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IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

REMEDIO ELAMETO AND PEDRO PUA,
Plaintiff-Appellees,

v.

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, RAJEE IYER, M.D., AND GARY RAMSEY, M.D.,
Defendant-Appellants.

Supreme Court No. 2017-SCC-0026-CIV
Superior Court Crim. No. 16-0110

SLIP OPINION

Cite as: 2018 MP 15

Decided December 27, 2018

Joseph E. Horey, Saipan, MP, for Appellees.

Christopher M. Timmons, Assistant Attorney General, Saipan, MP, and Colin M. Thompson, Saipan. MP, for Appellant.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLONA, Associate Justice; PERRY B. INOS, Associate Justice.

MANGLONA, J.:

¶ 1 Defendant-Appellant Dr. Gary Ramsey ("Ramsey") appeals the trial court's Order Finding Provisions of the Government Liability Act, 7 CMC §§ 2202(a)(1), (2), (e), and 7 CMC § 2210(a) Unconstitutional as They Violate Plaintiffs' Fundamental Right to Privacy Under NMI Const. art. I, § 10 ("Order"). Ramsey argues the court erred in finding 7 CMC § 2210(a), the substitution provision of the Government Liability Act ("GLA" or "the Act"), unconstitutional.[1] In particular, he asserts the court erred in: 1) finding the right to privacy allows an individual to seek recovery from private individuals; and 2) finding the right to privacy is implicated in a medical malpractice action alleging negligent conduct. For the following reasons, we VACATE the Order and REMAND for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 Around August of 2000, Remedio Elameto ("Elameto") went to the Commonwealth Health Center for an exploratory laparotomy to address health concerns. Dr. Rajee Iyer ("Iyer") and Ramsey performed the surgery while Elameto was under general anesthesia.[2] During surgery, Iyer and Ramsey closed Elameto's abdomen without removing 15-centimeter long hemostatic forceps from her abdominal cavity. Almost fourteen years later, Elameto went to a Guam hospital to receive a related procedure. During the Guam procedure, a doctor discovered the hemostat inside Elameto, buried under dense adhesions. Two doctors and an additional procedure were required to remove the instrument.

¶ 3 Approximately two years after the Guam surgery, Elameto and her significant other, Pedro Pua, filed a complaint alleging several causes of action against the Commonwealth, Ramsey, and Iyer.[3] Subsequently, the Commonwealth Attorney General ("AG") undertook an investigation as to Ramsey's role in the surgery pursuant to 7 CMC § 2210(a), the GLA's

[1] This appeal, as originally filed, named the Commonwealth of the Northern Mariana Islands ("Commonwealth") and Ramsey as Appellants.

[2] Although Elameto's consent form is absent from the record, her complaint does not include any allegations as to a lack of consent or a lack of informed consent regarding the surgery. *See* Op. Br. 18 (noting Elameto "do[es] not allege that [she] did not consent to the surgery that led to the alleged tort").

[3] Elameto's complaint began by explaining "[t]his is a medical malpractice case," including claims for medical malpractice, emotional distress and loss of consortium, common law bad faith, and bad faith under 7 CMC § 2202. *See* App. at 1-7. She also asked for declaratory judgment on the basis that the GLA's limits on liability "are unconstitutional and impermissibly, arbitrarily, and capriciously discriminate against tort victims seriously injured by the CNMI, without any rational relation to a legitimate state interest," denying them equal protection of the laws. App. at 7.

substitution provision ("Section 2210(a)" or "substitution provision").[4] Pursuant to the procedure under Section 2210(a), the AG found Ramsey was acting within the scope of his employment at the time of Elameto's surgery and filed its certification. App. 12 ("[B]ased on the results of [an] investigation, I certify that [Ramsey] was acting within the scope of his employment as a physician . . . at the time of the alleged incident . . . ."). The AG notified the court that pursuant to the certification, the Commonwealth would substitute Ramsey by operation of law, requesting to enter an order dismissing Ramsey as a party.

