

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
HONORABLE GEORGE C. JAMES, JR., CIRCUIT COURT JUDGE
C/A NO. 2010-CP-40-5705

Doris F. Atkinson and William E. Atkinson, Jr.,

Appellants,

v.

James A. Williams, Jr., M.D., and South Carolina Oncology Associates,

Respondents.

REPLY BRIEF OF APPELLANTS

Daryl J. Corbin, Esquire
Corbin Law Firm
Post Office Box 447
Florence, SC 29503
(843)667-6119

Attorney for Appellants

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SC Court of Appeals

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STATEMENT OF ISSUES ON REPLY

WOULD THE "MISSING" SMALL BOWEL SPECIMEN OR A STANDARD PATHOLOGY REPORT HAVE BEEN RELEVANT PROOF OF DR. WILLIAMS' NEGLIGENCE?

DID THE JURY HAVE EVIDENCE FROM WHICH IT COULD REASONABLY INFER THAT DR. WILLIAMS CAUSED THE DISAPPEARANCE OF MRS. ATKINSON'S "MISSING" SMALL BOWEL SPECIMEN?

WAS THE TRIAL COURT'S REFUSAL TO PROVIDE THE JURY WITH A STOKES SPOILIATION CHARGE PREJUDICIAL TO APPELLANTS' CASE?

ARGUMENT

THE "MISSING" SMALL BOWEL SPECIMEN OR A STANDARD PATHOLOGY REPORT WOULD HAVE BEEN RELEVANT PROOF OF DR. WILLIAMS' NEGLIGENCE.

The Respondents argue that Mrs. Atkinson's "missing bowel section had no relevance" to any issue of Dr. Williams' negligence. Respondents' Brief at page 27. Mrs. Atkinson's small bowel specimen or a standard Pathology Report involving Dr. Williams' first operation would have proven the length of bowel removed and the reasons for such removal. The Respondents' assertion that "the general length of that section was never in real dispute" has no merit. Even Dr. Williams admitted during cross-examination that a surgeon's removal of twelve (12) feet of small bowel would constitute a deviation from the applicable standard of care.

In relevant part, Dr. Williams testified as follows:

Q My understanding of your testimony is, you did not remove 12 feet of bowel. The question was educate the jury. If a surgeon were standing in your shoes out there, in Faye's case, operation number one, exactly the same, it would be a violation of the standard of care for that surgeon to remove 12 feet of her small bowel. Agreed?

A If in that case a surgeon were to indiscriminately remove 12 feet of otherwise normal bowel, that would be a violation of the standard of care.

Transcript at page 772, lines 6 – 14.

Dr. Williams clearly understood the relevance from a negligence standpoint of removing several feet of Mrs. Atkinson's small bowel. If approximately twelve (12) feet of Mrs. Atkinson's small bowel would have been sent to the Pathology Lab for analysis, the Pathology Report would have been relevant evidence (if not dispositive proof) of Dr. Williams' negligence in this case.

In addition, Robert W. Bailey, M.D. ("Dr. Bailey"), a Board Certified surgeon, provided some of Appellants' expert witness testimony at trial. Dr. Bailey testified about the importance of knowing not just the length, but also the "condition" of Mrs. Atkinson's small bowel specimen which Dr. Williams removed from her body. In relevant part, Dr. Bailey testified as follows:

Q If that bowel that is missing would have been sent to pathology, could they tell the jury how many holes were in that piece that was cut out?

A Yes, they could tell you if it was one, if there were multiple. They could also give you very, very detailed description of the length, because we really don't know how much bowel was removed; but by listening to the -- reading the deposition testimony, we understand was a couple of feet, I believe, or something of that nature; and it brings up one of many questions that I have with this case because when I read the operative report of Dr. Williams, it says there was one single hole that I had to resect and remove and the hole was usually half an inch, maybe an inch at the most. So you're going to remove a few inches of bowel. So why with one single hole would you end up removing two feet of bowel.

