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Supreme Court of California
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S261247

IN THE SUPREME COURT

OF THE

STATE OF CALIFORNIA

LYNN GRANDE
Plaintiff and Respondent,

v.

EISENHOWER MEDICAL CENTER
Defendant and Petitioner,

FLEXCARE, LLC
Intervener and Appellant,

On Review from the Court of Appeal for the
Fourth Appellate District, Division Two
Appeal Nos. E068730 and E068751

After an Appeal from the Superior Court of Riverside County
Honorable Sharon J. Waters
Case Number RIC1514281

APPLICATION & AMICUS CURIAE BRIEF OF SHARP MEMORIAL HOSPITAL

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CERTIFICATE OF INTERESTED PARTIES
(Cal. Rules of Court, Rule 8.208)

The following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves:

None.

DATED: December 23, 2020

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

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TABLE OF CONTENTS

Page

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF 6

STATEMENT OF INTEREST OF AMICUS CURIAE 6

AMICUS CURIAE BRIEF 12

ISSUE PRESENTED FOR REVIEW 12

SUMMARY OF ARGUMENT 12

STATEMENT OF THE CASE 13

LEGAL ANALYSIS 16

I. GRANDE'S PROPOSED RULE FOR ESTABLISHING PRIVITY IS UNDULY RESTRICTIVE 16

A. The Court Should Reject Arguments That Ignore the Practical Realities of the Relationship Between Staffing Agencies and Hospitals. 16

B. The Decision in *Castillo* is Consistent with *DKN Holdings* and was Correctly Decided. 20

II. CLAIM PRECLUSION SHOULD BE DETERMINED AS A MATTER OR SUBSTANCE AND NOT OF MERE FORM 22

CONCLUSION 25

CERTIFICATE OF COMPLIANCE 26

TABLE OF AUTHORITIES

Page(s)

Cases

Alvarez v. May Dept. Stores Co. (2006)
143 Cal.App.4th 1223 .... 17, 24

Bernhard v. Bank of America Nat. Trust & Savings Ass'n (1942)
19 Cal.2d 807 .... 16, 17, 24

Brinton v. Bankers Pension Services, Inc. (1999)
76 Cal.App.4th 550 18

Butcher v. Truck Ins. Exchange (2000)
77 Cal.App.4th 1442 22

Cal Sierra Development, Inc. v. George Reed, Inc. (2017)
14 Cal.App.5th 663 .... 17, 22, 23, 24

Castillo v. Glenair, Inc. (2018)
23 Cal.App.5th 262 .... *passim*

Clemmer v. Hartford Ins. Co. (1978)
22 Cal.3d 865 [overruled on other grounds by *Ryan v. Rosenfeld* (2017) 3 Cal.5th 124] 16

DKN Holdings LLC v. Faerber (2015)
61 Cal.4th 813 .... *passim*

Grande v. Eisenhower Medical Center (2020)
44 Cal.App.5th 1147 .... 13, 14, 15

Richard B. LeVine, Inc. v. Higashi (2005)
131 Cal.App.4th 566 19

Sartor v. Superior Court (1982)
136 Cal.App.3d 322 .... 18, 19

Thibodeau v. Crum (1992)
4 Cal.App.4th 749 .... 19, 20

Other Authorities

Wright & Cooper, 18A Fed. Prac. & Proc.
Juris. § 4448 (3d ed.) 22

Introduction to Restatement (Second) Judgments 1 24

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

To the Honorable Chief Justice Tani G. Cantil-Sakauye:

Pursuant to California Rules of Court, rule 8.520(f), Sharp Memorial Hospital respectfully requests permission to file the attached amicus brief in support of Petitioners Eisenhower Medical Center and FlexCare LLC. This application is timely made within 30 days of filing of the reply briefs on the merits.

