To be Argued by:
MARK R. BOWER
(Time Requested: 15 Minutes)

New York Supreme Court
Appellate Division—Second Department

CARMELINA BAGLIO, as mother and natural guardian of DOMINICK BAGLIO, and CARMELINA BAGLIO, individually,

Plaintiffs-Appellants,

Docket No.: 2002-01209

– against –

ST. JOHN'S QUEENS HOSPITAL,

Defendant-Respondent,

– and –

ELISE LAMBERT, M.D., JUAN SANDOVAL, M.D., VALERIE CUCCO, M.D., and JOHN DOE a/k/a FRANCISCO CELUYE, M.D.,

Defendants

BRIEF FOR PLAINTIFFS-APPELLANTS

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STATEMENT OF FACTS

A. MEDICAL HISTORY:

Overview: Brain-damaged infant DOMINICK BAGLIO was born at ST. JOHNS QUEENS HOSPITAL on July 13, 1994, and, according to the newborn hospital chart, was discharged from the hospital as a normal term baby boy after only two days (R. 85).

The principal issue in this case is whether DOMINICK suffered fetal distress during his mother's labor, that required a cesarian section or other intervention that was not offered or performed. The available hospital records provide no direct evidence of fetal distress. There are some indirect indicia that there might have been fetal distress, but the incomplete documentation is inadequate proof to allow plaintiff's experts to form opinions with the requisite medical certainty to make out a *prima facie* case. There is no evidence showing when the possible distress began, the character or degree of the distress, or the duration of the distress. These details are essential to prove that the distress was sufficiently severe and prolonged to cause injury. Without complete records, is impossible to prove (or disprove) malpractice, but the burden of proof is on the plaintiffs, so that the plaintiffs lose when the lack of records makes proof impossible.. The singular reason for this lack of proof, is that the defendant hospital either lost or destroyed the fetal monitor strips that document the baby's well-being during labor. The missing fetal monitor strips are "the key to the case."

The fetal monitoring: From her time of arrival at the hospital until the delivery, the mother, CARMELINA BAGLIO, was routinely put on a fetal heart monitor - a machine that detects and records the fetal heart rate relative to the mother's uterine contractions, to assess how the baby is

faring under the stresses of labor. There are characteristic patterns to the baby's heartbeat that are printed out by the fetal monitor machine, which indicate if the baby is doing well or poorly. If the fetal monitor shows alarming heartbeat patterns, medical intervention, such as oxygenating the mother or delivering the baby by cesarian section, may be necessary to prevent brain damage to the baby (R. 12-13, 356-357). The fetal monitor generates a paper strip, or tape, that looks somewhat like an EKG strip, as a permanent objective record of the readings (R. 12-13, 356-357).

According to the mother's hospital record (R.49-84), the fetal monitoring ran for about ten hours, from admission to the hospital (3 a.m.) until delivery (1:17 p.m.). The fetal monitor machine generates its paper strip record at the standard rate of three centimeters per minute (slightly more than five feet per hour), so there should be a paper tape approximately fifty feet long documenting DOMINICK BAGLIO's heartbeat during the last ten hours before his birth. By law, the fetal monitor tracings must be retained and preserved at least until the infant reaches his nineteenth birthday.

The delivery: DOMINICK was delivered using obstetrical forceps to pull the baby's head out of the birth canal (R. 74). Forceps are not used casually; they are used only if there is fetal distress (R. 13, 357). Nothing in the hospital record explains why forceps were needed in this case (R. 13, 357). However, the doctor's note for the delivery describes the "[umbilical] cord around neck x 4 tight" - meaning that the baby's umbilical cord looped around his neck four times (R. 13, 357), possibly kinking up, and/or strangling the baby like a hangman's noose. If the umbilical cord was kinked, or strangled this baby in the womb, it would create characteristic patterns of fetal asphyxia which would be reflected on the fetal monitoring (R. 13, 357). Therefore, the delivery note creates an expectation that the fetal monitor strips would document fetal distress, that was not recognized at the time.

However, without the fetal monitor strips, it is impossible for plaintiff to make a *prima facie* case, as it is impossible to prove the degree, character, or duration, of the distress., or exactly when or how it should have been treated. This underscores the critical nature of the fetal monitor strips - <u>the only *objective* record of the baby's condition during labor.</u>.

