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Supreme Court of California
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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 ANSWER TO PETITIONS FOR REVIEW BY EISENHOWER MEDICAL CENTER AND FLEXCARE, LLC

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CERTIFICATE OF INTERESTED PARTIES OR ENTITIES

Lynn Grande knows of no entity or person that must be disclosed under Cal. Rules of Court, Rule 8.208(e).

Dated: March 23, 2020 ______________________________

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Table of Contents

CERTIFICATE OF INTERESTED PARTIES OR ENTITIES 2

I. INTRODUCTION 5

II. THE COURT OF APPEAL IN THIS CASE PROPERLY HELD THAT PLAINTIFF'S CLAIMS AGAINST EMC ARE NOT BARRED BY THE DOCTRINE OF *RES JUDICATA*. 6

  A. Because FlexCare and EMC were alleged to be joint employers and, therefore, jointly and severally liable to Plaintiff, they were not in privity with each other under this Court's holding in *DKN Holdings LLC v. Faerber*. 6

  B. The *Castillo* Court's conclusion that privity "deals with a person's relationship to the subject matter of the litigation" is directly contrary to *DKN Holdings*. 11

III. THERE IS NO GOOD CAUSE TO REVIEW THE COURT OF APPEAL'S CONFIRMATION OF THE TRIAL COURT'S EXPRESS FACTUAL FINDINGS, MADE AFTER A TRIAL AND THE CONSIDERATION OF DOCUMENTARY EVIDENCE AND TESTIMONY, THAT EMC WAS NOT FLEXCARE'S AGENT. 13

IV. THE *CASTILLO* COURT'S "AGENCY" HOLDING IS INCONSISTENT WITH LONG-ESTABLISHED LAW REGARDING THE CONTROL NECESSARY TO ESTABLISH AN AGENCY RELATIONSHIP IN THE CONTEXT OF JOINT EMPLOYMENT. 14

V. CONCLUSION 19

CERTIFICATE RE NUMBER OF WORDS OF BRIEF 20

PROOF OF SERVICE 21

TABLE OF AUTHORITIES

CASES

Alvarez v. Felker Mfg. Co. (1964) 230 Cal.App.2d 987 15

Bernhard v. Bank of America Nat. Trust & Savings Ass'n (1942) 19 Cal.2d 807 ....6, 12

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

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

Falk v. Brennan (1973) 414 U.S. 190 11

Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp. (2007) 148 Cal.App.4th 937...14, 16, 17

Gottlieb v. Kest (2006) 141 Cal.App.4th 110...9

Grande v. Eisenhower Medical Center (2020) 44 Cal.App.5th 1147...13, 18

Martinez v. Combs (2010) 49 Cal.4th 35 10

McCollum v. Friendly Hills Travel Center (1985) 172 Cal.App.3d 83 15

McCray-Key v. Sutter Health Sacramento Sierra Region (E.D. Cal., Nov. 2, 2015, 2:15-CV-1514-JAM-CKD) 2015 WL 6703585 9

Mycogen Corp. v. Monsanto Co. (2002) 28 Cal.4th 888 6

Patterson v. Domino's Pizza, LLC (2014) 60 Cal.4th 474 ....15, 16

People v. JTH Tax, Inc. (2013) 212 Cal.App.4th 1219...............................15

Schultz v. Capital Intern. Sec., Inc. (4th Cir. 2006) 466 F.3d 298.............11

Sonora Diamond Corp. v. Superior Court (2000) 83 Cal.App.4th 523......15

Wickham v. Southland Corp. (1985) 168 Cal.App.3d 49............................15

STATUTES

29 C.F.R. § 791.2(a) 11

OTHER AUTHORITIES

Rest. 3d, Agency §1.01 (2006)...15, 16, 17

Rest. 3d, Agency §8.01...16

Rest. 3d, Agency §8.14...16

I. INTRODUCTION

The Petitions for Review of Eisenhower Medical Center ("EMC") and FlexCare, LLC ("FlexCare") should be denied. Plaintiff contended below that EMC and FlexCare were joint employers and that each were jointly and severally liable for the failure to pay her wages owing to her and the class members. The Court of Appeal held that there was no "privity" between EMC and FlexCare for res judicata purposes, even though FlexCare had settled Plaintiff's claims in a separate lawsuit, that would preclude Plaintiff from pursuing EMC for its liability as a Plaintiff's joint employer under California law. In doing so, the Court of Appeal properly interpreted this Court's holding in *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813 [189 Cal.Rptr.3d 809, 352 P.3d 378] ("*DKN Holdings*"), in which this Court expressly held that "***joint and several obligors are not considered to be in privity for purposes of issue or claim preclusion.***" (*Id.* at 826.)

