

COURT OF APPEALS NEW FILINGS

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

July 22 through July 28, 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.

ADMIRAL INSURANCE COMPANY v JOY CONTRACTORS, INC., et al.:
1ST Dept. App. Div. order of 2/17/11; modification; leave to appeal granted by App. Div., 7/14/11;
INSURANCE - DUTY TO DEFEND AND INDEMNIFY - ADDITIONAL INSURED ENDORSEMENT - WHETHER LESSOR OF CRANE IS ENTITLED TO COVERAGE "WITH RESPECT TO LIABILITY ... CAUSED BY (CRANE OPERATOR LESSEE'S) ACTS OR OMISSIONS ... IN THE PERFORMANCE OF (ITS) ONGOING OPERATIONS FOR ADDITIONAL INSURED(S)"; WHETHER PRIMARY AND EXCESS INSURANCE POLICIES WERE "ISSUED FOR DELIVERY IN NEW YORK" WITHIN THE MEANING OF INSURANCE LAW § 3420(d);
APPLICABILITY OF PROFESSIONAL SERVICES EXCLUSION; WHETHER THE

APPELLATE DIVISION ERRED IN DETERMINING THAT A RESIDENTIAL CONSTRUCTION ACTIVITIES EXCLUSION DID NOT APPLY TO CRANE COLLAPSE BECAUSE BUILDING WAS INTENDED TO BE A MIXED-USE STRUCTURE; WHETHER LIABILITY COMPANIES SEEKING COVERAGE AS ADDITIONAL INSUREDS ARE SUBJECT TO AN EXCLUSION FOR LIMITED LIABILITY COMPANIES IN A POLICY PROVISION ADDRESSING "WHO IS AN INSURED"; REPRESENTATIONS BY INSURED - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT ALLEGED MATERIAL MISREPRESENTATIONS BY THE NAMED INSURED DID NOT PRECLUDE ADDITIONAL INSUREDS FROM RECOVERING UNDER THE POLICY;

Supreme Court, New York County, among other things, granted plaintiff Admiral Insurance Company's and defendant Lincoln General Insurance Company's motions for summary judgment to the extent of declaring that they have no obligation to defend or indemnify defendant New York Crane & Equipment Company under the subject insurance policies; denied motions to dismiss the first, fourth, twelfth and thirteenth causes of action; and granted motions to dismiss the fifth cause of action and the sixth, seventh, ninth and tenth causes of action as against defendants other than Joy Contractors, Inc.; App. Div. modified to declare that the residential construction activities exclusion in the Admiral policy is not applicable and otherwise affirmed.

BUKOWSKI v CLARKSON UNIVERSITY et al.:

3RD Dept. App. Div. order of 7/14/11; affirmance with dissents; NEGLIGENCE - ASSUMPTION OF RISK - ACTION BY COLLEGE PITCHER TO RECOVER DAMAGES FOR INJURIES SUSTAINED WHILE PARTICIPATING IN BASEBALL PRACTICE IN AN INDOOR TRAINING FACILITY - WHETHER THERE WAS EVIDENCE FROM WHICH A JURY COULD CONCLUDE THAT THE RISK OF INJURY WAS UNREASONABLY ENHANCED BY THE CONDITIONS EXISTING IN THE TRAINING FACILITY - INHERENT COMPULSION TO PRACTICE WITHOUT L-SCREEN SAFETY DEVICE; DISMISSAL AND NONSUIT; Supreme Court, Albany County dismissed the complaint after defendants' motion to dismiss was granted at the close of proof at trial; App. Div. affirmed.

GRAVIUS v COUNTY OF ERIE:

4TH Dept. App. Div. order of 6/10/11; affirmance with dissents; Rule 500.11 review pending; DISCLOSURE - EXAMINATION BEFORE TRIAL - MUNICIPAL LAW § 50-h - PLAINTIFF INCARCERATED IN FLORIDA - WHETHER PLAINTIFF'S FAILURE TO COMPLY WITH MUNICIPAL LAW § 50-h WAS EXCUSED BY "EXCEPTIONAL CIRCUMSTANCES"; MUNICIPAL CORPORATIONS - NOTICE OF CLAIM; Supreme Court, Erie County granted defendant's motion to dismiss the complaint and dismissed the complaint; App. Div. affirmed.