Conflicting evidence: Blatant disparities exist between what is found in the limited available medical records surrounding the birth, and the reality of the child. DOMINICK's mother, CARMELINA BAGLIO, testified that her baby didn't cry when he was born (R. 181), and that he was pale and still in the newborn nursery (R. 290-201). The mother's sworn testimony is both credible and consistent with the subsequent developments, but is irreconcilably inconsistent with the Apgar scores and observations recorded in the newborn's chart. Of a possible maximum Apgar score of 10 points, consisting of the sum of up to two points for each of five different criteria, DOMINICK's birth records show high-normal Apgar scores of 8 at one minute and 9 at five minutes after birth (R. 91). The Apgar scores recorded by the defendants are *impossible*, if the mother's testimony that the newborn didn't cry after delivery, is believed. The baby was given one Apgar point (out of a possible maximum of two) for his cry, representing a weak cry (R. 105). If the baby had no cry at all, as the mother swore (R. 181), that part of the Apgar score should have been assigned a zero. Likewise, at 5 minutes after the birth, the baby was given perfect scores of two points each for muscle tone and color (R. 105), which is incompatible with the mother's testimony that the baby was pale and still in the nursery (R. 290-291).

Of course, the Apgar score is entirely *subjective*, dependent on the accuracy of the examiner's assessments, just as the mother's observations are. All of the handwritten narrative descriptions of

the labor (R. 71-72) and the appearance of the baby (R. 89-94), are likewise *subjective*, as they are filtered through the eyes and the perspectives of the observers.

For this reason, and the many additional reasons that will immediately follow, that *objective* proof, namely, the fetal monitor strips, is essential to break the impasse of contradicting factual assertions, and to prove that the baby experienced fetal distress prior to his birth.

Subsequent developments: From the time he came home from the hospital, the baby was shaking (R. 212). At age one week, he was taken back to the hospital screaming (R. 212). These episodes were seizures, and little DOMINICK was eventually diagnosed with cerebral palsy. DOMINICK has a seizure disorder (R. 243-244) requiring anti-convulsant medications (R.245, 249). His neuro-muscular problems were apparent at age 3, in his impaired gait. When he walked, he could not swing his arms back and forth like a normal child, holding them still by his sides (R. 235) He needed orthotics on his legs (R. 241), and was found to have hearing problems (R. 256). At age 3, he still did not speak (R. 234). His coordination, speech, hearing, and cognitive delays posed challenges beyond the abilities of the Special Education program in the public schools (R. 237-239), so that he now goes to a United Cerebral Palsy School (R. 237) instead. He needs speech therapy three times a week, and both occupational and physical therapy twice a week each (R. 253). Certainly, the prognosis for his ability to function as a normal, independent adult, is bleak.

The cause of these terrible problems is very much in dispute. The mother's labor and delivery record is inadequate and incomplete, but what is there shows nothing alarming *per se*. These records, at face value, will not support a *prima facie* case.

The irreconcilable inconsistencies between the delivery and newborn records on the one hand, and the mother's testimony and the subsequent course of the child's development on the other, make objective records of the baby's condition in the hours leading up to the birth, (i.e., the fetal monitor strips) of crucial and dispositive importance

B. PROCEDURAL HISTORY:

On March 10, 1997, as part of the pre-suit investigation, plaintiff's attorney requested that the hospital supply the infant's complete medical records, including the fetal monitor strips (R. 309). At first, the hospital produced some normal fetal monitor strips, which displayed reassuring heart patterns (R. 310-353). CARMELINA BAGLIO's name was hand-written on the strips, giving the illusion that these were the plaintiffs'; however, simple analysis proved that the strips that the hospital produced were not CARMELINA BAGLIO's, notwithstanding the labeling to the contrary.[1]

On June 17, 1997, the plaintiffs' attorney wrote to the hospital's Medical Records Department, protesting that the strips that had been supplied were not of this labor and delivery (R. 354).

The lawsuit was started on July 25, 1997 (Summons, R. 20-21).

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[1] Throughout this litigation, the hospital never claimed that the strips it originally produced are the *bona fide* tracings from Mrs. BAGLIO's labor.

There are multiple tip-offs that prove that these tapes (R. 310-353) are not of the plaintiff.

