S227393

IN THE SUPREME COURT OF CALIFORNIA

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SHARP MEMORIAL HOSPITAL dba
SHARP REHABILITATION CENTER

Defendant and Appellant,

vs.

BERTHE FELICITE KABRAN,
Successor in Interest to EKE WOKOCHA,

Plaintiff and Respondent.

SUPREME COURT
FILED

JAN 12 2016

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Deputy

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

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REPLY BRIEF ON THE MERITS

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I.

REPLY BRIEF

Plaintiff and Respondent, Berthe Felicite Kabran (hereinafter "KABRAN"), spends a great deal of time in her Answering Brief on the Merits arguing that the term "mandatory" is not synonymous with the term "jurisdictional". Defendant and Appellant, Sharp Memorial Hospital dba Sharp Rehabilitation Center (hereinafter "SHARP"), does not dispute that the terms "mandatory" and "jurisdictional" are indeed sometimes different. SHARP understands that there is often a distinction, but also understands that sometimes a rule can be both "mandatory" and "jurisdictional" at the same time.

KABRAN appears to argue that the 30-day aggregate time limit on filing affidavits in support of a new trial motion in California Code of Civil Procedure section 659a is mandatory, or discretionary, but that it is not jurisdictional, though no other court has so held other than the Fourth District Court of Appeal in this matter. SHARP has argued that 659a actually contains a discretionary section of the statute (the initial 10-day period in which to file supporting affidavits), as well as a jurisdictional section (the aggregate 30-day period made possible by a 20-day extension).

KABRAN cites to *Wiley v. Southern Pacific Transportation* (1990) 220 Cal.App.3d 177, 188, and *Fredrics v. Paige* (1994) 29 Cal.App.4th 1642, for the proposition that the first part of section 659a, the 10-day period from the filing of the notice in which to serve supporting affidavits, is not jurisdictional, and may be extended for good cause. SHARP does not and has never disputed that this portion of section 659a

is not jurisdictional, and is in fact discretionary because by the plain language of that portion of the statute the court can, "for good cause shown" or by "written stipulation of the parties", extend that 10 day period "for an additional period of not exceeding 20 days." These two cases do not advance KABRAN'S position.

To be sure, never do the words "mandatory" or "jurisdictional" appear in the statutes governing moving for a new trial, including the statute at issue here, section 659a. As such, Courts look to the terms and meaning of the language within the statute, as well as the Legislative history, for guidance. SHARP has done both of those extensively in its Opening Brief on the Merits.

Erickson v. Weiner (1996) 48 Cal.App.4th 1663 is on point and instructive, and has been fully explained in SHARP'S Opening Brief on the Merits. KABRAN asserts that the *Erickson* case is an "outlier" case and that its holding that the 30-day aggregate time limit in which to file affidavits is jurisdictional is "dicta" and should not be considered by this Court. While it is SHARP'S contention that the *Erickson* court's holding is certainly not dicta, that court examined the true operational definition of the term jurisdictional versus mandatory, and correctly determined that the 30-day aggregate time limit on filing affidavits in support of a new trial motion is in fact jurisdictional.

KABRAN further asserts that no other case has held the 30-day aggregate time limit under section 659a in which to file supporting affidavits to be jurisdictional. This is simply not true. SHARP set forth and discussed each and every California case so holding in its Opening Brief on the Merits. KABRAN would have this Court believe that

just because the opinions in the cases governing 659a, all of which SHARP has briefed in its Opening Brief on the Merits, do not use the specific word "jurisdiction" or "jurisdictional", then those cases cannot stand for the proposition that the 30-day aggregate time limit on filing affidavits in support of a new trial motion is jurisdictional. But in those cases those the various District courts did exactly what the *Erickson* court did in examining the true operational definition of the terms jurisdictional versus mandatory in the setting of the language of section 659a, taken into context with the rest of the statutory scheme pertaining to moving for a new trial (section 656 et sec.), and those courts all found that the 30-day aggregate time limit on filing affidavits in support of a new trial motion is jurisdictional (i.e. unable to be extended beyond the 20-day extension the statute provides, rendering late-filed affidavits not part of the record and error if considered by the court) and the initial 10-day time limit on filing affidavits is mandatory (i.e. discretionary because that 10-day time limit can be extended up to the 30-day aggregate). In fact, SHARP, in its Opening Brief on the Merits, attempts to cite every single case from California that deals with section 659a and its language making available a 30-day absolute outside aggregate deadline. Some of the cases dealt only with the initial 10-day period in which to file affidavits, which is clearly not jurisdictional and SHARP has never so asserted. The others dealt head on with the question and ruled the 30-day aggregate under section 659a to be jurisdictional. KABRAN did not cite a single section 659a case that SHARP did not cite to and explain in its Opening Brief on the Merits.

