IN THE SUPREME COURT OF GUAM

GEORGE P. MACRIS,
Plaintiff-Appellant,

v.

IAN C. RICHARDSON,
Defendant-Appellee.

Supreme Court Case No.: CVA08-004
Superior Court Case No.: CV1296-06

OPINION

Cite as: 2010 Guam 6

Appeal from the Superior Court of Guam
Argued and submitted on March 18, 2009
Hagåtña, Guam

Appearing for Plaintiff-Appellant:
Seaton M. Woodley, III, *Esq.*
Attorney at Law
Ste. 102, Tanaka Bldg., Rte. #4
Hagåtña, GU 96910

Appearing for Defendant-Appellee:
R. Todd Thompson, *Esq.*
Mair, Mair, Spade & Thompson
238 Archbishop F.C. Flores St.
Ste. 801, DNA Bldg.
Hagåtña, GU 96910

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

CARBULLIDO, J.:

[1] Plaintiff-Appellant, Dr. George P. Macris ("Macris"), and Defendant-Appellee, Dr. Ian C. Richardson ("Richardson"), were emergency room staff physicians at Guam Memorial Hospital. Richardson sent a memorandum on September 28, 2006 [hereinafter "Memorandum"], to the hospital administrators and certain emergency room directors alleging deficiencies in Macris' treatment of an emergency room patient. Macris believed the Memorandum was defamatory and brought this libel action against Richardson.

[2] The trial court found that Richardson's Memorandum was "absolutely privileged" under 19 GCA § 2105(b)(3) and granted summary judgment in favor of Richardson. Macris appeals, arguing that the trial court "erred in not considering the existence and application of Public Law No. 22-87 which added section 413 to Title 6, Guam Code Annotated, which would have afforded [Richardson] only a qualified privilege . . . not the absolute privilege stated by the Court."[1] Appellant's Br. at 5 (Nov. 1, 2008).

[3] For the reasons set forth below, we vacate the judgment and remand to the trial court.

I. FACTUAL AND PROCEDURAL BACKGROUND

[4] Plaintiff-Appellant, Dr. George P. Macris, and Defendant-Appellee, Dr. Ian C. Richardson, were emergency room staff physicians at Guam Memorial Hospital ("GMH"). Richardson sent a memorandum on September 28, 2006 to the following individuals: 1) the Acting ER Committee Chairman; 2) the ER Committee's Chairman Elect; 3) the GMH Medical Director; and 4) the GMH Administrator. The Memorandum entitled "Re: ER Incident (1) defective Physician Assessment and Management of Potentially Life-Threatening Event; (2) Physician Falsification/Fabrication of Medical Record," alleged concerns regarding Macris'

[1] Although Macris argues his position is supported by Public Law 22-87 which was originally codified as 6 GCA § 413, this public law and correlating statute have since been amended and moved to the Guam Rules of Evidence ("GRE") Rule 417. *See* Promulgation Order No.: 06-001, Note to GRE 413.

quality of care. Appellant's Br. at 3. Thereafter, the GMH Administrator forwarded to the Chairman of the Medical Executive Committee ("MEC") a request for a review of Macris' patient and hospital practices. The trial court found that "[a]ttached to this request were several memoranda from hospital staff, including [the Memorandum]." Appellant's Excerpts of Record ("ER"), tab D at 1-2 (Dec. & Order, May 19, 2008). The MEC Chairman requested for an immediate "peer review" to be conducted. The Chairman Elect of the ER Committee submitted a "peer review" report which recommended that Macris attend an intensive ER review course followed by another physician proctoring his cases.

[5] Shortly thereafter, Macris brought this libel action against Richardson based on the Memorandum. Richardson later filed a motion for summary judgment arguing, *inter alia*, that the Memorandum was "absolutely privileged" under Guam Rules of Evidence ("GRE") 417 and 19 GCA § 2105. In its Decision and Order, the trial court observed that Macris did not provide any opposition to the absolute privilege argument. ER, tab D at 5 (Dec. & Order) ("Plaintiff does not provide opposition to this argument. Nonetheless, the Court will not acquiesce in Defendant's 'absolute privilege' so absolutely."). Ultimately, the trial court found California case law persuasive in determining that Richardson's Memorandum was "absolutely privileged" under 19 GCA § 2105(b)(3) and granted summary judgment in favor of Richardson.

[6] Macris appeals, arguing the narrow issue that the trial court "erred in not considering the existence and application of Public Law No. 22-87 which added section 413 to Title 6, Guam Code Annotated, which afforded [Richardson] only a qualified privilege . . . not the absolute privilege stated by the Court." Appellant's Br. at 5.[2] Macris asserts, without any explanation or cited authority, that if the trial court addressed Public Law 22-87, the court would have

[2] Public Law 22-87, originally codified as 6 GCA § 413, was substantially amended by P.L. 24-84. Guam Supreme Court Promulgation Order No. 06-001, which amended and restated the Guam Rules of Evidence, moved 6 GCA § 413 to its current codification as GRE 417. *Re: Adoption of the 2006 Guam Rules Evidence*, PRM06-001 at 11 (Promulgation Order No. 06-001, Jan. 6, 2006). Macris conceded at oral argument that GRE 417(a) is the current statutory subsection most relevant to the events central to this litigation and that 6 GCA § 413 (Public Law 22-87) is not applicable. Digital Recording at 10:03:10-10:09:45 (Oral Argument, Mar. 18, 2009).

necessarily found that a qualified privilege, rather than an absolute privilege, would have applied. Then without explaining the standard for summary judgment or providing any law to support his assertion, Macris additionally argued that if a qualified privilege applied, Macris would have defeated the motion for summary judgment.

