

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 RESPONDENT

TEAM NO. 227

Counsel for Respondent

QUESTIONS PRESENTED

- I. Whether Eric Cartman may invoke a qualified reporter's privilege against court compelled disclosure of the identity of an anonymous source in an online defamation case when the Supreme Court has held that the First Amendment does not create such a privilege and when he is not engaged in news gathering or editing?
- II. Whether Cartman has established that no reasonable jury could find that Broflovski is a private citizen or if Broflovski is a limited purpose public figure that no reasonable jury could determine from the facts presented that there was actual malice in publishing the story?

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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

This action arose after Eric Cartman (“Cartman”), owner of the declining Cartman’s Computer World, and *The Sludge Report* cruelly accused Ike Broflovski (“Broflovski”) of human rights violations in Mumbai. (J.A. at 4-5.) Broflovski, a recent MIT graduate, is employed by his brother Kyle as the Director of Research and Development at Citrus. (J.A. at 3.) Kyle has given numerous television and magazine interviews promoting Citrus’ “new and exciting” products. (J.A. at 3.) Citrus employees have benefitted from Broflovski’s inventions and have begun to wear homemade “I Like Ike” buttons supporting his work for the company. (J.A. at 4.) Broflovski is not accustomed to all this attention as he is extremely shy, in fact, he is reclusive to the point that he is rarely seen in public and never gives interviews despite his growing fame. (J.A. at 3.)

Cartman, in order to supplement his income after a Citrus MegaStore opened across the street from his declining electronics store, sunk to a new low by creating the controversial blog, *The Sludge Report*. (J.A. at 4.) Topics range from celebrity gossip to local and international politics. (J.A. at 4.) However, during the last four years, his most vile criticism has been directed at Citrus and, specifically Kyle Broflovski. (J.A. at 4.) Cartman believes they are driving him out of business, and are also engaged in “systematic[ally] oppress[ing] . . . the peoples of the Third World.” (J.A. at 4.) Tipsters send Cartman tips for the blog, both confidential and not, to Cartman’s personal e-mail address including tips from a personal acquaintance that Cartman refers to as “Professor Chaos” (“Chaos”) in his blog. (J.A. at 5.) Chaos emailed Cartman a photo of Broflovski allegedly walking through a factory in Mumbai yelling at workers assembling ePlay Touchés who were not wearing proper safety attire. (J.A. at 5.) Cartman immediately

published the story under the inflammatory headline, “Citrus Engaging in Modern-Day Slavery?,” with the provocative caption of “where’s the whip, Ike?” for the photo. (J.A. at 5-6.)

In the article, Cartman introduced Broflovski by describing him as the “pawn of his evil older brother . . . whose face dominates billboards and commercials,” and even expressed some doubt as to the veracity of the photo when he stated “[i]f the image I am showing you depicts what I think it does” (J.A. at 6.) Yet Cartman’s hedging was not enough to prevent Broflovski from being labeled “The Most Heinous Individual in the Galaxy,” to avoid a boycott of Citrus products. (J.A. at 6-7.) This storm of controversy also led to Broflovski receiving death threats, and caused him to sink into depression. (J.A. at 7.)

Broflovski filed suit for online defamation in Silverado Superior Court, and Cartman removed the action to United States District Court for the Western District of Silverado. (J.A. at 7.) During discovery, it was learned that the photo from the factory was “likely doctored,” a fact that could have been discovered by Cartman if he had used the photo software he had previously used for the blog. (J.A. at 7.) It can be inferred that Cartman intentionally did not test the picture given to him by his source, Professor Chaos, due to his animosity towards Citrus and Kyle Broflovski. (J.A. at 7.) Professor Chaos claims to be a Citrus employee, and is known to Cartman personally. (J.A. at 5-7.) Broflovski asked for the source of the picture, but Cartman claimed a qualified privilege as a reporter under the First Amendment. (J.A. at 8.) Cartman’s invocation of this “privilege” forced Broflovski to file a motion to compel disclosure of Chaos’ identity. (J.A. at 8.) Cartman reacted by filing an opposition motion, and 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 appealed to the United States

Court of Appeals for the Fifteenth Circuit, which granted his motion to compel discovery under Federal Rules of Civil Procedure 37, and also found that the issue of fault in the defamation claim could not be automatically resolved in Cartman's favor. (J.A. at 32.) Therefore, the Court of Appeals reversed and remanded the case to the District Court for further proceedings on both motions. (J.A. at 31.) Subsequently, this Court granted certiorari, and the issues were certified for argument before this Court for the October Term, 2009. (J.A. at 32.)

SUMMARY OF THE ARGUMENT

In *Branzburg v. Hayes*, this Court recognized that a free press and its activities have a constitutional dimension, but that the First Amendment did not include the privilege for reporters to keep their sources confidential. The Court also refused to create another testimonial privilege. Circuit courts have created a reporter's privilege by claiming that Justice Powell's concurrence in *Branzburg* proclaimed that there was a privilege. This Court's ultimate concern in *Branzburg* was the implication of a reporter's privilege where a reporter was forced to answer relevant questions in a grand jury investigation, but the implications of the privilege were considered in all judicial proceedings. The D.C. and Seventh Circuits have recently held that this Court's decision in *Branzburg*, when read in context, provides no room for any interpretation except one that finds the First Amendment does not establish a reporter's privilege. Even if there were a reporter's privilege, Cartman should not be considered a reporter and should be barred from invoking such a privilege. The Constitution and this Court have not provided insight into who can be considered a reporter. Thus, it is informative to investigate circuit court decisions. This Court should adopt the Third Circuit's test for determining whether an individual is a reporter for the purposes of invoking the reporter's privilege. This is the appropriate test because the application of the privilege is dependent on whether the individual engaged in activities

intrinsically related to the function of reporting such as news gathering and editing. This privilege may be invoked to protect an individual from being required to divulge his sources so long as the other party cannot demonstrate some greater need for possession of the privileged information.

In the case at bar, Cartman does not qualify as a reporter under the Third Circuit test. Cartman was not engaged in investigative reporting or newsgathering. Cartman merely disseminated “news” found on other websites or received in e-mails. (J.A. at 4-5.) Cartman took no active or affirmative steps to determine the truth or veracity of the information he obtained. (J.A. at 4-5.) Such actions are nothing more than the reckless dissemination of unsubstantiated gossip. As a private citizen, Broflovski has exhausted all avenues available to him to discover the information without piercing Cartman’s privilege. Therefore, Cartman should not be deemed a reporter eligible to invoke the reporter’s privilege.

