

IN THE SUPREME COURT OF THE UNITED STATES

ERIC CARTMAN
PETITIONER

v.

IKE BROFLOVSKI
RESPONDENT.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifteenth Circuit

Brief for Respondent

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QUESTIONS PRESENTED

- I. Whether the District Court erred when it found a qualified reporter's privilege protecting a newsman from disclosing anonymous sources under the First Amendment, when no privilege exists in the express language of the First Amendment or in any statutory shield laws enacted by the state legislature?
 - A. Whether the District Court erred when it found a newsman qualified for the reporter's privilege when the newsman had not engaged in any investigation relating to the content reported on his website?
 - B. Whether the District Court erred when it found that respondent did not overcome the qualified reporter's privilege when the petitioner is a real party in interest in a defamation suit and the respondent, who has conducted a reasonable search, has exhausted all practical resources to obtain information sought?
- II. Whether the District Court erred when it found the respondent as a limited public figure and not a private individual when the respondent is a recluse executive of an international company who has no prior exposure to the public nor has attempted to interject himself into the present controversy?
 - A. Whether the District Court erred when it found petitioner, a part-time blogger, not liable on a standard of actual malice when he has the tools, time, and ability to verify the authenticity of a published falsified photo and accompanying defamatory statements?

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JURISDICTION STATEMENT

A Formal Statement of Jurisdiction has been omitted in accordance with the Rules of the Washington College of Law's Burton D. Wechsler First Amendment Moot Court Competition.

STATEMENT OF THE CASE

Ike Broflovski (“Broflovski”) was hired by Citrus, an electronic superstore, in 2006 as Director of Research and Development. (J.A. at 3.) On August 7, 2006, the President of Citrus introduced Broflovski to the company at a sparsely attended press conference that primarily showcased the company’s new products. (J.A. at 3.) The President said to reporters, “I have hired my genius brother [Broflovski] to oversee the development of a new line of Citrus products; Ike’s a little shy...So, pay no attention to the man behind the curtain!” (J.A. at 3.) Some news carriers wrote about the press conference focusing on the “new and exciting line of products,” but only briefly mentioned Broflovski’s hiring. (J.A. at 3.) The company enjoyed success, managed difficult times, and was highly valued. (J.A. at 2.) The employees of Citrus enjoyed working under Ike so much, they created the slogan, “I like Ike,” and wore it on shirts and pins. (J.A. at 3-4.) Broflovski’s public showcase is limited to the President’s praise in interviews and a standard biography on Citrus’s website containing basic contact information. (J.A. at 3.)

Eric Cartman (“Cartman”) owns an electronics store which competes for sales with the neighboring Citrus superstore. (J.A. at 4.) In June 2005, Cartman created a blog, *The Sludge Report*, as a part-time job to compensate for lost revenue caused by the opening of the Citrus superstore. (J.A. at 4.) Every night he would post “various news items he [found] on the internet and the headlines of major papers.” (J.A. at 4.) Many stories posted on *The Sludge Report* criticize large companies, yet Cartman’s harshest criticism is reserved for Citrus because of his personal objections to their work practices and his disdain for “nearly driving him out of business.” (J.A. at 4.) Some of his 100,000 readers began passing stories to Cartman in anonymity to be posted on *The Sludge Report*. (J.A. at 4-5.) Professor Chaos is a *Sludge Report*

reader who sends Cartman information about Citrus's internal matters. (J.A. at 5.) Cartman has met "Professor Chaos" and knows his personal information including his employment at Citrus. (J.A. at 5, 6.) The underlying litigation arose when Professor Chaos emailed Cartman a doctored photograph. (J.A. at 5.)

The doctored photo in question showed Broflovski overseeing alleged unethical and inhumane work conditions at Citrus's manufacturing plant outside Mumbai, India. (J.A. at 5.) Cartman neglected to use his available software that could have confirmed the authenticity of the photo with one scan. (J.A. at 7.) On July 8, 2008, Cartman posted the photo on *The Sludge Report*, along with allegations including sixteen-hour work days and poor work conditions. (J.A. at 6.) Cartman concluded that "[t]he Broflovskis and their capitalist oppression are a danger to humanity! If the image I am showing you depicts what I think it does, then I'm telling you the truth, Ike Broflovski is nothing but a slave driver!" (J.A. at 6.)

Over the next month some news media covered the story; most notably, a top cable news program gave Broflovski an undeserved superlative: "Most Heinous Individual in the Galaxy." (J.A. at 6.) In response to this award, Citrus's stock lost substantial value and Broflovski received threats on his life. (J.A. at 7.) Broflovski did not respond to media invitations regarding the situation, and only defended himself through his attorney, who noted he would handle the matter in a court of law. (J.A. at 6-7.)

Broflovski filed a defamation suit against Cartman in Silverado Superior Court claiming libel. (J.A. at 1.) Cartman removed the case to the District Court for the Western District of Silverado on October 14, 2008. (J.A. at 1.) In the discovery phase of the trial, Broflovski stipulated he traveled to India. (J.A. at 7.) Broflovski also deposed the manager of the factory where the alleged illegal practices occurred in an effort to find the source of the photo. (J.A. at

8.) The President also sent an email to the employees requesting information regarding the source of the photo. (J.A. at 8.) Both efforts were fruitless. (J.A. at 8.) Broflovski also sent interrogatories to Cartman seeking identification of the source. (J.A. at 8.) But, on January 16, 2009, Cartman invoked a qualified reporter's privilege under the First Amendment, preventing him from compelled discovery. (J.A. at 2, 8.) Also, Cartman moved for summary judgment. (J.A. at 2, 8.) The District Court found a privilege and granted summary judgment on January 27, 2009. (J.A. at 2.) The United States Court of Appeals for the Fifteenth Circuit reversed both findings on May 14, 2009. (J.A. at 32.)

