ELECTRONICALLY FILED FEB 22, 2024 CLERK OF SUPREME COURT

No. 23-1154

IN THE SUPREME COURT OF IOWA

KERA MORGAN, *Administrator/Personal Representative of the Estate of* PHILLIP RAYMOND MORGAN, *deceased*,

Plaintiff-Appellant,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant-Appellee,

On Appeal from the District Court for Polk County
Case No. LACL151115
The Hon. Scott D. Rosenberg, District Judge

FINAL BRIEF OF DEFENDANT-APPELLEE

J. Timothy Eaton
Jonathan B. Amarilio
Benjamin S. Morrell
TAFT STETTINIUS & HOLLISTER LLP
111 East Wacker Drive
Suite 2600
Chicago, IL 60601
Tel.: (312) 527-4000
Fax: (312) 527-4011
teaton@taftlaw.com
jamarilio@taftlaw.com
bmorrell@taftlaw.com

R. Todd Gaffney (AT0002657)
Joseph F. Moser (AT0011413)
FINLEY LAW
699 Walnut Street
Suite 1700
Des Moines, IA 50309
Telephone: (515) 288-0145
Facsimile: (515) 288-2724
tgaffney@finleylaw.com
jmoser@finleylaw.com

Counsel for Defendant-Appellee

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 3
STATEMENT OF ISSUES 6
ROUTING STATEMENT 9
STATEMENT OF THE CASE 9
STATEMENT OF FACTS 12
ARGUMENT 16

I. Because Plaintiff substantively alleges emotional rather than physical harm, she asserts a claim of negligent infliction of emotional distress. 19
  A. Error preservation 19
  B. Scope and standard of review 19
  C. Argument 20
    1. Overview of the FELA 20
    2. The district court correctly analyzed Mr. Morgan's injury as emotional rather than physical 22

II. Controlling Supreme Court precedent requires analyzing Plaintiff's claim using the "zone of danger" test 29
  A. Error preservation 29
  B. Scope and standard of review 29
  C. Argument 29

III. Plaintiff's claim fails because Mr. Morgan was never placed in the zone of danger by Union Pacific's negligent conduct 38
  A. Error preservation 38
  B. Scope and standard of review 38
  C. Argument 38

CONCLUSION 45

TABLE OF AUTHORITIES

Cases **Page(s)**

Balt. & Ohio S.W.R. Co. v. Carroll,
280 U.S. 491 (1930) 20

Barilla v. Atchison, Topeka & Santa Fe Ry. Co.,
635 F. Supp. 1057 (D. Ariz. 1986) 32

Consol. Rail Corp. v. Gottshall,
512 U.S. 532 (1994) .... *passim*

Crown v. Union Pac. R.R. Co.,
162 F.3d 984 (8th Cir. 1998) 39

CSX Transp., Inc. v. McBride,
564 U.S. 685 (2011) 21

Delise v. Metro-N. R.R. Co.,
646 F. Supp. 2d 288 (D. Conn. 2009) 32, 34

Epelbaum v. Elf Atochem, N. Am., Inc.,
40 F. Supp. 2d 429 (E.D. Ky. 1999)... 31

Matter of Estate of Gearhart,
584 N.W.2d 327 (Iowa 1998) 20

Ferguson v. CSX Transp.,
36 F. Supp. 2d 253 (E.D. Pa. 1999) 44, 45

Fulk v. Norfolk S. Ry. Co.,
35 F. Supp. 3d 749 (M.D.N.C. 2014) ....*passim*

Gallimore-Wright v. Long Island R.R. Co.,
354 F. Supp. 2d 478 (S.D.N.Y. 2005) 44

Halko v. N.J. Transit Rail Operations, Inc.,
677 F. Supp. 135 (S.D.N.Y. 1987) 32, 34

James v. City of Boise,
577 U.S. 306 (2016) 32

Lager v. Chi. Nw. Transp. Co.,
122 F.3d 523 (8th Cir. 1997) 21

Marazzato v. Burlington N. R.R. Co.,
817 P.2d 672 (Mont. 1991) 33

Marlin v. BNSF Ry. Co.,
No. 4:14-CV-00098-JEG, 2015 WL 11121702 (S.D. Iowa June 23, 2015) 42

Nelson v. Seaboard Coast Line R.R. Co.,
398 So.2d 980 (Fla. Dist. Ct. App. 1981).............................32, 34

Norfolk & W. Ry. Co. v. Ayers,
538 U.S. 135 (2003) 38

Pitts v. Farm Bureau Life Ins. Co.,
818 N.W.2d 91 (Iowa 2012) 43

Roberts v. CSX Transp., Inc.,
No. 1:06-CV-00169, 2006 WL 1763640 (N.D. Ind. June 26, 2006) 43

Rollins v. Wackenhut Servs., Inc.,
703 F.3d 122 (D.C. Cir. 2012).. 36

Slaughter v. Des Moines Univ. Coll. of Osteopathic Med.,
925 N.W.2d 793 (Iowa 2019) ....*passim*

Smith v. Union Pac. R.R. Co.,
236 F.3d 1168 (10th Cir. 2000) ....*passim*

Snipes v. Chi., Cent. & Pac. R.R. Co.,
484 N.W.2d 162 (Iowa 1992) 20, 21

Tennant v. Peoria & Pekin Union Ry.,
321 U.S. 29 (1944) 21

Urie v. Thompson,
337 U.S. 163 (1949) 37

Van Gorner v. Grand Trunk W. R.R., Inc.,
509 F.3d 265 (6th Cir. 2007) 20

Watters v. TSR, Inc.,
904 F.2d 378 (6th Cir. 1990) 31

Williams v. Nat'l R.R. Passenger Corp.,
161 F.3d 1059 (7th Cir. 1998) 21

Zimmer v. Vander Waal,
780 N.W.2d 730 (Iowa 2010) 19

Statutes

45 U.S.C. § 51..9, 20, 28

Other Authorities

Iowa R. App. P. 6.1101 9

Iowa R. Civ. P. 1.981 ....19, 43

Iowa R. Evid. 5.801 43

Restatement (Second) of Torts § 455 (1965).......................31, 33, 34

STATEMENT OF ISSUES

I. Plaintiff alleges that Union Pacific's negligence caused Mr. Morgan to develop insomnia and anxiety, and that these mental disorders caused his suicide, which occurred at home. Did the district court err in finding Plaintiff alleged an emotional rather than physical injury resulting from the railroad's negligence?

