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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000147-MR

TIM LYNCH; JANE LYNCH; AND HOLLAND,
A SUBSIDIARY OF YRC WORLDWIDE, INC. APPELLANTS

APPEAL FROM BOONE CIRCUIT COURT
v. HONORABLE RICHARD A. BRUEGGEMANN, JUDGE
ACTION NO. 15-CI-00539

PILOT CORPORATION APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JONES, KRAMER AND MAZE, JUDGES.

KRAMER, JUDGE: Tim Lynch, Jane Lynch, and Holland, a subsidiary of YRC Worldwide, Inc. appeal a jury verdict and judgment entered in Boone Circuit Court in favor of Pilot Corporation. We reverse and remand.

FACTUAL AND PROCEDURAL HISTORY

This is a premises liability case. Tim Lynch is a truck driver who delivered a truckload of supplies to the Pilot Travel Center in Walton, Kentucky, in April 2014. When he arrived, Jim Baker (a Pilot maintenance worker) directed Lynch where to park his truck. Lynch and Baker then unloaded the supplies into a shed at Pilot. As Lynch was walking back to the cab of his truck, he stepped onto an unsecured fuel cap,[1] which "slid like a skateboard" out from underneath Lynch. Lynch fell and fractured his elbow.

Lynch and his wife sued Pilot for negligence.[2] Before trial, each party submitted proposed jury instructions. Lynch's proposed jury instructions outlined the duty of care owed to an invitee, based on PALMORE & CETRULO, KENTUCKY INSTRUCTIONS TO JURIES, CIVIL § 24.01 (6th ed. 2017), as well as *Shelton v. Kentucky Easter Seals Soc'y, Inc.*, 413 S.W.3d 901, 908 (Ky. 2013) and *Dick's Sporting Goods, Inc. v. Webb*, 413 S.W.3d 891, 900 (Ky. 2013). Pilot's proposed jury instructions, on the other hand, were based on Palmore's § 24.11, entitled "Liability of Possessor to Invitee; Invitee Status Dependent on Place of Accident."

[1] Pilot stored its fuel in underground tanks where fuel trucks "drop" fuel into these tanks through openings covered by fuel caps.

[2] Jane Lynch, the wife of Tim Lynch, also asserted a loss of consortium claim against Pilot.

Trial lasted two days. After Lynch rested and before Pilot presented its case, the trial court distributed its proposed jury instructions to counsel. The trial court used portions of Pilot's proposed instructions and acknowledged the language came from Palmore's § 24:11. Lynch objected arguing that under this instruction, Pilot only owed Lynch a duty of care if Lynch stepped at a place Pilot provided for his use. Essentially, Lynch argued this gave the jury a threshold issue to decide whether Lynch was trespassing when he fell. The trial court reasoned that a factual dispute existed as to whether Lynch was permitted to walk on the fuel cap, which is similar to the situation described in Palmore's § 24.11.

After Pilot rested its case, the trial court distributed the jury instructions to the parties noting it would only hear arguments not previously raised. The trial court's ultimate instruction on Pilot's duty of care read:

> **Instruction No. 5**
>
> 1. It was the duty of Defendant, Pilot, through its employees, to exercise ordinary care to maintain its premises in a reasonably safe condition for the use of its patrons, including Plaintiff Tim Lynch, or to provide adequate reasonable warning of unsafe conditions. You will find for Plaintiffs if you are satisfied from the evidence as follows:
>
> (a) that the fuel lid on which Plaintiff Tim Lynch stepped **was at a place Defendant had provided for the use of its patrons, including Plaintiff**;
>
> AND
>
> (b) that in having the fuel lid untightened Defendant failed to comply with its duty of ordinary care as set forth above;
>
> AND

(c) such failure was a substantial factor in causing Plaintiff's injuries.

Otherwise you will find for Defendant.

2. However, even though you might find under Number 1 of this Instruction No. 5 that the untightened fuel cap was not in a reasonably safe condition for the use of the Defendant's patrons, you will nevertheless find for Defendant if you are further satisfied from the evidence that, on the date of Plaintiff's fall, Defendant or Defendant's employees had provided adequate reasonable warning to its patrons, including Plaintiff, of the dangers associated with the fuel lid.

Question No. 1
Do you find from the evidence that Defendant Pilot violated its duty as set forth in Instruction No. 5 and that such violation was a substantial factor in causing Plaintiff's injuries?

