

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

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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 is Respondent.

FINAL JOINT REPLY BRIEF OF APPELLANTS SPIROS FERDERIGOS AND PHILLIP
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STATEMENT OF FACTS

Many of the “facts” set forth in the Final Brief of Respondent Athan Fokas (hereinafter referred to as “Fokas”) relate to other matters between the parties also before the Court of Appeals.¹ Fokas’ Statement of Facts contains numerous inaccuracies and falsehoods related to the dealings between the parties.² Rather than address each “fact” set forth by Fokas, Spiros Ferderigos (hereinafter referred to as “Spiros”) and Phillip Ferderigos (hereinafter referred to as “Phillip”), pursuant to Rule 208(b)(6), SCACR, adopt and incorporate the Statement of Facts and Arguments set forth in the Joint Brief of Respondents Spiros Ferderigos, Phillip Ferderigos, and Jacob Ferderigos filed in the present consolidated appeal related to Fokas’ breach of contract claims.³ Additionally, pursuant to Rule 208(b)(6), SCACR, Phillip and Spiros intend to adopt

¹ The parties have two appeals currently pending. In the present appeal, Spiros Ferderigos and Phillip Ferderigos appealed the trial court’s order granting Fokas partial summary judgment on their counterclaims for defamation. Fokas appealed the trial court’s order granting summary judgment to Spiros, Phillip, and Jacob Ferderigos (hereinafter referred to as “Jacob”) on his claims for breach of contract and breach of fiduciary duty. The Court consolidated these matters into the present appeal.

In the second appeal, Spiros Ferderigos and Phillip Ferderigos also appealed the trial court’s order granting Fokas partial summary judgment on their counterclaims for defamation. Fokas appealed the trial court’s order granting summary judgment to Spiros and Phillip on his claim for defamation. There is presently a motion pending requesting the Court consolidate those appeals into Appellate Case No. 2018-000516.

² For example, contrary to Fokas’ assertions, he first filed a Complaint alleging a cause of action for defamation against Spiros and Phillip on July 14, 2015. He subsequently filed a Complaint alleging causes of action for breach of contract and breach of fiduciary duty against Spiros, Phillip, and Jacob (hereinafter collectively referred to as the “Ferderigos Brothers”) on July 15, 2015. (R. pp. 48-56). The breach of contract action was not pending at the time Fokas filed his defamation action. Spiros and Phillip filed counterclaims for defamation against Fokas in each of these actions. However, because the actual order of the filings does not seem to fit Fokas’ narrative, he incorrectly states the breach of contract action came first.

³ Despite Fokas’ arguments to the contrary, the evidence in the record shows the parties were simply investigating and negotiating the possible material terms of the proposed project and there was never an agreement on these material terms. Fokas subsequently filed meritless lawsuits in order to attempt to force Phillip and Spiros to agree to terms that they had repeatedly rejected and/or had never agreed to. In fact, the record unequivocally demonstrates numerous material terms for the proposed project were not even discussed, let alone agreed upon by Fokas and the Ferderigos Brothers. Additionally, other material terms, such as the total price for the proposed project, remained unknown at the conclusion of negotiations even after significant changes to the expected cost. Further still, Fokas misunderstood the terms for the loan for his and Jacob’s shares of the proposed project’s cost, and a meeting of the minds between Fokas and the Ferderigos Brothers on the loan terms would be impossible when Fokas himself did not understand the loan terms. Fokas’ repeated arguments that there was an agreement of material terms, despite the uncontroverted evidence, is indicative of the untenable positions Fokas has taken throughout this litigation.

and incorporate the Statement of Facts and Arguments set forth in the Joint Brief of Respondents Spiros Ferderigos and Phillip Ferderigos which shall be filed in Appellate Case No. 2018-000516 related to Fokas' defamation claims. Unlike Fokas' Statement of Facts, the Statement of Facts set forth in these briefs reflect the actual interactions and dealings between the parties as evidenced by the written record and testimony.

Prior to the hearing on Fokas' Motion for Partial Summary Judgment, Spiros and Phillip each filed a Memorandum in Opposition. (R. pp. 1143-1208; R. pp. 1209-1243). Spiros' and Phillips' memoranda set forth numerous defamatory statements published by Fokas to third parties outside the context of any litigation between the parties. (R. pp. 1143-1208; R. pp. 1209-1243). These memoranda set forth the various defamatory statements published by Fokas about Spiros and Phillip and to whom Fokas published them. (R. pp. 1143-1208; R. pp. 1209-1243). In Fokas' Respondent Briefs, he refers to only four of the defamatory statements alleged by Spiros and Phillip that Fokas published to third parties and seemingly ignores the other defamatory statements he published to third parties, including those his counsel conceded at the hearing were defamatory. Fokas cannot selectively choose which defamatory statements to address. The record shows Spiros and Phillip presented evidence to the trial court that Fokas published actionable *per se* defamatory statements about them to third parties which were not protected by any privilege.

