SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JULY 30, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Renwick, J.P., Richter, Gesmer, Kern, Singh, JJ.

9135 The People of the State of New York, Ind. 1909/17
Appellant,

-against-

Frederick Jennings,
Defendant-Respondent.

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Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for appellant.

Janet E. Sabel, The Legal Aid Society, New York (Allen Fallek of counsel), for respondent.

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Order, Supreme Court, New York County (Daniel P. Conviser, J.), entered on or about January 3, 2018, which granted defendant's suppression motion, unanimously reversed, on the law, and the motion denied.

At the suppression hearing, Parole Officer Kimberly Williams testified that she was responsible for supervising defendant, who was on postrelease supervision after having served a prison sentence for robbery in the second degree. When defendant was released from prison, he signed a "Certificate of Release to Post-Release Supervision," which set forth various conditions of his release. In that document, he stated that he understood that

"[his] person, residence and property are subject to search and inspection." He also agreed to permit his parole officer to visit him at his residence and to "search and inspect[] . . . [his] person, residence and property." He further agreed that he would not own, possess, or purchase any firearm without his parole officer's permission. When Williams began supervising defendant, she reviewed the form with him, and he stated that he understood the conditions of his release.

In the beginning of 2017, defendant violated the terms of his supervision in numerous ways, including failing to report to Williams, using marijuana, failing to attend a drug treatment program, and violating his curfew. Williams subsequently obtained a parole absconder warrant authorizing her to take defendant into custody. On the evening of May 11, 2017, Williams and a group of other parole officers executed the warrant at an apartment defendant shared with his mother and young siblings. When Williams knocked on the door, defendant's mother answered and let the officers inside, but told them that defendant was not home. Williams and her team decided to search the apartment to look for defendant because from past experience, she knew that parolees often hid in apartments to avoid apprehension.

Williams and her supervisor, Parole Officer Medina, went to defendant's bedroom, knocked on the door and announced themselves

before entering. Inside the bedroom, they saw four men and noticed a strong odor of marijuana. The officers asked the four men to leave the room, and they complied. Although the officers did not see defendant in the bedroom, they decided to search for him in the bedroom's "big" closet because it was "a good hiding place" and Williams had "found people in a closet before." The closet was full of hanging clothes, and there were bags of clothing and shoes on the floor.

The officers split the task of searching the closet, with Williams searching the left half, and Medina searching the right half. To see if defendant was hiding in the closet, Williams separated the hanging clothes "so [she] could open the space and be able to see that area." As she pushed the clothes, she inadvertently felt a "heavy object" in the right outside waist pocket of a goose jacket. Williams knew the jacket belonged to defendant because she had seen him wearing it in the past.

Upon feeling the outside of the jacket, Williams immediately recognized the object as a handgun because she previously had felt the outline of firearms during searches of other homes. Medina also felt the jacket and asked Williams "do you think it's what I think," "mean[ing]" "a firearm," and Williams responded "yes." Medina held open the jacket's pocket, and the officers observed a plastic bag; when they opened the bag, they saw a

handgun. The officers took photographs, and placed the handgun back into the pocket because they had no place to secure it. They then contacted the New York City Police Department, who subsequently arrived with a search warrant and recovered the firearm.

The hearing court granted defendant's motion to suppress the firearm, finding that the recovery of the weapon was improper because it was not substantially related to the officers' duties at the time. The court concluded that the officers' actions tainted the subsequent search warrant, requiring suppression of the weapon. The People now appeal.

Although "a parolee does not surrender his [or her] constitutional rights against unreasonable searches and seizures merely by virtue of being on parole," parolees nevertheless have a "reduced expectation of privacy" (*People v McMillan*, 29 NY3d 145, 148 [2017] [internal quotation marks and citation omitted]; *see Samson v California*, 547 US 843, 852 [2006]). Thus, when evaluating the reasonableness of a parole officer's search, the fact that defendant is on parole "is always relevant and may be critical" (*People v Huntley*, 43 NY2d 175, 181 [1977]). Indeed, conduct that may be unreasonable with respect to an ordinary citizen may be reasonable with respect to a parolee (*id.*).

In *Huntley*, the Court of Appeals "relied on the dual nature

of a parole officer's duties and a parolee's reduced expectation of privacy to hold that a parolee's constitutional right to be secure against unreasonable searches and seizures is not violated when a parole officer conducts a warrantless search that is rationally and reasonably related to the performance of the parole officer's duties" (*McMillan*, 29 NY3d at 148; *see Huntley*, 43 NY2d at 179, 181; *People ex rel. Watson v Commissioner of N. Y. City Dept. of Correction*, 149 AD2d 120, 123 [1st Dept 1989]). "It would not be enough necessarily that there was some rational connection; the particular conduct must also have been substantially related to the performance of duty in the particular circumstances (*Huntley*, 43 NY2d at 181).

