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St. Joseph Superior Court 4
St. Joseph County, Indiana

STATE OF INDIANA
IN THE COUNTY OF ST. JOSEPH
2023 TERM

TAMARA KAY, *Plaintiff*	
v.	
THE IRISH ROVER, INC., *Defendant*	Cause No. 71D04-2305-CT-000264

Defendant's Memorandum in Support of Defendant's Motion to Dismiss Under Indiana's Anti-SLAPP Law

Table of Contents

Table of Authorities

Cases

Constitutions, Statutes, and Regulations

Introduction

This lawsuit is without merit and should be dismissed under Indiana's Anti-SLAPP statute. Ind. Code § 34-7-7-1 *et seq*.

In order to protect vital public participation on issues fundamental to self-government, Indiana's Anti-SLAPP law provides a defense against meritless retaliatory lawsuits designed to chill their constitutional rights of petition or free speech, also known as Strategic Lawsuits Against Public Participation (SLAPP). Under Indiana's Anti-SLAPP law, upon receiving an anti-SLAPP motion to dismiss, the court must determine three things: (1) whether an action was in furtherance of the person's right of petition or free speech; (2) if so, whether the action was in connection with a public issue. If these two threshold requirements are satisfied, the court then analyzes (3) whether the action was taken in good faith and with a reasonable basis in law and fact.

The third element of whether the action was taken in good faith and with a reasonable basis in law and fact requires an analysis of whether the defendant's statement is "lawful" (i.e. that the *plaintiff cannot prove* one or more of the required elements of defamation under Indiana law). If the defendant shows, by a preponderance of the evidence, that it satisfies those three requirements under the Anti-SLAPP law, the court must grant the motion to dismiss. Here, The Irish Rover's satisfies those three elements under Indiana's Anti-SLAPP law.

First, The Irish Rover is an independent, non-profit, student publication "devoted to preserving the Catholic identity of Notre Dame."[1] The First Amendment to the U.S. Constitution and the Indiana Constitution specifically protects both the freedom of speech and freedom of the

[1] https://irishrover.net/mission/

press. The Irish Rover published two Articles at the heart of this matter regarding Dr. Kay's public position on abortion rights and on her actions concerning the same. A university-focused newspaper's publication of articles about the public statements and actions of a professor at that university, when those statements and actions are about the highly political, public concern of abortion, is a classic example of an action in furtherance of free speech rights afforded these strong constitutional protections. Therefore, The Irish Rover meets its first obligation under Indiana's Anti-SLAPP law to show its Articles were written in furtherance of the its right of free speech.

Second, abortion rights and access is among *the* preeminent public issues of the past year.[2] Moreover, it was a decision of this nation's highest court that led directly to Dr. Kay's heightened involvement in the abortion debate, including her involvement in the events that the Articles concerned. *See Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022). Therefore, The Irish Rover meets its second obligation under Indiana's Anti-SLAPP law to show its speech was in connection with a public issue.

Finally, The Irish Rover's Articles were made in good faith and with a reasonable basis in law and fact because the Articles were "lawful" under Indiana's defamation law. That is, The Irish Rover has produced, by at least the preponderance standard applicable under Indiana's Anti-SLAPP law, evidence which shows *Dr. Kay cannot prove* the required elements of defamation. First, the Articles are at least substantially true. Second, the evidence produced also shows that

[2]Ariel Edwards-Levy, *Polling Shows That Most Voters Say Economic Concerns Are Top of Mind*, CNN, Nov. 5, 2022, https://www.cnn.com/2022/11/05/politics/voters-issues-economy-midterms-2022/index.html

The Irish Rover acted without malice—that is, without knowledge of falsity, and without reckless disregard for the truth of the Articles. Finally, The Irish Rover's statements did not contain defamatory imputation, as they reported on Dr. Kay's own scholarship and advocacy, and on her statements regarding academic freedom and encouragement to students to advocate for their own sincerely held beliefs. Therefore, The Irish Rover's Articles were made in good faith and with a reasonable basis in law and fact because the Articles were "lawful" under Indiana's defamation law.

Because The Irish Rover has shown its actions were (1) related to its constitutional right to free speech; (2) in connection to a public issue; and (3) were made in good faith and with a reasonable basis in law and fact because the Articles were "lawful" under Indiana's defamation law, this Court should grant this motion to dismiss under Indiana's Anti-SLAPP law.

Factual Background[3]

The Irish Rover

The Irish Rover is an independent, non-profit, student publication "devoted to preserving the Catholic identity of Notre Dame."[4] Three objectives guide The Irish Rover's editorial policy:

1. Defend the Faith and honorable traditions of this great university;
2. Articulate conservative principles;
3. Engage in collegial debate.

[3] The declaration of W. Joe DeReuil, the former editor-in-chief of The Irish Rover, is attached as Exhibit A.

[4] https://irishrover.net/mission/ The Irish Rover Articles of Incorporation attached as Exhibit B.

Id. Through meeting these objectives, The Irish Rover seeks to facilitate one dimension of Notre Dame's own stated mission to be "a forum where, through free inquiry and open discussion, the various lines of Catholic thought may intersect with all the forms of knowledge found in the arts, sciences, professions, and every other area of human scholarship and creativity."[5]

Dr. Tamara Kay

Dr. Kay is a Professor of Global Affairs and Sociology at Notre Dame's Keough School of Global Affairs, and she holds a joint appointment in Notre Dame's Department of Sociology.[6] Dr. Kay's research and teaching focus on labor and environmental movements, but she "also works on global health, including health systems and organizations, culture and health, and reproductive health and rights." *Id.* Her listed scholarship in the area of reproductive rights is decidedly pro-choice when it comes to the issue of abortion.

Some of her publications on the subject of abortion rights include a research article in which Dr. Kay argued what was at stake in nineteenth-century abortion politics was "Anglo-Saxon control of the state and dominance of society";[7] a newspaper commentary declaring that a ban on mifepristone (a drug used in medication abortions) was bad policy in terms of "reproductive health care";[8] a newspaper commentary stating "lies" about abortion have dictated

[5] https://www.nd.edu/about/mission/

[6] https://keough.nd.edu/people/tamara-kay/

[7] Nicola Beisel and Tamara Kay, *Abortion, Race, and Gender in Nineteenth-Century America*, Am.Soc.Rev., 69(4), 498-518 (Aug. 2004). Abstract attached as Exhibit C.

