IN THE SUPREME COURT OF GUAM

STEVEN A. LEVIN,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Supreme Court Case No.: CRQ15-001
District Court of Guam Civil Case No.: 05-00008

OPINION

Cite as: 2016 Guam 14

Certified Question from the District Court of Guam
Argued and submitted October 21, 2015
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] Plaintiff-Appellant Steven A. Levin brought suit against Defendant-Appellee United States of America ("United States") in the District Court of Guam ("the District Court") seeking damages pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680, for negligent medical malpractice and battery.[1] The District Court has certified to this court one question of law.[2] Our response is that we adopt the principles articulated in *Mims* as stated herein.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Some time prior to December 31, 2002, Levin "was referred to the Ophthalmology Department of the U.S. Naval Hospital on Guam, for evaluation and treatment of a cataract in his right eye." Levin v. United States, CV-05-00008 (Order at 3 (Mar. 27, 2015)). The evaluation was performed by Frank M. Bishop, M.D., LCDR, United States Navy. Subsequent to discussing treatment options with Dr. Bishop, Levin agreed to undergo a procedure described as "'phakoemulsification [sic] with intraocular lens placement.'" *Id.* Levin gave informed consent on two occasions. Levin also signed a written consent form entitled "'Request for Administration of Anesthesia and for Performance of Operations and Other Procedures.'" *Id.*

[1] The designation for the underlying case in the District Court is Civil Case No. 05-00008.

[2] For the purposes of the litigation conducted in this court, Levin has been designated the appellant and the United States has been designated as the appellee. This is pursuant to Rule 20(a) of the Guam Rules of Appellate Procedure which reads in relevant part: "Where there are several questions which have been certified or reserved and a party maintains the affirmative to some and the negative to other certified or reserved questions, the plaintiff shall be regarded as the Appellant . . . ." Guam R. App. P. 20(a).

Additionally, Levin signed a written consent form entitled "'Consent for Anesthesia Service.'" *Id.*

[3] Dr. Bishop performed Levin's surgery at the U.S. Naval Hospital on Guam. Levin claims that he withdrew his consent to the operation at least twice, once when he saw the equipment in the operating room and again after he had been anesthetized. Nevertheless, the surgery took place. During the surgery, part of Levin's eye began to contract and the use of a hook-like "retractor" was required to keep the aperture open so that the surgery could continue. *Id.*

[4] After the surgery, Levin suffered from "'corneal clouding,'" which the United States claims was "'a known complication of cataract surgery that was discussed with [Levin] during his Informed Consent session with the surgeon.'" *Id.* (quoting ECF No. 75 at 3:2-4). In addition, Levin alleged to have suffered from "'severe corneal edema, which caused severe pain, some ptosis, disorientation, discomfort and problems with glare and depth of field vision as well as greatly diminished visual acuity.'" *Id.* (quoting ECF No. 1 ¶ 7).

[5] As a result, Levin filed a Complaint, seeking damages pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671–2680, for negligent medical malpractice[3] and battery[4] against the United States and Dr. Bishop.[5]

[3] "On September 12, 2008, the [District C]ourt granted the United States' motion for summary judgment on the medical malpractice claim." Levin v. United States, CV-05-00008 (Order at 4 n.1 (Mar. 27, 2015)) (citing ECF No. 84).

[4] "On June 3, 2009, the [District C]ourt granted the United States' motion to dismiss the battery claim, holding that the Gonzalez Act, 10 U.S.C. § 1089, does not authorize battery claims against the United States when military doctors operate without the patient's consent." Levin v. United States, CV-05-00008 (Order at 4 n.2 (Mar. 27, 2015)). The Ninth Circuit Court of Appeals affirmed. *Id.* (citing *Levin v. United States*, 663 F.3d 1059 (9th Cir. 2011)). In resolving a split among the circuit courts of appeals, the U.S. Supreme Court reversed the Ninth Circuit's judgment and remanded for further proceedings. *Id.* (citing *Levin v. United States*, 133 S. Ct. 1224 (2013)).

[5] "On June 27, 2005, the [District C]ourt granted the United States' motion to have itself named as the sole defendant." Levin v. United States, CV-05-00008 (Order at 4 n.3 (Mar. 27, 2015)).