Applying this standard, we find that Parole Officer Williams, whose testimony the hearing court credited, acted lawfully in retrieving the firearm from defendant's jacket pocket. While executing a valid parole warrant, and in the course of searching for defendant pursuant to that warrant, Williams inadvertently felt an object, that both she and her supervisor believed to be a gun, in the jacket pocket. Because parolees are not permitted to possess firearms, Williams's discovery meant that defendant was in further violation of the conditions of his supervised release. Thus, the minimally invasive step of retrieving the gun from the pocket was

"rationally and reasonably related to the performance of [her] duty as [defendant's] parole officer" (*Huntley*, 43 NY3d at 179; *see People v Andrews*, 136 AD3d 596, 596 [1st Dept 2016], *lv denied* 27 NY3d 1128 [2016] ["the parole officers were entitled to perform a warrantless search of defendant's apartment since their conduct was rationally and substantially related to the performance of their official duties"]).

The suppression court mistakenly concluded that Officer Williams's removal of the gun from the pocket was not related to her duty at the time because the only purpose of her searching the apartment was to locate defendant, not to find contraband. Although at the time Williams first entered the apartment, she had no plans to search for weapons, her duties included looking for defendant, who could be hiding in the closet. Upon learning that defendant was in possession of a weapon, which was a violation of his parole conditions, Williams was duty-bound to secure it (*see Huntley*, 43 NY2d at 181 [parole officer's duty includes the "obligation to detect and to prevent parole violations for the protection of the public from the commission of further crimes"]; *People v June*, 128 AD3d 1353, 1354 [4th Dept 2015], *lv denied* 26 NY3d 931 [2015] [because parole officers who discovered parole violations during a routine home visit were entitled to "intensify() their search," the handgun they

subsequently found should not have been suppressed]).

The suppression court's narrow view of Officer Williams's duty cannot be reconciled with the Court of Appeals's decision in *Huntley*. In *Huntley*, a parole officer obtained a parole violation warrant for a defendant who had failed to report. Prior to the issuance of the warrant, the officer had no knowledge as to the defendant's connection with narcotics. The parole officer executed the warrant, took the defendant into custody, and conducted a "thorough, exploratory search of his apartment" (43 NY2d at 180), which uncovered drugs and drug paraphernalia. The Court upheld the search as "rationally and reasonably related to the performance of" the parole officer's duty (*id*. at 179). Likewise here, although Williams had no prior knowledge as to defendant's possession of a weapon, upon discovering that information during the course of her search, she was entitled, as part of her duties as a parole officer, to recover it. Indeed, the suppression court's analysis might lead to the absurd result that had defendant been hiding in the closet, Williams still would not have been able to seize the gun because she did not enter the apartment with the express purpose of looking for a weapon.

The suppression court's reliance on *People v Diaz* (81 NY2d 106 [1993]), is misplaced. In *Diaz*, a case that did not involve

a search conducted by a parole officer, the Court of Appeals rejected a "plain touch" exception to the search warrant requirement. In upholding the search here, we do not rely on the "plain touch" doctrine. Instead, we find Officer Williams's conduct was permissible under the entirely separate framework for evaluating the lawfulness of searches by parole officers set forth in *Huntley*.[1]

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 30, 2019

CLERK

[1] It bears noting that the United States Supreme Court, as well as the overwhelming majority of states, have adopted the "plain touch" doctrine (*see e.g. Minnesota v Dickerson*, 508 US 366 [1993]). Although *Diaz* relied, in part, upon state constitutional principles, its reasoning was undermined by the Supreme Court's decision in *Dickerson*. However, because we are required, as an intermediate appellate court, to follow Court of Appeals precedent, we decline the People's invitation to reject *Diaz*.

Sweeny, J.P., Gische, Tom, Mazzarelli, Kern, JJ.

7446 The People of The State of New York, Ind. 1223/11
Respondent,

-against-

Gilroy Johnson,
Defendant-Appellant.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (William Mogulescu, J.), rendered June 10, 2014,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and a decision and order of this Court having been entered on October 23, 2018, holding the appeal in abeyance (165 Ad3d 556 [1st Dept 2018]), and upon the stipulation of the parties hereto dated May 3, 2019,

It is unanimously ordered that the said appeals be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JULY 30, 2019

CLERK

Renwick, J.P., Richter, Gesmer, Kern, Singh, JJ.