The Second District Court of Appeal's decision in *Castillo v. Glenair, Inc.* (2018) 23 Cal.App.5th 262 [232 Cal.Rptr.3d 844], *as modified on denial of reh'g (May 14, 2018), review denied (Aug. 8, 2018)* (*Castillo*) is a legally and logically unsupported aberration that expressly conflicts with the California Supreme Court's decision in *DKN Holdings* and other appellate authority. Moreover, *Castillo* court's "agency" standard is directly contrary to controlling California Supreme Court and other intermediate appellate court precedent, all of which hold that the hallmark of an agency relationship is the right of control by the principal over the purported agent's activities and the right of the agent to bind the principal as to third parties.

No review is necessary in this case. Rather, this Court should simply de-publish *Castillo* and allow the Court of Appeal's decision in this case to stand.

II. THE COURT OF APPEAL IN THIS CASE PROPERLY HELD THAT PLAINTIFF'S CLAIMS AGAINST EMC ARE NOT BARRED BY THE DOCTRINE OF *RES JUDICATA*.

One of the key requirements for the application of the doctrine of *res judicata* was that the subsequent action involve the "same parties or parties in privity with them." (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896–97 [123 Cal.Rptr.2d 432, 51 P.3d 297].) Here, it is undisputed that EMC was ***not*** named as a party in the Santa Barbara Action. Thus, to prove that *res judicata* operated to bar Plaintiff from suing EMC, a non-party, FlexCare and EMC were required to prove that EMC was "in privity" with FlexCare.

In *Bernhard v. Bank of America Nat. Trust & Savings Ass'n* (1942) 19 Cal.2d 807 [122 P.2d 892], Justice Traynor stated:

> ". . . A privy is 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. [Citations.]" (*Id.* at p. 811, [122 P.2d 892].) (Emphasis added.)

Here, there was no evidence that EMC was a "privy" under the California Supreme Court's definition.

A. Because FlexCare and EMC were alleged to be joint employers and, therefore, jointly and severally liable to Plaintiff, they were not in privity with each other under this Court's holding in *DKN Holdings LLC v. Faerber*.

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], *reh'g denied (Aug. 12, 2015)* (*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*.

In *DNK Holdings*, three individual lessees signed a commercial lease agreement, to which each agreed to have "joint and separate responsibility

to comply with the lease terms." (*Id*. at 818 (quotation marks omitted).) They later stopped paying rent, contending that the landlord had failed to disclose problems with the property. (*Id*.) One of the lessees sued the landlord, who counterclaimed seeking unpaid rent and other amounts due on the lease. (*Id*.) Judgment was entered in favor of the landlord for $2.8 million. (*Id*. at 819.) When the single lessee did not pay in full, the landlord sued the other two individuals who had signed the lease. (*Id*.)

The trial court and the Court of Appeal held that the second suit was barred by claim preclusion, but the California Supreme Court reversed. (*Id*.) It held that the relationship between the lessees was not so close as to consider them the "same" party or in privity with one another. (*Id*. at 826.)

Addressing the privity issue, this Court enunciated the basis test as follows: "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.)

This Court held 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).)

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.)

Because EMC was 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).)

In *Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 154 [46 Cal.Rptr.3d 7, 38], the court rejected an identical contention by the defendant in that case. In *McCray-Key v. Sutter Health Sacramento Sierra Region* (E.D. Cal., Nov. 2, 2015, 2:15-CV-1514-JAM-CKD) 2015 WL 6703585, at *2-3, the district court, in an essentially identical fact-pattern to this case, applied *DKN Holdings* and held that a subsequent suit by an employee against the hospital where she had been assigned to work by a staffing company was not barred by *res judicata* when the employee settled her action against the staffing company and dismissed the action with prejudice.

