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**CLERK
SUPREME COURT**

**COMMONWEALTH OF KENTUCKY
SUPREME COURT
2009-SC-000660-D**

BRANDON BENNINGFIELD, by
and through his mother and next friend,
LAURIE BENNINGFIELD

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
NO. 06-CI-04201

v.

COURT OF APPEALS OF KENTUCKY
NO. 2008-CA-001979-MR

WADE AND HELEN ZINSMEISTER

APPELLEES

BRIEF FOR APPELLANT

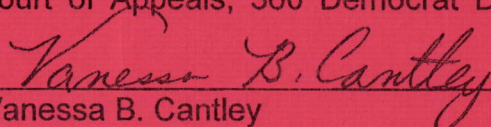
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of the foregoing were served upon the following named individuals via first class U.S. Mail on the 10th day of January 2011 to the following: Hon. Judith E. McDonald-Burkman, Judge, Jefferson Circuit Court Division Nine, 700 West Jefferson Street, Kentucky 40202; Douglas B. Taylor, Esq., Suite 610 North, First Trust Centre, 200 South Fifth Street, Louisville, Kentucky 40202; and Hon. Sam Givens, Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601.


Vanessa B. Cantley

INTRODUCTION

Brandon Benningfield appeals from a summary judgment entered in favor of Wade and Helen Zinsmeister. Benningfield was attacked by a dog that the Zinsmeisters permitted to remain on property they own. The lower courts erred by interpreting Kentucky's dog bite legislation, KRS 258.095(5) and 258.235(4), at variance with the stated language and creating exceptions to the statutes where none exist.

STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to Rule 76.12(4)(c)(ii) of the Kentucky Rules of Civil Procedure, the Appellant, Brandon Benningfield, requests the opportunity to present oral argument. The factual circumstances surrounding the attack on Brandon Benningfield—a child attacked by a dog living on rented property—are all too common. The lower courts are likely to face the novel, varied, and complex legal and public policy issues raised in this case frequently until they are resolved. These very important issues can be explained, and the error of the courts below can be best demonstrated, if Appellant is allowed oral argument in this case.

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STATEMENT OF THE CASE

Brandon Benningfield appeals from a summary judgment entered in favor of Wade and Helen Zinsmeister. (Exhibit 2: Opinion and Order, Jefferson Circuit Court Division Nine (September 11, 2008)). A panel of the Court of Appeals affirmed in an opinion on September 11, 2009. (Exhibit 1: Opinion of the Court of Appeals). This Court granted discretionary review on November 10, 2010.

A. FACUTAL BACKGROUND

This case arises out of a dog attack on Brandon Benningfield, who was eight years old at the time of his injuries. Dominic Harrison was the property owner of the dog, an unaltered male Rottweiler breed. (Exhibit 4: Resp. to First Int. No. 7). The dog was kept by Harrison's parents, along with several other Rottweilers, in the backyard of rental property located at 1702 Chester Road. (Exhibit 5: Resp. to Second RFA No. 1). Appellees, Wade and Helen Zinsmeister, owned the rental property where the dog was kept in the backyard and lived right next door to the rental property, just a few feet away, at 1700 Chester Road. (Exhibit 4: Resp. to First RFA No. 1; Resp. to First Int. No. 1).

On July 3, 2005, Benningfield was walking home from a neighbor's house when suddenly, and without provocation, the dog got out of the yard at 1702 Chester Road through a hole in the fence, ran across the street and attacked him, tearing his scalp, flesh on his face, arms, legs and buttocks, which ultimately required surgery and a lengthy, complicated hospitalization. At the time of the attack, Benningfield was lawfully on the sidewalk in front of the aforementioned property and was not engaged in the commission of a trespass or other tort and

was not teasing, tormenting, abusing or otherwise provoking the aforementioned dog. (Exhibit 3: Plaintiff's Complaint ¶ 9).

