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IN THE SUPREME COURT OF CALIFORNIA

SHARP MEMORIAL HOSPITAL dba
SHARP REHABILITATION CENTER

Defendant, 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

PETITION FOR REVIEW

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PETITION FOR REVIEW

ISSUE PRESENTED

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?

INTRODUCTION: WHY REVIEW SHOULD BE GRANTED

This case presents a matter of statewide importance - whether the time constraints in California Code of Civil Procedure §659a (hereinafter "section 659a") are jurisdictional, such that a court cannot consider late-filed documents.

Following a 10-week medical malpractice trial in San Diego County Superior Court in late 2012, the jury returned a verdict in favor of Defendant, Appellant, and Petitioner, SHARP MEMORIAL HOSPITAL dba SHARP REHABILITATION CENTER. The parties stipulated to allow Plaintiff in the underlying action an additional 20 days past the 10 days allotted by section 659a for filing and serving of affidavits in support of a motion for new trial, giving Plaintiff until April 1, 2013 (a court holiday) to file any such affidavits. Plaintiff attempted to file its moving papers and affidavits on April 2, 2013, which were rejected by the Superior Court for failure to submit the mandatory filing fee. The filing was therefore "cancelled" by the court clerk. Plaintiff thereafter was successful in filing the moving papers and affidavits with the court on April 5, 2013. The San Diego Superior Court granted Plaintiff's motion for a new trial. Then-Defendant SHARP MEMORIAL HOSPITAL dba SHARP REHABILITATION CENTER appealed from that decision. On May 20, 2015, the California Court of Appeal, Fourth Appellate District, held that the time constraints in section 659a were not jurisdictional, and that the

Superior Court did not exceed its jurisdiction in considering the late-filed documents.

In a prior appellate decision, however, the California Court of Appeal, Third Appellate District, held that the time constraints in Section 659a *were* jurisdictional.[2] *Erikson v. Weiner* (1996) 48 Cal.App.4th 1663, 1672-73. The Superior Court in that underlying case considered late-filed affidavits, which the Court of Appeal, Third Appellate District ruled was error pursuant to section 659a. *Id.* at 1666, 1674.

The May 20, 2015 decision by the Court of Appeal, Fourth Appellate District, is in direct conflict with the Court of Appeal, Third Appellate District's decision in *Erikson*, as well as the First and Second Appellate Districts' previous decisions cited in footnote 2 below. Here, the Court of Appeal, Fourth Appellate District, expressly disagreed with *Erikson, supra*, 48 Cal.App.4th 1663, on whether section 659a is jurisdictional. The *Erikson* Court answered yes, while the Court of Appeal here answered no, stating "[w]e are not persuaded by *Erikson*'s analysis and reasoning." (Typed opn.

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It should be noted that the mandatory nature of the aggregate time limits of section 659a have also been addressed by the Court of Appeal, First District (*Crespo v. Cook* (1959) 168 Cal.App.2d 360, 363-64), and by the Court of Appeal, Second District (*Sitkei v. Frimel* (1948) 85 Cal.App.2d 335, 338-39). These cases were also cited in oral argument.

p.12). As a result, this decision by the Court of Appeal, Fourth Appellate District, has created a direct conflict in California law. A review by the California Supreme Court is necessary not only to secure uniformity of decision, but also to settle an important question of law.

LEGAL DISCUSSION

UNIFORMITY OF DECISION IS NECESSARY WHEN THE DECISIONS OF TWO COURTS OF APPEAL ARE IN DIRECT CONFLICT

Erikson v. Weiner is a 1996 Court of Appeal, Third Appellate District decision. That case was a medical malpractice action where a jury found the defendant doctor negligent and awarded damages to Plaintiff. *Erikson, supra,* 48 Cal.App.4th at 1666-67. The Defendant doctor filed notice of intention to move for a new trial. *Id.* at 1667. The Defendant asked for, and was granted, an additional 20 days past the 10 days allotted by section 659a for filing and serving of affidavits in support of the motion for new trial. *Id.* The Defendant filed an affidavit within the 30 day aggregate due date, and filed others after the deadline. *Id.* The Superior Court admitted the late-filed affidavit. *Id.* at 1669. The Court of Appeal, Third Appellate District, citing section 659a, stated that "we decide that the provision of Code of Civil Procedure section 659a that the trial court may extend the period within which to file an affidavit in support of a new trial 'not exceeding 20 days' is mandatory. Accordingly, we will not consider the defendant's affidavits filed after the expiration of that period." *Id.* at 1666.

