

STATE OF INDIANA)	ST. JOSEPH SUPERIOR COURT NO. 4
)SS:	CIVIL DIVISION
COUNTY OF ST. JOSEPH)	CAUSE NO: 71D04-2305-CT-00264
TAMARA KAY,)	
)	
Plaintiff,)	
)	
v.)	
)	
THE IRISH ROVER INC.,)	
)	
Defendant.)	

PLAINTIFF’S RESPONSE IN OPPOSITION TO
DEFENDANT’S MOTION TO DISMISS

I. INTRODUCTION

Plaintiff Tamara Kay (“Professor Kay”) is a tenured professor at the University of Notre Dame (“Notre Dame” or the “University”). Defendant, the Irish Rover, Inc. (“Irish Rover”), is a student newspaper at Notre Dame charged with defending the Catholic character of Notre Dame. On October 12, 2022, the Irish Rover published an article regarding Professor Kay and stated, in a number of variations, that she was providing abortion services for Notre Dame students. The statements in the October 12, 2022, article are false and defamatory. In fact, the October 12, 2022, article was the result of a concerted effort of Notre Dame faculty, staff, students and even an alumni group, all with one agenda in mind– to get rid of Professor Kay. Following the publication of the October 12, 2022, article, Professor Kay received harassing emails and letters, death threats and rape threats from a variety of individuals, including Notre Dame alumni. On March 22, 2023, the Irish Rover published a second article on Professor Kay and stated that she posted offers to procure abortion pills on her office door. This statement is false and defamatory per se.

On May 22, 2023, Professor Kay filed a defamation complaint (the “Complaint”) against the Irish Rover as a result of the false and defamatory statements made in the October 12, 2022,

and March 22, 2023, articles. On July 12, 2023, the Irish Rover filed a Motion to Dismiss Professor Kay's Complaint pursuant to Indiana's anti-SLAPP statute (the "Motion"). The Irish Rover argues that Professor Kay's Complaint should be dismissed because its statements in the October 12, 2022, and March 22, 2023, articles were in furtherance of its right of free speech, in connection with a public issue and made in good faith and with a reasonable basis in law and fact.

Professor Kay now files her Response in opposition to the Irish Rover's Motion (the "Response") and, as set forth fully below, will show that: 1) the Irish Rover published the October 12, 2022, and March 22, 2023, articles not in furtherance of the right to free speech, but instead to advance the personal agendas of a number of Notre Dame faculty, staff, students, and an alumni group; 2) the October 12, 2022, and March 22, 2023, articles were not in connection with a public issue, but instead were aimed directly at Professor Kay; and 3) the statements in the October 12, 2022, and March 22, 2023 articles were not made in good faith and with a reasonable basis in law and fact. Accordingly, the Irish Rover's Motion should be denied.

II. STATEMENT OF FACTS

Notre Dame, The Irish Rover and the Sycamore Trust

Notre Dame is a private University located in South Bend, Indiana. (*See* Declaration of Professor Tamara Kay attached hereto as Exhibit 1, ¶ 3).¹ Notre Dame has media policies that apply to news media personnel and journalists. (*See* Declaration of Kimberly D. Jeselskis attached hereto as Exhibit 2, ¶ 7, Att. C).² Pursuant to the policies, Notre Dame expects journalists "to conduct themselves in accord with the code of ethics of the Society of Professional Journalists."

¹ Subsequent references to the Kay Declaration will be designated by her last name with reference to the paragraph and/or Attachments as follows: Kay Dec. ¶ __ Att. _____. The Kay Declaration and Attachments are included in Plaintiff's Designation of Evidence.

² Subsequent references to the Jeselskis Declaration will be designated by her last name with reference to the paragraph and/or Attachments as follows: Jeselskis Dec. ¶ __ Att. _____. The Jeselskis Declaration and Attachments are included in Plaintiff's Designation of Evidence.

(*Id.*). The code of ethics of the Society of Professional Journalists (the “Society”) is linked to Notre Dame’s medial policies. (*Id.*). The Society declares the following four (4) principles as the foundation of ethical journalism: 1) Seek Truth and Report It; 2) Minimize Harm; 3) Act Independently; and 4) Be Accountable and Transparent. (*Id.*). Notre Dame’s media policies also state:

Students, faculty and staff may, without permission, shoot video and still photos on campus for academic purposes. The resulting videos and photographs may not be used or distributed for commercial, marketing or promotional purposes.

(*Id.*)

The Irish Rover is a student newspaper on the campus of Notre Dame that is run by Notre Dame students. (*See* Deposition of Luke Thompson attached hereto as Exhibit 3, 9:11-13; *see* Deposition of William Joseph DeReuil attached hereto as Exhibit 4, 11:25).³ The mission of the Irish Rover is to articulate and defend the Catholic character of the University. (Thompson Dep. 9:13-15; DeReuil Dep. 11:21-25). The Irish Rover board of directors is made up of former Irish Rover editors who graduated from Notre Dame. (DeReuil Dep. 18:19-24; 19:1-4). The students involved with the Irish Rover meet on the Notre Dame campus at the Center for Ethics and Culture. (Thompson Dep. 19:23-25; 20:1-4).

The Irish Rover also has several Notre Dame faculty advisors. (DeReuil Dep. 11:24; 12:1-2; 30:4-13, Ex. 7). Faculty advisors include Professor Vincent Phillip Munoz, Professor Daniel Philpott, and Professor Walter Nicgorski. (DeReuil Dep. Ex. 7). The Irish Rover editing staff meets with the faculty advisors each fall and then during the year when faculty advisors give the Irish Rover topics for articles. (DeReuil Dep. 15:14-19; 16:7-25; 17:1-7; 39:8-11).

³ Subsequent references to deposition testimony will be designated by the deponent’s last name with reference to the page(s)/line(s) and/or deposition exhibit number as follows: Thompson Dep. __:__, Ex. __. All deposition excerpts and deposition exhibits are included in Plaintiff’s Designation of Evidence.

During the 2022 – 2023 academic year, William Joseph DeReuil (“DeReuil”), was the Editor-in-Chief for the Irish Rover. (DeReuil Dep. 17:17-22).⁴ The prior Editor-in-Chief, Mary Frances Myler (“Myler”), appointed DeReuil for the role. (DeReuil Dep. 17:24-25; 18:1-8). After being appointed, DeReuil attended a Zoom call with the Irish Rover board of directors, but does not know all of their names. (DeReuil Dep. 18:13-25). In his role as Editor-in-Chief, DeReuil was also considered to be a board member for that year, but he does not recall having any formal communications with the other board members until this legal action arose. (DeReuil Dep. 19:5-8; 20:1-11). In addition, DeReuil has never read the Irish Rover By-Laws. (DeReuil Dep. 27:11-25; 28:1-9, Ex. 6).

The Irish Rover has a Style Guide that does not address a code of ethics for journalists, but touches on the use of appropriate grammar, style and punctuation in writing articles. (Thompson Dep. 18:6-18; Jeselskis Dec. ¶ 6, Att. B). Luke Thompson (“Thompson”), a senior at Notre Dame, currently serving as the campus editor for the Irish Rover, is not sure whether he is required to verify the information in an article that he writes. (Thompson Dep. 8:13-18; 19:11-14).⁵ DeReuil has never seen Notre Dame’s media policies. (DeReuil Dep. 38:14-24, Ex. 9).

The Sycamore Trust (“Sycamore Trust”) is a Notre Dame alumni association that was founded by Bill Dempsey (“Dempsey”). (DeReuil Dep. 79:3-7). DeReuil has met Dempsey in person and spoken to him on the phone. (DeReuil Dep. 79:1-2). Dempsey frequently promotes Irish Rover articles, so when DeReuil was the Editor-in-Chief he was in contact with Dempsey fairly often. (DeReuil Dep. 79:15-22).

