

Empiregas, Inc., of Gadsden v. Geary
Ala., 1983.

Supreme Court of Alabama.
EMPIREGAS, INC., OF GADSDEN, a Corporation
v.
Pamela GEARY.
81-866.

April 1, 1983.
Rehearing Denied May 6, 1983.

Gas company customer brought action against company for, inter alia, conversion and outrageous conduct. The Circuit Court, Etowah County, William W. Cardwell, Jr., J., entered judgment for customer and denied gas company's motion for directed verdicts, and gas company appealed. The Supreme Court, Beatty, J., held that: (1) evidence was for jury on question whether gas company's removal of regulator from customer's tank constituted conversion, and (2) gas company's failure to deliver regulator for nine days during bitterly cold weather did not constitute outrageous conduct.

Reversed and remanded with directions.

Jones, J., concurred in part and dissented in part in opinion in which Faulkner, J., concurred.

West Headnotes

[1] Trover and Conversion 389 ⚔66

389 Trover and Conversion
389II Actions
389II(E) Trial
389k66 k. Questions for Jury. Most Cited Cases

Proper submission of conversion count to jury requires plaintiff to produce evidence from which reasonable jurors could infer wrongful taking or wrongful detention or interference, or illegal assumption of ownership, or illegal use or misuse of

plaintiff's property or rights in property.

[2] Trover and Conversion 389 ⚔23

389 Trover and Conversion
389II Actions
389II(A) Right of Action and Defenses
389k21 Defenses
389k23 k. Title or Right to Possession of Defendant or Third Person. Most Cited Cases
Ownership by converter does not prevent conversion.

[3] Trover and Conversion 389 ⚔1

389 Trover and Conversion
389I Acts Constituting Conversion and Liability Therefor
389k1 k. Nature and Elements of Conversion in General. Most Cited Cases
Conversion lies where there has been wrongful exercise of dominion over property in exclusion or defiance of plaintiff's rights, where plaintiff has immediate right to possession.

[4] Trover and Conversion 389 ⚔66

389 Trover and Conversion
389II Actions
389II(E) Trial
389k66 k. Questions for Jury. Most Cited Cases

In action for conversion, evidence that gas company removed regulator from customer's tank upon discovering gas purchased from another company had been placed in tank in breach of their contract but did not persist in its position that customer's breach terminated contract upon learning that gas from the other company had been placed in the tank without her knowledge was for jury on question whether gas company's removal of regulator constituted conversion.

[5] Damages 115 ⚔208(6)

115 Damages

115X Proceedings for Assessment

115k208 Questions for Jury

115k208(6) k. Mental Suffering and Emotional Distress. Most Cited Cases

(Formerly 115k50.10)

Proper submission of count of outrageous conduct to jury requires sufficient evidence from which permissible inferences could be drawn to support finding of extreme conduct necessary to constitute outrageous conduct.

[6] Damages 115 57.22

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.19 Intentional or Reckless Infliction of Emotional Distress; Outrage

115k57.22 k. Nature of Conduct.

Most Cited Cases

(Formerly 115k50.10)

Conduct referred to in tort of outrageous conduct must be so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in civilized society.

[7] Damages 115 57.25(1)

115 Damages

115III Grounds and Subjects of Compensatory Damages

115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses

115III(A)2 Mental Suffering and Emotional Distress

115k57.19 Intentional or Reckless Infliction of Emotional Distress; Outrage

115k57.25 Particular Cases

115k57.25(1) k. In General.

Most Cited Cases

(Formerly 115k50.10)

Evidence that gas company, after assuring customer that it would return gas regulator to her tank, failed to deliver regulator over nine-day period during bitterly cold weather was insufficient to establish tort of outrageous conduct.

*1259 Hobart A. McWhorter, Jr. and Scott M. Phelps of Bradley, Arant, Rose & White, Birmingham, for appellant.

Thomas E. Davis and Douglas Burns of Burns, Shumaker & Davis, Gadsden, for appellee.

