

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-10-3891
Appellate Case No. 2018-000516

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SC Court of Appeals

Athan Fokas,

Respondent/Appellant,

v.

Philip Ferderigos and Spiros Ferderigos,

Appellants/Respondents.

FINAL APPELLANT'S BRIEF OF ATHAN FOKAS

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STATEMENT OF ISSUE ON APPEAL

**DID THE TRIAL COURT ERR IN GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT?**

STATEMENT OF THE CASE

On July 14, 2015, Plaintiff Athan Fokas ("Fokas") commenced this action against two of his cousins, Defendants Philip Ferderigos and Spiros Ferderigos. The Complaint alleged a lone cause of action for defamation based on certain statements made by the Defendants about Fokas. The Complaint alleges that there was an agreement between the parties to expand a building they owned jointly so as to add three (3) floors to the building. In order to finance the expansion, the parties agreed to take out a loan but shortly before the loan closing, the Defendants reneged on the agreement. *See Record on Appeal ("R.")* at pp. 26-31.

The Complaint further alleges that the disagreement over whether to proceed with the expansion resulted in the possibility of Fokas commencing a lawsuit against the Defendants. Defendants thereafter threatened to accuse Fokas of various criminal acts if he pursued the lawsuit against them, including insurance fraud and arson. None of the accusations were true and Fokas thereafter instituted this action against the Defendants because of those accusations. *Id.*

Defendant Spiros Ferderigos filed an Answer on October 1, 2015, containing a general denial, various affirmative defenses and a counterclaim against Fokas alleging that the action was frivolous. *See R.* pp. 32-42. That same day, Defendant Philip Ferderigos filed an identical answer containing the exact same counterclaim. *See R.* pp. 43-53.

On December 18, 2015, Fokas moved to amend his complaint to allege that the defamatory comments were directed at members of Fokas and the Defendants' family for the purpose of intimidating Fokas into not pursuing litigation to enforce the deal to expand the building against his cousins. *R.* pp. 196-203. That motion was met with much opposition but was eventually granted.

Following a period of discovery, both sides moved for summary judgment and, of import to this appeal, the Trial Court granted Defendants' motions.¹ See R. pp. 204-209; 543-550; 210-265; 551-557; 1-13.

¹ The Trial Court also granted Fokas' motion for summary judgment as to the counterclaims, which is also on appeal.

STATEMENT OF FACTS

Fokas and the Defendants are all first cousins. The parties, along with the Defendants' other brother Jacob Ferderigos, 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 Philip and Spiros Ferderigos 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.² 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 building³ 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:

- 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

² That fire is the subject of one of the defamatory comments made by Defendants about Fokas.

³ Fokas $\frac{1}{2}$ and the Defendants $\frac{1}{6}$ each.

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 Athan 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. Philip 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 Philip 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 and Jacob Ferderigos insisting that they live up to their promises and expectations. As the bad blood continued to boil, Defendants made the following defamatory 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.

Upon learning of those comments, Fokas filed this action.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' RESPECTIVE MOTIONS FOR SUMMARY JUDGMENT

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 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).

The standard for summary judgment under South Carolina law is high. “Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues.” *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 376-77, 597 S.E.2d 181, 184 (Ct. App. 2004) (quoting *Murray v. Holnam, Inc.*, 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001)). 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 only 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) (“Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.”). Further, “[s]ummary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts.” *Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P.*, 385 S.C. 452, 456, 684 S.E.2d 756, 758 (2009).

II. SUMMARY JUDGMENT STANDARD RELATING TO DEFAMATION

“In order to prove defamation, the complaining party must show: (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 irrespective of harm or the publication of the statement caused special harm.” *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). “[L]ibel is a written defamation.” *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 509, 506 S.E.2d 497, 501 (1998). Whether the

alleged defamatory statement is actionable *per se* “is always a question of law for the court.” *Id.* at 501.

“If a defamation is actionable *per se*, then under common law principles the law presumes the defendant acted with common law malice and that the plaintiff suffered general damages.” *Id.* In the alternative, if a “defamation is not actionable *per se*, then at common law the plaintiff must plead and prove common law actual malice and special damages.” *Id.* at 501-02.

