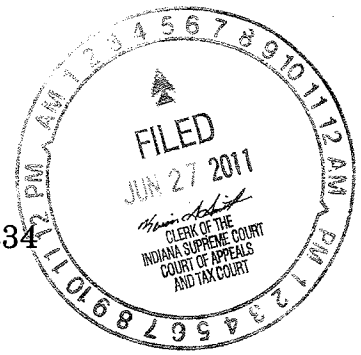


IN THE INDIANA COURT OF APPEALS

Appellate Court Cause No.: 49A02-1103-PL-00234

| | |
|---|---|
| IN RE: INDIANA NEWSPAPERS INC., d/b/a THE INDIANAPOLIS STAR,<br><br>Appellant-Non-Party,<br><br>JEFFREY M. MILLER and CYNTHIA S. MILLER,<br><br>Appellees-Plaintiffs,<br><br>JUNIOR ACHIEVEMENT OF CENTRAL INDIANA, INC.; JENNIFER BURK, Individually and in her Official Capacity; CENTRAL INDIANA COMMUNITY FOUNDATION, INC.; BRIAN PAYNE, Individually and in his Official Capacity,<br><br>Appellees-Defendants. | Appeal from Marion Superior Court No. 14<br><br>Honorable S.K. Reid<br><br>Trial Court Cause No. 49D14-1003-PL-01476 |

# BRIEF OF APPELLANT

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## STATEMENT OF THE ISSUE

Consistent with the Indiana Constitution's solicitude for free speech, Indiana's Journalist Shield Statute provides an absolute privilege protecting newspapers and their employees from compelled disclosure of sources. Here, a plaintiff who had already sued four defendants for defamation seeks the identity of an anonymous source who was responding to a news story published *after* the alleged defamation occurred. Did the trial court abuse its discretion by failing to apply Indiana's absolute privilege under the Shield Statute and the parallel protections afforded by the First Amendment and the Indiana Constitution when it signed the plaintiff's proposed order compelling production of this irrelevant information?

## STATEMENT OF THE CASE

Jeffrey M. Miller filed a complaint March 31, 2010 alleging defamation and other claims against his former employer, Junior Achievement of Central Indiana, Inc.; the Central Indiana Community Foundation, Inc.; and their respective presidents. (App. 7). On June 24, 2010, Miller sought non-party discovery from Indiana Newspapers, Inc., d/b/a The Indianapolis Star, giving rise to this appeal. (App. 63). After The Star objected, Miller eventually moved to compel production, and after The Star filed its opposition brief but before a hearing was held, the trial court granted the motion by signing Miller's tendered order without change on February 23, 2011. (App. 110).

Because the case against The Star was then concluded, The Star timely filed a notice of appeal of that order on March 21, 2011. Miller, who by then had amended his complaint to add his wife and their company as plaintiffs, sought to dismiss the appeal for lack of appellate jurisdiction. After briefing, this Court issued an Order May 27, 2011 denying the motion to dismiss, and setting a briefing schedule. Additional facts, more relevant to the issues presented for review, are included in the Statement of Facts in accordance with Ind. App. R. 46(A).

## STATEMENT OF FACTS

**The Underlying Lawsuit.**

Jeffrey Miller was the president and CEO of Junior Achievement of Indiana from September 1994 until his retirement December 31, 2008. (App 26). Thereafter, until February 2010, Miller continued as President of the Experiential Learning and Entrepreneurship Foundation, an organization that supports Junior Achievement. (*Id.*)

During Miller's tenure as president, the Foundation began a project to construct a $4 million culinary school on the Junior Achievement campus to be financed in part by a grant from the Central Indiana Community Foundation and the Eugene Glick family. (App. 27) However, according to Miller's original complaint, construction was suspended in January 2010, before the grant was exhausted, based on allegations that Miller had misappropriated funds for the project. (App. 28). Against the backdrop of these allegations, Miller filed a lawsuit on March 31, 2010, alleging that statements about his role in the formation and construction of the culinary school were false and defamatory, and constituted tortious interference with business or contractual relationships, and intentional infliction of emotional distress. All of the alleged defamatory statements were made before March 2010. (App. 27-29).[1]

[1] According to the original complaint filed March 31, 2010, the only allegedly defamatory statement made after March 1, 2010 was when Ms. Burk stated she was "distancing JACI from Mr. Miller and ELEF." (App 28).