STATEMENT OF INTEREST OF AMICUS CURIAE

Sharp Memorial, located in San Diego, is Sharp HealthCare's largest hospital and the system's only designated Level II trauma center. For more than 60 years, Sharp Memorial has treated San Diegans with compassionate care and state-of-the-art technology. Sharp Memorial's treatment requires skilled medical professionals and, as with the majority of other hospitals in the state, relies on staffing agencies to provide temporary competent medical workers to fill roles between full-time hires, to cover for absent medical workers due to health or personal reasons, to address seasonal fluctuations, acuity needs and other critical challenges[1]. The types of positions that health care staffing firms fill are exceedingly wide, and range from per diem and daily staffing, longer-term contracts, temporary-to-permanent, and direct-hire placements in a wide variety of medical working environments. The specific positions include nursing professionals (registered nurses, licensed vocational nurses, and licensed practical nurses), therapists, (physical, occupational, speech, and respiratory), advanced medical professionals (e.g.,

[1] As the COVID-19 pandemic surges, many hospitals have had the ability to add the beds needed to handle the influx of patients, but have had a more difficult challenge effectively managing the patient surge by securing the clinical staff — doctors, nurses and others — to treat the growing number of patients with COVID-19 who require hospitalization.

anesthesiologists), medical technologists, certified nursing assistants, dietitians, social workers, home health care workers, medical records, billing, and coding personnel, case managers, and discharge planners.

The strategic flexibility offered by the use of temporary or "traveling" staff to fill these critical positions provides hospitals such as Sharp Memorial with an opportunity to provide quality medical care and to at the same time reduce expenses as employment costs continue to climb. Because temporary staff are employees of their agency, administration is spared the costs of employee benefits like health insurance, paid-time off, retirement, and also the time and resources spent recruiting, training and for overtime. The use of temporary staffing often results in staffing agencies and client hospitals having shared and intertwined obligations with respect to labor law obligations. For that reason, in the event of litigation involving temporary staff, staffing agencies and the client hospitals will often functionally have an identity of interests with respect to the subject matter of the litigation. The issue of privity arises not only with regard to wage and hour claims, but a myriad of other claims stemming from that interdependent relationship.

For example, Sharp Memorial is currently a defendant/respondent in the California Court of Appeal for the Fourth District, Division One, entitled *Bogue v. Sharp Memorial Hospital*, D077195. Dr. Bogue, the plaintiff/appellant, was employed by Anesthesia Service Medical Group, Inc. (ASMG), a professional medical corporation that provides physician services in the medical specialty of anesthesia and employs approximately 250 anesthesiologists, 35 of whom primarily worked at Sharp Memorial. Dr. Bogue provided anesthesia services to patients at Sharp Memorial through his employment with ASMG.

Sharp Memorial and ASMG are separate corporate entities but the evidence showed they have an interconnected relationship. Sharp Memorial has inpatient and outpatient operating rooms. In addition to supplying

anesthesiologists to treat patients at Sharp Memorial, ASMG is contracted to provide administrative scheduling services to the hospital, including managing and staffing the anesthesia call schedule. This permits Sharp Memorial to provide services as an acute care hospital.

In addition to providing the scheduling and staffing services for Sharp Memorial's operating rooms, ASMG physician employees/shareholders are also employed in an administrative capacity by Sharp Memorial as independent contractors. Hospitals cannot practice medicine and therefore it was necessary for Sharp Memorial to contract with physicians to administratively manage the operating rooms and provide quality of care procedures and oversight. ASMG physician employees/shareholders performed policy creation and enforcement, as well as the oversight of quality of care in the operating rooms and Outpatient Pavilion.

Dr. Bogue sued ASMG for wrongful termination in violation of the Fair Employment and Housing Act and in retaliation for allegedly making patient safety complaints. Dr. Bogue's complaints directly related to the quality of patient care he alleged he brought to Sharp Memorial's attention. Sharp Memorial was not named as a defendant by Dr. Bogue, but Dr. Bogue's complaint against ASMG contained allegations regarding Sharp Memorial's purported efforts to discredit and silence Dr. Bogue from raising complaints. Additionally, the complaint alleged Dr. Bogue was fired because he complained specifically about the alleged conditions at Sharp Memorial, which Dr. Bogue claims were reported to the Sharp Medical Staff's Anesthesia Supervisory Committee, a peer review body.

