

IN THE SUPREME COURT OF GUAM

SALVADOR ENRIQUEZ,
Plaintiff-Appellee,

v.

ELSIE SMITH,
Defendant-Appellant.

OPINION

Cite as: 2012 Guam 15

Supreme Court Case No.: CVA12-005
Superior Court Case No.: CV1486-11

Appeal from the Superior Court of Guam
Argued and submitted on July 10, 2012
Hagåtña, Guam

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

TORRES, J.:

[1] Defendant-Appellant Elsie Smith appeals from the trial court’s decision to not address her motion for summary judgment and motion for sanctions based on the protections of the Citizen Participation in Government Act (“CPGA”), codified at Title 7 Guam Code Annotated (“GCA”) §§ 17101-09 (2005). Smith had sought dismissal of Plaintiff-Appellee Salvador Enriquez’s complaint against her for actual, compensatory, punitive, and other unspecified damages based upon claims of libel, slander, false light invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional distress. Smith filed her motion to dismiss pursuant to Rule 12(b)(6) of the Guam Rules of Civil Procedure (“GRCP”), and in the same filing, alternatively sought a motion for summary judgment pursuant to the provisions of GRCP 56 and the CPGA, specifically 7 GCA § 17106, as well as a motion for sanctions and damages based on the protections of the CPGA. The trial court granted dismissal pursuant to GRCP 12(b)(6), and further ruled that such dismissal “obviated” the need to address Smith’s claims under the CPGA. The trial court should have addressed the merits of Smith’s CPGA arguments and her motion for sanctions and damages, which flowed from the CPGA statute. Accordingly, we reverse and remand the matter to the trial court for a determination of the merits of Smith’s CPGA motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Elsie Smith was a patient of Dr. Hugh Sule, a dentist at Gentlecare Dental Clinic (“Gentlecare”) in Tamuning. Smith alleges that Dr. Sule initiated a root canal on her, but in the middle of the procedure, he left her in the hands of a dental auxiliary who continued performing

the root canal. After the root canal, Smith suffered pain and swelling of her face and eye. Smith eventually lodged a complaint with the Guam Board of Examiners for Dentistry (“Dental Board”). During the investigation of her complaint, Smith was asked to view photographs to identify the dental auxiliary who assisted with the root canal. Through these photographs, Smith identified Salvador Enriquez. As a result, the Dental Board, represented by the Office of the Attorney General (“Attorney General”), filed a disciplinary case against Dr. Sule and Enriquez.

[3] Enriquez thereafter filed a complaint against Smith in the Superior Court, seeking actual, compensatory, punitive, and other unspecified damages for libel, slander, false light invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional distress based on his assertion that Smith falsely identified him as the dental auxiliary who caused her harm. Enriquez maintains that he is not the dental auxiliary who performed the root canal on Smith. In support of his assertion, he submitted an affidavit from Edmund Julao stating that he, and not Enriquez, is the dental auxiliary who assisted Dr. Sule with Smith’s root canal. Enriquez also submitted affidavits from Gentlecare’s office manager, Maria Carandang, Dr. Sule, and another Gentlecare employee named Jason Samson, all of whom assert that Julao, not Enriquez, is the dental auxiliary in question.

[4] Smith subsequently filed a “Motion to Dismiss or in the Alternative, Motion for Summary Judgment and Motion for Sanctions and Punitive and Compensatory Damages.” Record on Appeal (“RA”), tab 11 (Mot. Dismiss, Sept. 21, 2011). Smith argued that dismissal was warranted under GRCP 12(b)(6) for Enriquez’s failure to state a claim upon which relief may be granted, or alternatively, for summary judgment under GRCP 56 and the CPGA, specifically 7 GCA § 17106. Smith stated that her motion “is made on the ground that the Complaint in this matter is specifically prohibited by the Guam Citizen Participation in

