

COURT OF APPEALS NEW FILINGS

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

**October 21 through October 27, 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.**

HUDSON VALLEY FEDERAL CREDIT UNION v NEW YORK STATE DEPARTMENT OF TAXATION and FINANCE, et al.:

1<sup>ST</sup> Dept. App. Div. order of 6/2/11; affirmance; leave to appeal granted by Court of Appeals, 10/18/11;

TAXATION - MORTGAGE RECORDING TAX - TAX LAW § 253 - WHETHER FEDERAL CREDIT UNIONS ARE EXEMPT FROM MORTGAGE RECORDING TAX UNDER EITHER THE FEDERAL CREDIT UNION ACT OF 1934 (12 USC Ch. 14) OR THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION; ACTION FOR DECLARATORY JUDGMENT;

Supreme Court, New York County dismissed the complaint; App. Div. affirmed.

HUFF v RODRIGUEZ:

4th Dept. App. Div. order of 10/7/11; affirmance; bringing up for review App. Div. order of 7/10/09; reversal with dissents; sua sponte examination whether an appeal lies pursuant to CPLR 5601(d);

TRIAL - ARGUMENT AND CONDUCT OF COUNSEL - COMMENTS MADE BY DEFENDANTS' ATTORNEY IN SUMMATION THAT PLAINTIFF DID NOT CALL HER EXPERT WITNESS BECAUSE HIS TESTIMONY WOULD NOT SUPPORT PLAINTIFF'S CLAIM THAT DEFENDANT DRIVER CAUSED THE AUTOMOBILE ACCIDENT;

Supreme Court, Erie County dismissed the complaint upon a jury verdict in favor of defendant on liability; App. Div., with two Justices dissenting, reversed, reinstated the complaint and granted a new trial on liability; thereafter, Supreme Court adjudged defendants 100% negligent for a 10/18/00 motor vehicle accident; App. Div. affirmed.

MARCHAND, MATTER OF v NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION, et al.:

2<sup>ND</sup> Dept. App. Div. order of 5/3/11; affirmance; leave to appeal granted by Court of Appeals, 10/18/11;

HIGHWAYS - HIGHWAY BY USE - WHETHER PRIVATE DIRT PATH USED BY PUBLIC HAD BECOME A VILLAGE STREET BY PRESCRIPTION UNDER VILLAGE LAW § 6-626 - NECESSITY FOR VILLAGE TO MAINTAIN AND REPAIR STREET; ABANDONMENT - WHETHER PATH THEREAFTER CEASED TO BE A VILLAGE STREET BY PRESCRIPTION BECAUSE IT WAS ABANDONED BY NONUSE;

Supreme Court, Nassau County, among other things, in a hybrid CPLR article 78 proceeding and declaratory judgment action, declared that the subject property continued to be a village street by prescription under Village Law § 6-626 and a public right-of-way; App. Div. affirmed.

MARTINEZ (HECTOR), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 5/17/11; affirmance; leave to appeal granted by Tom, J., 9/29/11;

CRIMES - MURDER - DEPRAVED INDIFFERENCE MURDER - SUFFICIENCY OF EVIDENCE - SHOOTING INTO GROUP CONSISTING OF INTENDED TARGET AND TWO BYSTANDERS; TIMELINESS OF PROSECUTION; DISCLOSURE - NOTICE OF INTENTION TO OFFER EVIDENCE - WHETHER THE TRIAL COURT ERRED IN GRANTING THE PEOPLE'S REQUEST FOR A BRIEF DELAY IN DISCLOSING THE EXISTENCE OF A NEWLY DISCOVERED WITNESS WHO MADE A PHOTOGRAPHIC IDENTIFICATION OF DEFENDANT SHORTLY BEFORE OPENING STATEMENTS; DENIAL OF DEFENDANT'S MOTION TO SUPPRESS STATEMENTS HE MADE TO POLICE; ALLEGED PROSECUTORIAL MISCONDUCT; CLAIMED INEFFECTIVE ASSISTANCE OF COUNSEL;

Supreme Court, New York County convicted defendant of murder in the second degree, assault in the second degree, and criminal possession of a weapon in the second degree; App. Div. affirmed.

RICHARDS, MATTER OF v CUOMO, &c.:

3<sup>RD</sup> Dept. App. Div. order of 10/6/11; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; PROCEEDING AGAINST BODY OR OFFICER - PROHIBITION - WHEN REMEDY AVAILABLE - PETITIONER CHALLENGES APPLICATION OF PARTICULAR PENAL LAW PROVISION TO HIM; Supreme Court, Franklin County dismissed a CPLR article 78 petition; App. Div. affirmed.

