

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

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SC Court of Appeals

Athan Fokas..... Respondent/Appellant,

v.

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

FINAL JOINT BRIEF OF RESPONDENTS

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COUNTERSTATEMENT OF THE ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN FINDING THE ALLEGED DEFAMATORY STATEMENTS ALLEGEDLY PUBLISHED BY RESPONDENTS ABOUT APPELLANT TO APPELLANT'S ATTORNEY DURING A SETTLEMENT CONFERENCE DID NOT CONSTITUTE PUBLICATION TO A THIRD PARTY WHEN ANY ALLEGED STATEMENTS WERE ALLEGEDLY MADE SOLELY TO APPELLANT'S ATTORNEY WHO INVITED THE ALLEGED STATEMENTS?

- II. DID THE TRIAL COURT ERR IN FINDING THE ALLEGED DEFAMATORY STATEMENTS ALLEGEDLY PUBLISHED BY RESPONDENTS ABOUT APPELLANT TO APPELLANT'S ATTORNEY DURING A SETTLEMENT CONFERENCE WERE PRIVILEGED?

- III. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT WHEN THERE WAS NO EVIDENCE RESPONDENTS PUBLISHED ANY ALLEGED DEFAMATORY STATEMENTS ABOUT APPELLANT TO ANY THIRD PARTY?

COUNTERSTATEMENT OF THE CASE

Appellant Athan Fokas (hereinafter referred to as “Fokas”) filed his Summons and Complaint on July 14, 2015. (R. pp. 26-31). In the original Complaint, Fokas alleged Respondents Spiros Ferderigos and Phillip Ferderigos (hereinafter collectively referred to as “Ferderigos” and individually referred to as “Spiros” and “Phillip”, respectively) published defamatory statements about Fokas to their father “for the purpose of intimidating [Fokas] into refraining for (sic) demanding that they go forward with the plan to expand the suites rental business.” (R. p. 29, ¶ 12). Specifically, Fokas alleged Spiros and Phillip published statements that Fokas hired someone to set fire to the second floor of 229 King Street for the purpose of collecting insurance proceeds and filed false insurance claims. (R. p. 29, ¶ 11). According to Fokas, his mother then confronted him with the statements and “identified [Spiros and Phillip] as the source of said statements.” (R. p. 30, ¶ 14).

Spiros and Phillip timely filed their Answers, Affirmative Defenses and Counterclaims on October 1, 2015. (R. pp. 32-42; R. pp. 43-53). They both denied publishing any such statements about Fokas to any third party. Fokas filed his Replies to Spiros’ and Phillip’s Counterclaims on May 31, 2016. (R. pp. 54-56; R. pp. 57-59).

Fokas filed a Motion to Amend Complaint on December 29, 2015. (R. p. 196-203). In response, Spiros and Phillip both moved for summary judgment. (R. pp. 204-209; R. pp. 210-265). Phillip also filed an affidavit of Nathan M. Crystal on February 12, 2016. (R. pp. 234-265). On March 28, 2016, Spiros filed a memorandum in support of his motion for summary judgment. (R. pp. 266-302).

Thereafter, Spiros and Phillip each filed a memorandum in opposition to Plaintiff’s Motion to Amend Complaint. (R. pp. 309-355; R. pp. 303-308). Fokas filed a Memorandum in

Support of Motion to Amend Complaint on November 3, 2016. The Court granted Fokas' Motion to Amend Complaint on November 9, 2016. (R. p. 25). Fokas filed an Amended Complaint on February 24, 2017, which removed the allegation that Spiros and Phillip communicated the alleged defamatory statements about Fokas to their father. (R. pp. 60-86). Instead, Fokas alleged Spiros and Phillip published the alleged defamatory statements about Fokas to Fokas' attorney and Fokas' sister (Urania Nikatos). (R. p. 63, ¶¶ 22-23). Spiros and Phillip timely filed their Answers, Affirmative Defenses and Counterclaims to Fokas' Amended Complaint. (R. pp. 87-107; R. pp. 108-127). Fokas filed his Replies to the Counterclaims on April 26, 2017. (R. pp. 128-144; R. pp. 145-161).

Spiros and Phillip filed renewed Motions for Summary Judgment. (R. pp. 543-550; R. pp. 551-557). Fokas filed a Memorandum in Opposition to the Motions for Summary Judgment on December 6, 2017. Spiros 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 motions on December 11, 2017. (R. pp. 162-195). The trial court issued its Order Granting Defendants' Motion for Summary Judgment on February 20, 2018. (R. pp. 14-24). Fokas served a Notice of Appeal on March 16, 2018, which included the wrong trial court case number on March 16, 2018. He served an Amended Notice of Appeal on March 21, 2018, with the correct trial court case number.

COUNTERSTATEMENT OF FACTS

Many of the “facts” set forth in the Initial Brief of 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 leading up to the lawsuits and counterclaims.² Rather than address each “fact” set forth by Fokas, Spiros and Phillip, pursuant to Rule 208(b)(6), SCACR, adopt and incorporate the Counterstatement of the Case and Arguments set forth in the Joint Brief of Respondents Spiros Ferderigos, Phillip Ferderigos, and Jacob Ferderigos filed on July 10, 2018, in Appellate Case No. 2017-002032 related to Fokas’ breach of contract claims. Additionally, pursuant to Rule 208(b)(6), SCACR, Phillip and Spiros also adopt and incorporate the Statement of the Case and Arguments set forth in their respective Initial Appellant Briefs filed in the present appeal on June 18, 2018, related to their counterclaims for defamation. Unlike Fokas’ Statement of Facts, the facts set forth in these briefs

¹ The parties have two appeals currently pending. In the present appeal, Spiros and Phillip appealed the trial court’s order granting Fokas partial summary judgment on their counterclaims for defamation. Consolidated into the present appeal, Fokas appealed the trial court’s order granting Spiros and Phillip summary judgment on Fokas’ claim for defamation.

In the other consolidated appeal, Fokas appealed the trial court’s order granting summary judgment to Spiros, Phillip, and their brother, Jacob Ferderigos, on his claims for breach of contract and breach of fiduciary duty. Consolidated into that appeal, Spiros and Phillip also appealed the trial court’s order granting Fokas partial summary judgment on their counterclaims for defamation. The Appellate Case Number for that consolidated appeal is 2017-002032.

² As noted in the Counterstatement of the Case and Arguments set forth in the Joint Brief of Respondents Spiros Ferderigos, Phillip Ferderigos, and Jacob Ferderigos filed on July 10, 2018, in Appellate Case No. 2017-002032, Spiros and Phillip vehemently dispute the factual allegations asserted by Fokas related to the alleged agreement to build the proposed project. As shown in the Record for that appeal, the parties never reached a meeting of the minds on the proposed project’s material terms.

Relevant to this appeal, citing another example of Fokas’ inaccuracies and contrary to Fokas’ assertions, the alleged statements giving rise to Fokas’ defamation claim did not occur after filing his breach of contract action. In fact, Fokas first filed a Complaint alleging a cause of action for defamation against Spiros and Phillip on July 14, 2015. (R. pp. 26-31). He subsequently filed a Complaint alleging causes of action for breach of contract and breach of fiduciary duty against Spiros, Phillip, and Jacob Ferderigos (hereinafter collectively referred to as the “Ferderigos Brothers”) on July 15, 2015. 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.

reflect the actual interactions and dealings between the parties as evidenced by the written record and testimony. In the present appeal, the undisputed facts are as follows:

On January 26, 2015, Stanley Barnett, Esquire (hereinafter referred to as “Barnett”), sent a letter to Spiros and Phillip, who are both attorneys, informing them he had been retained by Fokas to represent Fokas with respect to certain alleged breach of contract claims against the Ferderigos Brothers related to the proposed project to build additional rental suites at 229 King Street. (R. pp. 351-353). In the letter, Barnett, on behalf of Fokas, threatened litigation against Spiros and Phillip. (R. pp. 351-353). At the conclusion of the letter, Barnett asked for Spiros’ and Phillip’s “thoughts on scheduling a meeting quickly so that any further conflict can be avoided and so that a clearly profitable business can be significantly expanded to all of your benefit.” (R. pp. 351-353). Spiros responded to Barnett’s letter stating he would be willing to meet with Barnett to have a “conversation of resolving these issues.” (R. pp. 354-355). He also informed Barnett that if Fokas filed the threatened lawsuit against Spiros that Spiros would respond with counterclaims against Fokas. (R. pp. 354-355). Phillip concurred with Spiros and agreed to meet with Barnett to discuss possible resolutions to Fokas’ threatened litigation and their counterclaims. (R. pp. 66-77). Barnett met with Spiros and Phillip on February 17, 2015. (R. pp. 558-562).