ARGUMENTS

Spiros and Phillip presented evidence Fokas published defamatory actionable *per se* statements about them to third parties, and, for this reason, the trial court erred in granting summary judgment to Fokas. In written and verbal correspondence, Fokas published defamatory statements to third parties regarding Spiros' unfitness as an attorney, assistant solicitor, and businessperson. Fokas published defamatory actionable *per se* statements about Spiros as follows: (a) accused Spiros, 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"; (b) accused Spiros of misusing his office as an assistant solicitor to threaten him in a business matter; (c) accused Spiros of lying in his deposition, "which may be grounds for disbarment"; (d) published defamatory statements that Spiros is a bad businessman with no business sense; (e) accused Spiros to third persons of falsely defaming him; (f) blamed Spiros for the proposed project not moving forward because he could not eat for free at Old Towne Restaurant; and (g) blamed Spiros for the proposed project not moving forward because he was stubborn and/or jealous of Fokas.⁴

Similarly, in written and verbal correspondence, Fokas published defamatory statements to third parties regarding Phillip's unfitness as a businessperson. Fokas published defamatory actionable *per se* statements about Phillip as follows: (a) published defamatory statements that Phillip was manipulating his brother Jacob and wanted to keep Jacob below him; (b) published defamatory statements that Phillip is a bad businessman with no business sense; (c) accused Phillip to third persons of falsely defaming him; (d) blamed Phillip for the proposed project not

⁴ Spiros discussed each of these defamatory statements published by Fokas in detail in his Final Appellant Brief, including the date of publication, how the statement was published, to whom it was published, when it was published, etc. Rather than reiterate those details for each statement, Spiros relies upon his Final Appellant Brief for those details.

moving forward because he could not eat for free at Old Towne Restaurant; and (e) blamed Phillip for the proposed project not moving forward because he was stubborn and/or jealous of Fokas.⁵

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). As more fully set forth below, Spiros and Phillip presented evidence to satisfy each element of defamation or the law presumed the element. Spiros and Phillip presented evidence to the trial court the defamatory statements published by Fokas were defamatory *per se* or *per quod*. Similarly, as a matter of law, the written statements published by Fokas were actionable *per se*, and, as actionable *per se* defamatory statements, the law presumes the statements were false, Fokas published them with common law malice, and Spiros and Phillip suffered general damages. Contrary to Fokas’ arguments, because of these legal presumptions, Spiros and Phillip do not need to prove the statements are false. Rather, the burden falls upon Fokas to prove his affirmative defense of “truth.”⁶ Fokas offered no

⁵ Phillip discussed each of these defamatory statements published by Fokas in detail in his Final Appellant Brief, including the date of publication, how the statement was published, to whom it was published, when it was published, etc. Rather than reiterate those details for each statement, Phillip relies upon his Final Appellant Brief for those details.

⁶ Fokas’ arguments fail to address the actual elements of the cause of action of defamation. Fokas’ brief is disjointed and almost incoherent at times with incorrect citations to the law and facts as set forth in this Reply Brief. Fokas throws in random arguments and comments that have no bearing on the actual decision of the underlying judge or the current case before the Court of Appeals. The underlying Order by the trial court relies on three things: (1) the statements were not defamatory; (2) no publication to third parties; and (3) privilege. As set forth in their Final Appellant Briefs and in this Reply Brief, Phillip and Spiros have put forth more than a scintilla of evidence to establish all the elements of defamation. Fokas improperly attempts to shift the applicable burden of proof and standards to Spiros and Phillip without any supporting case law. It is clear more than a scintilla of evidence exists that: (a) Fokas’ statements were defamatory; (b) the defamatory statements were actionable *per se* which results in presumptions of falsity, common law malice, and general damages; (c) the defamatory statements were published to third parties; and (d) the defamatory statements were not privileged and were certainly not in good faith.

such evidence for the trial court to find as a matter of law the statements were true. Finally, Fokas published these statements outside the scope of any judicial proceeding privilege, and there was no qualified privilege protecting these statements. Even if the defamatory statements were protected by either privilege, Fokas either abused or exceeded the scope of the privilege in publishing the defamatory statements about Spiros and Phillip. For these reasons, and as more fully argued below, the trial court erred in finding there was no evidence to support Spiros' and Phillip's defamation claims and granting Fokas judgment as a matter of law.

I. FOKAS PUBLISHED DEFAMATORY ACTIONABLE *PER SE* STATEMENTS ABOUT SPIROS AND PHILLIP TO THIRD PARTIES WHICH THE LAW PRESUMES TO BE FALSE AND FOR WHICH THE LAW PRESUMES MALICE AND DAMAGES.

