

**IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA**

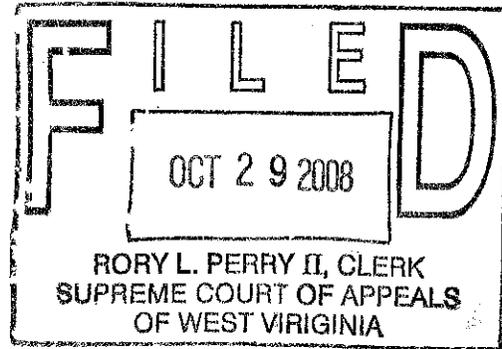
No. 34327

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

Plaintiff Below,
Appellee Herein,

v.

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



Defendants Below,
Appellants Herein.

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

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MEMORANDUM OF PARTIES

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KIND OF PROCEEDING AND NATURE OF RULING BELOW

This Appeal to the Supreme Court of Appeals of West Virginia is taken from an Order of the Circuit Court of Cabell County, West Virginia, Judge David M. Pancake presiding, granting Appellee-Plaintiff's¹ Motion for Partial Summary Judgment, striking the Appellants-Defendants² potential defense of immunity under the West Virginia Recreational Immunity Statute, W. Va. Code §§ 19-25-1, *et seq.*, (hereafter the "Circuit Court Order"). In the Circuit Court Order³, the Circuit Court held that:

The Court finds that the Barge Line Defendants did not hold out their real or personal property for recreational use and that, therefore, W. Va. Code §19-25-2, *et seq.*, does not shield the Barge Line Defendants in this case.

The Barge Line Defendants file this Appeal seeking reversal of the Circuit Court Order and remand to the Circuit Court of Cabell County because there are disputed issues of material fact and the interpretation of the statute was erroneous in terms of requiring a "holding out" and overly narrow in terms of the stated public policy purpose of the statute.

STATEMENT OF FACTS

On May 21, 2004, workers at the 27th Street Public Park in Huntington, WV (hereafter the "27th Street Park") found two bicycles and some boys' clothing on the riverbank of the Ohio River a short distance upstream from the "Fleeting Area"⁴ or barge mooring location where several commercial inland river barges were tied off. It was

¹ Carl Wayne Vaughan, as Administrator of the Estate of Randall Wayne Vaughan (hereafter "Mr. Vaughan").

² Ingram Barge Company (hereafter "Ingram"); the Ohio River Terminals Company LLC (hereafter the "Ohio River Terminals"); and the Ohio River Company LLC (hereafter the "Ohio River Company" and, collectively with Ingram and the Ohio River Terminals, the "Barge Line Defendants").

³ Entered while discovery was ongoing.

⁴ A fleeting area is a location on the river where permanent mooring devices are buried in the riverbank which are used to secure barges that are, in this case, waiting to be loaded with cargo.

subsequently determined that the clothing belonged to Randall Wayne Vaughan (age 14) and Justin Smoot (age 15). Following an extended search on the river, the bodies of each were recovered in different locations, approximately 8 miles downriver from the Fleeting Area. No one saw what happened to either or where they drowned. These facts are undisputed.

Mr. Vaughan was appointed administrator of the estate and, as the administrator, filed a Complaint in the Circuit Court of Cabell County, West Virginia. Ultimately named as defendants in Mr. Vaughan's suit were the Greater Huntington Park and Recreational District (hereafter the "GHPRD"), the owner and operator of the 27th Street Park; Ingram, the owner of the barge F-14002 (hereafter the "Barge F-14002") which was chartered or leased to the Ohio River Terminals and being used as a mooring location for other barges;⁵ the Ohio River Terminals, the operator of the Fleeting Area and the operator of a barge loading facility downriver from the Fleeting Area; and the Ohio River Company, the owner of the fleeting (or "riparian") and other rights.

Mr. Vaughan, in his Complaint, alleged, *inter alia*, that the Barge F-14002 was a dangerous instrumentality that attracts and invites children for use for swimming and diving; that the Barge F-14002 created a dangerous condition; that the Barge Line Defendants failed to exercise reasonable care to warn the "invitees" of the 27th Street Park about known dangers; and that the Barge Line Defendants "invited the public, including children, onto and to use the barge" and that "by its [the Barge F-14002's] placement on the park premises, the barge became part and parcel of the park and invited children on or around it." Additionally, Mr. Vaughan's Complaint alleged that

⁵ The Barge F-14002 was more or less permanently attached to the bank using concrete structures placed on the riverbank with chains running from the concrete structures out toward the river and attached to the barge.

