

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J.C. Nicholson, Jr., Circuit Court Judge

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Case No. 2015-CP-10-3919

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SC Court of Appeals

Appellate Case No. 2017-002032

Athan Fokas..... Respondent/Appellant,

v.

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

of Whom

Spiros Ferderigos and Philip Ferderigos are Appellants/Respondents,

And

Jacob Ferderigos is Respondent.

FINAL BRIEF OF APPELLANT SPIROS FERDERIGOS

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STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR BY FAILING TO FIND EVIDENCE EXISTED THAT RESPONDENT FOKAS PUBLISHED DEFAMATORY STATEMENTS ABOUT APPELLANT S. FERDERIGOS TO THIRD PARTIES THAT ARE ACTIONABLE *PER SE* REGARDING HIS UNFITNESS AS AN ATTORNEY, ASSISTANT SOLICITOR, AND BUSINESSPERSON?
- II. DID THE TRIAL COURT ERR BY FINDING RESPONDENT FOKAS' ACTIONABLE *PER SE* DEFAMATORY STATEMENTS ABOUT APPELLANT S. FERDERIGOS ARE SUBJECT TO THE ABSOLUTE JUDICIAL PRIVILEGE?
- III. DID THE TRIAL COURT ERR BY FAILING TO FIND EVIDENCE EXISTED THAT RESPONDENT FOKAS PUBLISHED ADDITIONAL DEFAMATORY STATEMENTS ABOUT APPELLANT S. FERDERIGOS TO THIRD PARTIES THAT ARE DEFAMATION *PER QUOD* AND NOT ACTIONABLE *PER SE*?

STATEMENT OF THE CASE

Respondent Fokas (hereinafter referred to as “Fokas”) filed his Summons and Complaint on July 15, 2015. (R. pp. 48-56). Fokas alleged claims for breach of contract, specific performance, and breach of fiduciary duty/violation of the LLC statute in regard to an alleged oral agreement to build a new building at 229 King Street and an alleged oral agreement to mortgage previously unencumbered property to finance the construction. (R. pp. 48-56). Appellants Spiros and Phillip Ferderigos (hereinafter collectively referred to as “Ferderigos” and individually referred to as “S. Ferderigos” or “P. Ferderigos”) timely filed their Answers, Affirmative Defenses and Counterclaims on October 1, 2015. (R. pp. 57-204; R. pp. 205-352). Relevant to S. Ferderigos’ appeal, as a counterclaim, he pleaded a cause of action for defamation against Fokas. (R. pp. 86-88, ¶¶ 145 – 158). Specifically, S. Ferderigos alleged Fokas published false and defamatory statements to third parties that he committed a crime of moral turpitude and was unfit for his profession. (R. p. 87, ¶ 152).

Fokas filed his Motion to Strike Ferderigos’ Answer and Counterclaims on October 26, 2015. (R. pp. 591-602). Thereafter, P. Ferderigos (incorrectly identified as “Philip Ferderigos”) filed his Response in Opposition to Motion to Strike on December 3, 2015. (R. pp. 603-620). Fokas filed his Memorandum in Support of his Motion to Strike on December 4, 2015. (R. pp. 621-631). S. Ferderigos filed his Memorandum in Opposition to Motion to Strike on December 7, 2015. (R. pp. 638-659). The Court issued its first Order regarding Plaintiff’s Motion to Strike Answers and Counterclaims of P. Ferderigos and S. Ferderigos filed on December 16, 2015. (R. pp. 34-38). Thereafter, Ferderigos filed a Joint Motion to Reconsider and Alter or Amend the Order Pursuant to SCRCP Rule 59(e) on December 29, 2015. (R. pp. 660-698).

On January 25, 2016, Fokas filed his Motion to Strike Answer and Counterclaim of Respondent Jacob Ferderigos. (R. pp. 699-709). In response to the Motion to Reconsider, the Court issued its Order regarding Plaintiff's Motion to Strike Answers and Counterclaims of P. Ferderigos and S. Ferderigos on January 28, 2016. (R. pp. 39-41). Fokas filed his Reply to the Counterclaims on March 31, 2016. (R. pp. 503-508). The Court entered a Consent Order regarding Plaintiff's Motion to Strike Answer and Counterclaims of Respondent Jacob Ferderigos on April 15, 2016. (R. pp. 42-47).

Fokas filed a Motion for Partial Summary Judgment as to the Ferderigos' Counterclaims on February 28, 2017. (R. pp. 737-801; R. pp. 802-847). Fokas moved only for summary judgment on Ferderigos' counterclaims for defamation. (R. pp. 737-801; R. pp. 802-847). Thereafter, S. Ferderigos and P. Ferderigos filed their respective memoranda in opposition to Plaintiff's Motion for Partial Summary Judgment on June 5, 2017, and June 6, 2017. (R. pp. 1209-1243; R. pp. 1143-1208). Fokas filed his Memorandum in Support of his Motion for Partial Summary Judgment on June 5, 2017. (R. pp. 848-856). The trial court held a hearing on the motions on June 8, 2017. (R. pp. 514-586). The Court issued its Order Granting Plaintiff Partial Summary Judgment on August 31, 2017. (R. pp. 1-9). S. Ferderigos received written notice of the entry of the final judgment on September 1, 2017. On September 29, 2017, Ferderigos timely served their respective Notices of Appeal, which were filed on October 2, 2017.

