

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: METRO-NORTH COMMUTER RAILROAD COMPANY,
Petitioner v. MICHAEL BUCKLEY

CASE NO: 96-320

PLACE: Washington, D.C.

DATE: Tuesday, February 18, 1997

PAGES: 1-57

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 METRO-NORTH COMMUTER RAILROAD :
4 COMPANY, :
5 Petitioner : No. 96-320
6 v. :
7 MICHAEL BUCKLEY :

8 -----X
9 Washington, D.C.

10 Tuesday, February 18, 1997

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:16 a.m.

14 APPEARANCES:

15 SHEILA L. BIRNBAUM, New York, New York; on behalf of
16 the Petitioner.

17 CHARLES C. GOETSCH, New Haven, Connecticut; on behalf of
18 the Respondent.

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1 PROCEEDINGS

2 (11:16 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 96-320, Metro-North Commuter Railroad Company
5 v. Michael Buckley.

6 Ms. Birnbaum.

7 ORAL ARGUMENT OF SHEILA L. BIRNBAUM

8 ON BEHALF OF THE PETITIONER

9 MS. BIRNBAUM: Mr. Chief Justice, may it please
10 the Court:

11 The Court this morning is confronted with a
12 ruling from the Second Circuit that is both unprecedented,
13 stands alone and is contrary to the common law and field
14 of precedent both before this Court and in most of the
15 common law courts of this country. If the Second
16 Circuit's decision is not reversed, it will greatly
17 exacerbate the asbestos litigation crisis we have in the
18 courts and will lead to the unpredictable and expansive,
19 unlimited liability that this Court was concerned about in
20 the Gottshall case.

21 Tort law is clear: you have to sustain an
22 injury before you can recover from a negligent defendant.

23 QUESTION: Ms. Birnbaum, may I ask you if you
24 would clarify your position in this case with the one that
25 the -- that is being taken by the defendants in the case

1 this afternoon? That is, they say that there is an
2 injury, that there is a class of people who have been
3 really exposed to asbestos. And they have an injury, in
4 fact -- a concrete, particularized injury, in fact -- here
5 and now, just by virtue of having been inundated with
6 asbestos. And you're saying, as I take it you've just
7 said, they don't have any claim until they suffer an
8 illness.

9 MS. BIRNBAUM: What --

10 QUESTION: We can't both be right.

11 MS. BIRNBAUM: Well, I'm not going to argue the
12 Georgene case on the standing issue. There may be
13 different considerations with regard to standing. You're
14 also looking at this issue through the context of FELA, a
15 statute that provides that there must be an injury, and
16 has a jurisprudence that goes with it. But it's still
17 much broader.

18 We would say that a person who is merely exposed
19 and has no injury -- in this case, the record is clear, he
20 has no clinical evidence even of pleural plaques, pleural
21 injuries, he has no recognition, no determination by his
22 own physicians even of subcellular changes --

23 QUESTION: The courts below relied on the
24 physical impact of the fibers going inside his lungs.

25 MS. BIRNBAUM: But, first, there is no real

1 evidence of that except a hypothetical given by the expert
2 below. But besides that, the real issue here is
3 subcellular injury, even if it existed, has been held over
4 and over again by most common law courts in this context
5 not to be an injury.

6 QUESTION: Well, how do we deal with a physical
7 impact, does that constitute an injury, even if it's
8 slight?

9 MS. BIRNBAUM: No. I think that -- and I think
10 if you look at the courts -- the common law courts -- even
11 a court like Florida, which clearly adopts an impact test
12 by itself, not a zone of danger test -- which I think we
13 need to talk about -- that this Court has adopted a zone
14 of danger test, not an impact test -- if you look at those
15 courts that have adopted an impact test, in the area of
16 asbestos exposure, toxic exposure, what the courts have
17 done is added more, because they are concerned about this
18 unlimited, unpredictable liability.

19 In Florida, where they have just the impact
20 test, the court, in the Cox case, said you have to also
21 have a physical injury.

22 QUESTION: But aren't there many jurisdictions
23 that have recognized a claim for medical monitoring, a
24 common law claim for medical monitoring, for people who
25 have been massively exposed but have not yet manifested

1 any illness? There are --

2 MS. BIRNBAUM: There are -- there are a few.

3 And it's --

4 QUESTION: How many, roughly, would you say?

5 Over a dozen I think.

6 MS. BIRNBAUM: A little less, but there are
7 some. And if you look at most of those cases, they are
8 either in the area where there are a very small number of
9 people -- the water cases, where there are just a small
10 number of people who have been exposed to contaminated
11 water, and not the kind of situation here, where 21
12 million people have been substantially exposed to
13 asbestos. Twenty-one million people could come into the
14 court today --

15 QUESTION: Yes, but may I interrupt with just a
16 question? Let's talk about one of those 21 million people
17 who has been substantially exposed. And say that person's
18 doctor says the exposure is sufficiently serious that I
19 think you ought to check with me every 6 months to see if
20 anything has developed, because if it does develop and we
21 catch it early, we'll be better able to treat you. Would
22 that be an injury?

23 MS. BIRNBAUM: No. Not under FELA.

24 QUESTION: Even though he'd have to pay his
25 doctor's bill every 6 months?

1 MS. BIRNBAUM: That would be a damage, but it
2 wouldn't be an injury.

3 QUESTION: But not within the meaning of the
4 statute?

5 MS. BIRNBAUM: Right.

6 QUESTION: But as a matter of ordinary
7 reasoning, would not that be a pecuniary injury that one
8 could at least say gave -- gave rise to some kind of
9 claim?

10 MS. BIRNBAUM: I think it's just much more
11 complicated than that --

12 QUESTION: Well, it's more complicated because
13 there are 21 million people out there. I agree with that.

14 MS. BIRNBAUM: Twenty-one million --

15 QUESTION: But if you look at just the one is
16 what I'm trying to think of.

17 MS. BIRNBAUM: But the problem is, if you had 21
18 million just asbestos-exposed people --

19 QUESTION: Right.

20 MS. BIRNBAUM: -- this would apply to all toxic
21 substances. We can't count the numbers of other toxic
22 substances --

23 QUESTION: No, but I'm just -- I'm just
24 challenging the integrity of the argument that there's no
25 injury there, when a person, because of the physical

1 exposure to that, is required to pay a doctor every 6
2 months for the next 10 years.

3 MS. BIRNBAUM: I would say that under tort law
4 and under the law of FELA, you have to have an injury. It
5 has to either be a physical injury or an emotional
6 distress injury within the boundaries that this Court has
7 said.

8 QUESTION: And dollar injury is not enough?

9 MS. BIRNBAUM: Damage. It's damage. It's not
10 injury. If we sustain --

11 QUESTION: But under general -- under general
12 tort law, you wouldn't make that argument, would you?

13 MS. BIRNBAUM: Yes, I would, Your Honor.

14 QUESTION: You -- you would not -- I mean, but
15 your argument seems to be saying that you -- that there is
16 no injury cognizable in tort which does not involve
17 personal as opposed to economic injury. And that --
18 you're not arguing that?

19 MS. BIRNBAUM: No. No. There --

20 QUESTION: But why isn't there, then, an
21 economic injury, just as Justice Stevens says? If the --
22 if the doctor says the exposure is such that you would be
23 crazy not to have an examination every 6 months, why --
24 and presumably you are not crazy, so that you're going to
25 act reasonably and you're going to have the exam -- why

1 doesn't the reasonable necessity of expending the money
2 for the examinations every 6 months constitute an economic
3 injury to you?

4 MS. BIRNBAUM: It -- it maybe a damage to you,
5 but before you can get to a damage for medical monitoring
6 -- for future medical monitoring, the courts -- the common
7 law courts have been very clear -- you first have to have
8 an injury.