Balt. & Ohio S.W.R. Co. v. Carroll, 280 U.S. 491 (1930).

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

CSX Transp., Inc. v. McBride, 564 U.S. 685 (2011).

Fulk v. Norfolk S. Ry. Co., 35 F. Supp. 3d 749 (M.D.N.C. 2014).

Lager v. Chi. Nw. Transp. Co., 122 F.3d 523 (8th Cir. 1997).

Matter of Estate of Gearhart, 584 N.W.2d 327 (Iowa 1998).

Slaughter v. Des Moines Univ. Coll. of Osteopathic Med., 925 N.W.2d 793 (Iowa 2019).

Smith v. Union Pac. R.R. Co., 236 F.3d 1168 (10th Cir. 2000).

Snipes v. Chi., Cent. & Pac. R.R. Co., 484 N.W.2d 162 (Iowa 1992).

Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29 (1944).

Van Gorner v. Grand Trunk W. R.R., Inc., 509 F.3d 265 (6th Cir. 2007).

Williams v. Nat'l R.R. Passenger Corp., 161 F.3d 1059 (7th Cir. 1998).

Zimmer v. Vander Waal, 780 N.W.2d 730 (Iowa 2010).

45 U.S.C. § 51.

Iowa R. Civ. P. 1.981.

II. In *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), the United States Supreme Court held that claims alleging emotional distress brought under the FELA must be analyzed using the common law "zone of danger" test. Plaintiff brought an FELA claim alleging negligent infliction of emotional distress. Did the district court err in analyzing her claim using the zone of danger test?

Barilla v. Atchison, Topeka & Santa Fe Ry. Co., 635 F. Supp. 1057 (D. Ariz. 1986).

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

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

Epelbaum v. Elf Atochem, N. Am., Inc., 40 F. Supp. 2d 429 (E.D. Ky. 1999).

Fulk v. Norfolk S. Ry. Co., 35 F. Supp. 3d 749 (M.D.N.C. 2014).

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

James v. City of Boise, 577 U.S. 306 (2016).

Marazzato v. Burlington N. R.R. Co., 817 P.2d 672 (Mont. 1991).

Nelson v. Seaboard Coast Line R.R. Co., 398 So.2d 980 (Fla. Dist. Ct. App. 1981).

Rollins v. Wackenhut Servs., Inc., 703 F.3d 122 (D.C. Cir. 2012).

Slaughter v. Des Moines Univ. Coll. of Osteopathic Med., 925 N.W.2d 793 (Iowa 2019).

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

Watters v. TSR, Inc., 904 F.2d 378 (6th Cir. 1990).

Restatement (Second) of Torts § 455 (1965).

III. Under the “zone of danger” test, a Plaintiff alleging emotional harm must show it was caused by either a physical impact or an “immediate risk” of physical impact. Plaintiff does not claim Mr. Morgan suffered a physical impact while on the job and fails to show Union Pacific ever negligently placed him at immediate risk of physical harm. Did the district court err in finding Mr. Morgan was not in a zone of danger that led to his emotional injury and suicide?

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

Crown v. Union Pac. R.R. Co., 162 F.3d 984 (8th Cir. 1998).

Ferguson v. CSX Transp., 36 F. Supp. 2d 253 (E.D. Pa. 1999).

Fulk v. Norfolk S. Ry. Co., 35 F. Supp. 3d 749 (M.D.N.C. 2014).

Gallimore-Wright v. Long Island R.R. Co., 354 F. Supp. 2d 478 (S.D.N.Y. 2005).

Marlin v. BNSF Ry. Co., No. 4:14-CV-00098-JEG, 2015 WL 11121702 (S.D. Iowa June 23, 2015).

Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135 (2003).

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

Roberts v. CSX Transp., Inc., No. 1:06-CV-00169, 2006 WL 1763640 (N.D. Ind. June 26, 2006).

Slaughter v. Des Moines Univ. Coll. of Osteopathic Med., 925 N.W.2d 793 (Iowa 2019).

Iowa R. Civ. P. 1.981.

Iowa R. Evid. 5.801.

ROUTING STATEMENT

Union Pacific respectfully suggests that this case is appropriate for transfer to the Court of Appeals because it may be resolved through a straightforward application of existing and controlling legal principles articulated by the United States Supreme Court. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Congress enacted the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, primarily to protect railroad workers from physical perils, consistent with the practical reality that railroading can be physically dangerous work. Plaintiff Kera Morgan brings a claim under this statute seeking to hold Defendant Union Pacific Railroad Co. liable for her husband Phillip's tragic suicide. But the circumstances of his suicide fall outside of the FELA's purpose. The FELA does not exist to compensate Ms. Morgan in these circumstances, no matter how tragic her loss may be, because the injury she alleges was caused by the railroad's supposed negligence was emotional, not physical, in nature, and because that injury does not fall within the "zone of danger" test

adopted by the United States Supreme Court nearly 30 years ago in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). This Court need not and should not consider the broader question of whether *any* claim involving suicide is actionable under the FELA. *Gottshall* and its progeny establish that Plaintiff's claim is not.

Although Plaintiff invites the Court to set aside controlling U.S. Supreme Court precedent, and consider the broad question of whether *any* claim involving suicide is actionable under the FELA, it is axiomatic that courts should analyze the facts and law before them. And here, the facts and law compel only one outcome: affirmance of the district court's decision.

This appeal concerns a single claim of negligence brought under the FELA. App. 5. Phillip Morgan worked for Union Pacific for many years until his suicide in August 2018. App. 6. Plaintiff Kera Morgan, Mr. Morgan's wife and the administrator of his estate, filed a Petition at Law on July 21, 2022, pleading a single negligence count under the FELA. App. 5. Plaintiff alleged that Union Pacific negligently failed to (1) provide Mr. Morgan with "a reasonably safe place to work," (2) provide him with "adequate and

appropriate supervision," and (3) "adequately staff its Engineering Department with a sufficient number of qualified welders and welder helpers." App. 8.