¶ 4 Elameto objected to Ramsey's dismissal. Notably, she did not dispute the AG's finding that Ramsey was acting within the scope of his employment when the alleged incident occurred. Rather, Elameto argued that because she requested the court declare the GLA's limitations on liability unconstitutional, and because the AG cited one of the challenged statutes as the sole authority for Ramsey's dismissal, additional briefing was needed to determine whether his dismissal was constitutional. The court obliged, ordering supplemental briefing on Elameto's constitutional claim. For the first time, she alleged the GLA infringed upon her right to privacy under Article I, Section 10 of the NMI Constitution ("Section 10"), invoking heightened review.

¶ 5 Following supplemental briefing, the court issued its Order, finding the right to privacy under Section 10 to be a fundamental right. Next, based on a one-sentence conclusion that "[l]eaving a medical clamp in a patient is an unconsented physical intrusion," the court found the right to be implicated in Elameto's action. Order at 19. Applying strict scrutiny review, it reasoned that because Section 2210(a) burdened her right to privacy without a compelling interest, the provision was unconstitutional as applied to Elameto's circumstances. As a result, the court denied Ramsey's dismissal from the lawsuit. Ramsey appeals.

II. JURISDICTION

¶ 6 We must first determine whether we have jurisdiction over the present appeal. *See Pac. Amusement, Inc. v. Villanueva*, 2005 MP 11 ¶ 7 ("The issue of

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[4] 7 CMC § 2210(a) provides the procedure for substitution:

> Upon certification by the Attorney General that *the defendant employee was acting within the scope of his/her office or employment at the time of the incident* out of which the claim arose, any civil action or proceeding commenced upon such claim in a court against an employee *shall* be deemed an action against the Commonwealth and *the Commonwealth shall be substituted* as the party defendant, if the Commonwealth was not already a defendant in the suit. An order dismissing the employee from the suit *shall* be entered.

(emphases added); *see also Kabir v. CNMI Pub. Sch. Sys.*, 2009 MP 19 ¶ 4 ("Under [the Act], employee immunity attaches–and automatic substitution of the Commonwealth as defendant in the employee's place is triggered–when the Attorney General files with the court a certificat[ion] . . . .").

appellate jurisdiction must always be resolved before the merits of an appeal are examined or addressed."). We have jurisdiction over final judgments and orders of the Commonwealth Superior Court. NMI CONST. art. IV, § 3. Generally, however, only *final* judgments and orders are immediately appealable. *Villanueva*, 2005 MP 11 ¶ 9. "A judgment or order is final if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Nev. D.H.H.S. Div. of Welfare v. Lizama*, 2017 MP 16 ¶ 8 (citation and internal quotation marks omitted). We thus review whether the Order was a final order permitting our review, or, whether an alternative basis for our review exists.

¶ 7 As to this determination, both Ramsey and Elameto concede the Order is not a final order. They argue, however, that the collateral order doctrine allows our review. Notwithstanding Elameto and Ramsey's agreement that we have jurisdiction under the collateral order doctrine, we have an independent duty to consider jurisdictional issues. *Commonwealth v. Crisostimo*, 2005 MP 18 ¶ 8. First, we agree the Order was not a final order. As relevant to this appeal, the Order solely determined whether the Commonwealth could substitute Ramsey as the defendant in the litigation below. Trial and discovery have yet to begin; the merits of Elameto's claims have yet to be determined. As such, the Order did not end the litigation on the merits. We thus consider whether the Order falls within the collateral order doctrine.

¶ 8 The collateral order doctrine "provides a narrow exception for decisions that 'finally determine claims . . . separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.'" *Camacho v. Demapan*, 2010 MP 3 ¶ 28 (quoting *Cohen v. Beneficial Indust. Loan Corp.*, 337 U.S. 541, 546 (1949)). "To come within the collateral order exception, the order sought to be appealed from must: (1) have conclusively determined a disputed question; (2) have resolved an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment." *Id.* ¶ 28. We review each prong in turn.

