UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO: 12-16433-AA

MAERSK LINE LIMITED CORPORATION
D/B/A MAERSK LINE LIMITED

Appellant / Defendant,

vs.

WILLIAM C. SKYE,

Appellee / Plaintiff.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

RESPONSE BRIEF OF APPELLEE/PLAINTIFF

MICHAEL A. WINKLEMAN
ERIC C. MORALES
LIPCON, MARGULIES,
ALSINA & WINKLEMAN, P.A.
Attorneys for Appellant
One Biscayne Tower, Suite 1776
2 South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 373-3016
Facsimile: (305) 373-6204
mwinkleman@lipcon.com

CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record for Appellant, in compliance with FRAP 26.1 and 11th Cir. R. 26.1-1, certifies that the following listed persons, parties, and corporations have an interest in the outcome of this appeal.

A.P. Moller-Maersk A/S

Alsina, Ricardo V., Esq.

Applin, Nicholas A., Esq.

Godwin, Eddie G., Esq.

Horr, David J., Esq.

Horr, Novak & Skipp, P.A.

Lau, Lane, Pieper, Conley & McCreadie, P.A.

Llinas-Negret, Carlos, F., Esq.

Lipcon, Charles R., Esq.

Lipcon, Margulies, Alsina & Winkleman, P.A.

Maersk, Inc.

Maersk Line Ltd. Corp. d/b/a Maersk Line Ltd. - Appellant

Margulies, Jason R., Esq.

Martin, Elbert L, IV, Esq.

Mcreadie, David W., Esq.

Morales, Eric C., Esq.

Skye, William C. – Appellee

Villareal, David A., Esq.

Winkleman, Michael A., Esq.

Wylie, Stephanie H., Esq.

STATEMENT REGARDING ORAL ARGUMENT

Appellee, William C. Skye, believes oral argument in this matter is unnecessary. The District Court properly held at the Summary Judgment stage and post trial, that Appellant/Defendant Maersk's legal arguments regarding *Gottshall*, were questions of fact for a jury. After a five (5) day jury trial and two (2) days of deliberation, a jury decided those factual questions in favor of Mr. Skye. The record before this Honorable Tribunal is clear that there was a sufficient evidentiary basis for a reasonable jury to find in his favor. As such, the record before this Honorable Court warrants affirmance without oral argument.

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

CASES **PAGE NO.**

RULE **PAGE NO.**

STATEMENT OF THE ISSUES

Pursuant to F.R.A.P. 28(b), Appellee Skye sees the issues to be far different from what Maersk indicated and thus provides a brief statement regarding the two issues presented in this appeal.

1. Whether Skye presented a legally sufficient evidentiary basis to support the Jury's finding that his injury was physical and thus compensable under the Jones Act?

2. Whether Skye presented a legally sufficient evidentiary basis to support the Jury's finding that his Complaint was timely filed?

STATEMENT OF THE CASE[1]

1. Introduction

This is a case about a Jones Act seafarer and career mariner who was nearly worked to death by Appellant/Defendant Maersk's negligence.[2] Two arguments have been set out by Maersk through these proceedings: that the Plaintiff/Appellee, William C. Skye, is not entitled to relief first, because his claims are not compensable under the Supreme Court case of *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532 (1994) and second, because Skye's claims are time barred.

These two issues were raised by Maersk at the Summary Judgment stage, which was denied by the District Court based on a finding that these two issues presented questions of fact for a jury. D.E. 97. These questions of fact went to a jury and were decided in Skye's favor. R.E. 1[3].

Post trial, Maersk renewed these same two arguments (along with numerous other arguments which have been abandoned on appeal) in a Renewed Motion for Judgment as a matter of Law. D.E. 171.[4] The district court disposed of Maersk's arguments in less than two pages. D.E. 190, p. 38-39. This appeal follows.

---

[1] Again, Skye believes Maersk's statement of the case is deficient and thus provides his own statement of the case pursuant to F.R.A.P. 28(b).

[2] Bill Skye is currently 58 years old, at the time he was forced to retire due to his medical condition he was 54. Skye began his career working aboard sea going ships as an officer in 1972. [Trial Tran. pg. 130, L:1-15].

[3] Skye cites the attached Record Excerpts as "R.E."

[4] Citations to the District Court Docket not included in the Record Excerpts will be cited to as "D.E."

2. The proceedings below and the evidence presented at trial

At trial, Skye presented the following evidence regarding the extreme physical nature of his job:

Over a number of years, William C. Skye, a chief mate on the Mearsk vessel, *Sealand Pride*, was regularly forced to work between 90 and 105 hours a week for 70 or 84 days at a time. R.E. 7[5]. Evidence indicated that in Skye's most back breaking week, Maersk required him to work 107 hours. R.E. 7, pg. 19-0013.[6]

These hours were not worked straight in a row, but rather scattered throughout the day and night, and organized in irregular patterns due to changing time zones and shifts. *See generally* R.E. 6.[7] Often, Skye was not given more than 2-3 hours of "unbroken rest" for days at a time, or alternatively would go days without sleeping. R.E. 6 and 7.[8] Even when Skye was afforded short opportunities

[5] Appellee specifically directs this Honorable Court to the column in R.E. 7, entitled "72 Hours Work in 7 day Period". The title of the column indicates that the Standards of Training, Certification, and Watch Keeping (commonly referred to as the "STCW") specify that a professional mariner should not be required to work more than 72 hours in any 7 day period. As indicated by red numbers in the column, Skye was regularly required by his employer to violate this law.

[6] R.E. 7 is a summary exhibit offered at trial that displayed the hours worked by Skye and then compared those hours to the work-rest hour laws to determine whether or not a statutory violation had occurred.

[7] R.E. 6, an exhibit offered at trial, consists of the Standards of Training Certification and Watch-keeping (STCW) Duty Logs from onboard the *Sealand Pride*. These logs indicate what hours were worked by each crewmember and when those hours were worked.

[8] One of the columns in Trial Exhibit 19 indicates the longest period of unbroken rest Skye was given in any 24 hour period.

to rest, taking advantage of them was unrealistic since the constant up and down demanded by Maersk would prevent his body from properly shutting down.

The work performed by Skye was extremely physical in nature. Skye spent multiple hours a day climbing up and down ladders to read reefers[9] and climbing into and out of spaces and tanks[10] in the belly of the *Sealand Pride*. R.E. 10, pgs. 436-437, pg. 439, L: 4-20, and pg. 440, L: 8-19. Skye was also required to perform constant maintenance on the *Sealand Pride*.[11] This physical labor was piled on top of the rest of Skye's chief mate duties as dictated by Maersk's Global Ship Management System ("GSMS"). R.E. 6.

Medical evidence offered at trial demonstrated that this pattern of work caused physical stress on Bill Skye's body, eventually wearing it down to the point of injury. Specifically, this physically demanding work and consistent sleep deprivation and/or degradation caused a physiological response in the body commonly known as the "fight or flight" response and/or long term vigilance reaction. R.E. 10, pg. 35, L: 7-17. R.E. 3, pg. 148.

The medical evidence further demonstrated that when this happens, adrenaline and hormones are released into the blood stream which, among other

[9] Reading reefers means monitoring the settings and recording temperatures on refrigerated containers aboard the *Sealand Pride*. Skye was required to do this every day and sometimes twice a day. Trial Tran. Volume II, pg. 439, L: 4-20. Generally the *Sealand Pride*, carried 144 reefers, some stacked four feet in the air, which all had to be checked individually by Skye.

[10] Tank entry was a grueling task that had Skye crawling into a hot confined space, often filled with noxious fumes.

[11] Tasks like chipping, painting, etc. R.E. 10, pgs. 168-169 and 170-172.

things, elevates blood pressure. *Id*. After experiencing this over a number of years, a patient, such as Bill Skye, develops labile hypertension (intermittent episodes of elevated blood pressure) which then leads to a ventricular hypertrophy (hardening and thickening of the muscle wall making up the pumping chambers in the heart); this condition can ultimately lead to heart attack or congestive heart failure. *Id*.