Witnesses from Sharp Memorial were among the 30 witnesses called to testify during the binding arbitration between Dr. Bogue and ASMG. Following a lengthy arbitration, the arbitrator issued a detailed and reasoned 27-page Arbitration Award generally concluding that Dr. Bogue failed to establish he had raised patient safety complaints *to anyone* or that he had

been retaliated against *by anyone.* The arbitrator also specifically found Dr. Bogue could not establish that "he had complained about or reported patient safety problems to ASMG and/or Sharp" or "that he was discharged, or discriminated or retaliated against, in violation of any public policy." Instead, the arbitrator determined the reasons for Dr. Bogue's termination "were not pretexual" and they "stand up to scrutiny, and reflect the business judgment of ASMG to terminate Plaintiff for reasons devoid of any pernicious or unlawful reasons," including that Dr. Bogue "had problems working with others at Sharp and ASMG from the earliest days of his employment at ASMG." The arbitrator rejected Dr. Bogue's repeated assertions that members of the Sharp Memorial medical staff, nursing staff, and members of senior leadership, had discriminated or retaliated against him for raising patient safety complaints and found instead that Dr. Bogue had never actually made any patient safety complaints and was terminated for interpersonal reasons—"Petitioner did not complain about patient safety or fraudulent billing, and he was not terminated because he complained about patient safety or billing fraud. Rather, he was terminated because he had recurring interpersonal issues with several ASMG and Sharp physicians and staff over the years, which did not permanently improve or dissipate over time despite good faith ongoing counseling by [ASMG counsel] and others."[2]

Nonetheless, despite having lost all of his claims against ASMG, Dr. Bogue is pursuing a successive action against Sharp Memorial raising the same claims decided against him by virtue of the ASMG final judgment. The litigation was and is a drain on Sharp Memorial and the judiciary's

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[2] Dr. Bogue appealed the judgment confirming the arbitration award in favor of ASMG. The appellate court affirmed the judgment. (*Bogue v. Anesthesia Service Medical Group, Inc.* (July 17, 2019, 0073518) [nonpub. opn.].) This Court denied Dr. Bogue's Petition for Review on October 16, 2019.

resources. The trial court correctly determined Dr. Bogue's complaint against Sharp Memorial was barred by res judicata because "the interrelationship between Sharp and ASMG employee/shareholders, on the particular 'whistleblower' issues raised by Dr. Bogue in both his arbitration and current action, is integral to the determination of the issue of privity for claim preclusion purposes." Even though Sharp Memorial was not a named party to Dr. Bogue's litigation against ASMG, Sharp Memorial and ASMG were in privity with respect to the subject matter of the litigation, i.e., the quality of patient care.

Dr. Bogue has appealed arguing that privity was lacking between Sharp Memorial and ASMG and that a jury should be able to inconsistently find he was terminated by ASMG in retaliation for reporting safety concerns to Sharp Memorial and ASMG even though an arbitrator concluded that did not occur. As such, Sharp Memorial is concerned that the approach of the Court of Appeal and plaintiff in the instant case unduly limits the privity "umbrella" and ignores the practical and functional realities regarding the interrelated and highly interdependent relationship between staffing agency and client hospital. The trend in California and other jurisdictions has been to determine the applicability of res judicata generally and preclusion as a matter of substance and not of mere form, based in part on an identification of the interests advanced in the first proceeding. Public policy and the interest of litigants alike require that there be an end to litigation. Applying res judicata when a plaintiff already has had an opportunity to litigate his or her claim against a party with interests sufficiently intertwined with the defendant in the second action preserves the integrity of the judicial system, promotes judicial economy, prevents inconsistent judgments, and protects litigants from vexatious litigation.

No party or counsel for a party authored the proposed brief in whole or in part, nor has any party or counsel for a party made a monetary

contribution intended to fund the preparation or submission of the proposed brief.

For these reasons, Sharp Memorial respectfully requests permission of the Court to file the proposed amicus curiae brief.

DATED: December 23, 2020

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AMICUS CURIAE BRIEF

ISSUE PRESENTED FOR REVIEW

May a class of workers bring a wage and hour class action against a staffing agency, settle that lawsuit with a stipulated judgment that releases all of the staffing agency's agents, and then bring a second class action premised on the same alleged wage and hour violations against the staffing agency's client?[3]

SUMMARY OF ARGUMENT

Parties proceed to court to resolve disputes, not perpetrate them. To honor and achieve this goal, courts apply the doctrine of res judicata when a party seeks to relitigate the same issue with the same party or its privity. It bars not only claims that were raised, but claims that could have been raised. Res judicata benefits litigants and the judicial system as a whole by promoting judicial economy, finality, and consistency.

