

COMMONWEALTH OF KENTUCKY
SUPREME COURT
No. 2008-SC-000509-MR

COMMONWEALTH OF KENTUCKY
CABINET FOR HEALTH AND FAMILY SERVICES

APPELLANT

ON APPEAL FROM JEFFERSON CIRCUIT COURT
ACTION NUMBER 06-CI-09152

ON APPEAL FROM COURT OF APPEALS
FILE NO. 2008-CA-000027

HONORABLE A.C. McKAY CHAUVIN
Judge, Eighth Division, Jefferson Circuit Court

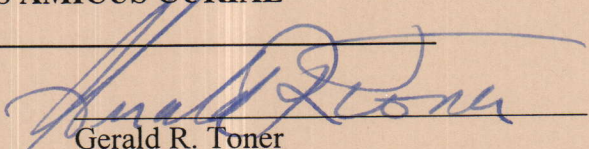
APPELLEE

and

MATTHEW BAUMLER and
CHRISTOPHER WARNER

REAL PARTIES
IN INTEREST

**KENTUCKY DEFENSE COUNSEL'S
BRIEF AS AMICUS CURIAE**


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Kentucky Defense Counsel's Brief as Amicus Curiae was mailed via U.S. Mail, postage prepaid, this 29th day of September, 2008 to: Hon. A.C. McKay Chauvin, Judge, Jefferson Circuit Court, Judicial Center 7th Floor, 700 West Jefferson Street, Louisville, Kentucky 40202; Hon. William P. Koehler, 600 West Main Street, Suite 100, Louisville, Kentucky 40202; Hon. Kenneth P. O'Brien, Sewell, O'Brien & Neal, 401 West Main Street, Suite 1800, Louisville, Kentucky 40202; Hon. Tad Thomas, Office of Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, Kentucky 40601; Hon. Ronald W. Crawford, Cabinet for Health and Family Services, Office of Legal Services, 275 East Main Street 5W-B, Frankfort, Kentucky 40621


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INTRODUCTION

The Kentucky Defense Counsel is Kentucky's premiere legal defense organization and is comprised of over 350 members. The mission of KDC is to increase the quality of legal services rendered to its members' clients and to improve the administration of justice in our courts. Many of KDC's members provide legal defense in civil actions involving personal injury claims. Their ability to obtain KASPER¹ reports, when relevant, strongly impacts their effectiveness in representing their clients' interests. For instance, KASPER reports can be an invaluable tool for discovering medical providers that plaintiffs fail to disclose in written discovery or during depositions.

This brief will assist the Court in understanding why the prohibition on disclosure of KASPER reports as provided by Section 6 of KRS 218A.202 is unconstitutional. This brief will argue that KRS 218A.202(6), as a legislatively prescribed rule of practice and procedure, is in violation of the separation of powers doctrine set forth in Sections 27 and 28 of the Kentucky constitution. As such, this Court should affirm the Court of Appeals and hold that the statute is unconstitutional.

Although the issue is framed in the context of *Baumler v. Warner*, and this brief discusses how disclosure of a KASPER report will assist the defendant in this case, disclosure of KASPER reports can be equally beneficial to plaintiffs. For example, in personal injury actions in which a defendant's level of impairment due to prescription drug use is at issue, KASPER reports would be highly relevant and beneficial to plaintiffs. A KASPER report might be the only way a plaintiff can adequately discover the extent of a defendant's prescription narcotic history.

¹ KASPER is the acronym for "Kentucky All-Schedule Prescription Electronic Reporting."

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STATEMENT OF THE CASE

I. Procedural History

On October 29, 2007, Honorable A.C. McKay Chauvin ("Judge Chauvin") entered an order requiring the Cabinet for Health and Family Services ("the Cabinet") to provide Christopher Warner ("Warner"), the Defendant in Jefferson Circuit Court Action No. 06-CI-9152, a prescription drug history for Plaintiff Matthew Baumler ("Baumler"). This order was entered upon motion by Warner for the release of Baumler's controlled substance records, commonly known as a KASPER report.

After counsel for Warner mailed the October 29 order to the Cabinet along with a written request for Baumler's KASPER report, the Cabinet on November 26, 2007 tendered a motion before Judge Chauvin requesting that he vacate the order on the grounds that KRS 218A.202(6) ("the statute") prohibits disclosure of KASPER reports "in the context of a civil action where the disclosure is sought either for the purpose of discovery or for evidence." Warner then filed a response to the Cabinet's motion wherein he argued that the KASPER report was relevant to the subject matter of the litigation and that the statute's prohibition on discovery of KASPER reports violates the separation of powers doctrine set forth in Sections 27 and 28 of the Kentucky constitution.

