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-10-3891

Appellate Case No. 2018-000516

Athan Fokas. .....Respondent,

v.

Phillip Ferderigos and Spiros Ferderigos..... Appellants.

FINAL BRIEF OF APPELLANT PHILLIP FERDERIGOS

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STATEMENT OF THE CASE

Respondent Fokas filed his Summons and Complaint on July 14, 2015. (R. pp. 26-31).[1] Appellant Phillip Ferderigos timely filed his Answer, Affirmative Defenses and Counterclaims on October 1, 2015. (R. pp. 43-53). Relevant to Appellant's appeal, as a counterclaim, he incorporated his Answer and Counterclaims in companion case number 2015-CP-10-3919 which also pleaded a cause of action for defamation against Respondent Fokas. (R. p. 49, ¶ 23; R. pp. 952-953, ¶¶ 146-161).

Respondent Fokas filed a Motion to Amend Complaint on December 29, 2015. (R. pp. 196-203). Appellant filed an affidavit of Nathan M. Crystal on February 12, 2016. (R. pp. 234-265). Respondent Fokas filed his Reply to Appellant's Counterclaims on May 31, 2016. (R. pp. 57-59). Thereafter, Appellant filed his Memorandum in Opposition to Plaintiff's Motion to Amend Complaint on June 13, 2016. (R. pp. 303-308). Respondent Fokas filed a Memorandum in Support of Motion to Amend Complaint on November 3, 2016. The Court granted Respondent Fokas' Motion to Amend Complaint on November 9, 2016. (R. p. 25). Respondent

[1] The following day, on July 15, 2015, Respondent Fokas filed a Summons and Complaint in companion case 2015-CP-10-3919 and 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 Respondent Fokas' and another member's share of the construction. (R. pp. 765-773). 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. 774-921; R. pp. 922-1069). Relevant to P. Ferderigos' appeal, as a counterclaim, he pleaded a cause of action for defamation against Fokas. (R. pp. 952-953, ¶¶ 146 – 161). Respondent Fokas filed his Reply to the Counterclaims on March 31, 2016. (R. pp. 1076-1081). Respondent Fokas filed a Motion for Partial Summary Judgment as to the Ferderigos' Counterclaims on February 28, 2017. Respondent Fokas moved only for summary judgment on Ferderigos' counterclaims for defamation. 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. Other than a single footnote in the memorandum of P. Ferderigos, those memoranda are identical to the memoranda filed in Opposition to Plaintiff's Motion for Partial Summary Judgment in case number 2015-CP-10-3891. Respondent Fokas filed his Memorandum in Support of his Motion for Partial Summary Judgment on June 5, 2017. The trial court held a hearing on the motion on June 8, 2017. (R. pp. 1193-1265). The Court issued its Order Granting Plaintiff Partial Summary Judgment on August 31, 2017. (R. pp. 1266-1274). P. 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. Those appeals were consolidated into Appellate Case No. 2017-002032.

Fokas filed an Amended Complaint on February 24, 2017. (R. pp. 60-86). Appellant timely filed his Answer, Affirmative Defenses and Counterclaims to Respondent Fokas' Amended Complaint on March 20, 2017. (R. pp. 108-127). Respondent Fokas filed his Reply to Appellant's Counterclaims on April 26, 2017. (R. pp. 145-161).

Respondent Fokas filed a Motion for Partial Summary Judgment on August 25, 2017. (R. pp. 356-459). Respondent Fokas filed a Memorandum in Support of Motions for Partial Summary Judgment on December 6, 2017. Appellant filed his Memorandum in Opposition to Fokas' Motion for Partial Summary Judgment on December 6, 2017. (R. pp. 563-628). Appellant Spiros Ferderigos filed the Deposition Transcript of Fokas' sister, Urania Nikatos, on December 7, 2017. (R. pp. 664-759). The trial court held a hearing on the motion on December 11, 2017. The trial court issued its Order Granting Plaintiff Partial Summary Judgment on February 22, 2018. (R. pp. 14-24).[2] Appellant received written notice of the entry of the final judgment on February 26, 2018, via the trial court's electronic notification system. On March 21, 2018, Appellant timely served his Notice of Appeal, which was filed on March 23, 2018.

[2] At the hearing on December 11, 2017, Appellants Phillip Ferderigos and Spiros Ferderigos incorporated their filings and arguments from companion case 2015-CP-10-3919 regarding Fokas' companion Motion for Partial Summary Judgment on the record without objection from Fokas' counsel. (R. pp. 188-190).

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). "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." Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). "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." Id. at 219, 616 S.E.2d at 729. "If triable issues exist, those issues must go to the jury." 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 (emphasis added). "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. (emphasis added).

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Id. 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. (emphasis added). "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).

ARGUMENT

I. THE COURT ERRED IN APPLYING BASIC DEFAMATION LAW AND THE ABSOLUTE JUDICIAL PRIVILEGE TO RESPONDENT'S STATEMENTS ABOUT APPELLANT WHICH WERE UNTRUE, DEFAMATORY, AND PUBLISHED TO THIRD PARTIES PRIOR TO ANY THREAT OF LITIGATION AND/OR OUTSIDE THE CONTEXT OF ANY JUDICIAL PROCEEDING OR REASONABLE REALTION TO IT.

The parties are presently involved in the appeal of two lawsuits initiated by Respondent Fokas. The companion lawsuit involves a dispute between the parties (Appellant, his brothers Spiros and Jacob, and his cousin Respondent Fokas) regarding their investigation into the possibility of building an entirely new, separate, and free-floating building above 229 King Street to be used for rental units. In his Complaint, based on the parties exploring and negotiating the possibility of building a new building, Respondent Fokas alleges Appellant and his brothers (the other Defendants) entered into a binding "oral" contract with Respondent Fokas and then "breached the contract by refusing to carry out their obligations to execute the mortgage on the building and other parts of the loan documentation." (R. pp. 765-773). As to Appellant, Respondent Fokas specifically alleges Appellant refused to execute a mortgage and loan documents because "Defendant Philip Ferderigos demanded that Respondent execute an agreement whereby specified penalties would be paid in the event payments were not made on the note to the lending bank."[3] (R. pp. 765-773). However, Respondent Fokas' lawsuit lacks merit because he alleges Appellant failed to execute a mortgage and loan documents for an approximate two million dollar ($2,000,000) loan, which were material terms Appellant never

[3] Significantly, Respondent Fokas' Complaint does not allege Appellant breached any "alleged contract" because Appellant could not eat for free at the restaurant located on the first floor of 229 King Street (Old Towne Restaurant) and/or because Appellant was jealous of Respondent Fokas and/or because of Appellant's stubbornness. Yet, Respondent Fokas published such false statements repeatedly to third parties, including Stavros Ferderigos, Fanouri Ferderigos, Irene Fokas, Antonia Fokas, Jacob Ferderigos, and Spiros Ferderigos. Respondent Fokas libeled, slandered, and defamed Appellant with ill will and actual malice by spreading these and other malicious and defamatory statements to such third parties in an effort to try to force and coerce Appellant to sign a mortgage and closing documents in connection with the proposed project that Appellant never agreed to.

agreed to when investigating the project. Moreover, the specific details of Respondent Fokas' unbelievable actions and defamatory/libelous statements against Appellant are set forth in Appellant's Answer and Counterclaims paragraphs 53 through 123. (R. pp. 922-1069). It is in this context Respondent Fokas viciously lashed out, threatened, and repeatedly libeled and slandered Appellant.