The rule Petitioners Eisenhower Medical Center and FlexCare LLC propose– that privity should be determined by analyzing a party's relationship to the subject matter of the litigation– is faithful to these important policies underlying the doctrine of res judicata and eliminates inefficiencies resulting from duplicative litigation of the same claims. The rule is also consistent with this Court's decision in *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813 (*DKN Holdings*), which although not

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[3] Petitioners argue that Grande's claims in this action are barred because (1) Eisenhower is entitled to enforce the approved release and settlement of all claims that were or could have been asserted in *Erlandsen* against FlexCare and its "agents" and "representatives" and (2) Grande's claims against Eisenhower are barred by res judicata, because the *Erlandsen* release was incorporated into a final judgment and Eisenhower was in privity with FlexCare. Sharp Memorial limits its briefing herein to the second basis for finding Grande's action is barred.

factually on point with the present case, recognized that derivative liability can give rise to privity. Derivative liability necessarily requires analysis of the parties' relationship to the subject matter of the two cases in circumstances where the nonparty would not necessarily be bound by an adverse judgment against the party. As held by the court of appeal in *Castillo v. Glenair, Inc.* (2018) 23 Cal.App.5th 262 (*Castillo*), a staffing agency and its client hospital are in privity for preclusion purposes based both on their interdependent relationship with respect to payment of the plaintiffs' wages and because the litigation revolved around alleged errors in the payment of those wages.

The holding of the court of appeal in *Grande v. Eisenhower Medical Center* (2020) 44 Cal.App.5th 1147 (*Grande*), wherein the court concluded a staffing agency and its client hospital based on nearly identical facts are not in privity for preclusion purposes is incorrect and should be reversed. The holding misconstrues this Court's opinion in *DKN Holdings* as preventing a finding of privity where two defendants were jointly and severally liable to a plaintiff. However, this Court held only that "[j]oint and several liability alone does not create such a closely aligned interest between co-obligors." (*DKN Holdings, supra,* 61 Cal.4th at p. 826.) *DKN Holdings* never decided that joint and several liability precludes a finding of privity particularly if as a practical matter a non-party is sufficiently close to the original case to support application of the principle of preclusion.

STATEMENT OF THE CASE

In February 2012, plaintiff Lynn Grande was assigned by her staffing agency, FlexCare LLC, to work as a nurse at Eisenhower Medical Center. She worked at Eisenhower for a total of nine days. After her assignment ended, she joined in a purported class action filed against FlexCare by other nonexempt nursing staff in Santa Barbara County entitled *Erlandsen v.*

Flexcare LLC, No. 1390595 (*Erlandsen*) alleging wage and hour violations involving meal and rest periods and wage statement claims.

The *Erlandsen* matter was settled in January 2014, and Grande was paid more than $20,000 in exchange for signing a settlement agreement and releasing all claims. However, the settlement did not release Eisenhower or any other FlexCare client by name. In December 2015, Grande filed a second putative class action in Riverside County Superior Court, this time bringing claims against Eisenhower. In the new case, Grande purported to represent all nurses employed by any staffing agency who were assigned to work specifically at Eisenhower; however, her claims were the same as those finally resolved by the judgment entered on the settlement in *Erlandsen*.

FlexCare intervened in the action against Eisenhower, arguing the judgment in the Santa Barbara case both barred (under the settlement) and precluded (under res judicata) Grande's claims in the second action. Evidence was presented that even though Eisenhower was not a party to the first lawsuit it was in privity with FlexCare because the staffing company and hospital's interests were so closely aligned. Following a trial limited to the questions as to the propriety of the lawsuit, the trial court ruled Eisenhower was not a released party under the settlement agreement and could not avail itself of the doctrine of res judicata because the hospital was neither a party to the prior litigation nor in privity with FlexCare. Grande was therefore allowed to bring her second purported class action against the hospital for the same alleged labor law violations resolved by the *Erlandsen* final judgment.

The Court of Appeal for the Fourth District, Division Two, affirmed the order in a published opinion. (*Grande, supra,* 44 Cal.App.5th 1147.) The court concluded FlexCare and Eisenhower were not in privity and res judicata did not preclude Grande's second lawsuit against Eisenhower. (*Id.* at p. 1163.) In reaching that conclusion, the court first looked to the staffing

agreement between FlexCare and Eisenhower. (*Id.* at p. 1153.) The staffing agreement stated that FlexCare was not Eisenhower's agent. According to the agreement, the temporary nurses were employees of FlexCare, not the hospital. However, Eisenhower maintained control over how the nurses performed their jobs. For example, the hospital assessed their competency during an orientation program and could require them to take its medication and clinical skills test. (*Id.*) The hospital also retained the discretion to make decisions about the nurses' assignments and to terminate a nurse from an assignment for poor performance. Moreover, the staffing agreement required the nurses to conform with hospital policies and procedures. Finally, although the staffing agreement stated that FlexCare was required to indemnify Eisenhower, the court of appeal found that wasn't enough to satisfy the privity requirements of res judicata. (*Id.*)

