

COURT OF APPEALS NEW FILINGS

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

**September 27, 2013 through October 3, 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.**

COLEMAN (EARL), PEOPLE v:

3<sup>RD</sup> Dept. App. Div. order of 8/1/13; reversal; leave to appeal granted by Stein, J., 9/17/13;  
CRIMES - SENTENCE - WHETHER DEFENDANT IS ELIGIBLE FOR RESENTENCING UNDER CPL 440.46 - DRUG LAW REFORM ACT OF 2009 - EXCLUSION FOR "PERSON WHO IS SERVING A SENTENCE ON A CONVICTION FOR OR HAS A PREDICATE FELONY CONVICTION FOR AN EXCLUSION OFFENSE" (CPL 440.46[5]) - DEFINITION OF "EXCLUSION OFFENSE";  
County Court, Sullivan County, denied defendant's CPL 440.46 motion for resentencing; App. Div. reversed and remitted to County Court for further proceedings not inconsistent with the decision.

GIAMBRONE, et al. v KINGS HARBOR MULTICARE CENTER &c., et al.:

1<sup>ST</sup> Dept. App. Div. order of 3/21/13; affirmance; leave to appeal granted by App. Div., 7/30/13; Rule 500.11 review pending; LIMITATION OF ACTIONS - CLAIM IN AMENDED PLEADING - WHETHER A DERIVATIVE CLAIM FOR LOSS OF SERVICES RELATED BACK TO SPOUSE'S MEDICAL MALPRACTICE COMPLAINT FOR PURPOSES OF THE STATUTE OF LIMITATIONS, PURSUANT TO CPLR 203(f); Supreme Court, Bronx County, granted plaintiff's motion to amend the complaint against defendant Kings Harbor Multicare Center to name his wife as an additional plaintiff and to assert a derivative cause of action on her behalf for loss of consortium and spousal services; App. Div. affirmed.

LAINFIESTA, MATTER OF v STATE OF NEW YORK:

3<sup>RD</sup> Dept. App. Div. order of 6/27/13; denial of motion; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether any jurisdictional basis exists to support an appeal as of right; APPEAL - APPELLATE DIVISION - DENIAL OF MOTION FOR EXTENSION OF TIME TO MOVE FOR RECONSIDERATION AND REARGUMENT AND FOR RECONSIDERATION AND REARGUMENT; App. Div. denied motion for extension of time to move for reconsideration and reargument and for reconsideration and reargument.

NESMITH &c., et al. v ALLSTATE INSURANCE COMPANY:

4<sup>TH</sup> Dept. App. Div. order of 2/1/13; reversal; leave to appeal granted by Court of Appeals, 9/17/13; INSURANCE - CONSTRUCTION OF POLICY - PROPERTY INSURANCE - WHETHER A NONCUMULATION CLAUSE IN THE POLICY BARS A PLAINTIFF FROM RECOVERING THE FULL LIABILITY AMOUNT WHERE SEPARATE PLAINTIFFS ARE INJURED DURING SUCCESSIVE RENEWAL PERIODS OF THE POLICY - WHETHER EXPOSURE OF UNRELATED CHILDREN TO LEAD-BASED PAINT IN THE SAME APARTMENT DURING SUCCESSIVE TENANCIES CONSTITUTES ONE OCCURRENCE UNDER THE TERMS OF THE POLICY, THEREBY LIMITING DEFENDANT'S AGGREGATE LIABILITY TO A SINGLE FULL COVERAGE AMOUNT; DECLARATORY JUDGMENT; Supreme Court, Monroe County, among other things, denied defendant's motion for summary judgment and granted that part of plaintiffs' cross motion seeking a declaration; App. Div. reversed, denied plaintiffs' cross motion in its entirety, granted defendant's motion insofar as declaratory relief was sought, and granted judgment in favor of defendant declaring that plaintiffs' losses are encompassed by the \$500,000 per occurrence limit in the insurance policy at issue.

SPEARS (KELVIN), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 5/3/13; affirmance; leave to appeal granted by Pigott, J., 9/23/13;

CRIMES - PLEA OF GUILTY - SUFFICIENCY OF ALLOCUTION - WAIVER OF RIGHT TO APPEAL - WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S REQUEST AT SENTENCING FOR AN ADJOURNMENT SO HE COULD CONSULT WITH COUNSEL ABOUT A MOTION TO VACATE HIS GUILTY PLEA;

Supreme Court, Monroe County, convicted defendant, upon his guilty plea, of sexual abuse in the second degree; App. Div. affirmed.