During the settlement conference to discuss Fokas’ threatened litigation and Spiros’ and Phillip’s counterclaims, Fokas’ attorney alleged Spiros and Phillip stated Fokas had committed insurance fraud and hired someone to set fire to 229 King Street.³ (R. pp. 66-77). Fokas alleged

³ Spiros and Phillip deny publishing any defamatory statements about Fokas to his attorney during the settlement conference. However, for purposes of summary judgment and this appeal, the evidence must be viewed in the light most favorable to Fokas. Regardless, Spiros and Phillip again deny any such defamatory statements about Fokas were made during the settlement conference. Moreover, Fokas asserts that, at his deposition, Phillip produced an artfully prepared written statement setting forth his version of the settlement conference and admits making the defamatory statements. However, nowhere does Phillip admit that he made any defamatory statements concerning Fokas during the settlement conference.

Spiros and Phillip made these statements to Barnett during the settlement conference proposed by Barnett. Fokas also alleged Spiros and Phillip generally described Fokas as “dishonest and capable of doing anything for money” during this settlement conference with Barnett. (R. pp. 66-77). According to Fokas, Barnett did not “communicate these statements to anyone other than [Fokas], including Irene Fokas...” (R. p. 62, ¶ 13). According to Fokas, his mother then confronted him with the statements and “identified [Spiros and Phillip] as the source of said statements.” (R. p. 62, ¶ 16).

However, as set forth in the numerous affidavits and depositions, no one, other than allegedly Barnett, ever heard Spiros or Phillip publish any defamatory statements about Fokas. In fact, Fokas’ own mother and sister repeatedly testified they never heard Spiros or Phillip publish these alleged defamatory statements. (R. pp. 287-296; R. pp. 297-298; R. p. 703, lines 19-22). They also never heard anyone claim to have heard Spiros or Phillip publish these alleged defamatory statements. The only person who claimed he heard Spiros and Phillip publish these defamatory statements about Fokas was Barnett, Fokas’ attorney, which allegedly occurred during a settlement conference and in response to questions about possible litigation, including counterclaims possessed by Spiros and Phillip against Fokas. (R. pp. 66-77). No one else, including Fokas’ mother and sister, testified they heard Spiros or Phillip publish the allegedly defamatory statements, and the only evidence presented in the case showed the source of the allegedly defamatory statements was someone else entirely.

Irene Fokas (hereinafter referred to as “Mrs. Fokas”) is Fokas’ mother, and during her deposition, she confirmed her refutation of Fokas’ initial central substantive allegation and again admitted under oath that the Ferderigos’ father never spoke to her about allegations that Fokas set fire to 229 King Street, hired someone to set fire to 229 King Street, or filed false insurance

claims. (R. pp. 287-296). She even testified that neither Spiros nor Phillip made any defamatory statements about her son to her or to anyone that she was aware of. (R. pp. 287-296). Instead, Mrs. Fokas testified that her daughter, Urania Nikatos (hereinafter referred to as “Mrs. Nikatos”), told her that Spiros and Phillip would accuse Fokas of setting fire to 229 King Street. (R. pp. 287-296). Mrs. Fokas confirmed on several occasions that her daughter was the sole source of this information. However, Mrs. Fokas admitted that her daughter never told her where she heard these statements (i.e., who allegedly said such statements) and that she never asked her daughter where she learned these things. (R. pp. 287-296). Rather, Mrs. Fokas testified that she *assumed* her daughter heard them from Spiros and Phillip because “they do work with their cousins.”⁴ (R. pp. 287-296). Indeed, Mrs. Fokas testified under oath as follows:

Q. Did your daughter tell you who she was talking about that might make these –

THE WITNESS: I never ask.

A. I never asked her, but I figured that – I figured that they might be them because she – they have – they do work with their cousins. She was hearing these things; but I never asked her, “Where did you find this stuff? Where did you hear it?”

...

Q. And at the time you heard that from your daughter, she did not say that she heard Phillip, Spiros, or Jacob say those things?

THE WITNESS: She didn't say 'cause I no ask.

A. I did not ask her.

MS. THIEM: I'm sorry. Miss Translator, can you say that again?
Interpreter.

⁴ Interestingly, Fokas' mother's assumptions underlying her speculation are also erroneous as Spiros and Phillip do *not* work with her daughter or her son-in-law/daughter's husband, Gerasimos Nikatos (hereinafter referred to as “Mr. Nikatos”).

THE INTERPRETER: The only thing I got was, "I did not ask her." I'm not sure if she said something else.

A. **I did not ask her, but I thought that they work together. I guess that's where she heard it.**

(R. pp. 287-296) (emphasis added). As a result, Mrs. Fokas not only refuted Fokas' initial central substantive allegation, but she also denied Spiros and Phillip ever published defamatory statements about Fokas to her. Further, she denied anyone, including her daughter, ever told her that Spiros or Phillip published defamatory statements about Fokas.

On November 20, 2015, Mrs. Nikatos, Fokas' sister, provided an affidavit wherein she denied ever hearing Spiros or Phillip state that Fokas set fire to 229 King Street, that Fokas hired someone to set fire to 229 King Street, or that Fokas filed false insurance claims. (R. pp. 297-298). Mrs. Nikatos also confirmed Mrs. Fokas' testimony by stating that she never told Mrs. Fokas that she "ever heard anyone say that Phillip and/or Spiros Ferderigos said that Athan Fokas hired someone to set fire to 229 King Street, that Athan Fokas was involved with the fire at 229 King Street, and/or that Athan Fokas has filed any false insurance claim(s)." (R. pp. 297-298). Mrs. Nikatos also stated that she never heard anyone tell her that Phillip and/or Spiros made any of these comments about Fokas. (R. pp. 297-298). In her deposition, Mrs. Nikatos repeatedly confirmed she never heard Spiros or Phillip publish any defamatory statements about Fokas. (R. p. 703, lines 19-22).

Finally, Mr. Nikatos, Fokas' brother in law and business partner, provided an affidavit wherein he stated that he heard from a contractor named Manoli Kehagias that Fokas asked Mr. Kehagias to set fire to 229 King Street. (R. pp. 299-300). Mr. Nikatos further stated that he immediately informed his wife what Mr. Kehagias had told him. (R. pp. 299-300). Mr. Nikatos' Affidavit "closes the loop" on how these allegations about Fokas setting fire to 229 King Street

originated with a contractor and got to his mother and ultimately himself. Nowhere in this chain of events is Spiros or Phillip involved or is there even a scintilla of evidence that Spiros or Phillip published any defamatory statements about Fokas in any way, shape, or form.

STANDARD OF REVIEW

“In reviewing a grant of summary judgment, our appellate court applies the same standard as the trial court under Rule 56(c), SCRCP.” Woodson v. DLI Properties, LLC, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). “[S]ummary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). “Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Id. “Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.” Id. at 220, 616 S.E.2d at 729. “Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied.” Id. “However, when plain, palpable, and indisputable facts exist on which no reasonable minds cannot differ, summary judgment should be granted.” Id.

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

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

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

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

ARGUMENTS

Even when viewing the evidence in the light most favorable to Fokas, there is no genuine issue of material fact and there is not a scintilla of evidence to support Fokas' allegation that Spiros and Phillip published any unprivileged defamatory statements to any third party about Fokas. Contrary to the allegations set forth in Fokas' Amended Complaint, there is no evidence in the record to show Spiros or Phillip published any defamatory statement to Fokas' sister regarding Fokas. In fact, Fokas' sister on numerous occasions denied ever hearing Spiros or Phillip publish any defamatory statements about Fokas. Further, Fokas' mother admitted under oath that she merely "guessed" and "figured" that the source of the alleged defamatory statements was Spiros and Phillip, and she never heard Spiros or Phillip publish any defamatory statements about Fokas. Lastly, even if Spiros or Phillip published any alleged defamatory statement to Fokas' attorney during the settlement conference, those statements cannot support a cause of action for defamation as a matter of law. As Fokas' agent and alter ego, Fokas' attorney stood in his place, and, therefore, he does not constitute a third party. Further, any alleged defamatory statements published to Fokas' attorney during the settlement conference were privileged and were otherwise invited by Fokas' attorney.

Under South Carolina law, "[t]he tort of defamation permits a plaintiff 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 plaintiff 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....” Hubbard and Felix, The South Carolina Law of Torts 462 (2d ed. 1997).