9 QUESTION: Except for the 12 that you said go
10 the other way?

11 MS. BIRNBAUM: Yes. And that is -- that is so.
12 There is --

13 QUESTION: But why should we not accept economic
14 injury?

15 MS. BIRNBAUM: Because if you do that, you will
16 be opening up the courts of this country to the -- to --
17 to --

18 QUESTION: Okay. But that's a different --
19 you're -- it seems to me you're now saying -- and I'm not
20 saying it's an illegitimate argument -- but you're making
21 a different kind of argument. You're saying not that it
22 would be, in the abstract, foolish to regard this as an
23 economic injury or economic damage, but if you do, you're
24 simply going to cost the system more than the system can
25 bear. And, therefore, not for an analytical reason, but

1 for reasons of the cost of consequences, we shouldn't
2 recognize it. That's the argument you're making now.

3 MS. BIRNBAUM: I -- that is the second argument.
4 I would go back to the first argument, and except for the
5 small number of cases in the water situation, not an
6 asbestos exposure, where there has been no physical
7 injury, the courts have not jumped in to provide a medical
8 monitoring kind of --

9 QUESTION: Ms. Birnbaum, if we -- if we just
10 took the one-on-one case that Justice Stevens gave -- I
11 really don't follow your argument. Because something
12 happened to this person. No illness is manifested yet.
13 But something happened to create a greater vulnerability
14 than the population at large. And if we just were looking
15 at these two people and say, who should bear the cost of
16 that something that the medical profession says should be
17 done, we would certainly put it on, would we not, the
18 person who caused the exposure rather than the person who
19 suffered the condition that requires the monitoring?

20 MS. BIRNBAUM: I -- I think that the tort law
21 does not -- does not respond that way, except for these
22 special circumstances, these minority group of cases --

23 QUESTION: Then are you saying that we have a
24 kind of assumption of the risk involved, that the worker
25 who didn't know that he was being exposed and is going to

1 incur this cost if he follows his doctor's advice, has to
2 bear that cost?

3 MS. BIRNBAUM: No, we're not saying that. I
4 think it's not an assumption of the risk. If there is an
5 injury, then he can recover all of the damages that arise
6 from that injury, including foreseeable medical expenses
7 in the future. But if we just have this type of damage --
8 and if you call it something else, then you may come up
9 with a different solution -- but it is a damage. It has
10 to go on to something. That something would be a physical
11 injury.

12 QUESTION: Well, Ms. Birnbaum, in the case just
13 preceding, we were discussing the product liability law.
14 Certainly that has evolved often in conscious
15 consideration of which party can best protect against an
16 injury. I take it what you're arguing is that
17 transactional costs are a permissible consideration in
18 deciding what recovery you can have under FELA?

19 MS. BIRNBAUM: Yes, I think -- I think it is,
20 Your Honor. And I think that even more so under FELA.
21 The statute is explicit -- you have to have an injury.
22 We're putting the cart before the horse. It talks about a
23 physical injury.

24 QUESTION: But it doesn't say "physical." If
25 you're relying on section 1 of FELA, 45 U.S. Code, Section

1 51 --

2 MS. BIRNBAUM: Yes, Your Honor.

3 QUESTION: -- it says a common carrier by --
4 railroad, while engaging in commerce shall be liable in
5 damages to any person suffering injury while he is
6 employed by such carrier. Now, does that include economic
7 injury or only physical injury? And -- and what do we
8 look to in precedent to resolve that?

9 MS. BIRNBAUM: I -- I think what you look to is
10 the common law. What you look to is your prior field of
11 precedent. What you look to is language and the intent of
12 Congress.

13 QUESTION: Well, certainly if you look to the
14 common law, an economic injury can be and has often been
15 recognized as the basis for liability in tort.

16 MS. BIRNBAUM: But this is not --

17 QUESTION: So you say this requires physical
18 injury, and how do we know that?

19 MS. BIRNBAUM: Well, I think that the kind of
20 economic damages we're talking about is not this type or
21 economic damage.

22 QUESTION: Economic injury. Don't put it in
23 terms of damages, because the statute says "injury."

24 MS. BIRNBAUM: I -- I -- the statute does say
25 "injury." And this Court has interpreted that to mean, in

1 some instances, physical injury, emotional distress injury
2 under certain limitations that this Court said was
3 important. And there is no case under FELA that has ever
4 held that the type of damage we're talking about here is
5 an injury that was covered by Congress, certainly in 1908,
6 and certainly today.

7 QUESTION: Well, but we have recognized that
8 emotional injury will suffice for recovery if the person
9 meets the zone of danger test.

10 MS. BIRNBAUM: Yes. That is exactly right.

11 QUESTION: And this is a case based on emotional
12 injury.

13 MS. BIRNBAUM: Well, it's based on emotional
14 injury, but he is not trying to recover medical monitoring
15 for his emotional injury. He's trying to recover medical
16 monitoring based on his potential physical injury in the
17 future.

18 QUESTION: Well, is his theory that if he has
19 regular monitoring, it will alleviate -- medical
20 monitoring -- it will alleviate his emotional concern?

21 MS. BIRNBAUM: That was never argued below. And
22 a jury would be giving him his emotional distress injury
23 not for any period of time until he had the first checkup.
24 What he's asking is for this injury over the entire period
25 of time, over his life span and medical monitoring damages

1 over his life span.

2 QUESTION: Ms. Birnbaum, you -- you said in
3 passing that this type of thing certainly wouldn't have
4 been covered in 1908, when FELA was enacted. Is it your
5 contention that we should not extend the statute beyond
6 what it meant in 1908?

7 MS. BIRNBAUM: No, Your Honor. It is clear that
8 it would not have -- have been a -- there had been no
9 toxic tort kind of litigation as we know it today.

10 QUESTION: Clear, but irrelevant.

11 MS. BIRNBAUM: It's not totally irrelevant, but
12 it doesn't matter --

13 QUESTION: Well, why is it not --

14 MS. BIRNBAUM: -- because today, also, there
15 would be no recovery under these circumstances in almost
16 every jurisdiction in the United States under the FELA
17 jurisprudence that we have.

18 QUESTION: What about Potter? I mean aren't
19 there two or three cases --

20 MS. BIRNBAUM: Yes, Your Honor.

21 QUESTION: -- Potter, Paoli, Ayers -- that were
22 --

23 MS. BIRNBAUM: Potter is interesting.

24 QUESTION: Potter sounds like an effort to try
25 to limit the recovery --

1 MS. BIRNBAUM: But -- but --

2 QUESTION: -- but allow it in a case where the
3 exposure is severe, the added risk is severe, and there is
4 good medical evidence that medical tests are useful.

5 MS. BIRNBAUM: But Potter goes even further,
6 because it provides that the risk in the future has to be
7 more probably than not. That's not what we have here. We
8 have a risk that the plaintiff's expert says is 1 percent
9 greater than the background risk.

10 QUESTION: But are you -- are you -- but that's
11 still an effort to create a set of cases where the risk is
12 serious enough, such that, given the seriousness of the
13 risk, the level of the exposure and the medical need for
14 examinations, you have a cause of action and can recover.

15 MS. BIRNBAUM: In a -- in the limited situation
16 in Potter of -- of four litigants who were exposed to
17 contaminated water, Potter did that. And we would say
18 that the California court, in Potter, is on the leading
19 edge and is not what most courts in the United States have
20 held.

21 QUESTION: Well, would you say never, or what
22 test?

23 MS. BIRNBAUM: Never -- never a medical
24 monitoring recovery under FELA. I would say never a
25 medical monitoring under FELA unless there has been a

1 physical injury.

2 QUESTION: Ms. Birnbaum, you're talking about
3 FELA as though it were some kind of very restrictive
4 statute. But at least as I remember in ancient days, when
5 I went to law school, it was the most forward-looking and
6 the most -- they stretched the boundaries of everything.
7 Causation was stretched to the breaking point under FELA.
8 And has now it become some kind of a constricted statute?