[8] Anna Calasanti, Tamara Kay and Susan Ostermann, Commentary, *Researchers: Banning abortion pill mifepristone would be a terrible policy choice and violate human rights*, Chi. Trib., Mar. 6, 2023 at 2:25pm. Ex. D

health policy (describing the "lie" that abortion kills babies);[9] an article asserting "access to health care means access to abortion";[10] and an article describing white supremacy as one of the primary motivations behind the movement to outlaw abortions in the United States and calling on "women in the U.S. [to] band together to birth a new political reality, one in which white supremacy and racism are things of the past."[11]

The Irish Rover Articles[12]

The Irish Rover published two articles about Dr. Kay that are at the heart of this matter. The first article, "Keough School Professor Offers Abortion Access to Students" was published on October 12, 2022. ("**October Article**"). Ex. H. The October Article described positions Dr. Kay took in comments to The Irish Rover, comments during a "Post-Roe America" panel Dr. Kay participated in, and a description of a sign Dr. Kay posted on her office door on campus. *Id.* As the October Article notes, all of these comments, panels, and office signs began after Indiana passed a statewide abortion ban ("**Indiana S.B.1**"). *Id.* The October Article quoted the language of the sign Dr. Kay posted on her office door: "This is a SAFE SPACE to get help and information on ALL Healthcare issues and access—confidentially with care and compassion." *Id.* The Irish Rover also noted the sign provided Dr. Kay's non-Notre Dame email (reprohealthahumanright@pm.me) and a capital letter "J" inside a circle. In addition, the October

[9]Tamara Kay and Susan Ostermann, Commentary, *Tamara Kay and Susan Ostermann: Lies about abortion have dictated health policy*, Chi. Trib., Dec. 5, 2022 at 5:00am. Ex. E

[10]Tamara Kay and Susan L. Ostermann, *Access to Health Care Means Access to Abortion: How the UK and US Compare*, Everyday Society, May 24, 2022. Ex. F.

[11]Tamara Kay and Susan L. Ostermann, *Abortion, racism and guns: How white supremacy unites the right*, Salon, Jul. 19, 2022 at 5:45am. Ex. G

[12]Collectively, the October Article and March Article will be referred to as "**Articles**."

Article included a picture of the sign on Dr. Kay's office door.

The October Article observed that the circled "J" on the office door denoted "Notre Dame professors who are willing to help access abortion." Dr. Kay's (since deleted) Twitter account was labeled "Dr. Tamara Kay - Notre Dame abortion rights expert." Ex. I. On the day Indiana S.B.1 was signed into law, Dr. Kay tweeted from this account the following: "Such a devastating day to be a woman in IN. But women faculty @NotreDame are organizing. We are here (as private citizens, not representatives of ND) to help you access healthcare when you need it, & we are prepared in every way. Look for the "J" Spread the word to students!" *Id.* The October Article also noted Dr. Kay tweeted an offer to help if someone had issues with access or cost [to abortion, in context]. Ex. H.

The October Article also mentioned Dr. Kay retweeted posts from "Abortion Finder" and "Catholics for Choice." Exs. J and K . Both Abortion Finder and Catholics for Choice provide information on how to receive reimbursement for costs for traveling out of state for abortion and how to get abortion pills by mail, and describes what the woman will have to do if her state does not legally permit such abortions.[13] *The* Catholics for Choice tweet publicized a Twitter account "@PlanCpills," which provides a guide for abortion pills by mail in all 50 States and encourages women to "Get Abortion Pills Now, Just In Case.".Ex. K. The October Article described Dr. Kay's September 16, 2022, tweet, in which she shared photos of "Need to be un-pregnant" stickers with QR codes that led to "PlanCPills.org," preceded by the text, "DM me if you want some physical stickers. A lot have been ordered. Sharing information is still legal in Indiana!" Ex. L.

[13] See abortionfinder.org; https://www.catholicsforchoice.org/

The second article about Dr. Kay, published on March 22, 2023, by The Irish Rover, was entitled, "Tamara Kay Explains Herself to Notre Dame Democrats." ("**March Article**") Ex. M. The March Article stated that Dr. Kay had "been subject to national uproar over the past few months over her support for abortion at a Catholic university, which included posting offers to procure abortion pills on her office door." *Id.* While the March Article did not include the exact language of the sign on Dr. Kay's office door, this quote from the March Article included a hyperlink to the October Article, which noted the exact language of the sign and included a picture of the same. *Id.*

The March Article went on to describe various aspects of Dr. Kay's presentation to the Notre Dame College Democrats, which took place on Tuesday, March 7, 2022. A full transcript of this meeting is attached as Exhibit N ("**College Dem. Tr.**"). Dr. Kay gave an extended response to a question from another student about her research on abortion laws that provided exceptions in the case of rape or incest. College Dem Tr. 25:15 - 29:15. After this response, a student asked Dr. Kay "How did you end up here?" *Id.* 29:16-21. In response, Dr. Kay described her work history and how she was approached by someone at Notre Dame's School of Global Affairs regarding an open position. *Id.* 30: 13-16. Dr. Kay continued describing her interview process at Notre Dame and how "the piece on abortion was front and center on [her] CV." *Id.* 31:6-7. Dr. Kay then continued her response to the student's question that no one at Notre Dame raised an issue with her work on abortion rights and supported such within the context of academic freedom. Id. 31:13-25.

The March Article described the above-referenced interaction between Dr. Kay and the student without any specific quote from the student or Dr. Kay, instead summarizing it this way:

"Another student asked how Kay—as someone who supports abortion—ended up at Notre Dame, a Catholic university that 'recognizes and upholds the sanctity of human life from conception to natural death," as stated by President Jenkins in Notre Dame's Institutional Statement Supporting the Choice for Life." March Article at 2.

The March Article also described Dr. Kay's answer to a questions about what pro-abortion students at Notre Dame could do given the fact that clubs that promote abortion and contraception are not allowed on campus. College Dem. Tr. 38:9-20 (asking a question comparing Dr. Kay's experience as an undergrad to a university that supports academic freedom but that certain things about sexual reproductive health are not allowed). The March Article quoted Dr. Kay's reply, "It's a hard thing; you have to really be fully committed to activism to really stick your neck out like I am." College Dem. Tr. 38:22-25. The March Article then stated that Dr. Kay acknowledged that not all students could be as forward in their pro-abortion activities as she is: "I can't impose that on you...but I'm doing me, and you should do you." College Dem. Tr. 39:3-4 ("And I think what I've come to is I'm doing me, and other folks can do them."). The March Article also described Dr. Kay's remarks expressing surprise that Fr. Jenkins' recent letter distanced the university from her views, but she also observed that Fr. Jenkins' letter suggested that students also have academic freedom. March Article at 2. The March Article then noted that Dr. Kay suggested to those in attendance that "if you have academic freedom, you should use it." See College Dem. Tr. 39:5-13 ("But I think – you know, I think Jenkins' – Jenkins' statement basically – I was surprised. It actually suggests that students also had academic freedom. So that was – I mean, I think that was something I was quite tickled by, and you know, so you have it. Right? I mean, I think, to me, if you don't have academic

freedom, you don't have a university. You can't call it a university.")

Summary Judgment Standard

Anti-SLAPP motions to dismiss are treated as motions for summary judgment, IC § 34-7-7-9, with the general summary judgment standard being applied, *Stabosz v. Friedman*, 199 N.E.3d 800, 808 (Ind. Ct. App. 2022), trans. denied, 208 N.E.3d 1249 (Ind. 2023) (collecting cases).