⁴ DeReuil, now a senior at Notre Dame, has been involved with the Irish Rover since the fall of 2020 when he started writing articles. (DeReuil Dep. 11:6-9; 12:5-14).

⁵ Thompson first became involved with the Irish Rover in the fall of 2021 when he was a staff writer. (Thompson Dep. 9:23-25; 10:1-12). During the 2022-2023 school year, Thompson was the politics editor for the Irish Rover. (Thompson Dep. 11:4-10).

Professor Tamara Kay

Professor Tamara Kay (“Professor Kay”) has been employed with Notre Dame since July 1, 2016. (Kay Dec. ¶ 2). Notre Dame hired Professor Kay for the position of tenured associate professor in the Keough School of Global Affairs and the Sociology Department. (Kay Dec. ¶ 4). Professor Kay’s primary appointment is in the Keough School, where policy work is required and relevant, and counts towards tenure, promotion, and merit pay. (Kay Dec. ¶ 5). On May 17, 2021, Notre Dame promoted Professor Kay to full professor. (Kay Dec. ¶ 6).

Professor Kay’s research and teaching focuses on trade, labor, social movements, globalization, organizations, and global health which includes reproductive health and rights. (Kay Dec. ¶ 8, Att. A). When Notre Dame hired Professor Kay, the University was well aware of her research and policy experience on abortion rights. (Kay Dec. ¶ 9). In addition to her research and teaching, during her tenure at Notre Dame, Professor Kay has also been appointed to and participated in a number of committees. (Kay Dec. ¶ 10). For instance, from 2019 to 2022, Professor Kay was the Diversity and Inclusion Officer for the Keough School. (Kay Dec. ¶ 11). From 2018 to 2021, Professor Kay was a member of the Notre Dame Committee on Women Faculty and Students. (Kay Dec. ¶ 12). From 2019 to 2020, Professor Kay was also a member on the Committee for the Advancement of Diversity and Inclusion in the Department of Sociology. (Kay Dec. ¶ 13).

Professor Kay’s work addressing issues of violence against women began over thirty years ago as an undergraduate at Northwestern University, where she trained with the Northwest Center Against Sexual Assault (then called Northwest Action Against Rape, and not affiliated with Northwestern University) to become a volunteer rape crisis counselor and medical advocate. (Kay Dec. ¶ 14). From 1991-1993, Professor Kay provided support to survivors in Chicago’s northwest

suburbs at local hospitals and during monthly shifts on a 24/7 telephone crisis hotline that came into her residence. (*Id.*).

Early on in her tenure at Notre Dame, Professor Kay became aware that the sexual assault of female Notre Dame students was an ongoing problem. (Kay Dec. ¶ 15). Professor Kay learned about the frequency of student sexual assaults through both students and faculty. (*Id.*). Faculty members in the Sociology Department, and other departments, took sexual assault survivors to the hospital after assaults, and students often wanted to talk about Notre Dame's problem with sexual assault in Professor Kay's classes. (Kay Dec. ¶ 16). Given the sexual assault issues Professor Kay became aware of at Notre Dame, very early on she decided she would say to her students during the first class in ALL of her classes what amounted to a script:

I just want all of you to know that if you ever experience sexual harassment, abuse, bullying, or assault and need my help, I will always be here to support you and do whatever I can to help you. You can always come to me.

(Kay Dec. ¶ 17). Professor Kay continues say this to all of her students. (*Id.*).

Professor Kay's Concerns about Student Sexual Assaults Continue in the 2022-2023 Academic Year

On August 10, 2022, the Director of Notre Dame's Gender Studies Program invited Professor Kay and her colleague, Professor Susan Ostermann, to participate in an in-person panel event regarding the Supreme Court overturning *Roe v. Wade*. (Kay Dec. ¶ 18). The name of the event was "Post-Roe America: Making Intersectional Feminist Sense of Abortion Bans" and it was to take place on September 21, 2022, on campus. (*Id.*). Professor Kay accepted the invitation. (*Id.*).

The 2022-2023 academic year started on Monday, August 22, 2022. (Kay Dec. ¶ 19). During the last week of August 2022, one of Professor Kay's students reported to her that on Friday, August 26, 2022, she was drugged, woke up in the hospital on Saturday morning and had

been told she had her stomach pumped and almost went into cardiac arrest. (Kay Dec. ¶ 20). The student also told Professor Kay that hospital staff informed her that she was drugged with a date rape drug and that the hospital had performed a rape kit examination. (*Id.*). The student told Professor Kay that hospital staff also said she was not the only Notre Dame woman student who had been drugged with rape drugs that they had treated, and that they believed male Notre Dame students were involved in drugging female students. (*Id.*). The student also told Professor Kay that video taken from that evening suggested it was likely a male Notre Dame Law School student who drugged her. (Kay Dec. ¶ 22).

At that time, Professor Kay had been involved in ongoing discussions at Notre Dame regarding student sexual assaults. (Kay Dec. ¶ 21). Notre Dame clearly knew that there was a problem with student sexual assaults. (*Id.*). On Monday, August 31, 2022, at 11:21 am, Professor Kay notified the Notre Dame Sociology Department about her student. (Kay Dec. ¶ 23, Att. B). At 11:45 am on August 31, 2022, the Sociology Department Chair responded and stated that faculty were all mandatory reporters and Professor Kay needed to report the information to Notre Dame's Title IX office. (Kay Dec. ¶ 24).

Professor Kay then called the Title IX office to make the report. (Kay Dec. ¶ 25). Professor Kay provided the information to the person who answered the phone in the Title IX office. (*Id.*) The person was very impatient, angry, and said that she was not even supposed to be in the office that day and was supposed to be having a medical procedure. (*Id.*) Professor Kay asked the person what services Notre Dame would provide to the student if she was, in fact, sexually assaulted after she was drugged. (*Id.*). The individual in the Title IX office responded that she did not understand. (*Id.*). Professor Kay asked if a rape kit would be provided, the individual said no. (*Id.*). Professor Kay asked if a sexual assault nurse examiner ("SANE") would be provided, the individual said no.

(*Id.*). Professor Kay then asked if emergency contraception would be provided, and the individual got very hostile with her. (*Id.*). The individual said that the student could go “somewhere else” for “that”. (*Id.*). This person at the Title IX office had zero empathy for the student’s situation. (*Id.*)

After her phone call with the individual in the Title IX office, Professor Kay emailed the Sociology Department Chair and some colleagues about the report she made and the experience that she had with the individual in the Title IX office. (Kay Dec. ¶ 26, Att. C). In the email Professor Kay stated:

If I got push back from just asking the question and trying to get clarity on all the resources/info, and my questions about medical care caused anger, what are our female students dealing with? How much trauma can they take? This is the person who will be talking to my student, and I am so upset about that because our conversation was so disturbing and unprofessional.

(*Id.*). After speaking to the individual in the Title IX office on August 31, 2022, Professor Kay thought about putting a note on her office door in reaction to how hostile the individual in the Title IX office was with her on the phone and to how Notre Dame was responding (or not responding) to student sexual assaults. (Kay Dec. ¶ 28).

After making the report to the Title IX office, Professor Kay also met with the student, and the student was completely traumatized. (Kay Dec. ¶ 27). The impact of the assault had immediate and visible impacts on her throughout the semester. (*Id.*). The student only felt safe in the classroom sitting near the door. (*Id.*). The student would have overwhelming moments of trauma when she needed to leave the classroom to call her mother. (*Id.*). Throughout the semester the assault impacted the student’s ability to concentrate and focus on her work. (*Id.*). The student told Professor Kay that she was having terrible dreams and was dealing with insomnia. (*Id.*).

