S.Ct. Case No.: S227393

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

BERTHE FELICITE KABRAN

Plaintiff and Respondent,

v.

SHARP MEMORIAL HOSPITAL

Defendant and Appellant.

After Decision by the Court of Appeal, Fourth District Div. One
(D064133)
Superior Court of San Diego County, Hon. John Meyer, Judge
(37-2010-00083678-CU-PO-CTL)

ANSWER TO PETITION FOR REVIEW

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Plaintiff and Respondent, BERTHE FELICITE KABRAN, as Successor in Interest to EKE WOKOCHA ("Kabran"), files this Answer responding to the Petition for Review filed by Defendant and Appellant, SHARP MEMORIAL HOSPITAL (collectively "Sharp"), seeking review from the Fourth District Court of Appeal's (Div. One) June 26, 2015 Opinion, affirming the trial court's new trial order.

I.

INTRODUCTION

The underlying case perfectly illustrates why the new trial statutes (Code. Civ. Proc. section 657, subd. (4)) permit the trial courts to order a new trial when confronted with newly discovered evidence which could not, with reasonable diligence, have been discovered and produced at trial.

At trial, the parties in this medical malpractice action debated the nature and extent of a mass located on the spine of 58-year-old psychologist, Eke Wokocha, Ph.D. ("Dr. Wokocha"), who became a near-total quadriplegic following his admission to Sharp in January of 2009. Dr. Wokocha claimed that mass was a neuroma which formed secondary to being dropped by an occupational therapist while at Sharp, causing the sudden onset of quadriplegia and his permanent disability. Sharp asserted that the mass in question was instead an astrocytoma or tumor which had naturally grown to an advanced

stage and compromised Dr. Wokocha's spinal cord. Each side's experts presented conflicting opinions supporting their respective positions based primarily upon competing imaging studies. But when Dr. Wokocha tragically died right after trial and an autopsy was performed to determine the cause of his death, slides of tissue blocks obtained from Dr. Wokocha's brain and spinal cord plainly confirmed that the damage to Dr. Wokocha's spine was not the result of a tumor, but rather was caused by trauma and the subsequent formation of a traumatic neuroma.

Correctly finding that such evidence was not available previously (as comparable tissue blocks from Dr. Wokocha's brain and spine obviously could not have been obtained while he was alive), the trial court granted Dr. Wokocha's Successor in Interest, Kabran, a new trial. It did so recognizing that because the jury had found that Sharp had been negligent but nevertheless concluded that negligence had not caused Dr. Wokocha any harm, there was a reasonable probability that newly discovered autopsy evidence would compel a different result in a new trial, especially on the hotly contested issue of causation.

The substantive issues of the significance and admissibility of that autopsy evidence, and whether it warranted a new trial, were thoroughly briefed by both Kabran and Sharp before the trial court. Indeed, neither party

was deprived of the opportunity to fully advance their arguments in that regard, and neither raised any objections to the trial court concerning their ability to do so. Yet well *after* the trial court granted a new trial in Kabran's favor and Sharp began its challenge of the substance of that ruling, it realized (for the first time) that although Kabran had filed her Notice of Intent to Move for New Trial without incident, the clerk incorrectly cancelled Kabran's subsequent filing of her supporting affidavits for the alleged lack of a filing fee. Seizing upon what it perceived to be a technical "gift horse," Sharp later claimed on appeal that the deadlines for filing supporting and opposing affidavits for new trial motions are "jurisdictional," and that therefore the trial court's order granting Kabran a new trial was "void" for lack of jurisdiction. Again, Sharp made those arguments despite being timely (and personally) served with Kabran's supporting affidavits and therefore suffering no prejudice as a result of when they were considered "filed" by the trial court. Sharp similarly advanced the position that the "aggregate 30-day time period" provided in Code of Civil Procedure section 659a for filing affidavits and counter-affidavits in new trial motions is mandatory and therefore "jurisdictional."

The Court of Appeal carefully considered, and properly rejected, both contentions. Specifically, it concluded that Kabran's supporting affidavits were timely served and that, in any event, Sharp never objected to – or suffered

any prejudice resulting from – when those supporting affidavits were deemed filed by the trial court. The Court of Appeal further reasoned that while the 30-day aggregate period for briefing new trial motions was "mandatory," this did not mean that those time limitations were "jurisdictional." Accordingly, it concluded that the trial court retained its fundamental jurisdiction to decide that motion, correctly granting Kabran a new trial.

