Rel: November 10, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2022-2023

SC-2022-0480

T&J White, LLC, d/b/a Brown Heating & Cooling, and Bobby R. Morse

v.

Timothy O. Williams

Appeal from Jefferson Circuit Court
(CV-2018-900078)

SELLERS, Justice.

T&J White, LLC, d/b/a Brown Heating & Cooling ("Brown Heating & Cooling"), and its employee, Bobby R. Morse ("the defendants"), appeal,

challenging the Jefferson Circuit Court's denial of their motions seeking a judgment as a matter of law ("JML") and a new trial following the entry of judgment on a jury verdict against the defendants and in favor of the plaintiff, Timothy O. Williams. We affirm the trial court's judgment.

Morse, while engaged as an employee of Brown Heating & Cooling, rear-ended Williams in a motor-vehicle collision. Thereafter, Williams filed a complaint asserting, among other things, negligence and wantonness claims against the defendants. The case proceeded to trial, during which testimony and other evidence was presented tending to show the following: (1) Williams's car was decelerating while approaching a yellow or red light at an intersection; (2) Morse, whose vehicle was behind Williams's car, saw the traffic light and saw Williams's car; (3) Morse accelerated over the speed limit in an attempt to make it through the light and rear-ended Williams's car; and (4) Morse was on his cell phone at the time of the collision.

After the trial court instructed the jury but before the jury retired, counsel for the parties discussed the verdict form and the jury instructions that had been given. Ultimately, the defendants requested, and received, an additional blank line on the verdict form to allow the

jury to award compensatory/nominal damages with respect to the wantonness claim; this additional line was placed just before the line for an award of punitive damages. The court then read the final verdict form to the jurors, and no objections were made. The jury returned a verdict in favor of Williams, awarding the following: $500,000 in compensatory damages for negligence, $250,000 in compensatory damages for wantonness, and $750,000 in punitive damages for wantonness.

After the jury was polled, defense counsel orally renewed its motion for a JML based on, among other grounds, the alleged insufficiency of the evidence of wantonness and alleged inconsistency of the verdict. The court denied the motion, concluded the trial proceedings, and entered a final judgment on the verdict. The defendants subsequently filed a motion for a new trial, again asserting that the verdict was inconsistent, which also was denied. On appeal, the defendants argue that they were entitled to a JML on the wantonness claim and that the trial court exceeded its discretion by denying their motion for a new trial, asserting that the verdict was inconsistent.

I. Standard of Review

A. Motion for a JML

The defendants argue that the trial court erred in failing to enter a JML against Williams on his wantonness claim.

> "When reviewing a ruling on a motion for a JML, this Court uses the same standard the trial court used initially in deciding whether to grant or deny the motion for a JML. Palm Harbor Homes, Inc. v. Crawford, 689 So. 2d 3 (Ala. 1997). Regarding questions of fact, the ultimate question is whether the nonmovant has presented sufficient evidence to allow the case to be submitted to the jury for a factual resolution. Carter v. Henderson, 598 So. 2d 1350 (Ala. 1992). The nonmovant must have presented substantial evidence in order to withstand a motion for a JML. See § 12-21-12, Ala. Code 1975; West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989). A reviewing court must determine whether the party who bears the burden of proof has produced substantial evidence creating a factual dispute requiring resolution by the jury. Carter, 598 So. 2d at 1353. In reviewing a ruling on a motion for a JML, this Court views the evidence in the light most favorable to the nonmovant and entertains such reasonable inferences as the jury would have been free to draw. Id. Regarding a question of law, however, this Court indulges no presumption of correctness as to the trial court's ruling. Ricwil, Inc. v. S.L. Pappas & Co., 599 So. 2d 1126 (Ala. 1992)."

Waddell & Reed, Inc. v. United Invs. Life Ins. Co., 875 So. 2d 1143, 1152 (Ala. 2003). Our standard of review as to this issue, therefore, requires us to determine whether each element of Williams's wantonness claim was supported by substantial evidence.

