Employment Law - Federal Employers' Liability Act

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EMPLOYMENT LAW — FEDERAL EMPLOYERS’ LIABILITY ACT — The Supreme Court held that an employee who suffered prolonged asbestos exposure could not recover under FELA for negligently inflicted emotional distress unless, and until, the employee had manifested physical symptoms of disease.


In 1985, Michael Buckley, ("Buckley"), began working as a pipe-fitter for Metro-North Commuter Railroad Company, ("Metro-North"). Buckley repaired and maintained the pipes in the steam tunnels of the Grand Central Terminal in New York City. Prior to performing any maintenance or repair on the pipes, Buckley and the other pipe-fitters had to remove a white insulation material covering the pipes. As Buckley and his co-workers removed the insulation, it often broke into pieces, releasing dust particles into the air. Throughout the day, the dust covered Buckley’s skin and clothes and entered his nose and mouth.

Unbeknownst to Buckley, the insulation material contained asbestos, a substance widely recognized as a carcinogen since the 1970’s. Over a three-year period, from June 1985 to June 1988, Buckley was exposed to the asbestos-laden dust on an average of one hour per working day. Metro-North admitted it knew of the asbestos problem, but not until August 31, 1987 did Metro-North require the pipe-fitters to attend an asbestos awareness class, more than two years after Buckley’s exposure began. During this class, Buckley first learned that the insulation that he had been working with for several years contained asbestos. The pipe-fitters reported

2. Buckley, 117 S. Ct. at 2125 (Ginsburg, J., dissenting).
3. Id.
4. Id.
5. Id. The pipe-fitters were known as the “snowmen of Grand Central” because their bodies were completely covered with the white dust at the end of their working day. Id.
6. Id.
7. Buckley, 117 S. Ct. at 2125 (Ginsburg, J., dissenting).
8. Id. at 2116. Metro-North made the classes a requirement only after it received numerous asbestos-related citations stemming from a September 1986 fire in Grand Central Terminal. Buckley v. Metro-North Commuter R.R. Co., 79 F.3d 1337, 1340 (2d Cir. 1996).
9. Buckley, 79 F.3d at 1340. During these classes, Buckley was told that asbestos can cause several debilitating and deadly diseases such as asbestosis and lung cancer and was shown several videotapes which displayed people suffering from these diseases. Id. Buckley also received instruction on how to safely remove the asbestos and was issued a half-face
back to work and began using the removal techniques taught in the class and safety apparatus Metro-North issued them. However, because the precautions seemed futile in preventing asbestos exposure, the pipe-fitters confronted Metro-North concerning the issue of safety, but Metro-North dismissed their complaints. The workers contacted the Attorney General for the State of New York. Buckley, joined by 140 other pipe-fitters, initiated a civil suit against Metro-North.

On the advice of his attorney, Buckley received a medical evaluation, during which his doctors concluded that due to his asbestos exposure, Buckley suffered an increased risk of death from cancer or another asbestos-related disease. After learning of his lengthy exposure and increased risks of disease, Buckley became extremely fearful of developing cancer. Because of this fear, Buckley underwent periodic medical checkups for cancer and asbestosis after 1989. These checkups, however, did not reveal any signs of cancer or any other asbestos-related disease.

Buckley sued Metro-North under the Federal Employers' Liability Act, ("FELA"), seeking damages for negligently inflicted emotional distress and future medical checkups. The United States District Court for the Southern District of New York granted Metro-North's

respirator. Id.
10. Id.
11. Id. at 1341. The workers were concerned because the respirators fit poorly and the plastic gloves they were issued melted on the pipes after the insulation was removed. Id.
12. Id.
13. Id. The pipe-fitters contacted the firm because they wanted Metro-North to be held accountable for their actions. Id. Buckley's case was organized as a test case for the claims of all the pipe-fitters. Id.
14. Buckley, 79 F.3d at 1341. The two doctors who evaluated Buckley testified that even after accounting for the effects of his now discarded 15-year smoking habit, Buckley's exposure to the extremely high levels of asbestos on the job created a significant added risk of death due to cancer. Id. One doctor testified to a 1-5% increase in risk while the other testified to a 1-3% increase. Id. The doctors explained that while Buckley had no present symptoms of disease, the latency period for any of the asbestos-related diseases is more than ten years and periodic medical check-ups would greatly increase the chances of early detection and immediate treatment. Id.
15. Id. Buckley was extremely angry with Metro-North and no longer trusted his employer to provide a safe workplace. Id. As a result of the exposure, Buckley was highly concerned about developing an asbestos-related disease in his future, no longer had peace of mind, and became very stressed and overprotective of his son. Id.
16. Buckley, 117 S. Ct. at 2116.
17. Id.
18. 45 U.S.C.A. § 51 (1908). This statute holds the railroad "liable in damages" to any employee "suffering injury . . . from the negligence" of the railroad. Id.
motion for judgment as a matter of law. The district court concluded that Buckley had not satisfied the "zone of danger" test that would warrant a finding of negligent infliction of emotional distress under FELA. Under the "zone of danger" test, recovery for emotional injury is limited to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct. The court determined that Buckley had not suffered a sufficient impact from asbestos to satisfy the "zone of danger" test. In addition, the court concluded that even if Buckley had satisfied the "zone of danger" test, he had not offered any objective evidence to allow a jury to find he suffered real emotional injury. The district court did not address Buckley's claim for the costs of medical monitoring in its judgment as a matter of law in favor of Metro-North.

