

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

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.

BRIEF OF APPELLANTS

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SC Court of Appeals

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of Issue on Appeal.....	1
Statement of the Case.....	1
Argument	7
I. THE TRIAL COURT ERRED IN DENYING APPELLANTS' JNOV AND NEW TRIAL MOTIONS GIVEN ITS FAILURE TO CHARGE THE JURY WITH SPOILIATION OF EVIDENCE.	
Conclusion	29

TABLE OF AUTHORITIES

Cases

<u>Baker v. Weaver</u> , 279 S.C. 479, 309 S.E.2d 770 (Ct. App. 1983).....	16
<u>Burroughs v. Worsham</u> , 352 S.C. 382, 574 S.E.2d 215 (Ct. App. 2002)	7,16
<u>Kershaw County Bd. of Education v. U.S. Gypsum Co.</u> , 302 S.C. 390, 396 S.E.2d 369 (1990)	7
<u>Stokes v. Spartanburg Regional Medical Center, et al.</u> , 368 S.C. 515, 629 S.E.2d 675 (2006)	7, 9, 13, 14, 15, 24, 26, 27

STATEMENT OF THE ISSUE ON APPEAL

DID THE TRIAL COURT ERR IN DENYING APPELLANTS' JNOV AND NEW TRIAL MOTIONS GIVEN ITS FAILURE TO CHARGE THE JURY WITH SPOILIATION OF EVIDENCE.

STATEMENT OF THE CASE

Respondent James A. Williams, Jr., M.D. ("Dr. Williams") is a Gynecological Oncologist and Surgeon in Columbia. Appellant Doris F. Atkinson ("Mrs. Atkinson") was a fifty-nine year-old, post-menopausal female with no history of cancer when her local gynecologist in Hartsville referred her to Dr. Williams for evaluation and treatment of two ovarian cysts. Mrs. Atkinson's ultrasound and a blood test called a CA 125 indicated her cysts were probably benign. Dr. Williams was aware Mrs. Atkinson had about ten inches of small bowel removed during her 1999 abdominal surgery at Hartsville's Byerly Hospital. Dr. Williams knew Mrs. Atkinson's prior abdominal surgery made her a riskier surgical candidate due to internal scar tissue called adhesions. Mrs. Atkinson had what is called a "Hostile Abdomen."

On April 25, 2007, Dr. Williams performed Mrs. Atkinson's first surgery to remove some ovarian cysts at Palmetto Health Richland ("Palmetto Health") in Columbia. Dr. Williams' surgery was risky and complex given Mrs. Atkinson's "hostile abdomen." During the first surgery, Dr. Williams significantly added to Mrs. Atkinson's surgical risk by performing an "adhesiolysis" procedure. Adhesiolysis involves the lysis or surgical releasing of old internal adhesions or scar tissue. Dr. Williams and Mrs. Atkinson's expert witnesses all agreed that

adhesiolysis causes surgical trauma; adhesions removed or released by adhesiolysis will eventually return probably even worse than before; and adhesiolysis exposes a patient to potentially serious surgical complications, such as small bowel perforations, bowel leaks, abscesses, and a potentially deadly infection called peritonitis. Mrs. Atkinson had no bowel problems between her 1999 Byerly Hospital surgery until completion of Dr. Williams' first surgery.

Mrs. Atkinson had significant complications from the first surgery due to numerous small bowel perforations caused by Dr. Williams and his removal of an indeterminate length of feet from her small bowel. Palmetto Health's Pathology Laboratory ("Pathology Lab") determined Mrs. Atkinson's cysts were non-cancerous and benign. Mrs. Atkinson spent sixty-two days in Palmetto Health; and her medical costs exceed \$500,000. There was no dispute that before Dr. Williams' first surgery Mrs. Atkinson did not have a horrible condition called "Short Bowel Syndrome."

Dr. Williams admits he removed an indeterminate length of feet from Mrs. Atkinson's small bowel and caused numerous perforations during the first surgery. R. pp. 616 – 617, 623 – 624, 771. Mrs. Atkinson's small bowel specimen Dr. Williams removed during the first surgery never got to the Pathology Lab for examination. Dr. Williams cannot remember how much of Mrs. Atkinson's small bowel he removed other than "feet." At trial, defense counsel conceded Dr. Williams removed "a lot" of Mrs. Atkinson's small bowel during the first surgery. R. pp. 846 - 847. Mrs. Atkinson's missing small bowel specimen which never got

from Dr. Williams' hands to the Pathology Lab would have generated a Pathology Report documenting its length, condition, and the number, location, and size of numerous perforations.

Dr. Williams' Operative Report fails to mention anything about the length of Mrs. Atkinson's bowel he removed or the number and sizes of perforations he caused during the first surgery. R. p. 991. Dr. Williams testified that he could not remember how much bowel he removed. R. pp. 623 - 624. There is no dispute that Mrs. Atkinson's bowel specimen never got to the hospital's Pathology Lab. No Pathology Report can refresh Dr. Williams' personal recollection of Mrs. Atkinson's feet of missing small bowel and the number and sizes of the perforations he caused during the first surgery. R. p. 628.

