

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00666 COA**

AUTOMOBILE RECOVERY BUREAU, INC.

APPELLANT

v.

CHERRYL WATSON GOODWIN

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	04/02/96
TRIAL JUDGE:	HON. ROBERT LEWIS GIBBS
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JAMES G. MCINTYRE
ATTORNEY FOR APPELLEE:	BERNARD C. JONES
NATURE OF THE CASE:	CIVIL - TORTS (OTHER THAN PERSONAL INJURY AND PROPERTY DAMAGE)
TRIAL COURT DISPOSITION:	VERDICT FOR GOODWIN - \$38,000, FOR CONVERSION OF JEWELRY AND EMOTIONAL DISTRESS
DISPOSITION:	REVERSED IN PART AND REMANDED IN PART - 1/27/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	4/8/98

BEFORE THOMAS, P.J., KING, AND PAYNE, JJ.

THOMAS, P.J., FOR THE COURT:

Automobile Recovery Bureau, Inc. appeals the jury verdict of conversion and emotional distress and damages in the amount of \$38,000, raising the following issues as error:

**I. WHETHER THE JURY'S VERDICT WAS AGAINST THE OVERWHELMING
WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL, IN THAT THERE WERE
INSUFFICIENT FACTS TO WARRANT SUCH A HOLDING.**

II. WHETHER THE LOWER COURT ERRED BY INSTRUCTING THE JURY

THROUGH APPELLEE'S JURY INSTRUCTION P-19, THAT THE APPELLEE SHOULD RECOVER FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS SUBSEQUENT TO THE INTENTIONAL TORT OF CONVERSION.

III. WHETHER THE JURY'S AWARD OF DAMAGES WAS EXCESSIVE AND THE RESULT OF PASSION, PREJUDICE, ARBITRARINESS AND UNDUE SYMPATHY AND BEYOND ANY AMOUNT THE JURY COULD REASONABLY AWARD UNDER THE FACTS OF THIS CASE, AND THE LOWER COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR NEW TRIAL.

Finding error, we reverse and remand in part and reverse and render in part. Because the second issue is dispositive, we will not address the third issue.

FACTS

On July 9, 1990, Automobile Recovery Bureau, at the request of Copiah Bank, repossessed Cherryl Watson Goodwin's vehicle. At the time of the repossession, the vehicle contained jewelry, approximately 110 pieces, valued at approximately \$3,050.09 that belonged to Goodwin. The repossession agent removed the bag containing the jewelry and locked it in the office of the Recovery Bureau. When Goodwin attempted to obtain her personal property, she discovered that several pieces of her jewelry were missing.

Goodwin testified that she had put the jewelry in bank bags underneath the driver's seat of the vehicle Sunday night, the evening before it was repossessed. She stated that she had her jewelry out on the couch Sunday evening, and she and her husband had an argument. She grabbed some of her belongings and put these things in the vehicle. She came home that night and left everything in the car. The next morning when she went to get in the vehicle, she noticed it was gone. Monday Goodwin went to discuss the repossession with the bank that held the lien of the vehicle. She then went to the Recovery Bureau. When she arrived the president of the business, Mary Marshall, was called in, and Goodwin and Marshall went to look at the jewelry. Marshall laid out the personal property, and while Goodwin was looking through she noticed that some items were missing. She noticed that a diamond tennis bracelet, a bumblebee pin, a pearl necklace, a Mexican peso neck charm, a Seiko watch, silver Cross pen and pencil set, and some pennies were missing. The only item that Goodwin recovered was the Cross pen. When Goodwin was signing the final papers at the Recovery Bureau, the individual who handed her the papers held the Cross pen. When Goodwin saw the pen, she told the person that the pen was hers. The individual left the room, came back, and handed the pen to Goodwin.

Goodwin testified that the missing jewelry had a special meaning to her because some items were gifts given to her by her husband. She did not have any receipts for the missing jewelry. She stated that because of the missing personal belongings she felt she had been violated and lost two to three nights of sleep. Goodwin did not seek medical help.

Mary Marshall testified that an employee of hers, Alan Tanner, completed a "Vehicle Condition Report" and a "Personal Property Inventory" subsequent to the repossession of the vehicle. On neither form did Tanner list any jewelry as being in the vehicle. Marshall explained that this was not done because Tanner gave her the bags after he discovered that the bags held valuable personal

property. Marshall later took the jewelry and put it in a safe at her home and locked the repossessed vehicle on the Recovery Bureau lot. She testified that the only persons who had access to Goodwin's vehicle were her employees. Marshall stated that to the best of her knowledge when they took photographs of the jewelry the Cross pen was there, and she picked up the pen by mistake and started writing with it to list all the jewelry.

After deliberations, the jury returned a verdict in the amount of \$38,000.

ANALYSIS

I.

WHETHER THE JURY'S VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL, IN THAT THERE WERE INSUFFICIENT FACTS TO WARRANT SUCH A HOLDING.

Recovery Bureau argues that there was no affirmative evidence produced at trial that established the fact that it took any of Goodwin's personal property, and Goodwin's actual ownership was never established, which leads to the only conclusion that there was never any missing jewelry.

This Court will not set aside a jury verdict unless it is against the overwhelming weight of the evidence and credible testimony. . . . The jury is the judge of the weight of the evidence and the credibility of the witnesses. . . . This Court . . . draws in the appellee's favor all reasonable inferences which flow from the testimony given. . . . This court must assume that the jury drew every permissible inference from the evidence offered in favor of the appellee.

Bobby Kitchens, Inc. v. Mississippi Ins. Guar. Assoc., 560 So. 2d 129, 131 (Miss. 1989)(citations omitted).

Drawing all favorable inferences from the testimony presented at trial, there was evidence to support the jury's verdict in favor of Goodwin. The jury obviously resolved the question of whether Goodwin was in possession of such jewelry and if Recovery Bureau had in fact converted this property in favor of Goodwin. Considering the fact that the jurors were in the best position to judge the demeanor and credibility of Goodwin firsthand, and an appellate court is allowed only the cold record, this Court is not able to determine that the reasonable and fair-minded jurors' decision was against the overwhelming weight of the evidence.

II.

WHETHER THE LOWER COURT ERRED BY INSTRUCTING THE JURY THROUGH APPELLEE'S JURY INSTRUCTION P-19, THAT THE APPELLEE SHOULD RECOVER FOR NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS SUBSEQUENT TO THE INTENTIONAL TORT OF CONVERSION.

The Recovery Bureau submits that the lower court erred in instructing the jury that they should decide the claim of Goodwin on an intentional or negligent standard. Goodwin's jury instruction, P-19, provides:

The Court instructs the jury that one who negligently, intentionally or recklessly causes emotional distress to another, and such emotional distress is reasonably foreseeable, is subject to liability for such emotional distress even though there is no physical injury.

At the outset we must note that the Recovery Bureau does not cite any authority to support this proposition. Failure to cite authority in support of claims of error precludes appellate review of alleged errors. ***Century 21 Deep South Properties, Ltd. v. Corson*, 612 So. 2d 359, 370 (Miss. 1992)**. Thus, we are under no obligation to address this part of the Recovery Bureau's argument; however, we find that this jury instruction is inadequate as a matter of law and must be addressed.

This instruction charges the jury that they can find for Goodwin under both a negligent and intentional standard. We will address negligent infliction of emotional distress first. To establish a claim for negligent infliction of emotional distress, the plaintiff need not necessarily establish that she suffered a physical injury. Nevertheless, she must prove that the distress caused her injury that required medical treatment:

[I]n a case of simple, or ordinary "garden variety negligence," even in the absence of physical injury accompanying the negligent conduct, if there is a resulting physical illness or assault on the mind, personality or nervous system of the plaintiff *which is medically cognizable and which requires or necessitates treatment by the medical profession*, this Court has followed the modern tendency and held that a legal cause of action exists

***Leaf River Forest Products v. Ferguson*, 662 So. 2d 648, 658 (Miss. 1995) (citing *Sears, Roebuck & Co. v. Devers*, 405 So. 2d 898, 900 (Miss. 1981))** (emphasis added). The record is clear that Goodwin did not receive any type of medical treatment from the alleged emotional distress she suffered here. Thus, according to precedent, Goodwin did not make out a claim based on negligent infliction of emotional distress, and the lower court should not have instructed the jury that it could find for Goodwin under a negligent standard.

Next, we will address the jury instruction regarding intentional infliction of emotional distress.

Mental anguish is a nebulous concept . . . and requires substantial proof for recovery. . . . The Restatement (Second) of Torts likens it to that required for entitlement to an award of punitive damages. It requires conduct "so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community."

***Morrison v. Means*, 680 So. 2d 803, 805-06 (Miss. 1996)** (quoting Restatement (Second) of Torts § 46 (1977)) (footnote omitted). "Where there is something about the defendant's conduct which evokes outrage or revulsion, done intentionally . . . Courts can in certain circumstances comfortably assess damages for mental and emotional stress, even though there has been no physical injury." ***Morrison*, 680 So. 2d at 806.**

Jury instruction P-19 was clearly intended to fit within the purview of negligent infliction of emotional distress; however, it is also as clear that the above quoted instruction does not meet the requirements for an intentional infliction of emotional distress instruction. This jury instruction merely informed the jury that if Recovery Bureau caused emotional distress to Goodwin, and if such

emotional distress was reasonably foreseeable, the jury could award damages; yet this is not the standard for intentional infliction of emotional distress in this State. This instruction failed to inform the jury that for it to find Recovery Bureau liable, Recovery Bureau's conduct must have been "outrageous in character, and so extreme in degree as to go beyond all bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community . . ." ***Morrison*, 680 So. 2d at 805-06** (quoting Restatement (Second) of Torts § 46 cmt. d (1977)). A review of all the jury instructions in this case show that the lower court never adequately informed the jury on what it must consider before awarding damages for intentional infliction of emotional distress.

Regardless of whether the jury was inadequately instructed, Goodwin in any event failed to produce sufficient evidence to prevail on her claim. Even if this Court could find that Recovery Bureau's conduct to be of such a nature to meet the above-mentioned standard, there is not enough evidence presented to support the claim of intentional infliction of emotional distress due to a lack of injury. ***Morrison*, 680 So. 2d at 806-07**. Goodwin stated that she had lost some sleep over this incident. She testified that there were many nights that we went without sleep, he [her husband] and I both; but mainly me, just went without sleep. And I cried a whole lot, you know, missing what I didn't have anymore, or whatever, and having to just kind of take something to put me to sleep because I couldn't go to sleep on my own. . . . [I felt] like somebody has, like, violated my personal body, my personal being.

Goodwin's husband testified that Goodwin did not pay attention to her daughter and did not cook. This testimony offered in support of this claim are not enough to evidence to support a verdict that amounts to \$38,000 in damages.

In *Morrison*, the plaintiff stated that he could not sleep many nights because he felt that he had been "done wrong." ***Id.* at 807**. The Court held that this was insufficient to support a claim for intentional infliction of emotional distress.

The Court in *Morrison*, in finding that the appellant's distress did not rise to the level of anxiety or anguish required to support an award for emotional distress, cited to ***Strickland v. Rossini*, 589 So. 2d 1268 (Miss. 1991)**. In *Strickland* the Court stated that evidence that the plaintiff was "very depressed . . . [and] very upset over all this and emotional . . . [and] not able to sleep," was insufficient to sustain damages for mental anguish and that the jury below was erroneous in its award of damages. **589 So. 2d at 1275-76**.

More recently in ***Wong v. Stripling*, 700 So. 2d 296, 307 (Miss. 1997)**, the Court held that an adverse summary judgment was clearly proper because the appellant failed to set forth any proof of injury, which was a necessary element of an intentional infliction of emotional distress claim. "It is axiomatic that in addition to suffering conduct that is outrageous or repulsive, this tort also requires proof of injury, i.e., that the conduct in question caused actual mental distress." ***Id.***(citing *Sears, Roebuck & Co. v. Devers*, 405 So. 2d 898 (Miss. 1981); ***Morrison*, 680 So. 2d at 807**). The Court stated:

The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind.

There is no occasion for the law to intervene in every case where some one's feelings are hurt.

Wong, 700 So. 2d at 306 (quoting Restatement (Second) Torts § 46 cmt. d (1977)). The Court held that "[i]n light of Dr. Wong's failure to place into the record any proof of his mental anguish, a necessary element of the claim, we hold that the adverse summary judgment rendered below was proper." *Id.*

Goodwin's meager evidence of emotional damages was commensurate to that presented in *Morrison*, *Strickland*, and *Wong*, where the Mississippi Supreme Court found that there was not enough evidence presented to support the claim of mental anguish as a result of the conduct due to a lack of an injury. Therefore, the jury below was erroneous in its award of damages.

The jury verdict in this case was a general verdict. We do not know what amount the jury awarded for the converted jewelry and what it awarded for emotional distress. We are finding that there was insufficient evidence of emotional distress and must reverse and render on this issue. However, the jury's verdict of conversion of the jewelry was not against the overwhelming weight of the evidence and must be affirmed, but we remand for a jury determination of the correct amount to award for the converted property.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS REVERSED AND RENDERED IN PART AND REVERSED AND REMANDED IN PART. ALL COSTS OF THIS APPEAL ARE SPLIT EQUALLY BETWEEN THE APPELLEE AND THE APPELLANT.

BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.