

**KENTUCKY COURT OF APPEALS  
PUBLISHED OPINIONS  
MARCH 2010**

**I. CRIMINAL LAW**

**A. Baker v. Commonwealth**

[2008-CA-001122](#) 03/19/2010 2010 WL 985301

Opinion by Judge Keller; Judges Acree and Caperton concurred. The Court affirmed appellant's convictions for first-degree trafficking in a controlled substance and possession of drug paraphernalia, second or subsequent offense, and for being a persistent felony offender in the first degree. The Court first held that the trial court improperly permitted the Commonwealth to bolster the testimony of the paid informant the police used to conduct the controlled purchase of drugs. The Commonwealth's questions and the police officer's answers regarding the number of cases in which the informant was used and whether the informant worked for any other agencies violated the spirit of *Farrow v. Commonwealth*, 175 S.W.3d 601 (Ky. 2005). However, the Court then held that in light of the overwhelming evidence of appellant's guilt, the errors were not reversible.

**B. Hatcher v. Commonwealth**

[2008-CA-001569](#) 03/12/2010 2010 WL 890004

Opinion by Judge Wine; Judge Keller and Senior Judge Lambert concurred. The Court reversed a circuit court order denying appellant post-conviction relief under RCr 11.42, vacated appellant's conviction and sentence for murder, and remanded for a new trial on the charge of murder and its lesser included offenses. The Court first held that counsel was not ineffective for failing to object to a constructive amendment of the indictment. Although the indictment stated that appellant intentionally killed the victim, no new evidence was required to prove wanton murder. The Court next held that counsel was not ineffective for failing to challenge the indictment on the grounds that appellant was convicted of trafficking in marijuana when the indictment was for possession of marijuana. Although the difference between the offense charged and the offense presented to the jury was significant, appellant was not unfairly prejudiced because the facts to prove both were the same and the caption in the indictment notified appellant of the charge. The Court next held that whether the trial court erred by refusing to continue the trial, when the Commonwealth waited to disclose a jailhouse informant until a week before trial, should have been raised on direct appeal. The Court next held that trial counsel was not ineffective for failing to raise double jeopardy protection on the drug charges when each charge involved a different subsection of KRS 218A. The Court finally held that trial counsel was ineffective for failing to object that there was no separate self-protection instruction, failing to object that self-protection was not defined for the jury, failing to request an

imperfect self-protection instruction and failing to request that extreme emotional disturbance be defined for the jury. Moreover, defense counsel was also ineffective for failing to object to the instructions on the grounds that there should have been an instruction on second-degree manslaughter as a lesser-included offense to wanton murder.

**C. Hill v. Commonwealth**

[2008-CA-001752](#) 02/12/2010 2010 WL 476015 Ord. Pub. 3/26/2010

Opinion by Judge Stumbo; Chief Judge Combs and Judge Clayton concurred. The Court affirmed an order of the circuit court directing that currency forfeited to the Commonwealth not be returned to appellant. The Court first held that there was evidence of traceability based on appellant's recorded confession, wherein he stated that he didn't smoke crack but made money from it, and an officer's testimony that smaller bags of cocaine found on appellant's person with the money were packaged. Appellant's self-serving testimony that he won the money gambling, without more evidence, was insufficient to rebut the presumption contained in KRS 218A.410(1)(j) that the money was related to a drug transaction. The Court also held that the forfeiture of \$2175.00 was not unconstitutionally excessive.

**D. Mitchell v. Commonwealth**

[2007-CA-002241](#) 03/05/2010 2010 WL 743674

Opinion by Judge Keller; Judges Acree and Lambert concurred. The Court reversed and remanded an opinion and order of the circuit court denying appellants' motions for post-conviction relief pursuant to KRS 11.42, wherein they alleged that they received ineffective assistance of counsel because they were both represented by attorneys from the Jefferson County Public Defender's Office. The Court ultimately held that the trial court erred in denying relief and remanded to the court for a new trial with directions for new counsel to be appointed. In doing so, the Court first held that although the record did not contain the guilty pleas, arraignments, or pretrial hearings, it did contain the Commonwealth's concession that the trial judge did not conduct a colloquy with the appellants regarding their waiver of dual representation and that this was sufficient for the Court to consider the issue. The Court next held that trial counsel was ineffective by undertaking dual representation without compliance with RCr 8.30. First, the trial court did not comply with its obligation to inform appellants of the potential consequences of dual representation. Second, the waivers did not contain language indicating that the trial court explained to the appellants the potential ramifications of conflicts of interest. The Court next held that while appellants were not automatically entitled to post-conviction relief, under the circumstances they were entitled to relief because there was an actual conflict of interest when the appellant son gave his post-arrest statement implicating the appellant father, the father maintained his complete innocence, and the son's plea bargain involved his agreement to testify his father.

