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June 7, 2020

John P. Asiello, Chief Clerk and Legal Counsel
New York State Court of Appeals - Clerk's Office
20 Eagle Street
Albany, New York 12207

Re: **Matter of Amanda K. Vignone (Peregrine Enterprises, Inc. d/b/s Rick's Cabaret- Commissioner of Labor), 182 AD3d 870 (3d Dept., 2020)**

Dear Mr. Asiello,

We take this opportunity to comment on the Court's subject matter jurisdiction regarding the appeal filed by Peregrine Enterprises, Inc. We request that the Court decline to exercise jurisdiction.

While this issue was raised in motions made at the Appellate Division level, it was not raised before the Unemployment Insurance Appeal Board. This Court held, in its decision rendered in ***In Re Shannon B.***, 70 NY2d 458, 462 (1987), that unless the constitutionality of the statute was raised in proceedings held prior to Appellate Division review, it has not been preserved for review by the Court of Appeals. Accordingly, Peregrine's appeal as of right must be dismissed on the ground that no substantial constitutional question is directly related.

Further, even where a constitutional question is an issue, an appeal as of right does not lie if the order appealed from was, or could have been, based upon some ground other than the construction of the Constitution. ***Board of Education v Wieder***, 72 NY2d 174 (1988) This court held in ***Wieder*** that "To support an appeal as of right on

this basis (CPLR 5601 (b) (1)), appellants must demonstrate that the ground for appeal is directly and primarily an issue determinable only by our construction of the Constitution of the state or of the United States." 72 NY2d 174, 182 (citations and internal quotations omitted).

Although the Appellate Division decided this case solely on the basis that the employer's failure to pay the penalty due under Labor Law § 625 precluded consideration of its appeal, there was ample precedent supporting an affirmance of the Appeal Board's decision. Substantial evidence existed supporting the Appeal Board's decision that an employment relationship existed between the claimant and her employer. This employer had lost a factually similar case in Federal Court, where the same Entertainer Guidelines were considered by Federal Court "to reflect the exercise of tight control, indeed, control fairly described as micromanagement, by Rick's NY, over the dancers." ***Hart v Rick's Cabaret International, Inc.***, 967 F. Supp. 2d 901, 914 (S.D.N.Y. 2013) The Appellate Divisiόn easily could have upheld the Appeal Board on the merits of the case, rather than based on the employer's failure to satisfy to a condition precedent. We believe that the employer has not sustained its burden of showing that constitutionality of the statute is the only ground on which the decision stands and that the decision was not, nor that it could have been, based upon some other ground. ***Winters v Lavine***, 574 F. 2d 46, 61-62 (2nd Cir., 1978)

The employer also argues, in its submission dated June 4, 2020, that "this is a novel question that has not been directly addressed by the Supreme Court of the United States or this Court." (page 4) The Appellate Division did not consider the employer's arguments as to Labor Law § 625 to "directly" present a constitutional issue. Instead, it held that "any change to the jurisdictional prerequisite prescribed in Labor Law § 625 is a matter properly addressed by the legislature (See NY Const. art. VI § 30)." The Appellate Division did not declare Labor Law § 625 unconstitutional, but rather considered that it was "deprived of jurisdiction over these appeals" due to the employer's failure to pay the amount required by the Board or obtain an undertaking in that amount. The Court of Appeals is therefore not required to entertain this appeal.

For the reasons set forth hereinabove, it is the claimant's position that the employer has not met the jurisdictional prerequisites of CPLR § 5601 (b)(1), and this court should not entertain its appeal.

Very truly yours,

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