

Appeals Court: Woman Can't File Med Mal Claim Notice 10 Months Late With No 'Reasonable Excuse'

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A state appeals court has denied a woman's petition to file a late claim notice in a potential medical-malpractice action against the city's public healthcare system, writing that she "failed to establish a reasonable excuse for her 10-month delay in filing a late notice" when she asserted that she didn't know her forearm's nerve was severed until she discovered it at a separate, private hospital.

The Appellate Division, First Department has ruled that the woman, Gina Vijeun, should have filed a notice of claim for malpractice against the New York City Health & Hospitals Corporation within 90 days of her last public hospital treatment on September 11, 2018, according to a First Department opinion and underlying court records.

In August 2018, Vijeun fell on a sidewalk, injured herself on broken glass, and was taken by ambulance to Jacobi Medical Center in the Bronx, which is part of the sprawling public system run by the city Health & Hospitals Corporation, according to court records that include a 2019 petition asking for allowance to file a late claim notice and a 2020 trial-court decision rejecting that petition.

Vijeu had surgery at the Jacobi hospital in August 2018, during which surgical staff examined and found no transection, or severing, of her right forearm's median nerve, according to the trial-court decision. Jacobi also created medical records reflecting that no transection of the median nerve was found, the decision noted.

Then, after last being seen at Jacobi on September 11, 2018, Vijeu received additional treatment at New York University Langone Health, a private hospital, on July 25, 2019, where “it was discovered that petitioner [Vijeu] suffered from ... complete transected neuroma of her median nerve,” according to the trial court decision, which appeared to recite facts alleged by Vijeu.

Only after that discovery at the private hospital did Vijeu file a claim notice against the city Health & Hospitals Corporation for malpractice, according to court records.

In a subsequent, 2020 petition for allowance of a late claim notice signed by Vijeu's lawyer, Jordan Tucker, the attorney stated that his firm was contacted in late September 2019 by Vijeu, and that in the ensuing weeks two physicians reviewed her medical records and found if she had been “properly evaluated, diagnosed timely” at Jacobi, a timely surgery at Jacobi “would have cured the injury and transection of the median nerve.”

And Tucker, of Reingold & Tucker in Brooklyn, also asserted that his client had provided a “reasonable excuse” for the 10-month delay in filing a notice of claim.

Under state law, a notice of claim must be served on a government entity, when a litigant plans to sue the government entity in New York state, within 90 days of the cause of action arising.

That 90 days ran out in 2018 regarding Vije's malpractice claim against the Health & Hospitals Corporation, after she was last seen at Jacobi in September 2018.

A First Department panel of justices, when rejecting Vije's appeal asking to be allowed to file a late claim notice, wrote in [its opinion](#) that Vije "failed to establish a reasonable excuse for her 10-month delay in filing a late notice of claim, particularly since the operative report from nonparty New York University Langone Health (Langone) indicates that she waited approximately nine months before undergoing a second surgery, despite her physician's recommending exploratory surgery on several occasions."

The panel also indicated there was no evidence presented showing that Jacobi had missed the nerve transection diagnosis. And the opinion and court appeared to leave open the possibility that the nerve was transected at a time after Vije was last seen at Jacobi.

"Petitioner's [Vije's] assertion that it was not apparent to her that the sensory nerve deficits, loss of grip strength, and difficulty flexing her right hand were the result of nerve damage until her second exploratory surgery at Langone, some 11 months after her first exploratory surgery at respondent's hospital, lacks probative value as to when her transected median nerve should have been discovered," the unanimous appellate panel wrote.

At another point in the four-paragraph opinion, the panel, composed of Justices Cynthia Kern, David Friedman, Anil Singh, Saliann Scarpulla and Julio Rodriguez, said that “the medical records in respondent’s [Health & Hospitals Corporation’s] possession do not show that the medical staff, by act or omission, caused petitioner an injury.”

Tucker represented Vijeu in the appeal, according to the First Department opinion, and he could not be reached for comment.

The city Law Department represented the Health & Hospitals Corporation. In an email, Nick Paolucci, a Law Department spokesman, said, “We are pleased with the court’s analysis and decision.”

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