On December 17, 2007, Judge Chauvin held that KRS 218A.220(6) violates the separation of powers doctrine in that it encroaches upon the judicial branch's exclusive power to prescribe the rules of practice and procedure for Kentucky courts. Judge Chauvin further ordered that discovery of the KASPER report take place. The Cabinet followed by filing a petition for writ of prohibition with the Court of Appeals.

In an opinion rendered on June 13, 2008, the Court of Appeals held that KRS 218A.202(6) is unconstitutional "because it articulates a legislatively prescribed rule of practice and procedure" and violates the separation of powers doctrine of the Kentucky constitution. The Cabinet now appeals from the Court of Appeals opinion.

II. Factual Background

The circuit court action underlying this appeal is a negligence case arising from an October 14, 2003 auto accident involving Warner and Baumler. Baumler alleges that Warner was negligent in causing the accident, and seeks damages for permanent bodily injury, future medical expenses, and pain and suffering. Through partial written discovery responses, Warner obtained records from several of Baumler's medical providers. From these records Warner learned that Baumler has in the past exhibited drug-seeking behavior.

To Warner, these findings raised the issues of whether Baumler fabricated or exaggerated his injuries in order to obtain prescription pain medication, whether Baumler has a predisposition to narcotic pain medication, and whether he has candidly identified every physician who has treated him before and after the automobile accident. As such, the KASPER report is relevant for the purposes of discovering all of Baumler's treating physicians and for determining how his suspected predilection for narcotic pain medication might impact the veracity of his injury claims. It is important to note that neither the Cabinet nor Baumler have challenged the relevance of Baumler's KASPER report or the fact that it is reasonably calculated to lead to the discovery of admissible evidence. See KRE 401; CR 26.02(1).

ARGUMENT

I. **Kentucky's Statutory Prohibition on Disclosure of KASPER Data for the Purpose of Discovery or for Evidence in the Context of a Civil Action Is Per Se Unconstitutional.**

A. **The Supreme Court is Constitutionally Vested with the Exclusive Power to Prescribe Judicial Rules of Practice and Procedure.**

The statute in question clearly violates the well settled law in the Commonwealth of Kentucky that one branch of Kentucky's tripartite government may not encroach upon the inherent powers granted to any other branch. Smothers v. Lewis, 672 S.W.2d 62, 64 (Ky. 1984). Sections 27 and 28 of the Kentucky constitution explicitly mark a delineation of powers between the judicial, executive, and legislative branches and mandate that no branch shall exercise power properly belonging to another branch. Ky. Alcoholic Beverage Control Bd. v. Klein, 192 S.W.2d 735, 738 (Ky. 1946). The framers of Kentucky's constitution were undoubtedly aware of the potential damage to the interests of the citizenry if the powers of government were usurped by one branch seeking dominion over another. Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 911-12 (Ky. 1984). Accordingly, this Court has held that the separation of powers doctrine is fundamental to Kentucky's tripartite system of government and must be strictly construed. Elk Horn Coal Corp. v. Cheyenne Resources, Inc., 163 S.W.3d 408, 422 (Ky. 2005).

The judicial power of the Commonwealth is vested exclusively in one Court of Justice which is divided into a Supreme Court, a Court of Appeals, circuit courts of general jurisdiction, and district courts of limited jurisdiction. Ky. Const. § 109. Further, the Supreme Court has the sole power to prescribe rules of practice and procedure for the Court of Justice. Ky. Const. § 116. Just as it would be a violation of the separation of

powers doctrine for a court to adopt substantive law under the guise of enacting a procedural rule, it is likewise a constitutional violation when the legislature promulgates rules of practice and procedure for the Court of Justice. Elk Horn, 163 S.W.3d at 423.

The making of rules of practice in courts, in matters pertaining to the rights of individuals under the law, is inherently possessed by courts and judges. Turner v. Kentucky Bar Ass'n, 980 S.W.2d 560, 562 (Ky. 1998). Such authority is universally accepted by the courts as properly embraced within the judiciary of the commonwealth.

