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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HERIBERTO ARELLANO,

Plaintiff and Appellant,

v.

JOHN VO,

Defendant and Respondent.

G044393

(Super. Ct. No. 30-2009-00116989)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Luis A. Rodriguez, Judge. Reversed and remanded.

Lavi & Ebrahimian, N. Nick Ebrahimian, Jordan D. Bello; The deRubertis Law Firm, and David M. deRubertis for Plaintiff and Appellant.

Gilbert & Nguyen and Jonathan T. Nguyen for Defendant and Respondent.

Heriberto Arellano sued Castle Valet Car Wash (Castle) and its owner, John Vo, for state and federal labor wage code violations, including the failure to pay the minimum wage and overtime. The trial was bifurcated after Arellano stipulated his only claims against Vo related to violation of the federal labor laws. In the first phase of the trial, the trial court held an evidentiary hearing to determine whether, as a matter of law, Vo qualified as an “employer” as defined by the Fair Labor Standards Act (FLSA) (29 U.S.C. §§ 201-219). Before the trial court made its ruling, Arellano suggested he had changed his mind and might later amend his complaint to include alter ego allegations seeking to hold Vo liable under the state labor laws that Castle violated. The court indicated it would not allow Arellano to amend his complaint. And after considering the testimony, it determined Vo was not Arellano’s employer under the FLSA and therefore could not be held jointly liable with Castle for federal wage law violations. The court dismissed Vo from the case. The parties stipulated to a \$70,000 judgment against Castle.

On appeal, Arellano contends: (1) a jury should have determined the question of whether Vo was an employer under the FLSA; (2) the court incorrectly concluded Vo was not an employer; and (3) the court should have permitted him to amend the complaint to add alter ego allegations. We conclude Arellano is partially correct. Because there was a factual dispute about Vo’s level of involvement in the car wash, Vo’s status as an FLSA “employer” could not be determined as a matter of law and this factual determination should have been submitted to a jury. However, we conclude the trial court correctly concluded Arellano should not be permitted to amend his complaint due to unexcusable delay and prejudice to Vo. The judgment is reversed and the matter remanded.

I

Arellano was a manager of a car wash in Westminster, California, for over 25 years. During this time, there were various owners of the car wash. In 2002, Vo and two partners incorporated Castle to run the car wash. Vo did not participate in

management of the car wash until 2005 when the other shareholders abandoned their shares in the business. In December 2008, the car wash was shut down due to financial losses.

Approximately one year later, Arellano filed a claim with the labor board alleging he worked 365 days a year and over 16 hours a day and was owed \$16,000 in unpaid wages and penalties. When the claim was dismissed, Arellano filed an action in superior court seeking over \$300,000 in damages from Castle. He amended the complaint to add Vo, as an individual defendant, when he realized Castle had gone out of business. Arellano also named several other prior owners of the car wash, but they were later voluntarily dismissed.

The first amended complaint (FAC), the operative complaint, alleged Castle and Vo violated state and federal law in failing to pay the minimum wage (first cause of action) or pay overtime (second cause of action). The remaining causes of action (Nos. 3 through 9) all related to additional code violations by Castle.

Before trial, Vo brought a motion in limine and motion to strike the FAC's allegations against him on the grounds he was not an employer under state or federal law. He argued California labor laws do not impose personal liability on corporate officers and directors for unpaid wages. Under federal law, Vo argued he could not be held personally responsible because he is not an employer as defined by the FLSA.

Arellano opposed the motions. He argued the lawsuit was brought against his "former employer [Castle] for unpaid wages, penalties and vested monies under state and federal law; and its CEO/President and owner, . . . Vo, for unpaid wages solely under federal law." He clarified the lawsuit "does not allege that individual . . .Vo is liable for failure to pay state minimum wages and state overtime. Those portions of the first and second causes of action for state law wages are alleged only as to [Castle]. [Arellano]

only seeks individual liability against . . . Vo for unpaid minimum wages and overtime pursuant to FLSA.” (Fn. omitted.) Arellano noted this point was clarified in his opposition to Vo’s demurrer raising the same argument. Arellano repeatedly stated he was only seeking federal overtime and minimum wages against Vo. Arellano argued the complaint adequately stated a cause of action against Vo that he was an employer pursuant to the FLSA.

