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Metro-North Commuter Railroad Co. v. Buckley

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Metro-North Commuter Railroad Co. v. Buckley[1]

I. THE CASE

Michael Buckley was employed by Metro-North Commuter Railroad Co. ("Metro-North") as a pipefitter. He was part of a crew of workers nicknamed the "snowmen of Grand Central"[2] because by the end of each workday they were covered with white insulation dust containing asbestos. Buckley was exposed to asbestos for approximately one hour every working day for three years.[3] After attending an "asbestos awareness" class, Buckley feared that he would develop cancer or other asbestos-related diseases and thereafter sought medical attention.[4] He displayed no signs or symptoms of cancer or other asbestos-related diseases, which was not uncommon as asbestos related diseases often have a latency period of no less than ten years.[5] He did not receive psychiatric treatment because, in his own words, "[w]hat is a psychiatrist going to do for me?"[6] Nor did he stop smoking cigarettes despite his fear of developing cancer.[7]

Based on his fear, concern for his future, and anger at Metro-North, Buckley, the test plaintiff for 140 asbestos-exposed Metro-North employees, sued Metro-North under the Federal Employers' Liability Act ("FELA")[8] for negligent infliction of emotional distress ("NIED") and medical monitoring damages.[9] Buckley obtained expert opinions from two doctors who testified at trial that Buckley had an increased chance of acquiring cancer or other asbestos related diseases as a result of his prolonged exposure to asbestos. One expert concluded that Buckley's risk of developing cancer or other asbestos-related diseases in the future increased by one to five percent while the other expert determined that chance to be one to three percent.[10] Metro-North admitted its negligence in exposing Buckley to the asbestos, but "did not concede that Buckley had actually suffered emotional distress."[11] It argued that "the FELA did not permit a worker like Buckley, who had suffered no physical harm, to recover for injuries of either sort[, NIED or medical monitoring]."[12]

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1. 521 U.S. 424, 117 S. Ct. 2113 (1997).
2. Buckley v. Metro-North Commuter R.R. Co., 79 F.3d 1337, 1340 (2d Cir. 1996).
3. 117 S. Ct. at 2116.
4. *Id.*
5. 79 F.3d at 1341.
6. *Id.*
7. *Id.*
8. 45 U.S.C. §§ 51-60 (1988).
9. The Supreme Court held with respect to Buckley's claim for medical monitoring damages that Buckley was not entitled to recover medical mointoring costs because the emotional distress at issue was not a compensable injury, 117 S. Ct. at 2121. For this reason, Buckley's claim for medical monitoring damages is only mentioned in this article.
10. 117 S. Ct. at 2116.
11. *Id.*
12. *Id.*

The United States District Court for the Southern District of New York granted Metro-North's motion for a judgment as a matter of law on Buckley's NIED claim and dismissed the case.[13] The District Court found "that Buckley did not suffer 'sufficient impact with asbestos' to sustain a claim for negligent infliction of emotional distress."[14] The United States Court of Appeals for the Second Circuit vacated the judgment of the District Court and remanded the case to the District Court for a jury trial.[15] After granting certiorari, the Supreme Court of the United States reversed the Second Circuit and remanded the case for further proceedings.[16]

The Court held that Buckley could not recover under FELA for negligently inflicted emotional distress unless, and until, he had manifested symptoms of a disease.[17] It stated that a plaintiff may not recover for negligently inflicted emotional distress unless the distress falls within specific categories that amount to recovery-permitting exceptions and that the FELA only allows recovery for such distress where a plaintiff satisfies the "zone of danger" test.[18] Under the "zone of danger" test, a plaintiff must sustain a physical impact or be placed in immediate risk of physical harm to recover for NIED. The Court concluded that Buckley's exposure to asbestos did not amount to a physical impact under the "zone of danger" test.[19]

This case note on *Metro-North Commuter Railroad Co. v. Buckley* will examine the brief history of NIED claims brought under the FELA before *Buckley*, the opinions of the United States Court of Appeals for the Second Circuit, and the Supreme Court in *Buckley*. The two opinions will be compared and evaluated and finally some future predictions regarding NIED claims from the fear of developing a disease brought under the FELA will be presented.

II. THE LAW BEFORE *BUCKLEY*

In 1908, Congress enacted the FELA[20] to grant railroad employees a tort remedy for "injury" resulting from their employer's "negligence." After Congress dealt with the accidental injuries and death on interstate railroads,[21] it shifted its attention to seamen, and 1920, Congress passed the Jones Act.[22] The Jones Act incorporated the FELA by providing that "all statutes of the United States modifying or extending the common-law right or remedy in cases

13. 79 F.3d 1337, 1341-42 (2d Cir. 1996).
14. *Id.* at 1343.
15. *Id.* at 1347-48.
16. 117 S. Ct. at 2124.
17. *Id.* at 2116.
18. *Id.* at 2117.
19. *Id.*
20. 45 U.S.C. § 51 (1993).
21. Urie v. Thompson, 337 U.S. 163, 181, 69 S. Ct. 1018, 1030 (1949).
22. 46 U.S.C. § 688 (1993).