In order to prevail on a motion for summary judgment, the movant must show "there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. All factual inferences must be construed in favor of the non-moving party, and all doubts as to the existence of a material issue must be resolved against the moving party." *Burris v. Bottoms Up Scuba - Indy, LLC*, 181 N.E.3d 998, 1003–04 (Ind. Ct. App. 2021) (internal citations omitted). "A defendant in a defamation case is entitled to summary judgment if he demonstrates that the undisputed material facts negate at least one element of the plaintiff[']s claim." *Wells v. Bernitt*, 936 N.E.2d 1242, 1248 (Ind. Ct. App. 2010) (citing *Kitco v. Corp. for Gen. Trade*, 706 N.E.2d 581, 587 (Ind.Ct.App.1999)).

The Irish Rover shows below that there is no material factual issue in dispute, as supported by the evidence produced. The Irish Rover is entitled to judgment as a matter of law because the undisputed facts negate several elements of Dr. Kay's defamation claim. Therefore, this case should be dismissed under Indiana's Anti-SLAPP law.

Argument

I. Indiana's Anti-SLAPP law

"Public participation is fundamental to self-government, and thus protected by the Indiana and United States Constitutions. When citizens are faced with meritless retaliatory lawsuits designed to chill their constitutional rights of petition or free speech, also known as Strategic Lawsuits Against Public Participation (SLAPP), Indiana's anti-SLAPP statute provides a defense." *Gresk for Est. of VanWinkle v. Demetris*, 96 N.E.3d 564, 566 (Ind. 2018); *see also Pack v. Truth Publ'g Co.*, Inc., 122 N.E.3d 958, 964 (Ind. Ct. App. 2019) ("the Anti-SLAPP statutes create an affirmative defense").

This law, encoded in Ind. Code § 34-7-7-1 *et seq.*, protects a person who has been sued for "an act or omission of that person in furtherance of the person's right of petition or free speech" under the United States Constitution or Indiana Constitution "in connection with a public issue" and "taken in good faith and with a reasonable basis in law and fact," Ind. Code § 34-7-7-5. That is, the court must grant the motion to dismiss if it finds "that the person filing the motion has proven, by a preponderance of the evidence, that the act upon which the claim is based is a *lawful* act in furtherance of the person's right of petition or free speech under the Constitution of the United States or the Constitution of the State of Indiana." Ind. Code § 34-7-7-9(d). (Emphasis added). In the case of defamation, this means that the defendant must show, by at least the preponderance standard applicable under Indiana's Anti-SLAPP law, evidence which shows the *plaintiff cannot* prove the required elements of defamation.

Once an anti-SLAPP motion to dismiss is filed, discovery is stayed except as necessary to

respond to the issues raised in the motion. Ind. Code §§ 34-7-7-6, -9(a)(3). Defendants who successfully invoke the statute's defense are entitled to dismissal and reasonable attorney's fees and costs. Ind. Code § 34-7-7-7. Dismissal under the statute is in addition to other remedies provided by the law. Ind. Code § 34-7-7-10." *Id.* at 568–69.

Thus, "[u]pon receiving an anti-SLAPP motion to dismiss, the court must determine three things: (1) whether an action was in furtherance of the person's right of petition or free speech; and, (2) if so, whether the action was in connection with a public issue. If both these threshold requirements are satisfied, the court then analyzes (3) whether the action was taken in good faith and with a reasonable basis in law and fact." *Stabosz*, 199 N.E.3d at 809 (Ind. 2023) (internal citation omitted). The third element of whether the action was taken in good faith and with a reasonable basis in law and fact requires an analysis of whether the defendant's statement "lawful" under IC § 34-7-7-9(d) (i.e. that the *plaintiff cannot* prove one or more of the required elements of defamation under Indiana law). *See infra* at Part II.

Under Indiana's Anti-SLAPP law, if a defendant shows, by a preponderance of the evidence, the alleged defamatory statements were made in furtherance of the person's right of petition or free speech, in connection with a public issue, and were made in good faith and with a reasonable basis in law and fact (i.e., "lawful" under Indiana's defamation law—evidence showing the *plaintiff cannot* prove the required elements of defamation), then the court must grant a motion to dismiss under the law.

II. Indiana's defamation law

Indiana's defamation law is relevant to this Court's analysis of whether The Irish Rover's

Articles were written in good faith and with a reasonable basis in law and fact—that is, whether The Irish Rover's articles were "lawful" under IC § 34-7-7-9(d). The defamation elements required under Indiana law relevant to this action are set out here. The Irish Rover's evidence, showing that its Articles were written in good faith and with a reasonable basis in law and fact (i.e. "lawful" under Indiana's defamation law) is analyzed in Part. III.C.

A. Elements of defamation

"Defamation is that which tends to injure reputation or to diminish esteem, respect, good will, or confidence in the plaintiff, or to excite derogatory feelings or opinions about the plaintiff" *Bd. of Trustees of Purdue Univ. v. Eisenstein*, 87 N.E.3d 481, 499 (Ind. Ct. App. 2017) (citing *Miller v. Cent. Indiana Cmty. Found., Inc.*, 11 N.E.3d 944, 955–56 (Ind. Ct. App. 2014)). In order to be defamatory, a statement must be (as relevant here): (1) false; (2) made with actual malice---that is, knowing it was false or made with reckless disregard to the truth; and (3) contain a defamatory imputation. *See Bd. of Trustees of Purdue Univ.*, 87 N.E.3d at 499; *see also Love v. Rehfus*, 946 N.E.2d 1, 15 n.13 (Ind. 2011). The plaintiff suing for defamation must "set out the alleged defamatory statement in his complaint." *Bd. of Trustees of Purdue Univ.*, 87 N.E.3d at 499 "When specific statements that are alleged to be defamatory have not been sufficiently identified in a plaintiff's complaint, an award of summary judgment for the defendant is proper." *Miller*, 11 N.E.3d at 956 (citation omitted).

Additionally, whether framed as an additional element—falsehood—or an aspect of an affirmative defense of truth, "[t]he party alleging that the speech is unprotected must also prove the falsity of the speech, which requires more than minor inaccuracies and focuses upon

substantial truth. Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.'" *Love*, 946 N.E.2d at 15 n.13; *accord Doe v. Methodist Hosp.*, 690 N.E.2d 681, 687 (Ind. 1997), abrogated in part on other ground by *Cmty. Health Network, Inc. v. McKenzie*, 185 N.E.3d 368 (Ind. 2022) (treating truth as defense).

B. Public Issue Plaintiffs must prove actual malice.

If the alleged defamation concerns something public—a public matter or a public figure—the malice element is heightened. "Both a public figure and a private individual bringing a defamation action over a matter of public or general concern[14] must prove by clear and convincing evidence that the defendant made the alleged defamatory statement with 'actual malice.'" *Shine v. Loomis*, 836 N.E.2d 952, 958 (Ind. Ct. App. 2005) (citing *Journal-Gazette Co. v. Bandido's, Inc.*, 712 N.E.2d 446, 452 (Ind.1999), cert. denied, 528 U.S. 1005, 120 S.Ct. 499, 145 L.Ed.2d 385 (1999)).