Government Act of 1998 . . . ,” essentially alleging that Enriquez’s complaint was a Strategic Lawsuit Against Public Participation, or SLAPP. *Id.* at 1. The day after Smith filed her motion, Enriquez sought to voluntarily dismiss his complaint pursuant to GRCP 41(a)(1)(i). However, because that rule only allows for voluntary dismissal by the plaintiff unilaterally prior to the filing by the defendant of an answer or a motion for summary judgment, the trial court found that such a notice of dismissal filed after Smith filed her motion was not proper. The Office of the Attorney General entered its appearance below and joined in Smith’s motion to dismiss.¹

[5] Thereafter, Enriquez filed his opposition to Smith’s motion for attorneys’ fees. After a hearing on the motion,² the trial court issued its decision and order, granting Smith’s motion to dismiss based on GRCP 12(b)(6), and further stating that “the need to address Smith’s argument in the alternative under the CPGA is obviated since the Court has granted Smith’s motion on the basis of her principal argument under Guam R. Civ. P. 12(b)(6).” RA, tab 35 at 6 (Dec. & Order, Jan. 6, 2012). The judgment was filed and Smith appealed.³

¹ The Attorney General, on behalf of itself and the Dental Board, filed a joinder in the position taken by Smith in this appeal. Enriquez thereafter filed a motion to strike the joinder, arguing that it was improperly filed pursuant to Rule 3(b) of the Guam Rules of Appellate Procedure (“GRAP”) because the Dental Board never properly joined in this appeal. *See Enriquez v. Smith*, Mot. Strike, CVA12-005 (July 2, 2012). The Attorney General filed an opposition to this motion, stating that the CPGA, at section 17106(f), specifically authorizes the Attorney General or any government body to which the moving party’s acts were directed to intervene, defend, or otherwise support the moving party in the SLAPP. *See Enriquez v. Smith*, Opp’n Mot. Strike, CVA12-005 (July 3, 2012). Enriquez filed a reply, noting that the CPGA’s authorization for the Dental Board or the Attorney General to intervene, defend, or otherwise support Smith is not meant to circumvent the rules of procedure that govern when and how a party may come before this court and take part in these appellate proceedings. *See Enriquez v. Smith*, Reply, CVA12-005 (July 5, 2012). The court agrees with Enriquez. The Attorney General, either on its own behalf or on behalf of the Dental Board, never properly sought to become a party nor to enter an appearance as an *amicus curiae*. As such, its filing of a joinder, mere days before oral argument, was not procedurally proper, and the court grants Enriquez’s motion to strike.

² The docket sheet indicates that the trial court held a hearing on the motion but neither party requested transcripts of any proceedings below. *See Enriquez v. Smith*, CVA12-005 (Appellant’s Rule 7(b) Certification; Certificate of Service, (Feb. 7, 2012); (Transmit. R., (July 3, 2012)).

³ Enriquez filed a motion to dismiss the appeal for being filed prior to the entry of the judgment on the docket. This court issued an order denying the motion on the basis that, pursuant to GRAP 4(a)(2), a notice of appeal may be filed after the trial court announces its decision but before judgment is entered, in which case the notice of appeal is treated as filed on the date of and after the entry of the judgment. The court ordered that Smith’s

II. JURISDICTION

[6] This court has jurisdiction over an appeal from a final judgment of the Superior Court pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 112-195 (2012)); 7 GCA §§ 3107(b) & 3108(a) (2005). Moreover, the CPGA provides that “the moving party [in an anti-SLAPP motion] shall have a right of expedited appeal from a trial court order denying such a motion or from a trial court failure to rule on such a motion in expedited fashion.” 7 GCA § 17106(a)(2) (2005). *See also White v. Lieberman*, 126 Cal. Rptr. 2d 608, 614 (Ct. App. 2002) (stating with regard to California’s counterpart of 7 GCA § 17106(a)(2) that “an order granting or denying an anti-SLAPP motion is expressly made appealable . . . An order declaring the motion to be moot is the equivalent of a denial and is appealable.”).

