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Public-Figure Defamation Actions in South Carolina - Courts Stay Mindful of the Defendant's State of Mind

Eric G. Zaiser

PUBLIC-FIGURE DEFAMATION ACTIONS IN SOUTH CAROLINA–COURTS STAY MINDFUL OF THE DEFENDANT'S STATE OF MIND

I. INTRODUCTION

"**Defame**, v. To lie about another. To tell the truth about another."[1]

While success in a defamation action is not completely divorced from the truth of the allegedly defamatory statement (Bierceian satire notwithstanding), generally the state of mind of the defendant is a crucial factor. When a public-figure plaintiff brings a defamation action, he must be ready to present not just circumstantial evidence that should have or could have raised doubts as to the accuracy of the statement, but must also provide clear and convincing evidence pertinent to the alleged defamer's state of mind regarding the statement.

This Comment discusses recent cases in which the Supreme Court of South Carolina has found in favor of defamation defendants where there is a lack of evidence indicating the defendants had the requisite "actual malice" state of mind. These reversals are in spite of the fact that the plaintiffs were able to cast doubt on the ultimate truth of the statements. This trend, a very positive one in light of the fundamental liberties at stake, will likely be ongoing.

Part II of this Comment provides a brief overview of public-figure defamation law in South Carolina. Part III presents three recently decided cases involving public-figure defamation plaintiffs, and Part IV contemplates the potential for reversal of the most recent case. Part V provides concluding remarks.

II. DEFAMATION LAW, ACTUAL MALICE, AND SOUTH CAROLINA

A. Development

On March 9, 1964, common-law defamation went out the window with the United States Supreme Court's decision in *New York Times Co. v. Sullivan.*[2] Sullivan and several other public officials successfully brought a libel suit against the *Times* for publishing an advertisement relating to its mistreatment of those fighting for civil rights;[3] at trial evidence showed that the descriptions therein were not entirely accurate.[4] The Supreme Court reversed the ruling of the Alabama

1. AMBROSE BIERCE, THE DEVIL'S DICTIONARY 29 (Dover Publications Inc., 1958) (1911).
2. 376 U.S. 254 (1964).
3. *Id.* at 264–65.
4. *Id.* at 258–59.

Supreme Court and famously created a rule "that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct, unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[5]

The progeny of the *New York Times* case affects numerous aspects of state defamation law. Many of these defamation cases are discussed in Chief Justice Toal's concurring opinion in *Holtzscheiter v. Thomson Newspapers, Inc.*,[6] in which she provided a new analytical framework to clarify the "mind-numbingly incoherent" aspects of South Carolina defamation law.[7] As stated in *Holtzscheiter*, the elements of defamation include:

> (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher [which implicates the actual malice standard when the plaintiff is a public figure]; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[8]

With regard to fault of the publisher, Toal's framework provides that, in order for a public person to recover for reputational injury in South Carolina, one must show actual malice by "clear and convincing proof."[9] As to summary judgment under South Carolina Rule of Civil Procedure 56, South Carolina's Supreme Court found the logic in *Anderson v. Liberty Lobby, Inc.*[10] persuasive and stated that "the appropriate standard at the summary judgment phase on the issue of constitutional actual malice is the clear and convincing standard."[11]

The *Holtzscheiter* case, while setting forth the clearest statement of the actual malice standard, is certainly not the first statement of actual malice in South

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5. *Id.* at 279–80.

6. 332 S.C. 502, 506 S.E.2d 497 (1998).

7. *Id.* at 516, 506 S.E.2d at 505 (Toal, J., concurring).

8. *Id.* at 518, 506 S.E.2d at 506.

9. *Id.* at 522–23, 506 S.E.2d at 508 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974)). *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 285–86 (1964) (referring to the "convincing clarity which the constitutional standard demands").

10. 477 U.S. 242, 255–56 (1986) (finding the appropriate summary judgment question was "whether the evidence on the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not").

11. George v. Fabri, 345 S.C. 440, 454, 548 S.E.2d 868, 875 (2001); *see also* Sunshine Sportswear & Elecs., Inc., v. WSOC Television, Inc., 738 F.Supp 1499, 1505 (D.S.C. 1989) ("Summary judgment occupies a position of great importance in libel actions as compared with other civil actions, due to the possible chilling effect on constitutionally protected speech which would result from the defense of defamation claims.").

