

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

D25720
W/kmg

_____AD3d_____

Argued - December 14, 2009

JOSEPH COVELLO, J.P.
DANIEL D. ANGIOLILLO
RUTH C. BALKIN
SANDRA L. SGROI, JJ.

2009-00554

DECISION & ORDER

Jesus Lopez, etc., respondent, v Juan S. Agustin, et al.,
defendants, Isaac V. Gutierrez, appellant.

(Index No. 3068/07)

Craig P. Curcio, Middletown, N.Y. (Tony Semidey of counsel), for appellant.

Paul Carmona & Associates, PLLC, Brewster, N.Y. (Pablo A. Carmona III of
counsel), for respondent.

In an action to recover damages for personal injuries and wrongful death, the defendant Isaac V. Gutierrez appeals, as limited by his brief, from so much of an order of the Supreme Court, Dutchess County (Brands, J.), dated December 2, 2008, as granted that branch of the plaintiff's motion which was to compel him to provide authorizations for the release of certain hospital records.

ORDERED that the order is affirmed insofar as appealed from, with costs.

The plaintiff, whose decedent was a passenger in a car that was struck by a car driven by the appellant, met his burden of establishing that the appellant's physical condition at the time of the accident was "in controversy," within the meaning of CPLR 3121(a) (*see Dillenbeck v Hess*, 73 NY2d 278, 286-289; *cf. Nappi v North Shore Univ. Hosp.*, 31 AD3d 509). Thus, the burden shifted to the appellant to establish that the hospital records at issue were privileged and, thus, exempt from disclosure (*see CPLR 3121[b]*; *Kivlehan v Waltner*, 36 AD3d 597, 599; *Lombardi v Hall*, 5 AD3d 739, 740; *Conlin v Birritella*, 244 AD2d 381, 382; *Navedo v Nichols*, 233 AD2d 378, 379).

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However, the appellant failed to meet his burden. Accordingly, the Supreme Court properly granted that branch of the plaintiff's motion which was to compel the appellant to provide authorizations for the release of the subject hospital records.

COVELLO, J.P., ANGIOLILLO, BALKIN and SGROI, JJ., concur.

ENTER:

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

James Edward Pelzer
Clerk of the Court