

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,

vs.

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

Appellee,

**APPELLEE BRIEF OF CARL WAYNE VAUGHAN, as
ADMINISTRATOR of the ESTATE OF RANDALL WAYNE VAUGHAN**

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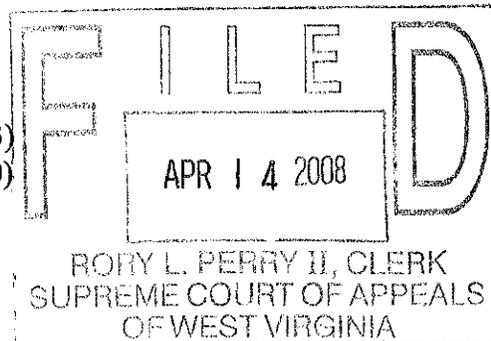
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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

Carl Wayne Vaughan, Administrator of the Estate of Randall Wayne Vaughan, hereinafter "Vaughan" or "Appellee," adopts the representations of Appellants Ingram Barge Company, The Ohio River Company LLC, and The Ohio River Terminals LLC (hereinafter "the Barge Line Defendants") contained in their paragraph entitled, "Type of Proceeding and Nature of the Ruling in the Lower Tribunal."

II. STATEMENT OF FACTS

This premises liability action involves the death of two young boys, ages 14 and 15, who drowned while diving from and swimming near a barge on the Ohio River. (Second Amended Complaint ¶27). The Complaint alleges that the barge is a dangerous instrumentality that attracts and invites children to use it for playing, swimming, and diving and that the Defendants knew, or should have known, of the dangerous condition. (Second Amended Complaint ¶19). The barge is located adjacent to the 27th Street Park, a facility owned and operated by the Greater Huntington Parks and Recreation District, hereinafter referred to as "Park Board," with tennis courts, basketball courts, and walk paths. (Second Amended Complaint ¶14). The Park Board owns and maintains the grass and landscape down to the barge. (Second Amended Complaint ¶15). The barge is a "mooring" or "fleeting" barge, which is secured permanently to the bank of the river. (Second Amended Complaint ¶13). This type of permanently attached barge is used to tie off empty coal

barge before they are loaded. The barge is located approximately two city blocks upstream from the main coal loading facility of the Defendants.

Depositions and documents establish that the Barge Line Defendants had actual knowledge that children were using the mooring chains to climb out on and dive from the barge. In her deposition, Sandra Strom testified that she lived directly across the street from the river and barge and that she called Ott Atkins, the barge company's general manager, and told him that she was "scared to death" that someone was going to drown or get hurt because kids were climbing out onto the barge and diving into the river. See Sandra Strom Deposition, page 7, lines 1 through 14, attached as Exhibit A to Plaintiff's Motion for Summary Judgment. Her husband, David Strom, in his deposition, said that he thought the barge and children's swimming was a very dangerous situation and he made an appointment and spoke with Mr. Adkins personally. See David Strom Deposition, pages 6 and 7, attached as Exhibit B to Plaintiff's Motion for Summary Judgment. More importantly, nine years before the death of Randall Vaughan, the Department of Defense, Corps of Engineers, personally contacted Adkins and advised him that kids were climbing out the chains of the barge on a regular basis. The internal memo indicates that Adkins said he would do what was necessary to insure safety. See Conversation Record, attached as Exhibit C to Plaintiff's Motion for Summary Judgment. Notwithstanding the knowledge of the Barge Line Defendants that swimming upstream from a barge could cause serious injury or death, nothing was done to insure safety. The training manual for their employees advises them that even a strong swimmer would be in danger of being washed under the barge if a person were in the water above or upriver from the barge. See Page 9, Fall Overboard Prevention, attached as Exhibit D to Plaintiff's Motion for Summary Judgment.

The Barge Line Defendants also argue in their Brief that, "The boys supposedly swam around or allegedly dove from the barges at The Tennis Court Fleet although there is no direct evidence nor a single witness who saw them do so." This misrepresents the evidence that exists at this point in the underlying proceedings. The Cabell County E-911 report shows that responders at the scene found two kids' bikes and some clothes on the bank of the Ohio River next to the barge with footprints leading into the water. See copy of 911 Report, attached as Exhibit E to Plaintiff's Motion for Summary Judgment. William Howard, a Park Board employee, arrived at the scene and saw clothes, bicycles, and footprints leading into the water 10 to 15 feet from the barge. See Howard Deposition, pages 10 and 11, attached as Exhibit F to Plaintiff's Motion for Summary Judgment. Stephanie Durst, the mother or one of the boys who drowned, testified at her deposition that when she arrived at the scene, she saw several muddy footprints going up the side of the front of the barge. See Stephanie Durst Deposition, page 48, line 7, attached as Exhibit G to Plaintiff's Motion for Summary Judgment.

III. STANDARD OF REVIEW

Appellee agrees that a *de novo* standard of review is applied to an appeal from a Circuit Court's decision on an issue of law.

IV. RESPONSE TO ASSIGNMENT OF ERROR

INTRODUCTION

The Barge Line Defendants' argument is that the underlying Circuit Court case should allow the use of the consumption offset in the calculations of future wage loss because this case is a cause of action involving a maritime tort and General Maritime Law dictates its use in either Federal Court or State Court. They suggest this is true because traditional maritime law requires a unified body of law. They even argue that although there is a United States Supreme Court decision on point on this issue, it does not apply because the decision violates the unified body of law concept. They do not offer one case that states that in all courts involving a maritime tort where a wrongful death is involved **must or shall** (emphasis added) use the consumption offset as opposed to the West Virginia Legislature's statutory pronouncement of damages allowed in a wrongful death action. The reason they do not offer a case is one does not exist. On the contrary as will be pointed out, for numerous years, the United States Supreme Court has held that in suits involving the death of a non-seaman in territorial waters, State Wrongful Death Statutes apply; and, in applying the State statutes, courts must enforce all of the statute; they may not pick and choose parts of it, as the Appellants suggest. Because this Court has interpreted the West Virginia Wrongful Death Statute to not include the use of the consumption offset in the calculations of future lost wages, the lower Court's granting of the Motion in *Limine* must be affirmed.