The standard surgical form which lists all pathological specimens sent to the Pathology Lab is called a "Surgery Document." R. p. 994. The Surgery Document from Dr. Williams' first surgery indicates no one sent Mrs. Atkinson's small bowel specimen to the Pathology Lab. The Surgery Document from Dr. Williams' first surgery indicates he sent Mrs. Atkinson's ovary and fallopian tube specimens to the Pathology Lab. The Surgery Document does not indicate Dr. Williams sent any portion of Mrs. Atkinson's small bowel to the Pathology Lab. Since Mrs. Atkinson's small bowel specimen never got to the Pathology Lab, no one other than Dr. Williams can identify the length of Mrs. Atkinson's bowel he removed or the number and sizes of perforations he caused during the first surgery. R. p. 229.

Mrs. Atkinson's post-operative course after both surgeries was stormy. While Dr. Williams was on vacation, another surgeon, Harris H. Parker, M.D. ("Dr. Parker"), diagnosed Mrs. Atkinson with frank peritonitis, a severe type of infection. Dr. Parker performed exploratory surgery and found a perforation in Mrs. Atkinson's small bowel. The perforation dumped two liters of bowel contents in Mrs. Atkinson's abdomen. Mrs. Atkinson almost died. R. p. 743, 997. Dr. Parker performed four additional abdominal operations on Mrs. Atkinson to treat post-surgical complications from Dr. Williams' prior surgeries. Before Dr. Parker performed any operation on Mrs. Atkinson, he determined she had about seventy centimeters or approximately thirty inches of small bowel left after Dr. Williams' surgery. R. p. 735.

Mrs. Atkinson suffers from Short Bowel Syndrome, a horrid and sometimes permanent condition arising from a small intestine too short in length to properly digest and process food. A person of Atkinson's size would normally have a small bowel of approximately sixteen to twenty feet in length. A common definition of Short Bowel Syndrome is a small bowel of less than six feet in length. R. p. 881. Atkinson's remaining small bowel is approximately twenty inches long. R. p. 150. Atkinson has been treated for chronic diarrhea, sometimes involving sixty bowel movements a day. Mrs. Atkinson has been hospitalized for severe electrolyte imbalances due to Short Bowel Syndrome. Mrs. Atkinson must eat several small meals a day which almost immediately leads to diarrhea. Sometimes Mrs. Atkinson uncontrollably defecates in her pants. R. p. 440. Mrs. Atkinson testified

she schedules her “life around commodes” and has become a prisoner in her own home.

The failure of a physician to exercise that degree of care and skill which is ordinarily employed by the profession generally, under similar conditions and in like surrounding circumstances, constitutes medical malpractice. Welch v. Whitaker, 282 S.C. 251 (Ct. App. 1984). Mrs. Atkinson asserted a medical malpractice claim against Dr. Williams and his medical practice. Mrs. Atkinson’s Gynecological Oncologist and Surgeon expert witnesses testified about Dr. Williams numerous failures to satisfy standards of care. R. p. 221. For example, Dr. Williams’ adhesiolysis during Mrs. Atkinson’s first operation was too aggressive and needlessly exposed her to numerous perforations and substantial small bowel loss. In addition, Dr. Williams should have stopped Mrs. Atkinson’s first surgical procedure after he started causing numerous perforations. However, Dr. Williams continued with the ill-fated first operation and needlessly caused multiple additional perforations and feet of small bowel loss. As a result of Dr. Williams’ negligence, Mrs. Atkinson suffers from Short Bowel Syndrome.

The central issue in Mrs. Atkinson’s case was “How much small bowel did Dr. Williams remove during the first surgery?” If Dr. Williams removed an excessive length of Mrs. Atkinson’s small bowel, he was negligent. How much is too much? Appellants believe Dr. Williams removed about twelve feet of Mrs. Atkinson’s small bowel during the first surgery. Dr. Williams testified that removal of that much of Mrs. Atkinson’s small bowel would constitute a “bad”

violation of the standard of care. R. p. 627.

Dr. Williams failed to mention in his first Operative Note the length of Mrs. Atkinson's small bowel he removed or the number of perforations he put in it. R. p. 991. There was no dispute at trial that it was a deviation from the standard of care for Dr. Williams not to indicate how much bowel he removed or the number of perforations he caused during Mrs. Atkinson's first surgery. There was no dispute at trial that it was a deviation from the standard of care for Dr. Williams not to send Mrs. Atkinson's small bowel specimen to the Pathology Lab for scientific analysis. R. p. 90.

