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 RESPONSE TO EISENHOWER MEDICAL CENTER'S SUPPLEMENTAL BRIEF RE NEW AUTHORITIES

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I. NEITHER *GARCIA* NOR *FRANKLIN* HAVE ANY RELEVANCE TO WHETHER EMPLOYEES OF ONE JOINT EMPLOYER CAN SUE ANOTHER JOINT EMPLOYER AFTER HAVING SETTLED WITH THE FIRST JOINT EMPLOYER.

Garcia v. Pexco, LLC (2017) 11 Cal.App.5th 782 [217 Cal.Rptr.3d 793, 11 Cal.App.5th 782] (*Garcia*) and *Franklin v. Community Regional Medical Center* (9th Cir. 2021) 998 F.3d 867 (*Franklin*) both involved issues regarding whether an employee who signs an arbitration agreement with a direct employer can be required to arbitrate the employee's claims against an alleged joint employer with whom the employee did not sign an arbitration agreement. That issue, however, has nothing to do with the issue before this Court, which is the *res judicata* effect, if any, that a settlement with one joint employer has with respect to claims against another joint employer.

A. *Garcia* is irrelevant to this case and its one-sentence *dictum* that joint employers are agents of each other has no binding or persuasive authority.

In *Garcia*, the plaintiff brought Labor Code violations against his employer, Real Time, a staffing company, and Pexco, the company for which Real Time assigned the plaintiff to work for violations of the Labor Code and unfair business practices pertaining to payment of wages. Garcia's employment application had a provision that required him to arbitrate " 'any dispute' " with Real Time, but not with Pexco. (*Id.* at p. 784, 217 Cal.Rptr.3d 793.) The defendants moved to compel arbitration. The California Court of Appeals held Pexco, the nonsignatory defendant, could compel arbitration based on equitable estoppel because the plaintiff's "claims against Pexco are rooted in his employment relationship with Real Time." (*Id.* at 787.)

The Court of Appeal in this case properly recognized that *Garcia* is inapposite to the *res judicata* privity issue before this Court and that neither FlexCare nor Eisenhower was an agent of the other. The Court reasoned:

> FlexCare and Eisenhower argue we should find them in privity with each other because their status as joint employers means they are agents of each other. They rely for this position on *Garcia v. Pexco* (2017) 11 Cal.App.5th 782, 788, 217 Cal.Rptr.3d 793 (*Garcia*), but the case is inapposite. *Garcia* involved an attempt by a nonparty to enforce an arbitration clause in an employment agreement. The Court of Appeal recognized an exception to the general rule against allowing such nonparty enforcement "when a plaintiff *alleges* a defendant acted as an agent of a party to an arbitration agreement." (*Ibid.*, italics added.) In *Garcia*, the plaintiff affirmatively alleged the party and the nonparty were "acting as agents of one another." (*Ibid.*) Here, Grande's pleadings don't allege the companies stand in an agency relationship. Moreover, because we are reviewing a judgment after a bench trial rather than interpreting an arbitration agreement, we're not concerned with the pleadings, but the actual relationship of the two companies. (*Durante v. County of Santa Clara, supra*, 29 Cal.App.5th at p. 842, 240 Cal.Rptr.3d 302.) Thus, the limited holding of *Garcia* has no bearing on the issue presented in this case.
>
> As to the actual relationship of the companies, the trial court found, in the context of interpreting the settlement agreement, that neither FlexCare nor Eisenhower was an agent of the other. As the court noted, " ' "[W]hether an agency relationship has been created or exists is determined by the relation of the parties as they in fact exist by agreement or acts [citation], and the primary right of control is particularly persuasive." ' " (Statement of Decision, p. 17, quoting *Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1184, 183 Cal.Rptr.3d 394.) Here, FlexCare and Eisenhower affirmatively disavowed any agency relationship in their contract, which says FlexCare "is performing the services and duties hereunder as an independent contractor and not as an employee, agent, partner of or joint venture with Hospital." The contract notes specifically "[Eisenhower] retains professional and administrative responsibility for the services rendered." Moreover, as the trial court noted, there was no evidence Eisenhower ever acted as FlexCare's agent or vice versa. On the contrary, Eisenhower maintained control over the temporary nurses in the

