# IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

# IN AND FOR NEW CASTLE COUNTY

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| **MARGO KANAGA, M.D.,** | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | CIVIL ACTION NUMBER |
| v. | ) | |
| | ) | 92C-12-182-JOH |
| **GANNETT CO., INC. t/a THE NEWS JOURNAL CO.,** | ) | |
| | ) | |
| | ) | |
| Defendant. | ) | |

*Submitted: September 21, 2001*
*Decided: January 10, 2002*

***MEMORANDUM OPINION***

*Plaintiff's Exceptions to 's Final Report of July 27, 2001 -* ***DENIED***

James S. Green, Esq., of Seitz, Van Ogtrop & Green, P.A., attorney for plaintiff Margo Kanaga, M.D.

Mason E. Turner, Jr., Esq., of Prickett, Jones & Elliott, P.A., and Robert C. Bernius, Esq., of Nixon Peabody LLP, Washington, D.C., attorneys for defendant Gannett Co., Inc.

HERLIHY, Judge

Plaintiff Dr. Margo Kanaga seeks review of a Master's decision of July 27, 2001, ordering her to produce patient medical records containing financial or related information but with redactions of medical information. The Master also ordered the parties to equally share the cost of making those redactions. The Court had ordered Master (now Commissioner) David White to review the parties' discovery dispute and make a recommendation to it.

Dr. Kanaga argues that the records to be produced contain confidential and privileged medical information. As such, she asserts, they are protected by the Rules of Evidence, contractual restrictions and various regulations. Gannett, on the other hand, contends the records also contain information not found in her separate financial records, which are pertinent to her damage claim for loss of patients and income.

That claim arises out of an article Gannett printed in July 1992 which a jury, in a prior trial of this case, found to be libelous. The article accused Dr. Kanaga, an obstetrician/gynecologist, of performing unnecessary surgery for profit. Finding that accusation to be libelous, the jury awarded Dr. Kanaga $2.6 million in compensatory damages.

On appeal, the Supreme Court affirmed the libel verdict but reversed the damages award.[1] The Supreme Court noted that the "actual [compensatory] damages" award consisted of two undifferentiated elements: (1) humiliation and loss of reputation and (2)

[1]*Gannett Co. Inc. v. Kanaga*, Del.Supr., 750 A.2d 1174 (2000).

past and future lost income attributable to impairment of professional standing.[2] It found the evidence, as to the latter element, to be insufficient and remanded the case for a new trial on damages.[3]

*A*

This current discovery dispute must be reviewed in the larger context of that first trial, the evidence of damages at that trial, the discovery disputes prior to that trial and the reasons for the reversal and remand for a new trial on damages.

Based on the record at the earlier trial, the Supreme Court said proof of economic damages, *i.e.*, loss of patients resulting in reduced income, was "problematic."[4] The Court noted that once liability was established, a plaintiff must show causation and consequential damages.[5] Further consequential damages must be shown, the Court said, with

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[2]*Id.* at 1184.

[3]*Id.* at 1188.

[4]*Id.*

[5]*Id.* at 1188.

"reasonable probability."[6] In addition to these general principles of damages, the Supreme Court made several particularized statements about Dr. Kanaga's damages evidence:

> We agree that [an economist testifying for Dr. Kanaga]'s expert testimony lacked the required factual basis for projecting Dr. Kanaga's claimed lost earnings. [The economist] . . . assumed that the reduction was attributable to the disputed article and to no other cause.
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> * * *
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> In making his calculations of past and future earnings losses, [the economist] assumed that the newspaper article was the "cause of the decline" and that the past rate of decline would not dissipate through the remaining years of Dr. Kanaga's work life.
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> * * *
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> Moreover, the projection of future loss income was, in itself, highly speculative since it assumed that Dr. Kanaga's practice would never recover from the effect of the libel so long as she continued to practice her speciality.
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> * * *

[6] *Id.*

> Because the evidence directed to that portion of the award failed to establish her actual injury with reasonable probability under required standards for admissibility, the damages award must be reversed.[7]

Dr. Kanaga's submission resisting the production, which Gannett now seeks, appears to indicate similar evidence will be offered on economic damages in the retrial. The problem remains of providing a sufficient quantum of proof of causation and reasonable probability. The problem also remains concerning Gannett's ability to refute her damages' evidence.

