

No. 09-2701

**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 THE RESPONDENT

Team #224
Counsel for Respondent

QUESTIONS PRESENTED

- I. WHETHER ERIC CARTMAN IS PROTECTED BY A QUALIFIED REPORTER'S PRIVILEGE AGAINST COURT-COMPELLED DISCLOSURE OF AN ANONYMOUS SOURCE IN AN ONLINE DEFAMATION CLAIM?
 - A. WHETHER THE FIRST AMENDMENT CREATES A QUALIFIED REPORTER'S PRIVILEGE AGAINST THE COURT ORDERED DISCOVERY OF SOURCES.
 - B. IF A IS ANSWERED IN THE AFFIRMATIVE, WHETHER ERIC CARTMAN IS A REPORTER FOR THE PURPOSES OF THIS DEFAMATION SUIT, AND IS, THEREFORE, ENTITLED TO SHIELD THE IDENTITY OF HIS ANONYMOUS SOURCE.
- II. WHETHER ERIC CARTMAN, AUTHOR OF THE INTERNET BLOG *THE SLUDGE REPORT*, SHOULD BE HELD LIABLE ON AN ACTUAL MALICE STANDARD IN AN ONLINE DEFAMATION CLAIM BROUGHT BY IKE BROFLOVSKI ON THE GROUNDS THAT BROFLOVSKI IS A LIMITED-PURPOSE PUBLIC FIGURE?

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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 Burton D. Weschler First Amendment Moot Court Competition.

STATEMENT OF THE CASE

Ike Broflovski is the Director of Research and Development at Citrus, a Fortune 500 consumer electronics company located in Parque del Sur, Silverado. (J.A. at 2-3). He is 26 years old and has a PhD. degree from the Massachusetts Institute of Technology. (J.A. at 3). His brother Kyle Broflovski, who is the CEO and majority shareholder of Citrus, hired him in 2006. (J.A. at 3).

Citrus started out as a small company, selling only handheld radios and VCRs. However, in 1997, Citrus introduced a new line of home computer system and the company skyrocketed to the top of the consumer electronics industry. (J.A. at 2). As the company grew, it began producing computers, televisions, stereo systems, DVD players and mobile phones. Citrus' most profitable product was the ePlay portable digital music player and its success carried the company through the dot-com burst of the early 2000s. (J.A. at 2).

In 2006, Kyle Broflovski decided to hire Ike Broflovski, his "genius brother," to fill the vacant position of Director of Research & Development. Ike was put in charge of overseeing the development of the new ePlay Touché, which was to come equipped with high-definition sound quality, a touch screen, and even the option of having satellite radio with a paid subscription. (J.A. at 3). On August 7, 2007, Kyle held a press conference to formally announce his brother's hiring. He highlighted some of the new and exciting happenings at Citrus and introduced Ike as the new Director of Research & Development. (J.A. at 3). Unlike Kyle, Ike did not enjoy being in the limelight and did not make any extensive comments other than to thank Kyle for the opportunity and tell those in attendance that he "looked forward to pushing Citrus, its employees, and its products to new heights." (J.A. at 3). The Associated Press released a story on the press

conference, covered in several newspapers, focusing on Kyle's announcement of a "new and exciting line of products" and mentioning Ike's hiring at the end of the article. (J.A. at 3).

Since beginning work at Citrus, Ike has for the most part stayed behind the scenes, giving no interviews to the press and rarely seen in public. (J.A. at 3). The only media attention Ike receives is through his brother Kyle, who has gone out of his way on several occasions to praise Ike's work in television and magazine interviews. Ike's popularity has also been evidenced through employees of Citrus MegaStores, located throughout the United States, who have started to wear "I Like Ike" buttons to celebrate his innovations. (J.A. at 4).

Things were going well for Ike in his position at Citrus until August 19, 2008 when the top-rated cable news show, "The Countdown Factor" hosted by Keith McRiley ran a segment on Ike, naming him the recipient of the "Most Heinous Individual in the Galaxy" award. The show went on to accuse Ike and Citrus of employing workers in slave-like conditions with no regard for their safety or well-being. (J.A. at 6). McRiley urged his audience to boycott Citrus. The following day Citrus' stock dropped by 25% and continued to decline in anticipation of weak sales. Several retailers also pulled Citrus products from their shelves. (J.A. at 6-7).

McRiley's hostility and criticism of Ike and his company stemmed from a blog entry posted several days earlier. (J.A. at 6). The author of this blog is Eric Cartman ("Cartman"). Cartman owns and operates Cartman's Computer World in the neighboring state of Washoe. (J.A. at 4). In 2005, in the hopes of making additional income, Cartman became a part-time blogger for profit. His blog, the "The Sludge Report," is updated it on a daily basis with various news items found on the Internet, as well as major headlines from newspapers. (J.A. at 4). Cartman receives income through streaming advertisements that run on his blog in proportion to

the number of hits received per day. The blog is operated on a third-party server run by the site Bloggeroo. (J.A. at 4).

Although topics on “The Sludge Report” range from celebrity gossip to local and international politics, Cartman has made it clear in his blog that he has much contempt for large companies that engage in international trade. (J.A. at 4). Since the inception of “The Sludge Report”, Cartman has been particularly critical of Kyle Broflovski and Citrus. He has persistently condemned Kyle and the company for exporting jobs and blames Citrus’ success for nearly driving Cartman’s Computer World out of business. (J.A. at 4).

Even though his store has not been profitable, Cartman’s blog has become popular and has a rising audience. (J.A. at 4). Readers of the blog began sending Cartman e-mails containing information on protests, scandals in politics, and other gossip. (J.A. at 5). Cartman treats his sources as confidential and does not obtain their personal information unless the users disclose that information to him. (J.A. at 5). One of the users who provided Cartman with information is an individual referred to as “Professor Chaos”. Cartman knows Professor Chaos personally, as they met previously at an electronics trade show in 2006. (J.A. at 5). Since then Professor Chaos has provided Cartman with various information especially concerning Citrus. (J.A. at 5).

On July 7, 2008, Professor Chaos sent Cartman an e-mail alleging that Citrus was engaging in human rights abuses at its manufacturing plant in Mumbai, India and that Ike Broflovski was responsible for these abuses. Professor Chaos attached a digital photograph of what appeared to be Ike walking through the factory and yelling at assembly workers wearing surgical masks and using machines with very little protective gear. (J.A. at 5).