The court of appeal concluded that the alleged joint employers could not be in privity in this case because they are subject to joint and several liability and because the difference in incentives precluded a finding that the companies could be adequate representatives for privity purposes. (*Id.* at pp. 1158-1160.) The court noted that FlexCare could have gone to trial in the Santa Barbara case with a defense that Eisenhower committed the wage and hour violations while it had fulfilled its own duties to the alleged employees. But, according to the court, it was significant that Eisenhower could not be bound by such a finding under the doctrine of issue preclusion because the two companies' legal interests diverged. In short, the court concluded FlexCare and Eisenhower were not closely enough aligned to be in privity. (*Id.* at p. 1161.)

The court of appeal's decision is at odds with the decision in *Castillo v. Glenair, supra,* 23 Cal.App.5th 262, wherein the Court of Appeal for the Second District, Division Two, held that a staffing agency and its client based on substantially similar facts were in privity. (*Id.* at pp. 279-280.) The

decision in *Castillo* is consistent with this Court's decision in *DKN Holdings* and provides clear rules to staffing companies and their clients about how to order their relationships and the legal consequences of agency relationships.

Eisenhower petitioned for review seeking resolution of the direct conflict between the court of appeal decisions, and this Court granted the petition.

LEGAL ANALYSIS

I. GRANDE'S PROPOSED RULE FOR ESTABLISHING PRIVITY IS UNDULY RESTRICTIVE

A. The Court Should Reject Arguments That Ignore the Practical Realities of the Relationship Between Staffing Agencies and Hospitals.

For purposes of both claim preclusion and issue preclusion, the concept of "privity" has expanded with time. (*Castillo, supra,* 23 Cal.App.5th at pp. 276-277.) Historically, this Court described the principle of privity as a more restricted concept. (See *Bernhard v. Bank of America Nat. Trust & Savings Ass'n* (1942) 19 Cal.2d 807, 811 (*Bernhard*) [describing a privity as one who, "after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties, as by inheritance, succession, or purchase."].) Grande cites to this definition and argues "there was no evidence that Eisenhower was a 'privity' under the California Supreme Court's definition." [Grande Answering Brief, p. 20.] However, this Court no longer follows such a restrictive definition and has also recognized "[p]rivity is a concept not readily susceptible to uniform definition." (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 875 [overruled on other grounds by *Ryan v. Rosenfeld* (2017) 3 Cal.5th 124].)

Grande ignores that over time courts have embraced a much broader, more practical concept of privity. Indeed, the Court in *Bernhard* recognized broad exceptions to the requirements of mutuality and privity, finding "no compelling reason . . .for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party to the earlier litigation." (*Bernhard, supra*, 19 Cal.2d at p. 812.) This Court's decision in *DKN Holdings* consistently described privity in broader terms: "As applied to questions of preclusion, privity requires the sharing of 'an identity or community of interest,' with 'adequate representation' of that interest in the first suit, and circumstances such that the nonparty 'should reasonably have expected to be bound' by the first suit. [Citation.] A nonparty alleged to be in privity must have an interest so similar to the party's interest that the party acted as the nonparty's " 'virtual representative' " in the first action." (*DKN Holdings*, *supra*, 61 Cal.4th at p. 826.) Thus, for purposes of privity, " '[t]he emphasis is not on a concept of identity of parties, but on the practical situation. The question is whether the non-party is sufficiently close to the original case to afford application of the principle of preclusion.' " (*Alvarez v. May Dept. Stores Co.* (2006) 143 Cal.App.4th 1223, 1236-1237 (*Alvarez*), citation omitted; *Cal Sierra Development, Inc. v. George Reed, Inc.* (2017) 14 Cal.App.5th 663, 674 (*Cal. Sierra*) [privity deals with a person's relationship to the subject matter of the litigation].)