Q During that first operation -- well, does a surgeon have an obligation to notate somewhere in the world how much of a body part he removed from a patient's body?

A Absolutely. Especially if it's going to be several feet because we know that we're dealing with this issue of short bowel syndrome and it's important to note the location of the intestine because different parts of the small intestines serve different functions as far as absorption of vitamins and nutrients and electrolytes. The terminal ilium, for example is very important with that and you -- especially when you're removing parts of the ilium, which is the last part of the small intestine, you want to make sure you document the length of bowel that's being removed; and as I said, the exact location.

Q Is it a deviation from the standard of care for Dr. Williams not to indicate how much bowel he removed in the first operative procedure?

A It is, in the fact that -- especially since the specimen was lost and we can't document it; but yes, removing, when removing -- as I said, if it's a small sigmoidal resection and you say there's a single hole and I remove just around this hole, you don't necessarily have to say it was exactly six inches or eight inches because we all know as surgeons, it's a limited resection. But then when you find out that several feet have been removed, that's a very important thing for you to know.

Q Tell the jury whether or not there's any importance in doing a surgery like Dr. Williams did to preserve as much bowel as you possibly can.

A Always. I mean, you want to limit your resection because if not, you end up in exactly the same situation down the lines as we have in this case, where a patient basically becomes what we call a gastrointestinal cripple, that they have chronic, massive diarrhea; they struggle with maintaining their weight and adequate nutrition because they don't have sufficient length of intestine to absorb all the nutrients that they need to survive.

In short, Dr. Bailey's testimony clearly constitutes evidence of the importance and relevance of knowing (a) the length of Mrs. Atkinson's small bowel which Dr. Williams removed during the first operation, and (b) the reasons for such removal.

The missing small bowel segment and Pathology Report were relevant in proving Mrs. Atkinson's negligence action against Dr. Williams. The Pathology Report would have described the length of the small bowel specimen. Further, the Pathology Report would have identified the exact number and sizes of the perforations in Mrs. Atkinson's small bowel specimen which Dr. Williams caused during the first surgical procedure. Without doubt, Dr. Williams and the parties' expert witnesses would have had difficulties refuting the accuracy of a standard Pathology Report.

Did Dr. Williams know that a Pathology Report would prove his surgical errors caused Mrs. Atkinson's debilitating short bowel syndrome? Would the Pathology Report prove the Appellants' position that Dr. Williams should have avoided an aggressive and excessive adhesiolysis "scar removal" procedure on Mrs. Atkinson's "hostile" abdomen? Why does Dr. Williams' Operative Report fail to identify the number of times he perforated Mrs. Atkinson's small bowel during the first surgery? A Pathology Report would have provided the parties' expert witnesses and the jury with relevant proof of whether Dr. Williams was negligent in (a) unnecessarily causing numerous small bowel perforations, and (b) failing to properly minimize Mrs. Atkinson's bowel loss by "over sewing" the

perforations rather than cutting out feet of small bowel. The Pathology Report would constitute proof of whether Dr. Williams was negligent in dooming Mrs. Atkinson to a lifetime of suffering from short bowel syndrome.

The Stokes Case

The Respondent states that the Stokes opinion is inapplicable to Mrs. Atkinson's appeal due to lack of relevance as follows:

The unavailable evidence's lack of relevance plainly distinguishes this case from Stokes . . . (T)he primary liability issue in Stokes was a dispute over the cause of a surgical patient's death.

As this Court noted, the two pieces of evidence missing from the hospital's records "would have helped determine how [the patient] died. Thus, it was crucial to the plaintiff's case that the jury know it could draw a negative inference from the Hospital's failure to produce those important pieces of evidence."

Respondents' Brief at pages 26 and 27.

According to the Respondents, an important distinction between Stokes and Mrs. Atkinson's case is "the missing bowel section was not crucial to the Appellants' case." Respondents' Brief at page 27. However, an important issue in Mrs. Atkinson's case was the cause of a surgical patient's short bowel syndrome, a condition some believe is worse than death.

