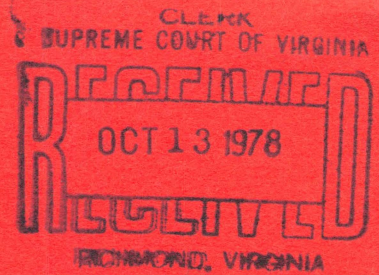


220VA1080



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IN THE  
**Supreme Court of Virginia**  
AT RICHMOND

---

RECORD NO. 780505

---

VEDII AYYILDIZ, M.D.,

.....Appellant

v.

EDWARD S. KIDD, JR.,

.....Appellee

---

APPENDIX

---

S. D. Roberts Moore  
Post Office Box 1018  
Roanoke, Virginia 24005

Counsel for Appellant



TABLE OF CONTENTS

	<u>Appendix</u> <u>page</u>
1. MOTION FOR JUDGMENT FILED JUNE 3, 1977 .....	1-4
2. DEMURRER FILED JUNE 24, 1977 .....	5
3. GROUNDS OF DEMURRER FILED AUGUST 22, 1977 .....	6
4. ORDER ENTERED NOVEMBER 14, 1977 .....	7-8
5. OPINION .....	9-12
6. ORDER ENTERED JANUARY 11, 1978 .....	13
7. NOTICE OF APPEAL FILED FEBRUARY 7, 1978 .....	14

MOTION FOR JUDGMENT

TO: EDWARD S. KIDD, JR.  
1014 Third Street, S.W.  
Roanoke, Virginia

Comes now, Vedii Ayyildiz, M.D., by counsel, and files this, his Motion for Judgment against the defendant, alleging the following:

COUNT I

(1) That on and prior to July 28, 1973, plaintiff was a duly licensed physician, licensed to practice medicine in the State of Virginia.

(2) That at all times relevant to this case, the defendant, Edward S. Kidd, Jr., was a duly licensed attorney at law, licensed to practice law in the State of Virginia.

(3) That on or about July 28, 1973, Wayne H. Grubb did seek and receive the professional services of the plaintiff, due to a stomach disorder.

(4) That the plaintiff exercised at least that degree of skill ordinarily possessed by other physicians in the same or similar circumstances, in the treatment of Wayne H. Grubb.

(5) That on July 25, 1975, the defendant, Edward S. Kidd, Jr., as counsel for Wayne H. Grubb, did file a Motion for Judgment, causing process to issue against Vedii Ayyildiz, M.D., plaintiff, in the Circuit Court for the City of Roanoke, Virginia. A copy of said Motion for Judgment is marked "Exhibit A".

WALKER R. CARTER, JR. Clerk

Writ Tax \$ 25.00  
Filing Fee \$ 30.00  
Court Fund \$ 1.00

LAW OFFICES  
ALD A. WILLIAMS & ASSOC.  
A PROFESSIONAL  
CORPORATION  
SALEM, VIRGINIA

(6) That the defendant, Edward S. Kidd, Jr., acting as counsel for Wayne H. Grubb, did prosecute the cause of action as set forth in Exhibit A.

(7) That the said cause of action which was instituted and prosecuted by defendant Edward S. Kidd, Jr., who was acting as counsel for Wayne H. Grubb, terminated in favor of the plaintiff Vedii Ayyildiz, M.D., when the said cause of action was dismissed on January 9, 1976.

(8) That the said cause of action was brought without probable cause in that the defendant Edward S. Kidd, Jr. knew, or in the exercise of reasonable and ordinary care, should have known, that Wayne H. Grubb did not have a claim for medical malpractice against the plaintiff. Nevertheless, defendant Edward S. Kidd, Jr. filed the said Motion for Judgment on behalf of Wayne H. Grubb.

(9) That the actions and conduct of the defendant in instituting and prosecuting the said cause of action against the plaintiff, Vedii Ayyildiz, M.D., for medical malpractice, amounted in law to malice.

(10) That the willful and/or negligent actions and conduct of the defendant did cause the plaintiff to expend sums of money in order to successfully defend the frivolous cause of action filed against him, and did cause him other direct injury, as well as injury to his professional reputation and good name.

## COUNT II

The plaintiff re-states the allegations contained in paragraphs (1) through (10) of Count I and incorporates the same by reference.

