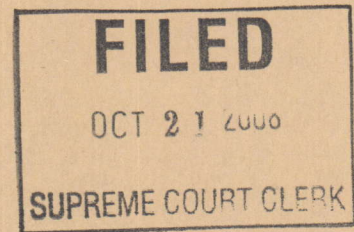


COMMONWEALTH OF KENTUCKY  
SUPREME COURT  
NO. 2008-SC-000509-MR



COMMONWEALTH OF KENTUCKY  
CABINET FOR HEALTH AND FAMILY SERVICES

PETITIONER

v.

HON. A.C. McKAY CHAUVIN, JUDGE,  
JEFFERSON CIRCUIT COURT

RESPONDENT

AND

MATTHEW BAUMLER AND  
CHRISTOPHER WARNER

REAL PARTIES IN  
INTEREST

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**BRIEF OF AMICUS CURIAE**

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ATTORNEY GENERAL

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**CERTIFICATE OF SERVICE**

The undersigned hereby certify that a true and correct copy of the Brief of Amicus Curiae was sent via U.S. Mail, postage prepaid, this 22nd day of September, 2008, to the Honorable William L. Knopf, Senior Judge, Kentucky Court of Appeals, Jefferson County Judicial Center, 700 W. Jefferson St., Suite 1020, Louisville, KY 40202-4737; the Honorable A. C. McKay Chavin, Circuit Judge, Jefferson County Judicial Center, 700 W. Jefferson St., Louisville, KY 40202-4733; Hon. Ronald W. Crawford and Hon. Wendell Overcash, Office of Legal Services, Cabinet for Health and Family Service, 275 East Main Street 5W-B, Frankfort, Kentucky 40621; Hon. William P. Koehler, III, 600 West Main Street, Suite 100, Louisville, Kentucky 40202; and Hon. Kenneth P. O'Brien and Hon. Erin C. Logsdon, Sewell, O'Brien & Neal, PLLC, 401 West Main Street, Suite 1800, Louisville, Kentucky 40202.

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**TAD THOMAS**

## I. INTRODUCTION

The Office of the Attorney General tenders the following Amicus Curiae Brief in support of the Commonwealth of Kentucky, Cabinet for Health and Family Services' appeal from the order of the Court of Appeals denying its Petition for Writ of Mandamus and Prohibition.

## **II. STATEMENT CONCERNING ORAL ARGUMENT**

The Office of Attorney General agrees that the Record on Appeal and oral argument before the Court of Appeals explored the issues pending before the Court. However, if the Court orders oral argument, the Office of the Attorney General requests to be heard.

III. STATEMENT OF POINTS & AUTHORITIES

INTRODUCTION .....ii

STATEMENT CONCERNING ORAL ARGUMENT .....iii

STATEMENT OF POINTS & AUTHORITIES .....iv

STATEMENT OF THE CASE .....1

    CR 26.02(1) .....1

    KRS 218A.202(6) .....1

ARGUMENT .....2

Thacker v. Commonwealth,  
    80 S.W.3d 451 (Ky. Ct. App. 2002) .....2

Williams v. Commonwealth,  
    213 S.W.3d 671 (Ky. 2006) .....2

Cabinet for Health & Family Services v. Clayton,  
    2007-CA-001480-OA (Ky. App.) .....3

Cabinet for Health & Family Services v. McDonald-Burkman,  
    2007-CA-001580-OA (Ky. App.) .....3

03-ORD-227 .....3

OAG 05-007 .....3

KRS § 218A.202(1) .....2

KRS § 218A.202(4) .....2

KRS § 218A.202(6) .....2, 3

**A. No direct conflict exists between the judicial prerogative over the discovery of evidence as provided by Civil Rule 26 and the protection of prescription drug records under KRS 218A.202(6) .....3**

Bender v. Eaton,  
    343 S.W.2d 799 (Ky. 1961) .....4

<u>Commonwealth v. DeWeese,</u> 141 S.W.3d 372 (Ky. App. 2003) .....	4
<u>Commonwealth v. Halsell,</u> 934 S.W.2d 552 (Ky. 1996) .....	4
<u>Cornelison v. Commonwealth,</u> 52 S.W.3d 570, 572 (Ky. 2001) .....	5
<u>Southern Bluegrass MHMR Board, Inc., v. Angelucci,</u> 609 S.W.2d 931 (Ky. App. 1980) .....	4, 5
<u>KRS 218A.202(6)</u> .....	4
<u>CR 26.01</u> .....	4, 5
<u>CR 26.02(1)</u> .....	3, 4