(Emphasis added.) Nine out of twelve jurors answered "no" to question number 1, resulting in a favorable verdict for Pilot. This appeal followed.

Lynch claims the trial court erred by giving a jury instruction on the duty of care owed to a trespasser instead of a business invitee. Lynch further claims Pilot previously admitted he was an invitee and should not have been allowed to argue he was a trespasser at trial. Finally, Lynch claims the jury was confused by the instruction, which asked them to find as a threshold issue whether he was permitted to walk in the area he fell. As a result, Lynch claims this speculative instruction prejudiced him.

STANDARD OF REVIEW

The content of a jury instruction is an issue of law that must be reviewed *de novo*. *Sargent v. Shaffer*, 467 S.W.3d 198, 204 (Ky. 2015). "The trial court may enjoy some discretionary leeway in deciding what instructions are authorized by the evidence, but the trial court has no discretion to give an instruction that misrepresents the applicable law." *Id*. If the applicable law given through the instruction is incorrect, the error is presumed to be prejudicial. *Harp v. Commonwealth*, 266 S.W.3d 813, 818 (Ky. 2008). "Of course, that presumption can be successfully rebutted by showing that the error 'did not affect the verdict or judgment.'" *Id*. (quoting 5 C.J.S. *Appeal and Error* § 968 (2008)).

ANALYSIS

In slip and fall cases, a plaintiff must prove negligence on the part of the defendant. To prove negligence, the court must determine what duty, if any, the defendant owed the plaintiff. Under the premises liability doctrine, "a landowner has a general duty to maintain the premises in a reasonably safe manner; and the scope of that duty is outlined according to the status of the plaintiff." *Smith v. Smith*, 563 S.W.3d 14, 16 (Ky. 2018) (quoting *Shelton*,413 S.W.3d, at 909 n.28). Accordingly, the first step in resolving a premises liability case is to determine the plaintiff's status. This status then defines the duty owed by the defendant.

The duty of care owed by Pilot to Lynch depends upon whether Lynch was an invitee, licensee, or trespasser. An invitee is present with the property owner's consent as a member of the public for whom the property is held open for the property owner's business. A licensee is present with the property owner's consent. A trespasser is present without the property owner's consent.

Lynch claims he was an invitee because he was a truck driver delivering supplies to Pilot. Invitees are those "who enter or remain on land upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make them safe for their reception." RESTATEMENT (SECOND) OF TORTS § 332, cmt. a (1965).[3] Invitees fall into two classes: (1) members of the public who enter the land for the purpose for which the land is held open to the public; and (2) those who enter the land for a purpose connected with the business of the landowner. *Id.* People in the second class are often called "business visitors." Business visitors fall into two classes: (1) persons invited to come upon the land for a purpose connected with the business for which the land is held open (*e.g.*, a person enters a shop to make a purchase); and (2) persons who come upon land not open to the public, for a purpose connected with the business the landowner conducts upon the

[3] When interpreting premises liability cases, Kentucky has followed the Restatement (Second) of Torts (1965). *Smith*, 563 S.W.3d at 17.

land. *Id.* at cmt. e. The Restatement (Second) of Torts specifically identifies a truck driver entering upon land to deliver goods as an example of a business invitee. *Id.*

In its brief, Pilot does not dispute that Lynch was an invitee. Instead, Pilot claims Lynch's status changed after he delivered the supplies by traversing an "unpermitted area" as he was getting back into his truck. Although Pilot does not call Lynch a "trespasser," that is its argument. A trespasser is "any person who enters or goes upon the real estate of another without any right, lawful authority or invitation, either expressed or implied[.]" KRS[4] 381.231(1). The legislature established the duty owed by a landowner to a trespasser and, according to KRS 381.232, a landowner "shall not be liable to any trespasser for injuries sustained by the trespasser on the real estate of the owner, except for injuries which are intentionally inflicted by the owner or someone acting for the owner."

Before we address Lynch's status on Pilot's property or the jury instruction at issue, we note that Pilot also argued Lynch should have avoided the fuel cap because it was not flush with the ground, had a yellow rim, and two curbs ran alongside the fuel caps in that area. In other words, Pilot argued the fuel cap was an obvious hazard on which Lynch should not have stepped. With this in mind, we briefly revisit the fact that Kentucky refined and clarified its premises

[4] Kentucky Revised Statute.

liability law with the 2010 decision of *Kentucky River Med. Ctr. v. McIntosh*, 319 S.W.3d 385 (Ky. 2010). Before that case and its progeny, the facts of this case may have fit into an open and obvious doctrine analysis to preclude any liability by Pilot, regardless of Lynch's status on Pilot's property. Under that doctrine, a landowner could not be held liable to a visitor on its property if the visitor was injured by an "open and obvious"[5] hazard that was known to the visitor or otherwise so obvious that the visitor would be expected to discover it. *Carney v. Galt*, 517 S.W.3d 507, 510 (Ky. App. 2017).

