IN THE SUPREME COURT OF IOWA

No. 23-1154

Polk County NO. LACL15115

KERA MORGAN,
ADMINISTRATOR/PERSONAL REPRESENTATIVE
OF THE ESTATE OF PHILLIP RAYMOND MORGAN, DECEASED,

Plaintiff/Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, a Delaware corporation,

Defendant/Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
THE HONORABLE SCOTT D. ROSENBERG, JUDGE

PLAINTIFF/APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

George F. Davidson, Jr. AT0001915
LAW OFFICE OF GEORGE F. DAVISON, JR., LC
2746 Lynner Drive, Des Moines, Iowa 50310
Telephone 515-250-1553; Facsimile: 515-864-0110
gfdavison@georgedavisonlaw.com

Paul Slocomb, PHV002803
Blunt Slocomb, Ltd.
1115 Locust Street, 4th Floor, St. Louis MO 63101
Telephone: 314-753-4364; Fax: 314-231-0323
paulslocomb@yahoo.com

ATTORNEYS FOR PLAINTIFF/APPELLANT, KERA MORGAN,
ADMINISTRATOR/PERSONAL REPRESENTATIVE
OF THE ESTATE OF PHILLIP RAYMOND MORGAN, DECEASED

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page**

Other Sources

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The standard of review for all issues is for errors of law.

CASES

Goodpaster v. Schwan's Home Serv., Inc., 849 N.W.2d 1 (Iowa 2014)

Jones v. Univ. of Iowa, 836 N.W.2d 127 (Iowa 2013)

Phillips v. Covenant Clinic, 625 N.W.2d 714 (Iowa 2001)

Pillsbury Co. v. Wells Dairy, Inc., 752 N.W.2d 430 (Iowa 2008)

Pitts v. Farm Bureau Life Ins. Co., 818 N.W.2d 91 (Iowa 2012)

STATUTES

Iowa R. Civ. P. 237(c)

Iowa R. Civ. P. 1.981(3)

The trial court erred when it concluded that Phillip Morgan's injury was an emotional injury as opposed to a physical injury resulting in death as part of its decision to grant Union Pacific's Motion for Summary Judgment.

CASES

Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994)

Fletcher v. Union Pacific Railroad Company, 621 F.2d 902 (8th Cir. 1980)

Fonseca v. Conrail, 246 F.3d 585 (6th Cir. 2001)

Harvey v. CSX Transportation, Inc., 23 F.3d 401 (4th Cir. 1994)

Lancaster v. Norfolk & Western Ry Co., 773 F.2d 807 (7th Cir. 1985)

Mix v. Delaware & Hudson Ry. Co., 345 F.3d 82,
cert. denied 540 S.Ct. 1183 (2nd Cir. 2003)

Sabalka v. BNSF Railway Co., 54 S.W.3d 605 (Mo.App.W.D. 2001)

Smith v. States Marine Internat'l, Inc., 864 F.2d 410 (5th Cir. 1989)

Smith v. Union Pacific Railroad Company, 236 F.3d 1168 (10th Cir. 2000)

Urie v. Thompson, 337 U.S. 163 (1949)

STATUTES

45 USC 51

45 USC 56

The trial court erred when it concluded that the *Gottshall* "zone of danger test" applied to Phillip Morgan's suicide as part of its decision to grant Union Pacific's Motion for Summary Judgment.

CASES

Atcheson, T. & S.F.R. C. v. Buell, 480 U.S. 557 (1987)

Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994)

Delise v.Metro-North, 646 F.Supp.2d 288 (D. Conn. 2009)

Gottshall v. Conrail, 988 F.2d 355 (3rd Cir. 1993)

Halko v. N.J. Transit, 677 F.Supp. 135 (S.D.N.Y. 1987)

Hotema v. United States, 186 U.S. 413 (1902)

Kahler v. United States, 140 S.Ct. 1021 (2020)

Kivland v. Columbia Orthopedic Group, 331 S.W.3d 299 (Mo. 2011)

McBride v. CSX Transportation, Inc., 564 US 685,
131 S.Ct. 2630 (2011)

Michigan Central R. Co. v. Vreeland, 227 U.S. 59 (1913)

Nelson v. Seaboard Coast, 398 So.2d 980 (Fla. 1st Dist. 1981)

Urie v. Thompson, 337 U.S. 163 (1949)

OTHER SOURCES

Restatement of Torts (Second) Sections 313, 436, 436A and 455

Restatement of Torts (Third)

"Abolishing the Suicide Rule", Alex B. Long,
Northwestern University Law Review, Vol. 1113: No 4 (2019)

The trial court erred when it concluded that the facts of this case did not meet the "zone of danger test" as part of its decision to grant Union Pacific's Motion for Summary Judgment.

CASES

Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994)

Gottshall v. Conrail, 56 F.3d 530 (3rd Cir. 1995)

Marzocchi v. Long Island Railroad Co.,
13-CV-7097 (E.D.N.Y. July 12, 2016)

ROUTING STATEMENT

Under Iowa R. App. P. 61101, this Court should retain and review this interlocutory appeal, which raises, inter alia, the following issues of first impression in the state of Iowa:

Whether suicide is a physical or emotional injury in a Federal Employers Liability Act wrongful death claim?

Whether the "Zone of Danger" test applies in a Federal Employers Liability Act wrongful death suicide claim?

Under Rule 6.1101(2), this Court "ordinarily retain[s]" review in cases presenting: "…(c)… substantial issues of first impression[;] (d) … fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the supreme court[;]… [and] (f) … substantial questions of enunciating or changing legal principles." Iowa. R. App. P. 6.1101(2)(c), (d) and (f). These subsections apply here.

