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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 REPLY FINAL BRIEF

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Reply to Appellee's Argument

Union Pacific's brief contains a discussion of the *Ferguson v. CSX Transportation, Inc.*, 36 F.Supp.2d 253 (E.D.Pa. 1999) and *Crown v. Union Pacific Railroad Company*, 162 F.3d 984 (8th Cir. 1998) cases. Neither of those decisions address suicide claims.

Union Pacific describes Mr. Morgan's death by suicide as a "physical symptom" and argues that there is a "thin distinction" between suicidal thoughts and the physical act of suicide. (p. 26-27, Appellee's Proof Brief) Respectfully, the difference between being alive and dead is not a thin distinction. Union Pacific's position ignores the scientific evidence that while at least 90% of those that die by suicide have mental disorders, only 5 to 8% of those with mental disorders actually commit suicide. See, e.g., 2018, Vol 15, *Int. J. Environ. Res. Public Health*. And it should go without saying that being dead is not a symptom, it is a permanent state of non-being.

Union Pacific claims that the Court in D*elise* did not mention *Gottshall* and therefore, it should be ignored. To the contrary, D*elise* did not address *Gotshall* because *Gottshall* did not address a suicide claim. 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.

Union Pacific's reliance upon the Barilla decision is misplaced. In *Barilla v. Atchison, Topeka*, 635 F.Supp. 1057 (D. Ariz. 1986), the Court held that a railroad employee's suicide caused by his/her railroad employer's negligence is *never* actionable under the FELA. However, *Barilla* should not be followed. Despite the existence of *Nelson*, the Court incorrectly held that no court had decided "any FELA case in which recovery for suicide ... has been permitted." Moreover, the *Barilla* Court cited no authority for its conclusion. Notably, the *Halko* Court

refused to follow *Barilla* precisely because it was not based on any reasoning or authority. Finally, the *Barilla* Court's conclusion that "suicide by a railroad employee is not a proximate cause cognizable in an FELA action nor intended to be remedied by the FELA" is in direct conflict with the Supreme Court's recent admonition in that the stricter "proximate cause" standard is not applicable under the FELA.

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.

Reliance on *Marazzato v. Burlington N. R.R.*, 817 P.2d 672 (Mont. 1991) is unavailing because that case itself is factually distinguishable from *Nelson, Halko, Delise*, and the case at bar. Significantly, *Marazzato* simply addressed whether Plaintiff failed to present sufficient evidence that the railroad knew or should have known that the working conditions could have resulted in foreseeable harm to plaintiff. *Id*. at 673. *Marazzato* involved an employee who had mental problems

unrelated to employment and was pushed over the edge by normal workplace stress. There simply was no wrongful conduct in *Marazzato* that caused the mental injury and suicide.

Fulk is readily distinguishable from this case. *Fulk v. Norfolk Southern Ry Co,*, 1:13cv234 (July 4, 2014 M.D.N.C. 2014). The Court granted Defendant's Motion to Dismiss finding that "the Complaint does not allege that he was ever threatened imminently with physical impact." Notably, the Plaintiff's submission in opposition to the Motion to Dismiss did not make any arguments to the contrary. *Fulk v. Norfolk Southern Ry Co,*, Plaintiff's Brief in Opposition, ECF No. 20 (June 24, 2013). The *Fulk* Court provided no analysis whatsoever in concluding that "a self-inflicted injury under the circumstances described in this case cannot be used to circumvent the zone of danger test." The Plaintiff's brief in the *Fulk* case argued that the suicide rule in Section 455 test applied. The *Fulk* Court concluded that the zone of danger test applied and therefore, in effect, rejected Plaintiff's claim that the suicide rule in Section 455 applied. Finally, the *Fulk* decision is not controlling on this Court. See, *Hawkins v. Steingut*, 829 F.2dd 317, 319 (2d Cir. 1987)(A District Court decision does not establish the law in its own circuit, let alone other circuits).