“Defamatory communications take two forms: libel and slander.” Erickson, 368 S.C. at 466, 629 S.E.2d at 664. “Slander is a spoken defamation while libel is a written defamation or one accomplished by actions or conduct.” Id. “[A] statement may be actionable *per se*, in which case the defendant is presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages.” Id. Under the common law, slander is actionable *per se* only when it charges 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. Holtzscheiter v. Thomson Newspapers, Inc., 332 S.C. 502, 511 n.5, 506 S.E.2d 497, 502 n.5 (1998). “Or a statement may be not actionable *per se*, in which case nothing is presumed and the plaintiff must plead and prove both common law malice and special damages.” Erickson, 368 S.C. at 465, 629 S.E.2d at 664 (emphasis added). Common law malice means the defendant acted with ill will toward the plaintiff or acted recklessly or wantonly, *i.e.*, with a conscious disregard of the plaintiff’s rights. Padgett v. Sun News, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982). “The determination of whether or not a statement is actionable *per se* is a matter of law for the court to resolve.” Erickson, 368 S.C. at 466, 629 S.E.2d at 665.

The trial court properly granted summary judgment because there was no evidence to support Fokas’ allegation that Spiros and Phillip published unprivileged false and defamatory statements about him to third parties. Specifically, the trial court properly found: (1) the alleged defamatory statements allegedly published by Spiros and Phillip to Fokas’ attorney during the settlement conference did not constitute publication; (2) the alleged defamatory statements

allegedly published by Spiros and Phillip to Fokas' attorney during the settlement conference were invited by Fokas through his attorney; (3) the alleged defamatory statements allegedly published by Spiros and Phillip to Fokas' attorney during the settlement conference were privileged; and (4) there was no evidence Spiros and Phillip published any unprivileged defamatory statements about Fokas to any third party.

I. THE TRIAL COURT PROPERLY FOUND THE ALLEGED DEFAMATORY STATEMENTS ALLEGEDLY PUBLISHED BY SPIROS AND PHILLIP ABOUT FOKAS TO FOKAS' ATTORNEY DURING A SETTLEMENT CONFERENCE DID NOT CONSTITUTE PUBLICATION TO A THIRD PARTY BECAUSE FOKAS' ATTORNEY WAS HIS ALTER EGO AND INVITED THE ALLEGED STATEMENTS.

The trial court properly found the allegedly defamatory statements allegedly published by Spiros and Phillip about Fokas to Fokas' attorney during a settlement conference did not constitute publication to a third party and were invited by Fokas through his attorney, and, as a result, the trial court properly granted Spiros' and Phillip's summary judgment. As Fokas' alter ego and agent, Fokas' attorney stood in Fokas' place at the settlement conference, and, therefore, any alleged publication to Fokas' attorney was merely publication directly to Fokas. Further, Fokas' attorney requested the settlement conference to discuss his client's alleged claims for breach of contract, but Spiros and Phillip agreed to meet with Fokas' attorney to also discuss their potential counterclaims against Fokas. Under the backdrop of discussing Fokas' threats of litigation/claims and Phillip and Spiros' counterclaims, Fokas' attorney invited the alleged defamatory statements about Fokas.

A. Fokas' attorney was his alter ego and agent during the settlement conference, and, as a result, any alleged publication of defamatory statements was not to a third party.

To the extent Fokas relied upon alleged defamatory statements allegedly published by Spiros and Phillip about him to his attorney during the settlement conference, Fokas did not put

forth any evidence of any publication to third parties because his attorney, as his alter ego and agent, does not constitute a third-party. South Carolina has “consistently recognized an attorney is the ‘alter-ego of his client’ and the attorney stands in the place of the client.” Williams v. Williams, 335 S.C. 386, 391, 517 S.E.2d 689, 691 (1999); Anderson v. Anderson, 198 S.C. 412, 18 S.E.2d 9 (1941); see also Equilease Corp. v. Weathers, 275 S.C. 478, 272 S.E.2d 789 (1980); Culbertson v. Clemens, 322 S.C. 20, 471 S.E.2d 163 (1996). Further, attorneys engaged in settlement negotiations within the scope of their representation of a party serve as agents for their clients. Koutsogiannis v. BB&T, 365 S.C. 145, 149, 616 S.E.2d 425, 428 (2005).

Barnett informed Spiros and Phillip that he had been retained by Fokas to represent Fokas with respect to certain alleged breach of contract claims against the Ferderigos Brothers related to the proposed project to build additional rental suites at 229 King Street. (R. pp. 351-353). At the conclusion of the letter, Barnett asked for Spiros’ and Phillip’s “thoughts on scheduling a meeting quickly so that any further conflict can be avoided and so that a clearly profitable business can be significantly expanded to all of your benefit.” (R. pp. 351-353). During the settlement conference, which involved discussions of Fokas’ threat of litigation and Spiros’ and Phillip’s potential counterclaims, Fokas alleged Spiros and Phillip stated Fokas had committed insurance fraud and hired someone to set fire to 229 King Street. (R. pp. 66-77). Fokas alleged Spiros and Phillip made these statements to Barnett during the settlement conference which had been proposed by Barnett and agreed to by Spiros and Phillip to discuss all the issues between the parties. Fokas also alleged Spiros and Phillip generally described Fokas as “dishonest and capable of doing anything for money” during this settlement conference with Barnett. (R. pp. 66-77).

As the attorney for Fokas, Barnett not only represented Fokas at the settlement conference for negotiations, but he stood in the place of Fokas at the settlement conference. He was Fokas' alter ego and agent for purposes of the negotiations at the settlement conference. Even assuming Spiros and Phillip published the allegedly defamatory statements to Fokas' attorney during the settlement conference, which they specifically deny, there was no publication to a third party. At the settlement conference, Barnett was the alter ego and agent of Fokas; in essence, Barnett was Fokas. Therefore, any alleged defamatory statements published about Fokas during the settlement conference were published directly to Fokas, not to a third party. Even viewing the evidence in the light most favorable to Fokas regarding the settlement conference, there was no publication because Barnett was Fokas' alter ego and agent, and, as a result, any such statements cannot serve as the basis for a defamation action. As Fokas' alter ego and agent, any alleged defamatory statements published to Barnett about Fokas did not constitute publication to a third party. See Rodgers v. Wise, 193 S.C. 5, 7 S.E.2d 517 (1940) ("We are satisfied that the sounder and better supported rules are, first, that communications made to a libeled party's attorneys, corresponding for him regarding the specific matter in connection with which the libelous matter is used, are not thereby given publication; ...").⁵

Contrary to Fokas' assertions, Spiros and Phillip did not agree to the settlement conference with Fokas' attorney simply to discuss "breaching their agreement with Fokas to expand the building." (Fokas Appellant Brief, p. 11). Rather, the evidence clearly showed Spiros and Phillip agreed to meet with Fokas' attorney to discuss possible resolution of all issues

⁵ Fokas misconstrues Rodgers. Barnett, as Fokas' attorney at the settlement conference, was Fokas' alter ego and agent as a matter of law and, therefore, cannot be a third party, period. Moreover, even under the standard Fokas argues exists, the evidence is clear that the parties met in response to Barnett's letter threatening litigation against Spiros and Phillip and their response threatening counterclaims against Fokas. Fokas argues that, in this matter, "Barnett met with the Defendants, not their attorneys," but Fokas ignores the fact that Spiros and Phillip are attorneys themselves representing themselves and each other in closed-door settlement negotiations that occurred at the request of Fokas' attorney.

between the parties. When Spiros and Phillip responded to the invitation by Fokas' attorney to meet and discuss a possible resolution, they set forth their allegations of counterclaims against Fokas. (R. pp. 354-355). These counterclaims were not limited to the proposed project. (R. pp. 354-355). Further, contrary to Fokas' argument, Fokas' dealings, activities, and rumors, including that Fokas started the fire at 229 King Street, a property Fokas and the Ferderigos Brothers own together, for insurance proceeds are clearly relevant to Spiros' and Phillip's counterclaims and the potential litigation between the parties. Interestingly, Fokas concedes that "[h]ad Defendants allowed the meeting to go forward as designed as a settlement discussion, anything they discussed during the course of that meeting would have been inadmissible." (Fokas Appellant Brief, p. 14). As set forth herein, Spiros' response agreeing to meet with Fokas' attorney specifically included discussing any counterclaims Spiros and Phillip may have against Fokas and any breaches of fiduciary duties by Fokas. It is with great concern that Fokas fails to inform the Court that his own attorney's alleged handwritten notes from the settlement conference confirm that any alleged statements by Spiros and Phillip regarding the fire or insurance fraud were raised specifically as possible counterclaims and causes of action that may be pursued against Fokas. (R. pp. 66-77). In those alleged "notes," Fokas' attorney clearly states that Spiros and Phillip allegedly raised the issues of fire and insurance fraud as "claims against Athan" and that Spiros and Phillip allegedly "both said these were all breaches of Athan's fiduciary duty to the corporation that runs the rental business or them as co-owners of the building – not clear to me." (R. pp. 66-77). This is a far cry from Fokas' attorney's subsequent affidavits and filed appellate briefs that Spiros and Phillip allegedly raised these matters to blackmail and/or "ambush and assail Fokas' character rather than pursue resolution of the issues at hand."