Libel is actionable *per se* if it involves “written or printed words which tend to degrade a person; that is, to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or to render him odious, contemptible, or ridiculous.” *Id.* at 502 (internal quotation marks omitted). “In other words, if the trial judge can legally presume, because of the nature of the statement, that the plaintiff’s reputation was hurt as a consequence of its publication, then the libel is actionable *per se*.” *Id.*

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO FOKAS’ DEFAMATION CLAIMS

In granting summary judgment on behalf of the Defendants with respect to Fokas’ defamation claims, the Trial Court concluded that “[t]he record is clear that, in the light most favorable to [Fokas], there is no genuine issue of material fact and there is not a scintilla of evidence to support [Fokas’] allegation that Defendants published any unprivileged defamatory statement(s) to any third party about him.” *R.* p. 2. The Trial Court then set out four (4) reasons why Fokas’ claims should be dismissed. First, there was no publication of a defamatory statement to a third party, only to Fokas’ attorney/agent. Second, if there was a defamatory statement made to Fokas’ attorney, it was privileged. Third, any such

statements to Fokas' attorney were not published as they were invited or provoked by Fokas' attorney. Fourth, that there was no evidence of publication of defamatory material to any other third parties. *Id.*

A. THE TRIAL COURT ERRED IN DETERMINING THAT ANY STATEMENTS WERE MADE TO FOKAS VIA HIS ATTORNEY/AGENT AND, THEREFORE, NOT DEFAMATORY.

In its Order, the Trial Court stated that because the obviously defamatory statements⁴ were made solely to Stan Barnett, Fokas' attorney/agent, those statements were essentially made to Fokas. Since defamatory statements have to be published to third persons, the Trial Court reasoned, there was no publication as the statements in question were only made to Fokas via his attorney/agent Barnett. In support of that conclusion, the Trial Court cited Rodgers v. Wise and quoted parenthetically as follows:

We are satisfied that the sounder and better supported [rule is that] communications made to a libeled party's attorneys, corresponding for him regarding the specific matter in connection with which the libelous matter is used, are not thereby given publication;

Rodgers v. Wise, 193 S.C. 5, 5, 7 S.E.2d 518, 518 (1940).

Fokas contends that the Trial Court ignored the plain language of the Rodgers' court and the import of its decision. The Rodgers decision clearly states that the **attorneys** must be ***talking about the specific matter at issue***. That was most certainly not the situation that occurred in this matter. In this matter, Barnett met with the Defendants, not their attorneys, and they were discussing the Defendants and Jacob Ferderigos breaching their agreement with Fokas to expand the building. ***Nowhere in that discussion were the issues of alleged***

⁴ In its Order granting the Defendants' motion for summary judgment in this matter, the Trial Court did not make any determination as to whether the statements made by the Defendants were defamatory or not. As such, Fokas takes the position that the failure of the Trial Court to address that issue would make any argument as to the truth or falsity of those statements abandoned on appeal.

insurance fraud or arson remotely relevant to the simple issue of whether the Defendants breached that agreement. The comments were nothing more than slanderous comments made by parties seeking to degrade the other party and dissuade them from litigating the core issue; these were “red herrings” offered with nothing less than sheer malice. Clearly, the Trial Court’s err in interpreting the Rodgers decision⁵ as supporting its misguided conclusion that the Defendants’ defamatory statements to Barnett should be viewed as statements by a party’s attorney to an agent of the other party.

B. THE TRIAL COURT ERRED IN DETERMINING THAT ANY STATEMENTS MADE TO FOKAS’ ATTORNEY WERE ABSOLUTELY PRIVILEGED.

The Trial Court next bolstered its decision to grant Defendants’ motion for summary judgment by espousing the finding/conclusion that any statements made by the Defendants to Barnett were in the context of settlement discussions and, therefore, absolutely privileged. *R.* pp. 1-13. *Order (February 20, 2018)*. For the following reasons, that determination could not possibly be any more erroneous.

