

In The
Supreme Court of the United States

OCTOBER TERM, 2009

Eric Cartman,

Petitioner,

v.

Ike Broflovski,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTEENTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether Eric Cartman is protected by a qualified reporter's privilege against court-compelled disclosure of the identity of an anonymous source in an online defamation claim.
 - A. Whether the First Amendment creates a qualified reporter's privilege against court-compelled disclosure of the identity of an anonymous source in an online defamation claim.
 - B. If A is answered in the affirmative, whether Eric Cartman qualifies as a reporter for the purposes of this defamations suit and is, therefore, entitled to shield the identity of his anonymous source.
2. Whether Ike Broflovski is a private figure and need only make a showing of negligence to prevail in a defamation claim.

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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

Ike Broflovski is the Director of Research and Development for the consumer electronics company Citrus, headquartered in Parque del Sur, Silverado. Hired in 2006, Broflovski was tasked with overseeing the development of Citrus's new ePlay Touché, an advanced digital music player promised to cement the ePlay brand as the premier music player on the market. (J.A. at 3.)

Ike Broflovski's hiring was announced by his brother and Citrus CEO, Kyle Broflovski, at the end of an August 7, 2006 press conference concerning Citrus's future endeavors in mobile touch screen technology. In response to the introduction, Ike Broflovski's only comment was "Thank you for the warm welcome, Kyle, and I look forward to pushing Citrus, its employees, and its products to new heights." The Associated Press released a story, printed in several newspapers, focusing mainly on the new line of Citrus products and mentioning Broflovski's hiring and subsequent comment only in the final paragraph. Since that initial press conference, Broflovski, who is shy and does not enter the limelight, has given no press interviews and has rarely been seen in public. (J.A. at 3.)

While Ike Broflovski avoids the media, Kyle has praised Ike's work in print and television interviews. (J.A. at 3.) Ike Broflovski's contact information and picture appear on the Citrus website, but no other biographical information is given. (J.A. at 4.) Additionally, in an effort to celebrate Ike Broflovski's innovations, some employees of Citrus have taken to wearing "I Like Ike" buttons at Citrus Megastores in the United States. (J.A. at 3-4.)

Eric Cartman

Eric Cartman owns and operates Cartman's Computer World, an electronic sales and repair shop. Due to declining sales since a Citrus Megastore opened across the street, Cartman started a part-time, for-profit blog entitled *The Sludge Report*. *The Sludge Report* showcases celebrity gossip and various news items that Cartman finds on the Internet and in major newspapers. *The Sludge Report* has grown in popularity and has an audience of over 100,000 readers. (J.A. at 4.)

Cartman has received a number of e-mails on topics ranging from protests to government scandals from *The Sludge Report* readers through a link on the website. (J.A. at 4-5.) A disclaimer on the website states that unless otherwise requested all persons sending information to the website will be treated as confidential sources. Neither Cartman, nor the website hosting company, have any personal information about users of the blog, unless the users choose to disclose the information to Cartman directly. (J.A. at 5.)

The Mumbai Photograph Post

On July 7, 2008, Cartman received an e-mail from a source cited only as "Professor Chaos." Cartman met Professor Chaos personally two years earlier. In that time Cartman had received reliable information about the release of Citrus products, which Cartman had used in stories posted to *The Sludge Report*. In the e-mail, Professor Chaos alleged that at the direction of Ike Broflovski, Citrus was committing human rights abuses at its factory outside of Mumbai, India. The e-mail contained a digital photograph of what appeared to be workers assembling the ePlay Touché, while using assembly line machines and wearing only minimal protective clothing. In the photograph, it appeared Ike Broflovski was walking through the factory yelling at the workers. (J.A. at 5.)

On July 8, Cartman posted the picture to *The Sludge Report* under the headline “Citrus Engaging in Acts of Modern-Day Slavery?” (J.A. at 5.) Cartman captioned the picture, “Ike Broflovski surveys his minions...but where’s the whip, Ike?” In the post associated with the picture, Cartman wrote:

Fellow comrades and patriots, it appears that the obscene profits generated by the capitalist machine at Citrus Electronics are the fruit of a very poisonous tree. I am the exclusive recipient of a photograph from my dear friend who you know as **Professor Chaos** (a name he chose to protect his identity), who works behind enemy lines at Citrus. The image below may shock you, but one picture can tell more than a thousand words. For those of you who don’t know who this man is, it is none other than Ike Broflovski, the pawn of his evil older brother, Kyle, whose face dominates billboards and commercials across the fruited plain. According to Professor Chaos, the men and women depicted in this photograph often work 16 hours a day, seven days a week, with few breaks. They are forced to work in slave-like conditions to put together what many consider to be little more than cheap status toys with which a bunch of San Francisco hipsters can listen to bad indie music. I wouldn’t be surprised if Ike didn’t have these poor Indians shackled to their stations at night...and I’m only half-joking about that...

