KIRKLAND **ALERT**

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Ahn v. Kumho Tire: The California Court of Appeal Widens an Exception to the Sham Declaration Rule

It has never been easy to win a motion for summary judgment in state court in California as a moving defendant. California's summary judgment statute, Code of Civil Procedure § 437c, differs from the federal standard in several key ways, each of which tends to favor the non-moving party.

- As to the moving party's burden, the California Supreme Court rejected the federal *Celotex* standard, which permits the moving party to simply point out gaps in the evidentiary record through argument.[1] In California, one must come forward with actual evidence to shift the burden.[2]

- Pinning a plaintiff down on the lack of evidence to support an element can be particularly difficult because the California Discovery Act imposes no obligation on a party to supplement responses to interrogatories calling for the disclosure of all known evidence that the plaintiff contends supports its position on an issue.[3]

- Summary adjudication lies only against an entire cause of action.[4] If a claim combines multiple theories, it is virtually impossible to obtain summary adjudication of only one or the other.[5]

- On top of all that, the Code of Civil Procedure requires a moving party to notice and serve its summary judgment motion 75 days in advance of the hearing on the motion.[6] This means that after a defendant serves the plaintiff with the motion—laying out all of the evidence and argument in support—plaintiff then has effectively two months to use the motion as a roadmap to go out and obtain whatever evidence it needs to defeat the motion. It is not unheard of for California plaintiffs to take no discovery at all until a summary judgment motion is served.

If it were not already difficult enough, a recent ruling of the California Court of Appeal just made it all the much harder. In *Ahn v. Kumho Tire U.S.A., Inc.*,[7] Division Two of District Four addressed the rule first set out in *D'Amico v. Board of Medical Examiners*,[8] which sets out the "sham declaration" rule in California. Under *D'Amico,* the non-moving party on a summary judgment motion cannot manufacture a material dispute of fact by submitting a declaration that contradicts its prior discovery responses. The rule, however, has a well-recognized exception: the non-moving party's contradictory declaration can be considered when it puts forth a "credible explanation" for the inconsistency.[9] The question addressed by *Ahn* is: just how convincing does that explanation have to be?

Federal courts addressing the same issue under the equivalent "sham affidavit" rule have held that, in order to disregard the inconsistent declaration, "the district court must make a factual determination that the contradiction is a sham[.]"[10] On appeal that decision gets reviewed for abuse of discretion, under which the district court's factual finding merits deference unless unsupported by evidence in the record.[11]

Ahn goes a different route. It does not leave it up to the superior court judge to make a factual finding as to whether the non-moving party's explanation for the contradiction is credible or not. Instead, *Ahn* holds that the credible explanation exception applies whenever the non-moving party comes forward with sufficient evidence from which a "reasonable trier of fact could conclude that plaintiffs' initial discovery responses were a mistake and that the contradictory statements in [the] declaration were credible."[12] If such evidence is present, the trial court abuses its discretion in setting aside the contradictory declaration.[13]

Under *Ahn*, the non-moving party does not actually need to persuade the trial judge that the contradiction has a credible explanation. It just needs to come forward with sufficient evidence from which a reasonable fact-finder *could be persuaded*.

Under *Ahn*, the non-moving party does not actually need to persuade the trial judge that the contradiction has a credible explanation. It just needs to come forward with sufficient evidence from which a reasonable fact-finder *could be persuaded*. That is a far lower burden of proof. So—as occurred under the facts of *Ahn*—an attorney declaration that attests to making a mistake in responding to the earlier discovery is likely sufficient to evade the *D'Amico* rule, enabling the non-moving party to avoid summary judgment based on fact issues created by the contradictory declaration. Because the standard is based on the mere sufficiency of the evidence and not actual fact-finding by the trial court, appellate review will function more like the substantive review of a summary judgment motion—which is *de novo*—than the deferential review that applies to evidentiary rulings by a trial court. Consequently, for a moving defendant, *Ahn* makes obtaining a favorable summary judgment and defending it on appeal even more difficult than it already is.

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1 *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

2 *Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 854–55 (2001) (noting that "[i]n this particular at least, [summary judgment in California] still diverges from federal law.").

3 *See Biles v. Exxon Mobil Corp.*, 124 Cal. App. 4th 1315, 1218 (2004) (referring to an asserted duty to supplement interrogatory responses as an "urban legend").

4 Cal. Code Civ. Proc. § 437c(f); *cf. Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 768–89 & n.3 (9th Cir 1981) (reading Federal Rule of Civil Procedure 56(b) as permitting motions for partial summary adjudication of specific fact issues that fall short of an entire cause of action).

5 *See Chavez v. Glock, Inc.*, 207 Cal. App. 4th 1283, 1312 (2012).

6 Cal. Code Civ. Proc. § 437c(a); *see also McMahon v. Superior Court*, 106 Cal. App. 4th 112, 118

(2003) (noting that trial courts have no authority to shorten the notice period).

[7] No. E054322, ___ Cal. App. 4th ___, 2014 WL 242205 (Jan 22, 2014).

[8] 11 Cal. 3d 1, 22–23 (1964).

[9] *See Mason v. Marriage & Family Ctr.,* 228 Cal. App. 3d 537, 546 (1991).

[10] *See Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012).

[11] *Id.* at 1079–80.

If you have any questions about the matters addressed in this *Kirkland Alert*, please contact the following Kirkland author or your regular Kirkland contact.

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