II. JURISDICTION AND STANDARD OF REVIEW

[7] This court has jurisdiction over an appeal from a final judgment of the Superior Court. 48 U.S.C.A. § 1424-1(a)(2) (West Supp. 2009); 7 GCA §§ 3107(b), 3108(a) (2005). The trial court's grant of a motion for summary judgment is reviewed *de novo*. *Wasson v. Berg*, 2007 Guam 16 ¶ 9.

III. DISCUSSION

A. Adequate Briefing Pursuant to GRAP Rule 13(a)(9)

[8] Rules 13(a)(9)(A) and (B) of the Guam Rules of Appellate Procedure require that arguments in an appellant's brief must contain appellant's contentions supported by citations to appropriate legal authority and factual record as well as state the applicable standard of review for each issue.[3] Guam R. App. P. ("GRAP") 13(a)(9)(A), (B). Macris, who was represented by counsel throughout trial and appeal, failed to meet the requirements mandated by Rule 13(a)(9)(A) and (B). An appellate brief which substantially fails to meet the requirements of Rule 13 faces the consequences outlined in GRAP Rule 17(e). GRAP 13(m); GRAP 17(e). When a brief does not conform to Rule 13, the Guam Supreme Court may exercise its discretion and dismiss the appeal. GRAP 13(m); GRAP 17(e).

[3] Rule 13(a)(9)(A) and (B) of the Guam Rules of Appellate Procedure provides that an appellant's brief "must" have arguments which contain:

> (A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and
>
> (B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues)[.]

GRAP 13(a)(9)(A), (B).

[9] We have previously treated the failure to adequately brief issues under Rule 13 as a waiver of issues on appeal. *Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶¶ 3 n.2, 9 n.3; *McGhee v. McGhee*, 2008 Guam 17 ¶ 9 & n.2. Macris argues that the trial court "erred in not considering the existence and application of Public Law No. 22-87 which added section 413 to Title 6, Guam Code Annotated, which would have afforded [Richardson] only a qualified privilege . . . not the absolute privilege stated by the Court." Appellant's Br. at 5. Macris does not explain what language in the applicable statute would support his assertion that there is a qualified privilege. Moreover, Macris fails to explain why the absolute privilege finding of the trial court is incorrect.

[10] At the trial level, opposing counsel and the trial court informed Macris that he was basing his argument on an incorrect version of the statute. Yet in his appellate brief, Macris still based his arguments on Public Law No. 22-87.[4] Macris attached a copy of Public Law No. 22-87 to his trial and appellate documents, demonstrating that he was arguing for application of the incorrect law throughout the entire time. Richardson addressed this error again in his appellee's brief, but Macris failed to request permission to amend the error or address the matter in a reply brief. It was not until oral arguments that Macris finally corrected this error.

[11] We have previously stated that we would reach the merits of a case not properly briefed if declining to review the merits "would result in manifest injustice." However, our discretion is not necessarily limited to only cases where manifest injustice would result from not reaching the merits. *Compare People v. Quinata*, 1999 Guam 6 ¶ 26 *with United States ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1201-02 (9th Cir. 2009) (deciding to reach issues not adequately briefed pursuant to Rule 28(a)(9)), *Simangunsong v. Holder*, 335 F. App'x 755, 757

[4] During the motions hearing on October 17, 2007, Richardson pointed out that 6 GCA § 413 was replaced by GRE 417 and the trial court asked about "public law 24 dash." Transcript ("Tr.") at 21 (Mot. Hr'g, Oct. 17, 2007). Throughout the hearing, Richardson addressed GRE 417. *Id.* at 12, 18. The trial court had to point out the correct statute to Macris, and stated, "I do want to ask one last question and it's on 417. . . . Did you respond to (a)(2) to the Court? That's formally [sic] 413, it's now 417(a)(2)." *Id.* at 44. However, Macris continued to base his argument on Public Law 22-87 and 6 GCA § 413. *Id.* at 29-30.

