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

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SC Court of Appeals

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

Athan Fokas,

Respondent/
Appellant,

v.

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

Of whom Spiros Ferderigos and Philip
Ferderigos are the

Appellants/
Respondents,

And

Jacob Ferderigos is the Respondent.

FINAL RESPONDENT'S BRIEF OF
RESPONDENT/APPELLANT ATHAN FOKAS
RESPONDING TO PHILLIP FERDERIGOS'
APPELLANT'S BRIEF

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STATEMENT OF ISSUE ON APPEAL

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

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

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

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

Old Towne Suites, LLC (the "LLC") was the entity created to operate the rental suites. The LLC was owned by the parties in the same proportion to their ownership of the building[2] 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:

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

2 Fokas ½ and the Defendants ⅙ each.

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

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

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

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

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

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

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

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

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

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

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

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

Fokas eventually moved for summary judgment with respect to the Defamation Defendants' claims for defamation. Despite Defamation Defendants attempting to prevent the trial court granting the motion by alleging even more allegedly defamatory comments made by Fokas at the hearing on Fokas' motion[3], the trial court granted it. From that Order, Spiros Ferderigos appeals.

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

ARGUMENT

I. STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, an appellate court must apply the same standard that governs the trial court under Rule 56(c), *SCRCP*, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002); Rule 56(c), *SCRCP*. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming*, 350 S.C. at 493-94, 567 S.E.2d at 860; *see Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 602 S.E.2d 389 (2004); *Osborne v. Adams*, 346 S.C. 4, 550 S.E.2d 319 (2001); *Koester v. Carolina Rental Ctr. Inc.*, 313 S.C. 490, 443 S.E.2d 392 (1994); and *Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24 (1988).

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

fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), *SCRCP*; See also, Tupper v. Dorchester County, 326 S.C. 318, 487 S.E.2d 187 (1997)

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

The tort of defamation permits a plaintiff to recover for an injury to his reputation caused by false statements by another. Banks v. St. Matthew Baptist Church, 406 S.C. 156, 161, 750 S.E.2d 605, 607 (2013). To prove defamation, a plaintiff must show: (1) a false defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 464, 629 S.E.2d 653, 664 (2006). "A communication is defamatory if it tends to impeach the honesty, integrity, virtue or reputation . . ." Hubbard and Felix, *The South Carolina Law of Torts*, 462 (2nd Ed. 1997).

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. Holtzscheiter v. Thomsan Newspapers, Inc., 332 S.C. 502, 511 n.5, 506 S.E.2d 497, 502, n. 5 (1998). "Or a statement may be not actionable *per se*, in which case nothing is presumed and the plaintiff must plead and prove both common law malice and special damages." Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006). Common law malice means the defendant acted with ill will toward the plaintiff or acted recklessly or wantonly, i.e. with a conscious disregard of the plaintiff's rights. Padgett v. Sun News, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982). "The determination of whether or not a

statement is actionable *per se* is a matter of law for the court to resolve." Erickson, 368 S.C. at 466, 629 S.E. 2d at 665.

A. Although Phillip Ferderigos Argues Extensively that Fokas' Statements Are Defamatory Because They Are False, He Offers No References In the Record to Substantiate That Position.

Phillip Ferderigos sets out to convince this Court that the trial court "misapply[ed] basic defamation law and the absolute judicial privilege to [this case]." *Phillip Ferderigos' Brief* at p. 15. His first attempt to do so involves dedicating five (5) pages of his Brief to the idea that Fokas' statements were defamatory because they were false. Unfortunately, no where in those five (5) pages does Phillip Ferderigos include the first reference to any evidence in the record indicating that any of those statements are false. See *Phillip Ferderigos' Brief* at pp. 15-20.

It is axiomatic that for a statement made to be defamatory it must be false. See Pierce v. Inter-Ocean Cas. Co., 148 S.C. 8, 145 S.E. 541 (1928). However, simply making assertions in a Brief, no matter how convincing, does not establish the truth of the matter asserted. "A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment." Germann v. New York Life Ins. Co., 286 S.C. 34, 39, 331 S.E.2d 385, 388 (Ct. App.1985)(*citing* Whitner v. Duke Power Co., 277 S.C. 397, 288 S.E. 2d 389 (1982)); See Harper v. Bolton, 239 S.C. 541, 124 S.E. 2d 54 (1962)("The contention that the statements of counsel are in effect testimony or evidence simply ignores reality and would substitute for it a figment of the imagination."). As Phillip Ferderiogos has failed to make even a minimal evidentiary showing of falsity, his argument fails to estalish any error on the part of the trial court in granting Fokas' motion for summary judgment.

