S261247

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

LYNN GRANDE, *Plaintiff and Respondent*,

v.

EISENHOWER MEDICAL CENTER, Defendant,

FLEXCARE LLC, *Intervenor and Appellant*.

On Review From a Published Decision of The Court Of Appeal For the Fourth Appellate District,
4th, Two Division; Civil No. E068730, E068751

After An Appeal From the Superior Court,
County of Riverside, Case Number RIC1514281
Hon. Sharon J. Waters

APPELLANT FLEXCARE LLC'S OPENING BRIEF

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I. ISSUE PRESENTED

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?

II. INTRODUCTION

Castillo v. Glenair (2018) 23 Cal.App.5th 262 ("*Castillo*"), answered the above question with a resounding "no," reasoning that because the client-company acted as the special agent of the staffing company for purposes of paying the staffing company's employees, it was both a "Released Party" under the prior settlement and in privity for purposes of claims preclusion. Despite identical procedural and factual circumstances in this case, the court below declined to follow *Castillo*, as inconsistent with this Court's decision in *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813 ("*DKN*"). *Castillo* is consistent with *DKN* and prior cases. It is also well-reasoned, and directly on point. More importantly, because *Castillo* provides clear rules to staffing companies and their clients about how to order their relationships to either create or avoid agency (and the ensuing consequences), this Court should follow it. Avoiding surprise and serial litigation is particularly important in the realm of wage and hour claims, which carry the potential for expensive, serial, class-action litigation.

In this case, two months after Intervenor and Appellant FlexCare, LLC ("FlexCare"), a staffing company, paid its stipulated class-action settlement with Respondent Lynn Grande ("Grande") and the judgment became final, Grande filed this action against Defendant and Appellant Eisenhower Medical Center ("Eisenhower"). Grande alleged that

Eisenhower and FlexCare were "joint employers." She also alleged identical wage claims premised on her seven-shift assignment at the hospital. As in *Castillo,* the parties to the prior action expressly released FlexCare's "agents." While FlexCare was responsible for paying its employees, Eisenhower's role in this process included scheduling employees, reviewing time cards and approving overtime. As such, Eisenhower acted as FlexCare's agent for the purpose of paying its employees and falls within the scope of FlexCare's release. This agency also places Eisenhower in privity with FlexCare for purposes of res judicata. Alternatively, because of their respective roles with respect to Grande's wage and hour claims, the interests of FlexCare and Eisenhower are so intertwined as to put them in the same relationship to the litigation. This creates a separate basis for privity.

Castillo specifically analyzed DKN in reaching its conclusions. As will be explained, none of them are inconsistent with *DKN*, which simply held that joint and several liability does not create privity. *DKN* never said that joint and severally liable parties cannot be in privity. In fact, *DKN* affirms that privity may exist in relationships where parties are derivatively liable, such as the principal / agent relationship.

For these reasons, it is appropriate to reverse the judgment.

III. FACTS

A. FlexCare Hired Grande and Placed Her at Eisenhower.

FlexCare is a temporary staffing agency that recruits travel nurses for short-term contracts with hospitals. (2 *Appellant's Appendix in Support of Opening Brief* ("AA") 495:16-17; *Reporters Transcript of Proceedings* ("RT") 63:26-64:3.)[1] Eisenhower Medical Center ("Eisenhower") is one of

[1] All citations to the Reporter's Transcript are to the February 6, 2017 transcript unless otherwise noted.

over 100 hospitals that FlexCare works with in California. (2 AA 495:26-27; RT 63:26-64:3, 64:21-25.) Eisenhower uses temporary nurses to manage its staffing requirements, which fluctuate seasonally when the population of the hospital expands in the wintertime. (RT 105:1-11.)

FlexCare and Eisenhower operate pursuant to a Staffing Agreement. (2 AA 495:18-21; 4 AA 1090; RT 72:14.) Under this Agreement, FlexCare (referenced therein as "Agency") is responsible for recruiting and screening temporary nurses for placement at Eisenhower according to Eisenhower's needs and specifications. (4 AA 1090 at ¶ 1.1; RT 64:26-65:18.) Eisenhower relies on FlexCare to vet the nurses that it places at the hospital, ensuring that they have the appropriate professional competencies and licensing. (RT 106:12-23.) For example, FlexCare is responsible for gathering information, including past employment, licensure, certifications, education and an assessment of the nurse's professional skills. (4 AA 1090 ¶ 1.1; RT 72:14.) FlexCare also obtains and maintains records regarding the nurse's healthcare history, criminal background, and OSHA training. (4 AA 1090 ¶ 1.5; 4 AA 1091 ¶ 1.6; 4 AA 1094 ¶ 6.4; RT 72:14.)

The Staffing Agreement explicitly provides that the nurses are "employees of Agency [FlexCare]" which "bears exclusive and total legal responsibility as the employer of Staff." (4 AA 1093 ¶ 5.1-5.2.) It also states that FlexCare (referenced therein as "Agency") is an independent contractor and not an employee, agent, or partner of Eisenhower (Hospital):

> Agency is performing the services and duties hereunder as an independent contractor and not as an employee, agent, partner of or joint venture with Hospital. Hospital retains professional and administrative responsibility for the services rendered. (4 AA 1112 ¶ 14.1.)

In accordance with the above, after a nurse is placed at Eisenhower, FlexCare relies on Eisenhower to assign the nurse to an appropriate clinical setting and provide him or her with the resources needed to care for

patients. (RT 93:27-95:2.) Eisenhower is also responsible for scheduling the nurses' days and hours of work. (RT 69:17-24, 99:16-21, 101:14-22.)

Once nurses are placed, FlexCare's primary responsibility is paying them. (RT 66:4-9.) With respect to payroll, the Staffing Agreement requires FlexCare to:

> . . . ensure full compliance with and satisfaction of (1) all state and federal payroll, income and unemployment tax requirements, (2) all state and federal wage and hour requirements, (3) all workers' compensation insurance requirements, (4) overtime, premium pay and all employee benefits, and (5) all other applicable state and federal employment law requirements arising from Agency's employment of Staff, the assignment of Staff to Hospital and/or the actual work of Staff at Hospital. (4 AA 1093 at ¶ 5.2.)

FlexCare, not Eisenhower, is responsible for ensuring that nurses are compensated. (*Id.*; RT 66:7-9, 109:5-12.) It remains responsible for disciplining the nurses. (RT 110:15-26.) FlexCare also provides certain insurance and indemnities to Eisenhower. (4 AA 1093 ¶ 5.3; 4 AA 1094 ¶ 6.3; 4 AA 1099 ¶ 13.)

Respondent Grande was a travel nurse who FlexCare assigned to work at Eisenhower. (2 AA 495:26-28.) Grande worked for FlexCare a total of eight days from February 6, 2012 to February 14, 2012. (1 AA 100:25-26; 1 AA 103:15-17; 2 AA 495:26-496:3-4; 6 AA 1602:09-17; 6 AA 1644:17-22.) During the seven shifts that she worked for FlexCare, she was assigned exclusively to Eisenhower. (1 AA 100:25-26; 1 AA 101:13-15; 2 AA 495 ¶ 8, 496; 5 AA 1226; 6 AA 1602:9-17; 6 AA 1644:17-22RT 62-63, 75; see also AA 7 1984; RT 39, 56-59.)

