

COURT OF APPEALS NEW FILINGS

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

December 23 through December 29, 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.

AIR STREAM CORP. v 3300 LAWSON CORP.:

2ND Dept. App. Div. order of 5/17/11; reversal; leave to appeal granted by Court of Appeals, 12/20/11; Rule 500.11 review pending;

ADVERSE POSSESSION - ACTION FOR DECLARATORY JUDGMENT REGARDING TITLE TO A LOADING DOCK BISECTING THE PARTIES' COMMON BOUNDARY LINE - WHETHER THE APPELLATE DIVISION DETAILED NEW FINDINGS OF FACT WITH SUFFICIENT PARTICULARITY (CPLR 5712) - WHETHER PLAINTIFF ESTABLISHED THE "EXCLUSIVITY" AND "HOSTILITY" ELEMENTS OF AN ADVERSE POSSESSION CLAIM;

Supreme Court, Nassau County declared that plaintiff had acquired title to a 7-foot strip of land located on defendant's property by adverse possession, that defendant does not have an easement by grant over a 7-foot strip of land on plaintiff's property, and that defendant is permanently enjoined from interfering with plaintiff's use of the 7-foot strip of land on defendant's property; and, in effect, denied defendant's counterclaims; App. Div. reversed and declared that plaintiff did not acquire the 7-foot strip of land located on defendant's property by adverse possession, that defendant has an easement by grant over a 7-foot strip of land on plaintiff's property, and that defendant is not enjoined from interfering with plaintiff's use of the 7-foot strip of land on defendant's property, and directed plaintiff to remove that portion of its cement platform that encroaches on defendant's property.

BRADLEY (DALE), PEOPLE v:

4TH Dept. App. Div. order of 4/1/11; affirmance; leave to appeal granted by Smith, J., 12/15/11;

CRIMES - EVIDENCE - PRIOR BAD ACTS - WHETHER THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE TESTIMONY REGARDING A PRIOR UNRELATED STABBING OF AN UNKNOWN PERSON BY DEFENDANT ON TRIAL FOR FATALLY STABBING HER BOYFRIEND; JURY INSTRUCTION - WHETHER JURY COULD CONSIDER EVIDENCE OF POSTTRAUMATIC STRESS DISORDER REGARDING DEFENDANT'S JUSTIFICATION DEFENSE;

Monroe County Court convicted defendant, upon a jury verdict, of manslaughter in the first degree; App. Div. affirmed.

DUPREE v GIUGLIANO:

2ND Dept. App. Div. order of 9/13/11; affirmance; leave to appeal granted by App. Div., 12/13/11;

PHYSICIANS AND SURGEONS - MEDICAL MALPRACTICE - SEXUAL RELATIONSHIP BETWEEN PHYSICIAN AND PATIENT; EVIDENCE - SUFFICIENCY OF EVIDENCE TO SUPPORT JURY VERDICT ON ISSUE OF LIABILITY; CONTRIBUTORY FAULT; CIVIL RIGHTS LAW § 80-a; DAMAGES; MOTION TO SET ASIDE VERDICT;

Supreme Court, Suffolk County, upon a jury verdict on the issue of liability finding defendant 75% at fault and plaintiff 25% at fault in the causation of plaintiff's injuries, and upon a jury verdict on the issue of damages finding that plaintiff sustained damages in the sums of \$150,000 for past mental distress, \$50,000 for future mental distress, and \$134,000 for loss of past financial support, and awarding plaintiff the sum of \$166,000 in punitive damages, and upon the denial of his motion pursuant to CPLR 4404(a) to set aside the verdict, awarded plaintiff judgment in the principal sum of \$416,000; App. Div. affirmed.

JAMES SQUARE ASSOCIATES, LP et al. v MULLEN &c., et al.:

4TH Dept. App. Div. order of 11/18/11; affirmance;

CONSTITUTIONAL LAW - TAKING OF PROPERTY - ELIGIBILITY TO PARTICIPATE IN EMPIRE ZONE PROGRAM - WHETHER THE APRIL 2009 AMENDMENTS TO GENERAL MUNICIPAL LAW § 959, PROVIDING FOR THE REVOCATION OF ELIGIBILITY TO PARTICIPATE IN THE EMPIRE ZONE PROGRAM FOR COMPANIES THAT FAILED TO MEET CERTAIN CRITERIA AS OF 1/1/08, VIOLATED DUE PROCESS; ECONOMIC DEVELOPMENT;

Supreme Court, Onondaga County granted plaintiffs' motion for summary judgment, denied defendants' cross motion for summary judgment, declared that Section 3 of the 2009 Amendments to the Empire Zone Program, set forth in General Municipal Law § 959(a)(v)(5) and (6), is prospective only and not retroactive to 1/1/08, and declared that the 6/29/09 decertification of plaintiffs, to the extent that it was applied by defendants retroactively to 1/1/08, was without legal authority and thereby declared null and void; Supreme Court then, upon renewal, adhered to its judgment entered 6/22/10, and further declared that the 8/11/10 "clarification" of the 2009 amendments to the Empire Zones Program is, as applied to plaintiffs, an unconstitutional taking of plaintiffs' property; App. Div. affirmed.