**The Non-Party Discovery and Miller's Multiple Amended Complaints.**

After the allegedly defamatory comments that were the subject of Miller's complaint, The Indianapolis Star published a news story March 19, 2010 under the headline, "Junior Achievement Faces Questions, Audit." On April 6, 2010,[2] a reader anonymously posted a comment about the story on indystar.com, The Star's website, stating, "This is not JA's responsibility. They need to look at the FORMER president of JA and others on the ELEF board. The 'missing' money can be found in their bank accounts." (App. 52, 64-66).

On June 24, 2010 Miller served The Star with non-party discovery seeking documents identifying the anonymous source of this comment. (App. 57-63). At the time, Miller was the sole plaintiff, and he attributed all of his damages to comments made by defendants Jennifer Burk and Bryan Payne, the presidents of Junior Achievement and the Central Indiana Community Foundation – and no one else. (App. 29-33). The anonymous source's response to The Star story was not an element of the pending complaint, nor was it included in the first amended complaint filed three months after service of the non-party request, September 27, 2010. (App. 34, 39-50). Indeed, it was not part of the lawsuit until leave was granted to amend the complaint a second time, after the motion to compel was

[2] Miller has asserted this as the date the anonymous source made the comment, though the actual comment attached to his motion indicates it was posted March 23, 2010. (App. 66). Nothing in the record indicates the trial court relied on either date to support its Order, and The Star does not assert the privilege analysis needs a determination of the correct date.

decided and nearly a year after the anonymous source posted the comment on indystar.com. (App. 16).

Moreover, Miller's wife and his company[3] (added as plaintiffs after the non-party discovery was served on The Star) made no additional allegations related to the defamation claim that prompted the lawsuit. The second amended complaint, filed nearly six months after service of this discovery and allowed after the court had signed the Order which is the subject of this appeal, apparently named several John Doe defendants and is the first pleading to allege harm from the anonymous source at issue. (App. 1, 16, 110).

The Star timely objected to the non-party discovery, relying on the statutory and constitutional protections against compelled disclosure of the anonymous source, and because Miller sought information unrelated to his claims. (App. 68, 69). Six months after The Star's objection, on January 31, 2011, Miller moved to compel and tendered a proposed order with his motion. The Star responded on February 16, 2011. (App. 75). Opposing the motion to compel, The Star submitted evidence that before readers can provide content to indystar.com, or provide commentary on the website about editorial content supplied by The Star, they are required to provide information about themselves which The Star does not publish or otherwise disclose. (App. 75-89).

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[3] Performance Professionals, Inc.'s claims have since been dismissed. (App. 15). Because Miller was the only plaintiff when the non-party discovery was served and responded to, and because the Trial Rule 26 inquiries focus on what is relevant to his claims and defenses, The Star refers to the plaintiffs by the singular "Miller."

On February 23, 2011, while The Star awaited a response as to Miller's availability on the dates available for hearing, the trial court signed Miller's tendered order (the "Order"). The Order did not condition relief on advance payment of The Star's damages, including attorney's fees, as required by Ind. T.R. 34(C). (App. 110). No hearing was held before the Order was entered. This appeal followed.

# ARGUMENT

## I. Standard of Review.

Discovery orders are generally reviewed for an abuse of discretion. *In re WTHR-TV*, 693 N.E.2d 1, 6 (Ind. 1998) ("*WTHR I*"). "[A] trial court abuses its discretion when it enters an order that is contrary to law." *In re Subpoena Issued to Beck's Superior Hybrids, Inc.*, 940 N.E.2d 352, 357 (Ind. Ct. App. 2011). Moreover, and as to factual issues, "[t]he trial court abuses its discretion when its decision is clearly against the logic and effect of the facts and circumstances before it, or the reasonable, probable, and actual deductions to be drawn therefrom." *Suding v. State*, 945 N.E.2d 731, 739 (Ind. Ct. App. 2011).

## II. Indiana's Journalist Shield Statute Precludes Compelled Production of The Identity of the Confidential Source Sought By Miller, And The Trial Court Abused Its Discretion By Not Applying This Absolute Privilege.

