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THOMAS GAWEL

Tran v. Minnesota Life Insurance Co.

65 N.Y.L. SCH. L. REV. [*] (2020–2021)

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What do Michael Hutchence,¹ David Carradine,² and Kevin Gilbert³ have in common? All three of these celebrities were found dead under circumstances resembling suicide.⁴ However, they were most likely victims of autoerotic asphyxiation.⁵ In the United States alone, this sexual practice is estimated to kill between 250 and twelve hundred people every year.⁶ Often mistaken for suicide, autoerotic asphyxiation constitutes an act far different from “intentionally taking one’s own life.”⁷

Autoerotic asphyxiation is a sexual practice whereby a person limits blood flow to the brain during sexual self-stimulation in order to incite a feeling of euphoria.⁸ This is usually done by applying pressure on neck arteries, using a rope or other ligature.⁹ The resulting hypoxia¹⁰ and hypercapnia¹¹ intensify the pleasure associated with the

1. Michael Hutchence was an Australian singer and member of the band INXS, found dead at the age of thirty-seven in a Sydney hotel room in November 1997. *Celebrities and Fans Share Hutchence Family Grief*, BBC NEWS (Nov. 27, 1997, 10:13 GMT), <http://news.bbc.co.uk/2/hi/34997.stm>.
2. David Carradine, an American actor known primarily for his role in the 1970s television series *Kung Fu* and for portraying the title character in Quentin Tarantino’s *Kill Bill Volumes I and II*, was found dead at the age of seventy-two in a Bangkok hotel room in June 2009. Bruce Weber, *David Carradine, Actor, Is Dead at 72*, N.Y. TIMES (June 4, 2009), <https://www.nytimes.com/2009/06/05/movies/05carradine.html>.
3. Kevin Gilbert, an American musician best known for co-authoring the 1993 *Tuesday Night Music Club* debut album by Sheryl Crow, was found dead in his living room at the age of twenty-nine in September 1996. Joel Selvin, *More Than ‘The Piano Player’*, S.F. CHRONICLE: SFGATE (Sept. 15, 1996, 4:00 AM), <https://www.sfgate.com/bayarea/article/More-Than-The-Piano-Player-Dumped-by-Sheryl-2966770.php>.
4. See *Michael Hutchence Death Explained: The Coroner’s Account in His Own Words*, HERALD SUN (Jan. 29, 2014, 4:38 PM), <https://www.heraldsun.com.au/news/law-order/michael-hutchence-death-explained-the-coroners-account-in-his-own-words/news-story/26dae2274fadfcb10beb994f7cf7d26> (“Hutchence was found at 11:50am, naked behind the door to his room. He had apparently hanged himself with his own belt and the buckle broke away and his body was found kneeling on the floor and facing the door.”); Selvin, *supra* note 3 (“A black hood covered his face. He wore a black skirt. His head was slumped against a leather strap chained to the headboard of the king-size bed in the sparsely furnished living room.”); Weber, *supra* note 2 (quoting a police officer investigating the death, Teerapop Luanseng) (“I can confirm that we found his body, naked, hanging in the closet.”).
5. See *Entertainment Paula Challenges Hutchence Verdict*, BBC NEWS (Aug. 10, 1999, 15:18 GMT), <http://news.bbc.co.uk/2/hi/entertainment/416509.stm> (“The . . . coroner recorded a suicide but many believe Hutchence has been involved in a fatal sex act.”); Brian Orloff, *David Carradine Died of Accidental Asphyxiation*, PEOPLE (Jul. 2, 2009, 3:40 PM), <https://people.com/celebrity/david-carradine-died-of-accidental-asphyxiation/> (“The actor died from accidental asphyxiation, a medical examiner who performed a private autopsy on the actor has concluded.”); Selvin, *supra* note 3 (“The Los Angeles County coroner’s office sees four or five such deaths a year—autoerotic asphyxiation.”).
6. Daniel D. Cowell, *Autoerotic Asphyxiation: Secret Pleasure—Lethal Outcome?*, 124 PEDIATRICS 1319, 1320 (2009).
7. Askar Mehdi et al., *Distinguishing Suicidal Attempt from Autoerotic Asphyxiation*, 45 PSYCHIATRIC ANNALS 285, 286 (2015) (defining suicide as “the act of intentionally taking one’s own life.”).
8. Gary Schuman, *Fatal Attraction: Autoeroticism and Accidental Death Insurance Coverage*, 49 TORT TRIAL & INS. PRAC. L.J. 667, 669 (2014).
9. *Id.*
10. Hypoxia is a condition characterized by a decreased oxygen level in the blood. *Id.*
11. Hypercapnia is a condition characterized by an increased carbon dioxide level in the blood. *Id.*

accompanying orgasm.¹² The American Psychiatric Association defines autoerotic asphyxiation as a subset of sexual masochism disorder.¹³

Unlike a suicide by hanging, a death from autoerotic asphyxiation generally offers evidence of: (1) no recent stressor; (2) no history of suicidal thoughts or attempts; (3) no significant anxiety, depression, or other psychotic symptoms; (4) the use of safety precautions and self-escape mechanisms; (5) a history of other autoerotic behaviors; and (6) causation by a solo sexual act.¹⁴

In 2019, in *Tran v. Minnesota Life Insurance Co.*, the Seventh Circuit Court of Appeals had to determine whether death from autoerotic asphyxiation constitutes an accidental death that entitles the victim's beneficiaries to an accidental death insurance payment.¹⁵ The court held that death by autoerotic asphyxiation is an intentionally self-inflicted injury and denied the insurance payment to the victim's spouse.¹⁶ The Seventh Circuit Court of Appeals applied the layperson understanding test, and reasoned that because a layperson would commonly view strangling oneself as an injury, the victim's act of strangling himself for autoerotic asphyxiation purposes was, therefore, an injury.¹⁷ Further, the Seventh Circuit Court of Appeals determined that, because the victim deliberately engaged in autoerotic asphyxiation, his injury must have been intentionally self-inflicted.¹⁸

This Case Comment contends that the *Tran* court erred in finding that the victim's death was intentional because the court misapplied the subjective/objective test as defined in binding Seventh Circuit precedent.¹⁹ First, in considering the subjective prong of the test, the *Tran* court asked whether the "injured individual had a subjective expectation of injuring himself,"²⁰ and not whether the "deceased had a

12. *Id.* Most individuals engaging in autoerotic asphyxiation retain their senses, relieve pressure to their arteries in a timely fashion, and suffer no permanent injuries. *Id.* However, on rare occasions, practitioners may die as a result of strangulation due to unconsciousness before timely pressure relief or equipment malfunction. *Id.* at 670.