& n.1 (10th Cir. 2009) (deciding to reach issues not adequately briefed pursuant to Rule 28(a)(9)), *Mendoza v. U.S. Att'y Gen.*, 327 F.3d 1283, 1286 n.4 (11th Cir. 2003) ("While we admonish Mendoza's counsel for failing to comply with Rule 28(a)(9)(A), we exercise our discretion to consider his brief."), *and United States v. Miranda*, 248 F.3d 434, 444 (5th Cir. 2001).[5]

[12] Although the failure to satisfy the briefing requirements according to appellate rules of procedure ordinarily constitutes a waiver of issues on appeal, courts have exercised discretion in appropriate circumstances to still reach the issues on appeal. *See, e.g.*, *Horizon Health Corp.*, 565 F.3d at 1201-02 (acknowledging rule but still reaching the merits of the issue); *Simangunsong*, 335 F. App'x at 757 n.1; *Mendoza*, 327 F.3d at 1286 n.4; *Miranda*, 248 F.3d at 444. The Fifth Circuit, for example, reevaluated its case law regarding waiver of issues not properly briefed according to Rule 28(a)(9), subsections (A) and (B) of the Federal Rules of Appellate Procedure and concluded that the court "may consider such an issue, particularly where substantial public interests are involved." *Miranda*, 248 F.3d at 444 (citing *Hatley v. Lockhart*, 990 F.2d 1070, 1073 (8th Cir.1993).

[13] Similarly, we exercise our discretion here to reach the merits in order to resolve the conflicting policies inherent in extending absolute privilege: the balancing of the public interest in reporting healthcare professionals' misconduct with the need to prevent undue injury from defamation. While we admonish Macris' counsel for failing to comply with Rule 13(a)(9) subsections (A) and (B); we exercise our discretion to reach the merits.

[5] Rule 13(a)(9), subsections (A) and (B) of the Guam Rules of Appellate Procedure, are identical to Rule 28(a)9, subsections (A) and (B) of the Federal Rules of Appellate Procedure. *Compare* GRAP 13(a)(9)(A), (B) *with* Fed. R. App. P. 28(a)(9)(A), (B). Therefore, federal court interpretation of the analogous federal rules is persuasive authority. *McGhee*, 2008 Guam 17 ¶ 12 ("Because the Guam Rules of Appellate Procedure are substantially similar to the Federal Rules of Appellate Procedure, we look to federal case law for guidance.").

B. Qualified Immunity Pursuant to GRE § 417(a)(3)

[14] During oral arguments, Macris conceded that GRE 417(a)(3) is the only applicable rule that would provide a qualified immunity rather than an absolute immunity. Digital Recording at 10:03:10-10:09:45 (Oral Argument, Mar. 18, 2009). GRE 417(a)(3) grants qualified immunity for "any *act* performed during peer reviews or quality of care utilization reviews if the person acts in good faith without malice." GRE 417(a)(3) (emphasis added). Since only GRE 417(a)(3) would support a qualified immunity argument, the next inquiry is whether the "communication" central to this suit falls within the meaning of "act" under GRE 417(a)(3). *Id.*

[15] A statute should be construed to give effect to all of its provisions so that no part would be superfluous or insignificant. *E.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (Refusing to adopt a construction of the statute that would render a word "insignificant, if not wholly superfluous," the U.S. Supreme Court reiterated its "duty to give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)); *see also Camacho v. In re Gumataotao*, 2010 Guam 1 ¶ 19 (observing the principle of statutory construction that "a narrower, more specific provision of a statute takes precedence over a more general provision of the same statute"). GRE 417(a) contains three subsections addressing three distinct areas to which varying degrees of immunity are to be applied: 1) participation; 2) communication; and 3) action. GRE 417(a).[6] To interpret Richardson's "communication" to be an "act" within the

[6] GRE 417(a) states:

> [T]here shall be no monetary liability on the part of, and no cause of action for damages shall arise against any person, partnership, corporation, firm, society or other entity arising from, relating to, or regarding:
>
> (1) participation in quality of care or utilization reviews by plan or health care provider peer review committees which are licensed health care providers composed mainly of physicians and surgeons, dentists, nurses, allied health professionals, optometrists or any of the above;
>
> (2) *communication* of information, the making or issuance of any recommendation or evaluation to any governmental agency, medical or specialists society, regarding the qualifications, fitness, professional conduct or practices of health care professionals, which communication, recommendation, and evaluation are the results of peer reviews or quality of care or utilization reviews;

meaning of GRE 417(a)(3) would render the meaning of "communication" in GRE 417(a)(2) superfluous. *See* GRE 417(a)(2), (3); *Duncan*, 533 U.S. at 174.[7]

[16] Additionally, "it is instructive to consider how courts in jurisdictions with similarly worded statutes have resolved this issue." *Macris v. Swavely*, 2008 Guam 18 ¶ 17. GRE 417(a)(2) and (3) are similar to California Civil Code ("Cal. Civ. Code") §§ 43.7 and 43.8.[8] Therefore, California courts' interpretation of the words "act" and "communication" are instructive when interpreting whether a communication falls within the meaning of "act" in 6 GRE 417(a)(3). *See id.* ¶ 17.

[17] The California Supreme Court explained that the purpose of "act" in section 43.7 was to protect actions taken by a peer review committee that are in keeping with its investigatory and disciplinary functions, while communications that would normally fall under libel would not. *See, e.g., Westlake Cmty. Hosp. v. Super. Ct. of L.A. County*, 551 P.2d 410, 420 (Cal. 1976);

> (3) any *act* performed during peer reviews or quality of care utilization reviews if the person acts in good faith without malice. . . .

GRE 417(a) (emphases added).

