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I. INTRODUCTION

In its 1964 landmark decision New York Times v. Sullivan, the Supreme Court of the United States held the First Amendment requires public officials to prove "actual malice" before recovering damages for harm to their reputation in a state-law defamation suit. Before that decision, the Supreme Court had not recognized a true interrelation between the common law tort of defamation and First Amendment protection of free speech. Defamation, in almost all cases, was a strict liability tort, requiring that a plaintiff prove the defendant published to a third party a defamatory statement of and concerning the plaintiff.

This Note analyzes the South Carolina Supreme Court's recent misguided treatment of the actual malice doctrine in Anderson v. Augusta Chronicle. Part II will discusses the development of the actual malice standard introduced in Sullivan. Parts III through V address the legal and practical ramifications of the holding and reasoning in Anderson. Finally, Part VI addresses the prophesy of confusion articulated by the Sullivan concurrences and how Anderson has brought the prophesy to fulfillment in South Carolina defamation jurisprudence.

II. FIRST AMENDMENT PROTECTIONS FOR DEFAMATORY PUBLICATIONS: SULLIVAN AND ITS PROGENY

Prior to Sullivan, after a plaintiff established the prima facie elements of defamation, courts presumed both the alleged defamatory statement's falsity and the resulting harm. Thus, common law defamation precedent required a defendant to rebut the presumption of falsity—to assert the affirmative defense of truth—as one possible means of escaping liability. Further, the strict liability nature of pre-Sullivan defamation actions precluded a defendant from offering evidence regarding his fault; as a strict liability tort, fault was not part of the defamation calculus.

2. Id. at 279–80.
4. See id. at 804.
5. 365 S.C. 589, 619 S.E.2d 428 (2005). South Carolina has stated the elements of the actual malice doctrine in a fashion similar to Sullivan, but because the common law elements of the tort are not at issue in Anderson, they are not stated separately.
6. See Keeton et al., supra note 3, at 804.
7. Id.
8. See id. (discussing the way courts used privileges, instead of a fault-based calculus, to protect the free flow of ideas).
With *Sullivan*, however, the United States Supreme Court fundamentally altered state defamation law, particularly with regard to defamation actions involving public official plaintiffs who are public officials. In *Sullivan*, Montgomery, Alabama’s Commissioner of Public Affairs, L.B. Sullivan, filed a defamation action against the *New York Times* for allegedly defamatory statements made in an advertisement printed in the *Times* titled “Heed Their Rising Voices.” The advertisement, addressing the civil rights struggles of African Americans in segregation-era Alabama, singled out state law enforcement officials for the alleged “wave of terror” they had perpetrated. According to the advertisement, this wave of terror was perpetrated by the actions of police officers surrounding the Alabama State College campus after students engaged in a peaceful protest—specifically, efforts by authorities to padlock the school cafeteria, to starve the protestors, and the repeated harassment of Dr. Martin Luther King, Jr., his family, and his supporters, who were prominent actors in the Alabama civil rights movement. Included in the advertisement copy was a list of sixty-four public figures who had supposedly endorsed the advertisement, which was purchased by a group referring to itself as the “Committee to Defend Martin Luther King and the Struggle for Freedom in the South.”

*Sullivan*, whose responsibilities included oversight of police officers and other actors implicated in the wave of terror outlined in the advertisement, took exception to several of the advertisement’s factual assertions, which later proved

9. *Id.* at 804–05. The United States Supreme Court extended the constitutional protections afforded to public official defendants in defamation actions to all public figures. *See*, e.g., *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 666 (1989) (rejecting the so-called “professional standards rule” for public figures espoused in *Curtis Publishing*, instead opting to apply the actual malice standard for public officials and public figures alike); *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 155 (1967) (plurality opinion) (holding that public figures must make a “showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers”). For the purposes of this Note, the author does not distinguish between public officials and public figures, unless otherwise noted. However, the South Carolina Supreme Court specifically referred to Anderson’s concession that he is a “public official” for the purposes of its actual malice inquiry. *Anderson v. Augusta Chronicle*, 365 S.C. at 595, 619 S.E.2d at 431.

10. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964). The advertisement in question was not a traditional commercial advertisement. Rather, it was an editorial advertisement (“advertorial”), a political commentary that was purchased by the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. *Id.* at 257, 260. Such editorial advertisements were a potentially effective tool for a class of people who largely had no voice in the mainstream media or society at large.

11. *Id.* at 256–57.

12. Even if true, the implication in the advertisement that students would have actually starved as a result of police conduct was dubious.


14. *Id.* at 257. Many of the supposed endorsers of the advertisement’s content claimed to have had no knowledge of the advertisement at the time of its publication. *Id.* at 260. Apparently, the advertisement purchasers had taken liberties with their inclusion of names of parties who had offered general support of the civil rights cause but who had not specifically sanctioned the material in the advertisement. *Id.* at 257, 260–61.

to be false. Sullivan contended the false and defamatory accusations of wrongful action by the police implied that he had participated in the wrongdoing and thereby injured his reputation. A jury awarded Sullivan $500,000 in damages—a verdict that the Alabama Supreme Court upheld on appeal. In upholding the verdict, the Alabama Supreme Court rejected the New York Times's argument that the First and Fourteenth Amendments protected the publication of the advertisement, stating: "The First Amendment of the U.S. Constitution does not protect libelous publications. The Fourteenth Amendment is directed against State action and not private action."

The Times appealed to the United States Supreme Court. The Times once again asserted that the First and Fourteenth Amendments provided a constitutional safeguard against defamation liability when a defendant publishes statements regarding a public official's discharge of his or her official responsibilities. The Court was sympathetic to the argument.

The Court began its analysis by rejecting Sullivan's contention that the First Amendment offers no protection for libelous statements. Justice Brennan, who delivered the opinion for the Court, wrote:

Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

The Court observed that cases like Sullivan that deal squarely with critically important issues in an ongoing national political debate, "would seem clearly to qualify for . . . constitutional protection. The question is whether it forfeits that protection by the falsity of some of its factual statements and by its alleged defamation of respondent."

First, addressing the issue of falsity, the Court observed "[]that erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms

16. Specifically, the police at no time surrounded the Alabama State campus, the dining hall had never been padlocked, the nature of the student protest had been mischaracterized, and the advertisement overstated the extent to which Martin Luther King had been harassed. Id. at 258–59. Also, many of the alleged advertisement's signatories disclaimed knowledge and approval of its publication. See supra note 14.
18. Id. at 256.
21. Id. at 264.
23. Id. at 269 (footnotes omitted).
24. Id. at 271.
of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”25

Next, addressing defamatory statements regarding public officials, the Court stated that “[i]njury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error.”26 Therefore, the Court concluded, “If neither factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, the combination of the two elements is no less inadequate.”

