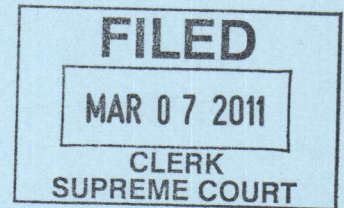


**COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY**

NO. 2009-SC-000660-D

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



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

APPELLANT

-VS-

WADE ZINSMEISTER  
HELEN ZINSMEISTER (DECEASED)

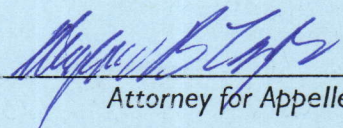
APPELLEES

APPEAL FROM THE JEFFERSON CIRCUIT COURT  
NO. 06-CI-04201  
HONORABLE JUDITH E. McDONALD-BURKMAN, JUDGE

**BRIEF FOR APPELLEES**

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It is hereby certified that a copy hereof was mailed this 4<sup>th</sup> day of March, 2011, to Ms. Vanessa B. Cantley, BAHE, COOK, CANTLEY & JONES, PLC, 700 Kentucky Home Life Building, 239 South 5<sup>th</sup> Street, Louisville, KY 40202, Attorney for Appellant; to the Trial Judge, Hon. Judith McDonald-Burkman, Jefferson Circuit Court, Division 9, Jefferson Judicial Center, 700 West Jefferson Street, Louisville, KY 40202; and to Mr. Sam Givens, Clerk, Court of Appeals of Kentucky, 360 Democrat Drive, Frankfort, KY 40601. It is further certified that the record on appeal was not withdrawn by counsel for appellees.

  
\_\_\_\_\_  
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**TABLE OF CONTENTS**

	<u>Page</u>
STATEMENT CONCERNING ORAL ARGUMENT .....	iii
COUNTERSTATEMENT OF POINTS AND AUTHORITIES .....	iv-vii
COUNTERSTATEMENT OF THE CASE .....	1-2
ARGUMENT .....	3-25
SUMMARY OF THE ARGUMENT .....	3
I.    LANDLORDS ARE NOT "OWNERS" OF A TENANT'S DOG AND HAVE NO LEGAL LIABILITY FOR INJURIES WHICH OCCUR OFF THE LEASED PREMISES. ....	3-4
II A.  LANDLORDS WHO HAVE RETAINED NO CONTROL OVER LEASED PROPERTY ARE NOT "OWNERS" OF A TENANT'S DOG. ....	4-6
II B.  THE COURT OF APPEALS DID NOT ERR IN ADOPTING THE RATIONALE OF <i>IRELAND V. RAYMOND</i> . ....	6-10
II C.  THE APPELLEES/LANDLORDS WERE NOT STATUTORY OWNERS OF THE TENANTS' DOG. ....	10
III.   KRS 258.235(4) DOES NOT IMPOSE STRICT LIABILITY ON APPELLEES FOR APPELLANT'S INJURY. ....	10-13
III A. THE COURT OF APPEALS DID NOT ERR IN FOLLOWING THE RATIONALE IN <i>IRELAND V. RAYMOND</i> . ....	13-19
III B. APPELLEES HAD NO LEGAL OBLIGATION TO EXERCISE ORDINARY CARE TO CONTROL THE DOGS KEPT BY THE TENANTS ON THE LEASED PREMISES. ....	19-23
IV A.  THERE IS NO "PUBLIC POLICY" IMPOSING LIABILITY ON LANDLORDS FOR INJURIES BY A TENANT'S DOG WHICH OCCUR OFF THE LEASED PREMISES. ....	23-24

IV B. CURRENT KENTUCKY LAW CORRECTLY APPLIES THE INTENT OF THE LEGISLATURE. ....	25
CONCLUSION .....	25

## STATEMENT CONCERNING ORAL ARGUMENT

Appellees believe oral argument would be beneficial, since this case involves whether or not the KRS 258.095(5) definition of "owner," with reference to the proprietorship of a dog, includes landlords – an issue which has never been expressly decided. It also involves whether or not the rationale in *Ireland v. Raymond*, 796 S.W.2d 870 (Ky.App. 1990), which held under an almost identical factual situation that a landlord had no legal liability for injuries caused by a tenant's dog when the incident did not occur on the leased premises, is still valid.

**COUNTERSTATEMENT OF POINTS AND AUTHORITIES**

	<u>Page</u>
<b>SUMMARY OF THE ARGUMENT</b> .....	3
KRS 258.095(5) .....	3
<i>Ireland v. Raymond</i> , 796 S.W.2d 870 (Ky.App. 1990) .....	3
<b>I. LANDLORDS ARE NOT “OWNERS” OF A TENANT’S DOG AND HAVE NO LEGAL LIABILITY FOR INJURIES WHICH OCCUR OFF THE LEASED PREMISES.</b> .....	3-4
KRS 258.095(5) .....	3, 4
<i>Jordan v. Lusby</i> , 81 S.W.3d 523 (Ky.App. 2002) .....	4
<b>II A. LANDLORDS WHO HAVE RETAINED NO CONTROL OVER LEASED PROPERTY ARE NOT “OWNERS” OF A TENANT’S DOG.</b> .....	4-6
KRS 258.095(5) .....	4, 5, 6
<i>Black’s Law Dictionary</i> , 6 <sup>th</sup> Ed. (1990) .....	4
<b>II B. THE COURT OF APPEALS DID NOT ERR IN ADOPTING THE RATIONALE OF IRELAND V. RAYMOND.</b> .....	6-10
<i>Ireland v. Raymond</i> , 796 S.W.2d 870 (Ky.App. 1990) .....	6, 7, 8
KRS 258.095(5) .....	7, 8, 9
<i>Uccello v. Laudenslayer</i> , 44 Cal.App.3d 504, 118 Cal.Rptr. 741 (1975) .....	7
KRS 258.275(1) .....	8
KRS 258.235(4) .....	8
<i>Jordan v. Lusby</i> , 81 S.W.3d 523 (Ky.App. 2002) .....	8, 9
<i>Stovall v. A. O. Smith Corp.</i> , 676 S.W.2d 475 (Ky.App. 1984) .....	9