On Thursday, September 15, 2022, SB 1, an abortion ban law, went into effect in Indiana. (Kay Dec. ¶ 29). This would affect survivors of sexual assault who would be less likely to report

the crime, and access healthcare, including forensic sexual assault exams (rape kits), pregnancy tests, prophylactic treatment for HIV and other sexually transmitted disease, and emergency contraception. (*Id.*). On the same day, Professor Kay's student left the classroom to go to the bathroom and did not return after the break. (*Id.*). Professor Kay became nervous and went to look for the student. (*Id.*). The student was anxious and upset and asked to leave for the day. (*Id.*). Professor Kay was very worried about her student's health and safety. (*Id.*). Professor Kay was also worried about the health and safety of the other female students on campus given that Notre Dame had (and has) a serious problem with sexual assaults. (*Id.*).

On September 15, 2022, after learning that SB 1 went into effect, Professor Kay tweeted, "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!" (Kay Dec. ¶ 30). Professor Kay sent this tweet in response to the lack of access to healthcare that Notre Dame was providing to its students who are sexually assaulted. (*Id.*). The "J" in the tweet stands for "Jane Doe", which is how victims of sexual assault are identified. (*Id.*). Professor Kay put the J in the tweet to indicate that she is an ally for victims of sexual assault. (*Id.*).

On September 15, 2022, around 5:30 pm, after Professor Kay finished teaching, she went to her office and wrote a note that she put on her door. (Kay Dec. ¶ 31). The note stated:

This is a SAFE SPACE to get help and information on ALL healthcare issues and access –confidentially and with care and compassion. My non-ND email is reprohealthahumanright@pm.me.

(Kay Dec. ¶ 32, Att. D). On the note, Professor Kay also put the letter J with a circle around it. (*Id.*). Like the tweet Professor Kay made earlier in the day, the J stood for "Jane Doe," which is how victims of sexual assault are typically referred to. (*Id.*). Professor Kay put the J on the sign to

indicate that she is an ally for victims of sexual assault. (*Id.*). This note was also created in response to the lack of access to healthcare that Notre Dame was providing to students who are sexually assaulted. (*Id.*).

On September 17, 2022, Professor Kay emailed the text of the note to the Sociology Department Chair and asked if it was okay. (Kay Dec. ¶ 33). The Department Chair said it looked fine but would run it up the chain of command. (*Id.*). Professor Kay never told the Department Chair or anyone else what the note meant when she taped it to her door. (*Id.*). Around this same time, Professor Kay also re-tweeted links to local organizations that provide information on how to access safe abortion care, including Plan B and Plan C. (Kay Dec. ¶ 34). Professor Kay made no reference to Notre Dame students, or any student, she simply re-tweeted the links. (*Id.*).

Notre Dame Faculty, the Irish Rover, other Notre Dame Students and the Sycamore Defame Professor Kay in an Attempt to Have Her Terminated

On September 19, 2022, Professor Vincent Munoz, a Notre Dame faculty member and faculty advisor to the Irish Rover, emailed a link of the upcoming September 21, 2022, panel discussion to Myler⁶ and said, “Can you suggest to the rover staff that they cover this.” (DeReuil Dep. 62:20-25, Ex. 10). Myler forwarded the email to DeReuil the same day. (DeReuil Dep. 63:1-4, Ex. 10). After forwarding the email to DeReuil, Myler texted DeReuil:

Call me when you can...Big rover story. Prof promising abortion procurement (sic) We want a super solid writer (probably you) and Munoz and I will walk you through each step and all the questions

(DeReuil Dep. 63:16-22, Ex. 12).

On September 21, 2022, Professor Phillip Munoz emailed DeReuil a photo of Professor Kay’s door with the note. (DeReuil Dep. 70:14-21, Ex. 13). On the same day, Professor Kay, along

⁶ At this time, Myler had graduated from Notre Dame and was on the Irish Rover board and employed by the University. (DeReuil Dep. 40:2-9).

with five (5) other individuals participated in the “Post-Roe America: Making Intersectional Feminist Sense of Abortion Bans” panel discussion. (Kay Dec. ¶ 35, Att. E). Immediately following the panel discussion, Professor Kay was approached by an individual named “Joe”, a Notre Dame student, who said he was with The Irish Rover. (Kay Dec. ¶ 36; Jeselskis Dec. ¶ 10, Att. F). Professor Kay later learned that Joe’s last name is DeReuil. (*Id.*). DeReuil did not state that he was interviewing Professor Kay, nor did he ask to interview her. (Kay Dec. ¶ 36; Jeselskis Dec. ¶ 10, Att. F). In addition, DeReuil did not disclose the fact that he was recording their conversation, and he did not take any notes during the conversation. (*Id.*, DeReuil Dep. 44:16-23). Nor did DeReuil state that he was writing an article for The Irish Rover and seeking Professor Kay’s comment. (*Id.*).

Professor Kay spoke to DeReuil for approximately fifteen (15) to twenty (20) minutes, during which time her colleague, Professor Ostermann, joined the conversation. (Kay Dec. ¶ 37; Jeselskis Dec. ¶ 8, Att. D). During the discussion, DeReuil did not ask Professor Kay anything about the note that she put on her office door, including the meaning of the “J”. (*Id.*, DeReuil Dep. 71:2-6; 149:8-25, 150:1). DeReuil also did not ask Professor Kay what she meant by “healthcare” in her September 15 tweet or on the note on her door. (*Id.*). During the conversation, Professor Kay focused on issues the two could agree on, such as support and safety nets for parents and caregivers. (*Id.*). Professor Kay also told DeReuil that she agreed to appear on the panel only if the rights of students who did not support abortion—including their right to protest and disrupt the event—was protected because they had the right to express their deeply held beliefs. (*Id.*). At the conclusion of their conversation, DeReuil asked Professor Kay if they could meet at a later date to continue their discussion. (Kay Dec. ¶ 38; Jeselskis Dec. ¶ 8, Att. D). The September 21, 2022,

discussion following the panel, is the only time that Professor Kay has ever spoken to DeReuil. (*Id.*).

Later in the evening on September 21, 2022, Professor Philpott, professor of political science at Notre Dae and an Irish Rover faculty advisor, emailed DeReuil:

Joe – I understand that you’ve been apprised of the professor tweeting out offers of assistance in procuring an abortion. I’ve received some additional images and so attach them if you have not seen them and with the idea that they might benefit you.

(DeReuil Dep. 71:16-25, 72:13-24, Ex. 14).

On or around Monday, September 26, 2022, Professor Kay met with Maura Ryan (“Ryan”), associate provost, and Scott Appleby (“Appleby”), Dean of the Keough School, who told her that they were getting complaints from conservative alumni about the note on her office door and her twitter handle. (Kay Dec. ¶ 40). Appleby later told Professor Kay that he was also getting complaints from a few conservative male faculty. (*Id.*). Professor Kay explained to Ryan and Appleby that the note referred to Notre Dame’s policies for student sexual assault survivors. (Kay Dec. ¶ 41). The majority of the September 26, 2022, meeting then centered on Professor Kay asking Ryan many questions about Notre Dame’s policies for sexual assault survivors. (Kay Dec. ¶ 42). Ryan said that she did not know about the policies, but would find out, and follow up with Professor Kay, which she did. (*Id.*). Professor Kay learned that Notre Dame will pay for students who are sexually assaulted to be transported (by taxi, Uber, Lyft, or the Notre Dame Police Department) to the Saint Joseph Regional Medical Center where they are provided with rape exams, access to a sexual assault nurse examiner, and access to emergency contraception. (Kay Dec. ¶ 42).

On September 30, 2022, Merlot Fogarty (“Fogarty”), then President of Notre Dame Right to Life, emailed a number of individuals, including, but not limited to, Myler, Professor Snead,

Professor Philpott, DeReuil, Professor Munoz, and Dave O’Conner regarding “a game plan to respond to the Dr. Kay/chemical abortion situation.” (DeReuil Dep. 76:3-18, Ex. 16). Fogarty also stated that she had been “contacted by several students who would like to pose a student senate petition calling for her [Kay’s] removal.” (DeReuil Dep. Ex. 16).