Much of the Sullivan Court’s analysis was based on earlier philosophical commentary regarding the Sedition Act,28 which provided criminal libel penalties for those who criticized government officials.29 In likening the Alabama court’s imposition of a judgment against the Times to sanctions under the Sedition Act, the Court stated that “[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel.”30 The imposition of a half-million dollar judgment against the Times, according to the Court, amounted to a far greater penalty to the newspaper than a criminal sanction.31

Having determined that the First and Fourteenth Amendments offered potential safeguards in a libel action, the Court then turned to establishing the extent to which the protections applied.32 First, in addressing whether the availability of an affirmative truth defense was a sufficient protection for a public official defamation defendant, the Court noted:

Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They [will] tend to make only statements which “steer far wider of the unlawful zone.”33

25. Id. at 271–72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).
26. Id.
27. Id. at 273 (emphasis added).
29. Sedition Act of 1798, ch. 74, 1 Stat. 596 (expired 1801). The Court’s commentary focused on the inherent injustice embodied in the acts, concluding that “[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.” Sullivan, 376 U.S. at 276 (footnote omitted).
30. Sullivan, 376 U.S. at 277. The Court’s treatment of Sullivan as a historical analogue to the Sedition Acts underscores the Court’s broader philosophy that, absent First Amendment protection, state libel laws could serve as a sharp sword against open political debate, especially when wielded against the disenfranchised. As Justice Goldberg wrote in his concurrence, “if newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can also be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished.” Id. at 300 (Goldberg, J., concurring in result).
31. See id. at 277.
32. Id. at 279.
In making this statement, the Court effectively held that defendants in public official defamation cases defendants no longer bear the burden of proving their statements were true (i.e., asserting truth as an affirmative defense). Rather, the plaintiff in such actions is required to adduce evidence that the alleged defamatory statement was false as part of his or her prima facie case. To justify this burden shifting, the Court noted that false statements themselves can add to the public discourse.\(^\text{34}\)

In shaping the new constitutional doctrine it had wrought, the Court then addressed the appropriate fault standard for public official defamation actions. Rejecting the common law theory of liability without fault, the Court stated:

> The constitutional guarantees require, we think, a federal 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.\(^\text{35}\)

The Court's formulation of the public official plaintiff's evidentiary burden was crucial to the application of the actual malice rule. In determining that Sullivan had not met this burden, the Court wrote the plaintiff's evidence “lack[ed] the convincing clarity which the constitutional standard demand[ed].”\(^\text{36}\) For evidence of actual malice to reach convincing clarity, the “state of mind required for actual malice would have to be brought home to the persons . . . having responsibility for the publication.”\(^\text{37}\) This statement by the Court provides a crucial element of the actual malice doctrine, especially for claims involving reckless disregard. The language signals the Court's adoption of a subjective test for examining a defendant's state of mind.

_Sullivan_ and its progeny have mandated that a public official plaintiff must show clearly and convincingly that, in the defendant's own mind, the defendant either knew the published statement was false or published it with “reckless disregard.”

\(^{34}\) _Id._ at 279 n.9.

\(^{35}\) _Id._ at 279–80 (emphasis added). The Court stated that the ultimate justification for such a rule was that “‘occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great.’” _Id._ at 281 (quoting Coleman v. MacLennan, 98 P. 281, 286 (Kan. 1908)).

\(^{36}\) _Id._ at 285–86. In the Court's subsequent defamation decisions, the “convincing clarity” language took a more definite shape, becoming known as the “clear and convincing” standard. See, e.g., Harte-Hanks Commun'ns, Inc. v. Connaughton, 491 U.S. 657, 659 (1989) (noting the requirement of clear and convincing evidence to prove a statement was made with actual malice); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 511 (1984) (noting that the Constitution bars any determination of actual malice that is not supported by clear and convincing evidence). The South Carolina Supreme Court has characterized the clear and convincing standard as “‘intermediate, more than a mere preponderance but less than is required for proof beyond a reasonable doubt.’” Peeler v. Spartan Radiocasting, Inc., 324 S.C. 261, 265 n.4, 478 S.E.2d 282, 284 n.4 (1996) (quoting Middleton v. Johnston, 273 S.E.2d 800, 803 (Va. 1981)).

\(^{37}\) _Id._ at 287.
The reckless disregard element of actual malice was an important issue in Garrison v. Louisiana, decided the Term after Sullivan. In Garrison, the Court characterized reckless disregard as "those false statements made with [a] high degree of awareness of their probable falsity."39

The subjective state of mind standard adopted in Sullivan becomes crucially important in light of Garrison’s holding. Had the Court mandated an objective assessment of the defendants’ states of mind, a public official plaintiff would have been allowed to prove actual malice by presenting evidence that a reasonable person in the defendant’s situation would have possessed the requisite knowledge of falsity or a “high degree of awareness of... probable falsity.”40 Instead, the subjective standard particularizes the actual malice inquiry to a defendant’s own state of mind, thereby requiring a public official plaintiff to prove with convincing clarity that the defendant in fact possessed such awareness.

Although Sullivan represented a significant victory for First Amendment protection of free speech and press, Sullivan’s concurring Justices articulated a number of misgivings regarding the Court’s actual malice analysis. Justice Goldberg warned that [i]f the constitutional standard is to be shaped by a concept of malice, the speaker takes the risk not only that the jury will inaccurately determine his state of mind but also that the jury will fail properly to apply the constitutional standard set by the elusive concept of malice.41

Forty years later, the South Carolina Supreme Court transformed Justice Goldberg’s words from a warning to a prophesy. Anderson turned on Sullivan’s reckless disregard inquiry,42 but the South Carolina Supreme Court’s analysis confused the doctrine through misapplication of both settled procedural and substantive defamation law. The problems exhibited in Anderson are particularly unfortunate given the checkered history of South Carolina defamation jurisprudence, parts of which Chief Justice Toal has characterized as "mind-numbingly incoherent."43 Anderson did little to cure this malady.

38. 379 U.S. 64 (1964).
39. Id. at 74.
40. Id.
43. Holtzscheiter v. Thomson Newspapers, Inc. (Holtzscheiter II), 332 S.C. 502, 516, 506 S.E.2d 497, 505 (1998) (Toal, J., concurring). In Holtzscheiter II, the South Carolina Supreme Court attempted to clarify a mass of uncertainty created by its earlier defamation jurisprudence. This 1998 opinion marked the second time in five years that this case had come before the court. The court stated that earlier, in Holtzscheiter v. Thomson Newspapers, Inc. (Holtzscheiter I), 306 S.C. 297, 411 S.E.2d 664 (1992), the court caused “error, or at least ... hopeless confusion.” Holtzscheiter II, 332 S.C. at 516, 506 S.E.2d at 505 (Toal, J., concurring).

