231

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

Counsel for Respondent,
Team 231

QUESTIONS PRESENTED

I. Whether a qualified First Amendment reporter's privilege exists that would allow a blogger to conceal the identity of his source when this Court has foreclosed on the existence of such a privilege.

II. Whether part-time bloggers are entitled to a reporter's privilege to bar discovery into their editorial process in order to protect the source of a fake photograph when they are not engaged in newsgathering nor affiliated with a professional news organization.

III. Whether an internet blogger, who published a fake photograph and commentary of a private person without verifying its authenticity, should be held liable under a negligence standard in a defamation claim on the grounds that the private person has not thrust himself to the forefront of a public controversy.

TABLE OF CONTENTS

Page:

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

JURISDICTION STATEMENT xi

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

I. THE APPELLATE COURT WAS CORRECT IN HOLDING THAT CARTMAN IS NOT ENTITLED TO A QUALIFIED REPORTER'S PRIVILEGE UNDER THE FIRST AMENDMENT. 6

A. STANDARD OF REVIEW. 6

B. NO QUALIFIED REPORTER'S PRIVILEGE EXISTS WITHIN THE FIRST AMENDMENT. 6

1. This Court's conclusion in *Branzburg* is supported by a clear majority of the Court, not a plurality. 7

2. Because this Court has rejected the argument that the First Amendment contains a reporter's privilege, Ike's motion to compel should be granted. 8

a. *Evidentiary privileges are disfavored because they poorly serve the interest of justice.* 9

b. *Claims that newsgathering will be diminished if reporters are compelled to testify are too speculative to justify a reporter's privilege.* 11

c. *No reporter's privilege exists because its scope would define an impractical and excessive class of privileged persons.* 12

C. EVEN IF A PRIVILEGE DOES EXIST, THE APPELLATE COURT WAS CORRECT IN FINDING THAT CARTMAN IS NOT ENTITLED TO INVOKE A REPORTER'S PRIVILEGE TO WITHHOLD THE IDENTITY OF HIS SOURCE. 12

1. Ike is entitled to the identity and personal contact information of Professor Chaos so he can investigate Cartman's editorial process. . . . 13

2. As a blogger, Cartman cannot claim status as a journalist to invoke a reporter's privilege, because bloggers are not journalists. 14

3. Ike's interest in justice outweighs Cartman's interest in concealing an unreliable source. 16

II. THE APPELLATE COURT WAS CORRECT IN DENYING CARTMAN'S MOTION FOR SUMMARY JUDGMENT BECAUSE A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER CARTMAN NEGLIGENTLY PUBLISHED THE PHOTO AND COMMENTARY. 18

A. STANDARD OF REVIEW. 18

B. IKE IS A PRIVATE PERSON BECAUSE HE HAS NOT VOLUNTARILY THRUST HIMSELF TO THE FOREFRONT OF A PUBLIC CONTROVERSY. 19

1. Ike has not engaged in a course of conduct that would invite attention or comment on a human rights controversy. 20

2. As Director of Research and Development, Ike could not have been expected to impact a human rights controversy. 23

C. UNDER THE NEGLIGENCE STANDARD, A JURY COULD CONCLUDE THAT CARTMAN DID NOT ACT LIKE A REASONABLY PRUDENT PERSON IN PUBLISHING THE FAKE PHOTO AND COMMENTARY. 24

D. ASSUMING, *ARGUENDO*, IKE IS A LIMITED-PURPOSE PUBLIC FIGURE, A QUESTION OF FACT REMAINS AS TO WHETHER CARTMAN DEFAMED HIM WITH ACTUAL MALICE. 26

1. Failing to name a source results in an inability to rely on that source for evidence and the presumption that one does not exist. 27

2. A publisher's motive can be evidence of actual malice. 28

3. Actual malice can exist where a publisher purposefully avoids the truth. 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s):

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Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986). 19

Blackmer v. United States,
284 U.S. 421 (1932). 9

Blair v. United States,
250 U.S. 273 (1919). 11

Branzburg v. Hayes,
408 U.S. 665 (1972). . . . . *Passim*

Celotex v. Catrett,
477 U.S. 317 (1986). 19

Cohen v. Cowles Media Co.,
501 U.S. 663 (1991). 10

Curtis Publ'g Co. v. Butts,
388 U.S. 130 (1967). 26, 29, 30

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974). 19, 20

Harte-Hanks Commc'ns, Inc. v. Connaughton,
491 U.S. 657 (1989). 27, 29, 30

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441 U.S. 153 (1979). . . . . *Passim*

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438 U.S. 1 (1978). 10

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443 U.S. 111 (1979). 20, 21, 22

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248 U.S. 215 (1918). 15

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475 U.S. 574 (1986). 19

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376 U.S. 254 (1964). 26

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435 U.S. 589 (1978). 9

St. Amant v. Thompson,
390 U.S. 727 (1968). 28

State Oil Co. v. Khan,
522 U.S. 3 (1997). 8

Times, Inc. v. Firestone,
424 U.S. 448 (1976). 21, 22

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443 U.S. 157 (1979). 19, 20, 21

Zurcher v. Stanford Daily,
436 U.S. 547 (1978). 11

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692 F.2d 189 (1st Cir. 1982), *aff'd* 466 U.S. 485 (1984). 27

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492 F.2d 631 (D.C. Cir. 1974). 9, 14, 16, 17, 18

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464 F.2d 986 (8th Cir. 1972). 17

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162 F.3d 708 (1st Cir. 1998). 16

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954 F.2d 1408 (7th Cir. 1992). 27

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233 F.3d 514 (7th Cir. 2000). 24

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54 F.3d 570 (9th Cir. 1995), *aff'd* 517 U.S. 830 (1996). 6

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37 F.3d 1541 (4th Cir. 1994). 22

Garland v. Torre,
259 F.2d 545 (2d Cir. 1958). 9, 10, 13

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194 F.3d 29 (2d Cir. 1998). 12

In re Grand Jury Investigation,
974 F.2d 1068 (9th Cir. 1992). 6

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219 F.3d 175 (2d Cir. 2000). 27

In re Grand Jury Proceedings,
810 F.2d 580 (6th Cir. 1987). 8

Kassel v. Gannett Co.,
875 F.2d 935 (1st Cir. 1989). 25

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339 F.3d 530 (7th Cir. 2003). 7

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112 F.3d 538 (1st Cir. 1997). 24

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593 F.2d 1030 (D.C. Cir. 1978). 6, 8

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5 F.3d 1289 (9th Cir. 1993). 15

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330 F.3d 1110 (9th Cir. 2003). 28

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817 F.2d 762 (D.C. Cir. 1987). 23

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151 F.3d 125 (3d Cir. 1997). 15

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811 F.2d 136 (2d Cir. 1987). 10, 13

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627 F.2d 1287 (D.C. Cir. 1980). 19, 20

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656 F.2d 705 (D.C. Cir. 1981). 13

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2002 U.S. Dist. LEXIS 24102, *5 (S.D.N.Y. Dec. 16, 2002). 15

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583 F. Supp. 427 (E.D. Mo. 1984). 10

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577 F. Supp. 238 (D.D.C. 1983). 27, 28

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216 F.R.D. 395 (E.D. Mich. 2003). 14

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291 F. Supp. 2d 44 (D.R.I. 2003). 7

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401 F. Supp. 2d 123, 141 (D.D.C. 2005). 11

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781 F. Supp. 131 (N.D.N.Y. 1991). 14

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166 F.R.D. 268 (D. Conn. 1996). 14

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732 F. Supp. 316 (N.D.N.Y 1990). 8

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328 F. Supp. 2d 1185 (D. Utah 2004). 8

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Ammerman v. Hubbard Broad. Inc.,
572 P.2d 1258 (N.M. 1977). 10

