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, Jefferson Circuit Court — **APPELLEE**

and

MATTHEW BAUMLER and
CHRISTOPHER WARNER — **REAL PARTIES IN INTEREST**

BRIEF FOR CHRISTOPHER WARNER

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Brief for Christopher Warner was mailed via U.S. Mail postage prepaid this 10th day of November, 2008 to: Hon. A.C. McKay Chauvin, Judge, Jefferson Circuit Court, Judicial Center, 7th Floor, 700 West Jefferson Street, Louisville, KY 40202, Hon. William P. Koehler, 600 West Main Street, Suite 100, Louisville, Kentucky 40202; Hon. Ronald W. Crawford, Cabinet for Health and Family Services, Office of Legal Services, 275 East Main Street, Suite 5W-B, Frankfort, KY 40621; Hon. Tad Thomas, Office of Attorney General, 700 Capitol Avenue, Suite 118, Frankfort, KY 40601; Hon. Gerald R. Toner, O'Bryan, Brown & Toner, 1500 South Fourth Avenue, Louisville, KY 40202 and that the original and ten (10) copies have been sent Susan Stokley Clary, Clerk, Supreme Court of Kentucky, 209 Capitol Building, 700 Capital Avenue, Frankfort, KY 40601-3488.

KENNETH P. O'BRIEN

STATEMENT CONCERNING ORAL ARGUMENT

Appellee has no objection to oral argument should this Court decide that it would be beneficial.

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COUNTERSTATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

This appeal concerns the constitutionality of KRS 218A.202(6), which prohibits the Cabinet for Health and Family Services ("Cabinet") from disclosing Kentucky All-Schedule Prescription Electronic Reporting data – commonly known as "KASPER" data – in civil actions where the disclosure is sought for the purpose of discovery. While the prohibition against disclosure in civil actions is absolute, the statute contains numerous exceptions that allow other state and private entities to obtain KASPER data upon satisfying certain criteria, including law enforcement personnel, state-operated Medicaid programs, grand juries, private practitioners and pharmacists, the Kentucky Board of Medical Licensure, the Kentucky Board of Nursing, and the Kentucky Department of Medicaid Services. KRS 218A.202(6)(a)-(h). Additionally, the statute permits the Department of Medicaid Services to search KASPER data to identify Medicaid recipients whose usage of controlled substances may be appropriately managed by a single outpatient pharmacy or primary care physician, and to introduce KASPER data as evidence in administrative hearings held in accordance with KRS 13B. KRS 218A.202(7), (8)(c).

The action underlying this appeal is an ongoing Jefferson Circuit Court case arising from an October 14, 2003 auto accident involving the Real Parties in Interest, Plaintiff Matthew Baumler ("Baumler") and Defendant Christopher Warner ("Warner"). Baumler alleges that Warner was negligent in causing the accident, and seeks damages for permanent bodily injury, future medical expenses, and pain and suffering. (ROA at 40). In the process of discovery Warner obtained records from several of Baumler's medical providers. These records indicate that Baumler (1) routinely ran out of his pain medication before his prescription was scheduled to be refilled, (2) claimed on at least

two occasions that his medication had been stolen, (3) was discharged from the care of at least one physician for violating his pain management protocol, and (4) has a history of cocaine use. (ROA at 40). These findings raise the issues of whether Baumler fabricated or exaggerated his injuries in order to obtain drugs, and whether Baumler has a predisposition to narcotic pain medications. Additionally, as explained to the Court of Appeals at oral argument below, Baumler's medical and health insurance records indicate that Baumler has been treated by a number of physicians in addition to those disclosed in response to Warner's interrogatories. This raises this issue of whether all of Baumler's treating physicians have been correctly identified.

On October 25, 2007 Warner filed a motion with the Trial Court to obtain a KASPER report from the Cabinet documenting Baumler's prescription drug history. Circuit Court Judge A. C. McKay Chauvin ("Chauvin") granted the Motion on October 29, 2007 (Order, attached as App. 1). The Order expressly provided that any KASPER records produced by the Cabinet "may be used by counsel for litigation or claims evaluation purposes only and in connection with the trial of this matter and are not to be disclosed to anyone who is not involved in this litigation." (Order at 2).

