A PART-TIME COLLEGE INSTRUCTOR SHOULD NOT HAVE BEEN AWARDED UNEMPLOYMENT BENEFITS BECAUSE HE HAD BEEN ASSURED OF EMPLOYMENT IN THE SEMESTER FOLLOWING THE SUMMER BREAK; TWO-JUSTICE DISSENT (THIRD DEPT).

The Third Department, reversing the Unemployment Insurance Appeal Board, over a two-justice dissent, determined claimant, a part-time community college instructor, should not have been awarded unemployment benefits because he had been notified he would be employed in the semester after the summer break. The dissenters argued his employment depended upon course-enrollment which was uncertain:

> Pursuant to Labor Law § 590 (10), "professionals who are employed by educational institutions are precluded from receiving unemployment insurance benefits during the period between two successive academic periods if they have received a reasonable assurance of continued employment" ... . "A reasonable assurance has been interpreted as a representation by the employer that substantially the same economic terms and conditions will continue to apply to the extent that the claimant will receive at least 90% of the earnings received during the first academic period ... . * * *
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> On the record before us, the Board's decision was not supported by substantial evidence ... . inasmuch as claimant received a reasonable assurance of continued employment for the 2018 fall semester such that he was ineligible to receive unemployment insurance benefits ... . Matter of Barnett (Broome County Community Coll.–Commissioner of Labor), 2020 NY Slip Op 02229, Third Dept 4-9-20

LABOR LAW 198-b, WHICH PROHIBITS AN EMPLOYER'S COLLECTING KICKBACKS FROM AN EMPLOYEE, DOES NOT CREATE A PRIVATE RIGHT OF ACTION AGAINST THE EMPLOYER (FOURTH DEPT).

The Fourth Department, reversing Supreme Court, determined Labor Law 198-b, which essentially prohibits an employer from collecting kickbacks from and employee, did not create a private right of action:

> Plaintiff, a former teacher at defendant Utica Academy of Science Charter School (UASCS), commenced this action seeking to recover damages based upon allegations that there in which plaintiff was required to provide donations to [defendant] High Way in the form of illegal kickbacks of his salary under threat of demotion or termination. In his third cause of action, plaintiff alleged that defendants' conduct violated Labor Law § 198-b, and plaintiff sought damages arising from that violation pursuant to Labor Law § 198. ...
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> Although we offer no opinion with respect to whether other provisions within article 6 of the Labor Law afford private rights of action, we agree with High Way that the legislature did not intend to create a private right of action for violations of Labor Law § 198-b ... , inasmuch as " [t]he [l]egislature specifically considered and expressly provided for enforcement mechanisms' in the statute itself" ... . Indeed, by its express terms, a violation of section 198-b constitutes a misdemeanor offense ... . Konkur v Utica Academy of Science Charter Sch., 2020 NY Slip Op 01827, Fourth Dept 3-13-20

DISMISSAL OF THE ACTION SEEKING OVERTIME PAY IN FEDERAL COURT ON THE GROUND NO NOTICE OF CLAIM WAS FILED DID NOT PRECLUDE, PURSUANT TO THE DOCTRINE OF RES JUDICATA, AN ACTION IN SUPREME COURT SEEKING PERMISSION TO FILE A LATE NOTICE OF CLAIM (SECOND DEPT).

The Second Department, reversing Supreme Court, determined the dismissal of the action concerning overtime pay in federal court, on the ground no notice of claim had been filed, did not preclude the action in Supreme Court seeking leave to file a late notice of claim:

> ... [T]he federal court dismissed the New York Labor Law claims for failure to file a timely notice of claim (see County Law § 52; General Municipal Law § 50-e). ...
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> ... [S]o much of the petition as sought leave to deem the late notice of claim timely served nunc pro tunc is not barred by the doctrines of collateral estoppel and res judicata. Although collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue which was raised and decided in a prior action or proceeding ... , the issue of whether the petitioners could obtain leave to deem the late notice of claim timely served nunc pro tunc pursuant to General Municipal Law § 50-e(5) was not

litigated or decided by the 2017 federal order. As the issue was not litigated, the petitioners are not precluded from raising it … .

Res judicata also is inapplicable to so much of the petition as sought leave to deem the late notice of claim timely served nunc pro tunc. "Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding" … . Since the federal court was without jurisdiction to determine whether the petitioners could obtain leave to deem the late notice of claim timely served nunc pro tunc (see General Municipal Law § 50-e[7]), the petitioners are not precluded by the doctrine of res judicata from seeking a determination of this issue … . Matter of Chodkowski v County of Nassau, 2020 NY Slip Op 01058, Second Dept 2-13-20

SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, GRANTED RELIEF NOT REQUESTED IN PLAINTIFFS' UNOPPOSED MOTION AND SHOULD NOT HAVE CONSIDERED EVIDENCE NOT BEFORE IT; THE ORDER SETTLING A CLASS ACTION FOR UNPAID WAGES AND OVERTIME SHOULD NOT HAVE DECLARED INVALID CERTAIN OPT-OUT STATEMENTS WHICH WERE NOT REFERRED TO IN PLAINTIFFS' MOTION AND WERE NOT OTHERWISE BEFORE THE COURT (SECOND DEPT).

