

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO: 33837

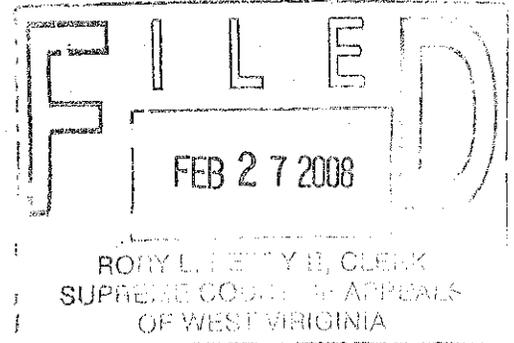
INGRAM BARGE COMPANY, THE OHIO
RIVER COMPANY LLC and THE OHIO RIVER
TERMINALS COMPANY LLC

Appellants,

v.

CARL WAYNE VAUGHAN, as Administrator of the
Estate of RANDALL WAYNE VAUGHN,

Appellee.



APPELLANT BRIEF OF INGRAM BARGE COMPANY, THE OHIO
RIVER COMPANY LLC AND THE OHIO RIVER TERMINALS
COMPANY LLC

Respectfully submitted,

Scott L. Summers, Esq. (WV#6963)
Robert H. Akers, Esq. (WV#9622)
Offutt & Nord
812 Quarrier Street, Suite 600
Post Office Box 2833
Charleston, West Virginia 25330-2833
Telephone: (304) 343-2869
Facsimile: (304) 343-3053

and

Carl J. Marshall, Esq.
E. Spivey Gault, Esq.
Gault, Marshall, Miller & Box, PLLC
129 South Water Street
Post Office Box 30
Paducah, Kentucky 42002-0030
Telephone: (270) 442-1900
Facsimile: (270) 442-8247
Counsel for Appellants

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
MEMORANDUM OF PARTIES.....	1
KIND OF PROCEEDING AND NATURE OF RULING BELOW.....	2
STATEMENT OF FACTS.....	3
ASSIGNMENTS OF ERROR.....	6
STANDARD OF REVIEW.....	6
SUMMARY OF ARGUMENT	
In A Case Involving a Death on Navigable Waters Caused by a Commercial Maritime Enterprise, Federal Maritime Law Applies. Therefore, Future Lost Wage Claims Must be Reduced by Personal Consumption.....	7
ARGUMENT	
I. This is a Lawsuit About a Maritime Tort - Which Is Governed by Maritime Law In State or Federal Court.....	8
II. The United States Supreme Court Holding of <u>Yamaha</u> Does Not Apply, Because, Unlike <u>Yamaha</u> , This Case Involves Traditional Commercial Maritime Operations.....	10
III. Even If <u>Yamaha</u> Applies, Because State Law Conflicts With General Maritime Law, General Maritime Law Must Prevail, Furthermore, <u>Yamaha</u> Did <u>Not</u> Stand for the Proposition That State Law May Supersede Maritime Law.....	16
RELIEF PRAYED FOR.....	18

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Barger v. Petroleum Helicopters, Inc.</u> , 514 F.Supp. 1199, 1200 (E.D.Tex. 1981).....	17
<u>Bubla v. Bradshaw</u> , 795 F.2d 349, 351-53 (4th Cir. 1986).....	9, 16
<u>Chrystal R.M. v. Charlie A.L.</u> , 194 W.Va. 138, 140, 459 S.E.2d 415, 417 (W.Va. 1995).....	7
<u>Complaint of Connecticut Nat'l Bank v. OMI Corp.</u> , 928 F.2d 39, 47 (2nd Cir. 1991).....	17
<u>East River S.S. Corp., v. Transamerica DeLaval, Inc.</u> , 476 U.S. 858, 864, 106 S.Ct. 2295, 2298-99, 90 L.Ed.2d 865 (1986).....	8
<u>Foremost Ins. Co. v. Richardson</u> , 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982).....	15
<u>Howard v. Crystal Cruises, Inc.</u> , 41 F.3d 527, 530-31 (9th Cir. 1994).....	17
<u>In re Amtrak "Sunset Limited" Crash</u> , 121 F.3d 1421 (11th Cir. 1997).....	13
<u>In re Diamond B Marine Services, Inc.</u> , 2000 WL 326155 (E.D.La).....	14, 15
<u>In re Matter of Strahle Limitation</u> , 250 F.Supp.2d 997 (N.D.Ind. 2003).....	15
<u>Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Company</u> , 513 U.S. 527 (1995).....	8
<u>Matthews v. Howell</u> , 359 Md. 152, 753 A.2d 69, 2000 A.M.C. 2067.....	15
<u>Offshore Logistics v. Tallentire</u> , 477 U.S. 207 (1986).....	11
<u>Petition of Marina Mercante Nicaraguense, S.A.</u> , 248 F.Supp 15, 27 (S.D.N.Y,1965).....	17
<u>Petition of U.S. Steel Corp.</u> , 479 F.2d 489, 505 (6th Cir. 1982).....	17
<u>Randall v. Chevron, Inc.</u> , 1992 WL 25707 pg. 3, 1992 A.M.C. 583, 588 (E.D.La. 1992).....	17
<u>Sisson v. Ruby</u> , 497 U.S. 358, 110 S. Ct. 2892, 111 L.Ed.2d 292 (1990).....	8, 14