Kentucky law now recognizes the "shift from the old common law's complete defense of contributory negligence, in its many guises, toward a new regime in which a plaintiff's own negligence no longer bars his or her claim." *Grubb v. Smith*, 523 S.W.3d 409, 415 (Ky. 2017). Under this new regime, the jury assesses the comparative fault of the invitee and the landowner, rather than giving the landowner a complete defense to any liability when the hazard was apparent.

Returning to Lynch's status in this case, he was clearly on Pilot's premises in connection with Pilot's business and, therefore, was an invitee.[6] As a

[5] The Kentucky Supreme Court recently asked the bench and bar to stop using the phrase, "open and obvious," describing it as a defunct legal term of art to be retired "from our collective vernacular" or risk confusing the law as it now stands. *Grubbs v. Smith*, 523 S.W.3d 409, 435-36 (Ky. 2017), *opinion modified on denial of reh'g*, (Aug. 24, 2017) (Wright, J., concurring in part).

[6] Lynch further argues Pilot judicially admitted he was an invitee and, thus, should not have been allowed to argue he was a trespasser at trial. As we have already concluded Lynch was an

result, Pilot owed to Lynch not only a general duty of reasonable care, but also the more specific duty associated with the landowner-invitee relationship. "Generally speaking, a possessor of land owes a duty to an invitee to discover unreasonably dangerous conditions on the land and either eliminate or warn of them." *Shelton*, 413 S.W.3d at 909. "This is as far as the duty analysis needs to go." *Id.* at 910.

However, Pilot argues Lynch's status changed from invitee to trespasser when he stepped in an "unpermitted area," which altered its duty of care owed. We do not agree. Lynch had an implied invitation to use Pilot's land to deliver supplies. His presence was desired by Pilot because Lynch was delivering supplies for its benefit. While the scope of Pilot's duty to keep conditions safe does not extend to all of its premises, Pilot could reasonably expect Lynch to walk near an area where Baker (Pilot's maintenance person) told him to park. Moreover, Baker even helped Lynch unload his truck from that location. "An invitation usually includes the use of such parts of the premises as the visitor reasonably believes are held open to him as a means of access to or egress from the place where his purpose is to be carried out." RESTATEMENT (SECOND) OF TORTS § 332 (1965), cmt. l. Furthermore, the evidence does not indicate Pilot excluded Lynch from the fuel cap area. No fence surrounded the area. No signs were

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invitee, we will not address the merits of this argument or Pilot's argument that Lynch failed to preserve this issue. We note, however, that Pilot admitted Lynch's status as an invitee in its answer to Lynch's complaint.

posted telling Lynch to "stay out." The painted diagonal, yellow lines where Lynch parked his truck may have meant for Lynch not to park there, but, again, Pilot's employee told Lynch to park there and this was Lynch's first time making a delivery to this Pilot location. Indeed, Donna Tate, the Pilot supervisor on the day in question, admitted other truck drivers had parked in that area before. She testified that she would sometimes need to fetch the drivers from the adjacent Waffle House or Pilot's showers to tell them to move their trucks because the fuel drop trucks may need to use that area.

Lynch analogizes his unchanging status to the truck driver in *Central Quality Coal Co. v. Akers*, 460 S.W.2d 349 (Ky. 1970). In that case, a truck driver was fatally injured when he went up a coal conveyor to see why the coal he was unloading had jammed. The coal company alleged the truck driver's status as an invitee terminated once he went up the conveyor, and claimed he became a licensee at best and a trespasser at worst at that point. The Court held a visitor is only an invitee while he is on the part of the land to which the invitation is extended. *Id.* at 351. While the coal company did not request the drivers to climb the conveyor and shake down the coal, it knew this happened and it was for the mutual benefit of the drivers and the company. *Id.* Thus, the coal company should not now deny the truck driver was an invitee when he was performing work for the mutual benefit of both parties. *Id.* Similarly, here, Pilot should not deny Lynch

was an invitee when its employee told him to park in that location, and he was on the property for the mutual benefit of Pilot and Lynch. Plus, Pilot knew truck drivers parked in that area.