¶ 9 First, the court's denial of Ramsey's substitution must have "conclusively determined a disputed question." *Id.* We have considered a denial of substitution under the GLA, citing *Osborn v. Haley*, in part, for the proposition that a court's denial of an attorney general's certification and substitution conclusively determines whether the employee-defendant will need to be a party to the lawsuit. *See Kabir*, 2009 MP 19 ¶ 5 n.2 (citing 549 U.S. 225 (2007)). Federal courts discussing the Westfall Act have similarly found a denial of substitution to conclusively determine a disputed question.[5] *See, e.g.*, *Osborn*, 549 U.S. at 238 ("[T]he [d]istrict [c]ourt's denial of certification and substitution conclusively decided a contested issue."); *Taboas v. Mlynczak*, 149 F.3d 576, 579 (7th Cir.

[5] The GLA is modeled after the Westfall Act. *Kabir*, 2009 MP 19 ¶ 25; *see also* PL 15-22 § 2 ("[T]he Commonwealth Government Liability Act closely tracks provisions of the Federal Tort Claims Act . . . .").

1998) ("[T]he denial of the United States' motion for substitution in this context is effectively a denial of immunity for the defendant employee . . . and the collateral order doctrine therefore applies with as much force in this context as it does to other claims of qualified or absolute immunity."). Like other courts considering a denial of substitution, we find the Order denying the Commonwealth's substitution to have conclusively determined the disputed question of whether Ramsey would be a party to the lawsuit such that Elameto could seek recovery from him. We thus turn to the doctrine's second prong.

¶ 10 Under the second prong, the court's denial of Ramsey's substitution must have "resolved an important issue completely separate from the merits of the action." *Demapan*, 2010 MP 3 ¶ 28. The United States Supreme Court has recognized that "a question of immunity is separate from the merits of the underlying action . . . even though a reviewing court must consider the plaintiff's factual allegations in resolving the immunity issue." *Mitchell v. Forsyth*, 472 U.S. 511, 528–29 (1985); *see also Osborn*, 549 U.S. at 238 (finding denial of certification and substitution was "important and separate from the merits of the action"). The *Mitchell* Court explained:

> [I]t follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is conceptually distinct from the merits of the plaintiff's claim that his rights have been violated. An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. *All it need determine is a question of law*: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions . . . . The resolution of these legal issues will entail consideration of the factual allegations.

472 U.S. at 527–29 (emphasis added) (citations omitted). The Court emphasized that "the appealable issue is a purely legal one: whether the facts alleged . . . support a claim of violation of clearly established law." *Id.* at 528 n.9; *cf. Johnson v. Jones*, 515 U.S. 304, 315 (1995) (interpreting *Mitchell* as instructing that "'the need to protect officials against the burdens of further pretrial proceedings and trial' justifies a relaxation of the separability requirement").

¶ 11 Here, the court's determination that "[l]eaving a medical clamp in a patient is an unconsented physical intrusion," does implicate, to a certain extent, a fact-related legal issue. Order at 19. However, for purposes of our review, we will not consider the correctness of Elameto's version of the facts, including the correctness of the allegation that a surgical instrument was left inside her. Instead, we limit our review to 1) the constitutional question of the type of conduct required to constitute an unconsented physical intrusion, and, 2) the legal effect of such a conclusion on the validity of Section 2210(a), should we find the right to privacy to encompass the facts of Elameto's claims. Assessed in these terms,

we find the analysis underlying the court's denial of substitution sufficiently separate from the case's merits, permitting our consideration. We deem the second prong satisfied.

¶ 12 Third and most importantly, the Order must "be effectively unreviewable on appeal from a final judgment." *Demapan*, 2010 MP 3 ¶ 28. In particular:

> [A]n issue would not be reviewable as part of a final judgment . . . where it involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial. For example, the issue of whether a government official is immune from answering for his conduct in a civil damages action is immediately reviewable, as *the government official's entitlement to such immunity would be lost forever if . . . the claiming party was required to go through a trial.*

Villanueva, 2005 MP 11 ¶ 20 (emphasis added) (citations and internal quotation marks omitted); *see also Guo Qiong He v. Commonwealth*, 2003 MP 3 ¶ 15–16 (finding the "denial of qualified immunity falls under the collateral order doctrine, as immunity is not merely a defense but an actual exemption from liability and an entitlement not to stand trial"). Here, substitution under Section 2210(a) is not merely a defense against liability; rather, substitution provides the employee-defendant with an exemption from liability and right not to stand trial. Ramsey's substitution would be effectively unreviewable on appeal from a final judgment, as his entitlement to immunity would be lost if he was forced to stand trial. We thus find the doctrine's third prong met. Because we find the collateral order doctrine to provide jurisdiction, we proceed to consider the appeal's merits.

