The Supreme Court of South Carolina

ORDER

On several occasions, an attorney appointed to protect the interests of another lawyer's clients pursuant to Rule 31, RLDE, Rule 413, SCACR, has notified the Court that the lawyer's client files are not maintained in a sanitary and safe condition. In some cases, the attorney to protect has advised the Court that the lawyer's client files are moldy and/or infested with rodents and insects. As a consequence, the attorney to protect clients' interests is hesitant to inventory the lawyer's client files, to remove original documents from the client files, and to relinquish control of the files to the lawyer's clients upon client request.

Where an attorney to protect clients' interests petitions the Court for authorization to destroy the lawyer's client files and provides the Court with photographs or other sufficient documentation establishing that contact with the lawyer's client files poses a health hazard, the Court will determine the procedure which shall be followed in the matter and may, if appropriate,

order the destruction of some or all of the lawyer's client files without first inventorying and removing original documents.

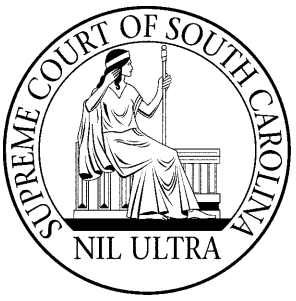
The Court may assess the costs and attorney's fees incurred in filing the petition and complying with the Court's order against the lawyer as provided by Rule 31(f), RLDE. Nothing herein shall relieve a lawyer from safekeeping client files in an appropriate manner. See Rule 1.15, Rules of Professional Conduct, Rule 407, SCACR.

IT SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT

Columbia, South Carolina

September 8, 2011



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 31
September 12, 2011
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Michael James Sarratt,

Respondent.

Opinion No. 27039
Submitted July 12, 2011 – Filed September 12, 2011

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and C. Tex Davis, Senior Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Michael James Sarratt, of Landrum, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to the imposition of a letter of caution, an admonition, or public reprimand. We accept the agreement and issue a public reprimand. The facts, as set forth in the agreement, are as follows.

FACTS

Respondent is a sole practitioner. He mainly handles domestic and criminal cases. Respondent admits that he deposited

unearned fees into his own personal account rather than into his trust account. At times, he deposited flat fees into his personal account.[1]

On February 4, 2010, the Court placed respondent on interim suspension and appointed an attorney to protect his clients' interests. In the Matter of Sarratt, 387 S.C. 220, 692 S.E.2d 892 (2010). During the process of returning files, several of respondent's clients requested a refund, claiming respondent had not earned all the monies paid to him. Respondent did not have sufficient funds in his trust account to refund monies to these clients. The attorney to protect clients' interests spoke with respondent about these claims and respondent acknowledged that the clients were due refunds because he had not earned all of the monies paid to him at the time of his interim suspension. Respondent has now reimbursed all clients who were owed the return of unearned legal fees at the time of his interim suspension.

LAW

Respondent admits that, by his misconduct, he has violated the Rules of Professional Conduct, Rule 407, SCACR, particularly Rule 1.15(a) (lawyer shall hold property of clients in lawyer's possession in connection with representation in an account separate from the lawyer's own property) and Rule 1.15(c) (lawyer shall deposit into client trust account unearned legal fees and expenses that have been paid in advance, to be withdrawn by lawyer only as fees are earned or expenses incurred). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically

[1] Respondent stipulates that the deposit of flat fees into his personal account constitutes a violation of the Rules of Professional Conduct. As we noted in In the Matter of Halford, 392 S.C. 66, 708 S.E.2d 740 (2011), the handling of flat fees is a complex matter. We do not intend this opinion to set forth a categorical rule addressing flat fees.

Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct).

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct.

PUBLIC REPRIMAND.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Sean Kevin Trundy,

Respondent.

Opinion No. 27040
Submitted August 9, 2011 – September 12, 2011

PUBLIC REPRIMAND

Lesley M. Coggiola, Disciplinary Counsel, and Susan B. Hackett, Assistant Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

Sean Kevin Trundy, of Charleston, pro se.

PER CURIAM: The Office of Disciplinary Counsel (ODC) and respondent have entered into an Agreement for Discipline by Consent pursuant to Rule 21, RLDE, Rule 413, SCACR, in which respondent admits misconduct and agrees to the imposition of an admonition or public reprimand. Respondent also agrees to complete the Ethics School portion of the South Carolina Bar's Legal Ethics and Practice Program (LEAPP) within one (1) year of the date of the order imposing discipline and to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission on Lawyer Conduct (the Commission) within thirty (30) days of the date of the order imposing discipline. The Court accepts the Agreement for Discipline by Consent and imposes a public reprimand. Further, the Court orders respondent to complete the Ethics School portion of

LEAPP and provide certification of completion to the Commission within one (1) year of the date of this order and to pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of the date of this order. The facts as stated in the Agreement are as follows.

FACTS

In 2003, the complainant filed a civil action. The complainant was represented by counsel. In 2005, the presiding judge issued an order granting partial summary judgment to the opposing party.

Thereafter, the complainant sought new counsel to assist her with the remaining claim. In August 2005, respondent agreed to represent the complainant. After several meetings, respondent stopped communicating with the complainant.

On April 7, 2008, the complainant wrote respondent expressing her difficulty in obtaining information from him and her concern over the protracted length of time for the litigation. On April 24, 2008, respondent replied, apologizing for his lack of communication. Respondent also explained that opposing counsel was unable to locate the opposing party. As a result, respondent advised the complainant that she might be able to obtain a judgment against the opposing party, enroll the judgment, and then decide how much effort to expend to try to collect the judgment. Respondent did not, however, inform the complainant that her case had been dismissed on January 5, 2007, pursuant to a voluntary non-suit without prejudice with leave to restore due to failure of the parties to pay the fee to refer the matter to the master-in-equity.

Hearing nothing further from respondent after his April 2008, letter, the complainant wrote respondent in October 2010. Respondent did not receive the letter as he had moved his law office and he had not informed the complainant of his new address. Respondent did not move to restore the complainant's action to the

active docket. The complainant's appellate rights have been extinguished.

LAW

Respondent admits that, by his misconduct, he has violated the following provisions of the Rules of Professional Conduct, Rule 407, SCACR: Rule 1.3 (lawyer shall act with reasonable diligence and promptness in representing a client); Rule 1.4 (lawyer shall keep client reasonably informed about status of the matter); Rule 3.2 (lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client); and Rule 8.4(a) (it is professional misconduct for lawyer to violate the Rules of Professional Conduct). Respondent acknowledges that his misconduct constitutes grounds for discipline under the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be ground for discipline for lawyer to violate Rules of Professional Conduct)

CONCLUSION

We find that respondent's misconduct warrants a public reprimand. Accordingly, we accept the Agreement for Discipline by Consent and publicly reprimand respondent for his misconduct. In addition, respondent shall complete the Ethics School portion of LEAPP and provide certification of completion to the Commission within one (1) year of the date of this order and he shall pay the costs incurred in the investigation and prosecution of this matter by ODC and the Commission within thirty (30) days of the date of this order.

