# IMPROPER MEANS TO A KALOPSIAN END: AN ANALYSIS OF MEDICAL REVIEW PANELS UNDER KENTUCKY'S CONSTITUTION

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## I. INTRODUCTION

Medical review panels are a product of tort reform.[1] In effect, they are pretrial screening panels designed to filter through medical malpractice claims before those claims are filed in court.[2] In June 2017, Kentucky was the latest state to join the national trend in attempting to enact these panels.[3] Other states have followed the same path only to have their respective state courts rule that the panels are unconstitutional on the basis of equal protection,[4] due process,[5] separation of powers,[6] or obstructing the right to jury trial with onerous procedural conditions.[7] Further, some states have terminated these panels for ineffectiveness.[8]

In years past, Kentucky's General Assembly has failed multiple times to implement a medical review panel.[9] However, this was not the case in 2017.

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[1] *KY Court of Appeals Rules Medical Review Panels Can Proceed; Stay in Effect Until Further Ruling*, N. KY. TRIB. (Nov. 10, 2017), http://www.nkytribune.com/2017/11/ky-court-of-appeals-rules-medical-review-panels-can-proceed-stay-in-effect-until-further-ruling/.

[2] John Gregory, *Medical Review Panels for Malpractice Claims*, KET (Feb. 7, 2017, 8:00 AM), https://www.ket.org/public-affairs/medical-review-panels/.

[3] Kevin R. Marciano & Patrick D. MacAvoy, *Pretrial Medical Malpractice Screening Panels: A State Law Guide*, MARCIANO LEGAL (Feb. 22, 2017), http://marcianolegal.com/pretrial-medical-malpractice-screening-panels-state-guide/.

[4] *See* Hoem v. State, 756 P.2d 780 (Wyo. 1988) ("We hold that the [Wyoming Medical Review Panel] act is unconstitutional because it violates the equal protection clause . . . .").

[5] *See* Aldana v. Holub, 381 So. 2d 231 (Fla. 1980) (ten-month limitation violates due process of the United States and Florida constitutions).

[6] *See* Wright v. Cent. Du Page Hosp. Ass'n, 347 N.E.2d 736 (Ill. 1976) (separation of powers and right to trial by jury).

[7] *See* Mattos v. Thompson, 421 A.2d 190 (Pa. 1980) (right to trial by jury by "onerous conditions . . . make[s] the right practically unavailable").

[8] *Id.* at 196.

[9] Kenny Colston, *Medical Review Panels*, MED. NEWS (Nov. 6, 2013), http://www.medicalnews.md/medical-review-panels/; *see also* James McNair, *Another Year, Another Push for Medical Review Panels in Kentucky*, KY. CTR. FOR INVESTIGATIVE REPORTING (Jan. 8, 2016),

In November 2016, a thundering crescendo for tort reform rose apace when Republicans gained control of the house of representatives for the first time in approximately one hundred years.[10] This, coupled with Matt Bevin's victory in the gubernatorial race one year prior, made tort reform legislation imminent.[11] After gaining control of the house in the November elections, Governor Bevin strutted his agenda: "We're going to be cutting red tape . . . we're going to bring tort reform. We're going to stop letting trial lawyers ride herd in this state."[12] On June 27, 2017, Kentucky's legislative and executive branches wasted little time passing and signing into law Kentucky Revised Statute (KRS) § 216C—the medical review panel statute.[13]

Advocates of medical review panels believe the panels are necessary to combat rising malpractice insurance premiums, frivolous lawsuits, and physicians practicing expensive, and often unnecessary, defensive medicine.[14] This aggregation of factors ground the querulous claims that a medical malpractice crisis exists in the Commonwealth.[15] Serious debate continues as to whether this crisis actually exists on a national level,[16] but deciphering the extensive statistics to determine its existence is not the purpose of this Note. Regardless, Kentucky's General Assembly enacted legislation in response to this crisis and raised significant questions under Kentucky's constitution in the process. One of these questions was answered on November 15, 2018 in *Commonwealth v. Claycomb*.[17] The Kentucky Supreme Court held that medical review panels violate Section 14 of Kentucky's constitution: the right to open access to the courts.[18]

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http://kycir.org/2016/01/08/another-year-another-push-for-medical-review-panels-in-kentucky/.

[10] Tom Loftus, *Gov. Bevin: 'Good Riddance' to Greg Stumbo*, COURIER J. (Nov. 9, 2016, 10:52 AM), http://www.courier-journal.com/story/news/politics/ky-governor/2016/11/09/gov-bevin-good-riddance-greg-stumbo/93536558/; *see also* Tom Loftus, *GOP Takes KY House in Historic Shift*, COURIER J. (Nov. 9, 2016, 7:40 AM), https://www.courier-journal.com/story/news/politics/elections/kentucky/2016/11/08/control-kentucky-house-up-grabs/93344114/.

[11] Kevin Robillard, *Republican Bevin Wins Kentucky Governor's Race*, POLITICO (Nov. 3, 2015, 11:24 PM), http://www.politico.com/story/2015/11/kentucky-governor-race-matt-bevin-wins-215502.

[12] Tom Loftus, *Gov. Bevin: 'Good Riddance' to Greg Stumbo*, *supra* note 10.

[13] Woody Maglinger, *Gov. Bevin Ceremonially Signs Recently Enacted Legislation*, KY.GOV (June 27, 2017), http://kentucky.gov/Pages/Activity-stream.aspx?n=KentuckyGovernor&prId=397.

[14] *Id.*; *see also* Chad Terhune, *Top Republicans Say There's a Medical Malpractice Crisis. Experts Say There Isn't*, WASH. POST (Dec. 30, 2016), https://www.washingtonpost.com/news/to-your-health/wp/2016/12/30/top-republicans-say-theres-a-medical-malpractice-crisis-experts-say-there-isnt/?utm_term=.f556c7219e79.

[15] Terhune, *supra* note 14.

[16] *Id.*; *see also* Gregory, *supra* note 2.