On October 1, 2022, Dempsey with the Sycamore Trust, forwarded DeReuil a copy of an email and letter that he sent to Notre Dame and also copied Myler. (DeReuil Dep. 78:18-22, Ex. 17). In the email that Dempsey sent to Provost McGreevy, Father Jenkins, and Dean Appleby, Dempsey stated:

We hope that, **one way or another and before too long**, she [Kay] will move on to a school where she will not feel compelled to subvert its deeply held convictions of conscience.

(DeReuil Dep. Ex. 17). [Emphasis Supplied].

On Monday, October 3, 2022, at 4:46 pm, Professor Kay received the following email from DeReuil:

Dear Prof Kay,

This is Joe DeReuil—we spoke briefly after the panel that you were on about a week ago. During that conversation, you mentioned that you would be open to meeting for coffee or otherwise to chat about your position regarding abortion, but also more broadly pro-life issues (comprehensive care throughout life)...Let me know if you have any availability this week...

Best,
Joe DeReuil
Editor-in-Chief, *Irish Rover*

(Kay Dec. ¶ 43, Att. F; DeReuil Dep. 84:23-25; 85:1-5, Ex. 21). When asked why he emailed Professor Kay, “we spoke briefly after the panel” instead of “I interviewed you after the panel,” DeReuil testified that he viewed “we spoke briefly” as semantically the same as “I interviewed you.” (DeReuil Dep. 85:3-15, Ex. 21).

On October 3, 2022, at 8:03 pm, Professor Nicgorski, a faculty advisor for the Irish Rover, emailed DeReuil an email exchange between Professor Kay and Steve O’Neil (“O’Neil”) that he received from O’Neil. (DeReuil Dep. 87:13-20, 88:9-14, Ex. 22). DeReuil has received emails from O’Neil before and believes that he is involved with the Sycamore Trust. (DeReuil Dep. 87:21:24).

On October 3, 2022, at 8:15pm, after Professor Kay received the email from DeReuil, she received an email with the subject “Reproductive Help” that states:

Hello Dr. Kay,

My name is Abbi Lemons, and I am a student at Holy Cross College. I am from a very conservative family, and this week I found myself in a position where I need help getting Plan C. One of my friends from Notre Dame gave me your name.

I hope that I am not imposing on you, but I appreciate any help that you might be able to offer.

Thank you for everything...

(Kay Dec. ¶ 44, Att. G). Elizabeth Hale (“Hale”), a student at Notre Dame, told DeReuil that a friend of hers (“Lemons”) reached out to Professor Kay about obtaining “abortion pills.” (DeReuil Dep. 50:14-25; 51:1-7; 90:20-25; 91:1-11, Ex. 24; Jeselskis Dec. ¶ 9, Att. E). On October 4, Lemons and Hale exchanged several text messages, including the following:

there’s always going to get (sic) office and approving her
Approaching

Are you comfortable doing that?
You can just play the part of scared, lost, heard she was a friendly.
She’s super narcissistic so if you were to butter her up I think it
would be good

(Jeselskis Dec. ¶ 9, Att. E).

On October 5, 2022, DeReuil and Hale exchanged text messages about “the abortion pill acquisition project.” (DeReuil Dep. 94:2-25, Ex. 26). Hale texted DeReuil “I’m thinking we should let up a bit because I don’t know about the legality of everything... Yeah I’m starting to think that I’m out of my depth, and I don’t want to do something stupid”. (DeReuil Dep. Ex. 26). Hale also texted DeReuil that Merlot (Fogarty) sent her Professor Kay’s personal email address after the first email to the school email address bounced. (DeReuil Dep. Ex. 26). At the end of the text exchange, DeReuil wrote, “I feel very nervous about citing things from my hidden recorded interview”. (DeReuil Dep. 95:14-23, Ex. 26).

On October 6, 2022, DeReuil texted Myler, “Is the meeting ab the abortion thing you’re going to the one with Snead et al this afternoon in Geddes?” (DeReuil Dep. 67:25; 68:1-13, Ex. 12). DeReuil attended the meeting and afterwards Fogarty shared notes with him from the meeting, including notes added by Professor Snead. (DeReuil Dep. 96:12-25, 97-98, Ex. 27). The notes also included a list of national news sources to contact after the Irish Rover article was released. (DeReuil Dep. Ex. 27). Professor Snead, through Fogarty, asked to read the article that DeReuil was drafting about Professor Kay before it was published. (DeReuil Dep. 34:24-25; 35:1-18). When DeReuil finished his first draft of the article he let Professor Snead read it. (DeReuil Dep. 54:18-24).

On October 10, 2022, DeReuil exchanged text messages with Professor Iffland about the article and Professor Kay. (DeReuil Dep. 99:19-25; 100:1-25; 101:1-25; 102:1-10, Ex. 28). Professor Iffland texted, “there needs to be a coordinated assault on the Tamara Kay issue. Just flood Jenkins. Basic output: Keough has to hire someone based to placate the mob.” (DeReuil Dep. Ex. 28).

The October 12, 2022, Article

On October 12, 2022, the Irish Rover, published a news article about Professor Kay, allegedly written by DeReuil (the “October 12 Article”) titled, *Keough School Professor Offers Abortion Access to Students*, with a subtitle reading, “Abortion assistance offered to students despite IN law⁷, ND policy.” (Kay Dec. ¶ 46, Att. H). On its Twitter page, on October 12, 2022, The Irish Rover also tweeted “Notre Dame Professors Help Students Obtain Abortions” and posted a link to the October 12 Article. (Kay Dec. ¶ 47, Att. I). Professor Kay did not offer abortion assistance to students. (Kay Dec. ¶ 48). Professor Kay did not help students obtain abortions. (*Id.*). Notre Dame also posted the October 12 Article on its website. (Kay Dec. ¶ 54).

The October 12 Article also provides, “Kay used this panel as a platform to explain why she thought abortions bans are ineffective and immoral, complementing her work to bring abortion to Notre Dame students.” (Kay Dec. ¶ 49, Att. H). Professor Kay has never had any “work to bring abortion to Notre Dame students.” (*Id.*). The October 12 Article goes on to provide that Professor Kay’s initiatives began after Indiana SB 1 took effect September 15 then references the note that Professor Kay put on her office door, which pertained to student sexual assaults. (Kay Dec. ¶ 50, Att. H). DeReuil never asked Professor Kay about the sign on her door, what it meant, or what the “J” meant. (*Id.*, DeReuil Dep. 107:2-4). However, DeReuil wrote, “[t]he letter “J” on office doors denotes Notre Dame professors who are willing to help students access abortion.” (Kay Dec. ¶ 51, Att. H).

DeReuil also wrote, “[m]uch of Kay’s efforts to help students obtain abortion services...” (Kay Dec. ¶ 53, Att. H). Professor Kay did not try to help or make efforts to help students obtain abortions. (*Id.*). During her twenty-year academic career, Professor Kay has never been asked by

⁷ On September 22, 2022, a judge in Owen County, Indiana issued a preliminary injunction against Indiana’s abortion ban. (Kay Dec. ¶ 39).

any student for help in procuring, paying for, or accessing an abortion. (*Id.*). Nor has Professor Kay offered to do so. (*Id.*).

DeReuil's research for the October 12 Article consisted of going through Professor Kay's Twitter, attending the panel, reading the signs on Professor Kay's door (from photos that he received), and speaking with Professor Kay following the panel. (DeReuil Dep. 49:1-20).