The reasoning behind the *Erikson* decision holding that section 659a was jurisdictional was explained thoroughly in the opinion. *Id.* at 1672-73. The *Erikson* court notes that "[s]ection 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.[3] 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.*'" *Id.* at 1672 (emphasis in original). The court continued, "[s]ince 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." *Id.*

The *Erikson* court further reasoned that all of the related statutory time frames for initiating and resolving a new trial motion are also mandatory. *Id.* "The notice of new trial must be given within 15 days of mailing the notice of entry of judgment; a late filing is void." *Id.*, citing California Code of Civil Procedure section 659. "The court must resolve the motion by 60 days from the date of mailing the notice of entry of judgment; this time period is

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It is well-established that the *10-day* limit is not jurisdictional, as the statute itself provides for a discretionary extension by the trial court. However, the 30-day aggregate time limit is jurisdictional according to the language of the statute.

jurisdictional." *Id.*, citing California Code of Civil Procedure section 660. "The opposing party must have at least 10 days to file counter-affidavits." *Id.*, citing section 659a." "When the time to file counter-affidavits has expired the respective parties are entitled to five days' notice by mail of the hearing." *Id.*, citing California Code of Civil Procedure section 661. The *Erikson* court continued, [i]n 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." *Id.* "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." *Id.* at 1672-73.

In this case, the San Diego Superior Court jury rendered its verdict on December 13, 2012. (AA at pp. 91-94.) Judgment was entered on February 5, 2013. (AA at pp. 95–99.) Notice of Entry of Judgment was personally served on all parties on February 14, 2013. (AA at pp. 104-105.) Plaintiff successfully filed notice of intent to move for a new trial within the statutory provided 15-day time frame, on March 1, 2013. (AA at pp. 100-101; section 659(a)(2).) Pursuant to section 659a, Plaintiff then had 10 days, or until March 11, 2013, to file its moving papers and "any affidavits intended to be used

upon such motion". However, also pursuant to section 659a, all parties stipulated to allow Plaintiff the additional 20 days provided by statute to file moving papers and any supporting affidavits. (AA at pp. 102-103.)

Plaintiff missed the new deadline to file moving papers and supporting affidavits on April 1, 2013 (a Court holiday). Plaintiff first attempted to file moving papers and supporting affidavits on April 2, 2013, but the moving papers and supporting affidavits were rejected by the San Diego County Superior Court because they were not supported by the required filing fee. (AA at pp. 106-169.) Plaintiff then successfully filed moving papers, supporting affidavits, and the filing fee with the San Diego County Superior Court on April 5, 2013. (AA at pp. 170-240.) This was three days beyond the aggregate maximum time allotted by section 659a, and thus the San Diego County Superior Court should not have considered the late-filed documents, and exceeded its jurisdiction in doing so.

Also on April 3, 2013, Plaintiff in the underlying medical malpractice case appeared in San Diego County Superior Court on an *ex parte* basis to request that the Court hear Plaintiff's Motion for New Trial on August 15, 2013.[4] (AA at pp. 104-105.) Pursuant to California Code of Civil Procedure

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[4] It should be noted that Plaintiff re-filed the original papers directly in the department on April 3, 2013, again without a filing fee.

section 660, the Superior Court had only 60 days to hear and rule on Plaintiff's motion. However, because April 5, 2013 was the date of the valid filing of Plaintiff's moving papers and affidavits, that left only 10 days (out of the potential 30 days allotted by section 659a) for Defendant, Appellant, and Petitioner SHARP MEMORIAL HOSPITAL dba SHARP REHABILITATION CENTER to file its opposing papers and affidavits, and to have the Superior Court hear and rule on the motion. However, at the *ex parte* hearing, it was ordered that SHARP MEMORIAL HOSPITAL dba SHARP REHABILITATION CENTER file and serve its opposition papers and affidavits by 12:00 p.m. on April 10, 2013, leaving it just seven days to do so. (AA at pp. 241.) SHARP MEMORIAL HOSPITAL dba SHARP REHABILITATION CENTER was entitled, under section 659a, to a full 10 days to file its opposition and moving papers, as well as an additional 20 days if good cause were shown or the parties so stipulated. This was in violation of section 659a, and thus the San Diego County Superior Court exceeded its jurisdiction in doing so. In fact, this very scenario at hand highlights why *all* the time limits for noticing/bringing a motion for a new trial are jurisdictional.