Following receipt of the e-mail, Cartman added a new lead story to “The Sludge Report” on July 8, 2008. The headline screamed “Citrus Engaging in Acts of Modern-Day Slavery?” The photograph was attached and the posting charged that the employees at the plant in India were subjected to working 16-hour days, seven days a week, with hardly any breaks. (J.A. at 6). Cartman did reveal that he had received the photograph from Professor Chaos, who was an employee of Citrus, but refused to disclose his identity. The story concluded with Cartman accusing the Broflovskis of being a danger to humanity and asserting it was his job to enlighten the public to such atrocities. (J.A. at 6). Within a few days of the posting, the story spread like wildfire through the “blogosphere” and attracted the attention of the mainstream press, which ultimately led to Keith McReily running the story on his show. (J.A. at 6).

On September 20, 2008 Ike Broflovski (“Broflovski”) filed a defamation suit against Eric Cartman in Silverado Superior Court, claiming the statements made by Cartman in his blog were libelous and that the comments caused Ike to suffer from depression due to threats on his life. (J.A. at 7). Cartman removed the case on diversity grounds to the United States District Court for the Western District of Silverado. (J.A. at 7).

Through the process of discovery, several pertinent facts came to light. Broflovski stipulated that he had made a number of visits to Mumbai. (J.A. at 7). It was also discovered that the photograph of Ike Broflovski, provided to Cartman by Professor Chaos, was likely doctored. A scan of the photograph using Citrus PhotoWorks software revealed that a third party took a photograph of the night-shift workers at the factory and superimposed Ike’s image onto it. The forgery was discoverable through software but was undetectable to the naked eye. (J.A. at 7). There was also evidence that Cartman had recently installed photo software on his computer, similar to Citrus PhotoWorks and with similar forgery detection capabilities, and that Cartman

used this software on a number of photographs previously posted on The Sludge Report. He, however, did not test Professor Chaos' photo with that software before publishing it. (J.A. at 7).

In an attempt to determine the source of the photograph, the Broflovskis deposed the manager at the Mumbai factory as well as several top engineers. (J.A. at 8). An e-mail was sent to every Citrus employee asking for information on the source of the leak. All these efforts yielded few leads. (J.A. at 8). On December 15, 2008 Broflovski submitted to Cartman an interrogatory requesting Cartman disclose the identity of Professor Chaos. On December 29, 2008 Cartman replied by invoking a qualified news reporter privilege under the First Amendment against disclosure of his source. (J.A. at 8). On January 8, 2009, Broflovski filed a motion to compel Cartman to reveal the identity of, and contact information for, Professor Chaos. On January 16, 2009, Cartman filed a motion in opposition to Broflovski's motion and filed a counter motion for summary judgment. (J.A. at 8).

The District Court denied Broflovski's motion to compel discovery and granted Cartman's motion for summary judgment. (J.A. at 20). Broflovski timely appealed to the United States Court of Appeals for the Fifteenth Circuit, which reversed and remanded the matter. (J.A. at 32). Subsequently, this Court granted certiorari. (J.A. at 33).

SUMMARY OF THE ARGUMENT

The Appellate Court's ruling in this case should be upheld for two separate and distinct reasons. First, Cartman is not protected by a qualified reporter's privilege against court-compelled disclosure of the identity of his anonymous source. No such privilege currently exists based on a reading of the First Amendment and the State of Silverado has not enacted a statute allowing a reporter to assert such privilege. Moreover, even if one were to exist, Cartman cannot avail himself of the news reporter privilege he asserts. In balancing Cartman's interest in

protecting his source with Broflovski's interest in the fair administration of justice, Broflovski's interest is paramount and he has made an affirmative showing to overcome any alleged privilege. Second, Broflovski is not a limited purpose figure according to the framework set forth by the Supreme Court in *Gertz* and subsequent cases. He has not voluntarily injected himself into a pre-existing controversy, has not attempted to influence its resolution, and has not had access to the media. Therefore, a reasonable jury could find that Cartman was negligent in his publication of the photograph and his comments by failing to take reasonable steps to verify its accuracy. However, even if Broflovski were a limited public figure, a reasonable jury could find Cartman liable for defamation under the actual malice standard due to his reckless disregard for the truth.

Unquestionably, this Court has rejected the interpretation of a qualified reporter's privilege from the First Amendment. Despite Cartman's contentions, in *Branzburg* the Court held that "the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against self-incrimination." *Branzburg v. Hayes*, 408 U.S. 665, 689-90 (1972). Thus, because this Court declined to create a special testimonial privilege for the media to prevent the disclosure of confidential sources, Cartman is required to reveal the identity of his anonymous source.

However, even if this Court were to hold such a qualified privilege exists, Cartman still must reveal the identity of his anonymous source because Cartman is the subject of discovery, a party to this litigation, and the only individual with knowledge of Professor Chaos' true identity. Furthermore, Broflovski has made an affirmative showing to overcome the asserted privilege. Under the standard set forth by the Second Circuit in *Garland*, if a qualified news reporter privilege exists it can be overcome. *Garland v. Torre*, 259 F.2d 545 (2d Cir. 1958), cert. denied, 358 U.S. 910 (1958). Broflovski has exhausted all other alternative means of acquiring the

information. Unless he can produce third-party witnesses to verify the falsity of the allegations, Broflovski's only means of proving their falsity is by denying them under oath. Accordingly, Cartman's asserted privilege must surrender to the need for disclosure so that Broflovski can effectively plead his claim.

Furthermore, Broflovski cannot accurately be classified as a limited purpose public figure. He has not thrust himself to the forefront of a pre-existing controversy and has limited his access to the media. *Gertz v. Welch*, 418 U.S. 323 (1974). He has had no significant involvement in, or attempted to affect the resolution of this issue. In addition, Cartman cannot make Broflovski out to be a public figure by simply manufacturing a public issue. Under both the test employed by the majority of Circuits, and the minority test promulgated by the Second Circuit, Broflovski is a private figure, and a reasonable jury could find Cartman was negligent in his publication by failing to take reasonable steps to verify the accuracy of the photograph and his comments.

However, even if Broflovski were a limited public figure, a reasonable jury could find Cartman liable under an actual malice standard. His publication occurred with reckless disregard for the truth or falsity of the statement. He failed to verify the photograph's authenticity, because he doubted its genuineness, yet intentionally disregarded whether Professor Chaos' allegations were false. A fact finder must determine whether this conduct meets the actual malice standard.

ARGUMENT

I. THE APPELLATE COURT'S RULING SHOULD BE UPHELD BECAUSE ERIC CARTMAN IS NOT PROTECTED BY A REPORTER'S PRIVILEGE AGAINST THE COURT-COMPELLED DISCLOSURE OF THE IDENTITY OF AN ANONYMOUS SOURCE.

