THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

PROGRESSIVE PREFERRED INSURANCE COMPANY,	:	**O P I N I O N**
	:	**CASE NO. 2006-L-242**
Plaintiff-Appellee,	:	May 23, 2008
- vs -	:	
CERTAIN UNDERWRITERS AT LLOYD'S LONDON,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 03 CV 002448.

Judgment: Dismissed.

Daniel A. Richards, Weston Hurd, L.L.P., 1900 The Tower at Erieview, 1301 East Ninth Street, Cleveland, OH 44114-1862 (For Plaintiff-Appellee).

Todd M. Raskin, *Jeffrey T. Kay*, *John T. McLandrich*, and *Frank H. Scialdone,* Mazanec, Raskin & Ryder Co., L.P.A., 100 Franklin's Row, 34305 Solon Road, Solon, OH 44139 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Certain Underwriters at Lloyds London ("Lloyds") appeal from the judgment of the Lake County Court of Common Pleas, denying its motion to quash the videotape depositions of Drs. Robert Anschuetz, M.D., and Joan Rothenberg, M.D., and granting Progressive Preferred Insurance Company's ("Progressive") motion to compel, in a declaratory action. We dismiss the appeal.

{¶2} This case arises from an accident occurring November 9, 2001. *Progressive Preferred Ins. Co. v. Certain Underwriters at Lloyd's London*, 166 Ohio App.3d 1, 2006-Ohio-1442, at ¶2 (hereinafter, "*Progressive* I"). Ann Crum-Griesmer and her husband, Jerome Griesmer, took various residents of Summerville Assisted Living, in Mentor, Ohio on a scenic tour in a Summerville van. Id. The van ran into a ditch, blocking its side doors; and, in order to let other passengers out while awaiting help, Mrs. Janet Schmidt was unstrapped from her secured wheelchair near the van's rear door, and placed in an unsecured wheelchair. Id. at ¶2-4. Mrs. Schmidt was never returned to her secured wheelchair; at some point, she fell, and suffered injuries allegedly leading to her death. Id. at ¶4.

{¶3} Mrs. Schmidt's son and executor filed a wrongful death and survivorship action in the Lake County Court of Common Pleas. *Progressive* I at ¶5. Progressive had issued a business automobile insurance policy to Summerville; Lloyds had issued Summerville a health care facilities professional, general and employee benefit liability policy. Id. Each policy had limits of one million dollars per accident. Id. Lloyds denied any duty to defend or indemnify, so Progressive assumed defense of Summerville, under a reservation of rights. Id. at ¶6. In August 2003, Progressive settled the Schmidt estate's wrongful death and survivorship action for $300,000, then commenced the subject declaratory action against Lloyds, pursuant to R.C. 3937.21, seeking contribution and/or indemnification. Id. Lloyds answered, and filed its own declaratory action, seeking a finding of no coverage. Id.

{¶4} Each side moved for summary judgment. *Progressive* I at ¶7. In autumn, 2004, the trial court denied Progressive summary judgment, and granted it to Lloyds

premised on an exclusion in the latter's policy. Id. at ¶7-8. Progressive appealed. Id. at ¶8. By an opinion filed March 24, 2006, we affirmed the trial court's denial of summary judgment to Progressive, but reversed its grant of summary judgment to Lloyds, and remanded. Cf. Id. at ¶38. Based on the recently announced decision of the Supreme Court of Ohio in *Estate of Nord v. Motorists Mut. Ins. Co.*, 105 Ohio St.3d 366, 2005-Ohio-2165, we held a genuine issue of material fact existed as to whether the failure to return Mrs. Schmidt to her secured wheelchair constituted an intervening and supervening act of negligence, breaking the chain of causation commencing with driving the van into the ditch. *Progressive* I at ¶26-33.

{¶5} On remand, the matter was scheduled for trial September 14, 2006, then reset for November 20, 2006. November 9, 2006, Progressive noticed the videotape depositions of Drs. Anschuetz and Rothenberg, both of whom had treated Mrs. Schmidt, for November 15, 2006. November 13, 2006, Lloyds moved to quash, asserting three bases for its motion: (1) the physician-patient privilege, set forth at R.C. 2317.02; (2) failure by Progressive to give Lloyds' counsel timely notice of the intended depositions; and, (3) failure by Progressive to disclose expert witnesses, in compliance with both Civ.R. 26(E)(1)(b) and the applicable local rule. November 14, 2006, Progressive moved to compel.