For instance, a machine-generated date and time stamp appears in fine print on almost every page. The date is 12/01/04. (The correct date would be 7/13/94-7/14/94.) Similarly, the time of day recorded on the strips is wildly off. The tape supplied is interrupted after several hours while the mother had a sonogram (R. 321). (There was no mid-labor sonogram in Mrs. BAGLIO's labor.) The tape also has notes showing where the mother was given oxygen (R. 321); Mrs. BAGLIO was never given oxygen during her labor. There are other major discrepancies, too.

It appears that someone else's normal tracings were supplied, with the plaintiff's name inscribed, in order to mislead us.

The Summons & Complaint crossed with a letter dated July 30, 1997, wherein the hospital's Director of Medical Information Services confirmed although fetal monitoring had indeed been performed, the hospital was unable to find the strips, concluding that "should we locate them, I will contact you immediately." (R. 355).

Five years later, the missing fetal monitor strips still have not been turned over.

Plaintiff moved to strike the defendants' Answer for spoliating this crucial evidence, but withdrew that initial motion when the hospital promised to produce the fetal monitor tracings if they were found, and agreed to produce a person knowledgeable about their procedures for storing such records, and the search to find the missing strips, for deposition (R. 16).

On May 31, 2001, the hospital's chosen witness, Ms. Maritza Payamps of the Medical Records Department, was deposed to explain the loss of the fetal monitor strips. Ms. Payamps testified that the fetal monitor strips are supposed to be stored with the mother's chart (R. 373); that in sixteen years in the Medical Records Department; that she had never encountered the loss of fetal monitor strips in any other case (R. 382); and she had no explanation for their loss (R. 16).

Ms. Payamps' deposition revealed glaring inadequacies in the hospital's efforts made to find these missing tracings. No inquiry as to what happened to the fetal monitor strips was ever made of the doctors or nurses actually involved in this labor or delivery (R. 405). No inquiry of the medical records personnel who handled DOMINICK BAGLIO's records at the time of preparation was made (R. 405), nor of the hospital's Risk Management Department, either (R. 405).

Thereafter, plaintiff demanded further discovery in an effort to locate the missing fetal monitor tracings, get secondary evidence or their contents, or explain their loss (R. 412-415, 462):

1. Any records of the fetal monitoring that were stored in an electronic or computerized medium;
2. A copy of the relevant Joint Commission Accreditation of Hospitals' standards for the completion of incomplete hospital records;
3. A copy of the hospital's computer program for record keeping, so as to see if the missing fetal monitor tracings had been computerized;
4. Inspection of the "unfiled" fetal monitor strips which Ms. Payamps testified were stored in a small box, in order to see if DOMINICK BAGLIO's lost tracings were in that box;
5. The depositions of Records Room employee Irene Ngai (who assembled the baby's chart) and Risk Management's Azarean Cameron (who did the original "search" for the missing records);
6. A copy of any "deficiency report" that details what portions of a medical record are missing; and
7. The identity of the unidentified Obstetrics Department representative, who represented to the Medical Records Department that the Obstetrics Department did not have the missing records.

Except for identifying one name, the hospital never moved for a protective order against this discovery, but simply stated "boiler plate objections" and refused compliance (R. 433-434).

A Compliance Conference was held on February 27, 2001. At the Compliance Conference, the court "so ordered" a stipulation that directed the depositions of a Risk Manager by April 31, 2001, and defendant DR. CUOCCO by June 29, 2001, and the plaintiff was required to put the case on the calendar by August 31, 2001 (R. 421).

The court's tight deadline to put the case on the calendar by August 31, 2001, forced plaintiffs' attorney to do so without obtaining six of the seven items of discovery listed above.

C. THE MOTION LEADING TO THIS APPEAL:

On July 3, 2001, after the defendants failed to supply six of the seven aforesaid items of documentary discovery (R. 412-415, 462), but prior to putting the case on the calendar, plaintiffs moved to strike the hospital's Answer for these failures of discovery, and particularly, for the spoliation of the crucial fetal monitor tracings.

In support of the motion, plaintiff submitted the Expert Affidavit of board-certified obstetrician/gynecologist Max Lilling, M.D. Dr. Lilling attested that in a case alleging mistreated fetal distress:

> "... the fetal monitor strips are needed to assess the presence and duration of the fetal distress. The loss of the fetal monitoring strips deprives one of the opportunity to assess these factors... [and also] takes away the ability to objectively evaluate the true status of the infant where there are alleged defenses."