[7] Since a "communication" under GRE 417(a)(2) pertains to " . . . the *results* of peer reviews or quality of care or utilization reviews," GRE 417(a)(2) does not apply to the facts of this case. GRE 417(a)(2) (emphasis added).

[8] *Compare* Cal. Civ. Code § 43.7 (1961), (1976), (1982), (2003), *and* Cal. Civ. Code § 43.8 (1977), (2007) *with* 6 GCA § 417. Although Cal. Civ. Code §§ 43.7 and 43.8 have undergone several amendments between 1961 and 2007, the substantive language distinguishing "act" and "communication" remains the same. Section 43.7(b) states:

> There shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any professional society, any member of a duly appointed committee of a medical [society] . . . for any *act* or proceeding undertaken or performed within the scope of the functions of [the] committee which is formed to maintain the professional standards of the society established by its bylaws. . . .

Cal. Civ. Code § 43.7(b) (emphasis added) (same language kept throughout 1961 through 2003 versions).

Cal. Civ. Code § 43.8(a) states:

> [T]here shall be no monetary liability on the part of, and no cause of action for damages shall arise against, any person on account of the *communication* of information in the possession of [that] person to any . . . peer review committee . . . when [the] communication is intended to aid in the evaluation of the qualifications, fitness, character, or insurability of a practitioner of the healing [profession] . . . .

Cal. Civ. Code § 43.8(a) (emphasis added) (same language kept throughout 1977 through 2007 versions).

Slaughter v. Friedman, 649 P.2d 886, 890 (Cal. 1982). The California Supreme Court in *Westlake* observed:

> [T]he gist of her claim is not that her injury has been occasioned simply by defendants' malicious *statements* at the proceedings, but *rather that she has been injured by the malicious actions* of the hospital and its committee members *in revoking her staff privileges*. As the Court of Appeal pointed out . . . it is section 43.7, and not section 47, subdivision 2, which 'is concerned with the *actions* taken by a medical committee (i.e., refusing, suspending or revoking hospital privileges to any doctor)'. . . .

Westlake, 551 P.2d at 420 (emphases added) (citations omitted). The court in *Slaughter* similarly observed:

> Section 43.7 protects peer review committee members from liability for *acts performed* in reviewing the quality of medical or dental services, while section 43.8 protects private *communications* "to any hospital, hospital medical staff, professional society, medical or dental school, professional licensing board . . ., peer review committee, or underwriting committee . . . " evaluating practitioners of the healing arts.

Slaughter, 649 P.2d at 890 (emphases added) (omissions in original). We interpret "act" in section 417(a)(3) to cover actions such as "refusing, suspending or revoking hospital privileges"; actions mandating probationary periods and supervision over a physician under investigation; or other similar actions related to the investigatory process. *See Westlake*, 551 P.2d at 420.

[18] The only rule that Macris believes would provide a qualified privilege, GRE 417(a)(3), does not apply to the Memorandum which is a "communication." *See, e.g., id.* at 420. Therefore, we must next determine whether a communication which prompts an official proceeding shares the same level of privilege as statements made during or as the result of an official proceeding and determine whether the Memorandum was a privileged communication made in an official proceeding in accordance with 19 GCA § 2105, as the trial court held.

C. Privilege for Communication Initiating an Official Proceeding

[19] Under California case law, a communication which prompts an official proceeding shares the same level of privilege as statements made during or as the result of an official proceeding. *King v. Borges*, 104 Cal. Rptr. 414, 416-17 (Ct. App. 1972). The court in *King* observed that

"[i]t seem[ed] obvious that in order for the Commissioner to be effective there must be an open channel of communication by which citizens can call his attention to suspected wrongdoing. That channel would quickly close if its use subjected the user to a risk of liability for libel. A qualified privilege is inadequate protection under the circumstances." *Id.* at 417-18. Ultimately, the court in *King* found that "a communication to an official administrative agency, which communication is designed to prompt action by that agency, is as much a part of the 'official proceeding' as a communication made after the proceedings have commenced." *Id.* at 417. We agree.

[20] We are persuaded by the strong policy of improving quality of care without the fear of a retaliatory lawsuit. *See, e.g.*, *Kibler v. N. Inyo County Local Hosp. Dist.*, 138 P.3d 193, 196 (Cal. 2006) (observing that the "peer review of physicians . . . serves an important public interest."); *Imperial v. Drapeau*, 716 A.2d 244, 250-51 (Md. 1998) ("Because the quality of pre-hospital, emergency medical care can literally be a matter of life and death, it carries a very high priority. Accordingly, public policy encourages the communication of information to public authorities responsible for maintaining the quality of emergency medical services."); *Hackethal v. Weissbein*, 592 P.2d 1175, 1181-86 (Cal. 1979) (Tobriner, J. dissenting) (discussing the important public policy interest). Although the court's discussion in *King* is narrowly tailored to administrative agencies, we extend the same logic to situations where a communication is designed to prompt "official proceedings" that are intended to benefit the public. We next address whether GMH's peer review is an "official proceeding" under 19 GCA § 2105.

