

REL: December 20, 2019

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2019-2020

1180156

Niloofar N. Nichols and John Matthew Nichols

v.

**Tennessee Valley OB/GYN Clinic, P.C., and Sharon L.
Callison, M.D.**

**Appeal from Madison Circuit Court
(CV-16-900572)**

PER CURIAM.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P.
Shaw, Bryan, Sellers, and Mitchell, JJ., concur.

1180156

Bolin, J., concurs specially.

Parker, C.J., and Wise, Mendheim, and Stewart, JJ.,
dissent.

1180156

BOLIN, Justice (concurring specially).

I concur in affirming the judgment of the trial court. I write specially to object to the Chief Justice's dismissive treatment, in his dissent, of the valuable service provided to our trial courts and to the bar by the Alabama Pattern Jury Instructions Committee (Civil).

In addressing the matter, I initially explain the history of pattern jury instructions in general and acknowledge with gratitude the countless hours the committee members of the Alabama Pattern Jury Instructions Committee (Civil), both past and present, have put into serving the trial courts, the bar, the litigants, and the juries in this State over the past half century.

One law-review article has explained the development of pattern jury instructions as follows:

"Originally, there was a rule in England that judges were not supposed to instruct jurors at all; they could only answer questions. Even then, the answers to jury questions were not always very helpful. In the 1314 case of Abbot of Tewkesbury v. Calewe, a jury was asked to decide whether certain land was 'free alms' or 'lay fee.' They pointed out to the judge, 'We are not men of law,' implicitly requesting his assistance. The judge replied, 'Say what you feel.' This is the problem, of course. If a judge does not explain to the jury what it is supposed to do, the jury will do what it feels is

best. This is precisely the sort of arbitrary decision making that the rule of law seeks to prevent.

"Eventually, judges in England did begin to instruct jurors on the law. But even today, English jury instructions (part of the judge's 'summation') remain oral and relatively informal. The judge summarizes the facts and possible inferences to be drawn from them and then tells jurors in his own words what the relevant law is.

"As in England, American judges originally did not instruct jurors on the law. Jurors were expected to use their common sense. Common sense may have worked well enough when the country was largely rural. But as the country industrialized, legal disputes became more complex and the need for consistently applied rules of law became more pressing. Eventually, jurors lost the right to decide questions of law. Additionally, toward the end of the nineteenth century, many states took away the power of the judge to charge juries on the facts. Thus arose the modern division of labor in which the judge decides the law and the jury is entrusted with the facts. Inevitably, jurisdictions began to require the judge to instruct the jury on the relevant law.

"The legal profession soon came to realize that instructing the jury could involve a lot of work and duplication of effort. With every trial, judges and attorneys would spend time drafting the instructions. Another problem was that instructions were often inconsistent from judge to judge. And judges were often reversed for instructional error.

"In 1935, Judge William J. Palmer of the Superior Court of Los Angeles, California addressed some of these issues in an article recommending that a committee be formed to compile approved instructions for civil cases. The presiding judge

1180156

of the court was impressed by the idea and appointed a committee of lawyers and judges to accomplish this goal. The committee published a book of instructions a few years later. The descendant of this book of instructions is still used in California, where it is known as the Book of Approved Jury Instructions ('BAJI'). A similar book of criminal instructions, California Jury Instructions: Criminal ('CALJIC') soon followed. The venture was a tremendous success and has since been imitated by many other states."

The Rocky Road to Legal Reform: Improving the Language of Jury Instructions, 66 Brooklyn L. Rev. 1081, 1082-84 (2001) (footnotes omitted).

In Alabama, an effort was undertaken to simplify civil jury instructions in 1967 by the Alabama Program of Continuing Legal Education, with the support of the Alabama Association of Circuit Judges, the Alabama Defense Lawyers Association, and the Alabama Trial Lawyers Association and with the cooperation of the Alabama State Bar. The goal of the resulting committee was, and still is, as this Court stated in a 1973 order, "to formulate and compile model jury charges for use by the Bench and Bar which would be concise, legally accurate, unslanted, and in simple language understandable by lay jurors."

1180156

By an order adopted in 1973, this Court "approved" the use of pattern jury instructions, stating in that order that pattern jury instructions would be an "invaluable aid to trial judges of this State in charging juries in civil cases." The Court recommended publication of the pattern jury charges and their use by the bench and bar. The Court noted, although the instructions appeared accurate, the instructions were patterns only, and "should be altered or changed as circumstances indicate." Thus, the Court recommended the use of the pattern charges, but without prejudice to the rights of any litigant to make and reserve for review any objections thereto -- either to form, substance, or application. The Alabama Pattern Jury Instructions Committee (Civil) ("the Committee") does not submit the pattern instructions to this Court before their publication. Although this Court "approved" the publication of the pattern instructions for use in trial courts in Alabama, it did not "preapprove" the pattern jury charges written by the Committee as being omnipresent, omnipotent, and all-encompassing -- applicable in their unaltered form to every possible factual scenario conceivable in civil litigation, then and in the future.

