

**PUBLISHED OPINIONS
KENTUCKY COURT OF APPEALS
APRIL 2009**

I. ARBITRATION

A. Beverly Health and Rehabilitation Services, Inc. v. Smith

[2008-CA-000604](#) 04/10/2009 2009 WL 961056

Opinion by Judge Wine; Judges Dixon and Keller concurred. The Court affirmed an order of the circuit court denying a motion to compel arbitration on an estates' claim that treatment the deceased received in a nursing facility hastened his death. The Court first held that the law of third party beneficiaries was inapplicable because neither the deceased nor his power of attorney were strangers to the contract. The Court then held that there was no evidence indicating that the deceased's daughter had the authority to sign and therefore, there was no binding, written contract with regard to the arbitration agreement.

II. CONTRACTS

A. Curry v. Bennett

[2007-CA-002315](#) 04/24/2009 2009 WL 1097959

Opinion by Judge Wine; Judges Dixon and Keller concurred. The Court affirmed a judgment of the circuit court ordering appellant to specifically perform on a horse-breeding contract and awarding appellee damages for appellant's breach of the contract. The Court first held that the trial court did not err by allowing evidence of customary practices in the American Saddlebred horse industry that a trainer acts as the agent for the horse owner. KRE 406 allows for evidence of habit or routine practice of an organization to prove the conduct of a person on a particular occasion was in conformity with the practice. The testimony at issue was relevant and admissible to show that appellee reasonably relied upon appellant's trainer's apparent authority to negotiate the agreement. The Court next held that the trial court properly instructed the jury on the issue of agency and did not improperly shift the burden to appellant to prove that the trainer was not acting as his agent. First, the instruction substantially adopted the recommended instruction set out in prior caselaw. Moreover, since appellant admitted that he knew the trainer was negotiating with appellee, the only issue was whether appellee knew that the trainer lacked authority to negotiate. The Court finally held that in order to show the diminished value of the colt, the trial court properly allowed testimony that had appellant not failed to provide the necessary paperwork for the colt, the colt would likely have won a weanling competition. The evidence was not unduly speculative in light of all of the evidence presented to establish the colt's diminished value. Further, appellant had the opportunity to cross-examine all of the evidence.

III. CORRECTIONS

A. **Hospital of Louisa v. Johnson County Fiscal Court**

[2008-CA-001302](#) 04/10/2009 2009 WL 961145

Opinion by Judge Caperton; Judge Thompson concurred; Judge Wine concurred by separate opinion. The Court affirmed a summary judgment of the circuit court on the appellant hospital's claim for payment from the county fiscal court for medical treatment given to a prisoner who had been released from jail on bail with the condition that he receive medical treatment and report back to the jail immediately upon completion of treatment. The Court held that because the prisoner was not in custody as defined by KRS 520.010(2), the county was not responsible pursuant to KRS 441.045(3) to pay for the medical treatment.

IV. CRIMINAL LAW

A. **Beckam v. Commonwealth**

[2008-CA-000277](#) 04/24/2009 2009 WL 1097985

Opinion by Judge VanMeter; Judge Lambert concurred; Senior Judge Knopf dissented by separate opinion. The Court affirmed a circuit court judgment sentencing appellant after a jury found him guilty of several drug-related offenses. The Court held that the trial court did not err in failing to suppress evidence found at appellant's home pursuant to the execution of a search warrant. The Court held that the police officer's affidavit provided a sufficient nexus for authorizing the warrant to search the residence. The conditions of two rental cars permitted the inference that appellant might be involved in drug trafficking and permitted the inference that evidence of drug trafficking might be found at his home. The Court also held that the evidence was admissible pursuant to the good-faith exception to the exclusionary rule as the officer's believe in the existence of probable cause was not wholly unreasonable.

B. **Graves v. Commonwealth**

[2008-CA-000901](#) 02/20/2009 2009 WL 414589 Ord pub 04/03/2009

Opinion by Judge Nickell; Judge Dixon and Senior Judge Buckingham concurred. The Court affirmed an order of the circuit court denying a motion filed pursuant to CR 60.02(f) to set aside appellant's conviction and sentence. The Court first held that appellant's failure to put a complete record before the court resulted in the assumption that the missing competency evaluation order and videotape of the guilty plea colloquy supported the circuit court finding that appellant's plea was intelligent, voluntary and knowing. The Court then held that, considering the scant facts presented, the totality of the circumstances and the holding in *Conley v. Commonwealth*, 569 S.W.2d 682 (Ky. App. 1968), there was no reason to conclude that the sentencing court had any doubt as to appellant's competency. The Court finally held that the trial court did not abuse its discretion in finding that the motion was not filed in a reasonable time when it was filed more than seven years after appellant's conviction.