Dr. Lilling further attested that:

> "This record contains very little information concerning fetal well-being or lack thereof. The record does, however, indicate (1) a forceps-assisted delivery, and (2) that the umbilical cord was tightly around the infant's neck 4 times at the time of delivery. These factors together indicate a *likelihood* of fetal distress. Forceps delivery is only done with a significant indication, generally related to a need to remove the child from the birth canal because of evidence of fetal distress. Moreover, when the umbilical cord is tightly around the infant's neck, the cord, which is the infant's oxygen supply, becomes crimped, and the child would be expected to show indications of fetal distress on the fetal monitoring strips. The progress notes in this case are scant and unhelpful in assessing the infant's condition, and give no indication why a forceps delivery was undertaken, or what impact the cord being tightly around the infant's neck had on fetal well-being,. The fetal monitoring strips would give fairly conclusive evidence as to the presence of fetal distress, or lack thereof. Without the fetal monitoring strips, one could only *speculate* regarding the degree, duration, and impact of fetal distress in this case.
>
> "It is therefore my opinion within a reasonable degree of obstetrical certainty, that **[the loss of the fetal monitor strips] significantly and grossly prejudices [the plaintiffs'] ability to fully evaluate and present this case**." (R. 12-13) [emphasis added.]

In a further Medical Affirmation submitted in a reply, Dr. Lilling added that:

> "In 1994, many hospitals in the New York City region backed up fetal monitoring strips on an electronic medium, i.e., a computer disk." (R. 461)

The defense did not submit any contrary expert's affirmation, did not deny the loss of the fetal monitor strips, did not explain the loss of the fetal monitor strips, did not dispute that they were necessary to evaluate the extent or duration of fetal distress, did not dispute the inference that a backup of the data may exist on a computer disk (but also did not search for the computer disk), and did not deny the fatal effect that the loss of the strips caused.

Despite this uncontradicted demonstration of "significant and gross prejudice" to the plaintiff, and based solely on the motion papers, without conducting a "Vaughn hearing" (named for Vaughn v. City of N.Y., 201 A.D.2d 556, 607 N.Y.S.2d 726) to explore the circumstances or significance of the spoliation, the lower court found, that "while the fetal monitoring strips are clearly significant to the plaintiff's case, there is other evidence that is available [that would compensate for the loss of the strips]. Indeed, the plaintiff's medical records and progress notes are included in the case file. Thus the court cannot conclude that the loss of the strips prejudices the plaintiff as to warrant the drastic sanction of striking St. John's [Hospital's] answer." (R. 5-6). No sanction whatsoever was imposed, and no compensating remedy was provided. The plaintiffs' motion was denied.

Plaintiff appeals from that Order.

RELEVANT STATUTES AND REGULATIONS

New York City Rules and Regulations, Title 10, Sec. 405.10(4):

"Medical records shall be retained in their original or legally reproduced form for a period of at least six years from the date of diskharge, or three years after the patient's age of majority (18 years), whichever is longer..."

Education Law §6530, "Definitions of Profession Misconduct", subdiv. 32"

"Failing to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient. Unless otherwise provided by law, all patient records must be maintained for at least six years. Obstetrical records and records of minor patients must be retained for at least six years, and until one year after the minor patient reaches the age of eighteen years."

POINT I

THE LOSS OR DESTRUCTION OF THE FETAL MONITOR STRIPS WAS WILLFUL

The loss of critical evidence can prevent a litigant from meeting their burden of proof and cost them the relief sought. An act of spoliation gives one party unfair advantage over the other in litigation, impeding the search for truth, and knocking the scales of justice out of balance. That is what happened here.

In the court below, the hospital did not deny the loss or destruction of the fetal monitor strips herein, or the devastating prejudicial effect that resulted. No benign or innocent explanation for the absence was offered, and there was no denial that the loss of this crucial evidence would eviscerate the plaintiff's case. The essential factual premises of the plaintiffs' motion were unchallenged.