The San Diego County Superior Court heard Plaintiff's Motion for New Trial on April 12, 2013, and granted it. Defendant, Appellant, and Petitioner SHARP MEMORIAL HOSPITAL dba SHARP REHABILITATION CENTER appealed the San Diego County Superior Court's decision to

consider the late-filed documents and grant a new trial. The Court of Appeal, Fourth Appellate District, disagreed with the established *Erikson* matter, *supra*, 48 Cal.App.4th 1663, as to whether the Court has discretion to admit affidavits submitted after the 30-day aggregate time period set forth in section 659a. The *Erikson* Court answered that the statute was jurisdictional, while the Court of Appeal, Fourth Appellate District here answered it was not, stating "[n]or are we persuaded by *Erikson*'s interpretation of the statute and its purported consequences." (Typed opn. p.13). As such, interpretation of section 659a and the corresponding established, published case law, is an important question of law warranting this Court's consideration. California *Rules of Court* Rule 8.500(b)(1).

The Court of Appeal here also stated that because SHARP MEMORIAL HOSPITAL dba SHARP REHABILITATION CENTER failed to challenge the timeliness of the Plaintiff's filed moving papers and affidavits, or the period of time in which it was left to file opposing papers in the Superior Court, and instead challenged the motion on its merits, SHARP MEMORIAL HOSPITAL dba SHARP REHABILITATION CENTER may not for the first time on appeal challenge the Superior Court's power to consider Plaintiff's new trial motion. (Typed opn. p.16).

SHARP MEMORIAL HOSPITAL dba SHARP REHABILITATION CENTER could not object to the late filing of Plaintiff's affidavits at the April 12, 2013 hearing on Plaintiff's Motion for New Trial because SHARP MEMORIAL HOSPITAL dba SHARP REHABILITATION CENTER could have no idea at that time that the moving papers and affidavits which Plaintiff had filed and served on April 2, 2013 had been rejected by the Superior Court. The only persons who could conceivably be charged with notice would be the Plaintiff, the Superior Court clerk, and perhaps the Superior Court department where the motion would be heard. Plaintiff served SHARP MEMORIAL HOSPITAL dba SHARP REHABILITATION CENTER its moving papers and affidavits on April 2, 2013, none of which had a "FILE STAMP CANCELLED" indication on them. Presumably the Superior Court returned the cancelled filings to Plaintiff.

The Superior Court's ruling on April 3, 2013, eliminated most of the statutory time SHARP MEMORIAL HOSPITAL dba SHARP REHABILITATION CENTER had to gather affidavits and mount an opposition. SHARP MEMORIAL HOSPITAL dba SHARP REHABILITATION CENTER simply cannot be held to a standard whereby every pleading or document it is served must be crossed-check within the Superior Court system for validity. SHARP MEMORIAL HOSPITAL dba SHARP REHABILITATION CENTER could not have waived what it could

not have possibly known. Instead, SHARP MEMORIAL HOSPITAL dba SHARP REHABILITATION CENTER raised the argument at the first opportunity it had upon learning of Plaintiff's April 2, 2013 rejected moving papers and affidavits - which was at the Court of Appeal.

Furthermore, if indeed section 659a is jurisdictional, as is the case for California Code of Civil Procedure section 659 and section 660 (*Tri-County Elevator Co. v. Superior Court* (1982) 135 Cal.App.3d 271, 277; see also *Siegal v. Superior Court* (1968) 68 Cal.2d 97, 101), then jurisdiction cannot be conferred by waiver. It is well-established that violations of the time limits of California Code of Civil Procedure section 659 and section 660 render a motion for new trial "denied by operation of law". *Siegal, supra,* 68 Cal.2d at 101-102. Thus, the trial court possesses no discretion and cannot simply act in *excess of jurisdiction* in ruling on the motion. Rather, the court lacks *fundamental jurisdiction* to rule at all on matters violating these sections.

