

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

Case No. 2015-CP-10-3891
Appellate Case No. 2018-000516

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SC Court of Appeals

Athan Fokas,

Respondent/Appellant,

v.

Philip Ferderigos and Spiros Ferderigos,

Appellants/Respondents.

**FINAL RESPONDENT'S BRIEF OF
ATHAN FOKAS (PHILLIP FERDERIGOS)**

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STATEMENT OF ISSUE ON APPEAL

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

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

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

In 2009, a fire occurred on the second floor of 229 King Street, resulting in extensive damage.¹ Prior to the fire, the second floor had been used for "overflow dining space" in conjunction with the Restaurant. However, rather than repair the second floor and restore it for its prior use, Fokas and the Ferderigos Brothers agreed to convert the second floor into two (2) rental suites. As such, the insurance proceeds resulting from the fire were used to upfit and convert the second floor into additional residential rental suites.

Old Towne Suites, LLC (the "LLC") was the entity created to operate the rental suites. The LLC was owned by Fokas and the Ferderigos Brothers in the same proportion as their ownership of the building² and was very successful. Due to that success, Fokas and the Ferderigos Brothers began discussing the possibility of creating more profitable rental units within the building in the early half of 2012. An agreement was formed out of those discussions, the basis of which was as follows:

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

² Fokas held $\frac{1}{2}$ interest in the LLC and each Ferderigos Brother held $\frac{1}{6}$ each.

- Fokas and the Ferderigos Brothers agreed to expand the existing building at 229 King Street by the adding two (2) more floors of rental suites to their existing rental suites business which they operated together as the LLC. That plan later expanded and the parties subsequently agreed to add three (3) floors so that six (6) rental suites would be added;
- Fokas and the Ferderigos Brothers would share the costs of design, engineering and permitting in proportion to their ownership interests in the building and the LLC (the percentages being the same);
- Fokas and the Ferderigos Brothers would mortgage the property at 229 King Street to secure the bank loan required to finance the rental expansion plan;
- The loan amount, as confirmed by the commitment letter from South Coast Bank, was to be \$1,800,000;
- The LLC would be the borrower on the loan and the profit stream from the LLC's existing rental suites business would fund payments on the loan;
- Only Jacob Ferderigos and Fokas would personally guarantee the loan from South Coast Bank; and
- Once the loan was closed, construction would commence under a contract with Kevin Carroll, the same contractor who constructed the original rental suites.

After canvassing a number of banks, Fokas received a commitment from South Coast Bank to fund the project. In reliance on that commitment, Fokas and the Ferderigos Brothers began spending substantial sums of their respective personal money to pay for detailed engineering, design and permitting work. The parties learned during the Board of Architectural Review ("BAR") review and approval process, that it would be possible to get

approval to add an additional story to the project. This is when they agreed to revise the plans and the loan to include the aforementioned total of three (3) stories/six (6) suites. In September of 2014, the bank increased the loan amount to cover the estimate for the expanded construction plan and in October of 2014, Fokas executed a contract for the construction of the addition to 229 King Street.

Around that point, *for the first time*, dissention in the ranks surfaced. Spiros Ferderigos informed the group that he would not commit to executing any of the necessary bank documents because he had decided to seek a Family Court judgeship. When Fokas objected to the potential delay, Phillip entered the conversation informing Fokas that he would kill the deal if Fokas did not – in essence - shut up. The relationship between Fokas and the Ferderigos Brothers continued to sour further, with Phillip Ferderigos telling Fokas, among other things:

- That he was losing interest in doing business with Fokas simply because Fokas wanted to move forward with the project;
- That the Appellants never actually agreed to anything, despite the fact that Jacob Ferderigos signed the commitment letter from South Coast Bank and all of the parties had shared in approximately \$90,000 of expenses to design and permit the building expansion; and
- That he was now unilaterally inserting new, self-serving terms into the parties' agreement *that had never previously been mentioned*.

