

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr.
Circuit Court Judge

Case No. 2015-CP-10-3919
Appellate Case No. 2017-2032

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SC Court of Appeals

Athan Fokas,

*Respondent/
Appellant,*

v.

Philip Ferderigos, Spiros Ferderigos, and
Jacob Ferderigos, Defendants,

Of whom Spiros Ferderigos and Philip
Ferderigos are the

*Appellants/
Respondents,*

And

Jacob Ferderigos is the Respondent.

**INITIAL RESPONDENT'S BRIEF OF
RESPONDENT/APPELLANT ATHAN FOKAS
RESPONDING TO SPIRO FERDERIGOS'
APPELLANT'S BRIEF**

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STATEMENT OF ISSUE ON APPEAL

**DID THE TRIAL COURT ERR IN GRANTING FOKAS' MOTION FOR SUMMARY
JUDGMENT AS TO THE DEFAMATION CLAIMS OF SPIROS FERGERIGOS?**

STATEMENT OF THE CASE

Fokas adopts Spiros Ferderigos' Statement of the Case in its entirety per Rule 208(b)(2).

STATEMENT OF FACTS

Athan Fokas (“Fokas”) and Defendants Phillip, Spiros and Jacob Ferdergos are all first cousins and own 229 King Street as tenants in common with Fokas holding one half interest and the Defendants holding one sixth interest each. The parties’ fathers took title to 229 King in the 1970s and operated a restaurant on the first floor of it that is still there today: the Old Towne Restaurant (“Restaurant”). The Restaurant is operated by a corporation, S&S Old Town, Inc., in which Defendants Phillip and Spiros Ferderigos (jointly referred to herein as the “Defamation Defendants”) have no interest.

In 2009, a fire occurred on the second floor of 229 King Street, resulting in extensive damage that was compensated for by insurance proceeds.¹ Prior to the fire, the second floor of 229 King Street had been used for “overflow dining space” in conjunction with the Restaurant. However, rather than repair the second floor and restore it for its prior use, the parties decided to convert the second floor into two (2) rental suites. As such, the insurance proceeds were used to upfit and convert the second floor into the rental suites.

Old Towne Suites, LLC (the “LLC”) was the entity created to operate the rental suites. The LLC was owned by the parties in the same proportion to their ownership of the building² and was very successful. Due to that success, in 2012 the parties began discussing the possibility of creating more profitable rental units within the building. Out of those discussions, an agreement was formed, the basis of which follows:

¹ That fire is the subject of one of the defamatory comments made by Defamation Defendants about Fokas.

² Fokas $\frac{1}{2}$ and the Defendants $\frac{1}{6}$ each.

- The parties agreed to expansion of the existing building at 229 King Street by the addition of two (2) more floors of rental suites to add to the existing rental suites business which they owned jointly, Old Towne Suites, LLC. That plan changed and the parties subsequently agreed to add three (3) floors so that six (6) more rental suites would be constructed;
- The parties would share the costs of design, engineering and permitting in proportion to their ownership interests in the building and the LLC (the percentages being the same);
- The parties would mortgage the property at 229 King Street, which they owned jointly as tenants in common, to secure the bank loan;
- The loan amount as per the commitment from South Coast Bank was to be \$1,800,000;
- The LLC would be a borrower on the loan as provided in the bank commitment letter and the profit stream of the LLC's existing rental suites business would fund payments on the loan;
- Only Jacob Ferderigos and Fokas would personally guarantee the loan from South Coast; and
- Construction would commence under a contract with Kevin Carroll, the same contractor who constructed the original rental suites, once the loan was closed.

By July 2012 and continuing through the summer of 2012, the parties were receiving estimates on the costs for design. At this point in time, the agreement between the parties was essentially that of "due diligence," investigating the possibility of adding the suites and

looking for acceptable funding through a loan. Later, the agreement evolved into a deal to secure a loan in which all the parties would borrow the funds and then proceed with the process of design, engineering and permitting of the new structure.

After canvassing a number of banks, Fokas received a commitment from South Coast Bank to fund the project. Subsequent to the issuing of the commitment letter, the parties began spending substantial sums to pay for detailed engineering, design and permitting work. During the Board of Architectural Review (“BAR”) review and approval process, the parties learned that it would be possible to get approval to add an additional story to the project. Consequently, they agreed to revise the plans and the loan to do so. In September of 2014, the bank increased the loan amount to cover the new estimate for the construction and in October of 2014, Fokas executed a contract for the construction of the building.