Buckley appealed the district court's decision to the United States Court of Appeals for the Second Circuit, which vacated the judgment and remanded the case to the district court for a jury trial. The Second Circuit determined that Buckley did suffer a physical impact from asbestos that would lead a reasonable person to fear asbestos-related cancer. The court dismissed Metro-North's

20. Buckley, 79 F.3d at 1342. "Judgment as a matter of law" may be entered against a party if the "party has been fully heard on the issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1).


22. Gottshall, 512 U.S. at 547.

23. Buckley, 79 F.3d at 1343. The district court found that Buckley had not sustained any immediate physical injury and did not present sufficient evidence to prove that he inhaled enough asbestos to create a reasonable fear of developing any asbestos-related disease, either of which is necessary to prove the genuineness of the claim. Id. The court, relying on expert testimony, concluded that the determination of an individual's actual exposure to asbestos is riddled with difficulty because it depends upon uncertainties of actual exposure time and individual sensitivity. Id.

24. Id. The court concluded that Buckley had not displayed the level of concern which would be necessary to sustain a claim for emotional injury. Id. They pointed out that he continued to work for Metro-North in the tunnels after learning of the asbestos exposure even after being given the option of transferring to a asbestos-free facility, that he continued to smoke, and that he did not show signs of worry to the doctors when he was examined. Id.

25. Id.

26. Id.

27. Id. The court found ample evidence that asbestos dust covered Buckley's skin, entering his nose, eyes, and mouth. Id. When this evidence is viewed in the light most favorable to Buckley, the evidence indicates that he suffered a massive exposure to asbestos.
argument that Buckley's exposure did not constitute a physical impact unless clinical symptoms of an asbestos-related disease developed.\(^2\) Also, the court found sufficient objective evidence of Buckley's expression of worry to permit the district court judge to send Buckley's claim to the jury.\(^2\) Finally, the court concluded that a plaintiff may recover reasonable medical expenses as a result of an injury and that, although Buckley had not yet exhibited asbestos-related disease, the costs of monitoring the effects of his asbestos exposure were reasonable and necessary expenditures.\(^3\)

The Supreme Court of the United States granted Metro-North's petition for certiorari.\(^3\) The Court reversed the judgment of the Second Circuit, holding that Buckley could not recover damages for negligent infliction of emotional distress until he manifested symptoms of an asbestos-related disease nor could he recover the cost of future medical monitoring.\(^3\)

In an opinion delivered by Justice Breyer, the majority recognized that the critical issue was whether the physical contact with the insulation dust amounted to a "physical impact," as the Court in \textit{Gottshall} used that term.\(^3\) The Court determined the contact with the dust was not a physical impact that would permit recovery for emotional distress under FELA.\(^3\) In reaching this conclusion, the majority determined that the phrase "physical impact" does not encompass an exposure to a substance that poses

\(^{28}\) \textit{Id.}, 79 F.3d at 1343. The court refused to dismiss the claim as not genuine just because Buckley's injuries are subcellular. The panel concluded that understanding the effect of asbestos is difficult, but with the help of expert testimony, a reasonable jury could find that Buckley suffered a physical impact from asbestos despite the absence of clinical symptoms. \textit{Id.} at 1344.

\(^{29}\) \textit{Id.}, 117 S. Ct. at 2116. Buckley had made several workplace complaints to his supervisors and other investigative entities. \textit{Id.}

\(^{30}\) \textit{Id.}, 79 F.3d at 1347. The court concluded that the basic law of damages allowed a plaintiff to recover past and future medical expenses incurred as a result of an injury. \textit{Id.} In this case, the evidence demonstrates that Buckley's risk of developing a disease increased significantly and future medical monitoring would be of immense value in detecting early signs or symptoms. \textit{Id.}

\(^{31}\) \textit{Id.} A "writ of certiorari" is an order issued by a higher court to a lower court requiring the production of the certified record of a particular case. The higher court will inspect the record and determine whether there were any irregularities. \textit{BLACK'S LAW DICTIONARY} 1109 (6th ed. 1990).

\(^{32}\) \textit{Id.}, 117 S. Ct. at 2120-21.