<u>Snyder v. Whitaker Corp.</u> , 839 F.2d 1085, 1093 (5th Cir. 1988).....	17
<u>Southern Pacific Railway Co. v. Jensen</u> , 244 U.S. 205 (1917).....	10, 11, 13
<u>State of Md. Dept. of Natural Resources v. Kellum</u> , 51 F.3d 1220 (4th Cir. 1995).....	16
<u>The Lottawana</u> , 88 U.S. 558 (1874).....	11
<u>Tiffany v. United States</u> , 726 F.Supp. 129 (W.D.Va. 1989).....	17
<u>Wehner v. Weinstein</u> 444 S.E.2d 27 (W. Va. 1994).....	16
<u>Wells v. Liddy</u> , 186 F.3d 505 (4th Cir. 1999).....	16
<u>West Virginia University Board of Governors v. West Virginia Higher Education Policy Commission</u> , 2007 WL 1526999 (W.Va.).....	6
<u>Yamaha Motor Corp., USA v. Calhoun</u> , 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed.2d, 578 (1996).....	7, 10, 12, 13, 14, 15, 17, 18
<u>Others</u>	<u>Page</u>
Art. III, §2, cl. 1, United States Constitution.....	8
<u>Benedict on Admiralty</u> , Jurisdiction § 112 at 7-36 (7th rev. ed. 1994).....	14
Charles Davis, <u>Maritime Law Deskbook 1</u> (ed. 2005).....	8
28 U.S.C. § 1333.....	10

MEMORANDUM OF PARTIES

For Appellee:

Charles W. Hatcher, Jr.
Hatcher Law Office
636 Fifth Avenue
Huntington, WV 25701
**Counsel for Carl Wayne Vaughan, as
Administrator of the Estate of Randall
Wayne Vaughan**

For Appellants:

Scott L. Summers, Esq. (WV #6963)
Robert H. Akers, Esq. (WV# 9622)
Offutt & Nord
812 Quarrier Street, Suite 600
Post Office Box 2833
Charleston, West Virginia 25330-2833

and

E. Spivey Gault, Esq.
Carl J. Marshall, Esq.
Gault, Marshall, Miller & Box, PLLC
Post Office Box 30
129 South Water Street
Paducah, Kentucky 42002-0030
**Counsel for Ingram Barge Company,
The Ohio River Company LLC and
The Ohio River Terminals Company LLC**

KIND OF PROCEEDING AND NATURE OF RULING BELOW

Appellants, Ingram Barge Company, The Ohio River Company LLC and The Ohio River Terminals Company LLC appeal from the following Order of the Cabell County Circuit Court below: "Amended Order Granting Plaintiff's Motion in Limine to the issue of the claim of Defendants', Ingram Barge Company, The Ohio River Company LLC and The Ohio River Terminals Company LLC, that consumption offset applies to lost earnings damages in the state filed wrongful death action."

The Plaintiff filed a Motion in Limine to exclude and/or limit any expert opinion which may be offered at trial by Defendants' economist, Dr. William Baldwin. (Plaintiff's Motion in Limine and Motion to Exclude the Calculations of the Economist of Defendants, Ingram Barge Company, The Ohio River Company LLC and The Ohio River Terminals Company LLC, Regarding the Projected Wage Earning Capacity of Randall Wayne Vaughan, hereafter "Motion to Exclude"). The Plaintiff alleged that because the case involved the death of a non-seafarer in navigable waters, the issue concerning damages should be controlled by the law of the State of West Virginia rather than the General Maritime Law. ("Motion to Exclude").

