

33837

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

CARL WAYNE VAUGHEN, Individually
and as Administrator of the Estate of
RANDALL WAYNE VAUGHN,
and BARBARA VAUGHAN,

Plaintiffs,

v.

Civil Action No.: 05-C-767
Judge David M. Pancake

GREATER HUNTINGTON PARKS AND
RECREATION DISTRICT,
INGRAM BARGE COMPANY, and
OHIO RIVER TERMINALS,

Defendants.

AMENDED ORDER GRANTING PLAINTIFF'S MOTION IN LIMINE TO
THE ISSUE OF THE CLAIM OF DEFENDANTS INGRAM BARGE
COMPANY, THE OHIO RIVER COMPANY, LLC, AND
THE OHIO RIVER TERMINALS COMPANY, LLC, THAT
CONSUMPTION OFFSET APPLIES TO LOST EARNINGS DAMAGES IN
THIS STATE-FILED WRONGFUL DEATH ACTION

On the 26th day of April, 2007, came the parties, by Counsel, pursuant to
Plaintiff's Motion in *Limine*.

The Court, having reviewed Plaintiff's Motion and the Responses to the
Barge Line Defendants, does hereby find as a matter of fact and conclusion of law
as follows:

The United States Supreme Court decision in *Yamaha Motor Corporation vs.
Calhoun*, 516 U.S. 199 (1996) held that, "In maritime wrongful-death cases in
which no federal statute specifies the appropriate relief and the decedent was not

a seaman, longshore worker, or person otherwise engaged in maritime trade, state remedies remain applicable and have not been displaced by the wrongful death action recognized in *Morgane*." The decision in *Yamaha* has not been distinguished or overruled by subsequent case law. It is, therefore, the Court's conclusion that *Yamaha* does, in fact, control the issue at hand and the Plaintiff is entitled to seek state remedies in this wrongful death action. The West Virginia Supreme Court, in *Wehner v. Weinstein*, 444 SE2d 27 (1994), rejected the use of a consumption offset in calculating the reasonably expected loss of income of the decedent in a wrongful death action filed in this state.

Accordingly, it is ADJUDGED, ORDERED and DECREED that the Barge Line Defendants' economic expert shall not be allowed to use the personal consumption offset in his calculations of the Plaintiff's lost future earnings. However, the Barge Line Defendants' expert is otherwise permitted, and should be allowed, to testify as to the Plaintiff's future earnings. The previous order entered on May 30, 2007, is hereby amended, *nunc pro tunc*, to reflect that the Court expressly finds that final judgment is entered on this claim pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure, and under West Virginia Code Section 58-5-1. The Court further finds that there is no just reason for delay. Therefore this is a final and appealable Order of this Court as to this issue.

The Clerk is directed to file this Order accordingly and to forward copies of such Order to counsel of record at the following addresses:

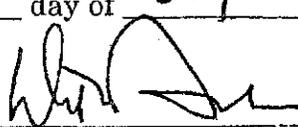
Michael M. Fisher, Esq.
Robert H. Akers, Esq.
Offutt, Fisher and Nord
P.O. Box 2833
Charleston, WV 25330-2833

E. Spivey Gault, Esq.
Carl J. Marshall, Esq.
Gault, Marshall & Miller, PLLC
P.O. Box 30
Paducah, KY 42002-0030

Charles M. Hatcher, Jr., Esq.
Hatcher Law Office
636 Fifth Ave.
Huntington, WV 25701

R. Carter Elkins, Esq.
Laura L. Gray, Esq.
W. Joseph Bronosky, Esq.
**Campbell, Woods, Bagley,
Emerson, McNeer & Herndon, P.L.L.C.**
P.O. Box 1835
Huntington, WV 25719-1835

ENTERED: this the 19th day of July, 2007.



Honorable David M. Pancake

JUL 19 2007

JUL 19 2007

PREPARED FOR ENTRY BY:



Michael M. Fisher, Esquire (WV Bar No. 4353)

Robert H. Akers, Esquire (WV Bar No. 9622)

Offutt, Fisher & Nord

812 Quarrier Street, Suite 600

Post Office Box 2833

Charleston, West Virginia 25330

and

E. Spivey Gault, Esq.

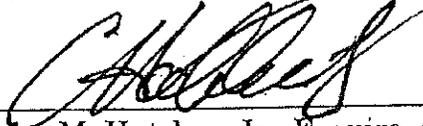
Carl J. Marshall, Esq.

Gault, Marshall & Miller, PLLC

P.O. Box 30

Paducah, KY 42002-0030

REVIEWED AND APPROVED BY:

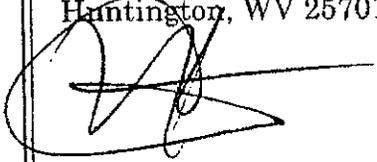


Charles M. Hatcher, Jr., Esquire (WV Bar No. 1633)

Hatcher Law Office

636 Fifth Ave.

Huntington, WV 25701



R. Carter Elkins, Esquire (WV Bar No. 1116)

Laura L. Gray, Esquire (WV Bar No. 5240)

W. Joseph Bronosky, Esquire (WV Bar No. 6051)

Campbell, Woods, Bagley,

Emerson, McNeer & Herndon, P.L.L.C.

P.O. Box 1835

Huntington, WV 25719-1835