Case No. S261247

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Lynn Grande, *Plaintiff and Respondent,*

vs.

Eisenhower Medical Center, *Defendant;*

FlexCare LLC, *Intervenor and Appellant.*

Eisenhower Medical Center, *Petitioner*

v.

Superior Court of Riverside County, *Respondent*;

Lynn Grande, *Real Party in Interest*

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

LYNN GRANDE'S ANSWERING BRIEF ON THE MERITS

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I. ISSUE PRESENTED

As framed by this Court, the issue presented is as follows:

> 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

The Court of Appeal's decision should be affirmed. Plaintiff contended below that Eisenhower Medical Center ("Eisenhower") and FlexCare, LLC ("FlexCare") were joint employers and that each were jointly and severally liable for the failure to pay Plaintiff wages owing to Plaintiff and the class members. The Court of Appeal held that there was no "privity" between Eisenhower and FlexCare for res judicata purposes that would preclude Plaintiff from pursuing Eisenhower for its liability as Plaintiff's joint employer under California law even though FlexCare had settled Plaintiff's claims against FlexCare in a separate lawsuit. 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 Court of Appeal also upheld the trial court's factual findings that, based on the evidence presented at the bench trial, Eisenhower was ***not*** FlexCare's "agent."

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 *DKN Holdings* and other appellate authority. Moreover, the *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. The trial court's factual finding that Eisenhower was not FlexCare's "agent" and was never intended to be released in the other class action settlement is supported by substantial evidence, and there is simply no basis for this Court to conclude that Eisenhower, FlexCare's client, was FlexCare's "agent" as a matter of law.

In answer to this Court's question for review, under the specific facts of this case, based on the trial court's factual findings that Eisenhower (the client) was ***not*** FlexCare's (the staffing agency) agent and was ***not*** intended to be released under the first lawsuit, a class of workers may bring a wage and hour class action against FlexCare, settle that lawsuit with a stipulated judgment that releases all of FlexCare's "agents" and then bring a second class action premised on the same alleged wage and hour violations against Eisenhower.

III. PROCEDURAL BACKGROUND

A. The Santa Barbara Action and its settlement

On January 30, 2012, Christina Erlandsen filed a wage and hour class action against FlexCare in the Santa Barbara Superior Court on behalf of herself and other nursing employees of FlexCare ("Santa Barbara Action"). Ultimately, Lynn Grande was added as an additional named Plaintiff. A Third Amended Complaint was filed on August 16, 2013, naming as additional defendants certain individuals who were employees, officers and/or owners of FlexCare. Eisenhower Medical Center, the hospital where Grande was assigned by FlexCare to work, was not named as a defendant in

the Santa Barbara Action. (Appellant's Appendix, Vol. 1, Tab 15, page 159.)[1]

Ultimately, Erlandsen and Grande reached a settlement with FlexCare and the other named defendants in the Santa Barbara Action. An Amended Final Judgment and Order (hereinafter "Judgment') reflecting the class action settlement was entered in the Santa Barbara Action on April 8, 2015. (AA:4:34, 1130-35.) ***Eisenhower was not named in the Judgment as a released party and did not pay any consideration whatsoever for the settlement***. (*Id*.)

B. The relevant "release" provisions in the Santa Barbara Action Judgment.

The "Released Parties" are defined in the Judgment entered in the Santa Barbara Action as follows:

> 12. As used in Paragraph 10 above, "Released Parties" means 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. (AA:1:15, 213-214.)

Eisenhower is nowhere identified by name as a "Released Party," nor does paragraph 12 include the words "joint employer," "joint obligor," "clients of FlexCare," or similar language. (*Id*.)

[1] References to the Appellant's Appendix will be designated as follows: "AA:[vol no]:[tab no], [page number]."

Under the Judgment, "Released Claims" are ***only released as against the "Released Parties"***:

> 10. As of the Effective Date, the Released Claims of each and every Class Member and Settlement Class Member, respectively, are and shall be deemed to be conclusively released ***as against the Released Parties***, including for any injunctive or declaratory relief. All Class Members, as of the Effective Date, are hereby forever barred and enjoined from prosecuting Released Claims ***against the Released Parties***. The effectiveness of the Released Claims is conditioned upon the timely payment by FlexCare, LLC and Vantus, LLC of all amounts due under the Stipulation. (AA:1:15, 213.)

The Section 1542 waiver contained in paragraph 11 of the Judgment only applied to "Defendants," not to all Released Parties. (*Id*.)

C. Grande's action against Eisenhower

On December 3, 2015, Grande filed a complaint in the Riverside Superior Court against Eisenhower alleging a claim under Business and Professions Code Section 17200, *et seq*. Grande alleged that Eisenhower was liable as her employer for Labor Code violations committed against her while she was working at Eisenhower through her assignment by FlexCare. (AA:1:1, 17-32.)

