

COURT OF APPEALS NEW FILINGS

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

**February 24, 2012 through March 1, 2012**

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.**

BITCHATCHI, MATTER OF v BOARD OF TRUSTEES OF THE NEW YORK CITY POLICE DEPARTMENT PENSION FUND, ARTICLE II:

1<sup>ST</sup> Dept. App. Div. order of 7/7/11; affirmance; leave to appeal granted by Court of Appeals, 2/21/12;

CIVIL SERVICE - RETIREMENT AND PENSION BENEFITS - ACCIDENTAL DISABILITY RETIREMENT (ADR) - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT SUPREME COURT PROPERLY DETERMINED THAT THE AGENCY FAILED TO REBUT WITH CREDIBLE EVIDENCE THE STATUTORY PRESUMPTION THAT PETITIONER'S DISABILITY WAS RELATED TO HER SERVICE AS A POLICE OFFICER AT THE WORLD TRADE CENTER SITE FOLLOWING SEPTEMBER 11, 2001;

Supreme Court, New York County granted a CPLR article 78 petition seeking, among other things, to annul respondent's determination denying petitioner accident disability retirement (ADR) benefits, concluded that petitioner was entitled to ADR benefits as a matter of law, and remanded to respondent to grant the petitioner an ADR pension and to recompute petitioner's retirement allowance; App. Div. affirmed.

LANDON &c. v KROLL LABORATORY SPECIALISTS, INC.:

2<sup>ND</sup> Dept. App. Div. order of 11/22/11; reversal; leave to appeal granted by App. Div., 2/16/12;

NEGLIGENCE - DUTY - WHETHER ALLEGATIONS THAT A DRUG TESTING LABORATORY NEGLIGENTLY TESTED THE PLAINTIFF'S BIOLOGICAL SPECIMEN, WHICH RESULTED IN THE EXTENSION OF PLAINTIFF'S PROBATION, AMONG OTHER THINGS, STATE A CAUSE OF ACTION IN TORT WHERE NO FORMAL CONTRACTUAL RELATIONSHIP EXISTED BETWEEN THE PLAINTIFF AND THE LABORATORY;

Supreme Court, Orange County granted defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(7); App. Div. reversed and denied that branch of the defendant's motion which was to dismiss the complaint pursuant to CPLR 3211(a)(7).

M.G.M. INSULATION, INC., et al., MATTER OF v GARDNER, &c.:

3<sup>RD</sup> Dept. App. Div. judgment of 7/21/11; confirmation of determination; leave to appeal granted by Court of Appeals, 2/14/12;

LABOR - PREVAILING RATE OF WAGES - WHETHER CONSTRUCTION OF FIRE STATION FOR VOLUNTEER FIRE DEPARTMENT CONSTITUTES A PUBLIC WORKS PROJECT - DETERMINATION THAT VOLUNTEER FIRE DEPARTMENT WAS FUNCTIONAL EQUIVALENT OF MUNICIPAL CORPORATION - AGENCY'S AUTHORITY TO APPLY FUNCTIONAL EQUIVALENCY TEST - APPLICABLE STANDARD OF REVIEW IN CPLR ARTICLE 78 PROCEEDING CHALLENGING AGENCY'S FUNCTIONAL EQUIVALENCY DETERMINATION - SUBSTANTIAL EVIDENCE;

App. Div. judgment confirmed respondent's determination finding that a project for the construction of a new firehouse for a volunteer fire department is subject to the State's prevailing wage laws, and dismissed the CPLR article 78 petition.

ROMAN CATHOLIC DIOCESE OF BROOKLYN v NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA &c.:

2<sup>ND</sup> Dept. App. Div. order of 9/20/11; reversal; leave to appeal granted by App. Div., 2/16/12;

INSURANCE - LIABILITY INSURANCE - EXHAUSTION OF SELF-INSURED RETENTION (SIR) - ACTS OF ALLEGED SEXUAL ABUSE CONSTITUTING MULTIPLE OCCURRENCES OR A SINGLE OCCURRENCE - FAILURE TO RAISE ISSUE IN INITIAL DISCLAIMER LETTER AS WAIVER OF RIGHT TO DEMAND PAYMENT OF MULTIPLE SIRS - EFFECT OF ALLEGED INEQUITY IN APPLYING PRO-RATA APPLICATION OF SIR - SUMMARY JUDGMENT;

Supreme Court, Kings County, among other things, denied those branches of the motion by defendant National Union Fire Insurance Company of Pittsburgh, PA, which were for summary judgment, in effect, declaring that the alleged acts of sexual abuse in the underlying action constitute multiple occurrences, that the settlement amount and any "additional consideration" are to be allocated on a pro rata basis over seven policy periods, and that plaintiffs must exhaust a \$250,000 self-insured retention for each commercial general liability policy implicated; and granted those branches of plaintiffs' cross motion which were for summary judgment dismissing the fourth and sixth affirmative defenses of the defendant National Union Fire Insurance Company of

Pittsburgh, PA; App. Div. reversed, granted those branches of the motion of the defendant National Union Fire Insurance Company of Pittsburgh, PA, which were for summary judgment, in effect, declaring that the alleged acts of sexual abuse in the underlying action constitute multiple occurrences, that the settlement amount and any "additional consideration" are to be allocated on a pro rata basis over seven policy periods, and that plaintiffs must exhaust a \$250,000 self-insured retention for each commercial general liability policy implicated; denied those branches of the plaintiffs' cross motion which were for summary judgment dismissing the fourth and sixth affirmative defenses of the defendant National Union Fire Insurance Company of Pittsburgh, PA; and remitted the matter to Supreme Court for the entry of a judgment, among other things, declaring that the alleged acts of sexual abuse in the underlying action constitute multiple occurrences, that the settlement amount and any "additional consideration" are to be allocated on a pro rata basis over seven policy periods, and that the plaintiff's must exhaust the \$250,000 self-insured retention for each commercial general liability policy implicated.

WARD, MATTER OF v CITY OF LONG BEACH:

2<sup>ND</sup> Dept. App. Div. order of 10/4/11; affirmance; leave to appeal granted by Court of Appeals, 2/21/12;

CIVIL SERVICE - FIREFIGHTERS - BENEFITS FOR INJURY INCURRED IN LINE OF DUTY - SUPPLEMENTAL WAGE BENEFITS - WHETHER THE APPELLATE DIVISION ERRED IN RULING THAT SUPREME COURT CORRECTLY HELD THAT THE MUNICIPALITY'S DETERMINATION DID NOT HAVE A RATIONAL BASIS IN THE RECORD;

Supreme Court, Nassau County granted that branch of the CPLR article 78 petition which was to annul a determination denying petitioner's application for supplemental wage benefits pursuant to General Municipal Law § 207-a(2), and directed the municipality to pay the subject benefits to petitioner; App. Div. affirmed.