The Irish Rover identified Professor Vincent Phillip Munoz, Myler, Daniel Philpott, Professor Carter Snead, and Professor Craig Iffland as Notre Dame faculty and staff involved in any way in researching, drafting, editing, revising, approving and publishing the October 12 Article. (Jeselskis Dec. ¶ 5, Att. A, pgs. 9-10). The Irish Rover also identified Professor Carter Snead as being involved in verifying the accuracy of the October 12 Article. (*Id.* at pg. 12)

The Aftermath of the October 12 Article

Immediately after the October 12 Article was released, Professor Kay started receiving threats via email, both death and rape threats and otherwise, from a variety of individuals, including Notre Dame alumni, from across the country. (Kay Dec. ¶55, Att. J). The emails were sent to both Professor Kay's Notre Dame and personal email addresses. (*Id.*). Professor Kay also received threatening letters that were mailed to her office on campus. (Kay Dec. ¶ 56). For instance, one letter that Professor Kay received from a Notre Dame alumni stated:

...I am glad someone at Notre Dame is ensuring women get abortions. Especially, for ugly and/or fat women, we don't want too many of them passing along their genes.

(*Id.*, Att. K).

Following publication of the October 12 Article, Professor Kay also learned that the Sycamore Trust posted a copy of a letter about her to its website and also sent out post cards to Notre Dame alumni. (Kay Dec. ¶ 57, Att. L). The language in the letter posted to the Sycamore Trust website and the postcard mirrored the language in the October 12 Article. (*Id.*). On December

27, 2022, Professor Kay sent an email to Appleby regarding the Sycamore Trust and the lack of response from Notre Dame regarding concerns for her safety and for the safety of Professor Ostermann. (Kay Dec. ¶ 58, Att. M). Appleby responded and acknowledged that Notre Dame had not adequately addressed the issue of Professor Kay's safety and Professor Ostermann's safety. (*Id.*).

On January 18, 2023, Professor Kay attended a meeting with Appleby, Professor Ostermann, the Notre Dame Police Chief, Bill Thompson, and American Association of University Professors representative Professor Francisco Robles. (Kay Dec. ¶ 59). The purpose of the meeting was to discuss the safety and security of Professor Kay and Professor Ostermann. (*Id.*). Professor Robles took notes during the meeting. (*Id.*) During the course of the meeting, Professor Kay discussed her concern that the harassment would not end because male faculty were inciting the harassment. (*Id.*). Appleby agreed that there were male faculty who were doing this, and that they were not reasonable and would not stop. (*Id.*) The police Chief asked Appleby if he could talk to the faculty that he knew were involved in the harassment and try to get them to change their behavior. (*Id.*). Appleby said only one was likely to be responsive and he would talk to him. (*Id.*).

On Friday, February 3, 2023, Professor Kay met with Captain Robert G. Martinez with the Notre Dame Police Department at her home. (Kay Dec. ¶ 60). The purpose of the meeting was for Captain Martinez to conduct a home security assessment because of the harassing emails and letters Professor Kay continued to receive and because her home had been vandalized on two occasions. (*Id.*).

The March 22 Article

On February 14, 2023, while on a previously approved sabbatical leave, Professor Kay received an email from the Presidents of the College Democrats of Notre Dame asking if she

wanted to speak at their on-campus club meeting on March 7, 2023, about her career and research. (Kay Dec. ¶ 61).⁸ Professor Kay agreed. (*Id.*). On February 27, 2023, Fogarty sent Thompson a text message regarding the March 7 event and said, “we should send some people undercover.” (Thompson Dep. 31:7-25; 32:1-12, Ex. 1).⁹ On March 6, 2023, Fogarty texted Thompson and asked who was going to the March 7 event, Thompson said he would not be recognized, so he would go. (Thompson Dep. 35:2-9; Ex. 1). On March 7, prior to the lecture, Fogarty texted Thompson, “Dave O’Connor said I should say ‘could you elaborate on your reasoning that a woman has a right to murder her child.’” (Thompson Dep. 36:18-25; 37:1-9, Ex. 2). Dave O’Connor is a professor at Notre Dame. (Thompson Dep. 37:10-16).

On March 7, 2023, Professor Kay spoke at College Democrats of Notre Dame’s club meeting. (Kay Dec. ¶ 62, Att. N). During the meeting, Professor Kay discussed the course of her career and then answered several questions asked by students attending the meeting. (Kay Dec. ¶ 63, Att. N). No one with The Irish Rover asked Professor Kay any questions at the March 7, 2023 meeting or after the meeting. (Kay Dec. ¶ 64, Att. N). Thompson attended the March 7 meeting and recorded the lecture. (Thompson Dep. 27:3-11). Thompson also took notes during the lecture and “attempted” to write down direct quotes or paraphrase “quite quickly” as Professor Kay spoke. (Thompson Dep. 40:3-24, Ex. 3).

On March 22, 2023, the Irish Rover published another news article about Professor Kay, which was written by Thompson (the “March 22 Article”) titled, *Tamara Kay Explains Herself to Notre Dame Democrats*, with a subtitle reading, “Controversial professor claims that her support

⁸ Professor Kay’s spring 2023 sabbatical was approved by Notre Dame on June 1, 2022. (Kay Dec. ¶ 7).

⁹ When asked if Thompson would identify himself as with the Irish Rover if he were to question Professor Kay, he responded, “I’m not sure.” (Thompson Dep. 34:18-21).

for abortion ‘comes from a place of deep faith.’” (Kay Dec. ¶ 65, Att. O). Professor Kay has never met Thompson or spoken to him. (Kay Dec. ¶ 66; Thompson Dep. 21:20-25).

The March 22 Article provides, “The sociology professor has been subject to a 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.**” (Kay Dec. ¶ 67, Att. O). [Emphasis supplied]. Professor Kay never posted offers to procure abortion pills on her office door. (Kay Dec. ¶ 67). The only thing Thompson did to verify this statement was to refer to the October 12 Article published by the Irish Rover. (Thompson Dep. 45:10-25; 46:1-4). He did not do anything to independently verify the statement. (Thompson Dep. 46:8-13).

The March 12 Article provides that, “[t]he audience questions (sic) Kay mostly focused on her recent controversial support for abortion since *Dobbs*. (Kay Dec. ¶ 68, Att. O, ¶ 9). However, the following questions were asked:

...And then can you please tell us more about the research projects?
(Kay Dec. ¶ 68, Att. N, pg. 13).

...So I was just wondering how your own interest in labor has shaped or if it’s shaped your research. (Kay Dec. ¶ 68, Att. N, pg. 20).

Oh, I was just going to ask really quickly, not that this is my stance, but do you have an opinion or any research on those laws that say abortion is illegal except for rape and incest? And I was wondering if you have any kind of perspective on how if it doesn’t work and what’s the issue with the difficulty of saying, oh, only rape and incest? Because you discussed the difficulty with those people trying to access abortion, but then some people who are prolife will be like, we’ll just add that exception to the law. (Kay Dec. ¶ 68, Att. N, pg. 24).

...I’m curious how you ended up here and possibly like if you go into it, how your research and how your experience and beliefs affected you coming here and if that was a positive thing or something you got to think about. I don’t know, just curious about (Kay Dec. ¶ 68, Att. N, pgs. 27-28).

...Back to your research on how these antiabortion policies will affect everything. And I know it's hard to tell, especially at the beginning of a project. But do you know what timeframe you're going to go for? Because the effects, I would think, after one year would be very different or would at least be substantially different. (Kay Dec. ¶ 68, Att. N, pg. 32).

...if you were in our position during this time, and you were an undergrad student, especially at a university, that says we have academic freedom for the students as well. But groups that are trying to educate students about sexual reproductive health are not allowed to exist, or even like clubs like this...How would you suggest students continuing to have these conversations and educating each other about this topic? (Kay Dec. ¶ 68, Att. N, pg. 36).

The March 22 Article also states that:

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.