[17] Commonwealth v. Claycomb, No. 2017-SC-000614-TG, 2018 Ky. LEXIS 504 (Ky. Nov. 15, 2018).

[18] *Id.* at *32–33.

Although the question of whether medical review panels violate Kentucky's open access to the courts provision has been decided, other issues remain unresolved. This Note will first present the structure of the review panel and detail the history, purpose, and case law regarding the constitutional provisions at issue. Next, this Note will address the Kentucky Supreme Court's reasoning in *Claycomb*, its impact, and why the issue of open access is not entirely settled. Then, this Note will argue that despite the *Claycomb* decision, there is a stronger argument that pre-jurisdiction review panels are unconstitutional under Kentucky's separation of powers provisions. Finally, this Note will end by offering a resolution and explanation of what is next for Kentucky regarding medical malpractice tort reform.

## II. HISTORICAL BACKGROUND: THE PANEL AND THE CONSTITUTION OF KENTUCKY

### *A. Structure of the Panel*

#### 1. Purpose and Procedure of Application

Kentucky's medical review panel is touted as a "jurisdictional precursor" that screens malpractice claims against healthcare providers before the claims can be filed in court.[19] The applicable scope of healthcare providers is broad, including healthcare facilities, providers, natural persons, and a large group of alternative jobs in the healthcare profession.[20] Yet, KRS § 216C does not apply to claims brought by healthcare providers themselves. Additionally, when a plaintiff brings a claim before the panel, the statute of limitations on the plaintiff's cause of action tolls until ninety days after the panel's opinion is rendered.[21]

Before the plaintiff may bring his or her medical malpractice claim to court, the panel must first review the claim and render an opinion within nine

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[19] STBM, *Medical Review Act Checkup–Three Months In*, STURGILL TURNER (Oct. 10, 2017), https://www.sturgillturner.com/medical-review-act-checkup-three-months/.

[20] KY. REV. STAT. ANN. § 216C.010(4) (West 2017), *invalidated by* Commonwealth v. Claycomb, No. 2017-SC-000614-TG, 2018 Ky. LEXIS 504 (Ky. Nov. 15, 2018); *see generally* KY. REV. STAT. ANN. § 216B.015(13) (West 2017) (including dieticians and nutritionists, physicians, osteopaths, podiatrists, emergency medical services, radiation specialists, chiropractors, dentists, dental specialists, registered nurses, respiratory care practitioners, pharmacists, pharmacies, psychologists, occupational therapists, optometrists, physical therapists, medical laboratories, speech language pathologists, audiologists, social workers, and professional counselors).

[21] *Id.* § 216C.040(1).

months of filing with the panel.[22] If no opinion is reached within the nine-month timeframe, the plaintiff can file the claim in circuit court while the panel continues to work toward an opinion.[23] KRS § 216C limits the panel to three possible opinions.[24] If a party wishes to admit the opinion in a subsequent proceeding in circuit court, the statute mandates that the court "*shall admit* the panel's opinion into evidence as an expert opinion, subject to cross-examination" upon a motion and a written finding that "the evidence would assist the trier of fact and otherwise comply with the Kentucky Rules of Evidence."[25] This is not automatic admission, but it affords the trial judge a procedure to follow and determines the circumstances in which he or she is allowed to use discretion.[26] Alternatively, the parties can agree to bypass the established review panel "if the claimant and all parties named as defendants in the action agree that the claim is not to be presented."[27] In reality, healthcare providers are not likely to agree to this hollow concession offered by the legislature.[28]

### 2. Composition and Action

The panel is composed of one non-voting attorney chairperson and three voting healthcare providers.[29] The chairperson may be selected upon agreement by both parties.[30] However, if no agreement can be reached, the Cabinet of Health and Family Services will provide a list of five possible attorneys to the parties for a $25 fee.[31] To be available for participation, the attorney must be licensed to practice in Kentucky, apply with the Health and Family Services Cabinet to serve as a chairperson, and practice in the supreme court district where the case is filed.[32] The parties then make

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[22] *Id.*

[23] *Id.*

[24] *Id.* §§ 216C.180(2)(a)–(c) ((a) defendant failed to comply with the appropriate standard of care and conduct was a substantial factor in the injury; (b) failed to comply with the appropriate standard of care and conduct was not substantial factor in the injury; or (c) no evidence of defendant failing to comply with the appropriate standard of care).

[25] *Id.* § 216C.200(1) (emphasis added).

[26] *See id.*

[27] *Id.* § 216C.030(1).

[28] *See id.* Additionally, this could easily be used against the claimant in settlement negotiations. It offers healthcare providers a bargaining chip that holds considerable weight when a claimant is otherwise forced to proceed with a potential nine-month mini-trial.

[29] *Id.* § 216C.060.

[30] *Id.* § 216C.070(1).

[31] *Id.* § 216C.070(2).

[32] *Id.* §§ 216C.070(2)(a)–(c).

alternating strikes from the list, with the plaintiff striking first, until only one attorney remains.[33]

Selection of the healthcare providers involves a similar striking procedure. In this case, the lists contain prospective panelists that "to the extent reasonably possible, include only . . . panelists from the professions and within the specialty fields, if any, of one (1) or more of the defendants" and to a reasonable extent are licensed in Kentucky.[34] These two panelists then must select a third and final panelist that meets comparable criteria and should be familiar with the area of medical specialty at issue in the claim.[35] Healthcare providers are not required to practice or teach in the area of contention, which presents considerable problems to their effectiveness and validity.

Fully realized, the medical review panel then gathers evidence, issues subpoenas, and approves depositions.[36] The panel has "a right and duty to request all necessary and relevant information."[37] This includes consulting other medical authorities, examining reports of other healthcare providers, and schedule hearings to question the counsel and parties under review.[38] The review panel would ideally establish the question of whether the defendant applied the appropriate standard of care before a trial is commenced. This would allow for the parties to plug in this expert opinion as evidence, save time at trial, and deter frivolous lawsuits against physicians.

