Ethics Watch

If Someone Must Pay ...

By Nathan M. Crystal

"If someone has to go to jail, make sure it's the client, not you." — An old joke about criminal defense practice, but one that can also be applied to civil litigation. If someone must pay damages, make sure it's your client, not you.

The S.C. Supreme Court's recent decision in *Ex Parte Gregory*, 2008 WL 2404207 (June 16, 2008) (#26504), provides some important insights into the award of sanctions against lawyers for frivolous litigation and about the exercise of professional judgment.

In 1999 Jerry Bittle sustained a brain injury in an automobile accident. His mother, Annie Melton, retained attorney Gerald Malloy to represent Bittle's interests. In 2001 a settlement agreement was reached with Bittle to receive $14,868.97. A few months later Melton and Bittle went to Malloy's office to conclude the settlement. Bittle endorsed the settlement check. Malloy's secretary said that Bittle would not receive this check, but would receive another check later.

Over the next several years Melton called and visited Malloy's office several times to determine when she and Bittle would receive their settlement check. Melton also sought the assistance of a North Carolina attorney. However, neither Melton nor the North Carolina attorney was able to reach Malloy.

Melton testified that she thought that Malloy had kept or spent the settlement proceeds. However, she also admitted that she knew that there was not enough money available from the settlement to pay all the medical bills.

In January 2004 Melton retained Gregory. Gregory talked with the insurance adjuster who handled the claim and learned that the settlement check was cashed in August 2001. Gregory also learned that Malloy had not responded to a number of telephone calls from Melton or to an inquiry from the North Carolina attorney. However, Gregory did not attempt to contact Malloy about the matter, nor did he try to obtain a copy of Malloy's file in the case.

Gregory advised Melton to file a grievance against Malloy in the hope that the grievance would "shake [the money] loose" from Malloy. In June Melton terminated Malloy's services and retained Gregory to represent her to recover the settlement proceeds. Gregory associated attorney J. Leeds Barroll as co-counsel in the matter. Barroll researched causes of action and drafted the complaint. He asked Gregory whether he should contact Malloy but Gregory stated that he did not think it would "do any good." Barroll also concluded that they had to file quickly because the statute would run soon. Because Malloy had not responded to Melton's requests for information about the settlement funds, Barroll included a cause of action for conversion. Gregory testified that the basis of the conversion claim was failure to account; he stated that he had no knowledge that Malloy had actually converted the settlement funds.

A staff writer for the local newspaper wrote two articles about the case. In one article Gregory stated, "As an attorney [respondent] should have known he couldn't co-mingle funds," and "if for some reason he couldn't disperse the check he should have kept it in a separate fund. Whatever [respondent] did, he shouldn't have kept it in his pocket and collected all the interest on it."

After Barroll filed suit, Malloy promptly transferred the settlement proceeds from his trust account to Gregory. Barroll obtained Malloy's file and deposed the Medicaid agent. He learned that Malloy had been in touch with the Medicaid agent in an effort to reduce the lien. While the contact was minimal, Barroll concluded that the case against Malloy offered little prospect of recovery; he voluntarily dismissed the case seven weeks after it was filed. Barroll was able to resolve the Medicaid claim; after payment of all fees and expenses, Bittle received approximately $5400.

After dismissal of the lawsuit against him, Malloy filed a motion for sanctions against Melton and Gregory but not against Barroll, contending that the claim against him, particularly the conversion claim, was frivolous. Malloy stated in his affidavit that he was representing Melton and Bittle for free. He further stated he had discussed with Melton and Bittle how to deal with all of the medical liens, which exceeded the amount Bittle was to receive under the settlement. Malloy sought a waiver of the Medicaid lien, but was only able to obtain an agreement for a reduction. Malloy told Melton and Bittle that he might be able to recover funds for Bittle if he held the settlement funds in trust until the statute of limitations expired on the medical provider liens. Malloy held the funds in trust pursuant to this arrangement. The CPA who reviewed Malloy's trust account stated that the funds never left this account until Malloy wrote the check to Gregory.

Gregory testified that he did not contact Malloy because he felt that Malloy would not respond to

him if Malloy had not responded to his client or a North Carolina attorney. He stated that he thought that it was unnecessary to contact Malloy because he believed that disciplinary counsel would handle the matter. Gregory did not ask for Melton's file because he did not believe he would learn anything from it.

The trial court found that the conversion claim was frivolous and that Gregory had not conducted a reasonable investigation before filing the claim. The court awarded Malloy $27,364.31 in attorney fees and costs in defending the action and in pursuing the claim for sanctions.