The post ended with:

Some people might consider the image I’m showing you to be too harsh or graphic. They also think I should keep my mouth shut, that I am a danger to democracy. I’ll tell you what, folks. The 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! Don’t shoot the messenger. I’m just a harmless, loveable little fuzz-ball with a talent for telling the truth. If the mainstream media won’t do their jobs, then I will! (J.A. at 6.)

Cartman’s blog entry attracted the attention of the mainstream press, and on August 19, 2008, the top rated cable news show, “The Countdown Factor,” named Ike Broflovski the recipient of the nightly “Most Heinous Individual in the Galaxy” award. The show’s host credited Cartman with breaking the story and urged a boycott of Citrus. (J.A. at 6.) Numerous retailers pulled Citrus products from their shelves, and Citrus stock fell over 25 percent. (J.A. at 6-7.) Broflovski gave no response to the media concerning the allegations, except for a message

delivered by his attorney stating, “The photograph posted on that site is a total fabrication, and Ike Broflovski will soon seek civil justice against its authors in a court of law.” (J.A. at 7.)

Discovery Barriers

Ike Broflovski filed his defamation suit against Cartman on September 20, 2008, alleging Cartman’s comments caused Broflovski to suffer depression due to threats against Broflovski’s life. Discovery proceeded, and produced multiple facts concerning both parties’ activities. Broflovski stipulated that he had made a number of visits to Mumbai, though it is unclear whether he visited the factor during any of those visits. A scan of the photograph with photo software revealed that the picture was likely doctored by super imposing a picture of Broflovski onto a picture of nightshift workers at the Mumbai factory. Evidence was presented that Cartman had recently installed photo software with similar forgery detection capabilities, and that Cartman had used the capabilities on other photographs posted to *The Sludge Report*. Cartman did not use the software on Professor Chaos’s photograph before posting it to the website. (J.A. at 7.) To determine the source of the photograph, the manager of the Mumbai factory and several top engineers were deposed. Additionally, Kyle Broflovski sent an e-mail to all Citrus employees requesting information on the source of the photograph. The depositions and information requests produced few leads. (J.A. at 8.)

In a final effort to gain information about the picture, Ike Broflovski submitted an interrogatory to Cartman asking for Professor Chaos’s contact information. In response, Cartman invoked a news reporter’s qualified privilege under the First Amendment against disclosure of the source. Broflovski filed a motion to compel the disclosure of Professor Chaos’s contact information, and Cartman filed an opposition motion. Additionally, Cartman filed a counter motion for summary judgment on the defamation claim, alleging Ike Broflovski was a

public figure and that Broflovski failed to provide evidence of actual malice to support a cause of action for defamation. (J.A. at 8.)

Proceedings Below

On January 27, 2009, the district court denied Broflovski's motion to compel discovery and granted Cartman's motion for summary judgment. (J.A. at 20.) In denying the motion to compel discovery, the district court held that the First Amendment implied the existence of a qualified privilege against compulsory disclosure of anonymous sources and that privilege applied to bloggers. (J.A. at 9.) Additionally, the district court held that Cartman was protected against compulsory disclosure because Broflovski had neither demonstrated a compelling interest in overriding Cartman's privilege nor exhausted other means for obtaining Professor Chaos's identity. (J.A. at 12.) The district court granted summary judgment after determining that Broflovski was a limited purposed public figure. (J.A. at 15.) The district court held that Cartman was not liable under an actual malice standard because he did not recklessly or knowingly disseminate false information concerning Broflovski. (J.A. at 18.)

Broflovski appealed the decision to the United States Court of Appeals for the Fifteenth Circuit. (J.A. at 21.) The Fifteenth Circuit reversed the decision of the district court on both issues. (J.A. at 32.) The court held that the First Amendment created no general qualified reporter's privilege, and that Broflovski's need for evidence to prove defamation outweighed Cartman's interest in the confidentiality of an anonymous source. (J.A. at 25.) In denying the motion for summary judgment, the court found that Broflovski was a strictly private figure, and that there were sufficient facts to reach the jury on Cartman's negligence in posting the photograph and commentary. (J.A. at 30.)

SUMMARY OF ARGUMENT

Eric Cartman is not protected by a qualified reporter's privilege against court compelled disclosure of an anonymous source in relation to Ike Broflovski's claim for defamation. The First Amendment does not create a reporter's privilege. Alternatively, if there is a reporter's privilege provided under the First Amendment, it would not apply to Cartman because the information Broflovski seeks is highly material and relevant, and goes to the heart of Broflovski's defamation claim. Additionally, the State of Silverado has not legislatively passed a reporter's shield law. Further, Cartman is the only source who can produce the information sought by Broflovski, and the information cannot be gained by other means. Cartman also does not qualify as a journalist for purposes of shielding his anonymous source. Cartman was not engaged in the traditional gathering and investigating of news, and Cartman had no intent to distribute the information to the public.