[6] Relying on *Mims v. Boland*, 138 S.E.2d 902 (Ga. Ct. App. 1964), the United States moved for summary judgment on the battery claim.

[7] Stating that it could find no authority from the Supreme Court of Guam on what constitutes a patient's withdrawal or revocation of consent during a procedure for which consent had previously been given such that a medical provider would be held liable for battery, the District Court requested an answer to the following Certified Question:

> In a medical battery case, with respect to what constitutes effective withdrawal of written consent as a matter of law after treatment or examination has commenced or is underway, does Guam follow the two-prong standard set forth in *Mims v. Boland*, 110 Ga. App. 477, 138 S.E.2d 902 (Ga. Ct. App. 1964)?

Id. at 2. This court accepted the Certified Question pursuant to Rule 20(b) of the Guam Rules of Appellate Procedure ("GRAP"). *See* Levin v. United States, CRQ15-001 (Order at 1 (Apr. 2, 2015)).

II. JURISDICTION

[8] This court has jurisdiction "to entertain certified questions from 'other' courts, as described in GRAP 20(b) . . . by virtue of the expansive language of 7 GCA § 3107(a)." *Maeda Pac. Corp. v. GMP Haw., Inc.*, 2011 Guam 20 ¶ 19; *see also id.* ¶ 20 (holding that the court had jurisdiction to entertain a certified question from the District Court of Guam "[g]iven the unrestrictive language of section 3107(a) and the lack of any Guam law purporting to limit our power to consider certified questions . . . even in the absence of any specific Guam statute addressing the issue of certified questions from 'other' courts (including the District Court)." (footnote omitted)); 48 U.S.C.A. § 1424-1(a)(1) (Westlaw current through Pub. L. 114-115 (2015)); 7 GCA § 3107(a) (2005).

III. STANDARD OF REVIEW

[9] "Normal standards of review do not apply when addressing certifications of law; instead, the court addresses the matters in the context in which they arise and as if they were presented to the court in the first instance." *Maeda Pac.*, 2011 Guam 20 ¶ 21 (quoting *People v. Johnny*, 2006 Guam 10 ¶ 8) (internal quotation marks omitted).

IV. ANALYSIS

A. Facts Outside the District Court's Certification Order

[10] As an initial matter, we first consider whether this court should consider facts outside of the District Court's certification order. Levin argues that the United States improperly included such facts in its statement of facts and argument presented before this court. Appellant's Reply Br. at 4-5 (Aug. 28, 2015). Levin urges the court not to consider such facts. *Id.* at 4.

[11] A majority of courts hold that courts answering certified questions consider only those facts contained in the certification order. *See, e.g.*, *In re Fontainebleau Las Vegas Holdings*, 267 P.3d 786, 794 (Nev. 2011) ("A vast majority of courts hold that the answering court is bound by the facts as provided in the certification order." (citations omitted)); *St Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 293 P.3d 661, 664 (Idaho 2013) ("If 'the parties in their briefs and arguments before this Court present [] facts outside' the certification order, we consider 'only those facts contained in the order.'" (quoting *Kunz v. Utah Power & Light Co.*, 792 P.2d 926, 927 n.1 (Idaho 1990))); *see also Piselli v. 75th St. Med.*, 808 A.2d 508, 516 (Md. 2002) (disregarding defendant's assertion that injury was discovered at an earlier date than that stated in the certification order); *Preussag Int'l Steel Corp. v. March-Westin Co.*, 655 S.E.2d 494, 498 n.2 (W. Va. 2007) (refusing to consider new affidavit intended to downplay certain facts in

certification order); *In re Patel*, 242 P.3d 1015, 1017 n.2 (Wyo. 2010) (stating that answering court relies on facts presented by certifying court). As the Nevada Supreme Court has noted, "[t]he answering court's role is limited to answering the questions of law posed to it, and the certifying court retains the duty to determine the facts and to apply the law provided by the answering court to those facts." *In re Fontainebleau Las Vegas Holdings*, 267 P.3d at 794-95 (citing *Janson v. Christensen*, 808 P.2d 1222, 1222 n.1 (Ariz. 1991); *AGV Sports Grp., Inc. v. Protus IP Solutions, Inc.*, 10 A.3d 745, 746 n.1 (Md. 2010); *Piselli*, 808 A.2d at 516; *In re Gregory*, 97 P.3d 639, 640 n.1 (Okla. 2004); *Mecham v. Frazier*, 193 P.3d 630, 632 (Utah 2008)). This policy precludes the answering court from encroaching on "the certifying court's sphere by making factual findings or resolving factual disputes." *Id.* at 795 (citing *Alexander v. Certified Master Builders*, 1 P.3d 889, 908 (Kan. 2000)). The Mississippi Supreme Court has stated that "this Court is not called upon to decide the case. Nor should we go behind the facts presented by the certifying court. If either party has any objection to the facts related by the certifying court, the place to voice the objection is with that court, not us." *Puckett v. Rufenacht, Bromagen & Hertz*, 587 So. 2d 273, 277 (Miss. 1991).