The missing bowel segment and the absence of a standard Pathology Report "would have helped determine" the length and condition of the small bowel segment which Dr. Williams removed, causing Mrs. Atkinson's short bowel syndrome. Dr. Bailey stated Dr. Williams' surgery rendered Mrs. Atkinson a "gastrointestinal cripple." Transcript at page 140, line 11.

Dr. Bailey testified about Mrs. Atkinson short bowel syndrome as follows:

Q Tell the jury whether or not there's any importance in doing a surgery like Dr. Williams did to preserve as much bowel as you possibly can.

A Always. I mean, you want to limit your resection because if not, you end up in exactly the same situation down the lines as we have in this case, where a patient basically becomes what we call a gastrointestinal cripple, that they have chronic, massive diarrhea; they struggle with maintaining their weight and adequate nutrition because they don't have sufficient length of intestine to absorb all the nutrients that they need to survive.

Transcript at page 140, lines 5 – 15.

Accordingly, it is clear that the missing bowel section was crucial to the Appellants' case.

Another portion of the Respondents' Brief states as follows:

(I)t is important to recall that Dr. Williams admitted he removed "feet" of Atkinson's bowel during the first surgery. Although Dr. Williams could not give the jury the exact measurement, he never attempted to minimize the removal made in the first surgery. In other words, this was not a case in which the defendant surgeon . . . said he removed a much smaller amount than the plaintiff claimed.

The general length of the section was never in any real dispute.

Respondents' Brief at page 27.

The Appellants tried to prove at trial that Dr. Williams removed approximately twelve (12) feet of Mrs. Atkinson's small bowel during the first surgery. Dr. Williams never agreed he removed that much of Mrs. Atkinson's small bowel. In fact, Dr. Williams testified that removal of twelve (12) feet of bowel would be inappropriate. Transcript at page 772. Contrary to the Respondents' appellate position, this is a case in which a defendant surgeon claims "he removed a much

smaller amount than the plaintiff claimed.” At trial, there was a real dispute that Dr. Williams removed approximately twelve (12) feet of Mrs. Atkinson’s small bowel.

THE JURY HAD EVIDENCE FROM WHICH IT COULD REASONABLY INFER THAT DR. WILLIAMS CAUSED THE DISAPPEARANCE OF MRS. ATKINSON’S “MISSING” SMALL BOWEL SPECIMEN.

The Respondents Brief states there is “no evidence that Dr. Williams caused the bowel section to be lost or destroyed.” Respondents’ Brief at page 28. However, the medical records and expert witness testimony do not support Dr. Williams’ claim that he sent Mrs. Atkinson’s small bowel specimen to the Pathology Lab. For example, William P. Irvin, M.D. (“Dr. Irvin”), a Board Certified Gynecologic Oncologist and surgeon, testified at trial as an Appellants’ expert witness. Dr. Irvin saw nothing in the medical records indicating that Dr. Williams ever sent Mrs. Atkinson’s small bowel specimen to the Pathology Lab.

A portion of Dr. Irvin’s trial testimony follows:

Q Is it a big deal that a patient has feet of bowel removed and it never gets to pathology?

A Typically, when you remove something from a patient, you will send that to a pathologist to have that specimen evaluated, find out what it is or what's unique about it, what's injured and what's damaged about it. When you remove a large portion of bowel, it would have been nice to have a pathologist say, Yes, there were multiple holes in this bowel or it was ischemic or something about it that required it to be removed. So it is typical that you will send specimens that you remove to a pathologist.

Q Did you see any evidence at all in the medical records of Dr. Williams sending feet of bowel after that first surgical procedure to pathology?

A No.

Q Did you see anything at all in the medical records -- if Dr. Williams did send feet of bowel to pathology and somehow it was missing, did you see anything in the medical records at all about Dr. Williams perhaps complaining or asking pathology what happened to my patient's bowel?

A No.

Transcript at page 277, line 10 – page 278, line 6.