As a private person, Broflovski has a valid claim for defamation against Cartman for posting the Professor Chaos photograph. Broflovski has not injected himself into a public controversy, nor is *The Sludge Report* a matter of legitimate public interest. Broflovski does not have significant access to the media to make him a public figure, and remains a private individual. As a private individual, Broflovski must only make a showing of negligence in Cartman's publishing of the Professor Chaos picture. Cartman negligently published the Professor Chaos photograph to *The Sludge Report*. Cartman failed to take elementary precautions concerning authenticity and integrity, failed to use a readily available tool to verify the photograph, and did not recognize the potential for bias in his own posting.

ARGUMENT

I. ERIC CARTMAN IS NOT PROTECTED BY A QUALIFIED REPORTER'S PRIVILEGE AGAINST COURT-COMPELLED DISCLOSURE OF THE IDENTITY OF AN ANONYMOUS SOURCE IN AN ONLINE DEFAMATION CLAIM.

It is of the utmost importance for the courts to have the power to “discharge an indispensable function of civilized society, that of adjudicating controversies between its citizens and between citizens and the state through legal tribunals in accordance with their historic procedures.” Garland v. Torre, 259 F.2d 545, 549 (2nd Cir. 1958). There is also no question that freedom of the press is a necessary component to establishing and maintaining a free society. When conflicts between these two basic tenants arise, and the conflict involves the court-compelled disclosure of the identity of an anonymous source, the courts have generally determined that there is no qualified reporter's privilege. This is especially true when the existence of such a privilege would rob a citizen of receiving a fair adjudication or presenting a complete case. Desai v. Hersh, 954 F.2d 1408, 1412 (7th Cir. 1992). As Thomas Jefferson remarked in his 2nd Inaugural Address, "Since truth and reason have maintained their ground against false opinions in league with false facts, the press confined to truth needs no other legal restraint. The public judgment will correct false reasonings and opinions on a *full hearing of all parties*, and no other definite line can be drawn between the inestimable liberty of the press and its demoralizing licentiousness." President Thomas Jefferson, 2nd Inaugural Address (March 4, 1805) (emphasis added).

In order for a qualified privilege to exist, it would have to be set forth in either the First Amendment or in a state statute. This Court has held that there is no reporter's privilege granted in the First Amendment and the State of Silverado has not enacted any type of shield act to protect reporters from compelled disclosure of sources.

A. The First Amendment does not create a qualified reporter's privilege against the court-compelled discovery of sources and, even if it did, Ike Broflovski is able to overcome the privilege and should be allowed to obtain the source's name.

This Court in Branzburg held that there was "no First Amendment privilege to refuse to answer the relevant and material questions asked during a good-faith grand jury investigation." Branzburg v. Hayes, 408 U.S. 665, 707 (1972). Although this case could be viewed as applying only to criminal investigations, this very narrow view would do a disservice to the Court's decision. Upon closer examination of the majority opinion, this Court refused to acknowledge any First Amendment reporter's privilege. As Justice White stated, "From the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished." Branzburg, 408 U.S. 665 at 698-99. Justice White also pointed out that the common law recognized no such privilege, and that the constitutional argument was not even asserted until 1958. Id. Additionally, "on the basis of both authority and reason, . . . civil litigation has its entitlements on proper occasion to the pursuit of truth wherever it may be found." Cary v. Hume, 492 F.2d 631, 632 (D.C. Cir. 1974). Even if the First Amendment does set forth a limited and qualified reporter's privilege, Broflovski should be allowed to obtain the source's name.

The name of Cartman's source is highly material and relevant, and goes to the heart of Broflovski's underlying claim of defamation. Further, information and evidence sought by Broflovski — including the source's name — is unavailable from alternative sources. Finally, the courts look to the facts on a case-by-case basis in the course of weighing the need for the testimony in question against the claims of the newsman. Hume, 492 F.2d at 636.

1. The information sought by Broflovski is highly material and relevant, and lies at the heart of the underlying claim.

Broflovski's case turns on the information possessed solely by Cartman's anonymous source. When balancing the competing interests of the supposed reporter's privilege and court compelled disclosure, the courts look to whether the information sought is highly material and relevant to the underlying claim. In order for the information to be highly material and relevant it has to be difficult for the defamed person to introduce evidence beyond his own testimony to prove that the published information was false. Baker v. F & F Inv., 470 F.2d 778, 784 (2nd Cir. 1972); Carey, 492 F.2d at 636-37. Of great concern to the court is the issue of fairness. If publishers or reporters of defamatory material were to be given immunity from disclosing their sources "...private individuals would be equally prevented from securing fair compensation for their injury". Carey, 492 F.2d at 640 (MacKinnon, J., concurring). Additionally, if this Court deems Broflovski to be a public figure, it would be nearly impossible to show malice on Cartman's part without having the opportunity to depose Cartman's anonymous source. Price v. Time, Inc., 416 F.3d 1327, 1345 (11th Cir. 2005).

