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2015 OCT 21 PM 12:16

SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

SALVADOR ENRIQUEZ,
Plaintiff-Appellant/Cross-Appellee,

v.

ELSIE SMITH,
Defendant-Appellee/Cross-Appellant.

Supreme Court Case No.: CVA14-020
Superior Court Case No.: CV1486-11

OPINION

Cite as: 2015 Guam 29

Appeal from the Superior Court of Guam
Argued and submitted on April 27, 2015
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

CARBULLIDO, J.:

[1] This dispute centers on interpreting whether Guam’s Citizen Participation in Government Act (“CPGA”), 7 GCA Chapter 17, provided Defendant-Appellee/Cross-Appellant Elsie Smith immunity from Plaintiff-Appellant/Cross-Appellee Salvador Enriquez’s action for slander, libel, false light invasion of privacy, and emotional distress. Enriquez appeals a final judgment of the trial court which, following remand, dismissed his claims due to Smith’s immunity under Guam’s anti-SLAPP statute, required him to pay Smith’s attorney’s fees from trial, and imposed a \$20,000.00 sanction against Enriquez. Enriquez argues that the CPGA is not applicable because Smith’s actions do not constitute petitioning, his hearing lacked adequate due process to be an official proceeding, and the sham exception precluded Smith’s immunity. Smith cross-appeals, claiming that the trial court erred in not awarding her attorney’s fees for her appeal, not imposing sanctions against Enriquez’s counsel, and not awarding her compensatory damages.

[2] For the reasons stated herein, we affirm in part, reverse in part, and remand for proceedings not inconsistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] The case has previously come before the court in *Enriquez v. Smith*, 2012 Guam 15. “Smith was a patient of Dr. Hugh Sule, a dentist at Gentlecare Dental Clinic (“Gentlecare”) in Tamuning.” *Enriquez*, 2012 Guam 15 ¶ 2. Smith alleged that Dr. Sule left in the middle of a root canal, leaving the procedure to a dental auxiliary. Smith suffered pain and swelling of her face and eye as a result of the procedure. In response, Smith filed a complaint with the Guam Board of Examiners for Dentistry (“Dental Board”). In the course of the Dental Board’s

investigation, Smith viewed photographs to identify the dental auxiliary who assisted with the root canal. Smith identified Salvador Enriquez. As a result, the Dental Board, represented by the Office of the Attorney General (“Attorney General”), filed a disciplinary case against both Dr. Sule and Enriquez.

[4] As a result of the investigation, Enriquez filed suit against Smith in the Superior Court, seeking actual, compensatory, punitive, and other unspecified damages for libel, slander, false light invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional distress based on his assertion that Smith falsely identified him as the dental auxiliary who caused her harm. Enriquez maintains that he did not participate in Smith’s procedure and submitted several affidavits in support of his claim, including one from Edmund Julao stating that he, and not Enriquez, was the dental auxiliary who assisted Dr. Sule with Smith’s root canal.

[5] Smith moved to dismiss Enriquez’s action against her pursuant to both Guam Rules of Civil Procedure (“GRCP”) Rule 12(b)(6) for Enriquez’s failure to state a claim upon which relief may be granted, and for summary judgment under the CPGA, 7 GCA § 17106. The trial court granted only the GRCP 12(b)(6) motion to dismiss, declining to address the CPGA argument. On appeal, this court ruled that Smith was entitled to have her CPGA argument considered, along with the claims for sanctions and damages stemming from a favorable ruling, and remanded for proceedings on these issues.

[6] On remand, the trial court dismissed the action against Smith, holding that her complaint and subsequent investigation assistance to the Dental Board satisfactorily constituted petitioning activity to trigger immunity from suit under the CPGA. The court also awarded Smith litigation costs including “reasonable attorney[’s] fees and sufficient sanctions for deterrence.” Record on Appeal (“RA”), tab 65 at 4 (Dec. & Order, May 10, 2013). Following an evidentiary hearing,

the court calculated Smith's reasonable attorney's fees to be \$22,091.82 and imposed a sanction against Enriquez of \$20,000.00. However, the court denied Smith's claim for compensatory damages for failure to articulate sufficiently concrete damages and causation.

[7] Following denial of a motion for reconsideration, the trial court issued its final judgment. Both parties timely appealed.

II. JURISDICTION

[8] This court has jurisdiction over appeals from final judgment of the Superior Court pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-40 (2015)) and 7 GCA §§ 3107(b) and 3108(a) (2005). This is an appeal of a final judgment issued by the Superior Court. RA, tab 95 at 1-2 (Judgment, May 19, 2014).

III. STANDARD OF REVIEW

[9] Any motion seeking immunity under the CPGA is treated as a motion for summary judgment. 7 GCA § 17106(a) (2005). We review a trial court's decision granting a motion for summary judgment *de novo*. *Zahnen v. Limtiaco*, 2008 Guam 5 ¶ 8; *see also Taitano v. Lujan*, 2005 Guam 26 ¶ 11. Additionally, issues of statutory interpretation, such as whether the CPGA and the sham exception apply in this case, are subject to *de novo* review. *People v. Aromin*, 2014 Guam 3 ¶ 11; *Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶ 6 (construction of the CPGA reviewed *de novo*). Mixed issues of law and fact, such as whether the Dental Board hearing provided sufficient due process protections to be considered an official proceeding, are reviewed *de novo*. *Att'y Gen. of Guam v. Gutierrez*, 2011 Guam 10 ¶ 18 (citing *Town House Dep't Stores, Inc. v. Ahn*, 2000 Guam 29 ¶ 6).