Sharp now comes to this Court attempting to exploit that technicality even further while straining to find a conflict with other decisional law which warrants this Court's attention. As Kabran explains in greater detail below, those efforts should fail, as Sharp's conflation of the concepts of "mandatory" and "jurisdictional" are without reasoned support, and were properly rejected by the Court of Appeal. Moreover, Sharp asks this Court to review the application of a statute which was substantially amended in 2014 and will not be followed by the lower courts in deciding new trial motions going forward. Accordingly, Kabran urges this Court to deny review so this matter can proceed back to trial, and the newly discovered evidence of Dr. Wokocha's medical condition can be fully and fairly evaluated by a jury.

II.

WHY REVIEW SHOULD BE DENIED

A. Having Suffered No Prejudice, Sharp Now Attempts to Exploit a Technical Issue to Invoke This Court's Review and Thereby Avoid a New Trial.

Sharp does not want to retry this case. This is understandable inasmuch as Sharp has devoted considerable time and resources developing a defense strategy – that Dr. Wokocha's quadriplegia was induced by the natural progression of a cancerous mass – which will now be refuted by the physical evidence uncovered by Dr. Wokocha's autopsy. Indeed, instead of merely relying on their favorable interpretations of imaging studies, Sharp's experts will now be confronted on retrial with actual tissue samples from Dr. Wokocha's brain and spine that plainly demonstrate the presence of a traumatic neuroma and the absence of a cancerous mass compromising his spinal cord. (Opn. at 4-5, 18-20.)[1] It is for that very reason that the Court of Appeal gave "great weight" to the trial court's conclusion that the new evidence made it reasonably probable that Kabran would have obtained a more favorable result. (Opn. at 26.)

[1] All facts in this brief are supported by reference to the Court of Appeal's Opinion, abbreviated as (Opn. at [page]); Sharp's Appellant's Appendix, abbreviated as: ([volume] AA [page]); and the Reporter's Transcript, abbreviated as: ([volume] RT [page]).

Rather than confront that new evidence head-on, Sharp raises a diversion in a rather obvious attempt to invoke this Court's review and thereby forestall a new trial. Sharp's central thesis – that it was somehow impacted by when affidavits and counter-affidavits were filed in the underlying new trial proceedings – fails on its own merits for two fundamental reasons, and therefore cannot serve as a reasonable basis for this Court's review.

First, Sharp was not prejudiced in any way by when Kabran filed her brief and affidavits with the trial court, as Sharp was timely (and personally) served with those documents and had ample time to respond to them. (See Opn. at 3-4, 15-16.) Although Sharp previously claimed that Kabran did not timely file those papers on April 1, 2013, it then retreated from that point when it was forced to concede that April 1, 2013 was a court holiday. (Opn. at 3, 5.) Sharp then seized upon the fact that the Superior Court clerk filed Kabran's affidavits and supporting papers on April 2, 2013, but then at some later point "unfiled" those documents and stamped that previous filing as "canceled" because the court allegedly had not received an accompanying filing fee. (Opn. at 3-4.) Putting aside the issue of whether the Superior Court clerk – after having accepted Kabran's filing and stamped it "filed" – could, a day or two later, "unfile" those previously filed documents and stamp the filing "cancelled" instead (an issue the Court of Appeal determined it need not decide

to rule in Kabran's favor – see Opn. at 10), the fact remains that Sharp was previously and timely served with Kabran's affidavits and supporting papers on April 2, 2013. Thus, Sharp had no knowledge of how the Superior Court clerk had handled the filing because it was not encumbered in any way by the clerk's actions or the payment of the accompanying filing fee because it received Kabran's supporting papers as required by law. Thus, the Court of Appeal correctly determined that Sharp suffered no prejudice whatsoever by virtue of the date those papers were filed either for the first time, on April 2, 2013, or subsequently refiled by the clerk, on April 5, 2013. (Opn. at 3-4, 15-16.) Further evidence of that fact is that Sharp never raised the issue of timeliness in its opposition papers. (Opn. at 15-16.) Thus, what was clear to the Court of Appeal remains clear today: *Sharp is trying to exploit a perceived technical defect in the filing of Kabran's supporting affidavits and briefing to manufacture an issue for this Court's review and to avoid a retrial on the merits*. This Court should decline Sharp's invitation to devote its limited time and resources to such a purely theoretical and contrived controversy. Indeed, the complete absence of any prejudice suffered by Sharp makes this case a particularly poor platform for that review.[2]

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[2] Sharp also contended that on *ex parte* motion, the trial court impermissibly reduced the time it had to respond to Kabran's new trial motion