Appellees were aware that the dog had gotten out of the yard at 1702 Chester Road several times prior to July 3, 2005. (Exhibit 4: Resp. to First RFA No. 4). Yet, they did nothing to repair the hole in the fence where the dog was getting out, or otherwise ensure that the dog would remain enclosed in the backyard of their property. (Exhibit 5: Resp. to Second RFA No. 4). Moreover, although Appellees claim that they repeatedly told their tenants over the course of six months that Harrison would not be permitted to keep the dog on the rented premises, they never moved to evict their tenants or otherwise attempted to remove the dog themselves or have the dog removed by Louisville Metro Animal Services. (Exhibit 5: Resp. to Second RFA No. 7).

B. RELEVANT PROCEDURAL HISTORY

Benningfield filed suit on May 10, 2006 against Appellees and Dominic Harrison alleging negligence and strict liability for the injuries he sustained in the dog attack. (Exhibit 3: Plaintiff's Complaint). After a brief discovery period, Appellees filed a motion for summary judgment arguing that a landlord's liability does not extend to instances where a tenant's dog attacks an individual while not on the leased premises, citing the Court of Appeals holding in *Ireland v. Raymond*, 796 S.W.2d 870 (Ky. Ct. App. 1990). The Jefferson Circuit Court granted Appellees' motion for summary judgment. However, bound by precedent, yet recognizing a conflict in the current state of the law, the Court commented "while Plaintiff's argument is compelling (especially in light of

Fetchko v. Morgan—S.W.3d—(Ky. Ct. App. 2008) the Court finds *Ireland* to be directly on point and still binding.” (Exhibit 2: Opinion and Order).

C. OPINION OF THE COURT OF APPEALS

On September 11, 2009, a panel of the Kentucky Court of Appeals affirmed and held the statutory definition of a dog “owner” under KRS 258.095(5) does not extend to landlords unless the landlords knew of their tenant’s dog *and its dangerous propensities*. This is a view sometimes referred to as the “Knowledge of Viciousness” or “One Free Bite” Rule which was abolished when Old Kentucky Statute 68a and KRS 258.275(1) and its successor statute, KRS 258.235(4) were enacted. (Exhibit 1: Opinion).

The panel failed to recognize the plain meaning of the controlling dog bite legislation. Instead, it 1) created exceptions to the statutory definition of dog “owner;” and 2) placed a burden on dog attack victims of proving an owner’s knowledge of a dog’s dangerous propensities—where no such exceptions or burden exist in the statutes. Benningfield moved this Court for discretionary review. This Court granted the motion on November 10, 2010.

SUMMARY OF THE ARGUMENT

The Opinion of the Kentucky Court of Appeals improperly overrides the public policy of the Commonwealth as embodied in dog attack legislation. KRS 258.095(5) defines a dog “owner” as “every person having a right of property in the dog *and* every person who keeps or harbors the dog, or has it in his care, or *permits it to remain on or about premises owned or occupied by him.*” KY. REV. STAT. ANN. § 258.095(5) (West 2008) (emphasis added). A landlord is a dog “owner” pursuant to KRS 258.095(5) and is held to the same liability standard as all other statutorily-defined “owners.”

The Court of Appeals interpretation of KRS 258.095(5), which excludes a landlord from the definition of “owner,” would require the court to re-write the statute or ignore the use of the word “or” in the statute. The court can do neither.

KRS 258.235(4) states, “[a]ny owner whose dog is found to have caused damage to a person . . . *shall be responsible for that damage.*” KY. REV. STAT. ANN. 258.235(4) (West 2008) (emphasis added). The Court of Appeals’ requirements that a dog attack occur on the rented premises and that the landlord be aware of a dog’s dangerous propensities creates impermissible exceptions to the strict liability language found in KRS 258.235(4).

However, even if landlords are not strictly liable for injuries caused by their tenants’ dogs, under controlling case law, they should still be liable if they failed to exercise ordinary care to control the dog. In this case, summary judgment would be inappropriate because whether Appellees exercised ordinary care to control the dog would be an issue of fact for the jury.

Finally, public policy requires a liberal interpretation of dog attack legislation. Dog owners, including landlords, are in the best position to bear the burden of damages resulting from dog attacks. Enforcing a strict liability standard as intended by the legislature is the only way to ensure dog owners will be held liable for injuries their dogs cause.

The Court of Appeals holding in this case is confusing, contrary to the plain language of the dog attack legislation, conflicts with its prior opinions and amounts to a partial reversion to common law. For all of these reasons, the decision of the Court of Appeals must be reversed.