In addition, Sidney T. Smith, M.D. (“Dr. Smith”), is Dr. Williams’ surgical partner. The Appellants published parts of Dr. Smith’s deposition transcript at trial as follows:

Q We do know that Dr. Williams made the decision to continue with the operation and caused numerous enterotomies and removed a significant part of her bowel, correct.

A Correct.

Q How much bowel did he remove?

A It's hard to tell, but it looks like he removed at least 60 percent of it, but I'm not real clear on that.

Q Next page 133, starting on line 21. Let me ask you two questions.

A Yes.

Q If you remove a portion of a patient's bowel, should that bowel be sent to pathology or just discarded?

A No, sent to pathology.

Q Under the standard of care, that body part needs to be sent to pathology, correct?

A Correct.

Transcript at page 415, line 18 – page 416, line 11.

Moreover, Dr. Williams testified at trial as follows:

Q The reason the surgeon sends it to Pathology -- and you want to make certain Pathology gets it, don't you? Don't you want to make certain Pathology gets the specimen?

A Yes.

Q It doesn't make sense to remove it and send it to Pathology and they don't get it. Right?

A No, I had no way to track that personally on that given day.

Q So when you take out the small bowel that day, you send it to Pathology. Did you ever get a report back about the small bowel?

A The small bowel was not in the report, no.

Q You got a report back because, you know, Pathology got the ovaries. Right?

A Yes.

Q Pathology told you what they indicated they found in the ovaries. Correct?

A Yes.

Q Were you upset when they didn't tell you what they found in Faye -- Faye's bowel specimen. I bet you were upset, weren't you?

A I honestly don't remember that -- those parts of the events now, five and a half years later.

Q It is a serious violation -- Doctor, you've been a physician for several years, probably sit on several committees for the hospital. Correct? Over the years?

A Yes.

Q Okay. It is a serious violation for body parts to be kind of missing in the hospital. Is it not?

A Body parts weren't missing. There was no Pathology report and I have no record that the Pathology Department received that specimen.

Q Is it serious to a hospital, with you sitting on these committees, you know that if the body part is missing, that is serious. Isn't it?

A I'm not an expert to that area specifically.

Q Given your experience, will you at least concede a body part missing is serious?

A Yes. It's not a desirable thing to happen.

Q And it hinders your ability to probably diagnose and treat your patient if a body part is missing. Correct?

A It could, yes, sir.

Q Among other things, correct?

A It could, depending on the reason you were doing it.

Q Tell the jury if you have any documentation at all, any records, in the 2,000 pages of the hospital documents where you mention missing bowel in your records?

A No, sir, there's not.

Q Pull out from your records where you notified Pathology. I bet you know the director. Right?

A Yes.

Q Friends?

A I'm not sure that the director knew me at that time, really.

Q You knew the director and how to get in touch with the director. Correct?

A Yes.

Q Show the jury where you notified the director of Pathology that your patient's body part was missing?

A I have no record.

Q Was it not important enough to put it in the record?

A I have no recollection of that five years later.

Transcript at page 773, line 20 - page 776, line 8.

Dr. Williams said it was important for a surgeon to “make certain” that the Pathology Lab receives all surgical specimens removed from a patient’s body for analysis. However, Dr. Williams did nothing to track “feet” of bowel he removed from Mrs. Atkinson despite the fact he never received a Pathology Report. Dr. Williams had no documentation indicating Mrs. Atkinson’s bowel specimen ever was sent to the Pathology Lab. Dr. Williams admitted “missing” body parts pose a serious problem and the lack of a Pathology Report could adversely affect patient care. In short, the jury had sufficient evidence from which to infer that Dr. Williams never sent Mrs. Atkinson’s “feet” of small bowel specimen to the Pathology Lab. Dr. Williams had no reason to track Mrs. Atkinson’s small bowel specimen since he knew it was not really missing. No need for a wild goose chase.

THE TRIAL COURT'S REFUSAL TO PROVIDE THE JURY WITH A STOKES SPOILIATION CHARGE WAS PREJUDICIAL TO APPELLANTS' CASE.