III. STANDARD OF REVIEW

[7] Enriquez argues that the standard of review in this case should be abuse of discretion, asserting that the trial court had the discretion to determine either of Smith’s alternative motions. Appellee’s Br. at 6 (May 7, 2012). However, the issue before this court is whether the trial court properly construed the CPGA. A trial court’s construction of a statute, such as the CPGA, is reviewed *de novo*. *Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶ 6 (citations omitted).

IV. ANALYSIS

A. The Trial Court’s Failure to Address Smith’s Substantive Rights Under the CPGA

[8] In her motion before the trial court, Smith argued that Enriquez’s complaint stemmed from her filing of a complaint with the Dental Board against Dr. Sule, which led the Attorney General to file a disciplinary action with the Dental Board against both Dr. Sule and Enriquez.

notice of appeal would be treated as filed on the date the judgment was entered on the docket, and proceeded to exercise jurisdiction over this appeal. *See Enriquez v. Smith*, CVA12-005 (Order at 2 (Feb 14, 2012)).

RA, tab 9 at 1 (Mem. P. & A., Sept. 21, 2011). Smith asserted that she is immune from liability for her filing of a complaint with the Dental Board. *Id.* at 2.

[9] In Smith's first argument for dismissal, premised on GRCP 12(b)(6), she asserted that her official communication to the Dental Board is protected speech and qualifies for absolute immunity pursuant to 19 GCA § 2105(b)(3). *Id.* at 5. In her second argument for summary judgment, Smith raised the CPGA, stating that "Enriquez's suit is a quintessential SLAPP suit," which sued her "for a variety of defamation related claims based solely upon [her] participation in the government process of asserting a disciplinary complaint against him with the [Dental Board]." *Id.* at 6. The trial court ruled in Smith's favor on GRCP 12(b)(6) grounds and declined to reach the CPGA issue. RA, tab 35 at 6 (Dec. & Order). The question now before this court is whether the trial court was required to address Smith's substantive rights under the CPGA even after granting dismissal of the complaint for failure to state a claim upon which relief may be granted.

[10] The legislative purposes of the CPGA include protection and encouragement of citizen participation in government to the maximum extent permitted by law and to provide for attorney's 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)(1) & (b)(5) (2005). The Guam Legislature set forth explicit procedures for when a motion to dispose of a claim is filed pursuant to the CPGA. These procedures are to be applied to "*any motion* to dispose of a claim in a judicial proceeding on the grounds that the claim is based on, relates to or is in response to any act of the moving party in furtherance of the moving party's rights as described in § 17104." 7 GCA § 17105 (2005) (emphasis added). The required procedures are that:

(a) the motion shall be treated as one for summary judgment:

(1) the trial court shall use a time period appropriate to preferred or expedited motions; and

(2) the moving party shall have a right of expedited appeal from a trial court order denying such a motion or from a trial court failure to rule on such a motion in expedited fashion;

(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;

(f) any government body to which the moving party's acts were directed, or the Attorney General of this Island, may intervene, defend or otherwise support the moving party in the SLAPP;

(g) the 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; and

(h) a person damaged or injured by reason of a claim filed in violation of their rights under § 17104 may seek relief in the form of a claim for actual or compensatory damages, as well as punitive damages, attorney's fees and costs, from the person or persons responsible.

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

[11] The construction of statutory language is reviewed *de novo*. *Greyhound*, 2008 Guam 13

¶ 6. "It is a cardinal rule of statutory construction that courts must look first to the language of the statute itself. Absent clear legislative intent to the contrary, the plain meaning prevails."

Sumitomo Constr. Co., Ltd. v. Gov't of Guam, 2001 Guam 23 ¶ 17 (citation omitted). On a plain reading of the statute, section 17105 expressly states that procedures mandated by section 17106 shall be applied to “any motion to dispose of a claim in a judicial proceeding on the grounds that the claim is based on, relates to or is in response to any act of the moving party in furtherance of the moving party’s rights as described in § 17104.” 7 GCA § 17105 (2005). Section 17103 of the CPGA further defines “motion” to include “any motion to dismiss, for summary judgment, for judgment on the pleadings, to strike, demurrer, or any other judicial pleading filed to dispose of a judicial claim.” 7 GCA § 17103(d) (2005).