KABRAN cites *Clemens v. Regents of University of California* (1970) 8 Cal.App.3d 1, *Spottiswood v. Weir* (1889) 80 Cal. 448, and Witkin's *Cal. Procedure* for the proposition that the filing deadline for supporting papers and affidavits is not jurisdictional. *Clemens* is a very unique case in which the 659a deadlines were initially met, but the question was whether the Court of Appeal could consider late-filed declarations from jurors regarding bias. While the Court of Appeal was considering the *Clemens* matter, the California Supreme Court handed down a decision on juror declarations being deemed admissible to demonstrate bias. The Court of Appeal was then faced with separate conflicting laws, and it made very clear that its decision in the *Clemens* case was "in the narrow circumstances of [that] case." *Clemens*, 8 Cal.App.3d at 19-20. It bears repeating again that *Spottiswood* is an 1889 case pre-dating section 659a, and was based solely on then-section 659 which did not contain any language regarding an extension of time which could not be exceeded, and is therefore inapplicable to this matter. Witkin only referenced the case of *Fredrics v. Paige* (1994) 29 Cal.App.4th 1642 which dealt with the initial 10-day period in which a party may file affidavits. The *Fredrics* court specifically limited its ruling to the initial 10-day deadline, and is thus inapplicable to this matter. *Fredrics*, 29 Cal.App.4th at 1648. Witkin also went on to cite to *Erickson* for the proposition that the 30-day aggregate under section 659a is jurisdictional, and the Fourth District Court of Appeal so noted in its opinion in this matter.

KABRAN points to six other cases that SHARP has cited to and explained in its Opening Brief on the Merits, but KABRAN attempts to distinguish these six cases for not standing for the proposition that the 30-day aggregate under section 659a is jurisdictional because none of the courts in those six cases use the word "jurisdiction" or "jurisdictional" in their opinions. This argument is misplaced. Each of these cases, which involve the California Supreme Court, The Court of Appeal of California, First Appellate District, Second Appellate District, and Fourth Appellate District, (not to leave out the Third Appellate District in *Erickson v. Weiner* (1996) 48 Cal.App.4th 1663, 1672) have all held that the 30-day aggregate time limit under section 659a in which to file and serve supporting affidavits to a motion for new trial is jurisdictional - or unable to be extended further by a trial court, rendering any late-filed affidavits not part of the record and rendering them unable to be considered as part of the motion - even without using the word "jurisdictional" in their decisions. Looking to the language of these six cases - *Hicks v. Ocean Shore R. Inc.* (1941) 18 Cal.2d 773; *Crespo v. Cook* (1959) 168 Cal.App.2d 360; *Sitkei v. Frimel* (1948) 85 Cal.App.2d 335; *Lewith v. Rehmke* (1935) 10 Cal.App.2d 97; *Terry v. Lessem* (1928) 89 Cal.App. 682; and *W.P. Fuller & Co. v. McClure* (1920) 48 Cal.App. 185 - we take each in turn here.

KABRAN states that the California Supreme Court in *Hicks*, concluded that an untimely filed affidavit was not part of the record, but that the Court did not decide whether the trial court lacked jurisdiction to consider it. *Hicks*, 18 Cal.2d at 789-90. While this statement supports SHARP'S position, this is not exactly what the *Hicks* Court

said. In fact, the Court stated as follows: "The Middleton 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. ¶ The purported appeal from the order denying the motion for a new trial is dismissed. ¶ The judgment is affirmed." *Id.* If the affidavit was improperly before the Court, and not part of the record one can (and should) surmise that there was a procedural barrier to having the affidavit considered. The ruling implies the *Hicks* Court's belief that the 30-day aggregate under section 659a is jurisdictional, even without using the word "jurisdictional" in its decision.