A. DEFAMATION JURISPRUDENCE

In South Carolina, an action for slander/libel is based on the violation of a person's right to enjoy his good reputation, unimpaired by false and defamatory attacks. Ervin's, S.C. Requests to Charge § 17-7 Defined. The South Carolina Supreme Court has noted that a person's reputation is invaluable. Miller v. City of West Columbia, 322 S.C. 224, 231, 471 S.E.2d 683, 687 (1996). 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 show "(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" of a party. 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). The tort of

defamation permits "a plaintiff to recover for injury to his or her reputation as the result of the defendant's communications to others of a false message about the plaintiff." Erickson v. Jones St. Publishers, L.L.C., 368 S.C. 444, 464, 629 S.E.2d 653, 664 (2006).

"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 party is presumed to have suffered general damages." Id. 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. Anderson S.C. Requests to Charge § 14-3 Defamation – Libel – Actionable *Per Se*; see Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 506 S.E.2d 497 (1998) (if trial judge can legally presume, because of nature of statement, that plaintiff's reputation was hurt as consequence of its publication, then the libel is actionable per se, that is, without pleading or proof of special damages). 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. Id. at 511 n.5, 506 S.E.2d at 502 n.5. "Or a statement may be not actionable *per se,* in which case nothing is presumed and a party must plead and prove both common law malice and special damages."[4] Erickson, 368 S.C. at 465, 629 S.E.2d at 664. An action for slander is based on the violation of a person's right to

[4] 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. Padgett v. Sun News, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982).

enjoy his good reputation, unimpaired by false and defamatory attacks. See Anderson S.C. Requests to Charge § 14-4 Defamation – Slander – Defined.

A statement that is slander/libel per se is one that our laws presume was made with a malicious intent on the part of the speaker/writer. Ervin's, S.C. Request to Charge § 17-4. 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. Id. "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. However, for defamation that is not actionable per se, a jury determines whether or not a plaintiff has proven the defendant spoke, wrote, or published words that are slanderous/libelous. Ervin's, S.C. Requests to Charge § 17-4 Defamation *Per Se*.

A trial court must initially determine if the communication is reasonably capable of conveying a defamatory meaning. Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502 (1998); 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.* 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.; Parrish v. Allison, 376 S.C. 308 (Ct. App. 2007).

"In determining the defamatory character of language, the meaning of which is clear or otherwise determined, the social station of the parties in the community, the current standards of moral and social conduct prevalent therein, and the business, profession or calling of the parties are important factors. An imputation may be defamatory as applied to one person at a given time and place, although it would not be derogatory of another person at a different time or in a different place. To determine whether the words were defamatory, [jurors should ask themselves] whether, taken as a whole, the words tend to diminish the respectability of the plaintiff – *and to expose him to disgrace and ill repute.*" Anderson S.C. Requests to Charge § 14-6. (emphasis added).

Moreover, the defamatory statement must be false. Ervin's, S.C. Requests to Charge § 17-8 Elements. "One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true." Id. "To create liability for defamation, there must be publication of matter that is both defamatory and false. There can be no recovery in defamation for a statement of fact that is true, although the statement is made for no good purpose, is inspired by ill will toward the person about whom it is published, and is made solely for the purpose of harming him. The truth of the matter published is an absolute defense." Id. However, in South Carolina, "a defamatory communication is presumed to be false under the common law. The plaintiff does not have the burden of proving falsity." Anderson, S.C. Requests to Charge §

14-6. However, truth can be asserted as an affirmative defense, the burden of which is on the defendant. Id.

"The defamatory meaning of a message or statement may be obvious on the face of the statement, in which case the statement is defamatory per se. A statement is defamatory per se, or on its face, if its defamatory meaning is apparent from the language itself...[;] conversely, if it is necessary to refer to facts or circumstances beyond the language itself in order to make the defamatory meaning of the statement clear, it is defamatory per quod.[5] In other words, if the defamatory meaning is not clear unless the hearer knows facts or circumstances not contained in the statement itself, then the statement is defamatory per quod." Anderson S.C. Requests to Charge § 14-7 Defamation – Defamation Per Se or Defamation Per Quod.

Further, couching a statement with a defamatory connotation in terms of an "opinion" is not a defense to defamation. South Carolina has adopted the standard set forth by the U.S. Supreme Court which rejected a defendants' argument that there is a First Amendment protection afforded defamatory statements which are categorized as "opinion" rather than "fact." Goodwin v. Kennedy, 347 S.C. 30, 41, 552 S.E.2d 319, 325 (Ct. App. 2001); Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). In Milkovich, the Supreme Court held that couching a statement with a defamatory connotation in terms of an opinion does not grant an exemption for anything that might be said.[6] The Court concluded:

> [W]e do not think this passage from Gertz was intended to create a wholesale defamation exemption for anything that might be labeled "opinion." Not only would such an interpretation be contrary to the tenor and context of the passage, but it would also ignore the fact that

[5] Defamation need not be accomplished in a direct manner. An insinuation may be defamatory. A mere insinuation is as actionable as a positive assertion if it is false and malicious and its meaning is plain. Anderson S.C. Requests to Charge § 14-8 Defamation – Insinuation.

[6] In Milkovich, supra, the United States Supreme Court rejected the creation of an artificial dichotomy between opinion and fact, holding that the Constitution does not require a wholesale defamation exemption for anything that might be labeled "opinion."

> expressions of 'opinion' may also ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact.
>
> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Joes is a liar," can cause as much damage to reputation as the statement, "Jones is a liar."

Id. at 18-19, 110 S.Ct. 2695; see also 50 Am.Jur.2d Libel and Slander § 105 (1995). Thus, the mere fact that an item is couched in terms of an "opinion" does not relieve the speaker or publisher from liability. See Goodwin, 347 S.C. at 41, 552 S.E.2d at 325 (applying Milkovich to uphold the trial court's denial of a requested jury instruction that "appear[ed] to exempt all opinion as non-defamatory comment without qualification"); Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed2d 1 (1990) (noting that expressions of "opinion" may often imply an assertion of objective fact"); see also Williamson v. Askin & Marine Co., 138 S.C. 47, 53, 136 S.E. 21, 23 (1926) ("To render words defamatory and actionable, ... they [may] make a defamatory charge ... *indirectly, ... by expression of belief or opinion*, by insinuation, [or] by mere questions[;] ... and it is not less actionable because made indirectly'" (quoting 36 C.J. Libel and Slander § 20, at 1153-54 (1924)) (emphasis added).

Further, in South Carolina, the defense of "fair comment" applies to matters of public interest, not an individual's private affairs, character, or business. Anderson S.C. Requests to Charge § 14-15. The "fair comment" privilege applies to statements concerning public officials or matters of public concern (see 50 Am.Jur.2d Libel and Slander, §334 (1995), stating the doctrine has been construed not to apply against private individuals), and is strictly limited to fair and honest criticism and does not intend to protect false statements, unjust inferences,

imputations of evil motives, or criminal conduct, and attacks upon private character or reputation. Id. Moreover, the doctrine does not apply to assertions of a factual proposition or misstatements of fact and only applies to "facts truly stated" and must be published for the "bonafide purpose" of giving the public the benefit of comment which the public is entitled to have, rather than for an ulterior motive of causing harm to the plaintiff. Id. When a publication is one that tends to bring the plaintiff into hatred, ridicule, or contempt, the law presumes that the publication of such material has by its very nature damaged the person referred to by injuring his standing in the community and by causing him humiliation. Id. The defense is a qualified privilege and may be lost by abuse (i.e., if the defendant acted with actual malice) as to be determined by a jury. See id.; Black v. State Co., 93 S.C. 467, 77 S.E. 51 (1913) (stating question when criticism and statements cease to be fair and honest, and become libelous, is usually for a jury to determine).