	<u>Page</u>
<i>Day v. Day</i> , 937 S.W.2d 717, 719 (Ky. 1997) .....	9
<b>II C. THE APPELLEES/LANDLORDS WERE NOT STATU- TORY OWNERS OF THE TENANTS' DOG..</b> .....	10
KRS 258.095(5) .....	10
<b>III. KRS 258.235(4) DOES NOT IMPOSE STRICT LIABIL- ITY ON APPELLEES FOR APPELLANT'S INJURY.</b> .....	10-13
KRS 258.235(4) .....	10, 11, 12, 13
KRS 258.095(5) .....	10
<i>May v. Holzknecht</i> , 320 S.W.3d 123 (Ky.App. 2010) .....	11
<i>Dykes v. Alexander</i> , 411 S.W.2d 47 (Ky. 1967) .....	11, 12, 13
<i>Johnson v. Brown</i> , 450 S.W.2d 495 (Ky. 1970) .....	11
KRS 258.275(1) .....	11, 12, 13
<i>Carmical v. Bullock</i> , 251 S.W.3d 324 (Ky.App. 2007) .....	12
Kentucky Statute Section 68 .....	12, 13
<b>III A. THE COURT OF APPEALS DID NOT ERR IN FOL- LOWING THE RATIONALE IN IRELAND V. RAY- MOND.</b> .....	13-19
<i>Ireland v. Raymond</i> , 796 S.W.2d 870 (Ky.App. 1990) .....	13, 14, 18, 19
<i>McDonald v. Talbott</i> , 447 S.W.2d 84 (Ky. 1969) .....	13, 14
<i>Jarvis v. Com.</i> , 960 S.W.2d 466, 468 (Ky. 1998) .....	14
KRS 258.275(1) .....	14, 15, 16, 17, 18, 19
KRS 258.235(4) .....	14, 16, 19
<i>Dykes v. Alexander</i> , 411 S.W.2d 47 (Ky. 1967) .....	14, 15, 16, 17, 18, 19

	<u>Page</u>
<i>Johnson v. Brown</i> , 450 S.W.2d 495 (Ky. 1970) .....	14, 15, 18, 19
<i>Carmical v. Bullock</i> , 251 S.W.3d 324 (Ky.App. 2007) .....	14, 15, 19
Kentucky Statute Section 68 .....	16, 18, 19
<i>Dillehay v. Hickey</i> , 71 S.W. 1 (Ky. 1902) .....	16
<i>Bush v. Wathen</i> , 104 Ky. 548, 47 S.W. 599 (1898) .....	17, 18
<b>III B. APPELLEES HAD NO LEGAL OBLIGATION TO EXERCISE ORDINARY CARE TO CONTROL THE DOGS KEPT BY THE TENANTS ON THE LEASED PREMISES.</b> .....	19-23
KRS 258.235(4) .....	19, 20
KRS 258.095(5) .....	19, 20
<i>Lewis v. B &amp; R Corporation</i> , 56 S.W.3d 432 (Ky.App. 2001) .....	20
<i>Pinnell v. Woods</i> , 121 S.W.2d 679 (Ky. 1938) .....	20
<i>Ireland v. Raymond</i> , 796 S.W.2d 870 (Ky.App. 1990) .....	20
<i>Carmical v. Bullock</i> , 251 S.W.3d 324 (Ky.App. 2007) .....	20
<i>Johnson v. Brown</i> , 450 S.W.2d 495 (Ky. 1970) .....	20
<i>Lambert v. Franklin Real Estate Company</i> , 37 S.W.3d 770 (Ky.App. 2000) .....	21, 22
<i>Pinkston v. Audubon Area Community Services, Inc.</i> , 210 S.W.3d 188, 190 (Ky.App. 2006) .....	22
KRE 407 .....	23
<b>IV A. THERE IS NO "PUBLIC POLICY" IMPOSING LIABILITY ON LANDLORDS FOR INJURIES BY A TENANT'S DOG WHICH OCCUR OFF THE LEASED PREMISES.</b> .....	23-24
KRS 258.095(5) .....	23, 24

	<u>Page</u>
<i>Lewis v. B &amp; R Corporation</i> , 56 S.W.3d 423 (Ky.App. 2001) .....	24
KRS 258.235(4) .....	24
<b>IV B. CURRENT KENTUCKY LAW CORRECTLY APPLIES THE INTENT OF THE LEGISLATURE. ....</b>	<b>25</b>

## COUNTERSTATEMENT OF THE CASE

This appeal arises from a dog bite injury to appellant, 8 year old Brandon Benningfield, which occurred on July 3, 2005 (R. at 1-2). The dog was owned by defendant, Dominic Harrison (R. at 63), against whom appellant obtained a default judgment on liability (R. at 187).

About 6 to 8 months before the injury, his parents, Sheila Harrison and Ed Roach, started keeping Dominic Harrison's dog (R. at 66) at a single family residence located at 1702 Chester Road, Louisville, Kentucky, which they leased in 2001 from appellees, Wade and Helen Zinsmeister. Helen Zinsmeister died on May 24, 2009, and a notice of her death was filed in the Court of Appeals' record while the case was under submission to that court, and no substitution has taken place. Dominic Harrison was not on the Lease (R. at 119-120). The appellees happened to live next door at 1700 Chester Road (R. at 61-62). The appellees were aware the tenants had started keeping dogs in an enclosed pen inside the fenced and gated back yard of the rental property (R. at 60; 65).

The incident did not occur on the leased premises, but rather occurred on public property across the street from 1702 Chester Road (R. at 34; 62; 68). In part because the dog had gotten out of the enclosed back yard on another occasion before July 3, 2005, appellees asked Ed Roach to make sure the gate was kept shut and, later, told him they no longer wanted them to keep dogs on the rental property (R. at 59-61; 65-66). The appellees had no knowledge that the dog had ever bitten, barked at, acted in an aggressive manner, or even frightened another person or any other dog prior to the occurrence, and had never

received any complaint about the dog or any other dog at the rental premises (R. at 66, 67, 70-71).