Carolina.[12] In *Miller v. City of West Columbia*,[13] the plaintiff was defamed when his superior, Broom, reported, and *The State* newspaper printed, that Miller had sexually harassed a co-worker.[14] The Supreme Court of South Carolina affirmed the trial court ruling for Miller because "Broom's conclusion . . . was factually unsupported."[15] Also, the court found "that Broom had serious reservations about [the victim's] allegations," which amounted to making the statement "with reckless disregard for the truth."[16]

The court also encountered the actual malice standard in *Peeler v. Spartan Radiocasting, Inc.*,[17] where Peeler, an incumbent state senator, had successfully brought a libel action against a television station and its reporter. Peeler alleged the defendant's television news stories implied that he was involved in forging names on a ballot petition.[18] In its *de novo* review of the the actual malice issue, the court found no evidence of actual malice. The court adopted the reasoning of *McMurry v. Howard Publications, Inc.*[19] that "a subjective awareness of probable falsity cannot be demonstrated under the standard of 'convincing clarity' namely, by evidence showing the publisher and the plaintiff disagreed with respect to their perceptions of events which they both observed."[20]

B. Recent Cases Bring the Subjective Intent Aspect of Actual Malice Into Sharp Relief

Recently in South Carolina, courts have applied the actual malice standard several times in cases public-figure plaintiffs have brought. In each, the supreme court overturned the court of appeals on the ground that the evidence did not support a finding of actual malice.[21]

Read alone, the cases present a sympathetic factual scenario for the respective

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12. In fact, the actual malice standard was not applied in *Holtzscheiter* because it involved a private-figure plaintiff. *Holtzcheiter*, 332 S.C. at 511, 506 S.E.2d at 502.

13. 322 S.C. 224, 471 S.E.2d 683 (1996).

14. *Id.* at 227, 471 S.E.2d at 685.

15. *Id.* at 228, 471 S.E.2d at 686.

16. *Id.* at 229, 471 S.E.2d at 686. "At trial, Broom stated, '[that he] was uncertain about [the victim's] allegations. [He] had no firm conclusions[, and] honestly did not know whom to believe.'" *Id.*

17. 324 S.C. 261, 478 S.E.2d 282 (1996).

18. *Id.* at 263, 478 S.E.2d at 283.

19. 612 P.2d 14 (Wyo. 1980), *cited in Peeler*, 324 S.C. at 266–67, 478 S.E.2d at 285.

20. *Peeler*, 324 S.C. at 266–67, 478 S.E.2d at 285 (quoting *McMurry*, 612 P.2d at 14); *see infra* note 70 (discussing *Peeler* and the "rational interpretation" doctrine).

21. Elder v. Gaffney Ledger, Inc., 333 S.C. 651, 511 S.E.2d 383 (Ct. App. 1999), *rev'd*, 341 S.C. 108, 533 S.E.2d 899 (2000); Fleming v. Rose, 338 S.C. 524, 526 S.E.2d 732 (Ct. App. 2000), *rev'd*, 350 S.C. 488, 567 S.E.2d 857 (2002); *cf.* Anderson v. Augusta Chronicle, 355 S.C. 461, 585 S.E.2d 506 (Ct. App. 2003) (As of the time this Comment was published, the Supreme Court of South Carolina had not yet issued a decision on whether the evidence supported a finding of actual malice), *cert. granted*, No. 3597, Shearouse Adv. Sh. No. 37 at 12 (Oct. 13, 2003).

plaintiffs; each plaintiff was featured in a prominent news story of arguably dubious veracity, and each suffered damage to his reputation. Looking at the less-than-compelling accuracy of the statements in question[22] and the resulting harm in each case, the plaintiffs seem entitled to recover. However, this ex post "gut reaction"—that the defendants should have exercised more care and perhaps investigated further—does not properly take into account whether the "state of mind required for actual malice [was] brought home" to the publishers.[23] As the United States Supreme Court stated in *Harte-Hanks Communications Inc., v. Connaughton*, reckless disregard for the truth is "more than a departure from reasonably prudent conduct," and a "failure to investigate . . . is not sufficient to establish reckless disregard."[24]

Although the statement's truth is not irrelevant to the actual malice inquiry,[25] there is a fine line between considering evidence of a statement's truth and losing sight of the state of mind of the publisher altogether. The actual malice determination focuses on the state of mind of the defamer. Reading *Fleming, Elder,* and *Anderson* together illustrates how such a determination can inadvertently transform from an evaluation of actual malice into an evaluation of the truth or falsity of the defamatory statements themselves.

