IN THE SUPREME COURT OF GUAM

MANU P. MELWANI and ISHWAR P. HEMLANI,
Plaintiffs-Appellees,

v.

VASUDEV B. HEMLANI and
the P.D. HEMLANI FOUNDATION, LTD.,
Defendants-Appellants.

Supreme Court Case No.: CVA14-019
Superior Court Case No.: CV1249-12

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on October 30, 2014
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 case is just a small part of a longstanding dispute between the parties involving a trust established by P.D. Hemlani and Radhi Hemlani, both deceased. The assets of this trust have been the subject of several lawsuits and are at the center of the present one. This case involves allegations of libel made in connection with the recording of a document entitled "Notice of Recordation of Further Fraudulent Transfers" (hereinafter referred to as "Notice") with the Guam Department of Land Management ("DLM") by Defendants-Appellants Vasudev B. Hemlani and the P.D. Hemlani Foundation, Ltd. The Defendants-Appellants now appeal the trial court's denial of their motion for summary judgment, motion for sanctions, and motion to dismiss.

[2] For the reasons set forth below, we affirm the Superior Court's decision denying the motion for summary judgment under the Guam Citizen Participation in Government Act ("CPGA") and denying the motion for sanctions. We hold that while the court erred in determining that the Notice recorded with DLM was not petitioning under the CPGA, the act of recording the Notice with DLM is not immune from liability because it was not aimed at procuring any government or electoral action, result or outcome. We also affirm the Superior Court's decision denying the motion to dismiss pursuant to the litigation privilege.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] This case is the most recent in a protracted family dispute initially arising out of an estate plan established in 1997 by the late P.D. Hemlani ("P.D.") and the late Radhi Hemlani ("Radhi"). The Defendants-Appellants in this action are Vasudev B. Hemlani ("Vashi"), a

nephew of P.D. and Radhi, and the P.D. Hemlani Foundation, Ltd. ("PDHF"). Plaintiffs-Appellees Manu P. Melwani ("Manu") and Ishwar P. Hemlani ("Don") are also the nephews of P.D. and Radhi.

[4] P.D. and Radhi, as co-settlors and co-trustees, established the Radhi Puran Trust in 1997 to "provide for the orderly disposition of the settlors' property upon the settlors' deaths . . . ." Record on Appeal ("RA"), tab 22, Ex. 1 to Ex. A at preamble (Radhi Puran Trust, Oct. 7, 1997). This trust was known as the "Radhi Puran Trust." *Id.* The terms of the trust provided that all property held by either P.D. or Radhi, either jointly or separately, was to be transferred into the trust, while retaining its joint or separate character.

[5] P.D. passed away on March 12, 2004, leaving Radhi as the sole remaining trustee. What followed was a decade of family disputes and litigation. Over the years, Radhi purported to amend the trust several times, and eventually, on September 4, 2009, she revoked the Survivor's Trust. In light of the various allegations of misconduct regarding the validity of Radhi's amendments and revocation of the trust, Vashi filed suit, naming Radhi, Manu, Don, Radhi's Foundation, and others as defendants. At issue in that litigation was what portion of the trust assets constituted Radhi's share in the community property, that is, property that she properly could claim as a result of revoking the Survivor's Trust. The parties, however, ultimately settled the case after two years of litigation. They entered into a Memorandum of Settlement, dated July 27, 2011, which was accepted by the court in a Stipulation and Order dismissing the entire action with prejudice.

[6] The Memorandum of Settlement provided that Vashi would form the PDHF, of which Vashi would also serve as president. The PDHF was to be formed "with the same charitable purpose as Radhi's Foundation . . . consistent with the charter filed in 1991." RA, tab 17, Ex. 31

to Ex. C at 2 ¶ 3(a) (Mem. of Settlement, July 27, 2011). The Memorandum of Settlement also included an itemized list of assets (mainly real properties, or the proceeds derived from the sale of those properties) that Radhi, Manu, Don, and Radhi's Foundation would distribute to the PDHF as the foundation's funding. As a result of the settlement and the segregation of the various properties between the PDHF and Radhi herself, Radhi purportedly proceeded to create an estate plan of her share of the assets and disposed of certain properties. Radhi executed three separate documents, each entitled Deed of Gift with Life Estate, on November 23, 2011. Radhi executed a Deed of Gift with Life Estate to: (1) her sister, Padi Kelly Daryanani, of Apartment No. 1101, in the Agana Beach Condominiums; (2) her brother, Jethmal K. Melwani, of Apartment No. 1103, in the Agana Beach Condominiums; and (3) her brother, Parmanand K. Melwani, of Lot No. 93, Tract No. 13105, Municipality of Tamuning. At the time the deeds were executed, Radhi, reserving life estates for herself, intended to convey the three properties to her siblings at the time of her death.