By entering Miller's proposed order, the trial court (Reid, J.) ordered discovery of information protected by an absolute privilege. Specifically, under Indiana's Journalist Shield Statute, the General Assembly has created a statutory privilege which prevents a newspaper owner or employee from being compelled to disclose, in legal proceedings or elsewhere, the source of any information procured or obtained in the course of the person's employment or representation of a newspaper. IND. CODE § 34-46-4-2.[4] Under the statute, it is irrelevant whether the

[4] *Amici Curiae* Lee Enterprises, Inc., LIN Televisions Corp., The E.W. Scripps Company; Gray Television, Inc., Hoosier State Press Association and The Electronic Frontier Foundation also point out that a constitutional qualified privilege exists. Brief at Part III. In accordance with App. R. 46(E)(2), The Star does not restate

source of the information was published or not. IND. CODE § 34-46-4-2(1). The Shield Statute applies regardless of the source of the information or how (or even if) it was used. If the information was procured or obtained in the course of the person's employment or representation of a newspaper, the Shield Statute provides an *absolute* privilege against compelled disclosure of "the source of any information procured or obtained" in the course of their "employment or representation of a newspaper, periodical, press association, radio station, television station, or wire service, . . . ." IND. CODE § 34-46-4-2.

The Shield Statute reads in its entirety:

> **IND. CODE § 34-46-4-1. Applicability of chapter.**
>
> This chapter applies to the following persons:
>
> (1) any person connected with, or any person who has been connected with or employed by:
>
> (A) a newspaper or other periodical issued at regular intervals and having a general circulation; or
>
> (B) a recognized press association or wire service; as a bona fide owner, editorial or reportorial employee, who receives or has received income from legitimate gathering, writing, editing and interpretation of news; and
>
> (2) any person connected with a licensed radio or television station as owner, official, or as an editorial or reportorial employee who receives or has received income from legitimate gathering, writing, editing, interpreting, announcing or broadcasting of news.
>
> **IND. CODE § 34-46-4-2. Privilege.**
>
> A person described in section 1 of this chapter shall not be compelled to disclose in any legal proceedings or elsewhere the source of any information procured or obtained in the course of the person's

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that argument here except to point out that a similar privilege applies regardless of the Shield Statute.

employment or representation of a newspaper, periodical, press association, radio station, television station, or wire service, whether:

(1) published or not published:

(A) in the newspaper or periodical; or
(B) by the press association or wire service; or

(2) broadcast or not broadcast by the radio station or television station; by which the person is employed.

The Star is a newspaper issued at regular intervals with a general circulation. (App. 110). It is also uncontroverted that the only evidence before the trial court on this issue -- the Verified Declaration of Jonathan M. Sweeney, The Star's digital news director -- confirms the other elements of the privilege because he receives income from legitimate gathering, writing, editing and interpretation of news. (App. 110-11). Thus, both The Star and Sweeney qualify under Section 1 of the Shield Statute. IND. CODE § 34-46-4-1.

Moreover, Sweeney is responsible for managing and maintaining the website, indystar.com, which received information from the anonymous source whose identity is sought to be compelled by the subpoena. (App. 111). Consequently, neither The Star nor Sweeney "shall [ ] be compelled to disclose . . . the source of *any* information procured or obtained in the course of the person's employment or representation of a newspaper, . . . whether: published or not published . . . by which the person is employed." IND. CODE § 34-46-4-2 (emphasis added). The Shield Statute does not distinguish among types of information procured or obtained; it simply applies to the source of any and all information obtained in the course of the person's employment by a newspaper. Sweeney obtained or procured information from the source of the online comments in the course of his employment by a

newspaper, rendering this information within the scope of this absolute statutory privilege. By the plain language of the Shield Statute, therefore, neither The Star nor Sweeney can be compelled to disclose the source's identifying information sought by the subpoena.

Contrary to the plain language of the statute, Miller erroneously claims that this absolute privilege is limited to *confidential* news sources interviewed in connection with a particular article. Miller is wrong. ***First***, the case cited for this proposition in the trial court, *May v. Collins*, did not involve the Shield Statute. Rather, because the plaintiff brought *federal* claims, the district court determined that *federal* privilege law applied, and refused to apply Indiana state law, including the Shield Statute, to the matter. 122 F.R.D. 535, 538 (S.D. Ind. 1988) "([I]t is this Court's opinion that the asserted privileges are governed by the principles of federal law.)"; *id.* at 540 (district court was not bound to follow Indiana law). Applying federal common law, the court held the information was protected from disclosure under First Amendment principles. *Id.* at 541. Nowhere does this case instruct that the Shield Statute, or even federal privilege law, is limited to a confidential source of information used by a reporter in the process of writing a story, as Miller appears to claim. Indeed, the *May* court held that under federal common law, this privilege extends to unpublished material regardless of the confidentiality of the source. *Id.* at 540.

