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

EISENHOWER MEDICAL CENTER'S SUPPLEMENTAL BRIEF RE NEW AUTHORITIES (Cal. R. Ct., Rule 8.520(d))

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Defendant and petitioner Eisenhower Medical Center submits the following supplemental brief to discuss new authority—*Franklin v. Community Regional Medical Center* (9th Cir. May 21, 2021) 998 F.3d 867 (*Franklin*)—which was decided six months after the merits briefing in this Court was completed. (See Cal. R. Ct., rule 8.520(d).)

A. *Franklin's* relevance in this appeal

One of the two cases creating the conflict that forms the basis for this Court's review is *Castillo v. Glenair, Inc.* (2018) 23 Cal.App.5th 262 (*Castillo*). In holding that the employer-client in that case was the agent of the staffing agency for purposes of a release in the settlement of the wage-hour litigation brought by the employee against the staffing agency, *Castillo* relied in part on *Garcia v. Pexco, LLC* (2017) 11 Cal.App.5th 782 (*Garcia*). In *Garcia*, the court of appeal held that the client of a staffing agency could enforce an arbitration agreement between the staffing agency and its employees because, "[a]s the alleged joint employers, [the client] and [the staffing agency] were agents of each other in their dealings with [the plaintiff]." (*Id.* at p. 788.) Both Eisenhower and FlexCare, LLC relied on *Garcia* in their merits briefing in this Court. (See Eisenhower Op. Br. at p. 26; FlexCare Op. Br. at pp. 15, 22, 23, 35; Eisenhower Reply at p. 19 fn. 9; FlexCare Reply at pp. 18, 23.) Grande did not address *Garcia* at all, and therefore has made no attempt to distinguish it.

The Ninth Circuit in *Franklin* looked to California law to determine whether a hospital could compel arbitration of a nurse-employee's wage-hour claims based on an arbitration agreement in the employment agreement between the employee and the temporary staffing agency that placed the employee at the hospital. (*Franklin*, 998 F.3d at pp. 870-871.) In considering whether the signatory employee's claim against the non-signatory hospital was "*intimately founded in and intertwined with*" her

employment contract with the staffing agency, the court found it was bound to follow the California appellate court's published decision in *Garcia.* (*Id.* at p. 871 ["Our review of California law shows that *Garcia* is not an 'outlier' case. . . . There are no California decisions inconsistent with *Garcia*, and we see no evidence that the California Supreme Court would reject *Garcia*'s reasoning."].)

Applying California law as laid out in *Garcia*, the Ninth Circuit in *Franklin* held that the nurse's claims against the hospital were "intimately founded in and intertwined with" her employment contract with the staffing agency so that she was equitably estopped from avoiding arbitration of her claims against the hospital. (*Id.* at p. 876.)[1] Since the nurse's hourly wage rate and overtime rate were set by the assignment agreement she signed with the staffing agency, which was also responsible to pay her wages, her claims could not stand on their own against the hospital. (*Ibid.*) Indeed, her claims were not "fully viable" without reference to the assignment agreement that set her hourly wage. (*Ibid.*)

Because *Franklin* applies the holding and analysis in *Garcia*, and because it was decided on facts similar to those here, it is relevant to a decision on the merits of Eisenhower's petition for review.

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[1] The court of appeal reached the same decision in *Garcia*, but based on both agency and equitable estoppel. (*Garcia*, *supra*, 11 Cal.App.5th at p. 788.) The Ninth Circuit made no distinction between those legal theories in analyzing the requisite relationship between the hospital and the staffing company in *Franklin*. (See *Franklin*, *supra*, 998 F.3d at pp. 871-872.) As discussed below, the economic and practical realities of the relationship between the staffing agency and its client are identical under the estoppel, privity and agency analyses and warrant a parallel analysis and consistent conclusion.

B. The factual context in *Franklin* is the same as here

The factual underpinnings of the decision in *Franklin* are essentially identical to those here.

In *Franklin*, the court found that the employee signed a travel nurse assignment agreement with the staffing agency, setting her hourly wages, her overtime rate, the length of her shifts, and its reimbursement policies. (*Id.* at p. 869.) In its arrangement with the staffing agency, the hospital retained supervision over the employee's provision of clinical services. (*Ibid.*) In addition, the employee was required to use the hospital's timekeeping system and follow the hospital's overtime policy, but the staffing company was responsible to pay the employee her wages, based on the rates and terms of the assignment agreement with the staffing agency. (*Ibid.*) The employee worked at the hospital for less than two months, and then filed her class action complaint against the hospital for alleged wage-hour violations. (*Id.* at p. 870.)

