IN THE SUPREME COURT OF GUAM

GUAM GREYHOUND, INC. and JOHN BALDWIN,
Plaintiffs-Appellants,

v.

DOROTHY BRIZILL,
Defendant-Appellee.

OPINION

Supreme Court Case No. CVA07-021
Superior Court Case No. CV0960-06

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Appeal from the Superior Court of Guam
Argued and submitted on May 3, 2008
Hagåtña, Guam

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

CARBULLIDO, J.:

[1] This case involves a summary judgment granted by the Superior Court that dismissed claims brought by Plaintiff-Appellant John K. Baldwin and Guam Greyhound, Inc. (collectively "Baldwin") against Dorothy Brizill ("Brizill"). The summary judgment was granted to Brizill under Guam's Citizen Participation in Government Act ("CPGA"), 7 GCA §§ 17101-17109 (2005). For the following reasons, we affirm the Superior Court's grant of summary judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] According to Baldwin, Guam Greyhound, Inc. ("Guam Greyhound") is owned by GG Acquisitions II, LLC ("GG Acquisitions"), which in turn is primarily owned by John K. Baldwin. Guam Greyhound, Inc. conducts dog races at its track located on Guam. In 2006, a ballot initiative was proposed to legalize slot machine gambling at the Guam Greyhound track. Brizill had previously opposed a slots initiative in Washington, D.C. On July 31, 2006, Jacqueline A. Marati ("Marati") and Lina'la Sin Casino ("Lina'la"), both of whom filed *amicus curiae* briefs in this case, issued a press release that allegedly contained "some . . . defamatory material" provided by Brizill.[1] Appellant's Excerpts of Record ("ER"), tab 2 at 6 (Complaint at 4-5) ("Complaint"). On August 2, 2006, Brizill made statements on a Guam radio broadcast that allegedly exposed her to liability for defamation. Baldwin alleges Brizill repeated "many of the same false and defamatory statements" provided to Lina'la and Marati in Brizill's August 2nd radio broadcast. Complaint at 5.

[1] The Attorney General and the SLAPP Resource Center also filed *amicus* briefs. Brief of *Amicus Curiae* Government of Guam (Feb. 29, 2008); Brief of *Amicus Curiae* SLAPP Resource Center (Feb. 29, 2008).

[3] Baldwin filed his complaint on August 4, 2006, alleging that Brizill's radio broadcast and her statements provided to Lina'la and Marati exposed Brizill to liability for defamation.[2]

[4] The ballot initiative regarding slots was certified for placement on the 2006 General Election Ballot. The initiative did not pass during the November 7, 2006 general election. The Superior Court granted Brizill's motion for summary judgment pursuant to the CPGA. Baldwin timely filed this appeal.

II. JURISDICTION

[5] This court has jurisdiction over a final judgment of the Superior Court under 48 U.S.C. § 1424-1(a)(2) (Westlaw through P.L. 110-230, 2008) and 7 GCA §§ 3107 and 3108(a) (2005).

III. STANDARD OF REVIEW

[6] "The constitutionality of a statute is a question of law reviewed *de novo*." *People v. Perez*, 1999 Guam 2 ¶ 6. This court reviews issues of statutory construction *de novo*. *People v. Lau*, 2007 Guam 4 ¶ 7. "A trial court's decision granting a motion for summary judgment is reviewed *de novo*." *Bank of Guam v. Flores*, 2004 Guam 25 ¶ 7.

[2] In his Complaint, Baldwin alleges three tort claims against Brizill: (1) defamation, (2) tortious interference with Guam Greyhound's prospective business advantage, and (3) false light invasion of privacy. Appellants' ER, tab 2, at 10-12 (Complaint at 8-10). The Superior Court granted "final judgment as to all claims and parties." Appellants' ER, tab 19 (Judgment at 2). In his Opening Brief, Baldwin never mentions his false light or tortious interference claims, and he solely discusses and argues his defamation claims. Furthermore, in his Reply Brief, he only mentions his tortious interference and false light claims in a footnote where he concedes that he is not arguing these claims "on this appeal." Appellants' Reply Brief at 3 n.5 ("There is not much to say about [the false light and tortious interference claims] on this appeal . . . ."). He does mention the term "false light" outside of a footnote in his Reply in a discussion of a Rhode Island Supreme Court case, but he does not include any argument or discussion regarding *his* false light claim. Reply Brief at 20. By appealing the summary judgment that dismissed all three claims but not arguing the false light and tortious interference claims on appeal, Baldwin has abandoned these claims. *Hemlani v. Flaherty*, 2007 Guam 17 ¶ 18 ("[A]lthough Hemlani appealed from the trial court's judgment dismissing the remaining count of specific performance, this issue was not argued in Hemlani's Opening or Reply Briefs and was therefore abandoned."). Therefore, this opinion solely refers to his defamation claims.

