

COURT OF APPEALS NEW FILINGS

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

**May 3, 2013 through May 9, 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.**

COUNTRY-WIDE INSURANCE COMPANY v PREFERRED TRUCKING SERVICES  
CORP, et al.:

1<sup>ST</sup> Dept. App. Div. order of 10/18/12; affirmance; leave to appeal granted by Court of Appeals, 5/2/13;  
INSURANCE - DISCLAIMER OF COVERAGE - TIMELINESS - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING UNTIMELY AS A MATTER OF LAW INSURER'S DISCLAIMER OF COVERAGE BECAUSE OF THE INSURED'S LACK OF COOPERATION IN THE DEFENSE OF THE UNDERLYING ACTION;  
Supreme Court, New York County granted the motion of defendants Filippo and Sherri Gallina for summary judgment to the extent of declaring that plaintiff's disclaimer of coverage for its insured defendant Preferred Trucking Services Corp. was untimely, and that plaintiff was obligated to indemnify Preferred up to the

policy limit of \$500,000, and denied plaintiff's cross motion for summary judgment declaring that it was not obligated to defend and indemnify Preferred in the underlying personal injury action; App. Div. affirmed.

KIMS (STANLEY R., II), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 6/15/12; modification; leave to appeal granted by Smith, J., 4/24/13;  
CRIMES - INSTRUCTIONS - CONTROLLED SUBSTANCE IN OPEN VIEW - DEFENDANT NOT IN CLOSE PROXIMITY TO CONTROLLED SUBSTANCE WHEN IT WAS FOUND - WHETHER STATUTORY "ROOM PRESUMPTION" (PENAL LAW § 220.25[2]) APPLIES TO A DEFENDANT WHO LEAVES THE ROOM SHORTLY BEFORE POLICE FIND CONTROLLED SUBSTANCES - HARMLESS ERROR; UNLAWFUL SEARCH AND SEIZURE - WHETHER EVIDENCE FROM RESIDENCE SHOULD HAVE BEEN SUPPRESSED AS RESULTING FROM A WARRANTLESS "PROTECTIVE SWEEP" BY POLICE; PROOF OF OTHER CRIMES - PRIOR DRUG SALES - ALLEGED MOLINEUX ERROR; ALLEGED PROSECUTORIAL MISCONDUCT; Jefferson County Court convicted defendant, upon a jury verdict, of criminal possession of a controlled substance in the first degree, criminal possession of a controlled substance in the third degree, criminal possession of a marihuana in the second degree and two counts of criminally using drug paraphernalia in the second degree; App. Div. modified by reversing those parts of the judgment convicting defendant of criminal possession of a controlled substance in the first degree and criminal possession of a controlled substance in the third degree, affirmed the judgment as modified, and granted a new trial on counts one and two of the indictment.

SCIARA, et al. v SURGICAL ASSOCIATES OF WESTERN NEW YORK YORK, P.C., et al.:

4<sup>th</sup> Dept. App. Div. order of 3/15/13; modification with dissents; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution; WITNESSES - RIGHTS OF COUNSEL FOR NONPARTY WITNESS AT DEPOSITION - CPLR 3113(c) - 22 NYCRR 221.2 AND 221.3; Supreme Court, Erie County, among other things, granted that part of plaintiffs' motion seeking to compel nonparty witness Chopra to appear for the completion of her deposition, and denied nonparty Chopra's cross motion to limit or regulate the deposition except that Chopra's counsel is entitled to employ 22 NYCRR 221.2 and 221.3; App. Div. modified by denying the cross motion of nonparty Chopra in its entirety.