OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CONSOLIDATED RAIL CORPORATION, Petitioner v.

JAMES E. GOTTSHALL AND ALAN CARLISLE

CASE NO: No. 92-1956

PLACE: Washington, D.C.

DATE: Monday, February 28, 1994

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IN THE SUPREME COURT OF THE UNITED STATES

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CONSOLIDATED RAIL CORPORATION, :

Petitioner :

v. : No. 92-1956

JAMES E. GOTTSHALL AND ALAN :

CARLISLE :

- - - - - - - - - - - - - - - - - -X

Washington, D.C.

Monday, February 28, 1994

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

RALPH G. WELLINGTON, ESQ., Philadelphia, Pennsylvania; on behalf of the Petitioner.

WILLIAM L. MYERS, JR., ESQ., Philadelphia, Pennsylvania; on behalf of the Respondent Gottshall.

J. MICHAEL FARRELL, ESQ., Philadelphia, Pennsylvania; on behalf of the Respondent Carlisle.

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PROCEEDINGS

(10:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 92-1956, Consolidated Rail Corporation v. Gottshall and Carlisle. Mr. Wellington.

ORAL ARGUMENT OF RALPH G. WELLINGTON

ON BEHALF OF THE PETITIONER

MR. WELLINGTON: Mr. Chief Justice, and may it please the Court:

These two consolidated cases from the Third Circuit arise from different factual circumstances, but present a single fundamental issue from their holdings: Do railroads have a broad duty, under the Federal Employers Liability Act, to protect their employees from all genuine and foreseeable emotional harm, even in the absence of physical impact or reasonable fear of physical impact?

This Court, in 1987, in its decision in the Atchison, Topeka & Santa Fe v. Buell case, discussed but did not decide whether claims for emotional injury were cognizable under the FELA. And since that time, Federal and State courts around the country have wrestled with that fundamental question, and with the legal principles to be applied in answering it.

Although different analyses have been applied by

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different courts, most -- indeed, all, so far, until the Third Circuit, have recognized the need to have reasonable limits on recovery for such claims of emotional distress. Only the Third Circuit, in the decisions below, has expressly rejected the experience of the common law and the limited tests of duty developed at common law with respect to emotional harm. And in its Gottshall decision, the court determined that the duty of railroads under the FELA, and I quote only a phrase from the appendix, page 52 of the writ -- appendix to the writ of certiorari, they held that the duty under the FELA, quote, includes a duty to guard against conditions in the work place that cause emotional harm to employees, end quote.

This duty was then applied in the Carlisle decision to hold for the first time that railroads can be subjected to damages under the FELA for general work place stress. We believe those decisions to be error.

At the outset, I wish to make Conrail's position on the issue clear. We do not dispute that under some circumstances the FELA may provide recovery for some claims of emotional distress. In short, we do not argue that the word "injury" in the statute precludes recovery for all emotional harm. Rather, we believe the critical inquiry is whether negligence in the statute imposes a general duty to guard against conditions in the work place

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that cause emotional harm.

Since there was no independent duty for -- at common law at the time the FELA was enacted to avoid negligent infliction of emotional distress, and since there is no evidence that Congress intended to include in the FELA a duty under negligence that was not included at common law at the time, we believe that no such general duty exists and should not be imposed by the courts.

QUESTION: So, you think the duty to guard against emotional injury is a more limited one than the duty imposed by the Act to guard against physical injury?

MR. WELLINGTON: Yes, Your Honor, we do. If -- if one looks -- as this Court recently, in Morgan Monessen, observed, it's important to look at the historical context of the FELA and the legislative history at the time. And at the time the FELA was enacted in 1908, there was no general duty at common law to avoid the negligent infliction of emotional distress. Indeed, there is no such general duty today.

What the common law has done in the last 80 years or so is carve out certain limited exceptions, defined by zone of danger test, bystander test, that permit some limited recovery under some circumstances. And we believe that if one begins with looking at the statute and its historical context, that you cannot assume

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that Congress, in 1908, included -- intended to impose a duty on the railroads that was not then recognized at common law and, indeed --

QUESTION: Well, is it possible, though, that the common law can change over time, and that a duty could evolve, and that perhaps the Act is broad enough to encompass those changing notions?

QUESTION: Absolut --

QUESTION: At least there's some suggestion to that effect, I think, in some of this Court's language.

MR. WELLINGTON: Absolutely, Justice O'Connor, that's correct. And we recognize that this Court has interpreted the statute as evolving with common law. But within the statutory framework originally enacted, for example, in the Urie decision, where this Court real -- held that injury in the statute includes injury over time from a deleterious substance, not just impact injury. That's, I think, an appropriate development with common law.

But, in Morgan, as the Court indicated, and as we believe here, where there was no -- in fact, where the statute could not have included the duty at the outset, and Congress has chosen not to include it through the next 80 years or so, we think it's inappropriate to include a new duty.

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The Third Circuit's test, in fact, goes beyond, Your Honor, anything that the common law generally recognizes. What we are suggesting is that the appropriate test is -- does reflect this -- a response to the remedial purposes of the FELA. And that's the zone of danger test that the common law has wrestled with over several decades.

And at the same time, in that test, it does permit recovery for certain plaintiffs under certain circumstances, who have sustained an emotional injury. But that --

QUESTION: Well, certainly these -- these particular plaintiffs present rather appealing cases, don't they?

MR. WELLINGTON: I think that the facts, Justice Blackmun, are compelling, particularly, let's say, in the Gottshall case. They are dramatized because of the heart attack of a co-worker. The difficulty, I think, with -- with the Third Circuit's opinion, is that in dramatizing those facts -- and they are sympathetic -- I don't take issue with the sympathy of the facts, particularly in the Gottshall case --

QUESTION: Well, courts always dramatize facts, I suppose.

MR. WELLINGTON: In -- in -- in reaching to

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recov -- to permit Mr. Gottshall to recover, they have established a rule of law that has a pernicious potential application in other cases. And the real problem is exhibited by its application in Carlisle. And it is this general duty that they've assumed that the railroads now have under the FELA. Once you apply the duty -- take the duty from the facts of Carlisle -- excuse me -- Gottshall -- and apply it to a Carlisle case, where you immediately have a finding that the duty includes a general duty to avoid emotional harm in the work place, you now have the kind of unlimited liability that has never been recognized.