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579 A.2d 469 (R.I. 1990). 13

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415 A.2d 683 (N.H. 1980). 27, 28

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458 S.E.2d 580 (Va. 1995). 24, 25

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366 So. 2d 445 (Fla. Dist. Ct. App. 1978). 27

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193 A.2d 181 (Pa. 1963). 9

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569 S.W.2d 412 (Tenn. 1978). 24

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588 A.2d 1050 (R.I. 1991). 13

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287 N.W.2d 104 (S.D. 1980). 29

CONSTITUTIONAL AMENDMENTS:

U.S. CONST. amend. I. 6

FEDERAL RULES OF CIVIL PROCEDURE:

FED. R. CIV. P. 26(b). 14

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BRIEF FOR RESPONDENT

STATEMENT OF JURISDICTION

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

STATEMENT OF THE CASE

Ike Broflovski (Ike) is a shy, reclusive, Ph.D. graduate of the Massachusetts Institute of Technology. (J.A. at 3.) On August 7, 2006, Kyle Broflovski (Kyle), the CEO and Majority shareholder of Citrus Electronics, Inc. (Citrus) called a press conference to flaunt the ePlay touché, while also mentioning that his brother, Ike, had been hired as the Director of Research and Development. (J.A. at 2-3.) Kyle stated that Citrus customers only care about quality electronics, so they should pay no attention to Citrus' new employee. (J.A. at 3.) Once Ike was introduced, he said very little, but made sure to thank Kyle and expressed his excitement about his new job. (J.A. at 3.) Kyle spent the rest of the conference showcasing the ePlay Touché. (J.A. at 3.) After the press conference, the Associated Press released an article focused on Kyle's proclamation of a "new and exciting line of products." (J.A. at 3.) The bottom of the article also mentioned Ike's hiring. (J.A. at 3.)

Since Ike's hiring, Kyle occasionally praises his work and some employees have taken it upon themselves to wear "I like Ike" buttons to honor his innovations. (J.A. at 3-4.) Nevertheless, Ike has remained modest and reserved. (J.A. at 3-4.) He is rarely seen in public and has yet to give an interview about his work at Citrus. (J.A. at 3.)

Eric Cartman (Cartman) is the sole proprietor of Cartman's Computer World (Computer World), which is an electronics store located in the state of Washoe. (J.A. at 4.) Around June 2005, Citrus opened a store across the street from Computer World. (J.A. at 4.) After this store opened, Cartman's store lost business to the point of nearly closing. (J.A. at 4.) Consequently, Cartman then created a "muckraking blog," appropriately coined *The Sludge Report*. (J.A. at 4.) Cartman uses his blog to express his personal distain for Citrus, who nearly drove him out of

business. (J.A. at 4.) He also expresses his objection for companies, like Citrus, who engage in international trade and allegedly oppress Third World countries. (J.A. at 4.)

Cartman updates his blog in variety of ways. (J.A. at 5.) He posts headlines and news he gathers from other major newspapers. (J.A. at 4.) Cartman also receives information from anonymous sources, sent to his personal email address, unless the sender discloses his or her identity. (J.A. at 4-5.) Due to an eagerness to read the blog's commentary on entertainment, gossip, government scandals, and protests, its audience has grown to over 100,000 viewers. (J.A. at 4-5.) One such viewer is Professor Chaos, who Cartman knows personally and has provided information for the blog's gossip in the past. (J.A. at 5.)

Cartman recently installed software on his computer, which he uses to test photographs for forgeries. (J.A. at 7.) Cartman has used this software on numerous photos he has posted. (J.A. at 5, 7.) Sometime after installing this software, Cartman received an email with an attached photo from Professor Chaos, who proposed that Ike was engaged in human rights violations. (J.A. at 5.) The photo superimposed Ike to create the impression that he was yelling at Citrus employees working at a facility outside Mumbai, India. (J.A. at 5.) Although Ike has previously traveled to Mumbai, no evidence exists that Ike has visited this facility. (J.A. at 7.) Cartman disregarded his forgery software and failed to check the veracity of Professor Chaos' photo. (J.A. at 7.) Within twenty-four hours Cartman published the fake photo and commentary on his blog. (J.A. at 5.)

The blog post was headlined with the question "Citrus Engaging in Acts of Modern-Day Slavery?" The main thrust of this post paints Ike to be an oppressive dictator, who forces his employees to work sixteen hours a day, seven days a week, and in slave like conditions. (J.A. at 6.) Cartman also speculates, "[i]f the image I am showing you depicts what I think it does, then

I'm telling you the truth, Ike Broflovski is nothing but a slave driver!" (J.A. at 6.) Further, Cartman states "I wouldn't be surprised if Ike didn't have these poor Indians shackled to their stations at night." (J.A. at 6.)

Shortly after Cartman's post, mainstream press caught word of the story. (J.A. at 6.) Keith McRiley, host of the highly viewed show "The Countdown Factor," dubbed Ike his nightly "Most Heinous Individual in the Galaxy." (J.A. at 6.) McRiley credited Cartman with the story and implored his audience to boycott Citrus. (J.A. at 6.) Soon after, Ike began receiving death threats causing him to fall into a state of depression. (J.A. at 7.) Nevertheless, Ike remained reserved and personally declined to respond to Cartman's false depiction. (J.A. at 7.) Instead, his attorney stated on his behalf that, "[t]he photograph posted on that site is a total fabrication, and Ike Broflovski will soon seek civil justice against its authors in a court of law." (J.A. at 7.)

On September 20, 2008, Ike filed a defamation suit in the Silverado Superior Court for Cartman's libelous claims published on his blog. (J.A. at 7.) Cartman removed the case to the District Court for the Western District of Silverado. (J.A. at 7.) After some depositions and emails to all Citrus employees failed to reveal the identity of Professor Chaos, Ike sent Cartman an interrogatory asking for Professor Chaos' identity and contact information. (J.A. at 8.) Cartman refused to divulge this information and alleged a qualified reporter's privilege under the First Amendment. (J.A. at 8.) Ike filed a motion to compel Cartman to give up Professor Chaos' information. (J.A. at 8.) Cartman then filed a motion in opposition and a counter motion for summary judgment. (J.A. at 8.)

The district court held that Ike cannot compel disclosure of Professor Chaos because Cartman is protected by a qualified reporter's privilege. (J.A. at 9.) The court also granted Cartman's motion for summary judgment, finding that Ike is a limited-purpose public figure,

who could not prove actual malice. (J.A. at 18, 20.) However, the Fifteenth Circuit Court of Appeals reversed and remanded both issues decided by the district court. (J.A. at 32.) The court of appeals held that the district court erred in ruling that Cartman could claim a qualified reporter's privilege to hide the identity of Professor Chaos. (J.A. at 23.) The court also held that the district court erred in granting summary judgment because Ike is a private person and a jury could find that Cartman published *The Sludge Report* negligently. (J.A. at 27, 32.)

On August 24, 2009, this Honorable Court granted a writ of certiorari. (J.A. at 33.)

SUMMARY OF THE ARGUMENT

Ike is entitled to discover the identity of Professor Chaos because this Court has declined to recognize a reporter's privilege existing within the First Amendment. This conclusion is particularly true in defamation cases where such a privilege would shield a defendant from liability by barring the plaintiff from discovering relevant information. The decision not to recognize a First Amendment reporter's privilege is articulated in *Branzburg*, which is considered binding precedent because it is supported by a clear majority of the Court. This Court held that a reporter's privilege does not exist for three reasons. First, evidentiary privileges are disfavored because they poorly serve the interest of justice. Second, the claim that a privilege is needed to avoid diminishing the newsgathering process is too speculative to support a reporter's privilege. Finally, creating a reporter's privilege would define an unworkably large class of privileged persons.