On November 26, 2007 the Cabinet filed a motion to vacate the Order on the ground that KRS 218A.202(6) prohibits the 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." (ROA at 41). Warner responded on December 10, 2007, arguing that Section 6 of KRS 218A.202 violates the separation of powers provisions of the Kentucky Constitution, which assign to the Supreme Court the power to prescribe the rules of practice and procedure for the Court of Justice. (ROA at 41). On December 12, 2007 the Cabinet filed a Notice of Supplementation with the Trial Court, asking the Court to take notice of two recent Court of Appeals decisions which granted writs of prohibition preventing the enforcement of orders directing the production of KASPER reports on the

ground that such production was prohibited by KRS 218A.202(6). (ROA at 41). However, as noted by both Warner and the Court of Appeals in its opinion below, both of these cases were decided prior to the 2007 revision of the statute which added the language prohibiting disclosure of KASPER data for purposes of discovery or for evidence in a civil trial, and therefore did not raise the constitutional issues involved in this case. (ROA at 174, n.8).[1]

Judge Chauvin denied the Cabinet's Motion to Vacate on December 17, 2007, holding that KRS 218.202(6) impermissibly infringed on the power of the judicial branch to determine the scope of discovery in civil trials. (Order attached as App. 2). The Cabinet then Petitioned the Court of Appeals for a Writ of Prohibition to prevent enforcement of the Order on the ground that disclosure was prohibited by KRS 218A.202(6). (ROA at 6). Additionally, The Kentucky Attorney General intervened in support of the Petition. The Attorney General argued that disclosure of KASPER data was inappropriate in this case on the ground that KRS 218A.202 creates a privilege for KASPER data, and that CR 26.02(1) expressly excludes privileged matter from the scope of discovery. (ROA at 171). The Court of Appeals heard oral argument on May 21, 2008, and decided the case on June 13, 2008.

The Court of Appeals **denied** the bulk of the Cabinet's Petition, holding that KRS 218A.202(6) is in direct and irreconcilable conflict with the rules governing discovery in civil trials, and that the statute unconstitutionally encroaches on the Judiciary's power to supervise the scope of discovery in civil cases. (ROA at 178). The Court further held that there is a clear distinction between "privilege" and "confidentiality," and that KRS 218A.202 has the effect of making KASPER data confidential, not privileged. (ROA at 177-178). Accordingly, discovery of Baumler's KASPER data was held appropriate

[1] Warner submitted affidavits to the Court of Appeals confirming that neither litigant raised the separation of power argument in those actions.

under CR 26.02(1). However, the Court **granted** the Petition to the extent that it did not order Baumler's KASPER data to be released directly to Warner's attorneys. Rather, in recognition that undue disclosure of KASPER data could undermine the usefulness of the data as an investigatory tool, the Court held that the party requesting disclosure must first make a showing of good cause, and that the KASPER data must then be produced under seal for *in camera* review by the Trial Court to determine relevancy. (ROA at 179-180). Additionally, the Court held that any release of KASPER documents to the parties must be conditioned upon a confidentiality provision similar to that contained in the Trial Court's Order. (ROA at 180). This Appeal followed.

The Cabinet submitted its Brief on September 5, 2008. On September 22, 2008 the Office of the Attorney General submitted an Amicus Curiae Brief in support of the Cabinet. While both Briefs argue for reversal of the Court of Appeals' opinion below, they do so on contradictory grounds. Accordingly, issues raised by these Briefs will be treated in separate sections below.

ARGUMENT

Before considering arguments in support of the Appellee, it is important to note what is not at issue in this Appeal. First, the *interpretation* of KRS 218A.202(6) is not at issue. Like the Cabinet (Appellant's Brief at 2-3), Warner understands KRS 218A.202(6) to constitute an absolute prohibition on the release of KASPER data to parties in a civil suit for the purposes of discovery or for evidence. Indeed, it is the very clarity of the prohibition that grounds Warner's argument in this Appeal: since the statute's prohibition on release of KASPER data for the purpose of civil discovery contains no exceptions, it is impossible to read KRS 218A.202(6) as anything other than a direct legislative encroachment on the ability of the judicial branch to determine what is properly discoverable in a civil action.

Second, the *relevance* of KASPER data to this case is not at issue. The Supreme Court has defined the scope of civil discovery in CR 26.02(1) to include:

> *[A]ny 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.*

(emphasis added). Since KASPER data is unquestionably related "to the subject matter" of this case (the extent and severity of Baumler's injuries following his auto accident; whether Baumler has fully disclosed his medical history), and since KASPER data would unquestionably indicate the "identity and location" of Baumler's treating physicians, the KASPER data requested by Warner clearly passes the relevancy requirement of CR 26.02(1). Indeed, KASPER data is the *only* way Warner can discovery the identity of physicians who treated Baumler but were paid in cash, and are therefore not be listed in Baumler's health insurance records. Neither the Cabinet nor the Amicus Curiae make any serious argument that, absent KRS 218A.202(6), KASPER data would not be discoverable under the Civil Rules.

Hence, the sole issues for this Court are whether KRS 218A.202(6) violates Kentucky's scheme of separation of powers and, if so, whether the Court should enforce KRS 218A.202(6) on the basis of comity. Warner's position on these matters is straightforward: KRS 218A.202(6), *clearly* encroaches on the judiciary's power to make rules for the practice and procedure of the courts, and hence violates the separation of power provisions of the Kentucky Constitution. Moreover, the statute should not be enforced on the ground of comity since it is neither an appropriate substitute for a current judicially mandated procedure, nor a reasonable limitation on the functioning of the Courts.