D. An "Official Proceeding" under 19 GCA § 2105

1. Review of Statutory History and California Case Law

[21] Title 19 GCA § 2105 originates from a 1927 version of California Civil Code § 47.[9] *Compare* Cal. Civ. Code § 47 (1927) *with* Guam Civ. Code § 47 (1953) (originally adopted by

[9] California Civil Code § 47(1) and (2) states:

Privileged publications. A privileged publication is one made—

1. In the proper discharge of an official duty.

the Naval Government in 1933).[10] The 1945 version of § 47 is not substantively different from the 1927 version. *Compare* Cal. Civ. Code § 47 (1927) *with* Cal. Civ. Code § 47 (1945).[11] However, in 1979, the California legislature significantly amended California Civil Code § 47. *Compare* Cal. Civ. Code § 47 (1945) *with* Cal. Civ. Code § 47 (1979).

[22] The last California Supreme Court case which analyzed the 1945 version of section 47 and the application of "any other official proceeding authorized by law" to a hospital peer review was *Hackethal v. Weissbein* in 1979. 592 P.2d 1175 *passim.* The court in *Hackethal* found that an absolute privilege did not exist for a private hospital peer review, while approving California appellate cases[12] that extended such a privilege to similar government agency proceedings. *Id.* at 1177. However, we are not persuaded by the logic that any governmental hospital peer review is an "official proceeding" solely because the hospital is a government agency. It is one factor a court considers. *See, e.g., Butz v. Economou,* 438 U.S. 478, 513-14 (1978); *Offen v. Brenner,* 935 A.2d 719, 726-31 (Md. 2007); *Imperial,* 716 A.2d at 248-49; *McDermott v. Hughley,* 561 A.2d 1038, 1044-45 (Md. 1989); *Gersh v. Ambrose,* 434 A.2d 547, 551-52 (Md. 1981).

[23] Although GMH is a governmental agency established by 10 GCA § 80103 with powers pursuant to 10 GCA § 80104, that does not necessarily make GMH's peer review process an "official proceeding." *See* 19 GCA § 2105 (2005); *Offen,* 935 A.2d at 726-28 (summarizing case

> 2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law; provided, that an allegation or averment contained in any pleading or affidavit filed in an action for divorce or an action prosecuted under section 137 of this code made of or concerning a person by or against whom no affirmative relief is prayed in such action shall not be a privileged publication as to the person making said allegation or averment within the meaning of this section unless such pleading be verified or affidavit sworn to, and be made without malice, by one having reasonable and probable cause for believing the truth of such allegation or averment and unless such allegation or averment be material and relevant to the issues in such action.

Cal. Civ. Code § 47(1)-(2) (1927).

[10] Guam Civ. Code § 47 was re-codified as 19 GCA § 2105.

[11] Since the focus of the inquiry is on § 47(2) subsection 3 (19 GCA § 2105(b)(3)) which did not change between the 1927 and the 1945 versions, the minor amendments in the subheading, subsection 4 and subsection 5 are immaterial to this analysis. *Compare* Cal. Civ. Code § 47 (1927) *with* Cal. Civ. Code § 47 (1945).

[12] *E.g., Ascherman v. Natanson,* 100 Cal. Rptr. 656 (Ct. App. 1972).

law where the question of privilege did not turn on whether communication took place within a governmental agency proceeding, but rather whether there were sufficient public interests *in addition to* procedural safeguards); *Imperial*, 716 A.2d at 248-51; *McDermott*, 561 A.2d at 1044-46); *Gersh*, 434 A.2d at 551-52 (declining to extend privilege to cover statements made by a witness testifying before the Baltimore City Community Relations Commission where insufficient procedural safeguards existed).

[24] Richardson's application of *Dorn v. Mendelzon*, 242 Cal. Rptr. 259 (Ct. App. 1987) to interpret 19 GCA § 2105(b)(3) is misplaced. *Dorn* based its interpretation and application on the fact that the alleged defamatory communication was to the California Board of Medical Quality Assurance ("BMQA") which is equivalent to the Guam Board of Medical Examiners ("GBME"). *See Dorn*, 242 Cal. Rptr. at 262-63; 10 GCA § 12203 (2005) (enabling act for the GBME). Unlike GMH's "peer review" committee, GBME and BMQA are state agencies with statutorily vested investigatory and enforcement power. *Id.* For purposes of comparison to this case, we note that the court in *Dorn* described its BMQA as:

> an administrative agency created by the Legislature whose responsibilities include enforcement of the Medical Practice Act and review of the performance of physicians and surgeons licensed in California. It is an agency analogous to the State Bar of California, with the duty to investigate complaints and the power to initiate disciplinary proceedings against practitioners. Disciplinary actions taken against a licensee are reviewable by application for writ of mandate.

Dorn, 242 Cal. Rptr. at 263 (citations omitted). The facts in this case are bereft of a description as to what exactly the procedures and rules governing GMH's peer review committee are, and Richardson fails to explain how GMH's peer review committee is legally analogous to the BMQA in *Dorn*. *See id.* Without more facts in the record concerning the procedural safeguards present in GMH's peer review process that would make an absolute privilege palatable, we cannot assume that GMH's peer review is an "official proceeding" simply because GMH is a governmental hospital.