Here, Grande was not attempting to hold EMC ***derivatively*** liable for FlexCare's violation of the Labor Code. Indeed, the liability of one employer is necessarily not "derivative" of a joint employer's liability. Rather, existing state and federal case law supports the view that joint employer liability is joint and several, with each employer having a separate and independent duty to comply with the Labor Code. As such, the

situation is analogous to that of co-obligors under a contract discussed in *DKN Holdings*.

In *Martinez v. Combs* (2010) 49 Cal.4th 35 [109 Cal.Rptr.3d 514, 231 P.3d 259], *as modified (June 9, 2010)*, the Court implicitly noted that every "employer" is liable to an employee for failure to pay minimum wages due to an employee. Implicit in the court's analysis is the recognition that section 1194 permits an employee with multiple employers to seek recovery of unpaid wages from any of them. The Court 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. There is simply nothing "derivative" about a joint employer's liability for its labor code violations that is "dependent" on a finding of liability of another alleged "employer." Instead, each employer is jointly and severally liable as an "employer."

The Court in *Martinez* also held that merely because a produce merchant had a contractual relationship with the actual employer, such relationship did not make the merchant an "employer" of the workers. Rather, the merchant had to exercise sufficient control over the wages, hours, or working conditions of the workers to be considered their "employer" of the employees, and in that case, the merchant did not. (*Id.*, 49 Cal.4th at 71-74.)

Moreover, the existence of the contractual relationship between EMC and FlexCare did not impose "derivative" liability on EMC for FlexCare's wrongful acts. Indeed, EMC, merely because of its contractual relationship with FlexCare, would not be liable for FlexCare's violations of its obligations to Grande as Grande's employer.

Neither EMC nor FlexCare even attempt to explain how EMC's liability as an "employer" is "solely derivative" of FlexCare's liability as an

employer. Indeed, the law is clear that each "joint employer's" liability is joint and several. "Separate persons or entities that share control over an individual worker may be deemed joint employers under the FLSA." (*Schultz v. Capital Intern. Sec., Inc.* (4th Cir. 2006) 466 F.3d 298, 305; *Falk v. Brennan* (1973) 414 U.S. 190, 195 [94 S.Ct. 427, 431, 38 L.Ed.2d 406] (observing in a FLSA case that apartment building maintenance workers were employed by both building management company and building owners).) "[A]ll joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the [FLSA], including the overtime provisions." (29 C.F.R. § 791.2(a)).

B. The *Castillo* Court's conclusion that privity "deals with a person's relationship to the subject matter of the litigation" is directly contrary to *DKN Holdings*.

In *Castillo*, the Court concluded: "Put another way, privity, ' "as used in the context of res judicata or collateral estoppel, does not embrace relationships between persons or entities, but rather it deals with a person's relationship *to the subject matter of the litigation*." ' " (*Castillo*, *supra*, 23 Cal.App.5th at p. 277.)

This aberrational holding cannot be reconciled with this Court's holding in *DKN Holdings*, however. In *DKN Holdings*, the "subject matter of litigation" was one lease and the breach of the parties' obligations such lease. Thus, were the *Castillo* Court's newly created res judicata "test" applied by this Court in *DKN Holdings*, this Court would have necessarily found "privity" between the defendants. It did not, however, and in fact expressly held that there was no privity because the defendants were jointly and severally liable for the obligations sued upon.

Moreover, in any case involving claims against multiple parties that involve allegations of joint and several liability, the "subject matter of the litigation" is always the same, *e.g.*, the same contractual obligation (as in

DKN Holdings), the same tort, the same violation by an employer and joint employer of the plaintiff's rights under the Labor Code.

The *Castillo* Court's privity test is also directly contrary to that enunciated by this Court in *Bernhard v. Bank of America Nat. Trust & Savings Ass'n* (1942) 19 Cal.2d 807, 811 [122 P.2d 892, 894], in which the Court held:

> Under the requirement of privity, only parties to the former judgment or their privies may take advantage of or be bound by it. Ibid. A party in this connection 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.' 1 Greenleaf, Evidence, 15th Ed., sec. 523. See cases cited in 2 Black, Judgments, 2d Ed., sec. 534; 15 R.C.L. 1009; 9 Va.L.Reg.(N.S.) 241, 242; 15 Cal.Jur. 190; 34 C.J. 992. ***A privy is 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***. See cases cited in 2 Black, Judgments, 2d Ed., sec. 549; 35 Yale L.J. 607, 608; 34 C.J. 973, 1010, 1012; 15 R.C.L. 1016. ***The estoppel is mutual if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him***.