Justin Smoot and Randall Wayne Vaughan, as invitees, "swam around and jumped off or dove off Barge F-14002 or other barges tied thereto and, as a result, were drawn under the barges and drowned."

A. Property Transferred to GHPRD

On December 1, 1993, the Ohio River Company owned a parcel of land (hereafter the "Property") which was located on the left descending shore of the Ohio River in Huntington, West Virginia.⁶ The Ohio River Company and/or its affiliates used the Property as a barge mooring or "fleeting" area (hereafter the "Fleeting Area"). Barges which were afloat on the Ohio River were moored to the shore at this location. Those barges were destined to be loaded at the Ohio River Terminals' facility and were kept at the Fleeting Area while they were in-between delivery and loading.⁷ The Ohio River Company secured a United States Army Corps of Engineers (hereafter the "COE") fleet permit, as required by law, for this Fleeting Area.⁸ The Fleet Permit regulated the location, size, and mooring structures of the Fleeting Area.

In 1993, the GHPRD asked the Ohio River Company to donate the property to the GHPRD so a small park (*i.e.*, the 27th Street Park), which was located adjacent to the Property, could be expanded to provide recreation for the people of Huntington, West Virginia.⁹

⁶ See Deed attached as Exhibit 2 to Response to Plaintiff's Motion for Partial Summary Judgment on the Issue of the Claim of the Defendants Ingram Barge Company, The Ohio River Company LLC and The Ohio River Terminals Company, LLC, that the West Virginia Recreational Immunity Statute Applies to the Facts of the Case (hereafter the "Deed").

⁷ See Answer to Second Amended Complaint, Paragraphs 4 and 12.

⁸ See the United States Army Corps of Engineers Fleet Permit (hereafter the "Fleet Permit") attached as an Exhibit to Defendant's Response to Plaintiff's Motion in Limine to Preclude Evidence of Personal Consumption.

⁹ See Deed and Answer to Second Amended Complaint, Paragraph 5.

On December 1, 1993, the Ohio River Company, by way of a Special Warranty Deed (hereinafter the "Special Warranty Deed"), donated the Property to GHPRD for use by the public for recreation, but the Ohio River Company retained significant property rights which were needed to continue the operation of the fleet. The Ohio River Company retained, among other things, its rights to use, maintain, and construct additional mooring structures and the ability to continue to use the Property to moor or dock its fleet without interference from the GHPRD and, presumably, its patrons.

The Special Warranty Deed provides that the land was conveyed only "for so long as said property is used as a public park and recreation area."

Further, there was reserved from this conveyance "all riparian rights appertaining or anywise belonging to said property" as well as:

. . . [A]n easement and right of way . . . across the Property, at such location as the Grantor [the Ohio River Company] and Grantee [the GHPRD] may agree, for purposes of pedestrian ingress and egress to and from the Ohio River and river bank for fishing, together with an easement along 300 lineal feet of river frontage adjacent to said ten foot access easement to allow fishing along said river frontage. . .

Further, excepted and reserved from the conveyance was a series of rights which were required to allow the continued question of the Grantor's business:

. . . the use of all existing mooring structures situate on the Property, together with the right to erect, construct and use such additional mooring structures and privileges as the Grantor may in its discretion desire, and Grantor shall have peaceable enjoyment in connection therewith.

. . . such rights of way and easements in and across the Property as Grantor may deem necessary or desirable in the connection with the use of existing mooring structures on the Property or the construction or use of mooring structures

which may hereinafter be established by Grantor upon the property.

In consideration of the grant of the Property, . . . [GHPRD] shall not cause or permit the Property to be used in such a manner as will interfere with the use or operation by the Grantor of its adjacent property or the Grantor's exercise of riparian, mooring and other rights reserved herein. This covenant shall run with the Property and be binding upon the Grantee, its successors and assigns.