Following voluminous electronic mail exchanges between Fokas and the Ferderigos Brothers, most of which involved the Ferderigos Brothers backing out of various aspects of the previously agreed upon project, the deal died. Fokas filed a breach of contract action

against the Ferderigos Brothers insisting that they live up to their promises and expectations. As the bad blood continued to boil, Appellants made the following comments regarding Fokas:

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

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

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

- That the Appellants reneged on the plan to add the additional rental suites at 229 King Street because it would result in Phillip Ferderigos and/or Spiros Ferderigos not being able to eat for free at the Old Towne Restaurant;
- That neither Phillip nor Spiros Ferderigos have good business sense;
- That Phillip and Spiros Ferderigos are bad business people; and

- That Phillip and Spiros Ferderigos were accusing Fokas of setting fire to 229 King Street.

Fokas eventually moved for summary judgment with respect to the Appellants' claims for defamation. Despite Appellants' attempt to prevent the trial court from granting the motion by introducing even more allegedly defamatory comments made by Fokas at the hearing on Fokas' motion³, the trial court granted summary judgment in favor of Fokas. From that Order, Phillip Ferderigos appeals.

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

ARGUMENT

I. STANDARD OF REVIEW

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

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

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

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

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

There is no genuine issue of material fact in the record in this case as to the elements of defamation. Further, there is certainly no evidence that Fokas made any defamatory statements to any third parties about Phillip Ferderigos. Alleged publication of any alleged defamatory statements cannot constitute defamation as any alleged statements were made to a party in the companion Contract Case and were made during the course of the disagreement between the parties to that case. The statements at issue were part of the disagreement which matured into the Contract Case. As such, any alleged defamatory statements do not give rise to defamation, but are protected by the litigation privilege.

Despite extensive discovery, Phillip Ferderigos failed to identify any person to whom any the alleged defamatory statements were made or published other than Jacob Ferderigos, Appellant's brother and co-defendant in the Contract Case. In his responses to interrogatories, Phillip Ferderigos alleged that defamatory statements ***might*** have made to Fokas' mother, Irene Fokas, his father, Spiros Fokas, to his sister, Rania Nikatos, Kevin Carroll, and Justin Hansen. See Record on Appeal ("R.") at pp. 400-424; 503-521. Spiros Ferderigos only offered similar generalities in his deposition testimony. See R. pp. 425-441; 522-526. Spiros Ferderigos noticed the deposition of Kevin Carroll in the companion Contract Case but cancelled it and never rescheduled it. Neither Spiros Fokas nor Rania Nikatos have provided any testimony that Fokas defamed Phillip Ferderigos in any way.

The publication of the alleged statements that Phillip Ferderigos claims "on information and belief" to have occurred is not supported by even a scintilla of proof. Consistent with Phillip Ferderigos' lack of any evidence of publication, Fokas has denied in his deposition and affidavit testimony making any such statements to third parties. See R. pp. 397-399; 500-502; 453-459; 536-542. Irene Fokas was deposed in this case and denied any of the alleged statements were made to her by Fokas. See R. pp. 442-452; 527-535. Justin Hansen has denied by affidavit ever being told anything about the fire at 229 King St. or the Defendants' accusations about the cause of the fire by Fokas. In the absence of any evidence of publication to a third party which is not subject to the litigation privilege, Phillip Ferderigos' claims fail as a matter of law and were properly disposed of by the trial court.

A statement may be actionable *per se*, in which case the defendant is presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages. Under common law, slander is actionable *per se* only when it charges the plaintiff with one of five types of acts or characteristics: (1) commission of a crime or moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; (5) unfitness in one's business or profession. *Holtzscheiter v. Thomsan Newspapers, Inc.*, 332 S.C. 502, 511 n.5, 506 S.E.2d 497, 502, n. 5 (1998). "Or a statement may be not actionable *per se*, in which case nothing is presumed and the plaintiff must plead and prove both common law malice and special damages." *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006). Common law malice means the defendant acted with ill will toward the plaintiff or acted recklessly or wantonly, i.e. with a conscious disregard of the plaintiff's rights. *Padgett v. Sun News*, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982). "The determination of whether or not a statement is actionable *per se* is a matter of law for the court to resolve." *Erickson*, 368 S.C. at 466, 629 S.E. 2d at 665.