SUMMARY OF ARGUMENT

Broflovski contends the District Court improperly read into *Branzburg v. Hayes*, 408 U.S. 665 (1972) and *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958) and misapplied them to find a qualified reporter's privilege. For public policy reasons mentioned in the dicta of these cases, a citizen's due process rights, requiring disclosure of sources, outweighed potential First Amendment rights owed to reporters. However, if the qualified reporter's privilege does exist, there are still two issues with its application in this scenario. First, the reporter must qualify for the privilege by demonstrating his efforts to investigate a news story with the intent to publish his findings. Cartman did not proactively investigate in the facts at bar. Secondly, there are still times, even with the proper assertion of the qualified reporter's privilege, where an individual seeking disclosure can overcome the First Amendment concerns by demonstrating a greater due process violation. In the effort to maintain equity and promote justice, this Court should find disclosure necessary because it is sought in good faith and of certain relevance to maintain a claim.

It is further asserted that Broflovski is a private individual drawn into the public eye by Cartman. Broflovski is able to maintain status as a private individual because he did not seek to influence a resolution in the controversy created by Cartman. Broflovski further reclosed himself from any public attention during this time, and, hence, the facts on record indicate that the District Court's opinion labeling Broflovski as a public figure was erroneous. Cartman intentionally published the defamatory content with a reckless disregard for the truth and was at the very least negligent. If, however, Broflovski is found to be a limited public figure, his intentional and reckless actions also qualify under a standard of actual malice. Summary

judgment in favor of Cartman is improper because there are material facts in dispute concerning both Broflovski's status and Cartman's recklessness in posting the defamatory content.

ARGUMENT

- I. UNDER THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION, THE SUPREME COURT HELD THAT A QUALIFIED REPORTER'S PRIVILEGE DOES NOT EXIST; THUS, CARTMAN HAS NO RELIEF FROM BEING REQUIRED TO ANSWER COURT COMPELLED DISCLOSURE REGARDING THE IDENTITY OF HIS ANONYMOUS SOURCE.

There are only three sources with authority to grant a privilege for newsman. *See* Romualdo P. Eclavea, Annotation, *Privilege of newsgatherer against disclosure of confidential sources or information*, 99 A.L.R.3d 37 §2(a) (1980). These sources of authority are the expressed provisions of the Constitution, the interpretation of constitutional language by courts, or a statutory shield law enacted by the legislature. *See Id.* Without authorization from one of these, no right of privilege exists. The State of Silverado has not enacted any legislation granting this right, nor has a right been found on the face of the First Amendment. Nonetheless, the District Court erroneously found a right, and the Court of Appeals correctly reversed the District Court's finding. This honorable court should affirm the Court of Appeals.

It was first held there is no qualified reporter's privilege in civil cases. *Garland v. Torre*, 259 F.2d 545, 550 (2d Cir. 1958). In *Garland*, the Second Circuit considered this question for the first time, and the court in its opinion, discussed in great detail the public policy that should prevent a reporter from having a privilege in civil cases. *See Id.* at 549-50. Chiefly, the court recognized its own power must be sufficient to find truth. *See Id.* If courts were stripped of this essential power, their role in society would be undermined; the citizens would recognize this as a weakness of the judicial system, and turn to self-help for remedies instead of litigating them. *See Id.* The court acknowledged the importance of the First Amendment in the context of the rights afforded to the press to publish without censure, print without tax, and gather their content in any

way. *See Id.* at 548. However, the court ultimately found its need to effectively adjudicate disputes between individuals so essential that any potential news reporter's privilege "must give place under the Constitution to a paramount public interest in the fair administration of justice." *Id.* at 549.

In 1972, the United States Supreme Court held that because the First Amendment does not provide newsmen a privilege from disclosing anonymous sources, they are required to appear and testify before state or federal grand juries. *See Branzburg*, 408 U.S. at 665. *Branzburg* was explicit in confining its narrow holding to criminal cases where the newsman was required to testify before a grand jury. *See Id.* at 691. The majority opinion acknowledged the concerns of the newsman, who argued for the privilege, claiming that ordered disclosure of his sources would lead to the sources being less inclined to share information that is valuable to the public, and thus, inhibiting the free flow of information. *See Id.* at 671 n5. However, the majority agreed the press did not gain extra rights over ordinary citizens via the First Amendment. *See Id.* at 691-92. This holding highlighted the public policy concerns if a privilege was created. One important reason to hesitate before granting a special privilege to a class of newsman would be defining the scope of this class. *See Id.* at 704. Further, the majority held the rights ordinary citizens enjoy, that protect them from bad faith discovery, are sufficient to bar the type of discovery the newsman sought to exclude. *See Id.* at 707-708.

Although *Garland* and *Branzburg* seem straight forward, they have been misapplied. Because both opinions give proper acknowledgment to the importance of First Amendment, pioneering courts have interpreted that acknowledgment to mean there may be times when First Amendment rights outweigh the need for disclosure. *See Von Bulow v. Von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987); *See In Re Grand Jury Proceedings*, 810 F.2d 580, 584-86 (6th Cir.

1987). In an opinion from 2003, Judge Posner drew attention to *Von Bulow* and other cases that “audaciously declar[e] that *Branzburg* actually created a reporter’s privilege.” *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003); *See also Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975) (holding that a state court had power and duty to weigh one’s right to due process with a newsman’s claim for protection of disclosing anonymous sources); *See also Lewis v. United States*, 501 F.2d 418 (9th Cir. 1974) (holding that there was no right for a radio station manager to refuse to produce recordings pursuant to a subpoena).

