RENDERED: SEPTEMBER 16, 2016; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001259-MR

LATASHA MAUPIN APPELLANT

v. APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 10-CI-00226

ROLAND TANKERSLEY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, MAZE, AND NICKELL, JUDGES.

MAZE, JUDGE: Latasha Maupin appeals from the Jackson Circuit Court's order denying her Motion for Judgment Notwithstanding the Verdict and/or Motion for a New Trial on Damages. Maupin argues the jury instructions improperly stated the law with respect to a dog owner's liability for injuries caused by his dog. Because we find no error, we affirm.

Background

On September 12, 2009, Maupin had been hunting with her boyfriend, James Carpenter, on wooded property owned by Carpenter's family in Jackson County. Maupin decided to head back to the couple's truck, which was parked on Kentucky Highway 1955, and wait for Carpenter to finish hunting. To reach the truck, Maupin traveled through the woods and picked up a dirt path on Defendant, Roland Tankersley's, rural forty-two acre property. Tankersley constructed the path several years ago to reach his barn and had once allowed Maupin's family to use the path to reach their adjacent property. The path had not been used by a vehicle in many years and was overtaken by vegetation, leaving it usable only as a walking path.

While Maupin was walking down the path, a group of four or five dogs attacked and seriously injured her. A man travelling the road in front of the property saw Maupin struggling and drove her to safety. She was flown to University of Kentucky hospital because of her injuries.

On August 3, 2010, Maupin filed suit against Tankersley claiming that Tankersley owned the dogs that attacked her and asserting that he should be held strictly liable for her injuries. Following a June 29, 2015 trial, both parties moved for a directed verdict. The court overruled both motions and each party proposed jury instructions.

Maupin submitted jury instructions holding Tankersley strictly liable if the jury found he was the owner of the dogs that attacked her. Tankersley

submitted instructions reflecting a negligence standard of liability. Over Maupin's objection, the court submitted Tankersley's instructions to the jury. The instructions 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.

The jury determined that Roland Tankersley was the owner of the dogs that attacked Maupin, but found that Tankersley had no reason to believe the Plaintiff would be in the vicinity of his dogs and did not fail to exercise ordinary care to control his dogs for the safety of others. Accordingly, the jury returned a verdict for Tankersley, and the trial court entered a judgment in his favor. Maupin filed a Motion for Judgment Notwithstanding the Verdict and/or Motion for a New Trial on Damages, which the trial court denied. Maupin now appeals.

Standard of Review

As the court most familiar with the "factual and evidentiary subtleties of the case," the trial court enjoys discretion when determining whether a particular instruction is required by the evidence. *Sargent v. Shaffer*, 467 S.W.3d 198, 203

(Ky. 2015). Accordingly, we review a trial court's decision to give or decline a particular jury instruction for abuse of discretion, reversing when the court's decision is "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Id*. While the trial court possesses discretion to determine which instructions are warranted by the evidence, it "has no discretion to give an instruction that misrepresents the applicable law." *Sargent* at 204. The content of an instruction is a matter of law and our review is *de novo*. *Id.*

Analysis

KRS[1] 258.235(4) states, "[a]ny owner whose dog is found to have caused damage to a person, livestock, or other property shall be responsible for that damage." Maupin claims the trial court erred by instructing the jury to determine Tankersley's liability under a negligence standard. She argues that, in any and all circumstances, KRS 258.235(4) imposes strict liability upon a dog's owner for injuries that dog inflicts.

Kentucky Appellate Courts have interpreted KRS 258.235(4) and its statutory forebears to abrogate the common law necessity of proving "the ancient hallmark of liability" that the dog owner or keeper had knowledge of the dog's vicious propensities. *Johnson v. Brown*, 450 S.W.2d 495, 496 (Ky. 1970). This Court has acknowledged that by "abrogating the common law, our dog-bite statutes were intended to broaden the responsibilities of those who keep a dog." *May v. Holzknecht*, 320 S.W.3d 123, 126 (Ky. App. 2010). At the same time,

[1] Kentucky Revised Statutes.

Kentucky courts have been reluctant to interpret the statute to extend dog owner responsibility so far that dog owners are made strictly liable in any and all circumstances. *Id*. (quoting *Johnson* at 496). Instead, Kentucky courts have consistently applied general negligence principles to determine dog owner liability.

In *Johnson*, the plaintiff was on the dog owner's property to rent equipment. The dog was chained to a post near the driveway. The owner warned the plaintiff to stay away from the dog. While the owner was distracted, the plaintiff approached the dog and he was attacked. This Court held the plaintiff's claim under the dog bite statute was subject to contributory negligence despite claims that the statute imposed strict liability. *Johnson* at 496.