Even if a reporter's privilege exists, Ike is still entitled to the identity of Professor Chaos as part of his investigation into Cartman's editorial process. Moreover, as a blogger, Cartman is not a journalist entitled to claim the privilege. Lastly, even if Cartman is able to claim a privilege, Ike's interest in justice outweighs Cartman's interest in protecting his source.

Because Cartman cannot claim a reporter's privilege, the appellate court was correct in denying Cartman's motion, because a genuine issue of material fact exists as to whether Cartman's statements were negligently published. For the negligence standard to apply, an individual must be considered a private person by not voluntarily thrusting him or herself to the forefront of a public controversy. A person enters a controversy by either engaging in conduct that would invite public attention and comment or using his or her position to impact that controversy. Because Ike has not engaged in either of these actions, the appellate court correctly held him to be a private person and correctly applied Silverado's negligence standard. A reasonable jury can find a publisher negligent by failing to verify a story or check it for its accuracy. Here, Cartman published his blog post without checking the veracity of the photo and commentary. Consequently, a reasonable jury could find that Cartman published with negligence.

Assuming, *arguendo*, Ike is a limited-purpose public figure, this Court should deny Cartman's motion for summary judgment because Ike can show actual malice. In a defamation action, actual malice is present where the defendant recklessly disregards the truth. Here, Cartman claimed a privilege over Professor Chaos, which bars him from using evidence from Professor Chaos. Because Cartman cannot show he verified the information he published on his blog, evidence of recklessness exists. There is also evidence that Cartman had a financial motive and personal animus towards Ike, which shows recklessness. Lastly, Cartman purposefully avoided the truth by not verifying the photo, which is evidence of recklessness. Because a reasonable jury could find that Cartman published with actual malice, this court should deny Cartman's motion for summary judgment.

ARGUMENT

I. THE APPELLATE COURT WAS CORRECT IN HOLDING THAT CARTMAN IS NOT ENTITLED TO A QUALIFIED REPORTER'S PRIVILEGE UNDER THE FIRST AMENDMENT.

A. STANDARD OF REVIEW.

Whether a reporter's privilege exists under the First Amendment presents a mixed question of law and fact. *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 576 (9th Cir. 1995), *aff'd*, 517 U.S. 830 (1996). On appeal, such issues should be decided under *de novo* review, allowing this Court to review the facts as new. *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992). Applying this standard, Cartman cannot claim a reporter's privilege because it does not exist. Nevertheless, if a privilege does exist, the record does not support Cartman's claim to a reporter's privilege. Thus, the appellate court's findings should be affirmed and this case remanded for further discovery.

B. NO QUALIFIED REPORTER'S PRIVILEGE EXISTS WITHIN THE FIRST AMENDMENT.

The First Amendment states, "Congress should make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. Interpreting the First Amendment, this Court has never recognized a reporter's privilege available to journalists. *See Branzburg v. Hayes*, 408 U.S. 665, 691 (1972). This is particularly true in defamation cases where the result of such a privilege would unfairly shield a journalist from liability and bar the plaintiff from discovering information relevant to establishing liability. *Herbert v. Lando*, 441 U.S. 153, 175 (1979); *Reporters Comm. for Freedom of the Press v. Am. Tel. & Tel. Co.*, 593 F.2d 1030, 1050 (D.C. Cir. 1978). Here, the district court did not follow this Court's precedent when it let Cartman withhold the identity of Professor Chaos. (J.A. at 8.)

Indeed, the appellate court correctly found that this Court has rejected "the idea of a reporter's privilege inherent in the First Amendment." (J.A. at 23.) By cloaking Cartman with this privilege, the district court ignored the *Branzburg* decision, which found that "[t]he [First] Amendment does not reach so far as to override the interest of the public in ensuring that neither reporter nor source is invading the rights of other citizens through reprehensible conduct forbidden to all other persons." 408 U.S. at 692-93. This Court found that no privilege exists for three reasons. First, evidentiary privileges are disfavored because they poorly serve the interest of justice. *Id.* at 686. Second, claims that the newsgathering process will be diminished if reporters are compelled to testify are too speculative to justify a reporter's privilege. *Id.* at 693-94. Lastly, no reporter's privilege exists because its scope would define an impractical and excessive class of privileged persons. *Id.* at 703-04. Because the *Branzburg* decision is supported by a clear majority of this Court, the appellate court was correct in adhering to this precedent when it denied Cartman the use of a reporter's privilege.

1. This Court's conclusion in *Branzburg* is supported by a clear majority of the Court, not a plurality.

The *Branzburg* decision is supported by a clear majority because five justices signed onto Justice White's opinion. *Id.* at 666. However, some courts recognizing a constitutional reporter's privilege do so by interpreting *Branzburg* as a plurality opinion and cite Justice Powell's concurring opinion. *See e.g. McKevvitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003); *In re Special Proceedings*, 291 F. Supp. 2d 44, 51 (D.R.I. 2003). But Justice Powell joined the majority opinion in its entirety and wrote a simple concurring opinion, which has no precedential value. Igor Kirman, *Standing Apart to be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2088-89 (1995). The difference between a majority opinion and a plurality opinion from this Court is a distinction that cannot be easily

sidelined. A majority opinion consists of five or more justices. Linas E. Ledebur, *Plurality Rule: Concurring Opinions and a Divided Supreme Court*, 113 PENN ST. L. REV. 899, 905 (2009). A plurality opinion occurs when there are less than five justices supporting the overall judgment of the case. *Id.* Because Justices White, Burger, Blackman, Powell, and Rehnquist signed onto the *Branzburg* majority in its entirety, Justice White's opinion is considered the majority, thus controlling law. *Branzburg*, 408 U.S. at 666; *United States v. Markiewicz*, 732 F. Supp. 316, 318 (N.D.N.Y 1990).

Majority rule is preferred because it promotes uniform and binding legal precedent for lower courts to follow. *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). As such, a conclusion that the *Branzburg* decision somehow supports recognizing a reporter's privilege is not only misplaced, but tears at the fabric of *stare decisis* and the stability of this Court's jurisprudence. In effect, this constitutes overruling the *Branzburg* decision, which refused to grant reporters "a testimonial privilege that other citizens do not enjoy." *Branzburg*, 408 U.S. at 690. The lower courts do not have the authority to alter this Court's precedent. *United States v. Olivera-Hernandez*, 328 F. Supp. 2d 1185, 1187 (D. Utah 2004). Moreover, this Court should not be persuaded by misinterpreted reasoning. Thus, this Court should affirm the *Branzburg* decision by rejecting Cartman's claim of a First Amendment reporter's privilege and compel him to disclose Professor Chaos' identity.

2. Because this court has rejected the argument that the First Amendment contains a reporter's privilege, Ike's motion to compel should be granted.

This Court has declined to recognize a reporter's privilege within the First Amendment. *In re Grand Jury Proceedings*, 810 F.2d 580, 583 (6th Cir. 1987); *Reporters Comm.*, 593 F.2d at 1050. Instead, this Court stated, "[i]t is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal

statutes of general applicability." *Branzburg*, 408 U.S. at 682; *see In re Taylor*, 193 A.2d 181, 184 (Pa. 1963). Moreover, "[this] Court has emphasized that 'the publisher of a newspaper has no special immunity from the application of general laws.'" 408 U.S. at 683 (citing *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937)). Three reasons can be extracted from the *Branzburg* opinion as to why no reporter's privilege exists.

a. Evidentiary privileges are disfavored because they poorly serve the interest of justice.