Upon a close reading of *Branzburg* and *Garland*, recognizing the misapplication other courts have made, and understanding the public policy implications involve in creating a privilege, there can be no mistake - there is no qualified reporter’s privilege. In conclusion, without finding a privilege in the express constitutional language, the constitutional language interpreted by the courts, or within the statutory shield laws enacted by the legislature, one must not exist. The Court of Appeals correctly reversed the District Court’s finding of a privilege. Any holding supporting the existence of a privilege to allow newsmen to shield their sources of information would be spearheading contradicting precedent.

II. ASSUMING THERE IS A QUALIFIED REPORTER’S PRIVILEGE FOUND IN THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION, CARTMAN DOES NOT QUALIFY AS A REPORTER AND HIS WEBSITE DOES NOT QUALIFY AS A PERIODICAL; THUS, HE IS NOT ENTITLED TO THE BENEFITS OF SUCH A PRIVILEGE.

Inherent in a qualified reporter’s privilege is that one who claims the privilege must qualify as a reporter to benefit from it. This issue was raised as a public policy concern by Justice White when he commented that defining the spectrum of reporters who would qualify would “present difficulties of a high order.” *Branzburg*, 408 U.S. at 704 (quoting *In Re Grand Jury Witness*, 322 F.Supp 573, 574 (N.D. Cal. 1970)). This is because our history has a tradition of

giving rights to any “lonely pamphleteer” to find protection under the First Amendment. *See Branzburg*, 408 U.S. at 704. However, the current definition of a reporter has been narrowed by qualifying who is entitled to the privilege. By the creation of a privilege, this notion of the liberty of the press being extended to anyone who puts pen to paper is not without its limits.

- A. Cartman is not a qualified reporter because he does not engage in investigative reporting, with the intent to publish the information he discovers at the time he happens upon the information.

The Second Circuit has held and affirmed limits to the reporter claiming the privilege with regard to their intent:

The critical question in determining if a person falls within the class of persons protected by the journalist’s privilege is whether the person, at the inception of the investigatory process, had the intent to disseminate to the public the information obtained through the investigation...[This] is no basis for claiming a journalist’s privilege by persons who do not begin their investigations with an intent to disseminate information to the public since no First Amendment rights are implicated under such circumstances.

Von Bulow, 811 F.2d 136 at 143.

The Third Circuit has established a similar test, requiring the reporter claiming the privilege to demonstrate he engaged in investigative reporting, gathered news, and possessed the intent to publish the information at the inception of the newsgathering process. *See Titan Sports, Inc., v. Turner Broadcasting Systems, Inc.*, 151 F.3d 125, 128-29 (3d Cir. 1998). Both of these tests are conjunctive, where if a newsman fails to satisfy one element, he does not qualify for protection.

Cartman’s conduct is contrary to any of the established tests. Although Cartman has the intent to publish what information he obtains, the manner in which he obtains the information is dissimilar to the required actions. Cartman scours the internet for news items merely echoing the headlines of legitimate news reporting websites. (J.A. at 4.) He also receives the information he posts from visitors to his website who email him “scoops” and “scandals.” (J.A. at 4-5.) The

difference between Cartman's research and other investigative journalists who did qualify for protection (i.e. Arthur Hirsch, in *Silkwood v. Kerr-McGee*, 566 F.2d 433, 434 (10th Cir. 1985)) is the passive nature in which Cartman obtains his information. In *Silkwood*, Hirsch began researching Karen Silkwood's death in March of 1975, formed a production company for the purpose of creating a documentary on her death, and interviewed numerous people to collect information. *Silkwood*, 566 F.2d at 434. Cartman, a part-time blogger, obtained the information, posted it within one day, and did not conduct any investigation. (J.A. at 5.) If Cartman's actions were considered investigative journalism, it would make a mockery of the industry that is vital the discovering and spreading information that qualifies as news. For this reason, Cartman is not an investigative reporter, and his work cannot constitute investigative journalism.

B. Cartman's website is not a qualified publication because, although it disseminates information the public has an interest in, it is not a newspaper, magazine, or other periodical where its published material is news.

California has a shield law providing reporters with rights not to disclose sources, and the discussion of the legislative intent prompting the statute is relevant as a guide to assess this question of first impression. The intent and history of the statute provide valuable insight and rationale as to what publications should be privileged. *See* Cal. Const. art I, § 2; *See O'Grady v. Superior Court of Santa Clara County*, 139 Cal. App. 4th 1423, 1459-60 (2006). The statute protects "newspaper[s], magazine[s], or other periodical publication[s]." Cal. Const., art I, § 2. While the court was able to distinguish websites which publish news from newspapers, it had a difficult time defining "magazine" and if the intent of the legislature would include "E-zines". *See O'Grady*, 139 Cal.App.4th at 1461. Magazines were deemed to include E-zines because they are defined as a "digital version of a print magazine, or a magazine-like electronic publication with no print counterpart made available via the Web, e-mail, or other means of Internet access."

Id. at 1461. The court never concluded what the website in that case was because of the differences between online and print media. *See Id.* at 1466. However, the court considered factors including: the title used by publishers when identifying their positions; the fact that the word “publication” invokes thoughts of printed media; and the fact that the word “periodical” invokes thoughts of regular publication intervals. *See Id.* at 1462-66. Additionally, although not directly used, both online publications in *O’Grady* had monthly visitors between 300,000 and 438,000. *See Id.* at 1432. These factors should all be appropriate guides to assist in answering this question of first impression.