B. Even if the "Malice" Standard Was Met in this Case, Fokas' Statements Are Protected By the Litigation Privilege.

Phillip Ferderigos next attempts to convince this Court that Fokas' allegedly defamatory statements should be viewed in isolation, without regard to the obviously applicable litigation privilege. In fact, he expends great effort to convince this Court that the statements made were made with "malice" without regard to the fact that those statements, in the trial court's eyes, were protected by the litigation privilege.[4] To summarize, at this point Phillip Ferderigos is asking this Court to reverse the Order granting Fokas' motion for summary judgment on the premise that Fokas' false statements were made with malice and not protected by the litigation privilege.

First, there is no mention of the word "malice" in the trial court's Order and Phillip Ferderigos made no motion requesting that the trial court consider that issue and rule on it. As such, the issue is not properly before this Court. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (citing Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997)). In order to preserve an issue for appellate review, "[t]he issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." S.C.

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[4] Although Fokas seeks not to ***wallow*** with Phillip Ferderigos, he would point out that the multiple self-serving and improper references Ferderigos has made to matters existing outside of this appeal, not before this Court and offered completely without proper context (i.e. contempt citations, etc.) are not worthy of this Court's attention and, therefore, should not be afforded judicial notice even if this Court were inclined to do so. Those references are offered for no reason but to further malign Fokas.

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

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

Second, even if this Court finds that the "malice" argument was preserved for appeal, it has no merit as, again, there is no evidence of malice on the part of Fokas. Again, Phillip Ferderigos offers a plethora of reasons why he considers Fokas' statements to be "malicious" without offering any evidence of their maliciousness. That lacking is fatal to his argument.

"Actual malice or malice in fact is not presumed and must be proved." Jones v. Garner, 250 S.C. 479, 488, 158 S.E.2d 909, 913-914 (1968).

The lone example offered by Phillip Ferderigos of a Fokas' statement that demonstrates malice is the following:

> 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 Waistline. 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.

Phillip Ferderigos' Brief at p. 20. That statement, even read in the context Phillip Ferderigos advocates, simply does not prove malice. Phillip Ferderigos may not like the statement but his distaste for it does not make it a statement made with malice.

C. The Trial Court Properly Held That the Litigation Privilege Was Applicable.

Even if this Court were to determine that any statements about Phillip Ferderigos made by Fokas were false (no evidence in the Record) and offered by Fokas with malice (again – no evidence in the Record), all of the statements complained of either related directly to the disputes between the Ferderigos brothers and Plaintiff which matured into the Contract Case or were made during the course of litigation. As such, the statements are covered by the litigation privilege and are absolutely privileged.

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

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

Phillip Ferderigos argues that Fokas' publication of statements made to his brother, Jacob Ferderigos, satisfies the element of the cause of action for defamation of publication to a third party. The statements to Jacob Ferderigos were all in the form of text messages sent to Jacob and the Defamation Defendants as part of a discussion and a disagreement over the development project to add floors to the building at 229 King Street. These discussions and disagreement resulted in the filing of the Contract Case. The statements concerning "eating for free," that Defamation Defendants were displaying bad business judgment by not going forward with the project to add floors to 229 King Street, even if defamatory, were made during the same disagreement that matured into the Contract Case and are directly within

the scope of the issues surrounding Fokas' allegations of breach of contract and breach of the duty of care.

South Carolina's adherence to the absolute litigation privilege "does not depend on the rigid requirement of a strictly . . . judicial proceeding; its limits are fixed rather by considerations of public policy." Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 30, 567 S.E. 2d 881, 896 (Ct. App. 2002) (*quoting* Corbin v. Washington Fire & Marine Ins. Co., 278 F. Supp. 393, 396 (D.S.C. 1968)). The absolute judicial privilege promotes a policy of affording freedom of access to the courts and full development of the facts. See Vitauts M. Gubis, Cumulative Supplement, *Libel and Slander*, 23 ALR 4th Art. 4(a) (1983); 50 Tex. Jur 3d Libel and Slander § 67 (2018). Again, those statements "which have some relation [ ]to" certain judicial proceedings have been held to be covered by the absolute litigation privilege. Pond, 351 S.C. at 23, 567 S.E. 2d at 894.