A. Plaintiff concedes this is a maritime tort, but this fact is irrelevant to the calculation of the future lost wages of Randall Wayne Vaughan

The Barge Line Defendants argue that because this is a Maritime Tort, Maritime law controls this case. They argue Federal judicial power extends to all cases of admiralty

and maritime jurisdiction and that although a Plaintiff can file a state court claim, the state court must apply Federal statutory or general maritime law to the case. The question is not "Does Federal judicial power extend to this case"? There is no question that Maritime Law applies to the issue of liability. The issue before this Court is "How have Federal courts interpreted what damages apply to different maritime actions, specifically what damages apply to state-filed wrongful death actions involving a nonseafarer in navigable waters"? Because lower Federal courts were interpreting in a different manner those damages in nonseafarer state court actions, the United States Supreme Court accepted and ruled on the issue in *Yamaha Motor Corporation v. Calhoun*, 516 U.S. 199 (1996), which opinion will be discussed in detail herein. The question that the underlying Federal Court Judge was asked in *Yamaha* was identical to the question that our underlying Circuit Court Judge Pancake was asked to address. The Federal Circuit Court Judge said, "These consolidated interlocutor cross appeals before us pursuant to 28 U.S.C. §1292(b) (1993) present an interesting and important question of maritime law: whether state wrongful death and survival statutes are displaced by a federal maritime rule of decision concerning the remedies available for the death of a recreational boater occurring within state territorial waters which are explicitly exceeded from the reach of the Death on the High Seas Act, 46 U.S.C.A. §761 (1975). The remedies at issue are loss of society, loss of support and services, loss of future earnings, and punitive damages." *Yamaha Motor Corporation v. Calhoun*, 40 F.3d 622 (3rd Cir. 1994). *Yamaha* made the same argument to the Circuit Court and later to the United States Supreme Court of Appeals that the Barge Line Defendants are making to this court. The argument was rejected in both of those Courts.¹

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¹ For an historical analysis of the development of damages in Maritime death cases written by an attorney specializing in maritime law after *Yamaha* see *ADMIRALTY LAW INSTITUTE SYMPOSIUM: DAMAGES IN*

B. Whether or not traditional maritime commerce was involved is irrelevant

The Barge Line Defendants argue although Appellee could bring this action in state court, "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," citing a 1921 United States Supreme Court case, *Southern Pacific Railway Co. v. Jensen*, 244 U.S. 205 (1917). *Jensen* does have that language but not as it applies to wrongful death actions of non-seamen, as with Appellee's deceased. As a matter of fact, the decision in *Jensen* supports Appellee's position that the West Virginia wrongful death action controls the damages in this case. The Court in *Jensen* discussed Federal courts' exclusive jurisdiction in maritime actions but then said, "In view of these constitutional provisions and the federal act it would be difficult, if not impossible to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That it may be done to some extent cannot be denied. A lien upon a vessel for repairs in her own port may be given by state statute and **the right given to recover in death cases.**" (emphasis added). *Jensen*, 244 U.S. 205, 216 (1917). As a matter of fact, four years later, the United States Supreme Court cited *Jensen* in a case contrary to the argument of the Barge Line Defendants. In *Western Fuel Company v. Garzia*, 257 U.S. 233 (1921), the Court said, "As a logical result of prior decisions we think it follows that, where death upon such waters results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel in personum for the damages sustained by those whom such right is given.

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MARITIME CASES: ARTICLE: Damages Recoverable in Death Cases. 72 Tul. L. Rev. 717 (1997). The author clearly interprets the case law different with the Barge Lines Defendants and consistent with the Plaintiffs in this action.

The subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts, when following the common law, will not work material prejudice to the characteristic feature of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations.”

Western Fuel Company, 257 U.S. 242, citing *Jensen*. The argument of the Barge Line Defendants is actually contrary to “established maritime law” and *Jensen* does not control the facts of this case.

Even before *Yamaha* and after *Jensen*, in *The Tungus v. Skovgaard*, 358 U.S. 588, (1959), a case with similar issues to the instant case, the Court said, “There is no merit to the contention that the application of state law to determine rights arising from death in state territorial waters is destructive of the uniformity of federal maritime law. Even *Southern P. Co. v. Jensen*, which fathered the ‘uniformity’ concept, recognized that uniformity is not offended by the right given to recover in death cases.” *Tungus v. Skovgaard*, 358 U.S., at 594. The Court rejected the uniformity argument and applied the New Jersey wrongful death action to the death on a non-seafarer in territorial waters. The decision in *Tungus* totally defeats any argument by the Barge Lines Defendants that the lower court should use the West Virginia Wrongful Death Statute but not apply the West Virginia Supreme Court’s decision that the statute does not allow the application of the consumption offset to compute future lost wages. The Court in *Tungus* said, “This broad argument must be rejected. The decisions of courts long ago established that when admiralty adopts a State’s right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating state attached.” *Id.*, 593. The Court also said, “The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give

rise to a right of recovery, nor even that tortuous conduct resulting in death shall be actionable, but damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon the court enforcing that policy to enforce it all, not pick or chose. *Id.*, 593.

In another case decision following *Tungus*, the Court looked at prior decisions pertaining to the use of State statutes in matters involving maritime torts and noting that until the creation of Federal and State statutes, there was no maritime cause of action for wrongful deaths. The Court said if there is no Federal statute, then whether or not there is a cause of action depends on “whether the State had enacted a wrongful-death statute and, if so, whether the statute permitted recovery.” *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 575. The Court noted the vast differences in various state wrongful death statutes and the fact that applying them would permit recovery of damages not permitted in statutory maritime cases. The Court also recognized that some state statutes would provide more liberal damages than in statutory maritime cases. The Court decided this factor did not displace their use. *Id.*, 588. Importantly, the Court recognized and defined the loss of future lost wages under the “American Rule,” which did not include a mention of the consumption offset. *Id.*, 594.

Again, contrary to the Barge Line Defendants' use of *Jensen* as the controlling case in this matter, in *Romero v. International Terminal Co.*, 358 U.S. 354 (1959), the Court acknowledged the rule in *Jensen* that “state law must yield to the needs of a uniform federal maritime law” and stated, “But this limitation still leaves the States a wide open scope.” The Court lists numerous state remedies not affected by the *Jensen* rule, including, “State remedies for wrongful death.” *Romero*, 358 U.S., at 373-374.