While the case is before the panel, parties remain entitled to petition the circuit court to limit discovery or request sanctions for panel members who fail to fulfill their duties.[39] However, this can only be accomplished if the plaintiff files the case in circuit court, otherwise the court will have no jurisdiction over the matter.[40] Prior to filing in court, the plaintiff is at the exclusive will of the panel. If a motion is made by the parties and filed in court, the court stays all review panel proceedings until a ruling on the motion is rendered.[41]

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[33] *Id.* § 216C.070(3).

[34] *Id.* § 216C.090(1).

[35] *Compare id.* § 216C.090(2) ("shall then select a third member who meets the criteria in KRS § 216C.080 and *is* from the profession and specialty field, if any, of one (1) of more of the defendants") (emphasis added) (it is silent on where the provider is licensed), *with id.* § 216C.090(1) ("to the extent reasonably possible").

[36] *Id.* § 216C.160.

[37] *Id.* § 216C.170(2).

[38] *Id.*

[39] *Id.* §§ 216C.240, .250.

[40] *Id.* § 216C.250.

[41] *Id.* § 216C.270.

### i. Open Access: Section 14

The open courts doctrine originated from the Magna Carta.[42] Today, thirty-nine state constitutions have such a doctrine, including Kentucky.[43] This provision is found in Section 14 of the Kentucky constitution: "*[a]ll courts shall be open*, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice *administered without sale, denial or delay*."[44] While most states incorporated this provision with little to no legislative deliberation,[45] Kentucky is an outlier in the fact that it has legislative records illustrating the intent in adopting the open courts provision.[46] The delegates to Kentucky's Constitutional Convention sought to limit the General Assembly's power, stating that the "principal, if not the sole purpose of the constitution which we are here to frame, is to restrain [the legislature's] will and restrict its authority."[47] This protection was intended to protect the citizens from the General Assembly's "almost unlimited power."[48]

Until 1991, Kentucky courts believed this guarantee only applied to causes of actions that were in existence at the time the 1891 Kentucky constitution was agreed upon: the time capsule theory. In *Perkins v. Northeastern Log Homes*, the Kentucky Supreme Court expanded its approach beyond this reasoning.[49] Now, all claims are afforded the open courts protection—including those coming into existence after 1891. Overall, Section 14 "precludes any legislation that impairs a right of action in negligence that was recognized at common law prior to the adoption of the Commonwealth's 1891 Constitution" and common law rights of recovery formulated after 1891 per *Northeastern Log*.[50] With the Kentucky Supreme Court's recent decision in *Claycomb*, the open courts guarantee is even further protected.

For proper context, it is worth noting that Section 14 is commonly read together with Sections 54 and 241 to form the jural rights doctrine, which protects common law causes of action. However, there is academic debate as

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[42] Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1281–89 (1995).

[43] David Schuman, *Right to a Remedy*, 65 TEMP. L. REV. 1197, 1201 n.25 (1992).

[44] KY. CONST. § 14 (emphasis added).

[45] Hoffman, *supra* note 42, at 1285.

[46] *Id.*

[47] Perkins v. Ne. Log Homes, 808 S.W.2d 809, 811–12 (Ky. 1991).

[48] *See id.* at 812.

[49] *See id.* at 816 (However, this does not affect medical malpractice because it existed before Kentucky's final constitution. But nonetheless, important to point out.).

[50] Gen. Elec. Co. v. Cain, 236 S.W.3d 579, 605 (Ky. 2007).

to whether these sections should be read together or whether the jural rights doctrine is a legal fiction.[51] Sections 54 and 241 are relevant to the Resolution of this Note because they provide a considerable hurdle for legislators pushing for tort reform through damage caps following *Claycomb*. In total, Kentucky citizens' right to access the courts and receive a fair administration of justice is strongly protected by the state constitution.

### ii. Separation of Powers: Sections 27 and 28

Kentucky's separation of powers and distribution of government provisions are found in Sections 27 and 28.[52] Collectively, these provisions provide a much stronger and distinct distribution of government powers than what is found in the United States Constitution.[53] The federal Constitution grants powers to the three branches of government within their respective articles.[54] Kentucky not only offers these separations,[55] but additionally includes a protection that prevents the branches from "exercis[ing] any power properly belonging to wither of the others."[56] This "unusually forceful command"[57] was not a product of thoughtless drafting.

The rationale of this structure is best understood through the intentions of Thomas Jefferson, the rumored author of Section 27. In 1898, Justice Anthony Burnam detailed the account of how this provision came into existence.[58] In 1789, Jefferson returned from France to find a particularly vulnerable separation of powers established by the federal Constitution.[59] He subsequently warned two Kentuckians, John Breckinridge and George Nicholas, of the potential dangers of the new Constitution without properly guarded powers of government. It was at this meeting that Jefferson insisted that a "sufficiently guarded" separation of powers should be the first thing

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[51] *See generally* Thomas P. Lewis, *Jural Rights Under Kentucky's Constitution: Realities Grounded in Myth*, 80 KY. L.J. 953 (1992).

[52] KY. CONST. § 27 ("The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."); KY. CONST. § 28 ("No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.").

[53] Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 911–12 (Ky. 1984).

[54] U.S. CONST. art. I, § 1 (Legislative); U.S. CONST. art II, § 1, cl. 1 (Executive); U.S. CONST. art. III, § 1 (Judiciary).

[55] KY. CONST. § 29 (legislative); KY. CONST. § 69 (executive); KY. CONST. § 109 (judiciary).

[56] Commonwealth v. Assoc. Indus., 370 S.W.2d 584, 586 (Ky. 1963).

[57] *Ex parte* Auditor of Pub. Accounts, 609 S.W.2d 682, 684–85 (Ky. 1980).

[58] Comm'rs of Sinking Fund v. George, 47 S.W. 779, 784–86 (Ky. 1898) (Branham, J., dissenting).

[59] *Id.* at 785.

provided for in Kentucky's developing constitution.[60] Jefferson accordingly drafted the provisions and sent them back to Kentucky; the provisions were added under an independent heading, directly after the bill of rights. The priority placement and background context of these provisions speak to their importance.