The Respondents assert as follows:

(T)he judge's decision not to give the spoliation charge did not prevent the Appellants from stressing the missing bowel section to the jury. (T)hat the jury did not assign significance to it is of no consequence for present purposes. All that matters now is that the judge allowed the Appellants to call extra attention to the fact that the bowel section was unavailable at trial.

Respondents' Brief at page 29.

Quite frankly, allowing counsel to stress missing evidence for the mere purpose of inferring a party exhibited lax behavior totally ignores the purpose of a spoliation charge. Without an appropriate spoliation instruction, how could a jury understand the legal significance of missing or destroyed evidence? The purpose of a spoliation charge is to allow a jury the option under appropriate circumstances to draw a negative inference against the party responsible for lost or destroyed evidence. Absent a spoliation charge, a jury would have no authority or guidance about proper consideration of lost or destroyed evidence.

The Respondents further state as follows:

This leniency by the judge prevented his decision not to give a spoliation charge from having any prejudicial effect.

Respondent's Brief at page 29.

Leniency does not cure the judge's failure to give the jury a Stokes spoliation charge. The jury had evidence from which it could reasonably infer that Dr. Williams was responsible for Mrs. Atkinson's missing small bowel specimen and the absence of a standard Pathology Report. The leniency of allowing Appellants'

counsel to mention the indisputable fact that the bowel specimen was missing was useless without the jury understanding its potential legal significance in deciding whether Dr. Williams was negligent.

Without an appropriate spoliation charge, a party's intentional or reckless disappearance of relevant evidence in a medical negligence case would be meaningless. Without a spoliation charge in the Stokes case, would the jury have understood the legal significance of a party losing or destroying important evidence? Mrs. Atkinson deserved a spoliation charge. The judge's rejection of the Appellants' spoliation instruction constitutes reversible error.

CONCLUSION

The availability of Mrs. Atkinson's missing small bowel specimen or a standard Pathology Report would have been relevant and important pieces of evidence at trial. The length and condition of the small bowel segment would have been critical factors in proving Dr. Williams' medical negligence. The Appellants introduced evidence at trial from which the jury could have reasonably inferred that Dr. Williams was responsible for losing or destroying evidence and causing the absence of a Pathology Report. Under Stokes, the Appellants were entitled to a spoliation and adverse inference charge. The judge's rejection of the Appellants' request for a spoliation and adverse inference charge was detrimental to Mrs. Atkinson's case. Under the circumstances, the Appellants respectfully petition the Court to grant them relief sought in this appeal.

RESPECTFULLY SUBMITTED,

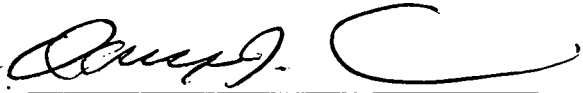
CORBIN LAW FIRM

227 West Evans Street

Post Office Box 447

Florence, South Carolina 29503-0447

(843)667-6119

BY: 
DARYL J. CORBIN
Attorney for Appellants

Florence, South Carolina

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PROOF OF SERVICE

I, Daryl J. Corbin, counsel for the Appellants, certify that I have served the within Appellant's Reply Brief on March 12, 2014, by depositing copies of the same in the United States Mail, postage prepaid, addressed to the following:

R. Hawthorn Barrett, Esquire
Thomas C. Salane, Esquire
Turner Padgett Graham & Laney
Post Office Box 1473
Columbia, SC 29202

Honorable Jenny Abbott Kitchings
SC Court of Appeals
Post Office Box 11629
Columbia, SC 29211

William C. McDow, Esquire
Richardson Plowden
Post Office Drawer 7788
Columbia, SC 29202


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RESPECTFULLY SUBMITTED,

CORBIN LAW FIRM
227 West Evans Street
Post Office Box 447
Florence, SC 29503-0447
(843)667-6119

BY: 
DARYL J. CORBIN
Attorney for Appellants

Florence, South Carolina

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