> performance of their jobs. It assessed their competency during an orientation program, could require nurses to take its medication and clinical skills test, and retained discretion to make decisions about the nurses' assignments and to terminate nurses for poor performance. In addition, the staffing agreement made clear nurses were required to conform with the hospital's policies and procedures. ***These facts show FlexCare and Eisenhower operated independently, and constitute substantial evidence supporting the trial court's finding that neither company was an agent of the other***. (*Grande v. Eisenhower Medical Center* (2020) 44 Cal.App.5th 1147, 1161–1162 [258 Cal.Rptr.3d 324, 335, 44 Cal.App.5th 1147, 1161–1162] (emphasis added).)

Eisenhower seizes on the one-sentence *dictum* in *Garcia* near the end of the opinion where the Court states, ***without any analysis or authority***: "As the alleged joint employers, Pexco and Real Time were agents of each other in their dealings with Garcia." (*Garcia v. Pexco, LLC* (2017) 11 Cal.App.5th 782, 788 [217 Cal.Rptr.3d 793, 11 Cal.App.5th 782].) The *Garcia* Court offers no authority or analysis for such statement, however. Moreover, this *dictum* is contrary to other appellate authority holding that the fact that two defendants may both be found to be employers of an employee does not impose "joint and several liability" on each for the acts of the other on an "agency" theory. (*See Noe v. Superior Court* (2015) 237 Cal.App.4th 316, 331–34 [187 Cal.Rptr.3d 836, 850–53].)

In *Noe*, Anschutz Entertainment Group (AEG) contracted with Levy Premium Foodservice Limited Partnership to manage the food and beverage services at several entertainment venues located in Southern California. Levy contracted with Canvas Corporation to provide laborers who sold food and beverages at AEG venues. Several individual vendors filed a wage and hour class action against AEG, Levy and Canvas for failure to pay minimum wage and willfully misclassifying them as independent contractors in violation of Labor Code section 226.8.

AEG and Levy filed motions for summary judgment, arguing in part that they were entitled to summary adjudication of plaintiffs' Labor Code section 226.8 claim because the undisputed evidence showed Canvas was the entity that had classified the vendors as independent contractors. Although the trial court denied the motions for summary judgment, it agreed that plaintiffs could not pursue a section 226.8 claim against AEG or Levy because neither entity had made the alleged misclassification decision.

The plaintiffs filed a petition for writ of mandate. In its decision, the Court rejected the plaintiff's claim a co-employer was liable based solely on the acts of another co-employer. The Court reasoned:

> Plaintiffs alternatively argue that a joint employer of an individual who has been misclassified by a co-employer is subject to section 226.8 penalties ***based on principles of agency and joint and several liability***. Plaintiffs assert that under California law, "[w]here multiple entities employ a common workforce, they are generally jointly held liable for the ... unlawful treatment of their employees, just as if they were each other's agents." They further contend if the Legislature had intended to "depart from this usual rule of joint and several liability" it would have added "express language prohibiting joint and several liability for violations of Section 226.8."
>
> ***We are aware of no authority suggesting that, under California law, joint employers are generally treated "as if they were each other's agents" or that joint employers are normally held jointly liable for Labor Code violation committed by a co-employer.*** The primary authority on which plaintiffs rely, *Martinez v. Combs* (2010) 49 Cal.4th 35, 109 Cal.Rptr.3d 514, 231 P.3d 259 (*Martinez*), contains no language supporting such a theory. The plaintiffs in *Martinez* brought claims under section 1194 against multiple defendants to recover unpaid wages due under California's minimum wage and overtime requirements. Although the plaintiffs were not hired or paid by the defendants, they argued that the defendants qualified as their joint employer based on the amount of control the defendants exerted over them. The defendants argued that that the undisputed facts demonstrated they

were not the plaintiffs' employer and therefore could not be held liable for unpaid wages under section 1194. The primary issues the court addressed were (1) how the "employment relationship" is defined under California law (see *id*. at p. 51, 109 Cal.Rptr.3d 514, 231 P.3d 259); and (2) whether defendants fell within that definition.