Because Spiros and Phillip presented evidence to the trial court that Fokas published defamatory actionable *per se* statements to third parties, the trial court should have presumed the statements were false, presumed Fokas published them with common law malice, required Fokas to support his affirmative defense of truth as a matter of law⁷, and presumed Spiros and Phillip suffered general damages. The trial court initially erred in finding the statements published by Fokas were not defamatory. In fact, most of the statements published by Fokas were defamatory *per se*, with only two of the statements requiring extrinsic evidence to show the defamatory nature of the statements. Next, the trial court erred in finding the defamatory statements were not actionable *per se* when they were libelous written statements which degraded and disgraced Spiros and Phillip to third parties or slanderous verbal statements which impugned on their fitness within their profession. Because these defamatory statements were actionable *per se*, the trial court should have presumed the statements were false, published with common law malice, and resulted in general damages.

⁷ Indeed, whether the affirmative defense of truth applies to the facts of this case would be an issue of fact for the jury to determine with the burden of proof on Fokas.

A. The statements Fokas published to third parties about Spiros and Phillip were defamatory *per se* or *per quod*.

As an initial matter, the statements published by Fokas to third parties about Spiros and Phillip were defamatory *per se* or *per quod*, and the trial court erred in finding the statements were not defamatory. “A 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 with him.” Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 530, 506 S.E.2d 497, 513 (1998) (Toal, J., concurring) (emphasis added). “With this first element of defamation, the trial court must initially determine if the communication is reasonably capable of conveying a defamatory meaning.” Parrish v. Allison, 376 S.C. 308, 321, 656 S.E.2d 382, 389 (Ct. App. 2007); White v. Wilkerson, 328 S.C. 179, 183, 493 S.E.2d 345, 347 (1997). If the defamatory meaning of a message or statement is obvious on the face of the statement, the statement is defamatory *per se*. Holtzscheiter, 332 S.C. at 508-09, 506 S.E.2d at 501. “If the defamatory meaning is not clear unless the hearer knows the facts or circumstances not contained in the statement itself, then the statement is defamatory *per quod*.” Id. In cases involving defamation *per quod*, the plaintiff must introduce facts extrinsic to the statement itself in order to prove a defamatory meaning.” Id. “If the question is one on which reasonable minds might differ, then it is for the jury to determine which of the two permissible views they will take.” Id. at 530, 506 S.E.2d at 512 (Toal, J., concurring). Some statements are so clearly innocent or defamatory the court is justified in determining the question itself. Id. “In making the determination of whether to submit the issue to the jury, the trial court may consider not only the statement on its face, but also evidence of any extrinsic facts and circumstances.” Id.

Many of the written communications published by Fokas about Spiros and Phillip were defamatory *per se* because the defamatory nature of the communications was obvious on their

face and the communications harmed their reputation to third parties. Fokas cannot with a straight face argue falsely accusing Spiros of ethics violations, abusing his office as an assistant solicitor, lying in his deposition, being a bad businessman, and publishing defamatory statements about Fokas do not constitute defamation *per se*. In fact, Fokas' counsel admitted several of these statements were defamatory *per se* at the hearing. (R. p. 525, l. 6-13; R. p. 538, l. 12-21). The defamatory meaning of these statements is clear on each statement's face, and Fokas intended them to disparage Spiros' fitness as an attorney, assistant solicitor, and businessperson with each statement. For some of these statements, Fokas actually accuses Spiros of committing serious crimes such as committing perjury and abusing his position as an assistant solicitor. These defamatory statements published by Fokas would tend to harm Spiros' reputation and deter others from associating with him.

Similarly, Fokas cannot reasonably argue falsely accusing Phillip of manipulating his brother Jacob, wanting to keep Jacob below him, being a bad businessman with no business sense, and publishing defamatory statements about Fokas do not constitute defamation *per se*. Again, Fokas' counsel admitted several of these statements were defamatory *per se* at the hearing. (R. p. 525, l. 6-13; R. p. 538, l. 12-21). The defamatory meaning of these statements is clear on each statement's face, and Fokas intended them to disparage Phillip's fitness as a brother, businessperson, and business partner with each statement. These defamatory statements published by Fokas would tend to harm Phillip's reputation and deter others, in particularly business partners, from associating with him.

The two statements published by Fokas about Spiros and Phillip blaming them for the proposed project not moving forward were defamatory *per quod*. As evidenced by the trial court's grant of summary judgment to Spiros and Phillip in the breach of contract matter, the

proposed project did not move forward because there was never an agreement between the parties on the material terms. The reasons were not because Spiros and Phillip could not eat for free at Old Towne Restaurant or were stubborn or jealous of Fokas. This extrinsic evidence provided sufficient evidence to the trial court that these defamatory statements published by Fokas were defamatory *per quod*.