IV. DISCUSSION

[7] In his appeal Baldwin makes three challenges to the summary judgment. One, he claims that the CPGA itself violates his Constitutional right to petition by "preventing [Baldwin] from petitioning the government by filing and maintaining an objectively reasonable lawsuit." Appellants' Opening Brief at 2 (Jan. 2, 2008).[3] Two, he makes certain statutory construction arguments, and, three, he argues that summary judgment was not appropriate under the facts in this case. As explained below, we reject all of Baldwin's challenges. After providing a brief explanation of the CPGA and the relevant provisions in this case, we analyze each of Baldwin's challenges.

A. The Citizen Participation in Government Act

[8] On December 3, 1998, the CPGA was enacted over the Governor's veto. Certification of Passage of an Act for Bill No. 110 (COR); letter dated December 5, 1998, from Governor Carl T.C. Gutierrez to Speaker Antonio R. Unpingco (acknowledging that "Bill No. 110 (COR), 'An Act to Protect Citizens, Businesses, and Organizations from Civil Lawsuits for exercising their Constitutional Rights of Petition and Public Participation in Government'" was enacted into law over the governor's veto.). The CPGA is nearly identical to a model statute provided in a book

[3] Baldwin provided no argument in his Opening Brief regarding any claim that his right to a jury trial was violated or that his due process rights were violated. Appellant's Opening Brief at 1-44. He never mentions in this brief any right to a jury trial, and, regarding due process, he only mentions in a footnote that "[l]aws that would prevent citizens from seeking redress for deprivations of property such as one's reputation - would raise equal protection and due process questions." Appellant's Opening Brief at 43 n.155. He provides no legal citation at all in his footnote and mentioning that something would raise "questions" is not argument. Generally, "[w]e review only issues which are argued specifically and distinctly in a party's opening brief. We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review." *Greenwood v. Federal Aviation Administration*, 28 F.3d 971, 977 (9th Cir. 1994); *see also* Guam R. App. P. 13(a)(9)(A) ("[A]rgument . . . must contain . . . appellant's contentions and the reasons for them, with citations to the authorities . . . on which the appellant relies . . . ."). Furthermore, "[t]he general rule is that issues raised for the first time in a reply brief are deemed waived." *In re Estate of Concepcion*, 2003 Guam 12 ¶ 10. This court has the discretion to reject issues raised for the first time in a reply brief. *Id.* ¶ 11. We decline to analyze Baldwin's other constitutional arguments, because he failed to effectively raise and argue them in his Opening Brief.

by Professors George W. Pring and Penelope Canan. *Compare* George W. Pring and Penelope Canan, *SLAPPS, Getting Sued for Speaking Out* 201-05 (Temple Univ. Press 1996), *with* 7 GCA §§ 17101-17109 (2005).

[9] The CPGA was intended to cover "Strategic Lawsuits Against Public Participation or SLAPPs." 7 GCA § 17102(a)(4) (2005). According to the Guam Legislature, SLAPP suits are lawsuits that 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). The Legislature has explained that SLAPP lawsuits "are used to censor, chill, intimidate, or punish citizens, businesses and organizations for involving themselves in public affairs." 7 GCA § 17102(a)(6) (2005). The CPGA is Guam's anti-SLAPP statute. Twenty-five states and Guam have enacted some form of anti-SLAPP statute. *See* California Anti-SLAPP Project, States and Territories with Anti-SLAPP Statutes, http://www.casp.net/statutes/menstate.html (last visited Aug. 6, 2008).[4]

[10] In this case, the relevant provisions of the CPGA are 7 GCA §§ 17104 and 17106. Section 17104 states that:

> Acts in furtherance of the Constitutional rights to petition, including seeking relief, influencing action, informing, communicating and otherwise participating in the processes of government, shall be immune from liability, regardless of

[4] *See, e.g.*, Ark. Code Ann. §§ 16-63-501 to 508 (West 2005); Cal. Civ. Proc. Code §§ 425.16-18 (West 2004 & Supp. 2008); Del. Code Ann. tit. 10, §§ 8136-8138 (1999); Fla. Stat. Ann. § 768.295 (West 2005); Ga. Code Ann. § 9-11-11.1 (2006); Haw. Rev. Stat. Ann. §§ 634F1 to 634F4 (West, Westlaw through 2007, Act 126); Ind. Code Ann. §§ 34-7-7-1 to 34-7-7-10 (West 1999); La. Code Civ. Proc. Ann. art. 971 (2005); Me. Rev. Stat. Ann. tit. 14, § 556 (2003); Mass. Gen. Laws Ann. ch. 231, § 59H (West 2000); Minn. Stat. Ann. §§ 554.01 to 554.05 (West 2000); Mo. Ann. Stat. § 537.528 (West, Westlaw through 2007 First Extraordinary Session of the 94th Gen. Assem.); Neb. Rev. Stat. §§ 25,241 to 25,246 (1995); Nev. Rev. Stat. Ann. §§ 41.650 to 41.670 (LexisNexis 2006); N.M. Stat. Ann. §§ 38-2-9.1 to 38-2-9.2 (LexisNexis 1998 & Supp. 2007); N.Y. Civ. Rights Law §§ 70-a, 76-a (McKinney Supp. 2008); Or. Rev. Stat. Ann. §§ 31.150 to 31.155 (Supp. 2007); 27 Pa. Cons. Stat. Ann. §§ 7707, 8301 to 8305 (Supp. 2007); R.I. Gen. Laws §§ 9-33-1 to 9-33-4 (1997); Tenn. Code. Ann. §§ 4-21-1001 to 4-21-1004 (2005); Utah Code Ann. §§ 78-58-101 to 78-58-105 (2002); Wash. Rev. Code Ann. §§ 4.24.500 to 4.24.520 (West 2005).

