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An Organized Compilation of the Summaries of Selected Decisions Released by Our New York State Appellate Courts the Week of August 30 – September 3, 2021, and Posted on the New York Appellate Digest Website on Monday, September 6, 2021. The Entries in the Table of Contents Link to the Summaries Which Link to the Full Decisions on the Official New York Courts Website. Click on "Table of Contents" in the Header on Any Page to Return There. Right Click on the Citations to Keep Your Place in the Newsletter.

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CRIMINAL LAW, JUDGES, ATTORNEYS.

EVEN THOUGH DEFENDANT WAS A DISBARRED ATTORNEY, THE TRIAL JUDGE SHOULD HAVE CONDUCTED AN INQUIRY TO MAKE SURE THE DEFENDANT UNDERSTOOD THE RISKS OF REPRESENTING HIMSELF; CONVICTIONS REVERSED (SECOND DEPT).

The Second Department, reversing defendant's conviction, determined the judge should have ensured defendant knew the risks of conducting the trial pro se before allowing defendant, a disbarred attorney, to represent himself:

A court must determine that the defendant's waiver of the right to counsel is made competently, intelligently, and voluntarily before allowing that defendant to represent himself or herself … . In order to make that evaluation, the court "must undertake a 'searching inquiry' designed to 'insur[e] that the defendant [is] aware of the dangers and disadvantages of proceeding without counsel'" … . The court's inquiry "must accomplish the goals of adequately warning a defendant of the risks inherent in proceeding pro se, and apprising a defendant of the singular importance of the lawyer in the adversarial system of adjudication" … . Nonetheless, no specific litany is required and a reviewing court may look to the whole record, not simply to the questions asked and answers given during a waiver colloquy, in order to determine whether a defendant actually understood the dangers of self-representation … . Subsequent warnings, however, cannot cure a trial court's earlier error in not directing the defendant's attention to the dangers and disadvantages of self-representation … .

Here, although the record demonstrates that the Supreme Court was aware of the defendant's pedigree information, including his status as a disbarred attorney, the court failed to ascertain that the defendant was aware of the risks inherent in proceeding without a trial attorney and the benefits of having counsel represent him at trial … . Contrary to the People's contention, there is nothing in the record that demonstrates that the dangers and disadvantages of self-representation were known by the defendant … , as the court neither "tested defendant's understanding of

choosing self-representation nor provided a reliable basis for appellate review" … . People v Crispino, 2021 NY Slip Op 04918, Second Dept 9-1-21

CRIMINAL LAW, SEX OFFENDER REGISTRATION ACT (SORA), APPEALS.

THE RECORD WAS NOT SUFFICIENT FOR THE APPEAL OF THE SORA RISK LEVEL CLASSIFICATION; MATTER REMITTED (THIRD DEPT).

The Third Department, reversing County Court, determined the appeal of the Sex Offender Registration Act (SORA) risk level classification could not be heard because the record was not sufficient. The matter was remitted:

"Although the short form order utilized by County Court contains the ordered language required to constitute an appealable paper, the written order fails to set forth the findings of fact and conclusions of law required by Correction Law § 168-n (3)" … . "The hearing transcript is similarly deficient as it does not contain clear and detailed oral findings to support County Court's risk level classification" … . The scant record before us is not sufficiently developed to enable this Court to make its own factual findings and legal conclusions — particularly with respect to the number of victims and the points assessed under risk factor three. Accordingly, County Court's order is reversed, and this matter is remitted for further proceedings. People v Kwiatkowski, 2021 NY Slip Op 04934, Third Dept 9-2-21

CRIMINAL LAW, TRAFFIC STOPS.

THE PEOPLE DID NOT DEMONSTRATE PROBABLE CAUSE FOR THE TRAFFIC STOP; THE 911 CALL WAS NOT PUT IN EVIDENCE AND THE RELIABILITY OF THE CALLER AND THE BASIS FOR THE CALLER'S KNOWLEDGE WERE NOT DEMONSTRATED; THE FACT THAT THE RELEVANT EVIDENCE WAS PRESENTED AT TRIAL WAS IRRELEVANT (CT APP).