KNAPP, et al. v HUGHES, et al.:

3RD Dept. App. Div. order of 1/12/06; modification; leave to appeal granted by Court of Appeals, 12/13/11;

WATERS AND WATER COURSES - OWNERSHIP RIGHTS - WHETHER THE COMMON DEED UNDERLYING THE FUTURE CONVEYANCES OF REAL PROPERTY TO DEFENDANTS CONTAINED AN UNAMBIGUOUS PROVISION RESERVING TO PLAINTIFFS' PREDECESSOR THE EXCLUSIVE RIGHT TO USE THE POND ADJACENT TO DEFENDANTS' PROPERTIES;

Supreme Court, Broome County, among other things, granted defendants' motions for summary judgment dismissing the complaint; App. Div. modified by (1) reversing so much of the 6/16/04 Supreme Court order as granted the motions of defendants Hughes, et al., (2) reversing so much of the order as granted the motions of defendants Guokas with respect to their claimed ownership of littoral rights with respect to lot Nos. 13 and 14, and (3) reversing so much of the order as denied plaintiffs' motion for summary judgment against Hughes, et al. with respect to lot Nos. 13 and 14, denied defendants' motions, and remitted the matter to Supreme Court for further proceedings; Supreme Court, among other things, declared that the Hauptmanns have established title to that portion of the improved shoreline lying underneath the waters of Perch Pond which is adjacent to their original parcel, and established the boundaries of the parties' parcels.

KOCH v ACKER, MERRALL & CONDIT COMPANY:

1ST Dept. App. Div. order of 5/27/10; reversal; leave to appeal granted by Court of Appeals, 12/15/11; Rule 500.11 review pending;

CONSUMER PROTECTION - DECEPTIVE ACTS AND PRACTICES - ACTION BY COLLECTOR OF FINE AND RARE WINES AGAINST AUCTION COMPANY THAT SOLD WINE TO HIM - WHETHER PLAINTIFF'S CONSUMER PROTECTION CLAIMS

UNDER GENERAL BUSINESS LAW (GBL) §§ 349 AND 350 ARE BARRED AS A MATTER OF LAW BY THE DISCLAIMER SET FORTH IN THE AUCTION CATALOG'S "CONDITIONS OF SALE/PURCHASER'S AGREEMENT"; Supreme Court, New York County denied defendant's motion to dismiss plaintiff's causes of action under GBL §§ 349 and 350; App. Div. reversed, granted defendant's motion to dismiss plaintiff's causes of action under GBL §§ 349 and 350, and dismissed such causes of action.

O. (ANONYMOUS), MATTER OF v M. (ANONYMOUS):

2ND Dept. App. Div. order of 10/11/11; affirmance; leave to appeal granted by Court of Appeals, 12/13/11; Rule 500.11 review pending;

PARENT AND CHILD - SUPPORT - PROCEEDING PURSUANT TO FAMILY COURT ACT ARTICLE 5 TO ESTABLISH PATERNITY AND FOR AN AWARD OF CHILD SUPPORT - ORDER FOR GENETIC MARKER-DNA TEST WHERE NO HEARING WAS HELD REGARDING ISSUE OF ESTOPPEL - WHETHER FAMILY COURT HAD JURISDICTION OVER PETITION FOR CHILD SUPPORT WHERE ANOTHER SUPPORT ORDER EXISTED IN NEW JERSEY FOR SAME CHILD; Family Court, Dutchess County, in a 3/4/11 order, upon an order of filiation dated 11/15/10 adjudging him to be the father of the subject child, and after a hearing, directed respondent to pay biweekly child support in the sum of \$430; Family Court, in a 4/21/11 order, among other things, denied certain of respondent's objections to the 3/4/11 order; App. Div. dismissed appeal from 3/4/11 Family Court order, and affirmed, insofar as appealed from, the 4/21/11 Family Court order.

NATHAN O., MATTER OF v JENNIFER P.:

3RD Dept. App. Div. order of 10/20/11; affirmance; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right;

PARENT AND CHILD - PATERNITY - PROCEEDINGS PURSUANT TO FAMILY COURT ACT ARTICLES 5 AND 6 TO ESTABLISH PATERNITY; CLAIMED DUE PROCESS VIOLATIONS;

Family Court, Saratoga County, in a 5/5/10 order, denied respondent Jennifer P.'s motion to dismiss the petitions in two proceedings; Family Court, in a 6/18/10 order, among other things, granted petitioner's application, in two proceedings pursuant to Family Court Act articles 5 and 6, to adjudicate petitioner as the father of the child born to respondent Jennifer P.; App. Div. dismissed the appeal from the 5/5/10 Family Court order, and affirmed the 6/18/10 Family Court order.

VASQUEZ (DANIEL), PEOPLE v:

2ND Dept. App. Div. order of 9/13/11; affirmance; leave to appeal granted by Graffeo, J., 12/13/11;

CRIMES - IDENTIFICATION OF DEFENDANT - SHOWUP AND POINT OUT - CPL 710.30 PRETRIAL NOTICE DID NOT LIST THE SHOWUP IDENTIFICATION - AT TRIAL, DEFENDANT'S ATTORNEY DID NOT RAISE THE LACK OF PRETRIAL NOTICE AS A BASIS FOR EXCLUDING EVIDENCE ABOUT THE SHOWUP

Supreme Court, Queens County convicted defendant, upon a jury verdict, of attempted robbery in the first degree, criminal possession of a weapon in the third degree, and menacing in the second degree, and imposed sentence; App. Div. affirmed.

WARREN (DAMIEN), PEOPLE v:

4TH Dept. App. Div. order of 6/17/11; reversal; leave to appeal granted by Smith, J., 12/16/11;

CRIMES - RIGHT TO JURY TRIAL - SIMULTANEOUS BENCH TRIAL OF CO-DEFENDANT AND JURY TRIAL OF DEFENDANT - WHETHER DEFENDANT WHO DOES NOT WAIVE A JURY TRIAL IS ENTITLED TO HAVE THE JURY EXCLUDED WHEN THE CO-DEFENDANT WHO DID WAIVE A JURY PUTS ON HIS DEFENSE; PRESERVATION;

Erie County Court convicted defendant of murder in the second degree and criminal possession of a weapon in the second degree; App. Div. reversed, and granted a new trial.