> intent or purpose, except where not aimed at procuring any government or electoral action, result or outcome.

7 GCA § 17104 (2005).

[11] As applied to this case, section 17104 simply provides for a limited situation where Brizill is "immune from liability" from Baldwin's defamation claims. 7 GCA § 17104. There are two distinct parts of section 17104. 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." 7 GCA § 17104. We will refer to the beginning part as the "petitioning provision" and the ending phrase as the "sham exception."

[12] Section 17106 states:

> On the filing of any motion as described in § 17105:
>
> > (a) the motion shall be treated as one for summary judgment:
> >
> > . . . .
> >
> > (b) discovery shall be suspended, pending decision on the motion and appeals;
> >
> > (c) the responding party shall have the burden of proof, of going forward with the evidence and of persuasion on the motion;
> >
> > (d) the court shall make its determination based on the facts contained in pleadings and affidavits filed;
> >
> > (e) the court shall grant the motion and dismiss the judicial claim, unless the responding party has produced *clear and convincing* evidence that the acts of the moving party are not immunized from liability by § 17104 . . . .

7 GCA § 17106 (2005) (emphasis in original).

[13] Section 17106 is a statute that allows certain qualifying cases to be disposed of under special rules of procedure.[5]

[5] The procedure embodied in 17106 was implemented by the Legislature prior to this court being granted in 2004 the power to "make and promulgate rules governing the administration of the judiciary and the practice and procedure in the courts of the judicial branch of Guam." 48 U.S.C. § 1424-1(a)(6). Baldwin did not challenge the continued

B. Constitutionality of the CPGA

[14] Baldwin lumps all of the provisions of the CPGA together when he makes his constitutional challenge to the Act. Baldwin states that "the CPGA cannot be read to prohibit Mr. Baldwin's objectively reasonable lawsuit, or it unconstitutionally authorizes a *prior restraint* on protected petitioning activity." Appellants' Opening Brief at 38 (emphasis added). He further states in his Reply that "Brizill argues that because Guam could abolish the law of defamation, the CPGA . . . does not violate Baldwin's right to petition . . . . The flaw in this argument is that Guam has *not* abolished defamation . . . ." Appellants' Reply Brief at 28 (Mar. 28, 2008) (emphasis in original). Baldwin's basic constitutional challenge is that because Guam has not abolished the tort of defamation, the liability immunity provided by the CPGA unconstitutionally violates his right to petition. Baldwin's constitutional challenge, however, is based on three flawed propositions; (1) that he has a constitutional right to unfettered defamation claims; (2) that certain right to petition cases can be applied to render the CPGA unconstitutional; and (3) that the CPGA acts as a prior restraint on petitioning activity. We address his arguments after providing an explanation of the right to petition on Guam.

1. The Right to Petition

[15] The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and *to petition the Government for a redress of grievances.*" U.S. Const. amend. I (emphasis added). The United States Supreme Court has "recognized th[e] right to petition as one of 'the most precious of the liberties safeguarded by the Bill of Rights.'" *BE & K Constr.*

validity of procedural statutes promulgated by the Legislature prior to this court being explicitly granted this power. Because no party or *amicus curiae* raised this issue, we express no opinion on it at this time.

Co. v. N.L.R.B., 536 U.S. 516, 524 (2002) (quoting *United Mine Workers of Am. v. Illinois Bar Assn.*, 389 U.S. 217, 222 (1967)). The Court has further "explained that the right is implied by '[t]he very idea of a government, republican in form.'" *BE & K Constr. Co.*, 536 U.S. at 524-25 (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) (alteration in original). The Court has "explicit[ly] [stated] that 'the right to petition extends to all departments of the Government.'" *BE & K Constr. Co.*, 536 U.S. at 525 (quoting *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)). The right of access to the courts is one aspect of the right to petition. *Cal. Motor Transp. Co.*, 404 U.S. at 510.

[16] Guam's Organic Act Bill of Rights, 48 U.S.C. § 1421b, also contains a right to petition, and states that "[n]o law shall be enacted in Guam respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and *to petition the government for a redress of their grievances*." 48 U.S.C. § 1421b(a) (emphasis added).[6] Guam's Organic Act Bill of Rights contains an identical phrase regarding the right to petition as the First Amendment. Therefore, we interpret the Organic Act's right to petition in the same manner as the United States Supreme Court has interpreted the same right. *Guam v. Guerrero*, 290 F.3d 1210, 1217-18 (9th Cir. 2002) ("[A] territorial court lacks the authority to interpret a federal statute or federal constitutional provision contrary to the interpretation the U.S. Supreme Court has given it.").

