Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically RECEIVED on 11/23/2020 at 11:56:34 AM

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 11/23/2020 by Emily Feng, Deputy Clerk

S261247

In The Supreme Court

OF THE

State of California

LYNN GRANDE
Plaintiff and Respondent,

v.

EISENHOWER MEDICAL CENTER
Defendant and Petitioner.

FLEXCARE, LLC
Intervener and Appellant.

On Review from the Court of Appeal for the
Fourth Appellate District, Division Two
Appeal Nos. E068730 and E068751

After an Appeal from the Superior Court of Riverside County
Honorable Sharon J. Waters
Case Number RIC1514281

EISENHOWER MEDICAL CENTER'S
REPLY TO GRANDE'S ANSWERING MERITS BRIEF

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
Richard J. Simmons, Cal. Bar No. 72666
Karin Dougan Vogel, Cal. Bar No. 131768
John D. Ellis, Cal. Bar No. 269221
333 South Hope Street, 43rd Floor
Los Angeles, California 90071-1422
Telephone: (213) 620-1780

Attorneys for Defendant and Petitioner
EISENHOWER MEDICAL CENTER

TABLE OF CONTENTS

Page

I. SUMMARY OVERVIEW 6

A. Grande's Claims Are Premised On Her Assertion That FlexCare And Eisenhower Are Joint Employers Who Controlled Her Wages, Hours And Working Conditions Through A System Of Interdependent Actions 6

B. *DKN* And *Castillo* Are Entirely Compatible 7

C. *DKN* And *Bernhard* Illuminate Key Principles That Warrant Reversal 9

II. GRANDE'S CLAIMS ARE BARRED BASED ON AGENCY 10

A. Grande Ignores The Wage Orders' "Employer" Definition 11

B. Eisenhower Was FlexCare's Special Agent 13

C. The Control Requirement For Agency Is Met Where FlexCare Had The Right To Control Eisenhower Regarding Its Wage-Hour Tasks 16

D. Grande's Other Attempts To Refute Agency Are Unavailing 20

E. The Agency Analysis Here Mirrors That In *Castillo* 25

III. GRANDE'S CLAIMS ARE BARRED BASED ON RES JUDICATA 25

A. *DKN* Plainly Does Not Preclude The Conclusion That Privity Exists Regarding Grande's Wage-Hour Claims 27

B. Under The Courts' Expanded Concept Of Privity And Recognized Exceptions To The Mutuality Rule, Grande's Action Is Barred 30

C. Repudiated Mutuality Principles Do Not Preclude Eisenhower From Relying On Res Judicata To Bar Grande's Claims 32

IV. CONCLUSION 34

TABLE OF AUTHORITIES

Page(s)

Cases

Alvarez v. Felker Mfg. Co. (1964)
230 Cal.App.2d 987 18

Bernhard v. Bank of America (1942)
19 Cal.2d 807 .... passim

Borders Online v. State Bd. of Equalization (2005)
129 Cal.App.4th 1179 16

Cacique, Inc. v. Reynaldo's Mexican Food Co., LLC (C.D. Cal. 2014)
2014 WL 505178 22

Cahill v. San Diego Gas & Electric Co. (2011)
194 Cal.App.4th 939 14

Cal Sierra Development, Inc. v. George Reed, Inc. (2017)
14 Cal.App.5th 663 30

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

Clemmer v. Hartford Ins. Co. (1978)
22 Cal.3d 865 26

Emery v. Visa Internat. Serv. Ass'n (2002)
95 Cal.App.4th 952 16

Erlandsen v. Flexcare LLC
Santa Barbara Superior Court Case No. 1390595 .... passim

Garcia v. Pexco, LLC (2017)
11 Cal.App.5th 782 19

Garlock Sealing Techs., LLC v. NAK Sealing Techs. Corp. (2007)
148 Cal.App.4th 937 19

Grande v. Eisenhower Medical Center (2020)
44 Cal.App.5th 1147 .... 6, 29

Hess v. Ford Motor Co. (2002)
27 Cal.4th 516 .... 20, 21, 22

Isenberg v. California Emp. Stab. Com. (1947)
30 Cal.2d 34 16

Lippert v. Bailey (1966)
241 Cal.App.2d 376 33

Malloy v. Fong (1951)
37 Cal.2d 356 17

McCollum v. Friendly Hills Travel Center (1985)
172 Cal.App.3d 83 18

Patterson v. Domino's Pizza, LLC (2014)
60 Cal.4th 474 .... 18, 20

People v. JTH Tax, Inc. (2013)
212 Cal.App.4th 1219 18

People v. Sims (1982)
32 Cal.3d 468 29

Serrano v. Aeortek, Inc. (2018)
21 Cal.App.5th 773 .... 27, 29

Sole Energy Co. v. Hodges (2005)
128 Cal.App.4th 199 33

In re Texas Rangers Baseball Partners
(Bankr. N.D. Tex. 2014) 521 B.R. 134 22

Tieberg v. Unemployment Ins. App. Bd. (1970)
2 Cal.3d 943 20

Violette v. Shoup (1993)
16 Cal.App.4th 611 18

Wickham v. Southland Corp. (1985)
168 Cal.App.3d 49 18

Statutes

Cal. Civ. Code § 1542 .... 11, 26

Cal. Civ. Code § 2297 .... 7, 13, 19

Cal. Code Regs. Title 8 § 11040(2)(H) 12, 19

Cal. Code Regs. Title 8 § 11040, subd. (3)(B)(8)(f) 13

Cal. Code Regs. Title § 11050(2)(H) 12, 19

Cal. Code Regs. Title § 11050, subd. (3)(B)(8)(f) 13

Cal. Labor Code § 226.. 25, 31

Other Authorities

29 CFR § 778.103... 12

29 CFR § 791.2(a) 12

https://www.dir.ca.gov/dlse/opinionletters-bydate.htm 13

https://www.google.com/url?sa=t&rct=j&q=&esrc=
s&source=web&cd=&ved=2ahUKEwiqyq773YXtAhUy
MX0KHTBvDnUQFjAAegQIBRAC&url=https%3A%2F
%2Fwww.dir.ca.gov%2Fdlse%2Fdlsemanual%2Fdlse_enf
cmanual.pdf&usg=AOvVaw2S0wY6EWH3ysbkHqNzhw
SB 12

I. SUMMARY OVERVIEW

The Court granted review to resolve the direct conflict between the court of appeal decisions in *Castillo v. Glenair, Inc.* (2018) 23 Cal.App.5th 262 (*Castillo*) (petition for review denied) and this case, *Grande v. Eisenhower Medical Center* (2020) 44 Cal.App.5th 1147 (*Grande*). If the Court agrees that Eisenhower was FlexCare's agent or representative when exercising control over plaintiff Lynn Grande's wages, hours or working conditions, Eisenhower is entitled to judgment in its favor for two reasons. First, her claims would be directly barred by the release she signed in *Erlandsen v. Flexcare LLC*, Santa Barbara Superior Court Case No. 1390595 (*Erlandsen*), which released FlexCare as well as its agents and representatives. It is undisputed that the judgment entered in that action has been fully satisfied. Second, as FlexCare's agent, Eisenhower and FlexCare were in privity for res judicata purposes. As a result, Grande is barred from suing Eisenhower for the same claims that were finally resolved by the judgment entered on the settlement in *Erlandsen*. Applying either agency or res judicata, Grande's complaint against Eisenhower is barred. Independently, as a party bound by the fully satisfied judgment in *Erlandsen*, Grande is barred from relitigating issues resolved in *Erlandsen* in a new action against Eisenhower.