As shown in Eisenhower's briefing, the operative facts in this case are the same. In fact, Grande's complaint alleges many of those facts, including agency. (See, e.g., 1 AA 18-19, ¶5 [alleging "[e]ach of the Defendants has been or is the … '*agent*' … and/or … 'co-conspirator' of each of the other defendants" and "all defendants were '*joint employers*' "]; 1 AA 19-20, ¶6 ["Defendants acted as the direct employer, co-employer and/or joint employer" of Grande and the putative class members and controlled the work site (¶6(a)), controlled the work schedules and conditions of employment (¶6(b)), set hours and work schedules(¶6(e)), had power over "when and whether to take meal and rest periods" (¶6(h)), supervised Grande's work activities (¶6(i)), and "provided the forms and systems in which the details of the work performance … were recorded." (¶6(j))].) Ultimately, Grande alleges, Eisenhower "did not comply with the

timekeeping procedures required by law ...” (1 AA 20, ¶9), and “Defendants knowingly and intentionally … failed to maintain and furnish class members with accurate and complete wage statements” in violation of Labor Code section 226 (1 AA 30, ¶51).

In other words, even though FlexCare was exclusively responsible to pay all wages and issue all wage statements, Grande alleges that Eisenhower is liable for FlexCare’s alleged violations. Likewise, she alleges that FlexCare was liable for Eisenhower’s violations because they are effectively joint employers and agents of each other and responsible for each other’s acts and omissions.

Because of the overlap of the facts in *Franklin* with the facts here, when *Franklin* concludes the employee’s claims against the hospital were “intimately founded in and intertwined with” her employment contract with the staffing agency, that conclusion applies equally here.

C. *Franklin’s* “intimately founded in and intertwined with” analysis is compelling on the privity and agency issues in this appeal

That conclusion—that Grande’s claims against Eisenhower are “intimately founded in and intertwined with” her employment contract with FlexCare—has implications for both agency and the privity required for res judicata.

For agency, it supports a conclusion that Eisenhower acted as FlexCare’s agent in recording and approving Grande’s hours and overtime and providing her required meal and rest breaks so that FlexCare could properly pay Grande her wages as required by California’s wage-hour laws. Like the nurse’s claims against the hospital in *Franklin*, Grande’s claims against Eisenhower are “intimately founded in and intertwined with” her employment contract with FlexCare, which set the pay rates FlexCare used

to pay her wages and issue her wage statements. Grande's claims are not "fully viable" without reference to that contract and the rates FlexCare paid her under that contract.

With regard to res judicata, the conclusion that Grande's claims are "intimately founded in and intertwined with" her employment contract shows that Eisenhower and FlexCare had the same relationship to the subject matter of the litigation. That is, Grande alleged both were responsible for the same wage-hour infractions for the same period she was jointly employed by them pursuant to her employment contract with FlexCare. Indeed, Grande's claims against either FlexCare or Eisenhower could not be proven without the involvement of the other. The intertwinement and interdependence of Grande's claims against Eisenhower with her employment contract with FlexCare satisfies the privity requirement for res judicata.

In short, the assessment of the relationship required to establish estoppel, privity and agency is so similar for each that the legal principles warrant a parallel analysis and consistent conclusion. In *Franklin*, applying equitable estoppel the court indicated "[w]e analyze Franklin's claims by looking at the relationship between the parties and their connection to the alleged violations." (*Franklin*, *supra*, 998 F.3d at p. 876.) That is the same analysis that is performed when considering whether Eisenhower was FlexCare's agent and whether Eisenhower and FlexCare were in privity. *Franklin* thus provides further support for the conclusion that Eisenhower was FlexCare's agent for the purpose of complying with California's wage and hour laws, and Eisenhower and FlexCare were in privity for that purpose as well.

For these reasons, Eisenhower submits *Franklin* as a supplemental authority supporting its position on appeal.

Dated: March 24, 2022

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By *s/Richard J. Simmons*
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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to California Rule of Court 8.204(c), the attached Appellant's Reply to Opening Merits Brief is proportionately spaced, has a typeface of 13 points, and contains 1,457 words, according to the counter of the word processing program with which it was prepared.

Dated: March 24, 2022

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PROOF OF SERVICE

Lynn Grande v. Eisenhower Medical Center
Case No. S261247

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Diego, State of California. My business address is 501 West Broadway, 19th Floor, San Diego, CA 92101-3598.

On March 24, 2022, I served true copies of the following document(s) described as **EISENHOWER MEDICAL CENTER'S SUPPLEMENTAL BRIEF RE NEW AUTHORITIES (Cal. R. Ct., Rule 8.520(d))** on the interested parties in this action as follows:

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Executed on March 24, 2022, at San Diego, California.

s/Pamela Parker

Pamela Parker

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **GRANDE v. EISENHOWER MEDICAL CENTER (FLEXCARE)**
Case Number: **S261247**
Lower Court Case Number: **E068730**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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3/24/2022

Date

/s/Pamela Parker

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