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Wong v. Tabor: The Latest Word in Physician-Attorney Countersuits

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WONG V. TABOR: THE LATEST WORD IN PHYSICIAN-ATTORNEY COUNTERSUITS

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The recent increase in medical malpractice litigation has caught the attention of the general public, attorneys and physicians. Individuals legitimately injured as a result of malpractice can seek legal counsel in an attempt to insure compensation for any injuries sustained. Malpractice suits result. The frequent criticism expressed in the medical community is that such suits are often brought against any and all parties with little regard to actual liability. The physician's legal retaliation has always been a countersuit for malicious prosecution.

Wong v. Tabor[1], a 1981 Indiana Court of Appeals decision, is the latest word on the courts' current attitude toward physician-attorney countersuits. The *Wong* court redefined the essential elements necessary to prove malicious prosecution. *Wong v. Tabor* is an important decision for attorneys and physicians because the court established a standard for attorneys in determining probable cause to sue on behalf of their physician-clients. Most importantly, the *Wong v. Tabor* decision sends an ominous message to physicians contemplating retaliatory legal action.

In September of 1974, Attorney Glenn J. Tabor filed a suit on behalf of Mrs. Myrtle D. Privett, alleging medical malpractice against Dr. Samuel N.T. Wong, a Hammond physician, and others. Two years later, in 1976, Dr. Wong retaliated with a malicious prosecution action against Attorney Tabor. The facts of the medical malpractice case deserve consideration.

In early 1972, Dr. Wong hospitalized Mrs. Privett to determine the cause of her persistent headaches. Mrs. Privett's neurological examinations were essentially normal. Dr. Wong then thought that Mrs. Privett's headaches might be caused by her sinuses; consequently, he referred her to an ear, nose and throat specialist. Dr. Wong also rendered gynecological services to Mrs. Privett in April and June of 1972. He did not see her again as a patient. On September, 24, 1972, Dr. Alan J. Kaufman, Mrs. Privett's neurosurgeon, admitted Mrs. Privett to St. Margaret's Hospital in Hammond, In-

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1. Wong v. Tabor, ____ Ind. App. ____, 422 N.E.2d 1279 (1981).

diana. On September 28, 1972, Dr. Kaufman performed an anterior cervical fusion. Upon discharge from the hospital following the surgery, Mrs. Privett was a quadraplegic.

One month after the surgery, in November of 1972, Dr. Wong visited Mrs. Privett in the hospital and prescribed a laxative for her when she complained of constipation. Dr. Wong did not render any pre-operative treatment to Mrs. Privett for a neurological condition. He did not recommend the performance of neurosurgery to remedy Mrs. Privett's headaches, nor did he refer her to Dr. Kaufman. He did not participate in the surgery, or the post-operative care of Mrs. Privett, except for the treatment of her constipation mentioned above. Dr. Wong was not qualified to engage in neurosurgery. His name did not appear on the medical records until November of 1972, one month after the surgery, when he prescribed mineral oil and a soap suds enema for Mrs. Privett.[2]

Attorney Tabor, however, was told by Mrs. Privett's husband that Dr. Wong could have participated in the surgery and that he probably referred Mrs. Privett to Dr. Kaufman.[3] Attorney Tabor filed suit on behalf of Mrs. Privett against Dr. Wong and others on September 26, 1974. In October of 1974, Attorney Tabor voluntarily dismissed two physicians, and in October of 1975, Attorney Tabor settled with Dr. Kaufman and three other physicians. Dr. Wong, however, remained in the lawsuit.

Dr. Wong's attorney requested by letter, in October 1975, that Attorney Tabor voluntarily dismiss Dr. Wong since he had no part in the surgery that rendered Mrs. Privett a quadraplegic. Having received no response from Attorney Tabor, Dr. Wong's attorney filed a motion to dismiss for failure to comply with an order to answer interrogatories and moved for summary judgment. Eighteen months passed from the filing of the lawsuit before Dr. Wong's attorney was able to obtain a summary judgment for him in April of 1976. The suit was reported in the local newspapers, Dr. Wong's medical malpractice insurance premiums increased by thirty percent, he received less referrals, and his income decreased in the year following the filing of the lawsuit.

