CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Saxena v Goffney (1/24/08)

Medical Malpractice; Lack of Informed Consent and Battery; Improper Jury Instructions; Invited Error Doctrine; Incomplete, Evasive Discovery Responses; Exclusion of Trial Witnesses

Plaintiff s decedent, Rajesh Saxena, died in February 2003 after seeking treatment from defendant Dr. Goffney. His heirs filed a wrongful death suit including causes of action for negligence and battery. Mr. Saxena first sought treatment for an open wound on his leg. Dr. Goffney, a general surgeon, planned a series of debridements and application of a synthetic skin (Apligraf) to promote healing. Saxena signed a consent form authorizing the treatment during the initial visit. Three debridements followed over the next two weeks. Unfortunately, Mr. Saxena s health declined.

During a visit of February 3rd, Saxena was diagnosed with the flu, but Dr. Goffney decided to go ahead with the debridement.,The decedent further declined. His wife took him to the emergency room on February 5th because of a fever, for which he was treated and released.

The last procedure was scheduled for February 10th. Mrs. Saxena attempted to postpone the treatment. Dr. Goffney s staff requested the patient come in, and as the visit commenced, Mrs. Saxena begged and pleaded to move th e date of the operation, according to her testimony. Dr. Goffney reportedly told her if they did not go forward with the procedure he would have to dispose of the Apligraf at a cost of $1200. He went forward with the debridement and applied the synthetic material. Mr. Saxena died the following day of congestive heart failure.

At trial, the jury returned a verdict for plaintiffs in the amount of $12.1 million for non-economic damages and over $600,000 for economic

damages. It found Goffney negligent in diagnosis or treatment, and that he performed the February 10th procedure without Saxena s informed consent. The jury also found Saxena would have refused the debridement and Apligraf procedure had he been fully informed of the risks and alternatives of the procedure.

Goffney moved for judgment notwithstanding the verdict (JNOV), and for a new trial, as well as a motion conforming the verdict to MICRA. The court denied the JNOV motion but granted the new trial motion on the battery and lack of informed consent negligence claims, and on damages. The court found the special verdict form did not require the jury to make a finding on battery, and also found the plaintiff s special jury instruction improperly blended the legal doctrines of negligence and battery.

On appeal, the Fourth DCA, Division 3, found the JNOV motion should have been granted because the special verdict did not include any findings on plaintiff s battery cause of action. In so ruling, the court discussed the distinction between negligence and battery. In *Cobbs v Grant* (1972) 8 Cal. 3d 229, the California Supreme Court noted:

An action should be pleaded in negligence when the doctor performs an operation to which plaintiff consents, but without disclosing sufficient information about the risks inherent in the surgery. The battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented.

In other words, a claim based on lack of informed consent which sounds in *negligence* ari ses when the doctor performs a procedure without first adequately disclosing the risks and alternatives. In contrast, a battery is an *intentional tort* that occurs when a doctor performs a procedure without obtaining any consent. (See CACI No. 530A)

A special verdict is fatally defective if it does no t allow the jury to resolve every controverted issue. In this case, using the special verdict form submitted by the plaintiff, the jury determined Goffney performed the surgery without the decedent s informed consent but the form did not require the jury to answer the separate question of whether he performed the procedure with no consent at all.

On appeal, plaintiffs argued the only interpretation of the verdict consistent with the evidence is that Saxena did not consent. The Justices noted the jury instructions said the jury could find the doctor liable for battery if he performed the procedure without his patient s *informed consent.* This fused the theories of negligence and battery and allowed the jury to find Goffney liable for battery if he performed the procedure without the patient s consent or by concluding Saxena consented without sufficient information. Performing a medical procedure without informed consent is not the same as performing a procedure without any consent.

Lack of informed consent is medical negligence. Lack of consent, period, is a battery in the medical context. The jury instruction tended to equate both of the legal theories.

Invited error doctrine

Plaintiffs also argued that a party waives any error regarding the special verdict form by failing to object to it before the court discharges the jury. The appellate court found the objection in the motion for new trial was sufficient to tender the issue. Plaintiffs also argued the invited error doctrine applied. Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal on appeal. (*Norgart v Upjohn Co.* (1999) 21 Cal. 4th 383).