Few Indiana courts have commented explicitly on the correlation between (a) the Anti-SLAPP Law's requirement of acting in good faith and with a reasonable basis in law and fact, and (b) defamation law's requirement that a Public Issue Plaintiff prove actual malice. However, *401 Public Safety v. Ray*'s comparison of the two standards is instructive. That court found that good faith is:

> a state of mind indicating honesty and lawfulness of purpose; belief in one's legal right; and a belief that one's conduct is not unconscionable. . . . Bad faith, then, appears to require, regardless of truth or falsity, a statement the speaker 'knew . . . was false or entertained serious doubts as to its truth; even if the speaker is motivated by self-interest, a statement might not be in bad faith if the speaker genuinely believed that he was being factual and also believed that it

[14]For ease of reference, Irish Rover will use the term "**Public Issue Plaintiff**" herein to refer to either type of plaintiff, and "**Public Issue Case**" to refer to the action brought thereby.

> would be best for his community to pursue the subject matter of the statement. . . . Actual malice exists when the defendant publishes a defamatory statement with knowledge that it was false or with reckless disregard of whether it was false or not.

401 Pub. Safety v. Ray, 80 N.E.3d 895, 901 (Ind. App. 2017) (cleaned up; citations omitted); *see also Stabosz*, 199 N.E.3d at 809–10. Accordingly, in a Public Issue Case, the SLAPP movant's obligation to prove that there is no material issue as to its good faith, *Id.* at 810, is concerned with the same factors as the Public Issue Plaintiff's trial obligation to prove actual malice.

In other words, the Public Issue Plaintiff must show that the defendant published the statement knowing it was false or recklessly disregarding whether it was. *Id.* In turn, proving reckless disregard requires sufficiently showing "'that the defendant in fact entertained serious doubts as to the truth of his publication,'" *id.* at 958–59 (quoting *St. Amant v. Thompson*, 390 U.S. 727 (1968)), or had a "'high degree of awareness of [the statement's] probable falsity.'" *Id.* at 959 (citation omitted). "Moreover, a speaker is not required to verify facts before speaking unless he or she has some reason to doubt the veracity of those facts." *Love*, 946 N.E.2d at 15. So the actual malice standard imposes strong protections for speech, going so far as to protect even "those negligent or careless false statements of fact that are inevitable in free debate, as is required by the Constitution." *Id.*

Accordingly, if a Public Issue Plaintiff alleges defamation, but fails to offer evidence that the allegedly defamatory statement was published with actual malice, the defendant is entitled to summary judgment. *Wells*, 936 N.E.2d at 1247–48. *401 Public Safety* makes clear that The Irish Rover must show only that there is no genuine issue as to whether it acted in good faith, 80 N.E.3d at 901; *see also Stabosz*, 199 N.E.3d at 809–10, but this is all the more clear in light of

the fact that this is a Public Issue Case.

1. The form and context of the Articles support a finding that this is a Public Issue Case, which requires proof of actual malice.

This Court may consider the speech's "form[] and context" to determine whether it addresses a matter of public concern. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985) (citation omitted).

The form of the Articles is the most public form available: publicly available on the web, with no subscription or fees required. Compl. ¶ 4 (not only subscribers, but "anyone who visits [Irish Rover's] website" can access its articles). The Articles' context is of an equally public nature: the October Article's context was Dr. Kay's speech at a September 21, 2022 panel, and the March Article's context was Dr. Kay's speech at a public March 7, 2023 meeting. Both events were advertised online, on web media available to the general public. Ex. O.

Accordingly, all factors lead plainly to the conclusion that the speech in question addressed a matter of general or public concern. *Dr. Kay has not and cannot prove* any material facts raising a genuine issue as to this conclusion.

2. Dr. Kay is a public figure, which requires proof of actual malice.

Even if this case were not about speech addressing a public concern, Dr. Kay is nonetheless, beyond cavil, a public figure. Because she is a public figure, proof of The Irish Rover's actual malice is required. *See Shine*, 836 N.E.2d at 958.

There are several varieties of public figure. *See State Farm Fire & Cas. Co. v. Radcliff*, 987 N.E.2d 121, 146 (Ind. Ct. App. 2013). Relevant here, one such category is limited-purpose public figures, that is, figures who have achieved "their status by 'thrust[ing] themselves to the

forefront of particular public controversies in order to influence the resolution of the issues involved.'" *Bandido's*, 712 N.E.2d at 454 (Ind.1999) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974)). Thus, whether a plaintiff is a limited-purpose public figure hinges on the "meaningful context," and may be determined "by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the [alleged] defamation." *Beeching v. Levee*, 764 N.E.2d 669, 677 (Ind. Ct. App. 2002) (quoting *Gertz*, 418 U.S. at 352). Put another way, "The two basic elements for this type of plaintiff are: (1) the existence of a public controversy and (2) the party's conduct in relationship to the controversy in question." *State Farm Fire & Cas. Co.*, 987 N.E.2d at 146.

Abortion rights and access is a preeminent public controversy. *Infra* Part III.B. Therefore, all that remains is to determine whether Dr. Kay's conduct in relationship to that controversy is significant—that is, whether she has placed herself at the forefront of that controversy in order to influence the resolution, *Bandido's*, 712 N.E.2d at 454.

Dr. Kay is a limited-purpose public figure for purposes of the present action. Indeed, she has all but admitted it: she has used a Twitter handle publicly describing herself as an "abortion rights expert," Ex. I, thus describing herself as a thought leader on the topic. Her actions confirm that she has placed herself at the forefront of the controversy: her 2022 work on abortion has been published in such prominent publications as the Los Angeles Times,[15] Salon,[16] and the Daily

[15]Tamara Kay, Susan L. Ostermann, and Tricia C. Bruce, *Op-ed: Pregnancy Is Risky. Losing Access to Abortion Puts Women's Lives at Stake*, LOS ANGELES TIMES (May 6, 2022), https://www.latimes.com/opinion/story/2022-05-06/supreme-court-abortion-maternal-mortality-pregnancy. Ex. P.

[16] See n. 11. Ex. G.

Beast.[17] As such, Dr. Kay has established herself as a public expert on abortion issues not only in the Notre Dame community, but across America. Because the Articles are concerned with her public comments on abortion, *see* Part III.B., *Dr. Kay has not and cannot prove* any material facts raising a genuine issue as to this conclusion.

Accordingly, there is no material issue that Dr. Kay is a public figure for purposes of this action. So there is no material dispute that this is a Public Issue Case.

Thus, although Indiana courts have indicated that the good faith standard required by the Anti-SLAPP law requires a showing that there is no material factual issue as to whether Irish Rover harbored doubts as to the veracity of the Articles, this is all the more clear since this is a Public Issue Case. Because the form and content of the Articles support a finding that this is a Public Issue Case and Dr. Kay is a public figure, proof that The Irish Rover acted with actual malice is required under Indiana law.