GRUCCI v GRUCCI:

2ND Dept. App. Div. order of 2/15/11; affirmance; leave to appeal granted by Court of Appeals, 6/28/11; TORTS - MALICIOUS PROSECUTION - ELEMENTS REQUISITE TO CAUSE OF ACTION - WHETHER THE APPELLATE DIVISION PROPERLY DETERMINED THAT PLAINTIFF WAS NOT PREJUDICED BY ANY ERROR SUPREME COURT MAY HAVE COMMITTED IN EXCLUDING CERTAIN EVIDENCE - AUDIOTAPE NOT ADMITTED

Supreme Court, Suffolk County, upon a jury verdict in favor of defendant and against plaintiff, dismissed the complaint; App. Div. affirmed.

KANE v GALTIERI:

2ND Dept. App. Div. order of 4/1/11; sua sponte examination whether the App. Div. order finally determines the action within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right;

APPEAL - CHALLENGE TO ORDER DENYING MOTION TO THE EXTENT IT SOUGHT WAIVER OF PAYMENT OF THE FILING FEE AND FOR FREE TRANSCRIPTS;

App. Div. denied those branches of the pro se defendant's renewed motion that were to waive payment of the filing fee and for free transcripts.

KELLEY (RICHARD), PEOPLE v:

1ST Dept. App. Div. order of 3/8/11; affirmance; leave to appeal granted by Lippman, Ch.J., 7/18/11;

CRIMES - EVIDENCE - DNA IDENTIFICATION TESTS - WHETHER TRIAL COURT ERRED IN (1) ALLOWING DNA EVIDENCE, NOT OBTAINED UNTIL AFTER THE PEOPLE HAD COMPLETED THEIR DIRECT CASE, TO BE INTRODUCED AGAINST DEFENDANT, AND (2) DENYING DEFENDANT'S REQUEST FOR A MISTRIAL - CPL 240.20; EFFECTIVENESS OF DEFENSE COUNSEL; Supreme Court, New York County convicted defendant of course of sexual conduct against a child in the first degree, endangering the welfare of a child, and 20 counts of criminal contempt in the second degree, and sentenced him to an aggregate term of 25 years; App. Div. affirmed.

SCARANO, MATTER OF v CITY OF NEW YORK, et al.:

1ST Dept. App. Div. judgment of 7/14/11; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

MUNICIPAL CORPORATIONS - LICENSES - ARTICLE 78 PROCEEDING BROUGHT BY LICENSED ARCHITECT TO CHALLENGE DETERMINATION PROHIBITING HIM FROM FILING ANY PAPERS ON PUBLIC PROJECTS; CLAIMED DENIAL OF DUE PROCESS AND EQUAL PROTECTION - CHALLENGE TO CONSTITUTIONALITY OF ADMINISTRATIVE CODE OF THE CITY OF NEW YORK § 28-211.1.2;

App. Div. confirmed determination of respondent Commissioner of the New York City Department of Buildings (DOB) which adopted the recommendation of the Administrative Law Judge that petitioner, among other things, be prohibited from filing any papers with DOB pursuant to Administrative Code of the City of New York § 28-211.1.2, denied the petition and dismissed the proceeding.

SMITH v REILLY:

4TH Dept. App. Div. order of 4/29/11; affirmance with dissents; leave to appeal granted by App. Div., 7/1/11; Rule 500.11 review

ANIMALS - KNOWLEDGE OF VICIOUS PROPENSITY - PERSONAL INJURY ACTION SEEKING DAMAGES SUSTAINED BY INJURED PLAINTIFF WHO WAS PROPELLED OVER THE HANDLEBARS OF HIS BICYCLE WHEN DEFENDANT'S DOG RAN INTO THE ROAD AND COLLIDED WITH THE BICYCLE - WHETHER DEFENDANT'S DEPOSITION TESTIMONY OR A WITNESS AFFIDAVIT SUBMITTED BY PLAINTIFFS RAISES A TRIABLE ISSUE OF FACT AS TO DOG'S PROPENSITY TO INTERFERE WITH TRAFFIC;
Supreme Court, Onondaga County denied defendant's motion for summary judgment dismissing the complaint; App. Div. affirmed.

WILLIAMS et al. v STATE OF NEW YORK:

1ST Dept. App. Div. order of 5/3/11; reversal; leave to appeal granted by App. Div., 7/14/11;

NEGLIGENCE - PROXIMATE CAUSE - WHETHER DEFENDANT STATE CAN BE HELD LIABLE FOR AN ASSAULT PERPETRATED TWO YEARS AFTER A VOLUNTARY MENTAL PATIENT WAS PERMITTED TO "ELOPE" FROM STATE PSYCHIATRIC FACILITY;

Court of Claims dismissed the claim; App. Div. reversed, reinstated the claim, found liability on the part of the State, and remanded the matter for a trial on the issue of damages.