[7] These transfers became the matter of two cases before the Superior Court. First, Kishore Hemlani, another nephew of P.D. and Radhi, petitioned the Superior Court to appoint a public guardian for Radhi. Vashi was permitted to intervene in that action, and the Public Guardian was appointed to serve as Radhi's guardian.

[8] In a second case before the Superior Court, another of P.D. and Radhi's nephews, Kamlesh Hemlani ("Kamlesh"), initiated a suit by way of a ten-count complaint filed on June 25, 2012, naming a number of defendants, including Radhi, Manu, Don, Radhi's Foundation, Vashi, and the PDHF. Kamlesh alleged that Manu and Don improperly diverted assets from the trust, and that Vashi and the PDHF failed to adequately protect the trust. The complaint further alleged that Vashi entered into the Memorandum of Settlement with the knowledge that Radhi

was incompetent, and that the settlement and the transfer of assets to the PDHF were void. Vashi filed an answer to the complaint in which he denied the allegations made against himself and the PDHF, but agreed with those allegations concerning Manu and Don. Kamlesh's action subsequently was dismissed, by way of Decision and Order, on July 10, 2013. In granting a joint motion to dismiss the action, filed by Manu and Don, amongst others, the court reasoned that the court had never made a finding as to Radhi's incapacity, and that Kamlesh lacked the standing to bring the action.

[9] In October 2012, Radhi's sister Padi visited Guam from Indonesia, where she resided. It was at this time, when all three of her siblings were together on the island of Guam, that Radhi decided to deliver the previously executed Deeds of Gift with Life Estate to her siblings, rather than wait for them to learn of the deeds following her death. The Public Guardian subsequently objected to the recording of the deeds. The PDHF and Vashi allege, and the trial court appeared to accept, that these transfers were actually performed by Manu, not Radhi. Radhi Hemlani passed away on August 18, 2013.

[10] On October 17, 2012, after learning of the transfers, Vashi, as the President and a Director of the PDHF, caused the PDHF to submit the Notice to the Superior Court with jurisdiction over the Kamlesh and the guardianship actions. The following day, the PDHF recorded the Notice with DLM.

[11] The Notice stated that the PDHF, through its counsel, had become aware of a "series of fraudulent real estate transfers from the Radhi Puran Trust" that were recorded at the DLM. RA, tab 26 at 1 (Dec. & Order, May 12, 2014). Specifically, the Notice listed three transfers of title

from Radhi to her siblings (that is, Manu's father, uncle, and aunt).[1] The Notice alleged that these transfers were completed without the knowledge or consent of the appointed Public Guardian, in violation of the guardianship court's orders, and that the transfers were detrimental to Radhi herself and to the PDHF. The Notice further stated, "The transfers are yet another step in the fraudulent scheme by Manu Melwani, Don Hemlani and their aiders and abettors to enrich themselves with assets that were ultimately supposed to go [sic] charity, as recounted in PDHF's Answer filed August 14, 2012." *Id.*

[12] Less than a month later, Manu and Don filed their complaint against the PDHF and Vashi seeking punitive, compensatory, and other unspecified damages based upon a claim of libel. Specifically, the complaint alleges that the statements in the Notice were false and libelous, that the PDHF and Vashi were aware that the statements were false, and that they made the statements with the intent to harm Manu and Don. The complaint further alleges that the statements have caused damage to Manu and Don because they exposed them to "hatred, contempt, ridicule or obloquy, cause[d] them to be shunned or avoided, and [have] a natural tendency to injure them in their occupations." RA, tab 3 at 2 (Compl., Nov. 7, 2012).