Around that point, *for the first time*, dissention in the ranks surfaced. Spiros Ferderigos informed the group that he had to delay his execution of any bank documents because he was under consideration for a Family Court judgeship. Phillip entered the conversation at this point, informing Fokas that he would kill the deal if Fokas did not shut up. Thereafter, the relationship between Fokas and the Defendants soured further, with Phillip Ferderigos telling Fokas, among other things:

- That he was losing interest in doing business with Fokas simply because Fokas wanted to move forward with the project;
- That the Defendants had never actually agreed to anything, despite the fact that Jacob Ferderigos had signed the commitment letter from South Coast and that all of the parties had shared in approximately \$90,000 of expenses to design and permit the building expansion;

- That he was unilaterally injecting new and self-serving terms into the parties' agreement ***that had never previously been mentioned;***

Following voluminous electronic exchanges between the parties, most of which involved the Defendants backing out of various aspects of the previously agreed upon project, the deal died. Fokas subsequently filed a breach of contract action against the Defendants insisting that they live up to their promises and expectations. As the bad blood continued to boil, Defamation Defendants made the following comments regarding Fokas:

- That Fokas hired someone to start the fire at 229 King Street, for the purpose of collecting insurance proceeds;
- That Fokas pursued a false workers' compensation claim when he had, in fact, been injured in ways not related to the business, for the purpose of collecting insurance proceeds; and
- That Fokas falsely filed an insurance claim, claiming damages to the roof of the building at 229 King Street were from a hurricane in 1998 or 1999 when they were not.

These comments were made to more than one person and were clearly defamatory.

Fokas had already filed an action for breach of contract against the Defendants ("Contract Case") and, upon learning of the above-cited comments, Fokas filed an action against Defamation Defendants. The answers of Defamation Defendants in both cases included counterclaims for defamation in which they allege that Fokas published false and damaging statements against them. The statements allegedly made to third persons were:

- That the Defamation Defendants did not agree to go forward with the plan to add additional rental suites at 229 King Street because Phillip Ferderigos and/or Spiros Ferderigos could not eat for free at the Old Towne Restaurant;
- That either Phillip or Spiros Ferderigos do not have good business sense;
- That either Phillip or Spiros Ferderigos are bad business people; and
- That either Phillip or Spiros Ferderigos were accusing Fokas of setting fire to 229 King Street.

Fokas eventually moved for summary judgment with respect to the Defamation Defendants' claims for defamation. Despite Defamation Defendants attempting to prevent the trial court granting the motion by alleging even more allegedly defamatory comments made by Fokas at the hearing on Fokas' motion³, the trial court granted it. From that Order, Spiros Ferderigos appeals.

ARGUMENT

I. STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, an appellate court must apply the same standard that governs the trial court under Rule 56(c), *SCRCP*, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002); Rule 56(c), *SCRCP*. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable

³ Those comments will be discussed in Section II of the Brief below.

to the non-moving party.” *Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860; *see Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 602 S.E.2d 389 (2004); *Osborne v. Adams*, 346 S.C. 4, 550 S.E.2d 319 (2001); *Koester v. Carolina Rental Ctr. Inc.*, 313 S.C. 490, 443 S.E.2d 392 (1994); and *Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24 (1988).

If there is a “scintilla of evidence” in the record which gives rise to a genuine issue of material fact, summary judgment should not be granted. *Howle v. Woods*, 231 S.C. 75, 97 S.E.2d 205 (1957); *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (“the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.”). The “scintilla of evidence rule” means that there must be some evidence arising out of testimony which elucidates the issues of fact and which enables the jury to form an intelligent conclusion, but does not authorize admission of speculative, theoretical and hypothetical views. *See In re Crawford*, 205 S.C. 72, 30 S.E.2d 841 (S.C. 1944). A trial court may grant a motion for summary judgment when the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), *SCRCP*; *See also, Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997)

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AS TO SPIROS FERDERIGOS’ DEFAMATION CLAIMS AGAINST FOKAS.

