

COURT OF APPEALS NEW FILINGS

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

**May 16, 2014 through May 22, 2014**

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.**

ALLEN, AN ATTORNEY, MATTER OF:

4<sup>th</sup> Dept. App. Div. order of 2/14/14; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right pursuant to CPLR 5601(b) and whether any other jurisdictional basis exists to support an appeal as of right;  
ATTORNEY AND CLIENT - DISCIPLINARY PROCEEDINGS - RECIPROCAL DISCIPLINE - WHETHER THE APPELLATE DIVISION LACKED ANY BASIS TO SUSPEND ATTORNEY FOR TWO YEARS AND TO DENY ATTORNEY LEAVE TO APPLY FOR REINSTATEMENT TO THE PRACTICE OF LAW IN NEW YORK UNTIL SUCH TIME AS HE IS REINSTATED TO THE PRACTICE OF LAW IN A JURISDICTION THAT DISBARRED THE ATTORNEY;

App. Div., among other things, suspended attorney from practice of law for two years, and until further order of the court, and denied attorney leave to appeal to the court for reinstatement to the practice of law in New York until such time as he is reinstated to the practice of law in the District of Columbia.

BROWN (JARROD), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 1/29/14; affirmance; leave to appeal granted by Graffeo, J., 5/9/14;  
CRIMES - SENTENCE - RESENTENCING UNDER DRUG LAW REFORM ACT, AS AMENDED IN 2011 - ELIGIBILITY - WHETHER A PAROLEE IS IN THE "CUSTODY" OF THE NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION WITHIN THE MEANING OF CPL 440.46(1) AND, THUS, ELIGIBLE FOR RESENTENCING UNDER THAT PROVISION;  
Supreme Court, Queens County, resentenced defendant, pursuant to CPL 440.46, upon the defendant's conviction of criminal sale of a controlled substance in the third degree, upon his guilty plea; App. Div. affirmed.

MALAY v CITY OF SYRACUSE, et al.:

4<sup>TH</sup> Dept. App. Div. order of 1/3/14; affirmance; leave to appeal granted by Court of Appeals, 5/8/14;  
LIMITATION OF ACTIONS - COMMENCEMENT OF ACTION WITHIN SIX MONTHS AFTER TERMINATION OF PRIOR ACTION (CPLR 205[a]) - WHETHER PRIOR FEDERAL ACTION WAS TERMINATED WITHIN THE MEANING OF CPLR 205(a) WHEN FEDERAL DISTRICT COURT DISMISSED PLAINTIFF'S FEDERAL AND STATE CLAIMS, WHERE PLAINTIFF TOOK AN APPEAL TO THE FEDERAL CIRCUIT COURT AND FILED THE SECOND ACTION IN STATE COURT WHILE THE APPEAL WAS PENDING, ALTHOUGH THE APPEAL WAS LATER DISMISSED FOR FAILURE TO PROSECUTE;  
Supreme Court, Onondaga County, order that granted defendant's motion to dismiss the complaint; App. Div. affirmed.

McGOVERN, MATTER OF v MOUNT PLEASANT CENTRAL SCHOOL DISTRICT:

2<sup>ND</sup> Dept. App. Div. order of 2/13/14; reversal; leave to appeal granted by Court of Appeals, 5/13/14;  
SCHOOLS - TEACHERS - NOTICE OF CLAIM (EDUCATION LAW § 3813[1] - CPLR ARTICLE 78 PROCEEDING TO REVIEW BOARD OF EDUCATION DETERMINATION DENYING PETITIONER TENURE AND TERMINATING HER EMPLOYMENT AS A PROBATIONARY TEACHER - WHETHER PETITIONER WAS EXEMPT FROM THE EDUCATION LAW NOTICE OF CLAIM REQUIREMENT;  
Supreme Court, Westchester County, directed that petitioner be reinstated with back pay pending a hearing to determine whether she was denied tenure and terminated from her position as a probationary teacher in bad faith; App. Div. reversed and remitted the matter to Supreme Court for entry of a judgment in favor of the school district, denying the petition and dismissing the proceeding.

TOUTPUISSANT, MATTER OF v FISCHER:

3<sup>RD</sup> Dept. App. Div. order of 4/17/14; modification; sua sponte examination whether a substantial constitutional question is directly involved to support an appeal as of right; PRISONS AND PRISONERS - DISCIPLINE OF INMATES - WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE DETERMINATION OF GUILT WITH RESPECT TO THE ONE REMAINING CHARGE OF POSSESSION OF CONTRABAND; CLAIMED BIAS OF HEARING OFFICER;

App. Div. modified by annulling so much of respondent's determination as found petitioner guilty of engaging in an unauthorized exchange, making a false statement, smuggling, violating facility correspondence procedures and solicitation and imposed a penalty; granted the petition to that extent; directed respondent to expunge all references thereto from petitioner's institutional record; and remitted the matter to respondent for an administrative redetermination of the penalty on the remaining violation; and as so modified, confirmed the determination.

TREZZA et al. v METROPOLITAN TRANSPORTATION AUTHORITY, et al.:

1<sup>ST</sup> Dept. App. Div. order of 1/7/14; modification; leave to appeal granted by App. Div., 4/29/14;

INSURANCE - NO-FAULT AUTOMOBILE INSURANCE - SERIOUS INJURY (INSURANCE LAW § 5102[d]) - WHETHER JURY'S AWARD FOR FUTURE PAIN AND SUFFERING WAS SUPPORTED BY THE EVIDENCE PRESENTED AT TRIAL; Supreme Court, Bronx County, upon a jury verdict, awarded plaintiff damages in the amount of \$500,000 for past pain and suffering, \$1,500,000 for future pain and suffering, and \$500,000 for future medical expenses; App. Div. modified to vacate the award and remand the matter to for a new trial on the issue of damages, unless plaintiff stipulates to reduce the award for past pain and suffering to \$300,000 and vacate the awards for future pain and suffering and future medical expenses, and to entry of an amended judgment in accordance therewith.

WALTON v STRONG MEMORIAL HOSPITAL, et al.:

4<sup>TH</sup> Dept. App. Div. order of 2/14/14; affirmance; leave to appeal granted by Court of Appeals, 5/8/14;

LIMITATION OF ACTIONS - MEDICAL MALPRACTICE - "FOREIGN OBJECT" EXCEPTION (CPLR 214-a) - FAILURE TO REMOVE POLYVINYL CATHETER FROM HEART AFTER SURGERY - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT PORTION OF POLYVINYL CATHETER THAT BROKE OFF AND REMAINED IN PATIENT AFTER ALL OTHER CATHETERS WERE REMOVED WAS A FIXATION DEVICE AND NOT A FOREIGN OBJECT BECAUSE THE CATHETERS WERE INTENTIONALLY PLACED INSIDE PLAINTIFF'S BODY TO MONITOR ATRIAL PRESSURE FOR A FEW DAYS AFTER HEART SURGERY; Supreme Court, Erie County, dismissed all claims against the named defendants; App. Div. affirmed.