9 MS. BIRNBAUM: No. I think it is a broad
10 remedial statute. And it has broadly looked at defenses
11 and causation. But I think this Court, in Gottshall, made
12 it clear that there have to be bright lines, especially in
13 the area of negligent infliction of emotional distress, to
14 prevent the kind of unpredictable and unlimited liability
15 that will occur if the Second Circuit's decision is
16 affirmed.

17 Look what we have here. We have a person who
18 has no injury, who has no serious emotional distress. He
19 is worried and angry. Well, he may have a good right to
20 be worried and angry. But he --

21 QUESTION: Indeed, he does. Because asbestos is
22 a known carcinogen and the causer of serious respiratory
23 harm. And if one worked for an employer who knowingly
24 subjected the employee for 3 years to massive doses of
25 asbestos, without ever a warning that that's what was

1 being dealt with, one would have some concern.

2 MS. BIRNBAUM: Well, I agree, Your Honor.

3 QUESTION: Even a normal-reacting employee would
4 be furious.

5 MS. BIRNBAUM: Your Honor, there are several
6 things in your statement that really I question -- and
7 we'll get back to the massive amounts in a moment -- of
8 asbestos -- but Dr. Selikoff, who is one of the noted
9 scientists in this area, who brought this all to the
10 attention of the public, said in his book, "Asbestos and
11 Disease," it is undisputed that the overwhelming majority
12 of exposure-only plaintiffs will never develop
13 asbestos-related injuries. It's -- it's -- the -- the
14 science is clear.

15 QUESTION: Well, should it turn, then, on the --
16 the likelihood of the danger of developing the injury, if
17 it's substantially likely that the injury -- that -- that
18 the illness will occur in time --

19 MS. BIRNBAUM: Well, I --

20 QUESTION: -- and that it can be alleviated if
21 there is early detection, and that there was, indeed,
22 significant exposure? I mean if all those fall into
23 place, is there room under the text of this statute for
24 medical monitoring recovery?

25 MS. BIRNBAUM: I -- I would say no, Your Honor.

1 If there is a need for medical monitoring, that is
2 something Congress should be deciding. The legislative
3 branch should decide that. That's -- there are so many
4 policy implications, besides the fact whether this does
5 any good, besides the fact what the amici argue or whether
6 it's necessary, beside the fact of how do we decide what
7 is massive or substantial, beside the fact that we have no
8 guidelines than the Second Circuit. To open up and make
9 the railroads the insurance, the HMO's for anybody who has
10 been exposed to beyond background level -- because that's
11 what's really being argued --

12 QUESTION: Why don't we let Congress decide
13 this?

14 MS. BIRNBAUM: Well, because if there's going to
15 be a whole new remedy, isn't this something the
16 legislature should decide, based on public policy?

17 QUESTION: That's what I suggest. But you say a
18 whole new remedy, you've conceded that we can create new
19 remedies. I mean the statute says "who has suffered
20 injury." And I presume that suffering injury meant
21 something in 1908. But you say we're not bound by that.
22 We can -- we can define today things to be injury that
23 were not injury in 1908.

24 MS. BIRNBAUM: I think we can -- we can define
25 physical injury, we can define emotional injury. This

1 Court did that in Gottshall.

2 QUESTION: Well, I know. I mean why do you
3 limit it to those? Once you acknowledge that we're not
4 bound to whatever Congress thought it was doing in 1908,
5 you're letting this Court simply create a whole new tort
6 law.

7 MS. BIRNBAUM: Well, I --

8 QUESTION: And you're just arguing, you know,
9 you want us to develop that -- what do we base this --
10 this new tort law on? Should we be guided by the -- the
11 -- you say we should be guided by the common law. What
12 does the common law mean?

13 MS. BIRNBAUM: Well, first of all --

14 QUESTION: It meant something in 1908. I'm not
15 sure what it means now. What does it mean?

16 MS. BIRNBAUM: Well, I think it's what,
17 generally, the law of the various States and Federal
18 courts interpreting State law -- I would say it would be
19 at least what the majority of courts would say.

20 QUESTION: The majority of States.

21 MS. BIRNBAUM: I don't -- I don't -- I'm not
22 making the argument, Your Honor, that you should do this.
23 I'm arguing just the opposite. You shouldn't do this --

24 QUESTION: But, Ms. Birnbaum, you recognize that
25 we did. If you take Wilkerson against McCarthy, it's

1 typical of an era under FELA. And so to say that -- you
2 would have to be urging, if you want to go back to 1908,
3 that this Court has a lot of overruling to do, with all
4 those cases from a generation ago under FELA.

5 MS. BIRNBAUM: Well, Your Honor, there are those
6 of you on this Court that will like to look at 1908 and
7 decide that what was the common law in 1908 should govern.
8 There are those of you who don't believe that, and you're
9 going to look at the common law as it has developed.

10 I would suggest to you that the overwhelming
11 common law -- all of the common law in 1908 -- and the
12 overwhelming common law today would require a physical
13 injury before you permit a requirement for the kinds of
14 damages we're talking about.

15 QUESTION: How long ago -- just -- I mean if, on
16 the assumption that you're supposed to look at the various
17 relevant features from a public policy point of view --
18 which maybe you're not or maybe we are -- but on that
19 assumption, how long ago did a serious, significant amount
20 of exposure in the work place to asbestos stop?

21 MS. BIRNBAUM: It's going on probably today in
22 many work places.

23 QUESTION: So how -- how many of the people --
24 it's going on today, you think?

25 MS. BIRNBAUM: Certainly.

1 QUESTION: All right. So how many --

2 MS. BIRNBAUM: It depends on how we define
3 "substantial."

4 QUESTION: Well, all right. What I'm thinking
5 -- what I'm wondering is, is how many of the people -- the
6 workers who are exposed, who need medical exams, are
7 likely to be covered automatically by insurance that would
8 provide for it?

9 MS. BIRNBAUM: I -- I don't -- I can't --

10 QUESTION: Is there any way to find out
11 something like that?

12 MS. BIRNBAUM: I -- I don't -- I don't know,
13 Your Honor.

14 QUESTION: Are many of them over 65?

15 MS. BIRNBAUM: Many would be. Many would not
16 be.

17 QUESTION: Well, don't most States follow the
18 collateral source doctrine, that a plaintiff can recover
19 for the cost of a medical exam from the defendant liable,
20 even though the insurance reimburses the plaintiff through
21 a contract?

22 MS. BIRNBAUM: Well, I think that has changed by
23 statute in -- in many jurisdictions now. But, yes, many
24 jurisdictions --

25 QUESTION: Yes, but that's what exactly I'm

1 interested in. To what extent are we actually thinking of
2 workers who won't get medical exams because they can't pay
3 for them? And to what extent are we thinking of workers
4 who will have medical exams regardless, but will simply
5 take this money as an extra amount of money that they or
6 their attorneys or whoever would be able to share for
7 other purposes?

8 MS. BIRNBAUM: There has been a great deal of
9 literature on this --

10 QUESTION: And where -- where would I look to
11 find out the answer to that question? Because I think it
12 -- if it's from a public policy point of view, if
13 relevant, it would make a difference as to whether you're
14 paying for a worker's medical exam in reality or whether
15 you're simply adding extra money to the worker's pocket --
16 at least it might be?