Grande and FlexCare entered into a Travel Nurse Agreement ("TNA") in which Grande agreed to look to FlexCare for payment for the hours she worked at the facility. (2 AA 495:22-24; 5 AA 1226, 1227, Items

1-2; RT 66:7-9, 74:26-75, 76:9-14.) The TNA required FlexCare to pay Grande following Eisenhower's review of the time records. (See 5 AA 1227 at item 2 [indicating that FlexCare will ". . . pay Consultant weekly for any time worked as long as a time sheet signed by consultant and a Facility Supervisor is received"] and item 2 [requiring Grande to accurately report actual hours worked and obtain "facility representative" signature.].) It also required Eisenhower's pre-approval for overtime. (See 5 AA 1226, boxes "Overtime Pay Rate" and "Premium Overtime Rate" [stating that "OT hours must be pre-approved and signed off on by an authorized Hospital representative"]; RT 75:2-76:13.) Echoing the Staffing Agreement, the TNA provided that Grande was to conform to the facility's schedules, including meal and rest breaks. (5 AA 1227, items 2, 3, and 8; 75:2-76:13.) Eisenhower was not a party to the TNA. (1 AA 103:19; 2 AA 495:25; 6 AA 1645:13-1646:13.)

B. Grande Sued FlexCare for Overtime, Meal Break, and Rest Break Claims in a Class Action and Agreed to a Stipulated Judgment.

On January 30, 2012, Christina Erlandsen, a nurse that FlexCare placed at the Lompoc Valley Medical Center ("LVMC"), filed a class action complaint against FlexCare in Santa Barbara County Superior Court ("the Erlandsen Action").[2] (2 AA 496:7-9.) Grande joined that suit as a named Plaintiff on May 30, 2013. (*Id.* at 496:12-14.) Her claims in that action were predicated entirely on her seven-shift assignment at Eisenhower. (*Id.* at 496:15-16.) The operative Third Amended Complaint alleged various causes of action under the Labor Code. (4 AA 1040.) For example, it alleged Defendants' "failure to provide lawful meal and rest periods, [and] the failure to pay meal and rest period wages." (4 AA

[2] The Erlandsen Action is sometimes referenced in the record as the "Santa Barbara Action."

1041:5-7.) Grande incorporated all of the purported Labor Code violations into a Business and Professions Code section 17200 claim. (4 AA 1063:2-14; RT 45:4-5.)

The class included ". . . employees of the defendant employed in California as nursing employees." (4 AA 1053:12-17.) The named defendants were FlexCare, its three principals, and its parent company. (4 AA 1040; RT 80:1-12.) Though Grande was well aware of her placement at Eisenhower, she did not sue Eisenhower or any of the other hospitals where FlexCare placed class members in the litigation. (2 AA 496:1-4, 12-16; 2 AA 499:12-13; 4 AA 1041:26-28; RT 45:4-5; RT 80:13-16.)

FlexCare vigorously defended the case for years, expending substantial time and resources. (4 AA 1143:3-6; RT 44:19, RT 81:14-23.) It ultimately agreed to pay $700,000 to resolve the case and on January 28, 2014, the parties entered into a class-wide Stipulation and Settlement Agreement ("Settlement Agreement"). (2 AA 496:24; 4 AA 1166; RT 44:19, 82:23-28.) None of the parties discussed the settlement with each other outside the context of mediation. (1 AA 103:23-28; 6 AA 1649:4-9; RT 85:14-18; RT 55:12-24; RT 57:4-10; RT 59:21-27; RT 142:2-13.) Grande did not express to FlexCare any intention to reserve her right to sue Eisenhower. (6 AA 1650:2-7; RT 55:12-24; RT 57:4-10; RT 59:21-27.)

The Santa Barbara County Superior Court approved the Settlement Agreement and incorporated its provisions into an Amended Final Judgment. (2 AA 498:4-5; 2 AA 499:1-7; 4 AA 1132-33 at ¶¶ 10-12; RT 45:9-17.) The Settlement Agreement and the Judgment both broadly defined "Released Parties" as including:

> FlexCare, LLC, Vantus, LLC, Christopher Truxal, Travis Mannon, Michael Kenji Fields, and Nathan Porter, **and all present and former** subsidiaries, affiliates, divisions, related or affiliated companies, parent companies, franchisors, franchisees, shareholders, and attorneys, and their respective

> successors and predecessors in interest, all of their respective officers, directors, employees, administrators, fiduciaries, trustees and **agents**, and each of their past, present and future officers, directors, shareholders, employees, agents, principals, heirs, representatives, accountants, auditors, consultants, insurers and reinsurers, and their counsel of record. (2 AA 499:1-7; 4 AA 1132:27-1133:6; 4 AA 1140:23-28; RT 45:9-17 [emphasis added].)

"Released Claims" were also defined very broadly. For example, with respect to rest periods, they "include but are not limited to" claims for "failure to provide meal and rest periods, [and] nonpayment or underpayment of the premium for meal and rest break violations." (2 AA 497:6-7, 17-18; 498:21-22.) Also released are "any claims which have been **or could have reasonably been asserted** in the Action or in any other state or federal court, administrative tribunal, or in arbitration or similar proceeding, based upon, or arising out of, or related to the allegations in the Action during the Class Period." (2 AA 498:18-19; 4 AA 1132:8-14 [emphasis added]; 1140:7-11; RT 45:9-17.) Significantly, Plaintiffs did not carve out the right to sue LVMC, Eisenhower, or any of the other hundreds of California hospitals where FlexCare placed class members. (2 AA 499:1-7; 4 AA 1132:22-1133:2; 6 AA 1650:2-7; RT 45:9-17; RT 55:12-24; RT 57:4-10; RT 59:21-27.)

In addition to the foregoing, the Erlandsen Court specifically reviewed the monetary recovery for the class and found "significant value." (4 AA 1131:16-20; RT 45:9-17.) It also determined that the Settlement was ". . . in all respects, fair, adequate and reasonable." (*Id.*) In exchange for the releases, Grande recieved $20,000 for herself as a Class Representative, recovery as a class member, and $300,000 in fees for her attorneys. (2 AA 498:5-8; 4 AA 1137:13-15, 1141:3-6; RT 44:19; RT 55:12-24; RT 57:4-12; RT 59:21-27.)

As part of the judgment, the Court certified a class consisting of:

> . . . . all persons who at any time from or after January 30, 2008 through April 8, 2014 were non-exempt nursing employees of FlexCare LLC employed in California. (4 AA 1131:21-23; RT 49:4-19.)

Plaintiff received notice, made a claim, and recovered a portion of the fund as a class member. (5 AA 1216; RT 53:5.) The Amended Final Judgment binds each Class Member and operates as a full release and discharge of the Released Claims. (4 AA 1134:5-8; RT 49:4-11.) It has a "res judicata effect" and bars Class Members from "bringing any action asserting Released Claims." (*Id.*) FlexCare fully satisfied the judgment, which became final on October 5, 2015. (RT 82:27-83:3.)

IV. PROCEDURAL HISTORY

Less than two months after the judgment became final, Grande and her attorneys sued Eisenhower in Riverside County Superior Court based on the same claims. (Compare 4 AA 1130; RT 49:4-1 with 1 AA 16; see also 7 AA 1870:23-28.) Like the first, her second lawsuit was premised solely on her brief seven-shift placement at Eisenhower. (1 AA 19:6-9, 100:25-26 101:13-15; 6 AA 1602:9-17, 1644:17-22.) And, she again brought a Business and Professions Code section 17200 claim that incorporated the same Labor Code provisions pled in the Erlandsen Action. (Compare 4 AA 1063:2-14; RT 45-:4-5 with 1 AA 23:19-31:9; compare also 1 AA 26:7-9 [Riverside complaint stating "Defendant failed to provide . . . duty free-meal periods"] and 1 AA 26:12-14 ["Defendants have not paid . . . the additional pay due to them under section 226.7] with 4 AA 1059:23-24 [Erlandsen Complaint stating "Defendants failed to provide . . . meal periods required to be provided"] and 4 AA 1060:7-9 ["Defendants have not paid . . . the additional pay due them under Section 226.7 . . . ."]; see also 7 AA 1871:9-21.)