[12] Here, the United States' discussion of Levin's mental condition certainly contains facts outside of those contained in the District Court's certification order. *See* Appellee's Br. at 8-10 (Aug. 19, 2015); Levin v. United States, CV-05-00008 (Order at 1-4 (Mar. 27, 2015)). The issue of whether to include those additional facts in the certification order was argued in the papers in the District Court, but the court excluded such facts in its certification order. *See* Levin v. United States, CV-05-00008 (United States' Proposed Certification Order at 5-7 (Mar. 2, 2015)) (including facts regarding Levin's mental condition in proposed certification order); Levin v.

United States, CV-05-00008 (Pl.'s Resp. to United States' Proposed Certification Order at 2-3 (Mar. 16, 2015)) (arguing that the references to Levin's "alleged psychiatric condition is improper and should be removed"); Levin v. United States, CV-05-00008 (United States Reply to Pl.'s Resp. to Proposed Certification Order at 4-6 (Mar. 20, 2015)).

[13] We hold that an answering court may consider only those facts contained in the certification order. Accordingly, we refuse to consider those facts presented by the United States that are outside of the District Court's certification order.

B. The *Mims* Standard

[14] Before discussing the issue of whether we adopt the standard set forth in *Mims*, we first note that the District Court's question assumes that the cause of action of medical battery exists under Guam law. Because the issue was not explicitly presented to this court in the certification order and because the issue was not briefed by the parties, our answer to the District Court's question assumes, without deciding, that medical battery exists as a cause of action under Guam law.

[15] Under the assumption that medical battery exists as a cause of action under Guam law, we next consider the issue of whether to adopt the two-prong standard set forth in *Mims*. In *Mims v. Boland*, the Georgia Court of Appeals considered the question of "whether after treatment or examination has begun, the patient's consent previously given may be withdrawn so as to subject the doctor to liability for assault and battery if the treatment or examination is continued." 138 S.E.2d at 907. The court, considering "the interest of the individual's right of freedom from unwanted contacts and invasions upon his body" stated that "we can not [sic] go so far as to say that once the examination or treatment has begun with the patient's consent the

patient can in no event and by no means withdraw his approval." *Id.* The court balanced this interest with the possibility that a doctor may face liability for malpractice or indictment for some criminal offense if a doctor stopping treatment in the middle of a procedure results in a patient's death or injury. *Id.* In weighing these interests, the court devised a standard to govern conduct in this scope of activity:

> To constitute an effective withdrawal of consent as a matter of law after treatment or examination is in progress commensurate to subject medical practitioners to liability for assault and battery if treatment or examination is continued, two distinct things are required: (1) The patient must act or use language which can be subject to no other inference and which must be unquestioned responses from a clear and rational mind. These actions and utterances of the patient must be such as to leave no room for doubt in the minds of reasonable men that in view of all the circumstances consent was actually withdrawn. (2) When medical treatments or examinations occurring with the patient's consent are proceeding in a manner requiring bodily contact by the physician with the patient and consent to the contact is revoked, it must be medically feasible for the doctor to desist in the treatment or examination at that point without the cessation being detrimental to the patient's health or life from a medical viewpoint.

Id. In addition, the court held that the burden of proving each essential condition was on the plaintiff, and that the second condition could only be proved by medical evidence. *Id.* at 907-08.

[16] The court reasoned that allowing a more lenient standard would:

> [S]ubject the medical profession to an endless possibility of harassment and would place upon them a potential of punishment in every case where their examination or treatment results in less than complete success. The possibility of irresponsible harassment is something the medical profession should not be called upon to bear, dealing as it does with human life and human frailty.