QUESTION: Well, under -- under your zone of danger test, is there a triable issue of fact in Gottshall?

MR. WELLINGTON: I do not believe there is, Justice Kennedy. The District Court, in fact, in Gottshall, in a -- in reviewing the summary judgment, analyzed Mr. Gottshall's claim on a traditional zone of danger analysis. And it determined that he was not within a zone of danger. In fact, in the Third Circuit, as the record reflects, Mr. Gottshall argued that the zone of danger was the inappropriate test to analyze his claim because he recognizes he's not within the zone of danger. And the Third Circuit did the analysis on the common law

bystander test, which some courts recognize.

QUESTION: If he had been rushing to help the victim and broken his arm, I assume that he would have been covered because of the rescue doctrine?

MR. WELLINGTON: Interesting question. Perhaps. He would have suffered -- if -- yes, he may have, Your Honor. He may have suf -- if that physical injury is a direct result of the negligence of the railroad, and it may be under the law, based upon the rescue doctrine.

QUESTION: Well, if -- if the stress were related to his rescue activities, then it seems to me the same result might follow.

MR. WELLINGTON: If his stress was related -- the difficulty I have, Your Honor, is that we have to -- I think it's appropriate -- important to have a legal analysis that really can be applied by the courts in these claims. No one has analyzed Mr. Gottshall's claim on the rescue doctrine to date, that's either in District Court or the Third Circuit. And the Third Circuit's principles are that, once you can foresee that someone will be distressed, that person can recover.

The prob --

QUESTION: Mr. Wellington, in describing the standard for the Third Circuit, whether it's correct or not, I'm not clear on whether you are taking the position

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that the FELA is frozen in a certain time or whether this statute, which uses the words "injury," uses the word "negligence," whether this is a charter to the courts to use the same kind of dynamic interpretation in developing common law concepts so that, with respect to this Act, the Federal courts would be in the same position that State courts are, and State courts, over time, have changed the common law with respect to emotional distress.

Is -- are the Federal courts in the same position vis-a-vis the FELA, or is there something different?

MR. WELLINGTON: Your Honor, they are within the same position, but only within the confines of what Congress intended within the original statute. And to that extent, the -- the Federal courts, in interpreting or expanding the FELA, are somewhat constrained by the original intent of Congress and the legislative history that reflects that intent. And so --

QUESTION: Well, was the original intent of Congress anything, or anything more definite at least, than the removal of certain defenses, so as to open up this kind of litigation? For example, I mean, it removed the fellow-servant defense. Where -- what can you point to in the intent of Congress that, in effect, precludes this Court or the Federal courts from any exercise of

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originality in developing a theory of liability?

MR. WELLINGTON: What we -- what we need to look to, Justice Souter, is what the common law of negligence was at the time Congress enacted it. And, as you say, Congress --

QUESTION: Well, you're saying that's what we need to look to, but my question was, what is there, either in the statute or -- or in legislative history, that you can specifically point to that requires us to do that?

MR. WELLINGTON: I bel -- it requires us to -- to not include emotional injuries.

QUESTION: Requires us to -- to foreswear originality.

MR. WELLINGTON: I do not believe the Court needs to foreswear originality, and we're not arguing that, Your Honor. What we are arguing is that, yes, the common law -- excuse -- yes, the statute does evolve within the common law, or gleaning guidance from the common law, as this Court has observed. But the problem with the Third Circuit decision is twofold. It has gone beyond what is generally accepted at common law, to begin with.

QUESTION: Well, that, in effect, it seems to me, you're saying the Third Circuit was guilty of some

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originality. It was supposed to take some sort of a common law census and determine the common law limit, and say, we cannot go one inch beyond that. That's what you're saying, isn't it?

MR. WELLINGTON: It is not just the common law limit, Your Honor. What we -- what we believe is instructive about the common law experience is that the courts, in decades of the common law, have dealt with these claims and have realized the pitfalls of going to a general foreseeability standard. So, it's important to look at that experience --

QUESTION: Well, what if -- what if the Federal courts look at it and say the -- the State courts are too timid?

MR. WELLINGTON: Then --

QUESTION: That's -- that's depending on the common law experience. It is presumably learning something from it and saying, the lesson is that we should do a better job.

MR. WELLINGTON: We are also constrained, I believe, Your Honor, by looking at the statute itself, though. And that's, I know, was Your Honor's original question. In -- when it was enacted, Congress, as Your Honor pointed out, knew how to change elements of the common law if it chose. And, indeed, it, at initial

enactment, made three modifications and, 40 years later, made another modification, by statute, to change basic negligence principles that had been enacted in the statute.

But at the time this statute was enacted, and indeed, today, as I -- as I've mentioned, there is, at the common law, no general duty to protect against emotional harm. For that duty to have -- for us to assume that in 1908 Congress intended that duty, without having reflected that in the statute itself, when the duty didn't exist at common law, or without there being any legislative history that reflects that emotional injuries of this nature were to be covered, I think is -- is inappropriate.

QUESTION: Then we're going back to the question then that I asked, and I think you're giving a different answer now. I thought that this statute, this general liability act, was meant to be guidance for the Federal courts to interpret the law of railroad worker liability in the way that the highest court of the State would interpret general liability statute.

And I asked you if there's any constraint based on the date of this Act, or did Congress mean the Federal courts to be as dynamic as a State court would be, so that then the question becomes, what is a sensible position for the highest court of a common law jurisdiction to take?

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And I -- I still haven't got a clear fix, because you seem to be backtracking now, on whether you're saying the Third Circuit didn't take the sensible position for a common law court dealing with concepts of negligence and injury to be taking, or there are additional constraints that the FELA places on the Federal courts that would not be placed on, say, the courts of Pennsylvania in determining the extent of liability for infliction of emotional distress.

MR. WELLINGTON: Your Honor, what I am saying -- or -- and our position is that both of those things are true. There are additional restraints that the common law courts would not have because of the historical context, and we need to look at what Congress intended, and the fact that it has not amended the statute since that time.

