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FIRST DEPARTMENT

CIVIL PROCEDURE, LANDLORD-TENANT, MUNICIPAL LAW, REAL ESTATE.

CLASS ACTION AGAINST NYC HOUSING AUTHORITY FOR BREACH OF THE WARRANTY OF HABITABILITY RE: LOSS OF HEAT AND/OR HOT WATER GOES FORWARD.

The First Department, reversing Supreme Court, determined the breach of the warranty of habitability cause of action should not have been dismissed . The plaintiffs' motion for certification of the "damages class" was granted. The class action concerned the loss of heat and/or hot water in NYC Housing Authority properties: "In order to prove a claim for breach of the warranty of habitability, plaintiffs must show the extensiveness of the breach, the manner in which it affected the health, welfare or safety of the tenants, and the measures taken by the landlord to alleviate the violation ... . NYCHA conceded that 80% of its housing units experienced heat and/or hot water outages during the relevant period, which demonstrates that the problems that affected each class member were system-wide. Thus, much of the proof will likely concern NYCHA's overall deficiencies, rather than the breakdown of individual heating systems in individual buildings. The need to conduct individualized damages inquiries does not prevent class certification as long as common issues of liability predominate ... . In any event, the heating systems that failed served multiple housing units, and proof of NYCHA's efforts to repair each system will be common to numerous class members. In order to address any concerns with the size or disparity of the class, the court can designate subclasses consisting of tenants of a particular NYCHA complex, development or building ... . Moreover, class action treatment is the most efficient method for adjudicating the claims of class members who lack the resources to bring individual actions for the small recovery they might obtain ...". ***Diamond v. New York City Hous. Auth.*, 2020 N.Y. Slip Op. 00376, First Dept 1-21-20**

CRIMINAL LAW.

DEFENSE MOTION TO SET ASIDE THE VERDICT BASED UPON THE ALLEGED MISCONDUCT OF TWO JURORS SHOULD NOT HAVE BEEN DENIED WITHOUT A HEARING.

The First Department, ordering a hearing, determined a juror's expression of a romantic interest in a member of the prosecution team could amount to disqualifying juror misconduct. Allegations about another juror's close relationship with a witness also warranted a hearing. The defense had moved to set aside the verdict alleging juror misconduct: "The court improvidently exercised its discretion in denying, without a hearing, that branch of defendant's motion to set aside the verdict on the ground of alleged misconduct by two jurors (see CPL 330.40[2][f]). The People's trial preparation assistant, who assisted the trial prosecutors, disclosed that some time after the trial and before sentencing, he received a handwritten note in the mail from the jury foreperson, stating: 'Now that the trial is over . . .' (ellipsis in original), followed by the juror's first and last name, her juror number, the court part in which the trial had occurred, her phone number, and her address. The note also included a crossed-out phrase from which it could be inferred that the original version of the note had been written during the trial. Under the circumstances, the note itself was sufficient evidence to raise an issue of fact about whether the foreperson's apparent romantic interest in the trial preparation assistant prevented her from deliberating fairly ... . The assistant's affidavit stating that he did not respond to the juror's note or otherwise communicate with her at any time is not dispositive, as the issue is the juror's misconduct or bias during the trial. The court also erred with regard to a second juror. That juror had a sufficiently close relationship with a witness to warrant a hearing as to whether that juror engaged in misconduct by failing to disclose the relationship to the court." ***People v. Guillen*, 2020 N.Y. Slip Op. 00387, First Dept 1-21-20**

DEFAMATION.

DEFAMATION ACTION BASED UPON A REPORTER'S NAMING THE WRONG TEACHER AS HAVING BULLIED A FIFTH-GRADER PROPERLY DISMISSED; THE REPORTER HAD SUFFICIENT REASON TO RELY ON THE STUDENT'S MOTHER AND ANOTHER SOURCE BOTH OF WHOM PROVIDED THE WRONG NAME.