ARGUMENT

I. STANDARD OF REVIEW

A de novo standard of review is required because the present case involves statutory interpretation, which is a matter of law. “A reviewing court is not required to adopt the decisions of the trial court as to a matter of law, but must interpret the statute according to the plain meaning of the act and in accordance with the legislative intent.”¹

II. KRS 258.095(5) PROVIDES THAT LANDLORDS ARE LEGAL “OWNERS” OF A DOG THEY ALLOW TO REMAIN ON PROPERTY THEY OWN.

KRS 258.095(5) defines a dog “owner” as “every person having a right of property in the dog *and* every person who keeps or harbors the dog, *or* has it in his care, *or permits it to remain on or about premises owned or occupied by him.*” KY. REV. STAT. ANN. 258.095(5) (West 2008) (emphasis added).

The language of KRS 258.095(5) is clear and unambiguous—the statute is meant to extend liability to people other than the mere property owner of the dog. The statute, in its entirety, extends liability to more than one second party owner of the dog; it extends liability to a person who keeps or harbors the dog, has it in his care, permits it to remain on or about premises owned by him, or permits it to remain on or about premises occupied by him.

The Court of Appeals acknowledged the legislature’s intent when it held a dog groomer was an “owner” pursuant to KRS 258.095(5).² Moreover, the Court

¹ *Floyd County Bd. Of Educ. v. Ratliff*, 955 S.W.2d 921, 925 (Ky. 1997).

² *Jordan v. Lusby*, 81 S.W.3d 523, 524 (Ky. Ct. App. 2002).

noted, “[b]y becoming an ‘owner’ of a dog under our statute, one is responsible for injuries inflicted by the dog to persons or animals. The statute does not make a distinction between the legal owner and a second party owner, we see no reason to create one here.”³

The statute clearly includes a landlord as a dog “owner” when it states, “every person . . . who . . . permits it to remain on or about premises **owned or occupied by him.**” KY. REV. STAT. ANN 258.095(5). The use of the word “or” means that each word or phrase before and after must have a different meaning.⁴

Thus, the statutory definition also includes a person who has a possessory interest in the property where the dog was kept—in this case, the tenants, Harrison’s parents. However, merely because the definition includes the tenants of the property does not mean the owners of the property are not also included in this definition. An owner includes (1) a person who permits the dog to remain on or about premises **occupied** by him, i.e. a tenant **or** (2) a person who permits the dog to remain on or about premises **owned** by him, i.e. a landlord. Additionally, the statute does not require one who permits the dog to remain on or about premises owned or occupied by him to have control of the dog.

³ *Id.*

⁴ See *Hall v. Hospitality Resources, Inc.*, 276 S.W.3d 775, 784 (Ky. 2008) (“It is a basic principle of statutory construction that terms joined by the disjunctive ‘or’ must have different meanings because otherwise the statute or provision would be redundant.”)

A. THE COURT OF APPEALS ERRED WHEN IT EXCLUDED LANDLORDS FROM THE STATUTORY DEFINITION OF DOG “OWNER.”

Unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.⁵ Thus, if a statute is clear, unambiguous and expresses the legislature’s intent, the statute must be applied as written.⁶ The court has a duty to ascertain and give effect to the intent of the Kentucky General Assembly, and it is not at liberty to add or subtract from legislative enactment or to discover meaning not reasonably ascertainable from language used.⁷ The court does not have the authority to make exceptions which the Legislature did not make.⁸

By interpreting KRS 258.095(5) to exclude a landlord from the definition of “owner,” the Court of Appeals frustrated the plain meaning of the statute and created an exception where one does not exist. To exclude a landlord from the statutory definition of ownership requires the court to rewrite the statute and utterly ignore the use of the word “or” in the statutory language. The court does not have the authority to do either.⁹

⁵ *Hall v. Hospitality Resources, Inc.*, 276 S.W.3d 775, 784 (Ky.2008) (citing *United States v. Plavcak*, 411 F.3d 655,660 (6th Cir.2005)).

⁶ *Id.* at 784 (citing *Griffin v. City of Bowling Green*, 458 S.W.2d 456,457 (Ky.1970)).