No reporter's privilege exists within the First Amendment because such a privilege would obstruct the interest of justice. *Id.* at 686. This Court found that the creation of new testimonial privileges is disfavored because such privileges obstruct the search for the truth. *Id.* at 691 n.29. The search for truth is an essential element of the judiciary's role in administering a plaintiff's interest in justice. *Garland v. Torre*, 259 F.2d 545, 548 (2d Cir. 1958). And although *Branzburg* involved criminal proceedings, this Court has held that evidentiary privileges inhibit the search for truth in civil cases and should not be recognized. *Herbert*, 441 U.S. at 175; *Blackmer v. United States*, 284 U.S. 421, 438 (1932). Moreover, a plaintiff is entitled to discover information from an adversary in order to promote the search for truth in litigation. *Carey v. Hume*, 492 F.2d 631, 632 (D.C. Cir. 1974). Thus, privileges, like the one claimed by Cartman, prevent a court from uncovering the truth, which is why this Court has never recognized such a privilege. *Herbert*, 441 U.S. at 174-75.

Avoiding ones presumptive duty also obstructs a plaintiff's interest in justice. *Garland*, 259 F.2d at 549. Citizens have a presumptive duty to testify in court. *Branzburg*, 408 U.S. at 699. It is also well-established that reporters are not given special treatment under the law. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 609 (1978). For example, reporters have no constitutional rights to access prisons or inmates beyond those afforded to the general public.

Houchins v. KQED, Inc., 438 U.S. 1, 9 (1978). Courts have followed this precedent by finding that "[t]he First Amendment does not grant a broadcaster any privilege, qualified or absolute, to refuse to reveal confidential information which is admittedly relevant to a court proceeding." *Ammerman v. Hubbard Broad. Inc.*, 572 P.2d 1258, 1265 (N.M. 1977). Moreover, courts have recognized that the privilege Cartman seeks to assert "would poorly serve the cause of justice" in civil cases because "[t]he privilege not to disclose relevant evidence obviously constitutes an extraordinary exception to the general duty to testify." *Garland*, 259 F.2d at 550; *see Cont'l Cablevision Inc. v. Storer Broad. Co.*, 583 F. Supp. 427, 434 (E.D. Mo. 1984). In short, the press is not above the law and has the same obligations as the general public. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). As such, this Court should continue to decline to interpret a reporter's privilege within the First Amendment. *Herbert*, 441 U.S. at 175.

Similarly, awarding Cartman the use of a reporter's privilege to conceal the identity of Professor Chaos results in an obstruction of truth, which is what this Court has sought to prevent. *Id.* at 174-76. The privilege would obstruct any verification of the actual existence of Professor Chaos. Additionally, the use of a privilege would prevent Ike from presenting evidence at trial showing that Cartman was negligent in publishing unverified information from an unreliable source. This result is precisely why this Court has held true to the principle that the public has a right to every person's evidence. *Von Bulow v. Von Bulow*, 811 F.2d 136, 141 (2d Cir. 1987) (citing *United States v. Bryan*, 339 U.S. 323, 331 (1950)). Thus, by presuming Cartman is entitled to a reporter's privilege, the district court went against established precedent that protects a plaintiff's interest in justice. *Branzburg*, 408 U.S. at 690; *Garland*, 259 F.2d at 549.

b. Claims that newsgathering will be diminished if reporters are compelled to testify are too speculative to justify a reporter's privilege.

Secondly, no privilege exists because this Court has not been convinced that the flow of news is compromised due to instances where reporters were compelled to testify in court proceedings. In *Branzburg*, this Court found that "the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public" if reporters fulfilled their obligation to testify in court. 408 U.S. at 693-94; *see Zurcher v. Stanford Daily*, 436 U.S. 547, 566 (1978). Moreover, studies attempting to determine if any chilling effect occurs from compelling disclosure of confidential sources have returned with almost no support for this claimed result. Marcus A. Asner, *Starting From Scratch: The First Amendment Reporter-Source Privilege and the Doctrine of Incidental Restrictions*, 26 U. MICH. J.L. REFORM 593, 612 (1994). As such, courts have continued to hold that the importance of maintaining confidential sources as a part of the newsgathering process is not enough to prevent a reporter from testifying. *Lee v. Dept. of Justice*, 401 F. Supp. 2d 123, 141 (D.D.C. 2005).

In short, this Court has continued to regard the chilling effect argument with skepticism. *Zurcher*, 436 U.S. at 566. Likewise, Cartman offers no evidence showing that his sources, including Professor Chaos, would refrain from giving him further information if Cartman testified in this case. Merely implying such an effect from the nature of the confidential relationship is not enough according to this Court's precedent. *Blair v. United States*, 250 U.S. 273, 281 (1919). Even if Cartman had offered evidence that his informants would refrain from supplying information, this Court has already found that such evidence is too speculative. *Branzburg*, 408 U.S. at 693-94; *Zurcher*, 436 U.S. at 566.

c. No reporter's privilege exists because its scope would define an impractical and excessive class of privileged persons.

Lastly, this Court refused to recognize a reporter's privilege because "[t]he administration of a constitutional newsman's privilege would present practical and conceptual difficulties of high order." *Branzburg*, 408 U.S. at 703-04. This Court reasoned that recognizing such a privilege would be impractical and excessive, calling for courts to make burdensome factual determinations as to who is entitled to a privilege. *Id.* at 705. Moreover, this Court recognized that because the First Amendment applies to anyone wishing to disseminate valid information and opinion, a reporter's privilege could too easily be used to avoid liability. *Id.* at 691.

Here, a reporter's privilege available to bloggers would similarly yield an unworkable situation for courts. Due to the ease of publishing on the Internet, anyone with a computer and Internet access would be able to claim the privilege in a defamation suit. Even the "lonely pamphleteer" is entitled to the freedom of speech, which would make it almost impossible to define a workable class of persons to which this privilege should be applied. *Id.* at 705. Rather then making these determinations, this Court has and should continue to defer such issues of privilege to the legislature. *Id.* at 706. Thus, because the state of Silverado and Congress have declined to enact a statutory reporter's privilege (J.A. at 9), this Court should refrain from creating such a privilege that would prove to be unworkable in our system of justice.

C. EVEN IF A PRIVILEGE DOES EXIST, THE APPELLATE COURT WAS CORRECT IN FINDING THAT CARTMAN IS NOT ENTITLED TO INVOKE A REPORTER'S PRIVILEGE TO WITHHOLD THE IDENTITY OF HIS SOURCE.

Assuming, *arguendo*, that a reporter's privilege is found within the First Amendment, Cartman is not entitled to invoke such a privilege for two reasons. First, as a party to the litigation, Cartman cannot invoke a constitutional privilege to block inquiry into the editorial process of his blog. *Herbert*, 441 U.S. at 175; *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 31 (2d

Cir. 1998). Second, Cartman cannot claim status as a journalist because he, as a blogger, is not a journalist. *Von Bulow*, 811 F.2d at 141. Lastly, even if Cartman is able to claim a privilege, Ike's interest in justice significantly outweigh Cartman's interest in protecting his source. Accordingly, this Court should affirm the appellate court's decision in denying Cartman the use of a reporter's privilege to restrict Ike's access to discoverable information.

1. Ike is entitled to the identity and personal contact information of Professor Chaos so he can investigate Cartman's editorial process.