[6] The First Amendment's right to petition applies to the states through the Fourteenth Amendment to the Constitution of the United States. *See United Mine Workers of Am.*, 389 U.S. at 221-22 ("We hold that the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist its members in the assertion of their legal rights." (footnote omitted)).

2. Baldwin's Right to a Defamation Claim

[17] Baldwin's first flawed proposition underpinning his constitutional challenge is that he has a constitutional right to unfettered defamation claims. In a nutshell, Baldwin argues that, by defining what is "immune from liability," section 17104 violates his constitutional or Organic Act right to petition by limiting his defamation claims. This argument lacks merit, and, unsurprisingly, Baldwin provides no case citation on point for his argument that the Legislature cannot limit defamation claims with an act like the CPGA. It is unclear from his argument whether his supposed right to his defamation claims is violated by the Legislature modifying his common law right or by limiting his statutory right to bring defamation claims. We analyze both possibilities.

[18] The Guam Legislature has the power to modify the common law. *See Liberty Warehouse Co. v. Burley Tobacco Growers' Co-Op. Mktg. Ass'n*, 276 U.S. 71, 89 (1928) ("[T]he present controversy concerns a statute, and a state may freely alter, amend, or abolish the common law within its jurisdiction."); *Benavente v. Taitano*, 2006 Guam 15 ¶ 19, 2006 WL 3060030, at *4 ("[T]he Legislature, in conferring standing, may by statute exempt litigants from proof of the 'special injury' required to establish common law standing."). The Legislature also has the power to modify statutory rights and causes of action. "Under the Organic Act, the legislative power is vested in the 'Legislature of Guam.' The Legislature's power 'extend[s] to all rightful subjects of legislation not inconsistent with the provisions of . . . [the Organic Act] and the laws of the United States applicable to Guam.'" *Villagomez-Palisson v. Super. Court*, 2004 Guam 13 ¶ 15 (citation omitted, alteration in original) (quoting 48 U.S.C. § 1423a). Without question, "it is within the purview of the Legislature to make statutory changes." *People v. Villapando*, 1999 Guam 31 ¶ 54; s*ee also Cory v. Shierloh,* 629 P.2d 8, 12-13 (Cal. 1981) ("It is well settled that

the Legislature possesses a broad authority both to establish and to abolish tort causes of action. . . . Except as the Constitution otherwise provides, the Legislature has complete power to determine the rights of individuals. It may create new rights or provide that rights which have previously existed shall no longer arise." (internal quotation marks and citation omitted)).

[19] The Legislature has the power to modify both statutory and common law rights and causes of action, and it has exercised its power in the area of defamation claims. Title 19 GCA § 2101 provides a statutory cause of action for defamation and states that "[e]very person has, *subject to the qualifications and restrictions provided by law*, the right of protection . . . from *defamation*." 19 GCA § 2101 (2005) (emphasis added). Section 2101 specifically acknowledges that the Legislature can "qualif[y] and restrict[]" statutory defamation, and the Legislature has restricted defamation actions in the same chapter that contains section 2101. In title 19 GCA § 2105, the Legislature provided a privilege of immunity from defamation for publications made "[i]n any (1) legislative or (2) judicial proceedings, or (3) in any other official proceeding authorized by law."[7] 19 GCA § 2105(b) (2005).

[20] Section 2101 specifically explains that the Legislature may "qualif[y] and restict[]" defamation claims, 19 GCA § 2101, and section 2105 provides an example of how the Legislature can eliminate liability for defamation in certain limited, qualifying situations. Furthermore, the Guam Code provides other examples where the Legislature has restricted defamation claims in certain qualifying situations. *See* 19 GCA § 2105(a), (c), (d), (e) (providing more situations where a publication would be deemed privileged by statute); 7 GCA § 9107 (2005) (immunizing from liability "for any action performed in the course of their official

[7] Title 19 GCA § 2105 does qualify the privilege with regard to "any pleading or affidavit filed in an action for divorce or an action prosecuted under [19 GCA] § 8402." 19 GCA 2105(b). Title 19 GCA 8402 pertains to alimony and permanent support. 19 GCA 8402 (2005).

duties . . . relative to the discipline of attorneys" the "Justices of the Supreme Court and those acting pursuant to orders or rules of Court as their employees or agents"); 10 GCA § 12326 (2005) (immunizing "from suit in any civil action taken by a licensee who is a subject of a professional review proceeding" members of the Board of Nurse Examiners and any witness appearing before the Board).