Moreover, if Fokas subsequently repeated what his attorney told him Spiros and Phillip allegedly said during the settlement conference, those statements constituted self-publication. “Self-publication of [an] allegedly defamatory statement may bar a plaintiff from recovery.” Murray v. Holnam, Inc., 344 S.C. 129, 144-45, 542 S.E.2d 743, 751 (2001); David P. Chapus, Annotation, Publication of Allegedly Defamatory Matter by Plaintiff (“Self-Publication”) As Sufficient to Support Defamation Action, 62 A.L.R.4th 616 (1988); see also 50 Am.Jur. 2d Libel and Slander § 241 (1995) (as a general rule, where a person communicates a defamatory statement only to person defamed and defamed person then repeats statement to others, publication of statement by person defamed, or “self-publication,” will not support defamation action against originator of statements). “There is no publication where a Defendant communicates a statement directly to the Plaintiff, who then communicates it to a third party.” Restatement of Torts 2d § 577, Comment m (1971). To the extent Fokas relied upon these allegedly defamatory statements to Fokas’ attorney during the settlement conference, if Fokas then reiterated these allegedly defamatory statements that his attorney claimed Spiros and Phillip made during the settlement conference (for example, filing lawsuits against Spiros and Phillip alleging they accused Fokas of these misdeeds), he self-published the statements to the public, and he cannot use those publications to support a defamation action against Spiros and Phillip. For these reasons, any and all communications between Fokas’ attorney and Spiros and Phillip during the settlement conference do not constitute publication as they were allegedly published only to Fokas through his attorney, who was Fokas’ alter ego and agent, not a third party, at the settlement conference.

B. Fokas' attorney invited the alleged defamatory statements at the settlement conference.

Also, any allegedly defamatory statements about Fokas published to his attorney during the settlement conference do not constitute publication because they were invited by Fokas' attorney.⁶ It has long been settled in South Carolina that "a person cannot invite or provoke another to make a slanderous charge against him, and then sue such person for damages on account of such charge." Boling v. Clinton Cotton Mills, 163 S.C. 13, 163 S.E. 195, 199 (1931).⁷ "There is no such publication as will support an action where the defamatory matter is invited or procured by the plaintiff *or by person acting for him in the matter.*" Id. (emphasis added). "If the only publication that can be provided is one made by the defendant in answer to an application from the plaintiff, or some agent of the plaintiff, demanding explanation, such answer, if fair and relevant will be held privileged; for the plaintiff brought it on himself." Id. Attorneys engaged in settlement negotiations within the scope of their representation of a party serve as agents for their clients. See Koutsogiannis v. BB&T, 365 S.C. 145, 149, 616 S.E.2d 425, 428 (2005).

Here, Fokas' attorney invited Spiros and Phillip, attorneys themselves, to meet with him to participate in a closed door settlement conference to discuss Fokas' allegations of breach of

⁶ Remarkably, Fokas asserts "the trial court failed to point out even a scrap of evidence in the record that supports the determination that Barnett invited Defendants slander and Fokas defies the Defendants to do so at this point." It is simply ludicrous for Fokas to argue that any alleged statements by Spiros and Phillip were not "invited" by Fokas' attorney when the written correspondence clearly sets forth that Barnett invited Spiros and Phillip, as attorneys, to attempt to resolve the threats of litigation between the parties. This included Spiros' and Phillip's response that they would agree to meet with Barnett to discuss those claims as well as their potential counterclaims against Fokas. Barnett's own notes reflect these alleged statements were made in the context of possible counterclaims against Fokas for breach of fiduciary duty. Perhaps Barnett and his client did not like the responses from Spiros and Phillip to his client's meritless claims, but a defamation action does not arise in such instance.

⁷ Boling is on point. Here, Barnett threatened litigation against Spiros and Phillip, and then they attempted to resolve the litigation and placed Fokas on notice of their counterclaims. Certainly, Barnett's invitation to attempt to resolve the case and his threat of litigation against Spiros and Phillip is a clear invitation for them to respond and defend themselves against the allegations. Indeed, Boling sets forth that responding to a plaintiff or some agent on his behalf (here, Barnett being the agent and attorney of Fokas) invites an answer "for the [p]laintiff brought it on himself." Simply because Barnett and his client did not like the answers that Spiros and Phillip provided does not mean that a defamation cause of action exists based upon the answers.

contract and breach of their fiduciary duties to “try to work out a way forward so as to accomplish the goals of the agreement which are to the mutual benefit of all four of you” and “so that any further conflict can be avoided...” (R. pp. 351-353). On February 3, 2015, Spiros replied to Barnett’s letter welcoming a “conversation of resolving these issues” and agreed to meet with Fokas’ attorney. (R. pp. 354-355). In the e-mail response, Spiros also made it clear to Fokas’ attorney that should Fokas file suit against him that Spiros would countersue “with numerous causes of action and well documented liability against [Fokas] for his behavior.” (R. pp. 354-355). Fokas’ attorney proceeded with the settlement conference, and, based upon Spiros’ e-mail, it was clear Spiros and Phillip would also candidly discuss their own potential causes of action against Fokas, as well. Barnett’s own notes reflect this was the context in which the alleged statements were made during the settlement conference. Fokas, through his attorney, cannot invite Spiros and Phillip to meet and discuss how to resolve the issues between them and then allege Spiros and Phillip defamed Fokas by discussing those issues. It would be against sound legal principle to allow Fokas to invite Spiros and Phillip to answer certain questions from Fokas’ attorney in a settlement meeting and then allow Fokas to sue for defamation based upon their answers. Because Fokas, through his attorney, invited Spiros and Phillip to a settlement conference, any statements made therein cannot, as a matter of law, serve as the basis of a defamation action. Therefore, the trial court, viewing the evidence in the light most favorable to Fokas, properly found Fokas, through his attorney, invited the alleged defamatory statements during the settlement conference.

II. THE TRIAL COURT PROPERLY FOUND THE ALLEGED DEFAMATORY STATEMENTS ALLEGEDLY PUBLISHED BY SPIROS AND PHILLIP ABOUT FOKAS TO FOKAS' ATTORNEY DURING A SETTLEMENT CONFERENCE WERE PRIVILEGED SETTLEMENT DISCUSSIONS.

The trial court properly found the alleged defamatory statements allegedly published by Spiros and Phillip about Fokas to Fokas' attorney during the settlement conference were privileged settlement discussions invited by Fokas' attorney, and, as a result, the trial court properly granted summary judgment. As the settlement conference was part of settlement negotiations between Fokas' attorney and Spiros and Phillip, both attorneys themselves, in an effort to avoid "further conflict," any communications were privileged settlement negotiations and cannot serve as the basis for Fokas' defamation claim. Further, any alleged defamatory statements allegedly published by Spiros or Phillip to Fokas' attorney during the settlement conference were absolutely privileged because the settlement conference was a preliminary step leading to the filing of the lawsuits and counterclaims.

A. Any alleged defamatory statements during the settlement conference were privileged settlement discussions.

"The courts favor compromise; accordingly, evidence relating to settlements is generally not admissible to prove liability." Commerce Center of Greenville, Inc. v. W. Powers McElveen & Associates, Inc., 347 S.C. 545, 558, 556 S.E.2d 718, 726 (Ct. App. 2001); Rule 408, SCRE; Hunter v. Hyder, 236 S.C. 378, 114 S.E.2d 493 (1960). Rule 408, SCRE, provides as follows:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or **offering or promising** to accept, a valuable **consideration** in compromising or attempting to **compromise** a claim which was disputed as to either validity or amount, **is not admissible to prove liability** for or invalidity of the claim or its amount. **Evidence of conduct or statements made in compromise negotiations is likewise not admissible.** This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for

another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

(emphasis added). “This rule contemplates that the parties need to feel free to make certain assumptions for the purpose of settlement negotiations and that those statements are assumed by the author to be true only for the purpose of compromise negotiations.” Fesmire v. Digh, 385 S.C. 296, 308-09, 683 S.E.2d 803, 809 (Ct. App. 2009). “The rule codifies the longstanding principle that evidence of conduct or statements made in compromise negotiations is not admissible.” Id.; see also QHG of Lake City, Inc. v. McCutcheon, 360 S.C. 196, 209, 600 S.E.2d 105, 111 (Ct. App. 2004). There has been a trend to extend the protection to all statements made in compromise negotiations. 2 McCormick on Evidence § 266 (6th ed. 2006). Because any communications Spiros and Phillip had with Fokas’ attorney prior to the filing of the two lawsuits were part of compromise and settlement discussions, those communications are privileged, are inadmissible, and cannot be used as the basis of Fokas’ defamation action against Spiros and Phillip. As such, to the extent Fokas argues Spiros and Phillip published defamatory statements about Fokas to his attorney during the settlement conference, those arguments are without merit.