In *DKN Holdings*, the plaintiff sued lessees who signed a lease agreeing that each was jointly and severally liable for the obligations under the lease. (*DKN Holdings, supra*, 61 Cal.4th at p. 818.) The Court held that because the plaintiff was not seeking to hold one party liable for another's actions, but was instead pursuing separate actions against the individual lessees based on their agreement to be jointly and severally liable, the separate actions were not subject to res judicata because the parties were not in privity. (*Id.* at p. 826.) In discussing the distinction between vicarious

liability and joint and several liability as applied to the modern concept of privity, the Court stated:

> When a defendant's liability is entirely derivative from that of a party in an earlier action, claim preclusion bars the second action because the second defendant stands in privity with the earlier one. [Citations.] The nature of derivative liability so closely aligns the separate defendants' interests that they are treated as identical parties. [Citation.]

(*DKN Holdings*, supra, 61 Cal.4th at pp. 827-828.) Thus, derivative liability requires analysis of the parties' relationship to the subject matter of the two cases in circumstances where the non-party would not necessarily be bound by an adverse judgment against a party. (*Id.*)

Grande's nine-day assignment at Eisenhower, and Eisenhower's time records, provision of meal and rest periods, and day-to-day control of Grande's work formed part of the basis of her wage and hour claims against FlexCare and Eisenhower. This is sufficient to show that the two companies' alleged liability is "derivative" of one another and that their interests and relationship to the subject matter of the claims are so closely aligned that they stand in privity with respect to the claims asserted by Grande in both actions. Other examples of derivative liability supporting claim preclusion include the relationship between a corporation and its employees, a general contractor and a subcontractor, an association and its agents, and among co-conspirators. (*Id.* at p. 828.)

In *Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, the court held that a financial services company could invoke res judicata based on a prior arbitration that found in favor of its officer on the same claim since the defendant's liability was merely derivative of that of its officer. (*Id.* at pp. 557-558.) In *Sartor v. Superior Court* (1982) 136 Cal.App.3d 322, the plaintiff sued a corporation and its employees in an action involving architectural and engineering services. The plaintiff

arbitrated against the corporation and prevailed. The court held the individual employees who were not parties to the arbitration were entitled to res judicata, because a corporation can act only through its agents. " '[I]t would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries.' " (*Id.* at p. 326, quoting *Bernhard, supra*, 19 Cal.2d at p. 812.)

In *Richard B. LeVine, Inc. v. Higashi* (2005) 131 Cal.App.4th 566, plaintiff first sued his partners for damages arising from his buy-out of the partnership, then he sued the partnership's accountant for civil conspiracy (aiding and abetting), and negligence. (*Id.* at pp. 570-572.) The court held the civil conspiracy claim was entitled to res judicata treatment because it was derived from an underlying breach of fiduciary duty claim against the partners, previously adjudicated in the first action. Applying the "primary right" theory used in California to determine when causes of action are identical, the court held:

> The primary right asserted... against the... partners was the right to be free of the wrongful diversion of plaintiff's rightful share of partnership profits to other... partners. The instant conspiracy and aiding and abetting claim... asserts the identical primary right. Thus, plaintiff's claim against the... partners is identical to its claim against defendants. Of course, liability for invasion of that primary right must be established against each party charged with the invasion. But if plaintiff's primary right is not violated at all, no defendant is liable.

(*Id.* at pp. 575-576.)

Similarly, in *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749, homeowners arbitrated "numerous construction deficiencies with the general contractor on their single-family home." (*Id.* at p. 752.) Among these deficiencies was a complaint about "radiating cracks" in the driveway. (*Id.* at p. 753.) On this point, the arbitrator awarded money for driveway repair, and denied the general contractor's claim for extra work. When the driveway

cracks worsened, the homeowners sued the subcontractor hired by the general contractor to construct the driveway. The *Thibodeau* court held the claim against the subcontractor was barred by the preclusive effect of the prior award, noting "the two proceedings here involve the same homeowner, the same home, and the same driveway." (*Id.* at p. 757.) The court treated the two claims as identical. That is, if the driveway was negligently constructed, it was done at the hands of the subcontractor hired by the general contractor. Thus, the general contractor's liability, if any, was derivative of his subcontractor's liability, and the claims were barred.

