AB K. J. LEVIN, Appellant, *v.* JUVICO SUPERMARKET, Appellee.

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

Argued March 20, 1975. Decided May 6, 1975.

1. A warranty given by the seller on the purchase of a commodity is a contract and the general rules of contracts determine its validity and enforceability.
2. No private agreement between parties can deny courts their rightful jurisdiction.
3. Consequential damages is synonymous with special damages.
4. All documentary evidence material to issues of fact raised by the pleadings, which is received and marked by the court, should be presented to the jury.
5. A written document offered as evidence must be identified before being admitted into evidence.
6. When a party objects to parts of the judge's charge to the jury, he must particularize the parts objected to in order to avail himself of the objection.
7. Allegations in pleadings only set forth in a logical manner the points constituting the offense complained of and if not supported by evidence can in no case amount to proof.
8. General damages are those which are the natural and necessary result of the wrongful act or omission asserted as the foundation of liability.
9. In cases of breach of warranty the damages recoverable by the buyer from the seller, including loss of profits, are those which are reasonably supposed to have been contemplated or foreseen by the parties at the time the warranty was made, as the probable result of the breach of warranty.

The appellee purchased a freezer from the appellant, and some months later it needed repairs. However, spare parts were not available at the repair shop but would be within three months. The freezer was never brought to the shop, and the purchaser complained to the Ministry of Commerce, Industry and Transportation, which ordered the seller to reimburse the buyer for the price paid, and the seller complied. Thereafter, appellee commenced an action in damages, seeking lost profits among other things, including loss of reputation of the business, although the warranty barred suit. The jury returned a verdict against seller for $54,000.00 after the trial judge declared the warranty void. Judgment was entered against appellant.

An appeal was taken from the judgment on the ground of the warranty's force and effect, and that the verdict was unsupported by the evidence. The Supreme Court agreed with the appellant, found the warranty valid and the verdict invalid for lack of evidentiary support, and on these grounds, as well as other reversible errors, the judgment was *reversed* and the case *remanded* for a new trial.

Samuel Pelham for appellant. *Victor Styker* and *Stephen B. Dunbar* for appellee.

MR. JUSTICE HENRIES delivered the opinion of the Court.

The appellee purchased a freezer from the appellant through its agent, Nestra, at a cost of $1,223.00, including freight and duty. There is some dispute as to whether a 50-cycle or 60-cycle motor was requested. The appellee contended that it asked for a 60-cycle motor to conform with the local electrical system. The appellant alleged that the appellee ordered a 50-cycle motor. In any event, the freezer was accepted by the appellee and installed in the supermarket. It carried a warranty for sixteen months. About six months after the installation of the freezer, it began to give trouble; and appellee informed the appellant thereof, which instructed that the freezer be taken to Modern Refrigeration Shop for repairs. The appellee did not deliver the freezer for repairs, as directed, but made inquiries of the Modern Refrigeration Shop as to whether the repairs could be made. This shop did not have the required spare parts, and informed the appellee that it would have the parts within three months. The freezer was never delivered to the shop, and, hence, no repairs were made to it. The appellee reported the appellant to the Ministry of Commerce, Industry and Transportation, which ordered that

the appellee be reimbursed the cost of the cooler. The appellant complied with this order by paying the sum of $1,193.00 to the appellee, which returned the freezer to the vendor.

Thereafter the appellee instituted an action of damages against appellant in the Sixth Judicial Circuit Court of Montserrado County, presided over by Judge Emma Shannon Walser, alleging that because of appellant's negligence in not procuring spare parts for the freezer, the appellee was unable to sell vegetables and meat to its many customers, who finally discontinued their patronage; that because of this loss of business, its reputation and good name had been defamed; and prayed that it be compensated for the loss, inconvenience, humiliation and damage it had suffered over an eight-month period. The case was tried, and the jury returned a verdict of $54,000.00, in favor of the appellee, and judgment was rendered in accordance with the verdict. The appellant excepted to and appealed from this judgment.