A. Grande's Claims Are Premised On Her Assertion That FlexCare And Eisenhower Are Joint Employers Who Controlled Her Wages, Hours And Working Conditions Through A System Of Interdependent Actions

Grande admits her claims against Eisenhower are based on her allegation that FlexCare and Eisenhower are "joint employers for all purposes" and "agents" who are responsible for each other's actions in the manner in which they controlled Grande's wages, hours and working

conditions. (1 PA 18-20 ¶¶5-7.) This includes her meal and rest periods and wage statements claims. But Grande still argues that Eisenhower was not FlexCare's agent or representative because FlexCare did not control every aspect of Eisenhower's relationship with her. Such general and all-encompassing control is not required. As *Castillo* points out, California law dictates that agency exists if a person is an agent only for a particular act or transaction – a "special agent." (Cal. Civ. Code § 2297.) That is precisely the case here. Eisenhower was FlexCare's agent and representative for the "particular acts or transaction" involving control over Grande's hours and working conditions. The applicable Wage Order governing Grande's wage-hour claims specifically anticipates that FlexCare, as Grande's employer, can exercise control, either directly or indirectly, through an agent or representative for this purpose. Where, like here, the special agency is directly aligned with the released wage-hour claims, FlexCare possessed the requisite control over Eisenhower. Because Eisenhower was FlexCare's agent for the very acts that formed the basis of Grande's claims in *Erlandsen* and this action, Grande's release of FlexCare together with its agents and representatives in the *Erlandsen* settlement bars her action against Eisenhower.

B. *DKN* And *Castillo* Are Entirely Compatible

As to privity, Grande criticizes the unanimous decision in *Castillo* by arguing that it failed to address this Court's recent treatment of privity in *DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813 (*DKN*). Grande's criticism is unfounded. *Castillo* expressly referenced and relied on *DKN* in its privity analysis, including in its response to the petition for rehearing. Furthermore, *Castillo* concluded that *DKN* did not create "an absolute bar against finding privity amongst parties who are also jointly and severally liable on a contract or as tortfeasors." (*Castillo*, *supra*, 23 Cal.App.5th at

p. 864.) Although *DKN* arose in a vastly different factual and legal context, it supports a privity finding here. The Court granted review in *DKN* "to clarify a bedrock principle of contract law." (*DKN*, *supra*, 61 Cal.4th at p. 818.) The issue was whether co-obligors on a lease that specifically stated they were "jointly and severally liable" could be sued in separate actions where two of the three co-obligors were not parties to the original litigation and the judgment against the third co-obligor in the first action was never satisfied. In that context, the Court held that "[j]oint and several liability *alone* does not create such a closely aligned interest between co-obligors" to establish privity when the liability of each joint obligor is "separate and independent, not vicarious or derivative." (*Id.* at p. 826, italics added.)

These facts are a world apart from those in this case. Grande does not allege contract or tort claims or present a case in which Eisenhower's alleged liability is "separate and independent." Instead, Grande structures her case on the central allegation that FlexCare and Eisenhower are joint employers who are liable as such for each other's interdependent and intertwined actions in managing her hours and pay during a single nine-day assignment. Her action against Eisenhower is predicated on statutory claims that are identical to the claims she settled on a class basis and pressed to judgment against FlexCare in the *Erlandsen* action. (1 PA 17-32, 114-139.) And unlike the facts in *DKN*, the parties agree the judgment in *Erlandsen* has been fully satisfied by FlexCare. (3 PA 613:20-25.) Despite her allegations that FlexCare and Eisenhower are joint employers who controlled her wages, hours and working conditions through a coordinated system of interdependent and intertwined actions, Grande refuses to acknowledge the same actions that she claims form the basis of her joint employer claim also support privity. Grande could not prove her

wage-hour claims against FlexCare, including her meal and rest break claims, without relying on Eisenhower's time-keeping records and actions taken on FlexCare's behalf. After all, Eisenhower scheduled her hours, recorded her work time and provided her meal and rest periods. Likewise, Grande cannot prove her claims against Eisenhower without relying on FlexCare's records, pay practices and wage statements.

C. *DKN* And *Bernhard* Illuminate Key Principles That Warrant Reversal

Even though *DKN* is not factually on point and addressed an erroneous lower court decision finding privity based on joint and several liability *alone*, it is important on multiple levels. *DKN* described and clarified the development of California law regarding res judicata (claim preclusion) and collateral estoppel (issue preclusion). The Court expanded the concept of privity from its historical foundation in *Bernhard v. Bank of America* (1942) 19 Cal.2d 807 (*Bernhard*), and severely limited the role of the mutuality of estoppel rule in California. It confirmed that its decision in *Bernhard* "repudiated the mutuality rule for issue preclusion and held that only the party *against whom* the binding effect of the previous judgment was asserted had to be a party or privy in that prior proceeding."[1] (*DKN*, *supra*, 61 Cal.4th at p. 827 fn. 10.) The Court then identified several instances where privity is established for claim preclusion, including cases where the liability of the defendant asserting res judicata is dependent upon

[1] The Court in *DKN* hastened to point out that issue preclusion can also bind a party in one action so as to bar that party from relitigating an issue in a subsequent action against a nonparty, *even in the absence of privity*. (*DKN*, *supra*, 61 Cal.4th at p. 824.) Thus, it is not necessary for Eisenhower to be bound by the *Erlandsen* judgment in order to find that it bars Grande.

or derives from the liability of the defendant in the prior litigation. Examples of such cases are illustrated by those involving a principal and agent or an indemnitor and indemnitee. (*Id.* at pp. 827-828.)

Based on *DKN*, FlexCare and Eisenhower are in privity and res judicata bars Grande's claims. *Bernhard*'s repudiation of the mutuality rule also offers an independent basis to rule for Eisenhower. The Court recognized broad exceptions to the requirements of mutuality and privity while stating: "There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation. (*Bernhard*, *supra*, 19 Cal.2d at p. 812.) It is not difficult to follow these clear principles here, where Grande's claims are identical to those she settled in *Erlandsen*. She asserts that FlexCare and Eisenhower are joint employers who acted for and through each other to coordinate highly interdependent and intertwined actions relating to her meal and rest periods, wage statements, time records and other working conditions.

The judgment must be reversed based on the court's improper conclusions regarding special agency, res judicata and mutuality.

II. GRANDE'S CLAIMS ARE BARRED BASED ON AGENCY

Grande sued FlexCare, claiming she was not paid properly under California law for the nine days she worked at Eisenhower, the sole facility at which she agreed to work. Grande was paid $26.40 an hour under her contract with FlexCare. (4 PA 989.) She settled *Erlandsen* on a class basis for $750,000, receiving a $20,000 class representative incentive payment

and $162.13 reflecting her pro rata share of the settlement proceeds.[2] (2 PA 423 ¶28; 6 PA 1397:17-1400:24.) In exchange, Grande released FlexCare and its agents and representatives (without exclusion) from liability for her statutory wage-hour claims, including all known and unknown claims pursuant to a Civil Code section 1542 waiver. (See 1 PA 83:7-27, 89:1-4, 167:23-26.) The release did not expressly exclude Eisenhower, the only entity at which she worked. Shortly after the judgment was fully satisfied, Grande sued Eisenhower for the same claims, the same work, the same meal and rest period violations, the same pay periods and the same assignment at Eisenhower, alleging FlexCare and Eisenhower were joint employers who acted through "agents." (1 PA 17-32.)