of personal injury to railroad employees shall apply" to seamen.[23] Therefore, the law under the FELA and the Jones Act regarding employers' liability to railroad employees and seamen is the same, and any interpretation of the FELA applies to the Jones Act.[24]

The Supreme Court has traditionally interpreted the FELA liberally to further its remedial goal.[25] The FELA's purpose is "humanitarian,"[26] and common law limitations on recovery[27] such as contributory negligence as a bar to recovery, assumption of the risk, and the fellow servant doctrine, do not apply.[28] Although the Court's liberal interpretation of the FELA favors the employee, the Act does not make the employer the insurer of all employee injuries because employer liability still depends upon employer negligence.[29] Because the FELA is based upon common law tort principles, the Court gives those principles not rejected by the FELA "great weight" in its interpretation of the Act, including an employee's NIED claim.[30]

In *Atchinson, Topeka & Santa Fe Railway Co. v. Buell*,[31] the Supreme Court left the question of whether or not a plaintiff could recover for NIED under the FELA unanswered. Seven years later, the Court returned to this issue in *Consolidated Rail Corp. v. Gottshall*[32] where it held that ". . . a railroad has a duty under FELA to avoid subjecting its workers to negligently inflicted emotional injury."[33] After concluding that an employee could recover for NIED under the FELA and the Jones Act, the Court in *Gottshall* shifted its focus to the adequacy of the test adopted by the United States Court of Appeals for the Third Circuit holding that "the Third Circuit applied an erroneous standard for evaluating claims for negligent infliction of emotional distress brought under FELA."[34] Consequently, the Court adopted the "zone of danger" test to examine NIED claims because it "best reconciles the concerns of the common law with the principles underlying our FELA jurisprudence."[35] Under the "zone of danger" test as announced by the Court in *Gottshall*, "those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who

23. *Id.* § 688(a).

24. *See* Thomas C. Galligan, Jr. and Jean Paul Picou Overton, *Recent United States Supreme Court Developments in Admiralty*, 55 La. L. Rev. 469 (1995).

25. 117 S. Ct. at 2117 (citing Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 114 S. Ct. 2396 (1994)).

26. *Id.*

27. *Id.*

28. *See* Galligan and Overton, *supra* note 24, at 480 (citing 45 U.S.C. §§ 51, 53, 54 (1988)).

29. 117 S. Ct. at 2117.

30. *Id.* (citing Consolidated Rail Corp. v. Gottsall, 512 U.S. 532, 114 S. Ct. 2396 (1994)).

31. 480 U.S. 557, 107 S. Ct. 1410 (1987).

32. 512 U.S. 532, 114 S. Ct. 2396 (1994).

33. *Id.* at 550, 114 S. Ct. at 2408.

34. *Id.* at 557-58, 114 S. Ct. at 2411.

35. *Id.* at 554, 114 S. Ct. at 2410.

are placed in immediate risk of physical harm by that conduct,"[36] fall within the "zone of danger" and should be entitled to relief.

As stated above, Metro-North admitted negligently exposing Buckley to asbestos on a daily basis for three years. Therefore, the negligence issue was neither before the Second Circuit nor the Supreme Court. The only issue for the appellate courts was whether Buckley suffered NIED under the FELA as a result of Metro North's negligence. Both courts were to interpret and apply *Gottshall*, but specifically, each had to determine whether Buckley's contact with the insulation dust constituted a "physical impact" which the *Gottshall* test requires for recovery for NIED under the FELA. Therefore, the focus of the Second Circuit and the Supreme Court was to determine whether the harm Buckley suffered amounted to a "physical impact" as defined by the Court in *Gottshall*.

III. THE SECOND CIRCUIT

The Second Circuit analyzed Buckley's negligent infliction of emotional distress claim in two separate sections of its opinion. Because the issues were before the Second Circuit in the context of the defendant's motion for a judgment as a matter of law, the evidence of Buckley's exposure had to be examined in a light most favorable to Buckley.[37] First, the court determined whether Buckley's exposure to asbestos amounted to a "physical impact." In making this determination, the Second Circuit examined the evidence related to Buckley's exposure and its recent decision in *Marchica v. Long Island Railroad Co.*[38] to conclude that Buckley's exposure was indeed a "physical impact."[39]

In concluding that Buckley's exposure constituted a "physical impact," the Second Circuit relied heavily on its opinion in *Marchica*. In *Marchica*, a welder for the Long Island Railroad Co. was stuck in the hand with a discarded hypodermic needle which contained blood in its syringe.[40] The needle punctured Marchica's skin.[41] Fearing the development of AIDS, Marchica sued the Long Island Railroad Co. under the FELA for negligent infliction of emotional distress.[42] The court concluded that the puncture constituted a "physical impact."[43] In affirming Marchica's recovery for NIED, the Second Circuit held that the puncture would cause a reasonable person to fear the development of AIDS.[44]

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36. *Id.* at 547-48, 114 S. Ct. at 2406.
37. 79 F.3d 1337, 1340 (2d Cir. 1996).
38. 31 F.3d 1197 (2d Cir. 1994).
39. 79 F.3d at 1345.
40. 31 F.3d 1197, 1199 (2d Cir. 1994).
41. *Id.* at 1200.
42. *Id.* at 1201.
43. *Id.* at 1203.
44. *Id.* at 1206.