NATURE OF THE CASE

Kera Morgan ("Ms. Morgan"), the Personal Representative of the Estate of Phillip Morgan ("Phillip") has brought this Federal Employers Liability ("FELA") wrongful death case pursuant to 45 U.S.C. 51, *et seq*. against Phillip's employer, Union Pacific Railroad Company ("Union Pacific"). Phillip committed suicide on August 18, 2018. Phillip was employed by Union Pacific at the time of the suicide and during the course and scope of his employment with Union Pacific his supervisor created an unsafe workplace that ultimately caused Phillip to commit suicide.

On April 11, 2023, Union Pacific filed a motion for summary judgment; Ms. Morgan filed her resistance to the motion for summary judgment on May 1, 2023, and May 10, 2023. A hearing on the motion was held on May 19, 2023. Summary Judgment was granted in favor of Union Pacific on June 27, 2023, and this timely appeal followed.

STATEMENT OF FACTS

On August 18, 2018, Phillip committed suicide. (Appx. 6). The course of events was put in motion by Phillip's supervisor, Michael Tomka ("Mr. Tomka") and Phillip's employer, Union Pacific's, negligence. Specifically, Union Pacific negligently failed to provide Phillip with a reasonably safe place to work;

negligently failed to provide Phillip with adequate and appropriate supervision; and negligently failed to adequately staff its Engineering Department with enough qualified welders and welder helpers. *Id*. (Appx. 8).

Phillip was devoted to his family; he strived to be home after work every day. (Appx. 268). Phillip was also a workaholic. *Id*. (Appx. 362). Besides his family, Phillip did not have many outside interests; he was not involved in church or social organizations. *Id*. Phillip worked most of the day at Union Pacific and tended some calves that he and Ms. Morgan raised on their land in Mapleton, Iowa. *Id*. Phillip's work ethic was not surprising to either Phillip or Ms. Morgan, who both lived paycheck to paycheck their entire lives. *Id*. (Appx. 341). Although Phillip's life was mostly work related, for the majority of his career, he never brought work home with him. *Id*. (Appx. 362). This changed the few months prior to his suicide. Ms. Morgan testified that she and Phillip spent their nights discussing his work, specifically his supervisor Mr. Tomka. (Appx. 408). Approximately three weeks prior to Phillip's death, he left for work as he normally would, but soon returned home, in the words of his wife, deeply frazzled. (Appx. 280, 283). Ms. Morgan insisted they go to the hospital where Phillip diagnosed with anxiety and insomnia. The note from the hospital stated that Phillip complained of long-term stress from his job because others were being laid off.

(Appx. 43, 716). Phillip was prescribed Lexapro for his anxiety and Trazodone for his insomnia. Id. at (Appx. 43, 717).

Phillip originally joined the Engineering Services/Track Department at Union Pacific in 1998. (Appx. 20). Phillip began his career with Union Pacific as a Welder, but Phillip bid for the welder helper position because he did not want to have the additional responsibilities that came with the welder position. (Appx. 405, 677, 671, 406, 705, 699, 725, 692, 706, 729). The Welder helper position took place overwhelmingly in red zones, where the employee is within an arms' length of a track or any other physical position which places the employee in a life-threatening situation. (Appx. 404, 405, 676, 670, 494, 677, 671).

The Welder Helper job is a safety sensitive position. (Appx. 407, 702). If the job is not performed correctly the safety of the coworkers and public are put at risk of injury, including death. (Appx. 404, 676). Railroad welding tasks involve activities that are potentially extremely dangerous and that is why Union Pacific has so many rules, regulations, procedures and protocols. (Appx. 404, 670).

Union Pacific's rules indicate that "Every job or task will have its own set of red zones." (Appx. 404, 670, 494) According to Union Pacific Rules, the "Red Zone" is "that area within an arms' length of a track or any physical position which places the employee in a life-threatening situation." (Appx. 404, 494). Being in the red zone puts Phillip in danger of being hit by moving equipment. (Appx. 405,

677). Even when the rules are implemented and followed to reduce the risk, such as providing track protection for welders, the grave risk is not eliminated. (Appx. 405, 677). Mr. Tomka himself has been disciplined in the past for releasing track protection when another gang was still working on those tracks, thereby putting the entire gang at risk in the red zone without track protection. (Appx. 405, 673, 674, 681). Mr. Tomka conceded that those mistakes do happen. (Appx. 405, 681). Union Pacific's rules mandate that its employees remain alert and attentive at all times to avoid injury. (Appx. 405, 484).

Union Pacific is part of a national organization with the sole purpose of analyzing deaths that occur by those working in the red zone on the tracks. (Appx. 406, 684, 685, 497, 500, 686, 687, 526).

