

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed  
by the Court of Appeals Clerk's Office

**July 8 through July 14, 2011**

Each week, the Clerk's Office prepares a list of recently-filed appeals, indicating short title, jurisdictional predicate, subject matter and key issues. Some of these appeals may not reach decision on the merits because of dismissal, on motion or sua sponte, or because the parties stipulate to withdrawal. Some appeals may be selected for review pursuant to the alternative procedure of Rule 500.11. For those appeals that proceed to briefing in the normal course, the briefing schedule generally will be: appellant's brief to be filed within 60 days after the appeal was taken; respondent's brief to be filed within 45 days after the due date for the filing of appellant's brief; and a reply brief, if any, to be filed within 15 days after the due date for the filing of respondent's brief.

**The Court welcomes motions for amicus curiae participation from those qualified and interested in the subject matter of these newly filed appeals. Please refer to Rule 500.23 and direct any questions to the Clerk's Office.**

BERNSTEIN (JOSHUA), MATTER OF:

2<sup>nd</sup> Dept. App. Div. order of 5/9/11; denial of motion; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution;  
CHALLENGE TO APPELLATE DIVISION ORDER DENYING MOTION FOR A "FINAL ORDER" ADDRESSING CONTENTION THAT THE ORDER DISBARRING ATTORNEY DID NOT ADJUDICATE HIS RETAINING LIEN DEFENSE;  
App. Div. denied disbarred attorney's motion for a "final order" addressing his contention that the order of disbarment did not "adjudicate [his] retaining lien defense."

CHAZON, LLC v MAUGENEST:

2<sup>ND</sup> Dept. App. Div. order of 2/15/11; affirmance; leave to appeal granted by Court of Appeals, 6/30/11;  
LANDLORD AND TENANT - LOFT LAW - EJECTMENT - WHETHER LANDLORD CAN MAINTAIN AN EJECTMENT ACTION AGAINST TENANT PROTECTED BY MULTIPLE DWELLING LAW ARTICLE 7-C (THE LOFT LAW), EVEN THOUGH LANDLORD HAS NOT COMPLIED WITH MULTIPLE DWELLING LAW § 285(1) REGARDING MINIMUM HOUSING MAINTENANCE STANDARDS;  
Supreme Court, Kings County, among other things, granted that branch of plaintiff's motion which was for summary judgment on the cause of action for ejectment, denied that branch of defendant's cross motion which was for summary judgment dismissing the complaint, and directed defendant to vacate the subject premises; App. Div. affirmed.

COLVILLE (DELROY), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 10/5/10; affirmance; leave to appeal granted by Read, J., 6/27/11;  
CRIMES - JURORS - JURY INSTRUCTIONS - COUNSEL'S WITHDRAWAL, IN DEFERENCE TO CLIENT'S WISHES, OF REQUEST TO CHARGE MANSLAUGHTER IN THE FIRST AND SECOND DEGREES AS LESSER INCLUDED OFFENSES TO MURDER IN THE SECOND DEGREE - WHETHER THE DECISION TO SUBMIT LESSER INCLUDED OFFENSES TO THE JURY IS A STRATEGIC DECISION TO BE MADE BY COUNSEL OR A FUNDAMENTAL DECISION TO BE MADE BY THE CLIENT - EFFECTIVE ASSISTANCE OF COUNSEL; JUSTIFICATION DEFENSE - DUTY TO RETREAT;  
Supreme Court, Kings County convicted defendant of murder in the second degree, and imposed sentence; App. Div. affirmed.

FLOYD v THE STATE OF NEW YORK DIVISION OF HUMAN RIGHTS:

1<sup>ST</sup> Dept. App. Div. orders of 9/29/09, 11/12/09, 4/27/10, 7/6/10 and 10/19/10; sua sponte examination whether the appeal was timely taken, appellant is an aggrieved party with respect to the 9/29/09 order, the orders appealed from finally determine the action within the meaning of the Constitution and, if so, whether there is any jurisdictional predicate for an appeal as of right;  
APPEAL - CHALLENGE TO APPELLATE DIVISION ORDERS REGARDING APPEAL TAKEN FROM A COURT OF CLAIMS ORDER DISMISSING A CLAIM AS UNTIMELY;  
Court of Claims dismissed claim as untimely filed; App. Div. (1) granted motion for enlargement of time to perfect appeal to the extent of "enlarging the time in which to perfect the appeal to the January 2010 Term, with no further enlargements to be granted" (9/29/09 order), (2) denied claimant's motion for the assignment of counsel (11/12/09 order), (3) denied motion for an enlargement of time in which to perfect the appeal and dismissed the appeal sua sponte (4/27/10 order), (4) denied claimant's motion for reargument of the 4/27/10 order (7/6/10 order) and (5) denied claimant's motion to reinstate the appeal (10/19/10 order).