Dr. Wong sued Attorney Tabor and others for malicious prosecution in the month of May, 1976. Dr. Wong subsequently dismissed everyone from the lawsuit except Attorney Tabor, after having

2. *Id.* at 1282.
3. *Id.* at 1281.

determined that Attorney Tabor had the sole responsibility for determining who to name as defendants and who to retain as defendants in the malpractice action. The case went to trial in March of 1979, and the jury found for Dr. Wong and awarded $25,000 in damages. Attorney Tabor moved for judgment on the evidence, and the trial court granted the motion and set aside the jury's verdict. Dr. Wong appealed, but the Indiana Court of Appeals affirmed.

The opinion is the court's latest word on physician-attorney countersuits. The Court in *Wong v. Tabor* redefined the essential elements necessary to prove malicious prosecution. In an action for malicious prosecution, the plaintiff must show (a) that the defendant instituted or caused to be instituted, a prosecution against the plaintiff; (b) that the prosecution was instituted without probable cause; (c) that the defendant acted maliciously in instituting the action; (d) that the prosecution terminated in the plaintiff's favor; and (e) that the plaintiff was damaged by the action.[4] A substantial number of

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4. The following cases list the elements of the tort of malicious prosecution in various states. Although states variously divide the elements into categories, the ultimate requirements of the tort are largely identical.

Ala. - Wilson v. Brooks, 369 So. 2d 1221 (Ala. 1979).

Ariz. - Bird v. Rothman, ___ Ariz. App. ___, 627 P.2d 1097 (1981); Carroll v. Kalar, 112 Ariz. 595, 545 P.2d 411 (1976).

Cal. - Cowles v. Carter, 115 Cal. App. 3d 350, 171 Cal. Rptr. 269 (1981); Weaver v. Superior Court, 94 Cal. App. 3d 498, 156 Cal. Rptr. 745 (1979); Clark Equip. Co. v. Wheat, 92 Cal. App. 3d 503, 154 Cal. Rptr. 874 (1979); Bertero v. National Gen. Corp., 13 Cal. 3d 43, 529 P.2d 608, 118 Cal. Rptr. 184 (1975); Tool Research and Eng'r Corp. v. Henigson, 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975); Babb v. Superior Court, 3 Cal. 3d 841, 479 P.2d 379, 92 Cal. Rptr. 1979 (1971); Munson v. Linnick, 255 Cal. App. 3d 589, 63 Cal. Rptr. 340 (1967); Ferraris v. Levy, 223 Cal. App. 2d 408, 36 Cal. Rptr. 30 (1963); Masterson v. Pig'n Whistle Corp., 161 Cal. App. 2d 323, 326 P.2d 918 (1958).

Conn. - Vandersluis v. Weil, 176 Conn. 353, 407 A.2d 982 (1978).

D.C. - Morowitz v. Marvel, 423 A.2d 196 (D.C. 1980); Ammerman v. Newman, 384 A.2d 637 (D.C. 1978).

Fla. - Fee, Parker & Lloyd v. Sullivan, 379 So. 2d 412 (Fla. Dist. Ct. App. 1980).

Ga. - Taylor v. Greiner, 156 Ga. App. 663, 275 S.E.2d 737 (1980); Cooper v. Public Fin. Corp., 146 Ga. App. 250, 246 S.E.2d 684 (1978); Baranan v. Kazakos, 125 Ga. App. 19, 186 S.E.2d 326 (1971).

Idaho - Russell v. Chamberlain, 12 Idaho 299, 85 P. 926 (1906).

Ill. - Lasswell v. Ehrlich, 92 Ill. App. 3d 935, 416 N.E.2d 423 (1981); Stopka v. Lesser, 82 Ill. App. 3d 323, 402 N.E.2d 781 (1980); Balthazar v. Dowling, 65 Ill. App. 3d 824, 382 N.E.2d 1257 (1978); Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978); Lyddon v. Shaw, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); Kurek v. Kavanagh, Scully, Sudow, White & Frederick, 50 Ill. App.3d 1033, 365 N.E.2d 1191 (1977).