The Barge Line Defendants also argue, “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 it conflicts with federal maritime law, state law is pre-empted.” The Barge Line Defendants cited pages 222 and 223 of that decision but could not have read page 224. If they had, it would be clear that the decision had nothing to do with the death of a non-seafarer in territorial waters as in the instant case. *Offshore*, which involved a death of a maritime employee on the high seas, actually dealt with whether a state wrongful death action could control the measure of damages instead of those provided by the Death on the High Seas Act (DOHSA). *Offshore*, 477 U.S., at 209. Congress has specifically created a remedy for a maritime employee under the facts of that case. Congress has decided not to provide an express remedy for an injury or death of a civilian in territorial waters. When an existing Federal Legislative rule of law exists, only then is state law pre-empted. Actually, the Court in *Offshore* recognizes and agrees with Appellee’s argument that the West Virginia Wrongful Death Statute damages apply in this case. The Court examined DOHSA and determined that Congress had intended to ensure that “state courts enjoyed the right to entertain causes of action and provide wrongful death remedies both for accidents arising on territorial waters and, under DOHSA, for accidents occurring more than one marine league from shore.” *Id.*, at 227.

Notwithstanding the fact that no case exists that concerns itself with uniformity when applying state-created wrongful death states to the death of non-seamen in territorial waters, the Barge Line Defendants cite the 1875 case, *The Lottawana*, 88 U.S. 558 (1875), for the proposition that allowing states to regulate or dispose of maritime matters defeats the uniformity and consistency the constitution anticipated. *The Lottawana* has nothing to do

with the facts of this case, as it dealt with liens created for services and supplies. If the Barge Line Defendants found a need to point this Court to cases of the United States Supreme Court more than a hundred years old, they should have cited *Steamboat Company v. Chase*, 83 U.S. 522 (1872), decided three years earlier. The reason they did not cite to that case is obvious, the Court upheld the application of Rhode Island's wrongful death statute in a suit based upon a collision between a sailboat and a steamer. The Defendants in that case argued, as the Barge Line Defendants do here, about uniformity and Federal courts' jurisdiction of admiralty law. The Court rejected that argument in a ruling similar to *Yamaha*, 124 years later, and said statutes have been passed in the states giving a remedy for death in territorial waters and that state law was competent to provide a remedy. *Steamboat*, at 532-533.

Recent decisions of the United States Supreme Court are also contrary to the uniformity argument of the Barge Line Defendants. The United States Supreme Court has long held that "maritime law is not a monistic system," which requires the application of uniform Federal rules. *Romero v. International Terminal Operating Co.* 358 U.S. 354, 374 (1959). The Court has also stated, "maritime law is not a complete and perfect system ... in all maritime countries there is a considerable body of municipal law that underlies as the basis of its administration." *Just v. Chambers*, 321 U.S. 383, 390 (1941). In a more recent decision, the Court stated, "It is true, as petitioner observes, that we have held admiralty accommodation of state remedial statutes to be constitutionally permissible." *Norfolk Shipbuilding & Drydock Corporation v. Garris*, 532 U.S. 811, at 815 (2001).

The Barge Line Defendants then make their most blatant misrepresentation of law to support their argument. They say, "Maritime law permits an offset against future lost wages and West Virginia law does not." Citing *Jensen*. *Jensen* does not mention an offset against

future lost wages. The argument of the Barge Line Defendants is that because West Virginia law does not allow the offset, there is a conflict with maritime law and, as a result, maritime law prevails. As set out above, the Court, in *Jensen*, did not say there was a conflict in applying wrongful death statutes to death actions of non-seafarers in territorial waters. To the contrary, maritime law allows the state statutes to supply the remedy in death cases.

Using just plain common sense, the "conflict" argument fails. For the Barge Line Defendants to prevail, this Court would have to say all of the United States Supreme Court cases hold that we are to use our West Virginia Wrongful Death Statute in this case, which does not allow the consumption offset; but, because the cause of action is maritime, we can use it for all of the damages it allows except for future lost wages. For this Court to follow this illogical argument, the Barge Line Defendants would have to provide some authority. However, Appellee has supplied this Court with authority to the contrary. If you use the state statute, you use it all; you cannot pick and choose part of it. *The Tungus v. Skovgaard*, 358 U.S., at 593.

Neither does the conflict argument of the Barge Line Defendants follow the logical statutory and court-decided development of maritime law as it applies to causes of action for wrongful death. If the consumption offset did not derive from maritime law, there can be no conflict. Specifically for there to be a conflict, there would have to be a maritime rule of law for recovery of future lost wages in actions involving the death of non-seamen. In fact, there is not. The Congressional Acts allowing for recovery in death cases do not allow for an award of future lost wages. Then, from where did the consumption offset evolve? It came from various courts' interpretation of state wrongful death statutes, which are not exclusively applied to maritime law. This Court reviewed the three theories that have been developed for

measuring the lost earning capacity of a decedent. In the Court's decision on which properly reflected the intent of the Legislature in the State's Wrongful Death Statute, the Court considered cases offered to it under Federal maritime law, which were rejected. *Wehner v. Weinstein*, 444 S.E.2d 27, 37-38 (1994). An article not considered by this Court in *Wehner* because the issue was not the origin of the consumption offset is helpful in both understanding the origin issue and also in settling the issue that the consumption offset did not originate in maritime law nor is it an integral part of that law. In the *Journal of Legal Economics*, the author traces the origin of the consumption offset. The article recognizes, as has been argued by the Appellee, that because common law did not allow for damages for wrongful death, this was remedied in most states by passing wrongful death statutes. *8 J. Legal Econ.*, at 3. The article also examined a survey conducted in 1990 and listed and set out which state Wrongful Death Statutes and which Federal Statutory Acts utilized the consumption offset to calculate future lost wages in death cases. No maritime statutes or cases were included. *Id.*, 1.