When Defendants refused to close on the financing package in early 2015, Fokas retained Barnett. Barnett, through correspondence, informed the Defendants that they were in breach of a contract to add floors to the building and expand the rental suites business. In response to that letter, Defendants denied there was an enforceable contract. Defendant Spiros Ferderigos responded to Barnett by email and added that if Fokas pursued a breach

⁵ The Trial Court also cited Koutsogiannis v. BB&T, 365 S.C. 145, 616 S.E.2d 425 (2005), for the proposition that attorneys engaged in settlement negotiations on behalf of a party serve as “agents for their clients.” *Order (February 20, 2018)*. While that is a correct statement of the law in South Carolina, it is meaningless in the context of the case at hand as the statements made by the Defendants had nothing to do with (1) whether there was an agreement between the parties to build the expansion and/or (2) any attempt to settle that claim.

of contract claim, he would assert his own claims against Plaintiff. *See R.* pp. 66-77. The Defendants agreed to meet with Barnett for the ***sole purpose of discussing the contract issues.*** *See R.* pp. 558-562. As his Affidavit explains, Barnett met with the Defendants at 5:00 pm at the law firm of Barnwell Whaley Patterson and Helms, LLC, in Charleston on February 17, 2015. The following day, Barnett memorialized the extraordinary substance of his discussion with the Defendants in handwritten notes attached to his 2015 Affidavit. *See R.* pp. 66-77. Barnett recorded that both Defendants accused Plaintiff of three specific instances of criminal conduct, all involving insurance claims: 1) that he hired someone to set fire to the second floor of the building at 229 King Street some years earlier; 2) that he filed a workers' compensation claim for an injury which was not suffered at work at the restaurant located at 229 King Street, but in a skiing accident; and 3) that he filed a roof damage claim as the result of a hurricane in 1999 when, in fact, the roof was not damaged in the hurricane. According to Mr. Barnett, both Defendants made it clear that if Plaintiff continued to allege that they were in breach of contract, they would accuse him of these three criminal acts. "Both Ferderigos brothers made direct threats to accuse Fokas of criminal acts unless he abandoned his claim there was a contract to enlarge the building, a contract which they breached." *R.* p. 560.

Though Defendant Spiros Ferderigos has denied making these statements in deposition testimony, Barnett maintains that he made "clear" and "unequivocal" threats to accuse Plaintiff of these serious crimes. Further, Barnett stated that "Spiros further said he might have an obligation as a state prosecutor to take action to see that Fokas was charged with crimes and tied his decision directly to Fokas' actions with respect to going forward with his claim of breach of contract." *R.* pp. 558-562.

Defendant Philip Ferderigos does not deny that this meeting took place or that these statements were made. At his deposition, Philip Ferderigos produced an artfully prepared written statement setting forth his version of the February 17, 2015 meeting and admits making the defamatory statements. Philip Ferderigos carefully recharacterized the meeting in an attempt to bring the statements made by the Defendants under the litigation privilege by insisting he merely had concerns about these alleged acts. Barnett has reviewed this statement and refutes the mischaracterization of the meeting: "It was and is my understanding that discussions in a settlement are privileged only if the [sic] relate to the subject of the disagreement which caused the settlement meeting to take place in the first place. At the meeting with these Defendants in February 2015, the focus of their comments to me was to make threats against [Fokas] in the form of a demand that unless he dropped any claim of the existence of a contract and their breach of this contract, they would make allegations that he committed insurance fraud as well as arson."⁶ R. p. 559. Had the Defendants allowed the meeting to go forward as designed as a "settlement discussion," anything they discussed during the course of that meeting would have been inadmissible. However, the Defendants turned the meeting into an ambush and proceeded to assail Fokas' character rather than pursue resolution of the issues at hand.