At the hearing on August 9, 2010, Vo’s counsel advised the court he wished to bifurcate the trial and the first phase would address only the determination of Vo’s liability. He argued this would save time because “we may even stipulate to whatever judgment the plaintiff wants to have against [Castle], which is in bankruptcy.” The court considered argument on the issue of bifurcation and asked the parties to submit briefing on the issue of whether Vo’s status as an employer under the FLSA was a question of law for the court to determine.

The parties prepared and submitted briefing. Vo argued his status as an employer under the FLSA was a question of law, citing *Bonnette v. California Health and Welfare Agency* (9th Cir. 1983) 704 F.2d 1465, 1469 (*Bonnette*), abrogated on other grounds by *Garcia v. San Antonio Metro. Transit Authority* (1985) 469 U.S. 528, 539. Arellano filed a brief purportedly arguing the issue was a factual question to be decided by the jury during the trial, however, he did not include a copy of it in the appellant’s appendix on appeal.

On August 10, 2010, the court announced Vo’s motion in limine would be treated as a motion for nonsuit, in which judgment can be entered for defendant if it is required as a matter of law, after the court resolves all presumptions in the plaintiff’s favor. The trial court noted Arellano had stated state and federal wage law claims against Vo, and it warned Arellano that he could not apply the FLSA federal definition of

employer to his state law claims. The court asked Arellano's counsel if they wanted to amend the pleadings and set forth any other basis of liability under state law, such as "alter ego." Arellano's counsel repeatedly clarified the causes of action against Vo were only federal claims related to his "failure to pay minimum wage and failure to pay overtime, in violation of the [FLSA]." He conceded state law (and specifically wage order No. 9) did not apply to Vo as an individual defendant, and offered to "stipulate to that [neither] the [L]abor [C]ode nor the wage orders apply to him as a defendant in this lawsuit." Arellano added he agreed with the trial court that the definition of an employer under the FLSA would have no applicability to state claims brought under the California Labor Code.

Arellano offered to stipulate or amend the complaint to specify "the only causes of action that we have against . . . Vo [is] violation of" the FLSA. The court then entered a "stipulated judgment" as follows: "As to the first and second causes of action, setting forth the state labor law claim pursuant to [Labor Code section] 1194 and wage order [No.] 9 as to . . . Vo, the judgment will be entered for . . . Vo. That [Arellano] take nothing from those two causes of action . . . as they are stipulating that . . . Vo would not be liable . . . for violations of those provisions as set forth."

The following day, the court restated it was treating Vo's motion in limine as a nonsuit. It granted the motion as to Arellano's state law claims against Vo, and "the proceeding against . . . Vo will be directed only to" violations of the FLSA. The parties then presented argument on whether the determination of Vo's status as an employer under the FLSA was a question of law or fact. The court stated it was "persuaded that the determination of employer as defined by federal law is an obligation of the court and will be heard by this court at an evidentiary hearing." The court stated Arellano had the burden of showing Vo was an employer.

During the evidentiary hearing, the court heard Vo, Arellano, and another car wash employee, Innocencio Pulido-Garcia (Pulido) testify. Near the end of the hearing, Arellano's counsel sought to introduce evidence Vo commingled funds. The court noted there was no alter ego claim before the court. Counsel asserted that could change and Arellano may choose to amend the complaint to allege alter ego liability at the end of trial if the FLSA claim failed. The court advised counsel it was too late to amend the complaint or argue any alter ego theory. It reasoned Vo's counsel could not represent Vo and the corporation at the same time if there were alter ego allegations. The court concluded amending the complaint would cause Vo and Castle extreme prejudice. The court noted Vo's counsel was only litigating the issue of whether Vo as a shareholder could be held individually liable under the FLSA. "It has been conceded that . . . Vo has no liability with regard to his participation . . . under state law. And the corporation . . . is subject to liability under the state wage law as an employer."