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

Phillip Ferderigos sets out to convince this Court that the trial court "misapply[ed] basic defamation law and the absolute judicial privilege to [this case]." *Phillip Ferderigos' Brief* at p. 17. He dedicates numerous pages of his Brief to the idea that Fokas' statements were defamatory because they were false, an argument that the trial court found wholly unpersuasive, while offering no evidence to suggest, let alone prove those statements **were, in fact, not true**. Not once in all those pages did he show that Fokas' alleged statements contained the single most important element of the cause of action: falsity. Thus, while truth

is an affirmative defense in a defamation action and while the court is entitled to presume the falsity of statements where defamation *per se* is alleged, the trial court in this instance was correct in rejecting any such presumption because no *per se* defamation occurred.

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

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

Even if this Court could conclude that any of the alleged defamatory statements made by Fokas about Phillip Ferderigos constitute defamation, those statements (1) related directly to the dispute between Fokas and the Ferderigos Brothers as that dispute matured into the Contract Case, or (2) were made during the course of litigation. Phillip Ferderigos argues, however, that Fokas' allegedly defamatory statements should be viewed in isolation and expends great effort to convince this Court that the statements made were made with

“malice” without regard to the fact that those statements, in the trial court’s eyes, were clearly protected by the litigation privilege.⁴

There is no mention of the word “malice” in the trial court’s Order and Phillip Ferderigos made no motion requesting that the trial court consider that issue and rule on it. As such, the issue is not properly before this Court. “It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (citing Creech v. South Carolina Wildlife and Marine Resources Dep’t, 328 S.C. 24, 491 S.E.2d 571 (1997)). In order to preserve an issue for appellate review, “[t]he issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.” S.C. Dept. of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007)(citing Broom v. Southeastern Highway Contracting Co., 291 S.C. 93, 352 S.E.2d 302 (Ct. App. 1986). See Dixon v. Besco Eng’g, Inc., 320 S.C. 174, 463 S.E.2d 636 (Ct. App. 1995)(holding that issues on which the trial judge never ruled and which were not raised in a post-trial motion are not preserved for appeal); United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992)(holding that where the circuit court sitting on appeal did not address an issue and appealing party made no motion

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

pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure to have it rule on the issue, the allegation was not preserved for further review by the Court of Appeals).

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

Even if this Court finds that the “malice” argument was preserved for appeal, it has no merit as, again, there is no evidence of malice on the part of Fokas. Again, Phillip Ferderigos offers a plethora of reasons why he considers Fokas’ statements to be “malicious” without offering any evidence of their maliciousness. That lacking is fatal to his argument. “Actual malice or malice in fact is not presumed and must be proved.” Jones v. Garner, 250 S.C. 479, 488, 158 S.E.2d 909, 913-914 (1968).

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

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

Phillip Ferderigos' Brief at p. 22. That statement, even read in the context Phillip Ferderigos advocates, simply does not prove malice. Phillip Ferderigos may not like the statement, but his distaste for it does not make it a statement made with malice.

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

Even if this Court were to determine that any statements about Phillip Ferderigos made by Fokas were false (no evidence in the Record) and offered with malice (again - no evidence in the Record and an issue not properly before the court), all of the statements complained of related directly to the disagreement and dispute between Fokas and the Ferderigos Brothers which eventually became the Contract Case. As such, the statements are covered by the litigation privilege and are absolutely privileged.

Any statement made as part of a judicial proceeding, in or out of court, is absolutely privileged under South Carolina law. *Crowell v. Herring*, 301 S.C. 424, 392 S.E.2d 464 (Ct. App. 1990). In *Crowell*, a Veterans of Foreign Affairs court martial was determined to be a judicial proceeding and statements made during the course of the proceeding were absolutely privileged. "The trial court held the VFW court-martial was a judicial proceeding. Crowell does not appeal this finding, nor does he argue the defendants' statements were irrelevant to the issues he was eventually brought to trial on." *Id.* at 430, 392 S.E.2d at 467. "[T]he investigation of Crowell's alleged misdeeds can be likened to a prosecutor gathering evidence, interviewing witnesses and preparing a case. Accordingly, we hold the statements made by Allen and Wilder during the course of their investigation of Crowell as trustees and as members of the investigatory committee, were absolutely privileged, ***inasmuch as the statements bore relation to the contemplated proceeding.***" [*emphasis added.*] *Id.* at 431,

392 S.E.2s at 467. See also Striberg v. Raymond, 370 Mass. 105, 345 N.E.2d 882 (1976) (holding that an attorney writing to a defendant threatening litigation could not be sued for defamation given that the statements made were to the very defendant and addressed the very claims which were raised in the eventual litigation); and Mathis v. Kennedy, 243 Minn, 219, 225, 67 N.W.2d 413, 418 (1954) (concluding that statements made in a court of record having jurisdiction of a guardianship proceeding were absolutely privileged so long as “it has reference to or relation to or connection with the case before the court”).