Holtzscheiter II took steps recognizing and correcting the problems the court had created in Holtzscheiter I. Specifically, Holtzscheiter II addressed the conceptual differences between defamation per se and defamation per quod and clarified the fault standards in private plaintiff versus media defendant defamation actions and clarified the fault standards for awarding punitive damages. See id. at 509–13, 506 S.E.2d at 501–03 (plurality opinion).

Although the court in Holtzscheiter II did not significantly address the doctrine of actual malice in public figure defamation actions, Justice Toal’s concurrence generally lamented the South Carolina
Because the court’s analysis in *Anderson* focused so heavily on facts surrounding the conflict between Anderson and the *Augusta Chronicle*, the next Part details the facts of *Anderson* and provides a brief procedural history that will serve as a background for the South Carolina Supreme Court’s analysis and conclusions.

III. *Anderson*: The Rebirth of Confusion in South Carolina Defamation Jurisprudence

The South Carolina Supreme Court’s synthesis of public official defamation precedent took a confusing and potentially troubling turn in *Anderson*. The case involved interactions between the *Augusta Chronicle* and Tom Anderson, a two-time candidate for the South Carolina House of Representatives.44 Chad Bray, a reporter for the *Chronicle*, conducted two telephone interviews with Anderson in 1997, addressing Anderson’s previous unsuccessful 1996 House campaign and his upcoming campaign for the state legislature by special election later that year.45

Subsequent to the two telephone interviews with Anderson, Bray wrote two articles published in the *Chronicle* in April 1997 and June 1997 which stated Anderson told Bray that Anderson had been contracted by the National Guard during two hurricanes but felt cheated because the call-up occurred during the later stages of the campaign.46 In reality, Anderson had gone to work in North Carolina as a claims adjuster for the National Flood Insurance Program (NFIP), assisting hurricane victims.47

In September of 1997, the *Chronicle*’s Aiken, South Carolina bureau chief called Anderson and asked the candidate to respond to charges leveled by the Executive Director of the South Carolina Republican Party that Anderson had lied about his National Guard service.48 The *Chronicle* reporter asked Anderson if he planned to withdraw from his second House campaign because he had been proven a liar.49 Anderson denied having ever stated that he served in the Guard, insisting that Bray had misunderstood his statement.50 Anderson later testified that during this conversation he reiterated to the bureau chief that he had been called away while working for the NFIP.51

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Supreme Court’s struggles to reconcile the state common law of defamation with constitutional principles articulated by the United States Supreme Court. *Id.* at 516–17, 506 S.E.2d at 505. Justice Toal admitted that “this Court’s opinions have not completely taken into consideration the impact of decisions by the United States Supreme Court.” *Id.* at 517, 506 S.E.2d at 505.


45. See Anderson v. Augusta Chronicle, 355 S.C. 461, 466–67, 585 S.E.2d 506, 509 (Ct. App. 2003). Specifically, Anderson testified at trial that only the first conversation referenced his 1996 campaign and his absence just prior to the election. *Id.* at 467, 585 S.E.2d at 509.


47. *Anderson*, 355 S.C. at 467, 585 S.E.2d at 509.

48. *Id.* at 467–68, 585 S.E.2d at 509.

49. *Id.*

50. *Id.* at 467–68, 585 S.E.2d at 509–10.

Shortly after conducting this interview with Anderson, the Chronicle published a story, written by John Boyette, regarding the Republican Party’s accusations, entitled, “GOP Wants Anderson Out of House Race: Clearwater Democratic Candidate is Accused of Lying About His National Guard Service.”52 The story noted that the Chronicle had originally reported Anderson’s alleged statement of Guard service in June of that year and stated that “Mr. Anderson, however, denied . . . that he ever told The Chronicle that he had served in the National Guard.”53

In response to the article, Anderson sought to inform the Chronicle that he had worked as a flood appraiser instead of in the National Guard.54 Anderson sent copious documentation regarding his NFIP employment to the Chronicle, which included “work certification, phone bills, hotel invoices, bank records, and checks he had written during the time he did appraisals in North Carolina.”55 However, none of the documentation provided direct contradiction of Bray’s recollection of the conversation.56

Five days after Anderson submitted this documentation, the Chronicle published an opinion piece by editorial page editor Phil Kent57 entitled “Let the Liar Run.”58 The piece stated that Anderson was a “proven prevaricator” and “a candidate who, in effect, lie[d] on his resume.”59

Anderson immediately attempted to contact Kent to demand a retraction.60 In a telephone conversation, a Chronicle employee told Anderson that Kent refused to talk with him.61 The employee did, however, invite Anderson to write a letter to the Chronicle explaining his position.62 Anderson sent the Chronicle a letter refuting the charges, which the newspaper printed, in a significantly edited form, along with a clarification.63

Based on the content of the editorial, Anderson filed a complaint against the Chronicle, alleging the newspaper’s characterization of him as a liar was defamatory.64 Anderson alleged that the defamatory statements had been published with actual malice as defined in Sullivan, which is the requisite standard for Anderson’s conceded status as a public official.65

52. John Boyette, GOP Wants Anderson Out of House Race: Clearwater Democratic Candidate is Accused of Lying About His National Guard Service, AUGUSTA CHRONICLE, Sept. 18, 1997, at A13. Prior to the publication of this September 18, 1997 article, Anderson claimed that he was unaware of the Bray articles’ publication, and thus he had made no request for correction or retraction of the erroneous information. Anderson v. Augusta Chronicle, 365 S.C. 589, 592, 619 S.E.2d 428, 429 (2005).
55. Id. at 593 n.4, 619 S.E.2d at 430 n.4.
56. Id. at 593, 619 S.E.2d at 430.
57. Id. at 593–94, 619 S.E.2d at 430.
59. Id.
61. Id. at 470, 585 S.E.2d at 510–11.
62. Id. at 470, 585 S.E.2d at 511.
64. Anderson, 355 S.C. at 470, 585 S.E.2d at 511.
65. Id. at 472 n.2, 585 S.E.2d at 512 n.2.
The trial court directed a verdict in favor of the *Chronicle*,66 evidently determining that the plaintiff had not presented clear and convincing evidence from which a reasonable jury could find liability based on actual malice.67 The South Carolina Court of Appeals reversed, however, holding the trial record contained ample evidence of actual malice.68 The court of appeals stated:

The . . . facts about Anderson, known to *The Chronicle* before publication of “Let the liar run,” support our conclusion that a reasonable jury could have found the newspaper had “obvious reasons to doubt” Bray’s recollection of his conversation with Anderson . . . . In light of these facts, we believe *The Chronicle’s* failure to undertake a reasonable investigation into the matter creates a jury question as to whether it published the editorial with actual malice.69

