

**Summary Judgment was improper where plaintiff had offered declaration to explain factually devoid, improper discovery responses.**

**FACTS AND PROCEDURAL POSTURE**

This case arises out of a breach of contract action. In 2010 Steve Ahn and New Star Transport sued Kumho Tire USA and Korea Express USA. New Star had contracted with Kumho and Korea to provide trucking services.

Plaintiffs gave “factually devoid” responses in response to defendants’ “state all facts” special interrogatories.

For example, one interrogatory asked Ahn and New Star to state all facts supporting their allegation that “there is now owing and due from defendants the sum of at least \$1,765,440.00 . . . .” Each plaintiff responded: “At this time, responsive party does not know whether any facts responsive to this request exist. Discovery is continuing.”

Similar responses were provided to other interrogatories and requests for production of documents. Plaintiffs eventually produced some documents, and supplemented a few of the interrogatory responses, but the majority of the responses were not changed.

Defendants moved for summary judgment arguing, based on plaintiffs’ “factually devoid” discovery responses, that plaintiffs had admitted that their claims lacked any factual basis. In opposition to the motion, plaintiffs submitted a declaration by Steve Ahn explaining the factual basis of plaintiffs’ claims. Plaintiffs also served amended discovery responses, and attached another declaration explaining that the original responses “were inadvertently omitted [or] mistakenly stated.”

The defendant objected to the Ahn declaration, arguing that the declaration violated the *D’Amico*<sup>1</sup> rule because it was contrary to plaintiffs’ original discovery responses and no explanation of the discrepancies had been given. Defendants additionally moved for sanctions on the grounds that plaintiffs had filed a complaint which they knew to lack evidentiary support. Relying on *D’Amico*, the trial court determined that it was required to disregard Ahn’s declaration because it contradicted the prior discovery responses. The court granted summary judgment in favor of the defendants, but denied the sanctions motion.

**DISCUSSION**

In *D’Amico* the Supreme Court held that where there is a clear and unequivocal admission by the plaintiff, and the plaintiff contradicts that admission in a subsequent declaration, the court must conclude that there is no substantial evidence of the existence of a triable issue of fact. However, subsequent cases clarified the *D’Amico* rule, warning that the entire record should be considered. The rule does not

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<sup>1</sup> *D’Amico v. Board of Medical Examiners* (1974) 11 Cal. 3d 1

mean that the court can ignore other credible evidence that contradicts or explains the party's answers or otherwise demonstrates that there are genuine issues of factual dispute.

The court held that the plaintiffs' responses, in light of all of the evidence, did not constitute clear and unequivocal admissions of fact. In light of all of the evidence, a reasonable trier of fact could conclude that plaintiffs' initial discovery responses were a mistake and that the contradictory statements in Ahn's declaration were credible. The court reversed the order granting summary judgment, and affirmed the order denying sanctions.