On January 4, 2016, Eisenhower sent a letter to FlexCare asserting that the indemnity provisions in the parties' Staffing Agreements may be applicable to this action. (2 AA 500:11-12; 2 AA 504-506; 5 AA 1228; RT 120:3-15.) In order to protect the finality of its judgment in the Erlandsen Action, FlexCare filed a Complaint-in-Intervention asserting a cause of action for declaratory relief against Grande. (1 AA 45, 51.) Specifically, FlexCare sought a judicial determination that: (1) Eisenhower is a Released Party under the Settlement Agreement, and (2) the Amended Final Judgment and Order in the Erlandsen Action is preclusive and bars the instant action by Lynn Grande against Eisenhower. (1 AA 50:11-17; 2 AA 500:14-23.) The Court granted FlexCare and Eisenhower's motions to bifurcate these issues for trial. (1 AA 61-64.) The parties stipulated to certain facts for trial. (2 AA 495-500.)

The Riverside Court conducted a bench trial on FlexCare's claim and Eisenhower's pertinent defenses in February 2017. (7 AA 185418-21.) After the Court took the matter under submission and shortly before it filed its Statement of Decision, the Fourth District Court of Appeal decided *Garcia v. Pexco, LLC* (2017) 11 Cal.App.5th 782. (7 AA 1798, 1818, 1848.) That case involved the question of whether a client employer who was not a party to an arbitration agreement between the staffing agency and its employee could enforce it. (7 AA 1848.) The court held that where (as here) the complaint alleges that the staffing company and its client are "joint employers," they are agents of each other in their dealings with the joint employee and the agreement may be enforced by the client company. (7 AA 1848.)

In May 2017, the Riverside County Superior Court issued its Statement of Decision ("Statement"), ruling against FlexCare and Eisenhower. (7 AA 1848.) It presumed for purposes of the trial that Eisenhower and FlexCare were joint employers. (7 AA 1856:15-16;

1858:2-6.) It also found the extrinsic evidence regarding the scope of the release had "little value." (7 AA 13:16-16; 7 AA 1859:14-16; see RT 97:2-15.) FlexCare's representative testified regarding his desire to "buy his peace," which included any indemnity obligations and Eisenhower. (*Id.*; 83:18-84:1; 85:19-26; 96:21-97:18.) Though not parties to the agreement, Grande's attorneys testified that they had no intent to release Eisenhower. (7 AA 1859:20-24.) But because no party communicated his or her subjective intent to the other, the court was "left largely with the words themselves" in construing the contract. (*Id.*) Based solely on a construction of the settlement agreement, the court determined that Eisenhower was not intended to be a "Released Party" in the Erlandsen Action. (7 AA 1858:22-1860:1.) With respect to the elements of claim preclusion, the court focused exclusively on whether Eisenhower was in privity with FlexCare. (7 AA 1855:18-21.) The court relied on *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813 and reasoned that there was no privity because FlexCare and Eisenhower were jointly and severally liable and their liability was not derivative. (7 AA 1855:15-1858:5.)

The court entered judgment against FlexCare on the Complaint in Intervention. (7 AA 1896.) The Court also granted Eisenhower's request to certify the Statement of Decision under Code of Civil Procedure section 166.1, finding substantial grounds for differences of opinion on this question of law. (7 AA 1944.) The controlling question of law identified was "whether the settlement and judgment in the Erlandsen Action bar plaintiff from asserting the very same claims against Eisenhower." (*Id.*; RT 26.)

FlexCare appealed and Eisenhower brought a writ to the Fourth District Court of Appeal. (7 AA 1949.) While the case was being briefed, the Second District Court of Appeal decided *Castillo v. Glenair, Inc.* (2018) 23 Cal.App.5th 262, which was factually almost identical to this case. In a

well-reasoned opinion, the Second District held that in a joint employer arrangement a class of workers could not bring a lawsuit against a staffing company, settle that lawsuit, and then bring identical claims against the company where they had been placed to work. (*Castillo, supra*, 23 Cal.App.5th at p. 278.) Specifically, the Court held that the staffing company and its clients were in privity and that the client company was an agent of the staffing company with respect to its paying employees who performed services at the client company. (*Id.* at pp. 278-282.)

Despite the nearly identical circumstances in *Castillo*, the Fourth District in this case chose to depart from *Castillo,* finding it irreconcilable with this Court's decision in *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813. (*Grande v. Eisenhower Medical Center* (2020) 44 Cal.App.5th 1147, 1157-1159, 1162-1163; see also *id.* at p. 1168 (dis. opn. of Ramirez, P.J.).)

V. ARGUMENT

A. Because Eisenhower is FlexCare's Agent For Purposes of FlexCare's Payment of its Employees, it is a "Released Party" Under the Stipulated Settlement

Courts interpret releases under the same principles that govern the interpretation of any other contract. (*General Motors Corp. v. Superior Court* (1993) 12 Cal.App.4th 435, 439.) Contracts must be interpreted to give effect to the intention of the parties as it existed at the time of contracting. (Civ. Code, § 1636.) The whole of a contract is to be taken together and construed to give force and effect not only to every clause, but also to every word in it, so that no clause or word becomes redundant. (Civ. Code, § 1641; *Cole v. Low* (1927) 81 Cal.App. 633, 637.) The Erlandsen release broadly defines the "Released Parties" to include over twenty categories of releasees beyond the named defendants, expressly

including "principals" and "agents." (2 AA 499:1-7; 4 AA 1132:27-1133.6; 4 AA 1140:23-28; RT 45:9-17.)

An agent is one who represents the principal in dealings with third persons. (Civ. Code, § 2295.) A special agent is an agent for a particular act or transaction. (Civ. Code, § 2297.) Ordinarily the existence of agency is a question of fact. (*Troost v. Estate of DeBoer* (1984) 155 Cal.App.3d 289, 299.) However, where, as here, the essential facts are not in conflict, the question of the legal relation arising from those facts is a question of law. (*Id*. [citing *Isenberg v. California Employment Stabilization Com.* (1947) 30 Cal.2d 34, 41]; see also *Castillo, supra*, 23 Cal.App.5th at p. 281.)

While this case was on appeal, the Second District decided *Castillo v. Glenair, Inc.*, which is uniquely on point because it dealt with successive class action wage and hour litigation. The facts relating to the relationship between the staffing company and its client with respect to paying employees and scheduling them are identical to this case. *Castillo* held that a client company is the agent of a staffing company with respect to payment of the employee and was therefore an "agent" within the meaning of the release the staffing company obtained in prior class action wage and hour litigation. (*Castillo, supra*, 23 Cal.App.5th at pp. 281-283.)

In *Castillo*, GCA Services Group ("GCA") was a temporary staffing company that provided employees to work on site at its client company, Glenair. (*Castillo, supra*, 23 Cal.App.5th at p. 266.) An employee, Gomez, filed a putative class action against staffing-company GCA, alleging wage and hour claims, including unfair business practices under Business and Professions Code section 17200, just as Grande did when suing FlexCare in Santa Barbara. (*Id*. at p. 267; 2 AA 496:12-23, 2 AA 499:12-13; 4 AA 1040, 1063:1-5.) The first lawsuit settled in exchange for a release and a California Civil Code section 1542 waiver. (*Castillo, supra*,

23 Cal.App.5th at p. 268.) The settlement agreement defined "released parties" as including the named defendants and their "agents." (*Id.* at p. 269.) Like Eisenhower, client-company Glenair was not a named defendant in the first case and was not expressly named in the release. (*Id.*; 2 AA 497:22-1; AA 499:12-13; 4 AA1140:23-28.) Two other employees, the Castillos, were class members in the first action and did not opt out of the settlement. (*Castillo, supra*, 23 Cal.App.5th at p. 267.) They filed a separate class action asserting the same claims against the client-company, Glenair. (*Id.* at p. 269.)