Among the facts the court of appeals found supportive of its holding were Anderson’s advanced age,70 his previous discharge from active military service four decades prior to the controversy at bar, and numerous other factual sources.71 According to the court of appeals, the *Chronicle’s* editorial board failed to heed obvious reasons to doubt the accuracy of Chad Bray’s stories.72

Tying the factual issue of publisher doubt to the publisher’s undertaking of investigations, the court of appeals adopted the Ninth Circuit’s view from *Masson v. New Yorker Magazine, Inc.*,73 which stated that “where the publisher undertakes to investigate the accuracy of a story and learns facts casting doubt on the information contained therein, it may not ignore those doubts, even though it had no duty to conduct the investigation in the first place.”74 Because a *Chronicle* staff member had specifically requested documentation from Anderson regarding his

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66. *Id.* at 470, 585 S.E.2d at 511.
67. This point assumes that the trial court applied the correct standard for determining the propriety of a motion for directed verdict, discussed *infra* Part IV. The trial court issued a form order with no findings of fact or conclusions of law. Brief of Respondent at 2, *Anderson v. Augusta Chronicle*, 365 S.C. 589, 619 S.E.2d 428 (2005) (No. 98-CP-02-0337).
69. *Id.* at 484, 585 S.E.2d at 518. Interestingly, this language indicates the court of appeals’ continued obeisance to the notion that failure to check or to make a “reasonable investigation” is a possible ground for finding actual malice, even though the Supreme Court of the United States expressly rejected this basis for liability in *Sullivan*. See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 287–88 (1964) (stating that the *Times*’ failure to check its own files to verify the accuracy of the advertisement in question could not support a finding of actual malice based on reckless disregard).
70. Anderson was 67 at the time of trial. *Anderson v. Augusta Chronicle*, 365 S.C. 589, 597 n.6, 619 S.E.2d 428, 432 n.6 (2005).
71. *Id.* at 596–98, 619 S.E.2d at 432–33. These sources included articles and editorials from a rival newspaper in which Anderson discussed his NFIP experience and explained his absence during Hurricane Fran. *Id.* at 598, 619 S.E.2d at 432–33.
73. 960 F.2d 896 (9th Cir. 1992).
NFIP employment five days before the publication of "Let the Liar Run," the court of appeals concluded that the Chronicle had assumed a duty not to ignore the facts it had learned.  

The South Carolina Supreme Court affirmed the court of appeals' holding that the evidence presented by Anderson on the issue of actual malice was sufficient to allow a jury to consider the Chronicle's liability. The supreme court stated that the trial record was "replete with circumstantial evidence of bad faith on the part of Kent. The record also contains reasons to doubt the accuracy of Bray's recount of the interview with Anderson." The court found several items of circumstantial evidence dispositive. First, Anderson testified that he had told a Chronicle reporter of his work with the flood insurance program prior to the publication of the alleged defamatory editorial. Second, a Chronicle employee contacted Anderson and specifically requested documentation of his employment with the NFIP five days before the editorial ran. Third, documentation from various sources, including Anderson's résumé, evidenced his employment with the NFIP. Fourth, Anderson's résumé documented his discharge from active duty military service in 1956 (readily verifiable from public records, according to the court) but made no mention of any National Guard service. Fifth, Anderson was 67 years old at the time of trial, making it unlikely that he was currently serving in the National Guard. Sixth, articles appeared in a rival publication that tended to support Anderson's assertion of reporter Bray's misunderstanding. The court held that this "evidence, viewed in the light most favorable to Anderson, was sufficient to submit the question of actual malice to a jury.

The Part that follows addresses several procedural and evidentiary problems in the Supreme Court's analysis that, if remedied, would lead to a contrary conclusion.

IV. THE SOUTH CAROLINA SUPREME COURT'S STATEMENT OF PROCEDURAL AND EVIDENTIARY RULES FOR A DIRECTED VERDICT PLACES ACTUAL MALICE INTO THE REALM OF HOLTZSCHIEFER-ESQUE CONFUSION

The South Carolina Supreme Court, in addressing the amount of evidence necessary to remand Anderson, stated that "[t]he central issue of this case is whether any evidence exists tending to prove that Kent recklessly disregarded the truth when he published the article 'Let the Liar Run.' If such evidence exists, the question of

75. See id. at 480–87, 585 S.E.2d at 516–20.
76. Anderson, 365 S.C. at 598, 619 S.E.2d at 433.
77. Id. at 596, 619 S.E.2d at 432.
78. Id. at 596–97, 619 S.E.2d at 432.
80. Id. at 597, 619 S.E.2d at 432–33.
81. Id. at 597, 619 S.E.2d at 432.
82. Id. at 597, 619 S.E.2d at 432.
83. Id. at 598, 619 S.E.2d at 432–33.
84. Id. at 598, 619 S.E.2d at 432.
actual malice is a question of fact for a jury.” 85 This statement mirrors the general rule regarding appellate review of directed verdicts in South Carolina: “When reviewing an order granting a directed verdict, [a c]ourt must view the facts in the light most favorable to the nonmoving party.” 86

When the issue of actual malice arises in the context of a public figure defamation action, however, the United States Supreme Court requires the plaintiff to bear a heavier evidentiary burden. Specifically, the plaintiff in such cases must prove actual malice by clear and convincing evidence. 87 This standard originates from the seminal language of Sullivan, in which the Court held that plaintiffs had not shown actual malice with the “convincing clarity which the constitutional standard demands . . . .” 88

Although the Sullivan appeal originated from the New York Times’ challenge to an Alabama state court jury verdict, 89 a subsequent Supreme Court defamation case, Anderson v. Liberty Lobby, Inc., 90 articulated the extent to which the clear and convincing standard applies to appellate review of actions in which a jury verdict has not been reached. 91 The South Carolina Supreme Court’s opinion in Anderson failed to account for this added constitutional requirement.

In Liberty Lobby, the United States Supreme Court held that “the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions [for defamation actions].” 92 In reaching this conclusion, the Court focused much of its analysis on how the evidentiary burden for preliminary motions has evolved in American law. 93 This evolution began, according to the Court, with the originally applied “‘scintilla of evidence’” 94 standard and progressed through the civil preponderance standard that courts apply to “run-of-the-mill civil case[s].” 95

The Court noted:

“Formerly it was held that if there was what is called a scintilla of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the

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86. Id. at 594, 619 S.E.2d at 430–31.
89. Id. at 256.
90. 477 U.S. 242 (1986). The plaintiff in this case is not the same plaintiff in the action that is the subject of this Note. See id. at 245; Anderson, 365 S.C. at 591, 619 S.E.2d at 466.
91. Liberty Lobby, 477 U.S. at 252–53.
92. Id. at 255.
93. Id. at 251–54.
94. Id. at 251 (quoting Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442, 448 (1872)).
jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed."\(^9\)