Unlike in Baker, the name of the anonymous informant in this case is highly material and relevant to Broflovski's defamation suit. The Baker case involved an overarching civil rights action naming sixty individuals as defendants. 470 F.2d at 780. Because the information the plaintiff sought was not held exclusively by the anonymous source, the anonymous source's name was not highly material or relevant to the plaintiff's suit. Id. at 783. In comparison, Broflovski's case depends upon learning the name of Cartman's anonymous source because that source is the only individual who can prove either the validity or falsehood of the picture posted on *The Sludge Report*. Cartman has no other background research, fact-checking documents, or interview transcripts which Broflovski could use to supplement his own denial as to the validity

of the posted picture. In the search for truth, Cartman's anonymous source lies at the heart of Broflovski's defamation case.

On the other hand, Broflovski's case is almost identical to that of Garland. As with the plaintiff in Garland, Broflovski has suffered serious damage to his professional reputation and career and has no other substantive means to prove the posted picture and corresponding story false outside of deposing Cartman's confidential source. Similar to Broflovski, because there was no other way for the plaintiff to try to make her case, and because tangible damage was suffered, the defendant's source was held to be at the heart of Garland's claim. Garland 259 F.2d at 550.

In Southwell the plaintiff, was provided with hundreds of documents and background materials to rely on in his defamation case. Southwell v. S. Poverty Law Ctr., 949 F.Supp. 1303, 1313 (W.D. Mich. 1996). The court noted, the "Plaintiff would have a much stronger argument for disclosure if this were a case where there was little tangible, physical proof of defendant's mind-set or the editorial process prior to publication of the allegedly defamatory article in KIR." Id. Broflovski's situation represents the court's hypothesized stronger argument. Broflovski was not provided with anything; no notes, no documents, no extrinsic materials. The only piece of evidence that Broflovski has to rely on, outside of his own testimony, is the fact that the posted photograph was "likely doctored". However, this "likely doctored" picture constitutes only a little tangible evidence and, under Southwell, would therefore not be enough to preclude the disclosure of Cartman's source.

Moreover, if this Court determines that Broflovski is a public figure, it is even more crucial that he be able to depose the anonymous source. A public figure bringing a defamation suit must show malice on the part of the publisher and/or reporter. Price, 416 F.3d at 1345. This

further step requires proving that the "...appellant in fact had no reliable sources, that he misrepresented the reports of his sources, or that reliance upon those particular sources was reckless." Carey, 492 F.2d at 637. Additionally, a public figure plaintiff must show by clear and convincing evidence that the defendant published the defamatory article either with actual knowledge that it was false or with a reckless disregard for the truth. Price, 416 F.3d at 1345. "Actual malice would be extremely difficult to prove without knowing whether the confidential sources existed and, if so, what they said and whether they were credible." Price, 416 F.3d at 1345 (quoting Star Editorial, Inc. v. U.S. Dist. Court, 7 F.3d 856, 861 (9th Cir. 1993)).

The identity of Cartman's anonymous source is very material and relevant, and lies at the heart of Broflovski's defamation claim. It would be nearly impossible for Broflovski to have an equitable opportunity to prove his case without deposing Carman's source.

2. The information sought by Broflovski is unavailable from alternative sources.

Broflovski has tried to uncover materials and documents regarding the questionable validity of Cartman's post and has also taken numerous steps, outside of compelling disclosure, to identify Cartman's source. The courts do not, "...require proof positive that the knowledge exists nowhere else on earth but in the minds of the journalists and their anonymous confidants. Lee v. Dep't of Justice, 401 F.Supp.2d 123, 135 (D.D.C. 2005), aff'd 413 F.3d 53 (D.C. Cir. 2005). Even if some outside evidence exists, the disclosure of the source's name may still be compelled if the defamed party has put forth reasonable efforts to discover the name of that source through alternative means. Southwell, 949 F. Supp. at 1313; Garland, 259 F.2d at 551. In order for the plaintiff to show his reasonable efforts, it is only necessary for the plaintiff to have taken some active steps to independently determine the source's identity. Baker, 470 F.2d at 784 (discussing Garland, 259 F.2d 545).