Further, the affirmative defense of conditional or qualified privilege only exists where a party 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. See Ervin's, S.C. Requests to Charge § 17-6; Anderson S.C. Requests to Charge § 14-6 and § 14-7. 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. Id. 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.[7] *The question whether the privilege has been abused is one for the jury.* Id.; Murray v. Holnam, 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001).

The defendant is liable for the defamatory statement if the scope of the privilege is exceeded. When determining if the privilege was abused, a jury should consider whether:

1. The defendant acted *in good faith* in making the statement;
2. The scope of the statement was *properly limited*;
3. The statement was sent only to the proper parties;
4. The publication *went beyond what the occasion required and was unnecessarily defamatory.*

Anderson S.C. Requests to Charge § 14-6 (emphasis added).

"The protection of a qualified privilege may be lost by the manner of its exercise. The privilege may be lost if the defamatory matters are published to persons other than those to whom the privilege extends. The publisher must not wander beyond the scope of the occasion. The privilege does not protect any unnecessary defamation." Id. "[A jury] must decide whether the publication went too far beyond what the occasion required, resulting in the loss of the qualified privilege. A qualified privilege does not prevent liability for defamation where the statement is made with actual malice[8] and [a jury] may find the existence of actual malice from

[7] A statement is not in good faith if it is made with actual malice. Common law actual malice means the defendant acted with ill will toward a party or acted recklessly or wantonly, meaning with conscious indifference towards a party's rights. Murray v. Holnam, 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001). Here, even a cursory review of Respondent's own repeated written libelous statements about Appellant reflect the ill will and actual malice Respondent Fokas published to ridicule, humiliate, and violate Appellant's rights and good reputation.

[8] "Malice in fact" is an evil intent that can be logically concluded from an examination of the circumstances. To prove malice in fact, the plaintiff must show that the language used went beyond the needs of the occasion, that it was too strong or violent for the occasion, or that the occasion was abused to gratify the ill will of the defendant. Ervin's, S.C. Requests to Charge § 17-9 Malice in Fact Defined.

the language of the communication itself, as well as from extrinsic evidence."[9] Anderson S.C. Requests to Charge § 14-16 Defense of Privilege- Qualified.

In general, whether an occasion gives rise to a qualified or conditional privilege is one of law for the court. 50 Am.Jur.2d Libel and Slander § 276 (1995). However, whether the privilege has been abused is one for the jury. Id. Factual inquiries, such as whether the defendants acted in good faith in making the statement, whether the scope of the statement was properly limited in its scope, and whether the statement was sent only to the proper parties, are generally left in the hands of the jury to determine whether the privilege was abused. Id.; see also Restatement (Second) of Torts §§ 599–610. It is a question for the jury to determine if the publication went beyond what the occasion required and was unnecessarily defamatory. The privilege may also be lost if the defamatory matters are published to persons other than those to whom the privilege extends. Abofreka v. Alston Tobacco Co., 288 S.C. 122, 341 S.E.2d 622 (1986); Ervin's, S.C. Requests to Charge § 17-6 Defense of Privilege.

Finally, in regard to defamation actions, South Carolina recognizes an absolute judicial 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

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[9] See Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (1999) (factual inquiries, such as whether defendants acted in good faith in making statement, whether scope of statement was properly limited in its scope, and whether statement was sent only to proper parties, are generally left in hands of jury to determine whether privilege was abused; in general, question whether occasion gives rise to qualified or conditional privilege is one of law for court; Fulton v. Atlantic Coast Line R.R., 220 S.C. 287, 67 S.E.2d 425 (1951) (class of absolutely privileged communications is narrow and practically limited to legislative and judicial proceedings and acts of state; holding it was a question for jury to determine not only whether publication went beyond what occasion required and was unnecessarily defamatory, but also whether defendant was actuated by malice); Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 556 S.E.2d 732 (Ct. App. 2001) (question whether privilege has been abused is one for jury); 50 Am.Jur.2d Libel and Slander § 273 (1995) (determination of whether publication is privileged is question of law to be decided by court, at least where facts are undisputed; however, question of privilege becomes mixed question of law and fact, to be determined by jury, under court's instructions, where evidence is conflicting, or where for any other reason different conclusions might reasonably be drawn therefrom); Weir v. Citicorp Nat'l Servs., Inc., 312 S.C. 511, 435 S.E.2d 864 (1973) (when truth of defamatory communication is in dispute, issue is a jury question).

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. In Crowell, the court held that a court martial was a "judicial proceeding" and noted that previous decisions afforded the privilege to pleadings, affidavits sworn before a magistrate and letters between counsel in litigation, but there had been no decisions pertaining to depositions, briefs or informal affidavits sworn to before someone other than an officer of the court. The Crowell court then extended absolute judicial privilege for communications involving preliminary steps leading to any judicial action:

> Historically there has been a tendency to restrict the absolute privilege to judicial proceedings, legislative proceedings and acts of state. ... This is so, ostensibly because when a communication is absolutely privileged, no action will lie for its publication. ... This, however, does not answer the question of whether there is or has been a tendency to restrict the definition of 'judicial proceeding' to exclude preliminary steps leading up to a formal judicial proceeding. ... We hold the 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.

Thus, in South Carolina, "the 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." Crowell v. Herring, 301 S.C. 424, 430, 392 S.E.2d 464, 467 (Ct. App. 1990) (emphasis added).

In Corbin v. Washington Fire & Marine Ins. Co., 278 F. Supp. 393 (D. S.C. 1968), the District Court for the District of South Carolina found that the absolute judicial proceeding privilege attached to arbitration proceedings and extends to all "indispensable proceedings, such as the receipt of evidence and argument thereon" and the "absolute privilege attaching to judicial proceedings embraces communications between counsel to a prospective witness, arguments or

statements by counsel in the course of proceeding, any statements made by witnesses in the course of proceedings, and even statements in the course of negotiation of a settlement." Id. In Pond Place Partners Inc. v. Poole, 351 S.C. 1 (Ct. App. 2002), the court of appeals adopted the Corbin decision's rationale in the context of a party's filing of a lis pendens, which the court found to be absolutely privileged as "the filing of a lis pendens enjoys the absolute privilege accorded judicial proceedings."[10]

B. THE COURT MISAPPLIED BASIC DEFAMATION LAW TO THE CASE AT HAND.

From the onset, the Order prepared by Respondent Fokas' counsel and adopted by the underlying judge errs by misapplying basic defamation law and the absolute judicial privilege to the case at hand.

1. Respondent Fokas' statements were false, not true.

Respondent Fokas made the following false statements about the Appellant to multiple third parties:

1. That Appellant keeps trying to unjustly take things away from his brother/business partner and that Appellant would try to take everything from his brother/business partner if he could.
2. That Appellant accused Respondent Fokas of arson and insurance fraud.
3. That Appellant has "no business sense."
4. That Appellant "didn't go along with building the new suites so that [his] brothers would not be able to have more income so that [Appellant] can keep them [his brothers] below Appellant."