At the end of the evidentiary hearing, the court stated, "The court made a ruling [Vo's employer status] was a legal determination, but it required the court to make subsidiary factual findings. [¶] The court has made these [factual] findings in order to draw the ultimate legal conclusion in the case. It has addressed and evaluated the evidence presented in what would be a mini-bench trial."

The trial court stated it had considered several factors related to the "economic reality" test as well as Vo's official position and ownership of Castle. The court made the following factual findings: (1) "during the period in question, [Vo] maintained a separate office from the car wash office"; (2) the office inside the car wash belonged to the "day-to-day" manager, Juan Calderon; (3) Calderon collected facts about the car wash's profitability and gave them to Vo to decide whether to close the car wash; (4) all personnel and wage records were kept in the car wash office, and when the car

wash closed, the records were transferred to Vo; (5) Vo asked Calderon how to improve services and he relied on the manager's experience but Vo offered advertising suggestions; (6) Vo and Calderon met on a weekly basis when Vo would sign checks prepared by an independent accounting service based upon Calderon's calculations of the hours worked; (7) Vo would get information from Calderon about who was hired or fired; (8) the managers gave Vo's wife their schedules to assess the "profitability and decision-making in regards to . . . Vo"; (9) there was no evidence as to how the schedules were created; (10) other than signing checks, Vo was not given detailed information regarding how wages were calculated or if hours were being deducted; (11) there was no evidence Vo paid anyone in cash at the car wash; (12) Calderon occasionally paid cash to workers at the car wash through a distribution system of tips; (13) Calderon determined who would work at the car wash each morning; (14) if the car wash was closed due to rain, Calderon offered workers a chance to be day laborers at Vo's house under construction and to be paid cash; (15) Vo did not select workers or give instructions to workers when they were on his property; (16) Calderon and Arellano made supply purchases for the car wash without Vo's input; (17) workers checked with Calderon before leaving work for the day; (18) Calderon prepared the business rules, job duties, and regulations; (19) Calderon was in charge of hiring, firing, disciplining, and promoting workers; (20) there was no evidence Calderon communicated with Vo about any specific employee or about any of the business's rules and regulations; (21) although Vo knew about Calderon's rules, all complaints were directed to Calderon; (22) Sergio was the assistant manager and would bring employees to Calderon's office to be hired; and (23) Flores was the on-site manager and reported to Sergio or Roberto and he never saw Vo working at the car wash; (24) Calderon increased Arellano's workweek to seven days, but there was no evidence Vo was "involved, engaged, directed or made any policies in connection with that."

The court discussed Pulido's testimony. He determined Pulido was paid cash when he cleaned up Vo's office, but it was done at the direction of the maintenance manager, not Vo. Pulido confirmed Calderon was the manager and controlled the worker's shifts and breaks. Pulido testified he reported to Calderon, he was selected to work by Calderon, and he twice cleaned Vo's office. Pulido said he never saw Vo when he worked as a day laborer at Vo's construction site. The court stated, "And with regard to . . . Pulido's testimony that [Arellano] was taking [Vo's] daughter to school in the morning, the court finds that . . . Pulido was impeached and not credible as far as that testimony."

The court concluded, "Based on the evidence, the evaluation and testimony, the weight, the court, as background, having applied the relevant legal principles, the court finds that . . . Arellano, has failed to show any evidence establishing the requisite degree of control either in the day-to-day operations of Castle . . . or indirect exclusive control over the wages and hours which forms the basis of FLSA operations that would apply to . . . Vo as an individual employer."

After ruling Vo was not an employer as defined by the FLSA, the court dismissed him from the case. The parties stipulated on the record to a judgment against Castle for \$70,000. Vo was not specifically mentioned in the final judgment.