This relatively low bar was established when the Garland court determined that simply deposing three CBS executives, before demanding the name of the anonymous source, constituted sufficient reasonable steps and thereby warranted disclosure. Garland, 259 F.2d at 551. Even in a case involving multiple leaks, likely coming from various large government agencies, and appearing in several major newspapers, the plaintiff having deposed only twenty government officials demonstrated that he “diligently pursued direct proof that the officers or employees of one or more defendant agencies were the original disseminators of the information about him to the news media.” Lee, 401 F.Supp.2d at 135.

Although Broflovski did not depose twenty different people, he was also dealing with a much smaller pool of potential sources and informants. Broflovski did, however, easily satisfy the bar set forth in Garland when he conducted interviews with the manager of the Mumbai factory and several of the factory's top engineers. Broflovski actually surpassed the Garland bar when, through his brother, he sent an e-mail to all Citrus employees requesting information on the identity of the anonymous source.

Although these efforts did not yield any tangible results, Broflovski certainly took sufficiently active steps to determine the name of the anonymous source, outside of compelling disclosure.

B. Silverado has not enacted a state shield law and therefore has not offered a qualified reporter’s privilege against court-compelled disclosure of the identity of an anonymous source.

The First Amendment does not provide a reporter's privilege. Rather, it is up to individual states to pass state shield laws. As the Branzburg Court noted, "There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement

officials and press in their own areas." Branzburg, 408 U.S. at 2669. Currently, thirty-seven states have passed shield laws intended to protect reporters against court-compelled discovery of sources. Ahnalese Rushmann, Texas Becomes 37th State to Enact a Shield Law, *The News Media & The Law*, Spring 2009 (Vol. 33, No. 2), at 26. However, these shield laws provide varying degrees of protection.

Alabama's State Shield Law is one such example. Alabama's Shield Law was enacted in 1935 to "safeguard and protect the professional confidence of newspapers and newspapermen." Price, 416 F.3d at 1335. Although this language could initially be interpreted to provide protection to all reporters, courts have actually held that this language does not extend a reporter's privilege to magazine reporters because a magazine is not considered to be a newspaper and a magazine reporter is therefore not considered to be a newspaperman. Id. at 1341. In contrast, Illinois's Reporter's Privilege Law is broader, providing that "No court may compel any person to disclose the source of any information obtained by a reporter during the course of his or her employment...." Desai, 954 F.2d at 1411. Even this statute, however, could be open to debate regarding whether "reporters" who are not employed by a traditional news source, or any news source, would receive the reporter's privilege.

Unlike Alabama, Illinois, and the other thirty-five states, Silverado has not enacted a state shield law. Without taking this step, Silverado's legislature has not extended any privilege under any conditions or circumstances. The legislature's lack of action in this area could be interpreted by this Court as indicating a lack of interest in protecting reporters and their confidential sources.

C. Eric Cartman does not qualify as a reporter for the purposes of this defamation suit and is, therefore, not entitled to shield the identity of his anonymous source.

The courts have struggled to define who would qualify as a "reporter" for the purposes of protection under a possible reporter's privilege. As this Court noted, "Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods." Branzburg, 408 U.S. at 704. This job has only become more challenging with the rise of the informal internet blogger; the "stereotypical 'blogger' sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way." In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 976 (D.C. Cir. 2005) (Sentelle, J., concurring).

In tackling this issue, courts have established a functional test for what constitutes reporting and, therefore, who can be considered a reporter. First, an individual may claim the journalist's privilege if he is involved in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press. von Bulow v. von Bulow, 811 F.2d 136, 142 (2nd Cir. 1987). Second, the court recognized that a true journalist, at the beginning of the news-gathering process, needs to have the intention of disseminating the gathered information to the public. von Bulow, 811 F.2d at 142; Titan Sports, Inc. v. Turner Broad. Sys., 151 F.3d 125, 130 (3rd Cir. 1998). Both of these elements need to be satisfied in order for an individual to be considered a journalist. von Bulow, 811 F.2d at 142. The burden of proof falls upon the individual claiming the privilege. Restatement (Second) of Torts §613 (1977).

Outside of this test, however, it is important to consider that the inclusion of all bloggers, internet journalists, and even pamphleteers under a blanket reporter's privilege would have wide ranging and very negative effects on established areas of law. If reporters could refuse to name their sources in defamation actions, they could "...effectively vitiate what is left of the libel laws by hiding behind anonymous sources whenever sued." Carey, 492 F.2d at 640 (MacKinnon, J., concurring). It is not only the courts who are trying to tackle this issue. Currently, The Free Flow of Information Act, otherwise called the Reporter Federal Shield Act, is before the Senate Judiciary Committee. Press Release, Senator Charles E. Schumer, Schumer Hails Revised Reporter Shield Bill as 'Balanced' as Key Senate Panel Inches Toward Passage of Landmark Measure (September 17, 2009) (http://schumer.senate.gov/new_website/record.cfm?id=317929). On September 17, 2009, an amendment, which excluded independent bloggers and internet journalists from protection under the proposed Act, was unanimously adopted by the Committee. Id. This amendment addresses the growing concerns of offering too big a blanket, and also provides the courts powerful guidance on the subject of who should qualify as a reporter for these purposes.

