

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO: 33837

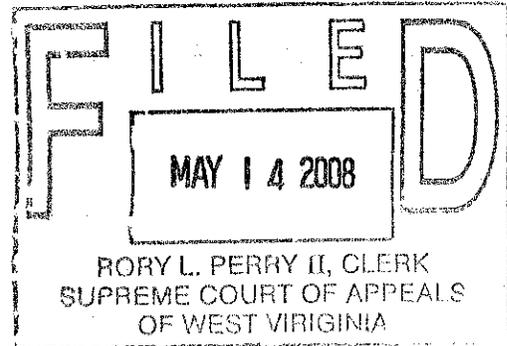
INGRAM BARGE COMPANY, THE OHIO  
RIVER COMPANY LLC and THE OHIO RIVER  
TERMINALS COMPANY LLC

Appellants,

v.

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

Appellee.



---

REPLY BRIEF OF APPELLANTS, 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

Page

TABLE OF AUTHORITIES.....	i
STATEMENT OF ARGUMENT.....	1
A.    The Concessions Made by Appellee Are Relevant to this Appeal.....	3
B.    Because Traditional Maritime Commerce Is at the Heart of this Case, the Limited Holding of <u>Yamaha</u> Does Not Mandate the Application of State Law to the Detriment of the General Maritime Law.....	4
C.    West Virginia Law Forbids Consideration of Personal Consumption While the General Maritime Law Requires That It Be Considered; Appellee Is Mistaken When He Argues There Is No Conflict.....	13
CONCLUSION.....	16

**TABLE OF AUTHORITIES**

<u>Cases</u>	<u>Page</u>
<u>Bubla v. Bradshaw</u> , 795 F.2d 349 (4 <sup>th</sup> Cir. 1987) .....	14
<u>Complaint of Connecticut Nat'l Bank</u> , 928 F.2d 39 (2 <sup>nd</sup> Cir. 1991) .....	14
<u>In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Ala., on Sept. 22, 1993</u> , 121 F.3d 1421 (11 <sup>th</sup> Cir. 1997).....	3, 8, 9, 10, 13
<u>In re Diamond B Marine Services, Inc.</u> , 2002 WL 10460 (E.D.La. Jan. 2, 2002) (not reported in F. Supp.2d).....	13
<u>Just v. Chambers</u> , 312 U.S. 383, 61 S. Ct. 687, 85 L.Ed.2d 903 (1941) .....	12
<u>Moragne v. States Marine Lines, Inc.</u> , 398 U.S. 375, 90 S. Ct. 1772, 26 L.Ed.2d 339 (1970) .....	1, 5, 6, 7, 11, 12, 17
<u>Petition of United States Steel Corp.</u> , 479 F.2d 489 (6 <sup>th</sup> Cir. 1973) .....	14
<u>Southern Pac. Co. v. Jensen</u> , 244 U.S. 215, 37 S. Ct. 524, 61 L.Ed. 1086 (1917) .....	10
<u>The Harrisburg</u> , 119 U.S. 199, 7 S. Ct. 140, 30 L.Ed. 358 (1886).....	12
<u>The M/V "Tungus" v. Skovgaard</u> , 358 U.S. 588, 79 S. Ct. 503, 3 L.Ed.2d 524 (1959) .....	12, 13
<u>Tiffany v. United States</u> , 726 F. Supp. 129 (W.D.Va. 1989) .....	14
<u>Wehner v. Weinstein</u> , 191 W. Va. 149, 444 S.E.2d 27 (W. Va. 1994) .....	2, 14
<u>Western Fuel Co. v. Garcia</u> , 257 U.S. 233, 42 S. Ct. 89, 66 L.Ed. 210 (1921).....	12
<u>Wilburn Boat Co. v. Fireman's Fund Ins. Co.</u> , 348 U.S. 310, 75 S. Ct. 368, 99 L.Ed. 337 (1955) .....	15
<u>Yamaha Motor Corp. v. Calhoun</u> , 516 U.S. 199, 116 S. Ct. 619, 133 L.Ed.2d 578 (1996) .....	1, 3, 5, 6,7,8, 9, 10, 11, 12, 14, 15, 16
<u>Others</u>	<u>Page</u>
Death on the High Seas Act, 46 U.S.C. §30302.....	2
Grant Gilmore and Charles Black, Jr., <u>The Law of Admiralty</u> , pp. 46-47 (2d ed. 1975) .....	15, 16
West Virginia Wrongful Death Act, W.Va. Code § 55-7-6.....	3