Ind. - Wong v. Tabor, ___ Ind. App. ___, 422 N.E.2d 1279 (1981).

Iowa - Bickel v. Mackie, 447 F. Supp. 1376 (N.D. Iowa 1978).

Kansas - Tappen v. Ager, 599 F.2d 376 (10th Cir. 1979); Nelson v. Miller, 227

jurisdictions further require that the plaintiff plead and prove a "special injury."[5] However, this is the minority position.

The plaintiff must first show that the defendant instituted, or

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Kan. 271, 607 P.2d 438 (1980).

Ky. - Raine v. Drasin, 621 S.W.2d 895 (Ky. 1981); Hill v. Willmott, 561 S.W.2d 331 (Ky. 1978).

La. - Junot v. Lee, 372 So. 2d 707 (La. Ct. App. 1979); Parks v. Winnfield Life Ins. Co., 336 So. 2d 1021 (La. Ct. App. 1976).

Md. - North Point Constr. Co. v. Sagner, 185 Md. 200, 44 A.2d 441 (1945).

Minn. - Hoppe v. Klapperich, 224 Minn. 224, 28 N.W.2d 780 (1947).

Mo. - Stafford v. Muster, 582 S.W.2d 670 (Mo. 1979).

N.J. - Ackerman v. Lagano, 172 N.J. Super. 468, 412 A.2d 1054 (1979).

N.Y. - Belsky v. Lowenthal, 62 A.D.2d 319, 405 N.Y.S.2d 62 (1978); Hoppenstein v. Zemek, 62 A.D.2d 979, 403 N.Y.S.2d 542 (1978); Kallman v. Burke, 47 A.D.2d 515, 363 N.Y.S.2d 588 (1975).

N.C. - Koury v. John Meyer of Norwich, 44 N.C. App. 392, 2961 S.E.2d 217 (1980).

Okl. - Anderson v. Canaday, 37 Okl. 171, 131 P. 697 (1913).

Or. - Erlandson v. Pullen, 45 Or. App. 467, 608 P.2d 1169 (1980).

Tenn. - Merritt-Chapman & Scott Corp. v. Elgin Coal, Inc., 358 F. Supp. 17 (E.d. Tenn. 1972); Peerman v. Sidicane, ___ Tenn. App. ___, 605 S.W.2d 242 (1980).

Tex. - Rodriguez v. Carroll, 510 F. Supp. 547 (S.D. Tex. 1981); Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App. 1979); Morris v. Taylor, 353 S.W.2d 956 (Tex. Civ. App. 1962).

Va. - Ayyildiz v. Kidd, ___ Va. ___, 266 S.E.2d 108 (1980).

5. D.C. - Morowitz v. Marvel, 423 A.2d 196 (D.C. 1980); Ammerman v. Newman, 384 A.2d 637 (D.C. 1978).

Ga. - Taylor v. Greiner, 156 Ga. App. 663, 275 S.E.2d 737 (1980).

Ill. - Lasswell v. Ehrlich, 92 Ill. App. 3d 935, 416 N.E.2d 423 (1981); Davis v. Ruff, 83 Ill. App. 3d 651, 404 N.E.2d 405 (1980); Balthazar v. Dowling, 65 Ill. App. 3d 824, 382 N.E.2d 1257 (1978); Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978); Panton v. Demos, 59 Ill. App. 3d 328, 375 N.E.2d 480; Lyddon v. Shaw, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); Kurek v. Kavanagh, Scully, Sudow, White & Frederick, 50 Ill. App. 3d 1033, 365 N.E.2d 1191 (1977).

Iowa - Bickel v. Mackie, 447 F. Supp. 1376 (N.D. Iowa 1978); Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978).

Md. - North Point Constr. Co. v. Sagner, 185 Md. 200, 44 A.2d 441 (1945).

N.J. - Ackerman v. Lagano, 172 N.J. Super. 468, 412 A.2d 1054 (1979).

N.M. - Farmers Gin Co. v. Ward, 389 P.2d 9 (N.M. 1964).