The Palmetto Health records indicate Dr. Williams never sent Mrs. Atkinson's small bowel specimen to the Pathology Lab. R. pp. 994 – 996. There was no Pathology Report about Mrs. Atkinson's small bowel specimen. Dr. Williams never did any follow-up involving Mrs. Atkinson's missing small bowel specimen or the absence of a Pathology Report. The absence of a Pathology Report made proving of the length of Mrs. Atkinson's small bowel removed by Dr. Williams during the first surgery essentially impossible.

The trial of Appellants' case started on October 8, 2012, and ended on October 12, 2012. The Trial Court refused to grant Appellants' request for a "spoliation of evidence" charge. The jury rendered a defense verdict. The Trial Court denied Appellants' JNOV and New Trial Motions. The sole appellate issue is whether the Trial Court should have given a "spoliation of evidence" charge to the jury. Appellants filed a timely appeal.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING APPELLANTS' JNOV AND NEW TRIAL MOTIONS GIVEN ITS FAILURE TO CHARGE THE JURY WITH SPOILIATION OF EVIDENCE.

A. Spoliation of Evidence and an Adverse Inference Charge

A trial court is required to charge the current and correct law. Burroughs v. Worsham, 352 S.C. 382, 392, 574 S.E.2d 215,220 (Ct.App. 2002). In Kershaw County Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 396 S.E.2d 369 (1990), the Supreme Court of South Carolina upheld a jury charge as follows:

[W]hen evidence is lost or destroyed by a party, an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party.

Id. at 394; 372

The Trial Court refused Appellants' request to charge the jury on the law of spoliation. Appellants' counsel requested that the Trial Court use the specific verbatim spoliation charge approved by the Supreme Court of South Carolina in Stokes v. Spartanburg Regional Medical Center, 368 S.C. 515 (Ct.App. 2006). In relevant part, Stokes spoliation of evidence charge states as follows:

I charge you that when a party fails to preserve material evidence for trial, it is for you to determine whether the party has offered a satisfactory explanation for that failure. If you find the explanation unsatisfactory, you are permitted - but not required - to draw the inference that the evidence would have been unfavorable to the party's claim.

Id. at 522.

The Stokes opinion applies to Appellants' classical "spoliation of evidence" case.

After reviewing Stokes, the Trial Court refused to give a spoliation of

evidence charge as follows:

THE COURT: All right. On the spoliation issue --

MR. CORBIN: Yes, sir.

THE COURT: I'm not going to give the spoliation charge.

MR. CORBIN: Yes, sir.

THE COURT: I will permit you to argue the lost bowel, not in the context of him either having something to do with it, because there's no evidence of it, and not in the context of it must have shown something bad or it should have would probably be here. You can -- you can argue that it is a further indication of his -- your theory --

MR. CORBIN: Yes, sir.

THE COURT: -- that's he just generally been lax in following up with the standards of care. In other words, he didn't even exercise diligence to follow up on that missing bowel.

MR. CORBIN: Yes, sir.

R. p. 885.

In addition, Appellants' counsel mentioned during the Directed Verdict stage that he would later request a spoliation charge as follows:

MR. CORBIN: At the appropriate time I would ask the Court to issue an spoliation charge.

THE COURT: But you've got to prove that he did it. You can't just say that it's lost and it must have been him. If -- it --

MR. CORBIN: Your Honor, it's my understanding under the spoliation case law that if a piece of evidence that is material to this case --

THE COURT: Uh-huh.

MR. CORBIN: Which in fact, the missing bowel is, that if it's missing, it was in his charge, he has an absolute right to explain to the

jury why it's missing and the jury might believe him. But the jury might also believe that, in fact, he never sent it to pathology.

THE COURT: Okay. But the jury -- the jury has to base a belief on something other than speculation. So we'll -- that's a jury charge issue.

R. p. 577.

The Trial Court's "spoliation of evidence" reasoning was wrong. The jury could reasonably believe that Dr. Williams never sent Mrs. Atkinson's small bowel specimen to the Pathology Lab which is consistent with the facts that (a) the hospital records never mentioned Dr. Williams sending Mrs. Atkinson's small bowel specimen to the Pathology Lab, (b) Dr. Williams failed to document in his Operative Note the length of small bowel he removed and the number and sizes of the perforations he caused during Mrs. Atkinson's first surgery, and (c) Dr. Williams did nothing to follow-up on the absence of a Pathology Report.

Appellants believe Dr. Williams intentionally concealed his violations of applicable standards of care. The reason no hospital record supports Dr. Williams is because he never sent several feet of Mrs. Atkinson's perforated small bowel to the Pathology Lab. The reason Dr. Williams never did anything to follow-up on Mrs. Atkinson's missing Pathology Report is because he never sent Mrs. Atkinson's small bowel specimen to the Pathology Lab. Accordingly, the Trial Court's refusal to charge the jury with spoliation of evidence was inconsistent with Stokes and constitutes grounds for reversal.

B. The Critical Importance of a Pathology Report

Dr. Williams testified that the standard of care required him to send Mrs.

