in the record that contradicts the statement of facts, or if it merely gives courts the option to consider such evidence. While the implications of *Green* are unclear beyond establishing a stricter standard for responding to and assessing summary judgment motions, *Green* likely makes summary judgment more attractive for Missouri practitioners hoping to capitalize on the carelessness of a non-movant and score a victory for their clients.

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[150] *Id.* at 116.

[151] *Id.*

[152] *Id.* at 118.

[153] *See* Fidelity Real Estate Co. v. Norman, 586 S.W.3d 873 (Mo. Ct. App. 2019); Street, 505 S.W.3d at 414; Great S. Bank v. Blue Chalk Constr., LLC, 497 S.W.3d 825 (Mo. Ct. App. 2016); Osage Water Co. v. City of Osage Beach, 58 S.W.3d 35 (Mo. Ct. App. 2001); Peck v. All. Gen. Ins. Co., 998 S.W.2d 71 (Mo. Ct. App. 1999).

[154] *Green*, 606 S.W.3d at 121.