S227393

IN THE SUPREME COURT OF CALIFORNIA

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SHARP MEMORIAL HOSPITAL dba
SHARP REHABILITATION CENTER

Defendant and Appellant,

vs.

BERTHE FELICITE KABRAN,
Successor in Interest to EKE WOKOCHA,

Plaintiff and Respondents.

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AFTER A DECISION BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION ONE
CASE NO. D064133

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OPENING BRIEF ON THE MERITS

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STATEMENT OF THE ISSUES

California *Code of Civil Procedure* §659a reads, "[w]ithin 10 days of filing the notice, the moving party shall serve upon all other parties and file any affidavits intended to be used upon such motion. Such other parties shall have ten days after such service within which to serve upon the moving party and file counter-affidavits. The time herein specified may, for good cause shown by affidavit or by written stipulation of the parties, be extended by any judge for an additional period of not exceeding 20 days."[1]

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[1] This is how former California *Code of Civil Procedure* §659a read before a 2014 amendment. Because the original motion for new trial here was filed in 2013, the former statute, as presented here, applies.

Is the 30-day aggregate period as set forth in California *Code of Civil Procedure* §659a jurisdictional, such that if a moving party fails to file and serve "affidavits intended to be used" upon a motion for a new trial within that 30 day aggregate period, the trial court cannot consider any late-filed affidavits?

LEGAL DISCUSSION

THE AGGREGATE 30-DAY DEADLINE IN SECTION 659a IS JURISDICTIONAL IN NATURE

It has long been a tenet of California law that motions for a new trial on the ground of newly discovered evidence "are regarded with distrust and disfavor." *Baker v. Joseph* (1860) 16 Cal. 173, 180; *see also Dasso v. Bradbury* (1940) 39 Cal.App.2d 712, 716; *see also Lubeck v. Lopes* (1967) 254 Cal.App.2d 63, 67-68. "Applications for this cause are regarded with distrust and disfavor. The temptations are so strong to make a favorable showing, after a defeat in an angry and bitter controversy involving considerable interests, and the circumstance that testimony has just been discovered, when it is too late to introduce it, so suspicious, that Courts require the very strictest showing to be made of diligence, and all other facts necessary to give effect to the claim." *Baker*, 16 Cal. at 180; *Dasso*, 39 Cal.App.2d at 716. Sharp Memorial Hospital dba Sharp Rehabilitation Center (hereinafter "SHARP") does not dispute that when a "trial court has exercised its discretion and granted a new trial that such action is looked upon with either distrust or disfavor." *Dasso*, 39 Cal.App.2d at 716. However, the entire process of seeking a new trial based on newly

discovered evidence is disfavored such that the statutes governing the process have jurisdictional guidelines, as illustrated below.

The California State Legislature enacted California Code of Civil Procedure section 656, et sec., in order to govern the filing of a motion for a new trial. Section 659, enacted in 1872, governs the front end of the process - the filing and service of the notice of a motion for a new trial. It reads, in pertinent part, that a party intending to move for a new trial *shall* file with the clerk a notice of intention to move for a new trial, and that this notice *shall* be filed and served within 15 days of the date of mailing notice of entry of judgment by the clerk of the court or service by any party of written notice of entry of judgment, or within 180 days after entry of judgment, whichever is earliest. Section 659 has been repeatedly held to be jurisdictional. *Markaway v. Keesling* (1963) 211 Cal.App.2d 607, 610; *Neff v. Ernst* (1957) 48 Cal.2d 628, 634; *Bank of America Nat'l Trust & Sav. Asso. v. Superior Court of Kern County* (1931) 115 Cal.App. 454, 457.

Section 659a, enacted in 1929[2], governs the middle portion of the process - the briefs and accompanying documents that parties may file in a motion for a new trial. This is arguably the most critical juncture in the process because it is the only portion of the process whereby the opposing party learns of the actual facts the motion for a new trial will be based upon. It reads, in pertinent part, that within 10 days of the filing of a notice for a motion for a new trial, the moving party *shall* file and serve any brief and accompanying documents,

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[2] While the state legislature did not enact section 659a until 1929, the language governing the deadlines for the filing and serving of affidavits in support of a motion for a new trial were all contained in section 659, which was enacted in 1872, and amended in 1873-74 and in 1915.

including any affidavits in support of the motion for a new trial. The aggregate deadline of Section 659a has also repeatedly been held to be jurisdictional. *Hicks v. Ocean Share R. Inc.* (1941) 18 Cal. 2d. 773, 789-790; *Erikson v. Weiner* (1996) 48 Cal.App.4th 1663, 1672-1673; *Crespo v. Cook* (1959) 168 Cal.App. 2d. 360, 663; *Sitkei v. Frimel* (1948) 85 Cal.App.2d 335, 337; *Lewith v. Rehmke* (1935) 10 Cal.App.2d 97, 105; *Terry v. Lesem* (1928) 89 Cal.App. 682, 685-686; *W. P. Fuller & Co. v. McClure* (1920) 48 Cal.App. 185, 194.