Phillip Ferderigos asserts that because the alleged defamatory comments were made prior to any formal litigation, and further that Fokas has defamed with a supposed "reckless abandon," the absolute litigation privilege should not be extended in the present case because that would go against public policy, giving a "blank check to defame your legal opponents." *Phillip Ferderigo's Brief* at 24: n. 14. Phillip Ferderigos attempts to paint Fokas' statements as off-handed and unwieldy falsehoods; however, appellant has yet again failed to acknowledge that the alleged defamatory statements, which have not been shown to be false, bare direct relation to the contemplated judicial proceeding: the Contract Case. Therefore, contrary to appellants' assertion, public policy is served well by extending the absolute judicial privilege in this case because the statements of Fokas share a tight nexus with the ultimate breach of contract litigation and are not unrelated slanders.

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

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

Conwell v. Spur Oil Co. of Western South Carolina, 240 S.C. 170, 178-79, 125 S.E.2d 270, 274-275 (1962).

Phillip Ferderigos further takes the position that the litigation privilege does not apply because some of Fokas' statements were made to third parties not associated with the Contract Case or the dispute at the center of it. As the trial court pointed out, there is no evidence in the Record that Fokas made any defamatory statements to any third parties about Phillip Ferderigos. Despite extensive discovery, Phillip Ferderigos cannot identify any person other than their brother and co-defendant in the Contract Case, Jacob Ferderigos, to whom any of the alleged defamatory statements were made or published. In his responses to interrogatories, Phillip Ferderigos acknowledged they had no specific information as to what third parties such statements were made by Fokas other than to their brother, but that they thought he might have made them to Fokas' mother, Irene Fokas, his father, Spiros Fokas, to his sister, Rania Nikatos, Kevin Carroll, and Justin Hansen. *See Record on Appeal ("R.")* at pp. 743-767. Phillip Ferderigos made similar statements in his deposition testimony. *See R.* pp. 768-784.

Consistent with Phillip Ferderigos' lack of any evidence of publication, Irene Fokas was deposed in this case and denied any of the alleged statements were made to her by Fokas. See *R.* pp. 785-794. Fokas has denied in his deposition and affidavit testimony making any such statements to third parties. See *R.* pp. 740-742; 795-801. The publication of the alleged statements that Phillip Ferderigos claims to have occurred is not supported by even a scintilla of proof. In the absence of any evidence of publication to a third party which is not subject to the litigation privilege, the Phillip Ferderigos' claims fail as a matter of law and were properly disposed of by the trial court.

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

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

A statement may be actionable *per se*, in which case the defendant is presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages. Under common law, slander is actionable *per se* only when it charges the plaintiff with one of five types of acts or characteristics: (1) commission of a crime or moral turpitude;

(2) contraction of a loathsome disease; (3) adultery; (4) unchastity; (5) unfitness in one's business or profession. Holtzscheiter v. Thomsan Newspapers, Inc., 332 S.C. 502, 511 n.5, 506 S.E.2d 497, 502, n. 5 (1998). "Or a statement may be not actionable *per se*, in which case nothing is presumed and the plaintiff must plead and prove both common law malice and special damages." Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006). Common law malice means the defendant acted with ill will toward the plaintiff or acted recklessly or wantonly, i.e. with a conscious disregard of the plaintiff's rights. Padgett v. Sun News, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982). "The determination of whether or not a statement is actionable *per se* is a matter of law for the court to resolve." Erickson, 368 S.C. at 466, 629 S.E. 2d at 665.

While Phillip Ferderigos cites numerous privileged communications that he believes establish *per se* defamation by Fokas, the following texts are the basis for most of Phillip Ferderigos' assertions of *per* se defamation by Fokas:

> Your brothers [Phillip and Spiros] have no business sense and I'm sure we will be butting heads with Greek properties in the future. Very sad!!!"

Phillip Ferderigo's Appellant's Brief at 26.

> I actually now think that you didn't fo along with bulding the new suites so that your brothers would not be able to have more income so that you can keep them below you.

