Case No. S261247

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Lynn Grande,
Plaintiff and Respondent,

vs.

Eisenhower Medical Center,
Defendant and Appellant,

FlexCare LLC.
Intervenor.

On Review from the Court of Appeal for the Fourth Appellate District,
Division Two 4th Civil Nos. E068730 and E068751

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

PLAINTIFF AND RESPONDENT LYNN GRANDE'S ANSWERING BRIEF TO BRIEFS OF AMICI CURIAE

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I. ALLOWING EMPLOYEES TO SUE ALL EMPLOYERS RESPONSIBLE FOR THEIR FAILURE TO PAY ALL WAGES OWING THEM IS NOT AGAINST PUBLIC POLICY, BUT PREVENTING THEM FROM DOING SO CERTAINLY IS.

Amicus Curiae American Staffing Association contends that it would be against public policy to allow employees who have been damaged as a result of their employer's failure to pay them all wages owed and have settled such claims for an amount less than what they were owed should not be allowed to pursue a claim against their joint employer to recover the additional unpaid wages owing them. Not true. There is nothing against public policy to allow employees who have been damaged by their joint employers' violation of California wage laws to seek compensation for all damages caused by such violations from all joint employers.

American Staffing Association's contention that, by allowing a class action to pursue claims against Eisenhower Medical Center (who was Plaintiff's and the putative class members' joint employer) for the unpaid wages that remained after the settlement with FlexCare would "result in a double recovery of wages and the creation of an inequitable penalty against clients that enter into staffing relationships" is simply untrue and wholly unsupported by the record. In fact, Eisenhower and other joint employers would receive a windfall if their liability were eliminated simply because a plaintiff settled with another joint employer for an amount that did not make them whole.

In this case, the $750,000 settlement in the *Erlandsen* Action was far less than FlexCare's and Eisenhower's potential liability, which was calculated at more than $10 million. (RT:157:11-23.) Thus, neither Plaintiff nor the class members obtained a full recovery under the settlement with FlexCare as to those claims for which FlexCare and Eisenhower were jointly and severally liable. Moreover, neither FlexCare nor Eisenhower

made any showing in the trial court that the $750,000 settlement payment fully compensated Grande and the class members for all the damages they had sustained.

As the Court held in *DKN Holdings,* "A plaintiff 'does not lose the right to the several liability of a several obligor until the obligation is fully satisfied,' notwithstanding that he may have obtained a judgment against other severally liable obligors." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 821 [189 Cal.Rptr.3d 809, 815, 352 P.3d 378, 384] (*quoting Melander v. Western Nat. Bank* (1913) 21 Cal.App. 462, 475 [132 P. 265].)

Thus, if Plaintiff is precluded from pursuing Eisenhower for unpaid wages, Grande and the settling class members will be harmed, and Eisenhower and other joint employers will obtain an unjustified windfall. This is contrary to public policy that promotes the protection of workers.

II. THERE IS NO BASIS FOR AMICI CURIAE'S CONTENTION THAT ALLOWING EMPLOYEES TO PURSUE CLAIMS FOR UNPAID WAGES AGAINST BOTH STAFFING AGENCIES AND HOSPITALS WOULD UNDERMINE THE ESTABLISHED HEALTHCARE STAFFING MODEL.

FlexCare and Eisenhower had indemnity agreements under which FlexCare agreed to indemnify Eisenhower. (*See, e.g.*, Supplemental Staffing Agreement, Eisenhower Appendix on Petition for Writ of Mandate, Volume 2, page 454, ¶ 5.3.) Eisenhower has admitted this in its Trial Brief: "The Staffing Agreements [between FlexCare and Eisenhower] include broad indemnification provisions, which require FlexCare to indemnify Eisenhower against 'any and all' legal claims against Eisenhower that are predicated on Flex Care and Eisenhower being joint employers." (Eisenhower Appendix on Petition for Writ of Mandate, Volume 2, page 378, lines 12-15.)