13. *See Tran v. Minn. Life Ins. Co.*, 922 F.3d 380, 381 (7th Cir. 2019) (explaining that autoerotic asphyxiation is a subset of sexual masochism disorder according to the American Psychiatric Association's definition in its Diagnostic and Statistical Manual (DSM) of Mental Disorders). In the DSM, there is a section that discusses sexual masochism disorder, which is defined as "sexual arousal from the act of being humiliated, beaten, bound, or otherwise made to suffer." *Id.* at 385 (emphasis omitted).

14. Mehdi et. al., *supra* note 7, at 288.

15. 922 F.3d at 381.

16. *Id.* at 386.

17. *Id.* at 383–85.

18. *Id.* at 385–86.

19. *Compare id.* (applying the layperson understanding test and holding that death by autoerotic asphyxiation does not constitute an accidental death under decedent's life insurance policy), *with Santaella v. Metro. Life Ins. Co.*, 123 F.3d 456, 463 (7th Cir. 1997) (quoting *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448, 1456 (5th Cir. 1995)) (adopting the subjective/objective test to determine whether a death is accidental under a life insurance policy).

20. *Tran*, 922 F.3d at 385.

subjective expectation of survival,” thus misapplying the precedent.²¹ Second, since the *Tran* court should have found that the subjective prong of the test was met, the court was then required to consider whether the victim’s subjective expectation of survival was objectively reasonable.²² This misapplication of the subjective/objective test led to an erroneous result that confuses accidental death caused by autoerotic asphyxiation with an intentional suicide. The *Tran* court, by rejecting the spouse’s claim for the accidental death insurance proceeds, contributed to an existing circuit split²³ and invalidated the very purpose of that insurance—to protect insureds from fatal mistakes.

In August 2016, Linno Llenos was alone in his Wilmette, Illinois home when he went down to his basement, hung a noose from a ceiling beam, stood on a stool, tied the noose around his neck, stepped off the stool, and died.²⁴ His wife, the plaintiff, Letran Tran, found his body when she returned home and immediately called the police, who reported the death as a suicide.²⁵

Further inquiry revealed that Llenos had not been suicidal and that his family’s finances were secure.²⁶ More importantly, police reports noted that Llenos took

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21. See *Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1127 (9th Cir. 2002) (discussing decedent’s expectation of survival when he performed autoerotic asphyxiation); see also *Santaella*, 123 F.3d at 463 (discussing decedent’s expectation of survival when she took a dose of pain medication prescribed by a doctor); see also *Todd*, 47 F.3d at 1456 (discussing decedent’s expectation of survival when he performed autoerotic asphyxiation).
 22. See *Critchlow v. First UNUM Life Ins. Co. of Am.*, 378 F.3d 246, 260 (2d Cir. 2004) (discussing decedent’s objectively reasonable expectation of survival when he died from autoerotic asphyxiation); see also *Santaella*, 123 F.3d at 463 (quoting *Todd*, 47 F.3d at 1456) (applying the objective prong of the subjective/objective test when decedent died from taking a dose of pain medication prescribed by a doctor); see also *Todd*, 47 F.2d at 1456 (articulating the objective prong of the subjective/objective test and applying it to an autoerotic asphyxiation case).
 23. The Seventh Circuit with its Circuit Rule 40(e) “follows a less rigid stare decisis rule, allowing one panel to overrule another” See Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 794 (2012); see also 7th Cir. R. 40(e) (“A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted.”). Notably, the *Tran* court acknowledged the circuit split it created “with the Second Circuit in *Critchlow* and the Ninth Circuit in *Padfield*,” explaining that it circulated the opinion under Circuit Rule 40(e) among judges of the court and that majority of the judges “did not favor rehearing the case en banc on the question of creating a conflict” with the Second and Ninth Circuits. *Tran*, 922 F.3d at 386 n.5. However, as this Case Comment argues, the *Tran* court also misapplied its own precedent, found in *Santaella*, which the court did not acknowledge for the purposes of stare decisis and Circuit Rule 40(e).
 24. *Tran*, 922 F.3d at 381.
 25. *Id.*
 26. *Id.* at 388 (Bauer, J., dissenting). Economic strain, which includes unemployment or economic loss, is often linked to suicide risk. Deb Stone et al., *Preventing Suicide: A Technical Package of Policy, Programs, and Practices* 15 (2017), <https://www.cdc.gov/violenceprevention/pdf/suicideTechnicalPackage.pdf>. On the other hand, economic strain is not a factor related to autoerotic asphyxiation. See Mehdi et al., *supra* note 7, at 288.

prophylactic²⁷ measures to eliminate the risk of injury, including placing a towel around his neck, resting his foot on a stool, and adding a possible release mechanism to the noose.²⁸ Additionally, the medical examiner found sexual paraphernalia²⁹ on Llenos's body as well as rubber rings placed around his genitals, and observed that his pubic hair was shaved in a semi-circular pattern, consistent with prior use of these rings.³⁰ The record seemed to indicate that Llenos had a non-injurious history of autoerotic asphyxiation; the medical examiner ultimately concluded that autoerotic asphyxiation was the cause of death.³¹

Following her husband's death, Tran filed a claim with Minnesota Life Insurance Company.³² Llenos was covered by two life insurance policies—Basic and Supplemental—providing \$517,000 in combined coverage.³³ Each policy also included Accidental Death & Dismemberment (AD&D) policy riders,³⁴ which provided an additional \$60,000 in combined coverage that could only be received following an accidental death.³⁵

Tran received \$517,000 under the Basic and Supplemental policies.³⁶ However, Minnesota Life denied Tran's claim for the additional \$60,000 in AD&D coverage, concluding that Llenos's death was not accidental.³⁷ In support of this position, Minnesota Life pointed to the exclusion for intentionally self-inflicted injuries, which states:

In no event will we pay the accidental death or dismemberment benefit where an insured's death or dismemberment results from or is caused directly by any

27. The term "prophylactic" is defined as "designed or intended to prevent or stop something harmful or undesirable; preventative." *Prophylactic*, BLACK'S LAW DICTIONARY (11th ed. 2019).

28. *Tran*, 922 F.3d at 388 (Bauer, J., dissenting).