STANDARD OF REVIEW

“In reviewing a grant of summary judgment, our appellate court applies the same standard as the trial court under Rule 56(c), SCRCP.” Woodson v. DLI Properties, LLC, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). “[S]ummary 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.” Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). “Summary judgment is appropriate if 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 judgment as a matter of law.” Id. “Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.” Id. at 220, 616 S.E.2d at 729. “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.” Id. “However, when plain, palpable, and indisputable facts exist on which no reasonable minds cannot differ, summary judgment should be granted.” Id.

“In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party.” Blumenthal Mills, 365 S.C. at 219, 616 S.E.2d at 729. “If triable issues exist, those issues must go to the jury.” Id. Similarly, “[o]n appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.” Id.

“The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact.” Id. at 220, 616 S.E.2d at 730. “Once the party moving for

summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." Id. "Rather the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id.

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Blumenthal Mills, 365 S.C. at 220, 616 S.E.2d at 730. Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues." Id. "In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

ARGUMENTS

Because S. Ferderigos produced evidence of Fokas' written communications wherein Fokas published defamatory statements to third parties regarding S. Ferderigos' unfitness as an attorney, assistant solicitor, and businessperson, the trial court erred in finding there was no evidence to support S. Ferderigos' defamation claim. Similarly, S. Ferderigos produced the deposition testimony of Fokas' own mother, Irene Fokas, wherein she testified Fokas defamed S. Ferderigos to her in both unprivileged defamatory statements that are actionable *per se* and in unprivileged defamatory statements that are not actionable *per se*. The trial court also erroneously found that absolute judicial privilege applied to these statements even though the defamatory statements were made prior to any threat of litigation, were published to third parties not involved in the litigation, or had no reasonable connection to the litigation between the parties whatsoever. Finally, the trial court erred in finding there was no evidence to support S. Ferderigos' claims that Fokas published defamatory not actionable *per se* statements *per quod* to third parties wherein he stated S. Ferderigos was to blame for the proposed project not moving forward. For these reasons, and as more fully argued below, the trial court erred in finding there was no evidence to support S. Ferderigos' defamation claim and granting Fokas judgment as a matter of law.

I. THE TRIAL COURT ERRED BY FAILING TO FIND EVIDENCE EXISTED THAT RESPONDENT FOKAS PUBLISHED TO THIRD PARTIES DEFAMATORY STATEMENTS ABOUT APPELLANT S. FERDERIGOS THAT ARE ACTIONABLE *PER SE* REGARDING HIS UNFITNESS AS AN ATTORNEY, ASSISTANT SOLICITOR, AND BUSINESSPERSON.

Because S. Ferderigos submitted Fokas' written communications wherein he published defamatory statements to third parties regarding his unfitness as an attorney, assistant solicitor, and businessperson, the trial court erred in finding there was no evidence to support S.

Ferderigos' defamation claim. Fokas accused S. Federigos, to members of his immediate and extended family, of committing ethics violations by "threatening" him by text, which "could be breach or of bad faith dealing between partners." In another communication published to third parties, Fokas accused S. Ferderigos of misusing his office as an assistant solicitor to threaten him in a business matter. In another communication, he accused S. Ferderigos of lying in his deposition, "which may be grounds for disbarment". In other communications, Fokas said that S. Ferderigos is a bad businessman and that he has no business sense. On yet another occasion, Fokas accused S. Ferderigos to third persons of falsely defaming him.

Under South Carolina law, "[t]he tort of defamation permits a party to recover for an injury to his reputation caused by the false statements of another." Banks v. St. Matthew Baptist Church, 406 S.C. 156, 161, 750 S.E.2d 605, 607 (2013). To prove defamation, a party must prove the following elements: "(1) a false and 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 462 (2d ed. 1997). Further, communication is defamatory "if it tends to harm the reputation of another as to lower him in the estimation of the community *or to deter third persons from associating or dealing with him.*" Fountain v. First Reliance Bank, 398 S.C. 434, 441, 730 S.E.2d 305, 309 (2012) (citing Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 860, 860 (2002) (emphasis added)).

"Defamatory communications take two forms: libel and slander." Erickson, 368 S.C. at 466, 629 S.E.2d at 664. "Slander is a spoken defamation while libel is a written defamation or

one accomplished by actions or conduct.” Id. “[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.” Id. Under the common law, slander is actionable *per se* only when it charges a party with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one’s business or profession. Holtzscheiter v. Thomson 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, 368 S.C. at 465, 629 S.E.2d at 664. “The determination of whether or not a statement is actionable *per se* is a matter of law for the court to resolve.” Id. However, the common law presumes such statements to be false. Id. at 466, 629 S.E.2d at 665. “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.” Holtzscheiter, 332 S.C. at 510, 506 S.E.2d at 502 (quoting Lesesne v. Willingham, 83 F.Supp. 918, 921 (E.D.S.C. 1949)). A statement accusing a person of an indictable crime is considered slander/libel *per se* or words that falsely charge a person with conduct, characteristics or a condition incompatible with the exercise of a lawful business, trade, profession or office are slander/libel *per se*. Ervin’s, S.C. Request to Charge § 17-4.¹

In the present case, Fokas published numerous written unprivileged defamatory statements to third parties that are actionable *per se* which the trial court should have presumed

¹ For the sake of brevity, S. Ferderigos further incorporates the law and arguments set forth in the Brief of Appellant Phillip Ferderigos as being equally applicable to S. Ferderigos. As set forth therein, and for the same reasons, the defenses of “opinion” and “fair comment” are not applicable to and do not negate Fokas’ actionable *per se* defamation and/or his not actionable *per se* defamation *per quod* concerning S. Ferderigos.

were false and damaging to S. Ferderigos' reputation. In these defamatory statements, Fokas charged S. Ferderigos with an act or characteristic "of unfitness in one's business or profession" and/or "commission of a crime of moral turpitude." As shown from Fokas' own written words, Fokas published at least six actionable *per se* defamatory statements about S. Ferderigos.