This metamorphosis appears to occur during the daunting task of determining if the publisher "entertained serious doubts" as to the truth or falsity of the statements. This task is daunting because, due to the great chance of error in determining the subjective state of mind of a self-interested defendant after-the-fact, the proof can be provided by circumstantial evidence.[26]

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22. In *Elder*, the defamatory statement was the transcript of an anonymous call alleging that Elder, the Blacksburg Police Chief, was being paid off by drug dealers. *See Elder,* 341 S.C. at 112–13, 533 S.E.2d at 901. The statement in *Fleming* related to disciplinary action against Fleming for failing to fully discuss information pertinent to an ongoing investigation. *Fleming*, 350 S.C. at 493, 567 S.E.2d at 859. In *Anderson*, the defamatory statements related to an assertion the plaintiff told the defendant newspaper he was in the National Guard and subsequent questioning by the paper of defendant's integrity in an editorial entitled "Let the Liar Run." *Anderson*, 355 S.C. at 468–69, 585 S.E.2d at 510–11.

23. New York Times Co. v. Sullivan, 376 U.S. 254, 287 (1964).

24. 491 U.S. 657, 688 (1989).

25. *Id.* at 668 ("[A] plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence . . . . and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry."

26. *See* St. Amant v. Thompson, 390 U.S. 727 (1968).

> The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where

The defendant's state of mind is of paramount importance because, ultimately, the First Amendment's umbrella of protection extends to speech that is "a product of a *process of judgment* that is independent, audience oriented, and grounded in a reasoned effort to publish information . . . judged useful and important for the maintenance of freedom in a self-governing society"[27]—considerations which implicate the publisher's state of mind. Although this leaves room for error, such error must be in favor of defendants,[28] for, in the words of Mr. Justice Black: "[t]his Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials."[29]

Therefore, in cases such as those discussed below where there is only circumstantial evidence as to the truth of the defamatory statements and little evidence as to the actual state of mind of the alleged defamer, it is appropriate to conclude that the plaintiff is unable to prove actual malice with convincing clarity.

III. ACTUAL MALICE IN ACTION: THREE DIFFICULT CASES

A. Fleming v. Rose

The Supreme Court of South Carolina's latest word on actual malice is *Fleming v. Rose*.[30] In *Fleming*, the only direct evidence as to the state of mind of Rose (the alleged defamer) was his testimony that he believed in the veracity of the reports provided to him in the course of an investigation that he oversaw—reports which "he had no reason to doubt."[31] Although there was circumstantial evidence that he had some uncertainty about the source of the information and the handling of the investigation, such uncertainty does not work to counter the evidence of Rose's subjective belief in the information's truth. Thus, the supreme court properly applied the actual malice standard to determine that Rose lacked the requisite state of mind for defamation liability.[32]

Fleming was a state trooper who spoke with another trooper, Cobb, who was involved in an accident.[33] The first investigation into the accident had been botched; consequently two more investigations probed an alleged cover-up of the first investigation.[34] During the third investigation Cobb spoke with Fleming and

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there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. *Id.* at 732.

27. Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 760 (1999).

28. In cases involving public-figure plaintiffs and media defendants any uncertainity usually favors the defendants.

29. *Times*, 376 U.S. at 297 (Black & Douglas, J., concurring).

30. 350 S.C. 488, 567 S.E.2d 857 (2002).

31. *Id.* at 497, 567 S.E.2d at 861.

32. *Id.* at 494–97, 567 S.E.2d at 860–62.

33. *Id.* at 491, 567 S.E.2d 859.