29. The term "sex paraphernalia" is commonly defined as "any inedible lubricant which is manufactured, promoted or designed to be used primarily for sexual stimulation, sexual arousal, or the enhancing or prolonging of sexual activity." *Sex Paraphernalia*, LAWINSIDER.COM, <https://www.lawinsider.com/dictionary/sex-paraphernalia> (last visited Jan. 26, 2021).

30. *Tran*, 922 F.3d at 388 (Bauer, J., dissenting).

31. *Id.* at 381, 388.

32. *Id.* at 382 (majority opinion).

33. *Id.* at 381.

34. An insurance policy rider is typically "an added provision to an insurance policy, such as additional coverage or temporary insurance to cover a public event." *Rider*, LAW.COM, <https://dictionary.law.com/Default.aspx?selected=1856> (last visited Jan. 26, 2021).

35. *Tran*, 922 F.3d at 381–82. "Accidental death or dismemberment by accidental injury as used in this rider means that the insured's death or dismemberment results, directly and independently of disease or bodily infirmity, from an accidental injury which is unexpected and unforeseen." *Tran v. Minn. Life Ins. Co.*, No. 17-cv-450, 2018 WL 1156326, at *3 (N.D. Ill. Mar. 5, 2018).

36. *Tran*, 922 F.3d at 381–82.

37. *Id.* at 382.

of the following: . . . intentionally self-inflicted injury or any attempt at self-inflicted injury, whether sane or insane³⁸

Tran filed an internal appeal³⁹ at Minnesota Life, which was denied.⁴⁰

Subsequently, Tran brought this action under the Employee Retirement Income Security Act (ERISA),⁴¹ in order to recover the AD&D coverage payout.⁴² The District Court for the Northern District of Illinois, Eastern Division, concluded that Minnesota Life had conceded that the death was accidental, thus leaving only one issue in dispute: whether autoerotic asphyxiation constitutes an “injury” as understood by the insurance policy language.⁴³

Since Tran brought this action under ERISA, federal common law applies and, accordingly, all policy ambiguities must be construed in favor of insurance coverage.⁴⁴ Relying on precedent from other circuits,⁴⁵ the district court found that reasonable minds could disagree about whether Llenos’s autoerotic asphyxiation was a self-inflicted injury within the policy language and ruled in favor of Tran.⁴⁶

Minnesota Life then filed an appeal, which was decided by the Seventh Circuit Court of Appeals on April 29, 2019.⁴⁷ The court of appeals shifted the focus of the

38. *Id.* (emphasis omitted).

39. In the insurance context, internal appeal is defined as “a review by an insurer of an adverse benefit determination made” by the insurer. *Internal Appeal*, LAWINSIDER.COM, <https://www.lawinsider.com/dictionary/internal-appeal> (last visited Jan. 26, 2021).

40. *Tran*, 922 F.3d at 382. On appeal, Tran claimed that Llenos did not commit or attempt suicide or self-inflicted injury, but that he engaged in a pleasurable activity resulting in an unfortunate accident, which should not prevent the accidental death insurance payment. Brief of Plaintiff-Appellee Letran Tran at 6, *Tran v. Minn. Life Ins. Co.*, 922 F.3d 380 (7th Cir. 2019) (No. 18-1723), 2018 WL 3729436. Tran compared autoerotic asphyxiation to enjoyable activities such as skydiving, motorcycle riding, or sailing, stating that these pastimes may also result in death in the event of accident. Minnesota Life argued that without any new medical information from the plaintiff, and based on the insurance policy terms, it must affirm the denial. *Id.*

41. 29 U.S.C. § 1132(a)(1)(B). The Employee Retirement Income Security Act of 1974 (ERISA) is a “federal law that sets minimum standards for most voluntarily established retirement and health plans in private industry to provide protection for individuals in these plans.” *Employee Retirement Income Security Act (ERISA)*, U.S. DEP’T OF LAB., <https://www.dol.gov/general/topic/retirement/erisa#targetText> (last visited Jan. 26, 2021). Llenos’s insurance policy with Minnesota Life was governed by ERISA. *Tran*, 922 F.3d at 381.

42. *Tran v. Minn. Life Ins. Co.*, No. 17-cv-450, 2018 WL 1156326, at *1 (N.D. Ill. Mar. 5, 2018), *vacated*, 922 F.3d 380 (7th Cir. 2019).

43. *Id.* at *6.

44. *Id.*

45. *See* *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448, 1456 (5th Cir. 1995) (holding that decedent’s death was accidental because he had a subjective expectation of surviving the autoerotic asphyxiation act); *see also* *Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1127 (9th Cir. 2002) (quoting *Todd*, 47 F.3d at 1456) (“We agree with the court’s holding in *Todd*: . . . ‘the likelihood of death from autoerotic activity falls short of what would be required to negate coverage’ under an accidental death policy.”).

46. *Tran*, 2018 WL 1156326, at *10.

47. *Tran v. Minn. Life Ins. Co.*, 922 F.3d 380, 380 (7th Cir. 2019).

analysis, stating that even an accidental death may be excluded from coverage under this particular insurance policy if it resulted from an intentionally self-inflicted injury.⁴⁸ Thus, in order to determine whether Llenos's death should be excluded from coverage, the court examined whether: (1) autoerotic asphyxiation constitutes an "injury" and (2) Llenos's injury was intentionally self-inflicted.⁴⁹

Accident insurance dates back to mid-nineteenth-century London, when early railroad accidents became a public concern.⁵⁰ In 1849, the Railway Passengers Assurance Company opened its doors and established the first accident insurance policy.⁵¹ This allowed railroad passengers to purchase insurance for their trips which would provide relief if insureds suffered injuries as a result of a railway accident.⁵² In 1850, the Accidental Death Insurance Company was founded, extending the scope of coverage beyond railroad accidents, to include all types of injuries, and offering affordable insurance to a greater number of people.⁵³

In the 1860s, accident insurance debuted in the United States with the formation of the Travelers Insurance Company.⁵⁴ As competition in the insurance market increased and companies vied for customers, U.S. insurers developed accidental death insurance.⁵⁵

The emergence of accident insurance created a new issue in legal jurisprudence—how to define "accident."⁵⁶ Early courts generally followed one of two distinct approaches: (1) the "accidental means" analysis or (2) the "common speech of man" analysis.⁵⁷ The "accidental means" approach barred recovery of accidental death

48. *Id.* at 382.