Through its exclusive power to promulgate rules of practice and procedure for the Court of Justice, this Court has enacted CR 26.02(1) to define the scope of discovery:

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 trial if the information sought appears **reasonably calculated to lead to the discovery of admissible evidence**.

(Emphasis added). This rule of procedure is the sole standard by which discovery may be had in a Kentucky court. The power to promulgate such a rule is vested in the Supreme Court of Kentucky and no other body by the provisions of Section 116 of the state constitution. Furthermore, this Court has promulgated CR 37.01 to provide courts with the authority to issue orders compelling discovery. CR 37.01 permits a party by motion to apply for an order to compel discovery, an action which Warner took on October 25, 2007 in order to obtain Baumler's KASPER report from the Cabinet.

In addition to the Supreme Court of Kentucky's rule making power, the judiciary is also vested with certain inherent powers to do that which is reasonably necessary for

the administration of justice. Smothers, 672 S.W.2d at 64 (citing Craft v. Commonwealth, 343 S.W.2d 150 (Ky. 1961)). The rule making power and the judicial power is one and the same, and the grant of judicial power to the courts by the constitution carries with it, as a necessary incident, the right to make that power effective in the administration of justice. Id. Once having obtained jurisdiction of a cause of action, a court has inherent power to do all things reasonably necessary to the administration of justice in the case before it. Id. Furthermore, the legislature may not shape or fashion circumstances under which this inherently judicial power may be granted or denied. Id.

From this it is evident that Judge Chauvin has the power, granted to him by the state constitution, to order the release of Baumler's KASPER report. Because Baumler's medical condition is at issue, ordering the release of his KASPER report, pursuant to CR 26.02(1) and CR 37, is reasonably necessary to the administration of justice in this case. By ensuring that Warner receives a full and accurate disclosure of Baumler's medical and prescription drug records, Warner will be better situated to defend his case. Whether Baumler has obtained prescription pain medication in quantities and at a frequency indicative of drug-seeking behavior is highly probative of whether his claimed permanent injury and medical expenses are truthful. Warner has every right to access the KASPER report for the sake of defending his case, and Judge Chauvin has the power to order disclosure under the state constitution and rules of civil procedure.

B. The Kentucky General Assembly Violated the Separation of Powers Provisions of the Kentucky Constitution When It Amended Section 6 of KRS 218A.202.

Section 6 of KRS 218A.202, as amended by the General Assembly in July 2007, is a legislative encroachment on the judiciary's exclusive power to promulgate rules of practice and procedure and constitutes a violation of the separation of powers doctrine. The statute is unconstitutional because it purports to prohibit disclosure of KASPER reports where disclosure is sought "in the context of a civil action" and "for the purpose of discovery or for evidence." See 2007 Ky. Laws Ch. 124 (SB 88). The legislative function, however, cannot interfere unreasonably with the functioning of the courts, and any unconstitutional intrusion is *per se* unreasonable. Turner, 980 S.W.2d at 563. Because the statute in question represents an unconstitutional intrusion into the power of the judiciary, it is thus unreasonable and constitutes an improper exercise of power by the legislature. As such, Section 6 of KRS 218A.202 is unconstitutional.

This Court has acted in numerous cases to strike down legislative enactments which sought to establish rules of practice and procedure for the judiciary, several of which are closely analogous to this case. The most prominent of these cases is O'Bryan v. Hedgespeth, 892 S.W.2d 517 (Ky. 1995), which involved a statute that abolished the collateral source rule.

The collateral source rule is a common law rule of evidence which states that evidence of payments received by a plaintiff from medical or disability insurers is excluded as irrelevant because such payments have no bearing on the amount of damages a plaintiff has incurred and is entitled to recover from a tortfeasor. Id. at 576. In an attempt to limit damages awards, the General Assembly in 1988 enacted KRS 411.188,

which provided that “collateral source payments...shall be an admissible fact in any civil trial.” In O’Bryan, this Court held that the statute was unconstitutional on the grounds that it amounted to a legislatively prescribed rule of practice and procedure and violated the separation of powers doctrine. Id. The opinion stated that the responsibility for deciding when evidence is relevant to an issue of fact falls squarely within the parameters of “practice and procedure” as assigned to the judicial branch by the separation of powers doctrine. Id.