KABRAN points to *Crespo* and asserts that the Court of Appeal confirmed the trial court's rejection of an affidavit filed 17 months after the deadline passed. *Crespo*, 168 Cal.App.2d at 363. This is incorrect. In *Crespo*, the trial court granted a patient a new trial against a physician for medical malpractice based on juror misconduct and irregularity in the proceedings of the jury. *Id.* at 361-63. The patient in *Crespo* submitted an affidavit of the jury foreman, and the trial court granted a new trial based on the affidavit. *Id.* The Court of Appeal reversed the order granting a new trial, holding that the affidavit did not show bias or concealment as required. *Id.* at 362-63. Plaintiff then tried to introduce a separate affidavit by Plaintiff's attorney affirmatively showing "that neither he nor his counsel knew of the facts constituting the misconduct before the rendition of the verdict", a requirement that Plaintiff did not fulfil at the trial court level, and instead tried to introduce it at the Court of Appeal. *Id.* at 363. The Court of Appeal stated that "[t]his novel effort must fail." *Id.*

Bear in mind that the *Crespo* case is set forth in the portion of KABRAN'S Answering Brief on the Merits where they claim that because the court did not use the language "jurisdiction" or "jurisdictional", then the rejection of the late-filed affidavit cannot be held as jurisdictional. SHARP admits that the *Crespo* court did not use the language "jurisdiction" or "jurisdictional", but the *Crespo* court in reversing the trial court's granting of a motion for new trial tells us *why* the court so reversed the trial court's decision. The Court of Appeal specifically stated that "[m]otions 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." *Id.* at 363, *citing Sitkei v. Frimel*, (1948) 85 Cal.App.2d 335, 338-339; *Lewith v. Rehmke* (1935) 10 Cal.App.2d 97, 105; *Terry v. Lessem* (1928) 89 Cal.App. 682, 685-686. It does not get any clearer. Without using the language "jurisdiction" or "jurisdictional", the *Crespo* court nonetheless by definition and meaning of the language it used in its holding - "[t]he code specifies the time within which such affidavits must be filed, and specifically limits extension of such time to 20 days", and "[a]ffidavits filed in the trial court after the limited time are not to be considered" - made clear that the *Crespo* court held that the 30-day aggregate under section 659a is jurisdictional.

KABRAN then points to *Sitkei* and asserts that the Court of Appeal did not focus on the supporting documents to a motion for a new trial, but focused only on the ability of

the trial court to allow amendment of a defective notice of intention to move for a new trial. *Sitkei v. Frimel* (1948) 85 Cal.App.2d 335, 337. While a portion of the *Sitkei* court's focus may have been on defective notice of intention to move for a new trial (though the decision seems to focus on both defective notice and the supporting affidavits), the language from the court in addressing the issue of supporting affidavits was not ambiguous. "The [trial] court erred in considering the affidavits because they were filed too late." *Id.* at 338. "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." *Id.* at 338-39, *citing* Code Civ. Proc. §659a; *Hicks v. Ocean Shore R. R. Inc.*, 18 Cal.2d 773, 789. This holding clearly implies that the trial court had no discretion to view the 30-day aggregate under section 659a as discretional as opposed to "jurisdictional", and clearly indicates that the Court of Appeal held that the trial court's consideration of the late-filed affidavits was error. It is clear that the *Sitkei* court held that the 30-day aggregate under section 659a is jurisdictional, even without using the word "jurisdictional" in its decision.

KABRAN next points to the *Lewith* matter and asserts that the Court of Appeal in that matter decided whether a motion originally brought under California Code of Civil Procedure section 662 could be properly considered a new trial motion where the supporting affidavits for that motion were not filed for nearly 45 days after the original section 662 motion was made. *Lewith v. Rehmke* (1935) 10 Cal.App.2d 97, 105. On