49. *Id.*

50. See Gabriel Burnham, Note, *What Does Accidental Mean?: Autoerotic Asphyxiation as an Illustration of the Problems Affecting Accident Insurance*, 13 *CARDOZO J.L. & GENDER* 607, 609 (2007) ("Technology and the unsatisfactory state of tort law compelled the development of accident insurance in mid-nineteenth century London, when railroads were still in the early stages of development and imperfections often led to accidents. These accidents were widely reported in local newspapers like the London Times and caused a great deal of public anxiety."). Meanwhile, the codification of tort law in the Fatal Accidents Act also created public anxiety because recovery in accidental cases was conditioned on monetary loss, thus allowing the wealthy to recover, while leaving the poor with nothing. *Id.* at 610.

51. *Id.*

52. *Id.*

53. *Id.* at 611.

54. *Id.*

55. *Id.* This accidental death insurance usually appeared as a double indemnity clause in life insurance policies. "Double indemnity clauses allowed the families of the insured to collect double the base amount . . . under the policy if death occurred as a result of an accident." *Id.* "[A]ccident insurance gradually changed from an instrument to protect train passengers to bonus coverage . . . sold to life insurance customers in the form of a double indemnity." *Id.* at 611–12.

56. *Id.* at 612.

57. *Id.*

insurance if the decedent voluntarily undertook the activity that led to their death.⁵⁸ The “common speech of man” approach called for a case-by-case analysis to determine whether “the accident resulting in death was an accident according to the ‘common speech of man’” and, if it was, allowed recovery.⁵⁹

In 1934, a landmark U.S. Supreme Court decision, *Landress v. Phoenix Mutual Life Insurance Co.*, followed the “accidental means” approach, and denied recovery to a man who died from sunstroke because, the Court reasoned, he voluntarily exposed himself to the sun while golfing.⁶⁰ This opinion, however, was frequently frowned upon by courts,⁶¹ which often preferred the “common speech of man” approach⁶² outlined in Justice Benjamin Cardozo’s dissent.⁶³

In applying these principles to autoerotic asphyxiation cases, courts have come to “erratic results.”⁶⁴ In *Runge v. Metropolitan Life Insurance Co.*, a 1976 decision, the Fourth Circuit Court of Appeals applied the “accidental means” approach and found an autoerotic asphyxiation death non-accidental because the decedent deliberately engaged in it.⁶⁵ But in 1994, in *Parker v. Danaher Corp.*, the U.S. District Court for the Western District of Arkansas applied the “common speech of man” approach and

58. *See id.* (“Courts that utilized [the] ‘accidental means’ analysis looked to the actions of the deceased: if the deceased voluntarily engaged in an activity that lead to their death, the recovery would be barred.”); *see also* Sam Erman, Note, *Word Games: Raising and Resolving the Shortcomings in Accident-Insurance Doctrine That Autoerotic-Asphyxiation Cases Reveal*, 103 MICH. L. REV. 2172, 2195–96 (2005) (“To distinguish, courts have reasoned that mishaps or involuntary, unintentional action that lead to unforeseen deaths and injuries—like stumbling while descending from a platform—qualify [for insurance payment], but voluntary actions that turn out badly—like russian roulette—do not.”).

59. Burnham, *supra* note 50, at 612.

60. 291 U.S. 491, 495–96 (1934) (“The stipulated payments are to be made only if the bodily injury, though unforeseen, is effected by means which are external and accidental. The external means is stated to be the rays of the sun, to which the insured voluntarily exposed himself.”); Burnham, *supra* note 50, at 613 (explaining that the *Landress* court applied the accidental means analysis to deny payment to the insured’s family in a sunstroke case).

61. *See* Burnham, *supra* note 50, at 613–14 (describing the *Landress* opinion as unpopular and receiving a “lack of esteem”); *see also* Erman, *supra* note 58, at 2196 (“Accidental-means analysis has proven unworkable and has been inconsistently applied. In some cases courts have been unable to locate the line between means and results, and where courts have applied the test, they have produced obscurely argued and conflicting opinions.”).

62. Burnham, *supra* note 50, at 615 (“The sunstroke cases illustrate the reluctance of courts to adopt the accidental means analysis . . . used by the Supreme Court in *Landress*. Instead, subsequent courts have adopted reasoning similar to . . . [the] ‘common speech of man’ test . . . suggested [by the dissent] in *Landress*.”).

63. *Landress*, 291 U.S. at 498–501 (Cardozo, J., dissenting) (arguing that sunstroke is an accident in the common speech of men and criticizing the majority’s reasoning).

64. *See* Burnham, *supra* note 50, at 618 (“Despite the general unpopularity of [the] ‘accidental means’ analysis, some jurisdictions continue to apply it The result has been erratic decisions that vary by jurisdiction.”); *see also* Erman, *supra* note 58, at 2199 (discussing that courts reach different results in determining whether autoerotic asphyxiation constitutes an accidental or intentional death with respect to life insurance coverage).

65. 537 F.2d 1157, 1159 (4th Cir. 1976); Burnham, *supra* note 50, at 619–20.

found an autoerotic asphyxiation death accidental because that is how a common person would understand it.⁶⁶ These two cases exemplify the “general confusion surrounding accident insurance claims involving autoerotic asphyxiation.”⁶⁷

Whether autoerotic asphyxiation constitutes an injury that is intentionally self-inflicted and precludes accidental death insurance payments remains an issue that splits courts.⁶⁸ Currently, many federal courts follow a subjective/objective test that was first applied in a deathly-fall case, *Wickman v. Northwestern National Insurance Co.*,⁶⁹ rather than the “accidental means” or “common speech of man” tests, to determine whether an injury from autoerotic asphyxiation is intentionally self-inflicted.⁷⁰ This test requires a court to determine whether the deathly result “was actually expected by the insured” and, if not, “whether the insured’s expectations were reasonable” from an objective standpoint.⁷¹

The Seventh Circuit adopted a version of this test in 1997 in *Santaella v. Metropolitan Life Insurance Co.*, a case involving an accidental overdose of prescription pain medication.⁷² In *Santaella*, the Seventh Circuit Court of Appeals quoted the Fifth Circuit’s methodology for determining whether a death is accidental:

[F]or death under an accidental death policy to be deemed an accident, it must be determined (1) that the deceased had a subjective expectation of survival, and (2) that such expectation was objectively reasonable, which it is if death is not substantially certain to result from the insured’s conduct.⁷³

In *Santaella*, the decedent died from an overdose of a drug whose therapeutic and toxic dosages were so similar that accidents were common.⁷⁴ The court allowed

66. 851 F. Supp. 1287, 1295 (W.D. Ark. 1994); Burnham, *supra* note 50, at 618–19.

