

COURT OF APPEALS NEW FILINGS

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

**October 8 through October 14, 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.**

AGINA (ALAA), PEOPLE v:

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

CRIMES - EVIDENCE - PRIOR BAD ACTS - WHETHER THE APPELLATE DIVISION ERRED IN HOLDING THAT PRIOR BAD ACTS WERE NOT ADMISSIBLE TO PROVE THE PERPETRATOR'S IDENTITY THROUGH A UNIQUE MODUS OPERANDI WHERE THE VICTIM WAS DEFENDANT'S WIFE BUT DEFENDANT DENIED INFLICTING THE INJURIES;

Supreme Court, Queens County convicted defendant, upon a jury verdict, of attempted assault in the first degree, assault in the second degree and unlawful imprisonment in the first degree, and imposed sentence; App. Div. reversed and ordered a new trial.

ASHLEY (PATRICK R.), PEOPLE v:

3<sup>RD</sup> Dept. App. Div. order of 3/15/10; affirmance; leave to appeal granted by Jones, J., 9/2/10; Rule 500.11 review pending;  
CRIMES - CHALLENGE TO WAIVER OF APPEAL AND GUILTY PLEA; ALLEGED INEFFECTIVE ASSISTANCE OF COUNSEL; SENTENCE - WHETHER DEFENDANT'S SENTENCE AS A SECOND FELONY OFFENDER WAS ILLEGALLY PREDICATED ON HIS 1999 ROBBERY CONVICTIONS IN WHICH THE COURT FAILED TO IMPOSE A MANDATORY PERIOD OF POST-RELEASE SUPERVISION - PRESERVATION OF ARGUMENT FOR APPELLATE REVIEW;  
St. Lawrence County Court convicted defendant, upon his plea of guilty, of attempted robbery in the first degree; App. Div. affirmed.

CORNELL (BARAK), PEOPLE v:

4<sup>TH</sup> Dept. App. Div. order of 7/9/10; reversal with dissents; leave to appeal granted by Nancy Smith, J., 9/28/10; Rule 500.11 review pending;  
CRIMES - PLEA OF GUILTY - FAILURE TO ADVISE DEFENDANT THAT SENTENCE INCLUDED A PERIOD OF POST-RELEASE SUPERVISION;  
Chautauqua County Court convicted defendant, upon his guilty plea, of arson in the second degree; App. Div. reversed, vacated the plea and remitted the matter to Chautauqua County Court for further proceedings on the indictment.

DAVIDSON v COACH USA, INC., et al.:

4<sup>TH</sup> Dept. App. Div. orders of 6/11/10; affirmance; leave to appeal granted by App. Div., 10/1/10;  
CONFLICT OF LAWS - LAW GOVERNING TORT ACTIONS - ACTION SEEKING DAMAGES FOR INJURIES OR WRONGFUL DEATH RESULTING FROM COLLISION OF TRACTOR-TRAILER PARKED ON SHOULDER OF HIGHWAY IN NEW YORK AND A CHARTERED BUS TRANSPORTING A YOUNG WOMEN'S HOCKEY TEAM FROM ONTARIO, CANADA - WHETHER COURTS BELOW ERRED IN DETERMINING THAT CANADIAN LAW APPLIED AS TO NONECONOMIC DAMAGES; EVIDENCE - JUDICIAL NOTICE - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT SUPREME COURT DID NOT ABUSE ITS DISCRETION BY TAKING JUDICIAL NOTICE OF ONTARIO LAW REGARDING NONECONOMIC DAMAGES DESPITE DEFENDANTS' FAILURE TO RAISE THE APPLICABILITY OF SUCH LAW AS AN AFFIRMATIVE DEFENSE AND TO PROVIDE THE SUBSTANCE OF THE LAW IN THEIR PLEADINGS PURSUANT TO CPLR 3016(e) - INTERPLAY BETWEEN CPLR 3016(e) AND CPLR 4511(b);  
App. Div. affirmed separate 3/24/09 Supreme Court, Livingston County orders granting defendants' motions and determining that the law of Ontario, Canada concerning noneconomic damages applies to this action for personal injury and wrongful death.

ETERNAL FLAME OF HOPE MINISTRIES, INC., MATTER OF v KING et al.:

3<sup>RD</sup> Dept. App. Div. order of 8/23/10; affirmance with dissents; Rule 500.11 review pending;

TAXATION - EXEMPTIONS - WHETHER PETITIONER WAS ENTITLED TO SUMMARY JUDGMENT DECLARING THAT CERTAIN OF ITS PROPERTY IS SUBJECT TO THE REAL PROPERTY TAX EXEMPTION PURSUANT TO RPTL 420-a(1)(a), WHICH PROVIDES THAT REAL PROPERTY OWNED AND PRIMARILY USED "BY A CORPORATION OR ASSOCIATION ORGANIZED OR CONDUCTED EXCLUSIVELY FOR RELIGIOUS, CHARITABLE, HOSPITAL, EDUCATIONAL [PURPOSES], OR [FOR THE] MORAL OR MENTAL IMPROVEMENT OF MEN, WOMEN OR CHILDREN ... SHALL BE EXEMPT FROM TAXATION"; Supreme Court, Sullivan County, among other things, in a proceeding pursuant to RPTL article 7, granted petitioner's motion for summary judgment striking certain real property from the tax assessment rolls of the Town of Highland; App. Div. affirmed.