The second issue that we are proposing is exactly as Your Honor suggested. Apart from that legislative constraint to begin with, the -- the test that they adopted is not a rational, reasonable or workable test. And we can look at the experience of the common law in order to come to that conclusion.

So, I am -- we are suggesting that both of those things are what is wrong with the Third Circuit's approach. By adopting a general foreseeability statute, or standard, that they now apply to -- to the railroads, a

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number of claims that have already been dealt with in the -- by the Circuit Courts around the country now become -- now pose situations of potential plaintiffs.

It is foreseeable -- it's a given that it is foreseeable on the railroad or any other industry that certain working conditions will cause people stress. Already this -- the Sixth Circuit has dealt with a claim of discipline -- of a person who claims emotional harm from discipline decisions against him. The Fifth Circuit has dealt with emotional claims arising from witnessing an accident to someone else. The Sixth Circuit has also dealt with emotional claims from people not liking the way a supervisor has treated them. And we've had several --

QUESTION: Well, Mr. Wellington, I take it -- I'm going back to the facts of these cases -- I take it you're not disputing the facts of these cases? Such as Conrail's disciplining Mr. Gottshall for administering CPR?

MR. WELLINGTON: I don't believe, Your Honor, that Mr. Gottshall was disciplined for that. I believe what the record says is that a supervisor, the following day -- I think verbally reprimanded him for doing that. I don't believe he was disciplined, Your Honor.

QUESTION: Well --

MR. WELLINGTON: I do not --

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QUESTION: Is there a difference between criticism and reprimand by a supervisor?

MR. WELLINGTON: Let us assume that there is not, Your Honor. The ques -- the legal question becomes, is that damage-provoking conduct?

QUESTION: I know what the legal question is. But what I want to know is whether you concede these facts as stated.

MR. WELLINGTON: For purposes of these arguments, Your Honor, we concede these facts -- we do, indeed.

The foreseeability standard that we're most concerned about is by the cases I just mentioned that the Circuit Courts have dealt with. Those plaintiffs now become damage plaintiffs, because, if their emotional distress was genuine, it is clearly foreseeable in those circumstances that people would be -- will be upset by management decisions there now state a recoverable claim with the Third Circuit.

The next point that I would like to address is the difficulty with Mr. Carlisle's claim and Mr. Gottshall's claim, himself -- themselves. Assuming the facts to be exactly as they are in the record, Mr. Gottshall --

QUESTION: Well, how would they be otherwise?

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MR. WELLINGTON: The -- Mr. Gottshall's facts, Your Honor, were on a summary judgment basis, and I'm assuming --

QUESTION: Yes, I'm speaking of the other one, though.

MR. WELLINGTON: Mr. Carlisle?

QUESTION: Yes.

MR. WELLINGTON: They are as they are in the record, Your Honor.

QUESTION: Okay. So, you don't have to assume.

MR. WELLINGTON: With the facts that we have before the Court, Mr. Gottshall does not, under any common law analysis, state a recoverable claim. The District Court so found that, and the Third Circuit, indeed, in analyzing Mr. Gottshall's claim under the generally accepted standards, found that he did not have a claim.

QUESTION: May I go back to a question Justice Kennedy asked you earlier, and just change the facts slightly. If Mr. Gottshall had been 50 years old with a heart condition, would he have been in the zone of danger?

MR. WELLINGTON: Your Honor, no.

QUESTION: Does the -- does the zone of danger, then, have to be created by an independent third party --

MR. WELLINGTON: The zone of danger --

QUESTION: Independent of the employer?

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MR. WELLINGTON: The zone of danger, under common law analysis, is the immediate threat of a physical impact -- an impact of immediate threat of a physical impact.

QUESTION: So, it's -- it's simply -- the answer is it cannot result from a -- an existing condition of the employee without the impingement of some external force?

MR. WELLINGTON: Yes, it cannot result from a working condition, whether that working condition be heat, cold, heavy lifting, work, stress, because the result is, if the plaintiff is permitted to recover, not because he's been injured by that condition, but because he's -- he's uncomfortable or afraid or concerned about working in that condition, you now open up as potential plaintiffs under the standard anyone who encounters a working condition -- a supervisor, a strenuous activity, hours -- they become damage plaintiffs under the FELA even before they've had an injury.

So, I don't believe under any circumstance a working condition can be the physical impact.

QUESTION: Mr. Wellington, why do you -- why do you pick that as the criterion? I mean, there are a lot of other tests that could be applied. For example, why shouldn't we adopt the rule that you can recover for emotional injury only if it manifests itself in some

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physical disability? You -- you sort of reject that. Why? Why is that, because you don't need it to win your case? It seems to me, you've picked, among the available common law choices that various States have used, the most permissive one that will yet enable you to win your case.

I don't know that that's the way we ought to decide this matter. There are many more restrictive views. Why shouldn't we consider some of those?

MR. WELLINGTON: There are three -- three answers, Your Honor. The -- the physical manifestation test that Your Honor just mentioned, for example, is not really a test under the common law, even though the Third Circuit sort of mentioned it as such. Physical manifestation -- every claim for emotional harm has an allegation of physical manifestation.

You cannot work -- develop a workable legal principle on whether or not a plaintiff says, I have insomnia or a headache. Even in the Buell case this Court had, there was gastritis.

Mr. Carlisle, although his claim is really emotional distress, had -- had sleeplessness. Mr. Gottshall had some physical manifestation. Every claim has one. And at the common law, that is essentially not a test. What it is, is the common law requires that manifestation as a showing of the genuineness of the

injury, which is part of the injury -- proof of it.

Secondly --

QUESTION: So, you say that test does apply, or it doesn't?

MR. WELLINGTON: I believe it's -- it's a thresh -- I believe it's an element of a plaintiff's proof, even under a zone of danger test, Your Honor.

Secondly --

QUESTION: But the plaintiffs met it here?

MR. WELLINGTON: Yes, Your Honor, they both had physical manifestations.

Under a zone of danger test --

QUESTION: Do -- do they get recovery for the physical manifestations only, or do they get recovery for the emotional --

MR. WELLINGTON: They get recovery for the physical manifestations if they meet --

QUESTION: No, I understand. But, in addition to that, do they -- do they get recovery for the emotional injury that caused the physical manifestation?