17 MS. BIRNBAUM: Well, there is some -- yes, there
18 is some literature.

19 QUESTION: Where?

20 MS. BIRNBAUM: And I could -- I just don't have
21 it in front of me, but I could let the Court know what it
22 is -- in which they have studied the kinds of cases where
23 workers have been provided money for medical monitoring in
24 which they never went to a doctor and in which they took
25 the money and pocketed the money. And there is some

1 literature on that by discussions and interviews with --
2 with workers. If this were --

3 QUESTION: Ms. Birnbaum, do we know whether OSHA
4 covers this --

5 MS. BIRNBAUM: Yes --

6 QUESTION: -- and would provide the -- would --
7 would OSHA require medical exams?

8 MS. BIRNBAUM: OSHA could require medical exams.
9 OSHA did not require medical exams here because -- it's
10 not in the record -- but -- because the amount of asbestos
11 that was -- that was found in -- in tests during the
12 period that he was working, but not in his work place,
13 just didn't show the proper amount that the -- that the
14 amount of asbestos was as high as OSHA would require.
15 OSHA has a provision that does cover this. And OSHA does
16 cover railroads in New York. So --

17 QUESTION: And, incidentally, were there -- if
18 there is a knowing -- under OSHA probably -- suppose it
19 were established that there was asbestos that was known to
20 the employer and the employer deliberately concealed the
21 fact from the workers and ordered them to be working here,
22 knowingly subjecting them to very massive doses. Would
23 that be a criminal violation?

24 MS. BIRNBAUM: It -- I don't know, Your Honor.
25 But I know, in that situation, you might have an

1 intentional act, which is not what we're talking about
2 here. We're only talking about a negligence act. And
3 there could be different rules there or different rules
4 that apply to intentional acts.

5 QUESTION: Intentional --

6 MS. BIRNBAUM: And it could be --

7 QUESTION: Intentional conduct was not alleged
8 here in any of the --

9 MS. BIRNBAUM: No. No, Your Honor. It's just
10 plain negligence. No matter how the plaintiff would argue
11 it, of outrageous, egregious, this was a stipulation of
12 negligence. The conduct of the defendant was never argued
13 before the court. It was never --

14 QUESTION: But the statute doesn't draw any
15 distinction between negligence and willful torts, does it?

16 MS. BIRNBAUM: The FELA statute?

17 QUESTION: Yes.

18 MS. BIRNBAUM: Yes, it's a negligence statute.

19 QUESTION: I say, it doesn't draw a distinction
20 between negligence and more -- and reckless or anything
21 else?

22 MS. BIRNBAUM: Right. Right. It's negligence
23 alone.

24 QUESTION: Well, in a sense, it -- it does
25 define the -- the activating factor is negligence.

1 MS. BIRNBAUM: Yes, Your Honor.

2 QUESTION: Is it not?

3 MS. BIRNBAUM: Negligence is what FELA is all
4 about. The defendant is negligent and the plaintiff is
5 injured. And --

6 QUESTION: Is a violation of OSHA negligence --
7 evidence of negligence?

8 MS. BIRNBAUM: It would be evidence of
9 negligence. But it was not -- this was not even before
10 the court here. And it was a stipulation.

11 QUESTION: But you -- you conceded negligence?

12 MS. BIRNBAUM: Yes.

13 QUESTION: And do any workers' compensation
14 schemes provide recovery for any of the items of damages
15 that are being sought here?

16 MS. BIRNBAUM: I do -- I can't -- I don't know
17 the answer to that. But this would not be what we're
18 talking about here under FELA. I just don't know whether
19 some workers' comps do -- statutes do -- and some don't.

20 But what is --

21 QUESTION: If -- if we were to affirm this
22 judgment and the employee got the recovery he seeks and he
23 then later develops a serious disease from the asbestos
24 exposure, could he sue again? Is that clear that he could
25 not?

1 MS. BIRNBAUM: We say he could not under the
2 one-judgment rule. This is not coming back for another
3 type of injury, where some courts have permitted that to
4 happen, where there has been an injury of asbestosis, and
5 then you come back when you can get cancer. We would say
6 that the one-judgment rule would put him out of court.

7 QUESTION: Well, if the claim initially is for
8 emotional injury and subsequently a claim for actual
9 physical illness, you think that would be barred?

10 MS. BIRNBAUM: I think it would. But if --

11 QUESTION: There is certainly precedent going
12 the other way that I am intimately familiar with.

13 MS. BIRNBAUM: Yes, if it would -- if it would
14 not, think what you're doing here. He would first recover
15 for his anger, not severe emotional distress, which we
16 haven't talked about, which almost every court has
17 required -- for his anger -- then, if he gets pleural
18 plaques or pleural thickening, he may come back again and
19 say it's a pleural disease. Then, if he gets asbestosis,
20 he may come back again and say he has a different disease,
21 asbestosis. And then, if he gets cancer down the road, he
22 can come back again and say he has cancer.

23 I mean this is --

24 QUESTION: The latter two, at least, there's a
25 considerable precedent for saying that, if you recover for

1 asbestosis and then you get this virulent form of cancer,
2 you haven't split a claim, you have indeed two separate
3 claims.

4 MS. BIRNBAUM: Many -- many courts have held
5 that way, Your Honor.

6 So, in this particular instance, we have not
7 only the one-disease or the two-disease rule, we have a
8 totally different type of damages, then all of the
9 potential of the personal injury damages. I would suggest
10 to you that the court -- the Second Circuit went off wrong
11 on two instances. One, this man is not -- not a
12 bystander. He doesn't fall into the zone of danger rule.
13 He wasn't in peril of imminent injury. He was not -- he
14 was not -- sustained any severe injury. There is no
15 physical manifestation of his injury. There is no
16 objective evidence that he even sustained an emotional
17 injury.

18 QUESTION: I suppose one might say he was
19 certainly in a zone of danger. Working in asbestos
20 dust-drenched air is a zone of danger. You know that some
21 of the people in that group are exposed to grave danger.

22 MS. BIRNBAUM: Then every worker who was
23 anywhere near a toxic substance is in the zone of danger.
24 And, clearly, that's not what this Court said in
25 Gottshall. What this Court said in Gottshall is you have

1 to be in imminent danger of immediate harm. This is a
2 person who has a potential -- a mere potential -- of harm
3 in the future. It is -- the Second Circuit's opinion is
4 unprecedented, when you look at it in all its pieces.

5 There is not one case in the entire United
6 States -- certainly not in 1908 and certainly not today --
7 that has stripped the common law and FELA of all its
8 limitations, of all its restrictions in this way, and
9 opened up the floodgates, opened up the courthouse doors
10 to any worker who has been exposed to any type of toxic
11 substance that is above background range and who is
12 worried or angry about what happened to him. I -- I
13 suspect -- and some of the amici have already said in the
14 amici briefs -- that there have been class actions that
15 have been brought since this decision for non-impaired
16 exposed workers seeking medical monitoring and this type
17 of emotional distress.

18 Almost every worker will be opening --

19 QUESTION: Thank you, Ms. Birnbaum.

20 MS. BIRNBAUM: Thank you, Your Honor.

21 QUESTION: Mr. Goetsch, we'll hear from you.

22 ORAL ARGUMENT OF CHARLES C. GOETSCH

23 ON BEHALF OF RESPONDENT

24 MR. GOETSCH: Thank you, Mr. Chief Justice, and
25 may it please the Court:

1 Michael Buckley and the Snowmen of Grand Central
2 Terminal are here to ask this Court to adapt the approach
3 and the standard of Gottshall to the problem of toxic
4 exposure in the railroad work place, and thereby fulfill
5 the essential remedial purpose of the FELA, while also
6 addressing the legitimate common law concerns about
7 screening out trivial, fraudulent and unlimited claims.
8 And here is the concrete, bright line, scientifically
9 verifiable test to do that.

10 First, three elements of proof. Proof of
11 physical impact by a toxic substance. You cannot have
12 exposure and ingestion without physical impact. But
13 that's not enough.

14 Second, proof of --

15 QUESTION: Well, how -- let's talk about your
16 first point for a minute. I mean how about the person
17 just walking down the street in a big city? I mean
18 they're going to be able to show some ingestion of a toxic
19 substance I suppose.

20 MR. GOETSCH: That's right, Your Honor. And
21 this is precisely why the test I'm giving you, the three-
22 part test, will screen out such trivial exposure.