January 3, 1931, the appellant in *Lewith* first filed notice of intention to move for new trial. *Id.* at 104. On February 20, 1931, the appellant gave notice that pursuant section 662 he would make a motion to vacate the judgment and to reopen the cause to permit the introduction of additional evidence which would be set forth in an affidavit, which was attached to the notice. *Id.* On February 25, 1931 the motion for new trial and motion for vacation of the judgment was heard, and respondent objected to any consideration given to appellant's affidavit on the grounds that it was not filed within the time permitted under the code. *Id.* Respondent also moved that the affidavit be stricken from the court files. *Id.* The trial court sustained the objection and the trial court denied both the motion for new trial and the motion to vacate the judgment. *Id.* at 105. The *Lewith* Court of Appeal held that appellant moved for a new trial, and that "the time within which affidavits in support of the motion might be filed is clearly stated in section 659a of the Code of Civil Procedure." *Id.* The *Lewith* Court continued, as follows:

> This section (section 659a) provides that within ten days after serving a 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. As above mentioned appellant's notice of intention to move for a new trial was filed on January 3, 1931, and the affidavit was not filed until February 20, 1931. It is therefore apparent that the affidavit was filed too late and that the trial court would not have been justified in considering it. *Id.*, citing W.P. Fuller & Co. v. McClure (1920) 48 Cal.App. 185, 194; *Terry v. Lessem* (1928) 89 Cal.App. 682.

It is clear by the language used in the decision by the *Lewith* Court of Appeal that the lower court did not have any discretion whatsoever to consider the late-filed affidavit. In fact, it is quite clear by the language used by the *Lewith* court that it held that the 30-day aggregate under section 659a is jurisdictional, even without using the word "jurisdictional" in its decision.

KABRAN next points to the *Terry* matter and asserts that the Court of Appeal confirmed that the trial court could properly decline to consider affidavits filed after the time allotted by the new trial statute. *Terry v. Lessem* (1928) 89 Cal.App. 682, 685-86. While this statement supports SHARP'S position, it is respectfully submitted that this is not exactly what the *Terry* court held. Recall that this case, as with the others, is in the line of cases being asserted by KABRAN in the portion of her Answering Brief on the Merits where it is claimed that because the court did not use the language "jurisdiction" or "jurisdictional", then the rejection of the late-filed affidavit cannot be held as jurisdictional. At the trial level, within the first 10 days after the notice of intention to move for a new trial was served, the trial court issued an order extending the time to file and serve supporting affidavits *an additional 30 days* beyond the original 10 days. *Id.* at 686 (*emphasis added*). The Court of Appeal in *Terry* held that the trial court could not grant an extension beyond the 20-day extension provided by the statute, and any such extension beyond the additional 20 days "was beyond the court's authority to grant." *Id.* "Since the affidavits were not served or filed until the lawful time therefor had expired, the (trial) court did not err in striking them from the files." *Id.* Again, it is quite clear by

the language used by the *Terry* court that it held that the 30-day aggregate under section 659a is jurisdictional, even without using the word "jurisdictional" in its decision.

Finally, KABRAN points to the *W.P. Fuller* matter and asserts that the Court of Appeal affirmed the trial court's denial of a new trial motion after it refused to consider a late-filed affidavit. *W.P. Fuller & Co. v. McClure* (1920) 48 Cal.App. 185, 194-95. This, again, supports SHARP'S position. The Court of Appeal in *W.P. Fuller* in fact did point out that the affidavits the appellant relied upon in its motion for a new trial were not filed until after 30 days from the filing and serving of the notice of intention to move for a new trial, and therefore were not served in time. *Id.* It is clear by the language used by the *W.P. Fuller* court (and not disputed by KABRAN) that it held that the 30-day aggregate (under then section 659) a is jurisdictional, even without using the word "jurisdictional" in its decision.

KABRAN then spends some time arguing that because section 659a does not set forth a remedy then it must be mandatory (i.e. discretionary) - and not jurisdictional. That argument, respectfully, is misplaced. The *Erickson* court pointed out that the language in section 659a "is not arbitrary . . . . It is hedged by other mandatory time frames for initiating and resolving a motion for new trial." *Erickson*, 48 Cal.App.4th at 1672. SHARP pointed out in its Opening Brief on the Merits and *Erickson* illustrated beautifully the interplay between the entire statutory scheme pertaining to the filing of a motion for new trial, and that each deadline for each act in filing a motion for a new trial must be adhered to or else you get exactly what we have here in this case - a Defendant

and Appellant who have been wrongfully deprived of its statutory right to defend itself against a motion for new trial. Here, SHARP should have had its 10 days in which to file counter-affidavits, and an additional 20-day extension under 659a. Instead, the trial court limited SHARP'S time to file counter-affidavits to a mere seven days. SHARP did not, and has never had, access to Plaintiff's independent autopsy upon which its brand new expert (who was not designated and did not testify at trial) authored an affidavit that garnered Plaintiff a ruling granting a new trial. The Court is also supposed to have five days in which to consider all filings prior to a hearing date, but the Court only had two.