(Kay Dec. ¶ 68, Att. O, ¶ 11). However, this question was never asked by any of the students. *See* (Kay Dec. ¶ 70, Att. N, pgs. 13, 20, 24, 27-28). The March 22 Article also states, “She acknowledges that not all the 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.’” (Kay Dec. ¶ 71, Att. O, ¶ 16). Professor Kay never made this statement. (Kay Dec. ¶ 71, Att. N). The March 22 Article also states, “She suggested that, ‘if you have that academic freedom, you should use it.’” (Kay Dec. ¶ 72, Att. O, ¶ 17). Professor Kay never made this statement. (Kay Dec. ¶ 72, Att. N).

To write the March 22 Article, Thompson used his recollection of the March 7 lecture, the recording of the lecture, and the notes that he took at the lecture. (Thompson Dep. 27:3-9). Thompson did not interview Professor Kay for the March 22 Article, but he testified that he interviewed Fogarty for the article through a text message exchange that occurred on March 15,

2023. (Thompson Dep. 27:12-22; 39:2-20, Ex. 2). Theoretically, the Irish Rover editing staff would edit for content, but with the March 22 Article they did light editing for language. (Thompson Dep. 30:21-25). DeReuil did not have any substantive comments on the March 22 Article and cannot recall what edits he did make to the article. (DeReuil Dep. 115:16-23). Even though DeReuil attested to the research and accuracy of the March 22 Article, DeReuil did not attend the panel, did not review Thompson's notes and did not listen to the audio recording made by Thompson until after the March 22 Article was published. (DeReuil Dep. 122:7-25, 123:1-22, Ex. 32).

In May 2023, Notre Dame terminated Professor Kay's husband. (Kay Dec. ¶ 73). He had been employed with Notre Dame, along with Professor Kay, since 2016. (*Id.*). Unlike Professor Kay, her husband was not tenured. (*Id.*).

Student Sexual Assault Remains a Concern for Professor Kay

Professor Kay returned to teaching at Notre Dame in the Fall of 2023. (Kay Dec. ¶ 74). On October 5, 2023, Professor Kay received an email from the Notre Dame Police Department notifying the campus that:

The Notre Dame Police Department has received a report of an incident of aggravated battery...that occurred in a men's residence hall on campus...It was reported that the female victim's drink was spiked with drugs without her consent and that testing at the hospital confirmed the presence of Roofalin/Rohypnol...

In addition to the on-campus incident, the Title IX office has recently received three separate reports of suspected drink spiking at Finnies Next Door...One incident occurred in June 2023 and two of the incidents took place in early September 2023...

(Kay Dec. ¶ 75, Att. P).

III. STATEMENT OF GENUINE ISSUES OF MATERIAL FACT

The following issues preclude granting Defendant's Motion to Dismiss and are supported by Plaintiff's citation to discovery responses, affidavits, and deposition testimony as set forth above in Plaintiff's Statement of Facts (Section II) and all of which are contained in Plaintiff's Designation of Evidence filed simultaneously with Plaintiff's Response:

1. Genuine issues of fact whether the Irish Rover's October 12 and March 22 Articles were made in furtherance of free speech.
2. Genuine issues of fact whether the Irish Rover's October 12 and March 22 Articles were made in connection with a public issue.
3. Genuine issues of fact whether the following statements in the Irish Rover's October 12 Article and Tweet regarding the October 12 Article were made in good faith and with a reasonable basis in law and fact:
 - a. *Keough School Professor Offers Abortion Access to Students*
 - b. Abortion assistance offered to students despite IN law, ND policy
 - c. Notre Dame Professors Help Students Obtain Abortions
 - d. Kay used this panel as a platform...complementing her work to bring abortion to Notre Dame students.
 - e. The letter "J" on office doors denotes Notre Dame professors who are willing to help students access abortion.
 - f. Much of Kay's efforts to help students obtain abortion services...
4. Genuine issues of fact whether the following statement made in the Irish Rover's March 22 Article was made in good faith and with a reasonable basis

in law and fact for the following statements in the Irish Rover’s March 22 Article:

- a. ...posting offers to procure abortion pills on her office door.

IV. ARGUMENT

A. Legal Standards.

1. Indiana’s Anti-SLAPP Statute.

Defendant filed its Motion to Dismiss Under Indiana’s Anti-SLAPP law, which is set forth in Indiana Code § 34-7-7 *et seq.* (the “Statute”). The Statute sets forth “conditions under which rights of petition or free speech may be used as a defense.” Ind. Code § 34-7-7-5. According to the Statute, “[i]t is a defense in a civil action against a person that the act or omission complained of is: (1) an act or omission of that person 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 in connection with a public issue; and (2) an act or omission taken in good faith and with a reasonable basis in law and fact.” A person who files a motion to dismiss under the anti-SLAPP statute “must state with specificity the public issue or issue of public interest that prompted the 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(b).

Thus, the Statute creates an affirmative defense. To demonstrate that defense, the moving party must show: (1) that its complained of act “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.” *Pack v. Truth Publ. Co.*, 122 N.E. 3d 958, 964 (Ind. Ct. App. 2019) (*quoting Gresk ex rel. Estate of VanWinkle v. Demetris*, 96 N.E. 3d 564, 569 (Ind. 2018); *See also* Ind. Code § 34-7-7-5(1). “If both 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.” *Id. See also* Ind. Code § 34-7-7-5(2). Pursuant to the Statute, the Court must treat Defendant’s Motion to Dismiss as a Motion for Summary Judgment. *Id. See also* Ind. Code § 34-7-7-9(a)(1). Finally, the anti-SLAPP law does not “supplant the Indiana common law of defamation,” but requires the person raising the defense to establish that his speech was “lawful.” *401 Public Safety v. Ray*, 80 N.E. 3d 895, 900 (Ind. Ct. App. 2017).

2. Summary Judgment Standard.

“Summary judgment in Indiana is an intentionally ‘high bar’ that ‘consciously errs on the side of letting marginal cases proceed to trial on the merits rather than risk short-circuiting meritorious claims.’” *Pack*, 122 N.E. 3d at 965 (quoting *Hughley v. State*, 15 N.E.3d 1000, 1004 (Ind. 2014)). “Drawing all reasonable inferences in favor of...the non-moving parties, summary judgment is appropriate ‘if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’” *Pack*, 122 N.E. 3d at 964 (quoting *Williams v. Tharp*, 914 N.E. 2d 756, 761 (Ind. 2009) (quoting T.R. 56(C))). “A fact is ‘material’ if its resolution would affect the outcome of the case, and an issue is ‘genuine’ if a trier of fact is required to resolve the parties’ differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences.” *Id.* “The initial burden is on the summary-judgment movant to ‘demonstrate the absence of any genuine issue of fact as to a determinative issue,’ at which point the burden shifts to the non-movant to ‘come forward with contrary evidence’ showing an issue for the trier of fact.” *Pack*, 122 N.E. 3d at 964 (quoting *Williams*, 914 N.E. 2d at 761-62).

Here, Defendant’s Motion is supported only by an affidavit signed by DeReuil attaching news articles, the Irish Rover’s articles of incorporation, the October 12 Article, and the March 22 Article. *See* Defendant’s Motion Exhibit 1. The only arguable testimony in DeReuil’s affidavit,

other than identifying himself as the editor-in-chief of the Irish Rover, is set forth in Paragraphs 10 and 16 where he stated that he can testify as to the research and accuracy of the October 12 Article and the March 22 Article. (Defendant's Motion Ex. 1; DeReuil Dep. Ex. 32). DeReuil's hollow statements are not sufficient to support Defendant's Motion. As set forth further below in Section III, there are genuine issues of material fact which block judgment for the Irish Rover.