Section 660, enacted in 1872, governs the back end of the process - the absolute outside time limit for the entire motion for a new trial to be heard. It reads, in pertinent part, that the power for a court to rule on a motion for a new trial *shall* expire 60 days from and after the mailing of the notice of entry of judgment by the court, or it *shall* expire 60 days from and after service of written notice of entry of judgment, whichever is earlier. This section has been repeatedly held to be jurisdictional. *Siegal v. Superior Court* (1968) 68 Cal. 2d 97, 100-101; *Hinrichs v. Maloney* (1959) 169 Cal.App.2d 544, 546; *Kocher v. Fidelity & Deposit Co.* (1934) 137 Cal.App. 474, 476.

These code sections all use the term "shall". It is counter-intuitive why all but one of them would be deemed jurisdictional, especially when given the fact that the language indicating the mandatory nature of the deadlines in sections 659 and 659a are identical.

At the time of the Motion for New Trial in this matter Section 659a read as follows:

> Within 10 days of filing the notice, the moving party shall serve upon all other parties and file any affidavits intended to be used upon such motion. Such other parties shall have ten days after such service within which to serve upon the moving party and file counter-affidavits. The time herein specified may, for good cause shown by affidavit or by written stipulation of the parties, be extended by any judge for an additional period of not exceeding 20 days.

Therefore, if an extension is granted up to 20 days, there is an aggregate time limit of 30 days from the filing of the notice within which the moving party shall serve and file any affidavits in support of their motion for a new trial. Section 659a is unique in that it contains essentially two separate deadlines, one of which provides some discretion to the trial judge, and one of which does not. As is clear from the language of the statue itself, the *10-day* deadline is not jurisdictional as it clearly can be extended by the Judge on a showing of good cause for up to 20 additional days. However, the aggregate deadline of *30 days* cannot be exceeded by the trial judge.

The grounds of this aspect of SHARP'S appeal to the District Court, as well as the petition and opening brief to the Supreme Court, are solely based on the respondent's violation of the aggregate *30-day* deadline which SHARP contends is jurisdictional in nature. The importance of the distinction between the 10-day deadline and the 30-day deadline becomes apparent when one analyzes the case law cited by the Fourth District Court of Appeal (hereinafter "DCA") in support of the Opinion.

The DCA Opinion concludes that sections 659 and 660 are in fact jurisdictional, but in relation to 659a, the DCA found that while the time limits for filing affidavits are "strict", the trial judge may indeed exercise discretion in considering documents filed after the 30 day deadline has expired. In support of this holding, the DCA cites six cases, three of which relate exclusively to the *10-day* deadline, two of which predate the amendments to *CCP* § 659 et. seq. that made the time limits mandatory or jurisdictional, and one which is narrowly tailored around facts which do not relate to the case at bar. These cases are addressed below:

Spottiswood v. Weir (1889) 80 Cal.448, 451; Smith v. Whittier (1892) 95 Cal.279, 295

The DCA cited to the two above-referenced Supreme Court cases, one from 1889, the other from 1892, for the proposition that the trial judge has discretion in accepting affidavits/declarations filed after the time fixed by the code. Indeed those cases stand for the proposition that the court may accept affidavits filed in support of a motion for new trial after the deadlines specified in the statute. As pointed out above, at the time of these decisions, there was no 659a. The time limits for filing affidavits were encompassed within 659 which also addressed the time limits for filing the notice of intention to move for new trial. While the specific language for filing the notice of intent used the term "must" when directing the moving party to file within 10 days of the verdict, the section addressing the filing of affidavits was much more forgiving:

> If the motion is to be made upon affidavits, the moving party must, within 10 days after serving the notice, *or such further time as the court in which the action is pending, or a judge thereof, may allow,* file such affidavits with the clerk. . . California *Code of Civil Procedure* § 659 (As amended 1873-1874). [*Emphasis added*].

In 1889 and 1892 the statute governing the deadlines for filing affidavits for a motion for new trial specifically granted the trial court seemingly unlimited discretion in determining when it *may* consider this evidence. The court was instead restricted only by the statutes addressing the deadlines for hearing and ruling on the motion. It was not until 1915 that the scope of the trial judge's discretion was limited as to when the affidavits must be filed. Following the 1915 amendment to 659, the pertinent section of the statute read as follows:

> If the motion is to be made upon affidavits, the moving party must, within 10 days after serving the notice, or such further time as the court in which the action is pending, or a judge

> thereof, may allow, *(but not to exceed 20 days' additional time)* file such affidavits with the clerk. . . . California *Code of Civil Procedure* § 659 (As amended 1915). [*Emphasis added*]

Since the 1915 amendment, there is no legislative history indicating that the removal of the language pertaining to the deadlines to file supporting affidavits in 659, and placing that language into newly-formed section 659a in 1929 was in any way meant to remove the jurisdictional nature and structure that all of section 659 was given by the state legislature from 1915 to 1929.

A series of early cases from 1915 on fully supports the position that affidavits must be filed within the prescribed aggregate statutory deadline or they are to be disregarded. In *W. P. Fuller & Co. v. McClure* (1920) 48 Cal.App. 185, 194, the Second District Court of Appeal held that affidavits relied upon for a new trial were not to be considered because they were served on August 7, 1917 and filed on August 8, 1917, and the notice of intention was served on July 6, 1917. "Where a motion for a new trial is to be made upon affidavits, the moving party must serve and file his affidavits not later than thirty days after serving his notice of intention." *Id.*, *citing* section 659.