⁷ *Beckham v. Board of Education of Jefferson County*, 873 S.W.2d 575, 577 (Ky.1994) (citing *Gateway Construction Company v. Wallbaum*, 35 S.W.2d 247, 249 (Ky.1962)).

⁸ *Mastin v. McLain*, 264 S.W. 1069, 1069 (Ky.1924).

⁹ See *Commonwealth of Kentucky v. Allen*, 980 S.W.2d 278, 280 (Ky.1998); *Hall*, 276 S.W.3d at 784.

The Court of Appeals argues that the legislature could not have intended to include landlords in the definition of dog owner merely because it “would create a society in which property owners would no longer allow dogs on public and private property, for fear of being sued.”¹⁰ Even if the court felt that KRS 258.095(5) is not in the best interest of the public, it is beyond the court’s power to override the public policy of the Commonwealth embodied in enacted legislation. This Court has held that the judiciary cannot vitiate an act of the legislature on the grounds that public policy promulgated therein is contrary to what the court considers to be in the public interest.¹¹ Judicially created common law must always yield to the superior policy of legislative enactment and the Constitution.¹²

By enacting KRS 258.095(5) the Kentucky legislature manifested its intention to include landlords within the meaning of dog “owners.” It is not the prerogative of the court to determine whether or not the statute is in the best interest of the public. The legislative process is the proper avenue for any proposed change.

B. THE COURT OF APPEALS ERRED WHEN IT RELIED ON JUDICIAL INTERPRETATION OF PRIOR DOG ATTACK LEGISLATION.

Ireland v. Raymond addressed the same issue as the case at hand—whether landlords can be held liable for injuries resulting from an attack by their

¹⁰ Exhibit 1: Opinion, p. 4.

¹¹ *Com., ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610, 614 (Ky.1992) (overturned on other grounds by *Com., ex rel. Conway v. Thompson*, 300 S.W.3d 152 (Ky.2009)).

¹² *Id.*

tenant's dogs off the rented property.¹³ The court held the landlords could not be held liable for such injuries. The court emphasized the landlords did not have knowledge of the dog's viciousness and had no control over the attack since it took place off of the leased premises.¹⁴

Under most circumstances, landlords are *not* liable for the negligence of their tenants unless it was an area over which the landlord had control.¹⁵ Therefore, the court emphasized if the attack would have taken place on the leased premises, summary judgment would have been inappropriate.¹⁶

In this case, the lower courts held that the court's decision in *Ireland*, and preceding judicial interpretation of the prior dog bite statutes excluding landlords from liability, is binding.¹⁷ However, the legislature modified the dog attack statutes after judicial interpretations of the prior statutes, clearly intending to change the law of Commonwealth.¹⁸

There is a presumption that the legislature, when amending a statute, knew of all prior judicial construction thereof.¹⁹ The legislature did not intend to codify common law interpretations of the prior statute by enacting the new statute

¹³ *Ireland v. Raymond*, 796 S.W.2d 870, 872 (Ky. Ct. App. 1990).

¹⁴ *Id.*

¹⁵ *Pinnell v. Woods*, 121 S.W.2d 679, 680 (Ky. 1938).

¹⁶ *Ireland*, 796 S.W.2d at 871.

¹⁷ Exhibit 1: Opinion, *citing Ireland v. Raymond*, 796 S.W.2d 870 (Ky. Ct. App. 1990).

¹⁸ Old Kentucky Statute § 68 and KRS § 258.275(1) repealed in 2004 with the current statute, KRS § 258.235(4).

¹⁹ *T.M. Crutcher Dental Depot v. Miller*, 251 Ky. 201, 64 S.W.2d 466, 468 (Ky. 1933).

because such act would be a vain and useless gesture.²⁰ When the legislature enacted KRS 258.095(5), it intended to do away with common law interpretations excluding landlords from liability. If the legislature had intended to keep the common law rule in place governing landlord-tenant liability in dog attacks, there would be no reason to enact dog bite legislation.