[21] The above statutes that limit defamation claims and the CPGA are not unconstitutional infringements on a plaintiff's right to petition, because they limit claims. They are simply embodiments of the Legislature's "authority [to] both . . . establish and to abolish tort causes of action." *Cory*, 629 P.2d at 12-13. *Cf. Paul v. Davis*, 424 U.S. 693, 711-12 (1976) ("Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered as a result of petitioners' actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions."). Furthermore, "[t]he right to petition exists in the presence of an underlying cause of action and is not violated by a statute that provides a complete defense to a cause of action or curtails a category of causes of action." *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 397 (2d Cir. 2008) (holding that right to petition was not violated by a Federal act that barred certain qualifying civil liability actions against gun manufacturers); *see also Christopher v. Harbury,* 536 U.S. 403, 415 (2002) ("[O]ur cases rest on the recognition that the right [of access to the courts] is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court.").

[22] Even though the CPGA could in certain situations limit objectively reasonable defamation claims by declaring certain qualifying acts "immune from liability," § 17104, it is

well within the Legislature's power to subject such claims to qualifications, limitations, or defenses. *See Liberty Warehouse Co.*, 276 U.S. at 89; *Beretta*, 524 F.3d at 397; *Cory,* 629 P.2d at 12-13; 19 GCA § 2101. Therefore, Baldwin's claim that the CPGA somehow unconstitutionally impacts his right to petition by limiting his right to bring objectively reasonable defamation claims lacks merit.

3. Misapplication of Right to Petition Cases

[23] Baldwin's second flawed proposition that underpins his constitutional challenge is his attempt to apply a line of United States Supreme Court right to petition cases to the situation in this case. By selectively quoting to these cases, he attempts to craft an argument that, by limiting his defamation claims, the CPGA unconstitutionally limits his right to petition. However, the cases he cited cover the application of the First Amendment's right to petition in the context of federal antitrust, labor, and racketeering laws. *BE & K Constr. Co.*, 536 U.S. at 536 (invalidating the NLRB's standard for imposing liability under a section of the National Labor Relations Act because the standard imposed liability when a party filed with a retaliatory purpose a reasonably based but unsuccessful lawsuit); *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 51 (1993) (holding "that litigation cannot be deprived of [antitrust] immunity as a sham unless the litigation is objectively baseless"); *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 748 (1983) (explaining "that the [NLRB] may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff's motive, unless the suit lacks a reasonable basis in fact or law"); *Cal. Motor Transp. Co.*, 404 U.S. at 511 (construing the antitrust laws as not prohibiting the filing of a lawsuit, regardless of the plaintiff's anticompetitive intent or purpose, unless the suit was a "mere sham" filed for harassment purposes); *Sosa v. DirectTV, Inc.*, 437 F.3d 923, 942 (9th Cir. 2006) (holding "that [the Racketeer Influenced and Corrupt Organizations Act

(RICO)] and the predicate statutes . . . do not permit the maintenance of a lawsuit for the sending of a prelitigation demand to settle legal claims that do not amount to a sham").

[24] Baldwin is apparently arguing for the extension of these antitrust, labor, and racketeering related right to petition cases to this case, but he does not provide any argument that would explain why or how these cases should be extended to the situation in this case. These cases are simply not applicable to a case where a legislature has specifically exercised its power to limit claims by statute. Baldwin's cases involve courts deciding not to "impute to Congress an intent to invade" the First Amendment right to petition. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961); *see also Prof'l Real Estate Investors, Inc.*, 508 U.S. at 56; *Sosa*, 437 F.3d at 931 ("Under the *Noerr-Pennington* rule of statutory construction, we must construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause *unless the statute clearly provides otherwise*." (emphasis added)).[8] Furthermore, Baldwin has not cited to any case where these federal antitrust, labor, and racketeering holdings regarding the right to petition have been extended to declare a statute like the CPGA unconstitutional.

[25] When the CPGA denies a plaintiff the ability to continue pursuing a defamation claim, it does not unconstitutionally impact that plaintiff's right to petition. It simply limits the plaintiff's

[8] The cases Baldwin cites can be classified as *Noerr-Pennington* doctrine cases. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, trucking companies brought suit against railroad companies alleging that efforts by the railroads to influence legislation regulating trucking violated the Sherman Antitrust Act. 365 U.S. at 129. The Court held that "the Sherman Act does not prohibit . . . persons from associating . . . in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Id.* at 136. However, the Supreme Court limited this antitrust immunity, grounded in the right to petition, when they explained that immunity would not extend to petitioning activity that was a "sham." *Id.* at 144. In *Pennington*, the Supreme Court determined that "*Noerr* shields from the Sherman [antitrust] Act a concerted effort to influence public officials regardless of intent or purpose." *United Mine Workers of Am. v. Pennington,* 381 U.S. 657, 670 (1965). *Noerr* and *Pennington* and the doctrine and cases they spawned have been used to develop model SLAPP laws, *see* Pring and Canan, *supra* at 15-28, 201-05, but Baldwin provides no citation for where the doctrine and cases have been used to *invalidate* a SLAPP law or any other analogous law.

ability to pursue that defamation claim, and the Legislature has the power to limit such claims. *See Liberty Warehouse, Co.*, 276 U.S. at 89; *Beretta*, 524 F.3d at 397; *Cory,* 629 P.2d at 12-13. If we were to accept Baldwin's proposition, then all instances where the Legislature has restricted defamation claims in certain qualifying situations, instead of totally banning defamation claims altogether, would be subject to a constitutional challenge. This is an untenable proposition.

