

COURT OF APPEALS NEW FILINGS

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

**September 24 through September 30, 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.**

AVILA v PLAZA CONSTRUCTION CORPORATION:

2<sup>ND</sup> Dept. App. Div. order of 5/4/10; reversal; leave to appeal granted by Court of Appeals, 9/14/10;

LABOR - SAFE PLACE TO WORK - LABOR LAW § 240(1) - PLAINTIFF STANDING ON A SUSPENDED REBAR GRID FRACTURED LEG THAT FELL THROUGH AN OPENING IN THE GRID MEASURING APPROXIMATELY ONE SQUARE FOOT - DEFENDANTS' ENTITLEMENT TO SUMMARY JUDGMENT - WHETHER THE OPENINGS IN THE GRID CREATED AN ELEVATION-RELATED HAZARD SUBJECT TO THE PROTECTIONS OF LABOR LAW § 240(1);

Supreme Court, Kings County, among other things, denied that branch of defendants' motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 240(1); App. Div. reversed, granted that branch of defendants' motion which was for summary judgment dismissing the cause of action alleging a violation of Labor Law § 240(1).

BORDELEAU et al. v STATE OF NEW YORK et al.:

3<sup>RD</sup> Dept. App. Div. order of 6/24/10; modification; leave to appeal granted by App. Div., 9/13/10;  
STATE - APPROPRIATIONS - DECLARATORY JUDGMENT ACTION BY TAXPAYERS SEEKING TO ENJOIN DEFENDANTS FROM DISTRIBUTING OR RECEIVING STATE FUNDS APPROPRIATED IN PURPORTED VIOLATION OF THE NEW YORK STATE CONSTITUTIONAL PROHIBITION AGAINST GIFTS OR LOANS OF STATE MONEY TO PRIVATE ENTITIES (ARTICLE VII, § 8[1]) AND REQUIREMENT THAT APPROPRIATIONS DISTINCTLY SPECIFY THE OBJECT OR PURPOSE OF THE FUNDS APPROPRIATED (ARTICLE VII, § 7) - APPROPRIATIONS OF STATE FUNDS TO PUBLIC BENEFIT CORPORATIONS THAT PROVIDE GRANTS TO PRIVATE ENTITIES FOR ECONOMIC DEVELOPMENT - WHETHER DEFENDANTS WERE ENTITLED TO DISMISSAL OF THE COMPLAINT PURSUANT TO CPLR 3211(a)(1) AND (7);  
Supreme Court, Albany County granted defendants' motions to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7); App. Div. modified by reversing so much of the order as granted defendants' motions to dismiss the first cause of action; denied the motions to that extent and remitted to Supreme Court to permit defendants to serve answers within 30 days after the date of the Court's decision; and affirmed as so modified.

GRONSKI, et al. v COUNTY OF MONROE:

4<sup>th</sup> Dept. App. Div. order of 5/7/10; affirmance; leave to appeal granted by Court of Appeals, 9/21/10;  
NEGLIGENCE - EMPLOYEE OF COMPANY OPERATING RECYCLING FACILITY OWNED BY DEFENDANT COUNTY INJURED AT THE FACILITY - WHETHER COUNTY RETAINED SUFFICIENT CONTROL OVER RECYCLING FACILITY TO INCUR LIABILITY; SUMMARY JUDGMENT - WHETHER PLAINTIFFS RAISED TRIABLE ISSUE OF FACT CONCERNING COUNTY'S CONTROL OVER FACILITY; EFFECT OF DEC PERMIT;  
Supreme Court, Monroe County granted defendant's motion for summary judgment and dismissed the complaint; App. Div. affirmed.

LIFSON v CITY OF SYRACUSE et al.:

4<sup>TH</sup> Dept. App. Div. order of 4/30/10; affirmance; leave to appeal granted by Court of Appeals, 9/16/10;  
NEGLIGENCE - ACTION ALLEGING THAT DECEDENT WAS KILLED WHEN VEHICLE STRUCK HER WHILE SHE WAS CROSSING THE STREET - EMERGENCY DOCTRINE - WHETHER THE TRIAL COURT ERRED IN GIVING THE JURY AN EMERGENCY DOCTRINE INSTRUCTION WHERE DRIVER ASSERTED THAT HE FAILED TO OBSERVE DECEDENT BECAUSE HE WAS SUDDENLY BLINDED BY SUN GLARE; DISMISSAL OF COMPLAINT AGAINST DRIVER; DECEDENT'S NEGLIGENCE;  
Supreme Court, Onondaga County, among other things, apportioned liability between decedent and defendant City of Syracuse, and dismissed the complaint against defendant Derek J. Klink, upon a jury verdict; App. Div. affirmed.

NEW YORK COALITION FOR QUALITY ASSISTED LIVING, INC. v MFY LEGAL SERVICES, INC., et al.:

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

HEALTH - ADULT CARE FACILITIES - ACTION BY ASSOCIATION OF MEMBERS WHO OPERATE ASSISTED LIVING FACILITIES AND ADULT HOMES FOR A DECLARATION THAT ITS PROPOSED GUIDELINES FOR VISITOR ACCESS ARE ENFORCEABLE IN ADULT CARE FACILITIES;

Supreme Court, New York County denied defendants' motion to dismiss the complaint and declare plaintiff's proposed Guidelines for Visitor Access unenforceable, and granted plaintiff's cross motion for summary judgment declaring its Guidelines enforceable and consistent with the controlling statutes and regulations; App. Div. reversed, denied plaintiff's cross motion, granted defendants' motion, and declared the proposed Guidelines unenforceable.

PAULIN (DAVID LANCE), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 6/29/10; affirmance; leave to appeal granted by Pigott, J., 9/22/10;

CRIMES - SENTENCE - WHETHER 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.

PORCO (CHRISTOPHER), PEOPLE v:

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

CRIMES - EVIDENCE - WHETHER TRIAL COURT ERRED IN ADMITTING TESTIMONY CONCERNING VICTIM'S HEAD NOD IN RESPONSE TO POLICE INQUIRY AT CRIME SCENE AND TESTIMONY CONCERNING AN ALLEGED PRIOR "STAGED BURGLARY" BY DEFENDANT - WHETHER TRIAL COURT ERRED IN FAILING TO CONDUCT A HEARING REGARDING EVIDENCE CHALLENGED AS DERIVED FROM DEFENDANT'S SUPPRESSED STATEMENT TO THE POLICE; CLAIMED PROSECUTORIAL MISCONDUCT;

Supreme Court, Albany County convicted defendant, upon a jury verdict, of murder in the second degree and attempted murder in the second degree, and imposed sentence; App. Div. affirmed.

WEEMS, MATTER OF v FISCHER:

3<sup>RD</sup> Dept. App. Div. order of 7/1/10; dismissal of CPLR article 78 petition; sua sponte examination whether a substantial constitutional question is directly involved or whether any jurisdictional basis otherwise exists to support an appeal as of right;

PRISONS AND PRISONERS - DISCIPLINE OF INMATES - CHALLENGE TO APPELLATE DIVISION JUDGMENT DISMISSING AS MOOT THE PORTION OF A CPLR ARTICLE 78 PETITION CHALLENGING A TIER II DETERMINATION, AND CONFIRMING TWO TIER III DETERMINATIONS AND DISMISSING THE PETITION TO THAT EXTENT;

App. Div. dismissed as moot that portion of the CPLR article 78 petition challenging a tier II determination, and confirmed two tier III determinations and dismissed the petition to that extent.