Similar to the statute at issue in O’Bryan, KRS 218A.202(6) is a legislatively prescribed rule of practice and procedure in that it provides a prohibition on discovery in civil actions. The Court of Appeals has held that statutes with provisions pertaining to the timing and scope of discovery are procedural enactments which implicate the separation of powers doctrine. See Commonwealth v. DeWeese, 141 S.W.3d 372, 377 (Ky. App. 2003). While the statute in O’Bryan contravened a common law rule of evidence, KRS 218A.202(6) is in direct conflict with a judicially enacted rule of civil procedure. CR 26.02(1), which was promulgated by this Court in accordance with its constitutional mandate, provides the sole standard by which discovery may be had in a civil action. Parties are entitled to discovery regarding **any matter** which is relevant to the subject matter involved in a pending action. As such, KRS 218A.202(6) is not only an unconstitutional exercise of power by the General Assembly, it also directly contradicts a rule of procedure promulgated by the judiciary in the exercise of its exclusive constitutional power.

Similarly, this Court held that a statute was unconstitutional which declared that the recording of an oral statement of a child made prior to a judicial proceeding is

admissible evidence. Gaines v. Commonwealth, 728 S.W.2d 525 (Ky. 1987). In Gaines, the Commonwealth, pursuant to KRS 421.350(2), sought to admit a videotaped interview of an alleged child abuse victim by a case worker. Id. at 526. The defendant characterized the videotaped interview as an un-sworn out-of-court statement and sought to suppress it. Id. The trial court, however, agreed with the Commonwealth that the statute made the videotaped interview admissible despite the fact that the child had not undertaken a solemn obligation to tell the truth. Id. This Court held that the statute was an unconstitutional violation of the separation of powers doctrine because, by permitting testimony from a child who has not been declared competent by the trial court to testify as a witness, the legislature infringed on the inherent power of courts to determine the competency of witnesses as an evidentiary matter. Id. at 527.

Three years after Gaines, this Court declared another statute unconstitutional which provided that out-of-court statements made by alleged child abuse victims were admissible as evidence in any criminal or civil proceeding. Drumm v. Commonwealth, 783 S.W.2d 380, 382 (Ky. 1990). As with Gaines, the Court in Drumm likewise concluded that the statute in question, KRS 421.355, represented a legislative transgression into judicially established procedures relating to the competency of children to testify as witnesses. Id. The statute usurped the power of the judiciary to control procedure and violated Sections 27 and 28 of the Kentucky constitution. Id.

While the case before this Court involves a matter of discovery, KRS 218A.202(6) prohibits the disclosure of KASPER reports for matters pertaining to both discovery and evidence. What Gaines and Drumm demonstrate is that the legislature may not infringe upon the judiciary's power to make evidentiary determinations at trial.

The prohibition on disclosure of KASPER reports is, however, an infringement upon a trial court's role as evidentiary gatekeeper. If enforced, KRS 218A.202(6) would prevent the Cabinet or any witness from disclosing the content of KASPER reports while testifying at trial, just as it would prevent the disclosure of these reports during the discovery phase of a case. As the holdings in O'Bryan, DeWeese, Gaines, and Drumm make clear, both prohibitions are unconstitutional infringements on the judiciary's exclusive power to prescribe rules of practice and procedure.

As a general matter, courts are vested with the power to manage their own affairs so as to achieve the orderly, expeditious, accurate, and truthful disposition of causes and cases. Potter v. Eli Lilly and Co., 926 S.W.2d 449, 453 (Ky. 1996). The power of courts to manage their own affairs is derived through the power constitutionally assigned to them and by their very nature. Id. One element of this inherent authority is the power of courts to enter orders protecting the integrity of its own proceedings. Id. at 454. While Potter involved the power of a court to set aside a judgment that did not conform to the true facts of the case, the principles elucidated therein are applicable to the case *sub judice*.

Where a plaintiff has failed to fully disclose his treating physicians and has a suspected history of drug-seeking behavior, a court must be given the power to order discovery to ensure that the facts the court will hear are truthful and complete. The Kentucky constitution and CR 26.02(1) provide such a power. The quantity, frequency, and timing of Baumler's narcotic pain prescriptions is clearly relevant with respect to his claimed injuries and the medical treatment required to obtain such medication. Were it not for the power of courts to order discovery of KASPER reports, defendants in personal

injury actions would be severely limited in their ability to obtain disclosure of treating physicians and develop theories on which they could defend their cases.