## STATEMENT OF ARGUMENT

Ingram Barge Company, The Ohio River Company LLC, and The Ohio River Terminals Company LLC (hereinafter the "Barge Line Defendants" or "Appellants") have appealed a decision of the Cabell County Circuit Court in which the trial court held that the recovery, if any, of Carl Wayne Vaughan, as Administrator of the Estate of Randall Wayne Vaughan (hereinafter "Plaintiff" or "Appellee" or "Vaughan"), for loss of future earnings should not be reduced by the decedent's personal consumption under the law of the State of West Virginia. This holding conflicts with the holdings of courts under the General Maritime Law which require that, in cases where the loss of future earnings is an allowed element of damage, personal consumption is to be considered.

The trial court's holding in this case, as well as Plaintiff's Response, are based on an overly broad reading of Yamaha Motor Corp. v. Calhoun, 516 U.S. 199, 116 S. Ct. 619, 133 L.Ed.2d 578 (1996) (hereinafter "Yamaha"). Appellee claims that despite the traditional maritime commerce in which Barge Line Defendants were engaged, and despite the interference with maritime commerce which Appellee has conceded to have occurred, Yamaha stands for the proposition that state law must always trump General Maritime Law where the two are in conflict when the decedent is a non-seafarer and the location of the accident is a state's territorial waters. In Yamaha, the United States Supreme Court only decided whether, after Moragne v. States Marine Lines, Inc., 398 U.S. 375, 90 S. Ct. 1772, 26 L.Ed.2d 339 (1970) (hereinafter "Moragne"), courts were completely prohibited from applying state wrongful death statutes in every case. Clearly, Yamaha stands for the proposition that states' wrongful death statutes should govern in some cases involving death of non-seafarers in territorial waters, but Yamaha

does not authorize the preemption of maritime law by state law in cases where there are conflicts with a uniform system of maritime law—particularly where traditional maritime commerce is at the heart of the dispute. In the alternative, Appellee argues that West Virginia state law and the General Maritime Law are not in conflict on this issue—despite the existence of numerous maritime cases which have required the consideration of the personal consumption offset and the recognition of that conflict by the West Virginia Supreme Court in Wehner v. Weinstein, 191 W. Va. 145, 444 S.E.2d 27 (W. Va. 1994) (hereinafter "Wehner").

Appellee has conceded that the incident resulting in the decedent's death is a cause of action in maritime tort.<sup>1</sup> Appellee further stipulates, "There is no question that Maritime Law applies to the issues of liability." (Vaughan Response, p. 11.) Appellee even concedes that "disruption of commercial activity actually did occur" as a result of this accident when the fleet barge and the empty barges attached to it had to be moved. (Vaughan Response, p. 22.)<sup>2</sup>

The parties are in agreement that Appellee's case is for a maritime tort which involves the commercial use of barges on the Ohio River and which not only could have, but did, disrupt maritime commerce. It is stipulated that maritime law defines the legal obligation of Barge Line Defendants.

Courts deciding wrongful death cases under the General Maritime Law and the Death on the High Seas Act, ( See 46 U.S.C. 30302), have required both proof and

---

<sup>1</sup> See Appellee Brief of Carl Wayne Vaughan, as Administrator of the Estate of Randall Wayne Vaughan, p. 10, (hereinafter "Vaughan Response").