Justice White, however, writing for the six-justice *Liberty Lobby* majority, noted that public figure defamation cases are far from run-of-the-mill civil cases. Recognizing the importance of the First Amendment in all phases of a public figure defamation action, Justice White wrote that "where the First Amendment mandates a 'clear and convincing' standard, the trial judge in disposing of a directed verdict motion should consider whether a reasonable factfinder could conclude, for example, that the plaintiff had shown actual malice with convincing clarity."\(^7\)

In light of the Court's plainly stated conclusion in *Liberty Lobby* that "a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits,"\(^8\) the South Carolina Supreme Court's apparent disregard of this mandate is perplexing. The court gave no consideration of whether a reasonable jury could find clear and convincing evidence of the Chronicle's alleged actual malice; neither the phrase clear and convincing nor the phrase with convincing clarity appear anywhere in the *Anderson* opinion.\(^9\) Although it is impossible to determine whether the court's opinion in *Anderson* would have changed if it had appropriately considered *Liberty Lobby*, public figure defamation defendants in general would fare better under a clear and convincing standard than under a preponderance standard.

The South Carolina Supreme Court's failure to acknowledge the clear and convincing standard becomes even more puzzling in light of South Carolina defamation precedent articulated prior to *Anderson*.\(^10\) For example, *Anderson*'s "any evidence" language seems to directly contradict the South Carolina's Supreme Court's prior holding in *George v. Fabri*.\(^11\) The *Fabri* court, after declaring directed verdicts and summary judgments to be analytical equivalents,\(^12\) held "the appropriate standard at the summary judgment phase on the issue of constitutional

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96. *Id.* at 251 (quoting *Improvement Co.*, 81 U.S. (14 Wall.) 442, 448 (1872) (alterations in original)).

97. *Id.* at 252. Additionally, the *Liberty Lobby* majority equated treatment of civil actions to their criminal counterparts, writing that "this is no different from the consideration of a motion for acquittal in a criminal case, where the beyond-a-reasonable-doubt standard applies and where the trial judge asks whether a reasonable jury could find guilt beyond a reasonable doubt." *Id*.

98. *Id.* at 252.


100. The court broadly stated, "The record in this case is replete with circumstantial evidence of bad faith on the part of Kent." But this language failed to state the appropriate evidentiary burden in a public figure defamation case. *Id.* at 596, 619 S.E.2d at 432.


102. See *Id.* at 452, 548 S.E.2d at 874 (stating that "[a] motion for summary judgment is akin to a motion for a directed verdict" because 'in each instance, one party must lose as a matter of law'" (quoting *Main v. Corley*, 281 S.C. 525, 526–27, 316 S.E.2d 406, 407 (1984))).
actual malice is the clear and convincing standard.”103 Interestingly, the Fabri court cited Liberty Lobby as the basis for its holding.104

The Anderson court’s apparent deviation from settled procedural and evidentiary standards begs the question of why the clear and convincing language is absent from the opinion. Two conclusions are possible. First, the South Carolina Supreme Court may have meant exactly what it wrote—creating a significant conflict with settled federal and South Carolina state precedent.105 Such a conclusion, because of the potential constitutional conflict it would create, seems implausible. Second, the court may not have meant exactly what it wrote and instead intended to leave settled precedent untouched.106 This conclusion would require future courts to infer that Anderson left the clear and convincing standard intact for appeals of directed verdicts, despite the court’s failure to acknowledge Liberty Lobby’s evidentiary mandate and the opinion’s seemingly contrary “any evidence” language. This conclusion also seems unlikely because Chief Justice Toal, who wrote the principal opinion in Anderson, previously articulated the following scathing critique of the “hopeless confusion” of South Carolina defamation jurisprudence:

[C]ertain areas of South Carolina defamation law . . . are mind-numbingly incoherent. Case law in this state presents no clear analytical system for resolving defamation questions. Because a clear framework is lacking, the resolution of disputes often turns on chance, on whatever aspect of defamation law happens to arrest the parties’ or court’s attention in that case. As a result, the law lacks consistency and predictability, and confounds the bench, the bar, members of the general public, and media personnel who have to make important decisions based on court precedent.107

103. Id. at 454, 548 S.E.2d at 875.
104. Id. at 453–54, 548 S.E.2d at 875 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250–56 (1986)).
105. Actually, the supreme court’s issue statement in Anderson paralleled Justice Rehnquist’s dissent in Liberty Lobby, which argued that Sullivan’s constitutional protections required no further bolstering by unnecessary procedural safeguards. Liberty Lobby, 477 U.S. at 268–70 (Rehnquist, J., dissenting). Justice Rehnquist stated that the majority, “apparently moved by concerns for intellectual tidiness, mistakenly decides that the ‘clear and convincing evidence’ standard governing finders of fact in libel cases must be applied by trial courts in deciding a motion for summary judgment in such a case.” Id. at 268. Justice Rehnquist continued, “‘[The Court has] have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws.’” Id. at 269 (quoting Calder v. Jones, 465 U.S. 783, 790–91 (1984)).
106. However, the South Carolina Court of Appeals cited Liberty Lobby in its holding. See Anderson v. Augusta Chronicle, 355 S.C. 461, 490, 585 S.E.2d 506, 521 (Ct. App. 2003) (citing Liberty Lobby, 477 U.S. at 257). The South Carolina Supreme Court’s affirmation of the appellate holding might signal its acceptance of the entirety of the lower court’s analysis. However, the court made no explicit statement of such blanket acceptance.
In light of now-Chief Justice Toal’s recognition that the court’s erratic
defamation analysis has often created significant confusion for lower courts, the Anderson court should have taken great pains to avoid creating Holtzscheiter-esque confusion in its consideration of the actual malice standard. However, given this difficult Hobson’s choice between possible, unsettling conclusions, the South Carolina Supreme Court apparently again embarked down a path of uncertainty in its defamation jurisprudence.

The supreme court’s ruling suggests a desire to give a defamation plaintiff his
day in court, even if doing so might confuse South Carolina defamation jurisprudence. In Anderson, the court seemingly dulled the edges of its analysis from the outset by failing to acknowledge the significance of Liberty Lobby in its procedural and evidentiary discussion.108 This error becomes more evident when examining the Anderson court’s substantive and factual analysis. The court either ignored or refused to consider several crucial legal and factual elements that, if appropriately considered, might have led to a contrary holding.

In the Part that follows, this Note will address troubling elements of the substantive legal analysis in Anderson.

V. CLEAR AND CONVINCING EVIDENCE GETS LESS CLEAR BY THE MOMENT: INSUFFICIENT EVIDENTIARY BASIS EXISTS TO SUPPORT A FINDING OF ACTUAL MALICE

The Anderson court’s procedural and evidentiary analysis pushes South Carolina
defamation jurisprudence down the path of confusion. But the court’s substantive legal analysis of the appeal in Anderson offers little assurance that the case is merely a temporary lapse of sound judgment.