\(^{34}\) \textit{Id.} at 2117.
a future risk of disease, but is limited to instances where a threatened physical contact caused, or might have caused, immediate traumatic bodily harm.\textsuperscript{35} The Court then considered common-law precedent and determined that most common law courts have denied recovery for negligently caused emotional distress to those who are disease and symptom free.\textsuperscript{36}

The Court also decided that the public policy concerning recovery for emotional harm demands a narrow definition of "physical impact."\textsuperscript{37} This interpretation of "physical impact" led the Court to conclude that Buckley had not suffered a physical impact because he had not suffered any threat of physical contact that caused, or could have caused, immediate physical harm.\textsuperscript{38}

The majority then examined Buckley's claim for medical monitoring costs.\textsuperscript{39} In concluding that Buckley could not recover these costs, the Court reasoned that damages cannot be awarded in the absence of injury.\textsuperscript{40} The Court surmised that the Second Circuit may have based its decision on the broader ground that medical monitoring costs represent a separate economic injury for which a plaintiff may recover under FELA.\textsuperscript{41} Nevertheless, the Court dismissed the Second Circuit's analysis, finding that it extended beyond the boundaries of evolving common law on the issue of recovery of lump sum damages.\textsuperscript{42}

Justice Ginsburg concurred in part and dissented in part with the majority's view.\textsuperscript{43} She believed Buckley's contact with asbestos did constitute a "physical impact,"\textsuperscript{44} but determined that his claim for

\textsuperscript{35} Id. at 2118.

\textsuperscript{36} Id.

\textsuperscript{37} Buckley, 117 S. Ct. at 2118. These reasons include: (1) difficulty for judges to distinguish valid from invalid claims; (2) a threat of unlimited liability; and (3) the potential for a deluge of trivial claims. Id. at 2119.

\textsuperscript{38} Id. at 2121.

\textsuperscript{39} Id.

\textsuperscript{40} Id. While the Court recognized that damages could be awarded for a recognizable injury, it ruled against awarding damages because it found that Buckley had not suffered a physical impact that would allow him to recover for emotional distress under FELA. Id.

\textsuperscript{41} Id. Under tort theory, a successful plaintiff may be permitted a lump-sum recovery of medical costs. Id.

\textsuperscript{42} Buckley, 117 S. Ct. at 2124. The Court found those cases permitting "recovery for medical monitoring in the absence of physical injury do not endorse a full-blown, traditional tort law cause of action for lump-sum damages." Id. at 2122.

\textsuperscript{43} Id. at 2124 (Ginsburg, J., concurring). Justice Stevens joined in Justice Ginsburg's concurrence. Id.

\textsuperscript{44} Id. Justice Ginsburg found that Buckley's extensive contact with the asbestos on the job constituted "physical impact" as that term was used in Consolidated R.R. v. Gottshall. Id.
emotional distress should fail because he did not present sufficient evidence of severe emotional distress. Justice Ginsburg, however, would not have disturbed the Second Circuit's ruling that allowed recovery for the cost of medical monitoring.

In the dissenting portion of her opinion, Justice Ginsburg reasoned that recognition of such a claim for medical monitoring costs would place FELA in agreement with evolving common law. Justice Ginsberg concluded that the Court undervalued several state court decisions upholding recovery for medical monitoring costs. She found the majority's anticipation of a flood of unlimited liability groundless, concluding that withholding relief is a grave decision because, without monitoring, diagnosis may come too late to save many people. Finally, Justice Ginsburg pointed out that although the Court reversed Buckley's claim for relief, it remanded the case for further proceedings. By this ruling, the Court proposed, in Justice Ginsburg's view, Buckley could replead his claim and recover medical monitoring costs in a form other than a lump sum. Justice Ginsburg concluded that the Court should have found that a claim for medical monitoring is allowable under FELA.

For nearly ninety years, FELA has governed the compensation claims of railroad workers injured on the job. Congress enacted FELA to protect against dangerous conditions by holding a railroad

45. *Id.* Justice Ginsburg made this conclusion based on the fact that Buckley did not seek any professional help to ease his mental distress and presented no medical testimony concerning his mental health. *Id.* at 2125 (Ginsburg, J., concurring).

46. *Id.* at 2125 (Ginsburg, J., dissenting).

47. *Buckley,* 117 S. Ct. at 2125 (Ginsburg, J., dissenting). Justice Ginsburg pointed out that this type of medical monitoring action has been increasingly recognized by state courts as essential given the latent nature of the diseases caused by exposure to asbestos and other hazardous materials. *Id.*

48. *Id.* at 2127 (Ginsburg, J., dissenting). The Third Circuit recognized a right of compensation for monitoring the warning signs of disease and elaborated on the elements of a compensable medical monitoring claim. *In re Paoli R. Yard PCB Litigation,* 916 F.2d 829, 851 (3d Cir. 1990).