Cartman’s blog is not a newspaper, just as the websites in *O’Grady* were not. However, Cartman’s blog is distinguishable from the *O’Grady* websites, which more closely resembled an online magazine or periodical publication. Both of the websites in *O’Grady* had staff writers who would research to write their own critiques and articles, whereas Cartman would take material from other websites to repost on his own. (J.A. at 4.) Although Cartman posted on his website daily, he did not hold himself out as an author, publisher, or editor as the writers in *O’Grady* did. Perhaps the largest distinction can be drawn on the number of readers who visit the pages. Cartman has a relatively low number of readers at 100,000 whereas the *O’Grady* pages had three to five times that many readers. (J.A. at 4.) Cartman’s blog does not effectively convey the same information as the *O’Grady* pages did, and should not be entitled to the same rights they earned.

III. ASSUMING THERE IS A QUALIFIED REPORTER’S PRIVILEGE FOUND IN THE FIRST AMENDMENT, BROFLOVSKI HAS MET THE REQUIREMENTS TO OVERCOME SUCH A PRIVILEGE, AND CARTMAN MUST BE COMPELLED TO DISCLOSE HIS CONFIDENTIAL SOURCES.

Even if a qualified reporter’s privilege exists and a newsman is a qualified reporter entitled to its protection, the party seeking disclosure of information has an opportunity to show

the need for disclosure outweighs the First Amendment concerns. *See Garland*, 259 F.2d at 545; *See Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *See also Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972). When this occurs, disclosure should be compelled. Jurisdictions that recognize a qualified reporter's privilege have each developed their own version of a multi factor test to determine when disclosure is required by reading into *Garland*.

Jurisdictional tests to balance an individual's rights to due process and a reporter's First Amendment rights generally encompass the same elements including: (1) whether the party seeking the disclosure has made an unsuccessful attempt to acquire the information sought from outside from the newsman, (2) whether the information sought "goes to the heart of the matter," (3) whether the information the newsman has is of "certain relevance," and (4) what the controversy is. *See Gonzales v. National Broadcasting Company*, 194 F.3d 29, 31 (2d Cir. 1999); *See also Carey*, 492 F.2d at 636. Importantly, "the asserted claim to privilege should be judged on its facts by striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Branzburg*, 408 U.S. at 710. This call for an investigation of the facts in this case should be sufficient for Broflovski to overcome Cartman's motion for summary judgment. When the party seeking disclosure has exhausted its other reasonable alternatives to obtain the information and the information goes to the heart of the matter and has certain relevance, disclosure will outweigh the First Amendment concerns and it should be compelled.

In determining if the party seeking information has exhausted all reasonable avenues to obtain the material independently, it should be noted that such a required search has its limits. Litigants must not "be made to carry wide-ranging and onerous discovery burdens where the path is ill-lighted as that emerging from appellant's deposition." *Carey*, 492 F.2d at 639. In that

case, the court noted that companies with “a very substantial number of employees” would have a difficult time in determining the source of the information when it could be “anyone from an office boy to a top officer, and in any part of the building,” and held the concept of exhaustion of remedies is vague and fact sensitive. *Id.* at 638. This is a question of fact that not only the Court of Appeals agreed with, but is, at a minimum, ground for reversing the District Court’s summary judgment.

When the subject of libel is a public figure, the proof of actual malice by the author of the libel is required. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Because this standard is so difficult to prove, there is no doubt that at the outset of a claim the field of play is not level between the parties. When the author is permitted to play hide the ball with his sources, the power of the judicial system to be unbiased is negated because only half of the facts have been discovered. It was noted “the heavy burden of proof imposed upon the plaintiff in such a case will often make discovery of confidential sources critical to any hope of carrying that burden.” *Carey*, 492 F.2d at 634. This debate is describing information which goes to the heart of the matter. If, for example, the information sought would be material and probative of proving the author’s negligence, it would be to the heart of the matter. When the information has such certain relevance as to the maintenance of the claim, the court’s interest should be in promoting the search of truth and leveling the playing field for the litigants to find if there was actual malice.

There is also significant weight given to compelling disclosure when the libellant is a party in the matter, opposed to when the source of the information is the target of the lawsuit. In a civil case where “the journalist is a party, and successful assertion of the privilege will effectively shield him from liability, the equities weigh somewhat more heavily in favor of disclosure.” *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir.1981).

The facts in the case at bar strongly favor compelling disclosure. Because Broflovski is suing Cartman for libel, Cartman is the real party in interest, and not just relaying the information from the source to the public. (J.A. at 2, 8.) The nature of him as a participant in the action strongly weighs in favor of disclosure. Also, the source of the information goes straight to the heart of the claim in the sense it is essential for Broflovski to have this information to prove the elements of libel. Without this information there is no equity in the quest for truth in this matter. Broflovski's effort to obtain the information independently was exhausted by not receiving any information from the India plant manager in a deposition. (J.A. at 8.) Because Citrus is a large *Fortune 500* corporation headquartered in Silverado with stores throughout the United States and international factories, including one in India, the number of employees who potentially sent Cartman the doctored photo are numerous. (J.A. at 2-5.) It would be an overdue burden on the company to conduct an investigation without any information given by Cartman as to where to begin the investigation.

Broflovski is suing Cartman for defamation. Cartman is a party in the litigation, and his source goes directly to the heart of the claim. The information Broflovski seeks is not in bad faith and is necessary in the quest of truth. Broflovski has no reasonable alternatives for finding the information on his own because of the large pool of potential sources. For these foregoing reasons, Broflovski has met the standards that weigh in favor of this court compelling disclosure.

IV. SUMMARY JUDGMENT WAS IMPROPER BECAUSE BROFLOVSKI IS A PRIVATE INDIVIDUAL AND NOT A PUBLIC FIGURE. ALSO, CARTMAN PUBLISHED THE CONTENT INTENTIONALLY AND WITH A RECKLESS DISREGARD FOR THE TRUTH.