Specifically, beyond the unclear procedural and evidentiary analysis, three analytical problems surface in Anderson. First, the court’s analysis does not address Sullivan’s mandate that, for liability to attach, the “state of mind required for actual malice . . . [must] be brought home to the persons in the . . . organization having responsibility for the publication.”109 The court noted no evidence, much less clear and convincing evidence, of reckless disregard on the part of Phil Kent, author of “Let the Liar Run.” Second, the court mistakenly relied on the informant veracity analysis of St. Amant v. Thompson110 to determine that the Chronicle’s editors had evidence to doubt reporter Chad Bray’s account of his conversation with Tom Anderson.111 Third, consistent with Sullivan, the court cited a publisher’s failure to investigate as an insufficient basis for a finding of actual malice,112 but language elsewhere in the court’s analysis suggested that liability may be found at both

108. Unlike the South Carolina Supreme Court, the South Carolina Court of Appeals relied to some extent on Liberty Lobby in reaching its conclusions. Anderson, 355 S.C. at 471, 475, 585 S.E.2d at 511, 513.
110. 390 U.S. 727 (1968). The informant veracity analysis is discussed infra Part V.B.
112. Id. at 596, 619 S.E.2d at 431.
extremes of the fact-checking spectrum. Under this rubric, actual malice may exist either in a complete absence of checking in a case where exhaustive checking occurs. This "failure to check" analysis seems bound up in the court's continued reliance on the professional standards rule from the United States Supreme Court's decision in Curtis Publishing Co. v. Butts, which the South Carolina Supreme Court relied on in reaching its holding in Peeler v. Spartan Radiocasting, Inc. This reliance endures even though the United States Supreme Court rejected the professional standards test in Harte-Hanks Communications, Inc. v. Connaughton.

**A. Inappropriate Application of the Sullivan State of Mind Requirement**

In Sullivan, the United States Supreme Court endorsed a subjective standard for assessing the defendant's state of mind in publishing defamatory statements regarding a public official plaintiff. The Court refused to impose defamation liability on the newspaper even though the advertising department staff would have found factual inaccuracies in the published piece if it had cross referenced the Times' own files. The Court determined that "[t]he mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times organization having responsibility for the publication." The factual situation in Anderson is strikingly similar to Sullivan. In Anderson, the South Carolina Supreme Court addressed the plaintiff's reckless disregard allegations, stating that "[t]he record in this case is replete with circumstantial evidence of bad faith on the part of Kent [the writer of the allegedly defamatory editorial]." The court then offered a laundry list of actions taken by various members of the Chronicle staff as evidence of bad faith. However, none of the factual elements cited by the court references Kent; instead, the court referred to the actions of reporter Chad Bray and Anderson's interactions with John Boyette and Pat Willis, two other Chronicle staff members. Additionally, the court pointed to information on Anderson's resume—including his military service record—subsequently provided by Anderson to contradict Bray's initial account. The court noted:

113. See id. at 596-97, 619 S.E.2d at 431-32.
114. 388 U.S. 130, 155 (1967).
118. Id.
119. Id. (emphasis added). This demonstrates that, although the Times was the defendant of record for the case, imposition of defamation liability on the Times required actual malice on the part of the department responsible for the advertisement's publication.
121. Id. at 596-98, 619 S.E.2d at 432-33; see supra notes 78-83 and accompanying text.
122. Id. at 596-98, 619 S.E.2d at 432-33.
123. Id. at 597, 619 S.E.2d at 432.
A jury could have concluded *The Chronicle* should have realized Anderson’s purported statement was highly questionable, particularly in light of his advanced age. These facts, known to *The Chronicle* before publication of ‘Let the liar run,’ could lead a reasonable jury to infer *The Chronicle* had ‘obvious reasons to doubt’ Bray’s recollection of his conversation with Anderson.  

The court stated three times that *the Chronicle* should have realized the questionable nature of Bray’s account because of the information later supplied by Anderson. However, the court did not cite evidence that the editorial page editor Kent actually had knowledge of this information, which is particularly puzzling in light of the fact that the *Chronicle* published no story containing the information Anderson provided prior to the publication of the editorial. Kent’s editorial was the sole basis upon which Anderson alleged defamation.  

Just like staff members of the *New York Times*, staff members at the *Chronicle* worked in different departments and performed discrete job functions. *Sullivan* required Anderson to “bring home” evidence of actual malice to Kent himself as the writer of the defamatory material. Based on this premise, evidence of bad faith by other *Chronicle* staff members revealed nothing about Kent’s subjective state of mind unless the plaintiff could prove by clear and convincing evidence that some link other than common employment existed between Kent and the other staff members. According to *Sullivan*, members of an organization may not be presumed to share knowledge unique to their employment endeavors; had the United States Supreme Court held differently, the *Times* would have been subjected to liability for defamation.  

The South Carolina Supreme Court’s determination that Kent may have acted in bad faith is even more troubling in light of an additional degree of separation that existed between Kent and his staff members that did not exist in *Sullivan*. In *Sullivan*, investigation of *Times* news files would have unearthed information conclusively contrary to the alleged defamatory statements in the advertisement. Assuming that Kent believed Bray’s account, the documentation that Anderson eventually sent Willis, or Anderson’s résumé and military record—none of which Anderson proved were brought to Kent’s attention—would only have served to confirm, not refute, Kent’s conclusion that Anderson lied. In failing to recognize Kent’s valid editorial judgment based on his subjective state of mind, the South

124. Id. at 597, 619 S.E.2d at 432 (footnote omitted).
125. Id. at 596–98, 619 S.E.2d at 432–33.
128. Although the court referred to Bray as causing incorrect information to be published regarding Anderson, any presumed bad faith on Bray’s part is inconsequential because Anderson only stated a defamation claim for Kent’s editorial. See Anderson, 365 S.C. at 593–94, 619 S.E.2d at 430.
129. See Sullivan, 376 U.S. at 287.
130. See id.
131. Anderson, 365 S.C. at 593 n.4, 619 S.E.2d at 430 n.4.
Carolina Supreme Court has intruded into the editorial function of the newspaper, an exertion of authority expressly rejected by the United States Supreme Court.\textsuperscript{132}

B. Inappropriate Application of St. Amant’s Informant Veracity Standard

In \textit{St. Amant}, the United States Supreme Court acknowledged that reckless disregard for the falsity of material may occur if a publisher fails to investigate the truth of the material when “there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.”\textsuperscript{133} The \textit{Anderson} court quoted this language as the foundation of its reckless disregard analysis.\textsuperscript{134} Although \textit{St. Amant}’s time-tested principle is an accurate statement of an important aspect of the reckless disregard calculus, its application to the facts in \textit{Anderson} is dubious at best.