Rule 408, *SCRE*, provides as follows:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not

⁶ It is simply incredible to believe that any court in the State of South Carolina could view those statements as remotely relevant to "settlement" of the contract issue or offered in a good faith attempt to resolve that issue.

admissible. ***This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when offered for another purpose***, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Id. (***emphasis added***); see Meehan v. Commercial Casualty Ins. Co., 166 S.C. 496, 165 S.E. 194 (1932) (finding that evidence of an offer to compromise may be admissible for some other purpose). Fokas submits that the attempt to resolve the conflict at the February 17, 2015 meeting were limited to the issue of whether there was a contract. The false and defaming allegations were completely outside the scope of the contract discussions. As such, those statements are not inadmissible per Rule 408. "Where the person exceeds his privilege and the communication complained of goes beyond what the occasion demands that he should publish, and is unnecessarily defamatory of plaintiff, he will not be protected." Woodward v. South Carolina Farm Bureau Ins. Co., 277 S.C. 29, 32, 282 S.E.2d 599, 601 (1981).

In Woodward, an injured party presented a claim to Farm Bureau for compensation for the damages allegedly suffered due to the negligence of Farm Bureau's insured. In an attempt to resolve the claim pre-suit, the injured party's attorney wrote Farm Bureau's claims representative advising of the nature and extent of treatments rendered by Dr. Woodward and seeking an amicable settlement of the claim. The claims representative responded to the attorney, both orally over the telephone to a legal assistant and in writing directly to the attorney. The claims representative's letter contains his assessment of the claim as well as the following statement which was also in substance orally made:

I have reviewed Dr. Woodward's medical report as well as the numerous traction treatments which he has administered to your client and quite frankly, these do not impress me very much to say the least. In all fairness to Dr. Woodward, I think it is the consensus of opinion that he quite often

overtreats his patients and therefore I do not feel that this is any real indication of the severity of Mr. Surrell's injury.

Id. at 31, 282 S.E.2d at 600. Woodward eventually brought an action for defamation and Farm Bureau attempted to hide behind the litigation privilege to shield itself from liability for its claims representative's defamatory statements. In addressing the situation, the South Carolina Supreme Court stated as follows:

These words, not proven by the first party, were spoken orally and were delivered in writing to a third party; we agree with the trial judge that they are libelous and slanderous per se since the professional integrity of the plaintiff has been directly and unfairly impugned. Capps v. Watts, 271 S.C. 276, 246 S.E. (2d) 606 (1978); Holmes v. Curtis Publishing Company, 303 F. Supp. 522 (1969). The real issues here are whether a privilege attaches in these circumstances and, if so, whether these communications were privileged.

We believe that pre-trial settlement negotiations of legal claims give rise to occasions of qualified or conditional privilege when each side discloses its reasons for the relative positions taken. As with all matters of qualified privilege, these communications must be reasonably related to the issue at hand which is of common interest to the parties. The publisher must take care not to wander beyond the scope of the occasion nor communicate in a manner which is likely to be intercepted by third parties. In other words, the statements though not straitjacketed must be reasonably tailored so as to relate only to the legitimate issues before the parties. Prentiss v. Nationwide Mutual Insurance Company, 256 S.C. 141, 181 S.E. (2d) 325 (1971). In Fulton v. Atlantic Coast Line Railroad Company, 220 S.C. 287, 297, 67 S.E. (2d) 425, 429 (1951) this Court stated:

"The privilege does not protect any unnecessary defamation. In order for a communication to be privileged, the person making it must be careful to go no further than his interests or his duties require.

"Where the person exceeds his privilege and the communication complained of goes beyond what the occasion demands that he should publish, and is unnecessarily defamatory of plaintiff, he will not be protected. And the fact that a duty, a common interest, or a confidential relation existed to a limited degree, is not a defense, even though he acted in good faith."

Id. at 31-32, 282 S.E.2d at 600-601. *See Murray v. Holnam*, 344 S.C. 129, 138, 542 S.E.2d 743, 747 (2001) ("In general, the question whether an occasion gives rise to a qualified or conditional privilege is one for the court. However, the question whether the privilege has been abused is one for the jury. Factual inquiries, such as whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited in its scope, and whether the statement was sent only to the proper parties, are generally left in the hands of the jury to determine whether the privilege was abused."). In granting the Defendants' motion for summary judgment, the Trial Court obviously accepted the Defendants' thinly veiled attempts to recharacterize their statements so as to avail themselves and their defamatory statements of a privilege. In doing so, the Trial Court ignored South Carolina decisions directly on point.

