RENDERED: JUNE 13, 2008; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000027-OA

COMMONWEALTH OF KENTUCKY,
CABINET FOR HEALTH AND
FAMILY SERVICES

PETITIONER

AND

COMMONWEALTH OF KENTUCKY,
HON. JACK CONWAY,
ATTORNEY GENERAL
PETITIONER

INTERVENING

v.

ORIGINAL ACTION
REGARDING JEFFERSON CIRCUIT COURT
ACTION NO. 06-CI-009152

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

RESPONDENT

AND

MATTHEW BAUMLER;
AND CHRISTOPHER WARNER
INTEREST

REAL PARTIES IN

OPINION AND ORDER
DENYING CR[1] 76.36 RELIEF IN PART

[1] Kentucky Rules of Civil Procedure.

AND
GRANTING CR 76.36 RELIEF IN PART

* * * * * *

BEFORE: STUMBO AND TAYLOR, JUDGES; KNOPF,[2] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: This matter is before the Court on a petition for writs of prohibition and mandamus pursuant to (CR) 76.36.

The Commonwealth of Kentucky, Cabinet for Health and Family Services, petitions this Court to direct the respondent trial court to vacate its order entered October 30, 2007, which requires it to produce to counsel for Christopher Warner, defendant below, information concerning Matthew Baumler's prescription drug history contained in its KASPER[3] records. Baumler has filed the action below against Warner for personal injuries allegedly suffered in an automobile accident. Warner's counsel has obtained some of Baumler's medical records which, he contends, show a history regarding narcotic pain medication suggesting behavior which, if established, would be relevant to Baumler's claims "because it is possible that the Plaintiff has fabricated or exaggerated his complaints in order to obtain narcotics for non-medical reasons." Warner sought a

---

[2] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

[3] KASPER is the acronym for Kentucky All-Schedule Prescription Electronic Reporting that is administered by the Cabinet. Details pertaining to what this monitoring system consists of and the Commonwealth's substantial interest in creating it are found in *Thacker v. Commonwealth,* 80 S.W.3d 451, 453, 455 (Ky. App. 2002) (reversed in part on other grounds, *Williams v. Commonwealth*, 213 S.W.3d 671 (Ky. 2006).

court order directing the Cabinet's records custodian to release its KASPER records pertaining to Baumler. The trial court found that Warner had shown good cause for the relief requested and granted the motion conditioned upon the provision that the records "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."

The Cabinet moved the court to vacate the order, arguing that KRS[4] 218A.202(6) prohibits disclosure to any person or entity not expressly authorized by the section to receive the information, "including disclosure in the context of a civil action where the disclosure is sought either for the purpose of discovery or for evidence . . .", pursuant to an amendment effective June 26, 2007.

The trial court found that the information sought by Warner was relevant to the subject matter involved in the action and reasonably calculated to lead to the discovery of admissible evidence. It denied the Cabinet's motion, recognizing that a conflict appears to exist between the court's obligation and authority to permit discovery as set forth in CR 26.02(1) and the limitation of the Cabinet's obligation and authority to disclose the information as set forth in the current version of KRS 218A.202(6). It resolved the conflict in favor of allowing the discovery based on its determination that a statute that encroaches on the judicial branch's responsibility and obligation to decide what may be properly discovered violates the doctrine of separation of powers. The court relied on

[4] Kentucky Revised Statutes.

O'Bryan v. Hedgespeth, 892 S.W.2d 571 (Ky. 1995).

In this original action, the Cabinet argues that the issue before this Court is not one relating to discovery. Rather, it asserts, the issue is of a constitutional nature. It pertains to whether the trial court proceeded erroneously, and outside its jurisdiction, against a mandate of the General Assembly, a co-equal branch of government acting within its constitutional prerogative and legislative discretion to create a KASPER statute and also to limit the dissemination of its data.

Warner responds that the trial court did not act outside its jurisdiction as it has the jurisdiction to control discovery and its scope in accordance with CR 26.02(1). However, he adds, if the argument is that the trial court acted erroneously within its jurisdiction, then the Cabinet was first required to demonstrate irreparable injury and the lack of an adequate remedy by appeal, which it failed to do. On the merits, relying on *O'Bryan, supra,* and on *Commonwealth v. DeWeese,* 141 S.W.3d 377 (Ky. App. 2003), Warner argues, as he did below, that the Cabinet has not shown that the trial court erred in ordering the production of the KASPER report because KRS 218A.202(6), as recently amended, encroaches on the exclusive power of the Judicial Branch to promulgate rules of a purely procedural nature that control the timing and scope of discovery. Therefore, he posits, this Court should determine that the amended statute violates Kentucky's doctrine of separation of powers. The *amicus curiae* brief filed by

Kentucky Defense Counsel concurs with that constitutional assessment.