As the trial testimony displayed to the Jury, this is exactly what happened to William Skye as a result of his employment with Maersk. This was not some unique emotional reaction particular to Skye. It was the physiological effect of Skye's extreme working conditions.

After these physical working conditions caused him to develop labile hypertension and left ventricular hypertrophy, Skye was advised by his cardiologist to retire or risk dropping dead on the job. R.E. 8, pg. 222, L: 25 – pg. 223, L: 5. As Skye testified: With a wife and two children, R.E. 8, pg 129, L: 12-24, Skye did the only thing he could, he left his job, forcing him to lose years of his working life and substantial income. R.E. 8, pg. 226, L: 3-6.

Furthermore, Maersk also argued throughout these proceedings that Skye's claim is barred by the applicable statute of limitations. To this point, evidence at trial demonstrated that although Skye was treated for a benign arrhythmia in 2000,

there was no indication that the arrhythmia was related to Skye's left ventricular hypertrophy. Trial Tran. Vol. III, pg. 28, L: 7-10[12].

Similarly, although Maersk argued that Skye had been experiencing symptoms of his heart condition for years, evidence was presented that Skye visited his cardiologist in 2003 and after a battery of tests, was told that he was in good health and there was nothing wrong with his heart. Trial Tr. Vol. III, at 14, L: 1-3. R.E. 8, pg. 218, L: 11. Skye was first diagnosed with a physical injury to his heart in June 2008. R.E. 8, pg. 222, L: 25 – pg. 223, L: 5.

The instant lawsuit was filed on May 5, 2011, well within the applicable three year statute of limitations for a Jones Act claim.

Maersk moved for Summary Judgment, and argued, *inter alia*, that Skye's claims were barred by *Gottshall* and/or were time barred. D.E. 52. In its order denying Maersk's Motion for Summary Judgment, the District Court held:

> It is evident that there remains a genuine issue of material fact that renders summary judgment inappropriate on this issue because the Court cannot conclude as a matter of law whether *Gottshall* limits Plaintiff's action [….] on this record, there appears to be evidence that the nature of Maersk's conduct constitutes a physical stress that is not limited by *Gottshall*, summary judgment is inappropriate on this issue.
>
> D.E. 97, pgs. 5-6.

[12] References to portions of the Trial Transcript not included in the Record Excerpts will be cited as "Trial Tran. Vol. X, pg. X, L: X"

With regard to Maersk's claim that Skye's action was time barred, the District Court held:

> The physical injury Skye complains of includes left ventricular hypertrophy, which was not detected until June of 2008 [….] It appears that there is some record evidence supporting Skye's assertion that the physical injury which he was first informed of in June of 2008 is a separate injury from – and not a mere continuation or aggravation of – the symptoms he complained of in 2000.
>
> [D.E. 97, pg. 6].

As such, the district ruled that Maersk's arguments regarding *Gottshall* and Statute of limitations (the two issues on appeal) were questions of fact for a jury.

The matter proceeded to jury trial.

At trial, Maersk asked for and obtained a jury instruction explaining the difference between emotional and physical injuries. R.E. 2, pg. 9. The Jury was instructed that:

> A purely emotional injury is an injury that has no physical causes, but rather was solely caused by the injured person's perception of a non-physical stress. The injured person, however, may receive compensation for an injury caused in any part by physical stress.

Further, also at Maersk's insistence and over Plaintiff's objection, the Jury was given a special verdict form that required the jury to decide whether Skye's injury was "physical" or "emotional." R.E. 1, pg. 1.

After listening to all of the evidence, the Jury found Maersk was negligent and that said negligence was a legal cause of Skye's injuries. Further, the jury

determined Skye's injury was **physical** in nature (and thus compensable under the Jones Act). *Id*.

Just as with Maersk's *Gottshall* defense, Maersk asked for and obtained a jury instruction concerning its statute of limitation defense, and the discovery doctrine. R.E. 2, pg. 7. Again, at Maersk's insistence and over Skye's objections, the verdict form required the Jury to determine whether or not Skye's Left Ventricular Hypertrophy was a continuation or evolution of the complaints he made in 2000, or if it was a new, unrelated injury. R.E. 1, pg. 2.

The Jury found the injury was not related to Skye's complaints from 2000. *Id*. The jury was then asked to determine when Skye first knew or should have known of his injury. *Id*. In response to this question on the verdict form, the Jury wrote, "**May 2008.**" *Id*. Accordingly, the Jury found that Skye's claims were timely filed.

At the close of Plaintiff's case, Maersk renewed its motion for judgment as a matter of law. The District Court again denied Maersk's Motion.

Finally, at those close of trial and after the Jury entered a verdict in favor of the Skye, Maersk again moved the Court for judgment as a matter of law regarding the *Gottshall* issue and the statute of limitations. The District Court denied Maersk's Motion, and held:

> The jury determined Plaintiff sustained a physical injury. (Jury Verdict 1). Maersk argues, however, that even when viewing the

> evidence with all inferences in favor of Plaintiff, Skye "did not suffer a compensable physical injury, but rather an emotional injury with physical manifestations." (Maersk's Mot. 34). Such an analysis does not advance Maersk's position, however, as Maersk engages in no specific discussion of the evidence. In particular, Maersk completely ignores Dr. Wachpress's[13] opinion that Skye's left ventricular hypertrophy was caused by physical stress. Thus, Maersk has failed to demonstrate that no record evidence supports the jury's finding that Plaintiff suffered a physical injury. As Defendant acknowledges, "[a] physical injury is compensable." (Maersk's Mot. 33). Relief on this ground is denied.
>
> D.E. 190, pg. 38.

In regard to the statute of limitations argument, the District Court held that Skye put forward adequate evidence to support the jury's finding. As the Court held in relevant part:

> …the Court recalls Dr. Wachspress opined that Skye's arrhythmia, diagnosed in 2000, was unrelated to the left ventricular hypertrophy diagnosed in May 2008. (*See* Trial Tr. Vol III, at 28:7–10). And that prior to 2008, Skye had no reason to think he had left ventricular hypertrophy, and indeed, "there was no[]" medical basis for Skye to know that he had developed left ventricular hypertrophy." (*Id.* 28:11–16). Dr. Wachspress's testimony is more than a "mere scintilla" upon which the jury could rely to arrive at its determination that "[t]he left ventricular hypertrophy was not related to [Skye's] complaints in 2000," and that "Plaintiff first knew or should have known that he or his working conditions were causing him physical injury [in May 2008]." (Jury Verdict 2).
>
> In sum, although Maersk points to much evidence in support of its theory that Plaintiff's injury was either related to his heart palpitations in 2000 or that he should have known he had left ventricular hypertrophy when he was not feeling well in April 2008,

[13] Skye's treating cardiologist, who was also designated as an Expert Witness.

> that is not the standard by which a motion for judgment as a matter of law is adjudicated. Relief on this ground is denied. *Id*.
>
> D.E. 190, pg. 39.

This appeal, which centers on the two identical issues addressed by the district court and the jury, follows.

SUMMARY OF THE ARGUMENT

This two issue appeal (as framed by Maersk) is easily resolved by this Honorable Court. Put simply, the District Court got it right, and the jury got it right.

The first issue centers on the Supreme Court decision in *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), which, in short, deals with physical versus emotional injuries. Maersk would like nothing more than for the issues in this appeal to be cold, legal issues for this Honorable Court to decide. Maersk wants to hide behind *Gottshall*, and let it be a shield (if not a sword) that gives it a green light to literally work its employee/crewmembers to death. In reality, the first issue before this Honorable Court is a detailed factual/medical issue, for which summary judgment was properly denied and a jury properly decided.