Further, the meeting at which the Defendants patently defamed Fokas took place months before litigation was filed. As such, it was not part of a judicial proceeding and therefore cannot give rise to an absolute litigation privilege. *Crowell v. Herring*, 301 S.C. 424, 392 S.E.2d 464 (S.C. Ct. App. 1990), is very instructive on that point. 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 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. . . . [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.***

Id. at 430-431, 392 S.E.2d at 467 (**emphasis** added). See *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); see also *Mathis v. Kennedy*, 243 Minn. 219, 67 N.W.2d 413 (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).

In *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (S.C. Ct. App. 2002), the South Carolina Court of Appeals considered whether the filing of a *lis pendens* was protected under the absolute litigation privilege in a slander of title action. The Court concluded that the same privileges applied as to those of a defamation claim. "It is well established that statements, written or oral, made by judges, attorneys, witnesses, parties or jurors in the course of judicial proceedings, **which have some relation thereto**, are absolutely privileged from slander or defamation actions, even if the statements are made with malice." *Id.* at 24, 567 S.E.2d at 893 (citing *Lone v. Brown*, 199 N.J. Super. 420, 489 A.2d 1192, 1195 (App. Div. 1985)) (**emphasis** added). The Court found that the filing of a *lis pendens* is merely another form of pleading and concluded that its filing was protected under the privilege.

There is no South Carolina decision that extends the privilege afforded to judicial proceedings to meetings that occur months before any litigation is filed. Therefore, the meeting cannot be characterized as being part of a judicial proceeding, nor did the statements made by the Defendants bear any relation to the subject matter of the meeting, which was whether a contract existed between Defendants and Fokas. Because the threats bore no relation to the scope of the meeting (which was whether there was a contract), the

statements are not privileged and the Trial Court improperly granted summary judgment to the Defendants on that basis.

C. THE TRIAL COURT ERRED IN DETERMINING THAT ANY STATEMENTS MADE TO FOKAS' ATTORNEY WERE NOT PUBLISHED, BUT RATHER "INVITED" BY FOKAS' ATTORNEY.

The Trial Court's next justification for its decision to grant Defendants' motion for summary judgment is by far its weakest from a factual standpoint:

Third, and in the alternative, any allegedly defamatory statements about Plaintiff allegedly published to Mr. Barnett do not constitute publication as they were invited by Plaintiff's agent, Mr. Barnett. It has long been settled in South Carolina that "a person cannot invite or provoke another to make a slanderous charge against him, and then sue such person for damages on account of such charge." Boling v. Clinton Cotton Mills, 163 S.C. 13, 163 S.E. 195, 199 (1931). . . .

As set forth herein and in the record, Plaintiff, through his agent, cannot invite Defendants to meet and discuss how to resolve the issues between them and then allege Defendants defamed him by discussing those issues. I further find that any statements made during the private settlement negotiations held at Plaintiff's request do not support a claim of defamation in this matter.

R. p. 12.

As stated multiple times in the Brief, and established by the uncontradicted evidence in the Record, the sole purpose for the meeting held on February 17, 2015, was to discuss resolution of the contract issue; there was no invitation extended to the Defendants to slander Fokas as they did and none of the slanderous comments bore any rational relationship to the contract issue. Strangely, The Trial Court appears to suggest, without explanation, that Barnett's good faith efforts to find a solution to the contract dispute enticed the defendants to make unrelated defamatory comments. The Trial Court failed to point out even a scrap of evidence in the record that supports the determination that Barnett invited

Defendants slander and Fokas defies the Defendants to do so at this point. As such, for the Trial Court to somehow conclude that Barnett invited the Defendants' slanderous statements is ludicrous and the mere suggestion should be enough for this Court to recognize that summary judgment was improvidently granted.