<sup>2</sup> Appellee has even presented to this Court that "in this case he is not requesting punitive damages; he is only requesting remedial damages. . . ." (Vaughan Response, p. 26.) This is a new development given that Appellee sought punitive damages in both Amended Complaints which he has filed. However, the Barge Line Defendants take Appellee's representation to be true and accordingly will ask Appellee to dismiss that portion of his Complaint.

consideration of personal consumption. The West Virginia Supreme Court has thus far interpreted the West Virginia Wrongful Death Act, (See *W.Va. Code §55-7-6*), to prohibit consideration of personal consumption. Obviously, the two schemes are in conflict, despite Appellee's claims to the contrary. Because General Maritime Law and West Virginia state law are in conflict on this issue and because the operation of commercial vessels on a busy commercial waterway is at the center of this case, the parties are required to have maritime law control the case where there is conflict between the two.

**A. THE CONCESSIONS MADE BY APPELLEE ARE RELEVANT TO THIS APPEAL**

Appellee has conceded that maritime commerce is central to the facts of this case. These conceded facts are not only relevant, but crucial to this appeal. Although states undeniably have interests in the activities which occur within their territorial waters, these interests do not trump the concern for the uniformity of maritime law where maritime commerce is, as here, undeniably involved. See *In re Amtrak "Sunset Limited" Train Crash in Bayou Canot, Ala. on Sept. 22, 1993*, 121 F.3d 1421, 1426-27 (11<sup>th</sup> Cir. 1997), (hereinafter "Sunset Limited") (case involving tug on waterway used extensively by commercial vessels gives rise to decidedly commercial maritime interests not found in Yamaha and parties are entitled to unique maritime law).

Appellee concedes Barge Line Defendants operated a fleeting barge from which they move empty inland river barges before they are loaded with coal. (Vaughan's Response, pp. 7-8.) Appellee alleges that somehow Barge Line Defendants were negligent in a manner which caused decedent's death because children allegedly climbed upon the moorings which held the barge to the riverbank, moorings which were

required by the United States Army Corps of Engineers fleet permit.<sup>3</sup> Appellee has conceded that this is a case of maritime tort and that maritime law defines the obligations of Barge Line Defendants. Appellee has admitted there was disruption of maritime commerce as a result of this accident.

Although Appellee argues this maritime commercial nexus is insignificant, he has not cited any authority for that proposition. Clearly, very significant commercial maritime interests are at stake in this case. Appellee argues that it is irrelevant that this case is a maritime tort. Appellee must have misunderstood Barge Line Defendants' argument. Although Appellee has now conceded the maritime tort status of this case, it is indeed very important. The Court must first determine that this is a maritime tort for the General Maritime Law to be applied. However, since Appellee has stipulated to this point, the Court need not be delayed by this analysis and may move to the question of whether state law shall preempt General Maritime Law concerning damages in this commercial maritime case.

**B. BECAUSE TRADITIONAL MARITIME COMMERCE IS AT THE HEART OF THIS CASE, THE LIMITED HOLDING OF YAMAHA DOES NOT MANDATE THE APPLICATION OF STATE LAW TO THE DETRIMENT OF THE GENERAL MARITIME LAW**

Appellee argues that the commercial maritime nature of the activity which is alleged to have caused the decedent's death, the conceded maritime tort status of the cause of action, and the actual disruption of maritime commerce are insignificant to this

---

<sup>3</sup> Appellee claims Barge Line Defendants misrepresented the evidence to this Court when they said there is "no direct evidence nor a single witness who saw" the decedent and another victim swim around or dive from the barges on the day of this accident. Despite this allegation of misrepresentation, Appellee has, indeed, not identified anyone who saw decedent swimming or diving into the water, much less anyone who saw decedent on the barge prior to his accident or who witnessed his drowning. In fact, Appellee cannot even say when the incident occurred or that it did not occur in the Ohio portion of the Ohio River. The bodies of the decedent and the other victim were found days after their disappearance—miles from the 27th Street Park.

Court's decision to follow the General Maritime Law or state law because Yamaha permits this Court to follow state law without regard to the principle of uniformity of maritime law. Appellee, in doing so, urges this Court to adopt an insupportably broad reading of Yamaha.

In Yamaha, *supra*, the United States Supreme Court permitted a state wrongful death statute to define the remedy in a case involving the death of a girl who was using a wave runner while she was on holiday at a beach resort. On appeal, Yamaha Corp. argued that Moragne, *supra*, completely preempted state wrongful death statutes in any maritime case. The Yamaha Court did not hold that General Maritime Law was preempted by state law in the wrongful death of a non-seafarer in territorial waters. Rather, it only held that Moragne and General Maritime Law do not completely displace state wrongful death statutes when it comes to the questions of what remedies are available in the deaths of non-seafarers.

