At an IAS Term, Part MMTRP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 11th day of April, 2008.

P R E S E N T:

HON. GERARD ROSENBERG,
Justice.

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MUSTAFA ABDUR-RAHMAN, AN INFANT, BY HIS MOTHER AND NATURAL GUARDIAN, DALILA BENKERROUM,

Index No. 32147/04

Plaintiffs,

- against -

SVETLANA LEYTES, M.D., et ano.,

Defendants.

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The following papers numbered 1 to 5 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3
Opposing Affidavits (Affirmations)	4-5
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers in this medical malpractice action brought by Mustafa Abdur-Rahman, an infant (the infant plaintiff), by his mother and natural guardian Dalila Benkerroum (Benkerroum) (collectively, plaintiffs), against defendants Svetlana Leytes, M.D. (Dr. Leytes) and Long Island College Hospital (LICH) (collectively, defendants), plaintiffs move for an order compelling LICH to produce: (1) the relevant head MRI and CT

scans of the infant plaintiff, (2) the medical records of the infant plaintiff's June 24, 1995 pediatric clinic visit, and (3) the placental pathology slides and the complete fetal heart monitoring strips. Plaintiffs' motion seeks, in the alternative, an order striking defendants' answer.

On June 17, 1995, Benkerroum presented to LICH at 12:15 P.M., complaining of a vaginal discharge. It was noted that the fetal heart rate was reassuring, and electronic fetal heart monitoring was started at around that time. Benkerroum was admitted for labor and delivery at about 2:50 P.M. A copy of a nurse's note at approximately 8:00 P.M., during fetal heart monitoring, states: "Variable Decelerations w/Late Component." At approximately 8:35 P.M., the infant plaintiff was delivered by the obstetrical staff at LICH. The infant plaintiff received Apgar scores of 9 at one minute and 9 at five minutes (which was within the normal range). At approximately 10:35 P.M., a nurse made a note of "whole body tremors," and glucose was given as treatment. All findings in the nursery were essentially normal, and the infant plaintiff was discharged and taken home by Benkerroum on June 19, 1995.

The infant plaintiff was seen by Dr. Leytes at the emergency room of LICH on June 24, 1995. The infant plaintiff also had a follow-up clinic visit with Dr. Leytes on June 26, 1995, and was later admitted to LICH on June 27, 1995 due to blood in his stool. On July 12, 1995, an MRI study and a CT scan were performed on the infant plaintiff. In the three-page report of the MRI study, the radiologist states that "[t]he presence of gliosis is

suggestive of a process at least three weeks old or more (third intrauterine trimester of gestation)." In the impression portion of the report of the CT scan, the radiologist states that the findings are "compatible with cystic encephalomalacia, secondary to prior hypotensive episode." Plaintiffs allege that following the infant plaintiff's discharge from LICH, he has been diagnosed as having spastic diplegia, left-sided hemiparesis, and developmental delay.

On October 12, 2004, plaintiffs filed this medical malpractice action against defendants. Plaintiffs' complaint alleges, among other things, that defendants failed to prevent and properly treat the infant plaintiff's perinatal hypoxia and to timely detect and treat the infant plaintiff's herpes meningitis. By a letter dated January 24, 2007, plaintiffs' attorney requested all MRI and CT scan films from the infant plaintiff's admission to LICH which began on June 27, 1995, the emergency room record from June 24, 1995, the fetal heart monitoring strips from June 17, 1995, and access to the placental pathology slides. Defendants did not provide this evidence. On April 25, 2007, the court entered an order requiring defendants to respond to plaintiffs' demand for the fetal heart monitoring strips and the MRI films, if available. Due to defendants' failure to provide the requested evidence, plaintiffs brought the instant motion.

In their moving papers, plaintiffs acknowledge that defendants have provided them with the fetal heart rate monitoring strips covering the period from 3:02 P.M. through 7:40 P.M. on June 17, 1995. In addition, defendants assert that following the onset of plaintiffs' motion, LICH has located the requested MRI scans and delivered them to plaintiffs.

Defendants, however, acknowledge that, at present, they have been unable to locate the portion of the fetal monitoring strips covering the time period from 12:15 P.M. to 3:02 P.M. and from 7:40 P.M. to 8:35 P.M. on June 17, 1995, the medical records of the infant plaintiff's June 24, 1995 emergency room visit, and the July 12, 1995 CT scan of the infant plaintiff. Defendants assert that there is no evidence that any placental pathology slides ever existed.