The Court of Appeal, Fourth Appellate District's ruling in this instance concludes that the time limits in section 659a are not jurisdictional. (Typed opn. p. 15). In support of this conclusion, the Court of Appeal, Fourth Appellate District, looks to the language of section 659a, and indicating that "shall" does not mean "mandatory" in this instance. (Typed opn. pp. 12-13). However, as pointed out in *Erikson*, not only does "shall" mean "mandatory"

as used in section 659a, but the same use of the word "shall" is in fact interpreted to be jurisdictional in nature under California Code of Civil Procedure section 659 (holding that under California Code of Civil Procedure section 659 a late filing of a notice of new trial is void). California Code of Civil Procedure section 659 provides no additional language which would lead to a different conclusion as to its "mandatory" nature than that which is contained in section 659a. *Erikson, supra*, 48 Cal.App.4th at pp. 1672-73

CONCLUSION

The Court of Appeal, Fourth Appellate District's ruling that the time constraints found in section 659a are not jurisdictional has serious implications for Plaintiffs and Defendants, alike, throughout the state. Its holding is in direct conflict with the Court of Appeal, Third Appellate District, which would not consider late filed documents pursuant to section 659a, creating uncertainly in the interpretation of the statute going forward. It is essential that this Court grant review.

Dated: June 24 2015

LOTZ, DOGGETT & RAWERS, LLP
JEFFREY S. DOGGETT
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By: _____
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SHARP MEMORIAL HOSPITAL dba SHARP REHABILITATION CENTER

CERTIFICATE OF WORD COUNT

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

The text of this brief consists of 2,703 words as counted by the Corel WordPerfect Office X5 word-processing program used to generate the brief.

Dated: June 24, 2015

Patrick F. Higle

ADDENDUM

Filed 5/20/15

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BERTHE FELICITE KABRAN, as Successor in Interest, etc., Plaintiff and Respondent. v. SHARP MEMORIAL HOSPITAL, Defendant and Appellant,	D064133 (Super. Ct. No. 37-2010-00083678-CU-PO-CTL)

APPEAL from an order of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed.

Berman & Riedel and William Michael Berman; Kenneth M. Sigelman & Associates and Kenneth M. Sigelman, Penelope A. Phillips; Jon R. Williams for Plaintiff and Respondent.

Lotz, Doggett & Rawers and Jeffrey S. Doggett, Evan J. Topol for Defendant and Appellant.

Defendant and appellant Sharp Memorial Hospital dba Sharp Rehabilitation Center (Sharp) appeals from an order granting plaintiff and respondent's Berthe Felicite Kabran's motion for new trial following a special verdict on a cause of action for medical

malpractice in which the jury found Sharp was negligent in the care and treatment of plaintiff's predecessor, Dr. Eke Wokocha, but that the negligence was not a substantial factor in causing harm.[1] Sharp contends the trial court acted in excess of its jurisdiction by granting a new trial because the motion was untimely, rendering the order void. It further contends the court abused its discretion because the evidence proffered by plaintiff in support of the new trial motion was cumulative and consistent with defense expert trial testimony, and thus would not change the outcome of the trial. We conclude that no jurisdictional defect appears in the court's new trial order and, as a result, Sharp may not raise its appellate contentions as to the motion's timeliness for the first time on appeal. We further conclude the trial court did not manifestly abuse its discretion in assessing the new evidence—results of an autopsy conducted on Dr. Wokocha—and ruling on this record that plaintiff should be granted a new trial. Accordingly, we affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In 2008, Dr. Wokocha began developing weakness in his upper extremities. By early 2009, he was experiencing progressive numbness, tingling, and weakness in his limbs, requiring him to use a wheelchair and walker. Medical resonance imaging (MRI) conducted in late 2008 showed two distinct problems in the same location of his cervical spine: narrowing of the spinal canal (cervical stenosis) as well as a mass, later determined

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1 Wokocha, a clinical psychologist, died after the jury returned its verdict, and the court substituted Kabran as his successor in interest. We refer to plaintiff at times as Dr. Wokocha as do the parties on appeal.

to be a low-grade astrocytoma or tumor, on the back side of his spinal cord. Dr. Wokocha underwent spinal decompression surgery on January 7, 2009, and five days later was transferred to Sharp's rehabilitation center. After the evening of January 16, 2009, while at Sharp, he experienced a rapid decline in his condition resulting in complete quadriplegia.