The memoranda submitted by Spiros and Phillip in opposition to Fokas' Motion for Partial Summary Judgment meticulously cite libelous and slanderous defamatory statements published by Fokas to third parties. These defamatory statements harm their reputations and are designed to deter others from doing business with them. Yet, despite the litany of evidence produced by Spiros and Phillip, Fokas argues that such evidence amounts to nothing more than "cherry-picked, mostly out of context, deposition segments (of a witness speaking through a translator) in order to create 'sound bites' that purport to create per se defamatory statements published to others by Fokas." (Respondent Brief to PSF, p. 19; Respondent Brief to SSF, p. 13). Spiros and Phillip respectfully reject Fokas' mischaracterization of the evidence. The written communications and deposition testimony set forth more than a scintilla of evidence to support a defamation claim against Fokas. For these reasons, Spiros and Phillip presented sufficient evidence the statements published by Fokas were either defamatory *per se* or *per quod*, and the trial court erred in finding the statements published by Fokas to third parties were not defamatory.⁸

⁸ As set forth in Phillip and Spiros' Final Appellant Briefs, Fokas continues to incorrectly rely upon the Murphy, Costas, and Dauterman decisions for the proposition that "[a] statement is not necessarily defamatory simply because it is unfavorable." Those decisions relied upon truth as an affirmative defense to negate any defamatory meaning behind the statements. Fokas asserts the statements he published were not defamatory "simply because [Spiros/Phillip] doesn't like them." Whether Spiros and Phillip like Fokas' statements, Fokas' statements are defamatory because they clearly hurt Spiros' and Phillip's reputation and/or attempted to deter others from doing business with or associating with them. Accordingly, the Murphy, Costas, and Dauterman decisions do not create a new standard for defamation, and, moreover, as those cases relied on truth precluding such statements from being

B. The defamatory *per se* statements published by Fokas about Spiros and Phillip to third parties were actionable *per se*.

The defamatory statements published to third parties by Fokas about Spiros and Phillip were actionable *per se*. Defamation may be either actionable *per se* or not actionable *per se*. Fountain v. First Reliance Bank, 398 S.C. 434, 442, 730 S.E.2d 305, 309 (2012). “When assessing the question of actionable *per se* or not actionable *per se*, an important distinction is drawn between the defamation in the form of libel and in the form of slander.” Parrish v. Allison, 376 S.C. 308, 322, 656 S.E.2d 382, 389 (Ct. App. 2007). Under the common law, “[l]ibel 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 v. Thomson Newspapers, Inc., 332 S.C. 502, 510, 506 S.E.2d 497, 502 (1998). With libel, “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. “Essentially, all libel is actionable *per se*, while only certain categories of slander are actionable *per se*.” Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 466, 529 S.E.2d 653, 665 (2006). “Slander is actionable *per se* when the defendant’s alleged defamatory statements charge the plaintiff 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.” Goodwin v. Kennedy, 347 S.C. 30, 36, 552 S.E.2d 319, 322–23 (Ct. App. 2001). When a defamatory statement is actionable *per se*, the law presumes plaintiff suffered general damages, and the defendant is presumed to have acted with common law

defamatory, they are simply inapplicable to the case at bar as Fokas has made no showing whatsoever the defamatory statements he published were true.

malice. See Fountain, 398 S.C. at 442, 730 S.E.2d at 309. “Whether the statement is actionable *per se* is a matter of law for the court to resolve.” Id.

For the defamatory statements published by Fokas in written communications, the libel constitutes actionable *per se* defamation. As referenced in the Final Appellant Briefs of Spiros and Phillip, Fokas published many of these defamatory *per se* statements in e-mails and text messages. Spiros and Phillip attached the written defamatory communications as exhibits to their Memorandum in Opposition to Plaintiff’s Motion for Partial Summary Judgment. As libel, the defamatory statements were undoubtedly actionable *per se*, especially given the effect on Spiros’ and Phillip’s reputations discussed above upon publication of the defamatory statements.

The slanderous defamatory statements published by Fokas were also actionable *per se* because they directly impugned Spiros’ and Phillip’s fitness as businessmen to third parties. The slanderous statements falsely accused Spiros and Phillip of being bad businessmen, defaming Fokas, and deciding against moving forward with the proposed project because they were stubborn or jealous of Fokas. Fokas published these defamatory statements to Spiros’ and Phillip’s family members and business partners, including Jacob Ferderigos, Antonia Fokas (Fokas’ wife), Irene Fokas (Fokas’ mother and Spiros’ and Phillip’s aunt)⁹, Fanouris Ferderigos (the parties’ uncle), and Stavros Ferderigos (Spiros’ and Phillip’s father and Fokas’ uncle). Accusations of unfitness in one’s profession by others can strain partnerships or even prevent future business dealings, and as attorneys, such allegations can be even more damaging. As a result, such slanderous statements are actionable *per se*. These false and defamatory slanderous

⁹ As set forth in the Spiros’ and Phillip’s Final Appellant Briefs, Irene Fokas testified Fokas defamed Spiros and Phillip to her. However, Fokas attempts to dismiss Irene Fokas’ testimony even though Fokas noticed the deposition and retained the interpreter. Fokas describes Irene Fokas’ testimony as that “of a confused non-party subject to repetitive harassment through an interpreter.” (Respondent Brief to PSF, pgs. 17). It is interesting to note that the “confused” non-party is Fokas’ own mother, and again, Fokas noticed the deposition and retained the interpreter.

statements about Spiros and Phillip regarding their fitness as businesspeople and attorneys are actionable *per se*.

