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)

ANSWERING BRIEF ON THE MERITS

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Plaintiff and Respondent, BERTHE FELICITE KABRAN, as Successor in Interest to EKE WOKOCHA ("Kabran"), herby files this Answering Brief on the Merits responding to the Opening Brief filed by Defendant and Appellant, SHARP MEMORIAL HOSPITAL (collectively "Sharp"), on 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 Court has granted review in this matter to consider whether the time constraints set forth in Code of Civil Procedure section 659a are jurisdictional such that a trial court cannot consider documents filed after those statutory deadlines. Critical to that analysis is the meaning of the terms "mandatory" and "jurisdictional," and how the Court of Appeal applied those terms in construing section 659a, which specifies the time limits for filing and serving affidavits in support of a new trial motion.

As Kabran explains below, section 659a's outside limit of 30 days to file documents supporting a new trial motion may be mandatory, but is not jurisdictional. Thus, the Court of Appeal properly concluded that the trial court retained jurisdiction to decide Kabran's new trial motion, and correctly granted that relief to Kabran given the compelling nature of the newly discovered

evidence in question. Moreover, this Court should also conclude – as did the Court of Appeal – that Sharp is precluded from disputing the timeliness of Kabran's filing where it never raised that issue in the trial court, and never demonstrated that it suffered any prejudice. Accordingly, Kabran asks this Court to affirm the Court of Appeal's judgment, and to allow Kabran's action to proceed back to trial in the lower court.

II.

RELEVANT FACTS AND PROCEDURAL HISTORY

A. Background Facts.

This medical negligence action involves a then 58-year-old psychologist, Dr. Eke Wokocha ("Dr. Wokocha"), who became a near-total quadriplegic during his admission to Sharp in January 2009. (1 AA 119.)[1] Trial commenced on October 9, 2012. (*Ibid.*) After over six weeks of trial, the matter went to the jury on November 20, 2012. (RT 1819). The jury deliberated for more than three weeks before returning its verdict on December 13, 2012. (1 AA 91-94.) It found that Sharp was negligent in its

[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]); Kabran's Respondent's
(continued on the next page)

care and treatment of Dr. Wokocha, but also found, by a nine to three vote, that Sharp's negligence was not a substantial factor in causing harm to Dr. Wokocha. (*Ibid.*)

The evidence adduced at trial evidence made it clear that there was an acute deterioration in Dr. Wokocha's condition during the late evening of January 16, 2009, and the early morning of January 17, 2009. Specifically, Dr. Wokocha contended that this deterioration was due to an incident on January 16, 2009, in which he was mishandled by a Sharp occupational therapist, causing a hematoma which compressed the spinal cord, thereby rendering him a near-total quadriplegic. (Opn. at 2-3.) He further contended that when his condition began to deteriorate, nursing personnel failed to recognize it, or to take steps to obtain appropriate assessment and treatment until it was too late. (*Ibid.*)

All parties acknowledged that imaging studies demonstrated the presence of a large "intramedullary mass" in Dr. Wokocha's spinal cord, but there was substantial disagreement about the nature of that mass.[2] Sharp

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(continued from the previous page)

Appendix, abbreviated as: ([volume] RA [page]), and the Reporter's Transcript, abbreviated as: (RT [page]).

[2] "Intramedullary" means "within the spinal cord."

claimed that Dr. Wokocha's quadriplegia was caused solely by the growth of an astrocytoma (a type of neoplasm or cancer) in his cervical spinal cord, with its experts repeating that mantra throughout their testimony. (1 RA 7.) Dr. Wokocha conceded that although there was some evidence of slow growing astrocytoma cells in another portion of the spinal cord, the cause of his sudden onset of quadriplegia was trauma-related, due to the formation of a traumatic neuroma which formed only after he was dropped by Sharp personnel on January 16, 2009. (Opn. at 2-3, 18-20.)