BEATTY, Justice.

This case requires us to examine the type of conduct constituting the tort of outrageous conduct, and to ascertain whether plaintiff produced evidence sufficient to avoid a directed verdict on certain claims submitted to the jury.

Plaintiff Pamela Geary sued defendant Empiregas after that company failed to return an LP gas regulator it had removed from her tank. These claims went to the jury: (1) breach of contract; (2) conversion; (3) fraud; (4) negligence and wantonness; and (5) outrageous conduct. Empiregas moved for directed verdicts separately and severally on each count at the end of trial. After the motions were overruled, the jury returned a \$25,000 general verdict for Mrs. Geary.

Empiregas contests the submission to the jury of the conversion and outrageous conduct claims. More specifically, Empiregas contends that the evidence is insufficient to support those counts; therefore, given the general verdict, the company maintains that it is entitled to a new trial on the entire case. Indeed, if the evidence is insufficient on either theory, Empiregas is entitled to JNOV on that claim and a new trial on the remaining claims supported by the evidence. *Ex parte Nix*, Ala., 401 So.2d 64 (1981).

We find sufficient evidence from which permissible inferences could be drawn to support conversion, but not of outrageous conduct; thus we reverse the

judgment.

I. FACTS

Mrs. Geary rented an LP gas tank and regulator from Empiregas and purchased gas from the company under an exclusive purchase agreement. The gas purchase and equipment rental agreement reads in pertinent part:

“1. That until this agreement be terminated as herein provided, [Empiregas] agrees to sell and [Mrs. Geary] agrees to purchase from [Empiregas], all of the gas as may be required by [Mrs. Geary] to operate all gas consuming equipment as [Mrs. Geary] is now or may hereafter be using. It is understood by the parties that the gas to be furnished by [Empiregas] and the gas to be used by [Mrs. *1260 Geary], is commonly known as liquefied petroleum gas....

“...

“8. [Mrs. Geary] shall be deemed to have breached this agreement upon the happening of any one or more of the following events: (A) Failure of [Mrs. Geary] to purchase from [Empiregas] during any twelve-month period, a quantity of liquefied petroleum gas equal to at least twice the gallonage capacity of the tank rented herein; (B) Failure of [Mrs. Geary] to pay [Empiregas] any accounts due for gas purchased within thirty (30) days after date of delivery; (C) Default, breach of non-performance by [Mrs. Geary] of any of the terms and conditions of this agreement Upon the happening of any one or more of said events, [Empiregas] may terminate this agreement immediately without any notice to [Mrs. Geary] by removing its equipment....

“...

“10. ... It is further understood and agreed by the parties hereto that as part of the consideration for this agreement [Empiregas], its agents and employees, shall have the immediate right upon any termination of this agreement to go upon the premises

of [Mrs. Geary] and take possession of said rented property and remove the same from the premises without process of law, and [Mrs. Geary] hereby waives any trespass or right of action for damages by reason of said entry and removal....”

Mrs. Geary used up her gas in September 1980 and could not afford to purchase more. The Church of Love discovered her situation and had LP gas, purchased from a competing company without her knowledge, placed in the tank. An Empiregas employee removed the regulator in December upon discovery of this purchase during a routine tank check. Mrs. Geary, finding her heat off, called Empiregas on December 11 and was informed the company removed her regulator because she bought gas from another company. After Mrs. Geary explained that the gas was donated by the church, Empiregas promised to return the regulator that evening. She sat up that night until 11:30 waiting for someone to arrive, but the regulator was not returned.

Mrs. Geary called Empiregas the following morning to discuss the delay, whereupon the company apologized and reassured her the regulator would be delivered shortly. When Empiregas did not deliver the regulator that day either, Mrs. Geary again called to complain of the cold and to inquire when the regulator would be returned. The calls and failure to deliver the regulator persisted over a nine-day period during bitterly cold weather. Each time Mrs. Geary phoned the company, the employee who answered apologized and gave repeated assurances the regulator would be returned right away.