As was the case with Eisenhower, client-company Glenair monitored the employees' time records and was responsible for scheduling. (*Id.* at p. 274; 4 AA 1092 §§ 3.5, 3.7, 4.1; 1095 § 6.8.2; 4 AA 1098 §§ 10.1, 10.3; see, e.g., 5 AA 1227, item 2 [requiring a "Facility Supervisor" to sign timesheets]; 5 AA 1227, item 1 [same].) Like FlexCare, the staffing company retained responsibility for paying its employees. (*Castillo, supra*, 23 Cal.App.5th at p. 281; 4 AA 1093 §§ 5.1-5.2.) The Second District determined that this evidence of agency was "susceptible of but a single inference," because it was undisputed that "GCA authorized Glenair to collect, review and transmit GCA employee time records to GCA." (*Castillo, supra*, 23 Cal.App.5th at p. 281.) For this reason, the court determined that "Glenair was authorized to represent and did represent, GCA in its dealings with third parties, specifically GCA's payment of wages to its employees placed at Glenair." (*Ibid.*) Glenair was thus an "agent" of CGA within the meaning of the release.

"The significant test of an agency relationship is the principal's right to control the activities of the agent." (*Id.* at pp. 277-278 [quoting *Violette v. Shoup* (1993) 16 Cal.App.4th 611, 620]; *Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1184.) A key difference between the analysis in *Castillo* and that of the lower courts in this case is the treatment

of the concept of control.[3] The Fourth District focused largely on the fact that Eisenhower maintained professional control over the nurses that FlexCare placed:

> 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.

(*Grande, supra*, 44 Cal.App.5th at p. 1167.)

But, *Castillo* counsels that control must be measured with respect to the specific agency at issue in the litigation:

> It need not be shown that GCA generally controlled Glenair. Rather it must be shown that GCA had the right to control Glenair with respect to the specific agency at issue, namely Glenair's role in collecting, reviewing, and providing time records to GCA. Indeed, " ' "[i]t is not essential that the right of control be exercised or that there be actual supervision of the work of the agent; the existence of the right establishes the relationship." ' "

(*Castillo, supra*, 23 Cal.App.5th at p. 282 [quoting *Violette, supra*, 16 Cal.App.4th at p. 620].) Of course Eisenhower, a hospital, maintained the right to control the nurse's professional administration of the services performed and retained the power to avoid malpractice by assessing competency, testing, and performance. (4 AA 1099 § 14.1; 4 AA 1095 § 6.8.2; 4 AA 1098 §§ 10.1, 10.3.) Were this a malpractice case, Eisenhower's role in this area might have some bearing on the question of agency. However, the specific agency at issue in this wage and hour litigation is Eisenhower's role with respect to FlexCare's payment of the

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[3] *Castillo* also determined that Glenair was in privity with GCA with respect to GCA's payment of its employees and thus a released party. This issue will be discussed separately, *infra*, Part B.)

alleged joint employees. (2 AA 495:18-19; 2 AA 496:1-6; 4 AA 1093 § 5.2; RT 72:14.)

The lower courts' determination that a provision within the Staffing Agreement precluded a finding of agency does not accord with either principles of contract interpretation or an examination of the special agency Eisenhower undertook. (*See Grande, supra*, 44 Cal.App.5th at pp. 1161-1162, 1167.) The provision disclaims FlexCare's general agency and articulates that the hospital retains control over the clinical environment:

> Agency is performing the services and duties hereunder as an independent contractor and not as an employee, agent, partner of or joint venture with Hospital. Hospital retains professional and administrative responsibility for the services rendered. (4 AA 1099 § 14.1.)

This provision does not speak to whether Eisenhower is FlexCare's agent. Nor does it disclaim Eisenhower's role in scheduling FlexCare's employees and reviewing the timecards FlexCare relies upon to pay them. (4 AA 1092 §§ 3.5, 3.7, 4.1; 4 AA 1095 § 6.8.2; 4 AA 1098 §§ 10.1 §10.3; see, e.g., 5 AA 1227, item 2 [requiring a "Facility Supervisor" to sign timesheets]; 5 AA 1227, item 1 [same].) To construe it in such a manner elevates a general provision over more specific provisions, contravening well-established principles of contract interpretation. (See *Prouty v. Gores Technology Group* (2004) 121 Cal.App.4th 1225, 1235 [stating that "under well established principles of contract interpretation, when a general and a particular provision are inconsistent, the particular and specific provision is paramount to the general provision"]; see also *Moore v. Wood* (1945) 26 Cal.2d 621, 630 [providing that contractual clauses are not to be construed in isolation]; *Bourland v. Hildreth* (1864) 26 Cal. 161, 231 [observing that "neither words, phrases, sentences, nor paragraphs should be isolated and interrogated apart; on the contrary, each should be interrogated in the presence of its companions, for each has a voice"].) For these reasons, on

its face, the provision is not determinative, nor is it (as the trial court found) a "binding admission" as to whether FlexCare authorized Eisenhower to act on its behalf with respect to Grande in the wage and hour context. (See 7 AA 1865:7-13.)

More importantly, when it comes to provisions like this, courts look behind the party's contract to the actual relationship in practice. (*Pistone v. Superior Court* (1991) 228 Cal.App.3d 672, 680-81 ["[C]ontract recitals of the existence or absence of agency, while relevant, are never determinative."]; see also *Jackson, supra,* 233 Cal.App.4th at p. 1184 [stating that agency "is determined by the relation of the parties as they in fact exist by agreement or acts . . ."].) For example, in *Mark Hopkins Inc. v. California Employment Stabilization Com.* (1948) 86 Cal.App.2d 15, 16-18, the Court of Appeal reversed because the trial court relied solely on the language in a contract to evaluate the relationship between the parties and ignored the testimony offered to explain how that relationship operated in practice. (See also *City of Los Angeles v. Meyer Bros. Parking System, Inc*. (1975) 54 Cal.App.3d 135, 138 [holding an independent contractor is also an agent when it contracts to act on behalf of a "principal" and is subject to the "principal's" control except with respect to the "agent's" physical conduct].)

Grande's allegation that FlexCare and Eisenhower are "joint employers" is another basis on which to find an agency relationship. The trial court presumed for purposes of the trial that Eisenhower and FlexCare were joint employers. (7 AA 1856:15-16, 1858:2-6). Another case that was decided during the pendency of the proceedings below is *Garcia v. Pexco, LLC* (2017) 11 Cal.App.5th 782, which states that where a plaintiff alleges identical workplace claims against two entities as joint employers, those employers are mutual agents of each other in their dealings with the plaintiff. (*Garcia, supra,* 11 Cal.App.5th at p. 788.)

In *Garcia*, the court examined the agency exception that allows non-signatory agents to enforce the arbitration agreements of their principals. Real Time Staffing Services hired Garcia and assigned him to work for Pexco. (*Id.* at p. 784.) Garcia filed suit against Real Time and Pexco for violations of the Labor Code, including unfair business practices pertaining to the payment of wages during the assignment with Pexco. (*Id*. at p. 785.) As was the case here, the operative complaint in the action alleged that Pexco and Real Time were acting as "joint employers." (*Id*.; *see* 1 AA 19:6-9 [alleging that Eisenhower is a joint employer with FlexCare].) After observing that Garcia alleged identical claims and conduct against both Real Time and Pexco, the Court determined that "as the alleged joint employers, Pexco and Real Time were agents of each other in their dealings with Garcia." (*Garcia, supra*, 11 Cal.App.5th at p. 788.)