In *Terry v. Lesem* (1928) 89 Cal.App. 682, 685-686, the Second District Court of Appeal held that affidavits served beyond the statutory time limit were properly struck. "Such affidavits must be filed and served within ten days after serving the notice of intention, or such further time as the court may allow, but not to exceed twenty days' additional time." *Id.*, *citing* section 659. In *Terry*, the notice of intention to move for a new trial was served on March 18, 1925. *Id.* at 686. The supporting affidavits were not served until April 24, 1925. *Id.* However, on March 23, 1925, the trial court made an order extending the time

of the appellant to serve and file the affidavits for "thirty days in addition to the time given by law." *Id.* The Second District Court of Appeal found that the trial court's decision to grant an extension in excess of 20 days was beyond that court's authority. *Id.* "Since the affidavits were not served or filed until the lawful time therefor had expired, the court did not err in striking them from the files." *Id.* at 686.

Boynton v. McKales (1956) 139 Cal. App. 2d. 777

In *Boynton v. McKales* (1956) 139 Cal.App.2d 777, the First District Court, addressing 659a, allowed the consideration of affidavits filed "three days late" or thirteen days after the filing of the notice of intent was filed. Here the court's ruling addresses the fact that the *10-day deadline* is clearly not jurisdictional in nature:

> Section 659a of the Code of Civil Procedure expressly permits the extension by the court of the 10-days' period for filing the affidavits for an additional period not exceeding 20 days. *The 10-day period is then clearly not jurisdictional. Id.* at 782. [*Emphasis added*].

The *Boynton* court never addressed the aggregate 30-day deadline in its decision, except to state that the trial court's extension *may not* exceed 20 days.

Wiley v. S. Pac. Transp. Co. (1990) 220 Cal.App.3d. 177

In *Wiley v. S. Pac. Transp. Co.* (1990) 220 Cal.App.3d. 177, 188, the Second District Court upheld the trial court's granting of a motion for new trial based on alleged jury misconduct. Here the court allowed a motion for new trial to be granted despite the fact that the required "no knowledge" affidavit of counsel had not been filed and considered by the trial court. In this instance, the hearing on the motion occurred two days before the declarations were due, thus the statutory deadlines for filing affidavits had not yet passed.

Again, the *Wiley* court also never addressed the jurisdictional nature of the aggregate 30-day deadline as it had not yet passed.

Fredrics v. Paige (1994) 29 Cal.App.4th 1642

Like, *Boynton*, in *Fredrics v. Paige* (1994) 29 Cal.App.4th 1642, 1648, the Second District Court specifically limited its ruling to addressing the 10-day deadlines of 659a. Here the issue was the filing of counter-affidavits which are also subject to a 10-day limit with a potential for a 20-day extension for good cause. As the aggregate 30-day deadline was not at issue, the *Fredrics* ruling fails to address the issue before this court:

> Appellant further argues the trial court should not have considered respondent's counter declarations because they were filed beyond the statutory 10 day period. (Code Civ. Proc., § 659a.) We disagree. *The 10-day period is not jurisdictional. Id.* [*Emphasis added*].

Clemens v. Regents of University of Cal. (1970) 8 Cal.App.3d 1

Clemens v. Regents of University of Cal. (1970) 8 Cal.App.3d 1, presents a more complex situation in relation to the case at bar. In this case a motion for new trial based on juror misconduct was denied by the trial court. It appears from the opinion that all deadlines for the filing and hearing of the motion, including 659a were initially met. *Id.* at 15-16. The issue before the Second District Court of Appeal centered on the fact that one particular juror failed to disclose a prior medical background in a medical negligence case, and then proceeded to use his prior knowledge to persuade the other jurors to find for the defendants/respondents. Declarations of fellow jurors contained statements indicating a potential bias by the juror in question. Under the law as it existed at the time of the ruling on the motion for new trial, it was at least questionable if the trial court could consider the

declarations of a number of jurors on the issue of bias of a fellow juror. However, while the appeal of the trial/denial of the motion for new trial was pending, the Supreme Court published its opinion in the matter of *People v. Hutchinson* (1969) 71 Cal.2d. 342. The Second District Court of Appeal found that the *Hutchinson* holding made clear that the juror declarations were in fact admissible on demonstrating bias. *Clemens*, 8 Cal.App.3d at 19.

The District Court was now faced with the dilemma of finding an equitable way to handle the matter in light of the change in the applicable law. They reasoned that there were three options available: 1) affirm the lower court and find that the appellant cannot change his theory on appeal despite the change in law; 2) reverse and order a new trial; or 3) remand for a rehearing on the motion for new trial. *Id.* at 20. Realizing that the first two options were "grossly unjust" the District Court opted for the third. *Id.* In light of the fact that there are strict guidelines applicable to the filing and hearing of a motion for new trial, the court held that they "have the power to order such a remand in the *narrow circumstances of this case.*" *Id.* [*Emphasis added*].