The Second Circuit in *Buckley* applied this "reasonable person" inquiry to determine that Buckley's contact with asbestos was a "physical impact." It concluded that "[j]ust like the needle puncture in *Marchica*, Buckley's three years of daily contact with the cancer-causing substance—contact that from time to time left him covered from head to toe in asbestos dust—constitutes a physical impact that would lead a reasonable person to fear asbestos-related cancer."[45]

After finding a "physical impact," the Court of Appeals determined whether Buckley suffered an "emotional injury."[46] It analyzed the evidence of Buckley's emotional injury in light of his "physical impact" to hold that Buckley suffered emotional distress sufficient to preclude a judgment as a matter of law. The court ultimately concluded that Buckley's exposure to asbestos was "massive"; finding that the asbestos covered Buckley's body, entering his eyes, nose, and clothes, and that Buckley had asbestos fibers embedded in his lung tissue.[47] The Second Circuit accepted the opinions of Buckley's experts that "subclinical changes"[48] could occur in Buckley's lungs which might later develop into "deadly and debilitating diseases."[49] The court concluded that "the effect of asbestos in the lungs is a subtle, complex matter"[50] to be determined by a jury, and a "reasonable jury could conclude that Buckley suffered a physical impact from large amounts of asbestos fibers despite the lack of clinical proof of asbestos exposure."[51]

The Second Circuit allowed Buckley to go forward with his claim even though FELA and common law fear-of-disease precedent did not support such a decision. The FELA cases cited by the court, *Schweitzer v. Consolidated Rail Corp.*[52] and *Amendola v. Kansas City Southern Railway Co.*,[53] held that asbestos fiber inhalation does not amount to an injury under the FELA.[54] In *Schweitzer*, former railroad workers who had been exposed to asbestos but who had not developed injury or illness brought a tort action under the FELA.[55] The Third Circuit held that FELA actions for asbestos-related injury do not exist before manifestation of injury reasoning that "[i]f mere exposure to asbestos were sufficient to give rise to a FELA cause of action, countless seemingly healthy railroad workers, workers who might never manifest injury, would have tort claims cognizable in federal court."[56] Likewise, in *Amendola*, railroad employees brought claims under the FELA for the increased susceptibility to

45. 79 F.3d at 1344.
46. *Id.* at 1345.
47. *Id.* at 1343.
48. *Id.*
49. *Id.*
50. *Id.* at 1344.
51. *Id.*
52. 758 F.2d 936 (3d Cir.), *cert. denied*, 474 U.S. 864, 106 S. Ct. 183 (1985).
53. 699 F. Supp. 1401 (W.D. Mo. 1988).
54. 79 F.3d at 1344.
55. 758 F.2d at 939.
56. *Id.* at 942.

asbestos-related diseases and NIED.[57] Following *Schweitzer*, the United States District Court for the Western District of Missouri dismissed both claims because the plaintiffs, although exposed to asbestos, neither manifested injury nor alleged physical harm.[58] Here, the Second Circuit by allowing Buckley's claim to go forward reached the opposite conclusion of the *Schwietzer* and *Amendola* courts by not requiring actual physical harm.

The common law cases cited by the Second Circuit also held that to be entitled to recovery, "a fear-of-disease plaintiff must prove both actual exposure to a disease and a reasonable medical probability of later developing a disease"[59] or must "prove the exposure caused a present physical injury, that a future disease will likely develop, or that the emotional injury has manifested itself physically."[60] Buckley had at most only a five percent chance of developing a disease, no present physical injury, and a slight manifestation of emotional injury. However, relying on its own opinion in *Marchica* to conclude that Buckley suffered a "physical impact," the Second Circuit rejected the FELA precedent and found the common law fear-of-disease precedent irrelevant.

The Second Circuit in *Buckley* specifically addressed the policy concerns expressed by the Supreme Court in *Gottshall* that courts must limit recovery for NIED under the FELA to prevent a "flood" of "trivial" NIED claims. The Second Circuit reasoned that allowing Buckley to recover would not result in a "flood" of litigation for three reasons. First, only a narrow group of plaintiffs can sue under the FELA; second, Buckley's case was "unusual" because his exposure was "massive, lengthy, and tangible" and; third, Metro-North's negligence was severe.[61] Therefore, "valid" claims can be distinguished from the "trivial" claims on a case by case analysis.

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57. 699 F. Supp. at 1403.

58. *See* 699 F. Supp. 1401.