Contrary to the District Court's findings, Broflovski is a private individual and not a public figure. Cartman intentionally made these false statements about Broflovski with a reckless disregard for the truth. Broflovski's status as a private figure, and the intentional and reckless

nature of the false statements made by Cartman are to be determined independently by this court under a clearly erroneous standard. *See Harte-Hanks v. Counnaughton*, 491 U.S. 657, 687 (1989). Summary judgment is improper if the court determines that a reasonable jury could conclude that Cartman had serious doubts as to the truth of the information published. *See Cervantes*, 464 F.2d at 994; *See also* Fed. R. Civ. P. 56(e). There are serious doubts pertaining to the validity of the information published by Cartman present within the record, therefore summary judgment in favor of Cartman improper.

A. Broflovski has a valid claim for defamation against Cartman because Cartman's article published in *The Sludge Report* was false, and Broflovski suffered severe emotional distress as a result of threats on his life.

The First Amendment's protection of free speech is not absolute. *See Gertz v. Robert Welch*, 418 U.S. 323, 333 (1974); *See gen.* U.S. Const. amend. I. Similarly, the protection of the First Amendment is not furthered by shielding individuals who publish defamatory statements bearing no constitutional value. *See Gertz* 418 U.S. at 340. For that reason, the law of defamation serves an important function to protect citizens harmed by false statements. *See Rosenbloom v. Metromedia*, 415 F.2d 892, 894-895 (1969), *aff'd*, 403 U.S. 29 (1971). "The legitimate state interest underlying the law of [defamation] is the compensation of individuals for the harm inflicted upon them by the defamatory falsehood." *Gertz*, 418 U.S. at 341.

To prove defamation, one must show all of the following four prongs: (a) "a false and defamatory statement concerning another;" (b) "an unprivileged publication to a third party;" (c) "either actionability of the statement irrespective of the special harm or the existence of special harm caused by the publication;" and (d) "fault amounting to at least negligence on the part of the publisher." Restatement (Second) of Torts § 558 (1977). A statement is considered false and defamatory when the truth would have a different "effect on the mind of the reader." *Masson v.*

New Yorker Magazine, 501 U.S. 496, 517 (1991). The defamatory statement can be phrased as an opinion as long as a court determines that the statement is provable as false and could “reasonably be interpreted as stating actual facts about an individual.” *Partington v. Bulgiosi*, 825 F. Supp. 906, 920 (D. Haw. 1993); *See also Milkovich v. Lorain Journal*, 497 U.S. 1, 19-20 (1990). Whether the defamation is libel or slander, its unprivileged publication can be through any form of media. *See Rosenbloom*, 415 F.2d at 895.

Accordingly, Cartman’s opinions in *The Sludge Report* concerning Broflovski bear no constitutional value and qualify as defamation in the following regards. First, Cartman’s statements about Broflovski, published in *The Sludge Report*, are considered false and defamatory because they fallaciously characterize him as being a “slave driver.” (J.A. at 6.) Cartman contrived this characterization in his blog utilizing the doctored photo depicting Broflovski abusing Citrus employees in India. (J.A. at 5, 7.) In actuality, conduct by Citrus employees blatantly contradicts Cartman’s false characterizations. Citrus employees’ high regard for Broflovski is exemplified by their creation and use of the “I like Ike” slogan on shirts and pins. (J.A. at 3-4.) Cartman’s statements about Broflovski were circulated to an online audience via *The Sludge Report*, and constitute as communications within the scope of the first two prongs of defamation.

Second, Broflovski suffered severe emotional distress from depression caused by threats on his life. (J.A. at 7.) Broflovski can “recover for any emotional distress or illness or other bodily harm of which the [libel] is the legal cause.” Restatement (Second) Torts § 575 cmt. a (1977). This Court articulated in *Gertz* that trial courts have experience and are fully capable of framing jury instructions that define actual injury, thus, a definition of injury is not needed on

appeal. *See Gertz*, 418 U.S at 350. Broflovski’s injuries are a special harm satisfying the third prong of defamation, but these injuries would be an issue of fact assessed on remand.

Finally, the level of fault of the publisher encapsulated in the final prong is determined by an evaluation of the status of the defamed individual. *See Gertz*, 418 U.S. at 351. A defamed private citizen must only show the publisher’s negligence in publicizing the defamatory falsehood. Restatement (Second) of Torts § 580B (1977). A public figure, however, must establish that the defamatory statements were published with actual malice. *See Masson*, 501 U.S. 496 at 510. The analysis hereafter shows Broflovski’s status as a private individual thereby warranting Cartman’s actions to be evaluated under a negligence standard.

B. Broflovski has the status of a private individual and cannot be deemed an all-purpose or limited public figure because Broflovski has not invited public attention nor involved himself in the controversy created by Cartman.

To what extent and whether someone is a public figure is a matter of law to be decided by the court. *See Travoulares v. Washington Post*, 817 F.2d 762, 772 (D.C. Cir. 1987). There are three different categories of individuals who are defamed: (1) “all-purpose public figures”¹, who achieve such pervasive fame or notoriety that they become public figures for all purposes and in all contexts;” (2) “limited-purpose public figures,” who voluntarily inject themselves into a particular public controversy and thereby become public figures for a limited range of issues;” and (3) private individuals who become involuntary public figures “through no purposeful action

¹ A “Public Official” is considered a “Public Figure” for their extent in a controversy and is afforded the same constitutional protections as one who has voluntarily assumed such a role. *E.g. Sullivan*, 376 U.S. at 273.

of their own.” *Gertz*, 418 U.S. at 345; *See also Foretich v. A.B.C.*, 37 F.3d 1541, 1551-1552 (4th Cir. 1995).