In further support of his position, Fokas would point out that the case cited by the Trial Court, *Boling v. Clinton Cotton Mills*, 163 S.C. 13, 163 S.E. 195 (1931), is not applicable in this instance. *Boling* involved a minister who had published statements and a sermon regarding conduct either conducted at or encouraged by Clinton Cotton Mills.⁷ Boling was thereafter invited to the office of the superintendent of Clinton Cotton Mills who accused Boling of adultery, then a crime. When later called to respond in front of Clinton Cotton Mills' board of stewards, the following occurred:

That on or about the 14th day of July, 1930, the defendant F. W. Gurry, while acting as agent and servant of the said Clinton Cotton Mill, received the said plaintiff and his board of stewards in his office at the said Clinton Cotton Mill, and, upon being interviewed by the entire committee as to whether or not he the said superintendent had stated and published that "he (the plaintiff) had been posing as a single man and had been having illicit relations with two women in or about Greenwood, S. C.," answered, "Right, right."

Id. at 13, 163 S.E.2d at 197-198. Because Boling had created the moment for the superintendent to repeat the allegedly slanderous accusations, "inviting" him to do so, the Court noted that if "the only publication that can be proved is one made by the defendant in answer to an application from the plaintiff, or some agent of the plaintiff, demanding explanation, such answer, if fair and relevant will be held privileged; for the plaintiff brought

⁷ The conduct in question was not revealed in the decision, but merely described as "seemingly evil recreations." 163 S.C. at 13, 163 S.E. at 197.

it on himself.” *Boling v. Clinton Cotton Mills*, 163 S.C. at 24, 163 S.E. at 199 (citing *Beeler v. Jackson*, 64 Md. 589, 2 A. 916 (1886); *Melcher v. Beeler*, 48 Colo. 233, 110 P. 181 (1910)).

Here, there is no conduct or statements on Barnett’s part that rationally can be interpreted as “an invitation” for the Defendants to slander Fokas. Quite the contrary, the **only evidence in the Record** indicates that Defendants slandered Fokas on their own accord for no reason related to the contract issue, shocking Barnett.⁸ Fokas can only assume that this Court will see the patent fallacy in the Trial Court’s finding on this issue and reverse accordingly.

D. THE TRIAL COURT ERRED IN DETERMINING THAT NO STATEMENTS MADE BY DEFENDANTS WERE PUBLISHED.

Lastly, and without much commentary, the Trial Court determined that “no genuine issue of material fact exists and there is not a scintilla of evidence to support publication of any alleged defamatory statement(s) by Defendants to any third party through circumstantial evidence. Additionally, there were numerous individuals who were aware of the alleged rumored incidents besides Defendants, and any one of those people could have been responsible for the rumors alleged in Plaintiff’s defamation claims. The alleged rumors could not be said to have only been possibly attributable to each Defendant.”

Even if the statements made to Barnett are somehow viewed as privileged, Defendants’ threats to publish the slanderous material constitutes competent evidence that the publication did actually occur. Proof of threats to commit a specific act has been recognized routinely by South Carolina courts as competent circumstantial evidence to

⁸ Which begs the question, how can out-of-context slanderous comments that “shock” the listener possibly have been considered “invited” by the Trial Court?

prove that the individual who made the threat did, in fact, do what was threatened. The question has often come up in criminal prosecutions. In *State v. Roger Dewitt Prince*, 316 S.C. 57, 447 S.E.2d 177 (S.C. Ct. App. 1994), evidence that a defendant had threatened to kill the deceased unless he “changed what he was doing” was held to support a circumstantial case that the defendant had hired someone to murder the deceased. In *State v. Ricky Prince*, 335 S.C. 466, 517 S.E.2d 229 (Ct. App. 1999), evidence of a threat was held to be proper circumstantial evidence supporting prosecution for damaging a car. In that case, circumstantial evidence, along with a threat that the defendant made towards the owner of the car, was held to be sufficient to support his conviction for malicious property damage even in the absence of direct evidence showing that the defendant had actually damaged the car. Based on these principles of law in South Carolina, the Defendants’ threats to publish the defamatory statements, which they do not deny having made, are evidence of publication to a third party.