1. Cartman was not involved in activities traditionally associated with the gathering and dissemination of news, including investigative reporting.

Cartman's activities did not fall under those traditionally associated with the gathering and dissemination of news as Cartman simply posted whatever arrived in his e-mail from Professor Chaos and did no other investigation or research. The courts have held that activities traditionally associated with the gathering of news include investigative reporting, conducting independent research on a subject, and working to uncover a story. Titan, 151 F.3d at 130; Silkwood v. Kerr McGee Corp., 563 F.2d 433, 436-37 (10th Cir. 1977). A reporter's privilege has been extended to various groups including filmmakers and authors of technical publications

and professional investigative books, based on those individuals' extensive research efforts and their time spent investigating their various subjects. Titan, 151 F.3d at 128. However, the courts have also differentiated reporters from entertainers, with entertainers being denied a reporter's privilege. Titan, 151 F.3d at 130.

In determining that a filmmaker qualified for a reporter's privilege, the Tenth Circuit focused on the considerable time and effort the filmmaker expended obtaining facts and researching the subject matter. Silkwood, 563 F.2d at 436-37. The filmmaker had even interviewed various witnesses to collect different views of the topic being explored. By taking these steps, the filmmaker was held to have engaged in investigative reporting sufficient to qualify for a reporter's privilege. Id. In contrast, Cartman was not carrying out investigative reporting. Cartman was not out pounding the pavement, speaking to potential sources, or researching storylines. Cartman was merely sitting at his computer when an e-mail happened to arrive. He did no research or fact checking at all before posting the story, all elements involved in the traditional act of gathering news.

In this case, Cartman was acting as more of an entertainer than a reporter. An entertainer is an individual who, among other things, is involved in "disseminating hype" and says or writes "things for satire value". Titan, 151 F.3d at 130. Cartman's blog includes items posted for entertainment value only and the posting in question can be considered as doing nothing more than "disseminating hype", negative hype about a company Cartman disliked. Additionally, in the posting at issue, there is satirical commentary including the line, "They are forced to work in slave-like conditions to put together what many consider to be little more than cheap status toys with which a bunch of San Francisco hipsters can listen to bad indie music". The Titan court also stressed that the defendant "uncovered no story on his own" and also did not "independently

investigate any of the information given to him by WCW executives”. Id. Cartman, like the Titan defendant, did not uncover the story, did not conduct any news gathering or investigative reporting, and did not even check the information that was provided to him by his anonymous source. Cartman, therefore, has not met his burden regarding proving that he was in fact a reporter entitled to any privilege.

2. Cartman had no intention at the beginning of the newsgathering process to disseminate the "gathered" information to the public.

When determining whether a reporter has the intention at the beginning of the newsgathering process to disseminate the gathered information to the public, the courts examine the individual’s preparation and their purpose in undertaking their research. Shoen v. Shoen, 5 F.3d 1289, 1293-94 (9th Cir. 1993); Builders Ass’n of Greater Chicago v. County of Cook, No. 96 C 1121, 1998 WL 111702, at *4-5 (N.D.Ill. March 12, 1998); Silkwood, 563 F.2d at 436-37. Individuals who do not begin their investigations with the sole intent to disseminate, will not be afforded any journalistic protection. von Bulow, 811 F.2d at 143.

In Shoen, the author of an investigative book spent time conducting interviews and collecting materials. Shoen, 5 F.3d at 1294. In Builders Ass’n of Greater Chicago, the Urban League conducted interviews and produced and collected information through various surveys. Builders Ass’n of Greater Chicago, No. 96 C 1121 at *4. And in Silkwood, the documentary filmmaker “spent considerable time and effort in obtaining facts and information of the subject.” Silkwood, 563 F.2d at 436. In each of these cases, the defendant claiming the reporter’s privilege was conducting real research and spending actual time collecting information that they intended to distribute to the public. Their efforts were deliberate, and intent was easy for the courts to ascertain. In each of these cases, the defendants were determined to be journalists for the purpose of asserting a reporter’s privilege.

In comparison to these cases, Cartman's version of "gathering the news" amounts to just happenstance, making it extremely difficult to clearly discern intent. Because he did no research and spent no time, there is no way of knowing whether Cartman from the beginning, thought to post the e-mail, or whether at first he didn't have the necessary intent. In fact, Cartman waited a full day before posting the information received from the e-mail. Since Cartman's delay had nothing to do with fact checking, editorial review, or conducting any additional research, his waiting very well may indicate that he wasn't sure whether or not to disseminate the received information.