The tort of defamation permits a plaintiff to recover for an injury to his reputation caused by false statements by another. *Banks v. St. Matthew Baptist Church*, 406 S.C. 156, 161, 750 S.E.2d 605, 607 (2013). To prove defamation, a plaintiff must show: (1) a false defamatory statement was made; (2) the unprivileged publication was made to a third party;

(3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 464, 629 S.E.2d 653, 664 (2006). “A communication is defamatory if it tends to impeach the honesty, integrity, virtue or reputation” Hubbard and Felix, *The South Carolina Law of Torts* at p. 462 (2nd Ed. 1997).

There is no genuine issue of material fact in the record in this case as to the elements of defamation and there is certainly no evidence that Fokas made any defamatory statements to any third parties about Spiros Ferderigos. Furthermore, publication of any or all of the alleged defamatory statements does not constitute defamation as the statements were made to a party in the companion Contract Case and were made during the course of the disagreement between the parties to that case. The statements at issue were part of the disagreement which matured into the Contract Case. As such, the alleged defamatory statements were not defamation, but are protected by the litigation privilege.

Despite extensive discovery, Spiros Ferderigos has failed to identify any person other than their brother and co-defendant in the Contract Case, Jacob Ferderigos, to whom any of the alleged defamatory statements were made or published. In his responses to interrogatories, Spiros Ferderigos acknowledged they had no specific information as to what third parties such statements were made by Fokas other than to their brother, but that they thought he might have made them to Fokas’ mother, Irene Fokas, his father, Spiros Fokas, to his sister, Rania Nikatos, Kevin Carroll, and Justin Hansen. See Exh. C to Motions as to both Defendants. Spiros Ferderigos made similar statements in their deposition testimony. See Exh. D to Motions as to both Defendants. Spiros Ferderigos noticed the deposition of Kevin Carroll in the companion Contract Case but cancelled it and never rescheduled it. Neither

Spiros Nikatos nor Rania Nikatos have provided any testimony that Fokas defamed Spiros Ferderigos in any way.

Consistent with Spiros Ferderigos' lack of any evidence of publication, Irene Fokas was deposed in this case and denied any of the alleged statements were made to her by Fokas. See Exh. E to Motions as to both Defendants. Fokas has denied in his deposition and affidavit testimony making any such statements to third parties. See Exhs. B & F to Motions as to both Defendants. Justin Hansen has denied by affidavit ever being told anything about the fire at 229 King St. or the Defendants' accusations about the cause of the fire by Fokas. See Exh. G to Fokas' Memorandum. The publication of the alleged statements that Spiros Ferderigos claims "on information and belief" to have occurred is not supported by even a scintilla of proof. In the absence of any evidence of publication to a third party which is not subject to the litigation privilege, the Spiro Ferderigos' claims fail as a matter of law and were properly disposed of by the trial court.

A. There Simply Were No Defamatory Remarks Made by Fokas that Could Be Considered Actionable Per Se.

A statement may be actionable *per se*, in which case the defendant is presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages. Under common law, slander is actionable *per se* only when it charges the plaintiff with one of five types of acts or characteristics: (1) commission of a crime or moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; (5) unfitness in one's business or profession. Holtzscheiter v. Thomsan Newspapers, Inc., 332 S.C. 502, 511 n.5, 506 S.E.2d 497, 502, n. 5 (1998). "Or a statement may be not actionable *per se*, in which case nothing is presumed and the plaintiff must plead and prove both common law malice and special damages." Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 465, 629 S.E.2d 653, 664

(2006). Common law malice means the defendant acted with ill will toward the plaintiff or acted recklessly or wantonly, i.e. with a conscious disregard of the plaintiff's rights. Padgett v. Sun News, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982). "The determination of whether or not a statement is actionable *per se* is a matter of law for the court to resolve." Erickson, 368 S.C. at 466, 629 S.E. 2d at 665.

In erecting his arguments on appeal, Spiro Ferderigos attempts to convince this Court that Fokas' allegedly defamatory statements should be viewed in isolation, without regard to the obviously applicable litigation privilege. Spiro Ferderigos claims that there is evidence in the record of *per se* defamation about him by Fokas, particularly that Fokas had made aspersions about Spiros Fergerogos being unfit as a solicitor, attorney and business person. In fact, he expends great effort to convince this Court that the statements made were *per se* defamatory without regard to the fact that those statements, in the trial court's eyes, were protected by the litigation privilege. However, to the extent some rebuttal to the "*per se* in isolation" argument is necessary, Fokas would point out the following.