Maritime law is clear that future lost wages are not recoverable for seamen whose deaths result from maritime accidents. There are three types of wrongful death actions under maritime law, not counting Longshoremen, who are covered by the Longshore and Harbor Workers' Compensation Act. Congress created two, and they only apply to seamen working on vessels. DOHSA, Death On the High Seas Act, *46 U.S.C. App. §761*, applies only to injuries or deaths of seamen beyond a marine league from shore and allows only pecuniary damages in death actions and not future lost wages. The Jones Act, *46 U.S.C. App. §688(a)* applies to injuries to seamen in territorial waters and does not provide for recovery of a decedent's future lost wages. In *Miles v. Apex Marine*, 498 U.S. 19 (1990), the Court was asked to decide the issue of recovery under those statutes for future lost wages in death cases.

The Court stated, "We next must decide whether, in a general maritime action surviving the death of a seaman, the estate can recover decedent's lost future earnings?" *Miles*, 498 U.S., at 33. After reviewing the development of the law since *The Harrisburg*, 119 U.S. 199 (1886), the Court said, "We also hold that a general maritime survival action cannot include recovery for decedent's lost future income." *Miles*, at 36. If neither of the two acts created by Congress allows for a recovery of future lost wages in actions involving death of seamen, how can an argument be made that maritime law utilizes the consumption offset in death cases to compute future lost wages? Not only does that not make sense, no case exists to support that proposition.

Accordingly, it is clear the consumption offset is part of a scheme created by certain state legislatures to calculate the future lost wages of a deceased in wrongful death actions in those states. "In the United States, every State today has enacted a wrongful death statute." *Moragne v. States Marine Lines, Inc., et al.*, 398 U.S. 375, 390 (1970). The Court in *Moragne* traced the history of wrongful death actions beginning with *The Harrisburg*, which held that there was not a cause of action for wrongful death under general maritime law **absent a statute** (emphasis added) giving that right. *Harrisburg*, 119 U.S., at 213. The Court, in *Moragne*, in overruling *The Harrisburg* decision, stated, "A development of major significance has intervened, making clear that the rule against recovery is sharply out of keeping with the policies of major maritime law." *Moragne*, 398 U.S., at 388. The Court recognized that in order to remove the harshness of *The Harrisburg*, both states and Congress enacted legislation for wrongful deaths. "For deaths within territorial waters, the federal law accommodated the humane policies of state wrongful death statutes by allowing recovery whenever an applicable state statute favored such recovery. Congress acted in 1920 to furnish

the remedy denied by the courts for deaths beyond the jurisdiction of any State, by passing two landmark statutes. The first of these was the Death on the High Seas Act.” Section 7 of the Act provides, “The provisions of any State Statute giving or regulating rights of actions or remedies for death shall not be affected by this Act.” *Id.*, at 393. The Court recognized that state wrongful death actions could be more generous than those provided by DOHSA. *Id.*, at 388.

This Court has recognized that a wrongful death action did not exist at common law and is a creature of the Legislature. *Baldwin v. Butcher*, 184 S.E.2d 428, at 433 (1971). This Court interpreted the West Virginia Wrongful Death Statute and specifically rejected allowing future lost wages to be reduced by an offset for the decedent's personal living expenses ("consumption offset"). *Wehner, et al. v. Weinstein, et al.*, 444 S.E.2d at 38. (1994).²

Notwithstanding all of above law to the contrary, the Barge Line Defendants set out to convince this Court that the *Yamaha* decision does not apply to the facts of this case. The facts of this case are the very reason the United State Supreme Court agreed to hear the case. The Court said the question is, “Does the federal maritime claim for wrongful death recognized in *Moragne* supply the exclusive remedy in cases involving deaths of nonseafarers in territorial waters.” *Yamaha*, 516 U.S. 199, at 204. As will be set out, the *Yamaha* Court answered that question by holding that in determining damages, the states' wrongful death statutes are to be used in maritime actions for the death of non-seamen in territorial waters. *Id.*, 216. Therefore, the West Virginia Wrongful Death Statute applies to the facts of this case.

² When using the method accepted by this Court, all parties' economists' agree and calculate the amount of future lost wages of Randall Wayne Vaughan as \$1,200,000.00. This assumes that Vaughan would have graduated from high school. Using the consumption offset, the economist of the Barge Line Defendants reduces this amount to \$285,000.00.

Again, ignoring substantial case law to the contrary, in support of their position that *Yamaha* does not apply, the Barge Line Defendants argue that the Court below erred in interpreting *Yamaha* to apply to the facts of this case because it was a “garden-variety product liability action involving a personal watercraft, not the alleged negligent operation of vessels engaged in maritime interstate commerce.” They do not cite any case law to support that position, as none exists. This position certainly is at odds with the argument of the Barge Lines Defendants in Section I of their Brief, which states the present action is a Maritime tort and general maritime law applies. It is either all maritime or it is not. As a matter of fact, the United States Supreme Court has held that maritime law applies to product liability cases when the wrong has a significant relationship to traditional maritime activity. *East River Steamship Corp., et al. v. Transamerica Delavalinc*, 476 U.S. 858 (1986).

The Barge Line Defendants also argue that *Yamaha* “did not involve maritime commerce in any way” and thus the United States Supreme Court was not concerned in that case with concerns for a uniform system of maritime law to be administered in all states. The United States Supreme Court disagrees with the Barge Line Defendants' argument. In *Foremost Insurance Co., et al. v. Richardson, et al.*, 457 U.S. 668, 674 (1982), the Court said, “We are not persuaded by petitioner’s argument that a substantial relationship with commercial shipping is at the heart of the traditional maritime activity sought to be protected by giving the federal courts exclusive jurisdiction over all admiralty suits. This argument is premised on the faulty assumption that, absent this relationship with commercial activity, the need for uniform rules to govern conduct and **liability** (emphasis added) disappears, and “federalism” concerns dictate that these torts be litigated in state courts.”

Although the Barge Line Defendants have cited as authority the United States Supreme Court decision in *Sisson v. Ruby, et al.*, 497 U.S. 358 (1990). On page 14 of their Brief, in support of the proposition that state law cannot supplant maritime law, they fail to mention that *Sisson* disagrees with their argument that an involvement in commercial activity is required before *Yamaha* applies. The Court in *Sisson* explains the test courts should use in making the determination on what commercial maritime means. Rejecting an argument that the impact in that case was minimal because no commercial vessels were involved, the Court said, "Rather, a court must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity." *Sisson*, 497 U.S., at 363. Although the Barge Lines Defendants have not asked this Court to conduct this inquiry, it would be simple and contrary to their position. Ott Adkins, the manager for the Barge Line Defendants, testified at his deposition that not only did the drowning cause the Coast Guard, Fire Department, and various agencies to drag the Ohio River for the bodies, the Barge Line Defendants actually moved the spar barge from the bank as well as the coal barges owned by the Counsel Company out into the river. See Deposition of Ott Adkins of December 5, 2006, page 59, lines 1 through 20. Not only was there a likelihood that a disruption of commercial activity would occur, it actually did.