When Phillip bid for the welder helper position, the traveling required for the job corresponded to the headquartered location for the employee which generally corresponded to where the worker lived. (Appx. 407, 408, 566, 565). Phillip was headquartered in Clinton, Iowa, which is in the Western territory for Iowa. Id. at (Appx. 408, 505, 509). The Western territory of Iowa was often short staffed with welders. Id. at (Appx. 406, 647, 688). Mr. Tomka was Phillip's supervisor. (Appx. 404, 670, 494). Phillip repeatedly complained to his wife about Mr. Tomka. (Appx. 406, 705, 699, 725, 692, 706, 729). According to Ms. Morgan, Mr. Tomka would require more welds to be completed than Phillip and his crew

were capable of doing. Id. When the crew failed to complete the necessary welds, Mr. Tomka would harass Phillip about the incomplete work. (Appx. 265). Ms. Morgan alleges that when Phillip complained to Mr. Tomka about being overworked Mr. Tomka transferred his crew to work in Eastern Iowa. (Appx. 268). According to a work note made by Phillip in his journal, Mr. Tomka told him the reason for the transfer was because there was not enough work in the area for Phillip's crew. (Appx. 304, 305, 486). However, a crew from Eastern Iowa was sent out to Western Iowa to do work around the same time as Phillip was sent East. Phillip did not like to be away from his family, so this meant he was traveling upwards of three hours each way to get to and from work each day. (Appx. 268). Ms. Morgan also testified that Phillip discussed Mr. Tomka repeatedly asking him to become a welder rather than stay a welder helper. (Appx. 350).

Compounding the effects of 7 hours of travel to and from work each day, Phillip told Ms. Morgan that he did not trust his welder to work safely and told Ms. Morgan that he believed that the welder was going to get someone hurt. Id. at (Appx. 272). Mr. Tomka also mandated that Phillip's welding gang use tents in windy weather conditions. Id. at (Appx. 321, 322). Phillip told Ms. Morgan that he was very concerned about one of the gang members getting hit by a train since there would be no way to see a train approaching if they are in the tent. Id. at Appx. 321, 322).

Ron Christiansen was a Section Foreman for UP Welding Gang 3448 stationed in Carroll, Iowa and was one of Phillip's good friends. (Appx. 409, 559, 560). Phillip spoke to Christiansen about the problems Phillip was having with Mr. Tomka. (Appx. 410, 560). The friction was stemming from the expectations of welding production that Mr. Tomka had put on Phillip's gang. (Appx. 410, 560). Christiansen described this as especially bad in the spring of 2018 as high winds created an increased risk of fire because all the grass is dead. (Appx, 410, 560). Christiansen even brought these concerns that Phillip had to the attention of Tomka's supervisors. (Appx. 410, 560). Christiansen specifically recalls speaking to Mr. Tomka's supervisor the Friday before RAGBRAI that year and told him that Phillip believes Mr. Tomka was out to get him and the supervisor responded that "they're just trying to meet their goals.[1] (Appx. 410, 560). Christiansen told the supervisor that he thought "someone should talk to Phil." (Appx. 410, 561). Christiansen was Phillip's good friend and Phillip did not ever mention any stressful issues at home but he did about Mr. Tomka at work. (Appx. 410, 560, 561)

Union Pacific employee Benton Warnke was a union representative for the Brotherhood of Maintenance of Way Employees. (Appx. 410, 659). Warnke was

[1] In 2018 RAGBRAI was July 22-28, and started in Council Bluffs

the senior employee in the local work group and was the local union lodge president and when there was an issue with management, Warnke would speak on behalf of the workers. (Appx. 410, 659). Warnke noticed that Phillip, who was normally a "bubbly" person, seemed "beaten down." (Appx. 411, 659). Warnke asked Phillip what was going on and Phillip told him that Mr. Tomka "was messing with him." (Appx. 411, 659). Warnke spoke to Mr. Tomka's direct supervisor Jason Cheney about Mr. Tomka's treatment of Phillip. (Appx. 411). Warnke asked Mr. Cheney why Mr. Tomka was moving the western Iowa welding gangs east and moving the eastern Iowa welding gangs west. (Appx. 411, 659). Mr. Cheney responded that the welding gangs "needed to start…cooperating." (Appx. 411, 659). On May 8, 2018, Warnke spoke directly to Mr. Tomka and asked him to stop harassing Phillip. (Appx, 411, 554). Mr. Tomka responded by telling Warnke that Phillip "needs to bid the welder position." (Appx. 411, 659). Warnke told Mr. Tomka that Phillip was a welder helper and that he had previously chosen to stop being a welder. (Appx. 411, 659). Warnke asked Mr. Tomka to back off the pressure on Phillip as it was becoming overbearing. (Appx. 411, 659). Mr. Tomka responded that "Phil was soldier, and he is a soldier and he needs to start stepping up to the plate and doing what they want him to do." (Appx. 411, 660). Mr. Tomka was aware of Phillip's prior military service. (Appx. 416, 674, 675).

Phillip was re-assigned back to his home territory on July 17, 2018. (Appx. 412, 441). Phillip's coworkers noticed a change in his demeanor once he came back from working in Eastern Iowa. (Appx. 412, 660).

Chris Gatton (Mr. Gatton) was a welder in the same gang as Phillip. (Appx. 749, 758, 759, 761). Mr. Gatton considered Phillip to be a work friend and loved working with Phillip. Id. at (Appx. 749, 759, 761, 750, 761). Mr. Gatton described Mr. Tomka as harassing their gang and taking it out on Phillip in particular. Id. at (Appx. 750, 760, 751, 760, 761). Specifically, Mr. Gatton noted that Mr. Tomka would get after them for not making enough welds. Mr. Gatton also described Mr. Tomka taking Phillip aside on several occasions to talk to him alone; Phillip always returned to the gang with a noticeable change in his demeanor. Id. at (Appx 751, 760, 761). Phillip would become quiet and not his usual talkative self. When Gatton asked Phillip what was wrong, Mr. Gatton was told that Mr. Tomka threatened to fire Phillip. Id. at (Appx. 751, 760). By Mid-July 2018, Mr. Gatton noticed a permanent change in Phillip's demeanor. Id. at (Appx. 752, 763). After Phillip moved back to western Iowa and began working with gang 3481, Warnke noticed that Phillip was not himself, and believed that Phillip need psychological help because something was really bothering him. Id. at (Appx. 412, 441, 660).