Eisenhower filed an Answer on March 22, 2016, asserting, *inter alia*, the affirmative defenses of waiver/release (10th Affirmative Defense), *res judicata* (18th Affirmative Defense), and collateral estoppel (19th Affirmative Defense). (AA:1:2, 39, 41.)

On or about July 19, 2016, FlexCare filed a motion to intervene, which the Court granted. (AA:1:4, 53) FlexCare filed its Complaint in Intervention on August 15, 2016. (AA:1:3, 45-50.) In its Complaint, FlexCare asserted a claim for Declaratory Relief, seeking a declaration that Grande's claims against Eisenhower had been released pursuant to the settlement in the Santa Barbara Action. FlexCare also asserted that the Final Judgment in the Santa Barbara Action had preclusive effect on

Grande's claims against Eisenhower pursuant to the doctrines of *res judicata* and collateral estoppel. (AA:1:3, 45-50.)

Thereafter, FlexCare filed a motion to bifurcate its Declaratory Relief Action and Eisenhower filed a motion to bifurcate its *res judicata* and waiver and release defenses. The Court bifurcated such claims and defenses on September 28, 2016. (AA:1:6, 61.) The parties thereafter agreed to have the bifurcated issues tried to the Court. (AA:7:66, 1854.)

D. The bench trial

On February 6 and 7, 2017, the trial court conducted a bifurcated trial on Eisenhower's 10th, 18th and 19th affirmative defenses and on FlexCare's declaratory relief Complaint in Intervention. The defenses and the Complaint in Intervention raised the same issues:

- Whether the class action settlement and resulting judgment in the Santa Barbara Action has any *res judicata* (claim preclusion) or collateral estoppel (issue preclusion) effect as to Grande's claim against Eisenhower; and
- Whether the release language in the Judgment in the Santa Barbara Action included a release of the claims that Grande may have had against Eisenhower. (AA:7:66, 1854.)

1. The evidence at trial

The trial court admitted and considered substantial extrinsic evidence concerning the ***factual*** issues of whether Eisenhower was FlexCare's "agent" or a "related or affiliated entity" as those terms were used and intended by the parties in the Judgment and whether the parties intended Eisenhower to be a "Released Party" under the Judgment. This included documents, testimony, and matters of which judicial notice was taken by the trial court.

a) There was substantial evidence that FlexCare did not control Eisenhower, *i.e.*, that Eisenhower was not FlexCare's "agent."

Two contracts between FlexCare and Eisenhower were introduced at trial, both of which ***expressly disavowed any agency relationship***. In their Supplement Staffing Agreement dated October 31, 2007, which was in effect at the time Grande provided services to Eisenhower through FlexCare, Eisenhower and FlexCare contractually agreed that FlexCare was an independent contractor and not an agent:

> 14. RELATIONSHIP OF THE PARTIES
>
> 14.1 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. (Emphasis added.) (AA:2:23, 535.)

An identical provision was also included in the Supplement Staffing Agreement dated November 19, 2014, which was in effect when the Judgment was entered. (AA:2:23, 548.)

Additional evidence was admitted that demonstrated that Eisenhower was not FlexCare's "agent."

- Except for the two Supplemental Staffing Agreements, FlexCare did not have any other written agreements with Eisenhower. (Reporter's Transcript, page 89, lines 13-23)[2]
- FlexCare did not control Eisenhower. (RT:87:19-20.).
- The only services that Eisenhower provided to FlexCare was to pay FlexCare for staff. (RT:114:11-19.)
- FlexCare did not pay Eisenhower for any services provided by Eisenhower. (RT:115:15-17.)

[2] References to the Reporter's Transcript will hereinafter be designed as "RT:[page no]:[line numbers]."

b) There was substantial evidence that the parties never intended that the Judgment would release claims against Eisenhower.

At trial, substantial evidence was introduced showing that Grande and FlexCare never intended that the Judgment in the Santa Barbara Action would release claims against Eisenhower, including the following:

- Eisenhower was not named as a defendant in the Santa Barbara Action. (AA:2:23, 499.)
- Eisenhower did not sign any settlement agreement in the Santa Barbara Action. (AA: 2:23, 498.)
- The Judgment in the Santa Barbara Action does not mention Eisenhower by name. (AA: 2:23, 499; RT:151:20-33.)
- Eisenhower is nowhere mentioned as a "Released Party" by description, such as:
    - "any client of FlexCare as to whom any class member may have provided services through FlexCare"
    - "any entity that could be deemed to be a joint employer of FlexCare"
    - "any entity that could be deemed to be a joint obligor of FlexCare"
    - "Released Parties shall include Eisenhower Medical Center, Lompoc Medical Center, or any other client of FlexCare for whom any class member provided services." (AA:1:15, 213-214; RT:161:12-14.)
- Eisenhower did not participate in the negotiations of the settlement. (AA:2:23, 499.)
- Eisenhower never paid any consideration for the Santa Barbara Action Settlement Agreement. (RT:150:23-151:6.)
- FlexCare was represented by a large law firm in the Santa Barbara Action and in the negotiation of the Settlement Agreement. (AA:2:23, 496.)
- Eisenhower had no communications with FlexCare regarding the settlement of the Santa Barbara Action prior to the settlement of the Santa Barbara Action. (AA:2:23, 499.)
- Eisenhower had no communications with FlexCare regarding the settlement of the Santa Barbara Action until after this action was filed against Eisenhower. (AA:2:23, 499.)

- Grande's right to sue joint employers for wrongs committed by such joint employers, including Eisenhower, was never discussed or agreed to by Grande's counsel with FlexCare's counsel. (RT:155:17-25; RT:155:17-25; RT:156:6-10.)
- FlexCare never asked for the release of any client of FlexCare as part of the settlement. (RT:156:2-5)
- There were no discussions whatsoever between Eisenhower and Grande's counsel before the judgment in the Santa Barbara Action was entered nor were there any discussions between Eisenhower and FlexCare or its counsel about Eisenhower or any client of FlexCare being released by the Settlement Agreement or judgment in the Santa Barbara Action prior to the entry of judgment in that case. (RT:156:2-5; RT:139:17-24; RT:141:14-20; RT:148:3-7; RT:154:27-155:6; RT:149:8-13; RT:139:17-24; RT:141:14-20; RT:148:3-7; RT:156:2-5; RT:155:2-6; RT:141:23-142:1; RT:149:16-20.)
- The number of employees of Eisenhower or the potential damages against Eisenhower were never discussed during non-mediation settlement discussions of counsel. (RT:157:3-6; RT:157:7-10.)
- Grande's attorneys settled the claims against FlexCare for only $750,000, which was paid in two installments, based in part on FlexCare's counsel's representations about FlexCare's lack of financial viability. (RT:157:11-23; RT:158:16-22.)
- No discovery was ever served on or taken against Eisenhower in the Santa Barbara Action. (RT:150:5-7; RT:150:8-10; RT:150:11-13.)
- Eisenhower did not attend any of the mediations in the Santa Barbara Action. (RT:150:17-19.)
- There were discussions with FlexCare legal counsel about the financial viability of the FlexCare defendants. (RT:156:15-18.) Legal counsel for FlexCare said that FlexCare was a very small company and that a judgment against it would not do the class members any good. (RT:156:27-157:2.)
- The number of Eisenhower employees was never discussed in the Santa Barbara Action. (RT:157:3-6.)
- The amount of damages that Eisenhower could be liable for was never discussed in the Santa Barbara Action. (RT:157:7-10.)

- The potential damages against FlexCare were calculated at more than $10 million yet FlexCare paid only $750,000 in two payments. (RT:157:11-23.)
- One of the reasons why Grande agreed to only $750,000 as a settlement was the financial viability of FlexCare, and the financial viability of FlexCare was cited in one of the motions for preliminary or final approval in the Santa Barbara Action. (RT:158:16-22; 23-27.)
- When additional defendants were added to the Santa Barbara Action because of concerns about the financial viability of FlexCare, Eisenhower was not added as a defendant in the Santa Barbara Action. (RT:165:6-166:6.)
- At the time of the settlement of the Santa Barbara Action, Grande's legal counsel did not think that Eisenhower or any other client of FlexCare was a released party under the Settlement Agreement. (RT:159:15-24.)
- The reasons Grande's legal counsel never intended to release Eisenhower in the Santa Barbara Action included the following: Eisenhower was not named in the release, no client of FlexCare was named in the release, no definition of any client of FlexCare was named in the release, there was no joint employer or joint obligor language in the release, Eisenhower was not a party to the Santa Barbara Action, there was no discovery against Eisenhower in the Santa Barbara Action, the number of employees of Eisenhower were never considered in the settlement, notice was not given to the broad class of traveling nurses at Eisenhower, no damages for the traveling nurses at Eisenhower were calculated and Eisenhower did not pay any part of the settlement in the Santa Barbara Action. (RT:161:4-162:4.)

2. The trial court's factual findings

The trial court considered the evidence admitted at trial and the admissible testimony of the witnesses and found in favor of Grande and against FlexCare and Eisenhower on all issues.

a) The trial court specifically found that neither Eisenhower nor FlexCare was the "agent" of the other as that term was used and intended in the Settlement Agreement.