677 NEW LOUDON CORPORATION, MATTER OF, d/b/a NITE MOVES v STATE OF NEW YORK TAX APPEALS TRIBUNAL et al.

3<sup>RD</sup> Dept. App. Div. judgment of 6/9/11; confirmation of determination; leave to appeal granted by Court of Appeals, 10/20/11; TAXATION - SALES AND USE TAXES - WHETHER EXOTIC DANCE PERFORMANCES AT PETITIONER'S ESTABLISHMENT CONSTITUTE "DRAMATIC OR MUSICAL ARTS PERFORMANCES," THEREBY EXEMPTING MONIES PAID FOR SUCH PERFORMANCES FROM TAXATION UNDER TAX LAW § 1105(f)(1) - ADMISSIONS CHARGES AND PRIVATE DANCE SALES; App. Div. confirmed respondent Tax Appeals Tribunal's determination which sustained a sales and use tax assessment imposed under Tax Law articles 28 and 29, and dismissed the CPLR article 78 proceeding.

SOLOMON (MICHAEL), PEOPLE v:

4<sup>th</sup> Dept. App. Div. order of 5/7/10; affirmance; leave to appeal granted by Pigott, J., 6/7/11; CRIMES - RIGHT TO COUNSEL - EFFECTIVE REPRESENTATION - CHALLENGE TO APPELLATE DIVISION RULING THAT DEFENDANT FAILED TO ESTABLISH THAT ANY CONFLICT CREATED BY DEFENSE COUNSEL'S SIMULTANEOUS REPRESENTATION OF A KEY PROSECUTION WITNESS AFFECTED THE CONDUCT OF THE DEFENSE - WHETHER DEFENSE COUNSEL PROVIDED MEANINGFUL REPRESENTATION - DEFENSE COUNSEL'S FAILURE TO PRESERVE VARIOUS ARGUMENTS FOR APPELLATE REVIEW; CONFESSION; EVIDENCE - TAPE RECORDED CONVERSATIONS BETWEEN THE VICTIM AND DEFENDANT; Niagara County Court convicted defendant, upon a jury verdict, of rape in the first degree, course of sexual conduct against a child in the first degree, course of sexual conduct against a child in the second degree, 10 counts of rape in the second degree, 7 counts of criminal sexual act in the second degree, and 4 counts of use of a child in a sexual performance; App. Div. affirmed.

TOWN OF WALLKILL, MATTER OF v CIVIL SERVICE EMPLOYEES ASSOCIATION, et al.:

2<sup>ND</sup> Dept. App. Div. order of 5/10/11; reversal; leave to appeal granted by Court of Appeals, 10/18/11; CIVIL SERVICE - DISCIPLINARY PROCEEDINGS - WHETHER DISCIPLINE OF TOWN POLICE OFFICERS IS A PERMISSIBLE SUBJECT OF COLLECTIVE BARGAINING UNDER THE TAYLOR LAW OR IS A PROHIBITED SUBJECT OF COLLECTIVE BARGAINING UNDER TOWN LAW § 155 - VALIDITY OF TOWN OF WALLKILL LOCAL LAW NO. 2 OF 2007;

Supreme Court, Orange County, in three related hybrid CPLR article 75 proceedings for, among other things, a stay of municipal police disciplinary arbitrations, and actions for a judgment declaring that Local Law No. 2 of 2007 valid and affords the Town of Wallkill the right to prescribe the manner of administration of all pending police disciplinary matters within its jurisdiction, among other things, denied the petitions, granted respondents/defendants' cross petitions to compel arbitration, declared Local Law No. 2 of 2007 invalid insofar as it is inconsistent with the disciplinary provisions of a collective bargaining agreement applicable to police officers who are members of the Town of Wallkill Police Benevolent Association, Inc., vacated disciplinary actions taken against respondents/defendants Dennis Rolan, Adam Bruce, Paul Besser, Charles Bodensieck, Darrell Algarin, Thomas Klevenko and Steven Walsh pursuant to Local Law No. 2 of 2007, and directed the parties to proceed to arbitration; App. Div. reversed, granted the petitions to stay arbitration, permanently stayed the related arbitration proceedings, denied the motion of the Town of Wallkill for summary judgment declaring that Local Law No. 2 of 2007 of the Town of Wallkill affords it the right to prescribe the manner of administration of all pending police disciplinary matters within its jurisdiction, and reinstated the disciplinary actions taken against respondents/defendants Dennis Rolan, Adam Bruce, Paul Besser, Charles Bodensieck, Darrell Algarin, Thomas Klevenko and Steven Walsh pursuant to Local Law No. 2 of 2007.