First, Fokas made unprivileged actionable *per se* defamatory statements to Iakovos Ferderigos, P. Ferderigos, and Antonia Fokas by informing them S. Ferderigos was unfit in his profession as an attorney by accusing him of ethical violations. (R. p. 1235). In a written communication published to Iakovos Ferderigos, P. Ferderigos, and Antonia Fokas, Fokas wrote as follows:

"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."

(R. p. 1235) (emphasis added). As noted in the e-mail's "To" line, Fokas sent this e-mail to Iakovos Ferderigos, P. Ferderigos, and to Fokas' wife, Antonia Fokas. (R. p. 1235). He additionally sent the e-mail to a Zeus Sea Food e-mail address. (R. p. 1235). In the e-mail, Fokas charged S. Ferderigos with committing an ethical violation. As an attorney and assistant solicitor, charges of ethical violations are serious and can greatly damage one's standing in the legal community. With this writing, Fokas clearly attacked S. Ferderigos' honesty, integrity, and reputation with an intent to disgrace and ridicule him in the eyes of his family members. This false and defamatory statement about S. Ferderigos regarding ethical violations published by

Fokas to third parties is actionable *per se*, for which damages are presumed, and the trial court erred in finding the statement was not defamatory.

Second, Fokas made unprivileged actionable *per se* defamatory statements to Iakovos Ferderigos and Phillip Ferderigos in writing by informing them S. Ferderigos is unfit in his profession as an assistant solicitor. In a communication published to Iakovos Ferderigos and P. Ferderigos, Fokas wrote as follows:

Speaking of fiduciary duty, I was a little shocked when I read in Stan Barnett's affidavit that you Spiro Ferderigos told him that it may be your fiduciary duty to inform the police as a current solicitor that you should tell them that I was involved in the fire at Old Towne without any proof whatsoever. That is a grave error from a solicitor. Does your boss know about that comment you made? Who exactly is your boss?

(R. p. 1230). Again, with this false and defamatory statement, Fokas directly impugned S. Ferderigos' honesty, integrity, and reputation with regard to his work as an assistant solicitor. In this statement, Fokas clearly accuses S. Ferderigos of abusing the powers of his office. Fokas published this statement with an intent to disgrace and ridicule S. Ferderigos in the eyes of his family members. This false and defamatory statement about S. Ferderigos regarding his abusing his office as an assistant solicitor, published by Fokas to third parties, is actionable *per se* for which damages are presumed, and the trial court erred in finding the statement was not defamatory.

Third, Fokas made unprivileged actionable *per se* defamatory statements to Iakovos Ferderigos and P. Ferderigos in writing that S. Ferderigos is unfit in his profession as an attorney and accusing S. Ferderigos of committing the crime of perjury. In a communication published to Iakovos Ferderigos and P. Ferderigos, Fokas wrote, "Spiro, you have already been proven to have lie'd [sic] in your deposition. I think that may be grounds for disbarment. Continue to lie and see where that gets you." (R. p. 1229). Again, Fokas directly impugned S. Ferderigos'

honesty, integrity, and reputation with regard to his work as an attorney and assistant solicitor.² Perjury is a serious crime, especially for an officer of the court such as an attorney and assistant solicitor, with serious repercussions both legally and professionally. However, it was not enough for Fokas to falsely accuse S. Ferderigos of lying in his deposition; Fokas went so far as to threaten his law license, as well. This false and defamatory statement about S. Ferderigos regarding allegations of perjury in his deposition, published by Fokas to third parties, is actionable *per se* for which damages are presumed, and the trial court erred in finding the statement was not defamatory.

Fourth, Fokas also made unprivileged actionable *per se* defamatory statements to Irene Fokas, S. Ferderigos' aunt, by informing her that he is unfit in his business or profession. In pertinent part, Irene Fokas testified she believes S. Ferderigos is a bad business person based upon statements made to her by Fokas:

Q. Okay. So then as a result of what your son Athan told you, do you think that Phillip and Spiros are bad business people?

A. Yeah. I tell you this for the second time. I answered this already. We're going to talk about the same things over and over again?

² Counsel for Respondent Fokas admitted this statement was defamatory at the motions hearing:

THE COURT: Well, if, in fact, you are wrong about the group and the brothers, okay, why wouldn't the fact that he said he's lying and I'm going to have him disbarred affect the lawyer, *per se*?

MR. BARNETT: That would be --

THE COURT: And same thing about the burning or the arson. I mean, I can't see how both of these statements are not defamatory.

MR. BARNETT: I would agree. I can't with a straight face say they are not.

(R. p. 538, l. 12-21).

(R. p. 1228). Fokas published these false and defamatory statements to Irene Fokas in an effort to impugn S. Ferderigos' abilities as a businessperson and rental property owner. As an owner of rental property, S. Ferderigos' business sense matters to the outside world, including family members, business partners, vendors, and customers. Fokas published these defamatory statements alleging S. Ferderigos was unfit as a rental property owner and investor to his aunt (Fokas' mother). As a result of these statements, Irene Fokas testified that she believes he is a bad businessperson. This false and defamatory statement about S. Ferderigos regarding his unfitness as a rental property owner and businessperson published by Fokas to Irene Fokas is actionable *per se* for which damages are presumed, and the trial court erred in finding the statement was not defamatory.