(11) That the defendant did fall below the legal standards in the community in which he practices law, in at least the following respects:

a. He filed suit against plaintiff when he knew or should have known that his client, Wayne H. Grubb, had no valid cause of action against the plaintiff.

b. He failed to examine any records relating to the treatment received by Wayne H. Grubb from the plaintiff.

c. He did not have an expert witness, nor did he have any reasonable grounds upon which to believe he would obtain an expert witness in an effort to prove that plaintiff was in fact liable to Wayne H. Grubb for medical malpractice. This is true even though the defendant knew or should have known that under the law of Virginia, it was absolutely necessary for an expert witness to be produced before his client, Wayne H. Grubb, could prevail a medical malpractice suit against plaintiff.

d. He failed to discuss the treatment received by Wayne H. Grubb from the plaintiff, with any physician prior to the institution of the said medical malpractice suit against the plaintiff.

e. He failed to take the deposition of plaintiff in a said medical malpractice suit against the plaintiff.

f. He was totally unaware throughout his representation of Wayne H. Grubb, as to the actual medical treatment received by Wayne H. Grubb from the plaintiff.

g. The conduct and actions of the defendant were taken when he knew or should have known that he had absolutely no evidence upon which to prove the various allegations contained

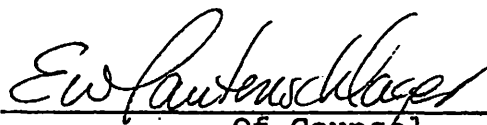
in said Motion for Judgment filed by him for his client, Wayne H. Grubb.

(12) Such willful and/or negligent actions and conduct on the part of the defendant did cause the plaintiff to expend sums of money in order to successfully defend the frivolous cause of action filed against him, and did cause him other direct injury, as well as injury to his professional reputation and good name.

WHEREFORE, Vedii Ayyildiz, M.D., moves the Court pursuant to Count I and Count II of this Motion for Judgment, for judgment against the defendant, Edward S. Kidd, Jr., in the amount of TWO HUNDRED FIFTY THOUSAND (\$250,000.00) DOLLARS compensatory damages, and TWO HUNDRED FIFTY THOUSAND (\$250,000.00) DOLLARS punitive damages, together with his costs.

VEDII AYYILDIZ, M.D.

BY

  
of Counsel

E. W. Lautenschlager, p.q.  
DONALD A. WILLIAMS & ASSOCIATES  
16 South College Avenue  
Salem, Virginia 24153

DEMURRER

Law Action No. 3894

The defendant, Edward S. Kidd, Jr., by counsel, does hereby demur to plaintiff's Motion for Judgment and states that the said Motion for Judgment is not sufficient in law.

EDWARD S. KIDD, JR.

By: Henry H. Bell  
Of Counsel

Haney H. Bell  
Woods, Rogers, Muse, Walker & Thornton  
105 Franklin Road, S. W.  
Roanoke, Virginia 24011

Of Counsel for Defendant

CERTIFICATE OF MAILING

I, Haney H. Bell, hereby certify that a true copy of the foregoing Demurrer was mailed to Mr. E. W. Lautenschlager, Donald A. Williams & Associates, 16 South College Avenue, Salem, Virginia 24153, counsel for plaintiff, this 24<sup>th</sup> day of June, 1977.

RECEIVED  
JUN 24 1977  
AND FILED  
Lena Gesterman  
DEPUTY CLERK

RECEIVED  
AUG 12 1977  
AND FILED  
JKE  
DEPUTY CLERK

GROUND OF DEMURRER

Law Action No. 3894

The defendant, Edward S. Kidd ("Kidd"), by counsel, states that his grounds of demurrer to the Motion for Judgment previously filed herein include the following:

(1) Count I of the Motion for Judgment alleges that the plaintiff was the subject of a previous civil action brought by Kidd on behalf of a client, and, further, that the previous civil action was maliciously prosecuted by Kidd on behalf of his client. However, no action for malicious prosecution can be maintained by plaintiff where there was no arrest of his person, or seizure of his property, or special damage incurred pursuant to the previous civil action complained of.

(2) Count II of the Motion for Judgment alleges that Kidd was negligent in prosecuting the previous civil action against the plaintiff, that Kidd's alleged negligence caused plaintiff to incur the expenses of a defense, and that plaintiff's reputation was consequently injured. However, Kidd's duty in the previous civil action was to his client, not the plaintiff. Therefore, his alleged negligence is not actionable by plaintiff.

EDWARD S. KIDD, JR.