{¶6} November 15, 2006, the trial court filed its judgment entry, denying Lloyds' motion to quash, and granting Progressive's motion to compel. In relevant part, the trial court found that Lloyds did not have standing to assert any physician-patient privilege subsisting between Drs. Anschuetz and Rothenberg and Mrs. Schmidt, and that Lloyds

failed to specify any undue hardship attendant upon attending the depositions. Lloyds noticed its appeal that same day, assigning one error:

{¶7} "The Trial Court erred to the prejudice of Defendant-Appellant Certain Underwriters at Lloyds, London in overruling its Motion to Quash and granting Plaintiff-Appellee Progressive Preferred Insurance Company's Motion to Compel thereby requiring decedent Janet Schmidt's treating physicians to testify without a waiver of the physician-patient privilege as required by O.R.C. §2317.02(B)."

{¶8} The balance of Lloyds' arguments in support of the assignment of error go to the two jurisdictional issues presented: (1) whether the trial court's order is final and appealable; and (2) whether Lloyds has standing to prosecute the appeal. We find the second issue dispositive.

{¶9} "It is well established in Ohio that the patient is the exclusive holder of the physician-patient privilege and third parties generally cannot assert the privilege on the patient's behalf. *State v. McGriff* (1996), 109 Ohio App.3d 668, 670 ***. '(I)t is axiomatic, as a prudential standing limitation, that a party is limited to asserting his or her own legal rights and interests, and not those of a third party.' *State v. Yirga*, 3rd Dist. No. 16-01-24, 2002-Ohio-2832, at ¶38, citing *Warth v. Seldin* (1975), 422 U.S. 490, 499 ***. In order to bring an action on behalf of a third party, three criteria must be satisfied:

{¶10} "'The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third

party's ability to protect his or her own interests.' (Internal citations omitted.) *Powers v. Ohio*, 499 U.S. 400, 411 ***.

{¶11} "In order to demonstrate an injury in fact, a party must be able to demonstrate that it has suffered or will suffer a specific injury traceable to the challenged action that is likely to be redressed if the court invalidates the action or inaction. *In re Estate of York* (1999), 133 Ohio App.3d 234, 241 ***." *Galbraith v. Medina, Ohio Fire Dept.*, 9th Dist. No. 05CA0051-M, 2006-Ohio-4410, at ¶5. (Parallel citations omitted.)

{¶12} In this case, Lloyds attempted to assert the physician-patient privilege belonging to the late Mrs. Schmidt or her estate. Consequently, to have standing to appeal the trial court's order, it must meet each of the factors mentioned above.

{¶13} In this case, we cannot identify any "injury in fact" that Lloyds will suffer if the depositions of Drs. Anschuetz and Rothenberg go forward. Lloyds argues vigorously that all persons attending will be subject to sanctions for violating both the physician-patient privilege, as codified at R.C. 2317.02(B)(1), and the Health Insurance Portability and Accountability Act ("HIPAA"). We respectfully disagree.

{¶14} The Ohio statutory physician-patient privilege is waived if the patient, her representative, or estate, files a wrongful death or other civil action implicating the privilege. R.C. 2317.02(B)(1)(a)(iii). Thus, the privilege regarding Mrs. Schmidt was waived when her estate filed the action underlying this declaratory action. Second, since the privacy requirements of R.C. 2317.02(B)(1) are more extensive than those mandated by HIPAA, it is not preempted by the federal enactment. See, e.g., *Grove v. Northeast Ohio Nephrology Assoc., Inc.*, 164 Ohio App.3d 829, 2005-Ohio-6914, at

¶18-23. HIPAA being inapplicable, we do not see how the parties or attorneys in this case could be penalized for violating it.

{¶15} Lloyds lacking standing, the appeal is dismissed.

{¶16} It is the further order of this court that appellant is taxed costs herein assessed. The court finds there were reasonable grounds for this appeal.