**B. By amending KRS 218A.202(6), the 2007 General Assembly established a privilege regarding prescription drug records, except in the specific exceptions outlined by the statute.**

<u>Commonwealth v. DeWeese,</u> 141 S.W.3d 372 (Ky. Ct. App. 2003) .....	5
<u>Commonwealth v. Halsell,</u> 934 S.W.2d 552 (Ky. 1996) .....	5
<u>Commonwealth v. Reneer,</u> 734 S.W.2d 794 (Ky. 1987) .....	7
<u>Commonwealth v. Taylor,</u> 821 S.W.2d 72 (Ky. 1990) .....	7
<u>Manns v. Commonwealth,</u> 734 S.W.2d 794 (Ky. 1987) .....	7
<u>Tabor v. Commonwealth,</u> 625 S.W.2d 571 (Ky. 1981) .....	6
<u>KRS § 218A.202(6)</u> .....	5, 7
<u>KRS § 446.080</u> .....	5

**C. In establishing a bifurcated process of *in camera* review followed by the release of potentially relevant evidence, the lower court is unnecessarily extending criminal law precedent to a civil case.  
KRS 218A.202**

Commonwealth v. Barraso,  
122 S.W.3d 554 (Ky. 2003) .....8

KRS § 218A.202 .....8

**D. Alternatively, Office of the Attorney General requests that the Court grant comity, deferring to the legislature the public policy debate regarding the public disclosure of personal prescription drug data.**

Manns v. Commonwealth,  
80 S.W.3d 439, 443 (Ky. 2002) .....9

Commonwealth v. Reneer,  
734 S.W.2d 794 (Ky. 1987) .....9

Commonwealth v. Taylor,  
821 S.W.2d 72 (Ky. 1990) .....9

**CONCLUSION** .....9

#### IV. STATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

The Appellant, the Commonwealth of Kentucky, Cabinet for Health and Family Services (hereinafter "CHFS"), has provided a thorough Statement of the Case. The Office of the Attorney General, Amicus Curiae, provides the following supplemental facts regarding its interest in these proceedings.

The underlying action upon which CHFS took its Petition for Writs of Mandamus and Prohibition involved a motor vehicle accident between Matthew Baumler and Christopher Warner. Upon the motion of the defendant, Christopher Warner, the Jefferson Circuit Court ordered the production of the prescription records of the plaintiff, Baumler, maintained in the Kentucky All-Schedule Prescription Electronic Reporting system. ROA, p. 15-16. Upon CHFS' motion to vacate the order of production, the circuit judge held that a conflict existed between its obligation to permit and enforce discovery under CR 26.02(1) and the confidentiality of the KASPER records pursuant to KRS 218A.202(6). ROA, p. 31-33.

Upon the filing of CHFS' Petition for Writs of Mandamus and Prohibition regarding the December 2007 order of the Jefferson Circuit Court, the Court of Appeals ordered the parties to serve the Attorney General and ordered the Attorney General to notify the Court of Appeals regarding intervention on the issue of constitutionality by May 14, 2008. ROA, p. 119. The privacy of prescription drug records is a matter of great public importance, and the Attorney General sought intervention in support of the constitutionality of KRS 218A.202(6). ROA, p. 122-134. For the same reasons, as explained in the Motion for Leave to File Amicus Brief, the Office of the Attorney General files this brief in support of CHFS' appeal.

## V. ARGUMENT

To aid in the detection of illegal or improper use of prescription drugs, the General Assembly directed the CHFS to establish “an electronic system for monitoring Schedules II, III, IV, and V controlled substances that are dispensed within the Commonwealth...” KRS 218A.202(1). Known as the Kentucky All Schedules Prescription Electronic Reporting (hereinafter “KASPER”) system, physicians, pharmacists, and other entities licensed to dispense prescription medication enter this data in the system on a statewide level. The data collected by KASPER includes a patient identifier, the drug dispensed, the date of dispensing, the quantity dispensed, the prescriber, and the dispenser. KRS 218A.202(4). CHFS is authorized to provide KASPER data only to those persons or entities specifically authorized to receive that data by statute. KRS 218A.202(6).

