S227393

IN THE SUPREME COURT OF CALIFORNIA

==========

SHARP MEMORIAL HOSPITAL dba
SHARP REHABILITATION CENTER

Defendant and Appellant,

vs.

BERTHE FELICITE KABRAN,
Successor in Interest to EKE WOKOCHA,

Plaintiff and Respondents.

==========

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

==========

OPENING BRIEF ON THE MERITS

==========

LOTZ, DOGGETT & RAWERS, LLP
JEFFREY S. DOGGETT
(SB No. 147235; jdoggett@ldrlaw.com)
PATRICK F. HIGLE
(SB No. 222585; phigle@ldrlaw.com)
101 West Broadway, Suite 1110
San Diego, California 92101
(619) 233-5565 • FAX: (619) 233-5564
ATTORNEYS FOR DEFENDANT AND APPELLANT
SHARP MEMORIAL HOSPITAL dba SHARP REHABILITATION CENTER

TABLE OF CONTENTS

OPENING BRIEF ON THE MERITS ..... -2-

STATEMENT OF THE ISSUES ..... -2-

LEGAL DISCUSSION ..... -3-

THE AGGREGATE 30-DAY DEADLINE IN SECTION 659a IS JURISDICTIONAL IN NATURE ..... -3-

CERTIFICATE OF WORD COUNT ..... -27-

TABLE OF AUTHORITIES

CASES

Baker v. Joseph (1860) 16 Cal. 173, 180 ..... -3-

Dasso v. Bradbury (1940) 39 Cal.App.2d 712, 716 ..... -3-

Lubeck v. Lopes (1967) 254 Cal.App.2d 63, 67-68 ..... -3-

Markaway v. Keesling (1963) 211 Cal.App.2d 607, 610 ..... -4-,-13-

Neff v. Ernst (1957) 48 Cal.2d 628, 634 ..... -4-,-13-

Bank of America Nat'l Trust & Sav. Asso. V. Superior Court of Kern County (1931) 115 Cal.App. 454, 457 ..... -4-

Hicks v. Ocean Share R. Inc. (1941)18 Cal. 2d 773, 789-790 ..... -5-,-15-

Erikson v. Weiner (1996) 48 Cal.App.4th 1663, 1672-1673 ..... -5-,-12-,-13-,-19-,-22-

Crespo v. Cook (1959) 168 Cal.App. 2d. 360, 663 ..... -5-,-15-

Sitkei v. Frimel (1948) 85 Cal.App.2d 335, 337 ..... -5-,-13-,-14-,-15-,-19-

Lewith v. Rehmke (1935) 10 Cal.App.2d 97, 105 ..... -5-,-15-

Terry v. Lesem (1928) 89 Cal.App. 682, 685-686 ..... -5-,-8-

W.P. Fuller & Co. McClure (1920) 48 Cal.App. 185, 194. ..... -5-

Siegal v. Superior Court (1968) 68 Cal. 2d 97, 100-101 ..... -5-,-14-

Hinrichs v. Maloney (1959) 169 Cal.App.2d 544, 546 ..... -5-

Kocher v. Fidelity & Deposit Co. (1934) 137 Cal.App. 474, 476 ..... -5-

Spottiswood v. Weir (1889) 0 Cal.448, 451 ..... -7-

Smith v. Whittier (1892) 95 Cal.279, 295 ..... -7-

W.P. Fuller & Co. V. McClure (1920) 48 Cal.App. 185, 194 ..... -8-

Boynton v. McKales (1956) 139 Cal. App. 2d. 777 ..... -9-

Wiley v. S. Pac. Transp. Co. (1990) 220 Cal.App.3d 177 ..... -9-,-10-

Fredrics v. Paige (1994) 29 CalApp.4th 1642 ..... -10-,-12-

Clemens v. Regents of University of Cal. (1970) 8 Cal.App.3d 1 ..... -10-,-11-

People v. Hutchinson (1969) 71 Cal.2d 342 ..... -11-

Jehl v. Southern Pac. Co. (1967) 66 Cal 2d 821 ..... -11-

Linhart v. Nelson (1976) 18 Cal.3d 641, 644 ..... -13-

Malkasian v. Irwin (1964) 61 Cal.2d 738, 745 ..... -13-

Maple v. Cincinnati (1985) 163 Cal.App.3d 387, 391 ..... -13-

Union Collection Co. V. Oliver (1912) 162 Cal. 755 [124 P. 435] ..... -14-

Douglas v. Janis (1974) 43 Cal.App.3d 931, 936 ..... -19-

Urshan v. Musicians' Credit Union (2004) 120 Cal.App.4th 758, 768 ..... -21-

CODES

California Code of Civil Procedure §659a
..... **-2-, -3-, -4-, -5-, -6-, -7-,-8-,-9-,-10-,-11-,-12-,-13-,-14-,-15-,-16-,-17-,-18-, -19-,-20-,-21-,-25-,-26-**

California Code of Civil Procedure section 656 ..... **-4-**

California Code of Civil Procedure section 658 ..... **-15-**

California Code of Civil Procedure section 660 ..... **-5-, -6-,-11-,-16-, -19-**

California Code of Civil Procedure section 661 ..... **-8-, -14-,-22-**

GOVERNMENT CODE

Government Code Section 70617(a)(5) ..... -17-

S227393

IN THE
SUPREME COURT OF CALIFORNIA

==========

SHARP MEMORIAL HOSPITAL dba
SHARP REHABILITATION CENTER

Defendant and Appellant

vs.

BERTHE FELICITE KABRAN,
Successor in Interest to EKE WOKOCHA,

Plaintiff and Respondents.

==========

OPENING BRIEF ON THE MERITS

==========

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]

---

[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,

---

[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*