The Court of Appeals' most recent holding in *Jordan v. Lusby*, more accurately reflects the legislature's intention to draw no distinction between the legal owner and a second party owner, such as Appellees in this case, when determining liability for dog attacks.²¹

However, even if the dog attack statutes are subject to different interpretations, the statutes are remedial legislation. Remedial legislation implies the intention to reform or extend existing rights, and must be broadly construed in favor of those it allows a cause of action.²² A broad interpretation of the dog attack statutes in this case warrants including landlords in the statutory definition of dog owner.

C. APPELLEES WERE STATUTORY OWNERS OF THE DOG THAT ATTACKED BRANDON BENNINGFIELD.

The Appellees lived at 1700 Chester Road, only a few feet away from the rental property located at 1702 Chester Road.²³ They were aware that a large,

²⁰ *Id.*

²¹ *Jordan v. Lusby*, 81 S.W.3d 523, 524 (Ky. Ct. App. 2002).

²² *Kentucky Insurance Guaranty Ass'n v. Jeffers*, 13 S.W.3d 606, 610 (Ky. 2000) (the rule of liberal construction for remedial legislation applies to a statute giving a party a remedy where he had none, or a different one, than before); see also KRS 446.080(1).

²³ Exhibit 4.

male Rottweiler dog was kept in the backyard of the rental property.²⁴ Despite the fact that Appellees claim they repeatedly told their tenants that the dog was not permitted to be kept on the rented premises, they never did anything to enforce this rule for at least six months prior to the attack on Appellant, and surprisingly, even after the attack occurred.²⁵ Therefore, Appellees were fully aware the dog remained on property owned by them and permitted the dog to remain on such property—i.e. placing them squarely within the definition of dog “owner” under KRS 258.095(5). Conversely, landlords who are unaware that their tenants are keeping a dog on the rental property, or do not permit the dog on their property, will not be considered owners of the dog by statutory definition.

III. KRS 258.234(5) IMPOSES STRICT LIABILITY ON DOG OWNERS FOR DAMAGES INCURRED IN DOG ATTACKS.

KRS 258.235(4) states, “[a]ny owner whose dog is found to have caused damage to a person . . . *shall be responsible for that damage.*” KY. REV. STAT. ANN. 258.235(4) (West 2008) (emphasis added). However, the lower courts have ignored this statute.

Again, it has long been held that statutory construction calls for the “[c]ommon words and phrases . . . to be understood according to their ordinary sense.”²⁶ Referring to the word ‘shall,’ this court held “in common or ordinary

²⁴ Exhibit 4

²⁵ Exhibit 4.

²⁶ *Dillehay v. Hickey*, 71 S.W. 1, 1 (Ky. 1902).

parlance, and in its ordinary signification, the term 'shall' is a word of command and . . . must be given a compulsory meaning . . . shall means shall."²⁷

Since the legislature used the word "shall" rather than "may," common sense requires one to construe the statute as imposing a strict liability standard.

A. THE COURT OF APPEALS ERRED IN RELYING ON THE 'KNOWLEDGE OF VICIOUSNESS' RULE ABOLISHED BY KRS 258.234(5)

In this case, the Court of Appeals held that in order for a landlord to be liable for a dog attack, (1) the attack must have taken place on the rented premises or some area over which the landlord had control; and (2) the landlord must have knowledge of the dog's viciousness. KRS 258.234(5) creates no such requirements.

Before the legislature enacted any legislation concerning dog owner liability, the "Knowledge of Viciousness" a/k/a the "One Free Bite" rule governed as set forth in the seminal case of *Dykes v. Alexander*.²⁸ This rule required an owner to have knowledge of the dog's viciousness before being held liable for any injuries caused by the dog.²⁹

Over the years, the legislature has enacted and repealed a number of statutes concerning dog owner liability, most important to the present case are Old Kentucky Statute 68 and KRS 258.275(1) (repealed in 2004 with the current statute, KRS 258.235(4)). All of the statutes have, in one way or another,

²⁷ *Vandertoll v. Com.*, 110 S.W.3d 789, 795-796 (Ky. 2003)(citing Black's Law Dictionary 1233 (5th ed. 1979).

²⁸ *Dykes v. Alexander*, 411 S.W.2d 47, 48 (Ky. 1967).

²⁹ *Brown v. Weathers*, 57 S.W.2d 4, 5 (Ky. 1933).

superseded the common law rule and imposed a standard of strict liability. However, the prior statutes differ in one key aspect—they all contained exceptions to the strict liability standard.