Atkinson's small bowel segment to the Pathology Lab as follows:

Q The purpose of Pathology when a surgeon removes a patient's body part -- a significant body part, like the small bowel, you are required under the standard of care to send that to Pathology for testing for the patient's safety. Are you not?

A Yes, sir. Amongst other things. And that -- it was done. I was operating; it was passed off to other hospital employees who then processed that specimen. I -- the surgeons do not carry that and log in or present it to the Pathology Department, so...

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.

R. p. 628.

Dr. Williams testified he had no way to track the missing small bowel "that given day." However, the fact is that he never did anything to track Mrs. Atkinson's missing bowel. Dr. Williams' testimony continued as follows:

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.

R. p. 629.

Dr. Williams could not remember whether the missing bowel segment and the absence of a Pathology Report even upset him. If Dr. Williams knew the small bowel segment was not "missing," the absence of a Pathology Report would not upset him.

Oddly, Dr. Williams testified that no body parts were missing while also stating that there was no record of the Pathology Lab ever getting Mrs. Atkinson's small bowel segment.

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.

R. p. 629.

C. Dr. Williams agreed removal of twelve feet of Mrs. Atkinson's small bowel constitutes medical malpractice.

A Pathology Report of Mrs. Atkinson's missing small bowel specimen would have definitively proven Dr. Williams' negligence. During cross-examination, Dr. Williams admitted that, if a surgeon were to remove twelve feet of Mrs. Atkinson's small bowel during the first operation, it would be a gross violation of the standard of care as follows:

Q 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.

Q A bad one. Right?

A I -- it would be indiscriminate and it's a bad thing.

R. p. 627.

Accordingly, even Dr. Williams would have to agree that a Pathology Report of Mrs. Atkinson's missing small bowel segment was critical to proving her case.

Appellants contend Dr. Williams was negligent by too aggressively operating on Mrs. Atkinson's hostile abdomen. R. p. 89. During the initial portion of the first surgery, Dr. Williams started causing perforations in Mrs. Atkinson's small bowel. Dr. Williams should have stopped the operation to preserve Mrs. Atkinson's small bowel. Dr. Williams was negligent in continuing the surgery and causing numerous additional perforations in Mrs. Atkinson's small bowel. Dr. Williams improperly removed approximately twelve feet of Mrs. Atkinson's small bowel, causing her short bowel syndrome.

No piece of evidence would be more important in this case than a Pathology Report. In short, Appellants believe Dr. Williams knew that a Pathology Report of Mrs. Atkinson's missing small bowel specimen would have proven he was negligent under applicable standards of care. Under the circumstances, Dr. Williams had a motive not to send Mrs. Atkinson's small bowel specimen to the Pathology Lab.

D. The Trial Court should have followed Stokes.

Dr. Williams could not remember how much of Mrs. Atkinson's small bowel he removed during the first surgery. Dr. Williams' Operative Report notes he caused perforations in Mrs. Atkinson's small bowel. R. p. 991. But, Dr. Williams could not remember how many perforations he caused. Dr. Williams' failure to mention the length of small bowel he removed and the number of perforations he caused in the Operative Report, the missing small bowel, and the absence of a critical Pathology Report could all be merely coincidental and fortuitous to Dr. Williams' defense. On the other hand, maybe the events were intentionally caused by Dr. Williams in anticipation of a medical malpractice case. A classical jury decision such a factual dispute presents. Under the circumstances, the Trial Court was required to grant Appellants' spoliation charge request.

The facts in Stokes are similar to the facts in this case. For example, the Stokes case involved two pieces of medical evidence missing from the patient's hospital records: (a) the results from a blood test, and (b) a nurse's chart detailing the patient's vital signs on the evening of his death. In Stokes, the defendant rebutted

evidence of the missing records by suggesting that the blood drawn from the patient's artery on the night of his death may never have been sent to the Pathology Lab for testing. As for the missing nursing chart, the defendant suggested it may have been lost during the confusion of the patient's code. The Stokes opinion, in relevant part, states as follows:

While the jury may well have accepted the hospital's explanations, it was also in its province to draw a negative inference from the hospital's failure to produce those pieces of evidence.

Id. at 521.

Like Stokes, Appellants proved that the indeterminate length of Mrs. Atkinson's perforated small bowel removed by Dr. Williams was missing. Dr. Williams speculated on the witness stand that perhaps a tech failed to deliver Mrs. Atkinson's small bowel to the Pathology Lab. R. p. 503. But, Palmetto Health's records indicated Dr. Williams never sent Mrs. Atkinson's bowel specimen to the Pathology Lab for examination. R. pp. 994 – 996. Although relevant and admissible as rebuttal testimony, Dr. Williams' explanation was implausible given (a) no hospital records or testimony from anyone else supported his claim, (b) the Pathology Lab record indicated Dr. Williams sent only Mrs. Atkinson's ovary, fallopian tube, and cysts to the Pathology Lab for analysis, not Mrs. Atkinson's small bowel specimen, and (c) Dr. Williams never did anything to follow-up on Mrs. Atkinson's feet of perforated missing bowel. R. p. 668.