The Court of Appeals, reversing the Appellate Division, determined the People did not present sufficient evidence at the suppression hearing. Probable cause for the traffic stop was based on a 911 call. But no evidence was presented to demonstrate the reliability of the caller or the basis for the caller's knowledge. The fact that the relevant evidence was presented at trial did not matter. The appeal focuses on the evidence presented at the suppression hearing:

… [T]he officer's only justification for the stop was the dispatcher's report that a 911 caller had asserted that one of the vehicle's occupants possessed a "long gun." Initially, defendant claims that the stop was invalid because possession of a "long gun" is lawful in New York. We reject that claim as meritless (see Penal Law 265.00 [22]). However, the People failed to introduce the 911 recording, failed to introduce any evidence indicating whether the 911 caller was an identified citizen informant or an anonymous tipster, and failed to offer any explanation of the basis of the caller's knowledge. In sum, the People put forward no relevant information concerning the circumstances surrounding the call at the hearing. Contrary to the People's suggestion that an appellate court can consider evidence subsequently admitted at trial to justify affirmance of an order denying suppression, "the propriety of the denial must be judged on the evidence before the suppression court" … . Therefore, on the record of the suppression hearing, "whether evaluated in light of the totality of the circumstances or under the Aguilar-Spinelli framework, the reliability of the tip was not established" … . People v Walls, 2021 NY Slip Op 04949, CtApp 9-2-21

FAMILY LAW, NEGLECT.

THE EVIDENCE OF ALTERCATIONS IN THE PRESENCE OF THE CHILDREN AND ALCOHOL CONSUMPTION DID NOT SUPPORT THE NEGLECT FINDINGS (THIRD DEPT).

The Third Department, reversing Family Court, determined the neglect findings were not supported by the record:

With respect to the April 2018 incident, petitioner did not sufficiently demonstrate the presence of the children during the altercation that occurred. Given that "a finding of imminent danger is contingent on the child[ren] being present," the evidence relating to that incident was not relevant and was insufficient to support a finding of neglect … .With respect to the January 2019 incident, it is undisputed that all of the children except the oldest child were asleep during the altercation; as such, the evidence presented could not support a finding of neglect as to the younger children. As to the oldest child, it is true that "a single act of domestic violence may be sufficient to establish neglect if the child is present for such violence and is visibly upset and frightened by it" … . However, the proof at the fact-finding hearing failed in this regard because it was not established that the oldest child was visibly upset or frightened. Thus, petitioner failed to demonstrate that the oldest child was in imminent risk of emotional or physical impairment … . Moreover, the oldest child's out-of-court statements that the father gave her two to three shots of alcohol were not corroborated by the other evidence presented by petitioner, and the mere "repetition of an accusation by a child does not corroborate that child's prior account" … . To the contrary, even petitioner's witnesses conceded that such a level of alcohol consumption was not supported by their observations of the oldest child's demeanor and her .01 blood alcohol content. With respect to the allegations of alcohol abuse while caring for the children, "[t]here was insufficient evidence that [respondents] 'misused alcoholic beverages to the extent that [they] lost self-control of [their] actions,' or that the physical, mental, or emotional condition of the children had been impaired or was in imminent danger of becoming impaired" … . Matter of Josiah P. (Peggy P.), 2021 NY Slip Op 04936, Third Dept 9-2-21

FORECLOSURE, DEBTOR-CREDITOR.

THE BANK IN THIS FORECLOSURE ACTION WAS NOT REQUIRED TO DEMONSTRATE IT WAS A LICENSED DEBT COLLECTION AGENCY PURSUANT TO THE NYC ADMINISTRATIVE CODE; THE BANK DID NOT ATTACH THE BUSINESS RECORDS NECESSARY TO DEMONSTRATE DEFENDANT'S DEFAULT (SECOND DEPT).