***Second***, Indiana courts interpreting the Shield Statute have never engrafted Miller's crabbed interpretation onto the plain language of the statute. To the

contrary, they have recognized the importance of the news media's absolute privilege. *See Jamerson v. Anderson Newspapers, Inc.*, 469 N.E.2d 1243, 1246 (Ind. Ct. App. 1984) (refusing to impose a "no source" presumption when newspaper defamation defendant invoked shield statute; "[O]ur shield law, confers, without a doubt, an absolute privilege on the news media."); *id.* at 1248 (Indiana is one of eight states that have "the 'ultimate' in news media protection[,] a seemingly unassailable privilege"); *see also Slone v. State*, 496 N.E.2d 401, 405 (Ind. 1986).[5]

Appropriately abandoning the untenable position that the Shield Statute is limited to confidential sources of news articles, Miller argued for the first time during motion practice in this Court that The Star's Terms of Service allow for disclosure. (Motion to Dismiss at Ex. C and Ex. D; Motion at 12). While these are

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[5] While no Indiana court has addressed the shield law in this context, courts around the country have applied their state shield laws to prevent disclosure of information about anonymous posters commenting on a news story. *See, e.g., Doty v. Molnar*, No. DV 07-022 (Mont. Dist. Ct., Yellowstone County, Sept. 3, 2008) (applying Media Confidentiality Act, Mont. Code § 26-1-902, *et seq.*, in defamation/false light action and granting newspaper's motion to quash subpoena for identifying information about persons who anonymously posted comments to online articles; "The Court doesn't even get to the constitutional issue [because] the legislature has already decided that with this statute [the shield law]. And though technology has advanced since the time of the creation of that law, it, nonetheless, is very broad and it does cover the situation we have here before us today") Order at (App. 95); *Doe v. TS*, No. 08030693 (Or. Cir. Ct., Clackamas County, Sept. 30, 2008) (applying Oregon Media Shield Law, O.R.S. § 44.510, *et seq.*, to deny plaintiff's motion to compel production of information identifying author of anonymous comment) (Order at App. 99); *Beal v. Calobrisi*, No. 8-CV-1075 (Fla. Cir. Ct., Okaloosa County, Oct. 9, 2008) (applying Florida Shield Law, Fla. Stat. § 90.5015, to quash subpoena requesting information about person who posted comment on newspaper's website) (Order at App. 103); *North Carolina v. Mead*, No. 10-CRS-2160 (N.C. Super. Ct., Gaston County, Aug. 16, 2010) (quashing subpoena under North Carolina shield law, N.C. Gen. Stat. § 8-53.11, seeking identity of an Internet commenter from newspaper and its publisher (Order at App. 107).

not part of the record on appeal, *see* Ind. App. R. 27, and were never raised below, they also are of no import. The Shield Statute by its terms protects The Star, not the anonymous source. Indeed, The Star holds and may assert the privilege. Accordingly, it simply does not matter what the anonymous source's subjective expectations of privacy may be. Instead, our General Assembly has correctly determined that the marketplace of ideas will benefit when news organizations such as The Star have the ability, through the Shield Statute, to freely gather information and maintain those sources as confidential. That this may occur more easily through the internet supports application of the privilege, for now the proverbial town square can be as broad as the globe.

## III. Miller Cannot Rebut Application of the Shield Statute.

For the first time on appeal, in his Verified Motion to Dismiss Indiana Newspaper Inc.'s Notice of Appeal for Lack of Appellate Jurisdiction, Miller also claimed he can satisfy the standard for the requesting party announced in *In re Stearns v. Zulka*, 489 N.E.2d 146 (Ind. Ct. App. 1986). Motion to Dismiss at 11. In that case, this Court recognized a *qualified* First Amendment privilege against compelled disclosure of unpublished journalistic material. Applying case law from Texas to facts inapplicable here, this Court held that "when a non-party newsgatherer claims a privilege the burden shifts to the discovering party to establish all elements of the following three part test: (a) the material sought is highly relevant, (b) there is a compelling need for the information sufficient to override the First Amendment privilege, and (c) the party has been unsuccessful in

securing the information from other sources." *Id.* at 150-51. Even if this Court does not find that Miller waived this issue, as it was never raised below and is not supported by any part of the trial court record, this test does not apply for two reasons.