Stokes approved a spoliation of evidence and negative inference charge as follows:

I charge you that when a party fails to preserve material evidence for trial, it is for you to determine whether the party has offered a satisfactory explanation for that failure. If you find the explanation unsatisfactory, you are permitted — but not required — to draw the inference that the evidence would have been unfavorable to the party's claim.

Id. at 522.

Was it within the province of the Atkinson jury to draw a negative inference from Dr. Williams' failure to send Mrs. Atkinson's perforated small bowel which he surgically removed during the first operation? The Trial Court should have given the Atkinson jury the spoliation charge the Court approved in Stokes. In addition, the Trial Court's charge was deficient since it "made no mention of missing evidence at all." Stokes states as follows:

[T]his language reflects the law of South Carolina and should have been charged based on the evidence presented in this case. While we recognize that no exact language is required, the **charge as given made no mention of missing evidence at all.**

Id. at 522 (emphasis supplied).

The Trial Court's jury charge was totally silent on the issue of missing evidence.

E. The Trial Court's failure to give a spoliation charge was prejudicial.

Under Stokes, the Trial Court's failure to charge on spoliation of evidence was prejudicial to Mrs. Atkinson as follows:

In addition to being erroneous, we find the failure to charge on "spoliation of evidence" was prejudicial to Appellant. Appellant's malpractice claim against the Hospital hinged on the jury believing Stokes died from lack of oxygen rather than from a sudden and unexpected heart attack. Both pieces of evidence the Appellant alleges are missing would have helped determine how Stokes died. Thus, it was crucial to Appellant's case that the jury know it could draw a negative inference from the Hospital's failure to produce those

important pieces of evidence. We therefore find the Appellant was prejudiced by the trial court's failure to instruct the jury on "spoliation of evidence." See, e.g., Baker v. Weaver, 279 S.C. 479, 309 S.E.2d 770 (Ct.App.1983) (finding trial court's erroneous jury charge prejudicial where requested instruction involved a substantial feature of the case).

Id. at 522.

In short, a Trial Court must charge the current and correct law. Burroughs v. Worsham, 352 S.C. 382, 392, 574 S.E.2d 215,220 (Ct.App. 2002). Would a jury charge on the law of spoliation have made a difference in the jury verdict in Mrs. Atkinson's case? Would it have made a difference if the jury knew the law allowed an adverse inference against Dr. Williams for the missing unknown quantity of feet of Mrs. Atkinson's perforated small bowel? Could a reasonable jury find that Dr. Williams knew that, if he sent Mrs. Atkinson's small bowel segment to the Pathology Lab, there would be a permanent and definitive Pathology Report detrimental to his defense? A standard spoliation of evidence jury charge would have given an important part of Appellants' case legal significance.

Appellants tried to make an effective argument about how much of Mrs. Atkinson's small bowel Dr. Williams removed during the first surgery. R. p. 616 and 877. Trying to effectively quantify the length of Mrs. Atkinson's small bowel segment removed during her 1995 Byerly Hospital abdominal operations was difficult and ineffectual given unavailability of records more than ten years old. Trying to effectively quantify the length of Mrs. Atkinson's small bowel segment Dr. Williams removed during her first surgery at Palmetto Health was difficult and ineffectual given unavailability of a Pathology Report. Dr. Williams testified that

a Pathology Report is the best record for a specimen presented. R. p. 622. Under the circumstances, it was grossly unfair for the Trial Court to refuse to charge the jury about spoliation of evidence.

F. Even a defense expert witness could not “pin down” Dr. Williams about the missing bowel.

Dr. Williams’ April 25, 2007, operative report failed to indicate both (a) how much small bowel he actually removed from Mrs. Atkinson during his first surgery, and (b) how he reattached her small bowel after removing an unknown portion of it. Even Dr. Williams’ expert witness prepared a pre-trial report that noted Dr. Williams needed to be “pinned down” for failing to document Mrs. Atkinson’s missing bowel. Matthew F. Kohler, M.D. (“Dr. Kohler”), a board-certified Gynecological Oncology defense expert witness, considered the lack of an indication of the amount of small bowel Dr. Williams removed and the failure to describe the repair technique to be significant “5 star” problems. In fact, Dr. Kohler testified during cross-examination about his hand-written notes listing several significant problems involving Dr. Williams’ treatment of Mrs. Atkinson. R. pp. 790 and 1010.

Dr. Kohler testified his notes indicated the important need to “pin down” and get answers from Dr. Williams involving several problem areas, including the missing bowel as follows:

Q Would you please read verbatim starting with the first issue that you had in this case?

A Okay. Number one, review of consents, particularly pertaining to surgeries, number one and number two, parenthesis, i.e.,

Williams end parenthesis. And number two, what happened to the bowel resected in surgery number one? It never appears on the Path Report and Williams doesn't mention reanastomosis per se.

