

COURT OF APPEALS NEW FILINGS

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

**July 16 through July 23, 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.**

BRACCI, MATTER OF v NEW YORK STATE DIVISION OF HUMAN RIGHTS:

3<sup>RD</sup> Dept. App. Div. judgment of 5/14/09; confirmation of administrative determination; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right and whether the appeal was timely taken;

CIVIL RIGHTS - DISCRIMINATION BASED ON GENDER - HOSTILE WORK ENVIRONMENT AND SEXUAL HARASSMENT - PROCEEDING PURSUANT TO HUMAN RIGHTS LAW (EXECUTIVE LAW § 298) BY CORRECTION OFFICER AGAINST THE DEPARTMENT OF CORRECTIONAL SERVICES AND HER FORMER CAPTAIN; WHETHER RESPONDENT'S DETERMINATION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE;

App. Div. confirmed respondent's determination dismissing petitioner's discrimination complaint, and dismissed the petition.

BUTLER v STAGECOACH GROUP, PLC, et al.:

COWAN, et al. v STAGECOACH GROUP, PLC, et al.:

GODWIN, et al. v STAGECOACH GROUP, PLC, et al.:

4<sup>TH</sup> Dept. App. Div. orders of 4/30/10; affirmances; leave to appeal granted by App. Div., 7/2/10;

CONFLICT OF LAW - LAW GOVERNING TORT ACTIONS - ACTION SEEKING DAMAGES FOR INJURIES OR WRONGFUL DEATH RESULTING FROM COLLISION OF TRACTOR-TRAILER PARKED ON SHOULDER OF HIGHWAY IN NEW YORK AND A CHARTERED BUS TRANSPORTING YOUNG WOMEN'S HOCKEY TEAM FROM ONTARIO, CANADA - WHETHER COURTS BELOW ERRED IN DETERMINING THAT THE LAW OF ONTARIO, CANADA APPLIED AS TO NONECONOMIC DAMAGES; EVIDENCE - JUDICIAL NOTICE - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT SUPREME COURT DID NOT ABUSE ITS DISCRETION BY TAKING JUDICIAL NOTICE OF ONTARIO LAW REGARDING NONECONOMIC DAMAGES DESPITE DEFENDANTS' FAILURE TO RAISE THE APPLICABILITY OF SUCH LAW AS AN AFFIRMATIVE DEFENSE AND TO PROVIDE THE SUBSTANCE OF THE LAW IN THEIR PLEADINGS PURSUANT TO CPLR 3016(e) - INTERPLAY BETWEEN CPLR 3016(e) AND CPLR 4511(b); Supreme Court, Livingston County granted defendants' motions and determined that the law of Ontario, Canada concerning noneconomic damages applies to these actions; App. Div. affirmed.

THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK v McGRAHAM:

1<sup>ST</sup> Dept. App. Div. order of 7/13/10; reversal with dissents; ARBITRATION - CONFIRMING OR VACATING AWARD - AWARD FINDING TEACHER GUILTY OF SERIOUS MISCONDUCT UNBECOMING A PERSON IN THE POSITION OF TEACHER AND IMPOSING A PENALTY OF 90 DAYS SUSPENSION WITHOUT PAY AND REASSIGNMENT - CHALLENGE TO APPELLATE DIVISION ORDER HOLDING THAT NO BASIS EXISTED "UPON WHICH [SUPREME] COURT SHOULD HAVE DISTURBED THE HEARING OFFICER'S DETERMINATION" REGARDING THE PENALTY IMPOSED;

In a proceeding pursuant to Education Law § 3020-a(5) and CPLR 7511 to vacate an impartial hearing officer's determination finding respondent teacher guilty of serious misconduct unbecoming a person in the position of teacher and imposing a penalty of 90 days suspension without pay and reassignment, Supreme Court granted the petition and remanded the matter for imposition of a new penalty; App. Div. reversed, reinstated the award and dismissed the petition.