59. 79 F.3d at 1344. *See, e.g.*, Harper v. Illinios Cent. G. R.R., 808 F.2d 1139, 1140 (5th Cir. 1987) (per curiam) (no recovery under Louisiana law for mental anguish based on fear of future health problems absent evidence of exposure to chemicals); Doner v. Ed Adams Contracting Inc., 208 A.D.2d 1072, 1072-73 (3d Dept. 1994) (though plaintiff could prove actual exposure to asbestos, plaintiff failed to show he was likely to contract a disease and thus could not prevail on emotional distress claim).

60. *Id.* at 1345. *See, e.g., In re* Hawaii Federal Asbestos Cases, 734 F. Supp. 1563, 1569-70 (D. Haw. 1990) (fear of asbestos disease not rational unless plaintiff experiences functional impairment); Bubash v. Philadelphia Elec. Co., 717 F. Supp. 297, 300 (M.D. Pa. 1989) (worker who briefly had been exposed to low level radiation did not suffer physical injury entitling him to compensation for emotional distress under Pennsylvania law); DeStories v. Phoenix, 744 P.2d 705, 709 (Ariz. Ct. App. 1987) (no recovery to plaintiffs who had been exposed to asbestos dust absent physical injury or illness, or physical harm resulting from the emotional distress); Burns v. Jaquays Mining Corp., 752 P.2d 28, 31 (Ariz. Ct. App. 1987) (no cause of action for fear of disease absent bodily injury); Eagle-Picher Indus., Inc. v. Cox, 481 So. 2d 517, 527-28 (Fla. Dist. Ct. App. 1985) (same).

61. 79 F.3d at 1345.

The Second Circuit illustrated this factual distinction in both *Marchica* and *Buckley*. In *Marchica*, the court pointed out that had Marchica merely touched the needle and not punctured his hand his claim would have been invalid.[62] In *Buckley*, the Second Circuit, using the same reasoning, concluded that Buckley's contact with asbestos was not an "incidental contact,"[63] and if it had been, his claim for NIED would also have been invalid.[64] The Second Circuit reasoned that most people are not subject to the type of contact to which Buckley and Marchica were subjected and consequently will not have valid claims for NIED under the FELA. According to the Court of Appeals, this method of distinguishing between "physical impact" and "incidental contact" will dramatically reduce the "flood" of "trivial claims" feared by the Supreme Court. Based on this distinction, the Second Circuit concluded that "a jury . . . may find that Buckley suffered an impact that would cause fear in a reasonable person."[65]

In dealing with the issue of "emotional injury," the Second Circuit in *Buckley* conceded that Marchica's emotional distress was much more severe than Buckley's.[66] Marchica experienced vomiting, sleeplessness, rashes, anxiety, lost thirty pounds, and his wife and co-workers often saw him crying.[67] Buckley did not exhibit these severe physical manifestations of emotional distress. However, even though the "objective" evidence of Buckley's emotional distress was "not overwhelming,"[68] the Second Circuit concluded that Buckley had in fact suffered emotional distress. Furthermore, the court stated that "emotional distress must be 'severe' only when a plaintiff has not suffered a physical impact."[69] Therefore, because Buckley's exposure constituted a "physical impact," the court demanded only minimal evidence of emotional injury which was satisfied by Buckley's complaints to his supervisors and to the Metropolitan Transit Inspector General about the asbestos, Buckley's testimony about his anger and fear of dying, and the court's own conclusion that a reasonable jury could conclude Buckley suffered a "physical impact."[70]

IV. THE SUPREME COURT

In an opinion by Justice Breyer, the Supreme Court reversed the Second Circuit concluding that "the 'physical impact' to which *Gottshall* referred does not include a simple physical contact with a substance that might cause a disease

62. 31 F.3d at 1204.
63. 79 F.3d at 1344.
64. *Id.*
65. *Id.* at 1345.
66. 79 F.3d at 1346.
67. 31 F.3d at 1200.
68. 79 F.3d at 1346.
69. *Id.*
70. *Id.*

at a substantially later time . . . ."[71] Justice Ginsburg, with Justice Stevens, concurred in the opinion finding that although Buckley's exposure constituted a "physical impact," Buckley did not suffer emotional distress.[72]

The Court denied Buckley relief because in its view his exposure to asbestos did not amount to a "physical impact" as required under the *Gottshall* test. The Court concluded that every form of contact does not amount to a "physical impact."[73] A "physical impact" does "not include a contact that amounts to no more than an exposure—an exposure, such as that before us, to a substance that poses some future risk of disease and which contact causes emotional distress only because the worker learns that he may become ill after a substantial period of time."[74] In order to recover for emotional distress because of the fear of developing a disease from an exposure, a plaintiff must develop the disease or manifest symptoms of the disease.