First, it is axiomatic that for a statement made to be defamatory, whether *per se* or merely defamatory at common law, it must be false. See Pierce v. Inter-Ocean Cas. Co., 148 S.C. 8, 145 S.E. 541 (1928). Although Spiro Ferderigos spends pages and pages and pages of his brief arguing that Fokas made *per se* defamatory statements to others about him, an argument that the trial court did not buy in the least, he never once offered even a shred of evidence to prove those statements **were in fact not true**. Not once in 10 pages did he show that Fokas' statements contained the single most important element of the cause of action: falsity. And while truth is an affirmative defense in a defamation action and the court is entitled to presume the falsity of statements where defamation *per se* is alleged, there was

no reason for the trial court in this instance to make any such presumption because no *per se* defamation occurred.

The following text is the basis for most of Spiro Ferderigos' assertions of *per se* defamation by Fokas:

If this deal is dead and you guys will not go forward unless you get to eat for free at Old Towne then I would like my expenses paid back to me because I have not delayed this project and we have had two closing's cancelled due to you guys reluctance to move forward. . . . I also feel that I can receive my attorney fees back due to a breach of contract and there may be ethics violations for Spiro admitting to threatening me by text. I have had trouble sleeping since I have received that text which could be breach or of bad faith dealing between partners. The eating at Old Towne for free was never an agreement between us going forward with the new suites and cannot be brought up now to delay the project. . . . I have cc'd my wife on this email so that she will be informed of all my conversations because we are life partners.

Spiro Ferderigo's Appellant's Brief at 9. Obviously, nothing in that text is defamatory if true and Spiro Ferderigos has made as best tacit denials of the truth of those statements in his brief or otherwise. Second, nothing in that text is defamatory as stated. Further, nothing in that text is defamatory **at all** simply because Spiro Ferderigos doesn't like it. A statement is not necessarily defamatory simply because it is unfavorable. *Murphy v. News & Courier*, 141 S.C. 51, 51, 139 S.E. 189, 190 (1927) ("To hold libelous per se the mere statement that one has failed, or even that he was unable, to furnish bond . . . would be carrying the law of libel beyond any precedent that has been called to our attention."); *Costas v. Florence Printing Co.*, 237 S.C. 655, 663, 118 S.E.2d 696, 700 (1961) ("We point out that there is no allegation that the respondent lost any customers, or had any diminution in trade. There is no allegation of special damages for losses sustained by reason of the publication of the alleged libelous statement. In short, the complaint does not allege special damages."); *Dauterman v. State*

Record Co., 249 S.C. 512, 519, 154 S.E.2d 919, 922 (1967) (“The language complained of by the plaintiff was naturally displeasing to him and was unquestionably of an unfavorable nature. However, it by no means follows that a publication which is unfavorable is also libelous.”).

Despite that simple truth, Spiro Ferderigos goes on to cite other privileged communications that are based on the same ideas contained in the above-cited text and couples them with cherry-picked, mostly out of context, deposition segments⁴ in order to create “sound bites” that purport to create *per se* defamatory statements published to others by Fokas. The trial court properly saw those attempts for the charade they are and granted summary judgment in Fokas’ favor.

B. Any and All Statements Made by Fokas Were Made in the Course of Litigation and, As Such, Are Protected by the Litigation Privilege.

Even if this Court were to conclude that the above-referenced statements constitute defamation, which would be a stretch, all of the statements Fokas made in the form of text messages sent to the Defendants and Jacob Ferderigos either related directly to the disputes between the Ferderigos brothers and Plaintiff and those disputes matured into the Contract Case or were made during the course of litigation. As such, the statements are covered by the litigation privilege and are absolutely privileged.