III. STANDARD OF REVIEW

¶ 13 This case presents a single issue: whether Section 2210(a), as applied to the facts of Elameto's case, infringes upon her right to privacy pursuant to Section 10. We review constitutional issues de novo. *Castro v. Castro*, 2009 MP 8 ¶ 15; *see also In re Estate of Tudela*, 4 NMI 1, 2 (1993) ("A question of whether the application of a statute is constitutional is reviewed de novo.").

IV. DISCUSSION

A. Right to Privacy

¶ 14 Ramsey asserts two main arguments in support of his assertion that Appellees' allegations regarding Section 2210(a) do not constitute a violation of the right to privacy pursuant to Section 10. First, he contests the trial court's interpretation of Section 10's state action requirement as allowing constitutional claims regarding a right to privacy to be brought against private individuals. Ramsey purports that Section 10 grants no such right, and, as such, that no state action issue is violated by his substitution under Section 2210(a). Second, Ramsey argues constitutional rights cannot be violated negligently; rather, intentional conduct is required to commit a constitutional violation. He further specifies that in the context of medical care, a constitutional violation requires a significant and serious infringement into one's bodily integrity, and does not

guarantee "freedom from mistakes made by medical professionals during a procedure to which a patient has . . . consented." Op. Br. 7.

¶ 15 Given that Ramsey's arguments require our interpretation of the parameters of the NMI Constitution's right to privacy, we turn to principles of constitutional interpretation to guide our review. In general, "[w]hen presented with a question of constitutional interpretation '[w]e are duty-bound to give effect to the intention of the framers of the NMI Constitution.'" *Dep't of Pub. Lands v. Commonwealth*, 2010 MP 14 ¶ 17. Our procedure for interpreting constitutional provisions indicates that we must begin with the provision's text. *See Kabir*, 2009 MP 19 ¶ 33. In reviewing the text, we apply a basic principle of construction: "that language must be given its plain meaning." *Manibusan v. Larson*, 2018 MP 7 ¶ 12 (Slip Op., Aug. 30, 2018) (citation omitted). However, if the provision's language is ambiguous, we attempt to ascertain the framers' intent by examining relevant legislative history. *See Dep't of Pub. Lands*, 2010 MP 14 ¶ 17. In this examination, "we may rely upon 'committee recommendations, constitutional convention transcripts, and other relevant constitutional history.'" *Larson*, 2018 MP 7 ¶ 16 (adding that "the Analysis of the Constitution of the Commonwealth of the Northern Mariana Islands ('Analysis') is extremely persuasive authority when one is called upon to discern the intent of the framers"). "Finally, we are hesitant to interpret constitutional language in a way that deviates from the common law absent a clear indication of an intention to do so by the drafters of the provision at issue." *Peter-Palican v. Commonwealth*, 2012 MP 7 ¶ 6.

¶ 16 We begin with Section 10's text: "[t]he right of individual privacy shall not be infringed except upon a showing of compelling interest." NMI CONST. art I, § 10. Two deductions follow from the plain text of Section 10. First, Section 10 indicates that the right to privacy is explicitly recognized in the Commonwealth as a constitutional guarantee, distinct from privacy interests that may be protected by the due process or equal protection clauses of the Commonwealth or U.S. Constitutions.[6] Second, the text's requirement of a