Arellano filed an appeal from the judgment, specifically challenging the court's dismissal of Vo and its alter ego ruling. Vo made a motion to dismiss the appeal as to him. This court issued an order stating the motion to dismiss was denied because the September 3, 2010 judgment "was a final judgment in the action terminating the trial court proceedings by completely disposing of the matter in controversy. In the interests of justice and to preserve judicial economy, we construe the September 3, 2010 judgment to include a judgment for Vo and against Arellano as determined by the trial court during the first phase of the bifurcated trial. [Citation.]"

II

A. *Alter Ego Allegations*

“The alter ego doctrine arises when a plaintiff comes into court claiming that an opposing party is using the corporate form unjustly and in derogation of the plaintiff’s interests. [Citation.] In certain circumstances the court will disregard the corporate entity and will hold the individual shareholders liable for the actions of the corporation: ‘As the separate personality of the corporation is a statutory privilege, it must be used for legitimate business purposes and must not be perverted. When it is abused it will be disregarded and the corporation looked at as a collection or association of individuals, so that the corporation will be liable for acts of the stockholders or the stockholders liable for acts done in the name of the corporation.’ [Citation.] [¶] There is no litmus test to determine when the corporate veil will be pierced; rather the result will depend on the circumstances of each particular case. There are, nevertheless, two general requirements: ‘(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow.’ [Citation.]” (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.)

In the middle of the evidentiary hearing regarding Vo’s status as an employer under FLSA, Arellano indicated he intended to amend his complaint sometime in the future to allege Vo was personally liable for all the state law wage claims raised against Castle under an alter ego theory of liability. The court denied Arellano’s request to amend the complaint on the grounds it would cause Vo and Castle prejudice. The court reminded Arellano the state labor law claims against Vo were previously ruled upon in Vo’s favor. The court stated the only issue currently before the court was whether Vo was an employer under the FLSA, and therefore, any evidence regarding alter ego would be a “back door attempt to bring in the state law claims” that were dismissed. The court reminded Arellano he stipulated Vo was an officer of the

corporation and to prove alter ego, Arellano would have to show “he really doesn’t hold an officer position and he is using the corporation for his own benefit.” The court determined amending the complaint would extremely prejudice Vo and Castle because they were represented by the same counsel. Their counsel had made stipulations and representations on behalf of the corporation because the issue in the case was narrowed down to whether Vo was individually liable under the FLSA. The court stated Arellano should have presented this theory earlier.

Arellano’s counsel asked if the issue could be raised in the second phase of the trial. He stated there is authority one can conform the pleadings to the evidence proven during trial. The court agreed there is always an opportunity to amend as long as it does not cause prejudice. Counsel replied, “We didn’t know that there was commingling, that there [were] no duties as president, no duties as secretary, no duties as a CFO.” The court stated “That’s what discovery [is] for. If you had a theory and you were going to address that theory, then you should have addressed that theory through discovery and given the opportunity for [Vo’s counsel] to make a critical decision in terms of representing and who he represents in terms of his client in relation to that discovery.” The court said defendants’ counsel would have recognized a conflict and decided which party to represent. Vo’s counsel reminded the court that everyone discussed the possibility of amending the complaint the first or second day of trial, and due to Arellano’s decision not to allege alter ego, the parties made a stipulation about the first phase of the trial.

“There is a policy of great liberality in permitting amendments to the pleadings at any stage of the proceeding. [Citations.] An application to amend a pleading is addressed to the trial judge’s sound discretion. [Citation.] On appeal the trial court’s ruling will be upheld unless a manifest or gross abuse of discretion is shown. [Citations.] The burden is on the plaintiff to demonstrate that the trial court abused its discretion.” (*Sullivan v. City of Sacramento* (1987) 190 Cal.App.3d 1070, 1081.)

““When a request to amend has been denied, an appellate court is confronted by two conflicting policies. On the one hand, the trial court’s discretion should not be disturbed unless it has been clearly abused; on the other, there is a strong policy in favor of liberal allowance of amendments. . . .”“ (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945.)