In consideration of the grant of the Property, Grantee does hereby grant and convey unto Grantor such riparian rights and easements as may be necessary to permit the Grantor, its successors and assigns to moor and dock its fleet, and to conduct its fleet operation in and along the river frontage adjacent to that certain parcel of property presently owned by Grantee

Further, the deed provided that,

It is agreed between the parties hereto that if the Property shall ceased [*sic*] to be used for the purposes of a public park and recreation area for a period of six months, then, and in that event, the title to the Property shall revert to the Grantor, its successors and assigns.

Although dated December 1, 1993, this Special Warranty Deed was not recorded until 2:43 p.m. on February 4, 2000, in the Office of the Clerk of Cabell County, West Virginia, at Deed Book 1059 Page 470.

B. Mitigation Agreement

At about the same time, the Ohio River Company decided to move its Fleeting Area a short distance downriver, but still adjacent to the Property, and was required to obtain both a new (*i.e.*, amended) COE permit (hereafter the "Amended Fleet Permit") and the permission of the Public Lands Corporation.^{10,11} Both agencies gave their

¹⁰ See Mitigation Agreement (D-1297 through D-1300) attached as Exhibit 3 to Response to Plaintiff's Motion for Partial Summary Judgment.

permission to move the fleet but the Public Lands Corporation required the Ohio River Company to execute a Mitigation Agreement.¹² The Mitigation Agreement required the Ohio River Company to donate approximately 12 acres near 27th Street “. . . for use exclusively as a public park . . .” and required the Ohio River Company to reserve an easement in its deed to the GHPRD for use of the public for fishing. The Mitigation Agreement states:

The [Ohio River] Company shall convey by deed a riverfront parcel containing approximately 12 acres near 27th Street in the City of Huntington (the “Park Property”), to the Greater Huntington Park and Recreation District (the “Park District”) for use exclusively as a public park and recreation area. In connection therewith, the Company will reserve for its own use all riparian rights and various easements to permit the Company to use the river and riverbank to moor barges and conduct the company’s fleet operations on the water adjacent to the park property. The Company agrees to further reserve in the deed of the park property to the Park District: (a) a ten-foot (10’) easement for the use and benefit of the general public across the park property to allow pedestrian ingress and egress to and from the river for public fishing, and (b) the right to allow public fishing on three hundred (300) lineal feet river frontage adjacent to the ten-foot (10’) easement.

See Mitigation Agreement, Paragraph 2.

The State of West Virginia stipulated in the Mitigation Agreement that the Ohio River Company’s liability connected with the Park Property¹³ shall be limited by §§ 19-25-1, *et seq*:

¹¹ The Public Lands Corporation is a body of the West Virginia State government which protects and oversees the title to areas, such as the beds of navigable waters in West Virginia, and assures the protection of these public lands. (W.Va. Code §20-1a-1).

¹² See Mitigation Agreement, *id*.

¹³ Presumably, this stipulation regarding liability in the Mitigation Agreement would also apply to the Ohio River Terminal’s operating the Fleeting Area, given the broad nature of the definition of “landowner” in W. Va. Code §§19-25-1, *et seq.*, as including, but not limited to, occupant or person in control of premises.

The [Ohio River] Company's liability for injury or damage to persons or property utilizing the subject area is limited by Chapter 19, Article 25, "Limiting Liability of Landowners," of the Official Code of West Virginia, 1931 as amended. A copy of said article is attached hereto and hereby made a part of this Agreement.

See Mitigation Agreement, Paragraph 3.

C. Fleet Operations and Alleged Invitation

In 2004, the Ohio River Terminals operated the barge Fleeting Area adjacent to the Park Property, pursuant to the rights retained in the Special Warranty Deed executed 11 years earlier between the Ohio River Company and the GHPRD.¹⁴ The Barge F-14002, a mooring barge which was owned by Ingram,¹⁵ was moored to the bank in accordance with the COE permit for that fleet.¹⁶ The Barge F-14002 had been chartered¹⁷ by Ingram to its affiliated company and the operator of the fleet, the Ohio River Terminals. The mooring barge was attached to large anchors, to serve as a mooring point for empty barges. The empty barges were dropped off at the Fleeting Area by large towing vessels where those empty barges would await movement by a small harbor tug to the terminal for loading.