This Court, in *Gertz v. Robert Welch, Inc.*, and *Time, Inc. v. Firestone* has held a limited-purpose public figure is one who thrusts himself into the middle of a controversy in order to influence the public. Limited-purpose public figures, when suing for defamation, must prove that the defendant demonstrated actual malice when publishing the defamatory material.

Alternatively, private figures, those who choose not to enter the limelight, need only prove general negligence. Private figures do not have the opportunity to rebut the defamatory material published about them (the way that public figures do), and thus are more deserving of recovery. The general interest is greater for private persons than public figures when dealing with compensation for injury to reputation.

The Second Circuit, in *Lerman v. Flynt Distribution Co.*, articulated a four-prong test to determine whether a plaintiff should be considered a limited purpose public figure for the

purposes of a defamation suit. This test is the only one to correctly interpret the public figure doctrine articulated by this Court. Under this test, Broflovski does not fit into the limited-purpose public figure category. Because Broflovski is a private figure, he does not need to prove Cartman demonstrated actual malice. Instead, all that is required is a showing of simple negligence to prevail in his action against Cartman for defamation.

Even if this Court were to hold that Broflovski is a limited-purpose public figure, Cartman would still not be entitled to summary judgment. A reasonable jury would find that material facts exist showing Cartman demonstrated actual malice when publishing the defamatory photograph and story. This Court, in *New York Times Co. v. Sullivan* held that to prove actual malice one must show either knowledge of the material's falsity, or a reckless disregard for whether the published material was true or false. Additionally, in *St. Amant v. Thompson*, this Court held that to prove reckless conduct, there must be evidence to show the defendant had doubts as to the truth of the publication. Because there must be a case-by-case analysis to determine actual malice, the inquiry focuses on the defendant's efforts to avoid the truth.

In the present case, Cartman did nothing to corroborate the evidence given to him by Chaos. He did not test the photograph before it was published to ensure its accuracy. Instead, he hastily posted it on his blog within 24 hours of receipt. Only after the damage to Broflovski was done was it discovered the photograph was fabricated. Because a reasonable jury would find that Cartman acted with actual malice, the denial of summary judgment by the Fifteenth Circuit was proper.

ARGUMENT

On appeal, the granting of a Motion for Summary Judgment is reviewed de novo. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). All evidence must be reviewed in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

I. THE FIRST AMENDMENT DOES NOT PROVIDE FOR A QUALIFIED REPORTER'S PRIVILEGE AND CARTMAN IS NOT A REPORTER ENTITLED TO INVOKE SUCH A PRIVILEGE IF IT EXISTED.

The Circuit Court of Appeals for the Fifteenth Circuit correctly held that “[a] plain reading of *Branzburg* forecloses the idea of a reporter’s privilege inherent in the First Amendment.” (J.A. at 23.) If a reporter’s privilege did exist, Cartman would not be entitled to invoke the privilege as he cannot be considered a reporter. Based on this Court’s strong pronouncement in *Branzburg v. Hayes*, the Fifteenth Circuit’s decision to reverse the district court’s denial of Broflovski’s motion to compel discovery should be affirmed. (J.A. at 32.)

A. The First Amendment Does Not Provide For A Qualified Reporter’s Privilege.

1. When the First Amendment was adopted, freedom of the press was understood to prevent prior restraints on and censorship of publication, and is so understood by Court precedent.

The Constitution provides no context as to the meaning of “freedom of the press.” Alexander Hamilton stated that the people and the government would ultimately define “liberty of the press.” *The Federalist No. 84* (Alexander Hamilton). This Court has narrowly defined freedom of the press, leaving Congress the opportunity to expand this definition.

In *Grosjean v. American Press Co.*, this Court engaged in a lengthy conversation on freedom of the press. 297 U.S. 233 (1936). The Court acknowledged Americans were intolerant

of prior restraints on publication that were accomplished by use of taxes at the time of the adoption of the First Amendment. *Id.* at 246-48. In its decision, the Court reiterated its precedent in declaring that liberty of the press “meant principally . . . immunity from previous restraints or (from) censorship.” *Id.* (citing *Near v. Minnesota*, 283 U.S. 697, 716 (1931)). But there is nothing in the Court’s interpretation of the history of the First Amendment, nor in the words of Alexander Hamilton to suggest that a right of an individual as a member of the press was being protected. *See* Leonard W. Levy, *Origins of the Bill of Rights* 122-23 (2001).

A journalist’s responsibilities can be viewed in a bifurcated manner—newsgathering and publication. Steven Helle, *The News-Gathering/Publication Dichotomy and Government Expression*, 1982 Duke L. J. 1 (1982). A reporter’s privilege may be beneficial to newsgathering but the Court has stated that “First Amendment protections for newsgathering . . . reach only so far as the opportunities available for the ordinary citizen to have access to the source of news.” *Saxbe v. Washington Post Co.*, 417 U.S. 843, 857 (1974) (holding that reporters’ rights not violated when not allowed to conduct personal interviews with inmates). This Court in *Branzburg v. Hayes* explicitly held that the First Amendment was a source of protection for the press but did not provide a reporter’s privilege. 408 U.S. 665, 690 (1972).

2. In *Branzburg v. Hayes*, this Court definitively held that there was no qualified reporter’s privilege found in the First Amendment.

Branzburg was actually a series of four cases in which reporters had promised confidentiality to their sources. 408 U.S. at 667-75. The journalists refused to testify before grand juries by claiming a privilege under the First Amendment to not divulge sources or information obtained from those sources. *Id.* at 675. In its decision, the Court acknowledged that a free press and its activities have a constitutional dimension. *Id.* at 681. The First Amendment,

however, was not an impenetrable shield that protected every action undertaken under the banner of freedom of the press. In particular, this Court emphasized that freedom of the press did not mean that reporters could not be subject to incidental burdens as a result of having to comply with laws of general applicability. *Id.* at 683-86. This Court reasoned that recognizing a privilege for reporters, would be contrary to the presumption against testimonial privileges. *Id.* at 690 n. 29. Ultimately, this Court held there was no privilege for the press in the First Amendment and refused to create another testimonial privilege. *See id.* In light of such a definitive statement, it is surprising that circuit courts have claimed there is a reporter's privilege rooted in the First Amendment. The room for finding a reporter's privilege is found through a loose reading of Justice Powell's concurrence in the case.