In both \textit{St. Amant} and in \textit{Harte-Hanks Communications, Inc. v. Connaughton}\textsuperscript{135}—the other United States Supreme Court case significantly employing the informant veracity rule—the informants were third parties who consciously fed information to the publisher of the defamatory statements.\textsuperscript{136} In neither case were the informants part of the organization from which the plaintiff sought relief.\textsuperscript{137} Apparently, like the court of appeals, the South Carolina Supreme Court regarded other \textit{Chronicle} staff members as third-party informants to Kent. This conclusion does not receive support from any settled precedent.

Assuming that a publication’s employees could be treated as third-party informants, the unique relationship between an employer and employee illustrates an additional problem with the reporter-as-third-party-informant theory. The \textit{St. Amant} standard allows a finding of reckless disregard if a publisher had “obvious

\textsuperscript{132} See Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (stating that a Florida statute that intruded into the editorial function could not survive constitutional scrutiny).
\textsuperscript{133} St. Amant v. Thompson, 390 U.S. 727, 732 (1968).
\textsuperscript{134} \textit{Anderson}, 365 S.C. at 595, 619 S.E.2d at 431 (quoting \textit{St. Amant}, 390 U.S. at 732).
\textsuperscript{135} 491 U.S. 657, 688 (1989).
\textsuperscript{136} See id. at 660 (stating that a grand jury witness provided information to a publisher of another party’s wrongdoing); \textit{St. Amant}, 390 U.S. at 728 (identifying a local union official who gave information to a political candidate that the candidate used to defame a rival).
\textsuperscript{137} The court of appeals explained away this distinction, stating that \textit{Masson v. New Yorker Magazine, Inc.} held that reporters may be considered informants for the purposes of the informant veracity rule. Anderson v. Augusta Chronicle, 355 S.C. 461, 479–80, 585 S.E.2d 506, 516 (Ct. App. 2003) (citing Masson v. New Yorker Magazine, Inc., 960 F.2d 896, 900 (9th Cir. 1992)). However, the facts of \textit{Anderson} and \textit{Masson} are hardly parallel. In \textit{Masson}, the Ninth Circuit (and later the Supreme Court) addressed the issue of whether a reporter’s deliberate and admitted alterations of quoted material could be a sufficient finding of actual malice. \textit{Masson}, 960 F.2d at 899. The South Carolina Court of Appeals also cited \textit{Spee v. Ottoway Newspapers, Inc.} in support of this theory, but again the reference is unfounded. Anderson, 355 S.C. at 479, 585 S.E.2d at 516 (citing \textit{Spee}, 828 F.2d 475, 477 (8th Cir. 1987)). In \textit{Spee}, an allegedly defamatory story was written from information given to editors by a reporter-photographer. \textit{Spee}, 828 F.2d at 476. In \textit{Anderson}, Kent and Bray had no discernible relationship adduced at trial. \textit{Anderson}, 355 S.C. at 466–70, 585 S.E.2d at 509–11. At any rate, the Eighth Circuit concluded in \textit{Spee} that the reporter’s actions inferred nothing regarding the editors’ state of mind. \textit{Spee}, 828 F.2d at 477. The court of appeals in \textit{Anderson} stated that the editors considered the reporter an “outside source”; it did not, however, state that the reporter was the legal equivalent to a \textit{St. Amant} informant. \textit{Anderson}, 355 S.C. at 479, 585 S.E.2d at 516.
reasons to doubt the veracity of the informant or the accuracy of his reports." 138 When an editor faces a choice of whether to believe a candidate for political office who makes statements favorable to his own candidacy or conflicting reports by his reporter who is presumably vetted by a hiring process, the Anderson court effectively held that the editor should believe the political candidate. The court reached this conclusion even though Anderson made no showing at trial that Kent was privy to any information beyond Bray’s initial reports and the Republican party allegations. 139 Thus, even if Bray was a third-party informant as envisioned by St. Amant, the evidence in Anderson lacked the obvious reasons to doubt the informant demanded by the rule. Indeed, demanding editors’ institutional distrust of staff members upon pain of defamation liability would cripple the newsgathering profession, and the Court in Sullivan warned of this effect. 140

C. Inappropriate Role of Failure to Investigate in Anderson

In Anderson, the South Carolina Supreme Court correctly cited the rule from Sullivan that “failure to investigate, alone, is insufficient to support a finding that a defendant ‘recklessly disregarded’ the falsity of a published article.” 141 Additionally, the Anderson court, quoting its earlier decision in George v. Fabri, noted that “South Carolina has also declined to impose rigid investigatory duties on members of the press . . . [holding] ‘reckless conduct contemplated by the New York Times standard is not measured by whether a reasonably prudent man would have . . . investigated before publishing.’” 142

From this point, however, the failure to investigate analysis in Anderson begins to exhibit inconsistencies with settled constitutional precedent. The Anderson court stated that “[t]his Court has held that to ‘establish recklessness, there must be an extreme departure from the standards of investigation and reporting ordinarily adhered to by reasonable publishers.’” 143

The court’s recitation of the professional standards rule from Peeler and Curtis Publishing failed to consider the fact that the United States Supreme Court explicitly

139. See generally, Anderson, 365 S.C. at 596–97, 619 S.E.2d at 432 (citing no factors directly related to Kent’s knowledge or state of mind).
140. See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 278 (1964) (stating that “whether or not a newspaper can survive a succession of such judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive”).
143. Id. at 596, 619 S.E.2d at 431 (quoting Peeler v. Spartan Radiocasting, Inc., 324 S.C. 261, 266, 478 S.E.2d 282, 285 (1996)). This language essentially restates the professional standards rule articulated in Curtis Publishing, a case that broadened First Amendment protections for defamation defendants to cases involving public figures. Curtis Publ’g Co. v. Butts, 388 U.S. 130, 155 (1967). Curtis Publishing stated the rule that courts will use to impose liability on a publisher—when there is evidence of “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.” Id.
rejected the use of the professional standards rule in Harte-Hanks, stating that “there is no question that public figure libel cases are controlled by the New York Times standard and not by the professional standards rule, which never commanded a majority of this Court.”\(^{144}\) Further, the professional standards rule never applied to defamation actions involving public officials, the term the South Carolina Supreme Court used to characterize Anderson.\(^{145}\)

The court’s citation to Peeler seems incorrect if the court is truly following a subjective standard. If South Carolina law requires, as the court suggested in Anderson, that a defendant’s actions be measured against a “standard [] of investigation,”\(^{146}\) then the court incorrectly adopted an objective test because standards are norms that serve as a references for judgment. Such a test directly conflicts with Sullivan and undermines the court’s next statement—“Further, this Court held that the ‘reckless conduct contemplated by the New York Times standard is not measured by whether a reasonably prudent man would have . . . investigated before publishing.’”\(^{147}\) The court further stated that a plaintiff must show “a subjective awareness of probable falsity.”\(^{148}\)

A final troubling element exists in Anderson’s “failure to investigate” analysis. The court referenced Anderson’s resumé and his military record, which were “public and easily verifiable.”\(^{149}\) This statement suggests that the ready availability of information somehow figures into the defendant’s subjective decision to publish—if information is close by, failure to procure it suggests fault on the part of the publisher. Once again, this position squarely conflicts with the failure to investigate language in Sullivan.