Again, the front end of the entire process, the initial filing of the notice of intent to move for a new trial is jurisdictional, and the back end of the process, the 60-day total in which the Court must have the hearing and rule, is jurisdictional. Why, then, would the middle portion of the process, the filing of the actual affidavits the Court will rely upon, not be jurisdictional and be allowed to greatly prejudice the side that was victorious at trial? The Legislature clearly did not intend this to be the case, and California case law has clearly not intended this to be the case. And Plaintiff and Respondent has not shown why she believes the statute to stand for such. Perhaps the *Erickson* court should not have used the word mandatory, because if mandatory means discretionary, one simply cannot argue that the *Erickson* court held that aggregate 30-day aggregate in section 659a can be extended in the court's discretion. *Erickson* clearly held the opposite - that the trial court has no discretion to admit affidavits submitted after the 20-day extension period. The 20-day extension portion of section 659a (and resulting 30-day aggregate) is

clearly jurisdictional.

A 2004 case pertaining to a motion for summary judgment is also instructive. "[A] trial court's inherent power does not provide authority for a trial court to shorten minimum time periods when specified as mandatory by the Legislature." *Urshan v. Musicians' Credit Union* (2004) 120 Cal.App.4th 758, 767. "'A trial court does not have inherent or unrestricted power to extend or shorten the time specified by the Legislature in which an act in a civil action must be done. Rather, the court has such power only to the extent granted by the Legislature. The Legislature has given trial courts broad authority to extend the time in [] which an act must be done. ... [¶] The Legislature has not granted such sweeping authority to the courts to shorten time." *Id.*

The Legislature here has clearly given trial courts the authority to extend the initial 10-day period of time in which to file supporting affidavits to a new trial motion. Equally as clear, the Legislature has not given trial courts the authority to extend the 20-day extension period of time in which to file supporting affidavits to a new trial motion. And the California Supreme Court, as well as the First, Second, Third, and Fourth Appellate Districts of the Court of Appeal of California have all repeatedly and uniformly so held.

The *Urshan* court, at 120 Cal.App.4th, at p. 764, was also instructive in breaking down the separate statutes involved in the bringing of a motion for summary judgment, as follows:

> As the statutory language indicates, a trial court has discretion to shorten the initial 60-day period to bring a motion for summary judgment on a showing of good cause. Similarly, a

> trial court has discretion to shorten the 30-day period in which a motion for summary judgment must be heard before trial where circumstances warrant. However, the Legislature did not similarly authorize a trial court to shorten the minimum notice period for hearings on summary judgment motions. Such discretionary language is notably absent from the statute. Moreover, the statutory language regarding minimum notice is mandatory, not directive. This section of the statute states, "Notice of the motion and supporting papers shall be served on all other parties to the action at least 28 days [now 75] before the time appointed for hearing" and twice thereafter refers to the 28-day period of notice as being "required."

Again, Plaintiff and Respondent KABRAN relies upon Witkin to advance the theory that the term "jurisdictional" is not synonymous with the term "mandatory." SHARP again acknowledges that, under certain circumstances, this is a correct statement, but it is not always the case. Respondent fails to grasp the concept that in other circumstances, such as the one before this Court, "mandatory" can be, and is, "jurisdictional." As with section 659a, where the Legislature intended to limit the ability of the Court to act by expressly delineating the Court's power, "mandatory" becomes "jurisdictional."

Plaintiff and Respondent KABRAN cites this Court's opinion in *Abelleira v. District Court of App. Third District* (1941) 17 Cal.2d 280 seemingly in support of his argument that "mandatory" is not synonymous with "jurisdictional." KABRAN'S reliance on, and even citation to, *Abelleira* is confusing as that case does not discuss the term "mandatory." Instead, the *Abelleira* Court analyzed the term "jurisdiction." This analysis provides the necessary framework to determine the language in section 659a is

"jurisdictional." *Abelleira* sets forth the "principal illustrations of the situations in which [jurisdiction] may be applied" and then considers "whether the present case falls within one of the classifications." *Id.* at 287-288. As more fully set forth below, the *Abelleira* Court succinctly described a category of "jurisdiction" that includes section 659a. By its own reasoning, *Abelleira* stands for the proposition that section 659a is "jurisdictional".