[10] A trial court's decision whether or not to award attorney's fees and impose sanctions is normally reviewed for an abuse of discretion. *Cruz v. Cruz*, 2005 Guam 3 ¶ 8; *Fleming v.*

Quigley, 2003 Guam 4 ¶ 14; *Trans Pac. Exp. Co. v. Oka Towers Corp.*, 2000 Guam 3 ¶ 37; *Adams v. Duenas*, 1998 Guam 15 ¶ 10. However, to the extent that the CPGA requires mandatory award of sanctions and fees, the issue is one of statutory interpretation, reviewed *de novo*. *Aromin*, 2014 Guam 3 ¶ 11; *Brizill*, 2008 Guam 13 ¶ 6. Thus, the imposition of sanctions against Enriquez is reviewed *de novo*, as is the court's decision to deny sanctions against Enriquez's attorney. By contrast, determination of the appropriate amount of the sanctions and attorney's fees remains subject to an abuse of discretion review. *Cruz*, 2005 Guam 3 ¶ 8; *Fleming*, 2003 Guam 4 ¶ 14; *Trans Pac.*, 2000 Guam 3 ¶ 37; *Adams*, 1998 Guam 15 ¶ 10.

[11] A refusal to award compensatory damages under the CPGA is subject to an abuse of discretion review. *See* 7 GCA § 17106(h).

IV. ANALYSIS

A. Whether the CPGA, 7 GCA Chapter 17, Applied to the Civil Action

[12] In evaluating this claim previously, the court found that Smith's motion was "essentially alleging that Enriquez's complaint was a Strategic Lawsuit Against Public Participation, or SLAPP." *Enriquez*, 2012 Guam 15 ¶ 4. "The CPGA is Guam's anti-SLAPP statute." *Brizill*, 2008 Guam 13 ¶ 9. In passing the CPGA, the Guam Legislature noted that SLAPP suits are "typically dismissed as unconstitutional, but often not before the defendants are put to great expense, harassment and interruption of their productive activities[.]" 7 GCA § 17102(a)(4) (2005). Rather than simply seeking recovery for civil wrongs committed against the litigant, SLAPP lawsuits are generally "used to censor, chill, intimidate, or punish citizens, businesses and organizations for involving themselves in public affairs." 7 GCA § 17102(a)(6); *see also* *Batzel v. Smith*, 333 F.3d 1018, 1024 (9th Cir. 2003) (SLAPPs "masquerade as ordinary lawsuits but are brought to deter common citizens from exercising their political or legal rights or to

punish them for doing so.” (internal quotation marks omitted)). Generally, the anti-SLAPP movant has the burden of making a *prima facie* showing that the claims against them are based on protected petitioning activities. See *Rusheen v. Cohen*, 128 P.3d 713, 717 (Cal. 2006); *Bleavins v. Demarest*, 127 Cal. Rptr. 3d 580, 585 (Ct. App. 2011). However, once a *prima facie* showing has been made, the opposing party must demonstrate by clear and convincing evidence that the movant’s acts are not immunized by the CPGA. 7 GCA § 17106(c), (e).

[13] The portion of the CPGA relevant to this discussion states that:

Acts in furtherance of the Constitutional rights to petition, including seeking relief, influencing actions, informing, communicating and otherwise participating in the processes of government, shall be immune from liability, regardless of intent or purpose, except where not aimed at procuring any government or electoral action, result, or outcome.

7 GCA § 17104 (2005). Here, the parties disagree first regarding the included scope of petitioning the government. Enriquez asserts that the CPGA “extend[s] only to communications about the government, its actions, people and processes essential to the survival of democracy, etc.” Appellant’s Br. at 5 (Sept. 29, 2014). In support of this contention, Enriquez relies on the interpretation of Guam’s CPGA found in Superior Court case *Leon Guerrero v. Ji*, CV0832-12 (Super. Ct. Guam Oct. 25, 2012). *Id.* at 9. In *Leon Guerrero*, the trial court employed a limited reading of Guam’s CPGA, reasoning that, because anti-SLAPP protections are aimed at preserving legitimacy in representation and government functioning, any communication to government officials not concerning government actions or public matters necessary to the survival of democracy fall outside the scope of protection. *Leon Guerrero*, CV0832-12, at 4-7. In reaching this conclusion, the court opined that complaints to licensing boards are not protected, since they have no value to the proper functioning of representative democracy. *Id.* at 5, 7.

[14] While helpful in evaluating the issues in dispute, a trial court decision holds “no precedential value” over this court. *See Bell v. Com., Cabinet for Health & Family Servs., Dep’t for Cmty. Based Servs.*, 423 S.W.3d 742, 751 (Ky. 2014) (citation omitted); *In re Emma F.*, 315 Conn. 414, 432 (Conn. 2015); *State Bd. of Equalization v. Courtesy Motors, Inc.*, 362 P.2d 134, 135 (Wyo. 1961). Further, examination of the merits reveals that the decision reached in *Leon Guerrero* is ultimately unpersuasive. “It is a cardinal rule of statutory construction that courts must look first to the language of the statute itself. Absent clear legislative intent to the contrary, the plain meaning prevails.” *Enriquez*, 2012 Guam 15 ¶ 11 (citing *Sumitomo Constr. Co. v. Gov’t of Guam*, 2001 Guam 23 ¶ 17). The CPGA explicitly defines petitioning to include “seeking relief, influencing action, informing, communicating, and otherwise participating with government bodies, officials, or employees or the electorate.” 7 GCA § 17102(a)(3); *see also* 7 GCA § 17104. This language suggests that communications with government bodies, employees, or officials aimed at influencing or informing may properly be considered petitioning triggering immunity. Further, the Guam Legislature’s findings and declaration of purpose emphasizes that citizen communications, information, reports and claims are essential to government action preserving public health and welfare. 7 GCA § 17102(a)(2). This declaration indicates that, in addition to protecting petitioning traditionally related to preservation of democracy, the Legislature placed a strong policy interest in safeguarding communications necessary for assisting government entities in maintaining public health and welfare.