Cartman's situation more closely resembles that of the defendant in von Bulow. In von Bulow, the defendant had mixed reasons for requesting and researching investigative reports. von Bulow, 811 F.2d at 145. The defendant's research was not only for a possible manuscript but was also conducted to satisfy her own personal interest. Id. Cartman too has shown intense personal interest in Citrus. The e-mail Cartman received from his anonymous source held for Cartman the mixed purpose of satisfying a personal interest as well as being useful for possible dissemination. This sort of mixed interest, judging from the von Bulow court, undercuts the intent to disseminate.

Cartman had no clear intent from the beginning of the scant process he undertook to disseminate the information received from his anonymous source.

II. IKE BROFLOVSKI IS A PRIVATE PERSON, AND MUST ONLY SHOW THAT ERIC CARTMAN WAS NEGLIGENT AND DEFAMATORY IN THE STATEMENTS MADE ON *THE SLUDGE REPORT*.

The protection of speech does not come at the total sacrifice of the competing values served by the law of defamation. Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974). The erroneous statement of fact is not constitutionally protected, though it may be inevitable in free and open debate. Id. at 340. The First Amendment guarantees freedom of speech and press, but defamation laws support a legitimate state interest in protecting an individual's right to protect her good name. Id. at 340-41.

The State of Silverado protects the right of private persons to their good name and provides compensation to individuals for the harm of defamatory falsehoods by adopting the standard for defamation outlined in the Second Restatement of Torts. Silverado draws a distinction between the standard for defamation for public figures and private figures. Restatement (Second) of Torts § 580(A)-(B) (1977). An individual classified as a public figure through “the notoriety of their achievements or the vigor and success with which they seek the public’s attention...may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.” Gertz, 418 U.S. at 342. In contrast, a private figure may support a claim for defamation with only a showing of negligence on the part of defendant in making a defamatory falsehood. Restatement (Second) of Torts §580(B) (1977).

Except in the rare instance of a person with such fame or notoriety that he becomes for all purposes and all contexts a public figure, the distinction between private and public figures is determined in the context of an individual's involvement and participation in a particular controversy. Gertz, 418 U.S. at 351-52. An individual is deemed a private figure, unless the

individual; 1) thrusts himself into a particular public controversy, 2) has sufficient access to the media, or 3) has assumed a role of public prominence in broad issues of public interest. *See Hutchinson v. Proxmire*, 443 U.S. 111, 135-36. The three part test must be applied in each controversy, ensuring that a private individual is not transformed into a public figure simply by involvement in or association with an event that attracts media attention. *See Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 166-68 (1979).

A. Ike Broflovski is a private person because he did not inject himself into a public controversy, does not have access to the media, and has not assumed an influential role in an issue of public interest.

Ike Broflovski never sought the public spotlight nor made any attempt to garner public attention concerning *The Sludge Report* photo, Citrus employee working conditions, or his role as a Citrus director. Broflovski is a private individual who has made no attempt to inject himself into a public controversy, has avoided the media spotlight, and does not have increased access to the media that public figures or public officials enjoy. An individual must inject themselves into the vortex of a public controversy to be deemed a limited purpose public figure in relation to that public issue. *Gertz*, 418 U.S. at 352. Simply because an issue may be of some interest to the public, does not make the issue a public controversy sufficient to transform a private individual into a public figure. *See Time, Inc. v. Firestone*, 424 U.S. 448, 454-55 (1976) (holding that the divorce of a wealthy socialite, while interesting to some portion of the public, was not a public controversy for defamation purposes).

To inject oneself into a public controversy requires more than the association of an individual with a public event. *Wolston*, 443 U.S. at 167. An individual must make an effort to influence the outcome of a public controversy, and play more than a minimal role in that controversy. *Gertz*, 418 U.S. at 352. Actions taken solely in response to alleged defamatory

publications cannot convert an otherwise private individual into a public figure. Proxmire, 443 U.S. at 135. Additionally, to qualify as a public figure, an individual must intend to thrust herself into a controversy in order to influence its resolution. Firestone, 424 U.S. at 455 (explaining that a few press conferences held to satisfy inquiring reporters had no effect on the merits of the disputed divorce and did not convert the plaintiff into a public figure).

An issue requires more than the interest of a limited portion of the public to qualify as a public controversy. Firestone, 424 U.S. at 454. A public controversy must focus on more than general concerns of the public, and those charged with defamation cannot by their own conduct make the complaining private individual a public figure. Proxmire, 443 U.S. at 135. To qualify as a public figure, more than mere newsworthiness of an event or individual must be shown. Wolston, 443 U.S. at 167-68.