I. KRS 218A.202(6) Violates the Separation of Powers Provisions of the Kentucky Constitution.

A. The Kentucky Constitution Vests the Power to Prescribe Rules of Practice and Procedure Exclusively in the Supreme Court.

A keystone of the Kentucky Constitution is its express and unambiguous commitment to the separation of powers. Section 27 of the Kentucky Constitution provides that the powers of government shall be divided into "three distinct departments . . . to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." Section 28 of the Constitution provides that no department "shall exercise any power properly belonging to either of the others." Hence,

> Our present Constitution contains explicit provisions which, on one hand, *mandate* separation among the three branches of government, and on the other hand, specifically *prohibit* incursion of one branch of government into the powers and functions of the other. Thus, our constitution has a double-barreled, positive-negative approach.

Legislative Research Commission v. Brown, 664 S.W.2d 907, 912 (Ky. 1984) (emphasis added). Kentucky Courts have described the separation of powers as the "cardinal principle of our republican form of government," *Bloemer v. Turner*, 281 Ky. 832, 137 S.W.2d 387, 390 (1940), and among the most "emphatically cherished and guarded" principles of our Constitution. *Arnett v. Meredith*, 275 Ky. 223, 121 S.W.2d 36, 38 (1938). Other decisions hold that the separation of powers "is fundamental to Kentucky's tripartite system of government and must be 'strictly construed.'" *Elkhorn Coal Corp. v. Cheyenne Resources, Inc.*, 163 S.W.3d 408, 423 (Ky. 2005) (citing *Legislative Research Commission*, 664 S.W.2d at 911). As this Court stated in *Sibert v. Garrett*, 197 Ky. 17, 246 S.W. 455, 457 (1922), "[p]erhaps no state forming a part of the national government of the United States has a Constitution whose language more emphatically separates and perpetuates what might be termed the American tripod form of government than does our Constitution."

Critically, the Kentucky Constitution places the Commonwealth's judicial power – including power to prescribe rules of practice and procedure – exclusively within the control of the judicial branch of government. Section 109 provides that the judicial power "shall be vested *exclusively* in one Court of Justice," consisting of a Supreme Court, a Court of Appeals, a Circuit Court of general jurisdiction, and a District Court of limited jurisdiction. (Emphasis added). Section 116 provides that "[t]he Supreme Court shall have the power to prescribe . . . rules of practice and procedure for the Court of Justice." These provisions are explicit, unambiguous, and directive. Additionally, they are reflected in "longstanding decisional law," which recognizes the power to prescribe rules of practice and procedure as "inherent in the court," and as "universally accepted . . . as properly embraced within the Judicial Department of the government." *Turner v. Kentucky Bar Association*, 980 S.W.2d 560, 562 (Ky. 1998) (citing *Ratterman v. Stapleton*, 371 S.W.2d 939, 941 (Ky. 1963) and *Hobson v. Kentucky Trust Co.*, 303 Ky. 493, 197 S.W.2d 454, 457 (1946)). Finally, these provisions clearly encompass the power to regulate the timing and scope of discovery. As this Court held in *Com. v. DeWeese*, 141 S.W.3d 372, 377 (Ky. App. 2003), since the timing and scope of discovery are "purely a procedural matter," the power to regulate these matters is reserved to the Supreme Court under Ky. Const. § 116.

B. KRS 218A.202(6) Encroaches on the Power of the Supreme Court to Prescribe Rules for Practice and Procedure.

As suggested above, *infra* at 5, there is no question that, absent KRS 218A.202(6), KASPER data would be discoverable in this case. Since the data is relevant to the severity of Baumler's present and past injuries, and since the data would unquestionably disclose the identity of Baumler's treating physicians, including those Baumler may have paid in cash, the data clearly passes the relevancy requirement of CR 26.02(1). However, the discovery of such data is thwarted by operation of KRS

218A.202(6), which prohibits the disclosure of KASPER data "in the context of a civil action where the disclosure is sought either for the purpose of discovery or for evidence." The statute eliminates – with no exceptions – the ability of a party in a civil suit to obtain data that the Supreme Court has deemed to be discoverable under the Civil Rules. As such, the statute infringes on the ability of the Court to prescribe rules for the timing and scope of discovery, and is per se unconstitutional. *Turner,* 980 S.W.2d at 563.

As Warner noted in his Brief to the Court of Appeals below, this is not a mere theoretical or speculative argument. Kentucky Courts have struck down legislative encroachments on the judiciary's power to prescribe rules in similar contexts. In *O'Bryan v. Hedgespeth*, 892 S.W. 2d 571 (Ky. 1995), this Court considered the enforceability of KRS 411.188, a statute which abolished the longstanding judicial rule that collateral source payments for injury were not admissible in civil trials. The Court held that the General Assembly had no authority to enact such legislation on the ground that it infringes upon the powers granted to the Supreme Court under the Kentucky Constitution:

> Responsibility for deciding when evidence is relevant to an issue of fact which must be judicially determined, such as the medical expenses incurred for treatment of personal injuries, falls squarely within the parameters of "practice and procedure" assigned to the judicial branch by the separation of powers doctrine and [Ky. Const.] Section 116. . . . Thus, as a rule of practice and procedure, the present statute is constitutionally defective under the separation of powers doctrine.