Mrs. Geary finally obtained a regulator through her brother on December 20. Until this time, Mrs. Geary could not cook for her children, and the temperature in her house fell below freezing. Despite her efforts to keep warm by huddling on the couch and bed with her children, they all suffered severely and became ill.

II. THE CONVERSION COUNT

[1] Proper submission of a conversion count to a jury requires a plaintiff to produce evidence from which reasonable jurors could infer “a wrongful taking or a wrongful detention or interference, or an illegal assumption of ownership, or an illegal use or misuse” of plaintiff’s property or rights in property. *Ott v. Fox*, Ala., 362 So.2d 836, 839 (1978).

[2][3] Empiregas argues that it exercised a legitimate contractual right when it removed its regulator from its gas tank, and cannot be guilty of conversion where it retrieved possession of its own property. Empiregas converted, if anything, the regulator itself. The parties dispute whether the removal was contractually authorized. In any case, ownership by the converter does not prevent a conversion. Conversion lies where there has been “wrongful exercise of dominion over property in exclusion or defiance of a plaintiff’s rights, where *1261 said plaintiff has ... the immediate right to possession.” *Ott v. Fox*, *supra*.

[4] We need not decide whether the contract authorized Empiregas to enter upon Mrs. Geary’s property and remove the regulator. The company’s subsequent conduct is sufficient basis for finding that Mrs. Geary had a right to immediate possession which was subject to conversion. *Russell-Vaughn Ford, Inc. v. Rouse*, 281 Ala. 567, 206 So.2d 371 (1968). In other words, once Empiregas became aware of the reasons the gas was purchased elsewhere, and no longer persisted in the position that her breach terminated the contract, then the further retention of the regulator could have constituted conversion. Reasonable jurors could infer that retention of the regulator for nine days after Empiregas promised to immediately return it constituted a wrongful detention or interference with Mrs. Geary’s possessory interest. Thus, the trial court did not err in submitting the conversion claim to the jury.

III. OUTRAGEOUS CONDUCT

[5] Proper submission of this count to a jury re-

quires sufficient evidence from which permissible inferences could be drawn to support a finding of the extreme conduct necessary to constitute outrageous conduct. In order to resolve this issue, we must consider the definition of this tort adopted in *American Road Service Co. v. Inmon*, Ala., 394 So.2d 361 (1980), and as applied in *Peddycoart v. City of Birmingham*, Ala., 392 So.2d 536 (1980).

[6] In *Inmon*, quoting from § 46 of the Restatement (Second) of Torts (1948), this Court defined the tort:

“One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”

The conduct referred to in that definition must be “so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society.” *Inmon* at 365.

[7] Aside from some doubt concerning the proof of the other elements of the tort of outrageous conduct it is clear that the conduct of Empiregas did not rise to the level of “beyond all possible bounds of decency” and “utterly intolerable in a civilized society.” Plaintiff complains primarily of the inaction of Empiregas after its assurance of action. Under the circumstances, whether that inaction was due to mistake or internal negligence, still it did not meet the test of outrageous conduct as our decisions and *Restatement (Second) of Torts* § 46 have considered it. Compare *Inmon*, *supra*; *Peddycoart v. City of Birmingham*, *supra*.

For the reasons stated the judgment of the trial court is reversed and this cause is remanded to that court for further proceedings. It is so ordered.

REVERSED AND REMANDED WITH DIRECTIONS.

TORBERT, C.J., and MADDOX, ALMON,

SHORES, EMBRY and ADAMS, JJ., concur.

JONES, J., concurs in part and dissents in part with opinion in which FAULKNER, J., concurs. JONES, Justice (concurring in part and dissenting in part).

