

COURT OF APPEALS NEW FILINGS

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

August 30, 2013 through September 5, 2013

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.

ASHMORE v ASHMORE:

2ND Dept. App. Div. order of 7/23/13; denial of motion; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution, whether a substantial constitutional question is directly involved to support an appeal as of right and whether the appeal is moot;

PARENT, CHILD AND FAMILY - CUSTODY - MOTION TO APPELLATE DIVISION TO DIRECT CUSTODY OF CHILDREN FOR SUMMER 2013; APPEALS - PERMISSION TO APPEAL - APPEALABLE PAPER - WRITTEN DECLINATION BY SUPREME COURT JUSTICE TO SIGN ORDER TO SHOW CAUSE; MOOTNESS; Supreme Court, Kings County, declined to sign order to show cause proposed by defendant; App. Div. denied that branch of defendant's motion which is for leave to appeal, and otherwise denied defendant's motion as academic.

BUSTOS v LENOX HILL HOSPITAL:

1ST Dept. App. Div. order of 4/16/13; reversal; leave to appeal granted by App. Div., 8/13/13; Rule 500.11 review pending;
WITNESS - EXPERT WITNESS - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT THE TESTIMONY OF PLAINTIFF'S EXPERT IN THIS MEDICAL MALPRACTICE ACTION WAS SPECULATIVE, CONCLUSORY AND WITHOUT PROBATIVE FORCE BECAUSE HE DID NOT EXPLAIN OR OTHERWISE SUPPORT HIS OPINION THAT THE BIRTHING MANEUVERS PERFORMED BY DEFENDANTS WERE EXCESSIVE, DEVIATED FROM THE APPROPRIATE STANDARD OF CARE AND CAUSED PLAINTIFF'S INJURIES - CPLR 4515;
Supreme Court, New York County, among other things, denied defendant Lenox Hill Hospital's motion to set aside the verdict; App. Div. reversed, granted the motion to set aside the verdict, as a matter of law, and directed the Clerk to enter judgment in defendants' favor dismissing the complaint.

DELEE (DWIGHT R.), PEOPLE v:

4TH Dept. App. Div. order of 7/19/13; modification; leave to appeal granted by Peradotto, J., 8/14/13; Rule 500.11 review pending;
CRIMES - VERDICT - WHETHER JURY VERDICT FINDING DEFENDANT GUILTY OF MANSLAUGHTER IN THE FIRST DEGREE AS A HATE CRIME WAS INCONSISTENT WITH THE JURY'S FINDING OF NOT GUILTY ON THE CHARGE OF MANSLAUGHTER IN THE FIRST DEGREE - LESSER INCLUDED OFFENSE;
POST-VERDICT STATEMENT OF JURY FOREPERSON;
County Court, Onondaga County, convicted defendant, upon a jury verdict, of manslaughter in the first degree as a hate crime and criminal possession of a weapon in the third degree; App. Div. modified by reversing that part convicting defendant of manslaughter in the first degree as a hate crime and dismissing count one of the indictment.

HOLMES, MATTER OF v WINTER:

1ST Dept. App. Div. order of 8/20/13; affirmance with dissents;
NEWSPAPERS - SHIELD LAW - IDENTIFICATION OF JOURNALIST'S SOURCES - ENFORCEMENT OF SUBPOENA UNDER UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES FROM WITHOUT THE STATE IN A CRIMINAL CASE (CPL 640.10) - REPORTER'S ASSERTION OF PRIVILEGE UNDER CIVIL RIGHTS LAW § 79-h(b);
Supreme Court, New York County, compelled respondent to testify before the District Court of Arapahoe County, Colorado, in a criminal proceeding against petitioner; App. Div. affirmed.

LUCIA, MATTER OF v BOARD OF EDUCATION OF EAST MEADOW UNION FREE SCHOOL DISTRICT:

2ND Dept. App. Div. order of 8/14/13; reversal;

SCHOOLS - TEACHERS - DISCIPLINARY MEASURES - EXERCISE OF FIRST AMENDMENT RIGHTS - MEMBER OF TEACHERS' UNION WHO LEGALLY PARKED HER CAR IN FRONT OF SCHOOL WHILE PICKETING BECAUSE OF STALLED NEGOTIATIONS ON A NEW COLLECTIVE BARGAINING AGREEMENT DISCIPLINED FOR CREATING A HEALTH AND SAFETY RISK INsofar AS HER CAR WAS PARKED IN A LOCATION WHERE PARENTS WOULD DROP OFF THEIR CHILDREN FOR SCHOOL, RESULTING IN SOME STUDENTS BEING DROPPED OFF IN THE STREET AND HAVING TO CROSS TRAFFIC LANES TO ENTER THE SCHOOL; Supreme Court, Nassau County, denied the petition in a proceeding pursuant to CPLR article 75 to vacate an arbitration award dated 1/7/11 sustaining a charge of misconduct against petitioner and imposing a fine against petitioner in the sum of \$1,000; App. Div. reversed and granted the petition.