49. *Id.* at 2128 (Ginsburg, J., dissenting). Justice Ginsburg expressed doubt that many individuals will ever be able to prove that their employer negligently exposed them to a hazardous substance that substantially increased their risk of developing a deadly disease. *Id.*

50. *Id.* at 2129 (Ginsburg, J., dissenting).

51. *Id.* at 2130 (Ginsburg, J., dissenting). Justice Ginsburg believed that this leaves open whether Buckley may state a claim for relief for medical monitoring under FELA. *Id.*

52. *Buckley,* 117 S. Ct. at 2130 (Ginsburg, J., dissenting).

53. *Id.* The dissent reasoned that allowing this type of recovery will place the Court in sync with evolving common law. *Id.*

liable for the "legs, eyes, arms, and lives that it consumed in its operations." This act, however, did not make the employer an insurer; liability under FELA was predicated upon employer negligence. The statute holds railroads liable for any injuries that an employee may incur as a result of the railroad's negligence. While the statute appeared to do no more than perpetuate the common law right to recover for negligence, FELA deprived employers of the traditional tort defenses that often barred employees' recovery. The statute eliminated the fellow-servant rule, replaced contributory negligence with comparative negligence, and prohibited employers from exemption by contract. Congress later amended FELA to eliminate the defense of assumption of the risk. Consequently, injured railroad employees found it much easier to recover for employer negligence.

Although FELA was a major step forward in employee safety, injured employees still had the difficult and often impossible task of proving the negligence of their employers. The Supreme Court recognized this difficulty, liberally construing FELA during the last

55. See Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949) (Douglas, J., concurring). The purpose of the statute was to "lift from the employees the 'prodigious burden' of personal injuries which that system had placed upon them, and to relieve men 'who by the exigencies and necessities of life are bound to labor' from the risks and hazards that could be avoided or lessened 'by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work.'" Id.

56. Id.

57. 45 U.S.C.A. § 51 (1908). The statute provides that "[C]ommon carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." Id.


59. 45 U.S.C.A. § 51 (1908). The employer is liable for the negligence of its "officers, agents, or employees." Id.

60. 45 U.S.C.A. § 53 (1908). In any action by a railroad employee against his employer to recover damages for injuries, "the fact that the employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." Id.

61. 45 U.S.C.A. § 55 (1908). "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from liability created by this chapter, shall be to that extent void." Id.

62. 45 U.S.C.A. § 54 (1939). "In any action brought against any common carrier [under FELA] . . . such employee shall not be held to have assumed the risks of his employment in any case where such injury resulted in whole or in part from the negligence . . . of such carrier." Id.

63. Wilkerson, 336 U.S. at 68.

64. 45 U.S.C.A. § 51 (1908).
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fifty years to further Congress' remedial goals. In doing so, the Court has consistently held that negligence under FELA differs considerably from pure common law negligence. One of the earliest cases in which the Supreme Court deviated from common law principles was Urie v. Thompson. In Urie, a railroad worker developed silicosis through inhaling silica dust that had blown into the cabs of the locomotives in which he worked. The employee sued under FELA, alleging that the railroad negligently failed to maintain sanders on the locomotives, thereby allowing excessive amounts of silica dust to penetrate the cabs. The Court examined two questions: whether the petitioner had stated a claim for negligence under FELA, and whether the coverage of FELA included occupational diseases in addition to accidents.

The Urie majority recognized that FELA was founded on the common law concepts of negligence and injury "as established and applied in the federal courts." Negligence under FELA is a federal question because a standard definition of negligence is required, not a definition that varies from jurisdiction to jurisdiction. Using this analysis, the Court rejected the railroad's defense of compliance with industry standards, holding that a railroad is liable for negligence under FELA if it knew or should have known that the customary safety precautions were insufficient to protect an employee.

The majority then turned to whether silicosis was an "injury"

65. Gottshall, 512 U.S. at 543.
66. Id. Courts have consistently concluded that negligence under FELA is subject to a more relaxed standard. Id.
67. 337 U.S. 163 (1949). Justice Rutledge delivered the opinion of the Court. Justice Frankfurter filed an opinion concurring in the judgement in part and dissenting in part in which Justices Reed, Jackson, and Burton joined.
68. Urie, 337 U.S. at 165. "Silicosis" is a permanently disabling pulmonary disease caused by long-term continuous inhalation of silica dust. Id.
69. Id. The railroad uses a sand material consisting of 80-90% silica or silicon dioxide to provide traction for the locomotive wheels. However, the sanders (the apparatus that stores and deposits the traction material on the rails) were out of adjustment allowing excessive amounts of this sand material to be emitted, thereby causing high amounts of silica dust to be sucked into the locomotive cabs. Id.
70. Id.
71. Id. at 174.
72. Id. Because FELA is a federal statute and does not define the term negligence, federal law formulating and applying the concept governs. Id.
73. Urie, 337 U.S. at 178. The court Stated that "negligence, within the meaning of FELA, attached if [the railroad] 'knew, or by the exercise of due care should have known,' that prevalent standards of conduct were inadequate to protect ... employees." Id.
under FELA. The Court rejected the railroad’s suggestion that the common law does not recognize occupational diseases, concluding that a restriction of the term “injury” would be contrary to the statute’s plain meaning. The Court held that FELA should be liberally construed to accomplish its humanitarian purposes. The Court’s decision broadened the term “injury” beyond a harm suffered by external, violent, and accidental means to any impairment of health that an employer’s negligence over an extended period of time may cause. Justice Rutledge explained that one type of injury should not be excluded from FELA coverage simply because it takes longer for its harmful and crippling effects to become apparent.