The First Department determined defendant WPIX was not liable for an article about the bullying of a fifth-grader by a teacher. The teacher allegedly involved in the bullying had the last name "Rainbow," but plaintiff, Starlight Rainbow, also a teacher, had no involvement with the student. The article misidentified the involved teacher as Starlight Rainbow. The First Department explained the standard of proof and found that the WPIX reporter had sufficient reason to rely on the wrong

name provided by the student's mother and another source. The court further found that there was no duty to retract the story: "The parties ... agree that the article concerned a matter of public concern, and that plaintiff is not a public figure. Thus, to prevail on a defamation claim, plaintiff must show, by a preponderance of the evidence, that WPIX was 'grossly irresponsible' in publishing the article on its website, in that it acted 'without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties' (Chapadeau v. Utica Observer-Dispatch, 38 NY2d 196, 199 [1975]). The gross irresponsibility standard of Chapadeau is more lenient than the actual malice standard applicable to public figures ... . * * * ... .WPIX could not be held liable for failure to retract the article during the nearly seven months that elapsed from her August 2014 retraction demand to its removal of the article from its website in March, 2015 upon her commencement of this case. Plaintiff provides 'no authority to support [her] argument that the Chapadeau standard imposes a duty to correct previously-acquired information — and the law does not recognize such an obligation' ...". ***Rainbow v. WPIX, Inc.*, 2020 N.Y. Slip Op. 00499, First Dept 1-23-20**

SECOND DEPARTMENT

ATTORNEYS, NEGLIGENCE.

PLAINTIFF'S COUNSEL'S REMARKS DURING SUMMATION DEPRIVED DEFENDANT RESIDENTIAL HEALTH CARE FACILITY OF A FAIR TRIAL; OVER $1 MILLION JUDGMENT IN THIS NEGLIGENCE/PUBLIC-HEALTH-LAW ACTION REVERSED.

The Second Department, reversing the over $1 million judgment in this negligence and Public-Health-Law-2801-d violation case, determined plaintiff's counsel's remarks in summation required a new trial. Plaintiff's decedent, who was at risk for falling, fell after getting up from a wheelchair at defendant residential health care facility and ultimately died: " '[L]itigants are entitled, as a matter of law, to a fair trial free from improper comments by counsel or the trial court' ... . 'The interest of justice thus requires a court to order a new trial where comments by an attorney for a party's adversary deprived that party of a fair trial or unduly influenced a jury' ... . Here, during summation, the plaintiff's counsel improperly appealed to the passion of the jurors by characterizing the defendant as a 'corporation' that has 'two lawyers,' a 'tech person,' 'general counsel,' and 'video people.' Counsel also improperly accused the defendant of willfully depriving the plaintiff of evidence that would have been harmful to the defendant's case, accused the defendant's witnesses of having 'changed' their testimony after their depositions or pretrial affirmations, which were not in evidence, 'because they saw that they couldn't win,' and improperly argued that the defendant failed to call certain witnesses, who were not under the defendant's control. Thus, 'the comments of the plaintiff['s] counsel . . . were not isolated, were inflammatory, and were unduly prejudicial. These prejudicial comments so tainted the proceedings as to have deprived the defendant . . . of a fair trial' ...". ***Nieves v. Clove Lakes Health Care & Rehabilitation, Inc.*, 2020 N.Y. Slip Op. 00422, Second Dept 1-22-20**

CIVIL PROCEDURE, DENTAL MALPRACTICE, NEGLIGENCE, EVIDENCE.

STATEMENT FROM PLAINTIFF'S OUT-OF-STATE EXPERT IN THIS DENTAL MALPRACTICE ACTION NOT IN ADMISSIBLE FORM; CPLR 2106 REQUIRES A SWORN AFFIDAVIT FROM A DENTIST LICENSED IN ANOTHER STATE.

The Second Department, reversing Supreme Court, determined the statement by a New Jersey dentist offered by the plaintiff in this dental malpractice action was not admissible because it was not in the form of a sworn affidavit. Therefore plaintiff did not raise a question of fact in opposition to defendants' motions for summary judgment: "In opposition, the plaintiff submitted, among other things, the unsworn affirmation of Martin, who was licensed to practice dentistry in the State of New Jersey. Consequently, the out-of-state dentist's statement did not constitute admissible evidence in that CPLR 2106 only authorizes attorneys, physicians, osteopaths, or dentists licensed in this state to utilize an affirmation in lieu of a sworn affidavit ... . While an otherwise qualified expert physician, osteopath, or dentist, who is not licensed in this state, may submit a statement in support of or in opposition to a party's position in a case at bar, that statement must be in the form of a sworn affidavit. CPLR 2106(a), which permits such a statement to be in the form of an affirmation, only applies to attorneys, physicians, osteopaths, and dentists licensed to practice in the State of New York." ***Nelson v. Lighter*, 2020 N.Y. Slip Op. 00420, Second Dept 1-22-20**

CIVIL PROCEDURE, FORECLOSURE.