[13] In response to the complaint, the PDHF and Vashi filed a motion for summary judgment, a motion for sanctions, and a motion to dismiss the complaint. The memorandum in support of their motions was later amended. The PDHF and Vashi argued that they were entitled to summary judgment pursuant to the Citizen Participation in Government Act ("CPGA"), 7 GCA §§ 17101-17109 (2005), and, accordingly, they also were entitled to sanctions pursuant to 7 GCA § 17106(g). In the alternative, the PDHF and Vashi argued that the court should grant their

[1] The Notice listed the following transfers: "(1) Lot No. 93, Tract No. 13104, Municipality of Tamuning, to Parmanand K. Melwani (Defendant Manu Melwani's father); (2) Apartment No. 1103, Agana Beach Condominiums, to Defendant Jethmal K. Melwani (Defendant Manu Melwani's uncle); and (3) Apartment No. 1101, Agana Beach Condominiums, to Padi Kelly Daryanani (Manu Melwani's aunt)." *Id.*

motion to dismiss the libel action because the recording of the Notice was absolutely privileged pursuant to the "litigation privilege," codified at 19 GCA § 2105, and Guam Rules of Civil Procedure ("GRCP") Rule 12(b)(6). RA, tab 18 at 16-19 (Am. Mem. of P. & A., Nov. 26, 2013).

[14] Manu and Don filed their opposition to the motions, and oral arguments on the PDHF and Vashi's motions were heard. The court rendered its Decision and Order denying the PDHF and Vashi's motion for summary judgment, motion for sanctions, and motion to dismiss. This timely appeal followed.

II. JURISDICTION

[15] This court has jurisdiction to hear an expedited appeal of a trial court order denying a motion for summary judgment in cases involving an anti-strategic lawsuit against public participation as outlined in 7 GCA § 17105. 7 GCA § 17106 (a)(2) (2005).

III. STANDARD OF REVIEW

[16] We review the denial of motions for summary judgment and to dismiss *de novo*. *Nat'l Union Fire Ins. Co. v. Guam Hous. & Urban Renewal Auth.*, 2003 Guam 19 ¶ 12. Issues of statutory interpretation also are reviewed *de novo*. *Town House Dep't Stores, Inc. v. Dep't of Educ.*, 2012 Guam 25 ¶ 11 (citing *Mendiola v. Bell*, 2009 Guam 15 ¶ 11).

[17] Reviewing the ruling on the motion for summary judgment requires the interpretation of the CPGA set forth in 7 GCA §§ 17101-17109. "The interpretation of a statute is a legal question subject to *de novo* review." *Guerrero v. Santo Thomas*, 2010 Guam 11 ¶ 8 (emphasis added). Statutory interpretation looks first to the language of the statute. *Aguon v. Gutierrez*, 2002 Guam 14 ¶ 6; *see also Pangelinan v. Gutierrez*, 2000 Guam 11 ¶ 23, *aff'd*, 276 F.3d 539 (9th Cir. 2002) (citing *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)). The plain meaning prevails where there is no clearly stated legislative intent to the contrary. *Sumitomo*

Constr., Co. v. Gov't of Guam, 2001 Guam 23 ¶ 17 (citing *Aaron v. SEC*, 446 U.S. 680, 697 (1980)). Further, this court has held that "in determining legislative intent, a statute should be read as a whole, and therefore, courts should construe each section in conjunction with other sections." *Id.* (citation omitted). Therefore, it is important to read the CPGA as a whole when interpreting its application to this case.

IV. ANALYSIS

[18] The PDHF and Vashi raise three issues on appeal: first, whether the trial court erred in denying summary judgment based on its holding that the CPGA did not protect the PDHF's activity; second, if summary judgment is granted, whether the trial court erred in not awarding sanctions; and finally, whether the trial court erred in denying the motion to dismiss based on the litigation privilege. Appellants' Br. at 3-4 (Sept. 2, 2014).

A. Motion for Summary Judgment Pursuant to the CPGA

[19] The CPGA was intended to discourage "Strategic Lawsuits Against Public Participation," commonly referred to as SLAPPs, which the Guam Legislature defined as being "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). That is, plaintiffs file SLAPPs not with the intent of recovering from defendants, but rather to silence individuals and groups that have publicly opposed the plaintiffs' actions or interests with the threat of costly, time-consuming, and potentially reputation-damaging litigation. *See Batzel v. Smith*, 333 F.3d 1018, 1023-24 (9th Cir. 2003). Accordingly, this court has acknowledged that "[t]he CPGA is Guam's anti-SLAPP statute." *Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶ 9.