Arellano failed to demonstrate the trial court abused its discretion. He argued there was ample evidence to support amendment of the complaint to allege an alter ego theory. He asserted amendment would further public policy of permitting all remedies available to address Vo’s illegal conduct. He maintained Vo would not be prejudiced by amendment because “the liability is based on his own acknowledgements at trial that he operated an undercapitalized business and failed to keep up any semblance of corporate obligations since 2005.” However, Arellano completely failed to mention or address the trial court’s stated reasons and concerns of prejudice that would occur if Arellano were permitted to amend the complaint after having narrowed the case to be about only federal wage violations against Vo. We conclude the trial court’s reasoning was sound and Arellano failed to demonstrate the ruling was an abuse of discretion.

The trial court ruled Arellano would not be permitted to amend the complaint to allege alter ego in the first phase of the trial because it concerned only the federal wage claim against Vo as an individual. The alter ego allegations would impose individual liability for Castle’s violations of state labor laws, but it was irrelevant to the federal wage claims. Arellano does not allege this part of the ruling was an abuse of discretion.

The trial court also indicated it would theoretically also deny any motion raised in the second phase of the trial, or if Arellano lost the federal wage claim against Vo in the first phase of the trial. It cited to Arellano’s unexcused delay and evidence Vo was misled and prejudiced. Arellano challenged the court’s statement, having never actually filed a motion to amend the complaint during the second phase of the trial.

There is no ruling on a motion for us to review. However, because the court's comments would reasonably have led Arellano to believe making a formal motion would have been futile, we will address the issue on appeal.

“Where inexcusable delay and probable prejudice to the opposing party is indicated, the trial court's exercise of discretion in denying a proposed amendment should not be disturbed. [Citations.]” (*Estate of Murphy* (1978) 82 Cal.App.3d 304, 311.) Arellano offered no excuse in the trial court, or on appeal, as to why the facts relating to alter ego could not have been discovered before a labor wage dispute trial, especially when the parties knew Vo was Castle's sole shareholder and the car wash was in bankruptcy. The facts needed to prove Vo is individually liable as an employer under the FLSA were related to the facts needed to prove Vo was individually liable as the alter ego of Castle. Both theories similarly rely on the notion Vo, not the corporate shell, was responsible for operating the car wash and supervising the laborers.

Moreover, Arellano's stipulation to dismiss the state law wage claims against Vo before trial, and his representation at that time that he did not need to amend the complaint to state a claim for alter ego misled Vo and his counsel. It was reasonable for counsel to believe there would be no conflict in one attorney representing both Castle, and its principal, because the only issue being litigated was whether Vo was liable, individually under the federal wage laws. Counsel offered to concede Castle (a bankrupt company) was liable under both federal and state law to streamline the trial. The trial court correctly concluded counsel could not represent both Vo and Castle if there were allegations of alter ego liability. The unexcusable delay in raising the issue caused Vo prejudice.

Arellano's explanation he would plead the alter ego theory only if the FLSA claim failed also does not refute the court's findings of inexcusable delay and prejudice. To the contrary, this inadequate excuse further supports the court's ruling. This is a unique case in which the parties' pretrial stipulation narrowly tailored the focus

of trial to a federal wage claim. Vo would be prejudiced if Arellano were permitted to rip open the seam and re-assert his state wage claims against Vo, individually. As stated by the trial court, evidence regarding alter ego would be a “back door attempt to bring in the state law claims” that were dismissed. We conclude the court’s ruling was not an abuse of discretion.

B. Employer Under the FLSA

The trial court determined Vo was not an employer as defined by the FLSA. Arellano maintains this issue should have been decided by a jury because there were factual disputes regarding Vo’s level of involvement with the car wash. Alternatively, he argues the facts support the conclusion Vo was an employer under the FLSA. Because we conclude his first argument is meritorious, we need not address the second. As will be explained in more detail below, the application of the statutory term “employer” is a question of law for the trial court only if the material facts are undisputed and no conflicting inferences can be drawn from the facts. Simply stated, such is not the case here.

