After winning a frivolous medical malpractice case, a doctor’s thoughts often turn to revenge, historically the remedy of choice for wrongs unjustly inflicted. Because society’s greater need is for civil stability in such matters, the doctor’s only option is to file a lawsuit against the patient or his or her lawyer for malicious prosecution.

Such lawsuits were originally designed to provide a remedy for defendants wrongly charged with crimes, inasmuch as dire consequences could result from the malicious prosecution of innocent citizens by the state. This right to redress was later expanded to include civil lawsuits. However, because civil litigants suffer only loss of property and not loss of life or liberty, as they do in criminal prosecutions, civil actions for malicious prosecution are disfavored to promote free access to the court system without fear of retribution if such a case is lost.

Because of the unfavorable status of malicious prosecution, many states treat civil and criminal lawsuits equally and require doctors to prove that they have been arrested or have had their property seized in order for them to recover for damages. This is called the “English rule.” In such states, doctors lose, because only rarely in medical malpractice trials are doctors physically taken into custody for failure to comply with court orders, prevented from practicing medicine, or subject to confiscation of property. Yet under the English rule, nothing less will suffice to prove the case. Even “great indignity, embarrassment, humiliation, nervousness and inability to properly concentrate on [one’s] professional activities, interference with enjoyment of [one’s] normal daily life and family, emotional distress and upset caused by expending time and effort in defense of said action, and increased costs of insurance coverage for medical malpractice, [with] injury [to one’s] good name and reputation in the community,” as well as attorney fees,¹ are insufficient damages. Such injuries are considered normal consequences of lawsuits under the English rule, and they do not constitute special injury sufficient to recover through an action for malicious prosecution.

Fortunately, the majority of states follow the American rule, which does not require arrest of the person or seizure of property. Nevertheless, a doctor must still prove that (1) the underlying malpractice lawsuit was filed not only without justification but maliciously and (2) the doctor won the case. Justification—in legal terms, probable cause—is based entirely on what the lawyer knew when the lawsuit was filed, not on what was later discovered. Malice is inferred from the absence of probable cause, and whether the doctor won—in legal terms, a favorable termination—depends wholly on the outcome of the case.

With respect to the first requirement of probable cause, a doctor can win if he or she demonstrates that the attorney had no justification for filing a lawsuit. In one such case, a patient who suffered a massive heart attack at home was taken, unconscious, to the hospital, where the emergency room physician discovered that the patient also had a fractured shoulder. Despite the fact that the attorney reviewed the hospital records, which showed that the patient had arrived with the fracture, he sued the hospital on the theory that they had broken his client’s shoulder. He then took the radiologist’s and orthopedist’s depositions and confirmed they were called in only after the fracture had been discovered. Instead of dismissing the lawsuit, he amended it to name the doctors personally. The doctors contacted their malpractice carriers, and the defense counsel quickly obtained a dismissal without any mention of settlement or compromise. The doctors then sued the lawyer, and even though they had no out-of-pocket losses whatsoever from the malpractice suit, the appellate court upheld the jury’s verdict of $10,000 compensatory and $15,000 punitive damages against the lawyer.²

In a similar case in 1980, police officers placed a potentially suicidal patient in Siskiyou General Hospital on a 72-hour watch. She was subsequently transferred by her
personal physician from a locked room to a private room. That night, she hanged herself by the belt of her robe from the sprinkler system. The attorney for the decedent’s daughter accepted the daughter’s version of the facts, conducted no investigation or legal research, and only spoke briefly on the golf course with a doctor who “thought” the hospital might have been negligent. The attorney filed a lawsuit against the decedent’s personal physician with a Certificate of Merit, stating that he (the attorney) had spoken with a doctor knowledgeable about the relevant issues who agreed that the physician had been negligent. The appellate court stated that these facts showed a lack of probable cause for filing the lawsuit.³

Conversely, a physician in another case was sued by a patient who underwent an anterior cervical fusion that was performed by a different surgeon; the operation rendered the patient a quadriplegic. After the physician successfully moved for summary judgment, he sued the patient and her lawyer. Even though the physician had done nothing more than prescribe laxatives to the patient and refer her to the operating surgeon, probable cause is always determined by what the lawyer knew at the time he filed suit—which in this case included the prescription for laxatives and the doctor’s name listed under “Postoperative care.” Hospital personnel had told the lawyer that the physician had been present during the surgery, as he had been on other occasions when procedures were performed by the same surgeon. The court was also sympathetic to the fact that several doctors were involved and that the attorney had just 30 days before expiration of the statute of limitations. As a result, the appellate court found probable cause, reversed the jury’s award of $25,000 to the doctor, and dismissed his malicious prosecution action.⁴

Even in the absence of probable cause for filing a medical malpractice action, it is essential that the underlying medical malpractice action terminate favorably for the physician. A judgment on the merits after a trial is always a favorable termination; a compromise or settlement is never a favorable termination; voluntary withdrawal, abandonment by the plaintiff, or summary judgment for the doctor may constitute a favorable termination, depending on the circumstances. For instance, in a case in which a patient failed to oppose her doctor’s motion for summary judgment and then gave a voluntary dismissal under circumstances suggesting settlement negotiations between the lawyers, the Arizona Supreme Court decided that the doctor should be given a new trial to prove that the voluntary dismissal (1) was given because the lawyer knew the doctor was going to win and (2) was thus a favorable termination.⁵

Physicians generally do not have the time or resources to pursue actions for malicious prosecution, which malpractice insurers refuse to fund. Consequently, most frivolous lawsuits go unchallenged. Nevertheless, for the right case in the right jurisdiction against the wrong physician, a malicious prosecution lawsuit against a plaintiff’s attorney can be successful.

References

1. Moss v Blake, 1982 Ohio App. Lexis 11667 (Ohio 1982); Ayyildiz, MD v Kidd, 266 S.E.2d 108 (Va 1980) [costs, attorney fees insufficient].
2. Raine v Drasin, 621 S.W.2d 895 (Ky 1981).

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