Appellee argues that the United States Supreme Court has directed that General Maritime Law is to be preempted by state law in all non-seafarer/territorial waters death cases. However, the United States Supreme Court made the limited finding that, in such cases, Moragne does not completely displace state law. Each court must examine the state interest and the federal maritime interest involved to determine whether General Maritime Law or state law should control issues concerning damages where conflicts between the two exist. Here, there are significant federal maritime interests which were not present in Yamaha that dictate the supremacy of the General Maritime Law.

The Supreme Court made no attempt to reverse the long-standing law that maritime law may not be disrupted by state law and no attempt to delineate the factual and legal circumstances in which a state law must be preempted because state wrongful death statutes conflict with General Maritime Law. The Supreme Court stated:

The federal cast of admiralty law, we have observed, means that "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[,] [b]ut this limitation still leaves the States a wide scope." *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373, 79 S.Ct. 468, 480, 3 L.Ed.2d 368 (1959). Our precedent does not precisely delineate that scope. As we recently acknowledged, "[i]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernable in our admiralty jurisprudence." *American Dredging Co. v. Miller*, 510 U.S. 443, 452, 114 S.Ct. 981, 987, 127 L.Ed.2d 285 (1994).

Yamaha, 516 U.S. at 211 n.8, 116 S. Ct. at 626 n.8.

The Supreme Court specifically limited the scope of its inquiry in Yamaha. It made no attempt to mark the "line separating permissible from impermissible state regulation," but only answered the question of whether Moragne totally preempted any aspect of any state statute in maritime wrongful death cases:

We attempt no grand synthesis or reconciliation of our precedent today, but confine our inquiry to the modest question whether it was *Moragne's* design to terminate recourse to state remedies when nonseafarers meet death in territorial waters.

*Id.*

Appellee misunderstands the argument of Barge Line Defendants when he says that Barge Line Defendants argue that Yamaha "violates the unified body of law concept." (Vaughan's Response, p. 10.) Barge Line Defendants argue nothing of the sort. Barge Line Defendants simply argue that Yamaha is limited in precisely the way

the Supreme Court said it is limited, which is to answering the question whether Moragne completely “terminates recourse to state remedies” without further inquiry. Yamaha held that Moragne did not terminate recourse to state remedies. The Yamaha Court did not hold—as Appellee argues—that state law shall displace General Maritime Law in non-seafarer/territorial waters death cases. Instead, the task of delineating the line between impermissible and permissible state regulation, presumably based on the circumstances of each case, is left to the individual courts.

Appellee is wrong when he argues that the inherent, and stipulated, commercial maritime nature of this case is irrelevant. In fact, the allegation that Barge Line Defendants were somehow negligent in their acts or omissions in the operation of commercial vessels in navigation upon one of the most heavily traveled navigable highways in the United States—the Ohio River—is not only relevant but crucial to any court’s analysis of whether General Maritime Law principles should control and any conflict between state law and General Maritime Law in this case.

In this case, which involves the operation of commercial vessels upon a navigable body of water which supports enormous amounts of commercial traffic, Barge Line Defendants ask this Court to draw the line between permissible and impermissible state conflict with General Maritime Law so that their expert economist may be allowed to testify about the personal consumption of the decedent in accordance with procedures followed by courts which have followed the General Maritime Law. The Court, it is respectfully submitted, is required in this case to balance the state interest in activities in its territorial waters against the requirement of a uniform system of maritime

law involving the alleged acts or omissions of a commercial vessel's operators and/or owners on the Ohio River. This is completely consistent with the holding in Yamaha.

In "Sunset Limited", *supra*, the Eleventh Circuit Court of Appeals examined a case in which the plaintiffs made the same argument which is being made here by Appellee. The Eleventh Circuit Court of Appeals rejected this argument, holding that, in a case involving commercial maritime activity, conflicts between state wrongful death statutes and maritime law must be resolved in favor of General Maritime Law.

