

# New York Law Journal

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Page printed from: [New York Law Journal](#)

[Back to Article](#)

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## Plaintiff Who Had Surgery Before Exam Spoiled Evidence, Judge Says

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New York Law Journal

08-07-2012

A woman who ignored three court orders to allow defense experts in a personal injury suit to examine her before she underwent surgery to repair a spinal injury has had her claim dismissed because the evidence was spoiled.

Queens Supreme Court Justice Charles Markey ([See Profile](#)) said his ruling involved an issue of first impression in New York as to whether a plaintiff, under the directive of a court to submit to a medical exam by her adversaries' experts, could be found to have spoiled evidence by having the damage corrected before the exam.

The December 2009 accident occurred when a cab in which Susanna Mangione was riding collided with another vehicle. Mangione sued the livery company, its driver and the driver of the other vehicle.

Markey held in [Mangione v. Jacobs](#), 7842/2010, that no "reasonable person would deprive a plaintiff of a life-saving surgery or any operation that would cure intense pain and alleviate injury." However, he ruled that Mangione failed to demonstrate any special medical urgency that compelled doctors to perform surgery on Feb. 27 instead of waiting for a week so she could comply with her most recent court-ordered independent medical examination (IME) on March 7.

"Their silence on these dispositive points speaks volumes," Markey wrote of what he said was the failure of Mangione's attorneys to explain the necessity of surgery on Feb. 27.

Based on the fact that the accident occurred more than two years before Mangione underwent surgery, and she could not offer medical proof of why the procedure was necessary on that day, "This court concludes that Mangione's spinal surgery on Feb. 27, 2012, was knowingly scheduled by the plaintiff and her counsel to frustrate the court-ordered IMEs...and that the aforementioned operation constituted a spoliation of the evidence," according to Markey.

Mangione's case was complicated medically by another outstanding personal injury suit she has filed. In 2008, she claimed she was injured when she fell from her seat on a Metropolitan Transportation Authority bus after she said it stopped abruptly.

Mangione argued that the spinal injuries she suffered in the 2009 car crash exacerbated injuries from the earlier mishap on the bus.

According to Markey's ruling, Mangione failed to appear for independent medical examinations in October and November 2011 requested by the defendants in the cab accident and ordered by Queens Supreme Court Justice Martin Ritzholtz.

Markey noted that Mangione's attorney, Sameer Chopra, signed a certificate in November falsely claiming the required medical exams had been completed.

Renewing their pursuit of an examination, the defendants won an order from Markey dated Jan. 25 that Mangione be examined within 45 days of the order.

Mangione ignored an exam scheduled for Feb. 22 and, five days later, had the spinal operation without informing the court or the defendants.

The judge said he could find no New York cases directly on point. He found a 2001 ruling by the Superior Court in Delaware in *Clark v. E.I. DuPont de Nemours*, WL 1482831, in which a judge dismissed a suit brought by a plaintiff who underwent hip replacement surgery before defendants were allowed to conduct an independent medical examination of her.

Delaware's Supreme Court affirmed the ruling in *Clark* and the U.S. Supreme denied a writ of certiorari in 2002 (537 U.S. 941).

Markey said the apparent flouting of three court orders for medical examination by Mangione and her attorneys heightened the punishment Mangione should face for her actions.

"This Court believes that court orders must be defended," he wrote in the July 31 determination. "The consequence of not punishing those who ignore state court orders is to foster the perception that such orders are not mandatory directions, but merely precatory guidelines and suggestions, to be altered by the litigants and their lawyers at whim, with little worry about reprisal."

He noted that a jury could be given an adverse instruction on the potential damage done to the truth of a case by the spoliation of evidence or a party that had been found to spoil evidence could be blocked from testifying.

But he said nothing short of dismissal could address the wrongdoing in the Mangione case.

"Considering the irreparable prejudice to defendants of the spoliation, where Mangione's surgery has eviscerated the means of defense doctors and lawyers of tracing the causal connection of Mangione's ailments to the most recent accident, the intentional thwarting of three court orders, dismissal is the appropriate sanction," Markey wrote.

Chopra, of Chopra & Nocerino, who represented Mangione, declined comment except to say the judge made the "wrong" decision and he intends to appeal.

Debra Malone and Kevin Flores of Mendolia & Stenz in Westbury argued for Jules Jacobs, the motorist involved in the 2009 crash with the cab in which Mangione was a passenger.

Ira Goldstein of O'Connor, O'Connor, Hintz & Deveney of Melville represented Ramabel Limo and driver Gelener Simbana.

Mangione's case in the bus accident continues as *Mangione v. Metropolitan Transit Authority Bus Company*, 20671/2009.

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