1180156

I quote the following steps set out in the first edition of the Alabama Pattern Jury Instructions - Civil, outlining the efforts to create a finished product:

"PREFACE

"In early 1967 a determined effort was undertaken to simplify one of the basic facets in the trial of civil jury cases, the matter of instructing juries. This objective became the project of the Alabama Program of Continuing Legal Education under the directorship of Honorable Douglas Lanford with the active support of the Alabama Association of Circuit Judges, the Alabama Defense Lawyers Association and Alabama Trial Lawyers Association, with the cooperation of the Alabama State Bar.

"A committee made up of members of these organizations was established and was composed of the following:

- "Judge James N. Bloodworth, Chairman, of Decatur
- "Judge Ingram Beasley, Vice Chairman, of Birmingham
- "Judge Will G. Caffey, Jr. of Mobile
- "Judge William C. Sullivan, of Talladega
- "H.R. Burnham, of Anniston
- "Richard L. Jones, of Birmingham
- "Janie L. Shores, of Birmingham

"Regular monthly meetings of one day duration were held during the succeeding years. As time passed, vacancies on the original committee occurred through the personal success of various members and recognition of their professional abilities. The original Chairman, Judge James N. Bloodworth, left to become an Associate Justice on the Supreme Court of Alabama. He was replaced as Chairman in 1968 by Judge Ingram Beasley. Judge Will G. Caffey, Jr.,

left the Circuit bench in Mobile and the committee to become a United States Referee in Bankruptcy. He was replaced by Circuit Judge Reneau P. Almon, of Moulton, who in turn left the committee upon his appointment to the Alabama Court of Criminal Appeals. Judge Edward N. Scruggs thereupon joined the committee, as did Judge George Murphy, and Judge Robert E.L. Key. Richard L. Jones became an Associate Justice on the Supreme Court of Alabama in 1972, but continued as a member of the committee, which was composed of the following at the time of publication:

"Judge Ingram Beasley, Chairman, of Birmingham
"Judge William C. Sullivan, Vice Chairman, of Talladega
"Judge Robert E.L. Key, of Evergreen
"Judge George Murphy, of Gadsden
"Judge Edward N. Scruggs, of Guntersville
"H.R. Burnham, of Anniston
"Justice Richard L. Jones, of Birmingham
"E.C. Hornsby, of Tallassee
"Professor Janie L. Shores, of Birmingham

"Subcommittee members serving at various times during the six years were:

"T. Rueben Bell, of Sylacauga
"Ollie L. Blan, Jr., of Birmingham
"Timothy M. Conway, Jr., of Birmingham
"Albert W. Copeland, of Montgomery
"A. Neil Hudgens, of Mobile
"Irvin J. Langford, of Mobile
"Robert B. Propst, of Anniston
"J.M. Sides, of Anniston
"J. William Thomason, of Bessemer
"George F. Wooten, of Talladega
"Judge Leigh M. Clark, of Birmingham
"Mable B. Fitch

".....

1180156

"... No citations in this volume should be construed as an indication that Alabama courts will necessarily adopt rules from other jurisdictions which may be stated in the material cited."

After considerable work and six years after the Committee was formed, the Committee issued its report to this Court in 1973, as captioned and stating:

"REPORT TO THE SUPREME COURT

"MAY IT PLEASE THIS HONORABLE COURT

"The Alabama Jury instructions Committee begs leave to report to Your Honors as follows:

"The Alabama Pattern Jury Instructions Committee was created by the Alabama Circuit Judges Association, the Alabama Plaintiff's Lawyer's Association and the Alabama Defense Lawyer's Association in 1967 for the purpose of research and drafting model charges for use in civil cases by the judges and lawyers of this State.

"The committee is deeply indebted to the Alabama Program of Continuing Legal Education for its financial assistance and to the Cumberland School of Law of Samford University for the many services rendered by it. The committee headquarters with all secretarial services and incidental expenses have been furnished by the Cumberland School of Law. Research services were furnished by law students of the Cumberland School of Law under the supervision of Professor Janie L. Shores who also acted as the Committee Reporter.