34. *Id.* at 491, 567 S.E.2d at 858–59.

allegedly provided information that would have hastened the outcome of the final investigation.[35] The investigators concluded that Fleming failed to report the entire conversation with Cobb. Fleming was disciplined, and his name was included in a press release issued by Rose regarding the disciplinary action against the troopers involved in the imbroglio.[36]

Fleming brought suit for defamation and the trial court granted summary judgment to Rose, "ruling that Fleming was a public official" and that there was no evidence of actual malice on Rose's part.[37] The South Carolina Court of Appeals reversed the trial court and held that there was evidence from which the jury could infer Rose acted with actual malice.[38]

The Supreme Court of South Carolina reversed the court of appeals and reinstated the trial court's grant of summary judgment.[39] The supreme court noted that the court of appeals relied on the following facts: (1) It was not normal department policy to include the names of officers in notifications of disciplinary proceedings; and "(2) the fact that the investigation did not involve Fleming's direct supervisor, Caulder."[40] The court held that the former was not violative of a "professional standard" and that the latter was "not supported by the record."[41]

Instead, the Supreme Court honed in on the evidence directly relating to Rose's actual state of mind regarding the truth of the statement itself: "Rose testified he had no reason to doubt the investigation was not thorough, solid, correct, and truthful."[42] Such a characterization of Rose's testimony differs from that of the court of appeals, which noted:

> Rose testified he had "no idea" where information implicating Fleming originated. Rose further testified he was not aware Caulder had not been interviewed regarding the information he received from Fleming. Rose could not remember stating in an interview "these men set a deplorable example" but conceded "there were a lot of mistakes made in this case."[43]

This testimony, while pertaining to Rose's subjective belief regarding the investigation generally, is not indicative of his subjective belief as to the truth or falsity of his statement. Instead, the testimony relates to how the investigation was

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35. *Id.* at 491–92, 567 S.E.2d at 859.

36. *Fleming*, 350 S.C. at 492–93, 567 S.E.2d at 859.

37. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 859 (2002).

38. Fleming v. Rose, 338 S.C. 524, 541, 526 S.E.2d 732, 741 (Ct. App. 2000), *rev'd* 350 S.C. 488, 567 S.E.2d 857 (2002).

39. *Fleming*, 350 S.C. at 497, 567 S.E.2d at 862.

40. *Id.* at 495–96, 567 S.E.2d at 861.

41. *Id.* at 496, 567 S.E.2d at 861. Caulder's testimony regarding questioning by investigator Ivey was equivocal, and Ivey testified that he did interview Caulder.

42. *Id.* at 497, 567 S.E.2d 861.

43. *Fleming*, 338 S.C. at 536, 526 S.E.2d at 738–39 (Ct. App. 2000).

conducted and ultimately whether or not the statement (that Fleming failed to report fully the contents of the Cobb conversation) was true. The supreme court declined to use the circumstantial evidence and "read between the lines" where Rose's actual belief was clear, and the circumstantial evidence *also* showed Rose could rely on his information.[44]

Fleming demonstrates how direct evidence of the defamer's subjective belief in the statement's truth must be rebutted with more than just circumstantial evidence of the possibility of a statement's falsity. The circumstances must be such that serious doubt as to the truth of the statement surely must have been raised in the alleged defamer's mind.

B. *Elder v. Gaffney Ledger*

Actual malice was also a matter of contention in *Elder v. Gaffney Ledger*.[45] As in *Fleming*, attendant circumstances produced some uncertainty as to the accuracy of the alleged defamatory statements. Also like *Fleming*, the plaintiff's circumstantial proof was not enough to counter the alleged defamer's subjective belief in the truth of the statement.[46]

Wayne Elder, the Chief of Police for the town of Blacksburg, South Carolina, brought suit against the *Gaffney Ledger* after it printed an editorial statement hypothesizing that drug dealers were paying off the Chief; at trial "[t]he jury awarded him $10,000 in actual damages and $300,000 in punitive damages."[47]

The South Carolina Court of Appeals affirmed the lower courts ruling,[48] relying upon evidence that the editor, Sossamon, "failed to investigate or verify the information" that appeared in the editorial, that the newspaper erased the recording that led to the editorial, that "Sossamon pled guilty to manufacturing marijuana in 1991," and "that he had been 'rude' to Chief Elder's wife on one occasion."[49]

The Supreme Court of South Carolina reversed the court of appeals, stating that the evidence was "patently insufficient to demonstrate Sossamon in fact entertained serious doubts as to the truth of the publication."[50] The court gave short shrift to inferences drawn by the court of appeals from the facts that Sossamon did not investigate the call and the tape was erased.[51] To the contrary, the supreme court discussed how Sossamon had a belief in the chief's tipoffs, and how the tape

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44. *Fleming*, 350 S.C. at 497, 567 S.E.2d at 861–62.

45. 341 S.C 108, 533 S.E.2d 899 (2000).