The Court stated that the concept of privity was dependent on the concept of "derivative liability":

> The courts of most jurisdictions have in effect accomplished the same result by recognizing a broad exception to the requirements of mutuality and privity, namely, that they are not necessary ***where the liability of the defendant asserting the plea of res judicata is dependent upon or derived from the liability of one who was exonerated in an earlier suit brought by the same plaintiff upon the same facts***. See cases cited in 35 Yale L.J. 607, 610; 9 Va.L.Reg.(N.S.) 241, 245–247; 29 Ill.L.Rev. 93, 94; 18 N.Y.U.L.Q.R. 565, 566, 567; 34 C.J. 988, 989. Typical examples of such derivative liability are master and servant, principal and agent, and indemnitor and indemnitee. (*Id.*, at 812.)

Here, Plaintiff's claims against EMC as an employer are not derivative of FlexCare's liability as an employer. Rather, both FlexCare and EMC are

jointly and severally liable for their violations of their independent legal obligations. Thus, Plaintiff's claims against EMC are not barred by the Judgment in the Santa Barbara Action.

III. THERE IS NO GOOD CAUSE TO REVIEW THE COURT OF APPEAL'S CONFIRMATION OF THE TRIAL COURT'S EXPRESS FACTUAL FINDINGS, MADE AFTER A TRIAL AND THE CONSIDERATION OF DOCUMENTARY EVIDENCE AND TESTIMONY, THAT EMC WAS NOT FLEXCARE'S AGENT.

In this case, on EMC's motion, the trial court bifurcated the released party and res judicata issues from all other issues and held a limited bench trial. (*Grande v. Eisenhower Medical Center* (2020) 44 Cal.App.5th 1147, 1156 [258 Cal.Rptr.3d 324, 330].) After trial, the trial court ruled EMC was not a released party. The trial court reached that conclusion based on the language of the settlement, which did not mention EMC or the category of FlexCare's hospital clients. Instead, the settlement named FlexCare, its officers and a corporate alter ego, and then added standard settlement language to release general categories of people and groups, like affiliated companies, principals or agents of FlexCare. The trial court held that EMC did not fit any of these categories and concluded as a matter of fact that EMC was not a "related or affiliated company" or an "agent" of FlexCare under the Released Parties clause of the settlement. (*Id.*)

In their Petitions, EMC and FlexCare improperly seek review of a trial court's ***factual finding*** that EMC was not FlexCare's agent. Reviewing a trial court's factual findings, which were based on specific testimony and documentary evidence, is not sufficient or proper grounds to grant their Petitions, however. Moreover, as discussed below, the *Castillo* Court's "agency" holding is directly contrary to well-established law regarding the control necessary to establish an agency relationship between persons or entities.

IV. THE *CASTILLO* COURT'S "AGENCY" HOLDING IS INCONSISTENT WITH LONG-ESTABLISHED LAW REGARDING THE CONTROL NECESSARY TO ESTABLISH AN AGENCY RELATIONSHIP IN THE CONTEXT OF JOINT EMPLOYMENT.

The *Castillo* Court concluded that the plaintiffs' claims in that case were barred by the *Gomez* settlement because Glenair (the client) was the "agent" of GCA (the staffing agency that provided employees to Glenair) "with respect to GCA's payment of wages to its employees" and therefore a "Released Party" under the *Gomez* settlement's terms (which included GCA's "agents" as "Released Parties").

This conclusion, however, was based solely on the court's assertion that "GCA authorized Glenair to perform certain timekeeping-related tasks on behalf of GCA." (*Id.* at 282.) According to the decision, "the only reasonable inference is that GCA required Glenair to perform those tasks," because, "[h]ad Glenair failed to perform those timekeeping tasks, GCA would not have been able to pay its employees." (*Id.* at 282.)

The *Castillo* Court's analysis of agency is grossly deficient. Initially, the Court of Appeal concluded as a matter of law that Glenair (the hiring company) was the agent of GCA (the staffing agency) in the absence of any record evidence showing that GCA had ***any*** right to control Glenair.