After the dispute arose regarding the parties’ underlying investigation into the possibility of, feasibility of, and their interest in constructing a new building above 229 King Street, Fokas retained an attorney to threaten litigation against Spiros and Phillip, including that they were in breach of contract. (R. pp. 351-353). Fokas’ attorney invited Spiros and Phillip to participate in a meeting to “try to work out a way forward so as to accomplish the goals of the agreement which are to the mutual benefit of all four of you.” (R. pp. 351-353). At the conclusion of the letter, Fokas’ attorney asked for Spiros’ and Phillip’s “thoughts on scheduling a meeting quickly so that

any further conflict can be avoided and so that a clearly profitable business can be significantly expanded to all of your benefit.” (R. pp. 351-353). It is clear Fokas, through his attorney, proposed the settlement conference. Spiros responded to Barnett’s letter stating he would be willing to meet with Barnett to have a “conversation of resolving these issues.” (R. pp. 354-355). He also informed Barnett that, if Fokas filed the threatened lawsuit against Spiros, Spiros would respond with counterclaims against Fokas. (R. pp. 354-355). Phillip concurred with Spiros and agreed to meet with Barnett to discuss Fokas’ threats of litigation and possible counterclaims by Spiros and Phillip against Fokas. (R. pp. 66-77). Barnett met with Spiros and Phillip on February 17, 2015. (R. 558, ¶ 3).

During the settlement conference to discuss Fokas’ threats of litigation/claims and Spiros’ and Phillip’s counterclaims and in response to Barnett’s questions, Fokas alleged Spiros and Phillip stated Fokas had committed insurance fraud and hired someone to set fire to 229 King Street⁸ and generally described Fokas as “dishonest and capable of doing anything for money” during this settlement conference with Barnett. (R. pp. 66-77). However, the written correspondence between the parties establish that they met in order to discuss whether there was a way to resolve the threatened litigation of Fokas and Phillip and Spiros’ potential counterclaims against Fokas.

Based upon the correspondence between Fokas’ attorney and Spiros and Phillip, it is clear that the purpose of the meeting was to discuss Fokas’ threatened litigation, including Spiros’ and Phillip’s counterclaims, and to attempt to resolve the issues between the parties in an effort to avoid “further conflict.” In other words, Fokas’ attorney and Spiros and Phillip met to

⁸ Spiros and Phillip, as co-owners of 229 King Street, would have concerns and/or a right to sue Fokas for setting fire to 229 King Street or filing false insurance claims, if such rumors were true. Indeed, even assuming Barnett’s affidavit and handwritten notes accurately reflect the conversations at the settlement conference, such statements by Spiros and Phillip were raised in the context of potential causes of action for breach of fiduciary duty by Fokas.

engage in compromise negotiations related to Fokas' threat of litigation and the counterclaims Spiros and Phillip intended to file if Fokas initiated a breach of contract action. As a result, any evidence of conduct or statements made during those compromise negotiations, namely the meeting itself between Barnett and Spiros and Phillip, or any alleged communications made during said meeting, is not admissible pursuant to Rule 408, SCRE.

South Carolina courts have excluded evidence related to efforts to schedule meetings to discuss settlement negotiations, let alone the content of those settlement meetings. For example, in Commerce Center of Greenville, a contractor in a construction litigation case attempted to enter into evidence two letters from plaintiff related to settlement negotiations. Commerce Center of Greenville, 347 S.C. at 553, 556 S.E.2d at 722. The letters concluded with plaintiff's attempts to schedule a meeting to discuss proposed repairs and to "see if a resolution can be reached...without the necessity of continued litigation." Id. at 558, 556 S.E.2d at 725. The Court of Appeals found that the letters related to actual settlement negotiations or a "settlement relationship between the parties" because "[t]hese letters reference an attempt to schedule a meeting to resolve the case" and "an attempt to curb further litigation." Id. The Court of Appeals held that the letters were properly excluded from evidence by the trial court. Id. at 559, 556 S.E.2d at 726.

Similarly, in this case, Barnett's letter to Spiros and Phillip requesting a meeting to avoid further conflict (wherein Barnett threatened a breach of contract/breach of fiduciary duties lawsuit) and Spiros' and Phillip's responses to Barnett agreeing to meet in an effort to resolve Fokas' threats of litigation demonstrate a settlement relationship between the parties and an attempt to avoid litigation. Fokas admitted to the trial court in his memoranda that he "retained Stan Barnett to communicate to [Spiros and Phillip] that they were in breach of contract," and

Barnett met with Spiros and Phillip “to discuss whether there was a way for them to *negotiate* a way with Plaintiff to move forward...” Barnett wrote to Spiros and Phillip that he had been retained by Fokas related to allegations of breach of contract and breach of fiduciary duties and requested a meeting “so that any further conflict can be avoided.” Barnett clearly threatened litigation against Phillip and Spiros in his correspondence. In agreeing to the meeting with Barnett, Spiros and Phillip specifically mentioned discussing ways to resolve the issues between the parties and Fokas’ threat of litigation and informed Barnett that they welcomed the conversation of resolving the issues because the threatened litigation by Fokas was frivolous. Spiros further informed Barnett that the filing of a frivolous lawsuit by Fokas would result in countersuits by Spiros and Phillip against Fokas. Barnett clearly invited Spiros and Phillip to participate in settlement negotiations, and Spiros and Phillip clearly met with Barnett to discuss settlement negotiations. Accordingly, any communications at such meeting constitute settlement negotiations, and Fokas cannot use those alleged discussions as evidence of defamation. Because the alleged defamatory statements published to Fokas’ attorney during a settlement conference were privileged, Fokas, as a matter of law, cannot establish a defamation claim based upon the alleged defamatory statements made during the settlement conference.

Again, Fokas incorrectly argues the sole purpose of the settlement conference between Fokas’ attorney and Spiros and Phillip was to discuss the “contract issue.” (Fokas Appellant Brief, pp. 14-16). Such assertion is refuted by Barnett’s own letter to Spiros and Phillip and their written responses. Fokas argues Spiros and Phillip exceeded any privilege which extended to communications made during the settlement conference because the sole purpose of the settlement conference was to discuss the “contract issue.” (Fokas Appellant Brief, pp. 14-16). Fokas completely ignores his own attorney’s written communications to Spiros and Phillip and

Spiros' and Phillip's responses to the letter from Fokas' attorney requesting the settlement conference. (R. pp. 354-355). In those responses, Spiros and Phillip both stated they have mountains of evidence to show no contract ever existed between the Ferderigos Brothers and Fokas with respect to the proposed project. (R. pp. 354-355). In fact, Spiros even informed Fokas' attorney that he believed Fokas had "not provided [Barnett] with accurate information nor all of the written correspondence which directly contradicts the assertions in [Barnett's] letter." (R. pp. 354-355). Spiros and Phillip also informed Fokas' attorney that Fokas had breached numerous legal duties to them and they intended to file counterclaims against Fokas in the event Fokas filed a meritless lawsuit against them. (R. pp. 354-355). Even if the allegedly defamatory statements were published at the settlement conference, they would have been reasonably tailored "so as to relate only to the legitimate issues before the parties," which included Fokas' threat of litigation/claims against Spiros and Phillip and Spiros' and Phillip's potential counterclaims against Fokas. Accordingly, Fokas' attempt to limit the scope of the settlement conference, ignoring both Fokas' threat of litigation and the responses from Spiros and Phillip, falls hollow.

Moreover, Fokas' argument that alleged communications between attorneys at a closed-door settlement conference at the request of Fokas' counsel are not privileged (when the basis of the meeting was to discuss each party's claims against one another) is unavailing. Fokas' claim that "Defendants agreed to meet with Barnett for the sole purpose of discussing the contract issues" is refuted by the actual written communications between Fokas' attorney and Spiros and Phillip. When considering all the evidence rather than just the letter from Fokas' attorney, the trial court correctly found the settlement conference covered numerous topics between the

parties, and, even when viewing the evidence in the light most favorable to Fokas, there was no evidence the privilege extended to the settlement discussions was abused.

B. Any alleged defamatory statements during the settlement conference were absolutely privileged.

In addition, any alleged defamatory statements allegedly published by Spiros or Phillip to Fokas' attorney were absolutely privileged and, thus, cannot serve as the basis for a defamation action as a matter of law. 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).⁹ "When a communication is absolutely privileged, no action lies for its publication, no matter what the circumstances under which it is published, i.e., an action will not lie even if the report is made with malice." Pond Palace Partners, Inc. vs. Poole, 351 S.C. 1, 22, 567 S.E.2d 881, 892 (Ct. App. 2002).