Gatton currently works in the same position as a welder. (Appx. 751, 764). Gatton described the difference in philosophy between his current supervisor and Mr. Tomka back in 2018:

> [The current supervisor] "is go out there and do what you can do, get done, try to make your two welds, but do it safely, where Tomka was do your three welds and get them done, got to have three welds no matter what." (Appx. 764).

(Appx 751, 764). Gatton explained that "We'd get an overstay if we have the track too long and I'd try to get it done before our time is up so that they can move the train safely, you know, but I wanted to do a proper job too. I don't want to mess anything up when I'm doing the weld." (Appx. 751, 761). Gatton reported Mr. Tomka's behavior to his own supervisor. (Appx. 751, 763). Gatton's supervisor told him that he would speak to Mr. Tomka's supervisor. (Appx. 761).

On the night of Phillip's death, Phillip got up and went to a hill overlooking his land where he and Ms. Morgan would talk with one another at the end of the day. Phillip did not come back home.

Ms. Morgan has retained a psychiatric expert who provided his opinion as follows:

> Based on my review of the above materials it is my opinion to a reasonable degree of medical certainty that Phillip Morgan's suicide was a direct result of the stress and harassment he underwent for months at work culminating with his self-inflicted gunshot wound on August 18, 2018. I concur with Dr. Charrlin's diagnosis of anxiety and insomnia. Unfortunately, both of these symptoms continued to

> worsen after his July 24, 2018, visit with Dr. Charrlin. It is well documented in the literature that chronic insomnia as well as anxiety can lead to a psychotic type state and be associated with self-harm behaviors.
>
> My review of the materials you provided, particularly his coworkers and wife's description of his personality traits strongly suggests that Mr. Morgan was a mission driven, ethical family man with a highly developed sense of responsibility and duty. Unfortunately, these somewhat rigid personality traits did not serve him well when confronted with the persistent harassment, bullying and threats he endured by primarily from Mr. Tomka. The tragic end result of these actions was unfortunately almost predictable. During the last month of his life, Mr. Morgan would, in my opinion, have been an immediate risk to himself and his colleagues as a result of the deterioration in his mental state. Besides the severe anxiety symptoms, his chronic sleep deprivation would adversely affect his judgment, focus and concentration and make it dangerous for him to work around moving trains. Putting increased pressure on a gentleman who has already been recognized by his supervisors and coworkers to be "not himself" is in effect a disaster waiting to happen. In summation, it is my opinion to a reasonable degree of medical certainty that Phillip Morgan's suicide was directly caused by the harassment, bullying and pressure he endured from his supervisor in the weeks and months leading up to his demise.

(Appx 416, 638).

ARGUMENT

Standard of Review

The standard of review for the ruling on the Summary Judgment motion in this case is for errors at law. *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717 (Iowa 2001). A district court properly grants summary judgment when there is no

genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id*.; Iowa R. Civ. P. 237(c).

Summary judgment is only appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); *Goodpaster v. Schwan's Home Serv., Inc.*, 849 N.W.2d 1, 6 (Iowa 2014). The burden is on the moving party to show the nonexistence of a material fact. *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 434 (Iowa 2008). In determining whether summary judgment is appropriate, the court shall consider the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. Iowa R. Civ. P. 1.981(3). We must view the facts "in the light most favorable to the nonmoving party" and "draw all legitimate inferences the evidence bears in order to establish the existence of questions of facts." *Jones v. Univ. of Iowa*, 836 N.W.2d 127, 140 (Iowa 2013) (quoting *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 96-97 (Iowa 2012)).

BRIEF POINT ONE: The trial court erred when it concluded that Phillip's injury was an emotional injury as opposed to a physical injury resulting in death as part of its decision to grant Union Pacific's Motion for Summary Judgment (p. 8, Opinion)

The heart of the FELA is spelled out 45 USC 51 which provides:

> Every common carrier by railroad while engaging in commerce between any of the several States …shall be liable in damages to **any person suffering injury** while he is employed by such carrier in such commerce, **or, in case of the death of such employee, to his or her personal representative**…**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, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

(emphasis added). The FELA statute itself makes a clear distinction between a FELA claim for wrongful death and a FELA claim for personal injury. Ms. Morgan has brought a wrongful death claim. (Appx. 6). The only injury alleged is death from suicide. (Appx 8). Indeed, Ms. Morgan has not brought a Survival Action for Phillip's pre-suicide injuries as she could have done pursuant to 45 U.S.C. 56.

The Court in *Gottshall v. Conrail* determined whether recovery for negligent infliction of emotional distress is available under FELA. 512 U.S. 532, 541 (1994).

Gottshall defined a "mental or emotional injury" as "mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and this is not directly brought about by a physical injury, but that may manifest itself in physical **symptoms**. 512 U.S. 532, 544 (1994)(emphasis added). Death by suicide is a physical injury resulting in death. Death by suicide is not a physical symptom. Phil Morgan's death by suicide is the injury alleged to be sustained as a result of Defendant's negligence.

The trial court's analysis hinges on the incorrect assumption that Phillip suffered an emotional injury, as opposed to a physical injury resulting in death. It is based upon this assumption that the trial court incorrectly concluded that the

"zone of danger test" as articulated by the U.S. Supreme Court in *Gottshall*, applies and requires Plaintiff to prove he suffered a physical impact or that he was in imminent danger of a physical impact. 512 U.S. 532 (1994).