4. Prior Restraint

[26] Baldwin's third flawed proposition is that "the CPGA cannot be read to prohibit [his] objectively reasonable lawsuit, or it unconstitutionally authorizes a *prior restraint* on protected petitioning activity." Appellant's Opening Brief at 38 (emphasis added). However, the CPGA is not "a prior restraint on protected petitioning activity," because it does not prevent Baldwin from petitioning the court by filing a complaint, which he has done. *Id.* Instead, the CPGA under certain qualifying circumstances will not allow Baldwin's claims to go forward. Actions or behavior not within the scope of the CPGA's immunity are not similarly protected.

[27] As explained above, Baldwin's constitutional challenge to the CPGA lacks merit. Therefore, the Superior Court's determination that the CPGA is Constitutional is affirmed. Having rejected Baldwin's constitutional challenge, we now turn to his statutory construction arguments.

C. Construction of the CPGA

[28] Baldwin makes two statutory construction arguments regarding section 17104. One, he argues that "[t]he use of the word '*Constitutional*' in the phrase 'Constitutional Rights to petition' [from section 17104] is shorthand for petitioning that falls within that protected by the Constitution." Appellant's Reply Brief at 13 (emphasis in original); *see also* Appellant's

Opening Brief at 21. Two, he argues that, because Brizill admitted that "[i]n [her] communications to Guam, [her] sole purpose was to share . . . information . . . for any value that it may have had for the voters in Guam," ER, tab 11 at 445 (Brizill Decl.), her comments were "not aimed at procuring any government or electoral, action, result, or outcome," 7 GCA § 17104, and, therefore, were not protected by section 17104. We reject both statutory construction arguments.

[29] If a statute is unambiguous, then the judicial inquiry into the meaning of the statute is complete. *People v. Quichocho,* 1997 Guam 13 ¶ 5. In order to determine whether a statute is ambiguous, the court examines the language of the statute and the structure of the law as a whole including its object and policy. *Id.* The inquiry into whether a statute is ambiguous begins with looking at the plain meaning of the language in question, and, when looking at the language, the court's task is to determine if the language is plain and unambiguous. *Aguon v. Gutierrez,* 2002 Guam 14 ¶ 6.

[30] The first of Baldwin's statutory construction arguments that we address involves the beginning part or "petitioning provision" of section 17104 which states that "[a]cts in furtherance of the *Constitutional* rights to petition, including seeking relief, influencing action, informing, communicating and otherwise participating in the processes of government, shall be immune from liability, *regardless of intent or purpose*." 7 GCA § 17104 (emphasis added). Baldwin would like the term "Constitutional" to mean "constitutionally protected," because that would insert the "actual malice" standard into section 17104.

[31] In *New York Times, Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court announced its First Amendment free speech "rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement

was made with 'actual malice'-that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. In *McDonald v. Smith*, the Supreme Court affirmed an appellate court's application of the actual malice standard from *New York Times Co. v. Sullivan* to a First Amendment right to petition case. *McDonald v. Smith*, 472 U.S. 479, 485 (1985). Following *McDonald v. Smith*, petitioning activity that includes defamatory comments published with actual malice is not protected by the First Amendment right to petition. *See id.* at 483-85.

[32] By interpreting "Constitutional" as meaning "constitutionally protected" and, in turn, inserting the "actual malice" standard into the term "Constitutional," Baldwin would exclude from the protection of section 17104 any defamatory comments made by Brizill which were made with actual malice. We, however, find nothing in the plain meaning of the phrase "in furtherance of the Constitutional rights to petition," 7 GCA § 17104, that would require this court to interpret it as actually meaning "constitutionally protected." Furthermore, by using the phrase "regardless of intent or purpose," the Legislature chose to reject a subjective analysis under the petitioning provision of section 17104. A subjective analysis would be required if this court accepted Baldwin's argument and incorporated into the term "Constitutional" the "actual malice" standard, because "'[a]ctual malice consistently has been deemed *subjective in nature*, provable only by evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement.'" *Rattray v. City of Nat'l City*, 36 F.3d 1480, 1486 (9th Cir. 1994) (emphasis added) (quotation marks omitted) (quoting *Newton v. Nat'l Broadcasting Co.*, 930 F.2d 662, 668 (9th Cir. 1990)).