Courts reading *Branzburg* together with *Herbert* draw the correct conclusion that this Court "has rejected the proposition that there is a First Amendment privilege accorded to newspapers to refuse to disclose information, confidential or otherwise, which is necessary to the determination of a litigated case." *Capuano v. Outlet Co.*, 579 A.2d 469, 478 (R.I. 1990); *Outlet Commc'ns, Inc. v. State*, 588 A.2d 1050, 1052 (R.I. 1991). In *Herbert*, this Court held that "there is no privilege under the First Amendment's guarantees of freedom of speech and freedom of the press barring the plaintiff from inquiring into the editorial processes of those responsible for the publication where the inquiry will produce evidence" relevant to the plaintiff's cause of action. *Herbert*, 441 U.S. at 169-77. Inquiry into a defendant's editorial process, which includes examining the reliability of sources, is a recognized method of establishing that the defendant negligently published statements with serious doubts as to their accuracy. *Id.* at 172-73. Particularly in libel cases, "[w]hen [a] journalist is a party, and successful assertion of the privilege will effectively shield him from liability, the equities weigh somewhat more heavily in favor of disclosure." *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981). Indeed, courts have followed this line of precedent and held that there is no First Amendment privilege available to a media defendant in a defamation action where such information is relevant and essential to a plaintiff's case. *Garland*, 259 F.2d at 551; *Capuano*, 579 A.2d at 476 (R.I. 1990). Instead,

courts continue to adhere to the discovery procedures articulated in Fed. R. Civ. P. 26(b) to compel defendants like Cartman to reveal their sources. *Lipinski v. Skinner*, 781 F. Supp. 131, 135 (N.D.N.Y. 1991) (citing *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)); *In re DaimlerChrysler*, 216 F.R.D. 395, 402 (E.D. Mich. 2003).

Here, "the present construction of the First Amendment should not be modified" to create a new evidentiary privilege which bars Ike's discovery into Cartman's editorial process. *Herbert*, 441 U.S. at 175. According to this Court's precedent, as a libel defendant, Cartman is precluded from invoking any reporter's privilege, because such a privilege would unduly burden Ike in gathering evidence into Cartman's editorial process. *Id.* at 174. Discovering the identity and reliability of Professor Chaos is a crucial part of investigating Cartman's editorial process; it is an accepted way of proving Cartman's awareness as to the falsity of the statements, or alternatively, Cartman's gross deviation from the standards of care for verifying sources. *Herbert*, 441 U.S. at 170; *Carey*, 492 F.2d at 637. Because Cartman based his commentary on a fake photo and he failed to verify this information, the identity of Cartman's source becomes a critical factor in showing Cartman's negligence. (J.A. at 7.) Thus, the appellate court was correct in finding that Ike is entitled to discover the identity of Professor Chaos. (J.A. at 26.)

2. As a blogger, Cartman cannot claim status as a journalist to invoke a reporter's privilege, because bloggers are not journalists.

Before Cartman can assert a reporter's privilege, he must prove he is part of the journalistic class entitled to claim the privilege. *Von Bulow*, 811 F.2d at 142; *SEC v. Seahawk Deep Ocean Tech., Inc.*, 166 F.R.D. 268, 270 (D. Conn. 1996). Bloggers are not journalists because they are not engaged in investigating news, but rather venting their own personal opinion. In articulating the journalistic standard, courts have recognized that a true journalist is one who is engaged in the process of gathering news with the intent of spreading that

information to the public. *Titan Sports, Inc. v. Turner Broad. Sys., Inc.*, 151 F.3d 125, 129 (3d Cir. 1997); *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993). Furthermore, this Court has found that merely taking headlines from another news agency is not considered gathering news. *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 236-37 (1918). Rather than disseminating news, the intent and purpose of blogs is to serve as an online diary, devoted to venting personal opinion or frustration. Anthony Ciolli, *Defamatory Internet Speech: A Defense of the Status Quo*, 25 QUINNIPIAC L. REV. 853, 855 (2007). Similarly, the record shows that Cartman takes headlines from major newspapers, instead of investigating news on his own. (J.A. at 4.) Also, his blog is a perfect example of a blog merely reserved for expressing personal distain and venting problems. (J.A. at 4.) While such speech may be protected from government regulation under the First Amendment, this Court has found that it hardly warrants special privilege from liability in a defamation suit. *Herbert*, 441 U.S. at 175.

Bloggers, like Cartman, are also not considered journalists because they are not affiliated with a professional news organization. For the purpose of invoking a reporter's privilege, most state shield laws define a professional journalist as one who is affiliated with an established news organization such as a newspaper, magazine, or other periodical. *Am. Sav. Bank, FSB v. UBS PaineWebber, Inc.*, 2002 U.S. Dist. LEXIS 24102, *5 (S.D.N.Y. Dec. 16, 2002). This safeguard assures that the news is subject to the formal standards of editorial review and verification. Patrick M. Garry, *Anonymous Sources, Libel Law, and the First Amendment*, 78 TEMP. L. REV. 579, 596 (2005). While traditional news outlets are governed by journalistic verification standards, bloggers often disseminate unverified "opinions, gossip, and speculation." Anne M. Macrander, *Bloggers As Newsmen: Expanding the Testimonial Privilege*, 88 B.U. L. REV. 1075, 1098 (2008). "Some bloggers do not consider themselves journalists, because they do not have

the time or the inclination to do the necessary fact-checking for accuracy of their stories that major news organizations do." *Id.* Thus, in order to assure the validity of news disseminated to the public, "whether the creator of the materials is a member of the media" is a threshold question that must be shown before the privilege is granted. *Cusumano v. Microsoft Co.*, 162 F.3d 708, 714 (1st Cir. 1998). Independent bloggers are not affiliated with a news agency that would classify them as journalists or impose professional standards. Larry E. Ribstein, *From Bricks to Pajamas: The Law and Economics of Amateur Journalism*, 48 WM. & MARY L. REV. 185, 214 (2006). Thus, they are unable to invoke a reporter's privilege. Similarly, Cartman is unaffiliated with a news agency; instead he is a storeowner and blogger on the side. (J.A. at 4.) Consequently, he is unable to invoke a reporter's privilege.

To classify bloggers as journalists would conjure the very fears this Court wrote about in *Branzburg* by creating an unworkable class of persons entitled to the privilege. *Branzburg*, 408 U.S. at 703-04. Given the accessibility of the Internet and the ease of which blogs are created, recognizing that bloggers are entitled to a reporter's privilege would create an enormous class of privileged persons. Moreover, because bloggers rely heavily on anonymous sources, there is a danger that bloggers may unjustly use a reporter's privilege as a shield in libel cases. Garry, 78 TEMP. L. REV. at 602-03. Accordingly, this Court should find that bloggers, like Cartman, are not entitled to a reporter's privilege to withhold the identity of sources in defamation suits.

3. Ike's interest in justice outweighs Cartman's interest in concealing an unreliable source.

Assuming, *arguendo*, Cartman is able to claim a reporter's privilege over his source, Ike is still entitled to the identity and personal contact information of Cartman's source. A defendant is required to divulge his or her source where a plaintiff's interest in justice outweigh a defendant reporter's privilege. *Carey*, 492 F.2d at 639. To make this determination, a three-prong test

should be applied: (1) does the evidence go to the heart of the litigation? (2) is there an interest in obtaining the information that outweighs the reporter's privilege? (3) can the information only reasonably come from the publisher? *Carey*, 492 F.2d at 635.

To prove defamation against a newsperson, a "plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability on the part of the publisher." *Herbert*, 441 U.S. at 175. Knowledge of an alleged source is an initial element to prove negligence, if not recklessness, by showing that no reputable source exists, the source is disreputable, or that the publisher misrepresented the source. 492 F.2d at 637. Here, Cartman published commentary based on a fake photo. (J.A. at 5-7.) Because this fake photo was allegedly sent by Professor Chaos, his identity and contact information go to the heart of showing that Professor Chaos does not exist, is disreputable, or was misrepresented by Cartman.