The Kentucky Supreme Court agrees with this sentiment. It recognized Kentucky's separation of powers doctrine as fundamental to the state's system of government and mandated that the doctrine "should be 'strictly construed'" against applicable threats.[61] Additionally, the court has acknowledged the significance and history of the doctrine:

> Perhaps no state forming 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 [Kentucky's] Constitution, which history tells us came from the pen of the great declaimer of American independence, Thomas Jefferson . . . .[62]

Collectively, Sections 27 and 28 create a "double-barreled, positive-negative approach."[63] One part of the doctrine grants powers to the three branches, while the other part "specifically prohibit[s] incursion of one branch . . . into the functions and powers of the others."[64] In light of the broad power afforded to the three branches, this increased protection is essential to ensuring that the branches only act within their limits.[65] Unlike in the federal Constitution, the powers of Kentucky's legislature are not entirely enumerated.[66] Instead, Kentucky allows the General Assembly to "enact any legislation, which is not prohibited by some provision of the Constitution of the state, or of the United States."[67] With more atmospheric power to legislate, and that power only regulated by provisions included in the constitution, Sections 27 and 28 stand as safeguards to protect against legislative overreach; they confine these expansive legislative powers within a room to operate.

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[60] *Id.*

[61] Arnett v. Meredith, 121 S.W.2d 36, 38 (Ky. 1938).

[62] Sibert v. Garrett, 246 S.W. 455, 457 (Ky. 1922); *see also* Beshear v. Haydon Bridge Co., 416 S.W.3d 280, 295 (Ky. 2013).

[63] Legislative Research Comm'n. v. Brown, 664 S.W.2d 907, 912 (Ky. 1984).

[64] *Id.*

[65] Commonwealth v. Assoc. Indus., 370 S.W.2d 584, 586 (Ky. 1963).

[66] *See* U.S. CONST. art. I., § 8.

[67] Boone Cty. v. Town of Verona, 227 S.W. 804, 805 (Ky. 1921).

Despite the fact that the Kentucky Supreme Court struck down medical review panels on the basis of the constitutional right to open access to the courts, there is a stronger argument that KRS § 260C is unconstitutional under Sections 27 and 28. The next Section of this Note will explore the court's *Claycomb* decision, highlight its weaknesses, and demonstrate that striking down medical review panels under Kentucky's separation of powers provision is a more cogent constitutional argument.

## III. ANALYSIS

### *A. Section 14: Open Access and Claycomb*

On November 15, 2018, the Kentucky Supreme Court struck down KRS § 216C—Kentucky's medical review panel statute—reasoning that it violated Section 14 of Kentucky's constitution.[68] The issues before the court were twofold: does Section 14 apply as a limitation to all government branches, and if so, does KRS § 216C violate Section 14?[69] With Chief Justice Minton delivering the opinion, the Kentucky Supreme Court answered both in the affirmative.[70]

First, the state argued that medical review panels were constitutional because Section 14's open access guarantee is only a limitation on the judiciary; the judiciary must keep its courts open "without sale, denial, or delay."[71] The court disagreed.[72] Maintaining consistency with the original constitutional framers, it held that Section 14 is instead a restriction on all branches of government.[73] The court also relied on Section 26, which protects the bill of rights from the "general" and "high" powers, which, in its opinion, logically includes the General Assembly.[74]

With the question of application settled, the court next evaluated KRS § 216C's constitutionality under Section 14.[75] The court found that the General Assembly cannot enact legislation that denies or delays access to the administration of justice. However, to analyze the constitutionality of KRS § 216C, the definition of "delay" needed to be established. State courts

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[68] Commonwealth v. Claycomb, No. 2017-SC-000614-TG, 2018 Ky. LEXIS 504, at *32–33. (Ky. Nov. 15, 2018).

[69] *Id.* at *7, *15.

[70] *Id.* at *14–15, *32–33.

[71] *See id.* at *7–15; KY. CONST. § 14.

[72] *Claycomb*, 2018 Ky. LEXIS 504, at *8, *15.

[73] *Id.* at *15; *see generally* Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309 (2003).

[74] *Claycomb*, 2018 Ky. LEXIS 504, at *14–15.

[75] *Id.* at *15–32.

that have addressed this issue are split on whether "delay" means no delay or a reasonable delay.[76] The *Claycomb* court cited the history, purpose, and text of the Kentucky provision, while holding that "Section 14, originally written and adopted in 1792, does not proscribe the creation of 'undue' or 'reasonable' delay on Kentuckian's access to the due course of law; Section 14 plainly proscribes delay."[77]

The majority took the stance that if the drafters of this provision meant the standard of delay to be reasonableness, they would have included it in the text.[78] In fact, three states have reasonable written into the text of their open access provision.[79] This textualist approach also removed an arbitrary examination into what is reasonable—i.e., is ten days reasonable? Five months? Nine months? This conclusion was necessary for the plaintiffs to succeed on their facial challenge to KRS § 216C: that no set of circumstances exist where medical review panels would be valid.[80] If three months would be constitutionally acceptable, the panels could remain intact. As a result, KRS § 216C is unconstitutional under Section 14 because the legislature enacted a delay to citizens' right to access the courts for claims arising out of common law.

This decision is a considerable victory for citizens' rights in the Commonwealth. *Claycomb* assuages the gradual, persistent billow of legislation, not explicitly with the intention of, but resulting in, limiting the constitutional guarantees to citizens afforded by Kentucky's constitution. It is equally reassuring that the Kentucky Supreme Court did not read a reasonableness standard into the text of Section 14; however, other states have stumbled down that path.[81]

For now, *Claycomb* closes the door on pre-jurisdiction review panels, or any delay manufactured by the legislature, for claims arising out of the common law. But that door is not convincingly locked. While all seven justices concurred in result, three justices withheld from the reasoning of the majority.[82] Justice Keller authored the concurrence and first argued the majority used inconsistent constitutional interpretations to achieve a

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[76] *Id.* at *29–31.

[77] *Id.* at *28.

[78] *Id.* at *27–28.