Any statement made as part of a judicial proceeding, in or out of court, is absolutely privileged under South Carolina law. Crowell v. Herring, 301 S.C. 424, 392 S.E.2d 464 (Ct. App. 1990). In Crowell, a Veterans of Foreign Affairs court martial was determined to be a judicial proceeding and statements made during the course of the proceeding were

⁴ Of a witness speaking through a translator.

absolutely privileged. “The trial court held the VFW court-martial was a judicial proceeding. Crowell does not appeal this finding, nor does he argue the defendants’ statements were irrelevant to the issues he was eventually brought to trial on.” *Id.* at 430, 392 S.E.2d at 467. “[T]he investigation of Crowell’s alleged misdeeds can be likened to a prosecutor gathering evidence, interviewing witnesses and preparing a case. Accordingly, we hold the statements made by Allen and Wilder during the course of their investigation of Crowell as trustees and as members of the investigatory committee, were absolutely privileged, ***inasmuch as the statements bore relation to the contemplated proceeding.***” [*emphasis added.*] *Id.* at 431, 392 S.E.2s at 467. *See also Sriberg v. Raymond*, 370 Mass. 105, 345 N.E.2d 882 (1976) (holding that an attorney writing to a defendant threatening litigation could not be sued for defamation given that the statements made were to the very defendant and addressed the very claims which were raised in the eventual litigation); *and Mathis v. Kennedy*, 243 Minn. 219, 225, 67 N.W.2d 413, 418 (1954) (concluding that statements made in a court of record having jurisdiction of a guardianship proceeding were absolutely privileged so long as “it has reference to or relation to or connection with the case before the court”).

Spiro Ferderigos argues that Fokas’ publication of statements made to his brother, Jacob Ferderigos, satisfies the element of the cause of action for defamation of publication to a third party. The statements to Jacob Ferderigos were all in the form of text messages sent to Jacob and the Defamation Defendants as part of a discussion and a disagreement over the development project to add floors to the building at 229 King Street. These discussions and disagreement resulted in the filing of the Contract Case. The statements concerning “eating for free,” that Defamation Defendants were displaying bad business judgment by not going forward with the project to add floors to 229 King Street and the 11th hour additions by Spiro

Ferderigos, even if defamatory, were made during the same disagreement that matured into the Contract Case and are directly within the scope of the issues surrounding Fokas' allegations of breach of contract and breach of the duty of care. The only statements Spiros Ferderigos complains of, which might otherwise give rise to a claim of defamation, are very clearly covered by the absolute litigation privilege. These are statements by Fokas via text message, accusing Spiros Ferderigos of lying in his deposition taken in this case and the statement by Fokas recounting part of an affidavit in this litigation describing Spiros Ferderigos' threat to use his position as an assistant solicitor to cause Fokas to become the subject of a criminal charge if the Plaintiff pursued the Contract Case. The statements concerning Spiros Ferderigos testifying falsely in his deposition are directly related to the discovery proceedings in this case. The statement that Spiros Ferderigos threatened to use his position as an assistant solicitor to convince law enforcement to pursue a charge against Plaintiff if he pursued a breach of contract action is directly related to the issues in the Contract Case and stem from an affidavit filed in this case. The statements Defendants complain of concerning Plaintiff's allegation that they were accusing him of arson and other insurance fraud actions also fall squarely within the absolute litigation privilege as they are directly related to the matters in this case.

South Carolina also recognizes the doctrine of qualified privilege that protects from actions for defamation:

A communication made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which, without his privilege, would be actionable, and although the duty is not a legal one, but only a moral or social duty of imperfect obligation. . . . The privilege arises from the necessity of full and

unrestricted communication concerning a matter in which the parties have an interest or duty, and is not restricted within any narrow limits.

Conwell v. Spur Oil Co. of Western South Carolina, 240 S.C. 170, 178-179, 125 S.E.2d 270, 274-275 (1962).

As Jacob Ferderigos shared the interests of Fokas, albeit with a different position being taken by him, Fokas' statements to him about matters related to the project to build additional floors at 229 King Street fall, if not under the protection of the absolute litigation privilege, then under the protection of qualified privilege. Consequently, Fokas' statements to Jacob Ferderigos are not actionable. No other statements made by Fokas, whether created by distorted interpretations of innocuous texts or e-mails or elicited via the deposition testimony from a confused non-party subject to repetitive harassment through an interpreter, fall outside of the litigation privilege. As such, the trial court properly granted Fokas' motion for summary judgment.