FlexCare agreed to indemnify Eisenhower for any claims relating to wage-hour matters. (4 PA 901 ¶5.3, 907 ¶13.1.) Eisenhower was FlexCare's agent and representative as to such matters. As such, Grande released Eisenhower when she released FlexCare. Her release must be enforced.

A. Grande Ignores The Wage Orders' "Employer" Definition

Grande's allegation that FlexCare and Eisenhower are joint employers forms the foundation of her claims that both are liable for the meal and rest period, wage statement and other wage-hour violations alleged in both lawsuits. Despite this, Grande utterly fails to address the definition of "employer" in the Wage Orders or the Division of Labor Standards Enforcement (DLSE) on-point authorities on joint employers. Those authorities are essential to assessing the relationship between

---

[2] Simple math reveals that the $20,000 equates to over 757 hours of pay at $26.40 an hour. Grande worked just seven 12-hour shifts during the nine-day assignment. (See 4 PA 989.)

FlexCare, Eisenhower and Grande for purposes of this appeal. Each supports Eisenhower's position that it acted as FlexCare's agent and representative.

Grande alleges that Eisenhower and FlexCare were "joint employers for all purposes," including with respect to her wages, hours and working conditions. (1 PA 18-19 ¶¶5-7.) Grande's allegation is rooted in her assertion that an employer to whom a temporary employee is assigned is jointly responsible with the temporary staffing agency for compliance with wage-hour requirements. (See 29 CFR § 791.2(a); see also 29 CFR § 778.103 [all hours worked by an employee jointly employed must be totaled in determining the number of hours to be compensated].) But despite founding her lawsuit on the joint employer allegation, Grande fails to address the definition of "employer" in the Wage Orders or the DLSE authorities.

Wage Orders 4 and 5 define "employer" as any person "who directly or indirectly, *or through an agent* or any other person, employs or exercises control over the wages, hours, *or* working conditions of any person." (Cal. Code Regs. Tit. 8 §§ 11040, subd. (2)(H), 11050, subd. (2)(H), italics added; see also DLSE Enforcement Policies and Interpretations Manual §§ 2.2 and 37.1.2[3].) Section 2.2.1 of the Manual states that "it is possible

[3] Accessible at https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwiqyq773YXtAhUyMX0KHTBvDnUQFjAAegQIBRAC&url=https%3A%2F%2Fwww.dir.ca.gov%2Fdlse%2Fdlsemanual%2Fdlse_enfcmanual.pdf&usg=AOvVaw2S0wY6EWH3ysbkHqNzhwSB.

that two separate employer entities (joint employers) may share responsibility for the wages due."[4]

Grande conveniently ignores the fact that is what occurred here. It is undisputed that Grande performed all of her work as an employee of FlexCare at Eisenhower and that Eisenhower acted in accord with its Staffing Agreement with FlexCare by recording Grande's time on time records it furnished to FlexCare, scheduling her hours and providing her meal and rest periods. This relationship between Eisenhower, FlexCare and Grande is relevant to the agency and privity issues in this appeal.

B. Eisenhower Was FlexCare's Special Agent

By statute, an agent can either be a general agent or a special agent. (Cal. Civ. Code §2297.) A special agent is "[a]n agent for a particular act or transaction." (*Ibid.*) Applying this definition, Eisenhower was FlexCare's special agent, exercising control over Grande's hours and working conditions on a day-to-day basis. In fact, Eisenhower controlled Grande's work schedule, hours, and meal and rest periods that form a critical part of both her lawsuits. (1 PA 19-20; 3 PA 597:3-15, 4 PA 900 ¶4.1, 903 ¶6.8.2, 990.) As a result, the *Erlandsen* settlement agreement

---

[4] The DLSE has concluded that temporary staffing agencies and clients are so aligned under California's wage-hour rules that the agencies can utilize their clients' alternative workweeks. (DLSE Opinion Letters 4/19/1991; 2/23/1990; and 10/6/1988 [see https://www.dir.ca.gov/dlse/opinionletters-bydate.htm].) The same alignment appears in Wage Orders 4 and 5, so that an "employer engaged in the operation of a licensed hospital *or in providing personnel for the operation of a licensed hospital*" is allowed to use the hospital's alternative workweek schedules. (See DLSE Manual § 56.21, italics added; Cal. Code Regs. Tit. 8 §§ 11040, subd. (3)(B)(8)(f), 11050, subd. (3)(B)(8)(f).)

released Eisenhower from Grande's wage-hour claims when it released FlexCare's "agents" and "representatives."

Neither the trial court nor the court of appeal discussed special agency, even though the issue was central to the decision in *Castillo* and fully briefed by Eisenhower.[5] Instead, both courts only found that Eisenhower is not FlexCare's agent in general. But Eisenhower does not (and need not) claim to be FlexCare's agent for all things, and the courts' general agency finding is not decisive of the agency issue. This is a fatal flaw in the court of appeal's analysis and holding.

Eisenhower is, however, FlexCare's special agent for purposes of wage-hour matters, which is all that is relevant.[6] That is because Eisenhower acted as FlexCare's agent as to the very claims for which Grande sued – alleged wage-hour, meal and rest period violations. If the special agency was for some other "act or transaction," it might not be as significant. But where it is directly aligned with Grande's released claims, *Castillo* teaches that the special agent is released. (*Castillo*, *supra*, 23 Cal.App.5th at p. 282 ["Thus, because the undisputed facts demonstrate Glenair was an agent of GCA—specifically an agent with respect to GCA's

---

[5] *Castillo* had not been decided when the trial court decided this case, but Eisenhower briefed it before the court of appeal and again in its opening merits brief in this Court. Still, Grande fails to discuss special agency at all, and thereby waives any argument that special agency does not exist or is not controlling. (See *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 [where a party fails to raise a point in its opening brief, the court treats it as waived].)

[6] Grande's complaint specifically alleged Eisenhower was a "joint employer for all purposes," and that it controlled her meal and rest periods, as well as her time records, work and working conditions. (1 PA 18-19 ¶¶4-7.)

payment of wages to its employees—Glenair was a released party under the *Gomez* settlement agreement."].)

Substantial evidence in the record shows Eisenhower was FlexCare's special agent, whereas no substantial evidence shows it was not.[7] In employing traveling nurses like Grande, FlexCare conducts background and reference checks, obtains documentation regarding the nurses' licensure status, and is responsible for firing them. (4 PA 901-903 ¶6; see 3 PA 641:19-20.) FlexCare also pays wages at rates it negotiates with nurses and issues them wage statements under California law. (3 PA 597:3-9; 640:6-11; 4 PA 901 ¶5, 990.) To carry out that role, and consistent with the Wage Order's definition of "employer," FlexCare depends on Eisenhower to act as its agent and representative with the nurses for a number of on-site tasks, such as: scheduling their work hours, verifying their hours worked (including overtime), and providing them with timely meal and rest breaks. (4 PA 903 ¶6.8.2; 3 PA 647:18-21; see also 1 PA 19-20 ¶7.) There is no dispute that Eisenhower performed these tasks for FlexCare. (See 1 PA 18-20 ¶¶4-7.)