As is illustrated by KRS 218A.202(6), legislative encroachment on matters of discovery interferes with the judiciary's fundamental truth-seeking process, a fact which supports the wisdom of Sections 27, 28, and 116 of the Kentucky constitution. If the legislature had the power to promulgate rules of practice and procedure for the judiciary, then the General Assembly could prohibit or permit discovery of any such matter in an effort to benefit or harm a cause for political purposes. The judiciary must remain independent and unencumbered to issue orders pertaining to discovery so that cases may be resolved in accordance with all available and relevant subject matter.

By seeking to limit discovery of KASPER reports in civil actions, the legislature enacted KRS 218A.202(6) through an unconstitutional exercise of power and imposed an encumbrance on the integrity of the judicial process. In order to uphold the separation of powers doctrine and protect the power of courts to issue orders of discovery pursuant to CR 26.02(1) and CR 37.01, this Court should hold that KRS 218A.202(6) is unconstitutional and affirm the Court of Appeals opinion granting the release of Baumler's KASPER report.

II. The Legislature Does Not Have the Power to Establish Evidentiary Privileges.

Contrary to the Attorney General's argument, the 2007 amendment to KRS 218A.202(6) did not create an evidentiary privilege with regard to KASPER data because the General Assembly does not have to power to create evidentiary privileges. Manns v. Commonwealth, 80 S.W.3d 439, 443 (Ky. 2002). The Attorney General argues that KASPER data is not subject to discovery because the legislature created a class of

confidential records that are privileged from disclosure. In support of the argument that the legislature may create privileges, the Attorney General cites Southern Bluegrass Mental Health and Mental Retardation Board, Inc. v. Hume, 609 S.W.2d 931 (Ky. App. 1980) and Tabor v. Commonwealth, 625 S.W.2d 571 (Ky. 1981). Unlike the KASPER statute, however, the statutes discussed in Southern Bluegrass and Tabor used express language to create privileges. The KASPER statute, on the other hand, does not once use the word "privilege."

More consequentially, both cases cited by the Attorney General pre-date the adoption of the Kentucky Rules of Evidence, which now control matters of evidentiary privilege. The Kentucky Rules of Evidence were adopted in 1992 by both the General Assembly and this Court. Id.; 1992 Ky. Acts ch. 324 (HB 241). After the passage of HB 241, this Court, in an order dated May 12, 1992, "adopt[ed] so much of the Kentucky Rules of Evidence as comes within the rule making power of the Court, pursuant to Ky. Const. sec. 116." Legislative Research Commission Note (7-1-92).

Included in the newly adopted rules of evidence were KRE 503-507, which provide for the following privileges: lawyer-client, husband-wife, religious, counselor-client, and psychotherapist-patient. Prior to the adoption of the rules of evidence, these privileges were codified at KRS 421.210 and KRS 421.215. See Tabor, 625 S.W.2d at 572. With the passage of HB 241, these statutory sections were repealed and all rules pertaining to privileges were consolidated in the Kentucky Rules of Evidence. 1992 Ky. Acts ch. 324. The five privileges allowed by the rules of evidence have remained constant since their adoption in 1992.

The General Assembly has not amended or added to the privileges provided by the rules of evidence because it does not have the power to do so. “[T]he General Assembly may not adopt amendments or additions to the Kentucky Rules of Evidence that constitute rules of practice and procedure under Section 116 of the Constitution of Kentucky.” KRE 1102(b). The rules of evidence were drawn up and adopted in part by act of the General Assembly. In so doing, the General Assembly wrote KRE 1102(b) and prohibited itself from amending or adding to evidentiary rules of privilege. 1992 Ky. Acts ch. 324, § 26. As such, because the General Assembly does not possess the power to add to the list of evidentiary privileges, its amendment to KRS 218A.202(6) cannot have created a privilege with regard to KASPER data.

In his brief, the Attorney General cites Manns for the proposition that matters of privilege and its exceptions are created by the legislature, not the judiciary. This interpretation of Manns, however, is incorrect and grossly misleading. The Attorney General’s reliance on Manns is inappropriate in light of the fact that the opinion expressly states that the General Assembly is powerless to amend or add privileges. Manns, 80 S.W.3d at 443.

In Manns, this Court held that the provision of a statute which mandated the admissibility of juvenile court records for impeachment in adult criminal trials was unconstitutional. Id. at 445; KRS 532.055(2)(a)(6). The provision violated the separation of powers doctrine because its subject matter fell within the scope of KRE 609(e), which “occupies the field with respect to impeachment by prior criminal adjudication.” Id. As a unilateral amendment to KRE 609, the statute violated both Section 28 of the Kentucky constitution and KRE 1102(b). Id. at 446.