[15] Smith made a complaint to the Dental Board, a government body composed of government officials, with the intent of informing them of misconduct and influencing them to undertake the action of commencing an investigation and if appropriate, disciplinary action. RA, tab 8, Ex. at 1-4 (Compl. Against Hugh Sule, DDS by Elsie Smith to Dr. Stanley Yasuhiro,

Chairperson, Guam Board Dental Examiners); 10 GCA § 12430 (2005). Further, she continued to inform and communicate with the Board in assisting during the course of their investigation. *Enriquez*, 2012 Guam 15 ¶ 2. Thus, Smith’s communication undoubtedly satisfies the definition of petitioning when analyzed under the plain meaning. *See* 7 GCA §§ 17102(a)(3), 17104. Further, protecting communication conveying information directly to a government board relevant to its task of disciplining dental professionals for incompetence or unprofessional conduct is wholly consistent with the stated policy objective of assisting government entities in maintaining public health and welfare. *See* 7 GCA § 17102 (a)(2); 10 GCA § 12417 (2005). Finally, unlike the holding in *Leon Guerrero*, a more comprehensive examination of persuasive guidance in Superior Court case law reveals that a majority of cases applied a broad interpretation of petitioning activities consistent with the present analysis. *See, e.g., Rokuro Koike, Inc. v. Resort Mgmt., Inc.*, CV0288-07, at 29-42 (Super. Ct. Guam July 3, 2008) (granting CPGA immunity for complaints made to Guam Real Estate Commission); *Busker Alley, Inc. v. Kasperbauer*, CV1081-12, at 3-4 (Super. Ct. Guam Sept. 30, 2013) (accepting CPGA defense where defendant made public statements to police and neighbors that proposed development of a bar was immoral and illegal); *Bank of Haw. v. Dearth*, CV1332-08, at 4-8 (Super. Ct. Guam Jan. 29, 2010) (accepting CPGA defense for slander claims related to statements made to police). Therefore, Enriquez’s assertion that “[s]imply finding that the complaint was not pertaining to the function of government or its democratic processes would result in denial of a CPGA motion,” *see* Appellant’s Br. at 14-15, is contradicted by the text and intent of the statute to cover a broad range of petitioning activities beyond those traditionally associated with the democratic process. 7 GCA §§ 17102, 17104; *Rokuro Koike*, CV0288-07, at 38-42.

[16] Enriquez also supports his contention that the CPGA immunity should be read in a limited fashion by citing to the Illinois Supreme Court case *Sandholm v. Kuecker*, 962 N.E.2d 418, 431 (Ill. 2012), which interpreted a similar version of an anti-SLAPP statute. Appellant's Br. at 7. This case established a limited view of petitioning rights under Illinois's CPGA. *Sandholm*, 962 N.E.2d at 430-31. In addition, the case presented facts involving a complaint to a school board, somewhat similar to those in the present dispute. However, when viewed in complete context, the facts presented in *Sandholm* are materially distinguishable from those in the dispute before us. Unlike this case, where Enriquez's lawsuit is entirely premised on communications made by Smith to the Dental Board in her complaint or in assisting with the Board's investigation, many of the allegedly defamatory statements made in *Sandholm* were not made to a government board and occurred outside the scope of protected petitioning activities. *Id.* at 422-24. Indeed, the defendants in that case "made multiple false and defamatory statements in various media. . . ." *Id.* at 423. This included penning articles in local publications, posting letters and publishing comments to multiple websites, and appearing on radio shows in order to disparage the reputation of the plaintiff. *Id.* at 423-24. While it is possible for statements made to the media to constitute protected petitioning activity when the content is aimed at informing voters to produce an electoral outcome or result, *see Brizill*, 2008 Guam 13 ¶¶ 2-3, 43-44, the substance of the communications in *Sandholm* consisted entirely of character attacks on the plaintiff's coaching and interaction with students. These communications were not directed toward any government employee or entity and were entirely separate from their petitions to the school board aimed at securing government action. *Sandholm*, 962 N.E.2d at 422-24. By contrast, Smith's communications in the present suit were made directly to government officials in their capacity as a government body and related directly

to their duties of protecting public health and welfare. Such conduct forms the very core of protected petitioning activity under Guam's anti-SLAPP statute. *See* 7 GCA §§ 17102, 17104. Accordingly, the reasoning in the *Sandholm* decision should not control this court's interpretation regarding the scope of Smith's petitioning rights under Guam's CPGA.

[17] Finally, in opposing Enriquez's claim, Smith argues in the alternative that, if the court adopts the suggested *Sandholm* requirements limiting immunity to meritless and retaliatory cases, Enriquez's claims would be meritless due to her separate immunity under 19 GCA § 2105. Appellee's Br. at 15-16 (Nov. 12, 2014). It was on this basis that the trial court originally granted her motion to dismiss before this court required consideration of her CPGA claims. RA, tab 35 at 1-7 (Dec. & Order, Jan. 6, 2012). However, we have already held that Smith's conduct falls within the definition of petitioning activity under Guam's CPGA statute. We thus decline to address whether Smith enjoys separate immunity under 19 GCA § 2105, as it would not be necessary to a resolution of the issue. *See Hemlani v. Hemlani*, 2015 Guam 16 ¶ 33; *People v. Flores*, 2009 Guam 22 ¶ 85.