In its Statement of Decision, the trial court expressly found as a matter of fact that neither Eisenhower nor FlexCare was the other's "agent" as that term was used and intended in the Settlement Agreement in the Santa Barbara Action. (AA:7:66, 1865.)

Moreover, the trial court expressly found that neither FlexCare nor Eisenhower had met its burden of establishing such agency relationship:

> While FlexCare and Eisenhower's admissions in their contracts that there is no agency relationship between FlexCare and Eisenhower may not "require" a finding that there is no agency relationship between them, such admissions are certainly ***substantial evidence that no such agency relationship exists***. The Court finds that neither FlexCare nor Eisenhower has met their burden of proof that FlexCare was Eisenhower's agent or that Eisenhower was FlexCare's agent for purposes of the Stipulation and Settlement Agreement between FlexCare and Eisenhower. (AA:7:66, 1869 (emphasis added).)[3]

b) The trial court specifically found that Eisenhower was never intended to be a "Released Party" under the Judgment.

With respect to FlexCare and Eisenhower's "release" defense, the trial court found that parties never intended Eisenhower to be a "Released Party" under the terms of the Final Judgment. (AA:7:66, 1858-1867; 1868, ¶ 11; 1870.)

[3] The trial court also specifically found that FlexCare and Eisenhower were not "related or affiliated companies" as that term was used and intended by the parties in the Judgment. (AA:7:66, 1861.)

c) The trial court specifically found that FlexCare and Eisenhower were not "in privity" for purposes of *res judicata*.

With respect to FlexCare and Eisenhower's *res judicata* defense, the trial court concluded that Eisenhower was not "in privity" with FlexCare for *res judicata* purposes and that Grande's claims against Eisenhower were not barred by the Judgment entered in the Santa Barbara Action. (AA:7:66, 1855-1858.)

3. The Court of Appeal's decision

FlexCare appealed the trial court's decision and Eisenhower filed a Petition for a Writ of Mandate, both improperly ignoring the applicable standard of review and requesting the Court of Appeal to disregard the trial court's factual findings and substitute its own judgment on the factual issues determined by the trial court. FlexCare and Eisenhower also improperly ignored the substantial evidence that supported the trial court's factual findings that Eisenhower was not FlexCare's "agent."

The Court of Appeal affirmed the judgment and denied Eisenhower's Petition, finding that Grande's claims against Eisenhower were not barred by the Santa Barbara settlement on res judicata grounds and that the trial court had not erred in finding that Eisenhower was ***not*** FlexCare's agent and ***not*** a released party under the terms of such settlement.

IV. STANDARD OF REVIEW

There are three fundamental principles of appellate review: "(1) a judgment is presumed correct; (2) all intendments and presumptions are indulged in favor of correctness; and (3) the appellant bears the burden of providing an adequate record affirmatively proving error." (*Fladeboe v. American Isuzu Motors Inc.* (2007) 150 Cal.App.4th 42, 58 [58 Cal.Rptr.3d 225, 237], *as modified* (Apr. 24, 2007).)

A. The trial court's factual findings that Eisenhower was not FlexCare's "agent" is reviewed under a "substantial evidence" standard.

The substantial evidence standard for review has been described by the California Supreme Court in *Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660 [190 Cal.Rptr. 355, 660 P.2d 813] as follows:

> "Where findings of fact are challenged on a civil appeal, we are bound by the 'elementary, but often overlooked principle of law, that ... the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. (*Crawford v. Southern Pacific Co.* [, *supra*,] 3 Cal.2d 427, 429 [45 P.2d 183].) We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court."

"Even though contrary findings *could* have been made, an appellate court should defer to the factual determinations made by the trial court when the evidence is in conflict. This is true whether the trial court's ruling is based on oral testimony or declarations." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479 [243 Cal.Rptr. 902, 749 P.2d 339] (emphasis in original).)

When the substantial evidence rule is applicable, "all intendments are in favor of the judgment and this court must accept as true the evidence which tends to establish the correctness of the findings as made, taking into account as well all inferences which might reasonably have been drawn by the trial court. The test . . . is not whether there is a substantial conflict in the evidence but whether there is substantial evidence in favor of the respondent." (*Crogan v. Metz* (1956) 47 Cal.2d 398, 403–404 [303 P.2d 1029, 1032].)

Whether Eisenhower was FlexCare's "agent" is a factual issue. Indeed, FlexCare and Eisenhower admitted at trial that the "agent-principal relationship" is a factual issue. (RT:6:7-10.)

