

COURT OF APPEALS NEW FILINGS

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

March 30, 2012 through April 5, 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.

APPLEWHITE, &c. et al. v ACCUHEALTH, INC. et al.:

1ST Dept. App. Div. order of 12/15/11; reversal; leave to appeal granted by App. Div., 3/20/12;

MUNICIPAL CORPORATIONS - TORT LIABILITY - ASSUMPTION OF SPECIAL DUTY TO INFANT PLAINTIFF IN ANAPHYLACTIC SHOCK - EMERGENCY MEDICAL PERSONNEL DID NOT TRANSPORT THE INFANT PLAINTIFF TO THE HOSPITAL IMMEDIATELY IN THEIR BASIC LIFE SUPPORT AMBULANCE, BUT ASSURED THE INFANT'S MOTHER THAT IT WOULD BE BETTER TO WAIT FOR AN ADVANCED LIFE SUPPORT AMBULANCE TO ARRIVE WITH PARAMEDICS AND NECESSARY EQUIPMENT;

Supreme Court, Bronx County granted defendant City of New York's motion for summary judgment dismissing the complaint against it in an action for personal injuries sustained as a result of allegedly negligent treatment rendered by emergency medical technicians; App. Div. reversed, denied the motion and reinstated the complaint as against the City of New York.

HECKER v STATE OF NEW YORK:

4TH Dept. App. Div. order of 2/10/12; affirmance with dissents; sua sponte examination whether the two-justice dissent at the App. Div. is on a question of law;

LABOR - SAFE PLACE TO WORK - SLIPPING HAZARD - SNOW AND ICE - APPLICABILITY OF 12 NYCRR 23.1.7(d) AS A PREDICATE FOR PLAINTIFF'S CLAIM UNDER LABOR LAW § 241(6) - CHALLENGE TO APPELLATE DIVISION'S DETERMINATION THAT 12 NYCRR 23-1.7(d) WAS INAPPLICABLE UNDER THE FACTS OF THIS CASE EVEN THOUGH DEFENDANT NEVER RAISED THAT ARGUMENT;

Court of Claims granted defendant's motion for summary judgment, dismissed the claim in this personal injury action and denied claimant's cross motion for summary judgment; App. Div. affirmed.

HOWARD, MATTER OF v STATURE ELECTRIC, INC. et al.:

3RD Dept. App. Div. order of 4/1/10; reversal; leave to appeal granted by Court of Appeals, 3/27/12;

WORKERS' COMPENSATION - DISQUALIFICATION FOR FALSE REPRESENTATION - COLLATERAL ESTOPPEL - WHETHER CLAIMANT'S ALFORD PLEA TO A CHARGE OF INSURANCE FRAUD, WHICH AROSE FROM EVIDENCE ALLEGEDLY REVEALING THAT HE WAS EMPLOYED WHILE COLLECTING WORKERS' COMPENSATION BENEFITS, IS ENTITLED TO COLLATERAL ESTOPPEL EFFECT WITH RESPECT TO THE WORKERS' COMPENSATION BOARD'S DETERMINATION WHETHER CLAIMANT VIOLATED WORKERS' COMPENSATION LAW § 114-a; App. Div. reversed decision of the Workers' Compensation Board, which determined that claimant violated Workers' Compensation Law § 114-a, and remitted the matter to the Workers' Compensation Board for further proceedings not inconsistent with the court's decision.

IPPOLITO (GERARD), PEOPLE v, a/k/a IPPOLITO (GERALD):

4TH Dept. App. Div. order of 11/10/11; modification; leave to appeal granted by Carni, J., 2/1/12;

CRIMES - SUFFICIENCY OF EVIDENCE - CRIMINAL POSSESSION OF A FORGED INSTRUMENT IN THE SECOND DEGREE - CHECKS ON WHICH DEFENDANT SIGNED THE VICTIM'S NAME WHILE HE WAS HER ATTORNEY-IN-FACT PURSUANT TO A POWER OF ATTORNEY - WHETHER VICTIM AUTHORIZED DEFENDANT TO SIGN THE CHECKS; RESTITUTION;

Monroe County Court convicted defendant of grand larceny in the second degree and 43 counts of criminal possession of a forged

instrument in the second degree; App. Div. modified by reversing those parts convicting defendant of criminal possession of a forged instrument in the second degree under counts 2 through 15, 17 through 26 and 28 through 43 of the indictment and dismissed those counts, and by vacating the amount of restitution ordered, and remitted the matter to Monroe County Court for a hearing to determine the amount of restitution.