The FLSA, enacted in 1983, mandates that employers must pay their employees at least the statutory federal minimum wage and overtime compensation for any employee working longer than 40 hours per week. (29 U.S.C. §§ 206(a)(1), 207(a)(1).) “Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.” (29 U.S.C. § 216(b), ruled unconstitutional on other grounds in *Alden v. Maine* (1999) 527 U.S. 706, 712, [finding unconstitutional provision of FLSA authorizing private actions against states in state courts without their consent].)

Under the FLSA, “employer” is defined to include “any person acting directly or indirectly in the interest of an employer in relation to an employee”

(29 U.S.C. § 203(d).) “The definition of ‘employer’ under the FLSA is not limited by the common law concept of ‘employer,’ and is to be given an expansive interpretation in order to effectuate the FLSA’s broad remedial purposes.” (*Bonnette, supra*, 704 F.2d at p. 1469.) “Above and beyond the plain language, moreover, the remedial nature of the statute further warrants an expansive interpretation of its provisions so that they will have ‘the widest possible impact in the national economy.’ [Citation.]” (*Herman v. RSR Sec. Services Ltd.* (2d Cir. 1999) 172 F.3d 132, 139 (*Herman*).)

As recited by the parties and the trial court, the Ninth Circuit has used a four-factor test to determine if an employee-employer relationship exists under the FLSA: “whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.” (*Gilbreath v. Cutter Biological, Inc.* (9th Cir. 1991) 931 F.2d 1320, 1324.) Whether an employer-employee relationship exists depends upon “the circumstances of the whole activity,” particularly the “economic reality” of the relationship. (*Bonnette, supra*, 704 F.2d at p. 1469.) The *Bonnette* court warned the four factors are merely guidelines. “We agree that this is not a mechanical determination. The four factors . . . provide a useful framework for analysis in the case, but they are not etched in stone and will not be blindly applied. The ultimate determination must be based ‘upon the circumstances of the whole activity.’ [Citation.]” (*Bonnette, supra*, 704 F.2d at p. 1469, quoting *Rutherford Food Corporation v. McComb* (1947) 331 U.S. 722, 730.)

In this case, the trial court cited to the four *Bonnette* factors in making its ruling. We conclude it is unclear whether the *Bonnette* test applies in the context of determining whether a corporate officer is an “employer,” as normally it is applied in cases concerning whether *an entity* is an employer. (See *Baystate Alternative Staffing, Inc. v. Herman* (1st Cir. 1998) 163 F.3d 668, 674-79 [applying *Bonnette* test in deciding whether corporation was “employer” but not in deciding whether corporate officer was]);

see also *Morgan v. MacDonald* (9th Cir. 1994) 41 F.3d 1291, 1293 [“The *Bonnette* factors are properly applied when an individual is clearly employed by one of several entities and the only question is which one”]; *Vanskike v. Peters* (7th Cir. 1992) 974 F.2d 806, 809 [“The *Bonnette* factors, with their emphasis on control over the terms and structure of the employment relationship, are particularly appropriate where (as in *Bonnette* itself) it is clear that some entity is an ‘employer’ and the question is which one”]; but see *Herman, supra*, 172 F.3d at pp. 139-140 [applying *Bonnette* test to determine if corporate officer was “employer”].)

Most federal courts considering whether a corporate officer is an employer under the FLSA, look to whether the officer has operational control or supervision of the employee. “‘The FLSA contemplates there being several simultaneous employers who may be responsible for compliance with the FLSA.’ [Citation.] The Eleventh Circuit has stated, “[t]he overwhelming weight of authority is that a corporate officer with operational control of a corporation’s covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages.” [Citation.] Corporate officers have ‘operational control’ when they are “‘involved in the day-to-day operation or have some direct responsibility for the supervision of the employee.’” [Citation.]” (*Solano v. A Navas Party Production, Inc.* (S.D.Fla. 2010) 728 F.Supp.2d 1334, 1340-1342.)

