COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2016-SC-000572

LATASHA MAUPIN — APPELLANT

V.

APPELLEE'S BRIEF

ROLAND TANKERSLEY — APPELLEE

On Appeal from Jackson Circuit Court
Honorable Oscar G. House, Judge
Civil Action No. 10-CI-00226
Court of Appeals of Kentucky
No. 2015-CA-1259

I hereby certify that a true copy of this Appellee's Brief has been served, in accordance with the applicable Rules of Civil Procedure, on the 6th day of July, 2017, upon each of the following: Hon. Oscar G. House, Circuit Judge, Jackson Circuit Court, P.O. Box 84, McKee, Kentucky 40447; Hon. Marshall F. Kaufman, III and Hon. Kerstin Schumann, Kaufman & Stigger, PLLC, 7513 New LaGrange Road, Louisville, Kentucky 40222; and ten (10) to Hon. Susan Stokley Clary, Clerk, Supreme Court of Kentucky, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, KY 40601-3415.

RESPECTFULLY SUBMITTED,

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COUNTERSTATEMENT CONCERNING ORAL ARGUMENT

Appellee, Roland Tankersley, has no objection to an oral argument in this matter.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE

In September of 2009, Appellee, Roland Tankersley ("Tankersley") and his wife, Linda Tankersley, resided on a 42-acre farm situated in rural Jackson County. (VR No. 1: 6/29/15; 11:34:45-11:35:18) Tankersley owned three adult dogs: Bertha, a red and white mutt; Bertha's pup, a black and white mutt; and Roy, a black and white mutt. (VR No. 1: 6/29/15; 11:45:14; 11:51:25; 11:53:17) Each dog weighed approximately 25 pounds. (VR No. 1: 6/29/15; 1:46:00-1:46:20)

On September 12, 2009, Appellant, Latasha Maupin ("Maupin") and her boyfriend, James Carpenter ("Carpenter") began squirrel hunting. (VR No. 1: 6/29/15; 10:38:27-10:38:44) Carpenter parked his truck near Gene Martin's home located on Kentucky Highway 1955. (VR No. 1: 6/29/15; 10:38:27-10:38:44) Maupin and Carpenter entered Gene Martin's property to hunt. (VR No. 1: 6/29/15; 10:38:55-10:39:13) At some point in the afternoon, Maupin left Carpenter in the woods to continue hunting while she began walking to Carpenter's truck. (VR No. 1: 6/29/15; 10:39:40-10:40:30).

Maupin entered Tankersley's property without Tankersley's permission, notice or knowledge, and began walking on a dirt path near Tankersley's home. (VR No. 1: 6/29/15; 11:09:45-11:10:05) Tankersley built the path on his property many years prior for his own farming purposes. (VR No. 1: 6/29/15; 11:36:10-11:36:30) In 2009, however, the path was overgrown from disuse and was inaccessible for most vehicles. (VR No. 1: 6/29/15; 10:36:20-10:36:35) Maupin testified she was aware of the path because it could once be used to access a cabin which abuts Tankersley's property. That property was owned by her aunt, Donna Johnson. (VR No. 1: 6/29/15; 11:02:39) Donna Johnson, however, does not reside at the cabin and had not visited the cabin in several years. (VR No. 1: 6/29/15;

11:06:45-11:07:10)

As Maupin interloped on Tankersley's property, she encountered four or five dogs. (VR No. 1: 6/29/15; 10:41:20-10:31:45) Maupin described the dogs as follows: one adult black and white dog, two adult brown and white dogs, and two adult red and white dogs. (VR No. 1: 6/29/15; 11:10:00-11:10:50) Maupin testified that each dog weighed approximately 50 pounds. (VR No. 1: 6/29/15; 11:10:00-11:10:50) Linda Tankersley testified that she witnessed and photographed numerous large, feral dogs roaming this area. (VR No. 1: 6/29/15; 1:46:00-1:46:20) The dogs bit Maupin, causing her injury. (VR No. 1: 6/29/15; 10:41:14-10:43:45)