C. The law presumes the defamatory actionable *per se* statements published by Fokas about Spiros and Phillip are false, and Fokas offered no evidence to show the statements were true.

Because the law presumes actionable *per se* statements are false, Spiros and Phillip did not need to prove the statements were false. “It is well settled in South Carolina that statements which are actionable *per se* are presumed false.” Herring v. Lawrence Warehouse Co., 222 S.C. 226, 234, 72 S.E.2d 453, 455 (1952). “The truth of the matter is a complete defense to an action based on defamation.” WeSav Fin. Corp. v. Lingefelt, 316 S.C. 442, 445, 450 S.E.2d 580, 582 (1994) (per curiam). “Under common law, a defamatory communication was presumed to be false, but truth could be asserted as an affirmative defense.” Parrish v. Allison, 376 S.C. 308, 326, 656 S.E.2d 382, 391 (Ct. App. 2007). “When the alleged defamatory statements are published by a private figure and involve a matter of private concern, the plaintiff is not required to prove falsity of the statements; instead, the defendant has the burden of pleading and proving the substantial truth of each of the alleged defamatory statements.” Kunst v. Loree, Op. No. 5564 (S.C. Ct. App. filed May 30, 2018); see Castine v. Castine, 403 S.C. 259, 266, 743 S.E.2d 93, 96–97 (Ct. App. 2013) (“Substantial truth must be proven as to each individual statement [appellant] made, not as to the contents of the letters he sent as a whole.”); Parrish, 376 S.C. at 326, 656 S.E.2d at 392 (“If the statements are a matter of private concern, the plaintiff is not required to prove falsity. Thus, truth is an affirmative defense as to which the defendant has the burden of pleading and proof, unless the statement involves a constitutional issue.” (citation omitted)). “When the truth of the defamatory communication is in dispute, the issue is a jury question.” Weir v. Citicorp Nat’l Servs., Inc., 312 S.C. 511, 515, 435 S.E.2d 864, 867 (1993).

Contrary to Fokas' assertions, Spiros and Phillip do not need to prove the defamatory statements published by Fokas were false. Because the defamatory statements were actionable *per se* as set forth above, the law presumes the defamatory statements were false, and the burden falls upon Fokas to prove the statements were true as an affirmative defense. Fokas offered no evidence, let alone sufficient evidence to prevent a question of fact for a jury, that the defamatory statements he published about Spiros and Phillip were true. Spiros and Phillip are not public figures, and the defamatory statements published by Fokas did not concern a public issue. As a result, Fokas must assert truth as an affirmative defense, and he bears the burden of proving this affirmative defense. Fokas refers to no evidence in the record to support his assertion the defamatory statements were true. Instead, Fokas relies solely on his argument that Spiros and Phillip must prove the defamatory statements were false. This argument is simply incorrect as demonstrated by the case law cited above. The burden to prove truth rested on Fokas, and he offered no such evidence to the trial court.

D. The law presumes Fokas acted with common law malice in publishing defamatory actionable *per se* statements about Spiros and Phillip to third parties.

Because Spiros and Phillip put forth evidence of Fokas publishing defamatory actionable *per se* statements to third parties, the law presumes Fokas acted with common law malice. In response to Phillip's Initial Brief, Fokas argues there was no evidence the defamatory statements were published with malice. (Respondent Brief to PSF, p. 12). Fokas seemingly argues Spiros and Phillip needed to prove "actual malice" or "malice in fact." (Respondent Brief to PSF, pp. 12-13). Again, Fokas' argument grossly misapplies defamation law and is simply wrong.

Generally, public figures and officials may only recover for defamation upon a showing of actual malice by clear and convincing evidence. Erickson v. Jones St. Publishers, LLC, 368

S.C. 444, 467-77, 629 S.E.2d 653, 666-70 (2006). On the other hand, private figure plaintiffs do not have to show actual malice when seeking to recover compensatory damages in a defamation case. Tharp v. Media General, Inc., 987 F.Supp.2d 673, 680 (D.S.C. 2013). Rather, under South Carolina defamation law, a private figure defamation plaintiff must show “common law malice.” Id. Common law malice under South Carolina defamation law generally “means that the defendant was actuated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff, or that the statements were published with such recklessness as to show a conscious indifference toward plaintiff’s rights.” Jones v. Garner, 250 S.C. 479, 488, 158 S.E.2d 909, 914 (1968). If a defendant publishes defamatory statements which are actionable *per se*, the law presumes the defendant acted with common law malice. Erickson v. Jones Street Publishers, LLC, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006).

