[J-59-2008] [MO: Castille, C.J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

RANDALL A. CASTELLANI AND JOSEPH J. CORCORAN,	:	No. 60 MAP 2007
Appellants	:	Appeal from the Order of the Superior Court dated January 3, 2007, at No. 1111 MDA 2005, reversing the Order of the
v.	:	Court of Common Pleas of Lackawanna County dated June 3, 2005, at No. 05 CV 69.
THE SCRANTON TIMES, L.P., T/D/B/A THE SCRANTON TIMES AND THE TRIBUNE, AND JENNIFER HENN,	:	916 A.2d 648 (Pa. Super. 2007)
Appellees	:	

ARGUED: April 16, 2008

DISSENTING OPINION

MR. JUSTICE McCAFFERY **DECIDED: SEPTEMBER 24, 2008**

I respectfully dissent from the majority's holding because I believe that it fails to afford adequate weight to the fundamental right of the citizens of this Commonwealth in the protection of their reputations. The Pennsylvania Constitution recognizes the possession and protection of an individual's reputation as an inherent and indefeasible right. PA. CONST. art. 1, § 1. Our Constitution also mandates that every individual whose reputation has been injured "shall have a remedy in due course of law and right and justice

administered without sale, denial or delay." Id., § 11.[1] As I see it, the issue in the instant case is the extent to which Appellants' constitutionally protected remedy to vindicate their constitutionally recognized interest in their respective reputations may be limited by application of the Shield Law. I would hold that the unique circumstances of this case warrant the disclosure ordered by the trial court as a necessary discovery tool that should be available to Appellants, and, accordingly, I would reverse the order of the Superior Court.

I disagree with the majority that our decision in Hatchard v. Westinghouse Broadcasting, 532 A.2d 346 (Pa. 1987), currently strikes the proper balance between Appellants' inherent and indefeasible right to protect their reputations through legal process and Appellees' statutory privilege under the Shield Law. See Majority Opinion, slip op. at 23, n.13. Rather, I conclude that where, as here, a public figure plaintiff in a defamation action makes a colorable showing that the alleged "unnamed source" may not, in fact, exist at all, that plaintiff may compel the defendant to disclose the identity of the source. Otherwise, the plaintiff is left without the ability to sustain his or her heavy burden to show that the alleged defamer acted with actual malice.[2]

Appellants' suspicion that the unnamed source may have been largely, or entirely, fictional, is supported by Judge Garb's finding of fact that Appellees' description of the grand jury proceedings was not supported by his review of the grand jury proceedings. Specifically, Judge Garb found that Appellees' reports of Appellants' conduct before the grand jury were inaccurate in that Appellants (1) had not been evasive in their answers; (2)

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[1] The right to protect one's reputation is not a second-class right, amenable to being pressed into oblivion by other constitutional provisions. Norton v. Glenn, 860 A.2d 48, 58 (Pa. 2004).

[2] In Carlacci v. Mazaleski, 798 A.2d 186, 190, n.9 (Pa. 2002), this Court recognized the applicability of the legal maxim "ubi jus, ibi remedium" ("where there is a right, there is a remedy,") in a defamation action seeking expungement of court records.

had not been non-cooperative; (3) had not "stonewalled" the grand jury in its inquiry; (4) had not caused the grand jury to become irate as a result of Appellants' demeanor; and (5) had not caused the grand jury to demand that Appellants be "thrown out" of the courtroom. See Majority Opinion, slip op. at 23. These findings by Judge Garb could readily support the conclusion that the alleged defamatory portions of the reports published by Appellees were not actually based upon information provided by any source at all. Under these circumstances, Appellants should have been afforded the opportunity to determine with certainty whether Appellees did, in fact, rely upon a source as a basis for the alleged defamatory statements.

In summary, I would overrule our conclusion in Sprague v. Walter, 543 A.2d 1078, 1085 (Pa. 1988), and disapprove our dicta in Hatchard, i.e., that information is **never** discoverable to the extent it would reveal the identity of a confidential source. Instead, I believe we should hold that a public figure plaintiff who makes a colorable showing that an alleged "unnamed source" may not, in fact, exist should be afforded the remedy of compelled disclosure of the identity of the purported source.[3] In such an instance, the constitutional interests in the protection of the plaintiff's reputation should take precedence over the statutorily created confidentiality interest of the alleged defamer. Because the majority reaches a contrary result, I respectfully dissent.

[3] Compelled disclosure here would not affect the trial court's inherent authority to control the course of discovery, and would not necessarily preclude a ruling by the court for in camera inspection by the court prior to disclosure to Appellants. The trial court would then be able to limit the release of the information to Appellants, should the colorable showing of non-existence **not be** supported upon review.