The importance of the nature of that mass to the outcome of this case was emphasized by Sharp in its closing argument. Specifically, counsel for Sharp told the jury that the mass on Dr. Wokocha's spine "is growing and it is changing and the only thing it can be is a tumor." (RT 1733). Sharp further argued to the jury:

> I'll submit to you that when we go through the evidence in this case in my closing, what we really have to address here is the elephant in the room, which is the tumor. (RT 1679.)

Similarly, counsel for Sharp's co-defendant, John Jahan, MD (who subsequently settled out of the case during jury deliberations), told the jury:

> And so if somebody asked you . . . the 35,000 foot question, you know, what was the case? What did the plaintiffs have? You would say, well, it was a case about a guy who had a mass in his cervical spine. There's a dispute about what that was. (RT 1785.)

Given that the jury found in favor of Dr. Wokocha on the issue of whether Sharp was negligent, and given the nine to three decision in favor of Sharp on the issue of causation, it is clear that defense verdict was the result of the jury's acceptance of the defense position as to the nature of the mass in Dr. Wokocha's cervical spinal cord. (1 AA 91-92.)

Judgment was entered on February 5, 2013. (1 AA 95.) Although it is not included in the appellate record, Sharp asserts, and Dr. Wokocha does not dispute, that its notice of entry of judgment was served on February 14, 2013. (See Sharp's Opening Brief on the Merits at p. 16.)

B. <u>Sharp's New Trial Motion.</u>

Just over a month after the jury returned its verdict, Dr. Wokocha died on January 20, 2013.[3] An autopsy was performed, which allowed (for the first time) actual gross and microscopic evaluation of the intramedullary mass in Dr.

[3] Following that death, the trial court granted an application for an order substituting Kabran, as Successor in Interest to Dr. Wokocha, as the plaintiff in the underlying action.

Wokocha's cervical spinal cord. That examination showed that the mass did *not* consist of an astrocytoma or tumor, as Sharp had claimed (and presumably the jury had found), but rather was consistent with a traumatic injury. (RA 74-75; Opn. at 18-20.)[4]

On March 1, 2013, Kabran timely served a notice of her intention to move for a new trial. (1 AA 100.) The parties then stipulated, and based upon that stipulation the trial court ordered, that the time for Kabran to file her brief and affidavits in support of that motion be extended for 20 days. (1 AA 102-103.) Simply counting days on the calendar, that 20-day extension would have made the affidavits in support of that motion due on March 31, 2013. However, Kabran requested that judicial notice be taken of the fact that March 31, 2013 was a Sunday, and that Monday, April 1, 2013 was a designated day of observance of Cesar Chavez Day and therefore was a court "holiday" within the meaning of Code of Civil Procedure section 12a. Thus, the trial court was closed on Monday, April 1, 2013. (Opn. at 3.) The Court of Appeal granted that request. (Opn. at 4.) Consequently, the date any supporting

[4] In preparing its Appellant's Appendix, Sharp did not include the declarations filed on April 2, 2013, and the copy of Kabran's memorandum of points and authorities in support of her motion for new trial in that appendix was incomplete, as it was missing exhibits and relevant proofs of service. Accordingly, Kabran submitted a Respondent's Appendix, which contains accurate and complete copies of those records.

papers and affidavits were due to be filed with the trial court was April 2, 2013. (See Code Civ. Proc. § 12a; Govt. Code § 6700, subds. (a) & (f).)

Kabran pointed out this timing issue in her briefing before the Court of Appeal, and Sharp expressly conceded the same it in its Reply Brief filed before the Court of Appeal. (See Sharp's Appellant's Reply Brief at p. 3.) However, in its Opening Brief on the Merits recently filed with this Court, it appears Sharp has resurrected that issue, and has again asserted that April 1, 2013 was the filing deadline for supporting affidavits and other documents in conjunction with Kabran's new trial motion, notwithstanding the judicially noticed court holiday on that date. (See Sharp's Opening Brief on the Merits at pp. 17, 18.)