The trial court relied upon the *Smith v. Union Pacific Railroad Company*, case that held that the *Gottshall* test looks to the substance of the injury and the nature of the railroad's conduct to determine whether its test is met. *Smith v. Union Pacific Railroad Company*, 236 F.3d 1168, 1171 (10th Cir. 2000). In *Smith* the injuries in question were a sleep disorder, insomnia and anxiety. *Id*. at 1170. In this case it is Phillip's death by suicide.

Where Morgan and the trial court differ is the characterization of the symptoms preceding the final act of suicide. The trial court concluded that Morgan's symptoms of insomnia and anxiety were part of the injury itself.

FELA case law makes a clear distinction between a physical injury and physical symptoms. *Urie v. Thompson*, 337 U.S. 163 (1949); *Fletcher v. Union Pacific Railroad Company*, 621 F.2d 902, 906 (8th Cir. 1980); See also *Fonseca v. Conrail*, 246 F.3d 585 (6th Cir. 2001). *Mix v. Delaware & Hudson Ry. Co.*, 345 F.3d 82, *cert. denied* 540 S.Ct. 1183 (2nd Cir. 2003). *Harvey v. CSX Transportation, Inc.*, 23 F.3d 401 (4th Cir. 1994) *Smith v. States Marine Internat'l, Inc*., 864 F.2d 410 (5th Cir. 1989); *Lancaster v. Norfolk & Western Ry Co.*, 773 F.2d 807 (7th Cir. 1985); *Sabalka v. BNSF Railway Co.*, 54 S.W.3d 605, 610 (Mo.App.W.D. 2001). It

is true that none of the foregoing cases involve emotional injuries or suicide, but the point is that these cases support the notion that Phillip's insomnia and anxiety leading to suicide were akin to aches and pains that ultimately lead to a more pronounced physical condition.

In *Gottshall*, the Court noted that the issue presented was "determining under what circumstances emotional distress may constitute "injury" resulting from "negligence" for purposes of the statute." 512 U.S. at 542. The *Gottshall* Court considered the cases of two railroad workers by the names of Gottshall and Carlisle. Carlisle was a train dispatcher. *Id.* at 539. Train dispatchers serve the equivalent function as an air traffic controller, and they are never physically in the red zone. As a train dispatcher, Carlisle was not exposed to the everyday perils that Phillip faced performing welds on the rails and in the red zone. Carlisle's core complaint was that he "had been given too much—not too dangerous—work to do." 512 U.S. at 558. Phillip, on the other hand, was subjected to an unsafe working environment and it was this environment and the resultant effect that led to his demise.

The trial court noted "what do we do we make of Phillip's anxiety and insomnia?" (Appx. 820) The simple answer is that Ms. Morgan has brought a claim for wrongful death, not an injury.

BRIEF POINT TWO: The trial court erred when it concluded that the *Gottshall* "zone of danger test" applied to Phillip's suicide as part of its decision to grant Union Pacific's Motion for Summary Judgment (Appx. 821).

Even if Phillip's suicide was an emotional injury, the "zone of danger" test should not be the test for recovery. The *Gottshall* case did not address suicide. The cases relied upon by the *Gottshall* Court in adopting the "zone of danger test" did not address suicide. The U.S. Supreme Court has not addressed a suicide claim under FELA. No Federal Appellate Courts have addressed whether the "zone of danger test" applies to a suicide claim under the FELA.

The *Gottshall* Court explained the policy underpinnings for the adoption of the Zone of Danger test for negligent infliction of emotional distress claims. The Court noted that "the common law restricts recovery for negligent infliction of emotional distress on several policy grounds: the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability. 512 U.S. 532, 557 (1994). The policy basis' for the adoption of the "Zone of Danger" test have no logical applications to Death by suicide cases. Clearly, and thankfully, Death by Suicide is a rare occurrence, and therefore it is safe to say no flood gates will be opened. Nor can Death by Suicide be considered a trivial or questionable injury.

Gottshall also raised a concern that the acts of negligence may be too far removed, temporally, from the injury itself. 512 U.S. 532, 545-546 (1994).

Respectfully, it should be noted that one of the seminal and most oft-cited FELA cases is *Urie v. Thompson Ry. Co.*, 337 U.S. 163, 16-187 (1949) and it holds:

> "In our view, when the employer's negligence impairs or destroys an employee's health by requiring him to work under conditions likely to bring about such harmful consequences, the injury to the employee is just as great when it follows, often inevitably, from a carrier's negligent course pursued over an extended period of time as when it comes with the suddenness of lightning. …We do not think the mere difference in the time required for different acts of negligence to take effect and disclose their harmful, disabling consequences would justify excluding the one type of injury from the Act's coverage or that such an exclusion would be consistent with its language, purposes, or unvarying standards of construction.

It is also important to note that the U.S. Supreme Court has recently addressed the policy concerns raised by its predecessor Court in *Gottshall:*

> In addition to the constraints of common sense, FELA's limitations on who may sue, and for what, reduce the risk of exorbitant liability. As earlier noted, the statute confines the universe of compensable injuries to those sustained by employees, during employment. § 51. Hence there are no unforeseeable plaintiffs in FELA cases.