When an action is a Public Issue case, a statement, in order to be defamatory must be (as relevant here): (1) false; (2) made with actual malice---that is, knowing it was false or made with reckless disregard to the truth; and (3) contain a defamatory imputation. *See Bd. of Trustees of Purdue Univ.*, 87 N.E.3d at 499; *see also Love*, 946 N.E.2d at 15 n.13. A failure to prove any of these elements is fatal to a defamation claim and the speech will be considered made in good faith and with a reasonable basis in law and fact—that is "lawful" under the third prong of Indiana's Anti-SLAPP law.

The Irish Rover now turns to the factual analysis of the three prongs of the Anti-SLAPP

[17]Susan L. Ostermann and Tamara Kay, *Want to Lower Abortion Rates? Look to Canada's Example*, DAILY BEAST (Sept. 1, 2022), https://www.thedailybeast.com/want-to-lower-abortion-rates-look-to-canadas-example. Ex. Q.

statute. That is, (1) whether the Articles were written in furtherance of The Irish Rover right of free speech; (2) if so, whether the Articles were in connection with a public issue; and (3) whether the Articles were written in good faith and with a reasonable basis in law and fact—that is, whether they were "lawful" under Ind. Code § 34-7-7-9(d).

III. The Irish Rover's Articles qualify for a motion to dismiss under Indiana's Anti-SLAPP statute.

A. The Irish Rover's Articles were in furtherance of its constitutional right of free speech.

The First Amendment to the U.S. Constitution specifically protects both the freedom of speech and freedom of the press. The Indiana Constitution "protects freedom of speech guarantees" even "more jealously," and "[t]he newsroom is a place where free speech has been particularly protected." *In re Indiana Newspapers Inc.*, 963 N.E.2d 534, 553 (Ind. Ct. App. 2012) (citations and internal quotation marks omitted). There can be no debate that the Irish Rover's news articles (including the Articles), which are publicly accessible "by anyone who visits its website," Compl. ¶ 4, are in furtherance of its constitutional right of free speech.

Not only this, but "popular comment on public concerns," in particular, "should not be restrained." *Price v. State*, 622 N.E.2d 954, 961 (Ind. 1993). The free speech guarantees of Indiana's Constitution "enshrine pure political speech," (as opposed, for example, to speech intertwined with non-speech action) "as a core value." *Id.* at 963, 963 n.13.

A university-focused newspaper's publication of articles about the public statements and actions of a professor at that university, when those statements and actions are about the highly political, public concern of abortion, is a classic example of an action in furtherance of free

speech rights afforded these strong protections. Therefore, The Irish Rover meets its first obligation under Indiana's Anti-SLAPP law to show in furtherance of the person's right of petition or free speech.

B. The Articles were in connection to the public issue of abortion rights and access.

Abortion rights and access is among *the* preeminent public issues of the past year.[18] ("In CNN's September/October [2022] poll, nearly three-quarters (72%) of registered voters called abortion at least very important to their vote, with 52% calling it extremely important. . . . And in CNN's latest poll, 15% of likely voters called abortion their top issue, placing it second [among voters' concerns]."") Moreover, it was a decision of this nation's highest court that led directly to Dr. Kay's heightened involvement in the abortion debate, including her involvement in the events that the Articles concerned. *See Dobbs*, 142 S. Ct. 2228.

A brief consideration of the Articles dispels any possible doubt that they concern abortion as a public issue. For example, the very first words of the October 12 Article are, in a caption above the main text, "Abortion assistance offered to students *despite IN law* . . . ," and the very first words of the main text—quoting Dr. Kay, importantly—are, "For me, abortion is a policy issue." October Article at 1, Ex. H. The October Article describes how Dr. Kay's actions stem directly from state action: she used a September 21 panel (entitled "Post-*Roe* America") "to explain why she thought abortion bans are ineffective and immoral . . . . Her initiatives began after Indiana S.B.1—a law that banned abortion statewide—took effect September 15, 2022. *Id.* She has continued since the law was suspended via injunction by a state judge while litigation

[18]Ariel Edwards-Levy, *Polling Shows That Most Voters Say Economic Concerns Are Top of Mind*, CNN, Nov. 5, 2022, https://www.cnn.com/2022/11/05/politics/voters-issues-economy-midterms-2022/index.html

takes place." *Id.* The remainder of the article is rife with the terminology of public, political concern: "Dr. Tamara Kay — Notre Dame abortion rights expert" (quoting Dr. Kay), "Sharing information is still legal in Indiana!" (same), "right to abortion" (quoting panel speaker), "abortion bans" (quoting Dr. Kay), "these policies" (same), "Dr. Tamara Kay — Abortion Rights & Policy Scholar" (same), *id.* at 2; "reproductive health, rights, and justice" (same), "World Health Organization policy" (same), *id.* at 3. So this article and the words and actions of Dr. Kay described therein are of an overtly public, political nature.

The same is true of the March Article, whose sole focus is an event hosted by a political group, "College Democrats," who invited Kay to discuss "her activism around abortion rights post-Dobbs [sic][.]" March Article at 1, Ex. M. Like the October Article, the March Article is saturated with the language of the political, often demonstrated by Dr. Kay's own quoted language: "Kay first spoke about how she became involved in 'women's rights issues,'" (internal quote from Dr. Kay), "reproductive rights" (quoting Dr. Kay), *id.*; "[With] the crisis that *Dobbs* has been for me personally . . . I felt compelled to turn back to that work [on abortion]" (same) (alterations in original), "I know what happens when abortion is banned[,]" (same), *id.* at 2; "[Dr. Kay's] op-ed arguing against restrictions on the abortion pill," *id.* at 3. So this article and the words and actions of Dr. Kay described therein are of an overtly public, political nature.

Therefore, The Irish Rover meets its second obligation under Indiana's Anti-SLAPP law to show its speech was in connection with a public issue.

C. The Irish Rover's Articles were written in good faith and with a reasonable basis in law and fact and were "lawful" under Indiana law.

The Irish Rover's Articles were written "in good faith and with a reasonable basis in law

and fact." *Stabosz*, 199 N.E.3d at 809. The Irish Rover's evidence, presented herein, show, by at least a preponderance of the evidence, that the Articles were (1) at least substantially true; (2) The Irish Rover did not act with malice—that is, it did not know the Articles were false and did not act with a reckless disregard for the truth; and (3) did not contain defamatory imputation. Therefore, The Irish Rover's has met its burden to show the Articles were "lawful" under IC § 34-7-7-9(d). That is, The Irish Rover has produced, by at least the preponderance standard applicable under Indiana's Anti-SLAPP law, evidence which shows *Dr. Kay cannot prove* the required elements of defamation.

