

COURT OF APPEALS NEW FILINGS

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

**March 26 through April 1, 2010**

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 60 days after the appeal was taken; respondent's brief to be filed 45 days after the filing of appellant's brief; and a reply brief, if any, to be filed 15 days after 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.**

CECUNJANIN (ZUFER), PEOPLE v:

3<sup>RD</sup> Dept. App. Div. order of 11/5/09; affirmance; leave to appeal granted by Smith, J., 3/16/10;

CRIMES - INTOXICATION - SUFFICIENCY OF EVIDENCE - SEXUAL ABUSE IN THE FIRST DEGREE (PENAL LAW § 130.65[2]) - WHETHER VICTIM WAS "INCAPABLE OF CONSENT BY REASON OF BEING PHYSICALLY HELPLESS"; ALLEGED JUROR MISCONDUCT; ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL;

Franklin County Court convicted defendant of attempted sexual abuse in the first degree and unlawful imprisonment in the second degree; App. Div. affirmed.

DIAZ (DAVID), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 12/29/09; affirmance; leave to appeal granted by Renwick, J., 3/16/10; Rule 500.11 review pending;

CRIMES - EVIDENCE - SUFFICIENCY OF EVIDENCE - CRIMINAL POSSESSION

OF A CONTROLLED SUBSTANCE - DRUGS HIDDEN IN AIR BAG COMPARTMENT OF AUTOMOBILE DEFENDANT OCCUPIED BUT DID NOT OWN - CONSTRUCTIVE POSSESSION OF CONTRABAND; CIRCUMSTANTIAL EVIDENCE; Supreme Court, New York County convicted defendant of criminal possession of a controlled substance in the second degree, and sentenced him, as a second felony drug offender, to a term of 7 years; App. Div. affirmed.

DOWNS v TOWN OF GUILDERLAND, et al.:

3<sup>RD</sup> Dept. App. Div. order of 2/18/10; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; CONSTITUTIONAL LAW - FREEDOM OF SPEECH - NY CONSTITUTION, ARTICLE I, § 8 - PLAINTIFF ARRESTED FOR TRESPASS BY TOWN POLICE OFFICER AT MALL AFTER PLAINTIFF REFUSED TO REMOVE "ANTI-WAR T-SHIRT" OR LEAVE MALL AS REQUESTED BY MALL SECURITY PERSONNEL; FALSE ARREST; Supreme Court, Albany County, among other things, granted defendants' motions for summary judgment dismissing the complaint; App. Div. affirmed.

HALL, PEOPLE ex rel. v ROCK:

3<sup>RD</sup> Dept. App. Div. order of 3/18/10; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; HABEAS CORPUS - WHEN REMEDY AVAILABLE; Supreme Court, Washington County denied petitioner's application for a writ of habeas corpus without a hearing; App. Div. affirmed.

FERNANDEZ (JOAO), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 3/9/10; affirmance; leave to appeal granted by Leventhal, J., 3/18/10; COURTS - CLAIMED IMPROPRIETY IN TRANSFER OF CASE FROM CRIMINAL COURT TO SUPREME COURT; WHETHER CPL 210.05 PRECLUDES THE INTEGRATED DOMESTIC VIOLENCE PART OF SUPREME COURT FROM EXERCISING ITS JURISDICTION TO TRY MISDEMEANOR CHARGES AGAINST A DEFENDANT IN THE ABSENCE OF AN INDICTMENT OR A SUPERIOR COURT INFORMATION; Supreme Court, Kings County convicted defendant of three counts of attempted aggravated harassment in the second degree and imposed sentence; App. Div. affirmed.

KABIR v COUNTY OF MONROE, et al.:

4<sup>TH</sup> Dept. App. Div. order of 12/30/09; reversal with dissents; leave to appeal granted by App. Div., 3/19/10; NEGLIGENCE - EMERGENCY DOCTRINE - PLAINTIFF INJURED WHEN HER VEHICLE WAS STRUCK FROM BEHIND BY DEPUTY SHERIFF'S VEHICLE - DEPUTY SHERIFF LOOKING DOWN AT MOBILE DATA TERMINAL TO ASCERTAIN LOCATION OF BURGLARIZED PREMISES ANNOUNCED IN RADIO DISPATCH - WHETHER DEPUTY SHERIFF ENTITLED TO QUALIFIED IMMUNITY UNDER VEHICLE AND TRAFFIC LAW § 1104(3) - "RECKLESS DISREGARD" STANDARD

Supreme Court, Monroe County granted those parts of defendants' motion seeking summary judgment dismissing the complaint against defendant County of Monroe and dismissing the amended complaint, and denied plaintiff's cross motion seeking partial summary judgment with respect to liability; App. Div. reversed, denied those parts of the motion seeking summary judgment dismissing the complaint against defendant County of Monroe and dismissing the amended complaint, reinstated the complaint, and granted plaintiff's cross motion.

SMITH &c. v SHERWOOD, et al.:

4<sup>TH</sup> Dept. App. Div. order of 12/30/09; modification with dissents; leave to appeal granted by App. Div., 3/19/10; NEGLIGENCE - DUTY - PRIVATE SCHOOL STUDENT STRUCK BY CAR AFTER EXITING PRIVATE BUS TRANSPORTING STUDENTS UNDER CONTRACT WITH REGIONAL TRANSPORTATION AUTHORITY AND SCHOOL DISTRICT - WHETHER REGIONAL TRANSPORTATION AUTHORITY AND DRIVER HAD DUTY TO PROTECT CHILD WHO HAD TO CROSS STREET; SUMMARY JUDGMENT;

Supreme Court, Onondaga County, among other things, granted the motion of defendants City of Syracuse, Syracuse City School District, Board of Education of Syracuse City School District, Central New York Regional Transportation Authority and Theodore R. Gray for summary judgment dismissing the complaint as against them; App. Div. modified by denying in part the motion of defendants Central New York Regional Transportation Authority and Gray and reinstating the common-law negligence claim against those defendants, and affirmed as so modified.

WEAVER (TONY), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 12/30/09; affirmance; leave to appeal granted by Jones, J., 3/16/10; CRIMES - EVIDENCE - SUFFICIENCY OF EVIDENCE - DISORDERLY CONDUCT - WHETHER CIRCUMSTANCES OF INCIDENT PRESENTED A PUBLIC ANNOYANCE CONSISTENT WITH PEOPLE v MUNAFO (50 NY2d 326); RESISTING ARREST; JURY INSTRUCTIONS;

Wayne County Court convicted defendant of resisting arrest and two counts of disorderly conduct; App. Div. affirmed and remitted to County Court for further proceedings pursuant to CPL 460.50(5).

WELCH, MATTER OF v FISCHER:

3<sup>RD</sup> Dept. App. Div. order of 2/4/10; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; PROCEEDING AGAINST BODY OR OFFICER - CERTIORARI - REVIEW OF SENTENCE COMPUTATION BY DEPARTMENT OF CORRECTIONAL SERVICES; Supreme Court, Franklin County converted petitioner's application for a writ of habeas corpus into a CPLR article 78 proceeding and dismissed the petition; App. Div. affirmed.