But the evidence of publication in this case is not limited to circumstantial evidence. In either late April or early May of 2015, Fokas’ mother (Irene Fokas) heard from her daughter Rania that Defendants were planning to “destroy” Plaintiff by making the same allegations of criminal conduct about which they told Barnett attorney. Irene Fokas testified that Rania told her about the statements. While Rania denies she told her mother these things, at the very least, the conflicting testimony creates a question of fact to be resolved by a jury.⁹

⁹ Obviously, the Trial Court was confused, as its Order states that Irene Fokas merely “guessed” at who made the statements.

Irene Fokas testified in her November 2015 deposition, through an interpreter as she is not proficient in English, that in April of 2015, her daughter Rania told her that “her cousins,” the Defendants, were planning on using the same allegations they published when they met with Mr. Barnett, to “destroy” Fokas. See R. p. 224. Irene Fokas further testified as follows:

Q: And where did you learn that these allegations might be made?

A: Unfortunately, I learned these things from my daughter. She was afraid for her brother. . . .

Id. Irene Fokas also testified that her daughter Rania identified the Defendants as the source of the threats:

Q: And, again, the cousin’s names are?

A: Spiro Ferderigos, Philip Ferderigos, and Iakovos Ferderigos.

Q: When your daughter said that these things might be – these allegations might be made against your son and that it would destroy him –

A: She was very afraid, and I was very afraid.

Q: Yes. Did your daughter say that it was one person or multiple people that would do these things?

A: She said her cousins will do it. Her cousins.

R. pp. 1135-1136. Further:

A: . . . And I told him that someone told me that [Fokas] should be very careful. His cousins are doing these things, and he’s going to be hurt; and I did not tell him who told me.

Q: And is that person who told you Rania?

A: Yes. . . .

R. p. 226. Additionally:

Q: So there were multiple conversations with Rania?

A: Yes. Because – she was – she was afraid for her brother, and she wanted [Fokas] to stop this.

Q: And these conversations occurred in April?

A: I don't remember exactly. Probably March or April.

Q: Was anyone else present for these conversations other than Rania?

A: No, no.

Q: What were the exact words that Rania used?

A: That's she's afraid for her brother, that has --- that her cousins will destroy him. And even though he – [Fokas] may be right or correct, they would make it into lies.

R. p. 226-227. Later testimony:

Q: Okay. Before today had you ever told anyone that Rania was the source of the information that you had about destroying Athan Fokas?

A: No. I said I was – I was forced to say this to my son when he came here.

Q: Today?

A: Not today. When I came back – when I came back from Greece, I was forced to do it, to tell him that it was my daughter who said it. I had no intentions of telling him. I didn't want my daughter to get involved in this, but it could not be done any other way. I had to say the truth.

Q: Have you had any conversations with your son [Fokas] related to the fire at 229 King Street?

A: I told him that the guys are going to accuse you for the fire.

Q: Who told you that the guys were going to do that?

A: I told you earlier. I learned these things from my daughter.

R. pp. 1137-1138. More testimony:

Q: And had your son [Fokas] previously told you that Philip and Spiros were accusing him of setting the fire at 229 King Street and filing false insurance claims?

A: I said that because my daughter told me. Are we going to repeat the same thing?

Q: No. but I want to know did your son [Fokas] ever tell you that Philip and Spiros were accusing him of those things?

A: [Fokas] said that they are looking for things to accuse me.

Q: And -

A: And I - I - and I heard them - I heard the things from my daughter; and I told him, "They're accusing you of insurance."

Q: So no one other than Rania told you that Philip and Spiros were accusing [Fokas] of these things?

A: Nobody else.

R. p. 1139. Further:

Q: Are you aware of any accusations made by Philip, Jacob, or Spiros that [Fokas] has done anything illegal?

A: Not that he has done, but they would like choose it.

Q: Okay. And who made those statements?

A: My daughter said it. He has to be careful because they – a lot they're going to say. They're going to accuse him.

Q: Okay. And all of that came from your daughter?

A: Yes.

R. p. 85. Lastly:

Q: In your son's complaint that he filed with the Court, he attributed statements to you and said that you identified his cousins as saying certain things. Are you aware of that?

A: Yes. I know my son because I was – I was afraid that they're going to do damage to him. Bad things.