McBride v. CSX Transportation, Inc., 564 U.S. 685 (2011). Moreover, damages for Wrongful Death under the FELA are severely circumscribed and are limited to pecuniary losses. Claims for funeral expenses, loss of society, loss of consortium and loss of care, companionship and comfort are not permitted. *Michigan Central R. Co. v. Vreeland*, 227 U. S. 59 (1913).

The Zone of Danger test adopted in *Gottshall* was a refinement of Restatement of Torts (Second) Sections 313, 436 and 436A. See, *Gottshall v. Conrail*, 988 F.2d 355,361 (3rd Cir. 1993). None of those Restatement Sections pertain to death by

suicide. Restatement of Torts (Second) Section 455 pertaining to Suicides was not discussed in the *Gottshall* decision. Restatement of Torts (Second) Section 455 provides:

> Acts Done During Insanity Caused by Negligent Conduct
>
> If the actor's negligent conduct so brings about the delirium or insanity of another as to make the actor liable for it, the actor is also liable for harm done by the other to himself while delirious or insane, if his delirium or insanity
> (a) Prevents him from realizing the nature of his act and the uncertainty or risk of harm involved therein, or
> (b) Makes it impossible for him to resist an impulse caused by his insanity which deprives him of his capacity to govern his conduct in accordance with reason.
>
> Illustration: A negligently injures B. The injuries cause insanity which takes the form of suicidal mania. While suffering in this condition, B locks his door to prevent interference and cuts his throat with a knife which he has secreted and sharpened for that purpose. A's negligence is the legal cause of B's death or other harm resulting from his cutting his throat.

As noted by Plaintiff's expert, Dr. Sky:

> Based on my review of the above materials it is my opinion to a reasonable degree of medical certainty that Phillip Morgan's suicide was a direct result of the stress and harassment he underwent for months at work culminating with his self-inflicted gunshot wound on August 18, 2018. I concur with Dr. Charrlin's diagnosis of anxiety and insomnia. Unfortunately, both of these symptoms continued to worsen after his July 24, 2018, visit with Dr. Charrlin. It is well documented in the literature that chronic insomnia as well as anxiety can lead to a psychotic type state and be associated with self-harm behaviors.
>
> During the last month of his life, Mr. Morgan would, in my opinion, have been an immediate risk to himself and his colleagues as a result

> of the deterioration in his mental state. Besides the severe anxiety symptoms, his chronic sleep deprivation would adversely affect his judgment, focus and concentration and make it dangerous for him to work around moving trains. Putting increased pressure on a gentleman who has already been recognized by his supervisors and coworkers to be “not himself” is in effect a disaster waiting to happen.

(Appx 416, 638). Dr. Sky’s opinions, coupled with the evidence and testimony from Ms. Morgan, the coworkers and Union Pacific’s own managerial employees, make it clear that the facts of the case fit squarely within the test outlined in the Restatement. As such, the issues in this case are for the jury to decide.

Courts construing the FELA have consistently held that a personal representative can recover under the FELA for the suicide death of the employee if the railroad's wrongful conduct was a cause, in whole or in part, of his/her suicide. As in this case, in *Nelson v. Seaboard Coast*, 398 So.2d 980 (Fla. 1st Dist. 1981), the plaintiff alleged that the employee's suicide was caused, in whole or in part, by the employer's negligent supervision of its managers. Recognizing that the FELA liability included injury or death caused "as a result of gradual development of disease" and the majority common law view that negligently inflicted suicide is actionable "if the negligent wrong causes mental illness which results in an uncontrollable impulse to commit suicide," the Court held that the plaintiff stated a claim under the FELA.

In *Halko v. N.J. Transit*, 677 F.Supp. 135 (S.D.N.Y. 1987), the plaintiff also claimed that the railroad's negligence in failing to properly hire, train and supervise

its management was a cause, in whole or in part, of a railroad employee's suicide. Again similar to the claims in this case, the railroad allowed management to harass the employee that resulted in significant safety issues. The Court recognized that it was "not dealing with a totally emotional injury since there was in fact a physical consequence albeit a delayed reaction." Because the plaintiff presented evidence showing that the railroad was aware of the character and propensities of the supervisors who preyed on the employee, it held that the employee's suicide was foreseeable. Because the common law allowed recovery for suicide when there is an uncontrollable impulse to take one's life caused by mental anguish caused by the defendant's wrongful conduct, the Court followed *Nelson* and denied summary judgment. The *Halko* Court also noted "if Halko's suicide was the result of mental anguish which prevented him from exercising restraint from truly understanding his actions, it was not a superseding cause thereby breaking the causal link. "The Court concluded "the question of whether the state of mind led to an uncontrollable impulse is far from clear and therefore is for a jury to determine." *Id*. at 142.

In *Delise v.Metro-North*, 646 F.Supp.2d 288, 291 (D. Conn. 2009), the Court refused to enter summary judgment on the plaintiff's FELA suicide claims because "genuine issues exist as to whether negligent supervision by [the railroad] played a part in [the employee's] death, and as to whether [the employee's] suicide was the result of an 'uncontrollable impulse.'" As in the case at bar, Delise's widow

"didn't see it coming." *Delise*, Plaintiff's Memorandum in Opposition, p. 25 ECF No. 69 (July 21, 2018). As in the case at bar, no suicide note was left behind. *Delise*, Plaintiff's Memorandum in Opposition, p. 26 ECF No. 69 (July 21, 2018). As in the case at bar, no advanced purchase of a firearm was made. *Delise*, Plaintiff's Memorandum in Opposition, p. 26 ECF No. 69 (July 21, 2018). As in the case at bar, no advanced discussions of suicide were had. *Delise*, Plaintiff's Memorandum in Opposition, p. 26 ECF No. 69 (July 21, 2018). While in *Delise,* alcohol contributed to the psychosis, Dr. Sky opines that Phil Morgan's sleep deprivation contributed to his psychosis. *Delise*, Plaintiff's Memorandum in Opposition, p. 26 ECF No. 69 (July 21, 2018); Exhibit 72.