Although Appellee has attempted to distinguish "Sunset Limited", that distinction falls short. In "Sunset Limited", the deaths of non-seafarers (train passengers) occurred in state territorial waters allegedly as a result of the actions or omissions of those in charge of a commercial towing vessel, the M/V MAUVILLA. The M/V MAUVILLA was northbound on the Mobile River, destined for another port on that river, when she struck a railroad bridge. The *Sunset Limited* train subsequently crossed that bridge and, apparently because of the damage to the bridge, plunged into the water. "Sunset Limited", 121 F.3d at 1422-23. The district court concluded that the Alabama state wrongful death statute governed that case based upon its reading of Yamaha. *Id.* at 1423. The appellants in "Sunset Limited" contended that the district court's ruling was in error because the Alabama Wrongful Death Act conflicted with the General Maritime Law. *Id.*

The district court in "Sunset Limited" reached the same conclusion which Appellee argues in this case: whenever a non-seafarer perishes in state territorial waters, the wrongful death statute of a state must control under Yamaha. The Eleventh

Circuit Court of Appeals concluded, as Barge Line Defendants argue in this case, that this is an overbroad and unsupported interpretation of Yamaha:

Embodied within the district court's reasoning is the assumption that *Yamaha*, by allowing state law remedies in that case, implicitly accepted a necessary byproduct of its holding: that state wrongful death schemes would conflict with the general maritime law which, ultimately, must yield to state interests. The district court's interpretation of *Yamaha* is mistaken.

*Id.* at 1424.

The Eleventh Circuit Court of Appeals, in "Sunset Limited", concluded that Yamaha did not sanction the wholesale displacement of General Maritime Law in non-seafarer/territorial waters wrongful death cases:

[T]he *Yamaha* Court, while aware that its decision would create, to some extent, unavoidable conflict between state law and federal maritime law, did not intend to wholly sacrifice long-standing admiralty principles at the altar of states' rights. To the contrary, in *Yamaha*, the Court confined its holding "to the modest question whether it was *Moragne's* design to terminate recourse to state remedies," *id.* at ---- n. 8 116 S.Ct. at 626, n. 8, but in answering that question in the negative, repeatedly urged that "[p]ermissible state regulation . . . must be consistent with federal maritime principles and policies," *id.* at ---- n. 13 166 S.Ct. at 628 n. 13 (citing *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 373-74, 79 S.Ct. 468, 480-81, 3 L.Ed.2d 368 (1959)), such that "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system," *id.* at ---- n. 8, 116 S.Ct. at 626 n. 8 (quoting *Romero*, 358 U.S. at 373, 79 S.Ct. at 480-81).

*Id.*

The "Sunset Limited" Court concluded that the Supreme Court was attempting to protect the state interests which were present in Yamaha, which the "Sunset Limited" Court observed was a products liability dispute which arose from a recreational boating

accident, and was not attempting to overrule "bedrock admiralty principles recognized in Southern Pacific Co. v. Jensen, 244 U.S. 215, 216, 37 S. Ct. 524, 529, 61 L.Ed. 1086 (1917) (hereinafter "Jensen"). In Jensen, the United States Supreme Court decided that state law is preempted in any case which conflicts with the General Maritime Law or interferes with the uniformity of maritime law in its "interstate relations." The "Sunset Limited" Court concluded Yamaha emphasized the principles of Jensen and "affirmed their continuing vitality." "Southern Limited", 121 F.3d at 1425.