Q: But, in fact, you did not – you never heard the cousins say anything about your son.

A: Not me.

Q: Okay. And Rania told you these things.

A: Yes.

Q: So to the extent that [Fokas'] complaint says that you heard these things directly, that's not true.

A: But I – I heard those things, and I was telling him. I heard them.

R. p. 228. Clearly, Irene Fokas was told by Rania that the Defendants were going to try to destroy Fokas with their slanderous allegations. As set forth above, she testified on multiple occasions that Rania was afraid that the cousins were going to raise these allegations. Apparently, the Trial Court did not believe that any of those eight **(8)** sections of testimony amounted to even a "scintilla" of evidence sufficient to deny the Defendants' motion for summary judgment.

The evidence also indicates that in either late April or early May of 2015, Irene Fokas, confronted Fokas with her belief that the Defendants were preparing to use allegations of criminal conduct against him to “destroy” him if he did not drop his claims that they were breaching the contract. *See R.* pp. 1150-1152. The allegations were exactly the same as those made to Barnett on February 17, 2015. While this evidence is not direct evidence of publication, it readily supports the conclusion that the Defendants further published the allegations of criminal conduct to third parties other than Barnett. A jury could conclude that the Defendants logically were the source of these statements and did publish the statements, such that the allegations reached Rania Nikatos, Irene Fokas, and Fokas. Therefore, because a factual question as to the issue of publication existed in the Record when the Trial Court considered Defendants’ motion for summary judgment, granting that motion was improper.

The South Carolina Supreme Court has been clear that defamation can be proved by circumstantial evidence. *See Duckworth v. First National Bank of S.C.*, 254 S.C. 563, 176 S.E.2d 297 (1970). In the *Duckworth* case, a bank officer summoned the plaintiff to the bank after a check deposited at the bank bounced. While the bank officer denied making any such statements, the plaintiff testified that he accused him on the phone of being a “swindler” and that in an open bank lobby cubicle the bank officer yelled at him again accusing him of trying to swindle the bank. The plaintiff testified there were other persons standing nearby who must have heard these loudly stated accusations, but there was no evidence of any specific names of such persons. Other bank employees also testified that they were nearby but denied that they heard the bank officer accuse the plaintiff of being a swindler. “In the instant case the respondent relied on circumstantial evidence to prove the fact of publication.” *Id.*

at 571, 176 S.E.2d at 301. The Court held that the matter of whether there was publication was properly submitted to the jury. The Court of Appeals followed the rule of that case in Wilhoit v. WCSC, Inc., 293 S.C. 34, 358 S.E.2d 397 (S.C. Ct. App. 1987), holding that the issue of publication can be submitted to a jury upon circumstantial evidence that a third-party could have heard the defamatory remarks and understood them to refer to the plaintiff. In the present case, the Amended Complaint clearly alleges that the Defendants made defamatory statements to third parties, and not only is this allegation supported by evidence of direct publication to Plaintiff's attorney, this allegation is supported by circumstantial evidence. The Trial Court turned a blind eye to the actual evidence in the record and granted Defendants' motion for summary judgment. Fokas now asks that this Court recognize the error by the Trial Court and reverse the grant of summary judgment to Defendants.

CONCLUSION

The Trial Court granted summary judgment to the Defendants in this matter based on two mistaken premises. First, that any statements made by the Defendants to Barnett were privileged and, as such, could not be the basis for a defamation claim. Second, that there was no evidence of publication of the defamatory material to any third-parties. For the reasons stated above, those determinations were incorrect and Fokas respectfully requests that this Court reverse the Trial Court and allow the issue of whether the Defendants defamed Fokas to be determined by a jury.



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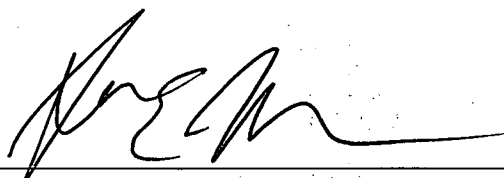
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December 14, 2018

RECEIVED
DEC 17 2018
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this brief complies with Rule 211(b), SCACR.



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