Notably, when Kabran sent her supporting papers for filing with the trial court on April 2, 2013, they were also personally served on Sharp's counsel. (1 RA 71-72.) The moving and supporting papers were also submitted for filing, and stamped as filed by the trial court on that same date. (1 RA 1, 73, 82.) However, the trial court clerk subsequently superimposed another stamp – which stated "File Stamp Cancelled" – and generated a "Notice to Filing Party" which stated: "We are unable to process the attached Motion for New Trial for the reasons indicated below: Fee(s) required: $60.00." (Opn at 4, fn. 3.) Apparently, as a result of inadvertence, the filing

fee was not submitted at the same time as Kabran's supporting papers on April 2, 2013. That filing fee was subsequently paid by Kabran, and the papers were re-stamped as filed on April 5, 2013. (1 RA 1, 73, and 82.) However, having been personally served with those same papers on April 2, 2013, Sharp was not impacted by the clerk's subsequent actions. Indeed, in opposing that motion, Sharp made no claim that the supporting declarations were not timely filed. (Opn. at 15-16.) Rather, it argued almost exclusively that the autopsy results did not constitute "new evidence," and were merely "cumulative." (1 AA 251.)

The motion for new trial was heard on April 12, 2013. After the trial court carefully considered the nature of the newly discovered autopsy evidence and its likely impact on the jury's deliberations on the critical issue of causation, it granted Kabran's new trial motion. (1 AA 269-270.)

C. Sharp's Appeal.

Clearly hoping to avoid a new trial where that compelling autopsy evidence would be considered by the jury, Sharp appealed from the trial court's new trial order. (1 AA 271.) In addition to repeating its arguments that the autopsy results did not amount to "new evidence" but were merely cumulative, Sharp also asserted – *for the first time* – that the brief and

affidavits supporting Kabran's new trial motion were not timely filed. It further asserted that the time limits for filing those supporting papers and affidavits were "jurisdictional," thus requiring the trial court to deny that new trial motion by operation of law. In support of that argument, Sharp principally relied on *Erikson v. Weiner* (1996) 48 Cal.App.4th 1663, claiming that the Third District had held that section 659a's relevant time limitation on filing affidavits in support of a new trial motion are "mandatory" and therefore "jurisdictional." (*Id.* at 1671, 1674.)

After carefully considering Sharp's contentions on appeal, the Fourth District affirmed the trial court's new trial order. In doing so, it stated that it was unnecessary to address Kabran's argument that the brief and declarations in support of the new trial motion were, in fact, timely filed on April 2, 2013, notwithstanding the trial court clerk's subsequent cancellation of the file-stamp of those documents. (Opn. at 10.) Instead, it emphasized that Sharp never objected to the timeliness of Kabran's supporting papers, and that in any event, it never suffered any prejudice from when those supporting papers were (correctly or incorrectly) deemed filed by the trial court. (Opn. at 15-16.) The Court of Appeal further reasoned that while the 30-day aggregate period for submitting papers supporting new trial motions was "mandatory," this did not mean that those time limitations were "jurisdictional" or that a trial court was

robbed of the power to consider such motions where those deadlines were not met. (Opn. at 11-15.) In that respect, it disagreed with *dicta* in *Erikson* that held that such deadlines were "jurisdictional," and further distinguished Sharp's reliance on cases which focused only on the deadline for the filing of a notice of intent to move for new trial (which is jurisdictional). (*Ibid.*) Along those same lines, the Court of Appeal also concluded that because the filing of supporting papers does not present a jurisdictional deadline, Sharp was precluded from raising that issue for this first time on appeal. (Opn. at 15-16.)

On June 25, 2015, Sharp filed its Petition for Review in this Court, asserting that the decision in *Erikson* is in direct conflict with the decision of the Fourth District in this case. Kabran opposed that petition, asserting that the language in question in *Erikson* was *dicta* only which has found no following in any subsequent decisions, and that the "conflict" in question was easily reconciled. On July 29, 2015, this Court granted Sharp's petition.

II.

DISCUSSION

A. The 30-Day Aggregate Time Limit on Filing Affidavits in Support of a New Trial Motion Contained in Code of Civil Procedure Section 659a Is Mandatory But Not Jurisdictional.