- a. *Justice Powell's concurrence in Branzburg does not limit the opinion and does not provide room for finding that a qualified reporter's privilege exists in the First Amendment.*

Justice Powell's concurrence has “ ‘led some to consider the Court really split 4-1-4, with Justice Powell's lone concurrence bearing the greatest weight of the Court's authority.’ ” Sean W. Kelly, *Black and White and Read All Over: Press Protection After Branzburg*, 57 Duke L. J. 199, 208 (2007). Justice Powell's opinion may be “enigmatic” but it is in line with the majority opinion. *Contra Branzburg*, 408 U.S. at 725. Much has been made of Powell's statement that newsmen are not without constitutional rights, but this does not signal that he found a privilege in the First Amendment. *Id.* at 709. Powell's statement on the constitutional rights of newsmen echoes the majority, which also emphasized that newsgathering did have some First Amendment protection. *Id.* at 681. However, as the D.C. Circuit stated whatever Justice Powell intended to communicate with his concurrence he did join the majority. *In re Grand Jury Subpoena, Miller*, 397 F.3d 964, 971-72 (D.C. Cir. 2005). The Supreme Court has provided a rule of interpretation

for situations where it may be argued that a concurrence is narrower than the majority opinion by stating that the “meaning of the majority opinion is to be found within the opinion itself; the gloss that an individual Justice chooses to place it upon is not authoritative.” *McKoy v. North Carolina*, 494 U.S. 433, 448 n.3 (1990) (filing of concurring opinions in a case on jurors considering mitigating factors in sentencing did not constitute opposition to majority opinion). Powell’s concurrence has been misguidedly used as the basis for finding a reporter’s privilege by several circuits. *Branzburg*, 408 U.S. at 785.

3. Some Circuit Courts misinterpret Justice Powell’s concurrence as holding that there is a qualified reporter’s privilege found in the First Amendment.

Almost as soon as this Court announced its decision in *Branzburg*, circuits sought to chip away at *Branzburg* by utilizing the Powell concurrence, and even going so far as to state that the existence of a First Amendment privilege “is no longer in doubt.” *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977). The Sixth Circuit refused to follow the trend. *In re Grand Jury Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987). The Sixth Circuit acknowledged several other circuits had found a reporter’s privilege in varying degrees, yet it did not find such a privilege. *Id.* The Sixth Circuit found that circuits in finding a privilege were utilizing Powell’s concurrence as a vote for the dissent to create a new majority, but the Powell opinion “certainly does not warrant the rewriting of the majority opinion” *Id.* at 585. Using Powell’s concurrence to find a privilege, even in different contexts such as civil cases or criminal prosecutions, flies in the face of the majority opinion. Although *Branzburg* arose in the context of a grand jury investigation, the majority opinion was not limited to the grand jury context.

- a. *The majority opinion in Branzburg effectively closed the door on the possibility that a qualified reporter's privilege existed in the First Amendment and could be applied outside of the grand jury context.*

The majority was concerned with the implications of a reporter's privilege in more than just the grand jury context, and thus circuits cannot limit the holding in *Branzburg* to situations substantially similar to its facts alone. In fact, in determining the holding, this Court contemplated the implications a privilege would have to "issuance of compulsory process to reporters at *civil and criminal trials and at legislative hearings.*" *Branzburg v. Hayes*, 408 U.S. 665, 702 (1972) (emphasis added). The mention of these proceedings suggests this Court was not concerned merely with how a privilege would operate in the grand jury context, but in all judicial proceedings. Both the D.C. and Seventh Circuits have recently held the *Branzburg* decision, when read in context, provides no room for any interpretation except one that finds that the First Amendment does not establish a reporter's privilege. *McKevitt v. Pallasch*, 339 F.3d 530, 531-32 (7th Cir. 2003); *In re Grand Jury Subpoena, Miller*, 397 F.3d 964, 968 (D.C. Cir. 2005).

4. The Seventh and D.C. Circuits have both correctly applied *Branzburg* by denying a party's ability to invoke the reporter's privilege and chastised their sister circuits for utilizing Powell's concurrence as a blessing to create a reporter's privilege.

The cases from the Seventh Circuit and the D.C. Circuit arose in different contexts, a defendant facing prosecution in Ireland sought tapes reporters had made of interviews with key prosecution witnesses and a grand jury investigation, respectively. *McKevitt*, 339 F.3d at 530; *In re Grand Jury*, 397 F.3d at 964. Both decisions took the opportunity to chastise their sister circuits for creating a privilege, insisting that this Court allowed for the possibility of a privilege under the First Amendment. In Judge Posner's opinion for the Seventh Circuit, he stated it was audacious that some circuits actually claimed *Branzburg* stated there was a privilege found in the

First Amendment or that the Court created a reporter's privilege. *McKevitt*, 339 F.3d at 530, 532. Rather, Posner urged reporters not be treated specially because when material or evidence is sought from a journalist, like with any other individual, the court must determine whether it is a reasonable request, in keeping with *Branzburg*. *See id.* at 533.

The D.C. Circuit, in its most recent reporter's privilege case, flatly refuted the claim there might be a reporter's privilege. In a strongly worded opinion, the court baldly stated the governing authority in the case was the Supreme Court of the United States and not any of the circuits. *In re Grand Jury*, 397 F.3d at 968. The opinion went further by deriding its sister circuits' use of Justice Powell's concurrence. Powell's concurrence was held to be that of an individual joining the majority on its terms, and the opinion was authoritative precedent that rejected the reporter's privilege. *Id.* at 971. The Seventh and D.C. Circuits in holding there was no reporter's privilege under the First Amendment, have followed the precedent set forth by this Court in *Branzburg*.

In sum, this Court has held there is no reporter's privilege in the First Amendment. *Branzburg*, 408 U.S. at 665. The Fifteenth Circuit correctly held the district court's denial of Broflovski's motion to compel discovery should be reversed since there is no reporter's privilege under the First Amendment, per *Branzburg*, and it is the responsibility of Silverado or Congress to create such a privilege, not the Court of Appeals for the Fifteenth Circuit. (J.A. at 25.)