First, the absolute privilege under the Shield Statute trumps *Zulka's* qualified privilege. Where, as here, the privilege is absolute, to engage in the qualified privilege balancing test adopted by *Zulka* is inappropriate as it contradicts the legislative intent to protect newspapers from compelled disclosure of source information. *Jorgensen v. State*, 574 NE2d 915, 917 (Ind. 1991) (three-step test applies "[w]ith respect to non-privileged information.") The General Assembly unquestionably has the power to create such absolute privileges. *State v.* Pelley, 828 N.E.2d 915, 918 (Ind. 2005). Second, the Shield Statute was not raised in *Zulka,* because what were sought were unpublished photographs of an accident scene, not the identity of a source. *Zulka* is inapplicable on that basis alone.

Moreover, the identity of the anonymous source is entirely irrelevant because the anonymous source provided the information *after* Miller claimed he had already been damaged by statements from the presidents of Junior Achievement and the Central Indiana Community Foundation about his misappropriation of funds for the culinary school project. Finally, Miller on appeal independently represented that he believes this information is available from a party to this litigation. Thus he cannot satisfy the very test he erroneously asks this Court to apply. Specifically, Miller cannot meet factors two and three, regarding need for the information and

unavailability from other, nonprivileged sources. In his Reply in Support of the Motion to Dismiss, Miller declared his suspicion that DownWithTheColts, whose identity is sought by his non-party discovery to The Star "*may also be Jennifer Burk* . . . ." Reply at 5 (emphasis added). Thus, at least until Miller determines through the numerous discovery tools available to parties, including requests for admission and deposition, that Burk is not the anonymous source, he cannot meet the high burden to overcome the qualified constitutional privilege – a lesser protection than the Shield Statute. For Miller to assert otherwise contradicts his representations to this Court.

## IV. Apart From the Shield Statute, Strong Constitutional Principles Preclude Compelled Disclosure of the Identity of the Anonymous Source.

Even apart from Indiana's Shield Statute, given the protection accorded anonymous speech under the First Amendment of the United States Constitution, the trial court abused its discretion because Miller has not satisfied the stringent requirements for compelling disclosure of the identities of anonymous posters recognized in numerous federal and state cases on this issue.[6]

The United States Supreme Court has consistently defended the right to anonymous speech, noting that a speaker's "decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) ("Under our Constitution,

[6] Because Miller failed to raise this below, he has waived it. *See GKC Ind. Theatres, Inc. v. Elk Retail Investors, LLC.*, 764 N.E.2d 647, 652 (Ind. Ct. App. 2002) ("A party generally waives appellate review of an issue or argument unless the party raised that issue or argument before the trial court."). The Star also, pursuant to App. R. 46(E)(2), directs this Court to the briefs of *amicus curiae*.

anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.")[7]; *see also Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 387 (2d Cir. 2000) ("anonymous communications . . . have played a central role in the development of free expression and democratic governance"). The First Amendment, including its concern for a speaker's choice to remain anonymous, is as fully applicable to speech on the Internet as it is to paper leaflets. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997) ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. . . . [O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium").

Indeed, "[t]he Internet is a particularly effective forum for the dissemination of anonymous speech." *Sony Music Entertainment Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 562 (S.D.N.Y. 2004). As stated by the California Court of Appeals:

> [O]rdinary people with access to the Internet can express their views to a wide audience through the forum of the online message board. The poster's message not only is transmitted instantly to other subscribers to the message board, but potentially is passed on to an expanding network of recipients, as readers may copy, forward, or

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[7] Of particular note is the concurrence of Justice Thomas in *McIntyre*, documenting in great detail the fact that anonymous political pamphleteering was a core value that the Founding Fathers sought to protect in drafting the First Amendment. 514 U.S. at 1525 (Thomas, J., concurring); compare *John Doe No. 1 v. Cahill*, 884 A.2d 451, 456 (Del. 2005) ("Anonymous internet speech in blogs or chat rooms in some instances can become the modern equivalent of political pamphleteering.").

> print those messages to distribute to others. The use of a pseudonymous screen name offers a safe outlet for the user to experiment with novel ideas, express unorthodox political views, or criticize corporate or individual behavior without fear of intimidation or reprisal. In addition, by concealing speakers' identities, the online forum allows individuals of any economic, political, or social status to be heard without suppression or other intervention by the media or more powerful figures in the field.

*Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231, 237, 2008 WL 315192, at *4 (Cal. App. Feb. 6, 2008); see *also Doe v. Cahill*, 884 A.2d at 456 ("Internet speech is often anonymous.... This unique feature of [the Internet] promises to make public debate in cyberspace less hierarchical and discriminatory than in the real world because it disguises status indicators such as race, class, and age.") (internal quotation omitted); *In re Does 1-10*, 242 S.W. 3d 805, 820 (Tex. Ct. App.--Texarkana 2007) (Internet anonymity "serves a particularly vital role in the exchange of ideas and robust debate on matters of public concern").