On appeal, the singular question for this Honorable Court is whether Skye presented a legally sufficient evidentiary basis for a reasonable jury to find for him on a material element of his cause of action. *Pickett v. Tyson Fresh Meats, Inc.*,

420 F.3d 1272, 1278-79 (11th Cir. 2005). A brief review of the record reveals the answer is yes.

From the outset of this case, Maersk has attempted to portray Skye's heart injury and occupational disease as emotional injuries, or alternatively as physical manifestations of "emotional stress" and has steadfastly relied on *Gottshall* and its progeny. What Maersk failed to do at **any** point in these proceedings, including on appeal, as indicated by the District Court in her Order denying Maersk's Motion for Post Judgment Relief, was offer ***any*** factual evidence to support that theory. D.E. 190 pg. 38.[14] As the district court stated:

> The jury determined Plaintiff sustained a physical injury. (Jury Verdict 1). Maersk argues, however, that even when viewing the evidence with all inferences in favor of Plaintiff, Skye "did not suffer a compensable physical injury, but rather an emotional injury with physical manifestations." (Maersk's Mot. 34). Such an analysis does not advance Maersk's position, however, **as Maersk engages in no specific discussion of the evidence**. In particular, Maersk completely ignores Dr. Wachpress's[15] opinion that Skye's left ventricular hypertrophy was caused by physical stress. Thus, Maersk has failed to demonstrate that no record evidence supports the jury's finding that Plaintiff suffered a physical injury. As Defendant acknowledges, "[a] physical injury is compensable." (Maersk's Mot. 33). Relief on this ground is denied.
>
> D.E. 190 pg. 38.

[14] Similarly, Maersk's motion for summary judgment offered no evidence that Skye's injury was caused by his perception of a stressful situation rather than being worked to the point of physical breakdown. This is probably because Maersk's own medical expert made no such finding in his report.

[15] Skye's treating cardiologist, who was also designated as an Expert Witness.

On the other hand, Plaintiff provided ample evidence that Skye's injuries were physical injuries caused by the physical working conditions imposed by Maersk**.** *Id*.

This was the exact same case when Maersk moved for summary judgment. Maersk offered **no** evidence to support its conclusions and Bill Skye offered competent substantial evidence demonstrating that Skye suffered physical injuries with physical causes. D.E. 70. Accordingly, when confronted with the evidence, the District Court correctly ruled that the question of whether Skye's injury was physical or emotional was a question of fact for a Jury. D.E. 97.

At trial, Maersk asked for and obtained a jury instruction explaining the difference between emotional and physical injuries. R.E. 2, pg. 9. The Jury was instructed that:

> A purely emotional injury is an injury that has no physical causes, but rather was solely caused by the injured person's perception of a non-physical stress. The injured person, however, may receive compensation for an injury caused in any part by physical stress.

Further, also at Maersk's insistence and over Plaintiff's objection, the Jury was given a special verdict form that required the jury to decide whether Skye's injury was "physical" or "emotional." R.E. 1, pg. 1.[16]

[16] The Jury also received instruction regarding the "impact rule" and the "zone of danger". R.E. 1, pg. 9. Likewise, the verdict form specifically required the jury to make a finding regarding whether Skye suffered a physical impact or was in the zone of danger if the Jury first found that Skye suffered from an emotional injury. Skye encourage this Honorable Court to peruse the unique verdict form, as it shows that the jury answered the detailed factual questions that the

After listening to all of the evidence, the Jury decided that Skye's injury was **physical** in nature and thus compensable under the Jones Act. *Id*.

By listening to the medical evidence, the Jury was able to grasp what Maersk was not: Skye's working conditions and the physical effects on his heart were no different than a bone breaking when being hit with a bat. Although Maersk told the Jury that Skye's injury was just the physical manifestation of his work stress, the jury agreed that it was the physiological effect of the negligent, physical working conditions imposed by Maersk.[17]

Again, both the District Court and the Jury got it right and there is no reason to second guess the wisdom of either. Throughout this case, Maersk has offered nothing but legal arguments without any factual support. Maersk now wants this Honorable Court to ignore the competent, substantial record evidence that supports the Jury's findings. What Maersk still cannot grasp, is that **just because Skye's injury is to his heart, does not mean it has emotional causes**.[18] To reverse the

---

instant issues before this Honorable Court turn on. And importantly, the record evidences competent substantial evidence to support this verdict (and thus warrant affirmance).

[17] To simplify by way of another analogy for this Honorable Court: Skye's injury in this case is analogous to a seaman being asked to heave a heavy anchor by himself. Eventually the physical task becomes too difficult and the seaman's body breaks down. The only difference here is that instead of dealing with herniated disc or a torn bicep, Skye suffered an injured heart muscle. In either example, the injury is compensable under the Jones Act.

[18] As Dr. Wachspress opined, the heart is a muscle. R.E. 10, pg. 35, L: 11-17. The heart muscle can sustain injury just as back muscle can. Repeated abuse caused by negligent working conditions will wear it down and cause injury. R.E. 10, pg. 36, L: 16-20. Just as if Maersk would have been responsible for bulging or slipped disc caused by its negligence, it is responsible for Bill Sky's left ventricular hypertrophy, torn mitral valve chordae, mild aortic root dilation, aortic sclerosis, and labile hypertension caused by its negligence.

Jury's findings is to give the shipping industry a green light to work mariners to death for sake of maximizing profits.

The second issue presented by this appeal is whether there was a legally sufficient evidentiary basis to support the jury's finding that Skye's claim was timely filed. This issue turns on the 'discovery rule' and a 'knew or should have known' analysis. That is, Maersk argued Skye knew or should have known of his the injuries sued on more than three years prior to filing suit.

In making this argument first to the District Court and then to the Jury, Maersk fell short in the same way it did when arguing that *Gottshall* barred Skye's claim. In short, Maersk relied heavily on case law and made an underwhelming display of evidence to support its argument.

Repeatedly throughout these proceedings, Maersk argued that Skye's injury was an evolution of the symptoms he experienced in 2000 and was thus time barred. D.E. 52. D.E. 171. Again, Maersk offered little to no medical evidence to support this conclusion.[19] On the other hand, as the District Court noted in its order denying Maersk's Motion for Post Trial Relief, Skye offered ample evidence to prove that the problems he experienced in 2000 were separate and apart from his

[19] Skye was diagnosed with a benign arythmia in 2000. Skye was then diagnosed with left ventricular hypertrophy, a serious medical condition, in 2008. R.E. 8, pg. 222, L: 23 - pg. 223, L: 5. Common sense dictates that Skye could not sue Maersk in 2000 for an injury that did not yet exist.

diagnosis of labile hypertension and left ventricular hypertrophy in 2008. D.E. 190, pg. 37, fn 19 *citing* Trial Tr. Vol. III, at 28:7-10.

This detailed factual issue is easily resolved by several record **facts**. Most tellingly, a doctor's visit in 2004 confirmed that the issues Skye experienced in 2000 had resolved and that Skye was in good health. A battery of testing at that time proved that there was **nothing** physically wrong with Skye's heart. R.E. 8, pg. 218, L: 11. Then, in June 2008, after four years working for Maersk, Skye was first diagnosed with Left Ventricular Hypertrophy. R.E. 8, pg. 222, L: 23 - pg. 223, L: 5. The instant claim was filed within 3 years of the diagnosis of Left Ventricular Hypertrophy

Just as with Maersk's *Gottshall* defense, Maersk asked for and obtained a jury instruction concerning its statute of limitation defense, and the discovery doctrine. R.E. 2, pg. 7. Again, at Maersk's insistence and over Skye's objections, the verdict form required the Jury to determine whether or not Skye's Left Ventricular Hypertrophy was a continuation or evolution of the complaints he made in 2000, or if it was a new unrelated injury. R.E. 1, pg. 2.