The same is true here. Not only does Grande's complaint allege joint employment, the trial court specifically assumed that Eisenhower was a joint employer. (7 AA 1858:2-6.) And, the record is rife with Grande's characterization of Eisenhower and FlexCare as "joint employers." (1 AA 19:1-21; 2 AA 20:11-14; 2 AA 447:13-18; 2 AA 452:18-21; 2 AA 464:8-9.) Like *Garcia*, Grande characterized Eisenhower and FlexCare as being responsible for identical Business and Professions Code violations. (Compare 2 AA 23:19-15:27 with 4 AA 24:2-28 and 2 AA 496:1-4, 15-16.) Furthermore, the trial court expressly found that Grande was making the same claims in both cases. (See also 7 AA-1783:8-25 [finding that the claims in the instant case are the same claims as those that were released in the Erlandsen Action].) Finally, even if this court were to reject the trial court's assumption and Grande's multiple admissions as a basis for finding mutual agency, it is undisputed that under the plain language of the Staffing Agreement, Eisenhower's role in scheduling FlexCare's employees and reviewing their time records makes it an agent with respect to the specific

agency at issue here – FlexCare's payment of its employees. (2 AA 495:18-19; 2 AA 496:1-6; 4 AA 1093 § 5.2; RT 72:14.)

Nor is there a requirement that the Erlandsen release specify Eisenhower by name. (See *General Motors, supra*, 12 Cal.App.4th at p. 444 ["It is not necessary that the contract identify the third party by name as long as such third party can show that it is one of a class of persons for whose benefit it was made."].) The lower courts relied on *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, for the proposition that Eisenhower should have been named specifically, but *Hess* is inapposite. In *Hess,* this Court examined extrinsic evidence, including conversations between the parties, and concluded that boilerplate language releasing "all other persons, firms, corporations, associations, or partnerships" was the product of a mutual mistake. (*Hess, supra*, 27 Cal.4th at pp. 523-527.) It was clear that the language was a mistake (made through the use of a form release containing language that neither party caught) because the parties and their counsel specifically discussed Hess's plan to sue Ford separately during their settlement negotiations. (*Id*. at p. 526.) Unlike *Hess*, the trial court here did not rely on extrinsic evidence. (7 AA 1859:14-16 [finding the extrinsic evidence "of little value"].) And, there is no evidence even remotely suggesting that Grande disclosed to FlexCare any plan to sue Eisenhower separately. (7 AA 1859:20-24; 1 AA 103:23-28; 6 AA 1649:4-9; RT 85:14-18; RT 55:12-24; RT 57:4-10; RT 59:21-27; RT 142:2-13.) *Hess* simply does not speak to this situation.

In fact, general releases in class-action settlement agreements "are not to be shorn of their efficiency by any narrow, technical, and close construction. . . . If parties intend to leave some things open and unsettled their intent so to do should be made manifest." (*Villacres v. ABM Industries Inc*. (2010) 189 Cal.App.4th 562, 589 [quoting *United States v. Wm. Cramp & Sons Co*. (1907) 206 U.S. 118, 128].) The language of the

settlement agreement release gives no indication that Grande intended to reserve her claims or sue other parties. (2 AA 499:1-7; 4 AA 1132:27-1133:6; 6 AA 1650:2-7; RT 133:15-21.)

Releases commonly identify the named parties and include broader categories of releasees. (See, e.g., *Castillo, supra*, 23 Cal.App.5th at p. 269.) FlexCare placed class members at hundreds of hospitals in California. (RT 63:26-64:3.) Listing each of them would render the release several pages long and would risk inadvertently omitting one or more of them. This is the practical reason why it is appropriate to capture them via a general category rather than as specifically named.

This Court recognized this practical problem when it determined, in an analogous context, that a release of "all" claims reaches claims that are not expressly enumerated in the release. (*Jefferson v. California Dept. of Youth Authority* (2002) 28 Cal.4th 299, 305.) Requiring an employer to enumerate every claim the employee might plan to allege would make employers disinclined to enter settlements due to uncertainty:

> [T]he release of "all claims and causes of action" must be given a comprehensive scope. [¶] If courts did not follow this rule, "it [would be] virtually impossible to create a general release that . . . actually achieve[d] its literal purpose" (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1172-1173, 6 Cal.Rptr.2d 554), and language releasing all claims would be inherently misleading, causing unfair surprise to parties that offer payment on the reasonable expectation that all claims are settled, only later to face continuing litigation.

(*Id*. at p. 306 [citing *Edwards v. Comstock Insurance Co.* (1988) 205 Cal.App.3d 1164, 1169].)

These same considerations apply to the Erlandsen Released Parties provision. The fact that other language could have been used to communicate this intent does not speak to the effect of the words that were actually used.

The trial court found the extrinsic evidence regarding the scope of the release was "of little value." (7 AA 1859:14-16; see also RT 97:2-15.) FlexCare's representative testified it was his desire to "buy his peace," which included any indemnity obligations and Eisenhower. (*Id.*; RT 83:18-84:1; 85:19-26; 96:21-97:18.) Though not parties to the agreement, Grande's attorneys testified that they had no intent to release Eisenhower. (7 AA 1859:20-24.) But because no party communicated his or her subjective intent to the other, the court was "left largely with the words themselves" in construing the contract. (*Id.*) Though this testimony of unexpressed intent does not determine the legal effect of the release, "[t]he trier of fact must decide how a reasonable person in the releasing party's shoes would have believed the other party understood the scope of the release." (*Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 351.)

The "words themselves" in the Stipulated Settlement communicate an overarching design to categorize and release entities like Eisenhower, who could potentially be liable for Grande's claims. Where a settlement agreement's language is broad and comprehensive in scope, covering all present and future litigation, the suggestion that the settlement was only intended to release the named parties renders the categories listed "mere surplusage." (*Brinton v. Bankers Pension Services Inc.* (1999) 76 Cal.App.4th 550, 560.)

Here, "Released Claims" broadly included "any and all claims, causes of action, debts . . . obligations and damages" that "could have been reasonably asserted in the Action . . . based upon or arising out of, or related to the allegations in the Action." (4 AA 1140:7-10.) "Released Parties" included "present and former" members of the enumerated categories. (4 AA 1140:23-27.) In fact, the "Released Parties" language is so broad that it releases the named defendants, the categorized entities, and all those entities' "respective officers, directors, employees, administrators

fiduciaries, trustees and agents, and each of their past, present and future . . . accountants, auditors, [and] consultants. . . ." (*Id.*) In essence, it released even the agents of agents. In the face of such an effort to cover the field, it is illogical to construe the release to exclude the other party in Grande's tri-partite working relationship, Eisenhower.

In this respect, *Castillo* is better reasoned than the Fourth District's decision in this case. Just as in *Castillo*, examination of the specific agency at issue establishes that, due to Eisenhower's role in reviewing and approving FlexCare's nurses' hours, it is an "agent" of FlexCare for purposes of Grande's identical wage and hour claims in this successive, class action litigation. The intentionally broad language of the "Released Parties" provision reinforces the settlement's objectively expressed intention and all-encompassing purpose to prevent future litigation against other parties sharing a transactional relationship with FlexCare, involving all "claims, causes of action," "obligations," and "damages" that Grande did bring or could have brought in the Erlandsen Action. Because Eisenhower was FlexCare's agent, it is a Released Party and the judgment should be reversed.