KAGAN v HMC-NEW YORK, INC., et al.:

1ST Dept. App. Div. order of 2/28/12; modification with dissents; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution; CONTRACTS - CONSTRUCTION AND INTERPRETATION - SALES CONTRACT - ALLEGED AMBIGUITY IN CONTRACT TERM; SUMMARY JUDGMENT; CLAIMED VIOLATION OF DUE PROCESS;

Supreme Court, New York County granted defendants' motion to dismiss plaintiff's claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty, denied the motion seeking dismissal of plaintiff's breach of contract claims against HMC Investors, LLC, HMC-New York, Inc. and Harbinger Holdings, LLC (6/7/10 order), and thereafter denied plaintiff's motion for leave to renew defendants' motion to dismiss (9/22/10 order); App. Div. modified to the extent of granting the motion to dismiss plaintiff's breach of contract claims as against defendants HML Investors, LLC, HMC-New York, Inc. and Harbinger Holdings, LLC; directed judgment dismissing the complaint as against those defendants; and affirmed the 9/22/10 Supreme Court order.

LONG (CORNELL), PEOPLE v:

4TH Dept. App. Div. order of 11/18/11; affirmance; leave to appeal granted by Court of Appeals, 3/22/12; CRIMES - SEX OFFENDERS - SEX OFFENDER REGISTRATION ACT (SORA) - ALLEGED DUE PROCESS VIOLATION WHERE SUPREME COURT FAILED, INITIALLY AND ON REMAND FROM THE APPELLATE DIVISION, TO SET FORTH SUFFICIENT FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND THE APPELLATE DIVISION THEN MADE ITS OWN FINDINGS OF FACT AND CONCLUSIONS OF LAW;

Supreme Court, Erie County determined that defendant was a level two sex offender under SORA; App. Div. affirmed.

PEALER (ROBERT), PEOPLE v:

4TH Dept. App. Div. order of 11/18/11; affirmance; leave to appeal granted by Ciparick, J., 3/14/12; CRIMES - RIGHT OF CONFRONTATION - WHETHER THE TRIAL COURT ERRED IN ADMITTING, UNDER THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE, BREATH TEST CALIBRATION AND SIMULATOR SOLUTION CERTIFICATES USED TO SHOW THAT BREATH TEST MACHINE WAS ACCURATE - TESTIMONIAL NATURE OF STATEMENTS; UNLAWFUL SEARCH AND SEIZURE - VEHICLE STOP - WHETHER EVIDENCE OBTAINED FOLLOWING STOP OF VEHICLE FOR HAVING

AN UNAUTHORIZED STICKER ON REAR WINDOW IS SUBJECT TO SUPPRESSION AS RESULTING FROM A PRETEXTUAL STOP; PREPARATION, SERVICE AND FILING OF BRIEF BY ATTORNEY IN SENECA COUNTY DISTRICT ATTORNEY'S OFFICE ON BEHALF OF YATES COUNTY DISTRICT ATTORNEY; ALLEGED PROSECUTORIAL MISCONDUCT; ALLEGEDLY IMPROPER REBUTTAL TESTIMONY; Yates County Court convicted defendant, upon a jury verdict, of driving while ability impaired and driving while intoxicated; App. Div. affirmed.

STATE OF NEW YORK, MATTER OF v BOBBY P.:

1ST Dept. App. Div. order of 3/20/12; affirmance; sua sponte examination whether so much of the App. Div. order as affirms the June 17, 2011 Supreme Court order finally determines the proceeding within the meaning of the Constitution and whether a substantial constitutional question is directly involved to support an appeal as of right;

CRIMES - SEX OFFENDERS - CIVIL COMMITMENT OR SUPERVISION - ALLEGED DUE PROCESS VIOLATION WHERE STATE'S PSYCHOLOGIST PROVIDED ERRONEOUS TESTIMONY REGARDING RESPONDENT'S SCORE ON A RISK ASSESSMENT INSTRUMENT;

Supreme Court, New York County, in a proceeding pursuant to Mental Hygiene Law article 10, upon a jury finding of mental abnormality, committed respondent to a secure treatment facility; thereafter, the same court denied respondent's motion for a new trial in the interests of justice pursuant to CPLR 4404 and motion for relief from judgment pursuant to CPLR 5015(a)(3); App. Div. affirmed.

WHITE &c. v FARRELL et al.:

4TH Dept. App. Div. order of 9/30/11; affirmance; leave to appeal granted by Court of Appeals, 3/22/12;

DAMAGES - MEASURE OF DAMAGES - BREACH OF REAL ESTATE CONTRACT - WHETHER SUPREME COURT CORRECTLY DETERMINED THAT SELLERS DID NOT SUSTAIN ACTUAL DAMAGES BECAUSE THERE WAS NO DIFFERENCE BETWEEN THE CONTRACT SALES PRICE AND THE ACTUAL MARKET VALUE OF THE PROPERTY AT THE TIME OF BREACH, EVEN THOUGH THE PROPERTY ULTIMATELY WAS SOLD FOR APPROXIMATELY \$373,000 LESS THAN THE CONTRACT PRICE; SELLERS' ENTITLEMENT TO CONSEQUENTIAL DAMAGES; Supreme Court, Onondaga County granted defendants' motion for summary judgment on their counterclaim against plaintiffs for breach of a residential real estate sales contract, determined that defendants did not sustain any actual damages, and denied defendants' claim for consequential damages; App. Div. affirmed.