MR. WELLINGTON: If -- if they were -- had a cognizable cause of action. And --

QUESTION: Yes; well, why not give them recovery only for the physical manifestations, for the physical injury that they've suffered?

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MR. WELLINGTON: If --

QUESTION: Even if that physical injury is caused indirectly --

MR. WELLINGTON: By -- by an emotional harm?

QUESTION: By an immediate emotional injury which produces a physical injury?

MR. WELLINGTON: It -- it's the same --

QUESTION: What's wrong with -- with doing that?

MR. WELLINGTON: What's wrong with doing that is I think the same problem we have with the decisions, is that you open up people who have not in fact been physically injured -- and the way the statute was originally intended to apply -- to -- to saying I, nonetheless, because I'm upset with my supervisor, I can't sleep and I've lost 10 pounds; I have a damage claim for that. You still expand the basic liability, because the --

QUESTION: Well --

MR. WELLINGTON: Excuse me, Mr. Chief Justice.

QUESTION: Well, when you're calculating damages, the damages are awarded for the physical manifestations really, are they not; not for the -- what is claimed to be the underlying emotional upset?

MR. WELLINGTON: Not on these claims, Your Honor. On Justice Scalia's hypothetical to me, as -- why

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not argue that -- I understand that's what he was suggesting -- but not on these claims. These claims go to the jury for emotion -- what is the emotional impact. And the physic -- or what is the emotional harm and how much should they recover? In addition, they're permitted to show damages, as well, or give damages, as well, for the physical injuries that have become manifest.

Our concern -- we just don't believe you can develop -- establish a workable principle of law on the amount of physical manifestation a plaintiff alleges coming with emotional harm, because they all allege some physical manifestation.

QUESTION: There's a different test than perhaps as what is floating around here -- that is, if you have a physical -- if there's a physical impact, then you can recover for both emotional and other kinds of injuries, but that the impact has to be physical. Which is different from saying that there are inevitably physical manifestations of emotional distress.

MR. WELLINGTON: Your Honor, what you've described is a basic negligence action, where someone is hurt. And we have no contest with that. If Mr. -- if Mr. Johns -- take out the drama for a moment of the Gottshall -- of the heart attack, and assume that Mr. Johns had been working lifting these rails, and had

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hurt his back lifting the rails, instead of had a heart attack. Mr. Johns would have had, presumably, if he could establish the negligence of the railroad in having him do this work, he would have a recovery for the physical injury itself and impact.

What Mr. Gottshall is now saying is, because I saw Mr. Johns hurt, I am afraid that I don't want to do that heavy labor, and I don't want to -- and I have an emotional harm that I will be hurt if I have to do that. And we believe that's where the line should be drawn.

If I might, Your Honor, I'd like to reserve my time for rebuttal.

QUESTION: Very well, Mr. Wellington.

Mr. Myers, we'll hear from you.

ORAL ARGUMENT OF WILLIAM L. MYERS, JR.

ON BEHALF OF THE RESPONDENT GOTTSHALL

MR. MYERS: Mr. Chief Justice, and may it please the Court:

The issue before this Court today is whether the Court is going to carve out an emotional injury exception to the FELA. It is the Respondent's position that it should not, first of all, because, to do so, this Court would have to essentially rewrite the FELA and, secondly, because there is simply no need to do so.

This Court has already construed the FELA as a

dynamic statute that is meant to include causes of action in specific injuries and specific classes of employees that may not have been originally contemplated by Congress.

QUESTION: Why is that? I mean, it is rather extraordinary. I'm not used to being a common law judge. I usually have a statute in front of me, and I give it the beginning it had when it was enacted. Indeed, some of my colleagues look to the committee reports and the legislative history to see what Congress thought the meaning was at the time it was enacted, and if that's what they thought, that meaning doesn't change, even if, in light of, you know, better knowledge, we -- it would better have a different meaning.

What is different about FELA that -- that converts us into common law courts?

MR. MYERS: The -- this Court found in Kernan, for example, Kernan v. American Dredging, that Congress itself did not want the FELA to be limited to the specific types of injuries or the specific class of employees --

QUESTION: Is that in the statute?

MR. MYERS: That's not in the statute. And that's -- and that's actually part of our position. Congress deliberately worded this statute in broad language. It set up a flexible scheme. It didn't set out

specific injuries, like accidental injuries as opposed to occupational injuries. It didn't say that the types of employees covered would only be employees who were traditional railroad employees, rather than clerks.

QUESTION: But you say that some injuries are covered today which clearly were not covered when it was passed? That it's acquired a different meaning today?

MR. MYERS: Not that it has acquired a different meaning, but that some specific injuries are covered today, and have been for many years, that are different from the types of injuries Congress was thinking about.

QUESTION: Is that different from what I said? Are you or are you not saying that some injuries are covered today which were not covered at the time the statute was passed?

MR. MYERS: No, Your Honor. I'm saying that some injuries today are covered that were not considered by Congress. To say that an injury wasn't covered --

QUESTION: So, it was covered when it was passed, Congress just didn't know it, is that it, and the courts didn't know it?

MR. MYERS: Essentially, Your Honor, yes. Con -- by creating a dynamic remedy, Congress set up a system where Congress itself didn't have to be aware of or know all the things that were going to develop in the

future. Congress deliberately chose not to create a statute limited to the peculiar hazards of the railroad industry. That was this Court's holding in, I believe, Reed v. Pennsylvania Railroad.

What the Petitioner asks this court to do, however --

QUESTION: I guess we can have different notions of causality today, too, right, that -- or are we free to fiddle with that, as to what -- how proximate the causality has to be? As common law courts, can we change that notion in the FELA as well?

MR. MYERS: I don't think that we can -- we can say -- that the courts can say, as common law courts, that causation is no longer required, but the --

QUESTION: No, we can change what causation means.

MR. MYERS: I think that the Court could find causation in situations where previously, because, for example, of the lack of medical expertise, the courts were ill-equipped to draw causation. And that's one of the themes that's replete in all these lower court decisions.