Fifth, Fokas made unprivileged defamatory actionable *per se* statements to Iakovos Ferderigos in writing that S. Ferderigos is unfit in his business or profession. In particular, Fokas published to Iakovos Ferderigos the statement, "Your brothers [Phillip and Spiros Ferderigos] have no business sense and I'm sure we will be butting heads with Greek properties in the future. Very sad!!!" (R. p. 1227). S. Ferderigos owns several rental properties, including the existing rental units at 229 King Street, with Fokas. Fokas published these defamatory statements alleging S. Ferderigos was unfit as a rental property owner and investor to S. Ferderigos' brother, Iakovos Ferderigos, who is also a property owner of the existing rental units at 229 King Street and S. Ferderigos' business partner. As an owner and operator of rental property, S. Ferderigos' business sense matters to the outside world, especially to business partners. Accusations of unfitness by others can strain partnerships or even prevent future business dealings. This false and defamatory statement about S. Ferderigos regarding his fitness as a rental property owner

and businessperson, published by Fokas to Iakovos Ferderigos, is actionable *per se* for which damages are presumed, and the trial court erred in finding the statement was not defamatory.

Sixth, Fokas published defamatory statements alleging S. Ferderigos falsely accused Fokas of willfully setting fire to 229 King Street for insurance proceeds and other insurance fraud. Irene Fokas admitted in her deposition that Fokas told her that S. Ferderigos is going to accuse him of setting fire to 229 King Street for insurance proceeds and filing false insurance claims. (R. pp. 1242-1243). Irene Fokas admitted in her deposition that Fokas made these unprivileged defamatory statements to her about S. Ferderigos. (R. pp. 1242-1243). These statements were either made directly by Fokas or through Fokas' agent and attorney, Stanley Barnett:

Q. Okay. Are you aware of any statements that Phillip or Spiros have made to Athan's lawyer?

A. I heard that the guys had told the attorney.

A. That Phillip and Spiros, they're going to accuse Athan for this and this and that.

Q. Does she – do you know what the specifics of the accusations are?

A. For fire, insurance, things like that ...

Q. Who told you these things?

A. Either the attorney or my son.

(R. pp. 1242-1243). These statements published by Fokas to Irene Fokas constitute defamation because these statements impeach S. Ferderigos' honesty, integrity, virtue, and reputation.³

³ Again, counsel for Respondent Fokas admitted these statements were defamatory at the motions hearing:

MR. BARNETT: Now, that would be a – to say that people had made this accusation, if they did so falsely, and obviously for bad purposes, that would be defamation.

THE COURT: Statement itself is defamatory?

These statements are false, as demonstrated by S. Ferderigos' deposition testimony and the trial court granting S. Ferderigos summary judgment on Fokas' claim of defamation in Civil Action No. 2015-CP-10-3891. In that case, the trial court found there was no evidence that S. Ferderigos published any defamatory statements about Fokas, let alone that S. Ferderigos published statements that Fokas willfully set fire to 229 King Street. Such defamatory statements by Fokas directly impugned S. Ferderigos' honesty, integrity, and reputation. Falsely accusing S. Ferderigos of deliberately defaming him is actionable *per se*, for which damages are presumed, and the trial court erred in finding the statement was not defamatory.

Contrary to the arguments made by Fokas at the motions hearing, he published the defamatory statements about S. Ferderigos to third parties. As noted above, Fokas published the first defamatory statement regarding S. Ferderigos' alleged ethical violations to Fokas' wife and to the Ferderigos brothers. Fokas published the second and third defamatory statements regarding S. Ferderigos' alleged abuse of office as an assistant solicitor and commission of the crime of perjury to his brothers. Fokas published the fourth and fifth defamatory statements regarding S. Ferderigos' unfitness as a rental property owner and investor to S. Ferderigos' aunt and brother, respectively. Fokas published the sixth defamatory statements, regarding allegations he was falsely accusing Fokas of willfully setting fire to 229 King Street, to S. Ferderigos' aunt. Unsupported by any case law, Fokas seemingly argues there is no publication because the statements were made to individuals connected to the parties' "business arrangement." (R. p. 536, l. 5 – R. p. 537, l. 5). Publication merely requires that someone other than the plaintiff hear

MR. BARNETT: I think it would be defamatory. I can't argue. Particularly for lawyers, that would be defamatory.

(R. p. 525, l. 6-13).

or see the defamatory statements. See Kendrick v. Citizens and Southern Nat. Bank, 266 S.C. 450, 453, 223 S.E.2d 866, 867 (1976). Fokas' argument ignores the fact that the first, fourth, and sixth defamatory statements about S. Ferderigos were published to Fokas' wife and mother, who have no relationship whatsoever to the business arrangement. While Fokas published the other defamatory statements to the Ferderigos brothers, who had a business and familial relationship with S. Ferderigos, it is still publication. Fokas published these defamatory statements knowing they were false and for the purpose of coercing S. Ferderigos to agree to an agreement based on material terms S. Ferderigos never agreed to. As a result, Fokas published these defamatory statements with malice and ill will toward S. Ferderigos, which would be an exception to any qualified privilege. Padgett v. Sun News, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982) (holding common law malice means the defendant acted with ill will toward a party or acted recklessly or wantonly, *i.e.*, with a conscious disregard of a party's rights). A jury issue clearly exists as to whether a qualified privilege applies to any of these defamatory statements and, if so, as to whether Fokas exceeded the privilege.