For a person to be deemed an “all-purpose public figure” they must demonstrate “clear evidence of general fame or notoriety in the community, and persuasive involvement in the affairs of society.” *Trotter v. Anderson*, 818 F.2d 431, 433 (5th Cir. 1987). All-purpose public figures can reasonably expect to have a substantial impact in the resolution of a public dispute with foreseeable consequences for those who are not immediate participants. *See Waldbaum v. Fairchild Publications*, 627 F.2d 1287, 1292 (D.C. Cir. 1980). A public figure’s fame invites scrutiny of their actions in the form of positive or negative feedback. *See Id.* at 1294. Due to its all-encompassing status, an all-purpose public figure is a rarity. *See Id.* at 1294. Broflovski does not qualify as an all-purpose public figure because he has not achieved pervasive fame or notoriety. His refusal to give interviews and lack of public exposure is characteristic of Broflovski’s unwillingness to pursue such fame or notoriety. (J.A. at 3.)

Most public figures are classified as limited public figures because they “have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved.” *Gertz*, 418 U.S. at 345. To determine whether someone is a limited public figure, an evaluation of the “nature and extent of an individual's participation in the particular controversy giving rise to the defamation” is required. *See Id.* at 352. In *Gertz*, this Court established a two-part test to determine whether an individual is a public figure. *See Partington*, 825 F. Supp. at 917. The test, which has since been further defined, consisted of a determination of whether there is a public controversy and the defamed individual’s nature and extent of participation in the controversy. *See Id.* at 917. As noted by the trial court, the determination of someone’s status as a limited public figure is one of first impression in the

Western District of Silverado. (J.A. at 16.) The Court of Appeals found the test used by the lower court to be insufficient and followed the extended test established by *Lerman v. Flynt. Distrib. Co.* 745 F.2d 123, 136-137 (2nd Cir. 1984). (J.A. at 29.) A test that strikes a balance between these tests employed by the appeals and trial court has been articulated as:

(1) [T]he plaintiff had access to channels of effective communication; (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy; (3) the plaintiff sought to influence the resolution or outcome of the controversy; (4) the controversy existed prior to the publication of the defamatory statement; and (5) the plaintiff retained public-figure status at the time of the alleged defamation.

Foretich, 37 F.3d at 1551; *See also Partington*, 825 F. Supp at 917. Typically the second and third requirements are combined. *See Foretich*, 37 F.3d at 1553.

It must first be established whether Broflovski enjoys access to channels of effective communication. *See Id.* at 1553; *See also McDowell v. Paiewonsky*, 769 F.2d 942, 947 (3d Cir. 1985). Due to one's constitutional right of rebuttal, this prong serves to protect those who do not have a realistic opportunity to counteract false statements. *See Partington*, 825 F. Supp at 917. Because of the nature of his position, Broflovski had access to effective channels of communication, yet he rarely, if ever, utilized them. His only statement issued in reference to the controversy was a rebuttal through his attorney. (J.A. at 2, 3, 7.) Such a response is a constitutionally protected right of rebuttal available to every citizen. *See Foretich*, 37 F.3d at 227; *See also Gertz*, 418 U.S. at 344.

Before the second and third prongs can be further defined, a determination of what constitutes a public controversy is essential. "A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which effects the general public or some segment of it in an appreciable way." *Foretich*, 37 F.3d at 1554. A general interest or concern is insufficient. *See Waldbaum*, 627 F.2d at 1297. There can be no public controversy

“unless the issues involved were truly divisive.” *Wolston v. Reader’s Digest*, 443 U.S. 157, 166 (1979). In making this determination, a court may look at the surrounding circumstances, such as public debate, previous coverage of the plaintiff in the press, and whether a reasonable person would have expected those beyond the immediate participants to feel the impact of its resolution. *See Id.*; *See Waldbaum*, 627 F.2d at 1295. A public controversy was found in *Foretich*, a child custody case, when the issues involved were so highly discussed by the public that Congress and the President of the United States became involved and issued legislation in favor of one of the claimants. *See Foretich*, 37 F.2d at 1555.

The alleged improper work environment is not a public controversy. The work environment of Citrus employees’ is not something which could reasonably affect anyone other than those at the Mumbai plant. Furthermore, the employees’ and Kyle Broflovski’s, President of Citrus, satisfaction of Broflovski’s work and their initiative to praise him illustrate that there is no public controversy, and it is at the very most a general concern. (J.A. at 4.); *See also Waldbaum*, 627 F.2d at 1297.

Once the controversy is defined, the plaintiff’s role in it must be analyzed. *See McDowell*, 769 F.2d at 949. “The plaintiff either must have been purposely trying to influence the outcome or could realistically have been expected, because of his position in the controversy, to have an impact on its resolution.” *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967); *See also Gertz*, 418 U.S. at 351-52. A court attempting to determine the plaintiff’s role can look at the plaintiff’s past conduct, the public reaction to the plaintiff’s conduct and statements, and the extent of press coverage. *See Curtis*, 388 U.S. at 164. “Trivial or tangential participation” is not sufficient to show the requisite involvement. *Id.* Someone who has not “voluntarily expose[d] themselves to an increased injury from defamatory falsehood” has not “assumed an

influential role in ordering society.” *Gertz*, 418 U.S. at 345; *See Curtis*, 388 U.S. at 164. They must have “‘thrust themselves to the forefront’ of the controversies as to become factors in their ultimate resolution”. *Waldbaum*, 627 F.2d at 1297. A plaintiff remains a private individual if he does not attempt to shape the outcome of the controversy; however, if he does, he is deemed to be a limited public figure for purposes of that controversy. *See Id.* at 1298. “A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.” *McDowell*, 769 F.2d at 949 (holding that plaintiff’s failure to respond to a grand jury’s subpoena to grand jury investigation of his uncle, a Russian spy, and other soviet intelligence agents, is insufficient to establish he voluntarily assumed a special role of prominence).