VI. CONCLUSIONS: THE PRACTICAL IMPACT OF ANDERSON AND AVOIDING A REPEAT OF HISTORY

Justice Goldberg, concurring in Sullivan, expressed doubt that juries would be able to adequately assess a defamation defendant’s state of mind or to correctly apply the concept of actual malice in reaching verdicts in defamation actions.\(^{150}\) In the wake of the Anderson court’s apparent procedural and substantive analyses problems, Justice Goldberg’s concerns apply with equal force to judges in defamation actions. Unlike a jury verdict’s discrete application to a single conflict, however, the Anderson court’s treatment of actual malice unfortunately conjures a specter of liability that will linger over South Carolina defamation jurisprudence.

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146. Harte-Hanks, 491 U.S. at 666 (emphasis added).
147. Anderson, 365 S.C. at 596, 619 S.E.2d at 432 (quoting Fabri, 345 S.C. at 456, 548 S.E.2d at 876 (emphasis added)).
148. Id. at 365 S.C. at 596, 619 S.E. 2d at 431–32 (emphasis added).
149. Id. at 597, 619 S.E.2d at 432.
This specter will doggedly pursue journalists whenever they interact with public figures.

Indeed, the most damning criticism of Anderson exists in its seeming disregard for the practical consequences that may arise in the case’s aftermath, rather than in any theoretical legal infirmity the case demonstrates. The court in Anderson apparently concluded that Phil Kent, writer of “Let the Liar Run,” demonstrated ample bad faith in his failure to consider readily obtainable and verifiable information that contradicted Anderson’s alleged dishonest statements—without any evidence that Kent actually knew the information existed.\(^{151}\) Had Kent examined this information, the court suggested, he would or should have doubted the veracity of his informant, the Chronicle’s own reporter.\(^{152}\) According to the court, such doubts were significant enough to provide a triable issue of fact for a jury and justify remand.\(^{153}\) Given this analysis, an editor could rarely trust his own reporter over a political candidate without fear of defamation liability. The South Carolina Supreme Court in Anderson suggested that an editor remain silent even if he implicitly trusts his reporter.

A hypothetical example serves to make this point. Assume in an Anderson-like situation the editor believes a political candidate has lied, basing this belief upon an obvious conflict between the candidate’s alleged statements to his reporter and other information known to the editor about the candidate. Further research from readily available sources, such as his publication’s own files, reinforces the editor’s belief that the candidate lied and does not contradict the reporter’s account of the interview.

However, the presence of such contrary information, as suggested by the court in Anderson, will serve as evidence of the editor’s bad faith if he prints an editorial with the accusation of dishonesty, even though the contrary information itself is the very basis of the accusation.\(^{154}\) If the editor publishes the accusatory editorial without additional checking, the failure to find and consider such readily available information could serve as evidence of actual malice.\(^{155}\)

At the other end of the spectrum, if the editor considers the additional information but still believed the reporter’s account, Anderson would again allow a jury to infer actual malice because the editor should have believed the significant body of information contrary to the statements the candidate allegedly made to the reporter. Either approach to fact investigation, according to Anderson, offers evidence of the editor’s bad faith, simply by virtue of the editor’s subjective belief in his reporter’s competence.

\(^{152}\) See id. at 596–98, 619 S.E.2d at 432–33.
\(^{153}\) Id. at 598, 619 S.E.2d at 433.
\(^{154}\) Id. at 596–98, 619 S.E.2d at 432–33.
\(^{155}\) Id. at 596–98, 619 S.E.2d at 432–33.
Such a conclusion might be plausible in cases where the political candidate did not lie or misstate his qualifications, but assume that the politician did lie.\textsuperscript{156} Given the same volume and availability of external facts contrary to the reporter’s assertion, the \textit{Anderson} court would weigh the reporter’s statement against the external facts and again conclude that the editor’s trust in the reporter manifested by printing the accusation of dishonesty, provided evidence of bad faith upon which actual malice could be found. This is true even though, in this hypothetical, the editor was right.

\textit{Sullivan}’s concurring justices foresaw the confusion that the doctrine of actual malice could create.\textsuperscript{157} They were correct—the outcome of \textit{Anderson} was inevitably forged on the day that the Supreme Court penned \textit{Sullivan}. Perhaps it is time then, to take heed of the \textit{Sullivan} prophets, and discard the actual malice doctrine and its confusion forever. As Justice Black suggested:

In my opinion the Federal Constitution has dealt with this deadly danger to the press in the only way possible without leaving the free press open to destruction—by granting the press an absolute immunity for criticism of the way public officials do their public duty. Stopgap measures like those the Court adopts are in my judgment not enough. This record certainly does not indicate that any different verdict would have been rendered here whatever the Court had charged the jury about “malice,” “truth,” “good motives,” “justifiable ends,” or any other legal formulas which in theory would protect the press. Nor does the record indicate that any of these legalistic words would have caused the courts below to set aside or to reduce the half-million-dollar verdict in any amount.\textsuperscript{158}

He concluded, “An unconditional right to say what one pleases about public affairs is what I consider to be the \textit{minimum} guarantee of the First Amendment.”\textsuperscript{159}

\textsuperscript{156} On the court’s consideration of the directed verdict, the court was not obliged to believe Anderson lied, as procedural rules required the court to view facts and inferences in a light most favorable to the plaintiff. \textit{Id.} at 594, 619 S.E.2d at 430–31. However, the court focused much of its analysis on establishing the improbability of Anderson’s dishonesty. \textit{Id.} at 596–98, 619 S.E.2d at 432–33. In this light, a discussion of how the court’s holding would apply if Anderson did lie or misstate his qualifications is appropriate.

\textsuperscript{157} \textit{See supra} note 40 and accompanying text.

\textsuperscript{158} N.Y. Times Co. v. Sullivan, 376 U.S. 254, 295 (1964) (Black, J., concurring) (emphasis added) (citation omitted).

\textsuperscript{159} \textit{Id.} at 297 (emphasis added).
Ensuring the full promise of the First Amendment by absolutely protecting press commentary on the actions of public officials would not only give plain application to the words of the amendment, but would also offer a quiet burial to the confusion that has plagued and seemingly will continue to plague South Carolina defamation jurisprudence.

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