Fokas' attorney sent a letter on behalf of Fokas to Spiros and Phillip threatening litigation for numerous causes of actions and damages and requested a meeting in order "to try and work out a way forward" "so that any further conflict can be avoided." (R. pp. 351-353). Spiros responded to Fokas' attorney and welcome a "conversation of resolving these issues" surrounding the threatened lawsuit. (R. pp. 354-355). Spiros informed Fokas' attorney that any such lawsuit would be frivolous and would further result in countersuits against Fokas for numerous causes of action for which Spiros had well documented liability against Fokas. (R. pp. 354-355).

⁹ Fokas argues "there is no South Carolina decision that extends the absolute judicial proceedings privilege to meetings that occur months before any litigation is filed." Again, this statement misrepresents South Carolina law. See Crowell, *supra*.

During this settlement conference, Fokas alleges Spiros and Phillip defamed him to his attorney. Because Fokas' attorney requested this meeting in an effort to resolve issues surrounding a potential lawsuit, it was a preliminary step leading to judicial action of an official nature with a reasonable relationship to the issues in the potential lawsuit. Fokas threatened litigation against Spiros and Phillip and requested a meeting to try and resolve the issues to avoid further conflict. The letter from Fokas' attorney outlined several allegations of breach of contract and fiduciary duty, threatened litigation, and even set forth his believed remedies under the law. In agreeing to meet with Fokas' attorney to discuss resolving the threats of litigation, Spiros and Phillip further informed Fokas' attorney in writing there would be numerous counterclaims against Fokas. The settlement conference did not succeed to resolve the issues, and Fokas ultimately filed a breach of contract lawsuit against the Ferderigos Brothers, to which Spiros and Phillip counterclaimed against Fokas. In other words, the parties initiated formal judicial proceedings against each other as was threatened by the parties in the aforementioned communications setting the settlement conference. Therefore, any alleged defamatory statements published by Spiros or Phillip about Fokas to his attorney at this settlement conference, which was a preliminary step (settlement/negotiation meeting) leading to formal judicial proceedings, were absolutely privileged and, therefore, cannot support a claim of defamation as a matter of law.

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THERE WAS NO EVIDENCE SPIROS AND PHILLIP PUBLISHED ANY ALLEGED DEFAMATORY STATEMENTS ABOUT FOKAS TO ANY THIRD PARTY.

Fokas put forth no evidence that Spiros and Phillip published any defamatory statements about him to third parties, and, as a result, the trial court properly granted Spiros and Phillip summary judgment. Both Fokas' mother and sister deny the allegation that Spiros and Phillip

published defamatory statements about Fokas to them. Neither Fokas' mother nor his sister even ever heard anyone claim to have heard Spiros and Phillip published defamatory statements about Fokas to them. Rather, the evidence shows other persons were publishing these rumors about Fokas, and Spiros and Phillip were not involved. Because there was evidence other persons published these allegedly defamatory statements about Fokas, Fokas cannot, as a matter of law, establish his defamation claim against Spiros and Phillip solely through circumstantial evidence.

A. Fokas offered no evidence to support his allegation Spiros and Phillip published defamatory statements about him to third parties.

To prove defamation, a plaintiff 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). Moreover, in South Carolina, a plaintiff must set forth facts sufficient to allege that the statements were unprivileged, the specificity of the alleged false statements, and *to whom* the alleged false statements were published. See McNeil v. SCDOC, 404 S.C. 186, 189, 743 S.E.2d 843, 844 (Ct. App. 2013). Defamation is published either verbally or in writing. See Erickson, 368 S.C. at 466, 629 S.E.2d at 664. Part of alleging publication is to allege that the defamatory statements were actually published to another person. McNeil, 404 S.C. at 189, 743 S.E.2d at 844; see also Williams v. Lancaster County School District, 369 S.C. 293, 631 S.E.2d 286 (2006).¹⁰ In the present case, Fokas presented no evidence from any third party that either heard or read alleged defamatory statements about Fokas published by Spiros or

¹⁰ In Williams, a father and mother filed a defamation action against the school district alleging the principal was responsible for a rumor that father was having an affair. As the Court noted, numerous individuals had knowledge of the incident at issue between the father and a secretary at the school. Id. at 304, 631 S.E.2d at 292. The father testified he could not say “any employee of the District had said he was having any affair” with the secretary. Id. As a result, the Court held any number of people could be responsible for the rumor, and, as a result, the father could not establish any defamatory statement actually published by the principal. Id.

Phillip. Fokas offered no evidence to the trial court that Spiros and Phillip published any such defamatory statements about him, and, as a result, the trial court properly found Fokas' defamation action failed as a matter of law.

Mrs. Fokas, whom Fokas originally alleged heard Spiros' and Phillip's father inform her that they published these allegedly defamatory statements to him, testified that she heard these allegedly defamatory statements from her daughter and does not know who told these things to her daughter. (R. pp. 287-296). Importantly, Mrs. Fokas admitted that her daughter never told her *from whom* she heard those statements and that she never asked her daughter *who* told her those statements. (R. pp. 287-296). In fact, Mrs. Fokas never asked her daughter where she learned about these alleged statements and allegations about Fokas' involvement in the fire at 229 King Street. (R. pp. 287-296). Instead, Mrs. Fokas testified that she *guessed* and *figured* her daughter heard these statements from Spiros and Phillip, despite never asking her daughter. (R. pp. 287-296). Indeed, Mrs. Fokas testified under oath as follows:

Q. Did your daughter tell you who she was talking about that might make these –

THE WITNESS: I never ask.

A. **I never asked her, but I figured that – I figured that they might be them because she – they have – they do work with their cousins. She was hearing these things; but I never asked her, “Where did you find this stuff? Where did you hear it?”**

...

Q. And at the time you heard that from your daughter, she did not say that she heard Phillip, Spiros, or Jacob say those things?

THE WITNESS: She didn't say 'cause I no ask.

A. I did not ask her.

MS. THIEM: I'm sorry. Miss Translator, can you say that again?
Interpreter.

THE INTERPRETER: The only thing I got was, "I did not ask her." I'm not sure if she said something else.

- A. **I did not ask her, but I thought that they work together. I guess that's where she heard it.**

(R. pp. 287-296). (emphasis added). Interestingly, Fokas only cites select portions of Mrs. Fokas' deposition testimony that she believes it is Phillip and Spiros who would defame Fokas. Fokas fails to cite the answers to the obvious follow-up questions asked by Phillip and Spiros' counsel to Mrs. Fokas at the deposition of *how* Mrs. Fokas allegedly knows that Phillip and Spiros will defame her son - Mrs. Fokas' answer is unequivocal and set forth verbatim above. Mrs. Fokas admitted repeatedly that she only *guessed* and *figured* that Phillip and Spiros were the source of the alleged defamatory statements.

Fokas misrepresents the Record when he argues that the trial court was "confused" that Mrs. Fokas' testimony was a mere guess/speculation.¹¹ To the contrary, Mrs. Fokas' testimony cannot be clearer that she "guessed," "figured," and assumed that Spiros and Phillip were the ones who defamed her son, a mere belief/speculation on her part. Fokas consistently ignores this key admission throughout his brief because it negates Fokas' narrative on appeal. However, Fokas cannot ignore his own mother's sworn testimony where she admitted she had no personal knowledge and simply "made up" her testimony, which Fokas then misrepresents to the Court. (Fokas Appellant Brief, pp. 22-26).

¹¹ Fokas argues "obviously, the trial court was confused, as its Order states that Irene Fokas merely 'guessed' at who made the statements." (Fokas Appellant Brief, p. 22, fn. 9). However, there is no "confusion" on behalf of the trial court where Mrs. Fokas literally testified under oath that she guessed as to who made the alleged defamatory statements because she never asked her own daughter who made the alleged defamatory statements and her daughter never told her who made the statements. It appears that Fokas is "confused" about the evidence in the Record, not the trial judge below.

Mrs. Fokas' testimony clearly shows that her daughter never told her that either Spiros or Phillip made these allegedly defamatory statements. After several years of litigation, Fokas could no longer rely upon Mrs. Fokas' conjecture as to the ultimate source of these allegedly defamatory statements. Mrs. Fokas testified that she never heard either Spiros or Phillip say that he was involved in the fire at 229 King Street or filed false insurance claims. All Mrs. Fokas knows is that she believes her daughter made statements to her and she subjectively believed/assumed the statements came from Spiros and Phillip.¹² However, at the summary judgment stage, Fokas could not rely upon Mrs. Fokas' admitted speculation (not to mention hearsay) that Spiros and Phillip published these allegedly defamatory statements given Mrs. Fokas admissions that she *guessed* and *figured* they were the source of the allegations.¹³ As a result, not only did Mrs. Fokas never hear either Spiros or Phillip publish a defamatory statement about Fokas, she was not aware of anyone hearing either Spiros or Phillip publish a defamatory statement about Fokas.