For these reasons, S. Ferderigos has set forth evidence showing Fokas published actionable *per se* defamatory statements about him to third parties for which falsity, malice, and damages would be presumed. The six defamatory statements published by Fokas to third parties, as described above, constitute actionable *per se* defamation. These statements either charge S. Ferderigos with the commission of a crime or impugn his fitness to serve as a businessman, attorney, or assistant solicitor, and, as a result, they are actionable *per se*. Because these false statements impeach S. Ferderigos' honesty, integrity, virtue, and reputation, they are defamatory. These statements are false, as demonstrated by the testimony of S. Ferderigos, and they are presumed to be false under the common law. Fokas published these defamatory statements to

third parties, including Irene Fokas, Antonia Fokas, Iakovos Ferderigos, and/or P. Ferderigos. For these defamatory statements which are actionable *per se*, the trial court should have presumed Fokas acted with common law malice and presumed S. Ferderigos suffered actual damages. Based on these actionable *per se* defamatory statements published by Fokas about S. Ferderigos to third parties, the trial court erred in finding there was no evidence to support S. Ferderigos defamation claim.

II. THE TRIAL COURT ERRED BY FINDING RESPONDENT FOKAS' ACTIONABLE PER SE DEFAMATORY STATEMENTS ABOUT APPELLANT S. FERDERIGOS WERE SUBJECT TO THE ABSOLUTE JUDICIAL PRIVILEGE.

Fokas' defamatory statements about S. Ferderigos were not protected by any privilege, including absolute judicial privilege, and, as a result, the trial court erred in finding the defamatory statements were privileged. South Carolina recognizes absolute judicial privilege in defamation actions. The common law rule protecting statements of judges, parties and witnesses offered in the course of judicial proceedings from a cause of action in defamation is well recognized in this jurisdiction. Crowell v. Herring, 301 S.C. 424, 430, 392 S.E.2d 464, 467 (Ct. App. 1990). "The privilege affords absolute protection upon a bipartite showing that the statements were issued as part of a judicial proceeding and the alleged defamation is relevant to a matter at issue in the case." Id. "[T]he absolute privilege exists as to any utterance arising out of the judicial proceeding and having any reasonable relation to it, including preliminary steps leading to judicial action of any official nature provided those steps bear reasonable relation to it."⁴ Id.

⁴ Moreover, our Supreme Court has held that defamatory matter contained in pleadings filed according to law in a court having jurisdiction, if relevant and pertinent to the issues in the case, are absolutely judicially privileged. McKesson & Robbins, Inc. v. Newsome, 206 S.C. 269, 33 S.E.2d 585 (1945); Manley v. Manley, 291 S.C. 325, 353 S.E.2d 312 (Ct. App. 1987). Further, absolute judicial privilege is afforded to members of legislative bodies for acts in the performance of their duties, so that absolute privilege is recognized for defamatory statements made by

Here, as a matter of law, the absolute judicial proceedings privilege is inapplicable to Fokas' actionable *per se* defamatory statements about S. Ferderigos. Several actionable *per se* statements (the first, fourth, fifth, and sixth) were made before Fokas initiated litigation and even before any preliminary steps toward litigation. They were not made in preparation for or in furtherance of the litigation but rather merely related to the same subject matter of the future litigation. As a result, the absolute judicial proceeding does not apply. Fokas accused S. Ferderigos of unethical behavior and threatened his law license as part of a negotiating tactic, not part of any preliminary steps leading toward a judicial proceeding. Moreover, the first, fourth, and sixth actionable *per se* defamatory statements were made to third parties who were not a party of any judicial proceeding. Finally, Fokas' actionable *per se* defamatory statements made while litigation was pending (second and third) have no reasonable relation to and/or do not "arise out of" any judicial proceeding. Rather, Fokas sought to disparage S. Ferderigos' reputation and to "scare" him from protecting himself against Fokas' meritless lawsuits by accusing him of ethical violations and threatening his job as an assistant solicitor. The statements were not made in furtherance nor in preparation for litigation. As such, the absolute judicial privilege simply does not apply to Fokas' continual actionable *per se* defamation published against S. Ferderigos. For these reasons, the trial court erred in finding the absolute judicial privilege protected Fokas' defamatory statements about S. Ferderigos published to third parties.

legislators in the course of their functions, if such statements are connected with, or relevant or material to, the matter under inquiry. Richardson v. McGill, 273 S.C. 142, 255 S.E.2d 341 (1979). Similarly, the privilege extends to executors and administrators of a will for libelous matter contained in the will. Craver v. Morrow, 213 S.C. 199, 48 S.E.2d 814 (1948). Finally, the publication of a newspaper article (merely reciting facts copied from complaints filed in the office of the clerk of court which were absolutely judicially privileged) was found to be judicially privileged in the absence of allegations that it was not a fair and impartial report of the pleadings in such proceedings or direct allegations of malice or specific intent to injure plaintiff. Lybrand v. The State Co., 179 S.C. 208, 184 S.E. 580 (1936).

III. THE TRIAL COURT ERRED BY FAILING TO FIND EVIDENCE EXISTED THAT RESPONDENT FOKAS PUBLISHED ADDITIONAL DEFAMATORY STATEMENTS ABOUT APPELLANT S. FERDERIGOS TO THIRD PARTIES THAT ARE DEFAMATION *PER QUOD* AND NOT ACTIONABLE *PER SE*.

