

COURT OF APPEALS NEW FILINGS

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

January 29 through February 4, 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.

ALFORD (GARY), PEOPLE v:

3RD Dept. App. Div. order of 9/3/09; modification; leave to appeal granted by Smith, J.; 1/20/10; Rule 500.11 review pending;

CRIMES - SENTENCE - CONCURRENT AND CONSECUTIVE TERMS - WHETHER CONSECUTIVE SENTENCES WERE ILLEGAL UNDER PENAL LAW § 70.25(2) - LESSER INCLUDED OFFENSES OF PREDATORY SEXUAL ASSAULT AGAINST A CHILD (PENAL LAW § 130.96);

Supreme Court, Albany County convicted defendant of predatory sexual assault against a child (two counts), criminal sexual act in the first degree, sexual abuse in the first degree and course of sexual conduct against a child in the first degree; App. Div. modified by reversing defendant's convictions of criminal sexual act in the first degree under count two of the indictment and course of sexual conduct against a child in the first degree under count five of the indictment, dismissed those counts and vacated the sentences imposed thereon, and affirmed as so modified.

AQUINO v HIGGINS, et al.:

4TH Dept. App. Div. order of 12/30/09; modification with
dissents;

NEGLIGENCE - DUTY - WHETHER DEFENDANT PARENTS HAD A DUTY OF CARE
TO ENSURE THAT PLAINTIFF MINOR, A GUEST AT A PARTY ON DEFENDANTS'
PREMISES, HAD A SAFE MEANS OF TRANSPORTATION HOME IN LIGHT OF
THEIR KNOWLEDGE THAT ALCOHOL HAD BEEN CONSUMED BY GUESTS AT THE
PARTY;

Supreme Court, Erie County granted in part and denied in part the
motion of defendants John Higgins and Heather Higgins for summary
judgment dismissing the complaint against them; App. Div.
modified by granting in its entirety the motion of defendants
John Higgins and Heather Higgins and dismissing the complaint
against them and affirmed as so modified.

FLOMENBAUM v NEW YORK UNIVERSITY:

1ST Dept. App. Div. order of 12/3/09; affirmance with dissents;
Rule 500.11 review pending;

COLLEGES AND UNIVERSITIES - CONTRACTS - BREACH OF CONTRACT -
WHETHER TRIABLE ISSUES OF MATERIAL FACT EXISTED WITH RESPECT TO
BREACH OF DEFENDANT UNIVERSITY'S AGREEMENT WITH PLAINTIFF FORMER
FACULTY MEMBER REGARDING ADMISSION OF HIS CHILDREN TO THE
UNIVERSITY "ON THE SAME BASIS AND WITH THE SAME COURTESIES" AS
CERTAIN OTHER TENURED MEMBERS OF THE UNIVERSITY'S SCHOOL OF
MEDICINE - JUDICIAL REVIEW OF ACADEMIC DISCRETION; SPOILIATION OF
EVIDENCE;

Supreme Court, New York County granted defendant's motion for
summary judgment dismissing the complaint and denied plaintiff's
cross motion for an order of preclusion based on spoliation of
evidence; App. Div. affirmed.

JOHNSON (FATIN), PEOPLE v:

1ST Dept. App. Div. order of 11/10/09; affirmance with dissents;
leave to appeal granted by Andrias, J., 1/14/10; Rule 500.11
review pending;

CRIMES - EVIDENCE - DEPRAVED INDIFFERENCE MURDER - APPELLATE
DIVISION'S CONSIDERATION OF APPELLANT'S WEIGHT OF EVIDENCE
ARGUMENT ON REMITTAL FROM COURT OF APPEALS; ELEMENTS OF CRIME AS
CHARGED TO JURY;

Supreme Court, New York County convicted defendant, after a jury
trial, of murder in the second degree and criminal possession of
a weapon in the third degree, and sentenced him to concurrent
terms of 25 years to life and 7 years, respectively; App. Div.
affirmed.

MCRAE (JAMES), PEOPLE v:

2ND Dept. App. Div. order of 9/29/09; modification with dissents;
leave to appeal granted by Eng, J., 1/14/10; Rule 500.11 review
pending;

CRIMES - CORROBORATION OF ACCOMPLICE TESTIMONY - SUFFICIENCY OF
EVIDENCE;

Orange County Court convicted defendant of robbery in the first degree (two counts), robbery in the second degree, criminal possession of a weapon in the fourth degree, and menacing in the second degree, and imposed sentence; App. Div. modified by vacating the defendant's conviction of robbery in the first degree under count one of the indictment and vacating the sentence imposed thereon, and remitted the matter to County Court for a new trial on the charge of robbery in the first degree under count one of the indictment.

PARADA (LUIS), PEOPLE v:

1ST Dept. App. Div. order of 11/19/09; affirmance; leave to appeal granted by Abdus-Salaam, J., 1/12/10; Rule 500.11 review pending;

CRIMES - SEXUAL CONDUCT AGAINST A CHILD - ADMISSIBILITY OF STATEMENTS OF CHILD TO NURSE EXAMINER DURING EXAMINATION REQUESTED BY PROSECUTOR MORE THAN ONE YEAR AFTER ALLEGED ABUSE - WHETHER STATEMENTS MADE BY CHILD TO AUNT AND COUSIN WERE ADMISSIBLE UNDER THE "PROMPT OUTCRY" HEARSAY EXCEPTION - WHETHER DEFENSE COUNSEL'S CROSS-EXAMINATION OF POLICE DETECTIVE OPENED THE DOOR TO THE ENTIRETY OF THE CHILD'S STATEMENT TO THE DETECTIVE; EXPERT TESTIMONY REGARDING CONSISTENCY OF VICTIM'S BEHAVIOR WITH THAT OF ABUSE VICTIMS; HARMLESS ERROR;

Supreme Court, New York County convicted defendant of course of sexual conduct against a child in the first degree, and sentenced him to a term of 20 years; App. Div. affirmed.

PARKER REALTY GROUP, INC. v PETIGNEY &c.:

1ST Dept. App. Div. order of 12/17/09; modification with dissents; Rule 500.11 review pending;

BROKERS - REAL ESTATE BROKERS - COMMISSION - MODIFICATION OF AGREEMENT - QUANTUM MERUIT;

Supreme Court, New York County awarded plaintiff the sum of \$83,350.75, consisting of individual awards of \$5,880, \$500 and \$60,000, plus interest on each, and costs and disbursements; App. Div. modified to vacate the individual awards of \$5,880 and \$60,000 and the interest on each, thereby reducing the total award to \$500 plus interest, costs and disbursements, and otherwise affirmed.