The terms of the Staffing Agreement show that FlexCare has the right to control the wage-hour process with regard to its employees. The

---

[7] Grande incorrectly argues that Eisenhower has waived its arguments regarding agency by not fully addressing the evidence. Eisenhower has never argued that it was FlexCare's agent for all purposes, i.e., a general agent, but only that it was FlexCare's special agent for the purpose of exercising control over hours and working conditions on a day-to-day basis. As to that point, Grande has failed to point to *any* substantial evidence to support a finding that FlexCare was not Eisenhower's special agent. Further, Grande is estopped by her complaint from arguing Eisenhower and FlexCare did not act interdependently as agents in controlling the working conditions. (See 1 PA 18-20 ¶¶4-7.)

parties agreed that FlexCare retained "s[o]le, exclusive and total legal responsibility as the employer of Staff," including primary responsibility for compliance with all wage-hour laws. (4 PA 901 ¶5.2.) Also, although the Staffing Agreement states that FlexCare is not Eisenhower's agent, that disavowal of an agency relationship is not reciprocal. (4 PA 907 ¶14.1.) Nowhere does it state that Eisenhower is not FlexCare's agent. (See *id.*) Grande, the trial court and the court of appeal all misread the Staffing Agreement on this point.

Given Grande's failure to address this special agency relationship, including its factual basis, the evidence regarding agency is "not in conflict." Rather, "the evidence is susceptible to a single inference:" that Eisenhower acted as FlexCare's special agent for purposes of exercising control over Grande's hours and working conditions. (See *Emery v. Visa Internat. Serv. Ass'n* (2002) 95 Cal.App.4th 952, 960.) As a result, the Court should find as a matter of law that Eisenhower was FlexCare's agent. (*Ibid*. [finding an agency relationship as a matter of law]; see also *Borders Online v. State Bd. of Equalization* (2005) 129 Cal.App.4th 1179, 1189; *Isenberg v. California Emp. Stab. Com.* (1947) 30 Cal.2d 34, 41 ["[I]f the essential facts are not in conflict the question of the legal relations arising therefrom is a question of law."].)

C. The Control Requirement For Agency Is Met Where FlexCare Had The Right To Control Eisenhower Regarding Its Wage-Hour Tasks

Grande mistakenly claims agency is lacking here because FlexCare had no control over Eisenhower. To support her argument, Grande claims that *Castillo* was wrongly decided because it found agency without establishing that the principal staffing company had " 'the right to control the conduct of the agent with respect to matters entrusted to him.' " (See

Answering Brief at p. 35, citing *Garlock Sealing Techs., LLC v. NAK Sealing Techs. Corp.* (2007) 148 Cal.App.4th 937, 964 [*Garlock*].) On the contrary, *Castillo* held "[t]he undisputed evidence demonstrates GCA [the staffing company] had the requisite control over Glenair [its client]." (*Castillo*, *supra*, 23 Cal.App.5th at p. 282.) The undisputed evidence here shows the same thing: FlexCare had the requisite right of control over Eisenhower with regard to Eisenhower's wage-hour responsibilities.

As a threshold matter, *Castillo* said that the client, Glenair, did not need to show that the staffing company, GCA, "generally" controlled it. (*Ibid.*) "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." (*Ibid.*) Further, it is only the "right to control" that necessarily must be shown. "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.' " (*Ibid.*, quoting *Violette v. Shoup* (1993) 16 Cal.App.4th 611, 620, internal quotations omitted; see also *Malloy v. Fong* (1951) 37 Cal.2d 356, 370.)

Applying this law, the court in *Castillo* found GCA had the right to control Glenair with respect to important tasks. "GCA authorized Glenair to perform certain timekeeping-related tasks on behalf of GCA and the only reasonable inference is that GCA required Glenair to perform those tasks. Had Glenair failed to perform those timekeeping tasks, GCA would not have been able to pay its employees." (*Castillo*, *supra*, 23 Cal.App.5th at p. 282.)

The evidence requires the same inference here. FlexCare authorized Eisenhower to collect Grande's time using Eisenhower's time recording system and then required Eisenhower to approve those hours before they

were reported to FlexCare. (See 4 PA 990.) In addition, because FlexCare did not have an on-site representative at Eisenhower overseeing Grande's work, it authorized Eisenhower to supervise Grande and provide her meal and rest periods. Like in *Castillo*, the only reasonable inference is that FlexCare required Eisenhower to perform those tasks so that FlexCare could properly pay Grande and issue wage statements listing her hours of work. This satisfies the control element of agency. "[T]he existence of the right establishes the relationship." (*Violette v. Shoup*, *supra*, 16 Cal.App.4th at p. 620 [court found no agency where an acquaintance merely did a favor by making a referral: "A person does not become the agent of another simply by offering help or making a suggestion."].)

The cases cited by Grande are not factually on point and do not require more to establish control. Most of Grande's authorities only address *general* agency in factual and procedural circumstances that are not relevant, such as a party's potential vicarious liability for torts under respondeat superior. [8] They do not address *special* agency, where an entity

---

[8] See Answering Brief at p. 36, citing *Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 541 (discussing degree of control a parent corporation must have over its subsidiary to establish the court's jurisdiction over the parent); *Wickham v. Southland Corp.* (1985) 168 Cal.App.3d 49, 57-59 (upholding jury instruction stating, "if the principal has the authority to exercise complete control, . . . a principal-agent relationship exists"); *Patterson v. Domino's Pizza, LLC* (2014) 60 Cal.4th 474, 493-495 (holding that employees of franchisees are generally not employees of the franchisor absent control of the franchisor); *People v. JTH Tax, Inc.* (2013) 212 Cal.App.4th 1219, 1240-1249 (addressing whether franchisee is agent of franchisor); *Alvarez v. Felker Mfg. Co.* (1964) 230 Cal.App.2d 987, 1000 (holding that buyer who merely intends to sell the products to third parties is not the seller's agent); *McCollum v. Friendly Hills Travel Center* (1985) 172 Cal.App.3d 83, 91 (found right of control

is an agent for a particular act or transaction, which is the issue here. (See Civ. Code § 2297.) The undisputed evidence demonstrates that FlexCare had "the right to control the conduct of [Eisenhower] *with respect to matters entrusted to [it]*." (*Garlock*, *supra*, 148 Cal.App.4th at p. 964, quotations omitted.) As to those matters – creating, approving and furnishing FlexCare with accurate time records and providing compliant meal and rest periods so that FlexCare could discharge its meal and rest period, timekeeping and wage statement and payment obligations – Grande does not dispute FlexCare had the right to control Eisenhower's conduct.[9]

Grande's reliance on cases referring to a principal's control over the "means and manner" of an agent's work is unavailing for several reasons. First, FlexCare did retain the right to control the "means and manner" of the matters entrusted to Eisenhower. As Grande concedes, FlexCare could have had its employees directly submit their time records. Or it could have had representatives on site to ensure that its employees were provided meal and rest periods. Instead, FlexCare engaged Eisenhower as its agent to complete these acts.