Both the Court of Appeals and this Court have recognized the constitutional significance of safeguarding KASPER data from public access. In *Thacker v. Commonwealth*, 80 S.W.3d 451 (Ky. Ct. App. 2002), the Court of Appeals, in an opinion authored by Judge William Knopf, upheld the constitutionality of KASPER against a Fourth Amendment challenge. Judge Knopf specifically found that the legislatively-imposed “safeguards against inappropriate disclosure of data” reasonably advanced the Commonwealth's interest in regulating the sale and distribution of prescription drugs. *Id.* at 455. Although overruling *Thacker* on other grounds, this Court also relied on these safeguards to uphold law enforcement's reasonable and lawful access to prescription data, stating that “KASPER data is not available to the general public, but rather only to specified personnel who certify that they are conducting 'a bona fide specific investigation involving a designated person.’” *Williams v. Commonwealth*, 213 S.W.3d 671, 683 (Ky. 2006) (quoting KRS § 218A.202(6)(a) & (b)).



Further strengthening these safeguards, the 2007 General Assembly amended the language of KRS 218A.202(6) to provide, in pertinent part, that:

Disclosure to any other person or entity, *including disclosure in the context of a civil action where the disclosure is sought either for the purpose of discovery or for evidence*, is prohibited unless specifically authorized by this section.

*Id.* (Emphasis added).

Prior to the 2007 amendment, that added the detailed language emphasized above, both the Court of Appeals and the Office of the Attorney General similarly held that KRS § 218A.202(6) created an absolute prohibition on disclosure, except where the statute specifically enumerated that disclosure was permitted. *See Cabinet for Health & Family Services v. Clayton*, 2007-CA-001480-OA (Ky. App.); *Cabinet for Health & Family Services v. McDonald-Burkman*, 2007-CA-001580-OA (Ky. App.); 03-ORD-227; and OAG 05-007.<sup>1</sup>

The question before this Court, and upon which the Office of the Attorney General appears, is whether KRS 218A.202(6) unconstitutionally conflicts with the rule making prerogative of the judiciary regarding discovery. For the following reasons, the Office of the Attorney General respectfully argues that KRS 218A.202(6) does not violate the separation of powers doctrine of the Kentucky Constitution.

**A. No direct conflict exists between the judicial prerogative over the discovery of evidence as provided by Civil Rule 26 and the protection of prescription drug records under KRS 218A.202(6).**

The trial court held that a conflict appears to exist between its obligation to oversee civil discovery and CHFS' obligation to protect KASPER records. The Attorney General respectfully disagrees. There is no direct conflict between CR 26.02(1) and a statutory provision that preserves the confidentiality of records. The creation by the legislature of a privilege that secures

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<sup>1</sup> The foregoing cases and opinions are not cited as binding precedent, which they are not, but rather submitted for the Court's consideration as the question presented, specifically the interpretation of KRS 218A.202(6), as amended, is a matter of first impression. CR 76.28(4)(c).

the confidentiality of a certain class of information does not abrogate the decision-making authority of the courts. *Southern Bluegrass Mental Health and Mental Retardation Board, Inc. v. Angelucci*, 609 S.W.2d 931 (Ky. Ct. App. 1980).

CR 26.02(1) provides that a trial court shall permit discovery “regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action...” CR 26.02(1) (emphasis added). For example, in *Southern Bluegrass Mental Health and Mental Retardation Board, Inc.*, this Court held that the legislature’s enactment of a psychologist-patient privilege, which provided no exception, did not abrogate the authority of the court. *Southern Bluegrass Mental Health and Mental Retardation Board, Inc.*, 609 S.W.2d at 34. As argued below, the KRS 218A.202(6) amendment by the 2007 General Assembly established an evidentiary privilege for KASPER records. Therefore, the Jefferson Circuit Court erred when it failed to protect KASPER records from discovery pursuant to its duty to do so under CR 26.02(1).

Further, this Court held that the *only* remedy to a court order releasing otherwise confidential or privileged records is by writ of mandamus or prohibition:

[W]e believe it is apparent that petitioners are without an adequate remedy by appeal or otherwise. Once the information is furnished it cannot be recalled and the privilege is, in effect, destroyed. The petitioner has no other adequate remedy.

*Bender v. Eaton*, 343 S.W.2d 799 (Ky. 1961), *See also* Commentary 4 to CR 26.01 (“A writ of prohibition or mandamus...is the proper method to bring to the immediate attention of the appellate court a claimed abuse of discovery, such as seeking to prevent the court-ordered production or disclosure of confidential or privileged information.”)