1. The October Article was written with a reasonable basis in law and fact and were "lawful" under Indiana law.

Dr. Kay first alleges that *something* in the October Article was defamatory. Notably, aside from the title of the article, she does not reference a single quotation from the article, or even describe its content, nor does she claim the title of the October Article is what she complains of. Compl. ¶ 5, "A plaintiff who sues for defamation must set out the alleged defamatory statement in his complaint." *Bd. of Trustees of Purdue Univ.*, 87 N.E.3d at 499. Accordingly, this Court may find for this reason alone that Dr. Kay has not stated a claim arising from the October Article.

But even if the Complaint is liberally construed to allege that the October Article's title—the only part of that article referenced in any detail—is defamatory, Dr. Kay nonetheless fails to allege, and cannot allege, anything giving rise to a genuine issue of material fact. The elements of defamation are sorely lacking here, so Irish Rover is entitled to judgment as a matter of law.

a. The October Article was true.

Defamation cannot lie where the statement complained of is true. *Love*, 946 N.E.2d at 15. Both the title—"Keough School Professor Offers Abortion Access to Students," October Article at 1, Exhibit H,—and all contents of the October article are true, not only substantially, but literally.

I. The headline was actually true.

Dr. Kay admits that the sign on her door offered "help . . . on all healthcare . . . access . . . ." Compl. ¶ 9. There can be no dispute that the "healthcare" referenced here was centered on abortion. Dr. Kay co-authored an article asserting "access to health care means access to abortion" *See supra*, n. 7. She posted the sign the same day that Indiana's abortion ban (Indiana S.B.1) went into effect and, in connection with this poster, describes faculty thinking, "We're going to have pregnant students . . . . What are we allowed to tell them? What are we allowed to do?"[19] Dr. Kay's (since deleted) Twitter account was labeled "Dr. Tamara Kay - Notre Dame abortion rights expert." Ex. I. On the day Indiana S.B.1 was signed into law, Dr. Kay tweeted from this account the following: "Such a devastating day to be a woman in IN. But women faculty @NotreDame are organizing. We are here (as private citizens, not representatives of ND) to help you access healthcare when you need it, & we are prepared in every way. Look for the "J" Spread the word to students!" The "J" was, of course, part of the poster on her door—tellingly, a detail the Complaint omits. Ex. I; *see generally* Compl.

[19] Andrea González-Ramírez, *The Holy War Against One Pro-Abortion-Rights Professor*, The Cut (Apr. 3, 2023), https://www.thecut.com/2023/04/tamara-kay-notre-dame-abortion-rights.html (last accessed July 7, 2023).

Dr. Kay did not become concerned that following the Dobbs decision and the passage of Indiana S.B.1 that Notre Dame students would not be able to access strep tests or be unable to pick up bandages from Walgreens. Even if Dr. Kay contemplated students needed help accessing other types of healthcare, the fact remains that within the context of Dr. Kay's scope of work on abortion rights, she *also* contemplated students might need help accessing abortions.

Thus, there can be no dispute that the "healthcare" referenced by the poster not only included, but was primary focused on, abortion. Dr. Kay's own words on Twitter stated that the "J" indicated those willing to help students "access healthcare when you need it, & we are prepared in every way." "Every way" in the context of Dr. Kay's own statements would necessarily include helping students access abortions. The most that could be complained of regarding Irish Rover's headline, then, is the difference between offering "help. . . on healthcare. . . access" and offering "healthcare. . . access."

Such a quibble, however, would be unavailing. "[T]he meaning of an allegedly libelous statement is to be determined by the plain and ordinary meaning . . . ." *Heeb v. Smith*, 613 N.E.2d 416, 421 (Ind. Ct. App. 1993) (citing *Simonson v. United Press International, Inc.*, 654 F.2d 478, 482 (7th Cir.1981)). If Jane helps John get to the hospital by driving him there, she has given him access to the hospital. If John helps Jane pay for medication, he has given her access to that medication. And if Dr. Kay offers to help students access abortion, she is offering them access to it.

The dictionary confirms this. "Access" is defined as "freedom or ability to obtain . . . something."[20] "Help" is defined: "to give assistance or support to (someone): to

[20] *Access*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.

provide (someone) with something that is useful or necessary in achieving an end."[21] Putting these definitions together, we see that to offer "help. . . on healthcare. . . access" is to offer to provide something that is necessary in achieving the ability to obtain healthcare. The difference between "providing that which is necessary to obtain healthcare" and "providing the ability to obtain healthcare" it is nothing more than the difference between a "square" and a "quadrilateral with equal sides and equal angles." In either case, the substance of the claim is that Dr. Kay offered to help students obtain abortion access. The title omits the word "help," but what else could the title mean? No rational reader would presume that the title actually means Dr. Kay offered to allow students to lay down on her office desk and receive an abortion operation directly from Dr. Kay. Offering "help"—not directly offering abortions—is implicit in any common sense reading of the headline.

Under Indiana defamation law, falsity "requires more than minor inaccuracies . . . '[which] do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified,'" *Love*, 946 N.E.2d at 15 (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991)) (nested quotation marks omitted). The infinitesimal difference in the shades of meaning between the headline in the October Article and the Complaint's reference to the same cannot establish falsehood. Indeed, the headline is actually true.

ii. The headline was substantially true.

And, *arguendo*, even if the headline were not literally true, it would be substantially true.

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com/dictionary/access (last visited July 6, 2023).

[21] *Help*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/help (last visited July 6, 2023)

The sting and gist of claiming Dr. Kay offered abortion access, and offered to help students obtain abortion access, is the same. *See Bandido's*, 712 N.E.2d at 461 (considering the similarity between the"sting" of an inaccurate newspaper headline referring to a restaurant having "rats" and the "gist of the truth" that only "rodent" droppings were found at the restaurant; finding headline to be substantially true because any technical differences between "rats" and "rodents"—and their presence and the presence of their dropping—would create the same reaction in readers, even though "the word 'rat' conjures up more bad connotations than 'rodents' . . . .").

An allegedly defamatory statement must "be viewed in context and given its plain and natural meaning." *Gatto v. St. Richard Sch., Inc.*, 774 N.E.2d 914, 923 (Ind. Ct. App. 2002). As noted, no rationale reader would believe the October Article's headline indicated Dr. Kay would perform abortions or prescribe medication herself. The plain and natural meaning of the headline implies that she would offer access by helping students obtain access. And the *context* of the article makes this more than clear: it pictured the door sign, with its offer of "help," and uses the word "help" no less than six times, many of those quoting Dr. Kay, in describing Dr. Kay's efforts. The context could not be *more* clear about the fact that Dr. Kay was—as she has admitted, Compl. ¶ 9—offering help for abortion access.

Regarding this context rule, as specifically relating to headlines, "[t]he majority of jurisdictions hold that a headline cannot be severed from the body of the article when undertaking defamation analysis; the entire body of the article serves as the context for the headline and must be considered in determining whether a headline has a defamatory meaning."

Hogan v. Winder, 762 F.3d 1096, 1108 (10th Cir. 2014).