B. Motion for a New Trial

The defendants also argue that they were entitled to a new trial because, they assert, the trial court erred in failing to instruct the jury that it could not reach a verdict in favor of Williams on both his negligence claim and his wantonness claim because, the defendants assert, such a verdict would be internally inconsistent.

> " '[A] party is entitled to proper jury instructions regarding the issues presented, and an incorrect or misleading charge may be the basis for the granting of a new trial.' Nunn v. Whitworth, 545 So. 2d 766, 767 (Ala. 1989). If an objection to a jury charge is properly preserved for review on appeal, this Court will 'look to the entirety of the trial court's charge to see if there was reversible error.' Nelms v. Allied Mills Co., 387 So. 2d 152, 155 (Ala. 1980). Reversal is warranted only when the error is considered to be prejudicial. Underwriters Nat'l Assurance Co. v. Posey, 333 So. 2d 815, 818 (Ala. 1976).
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> "The strength of the jury verdict is based upon the right to trial by jury, White v. Fridge, 461 So. 2d 793 (Ala. 1984), and a jury verdict is presumed to be correct. Alpine Bay Resorts, Inc. v. Wyatt, 539 So. 2d 160, 162 (Ala. 1988). This presumption is strengthened by the trial court's denial of a motion for a new trial."

King v. W.A. Brown & Sons, Inc., 585 So. 2d 10, 12 (Ala. 1991).

Thus, in reviewing the denial of a motion for a new trial based on an allegedly improper jury charge, we consider first whether an objection to the jury charge was properly made, thus preserving the issue for further review. If an objection was not properly made, we look no further.

But, even when an objection has been properly made, there is a presumption that the jury verdict is correct, and, therefore, to obtain a reversal of the judgment and a new trial, the objecting party must demonstrate that the jury charge was incorrect or misleading.

II. Analysis

A. The JML on the Wantonness Claim

The defendants argue that Williams failed to present substantial evidence in support of his wantonness claim and that, consequently, they were entitled to a JML on the wantonness claim. "To establish wantonness, the plaintiff must prove that the defendant, with reckless indifference to the consequences, consciously and intentionally did some wrongful act or omitted some known duty. To be actionable, that act or omission must proximately cause the injury of which the plaintiff complains." Martin v. Arnold, 643 So. 2d 564, 567 (Ala. 1994).

The defendants have cited a case involving a driver who took her eyes off the road before veering into oncoming traffic and causing a collision, Phillips v. United Servs. Auto. Ass'n, 988 So. 2d 464 (Ala. 2008), and a case involving a driver who caused a collision by running a stop sign while attempting to squeeze between two oncoming cars that had

the right-of-way, Ex parte Essary, 992 So. 2d 5 (Ala. 2007). In each of those cases, this Court held that a JML in favor of the defendant on the plaintiff's wantonness claim was appropriate. This case is dissimilar. Here, evidence was presented indicating that defendant Morse saw the traffic light, which was either yellow or red, saw Williams's car slowing at that light, and yet pressed the accelerator of his vehicle. This case is unlike the cases that the defendants have cited, which involved merely inadvertence or ill-advised attempts to dodge other vehicles. Here, there was substantial evidence showing that Morse accelerated toward Williams's vehicle, thus raising the question whether Marsh acted consciously and intentionally. This Court has noted that "'[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge ....'" O'Rear v. B.H., 69 So. 3d 106, 115 (Ala. 2011) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)). Based on this evidence, we cannot say that Williams failed to provide substantial evidence in support of the wantonness claim and, thus, that the trial court erred in determining that the defendants were not entitled to a JML on that claim.