(continued on the next page)

Second, *simply because statutory language is "mandatory" does not mean that it is also "jurisdictional."* Indeed, throughout its briefing in the Court of Appeal and its Petition before this Court, *Sharp continues to conflate those two concepts*, so as to suggest that all time deadlines provided by the Legislature for the briefing of new trial motions are necessarily "jurisdictional" and therefore, if they are not assiduously met, trial courts are robbed of their fundamental jurisdiction to decide those motions. On this point, Sharp is simply wrong. What is clear is that the initial filing of a notice of intent to move for new trial is a jurisdictional deadline. (See *Tri-County Elevator Co. v. Superior Court* (1982) 135 Cal.App.3d 271, 277.) But there is no dispute that Kabran satisfied that jurisdictional deadline in this case. (Opn. at 9-10.) Consequently, as the Court of Appeal aptly pointed-out, Sharp's continuing reliance on cases which analyze the jurisdictional imperative of timely filing a notice of intention to move for new trial do not support Sharp's dissimilar argument that the subsequent deadlines for filing supporting and opposition affidavits and briefs carry with them the same jurisdictional mandate. (Opn. at

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from ten days to seven days. (Opn. at 6.) But because Sharp never produced a record which demonstrated that it ever objected to that timetable for briefing the new trial motion, the Court of Appeal correctly determined that Sharp had waived that objection on appeal. (Opn. at 6 and fn. 6.)

10-11 [noting how the cases Sharp has cited dealing with the deadline for filing an original notice of intention "are inapposite because there is no dispute Kabran's notice of intention to move for new trial in this case was filed within the 15-day jurisdictional deadline"].)

Developing that point even further, the Court of Appeal correctly reasoned that "[a] typical misuse of the term 'jurisdictional' is to treat it as synonymous with 'mandatory.' There are many time provisions, *e.g.*, in procedural rules, which are not directory but mandatory; these are binding, and parties must comply with them to avoid default or other penalty. But failure to comply does not render the proceeding void . . . ." (Opn. at 14, citing *Poster v. Southern Cal. Rapid Transit Dist.* (1990) 52 Cal.3d 266, 274.) Following further guidance provided by this Court in its previous decision in *People v. Lara* (2010) 48 Cal.4th 216, 224, the Court of Appeal concluded that "[a] lack of jurisdiction in its fundamental or strict sense results in an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." (Opn. at 14-15.) But "in light of the general rule and the absence of clear legislative intent to the contrary, we conclude the period in which to file opposing papers, whether it be 10 or 30 days, is not jurisdictional in the fundamental sense" in that it did not deprive the trial court from ruling on that motion. (*Ibid.*) Thus, the Court of Appeal correctly rejected Sharp's

"mandatory v. jurisdictional" dichotomy as misconstruing the fundamental jurisdiction a trial court retains to decide a new trial motion even where mandatory briefing deadlines (as opposed to the filing deadline for a notice of intention) are not technically satisfied. (*Ibid.*) As the Court of Appeal clarified, its analysis of the trial court's "fundamental jurisdiction" to decide that new trial motion is supported by a long train of supporting authorities, creating no controversy worthy of this Court's intervention. (Opn. at 15 ["Our conclusion is consistent with the weight of authority cited above (see part I (A), *ante*), holding that the section 659a deadlines are not jurisdictional"].)

B. There Is No Conflict in the Decisional Law Created by the Court of Appeal's Opinion Which Requires this Court's Intervention Now.

In shifting its position to the 30-day internal aggregate deadlines for filing new trial affidavits and counter-affidavits under the prior iteration of Code of Civil Procedure section 659a, Sharp has seized upon language found in the Third District's prior decision in *Erikson v. Weiner* (1996) 48 Cal.App.4th 1663, 1671-1672, which ostensibly held that aggregate 30-day time period is "mandatory" and therefore "jurisdictional." But the *Erikson* holding does not present a conflict now worthy of this Court's review for several fundamental reasons.