In terms of the fact that the deadlines of 657, 659 and 660 would have expired once the remittitur as issued, the court reasoned that the change in the law essentially allowed the trial court to conduct a second hearing on the motion for new trial (citing *Jehl v. Southern Pac. Co.* (1967) 66 Cal 2d. 821) especially in light of the fact that the trial court did in fact timely rule and consider the motion for new trial in the first instance. *Id.* at 20-21. As to the fact that new affidavits would be filed, the court did state that the time limits for 659a affidavits are "not jurisdictional," but went on to hold that the trial court will "specify time limits no longer than those provided in Code of Civil Procedure section 659a for the filing

of affidavits. . ." *Id.* at 22. More importantly, the court held:

> We conclude, therefor, that under the *narrow and peculiar circumstances of this case* there is an inherent judicial power incident to the appellate process to permit the filing of affidavits and counter affidavits after the remittitur and rehearing on the motion. *Id.* [*Emphasis added*].

In the underlying matter, the Fourth District Court held that the deadlines governing the middle portion of the process -- specifically the deadlines governing the filing of the affidavits that Dr. Wokocha filed in support of his motion for a new trial, were not jurisdictional. The Opinion cited to the above-referenced cases for the proposition that the filing of affidavits, even under the 30-day aggregate deadline of section 659a, are not jurisdictional in nature. As explained in the arguments and supporting authority herein, Appellant SHARP respectively disagrees with such a characterization of that authority. It should also be noted that the Opinion also references 8 Witkin, Cal. Procedure (5th ed. 2008) Attack on Judgement in Trial Court, § 65. P. 650, for support of the non-jurisdictional nature of 659a, however, a reading of that section reveals that Witkin references only *Fredrics v. Paige, supra* in drawing this conclusion. (See Opn. at p. 8). As indicated above, the court in *Fredrics* only addresses the 10-day deadline of 659a. The DCA's opinion goes on to correctly point out that Witkin also cites to *Erikson v. Weiner* (1996) 48 Cal. App. 4th 1663, 1671-1672 for the proposition that the aggregate 30-day deadline is in fact jurisdictional. (Opn. at p. 9).

In addition, the more recent opinions addressing the filing of affidavits beyond the 10-day period of 659a do not support the DCA's position. The relevant case law is clear that the time limits governing a motion for new trial, including certain time limits prescribed by

sections 659 and 659a, are jurisdictional, or in other words, mandatory. *Erikson v. Weiner* (1996) 48 Cal.App.4th 1663, 1672-1673; *Markaway v. Keesling* (1963) 211 Cal.App.2d 607, 610 (holding that "[t]he failure to so file [a motion for new trial] is jurisdictional and renders the purported motion ineffectual" and "any affidavit filed in support of such a motion was likewise rendered ineffectual and thus became a nullity"); *Neff v. Ernst* (1957) 48 Cal.2d 628, 634 (stating, "[t]he time limit prescribed by law for [a motion for new trial] is jurisdictional.")

The Supreme Court of California has emphasized that "[a]s the motion for a new trial finds both its source and its limitations in the statutes, the procedural steps prescribed by law for making and determining such a motion are mandatory and must be strictly followed." *Linhart v. Nelson* (1976) 18 Cal.3d 641, 644, quoting *Malkasian v. Irwin* (1964) 61 Cal.2d 738, 745). Along the same lines, "[t]he right to move for a new trial is statutory [...]. Strict construction is necessary in order that litigants may not lose their rights." *Maple v. Cincinnati* (1985) 163 Cal.App.3d 387, 391, quoting *Sitkei v. Frimel* (1948) 85 Cal.App.2d 335, 337. "The purpose of strict time limits is, of course, to avoid undue delays in finalizing judgments." *Maple*, 163 Cal.App.3d at 391.

In *Erikson v. Weiner*, the Third District Court of Appeal held that the time limit for filing affidavits in support of a new trial is mandatory under section 659a. (*Erikson v. Weiner*, 48 Cal.App.4th at 1672-1673.) Thus, the trial court has no discretion to admit affidavits submitted beyond the aggregate 30-day time period. In affirming the trial court's decision to disregard an affidavit filed beyond the aggregate 30-day time period, the *Erikson* court explained, as follows:

> The first point of inquiry is whether section 659a specifies a consequence for exceeding the time limit for the filing of an affidavit in support of a new trial motion. It does so implicitly. Section 659a provides that the moving party *shall* file his affidavits within 10 days and prescribes a precise and expressly limited remedy for failure to comply. The trial court "may, for good cause shown by affidavit or by written stipulation of the parties, [extend the time to file] for an additional period of *not exceeding 20 days.*" (*Italics added.*) Since the 20-day period may not be exceeded the trial court has no discretion to admit affidavits submitted thereafter. That being the consequence plainly entailed by the statute, the statute must be read as mandating only that remedy.
>
> The express limitation of section 659a is not arbitrary. It is hedged by other mandatory time frames for initiating and resolving a new trial motion. The notice of new trial must be given within 15 days of mailing the notice of entry of judgment; a late filing is void. (§ 659; e.g., *Union Collection Co. v. Oliver* (1912) 162 Cal. 755 [124 P. 435].) The court must resolve the motion by 60 days from the date of mailing of notice of entry of the judgment; this time period is jurisdictional. (§ 660; e.g., *Siegal v. Superior Court* (1968) 68 Cal. 2d 97, 100-101 [65 Cal. Rptr. 311, 436 P.2d 311].) The opposing party must have at least 10 days to file counter-affidavits. (§ 659a.) When the time to file counter-affidavits has expired the respective parties are entitled to five days' notice by mail of the hearing. (§ 661.)
>
> In light of these associated time frames, the extension of time to file affidavits beyond the aggregate 30-day period provided in section 659a will almost always encroach upon the interests of the opposing party to her allotted time for response to the new trial motion or upon the period in which the court may deliberate after submission. These considerations also impel the view that the aggregate period is mandatory. Where statutory requirements are intended by the Legislature to provide protection or benefit to individuals they are likely to be construed as mandatory. *Erikson v. Weiner*, 48 Cal.App.4th at 1672-1673.