67. Burnham, *supra* note 50, at 620.

68. Compare Critchlow v. First UNUM Life Ins. Co. of Am., 378 F.3d 246, 264 (2d Cir. 2004) (holding that death from autoerotic asphyxiation is accidental and rejecting denial of insurance proceeds), with Sims v. Monumental Gen. Ins. Co., 960 F.2d 478, 481 (5th Cir. 1992) (holding that death from autoerotic asphyxiation results from an intentionally self-inflicted injury and thus denying insurance proceeds); see also Tracy Bateman Farrell, Annotation, *Recovery on Insurance Policy When Death Occurs by Autoerotic Asphyxiation*, 51 A.L.R.6th 495 (2010) (“The courts are about evenly divided on whether recovery is allowed when death results from autoerotic strangulation.”).

69. 908 F.2d 1077 (1st Cir. 1990).

70. Schuman, *supra* note 8, at 678.

71. *Id.* at 678–79; accord *Wickman*, 908 F.2d at 1088 (“[T]he reasonable expectations of the insured when the policy was purchased is the proper starting point If the fact-finder determines that the insured did not expect an injury similar in type or kind to that suffered, the fact-finder must then examine whether the suppositions . . . underlay[ing] that expectation were reasonable.”).

72. 123 F.3d 456 (7th Cir. 1997).

73. *Id.* at 463 (alteration in original) (quoting *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448, 1456 (5th Cir. 1995)).

74. *Id.* at 459. “[P]ropoxyphene has been associated very commonly with accidental drug overdoses because there is a very small margin of safety in propoxyphene. The margin between a therapeutic dose and a toxic or lethal dose is smaller than many other drugs.” *Id.* (citing the deposition of the medical examiner who performed the autopsy on decedent).

recovery, finding that there was no evidence that the decedent was aware of the risk of death or injury.⁷⁵

In 2019, the Seventh Circuit Court of Appeals issued its first opinion concerning autoerotic asphyxiation in *Tran v. Minnesota Life Ins. Co.*⁷⁶ Tran argued that under the subjective/objective test, adopted in *Santaella*, she was entitled to an accidental death insurance payment for two reasons.⁷⁷ First, Llenos had a subjective expectation of sexual gratification and not of injury, and evidence showed that he had engaged in this activity in the past and survived.⁷⁸ Second, Llenos's subjective expectation was objectively reasonable because he had set up protective measures.⁷⁹ Therefore, Llenos's death was due to an "accidental injury," and should have been covered by the accidental death insurance policy.⁸⁰

Minnesota Life disagreed and argued that: (1) the district court erred by equating Llenos's unintentional death with an accidental injury and automatically assuming coverage;⁸¹ (2) Llenos subjectively intended to shut down his vital functions, which an objectively reasonable person would perceive as carrying a substantial risk of injury or death;⁸² and (3) the district court failed to make findings of fact necessary to determine whether the exclusion for intentionally self-inflicted injuries applied.⁸³

On April 29, 2019, the *Tran* court held that Llenos died from an intentionally self-inflicted injury, and, therefore, his wife was not entitled to the \$60,000 of AD&D insurance coverage.⁸⁴ In the first phase of its analysis, the *Tran* court inquired whether autoerotic asphyxiation is an injury and thus falls under the

75. *Id.* at 465.

76. 922 F.3d 380 (7th Cir. 2019). In a common law system, a case of first impression is significant because it presents a novel issue the court has not seen before, in which the court must use persuasive authority or other analytical tools to answer the question before it; its answer, in turn, becomes part of the judicial precedent. *See* David S. Coale & Jeaneen M. Dyrek, *First Impressions*, 24 *APP. ADVOC.* 274, 274 (2011) (discussing the meaning of a case of first impression).

77. Brief of Plaintiff-Appellee Letran Tran, *supra* note 40, at *20.

78. *Id.*

79. *Id.* Protective measures included a towel, a step stool, and a release mechanism with a rope. *Id.*

80. *Id.*

81. *See* Brief of Defendant-Appellant Minnesota Life Insurance Co. at 18–19, *Tran v. Minn. Life Ins. Co.*, 922 F.3d 380 (7th Cir. 2019) (No. 18-1723), 2018 WL 3237576 ("The district court's [o]pinion was tainted by three fundamental legal errors. First, the district court confused unintended death with accidental injury. Minnesota Life acknowledged that Llenos's death was not a suicide. The district court misconstrued this as an admission that Llenos's death was accidental . . .").

82. *Id.* at 32.

83. *Id.* at 37. The findings of fact mentioned by Minnesota Life related to the effect that hanging had on Llenos's body, including "compression of his trachea to halt breathing and deprive his brain of oxygen while increasing carbon dioxide levels, compression of the arteries of his neck to raise the blood pressure in his head, and the sudden drop in blood pressure to create a head-rush." *Id.* at 38.

84. *Tran v. Minn. Life Ins. Co.*, 922 F.3d 380, 386 (7th Cir. 2019).

insurance policy's exclusion for "intentionally self-inflicted injuries."⁸⁵ The *Tran* court reasoned that strangulation is an injury because "an ordinary person would consider choking oneself by hanging from a noose to be an injury, even if that strangulation is only 'partial.'"⁸⁶ The *Tran* court focused on causation and found that because there was no intervening cause of death, Llenos was "injured" and killed by autoerotic asphyxiation and the resulting hypoxia.⁸⁷

The *Tran* court, having determined that the autoerotic asphyxiation was an injury, then moved on to the second phase of its analysis—determining whether the injury was "intentionally self-inflicted."⁸⁸ In order to establish whether the injury was self-inflicted within the meaning of the insurance policy exclusion, the *Tran* court applied the subjective/objective test from *Santaella*.⁸⁹ The court found that "the injured individual had a subjective expectation of injuring himself" because autoerotic asphyxiation is an injury and Llenos intentionally engaged in it.⁹⁰ Because Llenos's subjective intent to engage in the activity was clear, the court did not proceed to the second phase of the analysis—the objective stage.⁹¹ The court reasoned that, because autoerotic asphyxiation is an injury and Llenos intentionally engaged in it, his death fell under the insurance policy exclusion for intentionally self-inflicted injuries.⁹²

The dissenting opinion emphasized, as the lower court had, that insurance plan ambiguities must be resolved in favor of coverage, and that it would be reasonable to conclude that Llenos's death was not intentional but instead, an accident.⁹³ Therefore, the dissent found that Llenos's death was an "unexpected and unforeseen accident" that warranted the \$60,000 AD&D insurance payment.⁹⁴

Regardless of whether autoerotic asphyxiation is an injury, the *Tran* court erred in the second phase of its analysis. First, the *Tran* court erred in its application of the subjective prong of the subjective/objective test because it inquired whether Llenos

85. *Id.* at 382 ("To determine whether Llenos's death is excluded from AD&D coverage, we must determine first whether autoerotic asphyxiation is an 'injury,' and second, whether that injury was 'intentionally self-inflicted.'").