B. Eisenhower is in Privity With FlexCare Due to its Relationship to the Litigation or as FlexCare's Agent for Purposes of Paying Grande

The Fourth and Second Districts also came to different conclusions regarding privity on almost identical facts. In *Castillo,* the Second District determined that privity existed between the client company and the staffing company for two independent reasons. First, privity existed because the interests of the staffing company and the client company were so intertwined with respect to wage payment claims as to put them in the same relationship with respect to the plaintiffs' litigation. (*Castillo, supra*, 23 Cal.App.5th at pp. 279-280.) Second, privity existed because the client

company was an agent for the staffing company with respect to its payment of the staffing company's employees. (*Id.* at p. 281.) In this case, the Fourth District rejected Castillo as inconsistent with *DKN*, and stated that the liability of joint and severally liable obligors is independent and not vicarious or derivative. (*Grande, supra*, 44 Cal.App.5th at pp. 1159, 1162-1163; see also *id*. at p. 1168 (dis. opn. of Ramirez, P.J.).) As will be discussed, *Castillo* is entirely consistent with *DKN* and because privity exists, the FlexCare Judgment bars Grande's litigation against Eisenhower.

1. Standards for Applying Res Judicata (Claim Preclusion)

The doctrine of res judicata precludes a party who has had one fair trial from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. (*Bernhard v. Bank of America National Trust and Savings Association* (1942) 19 Cal.2d 807, 810-811; *Panos v. Great Western Packing Co*. (1943) 21 Cal.2d 636, 637.) Res judicata preserves the integrity of the judicial system by preventing inconsistent judgments, promotes judicial economy by minimizing needless litigation, and protects litigants from harassment. (*Clemmer v. Hartford Ins*. Co. (1978) 22 Cal.3d 865, 875, overruled on other grounds in *Ryan v. Rosenfeld* (2017) 3 Cal.5th 124, 128-29; *Dyson v. State Personnel Bd.* (1989) 213 Cal.App.3d 711, 725.)

Claim preclusion is an aspect of res judicata and it arises if the second action involves: (1) the same cause of action (2) between the same parties or parties in privity with them (3) after a final judgment on the merits in the first action. (*Clemmer, supra*, 22 Cal.3d at p. 874.) There is no dispute that Grande's Business and Professions Code claim in her two lawsuits involved the same cause of action, both factually and legally. (7 AA 1867:8-16, 1870:23-28.) Nor is there any dispute that the Amended Final Judgment in the Erlandsen Action is considered "a final judgment on the merits." (7 AA 1868:5-7, 1872:16-18.) Thus, the pivotal question is

whether client company, Eisenhower, is in privity with staffing company, FlexCare, with respect to the claim of the employee that FlexCare hired and placed at Eisenhower.

Traditionally, privity referred to "an interest in the subject matter of litigation acquired after rendition of the judgment through or under one of the parties." (*Clemmer, supra*, 22 Cal.3d at p. 875.) The concept has since expanded and though not susceptible to uniform definition, privity now exists where the relationship between the parties in successive litigation is "sufficiently close" to justify its application. (*Id.*; see also *Alvarez v. May Department Stores Co.* (2006) 143 Cal.App.4th 1223, 1236-1237 [examining the practical situation and asking "whether the non-party is sufficiently close to the original case to afford application of the princple of preclusion"]; *Cal. Sierra Development, Inc. v. George Reed, Inc.* (2017) 14 Cal.App.5th 663, 674 [focusing on "a person's relationship to the subject matter of the litigation"].) A person is adequately represented for privity purposes "if his or her interests are so similar to a party's interest that the latter was the former's virtual representative in the earlier action." (*Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Association* (1998) 60 Cal.App.4th 1053, 1070; *DKN, supra*, 61 Cal.4th at p. 826.)

This Court's most recent discussion of privity is in *DKN Holdings LLC v. Faerber*, which involved a dispute regarding rent and other moneys owed between a commercial landlord and its lessees. (*DKN, supra*, 61 Cal.4th at p. 818.) After obtaining a judgment against one lessee that went unsatisfied, the landlord filed a second suit against another lessee. (*Id.* at p. 823.) The second lessee's status as a joint and several obligor by itself was insufficient to establish privity for res judicata purposes. (See *id.* at p. 826 [stating that "joint and several liability alone" does not create a sufficiently closely aligned interest to establish privity].) Though it ultimately determined that privity did not exist, in examining whether there was a

basis for it, this Court observed that cases involving derivative liability create privity because "the nature of derivative liability so closely aligns the separate defendants' interests." (*Id*. at pp. 827-828.) Significantly, *DKN* did not involve a staffing relationship, an agency relationship, wage and hour claims, or a stipulated and satisfied class action judgment.

2. FlexCare and Eisenhower are in Privity Because they Share the Same Relationship to Grande and the Identical Wage and Hour Claims She Brought Against Them

As an initial matter, *DKN* does not say that joint and severally liable parties cannot be in privity. In fact, it explicitly notes that "joint and several liability ***alone***" is insufficient to create privity — something more is required. (*DKN*, *supra*, 61 Cal.4th at p. 826, emphasis added.) It then goes on to explain that this "something more" is a relationship where the parties share "an identity or community of interest with adequate representation in the first suit." (*Id*. at p. 826.) This was not a novel proposition. In a variety of circumstances, California courts have found privity where a party and nonparty share a close relationship or connection to the subject matter of the litigation and thus an identity of interests:

• In *Bernhard v. Bank of America National Trust & Savings Association*, (1942) 19 Cal.2d 807, the administrator of an estate received a declaration in probate that a particular deposit was a gift to him. In a subsequent proceeding, the Supreme Court determined that a bank, which was not party to the first proceeding, could successfully assert res judicata against a successor administrator attempting to sue the bank for permitting an unauthorized withdrawal of the same money.

• Likewise, in *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749, homeowners initially sued their general contractor for, among other things, extensive cracks in the driveway of the constructed residence. The arbitrator awarded the homeowners credits for poor workmanship. In the

second action, the court determined that the homeowners were precluded from suing the subcontractor for the same defect.

Here, as in *Crum* and *Bernhard*, Grande is attempting to litigate against a non-party the exact same right encompassed by the prior judgment. Because Grande's claims in both cases arise out of the seven shifts that she worked at Eisenhower per her contract with and placement there by FlexCare, both FlexCare and Eisenhower share a community of interest in the subject matter of the litigation. (2 AA 496:15-26; 4 AA 1063:2-14; 5 AA 1291:16-22; RT 40:2, 45:4-5.) In the Erlandsen Action, Grande stipulated to a judgment that determined the value of her claims for this placement. (4 AA 1130, 1136, 1166, 1174.) It is undisputed that — unlike the judgment in *DKN* — the judgment in the Erlandsen Action — and the entire right to compensation for the alleged wrong — was fully satisfied. (Compare RT 82:27-83:3 with *DKN, supra*, 61 Cal.4th at p. 826.)

Castillo is in line with these authorities. It examined whether the staffing company and its client shared a community of interest because of their intertwined interests with respect to the subject matter of the litigation (payment of the plaintiff) because both cases involved the same wage and hour causes of action, arising from the same work that the Castillos performed at the client company Glenair:

> . . . it is clear Glenair and GCA are in privity for present purposes. **The subject matter of this litigation is the same as the subject matter of the *Gomez* litigation – namely, both cases involve the same wage and hour causes of action arising from the same work performed by the same GCA employees (the Castillos) at GCA's client company Glenair. Based on the undisputed facts, it is apparent Glenair and GCA share the same relationship to the Castillos' claims here**. Both Glenair and GCA were involved in and responsible for payment of the Castillos' wages. Glenair was authorized by GCA and responsible for recording, reviewing and transmitting the Castillos' time

> records to GCA. GCA paid the Castillos based on those time records. And, by virtue of the *Gomez* settlement, the Castillos were compensated for any errors made in the payment of their wages. Thus, **with respect to the Castillos' wage and hour causes of action, the interests of Glenair and GCA are so intertwined as to put Glenair and GCA in the same relationship to the litigation here**. Accordingly, we conclude they are in privity for purposes of the instant litigation.

(*Castillo, supra,* 23 Cal.App.5th at pp. 279-280.)