[20] The CPGA contains nine sections, several of which are relevant to this appeal. Section 17104 defines what acts "shall be immune from liability" under the CPGA. 7 GCA § 17104. Section 17106 provides the procedure for a motion that allows the defendant to end the case if the plaintiff cannot "produce[] clear and convincing evidence that the acts of the moving party are not immunized from liability by § 17104." 7 GCA § 17106(e) (emphasis omitted). Sections 17106(g) and (h) deal with attorney's fees, sanctions, and claims by "a person damaged or injured by reason of a claim filed in violation of their rights under § 17104 . . . ." 7 GCA § 17106(g)-(h).

[21] This court has, however, provided clear instructions on how a trial court should proceed when faced with a motion to dispose of a claim in furtherance of a moving party's rights as described in the CPGA. We stated:

> In instances where a trial court is presented with any motion to dispose of a claim, even if pled alternatively, that raises the immunity from liability described in the CPGA, the trial court should first determine whether the claim actually falls within the scope of the CPGA. If the claim does, then the trial court must treat the motion to dispose of the claim as one for summary judgment and follow the procedures required by 7 GCA § 17106. Only after the trial court determines the motion to dispose of any claims under the CPGA should it then proceed to determine any other motions to dispose of any other claims.

Enriquez v. Smith, 2012 Guam 15 ¶ 18. Furthermore, we reasoned that the CPGA claim should be adjudged prior to any other potentially dispositive motions because a favorable outcome permits the moving party to attain sanctions from the other party. *Id.* ¶ 17.

[22] There appears to be very little question as to whether the claim—here, libel—"actually falls within the scope of the CPGA." *Id.* ¶ 18. Manu and Don allege in their Complaint that the recording of the Notice with the DLM amounted to a statement that was "libelous on its face." RA, tab 17, Ex. D at 2 ¶ 11 (Verified Compl., June 25, 2012). We have previously identified that a case brought pursuant to the CPGA is an appropriate response to claims involving

defamation, including libel. *See Brizill*, 2008 Guam 13 ¶¶ 1-3 (affirming grant of motion for summary judgment on the basis of the CPGA where defendant, who spoke against ballot to legalize slot machines, was sued for defamation); *see also Enriquez*, 2012 Guam 15 ¶¶ 1, 21 (directing trial court to make a determination on defendant's CPGA claim, raised in defense to being sued for libel, slander, and false light invasion of privacy). Having determined that the underlying claim falls within the CPGA, we must now assess whether the Notice at issue qualifies as a protected petition for CPGA purposes.

1. The Notice as Petitioning under the CPGA

[23] We look to this issue first pursuant to our prior interpretations of the CPGA. In *Brizill*, we noted that section 17104 can be divided into two sections. 2008 Guam 13. These sections include "[t]he 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.'" *Id.* (quoting 7 GCA § 17104). We referred to the first section as the "petitioning provision" and the second as the "sham exception." *Id.* Once an action is deemed to be petitioning, it must then be found outside the sham exception to be immune from liability.

[24] The PDHF and Vashi correctly point out that the protected acts of the CPGA extend further than those protected by the First Amendment Petition Clause. Appellants' Br. at 20-21 (Sept. 2, 2014). The statute clearly states that it protects "[a]cts in furtherance of the Constitutional rights to petition," 7 GCA § 17104, meaning that it protects not just the rights to petition but the acts in furtherance of those rights. Therefore, it is proper to first identify what conduct falls into the category of protected activity of the Petition Clause of the Constitution.