Rather, the defense simply argued that the plaintiff could not prove that the loss or destruction of the strips was malicious, willful, or contumacious. Since the mechanism by which the strips disappeared is unknown, the defense could not, and did not, affirmatively contend that it was accidental or innocent, but instead insisted that it was the plaintiff's burden to show intentional evil, if the defense was to be punished (R. 426-429). According to the defense, absent proof of malicious intent to hide or destroy evidence, an admitted spoliator escapes scot-free.

Although the plaintiffs necessarily have no *direct* proof of how the fetal monitor strips were lost or destroyed, malicious or wrongful intent can be inferred from the facts surrounding the spoliation, and may be proved circumstantially, by the nature and timing of the conduct and events. Sage Realty Corp. v. Proskauer Rose LLP, 275 A.D.2d 11; Sonmez v. World on Columbus, *supra*; cf., Christian v City of New York, ___ A.D.2d ___, 703 N.Y.S.2d 5.

Here, there are many circumstances that prove willfulness.

The hospital's initial supply of *someone else's tracings*, that inexplicably had Mrs. BAGLIO's name written onto them, would be suspicious enough, had it occurred in isolation. If the hospital's spoliation was innocent, one would ordinarily expect a simple response candidly conceding that the fetal monitor strips were lost. Instead, someone at the hospital wrote this mother's name on someone else's normal tracings, and tried to pass them off as the plaintiffs'. This was an obvious, affirmative attempt to deceive .The seriousness of the attempted deception can only be realized when the crucial nature of the lost tracings is fully appreciated; i.e., the missing fetal monitor strips are "the key to the case", the <u>only</u> document containing *objective* evidence of the pivotal issue - the baby's condition during labor. Only these strips can show the details of the fetal distress needed to prove the case.

But there is more.

After the attempted deception failed, and the unexplained loss was admitted, the hospital failed to conduct a diligent, meaningful search for the "missing" tapes. The search effort described by the hospital's chosen witness was superficial to the point of being empty "lip service". No inquiry was made of the obvious, key people who were involved in the target events at the time. (A detailed list of those shortcomings appears in the Statement of Facts, at pages 6-7 , *supra*.). The gross inadequacies in the search were compounded even further when the hospital blocked and refused the plaintiff's documentary discovery requests that required actions designed to find the strips (R. 412-415, 462), or back-up copies of the same data on computer disks (R. 461). <u>Every step the hospital took was deliberately designed to frustrate and impede any serious effort to find the missing strips.</u> Giving the defense the benefit of the doubt as to the initial loss of the strips, every action thereafter was undeniably deliberate and intentional.

An unmistakable picture of willfulness emerges.

POINT II

PROOF OF WILLFULNESS IS NOT ESSENTIAL TO STRIKE A SPOLIATOR'S PLEADINGS

Although plaintiffs believe that wilfulness has been fully demonstrated not just by the loss of the fetal monitor strips and the unexplained substitution of someone else's tracings mislabeled to give the false appearance of being the plaintiffs', and further buttressed by the hospital's actions and obstructions subsequent to the loss of these records, proof of willful intent is not a necessary element to strike a spoliator's pleadings. The evolving rule is "Spoliator, beware!" Klein v. Seenauth. 180 Misc. 2d 213, 687 N.Y.S.2d 889.

The unintentional loss of evidence, absent intentional destruction, can be just as fatal to a litigant as if it were deliberate, so as to justify striking a pleading. DiDomenico, *supra*, Squiteri, *supra* at 201-203. The court below explicitly recognized this. (Order Appealed From, R. 6).

Thus, this "drastic sanction@ has been applied even if the destruction occurred through negligence rather than willfulness, and even if the evidence was destroyed before the spoliator was a party to litigation, provided it was on notice that the evidence might be needed for future litigation. *See*, e.g., Kirkland v. New York City Housing Authority, 236 A.D.2d 170 (1st Dept. 1997) (dismissal of third- party action appropriate where crucial evidence was negligently destroyed); *accord*, Healey v. Firestone Tire & Rubber Co., 212 A.D.2d 351, *rev=d on other grounds* 87 N.Y.2d 596; *see, also*, Squiteri v. City of New York, 248 A.D.2d 201 (1st Dept. 1998). A pleading may be struck absent willful or contumacious conduct, depending on the extent of prejudice to a party and when necessary as a "matter of elementary fairness" Puccia v Farley, 261 A.D.2d 83, 85; Kirkland, *supra*. Hartford Fire Ins. Co. v. Regenerative Bldg. Const., 271 A.D.2d 862, 863, 706 N.Y.S.2d 236, quoting Puccia,