Phillip Ferderigos argues that Fokas’ publication of statements made to Jacob Ferderigos satisfies the element of publication to a third party required when alleging a defamation cause of action. Any statements to Jacob Ferderigos were in the form of text messages sent to Jacob and the Appellants as part of a discussion and disagreement over the development project to add floors to the building at 229 King Street. These discussions and disagreement resulted in the filing of the Contract Case. The statements concerning parties “eating for free,” statements questioning Appellants’ business judgment should they abandon the expansion project and statements challenging the 11th hour demands by Phillip Ferderigos not only failed to be defamatory, they were solely made in the context and scope of that same disagreement that matured into the Contract Case. Further, they are directly within the scope of the issues surrounding Fokas’ allegations of breach of contract and breach of the duty of care. Inasmuch as Fokas’ statements of bore relation to the contemplated proceeding, Fokas’ text messages and all discussions between Fokas and the Ferderigos leading up to and creating the disagreement that became the contract case are absolutely privileged.

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

Phillip Ferderigos asserts that because the alleged defamatory comments were made prior to any formal litigation, and further that Fokas has defamed with a supposed "reckless abandon," the absolute litigation privilege should not be extended in the present case because that would go against public policy, giving a "blank check to defame your legal opponents." *Phillip Ferderigo's Brief* at 26: n. 16. Phillip Ferderigos' attempts to paint Fokas' statements as off-handed and unwieldy falsehoods; however, Phillip Ferderigos has yet again failed to acknowledge that the alleged defamatory statements, which have not been shown to be false, bear direct relation to the contemplated judicial proceeding: the Contract Case. Therefore, contrary to Phillip Ferderigos' assertion, public policy is served well by extending the absolute judicial privilege in this case because Fokas' statements share a tight nexus with the Contract Case and are not unrelated slanders.

The trial court properly granted Fokas' motion for summary judgment because no statement upon which Appellants rely fell outside the litigation privilege. South Carolina also recognizes the doctrine of qualified privilege as protection from actions for defamation:

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

Conwell v. Spur Oil Co. of Western South Carolina, 240 S.C. 170, 178-179, 125 S.E.2d 270, 274-275 (1962).

Jacob Ferderigos was a member of the LLC and the expansion agreement that is the center of all discussions and the disagreement giving rise to this action and the Contract Case. Jacob, therefore, shared the interests of Fokas and while he may have taken different position than Fokas, Fokas' statements to him about matters related to the expansion project at 229 King Street fall, if not under the protection of the absolute litigation privilege, then wholly and clearly within the protection of qualified privilege. Consequently, Fokas' statements to Jacob Ferderigos are not actionable. In spite of Appellants' efforts to repackage and reinterpret Fokas' texts and emails and/or Appellants' efforts to manipulate deposition testimony from a confused non-party subject to repetitive harassment through an interpreter, Appellants fail to produce any allegedly defamatory statement that could fall outside of the litigation privilege. As such, summary judgment in favor of Fokas should stand.

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

A statement may be actionable *per se*, in which case the defendant is presumed to have acted with common law malice and the plaintiff is presumed to have suffered general damages. Under common law, slander is actionable *per se* only when it charges the plaintiff with one of five types of acts or characteristics: (1) commission of a crime or moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; (5) unfitness in one's business or profession. Holtzscheiter v. Thomsan Newspapers, Inc., 332 S.C. 502, 511 n.5, 506 S.E.2d 497, 502, n. 5 (1998). "Or a statement may be not actionable *per se*, in which case nothing is presumed and the plaintiff must plead and prove both common law malice and special damages." Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 465, 629 S.E.2d 653, 664 (2006). Common law malice means the defendant acted with ill will toward the plaintiff or acted recklessly or wantonly, i.e. with a conscious disregard of the plaintiff's rights. Padgett v. Sun News, 278 S.C. 26, 32, 292 S.E.2d 30, 34 (1982). "The determination of whether or not a statement is actionable *per se* is a matter of law for the court to resolve." Erickson, 368 S.C. at 466, 629 S.E. 2d at 665.