The Defendants filed a brief in response to Vaughan's Motion in Limine and Motion to Exclude in a timely manner arguing that where state law conflicts with General Maritime Law, in a case which involves a commercial maritime activity, General Maritime Law governs damages and therefore, Dr. Baldwin should be allowed to testify about the decedent's personal consumption. (Barge Line Defendants' Response to Vaughan's Motion in Limine and Motion to Exclude). Oral arguments were presented to Judge Pancake regarding the Motion. At a hearing on April 26, 2007, the Court ruled

that Vaughan's Motion in Limine would be granted to the extent that the Defendants' economic expert would be prohibited from subtracting personal consumption of the decedent from the calculation of the decedent's loss of future wage earning capacity. Significantly, for these purposes, the Circuit Court stated that there was no just reason for delay and that an appeal should proceed immediately from its ruling at this stage, and because this was an issue of first impression and the West Virginia Supreme Court of Appeals should be allowed to pass on this issue before any trial of this case was held. On July 19, 2007, the Court entered an Amended Order (*nunc pro tunc* to the Court's original Order of May 18, 2007) granting Plaintiff's Motion in Limine and stating that the Barge Line Defendants' economic expert should not be allowed to use the personal consumption offset in his calculation of the decedent's loss of future earnings. (Order of Judge David Pancake entered July 19, 2007).

STATEMENT OF FACTS

The Ohio River Company LLC, The Ohio River Terminals Company LLC and Ingram Barge Company are all engaged in the business of transporting cargo by vessels on the navigable waters of the United States including, but not limited to, the inland river system. (Answer to Second Amended Complaint, ¶ 11). The Ohio River Terminals Company LLC operates, among other things, a barge loading terminal which is located on the banks of the Ohio River in Huntington, West Virginia, where coal is loaded from railcars to barges which are afloat on the Ohio River. The empty barges, which are to be loaded with coal, are delivered by towboats to a barge mooring area called a "barge fleet". The barges await transportation to the coal loading facility at the empty barge fleet which is operated by Ohio River Terminals Company LLC. (Answer to

Second Amended Complaint ¶'s 4 and 12). This barge fleet is located just upriver from the terminal and adjacent to the 27th Street Park in Huntington, West Virginia. (Amended Complaint of Carl Wayne Vaughan, Individually and as Administrator of the Estate of Randall Vaughan, ¶'s 8 - 14, 20 and 28). The fleet is located next to the park because the Greater Huntington Park and Recreation District requested that the Ohio River Company donate the land adjacent to the barge fleet for use as a park. The Ohio River Company (the predecessor to the Defendant, The Ohio River Company LLC) gave the land to the Greater Huntington Park and Recreation District at no cost and maintained the right to operate its barge fleet adjacent to the donated property. (Answer to Second Amended Complaint, ¶ 8). Defendant, Ingram Barge Company, owns the Barge F-14002, which is afloat on the Ohio River, but which is attached to the shore by large cables and chains for the purpose of providing a stable place for the empty barges which are in transit to be moored. (Answer of Ingram Barge Company to ¶ 3 of Second Amended Complaint of Carl Wayne Vaughan, Individually and as Administrator of the Estate of Randall Wayne Vaughan, hereinafter Ingram's ("Answer to Second Amended Complaint")). A barge fleet such as this one must hold a permit issued by the United States Army Corp of Engineers according to the Rivers and Harbors Act. The barge fleet in question was permitted, according the United States Army Corp of Engineers permit, which stipulated the length, width, number of barges, mooring devices and lighting requirements to be maintained by the barge fleet. (U.S. Army Corp of Engineers Fleet Permit attached as an exhibit to Defendants' Response to Motion in Liminie).

It is undisputed that, on or about May 21, 2004, Randall Vaughan and his friend, Justin Smoot, disappeared. Clothing and bicycles which were thought to belong to

Vaughan and Smoot were found that day on the bank of the Ohio River within the confines of the 27th Street Park in Huntington, West Virginia. Downriver from the area where the clothes were found, 5 empty barges, which, upon information and belief were owned by Crouse Corporation, were moored to the empty barge fleet which was operated by the Ohio River Terminals Company LLC.

