



**Filed**

Supreme Court of Guam, Clerk of Court

**IN THE SUPREME COURT OF GUAM**

**JOE & FLO'S, INC.,**  
Plaintiff-Appellee,

**v.**

**DARREN GUTIERREZ,**  
Defendant-Appellant.

Supreme Court Case No.: CVA18-011  
Superior Court Case No.: CV0913-16

**OPINION**

**Cite as: 2020 Guam 21**

Appeal from the Superior Court of Guam  
Argued and submitted on October 16, 2019  
Hagåtña, Guam

Appearing for Defendant-Appellant:  
Gary W.F. Gumataotao, *Esq.*  
Law Office of Gumataotao & Pole, P.C.  
San Ramon Bldg.  
115 San Ramon St., Ste. 301  
Hagåtña, GU 96910

Appearing for Plaintiff-Appellee:  
Vincent Leon Guerrero, *Esq.*  
P.O. Box 12457  
Tamuning, GU 96931

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BEFORE: KATHERINE A. MARAMAN, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; and ROBERT J. TORRES, Associate Justice.<sup>1</sup>

**CARBULLIDO, J.:**

[1] Defendant-Appellant Darren Gutierrez (“Darren”) appeals from a denial of his motion to dismiss the Complaint based on Guam’s anti-SLAPP statute, 7 GCA § 17101 *et seq.* (also known as the “Citizen Participation in Government Act” or “CPGA”). The trial court denied Darren’s motion because Plaintiff-Appellee Joe & Flo’s, Inc.’s (“Joe & Flo’s”) Complaint was not a “strategic lawsuit against public participation” (“SLAPP”) within the purview of the CPGA. For the following reasons, we affirm the trial court’s denial of Darren’s motion to dismiss and remand to the Superior Court.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

[2] Joe & Flo’s filed a complaint for trespass against Darren, alleging he impermissibly entered onto Joe & Flo’s’ property in Merizo. Joe & Flo’s is a corporation created under the laws of Guam. Its property in Merizo is described as Lot No. L149-2-R1, Municipality of Merizo aka 768 Chalan Kanton Tasi, Merizo (“the Merizo Property”). Joe & Flo’s owns the Merizo Property, and the property is not open to the public. Darren is not a shareholder, officer, or employee of Joe & Flo’s. Joe & Flo’s has no business relationship with Darren.

[3] In a prior matter before the Superior Court of Guam, Civil Case No. CV0645-12, the parties also had stipulated to a restraining order that prohibited Darren from entering the Merizo Property for the duration of June 11, 2012, through October 9, 2012. In December 2012, the President and CEO of Joe & Flo’s, Harry Gutierrez (“Harry”), wrote a letter to Franklin Gutierrez, Darren’s father, that stated:

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<sup>1</sup> The signatures in this opinion reflect the titles of the justices at the time this matter was argued and submitted.

As president of Joe & Flo's, I am directing that Darren Gutierrez is barred from entering corporate property to include the Merizo property . . . . Should Darren be found on corporate property, he will be considered a trespasser and appropriate action will be taken.

Record on Appeal ("RA"), tab 1 (Compl., Oct. 14, 2016) at Ex. 1 (Letter from Harry Gutierrez to Franklin Gutierrez, Dec. 6, 2012) (emphasis omitted). Joe & Flo's served the letter on Darren and Darren's father. About a year later, Joseph Gutierrez, an officer of Joe & Flo's, sent a letter dated December 3, 2013, to Harry on behalf of the majority of Joe & Flo's' Board of Directors, reiterating that Darren was not allowed on the property.<sup>2</sup>

[4] On October 14, 2016, Joe & Flo's filed the complaint for trespass alleging that Darren, on two separate occasions, had entered the Merizo Property without permission. Joe & Flo's attached the two letters above as exhibits to the complaint.