Defining "physical impact" and subsequently denying Buckley recovery, the Court reasoned that all the state court cases cited in *Gottshall* to support the "zone of danger" test "where recovery for emotional distress was permitted . . . involved a threatened physical contact that caused, or might have caused immediate traumatic harm";[75] that the language in *Gottshall*, when read in light of this precedent, seemed similarly limited; that the common law precedent did not favor Buckley's position because he was disease and symptom free; and finally, that the policy reasons in *Gottshall* restricting emotional distress recovery to those cases falling within narrowly defined categories favored a narrow interpretation of "physical impact."[76]

The Court's policy reasons for limiting NIED recovery focused on the need to: separate the "valid" and "important" claims from the "trivial," prevent a "flood" of "trivial" claims, and prevent "unlimited and unpredictable liability."[77] The Court opined that limiting recovery for emotional distress from the fear of

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71. Metro-North Commuter R.R. Co. v. Buckley, 117 S. Ct. 2113, 2117 (1997).

72. *Id.* at 2124.

73. *Id.* at 2117.

74. *Id.*

75. *Id.* (citing Shuamer v. Henderson, 579 N.E.2d 452 (Ind. 1991) (car accident); Garrett v. New Berlin, 362 N.W.2d 137 (Wis. 1985) (car accident); Bovson v. Sanperi, 461 N.E.2d 843 (N.Y. 1984) (car accident); Rickey v. Chicago Transit Auth., 457 N.E.2d 1 (Ill. 1983) (clothing caught in escalator choked victim); Keck v. Johnson, 593 P.2d 668 (Ariz. 1979) (car accident); Tows v. Anderson, 579 P.2d 1163 (Colo. 1978) (gas explosion); Robb v. Pennsylvania R. Co., 210 A.2d 709 (Del. 1965) (train struck car); Pankopf v. Hinkley, 123 N.W. 625 (Wis. 1909) (automobile struck carriage); Simone v. Rhode Island Co., 66 A. 202 (R.I. 1907) (streetcar collision); Kimberly v. Howland, 55 S.E. 778 (N.C. 1906) (rock from blasting crashed through plaintiff's residence); Stewart v. Arkansas S. R.R. Co., 36 So. 676 (La. 1904) (train accident); Watson v. Dilts, 89 N.W. 1068 (Iowa 1902) (intruder assaulted plaintiff's husband); Gulf, C. & S.F.R. Co. v. Hayter, 54 S.W. 944 (Tex. 1900) (train collision); Mack v. South-Bound R. Co., 29 S.E. 905 (S.C. 1898) (train narrowly missed plaintiff); Purcell v. St. Paul City R. Co., 50 N.W. 1034 (Minn. 1892) (near streetcar collision)).

76. 117 S. Ct. at 2118.

77. *Id.* at 2118.

developing a disease to only those plaintiffs who manifest symptoms of a disease will further protect these policy interests.[78] The Court referred to the problem as "the evaluation problem"[79] because determining the presence of emotional injury without any external signs or symptoms of the injury is difficult, especially for judges and jurors.[80] The Court conceded that an increased chance of a person dying can cause emotional distress, but without the actual development of a disease, these sorts of predictions can be "controversial" and "uncertain."[81] In *Gottshall*, the Court addressed this problem out of a concern that without any physical evidence of an injury, judges would make "highly subjective determinations"[82] of NIED. Without any symptoms of disease, the Court stated that it could not separate the "valid" claims from the "trivial." Therefore, to meet the "physical impact" test, not only must a claimant show that an actual physical contact occurred, but that the contact caused at least the manifestation of a symptom of a disease.

Buckley raised three arguments with the Court in support of his position. First, he argued that his evidence of exposure and increased risk of death was "as strong a proof as an accompanying physical symptom that his emotional distress is genuine."[83] Second, common law jurisprudence supported his claim,[84] and lastly, the "'humanitarian' nature of the FELA warranted a holding in his favor."[85] The Court dismissed all three of Buckley's assertions.

With regard to Buckley's second argument, that his claim was supported by common law jurisprudence, the Court found that only three of the common law cases which he cited actually supported his claims.[86] However, the highest court of the relevant jurisdiction, had not decided any of these cases, and each case enunciated a minority view which did not provide an adequate basis for reaching Buckley's proposed conclusion.[87]

Buckley also relied on the decision of the second Circuit in *Marchica* as support for his claim. The Supreme Court refused to apply *Marchica* to Buckley's claim because Marchica "fell within a category where the law already

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78. *Id.* at 2119-20.

79. *Id.*

80. *Id.*

81. *Id.*

82. Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 552, 114 S. Ct. 2396, 2409 (1994).

83. 117 S. Ct. at 2120.

84. *Id.* at 2120. *See, e.g.*, Marchica v. Long Island R.R. Co., 31 F.3d 1197 (2d Cir. 1994); Clark v. Taylor, 719 F.2d 4 (1st Cir. 1983); Laxton v. Orkin Exterminating Co., 639 S.W.2d 431, 433-34 (Tenn. 1982); Lavelle v. Owens-Corning Fiberglas Corp., 507 N.E.2d 476 (Ct. Ohio Com. Pl. 1987).

85. 117 S. Ct. at 2121.

86. Watkins v. Fibreboard Corp. 994 F.2d 253, 259 (5th Cir. 1993) (Texas law) (recognizing cause of action for emotional distress based on exposure to asbestos in the absence of physical symptoms); *In re* Moorenovich, 634 F. Supp. 634 (D. Me. 1986) (Maine law) (same); Gerardi v. Nuclear Utility Servs., Inc., 566 N.Y.S.2d 1002 (N.Y. 1991) (same).