In Rogers v. Missouri Pacific R.R. Co., the Court made another step in furtherance of Congress’ remedial goals through liberal interpretation of FELA. In Rogers, the issue was whether the Missouri Supreme Court failed to apply the appropriate concept of causation under FELA, thereby invading the proper function of the jury. The plaintiff was an employee of the railroad who was assigned to burn off the vegetation that grew on either side of the tracks. According to company rules, if Rogers heard a train coming, he was to stop burning and move away from the tracks. On the day in question, Rogers moved off the tracks, but as the train went by, it fanned the flames of the burning weeds, enveloping Rogers in smoke and flames. As Rogers tried to retreat

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74. Id. at 180.
75. Id. at 182. The Court concluded, “at common law, the incurring of a disease or harm to health warrants a recovery if the other elements of liability for the tort are present.” Id.
76. Id. at 182.
77. Id. at 180-81. The Court held that “to read into the statute a restriction as to the kind of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and constant and established course of liberal construction of the Act.” Id.
78. Urie, 337 U.S. at 187. The Court concluded that silicosis is as much an injury under FELA, which in time leads to permanent disability, as an injury which produces instant consequences. Id.
79. Id.
80. 352 U.S. 500 (1957). Justice Brennan delivered the opinion of the Court in which Justice Burton concurred. Justices Frankfurter and Harlan each filed dissenting opinions.
82. Id.
83. Id.
84. Id. While the train passed, Rogers was required to inspect it and report any problems in his journal. Id.
from the flames, he slipped on gravel, fell down the slope, and was injured.86

The Supreme Court of Missouri reversed a decision in favor of Rogers, reasoning that Rogers' inattention to the fire was the direct cause of his injuries, not any negligence by the railroad.87 The Supreme Court of the United States reversed, holding that under FELA, the test is whether the evidence shows that employer negligence played even the slightest part in producing the employee's injury or death.88 The majority determined that ample evidence existed to support a jury finding for Rogers because the railroad should have been aware that a passing train could fan the flames and create a condition in which Rogers, while performing duties required of him, would be subject to such an injury.89 The Court's holding established a relaxed standard of causation under FELA, requiring a judge to submit questions of negligence to the jury if the conclusion could be drawn that the employer's negligence contributed even slightly to the injury of the employee.90

The Court's trend of liberal interpretation and application of FELA continued in Kernan v. American Dredging Co.91 In Kernan, a seaman lost his life in a fire caused by an open-flame kerosene lantern hung in violation of a Coast Guard navigation rule.92 A wrongful death action was commenced pursuant to the Jones Act.93 The district court held that no "negligence per se" existed because the Coast Guard intended the regulation to prevent collisions, not fires.94

86. Id.
87. Id. at 504. The Supreme Court of Missouri stated that the emergency that caused plaintiff's injury was brought on by himself, i.e., that plaintiff's inattention to the fire was "something extraordinary, unrelated to, and disconnected" from any negligence on the part of the railroad. Id.
88. Id. at 506. The Court stated that it is of no consequence whether the jury may also attribute the result to other causes, including the employee's contributory negligence. Id.
89. Id. at 503.
90. Rogers, 352 U.S. at 508. The employee's burden is met and the employer must compensate for damages when there is proof, even though completely circumstantial, from which the jury may with reason make an inference that the employer's negligence played any part in the injury. Id.
91. 355 U.S. 426 (1958) Justice Brennan wrote the opinion of the court. Justice Harlan filed a dissenting opinion, in which Justices Frankfurter, Burton, and Whittaker joined.
92. Kernan, 355 U.S. at 427. The rule promulgated by the Coast Guard required that kerosene lamps be hung no lower than eight feet above the water. Id. In this case, the lamp was hung approximately three feet above the water. Id.
93. Id. at 429. The Jones Act created a federal cause of action for the wrongful death of a seaman based on the principles of FELA. Id.
94. Id. at 428. "Negligence per se" is a form of ordinary negligence that results from a
The Supreme Court rejected the plaintiff's common law "negligence per se" argument by concluding that violation of a statute creates liability under FELA, even if the injury is one that the statute was not designed to prevent.96 The Court held that the violation of a statutory duty under FELA creates liability if the defect or insufficiency in equipment "contributes to the death or injury, without regard to whether the injury was one the statute sought to prevent."96 In redefining "negligence per se" in FELA claims, the Court concluded that Congress did not intend to create a fixed and unchanging remedy, but one that would develop and evolve to meet ever-changing conditions and concepts of industry's duty toward its employees.97