Fokas then argues that his own mother's speculation, in and of itself, although not direct evidence of publication, readily supports the conclusion that Spiros and Phillip further published the allegations of criminal conduct by Fokas to third parties, such that a jury could conclude that Spiros and Phillip logically were the source of these statements and did publish the statements so that there is a "factual question as to the issue of publication." (Fokas Appellant Brief, p. 27).

¹² As such, Mrs. Fokas' admitted speculation which is based on hearsay is not any evidence of Spiros or Phillip publishing defamatory statements about Fokas. The rampant speculation of Fokas' mother cannot be the basis of a defamation action against Spiros and Phillip.

¹³ Nowhere does Fokas' brief more egregiously misrepresent the Record than where he cites his own mother's testimony. Fokas misrepresents the testimony as Mrs. Fokas readily admitted that she "guessed" and "figured" Spiros and Phillip were the source of the alleged statements about Fokas. (Fokas Appellant Brief, pp. 22-26). Her testimony shows that she speculated that Spiros and Phillip were the ones that allegedly defamed her son, not that she actually heard Spiros or Phillip defame her son and not that anyone actually told her that Spiros or Phillip defamed her son.

Such assertion, however, is contrary to the applicable law. Mrs. Fokas' belief/speculation that Spiros and Phillip would defame Fokas does not constitute any evidence or a scintilla of evidence that there was publication to any third party by Spiros and Phillip. Fokas would have this court hold that a party's mother could create an issue of fact to support a defamation action if the mother testifies that she subjectively believes that the other party would defame her son in the future.

Mrs. Nikatos' sworn affidavit and testimony confirms her mother's testimony that she never told her mother that either Spiros or Phillip made these allegedly defamatory statements. (R. pp. 297-298). Mrs. Nikatos also confirmed Mrs. Fokas' testimony by stating that she never told Mrs. Fokas that she "ever heard anyone say that Phillip and/or Spiros Ferderigos said that Athan Fokas hired someone to set fire to 229 King Street, that Athan Fokas was involved with the fire at 229 King Street, and/or that Athan Fokas has filed any false insurance claim(s)." (R. pp. 297-298). In fact, Mrs. Nikatos swore that she never heard either Spiros or Phillip make these allegedly defamatory statements about Fokas. (R. pp. 297-298). Ms. Nikatos confirmed this in her deposition. (R. p. 703, lines 19-22).

Fokas offered no evidence that his mother or his sister heard Spiros or Phillip publish defamatory statements about Fokas. Both Fokas' mother and sister denied ever hearing any such defamatory statements about Fokas from Spiros or Phillip.¹⁴ The trial court properly found there

¹⁴ Fokas misrepresents the Record when he argues "Irene Fokas testified that Rania told her about the statements. While Rania denied that she told her mother these things, at the very least, the conflicting testimony creates a question of fact to be resolved by a jury." Mrs. Fokas never testified that Mrs. Nikatos told her that Spiros or Phillip defamed Fokas. Rather, Mrs. Fokas testified that she "guessed" and "figured" that Spiros and Phillip would defame her son and she admitted that she never asked her daughter who made the allegedly defamatory statements about her son. In other words, although Mrs. Fokas' testimony sets forth her belief that Spiros and Phillip would defame Fokas, she readily admitted that she had assumed that they were the ones that would defame her son. She admitted that she never asked her daughter who made the alleged statements. Mrs. Fokas' testimony does not create a question of fact about whether or not Spiros or Phillip published any defamatory statements about Fokas.

was no evidence Spiros and Phillip published defamatory statements about Fokas to any third party, and, as a result, the trial court properly granted summary judgment.

B. The evidence showed the alleged defamatory statements about Fokas originated with individuals other than Spiros and Phillip.

Gerasimos Nikatos' sworn affidavit demonstrates the actual source of these allegedly defamatory statements to be a contractor who claimed Fokas asked him to set fire to 229 King Street. (R. pp. 299-300). Mr. Nikatos then informed his wife about these allegations from the contractor, and Mrs. Nikatos purportedly then informed her mother, who in turn relayed the statements to Fokas, her son. (R. pp. 299-300). Nowhere in this sequence of events does either Spiros or Phillip publish any defamatory statement about Fokas to anyone, including any family member of Fokas or Spiros and Phillip. Fokas never presented or identified any person who allegedly heard either Spiros or Phillip publish any of these allegedly defamatory statements about Fokas. The reason Fokas could not identify any such person is quite simple: no such person exists.

Recall, Fokas never alleged any family member other than his mother confronted him about allegations that he was involved in the fire at 229 King Street. He alleged **only** that his mother confronted him about these allegations and that his mother "came to hear these falsehoods as a direct and proximate result of the publication of these falsehoods by Defendants." (R. p. 62, ¶ 14). Fokas' mother testified that her **only** source of this information was her daughter, and her daughter provided a sworn affidavit that she never heard either Spiros or Phillip make these allegedly defamatory statements and that she never heard anyone say that either Spiros or Phillip made these allegedly defamatory statements. Fokas' mother further admitted under oath that she does not know the source of these alleged defamatory statements but that she merely *guessed* and *figured* it came from Spiros and Phillip. As a result, the only

evidence in this case showed without question that these allegedly defamatory statements originated with a contractor who claimed Fokas asked him to set fire to 229 King Street and then such information was relayed to Mr. Nikatos, Mrs. Nikatos, Mrs. Fokas, and ultimately Fokas. Spiros and Phillip had no involvement whatsoever in this chain of events or in any publication of these allegedly defamatory statements to anyone in this chain of events; more importantly, given the sworn testimony in this case, Fokas is unable to put forth any evidence of any such publication of defamatory statements by Spiros and Phillip. As no one, including any family member of Fokas, has testified that he or she has heard either Spiros or Phillip publish any defamatory statement about Fokas, the trial court properly concluded Fokas' defamation claim against Spiros and Phillip failed as a matter of law.

C. Fokas cannot establish a claim for defamation based upon circumstantial evidence because the evidence shows people other than Spiros and Phillip published these allegedly defamatory statements about Fokas.

Because numerous other sources could have been responsible for the alleged defamatory statements about Fokas and no one can directly attribute the alleged defamatory statements to either Spiros or Phillip, Fokas cannot, as a matter of law, prove a cause of action for defamation based on circumstantial evidence. Fokas correctly states that a defamation cause of action can be proven through circumstantial evidence. Duckworth v. First National Bank of S.C., 254 S.C. 563, 176 S.E.2d 297 (1970). However, in considering the sufficiency of circumstantial evidence in a defamation action, where there is evidence to support that numerous people could have been responsible for the alleged defamatory statements and the alleged defamatory statements cannot only be possibly attributable to the defendant, plaintiff's attempt to establish defamation with

indirect circumstantial evidence fails. Williams v. Lancaster County School District, 369 S.C. 293, 631 S.E.2d 286 (2006).¹⁵

Contrary to Fokas' assertions, no genuine issue of material fact exists and there is not a scintilla of evidence to support publication of any alleged defamatory statements by Spiros or Phillip to any third party through circumstantial evidence. As set forth above, there were numerous individuals who were aware of the alleged rumored incidents involving the fire at 229 King Street and possible insurance fraud besides Spiros and Phillip. Any one of those people could have been responsible for the rumors about Fokas in his alleged defamation claims. The alleged rumors could not be said to have only been possibly attributable to Spiros or Phillip.¹⁶

Fokas seemingly argues the alleged threats Fokas' attorney alleged Spiros and Phillip made during the settlement conference amount to circumstantial evidence that they ultimately in fact published the defamatory statements about Fokas to a third party. Initially, as discussed previously, any and all alleged communications between Barnett and Phillip or Spiros were absolutely privileged and cannot be considered as "circumstantial evidence" to support a defamation cause of action. Thus, Fokas' argument that a "threat" to defame Fokas to Barnett, in and of itself, constitutes circumstantial evidence to support a defamation claim lacks any merit.

¹⁵ Moreover, pursuant to Williams, circumstantial evidence of publication does not create evidence of defamation unless there is no other way that the defamatory information could have leaked to third parties. In this instance, the Affidavits of Gerasimos Nikatos and Rania Nikatos prove that the community had long known of Fokas' rumored nefarious activities based on statements of other individuals not affiliated with Spiros or Phillip. Moreover, although the Duckworth court held that whether there was publication was properly submitted to a jury where there was direct evidence that defamatory statements were made in the presence of third parties, the Duckworth case is irrelevant to the case at hand as there is no evidence at all that there was ever any defamation made within the vicinity of any third parties at all.