2. Upholding Trial Court on Any Grounds Supported by the Record

[25] Richardson argues that the lower court decision "*must* be affirmed if it can be supported on any ground finding support in the record." Appellee's Br. at 14 (Dec. 5, 2008) (emphasis added). Although Richardson argues that this rule is mandatory on this Court, we have adopted the discretionary rule. *E.g.*, *Hart v. Hart*, 2008 Guam 11 ¶ 15 ("[T]his court '*may* affirm the judgment of a lower court on any ground supported by the record.' (emphasis added); *Ceasar v. QBE Ins. (Int'l), Ltd.*, 2001 Guam 6 ¶ 8; *see also Chen v. Board of Trustees of Guam Memorial Hosp. Authority*, 1986 WL 68521 at *3 (D. Guam App. Div. 1986) ("This panel can uphold that decision by the trial court on any ground which finds support in the record."); *Matter of Aguon*, 1983 WL 30229 at * 3 (D. Guam App. Div. 1983) ('We may uphold correct conclusions of law even though they are reached for the wrong reason or for no reason, and we may affirm a correct decision on any basis supported by the record.' (quoting *United States v. State of Washington*, 641 F.2d 1368 (9th Cir. 1981)). This rule is consistent with our case law delineating the standard to exercise discretion in reviewing arguments raised for the first time on appeal. *See Taniguchi-Ruth Assoc. v. MDI Guam Corp.*, 2005 Guam 7 ¶ 80 (stating rule that this court may exercise discretion to address an issue first raised on appeal "when the issue is purely one of law").

[26] We reiterate that this court 'may affirm the judgment of a lower court on any ground supported by the record' and thus exercise our discretion to address Richardson's argument raised for the first time on appeal. *Hart v. Hart*, 2008 Guam 11 ¶ 15. Richardson's argues that we can affirm the trial judgment based on a theory that GMH's peer review process should be considered an "official proceeding" under Guam's anti-SLAPP statute,[13] and that this court should therefore adopt the conclusion that the California Supreme Court made in *Kibler v. Northern Inyo County Local Hospital District.* In its recent interpretation of its anti-SLAPP

[13] The *Citizen Participation in Government Act of 1998* is Guam's anti-SLAPP (Strategic Lawsuits Against Public Participation) statute. 7 GCA Ch. 17 (2005)

statute in *Kibler*, the California Supreme Court found that communications to a hospital's peer review committee were absolutely privileged. *Kibler*, 138 P.3d at 196-97.

[27] While recognizing that California's anti-SLAPP statute should be interpreted broadly, the California Supreme Court still considered several factors in determining whether the hospital peer review was an official proceeding. *Id.* at 196-97. The California Supreme Court found, *inter alia*, the following facts significant: 1) California's "Business and Professions Code sets out a comprehensive scheme that incorporates the peer review process into the overall process for the licensure of California physicians."; 2) [u]nder the California Business and Professions Code "acute-care facilities . . . must include in their bylaws a provision for conducting peer review."; 3) under the California Business and Professions Code "a hospital must report to the Medical Board of California (Medical Board), which licenses physicians, any hospital action that 'restricts or revokes a physician's staff privileges as a result of a determination by a peer review body.'"; 4) "a hospital granting or renewing a physician's staff privileges must request a report from the Medical Board indicating whether the physician has at some other medical facility 'been denied staff privileges, been removed from a medical staff, or had his or her staff privileges restricted.' The failure to comply with this requirement is a misdemeanor."; and 5) "the Medical Board itself must maintain a historical record for each of its licensees that includes, among other things, the '[d]isciplinary information' reported to the Medical Board resulting from actions by hospital peer review committees." *Id.* at 196-97 (second alteration in original) (citations omitted). Richardson has failed to show similar legal requirements and protections as described in *Kibler* to justify why GMH's peer review process is an official proceeding under a *Kibler* application of the anti-SLAPP statute.

[28] Moreover, the court in *Kibler* found that "hospital's decisions resulting from peer review proceedings are subject to judicial review by administrative mandate." *Id.* at 197. The fact that a hospital's peer review decision is subject to judicial review led the court in *Kibler* to find a

hospital's peer review "comparable to that of quasi-judicial public agencies whose decisions likewise are reviewable by administrative mandate." *Id.* at 197.

[29] While it may be possible to find that GMH's peer review process rises to a level of a quasi-judicial proceeding, and like California, there may be a similar "comprehensive scheme that incorporates the peer review process into the overall process for the licensure of . . . physicians," Richardson has failed to meet the standard articulated in *Hart* since the record is insufficient to support this alternative legal theory. *See Hart v. Hart*, 2008 Guam 11 ¶ 15; *see e.g.*, *Property Owners of Whispering Palms, Inc. v. Newport Pacific, Inc.*, 33 Cal.Rptr.3d 845, 850 (Cal. App. 2005) (because record did not support alternative legal theory, decision was remanded). Therefore we decline to uphold the trial court's holding based on an alternative application of Guam's anti-SLAPP statute.