B. Even If a Qualified Reporter’s Privilege Existed, Cartman Does Not Qualify As A Reporter And In The Alternative If He Is Considered A Reporter, Broflovski’s Interest In Discovering The Identity Of The Source Would Outweigh Cartman’s Interest In Nondisclosure.

Even if there were a qualified reporter’s privilege, Cartman, as a part-time blogger, should not be considered a reporter for purposes of invoking the privilege. (J.A. at 4.) If Cartman is considered a reporter, Broflovski, having exhausted the means available to him, should have access to the information in Cartman’s possession.

1. The Constitution and this Court do not provide guidance as to the definition of reporter.

The Constitution does not provide guidance for determining who is a member of the press. U.S. Const. amend. I. Therefore, any determination to be made about who qualifies as a reporter would not flow from constitutional principles. David A. Anderson, *Freedom of the Press*, 80 Tex. L. Rev. 429, 515 (2002). This Court in *Branzburg* made clear that one of the chief difficulties in creating a reporter’s privilege would be defining who would be eligible to invoke the privilege because it would present “practical and conceptual difficulties of a high order.” *Branzburg v. Hayes*, 408 U.S. 665, 703-04 (1972). This Court was wary of a broad definition for “reporter” because it would be easy for anyone to assert the privilege simply by claiming he is “contributing to the flow of information to the public.” *Id.* at 705. This Court has not provided clear guidance on who should be considered a reporter, and thus has left the question to the circuits to establish.

2. No federal court has decided whether a blogger can be considered a reporter.

The approach of the federal courts who have addressed the issue of who is a reporter can be considered a “patchwork” set of decisions on free speech and the concerns raised by new

technology that has resulted in a complex set of compromises. Jonathan Wallace & Michael Green, *Bridging the Analogy Gap: The Internet, the Printing Press, and Freedom of Speech*, 20 Seattle U. L. Rev. 711, 723 (1997). The only federal court decision which allowed a blogger to invoke the reporter's privilege did so without providing an explanation as to why the blogger could be considered a reporter. *Blumenthal v. Drudge*, 186 F.R.D. 236, 244-45 (D.D.C. 1999). As there is no on point test from the circuits for determining whether a blogger qualifies as a reporter, an analogy can be drawn from where circuits have looked to whether non-traditional news media were entitled to the privilege in their circuit.

a. The lack of an on-point test for defining a reporter requires analogizing to other cases with non-media parties.

The Second Circuit in *von Bulow v. von Bulow* held the writer of a proposed book was not entitled to invoke the reporter's privilege where she did not have intent at the time of gathering the information to publicly disseminate what she gathered. 811 F.2d 136, 145-46 (2d Cir. 1987). Later, the Ninth Circuit found an author eligible for the privilege because he initiated his research with the purpose of disseminating the information to the public. *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993). The opinion emphasized it was the content and not the format which determined whether one was entitled to claim the reporter's privilege. *Id.* The Third Circuit announced a test for the application of the reporter's privilege based on the precedents established in the Second and Ninth Circuits.

Building upon the opinions of the Second and Ninth Circuits, the Third Circuit held a reporter who produced commentaries for a pay telephone hotline was not entitled to the reporter's privilege. *In re Madden*, 151 F.3d 125, 131 (3d Cir. 1998). The wrestling reporter's primary goal in producing the commentaries was not gathering or disseminating news, but rather

to produce entertainment and gain advertisers for his telephone service. *Id.* at 130. The Third Circuit created a test to determine when an individual was entitled to invoke the reporter's privilege. The reporter's privilege can be invoked when (1) an individual was engaged in investigative reporting, (2) gathering news, and (3) intending to disseminate the news to the public at the beginning of the process. *Id.* at 130. The reasoning of the Second, Third, and Ninth Circuits suggests it is critical to look to the "purported journalist's purpose, process, and product" to determine whether an individual is protected by the privilege. Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 *Hous. L. Rev.* 1371, 1391 (2003). The Third Circuit test is the appropriate test to be utilized, and not that of the Second Circuit because it addresses the process by which news is gathered and then disseminated.

b. The appropriate test to be utilized is the Third Circuit test not the Second Circuit test because it accounts for editorial oversight.

The Second Circuit test applies the privilege where a reporter (1) intends to use anonymous information in the dissemination of news, and (2) where such intent existed when the information was obtained. *See Gonzales v. NBC*, 194 F.3d 29, 35 (2d Cir. 1998). This test fails to address a significant component of the news gathering process, which is an independent editorial process. Traditional media is differentiated from mere gossip via control in the form of an editorial process. It ensures an effort has been made to verify information to prevent an unsubstantiated item from becoming the "buzz of the blogosphere and spread far and wide throughout cyberspace," as is the case here where Broflovski's face was superimposed onto the factory picture. Daniel J. Solove, *A Tale of Two Bloggers: Free Speech and Privacy in the Blogosphere*, 84 *Wash. U. L. Rev.* 1195, 1197 (2006); (J.A. at 7.) Most blogs lack this formal

editorial process, including Cartman's, which threatens the accuracy of information posted on blogs. *Protecting the New Media: Application of the Journalist's Privilege to Bloggers*, 120 Harv. L. Rev. 996, 1006 (2007). Another troubling aspect of blogs is their lack of transparency, which may require fellow bloggers to determine who or what lurks beneath them. *Id.*

A reader of *The Sludge Report* may be able to discern that Cartman is a harsh critic of Citrus, but those readers would not be provided with the valuable information that Cartman holds Citrus responsible for "nearly driving him out of business" (J.A. at 4.) This is critical information because it provides insight into the perspective from which the blog is written, but is lost where Cartman serves as both author and publisher with no independent editor. (J.A. at 4.) Therefore, if blogs are to be of the same value as traditional news reports, they must encompass the editorial process inherent in traditional media, and a blogger to be entitled to a reporter's privilege must embrace this editorial process.

3. Cartman cannot be considered a reporter under the Third Circuit test because he does not engage in investigative reporting and his blog does not have an editorial process.

Cartman does not qualify as a reporter under the Third Circuit test, but even if he did qualify, Broflovski's need for the information in Cartman's possession outweighs the qualified reporter's privilege. Under the Third Circuit test for reporter's privilege, Cartman satisfies the last prong of the test. Cartman updated his blog every evening with information he found on other sites and was provided with by tipsters. (J.A. at 4-5.) This updating of the blog indicates that Cartman had intent to disseminate to the public when he received the information thereby satisfying the third prong of the test, he has not satisfied the first and second prongs.

