



COMMONWEALTH OF KENTUCKY
SUPREME COURT
2016-SC-000572

LATASHA MAUPIN

APPELLANT

V. APPEAL FROM JACKSON CIRCUIT COURT
CIVIL ACTION NO. 10-CI-00226

COURT OF APPEALS OF KENTUCKY
NO. 2015-CA-1259

ROLAND TANKERSLEY

APPELLEE

APPELLANT'S BRIEF

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CERTIFICATE OF SERVICE

It is hereby certified pursuant to CR 76.12(6) that copies of this brief were served by placing a copy in the United States Mail, First Class, postage prepaid, on the 9th day of MAY, 2017 to: Daniel A. Simons, SIMONS DUNLAP & FORE, PSC, 116 W. Main Street, Ste. 2A, P.O. Box 726, Richmond, KY 40476-0726; and The Honorable Oscar G. House, Judge, Jackson Circuit Court, P.O. Box 84, McKee, KY 40447 and Hon. Susan Stokley Clary, Clerk of Supreme Court of Kentucky, State Capitol, Room 235, 700 Capitol Avenue, Frankfort, KY 40601-3415.


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STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION.....1

KRS 258.235(4).....1, 4, 6, 7, 8, 10, 11, 12, 13, 14,17

STATEMENT CONCERNING ORAL ARGUMENT.....1

STATEMENT OF THE CASE.....1

Appellant’s Appendix - Exhibit “A”.....1

Appellant’s Appendix - Exhibit “B”1

Appellant’s Appendix - Exhibit “C”1, 13

A. Factual Background.....1

B. Relevant Procedural History.....4

Palmore & Cetrulo, *Kentucky Jury Instructions* § 15.01 (2015).....4

Palmore & Cetrulo, *Kentucky Jury Instructions* § 15.02
(2015).....5, 14, 16

C. Opinion of the Court of Appeals.....6

SUMMARY OF THE ARGUMENT.....6

ARGUMENT.....7

I. Standard of Review.....7

Sargent v. Shaffer, 467 S.W.3d 198, 203 (Ky. 2015).....7

Commonwealth v. English, 993 S.W.2d 941, 945
(Ky. 1999).....7

Floyd County Bd. of Educ. v. Ratliff, 955 S.W.2d 921
(Ky. 1997).....8

II. KRS 258.235(4) imposes strict liability on dog owners for

	damages incurred in dog attacks.....	8
A.	Roland Tankersley was the owner of the dogs which attacked Latasha Maupin.....	8
	KRS 258.095(5).....	8, 13
B.	KRS 258.235(4) should have been enforced as written.....	9
	<u>Koestel v. Cunningham</u> , 97 Ky. 421, 17 Ky.L. Rptr. 296, 30 S.W. 970 (1895).....	9
	Old Kentucky Statute 68.....	9, 10, 11
	<u>Bush v. Wathen</u> , 104 Ky. 548 (1898).....	9
	<u>Brown v. Weathers</u> , 247 Ky. 306, 310 (1933).....	10
	KRS 258.275(1).....	10, 11
	<u>May v. Holz knecht</u> , 320 S.W.3d 123, 126 (Ky. App. 2010).....	10
	<u>Benningfield v. Zinsmeister</u> , 367 S.W.3d 561, 563 (Ky. 2012).....	10
	<u>Dykes v. Alexander</u> , 411 S.W.2d 47 (Ky. 1967).....	10, 12, 14, 15, 16
	<u>Johnson v. Brown</u> , 450 S.W.2d 495 (Ky. 1970).....	11, 12, 14, 15
	<u>Carmichael v. Bullock</u> , 251 S.W.3d 324 (Ky. App. 2007).....	11, 12, 14, 15, 16
	KRS 446.080(4).....	11
	<u>Vandertoll v. Commonwealth</u> , 100 S.W.3d 789, 795-796 (Ky. 2003).....	12
	<i>Black's Law Dictionary</i> 1233 (5 th Ed. 1979).....	12
	<u>Carter v. Bullitt Host, LLC</u> , 471 S.W.3d 288, 296 (Ky. 2015).....	12
III.	If KRS 258.235(4) allows exceptions to strict liability, a comparative fault standard should be applied.....	12

IV. If this Court allows the burden of proof to be shifted through a foreseeability or negligence standard then the cases cited by Tankersley are distinguishable from the present case as Tankersley took no affirmative steps to protect the public from his dogs.....14

A. Appellant, Latasha Maupin, was not an interloper.....16

CONCLUSION.....16

INTRODUCTION

This is a dog attack and bite case in which the Appellant appeals based upon the instructions given to the jury during the trial of the case and seeks a new trial solely on the issue of damages. The lower courts erred in interpreting Kentucky's dog bite legislation, KRS 258.235(4), at variance with the stated language and creating exceptions to the statute where none exist.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant, Latasha Maupin, has no objection to oral argument in this case.

STATEMENT OF THE CASE

Latasha Maupin appeals from jury instructions which were given to the jury at the trial of her cause which followed a foreseeability and/or negligence standard when a dog owner has taken no action to confine or fetter his dog to prohibit or limit contact with the public. Judgment was entered in Jackson Circuit Court against Appellant on July 13, 2015. (Exhibit "A" : Judgment of Jackson Circuit Court) The Jackson Circuit Court denied Appellant's Motion for Judgment Not Withstanding the Verdict and/or Motion for New Trial on Damages. (Exhibit "B") A panel of the Court of Appeals affirmed in an opinion dated September 16, 2016. (Exhibit "C": Opinion of the Court of Appeals) This Court granted discretionary review on March 15, 2017.

A. Factual Background

On September 12, 2009, Appellee, Roland Tankersley, owned 42 acres on Red Hill Road (also known as Ky Highway 1955) in Livingston, Jackson County, Kentucky. (VR No. 1: 06/29/15; 11:33:14 - 11:33:29) Mr. Tankersley built a dirt or gravel road on

his property from Ky Highway 1955 that went to his barn. (VR No. 1: 06/29/15; 12:06:08) This road was also used by Donna Johnson and her family to access land and a cabin which the Johnson family had owned for over twenty years and which property abutted the Tankersley property. (VR No. 1: 06/29/15; 11:35:12 - 11:35:28) The Appellant, Latasha Maupin, is Donna Johnson's niece. (VR No. 1: 06/29/15; 10:36:42) Latasha identified the dirt road she had walked down as well as Tankersley's home in Plaintiff's Exhibits. (R. 226) (VR No. 1: 06/29/15; 10:35:12; 10:36:00) (See also Exhibit "C" attached to Appellant's Appendix)

On September 12, 2009, Roland Tankersley owned three dogs: Bertha, a red and white mutt; Bertha's pup, an adult black and white mutt, and Roy, a black and white mutt. (VR No. 1: 06/29/15: 11:44:17; 11:51:25; 11:53:17) Roland Tankersley, fed and watered these dogs, gave them shelter in his barn, did not leash or collar them and allowed them to roam his property freely. (VR No. 1: 06/29/15: 11:45:17; 11:51:59; 11:53:31)

Appellant, Latasha Maupin lived with her boyfriend, James Carpenter and their daughter, Courtney, on Kentucky Highway 1955. (VR No. 1: 06/29/15; 1:23:15) Gene Martin, a neighbor, lived about 1/8 mile from their home on Ky 1955. (VR No. 1: 06/29/15; 1:24:45) On September 12, 2009, James and Latasha had started squirrel hunting on Gene Martin's property about 3:30 - 4:00 p.m. (VR No. 1: 06/29/15; 12:26:20) Gene Martin's property abuts government owned land which abuts land owned by Latasha's aunt, Donna Johnson. (VR No. 1: 06/29/15; 1:26:20) James had hunted in this area over a thousand times. (VR No. 1: 06/29/15; 1:27:10) Latasha decided to leave James in the woods hunting and was going to walk down the dirt road near the cabin on

her aunt's property that led out to Ky 1955. (VR No. 1: 06/29/15; 1:27:40) She was then going to walk on Ky 1955 back to Gene Martin's where they had parked their truck when they had started hunting. (VR No. 1: 06/29/15; 1:27:40)

As Latasha came down the dirt/gravel road, she testified that four or five dogs came down from Roland Tankersley's back yard and were sniffing at her when a black and white mix dog bit her ankle. (VR No. 1: 06/29/15; 10:41:14) The other dogs then began biting her and knocked her down as she covered her face and neck with her left arm and she tried to run from the dogs. (VR No. 1: 06/29/15; 10:42:48 - 10:43:45) Latasha described the dogs which attacked her as being large dogs including a black and white dog, a white and brown dog, and a white and red dog. (VR No. 1: 06/29/15; 10:41:14 - 10:42:14)

As Latasha was being attacked by the dogs, Nelce Drew, was driving his motorcycle on Highway 1955 and stopped his motorcycle to try to help her. Mr. Drew saw four dogs attacking Latasha Maupin which he described as average adult dogs with mixed colors. She was fighting the dogs away from her. (VR No. 1: 06/29/15; 1:10:25) He testified Latasha hollered "these dogs are killing me." (VR No. 1: 06/29/15; 1:10:49) She appeared to be fighting for her life and the dogs were biting her all over. (VR No. 1: 06/29/15; 01:11:05) Mr. Drew picked up Latasha near the end of the dirt/gravel road close to Highway 1955. (VR No. 1: 06/29/15; 1:09:09; 1:10:28; 1:17:30 - 1:18:07; 1:18:40) Mr. Drew drove Latasha to Gene Martin's son's residence and testified that the attacking dogs followed them 1/4 mile down Highway 1955 to the Martin residence and then went back in the direction they came from where the dog attack had occurred. (VR

No. 1: 06/29/15; 1:19:25 - 1:20:06)

Following the attack, Latasha Maupin was airlifted to University of Kentucky Hospital where the numerous dog bite wounds on her legs, back, left elbow and arm were cleaned and stitched. Latasha then underwent a series of injections for rabies and incurred medical bills totaling over \$34,000.00 and has been left with permanent scarring. (VR No. 1: 06/29/15; 10:45:54; 10:48:20; 10:54:35; 10:57:28)

B. Relevant Procedural History

At the close of all evidence, counsel for Appellant, Latasha Maupin made a Motion for a Directed Verdict which was denied by the Trial Judge. (VR No. 1: 06/29/15; 2:16:37). Jury instructions were then discussed by counsel and the Court. In following Kentucky's strict liability statute, KRS 258.235(4), Latasha Maupin submitted jury instructions to the Trial Court in accordance with *Palmore & Cetrulo, Kentucky Jury Instructions* § 15.01 (2015) and which stated:

You will find for the Plaintiff, Latasha Maupin, against Defendant, Roland Tankersley, if you are satisfied from the evidence that the Defendant, Roland Tankersley, was the "owner" of the dog(s) that inflicted the injuries described in this case upon the Plaintiff, Latasha Maupin.

Are you satisfied from the evidence that the dog(s) involved in the attack on the Plaintiff, Latasha Maupin, was/were owned by the Defendant, Roland Tankersley?

YES _____ NO _____

If you answered "YES" then go to Instruction No. 5 (damages).

If you answered "NO" then you shall complete Verdict Form

"B". (R. 239)

The Appellee, Roland Tankersley, submitted jury instructions to the Trial Court in accordance with Palmore and Cetrulo, *Kentucky Jury Instructions* § 15.02 (2015) titled "Issue of Negligence in the Confinement of a Dog" and which stated:

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. (R. 246)

Over Plaintiff's objection, the Court instructed the jury pursuant to Defendant's submitted Instructions. The jury determined from the evidence presented at trial that the Appellee, Roland Tankersley, was the owner of the dogs which attacked the Plaintiff. (R. 247) However, the jury then determined that Roland Tankersley had no reason to believe the Plaintiff would be in the vicinity of his dogs and Tankersley did not fail to exercise ordinary care to control his dogs for the safety of others. (R. 248) Therefore, in accordance with the instructions as given, the Jury determined Roland Tankersley was not liable to Latasha Maupin for the injuries caused by his dogs. (R. 249)

Judgment was entered in the Appellee's favor on July 16, 2015. (R. 259 - 261) Appellant, Latasha Maupin, filed a Motion for Judgment Notwithstanding the Verdict and/or a Motion for a New Trial on the issue of damages based upon improper jury instructions (R. 263- 266) which was denied by the Jackson Circuit Court on August 13, 2015. (R. 272) Appellant, Latasha Maupin, filed her Notice of Appeal on August 21, 2015. (R. 275-276)

C. Opinion of the Court of Appeals

On September 16, 2016, a panel of the Kentucky Court of Appeals affirmed the Jackson Circuit Court's Order denying Appellant's Motion for Judgment Notwithstanding the Verdict and/or Motion for New Trial on Damages. The Court of Appeals held that Appellee, Roland Tankersley, had no reason to anticipate Maupin's presence on his property and therefore a negligence standard applied.

The panel failed to recognize the plain meaning of KRS 258.235(4) which creates liability of an owner for damages caused by a dog. Instead, it put the burden of proof on dog bite and attack victims to prove a foreseeability and/or negligence standard on the part of the dog owner where no such burden or exception exists in the statute.

Appellant, Latasha Maupin, moved this Court for discretionary review which Motion was granted on March 15, 2017.

SUMMARY OF THE ARGUMENT

The opinion of the Court of Appeals improperly overrides the public policy of the Commonwealth as embodied in dog attack legislation. KRS 258.235(4) states, "[a]ny dog owner whose dog is found to have caused damage to a person....**shall be responsible for**

that damage.” (Emphasis added) The Court of Appeals requirement that a dog attack victim must show the dog owner was aware the victim was going to be on the dog owner’s property creates an impermissible exception to the strict liability standard found in KRS 258.235(4).

Public policy requires a liberal interpretation of the dog attack legislation. Dog owners 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 liable for injuries their dogs cause.

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

ARGUMENT

I. Standard of Review

The appropriate standard for determining whether a trial court erred by failing to give an instruction required by the evidence or by giving an instruction not sufficiently supported by the evidence, is whether the trial court abused its discretion. Sargent v. Shaffer, 467 S.W.3d 198, 203 (Ky. 2015). A trial court abuses its discretion when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

While the trial court may enjoy some discretionary leeway in deciding what instructions are authorized by the evidence, the trial court has no discretion to give an instruction that misrepresents the applicable law. “The content of a jury instruction is an

issue of law that must remain subject to de novo review by the appellate courts.” Sargent at 204. Therefore, as the Sargent Court summarized, a trial court’s decision on whether to instruct on a specific claim will be reviewed for abuse of discretion and the substantive content of the jury instructions will be reviewed de novo. Sargent at 204.

Also at issue in the present cause is the interpretation of KRS 258.235(4) which must be reviewed de novo. 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. Floyd County Bd. of Educ. v. Ratliff, 955 S.W.2d 921 (Ky. 1997).

II. KRS 258.235(4) imposes strict liability on dog owners for damages incurred in dog attacks.

KRS 258.235(4), states 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. (Emphasis added)

A. Roland Tankersley was the owner of the dogs which attacked Latasha Maupin.

KRS 258.095(5) defines who is an “owner” in the context of KRS 258.235(4):

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.

Roland Tankersley, fed and watered these dogs, gave them shelter in his barn, did not leash or collar them and allowed them to roam his property freely. (VR No. 1:

06/29/15; 11:45:17; 11:51:59; 11:53:31) Latasha Maupin testified that the dogs which attacked her came down the hill from Roland Tankersley's back yard. (VR No. 1: 06/29/15; 10:41:14) In addition, James Carpenter testified that when he emerged from the woods and was walking back to his truck down the same dirt/gravel road where Latasha had been previously attacked, he saw Roland Tankersley feeding four or five dogs by his carport; that these dogs came down to the edge of the road and were barking at him; and that he had to stomp his feet and yell at them to make them go away. (VR No. 1: 06/29/15; 01:27:43; 1:29:29 - 1:30:26)

The jury determined based upon the facts presented at trial that Roland Tankersley was the owner of the dogs involved in the attack on Latasha Maupin. (R. 247)

B. KRS 258.235(4) should have been enforced as written.

At common law "the dog was regarded as a tame, harmless, and docile animal, and its owner not responsible for any vicious or mischievous act it might do, unless he had a previous knowledge of the mischievous or vicious propensities." Koestel v. Cunningham, 97 Ky. 421, 17 Ky.L.Rptr. 296, 30 S.W. 970 (1895). This was more commonly known as the "one free bite" rule.

In 1893, the Kentucky General Assembly superceded the common law with the enactment of Kentucky statute 68, which read as follows:

Every person owning, having or keeping any dog shall be liable to the party injured for all damages done by such dog. **But no recovery shall be had in case the person injured is, at the time, upon the premises of the owner of the dog after night, or engaged in some unlawful act in the daytime.** Bush v. Wathen, 104 Ky. 548 (1898). (Emphasis added)

In 1918, the Legislature reenacted legislation which protected livestock and

poultry from injury by dogs but this legislation did not include language from the old Kentucky 68 statute detailing that “[e]very person having, owning or keeping any dog shall be liable to the party injured for all damages done by such dog.” Thus the legislation of 1918 left in force the common law in which the owner was not responsible unless the owner had notice of the dog’s vicious propensities. Brown v. Weathers, 247 Ky. 306, 310 (1933). Thus, the common law prevailed until the General Assembly enacted KRS 258.275(1) in 1954 which was repealed in 2004 and replaced with the current statute, KRS 258.235(4).

Kentucky courts have acknowledged that by “abrogating the common law, our dog-bite statutes were intended to broaden responsibilities of those who keep a dog.” May v. Holzkecht, 320 S.W.3d 123, 126 (Ky. App.2010). In Benningfield v. Zinsmeister, 367 S.W.3d 561, 563 (Ky. 2012) this Court noted that KRS 258.235 was “clearly part of a scheme to displace or abrogate the common law rule on dog-bite liability in part to expand liability, presumably to create incentives for various actors to take steps to reduce the chances of dog bites.” Id.

Prior dog bite statutes contained exceptions to the strict liability standard. Therefore, past courts logically concluded the legislature did not mean to impose strict liability in every circumstances since there were exceptions to strict liability within the language of each statute. In line with this reasoning is the case of Dykes v. Alexander, 411 S.W.2d 47 (Ky. App. 1967) which is often cited as the seminal dog bite case concerning liability. In Dykes, a five year old boy and his sister entered a fenced-in backyard without the owner’s knowledge and he was severely bitten by a dog. The Dykes

Court used the past interpretation of old Kentucky Statute 68 and stated that “[i]n the case at bar there was no showing that the dog had ever previously bitten anyone or that the dog was vicious or that either of the appellees had knowledge of the same.” Dykes at 49. The Dykes Court also looked to a California case in which there was strict liability statute which only applied if a person was on the premises lawfully. The Dykes Court in failing to determine the minor child was on the premises lawfully, found the dog owner did not owe a duty to a trespasser.

Despite the strict liability standard in the Kentucky statute, the Dykes Court relied upon contributory negligence provisions similar to the exceptions stated in old Kentucky Statute 68 even though KRS 258.275(1) contained no such exceptions. The unsound reasoning in Dykes resulted in later courts also disregarding the plain language of KRS 258.275(1) and KRS 258.235(1) in decisions which included Johnson v. Brown, 450 S.W.2d 495 (Ky. 1970) and Carmichael v. Bullock, 251 S.W.3d 324 (Ky. App. 2007). Specifically in the Carmichael case, the Court of Appeals upheld jury instructions which only required the owner to exercise ordinary care to control his dog, rather than imposing strict liability.

Contrary to this Commonwealth’s first dog bite legislation, KRS 258.235(4) does not contain any exceptions, but is plainly and clearly written, imposes a strict liability standard in that a dog owner shall be responsible for damages caused by his dog. When interpreting the meaning of a statute, all words and phrases shall be construed according to the common and approved usage of language. KRS 446.080(4). Referring to the word “shall” this Court held “in common or ordinary parlance, and in its ordinary signification,

the term 'shall' is a word of command and... must be given a compulsory meaning... shall means shall." Vandertoll v. Commonwealth, 100 S.W.3d 789, 795-796 (Ky. 2003)(citing *Black's Law Dictionary* 1233 (5th Ed. 1979).

Despite the unambiguous language of the statute, Kentucky courts have whittled away at the strict liability standard. "Stare decises does not, and indeed cannot, require application of a court-made rule in the face of a statute to the contrary; or, for that matter, a later-in-time court ruling to the contrary. It almost goes without saying that absent a constitutional bar or command to the contrary, the General Assémbly's pronouncements of public policy are controlling on the courts, as this Court has ruled countless times." Carter v. Bullitt Host, LLC, 471 S.W.3d 288, 296 (Ky. 2015).

Therefore, based upon the clear and unambiguous language of KRS 258.235(4), liability only requires proof of ownership which the jury found in this case during the underlying jury trial.

III. If KRS 258.235(4) allows exceptions to strict liability, a comparative fault standard should be applied.

In Dykes V. Alexander, 411 S.W.2d 47 (Ky. App. 1967), Johnson v. Brown, 450 S.W.2d 495 (Ky. 1970), Carmichael v. Bullock, 251 S.W.3d 324 (Ky. App. 2007) and the Court of Appeals opinion in this case, the burden of proof has been shifted to the dog attack victim who then becomes tasked with proving it was foreseeable for the dog owner to anticipate the victim's presence on the dog owner's property.

Instead of placing the burden of proof upon the victim, the burden of proof should be placed upon the dog owner who has undertaken the responsibility of owning an animal

which may attack and injure a person. KRS 258.095(5) extends liability to people other than the mere property owner of the dog. It extends liability a person who keeps or harbors the dog, has it in his care, or permits it to remain on his premises. Any person who takes responsibility for the dog is found to be an "owner". Therefore, in accordance with Kentucky's statutes, the dog owner assumes the risks which follow ownership.

In the present cause, Tankersley should have been found liable under KRS 258.235(4) so long as Maupin proved he owned the dogs which attacked her. Tankersley could then seek to lessen his liability by establishing fault on the part of Maupin based upon her disregarding warnings, failing to announce her presence or enticing the dogs in some way. (See Exhibit "C" - Dissent by Judge Jones in Maupin v. Tankersley, No. 2015-CA-001259-MR).

In the present cause, the jury made a determination Tankersley owned the dogs involved in the attack. (R. 247) In addition, Maupin established she was not a trespasser. She was not, as characterized by the Kentucky Court of Appeals, roaming upon Tankersley's undeveloped forty-two acre property.

The dirt/gravel road which Latasha Maupin was walking down was a right of way to her aunt's cabin. (VR No. 1: 06/29/15; 11:02:39) Roland Tankersley gave permission to Donna Johnson and her family to use the roadway. (VR No. 1: 06/29/15; 11:35:28) Roland Tankersley knew that people used the roadway to get to the Johnson cabin. (VR No. 1: 06/29/15; 12:02:29) Roland Tankersley met James Carpenter on the same road following the attack and never questioned why he was on the roadway. (VR No. 1: 06/29/15; 1:31:07) Further, the attack took place on the dirt road within feet of Kentucky

Highway 1955.

Therefore, since Roland Tankersley's ownership of the dogs was established under KRS 258.095(5), he should have been found liable under KRS 258.235(4).

IV. If this Court allows the burden of proof to be shifted through a foreseeability or negligence standard then the cases cited by Tankersley are distinguishable from the present case as Tankersley took no affirmative steps to protect the public from his dogs.

In the present cause, Appellee, Roland Tankersley, submitted jury instructions directly from Palmore & Cetrulo, *Kentucky Jury Instructions* § 15.02 (2015) titled "Issue of Negligence in the **Confinement** of a Dog." (Emphasis added) These instructions and the cases cited in the comments to these instructions deal with shifting the burden of proof to the Plaintiff under a foreseeability or negligence standard when the dog owner has taken affirmative steps to protect the public by confining the owner's dogs. The cases cited in the comments to §15.02 include Johnson v. Brown, 450 S.W.2d 495 (Ky. 1970); Dykes v. Alexander, 411 S.W.2d 47 (Ky. 1967) and Carmichael v. Bullock, 251 S.W.3d 324 (Ky. App. 2007) all involve cases where the owner has taken steps to confine or chain a dog. As stated in the Comments to §15.02 of Palmore, "[t]his instruction differs from the example presented in §15.01. Here the Defendant's liability is grounded in negligence as opposed to strict liability." The issue of foreseeability or the negligence of the owner only becomes relevant or an issue to be determined by a jury when there is proof the owner has taken steps to confine his dog(s).

In Johnson v. Brown, supra., the owner's dog bit a victim while he was on the dog

owner's premises for the purpose of renting some equipment. The dog was chained to a post and the owner advised the victim not to go near the dog. When the victim walked near the dog, he was attacked. The Johnson Court stated that if the Plaintiff's presence was known to dog's keeper (or within his reasonable expectation), it was the keeper's statutory duty to prevent the Plaintiff from being bitten. However, the Plaintiff was also expected to exercise ordinary care for his own safety. Based upon the facts of the case, the Johnson Court determined that the trial court had erred in not instructing the jury on the defense of contributory negligence and remanded the case for a new trial.

In Dykes, supra., two children entered Alexander's fenced-in back yard unknown to Alexander and one little boy was attacked by his dog. The Court found that the dog owner "in keeping a dog not thought to be vicious in his fenced-in backyard was not keeping him at his peril so as to be liable to a trespasser to whom he owed no duty." Dykes at 49.

In Carmical v. Bullock, supra., Carmical was completing a delivery to the homeowner, Bullock, but on a different day and time than his normal route, when he approached the homeowner's backyard and was attacked by Bullock's chained dog. The Carmical Court gave jury instructions which followed Palmore § 15.02. The Court of Appeals stated that these instructions were given based upon the holding in Dykes v. Alexander, 411 S.W.2d 47 (Ky. 1967) which stood 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. (Emphasis added)

Since the evidence was Roland Tankersley had not taken any steps to confine or

fetter his dogs, whether or not Roland Tankersley had reason to anticipate Latasha Maupin's presence was immaterial and not relevant. Roland Tankersley allowed his dogs to run unenclosed and unfettered on his 42 acre property and surrounding properties. Tankersley's dogs were neither kept in a fenced-in area (enclosed) nor on a chain or in any way restrained (fettered). As a result, it was error for the Court to instruct pursuant to § 15.02 which is limited to owners who have taken measures to confine or fetter their dogs.

A. Appellant, Latasha Maupin, was not an interloper.

The status of the Appellant, Latasha Maupin, is not relevant nor material because Appellee had not taken steps to confine his dogs. However, as discussed above, Latasha Maupin was not trespassing at the time of the attack as she was on the roadway leading to her aunt's cabin and was within feet of Kentucky Highway 1955.

Roland Tankersley presented no evidence at trial which would provide a legal basis to instruct a jury pursuant to the Dykes or Carmical cases. By allowing his dogs to run freely and without taking any affirmative action to confine (keep in a house or fenced in area) or fetter (keep on a chain), there was no legal or factual basis for the Court to instruct the jury pursuant to Dykes or Carmical and Palmore § 15.02 "Issue of Negligence in the Confinement of a Dog."

CONCLUSION

With dog ownership comes responsibility. Dogs confined to pens or by chains or fences can still escape. It may not be the owner's failure to keep a dog confined or restricted but the dog's innate tendencies which cause it to attack. The only way to

enforce the responsibility which comes with owning a dog is to enforce KRS 258.235(4) as written since the dog owner has assumed the risk that the dog may injure someone through his or her ownership. This statute abrogated the common law "one-bite" rule so as to broaden the responsibility of those who owned dogs. The risk of damages was then passed to the dog owner rather than to the innocent victim.

Should this Court believe that a foreseeability or negligence standard should be applied to KRS 258.235(4), then the dog owner should first be found liable under KRS 258.235(4) so long as the injured person proves the Defendant owned the dog which caused the damage. Next, comparative fault standards would then allow the Defendant to reduce or eliminate his responsibility by proving fault upon the part of the injured person.

Should this Court believe that the burden of proof should be shifted to the injured party, the trial court abused its discretion in giving a foreseeability and negligence instruction since Roland Tankersley's dogs were neither confined, fenced or fettered at the time of their attack in accordance with the case law discussed.

Based upon the foregoing, Appellant, Latasha Maupin, seeks an Order Vacating the Judgment entered against the Appellant on July 16, 2015 and ordering a new Trial on the sole issue of Appellant's damages.

Respectfully submitted,

A handwritten signature in cursive script, reading "Kerstin Schuhmann". The signature is written in black ink and is positioned above a horizontal line.

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