Despite the fact that the exception to the suicide rule has been part of tort law for over a century, courts are not at all consistent in the application of the exception. See, e.g. *Kivland v. Columbia Orthopedic Group*, 331 S.W.3d 299, 309 (Mo. 2011)(noting problems with the rule as "demonstrated by the various ways" courts have applied it).

A convincing argument has been made by some a recent commentator that Courts should abolish the suicide rule. See e.g., "Abolishing the Suicide Rule", Alex B. Long, Northwestern University Law Review, Vol. 1113: No 4 (2019). As noted by the author "the exception is a relic from a time when suicide was not well understood, when societal attitudes on the subject were quite different, and when

suicide remained a crime. The exception has always primarily reflected a view of fault or lack thereof on the part of a decedent. Now that nearly every state has adopted a system of comparative fault, decisions as to the fault of the decedent are better dealt with as part of this analysis."

It should also be pointed out that the "irresistible impulse" requirement was imported into the suicide rule from the Criminal Law and the insanity defense to murder charges. *Hotema v. United* States, 186 U.S. 413 (1902). Even the use of the "irresistible impulse" doctrine in Criminal Law is in question and is only one of 4 "strains" "for when to absolve mentally ill defendants of criminal culpability." *Kahler v. United States*, 140 S.Ct. 1021, 1025 (2020). The *Kahler* acknowledged that insanity "involves evolving understandings of mental illness." *Id. at 1023.*

The *Gottshall* Court stated that "common-law principles," where not rejected in the text of the statute, "are entitled to great weight" in interpreting the Act, and that those principles "play a significant role" in determining whether, or when, an employee can recover damages for "negligent infliction of emotional distress." 512 U.S. at 544. A Court's duty "in interpreting FELA . . . is to develop a federal common law of negligence . . . informed by reference to the evolving common law"); *Atcheson, T. & S.F.R. C. v. Buell*, 480 U.S. 557 (1987). FELA jurisprudence gleans guidance from common-law developments. *Urie v Thompson*, 337 U.S. at 174. Indeed, it is noteworthy that while the Reinstatement (Third) of Torts

references some of the decisions involving suicide and proximate cause but Section 455 pertaining to Irresistible Impulse does not even appear in the Third Restatement. To the extent it has even been recognized formally, the time has come to abandon the suicide rule in FELA cases and simply apply the long-standing rules of FELA recovery for physical injuries.

BRIEF POINT THREE: The trial court erred when it concluded that the facts of this case did not meet the "zone of danger test" as part of its decision to grant Union Pacific's Motion for Summary Judgment (Appx. 823)

The trial court concluded that "there is no factual dispute that Phillip was ever in a zone of danger" as plaintiff merely asserts that Phillip "worked his career in the red zone." (Appx. 823).

The Gottshall opinion is instructive on this point. The US Supreme Court remanded the *Gotshall* case to the 3rd Circuit which then determined that *Gotshall* was not in the zone of danger because *Gotshall* was working "within the bounds of conditions under which Conrail crews were expected to work," that *Gottshall* "did not contend that the conditions under which he was working violated any work rules" or that "any negligent act was committed by Conrail." *Gottshall v. Conrail*, 56 F.3d 530, 535, n. 7. (3rd Dir. 1995). That is not the situation in the case at bar. Substantial evidence has been presented that Union Pacific, primarily through the acts of Mr. Tomka, negligently failed to provide Phillip with a reasonably safe place to work.

The Welder Helper job is a safety sensitive position. (407, 72-73). The job itself involves daily situations where Phillip was put at risk of injury, including death. (Appx. 404, 676). Union Pacific itself defines the area where Phillip works as the "Red Zone" which places the employee in life-threatening situations. (Appx. 404, 494). Union Pacific's welding staff was shorthanded in Iowa. (Appx. 406, 647). Mr. Tomka harassed Phillip about becoming a welder again. (Appx. 406, 705, 699, 725, 692, 706, 729). Mr. Tomka's focus was on meeting production goals on the number of daily welds as opposed to safely performing the welds in a non-rushed situation. (Appx. 406, 705, 699, 725, 692, 706, 729). Co-worker Gatton described Mr. Tomka as harassing their gang for not getting enough welds done on a daily basis and that Mr. Tomka would take it out on Phillip in particular. (Appx. 750, 760, 751, 760, 761).

Gatton currently works in the same position as a welder. (Appx. 751, 764). Gatton described the difference in philosophy between his current supervisor and Mr. Tomka back in 2018:

> [The current supervisor] "is go out there and do what you can do, get done, try to make your two welds, but do it safely, where Tomka was do your three welds and get them done, got to have three welds no matter what." (Appx. 764).

(Appx. 751, 764). Gatton explained that "We'd get an overstay if we have the track too long and I'd try to get it done before our time is up so that they can move the

train safely, you know, but I wanted to do a proper job too. I don't want to mess anything up when I'm doing the weld." (Appx. 751).