23 QUESTION: But the first, obviously, doesn't?

24 MR. GOETSCH: Exactly, yes. But -- but it's
25 three -- it's a three-part test. First, physical impact,

1 exposure, ingestion. That's -- if you don't have that,
2 you have no claim. But that's not enough. You have to
3 show an -- an increase in risk of developing a grave toxic
4 disease.

5 Now, if you don't have any increase in the risk,
6 there's no recovery. But that also is not enough.

7 QUESTION: Why a grave toxic disease? I mean,
8 you know --

9 MR. GOETSCH: Well --

10 QUESTION: -- there are all sorts of risks that
11 we go through in life, and you pay for them out of your
12 own pocket. I mean, you know, life is --

13 MR. GOETSCH: Right. This is --

14 QUESTION: -- is not a bed of roses. I'm
15 walking down the street in New York or, worse yet, I'm
16 standing in a crowded subway in New York and the person
17 next to me coughs. And -- and some of the -- some of his
18 cough lands upon me or in the ambient air and I ingest it.
19 So there has been an impact. Your -- your test number one
20 has been met.

21 MR. GOETSCH: That's right.

22 QUESTION: This person is coughing, presumably
23 because he has a cold.

24 MR. GOETSCH: Right.

25 QUESTION: And I'm very careful about such

1 things. Let's say I'm elderly, and -- and getting a cold
2 could be very harmful. Now, is he liable to me for -- for
3 medical monitoring thereafter?

4 MR. GOETSCH: Absolutely not, Your Honor.

5 QUESTION: Why not?

6 MR. GOETSCH: Because there has to be a
7 three-part test that will screen out the trivial, the
8 fraudulent and the unlimited claims.

9 QUESTION: Well, that's not trivial to me. I
10 mean I -- I don't want to have a cold.

11 MR. GOETSCH: Well, okay, now, here's the point.
12 Here's the point, Your Honor. The Railroad is asking for
13 a genuineness test, in effect. They say you cannot
14 recover without some common law indicia of genuineness --
15 a manifest symptom, psychiatric testimony and so on. But
16 that's the genuine test that this Court rejected in
17 Gottshall.

18 QUESTION: Well, it's not a cold, it's the flu.
19 It's not a cold. It's the flu. The flu can be very
20 serious, very painful. Am I -- I mean every time somebody
21 causes me some inconvenience, do I have a cause of action?

22 MR. GOETSCH: No, Your Honor, absolutely, not.
23 And that's the standard that -- that I'm giving you --

24 QUESTION: Well, what's your third test?

25 QUESTION: Give us the third point.

1 MR. GOETSCH: The third test is --
2 QUESTION: We've gotten the two, can we hear the
3 third?
4 MR. GOETSCH: Thank you, Your Honor.
5 (Laughter.)
6 MR. GOETSCH: The third test is competent expert
7 testimony establishing a scientifically verifiable basis
8 for a reasonable fear of a future toxic disease. Now,
9 that expert testimony has to be --
10 QUESTION: That -- that doesn't help my
11 questions at all. I mean --
12 MR. GOETSCH: Well --
13 QUESTION: -- if you get coughed on, you're
14 likely to get a cold or flu --
15 MR. GOETSCH: We're talking about fear of future
16 death -- death by cancer. We're not talking about a cold
17 or the flu, Your Honor. That's the point here.
18 QUESTION: Well, about -- what about pneumonia?
19 (Laughter.)
20 QUESTION: I mean you can up the ante, you know,
21 from a cold to flu to pneumonia. And pneumonia for
22 elderly -- elderly Americans, as we call ourselves -- can
23 be --
24 (Laughter.)
25 QUESTION: -- can be very harmful.

1 MR. GOETSCH: Your Honor, this case is about
2 toxic exposure in the railroad work place. And we're not
3 talking about -- what we're talking about are regulated
4 hazardous substances.

5 QUESTION: Well, I'm in the work place and some
6 of my employees come to work with severe colds. And we
7 work closely together. They cough. And we ingest some of
8 the substance that they're coughing. And my doctor tells
9 me yes, it's very likely that you will develop pneumonia
10 from exposure to this sort of thing.

11 Now, I have a good doctor, reputable. It's
12 reasonably likely that that's what's going to happen.
13 Recovery?

14 MR. GOETSCH: No, Your Honor. It's not a known
15 carcinogen. It's not regulated --

16 QUESTION: But known carcinogens are the same.
17 I could spend the whole rest of your time reading you a
18 list of known carcinogens. There is no fruit or vegetable
19 that you can eat that is not going to have at least
20 several molecules of pesticide residue. There is nothing
21 in this room that doesn't contain some elements of known
22 carcinogens. All right.

23 So your first two tests don't help distinguish
24 your case, I think, from tens of thousands of millions of
25 cases affecting every man, woman and child in the United

1 States. So, therefore, the third part of your test must
2 do it. And that's what I want to know -- how? Because I
3 suspect, in every instance in which my 50,000-substance
4 list of known carcinogens is concerned, where in fact
5 negligence is at stake, you will find at least one expert
6 who would come in and say, well, negligence is at stake,
7 why isn't negligence -- there must be some significant
8 risk.

9 And, therefore, I take it that what your third
10 test is going to do is allow every -- a claim of negligent
11 infliction of emotional suffering without limitation.

12 MR. GOETSCH: No --

13 QUESTION: All right. Now, what I want to know
14 is why isn't that so.

15 MR. GOETSCH: Okay, let's take an example, Your
16 Honor. The Snowmen of Grand Central Terminal are leaving
17 their job site at the end of the day. They're walking
18 through the terminal. They're covered from head to toe
19 with a white --

20 QUESTION: You're covered from head to toe when
21 you dive into a swimming pool -- covered with chlorine.
22 Somebody could say -- you're covered from head to toe when
23 you sit and have apples -- you know, thousands of them
24 around you. There is -- there are tens of thousands of
25 toxic substances which, to some degree or other, create

1 small risks of cancer.

2 MR. GOETSCH: And that --

3 QUESTION: And -- and what -- in your case, you
4 talk about a 5-percent increase in the risk -- 10-percent
5 increase. You get 100-percent increase of being hit by
6 lightning if you go to the top of a hill. All right? The
7 amount of increase is not significant. What's significant
8 is the risk. And even in your case, I can't find out what
9 the risk is.

10 MR. GOETSCH: Okay.

11 QUESTION: The very case where you say, must be
12 an example of such a claim.

13 MR. GOETSCH: The -- the third element demands
14 and requires a scientifically verifiable basis for a
15 reasonable fear of future grave toxic disease.

16 QUESTION: Well, isn't that an element of every
17 claim for negligent infliction of emotional suffering?
18 How else could there be negligence?

19 MR. GOETSCH: Look, this -- what I'm saying is
20 that this is an FELA case that has to be interpreted in a
21 remedial and humanitarian fashion. The problem we have --

22 QUESTION: But -- but -- just a minute. What
23 does that mean to say it has to be interpreted in a
24 remedial and humanitarian fashion?

25 MR. GOETSCH: Okay --

1 QUESTION: This Court used language like that,
2 as Justice Ginsburg pointed out, years ago. But recently
3 we have backed off of that, to have a more neutral
4 approach.

5 MR. GOETSCH: Well, what I meant, Mr. Chief
6 Justice, was that the essential remedial purpose of the
7 FELA is to promote safe operating conditions on the
8 Nation's railroads by allowing recovery for -- for harms
9 and injuries that occur to -- to employees --

10 QUESTION: Okay. I didn't -- I interrupted you
11 while you were answering Justice Breyer's question. Why
12 don't you return to that.

13 MR. GOETSCH: Okay. Justice Breyer, if I recall
14 your question -- which I may not at this point --

15 QUESTION: My question --

16 (Laughter.)

17 QUESTION: My question was simply how your
18 limitation is any limitation.

19 MR. GOETSCH: Okay.

20 QUESTION: It seemed to me that as you say it,
21 your limitation is no limitation, but rather, in any
22 serious negligence case, would allow recovery.