In addition to the clear language of CR 26.02(1), which preserves privileged records, it is a hallmark of statutory construction that courts must “try to harmonize the law in order to give effect to both sections of statutes...” *Commonwealth v. DeWeese*, 141 S.W.3d 372, 376 (Ky. App. 2003) (citing *Commonwealth v. Halsell*, 934 S.W.2d 552 (Ky. 1996)). Further, “it is presumed that the legislature, in enacting a statute, has done so in accordance with constitutional

requirements.” *Commonwealth v. DeWeese*, 141 S.W.3d 372 (Ky. App. 2003) (citing *Cornelison v. Commonwealth*, 52 S.W.3d 570, 572 (Ky. 2001)).

Therefore, consistent with prior appellate rulings concerning the confidentiality of KASPER records, which are binding on the Jefferson Circuit Court, the trial court should have preserved the statutory confidentiality of those records pursuant to CR 26.01(2) by honoring the privilege established by the legislature.

**B. By amending KRS 218A.202(6), the 2007 General Assembly established a privilege regarding prescription drug records, except in the specific exceptions outlined by the statute.**

Pursuant to statutory and precedential authority, all statutes are to be liberally construed with a view to promoting their objects and carrying out the intent of the legislature. KRS § 446.080; *Commonwealth v. DeWeese*, 141 S.W.3d 372, 376 (Ky. Ct. App. 2003) (citing *Commonwealth v. Halsell*, 934 S.W.2d 552 (Ky. 1996)). The clear intent of KRS 218A.202(6) is to create a class of confidential records, privileged from disclosure, except for those purposes that reasonably advance the Commonwealth's interest in regulating the sale and distribution of prescription drugs.

The Court has previously addressed the requirements for determining a legislatively enacted privilege:

In looking at the rationale for privileged communications, “four fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:

- (1) The communications must originate in a confidence that they will not be disclosed.
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relationship by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation ..." [citations omitted]

The four conditions above give rise to the reason for an exception to the proposition that all persons are duty bound to give testimony upon all facts inquired of in a court of justice.

*Tabor v. Commonwealth*, 625 S.W.2d 571, 572-573 (Ky. 1981).

In this case, these four (4) requirements are present. Prescribers and dispensers of prescription drugs report data to CHFS pursuant to a comprehensive legislative plan, which specifically includes the requirements of confidentiality. The confidentiality of the records is essential to the legislative plan, which, according to this Court, is constitutional for the very reason of this confidentiality. *Williams, supra*. Preserving the confidentiality and reasonable oversight of prescription drug records is a matter of great public concern. Finally, opening these records to general review would be a far greater injury than requiring civil defendants to obtain this information by other means of civil discovery, including depositions.

In this case, the Court of Appeals specifically recognized the danger of allowing the free disclosure of KASPER records:

... the Court agrees with the Cabinet and the Attorney General that allowing [KASPER] records to be freely disclosed upon the request of a party, without a trial court's preliminary scrutiny as to the relevancy of their content, could undermine the integrity and efficacy of this valuable law enforcement tool as well as potentially facilitate "fishing expeditions."

Where the lower court erred was in distinguishing confidential records from legislative privileges, thereby placing trial courts, rather than the legislature, in the position of determining a policy matter – specifically, whether records should be privileged from disclosure.

Section 116 of the Kentucky Constitution reserves to the Supreme Court the power to prescribe rules of practice and procedure for the Court of Justice. This constitutional power may

not be exercised or usurped by another branch of government. Ky. Const. § 28. In cases where the legislature has enacted procedural provisions intended to invade the rule making prerogative of the judiciary, the Kentucky Supreme Court has either struck down the provisions as violative of this separation of powers doctrine or, in rare cases, has declined to strike down the statute under the principle of comity. *See, generally, Manns v. Commonwealth*, 80 S.W.3d 439, 443-444 (Ky. 2002) (discussing *Commonwealth v. Reneer*, 734 S.W.2d 794 (Ky. 1987), and *Commonwealth v. Taylor*, 821 S.W.2d 72 (Ky. 1990)).