All of these allegations were based on the behavior of Mike Tomka, Mr. Morgan's direct supervisor. App. 7. Plaintiff claimed that Mr. Morgan developed insomnia and anxiety as a result of Tomka's behavior, and that these mental disorders caused Mr. Morgan's suicide. App. 7-8; *see* Appellant's Final Br. at 19-20. "The only injury alleged [in this lawsuit] is death from suicide." Appellant's Final Br. at 22. Plaintiff did not bring a survival action for any alleged pre-suicide injuries to Mr. Morgan. *Id.*

Union Pacific moved for summary judgment at the close of discovery because Plaintiff's claim was not compensable under the FELA. App. 16. Specifically, Union Pacific argued that Plaintiff's claim did not concern a physical impact, nor did it satisfy the "zone of danger" test adopted by the United States Supreme Court for evaluating emotional distress claims, and that Mr. Morgan's suicide was an intervening cause eliminating any potential liability on the part of Union Pacific. App. 393-99. The district court agreed

and granted summary judgment in favor of Union Pacific. App. 825. The court found that Plaintiff's claim alleged an emotional injury, that the "zone of danger" test was the correct standard to evaluate her claim, and that Plaintiff failed to satisfy that test. App. 825. This appeal followed. App. 827.

STATEMENT OF FACTS

Phillip Morgan began working for Union Pacific in 1998 and was employed in its Engineering Services/Track Department, which focuses on repair and maintenance of the railroad's track and right of way. App. 20, 402; Tomka Dep. Ex. 25 at 4. During his employment, Mr. Morgan worked in the positions of welder and welder helper. App. 402. Much of Mr. Morgan's work in both positions was performed in "red zones," that is, within an arm's length of a track or "any physical position[ ] which places the employee in a life-threatening situation." App. 495. According to Union Pacific's Engineering Track Maintenance Field Handbook, "[e]very job or task will have its own set of Red Zones." App. 495.

Union Pacific maintains detailed safety rules and procedures for employees working in the Engineering Services/Track

Department. *See generally* Tomka Dep. Ex. 25. These include mandatory use of "positive protection" to reduce the risk of workers in red zones being hit by moving equipment. App. 208 (184:02-25). When positive protections are in place, "the only way an employee in the engineering department working on tracks could still be hit by moving equipment is if a mistake is made." App. 209 (185:03-07); *see* App. 405.

Plaintiff does not allege that Mr. Morgan was ever physically injured while on the job with Union Pacific. And he "never talked to [her] about being in a situation where he feared for bodily harm to himself at work." App. 347 (98:01-07). Plaintiff testified that Mr. Morgan told her about only one specific safety-related incident, when his gang was working on a railroad track and a train passed by on a parallel track. App. 322 (73:07-23), 367-68 (118:11-119:06). No one was injured. App. 322 (73:22-23). Plaintiff does not know when or where the incident happened, except that it occurred sometime during the 20 years Mr. Morgan worked for Union Pacific. App. 368 (119:02-06).

Mike Tomka was Mr. Morgan's direct supervisor starting in

December 2017. App. 20, 403. In the months leading up to his suicide, Mr. Morgan believed that Tomka was harassing him by, among other things, allegedly assigning him to do more work than he was capable of performing, assigning him to work far from home, asking him to falsify reports about railroad safety issues, repeatedly asking him to bid for (*i.e.*, request) a promotion to the position of welder, and delaying his travel reimbursements. App. 20, 403.

Mr. Morgan was a member of a labor union and had to bid for the position he held. He was aware that the position he bid for was a traveling position and that he would be required to work throughout Iowa. App. 21, 403. From late April to mid-July 2018, Tomka assigned Mr. Morgan's gang, which was based in eastern Iowa, to work in western Iowa, resulting in increased travel time to and from work for Mr. Morgan. App. 403. Mr. Morgan believed Tomka made this decision because Mr. Morgan refused to seek promotion as a welder. App. 403.

Mr. Morgan suffered from increased stress in the weeks prior to his death. App. 21, 403. During a doctor visit on July 24, 2018,

Mr. Morgan stated that he was "[t]here to discuss stress." App. 716. He reported "stress longterm with his job as others are being laid off" and that "[h]e still has good work performance." App. 716. He told his doctor that he slept only two to four hours at night, felt sleep deprived, was not depressed, and had "anxiety and restlessness longterm." App. 716. He also stated that he drank six beers every night and smoked between one and two packs of cigarettes every day. App. 716.

The doctor observed that Mr. Morgan appeared cooperative and not in acute distress, and after performing a mental status exam, found that he was well oriented in both mood and affect. App. 717. Mr. Morgan was diagnosed with anxiety and insomnia, and prescribed Lexapro and Trazodone HCL to treat these conditions, respectively. App. 717. The doctor completed brief supportive counseling and noted that Mr. Morgan "denie[d] the need to see psychiatry or a counselor." App. 717. Mr. Morgan began taking the medication soon after this doctor visit. App. 284 (35:01-04). He began getting more sleep and, according to Plaintiff, he was improving. App. 284 (35:05-21), 286 (37:07).

Plaintiff testified that the night of August 17, 2018, was a "normal night" for Mr. Morgan. App. 368 (119:20-25). Plaintiff thought her husband "[s]eemed fine," was thinking straight, and did not seem troubled. App. 368 (119:7-11, 119:20-25), 369 (120:07-10, 120:13-15). In the early morning hours of August 18, 2018, Mr. Morgan took his own life. App. 727. The suicide occurred at home, on his land. App. 727. Mr. Morgan had not previously talked about self-harm to his wife. App. 359 (110:14-20).

ARGUMENT

The purpose of the FELA is to provide a remedy to railroad workers for injuries sustained in railroad accidents. It is not a strict liability statute but rather requires proof of negligence and causation. Consistent with its primary purpose, the FELA expansively allows recovery for physical injuries, but for emotional injuries, recovery is much more limited.

The district court correctly analyzed Mr. Morgan's injury as emotional rather than physical. Courts must evaluate the substance of a plaintiff's claim rather than the label affixed to it in determining whether it asserts a physical or emotional injury.

Plaintiff does not claim Mr. Morgan was ever physically injured while on the job. Rather, she alleges that Union Pacific negligently allowed Mr. Morgan's supervisor to harass him, resulting in Mr. Morgan developing anxiety and insomnia. Plaintiff claims that these disorders caused Mr. Morgan's suicide. Plaintiff thus asserts an emotional injury caused by Union Pacific's negligence resulting in suicide, which was self-inflicted by Mr. Morgan. The suicide is thus an extension, or "physical symptom," of Mr. Morgan's emotional injury. As a matter of substance, then, Plaintiff's claim is for negligent infliction of emotional distress.