They next argue that the decision in *Yamaha* does not apply because "the United States Supreme Court was not concerned in that case with the considerations which give rise to, and which require, a uniform system of maritime law to be administered in all states." Brief of Appellants, page 12. This statement misstates any reading of *Yamaha* as well as other cases of the Supreme Court on that issue regarding the need for uniformity. Absent a statute, maritime law is, "Drawn from state and federal sources, the general maritime law is

an amalgam of traditional common-law rules, modifications of those rules, and newly created laws." *East River Steamship Corp*, 476 U.S. 858, at 873.

The *Yamaha* Court clearly considered uniformity. The Court examined maritime wrongful death law beginning with *The Harrisburg*, which did not allow a cause of action for wrongful death and recognized that, "Federal admiralty courts tempered the harshness of *The Harrisburg's* rule by allowing recovery under state wrongful death statutes. *Yamaha*, 516 U.S., at 206. The *Yamaha* Court then considered the issues *Yamaha* was arguing, like the Barge Line Defendants, there was a need for a uniform Federal maritime remedy in all deaths occurring in territorial waters and that *Moragne v. States Marine Lines, Inc.*, supported that position. The Court said, "We attempt no grand synthesis or reconciliation of our precedent today, but confine our inquiry to the modest question whether or not it was *Moragne's* design to terminate recourse to state remedies when nonseafarers meet death in territorial waters." The Court then explained, "The uniformity concerns that drove our concerns in *Moragne* related, instead, to the availability of un-seaworthiness as a basis of **liability** (emphasis added)." The Court also said that because the variations in remedies between state remedies, such as being excessive, did not interfere with the harmonious operation of maritime law because, "Variations of this sort had long been deemed compatible with federal maritime interests." *Yamaha*, 516 U.S., at 210.

What the Barge Line Defendants refuse to accept is how courts have distinguished between liability and damages and its importance. *Yamaha* expressly said that the uniformity concerns expressed by the Court in past decisions were different in the case before them. The Court said, "When Congress has prescribed a comprehensive tort **recovery** (emphasis added) regime to be uniformly applied, there is, we have generally recognized, no cause for

enlargement of the damages statutorily provided.” *Yamaha*, 516 U.S., at 215. The fact that *Yamaha* dealt with only remedies and not liability is clearly set out in Footnote 14. *Id.*, 216. The *Yamaha* decision concerned remedies or damages recoverable in a case governed by maritime law. The Court determined that there is no concern about uniformity because Congress did not enact laws that apply to damages in wrongful death actions of non-maritime (nonseafarer) employees. The *Yamaha* Court defined nonseafarers as persons who are not covered by the Jones Act or the Longshore and Harbor Workers’ Compensation Act. *Id.*, at 585, Footnote 2.

Yamaha discussed the remedies Congress provided for maritime wrongful deaths. The Jones Act was passed to provide recovery for the survivors of seamen killed in the course of employment. The Death on the High Seas Act was passed the same year to provide recovery for wrongful deaths occurring more than three nautical miles from the shore of any state. *Id.*, page 586, Footnote 4. The Court said, “But Congress has not prescribed remedies for the wrongful deaths of nonseafarers in territorial waters.” *Id.*, 592. The Court even recognized that Congress specifically stated it was not attempting to regulate those actions. The *Yamaha* Court quoted Congress, “The provision of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter.” *Id.*, 592. The Court held, “Taking into account what Congress sought to achieve, we preserve the application of state statutes to deaths within territorial waters.” *Id.*, 592. Importantly, the Court held, “For the reasons stated, we hold that the damages available for the jet ski death of Natalie Calhoun are properly governed by state law.” *Id.*, 592. Randall Wayne Vaughan was a nonseafarer; and he was killed in territorial waters, the Ohio River. Therefore, the West Virginia wrongful death statute controls the damages in this case.

This is the same result reached by the Third Circuit in *Yamaha* on remand. The Court interpreted the *Yamaha* decision; and, in holding that the Pennsylvania wrongful death statute applied to the damage issues of the case said, "Given that the individuals who seek to be made whole—Calhoun and Natalie's estate—are all Pennsylvania domiciliaries, it appears as if Pennsylvania has a strong interest in having its law of compensatory damages apply to the present matter. Further, it is hard to dispute that Pennsylvania has a substantial interest in obtaining compensation for its citizens in order to remedy wrongs that have been committed against such individuals." *Calhoun v. Yamaha Motor Corporation*, 216 F.3d 338 at 347 (3rd Cir.) 2000.

Even in light of United States Supreme Court cases to the contrary, the Barge Line Defendants rely on two cases from the 11th Circuit to support their position that *Yamaha* does not apply to the instant case, *In Re: Amtrak "Sunset Limited,"* 121 F.3d 1421 (11th Cir. 1997), and *In Re: Diamond B Marine Services, Inc.*, 2000 LEXIS 9047. Neither of those cases involved what the *Yamaha* Court specifically addressed, state-filed wrongful death actions of nonseafarers in territorial waters.

In "*Sunset Limited*," the Court was concerned with the Alabama wrongful death statute. The Court rejected applying the holding in the *Yamaha* decision and applied Maritime law to the facts of the case rather than the Alabama statute. In Alabama, the only state in the United States to hold so, the only damages an estate received were punitive damages, not compensatory damages, and the standard for the damages was simple negligence. *Michie's Alabama Code Annotated*, §6-5-410. The Court determined that this was not consistent with Federal maritime principles and policies on liability or damages and that there needed to be uniformity in maritime law. The conflict was that in maritime law, the

standard for recovering punitive damages is intentional or wanton and reckless conduct. Appellee in this case is not requesting punitive damages; he is only requesting remedial damages, one of which is future lost wages. For this Court to agree with the decision, the Barge Line Defendants would have to demonstrate that the consumption offset is something more than a state-created scheme to determine the value of future lost wages in death cases. This Court has not been asked to disregard a well-formed liability law, such as the burden of proof for punitive damages, as in "*Sunset Limited*." To the extent that the West Virginia remedy for future lost wages is greater than in other states, *Yamaha* and other courts cited herein have clearly found that a difference in the amount of money one recovers under is not a uniformity concern. *Yamaha*, 516 U.S., at 210.