87. 117 S. Ct. at 2121.

permitted recovery for emotional distress."[88] In a parenthetical discussion, the Court noted that Marchica had suffered a "traumatic injury."[89] Buckley had not. The Court relayed other categories where the common law of torts permits recovery for NIED claims: when the emotional distress accompanies a physical injury,[90] a close relative witnesses the physical injury of a negligence victim,[91] or the plaintiff suffers from a disease or exhibits a physical symptom of exposure and then concluded that Buckley fell into none of these categories.

V. A COMPARISON OF THE SUPREME COURT AND THE SECOND CIRCUIT'S OPINIONS

The Supreme Court and the Second Circuit viewed Buckley's exposure to asbestos very differently. The Supreme Court viewed the Second Circuit's interpretation of the words "physical impact" to include a "simple impact with a substance that might cause a disease at a future time, so long as the contact was of a kind that would 'cause' fear in a 'reasonable person.'"[92] The Second Circuit concluded that Buckley's exposure to asbestos would cause fear in a reasonable person but not that the contact was a "simple impact." As stated above, the Second Circuit concluded that Buckley's exposure was "massive."

The two courts reached differing conclusions, regarding whether Buckley's exposure constituted a "physical impact," because each court defined "physical impact" under the "zone of danger" test differently. Using two categories, (1) "physical impact," and (2) "emotional injury" to determine Buckley's NIED claim, the Second Circuit simply defined "physical impact" as the plaintiff's *actual physical contact* whereas the Supreme Court defined "physical impact" as the plaintiff's *actual physical contact* and the *result* of that contact on the plaintiff.

In *Buckley*, the Second Circuit used *Marchica* as the backbone of its decision and as the basis for its definition of "physical impact" under the "zone of danger" test. The Second Circuit viewed the "physical impact" as the *actual physical contact* that Buckley made with the asbestos or that Marchica made with the needle. According to its analysis, the *result* of the contact (the emotional injury) did not factor into the determination of whether or not a "physical impact" occurred. In *Marchica*, after holding that the plaintiff suffered a "physical impact," the Second Circuit concluded that his "emotional distress manifested itself physically in post traumatic stress disorder . . . ."[93] Although

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88. *Id.* at 2120.

89. *Id.*

90. *Id.* at 2117 (citing Simmons v. Pacor, Inc., 674 A.2d 232, 239 (Pa. 1996)); Restatement (Second) of Torts § 924(a) (1977).

91. *Id.* (citing Dillon v. Legg, 441 P.2d 912 (Ca. 1968)); *Gottshall*, 512 U.S. at 549 n.10, 114 S. Ct. at 2407 n.10 (citing cases).

92. *Id.* at 2117.

93. 31 F.3d 1197, 1203 (2d Cir. 1994).

the traumatic injury factored into the Second Circuit's ultimate decision, the Court of Appeals concluded that Marchica's contact with the needle constituted a "physical impact" without regard to his "traumatic injury." Therefore, in *Buckley*, the Second Circuit compared Marchica's *actual physical contact* with the needle to Buckley's *actual physical impact* with the asbestos to determine that Buckley's exposure constituted a "physical impact," because like Marchica's contact, Buckley's would also cause fear in a reasonable person. The Second Circuit did not compare the *results* of Marchica's and Buckley's contacts to reach its conclusion that Buckley suffered emotional distress under the FELA.

Justice Ginsburg in her brief concurrence defined "physical impact" as the Second Circuit did. She found that Buckley's contact with the asbestos amounted to a "physical impact" as the Supreme Court used the term in *Gottshall*.[94] In reaching this conclusion, Justice Ginsburg analyzed the NIED claim in a fashion similar to that of the Second Circuit by dealing with the "physical impact" and "emotional injury" as separate issues. This enabled the Second Circuit and Justice Ginsburg to both conclude that Buckley's *actual physical contact* with asbestos constituted a "physical impact" without agreeing on the ultimate conclusion of the case. She ultimately disagreed with the Second Circuit on the "emotional injury" issue because Buckley did not demonstrate enough objective evidence of severe emotional injury to warrant recovery which indicates that she shares the same policy concerns of the *Buckley* majority.

Unlike the Second Circuit's and Justice Ginsburg's analyses of the "zone of danger" test, the Supreme Court's majority opinion defined "physical impact" as encompassing two issues; the physical contact issue and the emotional injury issue. Therefore, the Court examined both Buckley's contact with the asbestos and his alleged emotional injury as a result of the contact with the asbestos to hold that Buckley's exposure did not constitute a "physical impact." Under the Court's analysis, although a plaintiff makes *actual physical contact* with a substance, the Court will not conclude that it constituted a "physical impact" without also examining the *result* of that contact. Ultimately, then, a plaintiff can not suffer a "physical impact" without suffering an injury which explains why the Court's definition of "physical impact" does not encompass every form of physical contact.