23 MR. GOETSCH: All right. And my illustration of
24 the -- how it would function to limit that situation, Your
25 Honor, is that a railroad clerk walks by the Snowmen when

1 they're walking out of the tunnels. And later learns that
2 that dust on them that that clerk breathed was in fact
3 carcinogenic asbestos. That clerk has a reaction, goes to
4 a psychiatrist, has severe distress -- physically
5 manifests distress -- the psychiatrist confirms this is
6 genuine distress. This person has severe emotional
7 distress. No question about it.

8 This test would hold that that clerk cannot
9 recover, because there is no scientifically verifiable
10 basis for that clerk to have a reasonable foundation --
11 scientific foundation -- to fear the future development of
12 asbestos cancer.

13 QUESTION: But why is a 3-percent increase in
14 the risk a basis?

15 MR. GOETSCH: Because --

16 QUESTION: Or 5 percent? That doesn't sound
17 significant.

18 MR. GOETSCH: It doesn't sound significant,
19 Justice O'Connor, but it is an enormous increase in risk.
20 The record in this case establishes that that is a 10 to
21 50 times greater risk than what is considered to be a
22 highly significant risk. What it means --

23 QUESTION: Well, as for that, how do we know if
24 it's a lot or a little? I'll tell you right now, your
25 risk is doubled of being hit by lightning if you walk out

1 the door. It's unlikely. All right. Do people worry
2 about being hit by lightning because they're outside? The
3 risk of lightning is 1 in 2 million. If you're on top of
4 a hill, it's probably 1 in 500,000. That's quadrupling --
5 not just 5 percent. How do we know the significance of
6 this 5 percent without knowing what the underlying risks
7 are? That's something that I haven't been able to find in
8 the record.

9 MR. GOETSCH: His underlying risk of death from
10 cancer due to asbestos was 0, Your Honor. It has now been
11 increased from 1 to 5 percent. Which means that if all
12 the Snowmen of Grand Central were -- share that 1- to
13 5-percent increased risk, it means that between two and
14 eight of them are going to be killed.

15 QUESTION: How can -- how can you be so sure his
16 underlying risk was 0? Maybe he went to school in a
17 classroom that had asbestos in it. I mean I don't think
18 you can just assume without proof that the large majority
19 of people in the country have a 0 risk.

20 MR. GOETSCH: But there's no scientific basis
21 for them to fear future asbestos cancer. And that's my
22 point. Is that those people shouldn't be able to recover.

23 QUESTION: What do you mean "fear"? We know
24 that -- look, my problem -- the reason I'm going into this
25 is to suggest how complicated and difficult, as soon as

1 you start using words like "increased risk," anything is
2 possible. All these substances have increased risks. And
3 -- and, therefore, what kind of standard are you offering
4 that would in fact permit some recovery for emotional
5 distress without saying in any toxic substance case, any
6 significant toxic substance case, automatically you get
7 emotional distress injury?

8 See, you purported to have some limitations.
9 And as I listen to them, I didn't see how they were going
10 to limit. That's why I asked my question.

11 MR. GOETSCH: Okay. All we can rely on, Justice
12 Breyer, is objective scientific evidence to -- to confirm
13 the legitimacy of the fear of the future. If there is no
14 basis -- if there's no connection --

15 QUESTION: But don't you agree, you can always
16 find a reputable doctor who will say yes, there is a
17 reasonable fear of this danger in the future?

18 MR. GOETSCH: Your Honor, I do not believe that
19 is true in the field --

20 QUESTION: Well, certainly that's been my
21 experience over 30-some years --

22 QUESTION: Or, if necessary, an unreputable one.

23 (Laughter.)

24 MR. GOETSCH: All we have, Justice O'Connor, is
25 Daubert, which vets expert testimony for is it reliable,

1 is it trustworthy, is it based on scientific method. I
2 mean that is the standard that --

3 QUESTION: The problem is not fake scientists.
4 The problem is that 500,000 people will die of cancer
5 every year. And of course exposure is real. And of
6 course it's a great concern. They're telling the truth.
7 These substances are dangerous. And so, are we supposed
8 to say, because of that true fact, not a false fact, that
9 everybody who has some exposure to a substance that
10 significantly increases the chance that he or she will get
11 cancer -- probably the entire population of the United
12 States -- are we to say that they are to have a cause of
13 action for emotional suffering when they do suffer?

14 Of course they worry about these things. I mean
15 that's the difficult question. It isn't as if it's a fake
16 question. It's a real question.

17 MR. GOETSCH: And -- and Justice Breyer, we're
18 talking about railroad employees who are negligently
19 toxically exposed. That's all we're talking about. We're
20 not talking about --

21 QUESTION: I know. And so shall each person who
22 is negligently exposed to a serious toxic substance --
23 i.e., vast numbers of people -- have causes of action for
24 infliction of emotional suffering? That's the question --
25 not the answer. And, therefore, I'm still looking. Your

1 answer could be yes, they all should have it. Or the
2 answer might be no. Or it might be somewhere in between.

3 MR. GOETSCH: My answer is that the only
4 objective scientific standard that we can rely on is
5 legitimate, verifiable scientific bases.

6 QUESTION: Mr. Goetsch, can I ask you a question
7 that has been running through my mind that's been touched
8 on? And that is, supposing the law is -- and I don't know
9 whether it is or not -- that if your client recovers in
10 this case, that will be the sole recovery for this
11 exposure? You get one bite at the apple. You can sue
12 early or you can wait till you really get -- the disease
13 manifests itself. Do you think all of your clients would
14 -- would bring this case?

15 QUESTION: You can ponder your answer to that
16 question. We'll resume at 1 o'clock, Mr. Goetsch.

17 (Whereupon, at 12:00 noon, the Court recessed,
18 to reconvene at 1:00 p.m., this same day.)

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1 AFTERNOON SESSION

2 (1:00 p.m.)

3 CHIEF JUSTICE REHNQUIST: We'll resume argument
4 now in No. 96-320, Metro-North Commuter Railroad Company
5 v. Michael Buckley.

6 ORAL ARGUMENT OF CHARLES C. GOETSCH (RESUMED)

7 ON BEHALF OF THE RESPONDENT

8 MR. GOETSCH: Thank you, Mr. Chief Justice --

9 QUESTION: Counsel, just to refresh your
10 recollection, the question I intended to leave with you --
11 we left in kind of a hurry -- was that, assuming that the
12 rule is that your client may only have one bite at the
13 apple as a result of the exposure to asbestos that he's
14 already had -- the particular individual. Would he --
15 would he bring the lawsuit in its present posture?

16 MR. GOETSCH: Yes, Your Honor, assuming that
17 that's the rule and not the separate disease rule, which I
18 believe Justice Ginsburg referred to. This is not a claim
19 for present physical injury. This is a negligent
20 infliction of emotional distress claim, which, by
21 definition, means that there is no present physical
22 injury. So when there are physical injuries down the
23 line, for asbestosis, lung cancer, et cetera, those --
24 those physical injuries will -- will accrue. But --

25 QUESTION: Yes, but my assumption is that he can

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1 only recover for one tort and only get one recovery. Even
2 if he has 19 different injuries, if he happens to sue for
3 only one of them, and this is the one he elects to sue
4 for, do you think he'd sue for this one -- assuming he'd
5 be barred from bringing a further action for other
6 injuries? It's really the same injury, it's just
7 manifested itself with further harm.environment

8 MR. GOETSCH: Well, assuming that that is the
9 applicable rule, then he would have to make a choice. And
10 -- and he could very well choose to wait. All right. But
11 that's not the rule that the -- that the common law is --
12 the --

13 QUESTION: No, but we're interpreting a statute,
14 and the question, as I understand it, has not been
15 resolved by this Court. And it would seem to me, a
16 permissible disposition of a case like this would be to
17 say sure, you can bring this suit, but that's it.