A compelling interest to identify Professor Chaos and to disclose his personal information outweighs Cartman's use of the privilege. Where a libel pre-trial record "discloses no wide-ranging and thorough investigatory effort by [defendant]" and defendant's actions are based on a confidential source, a compelling interest to identify the source exists. *Carey*, 492 F.2d at 637. Alternatively, a source can be concealed when a defendant produces extensive affidavits detailing prolonged and careful research and also relies on more than just the concealed source. *Cervantes v. Time, Inc.*, 464 F.2d 986, 991-92 (8th Cir. 1972). Here, Cartman made no attempt to verify Professor Chaos' photo, and based his statements on a confidential source. (J.A. at 5-6.) Further, there is no evidence that Cartman has produced any affidavits detailing prolonged or careful research nor has he named any other sources. Thus, a compelling interest to identify Professor Chaos and his personal information exists.

Lastly, where a libel defendant refuses to divulge a source's information, a plaintiff cannot be expected to carry onerous discovery burdens in an attempt to uncover such a source. *Carey*, 492 F.2d at 639. In *Carey*, the plaintiff attempted to compel the defendant publisher to disclose his sources in a deposition. *Id.* at 633. The publisher refused to divulge his sources' identities, but did assert they were employees that worked with the plaintiff. *Id.* at 638. As such, the court found that a plaintiff cannot be required to question everyone from an "office boy to a top officer." *Id.* Thus, because such vague information was "so imprecise as to afford [plaintiff] no reasonable basis to know where to begin [discovery]," the plaintiff was not required to do so. *Id.* at 639. Here, Ike asked Cartman for his source's identity and personal information. (J.A. at 8.) Cartman refused to disclose his source, claiming a reporter's privilege. (J.A. at 8.) Like the publisher in *Carey*, Cartman divulged less information to his opponent and was protecting only one source, not two or more. 492 at 638; (J.A. at 8.) Also, in *Carey*, the plaintiff did not appear to have consulted other sources. 492 F.2d at 638. In contrast, Ike attempted to uncover Cartman's source by deposing the Mumbai factory manager, several of his top engineers, and had Kyle email every employee at Citrus. (J.A. at 8.) Similar to the plaintiff in *Carey*, Ike has exhausted all reasonable sources. 492 F.2d at 638. Because these three prongs are satisfied, Ike's interest in justice outweighs Cartman's entitlement to the privilege. *Id.* at 639.

II. THE APPELLATE COURT WAS CORRECT IN DENYING CARTMAN'S MOTION FOR SUMMARY JUDGMENT BECAUSE A GENUINE ISSUE OF MATERIAL FACT EXITS AS TO WHETHER CARTMAN NEGLIGENTLY PUBLISHED THE PHOTO AND COMMENTARY.

A. STANDARD OF REVIEW.

Summary judgment should be granted under Fed. R. Civ. P. 56(c) when the moving party proves there is no genuine issue of material fact. When considering a summary judgment motion, a court must draw all inferences in favor of the nonmoving party. *Matsushita Elec.*

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). When the pleadings, depositions, answers to interrogatories, affidavits and admissions on file show that there is no issue of material fact, the moving party is entitled to judgment as a matter of law. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment will not lie "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Here, the court of appeals decision reversing the district court's grant of Cartman's motion for summary judgment was correct because Ike has presented evidence that shows a reasonable jury could return a verdict in Ike's favor.

B. IKE IS A PRIVATE PERSON BECAUSE HE HAS NOT VOLUNTARILY THRUST HIMSELF TO THE FOREFRONT OF A PUBLIC CONTROVERSY.

In defamation suits, this Court has determined that the heightened standard of actual malice does not apply to private individuals because they do not invite attention or comment from the public and have not assumed roles of special prominence or achieved fame or notoriety in society. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 164-65 (1979). Unlike private individuals, public figures have greater access to the media and can engage in self-help measures to alleviate any injury resulting from the defamatory statement. *Wolston*, 443 U.S. at 164. On the contrary, private individuals are more vulnerable to injury and need more protection because they cannot engage in the same self-help measures. *Gertz*, 418 U.S. at 345. Therefore, the state of Silverado applies the ordinary negligence standard to private individuals, as laid out in the Restatement (Second) of Torts § 580(B) (Restatement). (J.A. at 14.)

When determining whether a person is a private person or a public figure, a court must "look at the facts, taken as a whole, through the eyes of a reasonable person." *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1293 (D.C. Cir. 1980). Cartman and the district court

have correctly agreed that Ike is not an all-purpose public figure. (J.A. at 18.) Limited-purpose public figures are individuals who have voluntarily "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345. To determine if a person has thrust himself to the forefront of a controversy, "the plaintiff either must have been purposely trying to influence the outcome or could realistically been expected because of his position in the controversy, to have an impact on its resolution." *Waldbaum*, 627 F.2d at 1297; *see also Gertz*, 418 U.S. at 345, 351. Because Ike has not voluntarily thrust himself to the forefront of a public controversy, he is a private figure. Consequently, the appellate court was correct in denying Cartman's motion for summary judgment because Ike is a private individual and Ike has shown that a genuine issue of material fact exists as to whether Cartman published his blog post negligently.

1. Ike has not engaged in a course of conduct that would invite attention or comment on a human rights controversy.

Ike is a private person because he has not thrust himself to the forefront of a controversy involving human rights. Plaintiffs are private individuals when they have not addressed the public or the press, or taken a stand on the controversy. *Gertz*, 418 U.S. at 352; *Hutchinson v. Proxmire*, 443 U.S. 111, 135-36 (1979); *Wolston*, 443 U.S. at 165. In *Gertz*, although the plaintiff was a lawyer, an active member of the community, had published several books and articles, and was well known in some social circles, this Court concluded he was a private individual because "[h]e 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." 418 U.S. at 351-52. Similarly, in *Hutchinson* this Court held a scientist to be a private individual, despite his limited access to the media, and his publication of articles, because he had never taken a stand in the controversy over public expenditures. 443 U.S. at 135. In *Wolston*, this Court held the plaintiff

to be a private individual even though his actions attracted media attention. 443 U.S. at 161. He had never discussed the matter with the press so this Court found that "it would be more accurate to say that petitioner was dragged unwillingly into the controversy." *Id.* at 166.

Here, Ike is a private individual because has not thrust himself to the vortex of the issue of human rights. As in *Gertz*, *Hutchinson*, and *Wolston*, Ike has never discussed a public controversy with the press and has not tried to influence its outcome. Ike's only personal communication with the media and public was on August 7, 2006, after he was hired. (J.A. at 3.) During that press conference he merely thanked his brother Kyle and said he was looking forward to working for Citrus. (J.A. at 3.) During this short interaction, Ike did not discuss the issue of human rights. Since Ike's hiring, he has not given any interviews, made any comments to the press, and he is rarely seen in public. (J.A. at 3.) Also, like the plaintiff in *Gertz*, Ike is known in a small circle of people, consisting of the employees at Citrus. (J.A. at 3-4.) And although, Cartman's blog post generated some media attention surrounding Ike, under the reasoning in *Wolston*, this does not make Ike a public figure because Ike did not arouse the public or reach out to the public in any way about Cartman's allegations. Like the plaintiff in *Wolston*, Ike has been dragged unwillingly into this controversy over human rights. Under the reasoning of this Court, Ike cannot be a limited-purpose public figure.

Ike is also not considered a limited-purpose public figure merely because he is related to Kyle. This Court has held that in order to become a public figure, individuals must engage in some sort of conduct themselves, merely being related to a public figure does not make someone a public figure. *Times, Inc. v. Firestone*, 424 U.S. 448, 454 (1976). Here, Ike cannot be considered a public figure just because he is the brother of Citrus' CEO. (J.A. at 3.) Ike himself has not attracted press attention in any way. Like the plaintiff in *Hutchinson*, Ike is just like

other employees at Citrus and other members of the electronics research and development profession and therefore a private person.