The version of Code of Civil Procedure section 659a in effect in 2013, when Kabran brought her new trial motion, provided:

> Within 10 days of filing the notice [of intention to move for a new trial], 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. (Code Civ. Proc. § 659a.)

It has been consistently held that the initial 10-day time limit described above for the filing of affidavits supporting a new trial is *not* jurisdictional. (See *Fredrics v. Paige* (1994) 29 Cal.App.4th 1642 [holding that "[t]he 10-day period is not jurisdictional (citations) and may be extended for good cause"]; *Wiley v. Southern Pacific Transportation Co.* (1990) 220 Cal.App.3d 177, 188 ["it 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"]; *Boynton v. McKales* (1956) 139 Cal.App.2d 777, 782 [also confirming the power of the courts to consider affidavits filed beyond that 10-day initial period, even where an extension is not previously sought by the moving party].) The question posed by the present case is whether the portion of the rule that allows for an extension of that initial 10-day period for "an additional period of not exceeding 20 days" (*i.e.*, the "aggregate 30-day period") is jurisdictional.

Before the Court of Appeal's Opinion in this case, there was a fair amount of *dicta* – dating back over a century – supporting the notion that the filing deadline for supporting papers and affidavits is *not* jurisdictional. For example, in *Clemens v. Regents of University of California* (1970) 8 Cal.App.3d 1, the Second District concluded that time limit was not jurisdictional: "Code of Civil Procedure section 659a contains strict time limits for the filing of affidavits and counter-affidavits with respect to such motions. Those time limits are now long past. They are, however, not jurisdictional." (*Id.* at 21-22.) That reasoning echoed what this Court had concluded 125 years previously. (See *Spottiswood v. Weir* (1889) 80 Cal. 448, 451 [no error in allowing filing of counter-affidavits after time fixed by the code]; see also 8 Witkin, *Cal. Procedure* (5th ed. 2008) Attack on Judgment in Trial Court, § 65, p. 650 [where Professor Witkin fairly summarized the state

of that law by observing "[a]ffidavits 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"].)

It was not until the Third District's decision in *Erikson* that there is any indication that the deadline for filing supporting affidavits – as opposed to the deadline for filing a notice of intent – is "jurisdictional." But even then, *Erikson's* treatment of that issue, given the particular procedural context in which that case was decided, was classic *dicta.* Specifically, in *Erikson*, the *only* supporting affidavit claimed to have been filed late 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 in *Erikson* actually 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.

Importantly, the *Erikson* court recognized that 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" consequences – has not been embraced by other courts either before or after *Erikson* was decided. (See Opn. at 8 and the several cases cited therein.) Indeed, 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 jurisdictional* – 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.

Although Sharp asserts that the aggregate 30-day time limit "has repeatedly been held to be jurisdictional," that assertion is simply incorrect. With the exception of the *Erikson* case, none of the cases cited by Sharp even use the words "jurisdiction" or "jurisdictional"; they merely assert that the time limit is "mandatory," or words to that effect. (See, *e.g.*

Hicks v. Ocean Share R. Inc. (1941) 18 Cal.2d 773, 789, 790 [concluding that an untimely filed affidavit was not part of the record, but not deciding whether the trial court lacked jurisdiction to consider it]; *Crespo v. Cook* (1959) 168 Cal.App.2d 360, 363 [confirming the trial court's rejection of an affidavit which was filed some 17 months after the deadline passed]; *Sitkei v. Frimel* (1948) 85 Cal.App.2d 335, 337 [concerning only the ability of the trial court to allow amendment of a defective notice of intention to move for new trial, and not focusing on the supporting documents to that motion]; *Lewith v. Rehmke* (1935) 10 Cal.App.2d 97, 105 [deciding whether a motion originally brought under section 662 could properly be considered a new trial motion where affidavits in support of that motion were not filed for nearly 45 days after the original 662 motion was made]; *Terry v. Lesem* (1928) 89 Cal.App. 682, 685-686 [confirming that the trial court could properly decline to consider affidavits filed after the time allotted by the new trial statute]; *W.P. Fuller & Co. v. McClure* (1920) 48 Cal.App. 185, 194-195 [affirming the trial court's denial of a new trial motion after it refused to consider a late-filed affidavit].) In that sense, it is the *Erikson* decision which is the outlier – not the Court of Appeal's decision – as *Erikson's* extraneous discussion of section 659a's briefing deadlines as being "jurisdictional" swims against the steady flow of contrary decisions on