Id. at 576, 578. Similarly, the Court has struck down statutes encroaching on other powers granted to the Supreme Court under Ky. Const. § 116, including the power to promulgate rules determining who is authorized to practice law, *Turner*, 980 S.W.2d at 563, and to define its own appellate jurisdiction. *Elkhorn Coal Corp.*, 163 S.W.3d at 424. These decisions suggest that the appropriate response to statutory encroachments on the powers delegated to the judiciary under the Kentucky Constitution is to declare the

statute unconstitutional. Indeed, it the *obligation* of this Court to declare such statutes unconstitutional. *DeWeese*, 141 S.W.3d at 377-78.

In this case, KRS 218A.202(6) encroaches on the powers of the judiciary by preventing the release of information that would otherwise be discoverable under the Civil Rules. Since the power to prescribe rules regulating discovery is delegated exclusively to the Supreme Court under Ky. Const. § 116, *DeWeese*, 141 S.W.3d at 377, this Court should find that Judge Chauvin correctly determined that KRS 218A.202(6) was a legislative encroachment on the constitutional powers of the judiciary, and acted appropriately in ordering the Cabinet to produce Baumler's KASPER report.

II. None of the Cabinet's or Amicus Curiae's Arguments in Support of KRS 218A.202(6) Withstand Scrutiny.

The Cabinet makes at least two argument in support of the constitutionality of KRS 218A.202(6): that (1) discovery of KASPER data in civil trials impermissibly violates the privacy rights of patients, and (2) this Court approved a legislative discovery rule in *Comm. v. DeWeese*. Neither argument should carry any weight with this Court.

A. Discovery of KASPER Data does not Violate Baumler's Right to Privacy.

Citing *Thacker v. Comm.*, 80 S.W.3d 451 (Ky. App. 2002), the Cabinet appears to argue that, because KASPER data contains medical information that is subject to "the constitutional provisions against searches and seizures," *id.* at 454, such data should be undiscoverable in a civil case.[2] (Appellant's Brief at 4-5). Specifically, the Cabinet argues that, while KRS 218A.202(6)(a)-(b) permits law enforcement officials to obtain KASPER data, they must first articulate a bona fide suspicion that the individual about whom they are inquiring has violated a provision of KRS Chapter 218A. *Id.* at 455.

[2] Warner submits that it is difficult to discern the exact nature of the argument the Cabinet is making on Pages 4-5 of its brief. While the Cabinet *appears* to be arguing that disclosure of KASPER data in civil trials inherently violates the right of privacy, it does not make this conclusion explicit. In what follows, this Brief will respond to the logical implication of the Cabinet's argument, even if that implication is not stated expressly.

Since parties to a civil suit need not articulate such a suspicion under KRS 218A.202(6), allowing KASPER data to be discovered in a civil trial is, in the Cabinet's view, equivalent to permitting a search and seizure without probable cause.

This argument fails on multiple levels. First, even if the argument is true, it is not an argument on behalf of KRS 218A.202(6). The Cabinet's argument is a *general* argument against the disclosure of KASPER data. It does nothing to demonstrate that, in enacting KRS 218A.202(6), the General Assembly was acting within the proper sphere of its constitutional legislative power, or that the statute's encroachment on the prerogatives of the judicial branch should be permitted on the ground of comity. The argument is simply irrelevant to the constitutional issues before this Court.

Second, the statute authorizes the Cabinet to provide KASPER data to many other entities besides law enforcement officials, and *none* of these entities are required to articulate a "bona fide" suspicion of individual wrongdoing. For example, the statute authorizes the Cabinet to provide KASPER data to state-operated Medicare programs, KRS 218A.202(6)(c), and physicians and pharmacists who certify that they need this information to provide treatment to current patients. KRS 218A.202(6)(e). Similarly, the statute authorizes disclosure of KASPER data to members of the Kentucky Board of Medical Licensure and the Kentucky Board of Nursing, not on the basis of a bona fide suspicion of individual wrongdoing, but simply on the basis that a provider or nurse is associated with a business under investigation for improper prescribing practices, or lives in a geographical area in which there is a "substantial likelihood that inappropriate subscribing may be occurring." KRS 218A.202(6)(f)-(g). If the Cabinet's argument is correct, it will require restricting access to KASPER data for each of these entities, or amending the statute to require these entities to articulate a bona fide suspicion of individual wrongdoing.

