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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

VALETTA McMURRAY,)	
)	2:09-cv-02245-GEB-EFB
Plaintiff,)	
)	
v.)	<u>ORDER</u>
)	
COUNTY OF SACRAMENTO; DEPUTY)	
SHERIFF JAVIER BUSTAMANTE, and)	
DEPUTY SHERIFF L. CULP,)	
)	
Defendants.)	
_____)	

An order issued on January 11, 2012, which required the parties to file briefs concerning Defendants' contention, raised in their trial brief, that Plaintiff lacks standing to assert a Fourth Amendment survival claim on behalf of the decedent.

Defendants filed a "Supplemental Trial Brief Regarding Standing" on January 17, 2012. (ECF No. 79.) In essence, Defendants argue Plaintiff's Fourth Amendment survival claim should be dismissed because Plaintiff has not filed "the affidavit necessary under California law to commence a survival action as a decedent's successor in interest[;]" Plaintiff cannot cure her failure to file the necessary affidavit because she is now time barred by the applicable statute of limitations and California Government Code section 945.6; and even if she were given the opportunity to file the necessary affidavit, she cannot satisfy the statutory standing requirements "because decedent's father is also a beneficiary under state law but is not a party to this

1 action." (Def.'s Supp. Trial Brief ("Def.'s Brief") 3:23-27, 4:2-4, 4:8-
2 21, 4:24-27, 6:9-12.) Defendants further argue that Plaintiff lacks
3 "standing and/or cannot maintain her [state law] wrongful death [claim]
4 without decedent's father as a party to this action." Id. at 5:13-15.

5 Plaintiff addressed the standing issue in a filing captioned
6 "Plaintiff's Reply to Defendants' Motions in Limine Opposition/Strike
7 Motion," which was filed on January 17, 2012. (ECF No. 80.) Plaintiff
8 argues, "the standing issue ha[s] been waived by defendants' failure to
9 raise it during their pretrial statements and the prior two years of the
10 pendency of this lawsuit." (Pl.'s Reply to Defs.' Mots. In Limine
11 ("Pl.'s Brief") 1:18-19.) Plaintiff further argues that "defendants
12 should be estopped from raising [the standing issue] at this late stage
13 a few weeks before trial" "for their strategic or negligent withholding
14 of this argument[.]" Id. at 1:22-23.

15 Defendants' arguments are addressed in turn below.

16 **A. Plaintiff's Fourth Amendment Survival Claim**

17 Defendants argue "Plaintiff's survivor claim must be dismissed
18 for lack of standing" under California Code of Civil Procedure sections
19 377.30 and 377.32. (Defs.' Brief 2:19-20, 5:11.)

20 Although "[Defendants] use the term 'standing,' they are not
21 referring to 'standing' in the constitutional sense of the word.
22 Instead, they are referring to standing in terms of Plaintiff's
23 'capacity to sue' on behalf of Decedent's estate." Johnson v. Cal. Dept.
24 of Corr. & Rehab., 2009 WL 2425073, at *4 (E.D. Cal. Aug. 7,
25 2009) (citation omitted); see also Estate of Burkhart v. United States,
26 No. C 07-5467 PJH, 2008 WL 4067429, at *10 (N.D. Cal. Aug. 26,
27 2008) ("The question whether [Plaintiff] has the ability to assert claims
28 on [the decedent's behalf under California's survival statute] involves

1 the determination whether she has the capacity to bring suit as a
2 representative.") "'The question of a litigant's capacity or right to
3 sue or to be sued generally does not affect the subject matter
4 jurisdiction of the district court.'" De Saracho v. Custom Food
5 Machinery, Inc., 206 F.3d 874, 878 n.4 (9th Cir. 2000) (quoting Summers
6 v. Interstate Tractor & Equip. Co., 466 F.2d 42, 50 (9th Cir. 1972))
7 "Therefore, unless the objection is properly raised, the court may
8 properly adjudicate the case notwithstanding this defect." Estate of
9 Burkhart, 2008 WL 4067429, at *10 (citation omitted); see also De
10 Saracho, 206 F.3d at 878 (stating, "an objection to a party's capacity
11 . . . can be analogized to an affirmative defense and treated as waived
12 if not asserted by motion or responsive pleading[.]").

13 In this case, Defendants did not raise Plaintiff's capacity to
14 sue on the Fourth Amendment survival claim in their Answer or in a
15 pretrial motion, and "[a]ll law and motion . . . [was ordered to have
16 been] *completed* by July 6, 2011." (Status (Pretrial Scheduling) Order
17 2:12, ECF No. 32.) Further, Defendants have not shown that this issue
18 was not waived by their failure to timely raise it. For the stated
19 reasons, Defendants' "standing" arguments concerning Plaintiff's Fourth
20 Amendment survival claim are disregarded.

21 **B. Plaintiff's Wrongful Death Claim**

22 Defendants contend for the first time in their Supplemental
23 Trial Brief Regarding Standing that "Plaintiff [also lacks] standing
24 and/or cannot maintain her wrongful death [claim] without decedent's
25 father as a party[.]" arguing "California's wrongful death statute[,]
26 California Code of Civil Procedure section 377.60[,], has been
27 interpreted to authorize only a single action, in which all the
28 decedent's heirs must join." (Defs.' Brief 5:13-19.) Defendants further

1 argue: "[o]mitted heirs . . . are 'necessary parties,' and plaintiff
2 heirs have a mandatory duty to join all known omitted heirs in the
3 'single action' for wrongful death. If an heir refuses to participate in
4 the suit as a plaintiff, he or she may be named as a defendant . . . so
5 that all heirs are before the court in the same action." Id. 5:20-6:1.