The trial court's findings in this matter demonstrate that FlexCare and Eisenhower share the same relationship that was present in *Castillo*. The trial court found that "Plaintiff was a traveling nurse employed by . . . FlexCare, a licensed temporary staffing agency." (7 AA 1853:3-9.) "She was assigned by FlexCare to work at . . . Eisenhower." (*Id.*) "The Labor Code violations committed by FlexCare as to Plaintiff allegedly occurred when Plaintiff was assigned to work at Eisenhower." (*Id.*) "Plaintiff alleged that Eisenhower was her joint employer and was liable for the same Labor Code violations committed while she was working at Eisenhower through her assignment by FlexCare." (*Id.*; see, e.g., *id.* at p. 1870:23-28.) Plaintiff's instant claims against Eisenhower are "Released Claims" as defined in the January 2014 Stipulation and Settlement Agreement and the Amended Final Judgment in the Erlandsen Action. (7 AA 1871:9-25; compare *Castillo, supra,* 23 Cal.App.5th at p. 278 [reciting undisputed facts].)

Despite these findings, the court below concluded that FlexCare and Eisenhower were not in privity because the "liability of each joint and several obligor is separate and independent, not vicarious or derivative." (*Grande, supra*, 44 Cal.App.5th at p. 1159.) But, "joint and several liability" and "vicarious or derivative" liability are not mutually exclusive. This Court has noted that the term "joint and several liability" is used in

multiple contexts. (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 587.) In the concurrent tortfeasor context, the phrase simply embodies the general common law principle that a tortfeasor is liable for any injury where his negligence is a proximate cause. (*Id.* at p. 587.) It is also used with respect to those who act in concert to commit a tort, such as members of a conspiracy or partnership. (*Ibid.*) Most importantly for this case, this Court observed that the term is sometimes used in "contexts in which a preexisting relationship between two individuals made it appropriate to hold one individual liable for the act of the other." (*Ibid.*) *American Motorcycle* goes on to cite as "common examples" of such derivative liability the relationships between employers and employees or principals and agents. (*Ibid.*)

Castillo recognized that joint and several liability does not automatically create privity. It quotes *DKN's* observation that "[j]oint and several liability *alone* does not create such a closely aligned interest between co-obligors." (*Castillo, supra*, 23 Cal.App.5th at p. 280 [emphasis in original]; see *DKN, supra*, 61 Cal.4th at p. 826 [rejecting the concept that joint and several liability, by itself, automatically creates privity: "Nor does joint and several liability **put** co-obligors in privity with each other"], emphasis added.) *Castillo* goes on to note that its privity finding does not rely on a joint and several liability relationship.[4] (*Castillo, supra*, 23 Cal.App.5th at p. 280) Rather, privity was based on the interdependent relationship of the staffing and client companies with respect to the payment of the wages at issue, and the fact that the litigation revolves around alleged errors in the payment of those wages. (*Id.*)

[4] Likewise, FlexCare has never claimed that privity existed based on joint and several liability.

The Fourth District determined that the liability between FlexCare and Eisenhower was independent and stated that *Serrano v. Aerotek, Inc.* (2018) 21 Cal.App.5th 773 controls in this case. (*Grande*, *supra*, 44 Cal.App.5th at pp. 1159-1160.) But again, *DKN* did not hold that privity can never exist in the absence of derivative liability. (See, e.g., *Consumer Advocacy Group, Inc. v. ExxonMobil Corp.* (2008) 168 Cal.App.4th 675, 693 [citizens' groups bringing separate private enforcement actions in the public interest were in privity]; *Stafford v. Russell* (1953) 117 Cal.App.2d 319, 320 [corporation and its shareholder were in privity].) And, as recognized in *Castillo*, *Serrano* does not discuss privity because the plaintiff sued the staffing company (Aerotek) and the client company (Bay Bread) together in the same action. (*Serrano, supra*, 21 Cal.App.5th at pp. 778-779.) Though *Serrano* did discuss agency, it is factually distinct because Aerotek did not authorize its client company to represent Aerotek with respect to its payroll practices and instead, placed its own manager on site at Bay Bread to review employee time records. (Compare *id.* at p. 777 with *Castillo, supra*, 23 Cal.App.5th at p. 286.)

Aside from the fact that *Serrano* did not address privity, it also relied heavily on *Noe v. Superior Court* (2015) 237 Cal.App.4th 316. The court below did not cite *Noe*, but the case is significant. The question at issue in *Noe* was whether liability under Labor Code section 226.8 extended to an employer who had knowledge that a co-employer willfully misclassified their joint employees. (*Noe*, *supra*, 237 Cal.App.4th at pp. 319-320.) The Court of Appeal refused to analyze the issue under joint and several liability principles and indicated that the extent of liability that the Legislature intended to impose on joint employers is to be determined on a

case by case basis by examining the particular statute at issue.[5] (*Id.* at p. 333; see also *Castillo, supra*, 23 Cal.App.5th at p. 286 [citing *Serrano, supra*, 21 Cal.App.5th at p. 809] [characterizing its prior opinion in *Noe* as addressing "whether an employer is liable for a co-employer's violations depends on the scope of the employer's own duty under the relevant statutes, not 'principles of agency or joint and several liability'"].)

The dilemma that existed in *Noe* and in *Serrano* simply does not exist here because the trial court expressly found that Grande was bringing the same violations against Eisenhower that she brought against FlexCare in the prior action. (7 AA 1854:3-5; compare 4 AA 1059:23-24 and 4 AA 1060:7-9 [alleging in the Erlandsen Action that "Defendants failed to provide . . . meal periods required to be provided" and "Defendants have not paid . . . the additional pay due them under Section 226.7] with 1 AA 26:7-9 and 26:12-14 [alleging in the Riverside Action that "Defendant failed to provide . . . duty free-meal periods" and "Defendants have not paid . . . the additional pay due to them under section 226.7."].) And, because all of the alleged joint employers were before the court as defendants in both *Noe* and *Serrano*, neither case speaks to whether a plaintiff may sue one alleged joint employer for the same claims where there exists a fully-paid final judgment against the other.

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[5] Interestingly, shortly before *Noe* was decided, the Legislature enacted Labor Code section 2810.3, which states that a "client employer shares with a labor contractor all civil legal responsibility and civil liability for workers supplied by the labor contractor for . . . the payment of wages." (Lab. Code, § 2810.3(b)(1).) If this statute applied in this case, Eisenhower would be derivatively liable for FlexCare's payment of the wages and thus, under *DKN*, privity would exist. (*DKN, supra*, 61 Cal.4th at pp. 827-828.) *Noe* pointed out several times that there was "no authority" suggesting that under California law joint employers are normally held jointly liable for a co-employer's Labor Code violations. (*Noe, supra*, 237 Cal.App.4th at pp. 332-333.) *Noe* was decided before both *Garcia* and *Castillo,* which are such authority.

The court below also indicated that FlexCare and Eisenhower's interests are not sufficiently aligned for purposes of privity because they have an incentive to blame each other at trial for the Labor Code violations. (*Grande, supra*, 44 Cal.App.5th at p. 1160.) But, in this case, due to the specter of an indemnity obligation, FlexCare had no such interest. (2 AA 500:11-12; 2 AA 504-506; 5 AA 1228; RT 120:3-15.) At the time of the settlement, its interest was simply to pay the judgment and move on. (RT 84:17-22; 85:24-27.) The degree to which the interests of FlexCare and Eisenhower align is better demonstrated by the fact that FlexCare went out of its way to intervene in this action when it discovered that Grande and her attorneys were suing Eisenhower for the exact same wage and hour violations it paid Grande and her attorneys $700,000 to resolve. (1 AA 45, 51.) FlexCare and Eisenhower are in privity.