[79] *Id.* at *29–30; *see also* Linder v. Smith, 629 P.2d 1187, 1190–91 (Mont. 1981); Johnson v. St. Vincent Hosp., 273 Ind. 374, 388 (Ind. 1980); Irish v. Gimbel, 691 A.2d 664, 672 (Me. 1997).

[80] Harris v. Commonwealth, 338 S.W.3d 222, 229 (Ky. 2001).

[81] *Claycomb*, 2018 Ky. LEXIS 504, at *27–28; *see also Linder*, 629 P.2d at 1190–91; *Johnson*, 273 Ind. at 388 ("The delay . . . required by this challenged provision must be reasonable . . . if it is to pass constitutional muster"); *Irish*, 691 A.2d at 672.

[82] *Claycomb*, 2018 Ky. LEXIS 504, at *33–39.

premeditated result.[83] Second, and more importantly, the concurrence viewed the majority's interpretation as incorrectly austere and authoritarian.[84] Justice Keller reasoned that the due course of law clause found in Section 14 provides a reasonableness standard for the entire provision and permits the legislature to create reasonable procedural steps before bringing a medical malpractice claim.[85] The concurrence evidences judicial sentiment that the *Claycomb* decision should be reconsidered in the future with an alternative composition of the court. This may be possible given that two justices, Justice Venters in the majority and Justice Cunningham in the concurrence, have announced their retirement.[86] Their replacements could hypothetically swing the supreme court's sentiment on this issue, especially if Governor Bevin is successful in changing the process by which the justices are selected from election to executive appointment;[87] it is assumed the Governor would expect fealty. However, as explained in the following Section, even if *Claycomb* is reversed or modified, medical review panel legislation remains unconstitutional under Kentucky's separation of powers provisions.

### *B. Separation of Powers*

By enacting KRS § 216C into law, the General Assembly exercised powers belonging solely to the judicial branch of Kentucky. The General Assembly created a jurisdictional precursor in an attempt to prevent frivolous lawsuits, make Kentucky more competitive for physicians, and help, at least in theory, to make medical malpractice claims proceed more efficiently;[88] these are laudable goals. However, this attempt not only fails to simplify claims of medical malpractice, but it does so unconstitutionally. Kentucky's unique separation of powers provision works twofold: it mandates separation between the branches and "specifically prohibit[s] incursion."[89]

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[83] *Id.* at *37–38 (Keller, J., concurring).

[84] *Id.* at *38.

[85] *Id.* at *39.

[86] Tom Latek, *Supreme Court Justice Daniel Venters Retiring in January After Serving 35 Years in Judiciary System*, N. KY. TRIB. (Dec. 10, 2018), https://www.nkytribune.com/2018/12/supreme-court-justice-daniel-venters-retiring-in-january-after-serving-35-years-in-judiciary-system/; *Kentucky Supreme Court Justice Retiring February 2019*, WKYT (Dec. 27, 2018), https://www.wkyt.com/content/news/Kentucky-Supreme-Court-justice-retiring-February-2019-503590271.html; *see Claycomb*, 2018 Ky. LEXIS 504, at *33–37.

[87] *See generally* Jack Brammer, *Should Bevin Appoint Kentucky's Attorney General and Judges? 'Oh, Yeah,' He Says.*, HERALD LEADER (Sept. 15, 2017), https://www.kentucky.com/news/politics-government/article173325431.html.

[88] Gregory, *supra* note 2.

[89] Legislative Research Comm'n v. Brown, 664 S.W.2d 907, 912 (Ky. 1984).

To determine whether the General Assembly improperly exercised the power of the judiciary, the analysis must begin by establishing which powers belong to each respective branch. Section 27 divides the powers of government into three branches;[90] Section 28 mandates that a branch of government is not to exercise a power "properly belonging" to another branch.[91] The Kentucky constitution gives the General Assembly the power to legislate.[92] Under this power, for example, it has the authority to enact privileges, such as those found in the rules of evidence.[93] In total, the legislature has the authority to enact substantive law.[94]

The judicial branch is given the power to "prescribe . . . rules of practice and procedure for the Court of Justice," among other duties.[95] Accordingly, and with some limitations, this includes regulating the practice of law, rules of procedure, and the administration of justice.[96] The Kentucky Supreme Court acknowledged the standard that "the Kentucky Constitution undeniably delegates exclusivity to this Court the authority to adopt rules of practice and procedure for the Court of Justice."[97] Because of this, there is a "constitutional violation of separation of powers [] when the Legislature promulgates rules of practice and procedure for this Court of Justice . . . ."[98] As a result, the judiciary has the authority to adopt procedural rules to administer justice.

Now that the powers and roles of the concerned branches are established, the discussion must turn to whether KRS § 216C is procedural or substantive law and whether the General Assembly acted within its constitutional authority. If the statute is substantive, the General Assembly acted within its scope; if the act is procedural, the General Assembly unconstitutionally exercised a power properly belonging to the judiciary.[99]

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[90] KY. CONST. § 27.

[91] *Id.* § 28.

[92] *Id.* § 29.

[93] *See* KY. R. EVID. art. V (Privileges).

[94] Gen. Electr. Co. v. Cain, 236 S.W.3d 579, 605 (Ky. 2007).

[95] KY. CONST. § 116.

[96] O'Bryan v. Hedgespeth, 892 S.W.2d 571, 576 (Ky. 1995); *see also* Hobson v. Ky. Tr. Co., 197 S.W.2d 454 (Ky. 1946).

[97] Elkhorn Coal Co. v. Cheyenne Res., Inc., 163 S.W.3d. 408, 422 (Ky. 2005); *see also O'Bryan*, 892 S.W.2d at 576 (exclusive authority under § 116 to prescribe rules of practice and procedure); Huff v. Commonwealth, 763 S.W.2d 106, 108 (Ky. 1988).