B. The Inconsistency of the Verdict

The defendants argue that the jury's verdict in favor of Williams on both the negligence claim and the wantonness claim was inconsistent. A verdict is inconsistent when the "'record in a case does not reveal a situation in which the jury's decision can coexist.'" Johnston v. Castles & Crowns, Inc., 259 So. 3d 643, 652 (Ala. 2017) (quoting Jones Express, Inc. v. Jackson, 86 So. 3d 298, 303 (Ala. 2010)). Although the trial court instructed the jury that, "[i]f the plaintiff has proved [his] negligence and wantonness claims, you must then decide how much money ... to award plaintiff on those claims," Alabama law is well settled regarding the mutual exclusivity of negligence and wantonness. Ex parte Essary, 992 So. 2d at 9-10. This mutual exclusivity arises from the mental state required for wantonness, which is incompatible with negligence. Thompson v. White, 274 Ala. 413, 420, 149 So. 2d 797, 804 (1963). Consequently, an award of compensatory damages for both negligence and wantonness relating to a single act is inconsistent. The proper remedy for an inconsistent verdict is generally a new trial. Johnston, 259 So. 3d at 652. However, this court has upheld inconsistent verdicts under certain circumstances. See Beiersdoerfer v. Hilb, Rogal & Hamilton Co.,

953 So. 2d 1196 (Ala. 2006); BIC Corp. v. Bean, 669 So. 2d 840 (Ala. 1995); and Tombrello v. McGhee, 282 Ala. 408, 211 So. 2d 900 (1968).

C. The Defendants' Failure to Properly Object at Trial

The trial court noted that unchallenged jury instructions become the law of the case. Beiersdoerfer, 953 So. 2d at 1209. The defendants, however, argue that they did object to the trial court's jury instructions. To support this contention, the defendants point to statements made by their counsel both before and after the jury retired to deliberate. The Alabama Rules of Civil Procedure clearly state that a party must object "before the jury retires to consider its verdict, stating the matter objected to and the grounds of the objection." Rule 51, Ala. R. Civ. P. Accordingly, the defendants' counsel's statements made in this case after the jury retired were untimely under Rule 51 and thus insufficient to prevent the jury's instructions from becoming the law of the case. To support their argument that they properly lodged objections before the jury retired, the defendants point to two statements their counsel made:

> "[I]t's just clarification so that [the jurors] don't go back there and make any mistakes. … I just want to make sure that they have to do a negligence verdict or a wantonness verdict and that they can't come back with negligence and wantonness."

> "I just want to make sure that I've got it on the record I will have an objection if they return both a negligence and a wantonness verdict."

(Emphasis added.) Neither of those statements is an objection under Rule 51.

In the second statement, the defendants' counsel made a conditional promise to object in the future. That is not a timely objection. As the defendants note in their reply brief, Rule 51 requires predeliberation objections in order to give the trial court "'an opportunity to correct any error in its charge before it becomes error with injury to reversal.'" Ware v. Timmons, 954 So. 2d 545, 559 (Ala. 2006) (quoting Coleman v. Taber, 572 So. 2d 399, 402 (Ala. 1990)). The second statement does nothing to serve that purpose. Additionally, "[a] party may not … await the jury's verdict before challenging an instruction that invites an inconsistency." BIC Corp., 669 So. 2d at 844. If the defendants wanted to preserve a claim of error for appeal, the proper action was to object to the purported error, not promise to do so if the jury rendered an unfavorable verdict.

Likewise, the defendants' counsel's "clarification" statement is not an objection under Rule 51. As noted, Rule 51 requires three things: (1)

that the objection be made before the jury retires, (2) that the objector make a statement of the matter objected to, and (3) that the objector provide the grounds for the objection. It would require significant squinting to see "just [a] clarification" as an objection. The clarification statement has more in common with the "discussion" offered by the counterclaim defendants' counsel in Beiersdoerfer than with a proper objection under Rule 51. In Beiersdoerfer, the counterclaim defendants' counsel stated:

> "'It seems to me that [the counterclaim plaintiff] should ... elect between his remedies, fraud and breach of contract, since they're based upon the same facts. And there's the potential for the jury, if they rule his way on both of those claims, to award double damages. But I admit to you I have not researched that as of yet.'"

953 So. 2d at 1209. We held that this "discussion" did not give rise to an objection. Id. Like the "discussion" in Beiersdoerfer, the clarification statement offers no authority to support the objection -- it merely recognizes a potential issue. Additionally, the clarification statement is not sufficiently clear in its intent. Although Rule 51 does not require any magical language, something stronger than "just clarification" is necessary. Accordingly, the clarification statement was not an objection under Rule 51. Because the defendants failed to make a timely objection,

instructions in the jury charge became the law of the case. Beiersdoerfer, 953 So. 2d at 1209-10.

D. The Defendants' Objection to the Inconsistent Verdict

To avoid the preservation-of-error issue, the defendants argue that the alleged error relates solely to a substantive inconsistency in the verdict -- not to the instructions provided in the jury charge. This distinction is vital to the defendants. If a timely objection was not made at trial, an inconsistent verdict cannot be attacked on the ground that it was the result of erroneous instructions provided in the jury charge. Target Med. Partners Operating Co. v. Specialty Mktg. Corp., 177 So. 3d 843, 862 (Ala. 2013); Northwestern Mut. Life Ins. Co. v. Sheridan, 630 So. 2d 384, 389 (Ala. 1993). However, the issue of a substantive inconsistency in the verdict generally can be raised for the first time in a motion for a new trial. See Barnes v. Oswalt, 579 So. 2d 1319 (Ala. 1991); A.L. Williams & Assocs., Inc. v. Williams, 517 So. 2d 596 (Ala. 1987); Stinson v. Acme Propane Gas Co., 391 So.2d 659 (Ala. 1980); and Lewis v. Moss, 347 So. 2d 91 (Ala. 1977). Citing those authorities, the defendants argue that if their claim of error relates solely to an alleged substantive inconsistency in the verdict, not to the instructions provided

in the jury charge, then their failure to object at trial does not preclude them from attacking the substantive inconsistency. However, this argument ignores the cases in which we have upheld inconsistent verdicts under circumstances similar to those in this case.

Both the trial court's order denying the defendants' motion for a new trial and Williams's appellate brief cite to our holding in Tombrello v. McGhee, 282 Ala. 408, 211 So. 2d 900 (1968). In Tombrello, a trial court provided erroneous jury instructions, and the defendant failed to object. The jury rendered a verdict in favor of the plaintiff on both his wantonness claim and his negligence claim, which was substantively inconsistent but in accord with the court's instructions. The defendant filed a motion for a new trial, which was denied. On appeal, the defendant attacked the verdict as being contrary to law, correctly pointing out that wantonness and negligence cannot exist in the same act. This Court noted that, "as a general rule, a verdict based in part on [both wantonness and negligence] is contrary to the law." 282 Ala. 410, 211 So. 2d at 902. However, this Court upheld the inconsistent verdict because the jury had followed the trial judge's erroneous instructions, as "they were bound to do." Id. We noted that the defendant's silence indicated that "he assented

to the charge, which was the law of the case and by which the jury was bound." Id. The substantive inconsistency of the verdict was not enough to overcome this fact. In this case, the defendants' failure to object at trial similarly represents their assent to the jury charge.

Our jurisprudence does not explicitly speak to the interplay between the rule set forth in the cases relied upon by the defendants and our holding in Tombrello. However, an analysis of those cases illuminates both the rationale behind allowing objections to substantive inconsistencies in a verdict for the first time in a motion for new trial and the reasons why that rationale does not apply in this case. In Barnes, the plaintiff sued the estate of the driver of a motor vehicle who had caused a motor-vehicle accident that injured the plaintiff and resulted in the death of the plaintiff's wife. The jury returned a verdict in favor of the plaintiff as to his personal-injury claim, but not as to the wrongful-death claim, even though both his injuries and his wife's death had resulted from the same accident. This Court held that the verdict was therefore inconsistent. Williams involved myriad inconsistencies in a verdict stemming from a jury's findings that an employer was liable, but that its employee was not, when the employer's liability depended upon the

employee's liability. Additionally, in Williams the jury's finding for the plaintiff's wife on her loss-of-consortium claim was inconsistent with the jury's other findings. In Stinson, the jury found negligence but awarded no damages. Finally, the jury in Lewis awarded damages to the plaintiff but did not award any damages to her husband for medical expenses that he had incurred as a result of the plaintiff's injuries.

Unlike Tombrello, none of those cases involved application of the law of the case or a failure to timely object so as to preserve the relevant claim of error for appellate review. That is because the error in those cases was not detectable or contemplated by the parties before the jury's deliberation. As those cases show, juries sometimes reach verdicts that are contrary to law but that could not have been anticipated or reasonably foreseen. Under those limited circumstances, allowing objections to inconsistent verdicts to be raised for the first time in a motion for new trial is appropriate.

However, the defendants in this case attack an inconsistency that was contemplated well before the jury's deliberation and that the verdict form arguably invited. Thus, the holding in Tombrello applies, and defendants bore a duty to prevent such a foreseeable inconsistency by

timely objecting. See Tombrello, 282 Ala. at 410, 211 So. 2d at 902 (stating that the appellant "should have taken an exception to the oral charge or requested an explanatory charge"). The defendants' counsel's statements to the court demonstrate knowledge that the eventual inconsistency was possible. The defendants thus had a duty to prevent the unnecessary confusion that their failure to properly object caused. Because the defendants failed to timely and properly object to the jury charge, the instructions in that charge became the law of the case. The defendants could not raise their objection for the first time in a motion for a new trial.

This result is supported by this Court's holding in BIC Corp. v. Bean, 669 So. 2d 840 (Ala. 1995), which the trial court cited in its order denying the motion for a new trial but the defendants fail to distinguish or discuss. In BIC Corp., the trial judge received a question from the jury. None of the parties' attorneys were present, so the judge answered the question and then notified the attorneys of what had happened. Neither party objected. Only after the jury returned an inconsistent verdict did the defendant challenge the instruction that invited the inconsistency. Noting that "'[u]nchallenged jury instructions become the law of the

case,'" this Court held that the defendant's inconsistent-verdict argument would "not serve as grounds for reversal." BIC Corp., 669 So. 2d at 844 (quoting Clark v. Black, 630 So. 2d 1012, 1017 (Ala. 1993)).

The defendants in this case contend that they are not challenging the instructions in the jury charge but, rather, are challenging only the substantive inconsistency in the verdict. However, their appellate briefs are replete with excerpts from the instructions, seemingly provided to demonstrate error, and are filled with statements that they claim were objections to the instructions. It seems disingenuous for the defendants to assert that they are contesting only the substantive inconsistency of the verdict while supporting their argument with examples of what they contend were objections to the instructions at the root of that inconsistency. The fact remains that the defendants did not properly object to the instructions that they themselves say gave rise to the inconsistency. Those instructions became the law of the case, and the jurors acted accordingly.[1] For this reason, the defendants' inconsistent-

[1]This Court does not find it necessary to discuss whether the trial court erred in following the Alabama Pattern Jury Instructions ("APJI") for negligence and wantonness without clarifying the mutual exclusivity of the two torts. However, given the frequency with which the torts are

verdict argument cannot provide a basis to reverse the trial court's judgment entered on the verdict and award them a new trial.

III. Conclusion

Williams met his burden of presenting substantial evidence of wantonness, and, therefore, the trial court's denial of the defendants' motion for a JML on that claim was proper. Additionally, the record shows that all the parties considered the possibility of an inconsistent verdict before the jury began deliberating. Despite that knowledge, the defendants did not object to the trial court's failure to instruct the jury that it could not render a verdict for Williams on both his negligence claim and his wantonness claim. As a result, the unchallenged jury instructions became the law of the case. The jury acted in accord with the court's unchallenged instructions, as they were bound to do, and the judgment entered on their verdict, though inconsistent, cannot be reversed. Accordingly, we affirm the trial court's judgment.

AFFIRMED.

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litigated in tandem, we would recommend that the APJI be amended to include an instruction on their mutual exclusivity, which could be given when applicable.

Shaw, Wise, Mendheim, and Stewart, JJ., concur.

Parker, C.J., concurs in part and dissents in part, with opinion, which Bolin, Bryan, and Mitchell, JJ., join.

PARKER, Chief Justice (concurring in part and dissenting in part).

I concur with the main opinion as to the sufficiency of the evidence of wantonness. But as to the inconsistency of the verdict, I believe that the defendants sufficiently objected to the incompleteness of the jury instructions.

After instructing the jury on the law, the circuit judge sent the jury into the hallway and conferred with the parties' counsel:

> "THE COURT: All right. What says the plaintiff?
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> "[PLAINTIFF'S COUNSEL]: No objections to your jury.
>
> "THE COURT: What says the defendant?
>
> "[DEFENDANTS' COUNSEL]: Judge, I do have two areas that I would like to talk about.
>
> "THE COURT: Sure, sure.
>
> "[DEFENDANTS' COUNSEL]: May I approach?
>
> "THE COURT: Absolutely.
>
> "[DEFENDANTS' COUNSEL]: And I don't -- it's just clarification so that they don't go back there and make any mistakes. One, I don't know if you have anything in there -- if there's any in pattern jury instructions that talk about the fact that negligence and wantonness are distinct. I just want to make sure that they have to do a negligence verdict or a wantonness verdict and that they can't come back with negligence and wantonness.
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> "[PLAINTIFF'S COUNSEL]: I think the Court made that clear.

> "THE COURT: I think so too. And I have a tendency -- well, no, I never, unless everybody agrees on something outside the [Alabama Pattern Jury Instructions], I just don't do it. I find that it's just easier. My record is cleaner when I don't do that, so I think that was pretty well covered."

To preserve an error involving the incompleteness of jury instructions, a party must "object[] thereto ..., stating the matter objected to and the grounds of the objection." Rule 51, Ala. R. Civ. P. The purpose of requiring an objection is to "'afford[] the trial court an opportunity to correct any error in its charge,'" Ware v. Timmons, 954 So. 2d 545, 559 (Ala 2006) (citation omitted). Thus, all the law requires is that the party apprise the judge of the reason why the instructions are incomplete. See Robinson v. Harris, 370 So. 2d 961, 965-66 (Ala. 1979). The party must "adequately inform[] the trial court of its error[] and afford[] an opportunity for that court to correct the error." Nelms v. Allied Mills Co., 387 So. 2d 152, 154 (Ala. 1980). Magic words such as "objection" or "the instructions are incomplete" are not required. See Rule 46, Ala. R. Civ. P. ("[I]t is sufficient that a party, at the time the ruling ... of the court is ... sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor ...."); 9C Charles Alan Wright & Arthur R. Miller,

Federal Practice & Procedure § 2553 (3d ed. 2008) ("An objection stating distinctly the objectionable matter and the grounds for objection is sufficient; particular words or phraseology need not be employed."); id. § 2554 ("Rule 51 is not top-heavy with technical reasons for concluding that an objection is insufficient under the rule. No particular formality is required of the objection so long as it is clear that the trial judge was informed of possible errors in the charge and was given an opportunity to correct them."); cf. 21 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure § 5036.1 (2d ed. 2005) (explaining that informing a trial judge of an evidentiary objection "does not mean that the lawyer must utter the magic word 'objection'; it is enough that the trial judge understands that an objection is being made"). Nor is the objecting party required to propose an additional instruction. Robinson, 370 So. 2d at 966.

As seen from the above exchange, the defendants' counsel met this standard. In context, the judge clearly invited the parties' counsel to make any objections to the jury instructions. The plaintiff's counsel responded that he had none. The defendants' counsel then said, "I do have two areas" to discuss. He then expressed concern that the

instructions as they have been given would not prevent the jury from finding both negligence and wantonness. The discussion that followed makes clear that both the plaintiff's counsel and the judge understood the defendants' counsel's statement as an objection to the incompleteness of the instructions. The plaintiff's counsel countered that he thought the instructions were clear on the negligence/wantonness point. The judge said, "I think so too," and explained that she never gave outside-pattern instructions unless they were stipulated. In context, the parties and the judge clearly understood that as an overruling of the defendants' counsel's objection. The purpose of the objection requirement -- fair notice to the judge, see Ware, 954 So. 2d at 559 -- was thus satisfied here.

Moreover, when the defendants' counsel said, "[I]t's just clarification," in context he was requesting that the judge provide a clarification to the jury, in the form of an instruction about the mutual exclusivity of negligence and wantonness. Contrary to the main opinion's characterization, he was not merely making a clarification to the judge (or, for that matter, requesting that the judge clarify something to him). Indeed, the defendants' counsel's use of "clarification," in the sense of making something clear to the jury, is precisely the way the main opinion

itself uses the word. See ___ So. 3d at ___ n.1 ("This Court does not find it necessary to discuss whether the trial court erred in following the Alabama Pattern Jury Instructions for negligence and wantonness without clarifying the mutual exclusivity of the two torts." (emphasis added)).

Moreover, when understood in context, the defendants' counsel's objection is unlike the mere "discussion" in Beiersdoerfer v. Hilb, Rogal & Hamilton Co., 953 So. 2d 1196 (Ala. 2006). There, the attorney's language did not object to the incompleteness of the instructions:

> "'It seems to me that [the counterclaim plaintiff] should ... elect between his remedies, fraud and breach of contract, since they're based upon the same facts. And there's the potential for the jury, if they rule his way on both of those claims, to award double damages. But I admit to you I have not researched that as of yet.'"

Id. at 1209. The attorney's comment was directed to what he thought the counterclaim plaintiff should do -- elect between causes of action -- rather than what the trial court should do -- give an additional jury instruction. And the attorney took no definitive position on the verdict-inconsistency issue, admitting that he had not researched it.

In contrast, here the defendants' counsel both took a position on the verdict-inconsistency issue and expressed concern that the issue should

be clarified for the jury. This objection was similar to the one held sufficient in Robinson. There, the plaintiff's counsel pointed out that the judge had instructed the jury that the plaintiff had to prove that a particular service company was not an independent contractor of the defendant. Counsel then summarized evidence of the defendant's own negligence and said that that instruction was "'very wrong and unfair to the Plaintiff, because we haven't pinned our case ... on what was done that day when [the alleged independent contractor] was there.'" 370 So. 2d at 965-66 (emphasis omitted). We held that that explanation "was sufficient to call the court's attention to this omission to charge on plaintiff's other theories for recovery." Id. at 966. Likewise, here the defendants' counsel made clear his concern about the incomplete jury instructions sufficiently to apprise the court.

Further, the defendants' counsel's remark, two transcript pages after the above-quoted exchange, that "I just want to make sure that I've got it on the record that I will have an objection if they return both a negligence and a wantonness verdict," did nothing to undermine the sufficiency of his previous objection. First, it is not clear that that later comment was an expression of intent to object postverdict. In context, it

appears more likely that, by the word "objection," counsel meant "an issue preserved for appeal." In other words, he was probably simply explaining why he had earlier objected to the incomplete jury instructions regarding negligence versus wantonness: to have the objection on the record in order to preserve the issue for appeal, just in case the jury were to find both. Second, and more importantly, by the time of that comment, the judge had already unequivocally overruled the defendants' counsel's objection. Logically, then, the comment cannot alter the fact that the issue had already been preserved.

The preservation requirement of Rule 51 is not a game of magic words or stilted technicalities. See Rule 46; Wright & Miller, supra, §§ 2553, 2554. Here, during the time for objecting to jury instructions, the defendants' counsel communicated to the judge his (legally correct) concern that, under the instructions given, the jury might inconsistently find both negligence and wantonness; counsel said he "want[ed] to make sure" that did not happen, and he received a ruling on that objection. Accordingly, the issue was preserved, and I would reverse the judgment based on the inconsistent verdict.

Bolin, Bryan, and Mitchell, JJ., concur.