86. *Id.* at 384. The *Tran* court did not find the popularity of autoerotic asphyxiation or its sexual nature to be relevant. *Id.* at 384–85.

87. *Id.* at 384 (first citing *Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1123–24 (9th Cir. 2002); and then citing *Critchlow v. First UNUM Life Ins. Co. of Am.*, 378 F.3d 246, 250 (2d Cir. 2004)) ("[In those cases], there was no intervening cause, and no break in the chain of causation: one act of autoerotic asphyxiation caused the hypoxia that killed them. The same reasoning applies here . . .").

88. *Id.* at 385–86.

89. *Id.* at 385.

90. *Id.* at 385–86.

91. *Id.*

92. *Id.*

93. *Id.* at 386–88 (Bauer, J., dissenting).

94. *Id.* at 386–87. The dissent argued that the majority wrongly divides the activity into two separate acts: (1) the act of masturbation and (2) the act of self-strangulation. *Id.* at 387. This confused the analysis because it erroneously divided one process into two separate acts, with the majority focusing solely on the strangulation aspect. *Id.*

had a subjective expectation of injuring himself.⁹⁵ The correct test, however, asks whether Llenos had a subjective expectation of survival.⁹⁶

In *Santaella*, the Seventh Circuit Court of Appeals adopted in 1997 the following version of the subjective prong of the subjective/objective test: “[F]or death under an accidental death policy to be deemed an accident, it must be determined . . . that the deceased had a subjective expectation of survival.”⁹⁷ Thus, the decedent in *Santaella*, who voluntarily took an overdose of a prescription drug and died as a result, was nevertheless found to have a subjective expectation of survival, because nothing in the record indicated that she “intended to take an overdose or . . . inflict injury on herself.”⁹⁸

Likewise, in 2002, in *Padfield v. AIG Life Insurance Co.*, the Ninth Circuit Court of Appeals found that death as a result of autoerotic asphyxiation was an accident because the decedent had an expectation of survival.⁹⁹ This was especially true because the decedent had performed autoerotic asphyxiation in the past without any injuries, and thus had an expectation of doing so again.¹⁰⁰ The *Padfield* court analogized to *Santaella*, finding that the decedent died not from an intentionally self-inflicted injury, but from a fatal mistake.¹⁰¹

Similarly, in *Todd v. AIG Life Insurance Co.*, the Fifth Circuit Court of Appeals in 1995 formulated the famously quoted language for the analysis of the subjective prong of the subjective/objective test that the Seventh Circuit adopted in *Santaella* two years later.¹⁰² The *Todd* court found that, where the decedent had previously engaged in autoerotic asphyxiation without dying, was happily married, had plans for a family vacation, and was building a new house, he had a subjective expectation of surviving his autoerotic asphyxiation act.¹⁰³

The *Tran* court erred in its application of the subjective prong of the subjective/objective test because it asked whether Llenos had an expectation of injuring himself instead of asking whether he had an expectation of survival.¹⁰⁴ As a result, the *Tran*

95. *Id.* at 385.

96. *Santaella v. Metro. Life Ins. Co.*, 123 F.3d 456, 463 (7th Cir. 1997).

97. *Id.* (alteration in original) (quoting *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448, 1456 (5th Cir. 1995)).

98. *Id.* at 464–65.

99. 290 F.3d 1121, 1127 (9th Cir. 2002).

100. *Id.* at 1130.

101. *Id.* (citing *Santaella*, 123 F.3d at 465). The *Padfield* court emphasized that a voluntary and risky act that results in an injury, like autoerotic asphyxiation, is not necessarily an act that results in an intentionally self-inflicted injury, especially if decedent engaged in the act in the past with no injuries. *Id.* at 1129.

102. 47 F.3d 1448 (5th Cir. 1995); see *Santaella*, 123 F.3d at 463 (“[F]or death under an accidental death policy to be deemed an accident, it must be determined (1) that the deceased had a subjective expectation of survival.”).

103. *Todd*, 47 F.3d at 1456.

104. See *Tran v. Minn. Life Ins. Co.*, 922 F.3d 380, 385–86 (7th Cir. 2019) (“[W]e examine whether the injured individual had a subjective expectation of injuring himself . . . [L]lenos’s subjective intent was clear. Llenos intentionally performed autoerotic asphyxiation. Because the act itself is an injury, Llenos’s death falls under the policy exclusion for intentionally self-inflicted injuries.”).

court failed to consider a wealth of evidence indicating that Llenos had no intention of dying.¹⁰⁵ Just like the decedents in *Padfield* and *Todd*, Llenos had a history of non-injurious autoerotic asphyxiation, had both a secure family life and finances, was not suicidal, and used prophylactic measures to mitigate the risk of injury or death.¹⁰⁶

Llenos was certainly aware that some sort of an injury could result from this act; he would not have taken any precautionary measures otherwise.¹⁰⁷ His precautionary measures were precisely intended to mitigate this risk of injury, prompting Llenos to believe that he would survive this act.¹⁰⁸ This belief was further reinforced because Llenos had a non-injurious history of autoerotic asphyxiation.¹⁰⁹

The *Tran* court, however, inquired about Llenos's expectation of injury, not his expectation of survival.¹¹⁰ Therefore, the court found that Llenos intentionally inflicted an injury upon himself.¹¹¹ Had the court applied the correct standard for the subjective prong of the subjective/objective test, it would have found that Llenos subjectively expected to survive, because he had a history of non-injurious autoerotic asphyxiation and safety measures in place.¹¹²

Next, since the *Tran* court should have found that the first prong of the subjective/objective test was met, the court should have then considered whether Llenos's subjective expectation of survival was objectively reasonable.¹¹³ A court must consider both the subjective expectations of the insured and the objective reasonableness of these expectations when evaluating insurance proceeds for an accidental death.¹¹⁴ The *Santaella* court explicitly states that, when inquiring into whether death

105. *See id.* at 388 (Bauer, J. dissenting) (“Here, there is evidence that Llenos intended to weather the masturbatory episode unscathed.”).