The Supreme Court, without expressly doing so in its opinion, compared the *results* of Marchica and Buckley's exposures, not the actual physical contacts with the needle and the asbestos. The Court put *Marchica* in a category that permitted recovery because of his "traumatic injury." However, because the Court only dealt with *Marchica* in a parenthetical there is some ambiguity about what the Court meant by "traumatic injury." Is "traumatic injury" the slight physical injury, i.e. the puncture wound, that the needle caused Marchica's hand or the emotional injury, i.e. the post traumatic stress disorder, the vomiting, sleeplessness, etc, that he suffered following the contact with the needle?

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94. 117 S. Ct. at 2124.

The answer to this question is important because it discerns the true analysis of the *Buckley* majority regarding a "physical impact" under the "zone of danger" test. Although it is evident that some sort of injury is required to constitute a "physical impact," it is not absolutely clear if the injury may alone be emotional or must it be physical in order for a plaintiff to recover emotional distress damages. *Buckley* and *Marchica* do not resolve this issue because Buckley suffered from neither a physical injury nor a "sufficient" emotional injury whereas Marchica had both a physical injury as well as an emotional injury. Therefore, after *Buckley*, all that is certain is that Buckley did not recover under the Court's analysis because he was not injured although he made contact with the asbestos. However, the Court's holding that Buckley could not recover unless he manifested a symptom of disease lends more weight to the conclusion that the *Buckley* majority found the "traumatic injury" to be Marchica's physical injury not his emotional injury.

Justice Ginsburg clearly illustrates in her concurrence that had Buckley demonstrated more objective evidence of emotional distress she would have found recovery appropriate. Therefore, under her analysis, a plaintiff may recover for NIED without sustaining any physical injury from the "physical impact." Obviously, by allowing Buckley recovery, the Second Circuit agrees. However, from Justice Breyer's conclusion that a "physical impact" is not "an exposure . . . to a substance that poses some future risk of disease and which contact causes *emotional distress*. . .,"[95] it seems that the *Buckley* majority disagrees with Justice Ginsburg; not only with her definition of the term "physical impact" but with her opinion that recovery would have been appropriate had Buckley demonstrated more objective evidence of emotional injury. Justice Breyer's conclusion indicates that emotional distress alone without some sort of physical injury, i.e. either a puncture wound or disease, is not enough to constitute a "physical impact."

VI. EVALUATION OF THE OPINIONS

The FELA's purpose, as stated above, is to compensate railroad employees for "injury" caused by their employer's negligence. Therefore, although Metro-North admitted its negligence, the Court correctly denied Buckley recovery under the FELA because he lacked an injury. Additionally, the Court's policy concerns further justify its holding because as the Court indicated, exposures to cancer causing agents are common in our society.[96] Even Buckley conceded that he

95. *Id.* at 2117 (emphasis added).

96. 117 S. Ct. at 2119 (citing Nicholson, Perkel & Selikoff, *Occupational Exposure to Asbestos: Population at Risk and Projected Mortality—1820-2030*, 3 Am. J. Indust. Med. 259 (1982) (estimating that 21 million Americans have been exposed to work-related asbestos); U.S. Dep't of Health and Human Services, 1 Seventh Annual Report on Carcinogens 71 (1994) (3 million workers exposed to benzene, a majority of Americans exposed outside the workplace); James L. Pirkle et al., *Exposure of the U.S. Population to Environmental Tobacco Smoke*, 275 JAMA 1233, 1237 (1996)

continued to smoke cigarettes after his exposure. Without a mechanism to limit recovery, anyone who is exposed to a common carcinogen can bring suit for fear of developing a disease.

The Second Circuit proposed distinguishing the "common" exposures from the more severe exposures in determining NIED claims. Therefore, those who were severely exposed, like Buckley, would recover even though the evidence of emotional injury was not completely conclusive. The Second Circuit concluded that this case by case approach would prevent the flood of trivial NIED claims. This scheme might help distinguish the legitimate claims from the trivial, but it is hard to comprehend how it could prevent a flood of trivial claims.

Actually, it seems that the Second Circuit's scheme would encourage more lawsuits because a case by case analysis gives more authority to judges and juries to determine recovery for NIED. Under a case by case analysis, judges and juries are not limited to granting recovery to only those who fall within certain recovery permitting categories under the "zone of danger" test, but are free to determine their own criteria for recovery. This would not only perpetuate the "evaluation problem" and increase NIED litigation, but would leave large corporations with little chance of prevailing in these NIED suits because few jurors will have sympathy for them. Practically speaking, the Court had to maintain narrowly defined categories to discourage the number of trivial claims filed in courts. Therefore, even though Metro-North was negligent and Buckley's exposure severe, ultimately it is difficult to award damages to a plaintiff who only has at most a five percent chance of injury, especially in light of the Court's policy concerns.