Third, the Court of Appeals opinion does not grant civil parties *carte blanche* to discover KASPER data. The opinion expressly affirms that, before such data can be discovered, the parties must first make a showing of good cause, as Warner did below, and that the KASPER data must be produced under seal for *in camera* review by the Trial Court to determine relevancy. (ROA at 179-80). The Cabinet does not explain why these requirements do not adequately protect the privacy interests of the physician and patient. Indeed the *in camera* review procedure suggested in the Court of Appeals opinion provides even *greater* privacy protection than the "individualized suspicion" requirement of KRS 218A.202(6)(a)-(b), since Baumler will have the ability to contest Warner's argument for good cause, while the criminal suspect has neither the statutory right nor opportunity to contest a law enforcement officer's assertion that there are reasonable grounds to suspect a target of an investigation of violating the provisions of KRS Chapter 218A.

Fourth, should this Court affirm the Court of Appeals' opinion below, Warner will not receive a copy of Baumler's KASPER report, but only those portions of the record that satisfy the relevancy requirements of CR 26.02(1). (ROA at 180). Warner anticipates that, since Baumler's KASPER data is relevant to this case only to the extent that it discloses otherwise unknown treating physicians, the Trial Court will simply compare the physicians listed in Baumler's KASPER report against those identified in Baumler's interrogatories, and those discovered through a review of Baumler's medical records, to determine if the KASPER report lists any additional physicians. If the KASPER report does not list additional physicians, Warner will receive no additional information. Conversely, if the KASPER report does list additional physicians, Warner will receive only the names and address of those physicians. In other words, Warner will receive *only that information Baumler was required to disclose in response to Warner's interrogatories in the first place.* Hence, the *in camera* procedure suggested in the Court

of Appeal's opinion will do no more violence to Baumler's privacy right than does the normal process of civil discovery.

Finally, and most importantly, *Thacker* has been superseded by subsequent case law, which clearly holds that citizens have no privacy interest in KASPER data. In *Williams v. Comm.*, 213 S.W.3d 671 (Ky. 2007) this Court considered the claim by a physician that a warrantless examination by a police officer of his KASPER report was an unreasonable search and seizure under both the federal and Kentucky Constitutions. The Court dismissed this claim with the following words:

> It is axiomatic that application of the Fourth Amendment [and Section 10 of Kentucky's Constitution] depends on whether the person invoking its protection can claim a "justifiable," a "reasonable," or a "legitimate expectation of privacy that has been invaded by government action." . . . [W]e find that examination of KASPER reports by authorized personnel pursuant to KRS §§ 218A.202 (6)(a) & (b) does not constitute a "search" under the Fourth Amendment or Section 10 of Kentucky's constitution, since citizens have no reasonable expectation of privacy in this limited examination of and access to their prescription records.

Id. at 682 (internal citations and internal quotations omitted). The Court went on to explain that KASPER reports convey only limited information about a limited subset of all prescription drugs, and that nothing in these reports contain such sensitive personal information as the patient's condition, treatment, or communications with his or her physician. *Id.* at 683. Additionally, the Court concluded that "it is well known by citizens that any prescriptions they receive and fill will be conveyed to several third parties, including their physician, their pharmacy, and their health insurance company." *Id.* Since patients have no privacy interest in what they knowingly expose to the public, KASPER data is simply "not a subject of Fourth Amendment Protection." *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 351 (1967)). There simply can be no argument that the discovery of KASPER data improperly infringes on the privacy rights of individuals.

B. The Court did not Approve a Legislative Discovery Rule in *Commonwealth v. DeWeese.*

In *Comm v. DeWeese*, the Court held that KRS 610.342, a statute which grants attorneys representing juveniles in criminal cases the right to access certain state records, was not a discovery rule, and did not violate the Kentucky Constitution. *DeWeese*, 141 S.W.3d at 377-78. The statute provides:

> An attorney representing a child in any proceeding under KRS Chapters 600 to 645 or in any adult criminal proceeding shall have full access to all records, including juvenile records, held by law enforcement, courts, social work agencies, or any other record, public or private, relating to that child which the attorney believes is necessary to the representation of that child.

KRS 610.342(1). The statute further provides that the Kentucky Courts shall enforce this rule with appropriate orders upon the request of a juvenile's attorney. KRS 610.342(2).