N.Y. - Belsky v. Lowenthal, 62 A.D.2d 319, 405 N.Y.S.2d 62 (1978); Hoppenstein v. Zemek, 62 A.D.2d 979, 403 N.Y.S.2d 542 (1978); Coopers & Lybrand v. Levitt, 52 A.D.2d 493, 384 N.Y.S.2d 804 (1976); Drago v. Buonagurio, 89 Misc. 2d 171, 391 N.Y.S.2d 61 (1977), *rev'd* 61 A.D.2d 282, 402 N.Y.S.2d 250 (1978), *rev'd* 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 911 (1978).

N.C. - Koury v. John Meyer of Norwich, 261 S.E.2d 217 (1980).

Ohio - Dakters v. Shane, 64 Ohio App. 2d 196, 412 N.E.2d 399 (1978).

Or. - O'Toole v. Franklin, 279 Or. 513, 569 P.2d 561 (1977); Erlandson v. Pullen, 45 Or. App. 467, 608 P.2d 1169 (1980).

Pa. - Triester v. 191 Tenants Ass'n., 272 Pa. Super. Ct. 271, 415 A.2d 698 (1979);

caused to be instituted, a proceeding against the plaintiff.[6] Attorney Tabor instituted a malpractice claim against Dr. Wong in 1974, thus, the first element of malicious prosecution was established in the *Wong* case.

Next, the plaintiff must show that the action was commenced without probable cause.[7] Dr. Wong asserted that Attorney Tabor did not have probable cause to institute the action against him. Dr. Wong further contended that even if there had been probable cause to initiate the suit against him, Attorney Tabor was liable for wrongfully continuing the matter once he discovered from the medical records that Dr. Wong did not participate in Mrs. Privett's surgery. Although most reported actions are brought against the attorney who filed the proceeding, the tort of malicious prosecution has never been limited to the wrongful *initiation* of a proceeding.[8] An attorney who takes an active part in the initiation or *continuation* of a civil proceeding against another is subject to liability if he acts without probable cause.[9] The court in *Wong v. Tabor* stated that the continuation of a proceeding involves different damages since the adverse publicity and expenses of retaining counsel are incidents of the initiation of proceeding.[10] A party has remedies, such as a motion for summary judgment, to avoid the consequences of further prosecution. The court in *Wong v. Tabor* concluded that the considerations upon which liability can be predicated for wrongfully continuing a proceeding are quite narrow and do not include a negligent failure to conduct discovery.[11] The court did not find Attorney Tabor liable for wrongfully continuing the suit against Dr. Wong.

The question of whether an attorney has acted with or without probable cause raises an issue of law to be determined by the court,

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DeLeo v. Munley, 261 Pa. Super. Ct. 90, 395 A.2d 957 (1978).

R.I. - Jacques v. McLaughlin, ___ R.I. ___, 401 A.2d 430 (1979).

Tex. - Rodriguez v. Carroll, 510 F. Supp. 547 (S.D. Tex. 1981); Butler v. Morgan, 590 S.W.2d 543 (Tex. Civ. App. 1979); Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App. 1979); Moiel v. Sandlin, 571 S.W.2d 567 (Tex. Civ. App. 1978).

Va. - Ayyildiz v. Kidd, ___ Va. ___, 266 S.E.2d 108 (1980).

6. *See supra* note 3.

7. *See supra* note 3.

8. *See, e.g.*, Nelson v. Miller, 227 Kan. 271, 607 P.2d 438 (1980); Friedman v. Dozarc, 83 Mich. App. 429, 268 N.W.2d 673 (1978). RESTATEMENT (SECOND) OF TORTS, § 674 (1971).

9. *Id.*

10. *Wong*, ___ Ind. App. ___, 422 N.E.2d 1279, 1290 (1981).

11. *Id.* at ___, 422 N.E.2d at 1290.

not the jury, according to the *Wong* court.[12] In other words, the judge determines whether a given set of facts justifies the prosecution of an action. The rule is different, however, when the *existence* of material facts is in dispute. In that event, as in the *Wong* case, the issue is whether the facts were actually known by the attorney at the time of the filing of the lawsuit.[13] That issue must be resolved by the trier of fact.