The first statute enacted by the General Assembly in 1893 was Old Kentucky Statute 68 which provided: "Every person owning, having or keeping any dog *shall* be liable to the party injured for all damages done by such dog."³⁰ The highest Kentucky courts recognized this statute superseded common law principles, and an owner could be liable regardless of whether he had knowledge of the dog's vicious tendencies.³¹ However, this statute also contained exceptions which exempted an owner from liability where the person injured was on the premises at night, or where he was engaged in an unlawful act in the daytime.³² Therefore, past courts logically concluded that the legislature did not mean to impose strict liability in any and every circumstance because they chose to include exceptions to strict liability within the language of the statute.³³

Dykes was a critical case interpreting Kentucky's dog bite legislation, setting the stage for modern decisions. In *Dykes*, the Court used past interpretation of Old Kentucky Statute 68 to conclude the dog bite legislation in effect at that time also did away with the common law rule but did not impose

³⁰ Old Kentucky Statute 68

³¹ *Brown*, 57 S.W.2d at 5.

³² *Dillehay*, 71 S.W. at 1.

³³ *Dykes*, 411 S.W.2d at 48-49 (citing *Bush v. Wathen*, 47 S.W. 599 (Ky. 1898); *Vandercar v. David*, 96 So.2d 227 (Fla. Dist. Ct. App. 1957)).

strict liability on dog owners.³⁴ The *Dykes* Court recognized contributory negligence principles, similar to the exceptions stated in Old Kentucky Statute 68, *even though the new dog bite legislation contained no such exceptions.*³⁵

The controlling statute at the time *Dykes* was decided stated, in pertinent part, “[a]ny owner or keeper of a dog which has . . . injured or damaged any person or property, *shall* be liable to the . . . person in a civil action for all damages and costs . . .”³⁶ Up until the time *Dykes* was decided, KRS 258.275(1) had never been considered by the courts. The Court decided to look at Old Kentucky Statute 68a, because when statutes are comparable the construction of the other may be taken into account.³⁷ However, the Court failed to recognize that Old Kentucky Statute 68 had actual exceptions written into the language of the statute, which is a logical reason why past courts concluded that Old Kentucky Statute 68 did not impose an absolute strict liability standard. The *Dykes* Court was incorrect to use reasoning of the past courts, because the statutes were not as similar in construction as the Court determined.

The unsound holding in *Dykes* resulted in later courts disregarding the plain language of the statute in its decisions, certainly in this case, and also recently in *Carmical v. Bullock*.³⁸ Relying on *Dykes*, the Court of Appeals in

³⁴ *Dykes*, 411 S.W.2d at 48.

³⁵ *Id.*

³⁶ *Id.* (quoting KY. REV. STAT. ANN. § 258.275(1) (repealed 2004)).

³⁷ *Id.* (citing *Button v. Hikes*, 176 S.W.2d 112 (Ky. 1943)).

³⁸ *Carmical v. Bullock*, 251 S.W.3d 324 (Ky. Ct. App. 2007)

Carmical upheld jury instructions that only required the owner to exercise ordinary care to control his dog, rather than imposing strict liability.³⁹

Contrary to the first dog attack legislation, the current KRS 258.235(4) does not contain any exceptions that would allow the courts to determine that the legislature did not intend to impose a strict liability standard. When a statute is contrary to the common law rule, the statute should be liberally construed in order to promote its purpose.⁴⁰ Since the Court recognized the statute changed the common law, it should have construed it as imposing a strict liability standard.⁴¹

B. SUMMARY JUDGMENT WAS INAPPROPRIATE BECAUSE IF LANDLORDS ARE NOT STRICTLY LIABLE FOR INJURIES CAUSED BY A TENANT'S DOG, THEY SHOULD BE HELD LIABLE FOR FAILING TO EXERCISE ORDINARY CARE.

Contrary to its holding in *Carmical*, the Court of Appeals failed to apply even an "ordinary care" standard of liability to the landlord dog owners in this

³⁹ In *Carmical*, the Kentucky Court of Appeals upheld the Madison Circuit Court's jury instructions which stated:

The Defendant, Keith Bullock, is liable for damages cause by his dog to the Plaintiff, John Carmical, if he had reason to believe that John Carmical would be in the vicinity of the animal. He further had a duty to exercise ordinary care to control his dog for the safety of others.