Cartman was not engaged in investigative reporting or news gathering. As previously

stated Cartman merely found news from other sites or received emails from individuals. (J.A. at 4-5.) No active or affirmative steps were taken by Cartman to determine the truth of the information he obtained. In the instant case, Cartman posted the photograph with an inflammatory caption the next day after receiving the information from Chaos. (J.A. at 5-6.) Even with a day between receipt and publication of the information, Cartman took no steps to confirm the information that he had received from Chaos. Although Cartman was in possession of photo software that can detect forgeries in photographs, he elected not to use the software before publishing the photograph and story. (J.A. at 7.) By failing to make any effort to verify the information that he received, Cartman was not engaged in investigative reporting or news gathering, and fails to satisfy the first and second prongs. Rather, he was disseminating unsubstantiated gossip. Therefore, Cartman should not be deemed a reporter eligible to invoke the reporter's privilege.

4. Even if Cartman is considered a reporter he cannot invoke the privilege where Broflovski has taken steps to discover the confidential source's information was false.

A determination that Cartman is a reporter, and that a qualified reporter's privilege exists, still allows for the privilege to be pierced. The Eleventh Circuit in *Price v. Time, Inc.*, articulated a three-part standard under which the privilege may be overcome (articulating standard in a libel case). 416 F.3d 1327, 1330 (11th Cir. 2005). The three part standard requires: (1) that the challenged statement was published and is both factually untrue and defamatory; (2) that reasonable efforts to discover the information from alternative sources have been made and no other reasonable source is available; and (3) that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case. *Id.* Under this standard, Broflovski

has overcome the privilege invoked by Cartman.

This is not a case of Cartman's ability to invoke the privilege being barred since he is a defendant in the case. (J.A. at 13 citing *Cervantes v. Time, Inc.*, 464 F.2d 986, 993 (8th Cir. 1972)). Rather, Broflovski is able to meet the standard set forth by the Eleventh Circuit. The first prong has been met by the showing during discovery that the photograph of Broflovski published by Cartman was a forgery. (J.A. at 7.) This is more conclusive proof of the falsity of the statements than required in *Price*, which found even a libel plaintiff's sworn testimony would be enough to satisfy this prong where he does not know the source of the statement. 416 F.3d at 1330. The second prong of the test is satisfied by the information Broflovski obtained from Citrus, a non-party to the suit. Through Citrus, Broflovski was able to obtain depositions from the company's top officials, and information from employees on the leak. (J.A. at 8.) This is more information than a private individual can normally obtain from a corporation who is not a party to a suit. To ask Broflovski to cull through emails which he, as an employee, may not have access to, and to interrogate every Citrus employee who may have information is not just a fool's errand but is to further victimize the victim of defamation. (J.A. at 26-27.) Lastly, the third prong is satisfied because Cartman's interest in protecting the identity of an individual who provided him with a forged photograph cannot be considered greater than Broflovski's interest in determining the source of the false and damaging statement. (J.A. at 7.) Broflovski is entitled to not be considered the "Most Heinous Individual in the Galaxy," and to seek vindication of his rights in court. (J.A. at 6.) Cartman, unlike Citrus, is a party to the litigation, and thus should provide Chaos' true identity as Chaos' provided him with the ammunition to defame. (J.A. at 26 citing *Carey v. Hume*, 492 F.2d 631, 637 (D.C. Cir. 1974)).

II. THE FIFTEENTH CIRCUIT CORRECTLY APPLIED THE SECOND CIRCUIT’S TEST DETERMINING THAT IKE BROFLOVSKI IS NOT A LIMITED-PURPOSE PUBLIC FIGURE, AND THAT NEGLIGENCE, NOT ACTUAL MALICE, IS REQUIRED TO SHOW CARTMAN’S STATEMENTS WERE DEFAMATORY.

Because Broflovski is not a limited-purpose public figure, Cartman cannot claim actual malice is required to prove a cause of action for defamation. The Second Circuit, in *Lerman v. Flynt Distribution Co.*, established a four-prong test for determining whether a plaintiff in a defamation suit is a limited-purpose public figure. 745 F.2d 123, 136 (2nd Cir. 1984). (1) The subject must successfully invite public attention prior to the remarks litigated; (2) he must voluntarily inject himself into the relevant public controversy; (3) he must take on a prominent position within the public controversy; and (4) he must maintain regular and continuing access to the media in order to combat the defamatory remarks. *Id.* at 136-137.

The case arose after the defendant publishing company released a nude photograph that was wrongfully identified as the plaintiff. *Lerman*, 745 F.2d. at 127. When Lerman sued for libel and violations against the right to privacy, the Second Circuit held that she was a limited-purpose public figure as a “controversial, outspoken authoress advocating nudity,” and had become a “willing participant in the public controversy.” *Id.* at 138. The court dismissed her complaint when she could not prove the actual malice standard. *Id.* at 141. This test provides courts with objective criteria for determining whether an individual is a limited-purpose public figure.

The Ninth and Third Circuits have created a two-part analysis for determining whether an individual is a limited-purpose public figure: (1) does a public controversy exist, and (2) what was the nature and extent of the individual’s participation in the public controversy. *Partington v. Bugliosi*, 56 F.3d 1147 (9th Cir. 1995); *McDowell v. Palewonsky*, 769 F.2d 942 (3d. Cir. 1985). This minority view, is lacking when compared to the Second Circuit’s test as it does not

make a determination as to an individual's ability to combat the false statements publicly without judicial intervention. The Second Circuit test should be utilized because it does examine access to the public, which this Court has found to be critical.

In this case, Broflovski does not satisfy any of the requirements articulated in the four-pronged test (or the two-pronged minority definition) and therefore is a private figure. He never invited public attention. In fact, he was rarely seen in public and was never photographed. (J.A. at 3.) He never held press conferences, and would be a virtual unknown had it not been for his brother Kyle's introduction when he was hired at Citrus. (J.A. at 3.) Because of this, he cannot satisfy the second prong of the test, since Broflovski did not inject himself into the public. Broflovski also fails to meet the third prong of the test. His position in any public controversy is anything but prominent, as he has been known as the "man behind the curtain" (J.A. at 3.) Finally, as he does not "enter the public limelight," and does not give interviews to the press, he cannot be said to maintain regular and continuing access to the media. (J.A. at 3.) Broflovski does not meet any of the four prongs of the Second Circuit's test and because no public controversy existed until Cartman published a fabricated photograph, Broflovski is not a limited-purpose public figure. Broflovski is a private figure. Thus, simple negligence, rather than actual malice, is all that is required to prove defamation.

