Judicial Admissions: Anything You Say May Be Used Against You

by Ian Fusselman, Column Editor

One of the things I like most about writing these articles is that I frequently learn about esoteric details of the law that I get to share with others. In this month's column, I'll share some confusion I had after reading a recent case on judicial admissions and pleading in the alternative, and how I believe an apparent conflict in the law might be resolved. I close with some suggestions on avoiding the potential traps created by the conflict.

Let me set the stage: I was thumbing through the daily appellate reports, looking for any new cases that might impact my practice (and hoping for something interesting to write about) when I came across *Dang v. Smith* (November 30, 2010) ___ Cal.App.4th ____, 2010 WL 4840433, by the Sixth Appellate District. The summary for the case indicated the court held that statements in a pleading are always admissible against the pleader to prove the matter asserted. I thought that this must be an overly broad characterization of the holding, for I knew that Code of Civil Procedure ("C.C.P.") §431.20 only allows parties to presume the truth of uncontested allegations. I also believed that California allowed pleading in the alternative. For example, it is common practice (and, therefore, presumably acceptable) to allege in one cause of action that a defendant acted intentionally and in another to allege that the defendant acted negligently. Surely, the *Dang* decision did not stand for the proposition that an allegation the defendant was negligent could be used to trump an allegation that the defendant acted intentionally. After reading the case, I proceeded with additional research and I share my findings (and confusion) below.

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Dang v. *Smith*

The facts in the *Dang* case, a legal malpractice matter, are relatively straightforward. The defendant law firm successfully prosecuted a breach of contract action and plaintiff relied on the firm to perfect and enforce the judgment. Plaintiff brought suit claiming that the defendant firm failed to record a judgment lien. As the court explained:

> ***Defendants moved for summary judgment on evidence establishing that they had in fact recorded a lien, but that it had been extinguished when the debtor joint tenant died. In opposition to the motion, plaintiff offered three new theories of liability, of which only one resembled anything alleged in the original complaint. Plaintiff made no attempt to demonstrate, by proposed pleading, declarations, or otherwise, that she could truthfully plead, let alone prove, the elements of a cause of action on any of the three theories. She at no time moved, or even asked the court, for leave to amend her complaint. She offered no proposed amended pleading. She nonetheless contends on appeal that the trial court erred by failing to grant leave to amend. We reject this contention, not only because it is procedurally insupportable but because none of the proposed new theories appears to be substantively viable.***

In its discussion of the case, the *Dang* court observed:

> ***Certainly statements in a pleading are always admissible against the pleader to prove the matter asserted as is any other statement by a party.***

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> **(See 1 Witkin, Cal. Evidence (4th ed.2000) Hearsay, § 97, p. 799.) What distinguishes such statements is that they are not merely *evidence* of the matter stated, but operate as "a *conclusive concession of the truth* of [that] matter," thereby "removing it from the issues." (*Ibid.*, italics added.) In other words, a pleaded fact is *conclusively deemed true* as against the pleader.**

Id. at *6.

After making the foregoing observation, the court went on to describe how the issue of judicial admissions actually did not even apply in the case. Instead, the court explained how the crux of the case was founded in the law of joint tenancy, right of survivorship, severance by execution and a number of other issues most of us forgot as we walked out of the last day of the bar exam. The court concluded that plaintiff really did not have a case and that any efforts to amend her pleadings would be futile.

Pleading in the Alternative

The court's actual holding was based on the conclusion that the undisputed facts precluded liability regardless of any additional allegations that might be made. Indeed, the court went to great lengths to explain and support that position and, presumably, the court made the right call. However, it was the court's seemingly "throw away" comments in dicta on the issue of judicial admissions that caused me concern. I started my investigation of the issue by researching a party's ability to plead in the alternative in California. My findings did little to help resolve the issue.

I first came across *Grudt v. City of Los Angeles* (1970) 2 Cal.3d 575, which observed:

> **There is an abundance of authority permitting a plaintiff to go to the jury on both intentional and negligent tort theories, even though they are inconsistent. It has often been pointed out that there is no prohibition against pleading inconsistent causes of action stated in as many ways as plaintiff believes his evidence will show, and he is entitled to recover if one well pleaded count is supported by the evidence.**

Id. at 586.

The *Grudt* case seemed to support my belief that pleading in the alternative was acceptable. I found further support for this position in *Crowley v. Katleman* (1994) 8 Cal.4th 666, in which the California Supreme court explained: "[P]laintiff remains free to allege any and all 'inconsistent counts' that a reasonable attorney would find legally tenable on the basis of the facts known to the plaintiff at the time." *Id*. at 691. Done deal? Not so fast.

In *Drake v. Morris Plan Co.* (1975) 53 Cal.App.3d 208, the court offered the following interpretation of California law: "[T]he complaint alleges that 'said facts were known to defendants . . . or should have been known in the exercise of reasonable care by said defendants.' Pleading in the alternative is not permitted as the opposing party is entitled to a distinct statement of the facts claimed by the pleader to exist." *Id*. at 210-211. The *Drake* court presumably based its holding on C.C.P. §425.10(a)(1), which requires that a complaint contain a "statement of the facts constituting the cause of action, in ordinary and concise language."

Practice Pointers

It is difficult to reconcile the relatively clear mandate of C.C.P. §425.10, the *Drake* court's unambiguous holding that pleading in the alternative is improper and the *Dang* court's use of judicial admissions to prevent inconsistent pleading with the California Supreme Court's clear acceptance of pleading in the alternative. From the practitioner's point of view, we don't want to be put in a position in which we are prevented from presenting evidence of viable alternative theories and we absolutely want to avoid having an alternative allegation characterized as a judicial admission. So what to do?

I would suggest that it may be prudent to specifically acknowledge your limited knowledge of the facts in your pleadings if it is necessary to plead in the alternative and, when feasible, to separate your intentional and negligent causes of action. For example, separate your fraud claim and your negligent misrepresentation claim into two different causes of action. This would satisfy C.C.P. §425.10 and avoid the *Drake* court's criticism of pleading inconsistent facts within the same cause of action. Liberally include qualifiers such as "based on information and belief" and highlight alternative pleadings with signposts such as "alternatively" for your factual allegations to avoid the appearance of any judicial admissions. And, finally, avoid the pitfalls encountered in the *Dang* case by conducting a thorough screening of your case so that you don't find yourself in a situation you can't plead yourself out of. **TBN**