3. Privilege in an "Official Proceeding"

[30] An "'official proceeding' . . . (is one) which resembles judicial and legislative proceedings, such as transactions of administrative boards and quasi-judicial and quasi-legislative proceedings . . . ." *Hackethal*, 592 P.2d at 1177-78 (quoting *McMann v. Wadler*, 11 Cal. Rptr. 37, 41 (Dist. Ct. App. 1961)). Courts have extended privilege for proceedings similar to judicial and legislative proceedings recognizing that:

> There is no precise definition of what qualifies as a 'judicial proceeding' for the purpose[] of the absolute privilege; but it clearly extends to tribunals other than courts. The term is employed in a flexible fashion to embrace any governmental proceeding involving the exercise of a judicial or quasi-judicial function, including a wide variety of administrative boards, commissions, or other tribunals which may engage in judicial or quasi-judicial action though not part of the court system.

Imperial, 716 A.2d at 248 (quoting R.A. Smolla, *Law of Defamation* § 8.03[3][a] (1986, 1996 Supp.)). The extension of privilege to "official proceedings" (such as quasi-judicial proceedings) derives from common and statutory law recognizing the strong public policy in favor of protecting witness and testimonial speech. *E.g.*, *Gersh*, 434 A.2d at 548-52; *Hackethal*, 592 P.2d at 1181-85 (Tobriner, J., dissenting). However, courts are cognizant of the need to balance

competing policy interests between the benefits of certain speech in the interest of the public and the need to protect individuals from defamation. *See, e.g.*, *Gersh*, 434 A.2d at 549.

[31] Maryland's highest court has thoroughly and persuasively examined the history and competing policies behind the extension of witness privilege for quasi-judicial proceedings. *E.g.*, *Gersh*, 434 A.2d 547 *passim*; *Offen*, 935 A.2d 719 *passim*; *Imperial*, 716 A.2d at 248; *McDermott*, 561 A.2d at 1044-45. In *Gersh*, the court recognized that:

> [m]ost American courts which have extended absolute immunity to witnesses testifying in other than strictly judicial, in-court settings have first assured themselves that in such settings there are sufficient judicial safeguards so as to minimize the likelihood of harm to potentially defamed (or otherwise injured) individuals who would have no legal remedy.

Gersh, 434 A.2d at 549. In interpreting 19 GCA § 2105(b)(3), we also find that reviewing the qualities of judicial and legislative proceedings in 19 GCA § 2105(b)(1) and (2) reveals the importance of procedural safeguards in order for a proceeding to be "official" and enjoy a similar privilege. *See, e.g.*, *Hackethal*, 592 P.2d at 1177-78 & n.3; *King*, 104 Cal. Rptr. at 417 ("The Legislature has available to it methods for preventing or minimizing false complaints. . . . [F]or example[,] . . . making it a misdemeanor to falsely report [a] crime to a police officer."). The judicial and legislative proceedings stated in sections 2105(b)(1) and (2) have safeguards to deter individuals from making false claims and provide those who are accused an opportunity to defend themselves. *See, e.g.*, *Economou*, 438 U.S. at 513-14 (extending absolute immunity to a federal agency's adjudication because it "share[d] enough of the characteristics of the judicial process"); 48 U.S.C.A. § 1421b(e) (West 2003) (due process in judicial proceeding); 5 GCA § 34119(d) (2005) (burden of proof required to establish paternity); GRE 603 (oath requirement in judicial proceeding); 2 GCA § 3112 (2005) (consequences for false testimony in legislative proceeding).[14]

[14] *See also* 9 GCA § 52.15 (2005) (consequences for false testimony in judicial proceeding); 9 GCA §§ 52.20 and 52.30 (2005) (consequences for false statements made in judicial proceeding). Particularly instructive is 10 GCA § 12210, which details the required procedures for the Guam Board of Medical Examiners to take disciplinary action. 10 GCA § 12210 (2005). Section 12210(c) states in part:

[32] In *Imperial v. Drapeau*, Maryland's highest court explained how absolute privilege would not be extended if there were not sufficient procedural safeguards to protect individuals from the consequences of defamation. 716 A.2d at 248. The *Imperial* court found it significant that "[r]equisite procedural safeguards were present" in the proceeding and that such proceeding should be "'at least as functionally comparable to a trial before a court . . . .'" *Id.* at 249 (quoting *Odyniec v. Schneider*, 588 A.2d 786, 792 (Md. 1991)). In *Imperial*, the court reasoned that "'[t]he public benefit to be derived from testimony at Commission hearings of this type [wa]s not sufficiently compelling to outweigh the possible damage to individual reputations to warrant absolute witness immunity.'" *Id.* at 248 (quoting *Gersh*, 434 A.2d at 551) (first alteration in original).