In addressing plaintiffs' motion, the court notes that "[t]he 'drastic remedy' of striking an answer pursuant to CPLR 3126 is warranted when there is 'a clear showing' that the failure to comply with discovery demands was willful and contumacious" (*Denoyelles v Gallagher*, 40 AD3d 1027, 1027 [2007], quoting *Fellin v Saghal*, 268 AD3d 456, 456 [2000]). "Similarly, under the common-law doctrine of spoliation, 'when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading'" (*Denoyelles*, 40 AD3d at 1027, quoting *Baglio v St. John's Queens Hosp.*, 303 AD2d 341, 342-343 [2003]; *see also Tomasello v 64 Franklin, Inc.*, 45 AD3d 1287, 1288 [2007]; *Enstrom v Garden Place Hotel,* 27 AD3d 1084, 1086 [2006]; *Wetzler v Sisters of Charity Hosp.,* 17 AD3d 1088, 1089-1090 [2005], *amended on other grounds* 20 AD3d 944 [2005]; *Barahona v Trustees of Columbia Univ. in City of N.Y.*, 16 AD3d 445, 445-446 [2005]; *Iannucci v Rose*, 8 AD3d 437, 438 [2004]; *Herrera v Matlin*, 303 AD2d 198, 198 [2003]; *DiDomenico v C & S Aeromatik Supplies*, 252 AD2d 41, 53 [1998]).

"The determination of spoliation sanctions is within the broad discretion of the court" (*Denoyelles*, 40 AD3d at 1027; *see also Dennis v City of New York*, 18 AD3d 599, 600 [2005]). "Recognizing that striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct, courts will consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness" (*Iannucci*, 8 AD3d at 438; *see also Castillo v Staten Island Cable LLC,* 19 Misc 3d 1105 [A], 2008 NY Slip Op 50564 [U],*2 [2008]). "[A] less severe sanction or no sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense" (*Denoyelles*, 40 AD3d at 1027; *see also Gerber v Rosenfeld,* 18 AD3d 812, 812 [2005]). Thus, where other evidence exists which is sufficient to establish the claim or defense of the proponent of a spoliation motion, sanctions may be denied (*see Denoyelles*, 40 AD3d at 1027; *Myers v Sadlor,* 16 AD3d 257, 258 [2005]).

Here, as plaintiffs point out, 10 NYCRR 405.10 (a) (4) requires that hospitals retain medical records for a period of at least six years from the date of a patient's discharge (i.e., six years from June and July 1995) or three years after the patient's age of majority (18 years) (*see Felock v Albany Med. Ctr. Hosp.*, 258 AD2d 772, 774 [1999]). Although well more than six years have passed since June and July 1995, the infant plaintiff has not yet reached 21 years of age. However, it has not been alleged or established that defendants' failure to produce the evidence at issue or their loss of this evidence was willful or contumacious (*see Tawedros v St. Vincent's Hosp. of N.Y.*, 281 AD2d 184, 184 [2001]). Plaintiffs, though,

argue that due to defendants' negligent loss of the subject evidence, they are severely prejudiced in meeting their burden at trial.

In support of their argument, plaintiffs have submitted the expert affirmation of Douglas B. Savino, M.D. (Dr. Savino), a physician who is board certified in pediatrics. Dr. Savino opines that the missing medical records are both relevant and necessary in the present action. Specifically, Dr. Savino asserts that "[t]he records are necessary to identify the cause and time of [the infant plaintiff's] encephalopathy, i.e., meningitis as opposed to a hypotensive injury while still in utero." He explains that "[t]he fetal monitoring strips will also document for how long the tracings exhibited a non-reassuring pattern prior to delivery and the severity of same."

In arriving at his opinion, Dr. Savino notes that the medical records at LICH indicate that electronic fetal heart monitoring was used during Pitocin induction. He relies on the nurse's note written at 8:00 P.M. on June 17, 1995, during the fetal heart monitoring, which stated that there were "Variable Decelerations w/Late Component." He points out that variable decelerations refer to decelerations in the fetal heart rate, which are associated with umbilical cord compression, and that late decelerations also refer to decelerations in the fetal heart rate, which are associated with fetal distress. Dr. Savino concludes that since there was this nurse's note of a non-reassuring fetal heart monitoring pattern, it is imperative to review the entire set of strips, particularly the 35 minutes subsequent to the 8:00 P.M. nurse's note, in order "to determine if the pattern persisted or even worsened so as to assess the need for

obstetrical intervention." Dr. Savino further concludes that since the fetal heart monitoring pattern is described as having a variable component, and, thus, might be the result of an umbilical cord compromise, it is similarly important to review the tracing for the period from Benkerroum's admission through 3:02 P.M. in order to determine if there had been earlier evidence of such compromise, which would have indicated that there was a need for obstetrical intervention.

Dr. Savino explains the usefulness of electronic fetal heart monitoring in diagnosing fetal distress. He points out that fetal heart monitoring strips are the most critical indicators of fetal well-being. He cites medical articles which state that fetal heart monitoring can help the physician detect changes in fetal heart rate patterns that may be associated with such fetal conditions as hypoxia. He opines that, therefore, the fetal heart monitoring strips in this case would be relevant to showing any departures from good and accepted medical practice by LICH.