PUBLIC REPRIMAND.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

The Supreme Court of South Carolina

In re: Amendments to Rule 402(m), SCACR

O R D E R

Pursuant to Article V, § 4, of the South Carolina Constitution, Rule 402(m), SCACR, is hereby amended as follows:

> **(m) Admission of Certain Law Professors.** A person serving as the Dean or as a tenured professor of the University of South Carolina School of Law or the Charleston School of Law may be admitted to practice law in this State without taking the Bar Examination (section (c)(5) above), the Multistate Professional Responsibility Examination (section (c)(6) above), or the Bridge the Gap Program (section (c)(8) above) if the Dean or professor:
>
> > **(1)** has been admitted to practice law in the highest court of another state or the District of Columbia for at least five (5) years;
> >
> > **(2)** has been a full-time and continuous member of the faculty of the Law School with the rank of assistant professor of law or higher for the previous three (3) or more complete academic years; and
> >
> > **(3)** has been recommended for admission by the Dean of the Law School, or in the case of the Dean, by the President of the University of South Carolina or the Chairman of the Board of Directors of the Charleston School of Law.
> >
> > The application for admission shall be made on a form prescribed by the Committee on Character and Fitness, and shall be filed in

triplicate with the Clerk of the Supreme Court. The application shall be accompanied by a non-refundable application fee of $400. A portion of this fee will be used to obtain a character report from the National Conference of Bar Examiners. The Dean or professor must comply with all other requirements of section (c) above. If found qualified by the Committee on Character and Fitness, the Dean or professor shall be admitted upon taking the oath and paying the fee specified by section (k) above.

This amendment shall take effect immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

September 8, 2011

The Supreme Court of South Carolina

Re: Amendments to Rule 417, South Carolina Appellate Court Rules

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O R D E R

The South Carolina Bar has proposed amending Rule 417, South Carolina Appellate Court Rules, to adopt the American Bar Association's Model Rules for Client Trust Account Records. The amendments are designed to set forth practical trust accounting information, provide cautionary information on electronic check conversions, and explain Automated Clearing House transactions. The amendments also address issues related to record maintenance and outline necessary safeguards which a lawyer must have in place when using electronic record storage systems.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby adopt Rule 417, South Carolina Appellate Court Rules, as amended, and as set forth in the attachment to this order. The amendments are effective immediately.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
September 9, 2011

RULE 417
FINANCIAL RECORDKEEPING

RULE 1
RECORDKEEPING GENERALLY

A lawyer who practices in this jurisdiction shall maintain current financial records as provided in these Rules and required by Rule 1.15 of the South Carolina Rules of Professional Conduct, and shall retain the following records for a period of six years after termination of the representation:

(a) receipt and disbursement journals containing a record of deposits to and withdrawals from client trust accounts, specifically identifying the date, source, and description of each item deposited, as well as the date, payee, and purpose of each disbursement;

(b) ledger records for all client trust accounts showing, for each separate trust client or beneficiary, the source of all funds deposited, the names of all persons for whom the funds are or were held, the amount of such funds, the descriptions and amounts of charges or withdrawals, and the names of all persons or entities to whom such funds were disbursed;

(c) copies of retainer and compensation agreements with clients as required by Rule 1.5 of the South Carolina Rules of Professional Conduct;

(d) copies of accountings to clients or third persons showing the disbursement of funds to them or on their behalf;

(e) copies of bills for legal fees and expenses rendered to clients;

(f) copies of records showing disbursements on behalf of clients;

(g) the physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks provided by a financial institution;

(h) records of all electronic transfers from client trust accounts, including the name of the person authorizing transfer, the date of transfer, the name of the recipient and confirmation from the financial institution of the trust account number from which money was withdrawn, and the date and the time the transfer was completed;

(i) copies of monthly trial balances and monthly reconciliations of the client trust accounts maintained by the lawyer; and

(j) copies of those portions of client files that are reasonably related to client trust account transactions.

Comment

[1] Rule 1 enumerates the basic financial records that a lawyer must maintain with regard to all client trust accounts of a law firm. These include the standard books of account and the supporting records that are necessary to safeguard and account for the receipt and disbursement of client or third person funds as required by Rule 1.15 of the South Carolina Rules of Professional Conduct. Consistent with Rule 1.15, this Rule proposes that lawyers maintain client trust account records for a period of six years after termination of each particular legal engagement or representation.

[2] Rule 1(g) requires that the physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks be maintained for a period of six years after termination of each legal engagement or representation. The "Check Clearing for the 21st Century Act" or "Check 21 Act", codified at 12 U.S.C. §5001 et. seq., recognizes "substitute checks" as the legal equivalent of an original check. A "substitute check" is defined at 12 U.S.C. §5002(16) as a "paper reproduction of the original check that contains an image of the front and back of the original check; bears a magnetic ink character recognition ("MICR") line containing all the information appearing on the MICR line of the original check; conforms with generally applicable industry standards for substitute checks; and is suitable for automated processing in the same manner as the original check. Banks, as defined in 12 U.S.C. §5002(2), are

not required to return to customers the original canceled checks. Most banks now provide electronic images of checks to customers who have access to their accounts on internet-based websites. It is the lawyer's responsibility to download electronic images. Electronic images shall be maintained for the requisite number of years and shall be readily available for printing upon request or shall be printed and maintained for the requisite number of years.

[3] The ACH (Automated Clearing House) Network is an electronic funds transfer or payment system that primarily provides for the inter-bank clearing of electronic payments between originating and receiving participating financial institutions. ACH transactions are payment instructions to either debit or credit a deposit account. ACH payments are used in a variety of payment environments including bill payments, business-to-business payments, and government payments (e.g. tax refunds). In addition to the primary use of ACH transactions, retailers and third parties use the ACH system for other types of transactions including electronic check conversion (ECC). ECC is the process of transmitting MICR information from the bottom of a check, converting check payments to ACH transactions depending upon the authorization given by the account holder at the point-of-purchase. In this type of transaction, the lawyer should be careful to comply with the requirements of Rule 1(h).

[4] There are five types of check conversions where a lawyer should be careful to comply with the requirements of Rule 1(h). First, in a "point-of-purchase conversion," a paper check is converted into a debit at the point of purchase and the paper check is returned to the issuer. Second, in a "back-office conversion," a paper check is presented at the point of purchase and is later converted into a debit and the paper check is destroyed. Third, in an "account-receivable conversion,"a paper check is converted into a debit and the paper check is destroyed. Fourth, in a "telephone-initiated debit" or "check-by-phone" conversion, bank account information is provided via the telephone and the information is converted to a debit. Fifth, in a "web-initiated debit," an electronic payment is initiated through a secure web environment. Rule 1(h) applies to each type of electronic funds transfer described. All electronic funds transfers shall be recorded and a lawyer should not re-use a check number which has been previously used in an electronic transfer transaction.

[5] The potential for these records to serve as safeguards is realized only if the procedures set forth in Rule 1(i) are regularly performed. The trial balance is the sum of balances of each client's ledger card (or the electronic equivalent). Its value lies in comparing it on a monthly basis to a control balance. The control balance starts with the previous month's balance, then adds receipts from the Trust Receipts Journal and subtracts disbursements from the Trust Disbursements Journal. Once the total matches the trial balance, the reconciliation readily follows by adding amounts of any outstanding checks and subtracting any deposits not credited by the bank at month's end. This balance should agree with the bank statement. Monthly reconciliation is required by this rule.

[6] In some situations, documentation in addition to that listed in paragraphs (a) through (i) of Rule 1 is necessary for a complete understanding of a trust account transaction. The type of document that a lawyer must retain under paragraph (j) because it is "reasonably related" to a client trust transaction will vary depending on the nature of the transaction and the significance of the document in shedding light on the transaction. Examples of documents that typically must be retained under this paragraph include correspondence between the client and lawyer relating to a disagreement over fees or costs or the distribution of proceeds, settlement agreements contemplating payment of funds, settlement statements issued to the client, documentation relating to sharing litigation costs and attorney fees for subrogated claims, agreements for division of fees between lawyers, guarantees of payment to third parties out of proceeds recovered on behalf of a client, and copies of bills, receipts or correspondence related to any payments to third parties on behalf of a client (whether made from the client's funds or from the lawyer's funds advanced for the benefit of the client).