In a memorandum filed pursuant to this Court's direction, the Cabinet agrees that *O'Bryan* represents a "glaring example of the General Assembly encroaching on judicial prerogatives." However, it goes on to argue that, in that case, the statute at issue[5] was a positive attempt at telling courts how to conduct business regarding which they have exclusive jurisdiction whereas KRS 218A.202(6) "cannot reasonably" be argued to be a rule of discovery. The Cabinet goes on to state that *DeWeese*, *supra,* wherein a statute[6] providing a juvenile's attorney with full access to records from numerous sources pertaining to the juvenile was held not to be a rule of discovery, is dispositive of the argument that the doctrine of separation of powers applies equally to the Legislature and the Judicial Branch.

In his response, the intervening petitioner, Hon. Jack Conway, Attorney General, points out that data collected under KASPER is subject to privacy protections imposed under state and federal law. He argues that there is no direct conflict between CR 26.02(1) and KRS 218A.202(6) because the Rule excludes any privileged matter from the scope of discovery and, therefore, that the trial court erred when it failed to protect a confidential KASPER record against discovery as the Rule obligates it to do.

[5] The statute, KRS 411.188, was a statute "legislating the practice and procedure to apply to all civil actions wherein the plaintiff has received 'collateral source payments' related to the same expenses for which he seeks damages in a civil action." *O'Bryan* at 573. The statute provided, *inter alia,* that collateral source payments "shall be an admissible fact in any civil trial." *Id.*

[6] The statute in question was KRS 610.342.

At oral argument, the Court asked counsel for the Attorney General to elaborate on his argument pertaining to the existence of a privilege being attached to KASPER records. Counsel responded that the privilege is akin to the confidentiality of juvenile records. The Court queried as to whether there might be a material difference between that which is "privileged" and that which is "confidential." Counsel responded that there is no difference other than terminology and that the question to be asked should only be whether the Legislature has the right to make documents or information confidential whether it does it in the form of a privilege or in the form of a juvenile court record. Counsel added that there are many privileges created by statute that have been upheld as constitutional although never codified into a Rule of Evidence. During rebuttal, counsel illustrated his argument by referring to KRS 421.100, which creates a privilege for a news reporter's sources of information.

As further argument in its written response, the Attorney General states that the Legislature is the body that bestows records with confidential status and that creates any exceptions thereto and he posits that a statute like KRS 218A.202(6), which regulates the confidentiality of KASPER records, does not usurp judicial authority to promulgate rules of practice and procedure because it is not a rule of discovery. Therefore, he concludes, KRS 218A.202(6) does not violate the separation of powers. The Attorney General relies on *DeWeese, supra,* and on *Manns v. Commonwealth*, 80 S.W.3d 439 (Ky. 2002), wherein a statutory

provision which allowed the introduction of the juvenile records of a defendant during the penalty phase of a criminal trial was held not to be an unreasonable encroachment upon the rule-making authority of the Judicial Branch.

The Court has considered all previously recounted arguments and, being sufficiently advised, decides, for reasons henceforth stated, that the relief sought by the Cabinet must be DENIED to the extent that it asks the Court to vacate the order for the release of Baumler's KASPER records. However, the Court has further determined that the trial court must issue an amended order providing for an additional procedural step, to be taken prior to any ordered release of the documents to the parties' counsel. The amended order shall require the Cabinet's Records Custodian to produce the records to the trial court under seal and for its *in camera* review in order to determine what portion of those records, if any, is relevant to the subject matter at issue and may be released to the parties' counsel. To that extent, this original action is GRANTED.

Initially, the Court states that the Cabinet is entitled to a review of the merits of its original action. While the Court believes that it failed to demonstrate that the trial court acted outside its jurisdiction and failed to demonstrate that it would suffer irreparable injury if extraordinary relief is not granted, which is normally a prerequisite to an appellate court's review when the proper argument to be made is whether the trial court is proceeding erroneously within its jurisdiction,[7] the Court is of the opinion that the matter at hand qualifies for its

[7] *See, e.g., Hoskins v. Maricle,* 150 S.W.3d 1, 10 (Ky. 2004).

review as one of those "certain special cases" where review is desirable in the interest of the orderly administration of justice. *See, e.g., The Independent Order of Foresters v. Chauvin,* 175 S.W.3d 610, 616-17 (Ky. 2005). This is especially appropriate as we have determined that the Cabinet satisfies the one prerequisite for review under that exception, which is the lack of an adequate remedy by appeal. *Id*. at 617. As stated in *Bender v. Eaton,* 343 S.W.2d 799, 802 (Ky. 1961), "[o]nce the information is furnished it cannot be recalled."