The *DeWeese* case involved a minor defendant that was subject to transfer to a circuit court for trial as an adult. *Id.* at 375. The minor requested discovery prior to the transfer hearing pursuant to RCr 7.24, which request was granted by the juvenile court. *Id.* The Commonwealth petitioned in circuit court for review of the order, arguing that Chapter VII of the criminal rules (including RCr 7.24) was not triggered until the case was before a judge having authority to try the offense charged, which would not occur until *after* transfer was granted. *Id.* The court denied the petition, holding that the criminal rules did not dictate the timing and scope of discovery in juvenile proceedings, and that discovery was in any case available under KRS 610.342. *Id.* The circuit court further held that, while KRS 610.342 was a discovery rule that violated the separation of power provisions of the Kentucky Constitution, it was not an unreasonable encroachment on the powers of the judiciary, and that the Supreme Court would likely grant comity to the statute. *Id.*

The *DeWeese* Court rejected the circuit court's opinion in almost all its particulars. First, the Court held that the criminal rules *did* control the timing and scope

of discovery in juvenile proceedings, *id.* at 376, and that the criminal rules applicable to transfer hearings were those governing preliminary hearings generally. *Id.* at 376-77. The Court further held that the rules governing preliminary hearings did not provide for discovery, and that discovery must therefore await the completion of the transfer hearing, at which time the circuit court could enter the appropriate discovery orders. *Id.* at 377. Finally, the Court held that KRS 610.342 was not a discovery rule, but merely a statute that made otherwise confidential records available to attorneys representing juveniles in criminal proceedings. *Id.* at 377-78.

The Cabinet argues that, since both KRS 610.342 and KRS 218A.202(6) deal with access to state records, and since both provide for appropriate enforcement through the Courts, (Appellant's Brief at 6), there is no relevant difference between the statutes, and that KRS 218A.202(6) should therefore be treated as something other than a discovery rule.[3] However, the Cabinet's argument ignores both the obvious differences between the statues, and the reasoning of the *DeWeese* opinion itself. First, unlike the statue considered in *DeWeese*, KRS 218A.202(6) *expressly prohibits the release of KASPER data in the context of civil discovery*. The whole purpose of Section 6 is to prevent the discovery of materials that could otherwise be obtained under the Civil Rules. The Court of Appeals concluded that KRS 218A.202(6) was a discovery rule, not because it read the statute perversely, but because the wording of the statute unambiguously indicated that this was its intent. Conversely, KRS 610.342 says nothing about discovery in the context of criminal proceedings.

[3] Additionally, the Cabinet cites *Commonwealth v. G.F.W.*, 229 S.W.3d 596 (Ky. App. 2007) in support of its claim that the legislature can properly restrict the dissemination of KASPER data to particular individuals. This case is clearly inapposite. *G.F.W.* deals with the power of the courts to order the state to pay for certain forensic testing in the absence of specific statutory authority. The case has nothing to do with discovery rules, and expressly affirms that the legislature has no authority to encroach on the judiciary's inherent and constitutional power to "do that which is necessary for the administration of justice." *Id.* at 598. If anything, *G.F.W.* favors *Warner's* position in this Appeal, not the Cabinet's.

Second, the *DeWeese* Court was correct in concluding that the only purpose of KRS 610.342 was to modify the "confidential" status of juvenile records with respect to attorneys representing juveniles in criminal proceedings. Specifically, the *DeWeese* Court observed that, while the Commonwealth maintains a variety of records dealing with juveniles, Kentucky's statutory law makes most of those records confidential. *Id.* at 377-78. The Court further noted that KRS 610.342 is immediately preceded by KRS 610.320 and KRS 610.340, which expressly make certain juvenile court records confidential. *Id.* at 378. Accordingly, the Court logically concluded that the purpose of KRS 610.342 was to deal with the problems confidentiality posed to attorneys who represent juveniles in criminal matters. Noting that confidentiality can make it extremely difficult for attorneys to obtain records on behalf of their clients, the Court held that KRS 610.342 merely provided access to records "that would otherwise be confidential," and that were necessary to the representation of a minor. *Id.* at 378. The statute in no way modifies the rules of criminal discovery, and does not interfere with the ability of the Court to prescribe rules for discovery in criminal proceedings.

Nothing in this reasoning is applicable to KRS 218A.202(6). KRS 218A.202(6) is *clearly* intended to do something other than establish a rule relating to the confidentiality of KASPER data. KRS 218A.202(6) makes nothing confidential. Rather, it prohibits *one* class of persons (parties in a civil proceeding) from gaining access to KASPER data in *one* circumstance (civil discovery). KASPER data is still available to law enforcement personnel, government run Medicare programs, and a host of other entities under the statute. The statute directly interferes with the Civil Rules by preventing the release of information that would otherwise be discoverable under those rules.

C. KASPER Data is not Privileged.

Writing as Amicus Curiae, the Office of the Attorney General argues that 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 of distribution of prescription drugs," and therefore non-discoverable under CR 26.02(1). (Amicus Curiae Brief at 5; emphasis added). In support of this claim the Amicus Curiae cites to the 4-factor test for determining the validity of a legislatively created privilege advanced in *Tabor v. Comm.* 625 S.W.2d 571, 572-573 (Ky. 1981):

> [F]our 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.

(Internal citation omitted). Again, however, this claim fails on multiple levels.

First, it is impossible to read KRS 218A.202 as creating either a class of confidential records, or a privilege against disclosure. As noted above, KRS 218A.202 allows multiple entities access to KASPER records, and expressly provides that the information can be used in some administrative hearings. As the Court of Appeals concluded below, "the extensive list of individuals and entities allowed access to the data under KRS 218A.202(6)(a)-(h) would, in and of itself, raise a serious question regarding any legislative intent to create a privilege." (ROA at 177).