[18] Accordingly, we find that the actions taken by Smith appropriately satisfied petitioning to trigger the protections of the Guam CPGA.

B. Whether the Dental Board Proceedings Lacked Sufficient Due Process Protections so as to not Constitute an "Official Proceeding" and therefore not Fall within the CPGA , 7 GCA Chapter 17

[19] The court is next faced with a dispute regarding whether the Dental Board's hearing contained due process protections sufficient to make it an official proceeding. Enriquez seems to indicate that a communication not concerning a public matter and not made in an official proceeding is not entitled to immunity under the Guam CPGA, 7 GCA § 17104. Appellant's Br. at 15. He claims that a conflict of interest occurred because Assistant Attorney General

(“AAG”) Highsmith served as both prosecuting attorney and counsel to the Dental Board. *Id.* at 15-21. Further, he alleged that the proceeding lacked a proper conflict wall between the prosecuting AAG and the AAG serving as the hearings officer, citing an alleged threat by the former to have the latter disciplined for failing to rule in his favor. *Id.* at 21-24. Enriquez claims that these defects denied him appropriate due process required for an official proceeding. *Id.* at 24.

[20] Enriquez’s argument is entirely premised on the assumption that, in order to use the immunity under the CPGA, a communication must either concern a public matter related to representative government or be made to the government in an official proceeding. *Id.* at 16-17. In support of this proposition, he cites to *Macris v. Richardson*, 2010 Guam 6. The majority of the *Macris* opinion actually analyzes the official proceeding requirement under 19 GCA § 2105 and Guam Rules of Evidence Rule 417(a)(3), not immunity under the Guam CPGA. *See* 2010 Guam 6 ¶¶ 1-3, 14-24. However, in briefly exploring whether the trial court’s decision could be upheld on any alternate grounds supported by the record, this court applied its official proceeding analysis in the context of CPGA immunity, relying on a requirement under California’s anti-SLAPP statute. *Id.* ¶¶ 25-29. While this court ultimately declined to apply Guam’s CPGA to the decision in that case, we recognize that simply conducting such analysis could, when improperly interpreted, create the mistaken belief that Guam’s CPGA contains an official proceedings requirement. We therefore clarify this holding in *Macris* and emphasize that, unlike its California counterpart, the text of Guam’s anti-SLAPP statute contains no such requirement. *Compare* 7 GCA Chapter 17, with Cal. Civ. Proc. Code § 425.16(e). Rather, the Guam CPGA extends immunity for all petitioning acts including “seeking relief, influencing action, informing, communicating, and otherwise participating with government bodies, officials,

or employees or the electorate.” 7 GCA § 17102(a)(3). Additionally, in the context of petitioning, “Government” is defined broadly, including:

a branch, department, agency, instrumentality, official, employee, agent or other person acting under color of law of the United States, a State, a Territory, or a subdivision of a State or Territory, including municipalities and their boards, commissions, and departments, or other public authority, including the electorate.

7 GCA § 17103(a) (2005). It is clear under the Guam statute that communication seeking to influence action and convey information to the Dental Board satisfied this definition, since the Board is an administrative entity created by statute and consisting of government officials appointed by the Governor of Guam. 10 GCA § 12430.

[21] Further, even assuming that Guam law imposed an official proceedings requirement for purposes of the CPGA, a disciplinary proceeding by the Dental Board would certainly satisfy it. California cases interpreting official proceedings requirements, including those contained in their version of the CPGA, have held that a proceeding within the scope of a medical board’s duties is sufficient to trigger immunity. *See Kibler v. N. Inyo Cnty. Local Hosp. Dist.*, 138 P.3d 193, 196-97 (Cal. 2006); *Steed v. Dep’t of Consumer Affairs*, 138 Cal. Rptr. 3d 519, 523-24 (Ct. App. 2012); *Long v. Pinto*, 179 Cal. Rptr. 182, 184 (Ct. App. 1981). This is because, like the Dental Board in Guam, the process is authorized by statute for the purpose of regulating professional conduct and ensuring high standards of practice within the public health field. *See* 10 GCA § 12435(f) (2005); *Kibler*, 138 P.3d at 196-97. Indeed, Enriquez explicitly concedes that the Dental Board constitutes a governmental board whose actions normally constitute official proceedings for purposes of petitioning under Guam’s anti-SLAPP statute. Appellant’s Resp. & Reply Br. at 19 (Jan. 2, 2015). Instead, Enriquez attempts to assert that due process violations made his particular proceeding so deficient as to strip it of its official proceeding status. We

reject this argument. Improprieties on the part of administrative boards may indeed result in violations of due process and give rise to possible avenues of judicial relief. *See Sule v. Guam Bd. of Dental Exam'rs*, 2008 Guam 20 (reviewing disciplinary action imposed by the Dental Board to determine if due process violations occurred). However, so long as a Board's hearings generally satisfy the definition of an official proceeding, procedural deficiencies in a particular instance will not transform the nature of a proceeding for purposes of a petitioner's immunity. To hold otherwise would risk chilling the first amendment rights of a citizen who petitioned a legitimate government entity in good faith and who had no control over the procedural posture of the subsequent hearing. As such, there is no reason to address the specific allegations of due process violations, since they are irrelevant to the question of whether the court correctly found immunity under the CPGA. As stated above, Smith would be entitled to immunity even, assuming *arguendo*, that the Dental Board hearing was not an official proceeding. 7 GCA §§ 17103(a), 17104. Thus, we affirm that the trial court did not err in finding that CPGA immunity shields Smith from liability on the basis that her communications to the Dental Board did not occur in an official proceeding.