ROACH, et al. v COACH USA, INC., et al.:

4<sup>TH</sup> Dept. App. Div. orders of 6/11/10; affirmance; leave to appeal granted by App. Div., 10/1/10;

CONFLICT OF LAWS - LAW GOVERNING TORT ACTIONS - ACTION SEEKING DAMAGES FOR INJURIES OR WRONGFUL DEATH RESULTING FROM COLLISION OF TRACTOR-TRAILER PARKED ON SHOULDER OF HIGHWAY IN NEW YORK AND A CHARTERED BUS TRANSPORTING A YOUNG WOMEN'S HOCKEY TEAM FROM ONTARIO, CANADA - WHETHER COURTS BELOW ERRED IN DETERMINING THAT CANADIAN LAW APPLIED AS TO NONECONOMIC DAMAGES; EVIDENCE - JUDICIAL NOTICE - WHETHER THE APPELLATE DIVISION ERRED IN CONCLUDING THAT SUPREME COURT DID NOT ABUSE ITS DISCRETION BY TAKING JUDICIAL NOTICE OF ONTARIO LAW REGARDING NONECONOMIC DAMAGES DESPITE DEFENDANTS' FAILURE TO RAISE THE APPLICABILITY OF SUCH LAW AS AN AFFIRMATIVE DEFENSE AND TO PROVIDE THE SUBSTANCE OF THE LAW IN THEIR PLEADINGS PURSUANT TO CPLR 3016(e) - INTERPLAY BETWEEN CPLR 3016(e) AND CPLR 4511(b);

App. Div. affirmed separate 3/24/09 Supreme Court, Livingston County orders granting defendants' motions and determining that the law of Ontario, Canada concerning noneconomic damages applies to this action for personal injury and wrongful death.

RODRIGUEZ (MANUEL), PEOPLE v:

1<sup>ST</sup> Dept. App. Div. order of 5/18/10; modification; leave to appeal granted by Graffeo, J., 9/30/10;

CRIMES - SENTENCE - POST-RELEASE SUPERVISION - FAILURE OF COURT TO PRONOUNCE A TERM OF POST-RELEASE SUPERVISION - REMITTAL FOR PRESENTENCING PURSUANT TO PEOPLE v SPARBER (10 NY3d 457) - WHETHER A RESENTENCING COURT HAS DISCRETION TO RECONSIDER THE LENGTH OF A PREVIOUSLY IMPOSED TERM OF IMPRISONMENT - IF THE SENTENCING COURT LACKS SUCH DISCRETION, WHETHER THE APPELLATE DIVISION MAY MODIFY THE LENGTH OF A PREVIOUSLY IMPOSED TERM OF IMPRISONMENT PURSUANT TO ITS INTEREST OF JUSTICE JURISDICTION; Supreme Court, New York County resentenced defendant to a term of 25 years with 3 years' post-release supervision; App. Div. modified to the extent of reducing the sentence to a term of 20 years with 3 years' post-release supervision.

RONI LLC, et al. v ARFA, et al.:

1<sup>ST</sup> Dept. App. Div. order of 6/3/10; affirmance; leave to appeal granted by App. Div., 9/23/10; Rule 500.11 review pending;

PLEADING - SUFFICIENCY OF PLEADING - BREACH OF FIDUCIARY DUTY - FRAUD - INVESTORS' ACTION AGAINST DEFENDANTS WHO PROMOTED THE INVESTORS' MEMBERSHIP INTERESTS IN LIMITED LIABILITY COMPANIES (LLCs) THAT PURCHASED AND MANAGED MULTI-FAMILY RESIDENTIAL BUILDINGS IN HARLEM AND THE BRONX;

Supreme Court, New York County, among other things, denied motion of defendants Arfa, Shpigel and American Elite Properties, Inc. to dismiss plaintiffs' accounting, breach of fiduciary duty and constructive fraud causes of action; App. Div. affirmed.

SOWELL (VICTOR), PEOPLE v:

Order of Covello, J. at 2<sup>nd</sup> Dept. App. Div., 9/9/10; denial of CPL 450.15 and 460.15 application; sua sponte examination whether there is any jurisdictional basis for this appeal taken as of right in a criminal matter;

APPEAL - APPEAL AS OF RIGHT IN CRIMINAL MATTER - VACATUR OF JUDGMENT OF CONVICTION;

Supreme Court, Kings County denied defendant's motions to vacate the 3/16/88 judgment convicting him of second-degree murder and third-degree possession of a weapon; App. Div. denied defendant's application pursuant to CPL 450.15 and 460.15 for a certificate granting leave to appeal.