Although the Court ultimately reached the correct conclusion in *Buckley*, the analysis was flawed. Besides determining Metro-North's liability, the Supreme Court's role in *Buckley* was to interpret what constitutes a "physical impact." In doing so, the Court defined the term "physical impact" not to include every form of physical contact but only those that result in injury. By comparison, Justice Ginsburg and the Second Circuit's definition of "physical impact" is more rational because its meaning is in accord with the common usage of the words which suggest some form of physical contact not the result of the contact.

Defining "physical impact" as only "physical contact" allows for the use of a two-prong analysis in determining NIED claims under the "zone of danger" test similar to the analysis used by Justice Ginsburg and the Second Circuit. According to such an analysis, the Court could have reached the same conclusion in *Buckley* without defining the term as it did. Instead it chose to make "physical impact" a more technical term by incorporating two questions within it. A simpler analysis would be to first determine whether the actual physical contact constitutes a "physical impact," and if it does determine if the plaintiff

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(reporting that 43% of United States children lived in a home with at least one smoker, and 375 of adult nonsmokers lived in a home with at least one smoker or reported environmental tobacco smoke at work).

suffered an injury. If both prongs of the analysis are satisfied then recovery should be granted. Therefore, under the "zone of danger" test, the ultimate determination of an NIED claim should be whether the plaintiff suffered emotional injury, but to reach that question, the plaintiff must first sustain a "physical impact" or be placed in immediate risk of physical harm if no contact occurred.

The Court was not required to define "physical impact" as it did. The Court based its definition of "physical impact" on *Gottshall*'s "language" and the jurisprudence that supported its adoption of the "zone of danger" test in *Gottshall*.[97] However, neither the language of *Gottshall* nor the jurisprudence purport to define the term "physical impact." The Court in *Gottshall* adopted and defined the "zone of danger" test, but did not interpret the term "physical impact"; it was the Court in *Buckley* who was to interpret it. As for the jurisprudence regarding the term "zone of danger," those cases involved "*threatened* physical contact[s],"[98] not actual physical contacts. Consequently, those cases do not raise the issue of what constitutes a "physical impact," but apply to those plaintiffs who are placed in immediate risk of harm.

Aside from the Court's definition of "physical impact," *Buckley*'s holding is troublesome because it stated that Buckley could not recover for NIED unless he manifested symptoms of disease. Consequently, if that is the case then a separate NIED cause of action from the fear of developing a disease does not exist alone under the FELA, but emotional distress damages are only recoverable as parasitic damages from recovery for the disease not the fear of developing the disease. The only way a plaintiff could recover emotional distress damages from the fear of developing a disease would be if the plaintiff later developed the disease which revived recovery for the NIED claim for the emotional injury sustained for the period of time it took for the disease to develop.

Although Buckley had no injury, the Court's holding is too extreme because it does not allow for a plaintiff who suffers from emotional injury from the fear of developing a disease to recover for NIED without actually developing the disease. As its holding indicates, the Court put Marchica in a recovery-permitting category because his actual puncture wound, the physical injury, was the traumatic injury not the post traumatic stress disorder or the other physical manifestations of emotional injury. Therefore, even if the Second Circuit granted Marchica recovery based on his emotional distress from the fear of developing AIDS without regard to his slight physical injury, the Court deemed Marchica's recovery of emotional distress damages as parasitic. On the other hand, if Buckley had suffered severe emotional distress which manifested itself physically as Marchica's did, Justice Ginsburg would have allowed recovery. However, according to the majority's holding, the Court would not have allowed recovery in the absence of developing a disease even if Buckley had suffered severe

97. 117 S. Ct. at 2118.

98. *Id.* at 2117 (emphasis added).

emotional injury. If the Court is willing to conclude that an NIED claim exists under the FELA, then it should properly allow those employees who sustain emotional injury from their employer's negligence to recover even in the absence of suffering from a disease or manifesting a symptom of that disease.

VII. CONCLUSION

Even if the Court changes its definition of the term "physical impact" and shifts to a two-prong analysis, it would have little significance on NIED claims for the fear of developing a disease brought under the FELA because of the Court's policy concerns. Although other factors contributed to the Court's holding, *Buckley* was primarily policy driven. Therefore, to prevent a flood of trivial NIED litigation, the Court will only grant recovery for emotional distress to plaintiffs who fall within certain categories under the "zone of danger" test.

After *Buckley*, for a plaintiff to fall within the recovery-permitting category for a NIED claim for the fear of developing a disease under the "zone of danger" test, one must sustain a "physical impact." Under the Court's present definition of "physical impact," the plaintiff must sustain a physical contact or exposure that causes a plaintiff to suffer from a disease or manifest symptoms of a disease. The Court could have easily protected its policy interests and denied Buckley recovery while still leaving the door open for those employees who do suffer emotional injury to recover. Instead it went too far with its holding leaving fear of disease plaintiffs who do not suffer from a disease no chance of recovery for NIED under the FELA unless the actual development of the disease revives the NIED claim for the emotional injury for the time it took the disease to develop. Even if that is the case, the Court has eliminated the separate NIED cause of action for the fear of developing a disease under the FELA because recovery will depend on a cause of action for negligence causing a disease not emotional distress.

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