LYNCH, et al. v CITY OF NEW YORK, et al.:

1ST Dept. App. Div. order of 5/16/13; modification; leave to appeal granted by App. Div., 8/27/13;
 EMPLOYMENT RELATIONSHIPS - RETIREMENT AND PENSION BENEFITS - CHALLENGE TO CITY'S ACTION IN DECLINING TO MAKE AN INCREASED-TAKE-HOME-PAY CONTRIBUTION TO POLICE OFFICERS AND FIREFIGHTERS HIRED AFTER JULY 1, 2009 (TIER 3 MEMBERS);
 Supreme Court, New York County, granted plaintiffs' motion for summary judgment to the extent of granting plaintiffs summary judgment on their first cause of action and declaring that the City violated Retirement and Social Security Law § 480(b), and granted the City's motion to dismiss the complaints to the extent of dismissing the second, third, fourth and fifth causes of action; App. Div. modified to deny defendants' motion as to the fifth cause of action (conversion) as against the City and grant plaintiffs' motion for summary judgment on the issue of the City's liability for conversion.

MEHULIC. MATTER OF v STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT:

3RD Dept. App. Div. judgment of 6/6/13; confirmed determination; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right and whether the appeal is timely taken;
 PHYSICIANS AND SURGEONS - DISCIPLINARY PROCEEDINGS - LICENSE TO PRACTICE MEDICINE - CPLR ARTICLE 78 PROCEEDING PURSUANT TO PUBLIC HEALTH LAW § 230-c(5) CHALLENGING DETERMINATION THAT PETITIONER PRACTICED MEDICINE WITH INCOMPETENCE; CLAIMED DENIAL OF DUE PROCESS; CLAIMED EXCESSIVE PENALTY;
 App. Div. confirmed the determination and dismissed the petition.

MYERS, MATTER OF v FISCHER, &c., et al.:

3RD Dept. App. Div. judgment of 6/13/13; confirmed determination and dismissed CPLR article 78 petition; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

PRISONS AND PRISONERS - DISCIPLINE OF INMATES - CHALLENGE TO DETERMINATION BY COMMISSIONER OF CORRECTIONS AND COMMUNITY SUPERVISION FINDING PETITIONER GUILTY OF POSSESSING UNAUTHORIZED MEDICATION, POSSESSING AN ARTICLE IN AN UNAUTHORIZED AREA, AND SMUGGLING;

App. Div. confirmed a determination finding petitioner guilty of violating certain prison disciplinary rules, and dismissed the CPLR article 78 petition.

NORSE ENERGY CORP. USA, MATTER OF V TOWN OF DRYDEN et al.:

3RD Dept. App. Div. order of 5/2/13; affirmance; leave to appeal granted by Court of Appeals, 8/29/13;

MUNICIPAL CORPORATIONS - ZONING - WHETHER THE OIL, GAS AND SOLUTION MINING LAW, CONTAINED IN ARTICLE 23 OF THE ENVIRONMENTAL CONSERVATION LAW, PREEMPTS RESPONDENT TOWN FROM PASSING ZONING ORDINANCES WHICH BAN ACTIVITIES RELATED TO THE EXPLORATION FOR, AND THE PRODUCTION OR STORAGE OF, NATURAL GAS AND PETROLEUM - HYDRAULIC FRACTURING (HYDROFRACKING);

Supreme Court, Tompkins County, among other things, partially granted respondents' motion for summary judgment declaring that certain amendments to the Town of Dryden zoning ordinance are not preempted by the Oil, Gas, and Solution Mining Law; App. Div. affirmed.