18 MR. GOETSCH: Well, that issue was not raised or
19 discussed below and hasn't been briefed to --

20 QUESTION: Yes, but it seems to me you are
21 taking -- you may well, as counsel for this particular
22 plaintiff, be taking the risk that that's the outcome of
23 this case.

24 MR. GOETSCH: I don't believe so, Your Honor,
25 because, again, this is not a claim for a present physical

1 injury. It's an emotional distress claim, which, by
2 definition, does not include --

3 QUESTION: Assuming that you are taking that
4 risk, would your risk be different if you switched to your
5 claim for compensation for -- for the cost of medical
6 monitoring?

7 MR. GOETSCH: I think --

8 QUESTION: Would that be on a different footing?

9 MR. GOETSCH: Well --

10 QUESTION: Because that would -- that would be
11 -- that would be a purely economic injury.

12 MR. GOETSCH: To the extent that it allows the
13 plaintiff to discover, the accrual of a physical injury
14 for lung cancer and so forth, it allows the plaintiff to
15 -- to minimize his -- his damages by getting the early
16 detection and --

17 QUESTION: Well, no, but isn't your theory that
18 it's an entirely different tort?

19 MR. GOETSCH: It -- the legal injury for -- for
20 that is the invasion of the legally protected interests in
21 being free from having to undergo those types of tests and
22 examinations which were caused solely by the negligence of
23 the railroad.

24 QUESTION: And that -- that had nothing to do
25 with present physical injury and it has nothing to do with

1 the emotional consequences of the contact; it's entirely
2 separate, as I understand it?

3 MR. GOETSCH: Yes, Your Honor. It is the
4 invasion of that legally protected interest.

5 QUESTION: So then you really could have brought
6 two suits; you could bring just emotional distress, go the
7 jury on that, and then you could again bring a cause of
8 action for medical monitoring?

9 MR. GOETSCH: I don't believe so for this
10 reason, Justice Kennedy. The basis for a medical
11 monitoring claim is proof of exposure, increased risk and
12 a medically verifiable basis for exams that detect and
13 treat that increased risk of future cancer.

14 QUESTION: Well, those were also the predicate
15 tests for allowing recovery for emotional distress, were
16 they not?

17 MR. GOETSCH: Exactly. So --

18 QUESTION: Precisely the same.

19 MR. GOETSCH: So that if you qualify for a
20 medical monitoring claim, you also qualify for the fear of
21 future cancer claim by the previous three elements.

22 QUESTION: Are you seeking just the
23 reimbursement for those medical expenses? Or are you --
24 you described that what's at issue is his right to be free
25 from having to undergo these tests. So I guess you're

1 seeking both damage -- both the costs of the tests and
2 also damages for having to undergo them? Because they may
3 be painful. They're certainly inconvenient, at least.

4 MR. GOETSCH: The --

5 QUESTION: Are you --

6 MR. GOETSCH: The damages are for the costs of
7 the tests in the past and into the future.

8 QUESTION: Just the costs, though?

9 MR. GOETSCH: Yes, Your Honor. But the injury
10 --

11 QUESTION: Why --

12 MR. GOETSCH: -- that the injury is the invasion
13 of that legally protected interest, to be free of having
14 to undergo those tests and bear those costs.

15 QUESTION: Well, then, he should get damages for
16 having to undergo the tests, shouldn't he?

17 MR. GOETSCH: Yes --

18 QUESTION: Not just the costs of the tests.

19 MR. GOETSCH: Well --

20 QUESTION: It's just like saying, you know, if
21 somebody tortures you, you don't -- you don't just get the
22 cost of the torture instruments, you presumably get --

23 (Laughter.)

24 MR. GOETSCH: Here's -- here's the distinction.
25 You can qualify for fear of future cancer emotional

1 distress, but not qualify for medical monitoring damages
2 for this reason: The science, the medicine may say, look,
3 you're going to -- you have this reasonable basis to fear
4 this increased death from cancer. But there's no medical
5 tests or procedures that can detect it early enough or
6 treat it early enough to do any good. So --

7 QUESTION: Well, are you -- are you telling us
8 that if you can't win on emotional damage, you can't win
9 on monitoring?

10 MR. GOETSCH: That's -- you can win on emotional
11 distress for fear of future cancer and not win on medical
12 monitoring, because the medical science simply isn't
13 there. There's nothing they can do to detect it and treat
14 it beneficially.

15 QUESTION: Are you saying that's true of this
16 case?

17 MR. GOETSCH: Oh, no. No, no, no. I'm just
18 saying --

19 QUESTION: But you have a discrete claim for
20 medical monitoring apart from any emotional distress.
21 They both would accrue at the same time if you had both,
22 so -- so you couldn't split those two. But suppose you're
23 saying forget about emotional distress, that is fraught
24 with too many problems, we still have a medical monitoring
25 claim.

1 MR. GOETSCH: Yes. Yes.

2 QUESTION: And you're not suggesting, are you,
3 that -- that there is no such claim because there are no
4 tests that can detect --

5 MR. GOETSCH: Not in this case, no. The record
6 is clear that the medical monitoring costs are indicated
7 and based on medical proof.

8 QUESTION: Have you any idea of the size of the
9 universe that we're talking about, in terms of potential
10 plaintiffs who really would not have other sources of
11 paying for medical monitoring? I'm -- just in case it's
12 relevant. The ones I was -- so that they don't have
13 insurance, they're not on medicare, they're not on
14 medicaid and they actually have medically indicated need
15 for medical monitoring tests. Have -- is there -- there
16 might be, in the literature, something that gives us a
17 rough idea of that universe.

18 MR. GOETSCH: The amici brief filed by Mr. Simon
19 might refer to that, Your Honor. I'm not sure. I don't
20 have that at my fingertips. But I do want to make the
21 point that this universe, as you call it, is limited to
22 railroad workers who have a legally protected interest,
23 under the FELA and OSHA --

24 QUESTION: But that's not so. You're -- you're
25 asking us to interpret the FELA according to the common

1 law. So what you're trying to persuade is that, in
2 general, the common law ought to protect these interests.
3 And since the common law, in general, protects them, they
4 are protected under the FELA. You're not arguing for a
5 peculiar rule for the FELA. Is there any language of the
6 FELA that would make that the rule, if it's not the
7 general common law rule?

8 MR. GOETSCH: Your Honor, we are not here to
9 argue for the federalization of State common law via the
10 FELA. The FELA -- the common law is a smorgasbord --

11 QUESTION: I understand that, but you're arguing
12 that this should be the FELA rule only because it is the
13 general common law rule. Isn't that your argument?

14 MR. GOETSCH: No, no, no.

15 QUESTION: Oh, it isn't?

16 MR. GOETSCH: The starting point is Gottshall.
17 Gottshall says that if you want to recover for a
18 negligently inflicted emotional distress under the FELA,
19 you start with a zone of danger test, which is physical
20 impact or threat of physical --

21 QUESTION: But that itself was derived from the
22 common law.

23 MR. GOETSCH: Yes. And that's our starting
24 point here, Your Honor.

25 QUESTION: Well, but if we were to affirm here,

1 it seems to me this is going to be a precedent not just
2 for FELA, but because we say it's based on the common law,
3 the common law generally.

4 MR. GOETSCH: No, Your Honor, I strongly
5 disagree with that for this reason. The common law has
6 everything under the sun -- every remedial, conservative,
7 liberal, conservative case law -- cases. Simply because
8 this Court selects one remedial line of common law cases
9 to assist it to fulfill the remedial and humanitarian
10 purpose of the FELA --

11 QUESTION: Well, now --

12 MR. GOETSCH: -- it doesn't mean you're
13 endorsing that for all the --

14 QUESTION: Well, I, for one, don't endorse your
15 remedial and humanitarian comment, which you've repeated
16 several times. I don't think the Court has followed that
17 track in the last several FELA decisions it has handed
18 down. And I think Gottshall is a rather neutral
19 application of what we conceive to be the common law.