The district court correctly analyzed Plaintiff's claim by applying the "zone of danger" test adopted by the United States Supreme Court in *Consolidated Rail Corp. v. Gottshall*. According to this test, a plaintiff may recover for emotional injury under the FELA only if the plaintiff either sustained a physical impact as a result of the defendant's negligent conduct or was placed in immediate risk of physical harm by that conduct (*i.e.*, a "near miss"). Because *Gottshall* makes clear that this test must be used when evaluating an FELA claim for negligent infliction of

emotional distress, the district court was correct to apply it and this Court should reject Plaintiff's attempt to circumvent it. In any event, if the Court evaluates Plaintiff's claim under the common law "irresistible impulse" standard she advocates using as an alternative, it does not satisfy that test either.

The district court correctly found that the zone of danger test bars Plaintiff's claim. Courts applying *Gottshall* have consistently found that claims like this one—involving alleged workplace harassment and bullying but no immediate risk of physical harm—fail to satisfy the zone of danger test. This is also true for claims involving general workplace stress. Plaintiff cannot show Mr. Morgan's stress, resulting from the "everyday perils" of working in red zones, involved any specific incident that placed Mr. Morgan at imminent risk of being physically injured, or that Union Pacific's negligence caused any such occurrence. Accordingly, her FELA claim fails as a matter of law.

I. Because Plaintiff substantively alleges emotional rather than physical harm, she asserts a claim of negligent infliction of emotional distress.

A. Error preservation

Union Pacific does not dispute that Plaintiff has preserved for review the district court's summary judgment ruling.

B. Scope and standard of review

A district court properly grants summary judgment where "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Zimmer v. Vander Waal*, 780 N.W.2d 730, 732 (Iowa 2010) (cleaned up); *see* Iowa R. Civ. P. 1.981(3). The central question in this appeal is "whether the district court correctly applied the law." *Zimmer*, 780 N.W.2d at 732. Accordingly, this Court reviews the district court's grant of summary judgment "for the correction of errors at law." *Id.* The Court views the record in the light most favorable to the nonmoving party. *Slaughter v. Des Moines Univ. Coll. of Osteopathic Med.*, 925 N.W.2d 793, 800 (Iowa 2019).

C. Argument

1. Overview of the FELA

The Federal Employers' Liability Act provides the exclusive remedy to railroad employees for injuries sustained from railroad accidents. *Snipes v. Chi., Cent. & Pac. R.R. Co.*, 484 N.W.2d 162, 164 (Iowa 1992) (citation omitted); *see* 45 U.S.C. § 51. It imposes a duty on railroads to provide their employees with a "reasonably safe workplace." *Van Gorner v. Grand Trunk W. R.R., Inc.*, 509 F.3d 265, 269 (6th Cir. 2007). "[T]his does not mean that a railroad has the duty to eliminate all workplace dangers, but only the 'duty of exercising reasonable care to that end.'" *Id.* (quoting *Balt. & Ohio S.W.R. Co. v. Carroll*, 280 U.S. 491, 496 (1930)). The FELA is not a workers' compensation law and the mere fact that an on-the-job injury occurs is insufficient to recover. *Gottshall*, 512 U.S. at 543.

The FELA is rather a general negligence statute, under which substantive legal questions are governed by federal law, not state law. *Snipes*, 484 N.W.2d at 162; *see Matter of Estate of Gearhart*, 584 N.W.2d 327, 329 (Iowa 1998). "Recovery under the FELA requires an injured employee to prove that the defendant employer

was negligent and that the negligence proximately caused, in whole or in part, the accident." *Snipes*, 484 N.W.2d at 164. "To meet this standard, the plaintiff must present 'probative facts from which the negligence and the causal relation could reasonably be inferred.'" *Id.* (quoting *Tennant v. Peoria & Pekin Union Ry.*, 321 U.S. 29, 32 (1944)). "The FELA holds railroads to a prudent-person standard of care, and a plaintiff who wishes to demonstrate that a railroad breached its duty must show circumstances that a reasonable person would foresee as creating a potential for harm." *Williams v. Nat'l R.R. Passenger Corp.*, 161 F.3d 1059, 1062 (7th Cir. 1998) (cleaned up). Thus, "[r]easonable foreseeability of harm is an essential ingredient of FELA negligence." *Lager v. Chi. Nw. Transp. Co.*, 122 F.3d 523, 525 (8th Cir. 1997) (cleaned up).

Liability under the FELA is limited in other important respects. For instance, "[r]ailroads are liable only to their employees, and only for injuries sustained in the course of employment." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 691 (2011). Additionally, Congress's primary focus in enacting the FELA was the "physical dangers of railroading that resulted in the

death or maiming of thousands of workers every year." *Gottshall*, 512 U.S. at 542. The statute therefore expansively allows recovery for physical injuries but, as discussed below, severely limits recovery for emotional injuries.

2. The district court correctly analyzed Mr. Morgan's injury as emotional rather than physical.

Plaintiff's petition does not specify what type of claim she has brought under the FELA beyond generally alleging negligence of Union Pacific. And her brief appears to resist the label of negligent infliction of emotional distress, instead contending that Mr. Morgan's death by suicide was a "physical injury resulting in death" rather than a "physical symptom" of an emotional injury. Appellant's Final Br. at 22. However, analyzing the substance of her Petition and arguments shows that Plaintiff alleges an emotional injury consistent with a claim for negligent infliction of emotional distress.

The United States Supreme Court has clarified that the federal question of what constitutes negligence under the FELA "generally turns on principles of common law." *Gottshall*, 512 U.S.

at 544. Because the statute does not create any special type of action for suicide or wrongful death, the Court must consider the right of recovery pursued by Plaintiff in light of the common law. *Id.* Under the common law, "[t]he injury we contemplate when considering negligent infliction of emotional distress is mental or emotional injury." *Id.* More specifically, it "is mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms." *Id.*

Smith v. Union Pacific Railroad Co., 236 F.3d 1168 (10th Cir. 2000), which the district court looked to in its ruling, is instructive on this issue. There, the plaintiff brought an FELA claim alleging that his rotating twelve-hour shift schedule "resulted in a sleep disorder which, in turn, caused physical and emotional injuries, anxiety attacks, depression, insomnia," suicidal ideations, and "an exacerbation of his spinal injury." *Id.* at 1170 (cleaned up). As here, the "complaint did not label the specific cause of action being stated" beyond generally alleging that the railroad was negligent in creating the rotating shift schedule for the plaintiff's position. *Id.*