[10] 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 (1945).

5. That Appellant is a "bad business" person.
6. That Respondent could "not wait to spread the word that the suites multi-million dollar project couldn't get done because [Appellant] can't eat for free" at the restaurant, stating that Respondent Fokas was "sure everyone will find it hilarious" and referencing Appellant is "fat" and "stupid."
7. That Appellant was at fault for the proposed project failing because he could not "eat for free" at the restaurant.
8. That the proposed project failed because Appellant was *jealous* of the Respondent.
9. That the proposed project failed because the Appellant was *stubborn.*

(R. pp. 582, 603, 604 605, 615, 616, 620-622, 623-625; R. pp. 760). These statements were false. Respondent Fokas made these false statements with actual malice and the intent to force Appellant into agreeing to an agreement (which Appellant had consistently rejected) or, alternatively, Respondent Fokas would defame Appellant to place familial and peer pressure on Appellant – subject Appellant to ridicule, to harm his reputation, to lower his esteem by his immediate and extended family members and by the community and to deter third persons from associating or dealing with him, all because Appellant did not "give in" to Respondent Fokas' demands. Respondent Fokas offered no evidence in his memoranda or at oral argument to even suggest these defamatory statements about Appellant were true.

Additionally, these false statements were *designed to impugn* the reputation, honesty, and integrity of Appellant and were designed to degrade the Appellant, that is, to reduce his character or reputation in the estimation of his family, friends, or acquaintances, or to the public, or to disabuse him, or to render him odious, contemptible or ridiculous. Significantly, the underlying

Order erroneously misapplies key defamation case law concerning truthful statements that have a negative impact on someone's reputation, as opposed to false statements that have a negative impact on someone's reputation. The underlying Order erroneously conflates case law applicable to truthful statements which harm someone's reputation with false statements which harm someone's reputation (i.e., the former not being defamation, and the latter being defamation). Remarkably, the Order cites the 1927 Murphy, the 1961 Costas, and the 1967 Dauterman decisions for the correct proposition that *truthful* negative comments that harm someone's reputation are not defamatory, even if they are hurtful, but then misapplies such proposition to the facts of this case. See Murphy v. News & Courier, 141 S.C. 51, 139 S.E. 189 (1927); Costas v. Florence Printing Co., 237 S.C. 655, 118 S.E.2d 696 (1961); Dauterman v. State Record Co., 249 S.C. 512, 154 S.E.2d 919 (1967).

Importantly, these three cases, decided in 1927, 1961 and 1961, pre-date the current rules of civil procedure pleading requirements and address pre-modern pleading rules requirements (such as demurers and sufficiency of the complaint allegations). In addition, these cases address the libelous per se requirements which have largely been supplanted by the actionable per se requirements in South Carolina.[11] Most significantly, however, these cases involve allegations of actionable libel/libelous per se alleged defamatory statements that were substantially true. *In other words, the plaintiffs in these cases sought to allege defamation causes of action (libelous per se to be exact) for statements that were truthful, not false.* It is in this context that Respondent Fokas argued for, and the underlying Order adopted, a misapplication of these cases to the facts of this case.

[11] Cf. "To constitute actionable libel: (1) the writing must have been inspired by malice; (2) it must have tended to impeach the reputation of a party; and (3) thereby to injure his business" Murphy, supra; Costas, supra; Dauterman, supra with "slander is actionable per se only if it charges the plaintiff with one of five types of acts or characteristics..." Anderson, S.C. Requests to Charge § 14-5.

For example, the 1967 Dauterman decision held a university instructor could not recover in a libel action against a newspaper for its report that the instructor had been drinking quite a bit the day before he shot his wife, where such statement was substantially true. The court also held that a parent giving a one-year old baby "a gentle pat on the bottom" (i.e., a parent giving a child a slap on one isolated occasion as corporal punishment) was not actionable libel per se. The court specifically held that "certainly the publication of the story which was qualifiedly privileged and likewise true" was not libelous per se. Dauterman, supra. Likewise, the 1961 Costas decision held that a newspaper article stating that a fight between persons guilty of disorderly conduct took place in the plaintiff's business premises was not libelous per se because the article was true (and thus was not actionable per se). Costas, supra. Similarly, the 1927 Murphy decision held that "the only question involved is the sufficiency of the complaint, within itself, to constitute a cause of action" and that a "mere statement" a party failed or was unable to furnish bond, which is a "matter incident to and attaches to the fact of an arrest" (implying that the statement was substantially true), did not injure the party's reputation or business. Murphy, supra. Finally, these cases also cite the 1920 McGregor decision, a decision in which the court held that the allegations were not libelous per se because the statements alleged were substantially true. McGregor v. State Co., 114 S.C. 48, 103 S.E. 84 (1920) ("It is common knowledge that patent medicines are sold by many reputable druggists; and to hold that such practice, nothing more appeasing, is disrespectable or hurtful, would be an non sequester and a dictum.").

As such, these 1920's and 1960's cases stand for the general proposition set forth in Ervin's S.C. Request to Charge § 17-8 and Anderson S.C. Requests to Charge § 14-6 (i.e., that there is no actionable per se defamation if the alleged statements are true although the statements are made for no good purpose or inspired by ill will or made solely for harming a party). Thus,

according to long-standing South Carolina precedent, statements that are substantially true are not defamatory, even if they are published with ill will and malice. However, these 1920s and 1960s cases cited in the underlying Order do not, and cannot, stand for the proposition that false statements, which negatively impact someone's reputation, no matter how hurtful, are not defamatory.[12] As such, the above statements of Respondent Fokas, which were knowingly false and which Respondent Fokas published to the Appellant's family, peers, the public, and to the community at large, for the improper purpose of placing public pressure (pressure of his family, peers, and the community at large) on Appellant are defamatory because they are false, impugned Appellant's integrity and honesty, and negatively impacted his reputation and, by design, subjected Appellant to ridicule. Simply put, the Order errs in finding, as a matter of law, that Respondent Fokas' false statements published to third parties were not defamatory (whereby the Court misapplies these 1920's and 1960's cases dealing with *truthful* statements which injure someone's reputation). Moreover, at a minimum, more than a scintilla of evidence exists that Respondent Fokas' false statements were defamatory, whether they be actionable per se or defamation per quod.

2. Respondent Fokas' false statements were made with actual malice.

Second, Respondent Fokas' repeated libel/slander of Appellant (and Respondent Fokas' use of outright threats and intimidation tactics in order to force Appellant to agree to terms of an alleged "agreement" that Appellant never agreed to) were made in bad faith and with ill will and actual malice.[13] More than a scintilla of evidence exists, such evidence coming from Respondent

[12] It is also telling that Respondent Fokas had to resort to a contorted view of cases from the 1920s and 1960s, while ignoring the last fifty plus (50+) years in defamation jurisprudence, to cherry-pick and misapply selected quotes from these old cases in a manner which misapplies their holdings to the facts of this case.