Q If I may, please. And you had underlined, what happened to the bowel. Or did you underlined something later? This is just a...that you crossed off?

A I have --

Q Oh, I'm sorry. The part of the message that's underlined. Please continue.

A Yeah. It says, nightmare scenario, underlined. He got distracted and didn't finish the resection of the reanastomosis. I'll -- we'll come back to that if I get an opportunity.

R. p. 790.

Q And you needed to pin Dr. Williams -- or you said pin Williams down. What happened to the bowel? Did you ever find out?

A No.

R. p. 792.

Dr. Kohler also testified that, when a pathology specimen is rarely lost, the normal procedure would be to "backtrack" and find it. R. p. 804. In addition, Dr. Kohler affirmed the fact that Dr. Williams never "backtracked" to find Mrs. Atkinson's missing small bowel segment as follows:

Q Any evidence he backtracked?

A I have no evidence in that regard.

R. p. 806.

There is nothing in the record to indicate Dr. Williams did anything to "backtrack"

several feet of Mrs. Atkinson's perforated small bowel. A jury could reasonably conclude after given a proper spoliation charge that Dr. Williams never gave Mrs. Atkinson's several feet of perforated small bowel segment to anyone.

Just as no one else, Dr. Kohler could not state how much of Mrs. Atkinson's small bowel Dr. Williams removed during the first surgery:

Q How much was it, you don't know, correct?

A I can't -- I can't say.

R. p. 805.

Since no one knows (not even Dr. Williams or his expert witness) the length and condition of Mrs. Atkinson's small bowel Dr. Williams removed during the first surgery, there would be no more important document than the Pathology Report.

If it were possible to quantify the length of Mrs. Atkinson's small bowel segment Dr. Williams removed during her first surgery, why would no one for the defense do so? If it were possible to quantify the number of perforations Dr. Williams caused in Mrs. Atkinson's small bowel during the first surgery, why would no one for the defense do so? Dr. Williams' spoliation of evidence made it essentially impossible for Mrs. Atkinson to prove her case. Under the circumstances, the Trial Court erred in failing to give the jury a spoliation of evidence charge.

G. The Trial Court erred in denying Appellants' spoliation charge.

The only documentation in the record indicates that Dr. Williams removed from Mrs. Atkinson's small bowel an indeterminate length of feet with an

indeterminate number and size of perforations. The only proof that Dr. Williams did not cause the bowel specimen to become missing is his uncorroborated testimony that he gave the several feet of small perforated bowel too an unknown surgical tech for delivery to the Pathology Lab. A reasonable person could conclude that the reason for Dr. Williams' failure to properly document such a large, perforated small bowel specimen on the standard Pathology Transfer form, was because he simply never gave the specimen to anyone else. The logical reason for Dr. Williams' total failure to backtrack several feet of missing small bowel makes little sense unless he knew he never sent the specimen to the Pathology Lab. If Dr. Williams intentionally decided to make Mrs. Atkinson's critical small bowel specimen missing to conceal his medical negligence, why would he back track and draw attention to the missing specimen?

If Dr. Williams' testimony is true, why would he include Mrs. Atkinson's cysts and fallopian tubes and strangely fail to indicate he was also sending "lots" of "feet" of Mrs. Atkinson's perforated small bowel for a pathological examination? If it is that easy in South Carolina to avoid a spoliation adverse inference charge, a truly culpable party could state he gave the missing evidence which he can no longer even accurately describe to someone else without any corroborating evidence. Dr. Williams could not remember the name of the nurse to whom he says he gave Mrs. Atkinson's several feet of perforated small bowel. R. p. 503. Dr. Williams exercised his right to explain Mrs. Atkinson's several feet of missing perforated bowel by blaming a surgical tech. The Trial Court committed reversible

error in not allowing Mrs. Atkinson to level the playing field and attain a rebuttable adverse inference. The Trial Court protected Dr. Williams' rights and failed to do so for Mrs. Atkinson. The Court ought to grant the Appellants the relief they seek on appeal.

H. The Importance of Mrs. Atkinson's Missing Bowel

Mrs. Atkinson would normally have between sixteen and twenty feet of small bowel absent any resections. During cross-examination, Dr. Williams admitted that, if a surgeon were to remove twelve feet or more of Mrs. Atkinson's small bowel during the first operation, it would be a gross violation of the standard of care as follows:

Q 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.

Q A bad one. Right?

A I -- it would be indiscriminate and it's a bad thing.

R. p. 627.

No one contradicted at trial the fact that Mrs. Atkinson lost an unknown amount of small bowel during Dr. Williams' first surgery. Dr. Williams and none of the physicians who testified for the defense at trial knew the length of Mrs. Atkinson's small bowel segment that was removed and lost involving the first surgery. If Dr. Williams removed twelve feet of Mrs. Atkinson's bowel during the first surgery, he

admits his conduct would have been a serious violation of the applicable standard of care. Since Mrs. Atkinson's bowel specimen never got to pathology, it is difficult to prove how much bowel Dr. Williams removed. A jury with an appropriate spoliation charge could have reasonably concluded that Dr. Williams made proof of his medical negligence difficult on purpose.