In the course of analyzing those issues, the court explained that, under section 1194, every employer is liable to its employees for unpaid minimum wage and overtime compensation. (*Martinez, supra*, 49 Cal.4th at p. 49, 109 Cal.Rptr.3d 514, 231 P.3d 259.) Implicit in the court's analysis is a recognition that section 1194 permits an employee with multiple employers to seek recovery of unpaid wages from any of them. ***Contrary to the plaintiffs' suggestion, however, the court did not conclude that each joint employer is liable for unpaid wages based on principles of agency or joint and several liability. Rather, it concluded that such liability attaches as the result of section 1194, which imposes a duty on every employer to ensure its employees receive minimum wage and overtime compensation. Thus, Martinez merely confirms the unremarkable proposition that to establish employer liability for a Labor Code violation, the claimant (or the Labor and Workforce Development Agency (LWDA) in an enforcement action) must demonstrate the employer violated the terms of the specific Labor Code provision at issue.***

. . .

In sum, plaintiffs have identified no authority for the proposition that a joint employer may be held liable for Labor Code violations committed by a cojoint employer based on principles of agency or joint and several liability. Rather, whether an employer is liable under the Labor Code depends on the duties imposed under the particular statute at issue. Applying those principles here, if plaintiffs prove defendants were their joint employers, those defendants may be held liable under section 1194 for any unpaid minimum wage and overtime compensation resulting from plaintiffs' misclassification. (See *Martinez, supra,* 49 Cal.4th at pp. 49–50, 109 Cal.Rptr.3d 514, 231 P.3d 259.) To obtain civil penalties under section 226.8, however, plaintiffs must demonstrate not only that defendants were joint employers, but also that, as set forth in this opinion, they each engaged in the act of voluntarily and knowingly misclassifying plaintiffs. ***The mere fact that Canvas engaged in such conduct is insufficient***. (Emphasis added.)

The *Garcia* Court's *dictum* that two parties who are both found to be employers of an employee are *ipso facto* also "agents" of each other (and therefore vicariously liable for all acts of the other) without any evidence that one "controlled" the other is also contrary to well-established case law and has no basis in any precedent. Moreover, the trial court expressly found as a matter of fact that Eisenhower was not FlexCare's agent.

The Court of Appeal's opinion in *Noe* is well-reasoned and supported by controlling authority. This Court should therefore follow *Noe* and disregard the *dictum* in *Garcia*. It should also expressly disapprove of such *dictum*.

B. *Franklin* is also inapposite to the issue before this Court.

Franklin also involved a claim by an employee of a staffing agency against the staffing agency's client where the employee was placed. The nurse brought a class and collective action against the hospital alleging statutory hour and wage violations. The nurse had signed an agreement with the staffing agency containing an arbitration provision but had not signed an agreement with the hospital with an arbitration provision. The district court granted the hospital's motion to compel arbitration and the Ninth Circuit affirmed, relying on *Garcia*.

Franklin, however, like *Garcia*, did not involve resolution of the issue of whether the settlement by an employee with one employer has an *ipso facto res judicata* effect that precludes the employee from suing another joint employer who has not been released. The fact that the employee's claims against both employers may be "intertwined" does not mean that FlexCare and Eisenhower are in privity with one another for *res judicata* purposes and neither *Garcia* nor *Franklin* so hold.