One’s choice of profession is not determinative of whether someone is a private or public figure. *See Waldbaum*, 627 F.2d at 1299. A corporate official within a prominent company is not by default a public figure. *See Id.* By the nature of their profession, executives influence corporate policy, and simultaneously perform essential job tasks such as implementing innovative company policies and programs. *See Id.* Nonetheless, executives usually can remain private individuals because they do not affect one or more public controversies when performing of these activities. *See Id.* To preserve the legitimacy of the First Amendment, courts are discouraged from labeling certain positions as always being public. *See Id.*

Broflovski has not invited public attention to the alleged public controversy. He is rarely seen in the public and has refused to address demands by the media to respond to the allegations. (J.A. at 3, 7.) The acceptance of a position by a well qualified candidate such as Broflovski, as Director of Research & Development at Citrus, a *Fortune* 500 consumer electronics company, is not evidence of an attempt by Broflovski to “voluntarily thrust” himself into a public

controversy. (J.A. at 3.) Broflovski does not make decisions on public policy, nor do his responsibilities include decision-making that affects any public controversies. (J.A. at 3-4.) He also does not cause Citrus to be drawn regularly into the national view. (J.A. at 3-4.) Proof of this is shown by Broflovski's concerted efforts to maintain his privacy, from the default executive description on the Citrus website, to his one lined "thank you for the warm welcome" at a sparsely attended Citrus press conference; he has invited little, if any public attention. (J.A. at 3, 4.) By standing on the side, Broflovski has not thrust himself into the forefront of the controversy to influence the ultimate outcome.

This public controversy must have existed prior to the publication of the defamatory statement. *See Foretich*, 37 F.3d at 1551. Since a court may not question the legitimacy of the public concern, it must examine all these factors prior to the publication of the defamatory statements. *See Waldbaum*, 627 F.2d at 1296-1297. This examination is a safeguard put in place to ensure that plaintiff could have reasonably anticipated publicity. *See Id.* As a result, the creation of a public controversy is not the same as revealing one. *See Trotter*, 818 F.2d at 434. In conjunction with the fourth prong, the final prong requires a plaintiff to retain public figure status at the time of the defamation. *See Foretich*, 37 F.3d at 1551. The importance of this last prong falls on the existence of a public controversy and the individual's participation in the controversy, thereby rendering them a public figure for a limited range of issues. *See Waldbaum*, 627 F.2d at 1292.

The claim by Cartman that Broflovski is a slave driver is insufficient to be a public controversy for which Broflovski is a limited public figure for several reasons. First, it was not an existing public controversy; it was a controversy contrived by Cartman. (J.A. at 5.) Second, after Cartman made these false allegations, Broflovski, a "shy and private person", effectively

shielded himself from the public. (J.A. at 3, 7.) Accordingly, Broflovski cannot be deemed to be an all-purpose or limited public figure during the time of the defamation.

C. Broflovski is a private individual involuntarily dragged into the controversy through no purposeful action of his own.

When someone becomes a public figure “through no purposeful action of his own” he is considered an involuntary public figure. *See Gertz*, 418 U.S. at 345. An involuntary public figure must denounce any role in the debate to remain a private individual. *See Waldbaum*, 627 F.2d at 1298. Private individuals are more vulnerable to injury and are more deserving of recovery because they have not voluntarily assumed such a position as to invite media comment and may lack effective opportunities to rebut defamatory statements. *See Gertz*, 418 U.S. at 344-345; *See also Curtis*, 388 U.S. at 164. The constitutional privilege of free speech must be balanced with the government’s interest in protecting the reputation of an individual who has decided to stay out of public scrutiny. *See Travoulares*, 817 F.2d at 771; *See also Partington*, 825 F. Supp. at 916. This is accomplished by requiring the injured to show the defamatory publication was made negligently. *See Gertz*, 418 U.S. at 353.

A publisher can be liable for disseminating defamatory material when he “(a) knows that the statement is false and that it defames the other; (b) acts in reckless disregard to these matters; or (c) acts negligently in failing to ascertain them.” Restatement (Second) of Torts 580C (1977). The Court of the Appeals’ is correct that the standard for negligence in an action for defamation is whether the publisher acted as “a reasonable person in the circumstances.” (J.A. at 30.) A finding of negligence can be determined through factors such as the publisher’s diligence in researching the validity of the information, the reliability of source, the inherent nature of the news, the need for immediate dissemination, and the reasonability of the publisher’s reliance on such information. *See Rosenbloom*, 415 F.2d at 896.

At the very least, Cartman was negligent in publishing the doctored photograph of Broflovski. A reasonable person can find negligence on Cartman's behalf since the inherent nature of the photograph would warrant a reasonable person to conduct further investigation. *See Masson*, 501 U.S. at 521. His accessibility to and familiarity with electronics show that he easily could have checked the photograph's veracity in the day it took him to publish it. (J.A. at 4, 7.) Further proof of Cartman's purposeful avoidance of truth is shown by his frequent criticism of Citrus seen in conjunction with the fact that he started *The Sludge Report* to compensate for revenue lost to a Citrus store across the street. (J.A. at 4.) Additionally, Cartman's doubts as to the photo's authenticity are exemplified by the words he used to describe the doctored photograph (J.A. at 6.) When seen in the light most favorable to Broflovski, all these factors can, at the very least, be determined by a reasonable person as negligent.