[5] Darren filed an answer asserting the affirmative defense that Joe & Flo's cause of action violated his right to free speech and participation in public activities. Darren moved to dismiss the complaint as a "strategic lawsuit against public participation" or "SLAPP." RA, tab 22 (Mot. Dismiss, Mar. 8, 2017). Darren cited the December 3, 2013 letter as proof that Joe & Flo's filed its trespass claim in retaliation for Darren "reporting the corporation and its agent and President,

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<sup>2</sup> That letter states:

It has been brought to my attention that Darren has not apologized for his actions whereby he had you [Harry] arrested for trespassing / assault in addition to aiding his father in legal action against the family and corporation. I gave him this opportunity to redeem himself but he has not done so. There is currently a corporate resolution in place banning him from the Merizo family beach house property. . . .

Given this situation, myself and 3 other directors (majority) of Joe and Flo's Corporation require that Darren be given notice that he is no longer allowed on the property. Darren's only recourse would be to make a formal apology to you [Harry] and the directors . . . . Until such time that an apology is made, the corporate resolution to ban him from the Merizo property remains in full force and effect.

RA, tab 1 (Compl.) at Ex. 2 (Letter from Joseph Gutierrez to Harry Gutierrez, Dec. 3, 2013).

Harry Gutierrez, to the Guam Police Department for criminal trespass and assault.” *Id.* at 1; *see also supra* note 2.

[6] After a hearing, the trial court entered a Decision and Order denying Darren’s motion to dismiss Joe & Flo’s complaint and held that the claim was not a SLAPP within the scope of the CPGA. Darren timely appealed.

## II. JURISDICTION

[7] “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.” *Melwani v. Hemlani*, 2015 Guam 17 ¶ 15 (citing 7 GCA § 17106(a)(2) (2005)); *see also* 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-206 (2020)); 7 GCA § 3107 (2005).

## III. STANDARD OF REVIEW

[8] “Any motion seeking immunity under the CPGA is treated as a motion for summary judgment.” *Enriquez v. Smith*, 2015 Guam 29 ¶ 9 (citing 7 GCA § 17106(a)). This court reviews *de novo* a trial court’s denial of a motion for summary judgment under the CPGA. *See id.* We also review *de novo* issues of statutory interpretation, such as whether the CPGA and the sham exception apply in this case. *Id.*

## IV. ANALYSIS

[9] The First Amendment protects the right to petition the government for redress of grievances. U.S. Const. amend. I; *see also* 48 U.S.C.A. § 1421b(a) (Westlaw through Pub. L. 116-206 (2020)). The Legislature passed the CPGA to protect “citizen participation in government” from strategic lawsuits against public participation, commonly known as “SLAPPs.” 7 GCA § 17102(b)(1) (2005). “SLAPPs are an abuse of the judicial process; they are used to censor, chill,

intimidate, or punish citizens . . . for involving themselves in public affairs . . . .” *Id.* § 17102(a)(6). The CPGA “applies 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 [to petition].” *Id.* § 17105. Those rights include “seeking relief, influencing action, informing, communicating and otherwise participating in the processes of government.” *Id.* § 17104.

[10] “Generally, the anti-SLAPP movant has the burden of making a *prima facie* showing that the claims against them are based on protected petitioning activities.” *Enriquez*, 2015 Guam 29 ¶ 12. Once the movant makes a *prima facie* showing, the statute shifts the burden to “the opposing party [to] demonstrate by clear and convincing evidence that the movant’s acts are not immunized by the CPGA.” *Id.*; *see also* 7 GCA § 17106(c), (e). The party opposing the anti-SLAPP motion also bears the burden to prove that the moving party’s acts were not aimed at procuring any government or electoral action, result or outcome under the “sham exception” of section 17104. *See Guam Greyhound, Inc. v. Brizill*, 2008 Guam 13 ¶ 44.