By: Louise K. Zell

Of Counsel

Woods, Rogers, Muse, Walker & Thornton  
105 Franklin Road, S. W.  
Roanoke, Virginia 24011

Counsel for Defendant



ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the Plaintiff, Vedii Ayyildiz, M. D., by counsel, and moves the Court for leave to amend his Motion for Judgment in the following respects:

1. That paragraph (10) of Count I of the said Motion for Judgment be amended to read: "That the willful and/or negligent actions and conduct of the defendant did cause the plaintiff to expend sums of money in order to successfully defend the frivolous cause of action filed against him, and did cause him other direct injury in that the plaintiff suffered loss of present earnings and profits as well as future loss of earnings and profits in his practice of medicine, as well as injury to his professional reputation and good name."

2. That paragraph (12) of Count II of the said Motion for Judgment be amended to read: "That the willful and/or negligent actions and conduct of the defendant did cause the plaintiff to expend sums of money in order to successfully defend the frivolous cause of action filed against him, and did cause him other direct injury, in that he suffered present loss of earnings and profits as well as future loss of earnings and profits in his practice of medicine, as well as injury to his professional reputation and good name."

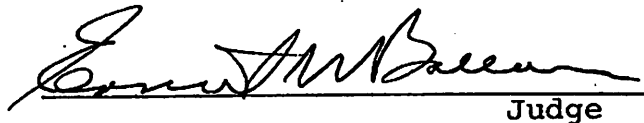
3. That the last paragraph of the said Motion for Judgment be amended to read: "WHEREFORE, Vedii Ayyildiz, M.D. moves the Court, pursuant to Count I and Count II of this Motion

for Judgment, for judgment against the defendant, Edward S. Kidd, Jr., in the amount of FOUR HUNDRED THOUSAND DOLLARS (\$400,000.00) compensatory damages, and ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) punitive damages, together with his costs."

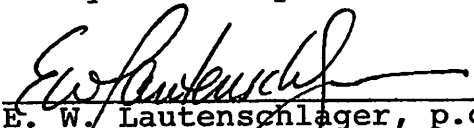
And it appearing to the Court that the aforementioned amendments are necessary for the furtherance of the ends of justice, it is, therefore, ADJUDGED, ORDERED and DECREED that the said plaintiff be and is hereby permitted to amend his said Motion for Judgment in the aforementioned manner.

And upon further motion of the plaintiff, this cause is hereby remanded to the Rules to amend said Motion for Judgment in the manner hereinbefore indicated.

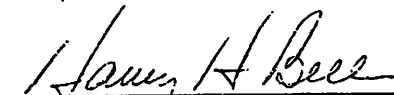
ENTER this 14<sup>th</sup> day of November, 1977.

  
Judge

I request entry of this Order:

  
E. W. Lautenschlager, p.q.  
16 S. College Avenue  
Salem, Virginia 24153

I have seen this Order:

  
Haney H. Bell, p.d.  
105 Franklin Road, S. W.  
Roanoke, Virginia

## OPINION

The matter before the Court is a Demurrer filed by the defendant to the Amended Motion for Judgment filed on behalf of the plaintiff.

The Motion for Judgment alleges that the plaintiff is a licensed, practicing physician and that the defendant is a licensed, practicing attorney and as such filed a Motion for Judgment on behalf of one Wayne H. Grubb against the plaintiff alleging medical malpractice, which suit was dismissed on January 9, 1976. The plaintiff's Amended Motion for Judgment contains two (2) counts, malicious prosecution and negligence.

The plaintiff's Amended Motion for Judgment in Count One (1), Paragraph Ten (10), sets forth the following:

"(10) That the willful and/or negligent actions and conduct of the defendant did cause the plaintiff to expend sums of money in order to successfully defend the frivolous cause of action filed against him, and did cause him other direct injury in that the plaintiff suffered loss of present earnings and profits as well as future loss of earnings and profits in his practice of medicine, as well as injury to his professional reputation and good name."

Count Two (2), Paragraph Twelve (12), sets forth the following:

"12. That the willful and/or negligent actions and conduct of the defendant did cause the plaintiff to expend sums of money in order to successfully defend the frivolous cause of action filed against him, and did cause him other direct injury, in that he suffered present loss of earnings and profits as well as future loss of earnings and profits in his practice of medicine, as well as injury to his professional reputation and good name."

The defendant's Grounds of Demurrer were as follows:

"(1) Count I of the Motion for Judgment alleges that the plaintiff was the subject of a previous civil action brought by Kidd on behalf of a client, and, further, that the previous civil action was maliciously prosecuted by Kidd on behalf of his client. However, no action for malicious prosecution can be maintained by plaintiff where there was no arrest of his person, or seizure of his property, or special damage incurred pursuant to the previous civil action complained of.