"The existence of an agency is a factual question within the province of the trier of fact whose determination may not be disturbed on appeal if supported by substantial evidence." (*L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.* (1991) 1 Cal.App.4th 300, 305 [1 Cal.Rptr.2d 680], internal citation omitted.) Accordingly, the trial court's factual findings that there was no agency relationship between FlexCare and Eisenhower must be reviewed under the deferential "substantial evidence" standard.

Because the trial court found against FlexCare and Eisenhower on this issue, FlexCare and Eisenhower bear the burden of showing that there was no substantial evidence to support the trial court's findings. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 801 [35 Cal.Rptr.2d 418, 883 P.2d 960], *as modified on denial of reh'g (Feb. 2, 1995)*.)

B. The *res judicata* issue is a mixed question of law and fact

Issues underlying the applicability of the *res judicata* defense are often mixed fact-law determinations. (*Windsor Square Homeowners Assn. v. Citation Homes* (1997) 54 Cal.App.4th 547, 557 [62 Cal.Rptr.2d 818].) In deciding a mixed question of law and fact, the trial court: (1) establishes the historical facts; (2) selects the applicable law; and (3) applies the law to the facts. An appellate court reviews the trial court's determination of the historical facts for substantial evidence and its determination of questions of law *de novo*. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 801.)

V. THE COURT OF APPEAL PROPERLY HELD THAT PLAINTIFF'S CLAIMS AGAINST EISENHOWER 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 Eisenhower was ***not*** named as a party in the Santa Barbara Action.

Thus, to prove that *res judicata* operated to bar Plaintiff from suing Eisenhower, a non-party, FlexCare and Eisenhower were required to prove that Eisenhower 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 Eisenhower was a "privy" under the California Supreme Court's definition.

A. Because FlexCare and Eisenhower 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*.

In *DKN Holdings*, this Court expressly held that where two defendants were jointly and severally liable to a plaintiff, there was no "privity" for purposes of the doctrine of *res judicata*. 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 basic 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 Holdings, supra,* 61 Cal.4th at p. 826, 189 Cal.Rptr.3d 809, 352 P.3d 378.)

This Court further 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 Eisenhower 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 Eisenhower ***derivatively*** liable for FlexCare's violation of the Labor Code. Indeed, the liability of one employer is 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.)

Here, the existence of the contractual relationship between Eisenhower and FlexCare did not impose "derivative" liability on Eisenhower for FlexCare's wrongful acts. Indeed, Eisenhower, 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 FlexCare nor Eisenhower even attempt to credibly explain how Eisenhower'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)).

Numerous courts have found joint liability for unpaid wages against multiple employers in various contexts. (*Real v. Driscoll Strawberry Associates, Inc.* (9th Cir. 1979) 603 F.2d 748, 754 (wage claim against joint employer decided under the Federal FLSA wage and hour laws); *Bonnette v. California Health and Welfare Agency* (9th Cir. 1983) 704 F.2d 1465, 1470 *disapproved of on other grounds by Garcia v. San Antonio Metropolitan Transit Authority* (1985) 469 U.S. 528 [105 S.Ct. 1005, 83 L.Ed.2d 1016] (wage claim decided in favor of employees against joint employer under the Federal F.L.S.A. wage and hour laws); *Michael Hat Farming Co. v. Agricultural Labor Relations Bd.* (1992) 4 Cal.App.4th 1037, 1043 [6 Cal.Rptr.2d 179] ("It is established that some farming operations have multiple, joint agricultural employers.") *citing Rivcom Corp. v. Agricultural Labor Relations Bd.* (1983) 34 Cal.3d 743, 768 [195 Cal.Rptr. 651, 670 P.2d 305].)

No court has intimated, let alone held, that one joint employer can avoid its responsibilities simply because there is another joint employer. In *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701, 728 [163 Cal.Rptr.3d 415, 436], for the example, the Court of Appeal held that merely because one joint employer may have "provided" meal and rest periods to employees, it did not relieve the other joint employer from its obligations:

> This assumption, however, is not supported by the language of the wage order, which imposes an affirmative obligation on every employer to authorize and provide legally required meal and rest breaks; if it fails to do so, it has violated the law and is liable."

(*See also Hodgson v. Griffin & Brand of McAllen, Inc.* (5th Cir. 1973) 471 F.2d 235, 238 ("Viewing the total work arrangement, we agree with the district court that appellant was a joint employer and thus responsible for the violations of the Fair Labor Standards Act.").)

If it were true that Plaintiff's claims against Eisenhower were "derivative" of Plaintiff's claims against FlexCare, then it would follow that Eisenhower would necessarily be vicariously liable for FlexCare's violations – a proposition that neither FlexCare nor Eisenhower has espoused.