[98] *Elkhorn Coal Co.*, 163 S.W.3d at 423 (citing Commonwealth v. Reener, 734 S.W.2d 794, 796 (Ky. 1987)) ("The Supreme Court of this Commonwealth has the authority to prescribe rules of practice and procedure in the courts of this Commonwealth. Because [proposed statute] is a legislative attempt to invade the rule making prerogatives of the Supreme Court by legislatively prescribing rules of practice and procedure, it violates the separation of powers doctrine enunciated in Section 28 of the Kentucky Constitution.").

[99] KY. CONST. § 28.

### 1. Jurisdiction

The General Assembly insists that KRS § 216C is a "jurisdictional precursor" to filing an action for medical malpractice.[100] This review panel mandates participation, unless waived by both parties, that could potentially result in a nine-month interim until the plaintiff can commence his or her action with a circuit court having general jurisdiction over the matter.[101]

Apart from being predominately procedural in nature, the enacted medical review panel serving as a precursor to access jurisdiction of a Kentucky circuit court is unconstitutional. Circuit courts possess a constitutionally granted power of general jurisdiction over controversies;[102] in contrast, the district court's jurisdiction is regulated by the legislature.[103] As such, Kentucky's circuit courts have "extensive subject matter jurisdiction over all types of cases in *common law* and equity flowing directly from and conferred by the constitution *that are not subject to limitation by statutes enacted by the legislature*."[104] Medical malpractice actions originate in common law and date back to 1851 in the Commonwealth.[105] It follows that circuit courts have general jurisdiction over medical negligence claims and the legislature has no power to tether that jurisdiction.

By enacting KRS § 216C into law, the General Assembly unconstitutionally attempted to regulate the circuit court's general jurisdiction in two sections of the statute. KRS §§ 216C.240 and 216C.250 manage how, when, and for what purposes the court may use its constitutionally granted jurisdiction. Before a plaintiff can commence his or her action in court, he or she must comply with the requirements of this panel. In other words, circuit court jurisdiction is inaccessible prior to this.[106] This means the court cannot be involved with—or exercise its jurisdiction—until a party invokes that jurisdiction in accordance with KRS § 216C.250: the panel reaches an opinion, nine months pass, or both parties consent to bypass the panel. A circuit court with proper subject matter jurisdiction over the

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[100] *See* STBM, *supra* note 19.

[101] KY. REV. STAT. ANN. § 216C.020 (West 2017), *invalidated by* Commonwealth v. Claycomb, No. 2017-SC-000614-TG, 2018 Ky. LEXIS 504 (Ky. Nov. 15, 2018).

[102] Hisle v. Lexington-Fayette Urban Cty. Gov't, 258 S.W.3d 422, 432 (Ky. Ct. App. 2008); KY. CONST. § 112(5) ("The Circuit Court shall have original jurisdiction of all justiciable causes not vested in some other court. It shall have such appellate jurisdiction as may be provided by law.").

[103] *Hisle*, 258 S.W.3d at 433; KY. CONST. § 113(6) ("The district court shall be a court of limited jurisdiction and shall exercise original jurisdiction as may be provided by the General Assembly.").

[104] *Hisle*, 258 S.W.3d at 432 (emphasis added).

[105] *See* Piper v. Menifee, 51 Ky. 465 (Ky. 1851).

[106] KY. REV. STAT. ANN. § 216C.020 (West 2017), *invalidated by* Commonwealth v. Claycomb, No. 2017-SC-000614-TG, 2018 Ky. LEXIS 504 (Ky. Nov. 15, 2018).

action is at the direction and will of the panel created by the General Assembly. As enacted, the panel decides how the plaintiff is to invoke or confer jurisdiction over the claim.[107]

The General Assembly created a bubble for medical malpractice claims that only offers the court limited interaction with cases it would otherwise have general, unregulated jurisdiction over. One of these limitations concern what motions the court is allowed to entertain. KRS § 216C.240(1) says that a court with personal and subject matter jurisdiction can only entertain three types of motions and may only do so pursuant to filing a petition in accordance with KRS § 216C.250.[108] The court may only hear and rule on motions to compel or limit discovery,[109] motions to enforce or quash subpoenas,[110] and motions for sanctions under KRS § 216C.130.[111] This is also an unconstitutional legislative regulation on the circuit court's general jurisdiction.

The other limitation created by this panel is temporal. KRS § 216C.240(2) says that, "[t]he court *has jurisdiction* to entertain a motion . . . *only during* that time after a proposed complaint is filed with the cabinet . . . *but before* the medical review panel gives a written opinion."[112] In effect, this sets a time restraint on when a court of proper jurisdiction can hear motions regarding the pending complaint. Through this, the General Assembly is declaring that a court does not have jurisdiction to hear motions before the claim is presented to the panel. The General Assembly cannot limit the terms of the circuit court's original jurisdiction, as set out in the Kentucky constitution and case law.[113] The time limits placed on the court's jurisdiction by KRS § 21C.240 are unconstitutional because the General Assembly does not have the authority under Kentucky's constitution to regulate or deny the circuit court's general jurisdiction.[114] These temporal and procedural regulations on the circuit court's jurisdiction run contrary to Kentucky's jurisprudence and are an unconstitutional overstep of authority by the General Assembly.

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[107] *Id.* § 216C.250(1) (invoking jurisdiction); *id.* § 216C.250(2) (conferring jurisdiction).

[108] *Id.* §§ 216C.240(1)(a)–(c).

[109] *Id.* § 216C.240(1)(a).

[110] *Id.* § 216C.240(1)(b).

[111] *Id.* § 216C.240(1)(c); *id.* § 216C.130 ("A party, attorney, or panelist who fails to act as required by this chapter without good cause shown if subject to appropriate sanctions upon application to a Circuit Court that has jurisdiction over the subject matter.") (It is difficult for the General Assembly to argue that this would not otherwise be filed with a circuit court when that is the court that is to issue sanctions.).

[112] *Id.* § 216C.240(2) (emphasis added).

[113] Hisle v. Lexington-Fayette Urban Cty. Gov't, 258 S.W.3d 422, 432 (Ky. Ct. App. 2008); KY. CONST. § 122(b).

[114] *Hisle*, 258 S.W.3d at 432; KY. CONST. § 122(b).