Dr. Williams did nothing to follow-up on Mrs. Atkinson's missing bowel specimen. A jury with an appropriate spoliation charge could have reasonably inferred that Dr. Williams failed to follow-up, because he knew there was no bowel specimen ever sent to Pathology. In addition, why would Dr. Williams want to raise an issue about the missing bowel specimen if he never wanted Pathology to receive and examine Mrs. Atkinson's bowel specimen? A jury could conclude that Dr. Williams did not want a pathologist to examine and include in a Pathology Report twelve feet of bowel he removed due to numerous perforations which he caused during Mrs. Atkinson's first surgery.

In addition, Dr. Bailey testified that Dr. Williams violated applicable standards of care by failing to indicate in his records how much of Mrs. Atkinson's small bowel he perforated and removed as follows:

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.

R. p. 91.

The Trial Court allowed Dr. Williams to rebut Mrs. Atkinson's potential spoliation charge by testifying he gave her small bowel specimen to an unnamed surgical tech. However, the Trial Court failed to allow Appellants to "even the playing field" by asserting another reasonable explanation for Mrs. Atkinson's missing small bowel. Without a spoliation charge, the jury really had no guidance from the Trial Court about the legal significance of missing evidence important to the Plaintiffs in proving their case. Since the jury charge was void of any reference to missing evidence, it would be reasonable to assume the jury had the belief that the missing bowel really had no legal significance at all and was not worthy of jury deliberation. The absence of a spoliation jury charge effectively emasculated Appellants' ability to prove Dr. Williams violated the standards of care.

Did Dr. Williams elect not to do any follow-up or documentation of several feet of Mrs. Atkinson's missing perforated small bowel specimen because he knew

it was not really missing? Dr. Williams testified that a physician's removal of twelve feet of small bowel would constitute a "bad" deviation from the applicable standard of care. A jury could reasonably conclude that Dr. Williams knew sending several feet of Mrs. Atkinson's perforated small bowel to the Pathology Lab could cause him some problems down the road. Dr. Williams addressed the potential litigation problem by destroying critical evidence in his possession. Such misconduct is a classical definition of spoliation of evidence. All of the records indicate Dr. Williams never sent Mrs. Atkinson's small bowel specimen from the first surgery to the Pathology Lab despite his absolutely uncorroborated testimony. A jury given a spoliation charge could resolve these factual issues and reasonably conclude that the Pathology Lab never got Mrs. Atkinson's small bowel specimen because Dr. Williams never sent it on purpose. No one should expect the jury to understand the significance of missing evidence without some guidance from the Trial Court and an adverse inference charge.

In the Atkinson case, the Trial Court refused Appellants' request to charge the jury on the law of spoliation. In fact, Appellants' counsel requested that the Trial Court use the specific verbatim spoliation charge approved by the Supreme Court of South Carolina in the case of Stokes v. Spartanburg Regional Medical Center, 368 S.C. 515 (Ct.App. 2006). The Trial Court reviewed the Stokes opinion and refused to give the jury charge on spoliation of evidence as follows:

THE COURT: All right. On the spoliation issue --

MR. CORBIN: Yes, sir.

THE COURT: I'm not going to give the spoliation charge.

MR. CORBIN: Yes, sir.

THE COURT: I will permit you to argue the lost bowel, not in the context of him either having something to do with it, because there's no evidence of it, and not in the context of it must have shown something bad or it should have would probably be here. You can -- you can argue that it is a further indication of his -- your theory --

MR. CORBIN: Yes, sir.

THE COURT: -- that's he just generally been lax in following up with the standards of care. In other words, he didn't even exercise diligence to follow up on that missing bowel.

MR. CORBIN: Yes, sir.

R. p. 885.

In fact, the Trial Court instructed Appellants' counsel not to even mention discuss the theory that Dr. Williams never sent Mrs. Atkinson's bowel specimen to the Pathology Lab in an effort to conceal his violations of applicable standards of care.

A Pathology Report of Mrs. Atkinson's missing small bowel specimen would have noted the approximate length and condition of Mrs. Atkinson's small bowel which Dr. Williams removed during his first surgery. Dr. Williams should have anticipated the first operation would involve a hostile abdomen more prone to perforations and extensive bowel resections. Appellants' experts testified that an important issue in this case was whether Dr. Williams violated applicable standards of care by even doing the first surgery given the significant risks of causing numerous bowel perforations and significant bowel loss. A Pathology Report of Mrs. Atkinson's missing bowel specimen would tend to prove or disprove

Appellants' positions that Dr. Williams negligently caused numerous perforations, needlessly removed approximately twelve feet of Mrs. Atkinson's small bowel, and caused Mrs. Atkinson's horrible Short Bowel Syndrome from which she suffers. In short, Appellants believe that Dr. Williams knew that a Pathology Report of Mrs. Atkinson's missing small bowel specimen would have proven he was negligent under applicable standards of care.