However, matters of privilege and the exceptions to the same are created by the legislature, not the judiciary. *Manns*, supra at 444. By amending KRS 218A.202(6) to provide that KASPER records are privileged from disclosure, the legislature did not usurp the authority of the judiciary to promulgate rules of practice and procedure. A statute that permits, prohibits or regulates access to records, such as KRS 218A.202(6), is not a rule of discovery. *See DeWeese*, 141 S.W.3d at 377; *Manns v. Commonwealth*, 80 S.W.3d 439 (Ky. 2002) (provision allowing introduction of a defendant's juvenile court records during penalty phase of trial not an unreasonable encroachment upon the prerogatives of the judiciary and thus not violative of separation of powers).

KRS 218A.202(6) establishes the non-disclosure KASPER records in the same way that the General Assembly has preserved the confidentiality of juvenile records, except under designated circumstances, or the privilege afforded to psychiatrist-patient communications. *Manns, supra; Southern Bluegrass, supra*. It is not the prerogative of the judiciary to make such laws by rulemaking. It is, however, the judiciary's prerogative and duty to enforce such statutory protections once enacted.

C. In establishing a bifurcated process of *in camera* review followed by the release of potentially relevant evidence, the lower court is unnecessarily extending criminal law precedent to a civil case.

Although recognizing the well-reasoned legislative purposes for the non-disclosure of KASPER records, the lower courts have held that any measure which hinders the release of potentially relevant evidence must be evaluated by the judiciary. This is an unnecessary extension of current law and the precedent of this Court.

In *Commonwealth v. Barraso*, 122 S.W.3d 554 (Ky. 2003), this Court held that a defendant's constitutional right to compulsory process may a legislative-enacted evidentiary privilege. Writing for the majority, former Justice William S. Cooper reasoned:

If the psychotherapy records of a crucial prosecution witness contain evidence probative of the witness's ability to recall, comprehend, and accurately relate the subject matter of the testimony, **the defendant's right to compulsory process must prevail over the witness's psychotherapist-patient privilege**. Upon a proper preliminary showing, described *infra*, the witness's psychotherapy records are subject to production for an *in camera* inspection to determine whether the records contain exculpatory evidence, including evidence relevant to the witness's credibility. ...

... *in camera* review of a witness's psychotherapy records is authorized only upon receipt of evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence.

*Id.* at 564-565 (emphasis added).

The case at bar however is not a criminal case in which a defendant's compulsory process rights are at issue. Therefore, the privilege and confidentiality of the records must prevail and not even an *in camera* review is warranted.

For the foregoing reasons, the Attorney General requests that the Court reverse the Opinion and Order of the Court of Appeals, and enter Writs of Prohibition and Mandamus as requested by Appellant.

**D. Alternatively, Office of the Attorney General requests that the Court grant comity, deferring to the legislature the public policy debate regarding the public disclosure of personal prescription drug data.**

Even in cases where this Court has struck down legislative provisions as violative of the separation of powers and as a usurpation of the judiciary prerogative over practice and procedure, the Court has granted comity in those instances where a legislatively prescribed plicy would enhance rather than impair the judicial function. *Manns v. Commonwealth*, 80 S.W.3d 439, 443-444 (Ky. 2002) (discussing *Commonwealth v. Reneer*, 734 S.W.2d 794 (Ky. 1987); and *Commonwealth v. Taylor*, 821 S.W.2d 72 (Ky. 1990). Clearly recognizing the need to keep prescription drug data confidential, the Court of Appeals Opinion and Order would require trial courts to order KASPER records for *in camera* review in any civil case in which a party's prescription drug history may lead to potentially relevant evidence. This result is untenable, since a fishing expedition now becomes an investigative assignment for the trial court.

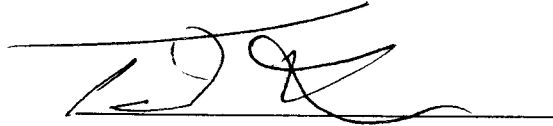
Rather than proceed down this slippery slope, the Attorney General respectfully requests that this Court grant comity and leave to the Kentucky legislature the burden of debating public policy issues concerning the privacy of personal prescription drug data.

### CONCLUSION

The Attorney General joins the CHFS in urging this Court to find that the restrictions regarding disclosure of KASPER data are within the constitutional power of the General Assembly and not subject to discovery in any civil case. If the Court cannot so find, the Attorney General respectfully asks the Court to grant the restrictions in the KASPER statute comity.

Respectfully submitted,

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ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read "TAD THOMAS", is written over a horizontal line.

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