

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SAN DIEGO GAS & ELECTRIC
COMPANY,

Petitioner,

v.

SUPERIOR COURT OF SAN DIEGO
COUNTY,

Respondent;

DEBRA HARRIS et al.,

Real Parties in Interest.

D049298

(San Diego County
Super. Ct. No. GIC833517)

MODIFICATION ORDER AND
ORDER DENYING PETITION FOR
REHEARING

[Change in Judgment]

THE COURT:

The published opinion filed on January 25, 2007 is modified as follows:

Page 2, paragraph 1, the first sentence is modified to read: In this case we **issued an order to show cause to** address whether the relation-back doctrine applies to save the claims of an omitted heir whose wrongful death cause of action would otherwise have been barred by the statute of limitations.

Page 3, paragraph 3, the second sentence is modified to read: The parties agree that Nicole's claims, **as currently pled**, are untimely and barred by the statute of limitations unless the relation-back doctrine applies.

Page 8, last paragraph, and page 9, first paragraph, are modified to read: Because all wrongful death claimants must show the nature of his or her loss as a result of the decedent's death, the addition of an omitted heir to a wrongful death action after expiration of the limitations period as to the omitted heir necessarily inserts a new cause of action that seeks to enforce an independent right; as such, the relation-back doctrine will not apply. We reject the plaintiffs' suggestion that a perceived lack of prejudice to SDG&E justifies **application of the relation-back doctrine** because the failure to comply with a statute of limitations cannot be excused on the ground of lack of prejudice. (*State Farm Fire & Casualty Co. v. Superior Court* (1989) 210 Cal.App.3d 604, 612.) Here, the plaintiffs sought to add Nicole as an additional heir after the two-year limitations period expired on her wrongful death claim. Under these circumstances, the relation-back doctrine does not apply and the trial court erred in allowing the amendment **on this basis**.

Although the trial court's reason for allowing the amendment was erroneous, we cannot say the trial court abused its discretion in allowing the amendment because plaintiffs' assert they can amend the complaint to allege tolling of the statute of limitations and we take judicial notice of their proposed third amended complaint. Accordingly, we remand this matter to the trial court with instructions to allow plaintiffs leave to file their proposed third amended complaint. In doing so, we express no opinion on the merits of plaintiffs' tolling argument.

Page 10, the Disposition is modified to read: **The petition is denied. Upon remand, the trial court is directed to allow plaintiffs leave to file their proposed third amended complaint.** The stay orders issued on September 1, 2006 and October 3, 2006 are vacated. Each party to bear its own costs on appeal.

The petition for rehearing is denied.

The disposition is changed to reflect the above changes.

BENKE, Acting P. J.

Copies to: All parties