When the railroad argued that the complaint "amounted to a claim of negligent infliction of emotional distress," the plaintiff rejected this characterization, asserting that "his claim was a pure negligence claim for a physical injury." *Id.*

The Tenth Circuit disagreed, noting that in some cases, "it may be difficult to draw a distinction between a physical and emotional injury given that emotional injuries are often accompanied by physical changes," and "[c]reative lawyering can disguise what is in substance an emotional injury by pointing to the tangible bodily changes that accompany it." *Id.* at 1171. When determining whether an injury is physical or emotional under the FELA, a court must focus on the substance of the claimed injury and nature of the railroad's alleged negligent conduct rather than how the plaintiff has labeled the claim. *Id.* The court found that while the plaintiff's "sleep disorder cannot be categorized as purely physical or purely emotional," the "substance of his claim is that his sleep disorder caused depression, and it was this depression that ultimately caused his other physical maladies." *Id.* Accordingly, the court concluded that his injuries "comport with a claim for

emotional distress." *Id.* (quotation marks omitted).

The similarities between this case and *Smith* compel the same result. Plaintiff alleges that Mr. Morgan was diagnosed with insomnia and anxiety "[a]s a result of Tomka's behavior." App. 7. She does not claim that Mr. Morgan suffered any physical injury while on the job.[1] Plaintiff argues in her brief that Mr. Morgan's "insomnia and anxiety le[d] to [his] suicide." Appellant's Final Br. at 24. The opinion of Plaintiff's hired expert is that:

- "[C]hronic insomnia as well as anxiety can lead to a psychotic type state and be associated with self-harm behaviors."
- "Besides the severe anxiety symptoms, [Mr. Morgan's] chronic sleep deprivation would adversely affect his judgment, focus and concentration and make it dangerous for him to work around moving trains."
- "[Mr.] 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."

App. 388-89; *see* Appellant's Final Br. at 19-20. The opinion of Plaintiff's own expert is that Union Pacific's alleged negligent conduct caused Mr. Morgan's mental disorders, which in turn caused his suicide. Plaintiff's claim is thus one for negligent

[1] The Petition also makes clear that Plaintiff's single claim under the FELA is for negligence, not an intentional tort. *See* App. 8.

infliction of emotional distress. Mr. Morgan's injuries were emotional and his suicide was a physical symptom of those emotional injuries.

Plaintiff attempts to distinguish *Smith* by stressing that it did not involve suicide and by arguing that suicide is a unique, physical injury. *See* Appellant's Final Br. at 23. Mr. Morgan's death may have occurred as a result of a physical injury, but Plaintiff does not account for the fact that the physical injury was self-inflicted. Plaintiff instead claims that Mr. Morgan's suicide "was directly caused by the harassment, bullying and pressure he endured from his supervisor in the weeks and months" prior to his death. Appellant's Final Br. at 20 (record citation omitted). These are allegations that an emotional injury—allegedly negligently inflicted by Union Pacific—led to the physical injury of suicide, purposely self-inflicted by Mr. Morgan. This is the structure of a negligent infliction of emotional distress claim. Plaintiff cites several cases distinguishing between physical symptoms and physical injuries, but admits that none of them involved emotional injuries or suicide. *Id.* at 23-24. In *Fulk v. Norfolk Southern*

Railway Co., 35 F. Supp. 3d 749 (M.D.N.C. 2014), an FELA case that involved both, the court noted that "the only physical injury alleged is Mr. Fulk's self-inflicted gunshot wound" and found "that a self-inflicted injury" under such circumstances "cannot be used to circumvent the zone of danger test." *Id.* at 757. The same is true here.

Additionally, *Smith* is a closer case to this one than Plaintiff admits. After beginning his new work schedule, Smith "started to experience sleep problems and became severely depressed, even contemplating suicide." 236 F.3d at 1170. His suicidal ideations were thus a symptom his mental disorder, depression. Plaintiff seeks to distinguish this case from *Smith* on the basis that Smith did not act on his suicidal thoughts, whereas Mr. Morgan unfortunately did. But that thin distinction does not address the underlying point—as in *Smith*, the injury allegedly caused by Union Pacific's negligence was emotional. *See also Gottshall*, 512 U.S. at 537 (treating as emotional a plaintiff's injuries stemming from major depression and post-traumatic stress disorder allegedly caused by railroad's negligence, including "suicidal

preoccupations”). Neither the FELA nor the common law supports treating them differently.

Plaintiff nevertheless argues that her claim is simply for “wrongful death.” Appellant’s Final Br. at 22, 24. Wrongful death is not a separate claim under the FELA or the common law.[2] The term describes the injury, not a theory of liability. Under the FELA, Plaintiff must allege and prove negligence to recover on her claim. And Plaintiff cites no authority in support of her position that wrongful death is a separate type of claim.

The district court accurately identified the causal chain underlying Plaintiff’s claim, faithfully examined and applied *Smith*, and correctly found that Mr. Morgan’s injuries were emotional, rather than physical. App. 820-21. It did not err at any of these steps. There is nothing to correct on review.

---

[2] The statute does contemplate that in the case of a railroad worker’s death, a “personal representative” may bring suit on his or her behalf. 45 U.S.C. § 51. But this mechanism does not create a separate claim.

II. Controlling Supreme Court precedent requires analyzing Plaintiff's claim using the "zone of danger" test.

A. Error preservation

Union Pacific does not dispute that Plaintiff has preserved for review the district court's summary judgment ruling.

B. Scope and standard of review

Appellate review of summary judgment rulings is for correction of errors at law. *Slaughter*, 925 N.W.2d at 800.

C. Argument

The district court correctly analyzed Plaintiff's claim under the "zone of danger" test adopted by the United States Supreme Court in *Consolidated Rail Corp. v. Gottshall*. The Court adopted this test in part to limit defendants' liability to certain classes of plaintiffs and to certain types of harm, notwithstanding that some genuine claims would be foreclosed. 512 U.S. at 552. In justifying these limitations, the Court explained:

> Our FELA cases require that we look to the common law when considering the right to recover asserted by respondents, and 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.

