MIM TIMBER CORPORATION, Appellant, v**. J. RUDOLPH JOHNSON,** Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: April 26, 1983. Decided: July 6, 1983.

1.Where personal property of a party has been injured by another, the obligation to minimize damages does not require the aggrieved party to exercise more than reasonable care to that end, though he must not exercise less than reasonable care.

2. What constitutes reasonable care depends on the circumstances of the particular case as the rule is simply one of good faith and fair dealing and does not require one to do his utmost to minimize damages.

3. A traffic violation usually sets the basis for a future civil suit.

4. Whether or not the jury will award exemplary or punitive damages is exclusively with the jury to decide based on the weight and force of the evidence adduced.

5. As a general rule, a person whose property is taken damaged or destroyed through the negligence or wrongful act or omission of another is entitled to compensation from such other person for the damages sustained, and this could include compensation for discomfort, annoyance, personal inconvenience and other consequential damages.

6. A bill of exceptions must show with particularity the alleged errors of the lower court.

7. One who is injured by the wrongful and negligent acts of another, whether as the result of a tort or of a breach of contract, is bound to exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage; and to the extent that his damages are the result of his active and unreasonable enhancement thereof, or are due to his failure to exercise such care and diligence, he cannot recover.

8. When an automobile has been damaged by the negligence of another and cannot be repaired, the measure of damages is the difference between the market value of the automobile before it was damaged and the value of the wreckage.

9. Exemplary damages are allowed in actions for injury to property where such injury is attended by circumstances of willful fraud, malice, or gross negligence. In actions for the recovery of personal property and damages for the tort, the fact that plaintiff has obtained possession of the property pending suits does not affect the question of exemplary damages.

As a result of a car accident on the Kakata Highway in Gibi Territory, involving a gas tanker belonging to the appellee, plaintiff in the lower court, and a Renault truck belonging to the

appellant, the appellee's truck was thrown into a nearby swamp. Police accident investigation showed the appellant's vehicle to be responsible for the accident. The truck deteriorated due to the inability of the appellee to repair it, and the refusal of the appellant to provide finance for the repair despite repeated requests made by the appellee. Accordingly, appellee instituted an action of damages against appellant. The lower court rendered judgment confirming the verdict brought by the jury in favor of appellee. From this judgment, appellant appealed to the Supreme Court. After a review of the records, the Court affirmed the judgment with the modification that the value gotten when the truck was sold be deducted from the award of the jury. The Court held that as the evidence showed that the accident was caused by the negligence of the appellant's driver, the jury did not err in awarding plaintiff damages, which were not unreasonable.

James G. Bull appeared for the appellant. George E. Henries appeared for the appellee.

MR. JUSTICE MORRIS delivered the opinion of the Court.

The genesis of this case reveal that on April 27,1977 between Salala and Kakata in the vicinity of the Slocum Mission; "Gibi Territory, an accident occurred involving a Russian made gas tanker bearing license plate No. T-1710, owned by Mr. J. Rudolph Johnson, the appellee; and operated by Kamara Duteh and a Renault truck bearing license plate No. TT-288 owned by MIM Timber Corporation and driven by Peter Sayon. As a result of the accident, truck No. T-1710 remained in the swamp for 28 days before the plaintiff/appellee was able to have it pulled out of the swamp. He then towed it to the Servo Garage on Bushrod Island, Monrovia, where it remained until it deteriorated due to the inability of the plaintiff/appellee to repair it, and also the refusal of the defendant/appellant to provide funding for the repairs, despite repeated requests made to it by the plaintiff/ appellee. The truck was sold by scraps for $2,500.00 even though the pre accident value was $10,000.00. Appellee instituted this action of damages against the appellant company claiming for $4,494.87 as estimate for the repairs, $185.00 for towing the truck to Servo Garage, $15,000.00 representing intake of the truck for 106 days at $150.00 per day, $10,000.00 as the pre accident value of the truck and $675.00 for repair of the tank. Appellant filed an answer and a motion to dismiss the complaint. Pleadings progressed to the reply. The motion to dismiss was resisted, argued and denied. Law issues were disposed of, trial had and the jury returned a verdict in favour of plaintiff/appellee awarding him $10,000.00 for the pre accident value of the truck and $185.00 representing amount paid to tow the truck as special damages and $9,000.00 as general damages. The verdict was affirmed by court's final judgment after denying the motion for a new trial. The appellant being dissatisfied with this judgment has appealed to this Court on a nineteen-count bill of exceptions. The counts of the bill of exception which we feel are pertinent to the determination of this case are counts 5, 6, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19.