DEFENDANTS' FAILURE TO ANSWER THE FORECLOSURE COMPLAINT WAIVED THE STATUTE OF LIMITATIONS DEFENSE.

The Second Department, reversing Supreme Court, determined defendants in this foreclosure action, by defaulting, had waived the statute of limitations defense: "CPLR 3211(e) provides that a defense based upon the statute of limitations is waived if not asserted in an answer or in a timely motion to dismiss pursuant to CPLR 3211(a). Such a motion is timely if it is made before service of the answer is required (see CPLR 3211[e]). Here, the defendants never answered the complaint, and their cross motion, inter alia, to dismiss the complaint was served at least six months after service of the answer was required. Thus, unless the defendants' default is vacated or excused, the defendants waived their statute of limitations de-

fense, and in their cross motion, the defendants did not seek relief from that waiver. Accordingly, the Supreme Court should not have granted that branch of the defendants' cross motion which was to dismiss the complaint insofar as asserted against them as time-barred without first determining whether the defendants were properly held in default ...". ***Nestor I, LLC v. Moriarty-Gentile*, 2020 N.Y. Slip Op. 00421, Second Dept 1-22-20**

CIVIL PROCEDURE, JUDGES, EVIDENCE, EMPLOYMENT LAW, LABOR LAW.

SUPREME COURT SHOULD NOT HAVE, SUA SPONTE, GRANTED RELIEF NOT REQUESTED IN PLAINTIFFS' UNOPPOSED MOTION AND SHOULD NOT HAVE CONSIDERED EVIDENCE NOT BEFORE IT; THE ORDER SETTLING A CLASS ACTION FOR UNPAID WAGES AND OVERTIME SHOULD NOT HAVE DECLARED INVALID CERTAIN OPT-OUT STATEMENTS WHICH WERE NOT REFERRED TO IN PLAINTIFFS' MOTION AND WERE NOT OTHERWISE BEFORE THE COURT.

The Second Department, reversing Supreme Court in this class action seeking unpaid wages and overtime, determined Supreme Court should not have. sua sponte, declared certain opt-out statements (opting out of the class action settlement) invalid because the issue was not raised by the plaintiff's motion and the opt-out statements were not properly before the court: "Pursuant to the February 2018 order, all class members who did not opt out were permanently enjoined from asserting, pursuing, and/or seeking to reopen claims that were released pursuant to the settlement agreement. The February 2018 order also contained a handwritten provision declaring that '[t]he opt outs received on 1/26/18 from Lee Litigation Group are deemed invalid as they were dated prior to the Class Notice which was sent 12/27/17, and do not contain the required opt-out language pursuant to the Class-Notice ordered by this court on November 22, 2017.' Such relief was not sought in the motion filed by the plaintiffs nor was it contained in the proposed order submitted to the court by the plaintiffs' counsel. ... CPLR 908 provides that '[a] class action shall not be dismissed, discontinued, or compromised without the approval of the court,' and that '[n]otice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs.' Contrary to the plaintiffs' contention, the Supreme Court should not have, sua sponte, declared invalid certain opt-out statements that were not part of the plaintiffs' unopposed motion and which relief was not requested in the motion. '[A] court may grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party' ... . Here, the court strayed from this principle ... . The relief awarded by the court, sua sponte, in the handwritten provision in the February 2018 order is 'dramatically unlike' the relief sought by the plaintiffs and was prejudicial to the appellants ... . Moreover, the opt-out statements referred to in the February 2018 order were not among the exhibits submitted on the plaintiffs' motion, and therefore were not properly before the court for consideration ...". ***Robinson v. Big City Yonkers*, Inc., 2020 N.Y. Slip Op. 00447, Second Dept 1-22-20**

CRIMINAL LAW.

PROTECTIVE ORDER ALLOWING THE PEOPLE TO HOLD BACK INFORMATION (OTHERWISE SUBJECT TO AUTOMATIC DISCLOSURE) UNTIL AFTER JURY SELECTION VACATED; MATTER REMITTED TO ALLOW THE DEFENSE TO OPPOSE THE REQUEST FOR THE ORDER; THE PROCEDURAL REQUIREMENTS OF THE NEW DISCOVERY PROVISIONS ADDRESSED IN SOME DETAIL.