[12] Therefore, we must examine Smith’s motion to determine whether, even in her request for 12(b)(6) relief, she premised that motion on a ground that is based on, relates to, or is in response to any of her acts in furtherance of her Constitutional rights to petition, including seeking relief, influencing action, informing, communicating and otherwise participating in the processes of government. *See* 7 GCA §§ 17104, 17105. Smith’s motion reads:

Defendant Elsie Smith . . . hereby moves to dismiss Plaintiff Salvador Enriquez’s Complaint in the above-captioned matter, pursuant to the provisions of Rule 12(b)(6) of the Guam Rules of Civil Procedure for failure to state a claim upon which any relief may be granted. In the alternative, defendant moves for the dismissal of plaintiff’s complaint pursuant to the provisions of GRCP Rule 56 and 7 GCA §17106 as there are no issues of material fact and defendant is entitled to judgment as a matter of law. *Defendant also moves* for sanctions and punitive and compensatory damages.

This motion is made on the ground that the Complaint in this matter is specifically prohibited by the Guam Citizen Participation in Government Act of 1998, an anti-SLAPP statute codified in 17 [sic.] GCA §17101, et. seq.

RA, tab 11 at 1-2 (Mot. Dismiss) (emphasis added). In her accompanying memorandum of points and authorities, even with regard to her 12(b)(6) argument based on an assertion of

privileged communication pursuant to 19 GCA § 2105(b)(3),⁴ Smith premised her motion to dispose of the judicial proceeding on the ground that Enriquez's complaint is based on, relates to, or is in response to Smith's lodging of a complaint with the Dental Board, which Smith asserted is protected activity within the purview of the CPGA. RA, tab 9 at 5-6 (Mem. P. & A.).

[13] Enriquez argues that Smith only sought CPGA relief as an alternative to the relief she was principally seeking, namely dismissal under 12(b)(6). *See* Appellee's Br. at 4-5. Enriquez also asserts that by pleading her CPGA request in the alternative, Smith waived her right to argue for such relief on appeal.⁵ *Id.* However, a review of Smith's motion, and specifically the portions emphasized above, reflects that although her summary judgment argument was presented as an alternative to her 12(b)(6) argument, her request for sanctions was moved for in addition to, and not as an alternative to, her request for either dismissal or summary judgment. Moreover, although Smith's CPGA arguments could have been developed and supported more clearly below, it is evident in her motion that the relief she was moving for was grounded on the protections of the CPGA. *See* RA, tab 11 at 1 (Mot. Dismiss) ("This motion is made on the ground that the Complaint in this matter is specifically prohibited by the Guam Citizen Participation in Government Act of 1998 . . ."). As such, Smith's motion (either for dismissal under GRCP 12(b)(6) or for summary judgment under GRCP 56) was a motion to dispose of a claim in a judicial proceeding on the ground that the claim was based on, related to, or was in

⁴ Title 19 GCA § 2105(b) states that a privileged communication includes one made in any official proceeding, in addition to legislative or judicial, which is authorized by law. Smith asserted her communications with the Dental Board were privileged.

⁵ Although much of the arguments presented by both Smith and Enriquez in their briefs have to do with the merits of the CPGA claim and whether Smith's actions warrant CPGA protection or whether they fall within the "sham exception," the issue of whether Smith should prevail on her CPGA motion, and consequently whether she is entitled to sanctions and damages, is not before this court. Because the trial court never reached those issues, the only issue before this court is whether the trial court should have addressed Smith's CPGA claims according to the procedures mandated by the Guam Legislature in 7 GCA § 17106.

response to her actions protected under the CPGA. *See* 7 GCA §§ 17103(d), 17105.