Id. at 557. The Court concluded that these policy considerations "accord with the concerns that have motivated our FELA jurisprudence." *Id.*

To effectuate these goals, the Court defined the zone of danger test as follows: "The zone of danger 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." *Id.* at 547-48 (emphasis added). "Under this test, a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not." *Id.* at 556. The Court noted that "[t]he zone of danger test also is consistent with FELA's central focus on physical perils," and that the "rule will further Congress' goal in enacting the statute of alleviating the *physical* dangers of railroading." *Id.* at 555, 556 (emphasis added).

Plaintiff's FELA claim is for negligent infliction of emotional distress. As such, it must be evaluated using the zone of danger test.

See id. at 555 ("[A]n emotional injury constitutes 'injury' resulting from the employer's 'negligence' for purposes of FELA only if it would be compensable under the terms of the zone of danger test."). Plaintiff nevertheless argues that the zone of danger test should not apply to her claim because the *Gottshall* case did not address suicide. Appellant's Final Br. at 25. This argument misses the forest for the trees. The question is, as discussed above, whether the nature of the injury caused by the railroad's alleged negligence was emotional or physical.

As a general matter, in non-FELA cases, "[c]ourts have been rather reluctant to recognize suicide as a proximate consequence of a defendant's wrongful act." *Epelbaum v. Elf Atochem, N. Am., Inc.*, 40 F. Supp. 2d 429, 431 (E.D. Ky. 1999) (quoting *Watters v. TSR, Inc.*, 904 F.2d 378, 383 (6th Cir. 1990)). Certain "exceptions have been carved into the general rule that suicide is an intervening cause eliminating liability on the part of a wrongdoer." *Id.* One of these, which Plaintiff advocates using here in place of the zone of danger test, is the Second Restatement's "irresistible impulse" standard. *See* Restatement (Second) of Torts § 455 (1965).

To be clear, this argument finds zero support in the text of the FELA and over a century of Supreme Court precedent interpreting it. Plaintiff cites three cases from other courts in support of using this test. But the first two predate the Supreme Court's decision in *Gottshall*. *See Halko v. N.J. Transit Rail Operations, Inc.*, 677 F. Supp. 135 (S.D.N.Y. 1987); *Nelson v. Seaboard Coast Line R.R. Co.*, 398 So.2d 980 (Fla. Dist. Ct. App. 1981). To the extent those decisions conflict with *Gottshall* on matters of federal law, they are overruled. *See James v. City of Boise*, 577 U.S. 306, 307 (2016) (per curiam). In the third case, *Delise v. Metro-North Railroad Co.*, 646 F. Supp. 2d 288 (D. Conn. 2009), the court did not distinguish or even mention *Gottshall* or the zone of danger test in its brief discussion of the plaintiff's FELA claim for "negligent supervision" regarding a railroad employee's suicide. *Id.* at 291.[3] *Delise* thus did not consider *Gottshall*'s application and has no persuasive authority here. *See Fulk*, 35 F. Supp. 3d at 758 (finding *Delise* "not

[3] It is also worth noting that the court did grant summary judgment in favor of the railroad regarding the plaintiff's negligent infliction of emotional distress claim brought under Connecticut law (and in the alternative). *Delise*, 646 F. Supp. 2d at 293.

persuasive" for these reasons).

Additionally, both before and after *Gottshall*, other courts have rejected FELA claims based on a railroad worker's suicide. *See, e.g.*, *id.* at 756 (dismissing FELA claim using zone of danger test); *Barilla v. Atchison, Topeka & Santa Fe Ry. Co.,* 635 F. Supp. 1057, 1059 (D. Ariz. 1986) ("The Court . . . concludes as a matter of law that suicide by a railroad employee is not a proximate cause cognizable in an FELA action nor intended to be remedied by the FELA."); *Marazzato v. Burlington N. R.R. Co.,* 817 P.2d 672 (Mont. 1991) (holding that suicide must at least be reasonably foreseeable).

Even if the "irresistible impulse" test were the correct standard to use here—and it is not—Plaintiff's claim would fail under it. The Restatement provides that a defendant is liable for negligent conduct that "brings about the delirium or insanity of another" only where the actor's "delirium or insanity" either (1) "prevents him from realizing the nature of his act and the certainty or risk of harm involved therein," or (2) "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."

Restatement (Second) of Torts § 455. The district court distinguished *Halko*, *Nelson*, and *Delise*, all of which applied the irresistible impulse test, because "the facts before us do not show that Phillip had an uncontrollable urge the night of his death." App. 824. Specifically, "Ms. Morgan stated that Phillip acted normally the night before he died. He took his meds and went to bed." App. 824. Plaintiff has offered no evidence that Mr. Morgan acted out of the ordinary on the night before his death or during the early morning hours of August 18, 2018. Nor does Plaintiff's Petition allege that Mr. Morgan was unable to control his own conduct or unable to appreciate the nature of his act, tragic as it was.

Plaintiff turns to expert testimony to attempt to make up for this deficiency. She asserts that "Dr. Sky opines that Phil Morgan's sleep deprivation contributed to his psychosis." Appellant's Final Br. at 30. But Dr. Sky never opined that Mr. Morgan suffered from psychosis, nor did he find that sleep deprivation contributed to any psychosis in Mr. Morgan. He merely stated that "chronic insomnia as well as anxiety *can* lead to a psychotic type state and be associated with self-harm behaviors." App. 388 (emphasis added).

Dr. Sky's conclusions were limited to the following:

> 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. . . .
>
> 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.

App. 388-89.

Dr. Sky never examined Mr. Morgan. The treating physician who did examine him on July 24, 2018, did not find that he was psychotic or exhibiting any other behavior that would support Plaintiff's "irresistible impulse" argument. Rather, she observed that Mr. Morgan appeared "[c]ooperative" and "[n]ot in acute distress." App. 717. She also performed a "[m]ental status exam," found that Mr. Morgan was "[o]riented X3"—meaning that he could readily recognize himself by name, where he was, and the time and date—and observed that he had an "appropriate mood and affect." App. 717.

The evidence shows that even under the incorrect test

Plaintiff advocates for, she fails to demonstrate a genuine dispute of material fact regarding whether Mr. Morgan's suicide resulted from an "irresistible impulse." *See Fulk*, 35 F. Supp. 3d at 759 ("There are simply no facts alleged to support any inference of insanity or uncontrollable impulse, particularly in light of the rational conduct and intent that preceded the suicide."). Under this framework, this means that the general rule—that suicide "is considered to be a deliberate, intentional, and intervening act which precludes a finding that a given defendant is, in fact, responsible for the decedent's death"—applies. *Rollins v. Wackenhut Servs., Inc.*, 703 F.3d 122, 127 (D.C. Cir. 2012).