### 2. Rules of Practice and Procedure

The General Assembly's attempts to manipulate the judiciary's authority to prescribe rules of practice and procedure for claims of medical malpractice through the enactment of medical review panels is unconstitutional. The Kentucky constitution authorizes the judiciary to create rules of practice and procedure to effectuate the administration of justice.[115] As such, the Kentucky Supreme Court regulates the rules of civil procedure, structure, and administration for the courts.[116] The General Assembly, outside of its authority, structured its own rules of civil procedure and administration with the enactment of KRS § 216C. These procedural rules are intended to filter out frivolous lawsuits against healthcare providers before the plaintiff's file the complaint with the court. Despite its claims of efficiency,[117] making Kentucky more competitive for attracting physicians,[118] and extinguishing the crisis of rising insurance premiums for physicians,[119] the legislative branch enacted this legislation unconstitutionally by exercising a power properly belonging to the judiciary. The General Assembly's ends were certainly attractive, but its means were improper.

The statute regulates how a party is to commence a suit for a claim of medical malpractice.[120] Before one can file a claim of medical malpractice in circuit court, one now must satisfy two requirements: (1) the complaint must be properly presented to the panel, and (2) an opinion must be given by the panel within nine months.[121] Without meeting these requirements, the plaintiff cannot proceed to access the courts. These requirements enacted by the General Assembly are procedural prerequisites that regulate a plaintiff when attempting to file a complaint against a healthcare provider. This is not within the authority of the legislature. Kentucky's constitution dictates the rules that govern the filing of a complaint in court.[122] To permit the General Assembly to exercise this procedural regulation over plaintiffs filing a

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[115] KY. CONST. § 109.

[116] KY. R. CIV. P. 1(2); KY. SUP. CT. R. 1.000, 1.010.

[117] Gregory, *supra* note 2.

[118] *Id.*

[119] *Id.*

[120] KY. REV. STAT. ANN. § 216C.020(1) (establishes requirements before "an action may proceed in a court in Kentucky"); *id.* §§ 216C.030(1), (2) (allows parties to bypass the review panel if both consent and how they are to file the complaint with the court); *id.* §§ 216C.040(2), (3) (defines when a complaint is considered filed and filing fees); *id.* § 216C.050 (panel issues service of the complaint to named defendants).

[121] *Id.* §§ 216C.020(1)(a), (b). If the panel does not reach an opinion within nine months, then the plaintiff may file with the court. *Id.* § 216C.020(1)(b).

[122] KY. CONST. § 109.

lawsuit would allow the legislature to avail themselves to the powers exclusively granted to the judiciary.

Kentucky courts look at the nature of the statute in question to determine whether it is substantive or procedural, which determines whether the legislature acted within its constitutional bounds.[123] Courts emphasize that "it is not within the purview of the General Assembly to enact procedural legislation for the courts, as that power belongs to the Judiciary."[124] Looking at the nature of the panel, the legislature has not created new rights of recovery. Instead, it created a pretrial screening panel which regulates the jurisdiction of the circuit courts and establishes a procedural system for filing claims against healthcare providers in court. By nature, the medical review panel is a procedural law dressed as substantive; views to the contrary place form over substance. The General Assembly overstepped its constitutional power by restricting the jurisdiction of circuit courts and enacting procedural law for the court. Because of this, KRS § 216C is an unconstitutional violation of the separation of powers doctrine found in Section 28 of the Kentucky constitution.[125]

In Kentucky's circumstance, challenging medical review panels on a separation of powers argument is stronger than one based on open access to the courts. It offers a more convincing longevity and does not rely on the interpretation of the term "delay," which has shown to vary among states. While the *Claycomb* court decided KRS § 216C was unconstitutional, this Note recognizes the opportunity for future reconsideration under a refashioned supreme court composition. The divide between the majority and concurring justices is symbolic of the national division between states when interpreting the meaning of delay and due course of law as applied to open access provisions.

## IV. RESOLUTION AND LOOKING FORWARD

Although by a narrow majority, *Claycomb* delivered clarity on the fundamental guarantee in Section 14. At the national level, there are sixteen states with enacted medical review panels.[126] This includes six states without

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[123] Commonwealth v. Reneer, 734 S.W.2d 794, 796 (Ky. 1987); *see also* Smith v. Dixie Fuel Co., 900 S.W.2d 609, 612 (Ky. 1995).

[124] Smothers v. Lewis, 672 S.W.2d 62, 64 (Ky. 1984).

[125] KY. CONST. § 28.

[126] *See* ALASKA STAT. ANN. § 09.55.536 (West 2018); DEL. CODE ANN. tit. 18, § 6803 (West, Westlaw through 82 Del. Laws, ch. 4); HAW. REV. STAT. ANN. § 671-12 (West 2018); IDAHO CODE ANN. § 6-1001 (West 2019); IND. CODE ANN. § 34-18-10-1 (West, Westlaw through the end of the Sp. Sess. of the 120th General Assembly); KAN. STAT. ANN. § 65-4901 (West 2018); LA. STAT. ANN. § 40:1231.8 (2018); ME. REV. STAT. ANN. tit. 24, § 2851 (Westlaw through the 2d Sp. Sess. of the 128th Maine Legis.); MASS.

open access guarantees and six states that have *reasonable delay* read into or explicitly in their text.[127] The remaining four states have open access provisions more similar to Kentucky's version in Section 14.[128] While some states have addressed medical malpractice issues with medical panels, the majority have enacted medical malpractice tort reform by way of mandatory arbitration, damage caps, and affidavits of merit.[129] Short of amending the constitution, this is predictably where Kentucky legislators will direct their efforts until they believe the majority of the supreme court is willing to reconsider *Claycomb*.