20 MR. GOETSCH: And under Gottshall, the
21 plaintiffs in this case recovered. They have physical
22 impact. That is the test -- physical impact or threat of
23 physical impact. Clearly, they had physical impact.

24 QUESTION: Didn't Gottshall talk about immediate
25 threat of physical impact, or am I incorrect in that

1 respect?

2 MR. GOETSCH: Only where there's no physical
3 impact, Your Honor. It was physical -- page 2406 of the
4 Gottshall decision -- physical impact or the immediate
5 risk of physical harm. That -- there's two doors. If you
6 have physical impact, you go in that door. If you don't
7 have physical impact, you have to go through the door
8 which is threat of physical impact or immediate risk of
9 physical harm. That is the Gottshall test.

10 The plaintiffs here satisfy that test.

11 QUESTION: Mr. Goetsch, let's -- let's assume
12 they do, at least as a threshold matter. Let me ask a
13 question which, in a way perhaps, is somewhat similar to
14 Justice -- or gets to the same point that Justice Breyer's
15 would. We heard from your opposing counsel this morning
16 that when the exposure reaches some measurable level --
17 and I'm not quite sure how it was measured -- that OSHA
18 would kick in with a medical monitoring remedy.

19 I want you to, if you will, comment on two
20 things. Is it correct that OSHA would not apply to the
21 facts of this case? And if that is so, shouldn't we take
22 that fact into consideration in deciding how far we ought
23 to go in developing an FELA common law when another --
24 when the Congress of the United States, in another
25 statute, has said this degree of exposure simply does not

1 merit -- merit a medical monitoring remedy?

2 MR. GOETSCH: OSHA applies when an employee is
3 exposed over the permissible exposure limit for more than
4 30 days a year. That is determined by medical -- by air
5 -- by taking air tests of the employee while he's actually
6 working and in his general work area. The Railroad, from
7 1985 to 1988, when they were exposing the Snowmen without
8 warning, training or protection, didn't take any air
9 tests, in violation of OSHA. Therefore, there's no OSHA
10 air tests over the permissible exposure limit. Therefore,
11 OSHA doesn't apply to these plaintiffs, and they are not
12 getting OSHA medical surveillance.

13 The point is this. The Railroad here saved an
14 enormous amount of money by -- by exposing their workers,
15 without warning, training or protection, to a
16 carcinogen --

17 QUESTION: No, but in any case, your answer is
18 that it is merely for lack of administratively acceptable
19 evidence that OSHA does not cover this case and grant the
20 remedy that you want -- the monitoring remedy that you
21 want.

22 MR. GOETSCH: My point is that you can't rely on
23 OSHA to deter this type of conduct by railroads.

24 QUESTION: No, I don't -- I want to hear what
25 you say, but was my statement a moment ago correct, that

1 the only thing that prevents an OSHA remedy from being
2 extended to your clients in this case is the lack of a
3 certain administratively necessary or legally necessary
4 evidence under the OSHA statute?

5 MR. GOETSCH: The lack of evidence means that
6 the Railroad is not required to provide such medical
7 surveillance. But even if they were, Your Honor --

8 QUESTION: But your claim is that if -- that the
9 evidence should have been provided. And if it had been
10 provided, you would be entitled, under OSHA, to the
11 monitoring remedy that you seek here; is that correct?

12 MR. GOETSCH: That the plaintiffs would be
13 entitled, under OSHA, to OSHA medical surveillance. But
14 that does not cover all the medical monitoring costs that
15 have been established and recommended --

16 QUESTION: You said the tests weren't taken.
17 But there's nothing to show what the tests would have
18 shown if they had been taken?

19 MR. GOETSCH: Well, the -- the only evidence in
20 this case is that the levels were massively over the
21 OSHA's levels. But there were no air tests taken by the
22 Railroad because they didn't want to tell anybody that it
23 was asbestos that they were having their employees work
24 on.

25 QUESTION: Before you conclude, may I ask your

1 reaction to one point that was made? That in the universe
2 of asbestos victims, if one were to have a line, one would
3 certainly put at the head of the line the people who get
4 this virulent form of cancer, and maybe next you'd go down
5 to the asbestosis victims, and then I suppose the last
6 people you would get to are the people who have -- have
7 had exposure, but haven't manifested anything. So in --
8 by pressing these claims, aren't you putting at risk
9 people who, 20, 30, 40 years from now, will develop a
10 dread disease?

11 MR. GOETSCH: Not as far as the defendants in
12 this case, which are railroads, are concerned. It's a
13 very narrow class of plaintiffs that we're addressing
14 here. We're not addressing general common law plaintiffs
15 or defendants. We're simply talking about the -- the
16 FELA. And what the Snowmen are asking this Court to do is
17 to interpret and apply the FELA in such a way that
18 railroads will not even think about doing this -- exposing
19 their workers to a known carcinogen, without any warning,
20 training or protection, in order to save money -- thereby
21 -- it's --

22 QUESTION: Well, what I would imagine, in terms
23 of the deterrence, a large number of people will get
24 cancer, will get these diseases and will have undoubted
25 enormous liability.

1 MR. GOETSCH: Well, in --

2 QUESTION: So what -- I mean --

3 MR. GOETSCH: -- in --

4 QUESTION: And what I'm worried about very much
5 is what Justice Ginsburg pointed out. I mean, to what
6 extent, by allowing a universal cause of action for the
7 medical, will we -- for the medical testing -- will we in
8 fact interfere with the people who are undoubtedly hurt --
9 that is, who have the disease -- from getting recovery.
10 Is the answer to that zero?

11 MR. GOETSCH: I'm sorry, Your Honor, what --

12 QUESTION: Is the case that there is or there
13 isn't a serious practical concern that if people can
14 recover -- often extra, because they have the tests anyway
15 -- for all this testing, that there will be significant
16 interference with recovery by people who do have the
17 disease?

18 MR. GOETSCH: Not -- I do not believe so in the
19 case of the railroads, especially --

20 QUESTION: Well, if you couldn't stop the
21 principle from spreading.

22 MR. GOETSCH: Well, I think that this Court can
23 and should make it clear that this is an FELA case based
24 on the policies and concerns of the FELA, which the common
25 law does not share. Medical monitoring will enable these

1 individuals to detect the disease early and hopefully
2 beneficially treat it. So they don't have to die and
3 bring a wrongful death case later on.

4 I mean the whole point of this is to mitigate
5 and to reduce society's burden and the railroads'
6 long-term burden for paying damages as a result of its
7 negligent conduct in violation of the FELA, in violation
8 of OSHA, in violation of these -- these human beings' who
9 happen to be railroad workers' legally protected duty to
10 be free from this type of exposure to a known carcinogen.

11 And if the railroads are not held economically
12 accountable under the FELA for this type of conduct, they
13 will have no meaningful economic incentive to avoid it in
14 the future. Indeed, they can save substantial amounts of
15 money by doing this again.

16 QUESTION: Well, that doesn't really follow.
17 Because isn't the hypothesis that maybe 1 out of 100 or 1
18 out of 50 -- that some of these people are going to get
19 cancer, and when they do, they'll have a tremendous
20 recovery?

21 MR. GOETSCH: In 20 to 30 to 40 years, Your
22 Honor, when witnesses are dead and gone, documents lost
23 and destroyed, the railroad merged and bankrupt, and the
24 railroad says okay, you're dying of cancer, now prove it.
25 That's not enough of a deterrent to stop what's happening

1 now. They don't want to be subject to this --

2 CHIEF JUSTICE REHNQUIST: I think you've
3 answered the question, Mr. Goetsch. The case is
4 submitted.

5 (Whereupon, at 1:16 p.m., the case in the
6 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

METRO-NORTH COMMUTER RAILROAD COMPANY, Petitioner V. MICHAEL BUCKLEY
CASE NO. 96-320

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BY Donna Maria Federico-----

(REPORTER)