## NATIONAL PORT AUTHORITY, by and thru its DIRECTOR, MOSES P. HARRIS, Appellant, v. CARR KPANYOR, Appellee.

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

Heard: June 17, 1981. Decided: July 30, 1981.

- 1. The theory of default judgment basically implies abandonment of all defenses including the right to representation at the trial.
- 2. The procedural requirement of deputizing a lawyer in the absence of counsel of litigant to take a ruling or judgment on his behalf, supports the view that the absent party desires to contest the issue. Where there is an abandonment of a case by a litigant, the court is not required and should not appoint a counsel to defend that party by either taking a ruling or excepting thereto.
- 3. Where an issue is not raised in the pleading by either party, it can neither be proved at the trial nor be permitted to be pleaded in the brief or argued orally before the Supreme Court. To allow a party to do so, will violate the principle of notice and waiver of defense.
- 4. Whenever a tort is proved, the evidence of negligence is implied.
- 5. Where a motion for new trial is made without any exceptions made to the verdict, a party concedes the legality of all that may have transpired at the trial up to the filing of the motion.

Appellee instituted an action of damages against the appellant in the Civil Law Court for the Sixth Judicial Circuit, in which he claimed special damages of not less than \$150.00 per day, plus general damages. Appellant failed to file an answer or to file a formal appearance. At trial, appellee prayed for a default judgment, which was granted, entered and perfected by a jury trial and a verdict brought in for appellee. Before the trial court could render final judgment on the verdict, appellant appeared and filed a motion for a new trial, which was resisted, argued and denied. From the final judgment affirming the jury verdict, appellant announced an appeal to the Supreme Court.

Appellant contended in his brief and bill of exceptions, as follows: (1) that the trial court lacked personal jurisdiction over him; (2) that the verdict was contrary to the evidence; (3) that the judge failed to appoint a counsel to receive the verdict; (4) that appellee failed to prove the negligence of appellant, and (5) that the trial judge failed to instruct the jury on the issue of contributory negligence, all of which appellant's counsel claimed to be reversible errors for the consideration of this Court.

The Supreme Court held that the trial court was under no legal duty to deputize counsel to take the ruling after appellant had abandoned the trial; that the issue of contributory negligence was not properly before the court since it was not pleaded; and that by appellant's failure to except to the verdict, it conceded the legality of all that may have transpired at the trial. Accordingly, the Supreme Court *affirmed* the judgement.

MR. JUSTICE MABANDE delivered the opinion of the Court.

On the morning of July 24, A. D. 1979, appellee, Carr Kpanyor, a businessman, drove his truck into the Freeport of Monrovia to transport a load of steel rods. While the truck was being loaded by a forklift, owned and operated by appellant National Port Authority, a bundle of the steel rods fell from the forklift and severely injured appellee Carr Kpanyor. He was hospitalized for a period of twenty-one (21) days and discharged. Thereafter, appellee Kpanyor sued appellant for the personal injuries he sustained.

In his complaint, he claimed special damages of not less than \$150.00 (one hundred fifty) dollars *per diem*, plus general damages. Appellant neither filed a responsive pleading to the complaint nor did it file its notice of formal appearance.

Nearly ten (10) months after the filing of the complaint, the case was assigned for hearing. Appellant failed to appear. A judgment by default was prayed for, entered, perfected by a jury trial, and a verdict brought in favour of appellee. Before final judgment was rendered appellant's counsel appeared and filed a motion for a new trial, which was denied and judgment entered affirming the verdict. To this judgment, appellant excepted, announced an appeal, and filed a seven count bill of exceptions.

In his brief and bill of exceptions, appellant challenged the validity of the verdict and judgment on the grounds (1) that the trial court lacked personal jurisdiction over him; (2) that the verdict was contrary to the evidence; (3) that the judge failed to

appoint a counsel to receive the verdict; (4) that appellee failed to prove the negligence of defendant, and (5) that the trial judge failed to instruct the jury on the issue of contributory negligence, all of which appellant's counsel claimed to be reversible errors for the consideration of this Court.

The theory of default judgment basically implies abandonment of all defenses including the right to representation at the trial. The procedural requirement of deputizing a lawyer in the absence of counsel of a party litigant to take a ruling or judgment on his behalf, supports the view that the absent party desired to contest the ruling or judgment. Where, however, there is an abandonment of a case by a litigant, the court is not required and should not deputize a counsel to defend that party by either taking a ruling or excepting thereto. Where an issue is not raised in the pleadings, by either party, it can neither be proved at the trial nor be permitted to be pleaded in the brief or orally before this court. To allow a party to do so, violates the principles of notice and waiver of defenses. No issue of contributory negligence was before the trial court; therefore, the judge properly avoided alluding to the same in his charge to the jury. Holder v. Teoh, 2 LLR 391 (1920); Cooper v. Republic, 13 LLR 528 (1960).

Whenever a tort is proved, the evidence of negligence is implied. Proof of a tort is evidence of some negligence.

Regarding the contention of appellant's counsel of lack of personal jurisdiction over it, appellant's counsel expressly waived this issue during his oral argument before this Court; hence, it deserves no discussion.

During his oral argument, appellant's counsel further told the Court that as he did not attend the trial, until after the verdict was entered, and to which he did not except, appellant conceded the legality of all that may have transpired at the trial up to the time of the filing of its motion for a new trial. A judgment supported by uncontradicted trial procedures, evidence and verdict, should not be disturbed by an appellate court. *Horton v. Horton*, 14 LLR 57 (1960).

We are therefore of the opinion that since appellant waived all objections to the trial and the verdict, and since the judgment only confirmed the verdict as brought in, without modifying or amending the same, it should not be disturbed.

The judgment is therefore affirmed with costs against appellant. The Clerk of this Court is hereby ordered to send a mandate to the trial court to resume jurisdiction over the case and enforce its judgment. And it is hereby so ordered.

Judgment affirmed.