Appellant contends the dog got out through a hole in the fence (Appellant's Brief, p. 1); however, there is nothing in the record to establish that appellees had any knowledge there was a hole in the fence or that that is how the dog got out. Appellees' request that the tenant keep the gate latched (Appellant's Brief, Exhibit 5 page 2) supports that appellees thought the dog was getting out through the gates, not a hole.

Appellant filed suit against the appellees and Dominic Harrison, the owner of the dog, but chose not to sue the tenants, Ed Roach and Sheila Harrison, who were keeping the dog on the leased premises (R. at 1-4). Extensive written discovery was conducted between appellant and appellees. Almost two years after suit was filed, appellees filed a motion for summary judgment, arguing that appellees, as the landlords and legal owners of the single family dwelling residence leased to tenants, did not have legal liability to appellant, a passerby who was injured off the leased premises by a dog kept by the tenants (R. at 34; 62; 68). The appellees retained no control over the leased premises, and the landlords had no knowledge of any vicious or dangerous propensities of the dog (R. at 149-157). After memorandums were filed, and the trial judge heard oral arguments, she entered an Opinion and Order granting appellees' motion for summary judgment (Appellant's Brief, Exhibit 2; R. at 189-192), based upon the holding in *Ireland v. Raymond*, 796 S.W.2d 870 (Ky.App. 1990). Appellant appealed from the Trial Court's Opinion and Order, which was affirmed by the Court of Appeals on September 11, 2009 (Appellant's Brief, Exhibit 1). On November 10, 2010, this Court granted appellant's motion for discretionary review.

## ARGUMENT

### SUMMARY OF THE ARGUMENT

The central issue involved in this appeal is whether or not KRS 258.095(5) extends to landlords and imposes legal liability on them for injuries caused by a tenant's dog which occur off the leased premises. KRS 258.095(5), states in full:

"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 the premises owned or occupied by him** (emphasis added).

It is the highlighted portion of that statutory definition that appellant argues applies to landlords and makes them liable for any injury caused by a tenant's dog, even when it occurs off the leased premises as occurred herein. While there is no Kentucky case law specifically discussing whether or not the KRS 258.095(5) definition of "owner" applies to landlords, *Ireland v. Raymond*, 796 S.W.2d 870 (Ky.App. 1990), is almost factually identical to this case, and held that landlords did not have legal liability for injuries caused by a tenant's dog which occurred off the leased premises.

I. **LANDLORDS ARE NOT "OWNERS" OF A TENANT'S DOG AND HAVE NO LEGAL LIABILITY FOR INJURIES WHICH OCCUR OFF THE LEASED PREMISES.**

Appellant's Argument II (Appellant's Brief, p. 6) that landlords are included within the statutory definition of "owner" contained in KRS 258.095(5) ignores, and the partial quote in appellant's Brief leaves out, that the statute states by its express terms it is limited to "the proprietorship of a dog," which means it is limited to individuals who have a direct ability to control the dog, regardless of where the dog happens to be located, such as the dog groomer

in *Jordan v. Lusby*, 81 S.W.3d 523 (Ky.App. 2002), who was bitten by the dog while holding it in her arms, or those individuals who have the ability to control the actions of the dog by virtue of the dog being located at property they control, such as appellees' tenants. In those circumstances, the individuals have the legal right and ability to control the activities of the dog.

It is implicit in KRS 258.095(5) that, by expressly limiting the statute to "proprietorship of a dog," its applicability is limited to those individuals who have an actual ability to control the dog. It does not extend to appellees/landlords who, while holding bare legal title to the property, have given up the possessory interest in the single family residence by renting it to tenants who then acquire exclusive possession and control over the property.

**II A. LANDLORDS WHO HAVE RETAINED NO CONTROL OVER LEASED PROPERTY ARE NOT "OWNERS" OF A TENANT'S DOG.**

Appellant's Argument II A (Appellant's Brief, p. 8) is to the effect that to not include landlords within the statutory definition of "owner" ignores the plain meaning of the statute and is tantamount to a rewriting of the statute. This argument ignores that KRS 258.095(5) specifically states that the definition of "owner" applies only to the "proprietorship of a dog." *Black's Law Dictionary*, 6<sup>th</sup> Ed. (1990), defines "proprietor" as: "Owner of proprietorship. One who has the legal right or exclusive title to property, business, etc." *Black's* defines the noun "proprietary" to include "one who possesses the dominion or ownership of a thing in his own right." As an adjective, *Black's* has a sub-definition for "proprietary rights" as:

Those rights which an owner of property has by virtue of his ownership. *Douglas v. Taylor*, Tex.Civ.App., 497 S.W.2d 308, 310. A right customarily associated with ownership, title, and possession and is an interest or right of one who exercises

dominion over a thing or property, of one who manages and controls. *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181, 185.

Appellant attempts to expand the dog "owner" definition to include landlords, even though they have given up the right of possession and control over the property where the dog is kept pursuant to a lease and, therefore, have no ability to control the activities that occur on the property, including the activities of the tenant's dog.

The KRS 258.095(5), by the very use of the term "proprietorship of a dog," shows clear legislative intent to limit the definition to those individuals who have a right to exercise control over either the dog or the property where the dog is kept, which in this case would not include appellees as landlords, with bare legal title and no possessory right to the property during the term of the lease. The leased premises are in the exclusive possession and control of the tenants, as is the dog. It should be emphasized that the leased premises was a single family residence in the exclusive possession of the tenants, with no retained right of control over the property, nor were there any common areas under the landlord's control, which is distinguishable from the situation where the landlord has retained control over a portion of the property.

Appellant, in his response to appellees' motion for summary judgment, even acknowledged that it would be reasonable to interpret the statutory language in KRS 258.095(5) to mean the person who had the possessory interest in the property where the dog was being kept (R. at 161), which in this case would be the tenants, not the landlords. Clearly, to impose liability on appellees/landlords, who have no ability to control the dog and no possessory or legal right to control the property where the dog is kept, particularly where

the injury does not even occur on the leased premises, is obviously not the intent of the legislature in enacting KRS 258.095(5), despite appellant's arguments to the contrary.