that very issue, decided both before and after *Erikson*. (See, *e.g., Fredrics, supra,* 29 Cal.App.4th at 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, supra,* 220 Cal.App.3d at 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"].)

The obvious problem is a lack of clarity as to the meaning of the terms "mandatory" and "jurisdictional," which are *not* synonymous. As this Court explained in *Abelleira v. District Court of App. Third District* (1941) 17 Cal.2d 280:

> [T]he term "jurisdiction," . . . used continuously in a variety of situations, has so many different meanings that no single statement can be entirely satisfactory as a definition. (*Id.* at p. 288.)

And as Witkin further observed:

> 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, that are not directory but mandatory; these are binding, and parties must comply with them to avoid a default or other penalty. But failure to comply does not render the proceeding void . . . .

(2 Witkin, *Cal. Procedure* (5th ed. 2008), Jurisdiction, § 4.)

There are numerous cases where the courts have made it clear that "mandatory" and "jurisdictional" do not mean the same thing. In *County of Santa Clara Court of Santa Clara County* (1971) 4 Cal.3d 545, this Court pointed out that a claims filing limitations period is not necessarily jurisdictional:

> . . . A statute of limitations, for example, is mandatory in the sense that the court may not excuse a late complaint on grounds of mistake, neglect, or the like; it is not "jurisdictional". . . . (*Id.* at 551, fn. 2.)

Similarly, in *Chernow v. Chernow* (1954) 128 Cal.App.2d 816, the Second District explained:

> The requirement of section 128 of the Civil Code that a complaint for divorce allege residence is mandatory but it is not jurisdictional. Failure to comply with the mandate of the section is nothing more than error in the exercise of jurisdiction. Such failure does not result in any limitation of, or otherwise affect, the jurisdiction of the court. (*Id.* at 818.)

And in *In re Marriage of Harris* (1977) 74 Cal.App.3d 98, the First District analyzed the "jurisdictional" versus "mandatory" dichotomy as follows:

> The mandatory language of the statute does not necessarily make it jurisdictional . . . in the absence of any legislative expression, we hold that failure to comply with the affidavit requirement is an error in the exercise of jurisdiction, but does not deprive the court of jurisdiction to render judgment. (*Id.* at 102.)

All of which presents a conceptual distinction between "jurisdictional" and "mandatory" consistent with the Court of Appeal's Opinion in this case, and confirming how the contrary *dicta* in *Erikson* has neither been universally accepted nor followed. As Professor Witkin aptly summarized:

> Most procedural steps, including those regarded as "mandatory," are not jurisdictional. Errors or omissions in compliance with them are not fatal to the fundamental subject matter jurisdiction of the court, or to its jurisdiction to act. (2 Witkin, *supra, Cal. Procedure* (5th ed. 2008), Jurisdiction, § 290.)

In short, despite the rather syllogistic approach embraced by the Third District in *Erikson* – that mandatory necessarily means jurisdictional – courts and commentators alike have distinguished the difference between those two discrete concepts. One secondary authority aptly described that "mandatory" versus "jurisdictional" distinction as follows, especially as that distinction reflects on the concomitant duties of the parties and the courts to police such rules:

> For a jurisdictional rule, the answer is (usually) easy. A jurisdictional rule can be raised by any party at any time, including for the first time on appeal; it obligates the court to police compliance *sua sponte*; and it is not subject to principles of equity, waiver, forfeiture, consent, or estoppel.
>
> By contrast, the effects of a non-jurisdictional characterization are far less studied. Often, courts and commentators simply assume that non-jurisdictional rules have all of the inverse effects of jurisdictional rules: that is, they must be raised by a particular party by a particular time or they are forfeited; they are subject to consent and waiver and estoppel; and they are subject to principles of equity. Thus, some courts and commentators have assumed that if a rule has any attributes of jurisdictionality, it must be jurisdictional, and that if a rule is non-jurisdictional, then it must have no attributes of jurisdictionality. In addition, that assumption is made without any meaningful discussion of what attributes the non-jurisdictional rule in question should have as an institutional, analytical, or normative matter. (61 Stanf. L. Rev 1 (Oct. 2008) at 9-10.)

In contrast, the same commentator analyzed the concept of "mandatory," as follows:

> A mandatory rule is non-jurisdictional but nevertheless has the jurisdictional attribute of being unsusceptible to equitable excuses for noncompliance. Thus, a mandatory rule has the non-jurisdictional attributes of being waivable, forfeitable, and consentable, and a court has no obligation to monitor it *sua sponte*. However, if the rule is properly invoked by the party for whose

benefit it lies, a court has no discretion to excuse noncompliance.

The benefits of such a rule in theory should be obvious. Waiver, consent and forfeiture allow the parties to designate which issues require court decision and which are of such relative unimportance to the parties that they would rather forgo the costs of litigating them. They allow the parties to engage in mini-settlements during the litigation, trading the invocation of a mandatory rule for a concession by the other side. They promote finality by ensuring that a relatively unimportant rule that is waived and quickly forgotten will not rise later on its own to unravel months or years' worth of litigation and the settled expectations and choices of the parties. And they reduce the unfairness of allowing the noncomplying party to raise her own default as a basis for overturning an adverse result. In sum, mandatory rules further efficiency and economy, encourage settlement, maintain finality, and promote fairness, all while preserving litigant autonomy and the adversarial process.

In addition, a mandatory but non-jurisdictional characterization relieves the court of the burden to police the rule *sua sponte*, an obligation that can impose significant costs on a court. Free of that duty, a court need not monitor when the rule's requirement approaches and need not fret over whether the parties have complied when it arises. Instead, the court need only address the rule if the party for whose benefit it lies properly raises it, and the court can rely on the parties to brief the issue. Thus, mandatory rules further accuracy and conserve judicial resources by ensuring that the courts need only resolve the issue when the parties have raised and briefed it. (*Ibid.*)

In this case, Kabran has no disagreement with the *Erikson* court's finding, or Sharp's repeated assertions that the 30-day aggregate time limit in section 659a is "mandatory." However, Sharp's further contention – that "mandatory" means exactly the same thing as "jurisdictional" – not only confuses those two distinct concepts in a manner completely at odds with settled authority, but is also fatally grounded in the *dicta* of a single, outlier opinion, *Erikson*. Indeed, other than *Erikson*, no other court has held that the 30-day aggregate time limit for filing supporting affidavits under section 659a is "jurisdictional." Similarly, no court has suggested why that particular time limit should not be waivable, forfeitable, or consentable, or why a court should have an obligation to monitor it *sua sponte* if the objection is not registered by the opposing party. As the Court of Appeal aptly pointed out, if this was the Legislature's intent when it enacted and subsequently amended section 659a, then it would have provided a penalty for non-compliance within the timing requirements of that statute. (Opn. at 14.) The absence of such a statutorily-mandated penalty is consistent with a legislative desire to establish mandatory rules and procedures for deciding new trial motions, but to retain the jurisdiction of the trial courts to enforce those rules where they are not otherwise waived.