9149 Alla Bahnyuk, Index 805273/15
Plaintiff-Respondent,

-against-

Lawrence S. Reed, M.D.,
Defendant-Appellant.

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Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for appellant.

Rosenberg, Minc, Falkoff & Wolff, LLP, New York (Daniel Minc of counsel), for respondent.

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Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about October 12, 2018, which, to the extent appealed from, denied defendant's motion for partial summary judgment dismissing the medical malpractice claim insofar as it is based on defendant's alleged failure to properly aspirate during the subject procedure, unanimously affirmed, without costs.

On March 24, 2015, defendant, a plastic surgeon, performed fat transfers to areas of plaintiff's face during an elective cosmetic procedure. One of the known risks of this procedure is that fat could enter a blood vessel and migrate to the eyes, causing blindness. Upon awaking from anesthesia, plaintiff complained of pain in her left eye and decreased vision. Plaintiff was immediately taken to an ophthalmologist, who

observed fat in some of the vessels of the retina. The next day, plaintiff went to a neuro-ophthalmologist, who determined that plaintiff had "lost vision from a central retinal artery occlusion secondary to fat embolism."

Plaintiff commenced this medical malpractice action alleging that as a result of defendant's negligence in injecting the fat into her face, she suffered permanent loss of vision in her left eye. It is plaintiff's theory that defendant failed to properly aspirate during the administration of fat. At his deposition, defendant explained that aspiration is the technique of drawing back on the syringe prior to the injection of fat to ensure that blood does not comes into the syringe. According to defendant's expert, this withdrawal technique helps to prevent fat from being injected directly into a blood vessel.

In a medical malpractice action, a defendant doctor establishes prima facie entitlement to summary judgment by showing either: (i) "that in treating the plaintiff there was no departure from good and accepted medical practice" or (ii) "that any departure was not the proximate cause of the injuries alleged" (*Roques v Noble*, 73 AD3d 204, 206 [1st Dept 2010]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985).

The motion court correctly denied defendant's motion to dismiss the malpractice claim based on the claimed failure to properly aspirate. Defendant failed to meet his prima facie burden of establishing that he did not depart from accepted medical practice in his method of injecting fat into plaintiff's face.[1] In support of his motion, defendant submitted the transcript of his deposition, an affidavit from a plastic surgery expert, and plaintiff's medical records. In his deposition testimony, defendant described the aspiration technique, but only in general terms, and never specifically stated that he used this technique during plaintiff's procedure. In fact, he stated "[t]hat's the technique that I *think* I used (emphasis added)." Defendant's generalized description of the aspiration technique is insufficient to establish prima facie that he properly used this technique in this case. Notably, defendant did not submit his own affidavit with the motion clarifying this equivocal testimony.

Nor does the expert's affidavit establish that defendant properly aspirated during the procedure, because it is based on

[1] In this appeal, defendant does not argue that a failure to properly aspirate is not a departure from the standard of care.

the same deposition testimony that we find lacking.[2] Finally, the surgery report relied upon by defendant does not remove all issues of fact as to whether he aspirated before each injection of fat. The term "aspirate" is not found in the report, and defendant acknowledged in his deposition that the report does not specifically describe the aspiration technique. Although the report references the "microdroplet multifocal technique," which defendant claims includes aspiration, the record is far from clear on this point, particularly in light of the fact that defendant only stated that he "think[s] [he] used" the aspiration technique.

[2] The expert also opines that plaintiff's loss of vision as a result of fat entering the retinal artery was "purely [a] function of injecting a foreign substance into the face rather than the means by which it is delivered." To the extent the expert means that any failure to aspirate was not the proximate cause of plaintiff's injuries, we find the affidavit to be conclusory and insufficient to establish prima facie a lack of causation.

In view of defendant's failure to meet his prima facie burden, it is unnecessary to determine whether plaintiff raised a triable issue of fact in her opposition papers (*Winegrad*, 64 NY2d at 853).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 30, 2019

CLERK

Sweeny, J.P., Gische, Webber, Kahn, Moulton, JJ.

9163 Odilson Fuentes, Index 450153/14
Plaintiff-Respondent,

-against-

Kwik Realty LLC,
Defendant-Appellant.

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Horing Welikson & Rosen, P.C., Williston Park (Richard T. Walsh of counsel), for appellant.

Northern Manhattan Improvement Corp. Legal Services, New York (Matthew J. Chachère of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen Coin, J.), entered October 19, 2017, amending a prior order, same court and Justice, entered October 17, 2017, which, insofar as appealed from, granted plaintiff partial summary judgment on his claim for rent overcharge and declared that his initial lease was subject to rent stabilization, solely to the extent of referring the matter to a referee or judicial hearing officer to hear and report at the earliest availability, unanimously modified, on the law, to deny plaintiff summary judgment on his claim for rent overcharge, and to vacate the order of reference, and otherwise affirmed, without costs.