Contrary to FlexCare's contention, Eisenhower and FlexCare's relationship is not akin to the general contractor-subcontractor relationship discussed in *Thibodeau v. Crum* (1992) 4 Cal.App.4th 749 [6 Cal.Rptr.2d 27]. In their contracts, FlexCare and Eisenhower agreed that FlexCare was ***an independent contractor***, not a subcontractor. Moreover, in *Thibodeau*, the claim against the general contractor for alleged construction deficiencies in the construction of the driveway that was arbitrated was based on alleged failures by the subcontractor.

Here, Grande did not claim that FlexCare was liable solely because of Eisenhower's acts or that Eisenhower could be liable solely because of FlexCare's acts. Rather, if both FlexCare and Eisenhower are "employers" under California law, each is ***independently*** liable for its violations as an employer. There is simply no derivative or vicarious liability of Eisenhower for the acts of FlexCare or of Eisenhower for the acts of FlexCare based solely on their contractual relationship.

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 under such lease. Thus, were the *Castillo* Court's *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. This Court held in *DKN Holdings* that the fact that the litigation involved the same subject matter was irrelevant. (*Id*. at 823–25.)

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 Eisenhower as an employer are not derivative of FlexCare's liability as an employer. Rather, both FlexCare and Eisenhower are jointly and severally liable for their violations of their independent legal obligations. Thus, Plaintiff's claims against Eisenhower are not barred by the Judgment in the Santa Barbara Action.

VI. THE TRIAL COURT PROPERLY FOUND THAT THERE WAS AMPLE EVIDENCE SUPPORTING THE TRIAL COURT'S EXPRESS FACTUAL FINDINGS, MADE AFTER A TRIAL AND THE CONSIDERATION OF DOCUMENTARY EVIDENCE AND TESTIMONY, THAT EISENHOWER WAS NOT FLEXCARE'S AGENT.

As discussed above, on Eisenhower'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 Eisenhower was ***not*** a released party. The trial court reached that conclusion based on the language of the settlement agreement, which did not mention Eisenhower 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 Eisenhower did not fit any of

these latter categories and concluded as a ***matter of fact*** that Eisenhower was not an "agent" or "related or affiliated company" of FlexCare under the Released Parties clause of the settlement. (*Id*.)

A. Eisenhower and FlexCare have not met their burden of proving that there was no substantial evidence to support the trial court's finding that Eisenhower was not FlexCare's agent.

FlexCare and Eisenhower contended at trial that Eisenhower was FlexCare's "agent" within the "Released Parties" definition in the Judgment in the Santa Barbara Action. After considering the extrinsic evidence presented by the parties on the issues, however, the trial court expressly found that Eisenhower was ***not*** FlexCare's agent.

As discussed below, FlexCare and Eisenhower have flagrantly violated their legal burden to discuss ***all*** the evidence introduced at trial on this issue and instead focus solely on the evidence that they contend supports their contentions. By failing to do so, they have ***waived*** any argument that substantial evidence does not support the trial court's findings. Moreover, if this Court independently reviews the evidence at trial, it is clear that substantial evidence supported the trial court's findings.

1. By failing to discuss all evidence presented on the issues, Eisenhower and FlexCare have waived their challenge that the evidence was insufficient to support the trial court's findings.

FlexCare and Eisenhower, in challenging the sufficiency of the evidence to support the trial court's factual findings, are required to address all the evidence submitted at the trial. (*See Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218 [99 Cal.Rptr.3d 158, 165], *as modified (Sept. 24, 2009),* ["[a] party who challenges the sufficiency of the evidence to support a finding must set forth, discuss, and analyze all the evidence on that point, both favorable and unfavorable"].)

Contrary to this fundamental tenet of appellate practice, FlexCare and Eisenhower fail to cite much of the unfavorable evidence set forth above or have done so in a self-serving, sanitized manner. In essence, FlexCare and Eisenhower have presented a one-sided version of the facts and asked this Court to reweigh the evidence in their favor. By doing so, FlexCare and Eisenhower have waived any such challenge. "When a party challenges on appeal the sufficiency of evidence, the party must discuss all the evidence supporting the court's ruling or the party waives the point." (*Gombiner v. Swartz* (2008) 167 Cal.App.4th 1365, 1374 [85 Cal.Rptr.3d 83, 91]; *Oliver v. Board of Trustees* (1986) 181 Cal.App.3d 824, 832 [227 Cal.Rptr. 1].)

Moreover, as discussed below, the evidence presented at trial was clearly sufficient to support the trial court's findings.

2. There was substantial evidence to support the trial court's factual finding that Eisenhower was not FlexCare's agent.

"An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency." (Civ. Code, § 2295.) "Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and ***subject to his control***, and consent by the other so to act." (Restatement, Agency, § 1.) "The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on his behalf and subject to his control.' (*Id.*, comment on subsec. 1.) ***In the absence of the essential characteristic of the right of control, there is no true agency*** . . ." (*Edwards v. Freeman* (1949) 34 Cal.2d 589, 592 [212 P.2d 883] (emphasis added); *Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1184 [183 Cal.Rptr.3d 394, 417], *review denied (May 13, 2015)*.)