The *Castillo* Court's characterization of Glenair as GCA's agent also conflicts with the decisional law of other California courts. Under blackletter law, Glenair could not be GCA's agent (and thereby could not be released by the *Gomez* settlement release's language) unless GCA, as the "principal[,] ha[d] the right to control the conduct of the agent [Glenair] with respect to matters entrusted to him." (*Garlock Sealing Technologies, LLC v. NAK Sealing Technologies Corp.* (2007) 148 Cal.App.4th 937, 964 [56 Cal.Rptr.3d 177, 199], *as modified on denial of reh'g (Apr. 17, 2007)* (internal quotations omitted).)

"Control is the key characteristic of the agent/principal relationship." (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 541 [99 Cal.Rptr.2d 824]; *see also McCollum v. Friendly Hills Travel Center* (1985) 172 Cal.App.3d 83, 91 [217 Cal.Rptr. 919] (same); Rest. 3d, Agency §1.01 (2006) ("the agent shall act … *subject to the principal's control*….") (emphasis added); *Id.* cmt. f ("An essential element of agency is the principal's right to control the agent's actions.").) As every other Court of Appeal has held, the "right to control the *result*" is not enough to establish agency: unless one company (in *Castillo*, the staffing agency, GCA) has "the right to control the ***means and manner*** in which the result is achieved" by another (in *Castillo*, the hiring company, Glenair), no agency relationship is created. (*Wickham v. Southland Corp.* (1985) 168 Cal.App.3d 49, 59 [213 Cal.Rptr. 825] (first emphasis in original; second emphasis added); *see also Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 493–495 [177 Cal.Rptr.3d 539, 555–556, 333 P.3d 723, 736–737]; *People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1242 [151 Cal.Rptr.3d 728, 747]; *Alvarez v. Felker Mfg. Co.* (1964) 230 Cal.App.2d 987, 1000 [41 Cal.Rptr. 514].)

The "right to control" the "means and manner" in an agency relationship ***requires more than a mere contractual obligation of one party to provide services to another.*** Instead, agency law requires proof that the principal had the power to dictate ***how*** its agent would provide the contracted-for service, which necessarily includes the ability to give additional instruction after the agent has begun performance:

> In many agreements to provide services, the agreement between the service provider and the recipient specifies terms and conditions creating contractual obligations that, if enforceable, prescribe or delimit the choices that the service provider has the right to make. ... ***The fact that such an agreement imposes constraints on the service provider does not mean that the service***

> ***recipient has an interim right to give instructions to the provider.*** Thus, setting standards in an agreement for acceptable service quality does not of itself create a right of control. (Rest. 3d, Agency § 1.01 cmt. f (emphasis added).)

Even if Glenair had agreed to track hours for GCA, that could not be enough, by itself, to transform Glenair into GCA's agent. If it were, every service contract would also establish an agency relationship, with the attendant fiduciary obligations, indemnification rights, and power to bind the principal to third parties. (*See* Rest. 3d, Agency §1.01 (agency is fiduciary relationship that gives agent power to bind principals to third parties); *id.* §8.01 (agent owes fiduciary duties to principal); *id.* §8.14 (principal must indemnify agent).)

The *Castillo* Court created a wholly novel and dangerously vague definition of "control" in order to deem Glenair an "agent" of GCA that was thereby released by the *Gomez* settlement agreement. But there was no evidence demonstrating that GCA directed the manner that Glenair was required (if it were) to maintain or share time-keeping data.

There was also no evidence to support the *Castillo* Court's assumption that GCA would have been unable to pay its employees absent Glenair's provision of time records. Indeed, as is often the case, those GCA employees could have reported their own time to GCA, manually or electronically, independent of Glenair's involvement.

Even assuming *arguendo* that GCA ***had*** imposed a contractual obligation upon Glenair to perform the timekeeping tasks, that would not mean that GCA had any right to control the "means and manner" Glenair used to perform those tasks. (*Patterson*, 60 Cal.4th at 495.)

The law is clear that service contracts do not automatically create agency relationships but do so only when the requisite elements of "agency" are proven. (*See Garlock Sealing Techs.*, 148 Cal.App.4th at 964;

cf. Rest. 3d, Agency §1.01 cmt. g ("In any relationship created by contract, the parties contemplate a benefit to be realized through the other party's performance. Performing a duty created by contract may well benefit the other party but the performance is that of an agent only if the elements of agency are present.").)