With respect to the missing June 24, 1995 emergency room visit record, Dr. Savino states that since Dr. Leytes referred to this visit during her deposition, it is apparent that this record is missing. He notes that after the infant plaintiff was admitted to LICH with the impression of "Rule-out Sepsis/Meningitis," "Torch" testing was performed, and laboratory test results from July 3th and 4th of 1995 show rising antibody levels for Herpes Simplex Virus of both Types 1 and 2.

Dr. Savino also states that he reviewed the report of the MRI study and the report of the CT study, which were both performed on the infant plaintiff on July 12, 1995. He discusses the radiologists' impressions on these reports (as set forth above), and states that since these radiologists are agents of LICH, it would be necessary for him to examine the actual studies to comment on the accuracy of their opinions.

Defendants, in opposition to plaintiffs' motion, have submitted the expert affidavit of Adiel Fleischer, M.D. (Dr. Fleischer), a physician who is board certified in obstetrics and gynecology, with a subspecialty board certification in maternal fetal medicine. Dr. Fleischer states that although the available fetal heart rate strips do not cover the time from Benkerroum's presentment at 12:15 P.M. to her admission to labor and delivery at LICH at 2:50 P.M. on June 17, 1995, or from 7:40 P.M. through 8:35 P.M. on that date, there is significant other evidence of the infant plaintiff's condition in utero during Benkerroum's presentment and labor, and at around the time of, and during the delivery of the infant plaintiff, and immediately after the infant plaintiff's birth, to determine the appropriateness and timeliness of the medical actions taken by the physicians and attending staff to react to and treat whatever was happening to the infant plaintiff during the labor, and surrounding and during the time of his birth.

Specifically, Dr. Fleischer states that "the [fetal heart rate monitoring] strips available are both excellent and reassuring from beginning to end and at no point was there ever any evidence of fetal distress." He notes that "[w]hile there were a couple of variable

decelerations, there was always a good recovery with accelerations and good variability throughout." He further concludes, based on the available fetal heart rate monitoring strips, that the infant plaintiff "was doing well in utero from 12:15 P.M. to 2:50 P.M. on June 17, 1995 and at no time was there any evidence of fetal distress."

Dr. Fleischer additionally states that if there had been a major hypoxic insult in between the time the strips ended at 7:40 P.M. and the infant plaintiff was delivered at 8:35 P.M., there would be an expectation of low Apgar scores, hypertonia, and seizures, and that none of these were present in this case. Dr. Fleischer notes that the infant plaintiff could not have had the Apgar scores of 9 and 9 at one and five minutes, respectively, which he, in fact, achieved, if he had suffered a hypoxic event in between the times of 7:40 P.M. and 8:35 P.M. Dr. Fleischer concludes, based upon the fetal heart rate monitoring strips available, the evidence of the infant plaintiff's good condition immediately after birth, and the absence of any reduced oxygenation, that there is more than sufficient evidence needed to make the determinations relevant to the issues in this case.

In addition, Dr. Fleischer concludes that there is no need to have the emergency room record of June 24, 1995, the small amount of missing fetal heart rate monitoring strips, or the CT scan to determine whether the actions of defendants in birthing or treating the infant plaintiff were appropriate. Dr. Fleischer disagrees with Dr. Savino's conclusions that due to the missing portions of fetal heart rate monitoring strips, the emergency room record of June 24, 1995, and the July 12, 1995 CT scan, one cannot determine the appropriateness and

timeliness of the medical actions taken by LICH's physicians and attending staff to treat the infant plaintiff in utero, during Benkerroum's presentment at LICH, at, around, and during his birth, and to later treat him upon his readmission to LICH.

While plaintiffs rely on the case of *Baglio* (303 AD2d at 343), which granted the motion of the plaintiffs therein to strike the defendant hospital's answer due to its negligent loss of fetal monitoring strips, such reliance is misplaced. In *Baglio* (303 AD2d at 342-343), the Appellate Division, Second Department, noted that "the fetal monitoring strips are the most critical evidence to determine fetal well-being at the time of treatment and in evaluating the conduct of health care providers with regard to obstetrical management thereafter." It also found that, "under the facts of th[at] case, the fetal monitoring strips would [have] give[n] fairly conclusive evidence as to the presence or absence of fetal distress, and their loss deprive[d] the plaintiff of the means of proving her medical malpractice claim against the [h]ospital" (*Id.* at 343).

