

Docket No. 05-4070

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TAJ BECKER, M.D.,	:	
	:	
Plaintiff below,	:	
Appellant,	:	
	:	An appeal from the United
V.	:	States District Court for
	:	the District of Utah
J. DENIS KROLL, et al.,	:	C.A. No. 2:02 CV 00024 DAK.
	:	
Defendants below,	:	
Appellees.	:	

**BRIEF FOR *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN
PHYSICIANS & SURGEONS FILED IN SUPPORT OF PLAINTIFF-
APPELLANT SUPPORTING REVERSAL OF THE JUDGMENT BELOW**

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May 31, 2005

CORPORATE DISCLOSURE STATEMENT
Taj Becker, M.D. v. J. Denis Kroll, et al., No. 05-4070

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* The Association of American Physicians and Surgeons makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations:

None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None.

3) If there is a publicly held corporation that is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None.

Dated: May 31, 2005

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STATEMENT OF IDENTITY, INTEREST AND SOURCE OF AUTHORITY TO FILE

The Association of American Physicians & Surgeons, Inc. (“AAPS”) is a non-profit national organization consisting of thousands of physicians in all specialties. Founded in 1943, AAPS is dedicated to defending the patient-physician relationship and the ethical practice of medicine. AAPS is one of the largest physician organizations funded virtually entirely by its physician membership. This enables it to speak directly on behalf of the ethical service of patients who entrust their care to the medical profession. AAPS files *amicus* briefs in cases of high importance to the medical profession, like this one. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914 (2000) (U.S. Supreme Court frequently citing AAPS submission); *United States v. Rutgard*, 116 F.3d 1270 (9th Cir. 1997) (reversal of a sentence as urged by an *amicus* brief submitted by AAPS).

AAPS and its members are particularly concerned about the chilling effect caused by retaliation against physicians who speak out. Free speech is important in all walks of life, but it is absolutely essential in connection with medical care. Nothing in federal or state law authorizes or confers immunity on those who maliciously act against a physician for expressing her opinion. Evidence in this case that the state filed unjustified criminal charges against a physician who spoke

out against prosecutorial conduct is troubling, and AAPS has a strong interest in defending its profession against this type of intimidation.

In addition, AAPS submits this brief to ensure that there will be legal accountability for malicious prosecutions that interfere with medical care for patients. Physicians should be able to care for indigent patients in the Medicaid program without being subjected to arbitrary and unjustified raids of their offices and baseless criminal prosecutions. It is already difficult enough to persuade physicians to accept the meager reimbursements under Medicaid without adding the risk of a baseless and vindictive prosecution. Preservation of professional integrity requires some legal accountability for retaliatory or malicious prosecutions.

BACKGROUND

In late 1998, Utah state officials demanded that board-certified neurologist Taj Becker, M.D., pay within two weeks \$107,000 in returns, fines and investigative costs or else be subjected to potential criminal prosecution, incarceration, loss of her medical license and bad publicity. “In his own words, [defendant-Appellee] Kroll testified that he informed Dr. Becker of the ‘parade of horrors’ and ‘how bad it could get’ if MFCU filed criminal charges.” *Becker v. Kroll*, 340 F. Supp. 2d 1230, 1234 (D. Utah 2004). There was no basis for this demand or for the criminal prosecution that followed when Dr. Becker refused to capitulate, and eventually the prosecution was dropped. At issue on appeal is whether the state officials are legally accountable for instituting a baseless prosecution in these circumstances. AAPS maintains here that Section 1983 of Title 42 of the United States Code allows redress for the damages.

The foregoing amounted to a shake-down of Dr. Taj Becker, as part of a general strategy by the Utah Medicaid Fraud Control Unit (MFCU) against rural physicians. The MFCU repeatedly raided rural physicians’ offices in front of waiting rooms filled with patients, simply to obtain billing records easily obtainable through a subpoena. Often the investigations were groundless fishing

expeditions. In this case, the criminal subpoena used to seize Dr. Becker's records lacked probable cause as required by the Fourth Amendment.

In early 2000, the Salt Lake City Deseret News reported that:

The [MFCU] came under fire a month ago, following complaints by rural physicians about investigators using heavy-handed tactics in probing allegations of Medicaid fraud. Doctors say investigators storm their offices unannounced, demanding patient records in front of full waiting rooms. They also say they're treated like criminals in drug busts.