46. *Id.* at 118–19, 533 S.E.2d at 904–05.

47. *Id.* at 112–13, 533 S.E.2d at 901. The alleged defamatory statement appeared in a column entitled, "What's Your Beef?," which invited readers to express their thoughts anonymously to an answering machine. *Id.* at 112 n.2, 533 S.E.2d at 901 n.2.

48. Elder v. Gaffney Ledger, Inc., 333 S.C. 651, 664, 511 S.E.2d 383, 390 (Ct. App. 1999).

49. *Elder*, 341 S.C. at 115, 533 S.E.2d at 902.

50. *Id.*

51. *Id.* at 115–16, 533 S.E.2d at 902–03.

ultimately was made available to the plaintiff.[52] Additionally, the supreme court noted that Sossamon viewed his own marijuana arrest as a positive development in his life and that it was unrelated to Chief Elder.[53]

The only evidence the court considered pertinent to the actual malice inquiry was "Sossamon's failure to investigate an anonymous phone call" and the "speculative testimony" regarding possible ill will by Sossamon toward Chief Elder,[54] both of which related to Sossamon's state of mind. Although the court acknowledged that "evidence of ill will may, in some circumstances, be relevant to demonstrate motive," the court found the evidence of ill will directed at Elder's wife to have no relevance in demonstrating malice towards Elder.[55]

With regard to Sossamon's failure to investigate, the court observed that "the only testimony regarding Sossamon's subjective belief" in the veracity of the publication was where he "testified that he believed the information [in the column] could be true."[56] In light of Sossamon's belief, the court "simply [could not] say he 'purposefully avoided the truth' in printing the column"[57] without investigating.

As in its analysis in *Fleming*, the court properly focused its evaluation on the defendant's state of mind; the only direct evidence thereof was Sossamon's own belief that the statement could be true, and the circumstantial evidence was not strong enough to raise doubts in Sossamon's mind.[58]

C. *Anderson v. The Augusta Chronicle*

The latest episode in South Carolina's actual malice analysis is *Anderson v. Augusta Chronicle*.[59] Like *Elder*, this case involved allegations that a newspaper should have investigated further before publishing a statement about the plaintiff.

In 1996, Tom Anderson unsuccessfully pursued a seat in the South Carolina

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52. *Id.*

53. *Id.*

54. *Id.* at 118–19, 533 S.E.2d at 904.

55. Elder v. Gaffney Ledger, 341 S.C. 108, 117, 533 S.E.2d 899, 903 (2000). The court also goes out of its way to highlight the distinction between constitutional actual malice and ordinary malice or ill will. *Id.* at 117–18, 533 S.E.2d at 903–04.

56. *Id.* at 118, 533 S.E.2d at 904. Interestingly, Sossamon's belief was premised on the fact, "essentially conceded" by the Chief at trial, that Elder "knew some people in Blacksburg who had been selling drugs for many years and had not done anything about it." *Id.* at 118 n.8, 533 S.E.2d at 904 & n.8. Apparently, the Chief also had "called Sossamon to advise him that a Newspaper employee had been hanging out with a known drug dealer." *Id.* at 118, 533 S.E.2d at 904. For a similar case addressing an editor's belief as to truthfulness of an opinion letter, see *Fort Worth Star-Telegram v. Street*, 61 S.W.3d 704 (Tex. Ct. App. 2001). The court in *Street* upheld summary judgment for the defendant based on a lack of actual malice where the editor's affidavit claimed belief in the statement's truth, lack of doubt, and the affidavit "provide[d] insight into what he thought the [defamatory] letter said and the factual basis for his understanding." *Id.* at 711.

57. *Elder*, 341 S.C. at 118, 533 S.E.2d at 904.

58. *Id.* at 118–19, 533 S.E.2d at 904–05.

59. 355 S.C. 461, 585 S.E.2d 506 (Ct. App. 2003), *cert. granted*, No. 3597, Shearhouse Adv. Sh. No. 37 at 12 (Oct. 13, 2003).

