

**STATE OF NEW YORK
SUPREME COURT, APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT**

**Summaries of Cases
to be Argued on
October 22, 2015**

Cornell Law School

J. CLARK, J. GARRY, P.J. PETERS, J. ROSE

These summaries are provided as a courtesy to the public attending this Court session. They are not intended to address the legal issues raised in a particular case and are distributed for background purposes only.

518644 - Matter of April WW.

Respondent is the mother of a son, Brandon WW., and a daughter, April WW. In December 2012, following a determination by two medical practitioners that the daughter had been sexually abused, the children were removed from respondent's custody on an emergency basis. Thereafter, petitioner commenced this neglect proceeding by filing a petition alleging that the children had been neglected by respondent. Following a fact-finding hearing, during which Family Court permitted two medical professionals - a physician and a registered nurse/sexual assault nurse examiner - to testify about their examination of the daughter and to draw conclusions regarding physical indications of sexual abuse, Family Court adjudicated the daughter to have been neglected, and the son to have been derivatively neglected, by respondent. Following a dispositional hearing, Family Court, among other things, continued placement of the children with petitioner, ordered respondent to comply with the terms of an order of protection issued in favor of the children, and ordered that petitioner commence termination of parental rights proceedings with respect to the children. These appeals by respondent followed.

519635 - Bowers v Hurley

In April 2007, plaintiff and defendant Daniel Hurley entered into a five-year mining lease agreement whereby plaintiff was given the exclusive right to mine a 14-acre parcel of land owned by Hurley. In May 2008, Hurley, defendant Narde Paving Company, Inc. and plaintiff signed a letter of commitment whereby the original mining lease agreement between plaintiff and Hurley was extended and whereby Narde was to receive gravel mining rights. In August 2008, plaintiff, Hurley and Narde signed a mining sublease agreement, whereby plaintiff subleased to Narde his mining rights on the 14-acre parcel of land. In July 2011, Hurley refused a request by plaintiff to sign an amendment to the original mining lease and plaintiff thereafter terminated the sublease with Narde and attempted to evict Narde from the property. The lease expired on April 12, 2012 and plaintiff thereafter commenced this action. Supreme Court denied plaintiff's application for a preliminary injunction, and also denied defendants' subsequent motion for summary judgment dismissing the complaint against them. Defendants now appeals.

106933 - People v Beckingham

In 2006, a jury found defendant guilty of manslaughter in the first degree in connection with the death of his wife. Following this Court's affirmance of the judgment of conviction, defendant moved pursuant to CPL 440.10 to vacate the judgment of

conviction on the ground that one of the jurors was the mother-in-law of a court officer and that, while the trial was ongoing, the court officer told her that he knew defendant was guilty. County Court denied defendant's motion without a hearing. This Court reversed and remitted the matter for a hearing. Following the hearing, County Court again denied defendant's motion to vacate the judgment of conviction. Defendant, by permission, now appeals.

520931 - Maines Paper & Food Serv. v Keystone Assocs. Architects, Engrs. & Surveyors

Plaintiff and defendant entered into an agreement in which defendant was to provide architectural and engineering services for plaintiff's retail food supermarket. Subsequent to the project's completion, plaintiff became aware of considerable settling on the floor of the structure. Plaintiff commenced this action seeking damages for defendant's alleged negligence, professional malpractice and breach of contract due to the improper design of the structure's floor. In its answer, defendant countered that its potential liability to plaintiff was expressly limited pursuant to a limited liability provision in a schedule attached to the parties' agreement. Defendant thereafter moved for partial summary judgment, requesting that Supreme Court limit its liability pursuant to the agreement's terms. Supreme Court denied defendant's motion and defendant now appeals, contending that plaintiff should be bound by the terms of the agreement.

520624 - Granger Constr. Co. v TJ, LLC

Defendant entered into a contract with plaintiff in 2011 for the construction of a hotel in the Town of Vestal, Broome County. The contract was insured by a performance bond with third-party defendant acting as surety. Although the hotel opened in April 2012, plaintiff did not complete construction on the hotel until early 2013. In January 2013, the fire alarm system in the hotel began to malfunction and defendant was forced to close the hotel for safety reasons. Defendant informed plaintiff of the need for repairs, but plaintiff refused to perform the repairs. Upon undertaking the repairs itself, defendant allegedly discovered other problems with the construction of the hotel and, by April 2013, defendant had hired contractors other than plaintiff to complete all the needed repairs.