Dr. Wokocha sued Sharp and others for negligence, and trial commenced in October 2012. The case was tried in part on the theory that while at Sharp Dr. Wokocha was mishandled by an occupational therapist during an attempted transfer from his bed to a shower commode chair, resulting in spinal shock and active bleeding (a hematoma), which caused his rapid deterioration to quadriplegia.[2] The parties presented conflicting expert testimony on the issues of negligence and causation, including based on the appearance of various MRIs taken of Dr. Wokocha's spine in January and February 2009, July 2011, and August 2012. The jury returned a special verdict finding Sharp was negligent in its care and treatment of Dr. Wokocha, but that the negligence was not a substantial factor in causing him harm.

On March 1, 2013, Kabran timely filed and served her notice of intention to move for a new trial on grounds, among others, of newly discovered evidence. Several days later, pursuant to the parties' stipulation, the court granted her an extension of time until Monday, April 1, 2013, which happened to be a court holiday, to file and serve her motion and supporting affidavits. On April 2, 2013, Kabran personally served her notice

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2 Trial proceeded only against Sharp and John Jahan, M.D., one of Dr. Wokocha's treating physicians.

of motion and motion for new trial, along with two supporting declarations. She attempted to file the papers in the superior court that day, but ultimately, because the requisite filing fee was not paid, the court clerk cancelled the file stamp and did not process the motion.[3] On April 3, 2013, Kabran successfully applied ex parte for an order setting the new trial motion for hearing on April 12, 2013. The court ordered Sharp's opposition papers to be filed and served by noon on April 10, 2013. Kabran's new trial motion was eventually filed with the court on April 5, 2013, and her supporting declarations were filed on April 9, 2013.

Kabran's new trial motion asserted newly discovered evidence, namely, the results of an autopsy assertedly showing that the damage to Dr. Wokocha's spine was not the result of his tumor, and that "the [defense] witnesses who testified that the markedly abnormal area on MRI consisted entirely of a malignant astrocytoma, and/or that it was unrelated to trauma, were wrong." In support of the motion, Kabran submitted a declaration from Guerard Grice, M.D., who with another doctor had performed an autopsy, removed Dr. Wokocha's brain and spinal cord, and examined slides of tissue blocks taken from the cervical spinal cord. Kabran also submitted a declaration from her trial expert Jeffrey Gross, M.D., a neurological surgeon. Kabran argued that the tissue obtained from the autopsy from the "obliterated" portion of Dr. Wokocha's cervical spinal

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3 We grant plaintiff's request to judicially notice the San Diego Superior Court's April 4, 2013 notice to filing party (Evid. Code, §§ 452, subd. (d) [allowing judicial notice of court records], 459, subd. (a)) as well as the fact that March 31, 2013, was Cesar Chavez day. (Evid. Code, § 451, subd. (f) [judicial notice of facts of generalized knowledge].)

Sharp now contends the new trial motion was untimely because plaintiff did not pay the required filing fee until April 5, 2013, after the prescribed time limit for filing the motion. Responding to plaintiff's argument that Sharp forfeited timeliness contentions by failing to raise them in the trial court, Sharp argues the statutory time periods, including the periods in which to file opposing papers or affidavits in support of a new trial motion, are jurisdictional, and as a result it cannot have waived any objection to the untimely filing in the trial court.

As an additional ground to reverse the order granting a new trial, Sharp asserts in its opening and reply briefs that the trial court erred by shortening time for it to respond to the motion in violation of Code of Civil Procedure[5] section 659a, depriving it of the mandatory 10 days within which to either prepare counteraffidavits or obtain an extension of time to file them. Because the record does not contain a reporter's transcript of the April 3, 2013 ex parte hearing on the matter, Sharp has moved to produce additional "evidence" by way of its counsel's declaration as to what he said at that ex parte hearing.[6]

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5 Statutory references are to the Code of Civil Procedure unless otherwise specified.

6 Plaintiff's counsel responds to that motion by submitting his own declaration recounting what occurred at the hearing, contradicting Sharp's counsel's declaration. We deny Sharp's motion to produce new evidence under section 909, as the circumstances do not warrant our acting as a fact finder on matters occurring before the trial court. Generally speaking, we review the record as it was before the trial court. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) "[T]he 'circumstances under which an appellate court can receive new evidence after judgment, or order the trial court to do so, are very rare. For this court to take new evidence pursuant to statute (§ 909) . . . , the evidence normally must enable the Court of Appeal to affirm the [order], not lead to a reversal.' " (*J.J. v.*