Dennis Romboy, "Lawmakers Want Fraud Unit Explained," Salt Lake City Deseret News B05 (Jan. 12, 2000). Legislators then questioned whether MFCU even had the power to do this. "The more you [defendant-Appellee Denis Kroll] speak, the more convinced I am your department has not been passed through this Legislature to be put into existence," said Rep. David Ure, R-Kamas, committee co-chairman[, adding that unless authority is found] 'I guarantee in the next (legislative) session that money is going to be cut. You don't have authority.'"

The practice of MFCU in making demands for payments by physicians "or else" typifies an unchecked motive for overzealous prosecutions. "[F]inancial incentives arguably pose [a] threat to prosecutorial discretion." Dayna Brown Matthew, "Tainted Prosecution of Tainted Claims: The Law, Economics, and Ethics of Fighting Medical Fraud Under the Civil False Claims Act," 76 Indiana L. J. 525, 580 (2001). Section 1983 provides the only meaningful restraint on the

powerful financial incentive to prosecute earnest physicians in an unjustified manner.

Dr. Becker was among a group of six physicians simultaneously investigated by the MFCU, two of whom were neurologists in addition to Dr. Becker who coded their bills in the same manner as she did. But only she publicly resisted the improper demands of the State. Only she filed a notice of claim against the MFCU and only she spoke out publicly about the baseless demands.

The reaction by the state officials was swift and vindictive. They destroyed her practice by filing criminal charges against only her and even binding her over at a hearing. The criminal action was filed just hours after Dr. Becker's husband testified before the Utah Legislature about abusive practices of the MFCU. The criminal case was completely baseless and ultimately dismissed with prejudice, but the devastating effects were very real.

There is a compelling public policy need to deter irresponsible prosecutions, particularly when they target someone like Dr. Becker who speaks out in favor of reform. AAPS, representing thousands of physicians nationwide and many in Utah, has witnessed a growing number of baseless prosecutions of private practitioners for alleged billing fraud. Often, as here, the physician faces professional ruin if she does not cave in to groundless demands. Hundreds or

thousands of patients suffer when their physician is distracted and even taken away from them by a misplaced criminal action. Without legal accountability to deter prosecutorial misconduct, the integrity of the medical and legal systems suffers. The chilling effect is simply too great to allow abuses to continue.

In effect and perhaps by design, these *in terrorem* Medicaid prosecutions cause physicians to abandon Medicaid patients in droves. That saves the State money by depriving care from Medicaid patients, particularly in rural areas. “Gunnison Valley Hospital administrator Greg Rosenvall ... expressed concern about what he called the Medicaid fraud unit’s ‘abusive tactics’ in a Nov. 8 letter to the Attorney General’s Office. A significant number of the hospital’s medical staff don’t intend to sign new contracts to provide Medicaid after January 2000, he said. ‘This alarming development,’ he wrote, ‘has placed Gunnison Valley Hospital’s ability to provide emergency care services at risk.’” Dennis Romboy, “Doctor Charged with Fraud,” Salt Lake City Deseret News B05 (Dec. 12, 1999).

While the State may frighten Medicaid physicians with baseless prosecutions, and thereby drive them away from the Medicaid program at the expense of indigent patients, the State must remain liable for damages that malicious prosecutions cause.

ARGUMENT

The chilling effect of overzealous prosecution against those who speak out is very real, and this appeal starkly illustrates the injustice. Dr. Becker resisted an unjust demand by the State and exercised her legal rights to defend herself and continue to serve destitute patients through the Medicaid program. In return, the State filed a baseless criminal action against Dr. Becker and bound her over for trial.

The State's message was clear: those who dare to speak out will face devastating consequences to their own careers. The resultant chilling effect undermines and deters much-needed improvements in the funding and delivery of quality medical care. Physicians and other caregivers should not fear losing their reputation or careers when they speak out against wrongful actions. The public relies almost entirely on the medical profession to serve the interests of patients in uncovering, addressing and improving the quality of medical care. Physicians are duty-bound by medical ethics to be vocal in addressing injustices. Appellant Dr. Becker should not suffer for exercising her constitutional rights.