[14] We recognize that the state of the law in our jurisdiction relative to the CPGA has not been extensively developed, offering little guidance to trial courts as to how they should proceed in situations such as this, where motions are pled in the alternative. Although this court has not previously addressed the issue presented here, the holdings of other courts regarding their states' similar citizen participation statutes may be of guidance. In the California case of *Moore v. Liu*, for example, a California court of appeal reversed a trial court's ruling that where a complaint was dismissed prior to the hearing on the defendant's anti-SLAPP motion, the anti-SLAPP motion was moot. 81 Cal. Rptr. 2d 807 (Ct. App. 1999). The court explained that:

[T]he trial court's ruling constitutes a nullification of an important part of California's anti-SLAPP legislation. If indeed respondents' cross-complaint against appellant is a SLAPP suit, then the court's decision to not hear the merits of appellant's motion to strike deprives appellant of the monetary relief which the Legislature intended to give her, while at the same time it relieves respondents of the punishment which [the statute] imposes on persons who use the courts to chill others' exercise of their constitutional rights.

Id. at 809. *See also Pfeiffer Venice Prop. v. Bernard*, 123 Cal. Rptr. 2d 647, 653 (Ct. App. 2002) (“[D]efendants were entitled to a ruling on the merits of their SLAPP motion, the result of which will necessarily determine their right to attorney fees . . .”).

[15] The Illinois Supreme Court addressed a somewhat similar situation as the one presently before this court. The case of *Wright Development Group, LLC, v. Walsh* concerned Illinois's version of the CPGA, which is very similar to Guam's. *Compare* 7 GCA §§ 17101-09 with 735 ILL. COMP. STAT. ANN. 110/1 – 110/99 (West 2012). In *Walsh*, a company filed a defamation suit against Walsh, the president of a condominium association, based on statements Walsh made to a reporter after an alderman's meeting – statements that identified the company as having been sued for fraud. *Wright Dev. Group, LLC v. Walsh*, 939 N.E.2d 389, 391-93 (Ill. 2010). Walsh

filed a motion to dismiss the defamation suit on various grounds challenging the sufficiency of the pleadings. *Id.* at 393. While those motions were pending, Walsh also moved to dismiss the suit pursuant to the state's Citizen Participation Act (the "Act"), arguing that the company's lawsuit was a SLAPP. *Id.*

[16] The trial court denied the motion to dismiss under the Act, ruling that Walsh's statements to the reporter were beyond the scope of the Act. *Id.* However, the court later granted Walsh's earlier filed motion to dismiss on the pleadings, ruling that his statements were not actionable under the innocent construction rule. *Id.* at 394. The company's lawsuit was thereafter dismissed with prejudice. *Id.* at 395. Walsh appealed to the state appellate court, which *sua sponte* dismissed the appeal as moot, stating:

Walsh got exactly the relief he sought (*i.e.* dismissal of the complaint), albeit on a different basis (*i.e.*, pursuant to [the innocent construction rule] rather than the Act). Walsh's issue is moot because he has already obtained the relief he sought and, any action by this court would constitute an advisory opinion.

Id. On review, the Illinois Supreme Court held that the lower appellate court erred in finding the appeal moot, stating:

Walsh was denied the relief requested in his Act motion to identify Wright Development's lawsuit as a SLAPP and for a statutory award of attorney fees and costs—an entitlement not available with the mere . . . dismissal. The appellate court therefore erred when it stated Walsh "has already obtained the relief he sought and, any action by this court would constitute an advisory opinion." If indeed Wright Development's action was a SLAPP suit, then the appellate court's ruling also relieves Wright Development of the punishment which the Act imposes upon entities who chill the exercise of constitutional rights by use of meritless and retaliatory lawsuits.

Id. at 397. Referencing the legislative purpose nearly identical to that stated by the Guam Legislature in 7 GCA § 17102(b)(1), the Illinois Supreme Court stated that "[a]s an expression of intent to 'protect and encourage public participation in government to the maximum extent

permitted by law,’ the legislature deemed the mere dismissal of SLAPP lawsuits insufficient.” *Id.* at 396.