Mr. Vaughan alleges in his Complaint that,

. . . [B]y allowing placement of the barge in the riverbank in the Park and by maintaining the premises in or around the barge, GHPRD [Greater Huntington Park and Recreation District], Ingram, and the Ohio River Company invited the public, including children, onto and to use the barge. **By its placement on the Park premises, the barge became part and parcel of the Park and invited children on or around it.**

¹⁴ See Answer to Second Amended Complaint, Paragraphs 4, 11 and 12.

¹⁵ See Answer of Ingram Barge Company to Paragraph 3 of Second Amended Complaint.

¹⁶ See diagram attached to Fleet Permit.

¹⁷ A charter is a maritime vessel lease.

Plaintiff's Amended Complaint, Paragraph 26 (emphasis added).

Mr. Vaughan further alleges in his Complaint that:

... [O]n the morning of May 21, 2004, Justin Smoot, age 15, and Randall Wayne Vaughn, age 14, as invitees without knowledge of the danger, entered upon the property of GHPRD, Ingram, and the Ohio River Company, ventured upon, swam around and jumped or dove off of Barge F-14002 or other barges tied thereto and, as a result, were drawn under the barges and drowned.

Plaintiff's Amended Complaint, Paragraph 27.

Mr. Vaughan has tendered Interrogatory Answers which state facts, he contended, supported his allegation that Randall Wayne Vaughan was given express and implied permission by the Barge Line Defendants to use the barges and their moorings for recreational purposes. The facts included the access to the barges by their moorings, the location of the Fleet near or on a Park, the presence of trees which allegedly could provide access to the barges and the alleged failure of the Barge Line Defendants to restrict access by the public. Although Mr. Vaughan's Interrogatory Answers and the facts they allege are discussed in much greater detail later in this Brief, one short passage summary will illustrate the factual dispute they create: "The children and their guests were given implied permission to continue their park ventures on the chains, ropes, and trees and the barge."

Although the Barge Line Defendants maintain that they did not tender the barges in the fleet, or the mooring devices which attach the barges to the fleet, to any member of the public for recreational use, Mr. Vaughan's claims are based upon the factual allegations and the theories quoted above. As will be discussed in greater detail below, Mr. Vaughan has consistently alleged that Randall Wayne Vaughn was given a direct or

indirect permission or invitation from the Barge Line Defendants to climb on and jump from the barges and the mooring facilities.¹⁸

ASSIGNMENTS OF ERROR

- 1. The Circuit Court erred when it improperly found that there exists no genuine issue of material fact and ruled that the Barge Line Defendants are not entitled to the protection afforded by W. Va. Code §§ 19-25-1, et seq.**
- 2. The Circuit Court erred when it granted partial summary judgment, stripping the Barge Line Defendants of the opportunity to defend themselves at trial by asserting the defense which the State of West Virginia stated they were entitled to under W. Va. Code §§ 19-25-1, et seq.**
- 3. The Circuit Court erred when it improperly and precipitously granted summary judgment prior to the close of discovery.**

STANDARD OF REVIEW

This Appeal arises out of the Circuit Court's grant of Mr. Vaughan's Motion for Partial Summary Judgment based upon the Circuit Court's interpretation of W.Va. Code §§ 19-25-1, et seq. Specifically, the Circuit Court improperly interpreted the statute and ruled that the Barge Line Defendants are not entitled to the protection of W.Va. Code §§ 19-25-1, et seq. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review."¹⁹

In addition to the misinterpretation and misapplication of the statute, the Circuit Court of Cabell County improperly and precipitously granted Mr. Vaughan's Motion for

¹⁸ See Plaintiff Vaughan's Answers to Interrogatories of Ingram Barge Company and the Ohio River Terminals Company, LLC Directed to Plaintiff, filed November 21, 2006.

¹⁹ See Syllabus point 2, Roberts v. Consol. Coal Co., 208 W. Va. 218, 222-23, 539 S.E.2d 478, 482-83 (2000), quoting Syllabus point 1, Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995).

Partial Summary Judgment. It is well established that “[a] circuit court’s entry of summary judgment is reviewed *de novo*.”²⁰

For all issues presented in this Appeal, this Court is to review the ruling of the Circuit Court of Cabell County *de novo*.