The Jury found Skye's injury was **not** related to Skye's complaints from 2000. *Id*. The jury was then asked to determine when Skye first knew or should have known of his injury. *Id*. The Jury answered: "**May 2008.**" *Id*. Accordingly, the Jury found that Skye's claims were timely filed.

Then, after post-trial motion, the District Court in its Order denying Maersk's Motion for Post Judgment Relief summarily found that Skye put forth competent substantial evidence supporting the jury's finding. D.E. 190 pg. 39.

Tellingly, as to both points raised on appeal by Maersk, the District Court was able to dispose of them in less than two pages. D.E. 190, p. 38-39. This Honorable Court should do the same.

Stated simply, as to both arguments raised on appeal by Maersk, legally sufficient evidence supported the Jury's factual findings. As such, this Honorable Court should affirm, and not disturb the Jury's verdict.

As explained herein, to hold otherwise would directly undermine the spirit and intent of FELA and the Jones Act. What's worse, it would set a dangerous precedent akin to a legal license for Maersk to overwork its crewmembers to death.

STANDARD OF REVIEW

This Honorable Court "review[s] the denial of a motion for a judgment as a matter of law *de novo*, and appl[ies] the same standards as the district court." *Ash v. Tyson Foods, Inc.*, 664 F.3d 883, 892 (11th Cir. 2011) citing *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1275 (11th Cir.2008). The Court should "reverse only if the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict." *Id.* (internal quotation marks omitted). This Honorable Court should view all the evidence and

draw all inferences from it in the light most favorable to Skye because he is the nonmoving party. *See id.*

A District Court should grant judgment as a matter of law when the plaintiff presents no legally sufficient evidentiary basis for a reasonable jury to find for him on a material element of his cause of action. *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1278-79 (11th Cir. 2005) citing *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1192 (11th Cir.2004). The court should deny it if the plaintiff presents enough evidence to create a substantial conflict in the evidence on an essential element of the plaintiff's case. *Watkins v. Sverdrup Tech., Inc.*, 153 F.3d 1308, 1313 (11th Cir.1998); *Bogle v. Orange County Bd. of County Comm'rs*, 162 F.3d 653, 659 (11th Cir.1998) ("[I]n order to survive a defendant's motion for judgment as a matter of law ... the plaintiff must present evidence that would permit a reasonable jury to find in the plaintiff's favor on each and every element of the claim.").

"We review *de novo* the denial of a motion for judgment as a matter of law, and, in applying the same standard as the district court, we view all facts, by whomever presented, in a light most favorable to the nonmoving party." *Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1154-55 (11th Cir. 2002) citing *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 582 (11th Cir.2000), *cert. denied*, 531 U.S. 1076, 121 S.Ct. 772, 148 L.Ed.2d 671 (2001). A verdict must stand unless "there is

no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue [.]" Id. Citing Fed.R.Civ.P. 50(a)(1).

It is the jury's task- not the Court's -"to weigh conflicting evidence and inferences, and determine the credibility of witnesses." *Id citing Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir.2001) (internal quotation marks omitted). If reasonable jurors could reach different results, we must "not second-guess the jury or substitute our judgment for its judgment." *Id citing Gupta*, 212 F.3d at 582.

ARGUMENT

I. MAERSK CONTINUALLY MIS-FRAMES THE ISSUES AND IGNORES THE RECORD FACTS. MAERSK TRIED TO CONVINCE THE DISTRICT COURT, THE JURY, AND NOW THIS HONORABLE COURT, THAT MAERSK KNOWS MORE THAN THE MEDICAL EXPERTS. THE SIMPLE FACT IS THAT THIS CASE INVOLVED A HIGHLY FACTUAL ANALYSIS OF A COMPLEX INJURY. ULTIMATELY, THE DISTRICT COURT RECOGNIZED THAT THESE FACTUAL ISSUES WERE PROPERLY LEFT TO A JURY. THE JURY THEN MADE WELL SUPPORTED FINDINGS OF FACT THAT SHOULD NOT BE DISTURBED ON APPEAL.

a. Maersk's attempt to mis-frame the issues.

Maersk's flawed strategy throughout this entire litigation has been an attempt to hide behind *Gottshall* while ignoring the facts and/or misstating the facts and issues. This strategy continues on appeal in several ways.

First, Maersk mis-frames the issue before the Court. Maersk would have this Court believe that the issue is "[w]hether the District Court committed reversible error by ignoring the Supreme Court's decision in [*Gottshall*] and permitting Mr. Skye to seek recovery for medical conditions related to work stress even though he did not sustain a physical impact and was not within a zone of danger? *Appellant's Initial Brief*, pg. 1. **That is not the first issue before this Honorable Court**.

The issue is whether there is a legally sufficient evidentiary basis for a reasonable jury to find that Skye suffered a physical injury? *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1278-79 (11th Cir. 2005). As the District Court held (in one concise paragraph), there certainly is. D.E. 190, p. 38.

Stated differently, in deciding the instant appeal, this Honorable Court should only reverse if there is no legally sufficient evidentiary basis for the Jury's findings. *Gupta v. Fla. Bd. of Regents,* 212 F.3d 571, 582 (11th Cir.2000), *cert. denied*, 531 U.S. 1076, 121 S.Ct. 772, 148 L.Ed.2d 671 (2001). Notably, in a 46 page order on the Post-Trial motions filed (the majority of which were abandoned on appeal), it took the District Court less than two pages to dispose of Maersk's arguments on appeal.

Further to this point, it is Maersk's tremendous burden to come forward with evidence to demonstrate that Skye's claim fails as a matter of law. Further, all evidence should be viewed in a light most favorable to Skye. *Brochu v. City of Riviera Beach*, 304 F.3d 1144, 1154-55 (11th Cir. 2002). Despite this high standard, Maersk **still** cites no evidence, but only case law. Maersk continues to ignore the record evidence in favor of citing to non-binding legal precedent derived from cases which Maersk simply declares are "similar" or "identical" without a discussion of the actual facts and/or evidence presented in those cases.

On the contrary and as set forth below, Skye provided the Jury with a legally sufficient evidentiary basis to find that his claims were compensable.

Furthermore, the District Court did not "ignore" *Gottshall*. Instead, the Court grappled with, weighed, and considered the *Gottshall* decision and its progeny throughout this case. As the District Court wisely held, based on the **record** evidence, the determination of whether or not *Gottshall* would bar Skye's claim relied on a **factual** determination of whether Skye's injury was "emotional" or "physical."

Skye sets out the pertinent record evidence herein that the Jury relied on in finding that the subject injury was physical, not emotional:

> **b. Skye's presented sufficient evidence that his job was physically punishing and ultimately led to his occupational disease, labile hypertension, and a physical injury to his heart, left ventricular hypertrophy.**

One of the primary cases Maersk has repeatedly relied on, *Smith v. Union Pac. R.R. Co.*, 236 F.3d 1168, 1171 (10th Cir. 2000), holds that this Honorable Court should understand the nature and substance of the Plaintiff's claim when determining if it is barred by *Gottshall*. Herein, the following evidence aptly describes the nature and substance of Skye's claim and his injury.

At trial, Skye presented evidence to the Jury that under Maersk's direction, he worked on average between 90 to 105 hours a week for 70 or 84 days at a time.