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[6] Ramsey cites a myriad of cases discussing privacy protections under the Fourteenth Amendment's Due Process Clause. In particular, we find his citation to *Daniels v. Williams* pertinent to our discussion. 474 U.S. 327 (1986). In *Daniels*, the United States Supreme Court considered whether an inmate's falling over a pillow negligently left on a stairway by a correctional officer amounted to a deprivation of plaintiff's "liberty interest in freedom from bodily injury . . . ." *Id.* at 328 (internal quotation marks omitted). Plaintiff claimed that the officer's defense of sovereign immunity left him without an adequate state remedy, depriving him of liberty without due process of law. *Id.* The Court cautioned against supplanting traditional tort law with constitutional claims, finding due process protections not to be triggered by a lack of due care. *Id.* at 332–33. However, the Court clarified that governmental negligence may nonetheless raise significant legal concerns and create protectible legal interests. *Id.* at 333 ("It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns."). The Court

showing of a compelling interest instructs that our constitution's drafters intended for the right to privacy to be a fundamental right, requiring an infringement of the guarantee to satisfy strict scrutiny review. Accordingly, the infringement must be justified by a compelling interest. Although these broad deductions are helpful to our review, the provision's text is ambiguous on the right's particular parameters.

¶ 17 As such, we turn to legislative history to determine what conduct is protected by Section 10. We first review the Analysis' discussion of the right to privacy, which describes the right at length. In relevant part, it states:

> This section establishes the fundamental constitutional right to individual privacy. . . . The right to individual privacy incorporates the concept that each individual person has a zone of privacy that should be free from government or private intrusion. Each person has a right to be let alone. This right permits a person to refuse to give personal information or to prohibit the collection of that information *without consent*. It protects a person's thoughts, ideas, and beliefs from regulation or attempted coercion by the government or other persons. It allows a person to associate with whomever the individual chooses. *It protects a person from unconsented physical intrusions into his or her body.* It guarantees privacy in a person's home to behave in any manner as long as the behavior does not harm others. It protects an individual's papers and belongings from outsiders. It protects an individual's right to physical solitude free from intrusions such as another's

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nonetheless concluded that "[w]here a government official's act causing injury to life, liberty, or property is merely negligent, 'no procedure for compensation is *constitutionally* required'"—due process protections are "simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." *Id.* at 328, 333.

Had our constitution not contained a separate guarantee to privacy, the discussion in *Daniels* would have all but resolved this appeal. *See Castro*, 2009 MP 8 ¶ 16 ("[F]ederal due process guarantees are applicable in the Commonwealth pursuant to Section 501 of the Covenant. Because the Commonwealth and U.S. Constitutions are essentially coextensive in regard to due process protections, we analyze the present facts as if the two bodies of law are one."). However, because the right to privacy is explicitly mentioned in the NMI Constitution, we are not constrained to interpret it within the narrow context of federal constitutional protections. *See, e.g.*, *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 813 (Cal. 1997) ("After reviewing the background of the state constitutional provision . . . the state right of privacy, *unlike its federal counterpart*, is not limited to state action . . . ."); *Gryczan v. State*, 942 P.2d 112, 121 (Mont. 1997) ("[W]e have long held that Montana's Constitution affords citizens broader protection of their right to privacy than does the federal constitution."). Therefore, although we find the reasoning in *Daniels* relevant, we look beyond the federal construction of privacy to determine the particular protections provided by Section 10.

> eavesdropping on telephone calls, on conversations, harassing telephone calls, constant and manifest surveillance, and any other intrusions that a reasonable person would find offensive and objectionable. . . . When an action is brought claiming an invasion of the right to individual privacy established by this section, and the individual bringing the action *offers sufficient evidence to establish the intrusion*, the defendant being sued must justify the intrusion by demonstrating a compelling government interest in the intrusion.

Analysis, *supra* 28–30 (emphases added).

¶ 18 The Analysis provides a few important insights as to what the drafters intended the right to encompass. First, in limiting Section 10's application, the drafters specified that litigants claiming the right's protections must, as a preliminary matter, provide sufficient evidence to establish that an intrusion rising to the level of a constitutional violation occurred. Second, the Analysis' repeated references to consent indicate an intent to limit the right to serious violations that deliberately exceed one's zone of privacy. Finally, the protection against "unconsented physical intrusions" into one's body—the phrase at issue here—indicates the right was intended, to some extent, to provide protection for certain infringements upon bodily autonomy and integrity.