The Opinion of the Court of Appeals does not create an exception to the statute where one does not exist, as appellant contends (Appellant's Brief, p. 8), but rather correctly finds the statutory language does not include landlords, where there is no right of possession or control over the property, since they have no "proprietary" interest in the dog.

**II B. THE COURT OF APPEALS DID NOT ERR IN ADOPTING THE RATIONALE OF *IRELAND V. RAYMOND*.**

Appellant's Argument II B (Appellant's Brief, p. 9) is that the Court of Appeals erred when it followed the holding in *Ireland v. Raymond*, 796 S.W.2d 870 (Ky.App. 1990). Appellant acknowledges (Appellant's Brief, p. 9) that *Ireland* involves the same issue as this case, which is whether or not landlords are liable for injuries caused by a tenant's dog which occur off the leased premises.

In *Ireland*, the landlord lived next door to the tenants, who kept dogs on the leased premises. The plaintiff lived on the other side of the tenants. Plaintiff had complained to the landlords/property owners about the tenants' dogs getting out but had never advised the landlords that she felt the dogs were vicious or that they had ever attempted to bite her. Evidence was even developed that one of tenants' dogs had nipped at plaintiff's child when it got too close to the tenants' dog's puppies in the dog's pen. There was no injury from that incident. The dog had, earlier on the same day plaintiff was injured, bitten some other person; however, the landlords did not know of that incident. The attack by the tenants' dog did not occur on the leased premises.

In affirming the Trial Court's granting of a summary judgment in favor of the landlords/property owners, the court stated at 871:

[T]he injuries were not received on the leased premises, and **there is nothing to indicate that the landlords had any control of the area where the injuries were received. It would be unthinkable to extend the liability of a landlord to include any area to which a tenant's dog might roam. Kentucky cases cannot be stretched to cover such a situation** (emphasis added).

The court went on to review the relevant facts, at 872:

Appellees knew there were dogs on their rented property, and that Appellant did not like it when the dogs entered her yard. Appellant expressed fear of that breed of dog in general, but never advised Appellees that she felt the dogs were vicious. Finally, **the attack took place under circumstances over which Appellees had no control** (emphasis added).

As indicated, those facts are almost identical to the established facts involved in this litigation.

Although not specifically discussed in *Ireland*, KRS 258.095(5) was in effect, having been enacted in 1954. Appellant correctly states the general rule that "landlords are *not* liable for the negligence of their tenants unless it was an area over which the landlord had control" (Appellant's Brief, p. 10). The *Ireland* court did state that the landlords did not have knowledge of the dog's dangerous propensities; however, in doing so, they were distinguishing the *Ireland* facts from the California case of *Uccello v. Laudenslayer*, 44 Cal.App.3d 504, 118 Cal.Rptr. 741 (1975), cited and relied upon by appellant Ireland. The main emphasis of the opinion in *Ireland* was that "the attack took place under circumstances over which the Appellees had no control." *Ireland* at 872.

The trial judge below did state that *Ireland* was “binding” (Appellant’s Brief, Exhibit 2; Trial Court Opinion and Order, p. 3); however, nowhere in the Court of Appeals’ Opinion, in adopting the *Ireland* rationale, does it state that it was doing so because it was binding. *Ireland* is non-binding because, at the time it was decided, KRS 258.275(1) was in effect and, at the time appellant’s injury occurred herein, it had been replaced by its substantial equivalent, KRS 258.235(4).

Appellant goes on to argue (Appellant’s Brief, p. 10) that “the legislature modified the dog attack statutes after judicial interpretations of the prior statutes, clearly intending to change the law of the Commonwealth,” and that “there is a presumption that the legislature, when amending a statute, knew of all prior judicial construction thereof” (Appellant’s Brief, p. 10). Appellant goes on to state that “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” (Appellant’s Brief, pp. 10-11). First of all, the only reported case expressly discussing KRS 258.095(5) is *Jordan v. Lusby*, 81 S.W.3d 523 (Ky.App. 2002), which is clearly distinguishable as discussed below.

The appellant’s argument appears to assume the sole purpose of KRS 258.095(5) was to do away with the common law applicable to landlords and totally ignores that the statute does not even mention landlords. Appellees are also unaware of any prior statutes similar to KRS 258.095(5), or judicial interpretations of them. Further, it is erroneous to claim that the sole purpose of the legislature in enacting KRS 258.095(5) was to change the common law

rule governing landlord-tenant liability in dog attacks. Clearly, the statute is much broader in effect and covers situations totally distinct and separate from landlord-tenant law. Additionally, as stated in *Stovall v. A. O. Smith Corp.*, 676 S.W.2d 475, 476 (Ky.App. 1984):

It is well settled that the legislature's intention to abrogate the common law will not be presumed and that such an intention must be clearly apparent.

Here, the legislature did not do so. Further, as indicated in *Day v. Day*, 937 S.W.2d 717, 719 (Ky. 1997):

Nothing can be assumed, presumed, or inferred and what is not found in the statute is a matter for the legislature to supply and not the courts (citations omitted).

Appellant also relies on *Jordan*, in support of his contention that the legislative intent was to include landlords as "owners," even when their only connection to the property was that they held bare legal title to it (Appellant's Brief, p. 11). *Jordan* is clearly distinguishable and relied upon different language in KRS 258.095(5), where a dog groomer was bitten by a client's dog, which the groomer was holding in her arms. The court found the groomer was an "owner" because she had the dog "in her care" while she groomed it. In *Jordan*, the only published case discussing KRS 258.095(5), the court, in discussing the intent of the legislature, stated at 524:

The statute was designed to expand liability to those parties who keep dogs, such as kennel owners, veterinarians, and **other persons who keep dogs owned by others in their care, as well as any person who keeps a dog owned by another on their property** (emphasis added).

Here, the appellees, as landlords, did not **keep** the dog on the rental premises. The tenants kept the dog there. That quote is consistent with appellees' position that the intent of the

statute was to expand liability to those individuals who had direct ability to control the dog and is not expansive enough to include landlords who have given exclusive control over their property to a tenant.

