

COURT OF APPEALS NEW FILINGS

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

**October 1 through October 7, 2010**

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 60 days after the appeal was taken; respondent's brief to be filed 45 days after the filing of appellant's brief; and a reply brief, if any, to be filed 15 days after 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.**

AFTON C., MATTER OF:

2<sup>ND</sup> Dept. App. Div. order of 3/16/10; reversal; leave to appeal granted by Court of Appeals, 9/23/10;

PARENT AND CHILD - ABUSED OR NEGLECTED CHILD - WHETHER THE APPELLATE DIVISION ERRED IN DISMISSING NEGLECT PROCEEDINGS AS A MATTER OF LAW WHERE THE FATHER "WAS AN 'UNTREATED' LEVEL THREE SEX OFFENDER WHO, AFTER HIS RELEASE, HAD RETURNED TO THE FAMILY HOME WHERE THE SUBJECT CHILDREN RESIDED" AND THE MOTHER ALLOWED THE FATHER TO RETURN TO THE HOME;

Family Court, Dutchess County fact-finding order that, as relevant here, after a hearing, found that father neglected the subject children; App. Div. reversed, denied the petitions and dismissed the proceedings.

CALDERON v WALGREEN CO., et al.:

4<sup>TH</sup> Dept. App. Div. order of 4/30/10; affirmance with dissents; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution, to be considered with appellants' motion to vacate the Court's 9/15/10 order dismissing the appeal pursuant to section 500.16(a) of the Court's Rules of Practice;

NEGLIGENCE - PLAINTIFF INJURED WHEN SCAFFOLDING HE WAS DISMANTLING TIPPED BACKWARD, CAUSING HIM TO FALL TO GROUND - DEFENDANTS' EXPERT OPINED THAT PLAINTIFF'S ACTIONS WERE THE SOLE PROXIMATE CAUSE OF THE ACCIDENT; LABOR LAW § 240(1); SUMMARY JUDGMENT;

Supreme Court, Monroe County granted plaintiff's motion for partial summary judgment and denied in part defendants' cross motion for summary judgment; App. Div. affirmed.

TOWN OF HEMPSTEAD v EAST COAST RESOURCE GROUP, LLC:

Supreme Court, Nassau County judgment of 6/24/10, bringing up for review a 2nd Dept. App. Div. order of 11/10/09; reversal; leave to appeal granted by Court of Appeals, 9/23/10;

CONTRACTS - BREACH OR PERFORMANCE - BREACH OF INSURANCE PROCUREMENT PROVISION - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT THE TOWN WAS ENTITLED TO SUMMARY JUDGMENT ON ITS CAUSE OF ACTION ALLEGING THAT DEFENDANT BREACHED AN AGREEMENT TO OBTAIN INSURANCE IN THE TOWN'S OWN NAME, AS AN ADDITIONAL INSURED UNDER DEFENDANT'S INSURANCE POLICY;

Supreme Court, Nassau County, among other things, denied plaintiff's motion for summary judgment on its cause of action to recover damages for breach of an insurance procurement provision, and judgment was entered accordingly; App. Div. reversed the judgment, reinstated that cause of action, granted plaintiff's motion for summary judgment on the cause of action and modified accordingly the Supreme Court order denying plaintiff's summary judgment motion; thereafter, Supreme Court entered judgment awarding damages to plaintiff.

HOUSTON, MATTER OF DIMANGO:

2<sup>ND</sup> Dept. App. Div. judgment of 8/31/10; denial of CPLR article 78 petition; sua sponte examination whether petitioner's conviction following a trial renders moot this matter in the nature of prohibition and whether a substantial constitutional question is directly involved to support an appeal as of right; PROCEEDING AGAINST BODY OR OFFICER - PROHIBITION - CHALLENGE TO APPELLATE DIVISION JUDGMENT DISMISSING A CPLR ARTICLE 78 PROCEEDING SEEKING TO PROHIBIT RESPONDENT SUPREME COURT JUSTICE FROM CONTINUING WITH FURTHER PROCEEDINGS IN AN UNDERLYING CRIMINAL ACTION;

App. Div. denied a CPLR article 78 petition seeking to prohibit respondent Supreme Court Justice from continuing with further proceedings in a criminal action entitled People v Houston, under Indictment No. 7919/09.

PRATTS (JESUS), PEOPLE v:

2<sup>ND</sup> Dept. App. Div. order of 6/10/10; affirmance; leave to appeal granted by Jones, J., 10/1/10;

CRIMES - SENTENCE - DRUG LAW REFORM ACT (DLRA) - ELIGIBILITY OF REINCARCERATED PAROLE VIOLATOR - WHETHER A DEFENDANT REINCARCERATED FOR A PAROLE VIOLATION IS ELIGIBLE FOR RESENTENCING UNDER CPL 440.46;

Supreme Court, Bronx County denied defendant's CPL 440.46 motion for resentencing; App. Div. affirmed.

WYCKOFF HEIGHTS MEDICAL CENTER &c. [NEW YORK and PRESBYTERIAN HOSPITAL, &c.] v COUNTRY-WIDE INSURANCE COMPANY:

2<sup>ND</sup> Dept. App. Div. order of 3/23/10; affirmance; leave to appeal granted by Court of Appeals, 9/21/10;

INSURANCE - NO-FAULT AUTOMOBILE INSURANCE - WHETHER A NO-FAULT CARRIER MAY DENY A HEALTH CARE PROVIDER'S CLAIM FOR HEALTH SERVICE EXPENSES BASED UPON THE FACT THAT A NOTICE OF ACCIDENT WAS NOT TIMELY FILED, WHERE THE HEALTH CARE PROVIDER TIMELY SUBMITTED A WRITTEN PROOF OF CLAIM FOR HEALTH SERVICE EXPENSES;

In an action to recover no-fault medical payments under two insurance contracts, Supreme Court, Nassau County granted that branch of plaintiffs' motion which was for summary judgment on the complaint insofar as asserted by plaintiff New York and Presbyterian Hospital, as assignee of Joaquin Benitez, and denied that branch of defendant's cross motion which was for summary judgment dismissing the complaint insofar as asserted by that plaintiff; thereafter, judgment was entered in favor of that plaintiff and against defendant in the principal sum of \$56,235.43; App. Div. affirmed.