

COURT OF APPEALS NEW FILINGS

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

June 14, 2013 through June 20, 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.

GABRIELA A., MATTER OF:

2ND Dept. App. Div. order of 2/27/13; reversal; leave to appeal granted by Court of Appeals, 6/6/13;

INFANTS - PERSON IN NEED OF SUPERVISION (PINS) - FIFTEEN-YEAR OLD ADOLESCENT, PREVIOUSLY ADJUDICATED A PINS AND WHO RESISTED PROBATION OFFICERS' ATTEMPTS TO RETURN HER TO THE NON-SECURE DETENTION FACILITY FROM WHICH SHE ABSCONDED, CHARGED IN A JUVENILE DELINQUENCY PETITION WITH, AMONG OTHER THINGS, RESISTING ARREST AND OBSTRUCTING GOVERNMENTAL ADMINISTRATION - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT THE ADOLESCENT'S CONDUCT WAS CONSISTENT ONLY WITH PINS BEHAVIOR AND NOT WITH JUVENILE DELINQUENCY;

Family Court, Westchester County, order of disposition that, upon a fact-finding order of the same court entered 4/3/12, finding that Gabriela A. committed acts which, if committed by an adult, would have constituted the crimes of resisting arrest and obstructing governmental administration in the second degree, adjudged Gabriela A. to be a juvenile delinquent and imposed a conditional discharge until 4/3/13; App. Div. reversed, vacated the fact-finding order, dismissed the petition, and remitted the matter to Family Court for further proceedings pursuant to Family Court Act § 375.1.

APPLEGATE v STATE OF NEW YORK:

2ND Dept. App. Div. order of 4/24/13; denial of motion; 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;
APPEALS - CHALLENGE TO APPELLATE DIVISION ORDER DENYING MOTION TO WAIVE FILING FEE ON AN APPEAL AND FOR LEAVE TO FILE LESS THAN NINE COPIES OF THE RECORD OR APPENDIX ON APPEAL;
App. Div. denied plaintiff's motion to waive the filing fee on an appeal from an a order of the Court of Claims dated 5/21/12, and for leave to file less than nine copies of the record or appendix on appeal.

BARET (ROMAN), PEOPLE v:

1ST Dept. App. Div. order of 10/2/12; reversal; leave to appeal granted by Smith, J., 6/5/13;
CRIMES - RIGHT TO COUNSEL - EFFECTIVE REPRESENTATION - FAILURE TO ADVISE DEFENDANT OF IMMIGRATION CONSEQUENCES OF GUILTY PLEA - WHETHER PADILLA v KENTUCKY (559 US 356 [2010]), DECIDED AFTER DEFENDANT'S CONVICTION WAS AFFIRMED ON DIRECT APPEAL, APPLIES RETROACTIVELY IN THIS STATE - CHAIDEZ v UNITED STATES (133 S. Ct. 1103 [2013]);
Supreme Court, Bronx County, denied defendant's CPL 440.10 motion to vacate the judgment of the same court, rendered 12/20/04, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him to a term of 2 to 6 years; App. Div. reversed and remitted the matter to Supreme Court for a hearing.

BOARD OF EDUCATION OF THE MINEOLA UNION FREE SCHOOL DISTRICT, MATTER OF v MINEOLA TEACHERS ASSOCIATION:

2ND Dept. App. Div. order of 3/27/13; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;
ARBITRATION - COLLECTIVE BARGAINING AGREEMENT - WHETHER SUPREME COURT PROPERLY GRANTED THE SCHOOL DISTRICT'S PETITION TO PERMANENTLY STAY ARBITRATION - RELIGIOUS HOLIDAYS PROVISION OF COLLECTIVE BARGAINING AGREEMENT - ESTABLISHMENT CLAUSE OF FIRST

Supreme Court, Nassau County, granted the petition and denied respondent union's motion to compel arbitration; App. Div. affirmed.

COUNCIL OF THE CITY OF NEW YORK v DEPARTMENT OF HOMELESS SERVICES et al.:

1ST Dept. App. Div. order of 2/14/13; affirmance; leave to appeal granted by Court of Appeals, 6/11/13;

SOCIAL SERVICES - TEMPORARY HOUSING ASSISTANCE - WHETHER THE COURTS BELOW PROPERLY DETERMINED THAT THE SINGLE ADULTS ELIGIBILITY PROCEDURE (PROCEDURE 12-400), WHICH GOVERNS THE INTAKE AND ADMISSION PROCESS OF SINGLE ADULT INDIVIDUALS APPLYING FOR TEMPORARY HOUSING, IS A "RULE" WITHIN THE MEANING OF THE CITY ADMINISTRATIVE PROCEDURE ACT (CHAPTER 45 OF THE NEW YORK CITY CHARTER);

Supreme Court, New York County, granted a CPLR article 78 petition to declare Procedure 12-1400, the Single Adults Eligibility Procedure, a nullity upon the ground that it had been promulgated in violation of Chapter 45 of the New York City Charter, the City Administrative Procedure Act; App. Div. affirmed.