In addition to the above actionable *per se* defamatory statements, Fokas also published numerous unprivileged written and verbal defamatory statements about S. Ferderigos to third parties that are defamatory *per quod* and not actionable *per se*, and, as a result, the trial court erred in finding there was no evidence Fokas published defamatory statements about S. Ferderigos to third parties. First, Fokas published to third parties false statements alleging the proposed project of new rental units was not moving forward because S. Ferderigos was not doing what he agreed to do. For example, Fokas informed third parties he did nothing to delay the proposed project and the reason the proposed project did not move forward was because S. Ferderigos could not eat for free at the restaurant located on the first floor of 229 King Street, Old Towne Restaurant. (R. p. 1232). Fokas told S. Ferderigos he thought the community would find his defamatory statements “hilarious.” (R. p. 1232). Second, Fokas also told other third parties the reason the proposed project was not moving forward was because S. Ferderigos was jealous Fokas had a greater ownership interest in 229 King Street than S. Ferderigos and/or S. Ferderigos’ stubbornness. (R. pp. 1239-1241). As more fully set forth below, each of these statements constituted the publication of defamatory statements by Fokas about S. Ferderigos.

A. Fokas published defamatory statements blaming S. Ferderigos for the proposed project not moving forward and alleging the reason the proposed project did not move forward was because S. Ferderigos could not eat at Old Towne Restaurant for free.

In his Complaint, Fokas alleges S. Ferderigos breached the alleged contract by (1) “refusing to carry out [his] obligations to execute the mortgage on the building” and (2) “other parts of the loan documentation.” (R. p. 54, ¶ 31). Fokas’ Complaint details one alleged reason

S. Ferderigos refused to execute a mortgage: “[S.] Ferderigos refused to sign the mortgage for the closing as he was in contention for a seat on the South Carolina Circuit Court and informed Fokas the mortgage might affect his consideration.” (R. p. 52, ¶ 16).

Fokas does not allege, nor even make mention, in his Complaint that the proposed project being explored failed to move forward because S. Ferderigos could not eat for free at a restaurant located on the first floor of 229 King Street (Old Towne Restaurant). Despite this fact, Fokas threatened to defame S. Ferderigos in the community if he did not execute the mortgage and loan documents based on material terms S. Ferderigos never agreed to. Fokas informed S. Ferderigos he would publish in the community a “multimillion dollar deal” did not move forward because S. Ferderigos could not eat for free, adding he believed everyone would find it “hilarious.” (R. p. 1232). Fokas in fact made true on his threats to defame S. Ferderigos in the community as further set forth below.

First and foremost, it is undisputable that Fokas terminated the second set of negotiations after the parties were unable to reach a resolution regarding material terms for loan closing documents and execution of a side agreement for the proposed project being considered. The written documentation from the negotiations cannot be clearer:

11/24/14: Email from Athan Fokas to Phillip Ferderigos stating “I’m not interested in you trying to bully me into signing any type of side agreement that is unnecessary. My attorney, as I said earlier, strongly was against it.”

11/24/14: Email response from Phillip Ferderigos to Athan Fokas stating “You are asking me to mortgage my part of Old Towne and you are unwilling to sign an Agreement to say that you will make your payments timely. I believe you have mortgaged your other properties and now you want to mortgage Old Towne. I am not your piggy bank. I will not mortgage my share of Old Towne for you unless you agree to make your payments timely. Unless you change your decision, there is no point in moving forward.”

11/24/14: Email response from Athan Fokas to Phillip Ferderigos stating "I am not asking you to do anything. The bank is requiring that all parties sign off on the mortgage. I did secure that you didn't have to personally guarantee the note. Quite [sic] trying to put yourself on a pedestal. If you want me to sign a side agreement that guarantees I will pay the note then you will sign one saying that you will come up with the money needed for construction or you shall suffer similar consequences. If you are intelligent you will already know that the money will be there with the original suites income to pay for the loan. Cut your pompous attitude and either get it done or not..."

11/24/14: Email response from Phillip Ferderigos to Athan Fokas stating "I do not care what your bank is requiring of you to get your loan...that has nothing to do with me. I will not sign off on any mortgage of my share unless you sign an agreement that you will make your payments timely. If you are an intelligent person you will see that I can not and will not agree to mortgage my share of Old Towne if you do not agree to make your payments on time. "

11/24/14: Email response from Athan Fokas to Phillip Ferderigos stating "Well then it's done. I'll reverse as much as I can and just right it off as a stupid transaction dealing with Ferderigos Family."

(R. pp. 112-117). Angry because S. Ferderigos would not mortgage his personal assets for Fokas' benefit to secure financing required for Fokas' share of the proposed project, for the first time, Fokas interjected that the thirty (30) plus year custom of the Ferderigos and Fokas families eating at Old Towne Restaurant for free was to cease immediately. (R. p. 1231). This was done in an effort to harass, humiliate, attempt to coerce, and "get back" at S. Ferderigos and P. Ferderigos for not giving into his inappropriate demands.

Athan Fokas: "Oh it has been a pleasure to say the least. I'm also done with paying your half of the food you so dearly like to eat at Old Towne weekly on my dime. If you don't pay your portion to me then Jacob will have to. All management will be put on notice."

(R. p. 1231).

When this attempt failed to coerce S. Ferderigos and P. Ferderigos into mortgaging their personal assets for Fokas' benefit to secure financing required for Fokas' share of the proposed

project, something S. Ferderigos and P. Ferderigos never agreed to do, Fokas took matters to the next level and threatened to defame and spread defamatory statements to the community that the proposed project being considered failed because they could not eat for free:

Athan Fokas: "I can't wait to spread the word that the suites multimillion dollar project couldn't get done cause Phillip can't eat for free. I'm sure everyone will find it hilarious. I am probably doing you a favor. Smaller waist line. I bet your kids will be real proud of you in the future too. Your dad was right for calling you palabo [means "stupid" in Greek] Philipa."