Similarly, in *Sitkei v. Frimel*, the Second District Court of Appeal reversed the trial court's order granting a new trial based on the failure to follow the statutory deadlines. *Sitkei*, 85 Cal.App.2d at 335. The *Sitkei* the court found that the affidavits were not filed

within the statutory time limit provided by Section 659a, as follows:

> The court erred in considering the affidavits because they were filed too late. Since they were not filed within 10 days after service of the notice of intention to move for a new trial and since no extension of time for filing them was granted either by stipulation of the parties or by order of court they could not serve as a basis for the motion. (*Sitkei*, 85 Cal.App.2d at 338-339, citing *Code Civ. Proc.*, § 659a; *Hicks v. Ocean Shore R. R. Inc.* (1941) 18 Cal.2d 773, 789.)

In *Lewith v. Rehmke* (1935) 10 Cal.App.2d. 97, 105, the Fourth District Court of Appeal addressed an affidavit filed nearly two months after the notice of intent to move for new trial, finding that "it is therefore apparent that the affidavit was filed too late and that the trial court would not have been justified in considering it." Similarly, the First District Court of Appeal, in *Crespo v. Cook* (1959) 168 Cal.App.2d 360, 363, addressed a request to consider a late "no knowledge declaration" filed by counsel in a motion for new trial based on juror misconduct. Here the court held:

> Motions for new trial upon the grounds here urged must be made on affidavits. (Code Civ. Proc., §658.) The code specifies the time within which such affidavits must be filed, and specifically limits extension of such time to 20 days. (Code Civ. Proc., § 659a.) Affidavits filed in the trial court after the limited time are not to be considered. (Citations Omitted.) *Crespo*, 168 Cal.App.3d at 363.

Lastly, the Supreme Court further addressed this issue in *Hicks v. Ocean Shore R. Inc.* (1941) 18 Cal.2d.773, 789-790 holding that an affidavit "not having been filed within the statutory period (Code of Civil Procedure sec. 659a) or any extension thereof, does not properly constitute a part of the record."

It is counter-intuitive that the deadlines governing the front end of the process and the back end of the process - Sections 659 and 660, respectively - are jurisdictional, while the 30-day aggregate deadline governing the middle process - Section 659a - the meat of the argument, if you will, is not jurisdictional.

In March of 2013, the relevant deadlines in the underlying matter, in section 659a, stated as follows:

> Within 10 days of filing the notice, the moving party shall serve upon all other parties and file any affidavits intended to be used upon such motion. Such other parties shall have ten days after such service within which to serve upon the moving party and file counter-affidavits. The time herein specified may, for good cause shown by affidavit or by written stipulation of the parties, be extended by any judge for an additional period of not exceeding 20 days.

Therefore, if an extension was granted up to 20 days, there was an aggregate time limit of 30 days, from the filing of the notice, within which the moving party *shall* serve and file any affidavits in support of its motion for a new trial. That did not occur in the underlying matter.

In the underlying matter, the jury rendered its verdict on December 13, 2012. (AA. at pp. 91-94.) The final judgment was entered on February 5, 2013. (AA. at pp. 95-99.) Notice of the entry of final judgment was personally served by SHARP on all parties on February 14, 2013. (AA. at pp. 104-105.) As set forth under section 659(a)(2), Plaintiff had 15 days from February 14, 2013, within which to provide notice of her intent to move for a new trial. Thus, Plaintiff had until March 1, 2013, to file her notice of intent to move for a new trial. Plaintiff filed her Notice on March 1, 2013. (AA. at pp. 100-101.)

Next in the process, pursuant to section 659a, Plaintiff had 10 days from the time she filed her notice of intent to move for a new trial - on March 1, 2013 - within which to file any affidavits to be used in support of the motion for a new trial. Thus, Plaintiff had until Monday, March 11, 2013, to file any such affidavits. However, on March 6, 2013, the parties stipulated, pursuant to section 659a, to a 20-day extension within which Plaintiff could file her motion and supporting affidavits. (AA. at pp. 102-103.) The stipulation stated, in pertinent part, as follows:

> Per stipulated agreement, plaintiff will now have until Monday, April 1, 2013 in which to file their moving papers and affidavits in support of a *Motion for New Trial.* (AA. at p. 102.)