In his tenure at Citrus, Broflovski has made only two public statements; the first a short statement at the press conference announcing his hiring, the second through his attorney in response to the postings on *The Sludge Report*. Broflovski has avoided media interviews, and stayed out of the limelight. While Broflovski is employed by Citrus, he has made no effort to influence public opinion concerning Citrus's employment practices or work conditions. In contrast to the plaintiff in Firestone, who called press conferences to satisfy reporter's inquiries, Broflovski has made no effort to insert himself into the public sphere.

A public figure must have "significantly greater access to the channels of effective communication...then private figures normally enjoy." Gertz, 418 U.S. at 344. Access to the media must be regular and continuing to qualify one as a public figure. Proxmire, 443 U.S. at 136. Increased access to the media requires more than the ability to call press conferences or respond to reporter's inquiries. See Firestone, 424 U.S. at 455; Proxmire, 443 U.S. at 134-35

(the plaintiff's only interaction with the press came in response to inquiries following the defamatory announcements).

Broflovski is the Director of Research and Development for a large electronics company, but as an executive with Citrus does not pose a unique ability to access the media or communicate with the public. Neither Broflovski's press conference in association with Citrus, nor his release of a response to Cartman's post via his attorney elevate Broflovski's status beyond that of a private individual. Without a further showing of Broflovski's ability to influence the news cycle, Broflovski cannot qualify as a public figure.

Neither the controversy surrounding the Professor Chaos photo, nor Broflovski himself, is a public controversy. The photo supposedly depicting Broflovski in the Mumbai factory could at best be of general concern to ePlay users, or those concerned generally with worker's rights. However, the standard outlined in Proxmire requires more than general public interest to create a specific public controversy. Additionally, while Broflovski may have a limited fan following among Citrus employees, the holding in Firestone distinguishes limited public interest from a legitimate public controversy. Finally, the only media coverage concerning Broflovski and Citrus's labor practices in India came from the alleged defamatory postings on *The Sludge Report*. Without other public interest, Cartman cannot make Broflovski a public figure solely through a single publication concerning Broflovski.

Broflovski's two public statements, limited access to the media, and failure to inject himself into the public sphere do not show him to be a public figure. Additionally, beyond the single publication on *The Sludge Report*, Cartman has failed to show that Broflovski or the working conditions at the Citrus plant in India are public controversies and of anything except general interest to the public.

B. Cartman was negligent in not testing the authenticity of Professor Chaos's picture before posting it to *The Sludge Report*.

Cartman had the capability to test the Professor Chaos picture before posting it to *The Sludge Report*, and was negligent in posting the photo without first verifying its authenticity. States may define the appropriate standard for liability for the broadcaster of defamatory falsehoods concerning private individuals so long as liability is not imposed without fault. Gertz, 418 U.S. 347. Silverado has adopted the negligence standard outlined in the Second Restatement of Torts concerning the defamation of private individuals, which requires the exercise of care that a reasonable person would take in that circumstance. Restatement (Second) of Torts § 580(B). Unreasonable conduct which constitutes a “departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers” is sufficient for liability to attach for defamation. Curtis Publ’g Co. v. Butts, 388 U.S. 130, 158 (1967) (finding the failure to follow elementary precautions in the publication of a false article could expose a journalist to liability for defamation).

In Butts, the editorial staff of a magazine recognized the need for further investigation of serious charges, but failed to take basic fact checking precautions before running the defamatory story. 388 U.S. at 157. The editorial staff published the story without independent support and without an attempt to determine the accuracy of the article. Id. Additionally, the editors published the story despite knowing that the writers of the story were already involved in litigation with the article’s central figure and that the writers were unlikely to be objective and complete in their investigation. Id. at 158. The editor’s actions represented a departure from the standards of reporting, and were sufficient to support a claim for defamation. Id.

Like the editors in Butts, Cartman failed to exercise the required care before publishing the Professor Chaos post to *The Sludge Report*. As in Butts, Cartman had a duty to

independently verify and determine the accuracy of the photo provided by Professor Chaos. Cartman had the means to at least determine if the picture had been edited by using his photo software, and had tested other pictures for authenticity in the past. Additionally, based on his belief that Citrus was attacking his business, Cartman had reason to believe he could not be objective in writing his article to accompany the picture. Like the editors in Butts, Cartman had a duty to ensure objective reporting, a duty he failed to meet.

Cartman failed to exercise due care in reporting by not using the tools at his disposal to verify the photograph of Broflovski, and by failing to account for his own lack of objectivity in reporting. Cartman was negligent in publishing the alleged defamatory statement about Broflovski, and the grant of summary judgment was improper in this case.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the Fifteenth Circuit.

Respectfully submitted,

Counsel for the Respondent

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