Plaintiff Odilson Fuentes is the tenant of apartment 5 in the building located at 520 West 183rd Street in New York, New York, owned by defendant Kwik Realty LLC. The building consists

of 48 residential apartments, and is subject to the Rent Stabilization Law.

By lease dated February 15, 2010 for a one-year term from February 1, 2010 to January 31, 2011, plaintiff agreed to pay defendant a preferential rent of $1,300 per month, although the listed unit charge was $2,200 per month. This lease and the later leases were Blumberg form leases that bore the notation "EXEMPT UNIT" in handwriting. The leases contained no references to rent stabilization and no rent stabilization riders were included with the leases.

By lease dated November 10, 2010 for a one-year term from February 1, 2011 to January 31, 2012, plaintiff agreed to pay defendant a preferential rent of $1,350 per month, although the listed unit charge was again $2,200 per month. By yet another lease dated November 28, 2011 for a one-year term from February 1, 2012 to January 31, 2013, plaintiff agreed to pay defendant a preferential rent of $1,400 per month, although this time, the listed unit charge was now $2,500 per month. Finally, by lease dated December 5, 2012 for a one-year term from February 1, 2013 to January 31, 2014, plaintiff agreed to pay defendant a preferential rent of $1,450 per month, although the listed unit charge was $2,600 per month.

On or about December 5, 2013, defendant sent plaintiff a

letter stating that his lease would not be renewed and demanding that plaintiff vacate the apartment "due to hazardous conditions." Plaintiff continued to pay his monthly rent of $1,450 to defendant.

Plaintiff commenced this action on January 27, 2014, asserting that defendant illegally deregulated the apartment and overcharged his rent. The complaint sought a declaratory judgment declaring plaintiff to be a rent-stabilized tenant and his prior leases to be illegal and fraudulent, and ordering defendant to offer plaintiff a proper, rent-stabilized lease. Plaintiff also sought declaratory and injunctive relief declaring the legal rent to be the last amount validly registered, $628.34, until defendant registered the apartment with the Division of Housing and Community Renewal (DHCR). Plaintiff also sought money damages and punitive damages for the overcharges, including interest, as well as his attorneys' fees under Real Property Law § 234 and the Rent Stabilization Law and Code.

The motion court properly held that plaintiff was entitled to a rent-stabilized lease. Plaintiff, as the first nonstabilized tenant of the apartment, was entitled to the notices required by RSL § 26-504.2(b) and RSC § 2522.5(c)(3). Defendant was required to give written notice to the first tenant of the apartment after the apartment became exempt from rent

stabilization, indicating the last regulated rent, the reason that the apartment is no longer subject to rent stabilization, and how the rent amount is computed (RSC § 2522.5[c][1]). Where an owner fails to provide the rent stabilization rider or requested documentation, "the owner shall not be entitled to collect any adjustments in excess of the rent set forth in the prior lease unless the owner can establish that the rent collected was otherwise legal" (RSC § 2522.5[c][3]).

We find, however, that the motion court improperly awarded summary judgment to plaintiff as to liability and referred the matter to a referee to hear and report on damages, if any. Plaintiff failed to present evidence of rent overcharge four years prior to the commencement of the lawsuit in January 2014. While rental history may be examined beyond four years to determine rent-stabilized status, it may not be used for the purpose of calculating an overcharge (*see East W. Renovating Co. v New York State Div. of Hous. & Community Renewal*, 16 AD3d 166 [1st Dept 2005]). Rent overcharge claims are generally subject to a four-year statute of limitations (Rent Stabilization Law § 26-516[a][2]; *see also* CPLR 213-a). Parties may look back farther than four years, where there is evidence of fraudulent conduct on the part of the landlord (*see Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15

NY3d 358, 362 [2010]). Here, plaintiff failed to set forth sufficient indicia of fraud to warrant consideration of the rental history beyond the four-year statutory period from January 2014 (*see id.* at 366–367). The motion court improperly concluded that defendant's failure to maintain any records of the alleged individual apartment improvements (IAIs) and its failure to provide notices under the Rent Stabilization Code relating to the last legal, regulated rent, were evidence of "an attempt to circumvent the Rent Stabilization Law." While defendant failed to provide notices, defendant registered the apartment with DHCR. And, although, defendant concededly failed to maintain records of the alleged IAIs, there is no requirement under the statute that such records be maintained indefinitely (*see Thornton v Baron*, 5 NY3d 175, 181 [2005], citing *Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 149 [2002]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 30, 2019

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Barbara R. Kapnick
Troy K. Webber
Jeffrey K. Oing
Anil C. Singh, JJ.