RULE 2
CLIENT TRUST ACCOUNT SAFEGUARDS

With respect to client trust accounts required by Rule 1.15 of the South Carolina Rules of Professional Conduct:

(a) only a lawyer admitted to practice law in this jurisdiction or a person under the direct supervision of the lawyer shall be an authorized signatory or authorize transfers from a client trust account;

(b) receipts shall be deposited intact and records of deposit should be sufficiently detailed to identify each item; and

(c) withdrawals shall be made only (i) by check payable to a named payee and not to cash, or (ii) by authorized electronic transfer.

Comment

[1] Rule 2 enumerates minimal accounting controls for client trust accounts. It also enunciates the requirement that only a lawyer admitted to the practice of law in this jurisdiction or a person who is under the direct supervision of the lawyer shall be the authorized signatory or be permitted to authorize electronic transfers from a client trust account. While it is permissible to grant nonlawyer access to a client trust account, such access should be limited and closely monitored by the lawyer. If a lawyer chooses to grant nonlawyer access to a client trust account, the nonlawyer must be an individual under the direct supervision and control of the lawyer. A lawyer should never grant access to closing companies or other, similar entities. The lawyer has a non-delegable duty to protect and preserve the funds in a client trust account and can be disciplined for failure to supervise subordinates who misappropriate client funds. See Rules 5.1 and 5.3 of the South Carolina Rules of Professional Conduct.

[2] The requirement in paragraph (b) that receipts shall be deposited intact means that a lawyer cannot deposit one check or negotiable instrument into two or more accounts at the same time, a practice commonly known as a split deposit.

RULE 3
AVAILABILITY OF RECORDS

Records required by Rule 1 may be maintained by electronic, photographic, or other media provided that they otherwise comply with these Rules and that printed copies can be produced. These records shall be readily accessible to the lawyer.

Comment

Rule 3 allows the use of alternative media for the maintenance of client trust account records if printed copies of necessary reports can be produced. If trust records are computerized, a system of regular and frequent (preferably daily) backup procedures is essential. If a lawyer uses third-party electronic or internet based file storage, the lawyer must make reasonable efforts to ensure that the company has in place, or will establish reasonable procedures to protect the confidentiality of client information. See ABA Formal Ethics Opinion 398 (1995). Records required by Rule 1 shall be readily accessible and shall be readily available to be produced upon request of a client or third person who has an interest as provided in Rule 1.15 of the South Carolina Rules of Professional Conduct, or upon official request of a disciplinary authority, including but not limited to, a subpoena *duces tecum*. Personally identifying information in records produced upon request of a client, third person, or disciplinary authority shall remain confidential and shall be disclosed only in a manner to ensure client confidentiality as otherwise required by law or court rule.

RULE 4
DISSOLUTION OF LAW FIRM OR SALE OF LAW PRACTICE

Upon dissolution of a law firm or of any legal professional corporation or the sale of a law practice, the partners shall make reasonable arrangements for the maintenance of the client trust account records specified in Rule 1.

Comment

This rule provides for the preservation of a lawyer's trust account records in the event of dissolution or sale of a law practice. Regardless of the arrangements the partners or shareholders make among themselves for maintenance of the records, each partner may be held responsible for ensuring the availability of these records. For the purposes of these Rules, the terms "law firm," "partner," and "reasonable" are defined in accordance with Rules 1.0(e), (i), and (j) of the South Carolina Rules of Professional Conduct.

RULE 5
AUTHORIZED ELECTRONIC TRANSFERS

Authorized electronic transfers involving client trust accounts shall be limited to:

(a) money required for payment to a client or third person on behalf of a client;

(b) expenses properly incurred on behalf of a client, such as filing fees or payment to third persons for services rendered in connection with the representation;

(c) money transferred to the lawyer for fees that are earned in connection with the representation and are not in dispute; and

(d) money transferred from one client trust account to another client trust account.

RULE 6
NO BEARER ITEMS

No item shall be drawn on a trust account or fiduciary account made payable to cash or bearer, and no cash shall be withdrawn from a trust account or fiduciary account by means of a debit card or ATM card.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

John C. Abraham, Appellant.

Appeal From Florence County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 4885
Heard May 5, 2011 – Filed September 7, 2011

AFFIRMED

Appellate Defender M. Celia Robinson and Appellate Defender Tristan Shaffer, both of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Assistant General Julie M. Thames, Assistant Attorney General

David Spencer, all of Columbia; and Solicitor Edgar L. Clements, III, of Florence, for Respondent.

WILLIAMS, J.: John C. Abraham (Abraham) appeals his conviction for possession of cocaine. On appeal, Abraham argues the circuit court erred in (1) denying his motion to suppress because he was subjected to an unreasonable search and seizure in violation of the Fourth Amendment and (2) failing to grant his motion for a directed verdict. We affirm.[1]

FACTS

On the night of June 27, 2007, Deputy Tracey Tolson (Tolson) of the Florence County Sheriff's Office's K-9 and Crime Suppression Unit, was patrolling Kershaw Street when she observed a vehicle abruptly stop after a bicycle crossed its path. Tolson exited her patrol car, identified herself, and attempted to speak with Abraham to ascertain whether he was impaired and if he was capable of operating his bicycle. At this point, Tolson testified she did not suspect Abraham was engaged in any criminal activity.

As Tolson attempted to speak with Abraham, Abraham cursed and threw his bicycle at her, striking Tolson's knee. Abraham fled the scene. Tolson ordered Abraham to stop, but he refused. Tolson deployed her taser but was unsuccessful in stopping Abraham. In pursuing Abraham, Tolson observed him toss an "orange-in-color medicine bottle" (the medicine bottle) out of his hand. Shortly thereafter, Abraham surrendered and was arrested. Tolson retrieved the medicine bottle and noticed what appeared to be narcotics inside the medicine bottle. Test results of the contents from the medicine bottle revealed the presence of 0.43 grams of cocaine. Abraham was indicted for possession of cocaine, possession of a controlled substance, and assault upon a law enforcement officer.[2]

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

[2] This appeal only concerns the possession of cocaine charge.

Prior to trial, Abraham made a motion to suppress the "whole stop" and claimed the stop was pretextual. Abraham claimed Tolson did not have any reason to stop and investigate because there was no contact between Abraham's bicycle and the vehicle. The circuit court took the matter under advisement until the evidence was presented at trial. Abraham renewed his motion and argued Tolson did not stop the vehicle that was nearly involved in an accident with Abraham, no injury occurred at the scene, and no evidence or information regarding the vehicle was sought. Abraham claimed Tolson stopped him to conduct a field interview in a high-crime area. The circuit court denied Abraham's motion and concluded Tolson acted reasonably in investigating whether Abraham was capable of operating his bicycle on a public street. Moreover, the circuit court noted Abraham assaulted Tolson, and as a result, Tolson's subsequent actions were justified.

Abraham also made a motion for a directed verdict arguing the State failed to submit direct or circumstantial evidence sufficient to support a guilty verdict. The circuit court denied Abraham's directed verdict motion. The jury convicted Abraham of possession of cocaine. The circuit court sentenced Abraham to two years' imprisonment, credited him with sixty-seven days of time served, and suspended the balance. This appeal followed.

STANDARD OF REVIEW

In Fourth Amendment cases, the circuit court's factual rulings are reviewed under the "clear error" standard. State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000). Under the "clear error" standard, an appellate court will not reverse a circuit court's findings of fact simply because it would have decided the case differently. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). Therefore, this court will affirm if there is any evidence to support the circuit court's ruling. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 459-60 (2002).

LAW/ANALYSIS

A. Reasonable Suspicion

Abraham contends the officer did not have reasonable suspicion that he was engaged in criminal activity when the officer stopped him for improperly riding his bicycle. We find this issue is not preserved for our review.