The Second Department, in an expedited appellate review of the issuance of a protective order by Supreme Court, vacated the protective order and sent the matter back to allow the defense to make an argument in opposition. The defendant is accused of stabbing his wife multiple times. The People, pursuant to CPL § 245.70, ex parte, applied for and were granted an order delaying, until after jury selection, the turning over of information otherwise subject to automatic disclosure under CPL § 245.70. The decision makes an effort to explain how these new disclosure provisions should be handled by the trial courts: "Unlike the prior discovery statute, which allowed the People to wait until the time of trial to turn over witness statements (see CPL former 240.45), the new statutory scheme provides that disclosure is to be made within days after arraignment (see CPL 245.10[1][a]). The new statute provides that there shall be a 'presumption in favor of disclosure' when interpreting certain listed provisions of CPL article 245 (CPL 245.20[7]), although the provision relating to protective orders (CPL 245.70) is not among those that are listed (see CPL 245.20[7]). CPL 245.70 provides that upon a showing of good cause by either party, the court may at any time order that discovery be denied, restricted, conditioned, or deferred, or make such other order as is appropriate (see CPL 245.70[1]). It further provides that the court 'may permit a party seeking or opposing a protective order under this section, or another affected person, to submit papers or testify on the record ex parte or in camera,' and that any such papers and a transcript of any such testimony may be sealed and constitute a part of the record on appeal (CPL 245.70[1]). ... The statute cannot be reasonably construed to permit a protective order to be sought entirely ex parte in every case. Since entirely ex parte proceedings should be allowed only in some cases, it necessarily follows that proceedings on applications for a protective order should be entirely ex parte only where the applicant has demonstrated the clear necessity for the entirety of the application, and the submissions in support of it, to be shielded from the opposing party. ... The necessity for appellate intervention would have been reduced had the Supreme Court, either before or after granting the subject protective order, afforded defense counsel the opportunity to be heard and thereafter determined

whether to grant, adhere to, modify, or rescind the protective order." ***People v. Bonifacio*, 2020 N.Y. Slip Op. 00517, Second Dept 1-23-20**
Similar issues and result in ***People v. Reyes-Fuentes*, 2020 N.Y. Slip Op. 00518, Second Dept 1-23-20**

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

PEOPLE'S APPLICATION FOR AN UPWARD DEPARTURE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE; EVIDENCE DEFENDANT WAS CHARGED BUT NEVER INDICTED OR CONVICTED DOES NOT MEET THE CLEAR AND CONVINCING STANDARD.
The Second Department, reversing Supreme Court, determined the People's application for an upward department was not supported by clear and convincing evidence. Evidence defendant was charged but not indicted or convicted does not meet the clear and convincing standard: "A departure from the presumptive risk level is generally the exception, not the rule (see Sex Offender Registration Act: Risk Assessment Guidelines and Commentary at 4 [2006] [hereinafter Guidelines]). Where the People seek an upward departure, they must identify an aggravating factor that tends to establish a higher likelihood of reoffense or danger to the community not adequately taken into account by the Guidelines, and prove the facts in support of the aggravating factor by clear and convincing evidence ... . Here, contrary to the Supreme Court's conclusion, the People failed to prove the existence of an aggravating factor by clear and convincing evidence. In granting an upward departure, the court relied upon the defendant's criminal history. However, the Guidelines account for an offender's criminal history by assessing points under risk factor 9, and the defendant's history here was not so extraordinary, extensive, or serious as to demonstrate that the assessment of those points was inadequate to capture his actual risk of reoffense and danger to the community . Further, an upward departure could not properly be based upon certain prior conduct of which the defendant was charged but either never indicted or never convicted, as the People's evidence regarding that alleged conduct did not meet the clear and convincing evidence standard ...". ***People v. Pittman*, 2020 N.Y. Slip Op. 00443, Second Dept 1-22-20**

FAMILY LAW.