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

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

Phillip Ferderigo's Appellant's Brief at 29-30.

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.

Phillip Ferderigo's Appellant's Brief at 31. Obviously, nothing in those texts is (1) defamatory if true; (2) defamatory as stated; and, most importantly (3) defamatory **at all** simply because Phillip Ferderigos does not like it. A statement is not necessarily defamatory simply because it is unfavorable. Murphy v. News & Courier, 141 S.C. 51, 51, 139 S.E. 189, 190 (1927) ("To hold libelous per se the mere statement that one has failed, or even that he was unable, to furnish bond ... would be carrying the law of libel beyond any precedent that has been called to our attention."); Costas v. Florence Printing Co., 237 S.C. 655, 663, 118 S.E.2d 696, 700 (1961) ("We point out that there is no allegation that the respondent lost any customers, or had any diminution in trade. There is no allegation of special damages for losses sustained by reason of the publication of the alleged libelous statement. In short, the complaint does not allege special damages."); Dauterman v. State Record Co., 249 S.C. 512, 519, 154 S.E.2d 919, 922 (1967) ("The language complained of by the plaintiff was naturally displeasing to him and was unquestionably of an unfavorable nature. However, it by no means follows that a publication which is unfavorable is also libelous.").⁵

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

⁵ A review of these three (3) decisions, cited by the Trial Court in its *Order*, yet summarily dismissed by Phillip Ferderigos (ostensibly because they do not further his agenda) reveals that they are still good law and oft cited.

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

Phillip Ferderigos' final argument, one raised for the first time on appeal and an argument Fokas can only hope was offered in jest, is that Fokas had no legitimate business-related reason to make the allegedly defamatory statements about Spiro Ferderigos obtained by Appellants at the 11th hour. Those statements, per Phillip Ferderigos, qualify as *per quod* defamation. While nothing could be further from the truth, this argument is procedurally barred as the issue of *per quod* defamation was not raised or ruled on by the trial court prior to appearing in Appellants' appellate briefs.

1. The Issue of Alleged *Per Quod* Defamation Is Not Properly Before this Court and Should Not Be Considered.

Without regard to whether or not any statements made by Fokas give rise to *per quod* defamation, the trial court's order is devoid of any reference to defamation *per quod* and Phillip Ferderigos never raised the issue in any subsequent motions to the trial court. As such, this argument is not properly before this Court. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)(citing Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997)). In order to preserve an issue for appellate review, "[t]he issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity." S.C. Dept. of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007)(citing Broom v. Southeastern Highway Contracting Co., 291 S.C. 93, 352 S.E.2d 302 (Ct. App. 1986). See Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 463 S.E.2d 636 (Ct. App.

1995)(holding that issues on which the trial judge never ruled and which were not raised in a post-trial motion are not preserved for appeal); United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992)(holding that where the circuit court sitting on appeal did not address an issue and appealing party made no motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure to have it rule on the issue, the allegation was not preserved for further review by the Court of Appeals).

“Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.” I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). “Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error.” S.C. Dept. of Transp. v. M & T Enter., 379 S.C. 645, 658-59, 667 S.E.2d 7, 15 (Ct. App. 2008)(citing Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000)). Accordingly, “it is a litigant’s duty to bring to the court’s attention any perceived error, and the failure to do so amounts to a waiver of the alleged error.” S.C. Dept. of Transp., 372 S.C. at 301, 641 S.E.2d at 907 (citing Parks v. Morris Homes Corp., 245 S.C. 461, 471, 141 S.E.2d 129, 134 (1965)). “[E]ven if an issue is preserved at the trial court level, it must still be properly raised and argued to the appellate court.” S.C. Dept. of Transp., 379 S.C. at 658-59, 667 S.E.2d at 15. “[I]ssues not argued in the brief are deemed abandoned and will not be considered on appeal.” Fields v. Fields, 342 S.C. 182, 191 n.8, 536 S.E.2d 684, 689 n.8 (Ct. App. 2000) (citing First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994)); see also Glasscock, Inc. v. U.S. Fid. and Guar. Co., 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001)(“[A] one sentence paragraph raised in an appellant’s brief was insufficient to preserve the issue for appeal.”).