The Court advanced the departure from common law negligence principles again only a few months later in Sinkler v. Missouri Pacific R.R. Co.98 In Sinkler, the Court interpreted the meaning of the term "agent" under FELA.99 Parris Sinkler, a railroad employee, was injured when the car in which he was riding collided with another car after it was negligently switched.100 The district court held that the defendant railroad could not be held liable for Sinkler's injuries because the switching crew responsible for the accident was an "independent contractor," not an "agent" of the railroad, under FELA.101 In reversing the lower court's decision, the Supreme Court held that an accommodation must be given to the word "agents," concluding that when a railroad employee is injured by the fault of others performing the normal activities of his violation of a statute or a municipal ordinance. BLACK'S LAW DICTIONARY 719 (6th ed. 1990). The conduct is treated as negligence without proof of the particular surrounding circumstances. Id.

95. Id. at 433.

96. Id. The Court concluded that liability ensues whether the employer's fault is a violation of a statutory duty or the broader duty of care because the employer owes just as much care when complying with a statutory obligation as when acting with the general duty of care. Id. at 440.


99. Sinkler, 356 U.S. at 328. The statute provides that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C.A. § 51 (1908).

100. Id. at 326. The switching crew caused the collision with another car in the train yard by switching the car onto the wrong track. Id.

101. Id. at 328. The switching crew was employed by Houston Belt & Terminal Railway Company and not the defendant, Missouri Pacific R.R. Id. at 326.
employer under contract, such others are considered "agents" under FELA.102

Although these cases demonstrate the liberal evolution of FELA jurisprudence in the Supreme Court, the issue in Metro-North v. Buckley (whether negligent infliction of emotional distress is cognizable under FELA) was not considered until 1987 in Atchison, Topeka and Santa Fe Ry. Co. v. Buell.103 In Buell, a car-man employed by the railroad suffered severe emotional injuries as a result of harassment and intimidation that the railroad condoned and approved.104 Unfortunately, the Supreme Court did not decide in Buell whether purely emotional injuries are cognizable under FELA because the Court found the trial court record insufficiently developed.105 In reaching this conclusion, the Court stated that the issue "is not necessarily an abstract point of law or a pure question of statutory construction that might be answerable without exacting scrutiny of the facts of the case."106 The Court concluded that the answer depended on many factors, including the extent of injury and nature of the injury-causing activity.107

Seven years later, in Consolidated Rail Corp. v. Gottshall,108 the Court again addressed whether negligent infliction of emotional distress is compensable under FELA.109 In Gottshall, the plaintiff sued Conrail under FELA for negligent infliction of emotional distress after suffering major depression and post-traumatic stress disorder.110 Gottshall was part of a work crew assigned to replace a length of defective track on an extremely hot day.111 Because the

102. Id. at 329, 331. The Court acknowledged that FELA was an avowed departure from the rules of the common law and that its purpose was to promote "the welfare of both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden." Id. at 330 (citing S. Rep. No. 60-460, at 3 (1908)).
103. 480 U.S. 557 (1987). Justice Stevens delivered the opinion for a unanimous Court.
104. Buell, 480 U.S. at 559.
105. Id. at 564. Although the issue was not raised by either party in the district court, the United States Court of Appeals for the Ninth Circuit raised the issue of whether emotional injuries were compensable under FELA. The Supreme Court found the facts were insufficient for either the Ninth Circuit or the Supreme Court to decide this issue. Id.
106. Id. at 568.
107. Id.
110. Id. at 537.
111. Id. at 535.
crew was behind in its work, the foreman discouraged the men from taking frequent breaks.\textsuperscript{112} One worker, who was a longtime friend of Gottshall's, collapsed, turned pale, and began sweating profusely.\textsuperscript{113} The other workmen ran to his assistance and administered cold compresses, but after they revived him, the crew supervisor ordered the men to stop assisting and return to work.\textsuperscript{114} Shortly thereafter, Gottshall saw his friend stand up and collapse again.\textsuperscript{115} Recognizing that his friend was having a heart attack, Gottshall began cardiopulmonary resuscitation.\textsuperscript{116} The supervisor then attempted to call for help, but found his radio inoperative because Conrail had temporarily taken the nearest base station off the air.\textsuperscript{117} By the time help arrived, the victim had died.\textsuperscript{118} They covered the body and the foreman ordered the men back to work until the coroner arrived several hours later.\textsuperscript{119} Shortly after the funeral of his friend, Gottshall was admitted to a psychiatric institution and diagnosed with major depression and post-traumatic stress disorder.\textsuperscript{120}