The Second Department, reversing Supreme Court in this class action seeking unpaid wages and overtime, determined Supreme Court should not have. sua sponte, declared certain opt-out statements (opting out of the class action settlement) invalid because the issue was not raised by the plaintiff's motion and the opt-out statements were not properly before the court:

> Pursuant to the February 2018 order, all class members who did not opt out were permanently enjoined from asserting, pursuing, and/or seeking to reopen claims that were released pursuant to the settlement agreement. The February 2018 order also contained a handwritten provision declaring that "[t]he opt outs received on 1/26/18 from Lee Litigation Group are deemed invalid as they were dated prior to the Class Notice which was sent 12/27/17, and do not contain the required opt-out language pursuant to the Class-Notice ordered by this court on November 22, 2017." Such relief was not sought in the motion filed by the plaintiffs nor was it contained in the proposed order submitted to the court by the plaintiffs' counsel. …
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> CPLR 908 provides that "[a] class action shall not be dismissed, discontinued, or compromised without the approval of the court," and that "[n]otice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." Contrary to the plaintiffs' contention, the Supreme Court should not have, sua sponte, declared invalid certain opt-out statements that were not part of the plaintiffs' unopposed motion and which relief was not requested in the motion. "[A] court may grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party" … . Here, the court strayed from this principle … . The relief awarded by the court, sua sponte, in the handwritten provision in the February 2018 order is "dramatically unlike" the relief sought by the plaintiffs and was prejudicial to the appellants … . Moreover, the opt-out statements referred to in the February 2018 order were not among the exhibits submitted on the plaintiffs' motion, and therefore were not properly before the court for consideration … . Robinson v Big City Yonkers, Inc., 2020 NY Slip Op 00447, Second Dept 1-22-20

PLAINTIFFS WERE NOT SIGNATORIES TO CONTRACTS WHICH REQUIRED ARBITRATION OF WAGE-UNDERPAYMENT ALLEGATIONS AND PLAINTIFFS DID NOT EXPLOIT THE BENEFITS OF THE CONTRACTS; THEREFORE PLAINTIFFS COULD NOT BE COMPELLED TO ARBITRATE (SECOND DEPT).

The Second Department determined the plaintiffs in this putative class action alleging wage-underpayment in violation of Labor Law article 6 could not be compelled to arbitrate. Plaintiffs were not parties to the contracts with defendants which compelled arbitration and did not seek to exploit the benefits of those contracts:

> … [U]nder limited circumstances nonsignatories may be compelled to arbitrate" … . Under the direct benefits theory of estoppel, a nonsignatory may be compelled to arbitrate where the nonsignatory "knowingly exploits" the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement … . "The benefits must be direct, and the party seeking to compel arbitration must demonstrate that the party seeking to avoid arbitration relies on the terms of the agreement containing the arbitration provision in pursuing its claim" … . Where the benefits are merely "indirect," a nonsignatory cannot be compelled to

arbitrate a claim … . "A benefit is indirect where the nonsignatory exploits the contractual relation of the parties, but not the agreement itself" … .

Here, contrary to the defendants' contention, the plaintiffs should not be compelled to arbitrate based upon the agreements. The record does not establish that the plaintiffs were even aware of the existence of the agreements or that they knowingly exploited the benefits of the agreements … . Arboleda v White Glove Enter. Corp., 2020 NY Slip Op 00098, Second Dept 1-8-20

PLAINTIFF STATED A CAUSE OF ACTION FOR VIOLATION OF LABOR LAW 196-d AGAINST A CORPORATE OFFICER AND A SHAREHOLDER INDIVIDUALLY FOR FAILING TO REMIT SERVICE CHARGES AND GRATUITIES TO THEIR WAITSTAFF EMPLOYEES; REQUEST FOR AN EXTENSION TO SEEK CLASS CERTIFICATION SHOULD HAVE BEEN GRANTED; MOTION TO AMEND THE COMPLAINT SHOULD HAVE BEEN GRANTED; PLAINTIFF'S DISCOVERY DEMANDS WERE PALPABLY IMPROPER (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined: (1) plaintiff banquet server had stated a cause of action against the Cortses (an officer and a shareholder in the corporation, Falkirk Management, sued by plaintiff) individually alleging the Cortses were plaintiff's employers within the meaning of Labor Law 196-d and did not remit service charges and gratuities to the waitstaff; (2) corporate shareholders and officers like the Cortes can be liable for corporate violations of the Labor Law; plaintiff's discovery demands were burdensome or immaterial and therefore improper (CPLR 3101(a)); (3) plaintiff's request for an extension to move for class certification should have been granted (CPLR 901(a); 902); and (4) plaintiff's motion to amend the complaint should have been granted:

> … [T]he complaint alleged that the Cortses exercised control over the "day-to-day operations" of "[the Country Club]," including "authority regarding the pay practices" of Falkirk Management. * * *
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> … [T]he information sought by the plaintiff in her first set of interrogatories and first request for the production of documents was largely burdensome or immaterial, and consequently, palpably improper … . * * *
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> A plaintiff's need to conduct pre-class certification discovery to determine whether the prerequisites of a class action set forth in CPLR 901(a) can be satisfied constitutes good cause for the extension of the 60-day time period fixed by CPLR 902 … . * * *
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> [Re: the motion to amend the complaint:] the defendants alleged no surprise or prejudice … . Moreover, the proposed amendments are not palpably insufficient or patently devoid of merit … . Lomeli v Falkirk Mgt. Corp., 2020 NY Slip Op 00115, Second Dept 1-8-20

STATUTE OF LIMITATIONS TOLLED BY THE FILING OF SIMILAR ACTIONS ALLEGING THE UNDERPAYMENT OF WAGES TO HOME HEALTH AIDES (SECOND DEPT).

The Second Department determined defendants' motion to dismiss these "wage-underpayment" actions as time-barred to the extent they seek damages for underpayment more than six years before the suits were brought was properly denied. The Second Department held that, pursuant to American Pipe & Constr. Co. v Utah, 414 US 538, the statute of limitations was tolled based upon the filing of prior similar actions:

> The plaintiffs, home health aides who were employed by the defendants Americare Certified Special Services, Inc., and Americare, Inc. (hereinafter together Americare), and who often worked 24-hour "live in" shifts, seek to recover damages for underpayment of minimum, overtime, and "spread of hours" wages in violation of the Labor Law and New York State Department of Labor wage orders and regulations. * * *
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> We find that … applying American Pipe tolling under the circumstances, where a court has not previously addressed the impropriety of class certification, is consistent with the policies underlying the tolling doctrine: avoiding multiplicity of suits and vexatious litigation … . Accordingly, we agree with the Supreme Court's denial of the defendants' motion to dismiss … . Badzio v Americare Certified Special Servs., Inc., 2019 NY Slip Op 08389, Second Dept 11-20-19

PLAINTIFF STATED CAUSES OF ACTION STEMMING FROM UNDERPAYMENT OF WAGES FOR MANUAL LABOR PURSUANT TO THE LABOR LAW; PLAINTIFF WAS PAID BI-WEEKLY; THE LABOR LAW REQUIRES PAYMENT WEEKLY (FIRST DEPT)

The First Department determined plaintiff stated causes of action under the Labor Law stemming from her employer's paying her bi-weekly, rather than weekly, for manual labor, in violation of Labor Law 191. Plaintiff sought liquidated damages, interest and attorney's fees pursuant to Labor Law 198 (1-a). The bi-weekly payments were deemed "underpayment" and the Labor Law provided plaintiff with a private right of action:

> … [T]he term underpayment encompasses the instances where an employer violates the frequency requirements of section 191(1)(a) but pays all wages due before the commencement of an action. "In the absence of any controlling statutory definition, we construe words of ordinary import with their usual and commonly understood meaning, and in that connection have regarded dictionary definitions as useful guideposts' in determining the meaning of a word or phrase" … . The word underpayment is the noun for the verb underpay; underpay is defined as "to pay less than what is normal or required" … . The moment that an employer fails to pay wages in compliance with section 191(1)(a), the employer pays less than what is required. …
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> In interpreting the liquidated damages provisions of the Fair Labor Standards Act of 1938 (FLSA), the Supreme Court has held that, regardless of whether an employee has been paid wages owed before the commencement of the action, the statute provides a liquidated damages remedy for the "failure to pay the statutory minimum on time," … Labor Law § 198(1-a), although not identical to the FLSA liquidated damages provision (29 USC § 216[b]), has "no meaningful differences, and both are designed to deter wage-and-hour violations in a manner calculated to compensate the party harmed" … . …
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> Labor Law § 198(1-a) expressly provides a private right of action for a violation of Labor Law § 191. Defendant's position that no private right of action exists is dependent on its erroneous assertion that the late payment of wages is not an underpayment of wages.
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> Furthermore, even if Labor Law § 198 does not expressly authorize a private action for violation of the requirements of Labor Law § 191, a remedy may be implied since plaintiff is one of the class for whose particular benefit the statute was enacted, the recognition of a private right of action would promote the legislative purpose of the statute and the creation of such a right would be consistent with the legislative scheme … . Vega v CM & Assoc. Constr. Mgt., LLC, 2019 NY Slip Op 06459, First Dept 9-10-19