supra; Lane v. Fisher Park Lane Co., 276 A.D.2d 136. Appropriate remedial actions include striking the pleadings. New York Cent. Mutual Fire Ins. Co. v. Turnerson's Elec., Inc., ___ A.D.2d ___, 721 N.Y.S.2d 92 [holding that where a party destroys key physical evidence "such that its opponents are ' prejudicially bereft of appropriate means to confront a claim with incisive evidence,"' the spoliator may be punished by the striking of its pleading; Squiteri, *supra*, at 202- 203 ["when a party alters, loses or destroys key evidence before it can be examined by the other party's expert, the court should dismiss the pleadings of the party responsible for the spoliation"]; Mudge, Rose, Guthrie, Alexander & Ferdon, *supra* at 493 [dismissing plaintiffs claim due to its "negligent loss of a key piece of evidence which defendants never had an opportunity to examine"]; *see*, also, Liz v. William Zinsser & Co., 253 A.D.2d 413.

Accordingly, proof of willfulness is not essential - nor should it be - as the important element of spoliation is that it results in same prejudice, and requires the same remedial steps to restore balance to the scales of justice, whether the spoliation was intentional or not.

POINT III

ALL OF THE TESTS TO MEASURE THE WHETHER THE DEFENDANT'S SPOLIATION WARRANTS STRIKING THEIR PLEADING, HAVE BEEN MET

The penalties for spoliation are separate and apart from the sanctions authorized by CPLR ' 3126 for defiance of a court order directing discovery. A spoliator of key physical evidence is properly punished by striking its pleadings. DiDomenico v. C&S Aeromatik, 52 A.D.2d 41 (2nd Dept. 1998); Mudge, Rose, Guthrie, Alexander & Ferdon v. Penguin Air Conditioning Corp., 221 A.D.2d 243 (2nd Dept., ___) [dismissal of complaint warranted where plaintiff negligently lost key piece of evidence before defendants could examine it]; Velasquez vs. Brocorp, 283 A.D.2d 423, 723 N.Y.S.2d 870 (1st Dept. 2001); Goldman v. Gateway Toyota, 283 A.D.2d 457, 724 N.Y.S.2d 630 (2001) [complaint stricken for spoliation]; Cabasso v. Goldberg, 288 A.D.2d 116, 733 N.Y.S.2d 47 (1st Dept, 2001) [defendant=s answer stricken for spoliation of evidence]; Stroebe v. Martin, 272 A.D.2d 318, 272 A.D.2d 318, 707 N.Y.S.2d 882 (1st Dept., 2000) [complaint dismissed for spoliation]; Sage Realty Corp. v. Proskauer Rose LLP, 275 A.D.2d 11 [plaintiff=s pleading stricken for spoliation] (1st Dept., 2000) ; New York Central Mutual Fire Insurance Company v. Turnerson's Electric Inc., 280 A.D.2d 652, 721 N.Y.S.2d 92 (2nd Dept., 2001) [complaint dismissed for spoliation]; Roman v North Shore Orthopedic Assn., 271 A.D.2d 669 (2nd Dept., 2000) [defendant=s third-party complaint dismissed for spoliation]; Romano v Scalia and DeLucia Plumbing, A.D.2d (2nd Dept., 2001) [complaint dismissed for spoliation]; Long Island Diagnostic Imaging v. Stoney Brook Diagnostic Imaging 286 A.D.2d 320, 728 N.Y.S.2d 781 (2nd Dept., 2001) [defendant=s counterclaims and third-party claims stricken for spoliating billing records].

Public policy demands, for obvious reasons, that a spoliator never be permitted to benefit from its spoliation of evidence. The spoliator must bear the consequences of its own acts or omissions, whether those were intentional or negligent, and suffer the consequences necessary to restore justice. In some cases, a lesser penalty than striking of pleadings may satisfactorily bring the scales of justice back into balance, but in this case, there is no way to do so except by striking the pleadings.[2] The long list of citations above shows that the striking of pleadings as a penalty for spoliation of evidence is not anathema to either the First or Second Departments, because they recognize that permitting a litigant to obtain any benefit from spoliation serves only to create an incentive that encourages more spoliation in the future.