In "Sunset Limited", the Eleventh Circuit Court of Appeals declined to apply the Alabama wrongful death statute and instead applied General Maritime Law. This decision was based upon the particular facts of that case, most importantly the commercial maritime nature of the case. *Id.*

Because courts are required to make a case-by-case decision of whether state wrongful death law impermissibly infringes on General Maritime Law, the connection of a case to commercial maritime operations is crucial. In this case, that connection is undeniable and should lead to the conclusion that very little, if any, infringement on principles of General Maritime Law can be allowed. In "Sunset Limited", the Eleventh Circuit Court of Appeals concluded that the nexus of the commercial maritime activity and the accident required that the case be decided, and the remedies be accorded, by the General Maritime Law. The ruling of the Court is instructive in this case:

Additionally, the facts of this case are so closely related to activity traditionally subject to admiralty law that the reasons for applying federal maritime law in this case are undeniably present. In sharp contrast to *Yamaha*, which was a products liability action arising from a recreational jet ski accident, the present action bears a substantial connection with traditional maritime activity. Here, we do not have a case involving a pleasure craft, or an airplane falling into navigable waters,

but a case involving an allision of a commercial tug and tow with a railroad bridge, that took place in the ordinary course of maritime business, on a waterway subject to heavy commercial traffic. Moreover, in contrast to the jet ski collision in *Yamaha*, the allision in our case substantially disrupted the flow of maritime commerce. Thus, the facts of this case, unlike those in *Yamaha*, give rise to federal maritime interests that are decidedly commercial in nature. Accordingly, the actors in this case are entitled to the application of a body of laws - maritime laws - that have been fitted over the years for just these type of situations.

*Id.* at 1426-27 (emphasis added).

Appellee's assertion that Barge Line Defendants argue that Yamaha is somehow incorrect is either a misunderstanding or misapprehension of Barge Line Defendants' arguments. Yamaha is correct, but it is limited to the issue of whether Moragne entirely prohibits the application of state wrongful death statutes. Yamaha does not require this Court to apply the state wrongful death statute where, as in this case, it conflicts with General Maritime Law. Indeed, as has been discussed, Yamaha requires that courts analyze the case, apply the facts of the case before them, and analyze the nature of the conflict between state law and General Maritime Law. In this case, Barge Line Defendants do not argue that the wrongful death statute of West Virginia is entirely preempted but simply argue that it is preempted to the extent that its interpretation by West Virginia courts strictly prohibits Barge Line Defendants' expert from testifying about the personal consumption offset to the claim for the decedent's future wage loss.

Appellee has also argued that only an Act of Congress may preempt state law in a maritime wrongful death case. This is not correct. The Eleventh Circuit Court of Appeals clearly knew that no Act of Congress was being asserted to preempt the

Alabama Wrongful Death Act in that case—yet it held that the General Maritime Law preempted that state's Wrongful Death Act.

Even the Yamaha Court agreed that the General Maritime Law does, given the appropriate circumstances, preempt state statutes. The Yamaha Court stated:

[I]n several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision, with no leeway for variation or supplementation by state law. See, e.g., *Kossick v. United Fruit Co.*, 365 U.S. 731, 742, 81 S.Ct. 886, 894, 6 L.Ed.2d 56 (1961) (federal maritime rule validating oral contracts precluding application of state Statute of Frauds); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409, 74 S.Ct. 202, 204-205, 98 L.Ed. 143 (1953) (admiralty's comparative negligence rule barred application of state contributory negligence rule); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 248-249, 63 S.Ct. 246, 252-253, 87 L.Ed. 239 (1942) (federal maritime rule allocating burden of proof displaced conflicting state rule).

Yamaha, 516 U.S. 199 at 210, 116 S. Ct. at 210. Thus, the issue whether an Act of Congress is involved is not dispositive, as Appellee argues.

Appellee has relied on several cases which are governed by the state wrongful death statutes which were decided before 1970 when Moragne created, for the first time, a General Maritime Law cause of action for wrongful death. These cases have no impact on the question before this Court. The Supreme Court, in The Harrisburg, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886), held there was no maritime law wrongful death action. The cases cited by Appellee<sup>4</sup> were all decided well before 1970, when there was no General Maritime Law cause of action for wrongful death, and were held to have supplemented, but not displaced, federal maritime law. There is no doubt that a

---

<sup>4</sup> See Western Fuel Co. v. Garcia, 257 U.S. 233, 42 S. Ct. 89, 66 L.Ed. 210 (1921); Just v. Chambers, 312 U.S. 383, 61 S. Ct. 687, 85 L.Ed.2d 903 (1941); and The M/V "Tungus" v. Skovgaard, 358 U.S. 588, 79 S. Ct. 503, 3 L.Ed.2d 524 (1959).

state's wrongful death statute may supplement General Maritime Law in a situation where the two do not conflict and that the nature of the conflict depends, to a large degree, on the need for uniformity in a particular factual situation—such as one which regulates maritime commerce. See "Sunset Limited", *supra.* and In re Diamond B Marine Services, Inc., 2002 WL 10460 (E.D.La. Jan. 2, 2002) (not reported in F. Supp.2d) (wrongful death case of non-seafarer resulting from commercial maritime operation in territorial waters was governed by pure unadulterated maritime law).

