

**THE EASTERN CARIBBEN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCv2008/0285

BETWEEN:

GCS BOTTLING COMPANY LIMITED

Claimant

and

DAVID PHILLIP

Defendant

Appearances:

Ms. Gail Pero for the Claimant
Mr. Trevor Kendall for the Defendant

.....
2009: September 29
2010: March 26
.....

JUDGMENT

- [1] **MICHEL, J.:** By Claim Form and Statement of Claim filed on 8th May 2005 the Claimant, GCS Bottling Company Limited, claimed against the Defendant, David Phillip, the sum of \$22,278 for damages and consequential loss resulting from a traffic accident which occurred on 10th May 2005, together with interest and costs.

- [2] By Defence and Counterclaim filed on 4th June 2008 the Defendant denied liability in respect of the accident and counterclaimed against the Claimant for damages, interest, costs and further or other relief arising from the aforesaid accident.
- [3] By Reply and Defence to Counterclaim filed by the Claimant on 23rd June 2008 the Claimant joined issue with the Defendant on his Defence and disputed the Counterclaim.
- [4] On 17th November 2008 the Defendant filed an Amended Defence and Counterclaim and on 26th November 2008 the Claimant filed an Amended Reply and Defence to Counterclaim, with another document also entitled "Amended Reply and Defence to Counterclaim" filed on 17th December 2008.
- [5] A Case Management Order was made in this matter by Master Cheryl Mathurin on 10th December 2008 and was entered on 16th December 2008, stipulating the times by which Lists of Documents, Pre-Trial Memoranda and Witness Statements were to be filed by the parties.
- [6] A List of Documents was filed by the Claimant on 4th February 2009 and by the Defendant on 30th April 2009, both outside of the time stipulated by the Master.
- [7] A Pre-Trial Memorandum was filed by the Claimant on 20th March 2009 and by the Defendant on 1st May 2009, way beyond the stipulated time of 20th March 2009.
- [8] The Witness Statement for the Defendant was filed on 30th April 2009 and the two Witness Statements for the Claimant were filed on 1st May 2009 - all having been filed way beyond the stipulated time of 27th February 2009.
- [9] A Trial Bundle was filed on 18th September 2009 and the trial of the matter took place on 29th September 2009.

- [10] Two witnesses gave evidence for the Claimant and the Defendant gave evidence on his own behalf.
- [11] The first witness for the Claimant was Hilroy Humphreys. In his Witness Statement he stated that he is the Managing Director of the Claimant and that the Claimant owned a motor van registration number C 3405 which was used for delivering bottled water to the Claimant's customers. That Michael Francis is an employee of the Claimant who was driving the aforesaid motor van on 10th May 2005 delivering water in the Coolidge area when the van was involved in an accident with another vehicle on the Airport Road. That he visited the scene of the accident and observed the Claimant's motor van in a ditch on the western side of the road and observed the Defendant's motor car facing north on the western side of the road several feet away from where the van had overturned. That on 26th January 2006 he received a copy of a police report on the accident which indicated that Michael Francis appeared to be at fault and would be prosecuted. That the Claimant did not accept the findings of the police as outlined in the report because the report and the assessment of the accident scene failed to take into consideration the weight of the motor van at the time of the accident. That, as a result of the accident, the motor van sustained extensive damage to its front and left side and the steering mechanism was also destroyed, along with the right front wheel rim. That on or around 12th May 2005 he requested and obtained an estimate of the parts, materials and labour required for the repair of the damages to the van from Ujamaa Auto Body Repair Shop. That the estimate amounted to \$15,000. That the total of the Claimant's claim is \$23,308, plus interest and costs.
- [12] Under cross-examination, Mr. Humphrey's testified that he is the owner and managing director of the Claimant. That his position is that he does not accept the findings of the police because the investigating officer failed to take into consideration the weight of the van. That if the van had 3,000 pounds of water in the back, this would affect the mobility of the van and the driver's ability to steer the van. That he accepts that this would require of the driver a certain amount of care when he is driving a van so loaded. That the ability to

correct and change the direction of the van and to stop the van would be somewhat impaired by the weight.