## II. FAMILY LAW

### A. **S.R. v. J.N.**

[2009-CA-001621](#) 03/26/2010 2010 WL 1133247

Opinion by Judge Acree; Judge Moore concurred; Senior Judge Buckingham dissented by separate opinion. The Court vacated and remanded an order of the family court finding that, pursuant to KRS 600.020, appellant's son was abused or neglected and removing the child from appellant's custody. The Court held that the family court erred as a matter of law when it did not follow the statutory requirement that it determine the truth or the falsity of the allegations in the complaint. Therefore, the adjudication did not comply with KRS 620.100. Further, the family court improperly relied upon information from previous custody proceedings, which was outside the record and was neither raised as an allegation in the complaint nor presented as evidence during the hearing. Therefore, the conclusion that the child was abused or neglected was not based upon substantial evidence.

## III. TORTS

### A. **Keeney v. Osborne**

[2007-CA-002112](#) 03/05/2010 2010 WL 743671 Rehearing Pending  
Opinion by Judge Clayton; Judge Moore concurred; Judge Stumbo dissented in part by separate opinion. The Court affirmed in part, vacated in part, and remanded a judgment of the circuit court based on a jury verdict against an attorney awarding his client compensatory and punitive damages of more than \$5.1 million on her claim for negligent representation. The client retained the attorney to represent her in an action against an airplane pilot who crashed his airplane into her home. The action against the airplane pilot was dismissed on statute-of-limitations grounds. The Court held that the client raised a viable claim of legal negligence. The Court also held that the jury had sufficient evidence to establish damages for personal property plus evidentiary support for the award of punitive damages in the malpractice case. However, the Court did not reach the issue of lost punitive damages in the airplane crash because clear and convincing evidence was not provided to demonstrate the requisite actions on the pilot's part warranting punitive damages. The Court also held that, without physical impact, Kentucky law did not allow for an award of damages for emotional distress for both the underlying case and the case itself. The Court also held that there was sufficient evidence on the record for the jury to believe the attorney's conduct was fraudulent in order to support an award for legal fees and costs. The Court also held that, based on the requisites of CR 8.02(2), the client was limited to punitive damages in the amount in the last itemization of such damages in her trial memorandum. The Court finally held that the trial court did not have jurisdiction to allow the client to amend her complaint nineteen days after the entry of the judgment in order to add the attorney's insurer as a defendant and to add claims against the insurer under KRS 304.12-230, the Unfair Claims Settlement Practices

Act, KRS 367.170 and Kentucky common law for bad faith conduct in refusing to settle the case.

**B. Rawlings v. Interlock Industries, Inc.**

[2008-CA-001616](#) 03/19/2010 2010 WL 1006853

Opinion by Judge Caperton; Judge Dixon and Senior Judge Henry concurred. The Court affirmed in part and reversed in part and remanded a summary judgment entered in favor of appellees on appellant's claims for injuries he received while he was rolling up the straps on his tractor-trailer after a delivery. The trial court found that the claims were barred by the one-year statute of limitations found in KRS 413.140(1) for personal injuries. The Court first held that summary judgment was improper as appellant's claims were properly brought under the Motor Vehicle Reparations Act (MVRA), contained in KRS 304.39, and therefore, the corresponding two-year statute of limitations in KRS 304.39-230 was applicable. Because appellant was preparing his vehicle for return to the roadway and was neither removing or securing a load when he was struck by an aluminum bundle falling from a forklift, his actions were not integral to the unloading of the tractor-trailer and thus, did not constitute unloading within the meaning of KRS 304.39-020(6). The Court next held that because there were no findings by the trial court on cross-appellant's alternative theory that there was no evidence of negligence on its part, the issue was not properly before the Court. The Court finally held that the trial court did not abuse its discretion by excluding the testimony of appellee's expert witness when it failed to comply with a pretrial discovery order. It was apparent from the trial court's order rescheduling the trial date that the original discovery deadlines were unaffected.