[33] In the petitioning clause of section 17104, by explicitly stating that the "[a]cts" in question would be judged "regardless of intent or purpose," the Legislature plainly rejected any

subjective analysis or standard. Therefore, we cannot graft a subjective standard into this part of section 17104 by reading "Constitutional" as meaning "constitutionally protected" and including through this interpretation the "actual malice" standard. In any event, it appears the Supreme Court has backed away from its actual malice standard and instead adopted one of "outcome versus process." Pring and Canan, *supra*, at 27. In *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), originally an antitrust suit, the Supreme Court announced a new standard, with language that appears to apply to all SLAPP Suits. Pring and Canan, *supra*, at 27; *see Omni*, 499 U.S. at 379-384. The only time when immunity for petitioning activity does not apply, the court ruled, is when "persons use the governmental *process*-as opposed to the *outcome* of that process-as a[] . . . weapon." 499 U.S. at 380. Thus, "[g]enuine government petitioning is not deemed to be aimed at the opposition . . . it is deemed rather to be aimed at the government with the intent to produce a desired outcome." Pring and Canan, *supra*, at 27. This standard merely allows SLAPPs to continue in the limited instances when the targets' original petitioning uses the government process exclusively as an end and not as a means. *Id.*

[34] Read as a whole, the petitioning provision of section 17104 lays out an objective test of whether a reasonable person would conclude from looking at the acts that the acts involved petitioning the government. Therefore, in order for the responding party to remove the acts in question from the protection of section 17104 under this objective test, the responding party must carry its burden of producing evidence such that a reasonable person would conclude by clear and convincing evidence that the acts did not involve petitioning the government. *See* 7 GCA § 17106 (c), (e). The CPGA includes "the electorate" in its definition of government. 7 GCA § 17103(a).

[35] Baldwin's second statutory construction argument involves the ending phrase or the "sham exception" in section 17104 which states "except where not aimed at procuring *any* government or electoral action, result, or outcome." 7 GCA § 17104 (emphasis added). Baldwin contends that because Brizill admitted that her "sole purpose [in making her comments] was to share" information with the voters of Guam, ER, tab 11 at 445 (Brizill Decl.), her comments were "not aimed at procuring any government or electoral, action, result, or outcome," 7 GCA § 17104. Baldwin is arguing that, because Brizill admitted that she was not promoting an outcome in the election, her comments cannot be protected by section 17104. However, we reject this argument, because the plain meaning of "any . . . electoral action, result, or outcome" includes in its meaning the result of there being an informed electorate for the vote that produces an informed outcome. 7 GCA § 17104. Furthermore, because the term government in the CPGA is defined as "including the electorate," 7 GCA § 17103(a), "any government . . . action, result or outcome" also plainly includes the action of the electorate becoming informed and the result of the electorate being informed. 7 GCA § 17104.

[36] Though we reject Baldwin's construction of the sham exception of section 17104, this section does provide a limit to the immunity under the statute. Title 7 GCA § 17104 is nearly identical to Section 3 of a Model Act provided in a book by Professors George W. Pring and Penelope Canan. *Compare* Pring and Canan, *supra*, at 203, *with* 7 GCA § 17104. When the Legislature derives a statute from a model act, the commentary to that act may be used to help determine the meaning of our version. *See People v. Palisoc*, 2002 Guam 9, ¶¶ 38-40 (relying on commentary to Model Penal Code to discern meaning of Guam statute); 2B Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 52:05 (6th ed. 2000) ("A court can . . . properly

consider the official comments as well as the published comments of the drafters [of a model code] as a source for determining the meaning of an ambiguous provision.").

[37] The commentary to Pring and Canan's model act explains that section 3, the section from which the Legislature derived section 17104, "spells out the acts or communications covered with the maximum constitutional breadth under the U.S. Supreme Court ruling in the *Omni* case." Pring and Canan, *supra,* at 205. Because section 17104 "spells out" what is covered by *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, we turn to that case to explain section 17104's sham exception.

[38] In *Omni*, the United States Supreme Court stated that:

> The "sham" exception to *Noerr* encompasses situations in which persons use the governmental *process*-as opposed to the *outcome* of that process-as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. *See California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 500, n. 4, 108 S.Ct. 1931, 1937, n. 4, 100 L.Ed.2d 497 (1988), not one "who 'genuinely seeks to achieve his governmental result, but does so *through improper means,*' "*id.,* at 508, n. 10, 108 S.Ct., at 1941, n. 10 (quoting *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 827 F.2d 458, 465, n. 5 (9th Cir. 1987)).

499 U.S. at 380 (emphasis in original).

[39] Interpreting section 17104 in light of *Omni*, the sham exception in section 17104 spells out an exception that excludes from 17104 protection acts that are not "genuinely aimed at procuring favorable government action." 499 U.S. at 380 (quotation marks omitted). The sham exception contained in section 17104 also does not protect "persons [who] use the governmental *process*-as opposed to the *outcome* of that process-as a[] . . . weapon." 499 U.S. at 380. The sham exception from 17104 requires a subjective analysis. Therefore, in order for the

responding party to remove the acts in question from the protection of section 17104, the responding party must carry its burden of producing clear and convincing evidence that the moving party's acts were a sham. *See* 7 GCA § 17106 (c), (e).

[40] As explained above, section 17104 contains both an objective and subjective test to determine whether the acts in question are protected by the section. Having rejected Baldwin's statutory construction arguments, we now apply this two part test to the summary judgment in this case.