DARRISAW, &c. v STRONG MEMORIAL HOSPITAL, &c., et al.:

4<sup>TH</sup> Dept. App. Div. order of 6/11/10; affirmance with dissents; sua sponte examination whether the two-justice dissent at the App. Div. is on a question of law;

PHYSICIANS AND SURGEONS - MALPRACTICE - SUMMARY JUDGMENT - WHETHER THE APPELLATE DIVISION ERRED IN AFFIRMING A SUPREME COURT ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS - NEGLIGENT SUPERVISION;

Supreme Court, Monroe County granted defendants' motion for summary judgment dismissing the complaint in this medical

FERNANDEZ (MARCOS A.), PEOPLE v:

3<sup>RD</sup> Dept. App. Div. order of 6/3/10; reversal; leave to appeal granted by McCarthy, J., 7/8/10;

CRIMES - WITNESSES - REPUTATION FOR TRUTH AND VERACITY - WHETHER THE TRIAL COURT IMPROPERLY PRECLUDED DEFENDANT FROM PRESENTING TESTIMONY OF TWO FAMILY MEMBERS REGARDING THE COMPLAINANT'S REPUTATION IN THEIR FAMILY FOR UNTRUTHFULNESS;

Ulster County Court convicted defendant of sexual abuse in the first degree, sexual abuse in the second degree and endangering the welfare of a child; App. Div. reversed, dismissed count 5 of the indictment and remitted to Ulster County Court for a new trial on counts 4 and 6 of the indictment.

GENT UNIFORM RENTAL CORP., MATTER OF v COUNTY OF SUFFOLK DEPARTMENT OF LABOR (AND ANOTHER PROCEEDING):

2<sup>ND</sup> Dept. App. Div. order of 5/4/10; affirmance; sua sponte examination whether the 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;

EMPLOYMENT RELATIONSHIPS - WAGES - CPLR ARTICLE 78 PROCEEDING TO REVIEW DETERMINATION OF THE SUFFOLK COUNTY DEPARTMENT OF LABOR THAT PETITIONER FAILED TO COMPLY WITH THE LIVING WAGE LAW OF THE COUNTY OF SUFFOLK (LOCAL LAW 12 OF 2001) IN PERFORMING A CONTRACT TO SUPPLY CERTAIN UNIFORMS AND AWARDED A CONTRACT TO ANOTHER COMPANY TO SUPPLY THE UNIFORMS; MUNICIPAL CORPORATIONS;

Supreme Court, Suffolk County denied the petition in proceeding number 1, directed an award on the counterclaims in that proceeding, found petitioner ineligible for future contracts with the county, compelled petitioner to submit to depositions, directed an inquest to assess the amount of penalties to be awarded on the counterclaims, denied petitioner's motion to renew the petition in proceeding number 1 and consolidate proceedings numbers 1 and 2, granted the County's motion to dismiss proceeding number 2 and dismissed that proceeding; App. Div. affirmed.

HUNTER (SHAWN), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 2/11/10; affirmance; leave to appeal granted by Smith, J., 7/15/10;

CRIMES - SUPPRESSION HEARING - STANDING TO CHALLENGE SEARCH OF APARTMENT IN WHICH DEFENDANT WAS ARRESTED; PRESERVATION - WHETHER THE PEOPLE MAY ARGUE FOR THE FIRST TIME ON APPEAL THAT DEFENDANT LACKED STANDING TO CHALLENGE THE SEARCH;

Supreme Court, Monroe County convicted defendant of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree; App. Div. affirmed.