8544
Index 153898/17

_____x

In re Kevin J. Silvar, et al.,
Petitioners,

-against-

The Commissioner of Labor
of the State of New York,
et al.,
Respondents.

_____x

Petitioners seek to annul the determination of respondent Industrial Board of Appeals, dated March 1, 2017, which, after a hearing, affirmed respondent Commissioner of Labor's Order to Comply, dated June 17, 2014, directing petitioners to pay certain unpaid wages, interest, liquidated damages, and civil penalties to two of their former employees.

Nixon Peabody LLP, Jericho (Jeffery A. Meyer and David A. Tauster of counsel), for petitioners.

Barbara D. Underwood, Attorney General, New York (ReNika C. Moore, Donya Fernandez, Julie Ulmet and Seth Kupferberg of counsel), for respondents.

OING, J.

The issue in this proceeding is the extent of the binding effect of a federal district court's release, in a class action, of New York State Labor Law wage claims and related civil penalties on respondents, the Commissioner of Labor of the State of New York (Commissioner) and the Industrial Board of Appeals of the State of New York (IBA).

Petitioner corporation, VisionPro Communications Corp., and its owners, petitioners Kevin J. Silvar and Joseph P. Romano, commenced this article 78 proceeding seeking to annul IBA's determination that affirmed the Commissioner's three Orders to Comply, dated June 17, 2014. Those orders directed petitioners to pay in the aggregate $28,761.87 to satisfy two former employees' State wage claims, inclusive of civil penalties. Supreme Court transferred the proceeding to this Court for disposition because resolution of the disputed issues ostensibly involves a substantial evidence review (CPLR 7804[g]).

VisionPro provides sales, service, and cable installation services to consumers of regional cable television companies such as Cablevision, Comcast, and Time Warner. On August 6, 2010, Damion Stewart and Shurwin Thompson, technicians employed by VisionPro to, among other duties, install cable, video, and data lines, commenced a class action on behalf of themselves and

similarly situated individuals against VisionPro, Silvar, and Cablevision Systems Corporation[1] in the United States District Court for the Eastern District of New York (the District Court) (*Stewart v VisionPro Communications Corp.*, No. 10-cv-3688 ED NY [*Stewart*]). Plaintiffs asserted claims under the State's Labor Law for failure to pay minimum wages, failure to pay overtime wages, and unlawful deductions. The class action included VisionPro employees who were technicians, or held comparable positions from August 6, 2004 through June 13, 2011, the date of the District Court's preliminary approval order. There is no dispute as to the composition of the class.

On June 3, 2011, the parties entered into a Joint Stipulation of Class Settlement and Release (settlement). The settlement defined "Settling Parties" to mean defendants (petitioners herein), opt-in plaintiffs, and class representatives on behalf of themselves and all participating class members. Under the terms of the settlement, a class member is required to submit a timely "Election Not to Participate in Settlement" form (opt-out); otherwise the individual will be deemed to be a participating class member, who will be bound by the settlement, including the release of all State wage claims.

[1]Although named as a defendant, Cablevision Systems Corporation is no longer a party to the class action. Also, it is not a party in the article 78 proceeding.

As is relevant to this proceeding, the settlement provides that class representatives, on behalf of themselves and all participating class members, and other bound individuals, will be releasing all wage-related New York Labor Law claims against petitioners accruing on or before the date of the final approval order entered by the District Court.

On June 13, 2011, the District Court issued an order granting preliminary approval of the settlement, which included approval of the "Class Notice." The Class Notice informed class members that they could: (1) participate in the settlement; (2) object to the settlement; or (3) opt-out of the settlement. It also provided that "[i]f you do nothing in response to this Notice, you will not be eligible to receive any proceeds under the Settlement, but you will be deemed to have released all of the Released State Law Claims." The Class Notice specifically directed all class members to respond by September 20, 2011.

After the preliminary approval, the parties retained Simpluris, Inc., the settlement administrator, to effectuate dissemination of the Class Notice and to monitor and record the responses. The original list of putative class members petitioners provided to Simpluris contained 710 names. After accounting for duplicates, an individual who was employed outside the class period, and an employee who was unintentionally

excluded, the final list contained 708 names.