The *Wong* case, a case of first impression in Indiana, sets an important precedent for all states regarding the element of probable cause.[14] The *Wong* court established a test to determine what constitutes probable cause for an attorney to institute a lawsuit. The court held that the objective standard which should govern the reasonableness of an attorney's action in instituting litigation for a client is:

> whether the claim merits litigation against the defendant in question on the basis of the facts known to the attorney when the suit was commenced. The question is answered by determining that no competent and reasonable attorney familiar with the law of the forum would consider that the claim was worthy of litigation on the basis of the facts known by the attorney who instituted suit.[15]

The establishment of this standard preserves the rule that "an attorney may institute and present a case vigorously and in a manner as favorable to his client as the rules of law and professional ethics will permit."[16] The court in *Wong* concluded that Attorney Tabor had probable cause to sue Dr. Wong based on the facts known to him when the suit was commenced.[17]

To prove malicious prosecution, the plaintiff must also show that the attorney acted with malice.[18] It is not always necessary to show hatred or ill will. Malice can be inferred from the lack of probable cause.[19] In the *Wong* case, the court concluded that Dr. Wong

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12. *Id.* at ____, 422 N.E.2d at 1285.
13. *Id.* at ____, 422 N.E.2d at 1288.
14. *Id.* at ____, 422 N.E.2d at 1285.
15. *Id.* at ____, 422 N.E.2d at 1288.
16. Weaver v. Superior Court, 95 Cal. App. 3d 166, 180, 156 Cal. Rptr. 745, 752 (1979).
17. *Wong*, ____ Ind. App. ____, 422 N.E.2d 1279, 1288 (1981).
18. Junot v. Lee, 372 So. 2d 707 (La. Ct. App. 1979); Tiede v. Fuhr, 264 Mo. 622, 175 S.W. 910 (1915); Smits v. Hogan, 35 Wash. 290, 77 P. 390 (1904).
19. Cal. - Tool Research & Eng'r. Corp. v. Henigson, 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 (1975); Masterson v. Pig'n Whistle Corp., 161 Cal. App. 2d 323, 326 P.2d 918 (1958).

failed to meet his burden of proving lack or probable cause, so no malice could be inferred.[20] The element of malice, then, was not sustained in the *Wong* case.

The plaintiff in a malicious prosecution action must also both plead and prove that the prior proceeding terminated in his favor.[21] Although a voluntary dismissal may be considered a favorable termination,[22] a settlement or compromise is not.[23] In the *Wong* case, several physicians were voluntarily dismissed by Attorney Tabor. Dr. Wong, however, had to move for a summary judgment, which was granted by the court in 1976. In *Wong v. Tabor* the court states that termination by summary judgment, not pursuant to a compromise, is a conclusion on the merits.[24] Since the court felt that the

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Fla. - Central Fla. Mach. Co. v. Williams, 400 So. 2d 30 Fla. Dist. Ct. App. (1981).
Kan. - Nelson v. Miller, 227 Kan. 271, 607 P.2d 438 (1980).
Me. - Nyer v. Carter, 367 A.2d 1375 (Me. 1977).
Mo. - Henderson v. Cape Trading Co., 316 Mo. 384, 289 S.W. 332 (1926).
N.C. - Koury v. John Meyer of Norwich, 44 N.C. App. 392, 261 S.E.2d 217 (1980).
R.I. - Nagy v. McBurney, ___ R.I. ___, 392 A.2d 365 (1978).