Abraham made a motion *in limine* in an attempt to "suppress this whole stop," arguing the detention was pretextual and Tolson lacked reasonable suspicion to stop him. The circuit court took the matter under advisement and withheld its ruling until evidence was presented at trial. During Tolson's direct examination, the State questioned the officer about the entire chain of events leading up to Tolson's decision to approach Abraham. The record reflects no attempt by Abraham, at trial, to object to or to move to strike Tolson's testimony. Instead, Abraham only raised the propriety of Tolson's seizure of Abraham in a motion after the close of the State's case-in-chief when the testimony pertaining to the stop had already been admitted. Therefore, we find this issue is not preserved for our review. See State v. Owens, 378 S.C. 636, 638, 664 S.E.2d 80, 81 (2008) (finding constitutional claims not preserved for review without a contemporaneous objection at trial); State v. Rice, 375 S.C. 302, 323, 652 S.E.2d 409, 419 (Ct. App. 2007) (holding that for an objection to be timely, it must be made at the time that evidence is offered); see also State v. Burton, 356 S.C. 259, 266, 589 S.E.2d 6, 9 (2003) (holding that the failure to object to, or the failure to move to strike evidence, renders such evidence competent and entitled to consideration to the extent it is relevant).

Even if this issue is preserved for review, Tolson had reasonable suspicion to stop Abraham. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV. "[T]he Fourth Amendment protects against unreasonable searches and seizures,

including seizures that involve only a brief detention." Pichardo, 367 S.C. at 97, 623 S.E.2d at 847 (citing United States v. Mendenhall, 446 U.S. 544, 551 (1980)).

"[R]easonable suspicion requires a particularized and objective basis that would lead one to suspect another of criminal activity." State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001). "In determining whether reasonable suspicion exists, the [circuit] court must consider the totality of the circumstances." State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007). Generally stated, reasonable suspicion is a standard that requires more than a "hunch" but less than probable cause. Id.

In this case, Tolson testified she stopped Abraham after she observed him operating his bicycle in a manner that posed a significant risk to the driving public. Based on this observation, we conclude Tolson's actions were reasonable in determining whether Abraham was impaired and capable of operating his bicycle. Moreover, Tolson had the legal authority to arrest Abraham when he threw his bicycle at her, even though Tolson did not suspect Abraham of any criminal activity when she initially stopped him. See S.C. Code Ann. § 17-13-30 (Supp. 2009) ("The sheriffs and deputy sheriffs of this State may arrest without warrant any and all persons who, within their view, violate any of the criminal laws of this State if such arrest be made at the time of such violation of law or immediately thereafter.").

B. Suppression of Evidence

Abraham also argues the circuit court erred in admitting the drug evidence because the officer lacked reasonable suspicion to stop him. We find this issue is not preserved for review.

During the same motion *in limine* in which Abraham asserted Tolson lacked reasonable suspicion to stop him, Abraham briefly argued the evidence discovered as a result of the stop should be suppressed. The circuit court did not rule on the admissibility of the evidence at that time. At trial,

the State introduced and the circuit court admitted the medicine bottle and cocaine into evidence. Abraham did not contemporaneously object to the admission of the medicine bottle or the cocaine into evidence. Therefore, we find this issue is not preserved for review. State v. Smith, 337 S.C. 27, 32, 522 S.E.2d 598, 600 (1999) ("[A] motion in limine seeks a pretrial evidentiary ruling to prevent the disclosure of potentially prejudicial matter to the jury. A pretrial ruling on the admissibility of evidence is preliminary and is subject to change based on developments at trial. A ruling in limine is not final; unless an objection is made at the time the evidence is offered and a final ruling procured, the issue is not preserved for review.").

Moreover, even if this issue is preserved for review, Abraham's argument is meritless. Tolson stated she observed Abraham toss a medicine bottle from his hand that was later retrieved from his flight path. Because Abraham abandoned the medicine bottle when he tossed it, we conclude no Fourth Amendment violation occurred. See State v. Dupree, 319 S.C. 454, 460, 462 S.E.2d 279, 283 (1995) (finding no Fourth Amendment violation when defendant could not have had a continued expectation of privacy in crack cocaine that was thrown on the floor of a business open to the public).

C. Directed Verdict Motion

Abraham argues the circuit court erred in denying his directed verdict motion because the State's evidence was insufficient to support a guilty verdict. We disagree.

"When ruling on a motion for a directed verdict, the [circuit] court is concerned only with the existence of evidence, not the weight." State v. Gibson, 390 S.C. 347, 353, 701 S.E.2d 766, 769 (Ct. App. 2010). When reviewing the denial of a motion for a directed verdict, an appellate court must review the evidence, and all inferences therefrom, in the light most favorable to the State. State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). The circuit court's denial of a directed verdict will not be reversed if supported by any direct evidence or substantial circumstantial evidence of the defendant's guilt. Id. at 292-93, 625 S.E.2d at 648.

In support of his motion for directed verdict, Abraham argues the State did not present any evidence linking him to the medicine bottle. Specifically, Abraham's position is that Tolson's description of the medicine bottle in her report and the lack of identifiable fingerprints on the medicine bottle, constitute insufficient evidence to support a guilty verdict.

At trial, Abraham questioned Tolson regarding her statement in her incident report that Abraham "toss[ed] an item out of his hand down Jarrott Street, at which time he then stopped and got on the ground." In response, Tolson testified her use of "item" was a typographical error and she in fact observed Tolson toss an "orange medicine bottle" onto Jarrott Street.

Additionally, Officer Andrew Clendinin of the Florence County Sheriff's Office testified he conducted a fingerprint analysis on the medicine bottle. Officer Clendinin stated he was able to locate a few lines of a raised portion of a person's finger but was unable to make a full identification of the fingerprint.

While Officer Clendinin's testimony did not link Abraham to the medicine bottle, Tolson testified she observed Abraham toss the medicine bottle. Because Abraham's argument regarding Tolson's observation of the medicine bottle relates to the weight of the evidence, and not its existence, we conclude the circuit court did not err in denying Abraham's motion for a directed verdict. Gibson, 390 S.C. at 353, 701 S.E.2d at 769 (stating a court's inquiry on a motion for directed verdict is limited to the existence, not the weight of the evidence).

CONCLUSION

Accordingly, the circuit court's decision is

AFFIRMED.

HUFF and THOMAS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Eugene J. Singleton, Appellant.

Appeal From Bamberg County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 4886
Submitted June 1, 2011 – Filed September 7, 2011 `

AFFIRMED

Appellate Defender M. Celia Robinson, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Deborah Shupe, all of Columbia, for Respondent.

GEATHERS, J.: Appellant Eugene Singleton was indicted in Bamberg County for first degree burglary, armed robbery, kidnapping, possession of a weapon during the commission of a violent crime, and criminal conspiracy. After a trial, a jury convicted Singleton of first degree burglary and criminal conspiracy. Singleton appeals, arguing the circuit court erred in allowing (1) the victim to identify Singleton in court when her out-of-court identification was arguably unreliable and created a substantial likelihood of misidentification and (2) the State to call a reply witness who did not comply with the sequestration order imposed by the circuit court at Singleton's request. We affirm.[1]

FACTS/PROCEDURAL HISTORY

On the night of September 7, 2007, Mattie Singletary (Victim) and her one-year-old daughter were sleeping in her bedroom when she heard a "thump." Moments later, a man walked into her bedroom, uttered an expletive, and ran out. Two other men then entered her bedroom and began threatening her with guns pointed in her and her daughter's direction. The two men ransacked the room and stole a cell phone, two pairs of shoes, jewelry,[2] and more than one thousand dollars in cash.[3] After the men left, Victim noticed her front door had been kicked in.