(R. p. 1232). Initially, Fokas singled out P. Ferderigos in his written communications. However, Fokas slandered S. Ferderigos as well by publishing the same to Stavros Ferderigos, Appellant's father, and Dr. Fanouri Ferderigos, Appellant's uncle, and then libeled S. Ferderigos in writing to Antonia Fokas. Fokas made true on his threat to defame S. Ferderigos and P. Ferderigos in the community and, in fact, defamed them by telling Stavros Ferderigos (Appellants' father), Dr. Fanouris Ferderigos (Appellants' uncle), and Antonia Fokas (Fokas' wife) that the proposed project being considered did not move forward because they could not eat for free at Old Towne Restaurant:

Athan: "I just spoke to your dad and he doesn't think everyone should eat at Old Towne for free either."

Athan: "Phillip I expressed your thoughts to uncle Fanouri and for what it's worth he thinks nobody should eat for free and he says it has become childish at this point."

Athan email to Spiros, Phillip, Jacob Ferderigos and copying third party Antonia 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.”

(R. p. 1235). These statements published by Fokas to third parties constitute defamation because these statements impeach S. Ferderigos’ honesty, integrity, virtue, and reputation. These statements are false, as demonstrated by the e-mails and text messages from Fokas himself. Fokas published these defamatory statements to third parties, including Stavros Ferderigos, Fanouri Ferderigos, and Antonia Fokas. Fokas acted with common law malice because he published these defamatory statements in an effort to coerce S. Ferderigos into agreeing to material terms S. Ferderigos never agreed to concerning building a new building at 229 King Street. Moreover, these statements are not subject to any absolute judicial privilege as they were not made in the context of any judicial proceeding (and were made months before any judicial proceeding was instituted) and were made to third parties who were not parties to the dispute. Further, no conditional privilege exists as said defamatory communications were made to third parties and, otherwise, would constitute an abuse of any such privilege even if it applied.⁵ For these reasons, S. Ferderigos set forth evidence showing Fokas published unprivileged defamatory statements about him to third parties resulting in damages to S. Ferderigos’

⁵ “In a defamation action, a defendant may assert the affirmative defense of conditional or qualified privilege.” Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 484, 514 S.E.2d 126, 134 (1999). “Under this defense, 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 conditionally privileged, and (2) the privilege is not abused.” *Id.* “When one has an interest in the subject matter of a communication, and the person (or persons) to whom it is made has a corresponding interest, every communication honestly made, in order to protect such common interest, is privileged by reason of the occasion.” Murray v. Holnam, 344 S.C. 129, 140, 542 S.E.2d 743, 749 (Ct. App. 2001) (quoting Bell v. Bank of Abbeville, 208 S.C. 490, 493-94, 38 S.E.2d 641, 643 (1946)). “The statement, however, must be such as the occasion warrants, and must be made in good faith to protect the interests of the one who makes it and the persons to whom it is addressed.” *Id.* “[T]he question whether the privilege has been abused is one for the jury.” *Id.* “A qualified privilege does not prevent liability for defamation where the statement is made with actual malice.” Murray, 344 S.C. at 142, 38 S.E.2d at 750. Common law actual malice means the Defendant acted with ill will toward the Plaintiff or acted recklessly or wantonly, meaning with conscious indifference towards the Plaintiff’s rights. *Id.*; Padgett v. Sun News, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982).

reputation, and, as a result, the trial court erred in finding no evidence existed Fokas published defamatory statements about S. Ferderigos to third parties.

B. Fokas published defamatory statements alleging the proposed project did not move forward because S. Ferderigos was jealous of him and blaming S. Ferderigos' stubbornness.

Fokas further defamed S. Ferderigos by publishing defamatory statements to Irene Fokas, S. Ferderigos' aunt, that the reason the proposed project did not move forward was because he was jealous Fokas has a larger ownership interest in 229 King Street and/or because of his stubbornness. Irene Fokas admitted in her deposition everything she knows about the proposed project being considered at 229 King Street she learned directly from Fokas. In particular, Irene Fokas testified as follows:

Q. And Athan is the one that has told you everything you know about the project at 229 King Street; correct?

A. Of course.

...

Q. But you never spoke with Phillip, Jacob, or Spiros about the proposed building?

A. No. I did not speak to them because I knew what was happening.

(R. pp. 1239-1241). Irene Fokas testified in her deposition Fokas defamed S. Ferderigos by telling her S. Ferderigos and P. Ferderigos were not being required to mortgage their interest in 229 King Street in order for Fokas to receive a loan for Fokas' share of the proposed project being considered (despite the fact Fokas' breach of contract lawsuit alleges that they did agree to provide such a mortgage). (R. pp. 1239-1241); (R. p. 53, ¶ 26).

Irene Fokas also testified Fokas told her the proposed project did not move forward because S. Ferderigos was jealous Fokas has a fifty percent ownership interest in 229 King Street, while the Ferderigos brothers each have only one-sixth interest in 229 King Street or that

the proposed project being considered at 229 King Street did not move forward because of S. Ferderigos' stubbornness:

Q. And did you know that in order for your son to get that loan, Phillip and Spiros would have to mortgage their interest in 229 King Street for Athan Fokas' loan?

A. I don't believe these things...[t]hey are not starting because the boys have – it's like – stubborn. They're stubborn ... [o]r because the – Athan has half of the – half. They have half. They only have one-third.