A. Because Ike Broflovski Is Not A Limited-Purpose Public Figure, A Showing Of Simple Negligence Is The Applicable Standard To Prove Defamation.

This Court has focused on the character of the plaintiff to determine the extent of constitutional protections afforded to him, and whether the plaintiff voluntarily exposed himself to increased risk of injury from the defamatory statement. *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1975). When the plaintiff has been deemed a private figure, the higher standard of actual

malice does not apply when seeking damages. *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1552 (4th Cir. 1994). Instead, the lower standard applies, where a defendant may be held liable for negligently publishing a defamatory falsehood about a private individual. *Id.*

In *Firestone*, the wealthy plaintiff was in the middle of a controversial divorce, which included a judicial hearing that “touted extramarital affairs and cruelty” during the marriage. 424 U.S. at 450. When the defendant news publisher inaccurately reported specifics of the divorce decree, the plaintiff sued for damages. *Id.* at 452. This Court held the plaintiff was not deemed a public figure despite holding press conferences during the proceedings, because they did not affect the outcome of the trial and there was nothing to indicate the plaintiff used the press intentionally to influence the proceeding. *Id.* at 455.

The plaintiffs in *Foretich* were involved in a highly publicized custody battle, which subsequently became the subject of a docudrama. When the docudrama referred to them as “abusers,” plaintiffs filed a defamation suit. 37 F.3d at 1550. The Fourth Circuit held although the plaintiffs allowed magazine and newspaper interviews, attended at least three press conferences, and appeared on television shows, they were not limited-purpose public figures. *Id.* at 1557. The court went on to say it was not going to prescribe public figure status to otherwise private people merely because they chose to respond to accusations to preserve their reputations. *Id.* at 1558. In holding that the plaintiffs were private figures, the court chose to not extend the *New York Times* actual malice standard to such citizens who do not have the avenues or notoriety to publicly disavow accusations against them. *Id.* at 1564. Furthermore, in *Gertz v. Robert Welch, Inc.*, this Court held because private individuals have less effective opportunities for rebuttal than public figures, they are more vulnerable to injury arising out of defamation. 418 U.S. 323, 343 (1974). Because private figures have not voluntarily exposed themselves to

increased risk of injury from false defamatory statements, private figures are more deserving of recovery. *Id.* at 344. Thus, the general interest is greater for private persons than public figures when dealing with compensation for injury to reputation. *Id.* at 345.

Cartman alleges because Broflovski is a limited-purpose public figure, in order to succeed in a defamation action he must prove that Cartman demonstrated actual malice. (J.A. at 2.) This belief is erroneous, as Broflovski did not become a limited-purpose public figure simply because Cartman libeled him on the Internet. (J.A. at 5-6.) Because the Circuit Court correctly identified Broflovski as a private figure, a finding of simple negligence is all that is required to prevent Cartman from being granted summary judgment.

Broflovski did not speak with the press, unlike the plaintiffs in *Firestone* and *Foretich*. He did not discuss his accomplishments or allow himself to be interviewed or photographed. (J.A. at 3.) His personality was such that he did not invite controversy, nor did it follow him. Kyle Broflovski was the one in the spotlight and both of them liked it that way. (J.A. at 2.) The woman married to the heir of the Firestone Tire fortune was not a limited-purpose public figure. *Firestone*, 424 U.S. at 455. The grandparents of a child who had multiple news articles and television programs written about her were not limited-purpose public figures. *Foretich*, 37 F.3d at 1543. Therefore, drawing on these cases, Broflovski is not a limited-purpose public figure and actual malice is not the proper standard necessary to prove defamation. The general standard dictates that negligence is enough.

1. The Second Circuit's test in determining if a person is a limited-purpose public figure must be adopted, as it is the only test which correctly interprets the public figure doctrine as decided by this Court in *Time, Inc. v. Firestone*.

In determining that Broflovski is not a limited-purpose public figure, the Fifteenth Circuit correctly interpreted the public figure doctrine. The public figure doctrine is meant to heighten

the standard of fault for those who invite media attention, and those who all too often thrust themselves into the spotlight. *Firestone*, 424 U.S. at 456. Public figures usually enjoy greater access to channels of communication and have more opportunity to speak out and counteract false statements than private individuals normally enjoy. *Gertz*, 418 U.S. at 344. The Second Circuit's test is the most specific test to follow, as it defines a limited-purpose public figure as established by this Court in *Gertz*. By adopting the Second Circuit's test, this Court will clarify the precedent established in *Firestone* and allow private figures to recover when a defendant negligently publishes defamatory material about them.

In *Gertz*, the plaintiff represented a family whose son had been killed by a police officer. During trial, the defendant published an article about the plaintiff being a Communist and also linked him with a Marxist organization. *Id.* at 326. Because the statements contained in the article were false, plaintiff filed a defamation action. This Court held the plaintiff was a private figure and a showing of actual malice was not required. *Id.* Like the plaintiff in *Gertz*, Broflovski was not considered to be a limited-purpose public figure until the story about him was published. Broflovski, like *Gertz*, took on a minimal role when it came to his public appearances. Neither man spoke with the press nor engaged the public's attention or knowingly thrust themselves into the spotlight. (J.A. at 3.) As such, the Second Circuit's test is the most accurate and should be applied when deciding if one is a limited-purpose public figure. Tests from other circuits allow the defamatory story itself to create a limited-purpose public figure, rather than determining the public figure status by that person's actions prior to the defamatory story being published. For these reasons, the Second Circuit's test must be adopted, as it correctly determines who is and who is not a limited-purpose public figure.

- a. *Ike Broflovski is a private figure because he neither injected himself into the public eye, nor invited controversy due to his occupation.*

Broflovski did not knowingly relinquish his anonymity in return for fame, fortune, or influence and therefore he cannot be categorized as a public figure. *Waldbaum v. Fairchild Publ'ns Inc.*, 627 F.2d 1287, 1294 (D.C. Cir. 1980). In *Waldbaum*, the plaintiff was the president and CEO of a highly ranked company. Plaintiff was actively implementing policies and procedures within the supermarket industry, holding meetings that were open to the press and the public. *Id.* at 1290. There, the court determined that simply holding a position of high influence within a prominent company is insufficient to qualify one as a public figure. *Id.* at 1299.