Our analysis now turns to the jury instruction at issue asking whether Pilot breached its duty to Lynch. In determining liability for the landowner, "[the courts] must ask whether the land possessor could reasonably foresee that an invitee would be injured by the danger. If the land possessor can foresee the injury, but nevertheless fails to take reasonable precautions to prevent the injury, he can be held liable." *McIntosh*, 319 S.W.3d at 392.

Here, Pilot could reasonably foresee that Lynch would be injured by an unsecured fuel cap that could slide out from underneath him. Thus, the jury should have evaluated whether Pilot failed to take reasonable precautions to prevent Lynch's injury. The jury should not have been asked, as a threshold issue, whether Lynch was permitted to be in that area. If Pilot is not liable in this case, it will be because it satisfied the standard of care in the given factual scenario. Only if the jury determines Pilot is liable should the jury reach Lynch's conduct. By asking the jury to determine if Pilot "provided" the area where the fuel cap was located as a place for Lynch to walk, the trial court gave an improper contributory negligence instruction. The trial court confused Kentucky law to mean that Pilot only owed a duty if it could *foresee Lynch would walk in the fuel cap area*.

Instead, the trial court should have asked if Pilot could *foresee that Lynch would be injured by an unsecured fuel cap on its property*.

This improper instruction most likely resulted from the trial court relying on Palmore's § 24.11. This model instruction is outdated and not current with Kentucky's law as it retains the vestiges of the open and obvious doctrine. Further, this model instruction involves a visitor whose status changes to a trespasser because the landowner did not know the visitor was on its premises, which is not applicable to this case because Pilot knew Lynch was on its property and directed him to the area where he was injured.

By asking if Lynch stepped at a place Pilot provided for his use, this amounted to a "no-duty" instruction and created the perception that Lynch was contributorily negligent. The Kentucky Supreme Court warned against this type of instruction. *Shelton*, 413 S.W.3d at 901, 912. The trial court must make a "no-breach" determination, rather than a "no-duty" determination. *Id.* at 904.

This Court recently addressed the no-breach assessment in a premises liability case in *Resnick v. Patterson*, 515 S.W.3d 206 (Ky. App. 2016). In *Resnick*, Robert Resnick was helping his mother move out of Charles Patterson's home. As Resnick was carrying a box from the shed behind the house through the backyard, he stepped into a hole next to some tree roots. This caused him to fall and injure his shoulder. The trial court granted summary judgment to Patterson

finding the hole and/or tree stump was an open and obvious natural hazard. The trial court held Patterson had no knowledge Resnick would be on the property and, therefore, could not anticipate the harm that befell him. On an initial appeal, this Court affirmed the trial court's entry of summary judgment. *Resnick v. Patterson*, 2011-CA-001657, 2012 WL 3236613 (Ky. App. Aug. 10, 2012). However, subsequent to that opinion, the Kentucky Supreme Court rendered *Shelton*, *Webb*, and *Carter v. Bullitt Host, LLC*, 471 S.W.3d 288 (Ky. 2015). The Supreme Court granted discretionary review in *Resnick* and remanded the case back to this Court for consideration of *Shelton*, *Webb*, and *Carter*. On remand, this Court reexamined the *Resnick* case and reversed. This Court ordered the trial court, on remand, to consider

> whether or not it was foreseeable to Patterson that Resnick might be on his property helping his mother move, might be distracted while carrying boxes from the storage shed, and might trip on a hole next to a tree stump. The trial court shall determine whether Patterson did everything he reasonably could under the circumstances and to what extent Resnick is responsible for his injuries.

Resnick, 515 S.W.3d at 211-12.

In this case, Pilot knew Lynch was on its property because Lynch was delivering supplies for its business and Pilot's employee, Baker, even helped him unload the supplies. *United Fuel Cas Co. v. Jude*, 355 S.W.2d 664, 666 (Ky. App. 1962) ("[A] principal is affected with constructive notice of all the material facts of

which his agent received or acquired knowledge while acting in the course of his employment . . . , even though the agent may fail to inform his principal thereof."). Therefore, Pilot could anticipate the harm that befell Lynch.

