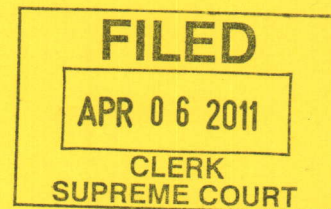


COMMONWEALTH OF KENTUCKY
SUPREME COURT
2009-SC-000660-D



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

REPLY BRIEF FOR APPELLANT

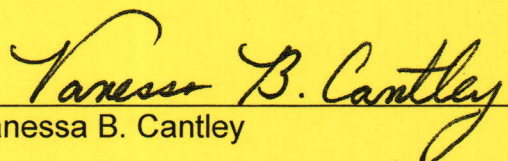
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that copies of the foregoing were served upon the following via first class U.S. mail on the 5th day of April, 2011: 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

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INTRODUCTION

Wade and Helen Zinsmeister lived only a few feet away from their rental property. They allowed their renters, Sheila Harrison and Ed Roach, to keep a Rottweiler on the property. They knew the Rottweiler could escape - it had escaped before. However, the Zinsmeisters took no action to evict the tenants or insist on immediate removal of the dog. The Zinsmeisters collected rent for six more months until the Rottweiler escaped again. This time the dog viciously bit and attacked eight-year old Brandon Benningfield.

In 2004, the Legislature made significant changes to KRS Chapter 258 to protect people like Brandon. The Legislature ensured that landlords, and other landowners in a position to insure against losses caused by dog attacks, would be responsible for injury caused by dogs which they allow on their property. The Zinsmeisters are no exception.

REBUTTAL ARGUMENT

I. THE LANGUAGE OF KRS CHAPTER 258 AS A WHOLE MAKES CLEAR THAT LANDLORDS LIKE THE ZINMEISTERS ARE STATUTORY DOG "OWNERS" UNDER KRS 258.095(5).

In 2004, Senate Bill (S.B.) 133 became law.¹ That legislation made significant changes to KRS Chapter 258 titled "Animal Control and Protection." Specifically, S.B. 133 created two categories of dog "owners." The first category, which pertains to mandatory animal vaccinations and rabies prevention, applies only to persons actually "owning, keeping, or harboring" a dog, cat, or ferret. KRS 258.005(2). The second category, which pertains to animal control, applies, not

¹ S.B. 133 is attached hereto in its entirety as Exhibit 1. Also available on Westlaw at KY LEGIS 189 (2004).

only to those who possess or control dogs, but landowners who permit dogs to remain on their property. KRS 258.095(5). Appellees would read KRS 258.005(2) and KRS 258.095(5) the same way. See Appellees' Brief, pp. 3-6 (arguing that dog "owner" for the purpose of KRS 258.095(5) means only a person in possession or control of a dog). A reading of the Act as a whole, along with the statutory additions and deletions in Senate Bill 133, reveals that such an interpretation is fundamentally flawed.

In 2004, the Legislature created the following definition of "owner" in KRS 258.005(2) along with other substantial revisions to Chapter 258:

(2) "Owner" means any person owning, keeping, or harboring a dog, cat, or ferret in Kentucky.

A "dog" in KRS 258.005 is any canine three (3) months of age or older. KRS 258.005(1). However, the Legislature expressly limited the definitions of "dog" and "owner" to KRS 258.005 through KRS 258.087. Those sections concern dog, cat, and ferret vaccinations, immunizations, and rabies control.

KRS 258.095(5), on the other hand, contains a different definition of "owner." In addition to the "owners" listed in KRS 258.005(2), the statute also includes landowners who permit dogs to remain on their property:

"Owner," when applied to the proprietorship of a dog, includes 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. (Emphasis added).

The definition of "dog" is also different. A dog, for the purpose of KRS 258.095, is a domestic canine six (6) months of age or older. KRS 258.095(4). These

definitions of “dog” and “owner” apply to KRS 258.095 through KRS 258.500. Unlike the preceding statutory sections, these sections regulate identification, control, and destruction of animals and, most importantly for purpose of the present case, liability for injuries caused by such dogs. See KRS 258.235(4).

If the Legislature intended to limit the definition of dog “owner” in KRS 258.095(5) to only those in possession or control of a dog, as Appellees suggest, it easily could have. The Legislature could have revised KRS 258.095(5) consistent with KRS 258.005(2). The fact that the Legislature chose the broader definition of “owner” in KRS 258.095(5) - and even a different definition of “dog” - demonstrates a clear intent to create two different categories.

Appellant’s interpretation of KRS 258.095(5) is the only reasonable interpretation, and the only interpretation consistent with the rules of statutory construction.² The argument advanced by Appellees does not withstand a fair reading of the Act as a whole. If KRS Chapter 258 is read as a whole, the Zinsmeisters are statutory “owners” of the Rottweiler.