[13] Respondent Fokas's improper, bully-type antics are consistent with his prior actions necessitating two (2) Restraining Orders against Respondent Fokas, an Order Granting a Motion to Amend Tax Returns Against Respondent Fokas, and an Order of Contempt of Court against Respondent Fokas, all of which were issued against

Fokas' own written words wherein he announced that he would repeatedly slander Appellant unless Appellant "gave in" to Respondent Fokas' demands:

> **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 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."**

(R. p. 582). Then, in pre-meditated fashion and in an effort to gain advantage during on-going negotiations (for a proposed project that was being negotiated), Respondent Fokas proceeded to libel and slander Appellant to (1) his father Stavros Ferderigos, (2) his uncle Fanouris Ferderigos, (3) his aunt (Respondent's mother) Irene Fokas, (4) Respondent's wife Antonia Fokas, (5) his brother Spiros Ferderigos, and (6) his brother Jacob Ferderigos. (R. pp. 582-628). Respondent Fokas' libel and slander were published to third parties with the express purpose to harm Appellant, expose him to ridicule from his family, immediate and extended, and to lower the esteem held by his family, peers and the community at large, and to intimidate/force him to agree to an alleged "agreement" he rejected and never agreed to throughout the on-going negotiations.

Respondent Fokas' statements and actions were designed to lower Appellant's esteem in his family and community and to deter third persons from associating or dealing with Appellant. For example, Respondent Fokas' defamation and actual malice is best expressed via a rhetorical question: who would want to do business with the Appellant in the future if Appellant (1) unjustly tries to take everything from his business partners, (2) accused individuals of crimes such as arson and insurance fraud, (3) had no business sense, (4) did not want his brothers to have more income so that he could "keep them below" him, (5) was a bad business person, (6)

Respondent Fokas in this and in other litigation involving Respondent Fokas by two separate judges (Judge Nicholson and Judge Young). The Court may take judicial notice of such Orders pursuant to SCRE Rule 201.

was both stubborn and jealous of Respondent, and (7) finally, was foolish enough to not move forward with an alleged multi-million dollar deal just because this fat and stupid Appellant could not eat at a restaurant for free? Of course, Respondent Fokas' nonsense is not actually true. But those are the defamatory statements that Respondent, by his own admissions, was publishing to Appellant's brothers, his father, his aunt, his uncle in Florida, and Respondent's wife. According to Respondent Fokas, he could not wait to spread the word to "everyone" who would find it "hilarious." Respondent Fokas was "chomping at the bit" to sully Appellant's reputation (saying he could not wait to "spread the word" to "everyone" who would find it "hilarious"). (R. pp. 582-628). Indeed, it is quite rare in a defamation case where someone harbors such ill will, hatred and actual malice that he admits his motives and malice in writing to the very person he is defaming, but that is what Respondent Fokas indisputably did.[14]

Moreover, Respondent Fokas' ill will and actual malice may also be shown by his actions, not only his own words. The Court may take judicial notice that, as of the time of this briefing, Respondent Fokas has had two different judges issue two different restraining Orders against him in matters involving Appellant and his family (which includes one restraining Order restraining Respondent Fokas from violating Appellant's rights and another Order undoing Respondent Fokas' unilateral filings of incorrect tax returns, over the objections of Appellant, which also violated this Appellant's rights), as well as an Order of Contempt against Respondent Fokas.

[14] The multiple Restraining Orders and Order of Contempt reflect similar egregious actions by Respondent Fokas that no reasonable person would take – yet, with little doubt, time and time again, Respondent Fokas would announce his intent to do whatever he wanted to do, irrespective of the rights of others.

3. The defenses of "opinion" and "fair comment" are inapplicable to this case and do not negate Respondent Fokas' defamation concerning Appellant.

Third, the underlying Order erroneously holds that several unspecified statements were, as a matter of law, Respondent Fokas' "opinion" and/or "fair comment," and therefore these statements were not defamatory statements. It is unclear if the Order makes actual findings of fact or was merely referencing the defenses of "opinion" or "fair comment" in passing; however, to the extent the underlying Order finds that Respondent Fokas' statements are not defamatory and/or privileged under such doctrines, such findings would also constitute errors of law. Respondent Fokas' implied assertion of objective facts underlying any published opinion or Respondent Fokas' false statements concerning Appellant's private affairs, character, or business (i.e., not a matter of public interest or concern) and/or abuse of such privilege are not protected by such defenses. Therefore, as a matter of law, classifying Respondent Fokas' false statements to third parties as "opinions" or "fair comments" does not negate Respondent Fokas' defamation of Appellant to third parties. At a minimum, issues of fact for a jury to determine exist concerning the application of and abuse of such privileges, even if they were applicable.

4. The absolute judicial privilege is not applicable and does not negate Respondent Fokas' defamation concerning Appellant.

Fourth, the underlying Order errs in finding such false statements were protected by the alleged "absolute litigation" privilege because the statements were not made to parties with any connection to the litigation, and, more importantly, were made months before any threat of litigation was made or otherwise did not arise out of any judicial proceeding or have any reasonable relation to it. As an initial matter, although South Carolina recognizes an absolute judicial privilege, South Carolina has not adopted an absolute "litigation" privilege.[15] Moreover,

[15] See Fulton v. Atlantic Coast Line R.R., 220 S.C. 287, 67 S.E.2d 425 (1951) (class of absolutely privileged communications is narrow and practically limited to legislative and judicial proceedings and acts of state; holding it

the absolute judicial privilege does not apply to Respondent Fokas' false and defamatory statements published to third parties Stavros Ferderigos, Fanouri Ferderigos, Irene Fokas, and Antonia Fokas because these third parties were not parties to any litigation or connected in any way to the dispute between the parties. (R. pp. 582-628). As a result, the absolute judicial privilege simply does not apply to these third parties. Moreover, the statements to these third parties were made months before any litigation was commenced and months before any threat of litigation was even made by Respondent Fokas to Appellant or his brothers.

Similarly, the absolute judicial privilege does not apply to the defamatory statements to Appellant's brothers Spiros and Jacob because there was no judicial or court proceeding in existence at the time such statements were made (and the statements were not submitted into the court record via an affidavit, via sworn testimony, or in open court during a judicial proceeding), and such statements did not arise out of the judicial proceeding or have any reasonable relation to it. For the defamatory statement Respondent Fokas made after commencement of litigation wherein Respondent Fokas salaciously defames Appellant by informing third parties that Appellant keeps trying to unjustly take everything from his business partner and would take everything from said business partner if Appellant could, such defamatory statement was not made in the context of a judicial proceeding or have any reasonable relation to it. Such statement was an effort to abuse Appellant, including charging Appellant with unfitness in his business and profession, and causing damage to Appellant's honesty, integrity, virtue, and reputation. Thus, the statements were not made in the course of, as a part of, or arising out of a judicial proceeding, including preliminary steps leading to a judicial action or bearing reasonable relation to it (such as settlement negotiations after a threat of litigation). In fact, most of Respondent Fokas' false

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was a question for jury to determine not only whether publication went beyond what occasion required and was unnecessarily defamatory, but also whether defendant was actuated by malice).

defamatory statements were made months before even a threat of litigation was made by Respondent Fokas. (R. pp. 582, 603, 605-607; R. pp. 958-1069; R. pp. 351-353). Under these circumstances, Respondent Fokas' false statements were simply defamatory statements published to third parties concerning related and non-related matters for which Respondent Fokas eventually filed lawsuits in the future. Further, Respondent Fokas created and spread known falsehoods to Appellant's brothers and business partners about Appellant concerning business matters (including unrelated business matters in Greece) which are unrelated to any judicial proceedings between the parties at hand at the time the statements were made. (R. pp. 582, 603, 605-607). Accordingly, such statements do not fall under the absolute judicial privilege.[16]

In contrast, Appellant concedes that a conditional privilege would likely arise for communications from Respondent Fokas to Appellant, Spiros Ferderigos, and Iakovos (Jacob) Ferderigos. However, such conditional and qualified privilege does not negate Respondent Fokas' libelous statements concerning Appellant to Appellant's brothers/business partners. At a minimum, as more than a scintilla of evidence exists of Respondent's actual malice and ill will, issues of fact for a jury to determine exist concerning the abuse of such conditional or qualified privilege. Moreover, the underlying Order finding that Respondent Fokas' defamatory statements are protected under the conditional/or qualified privilege *as a matter of law* constitutes an error of law (as more than a scintilla of evidence exists for a jury to determine that Respondent Fokas abused any applicable conditional or qualified privilege that may apply to the case at hand).