There is no evidence presented by Defendants that hospitals do not enter into similar indemnity agreements with staffing agencies who supply them with workers.

Thus, if hospitals are sued as joint employers (which they indisputably are because of the control they exercise over the assigned employees' working conditions), they can seek indemnity against the staffing agencies who supplied the workers and failed to pay all wages owing the assigned employees. There is simply no evidence or argument presented by Amici Curiae demonstrating that hospitals will no longer use employees from staffing agencies if they are allowed to be sued as joint employers when they have the right to seek indemnification from the staffing agencies.

More importantly, staffing agencies sued by employees who settle the employees' claims can easily protect their clients from also being sued simply by including them as releasees in the settlement agreements. Here, for example, if FlexCare had in fact intended to include Eisenhower as a released party, FlexCare could have mentioned Eisenhower by name or by description in the "Released Parties" provision of the Judgment, including, for example, language such as:

- "Release Parties" means FlexCare, LLC, Vantus, LLC, Christopher Truxal, Travis Mannon, Michael Kenji Fields, Nathan Porter, ***Eisenhower Medical Center, Lompoc Medical Center, or any other client of FlexCare for whom any class member provided services***, . . .;
- "Released Parties" means FlexCare, LLC, Vantus, LLC, Christopher Truxal, Travis Mannon, Michael Kenji Fields, Nathan Porter, ***and any client of FlexCare as to whom any class member may have provided services through FlexCare*** . . .; or
- "Released Parties" means FlexCare, LLC, Vantus, LLC, Christopher Truxal, Travis Mannon, Michael Kenji Fields, Nathan Porter, ***and any entity that could be deemed to be a joint employer of any class member*** . . .

FlexCare did not include any of this language in the settlement agreement. It was FlexCare's inaction in this regard, not the *Grande* appellate court's decision, that "injects uncertainty and risk into the system."

Amicus American Hospital Association's argument that it would be too "impractical" to provide protection to clients of staffing agencies when such agencies settle claims by their employees is simply untrue.[1] As discussed above, FlexCare could have protected Eisenhower by including in the "Released Parties" definition as reference by category to "any client of FlexCare as to whom any class member may have provided services through FlexCare." It is not true, as American Hospital Association appears to contend, that clients can only obtain protection from future claims if they are specifically named in release provisions.

Moreover, it is not the employee's burden to "carve out" joint employers from settlement agreements with staffing agencies. Rather, it is the staffing agencies' obligation to expressly include joint employers in release provisions if they want a release of claims by their joint employees. Certainty, in this regard, it is easily achievable by staffing agencies that settle claims against them through simply drafting language that specifically protects them and their clients.

Amicus American Hospital Association's contention that serial litigation is a bad thing to ensure that employees are compensated for all amounts owing them is nonsensical and directly contrary to the law, which

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[1] ". . . requiring settling parties to identify and name each and every released client in a settlement agreement, often is not straightforward or practical. For example, a large putative class of temporary workers suing a staffing agency may have, between them, worked at a large number of different clients during the class period." (Amicus Brief, page 25, fn 15.)

allows plaintiffs to sue all defendants responsible for their damages in separate lawsuits. Arguing that there is a potential "heavy" burden on defendants to pay for damages for their own violations of the law is an absurd argument for allowing to them to escape liability. If this were a valid argument, no defendant would ever have to pay for the damages that it created by its violations of law.

III. AMICUS SHARP MEMORIAL HOSPITAL'S BRIEF REHASHES ARGUMENTS THAT WERE ASSERTED BY DEFENDANTS AND PROPERLY REJECTED BY THE *GRANDE* COURT.

Sharp Memorial Hospital's Amicus Brief simply rehashes arguments that Defendants have already asserted in their briefs and were properly rejected by the *Grande* appellate court.