Several days later, and at different times, the bodies of Justin Smoot and Randall Vaughan were found several miles downriver. It is undisputed that autopsies revealed that Vaughan and Smoot had both drowned.

Mr. Vaughan has alleged that Randall Vaughan drowned because of the negligence of the operation of vessels which comprised the barge fleet, including the Barge F-14002 and the Crouse barges which were afloat and temporarily moored to that fleet while they were waiting to be loaded and moved upriver or downriver from Huntington, West Virginia. (Amended Complaint of Carl Wayne Vaughan, Individually and As Administrator of the Estate of Randall Wayne Vaughan, ¶s 8-14, 20 and 28), (Second Amended Complaint, ¶ 27). It is alleged by the Plaintiff that the accident occurred on the Ohio River, which is a navigable water of the United States. (Second Amended Complaint, ¶s 1-15). The boys supposedly swam around, or allegedly dove from, these barges which were engaged in interstate commerce at the Tennis Court Fleet (Second Amended Complaint, ¶ 27), although there is no direct evidence proving they were on the barges nor a single witness who saw them either jump from the barges or swim around in the vicinity of the barges.

For the purposes of this Appeal it is important to understand that it is undisputed by the Plaintiff that the Barge Line Defendants were engaged in traditional, commercial

enterprise (Answer to Second Amended Complaint, ¶ 11), and that the operation of the barges which were alleged to have, in some manner, caused or contributed to the death of Randall Wayne Vaughan, were vessels which were used by the Barge Line Defendants in the traditional maritime activity of moving cargo on the navigable waters of the United States.

ASSIGNMENTS OF ERROR

The Trial Court committed reversible error by granting Appellee's Motion and barring the Appellants' expert economist from testifying about the effect of the decedent's personal consumption on the amount of the Plaintiff's allowable loss of future wages claim, if any, in this case, which alleges negligent acts or omissions in the operation of vessels and facilities which are engaged in traditional maritime commerce on the navigable waters of the United States.

STANDARD OF REVIEW

The Court below ruled that a premise of West Virginia law, which conflicts with General Maritime Law, should be applied in this case, where the act or omission which is alleged to have caused the drowning death of Randall Vaughan was the operation of commercial vessels, which are subject to an United States Army Corp of Engineers permit and which operate on navigable waters. It is undisputed that the Barge Line Defendants are engaged in maritime commerce which relies upon commercial vessels. Accordingly, this is an Appeal from the Circuit Court's decision of an issue of law. A *de novo* standard of review is applied to an appeal from a Circuit Court's decision on an issue of law. West Virginia University Board of Governors v. West Virginia Higher

Education Policy Commission, 2007 WL 1526999 (W.Va.); Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 140, 459 S.E.2d 415, 417 (W.Va. 1995).

ARGUMENT

INTRODUCTION

In A Case Involving a Death on Navigable Waters Caused by a Commercial Maritime Enterprise, Federal Maritime Law Applies. Therefore, Future Lost Wage Claims Must be Reduced by Personal Consumption.

The Defendants' economist should be allowed to testify about the effect of personal consumption on the Plaintiff's claim for the decedent's future wage loss (if any is appropriate) because the act or omissions, which are complained of in this case, are the operation of a commercial maritime operation on navigable waters and because General Maritime Law on this issue and West Virginia state law on this issue appear to be in direct conflict. For those reasons, General Maritime Law should prevail. While state law may supplement General Maritime Law and accommodations to state law are to be made, as in Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 116 S.Ct. 619 (1996), the United States Supreme Court did not intend that state law supersede General Maritime Law where the two are in conflict. Therefore, because the Barge Line Defendants are engaged in traditional maritime commerce which requires a uniform body of maritime law, Yamaha does not apply. If this Court concludes that Yamaha does apply, Yamaha does not sanction the displacement of General Maritime Law by West Virginia state law.

I. This is a Lawsuit About a Maritime Tort - Which is Governed By Maritime Law In State or Federal Court.

The United States Constitution provides for federal judicial power extending to all cases of admiralty and maritime jurisdiction. Art. III § 2. cl. 1, United States Constitution. The "fundamental interest giving rise to admiralty jurisdiction is the 'potential for commerce.' " Sisson v. Ruby, 497 U.S. 358 (1990). Therefore, admiralty jurisdiction generally extends to matters which involve navigable waters and some aspect of maritime commerce. Charles Davis, Maritime Law Deskbook 1 (ed. 2005).