¶ 19 Briefing Paper 7, a report from the constitutional committee tasked with recommending the substance of the NMI Constitution's personal rights, provides further guidance.[7] It states:

> The delegates, however, may wish to give a more expansive meaning to the concept of privacy. Such was the choice of the draftsmen of the Montana constitution, which provides, 'The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.'
>
> This type of provision, however, demonstrates the shortcomings of all broadly phrased constitutional language: the word 'privacy,' as well as the phrase 'compelling state interest,' may be so vague as to defy judicial enforcement. Yet, this language may set a tone of governmental respect for the sanctity of the homes and personal affairs of the Northern Marianas people.

Briefing Paper 7, *supra* at 64. The inclusion of the right to privacy as a separate section of the constitution, along with the adoption of language in Section 10 closely resembling that of Montana's, convinces us that the framers indeed

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[7] The Briefing Papers were prepared by lawyers, political scientists and others with relevant expert qualifications in the areas discussed to assist the drafters of the Constitution. Briefing Papers for the Delegates to the Northern Marianas Constitutional Convention, Briefing Paper No. 1: Constitutional Convention Background & Overview 1, 28, 32 (1976).

intended to provide an expansive meaning to the concept of privacy. Moreover, we interpret the detailed list of contexts in which privacy interests may arise provided in the Analysis as an attempt to avoid the provision's potential vagueness defying judicial enforcement. To further combat this potential vagueness, we review the interpretations of states with codified privacy rights for guidance on when an unconsented physical intrusion may occur in the context of a physician-patient relationship.

¶ 20 Numerous state constitutions explicitly recognize a right to privacy. *See, e.g.*, ALASKA CONST. art. I, § 22 ("The right of the people to privacy is recognized and shall not be infringed."); CAL. CONST. art. I, § 1 ("All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining safety, happiness, and privacy."); MONT. CONST. art. II, § 10. California, in particular, has created a three-part test for evaluating allegations of "an invasion of privacy in violation of the state constitutional right to privacy." *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 657 (Cal. 1994). In California, an allegation of a violation of the right to privacy must establish: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." *Id.* As to the first consideration, autonomy privacy, or the "interest[] in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference" has been recognized as legally protected. *Id.* at 654; *see, e.g.*, *Lungren*, 940 P.2d at 813 (Cal. 1997) (noting interest in autonomy privacy includes pregnant woman's right to choose whether to continue a pregnancy"); *Conejo Wellness Ctr., Inc. v. City of Agoura Hills*, 154 Cal. Rptr. 3d 850, 871 (Cal. Ct. App. 2013) (recognizing autonomy privacy to encompass freedom of association). The second requirement is shaped by "customs, practices, and physical settings surrounding particular activities." *Hill*, 865 P.2d at 655 (further explaining that "advance notice of an impending action may serve to 'limit [an] intrusion upon personal dignity and security' that would otherwise be regarded as serious"). Lastly, "[a]ctionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right." *Id.* at 655; *see In re iPhone Application Litig.,* 844 F. Supp. 2d 1040, 1063 (N.D. Cal. 2012) ("Even negligent conduct that leads to theft of highly personal information . . . does not 'approach [the] standard' of actionable conduct . . . and thus does not constitute a violation of [p]laintiffs' right to privacy."). Although we decline to adopt such a test verbatim, we find these considerations relevant in evaluating an allegation of a constitutional privacy violation.