On October 6, 2011, based on Simpluris's application indicating compliance with the Class Notice procedures, the District Court issued a final order that (1) confirmed the certification of the class and collective action, (2) granted final approval of the class action settlement, and (3) entered final judgment. The District Court found that the notice methodology employed by Simpluris "constituted the best notice practicable under the circumstances to all persons within the definition of the Settlement Class," and "fully met the requirements of due process under the United States Constitution and applicable state law." Critically, the District Court found the actual notice to the settlement class was "adequate." Except as to those class members who validly and timely opted-out, the District Court held that the settlement class's wage claims asserted in the class action are dismissed with prejudice. The District Court entered judgment declaring that the settlement class released all wage-related New York Labor Law claims against petitioners arising on or before October 6, 2011, the date of the final approval order (*Stewart* release). The District Court dismissed the class action with prejudice, and, more importantly, retained exclusive and continuing jurisdiction of the class action, the parties, and the settlement class "for the purposes

of supervising the implementation, effectuation, enforcement, construction, administration and interpretation of the Settlement Agreement and this Judgment."

Notwithstanding the *Stewart* release, Kemoy Wright and Xavier Talbot, who were petitioners' employees during the relevant time period and undisputedly class members, filed separate State minimum wage/overtime complaints (State wage claims) with respondents, one on January 11, 2010, before the class action was commenced, and the other on January 31, 2012, after the opt-in period had expired, respectively.

After conducting an investigation, the State Department of Labor (DOL) investigator issued letters to petitioners on August 7, 2013 requiring them to make payment in the amount of $11,022.25 for Talbot's State wage claims, and on August 27, 2013, requiring them to make payment in the amount of $2,407 for Wright's State wage claims. The DOL letters relied on the State's Labor Law to find in claimants' favor. Because petitioners failed to make payments, the Commissioner issued the orders, dated June 17, 2014, requiring petitioners to make the following payments, which now included interest and penalties, on behalf of claimants: $8,263.13 for the State wage claims, and an additional $5,178.90 in interest at 16%, $2,066.12 in liquidated damages, and $8,263.13 as a 100% civil penalty for the State wage

claims; $2,990.59 for unlawful deduction claims, including 16% interest, 25% liquidated damages, and a 100% civil penalty (the State wage claim and unlawful deduction claim collectively referred to as the dual wage claims); and $2,000 in civil penalties for failing to keep accurate payroll records and failing to provide wage statements (penalty claims). Thereafter, petitioners filed with IBA a petition for review of these orders.

Before IBA, petitioners argued that the *Stewart* release barred claimants from pursuing their dual wage claims, and, that even without the release, claimants and respondents are barred by the res judicata effect of the final approval order in the class action. The sole issue entertained by IBA was whether the claimants received the class notice. Appearing before IBA were Eric Springer, a case manager with Simpluris, and Talbot. Although Wright did not testify, Simpluris's records showed it rejected Wright's claim as untimely. Thereafter, IBA issued a Resolution of Decision, dated March 1, 2017, that affirmed the Commissioner's orders.

We now modify the IBA's determination to find that the *Stewart* release incorporated in the District Court's final approval order bars Talbot, Wright, and respondents from pursuing Talbot's and Wright's dual wage claims. We, however, confirm IBA's penalty assessment for the non-wage penalty claims. For

the reasons that follow, our analysis does not require review under the substantial evidence standard, but, instead, involves a question of law (CPLR 7804[g]).

IBA recognized that there is no dispute that the *Stewart* release is legally enforceable, and that claimants' dual wage claims before DOL are identical to the ones at issue in the release. Significantly, IBA also recognized that

> "[c]laim preclusion bars successive litigation based upon the 'same transaction or series of connected transactions' if there is a judgment on the merits rendered by a court of competent jurisdiction, and the party against whom the doctrine is invoked was a party to the previous action, or in 'privity' with a party who was ...."

Thus, focusing on the concept of privity, IBA framed the issue as one concerning the adequacy of the class notice methodology. Based on the evidence proffered at the hearing, IBA rejected petitioners' argument that Talbot's and Wright's dual wage claims were released under the *Stewart* release because IBA found that the evidence demonstrated that the procedures for class notice were not adequate. In that regard, IBA determined that petitioners "failed to meet their burden of showing with reliable and credible evidence that [they] acted with reasonable diligence to send timely individual notice to claimants Talbot and Wright." Accordingly, IBA found that "[Talbot and Wright] were not

adequately represented by or in privity with the *Stewart* class," and that "the final resolution of the *Stewart* matter does not preclude them from pursuing their claims apart from the *Stewart* litigation."