During trial, Victim identified Singleton[4] as the first man who entered her bedroom. Prior to this in-court identification, Singleton's counsel had moved to suppress Victim's identification of Singleton on the basis of inconsistencies between Victim's written and oral statements. Specifically, Victim initially stated she did not recognize any of the perpetrators but later

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

[2] According to Victim, the shoes and jewelry that were stolen from her home belonged to Eugene Folk, her boyfriend and the father of her daughter.

[3] Victim testified on cross-examination that the $1,020 in cash that was stolen from her home came from a student loan refund.

[4] Eugene Singleton is also referred to throughout the record as "Jay" Singleton.

recalled that she recognized the first man who entered her room as "Jay." Singleton's counsel argued Victim's identification was the product of her hearing of Singleton's arrest by law enforcement after the fact. The circuit court agreed that there were inconsistencies between Victim's statements but ruled that any inconsistencies would go to her credibility and not to admissibility. The circuit court concluded the identification was sufficiently reliable to submit the issue to the jury because it was based on her own personal knowledge. Therefore, the circuit court denied the motion to suppress Victim's in-court identification of Singleton.

Victim testified she recognized Singleton "[b]ecause he used to be around my baby['s] father . . . [b]ut then after a while, I guess they drifted apart." Victim also noted she had seen Singleton several times on the campus of Denmark Technical College, where she attended school, and when she saw him he would greet her. Victim stated she had seen Singleton nine or ten times prior to September 7, 2007, and she got a good look at him the night of the robbery.

After the robbery, Victim called 911, but she did not mention that she recognized one of the perpetrators. Victim allegedly told one of the responding officers that she recognized one of the robbers as "Jay," but she admitted her written statement did not mention this fact. Victim's initial written statement said "a boy came in the room and said, [oh] sh[*]t, and turn[ed] around." Victim explained that her written statement given the day after the robbery did not mention she recognized Singleton because "it was just so much going on, and I was scared." Singleton's trial counsel cross-examined Victim extensively regarding the absence of this information in her initial written statement.

Two other perpetrators involved in the robbery, Lonnie Rowe and Eugene Hosey, testified at trial on the State's behalf and identified Singleton as a participant in the robbery. Both Rowe and Hosey testified Singleton joined them in planning to go rob a drug dealer and steal drugs from his mobile home. Rowe testified Singleton kicked in the front door and entered the mobile home first. Rowe said Singleton repeatedly asked Victim where her "stuff" was, and after she told them, Singleton went and got a white bag allegedly containing drugs out of the washing machine.

Rowe further testified he grabbed one or two pairs of sneakers and a cell phone before leaving the mobile home. Rowe claimed he did not know exactly what was in the white bag, and the State did not admit any drug evidence during the course of the trial. Rowe spent the night in the woods and was apprehended by the police the next morning. He confessed to his involvement in the crime and directed the police to Latrell Tyler's home, where Rowe knew Singleton would be staying.[5] Police proceeded to the address Rowe gave them and arrested Singleton.

In April 2008, Victim gave another statement to a Solicitor's Office investigator. In that statement, Victim stated she saw a black male whom she knew as "J" come into her bedroom with a handgun. "J" said "oh sh[*]t" and then ran from the room. Victim said she was not sure why she did not initially tell the police that "J" Singleton was one of the people who entered her home. Victim claimed that "J" probably ran from the room when he saw her because she and "J" knew each other. Victim said she did not see any drugs in the mobile home that night, but she admitted that she had heard her live-in boyfriend, Folk, sold drugs.

With respect to the jewelry stolen from her home, Victim's handwritten statement noted the robbers took a gold chain, a gold watch, and two gold rings. Victim claimed that all the jewelry found on Singleton when he was arrested belonged to Folk. Singleton's counsel cross-examined Victim regarding the fact that the jewelry found in Singleton's possession upon his arrest consisted of two gold bracelets, a watch, a ring, and did not include any gold chains.

In his case-in-chief, Singleton presented evidence that the jewelry found in his possession at the time of his arrest actually belonged to him and not to Folk. Specifically, Tyler, Tanora Clemons, and Dorothy May Singleton[6] described the jewelry in detail, and all three witnesses testified

[5] Tyler was Singleton's girlfriend.

[6] Clemons is the mother of Singleton's child, and Dorothy May Singleton is Singleton's mother.

they had seen Singleton wearing the jewelry prior to September 7, 2007. Tyler noted:

> I remember the bracelet because I asked him could I wear the bracelet. He told me no, he wouldn't let me wear the bracelet. It got the real pretty Jesus on it and I liked it. It had the diamonds on it. I asked could I get it. He told me no. I did want this too, but he told me no.

The State sought to call a reply witness, Harriet Washington, Folk's mother, to testify that the jewelry in fact belonged to her son. During a bench conference off the record, Singleton objected to Washington's testimony on the grounds that Washington was not sequestered during the trial, and was in the courtroom when the other witnesses discussed the jewelry. The circuit court overruled Singleton's motion to suppress the testimony but limited any prejudice by requiring Washington to verbally describe the jewelry prior to the State showing it to her.

During her direct testimony, Washington described the jewelry and identified it as belonging to her son, Folk. Washington testified:

> He got the Lord's piece, a big chain with the Lord face on it. And then he got another big gold chain like a, uh, it's something like some kind of like a head something, but then he got one with a Jesus in it with the diamonds on it and then he had, he got a gold bracelet with Jesus head because I had asked him for it . . . he got his gold watch. He got several rings.

During cross-examination, Singleton's counsel questioned Washington extensively regarding her presence in the courtroom when the jewelry was displayed earlier that same day. Washington admitted she had last seen the jewelry that same morning when Singleton's counsel displayed it for three witnesses.

The jury convicted Singleton of first degree burglary and criminal conspiracy. The circuit court sentenced Singleton to thirty-five years' imprisonment for first degree burglary, suspended upon the service of twenty-five years plus five years' probation. The circuit court also sentenced Singleton to five years' imprisonment for conspiracy, to run concurrently with the burglary sentence. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err in allowing the victim to identify Singleton in court when her out-of-court identification was arguably unreliable and created a substantial likelihood of irreparable misidentification?

2. Did the circuit court err in allowing the State to call a witness for reply testimony when the witness did not comply with the sequestration order imposed at Singleton's request such that his right to due process was violated?

LAW/ANALYSIS

I. In-Court Identification of Defendant

Singleton argues the circuit court erred in allowing Victim to identify him during her in-court testimony when her out-of-court identification was unreliable and created a substantial likelihood of misidentification. We disagree.

"The admission of evidence is within the sound discretion of the circuit court." State v. Simmons, 384 S.C. 145, 166, 682 S.E.2d 19, 30 (Ct. App. 2009). "Accordingly, a circuit court's decision to allow the in-court identification of an accused will not be reversed absent an abuse of discretion or prejudicial legal error." Id. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof."

Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005).

"An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." Simmons, 384 S.C. at 166, 682 S.E.2d at 30 (internal quotation marks and citation omitted). "The United States Supreme Court has developed a two-prong[ed] inquiry to determine the admissibility of an out-of-court identification." State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000) (citing Neil v. Biggers, 409 U.S. 188, 198-99 (1972)). First, a court must ascertain whether the identification process was unduly suggestive. Id. Next, the court must decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Id.

"The inquiry must focus upon whether, under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification." State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007). When determining the likelihood of misidentification, courts must evaluate the totality of the circumstances using the following factors:

> (1) the witness's opportunity to view the perpetrator at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation.

Id. at 127, 644 S.E.2d at 697.