In subsequent cases, including those rendered since passage of the latest version of KRS 458.235(4), this Court has continued to apply traditional negligence principles to assess liability based on the dog owner's knowledge or anticipation of the plaintiff's presence near the dog. In *Carmical v. Bullock*, 251 S.W.3d 324 (Ky. App. 2007), a home delivery route manager for Schwann Food Services stopped at the home of a regular customer on a day the customer was not expecting a delivery. The customer's dogs were in his fenced-in backyard where the owner also was, and when the plaintiff approached the backyard and waived his arms to get the customer's attention, one of the customer's dogs charged and attacked him. At trial, the court instructed the jury that the dog's owner was liable to the plaintiff "if the owner had reason to believe [the plaintiff] would be in the vicinity of the animal" or if the jury found the "customer failed to exercise

ordinary care to control his dog for the safety of others." *Carmical* at 326. This Court affirmed that instruction.

In *May v. Holzknecht*, 320 S.W.3d 123 (Ky. App. 2010), the defendants operated a home-based childcare center. While the defendants told parents their dog would be kept outside, it was allowed inside to interact with the children, where it attacked a two-year old child. We held that the owner's undisputed knowledge that the plaintiff would be in the vicinity of the dogs was the determining factor and imposed a duty upon the owner to prevent the plaintiff from being injured. *May* at 127.

In this case, Maupin claims a dog owner's knowledge or anticipation of the plaintiff's presence is relevant, and thus the negligence standard applies, only when the dog has been enclosed or fettered. Maupin correctly points out that the cases discussed above concern dogs which were either fenced in or chained on the owner's property; and she argues that because the dogs in the case at bar were neither fettered nor enclosed, Tankersley's awareness of her presence near the dogs is irrelevant, and strict liability should apply. However, whether Tankersley was aware that Maupin would be on his property is far from irrelevant. In fact, under the above case law, may be dispositive.

We decline to impose strict liability and thereby apply a different standard from those applied in *Johnson*, *Carmical*, and *May*. The vital fact remains that the dogs attacked Maupin as she walked on Tankersley's sizeable property, unbeknownst to Tankersley. The standard remains the same – and

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. The proper inquiry is whether Tankersley had reason to anticipate the plaintiff's presence or whether he failed to exercise ordinary care in controlling the dogs for the safety of others.

In dissent, our honorable colleague relies upon the Kentucky Supreme Court's plurality opinion in *Benningfield ex rel Benningfield v. Zinsmeister*, 367 S.W.3d 561 (Ky. 2012), for the proposition that the jury should have received a strict liability instruction. *Benningfield* answered 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 562. At the outset of its analysis, the plurality noted that it sought only "to answer these questions to the extent necessary to resolve this case." *Id*. at 563. The Court ultimately concluded that a landlord could be an "owner" under the statute, but that summary judgment in favor of that particular landlord was appropriate.

Benningfield is a narrowly-tailored plurality opinion based upon easily distinguishable facts.[2] For this and other reasons, *Benningfield*'s precedential value and impact upon our analysis is limited given that we are charged with

[2] It bears repeating that *Benningfield* was a plurality opinion issued by a divided Supreme Court. We primarily believe that the case does not control or inform our analysis because its analysis addresses itself to distinguishable facts and legal issues. However, is worth noting that "if a majority of the court agreed on a decision in the case, but less than a majority could agree on the reasoning for that decision, the decision has no stare decisis effect." *Fugate v. Commonwealth*, 62 S.W.3d 15, 19 (Ky. 2001) (citations and quotation marks omitted).

determining the liability of an undisputed owner – not a landlord – for conduct of animals which remained on his property – not off of it – and for injuries sustained by a person who the owner had no reason to expect would be on his property. 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.

We agree with our dissenting colleague in one respect: The language of KRS 258.235(4) is clear. But equally clear to us is the language of subsequent case law interpreting and applying that clear language. This case law applies a general negligence standard where an unexpected visitor wanders onto an owner's property and is attacked. Given this, we do not add – or "graft" – anything to the statute which the General Assembly or our Courts have not already expressly put there. Rather, our decision on these unique facts of this case merely reconciles the clear language of KRS 258.235(4) with the equally clear – and unchanged upon review – conditions our common law has since placed on that statute's allocation of liability.