[25] Federal courts have used the *Noerr-Pennington* doctrine, which is a rule of statutory construction, to interpret federal statutes "so as to avoid burdening conduct that implicates the

protections afforded by the Petition Clause. . . [.]" *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 931 (9th Cir. 2006) (footnote omitted).[2] The Ninth Circuit has applied the *Noerr-Pennington* doctrine to cases that determine whether specific conduct is protected by the Petition Clause of the Constitution. *See Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1184 (9th Cir. 2005); *see also Sosa*, 437 F.3d at 930-31. The doctrine holds that in addition to the acts of petitioning protected by the First Amendment, the Petition Clause of the First Amendment can be extended to "the breathing space required for the effective exercise of the rights it protects." *Sosa*, 437 F.3d at 933. This breathing room was further interpreted to include settlement negotiations and discovery even though they themselves were not "in any sense a communication to the court" because they were "'conduct incidental' to a petition." *Freeman*, 410 F.3d at 1184-85 (quoting *Theofel v. Farey-Jones*, 359 F.3d 1066, 1078-79 (9th Cir. 2004)); *see also E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 143-44 (1961).

[26] In considering whether the conduct falls within the broad protection of the CPGA, we must first look to what is specifically included in the statute and follow the plain meaning, unless there is legislative intent to the contrary. *Sumitomo*, 2001 Guam 23 ¶ 17. Section 17102(a)(3) sets forth the findings and declarations of the CPGA's purpose, which includes "seeking relief, influencing action, informing, communicating, and otherwise participating with government bodies, officials, or employees or the electorate." 7 GCA § 17102(a)(3). It is clear from this language that the Legislature intended to protect even basic communications of citizens involving themselves in public affairs and their communications with any government body or

[2] Originally, the *Noerr-Pennington* doctrine applied only to petitioning activity leading to antitrust liability, but it has since been extended to give immunity to those petitioning the government for redress of grievances from liability of statutory violations. *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000); *see also Or. Nat'l Res. Council v. Mohla*, 944 F.2d 531, 533-34 (9th Cir. 1991) ("The protection has been expanded to apply to petitions to courts and administrative agencies. . . ." (citation omitted)).

employee. As stated above, the Legislature explicitly expresses in section 17108 that the CPGA is to be "construed liberally to effectuate its purposes and intent fully." 7 GCA § 17108. It was further understood by this court to protect and encourage "citizen participation in government to the maximum extent permitted by law . . . ." *Enriquez*, 2012 Guam 15 ¶ 10.

[27] The Superior Court, in making its decision in this case, drew a distinction between seeking discretionary action and purely ministerial action from the government and found that Guam case law has not yet "interpreted the reach of the CPGA to extend to non-discretionary, purely ministerial duties of government." RA, tab 26 at 14 (Dec. & Order); *see also Gov't of Guam v. Schiff*, CV0055-13 (Super. Ct. Guam Oct. 23, 2013). The Superior Court held that even assuming the Notice satisfies the statutory requirements of a *lis pendens*, the recording of the Notice should not be considered petitioning because it is purely ministerial and does not seek any action by the government. RA, tab 26 at 20 (Dec. & Order).

[28] Manu and Don likewise maintain that recording the Notice with DLM, even if it had some relationship with a judicial proceeding, is an interaction between a citizen and government that does not involve petitioning activity. Appellees' Br. at 23 (Oct. 1, 2014). They assert that it is not the nature of the document received but the nature of the Recorder's action in accepting the document for recording that is important. They argue that because the government does not do anything in response to the recording of a document at DLM, that act could not have been protected by either the Petition Clause or the CPGA. *Id.* at 23, 26. They do suggest, however, that this argument need not be addressed since the Notice was not a *lis pendens* in the first place.

[29] We agree with Manu, Don and the Superior Court that there are issues with the Notice's conformity to the requirements found in the *lis pendens* statute.[3] Although the Notice was filed in the Kamlesh action, it referenced the guardianship proceedings. Neither case affected the title or the right of possession of the real property by Rhadi's siblings, who were not parties in these cases. Further, the Notice does not describe the "object of the action" as terminating the siblings' titles or possession of each's property. Thus, at the time the Notice was recorded at the DLM there was no pending litigation challenging the ownership of the properties naming Rhadi's siblings as defendants. The Notice did not qualify as a *lis pendens* neither for the two cases it referenced nor the later filed case.

