

COURT OF APPEALS NEW FILINGS

Preliminary Appeal Statements processed
by the Court of Appeals Clerk's Office
November 7 through November 13, 2008

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.

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.

CHARLEY v GOSS, et al.:

1ST Dept. App. Div. order of 9/2/08; affirmance with dissents;
Rule 500.11 review pending;
INSURANCE - NO-FAULT INSURANCE - SERIOUS INJURY - SUMMARY
JUDGMENT - WHETHER DEFENDANTS MET THEIR INITIAL BURDEN TO
ESTABLISH A PRIMA FACIE CASE THAT PLAINTIFF DID NOT SUSTAIN A
SERIOUS INJURY WITHIN THE MEANING OF INSURANCE LAW § 5102(d);
Supreme Court, New York County granted a motion for summary
judgment dismissing the complaint as against defendants Margaret
E. Goss and Howard J. Conroy; App. Div. affirmed.

CUNHA v CITY OF NEW YORK v HAKS ENGINEERS:

2ND Dept. App. Div. order of 11/13/07; reversal; leave to appeal granted by Court of Appeals, 10/28/08;

INDEMNITY - WHETHER THE APPELLATE DIVISION CORRECTLY AWARDED THE MUNICIPAL THIRD-PARTY PLAINTIFF FULL INDEMNIFICATION FROM THIRD-PARTY DEFENDANT CONTRACTOR BASED UPON COMMON-LAW INDEMNIFICATION WHERE THIRD-PARTY PLAINTIFF CONCEDED LIABILITY PURSUANT TO LABOR LAW § 241(6) TO THE INJURED PLAINTIFF IN THE MAIN PERSONAL INJURY ACTION AND THE JURY IN THE THIRD-PARTY ACTION FOUND THE CONTRACTOR 40% AT FAULT IN THE HAPPENING OF THE ACCIDENT;

Supreme Court, Kings County judgment that, upon a jury verdict finding the third-party defendant 40% at fault in the happening of the accident, is conditionally in favor of defendant third-party plaintiff and against the third-party defendant in the amount of only 40% of the damages recovered from it by the plaintiffs; App. Div. reversed and remitted to Supreme Court for the entry of an amended judgment which "is conditionally in favor of the defendant third-party plaintiff and against the third-party defendant in the amount of 100% of the damages recovered by the plaintiff from the defendant third-party plaintiff."

DECKER (WAYNE), PEOPLE v:

2ND Dept. App. Div. order of 5/6/08; affirmance; leave to appeal granted by Jones, J., 10/28/08;

CRIMES AND CRIMINAL PROCEDURE - INDICTMENT - 15-YEAR DELAY IN ARREST AND INDICTMENT - WHETHER TRIAL COURT SHOULD HAVE HELD A HEARING REGARDING THE DELAY; DUE PROCESS;

Supreme Court, Richmond County convicted defendant, after a jury trial, of murder in the second degree and imposed sentence; App. Div. affirmed.

GARTMOND, MATTER OF v CONWAY:

2ND Dept. App. Div. order of 9/23/08; modification and affirmance; sua sponte examination whether any jurisdictional basis exists to support an appeal as of right;

PARENT AND CHILD - SUPPORT - REDUCTION OF CHILD SUPPORT;

Family Court, Westchester County granted the father's objections to so much of a prior Family Court order as, after a hearing, directed him to pay the sum of \$2,373 in monthly child support, only to the extent of remitting the matter to the Support Magistrate, in effect, to articulate the manner in which the Support Magistrate calculated the amount of child support, and otherwise denied his objections; App. Div. modified, on the law, the facts and in the exercise of discretion, by deleting the provisions of the 9/10/07 order remitting the matter to the Support Magistrate and otherwise denying the father's objections, and substituting therefor provisions sustaining the father's objections to the extent of reducing his obligation to pay child support from the sum of \$2,373 to the sum of \$1,006 per month,

and directing him to pay 49% of the expenses for child care, including but not limited to nursery school, day camp, and home child care, and otherwise denying the objections; and affirmed the order as so modified.

NYENEKOR, PEOPLE ex rel. v DUBOIS:

2ND Dept. App. Div. order of 8/25/08; denial of writ of habeas corpus; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether any jurisdictional basis otherwise exists to support an appeal as of right;
HABEAS CORPUS - CHALLENGE TO APPELLATE DIVISION ORDER DENYING APPLICATION FOR A WRIT OF HABEAS CORPUS AND DENYING POOR PERSON RELIEF IN PART;
App. Div. denied petitioner's application for a writ of habeas corpus and dismissed the petition, and denied petitioner's application for poor person relief in part.

NYENEKOR, PEOPLE ex rel. v HEALY:

2ND Dept. App. Div. order of 9/30/08; denial of writ of habeas corpus; sua sponte examination whether the order appealed from finally determines the proceeding within the meaning of the Constitution and whether any jurisdictional basis otherwise exists to support an appeal as of right;
HABEAS CORPUS - CHALLENGE TO APPELLATE DIVISION ORDER DENYING APPLICATION FOR A WRIT OF HABEAS CORPUS AND DENYING POOR PERSON RELIEF IN PART;
App. Div. denied petitioner's application for writ of habeas corpus and dismissed the petition, and denied petitioner's application for poor person relief in part.

ROSS v NELSON, et al.:

1ST Dept. App. Div. order of 8/5/08; affirmance with dissents; sua sponte examination whether the order appealed from finally determines the action within the meaning of the Constitution;
LIMITED LIABILITY COMPANIES - MEMBERS AND MANAGERS - WHETHER PLAINTIFF WAS PROPERLY REMOVED AS A MEMBER-MANAGER OF THE SUBJECT LIMITED LIABILITY COMPANIES - PLAINTIFF'S ENTITLEMENT TO MEMBER-MANAGER FEE - SUMMARY JUDGMENT;
Supreme Court, New York County denied plaintiff's motion for summary judgment, granted defendants' cross motion to dismiss the first, second, fifth, sixth, seventh, eighth, ninth, tenth and seventeenth causes of action, and declared that plaintiff was properly removed as a member-manager of the subject limited liability companies and not entitled to management fees; App. Div. affirmed.

RSM WEST LAKE ROAD, LLC, et al. v TOWN OF CANANDAIGUA ZONING
BOARD OF APPEALS:

4TH Dept. App. Div. order of 10/3/08; affirmance with dissents;
Rule 500.11 review pending;

MUNICIPAL CORPORATIONS - ZONING - STANDING UNDER CANANDAIGUA LAKE
UNIFORM DOCKING AND MOORING LAW (UDML) - APPLICABILITY OF
RESIDENTIAL LAND USE CATEGORY OF UDML - ELIGIBILITY FOR SPECIAL
USE PERMIT;

Supreme Court, Ontario County, among other things, adjudged that
East Shore Association of Canandaigua Lake, Inc. and the
Canandaigua Lake Watershed Alliance, Inc. lacked standing to
appeal to the Zoning Board of Appeals those portions of the
Zoning Officer's determination relating to the UDML, including
the Zoning Officer's determination that the proposed sundeck is a
dock within the meaning of the UDML; annulled the determination
of respondent Town of Canandaigua Zoning Board of Appeals that
the proposed sundeck is not a dock within the meaning of the
UDML; and reinstated the Zoning Officer's determination that the
sundeck is a dock within the meaning of the UDML; App. Div.
affirmed.