FATHER'S NONVOLUNTARY UNION DUES SHOULD HAVE BEEN DEDUCTED FROM HIS INCOME FOR CALCULATION OF CHILD SUPPORT.
The Second Department, reversing (modifying) Family Court, determined father's nonvoluntary union dues should have been deducted from his income for the calculation of child support: "Although no deduction from income for union dues is specifically mandated by the Family Court Act, there is an allowable deduction for 'unreimbursed employee business expenses except to the extent said expenses reduce personal expenditures' (Family Ct Act § 413[1][b][5][vii][A]). Nonvoluntary union dues may be deducted under this category ... . 'However, such expenses are properly deducted from parental income in calculating child support obligations only when proven, usually by tax returns accompanied by records and receipts' ... . At the hearing, counsel for the mother consented to the deduction of the father's nonvoluntary union dues from the father's income for the purposes of calculating his child support and related financial obligations. Thus, the Family Court should have granted the father's objection to so much of the Support Magistrate's order as failed to deduct the father's nonvoluntary union dues from his income in calculating his child support and related financial obligations." ***Matter of Julien v. Ware*, 2020 N.Y. Slip Op. 00414, Second Dept 1-22-20**

INSURANCE LAW, PERSONAL INJURY.

IT WAS ALLEGED ONE MAN INTENDED TO DOUSE ANOTHER WITH LIQUID IN A CUP BUT UNINTENTIONALLY THREW THE CUP ITSELF CAUSING INJURY; THERE WAS A QUESTION OF FACT WHETHER THE INJURY WAS CAUSED BY INTENTIONAL CONDUCT OR AN ACCIDENT.
The Second Department, reversing Supreme Court, determined plaintiff insurer's (Unitrin's) motion for summary judgment in this insurance-coverage dispute should not have been granted. Apparently Sullivan was in one car and the injured party, Ciminello, was in another car when Sullivan allegedly attempted to throw liquid that was in a cup into Ciminello's car. It was alleged that Sullivan unintentionally threw the entire cup, not just its contents, which injured Ciminello. So there was a question of fact whether Ciminello was injured by intentional conduct (not covered by insurance) or an accident (which would be covered): "Ciminello raised a triable issue of fact as to whether the harm was inherent in the intentional act committed ... . Ciminello submitted evidence that, although Sullivan and his passenger intended to douse Ciminello with the liquid contained in the cup, there was no intent to throw the cup and strike Ciminello with it. As the instant case does not fall within the narrow class of cases in which the intentional act exclusion applies regardless of the insured's subjective intent ... , there is a triable issue of fact as to whether the event qualified as an 'accident,' as defined by the policy ...". ***Unitrin Auto & Home Ins. Co. v. Sullivan*, 2020 N.Y. Slip Op. 00452, Second Dept 1-22-20**

LABOR LAW-CONSTRUCTION LAW, PERSONAL INJURY.

PLAINTIFF WAS PROVIDED WITH A LADDER WITHOUT RUBBER FEET WHICH SLID CAUSING PLAINTIFF TO FALL; PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON HIS LABOR LAW § 240(1) CAUSE OF ACTION PROPERLY GRANTED.

The Second Department determined plaintiff was entitled to summary judgment on his Labor Law § 240(1) cause action in this ladder fall case: "We agree with the Supreme Court's determination granting that branch of the plaintiff's motion which was for summary judgment on the issue of liability on the Labor Law § 240(1) cause of action asserted against [defendant]. The plaintiff established, prima facie, [defendant's] liability under Labor Law § 240(1) through the submission of a transcript of the plaintiff's deposition testimony, which demonstrated that he was provided with a ladder that lacked rubber feet, and that the ladder, which was leaning against a wall, slid away from the wall, causing the plaintiff to fall to the ground ...". ***Chapa v. Bayles Props., Inc.*, 2020 N.Y. Slip Op. 00397, Second Dept 1-22-20**

MEDICAL MALPRACTICE, EMPLOYMENT LAW, PERSONAL INJURY.

QUESTION OF FACT WHETHER HOSPITAL MAY BE VICARIOUSLY LIABLE FOR TREATMENT PROVIDED BY A NON-EMPLOYEE IN THE HOSPITAL EMERGENCY ROOM.