During trial, Victim testified she recognized Singleton because he was formerly friends with Folk. Victim recalled that Singleton had greeted her on the Denmark Technical College campus several times in the past. Furthermore, she got a good look at Singleton on the night of the robbery. Victim explained her written statement did not mention she recognized Singleton because she was scared. Because Victim had prior personal

knowledge of Singleton, we conclude the identification process was not unduly suggestive. In addition, based on the totality of the circumstances, we find there was no substantial likelihood of irreparable misidentification such that the identification was unreliable as a matter of law.

Regardless, any error was harmless in light of the overwhelming evidence of guilt presented at trial. See State v. Sims, 387 S.C. 557, 566-68, 694 S.E.2d 9, 14-15 (2010) (finding error in admission of hearsay statement harmless in view of the overwhelming evidence of guilt presented at trial); Fields, 363 S.C. at 26, 609 S.E.2d at 509 (noting that to warrant reversal based on the admission of evidence, an appellant must demonstrate both error and prejudice). Specifically, two co-conspirators testified against Singleton and identified him as a participant in the robbery.

Accordingly, we affirm the circuit court's decision to admit Victim's in-court identification of Singleton because the identification process was not unduly suggestive, there was no substantial likelihood of irreparable misidentification, and there was no resulting prejudice.

II. Motion to Suppress Unsequestered Witness's Testimony

Singleton argues the circuit court's decision to allow an unsequestered witness to testify deprived him of fundamental fairness and violated his right to due process of law. Specifically, Singleton contends it was prejudicial error to allow Harriet Washington, Folk's mother, to provide rebuttal testimony regarding ownership of the jewelry found on Singleton at the time of his arrest. During trial, Singleton's counsel objected to the reply testimony by Washington because she was sitting in the courtroom when other witnesses described and identified all four pieces of jewelry.

"A denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice." State v. Hornsby, 326 S.C. 121, 129, 484 S.E.2d 869, 873 (1997). "At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion." Rule 615, SCRE (emphasis added). However, "[a] party is not entitled to the sequestration of witnesses as a matter of right." State v. Fulton, 333 S.C.

359, 375, 509 S.E.2d 819, 827 (Ct. App. 1998). "Rather, the decision to sequester witnesses is left to the sound discretion of the trial judge." Id. "This discretion extends to the State's right to recall a witness in reply who was present in the courtroom during a portion of the trial." Id.

"Whether a witness should be exempted from a sequestration order is within the trial court's discretion." State v. Tisdale, 338 S.C. 607, 616, 527 S.E.2d 389, 394 (Ct. App. 2000) (declining to grant a mistrial based on violation of a sequestration order by the State's witness); see also Fulton, 333 S.C. at 375, 509 S.E.2d at 827 (finding no abuse of discretion by the trial judge in allowing reply testimony from two previously sequestered witnesses who had remained in the courtroom following their initial testimony). Moreover, "[t]he admission of reply testimony is within the sound discretion of the trial judge, and there is no abuse of discretion if the testimony is arguably contradictory of and in reply to earlier testimony." State v. Todd, 290 S.C. 212, 214, 349 S.E.2d 339, 340 (1986); see also State v. Huckabee, 388 S.C. 232, 243, 694 S.E.2d 781, 786 (Ct. App. 2010) (finding no abuse of discretion by the trial judge in allowing reply testimony when it was limited in scope to contradict a previous contention raised by the defendant and not admitted to complete the State's case-in-chief).

We conclude Singleton's right to due process of law was not violated by the admission of this reply testimony. First, Singleton was not entitled to a sequestration order as a matter of right. See Fulton, 333 S.C. at 375, 509 S.E.2d at 827 ("A party is not entitled to the sequestration of witnesses as a matter of right."). Furthermore, the circuit court did not abuse its discretion in allowing Washington to testify regarding her belief that Folk owned the jewelry found in Singleton's possession at the time of his arrest. Washington's testimony was in direct response to three witnesses who testified Singleton owned the same jewelry. The reply testimony was limited in scope and not admitted to complete the State's case-in-chief. See Huckabee, 388 S.C. at 243, 694 S.E.2d at 786. Finally, Singleton's counsel cross-examined Washington extensively regarding her presence in the courtroom when the jewelry was displayed earlier that day. Therefore, any possible prejudicial effect was limited by Singleton's counsel repeatedly questioning Washington regarding the source of her knowledge of the jewelry.

CONCLUSION

We affirm the circuit court's decision to admit Victim's in-court identification of Singleton because the identification process was not unduly suggestive, the identification was reliable based on the totality of the circumstances, and there was no resulting prejudice. We also affirm the circuit court's decision to allow the State to call a previously unsequestered witness to give reply testimony because the admission of Washington's testimony did not deprive Singleton of either fundamental fairness or due process of law. The testimony was offered by the State in reply to directly contradictory testimony by Singleton's witnesses. Furthermore, Singleton's counsel cross-examined Washington extensively regarding her presence in the courtroom during the other witnesses' testimony.

AFFIRMED.

SHORT and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Rebecca West, Respondent,

v.

Todd Morehead, Columbia City Paper, LLC, and Paul Blake, Appellants.

Appeal From Richland County
J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No. 4887
Heard June 8, 2011 – Filed September 7, 2011

AFFIRMED IN PART AND REVERSED IN PART

Kirby D. Shealy, III and Evan Brook Bristow, both of Columbia, for Appellants.

S. Jahue Moore, Sr., of West Columbia, for Respondent.

FEW, C.J.: In this appeal from a jury verdict in favor of Rebecca West for actual and punitive damages on a defamation claim, we address the "fair report privilege" and whether West introduced sufficient evidence of Appellants' fault. We find the trial court properly handled the fair report privilege and properly submitted to the jury the question of whether West presented sufficient evidence of fault as to actual damages. We also find the

trial court acted within its discretion in ruling on issues regarding a "clarification" published by Appellants. We therefore affirm the jury's award of actual damages. As to punitive damages, however, we find as a matter of law that the evidence was insufficient to support a finding of actual malice, and we reverse the award of punitive damages.

I. Facts and Procedural History

On October 24, 2007, the Columbia City Paper published an article entitled "Adieu M'Armoire:[1] Whit-Ash Co. linked to bizarre divorce case, other prominent figures implicated." The subject of the article was the divorce of Stella and Whit Black and a lawsuit Stella Black filed against Whit's divorce attorney, Rebecca West. In particular, the article addressed allegations Black[2] made in an affidavit and motion filed in the divorce case, and in the complaint filed in the civil lawsuit, to support Black's claim that West should not be permitted to represent Whit. In the civil lawsuit against West, Black alleged causes of action for civil conspiracy, breach of fiduciary duty, fraud, negligent misrepresentation, and malpractice. Paul Blake, a reporter for City Paper, reviewed the public record of Black's civil suit against West, which included Black's affidavit and motion in the divorce case. Todd Morehead, another City Paper reporter, wrote the article based on Blake's review of the public record and interviews Blake conducted. Neither Blake nor Morehead attempted to speak with West before publishing the article.

West sued City Paper, Blake, and Morehead for defamation. West, who was mentioned by name in the article, alleged the following two statements in the article defamed her: (1) "[I]t had all the ingredients of a

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[1] In French, "adieu" means "farewell" or "goodbye," and "armoire" means "wardrobe" or "furniture." "Adieu, Mi Armoire" means, quite literally, "goodbye, my wardrobe." The Concise Oxford French-English Dictionary 14, 57 (1968). Todd Morehead testified he intended the title to be a play on the opera "Adieu, M'Amour," because Stella Black is an aspiring opera star, and Whit Black owns a furniture store.