This matter is a maritime tort because it involves the death of individuals on the navigable waters of the United States (the Ohio River), allegedly caused by a commercial vessel or vessels in, and associated with, waterborne interstate commerce.

The Supreme Court has stated that a maritime tort is one which occurs on navigable waters and which has a "nexus to a traditional maritime activity." Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Company, 513 U.S. 527 (1995). The nexus to traditional maritime activity in this case is obvious; the Plaintiff has alleged negligent operation of vessels in a barge fleet caused or contributed to the death of the decedent.

In fact, the Plaintiff conceded that this is a maritime tort in his Reply to the Barge Line Defendants' Response to his Motion. "Plaintiff concedes that federal judicial power extends to this case." (Reply to Barge Line Defendants' Response to Plaintiff's Motion in Limine and Motion to Exclude - page 2).

Thus, the case, even though pending in state court, is one which is subject to admiralty and maritime jurisdiction. "With admiralty jurisdiction comes the application of substantive admiralty law." East River S.S. Corp., v. Transamerica DeLaval, Inc., 476 U.S. 858, 864, 106 S.Ct. 2295, 2298-99, 90 L.Ed.2d 865 (1986). The Fourth Circuit

Court of Appeals has specifically found that admiralty jurisdiction exists in a case involving a docked vessel. Bubla v. Bradshaw, 795 F.2d 349, 351-53 (4th Cir. 1986). In Bubla, the Court found that the vessel and pier, which were at issue, possess "uniquely maritime characters," that support the application of admiralty law. Id., citing Oman v. Johns-Manville Corp., 764 F.2d 224, 230, at 231 (4th Cir.1985). Likewise, the barge fleet at issue in this case, which is located along the Ohio River, also possesses unique maritime character. The fact that the mooring of barges constitutes a commercial maritime activity is further supported by the permit issued by the Army Corps of Engineers for this mooring fleet.

It is important to note that there is no question in this case whether the actions of the Barge Line Defendants involve commercial maritime activity. The Court need not attempt to determine whether the decedent's swimming constitutes any type of traditional maritime activity because the sole negligence alleged by the Plaintiff against the Defendants is in the management and operation of vessels which existed for the purpose of carrying cargo on the Ohio, and other rivers. The very presence of the barges, about which the Plaintiff complains, is governed by a mandatory United States Army Corp of Engineers permit. The barges in the fleet are delivered and tended by towing vessels which are documented with the United State Coast Guard and operated by U.S. Coast Guard licensed individuals. The allegations of the Plaintiff against the Barge Line Defendants are that they improperly maintained or operated a commercial barge fleet which is used to move cargo on the navigable waters of the United States of America. The relationship to a traditional maritime activity in this case is found in the actions and/or omissions of the Barge Line Defendants, not in the actions of the

Plaintiff's decedent. This case possesses a unique maritime character and is clearly a maritime tort.

II. The United States Supreme Court Holding of Yamaha Does Not Apply, Because, Unlike Yamaha, This Case Involves Traditional Commercial Maritime Operations.

Plaintiff brought this case in state court, but because the case arises from the alleged negligent operation of vessels in maritime commerce, the Yamaha case does not require state law to control and state law should not be chosen to decide an issue when maritime law exists. The Savings to Suitors clause of 28 U.S.C. § 1333 allows a plaintiff to file a maritime suit in a state court if he can obtain *in personam* jurisdiction and subject matter jurisdiction in that state court.

Even though Plaintiff may proceed *in personam* in West Virginia's state courts against the Barge Line Defendants on his maritime tort claim, any state court must apply either the statutory law of the United States or General Maritime Law, if there is established maritime law, particularly in matters directly affecting maritime commerce. This was the holding of the United States Supreme Court in Southern Pacific Railway Co. v. Jensen. 244 U.S. 205 (1917), (reversed on other grounds). Although the Longshore Act was later enacted to provide compensation to those maritime employees who were left by that decision with no remedy, the Court's statement concerning the supremacy of maritime law in cases of admiralty is still accepted: "And further, in the absence of some controlling statute, the General Maritime Law, as accepted by the Federal Courts, constitutes our national law, applicable to matters within the admiralty and maritime jurisdiction." 244 U.S. at 215.