Maupin filed suit against Tankersley on August 3, 2010 in Jackson Circuit Court. Following a jury trial, each party proposed jury instructions. Honorable Judge Oscar House correctly submitted the following jury instructions:

You will find for the Plaintiff, Latasha Maupin, under this instruction if you are satisfied from the evidence that:

(A) The Defendant, Roland Tankersley, owned the dogs that caused Plaintiff's injuries; AND

(B) The Defendant, Roland Tankersley, had reason to believe that the Plaintiff would be in the vicinity of his dogs; OR

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

Otherwise, you will find for Roland Tankersley.

The jury returned a verdict for Tankersley, determining that Tankersley owned the

dogs that attacked Maupin, but that Tankersley had no reason to believe Maupin would be in the vicinity of the dogs, and that he exercised ordinary care to control the dogs for the safety of others.[1]

Maupin appealed the jury verdict to the Kentucky Court of Appeals, arguing the jury instructions improperly stated the law with respect to a dog owner's liability for injuries caused by a dog. On September 16, 2016, the Kentucky Court of Appeals affirmed the jury instructions as being consistent with the statute and applicable Kentucky common law. The court found that Kentucky courts consistently refuse to interpret KRS § 458.235(4) to impose strict liability in any and all cases. It held the proper inquiry was whether Tankersley had reason to anticipate Maupin's presence or whether he failed to exercise ordinary care in controlling the dogs for the safety of others. This Court granted Movant's Motion for Discretionary Review on March 15, 2017.

ARGUMENT

STANDARD OF REVIEW

A party is entitled to an instruction if there is evidence to sustain it. McAlpin v. Davis Const., Inc., 332 S.W.3d 741, 744 (Ky. App. 2011) (internal quotations omitted). The trial court's decision to instruct on a specific issue is reviewed for abuse of discretion. Sargent v. Shaffer, 467 S.W.3d 198, 204 (Ky. 2015). "A decision to give or to decline to give a particular jury instruction inherently requires complete familiarity with the factual and evidentiary subtleties of the case that are best understood by the judge overseeing the

[1] While the jury determined Tankersley owned the dogs responsible for Maupin's injuries, Tankersley presented several facts at trial to prove otherwise. Despite this compelling testimony regarding non-ownership, the jury found for the Plaintiff on this gateway issue, which is all the more reason to honor the jury's determination regarding Tankersley's state of mind. Appellee did not file a cross-appeal on the jury's findings. The jury verdict should remain intact in its entirety. It is entirely possible that the jury answered the questions in reverse order, making the affirmative finding of ownership meaningless.

trial from the bench in the courtroom." Id. If the trial court decides an instruction is proper, "it is reasonable to expect that the instruction will be given properly". Martin v. Commonwealth, 409 S.W.3d 340, 346 (Ky. 2013). The content of jury instructions, however, are an issue of law subject to a *de novo* standard of review. Sargent, 467 S.W.3d at 204.

I. KRS § 258.234(4) IMPOSES STRICT LIABILITY WHEN THE DOG'S OWNER HAS REASON TO ANTICIPATE THE PLAINTIFF'S PRESENCE NEAR THE DOG.

Kentucky courts have consistently determined that KRS § 258.235(4) does not impose strict liability under any and all circumstances. Johnson v. Brown, 450 S.W.2d 495, 496 (Ky. 1970). KRS § 258.235(4) reads as follows:

> Any owner whose dog is found to have caused damage to a person, livestock, or other property shall be responsible for that damage.

A dog owner is strictly liable when the owner had reason to anticipate the plaintiff's proximity to the dog. As outlined in the subject jury instructions, the proper inquiry is a three-question analysis:

> (1) Did the defendant own the dogs that caused the plaintiff's injuries; AND
>
> (2) Did the defendant have reason to believe the plaintiff would be in the vicinity of said dogs; OR
>
> (3) Did the defendant fail to exercise ordinary care to control the dogs for the safety of others, and was such failure a substantial factor in causing the plaintiff's injuries.

This analysis allows the jury to focus on the dog owner's state of mind rather than the dog. If the dog's owner could have reasonably anticipated the plaintiff's presence near the dog, it is the owner's duty to prevent the plaintiff from being bitten. May v. Holzknecht, 320 S.W.3d 123, 127 (Ky. Ct. App. 2010). In such instances, strict liability applies and

negates the plaintiff's prior requirement to prove the owner's knowledge of the dog's viciousness. Johnson, 450 S.W.2d at 496. If, however, the dog's owner could not have reasonably anticipated the plaintiff's presence, strict liability cannot attach. Carmical v. Bullock, 251 S.W.3d 324, 327 (Ky. Ct. App. 2007). The jury must still proceed to the third question analyzing the owner's potential negligence as well as comparative fault. Id. This approach allows strict liability to attach, in the appropriate circumstances, just as the General Assembly intended.

II. THE TRIAL COURT'S JURY INSTRUCTIONS WERE APPROPRIATE REGARDLESS OF WHETHER THE DOGS WERE TETHERED OR ENCLOSED.

The trial court correctly submitted jury instructions consistent with Johnson, Carmical, and May. KRS § 258.235(4) does not impute strict liability as a matter of law on a dog owner if the dog is not tethered or enclosed. The owner's state of mind is subjective and constitutes a question of fact. As the Court of Appeals reasoned, "Tankersley's knowledge or anticipation of Maupin's presence remains dispositive-whether the dogs were enclosed or fettered on the owner's property or allowed to roam free on the owner's property." Maupin v. Tankersley, No. 2015-CA-001259-MR. When the dog owner's anticipation of the plaintiff is disputed, the jury must be permitted to consider the specific facts and determine the answer in order for strict liability to attach.

In some instances, the fact that the dog was tethered or enclosed may offer the jury an indication that the owner did reasonably anticipate the plaintiff's presence. Nevertheless, this alone will not invariably shield nor inflict strict liability upon the owner. For example, the fact that the dog was enclosed did not shield the owner from strict liability in May v. Holzknecht, 320 S.W.3d at 127. In May, a dog bit a child while inside the

owner's home daycare center. Id. at 125. Even though the owner enclosed the dog in the home, the Court of Appeals upheld the trial court's granting of summary judgment because the owner had knowledge of the plaintiff's presence near the dog. Id. at 126.

In contrast, the dog's tether was only one fact among many regarding the owner's state of mind in Carmical, 251 S.W.3d at 325. A Great Dane injured a Schwann Home Food Services driver. Id. Whether the Great Dane's owner could have reasonably anticipated the driver was at issue because the driver usually delivered to the home on a different day. Id. The jury found the dog's owner not liable because he did not reasonably anticipate the driver's presence on that day. Id. The jury was able to consider all the facts to reach its findings.

The subject jury instructions are nearly identical to those in Carmical, 251 S.W.3d at 326. The Carmical court upheld these instructions as they were consistent with the holding in Dykes v. Alexander, 411 S.W.2d 47 (Ky. 1967), and Johnson. Id. at 328. Maupin attempts to narrow Carmical, Dykes and Johnson as "cases where the owner has taken steps to confine or chain a dog." *See* Appellant's Brief, p. 14. These cases were decided based upon numerous, individualized facts, and not simply the dog's confinement. A jury must analyze all the facts, including whether the owner tethered or enclosed the dog, to determine the owner's state of mind. KRS § 258.235(4) requires this analysis whether or not the dog is tethered or enclosed as the owner's state of mind is always at issue.

III. APPELLANT'S TENDERED JURY INSTRUCTIONS MISINTERPRETS KRS § 258.235(4).

Maupin misinterprets KRS § 258.235(4) and Kentucky common law. Maupin's proposed instructions mirrored Palmore & Cetrulo, Kentucky Instructions to Juries 15.01 titled "Deliveryman Bitten by Dog Near Premises; Liabilities of Dog's Keeper and

Landlord of Premises; Comparative Fault". This matter, however, does not involve a deliveryman or some similar person which Tankersley may have reasonably anticipated. The commentary to instruction 15.01 explains why this is not the appropriate instruction for this case. Palmore advises this instruction "assumes that the dog was not kept in confinement but was allowed to go unattended at a place or places **where as a matter of law its keeper should have anticipated other persons to be exposed to it.** Hence there is no instruction on that issue." Palmore & Cetrulo, Kentucky Instructions to Juries, Fifth Edition, Vol. 2, Civil §15.01) (emphasis added).

Quite the opposite is true in the case at bar. Maupin was not a deliveryman that Tankersley could have anticipated. She, moreover, was not in a populated area where one would expect a dog to encounter another person. Maupin trespassed onto Tankersley's 42 acre, rural property without Tankersley's knowledge, permission or invitation. As the lower court succinctly reasoned,

> Indeed, one of the chief distinctions between the suburban rental house and the secluded rural woods must be the expectation that others will come upon the property; and the jury in this case determined that no such expectation existed when Maupin entered Tankersley's forty-two acre, undeveloped property. Under the law we detail *supra*, this conclusion is both relevant and dispositive to our analysis.

Maupin v. Tankersley, No. 2015-CA-001259-MR.

Maupin's tendered instructions would be appropriate under facts such as May v. Holzknecht where the owner has knowledge the plaintiff would be in direct contact with the dog. May, 320 S.W.3d at 126. The May court upheld the trial court's grant of summary judgment because the dog's owner did not dispute the fact she had direct knowledge of the plaintiff's presence near the dog. Id. at 127. The Court reasoned as follows:

None of the factors that might have absolved or limited the Mays' liability is involved in this case...This case involves application of the statute to undisputed facts. Under these facts, the Mays were liable as the dog's keepers for [the plaintiff's] injuries as a matter of law, and the only question that remained was the extent of her damages.

Id.

In contrast, Tankersley overwhelmingly disputed this issue in the present matter. Maupin and Carpenter admit they never requested Tankersley's permission to access his property. Indeed, Carpenter agreed Tankersley could not have reasonably anticipated Maupin's presence that day. (VR No. 1: 6/29/15; 1:37:15-1:37:36) Tankersley built the path several years prior for his own farming purposes. Maupin's aunt, Donna Johnson, had not used the path or cabin near the property in many years. Maupin further did not regularly visit Tankersley. The trial court's instructions were, therefore, commanded under these circumstances.

IV. THE GENERAL ASSEMBLY RECENTLY NEGATED THE BENNINGFIELD DECISION.

In her dissenting opinion, Honorable Judge Jones stated that, while tempted to concur with the result reached by the majority, she dissented based solely upon Benningfield ex rel Benningfield v. Zinsmeister, 367 S.W.3d 561 (Ky. 2012), as modified (June 25, 2012). Maupin v. Tankersley, No. 2015-CA-001259-MR. The General Assembly's recent legislation, however, confirms Benningfield did not alter the dispositive question in this matter.

In Benningfield, a dog escaped from leased suburban premises and injured a child. Id. at 562. This Court addressed the specific questions of "whether a landlord can be liable under the statutory scheme's broad definition of 'owner' and whether that liability can extend to injuries caused by a tenant's dog off the leased premises." Id. at 563. The Court held a landlord could be considered an "owner" under KRS § §258.095(5), but these

specific landlords were not owners as the dog was not "on or about" the premises at the time of the attack. Id. at 569.

On March 20, 2017, Governor Matt Bevin signed House Bill 112 into law, effectively negating the Benningfield decision. House Bill 112 amends the KRS § 258.095 "owner" definition to include the following:

> (a) Every person having a right of property in the dog; and
>
> (b) Every person who:
>
> (1) Keeps or harbors the dog;
>
> (2) Has the dog in his care;
>
> (3) Permits the dog to remain on or about premises owned and occupied by him; or
>
> (4) Permits the dog to remain on or about premises leased and occupied by him.

2017 Kentucky Laws Ch. 30 (HB 112)17 RS HB 112.

The General Assembly, by an overwhelming majority, clarified that a landlord cannot be held liable for a tenant's dog. The legislation was in direct response to negate the Benningfield interpretation and explain that strict liability does not attach under any and all circumstances. The legislation further relieves the concerns Honorable Judge Jones expressed in her dissent. Kentucky law governing dog bite cases remains unequivocally settled and unchanged by Benningfield.

The Benningfield decision is, nevertheless, consistent with Johnson, Carmichael, and May. Benningfield only addressed KRS § 258.095(5) and the first question in the KRS § 258.235(4) analysis: did the defendant own the dogs that caused the plaintiff's injuries? Since the Court answered "no" to this question, it did not answer the second and third questions. In contrast, Johnson, Carmical, May, and the case at bar, did focus on the latter

two questions. Rather than conflict with the common law precedent, the Benningfield Court answered an entirely different question of law. The General Assembly and the Benningfield decision, therefore, support the Court of Appeals' decision.

V. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THE GENERAL ASSEMBLY'S LEGISLATIVE INTENT FOR KRS § 258. 235(4).

The Benningfield Court's discussion of the "reenactment doctrine" also proves the Court of Appeals followed the General Assembly's legislative intent. In Benningfield, the Zinsmeisters argued a landlord was not the "owner" of a lessee's dog because McDonald v. Talbott, 447 S.W.2d 84 (Ky.1969) held a landlord could not liable for an attack by a tenant's dog. Id. After McDonald, the General Assembly deleted the liability statute, KRS § 258.275, and readopted it in substantially the same version of KRS § 258.235(4). Id.

The Zinsmeisters argued the "reenactment doctrine" should apply because the General Assembly appeared to have acquiesced to the McDonald holding. Id. The Benningfield Court, however, refused to apply the "reenactment doctrine" to the statutory definition of "owner" because McDonald did not interpret the relevant statute. As the Court reasoned:

> This arguably suggests that Kentucky's highest court has interpreted the liability statutes to exclude landlords and that the General Assembly has acquiesced to that interpretation. "[W]hen a statute has been construed by a court of last resort and the statute is substantially reenacted, the Legislature may be regarded as adopting such construction." *Hughes v. Commonwealth,* 87 S.W.3d 850, 855 (Ky.2002) (quoting *Commonwealth v. Trousdale,* 297 Ky. 724, 181 S.W.2d 254, 256 (1944)); *see also id.* ("[T]he failure of the legislature to change a known judicial interpretation of a statute [is] extremely persuasive evidence of the true legislative intent. There is a strong implication that the legislature agrees with a prior court interpretation when it does not amend the statute interpreted." (quoting *Rye v. Weasel,* 934 S.W.2d 257, 262 (Ky.1996)) (second alteration in original)). This canon of interpretation is sometimes called the "reenactment doctrine." *Commonwealth v. Morris,* 142 S.W.3d 654, 661 (Ky.2004).

> The problem with this approach is that *McDonald* did not interpret the statute in which the definition of "owner" appeared. Indeed, KRS § 258.095(5), which was in effect at that time, was *never* even mentioned in the case. Admittedly, *McDonald* discussed the liability statute that was in effect at the time, KRS § 258.275, but it never mentioned the owner-definition statute, KRS § 258.095(5). *See McDonald,* 447 S.W.2d at 85. Benningfield, 367 S.W.3d at 564–65 (footnote omitted).

Unlike Benningfield, the "reenactment doctrine" does apply to the case at bar and supports the Court of Appeals' decision. KRS § 258.275(1), the predecessor of the present liability statute, was enacted in 1954, and read:

> Any owner or keeper of a dog which has killed or injured livestock or poultry or which has bitten such livestock or poultry so severely as to necessitate its destruction, or injured or damaged any person or property, shall be liable to the owner of such livestock or poultry, or person in a civil action for all damages and costs, or to the Commonwealth.

In 1967, the Court of Appeals (then the highest Kentucky Court) held the legislature did not intend to impose strict liability in any and all circumstances. Dykes v. Alexander, 411 S.W.2d 47 at 48-49. The Court of Appeals affirmed the Dykes holding three years later. Johnson, 450 S.W.2d at 496. The dispositive question in Johnson was whether the dog's owner had reason to anticipate the plaintiff's proximity to the dog. Id. Both Dykes and Johnson specifically cited KRS § 258.275(1) and analyzed its intent.

The General Assembly repealed KRS § 258.275 in 2004 and replaced it with KRS § 258.235(4). The new statute is substantially the same and states, "Any owner whose dog is found to have caused damage to a person, livestock, or other property shall be responsible for that damage." KRS § 258.235(4). The 2017 General Assembly also reviewed Kentucky's dog bite law and chose to only overhaul the "owner" definition. Based on the legislature's actions, this Court can apply the "reenactment doctrine" and conclude the legislature adopted the Dykes, Johnson, and Carmical interpretation.

Kentucky's court of last resort construed the statute twice before the legislature repealed the statute. Both cases explicitly cited KRS § 258.275. The legislature then reenacted it in substantially the same language as required for the "reenactment doctrine." Hughes, 87 S.W.3d at 855. It is, moreover, highly likely the legislature was aware of the Dykes and Johnson interpretations of the statute. Unlike the "owner" statute in Benningfield, Dykes and Johnson are listed in the annotations to KRS § 258.275 included in Michie's Kentucky Revised Statutes and in the Westlaw annotations to the statute. Indeed, the annotations state the following:

> KRS § 258.275(1) does not impose strict liability upon the owner or keeper of a dog. Dykes v. Alexander, (Ky. 1967) 411 S.W.2d 47." The annotations further state, "If the person bitten is one whose proximity to the animal the owner has reason to anticipate, the statute abrogates the necessity of proving that the owner had knowledge of the vicious propensities of the dog. Johnson v. Brown, (Ky. 1970) 450 S.W.2d 495.

The 2004 and 2017 General Assemblies were well aware of the court's interpretation that the dispositive question in dog bite cases is whether the dog owner anticipated the plaintiff's presence. After all, "these resources are what the General Assembly would likely turn to as it searched for any connection." Benningfield, 367 S.W.3d at 565.

Both legislative history and Kentucky's common law demonstrate the Court of Appeals correctly interpreted the legislative intent and the public policy of KRS § 258.235(4). The legislature did not make any clarifications to the liability statute in 2004 or 2017, which would create such a strict liability standard as Maupin suggests. The trial court provided the jury with the appropriate standard and instructions.

CONCLUSION

Roland Tankersley did not know or anticipate Latasha Maupin would be on his property the day of her injury. Testimony at trial showed that Maupin trespassed onto Mr. Tankersley's property without any warning or permission. The trail court provided proper jury instructions based on the testimony of Mr. Tankersley, Latasha Maupin and James Carpenter. KRS § 258.235(4) and Kentucky case law allows the jury to determine whether the dog's owner could have reasonably anticipated the plaintiff's presence prior to imposing strict liability. The General Assembly's enactment of House Bill 112 verifies Benningfield did not alter that analysis. Tankersley's anticipation of Maupin's presence was a material issue of fact. The trial court, therefore, correctly instructed the jury in accordance with KRS § 258.235(4) and Kentucky common law. Wherefore, Appellee, Roland Tankersley respectfully requests the Court approve the instructions given by the trial court and affirm the judgment of the jury.

Respectfully submitted,

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