In his complaint, Gottshall alleged Conrail's negligence created the conditions that caused him to witness and participate in the events surrounding his friend's death.\textsuperscript{121} Relying on the analysis and conclusions of its prior FELA decisions, the Court turned to the common law to consider the right of recovery for emotional distress.\textsuperscript{122} The majority determined that although common-law principles are not conclusive in determining FELA recovery, courts accord them considerable weight unless FELA expressly rejects such principles.\textsuperscript{123} FELA does not address the issue of negligent

\textsuperscript{112} \textit{Id.} at 536.
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Gottshall}, 512 U.S. at 536. The crew supervisor initially did nothing to assist the collapsed worker. \textit{Id.}
\textsuperscript{115} \textit{Id.} at 536.
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.} The base station was taken off the air for repairs; however, the crew supervisor had no knowledge that this was the case and was not provided with alternative means of communicating in case of an emergency. \textit{Id.}
\textsuperscript{118} \textit{Id.} After failing to raise anyone on the radio, the crew supervisor drove off to get help from paramedics. \textit{Id.}
\textsuperscript{119} \textit{Gottshall}, 512 U.S. at 536.
\textsuperscript{120} \textit{Id.} Gottshall experienced nausea, insomnia, cold sweats, and repetitive nightmares concerning the death. \textit{Id.} He lost a great deal of weight and suffered from suicidal tendencies and anxiety. \textit{Id.} at 537.
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.}
\textsuperscript{123} \textit{Id.} The Court concluded that only to the extent of explicit statutory alterations is FELA a departure from the rules of common law. \textit{Id.}
infliction of emotional distress and, therefore, common-law principles play a significant part in a court's decision.\textsuperscript{124} The Court determined that many states already acknowledged a right to recover for negligent infliction of emotional distress when Congress enacted FELA in 1908.\textsuperscript{125} Moreover, the Court looked to the broad scope of the term "injury" and found no reason that the term should not embody emotional distress.\textsuperscript{126} For these reasons, the majority concluded that FELA allowed claims for negligent infliction of emotional distress.\textsuperscript{127}

Although the right to recover for emotional distress is universally recognized, no jurisdiction allows for the recovery of all emotional harms.\textsuperscript{128} In recognizing that limitations need to be placed on the right to recover for this tort, the Court looked to common law tests for evaluating claims of emotional distress: the "physical impact" test, the "zone of danger" test, and the "relative bystander" test.\textsuperscript{129}

Under the physical impact test, to recover for negligent emotional injury, a plaintiff must prove that he sustained a physical impact due to the defendant's conduct.\textsuperscript{130} The Court determined that when Congress enacted FELA in 1908, most industrial states utilized this test.\textsuperscript{131} Ninety years later, most states have abandoned the physical impact test.\textsuperscript{132}

The majority then considered the "zone of danger" test.\textsuperscript{133} This test limits recovery for emotional injury "to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct."\textsuperscript{134} The Court ascertained that fourteen states currently follow the "zone of danger" test.\textsuperscript{135}

The final test considered by the majority was the relative

\textsuperscript{124} Gottshall, 512 U.S. at 544.
\textsuperscript{125} Id. at 550.
\textsuperscript{126} Id. See supra notes 74-79 and accompanying text.
\textsuperscript{127} Id.
\textsuperscript{128} Gottshall, 512 U.S. at 545.
\textsuperscript{129} Id. at 545. The policy reasons behind these limiting tests cited by the Court included: (1) a potential for a flood of trivial claims; (2) no limit to the number of persons who might suffer emotional trauma as a result of one negligent act; and (3) the incidence and gravity of emotional injuries are more difficult to evaluate because they hinge on psychological factors. Id.
\textsuperscript{130} Id. at 547.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Gottshall, 512 U.S. at 547.
\textsuperscript{134} Id. at 547-48. More briefly stated, "those within the zone of danger of physical impact can recover for fright, and those outside cannot." Id.
\textsuperscript{135} Id.
bystander test. Under this test, recovery is predicated on whether the defendant could have reasonably foreseen the emotional injury to the plaintiff. The plurality recognized three significant factors that determine reasonable foreseeability in such cases: (1) the proximity of the plaintiff to the scene of the accident; (2) whether the emotional shock was a result of the plaintiff observing the accident; and (3) the intimacy of the relationship between victim and plaintiff. The Court acknowledged that nearly half the states have adopted this test in allowing recovery for emotional injury.