Finally, Sharp offers the further rationale that the deadlines imposed by section 659a should be considered jurisdictional because "the entire process of seeking a new trial based on newly discovered evidence is disfavored." In doing so, Sharp cites *Dasso v. Bradbury* (1940) 39 Cal.App.2d 712, 716 for the proposition that "[w]hen a trial court has exercised its discretion and granted a new trial [] such action is looked upon with either distrust or disfavor." But, in fact, this is precisely the *opposite* of what *Dasso* says:

> This does not mean, however, that when the trial court has exercised its discretion and granted a new trial that such action is looked upon with either distrust or disfavor. In fact, it has been said that one of the most prolific causes of miscarriages of justice is the reluctance of trial judges to exercise the discretion with which they are clothed to grant a new trial when the circumstances show that justice would be thereby served. This by reason of the curtailed power of appellate courts to disturb the discretion of the trial court once it is exercised in such matters. It is recognized that despite the exercise of diligent effort, cases will sometimes occur where, after trial, new evidence most material to the issues and which would probably have produced a different result is discovered. It is for such cases that the remedy of a motion for a new trial on the ground of newly discovered evidence has been given. (*Id* at 716-717.)

This is precisely a case where the trial court properly exercised its discretion to grant a new trial because, under the extraordinary facts of this case, it concluded that not granting a new trial would result in a

miscarriage of justice. The Court of Appeal agreed, applying the correct legal standards and preserving the jurisdiction of the lower courts to rule on such matters notwithstanding any technical defect (either real or perceived) in the parties' filings. That outcome not only furthers the legislative purpose of the new trial statute, but also properly preserves discretionary decision-making where it belongs: with the trial judge who has sat through the trial and is in the best position to determine whether the motion should be granted or denied.

B. Sharp Has Raised in Its Opening Brief Issues Not Properly Before This Court.

In its appeal to the Fourth District, Sharp additionally claimed that it had not been allowed adequate time to prepare its opposition to Kabran's new trial motion. Specifically, Sharp contended that on *ex parte* motion, the trial court impermissibly reduced the time it had to respond to Kabran's new trial motion 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.)

In doing so, the Court of Appeal considered and rejected Sharp's motion to produce "additional evidence" by way of a declaration from its counsel. It further found unpersuasive Sharp's assertions in its briefing based upon that same self-serving and unsubstantiated declaration. (Opn. at 6.) This was not a hard decision for the Court of Appeal to reach where Kabran had responded to that motion with declarations from her own counsel clarifying how: (1) Sharp had explicitly agreed to the briefing schedule set before the court before it later sought to complain about it; (2) Sharp had impliedly waived any objection to shortened time by failing to object in the trial court; and (3) the 10-day time period for Sharp's opposition was not "jurisdictional" in any event. In short, the Court of Appeal correctly determined that Sharp's motion to produce new evidence was without support in the trial court record and it therefore should not be permitted to raise that issue for the first time on appeal. (Opn. at 6, 15.)

Notably, when Sharp filed its Petition for Review with this Court, it made no mention at all of that issue, instead asserting that the only question to be considered for review was whether "[T]he 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?" However, in preparing its Opening

Brief on the Merits before this Court, Sharp has resurrected the issue of the timing applicable to the filing of its opposition brief, apparently cutting and pasting that argument from the briefing it filed before the Court of Appeal. Kabran assumes this was merely an oversight by Sharp, and that it does not intend for this Court to address an issue which is not supported by the record and which was not subject to clarification by Sharp on a Petition for Rehearing before the Court of Appeal. (See Rule of Court 8.500, subd. (c)(2).) But if the Court is inclined to entertain that issue, for the sake of brevity, Kabran refers to and incorporates here the arguments he raised in the Court of Appeal, found at pages 12-16 of his Respondent's Brief. Suffice it to say that Sharp never made a factual record in the trial court to substantiate those newly-raised contentions, and the Court of Appeal properly rejected its late efforts to do so for the first time on appeal. This Court should do the same.

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 properly evaluated by a jury on retrial – Kabran respectfully requests this Court to affirm the Court of Appeal's judgment.

Respectfully submitted,

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DATED: 11/25/15

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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 2015), contains 6,144 words.

Date: 11/25/15

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

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On **November 25, 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):

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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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Executed on **November 25, 2015**, at San Diego, California.

Chenin Andreoli

Chenin M. Andreoli