The Appellants and Jacob Ferderigos unquestionably agreed to the expansion of the building at 229 King Street and spent substantial sums to pay for detailed engineering, design and permitting work. These costs, which totaled almost \$90,000, were shared by the parties in proportion to their ownership in the building and the Old Towne Suites, LLC. Sadly, as shown by the uncontradicted evidence in the record of the Contract Case and mostly because of Phillip ferderigos' selfish interests, Appellants thereafter attempted to pull out of the project and eventually claimed there never was any agreement to complete the project, despite the group expending \$90,000 in preparation for it.⁶ Despite all of that, Phillip Ferderigos is now taking the position that Fokas was to blame for the project's demise and that Fokas made defamatory statements in retaliation for the Appellants' refusal to go through with the project. Considering the unrefuted evidence in the record and Phillip Ferderigos' obvious defamation of Fokas, that position is *utterly amazing*.

2. Phillip Ferderigos' Claim of *Per Quod* Defamation Lacks Merit.

Even if this Court finds that the *per quod* argument was preserved for appeal, it has no merit and is clearly offered as a last-ditch effort to manufacture some scintilla of evidence where the trial court agrees the record has none and further entice this court to overrule privilege clearly established in law. "South Carolina courts use libel *per quod* to refer to situations where the defamatory meaning is not apparent without reference to extrinsic evidence." Hubbard and Felix, *The South Carolina Law of Torts*, at p. 491 (3rd Ed. 2004).

⁶ That assertion, in and of itself, is indicative of the untenable positions the Appellants have taken throughout this litigation.

None of the statements cited in Phillip Ferderigos' appellant's brief requires any "extrinsic evidence" to make clear any alleged defamatory meaning, even if taken in the context that Phillip Ferderigos suggests (which Fokas disputes):

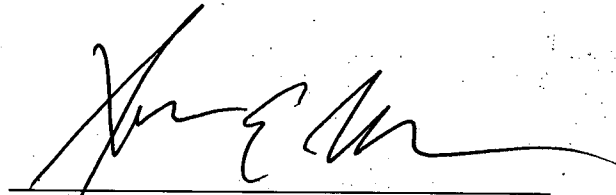
- The Appellants did not agree to go forward with the plan to add additional rental suites at 229 King Street because the Appellants could not eat for free⁷ at the Old Towne Restaurant;
- Neither Appellant has good business sense;
- The Appellants are bad business people;
- The Appellants were accusing Fokas of setting fire to 229 King Street;
- Spiros Ferderigos violated an ethical rule by threatening Fokas; and
- Spiros Ferderigos is unfit as a solicitor and/or attorney.

None of those statements requires extrinsic evidence for even the most simplistic mind to understand. Putting Phillip Ferderigos' perception of those statements aside, the statements simply either (1) are not defamatory or (2) are protected by the litigation privilege. Phillip Ferderigos failed to raise this argument to the trial court and further failed to argue that protections of privilege are waived under *per quod* defamation. Even if he had, Phillip Ferderigos would not have been able to produce any evidence sufficient to withstand summary judgment. Therefore, the trial court made no error in granting Fokas' motion for summary judgment.

⁷ Fokas could respond specifically to the approximately 10 pages of Phillip Ferderigos' brief that seems oddly focused on the concept of "Eating for Free" (and how it impacts his reasoning in this matter). However, since none of those examples is remotely defamatory under any theory espoused by Phillip Ferderigos, such a response does not seem warranted.

CONCLUSION

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



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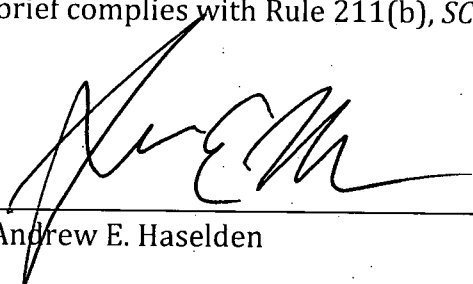
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this brief complies with Rule 211(b), *SCACR*.



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