Supporters of KRS § 216C claimed that its purpose was to reign in frivolous medical malpractice claims that are driving up the cost of insurance premiums and as a result, are creating an uninviting environment for physicians.[130] Ostensibly, the legislators wish to redefine the standard of frivolousness with regard to claims against healthcare providers. However, if legislators are dissatisfied with frivolous lawsuits or claims of such, there are procedural safeguards available in court to prevent frivolous claims or those lacking in merit: motion for summary judgment, dismissal, failure to state a claim, frivolous sanctions, and motion to strike.[131] Additionally, there are ethical guidelines that mandate honesty to the tribunal.[132] A common parry to this resolution is that trial judges are reluctant to impose sanctions against frivolous claims and are therefore ineffective. It is difficult to measure if this hesitancy is unwarranted or to find numbers to validate this counterclaim. But there is no real resolution to this concern. The state must reject a meritless committee that reviews all claims that are sent to judges, effectively removing their discretion. Although, if the judge's decision is particularly egregious, one could report the judge to Kentucky's Judicial Conduct Committee. Overall, the counterclaim of judicial inactivity is an excuse incapable of support by accurate, attainable statistics. Using the existing procedural remedies would eliminate the need for the General Assembly to

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GEN. LAWS ANN. ch. 231, § 60B (West 2018); MONT. CODE ANN. § 27-6-301 (West 2018); NEB. REV. STAT. ANN. § 44-2840 (West 2018); N.H. REV. STAT. ANN. § 519-B:1 (2018); N.M STAT. ANN. § 41-5-14 (West 2019); UTAH CODE ANN. § 78B-3-416 (West 2018); VA. CODE ANN. § 8.01-581.2 (West 2018); WYO. STAT. ANN. § 9-2-1520 (West 2018).

[127] Commonwealth v. Claycomb, No. 2017-SC-000614-TG, 2018 Ky. LEXIS 504, at *29–30 (Ky. Nov. 15, 2018).

[128] *See id.*

[129] *Id.* at *29 n.78.

[130] Gregory, *supra* note 2.

[131] KY. R. CIV. P. 12.03 (judgment on the pleadings); KY. R. CIV. P. 12.02 (failure to state a claim); KY. R. CIV. P. 12.06 (motion to strike); KY. R. CIV. P. 41.02 (dismissal); KY. R. CIV. P. 11 (frivolous sanctions).

[132] KY. SUP. CT. R. 3.130 (West 2017).

violate the doctrines of separation of powers or jural rights. Insisting that a significant number of lawyers are filing frivolous lawsuits to shakedown physicians and their insurance companies imposes an inaccurate, unfortunate image of the legal profession on to the public. This is an attack on the integrity of attorneys in Kentucky and these reproachful accusations should not be disregarded.

Another resolution to the alleged healthcare "crisis" would be to address the problem instead of regulating the punishment. In 2004, it was estimated that 632 to 1,407 deaths in Kentucky were the result of preventable medical error.[133] From this it appears the problem is healthcare providers—not lawyers. So, why not address the root of the apparent problem? Further safeguards in the medical field would be more appropriate than limiting physician liability. This would in turn lower the number of claims and likely reduce the amount of preventable deaths. Also, attracting physicians from out of state by limiting their liability is not the only means of obtaining better healthcare in our state. More prudent oversight, training, and regulation of healthcare providers within our state to improve the quality of treatment appears to be a more appropriate solution to this alleged malpractice crisis; however, on balance, increasing regulation is an ineffective solution to many problems. Through the review panel statute, physicians seem to be valuing their personal liability over the quality of care afforded to their patients. Addressing the root of the problem, which appears to originate with the healthcare providers, would nullify the General Assembly's unconstitutional encroachment on the judiciary's powers.

Although KRS § 216C was found unconstitutional, the General Assembly's tort reform agenda will not be deterred. Two proposed bills await enactment and vote that effectuate legislators' intentions. The first, Senate Bill 2, is a constitutional amendment to Section 54 that would grant the General Assembly the power to limit amounts recoverable for death and injury.[134] In turn, this would render Section 241, which prevents limitation on recovery for wrongful death, void. The second, Senate Bill 20, proposes to cap attorney's fees for any malpractice claim against a healthcare provider.[135] If enacted, it would place a 33% limit on the amount in damages recovered.[136] This would likely reduce medical malpractice claims to charity

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[133] Neal Pattinson, *The Facts About Medical Malpractice in Kentucky*, PUB. CITIZEN 2 (Feb. 2004), https://www.citizen.org/sites/default/files/ky_medmal_report.pdf.

[134] S.B. 2, 227th Gen. Assemb., Reg. Sess. (Ky. 2018) (proposed constitutional amendment to KY. CONST. § 54).

[135] S.B. 20, 227th Gen. Assemb., Reg. Sess. (Ky. 2018).

[136] S.B. 2, 227th Gen. Assemb., Reg. Sess. (Ky. 2018) (proposed constitutional amendment to KY. CONST. § 54).

work after considering the costs required to finance a malpractice lawsuit and the success rate of plaintiffs at trial.

The regulation of attorney's fees for medical malpractice claims by the General Assembly warrants its own constitutional analysis, but that is beyond the scope of this Note. It appears that members of the General Assembly will stop at nothing to insulate healthcare providers from claims of malpractice, even if it requires compromising and forfeiting citizens' fundamental rights. The General Assembly will undoubtedly seek to amend Kentucky's constitution to allow damage caps, which are now expressly prohibited. For now, the challenge to medical review panels is decided, but future challenges to citizens' rights remain on the horizon.

## V. CONCLUSION

As detailed in the Analysis of this Note, the *Claycomb* decision found medical review panels to be unconstitutional under Section 14. This opinion initiated a diminuendo for tort reform in the Commonwealth. Further, the defeat of an expected constitutional amendment to Section 54 of the Kentucky constitution would cement the nadir for tort reform in the Commonwealth. However, *Claycomb* was narrowly decided and leaves an opportunity for future reconsideration of Section 14 as applied to medical review panels. Regardless of the lifespan of *Claycomb*, there remains a stronger argument that medical review panels acting as jurisdiction precursors are unconstitutional under Sections 27 and 28 of Kentucky's constitution, as they tether the general jurisdiction of the circuit courts and proscribe rules of procedure for the judiciary.

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