II. THE ZINSMEISTERS, AS STATUTORY “OWNERS” OF THE ROTTWEILER, ARE RESPONSIBLE FOR BRANDON BENNINGFIELD’S INJURIES.

KRS 258.235(4) states, “[a]ny owner [as defined by KRS 258.095(5)] whose dog is found to have caused damage to a person . . . **shall be**

² *Richardson v. Louisville/Jefferson County Metro Govt*, 260 S.W.3d 777, 779 (Ky. 2008)(Statutes “must be read as a whole and in context with other parts of the law.”); *Petitioner F. v. Brown*, 306 S.W.3d 80, 86 (Ky. 2010)(“[A]n act is to be read as a whole, and any language in the act is to be read in light of the whole act.”); *University of the Cumberlands v. Pennybacker*, 308 S.W.3d 668, 683 (Ky. 2010)(“[W]e are not free to ignore portions of statutes that are inconvenient to a particular litigant’s position”); *Saxton v. Com.*, 315 S.W.3d 293, 300 (Ky. 2010) (“Discerning and effectuating legislative intent is the first and cardinal rule of statutory construction.”).

responsible for that damage.” (Emphasis added). Appellees ignore the word “shall” in KRS 258.235(4). Appellees instead rely on cases pre-dating KRS 258.235 or ignoring the 2004 revisions. Appellees also ignore KRS 446.010 which defines “shall” for all Kentucky Statutes: “**‘Shall’ is mandatory.**” KRS 446.010(30)(Emphasis added).

If there was any doubt that the Legislature meant what it said in KRS 258.235(5), the Legislature, in 2004, changed the “Penalties” section of KRS Chapter 258 to provide:

The owner of any dog, cat, or ferret which bites a human being **shall** be liable to pay all damages for personal injuries resulting from the bite of the dog, cat, or ferret.

KRS 258.990(2). Before 2004, KRS 258.990(2) only allowed recovery for damages caused by an unvaccinated rabid dog.³ By changing the penalty section, and reading that section consistent with KRS 258.235, the Legislature clarified that any dog “owner” in KRS 258.095(4) or KRS 258.005(2) is responsible for personal injury damages resulting from a dog bite.⁴ The Legislature could not have been clearer had it had imputed liability to dog owners a third time somewhere else in Chapter 258.

None of the cases cited by Appellees recognize the 2004 legislative changes, or the fact that the Legislature intended to broaden the definition of dog “owner” and extend liability to such owners. This, although our Courts have expressly recognized the Legislature’s right to regulate this area:

³ S.B. 133 attached as Exhibit 1. Also available on Westlaw at KY LEGIS 189 (2004).

⁴ Cat and ferret owners are also liable for their animals, but only if they are an “owner” as defined in KRS 258.005(2).

[T]he regulation of dogs is within the police power of the state, and that it is competent for the Legislature to prohibit the keeping of dogs entirely, or, if it is necessary for the public welfare, any other regulation may be adopted which to the Legislature may seem most expedient for the promotion of that end.⁵

The Court in *Bess* clarified that the legislative prerogative to regulate dogs, limit or define their ownership, and prescribe penalties and remedies is based on the inherent nature of dogs, specifically: “their liability to break through all discipline and act according to their original savage nature.”⁶ Given the inherent nature of dogs, the Legislature had every right to impute liability for dog attacks to dog owners, including landowners who permit dogs to remain on their property.

Finally, contrary to the Appellees’ suggestion, statutory imputed liability is not a novel concept. Liability without fault exists elsewhere in the Kentucky Revised Statutes. For instance, if a minor causes injuries as a result of an automobile collision, the parents can be held jointly and severally liable even though the parents did nothing wrong.⁷ Moreover, defining “owner” in the absence of actual title, possession, or control of property is not unique either. Car dealers remain statutory “owners” of vehicles if they fail to obtain proof of insurance before the sale.⁸

The regulation of animals, including dogs, is at least as important as vehicle ownership to the health, safety, and welfare of the citizens in this

⁵ *Bess v. Bracken County Fiscal Court*, 210 S.W.3d 177, 180 (Ky. App. 2006), quoting *McGlone v. Womack*, 129 Ky. 274, 284, 111 S.W. 688, 690 (1908).

⁶ *Id.*, quoting *Shadoan v. Barnett*, 217 Ky. 205, 207, 289 S.W. 204, 205 (Ky.1926).

⁷ See KRS 189.590.

⁸ See KRS 186A.220; see also *Gainsco Co. v. Gentry*, 191 S.W.3d 633 (Ky. 2006).

Commonwealth. In Chapter 258, the Legislature had every right to create the classifications and prescribe the remedies it did. There is no legitimate basis to disregard them.

CONCLUSION

This Court is faced with a compelling question: should this Court interpret the statutory language in KRS Chapter 258, including the 2004 statutory revisions, or should it follow inapposite case law because it is more convenient for Appellees? Fortunately this Court has already answered that question: “we are not free to ignore portions of statutes that are inconvenient to a particular litigant's position.”⁹ If Appellees believe KRS Chapter 258 is unfair or unreasonable, there is a solution: the legislature process. This Court, however, is not the appropriate forum for that solution or any statutory revision.

Given the statutory language, Appellant respectfully requests that the Court of Appeals be reversed and this case be remanded to the circuit court.

Respectfully submitted,



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⁹ *University of the Cumberlands v. Pennybacker*, 308 S.W.3d 668, 683 (Ky. 2010).