---

existed as a matter of law); *Garlock*, *supra*, 148 Cal.App.4th at p. 964 (control not at issue).

[9] Grande also has no answer to a number of Eisenhower's other legal arguments regarding agency. For example, Grande does not respond to Eisenhower's argument about how the Wage Orders define the relationship by which it acts as FlexCare's special agent for wage-hour matters. (See Cal. Code Regs. Tit. 8 §§ 11040(2)(H), 11050(2)(H) [defining "employer" to mean any person who controls the wages, hours or working conditions either directly or indirectly "or through an agent"].) Nor does Grande attempt to distinguish *Garcia v. Pexco, LLC* (2017) 11 Cal.App.5th 782 and its progeny. There, the court relied on the agency relationship between a staffing agency and its client to allow the client to enforce an arbitration agreement between the staffing agency and its employees.

Second, the "means and manner" test on which Grande relies arises in the context of proving an individual classified as an independent contractor or employee of a franchisee was actually an employee of the hiring entity or franchisor. (See, e.g., *Patterson*, *supra*, 60 Cal.4th at p. 493 [addressing franchisor-franchisee relationship]; *Tieberg v. Unemployment Ins. App. Bd.* (1970) 2 Cal.3d 943, 946 [addressing independent contractor/employee issue].) The rule is not relevant here, where Grande alleges FlexCare and Eisenhower acted interdependently as "joint employers for all purposes."

D. Grande's Other Attempts To Refute Agency Are Unavailing

In a further attempt to deprive Eisenhower of the benefit of the Settlement Agreement and satisfied judgment, Grande argues that Eisenhower had to be individually named in the release to be covered. For this argument, Grande relies heavily on *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516 (*Hess*). But *Hess* is factually and legally distinguishable and it does not control. It involved a far different release and circumstances causing the trial court to strike critical language from the release because of a mutual mistake of the parties. *Hess*'s holding has no application here.

The plaintiff in *Hess* entered into a release with the driver (Phillips) and insurer (Continental Insurance) of the car that had struck the Ford truck in which Hess was a passenger, leaving Hess a paraplegic. (*Id.* at p. 520.) In addition to releasing Phillips and Continental Insurance and their "agents, servants, successors . . . ," the release also released " '*all other persons, firms, corporations, associations or partnerships* of and from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever' that Hess had or might have due to the accident." (*Id.* at p. 521, italics in opinion.) As

characterized by the court, the release contained "broad language ostensibly releasing all potential tortfeasors from liability." (*Id.* at p. 520.)

When Hess's new attorney later sued Ford Motor Company for injuries based on the accident, Ford relied on the release to claim it could not be found liable. (*Id.* at p. 521-522.) But, in a separate action filed by Hess, the trial court reformed the release due to mutual mistake and struck the language releasing all potential tortfeasors. (*Id.* at p. 521.) At the later trial against Ford, all parties to the release – Hess, Hess's first attorney, and the former claims adjuster for Phillips and Continental – testified there was no intent to release Ford from liability. (*Id.* at p. 522.) In fact, Hess's first attorney had disclosed during settlement discussions that Hess intended to sue Ford and others. (*Ibid.*) On appeal, Hess did not dispute the scope of the broad release, but only argued that due to mutual mistake of fact, the language should have been omitted. (*Id.* at p. 525.) The court affirmed the judgment based on mutual mistake of fact. (*Id.* at p. 530.)

These facts, and the *Hess* court's holding based on mutual mistake of fact, are not present here. First, there was no broad release of "all potential tortfeasors," but only the release of FlexCare's agents, representatives and other categories of third-party beneficiaries. Second, there was no argument by FlexCare or Grande that the release of FlexCare's agents and representatives was the result of a mutual mistake of fact rather than a provision fully intended by both parties. Third, Grande did not testify at trial as to her intent regarding her release of FlexCare's agents and representatives. Nor did FlexCare testify there was no intent to release Eisenhower from liability. On the contrary, FlexCare's representative indicated at trial that it was his intent to release Eisenhower from Grande's wage-hour claims and that is why he used broad language in the release. (3 PA 626:26 – 628:15.) He testified his intent with the

settlement "was to in entirety and totality settle all the claims and be done with this, unambiguously and just done. I wanted to be done with all of it for everybody." (3 PA 616:16-23.)

Unlike in *Hess*, there was no mutual mistake with regard to the language of the release. The parties *intended* to release FlexCare's agents and representatives in settling Grande's wage-hour claims, and Eisenhower was one of those agents and representatives. In keeping with this intent, Eisenhower was not excluded from the release, which expressly covered *all claims that were or could have been* alleged by Grande. Grande has never disputed that she only worked at Eisenhower and could have named Eisenhower in the *Erlandsen* action.

Grande is wrong when she claims Eisenhower had to be specifically named in the release in order to be covered. The only parties listed by name in the release are the defendants named in the lawsuit – FlexCare and its principals. (1 PA 83:23-24.) All other released parties are listed by legal relationship. Just as those other "Released Parties" did not have to be listed by name to obtain the benefit of the release, FlexCare's agent, Eisenhower, did not have to be listed by name either. There is no evidence that Grande did not intend to release *all* of FlexCare's agents, no matter who they were.[10] Grande and her attorneys were well aware that

---

[10] Grande cites the unpublished federal district court opinion in *Cacique, Inc. v. Reynaldo's Mexican Food Co., LLC* (C.D. Cal. 2014) 2014 WL 505178, at *5 for the proposition that the absence of a company's name in a release shows a lack of intent to release it as an "affiliate." The district court did not so hold, however, and *Cacique* is not even persuasive here. (See *ibid.* ["The mere fact that affiliated entities are not specifically named in the MTK Settlement Agreement cannot alone establish that Cacique is not an affiliated entity."].) *In re Texas Rangers Baseball Partners* (Bankr. N.D. Tex. 2014) 521 B.R. 134, 170, also cited by Grande, is similarly

Eisenhower controlled Grande's schedule, hours, working conditions and meal and rest periods and was FlexCare's special agent. They knew that Grande had worked only at Eisenhower, that FlexCare had hired her and paid her wages for the work she performed at Eisenhower, and that FlexCare had enlisted Eisenhower to schedule her hours, keep track of her time, and provide her meal and rest periods. And they knew that the entity that controlled Grande's hours and working conditions (the *only* entity listed in her FlexCare Agreement) was not expressly excluded from the release. In other words, Grande and her attorneys knew that Eisenhower was released as FlexCare's agent and representative.

The mere possibility that the *Erlandsen* release could have described Eisenhower more specifically than "agent" or "representative" is beside the point. There was no need for it to do so where Eisenhower was already described by the "agent" and "representative" designations. Grande could have sought to specifically exclude Eisenhower from the release if she did not want Eisenhower to be released as FlexCare's agent or representative, but she made no attempt to do so.