3. Defamation.

To establish a claim of defamation, a "plaintiff must prove the existence of 'a communication with defamatory imputation, malice, publication, and damages.'" *Trail v. Boys & Girls Club of N.W. Ind.*, 845 N.E. 2d 130, 136 (Ind. 2006) (citation omitted). A statement is defamatory if it tends "to harm a person's reputation by lowering the person in the community's estimation or deterring third persons from dealing or associating with the person." *Kelley v. Tanoos*, 865 N.E. 2d 593, 596 (Ind. 2007) (citation omitted). "Any statement actionable for defamation must not only be defamatory in nature, but also false." *Miller v. Cent. Ind. Cmty. Found., Inc.*, 11 N.E. 3d 944, 956 (Ind. Ct. App. 2014).

Communication is defamatory per se if it imputes: (1) criminal conduct; (2) a loathsome disease; (3) misconduct in a person's trade, occupation, profession, office, or occupation, or (4) sexual misconduct. *Hamilton v. Prewett*, 860 N.E. 2d 1234, 1243 (Ind. Ct. App. 2007) (internal citations omitted).

Whether a communication is defamatory "depends, among other factors, upon the temper of the times [and] the current of contemporary public opinion, with the result that words, harmless in one age, in one community, may be highly damaging to reputation at another time or in a different place." *Journal-Gazette Co. v. Bandido's, Inc.*, 712 N.E. 2d 446, 452 n. 6 (1999). In other words, the defamatory words are to be construed in light of the circumstances of their utterance.

Rambo v. Cohen, 587 N.E. 2d 140, 145 (Ind. Ct. App. 1992). Whether a communication is defamatory is generally a question of law for the court, but the determination becomes a question of fact for the jury if the communication is reasonably susceptible to either a defamatory or non-defamatory interpretation. *Gatto v. St. Richard School, Inc.*, 774 N.E. 2d 914, 923 (Ind. Ct. App. 2002).

In its Motion, the Irish Rover argues that on summary judgment Professor Kay “must prove by clear and convincing evidence that [the Irish Rover] made the alleged defamatory statement(s) with ‘actual malice.’” (Defendant’s Motion, p. 18). However, this is not the correct standard under Indiana law. This issue was addressed in *Stabosz v. Friedman*, 199 N.E. 3d 800 (Ind. Ct. App. 2022), which involved an anti-SLAPP motion filed by Stabosz against Friedman after Friedman filed a defamation complaint. In *Stabosz*, like the Irish Rover, the defendant argued that a plaintiff was required to prove actual malice by clear and convincing evidence at the summary judgment stage rather than waiting until trial. *Stabosz*, 199 N.E. 3d at 807-808. The *Stabosz* court found that the trial court did not err in applying the general summary judgment standard to Stabosz’s anti-SLAPP motion. *Stabosz*, 199 N.E. 3d at 808. In other words, Professor Kay is not required to meet a heightened standard of proving actual malice by clear and convincing evidence in order to survive summary judgment. *Id.*

B. Defendant’s Motion Should Be Denied Because the Irish Rover’s October 12 and March 22 Articles Regarding Professor Kay Were Not in Furtherance of the Right to Free Speech.

The Irish Rover presumes that as a student newspaper it is somehow automatically entitled to the protections of the First Amendment or the Indiana Constitution. However, this is simply not true. The Irish Rover is not entitled to First Amendment protection as it is a private student newspaper at a private university. The First Amendment was designed by its framers to foster

unfettered discussion and free dissemination of opinion dealing with matters of public interest and governmental affairs. *Mills v. Alabama*, 384 U.S. 214, 218-219 (1966). The First Amendment, however, does not protect rights of speech and assembly against interference or impairment by private individuals. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

It is clear that public colleges and universities, as instrumentalities of state government, are not beyond the reach of the First Amendment. *Healy v. James*, 408 U.S. 169, 180 (1972). A public college or university, created or controlled by the state itself, is an arm of state government and, thus, by definition, implicates state action. *Powe v. Miles*, 407 F.2d 73, 82 (2nd Cir. 1968). A private college or university, however, stands upon different footing and the application of the First Amendment is not readily met in the case of a private educational institution. *Grafton v. Brooklyn Law School*, 478 F.2d 1137, 1143 (2nd Cir. 1973); *Blackburn v. Fisk Univ.*, 443 F.2d 121, 123 (6th Cir. 1971).

Similarly, in *Keyishiau v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967), it was held that the constitutional liberty of free press applies to student press. *See also Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). However, the student organizations discussed on *Keyishiau* and *Tinker*, involved student newspapers or student organizations at state or public institutions, not private institutions like Notre Dame. Thus, the Irish Rover must look to the Indiana Constitution for any free speech rights it asserts, which provides, in relevant part:

No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever; but for the abuse of that right, every person shall be responsible.

Ind. Const. art. 1, § 12.

Persons exercising their right of free speech do so to advance “the public exchange of ideas” essential to a healthy democracy. *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388 (2011). Indiana’s anti-SLAPP defense is inapplicable where actions are “simply in furtherance of a [person’s] own personal goals”. *Gresk*, 96 N.E. 3d at 569-570 (quoting *Ketner v. Timothy R. Downey, Ins., Inc.*, 430 F.Supp.2d 844, 846 (S.D. Ind. 2006).

Here, the record evidence establishes that the Irish Rover’s October 12 and March 22 Articles were not made pursuant to its right of free speech, but to instead to advance the personal agendas of male faculty members at Notre Dame, the Sycamore Trust, Notre Dame Right to Life, and the Irish Rover relating to Professor Kay.

For instance, the record shows the concept of the October 12 Article came from Professor Munoz who, on September 19, 2022, asked the Irish Rover to write about the September 21 panel discussion. Notably, although five (5) other individuals spoke at the September 21 panel, the sole focus of the October 12 Article was Professor Kay. On the same day, September 19, Professor Munoz also emailed DeReuil a photo of the note that Professor Kay posted on her door. The evidence shows that before any “investigation” was attempted, the unfounded and false conclusion that Professor Kay was engaging in criminal conduct or misconduct in her occupation had already been drawn – on September 19 Myler texted DeReuil, “Prof promising abortion procurement”. Myler assured DeReuil that she and Professor Munoz would “walk [him] through each step and all the questions”.

Between September 19 and October 12, 2022, no less than eight (8) individuals, either Notre Dame faculty or staff, students, or the Sycamore Trust contacted DeReuil regarding the article. In each of the communications, the false and defamatory conclusion had already been drawn – Professor Kay was providing abortions, and “we” must get rid of her. For example, on

September 21, Professor Philpott emailed DeReuil about the professor offering to procure abortions and provided DeReuil with images “with the idea that they might benefit [him].” On September 30, Fogarty sent an email to several Notre Dame faculty, staff and students regarding “a game plan to respond to the Dr. Kay/chemical abortion situation.” Fogarty was also working on a student senate petition calling for Professor Kay’s termination. Dempsey with the Sycamore Trust shared an email with DeReuil that he sent to Notre Dame administration where he said, “we hope that, **one way or another and before too long**, she [Kay] will move on...”. On October 5, DeReuil and Hale exchanged text messages about “the abortion pill acquisition project,” where Hale had a student from another university email Professor Kay in an apparent attempt to entrap her. On October 10, Professor Iffland emailed DeReuil, “there needs to be a coordinated assault on the Tamara Kay issue. Just flood Jenkins. Basic output: Keough has to hire someone based to placate the mob.” Clearly, neither the Irish Rover nor Notre Dame faculty or Notre Dame Right to Life had an interest in the public exchange of ideas. The record evidence also shows that the March 22 Article was simply a continuation of the October 12 Article with the same personal agendas. For instance, Fogarty and Thompson attended the March 7 event “undercover.” Thompson did not even speak to Professor Kay. Fogarty’s interest was getting a quote in the March 22 Article than any exchange of ideas.

Finally, given that the mission of the Irish Rover is “to articulate and defend the Catholic character of the University,” it seems improbable if not impossible that in publishing the October 12 and March 22 Articles, the Irish Rover and its faculty advisors and other Notre Dame faculty were trying to advance “the public exchange of ideas” essential to a healthy democracy. *Guarnieri*, 564 U.S. at 388.