JOHNSON (STEVE), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 6/1/10; affirmance; leave to appeal granted by Freedman, J., 7/13/10;

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CRIMES - INSANITY - DEFENDANT'S BELIEF THAT HIS ACTS WERE IN OBEDIENCE TO DIVINE INSTRUCTIONS - CHALLENGE TO TRIAL COURT'S STANDARD INSTRUCTIONS ON INSANITY DEFENSE AND SUPPLEMENTAL INSTRUCTIONS IN RESPONSE TO JUROR NOTES; JURY - SELECTION OF JURY - WHETHER TRIAL COURT ERRED IN DENYING DEFENDANT'S CHALLENGE FOR CAUSE TO A PROSPECTIVE JUROR WHO PROFESSED HAVING "STRONG OPINIONS" ON THE INSANITY DEFENSE BASED ON RESEARCH SHE CONDUCTED ON THE DEFENSE WHILE IN COLLEGE;

Supreme Court, New York County convicted defendant of attempted murder in the second degree as a hate crime, two counts of attempted murder in the second degree, assault in the first degree as a hate crime, three counts of assault in the first degree, 15 counts each of kidnapping in the second degree as a hate crime and kidnapping in the second degree, five counts each of assault in the second degree as a hate crime and of assault in the second degree, and three counts each of criminal possession of a weapon in the second and third degrees, and sentenced him, as a second violent felony offender, to an aggregate term of 240 years; App. Div. affirmed.

KATZ v MARRA:

2<sup>ND</sup> Dept. App. Div. order of 6/8/10; affirmance; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution;

CONTRACTS - BREACH OR PERFORMANCE OF CONTRACT - ACTION FOR SPECIFIC PERFORMANCE OF CONTRACT FOR SALE OF RENTAL PROPERTY; VACATUR OF ORDER; PARTIES - STANDING; APPOINTMENT OF SPECIAL REFEREE TO TRANSFER PROPERTY;

Supreme Court, Kings County denied defendant's motion to vacate a judgment of the same court dated 11/20/06 granting plaintiff's unopposed motion for summary judgment on the complaint and awarding plaintiff specific performances of the contract, and denied defendant's motion to vacate a 1/3/08 order of the same court granting plaintiff's unopposed motion for the appointment of a special referee to sign a deed transferring the subject real property to plaintiff; App. Div. affirmed.

MARTE et al., MATTER OF v BERKMAN:

1<sup>ST</sup> Dept. App. Div. order of 2/16/10; denial of writ in CPLR article 78 proceeding; leave to appeal granted by App. Div., 5/20/10;

PROCEEDING AGAINST BODY OR OFFICER - CPLR ARTICLE 78 PROCEEDING IN THE NATURE OF PROHIBITION SEEKING TO PREVENT RETRIAL OF PETITIONERS ON UNDERLYING CRIMINAL MATTER ON THE GROUND OF DOUBLE JEOPARDY - MANIFEST NECESSITY FOR MISTRIAL - PETITIONERS' CONSENT TO MISTRIAL;

App. Div. denied petitioners' CPLR article 78 petition in the nature of a writ of prohibition.

MARTINO v STOLZMAN, et al. (AND ANOTHER ACTION):

4<sup>TH</sup> Dept. App. Div. order of 6/11/10; modification with dissents; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution; MOTOR VEHICLES - COLLISION - DUTY OF SOCIAL HOSTS TO CONTROL AND SUPERVISE INTOXICATED GUESTS LEAVING THEIR PREMISES; NEGLIGENCE; DISMISSAL OF CLAIMS;

Supreme Court, Niagara County denied the motion of defendants Oliver seeking, among other things, dismissal of the claim in Action No. 1 and the cause of action against them in Action No. 2 asserting a violation of General Obligations Law § 11-101; App. Div. modified by granting the motion of defendants Oliver in part and dismissing the claim against them in Action No. 1 and the cause of action against them in Action No. 2 asserting the violation of General Obligations Law § 11-101.