Moreover, in Offshore Logistics v. Tallentire, 477 U.S. 207 (1986), the United States Supreme Court held that state law may supplement, or fill gaps in, federal maritime law, but where state law conflicts with federal maritime law, state law is pre-empted. 477 U.S. at 222-23. For example, the Savings to Suitors Clause leaves state courts "competent to adjudicate maritime causes of action in proceedings *in personam*", and means that "a state, 'having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit' so long as it does not attempt to [give *in rem* remedies or] make changes in the 'substantive maritime law.'" Id., citing Madrugua v. Superior Court, 346 U.S. 556, 560-561 (1954), (quoting Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 124, 44 S.Ct. 274, 277, 68 L.Ed. 582 (1924)).

In The Lottawana, 88 U.S. 558 (1875), the Court held the system of maritime law was:

"...coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other and with foreign states." 88 U.S. at 575.

The United States Supreme Court has stated in Jensen that state law must be pre-empted by general maritime law if "it works a material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of the law in its international and interstate relations." Jensen, 244 U.S. at 216. In the case at bar, there is a direct conflict between maritime law and the law of the State of West Virginia. Maritime law permits an offset against future lost wages and West Virginia law does not.

Federal maritime law should apply to all aspects of this case where that law exists. The Court below did not give due weight to the fact that the operation of vessels which were moored to the Barge F-14002 and/or the operation of that U.S. Army Corp of Engineers permitted fleet itself, constitutes exactly the kind of interstate maritime commerce which the courts have decided should be governed by a uniform system of maritime law, because of its unique relationship to maritime commerce.

The Court below erred when it interpreted Yamaha supra, as holding that a state court must apply state law concerning damages in any case involving the death of a non-seafarer on territorial waters, regardless of the connection to traditional maritime commerce and the presence of rules of maritime law. It is respectfully suggested that this is an erroneous reading of the Yamaha case for several reasons.

First, the rule of Yamaha was decided in the context of a garden-variety product liability action involving a personal watercraft, not the alleged negligent operation of vessels engaged in maritime interstate commerce and for that reason does not apply in this case. Yamaha does not apply in a case involving traditional maritime commerce - otherwise there would be no uniformity of maritime law governing cases brought by non-seafarers against commercial maritime entities for incidents which occurred in state territorial waters.

Yamaha did not involve maritime commerce in any way and there was, therefore, no reason for the Court to be concerned about the uniformity of maritime law in such cases. Because Yamaha did not involve maritime commerce, the United States Supreme Court was not concerned in that case with the considerations which gave rise to, and which require, a uniform system of maritime law to be administered in all states.

The interests of uniformity and maritime commerce which were central in Jensen and other similar cases simply did not exist in the Yamaha case. Simply put, the manufacturers of wave runners are not accorded a uniform system of law because they do not engage in traditional maritime commerce which the Constitution sought to foster. Jensen and its progeny expressly apply to cases involving commercial vessels, and state that incidents involving those vessels should be governed by a uniform system of maritime law. Because interstate maritime commerce is central to the case at bar, uniformity of maritime law is important and this case is, for that reason, distinct from Yamaha.

This is a case of first impression in West Virginia. However, in the case of In re Amtrak "Sunset Limited" Crash, 121 F.3d 1421 (11th Cir. 1997), the 11th Circuit Court of Appeals overruled a U.S. District Court which applied Alabama punitive damages law to a case in which non-seafarers (train passengers) were killed when a towing vessel struck a railroad bridge. The Court held that a uniform system of federal maritime law should apply to such a case, and stated that Yamaha does not apply in cases which involve commercial maritime vessels. The Court stated:

"Thus, it is evident in Yamaha that the Court, while intent on protecting the state interests that were present in that particular case (a product liability action resulting from a recreational boating accident in territorial waters), was not concerned with overruling bedrock admiralty principles recognized in Southern Pacific Company v. Jensen, . . . where the Court held that state law must yield if it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." Indeed, since the birth of the Jensen doctrine in the early part of this century, the goals of uniformity and harmony in admiralty have survived to the present. Yamaha, by emphasizing these principles yet again, has affirmed their continuing vitality.

Id. at 1424-1425.