The extent of an individual's participation in public affairs, however, and the assumption of the risk of adverse publicity determine the weight of the government's interest in protecting that person's reputation. *Tavoulaareas v. Piro*, 817 F.2d 762, 772 (D.C. Cir. 1987). In *Tavoulaareas*, the plaintiffs were father and son. The father was the president and chief operating officer of Mobil Corporation. *Id.* at 767. When an article was published saying that the father "set up" his son to work as a partner with a firm that did business with Mobil, the plaintiffs sued for defamation. *Id.* at 766. The D.C. Circuit found the father was a limited-purpose public figure because he had thrust himself and his company into the spotlight and the controversy had become a national concern. *Id.* at 773. As it could not be disputed that the father was personally involved in his son's business success, the necessary standard of proof was actual malice. *Id.* at 776.

The relationship between Broflovski and Kyle Broflovski is distinguishable from the one described in *Tavoulaareas*. Though Broflovski, as the Director of Research and Development, does hold an impressive title at Citrus, the D.C. Circuit has held this is not enough to make him a public figure. *Waldbaum*, 627 F.2d at 1299. In addition, Broflovski's participation in public

affairs is nonexistent, unlike the father in *Tavoulaareas*, and thus the government has a greater interest in protecting his reputation. In addition, Cartman's hatred of Broflovski and Citrus did not rise to the level of a national concern. (J.A. at 4.) Thus, Broflovski as a private citizen and negligence is the necessary standard.

b. Ike Broflovski has shown that a material fact exists as to whether Cartman acted with negligence in publishing the defamatory story.

Because Broflovski has shown a material fact exists regarding Cartman's negligence in publishing a fabricated photograph, the reversal of the District Court's decision to grant Cartman's Motion for Summary Judgment was proper. According to the Federal Rules of Civil Procedure, a court shall only grant summary judgment when there is no genuine issue of material fact. Fed R. Civ. P. 56. The party who moves for summary judgment has the burden of showing that no issue of material fact exists, and upon doing so, the burden shifts to the non-moving party. Fed R. Civ. P. 56(e). Finally, if any reasonable person could find that the non-moving party would prevail, summary judgment for the moving party must be denied. *Id.*

Restatement (Second) of Torts §580(B) states when the plaintiff in a defamation action is a private citizen, a showing of simple negligence is sufficient to support a cause of action for defamation. The reasonable person standard is applied to determine if the defendant acted as a prudent person would under the given circumstances. Cartman failed to exercise due diligence when he published the incriminating photograph of Broflovski. Cartman owned and knew how to operate software that had forgery detection capabilities. (J.A. at 7.) He had used the forgery detection software on multiple other photographs posted on his website. (J.A. at 7.) Though it is difficult to speculate whether Cartman intentionally chose to publish the photograph without first checking its authenticity, it is clear that such an error constituted gross negligence on his part. As

a journalist, Cartman has a responsibility to fact check and ensure that everything he publishes is verified. In failing to do so, he is liable for negligence. The Fifteenth Circuit was correct in concluding that the District Court's granting of summary judgment to Cartman was in error.

2. The District Court's determination that Ike Broflovski is a limited-purpose public figure is incorrect, because it applied the test that any person who is brought into the public light by a defamatory story is a limited-purpose public figure.

The District Court incorrectly applied the three-pronged test adopted by the Fifth, Eleventh and D.C. Circuits. This test is not the "most reasonable or sensible option to protect against the chilling effects" arising out of defamation suits. (J.A. at 17.) Under this test, plaintiff is considered a limited-purpose public figure if: (1) the relevant controversy is a matter of public concern, (2) the plaintiff in the action plays more than a trivial role in the controversy, and (3) the defendant's defamatory remarks are relevant to the public controversy. *Waldbaum*, 627 F.2d at 1296. This test is far too broad and should not be applied here, as by its very language this test means that anyone can become a limited-purpose public figure immediately upon the publication of a defamatory picture or story. Merely because one has been thrust into the limelight does not mean that they have access to the resources that this Court deemed differentiated a private figure from a public figure. *Gertz*, 418 U.S. at 343.

Cartman's blog story quickly made its way into mainstream media leading to Broflovski being called the "Most Heinous Individual in the Galaxy." (J.A. at 6.) There was a precipitous drop in Citrus' stock price after the subsequent boycott of Citrus' stock after Broflovski was "awarded" the title. (J.A. at 7.) Both of these events show how quickly a defamatory story can thrust an individual into the spotlight, but it is difficult to imagine how an individual such as Broflovski can stave off a defamatory story if a *Fortune 500* corporation such as a Citrus cannot

thwart off a story that led to a 25% drop in its stock. (J.A. at 1, 6-7.) Here, Broflovski does not play an active role in the management of Citrus. What Broflovski says and does is not commented upon by trade journals and general-interest publications, as occurred in *Waldbaum*. 627 F.2d at 1290. *Waldbaum* concluded with the Court noting a person becomes a public figure for a limited purpose if he is attempting to have (or can be expected to have) a major impact on the resolution of a specific dispute that has possible ramifications for those not directly related to it. *Id.* at 1292. The only dispute present in this case is between Cartman and Citrus, and it is personal rather than a dispute which is far reaching or impacts many.

The court in *Waldbaum* defined what constitutes “public controversy.” A public controversy is not simply a matter of interest to the public; it must be a real dispute, the outcome of which affects [the public] in an appreciable way. *Id.* at 1296. The ill feelings Cartman holds against the Broflovskis and Citrus does not fall within this category. In addition, private concerns or disagreements do not become public controversies simply because they attract attention. *Firestone*, 424 U.S at 454. In *Firestone*, this Court held the dissolution of a marriage through court proceedings does not amount to a public controversy, regardless of the fact that the wealthy divorcee is publicizing issues pertaining to the separation. *Id.* Based on the above cases, it is clear that Broflovski’s dispute with Cartman does not rise to a public controversy, and thus the three-pronged test fails and cannot be adopted by this Court. Broflovski’s occupation alone does not qualify him as a limited-purpose public figure. In addition to government officials, this Court has identified two classes of public figures: general purpose and limited-purpose public figures. *Tavoulaareas*, 817 F.2d at 772. When an individual achieves a high level of fame or notoriety, as a celebrity or household name, they are deemed a public figure for all purposes and in all contexts. *Gertz*, 418 U.S. at 351. A person who voluntarily injects himself or is drawn into

a particular public controversy, however, also becomes a limited public figure. *Id.* Broflovski does not fit into either of these categories.