The importance of the distinction between liability and damages was even addressed by the court in "*Sunset Limited*." The Court, in Footnote 4, acknowledges that the *Yamaha* Court's analysis of the wrongful death statutes in that case, Pennsylvania and Puerto Rico were not addressed because they were remedial. "*Sunset Limited*," 121 F.3d, at 1425.

The Court in "*Sunset Limited*" said that the Alabama wrongful death penalty conflicts with two fundamental admiralty principals, apportionment of damages between joint tortfeasors and the standard of liability for the recovery of punitive damages; and, because it does, state law must give in to Federal maritime law citing *American Dredging v. Miller*, 510 U.S. 443 (1994). "*Sunset Limited*," *Id.*, 1426.

American Dredging's analysis of the issue in that case actually supports Appellee's position in this case. The Court discussed the issue of *forum non conveniens* and held that because it did not originate in admiralty nor have exclusive application there, Louisiana's refusal to apply the doctrine does not work a material prejudice to a characteristic feature of

the general maritime law. *American Dredging*, 510 U.S., at 450. As stated herein, consumption offset is part of a scheme used by some of the 50 states to determine future lost wages. State wrongful death actions did not originate in admiralty nor do they have exclusive application or characteristic features of maritime law. As a matter of fact, state wrongful death statutes were enacted because general admiralty law did not afford a cause of action for wrongful death. As stated in *Yamaha*, "Federal Admiralty courts tempered the harshness of *The Harrisburg's* rule by allowing recovery under state wrongful-death statutes." *Yamaha*, 516 U.S., at 206. Rejecting the application of the consumption offset does not work a material prejudice to a characteristic feature of the general maritime law. It is Appellee's position that the consumption offset is not even a feature of maritime law.

"*Sunset Limited's*" interpretation of *Yamaha* has not been followed by any other Federal Circuit Court and specifically has been rejected by courts that have decided the issue in the Fourth Circuit. *Jurgensen v. Albin Marine*, 214 F.Supp.2d 505 (D.Md. 2002) and *Hester v. Cottrell Contracting*, 2001 U.S. Dist. LEXIS 20899 (E.D.N.C. 2001). In *Hester*, rather than addressing a death action, the District Court was being asked to decide whether or not maritime law precludes nonpecuniary remedies in a personal injury action involving a non-seaman. The Court acknowledged that the Supreme Court had not decided this issue nor had the Fourth Circuit. The Court acknowledged the "*Sunset Limited*" decision but, applying the same reasoning in *Yamaha*, rejected the decision of the 11th Circuit and held that since Congress had not enacted a statute under maritime law pertaining to nonpecuniary damages, state law damages were available to non-seaman for personal injuries on navigable waters. *Hester*, at 7.

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The Barge Line Defendants also argue that a 2000 Louisiana District Court decision, *In Re: Diamond B Marine Services*, 2000 U.S. Dist. LEXIS 4379, supports their argument that *Yamaha* does not authorize the application of state law in a case involving commercial vessels, but instead to cases where maritime commerce was not involved. Appellee has already discussed in detail that the commercial, non-commercial issue is not relevant in understanding and applying *Yamaha*. *Foremost Insurance Co.*, at 674 and *Sisson*, at 363. In addition, in *Diamond B Marine Services*, the Court was concerned with punitive and not compensatory damages.

Additionally, the Barge Line Defendants believe that the Court's use of the term "pure unadulterated" maritime law in that case supports their argument. Black's Law Dictionary defines adulterate as, "To debase or make impure by adding a foreign or inferior substance." *Black's Law Dictionary*, Seventh Edition (1999). As set out in the preceding discussion of "*Sunset Limited*," the consumption offset is not "pure unadulterated" maritime law. It did not originate in admiralty nor has exclusive application there nor is it a characteristic feature of the general maritime law. *American Dredging*, 510 U.S., at 450.

In addition, *In Re: Diamond B Marine Services* has not been followed in any Federal Circuit and has been criticized by other Federal District Court cases in that District. In *Stogner v. Central Boat Rentals, Inc.* 326 F.Supp. 2d 754 (E.D.La.) (2004), the court correctly followed the reasoning of other Federal cases, including *Yamaha*, and held the need for uniformity only applies when dealing with firmly established legislation. *Stogner*, 326 F.Supp. 2d, at 757. The Court stated because the cause of action in that case was by a seaman against a non-employer, a Federal Statute, the Jones Act, did not control damages. *Id.*, 757. In

the case before this Court, there are no Federal maritime statutes controlling damages for the wrongful death of a non-seaman in territorial waters.

Unless and until the Barge Line Defendants can provide an act of Congress stating that the consumption offset applies in all maritime wrongful death cases, they should simply admit because maritime law did not provide for wrongful death actions, all states, by legislation, could and did adopt wrongful death statutes. Some statutes, either by wording or their court's interpretation, have allowed the use of the consumption offset to calculate future lost wages. This Court has interpreted the West Virginia Wrongful Death Statute as not allowing the consumption offset.

C. West Virginia law and Maritime law are not in direct conflict

The Barge Line Defendants again argue that even if Yamaha applies, because of the conflict with maritime law, the damages provided by the West Virginia Wrongful Death Statute, as they pertain to future lost wages, cannot be applied because when state law and general maritime law are in direct conflict, maritime law controls. They argue Appellee's personal consumption should be deducted because that is the Maritime rule of law, but they offer no cases to support that argument. Appellee has set out in detail in Paragraph B above that the consumption offset is not part of maritime law but a scheme developed by some state courts to determine future lost wages. That scheme has been rejected by this Court based upon the wording used by our State Legislature in writing the Wrongful Death Statute. Because the Barge Line Defendants rely on additional cases in Section III of their Brief, some of those cases will be generally addressed.