You will find for the Plaintiff, John Carmical, under this Instruction if you are satisfied from the evidence that:

(A) The Defendant, Keith Bullock, had reason to believe that the Plaintiff would be in the vicinity of his dog; OR

(B) The Defendant, Keith Bullock, failed to exercise ordinary care to control his dog for the safety of others, and that such failure was a substantial factor in causing the Plaintiff's injuries.

Otherwise, you will find for Keith Bullock.
Carmical, 251 S.W.3d at 327.

⁴⁰ *Dillehay*, 71 S.W. at 1.

⁴¹ *Id.*

case.⁴² If the Court refuses to hold that KRS 258.235(4) imposes a strict liability standard for dog owners, Appellees should still be held liable if they failed to exercise ordinary care to control the dog and, thus, summary judgment is inappropriate. In *Johnson v. Brown*, this Court stated, “[t]hat case [*Dykes*] stands for the proposition that one who keeps a dog enclosed or fettered on his own premises will not be liable to an interloper whose presence and exposure to the dog he has no reason to anticipate.”⁴³ Conversely, and contrary to the Court of Appeals holding in this case, if the owner had reason to anticipate the victim’s proximity to the dog, the common law “One Free Bite” rule will be set aside, eliminating the requirement of proving the owner had knowledge of the dog’s vicious propensities.⁴⁴ *Carmical* expanded this interpretation to any victim, not only a trespasser, when the Court held a delivery man must prove the dog owner had reason to believe the delivery man would be in the vicinity of the dog.⁴⁵

Whether Appellees could have anticipated Brandon Benningfield’s proximity to the dog is an issue of fact for the jury. The Appellees knew the dog had escaped from the backyard of 1702 Chester Road on several occasions prior to the attack and that Benningfield lived in the neighborhood, along with many other children.⁴⁶ The Appellees lived adjacent to the rented property and could easily have observed the obvious hole in the fence where the dog had been

⁴² Exhibit 1: Opinion.

⁴³ *Johnson v. Brown*, 450 S.W.2d 495, 496 (Ky. 1970).

⁴⁴ *Id.*

⁴⁵ *Carmical*, 251 S.W.3d at 326.

⁴⁶ Exhibit 4.

escaping.⁴⁷ Benningfield was walking down the street when the attack occurred and did not act in an unreasonable manner or provoke the dog. Because there is evidence that Appellees had reason to believe Benningfield would be in the vicinity of the dog, Benningfield is not required to prove Appellees had actual knowledge of the dog's viciousness, since KRS 258.235(4) abrogated that common law principle. Therefore, a jury should be permitted to decide whether Appellees, as legal owners of the dog, should be responsible for Benningfield's injuries.

Under *Carmical*, Appellees can also be held liable under a basic negligence standard—if they failed to exercise ordinary care to control the dog for the safety of others and that failure was a substantial factor in causing the victim's injuries.⁴⁸ Appellees knew children lived in the neighborhood and were frequently out in the streets. They knew the dog was getting off of the property unrestrained.⁴⁹ There was a large hole in the fence at the rental property, which Appellees never fixed.⁵⁰ Benningfield maintains that it was through this hole that the dog escaped and attacked him. Appellees admit they told the tenants they did not want the dog at the rental property, yet they never evicted the tenants (even though they could have under the lease) nor did they call animal control.⁵¹ Even after the attack occurred, they failed to remove the dogs from the property

⁴⁷ Exhibit 4.

⁴⁸ *Carmical*, 251 S.W.3d at 327.

⁴⁹ Exhibit 4.

⁵⁰ Exhibit 5.

⁵¹ Exhibit 5.

and never did anything to repair the fence.⁵² Therefore, if this Court does not interpret the dog bite legislation to impose strict liability on landlords, a jury should be permitted to determine if Appellees failed to exercise ordinary care to control the dog for the safety of Benningfield and whether that failure was a substantial factor in causing Benningfield's injuries, making summary judgment inappropriate.