It is particularly significant that KRS 218A.202(6)(b), (d), (f), and (g) allow KASPER data to be released to, respectively, law enforcement personnel, grand juries, the Kentucky Board of Medical Licensure, and the Kentucky Board of Nursing for use in criminal and administrative investigations. The typical purpose of a privilege is to

prevent information from being used in such investigations. On the Amicus Curiae's argument, KRS 218A.202 creates that most rare of all privileges: a privilege against disclosure *except to those entities that can use the information as evidence in a criminal or administrative investigation and subsequent trial.* This stands the notion of "privilege" on its head.

Second, even if were possible to read KRS 218A.202(6) as an attempt to create a privilege, the statute unambiguously fails *Tabor*'s 4-part test of validity. The first prong of the test is whether the communications alleged to be privileged originate "in a confidence that they will not be disclosed." As noted above, this Court has already concluded that citizens are generally aware that any prescriptions they receive and fill will be disclosed to third parties, "including their physician, their pharmacy, and their health insurance company." *Williams*, 213 S.W.3d at 683. It was precisely on this basis that this Court held that patients have no privacy interest in their prescription records. *Id.* Moreover, the numerous exceptions to the prohibition against disclosure in KRS 218A.202(6)(a)-(h) destroy any expectation of non-disclosure. The statute permits KASPER data to be accessed by numerous state and private entities for a variety of reasons. For example, the statute permits the Department of Medicaid Services to review "*any* data or reports from the [KASPER] system for the purpose of identifying Medicaid recipients whose usage of controlled substances may be appropriately managed by a single outpatient pharmacy or primary care physician." KRS 218A.202(7) (emphasis added). Clearly, no prescribing physician or patient can reasonably believe that KASPER data originate in a confidence that they will not be disclosed under KRS 218A.202.

The Amicus Curiae cites *Southern Bluegrass Mental Health and Mental Retardation Board, Inc. v. Angelucci*, 609 S.W.2d 931 (Ky. App. 1980) as an example of legislatively created privilege that has been sustained by the judiciary. However, this

case deals with statute that clearly intends to create an evidentiary privilege (the psychiatrist-patient privilege), and not a statute which prohibits the release of data to one class of persons in a single context. Similarly, the Amicus Curiae cites *Manns v. Commonwealth*, 80 S.W.3d 439 (Ky. 2000), in which the Court deferred to a statute allowing the introduction of a defendant's juvenile record during the penalty phase of a trial, as an example of a regulation that did not usurp the authority of the judiciary to prescribe rules of practice and procedure. However, the Court accepted this part of the statute on comity, *id.* at 444, and struck down another section of the statute as a violation of the separation of powers. *Id.* at 445. Neither case stands for the proposition that the legislature has any ability to enact laws that restrict the scope of the Civil Rules regarding discovery.

D. The *In Camera* Review Mandated in the Court of Appeal's Opinion does not Unnecessarily Extend Criminal Law Precedent to a Civil Case.

Citing *Commonwealth v. Barraso*, 122 S.W.3d 554 (Ky. 2003), the Amicus Curiae argues that only a criminal defendant's constitutional right to compulsory process is significant enough to justify judicial encroachment on a legislatively created privilege, such as an *in camera* review of KASPER data. Since the case at bar is not a criminal case in which a defendant's compulsory process rights are at issue, "the privilege and confidentiality of the [KASPER] records must prevail and not even an *in camera* review of the KASPER data is warranted." (Amicus Curiae Brief at 8).

Obviously, this argument assumes that KRS 218A.202(6) creates a privilege for KASPER data. Should this Court conclude, as Warner argues, that KRS 218A.202(6) does *not* create a privilege, the argument is irrelevant. Moreover, the Amicus Curiae's argument self-destructs on the obvious fact that KRS 218A.202(6) authorizes numerous people to review KASPER data in the absence of a proceeding that puts a criminal defendant's right to compulsory process in jeopardy. KRS 218A.202(6)(a)-(h). Law

enforcement personnel and state administrative agencies can review KASPER data as part of a criminal or administrative investigation. Physicians and pharmacists can review the data if they think it is necessary to assist them in treating a patient. The Kentucky Department of Medicaid Services can review the data for no other reason than to identify Medicaid recipients whose prescription drug usage can be managed by a single outpatient pharmacy or primary care physician. Whatever the purpose of KRS 218A.202(6), the legislature clearly did not intend it to create a privilege of such importance that it could only be violated in the context of a criminal procedure that implicates a defendant's right to compulsory process.