For example, in *Patel v. Wargo* (11th Cir. 1986) 803 F.2d 632, 637 (*Patel*), the Eleventh Circuit held defendant, who was both the president and vice-president of the company, as well as a director and a principal stockholder was not an employer under the FLSA as a matter of law. The Eleventh Circuit determined, the defendant did not “have operational control of significant aspects of [the company’s] day-to-day functions, including compensation of employees or other matters in relation to an employee.”

(*Id.* at p. 638.) In making this finding, the Eleventh Circuit focused on the actual role defendant played in the company, instead of the theoretical role defendant as the president of the company could have played. (*Ibid.*)

The *Patel* court distinguished the case from “*Donovan v. Agnew* [(1st. Cir. 1984) 712 F.2d 1509, 1514 (*Donovan*), where] the First Circuit found that ‘corporate officers with a significant ownership interest who had operational control of significant aspects of the corporation’s day to day functions, including compensation of employees, and who personally made decisions to continue operations despite financial adversity during the period of nonpayment’ were employers within the meaning of the FLSA.” (*Patel, supra*, 803 F.2d at p. 638.) In contrast, it was undisputed the corporate officer in *Patel* “did not have operational control of significant aspects of [the corporation’s] day-to-day functions, including compensation of employees or other matters ‘in relation to an employee.’” (*Ibid.*)

Likewise, in *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.* (11th Cir. 2008) 515 F.3d 1150, 1162 (*Perez*), the Eleventh Circuit held that a defendant who was an officer and majority shareholder of the company was not an employer under the FLSA as matter of law. The Eleventh Circuit reasoned “[t]here was insufficient evidence for a jury reasonably to conclude that [defendant] was either involved in the day-to-day operation of the [company] or was directly responsible for the supervision of employees during the relevant years.” (*Ibid.*) Instead, the uncontradicted evidence showed it was defendant’s son who operated the company and made all the decisions about hiring, firing, and compensation during the relevant period. (*Ibid.*) The court explained, “‘To be classified as an employer, it is not required that a party have exclusive control of a corporation’s day-to-day functions. The party need only have operational control of *significant aspects* of the corporation’s day to day functions.’ [Citation.] For that reason the fact that a payroll bookkeeper handled the details of calculating hours, overtime, and commissions did not prevent the president, who actually decided how much the employee

compensation would be, from being an employer. ([*Dole v. Elliott Travel & Tours, Inc.* (6th Cir. 1991) 942 F.2d 962, 966 (*Dole*)]; see also *Shultz v. Mack Farland & Sons Roofing Co.* [(5th Cir. 1969)] 413 F.2d 1296, 1299-1300 . . .[finding that the founder, president, and sole investor in two corporations was an employer where he set the management policy for both corporations and exercised authority over the hiring, firing, hours, work assignments, and compensation of supervisory personnel].)” (*Perez, supra*, 515 F.3d at pp. 1161-1162.)

As demonstrated in the above cases, determining whether an individual is an employer within the meaning of the FLSA is a question of law when there are no disputed facts. However, in the case before us, clearly there were genuine issues of fact.¹ Arellano contends the trial court improperly resolved the disputed facts before reaching the legal question of whether there was an employer-employee relationship under the FLSA. We agree this was reversible error.

Generally under California law, “the application of a statutory term to a specific set of facts is a question of fact for the jury, unless the material facts are undisputed and no conflicting inferences can reasonably be drawn from these facts. [Citations.]” (*Islas v. D & G Manufacturing Co., Inc.* (2004) 120 Cal.App.4th 571, 579.) The same generalization holds true in the federal courts. (*Real v. Driscoll Strawberry Associates, Inc.* (9th Cir. 1979) 603 F.2d 748, 755 [workers raised genuine issues of facts as to whether they were employees under the FLSA precluding summary judgment].) Indeed, as articulated in *Ling Nan Zheng v. Liberty Apparel Co., Inc.* (2nd Cir. 2010) 617 F.3d 182, 185, “In the context of a jury trial, the question whether a defendant is a plaintiffs’ joint employer is a mixed question of law and fact.” That court held it is the