Pursuant to section 659a, then, Plaintiff had the maximum time limit allowed - 30 days from March 1, 2013 - in which to file her motion and supporting affidavits. The thirtieth day fell on Sunday, March 31, 2013, and thus, according to Code of Civil Procedure section 12a, Plaintiff had until Monday, April 1, 2013, in which to file her motion and supporting affidavits. Plaintiff failed to file any such motion or affidavits by April 1, 2013. Plaintiff first attempted to file the motion and supporting affidavits on April 2, 2013. However, the moving papers, as well as the supporting affidavits, were properly rejected by the court clerk, presumably because of the clear violation of the jurisdictional time limits of 659a. (AA. at pp. 106-169.) Although these documents were initially stamped as "filed" on April 2, 2013, that file stamp was subsequently cancelled by the clerk because the appropriate filing fee was not received. Pursuant to *Government Code* section 70617(a)(5), the filing of a motion for new trial requires a fee of $60.00. The clerk mailed a notice to Respondent on April 4, 2013, stating that, "We are unable to process the attached Motion for New Trial" due to the lack

of a required filing fee of $60.00. (See "Notice to Filing Party" attached as Exhibit 1 to Respondent's Request for Judicial Notice in the Court of Appeal record.) On April 5, 2013, three days beyond the statutory time limit within which Respondent had to file the Motion for New Trial, Respondent's attorney service submitted payment of $60.00 for the filing of the Motion, and the Motion was then file stamped on April 5, 2013. (Declaration of Michael Brown in support of Respondent's Motion for Production of Additional Evidence on Appeal, in the Court of Appeal record; *see also* Exhibit 2 to same, in the Court of Appeal record.)

On April 2, 2013, the same day in which Plaintiff first attempted to file her moving papers and supporting affidavits, Plaintiff brought an "*Ex Parte* Application for an Order Setting the Hearing of Plaintiff's Motion for New Trial", which was set to be heard by the court on April 3, 2013. (AA. at pp. 104-105.) The purpose of Plaintiff's *ex parte* Application was to request that the court hear and rule on the Motion for New Trial no later than April 15, 2013. In her Application, Plaintiff stated as follows:

> Plaintiff timely served her Notice of Intent to Move for New Trial on March 1, 2013, and timely served her Notice of Motion and Motion for New Trial on April 2, 2013. (AA. at p. 105.)

Although it is true that Plaintiff timely served her Notice of Intent to Move for New Trial on March 1, 2013, it is simply not true that Plaintiff timely served her Notice of Motion and Motion for New Trial on April 2, 2013. In fact, the Notice of Motion and Motion was not timely because, as required under section 659a, and as clearly stated in Plaintiff's own Stipulation, the Motion and supporting affidavits had to be filed and served by April 1, 2013. It was not until April 5, 2013, that Plaintiff successfully filed her Motion and supporting affidavits by filing them directly with the trial judge's department clerk following the *ex*

parte hearing.[3] (AA. at pp. 170-240.) The filing was thus *four days* beyond the aggregate 30-day maximum time period permitted by statute and was a total of 35 days after the filing of the Notice. Affidavits filed beyond the aggregate 30 day time period cannot be considered by the court. *Erikson*, 48 Cal.App.4th at 1672. Without the supporting affidavits, Plaintiff had no basis upon which a new trial could be granted.

Regardless of whether Plaintiff *served* the papers and affidavits on April 2, 2013, or Plaintiff's moving papers and affidavits were filed in the department without a filing fee or clerk stamp at the April 3, 2013 ex parte hearing (AA. at pp. 170-240), they were not properly *filed* with the court clerk until April 5, 2013. Both the service and filing of Plaintiff's Motion and supporting affidavits were beyond the maximum 30-day jurisdictional time limit. Given that the time limits are jurisdictional, the motion and affidavits cannot be considered by the court. *Erikson*, 48 Cal.App.4th at 1672; *Sitkei*, 85 Cal.App.2d at 338-339. The appropriate remedy is to void the Order which was granted based upon an ineffectual motion and affidavits. See *Douglas v. Janis* (1974) 43 Cal.App.3d 931, 936.

Pursuant to Section 660, the court was required to rule on the Motion for New Trial within 60 days of the service of the Notice of Motion, which occurred on February 14, 2013. Thus, even if Plaintiffs believed that at the time the Motion and affidavits were filed with in the department at the ex parte hearing on April 3, 2013, there were only 12 days within which the court could hear and rule on the motion. Section 659a requires that the other parties *shall*

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[3] Plaintiff attempted to file the papers in the department at the April 3, 2013 *ex parte* hearing, but this did not constitute a proper filing because the clerk did not receive the fee and officially stamp the documents until Plaintiff's copy service formally filed them on April 5, 2013. (Opn. at p. 5).

have 10 days from service of the motion for new trial in which to file and serve counter-affidavits. Section 659a also permits that the other parties be given an extension, not to exceed 20 days, by which to file and serve such counter-affidavits. Thus, according to Section 659a, SHARP had until April 12, 2013, at the earliest, within which to file any counter-affidavits, given the service date of April 2, 2013, but considering that the moving papers and affidavits were not actually properly filed with the court clerk until April 5, 2013, SHARP arguably had until Monday, April 15, 2013, within which to file any counter-affidavits.