...

Q. How did you come to know that Phillip and Spiros said these things?

A. He [Athan] said the stubbornness or the jealousy ...

(R. pp. 1239-1241). These statements published by Fokas to Irene Fokas constitute defamation because these statements impeach S. Ferderigos' honesty, integrity, virtue, and reputation. These statements are false, as demonstrated by the e-mails and text messages from Fokas himself set forth above and S. Ferderigos' deposition testimony. Fokas published these defamatory statements to third parties, including Irene Fokas. Fokas acted with common law malice because he published these defamatory statements in an effort to coerce S. Ferderigos into agreeing to material terms S. Ferderigos never agreed to concerning building a new building at 229 King Street. Moreover, these statements are not subject to any absolute judicial privilege because they were not made in the context of any judicial proceeding and were made to third parties. Further, no conditional privilege exists because said defamatory communications were made to third parties and otherwise would constitute an abuse of any such privilege even it is applied. For these reasons, S. Ferderigos set forth evidence showing Fokas published defamatory statements about him to third parties resulting in damage to his reputation, and, as a result, the trial court

erred in finding there was no evidence Fokas published defamatory statements about S. Ferderigos to third parties.

CONCLUSION

Because S. Ferderigos put forth evidence to show Fokas published defamatory statements impugning S. Ferderigos' honesty, integrity, and reputation to third parties, including statements about his unfitness to serve as an attorney and assistant solicitor, the trial court erred in finding no scintilla of evidence created an issue of fact concerning S. Ferderigos' defamation claim against Fokas. As set forth above, S. Ferderigos presented specific facts and evidence of defamatory statements published by Fokas showing there is a genuine issue of material fact for determination by a jury on his defamation claim, and Fokas failed to meet his burden of proof to clearly establish an absence of a genuine issue of material fact. To the contrary, S. Ferderigos put forth evidence showing Fokas published six actionable *per se* defamatory statements to third parties charging S. Ferderigos with the commission of a crime or impugning his fitness to serve as a businessman, attorney, or assistant solicitor. These defamatory statements included statements that S. Ferderigos abused his office as assistant solicitor, committed ethical violations, and committed perjury in his deposition, and these defamatory statements constituted actionable *per se* defamation for which falsity, malice, and damages should have been presumed.

Further, S. Ferderigos put forth evidence Fokas published defamatory statements that are not actionable *per se* but for which Fokas' purpose of publishing was to coerce S. Ferderigos to agree to material terms S. Ferderigos never agreed to concerning building a new building at 229 King Street. As a result of the publication of these defamatory statements by Fokas, S. Ferderigos suffered damages to his reputation in the community and even within his family. Accordingly, the trial court erred in finding there was no evidence Fokas published defamatory statements about S. Ferderigos to third parties.

Finally, the trial court erred in applying absolute judicial privilege to Fokas' defamatory statements about S. Ferderigos published to third parties. Several of Fokas' actionable *per se* defamatory statements were made before Fokas initiated litigation and before any preliminary steps toward litigation. Additionally, several actionable *per se* defamatory statements were made to third parties who were not a party to any judicial proceeding, so the judicial proceeding privilege did not apply to such communications. Finally, Fokas' actionable *per se* defamatory statements made while litigation was pending have no reasonable relation to any judicial proceeding. Rather, Fokas sought to disparage S. Ferderigos' reputation and to scare and threaten him from protecting himself against Fokas' meritless lawsuits by accusing him of ethical violations and threatening his job as an assistant solicitor. As such, the absolute judicial privilege simply does not apply to Fokas' continual actionable *per se* defamation published against S. Ferderigos.

For these reasons, the trial court erred in granting Fokas' Motion for Partial Summary Judgment. As a result, S. Ferderigos respectfully requests this Honorable Court reverse the Order Granting Partial Summary Judgment and remand the action to the trial court for a trial on the merits of S. Ferderigos' defamation claim against Fokas.

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November 26, 2018

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

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

Case No. 2015-CP-10-3919

Appellate Case No. 2017-002032

RECEIVED

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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 Appellants/Respondents,

And

Jacob Ferderigos isRespondent.

CERTIFICATION OF COMPLIANCE WITH RULE 211(b), SCACR

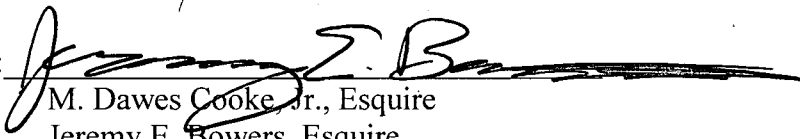
We hereby certify that the following final briefs served and filed in this matter comply with Rule 211(b), SCACR:

- (1) Final Brief of Appellant Spiros Ferderigos
- (2) Final Brief of Appellant Phillip Ferderigos
- (3) Final Joint Brief of Respondents Spiros Ferderigos, Phillip Ferderigos, and Jacob Ferderigos

(4) Final Joint Reply Brief of Appellants Spiros Ferderigos and Phillip Ferderigos

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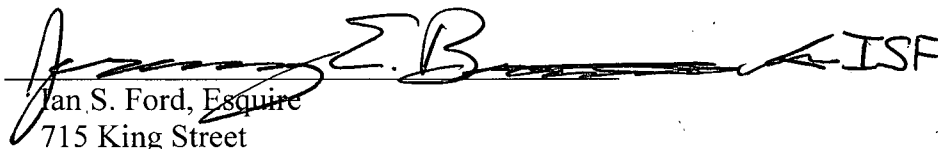

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