Conversely, imposing severe, negative consequences for spoliation creates a beneficial and necessary disincentive to prevent spoliation and encourages the proper preservation of evidence that is essential to our system of justice.

Applying the various tests espoused in these cases to the facts of this case, the plaintiffs=two pre-suit letters to the hospital=s Medical Records Department (R. 309 and 354) prove that the hospital was on actual notice that this evidence was crucial to the prosecution of this action even before litigation was commenced. Therefore, the criteria for striking a pleading based on pre-litigation notice, per Kirkland, *supra*, has been satisfied. At a minimum, the loss or destruction of that crucial

[2] In Kirkland, *infra*, this Court suggested that the drastic remedy of striking a party's pleadings might not be appropriate in a product liability action *if* the missing product could be reconstructed from the manufacturer's design plans. However, in the present action, the reconstruction of the fetal monitor tracings or their contents from other sources is totally impossible. Those tracings show continuous, moment-to-moment objective proof of the fetal hearbeat in relationship to the mother's uterine contractions, which is not documented anywhere else in the existing records, and cannot be reconstructed from any other source. This essential element of the plaintiff's case is totally precluded and lost forever, due to the spoliation of the strips by the defendant Hospital.

evidence despite advance knowledge of its importance, was negligent, and the supply of someone else=s strips falsely labeled as Mrs. BAGLIO=s suggests an intentional and deliberate attempt to mislead, that surely is Awillful and contumacious.@ This justifies striking the spoliator=s pleadings.

Applying the test of prejudice to the facts of this case, the statement by the plaintiff=s medical expert that Awithin a reasonable degree of obstetrical certainty, [the loss of the fetal monitor strips] significantly and grossly prejudices [the plaintiffs=] ability to fully evaluate and present this case,@ is uncontested. Thus, gross and significant prejudice to the plaintiffs is established without dispute.

Applying the test of "elemental fairness" to the facts of this case, **we reach the ultimate question**. **Inevitably, the loss of these records must cause one side or the other to lose the case**. **Who should that be?** The newborn baby, who is *non sui juris* and blameless for his own awful injuries, or the defendant who either negligently or wilfully lost or destroyed the records that would prove (or disprove) the merits of the case, and then impeded all efforts to find them? The just resolution of this question of fairness is easily and instantly resolved by looking to the statutory and regulatory mandates of New York City Rules and Regulations, Title 10, Sec. 405.10(4) and Education Law ' 6530, ADefinitions of Professional Misconduct@, subdiv. 32, both of which impose the clear legal duty of preserving these records on the defendants, for the benefit of the plaintiffs' use in litigation (hence the implicit references to the statute of limitations in both), in addition to the duty to avoid destruction of evidence imposed by the common law, obstruction of justice rules, and ordinary ethics. The scales of justice overwhelmingly tilt in the infant=s favor, as he is utterly innocent but nonetheless grossly prejudiced under any circumstances. The hospital was charged with the clear statutory, regulatory, common law, and ethical duty of preserving the crucial fetal monitor records,

and is responsible for their loss or destruction in violation of that duty, so that Aelemental fairness@ mandates that they, rather than the newborn, should suffer the consequences.

POINT IV

THE COURT BELOW ERRED IN FINDING THAT THE SPOLIATION HEREIN WAS NOT SO PREJUDICIAL AS TO WARRANT STRIKING THE DEFENDANT'S ANSWER, AND IN LEAVING THE PLAINTIFFS REMEDILESS

Neonatal brain damage does not occur instantly It develops progressively over time. Proving causal connection between malpractice and the infant=s brain injuries depends on demonstrating not only abstract suggestions of fetal distress, but also on a showing the duration and depth of that distress (R. 357). <u>No secondary evidence exists</u> that allows the plaintiffs to prove the duration and depth of fetal distress without the fetal monitor strips. Although plaintiff=s expert attested to Aa *likelihood* of fetal distress@ (R. 13, 357), without the strips he cannot assess either the depth or duration of the presumed distress (R. 13, 357), which is <u>indispensable</u> to proving causation. The spoliation of the fetal monitor strips leaves the plaintiffs with no evidence sufficient to make out a *prima facie* case