R.E. 6. [20] R.E. 7. Maersk provided a crew of 19 men to run a 856 foot long container ship. R.E. 8, pgs. 140-141. The Chief Mate's list of duties aboard the ship was long and arduous.[21]

Skye testified about the grueling nature and intense physical demands of his work aboard the ship, for example checking on containers and testing bilges:

> That means you've got to climb down 6 stories or 60 feet or so of ladder, climb through, crawl through little manholes and fit through, and go from space to space to see if you can find that container for them. [….] There was, there was also periodic testing and inspections of the bilges. A bilge is a, is a, basically a little space in the bottom of a hold, […] If the hold were flooding, then you would be pumping the hole through the bilge pumps. So, there's alarms on those that go off automatically. [….] But you have to go down and test those alarms to make sure they're working. And they're in every single hold in the ship. And two in each hold, there's one on each side. So, that means, again, that you're climbing down 60 feet, six stories down into the lower hold. You're going toward ships, across the ship in both directions, climbing and crawling through little manholes to go over, lift the manhole cover up, hold the alarm up for three minutes. And then do the same on the other side and climb back up. You'd go to the next hatch and do the same thing. So, you -- that's a fairly strenuous activity, testing and inspecting bilges, making sure they're not clogged and so forth. So, that's one chief mate duty.
>
> R.E. 8, pgs. 436-437.

[20] R.E. 6 is the STCW Log Book that was kept aboard the *Sealand Pride* and was introduced into evidence at trial. This log demonstrates both the hours that Skye worked and when in the day those hours were worked. This data was used to generate the computer spreadsheet depicted in R.E. 7.

[21] R.E. 4, introduced as evidence at trial, listed Skye's 27 official duties as a Chief Mate aboard Maersk's vessel. Going through this list of duties to explain them to the jury took close to an hour of direct examination and this list did not even cover the entire universe of work Maersk required of Skye. R.E. 8, pgs. 145-179.

Skye also testified about the physical demands of his daily task of reading reefers:

> Q. Bill, if you would very concisely, please, just explain for the jury the physical nature of reading reefers.
>
> A. The physical part of reading reefers is you have to carry a heavy ladder to each hatch. You have to put it up in-between the hatches, and you have to climb up to the second tier of reefers to read them. Then you climb down the ladder, you move the ladder over, and go hatch by hatch until you've finished reading all of the reefers.
>
> Q. And, briefly, what is a reefer?
>
> A. A reefer is a container with a refrigerator in it that keeps the cargo cold.
>
> Q. Okay. And, and how many times -- were -- was there a number of times you had to do that in a certain period?
>
> A. Yes, I'd do that daily, usually starting at 8:00. If we carried special handling reefers, I also did it at 8:00 at night.
>
> Q. And how many reefer containers are we talking about? Generally.
>
> A. Generally, up to 144 and more for carrying a power pack.
>
> R.E. 8, pg. 439, L: 4-20.

Skye also offered testimony about one of his most physically demanding tasks, tank entry:

> The most strenuous, I believe, was actually when we were required to open up ballast tanks and work on vents and cracks and problems. There were quite a few. We were always doing tank entry. With tank entry, you had to drag down SCBAs[22] and get set up for emergency rescue, if need be. You'd have your checklist and things ready for tank entry. But you're again climbing down not only the six stories to the

[22] SCBA is a Self Contained Breathing Apparatus.

> lower hold, crawling through the small manholes to get outboard and into the tanks. Once you're in the tanks, then, it's pretty dangerous, strenuous and very hot, walking around inside of confined space called a ballast tank.

R.E. 8, pg. 440, L: 8-19. The physical aspects of the work were strenuous enough, but pairing this demanding work with total sleep deprivation inevitably led to Skye's physical heart injury and occupational disease.

Further to this point, chronic sleep deprivation was a daily part of Skye's life for the years he spent working for Maersk. Testifying about his sleep patterns while working on the *Sealand Pride* Skye stated:

> The average? I might get a couple hours' sleep here, go a full day and get another couple hours later. And meanwhile, in-between there's -- we were doing all of these things that I've mentioned before and probably some other ones in addition to that.
>
> ….
>
> you'd be up all night in Rotterdam for a 24-hour cargo operation, and then you'd sail for Felixstowe. And, you know, it's a shore -- just a few hours across the Channel. It's very short and you're back into another all-night cargo operation, finishing up in Felixstowe. And you'd leave Felixstowe and head up to Bremerhaven, and you might finally get a watch there that you can actually lay down for six hours and seven hours and try to get some rest.

R.E. 8, pg. 203, L: 18-22 and pg. 440, 17-2. Importantly, the Jury was also reminded that even on his "easy" days at sea, Skye's sleep was cut short due to changing time zones as the *Sealand Pride* transited the Atlantic Ocean.[23]

After offering testimony regarding constant sleep deprivation and the physical demands of his job, **Skye then offered medical evidence demonstrating that these physical strains caused a physical damage to his heart and an occupational disease, labile hypertension.**

This included evidence from Dr. Bear, Skye's family physician whose records from a June 2008 check-up indicated:

> He's been having a lot of difficulty w/ his work and his schedule to me suggest sleep deprivation and all the contingent problems that go along w/ this. His job is extremely **physically** stressful because of the sleep deprivation, more so than anything and is taking its toll.
>
> R.E. 5 (emphasis added).

Dr. Wachspress, Skye's cardiologist who had been treating Skye for close to a decade testified:

[23] "If you're going eastbound, you advance the clocks going eastbound and you lose an hour's sleep that night. So, if you had seven hours and 20 minutes off between your two watches, you're gonna lose at least 40 minutes of that. Each watch loses 40 minutes, each watch changes the clock 20 minutes, so, in the end, you've moved your clocks an hour that night, so you lost an hour for the day. But it means for -- in regard to rest, it means you lost some, lost some rest period and time that you could have slept that night. And you feel pretty much the same way you feel when you do the Daylight Savings Time. Only on a ship you're doing a one-week, seven- or eight-day crossing, and you've got at least six clock changes to do during that week." R.E. 8, pg. 215, L: 7-24.

> It's been well known for many years that people who live under constant **physical** stress secrete large amounts of adrenaline, the so called "fight or flight" response, and when that adrenaline is secreted for long periods of the day, that has a deleterious effect on their health.

R.E. 10, pg. 26, L: 5-10.

In testifying about the connection between Skye's work and his physical injury, Dr. Wachspress further opined about the direct causal effect of sleep deprivation on the physical changes in Skye's heart:

> It causes the release of adrenaline and thereby raises the blood pressure and stimulates left ventricular hypertrophy to occur causing a stiffening of the heart muscle, **a thickening of the heart muscle and a less efficient working of the heart muscle ultimately raising the risk for congestive heart failure and heart attack**."

R.E. 10, pg. 35, L: 7-17 (emphasis added).

Dr. Wachspress also informed the Jury that numerous learned treatises documented the physiological link between sleep deprivation, long working hours, and heart problems. R.E. 10, Pg. 30-34.[24]

Tellingly, in arguing that Skye's injury is not physical and/or is simply a physical manifestation of emotional stress, **Maersk does not cite a single shred of medical evidence in the extensive record before this Honorable Court**. This is despite Maersk having hired its own expert cardiologist to assess Mr. Skye's claim of physical injury.

[24] These were the same learned treatises the District Court considered when it ruled that the issue of whether Skye's injury was physical or emotional in nature was a question of fact for the jury.

Perhaps the reason that Maersk fails to cite the record, including its own expert, is because Maersk's expert cardiologist, Dr. Feldman, largely corroborates Skye's claims:

> Q. Okay. You had said that under physical stress, blood pressure can be elevated. Correct?
>
> A. What are you referring to, Counsel?
>
> Q. You just made the statement that under physical stress, blood pressure can be elevated.
>
> A. Absolutely it's elevated.
>
> Q. Okay. Can you explain that to the jury?
>
> A. Sure. If I put you on a treadmill, and I walk you, and during exercise, the systolic blood pressure goes up and the diastolic blood pressure goes down, that's a standard physiologic response to physiologic stress.
>
> Q. Okay. And are there -- is that a well-established principle of medicine that physical stress can elevate the blood pressure?
>
> A. Physical -- absolutely a well-established fact. It's a standard, normal approach to exercise of any type, is that if the heart is healthy, the systolic blood pressure goes up and the diastolic blood pressure goes down.

R.E. 9, pg. 7-8, L: 10-25 and 1-3.

