

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.	:	

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF BY THE  
ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS IN  
SUPPORT OF PLAINTIFF-APPELLANT SUPPORTING REVERSAL OF  
THE JUDGMENT BELOW**

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## **INTEREST OF *AMICUS***

The Association of American Physicians & Surgeons, Inc. (“AAPS”) is a non-profit national organization consisting of thousands of physicians in all specialties, including many in Utah. 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 AAPS 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) (Justice Kennedy frequently citing AAPS submission); *United States v. Rutgard*, 116 F.3d 1270 (9<sup>th</sup> 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 the medical profession against this type of intimidation.

In addition, AAPS has a strong interest in ensuring 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 an unjustified and vindictive prosecution. Preservation of professional integrity requires some legal accountability for retaliatory or malicious prosecutions.

This motion for leave to file the accompanying brief became necessary when Debra J. Moore, counsel for several of the Appellees, denied consent on July 21 for *amicus curiae* to file it.

## **REASONS FOR FILING *AMICUS CURIAE* BRIEF**

AAPS seeks to file the accompanying *amicus curiae* brief to bring to this Court's attention issues of enormous significance to medical care.

1. The chilling effect of overzealous prosecution against medical professionals who speak out is very real, and this appeal starkly illustrates the injustice. Board-certified neurologist Taj Becker, M.D., 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 of Utah filed a baseless criminal action against Dr. Becker and bound her over for trial.

2. The State's message was clear: those who dare to speak out will face devastating consequences to their own careers. The resultant intimidation 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, and the decision below should be reversed.

3. 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.

4. *Amicus* AAPS alerts this Court in particular to how the State of Utah demanded that Dr. 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 files its motion to argue that Section 1983 of Title 42 of the United States Code allows redress for the damages.

5. 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.

6. 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.'"

7. 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.

8. 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.

9. 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 without merit and ultimately dismissed with prejudice, but the devastating effects were very real.

10. 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.

11. 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).

12. While the State may frighten Medicaid physicians with these 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. “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 (10<sup>th</sup> Cir. 2000), *cert. denied*, 533 U.S. 916 (2001).

13. Speaking out about medical issues is of obvious public concern, and plainly constitutes protected First Amendment speech. Physicians should be encouraged to express views about their profession and its regulation by the State. 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.

14. Unfortunately, retaliation against physicians in the employment context is all too familiar. In one study, nearly 25% of physicians who reported concerns with patient care suffered threats to their jobs. Scott Plantz, M.D., et al., *Am. J. of Emerg. Med.* (Jan. 1998) (<http://www.aaem.org/medicaltrends/darkside.shtml>).

Steve Twedt of the Pittsburgh Post-Gazette has reported on the same problem in his series beginning Oct. 26, 2003, entitled “Cost of Courage.” (<http://www.post-gazette.com/pg/03299/234499.stm>). His articles show how retaliation occurs 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.

15. 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.

16. 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.

17. “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.

18. Justice Ginsburg’s reasoning 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. "[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).

19. 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]econiling 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." *Taylor v. Meacham*, 82 F.3d 1556, 1561 (10<sup>th</sup> Cir.), *cert. denied*, 519 U.S. 871 (1996).

20. For these reasons, this Court should allow *Amicus* AAPS to file its accompanying brief to urge this Court to hold 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

*Amicus* AAPS respectfully requests that its motion for leave to file the accompanying brief be granted.

Respectfully submitted,

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Dated: July 25, 2005

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on July 25, 2005, he caused the original and three copies of the attached motion to be delivered by overnight commercial carrier to:

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