[11] In *Cho v. Alupang Beach Club, Inc.*, we refined the anti-SLAPP movant’s *prima facie* showing. *See generally* 2020 Guam 10. “To establish a *prima facie* case consistent with the petitioning provision, the movant must show that the petitioning or protected activity ‘*itself* is the wrong complained of.’” *Id.* ¶ 8 (quoting *Mission Beverage Co. v. Pabst Brewing Co.*, 223 Cal. Rptr. 3d 547, 557 (Ct. App. 2017)). “The pleadings and affidavits must have ‘no substantial basis other than or in addition to the petitioning activities.’” *Id.* (quoting *Duracraft Corp. v. Holmes Prods. Corp.*, 691 N.E.2d 935, 943 (Mass. 1998)). We “construe[d] the phrase ‘based on, relates to or is in response to’ in the CPGA to exclude motions brought against ‘claims with a substantial

basis other than or in addition to the petitioning activities implicated.” *Id.* ¶ 12 (quoting *Duracraft*, 691 N.E.2d at 943).

[12] Darren argues the trial court erred by denying his anti-SLAPP motion to dismiss because Joe & Flo’s claim is a retaliatory lawsuit. Darren also contends the trial court impermissibly shifted the burden under CPGA section 17106(c) to him, the moving party. We review *de novo* the denial of Darren’s motion to dispose of Joe & Flo’s claim under the CPGA.

[13] Citing the Illinois case of *Garrido v. Arena*, 2013 IL App (1st) 120466, the trial court first examined whether Darren’s communication with the Guam Police Department was protected activity under the CPGA. RA, tab 46 at 6 (Dec. & Order, Mar. 20, 2018). The trial court found that “the act of contacting the police for the purpose of informing law enforcement that criminal activity is taking place is a protected act under the CPGA, as it involves participating in the process of government.” *Id.*<sup>3</sup> Next, the trial court determined that Joe & Flo’s did not meet its burden of proving that Darren’s communications with the police were a sham. *Id.* Lastly, the trial court found that Joe & Flo’s had a legitimate legal interest in maintaining a secure premise of its property, and the present lawsuit was filed to advance that interest. *Id.* The trial court denied Darren’s motion because Darren did not “affirmatively demonstrate[] that the [plaintiff’s] claim is a SLAPP . . . , that is, that the claim is meritless.” *Id.* (second alteration in original) (quoting *Garrido*, 2013 IL App (1st) 120466, ¶ 18).

[14] While the trial court appears to have applied Illinois law to the facts here in a manner consistent with *Garrido*, Illinois law does not graft well onto the procedural framework established by this court’s anti-SLAPP precedent. For example, Darren correctly argues that the trial court

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<sup>3</sup> The parties do not contest this finding or argue whether Darren’s acts are protected activities as defined by the statute. For the purposes of this opinion, we assume without deciding that Darren’s acts of calling the police and participating in separate litigation are protected activities under the CPGA.

shifted the moving party's burden by applying the *Garrido* test. Appellant's Br. at 17 (June 22, 2018). The *Garrido* test requires the movant to "affirmatively" demonstrate that the plaintiff's claim is a SLAPP—"that is, that the claim is meritless and was filed in retaliation against the [defendant's] protected activities in order to deter the [defendant] from further engaging in those activities." See RA, tab 46 at 6 (Dec. & Order) (alterations in original) (quoting *Garrido*, 2013 IL App (1st) 120466, ¶ 18). Our precedent requires that the anti-SLAPP movant establish a *prima facie* case, but need not meet that more burdensome standard of affirmative proof that the claim is meritless and retaliatory. See *Cho*, 2020 Guam 10 ¶ 8; *Enriquez*, 2015 Guam 29 ¶ 12. Accordingly, we decline to follow the test in *Garrido*. We need not, however, adopt the trial court's reasoning to affirm its result denying Darren's anti-SLAPP motion. See *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.'" (quoting *Ceasar v. QBE Ins. (Int'l), Ltd.*, 2001 Guam 6 ¶ 8)).