As fully addressed above, Spiros and Phillip put forth evidence Fokas’ defamatory statements published to third parties were actionable *per se*. Additionally, as Spiros and Phillip are not public officials or figures, they did not need to prove actual malice. Instead, they merely needed to show Fokas published the defamatory statements with common law malice. However, as the defamatory statements published by Fokas were actionable *per se*, Spiros and Phillip did not need to prove common law malice because the law presumes Fokas acted with common law malice. This is yet another example of Fokas either misrepresenting facts or misapplying the law.

E. The law presumes Spiros and Phillip suffered general damages as a result of Fokas publishing defamatory actionable *per se* statements about them to third parties.

Because Spiros and Phillip put forth evidence of Fokas publishing defamatory actionable *per se* statements to third parties, the law presumes Spiros and Phillip suffered damages. In a successful defamation claim, the plaintiff recovers for injuries to his or her reputation, which

result from the defendant's communications to others of a false message concerning the plaintiff. Murray v. Holnam, 344 S.C. 129, 138, 542 S.E.2d 743, 748 (Ct. App. 2001). Consequently, "[d]efamation does not focus on the hurt to the defamed parties' feelings, but on the injury to their reputations." Castine v. Castine, 403 S.C. 259, 265, 743 S.E.2d 93, 96 (Ct. App. 2013). "If the alleged defamatory statement is actionable *per se*, the law presumes that the defendant acted with common law malice and the plaintiff suffered general damages; however, if the alleged defamatory statement is not actionable *per se*, the plaintiff must then plead and prove both common law malice and special damages." Kunst v. Loree, Op. No. 5564 (S.C. Ct. App. filed May 30, 2018); see also Fountain v. First Reliance Bank, 398 S.C. 434, 442, 730 S.E.2d 305, 309 (2012). For these reasons, Spiros and Phillip did not need to present evidence of special damages, and the trial court should have presumed Spiros and Phillip suffered general damages.

II. FOKAS PUBLISHED THE DEFAMATORY ACTIONABLE *PER SE* STATEMENTS ABOUT SPIROS AND PHILLIP TO VARIOUS THIRD PARTIES INCLUDING FOKAS' WIFE, FOKAS' MOTHER, AND OTHERS.

Contrary to Fokas' assertions, he published the defamatory statements about Spiros and Phillip to third parties. Fokas argues Spiros and Phillip put forth evidence that he only published the defamatory statements to Jacob Ferderigos. However, as noted in Spiros' and Phillip's respective Final Appellant Briefs, Fokas published defamatory statements about Spiros and Phillip to Antonia Fokas (Fokas' wife), Irene Fokas (Fokas' mother), Jacob Ferderigos (their business partner and brother), Fanouris Ferderigos (the parties' uncle), and Stavros Ferderigos (Spiros' and Phillip's father). Fokas also published some of the defamatory statements about Spiros to Phillip and the defamatory statements about Phillip to Spiros.¹⁰ Publication merely

¹⁰ Despite Fokas' argument at the hearing, there is no "family" exception as to who constitutes a third party under South Carolina's defamation law. Fokas' counsel conceded such point at the hearing despite his arguing that family

requires that someone other than the plaintiff hear 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). Spiros and Phillip attached as exhibits to their memoranda the various text messages and e-mails wherein Fokas published the defamatory statements to Antonia Fokas, Jacob Ferderigos, Fanouris Ferderigos, Stavros Ferderigos, and each other. Additionally, they cited the deposition transcript of Irene Fokas wherein she testified Fokas published defamatory statements about Spiros and Phillip to her. As such, Spiros and Phillip have sufficiently shown Fokas published the defamatory statements. For these reasons, the trial court erred in finding Fokas did not publish defamatory statements about Spiros and Phillip to third parties.

III. FOKAS' DEFAMATORY ACTIONABLE *PER SE* STATEMENTS WERE NOT PROTECTED BY ANY QUALIFIED OR JUDICIAL PROCEEDINGS PRIVILEGE.

The defamatory statements published by Fokas to third parties about Spiros and Phillip were not protected by any privilege. Fokas argues the qualified privilege protects his defamatory statements published to Jacob Ferderigos and the judicial proceeding privilege¹¹ protects the other defamatory statements published to third parties. Fokas' argument is grossly misplaced.

members should not constitute third parties. After due diligence and search, Spiros and Phillip have been unable to locate any case that excludes family members as third parties under the defamation law in South Carolina.

¹¹ South Carolina courts do not recognize a broad litigation privilege but instead recognize a more narrow and limited judicial proceedings privilege. All of Fokas' libelous and defamatory statements were either made before the anticipation of litigation and/or to third parties outside of the judicial proceedings (i.e., Fokas' wife, Fokas' mother, Phillip and Spiros' uncle, Phillip and Spiros' father) and/or are not protected by the judicial proceedings privilege. The defamatory statements were not made in good faith (i.e., the viciousness of Fokas' texts and emails themselves establish an issue of fact as to whether or not any such privilege was abused) and were presumably false. Further, the defamatory statements were made with malice and, moreover, had no reasonable relation to any judicial proceeding. Indeed, none of Fokas' defamatory statements were actually made in court or related to any judicial proceeding.