Accordingly, whether considered simply on the face of its plain meaning or in context (as both Indiana and the majority of jurisdictions require), there is no rationale construction in which the complained-of headline is less than true.

b. The Irish Rover did not publish the October Article with malice.

The "actual malice" standard, and why it is applicable here, has been explained *supra* Part II.B (generally, the plaintiff must show the defendant made the statement knowing its falsity or with reckless disregard as to its veracity). The October Article, including its headline, was actually true and, even if the headline's meaning is stretched to something beyond its plain meaning, still substantially true, with a context that makes its statements no different that what is admitted in the complaint. *See supra* Part III.C.1.a..This being the case, *Dr. Kay cannot produce* any evidence that The Irish Rover had any doubts as to the veracity of its claims. Thus, there can be no disputed issue of material fact regarding actual malice.

This is a Public Issue Case, but even if it were not, any inference of malice would be overcome by the same facts and principles adduced above, viz., Dr. Kay's own actions—her online comments, involvement in abortion advocacy, and the sign on her door—demonstrate conclusively that any reasonable observer would have concluded that the door-sign constituted an offer of abortion access, consistent with the plain, natural meaning of those words and the meaning reflected in the dictionary.

c. The October Article did not contain statements with defamatory imputation.

Dr. Kay is an advocate for abortion rights. Much of her professional life has been spent

researching and advocating for the same. It strains credulity to imagine how reporting on Dr. Kay's public offers to help students obtain information and access to "healthcare" (which, in context, at least includes abortion) could be considered defamatory imputation. How can Dr. Kay claim that publishing her willingness to help students obtain abortion pills, even if false (which it wasn't), is defamatory if she is in fact a supporter of those rights and willing to do this?

Dr. Kay's defamation claim regarding the October Article fails as a matter of law for at least three reasons. First, the October Article is true, both literally and substantially. Second, The Irish Rover published the October Article without malice, that is, without any knowledge of its falsity and without a reckless disregard for truth. Finally, the October Article did not contain any statements with a defamatory imputation as it accurately reported Dr. Kay's own position on abortion rights, which is well documented by articles and research authored by Dr. Kay. Because the evidence The Irish Rover has provided shows that no material fact is in dispute regarding these required elements of defamation, the defamation claim pertaining to the October Article must be dismissed under Indiana's Anti-SLAPP law.

2. The March Article was written with a reasonable basis in law and fact and were "lawful" under Indiana law.

The complaint alleges four statements from the March Article are defamatory:

> 1. The statement that Dr. Kay was "posting offers to procure abortion pills on her office door";
>
> 2. The statement that at the meeting of College Democrats, "Another student asked how Kay—as someone who supports abortion—ended up at Notre Dame, a Catholic university that 'recognizes and upholds the sanctity of human life from conception to natural death,' as stated by President Jenkins in Notre Dame's Institutional Statement Supporting the Choice for Life" Compl., ¶ 10;
>
> 3. The statement that Dr. Kay asserted, at the meeting of College Democrats that "if you have academic freedom, you should use it" *Id.*; and

4. The statement that "she acknowledges that not all students in the crowd could be as forward in their pro-abortion activities as she is: 'I can't impose that on you . . . but I'm doing me, and you should do you.'" *Id.*

a. The March Article was substantially true.

Defamation cannot lie where the statement complained of is true. *Love*, 946 N.E.2d at 15. Under Indiana defamation law, falsity "requires more than minor inaccuracies . . . '[which] do not amount to falsity so long as the substance, the gist, the sting, of the libelous charge be justified,'" *Id.*

I. The March Article was substantially true regarding Dr. Kay's office door poster.

The March Article stated that Dr. Kay had "been subject to national uproar over the past few months over her support for abortion at a Catholic university, which included posting offers to procure abortion pills on her office door." *Id.* While the March Article did not include the exact language of the sign on Dr. Kay's office door, this quote from the March Article included a hyperlink to the October Article, which noted the exact language of the sign and included a picture of the same. *Id.*

As provided *supra*, the evidence shows there can be no dispute that the "healthcare" referenced by the poster not only included, but was primary focused on, abortion. Dr. Kay's own words on Twitter stated that the "J" on the poster indicated those willing to help students "access healthcare when you need it, & we are prepared in every way." "Every way" in the context of Dr. Kay's own statements would necessarily include helping students access abortion pills, which Dr. Kay has consistently and publicly advocated for in newspapers across the country. *See* n. 8, Ex. D.

Dr. Kay re-tweeted posts from "Abortion Finder" and "Catholics for Choice." Exs. J, K. Both Abortion Finder and Catholics for Choice provide information on how to receive reimbursement for costs for traveling out of state for abortion and how to get abortion pills by mail, and describes what the woman will have to do if her state does not legally permit such abortions. The Catholics for Choice tweet publicized a Twitter account "@PlanCpills," which provides a guide for abortion pills by mail in all 50 States and encourages women to "Get Abortion Pills Now, Just In Case.". Ex. K. On September 16, 2022, Dr. Kay re-tweeted shared photos of "Need to be un-pregnant" stickers with QR codes that led to "PlanCPills.org," preceded by the text, "DM me if you want some physical stickers. A lot have been ordered. Sharing information is still legal in Indiana!" Ex. L.

The evidence provided by The Irish Rover, including the full language of the sign on Dr. Kay's office door with the letter "J," in context with Dr. Kay's own social media posts, shows that Dr. Kay was offering help for students to access "healthcare," in "every way." The evidence shows that "healthcare" in this context at least included abortion and "every way" at least included abortion pills, as both were publicly and repeatedly supported by Dr. Kay.

ii. The March Article was substantially true regarding Dr. Kay's statements at the meeting of College Democrats.

Dr. Kay's complaint alleges that:

> Another student asked how Kay—as someone who supports abortion—ended up at Notre Dame, a Catholic university that [']recognized and upholds the sanctity of human life from conception to natural death.['] That question was never asked and a recording of the comments by Dr. Kay conclusively establishes such an exchange never occurred.

Compl., ¶ 10. Dr. Kay's allegation is demonstrably false, and The Irish Rover's reporting of the

meeting is demonstrably true, as supported by the evidence produced by The Irish Rover.

Dr. Kay spoke to the Notre Dame College Democrats on Tuesday, March 7, 2022. Dr. Kay gave an extended response to a question from another student about her research on abortion laws that provided exceptions in the case of rape or incest. College Dem Tr. 25:15 - 29:15. After this response, a student asked Dr. Kay "How did you end up here?" *Id.* 29:16-21. In response, Dr. Kay described her work history and how she was approached by someone at Notre Dame's School of Global Affairs regarding an open position. *Id.* 30: 13-16. Dr. Kay continued describing her interview process at Notre Dame and how "the piece on abortion was front and center on [her] CV." *Id.* 31:6-7. Dr. Kay then continues her response to the student's question that no one at Notre Dame raised an issue with her work on abortion rights, and supported such within the context of academic freedom. Id. 31:13-25.

