

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1662

CA 09-01218

PRESENT: SCUDDER, P.J., HURLBUTT, SMITH, AND CENTRA, JJ.

BEVERLY A. BLAIR, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

DONNA S. KELLY, AS EXECUTRIX OF THE
ESTATE OF JOSEPH R. KELLY, DECEASED, AND
TRENCO, INC., DEFENDANTS-APPELLANTS.

BOUVIER PARTNERSHIP, LLP, BUFFALO (NORMAN E.S. GREENE OF COUNSEL), FOR
DEFENDANTS-APPELLANTS.

BURGETT & ROBBINS, LLP, JAMESTOWN (LORI L. THIERFELDT OF COUNSEL), FOR
PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Chautauqua County
(James H. Dillon, J.), entered February 18, 2009 in a personal injury
action. The order, inter alia, directed the disclosure of certain
medical records of Joseph R. Kelly.

It is hereby ORDERED that the order so appealed from is
unanimously reversed on the law without costs and the motion is
denied.

Memorandum: Defendants appeal from an order that, inter alia,
granted that part of plaintiff's motion to compel disclosure of
certain medical records of Joseph R. Kelly (decedent). Although we
agree with plaintiff that decedent's medical condition at the time of
the accident is " 'in controversy' within the meaning of CPLR 3121
(a)" (*Dillenbeck v Hess*, 73 NY2d 278, 286; see also *Koump v Smith*, 25
NY2d 287), we further conclude that those records are exempt from
disclosure inasmuch as defendant Donna S. Kelly, as executrix of
decedent's estate, did not waive the physician-patient privilege
"either by way of counterclaim or as a defense to the plaintiff's
claim" (*Koump*, 25 NY2d at 295; see *Dillenbeck*, 73 NY2d at 278). We
therefore reverse the order.

Entered: December 30, 2009

Patricia L. Morgan
Clerk of the Court