[13] The other witness for the Claimant was Michael Cole, formerly Michael Francis. In his Witness Statement he stated that he is and was for the preceding 12 years employed by the Claimant. That he regularly operated the Claimant's van as part of his duties. That on 10th May 2005 he was driving the van on Airport Road travelling from north to south. That he was driving on the left side of the road at approximately 30 to 35 miles per hour. That, as he approached a bend in the road, he saw the Defendant's vehicle travelling from south to north. That he took notice of the vehicle because the driver had drifted to his side of the road and appeared not to notice. That immediately as he came around the curve and saw the Defendant's vehicle, he attempted to pull on to the left on the dirt path to avoid the Defendant. That, however, the car struck the right front wheel of the van. That at the time of the accident the Defendant was using his cell phone. That there were no vehicles immediately ahead of him or immediately after the Defendant. That as result of the impact his right front tyre blew out, the steering mechanism broke and the van steered out of control, went across the road and collided with a wall on the western side of the road. That after the accident the Defendant steered his vehicle back into his lane and continued travelling in a northerly direction for approximately 45 to 50 feet. That the van sustained a lot of damage to the front and left side because it collided with the wall fencing and then overturned in the ditch. That sometime after the collision, the police arrived and took statements from the drivers and measurements at the scene. That at the time of the collision, he was not speeding or driving recklessly and the collision was caused entirely by the Defendant.

[14] Under cross-examination, Mr. Cole testified that he assisted the police with the measurements. That, in accordance with the measurements, the point of impact identified by him to the police is 2 feet over onto the Defendant's side of the road.

- [15] Under re-examination, Mr. Cole testified that at the time of the impact he was at least 10 feet from the east side of the road or that at the time of the impact his vehicle occupied 10 feet of the east side of the road.
- [16] In response to questions by the Court, Mr. Cole said that he noticed the Defendant's vehicle drifting to his side of the road. That he pulled his vehicle to the dirt path on the left side of the road to avoid a collision. That the Defendant however struck the right front of his vehicle and his vehicle ended up after the collision on the right or opposite side of the road. That this resulted from the Defendant's vehicle hitting the right front wheel and causing his vehicle to swing around and go to the other side of the road.
- [17] The Claimant's case having been closed, the Defendant took the stand in his own defence. In his Witness Statement the Defendant stated that on 10th May 2005 at about 2.30 p.m. he was driving his motor car on Airport Road. That he was travelling in his left lane at about 40 miles per hour. That as he approached a corner in the road, he slowed as he joined a line of several vehicles ahead of him. That he saw a white van travelling in the opposite direction coming around the corner in its own lane. That soon thereafter the van started heading straight at his vehicle instead of continuing around the bend and crashed into the right front section of his vehicle and then went on to overturn on his side of the road. That the van steered over to his side of the road before it struck his vehicle. That it became obvious that the driver was not paying attention to the middle line on the road as the van came across the middle of the road right in the bend. That the van just missed the car ahead of him while it veered across the road and crashed into his car. That, as a result of the collision, his vehicle was severely damaged on the right front fender and door area. That he obtained an estimate from Alfred Titus Body Repairs for the damage caused, totalling \$9,505. That, as a result of the collision, he struck his head on something in the car and received a cut. That he had to visit a medical doctor, who examined him and prescribed pain killers. That he paid \$120 for the medical consultation and was off work for 2 days and lost wages of \$132 as a result. That he had to pay to repair his vehicle and for his medical expenses.

- [18] Under cross-examination, the Defendant testified that the Airport Road was busy at the time because there were 2 international flights on the ground. That there were about 3 vehicles ahead of him as he approached the corner. That there was a vehicle behind him. That the time between when he saw the van and when the impact took place was a very short period. That it happened so fast. That he owns a cell phone. That between the time he left the office and when the accident occurred he did not make or receive any cell phone calls. That he does not recall having his cell phone with him on that day. That after the accident he borrowed a cell phone from the driver of the vehicle behind his in order to call the police. That he does not know what speed the van was being driven at, but it appeared to him that the driver lost control and swerved onto his side of the road. That when he saw the van coming towards him he applied brakes immediately. That his car stopped as soon as the van crashed into it. That it stopped about 18 feet away. That the front of the van made contact with his car. That after the van hit his car he still got enough momentum to travel 18 feet after the impact. That the middle line on the road was a solid white line and a driver would have been able to tell where the middle of the road was. That he denies that he was distracted before the collision and states that he was paying attention. That after the impact, the front of the car was damaged; the door was damaged; the mirror broke off; the glass was broken; the headlamp was broken. That he was driving on the west side of the road. That according to the police report there was a distance of 6 feet from the point of impact to the west side of the road. That he did not lose control of his vehicle at all.
- [19] Under re-examination, the Defendant testified that the collision was not a head-on collision. That the Claimant's van crossed over to his side of the road and impacted with the right front section of his car.
- [20] The case having been concluded, the parties were given until 10th October 2009 to file written closing submissions with authorities.
- [21] On 9th October 2009, written closing submissions were filed by Counsel for the Claimant, but none have been filed by or on behalf of the Defendant.