Lynch's situation is also similar to *McKinley v. Circle K*, 435 S.W.3d 77 (Ky. App. 2014), where plaintiff entered a Circle K to purchase a lottery ticket. Plaintiff parked in the rear of the store in a lot not marked for parking, but where he said he and others previously parked. Snow and ice were cleared from the front and sides of the store, but not the rear parking area. When plaintiff returned to his truck after purchasing a lottery ticket, he traversed the same path he took to enter the store, slipped and fell. On appeal from a summary judgment motion for Circle K, this Court reversed, holding an "issue of material fact exists as to whether Circle K could have foreseen the harm to [plaintiff] and whether it acted reasonably in fulfilling its duty to invitees to protect against the risk of physical injury from the ice and snow." *Id*. at 82.

This case does not even involve an outdoor, natural hazard, such as ice and snow. Here, the hazard was an unsecured fuel cap. On remand, the trial court should consider when instructing the jury whether Pilot could have foreseen that Lynch could step on an unsecured fuel cap on its property, slip and fall. The jury should decide Lynch's comparative fault in a separate instruction and interrogatory.

Although not raised by Lynch on appeal, for guidance to the trial court on remand, we will address part two of Jury Instruction 5, which permitted the jury to find for Pilot, even if the fuel cap was not in a reasonably safe condition, if the jury was satisfied that Pilot warned Lynch of the danger. This was error.

Under *McIntosh*, a landowner has a duty to discover unreasonably dangerous conditions on the land and to either correct them *or* warn of them. *McIntosh*, 319 S.W.3d at 388. This is an either-or finding. However, under Jury Instruction Number 5, the trial court paired the two findings together. Due to this coupling, this Court cannot separate whether the jury found for Pilot under part one or part two of Jury Instruction 5. Regardless, under the modern approach to cases dealing with apparent hazards, "there is no duty for the land possessor to warn of the dangers[.]" *Shelton*, 413 S.W.3d at 907. Even when a hazard is apparent, "a landowner's duty to maintain property in a reasonably safe condition is not obviated[.]" *Id.* (quoting *McIntosh*, 319 S.W.3d at 393). Accordingly, Pilot will not be relieved of its obligation to maintain its premises in a reasonably safe condition simply because the unsecured fuel cap was apparent or the yellow rim around it may be viewed as a warning.

This improper combination of findings is like the products liability case of *Clark v. Hauck Mfg. Co.*, 910 S.W.2d 247 (Ky. 1995), *overruled on other*

grounds by Martin v. Ohio County Hosp. Corp., 295 S.W.3d 104 (Ky. 2009). In that case, the trial court instructed the jury that the product had to be defective *and* have inadequate warnings for plaintiff to recover, rather than instructing that a finding of either a defective product *or* inadequate warning was sufficient to sustain a verdict for plaintiff. The Kentucky Supreme Court held the instruction was "erroneous and prejudicial and resulted in reversible error" because a verdict for plaintiff would be justified by either finding. *Id.* at 251.

While this is not a products liability case, the same reasoning for the improper instruction applies. A verdict for Pilot would be justified by finding it maintained its premises in a reasonably safe condition. However, under Jury Instruction 5, the jury could have found Pilot did *not* maintain its premises in a reasonably safe condition, but still find for Pilot because it provided "adequate reasonable warning to its patrons . . . of the dangers associated with the fuel lid." As the Court held in *Shelton*, the open-and-obvious nature of a hazardous condition does not eliminate a landowner's general duty of ordinary care. *Shelton*, 413 S.W.3d at 911-12. "Rather, in the event that the defendant is shielded from liability, it is because the defendant fulfilled its duty of care and nothing further is required." *Id.* at 911.

The Kentucky Supreme Court recently examined the sufficiency of jury instructions in a premises liability case in *Auslander Properties, LLC v.*

Nalley, 558 S.W.3d 457 (Ky. 2018). In that case, plaintiff was injured from falling off a roof trimming trees on defendant's property. Apparently, plaintiff stepped from the roof's solid shingled surface onto a section of decorative wooden rafters not designed to support his weight. Plaintiff claimed error with the following jury instruction:

> State whether you are satisfied from the evidence as follows:
>
> A. Because of the nature of the activity and the potential for distraction, in the exercise of ordinary care [defendant] should have anticipated that [plaintiff] might fall from the roof during the course of his work.
> B. Because of the nature of the work being performed and the potential for distraction, the work area upon which [plaintiff] stood was not in a reasonably safe condition for use by him.