GAUSE (DERRICK), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 2/10/11; affirmance; leave to appeal granted by Lippman, Ch.J., 6/29/11;  
CRIMES - DOUBLE JEOPARDY - WHETHER DOUBLE JEOPARDY CLAUSES OF STATE AND FEDERAL CONSTITUTIONS BAR APPELLANT'S FURTHER PROSECUTION FOR INTENTIONAL MURDER (NOT CONSIDERED BY THE FIRST JURY) AFTER APPELLATE DIVISION DISMISSED THE DEPRAVED INDIFFERENCE MURDER COUNT UPON WHICH HE WAS CONVICTED; COLLATERAL ESTOPPEL - ACCOMPLICE LIABILITY; EFFECTIVE ASSISTANCE OF COUNSEL; Monroe County Court convicted defendant, upon a jury verdict, of murder in the second degree; App. Div. affirmed.

HALTER (ROBERT), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 2/18/11; affirmance; leave to appeal granted by Pigott, J., 6/24/11;  
CRIMES - EVIDENCE - VICTIM'S PRIOR SEXUAL CONDUCT - APPLICATION OF RAPE SHIELD LAW (CPL 60.42) - ALLEGED DENIAL OF DEFENDANT'S RIGHTS TO CONFRONT ACCUSER AND PRESENT A DEFENSE;  
Monroe County Court convicted defendant, upon a nonjury verdict, of sexual abuse in the first degree, rape in the second degree, criminal sexual act in the second degree, and endangering the welfare of a child; App. Div. affirmed.

MAKI v BASSETT HEALTHCARE et al.:

3<sup>RD</sup> Dept. App. Div. orders of 6/9/11 and 6/8/11 (two orders); affirmance; sua sponte examination whether (1) the 6/8/11 App. Div. order denying plaintiff's motion for a declaratory judgment, the 6/8/11 App. Div. order denying plaintiff's motion for summary judgment and for bifurcation, and so much of the 6/9/11 App. Div. order as affirms the 11/18/10 Supreme Court order that denied plaintiff's motion for, among other things, recusal, finally determine the action within the meaning of the Constitution; and (2) the two App. Div. orders entered 6/8/11 and the 6/9/11 App. Div. order involve a substantial constitutional question to support an appeal as of right;  
JUDGMENTS - SUMMARY JUDGMENT - CHALLENGE TO APPELLATE DIVISION ORDER THAT AFFIRMED THE GRANT OF SUMMARY JUDGMENT DISMISSING THE COMPLAINT AGAINST DEFENDANTS IN AN ACTION ALLEGING A VARIETY OF NEGLIGENCE-BASED AND INTENTIONAL TORTS, AND THAT AFFIRMED THE DENIAL OF PLAINTIFF'S MOTION FOR, AMONG OTHER THINGS, RECUSAL; CHALLENGE TO APPELLATE DIVISION ORDERS DENYING MOTIONS FOR SUMMARY JUDGMENT, A DECLARATORY JUDGMENT AND BIFURCATION;  
Supreme Court, Delaware County, among other things, granted defendants' cross motion for summary judgment dismissing the complaint in this action alleging a variety of negligence-based and intentional torts stemming from medical treatment rendered by defendants following a motor vehicle accident and, in a separate order, denied plaintiff's motion for, among other things, recusal; App. Div., in two separate orders, denied plaintiff's motions for summary judgment on negligence and for a declaratory judgment; thereafter, App. Div. affirmed both Supreme Court orders.

NASH, MATTER OF v BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK:

1<sup>ST</sup> Dept. App. Div. order of 3/8/11; affirmance; leave to appeal granted by Court of Appeals, 6/23/11;

LIMITATION OF ACTIONS - FOUR-MONTH STATUTE OF LIMITATIONS - CHALLENGE TO TERMINATION OF PROBATIONARY EMPLOYMENT - TIMELINESS OF CHALLENGE - WHETHER A CPLR ARTICLE 78 PETITION CHALLENGING THE TERMINATION OF PROBATIONARY EMPLOYMENT ON SUBSTANTIVE GROUNDS IS TIME-BARRED WHERE IT IS NOT COMMENCED WITHIN FOUR MONTHS AFTER THE EFFECTIVE DATE OF TERMINATION BUT IS COMMENCED WITHIN FOUR MONTHS AFTER THE PETITIONER EXHAUSTS AVAILABLE ADMINISTRATIVE REMEDIES;

Supreme Court, New York County denied a CPLR article 78 petition seeking to annul respondents' determination terminating petitioner's probationary employment as a school secretary and to direct respondents to reinstate her employment with back pay and interest, and granted respondents' cross motion to dismiss the proceeding; App. Div. affirmed.