In June 2013, defendant sent third-party defendant a letter stating that it intended to file for contractor default under the terms of the performance bond in order to be reimbursed for the repair costs. Third-party defendant scheduled a conference between defendant and plaintiff to attempt to resolve their issues pursuant to the terms of the bond. Defendant, however, sent a formal notice of contractor default to third-party defendant in

July 2013. Third-party defendant did not reimburse defendant for its repair costs.

Thereafter, plaintiff commenced this action sounding in, among other things, breach of contract against defendant to demand payment of the balance on the construction contract. Defendant then commenced a third-party action in December 2013 against third-party defendant to compel it to perform under the bond. After answering, third-party defendant moved for summary judgment dismissing the third-party complaint, arguing that defendant failed to strictly comply with the conditions precedent in the performance bond. Supreme Court granted third-party defendant's motion for summary judgment and defendant now appeals.

105985 - People v Fagan

On May 21, 2012, while considered a person of interest in the midst of an ongoing narcotics investigation in the City of Elmira, Chemung County, defendant's vehicle was stopped for non-working brake lights and defendant was taken into custody for aggravated unlicensed operation of a vehicle. The arresting officer testified that he found an empty sandwich bag and rubber gloves in the center console of defendant's car during the vehicle search. The combination of the results from the vehicle search, defendant's delay in stopping his vehicle while leaning as if he was "going behind his back or under his body[,] " and a review of defendant's arrest record of prior drug offenses led the officer to believe he had reasonable suspicion that defendant was concealing evidence. A strip search of defendant ensued at the police station. While in custody and after speaking with the police, defendant produced cocaine from his rectum. Defendant was thereafter issued an appearance ticket for the traffic offenses and released after posting bail. Approximately 1½ months later, defendant was charged in an indictment with criminal possession of a controlled substance in the fourth degree stemming from the foregoing events. After conducting a Mapp hearing, County Court denied defendant's motion to suppress the cocaine recovered from his person after finding that his constitutional rights were not violated. Defendant then pleaded guilty to the crime as charged and was sentenced, as a second felony drug offender, to four years in prison followed by two years of postrelease supervision. Defendant now appeals.

520978 - Hawkins v Eaves

From August 2009 through February 2012, Leonard Wilcox executed four loans to plaintiffs. In the course of transactions concerning these loans, Wilcox allegedly collected "bonus payments" from plaintiffs when payments of principal were due, in exchange for continuing the "interest only" period of the loans. Plaintiffs commenced

this action against defendant, the executor and trustee of Wilcox's estate and living trust, to obtain a declaration that the four promissory notes are void for usury. Plaintiffs also sought an order directing that the judgments by confession be vacated and that defendant disgorge all principal, interest and other charges collected upon the promissory notes. Defendant's motion to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5) and (7) was denied and defendant now appeals.

107532 - People v Lowe

On December 1, 2011, Francisco Santiago was shot and killed during a home invasion at the Chestnut Hill Apartment Complex in the City of Ithaca, Tompkins County. Defendant and a codefendant were thereafter jointly indicted for the crimes of murder in the second degree committed during the course of a felony, robbery in the first degree and conspiracy in the fourth degree. The indictment also charged defendant with intentional murder in the second degree, two counts of criminal possession of a weapon in the second degree and criminal use of a firearm in the first degree. The prosecution alleged that after defendant and another unknown male went to the apartment, they demanded drugs and money from the victim and another person; a physical altercation ensued, during which one of the charged defendants brandished a gun and shot the victim, causing his death. In satisfaction of the seven-count indictment, defendant accepted a plea agreement that included a waiver of the right to appeal and a guilty plea to the reduced charge of manslaughter in the first degree; in exchange for the plea a sentence promise of 15 years with five years of postrelease supervision was given. Prior to sentencing, defendant moved to withdraw his guilty plea and requested that substitute counsel be assigned to represent him. County Court denied the motion and imposed the agreed-upon prison term of 15 years with five years of postrelease supervision. Defendant now appeals.