When asked about the sleep deprivation Skye endured, Dr. Feldman went on to testify:

> Q. What about lack of sleep? Are you aware of any articles or literature about the correlation between lack of sleep and negative effects on the heart?

A. Absolutely.[...]

R.E. 9, pg. 19, L: 24-25 and pg. 20, L: 1-2.

Much of Dr. Feldman's testimony corroborated **exactly** what Skye testified concerning his harsh working conditions:

> I mean he had to go down into the bowels of the boat, and I guess -- I mean I'm not certainly an occupational expert in this. But it was a **physically demanding**, mentally demanding job.
>
> ….
>
> **I know he was working long hours, many days, difficult and sleepless nights**.

R.E. 9, pg. 30, L: 19-20. (emphasis added). *Id* at pg. 25, l: 19-22 (emphasis added).

Accordingly, the overwhelming tide of evidence presented at trial supported the Jury's finding that Skye's injury was a physical injury with physical causes.

II. THE FALLACY OF MAERSK'S *GOTTSHALL* ARGUMENT IS TWO PRONGED. FIRSTLY, UNDER THE PLAIN LANGUAGE OF ITS HOLDING, *GOTTSHALL* DOES NOT APPLY TO THIS CASE. SECONDLY, IN AN ATTEMPT TO FIT A SQUARE PEG INTO A ROUND HOLE, MAERSK CONTINUES TO DRAW MEDICAL CONCLUSIONS BASED ON LEGAL PRECEDENTS.

Throughout this case, Maersk argued Skye's claim was barred as a matter of law under *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). What this

Honorable Court should recognize, is that no decisions that bind this Honorable Court extend *Gottshall* beyond the plain language of its concise holding.

a. *Gottshall* does not bar Skye's claim.

Gottshall says only that in an action under FELA[25], a plaintiff cannot recover for an emotional injury[26] where that emotional injury was not accompanied by a physical impact, or where the seaman was not placed within the "zone of danger" of an immediate impact.[27] As later explained in *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 147 (2003), *Gottshall* is narrowly tailored to instances where the Plaintiff has **no** physical injuries.[28]

---

[25] The Jones Act incorporates the provisions of the Federal Employers Liability Act ("FELA"). *See Kernan v. American Dredging Co.*, 355 U.S. 426 (1958).

[26] Negligent Infliction of Emotional Distress

[27] Notably, Maersk argued that Skye never once claimed that he was in the "zone of danger" due to Maersk's conduct. On the contrary, Skye made exactly that claim in response to Maersk's Motion for Summary Judgment, D.E. 70, pgs. 20-21, by stating that:

> the medical literature shows that each time the Defendant violated the STCW it was putting the Plaintiff at risk of immediate harm. Beyond the risk of injury associated with the loss of situational awareness accompanying extreme fatigue, a study performed by Dr. Robert S. Elliot discovered what has become known as the "long term vigilance reaction". The "long term vigilance reaction" is a series of physical changes that occur in the body when a person is being forced into an extended endurance mood, for instance by being kept awake for long periods of time. When this happens chemicals are pumped through the blood stream that have a number of ill affects if the state persists too long or happens too often. Id. One of the main effects is a rise in blood pressure. Id. This periodic high blood pressure can physically injure a person's heart.

Nonetheless, this point is merely academic because *Gottshall* does not apply to Skye's case. Having said that, this Honorable is to construe all inference in Skye's favor. And to this end, there is substantial evidence to find that Skye was within a zone of danger; as Wachpress testified, the physical stress he was under placed him at an increased risk of heart failure and heart attack. R.E. 10, pg. 35, L: 7-17.

[28] "In sum, our decisions in *Gottshall* and *Metro-North* describe two categories: Stand-alone emotional distress claims not provoked by any physical injury, for which recovery is sharply

As the Court expressly stated in *Gottshall*, "[t]he injury we contemplate when considering negligent infliction of emotional distress is mental or emotional injury." *Gottshall*, 512 U.S. at 544. Herein, it is indisputable that Skye's claim is for an **actual physical injury** to his heart, not for mental or emotional injury. The substance of Skye's claim was not for emotional distress, but rather physical injury, plain and simple. Accordingly, Skye's injury is compensable and wholly compatible with *Gottshall*.

The inapplicability of *Gottshall* is best shown by the facts therein. The relevant fact pattern in *Gottshall* deals with the plaintiff Alan Carlisle, who because of job responsibilities, "began to experience insomnia, headaches, depression, and weight loss. After an extended period during which he was required to work 12-hout to 15-hour shifts for weeks at a time, Carlisle suffered a nervous breakdown. Carlisle sued Conrail under FELA for negligent infliction of emotional distress." *Id*. at 539. Clearly, this fact pattern has no relevance whatsoever to the physical heart damage caused to Bill Skye. Yet, remarkably, Maersk argues "Mr. Carlisle's claim is so similar to Mr. Skye's claim, Maersk focuses its brief on the portion of *Gottshall* that analyses Mr. Carlisle's work stress claim." Initial Brief, p. 19, fn. 8. Maersk's baseless argument is indicative of the strength of its argument on appeal.

---

circumscribed by the zone-of-danger test; and emotional distress claims brought on by a physical injury, for which pain and suffering recovery is permitted." *Ayers*¸ 538 U.S. 135 at 147.

Perhaps realizing the inherent weakness in its argument, Maersk's only response to these facts and plain reading of *Gottshall* (and *Ayers*) is to call it "creative lawyering." As Skye stated in response to this same argument in Maersk's Motion for Summary Judgment: **This is not artful pleading but rather the plain truth of the medical evidence**.

Instead of addressing the **facts** and **medical evidence** before this Honorable Court, Maersk, once again, goes on to analyze decisions from the various Circuit Courts stretching *Gottshall*, and holding that even a claim for a physical injury, if caused by emotional distress, is barred by *Gottshall*. Notably, the cases cited by Maersk pre-date the Supreme Court's *Ayers* decision cited above.

More importantly, on close inspection, all of the cases relied on by Maersk miss the mark.

First, *Szymanski v. Columbia Trans. Co.*, 154 F.3d 591 (6th Cir. 1998) fails because there is simply no discussion of any medical evidence (which this appeal turns on).

Next, *Smith v. Union Pac. R.R. Co.*, 236 F.3d 1168 (10th Cir. 2000), is inapplicable because the injuries complained of by Plaintiff Smith were all emotional in nature, including anxiety attacks, depression, and even contemplating suicide. *Id*. at 1170.

Lastly, *Crown v. Union Pac. R.R. Co.*, 162 F.3d 984 (8th Cir. 1998) similarly fails because the alleged injuries were emotional in nature; such as extreme weight gain, nicotine, alcohol, and eating addictions; and a nervous breakdown requiring hospitalization, as well as helplessness, hopelessness, anger, and fatigue. Id. at 985. As such, each of these cases is inapposite to the facts before this Honorable Court.

In various forms, each of the cases cited by Maersk render similar holdings: that physical manifestations of emotional stress are not compensable under *Gottshall*. But as the District Court noted, even under these decisions, cases of sleep deprivation certainly blur the line of what is and is not physical. D.E. 97, pg. 4 *citing Duet v. Crosby Tugs*, Civil Action No: 06-1825 Section: R(4), 2008 U.S. Dist. Lexis 83607 at * 8 (E.D. La. 2008).

b. Maersk claims that Skye "confused"[29] the District Court by presenting medical evidence to prove his physical injury had a clear etiology linked to his working conditions. Arguing that the district court and the jury (who were given an explicit instruction on emotional versus physical injuries) were fooled into compensating Skye is far-fetched to say the least. The record is clear that competent evidence supported the jury's findings.