Plaintiff further argues in the alternative that the Court should not apply the "irresistible impulse" test at all, notes that it was not included in the Third Restatement, and cites a law review article advocating for abolishing the so-called "suicide rule" developed by courts to limit the recognition of suicide as a proximate consequence of a defendant's conduct. Appellant's Final Br. at 30–32. What Plaintiff truly advocates for, it seems, is abolishing the "zone of danger" test as well. Ultimately, these are

matters of federal law and not for this Court to decide. *See Urie v. Thompson*, 337 U.S. 163, 174 (1949) ("What constitutes negligence for the statute's purposes is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes."). If Plaintiff wishes to advocate for a change in the law, she must present her arguments to the United States Supreme Court (or Congress). In *Gottshall*, the Supreme Court noted that while the policy grounds supporting its adoption of the zone of danger test "have been criticized by commentators, they all continue to give caution to courts." 512 U.S. at 557. The Court found that in spite of these criticisms, "the concerns that underlie the common-law tests . . . [are] well-founded." *Id.*

Under the law as it currently stands, Plaintiff's claim must be evaluated using the zone of danger test. And under that test, Plaintiff's claim fails as a matter of law.

III. Plaintiff's claim fails because Mr. Morgan was never placed in the zone of danger by Union Pacific's negligent conduct.

A. Error preservation

Union Pacific does not dispute that Plaintiff has preserved for review the district court's summary judgment ruling.

B. Scope and standard of review

Appellate review of summary judgment rulings is for correction of errors at law. *Slaughter*, 925 N.W.2d at 800.

C. Argument

The district court correctly found that the zone of danger test bars Plaintiff's claim. Plaintiff does not argue that Mr. Morgan sustained a "physical impact" during his employment with Union Pacific. *See Gottshall*, 512 U.S. at 547-48. This means that for Plaintiff's claim, "recovery is sharply circumscribed by the zone-of-danger test." *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 147 (2003) (distinguishing between "[s]tand-alone emotional distress claims not provoked by any physical injury" and "emotional distress claims brought on by a physical injury, for which pain and suffering recovery is permitted.") Plaintiff must show Mr. Morgan was

"placed in immediate risk of physical harm" by Union Pacific's negligence—that, in other words, a "near miss" occurred. *Gottshall*, 512 U.S. at 547, 548 (citation omitted).

Plaintiff fails to do so. She highlights the fact that much of Mr. Morgan's work as a welder helper was performed in "red zones," *i.e.*, areas within an arm's length of a track or "any physical position[ ] which places the employee in a life-threatening situation." App. 495. Plaintiff also lists other stressful aspects of Mr. Morgan's job during 2018, including short staffing, pressure to meet production goals, increased scrutiny from Tomka, and increased travel time to and from work. *See* Appellant's Final Br. at 32-35. But the general stress of one's job, including working in red zones, does not satisfy the zone of danger test. The Supreme Court made this clear in *Carlisle* (the companion case to *Gottshall* addressed in the same opinion), finding that "Carlisle's work-stress-related claim plainly does not fall within the common law's conception of the zone of danger." 512 U.S. at 558; *see also Crown v. Union Pac. R.R. Co.*, 162 F.3d 984, 986 (8th Cir. 1998) ("Crown repeatedly complained of stress-related emotional and physical

injuries, but he did not show that the negligent acts of Union Pacific caused him to suffer a physical impact or an immediate risk of physical harm.").

Plaintiff attempts to distinguish *Carlisle* by noting that "[a]s a train dispatcher, Carlisle was not exposed to the everyday perils that Phillip faced performing welds on the rails and in the red zone." Appellant's Final Br. at 24. However, the zone of danger test does not allow recovery for "everyday perils." The zone of danger test is intended to cover only those incidents that result in either actual physical harm or a "near miss," which "may be as frightening as a direct hit." *Gottshall*, 512 U.S. at 547 (citation omitted); *see Fulk*; 35 F. Supp. 3d at 757 ("[A]lthough Mr. Fulk may have been at risk of injury and death from defective railcars just like everyone else, the Complaint does not allege that he was ever threatened imminently with physical impact." (cleaned up)). Having a generally dangerous job does not suffice. Beyond that, Union Pacific maintains extensive safety rules and procedures, including implementing "positive protection" to reduce the risk of workers in red zones being hit by moving equipment. App. 208 (184:02-25).

When positive protections are in place, "the only way an employee in the engineering department working on tracks could still be hit by moving equipment is if a mistake is made." App. 209 (185:03-07); *see* App. 405.

In the many years Mr. Morgan worked for Union Pacific, Plaintiff recalled learning of only one specific instance even arguably involving immediate danger, in which a train passed by Mr. Morgan's gang on a track parallel to the one they were working on at the time. App. 322 (73:07-23), 367-68 (118:11-119:06). Plaintiff could not provide specifics as to when or where this occurred, who was present, or how close the train came to any of the workers. *See* App. 322 (73:07-23), 367-68 (118:11-119:06). She was not even certain whether Mr. Morgan was "one of the people working on the track at the time." *See* App. 367-68 (118:23-119:01) (agreeing that this was her "impression" after hearing Mr. Morgan relay the story). Plaintiff could state only that the incident occurred "sometime in the 20 years before his death" and confirmed that no one was hurt. App. 322 (73:22-23); 368 (119:02-06). Mr. Morgan only talked about it "once." App. 367 (118:21-22).

Plaintiff offered no other evidence to add any detail to this nebulous recollection. *See* App. 209 (185:08-18) (testifying that there were no accidents or "close calls" involving can welders during Tomka's time in Carroll, Iowa). Relatedly, Plaintiff testified that she had no knowledge as to whether Mr. Morgan "at work was in a situation where he was threatened with an immediate risk of bodily harm in the . . . two weeks before his death." App. 346 (97:20-25). She then agreed that Mr. Morgan "never talked to [her] about being in a situation where he feared for bodily harm to himself at work." App. 347 (98:01-07).