Appellees-Defendants should not be able to escape legal accountability for their wrongdoing by asserting that Dr. Becker was never actually incarcerated. As recognized by Supreme Court Justices Ginsburg and Kennedy, a violation of one's

rights under the Fourth Amendment can surely occur without actual imprisonment. The torment of a criminal prosecution, and particularly a malicious one, is sufficient to trigger constitutional protections against vindictive state action.

Dr. Becker is entitled to her right to jury trial on her claims of retaliation and malicious prosecution, and the decision below should be reversed.

I. APPELLANT TAJ BECKER HAS A VALID CLAIM FOR RETALIATION IN VIOLATION OF HER FIRST AMENDMENT RIGHTS.

“Any form of official retaliation for exercising one’s freedom of speech, including prosecution, threatened prosecution, bad faith investigation and legal harassment, constitutes an infringement of that freedom.” *Worrell v. Henry*, 219 F.3d 1197, 1212 (10th Cir. 2000), *cert. denied*, 533 U.S. 916 (2001).

The court below recounted the advocacy of Dr. Becker and her husband as follows:

Dr. Becker and her husband asserted considerable political pressure on MFCU through testimony before legislative committees and letters to senators, the Governor, the Attorney General, media, and others. On or about January 11, 2000, a criminal complaint was filed against Dr. Becker on the same day Dr. Becker’s husband, A. Fred Becker, was testifying before a state legislative committee about MFCU’s alleged prosecutorial abuses. Sgt.

Wright did not make the decision as to whether or not to prosecute Dr. Becker, but he did sign the information and affidavit used to charge Dr. Becker. Shortly after the criminal charges were filed, Sgt. Wright was transferred out of MFCU to a different department although he later testified at Dr. Becker's preliminary hearing.

340 F.Supp.2d at 1234.

Dr. Becker expressed her view that MFCU lacked expertise, qualification and truthfulness. Dr. Becker's exposure of the MFCU's misconduct led to increased scrutiny of its operations, and apparently prompted it to take retaliatory action against her in the form of a baseless criminal prosecution. This violated her constitutional rights under the *Worrell* precedent. She was the only physician out of six who was singled out for this unjustified prosecution.

Speaking out about medical issues is of obvious public concern, and plainly constitutes a protected First Amendment speech. Physicians should be encouraged to express views about their profession and the regulation by the State of it. Dr. Becker exercised her First Amendment rights to speak out against improper governmental action by the State, which responded with a frivolous criminal prosecution. A starker violation of her First Amendment rights is difficult to imagine.

The First Amendment should fully protect Dr. Becker against retaliation for her speech. In the employment context, it is well-established that the State cannot retaliate against someone for his (non-disruptive) speech. *Baldassare v. New Jersey*, 250 F.3d 188 (3rd Cir. 2001). In *Baldassare* the plaintiff, a law enforcement investigator, was demoted and eventually fired after he helped conduct an investigation into criminal allegations against two members of the Prosecutor's Office. *Id.* at 192-93. The district court had granted summary judgment to the defendants on the plaintiff's claim for violation of his rights by not allowing "him to exercise his freedom of speech in speaking out about various public issues." *Id.* at 194 (quotations omitted). On appeal, the Court reversed by holding "that Baldassare's expression in his investigation is constitutionally protected." *Id.* at 200. There, as here, the plaintiff's comments "involved a matter of public concern" and thus "the state has failed to establish its interest outweighed its employee's." *Id.* Qualified immunity did not apply because "as of 1982 the law was 'clearly established' that a public employee could not be demoted in retaliation for exercising his rights under the first amendment." *Id.* at 201.

Supreme Court teachings fully support Dr. Becker's claim. In *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) a high school teacher was fired from his job by the defendant after he sent a letter to a newspaper critical of the defendant's past

handling of proposals to raise more money for the schools. *Id.* at 564. The U.S. Supreme Court held that the plaintiff's free speech rights were violated by the Board's actions. *Id.* at 565. The Court held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." *Id.* at 574. The Court discussed the importance of balancing the employee's interests "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. Similarly, the Appellees violated the free speech rights of Dr. Becker in retaliating against her. *See also Czurlanis v. Albanese*, 721 F.2d 98 (3rd Cir. 1983) (allowing claim for retaliation in the employment context).