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" (*In re American Express Fin. Advisors Sec. Litig.*, 672 F3d 113, 134 [2d Cir 2011], quoting *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 261 F 3d 355, 367-368 [3d Cir 2001]; *Fotheringham v Riversource Life Ins. Co. of N.Y.*, 148 AD3d 1519, 1521 [4th Dept 2017], *appeal dismissed* 29 NY3d 1019, *lv denied*, 29 NY3d 918 [2017]). Indeed, nowhere in IBA's decision does it proffer any legal basis as to why it should disregard the District Court's mandate of exclusive and continuing jurisdiction over the *Stewart* class action. The consequence is two inconsistent rulings on an issue within the

District Court's exclusive and continuing jurisdiction, an inconsistency that was avoidable. The proper course to challenge the District Court's findings of adequacy of the class notice would have been by direct appeal (*see e.g. Matter of Vidurek v New York Supreme Ct., Albany County*, 108 AD3d 896, 897 [3d Dept 2013]; *Matter of Raysor v Stern*, 68 AD2d 786, 788 [4th Dept 1979], *lv denied* 48 NY2d 605 [1979], *cert denied* 446 US 942 [1980]). That said, the bedrock of our jurisprudence is grounded in a simple, unassailable, legal principle -- where a court has jurisdiction of the parties and the subject matter in a particular case, its judgment, unless reversed or annulled in a proper proceeding, is not open to attack or impeachment by parties or privies in any collateral action or proceeding. Under these circumstances, we find that the District Court is the sole forum to resolve the question of adequacy of the class notice, and IBA committed clear error by entertaining this discrete issue in a collateral proceeding (*see Wyly v Milberg Weiss Bershad & Schulman, LLP*, 12 NY3d 400, 413 [2009] [declining to second guess federal court's judgments not an abuse of discretion given it supervised the class actions and retained jurisdiction to protect the interests of absent class members]; *Fotheringham*, 148 AD3d at 1521).

Even if IBA were not procedurally barred, it had no legal

basis to find that the methodology undertaken to disseminate the class notice was not adequate. That finding is in direct conflict with the District Court's determination that such notice methodology "constituted the best notice practicable under the circumstances to all persons within the definition of the Settlement Class," "fully met the requirements of due process under the United States Constitution and applicable state law," and, significantly, was "adequate." Clearly, the District Court in arriving at its determination understood and considered the notion that "[i]ndividual notice of class proceedings is not meant to guarantee that every member entitled to individual notice receives such notice" (*Williams v Marvin Windows & Doors*, 15 AD3d 393, 395-396 [2d Dept 2005], quoting *Reppert v Marvin Lumber & Cedar Co., Inc.*, 359 F3d 53, 56 [1st Cir 2004]), and recognized in making this determination that the "method of notice ordered [had to be] reasonably calculated to reach [class members], and diligent efforts [had to be] made to comply with the prescribed method [of notice]" (*Williams*, 15 AD3d at 396; *see also Gonzalez v City of New* York, 396 F Supp 2d 411, 417 [SD NY 2005] ["actual notice (of the class settlement) is not required for individuals to be deemed members of a class certified under (Federal) Rule 23(b)(3) if proper notification procedures were followed"]). Rather, the "adequacy of notice to the class as a

whole determines the binding effect of a class settlement on an individual class member" (*id.* at 418 [internal quotation marks omitted]). The IBA fails to set forth in its analysis any legal basis to challenge the District Court's determination that the class notice was adequate. Absent any such basis to support this starkly different result, IBA's finding of inadequacy has no legal footing and cannot stand.

Accordingly, we annul the IBA's finding that privity did not exist with respect to these claimants because the class notice was not adequate. As such, Talbot and Wright are bound by the *Stewart* release, and their dual wage claims have been released.

The question that remains is whether as a result of the *Stewart* release respondents are barred from pursuing the released dual wage claims on claimants' behalf. In its decision, IBA held that "[b]ecause we find . . . that claim preclusion does not bar claimants from pursuing their claims under the Labor Law, we need not address whether the Commissioner, who was not a party to the *Stewart* litigation, is precluded under the terms of *Applied Card Systems, Inc.* (11 NY3d 105), from, consistent with her statutory duty, pursuing claims on behalf of claimants Talbot and Wright." Although the IBA did not address this issue, respondents urge that even if claimants are barred from pursuing their dual wage claims before DOL, the Commissioner may still pursue these claims

on their behalf against petitioners. Stated differently, does the doctrine of res judicata or claim preclusion bar respondents' efforts on Talbot's and Wright's behalf? Although IBA did not address this issue in its decision, we undertake to resolve it because its resolution is a question of law (*see Brown v Sears Roebuck & Co.*, 297 AD2d 205, 210 [1st Dept 2002] [where there is no real dispute as to the facts or the proper inferences to be drawn from such facts the issue is a question of law to be decided by the court]).