The appellant filed a fourteen-count bill of exceptions, but we deem only counts 1, 3, 4, 8, 11, and 12, of sufficient merit to claim our attention, and we shall now proceed to traverse them in the following manner:

In count 1 it is contended that the trial judge erred when she declared the warranty null and void, even though it is the basis for the appellee's suit, as it was pleaded in count 5 of the complaint, and count 3 of the reply; it was also relied upon by appellant as can be seen from the answer. The trial judge declared the warranty null and void because the appellant had breached the warranty in two instances, but she only mentioned the instance when it referred the appellee to the Modern Refrigeration Shop to make necessary repairs, despite the fact that the appellee did not use the services of this shop. It is not clear what the second breach was. Presumably she was referring to the fact that the freezer had a 50-cycle motor instead of a 60-cycle one that the appel-

lee had allegedly ordered. If this is so, this cannot be considered a breach, because the warranty covered that particular 50-cycle freezer. Moreover, whether or not the appellee did order a 60-cycle freezer, he should have discovered that the freezer was not the type ordered, upon reasonable inspection, are questions that should have been left to the jury.

Even if the appellant or seller had breached the warranty, it is reasonable to conclude that this breach created a cause of action in damages. We have been unable to find any legal support for the conclusion that where a party breaches a warranty, the warranty becomes void. In fact, a warranty is a contract, and the general rules of contracts determine its validity and enforceability. See 77 C.J.S., *Sales,* § 302(c). Ordinarily, whether or not there has been a breach of warranty, where the evidence is conflicting, as in this case, is a question of fact for the jury. 77 C.J.S., *Sales* § 369.

The appellee's counsel in argument before this bar, contended it was not suing on the warranty. If this is true, then it must have sought damages for breach of the contract of sale which was oral. In that case it must show what breach was committed; and it can recover only for whatever loss or injury directly and proximately resulted from the wrongful act. The reason given by the appellee for not suing on the warranty was that it sought to oust the courts of jurisdiction when it excluded consequential damages or loss. We find this argument untenable because, aside from the fact that no private agreement can oust the courts of jurisdiction, *Grant* v. *Foreign Mission Board of the National Baptist Convention,* 10 LLR 209 (1949), this provision only tends to limit liability. Because we see no legal basis for declaring the warranty null and void, count 1 of the bill of exceptions is hereby sustained.

In count three of the bill of exceptions, it is alleged that the trial judge erroneously overruled the appellant's con-

tention that it was not liable for damages since the warranty excluded consequential loss or damages, and since the appellee had received the purchase price of the freezer. The trial judge ruled that the consequential loss provision was inapplicable because the appellant had breached the warranty, but said nothing about what effect, if any, resulted from the refunding of the purchase price. It would have been proper had the judge first defined consequential damage, and determined whether or not the damages being sought fell in this category; and then ruled whether damages would still lie where there was a refund of the purchase price. According to 25 C.J.S., *Damages,* § 2: "Consequential damages are such as are not produced without the concurrence of some other event attributable to the same origin or cause. The term may include damage which is so remote as not to be actionable. It has also been defined as synonymous with the term special damages." Again, we must sustain count 3 of the bill of exceptions.

In count 4 of the bill of exceptions, the appellant complained of an invasion of the jury's province by the judge when she declared that since the warranty had been breached, the consequential loss provision was inapplicable. Recourse to the warranty disclosed that the warranty did not cover defects caused by normal wear and tear, misuse, negligence or accident, or defects of which the seller was not immediately informed, and equipment that was improperly installed, altered, or repaired in the freezer. These are all questions of fact to be decided by the jury. The judge ruled that the warranty had been breached because the appellant required the appellee to take the freezer to the Modern Refrigeration Shop for repairs. Whether or not this constituted a breach is also a jury question. The judge erred when she decided these issues of fact in her ruling on the law issues and, therefore, count 4 of the bill of exceptions is also sustained.

In count 8 of the bill of exceptions, the appellant contended that during the trial he posed this question on direct examination: "I pass you this document, take it, scrutinize it, and say what you recognize it to be and whose signature appears on it?" The appellee objected on the ground that the document should not be identified and marked because it was never pleaded, and under the principle of notice, they were taken by surprise. The court sustained the objection. This is indeed unusual and we have been unable to ascertain what document was being introduced into evidence and, therefore, we are unable to pass upon whether it was properly excluded. It has always been the practice in the courts of this Republic that objections to admission of evidence are allowed after the evidence has been identified and marked. Objections to written evidence are made at the time it is being offered for admission and where a document has been admitted in evidence, it is error for the judge not to allow it to be submitted to the jury. *Williams* v. *Lewis & Co.*, 1 LLR 220 (1888). A written document offered as evidence must be identified before being admitted into evidence. *Johnson* v. *Republic,* 1 LLR 75 (1874).