A. Cartman must disclose the identity of Professor Chaos because the First Amendment does not create a qualified reporter's privilege against the court-compelled discovery of sources.

Cartman cannot assert a qualified reporter's privilege under the First Amendment because such privilege does not exist. This Court has in no uncertain terms rejected the existence of a First Amendment reporter's privilege in *Branzburg v. Hayes*, 408 U.S. 665. The Court noted in *Branzburg* that "the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against self-incrimination." *Id.* at 689-90. The *Branzburg* Court then declined to create another testimonial privilege by refusing to interpret the First Amendment to grant news reporters a testimonial privilege that other citizens do not enjoy. *Id.* at 690, 692. Justice Powell joined the majority opinion in *Branzburg*, adding in his concurrence that such claims of a news reporter privilege should be decided on a "case-by-case basis." *Id.* at 709-10. Regrettably, several courts have, since, essentially ignored *Branzburg*, instead holding that a qualified reporter's privilege exists. In fact, these courts have attempted to interpret Justice Powell's concurrence to support the proposition that a news reporter does have a First Amendment privilege against disclosure of confidential sources. *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003) (listing some of the circuits that have recognized a privilege and ignored the holding in *Branzburg*). However, countless courts have adhered to the controlling precedent established in *Branzburg* and have correctly rejected recognition of a news reporter privilege inherent in the First Amendment. See *McKevitt*, 339 F.3d at 531; *In re Grand Jury Proceedings*, 810 F.2d 580, 583 (6th Cir. 1987). Ultimately, a simple reading of the holding in *Branzburg* eliminates any suggestion that the First Amendment grants news reporters a privilege that other citizens do not enjoy. *In re Grand Jury Subpoena*, 438 F.3d 1141, 1148 (D.C. Cir. 2006).

The press has no special immunity from the application of general laws and no special privilege to invade the rights and liberties of others. *Associated Press v. NLRB*, 301 U.S. 103,

132-33 (1937). There is no need to have special criteria merely because the possessor of the evidence sought is a journalist. *McKevitt*, 339 F.3d at 533 (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991); *New York Times Co. v. Jascaveich*, 439 U.S. 1317 (1978)). A refusal to provide a First Amendment reporter's privilege will not undermine the freedom of the press to collect and disseminate news. *Branzburg*, 408 U.S. at 698-99. For as long as the press has existed in our country, it has "operated with no constitutional protection for informants, and the press has flourished." The lack of a reporter's privilege has not hindered the growth or retention of confidential news sources by the press. *Id.* at 699.

Declaring that a constitutional newsman's privilege exists would present practical and conceptual difficulties for courts to handle. *Id.* at 704. Eventually courts would need to determine who qualified for the privilege. Freedom of the press is not limited to newspapers and periodicals; rather it has historically included every sort of publication that affords a vehicle of information and opinion. *Lovell v. City of Griffin*, 303 U.S. 444, 450, 452 (1938). See also *Mills v. Alabama*, 348 U.S. 214 (1966). Therefore almost any author, including the author of an internet blog, could, therefore, effectively assert that he is contributing to the flow of information, and accurately contend they are entitled to the news reporter's privilege.

Although *Branzburg* involved a grand jury proceeding, thus a criminal not civil prosecution, courts have historically rejected the idea of a presumptive privilege for reporters in civil suits as well. *Garland v. Torre*, 259 F.2d 545; see also *McKevitt*, 339 F.3d at 532. While freedom of the press is vital to our society and has historically been free from censorship and restraints, it is not an absolute liberty. *Garland*, 259 F.2d at 548. Ultimately what must be determined is whether the interest to be served by compelling the testimony of a witness justifies some impairment on the First Amendment freedom of the press. *Id.* The duty of a witness to

testify in a court of law is as deeply rooted in our history as the guarantee of a free press, and there are times when freedom of the press “must give place under the Constitution to a paramount public interest in the fair administration of justice.” *Id.* at 549.

In *Garland*, an actress brought an action against a broadcasting system due to a network executive allegedly making false and defamatory statements about her to a newspaper columnist. In the course of discovery, the columnist refused to answer a question disclosing the identity of the network executive and was held in contempt by the trial court, which the columnist subsequently appealed. *Id.* at 547. The Second Circuit Court of Appeals held that the First Amendment granted no right on the columnist to refuse to disclose the identity of her source. *Id.* at 550. The court did acknowledge that compulsory disclosure of a journalist’s confidential sources could entail an abridgment of the press, but it held that freedom of the press is not an absolute right and must give way to the public interest in the fair administration of justice. *Id.* at 549. The disclosure sought from the journalist “went to the heart of the plaintiff’s claim and the Constitution conferred no right to refuse an answer.” *Id.* at 550. Thus, the defendant’s refusal to disclose the name of her informant lacked any Constitutional sanction. *Id.*

Cartman cannot claim that he is entitled to a qualified reporter’s privilege because the State of Silverado has not enacted this kind of privilege and the First Amendment cannot be distorted in such a way as to create one. In the same manner that disclosure of the confidential source went “to the heart of the plaintiff’s claim” in *Garland*, Professor Chaos’ identity is similarly material to Broflovski’s claim. Furthermore, this is not a case where the identity of the news source is of doubtful relevance or importance. See *Id.* at 551 (finding that the information sought was of obvious materiality and relevance since the confidential source’s identity was material to determining whether the allegations alleged by the confidential source were indeed

true.) A news reporter privilege simply cannot be asserted in this instance, because one does not exist. In this situation, Cartman's alleged right to keep his source confidential, must "bow down" to Broflovski's right to defend himself against the allegations mounted against him. Cartman's refusal to disclose the identity of Professor Chaos lacks Constitutional endorsement under the First Amendment and must give way to the public interest in the fair administration of justice, as in *Garland*. Cartman cannot hide behind his assertion of a news reporter's privilege.

The issue presented here is whether recognizing a news reporter's privilege under the First Amendment is imperative to the existence and continuation of a free press so that this privilege is deemed a right under the First Amendment. Granted, news reporters contribute a valuable service to our society and freedom of the press that has been a fundamental, essential liberty in our country since it was founded. See *Branzburg*, 408 U.S. at 704; *Garland*, 259 F.2d at 548. Nonetheless, this liberty is not superior to all other interests and liberties in this country, many of which are just as significant to a free society, protecting an individual's right to achieve fairness, and justice in a court of law. *Garland*, 259 F.2d at 549. The First Amendment grants no news reporter's privilege and to read such a privilege into the First Amendment would undermine the very constitutional protection it does provide.