[2] For simplicity, we refer to Stella Black as "Black" and Whit Black as "Whit."

cheap detective novel: . . . two-bit lawyers who'll even turn on their own clients if the retainer is juicy enough"; and (2) "[W]hen they think back to the tense days of the Black divorce many won't care about the corruptible attorneys or ETV property." At trial, Morehead admitted the statements refer to West. He also admitted he chose "adjectives" to describe West that do not appear in the public documents. However, both he and Blake testified the article was based exclusively on allegations Black made in the public documents. Morehead testified the article was written in "narrative literary style" and did not reflect his or City Paper's opinion of West.

The jury found in favor of West and awarded her $10,000.00 in actual damages and $30,000.00 in punitive damages.

II. Legal Background

The law of defamation permits a plaintiff to recover "for injury to her reputation as the result of the defendant's communication to others of a false message about the plaintiff." Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 508, 506 S.E.2d 497, 501 (1998). To establish a defamation claim, a plaintiff must prove: (1) a false and defamatory statement was made; (2) the unprivileged statement was published to a third party; (3) the publisher was at fault; and (4) either the statement was actionable regardless of harm or the publication of the statement caused special harm. Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006); Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). Under the law of defamation, however, certain communications give rise to qualified privileges, including the privilege to publish fair and substantially accurate reports of judicial and other governmental proceedings without incurring liability. See generally Padgett v. Sun News, 278 S.C. 26, 292 S.E.2d 30 (1982) (discussing fair report privilege); Jones v. Garner, 250 S.C. 479, 158 S.E.2d 909 (1968) (same); see also 2 Rodney A. Smolla, Law of Defamation § 8:3 (2d ed. 2010). The applicability of this "fair report privilege" and the sufficiency of proof on the fault element, both as to actual and punitive damages, are the primary issues in this appeal. We discuss each in turn.

III. The Fair Report Privilege

"Fair and impartial reports in newspapers of matters of public interest are qualifiedly privileged." Jones, 250 S.C. at 487, 158 S.E.2d at 913. Appellants contend they were entitled to a directed verdict on the basis that the fair report privilege immunized them from liability. We disagree. "Under this defense [of qualified privilege], one who publishes defamatory matter concerning another is not liable for the publication if (1) the matter is published upon an occasion that makes it [qualifiedly or] conditionally privileged, and (2) the privilege is not abused." Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999) (citing Restatement (Second) of Torts § 593 (1977)). Whether the occasion is one which gives rise to a qualified privilege is a question of law. 334 S.C. at 485, 514 S.E.2d at 134. Because the article relates to the content of public files on judicial proceedings, the trial court correctly ruled that the publication of the article is subject to the fair report privilege. However, "[t]he privilege extends only to a report of the contents of the public record and any matter added to the report by the publisher, which is defamatory of the person named in the public records, is not privileged." Jones, 250 S.C. at 487, 158 S.E.2d at 913. Where there is conflicting evidence,[3] "the question whether [a qualified] privilege has been abused is one for the jury." Swinton Creek, 334 S.C. at 485, 514 S.E.2d at 134. In this case, the evidence is subject to more than one inference as to whether the privilege was abused. In particular, there is conflicting evidence as to whether the article is a "fair and substantially true account" of allegations Black made in family and circuit courts. See Padgett, 278 S.C. at 31, 292 S.E.2d at 33 (stating the "[fair

[3] In Swinton Creek, the supreme court cited Woodward v. South Carolina Farm Bureau Insurance Co., 277 S.C. 29, 32-33, 282 S.E.2d 599, 601 (1981), for this proposition: "While abuse of [the conditional] privilege is ordinarily an issue [reserved] for the jury, . . . in the absence of a controversy as to the facts, . . . it is for the court to say in a given instance whether or not the privilege has been abused or exceeded." Swinton Creek, 334 S.C. at 485, 514 S.E.2d at 134 (bracketed language omitted in Swinton Creek); see also Padgett, 278 S.C. at 33, 292 S.E.2d at 34 (reversing the denial of a directed verdict motion based on fair report privilege where the "record conclusively show[ed] that the articles . . . were accurate reports of the documents as they were filed in the litigation").

report] privilege consists of making a fair and substantially true account of the particular proceeding or record"). Thus, the trial court properly submitted to the jury the question of whether Appellants' use of narrative journalism and their choice of words other than those used in court documents was an abuse of the privilege.

IV. Proof of Fault

Appellants also contend the trial court erred in not granting them a directed verdict on the element of fault, as to both actual and punitive damages.

a. Actual Damages

The trial judge charged the jury that the standard for proving fault in order to recover actual damages is common law malice. Neither party objected. A plaintiff may prove common law malice by showing "the defendant acted with ill will toward the plaintiff, or acted . . . with conscious indifference of the plaintiff's rights." Erickson, 368 S.C. at 466, 629 S.E.2d at 665. Our standard of review as to the factual finding of common law malice allows us only to correct errors of law. 368 S.C. at 464, 629 S.E.2d at 663-64 (citing Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976)). "[A] factual finding by the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings." Id. In making this review, we must view the evidence and the inferences that can be drawn from it in the light most favorable to the prevailing party. Swinton Creek, 334 S.C. at 476, 514 S.E.2d at 130; see also Erickson, 368 S.C. at 463, 629 S.E.2d at 663 ("The appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor. . . . If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury.").

There is conflicting evidence in this case as to whether West met her burden of proving Appellants acted with common law malice. In particular, we find some evidence exists as to whether the use of the phrases "two-bit lawyers" and "corruptible attorneys" to characterize the allegations contained in the public record amounted to conscious indifference to West's rights, and

thus to common law malice. The trial court properly submitted this question of fact to the jury.

b. Punitive Damages

Appellants contend the trial court should have granted a directed verdict on the question of punitive damages. We agree. "[I]n order to recover punitive damages from a media defendant, a private-figure plaintiff[4] must prove by clear and convincing evidence that the defendant acted with constitutional actual malice." Erickson, 368 S.C. at 466-67, 567 S.E.2d at 665. A plaintiff may meet this burden in either of two ways: (1) by proving "the defendant published the statement with knowledge it was false," or (2) by proving "the defendant published the statement . . . with reckless disregard of whether it was false." Id. In this case there was no evidence Appellants knew any of the statements were false. We therefore focus on whether there is sufficient evidence in the record that Appellants acted with reckless disregard of the falsity of the statements. Our supreme court has stated:

> A "reckless disregard" for the truth . . . requires more than a departure from reasonably prudent conduct. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." There must be evidence the defendant had a "high degree of awareness of . . . probable falsity."

Elder v. Gaffney Ledger, 341 S.C. 108, 114, 533 S.E.2d 899, 902 (2000) (quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968), and Garrison v. Louisiana, 379 U.S. 64, 74 (1964)); see also Elder, 341 S.C. at 114, 533 S.E.2d at 902 (stating "there must be evidence at least that the defendant purposefully avoided the truth"); Holtzscheiter, 332 S.C. at 513 n.9, 506 S.E.2d at 503 n.9 (stating that in order to prove reckless disregard, a plaintiff must prove the defendant had "serious reservations" about the truthfulness of the article).

[4] The parties agree West is a private-figure plaintiff.

Unlike our review of the other factual findings of the jury, we review the jury's determination of actual malice as a question of law. Elder, 341 S.C. at 113, 533 S.E.2d at 901-02.

> Whether evidence is sufficient to support a jury's finding of constitutional actual malice in a defamation action is a question of law. The trial court must make such a determination before submitting the issue to a jury. When the jury makes such a finding, the appellate court must independently examine the record to determine whether the evidence sufficiently supports a finding of actual malice. This review is necessary due to the "unique character of the interest protected by the actual malice standard. Our profound national commitment to the free exchange of ideas, as enshrined in the First Amendment, demands that the law of libel carve out an area of 'breathing space' so that protected speech is not discouraged."