[30] However, the failure to comply with the *lis pendens* statute does not preclude the recording of the Notice from being an act in furtherance of one's right to petition. While the Notice may not have complied with the statutory *lis pendens* requirements, it is still "communicating," "informing," and "otherwise participating" with "government bodies, officials or employees," especially when this court is instructed to construe this statute liberally. *See* 7 GCA §§ 17102(a)(3), 17108. The statutory parameters defining a petition are extremely broad, and in filing the Notice with the DLM there was communication and participation with the government, which is petitioning activity covered by the CPGA. Accordingly, the Superior Court erred in holding that the Notice should not be considered petitioning because it is purely

[3] Title 7 GCA § 14103 provides:

> In an action affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing an answer, when affirmative relief is claimed in such answer, or at any time afterwards, may record in the Department of Land Management, a notice of the pendency of the action containing the names of the parties and the object of the action or defense, and a description of the property affected thereby. From the time of filing such notice for record only, shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real names.

7 GCA § 14103 (2005).

ministerial and does not seek any action by the government. Although we find error with the Superior Court's holding that recording of the Notice with DLM was not petitioning, this does not end our analysis on whether the motion for summary judgment was properly denied. We must still determine whether petitioning activity was exempted from immunity under the sham exception

2. The Sham Exception

[31] The sham exception is outlined in the *Noerr-Pennington* doctrine and found in the second portion of section 17104. *See Brizill*, 2008 Guam 13 ¶¶ 38-39, 44 (citing *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 380 (1991)). 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. . . ." *Id.* ¶ 38 (quoting *Omni*, 499 U.S. at 380). 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)). The CPGA includes comparable language in its sham exception. *See* 7 GCA § 17104. Conduct "where not aimed at procuring any government or electoral action, result or outcome" is not immune from liability. *Id.* The test used by the Superior Court, whether the conduct seeks discretionary versus purely ministerial action, suggests the court decided that the conduct was in furtherance of the right to petition but not aimed at procuring any governmental action and appears to be this sham exception analysis.

[32] A notice of *lis pendens*, when properly recorded, provides a purchaser or encumbrancer of real property with constructive notice of the pendency of the action affecting the title or right of possession of the property. 7 GCA § 14103 (2005). The Superior Court, citing our opinion in

Pelowski v. Taitano, 2000 Guam 34, acknowledged that "[o]nly if such constructive notice is provided will the litigant be able to ensure that the property interest being litigated will be valid against third parties, who otherwise may well be bona fide purchasers for value." RA, tab 26 at 16 (Dec. & Order). Although the recorded *lis pendens* serves the laudable purpose of putting the public on notice of litigation that potentially affects the title or possession to property, the cloud on title created by the *lis pendens* has the practical effect of preventing the person holding the property from dealing with it in the usual course, impairing the alienability of a property and the ability to obtain financing for the duration of what often could be protracted litigation.

[33] The PDHF and Vashi argue that they overcome the sham exception because they were seeking a legitimate outcome by preserving their right against third-party transferees, Appellants' Reply Br. at 18 (Oct. 15, 2014), but we do not agree that the filing of the Notice, which does not satisfy the statutory *lis pendens* requirements, overcomes the sham exception. As Manu and Don argue, the recording of the Notice at DLM was simply not aimed at procuring any governmental or electoral action. Appellees' Br. at 29.

[34] In order to survive the sham exception, the PDHF and Vashi should have filed a *lis pendens* at the time or after they initiated the lawsuit against Radhi's siblings to determine title to the properties, rather than a month before. Title 7 GCA § 14103 specifically authorizes that "[i]n an action affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint . . . or at any time afterwards, may record in the [DLM], a notice . . ." of *lis pendens*. If they had complied with the statute, PDHF and Vashi may have been able to argue that they were actually seeking a government result or outcome, that of notifying all subsequent purchasers or encumbrancers of the properties that there is an action affecting the right or possession to the properties. Because the PDHF and Vashi did not comply with the *lis pendens*

statute, the constructive notice of the pendency of the action, and of its pendency against the parties properly designated, would not be effective pursuant to the *lis pendens* statute. *Pelowski*, 2000 Guam 34 ¶ 20.

[35] By filing this Notice, the PDHF and Vashi used the process as opposed to the outcome as a weapon, because there was no recognized "constructive notice" communicated to a purchaser or encumbrancer of the property. Thus, there was no governmental or electoral result or outcome available to the PDHF and Vashi resulting from their recording of the Notice with DLM. *See* 7 GCA § 14103; *Omni*, 499 U.S. at 380; *Brizill*, 2008 Guam 13 ¶ 38.