The Barge Line Defendants rely on *Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999) to support the proposition that Federal law controls in maritime tort cases where the two

schemes conflict. That decision has nothing to do with the instant case and cannot under any argument support the position that a United States Supreme Court case on point, *Yamaha*, does not apply to the facts of this case. Although the case has been cited by numerous courts regarding defamation issues, for example *Wilson v. The Daily Gazette Company*, 588 S.E.2d 197 (W.Va. 2003), the case has not been followed by any other courts involving maritime law. Using that case to support a maritime principal, when other well-established cases on point, such as *Yamaha*, exist, has been severely criticized. In *Bradshaw v. Unity Marine Corporation, Inc.*, 147 F.Supp.2d 668 S.D. TX (2001), the court, after reading *Wells* cited in a Response to a Motion, said, "Ultimately, to the Court's dismay after reviewing the opinion, it stands simply for the bombshell proposition that torts committed on navigable waters (in this case an alleged defamation committed by the controversial G. Liddy aboard a cruise ship at sea) require the application of general maritime law. See *Wells v. Liddy*, 186 F.3d 505, 524 (4th Cir. 1999) (*What the...?*)?! The Court cannot even begin to comprehend why this case was selected for reference. It is almost as if Plaintiff's counsel chose the opinion by throwing long range darts at the Federal Reporter."

In *Wells*, the 4th Circuit was deciding which state law to apply to a defamation suit when Mr. Liddy, of Nixon-Watergate fame, gave a speech on a cruise ship in Louisiana alleging that Wells, a secretary at the Democratic National Headquarters, was actually the target of the break-in because Nixon was afraid she had pictures in her desk that associated the fiancé of John Dean, Nixon's legal counsel, with a prostitution ring. *Wells*, 186 F.3d, at 513-514. The Court in *Wells* was examining which state law to use regarding **liability** (emphasis added), not remedies. *Id.*, 524. The most telling reason that the decision does not apply to this case and does not trump the law in *Yamaha* is the Court's analysis in not using

either Virginia or Louisiana law. The Court recognized that, "Because great diversity exists among the states' defamation law, we conclude that it would be more appropriate to apply general common law tort principles rather than the specific law of a single state. Application of a single state's defamation law would impair the uniformity and simplicity which is a basic principle of the federal admiralty. Accordingly, we determine that the common law compiled in the Restatement of Torts should have control over evaluation of the Well's claim of shipboard defamation." *Id.* 524. The problem with that analysis, of course, is that it cannot be applied to the case before this Court because wrongful death actions did not exist at common law. Wrongful death actions did not exist at common law and are creatures of the legislature. This has been acknowledged by this Court in *Baldwin v. Butcher* 184 S.E.2d 428 at 433 (1971)"; and the United States Supreme Court in *Moragne v. States Marine Lines, Inc., et al.*, 398 U.S. 375, at 390 (1970).

Even if this Court accepts Wells' reasoning to be an appropriate approach to address the issue before this court and decides to revert to the Restatement of Torts, the Court would find it is consistent with Appellee's argument. The Restatement states, "The measure of damages for causing the death of another depends upon the wording of the statute creating the right of action and its interpretation." *Rest 2d of Torts*, §925. The comments of the Restatement clearly discuss the differences in the various state wrongful death statutes. This logically brings the issue before this Court back to *Yamaha*, where the Court stated, "But Congress has not prescribed remedies for the wrongful deaths of nonseafarers in territorial waters." Quoting Congress, "The provision of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." "Taking into account what Congress sought to achieve, we preserve the application of state statutes to deaths within

territorial waters.” *Yamaha*, at 592. As stated herein, West Virginia does not allow the consumption offset. *Wehner, et al. v. Weinstein, et al.*, 444 S.E.2d 27 (1994).

The Barge Line Defendants then say that the decision of *Byrd v. Byrd*, 657 F.2d 615 (1981) supports the *Wells* decision. *Byrd* pertained to a suit by the wife against a husband alleging he was negligent in not attaching a deck chair or providing deck railing. The issue was interspousal immunity differences in the Federal Maritime Law and State law. *Byrd*, 657 F.2d, at 616. The Court then determined that Congress has not enacted legislation regarding the application of interspousal immunity in an admiralty case. *Id.*, 617. The case involved liability as opposed to remedies or damages. The Court in that case decided, “Interspousal immunity is a doctrine that has come and gone.” *Id.*, 621. However, the court did recognize there may be some questions which are so local in nature or where a declaration of preemption by Federal rule would leave a complex area largely unregulated, despite complete regulations by the state, citing *Wilburn Boat Co. v. Firemans Fund Insurance*, 348 U.S. 310 (1955). The Court's reasoning in that case is on point with the decision in *Yamaha* and defeats the argument of the Barge Line Defendants. The issue in *Wilburn* was whether or not admiralty law or state law governed the validity and scope of warranties in marine insurance contract. *Wilburn Boat Co.*, at 311. The Court traced the history of marine insurance and recognized that Congress had passed the McCarran Act specifically assuring a state's power to regulate insurance. *Id.*, 317, 318. The Court acknowledged “some state legislatures have developed one kind of new rule and some another.” The Court then declined to fashion a uniform law involving insurance, instead decided the decision would have to be with Congress. *Id.*, 320. This is exactly the reasoning of the Court in *Yamaha*, which is set out in detail above. The Court examined the history of wrongful death actions and determined that

various states had enacted wrongful death statutes to regulate causes of action in deaths involving non-seamen in territorial waters and that Congress had not. The Court also acknowledges Congress has not enacted statutes to regulate those deaths. It acknowledges, as in *Wilburn*, that Congress in the DOHSA had explicitly excluded State statutes regulating the rights of actions and **remedies** (emphasis added) for death. *Yamaha*, 516 U.S. at 215.

Neither *Wells* nor *Byrd* supports the argument of the Barge Line Defendants that there is a conflict with State law and Maritime law regarding damages in wrongful death actions.

The Barge Line Defendants then cite to nine cases to support their argument, “Conversely, General Maritime Law requires proof of lost wages, if they can be awarded, be reduced by personal consumption.” None of the cases cited makes that statement and none was decided after the *Yamaha* decision in 1996. Most of the cases involve either the Jones Act or DOHSA, which, as has been set out in detail above, are acts of Congress, which have provisions controlling damages but do not provide for lost future earnings. Only four cases will be discussed briefly to illustrate that none applies.