PERALES (RICHARD), PEOPLE v:

2ND Dept. App. Div. order of 11/28/12; denied application; leave to appeal granted by Smith, J., 7/10/13; Rule 500.11 review;

CRIMES - RIGHT TO COUNSEL - EFFECTIVE REPRESENTATION - COUNSEL'S FAILURE TO FILE NOTICE OF APPEAL OR REQUEST LEAVE TO FILE A LATE NOTICE OF APPEAL - WHETHER THE APPELLATE DIVISION ERRED IN DENYING DEFENDANT'S APPLICATION FOR A WRIT OF ERROR CORAM NOBIS SEEKING LEAVE TO FILE A LATE NOTICE OF APPEAL - PEOPLE v SYVILLE (15 NY3d 391 [2010]);

App. Div. denied defendant's application for a writ of error coram nobis seeking leave to file a late notice of appeal from a Supreme Court, Queens County, judgment rendered 6/15/07.

PINE (JAMES R.), PEOPLE v:

3RD Dept. App. Div. order of 7/15/13; denied motion; sua sponte examination whether an appeal as of right lies from an order entered in a criminal proceeding;

APPEAL - EFFECTIVENESS OF COUNSEL - APPLICATION FOR WRIT OF ERROR CORAM NOBIS - CLAIMED FAILURE OF APPELLATE COUNSEL TO RAISE INEFFECTIVENESS OF TRIAL COUNSEL WHO DID NOT ASSERT A JUSTIFICATION DEFENSE OR DEMONSTRATE BIAS OF WITNESS WHO ENTERED INTO PLEA DEAL WITH DISTRICT ATTORNEY IN EXCHANGE FOR TESTIMONY;

App. Div. denied motion for writ of error coram nobis to vacate App. Div. decision.

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STRAUSS PAINTING, INC. v MT. HAWLEY INSURANCE CO., et al.:

1ST Dept. App. Div. order of 4/11/13; modification; leave to appeal granted by App. Div., 8/20/13;

INSURANCE - DUTY TO DEFEND AND INDEMNIFY - INSURED'S FAILURE TO PROVIDE TIMELY NOTICE OF OCCURRENCE - WHETHER PLAINTIFF-INSURED'S

RELIANCE UPON ITS BROKER'S ERRONEOUS ADVICE CONSTITUTES A REASONABLE EXCUSE FOR INSURED'S FAILURE TO PROVIDE ITS INSURER WITH TIMELY NOTICE OF THE ACCIDENT - WHETHER THE COURTS BELOW CORRECTLY DETERMINED THAT INSURER IS OBLIGATED TO DEFEND AND INDEMNIFY A PARTY UNDER AN ADDITIONAL INSURED ENDORSEMENT CONTAINED IN THE COMMERCIAL GENERAL LIABILITY POLICY IT ISSUED TO PLAINTIFF, THAT INSURER DID NOT TIMELY DISCLAIM COVERAGE TO THE ADDITIONAL INSURED ON THE BASIS OF LATE NOTICE OF THE ACCIDENT, AND THAT THE "ACTS AND OMISSIONS" LANGUAGE IN THE ADDITIONAL INSURED ENDORSEMENT PROVIDED COVERAGE EVEN ABSENT A FINDING OF NEGLIGENCE BY PLAINTIFF-INSURED IN THE UNDERLYING PERSONAL INJURY ACTION;

Supreme Court, New York County, (10/16/12 orders), upon reargument, declared that Mt. Hawley Insurance Company's (Mt. Hawley) duty to defend and indemnify is conditioned upon a finding of negligence by plaintiff or those acting on plaintiff's behalf and reinstated the Metropolitan Opera Association's (the Met) second and third cross claims on the basis that they were not abandoned; and (11/4/11 judgment) granted defendant Mt. Hawley's motion for summary judgment declaring that it has no obligation to defend or indemnify plaintiff Strauss Painting in an underlying personal injury action, granted defendant Met's motion for summary judgment declaring that Mt. Hawley is obligated to defend and indemnify the Met in an underlying personal injury action, denied Mt. Hawley's cross motion for summary judgment declaring that it is not obligated to defend and indemnify the Met in the underlying action, and dismissed the Met's second and third cross claims against Mt. Hawley on the basis that they were abandoned; App. Div. modified (1) the 11/4/11 judgment to deny Mt. Hawley's motion for the dismissal of the complaint as against it upon the declaration that Mt. Hawley has no duty to defend and indemnify plaintiff; (2) the 10/16/12 order to dismiss the Met's third cross claim against Mt. Hawley for expenses incurred in this action; and (3) the other 10/16/12 order to delete that portion of the order that conditioned Mt. Hawley's duty to defend and indemnify upon a finding of negligence by plaintiff in the underlying action and to declare that Mt. Hawley's duty to defend the Met shall arise and be conditioned upon a finding of an act or omission by plaintiff or one acting on plaintiff's behalf.