C. Spiro Ferderigos' Argument that Fokas' Statements Were Actionable Per Quod, if It Is Properly Before This Court, Has No Merit.

Spiro Ferderigos' final argument, one that Fokas can only hope was offered in jest, is that Fokas had no legitimate business related reason to make the 11th hour allegedly defamatory statements about Spiro Ferderigos. Those statements, per Spiro Ferderigos, qualify as *per quod* defamation. Nothing could be further from the truth.

The Defamation Defendants and Jacob Ferderigos unquestionably agreed to the expansion of the building at 229 King Street and spent substantial sums to pay for detailed engineering, design and permitting work. These costs, which totaled almost \$90,000, were shared by the parties in proportion to their ownership in the building and the Old Towne Suites, LLC. Spiros Ferderigos was heavily involved in discussions with the expected lender

for the project about the project's financing and when financing was secured and the project appeared to be a "go," Spiro Ferderigos expressed his excitement. Sadly, as shown by the uncontradicted evidence in the record of the Contract Case, Defamation Defendants thereafter attempted to pull out of the project and eventually claimed there never was any agreement to complete the project, despite the group expending \$90,000 in preparation for it.⁵ Despite all of that, Spiros Ferderigos (like his brother Phillip) is now taking the position that Fokas was to blame for the project's demise and that he made defamatory statements in retaliation for the Defemataion Defendants' refusal to go through with the project. Considering the unrefuted evidence in the record and Spiros Ferderigos' obvious defamation of Fokas, that position is *utterly amazing*.

"South Carolina courts use libel *per quod* to refer to situations where the defamatory meaning is not apparent without reference to extrinsic evidence." Hubbard and Felix, *The South Carolina Law of Torts*, at p. 491 (3rd Ed. 2004). Without regard to whether or not any statements made by Fokas fall into that category, Spiros Ferderigos never made any such argument to the trial court. The trial court's Order is devoid of any reference to defamation *per quod* and Spiro Ferderigos never raised the issue in any subsequent motions to the trial court. As such, this argument is not properly before this Court. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)(citing *Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997)). In order to preserve an issue for appellate review,

⁵ That assertion, in and of itself, is indicative of the untenable positions the Defamation Defendants have taken throughout this litigation.

"[t]he issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." S.C. Dept. of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007)(citing Broom v. Southeastern Highway Contracting Co., 291 S.C. 93, 352 S.E.2d 302 (Ct. App. 1986). See Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995)(holding that issues on which the trial judge never ruled and which were not raised in a post-trial motion are not preserved for appeal); United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992)(holding that where the circuit court sitting on appeal did not address an issue and appealing party made no motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure to have it rule on the issue, the allegation was not preserved for further review by the Court of Appeals).

"Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." S.C. Dept. of Transp. v. M & T Enter., 379 S.C. 645, 658-59, 667 S.E.2d 7, 15 (Ct. App. 2008)(citing Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). Accordingly, "it is a litigant's duty to bring to the court's attention any perceived error, and the failure to do so amounts to a waiver of the alleged error." S.C. Dept. of Transp., 372 S.C. at 301, 641 S.E.2d at 907 (citing Parks v. Morris Homes Corp., 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965). "[E]ven if an issue is preserved at the trial court level, it must still be properly raised and argued to the appellate court." S.C. Dept. of Transp., 379 S.C. at 658-59, 667 S.E.2d at 15. "[I]ssues not argued in the brief are deemed

abandoned and will not be considered on appeal.” *Fields v. Fields*, 342 S.C. 182, 191 n.8, 536 S.E.2d 684, 689 n.8 (Ct. App. 2000) (citing *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994)); *see also Glasscock, Inc. v. U.S. Fid. and Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001)(“[A] one sentence paragraph raised in an appellant’s brief was insufficient to preserve the issue for appeal.”).