V. ASSUMING THIS COURT FINDS THAT BROFLOVSKI IS A LIMITED PURPOSE PUBLIC FIGURE, SUMMARY JUDGMENT IN FAVOR OF CARTMAN IS STILL IMPROPER BECAUSE THERE ARE SUFFICIENT FACTS TO SUPPORT THAT A REASONABLE JURY COULD FIND CARTMAN ACTED WITH ACTUAL MALICE.

If the victim of defamation is a public official he must show that the author acted with actual malice. *See Gertz*, 418 U.S. at 345. Actual malice is defined as the publisher's high awareness of the statements probable falsity and defamatory character and the fact that he acted with "reckless disregard of these matters". Restatement (Second) of Torts § 580A (1977); *Sullivan*, 376 U.S. at 279-280; *Accord Gertz*, 418 U.S. at 345. This Court must make an independent determination after thorough review of the whole record to "determine whether [it] establishes malice with convincing clarity." *Bose Corp v. Consumers Union*, 466 U.S. 485, 511 (1984).

The *New York Times* standard is stringent because it balances the high price a public figure must pay and the limited state interest in libel actions brought by a public plaintiff. *See Gertz*, 418 U.S. at 344. Public figures are afforded less constitutional protection because they have voluntarily assumed a special role in society and, consequently, enjoy a greater opportunity to counteract any false statements. *See Id.*

Actual malice may be proved by inferences and circumstantial evidence because direct evidence is rarely available. *See Levesque v. Doocy*, 560 F.3d 82, 90 (1st Cir. 2009); *See Travoulares*, 817 F.2d at 795. Inferences of actual malice may be found where a publisher relies on a source with obvious reason to doubt its veracity, if he fabricates an account, or if evidence calling the published statements into question is ignored. *See Levesque*, 560 F.3d at 90. A defamed public figure must show the publisher made his comments with “an intent to inflict harm through falsehood.” *Travoulares*, 817 F.2d at 795. In some circumstances, this intent to inflict harm will outweigh the risk of impeding constitutionally protected free speech; therefore, this analysis must be done on a case-by-case basis. *See Id.* The finder of fact makes the ultimate determination of whether the publication was made with actual malice. *See St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

When matters are inherently hot news and require instant dissemination, thorough research or verification of individual facts impossible. *See Rosenbloom*, 415 F.2d at 895-896. However, documentaries or feature stories yield less constitutional protection as a controversy because they require more time to verify questionable material. *See Id.* Evidence of ill will can be used as proof of actual malice to show a defendant’s motive in knowingly publishing a reckless falsehood and that a newspaper reporter followed a “sensationalistic policy.” *Id.* at 833. Ill will may be shown by surrounding circumstances such as whether the publisher retracted the

defamatory statements, his avoidance of the truth, or by the volume of content he published. *See Partington*, 825 F. Supp at 913; *See Harte-Hanks*, 491 U.S. at 689; *See Lerman*, 745 F.2d at 139. The publisher's conduct is measured by whether there is sufficient evidence to show he had serious doubts as to the truthfulness of his defamatory publication. *See St. Amant*, 390 U.S. at 731. Such recklessness is exposed where there are obvious reasons to doubt the veracity of the information or the accuracy of the reports. *See Id.* at 732. A reporter acted with actual malice when he published defamatory material accusing a candidate for public office of bribery without interviewing a key witness and did not review tape recordings of other interviews. *See Harte-Hanks*, 491 U.S. at 657. In the alternative, an extensive amount of research conducted by a defendant, overcame a claim of actual malice for publishing a news story accusing the Tennessee Valley Authority of foul play when allowing a plant to pass inspection when it should have failed. *See Bressler v. Fortune Magazine*, 971 F.2d 1226, 1233 (6th Cir. 1992).

Per *arguendo*, if this Court finds Broflovski is a limited purpose public figure, Cartman's motion for summary judgment is still improper because there are sufficient facts in the record to support a reasonable jury could find Cartman acted with actual malice. Because Cartman has not divulged the true identity of his source, it cannot be determined how reliable Dr. Chaos is. (J.A. at 7.) Cartman also did not make any attempt retract the defamatory information. (J.A. at 5-7.) Cartman's reckless disregard and purposeful avoidance of the truth is evidenced by his failure to utilize his extensive knowledge of electronics and software to scan the photo. (J.A at 4.) Within the day it took Cartman to publish the content, he could have easily discovered, with one scan, that the photo's image had been doctored. (J.A. at 5, 7.) Furthermore, Cartman's blog, which often reserves the harshest criticism for Citrus, is a part-time venture he undertook to compensate for sales lost by the opening of the Citrus store across the street from his small electronics store

(J.A. at 4.) In consideration of these facts and his failure to disclose his source, inferences can be drawn giving rise to a legitimate showing of Cartman's motive. (J.A. at 8.) Furthermore, Cartman's part-time part time participation in the blog did not render his ability to conduct this brief investigation unreasonable. (J.A. at 4.) In addition to these facts, Cartman's commentary of "*if* the image...depicts what I *think* it does" is further proof he doubted the photo's veracity. (J.A. at 6.) (emphasis added).

Considering the evidence in the light most favorable to Broflovski, the non-moving party, there are material facts in dispute as to the presence of actual malice. The circumstantial evidence indicates that Cartman had serious doubts as to the photo's truthfulness, yet failed to investigate further. Hence, the summary judgment in Cartman's favor was improper.

CONCLUSION

For the aforementioned reasons, Respondent respectfully requests that this Honorable Court affirm the Court of Appeals' decision.

Respectfully submitted,

Team 222

Attorney of Counsel