The Appellee has relied upon the case of The M/V "Tungus" v. Skovgaard, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524 (1959), to convince this Court that if any portion of a state's wrongful death act is applied in an admiralty case, the then entire act must be applied, *i.e.*, personal consumption proof should be excluded. This is clearly no longer the law. In Tungus, the court required that both liability and damage be governed by the state statute. Even the Appellee concedes that under the present law, the liability of the Barge Line Defendants must be governed by maritime law and he only argues that damages are governed by state law. The Appellee's argument in this regard is contradictory and simply wrong.

**C. WEST VIRGINIA LAW FORBIDS CONSIDERATION OF PERSONAL CONSUMPTION WHILE THE GENERAL MARITIME LAW REQUIRES THAT IT BE CONSIDERED; APPELLEE IS MISTAKEN WHEN HE ARGUES THERE IS NO CONFLICT**

Appellee contends that the issue of whether the expert economist for Barge Line Defendants may testify about the decedent's personal consumption presents no conflict between General Maritime Law and the interpretation of West Virginia's wrongful death statute. In fact, he contends that Barge Line Defendants misrepresented the law in saying so. Barge Line Defendants are at a loss to understand this position.

Barge Line Defendants cited numerous cases in their original brief to this Court in which courts in maritime wrongful death cases which allowed loss of future wages required the finder-of-fact to consider the decedent's personal consumption in calculating the plaintiff's damages. In Bubla v. Bradshaw, 795 F.2d 349 (4<sup>th</sup> Cir. 1987) (hereinafter "Bubla"), the Fourth Circuit Court of Appeals reversed in part and remanded a United States District Court decision in a wrongful death case of a workman who was neither a longshoreman nor a seaman and whose death occurred in territorial waters. The trial court failed to consider the decedent's rate of personal consumption and the damages portion the trial court's decision was remanded by the Fourth Circuit Court of Appeals expressly, in part, for the failure to do so. Bubla, 795 F.2d at 355. Although Appellee attempts to distinguish this and the other maritime cases which have been cited by Barge Line Defendants, clearly those distinctions are without merit.

Appellee complains that Bubla was decided before Yamaha. No doubt this is true, but it is a completely insignificant fact. The Yamaha decision would do nothing to change the outcome of Bubla, *i.e.*, that the Fourth Circuit Court of Appeals remanded to the District Court for its failure to consider personal consumption in computing future wage loss under the General Maritime Law.

Appellee also claims to be puzzled that Barge Line Defendants cited the maritime cases of Tiffany v. United States, 726 F. Supp. 129 (W.D.Va. 1989); Complaint of Connecticut Nat'l Bank, 928 F.2d 39 (2<sup>nd</sup> Cir. 1991); and Petition of United States Steel Corp., 479 F.2d 489 (6<sup>th</sup> Cir. 1973), which were considered by the West Virginia Supreme Court in Wehner, *supra*. The answer is simple; there is no puzzle. The West Virginia Supreme Court has already considered these three maritime cases and

acknowledged that the personal consumption offset is applied in maritime law. Appellee may not recognize the conflict between West Virginia's interpretation of its Wrongful Death Act and maritime law, but the West Virginia Supreme Court already identified that conflict in Wehner when they examined these cases. Barge Line Defendants simply argue that, in this commercial maritime case, state law should not be allowed to supersede General Maritime Law where the two conflict, and here the decedent's personal consumption should be considered. In this case, where the location of the decedent's death is unknown,<sup>5</sup> there is a particular need for the issue to be decided by maritime law which has developed over the years to address maritime issues.