106. *Id.* Prophylactic measures included placing a towel around the neck and a release mechanism. *Id.*

107. *See* Burnham, *supra* note 50, at 607 (“[M]ost people who engage in this activity install some safety measures to ensure continued existence.”).

108. *See id.* (“Far from being suicidal, those who practice autoerotic asphyxiation intend to survive the experience.”); *see also* Douglas R. Richmond, *Drugs, Sex, and Accidental Death Insurance*, 45 TORT TRIAL & INS. PRAC. L.J. 57, 59 (2009) (“The vast majority of people who engage in activities with any measure of physical risk believe that they have those risks under control.”).

109. *Tran*, 922 F.3d at 388 (Bauer, J., dissenting).

110. *See id.* at 385 (majority opinion) (“[W]e examine whether the injured individual had a subjective expectation of injuring himself . . .”).

111. *Id.* at 386.

112. *See id.* at 388 (Bauer, J., dissenting) (“[T]here is evidence that Llenos intended to weather the masturbatory episode unscathed . . . [T]here were prophylactic measures in place to mitigate the risk of injury . . . [L]lenos had a history of engaging in autoerotic asphyxiation and doing so without injury, leading one to the belief that the act . . . was not injurious.”).

113. *Id.* at 385–86 (majority opinion) (holding that autoerotic asphyxiation is an injury, and, therefore, by engaging in the act, Llenos automatically had both subjective and objective expectation of an injury or even death); *but see* *Santaella v. Metro. Life Ins. Co.*, 123 F.3d 456, 463 (7th Cir. 1997) (noting that in order to evaluate insurance proceeds for an accidental death, the court must first determine whether decedent had a subjective expectation of survival, and second, whether such expectation was objectively reasonable).

114. *Santaella*, 123 F.3d at 463.

insurance proceeds should be paid, “it must be determined (1) that the deceased had a subjective expectation of survival, and (2) that such expectation was objectively reasonable, which it is if death is not substantially certain to result from the insured’s conduct.”¹¹⁵

In *Santaella*, the Seventh Circuit Court of Appeals found the decedent’s death accidental not only because there was no subjective expectation of overdosing from the drug, but also because a reasonable person in her circumstances would not have considered death either “highly likely to occur” or “substantially certain to result” from her conduct.¹¹⁶

In *Todd*, the Fifth Circuit Court of Appeals reiterated this standard by holding that looking to the decedent’s expectations is not a sufficient inquiry.¹¹⁷ The court reasoned further that the decedent’s expectation “must be reasonable,” explaining that an expectation is unreasonable if the risk of death is so high that the expectation of survival is simply unrealistic.¹¹⁸

In *Critchlow v. First UNUM Life Insurance Co. of Am.*, a 2004 autoerotic asphyxiation death case, the Second Circuit Court of Appeals also applied the two-prong test found in *Santaella* and *Todd*.¹¹⁹ The Second Circuit stated:

We conclude . . . that this subjective/objective analysis reflects the developing federal common law used in ERISA cases to determine whether a death, including a death during the practice of autoerotic asphyxiation, was, within the meaning of an ERISA-regulated insurance policy, either accidental or the result of an intentionally self-inflicted injury.¹²⁰

When considering the objective prong of the test, the *Critchlow* court concluded that the decedent’s expectation of survival was objectively reasonable because “autoerotic asphyxiation is not likely to result in death,” the decedent had practiced autoeroticism with nonlethal results before, and had set up an escape mechanism

115. *Id.* (quoting *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448, 1456 (5th Cir. 1995)).

116. *Id.*

117. *See* 47 F.3d at 1456 (“[T]he deceased’s expectation of survival, without more, is not enough That expectation must be reasonable . . .”).

118. *Id.* (“[T]he expectation would be unreasonable if the conduct from which the insured died posed such a high risk of death that his expectation of survival was objectively unrealistic.”). The decedent in *Todd* died from autoerotic asphyxiation despite an elaborate escape mechanism. *Id.* at 1450. The *Todd* court stated that the decedent’s expectation of survival was reasonable, relying on scientific evidence and testimonies that characterized death from autoerotic asphyxiation as not a “normal expected result of the behavior.” *Id.* at 1457 (internal citations omitted):

[A]utoerotic . . . asphyxia . . . [is] the use of asphyxia to heighten sexual arousal, more often than not with a nonfatal outcome [E]xperts . . . testified that death from the practice would be considered unusual . . . [and] risk of death from autoerotic practice is ‘not of such a nature that [the decedent] knew or should have known that it probably would result in death.

Id.

119. 378 F.3d 246, 259 (2d Cir. 2004).

120. *Id.*

that would save him in the event of loss of consciousness.¹²¹ Therefore, his subjective expectation of survival was objectively reasonable.¹²²

Here, the *Tran* court failed to confirm the reasonableness of the decedent's expectations.¹²³ Even assuming that the *Tran* court was right and Llenos subjectively expected to injure himself, that expectation may not have been objectively reasonable because, like the decedents in *Todd* and *Critchlow*, Llenos took prophylactic measures to mitigate the risk of injury and had a non-injurious history of autoerotic asphyxiation.¹²⁴ Further, autoerotic asphyxiation, more often than not, results in heightened sexual arousal only, not death.¹²⁵ There is no reason to believe that this would hold true for *Todd* and *Critchlow* but not for Llenos, when his cause of death was identical to theirs.¹²⁶ Therefore, the court erred by not considering the objective prong of the subjective/objective test, because it did not assess the reasonableness of Llenos's expectation of survival.¹²⁷

Finally, Llenos likely purchased the accidental death insurance precisely for the purpose of protecting himself from his own mistakes and miscalculations.¹²⁸ Accidental death insurance exists to protect its purchasers from fatal mistakes.¹²⁹ This is also why courts must inquire into the expectations of the insured in accidental death cases.¹³⁰ That Llenos died as the result of a risky activity does not render his death intentional.¹³¹ By misapplying the subjective/objective test and, in turn,

121. *Id.* at 260.

122. *Id.*

123. *Tran v. Minn. Life Ins. Co.*, 922 F.3d 380, 385–86 (7th Cir. 2019).

124. *Id.* at 388 (Bauer, J., dissenting).

125. *See Todd v. AIG Life Ins. Co.*, 47 F.3d 1448, 1457 (5th Cir. 1995) (summarizing scientific evidence and expert testimony to conclude that death from autoerotic asphyxiation is unusual).