On that point, Grande makes the inappropriate and misleading statement that "Eisenhower was never discussed as being a released party when counsel negotiated the release language of the Judgment." (Answering Brief at p. 34.) Grande is not credible in contending that Eisenhower, which controlled her hours and working conditions, was not even considered when she sued FlexCare in the *Erlandsen* action. The *Erlandsen* complaint alleges FlexCare assigned Grande to work at only one

---

irrelevant and not persuasive, where the Texas bankruptcy court merely applied the definition of affiliate under Texas state law to find the non-named entity was not subject to the release.

hospital: Eisenhower. (1 PA 115:27-28.) Yet Grande and her attorneys (who also represent her in this action) chose not to name Eisenhower as a defendant, alert Eisenhower to Grande's claims, or take discovery from Eisenhower in the *Erlandsen* action, which would have put Eisenhower on notice of Grande's claims. (3 PA 680:27-681:16.) Neither Grande nor her attorneys made any attempt to involve Eisenhower in *Erlandsen* or the mediation, despite knowing that Grande only worked for Eisenhower while employed by FlexCare. (See *ibid.*)

Further, because the discussions during the two-day mediation were privileged, the trial court refused to allow testimony about the discussions at trial. (3 PA 684:2-5.) Therefore, Grande's claims that various topics related to Eisenhower were not discussed in the *Erlandsen* action are not credible because the record does not contain any evidence of what was discussed in the mediation.[11]

Regardless of what was or was not discussed during the mediation, one key fact is clear. The parties did not exclude Eisenhower from the release or the settlement.

---

[11] Consequently, the testimony Grande cites on pages 13-15 and 34 of the Answering Brief about the absence of any discussions about Eisenhower can *only* relate to the time before the mediation or after the settlement agreement was signed. That testimony is meaningless regarding the parties' intent as to the meaning of the terms "agent" and "representative" used in the release negotiated during the privileged mediation. (See 3 PA 684:6-9 [Trial court admonished: "Why you'd be asking about including parties as released parties before you went to mediation or after you signed the settlement agreement, God only knows. But if you want to ask him those questions, go ahead."].) Given this record, Grande's reliance on her attorney's trial testimony to argue Eisenhower was never discussed during settlement negotiations is intentionally misleading.

E. The Agency Analysis Here Mirrors That In *Castillo*

The undisputed facts here are virtually identical to those found to constitute agency in *Castillo*. (See *Castillo*, *supra*, 23 Cal.App.5th at p. 281-282.) The undisputed evidence shows FlexCare authorized Eisenhower to collect, review, and approve Grande's time records for transmittal to FlexCare, and to control Grande's working conditions, meal and rest periods. (4 PA 900 ¶4.1, 903 ¶6.8.2, 990.) Thus, Eisenhower was authorized to represent, and did represent, FlexCare in its dealings with third parties, specifically FlexCare's employees so that FlexCare could properly pay their wages and issue compliant wage statements under Labor Code section 226. Further, the "only reasonable inference" from this evidence is that FlexCare required Eisenhower to perform these tasks, satisfying the control facet of agency. As *Castillo* noted under the same facts, "[h]ad [Eisenhower] failed to perform those timekeeping tasks, [FlexCare] would not have been able to pay its employees." (See *id.* at p. 282.)

Because the undisputed facts demonstrate Eisenhower was an agent of FlexCare, Eisenhower was a released party in the final *Erlandsen* judgment that has been fully satisfied. Grande was a party to that action. As a result, Grande's complaint against Eisenhower is barred and the judgment in Grande's favor here should be reversed.

III. GRANDE'S CLAIMS ARE BARRED BASED ON RES JUDICATA

Grande's claims are also barred by res judicata. Grande does not dispute that Eisenhower has established two of the three elements of a res judicata defense: the *Erlandson* judgment to which she was a party was on

the merits and she is raising the very same claims against Eisenhower that she raised against FlexCare.[12] (See *DKN*, *supra*, 61 Cal.4th at p. 824.) Indeed, she has no claim against Eisenhower based on her nine-day assignment that she did not first allege and settle with FlexCare.[13]

As to privity, the third element of res judicata, Grande misapprehends both the law and its application to the facts. She criticizes *Castillo* on the unsupportable ground that it failed to apply the test for privity articulated in *DKN*. She argues, incorrectly, that *DKN* determined privity cannot be found where parties are jointly and severally liable. By erroneous extrapolation, she then equates "joint and several liability" with "joint employers" to argue that privity can never be found where parties are joint employers.

Grande's arguments are unsound. Not only does *Castillo* discuss *DKN* in detail, it applied its principles correctly. *DKN* does not purport to define privity for all circumstances, but only for the very different factual and legal context before it involving contract claims. As this Court admonished more than 40 years ago, "[p]rivity is a concept not readily susceptible of uniform definition." (*Clemmer v. Hartford Ins. Co.* (1978) 22 Cal.3d 865, 875 [overruled on other grounds by *Ryan v. Rosenfeld* (2017) 3 Cal.5th 124].) Further, *DKN* does not hold joint and several obligors cannot be in privity, but only that joint and several liability *alone* does not establish privity. Regardless, Grande's allegation that FlexCare

---

[12] In fact, at trial Grande stipulated that her "claims in the *Erlandsen* Action against FlexCare were predicated on Grande's assignment at Eisenhower." (2 PA 421:15-16.)

[13] The *Erlandsen* judgment reflects that the settling parties waived all known and unknown claims under California Civil Code section 1542. (1 PA 167:23-26.)

and Eisenhower are joint employers does not establish they are jointly and severally liable, as *Serrano v. Aeortek, Inc.* (2018) 21 Cal.App.5th 773 confirms. But it does distinguish this case from *DKN* and directly contradicts Grande's claim that Eisenhower was not FlexCare's special agent. FlexCare and Eisenhower's alleged "joint employer" status only adds to the privity that exists between them on principles of agency, indemnification and derivative liability, among other things.

And finally, the estoppel need not be mutual for res judicata to apply. That is, FlexCare's privy, Eisenhower, can claim the benefit of res judicata defensively to bar Grande's claims against it. But contrary to the court of appeal's conclusion, Eisenhower need not concede it is subject to the *Erlandsen* judgment in order to bind Grande to that judgment. Grande cites but ignores the holding in *Bernhard v. Bank of America* (1942) 19 Cal.2d 807 (*Bernhard*), repudiating the mutuality rule and putting into question its application where there is derivative liability, a principal and agent relationship, or, as undisputed here, an indemnitor and indemnitee relationship.

Eisenhower has established that all applicable requirements of res judicata are present, and that an exception to mutuality applies. As a result, Grande's claims against it are barred by the judgment in *Erlandsen*.

A. *DKN* Plainly Does Not Preclude The Conclusion That Privity Exists Regarding Grande's Wage-Hour Claims

The central issue raised by *DKN* was not the definition of privity, but rather whether joint and several obligors could be sued separately. The Court described the basis for its review in the opening sentence of its opinion – "We granted review to clarify a bedrock principle of contract law: Parties who are jointly and severally liable on an obligation may be sued in separate actions." (*DKN*, *supra*, 61 Cal.4th at p. 818.) The case

involved a commercial lease agreement between landlord DKN and multiple lessees, which specifically provided that the lessees "shall have joint and several responsibility" to comply with the lease terms. (*Ibid.*) One lessee, Caputo, sued DKN for various claims, and DKN cross-complained for rent and other monies due. (*Ibid.*) DKN prevailed and judgment was entered in its favor for $2.8 million. (*Id.* at p. 819.) The Court emphasized that the judgment was never satisfied. (*Id.* at p. 823.) Under these facts, the Court concluded: "Although the original judgment conclusively resolves DKN's rights against Caputo, and may bear upon the total amount DKN is entitled to recover for breach of the lease from all obligors [citation], it does not bar DKN from suing Caputo's copromisors. *Only a satisfaction of the obligation would do so*." (*Id.* at pp. 822-823, italics added.)