The Supreme Court of South Carolina approved the spoliation of evidence charge in Stokes as follows:

I charge you that when a party fails to preserve material evidence for trial, it is for you to determine whether the party has offered a satisfactory explanation for that failure. If you find the explanation unsatisfactory, you are permitted - but not required - to draw the inference that the evidence would have been unfavorable to the party's claim.

Id. at 522.

Was it within the province of the Atkinson jury to draw a negative inference from Dr. Williams' failure to send the Pathology Lab feet of Mrs. Atkinson's small bowel which he surgically removed during the first operation? The Trial Court should have given the Atkinson jury the spoliation charge the Court approved in Stokes. In Stokes, the appellant requested that the trial court provide the jury with the following spoliation of evidence and negative inference charge under the law:

I charge you that when a party fails to preserve material evidence for trial, it is for you to determine whether the party has offered a satisfactory explanation for that failure. If you find the explanation unsatisfactory, you are permitted — but not required — to draw the

inference that the evidence would have been unfavorable to the party's claim.

Id. at 522.

The South Carolina Supreme Court's opinion in Stokes further states:

[T]his language reflects the law of South Carolina and should have been charged based on the evidence presented in this case. While we recognize that no exact language is required, the **charge as given made no mention of missing evidence at all.**

Id. at 522 (emphasis supplied).

The Trial Court's jury charge was totally silent on the issue of missing evidence. In short, the Trial Court failed to charge the current and correct law. A standard spoliation of evidence jury charge would have given an important part of Appellants' case legal significance.

The defense could not dispute the fact that Dr. Williams removed a lot of Mrs. Atkinson's small bowel as follows:

THE COURT: Mr. McDow, is there any dispute that between the April surgery and the May surgery that, I think what Dr. Parker (sic) took out -- how much did he say he took out?

MR. MCDOW: He -- well, he said he doesn't know, he just knows how much was --

MR. CORBIN: Sir, the important thing is, when he got it and he looked at it and he said it was 70 to 80 centimeters, that's 2 and a half feet.

THE COURT: I understand that. So that's what Dr. Parker took out?

MR. CORBIN: No, that's what he began with.

THE COURT: Okay. That's what he began with. So how is the Defendant going to logically argue to this jury that between April and when Dr. Parker got there that Dr. Williams didn't remove a

substantial portion of the small intestine? Can you even dispute that? I mean, that's the -- that's the reality.

MR. MCDOW: Right. I mean, I don't dispute that.

R. p. 846.

The Trial Court's "indisputable" acknowledgment that Dr. Williams "left" Mrs. Atkinson's with thirty inches of small bowel is only a portion of the argument. The more important issue is "how much" of Mrs. Atkinson's small bowel did Dr. Williams remove during the first surgery. Dr. Williams admits removal of twelve feet of small bowel constitutes medical malpractice. If Mrs. Atkinson's small bowel which Dr. Williams removed would have gotten to the Pathology Lab, no one would have to guess how much small bowel Dr. Williams removed.

The Trial Court stated Dr. Williams had a "problem" as follows:

THE COURT: You've got -- the defendant has a problem. Frankly, we wouldn't be here if there was evidence of that. But it's not his fault you don't know how much you started with in April. That's -- that's just the passage of time. Byerly's records, Carolina Pines' records, through no fault of anybody's, they don't exist.

MR. CORBIN: That was an issue raised in the defense. Nobody knows how much was taken out.

THE COURT: But the question is, he's not responsible for what was taken out. He's responsible for leaving her with so little. Regardless of how much she had when he started.

R. p. 848.

The Trial Court's reasoning was flawed. Dr. Williams' negligence was based upon "not leaving her with so little," but unnecessarily removing so much. Appellants were entitled to a spoliation jury charge. The Trial Court's failure to do so

constitutes reversible error.

CONCLUSION

Appellants respectfully petition the Court to reverse the Trial Court's decisions to deny the Appellants' spoliation charge request and the Motion for Directed Verdict as to the issue of Informed Consent. Appellants ask the Court to enter judgment as to liability against Dr. Williams for professional negligence given his responsibility for causing Mrs. Atkinson's missing small bowel specimen and remand the case for a jury trial on the sole issues of actual and punitive damages. In the alternative, Appellants petition the Court to (a) remand the case with an entry of judgment as to liability against Dr. Williams for failing to attain Mrs. Atkinson's Informed Consent with a jury trial on the sole issues of actual and punitive damages, or (b) remand the case and order a new trial absolute with instructions to the Trial Court to charge the jury on the issue of spoliation.

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IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
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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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Appellants complies with the Rule 211(b), SCACR and the South Carolina Supreme Court Order dated August 13, 2007.

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