126. *See Tran*, 922 F.3d at 381 (“Linno Llenos died engaging in an act known as autoerotic asphyxiation.”); *see also Critchlow*, 378 F.3d at 250 (“The coroner’s report concluded, and it is undisputed, that his death resulted from his practice of autoerotic asphyxiation”); *see also Todd*, 47 F.3d at 1450 (“The cause of death was determined to be autoerotic asphyxiation”).

127. *See Tran*, 922 F.3d at 385–86 (“Here, we need not reach the objective step in the analysis, because Llenos’s subjective intent was clear.”).

128. *See Wickman v. Nw. Nat’l Ins. Co.*, 908 F.2d 1077, 1088 (1st Cir. 1990) (“Generally, insureds purchase accident insurance for the very purpose of obtaining protection from their own miscalculations and misjudgments.”).

129. *See Burnham*, *supra* note 50, at 611 (explaining that accidental death insurance was developed by insurance companies to attract customers with double coverage if death occurred as a result of an accident).

130. *Wickman*, 908 F.2d at 1088 (“[T]he reasonable expectations of the insured when the policy was purchased is the proper starting point for a determination of whether an injury was accidental under its terms.”).

131. *Richmond*, *supra* note 108 (“The fact that a person’s death was senseless or the product of foolhardy behavior or recklessness does not mean that it was nonaccidental.”).

denying Tran her husband's accidental death insurance proceeds, the *Tran* court invalidated the very purpose of that insurance.¹³²

Insurance companies have the ability to explicitly exclude those acts they do not intend to cover.¹³³ Many insurance companies already exclude from coverage activities such as bungee jumping, motorcycle racing, skydiving, or mountain climbing.¹³⁴ As the court in *Todd* and the dissent in *Tran* point out, life insurance companies could, if they wanted to, protect themselves from adverse judgments in autoerotic asphyxiation death cases.¹³⁵ In deciding that Tran is not entitled to the insurance proceeds in this case, the *Tran* court remedied an ambiguity in the insurance policy that Minnesota Life should have remedied itself, all the while invalidating the very purpose of accidental death insurance and contributing to an existing circuit split regarding autoerotic asphyxiation deaths.¹³⁶

In summary, the *Tran* court erred when applying the subjective/objective test. First, it misapplied the subjective prong of the test by asking whether the decedent had a subjective expectation of injuring himself, and not whether he had a subjective expectation of survival.¹³⁷ Next, the *Tran* court did not address the second prong of the test, which explores the reasonableness of the decedent's expectations.¹³⁸ In other words, the *Tran* court failed to apply the correct test adopted by the Seventh Circuit

132. See *Tran*, 922 F.3d at 386 (“Llenos died from an ‘intentionally self-inflicted injury.’ Even assuming Llenos’s death were accidental, Tran is not entitled to AD&D coverage and an additional \$60,000 payment.”). In denying recovery, the *Tran* court also contributed to the existing lack of uniformity among federal jurisdictions dealing with autoerotic asphyxiation death cases under ERISA. See Burnham, *supra* note 50, at 629 (“A comparison of all the autoerotic death cases illustrates the inconsistent results that these cases provoked depending on the jurisdiction These erratic results can be attributed partly to the lack of uniformity in the tests the different courts use.”).

133. See *Todd v. AIG Life Ins. Co.*, 47 F.3d 1448, 1452 n.3 (5th Cir. 1995) (“The district court also observed . . . that it is the company’s burden clearly to exclude those acts it does not intend to cover, and that acts that are not expressly omitted or excluded are covered.”).

134. See *Tran*, 922 F.3d at 389 (Bauer, J., dissenting) (first quoting *Johnson v. Am. United Life Ins. Co.*, 716 F.3d 813, 817 (4th Cir. 2013); and then quoting *Kovach v. Zurich Am. Ins. Co.*, 587 F.3d 323, 336 (6th Cir. 2009)).

135. See *id.* (“Minnesota Life is in the best position to remedy . . . ambiguity by expressly excluding coverage for such inherently dangerous activities, as other insurance providers have done.”); see also *Todd*, 47 F.3d at 1457 (“The life insurance companies have ample ways to avoid judgments like this one.”).

136. See *Tran*, 922 F.3d at 389 (Bauer, J., dissenting); see also Burnham, *supra* note 50, at 629 (discussing the circuit split on autoerotic asphyxiation death cases).

137. See *Padfield v. AIG Life Ins. Co.*, 290 F.3d 1121, 1127 (9th Cir. 2002) (discussing decedent’s expectation of survival when he performed autoerotic asphyxiation); see also *Santaella v. Metro. Life Ins. Co.*, 123 F.3d 456, 463–64 (7th Cir. 1997) (discussing decedent’s expectation of survival when she took a dose of pain medication prescribed by a doctor); see also *Todd*, 47 F.3d at 1456 (discussing decedent’s expectation of survival when he performed autoerotic asphyxiation).

138. See *Critchlow v. First UNUM Life Ins. Co. of Am.*, 378 F.3d 246, 260 (2d Cir. 2004) (discussing decedent’s objectively reasonable expectation of survival when the decedent died from autoerotic asphyxiation); see also *Santaella*, 123 F.3d at 463 (quoting *Todd*, 47 F.3d at 1456) (applying the objective prong of the subjective/objective test to a case where decedent died from taking a dose of pain medication prescribed by a doctor); see also *Todd*, 47 F.3d at 1456 (articulating the objective prong of the subjective/objective test and applying it to an autoerotic asphyxiation case).

in *Santaella*.¹³⁹ In doing so, the *Tran* court determined that autoerotic asphyxiation falls within the insurance policy's exclusion, when Minnesota Life should have expressly indicated such exclusion to begin with.¹⁴⁰ The *Tran* court's misapplication of the precedent contributed to a circuit split that continues to divide U.S. jurisdictions deciding otherwise identical cases.¹⁴¹ Further, it curbed the scope of accidental death insurance coverage, advancing the interests of insurance companies at the expense of families whose loved ones met an accidental death. More particularly, the court assigned responsibility for this unfortunate accident to the defenseless decedent, while leaving his mourning wife—already crushed by the weight of this rather intimate and humiliating tragedy—without proceeds from the accidental death insurance, duly paid by the decedent.

139. *Tran*, 922 F.3d at 387 (Bauer, J., dissenting).

140. *See id.* at 389; *see also Todd*, 47 F.3d at 1452 n.3.

141. *See Burnham*, *supra* note 50, at 629.