There seems to be a misunderstanding of the holding in *Walker* v. *Morris,* 15 LLR 424, 428 (1963), with respect to the admission of documentary evidence. In that case we held that "all documentary evidence which is material to issues of fact raised in the pleading, and which is received and marked by the court, should be presented to the jury." Some have construed this to mean that any document, regardless of its materiality, must be admitted into evidence. This construction is incorrect. The admission of documentary evidence is still dependent upon relevance or materiality in keeping with our Civil Procedure Law, which provides that "all evidence must be relevant to the issue; that is, it must have a tendency to establish the truth or falsehood of the

allegations or denials of the parties, or it must relate to the extent of the damages." Rev. Code 1:25.4. Whether a document is material to issues of fact raised in the pleading can be determined only after it has been properly identified, received and marked or after the court has had the opportunity to find out what the document is about. After this has been done, objections are allowed, and the court can properly determine its relevance in order to pass on its admission into evidence for submission to the jury. The trial judge erred in sustaining the objection to identification of the document, and, therefore, count 8 of the bill of exceptions is sustained.

Count 11 of the bill of exceptions deals with the appellant's exception to the trial judge's charge to the jury. We observe from the record certified to us that the appellant made a general exception, that is to say, he did not state to what portions of the charge he objected, neither did he declare that he objected to the entire charge. In such instance, where instructions to the jury embody several propositions of law, to some of which there are no objections, the party objecting must point out specifically to the trial court the part to which he objects in order to avail himself of the objections. See *Liberia Mining Co.* v. *Zwannah,* 19 LLR 73 (1968). However, we must note in passing that had the judge not assumed the role of the trier of facts, more evidence would have been presented to the jury on which she would have had to instruct the jury.

Count 12 of the bill of exceptions deals with the verdict of the jury, which was in the amount of $54,000.00. Reviewing the evidence, such as it is, we find nothing to warrant a verdict in that amount. Three witnesses testified for the appellee: its manager, his wife, and counsel. His wife, when asked to what extent they had been damaged, replied that "the sky is the limit. I would say $50,000.00." There was no evidence from customers who ceased to patronize the supermarket because of the

defective freezer, or from anyone as to what effect the closing down of the business had on the good name and reputation of the supermarket or its manager. Neither was any evidence introduced as to the loss of profits or business, or what percentage of the business dealt with frozen foods. In *Jogensen* v. *Knowland,* 1 LLR 267 (1895), this Court said: "The want of proof must defeat the best laid action." Similarly in *Houston* v. *Fischer et al.,* 1 LLR 434, 436 (1904), we said: "A fundamental rule of pleading and practice is that evidence must support the allegations or averments. . . . In pleadings, allegations are intended only to set forth in a clear and logical manner the points constituting the offense complained of, and if not supported by evidence can in no case amount to proof. Evidence alone enables the court to pronounce with certainty concerning the matter in dispute."

The appellee argued that since he was asking for only general damages, he was not required to plead them specifically. We agree with this principle, but this does not mean that the complainant is not required to show proof that such damages are traceable to, and the probable and necessary result of, the injury. According to 22 AM. JUR., 2d, *Damages,* § 15 "General damages are those which are the natural and necessary result of the wrongful act or omission asserted as the foundation of liability."

In cases of breach of warranty, the damages recoverable by the buyer from the seller, are those which are reasonably supposed to have been contemplated or foreseen by the parties at the time the warranty was made, as the probable result of the breach. This rule also applies in cases of loss of profits as a result of a breach, but the amount of the lost profits should be determined with reasonable certainty from the evidence. See 67 AM. JUR., 2d, *Damages,* §§ 744, 749, 750.

Ordinarily a verdict will not be set aside as being ex-

cessive, but an appellate court will do so where there is insufficient evidence to support the amount awarded; where the verdict is so grossly disproportionate to the measure of damages; and where the testimony most favorable to the successful party will not sustain the inference of fact on which the damages were estimated. See 5A C.J.S., *Appeal and Error,* §1651. We find the verdict to be contrary to the weight of the evidence adduced at the trial and, therefore, the judge erred when she denied the motion for a new trial.

Because the trial judge erred when she denied certain factual issues, and in not making her ruling so comprehensive as to embrace all the material issues by the pleadings, *Zakaria Bros.* v. *Pannell, Fitzpatrick, Graham & Grewdson,* 19 LLR 170 (1969), and because of the excessiveness of the verdict, this case is reversed and remanded for a new trial, starting with a reconsideration of the issues of law. Costs to abide final determination. And it is so ordered.

Reversed and remanded.