Appellee has also argued that Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 75 S. Ct. 368, 99 L.Ed. 337 (1955) (hereinafter "Wilburn") supports his position. To the contrary, Wilburn simply states that if there is no rule recognized by the General Maritime Law on an issue and the matter does not require national uniformity, state law may be referred to. In this case, there is a rule recognized and carried out by courts construing the General Maritime Law and the need for uniformity for parties operating in many states is obvious.

Appellee also claims there is no conflict between state law and maritime law on this issue because no case has been cited saying that personal consumption "shall" be considered. Appellee further argues that it is his belief that in the maritime cases cited, judges may be importing concepts from state law into the General Maritime Law. Appellee apparently misunderstands the nature of the General Maritime Law in making these arguments. As the Yamaha Court observed, the General Maritime Law is just a "species of judge-made federal common law." Yamaha, 516 U.S. at 200, 116 S. Ct. at

---

<sup>5</sup> It is unclear whether decedent died in West Virginia or Ohio.

624. It is well recognized that no formal pronouncement of “shall” or “must” is required for a principle to be incorporated into the General Maritime Law—and indeed Appellee cites not a single precedent to support that position. In Grant Gilmore and Charles Black, Jr., The Law of Admiralty, (2d ed. 1975) (hereinafter “The Law of Admiralty”), one of the preeminent treatises on admiralty law in the United States, it is noted:

As was inevitable when the “maritime law” was placed in the hands of judges trained in the Anglo-American common law tradition, maritime law amongst us has been heavily influenced, substantively and methodologically, by shoreside law. Concepts sometimes visibly moved from one to the other without remark. In Petition of Kinsman Transit Co., [38 F.2d 708] for example, the celebrated “Palsgraf” doctrine is treated as fully applicable in admiralty. In Watz v. Zapata Offshore, [431 F.2d 100] land developed doctrines of liability of the remote vendor are applied in admiralty. And in the celebrated Moragne case, [398 U.S. 375 (1970)] the general maritime law wrongful death action is firmly bottomed on analogy with shoreside statutes.

The Law of Admiralty at pp. 46-47

Appellee’s argument that there is no conflict is simply without merit.

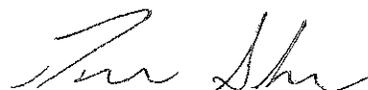
### CONCLUSION

Because this case, with respect to the Barge Line Defendants, is all about the acts and/or omissions of those charged with the operation of commercial vessels on a navigable highway and/or the acts of those who allegedly, without permission, have traveled upon those vessels for purposes which were not in furtherance of the interests of the vessel owners but, instead, for personal recreation, Barge Line Defendants have the right to have their actions and the remedies accorded those who claim to be harmed by their actions, decided in accordance with maritime law. The Yamaha decision does

not prevent the application of maritime law but, instead, assures that the interests of the states in their navigable waters are not disregarded because of Moragne.

For these reasons, it is respectfully requested that the Order of the Circuit Court of Cabell County forbidding Barge Line Defendants' economist from testifying about the decedent's personal consumption be reversed.

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) 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*

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 VAUGHAN

Appellee.

CERTIFICATE OF SERVICE

I, Robert H. Akers, one of the attorneys for Appellants, Ingram Barge Company, The Ohio Rive Company LLC and The Ohio River Terminals Company LLC hereby certify that on **May 14, 2008**, a true and correct copy of the foregoing "**Reply Brief of Appellants, Ingram Barge Company, The Ohio River Company LLC and The Ohio River Terminals Company LLC**" was served on the parties hereto by United States Mail, postage prepaid, addressed as follows:

Charles M. Hatcher, Jr., Esq.  
**Hatcher Law Office**  
636 Fifth Ave.  
Huntington, WV 25701  
*Counsel for Plaintiffs*

W. Joseph Bronosky, Esquire  
**Campbell, Woods, Bagley,  
Emerson, McNeer & Herndon, P.L.L.C.**  
Post Office Box 1835  
Huntington, WV 25719-1835  
*Counsel for the G.H.P.R.*



Robert H. Akers, Esquire (WV Bar #9622)