At the *ex parte* hearing, held on the morning of April 3, 2013, counsel for SHARP argued that the court must allow the defendant to have 10 days, as required by Section 659a, within which to prepare counter-affidavits in response to Plaintiff's Motion for New Trial. Counsel for SHARP submitted a declaration indicating that he strenuously and repeatedly objected to the trial court's granting Plaintiff's request for an order shortening time to hear the Motion, argued that in doing so the trial court's ruling was highly prejudicial in that SHARP would be deprived of the full statutory-allotted time to file an opposition (thereby not waiving the issue and preserving it for appeal). (Declaration of Patrick F. Higle, pp.1-2, ¶4 in the Court of Appeal record; Opn. at p.6.) Plaintiffs' counsel also filed a declaration recounting what occurred at the hearing, "contradicting Sharp's counsel's declaration", according to the opinion. (Opn. at p.6, fn.6.) A closer reading of Plaintiffs' counsel's declaration reveals that Plaintiffs' counsel states as follows: "On April 3, 2013, I attended the hearing of Plaintiff's *ex parte application* [sic] for an order shortening time to hear his new trial motion. At the time of that hearing, counsel for Defendant acquiesced, albeit

somewhat grudgingly, to the order shortening time, and did not assert objections, 'strenuous and repeated' or otherwise." (Respondent's Opposition to Appellant's Motion for Production of Additional Evidence on Appeal, p.i, ¶2, in the Court of Appeal record.) The Court of Appeal denied SHARP'S motion to produce new evidence at appeal, even though Plaintiffs' counsel's responding declaration conceded that counsel for SHARP was at the ex parte hearing and "acquiesced, albeit somewhat grudgingly, to the order shortening time". This cannot in any way be construed a waiver on SHARP'S part, as Plaintiff's counsel admits SHARP was present and was resentfully unwilling to allow the trial court's ruling, but ultimately acquiesced to the trial judge's ruling.[4]

After argument at the April 3, 2013 ex parte hearing, the trial court ordered that SHARP file and serve its opposition to the motion by noon on April 10, 2013, with the motion set to be heard on April 12, 2013. (AA. at p. 241.) Thus, the court improperly shortened SHARP'S time within which to respond to Plaintiff's Motion, in violation of Section 659a, leaving only seven days to file an opposition and counter-affidavit. Not only did the court deprive SHARP of its mandated 10 days within which to prepare counter-affidavits, it also deprived SHARP an opportunity to get an extension of up to 20 days, pursuant to section 659a, to file its counter-affidavits.

There were no less than eight expert witnesses and three treating physicians who provided testimony at trial regarding the causation issue addressed in the Motion,

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[4]*See also Urshan v. Musicians' Credit Union* (2004) 120 Cal.App.4th at 758, 768, a case involving summary judgment, where the Court of Appeals stated that "waiver of the right to the statutorily mandated minimum notice period for summary judgment hearings should not be inferred from silence. Waiver of minimum notice in this context should only be based on the affirmative assent of the affected parties."

demonstrating the cumulative nature of Plaintiff's "new evidence" as well as the reasons that Plaintiff would not prevail on the causation issue, regardless of its admission as evidence at trial. SHARP was given seven days to put together an opposition to the Motion for New Trial. (AA. at pp. 242-268.) Had SHARP been given the statutory 10 or 30 days to respond, at least part of the evidence - the actual trial testimony - supporting SHARP'S brief would have been available for consideration for the trial court. Instead, the trial court ruled based on deposition testimony provided by Plaintiff with no evidence as to what was actually presented at trial. Similarly, the customary five days notice prior to the hearing on the motion, pursuant to Section 661[5], was not provided by the court because the court asked the parties to waive notice; thus further limiting SHARP'S ability to oppose the motion, and allowing the judge only one and a half days within which to consider the papers and review the evidence presented during a 10-week trial before formulating his ruling.

The trial court clearly encroached upon the interests of SHARP by shortening the time within which it had to respond to the Motion for New Trial. This was one consideration which the *Erikson* court discussed in holding that the aggregate time period within which to file the necessary affidavits was mandatory. *Erikson*, 48 Cal.App.4th at 1672. In this case especially, the Motion for New Trial which was based on newly discovered evidence, dealt with a complex medical issue that involved the testimony of eight expert witnesses and multiple treating physicians over the course of a 10-week trial. Thus, in order to properly address the issue at hand and the arguments raised in Plaintiff's Motion, a significant amount

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[5] Section 661, in pertinent part, provides that, "Five (5) days' notice by mail shall be given of such oral argument, if any, by the clerk to the respective parties".

of time was needed by SHARP, as evidenced by the second portion of its appellate brief. As well, there was important information that the attorneys for Respondent had in their possession, such as Eke Wokocha's Certificate of Death, which had not been provided to the attorneys for SHARP, which was important to have in preparing an opposition to Plaintiff's Motion.[6] In limiting SHARP to seven days, the court improperly infringed on SHARP'S ability to thoroughly respond to the Motion and as a result, the court did not have the opportunity to fully consider the arguments, and examine the evidence, in opposition to the Motion for New Trial. Although it is not necessary to show that SHARP was prejudiced by having less time within which to respond to the Motion, since the time limits are mandatory, it helps illustrate an important point that was discussed by the *Erikson* court as a justification for why the time limits are mandatory. The trial court exceeded its jurisdiction by depriving SHARP of its statutory time period within which to respond to Respondent's Motion for New Trial, and thus the Order Granting New Trial must be reversed.