Union Pacific claims, without authority, that wrongful death is not a separate claim from a survival action under the FELA. (p. 8, Appellee's Proof Brief) In fact,

the FELA creates two separate causes of action which may apply in the event of the death of a seaman or railroad worker: personal injury or wrongful death (45 U.S.C. § 51). An action for personal injury survives the death of the railroad employee (survival action) (45 U.S.C. § 59). These types of actions are separate and distinct from each other. *Miller v. Foster Wheeler Co.*, 993 P.2d 917, 920 (Wash.Ct.App. 1999)(citing *Van Beeck v. Sabine Towing Co.*, 300 U.S. 342, 347, 57 S.Ct.452 (1937).

When the injured employee is deceased, the statute thus creates two separate claims that the employee's personal representative may bring: (1) a wrongful death claim pursuant to § 51; and (2) a survival claim pursuant to § 59. The two claims constitute "two distinct and independent liabilities, resting, of course, upon the common foundation of a wrongful injury, but based upon altogether different principles." *Michigan Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 65 (1913). The United States Supreme Court explained the relationship between the two claims as follows:

> [T]he personal representative is to recover on behalf of the designated beneficiaries, not only such damages as will compensate them for their own pecuniary loss [in the wrongful death claim], but also such damages as will be reasonably compensatory for the loss and suffering of the injured person while [the employee] lived [in the survival claim]. Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other.

Id. Phillip committed suicide. Ms. Morgan has brought a claim for wrongful death under the FELA. No survival action has been alleged.

As for the irresistible impulse test, criminal law concepts developed more than 150 years ago to address the issue of one's capacity to commit a criminal act resulting in death should not be the guide to an assessment of the issues in this case. Should the "irresistible impulse" test that is used to determine if a criminal defendant should bear responsibility for the death of another be used to determine if a suicide caused by work-related safety issues is compensable ?

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.

The state of Iowa has followed this trend. In 1959, Iowa adopted the irresistible impulse test. *Schofield v.* White, 250 Iowa 571, 581 (1959). 34 years

later, the Iowa Supreme Court explained the long held doubts of the continuing efficacy of the "irresistible impulse" rule and specifically dispensed with the rule in the 1993 decision of *Kostelac v. Feldman's, Inc.*, 497 N.W.2d 853, 857 (Iowa 1993). In Kostelac, the employee that committed suicide after a period of calm and at a time when his "mood seemed to lighten unexpectedly." Id. at 855. The Iowa Supreme Court noted:

> In the intervening years since *Schofield*, society's heightened understanding of mental illness has prompted most jurisdictions to move away from the doctrine's harsh reliance on proof of "uncontrollable impulse" or "delirium of frenzy." It has generally been replaced as majority rule by a chain-of-causation test in which compensability turns upon proof that an employment-related injury caused the deranged mental state, which, in turn, caused the suicide…. Critics of the former rule point out that it required a claimant to prove the deceased employee meet the *McNaughton* standard of insanity, thereby mixing a criminal law concept with a civil action…Application of the doctrine has also tended to result in compensation for suicide committed in bizarre or violent ways ("delirium or frenzy") while denying compensation in those cases where the unbearable agony breaks the will but leads undramatically to a solitary death."

Id. at 856-857. The irresistible impulse test has also been rejected in cases under Federal Workers Compensation laws such as the Longshore and Harbor Worker's Compensation Act. *Kealoha v. Director, Office of Workers Compensation*, 713 F.3d 521, 524-525 (9th Cir. 2013).

The irresistible impulse test grew out of the criminal law to address whether a person accused of killing someone did so with the adequate *mens rea* for

criminal culpability. This test is an antiquated, worn-out relic of the past century and has no place in modern FELA jurisprudence. Analysis of Ms. Morgan's claim should be conducted under the traditional FELA physical injury analysis.

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.

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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 2064 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* 02/13/24
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 February 13, 2024, I or a person acting on my behalf served the above Plaintiff/Appellant's Reply Proof brief 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 Reply Proof Brief upon the Clerk of the Iowa Supreme Court via the Court's electronic filing system on this 13th day of February 2024.

/s/ Paul T. Slocomb