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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JOHN LIPPERT,

Plaintiff and Appellant,

v.

SCHAEFER AMBULANCE SERVICE
INC. et al.,

Defendants and Appellants.

B230276

(Los Angeles County
Super. Ct. No. BC384410)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Ramona G. See, Judge. Reversed.

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup, Allison A. Arabian; Pollard
Mavredakis Cranert Crawford & Stevens, James F. B. Sawyer for Defendants and
Appellants.

Champ & Associates, Michael W. Champ for Plaintiff and Respondent.

Plaintiff and respondent John Lippert sued defendants and appellants Schaefer Ambulance and Matt Henderson. Judgment was entered in their favor after jury trial, but the trial court granted Lippert's motion for new trial, as to some causes of action. This appeal followed. We reverse.

Factual and Procedural Summary

In January of 2007, Lippert went to an urgent care clinic complaining of a headache. The clinic determined that he should be transported to a hospital for a CAT scan, and called Schaefer Ambulance. Schaefer Ambulance responded. The ambulance was staffed by its employees, including paramedic Matt Henderson,¹ who administered a glucose injection to Lippert.

In his complaint, Lippert alleged that the glucose was injected negligently and without his consent, and that the injection caused him to suffer physical and emotional damage. He brought causes of action against all defendants for medical malpractice, breach of fiduciary duty, battery, and intentional infliction of emotional distress.

The cause of action for battery against Schaefer was dismissed after its demurrer to that cause of action was sustained without leave to amend. After further litigation, including demurrers and a motion for summary judgment, the case went to the jury on a cause of action for professional negligence as to all defendants and a cause of action for battery, as to Henderson alone.

The case was assigned to a new judge prior to trial.

The parties agreed to a special verdict form which was authored by Lippert.

The jury was asked, "Were defendants negligent in the care and treatment of John Lippert?" and answered, "No."

¹ There was a second paramedic, Tecumseh Martin Givens. He was named as a defendant in the case, but prevailed before the jury and is not affected by the motion for new trial and is not a party to this appeal.

The jury was asked, "Did Matt Henderson perform an injection of d50 glucose on John Lippert?" and answered, "Yes." The jury was then asked, "Did John Lippert give his informed consent for the injection of d50 glucose?" and answered, "No."

The jury was asked, "Would a reasonable person in John Lippert's position have refused the injection of d50 glucose if he or she had been fully informed of the possible results and risks and alternatives to the injection of d50 glucose?" and answered, "No."

This answer meant that the jury did not reach several other questions posed by the special verdict; specifically, whether Lippert would have consented if given enough information about the risks of the injection, whether he suffered harm as the result of a risk Henderson should have explained, and whether Henderson had reasonably believed that the injection was necessary.

Lippert then moved for a new trial, contending, *inter alia*, that the special verdict form was defective because it did not ask the jury to determine whether he had given any consent at all,² and thus did not ask the jury to find on battery. He relied on *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, which held that "battery and lack of informed consent are separate causes of action. A claim based on lack of informed consent—which sounds in negligence—arises 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. [Citations.]" (*Id.* at p. 324.)

The court granted a new trial as to the battery claim against Henderson, finding that the special verdict omitted an essential element of the tort, and also finding that the fact that Lippert had authored the verdict form did not bar him from complaining of it.

The court also granted a new trial as to the battery claim against Schaefer, finding that Schaefer could be held vicariously liable for a battery committed by Henderson acting in the course and scope of his employment. The court found that "[it] is unclear

² There was disputed evidence on this point.

why the prior [trial] judge on the case sustained the demurrer without leave to amend," and that "the prior ruling in this regard was in error and is a proper basis for a new trial."

Discussion

"We generally review the trial court's decision to grant a new trial for specified reasons under the abuse of discretion standard. [Citations.] We defer to the trial court's resolution of conflicts in the evidence if the decision is supported by substantial evidence and reverse only if there is no reasonable basis for the court's decision or the decision is based on a legal error." (*Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1122.)

Here, defendants at least impliedly conceded that the special verdict form omitted an element of battery. They do contend, however, that the trial court abused its discretion in granting a new trial, because Lippert created the error of which he later complained.

In its ruling, the trial court cited *McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, and Lippert relies on that case and many other cases which hold that a trial court may grant a new trial even where the party seeking new trial consented to the error, in order to prevent a miscarriage of justice. (See, i.e., *Shaw v. Pacific Greyhound Lines* (1958) 50 Cal.2d 153, 159 [party moving for new trial proposed the erroneous jury instruction]; *Malkasian v. Irwin* (1964) 61 Cal.2d 738, 747 [party moving for new trial failed to object to improper closing argument].)

In response, appellants cite *Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247. There, one basis for the defendant's motion for new trial was that the polling of the jury was incomplete. The trial court denied the motion, and the Court of Appeal reversed, finding, inter alia, that the defendant had not waived the defect by failing to object. The Supreme Court found that defendant had waived the defect, and that the failure to object at the time the error occurred meant that the defendant had forfeited its right to assert that the failure to poll the jury rendered the verdict invalid. "The requirement of an objection is premised upon the idea that a party should not sit on his or her hands, but instead must

speak up and provide the court with an opportunity to address the alleged error at a time when it might be fixed." (*Id.* at p. 266.)

Keener thus re-stated basic principles of forfeiture and invited error, but we cannot say that the case overruled *Shaw v. Pacific Greyhound Lines*, *supra*, 50 Cal.2d 153, *Malkasian v. Irwin*, *supra*, 61 Cal.2d 738, or the many other cases that hold that "the power of the judge to do justice by ordering a new trial is not impaired even though the moving party is technically estopped to claim error or has waived his right to complain." (*Shaw*, *supra*, 50 Cal.2d at p. 159.)³

However, there is "no discretion to grant a new trial for harmless error" (*Garcia v. County of Los Angeles* (1986) 177 Cal.App.3d 633, 641), and we agree with defendants that any error in the special verdict form was harmless. Although there was contested evidence on whether Lippert gave consent to the injection, it is inconceivable that a jury which found that the injection was not administered in a negligent manner, and that a reasonable person would have given informed consent would have awarded damages for battery.

The ruling granting new trial as to the battery cause of action brought against Henderson was thus in error. This means that the grant of new trial as to the battery cause of action brought against Schaefer must be reversed, too.

³ We would add, however, that where, as here, a party proposes a special verdict, then seeks a new trial based on defects in that verdict, an order granting a new trial creates an unfairness, if not a miscarriage of justice, to the other party. Defendants had no right and no ability to ensure that Lippert's theories and arguments were without defect or error. Under the trial court's order, they would now be put to the expense of a new trial because he erred, although they did not.

Disposition

The order granting in part in the motion for new trial is reversed and the original judgment reinstated. Appellants to recover costs on appeal.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.