C. Nicely v. Commonwealth

[2007-CA-002109](#) 04/24/2009 2009 WL 1097905

Opinion by Judge Wine; Chief Judge Combs concurred; Senior Judge Buckingham concurred in result only by separate opinion. The Court reversed and remanded an order of the circuit court denying appellant's CR 60.02 motion for credit for time served in the county jail while he participated in a drug court program. In a case of first impression, the Court held that a court was free to use either its civil or criminal contempt powers, as opposed to revoking a defendant's probation or modifying previously imposed conditions of probation. However, the court could not impose contempt sanctions for the same violations of the conditions of probation which were used to revoke the probation. Since the trial court previously found that appellant violated the conditions of drug court, it abused its discretion when, *nunc pro tunc*, it also found him in contempt. As a result, the court erred when it failed to follow the mandates of KRS 532.120(3) by awarding appellant the appropriate credit for time served before final sentencing.

V. EMPLOYMENT

**A. Commonwealth, Dept. of Revenue, Finance and Administration
Cabinet v. McDonald**

[2007-CA-001626](#) 04/10/2009 2009 WL 960765

Opinion by Judge Moore; Judges Clayton and Taylor concurred. The Court reversed an opinion and order of the circuit court concluding that appellees' requests for retroactive pay related to their job reclassifications were timely appealed. The Court held that the Personnel Board and the circuit court improperly interpreted KRS 18A.095(29). The General Assembly enacted a one-year time limit for merit employees who did not receive written notification of a penalization to file an appeal with the Personnel Board and there were no exceptions to the time limits for continuing violations or ongoing penalizations. The Court further held that that the statute did not require an acknowledgement of the penalization by the appointing authority. Because the appellees failed to appeal the action to the Personnel Board within the time limitation, calculated from the date they were notified that their job assignments were changed but they were not reclassified at a higher pay grade, the appeals to the Board were time barred.

VI. FAMILY LAW

A. Conn v. Ingram

[2007-CA-002255](#) 04/24/2009 2009 WL 1097937

Opinion by Judge Nickell; Judges Caperton and Keller concurred. The Court affirmed an order of the circuit court dismissing appellant's petition to adopt his adult daughter. The Court held that the trial court correctly found that appellant, a Missouri resident, failed to satisfy the residency requirement of KRS 199.40(1). The Court further held that the residency requirement was not relevant only to the adoption of minors and that it must be strictly enforced.

VII. OPEN RECORDS

A. **Lexington H-L Services, Inc. v. Lexington-Fayette Urban County Government**
[2008-CA-000068](#) 04/10/2009 2009 WL 960826

Opinion by Judge Taylor, Judge Lambert and Senior Judge Graves concurred. The Court affirmed a summary of the circuit court concluding that the personal privacy exemption of KRS 61.878 mandated redaction of a rape suspect's identity in response to an open records request for a police file in a closed investigation. The Court held that the circuit court properly concluded that the personal privacy exemption applied. Balancing the reasons for public disclosure against the suspect's personal privacy interest, the Court concluded that, under the circumstances, the disclosure would constitute a clearly unwarranted invasion of personal privacy. The Court further held that appellee's blanket policy of identity redaction in all cases where a suspect was investigated but not arrested did not violate the Open Records Act.

VIII. TORTS

A. **Tapp v. Owensboro Medical Health System, Inc.**
[2008-CA-000848](#) 04/10/2009 2009 WL 960826

Opinion by Judge Acree; Judge Moore and Senior Judge Knopf concurred. The Court affirmed a judgment of the circuit court dismissing a negligence action against a doctor and hospital. The Court held that the trial court did not abuse its discretion in allowing a doctor to testify regarding the nurses' standard of care. The testimony complied with the requirements of KRE 702 in that the testimony was within the board certified pediatrician's area of expertise; his opinion was based upon facts and data, including deposition testimony of all relevant witnesses and medical records admitted into evidence; the principles and methods used to assess the facts and data were obtained from the doctor's career focusing on pediatric patients, including emergency situations, and were typical of traditional medical education in the specialty; and the doctor clearly applied reliable principles and methods to the specific circumstances. The Court declined to adopt holdings from other jurisdictions that physicians were incompetent to testify regarding a nurses' standard of care.