Res judicata or claim preclusion precludes successive litigation based on the same transaction or series of connected transactions if there is a valid and enforceable judgment and the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party (*Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 122 [2008], *cert denied* 555 US 1136 [2009]). Further, res judicata "applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation" (*Matter of Hunter*, 4 NY3d 260, 269 [2005]). 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. We find that the holding in *Applied Card Sys., Inc.* (11 NY3d at 124) is dispositive of this issue.

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 (*id.* at 124). 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.

Respondents, however, argue that privity must yield to public policy, namely, that pursuit of the dual wage claims has less to do with pecuniary interests, and more to do with deterring wage violations under the Labor Law. Again, *Applied Card* is dispositive. There, the Attorney General argued that privity should yield to the greater good:

> "[The Attorney General's] interest in seeking restitution on those consumers' behalf is far broader than their individual pecuniary concerns. Rather, he seeks restitution as a means of deterring future fraud, deception, and false advertising and restoring the public's trust in the consumer credit marketplace."

(*id.* at 122-123). In urging the Court to accept his argument,

the Attorney General also noted that

> "his interest in protecting the public was not represented at all in the [class action] case. Indeed, he points out that he was not provided with notice of the settlement or an opportunity to object to it"

(*id.* at 124). The Court rejected the Attorney General's public policy plea and lack of representation argument, and reaffirmed its commitment to its "traditional solicitude" towards class action settlement agreements. In so doing, the Court restated the core principle of res judicata, "a party's right to rely upon the finality of the results of previous litigation" (*id.* at 124).

Accordingly, we hold that the doctrine of res judicata bars respondents from pursuing on claimants' behalf their released dual wage claims.

Respondents argue that even if they are precluded from pursuing these claims they may still pursue civil penalties against petitioners based on these claims. In making this argument, respondents rely on *Applied Card*. Their reliance is misplaced. In *Applied Card*, the Attorney General commenced an action to, among other things, recover civil penalties under General Business Law § 350-d "for 'each' violation of § 349 and § 350, which 'shall accrue to the state of New York'" (*Matter of People v Applied Card Sys. Inc.*, 2006 NY Misc LEXIS 9527, *23 [Sup Ct, Albany County 2006]). Here, unlike *Applied Card*,

respondents are not asserting General Business Law claims, but only put forth Labor Law § 218 as the basis for the Commissioner's authority to recover penalties for violation of the Labor Law. As for the wage-related penalties, section 218 provides:

> "In addition to directing payment of wages, benefits or wage supplements found to be due, and liquidated damages in the amount of one hundred percent of unpaid wages, such order, if issued to an employer who previously has been found in violation of those provisions, rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional sum as a civil penalty in an amount not to exceed double the total amount of wages, benefits, or wage supplements found to be due."

Thus, any penalty related to a wage claim must be based on, and in addition to, an order directing payment on such claim. We have determined that respondents are precluded from pursuing claimants' dual wage claims on their behalf. As such, without a viable wage claim, respondents cannot seek to impose on petitioners civil penalties based on section 218.

Respondents, however, are not precluded from recovering $2,000 civil penalties based on violations of Labor Law § 661, which permits assessment for failure to keep accurate payroll records or furnish wage statements. These violations are not related to claimants' released dual wage claims, and Labor Law §

661 does not require a viable wage claim to support imposition of such civil penalties (*see e.g. Wyly v Milberg Weiss Bershad & Schulman*, LLP, 12 NY3d at 408 [permissible to pursue claims not released in class action in another forum]).

Accordingly, the determination of respondent Industrial Board of Appeals, dated March 1, 2017, which, after a hearing, affirmed respondent Commissioner of Labor's Order to Comply, dated June 17, 2014, directing petitioners to pay certain unpaid wages, interest, liquidated damages, and civil penalties to two of their former employees should be modified, on the law, to deny the Order to Comply insofar as it directed petitioners to pay the unpaid wages, interest and liquidated damages, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Shlomo Hagler, J.], entered September 11, 2017), otherwise disposed of by confirming the remainder of the determination challenged, without costs.

All concur.

Determination of respondent Industrial Board of Appeals, dated March 1, 2017, modified, on the law, to deny the Order to Comply insofar as it directed petitioners to pay the unpaid wages, interest and liquidated damages, and the proceeding

brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Shlomo Hagler, J.], entered September 11, 2017), otherwise disposed of by confirming the remainder of the determination challenged, without costs.

Opinion by Oing, J. All concur.

Friedman, J.P., Kapnick, Webber, Oing, Singh, JJ.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JULY 30, 2019

CLERK