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With this background, the Court will examine the Master's findings and recommendations. Such review is *de novo*.[8] The starting point is this Court's Rule 26 regarding the scope of discovery.

> (1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

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[7] *Id.* at 1186, 1188.

[8] *DiGiacobbe v. Sestak*, Del.Supr., 743 A.2d 180, 183 (1999).

> The frequency or extent of use of the discovery methods set forth in paragraph (a) shall be limited by the Court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The Court may act upon its own initiative after reasonable notice or pursuant to a motion under paragraph (c).[9]

The rule protects privileged material. Dr. Kanaga invokes this privilege of confidential medical information contained in the Rules of Evidence:

[9]Superior Court Civil Rule 26(b).

> (c) *Who may claim the privilege.* The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.[10]

No patient whose record Gannett wants to inspect has waived her privilege. And, the rule provides that Dr. Kanaga may invoke the privilege on a patient's behalf. The rationale for the physician-patient privilege is "the encouragement thereby given to the patient freely to disclose all matter which may aid in the diagnosis and treatment of disease and injury [which makes it] necessary to secure the patient from disclosure in open court of potentially embarrassing private details concerning health and bodily condition."[11]

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[10]D.R.E. 503(b).

[11]*Monsanto Co. v. Aetna Cas. and Sur. Co.*, Del.Super., No. 88C-JA-118, Ridgely, P.J. (May 26, 1992) quoting *McCormick on Evidence* 3d Ed. (1984) at 244.

In considering the significantly conflicting principles present in this dispute, the existence of the patient privilege is the most important. Candidly, this Court was very concerned with the privilege and the reasons for it in addressing the discovery disputes occurring prior to the first trial and to other privacy concerns, such as the income, expenses and other financial information on the joint tax returns of Dr. Kanaga's husband, who is an attorney. It would appear, based on comments in the Supreme Court's opinion remanding this case, that this Court was too protective of those concerns.[12] Also, those same comments raise legitimate questions about the admissibility of other evidence without the foundation documents being in evidence. For instance, the Supreme Court said this Court erred by not requiring the admission into evidence of Dr. Kanaga's tax returns before expert testimony was allowed on her income and projected loss of income.[13]

The Court is mindful of other considerations, too. Dr. Kanaga is a sole practitioner and does not have an elaborate, sophisticated record keeping system. But, she has made a claim that the July 1992 libelous article caused her to lose patients and, consequently, significant income. She testified at the first trial, for instance, how her waiting list for new patients prior to the article was three months but went to zero after the article.

The Supreme Court's opinion made two points, among others, about damages. One, this Court was too restrictive in its pretrial rulings on documents (Schedule Cs, for

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[12]*See*, *Kanaga*, 750 A.2d at 1187-88, 1189.

[13]*Id.* at 1188. This Court notes, however, the long-standing, frequent practice in many trials of this Court to allow economists, both plaintiff and defense witnesses, to offer economic projections *without* the actual tax returns being in evidence. As a result of the

example) that could be viewed and, two, Dr. Kanaga had to make a stronger showing of proof that the article *caused* loss of patients and income.

In the pretrial discovery stages for the new trial, Dr. Kanaga has offered to make available more of her financial records. But, those records alone, this Court is now satisfied, do not necessarily prove her point. More accurately, the non-medical portions of the patient records she kept could contain information which Gannett could use to show there were other reasons for her loss of patients and income. Such evidence is probative[14] on the central issue of damages in the second trial: lost patients and income.

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Supreme Court's opinion, that long-standing, accepted practice is problematical.

[14]D.R.E. 401.

Dr. Kanaga cites to two cases where production of medical records was blocked. Both cases are distinguishable in that privileged medical information was sought, but that is not what Gannett seeks. One is *Shaw v. Metzager*,[15] a medical negligence case, in which the plaintiff sought six years' worth of surgical records. The request was too broad and the reason for the production was minimally relevant, if at all, to the underlying claim of negligence. Here, Gannett's request is central both to Dr. Kanaga's claim for damages and Gannett's ability to rebut it.