The passage misleadingly alluded to in the Attorney General's brief merely states that "[t]he confidentiality afforded to juvenile records was created by the legislature, not the judiciary." This Court did not hold that *privileges* and their exceptions are created by the legislature. Rather, this Court merely acknowledged that the statute at issue provided for the *confidentiality* of a class of information in certain situations. As the Court of Appeals aptly pointed out in its opinion in this case, the concepts of privilege and confidentiality are not synonymous. Opinion, pp. 10-11. While the KASPER statute seeks to protect the confidentiality of prescription drug reports, it does not and may not create a privilege.

The power to amend and add to evidentiary privileges rests exclusively with the judiciary. KRE 1102(a). The General Assembly, on the other hand, has no such power. KRE 1102(b). As such, the General Assembly did not establish a privilege with respect to KASPER data through its amendment of KRS 218A.202(6).

III. Enforcement of the Statute By Way of Comity Is Improper in This Case.

The principle of comity cannot be applied to KRS 218A.202 because it is not a statutorily acceptable substitute for current judicially mandated procedures. See Turner, 980 S.W.2d at 563; Commonwealth v. Reneer, 734 S.W.2d 794, 797 (Ky. 1987). For a court to extend comity, the statute must not unreasonably interfere with the "orderly functioning of the courts." Id. Section 6 of KRS 218A.202, however, does not qualify for comity under this standard.

In Reneer, the Supreme Court of Kentucky elected to extend comity to a statute because it concluded that the practice and procedure legislatively prescribed would enhance rather than impair the judicial function in deciding an appropriate sentence.

Reener, 734 S.W.2d at id. In stark contrast, and as noted *supra*, the practice and procedure prescribed by KRS 218A.202(6) clearly impairs the judicial function by prohibiting discovery of information that is highly probative and relevant to the ultimate resolution of the pending action.

Should a court choose to enforce the prohibition on disclosure of KASPER reports, then parties such as Warner would be unable to know whether the opposing party disclosed all treating physicians, or whether the prescription and consumption of narcotic pain medication by the opposing party supports claimed injuries and medical expenses. Such a scenario would be a substantial impairment of the truth-seeking process and interfere with the orderly functioning of the courts. Not only would courts be prohibited from ordering discovery as they see fit, but it would create a precedent by which the legislature could gradually expand its dominion over rules of discovery and evidence in civil court proceedings.

To provide an analogy, although imperfect, imagine if Congress had passed the Health Insurance Portability and Accountability Act ("HIPAA") without including a process for obtaining discovery of medical records in civil actions. Further, what if Congress had prescribed an outright prohibition on the disclosure of medical records in judicial proceedings? Would courts have meekly deferred to the will of Congress? The answer to that is a resounding no. Courts have long exercised their powers to ensure just adjudication of the cases before them, and this is exactly what we are asking the Court to do with regard to the disclosure of KASPER data.

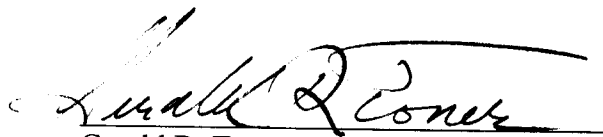
An outright prohibition on discovery, without consideration of case specific facts and circumstances, is not an acceptable substitute to the discovery rules currently in

place. The Supreme Court of Kentucky has carefully promulgated procedural rules of discovery in accordance with its constitutional mandate, and to allow the legislature to operate outside its sphere of power would leave our civil court system on less secure footing. Courts are in the best position to make decisions with regard to discovery so as to ensure just outcomes in cases pending before them. Permitting the General Assembly to enact rules of practice and procedure that contradict those promulgated by the judiciary would be an inadequate substitute to the rules that were carefully crafted by the Supreme Court of Kentucky. Thus, enforcing the unconstitutional dictates of KRS 218A.202(6) would fall well outside the bounds of comity.

CONCLUSION

Because KRS 218A.202(6) is an unconstitutional violation of the separation of powers doctrine, we respectfully request that the Court of Appeals be affirmed, and that the Cabinet for Health and Family Service's petition for writ of prohibition be denied.

Respectfully submitted,



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