The purpose of the doctrine is to prevent a party from misleading the trial court and then profiting therefrom in the appellate court. Here, the plaintiffs proffered the erroneous instructions, thereby inviting the error. Even though Goffney submitted a similar verdict form, the doctor had already lost his argument on plaintiffs improper special battery instruction.

Plaintiffs were responsible for pursuing the wrong battery theory in both the instruction and the special verdict form. The invited error doctrine does not extend to situations where a party induces commission of the error, but does not in fact mislead the trial court in any way, as where a party endeavors to make the best of a bad situation for which it was not responsible.

Although the trial court correctly identified the failure to distinguish the negligence and battery claims, and the absence of any findings the doctor committed a battery in the special verdict, the proper remedy was the JNOV, not the new trial order. CCP section 657 provides only statutory grounds for new trial, and an inadequate special verdict form is not included as a basis for the motion.

Exclusion of witnesses as evidence sanction

Dr. Goffney also moved for new trial on the basis that two of his defense witnesses were excluded from trial. He claims the witnesses, a doctor and a nurse, would have rebutted the plaintiffs testimony that Saxena was not a candidate for surgery.

The physician witness would have testified he examined the decedent in the emergency room on February 5th and found no evidence of congestive heart failure. The nurse was present for the last debridement on February 10th and would state under oath the decedent was breathing normally and neither he nor his wife sought a postponement of the procedure.

Plaintiffs had objected to the witnesses testimony because Goffney never identified them in his answers to interrogatories, number 12.1, as material witnesses, nor under 15.1, as witnesses in support of allegations and defenses. Ten days before trial, the plaintiffs served a motion *in limine* to exclude all witnesses not identified in discovery.

Then, on the first day of trial the defense served amended answers to interrogatory 12.1 identifying 16 witnesses. When the two defense witnesses were announced for testimony, the plaintiff objected and the court excluded them both.

Precluding a witness from testifying at trial is proper where a party *willfully and falsely* withholds or conceals a witness s name in response to an interrogatory. Under these circumstances, an order barring the testimony of the witness must be sustained as a sanction. (*Thoren v Johnston & Washer* (1972) 29 Cal. App. 3d 270).

The Justices noted that *Thoren* does not stand for the proposition that evidence may be excluded on the ground an interrogatory answer is evasive or incomplete. The Civil Discovery Act provides remedies for evasive or incomplete answers and an evidence sanction is not one of them. (CCP 2016.010).

While current law continues to treat a failure to respond to discovery as a misuse of the discovery process, the imposition of an evidence sanction is now conditioned upon the violation of an order compelling the response. (CCP 2023.030, 2030.290(c)). The former requirement of a willful failure to respond has been replaced with the mandate the responding party violated an order compelling the response.

Since *Thoren* has never been overruled, in the absence of a violation of an order compelling an answer or further answer, the evidence sanction of barring a witness from testifying at trial may only be imposed where the answer given is *willfully false*. The simple failure to answer or the giving of an evasive answer, requires the propounding party to pursue an order compelling an answer or further answer otherwise the right to an answer or further answer is waived and an evidence sanction is not available. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2007).

In this case, the doctor s answers to 12.1 and 15.1 directed the plaintiffs to look in Saxena s medical records to determine the identities of individuals with knowledge of the incident or who had information supporting Goffney s affirmative defenses. Plaintiffs presented no evidence establishing or implying these answers were untrue. The doctor s answers were incomplete and evasive, and clearly merited the issuance of an order compelling further answers and an award of monetary sanctions.

The Justices indicated the plaintiffs failure to seek such an order constituted a waiver of any right to a further response. In the absence of a violation of an order compelling further answers, the incomplete and evasive answers provided are insufficient to provide a basis to exclude evidence. The two witnesses should not have been excluded.

Notwithstanding this finding, the error was harmless because

Goffney offered a medical standard of care witness who testified in great detail from the records of the witness physician about Saxena s complaints at the hospital. Additionally, the expert testified to the actual measurements of the decedent s respiration rate on the date of the last debridement. The addition of the testimony of the doctor and nurse witnesses would have added little persuasive force to the other evidence presented to the jury.

Since it is reasonably probable Goffney would not have received a more favorable result if the two witnesses had testified, the exclusion of their testimony did not constitute reversible error.

The trial court is ordered to grant the doctor s JNOV motion on the battery claim, hear the MICRA motion, and enter the resulting judgment for plaintiffs on the negligence claims and for Dr. Goffney on the battery claim.