To begin, as Sharp concedes in a footnote on the first page of its Petition for Review, *Erikson* dealt with the language of Code of Civil Procedure section 659a *as it existed before 2014 amendments completely overhauled that statute*, changing the allowable briefing (by providing for the filing of a reply brief where the prior statute did not), and otherwise altering the amount of additional time a moving party can obtain for the filing of its affidavits and supporting papers. (See Code Civ. Proc. § 659a, as amended by Stats 2014, ch. 93 (AB 1659).) Those changes to section 659a became effective January 1, 2015. (*Ibid.*) The fact that the chief case on which Sharp has relied is limited in its analysis to *statutory provisions which have been replaced by an amended statute only further underscores the truly academic nature of Sharp's request for this Court's review*. Indeed, any future new trial motions being brought in the trial courts will – from this point forward – be brought under the amended version of section 659a which *Erikson* did not address. And to that extent, providing for the filing of a reply brief in the amended version of section 659a would allow moving parties like Kabran to further brief the issue of timeliness of the filing of their initial supporting affidavits and supporting papers, if that issue was raised in any opposition (even though Sharp did not do so here). Consequently, under the current amended version of section 659a, trial courts will have greater opportunity to consider and rule on those timeliness issues

with the input of *both* parties (on opposition and reply), and reviewing courts will similarly be aided with a more complete record on those issues. As such, if the Court is even remotely enticed to review the question of the nature of the internal briefing deadlines for new trial motions, *it should do so from a case which applies the new, amended version of section 659a so as to provide trial courts (which will be bound only by that new statute) the most relevant guidance going forward.* In that sense, both *Erikson* and the Court of Appeal's decision in this case necessarily have limited precedential value given the interim changes the Legislature made to section 659a and the new regime that will be followed for those motions in the future.

But perhaps most importantly is the fact that *Erikson's* language regarding whether the internal briefing deadlines for new trial motions are "mandatory" and therefore "jurisdictional" is classic *dicta.* Specifically, in *Erikson*, the *only* supporting affidavit claimed to have been filed late by the opposition and therefore beyond the trial court's "jurisdiction" was the "Gonzalez affidavit." (*Erikson, supra,* 48 Cal.App.4th at 1670 ["The only pertinent declaration admitted in evidence, the Gonzales affidavit, was not filed until after the expiration of the 20-day extension granted by the trial court which, pursuant to section 659a, may not be exceeded. This is the ground of Erikson's claim the time limit is mandatory and accordingly the affidavit may

not be considered"].) Yet importantly, the trial court considered that Gonzales affidavit and ruled against the moving party anyway, denying new trial. (*Id.* at 1669, fn. 3.) Consequently, whether the Gonzales declaration was filed late or not was inconsequential to the *Erikson* court's affirmance of the trial court's denial of new trial, as it could have simply ruled that although the trial court was not authorized to even consider the Gonzales declaration, it considered the substance of that declaration and denied the new trial motion anyway.

The *Erikson* court recognized this anomaly when it conceded that "Erikson was not aggrieved by the judgment or the order denying the new trial motion" and "[t]he ruling admitting the Gonzales affidavit into evidence had no adverse effect on the judgment." (*Id.* at 1671.) Thus, *Erikson* acknowledged that the only purpose for analyzing the timeliness of the filing of the Gonzales affidavit was to determine if the appealing party (the party moving for new trial, Dr. Weiner) had somehow been prejudiced by its admission and consideration by the trial court. (*Ibid.*) By that elliptical reasoning – considering the timeliness of an affidavit which was nonetheless admitted and considered by the trial court as somehow *prejudicing* the party who proffered that declaration – the *Erikson* court then set about to consider whether the deadlines established by the (then-existing) provisions of section 659a further justified the trial court's denial of Dr. Weiner's new trial motion.

But if the trial court's denial of Dr. Weiner's new trial motion was correct if it had not reviewed the Gonzales affidavit, there was no reason it was incorrect if it had reviewed that declaration and reached the same result. Put differently, Dr. Weiner simply could not have been prejudiced by the trial court considering that affidavit and still ruling against him. Consequently, *Erickson's* entire analysis of section 659a, ultimately finding that the Gonzales declaration was late and should not have been considered, only served to validate the trial court's original new trial ruling, denying that motion even after admitting the Gonzales declaration.

This perhaps explains why *Erikson's* analysis – imbuing "mandatory" deadlines with "jurisdictional" consequence – has not been embraced by other courts either before or after *Erikson* was decided. (See Opn. at 8 and the several cases cited therein.) In synthesizing that unbroken line of authority, Witkin observed: "Affidavits or declarations [in connection with a new trial motion] filed too late may be disregarded. (Citations.) On the other hand, the time limits are not jurisdictional. The court may still consider an affidavit or declaration even if it is filed after the deadline" (8 Witkin, *Cal. Procedure* (5th ed. 2008) Attack on Judgment in Trial Court, § 65, p. 650.) Notably, in the nearly 20 years since *Erikson* was decided, it has not been cited in one published opinion for the proposition advanced by Sharp – that the internal

deadlines for briefing new trial motions are jurisdiction – only further demonstrating the context and manner in which *Erikson* decided its "mandatory equals jurisdictional" interpretation of section 659a has garnered little (if any) resonance with other courts.