The second case Dr. Kanaga cites is *Ortiz v. Ikeda*.[16] That case, too, was a medical negligence case. The plaintiff sought copies of records of seven surgeries on others similar to the one he had. He offered to redact names. This Court held that even with the redaction, the information sought was clearly covered by the physician/patient privilege in D.R.E. 503(b). That privilege barred the discovery being sought.

*Ortiz* is closer to this case than *Shaw*. In that case, the plaintiff sought the records for two reasons. One, to test the doctor's skill level for the particular surgery and, two, to question his credibility. The latter reason is applicable here and again is central to the non-medical basis of the damage claim. The records Gannett seeks contain privileged material, and to the extent they do, D.R.E. 503(b) and *Ortiz* bar introduction into evidence in this case of any such record.

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[15]Del.Super., C.A.No. 77C-DE-101, Walsh, J. (November 22, 1982).

[16]Del.Super., C.A.No. 99C-10-032, Vaughn, J. (March 26, 2001).

The Court intentionally used the word "introduction." The problem which arises here in the discovery stage, however, is the inspection of these records with only patient identifying information deleted (name, age, address, etc.), but the presence of privileged information in those records to be reviewed. The question is more complicated because the relevant information is interspersed with privileged information, or there is a substantial chance that it is. The separate financial-only records of which Dr. Kanaga has now allowed, or said she would allow, inspection are not necessarily complete as to the central damage issues in this case. The Court is satisfied, however, that Gannett has shown enough need, cause if you will, to be entitled to examine patient records. The Court also finds the financial or related information (such as why a patient discontinued seeing Dr. Kanaga) of these records to be highly relevant and directly related to the central issues in this case. In this respect, this case is analogous to *Monsanto*[17] in which discovery of medical records was permitted.

Dr. Kanaga also interposes certain contractual provisions and federal regulations as a bar to Gannett's inspection of these records. Since Dr. Kanaga will be operating under a court order to allow the inspection, these provisions and regulations are inapplicable.

But, the records, even for inspection purposes, must be redacted, to an extent, by deleting age, address, race or any other identifying information. As noted earlier, the

[17]*Supra*.

Court is mindful, and has weighed, the fact that Dr. Kanaga is a sole practitioner. The Court has also weighed the fact that there could be numerous records. The Court finds to be reasonable the Master's recommendation for the parties to share equally the costs of redaction.

These redactions, of course, do not alone address the Court's balancing of preserving the applicable privilege and the need to inspect for potentially highly relevant non-privileged material. Therefore, all those, other than Dr. Kanaga, who inspect these records must read this opinion before any such inspection. Those conducting the inspection who violate the physician/patient privilege by communicating privileged information to any other person shall be held in contempt of court. If any such examining person does not agree to that condition prior to inspecting the records, that person shall not participate in the inspection. Counsel are responsible for compliance with this directive.

The records are not to be photocopied during the inspection unless the following is done. All privileged information will be redacted prior to any copying. The party making any such copying does so at her or its own expense. If for any reason a party seeks to introduce any patient record at trial, all these redactions shall be made. The only information left on any record copies of the introduced evidence will be non-privileged in nature.

If anyone inspecting these records makes notes on a separate paper or some object like a laptop, only non-privileged information will be so transferred. Anyone failing to adhere to this instruction will also be subject to contempt of court.

Any ambiguity about whether the privilege applies is resolved in favor of the invocation of the privilege. The Court expects the parties to resolve all these issues but remains available to be consulted, if needed.

The parties have raised additional, corollary issues arising out of an earlier inspection at Dr. Kanaga's office. The Court, at this time, will not take action on those issues. It hopes the "misunderstanding" will not be repeated. It is preferable that counsel for both parties will be present or no counsel will be present at any future inspection.

*CONCLUSION*

For the foregoing reasons, plaintiff Margo Kanaga's exceptions to the Master's final report of July 27, 2001 is **DENIED**.

**IT IS SO ORDERED**.

J.