Plaintiff's vague testimony, even when viewed in the light most favorable to her, fails to establish that Mr. Morgan was ever placed in the zone of danger by any negligent conduct of Union Pacific or that he ever "anticipate[d] an imminent risk of harm," much less that such an incident occurred anywhere near the time of his passing. *Marlin v. BNSF Ry. Co.*, No. 4:14-CV-00098-JEG, 2015 WL 11121702, at *6 (S.D. Iowa June 23, 2015). Nor does it show this occurrence played any role in bringing about the diagnosed mental disorders that, according to Plaintiff, caused his

suicide. Indeed, Plaintiff's Petition does not mention this incident; neither does her brief in this Court.[4]

Plaintiff instead focuses her claim on Mike Tomka's actions, arguing that Mr. 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." Appellant's Final Br. at 20 (record citation omitted). In the years since *Gottshall*, courts have consistently held that workplace harassment and bullying alone do not give rise to emotional distress claims under the FELA. *See, e.g.*, *Fulk*, 35 F. Supp. 3d at 756; *Roberts v. CSX Transp., Inc.*, No. 1:06-CV-00169, 2006 WL 1763640, at *3 (N.D. Ind. June 26, 2006) (finding injuries "stemming from nonphysical contact, such as the alleged supervisor harassment, the arguably flawed disciplinary proceedings, or [the plaintiff's] wrongful firing," not compensable under the FELA as a matter of

---

[4] In any event, this evidence is hearsay and cannot be considered at summary judgment. *See* Iowa R. Evid. 5.801; *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 96 (Iowa 2012) ("[T]he court should only consider 'such facts as would be admissible in evidence' when considering the affidavits [or testimony] supporting and opposing summary judgment." (quoting Iowa R. Civ. P. 1.981(5))).

law); *Gallimore-Wright v. Long Island R.R. Co.*, 354 F. Supp. 2d 478, 487 (S.D.N.Y. 2005) (dismissing FELA claim alleging the railroad "intentionally inflicted emotional distress upon [the plaintiff] by undertaking a deliberate campaign to subject her to discipline and fire her in retaliation for her prior lawsuit" because there was "no suggestion that it resulted in any physical impact on plaintiff or brought her within the zone of danger of such an impact.")

Consider also *Ferguson v. CSX Transportation*, 36 F. Supp. 2d 253 (E.D. Pa. 1999), *aff'd*, 208 F.3d 205 (3d Cir. 2000) (table), in which a railroad employee alleged that he suffered severe emotional distress (including major depression and severe anxiety disorder) as a result of verbal and physical threats by a coworker. The coworker threatened to kill the plaintiff for reporting indiscretions of another employee to a supervisor, threatened to burn down his house and kill his family, and on one occasion made slashing motions across his neck and threw rocks and lumber at the plaintiff. *Id.* at 253-54. The court held that none of these actions gave rise to an FELA claim. *Id.* at 255-56. While the plaintiff testified that he

remained in constant fear for himself and his family as a result of these threats, the court "conclude[d] that the fear of some future harm caused by verbal threats is insufficient to place plaintiff within the actionable zone of danger because these threats of future harm did not place plaintiff in *immediate* risk of physical harm or threatened him *imminently* with physical impact." *Id.* at 256 (cleaned up). This case illustrates that even extreme and outrageous conduct resulting in emotional distress (much worse than anything Tomka is accused of here) does not give rise to an FELA claim without an accompanying imminent risk of physical harm. As Plaintiff alleges no such risk here, she has no FELA claim.

In sum, there is no way for Plaintiff to remedy the fatal flaw inherent in her claim. Mr. Morgan was never placed at immediate risk of physical injury by Union Pacific's negligence. The zone of danger test necessarily bars Plaintiff's claim as a result.

CONCLUSION

In adopting the zone of danger test, the Supreme Court acknowledged that the "test is 'arbitrary' in the sense that it does not allow recovery for all emotional distress." *Gottshall*, 512 U.S. at

557. The Court nonetheless found it to be "fully consistent with our understanding of the statute" and in "accord with the concerns that have motivated our FELA jurisprudence." *Id.* A straightforward application of that test shows that Plaintiff may not recover under the FELA for Mr. Morgan's tragic suicide. Regardless of whether a claim for a railroad worker's suicide in some hypothetical case involving different facts might be actionable under the FELA, this is not that case.

For the reasons discussed above, the Court should affirm the district court's judgment.

Date: February 22, 2024

Respectfully submitted,

UNION PACIFIC RAILROAD COMPANY,

By: /s/ *J. Timothy Eaton*

J. Timothy Eaton
Jonathan B. Amarilio
Benjamin S. Morrell
TAFT STETTINIUS & HOLLISTER LLP
111 East Wacker Drive
Suite 2600
Chicago, IL 60601
Tel.: (312) 527-4000

R. Todd Gaffney (AT0002657)
Joseph F. Moser (AT0011413)
FINLEY LAW
699 Walnut Street
Suite 1700
Des Moines, IA 50309
Telephone: (515) 288-0145
Facsimile: (515) 288-2724
tgaffney@finleylaw.com

Fax: (312) 527-4011
teaton@taftlaw.com
jamarilio@taftlaw.com
bmorrell@taftlaw.com

jmoser@finleylaw.com

Counsel for Defendant-Appellee

STATEMENT REGARDING ORAL ARGUMENT

Union Pacific respectfully suggests that the facts and legal arguments are adequately presented in the briefs and record before this Court and that the decisional process would not be significantly aided by oral argument.

CERTIFICATE OF COST

I hereby certify that there was no cost to reproduce copies of the foregoing brief because the appeal is being filed exclusively in the Appellate Court's EDMS system.

Date: February 22, 2024

/s/ *J. Timothy Eaton*
J. Timothy Eaton
Counsel for Defendant-Appellee

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rules of Appellate Procedure 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

This brief has been prepared in a proportionally spaced typeface using Century Schoolbook in 14-point and contains 7,148 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

Date: February 22, 2024

/s/ *J. Timothy Eaton*
J. Timothy Eaton
Counsel for Defendant-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I electronically filed the foregoing with the Clerk of the Court for the Supreme Court of Iowa using the EDMS system. I certify that all participants in this case are registered EDMS users and that service will be accomplished by the Appellate EDMS system. *See* Iowa R. App. P. 6.702(2); Iowa R. Elec. P. 16.315(1)(b).

I further certify that on the date listed below, I provided a copy of this filing to the Appellant herein.

Date: February 22, 2024

/s/ *J. Timothy Eaton*
J. Timothy Eaton
Counsel for Defendant-Appellee