The *Castillo* Court's opinion also deviated from well-established agency principles regarding the third element of the agency test: the agent's power to bind the principal to third parties. (*See Garlock Sealing Techs.*, 148 Cal.App.4th at 964.) The *Castillo* Court offered no rationale for its "finding" that Glenair's collection of employees' time records established that Glenair had the power to bind GCA to third parties. (*Castillo, supra*, 23 Cal.App 5th at 287-288.) GCA was bound to pay its employees their wages ***because GCA employed them -*** Glenair's collection of time records did not create a new contract or obligation between GCA and those employees within the meaning of agency law. (*See Garlock Sealing Techs.*, 148 Cal.App.4th at 964.) Thus, the *Castillo* Court again applied a novel standard to find an agency relationship, creating unacceptable conflict with settled precedent. (*See id.* at 965 (court cannot find agency relationship as matter of law where essential facts are in conflict).)

In this case, the Court of Appeal recognized that the evidence before the trial court weighed against a finding that EMC was FlexCare's "agent":

> The trial evidence also weighs against concluding the parties were in a principal-agent relationship. "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." (Rest.3d Agency, § 1.01.) The trial court concluded there was no evidence Eisenhower ever acted as FlexCare's agent or vice versa. Eisenhower maintained control over the temporary nurses in the performance of their jobs. It assessed their competency during an

> orientation program, retained discretion to require nurses to take its medication and clinical skills test, and had authority under the contract to make decisions about the nurses' assignments, including whether to terminate them for poor performance. In addition, the staffing agreement made clear nurses were required to conform with the hospital's policies and procedures and use the hospital's time and attendance system. In addition, the travel nurse agreement required Grande to report her hours worked to FlexCare after obtaining approval from Eisenhower. ***Finally, FlexCare's corporate representative testified FlexCare did not control Eisenhower*** and said he didn't know whether Eisenhower exercised control over FlexCare. ***These facts support the trial court's finding that FlexCare and Eisenhower did not exercise control over each other, and provide sufficient support for the trial court's finding that neither company was an agent of the other***. (*Iqbal, supra*, 10 Cal.App.5th at p. 8, 215 Cal.Rptr.3d 684.) (*Grande v. Eisenhower Medical Center* (2020) 44 Cal.App.5th 1147, 1166–1167 [258 Cal.Rptr.3d 324, 339] (emphasis added).)

Moreover, as the Court of Appeal notes, the contract between EMC and FlexCare expressly disavowed any principle/agency relationship. The Court of Appeal concluded, “That provision, while not dispositive of the relationship, is the best evidence we have regarding whether the parties understood the companies to be in a principal-agent relationship, and strongly counsels against overruling the trial court and reading into the agreement a release of Eisenhower.” (*Id*., at 1167.)

V. CONCLUSION

Petitioners' Petitions should be denied. The *Castillo* Court's new standards regarding the issues of "privity" and "agency" are unsupported by any controlling authority and directly conflict with *DKN Holdings* and other well-established decisional law. This Court should therefore de-publish *Castillo* and deny EMC's and FlexCare's Petitions.

Dated: March 23, 2020

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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, **PLAINTIFF AND RESPONDENT LYNN GRANDE'S ANSWER TO PETITIONS FOR REVIEW BY EISENHOWER MEDICAL CENTER AND FLEXCARE, LLC** contains 4,528 words, including footnotes. Counsel relies on the word count of the Word computer program used to prepare this brief.

Dated: March 23, 2020 ____________________________

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I am over the age of 18 and not a party to the within action. My business address is 2945 Townsgate Road, Suite 200, Westlake Village, CA 91361. On March 23, 2020, I served the following document(s) described as:

PLAINTIFF AND RESPONDENT LYNN GRANDE'S ANSWER TO PETITIONS FOR REVIEW BY EISENHOWER MEDICAL CENTER AND FLEXCARE, LLC

on interested parties in this action an original or true copy thereof enclosed in a sealed envelope addressed as follows:

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I deposited such envelope with postage thereon fully prepaid in the United States mail at a facility regularly maintained by the United States Postal Service at Los Angeles, California. I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 23, 2020.

Kale M. Eaton

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 3/23/2020 by Emily Feng, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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

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3/23/2020

Date

/s/Peter Dion-Kindem

Signature

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