[15] Darren mainly argues Joe & Flo's filed its claim in retaliation because he called the police and assisted in a different lawsuit against Joe & Flo's. Darren contends the letters attached as exhibits to Joe & Flo's complaint prove the claim is a SLAPP. Joe & Flo's complaint, however, alleges trespass—and it bears no mention of Darren's protected activity, which was calling the police and assisting in separate litigation. Joe & Flo's could prove (or fail to prove) the elements of their trespass claim even if Darren had not gone to the police or participated in the separate litigation—which means Joe & Flo's claims had a substantial basis other than or in addition to Darren's protected activities. And even if the letters Darren presented indicate the trespass suit was filed after petitioning or protected activities, a claim is not a SLAPP "simply because it contests an action . . . that was arrived at following . . . petitioning activity." *Park v. Bd. of Trs. of Cal. State Univ.*, 393 P.3d 905, 907 (Cal. 2017). Courts must distinguish between protected

activity “that provides the basis for liability” versus “evidence of liability.” *See id.* at 908-09 (collecting cases). SLAPPs are retaliatory lawsuits intended to chill and infringe on a citizen’s right to participate in government. *See Cho*, 2020 Guam 10 ¶ 6. Darren’s argument fails to distinguish between a lawsuit filed in retaliation and a retaliatory lawsuit that falls within the purview of the CPGA. Darren may be correct that Joe & Flo’s filed its trespass claim in retaliation for him calling the police and assisting in separate litigation, but the inquiry here is whether Darren’s protected activities alone form the basis of the claims against him and have no substantial basis other than or in addition to those protected activities.

[16] In *Cho*, for example, the movant alleged its petitioning activity—testimony before a government agency—as the factual basis for the lawsuit against it. *See id.* ¶ 9. But the non-movant had sued the movant in *Cho* for attempting to testify in alleged breach of a settlement agreement between the parties, and we found that a preexisting legal relationship and alleged breach of that relationship constituted a basis other than the movant’s testimony. *See id.* ¶ 13 (explaining anti-SLAPP movant “pointed to petitioning activity as a factual basis for the claims against it” but failed to show the claims had “no substantial basis other than or in addition to [the] petitioning activity”). Here as well, there is enough evidence on the record showing Joe & Flo’s possessory interest over the property in question—and Joe & Flo’s complaint is based on Darren’s alleged affront of that interest.<sup>4</sup> Since those rights form the basis of Joe & Flo’s complaint, Darren has not met his *prima facie* burden.

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<sup>4</sup> There is evidence on the record supporting Joe & Flo’s control over the Merizo property, whether or not Joe & Flo’s actually owns that property. *See, e.g., Cantina Grill, JV v. City & Cty. of Denver Cty. Bd. of Equalization*, 2015 CO 15, ¶ 1 n.1 (defining possessory interest as “a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land”) (quoting Restatement (First) of Prop. § 7 (1936)); *accord Connaghan v. Eighty-Eight Oil Co.*, 750 P.2d 1321, 1323 (Wyo. 1988). A “possessory interest” is also defined as “[t]he present right to control property, including the right to exclude others, by a person who is not necessarily the owner.” *Possessory Interest*, *Black’s Law Dictionary* (11th ed. 2019). A corporation may maintain a trespass claim if it can demonstrate a possessory interest in the property. *See Greenpeace, Inc. v. Dow Chem. Co.*, 97 A.3d 1053,

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[17] We hold that Darren failed to meet his *prima facie* burden under the CPGA, and, therefore, the trial court did not err when it denied Darren's anti-SLAPP motion. Accordingly, we affirm the trial court's denial of Darren's anti-SLAPP motion, even though the trial court based its denial on different grounds. See *Hart*, 2008 Guam 11 ¶ 15.

## V. CONCLUSION

[18] We **AFFIRM** the trial court's denial of Darren's motion under the CPGA and **REMAND** the case to the Superior Court for further proceedings not inconsistent with this opinion.

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/s/  
F. PHILIP CARBULLIDO  
Associate Justice

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/s/  
ROBERT J. TORRES  
Associate Justice

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/s/  
KATHERINE A. MARAMAN  
Chief Justice

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1060 (D.C. 2014); see also *Bayou Fleet P'ship v. Clulee*, 13-934, pp. 5-7 (La. App. 5 Cir. 9/10/14); 150 So. 3d 329, 333-34 (finding corporation, and not its individual members, was proper party to bring trespass claim).