General Assembly.[60] During the election, he went to North Carolina for ten weeks to work as an insurance claims adjuster for the National Flood Insurance Program.[61] The next year, when Anderson ran for a seat in a special election, a reporter for the *Chronicle* asked him about his absence. The *Chronicle* published an article mentioning that Anderson was out of the area with the National Guard.[62] The "National Guard" absence was again misstated in a later article, and the newspaper contacted Anderson about the resulting political accusations that Anderson lied about his National Guard Service.[63] Subsequently, the *Chronicle* published an editorial entitled "Let the Liar Run," again referencing Anderson's purported statement about the National Guard Service.[64] Nearly a month later, the newspaper published a "[c]larification" which recited Anderson's version of the story.[65]

At trial, the court granted the *Chronicle's* motion for a directed verdict on Anderson's libel action on the grounds that "Anderson failed to show constitutional malice."[66] The South Carolina Court of Appeals, however, reversed the trial court's ruling, and held that Anderson's testimony and documentary evidence in the record were sufficient to raise a jury question regarding the existence of actual malice.[67]

The court's actual malice analysis focused on the *Chronicle's* failure to investigate its own reporter's accuracy, because "the evidence points to a mistake or misunderstanding between the reporter and his interview subject," and that Kent, the *Chronicle's* editor, "never spoke with Anderson to obtain his side of the story."[68]

Although, like *Peeler*,[69] this case involved a plaintiff-subject who disagreed with an alleged media defamer's report, the court distinguished *Peeler* by construing the *Chronicle's* alleged defamatory statements as misquotes instead of statements reflecting a misconception of events.[70] The court noted that the facts presented by Anderson, including his resume and the fact that a man of his age

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60. *Id.* at 466, 585 S.E.2d at 509.

61. *Id.* at 466–67, 585 S.E.2d at 509.

62. *Id.*

63. *Id.* at 467, 585 S.E.2d at 509. Anderson asserted that the reporter confused the National Flood Insurance Program with the National Guard.

64. *Id.* at 469, 585 S.E.2d at 510.

65. Anderson v. Augusta Chron., 355 S.C. 461, 470, 585 S.E.2d 506, 511 (Ct. App. 2003), *cert. granted*, No. 3597 Shearhouse Adv. Sh. No. 37 at 12 (Oct. 13, 2003).

66. *Id.* at 470, 585 S.E.2d at 511.

67. *Id.* at 490, 585 S.E.2d at 521.

68. *Id.* at 479–80, 585 S.E.2d at 516.

69. 324 S.C. 261, 266–67, 478 S.E.2d 282, 285 (1996) ("A subjective awareness of probable falsity cannot be demonstrated [to] 'convincing clarity' [merely] by evidence showing that the publisher and the plaintiff disagreed with respect to their perceptions of events which they both observed."); *see supra* nn.17-20 and accompanying text.

70. *Anderson*, 355 S.C. at 480–81, 585 S.E.2d at 516–17. Both parties and the court apparently agreed that *Peeler* adopts the "rational interpretation" doctrine of *Time, Inc. v. Pape*, 401 U.S. 279 (1971), which does not extend to alleged misquotations. *Id.* at 481, 585 S.E.2d at 516; *see also* Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 518 (1991).

would likely not be in the National Guard,[71] as information that should have caused the *Chronicle* to realize that "Anderson's purported statement was highly improbable."[72]

The South Carolina Court of Appeals also distinguished a similar case, *Speer v. Ottaway Newspapers, Inc.*,[73] by stating that the *Anderson* case did not involve "a publisher's failure to guess accurately among conflicting accounts of a perceived event."[74] In *Speer*, the newspaper knew both versions of the story, but in *Anderson*, the newspaper never spoke with Anderson to determine his side of the story.[75]

Based on Anderson's testimony and the "irrefutable documentary evidence in the record," the court ruled that the newspaper had "no more reason to believe" its reporter's recollection of the initial conversation with Anderson than Anderson himself, and therefore, the evidence was sufficient to send the question of whether the *Chronicle* published the editorial with actual malice to the jury.[76]

IV. Looking Forward: Is an Actual Malice Reversal Appropriate for *Anderson*?

Reading *Anderson* and *Elder* together is puzzling. In *Anderson*, sufficient evidence was presented to justify sending the question of actual malice to a jury because a newspaper failed to follow-up on a story before printing, but in *Elder* the lack of follow-up was insufficient to show actual malice. Like *Elder*, *Anderson* closely follows one of the situations set forth in *St. Amant v. Thompson*,[77] but there is a critical difference: the allegation was that Anderson claimed to be in the National Guard, and not that he actually was in the National Guard.[78] However, either the cases must be harmonized or *Anderson* must be reversed in order to provide predictability and consistency in South Carolina law.[79]

The problem with *Anderson* is its overemphasis on circumstantial evidence regarding the ultimate truth of the statement and the lack of focus on the defamer's actual state of mind. Thus, unless Anderson can prove a "knowing falsehood," he "must establish [that the *Chronicle*] in fact entertained serious doubts as to the truth

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71. *Id.* at 483–84, 585 S.E.2d at 518.