Id. at 468-69. Plaintiff argued the two parts of the instruction confused the jury and was unnecessary. The Court disagreed holding the instruction sufficient. *Id.* at 469. Relying on *Shelton*, the Court concluded the instruction did not misstate Kentucky law as the liability inquiry could not simply end with part A; the instruction in part B was needed for the jury to conclude, based on the circumstances, that defendant did not breach its duty owed to plaintiff. *Id.* at 470.

Notably, the jury instruction in *Auslander Properties, LLC* did not even mention "warning." In this case, the trial court should have focused on

foreseeability instead of warning. Pilot's duty of care to keep its premises safe is not obviated by warning Lynch that the fuel cap is dangerous. A hazardous condition can be obvious, but a landowner will still be liable if he had "reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious or will forget what he has discovered . . . ." *Shelton*, 413 S.W.3d at 907. Pilot had reason to expect that Lynch may step on the fuel cap, particularly given that its employee instructed Lynch to be in this area, and that Lynch would not discover the fuel cap was unsecured and capable of causing him to fall. Despite all this, on remand, the jury may place the lion's share of liability on Lynch for failing to exercise care for his own safety by stepping on a raised, yellow-rimmed fuel cap. However, the jury will make this assessment in the comparative fault instruction, not in the instruction determining Pilot's duty of care.

The function of instructions is to state what the jury must believe from the evidence to return a verdict in favor of the party who bears the burden of proof. *Olfice, Inc. v. Wilkey*, 173 S.W.3d 226, 228 (Ky. 2005). "[I]t is a rule of longstanding and frequent repetition that erroneous instructions to the jury are presumed to be prejudicial." *Osborne v. Keeney*, 399 S.W.3d 1, 13 (Ky. 2012) (quoting *McKinney v. Heisel*, 947 S.W.2d 32, 35 (Ky. 1997)). Although this presumption is rebuttable, the party asserting harmless error bears the burden of

affirmatively showing that no prejudice resulted from the error. *Id.* To show no prejudice resulted from the error, the party must prove "no reasonable possibility" that the erroneous instruction affected the verdict. *Id.* (quoting *Emmerson v. Commonwealth*, 230 S.W.3d 563, 570 (Ky. 2007)). We conclude Jury Instruction 5 misstated the law by failing to sufficiently advise the jury what it had to believe from the evidence to return a verdict in Lynch's favor.

Finally, as to Pilot's argument that Lynch failed to properly preserve the issues raised in this appeal, we disagree. Under CR[7] 51(3), objections to jury instructions must be made "before the court instructs the jury[.]" And, if a party is not satisfied with any phrase or portion of an instruction, the party must object on the record. *Harris v. Thompson*, 497 S.W.2d 422, 431 (Ky. 1973).

We conclude Lynch raised specific, timely objections to Jury Instruction 5. Lynch submitted proposed jury instructions based on Palmore's § 24.01, *Shelton*, and *Webb*. On the second day of trial, when the trial court heard arguments regarding the jury instructions, most of the hearing revolved around the trial court's proposed Jury Instruction 5 and Lynch's objection to the language in this instruction. During this hearing, the trial court indicated its proposed Jury Instruction 5 was modeled after Palmore's § 24.11 because a factual dispute existed as to whether Lynch was permitted to walk in the fuel cap area, which was

[7] Kentucky Rule of Civil Procedure.

like the situation described in Palmore's § 24.11. Lynch, on the other hand, argued that Tate never told Lynch he was not permitted to be in that area. Lynch further argued that Palmore's model instructions are not the law, while his proposed instruction was based on recent Kentucky caselaw. The trial court acknowledged that Palmore's model instructions are not the law, but they are "safe." After hearing arguments, the trial court took the instructions under consideration while Pilot presented its case. Later that afternoon, after Pilot rested, the trial court distributed the revised set of instructions informing the parties to not make arguments already made. After some minor corrections, the trial court finalized the instructions for the jury. Granted, Lynch did not re-raise the arguments he made earlier that afternoon regarding Jury Instruction 5. However, after reviewing the record, we conclude Lynch was simply following the trial court's directive not to rehash previous arguments and Lynch's arguments regarding Jury Instruction 5 were properly preserved in the earlier hearing that day. The record reveals Lynch objected to the language of Jury Instruction 5 at trial for the same reasons raised in this appeal.

CONCLUSION

The judgment of the Boone Circuit Court is reversed, and this case is remanded for a new trial. On remand, the trial court should provide an instruction consistent with this opinion.

ALL CONCUR.

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