Unfortunately, retaliation against physicians in the employment context is all too familiar. Dr. Scott Plantz published a study of about 400 physicians in a 1998 edition of the *Journal of Emergency Medicine*. He found that almost 1 in 4 of roughly 400 physicians who responded to his survey had been terminated or threatened with termination for reporting problems with patient care. Steve Twedt of the Pittsburgh Post-Gazette has reported on the same problem in his series "The Cost of Courage." His articles demonstrated the pervasiveness of this problem

nationwide, describing in detail the experiences of 25 physicians and a nurse, who suffered from actions adverse to their careers after they tried to improve care at their respective institutions.

The need for redress is even more compelling in the case of retaliatory prosecution, as in the case of Dr. Becker. Patient's lives can be lost in rural areas when physicians are abruptly removed or severely distracted. In addition, promoting quality medical care depends on protecting physicians' First Amendment rights. The State should be held legally accountable for destroying those who speak out.

Courts are becoming increasingly sensitive to retaliation against physicians. In *Mangieri v. DCH Healthcare Authority*, the Eleventh Circuit held that the plaintiff medical doctor "is not barred . . . from asserting claims for the alleged violation of his First Amendment rights in a suit under § 1983." 304 F.3d 1072, 1076 (11th Cir. 2002). In that case, plaintiff "began receiving complaints from the Authority regarding the quality of anesthesia services provided" by his company after he "opposed a proposal by the Authority." *Id.* at 1073-74. Subsequently, the defendant [Authority] told the plaintiff that they would not renew his contract when it expired at the end of that year. *Id.* at 1074. In *Jones v. Memorial Hosp. System*, the plaintiff, a nurse employed by the defendant, wrote an article which

was printed in a local paper “critically describing the conflict between the wishes of terminally ill patients and their families and the orders of the attending physicians.” 677 S.W.2d 221, 223 (Tex. App. 1 Dist. 1984). After the hospital fired her, the plaintiff brought an action against them for infringing her free speech rights under the Texas Constitution. *Id.* The Court looked to “federal first amendment cases for guidance.” *Id.* at 224. The Texas Court stated that “the plaintiff may still assert her claim for reinstatement if the hospital’s decision was grounded upon the plaintiff’s exercise of her constitutionally protected first amendment freedom of speech.” *Id.* at 225. Since the hospital was technically privately owned, the Court remanded the case to determine whether the state action doctrine applied to the hospital, which is not in dispute here. *Id.* at 225-26.

Dr. Becker spoke out against an injustice, and should not be subjected to retaliation as a result. The dismissal of her claim should be reversed here.

II. THE TENTH CIRCUIT SHOULD ADOPT JUSTICE GINSBURG'S VIEW THAT SEIZURE CAN OCCUR WITHOUT INCARCERATION.

The criminal prosecution of Dr. Becker was a seizure of her person by compelling her to appear in court proceedings, obey travel limitations, and live under a shadow of stigma and doubt. Actual incarceration is not a necessary element of a seizure; indeed, a brief actual incarceration can be less burdensome than an intimidating criminal prosecution that becomes well-known in the victim's community. Prosecutors turned Dr. Becker's life upside-down with their unjustified criminal action against her. This, and the taking of her records without probable cause, constituted a seizure for the purposes of the Fourth Amendment.

“A person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip. He is required to appear in court at the state's command. He is often subject ... to the condition that he seek formal permission from the court (at significant expense) before exercising what would otherwise be his unquestioned right to travel outside the jurisdiction. Pending prosecution, his employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense.” *Albright v. Oliver*, 510 U.S. 266, 278 (1994)

(Ginsburg, J., concurring). The severe limitation of Dr. Becker's unquestioned personal freedoms is enough to constitute a seizure.

The reasoning of Justice Ginsburg in her concurring opinion to *Albright v. Oliver* is particularly apt here. Justice Ginsburg observed that the Fourth Amendment protections against unlawful seizure of persons by the government should be interpreted as protecting citizens even when they are not physically imprisoned. This extension of the Fourth Amendment protects citizens against all false and malicious prosecutions even when they do not involve incarceration or sentencing. In the case at bar, the prosecutors falsely charged Dr. Becker with having committed criminal acts, and in effect seized her person by restricting her ability to function normally. By lacking good cause for this seizure, the State officials violated Dr. Becker's constitutional rights.