In count five the appellant contended that the jury erred for awarding $10,000.00 as the pre accident value for the truck when it was reparable and cites 15 AM. JUR. pp.420 and 439 § 27 and §40 to buttress her contentions. We quote these two Sections:

Section 27

"One who is injured by the wrongful or negligent acts of another, whether as the result of a tort or of a breach of contract, is bound to exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage, and to the extent that his damages are the result of his active and unreasonable enhancement thereof or are due to his failure to exercise such care and diligence, he cannot recover; or, as the rule is sometimes stated, he is bound to protect himself if he can do so with reasonable exertion or at trifling expense, and can recover from the delinquent party only such damages as he could not, with reasonable effort have avoided. It is also an elementary principle that a party claiming damages must not be in fault in contributing to them by his own want of proper care; and such care must extend to the protection from further loss after the act complained of. If he fails to use such diligence, his negligence is regarded as contributing to his injury, and, furthermore, such damages could have been so avoided are not regarded as the natural and probable result of the defendant's acts."

Section 40

"Under the rule requiring one injured by the negligent or wrongful act or omission of another to use reasonable effort to lessen the resulting damage, it is the duty of one whose property is injured or threatened with injury to take reasonable precautions and to make reasonable expenditures to guard against or minimize such injury: and if he fails to do so, he cannot recover damages for any injuries which by the exercise of reasonable care he could have avoided. In other words, the law will not allow one to sit idly by and see his property destroyed through forces negligently set in motion by another and then collect damages occasioned by his own failure to make reasonable exertion to arrest such disaster."

We shall revert to the records to ascertain if the appellee in this case made any reasonable effort to minimize or lessen the damages. The appellee testified that when he was informed of the accident he engaged the services of the police jack-truck to retrieve his truck from the mud but the jack truck was unable. He also had the driver of his truck to keep watch over the truck and this driver also made repeated efforts by requesting other truck drivers plying the highway to help pull the truck from the mud but all these failed. He finally approached the Ministry of Public Works and he was fortunate to get one of their caterpillars to finally pull the truck from the mud. He also deposed that when he discovered the owner of the truck that was responsible for the accident to be the MIM Timber Corporation, he approached the manager for assistance but the manager refused to help. When he pulled the truck from the mud, he had same towed from the accident scene to the Servo Garage in

Monrovia at a cost of $185.00. He again approached the manager of MIM Timber Corporation to facilitate the repairs of the truck because the estimate for the repairs was $5,400.00 which he did not have and which repairs the Servo Garage refused to undertake on credit basis, and the manager of the appellant company referred him to the insurance company, the Lone Star. The insurance company in turn referred him to the MIM Timber Corporation and so the truck remained in the garage until it deteriorated. The manager of Servo Garage requested that he removes his truck from the garage and in order not to be at a total loss, he sold the truck by scraps for a sum of $2,500.00. This testimony was corroborated by witness Gladys Johnson, and the appellant never refuted this testimony. The question now is, what does the law relied upon by appellant refer to as reasonable effort and care in minimizing damage by a appellee. Section 29 of the same chapter of the same book provides the following:

"The efforts required of the injured party to prevent or lessen his damages include a reasonable expenditure of money, which he may recover as part of his damages. He is not, however, required to incur large expenses. A common statement of the rule is that he must protect himself if he can do so at trifling expense. The word "trifling" in this connection has reference to the situation of the parties. It means a sum which is trifling in comparison with the consequential damages which the plaintiff is seeking to recover in the particular case. So, a property owner is not required to make expenditures, which in comparison with the injury threatened are considerable, for the purpose of protecting his property. It appears that a want of sufficient funds will excuse an absence of effort to lessen damages."

The obligation to minimize damages never requires a party to exercise more than reasonable care to that end, though one must not exercise less than reasonable care. What constitutes reasonable care depends on the circumstances of the particular case as the rule is simply one of good faith and fair dealing. It does not require one to do his utmost to minimize damages, without regard to his own interests, but only what is reasonable under the circumstances. 81 A.L.R., 283.

In Firestone Plantations Company v. Greaves, 9 LLR 250, 267 (1947), this Court, deciding a similar issue held that:

"Whilst it is true that one whose property is endangered or injured by the negligence of another, must exercise reasonable care to protect it from further injury, especially where due notice of the wrong or injury is brought home to him who seeks redress for such injury, and while a proven failure on his part to do so has a tendency to cause him to lose whatever damages he may claim or may otherwise have been entitled to, or in some cases to minimize said damages; yet we are of the opinion that where, as in this case, the person whose property is injured can show that he exercised every possible reasonable care to protect said injured property from further injury or total loss, he will have done all that is required of

him. 13 Cyc. of Law & Proc, 75 (1904). In this case, appellee put forth every possible effort through correspondence with appellant to protect said damaged property from further injury and even to have appellant undertake the possible repairs of said damaged car. This correspondence discloses an indisposition on the part of appellee towards litigation, preferring a reasonable settlement out of court; but this attitude appeared not to have been appreciated by appellant since it claimed it was not liable. Under these circumstances, appellee was left with no alternative but to abandon said car to appellant."