DUMAY (JOSEPH), PEOPLE v:

App. Term 2nd, 11th and 13th Judicial Districts order of 9/13/12; affirmance; leave to appeal granted by Read, J, 6/6/13;

CRIMES - COMPLAINT - LEGAL SUFFICIENCY OF MISDEMEANOR COMPLAINT CHARGING OBSTRUCTION OF GOVERNMENTAL ADMINISTRATION - COMPLAINT ALLEGING THAT DEFENDANT STOOD BEHIND A POLICE CAR AND HIT ITS TRUNK, WITHOUT ALLEGING THAT THE POLICE HAD COMMUNICATED TO DEFENDANT OR THAT DEFENDANT OTHERWISE WAS AWARE THAT THE POLICE NEEDED HIM TO MOVE SO THEY COULD LEAVE;

Criminal Court of the City of New York, Kings County, convicted defendant, upon his guilty plea, of obstructing governmental administration in the second degree; App. Term affirmed.

GILLOTTI (NEIL F.), PEOPLE v:

4TH Dept. App. Div. order of 3/15/13; affirmance; leave to appeal granted by Court of Appeals, 6/11/13;

CRIMES - SEX OFFENDERS - SEX OFFENDER REGISTRATION ACT (SORA) (CORRECTION LAW ART. 6-C) - WHETHER DEFENDANT ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE THAT HE WAS ENTITLED TO A DOWNWARD DEPARTURE FROM THE SORA RISK LEVEL;

Niagara County Court determined that defendant is a level three risk pursuant to SORA; App. Div. affirmed.

VILLAGE OF ILION, et al. v COUNTY OF HERKIMER:

4TH Dept. App. Div. order of 2/1/13; affirmance; leave to appeal granted by Court of Appeals, 6/6/13;

DAMAGES - MEASURE OF DAMAGES - WHETHER TRIAL COURT ERRED IN DECLINING TO DISCOUNT THE DAMAGES AWARDED BY THE JURY TO PRESENT VALUE AND IN AWARDED PREJUDGMENT INTEREST ON THE UNDISCOUNTED

Supreme Court, Oneida County, among other things, awarded money damages to defendant County individually and as administrator of Herkimer County Self-Insurance Plan; App. Div. affirmed.

McCRAVY (LIONEL), PEOPLE v:

1ST Dept. App. Div. order of 1/24/13; affirmance; leave to appeal granted by Read, J., 6/6/13;

CRIMES - BURGLARY - DWELLING - MULTIPLE UNIT BUILDING - WHETHER DEFENDANT WAS PROPERLY CONVICTED OF TWO COUNTS OF SECOND-DEGREE BURGLARY UNDER PENAL LAW § 140.25(2) BASED UPON HIS ENTRIES INTO A HOTEL'S EMPLOYEE LOCKER ROOM AND A MUSEUM LOCATED IN THE SAME BUILDING AS THE HOTEL; SENTENCE - CONSECUTIVE SENTENCES - WHETHER CONSECUTIVE SENTENCES MAY BE IMPOSED BASED UPON CONVICTIONS OF TWO COUNTS OF BURGLARY ARISING OUT OF ENTRIES INTO SEPARATE COMPONENTS OF A SINGLE BUILDING DURING ONE CONTINUOUS COURSE OF CRIMINAL ACTIVITY;

Supreme Court, New York County, convicted defendant, after a jury trial, of two counts of burglary in the second degree, and sentenced him, as a second felony offender, to an aggregate term of 15 years; App. Div. affirmed.

PASCAZI, MATTER OF v GARDNER:

3RD Dept. App. Div. judgment of 5/2/13; confirmation of agency determination; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

EMPLOYMENT RELATIONSHIPS - WAGES - CPLR ARTICLE 78 PROCEEDING TO REVIEW DETERMINATIONS OF THE COMMISSIONER OF LABOR - FAILURE TO PAY PREVAILING WAGES AND SUPPLEMENTS; CLAIMED IMPROPER ENFORCEMENT OF STATE PREVAILING WAGE LAW DUE TO PREEMPTION OF LAW BY FEDERAL TELECOMMUNICATIONS ACT AND LABOR MANAGEMENT RELATIONS ACT; CLAIMED DUE PROCESS VIOLATIONS;

App. Div. confirmed two determinations of respondent Commissioner of Labor which found, among other things, that petitioner was a shareholder of a corporation that failed to pay prevailing wages and supplements, and dismissed the petition.