According to the *Abelleira* Court, there are two jurisdictional classifications. The first, "[t]he lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter of the parties." *Id.* at 288. The second jurisdictional classification, is "where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites." *Id.* For example, "[t]he court has power under section 473 of the Code of Civil Procedure to set aside its judgment or order on motion where it was entered against a party through inadvertence, excusable neglect, or mistake; but that power is wholly lost at the end of the six months' period prescribed by statute." *Id.* at 289. (Internal Citations Omitted.) As with 30-day aggregate limit set forth in section 659a, the Court has discretion to act within the time frame set forth by the statute, however, once that time has elapsed, the Court has no "jurisdiction" to act.

The analysis as to whether a statute is simply "mandatory" or "jurisdictional" requires looking at both the statute and the statutory framework in question. KABRAN

cites to a number of cases purportedly in support of his position that section 659a is not "jurisdictional", however, these cases further support SHARP'S position that this code section is in fact "jurisdictional."

KABRAN first sites to a footnote in *County of Santa Clara Court v. Superior Court of Santa Clara County* (1971) 4 Cal.3d 545. *County of Santa Clara Court* addresses the issue of whether the lower court abused its discretion in granting relief to Plaintiff for failure to file a claim with the county within the time prescribed Government Code §§911.2 and 945.4. This Court upheld the lower court's ruling which granted relief based upon Government Code §946.6, a code section that specifically allows for relief when a claim is not filed within the statutory period. This case is easily distinguished because there was a statutory basis for relief, which is not present in this case.

Additionally, KABRAN'S citation to the footnote is confusing because a careful reading of the footnote shows that it in fact stands for the proposition that Government Code §§911.2 and 945.4 are "mandatory" and "jurisdictional." The footnote concludes as follows "[t]he holdings of *Dominquez* and *Harvey*, affirming the trial court orders refusing to consider excuses for noncompliance with the 20-day limitation, are clearly correct." *Id.* at 551, fn.2. Hence, the California Supreme Court, in footnote 2, agrees with the rulings in *Dominiquez* and *Harvey*, both cases holding that the time limit set forth is both "mandatory" and "jurisdictional."

The Court of Appeal in *Dominiquez v. County of Butte* (1966) 241 Cal.App.2d 164 affirmed the Superior Court's denial of plaintiff's petition to file a late claim against the

county. In doing so, the Court explained that the "[l]egislature in enacting section 912 apparently decided that the time previously allowed for applying to the superior court for relief was too long and changed it to a flat 20 days and intended that that limitation be mandatory and hence jurisdictional." *Id.* at 167, emphasis added. One year later, the Fourth District Court of Appeal came to the same conclusion in *Harvey v. Holtville*, (1967) 252 Cal.App.2d 595, 597 "[c]ompliance with this 20-day requirement was mandatory and jurisdictional."

KABRAN next cites to *Chernow v. Chernow* (1954) 128 Cal.App.2d 816. The *Chernow* Court ruled that Plaintiff's failure to allege residence in the state pursuant to California Civil Code §128 did not deprive the Court of jurisdiction to enter a judgment of divorce. Whether a defect in the Complaint affects the Court's jurisdiction has no bearing on the issues being decided here. First, *Chernow* deals with a substantive issue, not a procedural one. Second, parties to actions file defective pleadings regularly. To hold a defective pleading deprived the Court of jurisdiction to proceed with any aspect of an action would lead to an absurd result.

The last case cited by KABRAN regarding the distinction between "mandatory" and "jurisdictional" is *In re Marriage of Harris* (1977) 74 Cal.App.3d 98. The Court of Appeal in *In re Marriage of Harris* held that the lower court's denial of a motion to set aside a default judgment where a husband failed to file an affidavit of service pursuant to California Code of Civil Procedure §587 was an error in the exercise of jurisdiction but did not deprive the Court of jurisdiction. While the Court of Appeal discusses the fact