[36] To put a third party on notice of a property dispute with the corresponding protections of the *lis pendens* statute requires the filing of a conforming *lis pendens*.[4] To allow the recording at DLM of any substantively inadequate document under the *lis pendens* statute to be fully immunized will open the door to abuse and the slandering of title without corresponding consequences. The procedural threshold for registering a *lis pendens*, even one that is defective, is much lower than that for vacating it, which requires considerably more time, effort and expense. Consequently there is considerable scope for abuse of this mechanism.

[37] Because we decide that the PDHF and Vashi were not seeking any action or redress from the government, the filing of the Notice, while still a form of petitioning, does not overcome the exemption from immunity under the sham exception. Therefore, we affirm the Superior Court's denial of the motion for summary judgment pursuant to the CPGA, although on other grounds.

[4] There is no dispute that the PDHF and Vashi did not file a notice of *lis pendens* which complied with 7 GCA § 14103, and while a properly recorded *lis pendens* should be protected by the CPGA, we do not need to decide that issue now. *See Manhattan Loft, LLC v. Mercury Liquors, Inc.*, 93 Cal. Rptr. 3d 457, 463-64 (Ct. App. 2009) (holding that a *lis pendens* is directly related to an action and, therefore, is in furtherance of the right to petition and protected); *see also Salma v. Capon*, 74 Cal. Rptr. 3d 873, 882 (Ct. App. 2008).

"An appellate court may affirm the judgment of a lower court on any ground supported by the record." *People v. San Nicolas*, 2001 Guam 4 ¶ 29.

[38] We take no position, however, in the merits of the referenced libel lawsuit. The alleged libelous claims and the raised defenses must be decided on their merits.

B. Motion for Sanctions Pursuant to the CPGA

[39] Because the Superior Court denied the motion for summary judgment, the related motion for sanctions was denied without review of its merits. The Guam Legislature expressly stated that one of the purposes of the CPGA was "to provide for attorneys [sic] fees, costs, sanctions and damages for persons whose citizen participation rights have been violated by the filing of a SLAPP against them." 7 GCA § 17102(b)(5). Naturally, the award of sanctions is contingent on successfully attaining a dismissal on the basis of the moving party's rights under 7 GCA § 17104. The CPGA provides in relevant part:

> [T]he court shall award *a moving party who is dismissed*, without regards to any limit under Guam law:
>
> > (1) costs of litigation, including reasonable attorney and expert witness fees, incurred in connection with the motion; and
> >
> > (2) such additional sanctions upon the responding party, its attorneys or law firms 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).

[40] Clearly, without a favorable ruling with respect to their anti-SLAPP motion, the PDHF and Vashi are not entitled to sanctions. Because the lower court denied the motion to dimiss under the CPGA and we agree with that finding, sanctions and fees were not awarded, and we affirm this portion of the decision.

C. Motion to Dismiss Pursuant to 19 GCA § 2105(b)

[41] In the alternative to their motion for summary judgment, the PDHF and Vashi moved to dismiss the action on the basis that the Notice was a privileged communication pursuant to 19 GCA § 2105(b) (what the parties refer to as the "litigation privilege"). They argue that because the filing of the Notice was privileged, the motion to dismiss should be proper pursuant to GRCP 12(b)(6) because Manu and Don stated no other claim upon which relief could be granted. RA, tab 18 at 19 (Am. Mem. of P. & A.).

[42] The Guam Legislature provided a privilege of absolute immunity from defamation—which encompasses both libel (as is the case here) and slander—for publications made "[i]n any (1) legislative or (2) judicial proceedings, or (3) in any other official proceeding authorized by law[.]" 19 GCA § 2105(b) (2005). This provision "originates from a 1927 version of California Civil Code § 47. . . . The 1945 version of [section] 47 is not substantively different from the 1927 version. . . . However, in 1979, the California legislature significantly amended California Civil Code § 47." *Macris v. Richardson*, 2010 Guam 6 ¶ 21 (footnotes and citations omitted).

[43] The PDHF and Vashi make two arguments with respect to why the Notice was privileged.[5] First, they maintain that the Notice is a *lis pendens* and, as such, the recording of the Notice was a privileged publication made in an "official proceeding authorized by law." Appellants' Br. at 49-52. Next, they argue that the recording of the Notice was privileged because it "satisfied the requirement of serving a 'functional' purpose." *Id.* at 53-56. We address these arguments in turn.