In this case, the appellee in addition to this repeated appeals made to the appellant, utilized all means to have the truck pulled out of the swamp, towed it to the Servo Garage and obtained an estimate for the repairs in the amount of $5,400.00 which he said he could not afford. Therefore, he again appealed to the appellant company who refused to repair it and, in order to avoid a total loss, appellee sold the truck by scraps, after it had deteriorated, for $2,500.00. It is our opinion that the appellee did exert reason-able care in lessening or minimizing the damages. Count five of the bill of exceptions is not sustained.

Count six is logical and tenable in law and therefore sustained, for if appellee sold the truck by scraps for $2,500.00, the jury should have deducted that amount from the $10,000.00 awarded as pre-accident value for the truck.

Appellant in counts 10, 11 and 12 which relate to the judge's charge to the jury maintains that the judge erred when he referred to appellee's borrowing money to purchase a truck for the support of his family, the request of the appellee for general damages and the conviction of the appellant's driver by the traffic court, because she claims that these remarks in the charge influenced the jury's verdict.

"At the time of instructing the jury, the judge may sum up the evidence and instruct the jury that they are to determine the weight of the evidence and the credit to be given to the witnesses. "Civil Procedure Law, Rev. Code, 1:22.10.

The appellee and his witnesses having testified to (1) the purchase of a truck to support the plaintiffs family; (2) the conviction of appellant's driver at the Traffic Court; and (3) the appellee having requested for general damages during his testimony, the judge in keeping with the statute just recited did not err in summing up the evidence. Counts 10, 11 and 12 are therefore overruled.

Counts 13 standing alone is not sufficient to reverse the judgment of the lower court in that although a criminal conviction may not establish a liability in civil suit, yet, a traffic conviction usually lay the basis for the civil suit as in the instant case.

Regarding the failure of the judge to instruct the jury not to award exemplary damages as contended in count 14, the Court says that whether exemplary or punitive damages are allowable rests in the discretion of the jury under all the circumstances of a particular case

for, it is exclusively with the jury to consider the weight and force of the evidence warranting the award of such damages. 15 Am. Jur., Damages, § 365. Count 14 of the bill of exceptions is not sustained.

Count 15 relates to the denial of appellant's motion for new trial and count 16 attacked the verdict as being contrary to the evidence, while count 17 raises the issue that seven of the jurors did not sign their names, but rather their names were written. Since these three counts deal with the amount of both general and special damages awarded by and the conduct of the jury, we shall pass upon them together. The jury awarded $10,185.00 as special damages, $10,000.00 as the pre-accident value of the truck and $185.00 as the amount paid by appellee to tow the truck from the scene of accident to the Servo Garage in Monrovia, $9,000.00 as general damages. The award of $10,185.00 as special damages was within the pale of law, since $10,000.00 was the pre-accident value of the truck and $185.00 was paid by appellee to tow the truck from the scene of the accident to Servo Garage in Monrovia; except that the jury should have deducted the $2,500.00, which the appellee received for the sale of the truck by scraps, from $10, 000.00. "When an automobile has been damaged by the negligence of another and cannot be repaired, the measure of damages is the difference between the market value of the automobile before it was damaged and the value of the wreckage." 15 AM. JUR., Damages, footnote 19 and 35 A.L.R. 52.

Referable to the $9,000.00 as general damages, a person whose property is taken damaged or destroyed through the negligence or wrongful act or omission of another is entitled to compensation from such other person for the damages sustained. He is also generally entitled to recover compensation for discomfort, annoyance, and personal inconvenience and for any other consequential damages which may be the result of such wrongful act. 15 Am. Jur., Damages, § 106. Firestone Plantaions Company v. Greaves, 9 LLR 250, 266 (1947) and Nouredine and Intrusco Corporation v Johnson, 30 LLR 575 (1982). 15 AM. JUR., Damages, §106.

The appellee in his testimony said " ....furthermore the fact that I was no longer able to receive any income from this truck, threw me out of business for quite some time, making it also impossible for me to meet my many, many commitments, both in the home and outside. For example, the many children I have to support in school and at home, as regards food and clothing, felt the direct effect of my reduced income. In order also to be able to make ends meet, I was forced to borrow funds from the development bank to purchase a new truck, which loan I am having great difficulty to pay. I have, therefore, considered that at this point we are no longer talking about the repair of the truck, but replacement of same and possible damages that have been done to me personally in terms of the serious financial and moral embarrassment I have been facing for the past two and a half years since this accident occurred. And this embarrassment is the direct result, not only of the accident as such, but the total uncooperative attitude of MIM Timber in not working out a fair

settlement." This testimony was corroborated. This being the case it would seem that the appellee did suffer discomfort, inconvenience and embarrassment.