Consequently, it would be wrong to assume, as it appears the Circuit Court did in this case, that the holding in Yamaha embodies an unspoken rule that state interest must always trump competing admiralty principles when the two collide in state territorial waters. It is plain from the language in Yamaha that more is at issue in these situations; conflicts of this type must be resolved with a healthy regard for the needs of a uniform maritime law. Thus, in a case like the present, where substantive admiralty principles are placed at risk by the potential application of state law, there is no leeway for variation or supplementation by state law.

The United States Supreme Court has recognized, in cases involving commercial maritime vessels, the Constitution mandates that the uniform system of maritime law should govern all commercial activities on navigable waters regardless of the law of the adjacent state. In Sisson v. Ruby, 497 U.S. 358, 110 S.Ct. 2892, 111 L.Ed.2d 292 (1990), the plaintiff brought suit under admiralty to limit his liability when a fire destroyed his moored yacht and caused damage to the marina. The Supreme Court held that the storage and maintenance of a vessel (like the temporary mooring here) was a traditional maritime activity and found that this was a maritime tort subject to admiralty law. Id. at 367. Certainly, state law has been used to supplement maritime law on a question where no entrenched rule of maritime law exists, but it may not supplant maritime law. "States may modify or supplement federal maritime law but . . . they may not flatly contradict it or deprive any person of a substantive federal right." Benedict on Admiralty, Jurisdiction § 112 at 7-36 (7th rev. ed. 1994).

In the case of In re Diamond B Marine Services, Inc., 2000 WL 326155 (E.D.La), the Court stated that Yamaha did not authorize the application of state law in a case

involving commercial vessels, but instead applied to cases where maritime commerce was not involved. Where non-seaman passengers on a commercial vessel were injured in a collision, the Court in Diamond B stated "pure unadulterated" maritime law controlled.

It is well accepted that even cases involving pleasure vessels on navigable waters, let alone commercial vessels, are admiralty cases. See Foremost Ins. Co. v. Richardson, 457 U.S. 668, 102 S.Ct 2654, 73 L.Ed.2d 300 (1982), (collision between pleasure vessels on navigable water is within admiralty jurisdiction); In re Matter of Strahle Limitation, 250 F.Supp.2d 997 (N.D.In. 2003), (found admiralty jurisdiction over a jet ski accident on Wabash river - accident had capacity to disrupt maritime commerce); In Matthews v. Howell, 359 Md. 152, 753 A.2d 69, 2000 A.M.C. 2067, the Maryland Court of Appeals applied admiralty law where a woman died when she fell or dove from a pleasure boat.

The Circuit Court's decision in this case should, it is respectfully submitted, be reversed. The Court below did not accord significance to the commercial maritime nature of the operations of the Barge Line Defendants, which are at the heart of this dispute, or to the significant interest which the United States has in administering a uniform system of maritime law in such cases. The rule of Yamaha does not apply here and maritime law must control this issue.

III. Even If Yamaha Applies, Because State Law Conflicts With General Maritime Law, General Maritime Law Must Prevail, Furthermore, Yamaha Did Not Stand for the Proposition That State Law May Supersede Maritime Law.

West Virginia state law and General Maritime Law are in direct conflict on the issue of whether a decedent's personal consumption shall be deducted from calculation of the decedent's loss of future earnings - if such earning is compensable.

The Fourth Circuit Court of Appeals recognized that federal maritime law controls in maritime tort cases where the two schemes conflict. In Wells v. Liddy, 186 F.3d 505 (4th Cir. 1999), the Court of Appeals reversed a District Court which applied Louisiana state law in a maritime tort case. Id. at 524. The Court, (*citing* Byrd v. Byrd, 657 F.2d 615, 617 (4th Cir. 1981)), stated: "All cases involving a tort committed on navigable waters whether brought under federal admiralty jurisdiction in state court under the Saving to Suitors clause, or in federal court under diversity jurisdiction are governed by admiralty law." Wells at 524. In State of Md. Dept. of Natural Resources v. Kellum, 51 F.3d 1220 (4th Cir. 1995), the Court of Appeals refused to apply state law to a maritime tort where that state law was in conflict with maritime law and to apply state law would alter the rights of parties. Id. at 1228-29.