B. Even If Ike Broflovski Is Determined To Be A Limited-Purpose Public Figure By This Court, Cartman’s Motion For Summary Judgment Must Still Be Denied As There Exists Material Facts That Indicate Cartman Demonstrated Actual Malice.

This Court must deny Cartman’s Motion for Summary Judgment even if it finds that Broflovski is not a private figure but a limited-purpose public figure. Cartman demonstrated actual malice when choosing to publish a photograph and story about Broflovski that Cartman deliberately did not check for accuracy. (J.A. at 7.) To prove actual malice, one must show the statement (or photograph) was made with knowledge of its falsity or with reckless disregard for whether it was true or false. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

1. A reasonable jury would conclude, based on all the facts taken together, that Cartman acted with actual malice in publishing the doctored photograph and accompanying story.

This Court does not measure reckless conduct by the reasonably prudent publisher standard. Rather than questioning whether one would have published or would have investigated material prior to publishing, there must be evidence to show the defendant had serious doubts as to the truth of the publication. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). In *St. Amant*, the plaintiff was defamed in a political speech given by defendant. *Id.* at 729. This Court stated there must be sufficient evidence to permit the conclusion the defendant in fact entertained serious doubts as to the truth of his publication and publishing with these doubts showed reckless disregard for the truth and demonstrated actual malice. *Id.* at 731. This Court has held the mental element of “knowing or reckless disregard” is not easy to prove. Therefore, a case-by-case

analysis is most appropriate when determining if one acted with actual malice. *Id.* at 730. With regard to a defamation claim and actual malice, the relevant legal inquiry focuses on the extent of the defendant's efforts to avoid the truth. *Id.*

In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989), this Court stated although failure to investigate prior to publishing will not be enough to show actual malice, recklessness may be found where there are obvious reasons to “doubt the veracity of the informant or the accuracy of his reports.” The courts must consider the facts in their entirety. *Id.* In *Harte-Hanks*, the defendant newspaper published a defamatory story about the plaintiff who was a judicial candidate. *Id.* at 659. This Court, when reviewing the “facts in their entirety,” determined a finding of actual malice was unmistakably supported, even though the facts taken independently would not rise to the level of actual malice. *Id.* at 667, 693.

Cartman was malicious in publishing his diatribe next to the doctored photograph of Broflovski and a jury could conclude Cartman's reversal of summary judgment was proper. Describing Broflovski as a “danger to humanity” illustrates actual malice, especially because shortly after the defamatory story was published, Broflovski received death threats causing him to suffer from depression. (J.A. at 6.) Cartman has also accused Broflovski of “engaging in acts of modern day slavery,” which in light of this nation's troubled history can be considered extremely inflammatory. (J.A. at 5.) Cartman chose to publish such phrases without corroborating evidence. Cartman had motive to act maliciously, because his store is in direct competition with Citrus. Cartman began his blog because, as a result of this direct competition with Citrus, his Computer World has suffered financially. (J.A. at 4.) Cartman as a result of his competition with Citrus has reserved his harshest criticism for Kyle Broflovski and his company, and utilized his blog as a platform for his personal vendetta against them.

What Cartman wrote in his blog was not verified by any source, including Chaos. When he emailed Cartman the doctored photograph, Chaos stated that Citrus was “engaging in human rights violations” under the direction of Broflovski. (J.A. at 5.) But, in Cartman’s blog, he stated that *Professor Chaos* had the people depicted in the photograph work “16 hour days and seven days a week under slave-like conditions” (J.A. at 7.) Cartman never corroborated this information. This illustrates reckless disregard for the truth by Cartman, especially since he published the story and fictitious photograph less than 24 hours after it was received. 24 hours is plenty of time in this day of the internet to corroborate with another source the information provided by Chaos especially as it was extremely controversial.

2. A jury would find Cartman demonstrated actual malice when he deliberately failed to determine if the photograph of Ike Broflovski was doctored, fabricated or altered when he had the proper equipment to make such a finding, and had done exactly that with other photographs submitted to his blog.

Cartman’s lack of professionalism in choosing to publish the fabricated photograph of Broflovski is enough to satisfy the actual malice standard because he had the means to check for inaccuracies. Actual malice must be established by clear and convincing proof. *Bressler v. Fortune Magazine*, 971 F.2d 1226, 1228 (6th Cir. 1992). The inquiry is subjective and focuses on whether the defendant has serious doubts as to the truth of the publication. *Id.*

In *Bressler*, the plaintiff, who worked for a power plant, filed a libel action against a defendant magazine. *Id.* Plaintiff’s claim arose from information in the article that said he tried to cover up safety violations at the plant. *Id.* at 1229. The Sixth Circuit found the plaintiff, as a limited-purpose public figure, had not sufficiently proved actual malice. *Id.* at 1230. Since the defendant reporters relied on corroborating materials and sources, along with conducting extensive research, it could not be shown they had purposefully avoided the truth. *Id.* at 1231-

1232.

The facts of the present case are distinguishable from *Bressler*. Here, Cartman did not take any of the precautionary measures that the defendants did in *Bressler*. Cartman instead published the photograph along with the vicious story less than 24 hours after initially receiving it. (J.A. at 5.) 24 hours was a sufficient amount of time to utilize the software Cartman possessed and had used prior to determine whether the photograph was doctored. (J.A. at 7.) Cartman's longstanding grudge against Broflovski, Kyle Broflovski and Citrus proves he was vengeful and thus did not exercise sound judgment in examining the photograph.. A reasonable jury reviewing these facts in their entirety, would conclude Cartman acted with actual malice when he published his story.

CONCLUSION

For the reasons set forth above, Ike Broflovski, Respondent, respectfully requests this Court **AFFIRM** the decision of the United States Court of Appeals for the Fifteenth Circuit on both issues on appeal and **REMAND** for further proceedings.

Respectfully Submitted,

Team 227
Counsel for Respondent