Here, while fetal monitoring strips may be critical evidence, most of the fetal monitoring strips have been provided to plaintiffs. Moreover, the loss of part of the fetal monitoring strips do not constitute such "key evidence" so as to deprive plaintiffs of the only means of proving their medical malpractice claim against defendants (*see Denoyelles*, 40 AD3d at 1027; *Enstrom*, 27 AD3d at 1086; *Iannucci*, 8 AD3d at 438; *Tawedros*, 281 AD2d at 184). Plaintiffs are in possession of Benkerroum's June 17, 1995 labor and delivery admission records, the contemporaneous nurse's notes that indicate the ongoing events of

Benkerroum's labor, and the infant plaintiff's newborn and pediatric records (*compare Spitz v Dvorkes*, 11 Misc 3d 1084 [A], 2006 NY Slip Op 50693 [U], *1 [2006]). Thus, it cannot be said that the loss of a portion of the fetal monitoring strips rendered the plaintiffs "prejudicially bereft of appropriate means" to prove their claims (*DiDomenico*, 252 AD2d at 53 [internal quotation marks omitted]; *see also Denoyelles*, 40 AD3d at 1027). Therefore, plaintiffs have failed to establish that they will be unable to present a prima facie case against defendants due to the loss of this evidence (*see Tomasello,* 45 AD3d at 1288; *Denoyelles*, 40 AD3d at 1027).

With respect to the missing June 24, 1995 emergency room records, it was reported and referred to in the June 27, 1995 readmission of the infant plaintiff. In addition, plaintiffs are in possession of a full set of the infant plaintiff's medical records from his readmission on June 27, 1995 through July 25, 1995, as well as the record of his June 26, 1995 clinic presentment, which immediately followed the June 25, 1995 emergency room visit and preceded his admission at LICH. Plaintiffs also possess Dr. Leytes' deposition testimony regarding the June 24, 1995 emergency room visit. Thus, the absence of the record of the infant plaintiff's June 24, 1995 emergency room visit does not deprive plaintiffs from proving their claim (*see Denoyelles*, 40 AD3d at 1027; *Enstrom*, 27 AD3d at 1086; *Iannucci*, 8 AD3d at 438; *Tawedros*, 281 AD2d at 184).

As to the missing July 12, 1995 CT scan, plaintiffs have the radiologist's report of that CT scan, as well as the actual MRI films and the report of that MRI, which was performed

on the same day as the CT scan. Consequently, it cannot be said that the absence of the actual July 12, 1995 CT scan film leaves plaintiffs bereft of evidence with respect to their claim as to the timing and cause of the infant plaintiff's brain injury (*see Denoyelles*, 40 AD3d at 1027; *DiDomenico*, 252 AD2d at 53).

While plaintiffs also assert that the placental pathology slides are missing, defendants (as noted above) assert that there is no evidence that such slides ever existed. "It is incumbent on the proponent of a motion seeking sanctions for spoliation to prove that the evidence allegedly lost or destroyed actually existed" (*Ecor Solutions, Inc. v State of New York,* 17 Misc 3d 1135 [A], 2007 NY Slip Op 52261 [U], *6 [2007]; *see also Wilkie v New York City Health & Hosps. Corp.,* 274 AD2d 474, 474 [2007]).

Thus, inasmuch as plaintiffs are in possession of the hospital records of Benkerroum and the infant plaintiff (which show, among other things, the infant plaintiff's condition at birth), the radiological report of the MRI scan, the MRI scan, the radiological report of the CT scan, and a portion of the fetal heart rate monitoring strips, there is ample other evidence from which the determinations relevant to the issues in this case can be made (*see Denoyelles*, 40 AD3d at 1027; *Myers*, 16 AD3d at 258). Therefore, upon considering the available evidence and the submitted expert affirmations, the court does not find that the missing evidence has deprived plaintiffs of the ability to establish their case so as to justify the drastic sanction of striking defendants' answer (*see Denoyelles*, 40 AD3d at 1027; *Tawedros*, 281 AD2d at 184).

However, the court notes that an adverse inference charge against defendants may be a more appropriate sanction for the spoliation of the evidence at issue (*see Enstrom*, 27 AD3d at 1087; *Martelly v New York City Health & Hosps. Corp.*, 276 AD2d 373, 373-374 [2000]; *Tavares v New York City Health & Hosps. Corp.*, 2003 NY Slip Op 51278 [U], *8 [2003]). Thus, plaintiffs may, at trial, if they be so advised, seek an adverse inference charge that had the missing evidence sought been produced, such evidence would have been unfavorable to defendants (*see* PJI 1:77; *Rodriguez v 551 Realty LLC*, 35 AD3d 221, 221 [2006]; *Ifraimov v Phoenix Indus. Gas*, 4 AD3d 332, 334 [2004]; *Gentle v State of New York*, 4 Misc 3d 453, 456 [2004]).

Accordingly, plaintiffs' motion is denied, without prejudice to an application by plaintiffs at trial for an adverse inference charge.

This constitutes the decision and order of the court.

E N T E R,

HON. GERARD H. ROSENBERG
J. S. C.