At this point it is particularly important to note that a 2014 amendment to section 659a was made shortening the 20-day extensions available to each party to 10 days. Assembly Bill 1659, passed through the Assembly Floor by a 77-0 vote on April 21, 2014[7], "increases uniformity between the timelines for three different post-verdict motions: a motion for judgment notwithstanding the verdict (JNOV); a motion for a new trial; and a motion to set aside and vacate a jugdment." The "Background" portion of the bill reads as follows:

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[6] The Certificate of Death states that the "Immediate Cause" of Eke Wokocha's death was "spinal cord astrocytoma" which is consistent with the opinions of the defense causation experts.

[7] On June 17, 2014 the bill was passed by the Senate Judiciary Committee by a 6-0 vote, and it was also passed by the Assembly Judiciary Committee by a 10-0 vote.

> CCP generally sets timelines and procedures for the making and consideration of each of the above motions. If a motion is not filed and served within those timeframes, it can either be premature or overdue; **either way, the court would lack jurisdiction to consider and grant the motion**. Sponsored by both the California Defense Counsel and the Consumer Attorneys of California, this bill seeks to bring uniformity to the timeliness and procedures for filings and service of documents relating to these post-verdict motions so as to reduce confusion for the parties and promote the efficient use of court resources. [**Emphasis added**].

The Arguments in Support of the bill (there were no arguments in opposition), according to the author of the bill, were as follows:

> AB 1659 will set a uniform briefing schedule for post-trial motions. Currently, the deadlines for filing post-trial motions are inconsistent and cause confusion to practitioners. Post-trial motions refer to motions for a new trial, judgment notwithstanding the verdict (JNOV), and motions to vacate the judgment. [. . .]
>
> These motions are vital to civil litigation practice and the inconsistency in deadlines result in procedural difficulties by requiring practitioners to make numerous ex parte trips to the courthouse to work out scheduling.
>
> Given the importance of these motions and the budgetary constraints our courts face, conforming these deadlines will benefit the practice of law for all parties and will help save the court resources by minimizing the need for ex parte trips.
>
> AB 1659 will make scheduling more efficient for attorneys and the courts by simplifying and streamlining the deadlines for filing a motion for a new trial, a motion for judgment notwithstanding the verdict and a motion to vacate the judgment.

The bill contains a passage representing that the "Consumer Attorneys, a co-sponsor of the bill, writes that 'AB 1659 is a non-controversial, procedural measure that will set a uniform briefing schedule for certain post trial motions,' noting that, currently, 'post trial

motions are complex and intricate and laden with jurisdictional pitfalls.' The bill contains another passage representing that the California Defense Council, also a co-sponsor of the bill, adds that aligning the deadlines for these three post-trial motions 'will simplify practice to the benefit of lawyers, litigants, and the courts.'"

By the shortening of the 20-day extensions available to each party to 10 days this amendment was also arguably made in an effort to ensure that the overall 60-day deadline for the court to hear and rule on a motion for new trial pursuant to section 660 could be accomplished without depriving a party its statutorily-granted time to formulate moving papers and supporting affidavits. This deprivation is exactly what occurred in the underlying matter. The prevailing party at trial - SHARP - had 23 days taken from it to prepare moving papers and supporting affidavits to counter Plaintiff's motion for a new trial because the deadlines imposed on Plaintiff pursuant to section 659a were not strictly adhered to. This further highlights why it makes no sense that the deadline governing the motion for a new trial is jurisdictional, the overall deadline governing the court's drop-dead date to hear and rule on the motion for a new trial is jurisdictional, yet the deadline governing the filing and serving of the meat of the parties' arguments is not. The entire process was jurisdictional dating back to section 659's amendment in 1915, which was followed by the 1929 addition of section 659a, whereby the legislature simply took the language from section 659 governing the mandatory deadline for filing affidavits and made it its own subsection of section 659. In no way did that process ever change the jurisdictional nature of the entire process.

We therefore urge this Court to overrule the Fourth District Court of Appeal's holding that the aggregate 30-day deadline to file affidavits in section 659a is not jurisdictional.

Dated: August 26 2015

LOTZ, DOGGETT & RAWERS, LLP
JEFFREY S. DOGGETT
PATRICK F. HIGLE

By: _____
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CERTIFICATE OF WORD COUNT

(California Rules of Court, Rule 8.204(c)(1))

The text of this brief consists of 7,695 words as counted by the Corel WordPerfect Office X5 word-processing program used to generate the brief.

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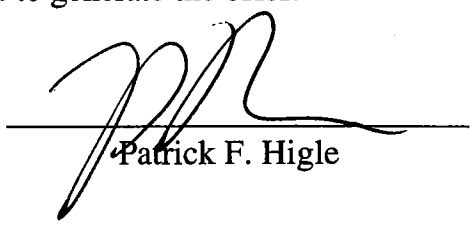

Patrick F. Higle

SHARP MEMORIAL HOSPITAL, ET AL. V. BERTHE FELICITE KABRAN
CASE NO. 37-2010-00083678-CU-PO-CTL
4th CIVIL NO. D064133

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on all interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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350 MCALLISTER STREET
SAN FRANCISCO, CALIFORNIA 94102-7303

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JON R. WILLIAMS, ESQ.
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OPAL WOFFORD

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HON. JOHN S. MEYER
330 WEST BROADWAY
SAN DIEGO, CALIFORNIA 92101

CALIFORNIA COURT OF APPEAL
4TH DISTRICT, DIVISION 1
750 "B" STREET, SUITE 300
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