E. This Court Should not Grant Comity to KRS 218A.202(6).

Finally, both the Cabinet and the Amicus Curiae request that this Court defer to KRS 218A.202(6) on the ground of comity. Comity is defined as "the judicial adoption of a rule unconstitutionally enacted by the legislature not as a matter of obligation, but out of deference and respect." *Fugett v. Commonwealth*, 250 S.W.3d 604, 611 (Ky. 2008) (internal brackets omitted). To be extended comity, the Court must find either that the rule "is a statutorily acceptable substitute for current judicially mandated procedures," or that it "can be tolerated in a spirit of comity because it does not unreasonably interfere with the orderly functioning of the courts." *Id.* With due respect to the Cabinet and the Amicus Curiae, this statute violates both criteria.

First, KRS 218A.202(6) is not a substitute for any current judicially mandated procedure. On the contrary, the statute *violates* the express intention of the Civil Rules to allow discovery "of *any* matter, not privileged, which is relevant to the subject matter involved in the pending action," including "the *identity and location of persons having knowledge of any discoverable matter.*" CR 26.02(1) (emphasis added). The entire purpose of KRS 218A.202(6) is to prohibit discovery that would otherwise be permitted under the Civil Rules. The statute does not "substitute" for the current rule so much as it

"restricts" it and "declares it inoperative." Hence, KRS 218A.202(6) is clearly distinguishable from, e.g., the statute accepted by way of comity in *Fugate*, which granted trial courts *broader* discretion to issue personal summons to wayward jurors than the administrative rules prescribed by the Court. *Id.* at 610-11.

Second, KRS 218A.202(6) certainly interferes with the orderly functioning of the courts. Kentucky courts have long held that the Civil Rules give trial courts "broad power to control the discovery process and to prevent its abuse." *Hoffman v. Dow Chemicals Co*, 413 S.W.2d 332, 333 (Ky. 1967). Additionally, Kentucky courts have an inherent power to do "that which is necessary for the administration of justice within the scope of their jurisdiction." *Smothers v. Lewis*, 672 S.W.2d 62, 64 (Ky. 1984). In *Craft v. Commonwealth*, Ky., 343 S.W.2d 150, 151 (1961) this Court held that the Constitution's grant of rule making power to the courts "carries with it, as a necessary incident, the right to make that power effective in the administration of justice." KRS 218A.202(6) frustrates these powers by preventing the courts – without exception – from ordering the release of KASPER data in the context of civil discovery, even when that data is necessary to resolve factual disputes in civil trials, or to further the administration of justice within a particular case.

In *Arnett v. Meade*, 462 S.W.2d 940, 946 (Ky. 1971), this Court held:

> The general rule is that any legislation that hampers judicial action or interferes with the discharge of judicial functions is unconstitutional. However the rule is subject to the qualification that the legislature may put reasonable restrictions upon constitutional functions of the courts, *provided that such restrictions do not defeat or materially impair the exercise of those functions.*

There is simply no question that KRS 218A.202(6) materially impairs the ability of the courts to administer justice. In the case at bar real questions exist as to whether Plaintiff Baumler has exaggerated his injuries, and fully disclosed his medical history. Discovery of Baumler's KASPER data will unquestionably help to resolve these issues, and will be

the *only* way Warner can discover the identity of physicians who may have treated Baumler but were paid in cash. However, discovery of this data is completely prohibited by operation of KRS 218A.202(6). Hence, the legislature's policy of blanket protection of KASPER data from civil discovery materially impairs the truth-seeking function of the courts, and unreasonably frustrates the administration of justice. The statute prevents Warner from fully investigating the allegations made against him, and reduces the inherent power of the courts to control discovery. The statute is an unreasonable restriction on the orderly functioning of the courts.

CONCLUSION

KRS 218A.202(6) prohibits the discovery of KASPER data in all civil cases without consideration of the facts at issue, or whether the data is needed for the proper administration of justice. As a legislative attempt to restrict the scope of discovery in civil actions, the statute impermissibly encroaches on the judiciary's constitutional power to prescribe rules for practice and procedure, and materially interferes with ability of the courts to manage discovery. Contrary to the Arguments of the Appellant and the Amicus Curiae, the statute is without constitutional precedent, does not safeguard the right to privacy, and does not create a privilege that can only be outweighed by the defendant's right to compulsory process. Finally, because the statute is not a substitute for a current judicially mandated procedure, and because it materially interferes with the functioning of the Courts, there is no basis for accepting the statute on the basis of comity. Accordingly, this Court should declare KRS 218A.202(6) unconstitutional, sustain the Court of Appeals' opinion below, and order the Cabinet to release Baumler's KASPER data to Judge Chauvin for his *in camera* review.

Respectfully submitted,

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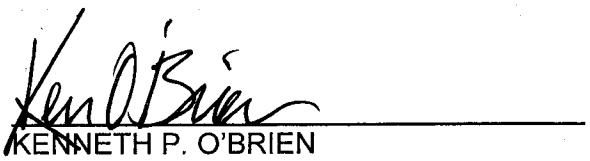

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