At the time the FELA was enacted, juries didn't have the benefit of a medical science that had been developed to the point where you could draw -- the medical people could draw a causal link or could discern a causal

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link or a lack of a causal link between emotional injuries and work place conditions.

Juries now have the ability to do that. They have these medical experts who can come in and assist them on this question of causality. Which is one of the reasons, I think, that we don't need these kind of arbitrary hurdles that were enacted at common law as ways to -- to weed out problematic cases. Medical science is now the primary method to weed out problematic cases --

QUESTION: Well, Mr. Myers, we reserve the question of whether the FELA covered emotional injury in the Buell case, did we not?

MR. MYERS: Yes, Your Honor.

QUESTION: So, it's -- it's something that obviously this Court feels is -- is undecided.

MR. MYERS: Yes, Your Honor. Yes. The Court has not addressed -- has reserved that specific issue. I believe that there -- there is, in the phrasing of the issue, a major difference. The Petitioner sees the issue as whether this Court should create a whole new duty.

The Respondents see the issue before the Court as whether, accepting the preexisting duty to provide a worker with reasonably safe working conditions, this Court should say, yes for physical injuries and no for emotional injuries, except under a very limited set of

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circumstances.

QUESTION: Mr. Myers, regardless of how the Court comes out on this, is there a State cause of action in addition, in a State which would recognize an emotional injury negligence claim?

MR. MYERS: No, Your Honor. This Court has held that the FELA is a preemptive statute. For example, a worker could not bring a cause of action under a State negligence statute if he couldn't meet the FELA standard. Similarly, a worker --

QUESTION: Even if -- even if it's determined that the FELA just doesn't cover it?

MR. MYERS: To say that the FELA -- yes -- the answer is yes. If the FELA does not provide a railroad worker with a cause of action, then the preemptive nature of the FELA would have to mean that no State could, as well.

QUESTION: Have we said as much?

MR. MYERS: I believe you said as much in the loss of consortium case, and I don't remember the name of it, where it was held that -- that a wife could not bring a State cause of action for loss of consortium where she had no cause of action under the FELA.

The next point I'd like to make has to do with this whole issue of unlimited liability.

QUESTION: So, to that extent, the FELA was not dynamic, if the FELA is limited to the -- to the injury to the worker, and doesn't cover derivative injuries, the spouse's?

MR. MYERS: Yes, Your Honor.

In respect of the scope of -- of the -- in respect of the relationship covered by the FELA, the FELA has always been meant to address the relationship between the worker and the employer. That's what the FELA is designed to redress. The FELA has not been read by this Court or by any others to reach out to someone's wife or someone's child, for example.

And this gets me to the -- to this -- this --

QUESTION: Although I suppose it's sufficiently dynamic -- I'm just looking at the statute -- it contains the word "widow," and husband, I suppose, it would be interpreted to be "widower" and wife of, today?

MR. MYERS: Yes, I -- I would think so, Your Honor.

QUESTION: Mr. Myers, does the dynamism work both ways? If there were a trend among common law courts to restrict liability beyond what it was, say, restricted in 1908, would the FELA move with that trend?

MR. MYERS: I don't think so, Your Honor.

QUESTION: So, it's kind of a ratchet?

MR. MYERS: Moves one way, yes. I think that's true.

QUESTION: How can we -- how can we tell that from the -- from the language of the stature?

MR. MYERS: Well, from the language --

QUESTION: Yes, from the language.

MR. MYERS: Well, the language is -- clearly states that any employee injured while he is employed by the railroad has a cause of action so long as the railroad is negligent.

QUESTION: Yes, but supposing the common law definition of negligence constricts over a period of years, so that what was once thought to be negligent is no longer negligent?

MR. MYERS: The FELA has been -- what this Court has stated is that the FELA, as a Federal statute, is not bound by State notions of common law. That is, the Federal courts are to develop their own Federal common law in respect of the statute.

QUESTION: Well, then, if that is true, even though, let's suppose that the State concepts expand, the Federal courts would be free to contract. They're not bound by what's happening in the common law world, I gather.

MR. MYERS: They're not bound by it, Your Honor,

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but I think, in that situation, the remedial purpose of the Act would warrant that the Federal courts expand with -- with the expansion of State common law.

QUESTION: I don't understand that.

QUESTION: I don't understand that either.

MR. MYERS: Well, you start with the premise that the statute is a remedial statute.

QUESTION: Well, what -- what does that mean? What statute isn't a remedial statute? Every statute is designed to remedy something, or presumably Congress wouldn't waste its time fooling around with it.

MR. MYERS: It's meant to be remedial in the sense that it is meant to provide recovery for injured railroad workers.

QUESTION: Well, certainly. It says that in so many words. But what more does that tell us about it?

MR. MYERS: Well, the -- the language of the statute itself, I think, is not -- is not the answer to the question.

QUESTION: Then where do we look?

MR. MYERS: I think we should look to this Court's prior decisions, in Kernan v. American Dredging --

QUESTION: And where -- where did the Court in the Kernan case derive its interpretation? It didn't look at the statute?

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MR. MYERS: Yes, it did look at the statute, and it found in the statute no basis to exclude certain causes of action and to include certain other causes of action. In other words, the construction of the Act, as so far given by this Court, as this Court is looking to what Congress intended, was that the construction would broaden, rather than narrow.

QUESTION: And how do we tell what Congress intended again -- from looking at the language?

MR. MYERS: Not just from looking at the language --

QUESTION: From looking at committee reports?

MR. MYERS: Yes, Your Honor, the committee reports --

QUESTION: Do the committee reports indicate that a broad range of relief was intended?

MR. MYERS: I'm not -- I'm not familiar with the details of the committee report. Actually, the -- I guess the best place to start, really, is the language of the statute, and that's the first place this Court has always started in construing the FELA. And when it looks at the FELA, and when it has looked at the FELA in the past, it has always found no limitations on the right to recover from -- from the language of the Act.

QUESTION: How about negligence, that's a

limitation?

MR. MYERS: Negligence is a limitation, Your Honor. And that's why there's not going to be a kind of a free-for-all -- a person can't just walk into court and say, I don't like my supervisor, I have had a headache, I've lost 40 pounds. The FELA does require him to prove negligence. It requires him to prove that his employer failed to exercise due care under the circumstances.