The Supreme Court affirmed. The Court found that under both Rule 11(a) of the South Carolina Rules of Civil Procedure and under the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10, Gregory had filed a frivolous claim. The Court also affirmed the trial court's award of sanctions.

Sanctions motions against lawyers involve two issues: When is a lawyer subject to sanctions? What sanctions may be awarded? *Gregory* is significant on both issues. Gregory was subject to sanctions because of his failure to conduct a reasonable investigation into the conversion claim before filing suit. The Court emphasized the following failures in Gregory's investigation:

- He had time to investigate whether Malloy had contacted Medicaid, but failed to do so. Had he done so he would have learned much sooner that there was no basis for the conversion action.
- He did not request a copy of Malloy's file.
- He did not attempt to contact Malloy about the matter, even though his co-counsel suggested that he do so.
- He relied on his client's unsubstantiated statements that Malloy had taken the settlement funds and went so far as to make these accusations to a reporter even though he lacked any basis other than his client's statements for making these allegations.

While reasonable investigation of a claim is a fundamental aspect of the duty to avoid frivolous claims, the Court in *Gregory* went further, establishing a per se rule applicable to claims against attorneys not only for misappropriation but also it seems to any malpractice claim. The Court stated: "Our conclusion that an attorney must conduct a reasonable investigation beyond what is related to the attorney by his client is limited to the situation where a client is alleging conversion against his or her former attorney for misappropriation of client funds or legal malpractice" (footnote 3 of the opinion). Although the Court in *Gregory* was careful to limit its holding to cases by clients against their attorneys, it is not hard to imagine the Court extending the principle of the case to other situations in which the client alleges intentional wrongdoing by a defendant and the only evidence offered by the client is the client's own testimony, which may be vague, incomplete, or sometimes inconsistent. A prudent lawyer who wishes to minimize the possibility of sanctions in such cases will not rely simply on the client, but will conduct a reasonable investigation before filing suit. The Court in *Gregory* was careful to state that an attorney "does not have a duty to consult with a potential defendant prior to filing suit." However, prudent lawyers should seriously consider communicating with the defendant before filing suit unless such a contact could damage the client's case (fear of destruction of evidence, for example) or unless the statute of limitations is about to run. Any such communication should, of course, comply with Rules 4.2 or 4.3 of the South Carolina Rules of Professional Conduct.

Lawyers should remember that reasonable investigation into the facts before filing suit is only one aspect of avoiding frivolous claims. A filing is frivolous if it is

- not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;
- was intended merely to harass or injury the other party; or
- is interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based.

S.C. Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10(A)(4)(a). Once suit is filed a lawyer may be subject to sanctions for making frivolous arguments that are not warranted under the facts or law. *Id*. §15-36-10(A)(4)(b), (c). With regard to claims for negligence against statutorily designated professionals or against licensed health care facilities based on the negligence of such professionals, the plaintiff must file with his complaint an affidavit of a qualified expert stating that the defendant has committed at least one negligent act or omission and the factual basis for that conclusion, unless an exception to the filing requirement applies. S.C. Code Ann. §15-36-100(B). Malpractice claims against attorneys are covered by this provision. *Id*. §15-36-100(G).

Violation of Rule 11 of the South Carolina Rules of Civil Procedure can also be the basis of sanctions, although the Court of Appeals has held that the substance of the rule and the statute are essentially the same. *Father v. South Carolina Department of Social Services*, 345 S.C. 57, 545 S.E.2d 523 (Ct. App. 2001).

Gregory is also significant on the question of the appropriate sanction for frivolous filings. The Supreme Court upheld an award of attorney's fees against Gregory that included not only fees for defending the frivolous claim but also fees for bringing the sanctions proceeding. While the Court was applying an earlier version of the Frivolous Civil Proceedings

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(803) 799-2000. **Matthew E. Brown** has joined the Charleston office located at 151 Meeting St., 29401. (843) 853-5200.

Travis A. Newton announces the relocation of his law firm to 2410 N. Main St., Ste. A, Anderson 29621. (864) 965-9148.

Nexsen Pruet, LLC announces that **Stephanie Yarbrough** has joined the Charleston office located at 205 King St., Ste. 400, 29401. (843) 577-9440. The firm also announces that **Ronald B. Cox** has joined the Columbia office located at 1230 Main St., Ste. 700, 29201. (803) 771-8900.

Parker Poe Adams & Bernstein, LLP announces that **Michael Larsen** has joined the firm located at 200 Meeting St., Ste. 301, Charleston 29401. (843) 727-2650.

Pennington Law Firm, LLP announces that **Tiffany M. Melchers** has joined the firm located at 1501 Main St., Ste. 600, Columbia 29201. (803) 929-1070.