**II C. THE APPELLEES/LANDLORDS WERE NOT STATUTORY OWNERS OF THE TENANTS' DOG.**

In appellant's Argument II C, he contends that, merely because appellees were aware the tenants kept a dog on the rental property and ultimately asked the tenants to remove the dogs from the premises, the landlords have legal liability under KRS 258.095(5) as "owners" (Appellant's Brief, p. 12). Allowing the tenants to keep a dog on the leased property and then requesting that the tenants no longer do so does not make appellees "owners" of the dog, nor does it create legal liability on the appellees for injury caused by the tenants' dog which occurred off the leased premises. As previously addressed, appellees/landlords, in this factual situation, are not "owners" of the tenants' dog pursuant to KRS 258.095(5), and the Court of Appeals and Trial Court correctly found that to be the case.

**III. KRS 258.235(4) DOES NOT IMPOSE STRICT LIABILITY ON APPELLEES FOR APPELLANT'S INJURY.**

Appellant's third argument (Appellant's Brief, p. 12) is that KRS 258.235(4) imposes strict liability on appellees as landlords. KRS 258.235(4) states in relevant part:

Any owner whose dog is found to have caused damage to a person . . . shall be responsible for that damage.

Obviously, the threshold issue is still whether or not the appellees, as landlords, come within the definition of "owner," as contained in KRS 258.095(5), before they would be subject to potential liability pursuant to KRS 258.235(4). For the reasons previously discussed herein,

appellees are not "owners" of the tenant's dog and, therefore, under these facts, have no liability pursuant to KRS 258.235(4).

In spite of the use of the word "shall" in that statute, Kentucky courts have consistently found that the legislature did not intend to impose strict liability on dog "owners" under all circumstances. As stated in *May v. Holzkecht*, 320 S.W.3d 123, 126-127 (Ky.App. 2010):

In abrogating the common law, our dog-bite statutes were intended to broaden the responsibilities of those who keep a dog. *Koestel, supra*. Nevertheless, in construing various (yet similar) versions of the dog-bite statute over time, our courts have held that the General Assembly "did not intend to impose strict liability under any and all circumstances." *Johnson v. Brown*, 450 S.W.2d 495, 496 (Ky. 1970). In *Bush v. Wathen*, 104 Ky. 548, 47 S.W. 599, 600, 20 Ky.L.Rptr. 731 (1898), the Court acknowledged that the keeper of a dog "shall be liable to the party injured for all damages done by such dog[.]" but it also held that "if the party injured was guilty of some act except for which the dog would not have bitten him, he is guilty of contributory negligence, and cannot recover damages for the injuries sustained."

The *May* court went on to discuss several additional cases where strict liability was not followed, including *Dykes v. Alexander*, 411 S.W.2d 47 (Ky. 1967), where a trespassing child, whose presence and exposure to the dog was unknown to the dog owner, was injured after wandering into the fenced-in yard of the dog owner and was bitten by the owner's dog.

Additionally, in *Johnson v. Brown*, 450 S.W.2d 495 (Ky. 1970), it was held that contributory negligence was a valid defense in spite of the argument that KRS 258.275(1) imposed strict liability, because it had been a valid defense under prior decisions involving similar statutes.

In *Carmical v. Bullock*, 251 S.W.3d 324 (Ky.App. 2007), the court found that comparative fault and negligence principles were still applicable in dog bite situations. At the time the injury occurred in *Carmical*, KRS 258.275(1) was in effect and stated in relevant part:

Any owner or keeper of a dog which has . . . injured or damaged any person . . . **shall be liable** to the . . . person in a civil action for all damages and costs (emphasis added).

When *Carmical* was decided, KRS 258.275(1) had been replaced by KRS 258.235(4), which in relevant part provides:

Any owner whose dog is found to have caused damage to a person . . . **shall be responsible** for that damage (emphasis added).

*Carmical* at page 326 in footnote 1 expressly recognized that KRS 258.235(4) was substantially the same as KRS 258.275(1).

In *Carmical*, the court affirmed a jury verdict in favor of the dog owner. In rejecting the strict liability argument, the court expressly recognized that “Kentucky courts have previously held that KRS 258.275(1) does not impose strict liability on the owner or keeper of a dog.” At 326.

At the time *Dykes* was decided, no case had ever considered KRS 258.275(1). The *Dykes* court recognized, at page 48:

[W]hen statutes are similar the construction of the other statute may be considered, as it does not appear that KRS 258.275(1) has been construed in this court (citation omitted).

In doing so, the *Dykes* court reviewed Kentucky Statute Section 68 (later 68a) which was the substantial equivalent of KRS 258.275(1) but had been repealed at an earlier time, and the cases interpreting those earlier statutes. The *Dykes* court went on to find that the legislature,

in enacting KRS 258.275(1), did not intend to impose strict liability on the owner or keeper of a dog under any and all circumstances, which was consistent with earlier cases interpreting Kentucky Statute Section 68.

Similarly, since KRS 258.275(1) is substantially the same as KRS 258.235(4), it was appropriate for the Trial Court and Court of Appeals to consider prior decisions based on KRS 258.275(1) in concluding KRS 258.235(4), likewise, does not impose strict liability on dog owners under any and all circumstances, just was done in *Dykes*.

**III A. THE COURT OF APPEALS DID NOT ERR IN FOLLOWING THE RATIONALE IN IRELAND V. RAYMOND.**

The Court of Appeals, in following the rationale in *Ireland v. Raymond*, 796 S.W.2d 870 (Ky.App. 1990), incorrectly stated, on page 5:

As indicated by the Court in *Ireland* a landlord must be in control of the area where the injuries took place and must also be aware of a dog's dangerous propensities.

As previously discussed (Appellees' Brief, p. 7), the *Ireland* court quoted from a California case relied upon by *Ireland* which held that, under California law, to impose liability on a landlord required proof that the landlord knew of the presence of the dog and its dangerous propensities in distinguishing it from the facts in *Ireland*; however, that was not the holding in *Ireland*. The rationale for the *Ireland* ruling was a lack of control over the area where the attack occurred. The *Ireland* court also contrasted the *Ireland* factual situation from the factual situation in *McDonald v. Talbott*, 447 S.W.2d 84 (Ky. 1969), and stated, at 871:

[T]he injuries were not received on the leased premises, and there is nothing to indicate that the landlords had any control

of the area where the injuries were received. It would be unthinkable to extend the liability of a landlord to include any area to which a tenant's dog may roam. Kentucky cases cannot be stretched to cover such a situation.