The right to speak anonymously would be largely hollow, however, if would-be plaintiffs could simply dash off a subpoena and force disclosure of an anonymous speaker's identity. Without significant procedural protections in the civil discovery context, the legitimate exercise of First Amendment rights will be chilled. *See Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) ("If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment rights."); *Quixtar Inc. v. Signature Mgmt. Team LLC*, 566 F. Supp. 2d 1205, 1214 (D. Nev. 2008) ("To fail

to protect anonymity is, therefore, to chill speech."); *Cahill*, 884 A.2d at 457 ("The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all.")

The chilling effect from civil subpoenas and discovery gambits such as Miller's is especially worrisome given evidence suggesting that plaintiffs often pursue these measures simply to unmask their critics and take extra-judicial action, rather than to obtain redress for legally actionable speech. *See, e.g., Swiger v. Allegheny Energy*, No. 05-5725-JCJ, 2007 WL 442383 (E.D. Pa. Feb. 7, 2007) (company subpoenaed employee-poster's identifying information, dismissed lawsuit, and fired employee); Jay Eisenhofer & Sidney S. Liebesman, *Caught by the Net: What To Do If a Message Board Messes with Your Message*, 10 Bus. Law Today 40, 46 (Sept./Oct. 2000) (encouraging companies to sue, even if they do not intend to pursue action to conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings"); *see also Cahill*, 884 A.2d at 457 ("After obtaining the identity of an anonymous critic through the compulsory discovery process, a defamation plaintiff who either loses on the merits or fails to pursue a lawsuit is still free to engage in extra-judicial self-help remedies . . .").

Because of these important values, efforts to use the power of the courts to pierce anonymity by subpoena implicate First Amendment concerns. *Sony*, 326 F. Supp. 2d at 563. Such efforts are therefore subject to a qualified privilege, which must be considered—and overcome—before permitting discovery of a prospective defendant's identity. *See McMann v. Doe*, 460 F. Supp. 2d 259, 266 (D. Mass. 2006)

("Courts must adopt an appropriate standard such that aggrieved parties can obtain remedies, but can not demand the court system unmask every insolent, disagreeable, or fiery anonymous online figure.").

Thus, in the absence of a shield statute, courts faced with similar requests have attempted to strike a balance between the anonymous speaker's First Amendment rights and the potential plaintiff's legitimate needs. *See Krinsky v. Doe 6*, 2008 WL 315192, at *5. It is critical that the hurdle for such identification be sufficiently high:

> We are concerned that setting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all. A defamation plaintiff, particularly a public figure, obtains a very important form of relief by unmasking the identity of his anonymous critics. The revelation of identity of an anonymous speaker may subject [that speaker] to ostracism for expressing unpopular ideas, invite retaliation from those who oppose her ideas or from those whom she criticizes, or simply give unwanted exposure to her mental processes.

*Cahill*, 884 A.2d at 457; *see also Tendler v. www.jewishsurvivors.blogspot.com*, 164 Cal. App. 4th 802, 812 (Cal. Ct. App. 2008) (McAdams, J., concurring) (some requests for information to disclose writers' identities "will be solely for the purpose of silencing a critic by harassment, ostracism, or retaliation").

These free speech principles must prevail, particularly where, as here, Miller's claim seems to be based on a vendetta rather than a legitimate claim. If he can prove his complaint against the named defendants, *they* have defamed him, making the effect of the one anonymous comment on a newspaper story negligible.

According to the Amended Complaint – a judicial admission which binds Miller – the anonymous source of the comment questioned Miller's finances *after* Burk stated that Miller had been "very dishonest," claimed that his "House of Cards is about to fall down", and implied that he had misappropriated funds. (App. 44-45) Given the defamatory statements Miller alleges were made by defendants *already* in the case, he faces an uphill climb to prove, by clear and convincing evidence, constitutional actual malice on the part of the anonymous source of the comment on The Star's website, or independent damages resulting from that solitary post. These First Amendment principles provide a separate and independent reason, apart from the Shield Statute, for determining the trial court abused its discretion.