Regardless of the plain distinction between this case and *Gotshall*, Maersk's argument suffers from another fatal flaw. In putting forth the argument that Skye's

[29] *See Appellant's Initial Brief*, pg. 15, ECF pg. 27. On the same page, Maersk humorously quips that the "law is not so facile" when discussing Skye's claim of physical injury. Respectfully, Skye submits that Federal Judges and Juries are not so facile as to be "confused" by "creative lawyering".

case should be barred as an "emotional injury" by the various Circuit Court decisions that have stretched *Gottshall's* holding, **Maersk has not once in these proceedings put forth evidence to demonstrate that Skye's injury is an "emotional injury."**

Maersk failed to do this even though one of the primary cases it has repeatedly relied on, *Smith v. Union Pac. R.R. Co.*, 236 F.3d 1168, 1171 (10th Cir. 2000), holds that the Court should understand the nature and substance of the Plaintiff's claim when determining if it is barred by *Gottshall*. *Id*.

In response to Maersk's Motion for Summary Judgment, Skye provided evidence to the Court to aid it in understanding both the physical nature of Skye's claim and the substance of his allegations. That evidence demonstrated that the substance of Skye's claim dealt not with emotional stress, but rather with an employer that was cutting corners, operating outside the law, and creating a working environment that was **physically** harming its employees.

In ignoring its burden, Maersk asked the Hon. J. Altonaga, then the Jury, and now this Honorable Court to ignore the evidence presented by Skye and simply take the word of Maersk's lawyers that Skye's injury was "emotional" in nature. Maersk's blatant attempts to divert attention away from the evidence begs the question: who is really attempting to fool who in this case?

Notably, what Maersk has asked the District Court, the Jury, and now this Honorable Court to do, goes against every legal standard when moving for judgment as a matter of law. At each stage of these proceedings, it was Maersk's burden to come forward with evidence to demonstrate that Skye's claim failed as a matter of law.

When Maersk moved for Summary Judgment, under Fed. R. Civ. Pro. 56, it had the burden to show that there was no genuine issue as to any material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Accordingly, Maersk had the burden to show it was undisputed that Skye did not suffer a "physical" injury. Remarkably, all Maersk did to meet its significant burden was cite to case law.

In response, Skye offered the medical report of his treating cardiologist which stated that the working conditions and lack of sleep imposed upon the Plaintiff were a "physical stress" upon his body. R.E. 3, pg. 1. Dr. Wachspress' report also clearly stated, "long hours, irregular shifts, inadequate sleep and time off, and constant stress had serious ***physical*** consequences on Mr. Skye's health". *Id* (emphasis added). Not only did Dr. Wachspress's report opine this, it also attached 151 pages of scholarly articles demonstrating that this opinion was confirmed by the medical literature. *Id*.

Skye's response to Maersk's Motion for Summary Judgment, D.E. 70, noted that in a study reported in the Annals of Internal Medicine in 2011[30], long working hours were determined to be a better predictor of coronary heart disease than the Framingham Risk Score.[31] Similarly a study released in March of 2011 in the Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report[32] found that, "[p]ersons experiencing sleep insufficiency are more likely to have chronic diseases such as cardiovascular diseases[…]." This study is closely related to another study done by the CDC in 2004.[33] The findings therein showed persons who worked an average of 61 hours/week and had less than two days off a month, were over two times as likely to suffer a myocardial infarction as compared to a regular worker.

When moving for judgment as a matter of law, Maersk again had the burden to show that "there [was] no legally sufficient evidentiary basis for a reasonable jury to find" for Skye. *See Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir.2001). In deciding a Rule 50 motion, the District Court's proper analysis is squarely and narrowly focused on the sufficiency of evidence. *See Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1192

[30] This study was attached to Dr. Wachspress' report and found to be medically authoritative and generally relied on his field. D.E. 70-3.
[31] The Framingham Risk Score is one of the most widely used predictors of long term heart health and is based on one of the longest lasting studies into cardiovascular health.
[32] *See* footnote 30 *supra*.
[33] *Overtime and Extended Work Shifts: Recent Findings on Illnesses Injuries and Health Behaviors*, Centers for Disease Control and Prevention, April 2004. *See* footnote 30 *supra*.

(11th Cir.2004). In light of the overwhelming evidence presented by Skye, Maersk again failed to meet its burden. As noted by the District Court, "Maersk has failed to demonstrate that no record evidence supports the jury's finding that Plaintiff suffered a physical injury." D.E. 190 pg. 38.

Now Maersk tries the same old tactic before this Honorable Court. Maersk cites to no record evidence and instead cites to non-binding legal precedent. Declaring the cases factually similar, Maersk then asks the Court to enter judgment against Skye. In reality, **Maersk is attempting to fit a square peg into a round hole.** That is, Maersk wants to do away Skye's claim of physical heart injury (the square peg) by attempting to bar it under *Gottshall* (the round hole). Unfortunately for Maersk, neither the record evidence, nor the case law, is on its side.

Notably, in Maersk's detailed analysis of each of the Circuit Court cases it claims are "factually similar" or "factually identical" to Skye's, Maersk never once informs this Honorable Court as to what record evidence the Plaintiffs in those cases presented to support their claims. Maersk never once considers that perhaps those Plaintiff's claims failed because they were unsupported by the record evidence.

Conversely, in this case, Skye put forward overwhelming record evidence that proved his claims, at Summary Judgment, at Trial, and post-trial. Maersk never put forward any evidence to show that Skye's claim was barred by any of the

cases it repeatedly cited to. Accordingly, this Honorable Court should find that Skye has not just met his burden, he has exceeded it.

III. FROM A PUBLIC POLICY PERSPECTIVE, THIS HONORABLE COURT SHOULD FULFILL THE REMEDIAL PURPOSES OF THE JONES ACT AND PROTECT SEAFARERS LIKE BILL SKYE FROM LITERALLY BEING WORKED TO DEATH BY UNSCRUPULOUS SHIPOWNERS.

As Skye explained in response to Maersk's Motion for Summary Judgment and further in his testimony at trial, this case is about an employer who slashed man power, violated laws, and pushed its employees past the limits of safety in a never ending quest to squeeze the last dollar out of every ship.

The result of this kind of behavior was, inevitably, physical injury. Unfortunately, Maersk's conduct is not unique in the shipping industry. The health issues associated with chronic fatigue, lack of rest, and inadequate sleep are well known in the maritime industry. Studies show that mariner fatigue is a severe problem onboard modern cargo vessels. *See Andy Smith, Adequate Crewing and Seafarers Fatigue: The International Perspective*, Center for Occupational Health and Psychology Cardiff University 2007.[34]

The National Transportation and Safety Board has criticized the U.S. Coast Guard for not doing enough to address this monumental health and safety issue.[35]

[34] R.E. 3, pg. 21.
[35] R.E. 3, pg. 146.

The Coast Guard has taken some steps to increase awareness of the issues resulting from the extreme fatigue and inadequate rest onboard vessels through its Crew Endurance Management training program.[36] Unfortunately, this program is voluntary and Maersk chose not to participate during Skye's tenure with the company.[37]

In considering this Appeal, this Honorable Court should be reminded of the humanitarian purposes of FELA and the Jones Act, and their liberal application. *See Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987). The embodiment of that humanitarian purpose and liberal application can be seen in the Jones Act's featherweight burden on causation, a burden recently reaffirmed in the Supreme Court's decision of *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630 (2011). This featherweight burden reflects congress' intent to curtail the abusive practices of the transportation industry, and the imbalance of power that exists between employer and employee.

As the Court held in *Gottshall*, "Congress crafted a federal remedy that shifted part of the " 'human overhead' " of doing business from employees to their employers. *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 58, 63 S.Ct. 444, 446-447, 87 L.Ed. 610 (1943). See also *Wilkerson v. McCarthy*, 336 U.S. 53, 68, 69 S.Ct. 413, 420, 93 L.Ed. 497 (1949) (Douglas, J., concurring) (FELA "was

[36] D.E. 70., pg. 20 fn. 18.
[37] D.E. 70, pg. 20 fn. 19.

designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations")." *Gottshall*, 114 S. Ct at 2404. There is simply no reason why seafarers hearts should not be considered under the protection afforded by FELA and/or the Jones Act.

