

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D22256
O/hu

_____AD3d_____

Submitted - January 30, 2009

WILLIAM F. MASTRO, J.P.
RUTH C. BALKIN
THOMAS A. DICKERSON
ARIEL E. BELEN, JJ.

2008-03299

DECISION & ORDER

Estate of Mirco Teta, etc., respondent, v Mercy
Medical Center, et al., appellants, et al., defendants.

(Index No. 1743/07)

Bower & Lawrence, P.C., New York, N.Y. (Mitchell A. Greene of counsel), for
appellants.

Rodney Drake, Bohemia, N.Y. (Joseph B. Fazio of counsel), for respondent.

In an action to recover damages for medical malpractice and wrongful death, the
defendants Mercy Medical Center, Joseph Sciammarella, and Emmanuel Romero appeal, as limited
by their brief, from so much of an order of the Supreme Court, Nassau County (Winslow, J.), dated
April 8, 2008, as denied their cross motion for a protective order regarding certain documents.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs,
and the cross motion of the defendants Mercy Medical Center, Joseph Sciammarella, and Emmanuel
Romero for a protective order is granted.

The New York Education Law shields from disclosure, among other things, “the
proceedings [and] the records relating to performance of a medical or a quality assurance review
function” (Education Law § 6527[3]; *see Kivlehan v Waltner*, 36 AD3d 597, 598). “The party
seeking to invoke the quality assurance privilege bears the burden of demonstrating that the
documents sought were prepared in accordance with the relevant statutes” (*Kivlehan v Waltner*, 36
AD3d at 598).

March 3, 2009

Page 1.

ESTATE OF MIRCO TETA v MERCY MEDICAL CENTER

Here, the appellants satisfied their burden of proof and, therefore, were entitled to the protection of Education Law § 6527(3) (*see Klingner v Mashioff*, 50 AD3d 746, 747). Accordingly, the Supreme Court should have granted the appellants' cross motion for a protective order.

The plaintiff's contention regarding the appellants' alleged waiver of this privilege is improperly raised for the first time on appeal and, in any event, is without merit.

MASTRO, J.P., BALKIN, DICKERSON and BELEN, JJ., concur.

ENTER:

A handwritten signature in black ink, reading "James Edward Pelzer". The signature is written in a cursive, flowing style.

James Edward Pelzer
Clerk of the Court