## V. Miller Ignores the Stronger Protections Given to Freedom of Speech Under The Indiana Constitution.

Indiana law, both constitutional and statutory, is especially solicitous of free speech. The Indiana Constitution "more jealously protects freedom of speech guarantees than does the United States Constitution." *Mishler v. MAC Sys., Inc.*, 771 N.E.2d 92, 97 (Ind. Ct. App. 2002) (quotation marks omitted); *see also* Randall T. Shepard, *Second Wind for the Indiana Bill Of Rights,* 22 IND. L. REV. 575, 580-81 (1989) ("Section 9 affirms the rights of expression in language much more comprehensive than the first amendment").

Though courts across the country have refused to permit non-party discovery similar to Miller's, those cases were decided under a rubric *far less protective* of speech and the news media's rights than Indiana's constitutional and statutory

framework. Under Indiana constitutional law, the chilling effect of the disclosure of anonymous speakers' identities cannot be countenanced.

Indiana courts have consistently recognized that discovery into the newsroom threatens a chilling effect on constitutionally protected speech. "Where a media organization is subpoenaed, the Trial Rules require sensitivity to any possible impediments to press freedom. A showing that the information is unique and likely not available from another source should normally be required." *WTHR I*, 693 N.E.2d 1, 9 (Ind. 1998). In *WTHR I*, a case in which the Shield Statute was ***not*** raised, a juvenile defendant sought to compel production of video outtakes of her jailhouse interview. The Indiana Supreme Court recognized these concerns and directed trial courts to carefully examine discovery targeted to journalists to avoid the adverse impact on speech. *See id.* at 9 ("If the threat of disclosure has any significant effect on the flow of information, that is an interest worthy of consideration" in determining whether to prohibit discovery directed to news organizations and reporters).

In *WTHR I*, the Court recognized that the particular facts of that case did not involve a "chilling effect" on the television stations. There, the only material sought – video out-takes of the juvenile's interview -- *could* have been aired, but simply were not. There was no expectation of privacy: "A videotaped interview by definition is not given under any expectation of confidentiality on the part of the interviewee." *Id.* By contrast here, anonymous sources of posted comments have every expectation of remaining anonymous; indeed, that is why they adopt

pseudonyms that appear with their comments, rather than using their given names. The First Amendment and Indiana's broader and more protective constitutional freedoms of speech foreclose The Star's compelled production of documents identifying the source of the anonymous comments.

## VI. Miller's Subpoena Exceeds the Scope of Permissible Discovery.

Finally, and separate from the legal issues compelling reversal of the trial court's order, the Complaint pending when the non-party discovery request was served, and Amended Complaint pending when the motion to compel was filed do not mention the anonymous comment on The Star website, nor do they plead defamation claims against a John Doe defendant. Indiana courts recognize a heightened pleading standard for defamation, requiring the alleged defamatory statement to be included in the complaint. *See Trail v. Boys & Girls Clubs*, 845 N.E.2d 130, 136-37 (Ind. 2006). Because Miller did not include the comments posted on The Star website in the Amended Complaint, his defamation claims are not, and cannot be, based on these comments, regardless of the source. Any attempt to bootstrap the Second Amended Complaint to a discovery request served more than six months before it was filed fails for several reasons. ***First***, the touchstone of whether discovery is objectionable is relevance. *See* Ind. T.R. 26(B)(1). The information Miller seeks from The Star is irrelevant for several reasons. Initially, when the discovery was sought, no claim in the case was or could have been tied to these comments because no damages in either the original or the amended complaint were alleged to result from posted comments. Moreover, absolutely no

argument was made in the trial court that this information was relevant for any reason, let alone that it "related to" a claim or defense of the party. All that is shown from the record is that Miller did not like the comment and thus labeled it defamatory. This *ipse dixit* is interesting, but the merits do not need to be decided when all of the alleged harm for which Miller seeks recovery occurred before the comment appeared on The Star's webpage.

***Second,*** Miller has waived this argument, because he failed to assert below that this information was relevant to any claim or defense. *GKC Ind. Theatres, Inc.*, 764 N.E.2d at 652. To make it relevant now, for a pleading not even before the trial court when it decided the motion to compel or when The Star served its objection, would encourage plaintiffs to amend pleadings whenever they sought discovery and the Court thought it was a close call. Miller amended the complaint for the first time before filing his motion to compel and after service of the non-party request and response. (App. 39). If harm was allegedly caused by the anonymous source of information, it could have and should have been included in those allegations. The fact that it was not underscores the lack of relevance of Miller's request.

Plainly, Miller is fishing, and that kind of discovery is not permitted. The United States Supreme Court, interpreting the federal discovery rule which at the time was identical to Indiana's current Trial Rule 26(B), refused to countenance efforts to obtain discovery in one case for use in other proceedings. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 353 (1978). Specifically, the Court held:

> In deciding whether a request comes within the discovery rules, a court is not required to blind itself to the purpose for which a party seeks information. Thus, when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery properly is denied.

