

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D30644  
G/hu

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - February 25, 2011

WILLIAM F. MASTRO, J.P.  
CHERYL E. CHAMBERS  
PLUMMER E. LOTT  
JEFFREY A. COHEN, JJ.

---

2010-05567

DECISION & ORDER

Kylah Madkins, etc., appellant, v State of New York,  
respondent.

(Claim No. 113990)

---

Regina L. Darby (Pollack, Pollack, Isaac & De Cicco, New York, N.Y. [Brian J. Isaac], of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York, N.Y. (Michael S. Belohlavek, Benjamin N. Gutman, and Sudarsana Srinivasan of counsel), for respondent.

In a claim to recover damages for medical malpractice, the claimant appeals from an order of the Court of Claims (Marin, J.), dated March 22, 2010, which granted the defendant's motion to compel the claimant to provide a certificate of merit pursuant to CPLR 3012-a and denied the claimant's cross motion to strike the answer on the ground of spoliation of evidence.

ORDERED that the order is modified, on the law and in the exercise of discretion, by deleting the provision thereof denying the claimant's cross motion to strike the answer of the defendant on the ground of spoliation of evidence, and substituting therefor a provision granting that cross motion only to the extent of directing that an adverse inference charge be given at trial with respect to the fetal heart monitoring strips; as so modified, the order is affirmed, with costs payable by the defendant.

The claimant failed to demonstrate that the defendant's loss of the fetal heart monitoring strips in this case left her prejudicially bereft of evidence to prosecute her malpractice claim. Rather, the medical record, which includes progress notes, some references to the fetal heart

March 29, 2011

Page 1.

MADKINS v STATE OF NEW YORK

rate at certain points in the mother's brief labor, and other relevant evidence, established that the claimant's ability to pursue her claim was not fatally compromised so as to warrant the drastic sanction of striking the defendant's answer (*see Rodman v Ardsley Radiology, P.C.*, 80 AD3d 598; *Coleman v Putnam Hosp. Ctr.*, 74 AD3d 1009, 1011; *Gotto v Eusebe-Carter*, 69 AD3d 566, 568; *cf. Baglio v St. John's Queens Hosp.*, 303 AD2d 341, 342-343). However, the defendant's failure to preserve the fetal heart monitoring strips as required by regulation (*see* 10 NYCRR 405.10[a][4]), and the resulting prejudice to the claimant, warrants the imposition of the lesser sanction of an adverse inference charge to be given at trial (*see e.g. Rodman v Ardsley Radiology, P.C.*, 80 AD3d 598; *Shayovich v 800 Ocean Parkway Apt. Corp.*, 77 AD3d 814, 815-816; *Coleman v Putnam Hosp. Ctr.*, 74 AD3d 1009, 1012; *Gotto v Eusebe-Carter*, 69 AD3d at 568).

In view of the foregoing, the Court of Claims properly granted the defendant's motion to compel the claimant to provide a certificate of merit pursuant to CPLR 3012-a.

MASTRO, J.P., CHAMBERS, LOTT and COHEN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan  
Clerk of the Court