Herein, this Honorable Court can help further Congress' intent by shifting power in the shipping industry into the hands of seafarers by holding their employers liable for the dangerous, illegal conditions they create on their vessels.[38]

Tellingly, Maersk does not claim that Skye's injuries were not caused by his employment. Rather, Maersk argues his heart conditions were not compensable under the law. The truth is that Maersk is not concerned about the welfare of its employees/crewmembers, but rather is concerned only about the liability it can face for harming those crewmembers. The only thing that will curb abusive practices in commercial shipping is the fear of liability for those practices. As long as Maersk is allowed to skew the facts and hide behind legal precedent, the situation for seafarers will only get worse.

---

[38] Further to this point, even the slightest broadening of the scope of *Gottshall* is incompatible with the purpose of FELA / Jones Act, as well as the Supreme Court's recent affirmation of the featherweight causation standard in *CSX Transportation*. It is well established that the quantum of evidence required to establish liability in a FELA case is much less than in an ordinary negligence action. *Harbin v. Burlington Northern R.R. Co., 921 F.2d 129, 131 (7th Cir. 1990).* A trial judge must submit a FELA case to the jury when there is even slight evidence of negligence. Id. The test is simply whether the evidence justifies with reason the conclusion that employer negligence played any part, even the slightest, in producing the employee's injury. *Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500, 506, 1 L. Ed. 2d 493, 77 S. Ct. 443 (1957).*

If this Honorable Court fails to uphold liability as found by the Jury in this case, Maersk will be free to require even more dangerous work schedules of its shipboard employees. Bill Skye's 107 hours a week will turn into 115 hours, 120 hours, or whatever number of hours Maersk can squeeze out of its crewmembers. The result will be injuries and deaths. This Honorable Court cannot let that happen and should uphold the Jury's verdict, which reflects the spirit and intent of FELA and the Jones Act.

By looking at the medical evidence, this Honorable Court will see that Skye's claim is compensable under the Jones Act. If this Honorable Court denies Maersk's appeal, it will send a strong message to ship owners that they cannot hide behind legal precedent, in the face of overwhelming medical evidence that they are slowly harming and/or killing their employees by pushing them to dangerous physical extremes.

IV. SKYE PRESENTED SUFFICIENT EVIDENCE THAT HIS LABILE HYPERTENSION AND LEFT VENTRICULAR HYPERTROPHY WERE FIRST DIAGNOSED IN MAY OF 2008 AND FURTHER THAT THESE INJURIES WERE NOT RELATED TO A BENIGN ARRHYTHMIA THAT HE WAS TREATED FOR IN 2000.

Just as with Maersk's *Gottshall* argument, its Statute of Limitations defense has been **repeatedly** raised and repeatedly disposed of, first at Summary Judgment,

then at the close of Plaintiff's case, and then in post-trial motions. Once more, on appeal, this argument should quickly be put to rest.

In short, the District Court was first correct in ruling that the issue of the Statute of Limitations was a question for a jury. The jury determined Skye's claims were timely filed. And then the District Court, in its post trial order, properly determined that there was competent substantial evidence for the jury to have made this finding. There is nothing in the record on appeal that would warrant anything other than affirmance.

Importantly, Maersk **again** misstated the issue before this Honorable Court. The issue is merely whether there is substantial evidence to support the jury's finding, nothing more. And Maersk's framing of the issue at page 1 of its Initial Brief is immaterial to this issue before this Tribunal.

Nonetheless, Maersk has repeatedly raised the statute of limitation defense because it cannot understand the physiology of the heart. Again, Maersk refuses to defer to the medical experts on this medical issue. Simply put, just because Skye experienced a benign arrhythmia in 2000, that does not mean that he knew or should have known about an injury he did not yet have and that is in no way related to heart arrhythmia.[39]

[39] Maersk's lack of medical knowledge has been its Achilles heel throughout this case and is truly on display with this issue. To illustrate Maersk's argument Skye provides the following analogous hypothetical situation: if a seaman sprained his ankle when he stepped into a pothole

When dealing with a latent injury, the discovery rule is used to determine if the statute of limitation has run. *See White v. Mercury Marine*, 129 F.3d 1428 (11th Cir. 1997). The discovery rule holds that a cause of action does not accrue until a seafarer knows of his injury and its cause. *Id.* Application of this rule is common sense. **The Plaintiff cannot know of his injury before it exists.**

Skye testified that he was first diagnosed with left ventricular hypertrophy and labile hypertension in 2008. Trial Tran. Pgs. 222-223, L: 23-25 and 1-5. Further, as pointed out by the District Court in the order denying Maersk's motion for post judgment relief based on the statute of limitations, Dr. Wachspress testified that the symptoms previously experienced by Skye were **not** related to his left ventricular hypertrophy that was first diagnosed in 2008. D.E. 190, pg. 37 *citing* Trial Tran. Vol. III, at 28:7-10. *See also* D.E. 190, pg. 39 *citing* Trial Tran. Vol. III, at 28:7-10.

Further, the Court's order noted that Dr. Wachspress closely monitored Skye's heart condition between 2000 and 2008, and that "there was no[] medical basis for Skye to know that he had developed left ventricular hypertrophy." D.E. 190, pg. 39 *citing* Trail Tran. Vol. III at 28: 11-16.

---

in 2000, he could not recover for an injury in 2008 wherein his ankle was crushed by a shipping container that was not properly fastened to a deck. According to Maersk, it's the same body part, same pain just more severe, and accordingly a related injury that is time barred. That is the essence of Maersk's argument. Maersk cannot grasp that heart injuries are no different than ankle injuries, they are not all related, nor do they all have the same causes.

Contrary to what Maersk would have this Court believe, the Jury was provided with a sufficient evidentiary basis to support its finding that the physical changes in Skye's heart, the Left Ventricular Hypertrophy, were **not** related to his complaints in 2000. Further, the jury was provided with sufficient evidence that those physical injuries to his heart could not have been known to Skye prior to May of 2008, within the applicable 3 year statute of limitations.

In sum, the District Court was first correct in ruling that the issue of the Statute of Limitations was a question for a jury. The jury determined Skye's claims were timely filed. And then the District Court, in its post trial order, properly determined that there was competent substantial evidence for the jury to have made this finding. There is simply nothing in the record that should have this Honorable Court do anything other than affirm.

CONCLUSION

As set forth above, the Jury's verdict was supported by legally sufficient evidence. The evidence demonstrated that Bill Skye suffered a physical injury caused by his physical working conditions. Further, that evidence demonstrated that Bill Skye first knew or should have known about his injury in May of 2008.

As in its Motion for Summary Judgment and its Omnibus Motion for Post Judgment Relief, Maersk has again failed to meet its burden. Accordingly, Plaintiff respectfully requests this Honorable Court affirm the Jury's verdict.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing was furnished by mail and email to Eddie Glenwood Godwin, Esq., Lau Lane Pieper Conley & McCreadie, 100 S Ashley Drive, Suite 1700 PO Box 838, Tampa, FL 33601, on May 6, 2013.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this Initial Brief is Times New Roman in 14 Point Type and further that this brief meets the length requirements contained in F.R.A.P. 32(a)(7)(B).

RESPECTFULLY SUBMITTED,
LIPCON, MARGULIES,
ALSINA & WINKLEMAN, P.A.
Attorney for Appellant
One Biscayne Tower, Suite 1776
2 South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 373-3016

By: s/ Michael A. Winkleman
MICHAEL A. WINKLEMAN
FLORIDA BAR NO.: 36719
ERIC C. MORALES
FLORIDA BAR NO.: 91875