REIS, &c. v VOLVO CARS OF NORTH AMERICA, et al.:

1ST Dept. App. Div. order of 4/30/13; modification; motion to dismiss plaintiff's cross appeal pending;

PRODUCTS LIABILITY - FAILURE TO WARN - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT SUPREME COURT PROPERLY SET ASIDE THE JURY VERDICT ON PLAINTIFF'S FAILURE TO WARN CLAIM;

Supreme Court, New York County, granted defendants' motion to set aside the jury's verdict to the extent of setting aside the verdict on plaintiff's failure to warn claim; thereafter, the same court awarded plaintiff damages on his negligence claim; App. Div. modified to reduce the jury's award for future household relocation and modification costs by \$168,000, and

otherwise affirmed.

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RIVERA (DAVID), PEOPLE v:

1ST Dept. App. Div. order of 10/11/12; reversal; leave to appeal granted by Read, J., 6/6/13;

CRIMES - WITNESSES - PHYSICIAN-PATIENT PRIVILEGE (CPLR 4505) - WHETHER TESTIMONY OF PSYCHIATRIST TO WHOM DEFENDANT ADMITTED SEXUAL ABUSE OF A CHILD WAS PROPERLY ADMITTED AT TRIAL IN LIGHT OF WITNESS'S PRIOR REPORTING OF DEFENDANT'S STATEMENTS TO THE ADMINISTRATION FOR CHILD SERVICES;

Supreme Court, New York County, convicted defendant, after a jury trial, of predatory sexual assault against a child, and sentenced him to a term of 13 years to life; App. Div. reversed and remanded matter for a new trial.

SWEAT (TYRONE), PEOPLE v:

County Court, Erie County, order of 1/15/13; affirmance; leave to appeal granted by Pigott, J., 6/7/13;

CRIMES - DOUBLE JEOPARDY - WHETHER TRIAL COURT ERRED IN DISMISSING THE INFORMATION CHARGING CRIMINAL CONTEMPT IN THE SECOND DEGREE (REFUSAL TO TESTIFY IN CRIMINAL TRIAL) ON DOUBLE JEOPARDY GROUNDS AFTER DEFENDANT WAS CITED AND CONFINED FOR CIVIL CONTEMPT FOR THE DURATION OF THE TRIAL FOR THE SAME REFUSAL TO TESTIFY;

Buffalo City Court dismissed the information charging defendant with criminal contempt in the second degree on double jeopardy grounds; County Court, Erie County, affirmed.

25 AVENUE C NEW REALTY, LLC v ALEA NORTH AMERICA INSURANCE COMPANY, et al.:

1ST Dept. App. Div. order of 6/12/12; modification; leave to appeal granted by Court of Appeals, 6/6/13;

INSURANCE - DUTY TO DEFEND AND INDEMNIFY - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT INSURER COULD NOT BE ESTOPPED FROM DISCLAIMING COVERAGE BECAUSE THE INSURANCE POLICY WAS NOT IN EFFECT AT THE TIME OF THE ACCIDENT; WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT DELAY IN PROVIDING INSURER WITH A NOTICE OF CLAIM WAS UNREASONABLE AS A MATTER OF LAW;

Supreme Court, Bronx County, granted plaintiffs' motion for summary judgment to the extent of declaring that defendant Merrimack Mutual Fire Insurance Company is obligated to defend and indemnify plaintiffs in an underlying personal injury action, granted defendant Alea North America Insurance Company's cross motion for summary judgment dismissing the complaint and all cross claims against it, and denied Merrimack's cross motion for summary judgment; App. Div. modified to the extent of denying plaintiffs' motion for summary judgment, and granting defendant Merrimack's cross motion for summary judgment to the extent of declaring that Merrimack is not obligated to defend and indemnify plaintiffs in the underlying personal injury action, and otherwise affirmed.

WILLIAMS, &c. v WEATHERSTONE et al.:

4TH Dept. App. Div. order of 3/22/13; modification; leave to appeal granted by App. Div., 6/7/13;

SCHOOLS - TRANSPORTATION OF PUPILS - DUTY TO SAFELY TRANSPORT STUDENT TO SCHOOL - STUDENT STRUCK BY VEHICLE IN ATTEMPT TO CATCH BUS STOPPED ACROSS THE STREET - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT THE SCHOOL DISTRICT OWED A DUTY TO THE STUDENT EVEN THOUGH THE STUDENT WAS NOT IN ITS PHYSICAL CUSTODY AND CONTROL WHEN THE ACCIDENT OCCURRED, BECAUSE "THE BUS ARRIVED AT THE BUS STOP, PASSED IT, AND THE DRIVER TURNED AROUND TO PICK UP THE [STUDENT]," AT WHICH POINT THE STUDENT RAN ACROSS THE STREET TO CATCH THE BUS AND WAS STRUCK BY A VEHICLE - PRATT v ROBINSON (39 NY2d 554 [1976]);

Supreme Court, Onondaga County, denied defendant Jordon-Elbridge Central School District's motion for summary judgment; App. Div. modified by granting defendant Jordon-Elbridge Central School District's motion for summary judgment in part and dismissing the complaint as against that defendant, as amplified by the bill of particulars, insofar as it alleges negligence based upon violations of the Vehicle and Traffic Law, and affirmed as so modified.