In *McDonald*, the plaintiff was injured by a tenant's dog in a common area over which the landlord retained control (a business parking lot). Clearly, the difference between *Ireland* and *McDonald* was the lack of control over the area where the injury occurred and not that the dog had dangerous propensities as appellant contends. In spite of the misstatement contained in the Court of Appeals' Opinion that *Ireland* required knowledge of the dangerous propensities of the dog in addition to control of the premises, the result was correct and does not form a basis for reversing the Opinion. As stated in *Jarvis v. Com.*, 960 S.W.2d 466, 468 (Ky. 1998), "We have long held that we will uphold a correct result made for the wrong reasons."

Appellant goes on to contend that all of the cases interpreting KRS 258.275(1), and now KRS 258.235(4), including *Dykes v. Alexander*, 411 S.W.2d 47 (Ky. 1967), *Johnson v. Brown*, 450 S.W.2d 495 (Ky. 1970), and *Carmical v. Bullock*, 251 S.W.3d 324 (Ky.App. 2007), are unsound and should be ignored or overturned, with strict liability being applied in any and all dog bite cases, regardless of the circumstances. The courts in Kentucky have consistently refused to do so, and that is obviously not the intent of the legislature in spite of the use of the term "shall" in the prior and current statute. As recognized by the Court of Appeals (Opinion, p. 4), "To apply the plain meaning suggested by *Benningfield* would create a society in which property owners would no longer allow dogs on public or private property for fear of being sued."

When you review the facts, it is obvious why those courts found that the legislative intent was not to create strict liability on dog owners in any and all circumstances. In *Dykes*, the dog was located in the owner's fenced-in backyard, was not vicious, had never previously bitten anyone, and the injury occurred to a trespassing child. The dog was where it had a right to be, and the court was unwilling to impose liability on the dog owner for injuries to a trespassing child.

In *Johnson*, the court held that contributory negligence was a valid defense available to the dog owner. At that time, KRS 258.275(1) was in effect. A customer who arrived at the business premises early was warned not to get too close to the business owner's dog. In spite of that warning, the customer did so and was injured by the dog. The customer's negligence was a valid defense to the claim.

In *Carmical*, which is factually similar to *Dykes*, the dog was tethered to a staked 30 foot chain in his back yard when a food delivery route manager stopped by the house at a time other than his usual delivery time. The dog owner had no reason to believe the route manager would be in the vicinity of the animal at the time the injury occurred, and the dog was located where he had a right to be.

In *Carmical*, the court found, at 327:

Even if KRS 258.275(1) created a strict liability action, negligence principles are still applicable, as the dog owner's liability should be subject to the doctrine of comparative negligence. Under a strict liability theory, the owners of an animal may exculpate themselves from liability by showing that the harm was caused by the victim's fault, or **by the fault of a third person for whom the owner was not responsible**, or by a fortuitous circumstance. The instruction in § 15.01 of 2 John S. Palmore, *Kentucky Instructions to Juries, Civil*, clearly

anticipate circumstances where a comparative negligence instruction may be appropriate (emphasis added).

Clearly, Kentucky courts have consistently held that KRS 258.275(1) did not impose absolute strict liability on dog owners, and it was appropriate to extend that holding to KRS 258.235(4) by considering cases so holding when KRS 258.275(1) was in effect, since the two statutes are the substantial equivalent of each other.

Appellant contends (Appellant's Brief, pp. 13-16) that *Dykes* and the subsequent cases decided while KRS 258.275(1) was in effect were all erroneously decided because the earlier statutes (Kentucky Statutes 68 and 68a) contained exceptions to strict liability which are not contained in KRS 258.275(1) or KRS 258.235(4). That argument is without merit.

As discussed in *Dillehay v. Hickey*, 71 S.W. 1 (Ky. 1902), the exceptions contained in Kentucky Statute Section 68, providing that the person keeping the dog "shall be liable" to the party injured by the dog, expressly stated it did not apply if the injured person was on the premises of the owner of the dog after night or engaged in some unlawful act in the daytime. Neither of those exceptions applied in *Dillehay*; however, the court, rather than impose strict liability on the dog owner, found that "[t]he question of contributory negligence on the part of the appellee [the injured plaintiff] was, by proper instruction, aptly submitted to the jury." At 1.

Appellant also incorrectly states (Appellant's Brief, p. 15) that the *Dykes* court recognized the principle of contributory negligence similar to the exceptions contained in Kentucky Statute Section 68, when deciding that KRS 258.275(1) did not create strict liability for dog bites; however, that is not correct. First of all, the *Dykes* court did not recognize contributory negligence as a defense, since the injured plaintiff was under seven years old and

incapable of being guilty of negligence. At 49. In finding that KRS 258.275(1) did not impose strict liability, the *Dykes* court found that the dog owner owed no legal duty to the trespassing child. The court relied in part on *Bush v. Wathen*, 104 Ky. 548, 47 S.W. 599 (1898), which did expressly recognize contributory negligence as a defense in spite of the fact plaintiff's actions did not fall within one of the enumerated statutory exceptions to the alleged strict liability language contained in the statute. As stated in *Bush*, at 601:

We are of the opinion that although the party is injured by the dog while away from the premises of the owner at night, or is injured in the daytime when not engaged in some unlawful act, still, if the party injured was guilty of some act except for which the dog would not have bitten him, he is guilty of contributory negligence, and cannot recover damages for the injury sustained.