Accordingly, the Irish Rover’s Motion should be denied.

C. Defendant’s Motion Should Be Denied Because the Irish Rover’s October 12 and March 22 Articles Regarding Professor Kay Were Not in Connection with a Public Issue.

The *Gresk* Court addressed the requirement of a public issue in the context of an anti-SLAPP motion and explained that “speech is in connection with a matter of public concern if it is addressed to any matter of political, social, or other concern to the community, as determined by its content, form, and context.” *Gresk*, 96 N.E. 3d at 571 (quotation marks omitted). The *Gresk* Court specifically rejected a broad interpretation of the term “public issue” in subsection (1) of the anti-SLAPP statute. *Id.* at 571, n. 10. Instead, the Indiana Supreme Court directs that “courts should analyze the narrow statements at issue, avoiding a sweeping view of what is ‘public.’” *Id.* at 571.

In *Gresk*, a physician argued that her report of suspected medical child abuse to the Department of Child Services was in connection with a public issue. *Id.* In denying the anti-SLAPP motion filed by the physician, the *Gresk* court recognized that child abuse reporting could be, in certain instances, a matter “of general public interest[,] but it held that “based on the narrow content, form, and context of th[e] doctor’s report—medical child abuse of one child—it was not a matter of public concern.” *Gresk*, 96 N.E. 3d at 571. *See also Burris v. Bottoms Up Scuba – Indy, LLC*, 181 N.E. 3d 998, 1005 (anti-SLAPP motion denied because complaint about single individual not a matter of public concern); *Turner v. Miller et al.*, 2021 WL 396622 at *13 (S.D. Ind. 2021) (anti-SLAPP motion denied because complaint concerning the conduct of one individual not a matter of public concern).

In this case, the Irish Rover claims that the October 12 and March 22 Articles were in connection with the public issue of abortion rights and access. Although abortion rights and access are undoubtedly a matter of general public interest, it is not in this case. Here, the record evidence establishes that the narrow content, form and context of the October 12 and March 22 Articles (and

the nefarious motive behind the articles) pertain to one person – Professor Kay. The very title of the October 12 Article provides that it is about Professor Kay – *Keough School Professor Offers Abortion Access to Students*. In addition, the narrow content of the October 12 Article is not about abortion rights and access, it is about Professor Kay. The same holds true for the title of the March 22 Article – *Tamara Kay Explains Herself to Notre Dame Democrats*. Similar to the October 12 Article, the narrow content of the March 22 Article is not about abortion rights and access, it is about Professor Kay. Based on the narrow content, form, and context of the October 12 Article and the March 22 Article – Professor Kay – the articles are not a matter of public concern.

Accordingly, the Irish Rover’s Motion should be denied.

D. Defendant’s Motion Should Be Denied Because a Reasonable Jury Could Conclude that the Statements in the Irish Rover’s October 12 and March 22 Articles Regarding Professor Kay Were Not Made in Good Faith and With a Reasonable Basis in Law and Fact.

In its Motion, the Irish Rover failed to introduce any record evidence that the statements made in the October 12 and March 22 Articles were made in good faith and with a reasonable basis in law and fact. “In the context of defamation law, ‘good faith’ has been defined as a state of mind indicating honesty and lawfulness of purpose; belief in one’s legal right; and a belief that one’s conduct is unconscionable.” *Stabosz*, 199 N.E. 3d at 809 (citing *Pack*, 122 N.E. 3d at 966 (citations omitted)). “Whether a defendant acted in good faith in making a statement is usually a question of fact for the jury.” *Kelley*, 865 N.E. 2d at 598 (citation omitted). Evidence indicating a lack of good faith would include “whether the statement is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call.” *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968). With respect to the question of good faith and actual malice, the question is whether an issue of material fact remains. *Stabosz*, 199 N.E. 3d at 809. “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.” *Id. citing Bandido’s*, 712 N.E. 2d at 456.

The Irish Rover cannot establish that its statements were made in good faith and with a reasonable basis in law and fact because they were either premediated, based on personal beliefs, or insinuation. The following statements in the October 12 Article and Tweet were not made in good faith and with a reasonable basis in law and fact:

Keough School Professor Offers Abortion Access to Students

Abortion assistance offered to students despite IN law, ND policy

Notre Dame Professors Help Students Obtain Abortions

Kay used this panel as a platform...complementing her work to bring abortion to Notre Dame students.

The letter “J” on office doors denotes Notre Dame professors who are willing to help students access abortion.

Much of Kay’s efforts to help students obtain abortion services...

At his deposition, DeReuil claimed these statements were supported by the note that Professor Kay put on her door, the Tweets that he saw, his attendance at the September 21 panel discussion, and his “interview” of Professor Kay following the panel discussion.¹⁰ However, although DeReuil had the opportunity to do so, he never asked Professor Kay about the note on her door, about the meaning of the letter “J”, what she meant by healthcare, etc. Instead, as set forth above in Section IV.B., the Irish Rover, Notre Dame faculty, staff and students and the Sycamore Trust already had an agenda when it came to Professor Kay, and it is clear from the activities that occurred prior to the publication of the October 12 Article that all of those were

¹⁰ Plaintiff disputes that DeReuil “interviewed” her. He clearly did not abide by Notre Dame’s media policies as a “student journalist” in surreptitiously recording Professor Kay and felt “nervous” about his secret recording. In addition, in DeReuil’s follow up email to Professor Kay, he did not mention the interview, but instead wrote, “we spoke briefly after the panel...”

involved in the article had no interest in seeking the truth. The October 12 Article cannot be looked at in a vacuum given the number of people invested in their personal agendas who were involved in its publication. In short, the Irish Rover cannot show that these statements were made in good faith and with a reasonable basis in law and fact.

The following statement in the March 22 Article was not made in good faith and with a reasonable basis in law and fact:¹¹

...posting offers to procure abortion pills on her office door.¹²

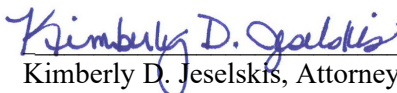
For the same reasons addressed above in relation to October 12 Article, the Irish Rover cannot show that this statement in the March 22 Article was made in good faith and with a reasonable basis in law and fact.

Accordingly, Defendant's Motion should be denied.

V. CONCLUSION

For the foregoing reasons, Plaintiff Tamara Kay, respectfully requests that this Court deny Defendant's Motion to Dismiss.

Respectfully submitted,



Kimberly D. Jeselskis, Attorney No. 23422-49
B.J. Brinkerhoff, Attorney No. 24811-53
MacKenzie A. Watson, Attorney No. 36139-32
JESELSKIS BRINKERHOFF AND JOSEPH LLC
320 North Meridian Street, Suite 428
Indianapolis, Indiana 46204
Telephone: (317) 220-6290
Facsimile: (317) 220-6291
kjeselskis@jbjlegal.com
bjbrinkerhoff@jbjlegal.com
mwatson@jbjlegal.com

Counsel for Plaintiff

¹¹ There were numerous statements in the March 22 Article that were misquoted or taken severely out of context, referred to questions by students that did not occur, and contributed statements to Professor Kay that she did not make, which go to the credibility of the Irish Rover. *See* Kay Dec. ¶¶'s 68, 70-72, Att. N).

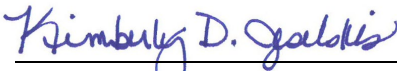
¹² Thompson testified that he did nothing to independently verify this statement.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2023, I electronically filed the foregoing with the Clerk of the Court using the Indiana E-Filing System ("IEFS") and that the foregoing document was served upon the following person(s) using the service contact entered in the IEFS via IEFS on November 3, 2023.

James Bopp, Jr. jboppjr@aol.com

Melena S. Siebert msiebert@bopplaw.com



Kimberly D. Jeselskis