



addressed in her Response Brief and concerning which she is entitled to have the final word.

As an appellee, Tully was not required to file a notice of cross-appeal. She was not seeking reversal of the trial court's order but instead "raising a ground for affirming that appears in the record and was rejected or not considered by the trial court." *Citimortgage, Inc. v. Barabas*, 975 N.E.2d 805, 813 (Ind. 2012).

*Citimortgage* was subsequently cited in *Drake v. Dickey*, 12 N.E.3d 875, 875 (Ind. 2013), where our Supreme Court held that appellees would not be prohibited from raising a claim as an alternative ground for affirming the trial court's summary judgment order that appellees had not expressly denominated as a cross-appeal.

*Drake v. Dickey* controls and requires this Court to deny Rokita's motion to strike.

If an appellee can raise alternative grounds for affirming a trial court's judgment in her favor, she may do so both in her opening and reply briefs filed in this Court.

Rokita asks this Court to strike from Appellee Tully's Reply Brief in support of her cross-appeal her argument that Rokita waived or should be estopped from invoking APRA's deliberative materials exception because of his public claims the IG opinion exonerated him. In light of its decision that Tully was entitled to summary judgment on other grounds, the trial court elided this argument.

However, as an alternative ground for affirming the trial court's judgment in her favor, the waiver issue is part of her cross-appeal regardless of whether she

specifically denominated it as such. *Porter Hosp., LLC v. TRK Valpo, LLC*, 212 N.E.3d 683, 689 n.3 (Ind. Ct. App. 2023); *RCM Phoenix Partners, LLC v. 2007 East Meadows, L.P.*, 118 N.E.3d 756, 760-61 (Ind. Ct. App. 2019)(observing that although ordinarily an argument or issue raised for the first time on appeal is waived, *Drake v. Dickey* “signaled a shift away from this, at least as far as appellees are concerned” and permits an appellee to defend the trial court’s ruling on any grounds, even one not raised at trial); *see also Ind. BMV v. Gurtner*, 27 N.E.3d 306, 312 (Ind. Ct. App. 2015)(“on appellate review the trial court’s judgment will be affirmed if sustainable on any theory or basis in the record,” citing *J.M. v. Review Bd. of Ind. Dep’t of Workforce Dev.*, 975 N.E.2d 1283, 1289 (Ind. 2012)). Further, this is not a “new” issue being raised for the first time in her Reply. Appellee Tully raised this issue both in the trial court<sup>1</sup> and in her Response Brief<sup>2</sup> filed in this Court. That argument being integral to her cross-appeal, she did not, as Rokita claims (Motion to Strike at 4), “depart[] from general appellate practice” by including the waiver argument in her Reply Brief, as it is an additional basis in the record on which the trial court’s judgment may be affirmed.

Rokita’s motion to strike from her Reply Brief her constitutional arguments related to the post-judgment legislation—which Rokita claims requires this Court

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<sup>1</sup> Appellant’s App. Vol. II pp. 129-133, 199-203.

<sup>2</sup> Response Brief at pp. 21-25.

to summarily reverse the trial court’s judgment—is frivolous. Tully could not have initially litigated the separation-of-powers issues arising from the Legislature’s post-judgment intervention in the trial court. Were this Court to grant Rokita’s motion to strike those arguments from her Reply, she would have had but a single opportunity (i.e., in her Response Brief) to brief this weighty constitutional issue, while Rokita (both in his opening brief and again in his reply) had two. It is Rokita who seeks two bites of the apple while limiting Tully to one.

Rokita lastly argues (Motion to Strike at 5) that Tully’s reference to Rokita’s answer to the Disciplinary Complaint lodged against him after Tully had submitted her Response Brief should be stricken as “immaterial” from Tully’s Reply Brief. He recklessly accuses both Appellee Tully and her counsel of engaging in “naked partisanship” by referencing Rokita’s answer to that disciplinary complaint and by her counsel’s having filed an unrelated disciplinary grievance against Rokita a year ago.

This Court should reject this sort of *ad hominem* attack. Tully’s undersigned counsel was but one among other attorneys, including the former executive director of the Disciplinary Commission and the former dean of Mauer Law School, who filed disciplinary grievances against Rokita after a trial court ruled that Rokita had violated Indiana law by publicly disclosing that his office was investigating the actions of a physician with respect to a 10-year-old Ohio rape

victim.<sup>3</sup> It has since been adjudicated that Rokita’s conduct and words with respect to that physician violated Indiana’s Rules of Professional Conduct. *In re Rokita*, \_\_\_ N.E.3d \_\_\_, 2023 Ind. LEXIS 640 (Ind. Nov. 2, 2023). Rule of Professional Conduct 8.3(a) makes clear that “[a] lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct...shall inform the appropriate professional authority.” (emphasis added).

Moreover, Appellee Tully referenced Rokita’s answer to that Disciplinary Complaint for a good reason: it shows that Rokita is advocating for a different waiver standard in a separate venue that would require the same conclusion advocated for by Tully in this case. It also shows that Rokita is asking this Court to give him the benefit of a double standard. He claims that although he did not waive his right to confidentiality by making a public claim of complete exoneration, the physician’s vague and unspecific public comments had waived her right to confidentiality. Tully’s contrasting of Rokita’s legal positions in these two forums is well within the boundaries of legitimate argumentation.

Under the holding of *Drake v. Dickey*, *supra*, and its progeny, Appellee Tully was not required to file a notice of cross-appeal or specifically designate the issues she intended to raise in her cross-appeal. It is enough that those issues are

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<sup>3</sup> <https://www.indystar.com/story/news/politics/2023/09/18/indiana-attorney-general-todd-rokita-disciplinary-complaint-dr-caitlin-bernard-fox-news-10-year-old/70890640007/>

alternative reasons for affirming the trial court's judgment in her favor. Rokita has cited to no authority that would prohibit Tully from arguing those alternative grounds in both her Response and Reply Briefs.

**WHEREFORE**, Appellee Tully respectfully submits that Appellant Rokita's motion to strike should be **DENIED**.

DATED this 5th day of November, 2023.

Respectfully submitted,

/s/ William R. Groth, Atty No. 7325-49

/s/ Daniel Bowman, Atty No. 31691-49  
*Attorneys for Appellee/Cross-Appellant*

BOWMAN & VLINK, LLC  
911 E. 86th Street, Suite 201-M  
Indianapolis, IN 46204  
(317) 912-3220

## CERTIFICATE OF SERVICE

I certify that on November 5, 2023, the foregoing document was filed using the Indiana E-filing System and was served, contemporaneously with this filing, via the IEFS, to the following attorneys for Appellant:

James Bopp Jr., [jboppjr@aol.com](mailto:jboppjr@aol.com)

Melena S. Siebert, [msiebert@bopplaw.com](mailto:msiebert@bopplaw.com)

*/s/ William R. Groth*