¹⁶ See Williams v. Lancaster County School Dist., 369 S.C. 293, 298-99, 631 S.E.2d 286, 289-90 (2006) ("Based on the evidence of record, there were numerous individuals who were aware of the bathroom incident besides Dr. Jordan. Any one of those people could have been responsible for the rumor of an illicit relationship between Philip and Cheryl. The record simply does not support the Williamses' assertion that the only individuals who had knowledge of the incident were Dr. Jordan and John Hardin. Further, the Williamses have conceded that John Hardin had knowledge of the incident. Thus, the rumors cannot be said to have only been possibly attributable to Dr. Jordan, and the Williamses' argument concerning indirect evidence fails.").

Moreover, the cases Fokas cites in support of this contention are easily distinguishable from the present case. First, Fokas relies upon two criminal cases where a defendant threatened to commit a criminal act and prosecutors used the threats against the defendants. State v. Roger Dewitt Prince, 316 S.C. 57, 447 S.E.2d 177 (Ct. App. 1994)¹⁷; State v. Ricky Prince, 335 S.C. 466, 517 S.E.2d 229 (Ct. App. 1999)¹⁸. Fokas argues that “proof of threats to commit a specific act has been recognized routinely by South Carolina courts as competent circumstantial evidence to prove that the individual who made the threat did, in fact, do what was threatened.” A simple review of the cases, however, even in the context of criminal cases, sets forth that a threat, in and of itself, is not sufficient to establish the accused actually committed the crime. Rather, even in criminal cases, more evidence is needed. In addition, applying such criminal prosecution cases in the context of a defamation case would flip defamation jurisprudence on its head. Fokas argues that, as long as someone is willing to testify that someone threatened something, then such testimony provides circumstantial evidence allowing a party to be held responsible for the alleged defamation, based upon an allegation of a mere threat. South Carolina law refutes such absurdity and requires actual proof or a scintilla of evidence that a party actually published defamatory statements about another party to a third party. The cases that Fokas cites simply do not apply in the context of his defamation action. Fokas cannot prove his defamation action based upon circumstantial evidence where there is absolutely no supporting evidence that Spiros or Phillip ever published defamatory statements about Fokas to any third parties. In the present

¹⁷ The trial court allowed evidence of threats made by defendant to hire someone to kill an individual where defendant was charged with accessory before the fact and tried along with the accused murderer who admitted in a statement to murdering the individual. State v. Roger Dewitt Prince, 316 S.C. 57, 60-64, 447 S.E.2d 177, 179-81 (Ct. App. 1994).

¹⁸ Fokas ignores the fact that the circumstantial evidence of a threat to damage a vehicle was supported by direct evidence as an eyewitness actually saw the defendant slash the vehicle’s tire. Id. at 471, 517 S.E.2d at 232.

case, Fokas offered no such supporting direct evidence of publication by Spiros or Phillip, and these criminal prosecution cases are simply inapplicable.

Similarly, Fokas' reliance on Duckworth is misplaced as Duckworth supports the trial judge's grant of summary judgment.¹⁹ In that case, the court held where a third person is present and could have heard the alleged defamatory statements, publication became a question for the jury. Duckworth, 254 S.C. at 570-71, 176 S.E.2d at 301. Unlike the present case, in Duckworth, the plaintiff testified he heard the bank officer make the slanderous statements, and he further testified customers in the bank were close enough to hear what the bank officer said. Id. In the present case, only Fokas' attorney and Spiros and Phillip, both attorneys, were present at the closed-door settlement conference. There was no third party present who could have heard the alleged defamatory statements. Similarly, Fokas offered no other evidence of publication by Spiros or Phillip at any other instance. As a result, the trial court properly found Fokas did not present circumstantial evidence that Spiros and Phillip published defamatory statements about Fokas to third parties, and, as a result, the trial court properly granted summary judgment.

When one considers the sworn testimony of Mrs. Fokas, Mrs. Nikatos, and Mr. Nikatos, it is clear and unequivocal where the alleged defamatory statements about Fokas started and how they eventually got relayed to Fokas. The only evidence in this case demonstrates that Mr. Nikatos heard a contractor claim Fokas asked him to set fire to 229 King Street, that Mr. Nikatos

¹⁹ Duckworth supports Spiros' and Phillip's position and negates Fokas' arguments. In Duckworth, there was unrefuted testimony that other persons were standing nearby who heard the allegedly defamatory statements, although the specific names of the witnesses were unknown. This is completely different than the case at bar where there is no evidence at all that Spiros or Phillip published defamatory statements about Fokas to any third party or within the vicinity of any third party at all. The circumstantial evidence in Duckworth was evidence that third parties heard defamatory statements although the identity of those third parties was not known. There was direct evidence from plaintiff that defendant published the statements. Here, there is no third party that heard any alleged defamatory statements of Spiros or Phillip in any way whatsoever. Fokas seeks to use "circumstantial evidence" to establish some evidence that Spiros and Phillip must have published something to someone; however, such an inference is contrary to South Carolina defamation law which requires some evidence that there was a publication of defamatory statements to some third parties. After nearly three years of litigation, Fokas has utterly failed to provide any evidence whatsoever of any publication to any third party, and the trial court properly granted summary judgment to Spiros and Phillip on Fokas' defamation claim.

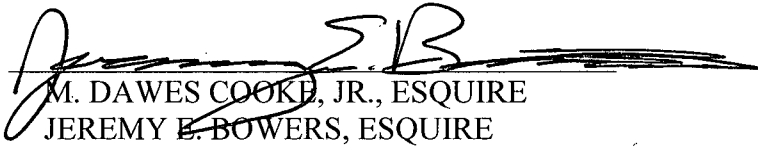
relayed this information to his wife, that Mrs. Nikatos purportedly relayed this information to her mother, and that her mother relayed this information to Fokas. Nowhere in this chain of events are Spiros and Phillip involved concerning any defamatory statements about Fokas setting fire to 229 King Street or filing false insurance claims. These statements were made by other individuals within Fokas' own family, and none of these family members learned about these allegations from either Spiros or Phillip. Not only does the uncontroverted evidence demonstrate that neither Spiros or Phillip published or made these allegedly defamatory statements about Fokas, but the evidence proves that these allegedly defamatory statements about Fokas were published by someone else entirely. As more fully discussed above, the evidence demonstrates that persons other than Spiros and Phillip made these allegedly defamatory statements about Fokas and that Spiros and Phillip had no involvement whatsoever in the chain of events leading to those statements reaching Fokas. Because numerous other sources could have been responsible for the alleged defamatory statements about Fokas, no one can directly attribute the alleged defamatory statements to either Spiros or Phillip, and no third party was near enough to hear the allegedly defamatory statements at a closed-door settlement conference, as Williams requires, Fokas cannot, as a matter of law, prove a cause of action for defamation based on circumstantial evidence.

CONCLUSION

Even when viewing the evidence in the light most favorable to Fokas, there is no genuine issue of material fact and there is not a scintilla of evidence to support Fokas' allegation that Spiros and Phillip published any unprivileged defamatory statements to any third party about Fokas. To the contrary, there is no evidence in the record to show Spiros or Phillip published any defamatory statement to Fokas' sister regarding Fokas. Further, Fokas' mother admitted under oath that she merely "guessed" and "figured" that the source of the alleged defamatory statements was Spiros and Phillip, and she never heard Spiros or Phillip publish any defamatory statements about Fokas. Fokas' argument that circumstantial evidence exists to create an issue of fact that Spiros and Phillip published defamatory statements about him to third parties fails, as a matter of law, because the evidence showed other sources published the defamatory statements and the alleged indirect and circumstantial evidence cited by Fokas does not support the standard required to prove publication based upon circumstantial evidence.

Lastly, even if Spiros or Phillip published any alleged defamatory statement to Fokas' attorney during a closed-door settlement conference, those statements cannot support a cause of action for defamation as a matter of law. Only Fokas' attorney, who as Fokas' agent and alter ego stood in Fokas' place, and Spiros and Phillip, both attorneys, were present at the settlement conference held at the request of Fokas' counsel in response to Fokas' threat of litigation, and there were no third parties present who could have heard any allegedly defamatory statements. As Fokas' agent and alter ego, Fokas' attorney does not constitute a third party as a matter of law. Moreover, any alleged defamatory statements published to Fokas' attorney during the settlement conference were privileged and were otherwise invited by Fokas' attorney.

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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

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SC Court of Appeals

Athan Fokas Respondent/Appellant,

v.

Phillip Ferderigos and Spiros Ferderigos Appellants/Respondents.

CERTIFICATE OF COMPLIANCE WITH RULE 211(b), SCACR

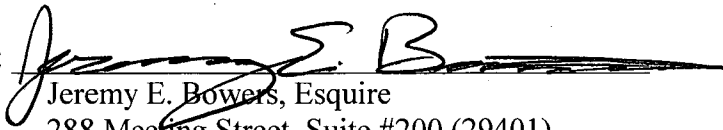
I hereby certify that the following final briefs served and filed in this matter comply with Rule 211(b),

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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