20. Wong v. Tabor, ___ Ind. App. ___, ___, 422 N.E.2d 1279, 1289 (1981).

21. Cal. - Lackner v. LaCroix, 25 Cal. 3d 747, 602 P.2d 393, 159 Cal. Rptr. 693 (1979); Babb v. Superior Court, 3 Cal. 3d 841, 479 P.2d 379, 92 Cal. Rptr. 179 (1971); Cowles v. Carter, 115 Cal. App. 3d 350, 171 Cal. Rptr. 269 (1981); Christensen v. Gobar, 47 Cal. App. 3d 613, 120 Cal. Rptr. 923 (1975); Webb v. Youmans, 24 Cal. App. 2d 51, 57 Cal. Rptr. 11 (1967).
D.C. - Shulman v. Miskell, 626 F.2d 173 (D.C. Cir. 1980).
Ga. - Cooper v. Public Fin. Corp., 146 Ga. App. 250, 246 S.E.2d 684 (1978).
Ill. - Executive Com. Serv., Ltd. v. Daskalakis, 74 Ill. App. 3d 76, 393 N.E.2d 1365 (1979); Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 137 (1978).
Ind. - Wong v. Tabor, ___ Ind. App. ___, 422 N.E.2d 1279 (1981).
Kan. - Nelson v. Miller, 227 Kan. 271, 607 P.2d 438 (1980).
La. - Parks v. Winnfield Life Ins. Co., 336 So. 2d 1021 (La. Ct. App. 1976).
Mass. - Antelman v. Lewis, 480 F. Supp. 180 (D. Mass. 1979).
Mich. - Peisner v. Detroit Free Press, 68 Mich. App. 360, 242 N.W.2d 775 (1976).
Mo. - McMahon v. May Dept. Stores Co., 374 S.W.2d 82 (Mo. 1963).
N.Y. - Lieberman v. Roadside 3 Hour Cleaners, Inc., ___ A.D.2d ___, 438 N.Y.S.2d 134 (1981); Drago v. Buonagurio, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 911 (1978); Ametco, Ltd. v. Beltchev, 5 A.D.2d 631, 174 N.Y.S.2d 378 (1958), *appeal denied*, 6 N.Y.2d 978, 161 N.E.2d 733, 191 N.Y.S.2d 945 (1959), *aff'd*, 7 N.Y.2d 783, 163 N.E.2d 339, 194 N.Y.S.2d 517 (1959).
Ohio - Board of Educ. v. Marting, ___ Ohio St. ___, 185 N.E.2d 597 (1962).
Or. - Erlandson v. Pullen, 45 Or. App. 467, 608 P.2d 1169 (1980).
R.I. - Nagy v. McBurney, ___ R.I. ___, 392 A.2d 365 (1978).
Wis. - Izard v. Arndt, 483 F. Supp. 261 (E.D. Wis. 1980).

22. Weaver v. Superior Court, 94 Cal. App. 3d 498, 156 Cal. Rptr. 745 (1979); Minasian v. Sapse, 80 Cal. App. 3d 823, 145 Cal. Rptr. 829 (1978); Webb v. Youmans, 24 Cal. App. 2d 51, 57 Cal. Rptr. 11 (1967); Kurek v. Kavanagh, Scully, Sudow, White & Frederick, 50 Ill. App. 3d 1033, 365 N.E.2d 1191 (1977).

23. *Wong*, ___ Ind. App. ___, ___, 422 N.E.2d 1279, 1284 (1981).

24. *Id.* at ___, 422 N.E.2d 1279 at 1284.

summary judgment was not the result of an agreement between the parties, the court found that Dr. Wong sustained his burden of proving prior favorable termination.[25]

Finally, the plaintiff in a malicious prosecution action must show that he has been damaged.[26] The majority rule is that the plaintiff in a malicious prosecution action may recover attorney fees and costs incurred in defending a groundless action.[27] In the jurisdictions that require a showing of "special damages," the plaintiff must show an injury different from the normal incidents of defending a lawsuit.[28] Indiana follows the majority rule, and Dr. Wong sustained his burden of proving damages by showing that his medical malpractice insurance premiums increased by thirty percent after the filing of the suit.[29]

The *Wong v. Tabor* case is important because of the court's new standard for attorneys in ascertaining whether they have probable cause to institute a lawsuit on behalf of their clients. Again, that standard is "whether the claim merits litigation against the defendant in question on the basis of the facts known to the attorney when the suit was commenced."[30] An important purpose of our courts is to determine the rights and remedies of all persons. The new *Wong* standard reinforces this public policy concern that all litigants are to have free access to the courts.