Erickson, 368 S.C. at 477, 629 S.E.2d at 670-71 (citing Elder, 341 S.C. at 113, 533 S.E.2d at 901-02, and quoting Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 686 (1989)).

West argues Appellants' failure to investigate the legitimacy of Black's allegations is evidence of actual malice. West also contends Appellants did not call her to verify Black's allegations. However, the mere failure to investigate an allegation is not sufficient to prove the defendant had serious doubts about the truth of the publication. Elder, 341 S.C. at 114, 533 S.E.2d at 902 ("Failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard."). The media has no duty to verify the accuracy or measure the sufficiency of a party's legal allegations. The Constitution does not require that the press "warrant that every allegation that it prints is true." Reuber v. Food Chem. News, Inc., 925 F.2d 703, 717 (4th Cir. 1991) (en banc).

We must therefore analyze whether there is evidence in the record that Appellants had a "high degree of awareness of probable falsity" concerning

the characterizations of West as a "two-bit lawyer" and a "corruptible attorney," or whether Appellants otherwise "entertained serious doubts as to the truth" of the characterizations. The phrase "two-bit" means cheap, mediocre, inferior, or insignificant. Webster's New World College Dictionary 1547 (4th ed. 2008). Applying the term to a lawyer in its most defamatory sense, the phrase means not a good lawyer, below par in performance, and not worthy of respect. The word "corruptible" means subject to bribery and to change from morally sound to morally unsound or debased. Webster's New World College Dictionary 327 (4th ed. 2008). Applying the term to West in its most defamatory sense, the phrase means West is not devoted to her clients, she is willing to forsake the best interests of her clients, she is subject to being bribed, and she is a crooked lawyer.

In determining whether Appellants had a high degree of awareness of probable falsity of those characterizations, or whether they entertained serious doubts as to their truth, we must compare the terms "two-bit lawyer" and "corruptible attorney" to the terms Black used in her affidavit filed in family court and in the complaint filed in her civil lawsuit. In her affidavit, Black made the following statements:

- "I have been most concerned about conflicts of interest that have arisen due to my lawyer, Rebecca West, sharing privileged communications about my business dealings concerning which she represented me prior to my institution of this action."
- "Beginning in 2005, I was represented by Rebecca West . . . about a number of issues dealing with my business . . . . The next thing I knew, Ms. West was listed as one of my husband's attorneys of record . . . ."
- "There is no question in my mind that since Rebecca West represented me in matters substantially related to this case, her representation of my husband in this action is an absolute conflict of interest."
- "[T]he matters for which Rebecca West . . . represented me are substantially related to the very same issues that are at the very heart of this pending litigation. . . . [T]he same transactions and issues . . . are matters about which I am now being questioned extensively in this divorce action. [This] makes me most

concerned that Rebecca West, who did this work for me and to whom I imparted confidences, made this information available to [my husband's other lawyers]."

- "I also have concern that Ms. West . . . did not perform a number of services that I requested of her in a timely fashion, if at all, especially after my husband left me . . . ."
- "I believe she has used and passed along information I provided to her in confidence to [my husband's other lawyers]."

In the complaint for her civil lawsuit, Black made the following statements:

- [My husband paid] legal fees generated by West . . . for representing [me], all with the underlying goal of benefitting [my husband] . . . without [my] knowledge or consent."
- "West . . . did not follow through on representation of [me], . . . all in an effort to damage [my] career opportunities."
- "West, . . . having been paid by [my husband's company], furnished privileged and confidential information about [me] to [my husband] . . . for the purpose of assisting [him] in efforts to economically detriment [me] in the marital litigation."
- "West . . . gave publicity to matters that are private to [me]."
- "[West] breached [her] fiduciary duties . . . by disseminating her private business and personal matters to [my husband] without . . . authorization."
- "[West] breached . . . fiduciary duties by not only taking [my] private information to [my husband] . . . , but also by . . . sharing documents and information about [me] without proper disclosures to or securing waivers from [me], and . . . going so far as to appear as an attorney of record for [my husband] in the matrimonial proceeding wherein confidential information gained by West during her representation of [me] is directly at issue."
- "West made false representations to [me] about assisting [me] and about [her] own true interests with the knowledge that those representations were false or in reckless disregard of the falsity of those representations."

Beyond these quotes from the affidavit and the complaint, the gist of the publicly filed allegations Black made against West is that West is not a good lawyer, and that in this particular instance West intentionally and deceitfully abused her position of confidence with Black for the purpose of harming Black and benefiting Black's husband so that West would realize financial gain. When we compare these publicly made allegations with the statements in the article that West is a "two-bit lawyer" and a "corruptible attorney," we find West has not proven by clear and convincing evidence that Appellants believed their characterization of the allegations Black made against West were not accurate. Therefore, West has failed to prove actual malice. We find the trial court erred as a matter of law in denying Appellants' directed verdict motion. Accordingly, we reverse the jury's award of punitive damages.

V. Issues Regarding the "Clarification"

Appellants allege three errors relating to a "clarification" published by City Paper on October 26, 2007, two days after the article was published. First, Appellants contend the trial judge should have granted a mistrial when West's counsel mentioned the clarification in his opening statement. Second, Appellants contend the trial judge erred in admitting the clarification as evidence. Third, Appellants contend they should have been permitted to call West's trial counsel as a witness to testify concerning a letter he wrote to City Paper seeking a retraction. We find the first two issues are not preserved, and the trial judge did not err in refusing to allow Appellants to call West's trial counsel as a witness.

We find the first and second issues unpreserved because the only objection made to the use of the clarification in the opening statement or the admission of it as evidence was based on Rule 407, SCRE. Rule 407 does not apply to this situation. The rule provides that evidence of subsequent measures "which, if taken previously, would have made the event less likely to occur" is not admissible for the purpose of proving culpable conduct. Rule 407, SCRE. City Paper could not possibly have issued a clarification of the article before the article was printed. Thus, Rule 407 could not be the basis on which the opening argument could have been limited, or on which the evidence could have been excluded. Appellants make arguments and cite authorities in their briefs that were not presented to the trial court. These

arguments are not preserved. See State v. Russell, 345 S.C. 128, 133-34, 546 S.E.2d 202, 205 (Ct. App. 2001) (finding evidentiary argument was not preserved for review because the issue was never raised to or ruled upon by the trial judge).

Appellants also argue the trial court erred in not allowing them to call West's trial counsel as a witness. In an offer of proof, Appellants questioned whether the letter written by West's counsel to City Paper was a threat to file a defamation lawsuit regardless of any retraction, and whether the letter was a strategic attempt to set up the lawsuit. The proffer contained no more than a discussion of what counsel was attempting to accomplish in writing the letter. The trial court indicated it would allow the letter into evidence. However, the court denied the request to call counsel as a witness, stating "there is no need to put him up there and question his trial tactics, which is all you want to do. That he wrote the letter is in evidence. That they responded to it is in evidence. The rest of it, forget it." The trial court essentially ruled that the letter speaks for itself, and counsel's reasons for writing the letter were not relevant. We find the trial court's ruling was within its discretion. See Hartfield v. Getaway Lounge & Grill, Inc., 388 S.C. 407, 413, 697 S.E.2d 558, 561 (2010) ("The admission of evidence is within the sound discretion of the trial judge and will not be reversed absent a clear abuse of discretion.").

VI. Conclusion

We find the trial court properly submitted to the jury the factual questions of whether Appellants abused the fair report privilege and whether West met her burden of proving common law malice. We affirm the trial court's rulings regarding the clarification. However, we find the evidence is not sufficient to establish constitutional actual malice, and therefore West may not recover punitive damages. The judgment below is

AFFIRMED IN PART AND REVERSED IN PART.

PIEPER and LOCKEMY, JJ., concur.