The Second Department, in a full-fledged opinion by Justice Iannacci, determined: (1) the bank in this foreclosure action did not have to allege it was a licensed "debt collection agency" pursuant to the NYC Administrative Code (20-490); (2) the proof of defendant's default was inadmissible hearsay:

A judicial foreclosure action such as the one at bar does not constitute the sort of tactics "shocking to the conscience of ordinary people"—like phone calls at unreasonable hours and other threatening behavior—that the subject Administrative Code provisions were enacted to address. Furthermore, the particular requirements and prohibitions placed upon debt collectors under the Administrative Code are concerned with ensuring that consumers can verify that payment on a debt is actually due, learn the correct amount of the debt, and meaningfully communicate with the debt collection agency about the debt … . In the context of judicial foreclosure, the state statutory scheme operates to protect homeowners and ensure fairness in the process, in a far more comprehensive manner and in ways that might not be entirely consistent with the Administrative Code provisions. * * *

… [T]he plaintiff failed to sustain its initial burden of demonstrating that the defendants defaulted in the repayment of the subject note. To establish such default, the plaintiff relied upon an affidavit of a representative of its loan servicer, whose averment regarding the defendants' default was based upon her review of unidentified business records. Inasmuch as no business records were attached to, or otherwise incorporated into, the affidavit, this averment constituted inadmissible hearsay lacking in probative value … . Citibank, N.A. v Yanling Wu, 2021 NY Slip Op 04902, Second Dept 9-1-21

LABOR LAW-CONSTRUCTION LAW, NEGLIGENCE, CONTRACT LAW.

QUESTION OF FACT WHETHER A CONTRACTOR WAS LIABLE TO A SUBCONTRACTOR FOR LAUNCHING AN INSTRUMENT OF HARM; THE SUBCONTRACTOR WAS INJURED ATTEMPTING TO FIX THE PROBLEM ALLEGEDLY CREATED BY THE CONTRACTOR (SECOND DEPT).

The Second Department, reversing (modifying) Supreme Court, determined there was a question of fact whether a contractor, Home Crafts, launched an instrument of harm such that the contractor was liable to a subcontractor, Catalano, who fell from a ladder when attempting to fix the problem. Home Craft had ordered that sheet metal be placed over a chimney during the installation of gas fireplace inserts. The sheet metal caused smoke to back up when the fireplace was tested. Catalano fell when taking the sheet metal off the chimney:

… "[A] contractor may be said to have assumed a duty of care and, thus, be potentially liable in tort, to third persons when the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm" … .

Here, Home Crafts failed to establish, prima facie, that it did not launch a force or instrument of harm by directing Catalano to seal the chimney, without alerting the other contractors that the fireplace at issue was rendered inoperable due to the inability to ventilate smoke … . Santibanez v North Shore Land Alliance, Inc., 2021 NY Slip Op 04921, Second Dept 9-1-21

NEGLIGENCE, TRAFFIC ACCIDENTS, VEHICLE AND TRAFFIC LAW.

PLAINTIFF WAS STRUCK AFTER DEFENDANT CROSSING GUARD MOTIONED FOR HIM TO CROSS; THE CROSSING GUARD'S MOTION FOR SUMMARY JUDGMENT PROPERLY GRANTED; THE DISSENT WOULD HAVE DENIED THE MOTION (SECOND DEPT).

The Second Department, over a dissent, affirmed the grant of the crossing guard's (Gandolfo's) and the county's motion for summary judgment in this pedestrian-vehicle accident case. Defendant Gandolfo had assumed her position in the crosswalk and motioned for infant plaintiff to cross the road when plaintiff was struck by a car driven by Upton. The dissent argued there was some evidence that Gandolfo may have been negligent:

Vehicle and Traffic Law § 1102 provides that "[n]o person shall fail or refuse to comply with any lawful order or direction of any police officer or flagperson or other person duly empowered to regulate traffic." Here, the County defendants … [submitted] transcripts of the deposition testimony of Gandolfo, Upton, and an eyewitness to the accident, which demonstrated that Upton's actions were the sole proximate cause of the accident. Gandolfo testified that, upon seeing the infant at the southern corner of the intersection from her post on the northern corner, she entered the crosswalk, and, upon reaching the middle, raised her stop sign toward traffic traveling east on Montauk Highway, and her gloved hand toward traffic traveling west, checked in both directions two times for approaching vehicles, and seeing none, nodded to the infant to enter the crosswalk. Gandolfo further testified that she heard Upton's vehicle, which was traveling east on Montauk Highway, before she saw it, and that, despite Gandolfo's presence in the crosswalk, Upton failed to stop her vehicle, and struck the infant as he had almost reached the middle of the crosswalk. The eyewitness testified that, after dropping her child off at the high school, she was waiting for the infant to walk through the crosswalk before making a right turn onto Montauk Highway, and the crossing guard, dressed in a crossing guard uniform, was in the middle of the crosswalk holding a stop sign, when the infant was struck as he approached the middle of the crosswalk. During her deposition, Upton, who frequently traveled the route where the accident occurred,

testified that, prior to striking the infant, she saw Gandolfo in the road, holding up her stop sign, but did not see the infant until after her vehicle struck him. Christopher W. v County of Suffolk, 2021 NY Slip Op 04922, Second Dept 9-1-21

WORKER'S COMPENSATION, EVIDENCE.

THE WORKERS' COMPENSATION BOARD DID NOT HAVE SUFFICIENT EVIDENCE TO MAKE ITS OWN DETERMINATION TO APPORTION SOME OF CLAIMANT'S DISABILITY TO A 1976 INJURY (THIRD DEPT).

The Third Department, reversing the Worker's Compensation Board, determined the Board did not have sufficient evidence to determine the extent to which a 1976 injury accounted for some of claimant's disability:

We recognize that the Board's medical guidelines "provide 'useful criteria' and the Board makes the ultimate determination of a claimant's degree of disability, but that determination must be supported by substantial evidence" … . Moreover, "although the Board may reject medical evidence as incredible or insufficient, it may not fashion its own medical opinion" … . Here, there are no operative or pathological reports from any surgeries related to the 1976 injury in the record. Nor is there any medical evidence regarding the degree of disability, if any, that had resulted from the 1976 injury and/or surgery and the record reflects that claimant was fully employed with no restrictions at the time of the 2016 injury. Further, even assuming, without deciding, that an evaluation of the 1976 injury under the 1996 guidelines is appropriate for the purposes of determining whether that injury would have resulted in an SLU [schedule loss of use] award, there is no medical opinion that the 1976 injury would have resulted in an SLU award at the time of the injury or under the subsequently published 1996 guidelines. Matter of Hughes v Mid Hudson Psychiatric Ctr., 2021 NY Slip Op 04939, Third Dep 9-2-21

ZONING.

THE ZONING BOARD OF APPEALS' (ZBA'S) DENIAL OF A LOT-SIZE VARIANCE CONFLICTED WITH A PRIOR RULING BASED ON SIMILAR FACTS; THEREFORE THE ZBA WAS REQUIRED TO PROVIDE A FACTUAL BASIS FOR ITS DECISION; THE DECISION, WHICH WAS SUPPORTED ONLY BY COMMUNITY OPPOSITION, WAS ARBITRARY AND CAPRICIOUS (SECOND DEPT).

The Second Department affirmed Supreme Court's ruling that the zoning board of appeals (ZBA's) denial of a lot-size variance was arbitrary and capricious:

"A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious," and thus, "[w]here an agency reaches contrary results on substantially similar facts, it must provide an explanation" … .

Here, the ZBA failed to set forth any factual basis in the determination to establish why it was reaching a different result on essentially the same facts as a prior application that had been granted … . Further, in response to the petitioner's submission of expert testimony, the ZBA's findings were merely supported by generalized community opposition and were not corroborated by any empirical data or expert testimony … . Matter of O'Connor & Son's Home Improvement, LLC v Acevedo, 2021 NY Slip Op 04915, Second Dept 9-1-21