Common law has rejected the fiction that incarceration is somehow necessary for a seizure to exist. “[H]e that is bailed, is in supposition of law still in custody, and the parties that take him to bail are in law his keepers.” 2 M. Hale, *Pleas of the Crown* *124 (quoted in *Albright v. Oliver*, 510 U.S. 266, 278 (1994)) (Ginsburg, J., concurring). Thus, one does not have to be physically in prison to be considered as held by the government. When this holding takes place under false and malicious accusations, it is an unreasonable seizure because there is no just

cause for it to take place. This Circuit has acknowledged the existence of this position in *Taylor v. Meacham*: “Justice Ginsburg’s concurrence suggests a theory under which a person is effectively ‘seized’ for constitutional purposes as long as a prosecution is pending.” 82 F.3d 1556, 1561 (10th Cir.), *cert. denied*, 519 U.S. 871 (1996). However, the Court did not pursue this line of thought further, as it was not applicable to the case then in question, as it is here.

Any involvement in a criminal proceeding inflicts serious financial costs on the accused, both in legal fees and in time lost. In most professions, income is directly related to time spent on the job; when the accused must spend a great amount of time either in court or arranging a defense (conferring with attorneys, seeking witnesses, etc.) his or her income may suffer a great deal. False prosecutions can thus impose a great deal of hardship on an innocent victim by distracting her from her livelihood.

A person under prosecution also loses a great deal of freedom of mobility; he or she is not only required to appear in court for long, drawn out proceedings, but also must beg permission of the government in order to travel beyond the bounds of the court’s authority. This limitation of travel resembles more the restrictions imposed upon a paroled felon than anything that a court should impose upon a presumably innocent defendant.

Members of the medical profession suffer especially from injuries to their reputation, because much of their business depends on word-of-mouth testimonials from patients. Considerable defamation can result merely through accusation, even if the charges are never proved. A false accusation can result in long-term damage to the victim's reputation that could mean a tremendous amount of business and income lost over the years. "[A] malicious prosecution, like a defamatory statement, can cause unjustified torment and anguish--both by tarnishing one's name and by costing the accused money in legal fees and the like." *Albright v. Oliver*, 510 U.S. 266, 283 (1994) (Kennedy, J., concurring).

Because of the immense damage caused by false prosecutions through seizures, it is necessary that victims have redress and there must be deterrence of future wrongdoing. It is essential that lawsuits for malicious prosecution be allowed, where malice is defined as the common law "ill will or spite" present here. *Murphree v. US Bank of Utah*, 282 F. Supp. 2d 1294, 1297 (D. Utah 2003) (quoting *Cox v. Hatch*, 761 P.2d 556, 560 n.3 (Utah 1988)). *See also Hilfirty v. Shipman*, 91 F.3d 573 (3rd Cir. 1996) (allowing an action for malicious prosecution to go forward).

The Tenth Circuit recognized the use of Section 1983 as a remedy for unconstitutional malicious prosecution in *Pierce v. Gilchrist*. "The Tenth Circuit

recognizes a cause of action under § 1983 for malicious prosecution if the prosecution is conducted in a way that implicates constitutional rights” *Becker v. Kroll*, 340 F. Supp. 2d 1230, 1239 (2004) (citing *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004)). Also, in *Taylor v. Meacham* this same Circuit stated, “[r]econciling these various cases, we conclude that our circuit takes the common law elements of malicious prosecution as the ‘starting point’ for the analysis of a § 1983 malicious prosecution claim, but always reaches the ultimate question, which it must, of whether the plaintiff has proven a constitutional violation. Following *Albright*, in the § 1983 malicious prosecution context, that constitutional right is the Fourth Amendment’s right to be free from unreasonable seizures.” 82 F.3d at 1561.

For these reasons, the Court should adopt the view that personal seizure can result from prosecution without incarceration, and that Section 1983 allows lawsuits against state officials who, through a malicious and unfounded prosecution, cause such seizures to take place.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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Dated: May 31, 2005

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Taj Becker, M.D. v. J. Denis Kroll, et al., No. 05-4070

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Dated: May 31, 2005

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The undersigned hereby certifies that on May 31, 2005, he caused the original and seven copies of the attached brief to be delivered by overnight commercial carrier to:

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