IV. PUBLIC POLICY REQUIRES A LIBERAL INTERPRETATION OF KENTUCKY'S DOG BITE LEGISLATION.

A. DOG OWNERS ARE IN THE BEST POSITION TO BEAR THE BURDEN OF DAMAGES RESULTING FROM DOG ATTACKS.

Dog owners, including landlords, are in the best position to be held liable for injuries and damages caused by their dogs. Dog owners make a conscious decision to have a dog and must consider that their dog could potentially bite someone (however unlikely that may seem to the owner). Likewise, when landlords permit dogs to live on property they own, they must consider that the dog may potentially injure someone. In sum, dog owners, including landlords, assume the risks that naturally follow by having a dog or allowing it to live on their property.

The easiest way for dog owners to protect themselves financially in the event someone is injured by their dog is to obtain insurance, or require their tenants to secure insurance, that will provide coverage for injuries inflicted by dogs. If secondary dog owners, such as landlords, do not want to be held liable

⁵² Exhibit 5.

for injuries caused by their tenants' dogs, they should not allow them to remain on the property.

On the other hand, innocent victims of dog attacks are not in a position to be responsible for their injuries. They do not know they are going to be bitten by a dog and should not be forced to bear the burden of paying for medical care and treatment for injuries they suffer in dog attacks. According to a state survey of Kentucky, sixteen percent (16%) of the population does not have health insurance and seventeen percent (17%) receive Medicaid.⁵³ Moreover, many dog bite injuries require extensive medical treatment and cosmetic surgery to repair permanent scarring, which many health insurance plans will not cover. Consequently, an innocent victim is left with no redress if he does not have medical insurance to cover the cost of dog attack injuries or if he is uninsured—and, in such instances, it is often the taxpayers of the Commonwealth of Kentucky who are left holding the bag.

B. ENFORCING A STRICT LIABILITY STANDARD, AS INTENDED BY THE LEGISLATURE, RATHER THAN NEGLIGENCE PRINCIPLES, IS THE ONLY WAY TO ENSURE DOG OWNERS WILL BE HELD LIABLE FOR INJURIES THEIR DOGS CAUSE.

Dog ownership encompasses more than just the companionship that comes with having a dog; it is also a responsibility. The only way to enforce this responsibility is with a strict liability standard. Dogs are animals and, therefore, humans will never have complete control over them. No matter how well an owner trains a dog, it can still disobey because animals act on instinct. Dogs

⁵³ Census Bureau, *Current Population Survey*, March 2006-2007 available at <http://www.statehealthfacts.org/profileind.jsp?ind=125&cat=3&rgn=19>. (Last visited January 8, 2011).

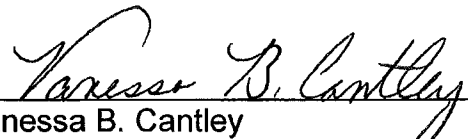
confined to areas by pens, chains, or fences can still escape. The most careful owner can still have a dog that may one day bite or attack someone. Given a dog's inherent nature, it is not good law to take into account the owner's negligence when considering liability; many times it is not an owner's failure to confine or restrict his dog but the innate tendencies of the dog that cause it to react a certain way and attack.

The fact still remains, however, that the dog belongs to the owner(s). The dog is the owner's responsibility and, because he assumes the risk that the dog may injure a person, he should bear the burden of the victim's damages. By applying a strict liability standard, as intended by the legislature, dog owners will know they have a responsibility to pay for damages caused by their dogs and are more likely to protect themselves and potential victims by obtaining insurance to cover these types of injuries.

CONCLUSION

Appellant, Brandon Benningfield, requests that this Court reverse the Court of Appeals and remand with instructions for the trial court to enter summary judgment in favor of Benningfield on the issue of Appellees' liability. Given the plain meaning of KRS 258.095(5), Appellees are statutory owners of the dog that attacked Brandon Benningfield because they permitted the dog to remain on property they own and, therefore, given the plain meaning of KRS 258.235(4), Appellees *shall* be liable for Benningfield's damages. Alternatively, reversal and remand for a trial on the issues of whether Appellees exercised ordinary care to the control the dog is appropriate.

Respectfully submitted,



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