"The goal of the committee has been to draft charges on various subjects that would furnish busy trial judges and lawyers with model jury instructions that would be concise, legally

accurate, unslanted and in simple understandable language.

"Since members of this Committee met with members of this Court shortly after its formation the Committee has approved a sufficient number of charges to justify their publication. The Committee does not pretend to represent that the work done by it is in anywise complete as to the subjects included or includes all subjects that will be useful. There are many other subjects to be covered and numerous other pattern charges that would be desirable and helpful. We therefore recommend the creation of a permanent Pattern Jury Instructions Committee appointed by this Honorable Court to review these charges as experience may indicate or require and to draft additional pattern charges to expand the collection to other subjects not now covered. Copies of the pre-publication manuscript are herewith furnished to each member of the Supreme Court and the Court of Civil Appeals of Alabama for examination and comments. Before proceeding with publication we are anxious to have your comments and suggestions. Your suggestions, criticism or recommendation will be of great value to the Bench and Bar as well as to this Committee.

"Respectfully submitted,
"Alabama Pattern Jury Instructions
Committee
"Judge Ingram Beasley, Chairman
"Judge William C. Sullivan, Vice Chairman
"Honorable Janie Shores, Reporter
"Judge Edward N. Scruggs
"Judge R.E.L. Key
"Judge George Murphy
"Honorable H.R. Burnham"

(Emphasis added.)

1180156

Based upon this formal committee report, also in 1973, this Court issued an order of the Supreme Court of Alabama that stated:

"ORDER OF THE SUPREME COURT OF ALABAMA APPROVING USE
OF ALABAMA PATTERN JURY INSTRUCTIONS

"This matter comes on to be heard on the report of the Alabama Pattern Jury Instructions Committee, accompanied by a copy of Alabama Pattern Jury Instructions in Civil Cases, drafted by the Committee and which it now proposes to publish. Upon consideration thereof, this Court is of the opinion that the Alabama Pattern Jury Instructions prepared by this Committee will be an invaluable aid to trial judges of this State in charging juries in civil cases, and its publication and use by bench and bar are recommended.

"The Court acknowledges with appreciation the painstaking care, attention to detail and many hours of work and study which went into the drafting of these pattern instructions and commends the Committee for the preparation of this work. The Court is confident that the instructions prepared by the Committee represent a scholarly effort on the part of a group of experienced and dedicated judges and lawyers to state the law of Alabama in simple and understandable, yet accurate language. Use of the instructions should relieve both trial judges and lawyers of some of the time and tedium involved in drafting jury instructions. A reference to the appropriate instructions, the notes on use and the references stated therein should enable busy trial judges to prepare and deliver oral instructions in less time and with greater accuracy and thus allow them to devote more attention to other important aspects of trials.

"While these instructions appear to be accurate and appropriate to the subjects to which they relate, they are to be considered as patterns only and should be altered or changed as circumstances indicate.

"Accordingly, it is ORDERED by the Court:

"1. The publication by the Alabama Pattern Jury Instructions Committee of Alabama Pattern Jury Instructions in Civil Cases and their use by the trial judges of this state are recommended, but without prejudice to the rights of any litigant to make and reserve for review any objection thereto either as to form, substance or application. All such objections shall be made during the trial in accordance with the provisions of the Alabama Rules of Civil Procedure. Any objections thus made, if assigned and argued as error, will be reviewed by this Court as other assignments of error are reviewed.

"2. The Supreme Court Advisory Committee on Civil Practice and Procedure is hereby requested to consider the desirability of an amendment to the Alabama Rules of Civil Procedure so as to include an additional rule, entitled Use of Alabama Pattern Jury Instructions, to provide, in substance, as follows:

"The publication by the Alabama Pattern Jury Instructions Committee of Alabama Pattern Jury Instructions in Civil Cases and their use by the trial judges of this State are recommended, but without prejudice to the rights of any litigant to make and reserve for review any objection thereto either as to form, substance or application. All such objections shall be made during the trial in accordance with the provisions of the Alabama Rules of Civil Procedure. Any objections thus made,

if assigned and argued as error, will be reviewed by this Court as other assignments of error are reviewed.'

". . . .

"3. In accordance with the recommendation of the Committee, a permanent Alabama Pattern Jury Instructions Committee is hereby created by this Court for the purpose of reviewing and improving the charges presented as experience may require and adding charges on subjects not covered. The following judges and attorneys are hereby appointed to serve at the pleasure of this Court for a term of one (1) year:

"Judge Ingram Beasley, Chairman

"Judge William C. Sullivan, Vice Chairman

"Judge Robert E.L. Key

"Judge George Murphy

"Judge Edward N. Scruggs

"H.R. Burnham

"E.C. Hornsby

"Professor Janie L. Shores

"Done and Ordered this the 19th day of April, 1973.