The Barge Line Defendants argue that the Fourth Circuit Court of Appeals, in *Bubla v. Bradshaw*, 795 F.2d 349 (4th Cir. 1986), held that maritime law provides a wrongful death remedy for negligence for nonseafarers in territorial waters. Clearly, the case was decided before *Yamaha*. More importantly, the facts in the case have nothing to do with the facts in the instant case. The issue in *Bubla* dealt with a suit brought in Federal Court by a family for the death of a man who went to a ship at the request of the barge company to do a marine survey. He was electrocuted. The lower court found the barge company negligent. The Barge Line Defendants argued on appeal that the case did not fall within admiralty jurisdiction because *Bubla's* actions on the ship did not “support the invocation of admiralty.”

The Circuit Court held that his action did “bear a significant relationship to traditional maritime activity.” How the facts of that case have anything to do with the facts of this case is a puzzle. Appellee is not trying to invoke admiralty jurisdiction in a suit filed in Federal Court. He filed a premises liability action in state court. More importantly, Appellee is not trying to say that Randall Vaughan’s activity had a significant relationship to traditional maritime activity. He is not alleging he was on the barge to do work or perform services for the owner. As a matter of fact, the Barge Line Defendants agree; they say he was a trespasser. Nor does the decision make a finding on what Maritime law dictates in damages in wrongful death actions. Therefore, the decision in *Bubla* does not apply.

Knowing and presumably having read this Court’s decision, *Wehner, et al. v. Weinstein, et al.*, 444 S.E.2d 27 (1994), the Barge Lines Defendants ask the Court to rely on their argument regarding the consumption offset by citing as authority the following cases: *Tiffany v. United States*, 726 F.Supp. 129 (W.D.Va. 1989), *Complaint of Connecticut Nat’l Bank v. OMI Corp.*, 928 F.2d 39 (2d Cir. 1991), and *Petition of U.S. Steel Corp.*, 479 F.2d 489 (6th Cir. 1973). This Court, in *Wehner*, considered those cases and said, “These cases do not discuss the state damage law. We find them not to be persuasive. The same is true of the several cases cited by the defendants which deal with damages for the death of seamen under federal maritime law.” *Wehner*, at 161. Why the Barge Line Defendants think that they hold any more force now, especially in light of the *Yamaha* decision two years later, is a puzzle.

This Court’s analysis in *Wehner* in resolving that dispute is identical to the United States Supreme Court in *Yamaha*. This Court said, “In the absence of any clear legislative language, we refuse to construe the phrase “reasonable expected loss of ...income of the decedent to mean net income.” *Wehner*, at 160. In fact, it was the absence of Congressional

legislation considering that each state had enacted legislation for wrongful deaths that resulted in the *Yamaha* Court's preserving damages in wrongful death actions of non-seamen to the states.

CONCLUSION and RELIEF PRAYED FOR

Appellee maintains that the cases cited herein are indisputably the authority to be followed by this Court in deciding this case: It is undisputed that the United States Supreme Court has held that maritime law did not provide for an action for the wrongful death of a seaman under the common law because there was not a statute providing for the same until 1970 when the United States Supreme Court overruled an earlier decision recognizing that all fifty (50) states and Congress has enacted statutes allowing for damages in actions for wrongful death. It is undisputed that since that decision, the United States Supreme Court has repeatedly refused to eradicate the state remedies that existed before the 1970 decision. It is undisputed that the United States Supreme Court was asked to address the specific question of whether or not maritime death law was the sole remedy for the wrongful death of non-seaman in territorial waters and that they specifically ruled that state statutes provide the remedies for those deaths. It is undisputed that Randall Wayne Vaughan was a non-seaman whose death occurred in territorial waters, the Ohio River, and his Estate has filed a wrongful death action in the Circuit Court of Cabell County, West Virginia. It is undisputed that this Court, in interpreting the West Virginia Wrongful Death Statute, held that the consumption offset is not to be used in the calculation of future lost wages in cases brought pursuant to that statute. It is undisputed that this Court has extensively examined numerous state and Federal courts'

interpretations of wrongful death statutes before rendering its decision on the issues and determined that maritime cases do not apply because they did not address or consider the state law.

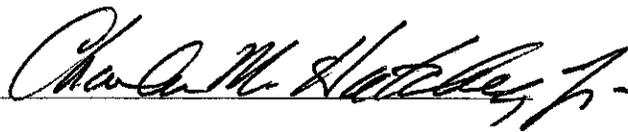
Notwithstanding those undisputed principals of law, the Barge Line Defendants are asking this Court to reverse the underlying court's granting Appellee's Motion in *Limine* regarding the use of the consumption offset in the underlying case because maritime law demands that the consumption offset be used to determine future lost wages in death actions. They argue the reason it should be used is if there is a conflict between maritime and state law, maritime law should prevail because of the need for uniformity in Federal maritime law. It is undisputed that the consumption offset was not created by a Federal Statute nor did it originate in admiralty. Additionally, not applying the offset in death cases does not work a material prejudice to a characteristic feature of maritime law. As a matter of fact, it is undisputed that the consumption offset is one of three schemes used to calculate future lost wages in wrongful death cases under state wrongful death actions and that it did not originate in maritime law.

Accordingly, the underlying Court Order, entered July 19, 2007, granting Appellee's Motion in *Limine* limiting Appellants' expert's use of the consumption offset in the underlying case should be affirmed.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

vs.

APPEAL NO. 33837

GREATER HUNTINGTON PARK AND
RECREATION DISTRICT,
INGRAM BARGE COMPANY,
THE OHIO RIVER COMPANY LLC, and
THE OHIO RIVER TERMINALS COMPANY LLC,
Defendants.

CERTIFICATE OF SERVICE

I, CHARLES M. HATCHER, JR., HATCHER LAW OFFICE, Counsel for the Appellee, Carl Wayne Vaughan, as Administrator of the Estate of Randall Wayne Vaughan, hereby *CERTIFY* that I served a copy of the foregoing **Appellee's Brief** upon all Counsel of Record by this day mailing in the United States Mail, postage prepaid, true copies hereof to the following:

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