C. Whether the Sham Exception Applied to the Application of the CPGA , 7 GCA Chapter 17

[22] This court in *Brizill* interpreted the relevant portions of this statute, holding that 7 GCA § 17104 can be divided into two sections: "The beginning part which ends with 'regardless of intent or purpose,' and the ending phrase which states 'except where not aimed at procuring any government or electoral action, result or outcome.'" 2008 Guam 13 ¶ 11. The first section was referred to as the "petitioning provision," and the second was the "sham exception." *Id.* As discussed above, once the moving party makes a *prima facie* case regarding their petitioning

activities, the opposing party must show by clear and convincing evidence that their acts are not immunized. 7 GCA § 17106(c), (e).

[23] The sham exception states that protected acts of petitioning shall be immune from liability “except where not aimed at procuring any government or electoral action, result or outcome.” 7 GCA § 17104. The purpose of this exception is to ensure that petitioning is done in good faith, rather than merely serving as a mechanism to indemnify an individual for defamatory speech or interference with another. See *E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961) (holding that a publicity campaign is a sham where it is merely an attempt to interfere with a competitor, rather than a genuine effort to influence legislation). The exception is designed to “encompass[] situations in which persons use the governmental process—as opposed to the *outcome* of that process—as an anticompetitive weapon.” *Brizill*, 2008 Guam 13 ¶ 38 (quoting *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380) (1991). The Court in *Omni* described conduct fitting into this exception as “‘not genuinely aimed at procuring favorable government action’ at all. . . .” *Omni*, 499 U.S. at 380 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500, n.4 (1988)). Thus, in order to prevail on a sham exception, Enriquez must prove, by clear and convincing evidence, that Smith’s petitioning activity was not aimed at procuring any governmental result or action. 7 GCA § 17104.

[24] Here, there can be no doubt that by reporting Dr. Sule to the Dental Board and identifying Enriquez in assistance of their investigation, Smith’s communications were aimed at producing investigative and disciplinary government action. RA, tab 8, Ex. at 1-4 (Compl. Against Hugh Sule, DDS by Elsie Smith to Dr. Stanley Yasuhiro, Chairperson, Guam Board Dental Examiners). Thus, the text of the sham exception within Guam’s statute is satisfied. Enriquez

attempts to show that Smith's actions participating in the investigation were merely an attempt to secure a civil settlement. However, his only allegation on this issue is that AAG Highsmith and the Dental Board made a settlement offer which included monetary compensation to Smith. Appellant's Br. at 25-26. However, by his own admission, "[t]he record is unclear if Elsie [Smith]'s counsel and AAG Highsmith discussed the specifics of a settlement proposal." *Id.* at 25. Enriquez's proffered evidence fails to establish that Smith was even aware of a settlement offer, let alone motivated by it. *Id.* There is nothing to suggest that her complaint to the Dental Board and subsequent assistance in their investigation was not done in good faith to further the Board's purpose of safeguarding professionalism and competence in the practice of dentistry. Whether or not the actions of the Dental Board were proper is irrelevant to Smith's motivation for engaging in petitioning activity.

[25] Enriquez's argument falls far short of his burden to establish the exception by clear and convincing evidence, which "must be of extraordinary persuasiveness" and must be "so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy. . . ." *Brizill*, 2008 Guam 13 ¶ 41 (citations and internal quotation marks omitted). Accordingly, this court holds that the sham exception does not deny Smith immunity from suit under the CPGA.

D. Whether the Trial Court Erred in Assessing Attorney's Fees and Sanctions Against Plaintiff

[26] Having determined that Smith is entitled to relief under the CPGA, the court must now turn to the issue of awarding attorney's fees and sanctions. Under normal circumstances, the decision of whether or not to impose sanctions is entirely discretionary. *Adams*, 1998 Guam 15 ¶ 10. However, the CPGA explicitly provides that the trial court:

shall award a moving party who is dismissed . . . (1) costs of litigation, including reasonable attorney . . . fees, incurred in connection with the motion; and (2) such additional sanctions . . . as it determines will be sufficient to deter repetition of such conduct and comparable conduct by others similarly situated.

7 GCA § 17106(g). Use of the word “shall” within the statute makes clear that both the imposition of sanctions and the award of attorney’s fees is mandatory, rather than permissive. 1 GCA § 715(9) (2005). Reasonable fees and sanctions necessary to deter future misconduct are required, though the amount of each is left to the sound discretion of the trial court.

1. Attorney’s fees

[27] On the issue of attorney’s fees, Enriquez does not challenge the trial court’s method of computation for determining litigation costs. Rather, his protest apparently stems from the trial court’s award of fees from December 11, 2011, to the Decision and Order dismissing his claims on May 10, 2013, as well as fees for services between May 10, 2013, and the final Decision and Order regarding attorney’s fees on October 31, 2013. RA, tab 85 at 5-9 (Dec. & Order, Oct. 31, 2013). Enriquez’s sole contention on appeal is that the award of fees should be granted only through September 22, 2011, the date when he volunteered to withdraw his action. Appellant’s Br. at 26-29. The basis of this assertion is that the award of attorney’s fees is intended as a remedy enabling escape from an oppressive lawsuit, the precise result he attempted to ensure by moving to dismiss his own case against Smith. *Id.* at 27-28. Further, he claims that the actions of Smith’s attorney had the perverse effect of opposing dismissal on the supposedly unjust suit, undermining the intention of the Legislature. *Id.* While rhetorically clever, this argument fails upon examination of its practical effects.