"Chief Justice

"Howell T. Heflin

"Associate Justices

"Pelham J. Merrill

"James S. Coleman, Jr.

"Robert B. Harwood

"James N. Bloodworth

"Alva Hugh Maddox

"Daniel T. McCall, Jr.

1180156

"James H. Faulkner
"Richard L. Jones"

(Emphasis added.)

I recognize that, in 2018, the members of this Court, myself included, determined that it would be best if the Committee was completely independent from this Court. This move simply amplified and reaffirmed the origin of the Committee in 1967, as a unique extrajudicial workforce of very learned lawyers, judges, and justices -- both active and retired -- that would be allowed to perform its ongoing work on its own. The absence of Committee members appointed by this Court removes any hint of bias, either consciously or subconsciously, on behalf of this Court in deciding appeals based upon the workproduct of a committee appointed by it. Further, as time moves along, the independence of the Committee will counter any future misconception by the trial bench or bar that the Alabama Pattern Jury Instructions - Civil, although inordinately helpful, are a be-all and end-all compilation.

The effective end result of this process allows selfless experts in the field of civil litigation serving on the Committee to continue to study intervening statutory law and

1180156

caselaw, as well as new topics, that will be helpful to lawyers and trial judges, and by relation to parties, involved in jury trials pertaining to the subject of the pattern instructions.

I conclude by again acknowledging the timeless and tireless hours of quality work that all the members of the Alabama Pattern Jury Instructions Committee (Civil) have performed to make the tasks of lawyers, trial judges, and appellate judges smoother, easier, and more efficient.

1180156

PARKER, Chief Justice (dissenting).

Niloofar N. Nichols and John Matthew Nichols appeal from a judgment entered on a jury verdict holding Sharon L. Callison, M.D., and Tennessee Valley OB/GYN Clinic, P.C. ("the clinic"), not liable for injuries caused by surgical objects left in Niloofar's body after she gave birth. The Nicholoses argue that the circuit court erred in refusing to give a jury instruction that was necessary to accurately reflect the burden shifting required by Alabama law in retained-objects cases. Because I agree with the Nicholoses and would reverse the circuit court's judgment, I dissent.

I. Facts and Procedural History

On July 7, 2014, Niloofar gave birth to a baby boy while attended by her obstetrician/gynecologist, Dr. Callison. In the days following the birth, Niloofar began to feel vaginal and abdominal pain to an extent that she was unable to care for her newborn child. She made an appointment with Dr. Callison, at whose clinic a nurse practitioner performed an external examination and reported "redness and swelling, warmth, tenderness to touch at the episiotomy site," and a "[v]ery foul odor with erythema and swelling." Dr. Callison

1180156

approved a prescription for antibiotics and sent Niloofar home. When Niloofar's condition did not improve within a few weeks, she returned to Dr. Callison's office. Dr. Callison performed an internal examination and discovered a surgical sponge in Niloofar's vaginal cavity, left from Niloofar's delivery. About three weeks later, a piece of what Niloofar believed was gauze came out of her vagina while she was in the bathroom.

The Nicholises sued Dr. Callison and the clinic, alleging medical malpractice; John alleged loss of consortium. At trial, the parties agreed to the following pattern jury instruction (hereinafter referred to as "the standard-of-care instruction"):

"The fact that Dr. Callison did not remove the object placed in [Niloofar] is evidence that Dr. Callison did not meet the standard of care. Dr. Callison put on evidence that she did meet the standard of care when she did not remove the object. This creates an issue for you to decide. You must consider all the evidence and decide whether Dr. Callison either met or did not meet the standard of care when she did not remove the object."

The night before the last day of trial, however, the Nicholises requested the following supplemental jury

1180156

instruction (hereinafter referred to as "the Nicholises' burden instruction"):

"It is the Plaintiffs' burden to prove to you by substantial evidence that the Defendants left a foreign object inside Mrs. Nichols. If you are reasonably satisfied that the Defendants left a foreign object inside Mrs. Nichols, the burden of proof would shift to the Defendants to prove to you by substantial evidence and by expert testimony that they acted within the standard of care. If you conclude that the Defendants have not met their burden, you must conclude that the Defendants breached the standard of care by leaving a foreign object inside Mrs. Nichols."

The judge refused to give that instruction, stating: "I'm only going to give pattern charges." The judge continued: "Y'all let me know if there's a pattern y'all [want] me to look at." The Nicholises timely objected to the refusal to give the instruction, and the judge noted their objection on the record.