The Order Appealed From (R. 5-6) adopted the authorities urged by the plaintiff that support punishing a spoliator by striking its pleadings. <u>DiDomenico</u>, *supra*; <u>Kirkland</u>, *supra*. The lower court also agreed that the unintentional loss of evidence, absent intentional destruction, could be just as fatal to a litigant as if it were deliberate, so as to justify striking a pleading. <u>DiDomenico</u>, *supra*, <u>Squiteri v. City of N.Y.</u>, 248 A.D.2d 201 at 201-203, (R. 6). Nonetheless, plaintiffs= motion was denied, based on the lower court=s unsupported *sua sponte* finding that Awhile the [lost] fetal monitoring strips are clearly significant to the plaintiff=s case, there is other evidence that it available [that makes up for the loss]. Indeed, plaintiff=s medical records and progress notes are included in the

case file. Thus, the court cannot conclude that the loss of the strips prejudices the plaintiff [so] as to warrant the drastic sanction of striking St. John=s Answer.@

Plaintiffs-Appellants contend that this finding is clear error. There is nothing whatsoever in the Record on Appeal that supports the lower court's conclusion that the available Amedical records and progress notes@ can *possibly* compensate for the lost fetal monitor strips. On the contrary, the existent "medical records and progress notes" can not support a *prima facie* case. In their opposing papers, the defense never suggested that the prejudice from the absence of the monitor strips could be compensated or overcome through the use of other records. The plaintiffs= expert=s medical affirmation showing Asignificant and gross prejudice@ was uncontradicted. If the case were to go to trial, the defense would certainly emphasize the plaintiff=s complete inability to prove the depth or duration of the *presumed* fetal distress to maximum advantage. The plaintiffs simply cannot make out a *prima facie* case, far less a persuasive *prima facie* case, without this evidence. Indeed, given the expert=s frank concession of Agross prejudice@ to his ability to evaluate and present the case, the expert would be devastated on cross-examination, and would have to concede that any opinions on causal connection were speculative. No "adverse inference charge" to the jury can fill the gaps in the the necessary expert testimony that is lacking. The result would have to be a dismissal, or a defendant=s verdict

As such, the court=s conclusion that the consequent prejudice would not be fatal, is utterly unfounded and unsupported by the Record on Appeal..

ARemedial action is obligatory in instances in which the lost or destroyed evidence is 'crucial to the determination of the key issue.'" Fada Industries, Inc. v. Falchi Building Co., L.P., 189 Misc.2d 1, 730 N.Y.S.2d 827 (N.Y. Sup. 06/22/2001), citing Squitieri v. City of New York, *supra*;

Kirkland v. New York City Housing Authority, *supra;* Mudge, Rose, Guthrie, Alexander & Ferdon v. Penguin Air Conditioning Corp., *supr*a; Liz v. William Zinsser & Co., 253 A.D.2d 413. The court below erred, as it extended no remedy to the prejudiced party, leaving a terrible harm unaddressed and unpunished.

While striking a pleading is unquestionably a Adrastic remedy@, it is the only remedy that can compensate for the Agross prejudice" created by the loss of the fetal monitor strips. Here, the defense clearly gains an immense, unfair advantage from their spoliation of crucial records, yet the plaintiff was awarded no remedy to compensate for this massive wrong, forcing the plaintiff into the hopeless position of having to try a case to a certain defeat.

While the court=s assessment of an appropriate penalty for spoliation is discretionary, that exercise of discretion must have a proper foundation. It cannot be unsupported whimsy or caprice. Here, there is no foundation for either the finding that other records compensated for the loss of the fetal monitor strips, or the lower court=s refusal to penalize the spoliator, leaving the plaintiff remediless despite the destruction of evidence that is fatal to the case.

Accordingly, the Order Appealed from is error, and should be reversed.

CONCLUSION

The court below erred in finding that the plaintiff was not irreparably prejudiced by the loss or destruction of the fetal monitor strips. There is powerful inferential proof that the spoliation was willful, but even if it was unintentional, it was so negligent and so prejudicial as to warrant striking the defendant=s pleading just the same. The spoliation will inevitably cost one side or the other a certain loss at trial. As between the spoliator and the innocent baby, elemental fairness mandates the loss be borne by the spoliator.

The Order Appealed From should be reversed.

Respectfully submitted,

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