Ike cannot be considered a limited-purpose public figure because this Court has held that the defamation defendant cannot "create their own defense by making the claimant a public figure." *Hutchinson*, 443 U.S. at 135. The plaintiff must be considered a public figure before the defamatory material is published. *See Id.* In *Hutchinson*, the plaintiff was a private citizen before the press sought him out. *Id.* at 135-36. Similarly, Cartman has tried to turn Ike into a public figure by publishing the blog post about him. Before Cartman's article, Ike had virtually no interaction with the public and press. Ike had never even been mentioned in Cartman's own blog before. Cartman is using his blog to push Ike into the limelight, consequently he now cannot claim that Ike is a limited-purpose public figure.

The statement made by Ike's attorney also does not turn Ike into a public figure. (J.A. at 7.) Responding to allegations or using the media in order to "satisfy inquiring reporters" does not turn a plaintiff into a limited-purpose public figure. *Firestone*, 424 U.S. at 455 n.3. Also, a person accused of committing a serious act cannot be a limited-purpose public figure just by replying to the allegations. *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1558 (4th Cir. 1994). Under this reasoning, Ike's use of the press to respond to Cartman's allegations is not enough to make Ike a limited-purpose public figure.

Ike is a private person because he has not thrust himself to the forefront of a human rights controversy. Specifically, Ike has never used the media to discuss Citrus products or take a stand on human rights. Merely being related to Kyle does not turn Ike into a limited-purpose public figure, nor can Cartman use his blog post to do so. And lastly, the statement made by Ike's

attorney does not turn Ike into a public figure. Therefore, the appellate court was correct in concluding that Ike was a private person. (J.A. at 30.)

2. As Director of Research and Development, Ike could not have been expected to impact a human rights controversy.

Ike is a private person because merely holding an executive position at a company does not make him a limited-purpose public figure. *Waldbaum*, 627 F.2d at 1299. A person must be a leader in the controversial activity and take a stand on the controversy to be considered a limited-purpose public figure. *Id.* at 1299-1300. In *Waldbaum*, the court held the President and CEO to be a limited-purpose public figure because through his position he voluntarily thrust himself to the forefront of a public controversy by educating the community about policies and taking a stand on controversies in the industry. *Id.* "[H]e was a mover and shaper of many of the cooperative's controversial actions." *Id.* at 1300. Conversely, Ike has not engaged in any actions that would show how he used his position to purposely thrust himself to the forefront of a human rights controversy or impact and influence the controversy. Unlike the plaintiff in *Waldbaum*, as Director of Research and Development, Ike has not informed the public or taken a stand on any controversies in the electronics industry. He was hired solely for the purpose of overseeing the development of the ePlay Touché. (J.A. at 3.) And merely holding an executive position with a prominent company does not automatically make a person a public figure. *Waldbaum*, 627 F.2d at 1299. Therefore, Ike is a private person.

Nor can Ike be a limited-purpose public figure because he has not used his position to access the media. *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987). In *Tavoulareas*, the president and CEO of a company used his position to make speeches, publish articles, testify before congress, gain the public's attention and enter the controversy over the oil industry. *Id.* at 773-74. These actions lead the court to conclude that he was a limited-purpose public figure. In

contrast, Ike has never used his position at Citrus to makes speeches or publish articles to get the public's attention about human rights issues. (J.A. at 3.) Ike does not have regular access to the press and media; consequently he has never made any statements about Citrus, its products, the electronics industry, or human rights. Therefore, the appellate court was correct in finding that Ike is a private person because he does not hold a position of prominence that can impact the human rights controversy nor does he use his position to access the media.

C. UNDER THE NEGLIGENCE STANDARD, A JURY COULD CONCLUDE THAT CARTMAN DID NOT ACT LIKE A REASONABLY PRUDENT PERSON IN PUBLISHING THE FAKE PHOTO AND COMMENTARY.

Because Ike is a private person, the appellate court was correct in applying the state of Silverado's negligence standard. The Restatement § 580 (B) cmt. k states that the question of whether a defendant negligently published defamatory material is a fact issue that is reserved for the jury. The negligence standard requires that the plaintiff show, by a preponderance of the evidence, that the defendant did not follow the standard of conduct of a reasonable person under like circumstances. *Desnick v. Am. Broad. Cos.*, 233 F.3d 514, 518 (7th Cir. 2000); *Memphis Publs'g Co. v. Nichols*, 569 S.W.2d 412, 418 (Tenn. 1978); *Food Lion, Inc. v. Melton*, 458 S.E.2d 580, 584 (Va. 1995); Restatement § 580(B) cmt. g, cmt. j. This can be done by showing the defendant did not have a reasonable belief that the defamatory material was true, or by showing the defendant did not act "reasonably in checking on the truth or falsity or defamatory character of the communication before publishing it." § 580(B) at cmt. g.

A reasonable jury could find that the Cartman's commentary based on the fake photo was published negligently. *Penobscot Indian Nation v. Key Bank*, 112 F.3d 538, 560 (1st Cir. 1997). Some factors the court can consider when deciding if the defendant acted like a reasonable person under the circumstances are whether the defendant was informing the public or just

spreading gossip, and how much the plaintiff's reputation would be injured if the defamatory material was false. § 580(B) at cmt. h. Because Cartman is a Citrus Competitor, it is easy to see how Cartman may have posted the photo just to spread gossip about his competitor, rather than inform the public. Also, Cartman is not informing the public of any news, because the photo is a fake. (J.A. at 7.) A reasonable person would know that alleging that human rights violations would damage Ike's reputation. (J.A. at 5-6.) Shackling humans and slave driving are serious allegations which would naturally cause someone to receive death threats. (J.A. at 7.) Under the Restatement, because Cartman was spreading gossip and injured Ike's reputation, Cartman did not act like the reasonable person under the circumstances.

The First Circuit considered a newspaper to be negligent when it published a story without checking the accuracy of the piece and failed to verify the story. *Kassel v. Gannett Co.*, 875 F.2d 935, 944 (1st Cir. 1989); *see also Food Lion*, 458 S.E.2d at 585. The court held that checking a story for error is especially important when time is not a problem, and the means to check the story are readily available. *Kassel*, 875 F.2d at 944. In *Kassel*, USA Today printed a story that misquoted the plaintiff and made it appear as though he did not care about the problems Vietnam veterans face, when the opposite was true. The story's deadline was four days away and all of the information could have been verified by a simple phone call to the plaintiff. *Id.* Consequently, the court held that a reasonable jury could find that the newspaper was negligent because it did not conduct a "meaningful check for accuracy" and did not verify the story. *Id.*

Under this reasoning, a reasonable jury could conclude that Cartman acted negligently for several reasons. First, time was not an issue with this blog post. Cartman has no deadlines for his postings, therefore he was negligent in failing to test the photo and verify his information

before publishing it. Second, the means to check Cartman's story were readily available. Cartman installed software on his computer that was capable of detecting forged photographs. (J.A. at 7.) He had already used this software on other photos he posted on his blog. (J.A. at 7.) Cartman's failure to test the photo of Ike was a failure to follow the standard of conduct of a reasonable person under the circumstances. If Cartman tested the photo, he would have learned that Ike's image was superimposed and thus he would have nothing to base his human rights allegations on. Although Ike traveled to Mumbai, the photo of him and the workers was not real. (J.A. at 7.) There was no evidence that Ike had actually been to the factory in Mumbai or had any interaction with those Citrus employees. (J.A. at 7.) Finally, Cartman admitted that he did not know if the photo was valid by stating "[i]f the image I am showing you depicts what I think it does, then I'm telling you the truth . . . ." (J.A. at 6.) This shows that Cartman acted unreasonably in verifying his post. Similar to the facts in *Kassel*, a reasonable jury could conclude that Cartman acted negligently in failing to authenticate the photo and commentary.