[28] Enriquez is correct that the ultimate goal of a motion under an anti-SLAPP statute is to free an individual from an oppressive lawsuit stemming from their protected petitioning

activities. *See* 7 GCA § 17102; *see also* *Wilkerson v. Sullivan*, 121 Cal. Rptr. 2d 275, 277 (Ct. App. 2002). However, Guam's CPGA entitles an affected party to the cost of litigating their claim and mandates sanctions to ensure that future parties are not subjected to similar suits. 7 GCA §§ 17102(b)(5), 17106(g). When this case last came before the Guam Supreme Court, we held that dismissal was insufficient precisely because Smith was entitled to have her CPGA argument considered in order to determine if she was entitled to sanctions and damages, which flowed from the CPGA statute. *Enriquez*, 2012 Guam 15 ¶ 17. Similarly, accepting Enriquez's offer for voluntary dismissal without a ruling on whether the case triggered CPGA protections would have been an insufficient remedy, as it would have denied her the ability to seek the fees, sanctions, and damages to which she was arguably entitled under 7 GCA § 17106(h). Thus, it would be inconsistent with the purposes of the statute to limit the recoverable attorney's fees so as to exclude a good faith attempt to recover what Smith was entitled to under the 7 GCA § 17106(g). To do so would erode the protections of the statute by allowing parties to bring SLAPP suits to chill petitioning actions and limit their liability for doing so by simply volunteering to dismiss their claims if their target moves to protect themselves with CPGA immunity. Such a result would violate our mandate to liberally interpret the statute in order to protect petitioning activities to the fullest extent of the law. *See* 7 GCA §§ 17102(b)(1), 17108 (2005). Accordingly, the trial court did not err in awarding attorney's fees after Enriquez's September 22, 2011 motion for voluntary dismissal.

2. Sanctions

[29] Enriquez argues that sanctions were not warranted in this case since the matter was one of first impression before this court. He supports this claim by noting the split within the Superior Court regarding the scope of the CPGA applicability. Appellants' Br. at 29-30. He

also notes that attorneys have an ethical duty to bring legitimate disputes on behalf of their clients which test the scope of the law. *Id.* at 29 (citing Guam R. Prof'l. Conduct 3.1, 1.2(d)).

[30] Enriquez is correct that this issue remains subject to a split of authority in Superior Court cases. *Compare Leon Guerrero*, CV0832-12, *with Rokuro Koike*, CV0288-07. Additionally, this court has admitted that the issue is one of first impression that has yet to be decided definitively. *Enriquez*, 2012 Guam 15 ¶¶ 14, 18. However, while these arguments present a persuasive case against a finding of frivolousness, the court is obligated to follow the clear mandates of the CPGA. As noted above, the statute explicitly orders that “the court *shall* award a moving party who is dismissed, *without regards to any limit under Guam Law . . .* such additional sanctions . . . as it determines will be sufficient to deter repetition of such conduct and comparable conduct by others similarly situated.” 7 GCA § 17106(g) (emphasis added). As discussed, this language mandates the imposition of sanctions where a CPGA violation warranting dismissal is found. 1 GCA § 715(9). While a compulsory sanction in this case may appear somewhat draconian, the legislative mandate is clear, as is their explicit instruction that this court may not use the other limiting factors of Guam law to waive the imposition of such penalties. 7 GCA § 17106(g). In interpreting a similar provision in its own anti-SLAPP statute, the Georgia Court of Appeals reached the same conclusion that, while the trial court had discretion with regard to the amount, the plain meaning of the statute mandated the imposition of some sanction. *Hagemann v. Berkman Wynhaven Assoc.*, 660 S.E.2d 449, 454-55 (Ga. Ct. App. 2008).

[31] Further, while he claims that a \$20,000.00 sanction is excessive, Enriquez offers no explanation on why this amount constitutes an abuse of discretion based on “an erroneous view of the law or on a clearly erroneous assessment of the evidence.” *Trans Pac.*, 2000 Guam 3 ¶ 37.

While the amount is not insignificant, it is within the realm of reasonableness compared to anti-SLAPP sanctions in other jurisdictions. *See, e.g., Bevan v. Meyers*, 334 P.3d 39, 45 (Wash. Ct. App. 2014) (allowing \$10,000.00 sanction plus additional sanction to deter future misconduct); *Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 881 (Tex. App. 2014) (allowing \$15,000.00 sanction to deter similar actions under Texas CPA). Indeed, courts have found that, in some circumstances, imposing sanctions too low constitutes an abuse of discretion when the statute requires a sufficient penalty to deter future misconduct. *See Rentz v. Dynasty Apparel Indus., Inc.*, 556 F.3d 389, 400-02 (6th Cir. 2009). As such, we do not hold that the decision to award this amount constituted an abuse of the trial court's discretion.

E. Cross-Appeal: Whether the Trial Court Erred in not Awarding Attorney's Fees and Costs for Work Done on Appeals that were Integral to Eventual Success on the CPGA Motion

[32] Having determined that awarding attorney's fees was proper at the trial level, the court must now address whether Smith was entitled to the cost of attorney's fees in her litigation of her prior appeal and her current appeal. As discussed above, the decision to award attorney's fees is generally reviewed under an abuse of discretion standard. *Cruz*, 2005 Guam 3 ¶ 8. However, the CPGA guarantees the mandatory award of "costs of litigation, including reasonable attorney . . . fees, incurred in connection with the motion." 7 GCA § 17106(g)(1). Smith argues that, because the work done on appeal was necessary to secure her success on the merits of her motion and award stemming therefrom, the CPGA requires Enriquez to compensate her for these costs. Appellee's Br. at 32-33. In response, Enriquez merely restates his argument that attorney's fees should not be awarded after September 22, 2011, due to his attempt to voluntarily dismiss his claim. Appellant's Resp. & Reply Br. at 22-26. As this argument has been disposed of above,

we will analyze whether Smith's entitlement to attorney's fees through the pendency of trial extends to fees accrued in preparation for her appeal.