Phillip Ferderigo's Appellant's Brief at 27. Obviously, nothing in those texts is defamatory if true. Second, nothing in that text is defamatory as stated. Further, nothing in those texts is defamatory ***at all*** simply because Phillip Ferderigos doesn't like it. A statement is not necessarily defamatory simply because it is unfavorable. Murphy v. News &Courier, 141 S.C.

51, 51, 139 S.E. 189, 190 (1927) ("To hold libelous per se the mere statement that one has failed, or even that he was unable, to furnish bond . . . would be carrying the law of libel beyond any precedent that has been called to our attention."); Costas v. Florence Printing Co., 237 S.C. 655, 663, 118 S.E.2d 696, 700 (1961) ("We point out that there is no allegation that the respondent lost any customers, or had any diminution in trade. There is no allegation of special damages for losses sustained by reason of the publication of the alleged libelous statement. In short, the complaint does not allege special damages."); Dauterman v. State Record Co., 249 S.C. 512, 519, 154 S.E.2d 919, 922 (1967) ("The language complained of by the plaintiff was naturally displeasing to him and was unquestionably of an unfavorable nature. However, it by no means follows that a publication which is unfavorable is also libelous.").

The simple truth is that Phillip Ferderigos's argument that he has been *per se* defamed by Fokas is based on his perception of several otherwise innocuous texts coupled with cherry-picked, mostly out of context court and deposition statements. The trial court properly saw those attempts for the charade they are and granted summary judgment in Fokas' favor.

E. Phillip Ferderigos' Argument that Fokas' Statements Were Actionable Per Quod, If It Is Properly Before This Court, Has No Merit.

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

The Defamation Defendants and Jacob Ferderigos unquestionably agreed to the expansion of the building at 229 King Street and spent substantial sums to pay for detailed engineering, design and permitting work. These costs, which totaled almost $90,000, were shared by the parties in proportion to their ownership in the building and the Old Towne Suites, LLC. Sadly, as shown by the uncontradicted evidence in the record of the Contract Case, Defamation Defendants thereafter attempted to pull out of the project and eventually claimed there never was any agreement to complete the project, despite the group expending $90,000 in preparation for it.[5] Despite all of that, Phillip Ferderigos (like his brother Spiros) is now taking the position that Fokas was to blame for the project's demise and that he made defamatory statements in retaliation for the Defematation Defendants' refusal to go through with the project. Considering the unrefuted evidence in the record and Phillip Ferderigos' ***admitted*** defamation of Fokas, that position is ***utterly amazing.***

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

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

497 S.E.2d 731, 733 (1998) (citing Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997)). In order to preserve an issue for appellate review, "[t]he issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." S.C. Dept. of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007)(citing Broom v. Southeastern Highway Contracting Co., 291 S.C. 93, 352 S.E.2d 302 (Ct. App. 1986). See Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995)(holding that issues on which the trial judge never ruled and which were not raised in a post-trial motion are not preserved for appeal); United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992)(holding that where the circuit court sitting on appeal did not address an issue and appealing party made no motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure to have it rule on the issue, the allegation was not preserved for further review by the Court of Appeals).

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

- The Defamation Defendants did not agree to go forward with the plan to add additional rental suites at 229 King Street because Phillip Ferderigos and/or Spiros Ferderigos could not eat for free at the Old Towne Restaurant;

- Either Phillip or Spiros Ferderigos do not have good business sense;
- Either Phillip or Spiros Ferderigos are bad business people; and
- Either Phillip or Spiros Ferderigos were accusing Fokas of setting fire to 229 King Street.

None of those statements requires extrinsic evidence for even the most simplistic mind to understand. Phillip Ferderigos' perception of those statements aside, the statements simply either (1) are not defamatory or (2) are protected by the litigation privilege. Phillip Ferderigos failed to raise this argument to the trial court and, even if he had, would not have been able to produce any evidence to back it up. As such, the trial court made no error in granting Fokas' motion for summary judgment.

CONCLUSION

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

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November 20, 2018

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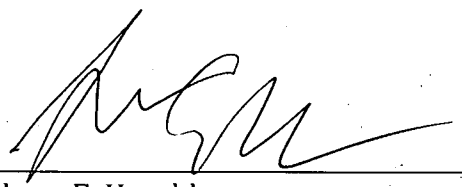
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the *Final Respondent's Brief of Respondent/Appellant Responding to Phillip Ferderigos' Appellant's Brief* complies with Rule 211(b), *SCACR*.



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