STATE OF NEW YORK, MATTER OF v FLAGG:

4<sup>TH</sup> Dept. App. Div. order of 10/1/10; reversal; leave to appeal granted by Court of Appeals, 6/28/11;

CRIMES - SEX OFFENDERS - CIVIL COMMITMENT OR SUPERVISION - REVOCATION OF STRICT AND INTENSIVE SUPERVISION AND TREATMENT (SIST) WHERE SEX OFFENDER VIOLATES CONDITIONS OF SIST WHERE VIOLATIONS DO NOT CONSTITUTE SEXUAL MISCONDUCT - CHALLENGE TO APPELLATE DIVISION ORDER THAT, AMONG OTHER THINGS, DETERMINED THAT STATE ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT SEX OFFENDER WAS A DANGEROUS SEX OFFENDER REQUIRING CONFINEMENT - ALLEGED DEPRIVATION OF DUE PROCESS;

Supreme Court, Onondaga County directed that respondent be released from detention at Onondaga County Correctional Facility under the oversight of the New York State Division of Parole, subject to conditions of strict and intensive supervision and treatment; App. Div. reversed, granted the petitions to the extent they seek a determination that respondent in the proceeding is a dangerous sex offender requiring confinement and an order for confinement pursuant to Mental Hygiene Law § 10.11(d).

STATE OF NEW YORK ex rel. GRUPP AND MOLL v DHL EXPRESS (USA), INC., et al.:

4<sup>TH</sup> Dept. App. Div. order of 4/1/11; reversal; leave to appeal granted by Court of Appeals, 6/28/11;

STATUTES - FEDERAL PREEMPTION - WHETHER CLAIMS UNDER NEW YORK FALSE CLAIMS ACT (STATE FINANCE LAW § 187 et seq.) ARE PREEMPTED BY THE AIRLINE DEREGULATION ACT OF 1978 AND THE FEDERAL AVIATION ADMINISTRATION AUTHORIZATION ACT - CLAIMS ALLEGING, AMONG OTHER THINGS, THAT DEFENDANTS SUBMITTED TO THE STATE CLAIMS FOR DELIVERY SERVICES THAT FALSELY AND FRAUDULENTLY (1) MISREPRESENTED THAT CERTAIN PACKAGES WERE DELIVERED BY AIR WHEN THEY WERE ACTUALLY DELIVERED BY GROUND TRANSPORTATION, (2)

IMPOSED JET FUEL SURCHARGES FOR PACKAGES THAT WERE DELIVERED SOLELY BY GROUND TRANSPORTATION, AND (3) IMPOSED DIESEL FUEL SURCHARGES BUT PASSED ALONG ONLY A SMALL PORTION OF SUCH SURCHARGES TO THE INDEPENDENT CONTRACTORS WHO BOUGHT THE FUEL; Supreme Court, Erie County denied defendants' motion to dismiss the amended complaint; App. Div. reversed, granted the motion and dismissed the amended complaint.

VAELLO, MATTER OF v CONNOLLY:

3<sup>RD</sup> Dept. App. Div. judgment of 5/19/11; confirmation of determination; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right pursuant to CPLR 5601(b)(1); PRISONS AND PRISONERS - DISCIPLINE OF INMATES - CHALLENGE TO APPELLATE DIVISION ORDER CONFIRMING DETERMINATION FINDING PETITIONER GUILTY OF VIOLATING CERTAIN PRISON DISCIPLINARY RULES; App. Div. confirmed a determination of the Commissioner of Correctional Services that found petitioner guilty of stalking and refusing a direct order, in violation of certain prison disciplinary rules, and dismissed the petition.

VELEZ (JESSIE), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 12/14/10; reversal; leave to appeal granted by Read, J., 6/23/11; CRIMES - SENTENCE - RESENTENCE - ADDITION OF POST-RELEASE SUPERVISION TO SENTENCE AFTER DEFENDANT'S RELEASE FROM PRISON - RESENTENCE PROCESS COMMENCED BEFORE DEFENDANT'S RELEASE FROM PRISON - DEFENDANT DID NOT OBJECT TO COURT ADJOURNMENTS; DOUBLE JEOPARDY - WAIVER; Supreme Court, Bronx County resentenced defendant to a term of 9 years with 5 years' post-release supervision; App. Div. reversed, vacated resentence and reinstated the original sentence without post-release supervision.