The only privilege recognized by this Court under the Constitution is the Fifth Amendment privilege against self-incrimination. *Branzburg*, 408 U.S. at 690. Whether other privileges should exist is a matter to be decided by legislative means. Thus, the only way for a news reporter's privilege to exist is for states to individually elect to create one statutorily; one is not implied under the First Amendment. *Id.* at 706. Congress has considered several federal reporters' shield bills and there have been numerous efforts made in recent years to create a statutory reporter's privilege at the federal level. See, e.g., *Free Flow of Information Act*, H.R.

2102, 110th Cong. (2007). However, such efforts have been unsuccessful. Ultimately it remains in the hands of each individual state to determine whether a news reporter's privilege is appropriate. The State of Silverado has, thus far, chosen not to enact such a statute. Therefore, Cartman cannot successfully assert a qualified news reporter's privilege that has not been created statutorily and does not exist under the First Amendment.

B. Even if a qualified reporter's privilege does exist, Cartman cannot assert the privilege, as he is a party to this litigation and Broflovski has made an affirmative showing to overcome any privilege asserted.

Even if a qualified reporter's privilege does exist, Cartman cannot avail himself of the privilege, as he is the subject of discovery, a party to the litigation, and the only individual with knowledge of Professor Chaos' true identity. Furthermore, Broflovski has made an affirmative showing to overcome any asserted privilege. Even in the rare instance a reporter can invoke a qualified privilege, such a privilege is overcome if the party moving to compel disclosure shows that: (1) the party seeking the information has independently attempted to obtain the information elsewhere and has been unsuccessful; (2) the information goes to the heart of the matter; and (3) the information is of certain relevance to the litigation. *Silkwood v. Kerr-McGee Corp.*, 563 F.3d 433, 438 (10th Cir. 1977) (citing *Garland*, 259 F.2d 545); see also *Zerilli v. Smith*, 656 F.2d 705, 713-14 (D.C. Cir. 1981). When analyzing whether the reporter's interest in confidentiality should yield to the moving party's need for the probative evidence, little distinction is drawn between civil and criminal cases. Although the "evidentiary needs of the criminal defendant may weigh more heavily in the balance," the standard of review tends to remain the same. *U.S. v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983).

The plaintiff in a libel claim has a very heavy burden placed upon him. Unless he can produce third-party witnesses to verify the falsity of the allegations, a plaintiff, without

knowledge of the source of the allegations, can only prove their falsity by denying them under oath. *Price v. Time, Inc.*, 416 F.3d 1327, 1345 (11th Cir. 2005). Where the source of the allegedly libelous comments is an informant, the only method of determining the recklessness of the news reporter is to examine the reliability of the informant. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980). In order for a plaintiff to make that determination, he “must [acquire] the informant’s identity.” *Id.* at 727. See also *In re Selcraig*, 705 F.2d 789, 798-99 (5th Cir. 1983) (finding that the standard established in *Miller* is also applicable to reporter who was not a party to the lawsuit.)

When the journalist is a party to the libel suit, and successful assertion of the privilege would effectively shield him from liability, the equities weigh more heavily in favor of disclosure. *Price*, 416 F.2d at 1345-46. Otherwise, protecting the identity of the confidential source would prevent the plaintiff from obtaining recovery. *Id.* at 1346. If, however, a plaintiff makes a concrete demonstration that the identity of a defendant’s news sources will lead to persuasive evidence on the issue of malice, summary judgment should not be granted until, and unless, the plaintiff is first given a meaningful opportunity to cross-examine those sources, whether anonymous or known. *Cervantes v. Time, Inc.*, 464 F.2d 986, 994 (8th Cir. 1972). Knowledge of the identity of the alleged confidential sources is an essential element to proving whether the allegations are indeed true. *Carey v. Hume*, 492 F.2d 631, 637 (D.C. Cir. 1974). “Consequently, ... the identity of the source is critical to the [plaintiff’s] claim.” *Id.*

Admittedly, the plaintiff does have a duty to ensure he conducts an adequate investigation to determine whether the information sought can be obtained from some other source. *Carey*, 492 F.2d at 638. Courts must be alert to the possibilities of limiting impingements on the freedom of the press and thereby only compel disclosure by a journalist as a last resort, after

pursuit of all other opportunities has failed. *Id.* at 639. However, the parties seeking the disclosure must not be forced to embark on burdensome, time-consuming discovery that is not likely to shed any light on the identity of the confidential source. *Id.*

In *Miller*, the plaintiff sued a magazine and its editor for libel stemming from an article that had been published in the magazine and alleged that plaintiff had been involved in swindling money from a pension fund. During the course of discovery the plaintiff learned the source of the article was a confidential informant and he filed four motions to compel the disclosure of the identity of the informant. *Id.* at 723. The Fifth Circuit Court of Appeals held that the defendants' asserted First Amendment privilege must yield to the plaintiff's need for the information. *Id.* at 725. "The only source of the allegedly libelous comments was the informant." The only way for the plaintiff to establish that the allegations were false was to demonstrate that defendants were reckless in relying on the informant. For that, plaintiff was "required to know the informant's identity." *Id.* at 726.

Several circuits have addressed the issue of what amount of discovery a plaintiff is required to engage in before he is said to have exhausted all reasonable means of obtaining the information. In *Selcraig*, the plaintiff, a professional school administrator, sued the school district for defamation after an article containing allegations about the plaintiff was printed in a newspaper. The plaintiff sought discovery from a news reporter as to the source of his knowledge in writing the article. The reporter invoked a qualified privilege to escape from revealing his confidential source. *Id.* at 792-93. The plaintiff proceeded to depose five reporters who had written articles about him, as well as two high-ranking school officials, and he also submitted interrogatories to the school district seeking to learn the reporter's source. When the results of this investigation revealed nothing, the plaintiff filed a motion to compel the reporter to

reveal his sources. *Id.* at 794. The Eight Circuit Court of Appeals held that the plaintiff, through his investigation, had shown a probability that those school district officers were the informants, and he had “exhausted alternative means of establishing that fact.” *Id.* at 799. Thus, the reporter’s privilege “must succumb to the [plaintiff’s] discovery needs.” *Id.* But see *Price*, 416 F.3d at 1346 (plaintiff’s failure to question under oath four witnesses he was aware were in a position to confirm or deny the truth of the allegations, was evidence that he had not exhausted all reasonable alternative means to discover the identity of the confidential source.)