A. Fokas fails to show the qualified privilege applies to the defamatory statements he published to third parties about Spiros and Phillip, and even if the privilege applies, the question of whether he abused the privilege is one for the jury.

The qualified privilege does not apply to Fokas' defamatory statements published to third parties about Spiros and Phillip, and, even if it did, Fokas exceeded the scope of the privilege. A defendant in a defamation action may assert the affirmative defense of conditional or qualified privilege. Swinton Creek Nursery v. Edisto Farm Credit, ACA, 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.* The party asserting a qualified privilege must prove the following elements: (1) good faith, (2) an interest to be upheld, (3) a statement limited in its scope to this purpose, (4) a proper occasion, and (5) publication in a proper manner and to proper parties only. Manley v. Manley, 291 S.C. 325, 331, 353 S.E.2d 312, 315 (Ct. App. 1987). Whether an occasion gives rise to a qualified or conditional privilege is generally a question of law for the court. Murray v. Holnam, Inc., 344 S.C. 129, 140, 542 S.E.2d 743, 749 (Ct. App. 2001). "Where the occasion gives rise to a qualified privilege, there is a prima facie presumption to rebut the inference of malice, and the burden is on the plaintiff to show actual malice or that the scope of the privilege has been exceeded." Swinton Creek Nursery, 334 S.C. at 484, 514 S.E.2d at 134. Abuse of the conditional privilege is generally an issue for the jury to decide. Woodward v. S.C. Farm Bureau Ins. Co., 277 S.C. 29, 32-33, 282 S.E.2d 599, 601 (1981).

First, Fokas did not assert qualified privilege as an affirmative defense in his Replies to Spiros' and Phillip's counterclaims. (R. p. 497-502; R. p. 503-508). An affirmative defense must be raised in a pleading. Rule 8(c), SCRPC. "Affirmative defenses are waived if not pled."

Howard v. S.C. Dep't of Highways, 343 S.C. 149, 155, 538 S.E.2d 291, 294 (Ct. App. 2000).

“Generally, claims or defenses not presented in the pleadings will not be considered on appeal.”

Fraternal Order of Police v. S.C. Dep't of Revenue, 352 S.C. 420, 435, 574 S.E.2d 717, 725

(2002). Fokas did not raise qualified privilege as an affirmative defense in his Replies. As a result, the trial court erred in granting Fokas summary judgment on the grounds of qualified privilege.

Second, Fokas seemingly argues the qualified privilege applies simply because he published the defamatory statements about Spiros and Phillip to Jacob Ferderigos, their business partner in the proposed project. Fokas does not address the five elements required to show the qualified privilege applies. First, Fokas cannot show good faith because his defamatory statements were false and he knew them to be false. In fact, as set forth in their Final Appellant Briefs, Spiros and Phillip put forth evidence Fokas published these defamatory statements for the improper purpose of attempting to force Spiros and Phillip to agree to terms they had repeatedly rejected and/or had never agreed to as part of the proposed project. Second, Fokas has not established any interest to be upheld by publishing these defamatory statements to Jacob Ferderigos. Third, the defamatory statements exceeded any reasonable scope pertaining the parties' business relationship. Finally, Fokas fails to show the defamatory statements were published in a proper way at a proper time and to the proper parties.

Finally, even if the qualified privilege applied, Fokas' publication of the defamatory statements abused the qualified privilege. As discussed above, Spiros and Phillip put forth evidence Fokas published these defamatory statements for the improper purpose of attempting to coerce Spiros and Phillip to agree to terms they had repeatedly rejected and/or had never agreed

to as part of the proposed project. As a result, even if the qualified privilege applies, Spiros and Phillip created an issue of fact for the jury on whether Fokas abused the privilege.¹²

B. The judicial proceedings privilege does not apply to Fokas' defamatory actionable *per se* statements published to third parties about Spiros and Phillip.

The judicial proceedings privilege does not apply to Fokas' defamatory statements published to third parties about Spiros and Phillip, and even if it did, Fokas exceeded the scope of the privilege. 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." Id. (emphasis added).

First, Fokas did not assert the judicial proceedings privilege as an affirmative defense in his Replies to Spiros' and Phillip's counterclaims. (R. p. 497-502; R. p. 503-508). An affirmative defense must be raised in a pleading. Rule 8(c), SCRCP. "Affirmative defenses are waived if not pled." Howard v. S.C. Dep't of Highways, 343 S.C. 149, 155, 538 S.E.2d 291, 294 (Ct. App. 2000). "Generally, claims or defenses not presented in the pleadings will not be considered on appeal." Fraternal Order of Police v. S.C. Dep't of Revenue, 352 S.C. 420, 435, 574 S.E.2d 717, 725 (2002). Fokas did not raise the judicial proceedings privilege as an affirmative defense in his

¹² Additionally, any qualified privilege would not apply to any statements made to third parties uninvolved in the business dealings between the parties such as Fokas' wife, Fokas' mother, Spiros' and Phillip's uncle, and Spiros' and Phillip's father.