Finally, that is it exclusively the General Assembly's task to weigh and act upon public policy does not prohibit this, or any, Court from acknowledging that policy considerations accompany the legal ones we have

enumerated. Many of these considerations are those with which Kentucky's Courts – including the one in *Benningfield* – have felt fit to grapple with for over a century. One such consideration is this: While the unconditional imposition of strict liability may well encourage owners to take greater precautions against such attacks, *Benningfield*, 367 S.W.3d at 566, it has the inevitable effect of making owners the insurers of their animals in any and all circumstances, even absurd ones. That is not the law; and we decline to make it so in this case. The trial court properly instructed this jury.

Conclusion

Because we find the trial court properly instructed the jury in accordance with the applicable law, we affirm.

NICKELL, JUDGE, CONCURS.

JONES, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

JONES, JUDGE, DISSENTING: Respectfully, I dissent. I cannot agree with the majority's grafting of additional requirements onto KRS 258.235(4). In 2012, our Supreme Court noted that KRS 258.235(4) creates "a form of strict liability for the owner of a dog." *Benningfield ex rel. Benningfield v. Zinsmeister*, 367 S.W.3d 561, 563 (Ky. 2012). Moreover, it 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.*

In *Benningfield*, the Court was called upon to determine whether a landlord could be liable under the statute if his tenant's dog bit a third-party. In determining that the landlord could be liable, the Court noted that the definition of an owner "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." KRS 258.095(5). The court reasoned that a landlord fell into the latter category if he knowingly permitted his tenants to keep dogs. While the court acknowledged certain policy concerns with the adoption of this definition, it reasoned that the General Assembly likely intended this result. *Id.* ("This reading furthers the policy of the statute to expand liability so that dog-bite victims can be compensated, which in turn gives incentives to potential owners of dogs to alter their behavior.").

I cannot reconcile the outcome reached by the majority with the plurality opinion in *Benningfield*. Under *Benningfield*, a landlord can be held liable, if while on or about the leased premises, his tenant's dog bites a third party. Liability is imposed on the landlord simply by virtue of his knowing decision to allow his tenants to keep dogs. With the knowledge that he will be held strictly liable if he allows dogs to be kept on the property, a landlord could "bar[] dogs from the property . . . thus preventing the problem from ever occurring (or at least decreasing its likelihood, notwithstanding a tenant who acts in violation of the lease) [or] . . . purchas[e] adequate insurance, which could be used to pay for injuries after the fact." *Id.* The plurality in *Benningfield* plainly distinguished

statutory liability predicated on KRS 258.235(5) from liability predicated on common-law negligence. Based on *Benningfield*, it is clear to me that the liability under the statute requires only proof of ownership.[3]

Certainly, I cannot dispute the policy concerns expressed by the majority. But, like the plurality in *Benningfield,* I believe we are bound to apply the statute as drafted. If there are policy issues with the statute, they should be addressed by the General Assembly. *See id*. ("While some may believe this is a bad rule or poor policy, it is the prerogative of the General Assembly to set public policy. . . . By enacting the statute, the legislature has proclaimed the public policy of this state, and this Court is bound to interpret the statute to effectuate that policy."). What one may label as "absurd" might seem entirely reasonable to another. And, I presume the General Assembly considered the various pros and cons of the statute in question when it determined that an owner is strictly liable if his dog bites another. Even so, "[i]t 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." *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)

[3] Although, the statute would appear to exclude a trespasser from its coverage. *See* KRS 258.095(6)("'Attack' means a dog's attempt to bite or successful bite of a human being. This definition shall not apply to a dog's attack of a person who has illegally entered or is trespassing on the dog owner's property in violation of KRS 511.060, 511.070, 511.080, or 511.090.")

Even though our courts have grappled with the appropriate standard to impose on dog owners throughout the last century, it does not mean we should follow that case law in the face of a statute that is clear and unambiguous. "[S]tare decisis 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 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).

Instead of grafting additional requirements onto KRS 258.095(5), I believe the issue of Maupin's status on the property is better addressed through an apportionment of fault based on principles of comparative fault. The point here, however, is that the focus would be on Maupin's conduct not what Tankersley knew or did. In other words, Tankersley would be liable under KRS 258.095(5) so long as Maupin proved he owned the dogs that injured her, and she was not a trespasser. Tankersley could then seek to lessen his ultimate responsibility by establishing part of the fault was with Maupin. This could include showing that she disregarded warnings, failed to announce her presence, enticed the dogs in some way, or facts of the like. But, as drafted, I cannot accept that the statute requires any more than mere ownership to establish liability on Tankersley.

I appreciate the analysis performed by the majority. While I am tempted to concur with the result reached therein, I cannot reconcile that approach

with what I believe to be a clear and unambiguous statutory directive. For this reason, I most respectfully dissent.

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