Here, even assuming Cartman can assert a qualified reporter’s privilege, the privilege has been completely overcome by Broflovski’s need for the information and the public interest in the fair administration of justice. Therefore, Cartman is required to reveal the identity of Professor Chaos. Broflovski has exhausted every reasonable means available to him of uncovering the identity of this confidential informant. See *Selcraig*, 705 F.2d at 799. He has deposed several high-ranking employees at the Mumbai factory; he has contacted all Citrus employees to request information on the source of the leak. Regrettably, these efforts did not provide Broflovski with the necessary information to defend himself against the heinous allegations brought against him by an anonymous source seeking to hide behind a veil of confidentiality. Broflovski then turned to Cartman, submitting written interrogatories requesting the disclosure of Professor Chaos’ identity. This action was unsuccessful as well, and in order to proceed with his claim, Broflovski was forced to file a motion to compel the disclosure of the identity of Professor Chaos.

This situation is akin to that found in *Selcraig*, in that Broflovski has attempted to uncover the identity of Professor Chaos from all sources, who either know or may possibly know such information. It has already been conceded that Professor Chaos is an employee of Citrus, thus, Broflovski does not have to show a probability that he is indeed such. Broflovski has

attempted to find out the identity from all sources that reasonably could identify Professor Chaos: the manager of the Mumbai factor, several top engineers, as well as all the employees at Citrus. When these efforts failed, Broflovski went to the source, whom undoubtedly knew the identity of Professor Chaos, Cartman himself. Unlike the plaintiff in *Price*, Broflovski is not aware of any other individuals who know Professor Chaos' identity or any one who could confirm the allegations asserted by Professor Chaos. To ask Broflovski to do more would be extraordinarily onerous and unreasonable. Citrus is a large corporation, and the Mumbai factory, along with all of its employees, are not particularly accessible to litigation occurring in the courts located in the United States. Broflovski is only required to make reasonable efforts to uncover the identity of Professor Chaos. He has already made an affirmative showing that such reasonable efforts have been made. As such, this Court should find that Cartman's asserted privilege must succumb to Broflovski's right to fully pursue his claim.

Broflovski has also made an affirmative showing that the information he seeks is relevant and, without question, goes to the heart of this matter. See *Garland*, 259 F.2d at 550. Professor Chaos is the only source of the allegations made against Broflovski. There has been no other evidence set forth to corroborate Cartman's allegations, which were based on information he received from Professor Chaos. This situation is analogous to *Miller* in that, in both *Miller* and this case, the only way the plaintiff can prove his case and negate the allegations against him is to "acquire the informant's identity." *Id.* at 727. That informant is the only person who has made these allegations, which are central to his claim. The only way to ascertain whether these allegations are true or false is to determine the credibility and reliability of the informant. Broflovski must have an opportunity to question and examine Professor Chaos; therefore, he must know his identity.

Furthermore, because Cartman is a defendant in this suit, this Court should be more inclined to allow disclosure of Professor Chaos' identity. If courts are willing to allow disclosure of a confidential informant's identity when the news reporter is not a party to the lawsuit, the importance of such disclosure is significantly greater when the reporter is indeed the party being sued for such defamation. The Fifth Circuit and Tenth Circuit have held in *Selcraig* and *Silkwood* respectively, that even when the news reporter was not a party to the suit, the asserted privilege could still be overcome. So here, should this Court hold that Cartman's asserted privilege must surrender to the need for disclosure, specifically because Cartman is a party to this lawsuit. It is easy for Cartman to simply assert that he has a news reporter's privilege and hide behind that contention. If he is not required to disclose the identity of his source, there is no way for Broflovski to proceed with defending himself against the libelous allegations. Broflovski has affirmatively demonstrated the disclosure of Professor Chaos' identity is crucial to his claim and "goes straight to the heart of the matter." Moreover, he has exhausted all reasonable means of obtaining the information from sources other than Cartman. For these reasons, Broflovski's need for the information outweighs Cartman's asserted privilege, and this Court should find that Cartman must disclose Professor Chaos' identity.

II. THE APPELLATE COURT CORRECTLY HELD THAT A REASONABLE JURY COULD FIND THAT BROFLOVSKI WAS A PRIVATE FIGURE AND THAT CARTMAN WAS NEGLIGENT IN DEFAMING HIM.

The Appellate Court correctly ruled that Broflovski is a private citizen, not a limited public figure; therefore, negligence is the proper standard that should apply in this case. Since 1964, this Court has recognized that some traditional common law actions for defamation may interfere with the First Amendment right of free expression. *New York Times v. Sullivan*, 376 U.S. 254 (1964). In balancing the competing interests of an individual's right to be free from

defamatory falsehoods and the public's right to free speech, this Court has defined basic standards. *Id.* Accordingly, public officials or public figures must show that a defamatory statement was made with actual malice, that is, knowledge of the falsity of the statement or a reckless disregard for the truth, before they may recover damages in a defamation action. *Id.* at 279-80; *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 154-55 (1975) (holding the question of whether a libel action brought by an individual who is a "public figure," but not a "public official," must also be governed by the *Sullivan* standard.) This Court has identified two classes of public figures: general-purpose and limited purpose public figures. *Curtis Publ'g Co.*, 388 U.S. at 154. An individual may, by position alone, achieve such fame or notoriety that he becomes a public figure for all purposes in all contexts. *Id.* Here, Cartman concedes that Broflovski is not a general-purpose public figure. However, more commonly, an individual "by his purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy" becomes a public figure for a limited range of issues." *Id.* at 155. Whether an individual is a public figure is a matter of law for the court to decide. *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966).

Where a private individual brings a defamation claim and the speech concerns a matter of "public concern," states may define their own standard of liability for defamation, as long as that standard requires some showing of fault. *Gertz*, 418 U.S. at 347-49. In the State of Silverado, the standard for negligence in a defamation action is whether the defendant acted as a reasonably prudent person in the circumstances. See Restatement (Second) of Torts § 580 (B). The fact finder must assess the context of the communication including whether the topic is urgent or "hot news", efforts to corroborate sources, independent investigation, and other relevant facts. *Id.* § 580(B) cmt. c. Here, because Broflovski is a private citizen, not a public figure, negligence is

the applicable standard, and a reasonable jury could find that Cartman was negligent in his publication of the photograph and commentary.

However, even if the court classified Broflovski as a limited-public figure, a reasonable jury could hold Cartman liable under the actual malice standard. A plaintiff acts with actual malice when making a statement with knowledge that it is false or with a reckless disregard for the truth. *Sullivan*, 376 U.S. at 279-80; *Curtis*, 388 U.S. at 154-55. Cartman published statements with complete disregard for their truth. He possessed doubts about the photograph's genuineness, but was determined to post his statements whether they were true or false. Thus, a reasonable jury could find his actions satisfy the actual malice standard.