After closing arguments, the judge gave the jury both the standard-of-care instruction and the following instruction on the burden of proof (hereinafter referred to as "the court's burden instruction"):

"To recover damages on this claim, Mrs. Nichols must prove to your reasonable satisfaction by substantial evidence all of the following elements: Number one, the standard of care that should have been followed by Dr. Callison during the time she

was responsible for the medical care of Mrs. Nichols; number two, that Dr. Callison did not follow the standard of care in providing medical care and treatment of Mrs. Nichols; and, number three, that the harm to Mrs. Nichols was probably caused by Dr. Callison's failure to follow the standard of care.

"Mrs. Nichols must prove each element of her claim by substantial evidence. ...

".

"If Mrs. Nichols proves to your reasonable satisfaction by substantial evidence each of these elements, then you should find in favor of Mrs. Nichols. However, if Mrs. Nichols fails to prove all of these elements to your reasonable satisfaction by substantial evidence, then you should find in favor of Dr. Callison."

The jury returned a general verdict in favor of Dr. Callison and the clinic. The circuit court entered a judgment on that verdict. The Nicholises appealed, and a majority of this Court affirms that judgment, without an opinion.

II. Standard of Review

A fundamental tenet of Alabama law is that a party has a right to have his theory of the case presented to the jury by proper instruction. Alabama Farm Bureau Mut. Ins. Serv., Inc. v. Jericho Plantation, Inc., 481 So. 2d 343, 344 (Ala. 1985).

"A trial court has broad discretion when formulating its jury instructions, provided those instructions accurately reflect

1180156

the law and the facts of the case." Lee v. Houser, 148 So. 3d 406, 417 (Ala. 2013). Thus, the standard of review for jury instructions is generally whether the trial court exceeded its discretion. Arthur v. Bolen, 41 So. 3d 745, 749 (Ala. 2010). Because "[a] trial judge has no discretion to misapply or misinterpret the law," Joseph L. Lester, Alabama Evidence § 7:29 (3d ed. 2019), we will reverse a judgment where the jury instructions misapply or misstate the law, see Hamilton v. Scott, 278 So. 3d 1180, 1187 (Ala. 2018) (reversing judgment where trial court's refusal to give instruction was "directly contrary to the law as stated in our cases"). However, we will reverse the judgment only if the error was prejudicial. See Baldwin Cty. Elec. Membership Corp. v. City of Fairhope, 999 So. 2d 448, 459 (Ala. 2008).

III. Discussion

The Nicholises argue that the circuit court erred in refusing the Nicholises' burden instruction, which resulted in the failure of the given jury instructions to accurately explain that a plaintiff's showing of a retained object shifts the burden of disproving negligence to the physician. The parties agree that the controlling law regarding retained

1180156

objects in medical-malpractice cases was laid out by this Court in Breaux v. Thurston, 888 So. 2d 1208 (Ala. 2003), and Houserman v. Garrett, 902 So. 2d 670 (Ala. 2004). In Breaux, this Court stated:

"The presence of the retained object is prima facie evidence of negligence by the surgeon in carrying out that responsibility. The presence of the retained object does not, however, establish negligence per se. Rather, it serves to shift the burden to the defendant surgeon to show that he or she was not negligent because he or she fully complied with the statutorily defined standard of care."

888 So. 2d at 1217. This Court clarified in Houserman that "proof of a retained object creates a prima facie case of negligence, [and] the burden then shifts to the defendant physician, who, upon presenting substantial evidence of the applicable standard of care and his or her compliance with it, may be found by the jury not to have been negligent." 902 So. 2d at 674. The parties disagree, however, about whether the standard-of-care instruction and the court's burden instruction, read together, accurately reflected the burden-shifting process required by Breaux and Houserman.

In communicating which party bears the burden of proof, it is not necessary that the trial judge use the specific term

1180156

"shifting burden of proof," so long as the language of the instruction meaningfully communicates the concept. See Rule 51, Ala. R. Civ. P. ("The refusal of a requested, written instruction ... shall not be cause for reversal on appeal if it appears that the same rule of law was substantially and fairly given to the jury in the court's oral charge or in charges given at the request of the parties."); Birmingham Tr. & Sav. Co. v. Acacia Mut. Life Ass'n, 221 Ala. 561, 563, 130 So. 327, 328 (1930) (holding that an instruction was not incorrect for using the term "burden" rather than "weight of the evidence" because there was no meaningful distinction between the terms). In other words, as the Louisiana Court of Appeals explained, the instructions must "provide the jury with sufficient guidance to overcome the omission of the burden-shifting language." Odom v. Colonel Sanders Kentucky Fried Chicken, 636 So. 2d 1027, 1028 (La. Ct. App. 1994).