(2) Count II of the Motion for Judgment alleges that Kidd was negligent in prosecuting the previous civil action against the plaintiff, that Kidd's alleged negligence caused plaintiff to incur the expenses of a defense, and that plaintiff's reputation was consequently injured. However, Kidd's duty in the previous civil action was to his client, not the plaintiff. Therefore, his alleged negligence is not actionable by plaintiff."

The Court believes that this is a case of first



impression in Virginia, although, it has been decided in a number of other jurisdictions. See O'Toole v. Franklin, (Oregon 1977) 569 P 2nd 561.

One of the issues before the Court is whether Virginia requires special damages or special injuries to maintain a malicious prosecution action based upon a prior civil action and what constitutes "special damages" or "special injuries" in an action such as before the Court in this matter. Under the so-called English Rule, a malicious prosecution suit may be maintained on a prior civil action where accompanied by an arrest of the person, seizure of property, injury to business or other special damages. Since there is no statutory authority in Virginia in this matter, the Court would have to follow the English Rule. See Virginia Code Section 1-10, which states:

"The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and Constitution of this State, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly."

In the Amended Motion for Judgment there is no allegation as to arrest, or seizure of property. The allegations in the Amended Motion for Judgment alleges the costs in defending the suit, loss of present earnings and profits as well as future loss of earnings and profits and injury to his professional reputation and good name. The expense in defending the original suit would not be "special damages" or "special injuries". See

52 Am Jur 2nd, Malicious Prosecution, Paragraph Eleven (11).

A malicious prosecution action alleging injury to reputation is not a "special damage". O'Toole v. Franklin, Supra.

It appears to the Court that the allegations as to the loss of earnings and profits past and present would be the same as the injury to the plaintiff's professional reputation and good name.

It is, therefore, the opinion of the Court that the plaintiff has not stated a cause of action in Count One (1) of his Amended Motion for Judgment and the Demurrer to Count One (1) is hereby sustained.

In reference to Count Two (2) of the Amended Motion for Judgment, which alleges negligence on behalf of the defendant, the Court is of the opinion that there was no privity of contract between the now plaintiff and the defendant and that this Count does not state a cause of action and the Demurrer thereto is hereby sustained.



---

Kenneth I. Devore, Judge-Designate  
Twenty-Seventh Judicial Circuit

O R D E R

Law Action No. 3894

This action came on to be heard on December 23, 1977, upon the plaintiff's amended motion for judgment and the defendant's pending demurrer and was argued by counsel.

Upon consideration of the pleadings, briefs filed herein, and argument of counsel, it appears to the Court that the plaintiff's amended motion for judgment fails to state a cause of action upon which relief can be granted.

It is, therefore, ADJUDGED and ORDERED that the defendant's demurrer be, and it hereby is, sustained for the reasons set forth in the Court's opinion dated January 3, 1978, to which reference is hereby made. It is further ADJUDGED and ORDERED that the plaintiff's amended motion for judgment be, and it hereby is dismissed for failing to state a cause of action upon which relief can be granted.

Enter this 11<sup>th</sup> day of January, 1978.

K. A. Deane  
Judge

We request this Order:

L. H. Bee  
Counsel for Defendant

Seen and Objected to:

[Signature]  
Counsel for Plaintiff

NOTICE OF APPEAL IN ACCORDANCE  
WITH RULE 5:6, RULES OF THE  
SUPREME COURT OF VIRGINIA

TO: Walker R. Carter, Jr., Clerk  
Circuit Court for the City of Roanoke  
210 Campbell Avenue, S. W.  
Roanoke, Virginia 24011

Comes now the Plaintiff, Vedii Ayyildiz, M.D.,  
pursuant to Rule 5:6 of the Rules of Court of the Supreme Court  
of Virginia, and does hereby file his notice of appeal and does  
hereby give notice of his intention to apply to the Supreme  
Court of Virginia for a writ of error in the above-styled case,  
appealing the final judgment of the Circuit Court for the City  
of Roanoke entered on January 11, 1978.

RESPECTFULLY,

VEDII AYYILDIZ, M.D.

BY Robert P. Doherty, Jr.  
Of Counsel

Charles B. Phillips  
and  
Robert P. Doherty, Jr.  
22 High Street  
Salem, Virginia 24153  
Of Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I have this 6th day of February,  
1978, mailed a true copy of the foregoing to Haney H. Bell, Esq.,  
Woods, Rogers, Muse, Walker & Thornton, 105 Franklin Road, S. W.,  
Roanoke, Virginia 24015, Counsel of record for Defendant.

Robert P. Doherty, Jr.  
Robert P. Doherty, Jr.