

COURT OF APPEALS NEW FILINGS

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

**February 3, 2012 through February 9, 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.**

CALDWELL v CABLEVISION SYSTEMS CORPORATION, et al.:

2<sup>ND</sup> Dept. App. Div. order of 5/31/11; affirmance; leave to appeal granted by Court of Appeals, 1/17/12;

WITNESSES - FEES - FACT WITNESS - PAYMENTS IN EXCESS OF STATUTORY RATE OF \$15 PER DAY - PAYMENT OF \$10,000 FEE TO ORTHOPEDIC SURGEON WHO TESTIFIED AS A FACT WITNESS FOR DEFENDANT - WHETHER SUCH PAYMENT REQUIRED THE WITNESS'S TESTIMONY TO BE STRICKEN - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT THE TRIAL COURT'S ERROR IN FAILING TO GIVE JURY SPECIFIC INSTRUCTION REGARDING FACT-WITNESS COMPENSATION WAS HARMLESS;

Supreme Court, Westchester County amended its judgment dated 5/18/09 and entered 5/19/09, dismissing the complaint as against defendant Communications Specialists, Inc.; App. Div. affirmed.

CERVERA v BRESSLER:

2<sup>ND</sup> Dept. App. Div. order of 12/20/11; affirmance; sua sponte examination whether the order appealed from 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;

PARENT AND CHILD - CUSTODY - MODIFICATION OF CUSTODY - CLAIMED DUE PROCESS VIOLATIONS;

Supreme Court, Westchester County, among other things, granted that branch of the defendant mother's motion which was to modify a so-ordered stipulation dated 9/25/03, so as to award her sole legal and physical custody of the parties' child, directed that the plaintiff father and the child initially attend reunification therapy and, thereafter, supervised visitation with a therapist for a period of three months, and denied that branch of father's motion which was to suspend his future child support payments; App. Div. affirmed.

DIAZ (RANDOLFO), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 6/21/11; reversal; leave to appeal granted by Pigott, J., 1/19/12;

CRIMES - WITNESSES - EXPERT WITNESS - IMPROPER BOLSTERING - WHETHER THE TRIAL COURT ERRED IN PERMITTING THE PEOPLE'S EXPERT TO DESCRIBE HOW A SEX OFFENDER "GROOMS" A CHILD VICTIM; EVIDENCE - PRIOR FALSE ALLEGATIONS OF RAPE OR SEXUAL ABUSE - WHETHER THE TRIAL COURT PROPERLY PRECLUDED DEFENSE WITNESS FROM TESTIFYING THAT THE COMPLAINANT HAD MADE A FALSE ALLEGATION OF SEXUAL ABUSE AGAINST HIM APPROXIMATELY SIX YEARS EARLIER;

Supreme Court, Kings County convicted defendant of a course of sexual conduct against a child in the second degree and endangering the welfare of a child, upon a jury verdict, and imposed sentence; App. Div. reversed the judgment of conviction and remitted the matter to Supreme Court for a new trial.

DZIELSKI v ESSEX INSURANCE COMPANY:

4<sup>TH</sup> Dept. App. Div. order of 12/23/11; modification; Rule 500.11 review pending;

INSURANCE - EXCLUSIONS - "STAGE HAND" EXCLUSION IN "RESTAURANT, BAR, TAVERN, NIGHT CLUBS, FRATERNAL AND SOCIAL CLUBS ENDORSEMENT" - APPLICABILITY OF EXCLUSION TO PERSON INJURED BY FALL FROM ALLEGEDLY DEFECTIVE LOADING DOCK WHILE REMOVING EQUIPMENT HE PROVIDED FOR BAND THAT PERFORMED AT INSURED'S NIGHTCLUB;

Supreme Court, Erie County awarded plaintiffs \$950,000 against defendant Essex Insurance Company; App. Div. modified by reducing the award of \$950,000 to \$499,500, plus interest.

H. H. WARNER, LLC, MATTER OF v ROCHESTER GENESEE REGIONAL TRANSPORTATION AUTHORITY:

4<sup>TH</sup> Dept. App. Div. order of 9/30/11; confirmation of determination; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

EMINENT DOMAIN - JUDICIAL REVIEW; ENVIRONMENTAL CONSERVATION - ENVIRONMENTAL QUALITY REVIEW - CONDEMNATION OF PROPERTY FOR USE AS REGIONAL BUS TRANSIT CENTER;

App. Div. confirmed respondent's determination to acquire certain real property by eminent domain, and dismissed the petition.

PAPPAS v TZOLIS:

1<sup>ST</sup> Dept. App. Div. order of 9/15/11; modification with dissents; leave to appeal granted by App. Div., 1/19/12;

LIMITED LIABILITY COMPANIES (LLC) - MEMBERS AND MANAGERS - CLAIMS BY TWO MEMBERS FOR BREACH OF FIDUCIARY DUTY, CONVERSION, FRAUD AND UNJUST ENRICHMENT AGAINST THIRD MEMBER WHO BOUGHT OUT THEIR INTERESTS IN COMPANY FOR \$1.5 MILLION WITHOUT DISCLOSING HIS ONGOING NEGOTIATIONS WITH PARTY WHO LATER PURCHASED COMPANY'S SOLE ASSET FOR \$17.5 MILLION - EFFECT OF CERTIFICATE STATING THAT IN ASSIGNING THEIR INTERESTS IN THE COMPANY TO THE THIRD MEMBER, THE TWO MEMBERS PERFORMED THEIR OWN DUE DILIGENCE, WERE NOT RELYING ON ANY REPRESENTATIONS BY THIRD MEMBER NOT CONTAINED IN CERTAIN DESIGNATED DOCUMENTS, AND THAT THIRD MEMBER OWED THEM NO FIDUCIARY DUTIES - EFFECT OF PROVISION IN OPERATING AGREEMENT PERMITTING MEMBERS TO ENGAGE IN BUSINESS VENTURES OF ANY NATURE WITHOUT OBLIGATION OF ANY KIND TO THE COMPANY OR OTHER MEMBERS; Supreme Court, New York County, insofar as appealed from as limited by the briefs, granted defendant Tzolis's motion to dismiss the first, second, third, fourth, fifth, ninth, tenth and eleventh causes of action pursuant to CPLR 3211(a)(1) and (7); App. Div. modified to deny the motion to dismiss as to the first, fourth, fifth and tenth causes of action.

STRUNK v PATERSON:

Supreme Court, Kings County, order of 11/22/11; denial of motion; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution, and whether any basis exists for a direct appeal pursuant to CPLR 5601(b)(2);

MOTIONS AND ORDERS - DENIAL OF MOTION TO INTERVENE;

Supreme Court denied proposed intervenor's motion to intervene.