For an example of instruction language that effectively communicates burden-shifting to the jury, Alabama Pattern Jury Instruction -- Civil 15.32 explains how the burden of proof shifts in spoliation cases:

"If [plaintiff] does prove these things[,] you will presume (he/she/it) would have won (his/her/its)

1180156

lawsuit against [third party] if [defendant] had not (destroyed/lost) the evidence.

"[Defendant] must then prove to your reasonable satisfaction that [plaintiff] would not have won the lawsuit even if (he/she/it) had the evidence."

That formulation accurately explains the burden shifting required in spoliation jurisprudence, despite not containing the word "burden" or "shifting."

That was not the case here. The standard-of-care instruction failed to communicate the burden-shifting process described in Breaux and Houserman. A reasonable jury hearing that instruction would not have understood that, if they believed that Dr. Callison left objects inside Niloofar following the surgery, Dr. Callison must then prove what the standard of care was and that her actions were consistent with that standard.

Compounding the confusion caused by the standard-of-care instruction was the court's burden instruction, which stated that the Nicholises had to prove every element of their case. Although generally the plaintiff is responsible for proving all elements of his case, the unique formulation of medical malpractice in retained-objects cases "[shifts] the burden ... to the defendant physician" when the plaintiff makes a prima

1180156

facie showing of a retained object. Houserman 902 So. 2d at 674. The failure of the court's burden instruction to acknowledge that burden shifting, and what triggers it, resulted in an inaccurate statement of the law. By giving jury instructions that inaccurately stated the law, the circuit court exceeded its discretion.

To be reversible, however, the error must be prejudicial. "The rules as to the burden of proof or persuasion are important and indispensable in the administration of justice, and constitute a substantial right of the party on whose adversary the burden rests." 31A C.J.S. Evidence § 191 (2008). If the burden of persuasion is not accurately communicated to the jury, the party who does not bear the burden is prejudiced. Therefore, failure to accurately instruct the jury on the burden of proof is reversible error. See Gaither v. Phillips, 199 Ala. 689, 694, 75 So. 295, 297-98 (1917) (reversing trial court's judgment because "[the jury instructions] pretermitt[ted] the fact that in order to meet the burden of proof, the party upon whom it devolves must reasonably satisfy the jury as to the truth of the material issue or issues which the law requires him to establish"). See

1180156

also Texas Emp'rs' Ins. Ass'n v. Olivarez, 694 S.W.2d 92, 94 (Tex. App. 1985) (finding reversible error where "[t]he instruction as submitted did not properly place the burden of proof"); Grover v. Commonwealth Plaza Condo. Ass'n, 76 Ill. App. 3d 500, 510, 394 N.E.2d 1273, 1280, 31 Ill. Dec. 896, 903 (1979) (finding reversible error where the judge failed to instruct the jury as to which party bore the burden of proof). Because the circuit court here misstated the burden of proof, the error was prejudicial.

Dr. Callison argues that the circuit court could have, in its discretion, refused to permit changes to the jury instructions when the Nicholises' burden instruction was offered the night before the last day of trial. Here, however, the circuit judge's stated reason for refusing the Nicholises' burden instruction was that the instruction was not a pattern instruction, not that it was untimely. Indeed, on the last day of trial, the judge specifically told the parties that changes to the jury instructions would still be considered -- if they were pattern instructions. Thus, the court's refusal to give the jury instruction was clearly based solely on the fact that the instruction was not a pattern

1180156

instruction. "[I]f a ruling that might have been made as a matter of discretion is based entirely on other grounds, the appellate court will not consider whether the ruling would constitute a proper exercise of the discretionary power." 5 C.J.S. Appeal and Error § 923 (2019). That is, we will not affirm a judgment on a different discretionary ground from that stated by a trial court, because an appellate court will not substitute its discretion for that of the trial court, see Beckwith v. Beckwith, 475 So. 2d 575, 576 (Ala. Civ. App. 1985). Although the circuit court might have been within its discretion to refuse the Nicholises' burden instruction request because it was untimely, an appellate court cannot presume that it would have done so. Thus, we may not uphold the circuit court's ruling on the basis of untimeliness.

Dr. Callison also argues that because the Nicholises initially requested the standard-of-care instruction, any error was invited. However, the Nicholises do not object to the giving of any instruction they requested. Rather, they contend that the circuit court erred in refusing to give another instruction they requested and that the given instructions did not cure that error. Thus, the Nicholises did

1180156

nothing to invite the error they challenged in the court below and now raise on appeal.

