

520 P.2d 191
Supreme Court of Utah.

David DALLOF, Administrator for Terry David
Dallof, Deceased, Plaintiff and Respondent,

v.

Bert ROBINSON, dba Bert Robinson &
Son Contractors, Defendant and Appellant.

No. 13369.

March 19, 1974.

Synopsis

Action by administrator for personal injuries sustained by decedent allegedly while in employ of defendant, who did not have workmen's compensation insurance. The Second District Court, Weber County, Calvin Gould, J., rendered judgment for plaintiff and defendant appealed. The Supreme Court, Ellett, J., held that evidence supported findings of negligence and that decedent was acting in course of employment and that defendant could not testify to transactions with decedent although he was called as witness by plaintiff.

Affirmed.

West Headnotes (3)

[1] Workers' Compensation

🔑 Weight and Sufficiency of Evidence

Evidence in personal injury action against defendant, who did not have compensation insurance, supported finding that plaintiff's decedent was acting in course of employment and that his injuries were caused by wrongful act, neglect or default of defendant. U.C.A.1953, 35-1-57, 35-1-58.

[1 Cases that cite this headnote](#)

[2] Witnesses

🔑 Effect of Calling or Examination as Witness by Adverse Party

That plaintiff administrator called defendant as witness in personal injury action did not entitle defendant to testify to transactions with decedent. U.C.A.1953, 78-24-2.

[1 Cases that cite this headnote](#)

[3] Appeal and Error

🔑 Actions for Personal Injuries

Defendant who did not raise in trial court contention that personal injury action could not be maintained since injured employee had filed compensation claim against defendant, who did not have compensation insurance, could not raise contention on appeal. U.C.A.1953, 35-1-58.

[1 Cases that cite this headnote](#)

Attorneys and Law Firms

*191 C. DeMont Judd, Jr., and Parley R. Baldwin,
Ogden, for defendant and appellant.

Robert A. Echard and Robert L. Neeley, Ogden, for
plaintiff and respondent.

Opinion

ELLETT, Justice:

This action was brought by the administrator of the estate of Terry David Dallof for injuries received due to claimed negligence of the defendant. The death of Terry was in no way related to the injuries complained of.

The defendant appeals from an adverse judgment in favor of the plaintiff and claims error in the following particulars:

1. The court erred in finding that Terry Dallof was acting in the course of employment.
2. The court erred in finding that Terry Dallof's injuries were caused by the wrongful act, neglect or default of defendant-appellant.
3. The court erred in failing to allow Bert Robinson to testify to transactions with the deceased.

4. The court erred in failing to dismiss plaintiff's action under Section 35-1-58, Utah Code Annotated 1953.

[1] The dispute in this case revolves about the question of whether Terry was in the course of his employment at the time he was injured. The trial judge sitting without a jury found that he was, and there was believable evidence to sustain this finding.

The defendant did not have workmen's compensation insurance, and he would be liable for his negligence which caused injury to workmen in the course of their employment and would be denied the defenses of contributory negligence, fellow-servant rule, and assumption of the risk. ¹ The statute ² also provides that 'proof of the *192 injury shall constitute prima facie evidence of negligence on the part of the employer and the burden shall be upon the employer to show freedom from negligence resulting in such injury.'

The defendant did business under the name and styled of 'Bert Robinson & Son.' He said he went as Bert Robinson until his boy got older, and then he put the name on of 'Bert Robinson & Son.' The son was not a partner. He drew money as he needed it-\$25-\$50 per week, plus child support of \$75 per month.

While the son was not a partner, he did have authority to hire and supervise employees. He and Terry Dollof were buddies, and he was teaching Terry how to operate a front-end loader. At the time of the accident Terry was 27 years of age.

The son testified at trial and on cross-examination admitted that when his deposition was taken he had testified as follows:

Q. (M)y question was who else was working for your company the day the accident happened. And what did you answer?

July 6, 1968	\$ 41.00
July 12, 1968	25.92
July 19, 1968	54.43
July 27, 1968	45.49
August 2, 1968	46.75
August 8, 1968	79.28

A. I says here I think that Terry and I were the only ones.

Q. Continue, please.

A. As far as I recall that day.

Q. Isn't it true that you testified in your deposition that that morning, the morning of the accident, that you had been backfilling a pipeline in South Ogden City?

A. Yes.

Q. Isn't it true that you testified that Terry was with you?

A. Yes, he was with me.

A. We backfilled the trench with it (the front-end loader) on the semi.

A. Apparently Terry was with me.

The son testified at trial that Terry did not work the day of the accident-that they were pals and Terry was around. However, they were to move the front-end loader and the semi truck. The son said Terry was to drive the semi and he (the son) would move the loader and that he told Terry not to drive the loader.

Terry had no license to drive, and the son knew it. Despite that testimony, the evidence was clear that the son drove the semi (he said to get coffee) and Terry drove the loader, which overturned as it was being driven off the highway down a ramp and injured Terry.

The accident occurred September 19, 1968. The defendant had given Terry checks as follows:

August 16, 1968	53.36
August 24, 1968	41.76
August 30, 1968	41.28
September 6, 1968	75.00
September 12, 1968	61.38
September 20, 1968	49.44

The trial court had ample reasons for believing and holding that Terry was in the course of his employment when he was injured.

There was also ample evidence to support the finding of the trial court that Terry's injuries were caused by the negligence of the defendant in that the hydraulic brake system of the front-end loader leaked brake fluid and would not brake properly when the fluid was low.

The defendant complains because he was not permitted to testify to transactions with the decedent, since he was called as a *193 witness by the administrator of the decedent. He apparently believes that if he is called as a witness by the administrator, he then may testify to transactions with the dead man. Our statute, [Section 78-24-2, U.C.A.1953](#), prevents a party to a civil action from testifying to matters equally within the knowledge of the witness and the deceased unless such witness is called to testify thereto by the administrator of the estate of the deceased.

[2] This statute does not mean that a party may not be called to testify to matters not pertaining to transactions with the deceased without opening up the matter so that the survivor may testify to forbidden transactions. It is when the administrator calls the survivor to testify to the transaction that the matter is opened up for further testimony in that regard. The ruling of the trial court

was correct in denying defendant the right to testify to transactions with the deceased.

The defendant now claims that the plaintiff cannot recover in this action because Terry, during his lifetime, filed a claim for workmen's compensation insurance pursuant to Section 35-1-58, U.C.A.1953. This statute permits an injured employee to file for compensation and requires an employer who does not carry workmen's compensation insurance to pay the award made within ten days after receiving notice of the same.

[3] The answer to this contention is that it was not raised in the court below, and we will not consider it on appeal. The defendant cannot ignore a proceeding which would undoubtedly have resulted in an award and defend an action at law and then if he loses his case claim that the action does not lie.

The judgment is affirmed. Costs are awarded to the respondent.

CALLISTER, C.J., and HENRIOD, CROCKETT, and TUCKETT, JJ., concur.

All Citations

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Footnotes

- 1 Sec. 35-1-57, U.C.A.1953 (1973 Pocket Supplement).
- 2 Sec. 35-1-57, U.C.A.1953 (1973 Pocket Supplement).