[33] The trial court properly determined that the motivation of an anti-SLAPP statute is to allow wrongfully sued individuals to escape liability under an abusive legal action. *See* 7 GCA § 17102; *Jackson v. Yarbray*, 101 Cal. Rptr. 3d 303, 317 (Ct. App. 2009); *Wilkerson*, 121 Cal. Rptr. 2d at 277. However, it does not follow that once the trial court granted a GRCP 12(b)(6) motion to dismiss, Smith was no longer entitled to attorney's fees, since she was not attempting to free herself from the suit. The Ninth Circuit as well as state and federal courts in California have held that in the context of anti-SLAPP litigation, the prevailing party is entitled to fees for appeal, since appeal is necessary to the ultimate success of their motion. *See Manufactured Home Communities, Inc. v. Cnty. of San Diego*, 655 F.3d 1171, 1181 (9th Cir. 2011); *Metabolife Int'l, Inc. v. Wornick*, 213 F. Supp. 2d 1220, 1222 (S.D. Cal. 2002); *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 54 Cal. Rptr. 2d 830, 835 (Ct. App. 1996). This rationale is consistent with our previous holding in *Enriquez*. As noted in the previous section, this court was clear in holding that dismissal of the action is not a sufficient remedy. *Enriquez*, 2012 Guam 15 ¶ 17. Indeed, at the time of the appeal, Smith would have been unable to seek fees, sanctions, and damages under either 7 GCA 17106(g) or (h) because, in dismissing the claim against her, the trial court declined to rule on whether or not she was protected under the CPGA. There can be no doubt that her appeal was necessary to her success on her motion and to establish her entitlement to relief under Guam's anti-SLAPP legislation.

[34] As discussed above, recovery of attorney's fees is limited to compensating for the cost incurred "in connection with the motion." 7 GCA § 17106(g)(1). Smith's initial appeal arguing that the trial court be compelled to address her anti-SLAPP motion on the merits, as well as her

defense of the appeal in the present case are certainly covered by the statutory mandate. Additionally, because the award of attorney's fees and sanctions are a mandatory result of success on a CPGA motion, Smith's counterclaims regarding these issues are also sufficiently connected to her motion to warrant compensation for preparation of these arguments. *See id.* However, an argument seeking compensatory damages, while permitted by the statute, is discretionary and separate from the motion itself. 7 GCA § 17106(h). As such, the costs of preparing the counterclaim seeking compensatory damages were not incurred in connection with the motion and are thus not recoverable.

[35] For these reasons, we find that the trial court erred in denying Smith's request for attorney's fees associated with the appeal to this court except with regard to her discretionary counterclaim seeking compensatory damages.

F. Cross-Appeal: Whether the Trial Court Erred in not Imposing a CPGA Sanction on Enriquez's Counsel

[36] On appeal, Smith argues that the court erred in failing to sanction Enriquez's attorney as well as Enriquez himself. We must begin by examining whether the statute mandates sanctions upon the attorney as well as the party. The CPGA states that "the court shall award a moving party who is dismissed, without regards to any limit under Guam law . . . such additional sanctions *upon the responding party, its attorneys or law firms* as it determines will be sufficient to deter repetition. . . ." 7 GCA § 17106(g) (emphasis added). Smith argues that this provision requires sanctions upon both the responding party and its attorneys or law firms. Appellee's Br. at 33-34. She alleges that failure to impose any sanctions upon Attorney Moylan was an error. *Id.* However, the other possible interpretation is that while this provision does require that sanctions be imposed, it leaves to the discretion of the trial court whether to impose the sanction

against the responding party, its attorney, or law firm based on what the court believes will sufficiently deter future repetition of SLAPP suits.

[37] When determining the meaning and applicability of statutes, the court's primary task is to determine the Legislature's intent. *Big Creek Lumber Co. v. Cnty. of Santa Cruz*, 136 P.3d 821, 829 (Cal. 2006). Such inquiry necessarily begins with the language of the statute itself. *Pangelinan v. Gutierrez*, 2000 Guam 11 ¶ 23. Based on the plain meaning, the superior grammatical interpretation is that the trial court is free to impose the mandated sanction on either the party, his attorney or law firm based on which, in the court's judgment, would best deter repetition of oppressive SLAPP actions. Indeed, Smith's interpretation requires us to infer the word "and" between "the responding party" and "its attorneys." As a general rule, principles of statutory construction disfavor interpreting a statute as if the Legislature was "ignorant of the meaning of the language it employed." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 186-87 (2004) (quoting *Montclair v. Ramsdell*, 107 U.S. 147 (2004)). In assuming that the Legislature intended to state the language exactly as it is written, it appears that the trial court maintains discretion over whether or not to sanction an attorney.

[38] Analysis of similarly worded sanctions provisions from other anti-SLAPP statutes offers little guidance; some explicitly allow for sanctions on one or both (the party and their attorney) while others require sanctions for both. Compare, e.g., Wash. Rev. Code Ann. § 4.24.525(6)(a)(iii) (West 2015) ("Such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines to be necessary to deter repetition of the conduct and comparable conduct by others similarly situated."), with Ga. Code Ann. § 9-11-11.1(b) (West 2015) ("If a claim is verified in violation of [the anti-SLAPP statute], the court, upon motion or upon its own initiative, shall impose upon the persons who signed the

verification, a represented party, or both an appropriate sanction” (emphasis added)). Given this lack of clearly contrary legislative intent, we defer to the plain meaning analysis provided above. Though the mandate that the statute be liberally construed could potentially require that sanctions be imposed against both the attorney and the party, it is equally likely that giving trial courts the ability to best judge what would deter future misconduct on a case-by-case basis would effectuate the goals of the statute.