Now reaching the merits of this original proceeding, we note that the issue that it presents regarding the constitutionality of the language by which KRS 218A.202(6) was amended effective June 26, 2007, is a matter of first impression.[8] Specifically, our task is to decide whether the amended language violates the doctrine of separation of powers as articulated in Sections 28 and 116 of the Kentucky Constitution because it exemplifies an encroachment by the General Assembly into the power exclusively granted to the Judicial Branch to promulgate rules of practice and procedure. We conclude in the affirmative, as it relates to civil litigation.

The specific language which amended KRS 218A.202(6) in 2007 and which is at issue herein is highlighted below:

> The Cabinet for Health and Family Services shall only disclose data to persons and entities authorized to receive

[8] The Court previously disposed of two original actions which involved a previous version of the statute and did not raise a constitutional issue. Those cases were *Cabinet v. Clayton,* 2007-CA-001480-OA and *Cabinet v. McDonald-Burkman,* 2007-CA-001580-OA.

> that data under this section. Disclosure to any other person and 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. (Emphasis added)

The trial court correctly recognized a conflict between the limitation on discovery imposed by the statute and the authority and obligation of a trial court to permit discovery to go forward in accordance with the requirements of CR 26.02(1). That Rule reads as follows:

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

The trial court determined that Baumler's KASPER records are relevant to the subject matter involved in the action and are reasonably calculated to lead to the discovery of admissible evidence. In so ruling, the trial court exercised its discretion and authority as the gatekeeper of the timing and scope of discovery in actions over which it presides. The Cabinet and the Attorney General do not challenge the trial court's determination in that regard. Rather, they challenge its determination that a conflict exists between the amended statute and

the Rule, based on the argument that the Rule excludes privileged matters from the scope of allowable discovery and that the statute creates a privilege shielding KASPER records from disclosure for discovery or evidentiary purposes. As previously mentioned, this Court orally required the Attorney General to further elaborate on the existence of this legislatively created privilege. However, while the Court recognizes the Attorney General's argument that KASPER records constitute a highly confidential law enforcement tool, the Court rejects the concept that he advanced that the Legislature created a privilege when it made the records confidential. The Attorney General provided no authority to support the argument that the difference between that which is "privileged" and that which is "confidential" is only one of "terminology" and this Court has found none.

The Court notes that, with regard to information or documents, *Black's Law Dictionary* defines "confidential" as "meant to be kept secret" while it defines "privileged" as "[n]ot subject to the usual rules or liabilities; esp., not subject to disclosure during the course of a lawsuit." BLACK'S LAW DICTIONARY (8th ed. 2004). Clearly, the two adjectives are not one and the same. Unlike information or document that is "confidential," information that is "privileged" is not discoverable, unless discovery is allowed under a listed exception. It has been held that whoever asserts a privilege has the burden of proving its application "[b]ecause privileges operate to exclude relevant evidence . . . ." *Stidham v. Clark,* 74 S.W.3d 719, 725 (Ky. 2002). This exclusion operates

as a drastic consequence upon the search for the truth and, therefore, it follows that whoever asserts a privilege should also have the burden of first proving its existence. Neither the Cabinet nor the Attorney General satisfied that burden. On the basis of a plain reading of KRS 218A.202(6), the Court is unable to discern any intent by the General Assembly to elevate the confidential KASPER records to a privileged status. In fact, 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.

Based on the foregoing, the Court now determines that the statute does not create any privilege regarding KASPER data. As a result, and because the statute mandates a blanket prohibition against the release of those documents for any discovery or evidentiary purposes in civil actions, we hold that the statute, as amended in 2007, directly conflicts, and cannot be reconciled, with the express provisions set forth in CR 26.02(1).