MEDINA (JUAN), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 11/19/09; modification; leave to appeal granted by Lippman, Ch. J., 7/7/10; CRIMES - INSTRUCTIONS - CHALLENGE TO INSTRUCTION NOT CONTAINING THE STATUTORY DEFINITIONS OF "DEPRIVE" AND "APPROPRIATE" SET FORTH IN SUBDIVISIONS (3) AND (4) OF PENAL LAW § 155.00; TRIAL - MISTRIAL - CHALLENGE TO APPELLATE DIVISION HOLDINGS THAT TRIAL COURT PROPERLY EXERCISED ITS DISCRETION (1) "WHEN IT DENIED DEFENDANT'S MISTRIAL MOTIONS MADE AFTER NOTES FROM DELIBERATING JURY INDICATED IT WAS DEADLOCKED ... AND INSTEAD DELIVERED SEVERAL ALLEN CHARGES" AND (2) "BY NOT ASKING THE JURY ABOUT THE LIKELIHOOD OF A VERDICT OR CONDUCTING A SEPARATE COLLOQUY WITH A POSSIBLE HOLDOUT JUROR";

Supreme Court, Bronx County convicted defendant of robbery in the first degree and sentenced him to a term of 10 years; App. Div. modified to the extent of reducing the sentence to a term of 8 years and otherwise affirmed.

OAKES, &c. v MUKA:

3<sup>RD</sup> Dept. App. Div. orders of 7/6/06, 11/26/08, 1/21/10 and 6/8/10; sua sponte examination whether the orders appealed from finally determine the action within the meaning of the Constitution and whether any jurisdictional basis exists to support an appeal as of right;

TRUSTS - CONSTRUCTIVE TRUST - CHALLENGE TO VARIOUS ORDERS ENTERED IN ACTION SEEKING, AMONG OTHER THINGS, DECLARATION THAT PARTICULAR LIVING TRUST, AS AMENDED ON A CERTAIN DATE, WAS IN FULL FORCE AND THAT ALL SUBSEQUENT APPOINTMENTS, AMENDMENTS AND AFFIDAVITS WERE OF NO EFFECT BECAUSE DEFENDANT USED FRAUD, DURESS AND UNDUE INFLUENCE UPON DECEDENT TO MAKE CHANGES TO THE TRUST; Supreme Court, Tompkins County denied defendant's motion to dismiss the complaint and for recusal; App. Div. affirmed; Supreme Court granted plaintiff's motions to dismiss defendant's counterclaim and denied defendant's motion to vacate a prior order of that court; App. Div. affirmed; Supreme Court issued a

judgment in plaintiff's favor that, among other things,  
invalidated several changes to the Herbert C. Oakes Living Trust,

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imposed a constructive trust over the trust assets and enjoined defendant from conducting any further transactions with respect to any of the assets, and denied defendant's motion to set aside the verdict; App. Div. affirmed and, thereafter, denied defendant's motion for, among other things, reargument or permission to appeal to the Court of Appeals.

WINGATE (BLAKE), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 2/2/10; modification; leave to appeal granted by Smith, J., 7/15/10;

CRIMES - RIGHT TO REPRESENTATION PRO SE - SUFFICIENCY OF "SEARCHING INQUIRY" - WHETHER JUDGMENT OF CONVICTION MUST BE REVERSED WHERE NISI PRIUS COURT ALLOWED DEFENDANT TO REPRESENT HIMSELF AT SUPPRESSION HEARING WITHOUT GIVING HIM ADEQUATE WARNINGS ABOUT THE DANGERS AND DISADVANTAGES OF PROCEEDING WITHOUT COUNSEL BUT GAVE DEFENDANT ADEQUATE WARNINGS BEFORE ALLOWING HIM TO REPRESENT HIMSELF AT TRIAL; ALLEGED ERROR IN LIMITING ACCESS TO STANDBY COUNSEL BY PREVENTING DEFENDANT FROM COMMUNICATING WITH COUNSEL DURING CROSS-EXAMINATION OF PROSECUTION WITNESS AND WITH AN INVESTIGATOR BEFORE DECIDING WHETHER TO PUT ON A DEFENSE CASE;

Supreme Court, Queens County convicted defendant of possession of stolen property in the fourth degree and criminal possession of a controlled substance in the seventh degree, upon a jury verdict, and imposed sentence; App. Div. modified by vacating the conviction of criminal possession of stolen property in the fourth degree and the sentence imposed thereon, and dismissing that count of the indictment, and affirmed the judgment as so modified.