[17] Similarly, in this case, the trial court’s conclusion that the need to address Smith’s CPGA arguments (and consequently her motion for sanctions and damages that flow from a favorable CPGA ruling) were obviated by the 12(b)(6) disposition deprived Smith of monetary relief that the Guam Legislature intended to give her if she prevailed on her CPGA motion. Enriquez’s argument that this appeal should be dismissed as moot and the trial court’s decision affirmed because Smith received her requested relief, *i.e.* dismissal of the complaint, is wrong. *See* Appellee’s Br. at 4-5. The trial court erred in ruling essentially that the dismissal of the complaint against Smith was sufficient relief, without considering any of the requested CPGA relief. Instead, the trial court should have addressed the merits of Smith’s CPGA arguments and her motion for sanctions and damages, which flowed from the CPGA statute, in accordance with the procedures set forth in 7 GCA § 17106.⁶

[18] Because this is a matter of first impression before our court, we want to offer clarity to the trial courts on how to proceed when faced with a motion to dispose of a claim in a judicial proceeding on the grounds that the claim is based on, or relates to, or is in response to any act of the moving party in furtherance of the moving party’s rights as described in the CPGA. 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

⁶ Enriquez argues that Smith’s failure to seek reconsideration from the trial court prior to filing this appeal constitutes a waiver or forfeiture of her right to raise these issues on appeal, citing this court’s opinion in *Tanaguchi-Ruth + Associates v. MDI Guam Corporation*, 2005 Guam 7 ¶ 77. *See* Appellee’s Br. at 9-10. Although it might have been helpful in fleshing out the issues if Smith had sought reconsideration from the trial court, we reject Enriquez’s assertion that Smith was *required* to file a motion for reconsideration and that her failure to do so results in a forfeiture of her appellate rights. Neither our opinion in *Tanaguchi-Ruth + Associates* nor any other authority compels us to hold otherwise.

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.

B. Smith's Entitlement to Attorney's Fees and Cost for Appeal

[19] Smith asks this court to determine whether she is entitled to attorney's fees and costs on appeal. *See* Appellant's Br. at 19-20 (Mar. 22, 2012). However, because the trial court never made a determination as to whether Smith's actions fall within the purview of the CPGA, triggering the entitlement to fees, there has thus far been no finding of CPGA immunity such that this court can appropriately award fees. That is a determination that should be made by the trial court in the first instance. *See, e.g., Pfeiffer Venice Prop.*, 123 Cal. Rptr. 2d at 652 (stating that "[t]he fee motion is wholly dependent upon a determination of the merits of the SLAPP motion.").

V. CONCLUSION

[20] Based on a plain reading of the CPGA, the mandates of 7 GCA § 17106 are to be applied to *any motion* to dispose of Enriquez's complaint that was based on, related to, or was in response to Smith's filing of a complaint with the Dental Board, which Smith clearly argued was protected activity. This is consistent with, and further supported by, the definition of "motion" for CPGA purposes as "any motion to dismiss, for summary judgment, for judgment on the pleadings, to strike, demurrer, or any other judicial pleading filed to dispose of a judicial claim." 7 GCA § 17103(d). Thus, even if Smith's 12(b)(6) motion was asserted principally and her motion for summary judgment alternatively, section 17106 requires that any such motion be

treated as one for summary judgment and that the procedures therein outlined be followed. We hold, therefore, that the trial court erred in not addressing the merits of Smith's request for CPGA relief.

[21] This matter is **REMANDED** for the trial court to determine in the first instance whether Smith's actions complained of in Enriquez's lawsuit are entitled to CPGA protections and whether Smith is thus entitled to the substantive relief mandated by the CPGA.

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

ROBERT J. TORRES
Associate Justice

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

KATHERINE A. MARAMAN
Associate Justice

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

F. PHILIP CARBULLIDO
Chief Justice