We further hold that this conflict implicates the doctrine of separation of powers and renders the language, which the Court highlighted earlier in this Opinion and Order and by which KRS 218A.202(6) was amended in 2007, unconstitutional because it articulates a legislatively prescribed rule of practice and procedure for civil actions[9] that purports to encroach upon, and control, a

[9] The Court does not construe the prohibition against the disclosure of KASPER records as set forth in the statute to apply to discovery in criminal actions. An Opinion and Order setting forth the Court's reasoning is rendered contemporaneously with the instant one in *Cabinet v. Bartlett,* 2008-CA-000046-OA.

responsibility and a function that are exclusively assigned to the Judicial Branch by the Kentucky Constitution, namely that of supervising the scope of discovery and deciding how to deal with the evidence.[10] We see no materially significant distinction with regard to the issue at hand between KRS 411.188, which was held to be unconstitutional in *O'Bryan, supra,* and the amended language in KRS 218A.202(6) that is at issue in this case because we are of the opinion that they both amount to rules of practice and procedure that infringe on the exclusive discretion and authority of the Judicial Branch to control the functioning of its own proceedings.

Neither do we attribute any merit to the argument made by the Cabinet and the Attorney General concerning the *DeWeese* case as we believe that the construction given by the Kentucky Supreme Court to the statute at issue therein is narrowly tailored to the recognition of the enormous difficulties that a juvenile's attorney would otherwise experience in seeking access to a uniformly confidential body of information regarding the juvenile. In so far as *Manns, supra,* is concerned, the statute therein expressly subjected its disclosure provisions to the Kentucky Rules of Evidence, thereby allowing the trial court to retain discretion over the introduction of evidence relating to an issue raised before it. In contrast, KRS 218A.202(6) divests the trial court of any discretion

[10] Applying the concept articulated in KRS 446.090 to this matter, the Court construes the language that this Opinion and Order holds to be unconstitutional as severable from the other provisions set forth in KRS 218A.202(6). *See Martin v. Commonwealth,* 96 S.W.3d 38, 57-58 (Ky. 2003).

whatsoever in civil actions "where the disclosure is sought either for the purpose of discovery or for evidence . . . ."

However, this Court's inquiry needs to go one step further. In issuing this decision, the Court wants to emphasize that it is utterly mindful that KASPER records are confidential and that this confidentiality serves to advance the state's interest in monitoring the sale and distribution of controlled substances.[11] Given such substantial interest, the Court agrees with the Cabinet and the Attorney General that allowing those 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." Thus, while the Court has now upheld the discoverability[12] of those records and has upheld the respondent trial court's determination in that regard, the Court believes that the trial court erred in ordering the records to be produced directly to Warner's counsel solely based on a determination that counsel's arguments provide "good cause for the relief requested" and without undertaking any prior review of the records themselves to establish their relevancy to the subject matter of the action pending before it.

Therefore, in view of the powerful interest that plays into the need to

[11] *Thacker, supra,* at 455.

[12] The issue of admissibility of those records is not before the Court at this time and this Opinion and Order should not be construed to extend to it.

keep KASPER records confidential, the Court is of the opinion that the proper method to be used by a trial court,[13] following a preliminary determination such as the respondent trial court made herein that the moving party has made a satisfactory threshold showing of good cause for the relief requested, but prior to ordering any disclosure of the documents to the movant, should be nothing short of ordering that the KASPER records be produced to it under seal for its review *in camera* so as to decide what portion of the records, if any, satisfies the relevancy requirement of CR 26.02(1). Further, any ordered release of KASPER documents to the parties to an action shall be conditioned upon a confidentiality provision similar to the one ordered by the respondent trial court.

In conclusion, the Court holds that partial relief is appropriate to the extent that the trial court is hereby DIRECTED to amend its order of disclosure entered October 30, 2007, to conform with the aforestated guidelines.

ALL CONCUR.

ENTERED: June 13, 2008

/s/ William L. Knopf
SENIOR JUDGE, COURT OF APPEALS

[13] The Court notes that Warner's counsel orally expressed his lack of objection to this method.

BRIEF AND ORAL ARGUMENT FOR PETITIONER:

Wendell H. Overcash
Office of Legal Services
Cabinet for Health & Family Services
Frankfort, Kentucky

BRIEF AND ORAL ARGUMENT FOR INTERVENING PETITIONER:

Tad Thomas
Assistant Deputy Attorney General
Office of Attorney General
Frankfort, Kentucky

BRIEF FOR REAL PARTY IN INTEREST CHRISTOPHER WARNER:

Kenneth P. O'Brien
Thomas N. Peters
Sewell, O'Brien & Neal, PLLC
Louisville, Kentucky

ORAL ARGUMENT FOR REAL PARTY IN INTEREST CHRISTOPHER WARNER:

Kenneth P. O'Brien

BRIEF FOR AMICUS CURIAE KENTUCKY DEFENSE COUNSEL

Gerald R. Toner
O'Bryan, Brown & Toner, PLLC
Louisville, Kentucky