¹ We reach this conclusion because the trial court acknowledged it resolved disputed facts before making its ruling. It stated on the record it completed a “mini-bench trial,” during which it acted as the trier of fact by weighing evidence, finding a witness not credible, and resolving disputed questions of fact.

jury's role "to apply the facts bearing on the multi-factor employment inquiry to the legal definition of joint employer" (*Ibid.*)

The trial court's decision to hold a mini-bench trial appears to be based on a misunderstanding of the Ninth Circuit's opinion in *Bonnette*. It interpreted *Bonnette* as requiring the trial court to first decide "subsidiary factual questions" before drawing the ultimate legal conclusion about Vo's employer status. (*Bonnette, supra*, 704 F.2d at p. 1469.) The Ninth Circuit explained there was an issue about the standard of review to be applied to the district court's ruling. It reasoned, "In FLSA cases, although it has not explicitly discussed the standard of review, the Supreme Court appears to treat the ultimate question of whether a party is an 'employer' as a legal issue. [Citations.] [¶] The Eighth Circuit treats this determination as a legal one. [Citation.] The Fifth Circuit also treats this as a legal question, although some earlier cases from that circuit considered it as a factual question. [Citations.] [¶] We agree with the Eighth Circuit and the most recent Fifth Circuit precedent. Although the underlying facts are reviewed under the clearly erroneous standard, the legal effect of those facts—whether appellants are employers within the meaning of the FLSA—is a question of law. [Citation.] The reasons for deferring to the district court's determinations of fact do not apply in this case to the legal conclusion the court draws from those facts." (*Bonnette, supra*, 704 F.2d at p. 1469.)

It is important to realize that in the *Bonnette* case it appears the parties submitted to a bench trial by the district court. The opinion specifies the district court ruled for the workers "[a]fter a trial, and on the basis of the parties' stipulation of facts" (*Bonnette, supra*, 704 F.2d at p. 1468.) There was no mention of a jury. The two stated standards of review relate to the district court's findings *in a bench trial*. The court never suggested a bench trial must replace jury trials in federal wage disputes. And we found nothing in the federal labor wage laws specifically removing the issue from the jury's purview.

As noted above, there were clearly material issues of fact regarding Vo's level of involvement in the business and with the employees. Vo served as a corporate officer and majority shareholder of Castle during the relevant period but claimed he was never fully involved in the day-to-day operations of the company. Arellano presented contrary evidence about Vo's involvement with the workers' schedules and wages. For example, Pulido testified that when Vo became the owner he told the workers they would "get paid regular pay, not overtime. That there would be many hours, but no overtime pay." Pulido stated he saw Vo at the car wash and Vo told him he was doing a good job. Pulido and Arellano testified car wash employees were often asked to clean Vo's real estate office and help at the construction site at Vo's house where they were paid cash. They testified Arellano also drove Vo's daughter to school. It could be inferred from these facts that Vo was more involved in the conditions of the car wash workers' employment than he alleges. It is apparent the court resolved this conflict in Vo's favor by determining Pulido was not a credible witness and by inferring Vo had nothing to do with directing workers to clean his personal office or work as day laborers at his home construction site. We conclude resolution of this material factual issue was for the jury.

Vo suggests a jury would have reached the same result as the trial court because of the evidence Calderon and other managers handled many of the day-to-day problems relating to operation of the corporation and primarily controlled the hours of the employees. We disagree. As noted above, the definition of employer under the FLSA must be afforded a broad interpretation. A jury may find Vo jointly and severally liable with Castle if he participated in business operations of the corporation and controlled the purse strings. (See *Dole, supra*, 942 F.2d at p. 966.) Determining the hours, duties, and pay of the workers was a significant aspect of the car wash business.

III

The judgment is reversed and remanded for further proceedings on the FLSA cause of action only. Appellant shall recover his costs on appeal.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

FYBEL, J.