The *Wong* decision affords attorneys special protection while acting in their representative capacities. The attorney simply has to believe reasonable facts told him by his client. He does not have to investigate further before filing suit. The *Wong* court no doubt felt that attorneys should not be fearful of being held liable as insurers of the merits of their client's cases. The court did not want attorneys to be unwilling to undertake representation in close or difficult matters or where only a short amount of time remains before action must be taken. In those situations, a "chilling effect" could limit litigants' free access to the courts.

One of the problems with the new standard set by *Wong v. Tabor* is that it is nearly impossible to prove the element of "lack of probable cause" in a malicious prosecution action. Thus, frivolous

25. *Id.* at ____, 422 N.E.2d 1279 at 1285.
26. *See supra* note 2.
27. Peerman v. Sidicane, ____ Tenn. App. ____, 605 S.W.2d 242 (1980).
28. *See supra* note 5.
29. *Wong*, ____ Ind. App. ____, ____, 422 N.E.2d 1279, 1282-83 (1981).
30. *Id.* at ____, 422 N.E.2d 1279 at 1288.

lawsuits against physicians are not discouraged by the *Wong* case:

> While the tort [of malicious prosecution] assumes litigant responsibility, it was not created for, nor does it contemplate, the need for a remedy designed to deter attorneys from filing baseless lawsuits. The clear reluctance of the courts to find attorneys liable for malicious prosecution is evidence of the questioned efficacy of such an action in promoting this end.[31]

This implication is unfortunate. The filing of any spurious claim perverts the legal process. A physician is especially vulnerable to spurious claims. His name is obvious in the hospital chart, whether he was the primary physician or not. He is an easy target. It is common knowledge that physicians carry malpractice insurance and that there is money available for damages. The mere filing of an unwarranted malpractice action against a physician becomes part of his record which the state might consider when his license is up for renewal. The filing of such a suit inevitably leads to impairment of reputation, mental distress, loss of time and money, and increase of malpractice insurance premiums or perhaps even cancellation of insurance. The detrimental personal effects upon a physician, his privacy and his reputation are profound. The *Wong* case has done nothing to alleviate these problems.

Another problem with the *Wong* standard is that it violates the common law rule that no injury, improperly inflicted, shall go unredressed,[32] by practically eliminating malicious prosecution actions. Public policy grants all persons freedom of access to the courts.[33] Malicious prosecution plaintiffs are persons and should have access, too. The *Wong* standard has the effect of denying a remedy for a wrong. The tort of malicious prosecution was designed to place restraints on malicious plaintiffs.[34] If the law will not restrain and punish malicious conduct, public confidence in the merits of our system of jurisprudence will inevitably be shaken. The efficient administration of justice will be threatened. Therefore, another unfortunate result of *Wong v. Tabor* is the near annihilation of the tort of malicious prosecution.

Although *Wong v. Tabor*, as well as other malicious prosecu-

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31. *Id.* at ___, 422 N.E.2d 1279 at 1283.
32. Lipsciemb v. Shofner, 44 S.W. 818, 819 (S.Ct. Tenn. 1896).
33. Teesdale v. Liebschwager, 174 N.E. 620, 621 (S.Ct. S.D. 1919).
34. Norton v. Hines, ___ Cal. App. ___, 123 Cal. Rptr. 237, 240 (1975).

tion actions in other jurisdictions, have succeeded at the trial level,[35] only two appellate courts have affirmed judgment in favor of a physician and against an attorney.[36] In fact, in the history of American jurisprudence, few former adversaries have been able to prove that an attorney has acted without probable cause and with malice.[37] The *Wong* case is no exception.

Wong v. Tabor sends a message of caution to physicians. That message is that any venture into the area of malicious prosecution is speculative and unlikely to succeed. Careful consideration, then,

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35. Fee, Parker and Lloyd v. Sullivan, 379 So.2d 412 (Fla. Dist. Ct. App. 1980); Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978).