[33] In order to determine whether extension of absolute privilege is warranted, Maryland's *Gersh v. Ambrose* and its progeny have developed and applied a two-part test examining the degree of public interest and the extent of procedural safeguards in place to protect individuals from harm. *See, e.g.*, *Offen*, 935 A.2d 719 *passim*; *Imperial*, 716 A.2d at 248; *McDermott*, 561 A.2d at 1044-45[15]; *Gersh*, 434 A.2d at 551-52.[16] To determine whether statements in quasi-

> The procedural provisions should provide for *investigation of charges* by the Board; *notice of charges* to the accused; an opportunity for a *fair and impartial hearing* for the accused before the Board or its examining committee; an opportunity for *representation* of the accused by counsel; the *presentation of testimony, evidence and argument*; subpoena power and attendance of witnesses; a record of proceedings; and *judicial review* by the courts in accordance with the standards established by the jurisdiction for such review.

10 GCA § 12210(c) (emphases added). GBME shares with GMH's peer review proceedings the same public interest to ensure the quality of care from health professionals. It is clear from 10 GCA § 12210(c) that GBME's proceedings have procedural safeguards in place that are similar to legislative and judicial proceedings under 19 GCA § 2105(b)(1) and (2). The record does not show what, if any, procedural safeguards exist for GMH's peer review.

[15] *See McDermott*:

> In *Gersh*, we noted examples of administrative proceedings not giving rise to absolute privilege: *E.g.*, *Hackethal v. Weissbein*, 24 Cal. 3d 55 (1979) (proceedings before judicial commission of private medical society not an official proceeding authorized by law; no legal requirement that witnesses take an oath therefore no threat of perjury); *Blakeslee & Sons v. Carroll*, 64 Conn. 223 (1894) (investigating committee had no judicial office; and its decisions and subpoenas were unenforceable, the testimony non-compellable); *Mills v. Denny*, 245 Iowa 584 (1954) (city council proceedings not under able and controlling influence of learned judge who may reprimand, fine, punish, and expunge impertinent material from record); *Bienvenu v. Angelle*, 254 La. 182 n.1 (1969) (*overruled by Gonzales v. Xerox Corp.*, 320 So. 2d 163 (La. 1975)) (statements to Civil Service investigator not under oath, not subject to

judicial or quasi-legislative proceedings are within the "ambit of the absolute privilege," we adopt Maryland's two part test which evaluates: "(1) the nature of the public function of the proceeding and (2) the adequacy of procedural safeguards which will minimize the occurrence of defamatory statements." *Imperial*, 716 A.2d at 248 (quoting *Gersh*, 434 A.2d at 551-52).

[34] When there is a significant public interest and sufficient procedural safeguards are in place analogous to judicial and legislative proceedings under 19 GCA § 2105(b), then the extension of absolute immunity is justified. *See* 19 GCA § 2105(b); *see also Economou*, 438 U.S. at 513-14; *Gersh*, 434 A.2d at 551-52. This test balances the public interest in facilitating the reporting of health professionals' misconduct while ensuring sufficient safeguards will minimize the potential harmful impact of a false accusation. In this case, we are unable to apply the Maryland Test because the record lacks sufficient information regarding the procedural safeguards of GMH's peer review process.

IV. CONCLUSION

[35] We find that the qualified privilege under GRE 417(a)(3) does not apply to communications intended to initiate a hospital peer review proceeding. We also find that where a communication intends to prompt an official proceeding which benefits the public, such communication enjoys a similar degree of privilege as a communication during an official proceeding under 19 GCA § 2105(b)(3). Moreover, we find that there is insufficient evidence in the record to support the trial court's conclusion that GMH's peer review process is an "official

---

sanctions); *Mundy v. Hoard*, 216 Mich. 478, 185 N.W. 872 (1921) (irrelevant hearsay statements made by voluntary witness before hearing of city police committee not absolutely privileged); *Elder v. Holland*, 208 Va. 15 (1967) (not all administrative proceedings warrant absolute privilege; superintendent of State police lacked subpoena power; uncertain whether witnesses subject to perjury; no evidentiary rules followed); *Engelmohr v. Bache*, 66 Wash. 2d 103, *cert. dismissed*, 382 U.S. 950 (1965) (proceeding before study group appointed by S.E.C. merely [an] investigatory hearing not conducted in manner essential to constitute quasi-judicial administrative proceeding).

561 A.2d at 1045 n.2 (alterations to citations) (some citations omitted).

[16] *See also Saavedra v. City of Albuquerque*, 859 F. Supp. 526, 532 (D. N.M. 1994) ("To justify protecting quasi-judicial officers with absolute immunity, therefore, the procedural safeguards in place must be sufficient to correct or prevent violations of due process rights of which a reasonable person would have known, or decisions made in bad faith or motivated by malice.").

proceeding" under 19 GCA § 2105(b)(3). To determine whether statements in quasi-judicial or quasi-legislative proceedings are within the "ambit of the absolute privilege," we adopt Maryland's two-part test which looks at the nature of the public function of the proceeding and the adequacy of procedural safeguards which will minimize the occurrence of defamatory statements. We do not reach whether Richardson would prevail on summary judgment based on other grounds, since the trial court granted summary judgment solely on the finding of absolute privilege under 19 GCA § 2105(b)(3). Therefore we **VACATE** the judgment and **REMAND** to the trial court to make findings consistent with this opinion or make a summary judgment ruling on the remaining possible grounds.

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

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

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