[16] Moreover, from a public policy perspective, filing a lawsuit against someone does not allow a party to then proceed to viciously defame the opposing party he is suing to third parties with reckless abandon outside of the actual judicial proceedings themselves. The absolute judicial privilege is not a blank check to defame your legal opponents to his family members and the community with no recourse by the harmed party before, during, and after a lawsuit is pending with the Court. The absolute judicial privilege stands for no such proposition; yet, such proposition, an absolute blanket immunity for a party litigant to viciously defame other parties outside the court room to third parties - as long as a lawsuit was eventually filed - is what Respondent Fokas wrongfully advocated and the underlying Order erroneously adopts.

Therefore, the Court's Order erroneously applies the absolute judicial privilege because litigation had not been filed or even threatened and the defamatory/libelous statements were made to third parties to whom the privilege did not extend. Further, Respondent Fokas' defamatory statements did not arise out of any judicial proceeding and has no reasonable relation to any judicial proceeding.[17]

II. THE COURT ERRED BY FINDING, AS A MATTER OF LAW, NO SCINTILLA OF EVIDENCE EXISTS THAT RESPONDENT FOKAS PUBLISHED DEFAMATORY STATEMENTS TO MULTIPLE THIRD PARTIES CONCERNING APPELLANT.

Appellant has set forth Respondent Fokas' own written communications to third parties and deposition testimony of Respondent Fokas' own mother, Irene Fokas, that clearly set forth that Respondent Fokas did indeed defame Appellant in both unprivileged false defamatory statements that are *actionable per se*, and in unprivileged false defamatory statements that are *defamation per quod*, with ill will and common law malice. In the Court's Order, the judge erred in finding, as a matter of law, statements to Stavros Ferderigos, Fanouri Ferderigos, Irene Fokas, Antonia Fokas, Spiros Ferderigos, and Jacob Ferderigos were not slanderous/libelous statements to third parties.

A. Respondent Fokas' Actionable *Per Se* Defamatory Statements.

Respondent Fokas made numerous written unprivileged defamatory statements that are *actionable per se* as Respondent Fokas' defamatory statements charged Appellant with an act or characteristic "of unfitness in one's business or profession" and/or "commission of a crime of moral turpitude":

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[17] If such privilege did apply, then parties would be free to defame opposing parties with reckless abandon and no consequences as long as they subsequently became involved or were involved in litigation. However, eventually filing a lawsuit does not sanitize or inoculate a party from the consequences of his defamatory statements. Being in litigation with a party does not allow a party to viciously defame opposing party to third parties ... the absolute judicial privilege has never been extended in such context and the underlying Order erred in applying it as such in this case.

(1) Respondent Fokas made unprivileged defamatory actionable *per se* statements to third parties Jacob (Iakovos) Ferderigos and Spiros Ferderigos in writing that Appellant is unfit in his business or profession: **"Keeping with Greek tradition the first born is supposed to be taking care of the family but you and Phillip keep trying to unjustly take things away from Jacob. It seems that it is a common practice with the Ferderigos family starting with your own father kicking his mother out of her own house. I wouldn't doubt it if you would tried to take everything from your brother Jacob if you could."**

(R. p. 760).

Respondent Fokas sent the aforementioned defamatory e-mail to Appellant's business partner and brother, Spiros Ferderigos. Respondent Fokas further copied Appellant's business partner and brother, Jacob Ferderigos, on the defamatory e-mail as well. Appellant's counsel presented a copy of this e-mail to the trial court for consideration at the motions hearing without objection from Respondent Fokas' counsel. (R. pp. 190-192). These unnecessary and false statements published by Respondent Fokas not only impeach Appellant's honesty, integrity, virtue, and reputation but also charge that Appellant is unfit in his business or profession. Appellant, Spiros Ferderigos, and Jacob Ferderigos are in business together, owning and being in the business of numerous rental properties together both in the United States and overseas. (R. pp. 563-628). Respondent Fokas sent this defamatory e-mail to Appellant's business partners less than one week prior to the parties appearing before the Court for their respective Motions for Summary Judgment on December 11, 2017, regarding the very issue of defamation. Respondent Fokas e-mailing Appellant's business partner(s) that Appellant keeps trying to unjustly take

away the businesses the partners have jointly together charges Appellant with unfitness in his business and profession and is therefore defamation *per se*.

In addition to charging Appellant as unfit in his business by trying to take away "everything" from his business partner(s), such statements also impugn and attack Appellant's fitness, acumen and judgment as a professional attorney. No self-respecting client would seek to retain counsel who unjustly tries to take away everything from those he has business dealings with as Respondent Fokas claims. Respondent Fokas' words falsely charge Appellant with conduct, characteristics, or a condition incompatible with the exercise of his business, trade, or profession. As such, Respondent Fokas' libel to Jacob and Spiros Ferderigos, defaming Appellant's fitness for his business, is actionable *per se*.

> (2) Respondent Fokas made unprivileged defamatory actionable *per se* statements to third party Jacob (Iakovos) Ferderigos in writing that Appellant is unfit in his business or profession: **"your brothers [Phillip and Spiros Ferderigos] <u>have no business sense and I'm sure we will be butting heads with Greek properties</u> in the future. Very sad!!!"** (Emphasis added).

(R. p. 603).

This statement charges that Appellant is unfit in his business or profession. In addition to being a licensed attorney, Appellant also owns several real estate investment (both residential and commercial) properties in Greece and in South Carolina. To understand the context of the above statement, Appellant, his brothers, and Respondent Fokas own property that provides rental income in Greece. Indeed, Appellant's business also involves commercial and residential real estate investments in Greece that he and his brothers inherited from their father, which

Respondent Fokas also inherited from his father. It is in this context wherein Respondent Fokas attacks Appellant's "business sense," stating Appellant has no business sense, defaming Appellant's fitness for such business to his brother/business partner Jacob Ferderigos. Appellant's business activities with his brothers in Greece have nothing to do with 229 King Street or the claims Respondent Fokas filed against Appellant. In addition to attacking his fitness for business dealings and lack of business sense, such statements also impugn and attack his acumen and judgment as a professional attorney. No self-respecting client would seek to retain counsel who has "no business sense" as Respondent Fokas claims. Respondent Fokas' words falsely charge Appellant with conduct, characteristics, or a condition incompatible with the exercise of his business, trade, or profession. As such, Respondent Fokas' libel to Jacob Ferderigos, defaming Appellant's fitness for his business, is actionable per se.