After evaluating all three tests, the Court recognized that the "zone of danger" test is more progressive than either the physical impact test or the relative bystander test and, therefore, would be more in harmony with the broad remedial goals of FELA. The majority determined that the "zone of danger" test is consistent with FELA's focus on physical and emotional dangers as well as the historically liberal FELA jurisprudence. The Court rejected the physical impact test because it did not want recovery for emotional injury to be set aside simply because physical impact did not occur. The majority disregarded the relative bystander test because the test limited recovery to persons who witnessed the injury or death of a close family member. Therefore, the Court held that although negligent infliction of emotional distress is cognizable under FELA, emotional distress constitutes an "injury" under FELA only when it satisfies the "zone of danger" test.

After reviewing the Supreme Court's FELA jurisprudence, it is clear that the Buckley Court has reversed the trend toward liberalizing FELA interpretation. FELA was enacted to protect employees of the railroad from the dangerous conditions of the industry and, for the last fifty years, the Supreme Court has

136. Id. See Dillon v. Legg, 441 P.2d 912 (1968) (rejecting the "zone of danger" test in favor of a new test that turned on reasonable foreseeability, i.e., the "relative bystander" test.)
138. Id. at 548.
139. Id. at 549.
140. Id. at 545.
141. Id. at 556. The Court concluded that the term "injury" as used in FELA refers to both physical and emotional injuries and that the zone of danger test best provides for both under any given circumstance. Id.
142. Gottshall, 512 U.S. at 556. The physical impact test also has less support under current common law than does the zone of danger test (only five states continue to use this test). Id.
143. Id. The Court also pointed out that this test lacks historical support because it was not developed until 60 years after FELAs enactment. Id.
144. Id. at 555.
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construed FELA liberally to further the goals of Congress. However, in this case, the Supreme Court has clearly halted that progress.

Although FELA cases have consistently broadened the instances in which injured railroad workers can recover, the Buckley Court’s decision has narrowed recovery under FELA by restricting the types of contact that constitute physical impact under the “zone of danger” test. The Court concluded that physical impact under the “zone of danger” test does not include a “simple physical contact with a substance [in this case, asbestos], that might cause a disease at a substantially later time, where the substance . . . threatens no harm other than that disease-related risk.” This conclusion is faulted, erroneous, and destructive to the Court’s liberal interpretation of FELA cases.

The Court’s first error was in the classification of Buckley’s exposure to asbestos as a “simple physical contact.” As recognized by the Second Circuit, Buckley’s contact with the asbestos-laden insulation dust was “massive, lengthy and tangible” and took place one hour per day for three full years. The Court’s conclusion also rejects the analysis in Urie. In Urie, the plurality concluded, “the mere difference in time required for different acts of negligence to take effect and disclose their disabling consequences should not exclude one type of injury from FELA’s coverage.” Therefore, the fact that Buckley is disease-free at this point should have had no bearing on the Court’s decision.

The majority further erred in its justification of this conclusion. The Court determined that common law precedent does not favor recovery by those who are disease and symptom-free. However, the majority seemed to disregard cases that directly support Buckley because the highest court of the state did not decide them. The decision to dismiss these cases is in direct opposition to this Court’s historically liberal treatment of FELA cases by repudiating the humanitarian goals of FELA and contradicting previous decisions. The Court in Kernan expressly stated that Congress

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145. Buckley, 117 S. Ct. at 2117.
146. Id. at 2116.
147. Urie, 337 U.S. at 187.
148. See Watkins v. Fibreboard Corp., 994 F.2d 253, 259 (5th Cir. 1993) (holding that the jury need not find any current asbestos related disease and may believe that the plaintiff will never suffer from an asbestos related disease, yet still award damages for the fear of one day suffering from an asbestos related disease so long as the fears is reasonable in light of the nature of the exposure). See also In re Moorenovich, 634 F. Supp. 634 (D. Me. 1986); Gerardi v. Nuclear Util. Serv., Inc., 566 N.Y.S.2d. 1002 (Westchester County 1991).
intended "the creation of no static remedy, but one that would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers." Furthermore, in *Gottshall*, Justice Souter, in his concurrence, concluded that the Court's duty, in interpreting FELA, is to "develop a federal common law of negligence under FELA, informed by reference to evolving common law" so that Congressional intent for liberal recovery by injured workers could be furthered. This Court's decision to disregard those cases that support Buckley is in clear opposition to its previous rulings and the purpose of FELA.

While it is unclear whether the Court's decision will trigger a movement away from the liberal treatment of FELA, it is evident that the *Buckley* decision has sidetracked a fifty-year crusade to improve industrial safety and hold railroads economically accountable for their injury-causing negligence. Nonetheless, until the Supreme Court seizes the opportunity to correct its grave mistake, those afflicted with emotional distress as a result of massive asbestos exposure will be unable to recover for their employers' negligence.

*Anthony Lamanna*

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149. Kernan, 356 U.S. at 432.
150. Gottshall, 512 U.S. at 558-59.