IV. Conclusion

Because I believe that the instructions given to the jury did not accurately reflect the burden-shifting process required in retained-object medical-malpractice cases, I would reverse the judgment of the circuit court and remand the case for a new trial.

Finally, I note that the Alabama Supreme Court no longer has any role in the crafting, approval, or publication of the Alabama Pattern Jury Instructions - Civil. Although a 1973 order of this Court recommended the Alabama Pattern Jury Instructions - Civil as then drafted, and although this Court first established in that order a formal Alabama Pattern Jury Instructions Committee (Civil) for a term of one year, the relationship between this Court and the Alabama Pattern Jury Instructions - Civil has changed significantly since then. Suffice it to say that, in 2018, this Court formally abolished the standing committee formed to interface with the publisher of the Alabama Pattern Jury Instructions - Civil, thereby cutting the last formal connection between this Court and the

1180156

publisher. Therefore, the Alabama Pattern Jury Instructions - Civil are not, and should not be perceived as, the product of this Court or any committee thereof and are neither published nor in any way endorsed by this Court or any committee thereof. See Merchants FoodService v. Rice, [Ms. 1170282, March 1, 2019] ___ So. 3d ___, ___ n.7 (Ala. 2019) (noting that "this Court does not preapprove" Alabama Pattern Jury Instructions - Civil, which are merely "a secondary source concerning the law they address" (citing Ex parte Wood, 715 So. 2d 819, 824 (Ala. 1998))).

Thus, in an appropriate case, a trial court or this Court may hold that a jury instruction in the Alabama Pattern Jury Instructions - Civil is legally deficient. But we cannot order that the independent Alabama Pattern Jury Instructions - Civil be amended to correct any such deficiency. Therefore, to remedy the issue raised in the immediate case, I would urge the publishers of the Alabama Pattern Jury Instructions - Civil to consider adopting an amended or new jury instruction that accurately communicates the burden-shifting process in retained-objects cases, as described in Breaux and Houserman, *supra*. Those opinions were issued in 2003 and 2004,

1180156

respectively, and are long due for incorporation into the
Alabama Pattern Jury Instructions - Civil.

Mendheim and Stewart, JJ., concur.

1180156

MENDHEIM, Justice (dissenting).

I concur fully in Chief Justice Parker's dissent. Although a trial court has broad discretion in formulating a jury instruction, the trial court must nonetheless accurately convey the law to the jury. See Snyder v. State, 893 So. 2d 488, 551 (Ala. Crim. App. 2003). It is the court's duty alone to explain the law to a jury.

In this case, the trial court refused to give a requested charge submitted by the plaintiffs, Niloofar N. Nichols and John Matthew Nichols, that accurately stated the law on a key issue, and the trial court's stated reason for the refusal was: "I'm only going to give pattern charges." The trial court left no doubt as to its reason for refusing to consider the requested charge, later reiterating: "[I]f y'all have a pattern jury charge ..., if y'all want me to look at it. Anything that's a pattern charge, I'll look at it."

I write specially to stress that a trial court is incorrect to refuse to consider any jury instruction solely on the ground that the instruction is not included in the Alabama Pattern Jury Instructions. This Court has never approved such a view of jury instructions. To the contrary, this Court has

1180156

emphasized that "a trial court must diligently scrutinize the jury charges it gives -- even pattern charges -- on a case-by-case basis to ensure that they properly instruct the jury in accordance with applicable statutes and caselaw." Ex parte Wood, 715 So. 2d 819, 824 (Ala. 1998) (emphasis added). As Chief Justice Parker notes, this Court has never held that the Alabama Pattern Jury Instructions - Civil are an exhaustive and comprehensive written report of all possible jury instructions in civil cases. This Court has never sanctioned, as a whole, the Alabama Pattern Jury Instructions - Civil as a correct statement of Alabama law. See, e.g., Cackowski v. Wal-Mart Stores, Inc., 767 So. 2d 319, 330 (Ala. 2000) (holding that a trial court's instruction on malpractice was erroneous because it was "potentially confusing, misleading, or incomplete" even though the trial court used the Alabama Pattern Jury Instructions - Civil in formulating its instruction). In fact, the Alabama Pattern Jury Instructions Committee (Civil) is a private entity that has no association with this Court.¹ I have no doubt that the

¹The first two editions of the Alabama Pattern Jury Instructions - Civil declared on the title pages that they had been "[a]pproved by the Supreme Court of Alabama." Alabama Pattern Jury Instructions - Civil (1974); Alabama Pattern Jury

1180156

authors endeavor in good faith to provide proposed jury instructions that could be helpful to lawyers in trials, and trial judges may consider Alabama Pattern Jury Instructions - Civil instructions when formulating their jury instructions.