I disagree with the majority opinion only to the extent that its reversal is based on insufficiency of evidence as to the tort of outrage count. I would treat that issue thusly:

Proper submission of this count to a jury requires sufficient evidence from which permissible inferences could be drawn to support a finding of the extreme conduct necessary to constitute a tort of outrage. In order to resolve this issue, we must consider the definition of this tort adopted in *American Road Service Co. v. Inmon*, 394 So.2d 361 (Ala.1980), and as applied in *Peddycoart v. City of Birmingham*, 392 So.2d 536 (Ala.1980), and *Cates v. Taylor*, 428 So.2d 637 (Ala.1983).

*1262 In *Inmon*, quoting from § 46 of the *Restatement (Second) of Torts* (1948), this Court described the tort:

“One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”

In *Peddycoart*, a police sergeant mistakenly told the father of an arrested man, upon the father's arrival at the jail, that his son had tried to hang himself in jail and had been sent to the hospital. The father, mother, and wife of the arrested man went to the hospital, whereupon a doctor told them he was sorry, but that he had done everything he could to save the man's life and the man had died anyway. It was then that the family, after examining the body, discovered it was a stranger who had hanged himself instead of their family member. Plaintiffs brought an action against the municipality for extreme and outrageous conduct resulting in emotional distress. This Court held, in applying the standard adopted in *Inmon*, that there was no evidence the police sergeant intentionally or recklessly

caused the distress—he had merely made a mistake. The absence of evidence showing he abused his position, that he had a desire or intent to inflict distress, or knew that severe distress would probably result, justified the trial court's granting of defendant's motion for a directed verdict on the outrageous conduct claim.

Plaintiff contends this case is not controlled by *Peddycoart* for two reasons: 1) the initial conduct of Empiregas cannot be categorized as a mere mistake—the employee deliberately came onto her property and removed the regulator without any inquiry or notice; and 2) the entire basis of the claim in *Peddycoart* began and ended with the single mistake of the police sergeant. There was no subsequent conduct compounding the original error.

While Plaintiff's argument with respect to 1) is persuasive, I would not decide that issue. Even if we assume that the initial conduct was analogous to the unintentional “mistake” in *Peddycoart*, the subsequent conduct in the instant case, in my opinion, furnishes sufficient evidence from which a jury could reasonably infer the necessary intent, or reckless disregard equivalent to such intent, to constitute the tort of outrage. Although the descriptive terminology of the tort seems to suggest an inquiry as to the gravity of the harm done when ascertaining whether the tort lies, the focus must be upon the gravity of the *conduct*, rather than upon the result of that conduct.

The policy of the law is to look at an original error in a manner favorable to the one who makes the error, because the nature of the tort demands it be difficult of proof. But, here, Empiregas engaged in conduct after discovery of the “mistake,” compounding that error. Mrs. Geary suffered severe distress because of her reliance on the company's repeated assurances that the regulator would be quickly returned. Mrs. Geary informed Empiregas of her condition; yet, the company, though promising to remedy the situation, did nothing despite its knowledge of the extreme cold and knowledge that the family was experiencing extreme distress. This

conduct, coupled with the awareness of the surrounding circumstances, compounded the original error, and thereby overcomes *Peddycoart*'s fatal evidentiary deficiencies.

Broken promises and assurances, however politely made, can constitute outrageous conduct. The Restatement definition of the tort does not require confrontation in an abusive or humiliating manner. See *Holmes v. Oxford Chemicals, Inc.*, 672 F.2d 854 (11th Cir.1982). Here, Empiregas created the condition causing the extreme suffering and anguish experienced by Mrs. Geary. The consequences of this condition were not merely foreseeable, but were actually revealed to Empiregas. The intentional actions of Empiregas in light of these circumstances furnish evidence sufficient to permit a jury reasonably to infer the elements necessary to constitute the tort of outrage. I am unable to reconcile this Court's acceptance of Plaintiff's claim of outrage in *Cates v. Taylor*, supra, and its *1263 rejection of that tort under the facts of this case.

FAULKNER, J., concurs.

Ala.,1983.

Empiregas, Inc., of Gadsden v. Geary
431 So.2d 1258

END OF DOCUMENT