The court did not base that decision upon the fact that the statute contained exceptions to strict liability, since the actions of the injured boy did not come within those exceptions; rather, the court went on to state, at 601:

The principle of the law which requires the exercise of reasonable care to avoid doing injury to others also requires the exercise of reasonable care to avoid being injured by the negligence of others; and, as a general rule, one cannot recover compensation for injury occasioned by the mere negligence of another which he might have avoided by the exercise of reasonable care. If the injury would not have happened to him but for his own want of ordinary care, he cannot legally charge to the negligence of the other party the consequence of his own carelessness. It may be said that this rule of law has been changed by the statute. The statute is remedial. It imposed no penalty, but simply makes the owner responsible for the damages sustained by reason of injury inflicted by the dog. It gives a remedy for enforcing the common-law right for the recovery of damages for the actual injuries sustained, and should be given a reasonable interpretation. ***It would not be a reasonable interpretation to wholly disregard the general principle of contributory negligence.***

It, in part, was intended to obviate the difficulty which existed at common law of showing the owner's knowledge of the vicious propensities of the dog in an action for damages; and the interpretation which we give accomplishes that object. In *Quimby v. Woodbury*, 63 N.H. 370, the court construed a statute substantially the same as the one here construed, and said: "A construction of the statute making the owner of a dog absolutely liable for injuries, regardless of the conduct of the party injured, might in some cases hold the owner responsible for injuries occasioned solely by the reckless carelessness of the party injured. It would make the owner liable to a person injured while intentionally exposing himself by worrying and irritating a dog for the purpose of testing his temper and disposition. Such a construction would be unreasonable. We think the rule of interpretation applicable to this statute is analogous to that applied to the statute making towns liable for damages happening from defective highways, which, although literally imposing an absolute and unqualified liability, is construed with the qualification that the party injured is not entitled to recover if his own negligence contributed to the injury" (emphasis added).

In *Bush*, it was held that it would not be reasonable to impose strict liability so as to allow a recovery against the dog owner by an injured plaintiff who was contributorily negligent. In *Ireland*, the court similarly found it would be unreasonable to impose liability under the statute upon a landlord who had no control over the dog or the premises where the dog was kept, just like the court in *Dykes* found it would not impose strict liability on a dog owner when a child trespasses into the enclosed back yard and is injured, even though the child was under seven and incapable of contributory negligence. In *Johnson*, the court found contributory negligence to be a viable defense in spite of the language of KRS 258.275(1), just as the court in *Bush* found it to be a viable defense in spite of the language in Kentucky Statutes, Section 68.

Finally, the court in *Ireland*, in spite of the alleged strict liability language of KRS 258.275(1), found “[i]t would be unthinkable to extend the liability of a landlord to include any area to which a tenant’s dog might roam. Kentucky cases cannot be stretched to cover such a situation.”

On the basis of the foregoing, it is clear that appellant’s attempt to make a distinction between the dog bite statutes based upon Kentucky Statute Section 68 having exceptions in it is not viable or correct, and the holdings in *Dykes*, *Carmical*, *Johnson*, *Ireland*, and the present case are correct and strict liability is not an absolute standard imposed by KRS 258.275(1), or its substantial equivalent KRS 258.235(4) without regard to the factual circumstances.

**III B. APPELLEES HAD NO LEGAL OBLIGATION TO EXERCISE ORDINARY CARE TO CONTROL THE DOGS KEPT BY THE TENANTS ON THE LEASED PREMISES.**

Appellant’s Argument III B is that, even if the court concludes KRS 258.235(4) does not impose strict liability on appellees, they would still be liable to appellant based upon a failure to exercise ordinary care to control the tenant’s dog, when coupled with a failure to anticipate appellant’s exposure to it off the leased premises. Appellant is arguing that appellees/landlords have legal liability to the appellant under general negligence principles; however, that is not correct. Based upon appellees’ prior arguments, it is clear that appellees are not “owners” of the dog in question, in spite of KRS 258.095(5), nor did they have control over the premises where the dog was kept. Therefore, KRS 258.095(5) and KRS 258.235(4) do not apply to them.

Appellant's argument (Appellant's Brief, p. 12) is that the Court of Appeals failed to apply even an "ordinary care" standard of liability to the "landlord/dog owners." As stated in *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001):

In order to state a cause of action based on negligence, a plaintiff must establish a duty on the defendant, a breach of the duty, and an injury suffered by the plaintiff (citations omitted).

"Ordinary care" is a negligence concept and is the standard by which an individual's actions are measured once it is determined that individual has a legally imposed duty to someone.

As appellant has previously recognized (Appellant's Brief, p. 10), landlords are not liable for the negligence of their tenants in the use of the leased premises. See *Pinnell v. Woods*, 121 S.W.2d 679, 680 (Ky. 1938).

This argument falls squarely within the holding in *Ireland v. Raymond*, 796 S.W.2d 870 (Ky.App. 1990), that appellees have no legal liability to appellant under ordinary negligence principles. They had neither control over the premises where the dog was kept nor control over the dog itself and, therefore, had no legal duty to appellant.

*Carmical v. Bullock*, 251 S.W.3d 324 (Ky.App. 2007), is distinguishable from this case in that the dog was located on the dog owner's property, and that is where the attack occurred. The property owner/dog owner had the right and ability to control what occurred on his property as well as his dog's actions and was still found to have no liability to plaintiff. Here, appellees had neither control of the dog nor the premises where the dog was kept and, therefore, had no legal duty or obligation with reference to appellant.

Similarly, in *Johnson v. Brown*, 450 S.W.2d 495 (Ky. 1970), both the dog and the premises were under the control of the business owner/dog owner. Here, appellees had

bare legal title to the premises, but no possessory interest since the premises had been leased to the tenants with no retention over any common areas, nor did they have any legal interest in the dog.

Appellant argues that appellees should have anticipated that the dog would somehow get out of both the enclosed pen and the enclosed back yard where the pen was located and be in proximity to the appellant, who happened to be passing by across the street, and that the dog, with no known dangerous propensities, would attack appellant. Appellant then argues, not that the appellees knew the dog had escaped and that appellant would be in proximity to the dog, but merely that the appellees "could" have anticipated his proximity to the dog (Appellant's Brief, p. 17). He further argues that because the appellees lived next to the rented property, they "could easily have observed the obvious hole in the fence where the dog had been escaping" (Appellant's Brief, pp. 17-18). That argument assumes that the law imposes some type of ongoing legal duty on the landlords; however, that is not the case.