Even if this Court finds that the *per quod* argument was preserved for appeal, it has no merit and is clearly offered as a last-ditch effort to convince this Court that Fokas made statements that were defamatory and not protected by privilege. Fokas’ position is bolstered by the fact that none of the statements cited in pages 18-25 of Spiro Ferderigos’ appellant’s brief requires any “extrinsic evidence” to make clear their alleged defamatory meaning, even when taken in the context that Spiros Ferderigos suggests:

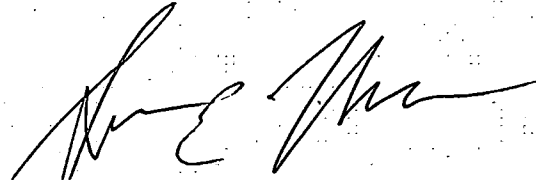
- The Defamation Defendants did not agree to go forward with the plan to add additional rental suites at 229 King Street because Phillip Ferderigos and/or Spiros Ferderigos could not eat for free at the Old Towne Restaurant;
- Either Phillip or Spiros Ferderigos do not have good business sense;
- Either Phillip or Spiros Ferderigos are bad business people;
- Either Phillip or Spiros Ferderigos were accusing Fokas of setting fire to 229 King Street;
- Spiros Ferderigos violated an ethical rule by threatening Fokas; and
- Spiros Fergerogos is unfit as a solicitor and/or attorney.

None of those statements requires extrinsic evidence for even the most simplistic mind to understand. Spiro Ferderigos’ perception of those statements aside, the statements simply

either (1) are not defamatory or (2) are protected by the litigation privilege. Spiro Ferderigos failed to raise this argument to the trial court and, even if he had, would not have been able to produce any evidence to back it up. As such, the trial court made no error in granting Fokas' motion for summary judgment.

CONCLUSION

The trial court properly concluded that any statements made by Fokas about the Defamation Defendants were either not defamatory or protected by privilege. The privilege extends to alleged defamation *per se* and/or *per quod* (an argument not properly preserved for appellate review). As such, Fokas respectfully requests that this Court affirm the Order of the trial court granting him summary judgment in this matter.



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July 3, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable J.C. Nicholson, Jr.
Circuit Court Judge

Case No. 2015-CP-10-3919
Appellate Case No. 2017-2032

RECEIVED

JUL 05 2018

SC Court of Appeals

Athan Fokas,

*Respondent/
Appellant,*

v.

Philip Ferderigos, Spiros Ferderigos, and
Jacob Ferderigos, Defendants,

Of whom Spiros Ferderigos and Philip
Ferderigos are the

*Appellants/
Respondents,*

And

Jacob Ferderigos is the Respondent.

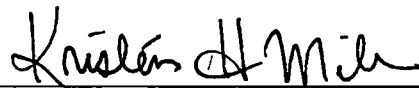
**PROOF OF SERVICE AS TO
INITIAL RESPONDENT'S BRIEF OF
RESPONDENT/APPELLANT ATHAN FOKAS
RESPONDING TO SPIRO
FERDERIGOS' APPELLANT'S BRIEF**

I, the undersigned employee of Howser Newman & Besley, LLC, hereby certify that pursuant to Rules 208(a) and 262(b), SCACR, I have served the **Initial Respondent's Brief of Respondent/Appellant Athan Fokas** in this matter on all counsel of record by mailing a copy, United States Mail, postage prepaid, on July 5th, 2018, to the following addresses:

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July 5, 2018

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
JUL 05 2018
SC Court of Appeals

RE: Fokas v. Ferderigos
C/A No.: 2015-CP-10-3919
Appellate Case No.: 2017-2032


Dear Ms. Kitchings:

Enclosed for filing are the original of each of the following documents in the above-captioned action:

- *Initial Respondent's Brief of Respondent/Appellant Athan Fokas Responding to Spiro Ferderigos' Appellant's Brief;*
- *Proof of Service* with respect to the Brief;
- *Designation of Matter to Be Included in the Record on Appeal with Respect to Spiro Ferderigos' Appellant's Brief;* and
- *Proof of Service* with respect to the Designation.

By copy of this letter, I am serving all parties to the appeal with copies of each of the above-described documents via their attorneys of record. Thank you for your assistance in this matter and please do not hesitate to contact me with any questions or concerns.

Regards



Andrew E. Haselden

AEH/khm

cc: M. Dawes Cook, Esquire
Jeremy E. Bowers, Esquire
Ian S. Ford, Esquire
John Massalon, Esquire
Leslie S. Lenhardt, Esquire (*via electronic mail only*)
Stan Barnett, Esquire (*via electronic mail only*)
Mr. Athan Fokas (*via electronic mail only*)