A. Broflovski is not a limited purpose public figure because he did not voluntarily thrust himself to the forefront of a pre-existing controversy and has not attempted to affect its resolution.

According to the standards set forth by this Court, Broflovski has not achieved status as a limited public figure in this case. Although a plurality of the Court in *Rosenbloom* held that *Sullivan* should extend to private individuals involved in matters of public interest, this Court rejected that event-oriented approach in *Gertz*. Instead, it chose to focus on the status of the defamation plaintiff. *Rosenbloom v. Metromedia*, 403 U.S. 29, 43 (1971) (extending constitutional protection to all matters of public concern, regardless “whether the persons involved are famous or anonymous.”), overruled by *Gertz*, 418 U.S. at 345. “For the most part those who attain this status have assumed roles of especial prominence in the affairs of society” such that they are deemed public figures for all purposes. However, “[m]ore commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they “invite attention and comment.” *Id.*

“Trivial or tangential participation is not enough. The language of *Gertz* is clear that plaintiff’s must have ‘thrust themselves to the forefront of the controversies so as to become factors in their ultimate resolution. They must have achieved a special prominence in the debate.’” *Walbaum v. Fairchild Publications, Inc.*, 627 F. 2d 1287, 1296 (D.C. Cir. 1980); *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 450 (1976) (quoting the standard from *Gertz* and explaining that the plaintiff was not a public figure because she did not “assume any role of prominence in the affairs of society, ... and she did not thrust herself to the forefront to any particular controversy in order to influence the resolution of the issues involved in it.”) However, “those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.” *Hutchinson*, 443 U.S. at 137; *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S., 157, 167-68 (1979).

Under the framework promulgated by this Court, Broflovski cannot be classified as a limited public figure. A plaintiff must achieve a “special prominence” in the debate by purposely attempting to influence the outcome or, because of their position, must have been expected to have an impact on the resolution. *Gertz*, 418 U.S. at 351. In *Gertz*, the plaintiff was an attorney representing clients in a civil action against a police officer convicted of murdering their son. Although some controversy surrounded the prosecution of the officer, the plaintiff’s participation in it related solely to the representation of his clients. The *Gertz* Court found that at no time did he ever discuss the criminal litigation with the press or seek any attention to influence the outcome of the trial. *Id.* at 352. The “[plaintiff] plainly did not thrust himself into the vortex of this public issue, nor did he engage the public’s attention in an attempt to influence its outcome.” Therefore, this Court refused to classify him as a public figure. *Id.* Although the

Gertz Court allowed for the possibility of an involuntary public figure in the case, it immediately retreated from the idea, noting that those instances should be “exceedingly rare.” *Id.* at 351.

Broflovski was not a public figure and only became a subject of public controversy because of Cartman’s defamatory speech. To be considered a public figure, a plaintiff must actively play a part in the public controversy through “regular and continuing access to the media” and “not because they are dragged, unwillingly, into the public controversy as a result of the defamation.” *Hutchinson*, 443 U.S. at 135; *Wolston*, 443 U.S. at 167-68. In *Hutchinson*, the plaintiff, a research director and professor who had received federal funding for a research project, sued for defamation after he was awarded the “Golden Fleece” award by a United States Senator as an example of wasteful government spending. In determining whether plaintiff was a limited public figure, the Court noted that defendants never identified a public controversy, “at most [pointing] to public concern about general public expenditures.” As a concern “shared by most and relat[ing] to most public expenditures”, it was not sufficient to make Hutchinson a public figure.” *Id.* at 135.

Additionally, the *Hutchinson* Court pointed out that the plaintiff never “assumed an role of public prominence in the broad question of concern about expenditures.” *Id.* Rather, he merely sought and received federal funds for his research. This Court reasoned that the fact that his research became matter of controversy was a result of defendant’s conduct. Therefore, it held that it would be unfair to allow a defendant, by his own conduct, to create a defense by making the claimant a public figure. *Id.*; See also *Wolston*, 443 U.S. at 167-68 (refusing to classify plaintiff as a limited purpose public figure because he did not “voluntarily thrust himself into the forefront of the controversy,” and stating “a private individual is not automatically

transformed into a public figure just by becoming involved in ... a matter that attracts public attention.”)

In this case, Broflovski is a private individual who has not achieved status as a limited purpose public figure. This Court in *Gertz* focused primarily on: (1) the voluntary conduct of the plaintiff in the controversy, and; (2) his interaction with the media. *Gertz*, 418 U.S. at 352. Here, Broflovski has not “thrust himself into the vortex of this public issue, nor did he engage the public’s attention in an attempt to influence its outcome.” *Id.* He has not maintained “regular and continued access to the media,” making only one brief statement through his attorney. See *Hutchinson*, 443 U.S. at 135. Through his position with Citrus, he has no significant involvement in the controversy at issue: slave labor. As in *Gertz*, Broflovski is merely a private individual for the purposes of the present action. “[H]e has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood.” *Id.* at 345.

To classify Broflovski as a limited purpose figure would be to re-adopt the *Rosenbloom* standard, which this Court expressly rejected in *Gertz*. In essence, it would give Cartman the opportunity to create his own defense by manufacturing a public controversy. *Hutchinson*, 443 U.S. at 135; *Wolston*, 443 U.S. at 166. Instead, this Court should continue to apply the approach articulated in *Gertz* and its progeny, which focuses on the voluntary actions of the plaintiff. Under that framework, Broflovski has not sought to “invite attention and comment” to the controversy. *Gertz*, 418 U.S. at 345.

The facts of this case are analogous to those of *Hutchinson*. In *Hutchinson*, the Court found the plaintiff did not “thrust himself or his views into the public controversy to influence others,” noting his access to the media was limited to a single response to the accusations

through his attorney. *Id.* at 135. Here, Broflovski did not address the media to respond to the allegations save for a message delivered through his attorney. In both *Hutchinson* and the case at hand, the plaintiff did not access the media or attempt to affect the outcome of the controversy. Accordingly, like the *Hutchinson* plaintiff, Broflovski has not achieved public figure status.