The applicable Kentucky law was summarized in *Lambert v. Franklin Real Estate Company*, 37 S.W.3d 770 (Ky.App. 2000), where the court stated, at 775-776:

"[A] landlord has a duty to disclose a known defective condition which is unknown to the tenant and not discoverable through reasonable inspection." *Milby v. Mears*, Ky.App., 580 S.W.2d 724, 728 (1979). However, "[i]t has been a long-standing rule in Kentucky that a tenant takes the premises as he finds them. **The landlord need not exercise even ordinary care to furnish reasonably safe premises**, and he is not generally liable for injuries caused by defects therein." *Milby* at 728. "[T]he landlord is under no implied obligation to repair the demised premises in the absence of a contract to that effect, nor is he responsible to a tenant for injuries to person or property caused by defects therein, where there has been no reservation on the part of the landlord of any portion of the rented premises. In such cases the law applies

to the contract or lease the doctrine of caveat emptor.” *Home Realty Co. v. Carius*, 189 Ky. 228, 224 S.W. 751 (1920). **Where the tenant is put in complete and unrestricted possession and control of the premises, as here, the landlord is liable only for the failure to disclose known latent defects at the time the tenant leases the premises.** *Carter v. Howard*, Ky., 280 S.W.2d 708, 711 (1955) (emphasis added).

It is argued that the appellees had knowledge of the hole (which is disputed) and further had a duty to make repairs (Appellant’s Brief, p. 18). *Pinkston v. Audubon Area Community Services, Inc.*, 210 S.W.3d 188, 190 (Ky.App. 2006), held that “a landlord is not liable for injuries caused by breach of a covenant to make repairs to a leased premises. Rather, the remedy for breach of an agreement to repair is the cost of repair.”

Appellant also erroneously states (Appellant’s Brief, p. 17) that appellees knew the dog had escaped from the back yard of 1702 Chester Road “on several occasions,” citing to Appellant’s Brief, Exhibit 4; however, the only reference to that would be Response No. 4, where the appellees indicate that they were aware of only one prior occasion.

Appellant’s argument alleges ongoing duties on the appellees concerning inspection of the property and making repairs, where they have no legal duty to do so as indicated in *Lambert*. Appellant argues that appellees could have easily observed the large hole in the fence where the dog escaped; however, there is no evidence in the record to show where the hole was located, how large it was, how long it had been there, or even that the dog got out from a hole in the fence. There is no evidence in the record to establish any of these contentions as fact. Additionally, while children did live in the neighborhood, appellant states (Appellant’s Brief, p. 18) they “were frequently out in the streets”; however, the record is

devoid of any information that that is the case, nor is there even any indication of the number of children who lived in the area.

Appellant contends (Appellant's Brief, p. 17) that appellees "could" have anticipated appellant's proximity to the dog because they were aware it had gotten loose on one other occasion, after which appellees asked the tenants to make sure the gates were kept shut. This argument is irrelevant, since appellees had no legal obligation or duty to appellant, and he cannot, therefore, create a factual dispute for a jury to decide when there is no underlying legal duty.

Appellees not wanting the dog at the rental property does not create liability for appellant's injury, nor does it create a duty on appellees to evict the tenants or call animal control as appellant contends (Appellant's Brief, pp. 18-19). This is particularly true where there is no evidence that the dog in question had any dangerous or vicious propensities.

Finally, appellant's argument (Appellant's Brief, p. 19) that appellees did not take action after the injury to remove the dog from the property or repair the fence would not be admissible or relevant to the issues at trial. See KRE 407.

**IV A. THERE IS NO "PUBLIC POLICY" IMPOSING  
LIABILITY ON LANDLORDS FOR INJURIES BY  
A TENANT'S DOG WHICH OCCUR OFF THE  
LEASED PREMISES.**

Appellant's Argument IV A merely makes the social argument that a landlord should be liable for injuries and damages caused by a tenant's dog merely because they allow a tenant to have a dog on the leased premises. Again, landlords are not "owners" as contemplated by KRS 258.095(5). Appellant cites no legal authority for the contention that Kentucky law is based upon who is in the best position to bear the burden of damages

resulting from dog attacks, and that is obviously not the law, nor is it the basis for principles of negligence under the common law. See *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky.App. 2001).

Contrary to appellant's argument that victims of dog injuries are not in a position to be responsible for their injuries ignores the fact that they have legal rights against the legal owner of the dog and, in this case, have actually asserted some of those rights by suing and obtaining a default judgment against Dominic Harrison, who owned the dog. As previously indicated, they chose not to assert a claim against the tenants who kept the dog; however, they would clearly have a right to do so pursuant to KRS 258.095(5) and KRS 258.235(4). Appellant, not being satisfied with those remedies, is attempting to expand them to include landlords, even when they have no possessory interest in the premises, nor any direct ability to control the actions of the tenants' dog.

Appellant goes on to argue that many dog bite injuries require extensive medical treatment and cosmetic surgery to repair permanent scarring, which many health insurance plans do not cover; however, there is no factual evidence in the record to support those statements. Appellant also incorrectly states that individuals injured by dogs are "left with no redress" if they do not have medical insurance (Appellant's Brief, p. 20); however, that is not correct. Those individuals' right to redress is found in their right to sue the tortfeasors which, in this case, is a cause of action against Dominic Harrison and his parents, who were keeping the dog. That right of redress does not extend to appellees as previously discussed herein.


**IV B. CURRENT KENTUCKY LAW CORRECTLY  
APPLIES THE INTENT OF THE LEGISLATURE.**

Appellant's final Argument IV B is merely appellant's statement that the current status of the law in Kentucky should be changed to impose a strict liability standard on all dog owners, regardless of facts or circumstances, and that it should be expanded to include all landlords. Those arguments have already been addressed herein and are without merit.

**CONCLUSION**

The Court of Appeals was correct in finding the Trial Court properly granted summary judgment in favor of appellees because, as landlords, they had no legal liability to appellant for a dog bite injury that occurred off the leased premises by a dog which was kept on the leased premises by the tenants, and the Opinion of the Court of Appeals should be affirmed.

Respectfully submitted,

  
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