The law indulges in no presumption that an agency exists but instead presumes that a person is acting for himself and not as an agent for another.

(*Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767, 780 [278 Cal.Rptr. 228, 234].)

As discussed above, there was substantial evidence introduced at trial to support the trial court's finding that Eisenhower was ***not*** FlexCare's agent.

B. The facts surrounding the Santa Barbara Action and the negotiation of the settlement demonstrate that the parties never intended Eisenhower to be a "Released Party."

When a settlement agreement is in dispute, the focus is on ascertaining and implementing the parties' mutual intent when they entered into the settlement. (*In re Marriage of Simundza* (2004) 121 Cal.App.4th 1513, 1518 [18 Cal.Rptr.3d 377, 380].) In performing this task, a court must construe the judgment as a whole rather than separately considering its individual clauses (*Yarus v. Yarus* (1960) 178 Cal.App.2d 190, 201 [3 Cal.Rptr. 50]) and consider the circumstances when the parties signed the settlement agreement. (*In re Marriage of Williams* (1972) 29 Cal.App.3d 368, 378 [105 Cal.Rptr. 406]; *In re Marriage of Hibbard* (2013) 212 Cal.App.4th 1007, 1013 [151 Cal.Rptr.3d 553, 556-557], *as modified on denial of reh'g (Feb. 8, 2013)*.)

It is solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence. (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 [44 Cal.Rptr. 767, 770, 402 P.2d 839, 842].)

In this case, the parties presented conflicting extrinsic evidence regarding the parties' intent as to whether Eisenhower was a "Released Party" as defined in the Judgment. Thus, the substantial evidence rule applies. "[W]here extrinsic evidence has been properly admitted as an aid to the interpretation of a contract and the evidence conflicts, a reasonable construction of the agreement by the trial court which is supported by

substantial evidence will be upheld." (*In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 746–747 [131 Cal.Rptr. 873, 552 P.2d 1169].)

In *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 524 [117 Cal.Rptr.2d 220, 41 P.3d 46], the California Supreme Court recited applicable principles to claims by third parties seeking to claim third-party beneficiary status with respect to a contract:

> A third party beneficiary may enforce a contract made for its benefit. (Civ.Code, § 1559.) However, "[a] putative third party's rights under a contract are predicated upon the contracting parties' intent to benefit" it. (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 436, 204 Cal.Rptr. 435, 682 P.2d 1100 (*Garcia*).) Ascertaining this intent is a question of ordinary contract interpretation. (*Ibid.*) Thus, "[t]he circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle that party to demand enforcement." (*Neverkovec, supra,* 74 Cal.App.4th at p. 348, 87 Cal.Rptr.2d 856.)
>
> Under long standing contract law, a "contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ.Code, § 1636.) Although "the intention of the parties is to be ascertained from the writing alone, if possible" (*id.,* § 1639), "[a] contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates" (*id.,* § 1647). "However broad may be the terms of a contract, it extends only to those things which it appears that the parties intended to contract." (*Id.,* § 1648.)

The Court went on to hold that where parties to a release agreement failed to specifically name a potentially liable defendant subsequently sued by the plaintiff, such failure suggested that the release did not cover claims against the unnamed entity:

> The failure of the Release to specifically name Ford even though the signatories to the Release had counsel and were aware of Hess's claims against Ford also suggests that the Release did not cover those claims. (See *Appleton, supra,* 27 Cal.App.4th at pp. 555–556, 32 Cal.Rptr.2d 676 [failure of release to expressly mention defendant even though he was a key actor in the accident suggests that the parties did not intend to release him]; *Asare v.*

> *Hartford Fire Ins. Co.* (1991) 1 Cal.App.4th 856, 863, 2 Cal.Rptr.2d 452 [failure of release to refer expressly to discrimination claims indicates that the parties did not intend the release to cover such claims where parties had counsel and were aware of the claims].) (*Id*., at 527.)

In *Cacique, Inc. v. Reynaldo's Mexican Food Co., LLC* (C.D. Cal., Feb. 7, 2014, No. 2:13-CV-1018-ODW MLG) 2014 WL 505178, at *5, the Court was confronted with the issue of whether a certain company was intended to be subject to the release provisions of a Settlement Agreement based on the contention that it was an "affiliated" entity. The Court noted:

> . . . the absence of Cacique's name in the MTK Settlement Agreement is probative of a lack of intent to make Cacique subject to its general releases.