D. Summary Judgment

[41] We review *de novo* the Superior Court's grant of summary judgment for Brizill. *Bank of Guam v. Flores,* 2004 Guam 25 ¶ 7. In a standard summary judgment, this court would "draw inferences and view the evidence in a light most favorable to the non-moving party." *Id.* However, section 17106 shifts "the burden of proof, of going forward with the evidence and of persuasion on the motion" to the non-moving, responding party. 7 GCA § 17106(c). Brizill argues that the inferences should be drawn in her favor and that the evidence should be looked at in the light most favorable to her. Baldwin contends the opposite. However, we need not decide this issue at this time. We have explained that "[c]lear and convincing evidence must be of 'extraordinary persuasiveness.'" *Shorehaven Corp. v. Taitano*, 2001 Guam 16 ¶ 19 (quoting *State v. Gjerde,* 935 P.2d 1224, 1226 (Or. Ct. App. 1997)). We have further explained that "'[c]lear and convincing evidence means testimony that is so clear, direct, weighty, and convincing as to enable the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.'" *Id.* (quoting *In re Chiovero,* 570 A.2d 57, 60 (Pa. 1990)). In this case, even if we view the evidence in the light most favorable to Baldwin and draw all inferences in his favor, we find that he has not carried his burden of producing "*clear and*

convincing evidence that the acts of [Brizill] [were] not immunized from liability by § 17104." 7 GCA § 17106(e).

[42] Under the objective test from the petitioning provision of section 17104, we must determine whether Baldwin carried his burden such that a reasonable person would conclude by clear and convincing evidence that the acts did not involve petitioning the government. *See* 7 GCA §§ 17103 and 17106(c), (e). Baldwin argued on appeal that Brizill made three defamatory statements: (1) that Mr. Baldwin was involved in a signature-buying scheme in D.C.; (2) that Mr. Baldwin controlled and/or was part of a group fined $622,820 in D.C.; and (3) that Mr. Baldwin was denied gambling licenses in five states due to financial irregularities. Appellants' Reply Brief at 37; Appellant's Opening Brief at 11. These alleged defamatory statements are the acts in this case. Under the objective test, we do not judge the veracity of the statements, and the actor's "intent or purpose" has no bearing on this test. 7 GCA § 17104. We simply analyze whether the responding party has carried its burden such that a reasonable person would conclude by clear and convincing evidence that the acts did not involve petitioning the government. The electorate is part of the government under the CPGA. 7 GCA § 17103.

[43] Viewing the acts in this case in the context of the ballot initiative that would eventually place a slot machine initiative on the election ballot, it is clear that Baldwin has not carried his burden. Mr. Baldwin had a financial interest in and was a supporter of the ballot initiative. Looking at the nature of the allegedly defamatory comments in the context of the ballot initiative, a reasonable person could conclude that the acts in question are petitioning activity. They are not salacious personal attacks that lack relevance to anything in the ballot initiative, and they were not made against a person who was not an interested party in the outcome of the ballot initiative. Baldwin's business would have directly benefited from the passing of the initiative,

and a reasonable person could conclude that information regarding vote buying, fines, and any denials of gambling licenses, whether true or not, is petitioning activity in this case. Therefore, after reviewing the evidence in the record in the light most favorable to Baldwin, we find that he has not carried his burden such that a reasonable person would conclude by clear and convincing evidence that Brizill's acts did not involve petitioning the electorate regarding the initiative.

[44] Under the subjective test from the sham exception in section 17104, Baldwin must carry his burden of producing clear and convincing evidence that the moving party's acts were a sham. To place Brizill's acts within the sham exception of section 17104, Baldwin relied solely on his argument that Brizill was only seeking to inform and not seeking an "electoral action, result, or outcome," 7 GCA § 17104. However, as explained above, we reject this overly narrow statutory construction argument. Furthermore, we find that Baldwin has not carried his burden of producing clear and convincing evidence that Brizill's acts were not "genuinely aimed at procuring favorable government action," 499 U.S. at 380 (quotation marks omitted), or that Brizill was using "the governmental *process*-as opposed to the *outcome* of that process-as a[] . . . weapon." 499 U.S. at 380 (emphasis in original). Brizill admitted that "[i]n [her] communications to Guam, [her] sole purpose was to share . . . information . . . for any value that it may have had for the voters in Guam," ER, tab 11 at 445 (Brizill Decl.). Because we accept that informing the electorate is an outcome that brings her comments under the protection of the CPGA and because the record contains no clear and convincing evidence that Brizill was using the process as a weapon, Baldwin has failed to carry his burden to survive summary judgment under the CPGA.

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V. CONCLUSION

[45] For the foregoing reasons, we **AFFIRM** the Superior Court's grant of summary judgment and **REMAND** this matter for further proceedings consistent with this Opinion.

Original Signed By: Katherine A. Maraman
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: F. Philip Carbullido
F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: Robert J. Torres
ROBERT J. TORRES, JR.
Chief Justice