John Price Law Firm announces that **Max Sparwasser** has joined the firm located at 7445 Cross County Rd., N. Charleston 29418. (843) 552-6011.

Pritchard & Elliott, LLC announces that **John C. Hayes IV** has joined the firm as special counsel located at 8 Cumberland St., Ste. 200, Charleston 29401. (843) 722-3300.

Kim Anderson Ray announces the opening of the **Law Office of Kim Anderson Ray, LLC** located at 302 Park Ave., SE, Aiken 29801. (803) 648-0797.

Robinson, McFadden & Moore, PC announces that **Wilson W. McDonald** has become of counsel to the firm located at 1901 Main St., Ste. 1200, Columbia 29201. (803) 779-8900.

Rosen, Rosen & Hagood, LLC announces that **Daniel F. (Frank) Blanchard III, A. Bright Ariail** and **Andrew G. Gowdown** have become members and **James A. (Chip) Bruorton IV** has become a shareholder of the firm located at 134 Meeting St., Ste. 200, Charleston 29401. (843) 577-6726.

Sexual Trauma Services of the Midlands announces that **Genevieve N. Waller** has become the Director of Development with offices located at 3700 Forest Dr., Ste. 350, Columbia 29204. (803) 790-8208.

C. Frederick Shipley IV, PC announces that its name has been changed to **Shipley & Hayes, PC** and that **Tressa Hayes** has become a shareholder in the firm located at 445 Meeting St., W. Columbia 29169. (803) 794-7588.

Brandon W. Smith announces the opening of **Smith Law** located at 1111 Bay St., Beaufort 29902. (843) 379-8300. **Mary Coleman Smith** has joined the firm.

Smith Debnam Narron Drake Saintsing & Myers, LLP announces that **Richard J. Steele** has joined the firm located at 4601 Six Forks Rd., Ste. 400, Raleigh 27609. (919) 250-2207.

Smith Moore, LLP announces that it has combined offices with **Leatherwood Walker Todd & Mann, PC** to form **Smith Moore Leatherwood, LLP**. The firm will have six offices in the Carolinas and Georgia.

The S.C. Department of Education announces that **Shelly Bezanson Kelly** has become General Counsel and that **Karla McLawhorn Hawkins** has become Deputy General Counsel to the agency located at 1429 Senate St., Columbia 29201. (803) 734-8783.

Law Offices of J. Van Wyck Taylor, LLC announces that **Howard Wilson Taylor** has become an associate of the firm located at 9225-B University Blvd., Charleston 29406. (843) 797-2291.

The Tecklenburg Law Firm, LLC announces that **Gary E. English** has joined the firm located at 215 E. Bay St., Ste. 404, Charleston 29401. (843) 534-2628.

Turner-Vaught Law Firm, LLC announces the opening of its new office located at 1039 44th Avenue N., Ste. 101, Myrtle Beach 29577. (843) 492-0369.

Willson Jones Carter and Baxley, PA announces that **Shannon Till Poteat** has joined the firm located at 4500 Fort Jackson Blvd., Columbia 29209. (803) 227-2883. **Mitchell K. Byrd** has become an associate in the Greenville office located at 872 S. Pleasantburg Dr., 29607. (864) 527-3280. ■

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Sanctions Act (see footnote 1 of the opinion), the current version would seem to lead to the same result. Section 15-36-10(B)(2) authorizes a court to impose "any sanction which the court considers just, equitable, and proper under the circumstances." Section 15-36-10(G)(1) provides that sanctions can include "an order for the party represented by an attorney or pro se litigant to pay the reasonable costs and attorney's fees of the prevailing party under a motion pursuant to this section." Moreover, a court in appropriate cases may impose a fine on the offending lawyer. *Id.* §15-36-10(G)(2). The opinion does not indicate how much of the $27,000 award was for fees incurred in bringing the sanctions motion, but since the case against Malloy was voluntarily dismissed only seven weeks after it was brought, it seems likely that a substantial portion of the fee award was for bringing the sanctions motion. And of course, there was an appeal, so presumably a supplemental petition could be filed for the fees incurred on appeal. Moreover, whenever a court awards sanctions under the act, it is required to report the matter to the Commission on Lawyer Conduct. *Id.* §15-36-10(H).

Finally, *Gregory* provides a significant lesson about the exercise of professional judgment. Gregory made two important choices in the case. He chose not to contact Malloy, and he decided to make remarks to the press that were not supported by the facts. Both choices turned out to be bad mistakes. Malloy, although the winner in the case, was not free from blame. He did not respond to inquiries about the status of the case, resulting in an unhappy client who brought a suit against him that could have easily been avoided. To borrow a line from a famous movie, "What we've got here is failure to communicate." (*Cool Hand Luke*, 1967). ■