QUESTION: Like he had a nagging supervisor, that would do it, right? The employer didn't -- didn't replace this supervisor who is a little -- he's -- he's really too tough. That would be enough?

MR. MYERS: That would not be enough.

QUESTION: It wouldn't be enough?

MR. MYERS: It would not be enough, because it would not satisfy the requirement of negligence. An employee has to come into court ready to prove to a jury that his employer failed to exercise due care, failed to act like a reasonable employer.

QUESTION: Well, a reasonable employer wouldn't -- wouldn't have -- wouldn't leave in place a supervisor who is always nagging people.

MR. MYERS: I think quite the contrary.

QUESTION: Who is too tough.

MR. MYERS: I think quite the contrary, Your

Honor. In working --

QUESTION: You wouldn't argue that to a jury? Gee, I'd argue that to a jury.

MR. MYERS: Your Honor, I think that in any working situation, we're going to expect, and a jury is going to expect, there will be unpleasantness. Just as there is physical discomfort, there may be some level of emotional discomfort.

QUESTION: But, basically, that level is one for the jury to assess?

MR. MYERS: That one is for the jury to assess, exactly, based on a case-by -- a case-by-case basis.

QUESTION: But what -- you know, even if we are developing a common law rule, we are not, like other common law courts, developing a common law rule for the totality of tort. Rather, for this very specialized area; right?

MR. MYERS: Yes, Your Honor.

QUESTION: It's an area in which you have distinctive types of employers, distinctive types of employees. They're generally not inclined to be the -- the shrinking violets who might suffer emotional trauma from a -- from a severe boss. I mean, you're talking about railroad workers. It's -- it's also an area where there are other remedies that are available, such as the

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Railway Labor Act, which are not available in other -- I don't -- I don't -- really don't know what relevance general State tort law has to this -- to developing a common law rule for this very specialized area.

MR. MYERS: I think that Your Honor's point is -- is well taken, in light of the previous question. The Federal statute isn't bound by State common law for those reasons. Additionally, the availability of the Railway Labor Act as an alternative mechanism for dispute resolution would tend to minimize these claims, where people would come in to court and try to assert a claim that their -- their supervisor annoys them, or their supervisor upsets them.

QUESTION: Is there an analog to that in the Jones Act, because, after all, we do want to keep the -- the substantive rules consistent. The Jones Act just picks up on the FELA. So, to what extent would the -- would the RLA qualify FELA in -- in a way that the Jones Act then might be different?

MR. MYERS: Your Honor, I do not know if there is an analog statute that covers Jones Act employees, so I cannot answer the question directly.

The last area that I'd like to talk about and just make one observation, which I think is very important. In his opening to the Court, the Petitioner

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admits that the cases that he is asking this Court to exclude from the statute involve genuine and foreseeable and severe injuries, which -- which contradicts, I think, to a certain extent, his argument that allowing recovery under these cases is going to result in a flood of trivial lawsuits. We're not talking -- thank you --

QUESTION: Thank you, Mr. Myers.

Mr. Farrell, we'll hear from you.

ORAL ARGUMENT OF J. MICHAEL FARRELL

ON BEHALF OF THE RESPONDENT CARLISLE

MR. FARRELL: Mr. Chief Justice, and may it please the Court:

I will frame the issue just a little bit differently, because I think the issue that this Court is presented with here is whether Conrail's distrust of the twin pillars of the American justice system -- and that is the jury and the adversarial system -- should persuade this Court to ignore the text of the FELA and the broad remedial purposes as -- as the commitments of this Court over almost the last century have revealed, to ignore genuine, severe and foreseeable injury resulting from the negligence of the railroad.

Let me, because of the position that I stand in, address some questions.

First, Petitioner said that there was no duty in

1908 to avoid emotional injury at common law. That's incorrect. And he ignores the case of Dulieu v. White & Son, which is actually a King's Bench case in 1901. I apologize I did not cite it, and I can provide, by letter, the cite. It was --

QUESTION: To the extent that there is a common law point of reference, isn't it American common law that Congress was presumably interested in?

MR. FARRELL: Yes, Your Honor, I believe that is correct. However, as I think that we, as common law lawyers approach common law, I believe the common law would embody both -- and -- and I'll get to your question in a little different way, contrasting whether --

QUESTION: Well, common law is not -- to use -- it's not the brooding omnipresence, it's the law of a bunch of specific States, isn't it?

MR. FARRELL: Absolutely. And let me go right to -- to your -- to the answer to your question. And that's Spade v. Lynn and Massachusetts Railroad, which was -- which was the American case that was specifically addressed by Just -- Judge Kennedy -- excuse me -- of the King's Bench in Dulieu, in which -- in Spade v. -- v. Lynn and Massachusetts Railroad, they recognized that there was a duty to exercise reasonable care to avoid emotional injury. But the court said in Spade, we have a problem of

the administration of these claims -- the same argument that Conrail is making here -- we have a difficulty of proof.

And what the resolution of the issue before this Court is, is really a matter of proof. In the Carlisle case, we marshalled a trial, and the jury decided that Conrail ignored the 1929 studies that revealed the dangerous medical consequences, bodily consequences, that -- that occurred as a result of unreasonable stress on the job without visual assistance; they ignored the 1974 report of the FRA, which confirmed those results; they ignored the 1987 assessment of the very office that found the conditions there hazardous, that found the staff inadequate, that found the work excessive, that found that there was no visual assistance whatsoever to assist train dispatchers who were making moment-to-moment decisions that could involve wholesale catastrophe.

And that leads me --

QUESTION: That's a Workmen's Compensation case, but why should it be a negligence case?

MR. FARRELL: Good question, because that brings me over to Justice O'Connor, who I think asked a question, isn't there another remedy here? No, Your Honor. The remedy that -- that in fact the Petitioner is arguing for before this Court is to exclude an entire class of

employees, an entire class of injuries, from any remedy whatsoever.