While the Court in *DKN Holdings* noted that none of these derivative liability cases involve joint and several liability in the context of addressing co-obligors' liability on a contract, these authorities do support a finding that a staffing agency and its client are in privity as to their identity of interest with respect to ensuring compliance with wage and hour labor laws. (*DKN Holdings, supra,* 61 Cal.4th at p. 828.)

B. The Decision in *Castillo* is Consistent with *DKN Holdings* and was Correctly Decided.

In *Castillo,* the court of appeal examined whether the plaintiffs' causes of action for labor code violations against a temporary staffing company and its client company were barred by claim preclusion. A settlement and release was executed in a prior class action suit brought against the staffing company. The plaintiffs, who were covered by the prior settlement, then brought a class action suit against the client company again alleging the same labor code violations as those alleged in the prior suit. One of the grounds upon which the trial court granted summary judgment was that plaintiffs' claims were barred by claim preclusion. (*Castillo*, *supra*, 23 Cal.App.5th at p. 274.)

On appeal, the court affirmed the judgment because the undisputed facts demonstrated the staffing company and client company were "in privity. . .with respect to the subject matter of the litigation." (*Id.* at p. 279.) The subject matter of both litigations were the same in that the cases involved the same wage and hour causes of action arising from the same work performed by the staffing company employees at the client company. (*Id.* at p. 280.) The staffing company and client company had interdependent responsibilities for paying the plaintiffs' wages. (*Ibid.*) And, by virtue of the prior settlement, the plaintiffs were compensated for any errors made in the payment of their wages. (*Ibid.*) Thus, the interests of the companies were "so intertwined" as to functionally put them in the same relationship to the litigation. In short, because both cases involved the same wage and hour claims, for the same work done, covering the same time period as the claims previously asserted, the settlement barred the subsequent action. (*Id.* at p. 282.)

Grande argues, incorrectly, that *DKN Holdings* determined privity cannot be found where parties are jointly and severally liable and then reasons alleged "joint employers" can never be in privity. *DKN Holdings* did not make a blanket determination that privity can never be found where parties are jointly and severally liable. Instead, the Court held joint and several liability alone does not establish privity. *Castillo* was correct in noting that *DKN Holdings* did not impose "an absolute bar against finding privity amongst parties who are also jointly and severally liable on a contract or as tortfeasors." (*Castillo, supra*, 23 Cal.App.5th at p. 287.)

The facts at issue in *DKN Holdings* are also a distinguishing factor. Review was granted in that case "to clarify a bedrock principle of contract law: Parties who are jointly and severally liable on an obligation may be sued in separate actions." (*DKN Holdings, supra*, 61 Cal.4th at p. 818.) The case involved multiple lessees' obligations on a commercial lease that specifically

provided each lessee "shall have joint and several responsibility" to comply with the lease terms. (*Ibid.*) After a judgment entered against one of the lessees was never satisfied, this Court concluded the lessor was permitted to file a separate action against a separate co-obligor. Each lessee's obligation in *DKN Holdings* was completely independent and separate. (*Id.* at pp. 822-823.) By contrast, in this case, the parties have intertwined obligations and the original judgment was satisfied.

II. CLAIM PRECLUSION SHOULD BE DETERMINED AS A MATTER OR SUBSTANCE AND NOT OF MERE FORM

The trend in California and other jurisdictions has been to determine the applicability of res judicata generally and preclusion as a matter of substance and not of mere form, based in part on an identification of the interests advanced in the first proceeding. (*Cal. Sierra*, 14 Cal.App.5th at p. 672; see also Wright & Cooper, 18A Fed. Prac. & Proc. Juris. (3d ed.) § 4448 ["The traditional rules have changed substantially. Both the privity label and the mutuality rule are losing their former capacity to deter functional analysis. As to privity, current decisions look directly to the reasons for holding a person bound by a judgment."].)[4] Courts have correctly reasoned privity should be expanded beyond its classical definition to relationships "sufficiently close to afford application of the principle of preclusion" "to maintain the stability of judgments, insure expeditious trials," prevent vexatious litigation, and "to serve the ends of justice." (*Castillo, supra*, 23 Cal.App.5th at pp. 276-277, citing *Cal Sierra,* 14 Cal.App.5th at p. 672, internal quotations and citation omitted.)

[4] See *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1460, fn. 16 ("there is little difference in the doctrine of res judicata as expounded in state and federal courts", quotations omitted.)