Its contention that the definition adopted by the *Grande* Court is "outdated" is nonsense. The *Grande* Court expressly adopted the privity test enunciated by this Court in *DKN Holdings*, in which this Court expressly held:

> 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*, *supra*, 61 Cal.4th at p. 826, 189 Cal.Rptr.3d 809, 352 P.3d 378.)

Defendants have made no showing that Eisenhower would have been bound by a judgment against FlexCare if Plaintiff's claims had been tried to a judgment.

Moreover, this Court rejected Defendants' and Amici's argument that because the claims arose out of the same assignment at Eisenhower, there was privity between FlexCare and Eisenhower for *res judicata* purposes.

Indeed, this Court held in *DKN Holding* that it was irrelevant that a plaintiff's two lawsuits involved the same primary right or involved the same subject matter of the litigation:

> As discussed, claim preclusion applies only to the relitigation of the same cause of action *between the same parties* or those in privity with them. (*Teitelbaum Furs, supra*, 58 Cal.2d at p. 604, 25 Cal.Rptr. 559, 375 P.2d 439; *Rice v. Crow* (2000) 81 Cal.App.4th 725, 734, 97 Cal.Rptr.2d 110.) ***Whether DKN's two lawsuits involve the same primary right is beside the point.*** (See *Rice*, at p. 736, 97 Cal.Rptr.2d 110.) ***Claim preclusion does not bar DKN from suing Faerber because Faerber is not "the same party" who defended the cause of action in the first suit, nor was he in privity with Caputo based on their business partnership or cosigner status***. (See *Dillard v. McKnight* (1949) 34 Cal.2d 209, 214, 209 P.2d 387 [business partners are not in privity for purposes of preclusion].)
>
> This conclusion is entirely consistent with the settled rule that joint and several obligors may be sued in separate actions. (See *Williams II, supra*, 48 Cal.2d at p. 66, 307 P.2d 353.) Claim preclusion does not bar subsequent suits against co-obligors if they were not parties to the original litigation. In this context, a party "is one who is 'directly interested in the subject matter, and had a right to make defense, or to control the proceeding, and to appeal from the judgment.' " *Bernhard v. Bank of America, supra*, 19 Cal.2d at p. 811, 122 P.2d 892.) Faerber has never contended that he and the other lessees should be considered the same party.
>
> ***Nor does joint and several liability put co-obligors in privity with each other.*** 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. (*Clemmer v. Hartford Insurance Co.* (1978) 22 Cal.3d 865, 875, 151 Cal.Rptr. 285, 587 P.2d 1098.) 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. (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 150, 46 Cal.Rptr.3d 7.) Joint and several liability alone does not create such a closely aligned interest between co-obligors. ***The liability of each joint and several obligor is separate and independent, not vicarious or***

> ***derivative.*** (See *id.* at p. 154, 46 Cal.Rptr.3d 7, citing *Tavery v. U.S.* (10th Cir.1990) 897 F.2d 1032, 1033.) ***Thus, joint and several obligors are not considered to be in privity for purposes of issue or claim preclusion.*** (*Gottlieb*, at p. 154, 46 Cal.Rptr.3d 7.) (*Id.* at 823–25 (emphasis added).)

IV. CONCLUSION

The trial court, based on substantial evidence, properly found that Eisenhower was never intended to be released by the *Erlandsen* Action settlement agreement and Judgment. Eisenhower has failed to demonstrate that the trial court's findings were not supported by substantial evidence or that its legal conclusions were erroneous.

The *Castillo* decision is unsupported by any controlling authority and directly conflicts with *DKN Holdings* and should be disregarded.

This Court should affirm the trial court's judgment.

Dated: January 28, 2021

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CERTIFICATE RE NUMBER OF WORDS OF BRIEF

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, **RESPONDENT LYNN GRANDE'S ANSWERING BRIEF TO BRIEF OF AMICI CURIAE** contains 2,000 words, including footnotes. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: January 28, 2021

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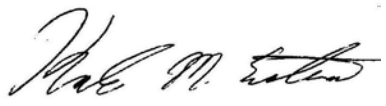

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