When applying the negligence standard to Cartman's conduct, a reasonable jury could conclude that he did not act like a reasonably, prudent person under the circumstances. Therefore the appellate court was correct in denying Cartman's motion for summary judgment because a genuine issue of material fact does exist.

D. ASSUMING, *ARGUENDO*, IKE IS A LIMITED-PURPOSE PUBLIC FIGURE, A QUESTION OF FACT REMAINS AS TO WHETHER CARTMAN DEFAMED HIM WITH ACTUAL MALICE.

The Supreme Court has held that a public figure can establish defamation where the defendant has made a publication with actual malice. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967). Actual malice exists where a defendant knows of a publication's falsity or recklessly disregards its falsity. *New York Times, Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

Plaintiffs will rarely be successful in proving actual malice from the mouth of the defendant himself. *Herbert*, 441 U.S. at 170. Accordingly, the use of circumstantial evidence to prove actual malice is explicitly permitted and encouraged by this Court. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989). This includes purposeful avoidance, motive, and reliance on an anonymous or unverified source. *See Id.* at 692 (1989); *See Bose Corp. v. Consumers Union*, 692 F.2d 189, 196 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984). Here, Cartman purposely avoided the truth, had motive and relied on an unverified source, therefore he published with actual malice.

1. Failing to name a source results in an inability to rely on that source for evidence and the presumption that one does not exist.

"[A] party cannot partially disclose privileged communications or affirmatively rely on privileged communications to support its claim or defense and then shield the underlying communications from scrutiny by the opposing party." *In re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000). In other words, where a defendant, charged with defamation, claims a source privileged and indications of falsity exist, that defendant is barred from using that source. *Dowd v. Calabrese*, 577 F. Supp. 238, 244 (D.D.C. 1983). If not, a libeled plaintiff would be required to prove the veiled reputation or existence of a defendant's confidential source, which pits him against an unbeatable opponent. *Desai v. Hersh*, 954 F.2d 1408, 1412 (7th Cir. 1992). Further, where a defendant is unable or unwilling to name his informant, there is a presumption that there is none. *Downing v. Monitor Publ'g Co., Inc.*, 415 A.2d 683, 685 (N.H. 1980). Here, Cartman has invoked a qualified privilege barring the disclosure of Chaos. (J.A. at 8.) Therefore, Cartman is presumed to have no source. *Downing*, 415 A.2d at 685. An "anonymous or otherwise suspect source should be verified with care. Otherwise, as noted in *St. Amant*, recklessness may be found." *Holter v. WLCY T.V.*, 366 So. 2d 445, 455 (Fla. Dist. Ct. App.

1978). And because Cartman cannot rely on evidence of Professor Chaos' existence, and he did not verify the photo, a reasonable jury could find that he was reckless. *See St. Amant v. Thompson*, 390 U.S. 727, 732 (1968).

Here, unlike *St. Amant*, Cartman acted with actual malice. *Id.* at 733. In *St. Amant*, the court reasoned that the closest argument to finding actual malice was the publisher's reliance on his source. *Id.* at 733. However, because the publisher did not invoke a privilege, the source's character was ascertainable. *Id.* Also, the source "swore to his answers, first in writing and later in the presence of newsmen . . . [and] was prepared to substantiate his charges." *Id.* Conversely, Cartman has invoked a privilege, making Professor Chaos non-existent. (J.A. at 8.); *Downing*, 415 A.2d at 685; *Dowd*, 577 F. Supp. at 244. Furthermore, unlike the source in *St. Amant*, no evidence exists that Professor Chaos ever proclaimed the truth of his assertions. 390 U.S. at 733.

2. A publisher's motive can be evidence of actual malice.

Sufficient circumstantial evidence of a financial motive can support the ultimate conclusion of actual malice. *Suzuki Motor Corp. v. Consumers Union*, 330 F.3d 1110, 1136 (9th Cir. 2003). In *Suzuki*, the defendant publisher printed a defamatory consumer report based on test-rigging to catapult itself out of debt. *Id.* at 1135-36. The court of appeals held "that the evidence of motive and test-rigging, in combination, is sufficient to preclude summary judgment and therefore requires reversal" of the district court. *Id.* at 1136. Cartman had a stronger financial motive than the defendant in *Suziki*. Cartman's motive was decreasing the profitability of his competitor, Citrus, and also increasing his blog's profitability. (J.A. at 4.) Similar to the defendant in *Suziki*, Cartman's financial motive resulted in a reckless publication. 330 F.3d at 1136. Instead of verifying the photo's veracity with software he owned and had used, Cartman saw a financial opportunity and seized it by publishing the fake photo within twenty-four hours

of its arrival. (J.A. at 5-7.) Thus, Cartman had a financial motive and disregarded his customary procedure of using forgery software to check a photo's veracity. (J.A. at 7.)

Personal animus coupled with unreliable information "could in the eyes of a jury be clear and convincing evidence of actual malice." *Wollman v. Graff*, 287 N.W.2d 104, 107 (S.D. 1980). In his blog, Cartman blatantly reserves his harshest criticism towards Ike's employer, Citrus. (J.A. at 4.) Also, Computer World has lost profitability since Citrus opened a store across the street. (J.A. at 4.) This establishes Cartman's personal animus towards Ike. Secondly, without further discovery, the reliability of Cartman's information is indeterminable. Therefore, this Court should deny Cartman's motion for summary judgment.

3. Actual malice can exist where a publisher purposefully avoids the truth.

In finding evidence "unmistakably sufficient to support a finding of actual malice," this Court has reasoned that "failure to investigate will not alone support a finding of actual malice . . . [but] the purposeful avoidance of the truth is in a different category." *Harte-Hanks*, 491 U.S. at 692-93. In *Harte-Hanks*, the defendant had the opportunity to check tapes contravening an article it had written about the plaintiff, but failed to do so. *Id.* at 691-92. The defendant was also aware of a witness who could verify its story, but failed to interview her. *Id.* at 692. In *Butts*, before publishing the article at issue, the Saturday Evening Post editorially decided to muckrake in an attempt to increase sales. 388 U.S. at 157. The article at issue stated in pertinent part that the athletic director at Georgia will never help another football team and careers will be ruined. *Id.* The Post's editors failed to consider game film or interview a particular witness, both of which would have verified the story's falsity. *Id.* "[T]he evidence here discloses that degree of reckless disregard for the truth." *Id.* at 170 (Warren, C.J., concurring).

Here, Cartman had the opportunity to verify the photo in question with his forgery software before publishing, but failed to do so. (J.A. at 7.) Also, no evidence exists that Cartman consulted either Professor Chaos or Ike to prove its veracity. Most importantly, Cartman's own statements prove that he purposely avoided the truth by asserting that he knew there was a possibility the photo was false. (J.A. at 6.) Thus, Cartman, like the publishers in *Harte-Hanks* and *Butts*, purposefully avoided the truth, which shows evidence of actual malice. *Harte-Hanks*, 491 U.S. at 693; *Butts*, 388 U.S. at 170 (Warren, C.J., concurring).

"Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers." *Butts*, 388 U.S. at 170 (Warren, C.J., concurring). Here, evidence exists that Cartman published the blog post with reliance on an anonymous or unverified source, had malicious motive, and purposely avoided the truth. Because a reasonable jury could find that Cartman published with actual malice, this Court should deny Cartman's Motion for Summary Judgment.

CONCLUSION

For the foregoing reasons, Respondent Ike Broflovski respectfully requests this Court affirm the Fifteenth Circuit Court of Appeals decision reversing the District Court's denial of Ike's motion to compel discovery. Additionally, Ike Broflovski respectfully requests that this Court affirm the Fifteenth Circuit Court of Appeals decision reversing the District Court's grant of Eric Cartman's motion for summary judgment.

Respectfully submitted,

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Team 231