Replies. As a result, the trial court erred in granting Fokas summary judgment on the grounds of the litigation privilege.

Second, as a matter of law, the absolute judicial proceedings privilege does not apply to Fokas' actionable *per se* defamatory statements about Spiros and Phillip. Several actionable *per se* statements were made before Fokas initiated litigation and even before any preliminary steps toward litigation or any anticipation of litigation. They were not made in preparation for or in furtherance of the litigation but rather merely related to the same subject matter as the future litigation. As a result, the absolute judicial proceedings privilege does not apply.

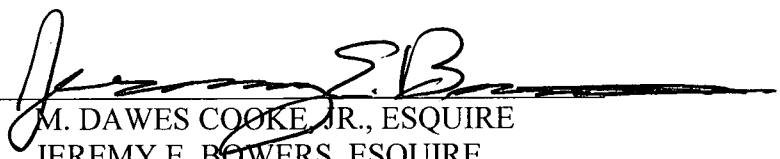
Finally, Fokas' defamatory statements published to third parties were part of his negotiating tactics for the proposed project, not part of any preliminary steps leading toward a judicial proceeding. Moreover, Fokas published numerous defamatory statements about Spiros and Phillip to third parties who were not a party of any judicial proceeding, including Fokas' wife, Fokas' mother, Spiros' and Phillip's father, and the parties' uncle. Finally, Fokas' actionable *per se* defamatory statements made while litigation was pending have no reasonable relation to and/or do not "arise out of" any judicial proceeding. Rather, Fokas sought to disparage Spiros' and Phillip's reputation and to "scare" them from protecting themselves against Fokas' meritless lawsuits. The statements were not made in furtherance nor in preparation for litigation. As such, the absolute judicial proceedings privilege simply does not apply to Fokas' continual actionable *per se* defamation published against Spiros and Phillip. For these reasons, the trial court erred in finding the absolute judicial proceedings privilege protected Fokas' defamatory statements about Spiros and Phillip published to third parties.

CONCLUSION

For the reasons argued above, Spiros and Phillip produced well beyond a scintilla of evidence that Fokas published defamatory statements about Spiros and Phillip to third persons. As a matter of law, the written statements published by Fokas were actionable *per se*, and as actionable *per se* defamatory statements, the law presumes the statements were false, Fokas published them with common law malice, and Spiros and Phillip suffered general damages. The burden fell upon Fokas to prove his affirmative defense of “truth,” and he offered no such evidence for the trial court to find as a matter of law the statements were true.¹³ Finally, Fokas published these statements outside the context of judicial proceedings privilege, and there was no qualified privilege protecting these statements. Even if a qualified privilege applies to Fokas’ defamatory statements, a question of fact arises on whether Fokas abused the privilege. For these reasons, the trial court erred in finding there was no evidence to support Spiros’ and Phillip’s defamation claims and granting Fokas judgment as a matter of law.

¹³ As set forth in the Order, the trial court did not find the defamatory statements published by Fokas about Spiros and Phillip were true. Rather, the trial court erroneously held the statements did not constitute defamation based upon a misapplication of the Murphy, Costas, and Dauterman decisions.

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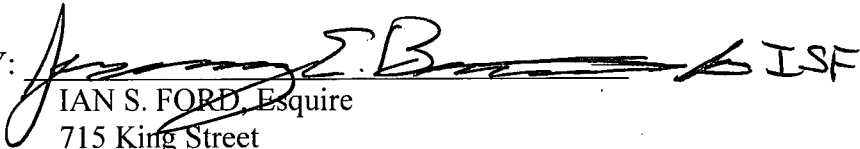
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November 26, 2018

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 is Respondent.

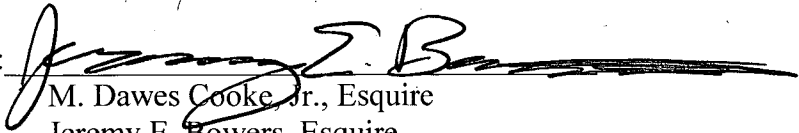
CERTIFICATION OF COMPLIANCE WITH RULE 211(b), SCACR

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

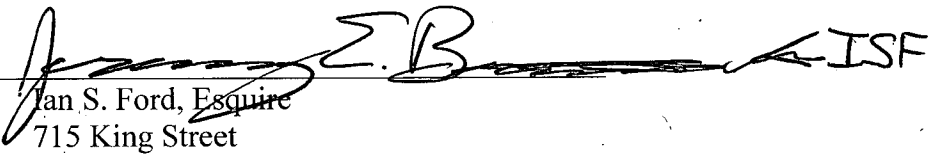
(4) Final Joint Reply Brief of Appellants Spiros Ferderigos and Phillip Ferderigos

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