*Id.*

Indiana courts frequently rely upon federal cases interpreting parallel rules. *See, e.g., Stuff v. Simmons*, 838 N.E.2d 1096, 1110 (Ind. Ct. App. 2005) (Because Indiana's Trial Rule 35 largely duplicates the language of its equivalent rule of the Federal Rules of Civil Procedure, the federal courts' construction of Federal Rule 35 is helpful in our analysis of T.R. 35); *Riggin v. Rea Riggin & Sons, Inc.*, 738 N.E.2d 292, 309 (Ind. Ct. App. 2000) ("Because our Rule 26 was adopted from the Federal Rules of Civil Procedure, federal authorities are relevant to our discussion."). Here, no less of an authority than the United States Supreme Court has unequivocally stated that the discovery rules do not permit fishing expeditions that seek discovery for future lawsuits -- exactly the discovery Mr. Miller seeks here.

Moreover, in another non-party discovery case, our Supreme Court has noted that a party seeking information must show, "that the information is not readily available elsewhere . . . and that the party seeking it is not engaged in a fishing expedition with no focused idea of the size, species, or edibility of the fish." *WTHR I*, 693 N.E.2d at 7. Here, as noted in Part III above, Miller asserts on the one hand that he "believes" he knows the identity of the anonymous source, and that this person is already a party. If true, the information is readily available elsewhere, and more importantly Miller "believes" he knows exactly where that is. On the

other hand, and though at least Miller's first two complaints confirm this anonymous source's comment bears no relationship to any allegation in this case, on appeal Miller represented to this Court that this source is a "vital defendant." Reply to Motion to Dismiss at 5. Miller does not and cannot point to any allegation or claim at issue when the discovery was served or the motion to compel was filed which supports this assertion. In any event, Miller has not satisfied his burden of being allowed to go on this fishing expedition even independent of the significant statutory and Constitutional concerns raised by his non-party request. Trial Rule 26(B)(1) thus provides a fourth, independent reason for the Court to reverse the trial court.

## CONCLUSION

The Court should reverse the trial court order compelling The Star to produce documents disclosing the identity of the anonymous source.

Dated: June 27, 2011

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| STATE OF INDIANA | ) | IN THE MARION SUPERIOR COURT |
| | ) SS: | |
| COUNTY OF MARION | ) | CAUSE NO: 49D14-1003-PL-014761 |

JEFFREY M. MILLER; CYNTHIA S. MILLER;

Plaintiffs,

vs.

JUNIOR ACHIEVEMENT OF CENTRAL INDIANA, INC.; JENNIFER BURK, Individually and in her Official Capacity; CENTRAL INDIANA COMMUNITY FOUNDATION, INC.; BRIAN PAYNE, Individually and in his Official Capacity,

Defendants.

FILED

150 FEB 2 - 2011

Elizabeth A. White

CLERK OF THE MARION CIRCUIT COURT

RECEIVED

FEB 28 2011

**ORDER COMPELLING DISCOVERY**

This matter came before the Court upon Plaintiffs' Motion for Order Compelling Non-Party Discovery, and the Court, having considered the same and being duly advised, hereby finds that the Motion should be GRANTED.

Non-Party The Indianapolis Star is hereby ORDERED to produce immediately the following:

1. Any and all records, documents, including electronic information or documents and/or digital information of all kinds, log files, reports, notes or any other documentation, relating to the posting and/or identity of "DownWithTheColts," the individual who posted a comment on the article titled "Junior Achievement faces questions, audit" (dated March 19, 2010) posted on IndyStar.com.

S.K. Reid

Dated: FEB 23 2011

Judge, Marion Superior Court No. 14

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## CERTIFICATE OF SERVICE

Pursuant to IND. APPELLATE RULE 24(D), I certify that on June 27, 2011, I caused copies of the foregoing Brief of Appellant to be served by the method noted:

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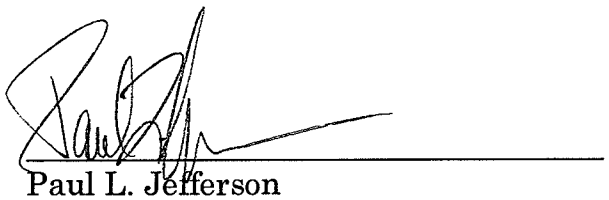

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