However, the trial of a lawsuit is unique to the facts of the particular case. Accordingly, the law must be explained to a jury with consideration of the facts of the case being tried.² For instance, a correct statement of law does not

Instructions - Civil (2d ed. 1993). Notably, the "Publisher's Preface" to the 2018-2019 Revision now correctly states that "[t]he Alabama Pattern Jury Instructions Committee does not submit the instructions to the Supreme Court of Alabama before publication. Therefore, contrary to either perception or common belief, the Court does not preapprove them." Alabama Pattern Jury Instructions - Civil (3d ed. 2018).

²An excellent example of a trial court refining its jury instructions to suit the particular facts of a case is Merchants FoodService v. Rice, [Ms. 1170282, March 1, 2019] ___ So. 3d ___ (Ala. 2019), in which the trial court rejected a proposed charge taken verbatim from the Alabama Pattern Jury Instructions - Civil and instead edited the instruction to correctly state the applicable rule of law as it concerned the facts of the case. Quoting Wood, the Court reiterated:

"While most pattern jury instructions may be properly used in the majority of criminal and civil cases, there may be some instances when using those pattern charges would be misleading or erroneous. In those situations, trial courts should deviate from the pattern instructions and give a jury charge that correctly reflects the law to be applied to the circumstances of the

1180156

have to be given if it is inapplicable to the facts of the case. See, e.g., Vaughan v. Oliver, 822 So. 2d 1163, 1177 (Ala. 2001) (noting that "[t]he ground that a jury instruction is a correct statement of the law is insufficient to preserve an objection to the trial court's refusal to give the instruction" (quoting Ex parte R.D.W., 773 So. 2d 426, 429 n.3 (Ala. 2002), quoting in turn Knight v. State, 710 So. 2d 511, 513 (Ala. Civ. App. 1997))). Nor must a trial judge give instructions that are in substance repetitive simply because they may be correct statements of the law or included in a pattern-charge manual. A correct statement of law may also be refused if it would tend to confuse the jury. See, e.g., Eiland v. State, 52 Ala. 322, 329 (1875) (observing that "it is the duty of the court to see to it that the jury are not misled by any charge which is given"). The trial judge is never required to robotically recite legal principles in a jury instruction. Rather, the overriding responsibility of the trial judge is to correctly articulate legal principles to jurors, who are often laypersons, with a goal of such

case.'"

____ So. 3d at ____ n.7 (quoting Ex parte Wood, 715 So. 2d at 824).

1180156

principles being understood by the jurors so that they may fairly apply the law to the particular facts of the case. See Towner v. Hosea O. Weaver & Sons, 614 So. 2d 1020, 1023 (Ala. 1993) (explaining that "[t]he trial court has a duty 'to instruct the jurors fully and correctly on the applicable law of the case and to guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for the truth'" (quoting American Cast Iron Pipe Co. v. Williams, 591 So.2d 854, 856 (Ala. 1991))).

The trial court, though, has the right to rely upon the parties to conduct the legal research and to draft proposed jury instructions for the court's consideration. If a particular legal principle is not requested or is incorrectly stated by a party, the trial court will not be placed in error for not giving the instruction. In this case, the Nicholises prepared and requested a jury instruction that reflects a well established rule of law concerning the burden of proof in a foreign-object medical-malpractice case. The trial court refused to consider the proposed instruction only because it was not contained within the Alabama Pattern Jury Instructions

1180156

- Civil.³ I believe the Nicholises were prejudiced by having the burden of proof placed on them when, under the particular facts of this case, Alabama law clearly places it on the medical provider. The Nicholises requested a proposed jury instruction that reflected a correct statement of law. I would reverse the judgment and remand the case for a new trial. Accordingly, I respectfully dissent.

Parker, C.J., and Wise and Stewart, JJ., concur.

³I note that the trial court's logic, if taken to its natural conclusion, would mean that the Alabama Pattern Jury Instructions Committee (Civil) could nullify any ruling of this Court or legislative enactment simply by refusing to publish the applicable law in its collection of instructions. For instance, if the Committee declined to publish any proposed jury instruction for contributory negligence, a defendant would lose the right to a well established defense. I do not believe that such a result was the intended purpose of either the trial court's stance or the Committee in omitting the legal principle proposed by the Nicholises. Rather, I simply seek to stress that it is the judiciary alone that has the constitutional duty to declare the law as applied to specific cases.