And I might point out that they absolutely misstate the law with respect to Workmen's Compensation in the United States. The law of Workmen's Compensation in the United States, every other worker in any other industry would have recovery for an emotional injury which was foreseeable and was an essential consequence of their type of job. But let's talk a little bit about the zone of danger that I think --

QUESTION: I was going to ask that question. I guess you -- there's just a conflict on that, because, as I recall the Petitioner's brief, the assertion is made that -- that emotional injury is generally not recoverable.

MR. FARRELL: Judge, I -- I believe I've cited --

QUESTION: Under Workmen's Comp.

MR. FARRELL: Goyden v. -- I forget the defendant's name -- a New Jersey case, which essentially holds that if in fact the emotional injury is causally related to an essential aspect of that employee's work, that emotional injury is fully compensable.

QUESTION: But in all -- in all events, counsel, Workmen's Compensation statutes are not based on

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negligence. And it seems to me to undercut your case --

MR. FARRELL: That's why --

QUESTION: If what you are saying is that this statute must somehow be construed so that negligence in this statute is parallel to Workmen's Compensation standards for recovery in the States.

MR. FARRELL: Judge -- Justice, let me please comment on that. Because, actually, if you look at the law of Workmen's Compensation in this area -- for instance, the case of Hammerle, which is the Pennsylvania Workmen's Compensation that recognizes the compensability of emotional injury, the test is: Was the emotional illness a reasonable reaction to an abnormal working circumstance? Which, actually, it is the -- the only Workmen's Compensation type of case in Pennsylvania that actually requires proof of fault -- proof of showing that the condition was abnormal.

So, it's very interesting in this area that in -- in the emotional recovery area in Workmen's Comp, the test does include the reasonable person test, which is a negligence concept. And that is, this is not a -- a subjective reaction, it is an objective test in Workmen's Compensation.

So, I -- I come -- I cite the issue with some hesitancy, because of the knee-jerk reaction of railroads

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generally to the mention of Workmen's Compensation. But I mention it because of Justice O'Connor's question, so that this Court understands that what Conrail is really arguing here is that an entire class of genuine, foreseeable, real and severe injuries go completely uncompensated in the face of the clear language of the statute in 1908 that every injury suffered at the hands of the negligence of the railroad, in whole or in part, should be in fact compensated.

And there's a couple of other points that I want to make as a matter of proof. This Court has recently addressed the issue, and actually reaffirmed its faith and its confidence in the American adversary system and in the jury in the case of Dalbert, and also in the case of -- Harris. But --

QUESTION: We -- we trust all of that, but -- but why isn't -- you're arguing to us policy questions -- whether there is too much risk of -- of runaway awards, whether the employer is going to be excessively burdened in trying to keep a happy work place. All of these policy questions are the kinds of things that Congress usually resolves in this Federal system. We don't resolve them.

We have a statute that hasn't covered this stuff in the past. If Congress wants it to cover it, why can't Congress amend it to cover it?

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MR. FARRELL: If I might return to the initial discussion that I had about the Dulieu case, Judge, I -- Justice, I believe that it was in fact a duty that existed at common law that, at the time of the Spade v. Lynn and Massachusetts decision, there were these concerns about the administration -- that is, fraudulent claims and unforeseeable liability or -- excuse me -- potential liability -- caused the court to adopt certain crutches that in fact were really examples of meritorious cases.

We have now developed medical science to such a point -- and the adversarial system allows the medical science -- the competing medical views of the causation, of the seriousness of an emotional injury, under the reasonable man standard, to compete in the marketplace of the courtroom, and to allow the jury, with proper instructions, to decide what, in fact, Spade v. Lynn kind of threw up its hands and say, we'll use these crutches, the physical impact doctrine.

Let me also make a point --

QUESTION: I don't think that -- I -- I think that injury just used to mean physical injury. In some contexts, it still does. If you're filling out an insurance form, they say, were there any injuries? You know, were there any injuries from the -- from the automobile accident? Well, yes, my -- my wife in the seat

next to me was -- was really scared when we hit. I wouldn't say yes, that was an injury. It isn't an injury. It means physical injury, something that's -- that's physically demonstrable.

MR. FARRELL: Let me -- let me make a point under the Restatement. I think it was a point that actually Justice Ginsburg kind of hinted at. And that is that, frankly, under the Restatement, specifically, 313, if in fact a reasonable person would foresee that their conduct would result in emotional distress that would result in bodily harm, that that is injury.

Our position, the petition of the Respondents in this case, is that injury, as used in the statute, means both mental and physical injury. And, frankly, as this Court said in Urie, there is nothing in the statute that would indicate an intention to exclude any class of injuries or class of employees, and -- and any attempt to read in such a limitation would be, quote, sheer inference.

And -- and, Your Honor, I think one of the other points that I want to make with respect to the -- the issue of the --

QUESTION: Mr. Farrell, before you go on to the other point, isn't it the case that your opponents on the other side are not asking us to read out the entire class

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of injuries. They are simply saying, do not provide for compensation for those injuries until certain other conditions have been met -- the conditions that are summarized by zone of danger or whatever test might be used. They're not asking this Court or any Federal court to read emotional injury totally out of the statute.

MR. FARRELL: Let me address that --

QUESTION: And -- and if -- if it is not read -- I guess the question should be, if it is not read totally out of the statute, then how, even on your premise, can we say that we, in effect, are defying the intention of Congress?

MR. FARRELL: Your Honor, the problem with zone of danger tests -- and I think it was a question that -- that Justice Kennedy asked -- is that it is so fortuitous. If in fact Mr. Gottshall --

QUESTION: Well, maybe -- maybe it's a bad test, but that wasn't my question. My question is: If in fact we're not reading the entire class of emotional injuries out of the realm of compensation under this statute, how can it be said that we are defying the intention of Congress to include all injuries?

MR. FARRELL: I don't believe that we can. I think the answer is that -- that -- that Your Honors, obviously, I believe, are -- are here, and I -- I -- with

respect to Justice Rehnquist, Chief Justice Rehnquist's question, I believe, theoretically, that -- that this remedy is a dynamic remedy, and this Court, consistent with guidance from the common law or medical science, could contract the remedy, as well as -- as expand it.