The March Article described the above-referenced interaction between Dr. Kay and the student without any specific quote from the student or Dr. Kay, instead summarizing it this way: "Another student asked how Kay—as someone who supports abortion—ended up at Notre Dame, a Catholic university that ['] recognizes and upholds the sanctity of human life from conception to natural death,['] as stated by President Jenkins in Notre Dame's Institutional Statement Supporting the Choice for Life." March Article at 2. The Complaint is misleading in its inaccurate placement of quotation marks. The March Article accurately summarizes a question from a student about how Dr. Kay ended up in Notre Dame (i.e., "here") and Dr. Kay's response shows that she understood the student to be asking that question within the context of Notre Dame's position as it relates to the sanctity of human life, given Dr. Kay's work on

abortion rights.

The Complaint also alleges that, at this same meeting with College Democrats, Dr. Kay never said (1) "if you have that academic freedom, you should use it"; and (2) "I can't impose that on you...but I'm doing me, and you should do you." Compl., ¶ 10. Again, the evidence shows that The Irish Rover's reporting on Dr. Kay's statements is substantially, if not literally, true.

In the meeting, Dr. Kay was asked,

> So based on one of your stories, you were really active when you were an undergrad student, and you don't have to answer this; but if you were in our positions during this time when you were an undergrad student, especially at a university that said, "We have academic freedom for the students as well," but there's that (INAUDIBLE) about sexual reproductive health are not allowed (INAUDIBLE) – certain things we talk about, how would you suggest students to have these conversations about this topic?

College Dem. Tr. 38:9- 20.

She responded with,

> Well, I mean, you know, this is a hard thing is that, you know, you have to really be fully committed to activism to be able to stick your neck out like I am – (CHUCKLES) – right? – because I can't impose that or say you should do it. You know, you have to do what you have to do. And I think what I've come to is I'm doing me, and other folks can do them.
>
> But I think – you know, I think Jenkins' – Jenkins' statement basically – I was surprised. It actually suggests that students also had academic freedom. So that was – I mean, I think that was something I was quite tickled by, and you know, so you have it. Right? I mean, I think, to me, if you don't have academic freedom, you don't have a university. You can't call it a university.

College Dem. Tr. 38:22 - 39:13.

The March Article stated "Kay also remarked that she was surprised that Fr. Jenkins' recent letter distancing the university from her views, [']suggested that students also have

academic freedom.[']" March Article at 2. The March Article then noted that Dr. Kay suggested to those in attendance that "if you have academic freedom, you should use it." As Dr. Kay's response to the question above shows, she literally said she "was surprised" that Fr. Jenkins suggested that the students have academic freedom. College Dem. Tr. 39:6-8. As the rest of her answer makes clear, Dr. Kay did say she was "tickled" by this statement and emphasized to the students that they have "it" (i.e. academic freedom) and without it, you don't have a university. Again, the March Article stated that Dr. Kay *suggested* to the audience that if they have academic freedom, they should use it. Within context, the evidence shows that Dr. Kay did, in fact, suggest to the audience they should use the academic freedom Fr. Jenkins referenced—after all, why else would she declare that without academic freedom, "you don't have a university"?

The March Article quoted Dr. Kay's response as including the phrase, "I can't impose that on you ... but I'm doing me, and you should do you." These words are substantially indistinguishable from Dr. Kay's response in the transcript of the meeting, "because *I can't impose that* or say you should do it. You know, you have to do what you have to do. And I think what I've come to is *I'm doing me, and other folks can do them*." College Dem. Tr. 39:1 - 4 (emphasis added).

The Irish Rover's reporting on this exchange is thus, substantially true. Therefore, was made in good faith and with a reasonable basis in law and fact.

b. The Irish Rover did not publish the March Article with malice.

The "actual malice" standard, and why it is applicable here, has been explained *supra* Part II.B. (generally, the plaintiff must show the defendant made the statement knowing its falsity

or with reckless disregard as to its veracity). The Irish Rover has produced, by a preponderance of the evidence, proof that shows the March Article was substantially true. *See supra* Part III.C.2.a. This being the case, *Dr. Kay cannot produce* any evidence that The Irish Rover had any doubts as to the veracity of its claims. Thus, there can be no disputed issue of material fact regarding actual malice.

This is a Public Issue Case, but even if it were not, any inference of malice would be overcome by the same facts and principles adduced above, viz., Dr. Kay's own actions—her online comments, involvement in abortion advocacy, and the sign on her door—demonstrate conclusively that any reasonable observer would have concluded that the door-sign constituted an offer of abortion access, including abortion pills. Likewise, any inference of malice in relation to Dr. Kay's comments to the meeting of College Democrats is overcome by the evidentiary record—namely, a transcript of the meeting.

c. The March Article did not contain statements with defamatory imputation.

Dr. Kay is an advocate for abortion rights. Much of her professional life has been spent researching and advocating for the same. It strains credulity to imagine how reporting on Dr. Kay's public offers to help students obtain information and access to "healthcare" (which, in context, at least includes abortion) could be considered defamatory imputation. How can Dr. Kay claim that publishing her willingness to help students obtain abortion pills, even if false (which it wasn't), is defamatory if she is in fact a supporter of those rights and willing to do this? How can comments (even if false) regarding how a tenured professor came to work for Notre Dame, despite the fact that she has devoted a significant amount of her professional career to abortion

rights advocacy contain defamatory imputation? Likewise, how can comments by this tenured professor about the university's statement supporting academic freedom and her encouragement to college students to exercise that freedom by advocating for their sincerely held beliefs contain defamatory imputation? In short, they can't, and the evidentiary record demonstrates this lack of defamatory imputation.

Dr. Kay's defamation claim regarding the March Article fails as a matter of law for at least three reasons. First, the March Article is at least substantially true. Second, The Irish Rover published the March Article without malice, that is, without any knowledge of its falsity and without a reckless disregard for truth. Finally, the March Article did not contain any statements with a defamatory imputation as it accurately reported on Dr. Kay's office poster and her comments to College Democrats, supported by her own position on abortion rights, which is well documented by articles and research authored by Dr. Kay. Because the evidence The Irish Rover has provided shows that no material fact is in dispute regarding these required elements of defamation, the defamation claim pertaining to the March Article must be dismissed under Indiana's Anti-SLAPP law.

Conclusion

Because The Irish Rover has shown its actions were (1) related to its constitutional right to free speech; (2) in connection to a public issue; and (3) were made in good faith and with a reasonable basis in law and fact because the Articles were "lawful" under Indiana's defamation law, this Court should grant this motion to dismiss under Indiana's Anti-SLAPP law.

Dated: July 12, 2023

Respectfully submitted,

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Certificate of Filing and Service

I certify that on July 12, 2023, the foregoing document and all attachments thereto were filed using the Indiana E-filing System. I also hereby certify that on July 12, 2023, the foregoing action served the foregoing document on the following via IEFS:

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