When Phillip refused to become a welder again, Mr. Tomka relocated Phillip's gang to Eastern Iowa, thereby requiring Phillip to travel 7 hours a day to and from work. (Appx. 268). Compounding the effects of 7 hours of travel to and from work each day, Phillip told Ms. Morgan that he did not trust his welder to work safely and told Ms. Morgan that he believed that the welder was going to get someone hurt. Id. at (Appx. 272). Mr. Tomka also mandated that Phillip's welding gang use tents in windy weather conditions. Id. at (Appx. 321, 322). Phillip told Ms. Morgan that he was very concerned about one of the gang members getting hit by a train since there would be no way to see a train approaching if they are in the tent. Id. at (Appx. 321, 322). Co-worker Ron Christiansen corroborated this concern. (Appx. 410, 560). Christiansen brought these concerns that Phillip had to the attention of Mr. Tomka's supervisors. (Appx. 410, 560).

Phillip's union representative also notified Mr. Tomka and Mr. Tomka's supervisors of the safety concerns that were created by Mr. Tomka's treatment of Phillip. (Appx. 410, 411, 659). Mr. Tomka's supervisor responded that the welding gangs "needed to start…cooperating." (Appx, 411, 659). Mr. Tomka responded by telling Warnke that Phillip "needs to bid the welder position" and that "Phil was soldier, and he is a soldier and he needs to start stepping up to the plate and doing

what they want him to do." (Appx. 411, 554, 659). Mr. Tomka was aware of Phillip's prior military service. (Appx 416, 674, 675).

Phillip was re-assigned back to his home territory on July 17, 2018. (412, 441). Phillip's coworkers noticed a change in his demeanor once he came back from working in Eastern Iowa. (Appx 412, 441, 660, 752, 763).

This evidence is further buttressed by what Phillip shared with his wife, in what Phillip shared with a health care professional less than a month prior to the suicide, and what Ms. Morgan told the ambulance personnel at the scene about work stress.

Union Pacific's rules mandate that its employees remain alert and attentive at all times to avoid injury. (Appx. 405, 484). Phillip's ability to remain alert and attentive was compromised by the acts of Union Pacific by and through Mr. Tomka. The effect upon Phillip is described in the report of Dr. Adam Sky, which indicates:

> My review of the materials you provided, particularly his coworkers and wife's description of his personality traits strongly suggests that Mr. Morgan was a mission driven, ethical family man with a highly developed sense of responsibility and duty. Unfortunately, these somewhat rigid personality traits did not serve him well when confronted with the persistent harassment, bullying and threats he endured by primarily from Mr. Tomka. The tragic end result of these actions was unfortunately almost predictable. During the last month of his life, Mr. Morgan would, in my opinion, have been an immediate risk to himself and his colleagues as a result of the deterioration in his mental state. Besides the severe anxiety symptoms, his chronic sleep deprivation would adversely affect his judgment, focus and

> concentration and make it dangerous for him to work around moving trains. Putting increased pressure on a gentleman who has already been recognized by his supervisors and coworkers to be "not himself" is in effect a disaster waiting to happen. In summation, it is my opinion to a reasonable degree of medical certainty that Phillip Morgan's suicide was directly caused by the harassment, bullying and pressure he endured from his supervisor in the weeks and months leading up to his demise.

See, *Marzocchi v. Long Island Railroad Co.*, 13-CV-7097 (E.D.N.Y. July 12, 2016)(importance of expert psychiatric opinion of connection between mental condition and fear of safety). Dr. Sky's opinion about imminent danger due to Phillip's mental condition should be considered in light of the testimony of Ms. Morgan and the Union Pacific employees. This case should be submitted to the jury.

CONCLUSION

Plaintiff prays this Honorable Court reverse the district court's Order granting Union Pacific Railroad Company's Motion for Summary Judgment, and remand for a trial on the merits.

REQUEST FOR ORAL ARGUMENT

Plaintiff requests oral argument.

/s/ George F. Davison, Jr.
George F. Davison, Jr. AT0001915
LAW OFFICE OF GEORGE F. DAVISON, JR., LC

2746 Lynner Drive, Des Moines, Iowa 50310
Telephone 515-250-1553; Facsimile: 515-864-0110
gfdavison@georgedavisonlaw.com

/s/ Paul T. Slocomb
Paul Slocomb, PHV002803
Blunt Slocomb, Ltd.
1115 Locust Street, 4th Floor
St. Louis MO 63101
Telephone: 314-753-4364; Fax: 314-231-0323
paulslocomb@yahoo.com

ATTORNEYS FOR PLAINTIFF, KERA MORGAN, ADMINISTRATOR/PERSONAL REPRESENTATIVE OF THE ESTATE OF PHILLIP RAYMOND MORGAN, DECEASED

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 7,516 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App.R. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

/s/s Paul T. Slocomb 11/27/23
Date

CERTIFICATE OF SERVICE

I, Paul T. Slocomb, admitted as a Pro Hac Vice member of the Bar of this Court in good standing, hereby certifies that on November 27, 2023, I or a person acting on my behalf served the above Plaintiff/Appellant's Proof Brief and Request for Oral Argument to all attorneys of record via electronic mail in full compliance with the Iowa Rules of Appellate Procedure and Iowa Rules of Civil Procedure.

/s/ Paul T. Slocomb

CERTIFICATE OF FILING

I, Paul T. Slocomb, admitted as a Pro Hac Vice member of the Bar of this Court in good standing, hereby certifies that I, or a person acting on my behalf and under my direction, did file the attached Plaintiff/Appellant's Proof Brief and Request for Oral Argument upon the Clerk of the Iowa Supreme Court via the Court's electronic filing system on this 27th day of November 2023.

/s/ Paul T. Slocomb