In *Cal Sierra*, the court applied a practical privity analysis. (*Cal Sierra, supra*, 14 Cal.App.5th at pp. 674-675.) There, the plaintiff mining company (Cal Sierra) had previously received an arbitration decision partly in its favor against another mining company (Western Aggregates) whose licensee had erected an asphalt plant in a problematic location on the land Cal Sierra and Western Aggregates shared. (*Id.* at p. 668.) After its partially successful arbitration against Western Aggregates, Cal Sierra filed a lawsuit against the licensee and its parent company based on the same facts and raising the same or similar causes of action as those raised in the arbitration. (*Ibid.*) The trial court held claim preclusion applied and entered judgment in favor of the licensee. (*Ibid.*)

The court of appeal affirmed and explained that a finding of privity for purposes of claim preclusion was not precluded even though Western Aggregates and its licensee were separate companies with a licensor-licensee relationship. (*Id.* at p. 673.) Rather, because the "subject matter of the litigation . . . was the same as that at the center of the arbitration dispute: the placement of the asphalt plant and whether it infringed on Cal Sierra's mining rights," Western Aggregates and its licensee "had an identical interest" as to that issue and were "adversely and similarly impacted by the propriety (or impropriety) of the plant's location." (*Id.* at p.674.) Thus, because Western Aggregates and its licensee shared the same relationship to the subject matter of the arbitration and litigation, privity existed and claim preclusion applied.

Similarly, the *Castillo* court correctly considered the two companies' interdepending relationship and their "relationship *to the subject matter of the litigation*" to determine privity. (*Castillo, supra*, 23 Cal.App.5th at pp. 279-280, citation omitted, original emphasis.) The two companies had shared responsibilities in performing a single legal duty such that their roles could not be divided into separate causes of action. A party that has an

opportunity to litigate whether there has been a breach of that duty, or who elects to voluntarily settle such a claim, is not deprived of a fair adversary proceeding in which fully to present his or her case.

The purpose of res judicata is served by including relationships between staffing agencies and their client hospitals, such as existed between Eisenhower and FlexCare with regarding to ensuring compliance with wage and hour labor laws, under the umbrella of privity for claim preclusion purposes. (See *Alvarez, supra,* 143 Cal.App.4th at pp. 1236-1237 ["The emphasis is not on a concept of identity of parties, but on the practical situation. The question is whether the non-party is sufficiently close to the original case to afford application of the principle of preclusion."].) Public policy and the interest of litigants alike require that there be an end to litigation. Finality helps to preserve the entire judicial system: "Indefinite continuation of a dispute is a social burden. It consumes time and energy that may be put to other use, not only of the parties but of the community as a whole. It rewards the disputatious." (Introduction to Restatement (Second) Judgments 1, 11.)

A party who has had one fair trial should be precluded from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. (*Bernhard*, *supra*, 19 Cal.2d at pp. 810-811.) The same is true when a party opts to settle litigation and the result is a final judgment. Applying res judicata when a plaintiff already has had an opportunity to litigate his or her claim against a party with interests sufficiently intertwined with the defendant in the second action preserves the integrity of the judicial system, promotes judicial economy, prevents inconsistent judgments, and protects litigants from vexatious litigation. (*Cal. Sierra*, *supra*, 14 Cal.App.5th at pp. 672-673.)

Grande urges that this Court accept an outdated definition of privity that ignores the practical realities of the staffing agency/client relationship.

The *Castillo* court, by contrast, was correct in focusing on the subject matter of the claims and whether the staffing agency and client's interests were sufficiently intertwined and interdependent as to put them in the same relationship to the litigation.

CONCLUSION

For the foregoing reasons, the Court should reverse the court of appeal and hold that Grande's claims against Eisenhower are barred by the doctrine of res judicata.

Respectfully submitted,

DATED: December 23, 2020

PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

By: /s/ Kendra J. Hall
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.204(c), I certify this APPLICATION & AMICUS CURIAE BRIEF OF SHARP MEMORIAL HOSPITAL is proportionately spaced, has a typeface of 13 points or more, and contains 4,121 words.

DATED: December 23, 2020

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is PROCOPIO, CORY, HARGREAVES & SAVITCH LLP, 525 "B" Street, Suite 2200, San Diego, California 92101. On December 23, 2020, I served the within documents:

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Executed on December 23, 2020, at San Diego, California.

/s/ Kristina Terlaga

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Supreme Court of California

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12/23/2020

Date

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