Additionally, Broflovski has never “assumed any role of public prominence” in the issue of concern, and only became involved in the controversy as a result of Cartman’s defamatory statements. *Id.* at 135. Concededly, the issue of slave labor is a widely held public concern. However, as in *Hutchinson*, Cartman never identified a specific pre-existing controversy involving Broflovski; instead he merely pointed to a general concern shared by most and relating to all. *Id.* He was dragged unwillingly into the present controversy without attempting “to influence the resolution of the issues involved” *Firestone*, 424 U.S. at 450. To allow Cartman to claim Broflovski is a limited purpose public figure would improperly permit him to “create [his] own defense by making Broflovski a public figure” on the issue. *Wolston*, 443 U.S. at 167.

Cartman’s speech consisted of false statements intended to create a public controversy. This Court has held “there is no constitutional value in false statements of fact.” It concluded that “[n]either the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open debate’ on public issues.” *Gertz*, 418 U.S. at 344 (quoting *Sullivan*, 376 U.S. 254 (1964)). Cartman’s statements “belong to that category of utterances which ‘are not an essential part of the exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’ ” *Id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

In addition, Broflovski’s own actions “cannot be said to have invited the degree of public attention and comment... essential to meet the public figure level.” *Id.*

Under either the plurality test adopted by the District Court or the minority approach applied by the Appellate Court, Broflovski is not a limited public figure. His lack of participation in the controversy and limited media access prevents him from being classified as such. Hence, a reasonable jury could find that Cartman was negligent in posting the photograph and commentary by failing to take reasonable means to verify their authenticity.

i. The District Court incorrectly applied the plurality test when it determined Broflovski was a limited public figure.

The District Court incorrectly applied the plurality test in analyzing whether Broflovski was a limited public figure. Under the three-pronged test adopted by the District Court and a plurality of circuits, a plaintiff is a limited public figure if: (1) the relevant controversy is a matter of public concern; (2) the plaintiff plays more than a “trivial or tangential role” in the controversy, and; (3) the defendant’s allegedly defamatory remarks are relevant to the public controversy. *Waldbaum*, 627 F.2d at 1296; *Silvester v. American Broad. Companies, Inc.*, 839 F.2d 1491, 1492-93 (11th Cir. 1988) (“The proper standards for determining whether plaintiffs are limited public figures are best set forth in [*Waulbaum*]...”); *Trotter v. Jack Anderson Enterprises, Inc.*, 818 F.2d 431, 432 (5th Cir. 1987) (“In an effort to give shape to what might be a formless inquiry into limited-purpose-public-figure status, the District of Columbia has developed a three part test... This test appears to be sensible and we adopt it.”)

Under the plurality test from *Walbaum*, Broflovski is not a limited public figure. In *Waldbaum*, the court articulated its test for limited public figures. *Id.* at 1296-97. A court must “first isolate the controversy” because “[a] general concern or interest will not suffice.” *Id.* Once the court has defined the controversy, it must next analyze the plaintiff’s role in it. *Id.*

Limited public figures must “thrust themselves to the forefront of controversies so as to become factors in their ultimate resolution”. The plaintiff must achieve a “special prominence” in the debate by trying to influence the outcome or having some impact on its resolution. *Id.* Finally, the alleged defamation must relate to the plaintiff’s participation in the controversy. *Id.* at 1298.

Here, there was no pre-existing public controversy and Broflovski had no significant involvement in the alleged controversy, thus, he cannot be regarded as a limited public figure. To determine a plaintiff is a limited public figure, a pre-existing public controversy must be the subject of the defamatory statements, the plaintiff must have “significant involvement” in the alleged controversy, and the statement must be germane to his involvement. *Trotter*, 818 F.2d at 432. In *Trotter*, the court first discussed whether the labor violence at issue was a pre-existing public controversy. *Id.* at 434. Based on attention by a “diverse and broadly based audience including the media, political leaders, human rights organizations, labor unions, and...shareholders” the court found it was and noted that “[c]reating a public issue is not the same as revealing one.” The court then concluded the plaintiff had significant involvement in the controversy due to his prominent role in it and his efforts to influence its resolution by making important policy decisions. *Id.* at 435. Although the court considered the plaintiff’s infrequent contact with the media in its determination, it “viewed significant involvement in public controversies as more important.” *Id.* at 436. Finally, because the defamatory statements were germane to the plaintiff’s involvement, it held that he was a limited public figure. *Id.*

In applying the plurality test here, the District Court simply looked at whether Broflovski was “directly involved in the issue of public concern and [whether] the defendant’s remarks were geared toward plaintiff’s participation.” J.A. at 18. This focus on the public’s interest in the controversy rather than the plaintiff’s voluntary participation, was apparently either a revival

of the event oriented approach from *Rosenbloom* or an attempt to institute the involuntary public figure, an approach similarly abandoned. In either event, the District Court improperly applied the plurality test to the facts of this case.

The District Court failed to determine the extent of Broflovski's "significant involvement" in the controversy. *Trotter*, 818 F.2d at 432. The focus should have been on his voluntary conduct, not passive involvement. See *Gertz*, 418 U.S. 345. *Walbaum* expressly states "the plaintiff must have been purposefully trying to influence the outcome or could realistically have been expected, because of his position of influence in the controversy, to have and impact on its resolution." *Id.* at 1297. Embedded in this analysis must be: (1) the plaintiff's "significant involvement in the controversy," and; (2) his access to the media. *Trotter*, 818 F.2d at 435. Instead, the District Court ignored the second prong by failing to analyze Broflovski's significant participation in the controversy whatsoever, thereby, permitting intrusion into a person's privacy when that person did not intentionally become a public figure. See *Gertz*, 418 U.S. at 345.

Under a complete analysis of the majority test, Broflovski is not a limited public figure. The facts of this case can easily be distinguished from *Trotter*. Here, a valid public controversy did not exist prior the Cartman's publication. In *Trotter*, the court noted "[c]reating a public controversy is not the same as uncovering one" and refused to hold the first paper to report on a pre-existing public dispute to a stricter standard of liability than those who followed. *Id.* at 435. However, in that case, the court referenced many "diverse and broadly based audiences including the media, political leaders, human rights organizations, labor unions, and...shareholders" that had given attention to the issue, making it a valid public controversy. *Id.* In contrast, Cartman did not discover a pre-existing public controversy; he created one. There were no intimations or evidence suggesting Broflovski was involved in a slave labor issue. Cartman was the only one to

allege such a connection because he manufactured the controversy. Therefore, his statement fails to meet the first prong of the plurality test and is not a valid pre-existing public controversy.

Moreover, Broflovski had no significant involvement in the public controversy. His job consisted of research and development and had nothing to do with production or labor issues. In *Trotter* the plaintiff's was a central figure in important policy decisions and the resolution of the controversy. Conversely, here, Broflovski had no effect on the resolution of this matter or Citrus' policy regarding labor. Along with his lack of significant involvement, Broflovski has not addressed the media, which is an important consideration addressed by the court in *Trotter*. Consequently, according to the logic in *Trotter*, Broflovski has not achieved public figure status.

ii. In applying the Second Circuit's test, the Court of Appeals correctly ruled that Broflovski is a private figure.