CYNTHIA WESTCOTT RICE, J., concurs,

DIANE V. GRENDELL, P.J., dissents with a Dissenting Opinion.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶ 17} I disagree with the majority's conclusion that Lloyd's lacks standing to prosecute this appeal. Therefore, I respectfully dissent.

{¶ 18} Lloyd's standing to raise the issue of privilege on behalf of a third party and its "standing to prosecute the appeal" are two distinct issues.

{¶ 19} The majority apparently does not dispute that the lower court's judgment constituted a final appealable order. This is because orders relating to "discovery of [a] privileged matter" fall under the statutory definition of an order granting or denying a "provisional remedy" under R.C. 2505.02(A)(3). *Grove v. Northeast Ohio Nephrology Assoc., Inc*., 164 Ohio App.3d 829, 2005-Ohio-6914 at ¶8. The *Grove* court further held that an order determining the discovery of a privileged matter "prevent[s] a judgment in favor" of the appellant, since "appealing subsequent to [such a judgment] would not be

meaningful because *** the privilege would have already been compromised." Id. at ¶9, citing R.C. 2505.02(B)(4).

{¶ 20} R.C. 2501.02, determining the jurisdiction of an appellate court, states that "[i]n addition to the original jurisdiction conferred by Section 3 of Article IV, Ohio Constitution, the court shall have jurisdiction upon questions of law to review, affirm, modify, set aside, or reverse judgments or *final orders* of courts of record inferior to the court of appeals." (Emphasis added). Thus, our court possesses the requisite jurisdiction to address the instant appeal.

{¶ 21} Despite the fact that a final order existed, the majority nevertheless concludes that dismissal was appropriate, because Lloyds "lacked standing to prosecute the appeal." This holding is based upon the fact that as a third party, Lloyds cannot assert the privilege on another's behalf. While I do not dispute that Lloyds, as a third party, generally cannot *assert* the privilege on behalf of another, this is not the only, nor the *primary* issue before us on appeal.

{¶ 22} Lacking standing to assert privilege, Lloyd's Motion to Quash was properly denied. Mrs. Schmidt's personal representative has not intervened to assert privilege in this case. Absent the protection of privilege, Progressive has the right to depose Drs. Anschuetz and Rothenberg.

{¶ 23} Moreover, the *actual* issue before us is whether a prior valid waiver of the physician-patient privilege in the wrongful death action by Mrs. Schmidt's estate *extends* to the matter presently before the court.

{¶ 24} With regard to this issue, a review of the case law indicates a split of authority among the districts on this issue. The Twelfth District has held that a waiver of

the physician-patient privilege in one case was "not for the benefit of appellant for use in a separate action." *Asbrock v. Brown* (Aug. 18, 1997), 12th Dist. No. 97-01-002, 1997 Ohio App. LEXIS 3655, at *6. The Second District has held that such prior waiver *may be applicable* in a separate case: "[I]t is well settled that, by filing a civil action which puts *** medical or physical health at issue, a plaintiff waives the physician-patient privilege *in that case*." *Menda v. Springfield Radiologists, Inc.* (2000), 136 Ohio App.3d 656, 660 (emphasis sic). However, "[t]he trial court must [still] determine what information is sufficiently relevant so as to be admissible at trial after the medical records have been disclosed." Id. at 661.

{¶ 25} In *Menda*, the court noted that while the physician-patient privilege is intended to be used as a "shield of privacy," it is "illogical 'to claim protection from exposure by asserting a privilege for communicating to doctors,'" when the patient is willing to parade "'before the public the mental or physical condition as to which he consulted the doctor by bringing an action for damages arising from that same condition.'" Id. at 659 (citation omitted). This reasoning is persuasive. An individual cannot turn the physician-patient privilege on and off like a faucet simply to allow the individual to collect damages and then frustrate a subsequent subrogation action by the insurance company that pays those damages.

{¶ 26} While I do not agree with the trial court's conclusion that Progressive had the power to waive the privilege by virtue of "standing in the shoes of the insured," I would affirm the lower court's decision for the reasons discussed above.

{¶ 27} Based upon the aforementioned analysis, Lloyds had standing to prosecute the appeal. However, Lloyd's arguments lack merit. I respectfully dissent, and would affirm the lower court's decision.