With reference to the contention of the appellant that seven members of the jury did not sign the verdict, the statute provides that:

"The foreman of the jury shall deliver its verdict. On demand of a party at any time before the jury is discharged, the jury shall be polled to determine whether all the jurors subscribe to the verdict. On rendition of the verdict, the clerk shall make an entry in his minutes specifying the time and place of the trial, the names of the jurors and witnesses, the general verdict if such a verdict was rendered, the questions or answers or other written findings constituting a special verdict, and the direction, if any, which the court gives with respect to subsequent proceedings. Civil Procedure Law, Rev. Code 1:2.12.

It is our holding that if the appellant thought the verdict was not unanimous he should have requested the court to have the jury polled. The records in this case indicate that after the jury returned its verdict upon instruction of the court the jury was polled. Counts 15, 16 and 17 are therefore overruled.

In count 18 of the bill of exceptions, appellant argued that the judge committed a reversible error when he ruled the second action between the same parties and over the same subject matter to trial after the court had awarded new trial. Civil Procedure Law, Rev. Code 1:11.6(2)(3) provided that:

"2. By order of court. Except as provided in paragraph 1, an action shall not be discontinued by the claimant except upon order of the court and upon such terms and conditions as the court deems proper.

"3. Discontinuance after submission. Discontinuance may not be granted after the case has been submitted to the court or jury to determine the facts except upon the stipulation of all parties."

In our opinion, section 11.6 (2) is the applicable statute in this case since the case was not yet submitted to the court or jury to determine the facts which is done only after both counsel have rested evidence, argued their sides and submitted the case for the determination of the facts either by the court or jury. From recourse to the records, we have discovered that the notice of withdrawal with reservation was approved by Judge Emma Shannon Walser, the then presiding circuit judge over the Civil Law Court of the Sixth Judicial Circuit. Hence, it cannot be said that the case was withdrawn without her orders. Section 11.6 (2) was fully complied with in this case. Count 18 is therefore overruled.

Count 19 states, "because defendant excepted to the several rulings of Your Honour made on the law issues in this case as well as Your Honour ruling the plaintiffs new case to trial." The statute has defined a bill of exceptions as "a specification of the exception made to the

judgment, decision, order, ruling, or other matter excepted to on the trial and relied upon for the appeal together with a statement of the basis of the exceptions..." Ibid., 1:51.7. A perusal of the records reveal that after the court ruled on the issues of law, the appellant made the following exceptions: "to which ruling defendant excepts." In Quai v. Republic, 12 LLR 402 (1957) and Bailey v. Saucea, 22 LLR 59, 61 (1973), this Court held that a bill of exceptions must show with particularity the alleged errors of the lower court. In the case under review, the appellant excepted to the ruling of the judge on the law issues without mentioning any particular error which this Court should review. Count 19 is therefore overruled.

Counsel for appellant further argued that there is not and should not be any exemplary damages awarded in an action of damages to personal property, the only damages recoverable being the market value prior to the injury, destruction or damage if completely destroyed, or the cost of repairs. Since our statute is silent on the issue, we shall take recourse to common law. The weight of authority on the issue is thus:

"§275. Injury to Property -(1) In General. The question whether exemplary damages will be allowed in actions for injuries to property depends upon the nature of the injury complained of. They will be allowed only where such injury is attended by circumstances of willful fraud, malice, or gross negligence. "§276 (2) Personality. There may be a recovery of exemplary damages for a destruction of, and injury to, or a trespass upon personal property under any of the circumstances above enumerated. And it is not material to the application of the rule whether the action is for the value of the property or for the recovery of the property itself. In actions for the recovery of personal property and damages for the tort, the fact that plaintiff has obtained possession of the property pending suit does not affect the question of exemplary damages." 17 C. J., Damages, pp.979 and 980.

The injury in this case was due to the gross negligence of the appellant's driver according to the police charge sheet which was upheld by the Traffic Court. In view of these circumstances, the jury committed no error in awarding the $9,000.00 as general damages.

In view of all what we have said and the laws quoted, it is our considered opinion that the judgment of the lower court be and the same is hereby confirmed and affirmed with the modification that the $2,500.00 received by appellee be deducted from the pre-accident value of the truck leaving a balance of $7,500.00 as value of the truck, $185.00 as a refund for the amount paid by Appellee for towing the truck from the accident scene to the Servo Garage in Monrovia and $9,000.00 for general damages. And it is hereby so ordered.

Judgment affirmed with modification.