Under the minority test employed by the Court of Appeals for the Fifteenth Circuit, Broflovski was correctly classified as a private figure for the purposes of this litigation. The essential ruling in *Gertz* is a focus on the actions of the plaintiff bringing the defamation action. In rejecting the plurality rule applied by the District Court, the Court of Appeals adopted the approach promulgated by the Second Circuit which requires a plaintiff to: (1) "successfully invite public attention prior to the remarks litigated; (2) "voluntarily inject" himself into the relevant public controversy; (3) take a "position of prominence" within the public controversy, and; (4) maintain regular and continuing access to the media in order to combat the defamatory remarks in order to be considered a limited purpose public figure. *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136-37 (2d. Cir. 1984). Simply occupying a position of high influence within a prominent company is insufficient to qualify a plaintiff as a public figure. *Tavoulaareas v. Piro*, 817 F.2d 762, 773 (D.C. Cir. 1987) (finding that plaintiff's position as CEO of a company did not alone qualify him as a public figure for the purposes of the case.)

The four-factor test adopted by the Second Circuit, and the Court of Appeals for the Fifteenth Circuit, is based on an analysis of Supreme Court case law. It hinges largely on whether a plaintiff voluntarily injected himself into the controversy and “the nature and extent of an individuals participation in the particular controversy giving rise to the defamation.” *Gertz*, 418 U.S. at 352; *Wolston*, 443 U.S. at 167; *Lerman*, 745 F.2d at 136-37.

Under the present facts, Broflovski does not satisfy the criteria necessary to be classified a limited public figure. The Court of Appeals correctly held that he “failed to satisfy any of the prongs with respect to [Cartman].” J.A. at 29. The limited public attention that Broflovski received prior to Cartman’s publication is insufficient to satisfy the first prong. J.A. at 29. Broflovski made absolutely no affirmative steps to invite any attention. His position as head of Research and Development alone does not make him a public figure. See *Tavoulareas*, 817 F.2d at 773. The inconsequential actions Broflovski engaged in prior to the controversy were standard business practice, which drew little media attention. The remaining attention he received was not due to his own affirmative actions; instead, it was a result of his brother’s conduct and that of a voluntary “fan cult.”

In addition to the lack of prior attention, Broflovski did nothing to voluntarily inject himself into the controversy or to maintain access to the media during the controversy. See *Lerman*, 745 F.2d at 136-37. On the contrary, Broflovski withdrew from public attention and remained secluded, making no direct statements to the media. Instead, his attorney did so on his behalf. Based on the evidence, Broflovski is strictly a private figure in the subject action.

B. Even if Broflovski achieved limited-purpose public figure status, a reasonable jury could find Cartman liable under the actual malice standard.

Even if Broflovski were a public figure in this action, a jury should decide whether Cartman's actions satisfy the actual malice standard. Actual malice is defined as: (1) a defamatory statement made with knowledge that the statement is false, or; (2) with reckless disregard for the truth. *Sullivan*, 376 U.S. at 279-80; *Curtis Publ'g Co*, 388 U.S. 130, 154-55 (1975). Reckless disregard occurs when the defendant "entertained serious doubts as to the truth" of the statement or the defendant had a "subjective awareness of [its] probable falsity." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Gertz*, 418 U.S. at 335. The test involves a fact intensive analysis to determine "how close the action of the reporter and the paper was to the reckless disregard of the truth." *Hardin v. Santa Fe Reporter, Inc.* 745 F.2d 1323, 1326 (10th Cir. 1984); *Goldwater v. Ginsburg*, 261 F. Supp 784, 788 (D.C.N.Y. 1966) (holding the issue of actual malice seems peculiarly inappropriate for disposition by summary judgment because it concerns "motive, intent, and subjective feelings and reactions," and relying on *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464 (1962), where this Court cautioned against summary judgment "where motive and intent play leading roles.") "The [actual malice] standard is a subjective one." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989).

A reasonable jury could find Cartman liable under an actual malice standard. The test is a subjective one in which the jury must determine Cartman's motive and intent. *Hardin*, 745 F.2d at 1326; *Harte-Hanks*, 491 U.S. at 688. As discussed in *Goldwater*, this Court has cautioned against summary judgment where the issue concerns "motive, intent, and subjective feelings and reactions." *Goldwater*, 261 F. Supp at 788. As in that case, here, summary judgment, would be "peculiarly inappropriate" because subjective feelings are at the heart of the issue. *Id.* When looking at all of the evidence, a reasonable jury could conclude that Cartman's personal animus toward Broflovski motivated his reckless disregard for the truth or falsity of his

statements. *Sullivan*, 376 U.S. at 279-80. Rather than finding that he was more likely to believe the photograph was true, a fact finder may determine Cartman willingly published information he doubted to be truthful. See *St. Amant*, 390 U.S. at 731. This is an issue of fact, which is indicative of its appropriateness for a jury. At the very least, Cartman's failure to test the photo evinces a subjective belief that he "entertained serious doubts as to the truth." *Gertz*, 418 U.S. at 335. Regardless, this issue is not a matter of law for the Court to decide; rather, it is a question for a jury whether these actions satisfy the actual malice standard.

CONCLUSION

This Court should uphold the Appellate Court's ruling for two distinct reasons. First, Cartman is not protected by a qualified reporter's privilege against disclosure of the identity of his anonymous source. No such privilege exists based on a reading of the First Amendment, and the State of Silverado has not enacted a statute allowing for this privilege. Moreover, even if one were to exist, the privilege is outweighed by Broflovski's need for disclosure to effectively pursue his claim. In balancing the two parties' competing interests, Broflovski's interest is paramount. Therefore, he has made an affirmative showing to overcome any alleged privilege.

Second, under the standards set forth by this Court, Broflovski cannot be deemed a limited purpose figure for the purposes of this litigation. He did not thrust himself to the forefront of the controversy nor did he attempt to affect its resolution. Accordingly, he is a private figure and a reasonable jury could find Cartman's publication of the photograph was negligent and defamatory. However, even if Broflovski is a limited purpose public figure, a reasonable jury could find Cartman's actions satisfied the actual malice standard by his posting of statements with reckless disregard for their accuracy. This issue is one for a jury to decide.

For the foregoing reasons, this Court should uphold the Appellate Court's ruling.