(3) Respondent Fokas further made unprivileged defamatory actionable *per se* statements to third party (Jacob Ferderigos) in writing by informing Jacob that Appellant was manipulating Jacob and trying to keep Jacob and his other brother Spiros from having more income so that Appellant can keep his brothers (i.e., and his business partners) beneath him:

> **There were no demands but we all know this is Phillip talking and exaggerating words as usual. ... "So enough with your ridiculous rhetoric and let Jacob and I take care of business as we always have for the last ten plus years!" ... I actually now think that you didn't go along with building the new suites so that your brothers would not be able to have more income so that you can keep them below you. Just like your dad said that Phillip is the King of the family. (Emphasis Added).**

(R. pp. 605-607).

This email/text communication was sent to Jacob only and such words charge Appellant with conduct and characteristics incompatible with good business dealings with Appellant's brothers/business partners Jacob and Spiros Ferderigos.

(4) Respondent Fokas further made unprivileged defamatory actionable *per se* statements to third party (Irene Fokas, Appellant's aunt) by informing her that Appellant is unfit in his business or profession:

> **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?**

(R. p. 605).

(5) Respondent Fokas further made unprivileged defamatory actionable *per se* statements to third party (Irene Fokas) that Appellant accused Respondent Fokas of arson and insurance fraud:

Irene Fokas admitted in her deposition that Respondent Fokas told her that Appellant was going to accuse Respondent Fokas of filing false insurance claims and setting fire to 229 King Street for insurance proceeds. Irene Fokas admitted in her deposition that Respondent Fokas made these unprivileged defamatory statements to her about Appellant, and that said statements were either made directly by Respondent Fokas to her or through Respondent Fokas' agent, Stanley Barnett, to her:

> **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. 626-628).

These false statements, in particular, are particularly defamatory as they accuse Appellant of unethical behavior, impugning his integrity as an attorney. Remarkably, at the hearing of the motion, Respondent Fokas' counsel conceded and admitted that such statements constituted defamation:

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

(R. p. 1204, l. 6-13).

Indeed, Respondent Fokas' counsel admitted such statements that Appellant accused him of arson and insurance fraud were defamatory at the hearing a second time:

> **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. 1217, l.12-21).

Under these circumstances, the Court erred in finding the statements were not defamatory as they were either defamatory *per se* or, at a minimum, there is an issue of fact of whether such statements are defamatory.

B. Respondent Fokas' defamatory statements that are defamation *per quod.*

In addition to the above actionable *per se* defamatory statements, Respondent Fokas also made numerous unprivileged written and verbal defamatory statements to third parties that are defamation *per quod* against Appellant. This includes: (1) publishing to third parties the false statements that Respondent Fokas did nothing to delay the proposed project, but that the reason the proposed project failed was because Appellant could not eat for free at the restaurant located on the first floor of 229 King Street, Old Towne Restaurant[18] and (2) Respondent Fokas telling third parties that the reason the proposed project failed was because Appellant was jealous that Respondent Fokas had a greater ownership interest in 229 King Street than Appellant and/or Appellant's stubbornness.

1. Respondent Fokas' defamatory statements that the reason the proposed project failed was because Appellant could not eat for free at Old Towne Restaurant and Appellant was to blame for the proposed project failing.

In his Complaint in Civil Action No. 2015-CP-10-3919, Respondent Fokas alleges that Appellant breached an alleged contract by (1) "refusing to carry out their obligations to execute the mortgage on the building" and (2) "other parts of the loan documentation." (R. p. 771, ¶ 31). Respondent Fokas' Complaint alleges <u>one</u> alleged reason that Appellant refused to execute a

[18] In contrast, the "real" reason the negotiations ceased was Respondent Fokas' "fault," based on his own improper actions and demands. Respondent knew the truth, but he chose to spread falsehoods against Appellant to his family, both immediate and extended, and others and to subject Appellant to ridicule of his own family members and to put familial and peer pressure on Appellant to give in to Respondent Fokas' demands.

mortgage, "Defendant Philip Ferderigos demanded that [Respondent Fokas] execute an agreement whereby specified penalties would be paid in the event payments were not made on the note to the lending bank." Respondent Fokas does not allege, nor even mention, in his Complaint that the proposed project being explored failed to move forward because Appellant could not eat for free at a restaurant located on the first floor of 229 King Street (Old Towne Restaurant).

Despite this fact, Respondent Fokas threatened to defame Appellant in the community (if Appellant did not execute a mortgage and other loan documents Respondent Fokas had his bank prepare, but which Appellant had rejected and never agreed to) by threatening Appellant, in writing, that Respondent Fokas would publish to the community that a "multimillion dollar deal" did not move forward because Appellant could not "eat for free," adding that he believed everyone would find it "hilarious" and referencing that Appellant was "stupid":

> **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. 582).

As Respondent Fokas made abundantly clear in his communication above, the only point of the falsehoods he created was to ridicule and shame Appellant into complying with Respondent Fokas' demands; otherwise, Respondent Fokas "can't wait to spread the word" and he is "sure everyone will find it hilarious." Thereafter, Respondent Fokas made true on his threat to defame Appellant to his family members and to the community as set forth herein:

a. Respondent Fokas terminated the on-going negotiations, not Appellant.

Initially, it is undisputable that, among other reasons, *Respondent Fokas* terminated the second set of negotiations after the parties reached an impasse concerning a side agreement requirement (to protect Appellant's collateral), a mortgage and incorrect loan closing documents Respondent Fokas prepared, which Appellant never agreed to:

> **11/24/14: Email from Athan Fokas to Ferderigos Brothers 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." (Emphasis added).**

(R. pp. 978-983).

b. Thereafter, Respondent Fokas introduced the "eat for free" at Old Towne Restaurant threat into negotiations, not Appellant.

By November 24, 2014, Respondent Fokas ended negotiations by stating "Well, then it's done. I'll reverse as much as I can and just right [sic] it off as a stupid transaction dealing with Ferderigos Family." (R. pp. 978-983). Thereafter, angry that Appellant would not mortgage his property for Respondent Fokas's benefit, for the first time, it was *Respondent Fokas* himself who 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.[19]

> **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. 614).

This was done in an effort to harass, attempt to coerce and to gain an upper hand in negotiations, and "get back" at Appellant for not giving into Respondent Fokas's inappropriate demands. In other words, Respondent Fokas took such action out of ill will and malice.

c. Respondent Fokas threatened to defame Appellant with his false reason for the negotiations falling apart, said fabrication being designed to pressure Appellant into complying with Respondent Fokas' demands and to harm Appellant's reputation.

When his attempt failed to inappropriately coerce Appellant into giving a mortgage for Respondent Fokas' benefit or signing incorrect loan documents, something Appellant never agreed to do, Respondent Fokas took matters to the next level and viciously threatened to defame

[19] Comparable to the scenes of the movie "Big Fat Greek Wedding," both Ferderigos and Fokas family members had been eating "for free" for decades as they all grew up working in the family business. Respondent Fokas' ill will and contempt were on full display when he then attempted to use such long-standing tradition as a bargaining chip in his negotiations. Failing to have its desired effect, it was shortly thereafter that Respondent Fokas concocted the fabrication that the negotiations come to an end when Appellant could not eat "for free" at Old Towne Restaurant. Respondent Fokas's rumor was intended to "defame" Appellant into complying with Respondent Fokas's demands.

and spread defamatory statements to the community that the proposed project being considered failed because Appellant 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 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." (Emphasis Added).**

(R. p. 582).