The Court considered whether res judicata applied only because the lower courts had mistakenly relied on it to preclude separate suits against those jointly and severally liable on a contract. (*Id.* at p. 823.) The Court disagreed with the lower courts, stating: "This interpretation runs counter to the essential principles that parties have a duty to meet their contractual obligations and that those injured by a breach have a right to be made whole." (*Ibid.*) Thus, in analyzing whether res judicata prevented joint and several obligors from being sued separately, the Court held that "[j]oint and several liability *alone* does not create such a closely aligned interest between co-obligors" to constitute privity. (*Id.* at p. 826, italics added.)

The central issue in *DKN* – whether joint and several obligors on a contract can be sued separately – is not at issue here. This case is predicated on statutory claims rather than contract claims, the judgment in the *Erlandsen* action has been fully satisfied, Grande alleges that FlexCare and Eisenhower are joint employers, Eisenhower was FlexCare's special

agent and FlexCare is obligated to indemnify Eisenhower. All of these undisputed facts distinguish this case from *DKN* in material ways. Additionally, joint employers are not automatically jointly and severally liable when a violation is committed by one employer.[14] Nor are claims brought under California's wage-hour statutes the equivalent of the contract claims at issue in *DKN*. The court of appeal in *Grande* erred in anchoring its opinion on a misreading and misapplication of *DKN*.

DKN, then, does not define privity for this case. Contrary to Grande's characterization, there is no single definition of privity. (*People v. Sims* (1982) 32 Cal.3d 468, 486 [holding "there is no universally applicable definition of privity", quoting *Lynch v. Glass* (975) 44 Cal.App.3d 943, 947].) Instead, the definition of privity depends on "the circumstances of each case as it arises." (*Zaragosa*, *supra*, 33 Cal.2d at p. 318.) But generally, "privity involves a person so identified in interest with another that he represents the same legal right." (*Ibid.*) As described in *DKN*, a nonparty alleged to be in privity must, like here, have an interest so similar to the party's interest that the party acted as the non-party's "virtual representative." (*Id.* at p. 826.) And, as *Bernhard* and *DKN* both hold, broad exceptions to mutuality exist in cases such as this, particularly where the judgment in the first action has been fully satisfied.

---

[14] *Serrano*, *supra*, makes clear that a temporary staffing agency may, under certain circumstances, be liable for some actions of its client, but a staffing agency that meets its own duty to provide meal and rest breaks is not liable for its client's independent violation of its duty to provide such breaks. (21 Cal.App.5th at p. 785.)

B. Under The Courts' Expanded Concept Of Privity And Recognized Exceptions To The Mutuality Rule, Grande's Action Is Barred

Courts have described privity as it has expanded from its classical definition: " '[T]o maintain the stability of judgments, insure expeditious trials,' prevent vexatious litigation, and 'to serve the ends of justice,' courts are expanding the concept of privity beyond the classical definition *to relationships 'sufficiently close to afford application of the principle of preclusion.*' " (*Cal Sierra Development, Inc. v. George Reed, Inc.* (2017) 14 Cal.App.5th 663, 672, italics added, citation omitted.) Privity does not depend solely on the relationships between persons or entities. Rather, for res judicata purposes privity "deals with a person's relationship *to the subject matter of the litigation.*" (*Id.* at p. 674, italics original, internal quotations and citation omitted.) *Castillo* applied these recognized principles of privity and res judicata to find the staffing company and its client had interests that were so intertwined with respect to the litigation that they had the same relationship to the litigation and were in privity. (*Castillo*, *supra*, 23 Cal.App.5th at pp. 279-280.) The same conclusion is warranted here.

In contrast to the defendants in *DKN*, Eisenhower does not contend that privity with FlexCare exists based on joint and several liability. In fact, where Grande has alleged Eisenhower and FlexCare are joint employers for "all purposes" with respect to her wage-hour claims, she asserts that their liability is only joint. That allegation is based on the fundamental premise that either Eisenhower's or FlexCare's actions can result in the liability of both. Stated differently, Grande alleges that FlexCare is liable for its own actions and those of Eisenhower under her joint employer theory. Likewise, she maintains that Eisenhower's liability derives both from Eisenhower's own actions and practices as well as from

those of FlexCare. How else could she claim that Eisenhower is liable for wage statement violations under Labor Code Section 226 when FlexCare alone was responsible to provide Grande wage statements? And how else can Grande assert FlexCare was liable for meal and rest period transgressions when Eisenhower provided Grande her meal and rest breaks and controlled her schedule as FlexCare's agent and representative? The essence of her joint employer claim is that both are in privity and directly responsible for each other's actions towards Grande and other nurses.

Relatedly, Eisenhower is in privity with FlexCare because it was FlexCare's special agent for wage-hour matters. The relationship between FlexCare and Eisenhower is nearly identical to the relationship between the staffing agency and its client in *Castillo*. (See *Castillo*, *supra*, 23 Cal.App.5th at pp. 279-280.) If anything, the record here is more developed and shows that Eisenhower did even more as FlexCare's agent than the staffing agency's client did in *Castillo*. For example, FlexCare relied on Eisenhower to schedule nurses, provide them meal and rest breaks and keep track of their time, among other things. FlexCare could not properly pay Grande or issue accurate wage statements without Eisenhower performing its assigned tasks. In the same vein, Grande's allegation that Eisenhower is liable for the actions of FlexCare, e.g., in furnishing wage statements, implicates derivative liability between them. And finally, FlexCare was and remains Eisenhower's indemnitor with regard to wage-hour liability. (4 PA 901 ¶5.3.) All of these factors show their identity of interest with respect to the subject matter of the litigation and establish privity. And all of these factors are ones *DKN* indicated would be relevant to establish privity. (See *DKN*, *supra*, 61 Cal.4th at pp. 827-828.)

As the court concluded in *Castillo*, with respect to Grande's wage-hour causes of action the interests of Eisenhower and FlexCare are so

intertwined and interdependent as to put them in the same relationship to the litigation. "Accordingly, we conclude they are in privity for purposes of the instant litigation." (See *Castillo*, *supra*, 23 Cal.App.5th at p. 280.)

C. Repudiated Mutuality Principles Do Not Preclude Eisenhower From Relying On Res Judicata To Bar Grande's Claims

Eisenhower's reliance on res judicata to bar Grande's claims is not undermined by any requirement that the estoppel be mutual. That is, Grande is barred by res judicata from suing Eisenhower for the claims she earlier litigated to judgment in *Erlandsen*, even though she would not be able to use res judicata offensively to bind Eisenhower to that judgment. For one thing, the judgment was already fully satisfied by the time Grande sued Eisenhower. (Cf. *DKN*, *supra*, 61 Cal.4th at p. 823 [concluding a satisfaction of the first judgment would bar DKN from suing the remaining copromisors].) Eisenhower was directly entitled to the protections afforded by the judgment because it encompassed the release given to FlexCare and its agents and representatives once the judgment had been fully satisfied.