¶ 21 We are further guided by *Ross v. Kansas City General Hospital & Medical Center*, where the Missouri Supreme Court was tasked with determining whether a patient's right to privacy was violated in a medical malpractice action. 608 S.W.2d 397 (Mo. 1980). In *Ross*, a doctor performed a bilateral tubal cauterization for the purpose of sterilization; the surgery was performed inadequately, with the patient later becoming pregnant. *Id*. at 399. The patient

questioned the constitutionality of a Missouri statute of limitations that resulted in her claim being time-barred. *Id.* at 398. She argued she had a right to have the surgery performed properly and "that the doctor's negligent performance of the operation, and the subsequent pregnancy and birth of the child made this right a nullity and that the application of the bar of [the statute of limitations] mean[t] the state [was] preventing plaintiffs from vindicating their right to privacy." *Id.* at 400. Further, the patient argued that for the right to mean anything in her circumstances, she would need to recover money damages; because the statute of limitations prevented her remedy, it was unconstitutional. *Id.* The *Ross* court disagreed, failing to see how the flawed surgery and pregnancy that followed "change[d] the situation so as to make the statute unconstitutional" as a violation of the patient's right to privacy. *Id.* at 401. It reasoned that although the patient could sue for the "doctor's alleged failure to perform the sterilization properly," her "right to sue for damages may be limited by the state by a statute of limitations, based on the perceived desirability of having some deadline beyond which claims cannot be maintained in a judicial proceeding." *Id.*[8]

¶ 22 Furthermore, these considerations accord with and stem from the related common law causes of action for invasion of privacy and medical battery. For example, California requires "(1) intrusion into a private place, conversation[,] or matter, (2) in a manner highly offensive to a reasonable person," in a common law claim for invasion of privacy. *Safari Club Int'l v. Rudolph*, 862 F.3d 1113, 1127 (9th Cir. 2017). Like the *Hill* test, the first element requires a penetration of a "zone of physical or sensory privacy . . . in violation of the law or social norms," while the second element involves "a 'policy' determination as to whether the alleged intrusion is 'highly offensive' under the particular circumstances." *Id.* In particular, a medical examination of the body constitutes an invasion of privacy unless the patient consents. *Smith v. Welch*, 967 P.2d 727, 732 (Kan. 1998) ("[A]s applied to a surgical operation, the distinction 'between an unauthorized operation amounting to assault and battery on the one hand, and negligence such as would constitute malpractice on the other, is that the former is intentional while the latter is unintentional.").

¶ 23 Similarly, a common law claim for medical battery rests on respect for "the individual's right to be free from unwanted bodily intrusions no matter how well intentioned." *In re Brown*, 478 So. 2d 1033, 1040 (Miss. 1985). Following

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[8] We also point out *Ambers-Phillips v. SSM DePaul Health Ctr.*, where, considering facts strikingly similar to ours, the Missouri Supreme Court determined no constitutional violation had occurred. 459 S.W.3d 901 (Mo. 2015). There, the patient also underwent an exploratory laparotomy. *Id.* at 904. "Nearly 14 years later . . . she underwent another exploratory laparotomy at a different . . . hospital because she was having pain in her side. According to the petition, during the surgery her doctors found four foreign objects that had been left inside her abdomen during the 1999 surgery." *Id.* The patient sued for medical malpractice and alleged various constitutional violations; the court rejected her claims, finding the right to bring a medical malpractice claim not to be a fundamental right and medical malpractice victims not to be a suspect class. *Id.* at 911.

this policy, no physician may subject a patient to medical treatment without their consent; "[v]iolation of this rule constitutes a battery." *Id.* Specifically, "[a]n action for total lack of consent sounds in battery, while a claim for lack of informed consent is a medical malpractice action sounding in negligence." *Bundrick v. Stewart*, 114 P.3d 1204, 1208 (Wash. Ct. App. 2005). The claims are distinguishable as "[t]he performance of an operation without first obtaining any consent thereto may fall within the concepts of assault and battery as an intentional tort, but the failure to tell the patient about the perils he faces is the breach of a duty and is appropriately considered under negligence concepts." *Id.* (explaining that a negligence claim for "informed consent protects the patient's right to know the risks of the decisions she makes about her care, whereas the cause of action for common law battery protects an individual's right to privacy and bodily integrity"). We find no reason to deviate from such concepts, and, like the California Supreme Court, find common law guidance to be an "invaluable guide in constitutional privacy litigation." *See Hill*, 865 P.2d at 649.