36. Peerman v. Sidicane, ___ Tenn. App. ___, 605 S.W.2d 242 (1980); Raine v. Drasin, 621 S.W.2d 895 (Ky. 1981).

37. Ariz. - Carroll v. Kalar, 112 Ariz. 595, 545 P.2d 411 (1976).

Cal. - Lackner v. LaCroix, 25 Cal. 3d 747, 602 P.2d 393, 159 Cal. Rptr. 693 (1979); Babb v. Superior Court, 3 Cal.3d 841, 479 P.2d 379, 92 Cal. Rptr. 179 (1971).

D.C. - Shulman v. Miskell, 626 F.2d 173 (D.C. Cir. 1980) (reserved as to statute of limitations defense); Morowitz v. Marvel, 423 A.2d 196 (D.C. 1980); Ammerman v. Newman, 384 A.2d 637 (D.C. 1978).

Fla. - Fee, Parker and Lloyd v. Sullivan, 379 So. 2d 412 (Fla. Dist. Ct. App. 1980) (judgment for physician reversed and judgment entered for attorney; lawsuit financed by members of medical profession).

Ill. - Davis v. Ruff, 83 Ill. App. 3d 651, 404 N.E.2d 405 (1980); Stopka v. Lesser, 82 Ill. App. 3d 323, 402 N.E.2d 781 (1980); Balthazar v. Dowling, 65 Ill. App. 3d 824, 382 N.E.2d 1367 (1978); Berlin v. Nathan, 64 Ill. App. 3d 940, 381 N.E.2d 1367 (1978); Pantone v. Demos, 59 Ill. App. 3d 328, 375 N.E.2d 480 (1978); Lyddon v. Shaw, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978).

Ind. - Wong v. Tabor, ___ Ind. App. ___, 422 N.E.2d 1279 (1981).

Iowa - Bickel v. Mackie, 447 F. Supp. 1376 (N.D. Iowa 1978); Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978).

Kan. - Nelson v. Miller, 227 Kan. 271, 607 P.2d 438 (1980).

Ky. - Hill v. Willmott, 561 S.W.2d 331 (Ky. 1978).

La. - Spencer v. Burglass, 337 So. 2d 596 (La. Ct. App. 1976).

Mich. - Friedman v. Dorzorc, 83 Mich. App. 429, 412 A.2d 1054 (1979).

N.Y. - Drago v. Buonagurio, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978); Fried v. Bower & Gardner, 46 N.Y.2d 765, 386 N.E.2d 258, 413 N.Y.S.2d 650 (1978); Belsky v. Lowenthal, 62 A.D.2d 319, 405 N.Y.S.2d 62 (1978) (suit against patient); Hoppenstein v. Zemek, 62 A.D.2d 979, 403 N.Y.S.2d 542 (1978).

N.C. - Petrou v. Hale, 43 N.C. App. 655, 260 S.E.2d 130 (1979).

Ohio - Dakters v. Shane, 64 Ohio App. 2d 196, 412 N.E.2d 399 (1978).

Or. - O'Toole v. Franklin, 279 Or. 513, 569 P.2d 561 (1977).

Pa. - DeLeo v. Munley, 261 Pa. Super. Ct. 90, 395 A.2d 957 (1979).

Tex. - Rodriguez v. Carroll, 510 F. Supp. 547 (S.D. Tex. 1981); Butler v. Morgan, 590 S.W.2d 543 (Tex. Civ. App. 1979); Martin v. Trevino, 578 S.W.2d 763 (Tex. Civ. App. 1979); Moiel v. Sandlin, 571 S.W.2d 567 (Tex. Civ. App. 1978).

Va. - Ayyildiz v. Kidd, ___ Va. ___, 266 S.E.2d 108 (1980).

Wash. - Smits v. Hogan, 35 Wash. 290, 77 P. 390 (1904).

should be taken before any action is pursued. If malicious prosecution suits are judiciously instituted by physicians, that is, only in situations of obvious abuse by attorneys, the court may very well be more receptive. The courts must carefully balance the new standard of probable cause to sue established by *Wong v. Tabor* with the interest of physicians to be free from vexation, damage, and possible ruin by frivolous lawsuits. Only if courts strictly apply the new *Wong v. Tabor* probable cause standard, and only if there are some successful malicious prosecution actions affirmed by the appellate courts, will unwarranted malpractice actions against physicians ever really be deterred.