- [22] On the evidence as summarised above, the Court is called upon to decide on a balance of probabilities whether the collision was caused by the negligence of the Defendant and so to give judgment in favour of the Claimant on his claim or by the negligence of the Claimant and so to give judgment in favour of the Defendant on his counterclaim.
- [23] In assessing the issue of whose negligence caused the collision one can discount almost entirely the evidence of Mr. Hilroy Humphreys. He was not present when the collision occurred and merely saw the two vehicles where they had stopped after the impact. He did not even appear to have been present when statements were given to the police by the two drivers or when the police took measurements. His opinion as to how the collision occurred or as to the assessment of the investigating officer as to how it occurred is of no probative value.
- [24] The evidence of Mr. Michael Cole that the collision occurred because the Defendant had drifted to his side of the road and that he (Michael Cole) attempted to pull on to the left on the dirt path to avoid the Defendant, is rendered highly improbable by the measurements taken by the police, the conclusions reached by the police in the police report and even by the location of the vehicles after the impact.
- [25] According to the police report, forming part of the List of Documents of both parties, the point of impact identified by the Defendant was 6 feet to the west of the 22 foot road, which would be 5 feet onto the Defendant's side of the road, while the point of impact identified by Mr. Michael Cole was 13 feet to the east side of the road, which would be 2 feet onto the Defendant's side of the road. Either way, the collision occurred on the Defendant's side of the road; and these measurements were not disputed by Mr. Cole. In fact, under cross-examination, he said that he assisted the police with the measurements. His statements made in re-examination that at the time of the impact he was at least 10 feet from the east side of the road and that at the time of the impact his vehicle occupied 10 feet of the east side of the road serve only to muddle his already unclear evidence.

- [26] The police report clearly stated that the police investigations revealed that it was the Claimant's vehicle which swerved to the right and collided with the Defendant's vehicle and that Michael Francis (now Michael Cole) appeared to be at fault. The fact too that, by all accounts, both vehicles ended up on the Defendant's side of the road is also indicative of the side of the road where the collision most likely occurred and of the direction which the heavier vehicle was facing at the time of the collision.
- [27] In other words, the evidence points to Michael Cole and not David Phillip as the driver at fault.
- [28] The Court accordingly determines that the collision which occurred at Airport Road in the Parish of Saint George on 10th May 2005 involving the Claimant's motor van and the Defendant's motor car was occasioned by the negligent driving of the Claimant's driver, Michael Cole, in that he crossed into the Defendant's lane and collided with the right front side of the Defendant's motor car, causing damage in the process to the right front fender and right front door of the car.
- [29] The Defendant has not however proved that he expended any particular sum of money on the repair of the damage to his motor car resulting from the aforesaid collision. The evidence of the receipt by the Defendant of an estimate from Alfred Titus Body Repair for damage caused totalling \$9,505 was not followed up with any evidence of the expenditure of this or any particular sum of money by the Defendant towards the repair of the damage to his vehicle. No award of special damages can therefore be made in favour of the Defendant for the cost of damage to or repair of his vehicle.
- [30] In terms of the Defendant's claim for special damages for loss of wages and medical costs arising from personal injuries sustained by him as a result of the collision, the Court can make no award to the Defendant for this because his claim for damages for personal injuries was made by virtue of a Counterclaim filed on 4th June 2008, more than 3 years after the collision. This claim would – in accordance with section 13 (1) of the Limitation Act, 1997 – have become statute barred as of 10th May 2008.

[31] The Court can and will award general damages to the Defendant in the sum of \$9,500 for damage to his motor car occasioned by the negligence of Michael Cole for which the Claimant (his employer at the time) is vicariously liable.

[32] General damages are accordingly awarded to the Defendant in the sum of \$9,500, together with interest at the rate of 5% per annum from 4th June 2008 (when the Counterclaim was filed) to the date of judgment. Costs are also awarded to the Defendant in the sum of \$1,000, which amount is deliberately low in light of the fact that the Defendant was late in filing all documents, as per the Order of Master Mathurin, and did not ever file the written closing submissions as ordered by the Court at the conclusion of the trial.

[33] The Court's order is as follows:

1. The Claimant's claim is dismissed.
2. The Defendant is awarded general damages of \$9,500.
3. The Defendant is awarded interest on the sum of \$9,500 from 4th June 2008 to 26th March 2010.
4. Costs to the Defendant in the sum of \$1,000.



Mario Michel
High Court Judge