¶ 24 Based on Section 10's text, relevant historical documents, other states' discussions of privacy rights, and common law guidance, we interpret whether the present factual allegations constitute an unconsented physical intrusion implicating the protections of Section 10. Although we acknowledge that constitutional protections are warranted for some intrusions into one's physical autonomy, we find the incident at issue not to rise to the level of constitutional concern. We are persuaded by various points from the aforementioned authorities, the most important of which we discuss. First, we are unconvinced by the fact that because a foreign object was left in Elameto's body during the medical procedure, it could be characterized as done against her will such that would evince a lack of consent. On the contrary, Elameto affirmatively sought medical assistance to address her health concerns, consenting to the exploratory laparotomy. Further, the injury at the crux of Elameto's complaint, the failure to remove the forceps from her body during the operation, does not implicate an invasion of privacy. Rather, the alleged injury follows the consented intrusion potentially implicating significant—but separate—legal concerns. Next, taken from the *Hill* test, we believe a reasonable patient undergoing an exploratory laparotomy, like most other medical procedures, would understand that the surgery carries with it various risks, including the risk that the doctor performing the procedure may err during it. Finally, we join various courts in adopting the notion that although a lack of due care by a doctor may raise significant concerns, such action will not, barring extremely unusual circumstances, result in an intrusion serious enough to raise constitutional concerns. We find such was the case here. As a result, we find the right to privacy was not implicated by the present allegations.[9]

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[9] Although we do not find a privacy right implicated by the present facts, we can ostensibly conceive of limited factual scenarios in the medical context that would constitute an unconsented physical intrusion. For now, however, we express our belief

¶ 25 Because we find the right to privacy not to be implicated, we need not speculate as to what, if any, compelling interests existed in the enactment of Section 2210(a) such that would justify a privacy intrusion. Moreover, because our discussion defining an unconsented physical intrusion is sufficient to adjudicate the dispute before us, considerations of judicial restraint and precaution in the resolution of complex constitutional issues warrant that we need not resolve Ramsey's additional argument regarding whether Section 10 includes a state action requirement. *See Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 531 (Stevens, J., concurring) ("Faithful adherence to the doctrine of judicial restraint provides a fully adequate justification for deciding this case on the best and narrowest ground available."); *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."); *see, e.g., Kabir*, 2009 MP 19 n. 23 (noting related constitutional issue of sovereign immunity need not be addressed to resolve the appeal). We leave these important but ancillary issues for future consideration.

V. CONCLUSION

¶ 26 For the foregoing reasons, we VACATE the Order and REMAND to the trial court for further proceedings consistent with this opinion.

SO ORDERED this 27th day of December, 2018.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

/s/
PERRY B. INOS
Associate Justice

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that these limited scenarios would likely not fall into the scope of employment certification required for substitution under Section 2210(a). *See generally Kabir*, 2009 MP 19 ¶ 39–48 (discussing interplay between certification under GLA and scope of employment analysis under NMI law).

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IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

REMEDIO ELAMETO AND PEDRO PUA,
Plaintiff-Appellees,

v.

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, RAJEE IYER, M.D., AND GARY RAMSEY, M.D.,
Defendant-Appellants.

Supreme Court No. 2017-SCC-0026-CIV
Superior Court No. 16-0110

JUDGMENT

Defendant-Appellant Gary Ramsey, M.D., appeals the trial court's Order Finding Provisions of the Government Liability Act, 7 CMC §§ 2202(a)(1), (2), (e), and 7 CMC § 2210(a) Unconstitutional as They Violate Plaintiffs' Fundamental Right to Privacy Under NMI Const. art. I, § 10 ("Order"). For the reasons discussed in the accompanying opinion, the Court VACATES the portion of the Order finding 7 CMC § 2210(a) unconstitutional as applied to Appellees' under Article I, Section 10 of the NMI Constitution. The Court REMANDS the case for further proceedings consistent with the opinion.

ENTERED this 27th day of December, 2018.

/s/___________________
NORA V. BORJA
Acting Clerk of the Supreme Court