ALTHOUGH THE BETTER PRACTICE IS TO SUBMIT A SEPARATE AFFIRMATION, DEFENSE COUNSEL'S PRIMARY AFFIRMATION IN SUPPORT OF THE MOTION TO COMPEL PLAINTIFF TO SUBMIT TO A VOCATIONAL EXAM DESCRIBED THE GOOD FAITH EFFORTS TO RESOLVE THE ISSUE, THE MOTION TO COMPEL WAS PROPERLY GRANTED (SECOND DEPT).

The Second Department determined Supreme Court was not required to deny defendants' motion to compel plaintiff to submit to a vocational exam because defense counsel did not submit a separate affirmation demonstrating a good faith effort to resolve the dispute. The requirements of 22 NYCRR 202,7 (c) were met in the primary affirmation submitted is support of the motion. The Second Department also determined the plaintiff was properly ordered to submit to a vocational rehabilitation examination in this Labor Law personal injury action:

> … [T]he Supreme Court was not required to deny that branch of the defendants' motion on the ground that the defendant failed to submit an affirmation attesting to a good faith pre-motion attempt to resolve the dispute with the plaintiff. While it may be the better practice for the movant to detail such good faith efforts in an affirmation separate from the affirmation addressing the merits of the motion, under the circumstances of this case, the requirements of 22 NYCRR 202.7(c) were satisfied by the primary affirmation of counsel submitted in support of the motion wherein counsel detailed her efforts to obtain the plaintiff's compliance with the extant court order, including the failure of the plaintiff to appear for a duly noticed examination and the failure of the plaintiff's counsel to respond to correspondence, submitted with the defendants' motion papers, seeking the plaintiff's voluntary cooperation. Thus, the defendants amply demonstrated that the plaintiff was refusing to voluntarily cooperate with a court-ordered examination … . …
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> … [T]he plaintiff was noticed and directed to appear for a medical examination to be conducted by a vocational rehabilitation specialist on February 26, 2018. The plaintiff failed to respond to the notice or appear for the examination. Given the nature of this action and the parties' past discovery disputes, the Supreme Court providently exercised its discretion in granting that branch of the defendants' motion which was pursuant to CPLR 3124 to compel the plaintiff to submit to a vocational rehabilitation examination … . Encalada v Riverside Retail, LLC, 2019 NY Slip Op 06066, Second Dept 8-7-19

COMMISSIONER OF LABOR AND INDUSTRIAL BOARD OF APPEALS COULD NOT PURSUE STATE WAGE CLAIMS ON BEHALF OF CLAIMANTS WHO ARE SUBJECT TO A CLASS ACTION SETTLEMENT IN FEDERAL DISTRICT COURT IN WHICH THE STATE WAGE CLAIMS WERE RELEASED (FIRST DEPT).

The First Department, in a full-fledged opinion by Justice Oing, determined that the Commissioner of Labor and the Industrial Board of Appeals (IBA) were bound by the federal district court's release in a class action alleging failure to pay minimum wages, failure to pay overtime wages and unlawful deductions. The IBA had awarded two members of the class state wage claims together with interest and penalties:

> Procedurally, IBA erred in entertaining this issue. In the final approval order, the District Court clearly and unmistakably retained exclusive and continuing subject matter jurisdiction of the Stewart class action "for the purposes of supervising the implementation, effectuation, enforcement, construction, administration and interpretation of the Settlement Agreement and this Judgment." Undoubtedly, the District Court "has the power to enforce an ongoing order against relitigation so as to protect the integrity of a complex class settlement over which it retained jurisdiction" ... . * * *
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> Because we have determined that claimants have released their dual wage claims, the focus now necessarily concerns the concept of privity, and whether it exists between claimants and respondents [Commissioner of Labor, et al]. We find that the holding in Applied Card Sys., Inc. (11 NY3d at 124) is dispositive of this issue.
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> The Applied Card Court addressed whether the state Attorney General was precluded under the doctrine of res judicata from pursuing on the class members' behalf their restitution claims released in an underlying class action settlement. The Court held that because the Attorney General was pursuing claims identical to the ones that had been released that fact alone established privity ... . The facts herein are virtually indistinguishable from Applied Card. Here, respondents, on behalf of claimants, seek to pursue their released dual wage claims. As such, privity has been established between claimants and respondents. Matter of Silvar v Commissioner of Labor of the State of N.Y., 2019 NY Slip Op 05841, First Dept 7-30-19