At present, West Virginia state law does not allow evidence of personal consumption in a wrongful death case. Wehner v. Weinstein 444 S.E.2d 27 (W.Va. 1994). Conversely, General Maritime Law requires that proof of loss of future wages, if they can be awarded, be reduced by personal consumption. In Bubla v. Bradshaw, 795 F.2d 349 (4th Cir. 1986), the Fourth Circuit remanded the District Court's decision for reconsideration of damages and expressly found that the District Court erred when it failed to consider the decedent's rate of personal consumption in determining the value

of lost support. 795 F.2d at 355. See also, Snyder v. Whitaker Corp., 839 F.2d 1085, 1093 (5th Cir. 1988), (factfinder should review "how much consumption would eat into accumulations"); Tiffany v. United States, 726 F.Supp. 129, 134 (W.D.Va. 1989), (reversed on other grounds); 931 F.2d 271 (4th Cir. 1991); cert. denied, 502 U.S. 1030, 112 S. Ct. 867, 116 L.Ed.2d 773 (1992), (death on High Seas Act claim reduced by personal consumption); Complaint of Connecticut Nat'l Bank v. OMI Corp., 928 F.2d 39, 47 (2d Cir. 1991), (25% deduction for personal consumption in maritime death case); Petition of Marina Mercante Nicaraguense, S.A., 248 F.Supp. 15, 27 (S.D.N.Y. 1965), (modification other grounds); 364 F.2d 118 (2d Cir. 1966) cert. denied, 385 U.S. 1005, 87 S.Ct. 710, 17 L.Ed.2d 544 (1967); Petition of U.S. Steel Corp., 479 F.2d 489, 505 (6th Cir. 1973), (personal consumption deducted); Barger v. Petroleum Helicopters, Inc., 514 F.Supp. 1199, 1220 (E.D.Tex. 1981), (reversed on other grounds); 692 F.2d 337 (5th Cir. 1982), (general maritime law and Jones Act suit-personal consumption deducted); Howard v. Crystal Cruises, Inc., 41 F.3d 527, 530-531 (9th Cir. 1994), (30% reduction for personal consumption); Randall v. Chevron, Inc., 1992 WL 25707 pg 3, 1992 A.M.C. 583, 588 (E.D.La. 1992), (personal consumption considered by economists for plaintiff and defendant).

Even if Yamaha applied here, maritime law conflicts directly with West Virginia's current state law on the issue of personal consumption and Yamaha never intended that state law should be allowed to trump maritime law. In Yamaha, the Court did not say that state law must always supersede federal law in non-seafarer death cases which occur on navigable waters. Instead, the Court followed a standard practice of

supplementing maritime law with state law. Here, the lower Court allowed state law to supplant general maritime law, which is improper.

In fact, the United States Supreme Court in Yamaha reiterated the rule that "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system, [1] [b]ut this limitation still leaves the states a wide scope." Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 211 n. 8, 116 S. Ct. 619, 626 n. 8 (1996), *quoting* Romero v. International Terminal Operating Co., 79 S. Ct. 468, 480-81 (1959).

Thus, even after Yamaha, the rule concerning choice of law remains the same, state law may only supplement maritime law – it may not be applied where it contradicts maritime law.

General Maritime Law provides a measure of damages in this case. West Virginia Law is not controlling here, because it conflicts with this maritime law. In a case involving a commercial vessel such as the Barge F-14002, or the Crouse barges at issue in this case, the interest in uniformity of maritime law dictates that if state law conflicts with maritime law, then maritime law must be applied. The Court below erred in holding that personal consumption should not be considered by the jury and that Dr. Baldwin, if called, should not be allowed to consider personal consumption.

RELIEF PRAYED FOR

The Appellants, Ingram Barge Company, The Ohio River Company LLC and The Ohio River Terminals Company LLC hereby pray that the Order of the Circuit Court of Cabell County entered on the 19th day of July, 2007, *nunc pro tunc* May 30, 2007, be

reversed and that this case be remanded to the Circuit Court of Cabell County, West Virginia for further proceedings consistent with the rulings of this Court.

Respectfully submitted,



Scott L. Summers, Esq. (WV#6963)

Robert H. Akers, Esq. (WV#9622)

Offutt & Nord

812 Quarrier Street, Suite 600

Post Office Box 2833

Charleston, West Virginia 25330-2833

Telephone: (304) 529-2868

Facsimile: (304) 529-2999

and

E. Spivey Gault, Esq.

Carl J. Marshall, Esq.

Gault, Marshall, Miller & Box, PLLC

Post Office Box 30

Paducah, Kentucky 42002-0030

Telephone: (270) 442-1900

Facsimile: (270) 442-8247

Counsel for Appellants