Respondent Fokas' threat was clearly intended to ridicule Appellant and to put family/peer pressure on Appellant to comply with Respondent Fokas's demands, otherwise Respondent Fokas threatened to injure Appellant's reputation and integrity by spreading his knowingly false rumor (that the negotiations failed because Appellant could not eat for free at Old Towne Restaurant). Respondent Fokas knew such allegation was false, and Respondent Fokas' defamatory statements were designed to harm Appellant's reputation, which is exactly why he threatened Appellant that he would take such action.

d. Respondent Fokas proceeded to defame Appellant to Stavros Ferderigos, Dr. Fanouri Ferderigos, and Antonia Fokas.

Thereafter, Respondent Fokas made true on his threat to defame Appellant to his family members, his peers, and others in the community and he defamed Appellant by telling third parties Stavros Ferderigos (Defendants' father), Dr. Fanouris Ferderigos (Appellant's uncle who lives in Florida), and Antonia Fokas (Respondent Fokas's spouse) that the proposed project being considered did not move forward because Appellant 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: "<u>If this deal is dead and you guys will not go forward unless you get to eat for free at Old Towne</u> 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 ... <u>I have cc'd my wife on this email so that she will be informed of all my conversations because we are life partners</u>."

(R. pp. 615, 616, 617) (emphasis added).

The rumor based on Respondent Fokas' outright lie, that the multi-million dollar deal fell apart because Appellant could not eat for free, was thus "born" by Respondent. Although it was Respondent Fokas who abruptly ceased on-going negotiations while also insulting Appellant and his family on November 24, 2014, Respondent Fokas proceeded to viciously spread his defamatory lie (that the negotiations ceased because Appellant could not eat for free) to such third parties in order to try to force Appellant to agree to material terms he never agreed to.[20]

e. Thereafter, Respondent Fokas attempted to negotiate with the "eat for free" term as leverage in his on-going negotiation attempts.

After threatening to defame Appellant and then defaming Appellant by spreading rumors that Appellant failed to move forward with the proposed project negotiations because Appellant could not eat for free at Old Towne, Respondent Fokas then attempted to negotiate with the "eat for free" issue as leverage in his on-going negotiation attempts:

[20] To further prove Respondent Fokas' ill will and malice, Respondent Fokas then proceeded to threaten to build the new building on Appellant's property without his consent and he threatened that he would take ownership of that new building without Appellant's consent. See Email/Text to Ami Haynes and others, stating "To all parties. Let it be know [sic] that I will be more than happy to acquire an extra 1/6 percentage of this new project so that Phillip Ferderigos does not have to worry about signing as long as I own an extra 1/6th percent of the new project."

12/16/14: "As I was running this morning I came up with a proposal. I will agree to let you eat for free if you are out of the note and you put your 350 g's in escrow."

(R. p. 619).

Based on the above, the entire "eat for free" debacle was a negotiating tactic of Respondent Fokas, which he employed to threaten, and then to defame, and ultimately to negotiate, with Appellant. Further, Respondent Fokas' initial reference to "the community" finding Respondent Fokas' defamation to be "hilarious" reflects his ill will and malice to have Respondent Fokas' defamation negatively impact Appellant's reputation and subject Appellant to ridicule if Appellant failed to comply with Respondent Fokas' demands.

Under these circumstances, the Court erred by finding as a matter of law that such statements published to third parties were not defamatory. Instead, these factual issues are for a jury to determine; clearly, more than a scintilla of evidence exists that these false and defamatory statements were published to third parties.

2. Respondent Fokas' defamatory statements that the proposed project failed because Appellant was jealous of him and/or Appellant's stubbornness.

Thereafter, Respondent Fokas further defamed Appellant by publishing defamatory statements to third party Irene Fokas that the reason the proposed project failed was because Appellant was jealous that Respondent Fokas had a larger ownership interest in 229 King Street than Appellant and/or because of Appellant's stubbornness. Irene Fokas admitted in her deposition that everything she knows about the proposed project being considered at 229 King Street she learned directly from Respondent Fokas:

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. 620-622).

Irene Fokas testified in her deposition that Respondent Fokas told her that Appellant was not being asked/required to mortgage his interest in 229 King Street for Respondent Fokas to receive a loan for the proposed project being considered (despite the basis of Respondent Fokas' lawsuit alleging that Appellant did agree to provide such a mortgage). Instead, Respondent Fokas told her the reason the proposed project failed was because Appellant was jealous that Respondent Fokas has a fifty percent ownership interest in 229 King Street, while Appellant only owned a one-third interest in 229 King Street. She also testified Respondent Fokas told her that the proposed project being considered at 229 King Street failed because of Appellant's 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. 623-625).

Again, Respondent Fokas spread false rumors to injure Appellant's reputation and to attempt to "shame" Appellant into compliance of Respondent Fokas' demands. The Court erred

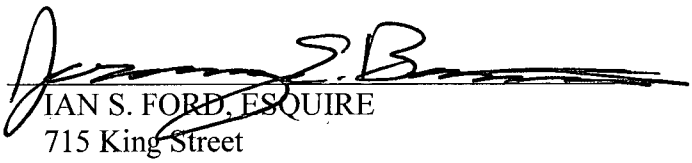
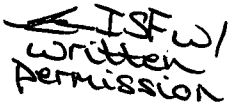
in finding that such statements were not defamatory; at a minimum, there is an issue of fact for a jury to determine whether such statements were defamatory and the Court erred as a matter of law in finding to the contrary.

CONCLUSION

As set forth above, Respondent Fokas has failed to meet his burden of proof to establish an absence of a genuine issue of material fact. Because more than a scintilla of evidence exists that Respondent Fokas repeatedly published defamatory statements about Appellant to third parties, the Court erred by granting Respondent Fokas' Motion for Summary Judgment. Indeed, as reflected herein, much more than a mere scintilla of evidence exists because Appellant has proven Respondent Fokas defamed him by Respondent Fokas' own admissions and writings to third parties cited in the Record. Appellant has specifically set forth Respondent Fokas' own written communications to third parties and deposition testimony of Respondent Fokas' own mother which set forth that Respondent Fokas did indeed viciously defame Appellant with both defamatory statements to third parties that are *actionable per se*, as well as defamatory statements that not *defamation per quod.*

Based upon the evidence set forth herein, Appellant Ferderigos respectfully asks this Honorable Court to reverse the underlying Order granting Respondent Fokas summary judgment as to Appellant's defamation claim against Respondent Fokas and to allow the Appellant to present his case and have his day in court before a jury to determine Respondent Fokas' injury to Appellant's reputation.

FORD WALLACE THOMSON LLC

BY:  

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December 18, 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-10-3891

Appellate Case No. 2018-000516

Athan Fokas ..... Respondent/Appellant,

v.

Phillip Ferderigos and Spiros Ferderigos..... Appellants/Respondents.

CERTIFICATE OF COMPLIANCE WITH RULE 211(b), SCACR

I 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 and Phillip Ferderigos

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

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