[39] In concluding that the statute allows but does not require sanctions against a party’s attorney, there is no need to address Smith’s arguments about the misconduct of Attorney Moylan. Appellee’s Br. at 34-35. Because the review is not *de novo*, it is irrelevant whether this court believes that Attorney Moylan’s conduct is deserving of sanctions. Rather, so long as it was reasonable for the trial court to find that sanctioning Enriquez \$20,000.00 was sufficient to deter future SLAPP suits, there was no abuse of discretion. We thus hold that the court did not err by not imposing sanctions against Enriquez’s attorney.

G. Cross-Appeal: Whether the Trial Court Erred in Denying Smith’s Claim for Compensatory Damages

[40] Under Guam law, “[c]ompensatory damages are ‘intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct.’” *Park v. Mobil Oil Guam, Inc.*, 2004 Guam 20 ¶ 13 (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003)). The CPGA provides that “a person damaged or injured by reason of a claim filed in violation of their rights under § 17104 may seek relief in the form of a claim for actual or compensatory damages. . . .” 7 GCA § 17106(h). Unlike subsection (g) of this provision, claims for compensatory damages are permissive rather than mandatory. 1 GCA § 715(9). Further, as indicated by the CPGA, the burden rests with the party allegedly harmed by a

SLAPP suit to assert the claim seeking compensatory damages. “In order to conduct a meaningful review, the parties must articulate their arguments in a way that allows a court to apply the recognized rules of law.” *Lamb v. Hoffman*, 2008 Guam 2 ¶ 35.

[41] A court abuses its discretion when it “bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence.” *Trans Pac.*, 2000 Guam 3 ¶ 37. Smith claims that the trial court committed a misstatement of evidence warranting a finding of error. According to her, the court erroneously concluded that she had failed to articulate the type and extent of damage or identify Enriquez’s conduct as the proximate cause of her suffering despite testimony provided to the contrary. Appellee’s Br. at 36-37. This assertion seems consistent with the trial court’s initial mischaracterization of her evidence in its October 31, 2013 Decision and Order. *See* RA, tab 85 at 11 (Dec. & Order). Further, Smith’s assertions regarding her testimony provides an accurate picture of evidence in the record. Smith testified regarding her embarrassment, emotional distress, and anxiety as well as her fear for her financial situation. RA, tab 8 at 3 (Decl. of Elsie Smith, Sept. 21, 2011). She further stated that this stress hindered her productivity at work, causing her to take time off and interrupt her schedule to hire an attorney. *Id.* She also tied the cause of these injuries to receiving the summons and complaint at her place of business and seeing that Enriquez was seeking \$500,000.00. *Id.* These concerns were echoed in a compromise letter from Smith’s attorney, which reiterated Smith’s feelings of victimization and anxiety as a result of the amount sought and service at her place of employment. RA, tab 87, Ex. 3 at 2 (Letter from Robert Keogh to Douglas B. Moylan, *Esq.* re Proposed Compromise of Disputed Claim, Sept. 25, 2011).

[42] Notwithstanding these facts, the trial court maintains wide discretion in awarding compensatory damages and is not necessarily required to find these declarations persuasive, so

long as it properly considers evidence in the record and makes an informed decision. It is clear on reconsideration that the trial court specifically considered the testimonial evidence presented by Smith. RA, tab 92 at 5 (Dec. & Order, Mar. 11, 2014). The court concluded that this testimony did not set forth sufficiently concrete loss and failed to quantify the extent of alleged harm. This rationale denying an award of compensatory damages for failure to show reasonably certain monetary damages in lieu of mental suffering/embarrassment allegations finds support in other jurisdictions examining compensatory damages claims in anti-SLAPP suits. *See Schelling v. Lindell*, 942 A.2d 1226, 1231, 32 (Me. 2008) (“[T]he record must contain evidence from which damage in a definite amount may be determined with reasonable certainty. . . . [C]laimed loss of sleep, mental suffering, and embarrassment are not legally sufficient” (internal quotation marks omitted)). Thus, the trial court did not abuse its discretion in declining to award compensatory damages.

V. CONCLUSION

[43] In light of the facts and arguments presented, we affirm that the Superior Court did not err in dismissing Enriquez’s claims due to Smith’s protected status under the Guam CPGA. We hold that Smith’s action constituted petitioning, did not require an official proceeding, and was not subject to the sham exception. Further, we affirm that the trial court did not abuse its discretion in the attorney’s fees and sanctions imposed by the October 31, 2013 Decision and Order. On Smith’s cross-appeal, this court finds that the trial court abused its discretion in not awarding Smith attorney’s fees for the appeal necessary to prevail on her CPGA claim. However, we affirm that the court did not err by not imposing sanctions against Enriquez’s attorney. Finally, we affirm that the trial court did not abuse its discretion in denying compensatory damages.

[44] Accordingly, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** for proceedings not inconsistent with this opinion.

Original Signed: **F. Philip Carbullido**
By

Original Signed: **Katherine A. Maraman**
By

F. PHILIP CARBULLIDO
Associate Justice

KATHERINE A. MARAMAN
Associate Justice

Original Signed: **Robert J. Torres**
By

ROBERT J. TORRES
Chief Justice