Id. at 908.

[17] A few jurisdictions have directly utilized the standard set forth in *Mims*. For example, Kentucky adopted the *Mims* test in *Coulter v. Thomas*, 33 S.W.3d 522, 524 (Ky. 2000). Additionally, in an unpublished opinion, the Superior Court of Connecticut applied the *Mims* test

in *Pallacovitch v. Waterbury Hosp.*, No. CV126013332, 2012 WL 3667310, at *4 (Conn. Super. Ct. Aug. 3, 2012). Finally, in another unpublished opinion, the Court of Appeals of Tennessee employed the *Mims* test in *Hartman v. Le Corps*, No. 89-188-II, 1989 WL 115181, at *3-5 (Tenn. Ct. App. Oct. 4, 1989).

[18] Moreover, while the aforementioned jurisdictions are the only ones to have used the *Mims* test verbatim, other jurisdictions perform a similar analysis when ruling on the issue of what constitutes effective withdrawal of consent after consent is given. For example, the Supreme Court of Wisconsin has stated:

> We reject the notion that the onset of a procedure categorically forecloses a patient's withdrawal of consent. To be sure, at some point in virtually every medical procedure a patient reaches a point from which there is no return. However, that point need not be arbitrarily created at the commencement of treatment. Rather it varies with the nature and circumstances of the individual procedure and continues so long as there exist alternative viable modes of medical treatment.

Schreiber v. Physicians Ins. Co. of Wisconsin, 588 N.W.2d 26, 31 (Wis. 1999). Accordingly, in a case in which the patient had given a "clear indication of her withdrawal of consent" and "since alternative viable modes of medical treatment existed," the patient was able to withdraw consent to the medical procedure at issue. *Id.* at 31-32. Additionally, the Supreme Court of Nebraska held that "[i]n a medical examination context, a court must first ask whether a party used language that unequivocally revoked his or her consent and was subject to no other reasonable interpretation. Second, a court must ask whether stopping the treatment or examination was medically feasible." *Yoder v. Cotton*, 758 N.W.2d 630, 637 (Neb. 2008) (footnote omitted). Finally, the Supreme Court of Virginia, citing *Mims*, has held that "consent to an operation may

. . . be withdrawn, if timely and unequivocally done, thereby subjecting the surgeon to liability for battery if the operation is continued." *Pugsley v. Privette*, 263 S.E.2d 69, 74 (Va. 1980).

[19] We are persuaded by the language used in *Yoder* by the Supreme Court of Nebraska. As such, we hold that "where . . . a physician is conducting an examination with express or implied consent, a plaintiff must prove that she withdrew her consent." *Yoder*, 758 N.W.2d at 637 (quoting *Andrew v. Begley*, 203 S.W.3d 165, 172 (Ky. Ct. App. 2006)). Moreover, "[i]n a medical examination context, a court must first ask whether a party used language that unequivocally revoked his or her consent and was subject to no other reasonable interpretation. Second, a court must ask whether stopping the treatment or examination was medically feasible." *Id.* (footnote omitted).

[20] As a final matter, we address Levin's argument that the second element of the *Mims* test, that it must be medically feasible for the doctor to desist treatment, "is simply a common law affirmative defense" and thus, that this court should not adopt the *Mims* test as it shifts the burden of proof from the defendant to the plaintiff. Appellant's Br. at 11-12 (July 17, 2015). We find this argument unconvincing. As discussed above, there are important policy considerations as to why the plaintiff should bear the burden of proof. *Mims* noted that a lesser standard of review would "subject the medical profession to an endless possibility of harassment . . . . [which is] something the medical profession should not be called upon to bear, dealing as it does with human life and human frailty." *Mims*, 138 S.E.2d at 908. We agree that the burden of proof to establish an effective withdrawal of consent under these circumstances is properly with the plaintiff.

V. CONCLUSION

[21] We hold that in the context of a medical procedure in which consent was previously given by the plaintiff, to constitute an effective withdrawal of consent, (1) the plaintiff must have used language that unequivocally revoked his or her consent and was subject to no other reasonable interpretation, and (2) stopping the treatment or examination must have been medically feasible. Accordingly, we follow the principles of the two-prong standard articulated in *Mims* as stated herein.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice