**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**

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# APPELLANT'S REPLY 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 19th day of July, 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

## I. NOTHING IN KRS 258.235(4) REFERS TO A DOG OWNER'S STATE OF MIND

Appellee, Tankersley, argues that whether or not Tankersley enclosed or fettered his dogs, his knowledge or anticipation of Appellant, Maupin's presence remains the pivotal question of fact in this dog bite case and therefore his submission of jury instructions was consistent with the Dykes v. Alexander, 411 S.W.2d 47 (Ky. 1967), Johnson v. Brown, 450 S.W.2d 495 (Ky. 1970), and Carmichael v. Bullock, 251 S.W.3d 324 (Ky. App. 2007) cases.

The plain and unambiguous language of KRS 258.235(4) does not reference a dog owner's state of mind. It states that a dog owner **shall** be responsible for the damages caused by the dog. In the present cause, the jury found Tankersley owned the dogs which attacked Maupin. It was also established that Tankersley allowed his dogs involved in the attack to roam freely upon his 42 acres and beyond and that Maupin was on a dirt road which was a right-of- way to her aunt's cabin when she was attacked. (See Appellant's Appendix "D") The dog attack occurred within feet of Highway 1955 and the dogs followed Maupin and her rescuer about 1/4 mile down Highway 1955 before they retreated back to the Tankersley property following the attack.

The statute, as written, clearly places the burden on the dog owner, who has taken responsibility for the dog, and therefore for any injuries the dog causes. If, as Tankersley has suggested, the statute looks to the whether the owner has reason to anticipate the victim's presence, the burden is then placed squarely on the innocent victim, and not on an owner who has taken no steps to confine or fetter his dogs. The Comments to § 15.02

Issue of Negligence in the Confinement of a Dog, Palmore & Cetrulo, *Kentucky Jury Instructions* (2015) state:

> KRS 258.235(4) and its predecessor KRS 258.275, have been held to nullify the common law principle of liability that the owner or keeper of a dog must have knowledge of the animal's vicious tendencies, **but strict liability, liability without fault, on the part of the owner or keeper of a dog, is imposed only in those instances in which a dog is not enclosed or fettered on the owner's premises, OR the owner has reason to anticipate an interloper's presence and exposure to the dog.** Dykes v. Alexander, 411 S.W.2d 47 (1967), Johnson v. Brown, 450 S.W.2d 495 (Ky. 1970). (Emphasis added)

These comments clearly show strict liability is still imposed in cases unless the owner has taken steps to enclose or fetter his dog, and then, and only then, does the issue of the owners anticipation of the victim's presence become an issue to be presented to the jury.

## II. THE COURT OF APPEALS DECISION IS NOT CONSISTENT WITH THE GENERAL ASSEMBLY'S LEGISLATIVE INTENT FOR KRS 258.235(4)

The Appellee, Tankersley, argues that his approach of looking at whether the owner has anticipated the victim's presence follows the legislative intent for KRS 258.235(4) under the "reenactment doctrine". This doctrine is a generally recognized rule of statutory construction which applies when a statute has been construed by a Court of last resort and the statute is subsequently reenacted. The Legislature may then be regarded as adopting such construction. Commonwealth v. Morris, 142 S.W.3d 654 (Ky. 2004).

KRS 258.275(1) was enacted in 1954 stated that any owner or keeper of a dog **shall** be liable to a person in a civil action for all damages and costs. In 1967, Kentucky's

highest court found in Dykes v. Alexander, 411 S.W.2d 47 (Ky. 1967) that the legislature did not intend to impose strict liability in any and all circumstances. In Dykes, a five year old boy and his sister entered a fenced in yard without the owner's knowledge and was severely bitten by the owner's dog. Dykes was decided by applying Old Kentucky Statute 68 and a contributory negligence standard. In 2004, the General Assembly enacted KRS 258.235(4) which stated "Any owner whose dog is found to have caused damage to a person....**shall** be responsible for that damage."

Tankersley argues that because the legislature enacted KRS 258.235(4) in substantially the same form as its prior enactment, it must therefore have adopted the holdings of Dykes and Johnson. Johnson involved a dog owner who had chained his dog. Tankersley argues that the research annotations to the statute put the legislature on notice of the changes and under the reenactment doctrine, the legislature reenacted virtually the same statute, thereby incorporating those annotations. Tanklersley argued in his Brief that the annotations to the statute stated as follows:

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 a person bitten is one whose proximity to the animal the owner had 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. (Emphasis added)

As cited above, the Dykes and Johnson Courts used the past interpretation of Old Kentucky Statute 68 which looked to whether the dog had ever previously bitten anyone

before or whether the owner had knowledge of the same. Dykes at 49. This unsound reasoning, based upon a prior repealed statute and on contributory negligence, was again followed in later decisions.

In addition to the reenactment doctrine, Tankersley cites to the legislature's response to Benningfield ex rel. Benningfield v. Zinsmeister, 367 S.W.3d 561 (Ky. 2012) as proof that strict liability has been abrogated. In Benningfield, this Court determined that a landlord could be considered a dog's owner under KRS 258.095(5). Following the opinion rendered in Benningfield, the Kentucky General Assembly passed House Bill 112 into law effectively overruling Benningfield and changing the definition of the dog "owner" to exclude landlords. Tanklersley argues that this legislation was a direct response to the Benningfield decision and further cemented the fact that strict liability does not attach under any and all circumstances.

While Appellant agrees that House Bill 112 was a direct response to Benningfield, it was not a direct response to KRS 258.235(4). It was only direct response to the definition of dog "owner" which had previously included landlords under KRS 258.095(5). The House Bill did not amend or explain KRS 258.275, it simply removed landlords from the definition of a dog owner.

Appellee's argument that the legislature adopted the holdings in Dykes and Johnson when it adopted KRS 258.235(4) does not logically make sense given the legislative action undertaken following the Benningfield case. If the legislature had truly wished to incorporate the holdings from those cases into the new statute, why didn't the legislature simply change the clear and unambiguous strict liability language of the statute

as it did after the Benningfield case to make sure there was no confusion on the issue?

Although adherence to stare decisis is the default approach in our jurisprudence, it is not an immutable rule. This Court will depart from previous decisions where "there are sound legal reasons to the contrary." Hilen v. Hayes, 673 S.W.2d 713, 717 (Ky. 1984). The Kentucky dog bite strict liability statute is clearly part of a scheme to displace or abrogate the common law rule on dog-bite liability and in part to expand liability, presumably to create incentives for various actors to take steps to reduce the chances of dog bites. Benningfield ex rel. Benningfield v. Zinsmeister, 367 S.W.3d 561, 563 (Ky. 2012).

Further, the General Assembly has commanded: "All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature, and the rule that statues in derogation of the common law are to be strictly construed shall not apply to the statutes of this state." KRS 446.080(1). The establishment of public policy is granted to the legislature alone. It is beyond the power of a court to vitiate an act of the legislature on the grounds that public policy promulgated therein is contrary to what the court considers to be in the public interest. It is the prerogative of the legislature to declare that acts constitute a violation of public policy. Commonwealth ex rel. Cowan v. Wilkinson, 828 S.W.2d 610, 614 (Ky. 1992; Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc., 286 S.W.3d 790, 807 (Ky. 2009). KRS 258.235(4) is clear and unambiguous. The General Assembly'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).

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

Respectfully submitted,

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