In that sense, it is the *Erikson* decision which is the outlier – not the Court of Appeal's decision – as its extraneous discussion of section 659a's briefing deadlines appears to swim against the steady flow of contrary decisions on that very issue, decided both before and after *Erikson*. (See, *e.g.*, *Fredrics v. Paige* (1994) 29 Cal.App.4th 1642, 1648 ["Appellant further argues the trial court should not have considered respondent's counter-declarations because they were filed beyond the statutory 10-day period. (Citations.) We disagree. The 10-day period is not jurisdictional"]; *Wiley v. Southern Pacific Transportation Co.* (1990) 220 Cal.App.3d 177, 188 ["[I]t has been held that the time limits for filing the affidavits in support of a new trial motion are not jurisdictional in contrast to the time limit for filing the new trial motion under section 659"].) If there was no cause previously for this Court to address *Erikson's dicta* to the contrary, it certainly does not exist now by virtue of the Court of Appeal's Opinion in this case. To be sure, the Court of Appeal here not only analyzed section 659a because doing so was germane to its decision (as opposed to optional only in *Erikson*), but also did so in a manner which is

consistent with every other case that has squarely addressed that issue over the last 125 years. (See, *e.g.*, *Spottiswood v. Weir* (1889) 80 Cal. 448, 451 [no error in allowing filing of counter-affidavits after time fixed by the code].) Accordingly, Sharp's attempts to create a conflict worthy of this Court's attention between *Erikson* and the Court of Appeal's Opinion instead only reveals how the *Erikson* decision is of limited import given the lack of necessity for it to address section 659a in the first place, and the conclusion it ultimately reached contrary to every other court which has analyzed that issue either before or after. Thus, the Court of Appeal's decision here adds nothing new to the mix, but only reinforces how *Erikson* rightly remains at the margins of the larger body of decisional law on this issue, and will be become even more vestigial in light of the new amendments to section 659a. Consequently, this Court's review of the Court of Appeal's Opinion to reconcile it with the *Erikson* decision is neither required nor justified.

III.

CONCLUSION

For the foregoing reasons – and to allow the critical newly discovered evidence revealed for the first time in Dr. Wokocha's autopsy to be evaluated by a jury on retrial – Kabran respectfully requests this Court to deny Sharp's Petition for Review.

Respectfully submitted,

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DATED: 07/16/15

Jon R. Williams, Esq.
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CERTIFICATE OF COMPLIANCE PURSUANT TO THE CALIFORNIA RULES OF COURT, RULE 8.204(c)

Pursuant to the California Rule of Court, Rule 8.204(c), I certify that the foregoing brief is proportionally spaced, has a typeface of 14 points, is double-line spaced, and based upon the word count feature contained in the word processing program used to produce that brief (Microsoft Word 2010), contains 3,911 words.

Date: 07/16/15

Jon R. Williams

KABRAN v. SHARP MEMORIAL HOSPITAL
Supreme Court of the State of California
California Supreme Court Case No.: S227393
Court of Appeal Case No.: D064133
San Diego County Superior Court Case No.: 37-2010-00083678-CU-PO-CTL

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

I am employed in the county of San Diego, State of California. I am over the age of 18 and not a party to the within action; my business address is 666 State Street, San Diego, California 92101.

On **July 16, 2015**, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

1) ANSWER TO PETITION FOR REVIEW

In a sealed envelope, postage fully paid, addressed as follows:

Jeffrey S. Doggett, Esq. Patrick F. Higle, Esq. Lotz, Doggett & Rawers, LLP 101 West Broadway, Suite 1110 San Diego, CA 92101	*Attorney(s) for Defendant and Appellant: Sharp Memorial Hospital*
Hon. John S. Meyer San Diego Superior Court 330 West Broadway, Dept. 61 San Diego, CA 92101	*Superior Court*
Court of Appeal, State of California 4th Appellate District, Division 1 750 B Street, Suite 300 San Diego, CA 92101	*Appellate Court*

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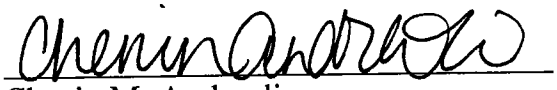

Chenin M. Andreoli