However, consistent with medical science as well as the development of common law -- and common law courts all across this country, with respect to recovery for emotional injury, it has been expanding. With respect to the ability to identify, to measure, to scientifically present and defend the existence of real emotional injury, it has expanded.

So, Your Honor, I -- I believe he's not writing it out of the statute. I think Justice Scalia properly -- he's picking the test which is the most -- the broadest test, which allows him to win in both of these cases. But it is completely fortuitous. It is overinclusive and underinclusive at the same time, just as a physical impact test.

If you remember Roscoe Pound, 75 years ago, made the very same point, that it's absolutely fortuitous -- if there's a -- if there's a jostling -- in the case from Pennsylvania, Zelinsky, an automobile passenger in an absolute bump in a parking lot, who is jostled, is then able to collect for -- for a full range of emotional

injury because of the magical coincidence of the cars having touched.

And there -- there are -- are a myriad of examples, Justice Kennedy, using it in the Gottshall case, if in fact, Mr. Gottshall had fallen on the way to help, then there would have been the contemporaneous physical injury and, magically, he would have fallen within the test.

I have to, because I represent Alan Carlisle, make another point. The congressional history, the House of Representatives, with respect to the Boiler Inspection Act, also indicated that their intention was not only to protect and place the human overhead that the railroad consumed in its wake on its employees on the railroad, it also indicated that a purpose was to protect us, the public.

And this is where Alan Carlisle comes in. Because Alan Carlisle is in the operations aspect of a dynamic transportation injury -- industry -- the movement of hazardous materials that involve catastrophe that would, in fact, compromise entire communities. My client's stress was not fear for himself. My client's stress was fear for whole communities; that he was being asked to make moment-to-moment decisions about catastrophe with inadequate, outdated commit -- equipment, which was

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proven by a Government study of the exact office and the exact defendant at the very same time, which they ignored.

Are we, as a court, to ignore the stress and inevitable bodily consequences on an employee in a -- air traffic controllers -- that's the analogous -- the analogous position that my client would be in if he was in the airline industry. They work 20 minutes and then -- then take a break. My client worked 15 and 16 hours a day, 16 days in a row under abusive supervisors, with no visual assistance. And his concerns were that he was going to kill somebody -- not only that he was going to kill somebody, but that he was going to see his face on the front page not of the "Philadelphia Daily News," but of the "London Times," because his -- his mistake could compromise an entire community because of the hazardous material.

Let me move just a second to my closing remarks.

We cannot use 18th and 19th century crutches, such as the physical impact rule, to resolve 20th and 21st century work place problems. In Dalbert, this Court -- and it's actually the test in the Third Circuit -- that the scientific validity of the medical evidence in emotional duress test cases, the gatekeeping function of -- of the Federal court judges can in fact identify the reliability of that validity. And if in fact it meets

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that test, then those -- that expert testimony, which in both these cases, the injuries are supported with, substantiated by medical expert testimony, in my case, liability -- that is, that a reasonable person under the same circumstances, normally constituted, would have suffered the same or similar injuries, by Dr. Paul Rouech, who is in fact a consultant for the Centers for Disease Control in Atlanta, found -- was the expert on liability in the Carlisle case.

I am asking this Court to affirm the decisions below, and affirm our confidence and our commitment, and reject, and not be counseled by the fears that Conrail would like to in fact share with us, and affirm our belief in the working ability of American juries and of the adversary system to find the truth and to compensate the meritorious case, which was in fact both the text and the legislative history.

QUESTION: Thank you, Mr. Farrell. Your time is -- your time has expired.

MR. FARRELL: Thank you very much.

QUESTION: Mr. Wellington, you have four minutes remaining.

REBUTTAL ARGUMENT OF RALPH G. WELLINGTON

ON BEHALF OF THE PETITIONER

MR. WELLINGTON: Thank you, Your Honor.

This is indeed a Federal statute that we are interpreting. And it is not tied irrevocably or immutably to the common law. We have not suggested that.

What we must keep in mind is that the common law, however, has -- does give us the experience of dealing with these claims over several decades. And under no common law test would Mr. Gottshall or Mr. Carlisle recover. And -- and the Third Circuit, recognizing that through its analysis, did away with those prongs all on the basic justification that the Third -- that the FELA is a broad remedial statute.

But that does not answer the question -- it is not a justification for doing away with that experience. Nor is it enough to say we'll, send everything to the jury. We have no quarrel at all with the jury system and its importance in FELA cases. But this Court, over its -- over its decades, has reviewed a number of cases and determined some had appropriate evidence to go to a jury and some did not. Courts still do that.

The question is not, let everything go to a jury, they'll solve it. The question is, is this a duty that employ -- railroad employers now have to protect their employees from emotional harm?

QUESTION: Mr. Wellington, can I ask about the language of the statute. You -- as I understand, you've

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conceded their injuries in this case within the meaning of the statute?

MR. WELLINGTON: Yes, Your Honor.

QUESTION: But your position is there was no negligence within the meaning of the statute?

MR. WELLINGTON: Yes, Your Honor.

QUESTION: Because there was no violation of a particular duty to these two employees?

MR. WELLINGTON: Yes, Your Honor.

QUESTION: Yes, I want to be sure.

QUESTION: Well, and on that point, it seems to me that the duty that is being argued is the duty of the employer not to avoid stress but to use necessary due care to avoid unnecessary stress. That's the duty that's being argued for, I take it?

MR. WELLINGTON: We -- we believe the duty, under the FELA, is to avoid physical impact or reasonable threat of a physical impact --

QUESTION: I'm talking about what they -- they are arguing that there is a -- a duty for the employer to use due care.

MR. WELLINGTON: Due care, yes, that's -- and even under a Worker's Compensation analysis that was brought up, that -- people are able to recover for Worker's Compensation claims in different standards in

different States, but, essentially, if there's abnormal stress and they can show it's related to the work place. That really, fundamentally, is where the Third Circuit comes. By eliminating any other limited duty, it equates this foreseeability with duty. And someone who has emotional distress and it was clearly foreseeable from the work place is now a damage plaintiff.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Wellington. The case is submitted.

(Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.)

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No. 92-1956

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BY Ann Marie Federico

(REPORTER)