[5] Manu and Don do not dispute that the filing of the Notice with the Superior Court in connection with the Kamlesh action was privileged. Appellees' Br. at 23.

[44] The PDHF and Vashi argue that the recording of the Notice, even falling short of the statutory requirements of a *lis pendens*, was still privileged because it was intended to be a *lis pendens* and constituted a publication "in any official proceeding authorized by law" under 19 GCA § 2105(b). Appellants' Br. at 50. They contend that Guam law expressly authorizes publications of *lis pendens* in 7 GCA § 14103. *Id.* Manu and Don do not contest that recording a *lis pendens* is privileged. RA, tab 26 at 12, 22 (Dec. & Order). Instead, they argue that the trial court correctly held that because the Notice does not constitute a *lis pendens*, it is not privileged. Appellees' Br. at 17.

[45] It is true that the recording of a *lis pendens* would be covered by the litigation privilege. In *Albertson v. Raboff*, 295 P.2d 405 (1956), the Supreme Court of California interpreted the statute that forms the basis of Guam's litigation privilege. Therein, the court stated that "publication of the pleadings is unquestionably clothed with absolute privilege, and we have concluded that the republication thereof by recording a notice of lis pendens is similarly privileged." *Id.* at 408. This, however, suggests that there must be actually filed pleadings indicative of pending litigation of which the public should be aware. Based on the analysis found in section IV.A.1. above, we have already decided that the Notice did not conform to the *lis pendens* statutory requirements because it was not filed in conjunction with any litigation currently pending between the parties over the title to the properties. Furthermore, Radhi's siblings, who were, at the time of the recordation of the Notice, owners of the named properties, were not parties to any lawsuit relating to the properties. Therefore, the PDHF and Vashi's argument that it was made as part of "an official proceeding by law" is not persuasive because the *lis pendens* does not point to any pending litigation involving all the relevant parties in which the titles of the properties are disputed.

[46] Finally, the PDHF and Vashi rely on the case, *Rothman v. Jackson*, 57 Cal. Rptr. 2d 284 (Ct. App. 1996), which held that the term "judicial proceeding" applied to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." 57 Cal. Rptr. 2d at 288 (quoting *Silberg v. Anderson*, 786 P.2d 365, 369 (Cal. 1990)). With respect to the fourth element, the court stated that the communication must have a "functional connection" such that "the communicative act—be it a document filed with the court, a letter between counsel or an oral statement—must function as a necessary or useful step in the litigation process and must serve its purposes." *Id.* (emphasis omitted). The PDHF and Vashi argue that "[t]he recordation of the Notice was directed toward achieving a very concrete goal of the underlying [Kamlesh Hemlani] litigation—securing the Trust's (and charity's) interest in the disputed assets, including against third parties." Appellants' Br. at 55. However, we have already decided that the Notice that was filed with the DLM served no purpose to any pending litigation and sought no governmental result or outcome. If this *Rothman* test were to be adopted by this court, we still would not find any existing action relevant to the title of the properties, which strips the filing of the Notice of any functionality to any relevant litigation. The PDHF and Vashi argue that the Notice should be protected because the *Rothman* test extends protection to communication made "in anticipation of" litigation, but that contradicts the *lis pendens* statute, which specifically requires the underlying action over the titles be pending and the parties and object of that action be named at the time the *lis pendens* is filed. *See* 7 GCA § 14103. Moreover the statute requires that the notice of *lis pendens* be filed at the time of the filing of the relevant complaint or any time afterwards. 7 GCA § 14103; *see also* Appellants' Reply Br. at 28. It does not provide for filing of a notice of *lis pendens* before

the existence of a relevant property lawsuit. Therefore, the filing of the Notice with the DLM is not protected by the litigation privilege, and the Superior Court's denial of the motion to dismiss is also affirmed.

V. CONCLUSION

[47] The recordation of the Notice with the DLM, though a communication with the government, is exempted from immunity from liability under the sham exception of the CPGA. It is also not protected by the litigation privilege. We therefore **AFFIRM** the decision of the Superior Court to deny the motion for summary judgment, the motion for sanctions, and the motion to dismiss.

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