3. Because Eisenhower is FlexCare's Agent for the Purpose of Scheduling and Paying Grande, Agency, and therefore Privity, Exists

DKN expressly recognized this Court's prior holdings to the effect that "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." (*DKN, supra*, 61 Cal.4th at p. 827; see also *Clemmer, supra*, 22 Cal.3d at pp. 875-876; *Bernhard, supra*, 19 Cal.2d at pp. 812-813.)

In addition to their common interest in the subject matter of the litigation, the agency relationship between FlexCare and Eisenhower also supports a finding of privity. *DKN* stands for the proposition that derivative liability is one way to establish privity:

> 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. The nature of derivative liability so closely aligns the separate defendants' interests that they are treated as identical parties. Derivative liability supporting issue preclusion has been found between a corporation and its employees, a general contractor and subcontractors . . . and among alleged coconspirators.

(*DKN, supra*, 61 Cal.4th at pp. 827-828 [internal citations omitted].) "Typical" examples of derivative liability include "principal and agent, and indemnitor and indemnitee." (*Bernhard, supra*, 19 Cal.2d at p. 812; see *DKN, supra*, 61 Cal.4th at p. 828 [noting that such liability exists between a corporation and its employees, subcontractors, an association of securities dealers and member agents and among alleged co-conspirators]; *Triano v. F.E. Booth & Co.* (1932) 120 Cal.App. 345, 348.)

This proposition is also well supported by prior cases. For example, in *Triano v. F.E. Booth & Co.* (1932) 120 Cal.App. 345, 346-347, the plaintiff sued defendant Booth and Company for personal injuries and in a second action sought to sue the company's stockholders for the same injury. The court barred the second suit because the liability of the stockholders depended upon the culpability of the corporation. Similarly, in *LeVine v. Higashi* (2005) 131 Cal.App.4th 566, 579, the estate of a deceased partner unsuccessfully sued the partnership for miscalculating the deceased partner's share of partnership profits. The court barred the estate's second suit against the partnership's accounting firm, who plaintiff styled as a co-conspirator, on the ground that the firm's liability was derivative.

In this case, it is undisputed that as between FlexCare and Eisenhower, FlexCare assumed the obligation to pay Grande. (4 AA 1093 ¶ 5.2; RT 76:9-14.) Grande also agreed, in her Travel Nurse Agreement, to look to FlexCare for payment. (2 AA 495:22-25; 5 AA 1226-1227; RT 74:26-75:6, 76:9-14.) Thus, any liability of Eisenhower is necessarily

derivative because FlexCare was responsible for paying Grande. To the extent that she was not properly paid, FlexCare was the immediate actor. (See *Triano, supra*, 120 Cal.App. at p. 348 [noting that "a judgment in favor of the immediate actor is a bar to an action against one whose liability is derivative from or dependent upon the culpability of the immediate actor"].) Accordingly, under agency and derivative liability principles, privity exists and Grande is bound by the judgment that she negotiated.

4. Policy Considerations Support the Application of Res Judicata in this Case

Policy considerations are relevant to the res judicata analysis. (*Citizens for Open Access to Sand and Tide, supra*, 60 Cal.App.4th at p. 1074.) In deciding whether to apply collateral estoppel, the court must balance the rights of the party to be estopped against the need for applying collateral estoppel in the particular case to promote judicial economy, minimize repetitive litigation, prevent inconsistent judgments or protect against vexatious litigation. (*Clemmer, supra*, 22 Cal.3d at p. 875.) Applying the doctrine in this case accomplishes all of these purposes.

The parties stipulated and the trial court found that Grande's seven shifts at Eisenhower through FlexCare was entirely co-extensive. (2 AA 495:26-496:6; 2 AA 496:14-16; 7 AA 1853:3-9; 7 AA 1867:8-16.) It was also stipulated that Grande (and her attorneys) *chose* to sue FlexCare alone in the initial action. (2 AA 496:17-18; 2 AA 499:12-13.) In exchange for, among other things, a class representative award, Grande *chose* to compromise her claims through a court-approved class action settlement in the Erlandsen Action. (2 AA 498:3-8.) Grande *chose* to affirmatively make a claim on the settlement fund and not to opt out. (2 AA 498:3.) FlexCare then paid the judgment *in full*, which included payment to Grande of the claim she chose to compromise. (RT 82:27-83:3.)

Allowing Grande to compromise her claim and double dip deprives FlexCare of the court-approved finality that FlexCare bargained for when it agreed to resolve the first case. (See *Castillo, supra*, 23 Cal.App.5th at pp. 286-287 [observing that if the Castillos were permitted to pursue their causes of action, they would undermine the finality of the bargained for and court approved settlement].) The legal basis for vicarious responsibility rests on the notion that the injured person should have additional security for recovery of his loss, which justifies imposing liability on someone other than the primary obligor. (Rest. Judgments 2d § 51, com. b.) However, "this should not afford the injured person a further option to litigate successively the issues upon which his claim to redress is founded." (*Ibid*.) Grande and her attorneys were aware of her claims against Eisenhower during the pendency of the FlexCare litigation, but chose not to bring them. (4 AA 1041:24-28.) And, Grande waited until the settlement was fully paid to file suit against Eisenhower. (2 AA 498:4-5; 2 AA 500:10; see *Thibodeau, supra*, 4 Cal.App.4th at p. 755 ["A party cannot by negligence or design withhold issues and litigate them in consecutive actions."].)

The purpose of the doctrine of res judicata is to promote judicial economy and protect litigants from unnecessary litigation, both of which are furthered by ending this litigation. The releases in the Stipulated Settlement Agreement, Class Notice, and Judgment do not carve out Eisenhower, or otherwise evidence any attempt to preserve a right to do so. (See *Villacres, supra*, 189 Cal.App.4th at p. 589.) Allowing this case to continue promotes serial litigation, including potential litigation regarding indemnity between Eisenhower and FlexCare. (2 AA 500:11-12; 2 AA 504-506.) It also undermines the court-approved finality that FlexCare bargained for when agreeing to the Erlandsen settlement.

Applying res judicata here is also good public policy because it has the benefit of providing clear rules for co-employers regarding preclusion

and how preclusion might affect how the co-employers choose to order their contractual relationships. Like FlexCare and Eisenhower, parties could chose to create an agency where the client company is responsible for aspects of the employment such as scheduling, approving overtime and timecard review. Alternatively, as in *Serrano*, the staffing agency can avoid agency by stationing its own employee-manager on site to handle these issues. Either situation has its own benefits and detriments. In any event, the virtue of a clear rule is apparent: it allows co-employers to enter into a relationship with full knowledge about what the legal consequences of that relationship may be.

VI. CONCLUSION

For all these reasons, this Court should acknowledge that the public policy supporting res judicata and the finality of judgments is best served by prohibiting the unique type of serial class-action litigation attempted by Grande here and reverse the judgment.

DATED: September 1, 2020 DOWNEY BRAND LLP

By: */s/ Cassandra M. Ferrannini*
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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.504(d)(1)

Pursuant to California Rules of Court Rule 8.504(d)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 10,611 words.

DATED: Septemer 1, 2020 DOWNEY BRAND LLP

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PROOF OF SERVICE

Lynn Grande v. Eisenhower Medical Center
Supreme Court of California; Case No. S261247
US Court of Appeal, Fourth District Appellate District, Division Two, Case No. E068730
After An Appeal From the Superior Court, County of Riverside, Case No. RIC1514281

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 Sacramento, State of California. My business address is 621 Capitol Mall, 18th Floor, Sacramento, CA 95814.

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Executed on September 1, 2020, at Sacramento, California.

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Supreme Court of California

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Case Number: **S261247**
Lower Court Case Number: **E068730**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

9/1/2020

Date

/s/Cassandra Ferrannini

Signature

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