But mutuality of estoppel does not interfere with Eisenhower's use of res judicata to bar Grande's claims for another reason. In California's seminal case regarding res judicata, *Bernhard*, *supra*, 29 Cal.2d at p. 813, this Court held that "the defendant is not precluded by lack of privity or of mutuality of estoppel from asserting the plea of res judicata against the plaintiff." This Court in *DKN* clarified that *Bernhard* made clear that a party asserting issue preclusion need not have been a party or a person in privity with a party to the first action. (*DKN*, *supra*, 61 Cal.4th at p. 827 fn. 10.) But there is no compelling reason why the principle that a defendant "is not precluded by lack of . . . mutuality of estoppel from asserting the plea of res judicata against the plaintiff" should not apply equally in the circumstances here. Grande makes identical statutory claims in both

lawsuits, asserts that FlexCare and Eisenhower are joint employers, and structures her identical claims against both on the interdependent and intertwined actions relating to the same hours, the same meal and rest periods, and the same practices that were identified as the core of the *Erlandsen* judgment before the Eisenhower action was initiated. And, Grande waited until the *Erlandsen* judgment was fully satisfied before initiating an action against Eisenhower. Grande has fully reaped the benefit of the *Erlandsen* judgment, extracting $20,000, an amount equal to over 18 weeks' pay for her nine-day stint. She then lay in wait to act as though unencumbered by the judgment. Such a haul would undoubtedly motivate many to seek $20,000 in two cases rather than one. The Court should hold Eisenhower is in privity with FlexCare, so as to bar Grande's claims.

This result is reinforced by cases like *Lippert v. Bailey* (1966) 241 Cal.App.2d 376, 382, which held that a plaintiff was precluded from suing insurance agents after he settled with the insurance company for the same loss. But since the insurance agents (like Eisenhower) were never informed of the first case they could not be "bound" consistent with due process. (See *Sole Energy Co. v. Hodges* (2005) 128 Cal.App.4th 199, 210 [default judgments against parties provided no notice or opportunity to be heard are void as violating due process].) Yet, even though the insurance agents in *Lippert* were not and could not be bound, *DKN* cited *Lippert* and agreed that they and their principals were in privity for purposes of the settlement against their principal. (*DKN*, *supra*, 61 Cal.App.4th at p. 827.)

The court of appeal was mistaken when it determined that Eisenhower could not bar Grande's action based on the *Erlandsen* judgment where it was not itself notified of the case or bound by it. Mutuality of estoppel does not preclude Eisenhower from being found in privity with FlexCare, and Grande's claims are barred by res judicata.

IV. CONCLUSION

For these reasons, the Court should reverse the court of appeal and hold that Grande's claims against Eisenhower are barred by the *Erlandsen* settlement and judgment.

Dated: November 23, 2020

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By *s/Richard J. Simmons*

RICHARD J. SIMMONS
KARIN DOUGAN VOGEL
JOHN D. ELLIS

Attorneys for Defendant and Petitioner
EISENHOWER MEDICAL CENTER

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to California Rule of Court 8.204(c), the attached Appellant's Reply to Opening Merits Brief is proportionately spaced, has a typeface of 13 points, and contains 8,394 words, according to the counter of the word processing program with which it was prepared.

Dated: November 23, 2020

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By *s/Richard J. Simmons*

RICHARD J. SIMMONS
KARIN DOUGAN VOGEL
JOHN D. ELLIS

Attorneys for Defendant and Petitioner
EISENHOWER MEDICAL CENTER

PROOF OF SERVICE

Lynn Grande v. Eisenhower Medical Center
Case No. S261247

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

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

On November 23, 2020, I served true copies of the following document(s) described as **EISENHOWER MEDICAL CENTER'S REPLY TO GRANDE'S ANSWERING MERITS BRIEF** on the interested parties in this action as follows:

SERVICE LIST

Peter R. Dion-Kindem #95267 The Dion-Kindem Law Firm 21550 Oxnard Street, Suite 900 Woodland Hills, CA 91367	Attorneys for Respondent Lynne Grande
Lonnie Clifford Blanchard #93530 Blanchard Law Group, APC 3311 E. Pico Blvd. Los Angeles, CA 90023	Attorneys for Respondent Lynne Grande
Cassandra M. Ferrannini #204277 Bradley C. Carroll #300658 Downey Brand LLP 621 Capitol Mall, 18th Floor Sacramento, CA 95814	Attorneys for Intervenor Flexcare, LLC
California Court of Appeal Fourth Appellate District Division Two 3389 12th Street Riverside, CA 92501	Superior Court of California County of Riverside 4050 Main Street Riverside, CA 92501-3704

BY ELECTRONIC SERVICE: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling), I provided the document(s) listed above electronically on the TRUE FILING Website to the parties on the Service List maintained on the TRUE FILING Website for this case, or on the attached Service List. TRUE FILING is the on-line e-service provider designated in this case. Participants in the case who are not registered TRUE FILING users will be served by mail or by other means permitted by the court rules.

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

Executed on November 23, 2020, at San Diego, California.

____

Pamela Parker

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 11/23/2020 by Emily Feng, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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

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

2. My email address used to e-serve: **kvogel@sheppardmullin.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	Eisenhower's Reply to Opening Brief on the Merits

Service Recipients:

Person Served	Email Address	Type	Date / Time
George Howard Jones Day 076825	gshoward@jonesday.com	e-Serve	11/23/2020 11:56:34 AM
Lonnie Blanchard The Blanchard Law Group, APC 93530	lonnieblanchard@gmail.com	e-Serve	11/23/2020 11:56:34 AM
Pamela Parker Sheppard Mullin Richter & Hampton	pparker@sheppardmullin.com	e-Serve	11/23/2020 11:56:34 AM
Karin Vogel Sheppard Mullin Ruchter & Hampton, LLP	kvogel@shepardmullin.com	e-Serve	11/23/2020 11:56:34 AM
Paul Grossman Paul Hastings LLP 035959	paulgrossman@paulhastings.com	e-Serve	11/23/2020 11:56:34 AM
Peter Dion-Kindem Peter R. Dion-Kindem, P.C. 95267	kale@dion-kindemlaw.com	e-Serve	11/23/2020 11:56:34 AM
Richard Simmons Sheppard, Mullin, Richter & Hampton LLP 72666	rsimmons@sheppardmullin.com	e-Serve	11/23/2020 11:56:34 AM
Peter Dion-Kindem Peter R. Dion-Kindem, P.C.	peter@dion-kindemlaw.com	e-Serve	11/23/2020 11:56:34 AM
Bradley Carroll Downey Brand LLP 300658	bcarroll@downeybrand.com	e-Serve	11/23/2020 11:56:34 AM
Karin Vogel Sheppard, Mullin, Richter & Hampton 131768	kvogel@sheppardmullin.com	e-Serve	11/23/2020 11:56:34 AM
Gail Blanchard-Saiger	gblanchard@calhospital.org	e-	11/23/2020

California Hospital Association 190003		Serve	11:56:34 AM
Patricia Pineda Downey Brand LLP	ppineda@downeybrand.com	e-Serve	11/23/2020 11:56:34 AM
Cassandra Ferrannini Downey Brand LLP 204277	cferrannini@downeybrand.com	e-Serve	11/23/2020 11:56:34 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

11/23/2020
Date

/s/Pamela Parker
Signature

Vogel, Karin Dougan (131768)
Last Name, First Name (PNum)

Sheppard, Mullin, Richter & Hampton LLP
Law Firm