In fact, that claims may arise of an identical contract, or accident, or work setting and may therefore be "intertwined" is irrelevant to the *res*

judicata issue. The joint obligors' lease obligations in *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 823–25 [189 Cal.Rptr.3d 809, 818–19, 352 P.3d 378, 386–87] may have been "intertwined" in the sense that such obligations arose out of the same lease. Similarly, the jointly and severally liable of two defendants' liability for a car accident may be "intertwined" in the sense that such liability arises out of the same accident. In both cases, however, the settlement by the plaintiff of claims against one obligor does not release the plaintiff's claims against the other obligor.

In *DKN Holdings*, this Court expressly held that where two defendants were jointly and severally liable to a plaintiff, there was no "privity" for purposes of the doctrine of *res judicata:*

> 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.) (Emphasis added.) *(DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 825–826.)

This Court went on to explain that joint and several liability is to be distinguished from derivative liability where claim preclusion may be applied:

> When a defendant's liability ***is entirely derived*** 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 omitted.] The nature of derivative liability so closely aligns the separate defendants' interests that they are treated as identical parties. [Citation omitted.] Derivative liability supporting preclusion has been found between a corporation and its employees (*Sartor v. Superior Court* (1982) 136 Cal.App.3d 322, 328 [187 Cal.Rptr. 247]; Lippert, at p. 382), a general contractor and subcontractors (*Thibodeau v. Crum* (1992) 4 Cal.App.4th 749, 757 [6 Cal.Rptr.2d 27]), an association of securities dealers and member agents (*Brinton*, at pp. 557-558), and among alleged coconspirators (*Richard B. LeVine, Inc.*, at p. 579). (*DKN*, *supra*, at 827-828 (emphasis added).)

Because Eisenhower is alleged to be a joint employer with FlexCare and they are therefore joint and several obligors, they are not "in privity" for purposes of claim preclusion. As this Court in *DKN Holdings* expressly

held: "joint and several obligors are not considered to be in privity for purposes of issue or claim preclusion. (*Id*., at 820).)

Under controlling law, joint employers are each jointly and severally liable for violations of labor laws as to their employees. Plaintiff can therefore sue them in the same lawsuit or in separate lawsuits. Eisenhower's liability to Plaintiff exists independently of FlexCare's liability. Plaintiff is not required to prove that FlexCare was her employer to prove that Eisenhower was her employer, *i.e.*, Eisenhower's liability is not "derived from" FlexCare's status as an employer but from Eisenhower's status as an employer. It is simply not true, as Eisenhower contends, that "Grande's claims against either FlexCare or Eisenhower could not be proven without the involvement *[whatever that means]* of the other." (Supp. Brief at 8.)

Nor is it true that Plaintiff is contending that Eisenhower and FlexCare are responsible for each other's acts and omissions because they are joint employers. (Supp. Brief at 7.) Plaintiff is contending, and the law establishes, that joint employers are ***independently liable*** as employers for their own acts and omissions. Plaintiff has never contended, and Eisenhower cites no controlling law, that joint employers are vicariously liable for each other's violations based on their status as joint employers. Indeed, as discussed above, the Court in *Noe* specifically held to the contrary.

II. CONCLUSION

The Court should ignore Eisenhower's conflation of the holdings of the courts in *Garcia* and *Franklin* with the issues before this Court. Neither decision is relevant to whether there was substantial evidence to support the trial court's factual finding that Eisenhower was ***not*** FlexCare's agent, and neither decision disagrees with the Court of Appeal's decision in this case

that Plaintiff's settlement with FlexCare does not preclude Plaintiff from suing Eisenhower as a joint employer.

Dated: March 25, 2022

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Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, **PLAINTIFF AND RESPONDENT LYNN GRANDE'S RESPONSE TO EISENHOWER MEDICAL CENTER'S SUPPLEMENTAL BRIEF RE NEW AUTHORITIES** contains 3,111 words, including footnotes. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: March 25, 2022

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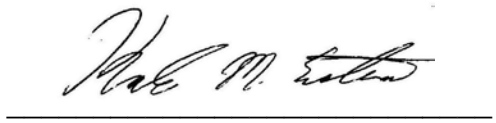

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