The Second Department determined there was a question of fact whether the hospital, Good Samaritan, was vicariously liable for the alleged malpractice of a physician, Chin, who, although not a hospital employee, treated plaintiff in the hospital emergency room: " 'In general, under the doctrine of respondeat superior, a hospital may be held vicariously liable for the negligence or malpractice of its employees acting within the scope of employment, but not for negligent treatment provided by an independent physician, as when the physician is retained by the patient himself' ... . However, '[a]n exception to this general rule exists where a plaintiff seeks to hold a hospital vicariously liable for the alleged malpractice of an attending physician who is not its employee where a patient comes to the emergency room seeking treatment from the hospital and not from a particular physician of the patient's choosing' ... . Here, although Good Samaritan established that Chin was not its employee, the evidence submitted in support of its motion for summary judgment was insufficient to demonstrate, prima facie, that the plaintiff entered Good Samaritan's emergency room seeking treatment from a privately selected physician rather than from the hospital itself ...". ***Fuessel v. Chin*, 2020 N.Y. Slip Op. 00404, Second Dept 1-22-20**

REAL PROPERTY LAW.

QUESTION OF FACT WHETHER THE ENCROACHMENT OF A FIRE ESCAPE HOVERING OVER A PORTION OF DEFENDANT'S PROPERTY WAS HOSTILE AND CONTINUOUS FOR THE PRESCRIPTIVE PERIOD.

The Second Department, reversing Supreme Court, determined defendant's motion for summary judgment in this prescriptive easement action should not have been granted. A fire escape on plaintiff's building hovers over a portion of defendant's land, which had been used as parking lot. The defendant argued the encroachment by the fire escape was permissive, not hostile, because the fire escape did not interfere with the use of the parking lot. The Second Department held that was question of fact whether a prescriptive easement had been created before the alleged permissive use: "The defendant, in moving, inter alia, for summary judgment declaring that the plaintiff does not have a prescriptive easement, established, prima facie, that the fire escape on the rear of plaintiff's building that encroaches several feet above the defendant's property was not hostile, but permissive ... . Specifically, the defendant submitted evidence that the fire escape did not interfere with the operation of a parking lot on its property from June 1, 1991, to October 15, 2014. In opposition, however, the plaintiff raised triable issues of fact as to whether the use of the subject fire escape, which hovers over a portion of the defendant's property, has been adverse, open and notorious, and continuous for the prescriptive period ... . The plaintiff asserted that the subject fire escape has been in place since at least 1902, and that the period of prescription could have been satisfied and the easement created by the time of the alleged permissive use ...". ***Barrett v. A&P Pac. Owner, LLC*, 2020 N.Y. Slip Op. 00396, Second Dept 1-22-20**

THIRD DEPARTMENT

MEDICAL MALPRACTICE, NEGLIGENCE, COURT OF CLAIMS.

THE COURT OF CLAIMS IN THIS MEDICAL MALPRACTICE ACTION CREDITED BOTH EXPERTS, ONE OF WHOM OPINED DEFENDANT WAS AT RISK FOR FUTURE HEART PROBLEMS; THEREFORE THE AWARD OF ZERO DAMAGES FOR FUTURE PAIN AND SUFFERING WAS ERROR; AWARD INCREASED BY $10,000.

The Third Department, reversing the Court of Claims, determined the conflicting expert evidence credited by the Court of Claims forced the conclusion claimant suffered some permanent damage to his heart. Therefore awarding nothing for future pain and suffering was error. The Third Department awarded an additional $10,000: "... [T]he court accepted aspects of both experts' opinions, crediting both the opinion of defendant's expert cardiologist that claimant had suffered no significant permanent damage and simultaneously crediting the opinion of claimant's expert cardiologist that claimant could

develop a future arrhythmia because of his injury. As claimant argues, and based upon our review of the record, we find these opinions to be inconsistent with one another. Claimant's cardiologist based his opinion that claimant was at risk of developing a future arrhythmia upon his opinion that claimant had suffered permanent damage to his heart muscle, consisting of weakness that would not resolve with time and that required the rest of his heart to work harder to maintain normal function. As the court noted, claimant's cardiologist did not quantify the degree of potential risk to which he believed claimant was exposed. Nevertheless, in order to accept the opinion that claimant's risk of suffering a future arrhythmia was increased, the court must necessarily also have credited the cardiologist's opinion that claimant had suffered some, albeit limited, degree of permanent injury. We thus find that the award of no damages for future pain and suffering deviates from reasonable compensation." ***Serrano v. State of New York*, 2020 N.Y. Slip Op. 00458, Third Dept 1-23-20**

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