In *In re Texas Rangers Baseball Partners* (Bankr. N.D. Tex. 2014) 521 B.R. 134, 170, the Court addressed the issue of whether the broad release in a Settlement Agreement applied to a non-named entity because it was an "affiliate." The Court, looking to local state law, found that it was not an affiliate under the provisions of the state law (Texas) because the purported releasee was neither controlled by or under common control with the named defendant.

Here, Mr. Porter, FlexCare's representative, testified that he was concerned about potential claims against FlexCare's clients and wanted them released. (RT:96:1-9; RT:97:2-18.) The standard of care of defense counsel seeking to protect "employment agencies" from claims for indemnity against their clients in the event their employees sued their clients where the employees were placed would require ***specific language*** to ensure that claims against the employment agency's clients were being released if such clients were in fact intended to be released.

Despite FlexCare's alleged concern, however, the parties did not name Eisenhower as a released party. Moreover, Mr. Porter admitted that he does not know of anything that prevented his attorneys from adding

Eisenhower's name as a specifically named released party in the Santa Barbara Action Settlement Agreement. (RT:97:27-98:19.)

If the parties had in fact intended to include Eisenhower as a released party, they could have mentioned Eisenhower by name or by description in the "Released Parties" provision of the Judgment, including, for example, language such as:

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

Moreover, Eisenhower was never discussed as being a released party when counsel negotiated the release language of the Judgment. Grande's right to sue joint employers for wrongs committed by such joint employers, including Eisenhower was also never discussed. Plaintiff's counsel never agreed that Plaintiff could not sue other joint employers such as Eisenhower for wrongs for which they were liable. (RT:156:6-10.)

The facts introduced at trial cited above are more than substantial evidence to support the trial court's factual findings that Eisenhower was not FlexCare's agent and that the parties never intended to release Eisenhower through the Judgment.

VII. 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 black letter 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 also ***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 Eisenhower 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 noted, the contract between Eisenhower and FlexCare expressly disavowed any principal/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.)

VIII. LABOR CODE SECTION 2810.3 DOES NOT SUPPORT ANY PRIVITY FINDING.

Eisenhower's and FlexCare's citation to Labor Code Section 2810.3 is inapposite. That section was not enacted until January 1, 2015, long after Grande worked for FlexCare and Eisenhower in 2012.

IX. PUBLIC POLICY CONSIDERATIONS SUPPORT A DECISION IN FAVOR OF GRANDE.

FlexCare could easily have specifically named Eisenhower as a released party in the Santa Barbara Settlement. It did not. FlexCare could also have included as "released parties" FlexCare's clients or any entity to whom FlexCare had provided the services of class members. It did not. If Eisenhower is found to be Grande's and the class members' employer and failed to pay all wages owing them, Eisenhower should not be entitled to a

"free pass" from liability simply because the Santa Barbara Settlement Agreement releases the claims against FlexCare -- especially where the trial court expressly found that Eisenhower was never intended to be released by that settlement agreement.

Moreover, contrary to FlexCare's contention, there is no "double-dipping" by allowing one of two joint employers to be held liable for unpaid wages and released penalties. Eisenhower would be entitled to "credit" any settlement payments made by FlexCare under the Santa Barbara Settlement Agreement against any amounts for which Eisenhower is ultimately found liable, just as any joint and several obligor is entitled to such credits made by another obligor.

X. CONCLUSION

This Court's holding in *DKN Holdings* and other well-established decisional law demonstrates that Eisenhower and FlexCare, alleged to be Grande's joint employers, are not "in privity" for purposes of *res judicata*.

Moreover, there is no basis or policy reason for this Court to hold that the client of a staffing agency, whom the staffing agency has admitted it did not "control," is the staffing agency's "agent" as a matter of law.

As to the factual issue of whether Eisenhower was FlexCare's "agent" in the specific circumstances of this case, there was substantial evidence to support the trial court's express factual finding that no such agency relationship existed.

This Court should therefore affirm the Court of Appeal's decision.

Dated: September 16, 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, **LYNN GRANDE'S RESPONSIVE BRIEF RE TO PETITIONS FOR REVIEW BY EISENHOWER MEDICAL CENTER AND FLEXCARE, LLC** contains 10,360 words, including footnotes. Counsel relies on the word count of the Word computer program used to prepare this brief.

Dated: September 16, 2020

PETER R. DION-KINDEM
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PROOF OF SERVICE

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 September 16, 2020, I served the following document(s) described as:

LYNN GRANDE'S ANSWERING BRIEF ON THE MERITS

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 16, 2020.

Kale M. Eaton

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
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Lower Court Case Number: **E068730**

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9/16/2020

Date

/s/Peter Dion-Kindem

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