6 Defendants' contentions do not concern Plaintiff's "standing"
7 to assert a wrongful death claim, since Defendants have not contested
8 Plaintiff's standing under section 377.60 to bring this claim in her
9 capacity as the parent of a decedent without children. See Chavez v.
10 Carpenter, 91 Cal. App. 4th 1433, 1439 (2001) ("The first subdivision of
11 the wrongful death statute gives standing to those persons who would be
12 entitled to the property of the decedent by intestate succession, but
13 only if there is no surviving issue of the decedent. Under the laws of
14 intestate succession, a decedent's parents become heirs where there is
15 no surviving issue.") Instead, the crux of Defendants' argument
16 challenges whether Plaintiff has the ability to maintain her wrongful
17 death claim without having the decedent's father joined as a party in
18 this action.

19 Rule 19 governs the compulsory joinder of parties, and
20 decision on a joinder issue involves a "two-part analysis." Washington
21 v. Daley, 173 F.3d 1158, 1167 (9th Cir. 1999). "First, [the court must]
22 determine whether an absent party is 'necessary.' If the absent party is
23 necessary and cannot be joined, [the court must] then decide whether the
24 absent party is 'indispensable.'" Id. (citations omitted).

25 The terms "necessary" and "indispensable" are terms
26 of art in Rule 19 jurisprudence: "Necessary" refers
27 to a party who should be "[j]oined [under Rule
28 19(a)] if [f]easible[]"; "Indispensable" refers to
a party whose participation is so important to the
resolution of the case that, if the joinder of the
party is not feasible, the suit must be dismissed
[under Rule 19(b).]

1 Disabled Rights Action Comm. V. Las Vegas Events, Inc., 375 F.3d 861,
2 867 n.5 (9th Cir. 2004) (internal citations omitted).

3 "[A]lthough the absence of an [']indispensable party['] may be
4 raised at any time, the failure to join [']necessary parties['] may be
5 waived if objections are not made in the defendant's first responsive
6 pleading." Baykeeper v. Union Pacific R.R. Co., No. C 06-02560 JSW, 2009
7 WL 1517868, at *1 (N.D. Cal. June 1, 2009) (citing Citibank, N.A. v.
8 Oxford Properties & Finance Ltd., 688 F.2d 1259, 1263 n.4 (9th Cir.
9 1982)).

10 "Section 377.60 . . . do[es] not expressly prevent more than
11 one cause of action by a decedent's heirs. Nevertheless wrongful death
12 actions are considered to be joint, single and indivisible." Ruttenberg
13 v. Ruttenberg, 53 Cal. App. 4th 801, 807 (1997) (internal quotation marks
14 and citations omitted). The California Supreme Court has defined "joint,
15 single and indivisible," as follows:

16 In stating that an action for wrongful death is
17 joint, it is meant that all heirs should join or be
18 joined in the action and that a single verdict
19 should be rendered for all recoverable damages;
20 when it is said that the action is single, it is
21 meant that only one action for wrongful death may
22 be brought whether, in fact, it is instituted by
all or only one of the heirs, or by the personal
representative of the decedent as statutory trustee
for the heirs; and when it is said that the action
is indivisible, it is meant that there cannot be a
series of suits by heirs against the tortfeasor for
their individual damages.

23 Cross v. Pacific Gas & Elec. Co., 60 Cal. 2d 690, 694 (1964). "The
24 wrongful death statute is 'a procedural statute establishing compulsory
25 joinder and not a statute creating a joint cause of action.'" Ruttenberg,
26 53 Cal. App. 4th at 807 (quoting Cross, 60 Cal. 2d at 692).

27 Two conclusions follow from this principle. First,
28 each heir has a personal and separate cause of
action, and a separate rather than a joint
interest. Second, strict compliance with the


1 statutory procedure is not jurisdictional in the
2 sense that a failure to comply with statutory
3 requirements requires reversal of a judgment. The
4 latter point applies when wrongful death plaintiffs
5 fail to join all heirs. The [court] has
6 jurisdiction to try a wrongful death action even
7 absent joinder of one or more heirs of the
8 decedent.

9 Id. (internal quotation marks and citations omitted).

10 Applying the above principles, omitted heirs have been held to
11 be "necessary," but not "indispensable" parties, under California
12 procedural law. Ruttenberg, 53 Cal. App. 4th at 808 ("As defined by
13 [California Code of Civil Procedure] section 389, a nonjoined heir is
14 not an 'indispensable party' to a wrongful death action.") Similarly,
15 federal courts have held that omitted heirs are not per se indispensable
16 parties under Rule 19(b). See A.D. v. Cal. Highway Patrol, No. C 07-5483
17 SI, 2009 WL 733872, at *4-5 (N.D. Cal. Mar. 17, 2009) (stating an omitted
18 heir was not an indispensable party where his claims were time barred by
19 failing to timely file an administrative claim); Estate of Burkhart,
20 2008 WL 4067429, at *6-8 (same).

21 Here, Defendants have not shown that the decedent's father is
22 an "indispensable party" under Rule 19(b); they only argue that he is a
23 "necessary" party. (Def.'s Brief 5:20-22.) Further, Defendants have not
24 shown that their failure to object in their first responsive pleading to
25 the absence of the decedent's father as a party does not constitute
26 waiver of the issue. Therefore, Defendants' "standing" arguments on
27 Plaintiff's wrongful death claim are disregarded.

28 Dated: January 30, 2012


GARLAND E. BURRELL, JR.
United States District Judge