72. *Id.* at 483–84, 585 S.E.2d at 518.

73. 828 F.2d 475 (8th Cir. 1987).

74. *Anderson*, 355 S.C. at 480, 585 S.E.2d at 516.

75. *Id.*

76. *Id.* at 488–90, 585 S.E.2d at 520–21.

77. 390 U.S. 727 (1963). It is likely that directly alleging Anderson was in the National Guard would be an "allegation[] so inherently improbable that only a reckless man would have put them in circulation." *Id.* at 732. *See supra* note 26.

78. Additionally, *Anderson* involves a series of related defamatory statements, as opposed to the lone editorial in *Elder*.

79. The Supreme Court of South Carolina granted certiorari on October 3, 2003. *See* No. 3597, Shearhouse Adv. Sh. No. 37 at 12 (Oct. 13, 2003).

of the publication.'"[80] To quote the dissent, "evidence of Anderson's personal recollection of the interviews fails to shed light on what *The Chronicle* believed in good faith about the truth of the statements it published."[81] In short, actual malice does not seem to be clearly and convincingly proved, which would make the trial court's directed verdict proper.[82]

If *Anderson* is not reversed or otherwise modified, it may have serious implications for the media in South Carolina. Generally, much news is based on highly improbable statements by public figures that are untrue; often the statement is newsworthy not for its content, but for the fact that it was made.

In such situations, the subjective actual malice standard allows the press to do its job of reporting newsworthy events—even the making of statements so outrageous or improbable that the statements "must" be untrue. Requiring a newspaper to double-check an otherwise credible reporter's account simply because the facts of the story are improbable moves too far from a consideration of the defamer's state of mind and runs afoul of the purpose for which the actual malice standard was established.[83]

Double-checking would be required in any instance where the subject of the account could potentially complain of an inaccuracy,[84] because under *Anderson*, such complaints by the alleged defamation victim can be used to establish serious doubts on the part of the publisher as to the truth or falsity of the publisher's statement. Under *Anderson*, such "doubts" are sufficient to lead to a costly trial.

Because of the lack of information relating to the *Chronicle*'s subjective intent and the lack of evidence showing any doubt in fact as to its reporter's veracity, a reversal on appeal to the Supreme Court of South Carolina would be proper.[85]

V. CONCLUSION

The *Times* malice standard and the cases that follow it provide a fortress for protected speech that can only be penetrated by a public-figure plaintiff who has clear and convincing evidence of actual malice. The plaintiff bears a heavy burden because the implications of libel suits by public-figure plaintiffs are so great.

The particular South Carolina cases discussed in this Comment are but a narrow

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80. *Anderson*, 355 S.C. at 473, 585 S.E.2d at 512.

81. *Id.* at 492, 585 S.E.2d at 523 (Hearn, C.J., dissenting).

82. Regarding clear and convincing proof, see *supra* note 9.

83. This proposition is succinctly stated in *Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475 (8th Cir. 1987), where the court stated the following: "[T]o prevent the self-censorship that may arise if a critic of official conduct were compelled to guarantee the actual truth of all factual assertions on pain of a libel judgment virtually unlimited in amount." *Id.* at 478.

84. This category would encompass essentially any unrecorded interview between a single reporter and subject.

85. Such a reversal would additionally provide the court an opportunity to apply *Holtzscheiter* to cleanse South Carolina defamation law of the remnants of the confusing libel *per se* and *per quod* distinction.

slice of the defamation pie, showing one of the more subtle points that may arise in defamation actions by public-figure plaintiffs: the importance of proving the alleged defamer's state of mind through evidence of the defamer's subjective belief as to the truth or falsity of his statement. Plaintiffs who bring a defamation action must be sure their case is brimming with pertinent evidence not only about the statements made and the surrounding circumstances, but specifically relating to the state of mind of the alleged defamer. For the sake of a democratic society fueled by open, fiery debate, bringing such actions should not become any easier.

Eric G. Zaiser