STATEMENT OF ARGUMENT

W. Va. Code §§ 19-25-1, *et seq.*, is designed to shield property owners who make their property available for public recreation from liability, yet the Circuit Court in this case stripped the Barge Line Defendants of this defense before they had the chance to complete discovery and to submit the question to a jury. Mr. Vaughan in his pleadings and sworn Interrogatory Answers alleged facts which support and state the conclusion that Randall Wayne Vaughan had both express and implied permission to use the barges and moorings for recreation. If the Circuit Court had recognized all facts and adopted all inferences in favor of the non-movant, as required, there should have been no question that one or more genuine issues of material fact existed, upon which the Motion for Partial Summary Judgment should have failed.

The Circuit Court’s narrow interpretation of W. Va. Code §§ 19-25-1, *et seq.*, also has a chilling effect on landowners who would donate land for public use and wished to retain ownership rights in the donated property or to continue their business on land adjacent to the donated property. This is against public policy and the unambiguous intent of W. Va. Code §§ 19-25-1, *et seq.*

The Mitigation Agreement between the State of West Virginia’s Public Lands Corporation and the Ohio River Company stipulated that after the land was deeded to

²⁰ See Syllabus point 1, Drake v. Snider, 216 W. Va. 574, 575, 608 S.E.2d 191, 192 (2004), quoting Syllabus point 1, Painter v. Peavy, 192 W. Va. 189, 51 S.E.2d 755 (1994).

the GHRPD and the easement was incorporated in the Special Warranty Deed, the liability of the Ohio River Company for personal and/or property damage on the Property would be governed by W. Va. Code §19-25-1, *et seq.* The Ohio River Company reserved the right to operate the barge fleet, to own the riparian rights, and to own all rights to use the riverbank. The Ohio River Terminals operated the fleet and Ingram owned the fleet barge in furtherance of fleet operations adjacent to the Park Property. The Mitigation Agreement extends the protection of W. Va. Code §§ 19-25-1, *et seq.*, against anyone using the Property.

The Circuit Court's decision also creates a conflict between the common law Dangerous Instrumentality Doctrine and W. Va. Code §§ 19-25-1, *et seq.*, by adopting characterization of Mr. Vaughan's Interrogatory Answers which he crafted in order to end run the genuine dispute of material fact they create. The Dangerous Instrumentality Doctrine is not applicable in this case—where Randall Wayne Vaughan was 14 years of age and the Circuit Court had already ruled he was presumed to be capable of contributory negligence. However, Mr. Vaughan continues to put forth the Dangerous Instrumentality argument as his principal theory of liability against the Barge Line Defendants. The West Virginia legislature in § 19-25-1 has made no exception in its liability shield for the "Dangerous Instrumentality" Doctrine and for this reason Mr. Vaughan's characterization of his Interrogatory Answers is meaningless. If the "Dangerous Instrumentality" Doctrine creates an exception to the Recreational Immunity Statute, then, to a great extent, these statutes are rendered ineffective and the intent of the legislature in §§ 19-25-1, *et seq.*, will be ignored.

ARGUMENT

A. There Exist Genuine Issues of Material Fact and Mr. Vaughan is Not Entitled to Summary Judgment on the Issue at Bar.

There exists a genuine issue of material fact in the case which prevents the Circuit Court from granting Mr. Vaughan's Motion for Partial Summary Judgment with regard to the application of W. Va. Code §§ 19-25-1, *et seq.*, to this case.

The Circuit Court incorrectly framed the question as: "whether the barge was held out to the public for recreational purposes."²¹ The Circuit Court's ruling relied upon "deposition testimony of the Barge Line Defendant's terminal manager, Otis Adkins, and assistant manager Randy Workman; the posted no trespassing signs and the calls to police to remove people in the vicinity of the barge."²² At the same time, the Circuit Court simply chose to disregard the factual information in Mr. Vaughan's own Interrogatory Answers and found that "Plaintiff's [Mr. Vaughan's] Motion is based on this undisputed evidence. It is not based on an answer to an interrogatory that was perhaps inartfully worded."²³

The correct material factual issue is whether the Barge Line Defendants "directly or indirectly invite[d] or permit[ted], without charge, any person to use such property for recreational purposes . . ."²⁴ As is discussed in more detail below, Mr. Vaughan argues that the Barge Line Defendants had knowledge that children were using a moored barge to climb upon and dive in the river. Mr. Vaughan's argument is that the Barge Line Defendants permitted, without charge, people to use the moored barge and its mooring chains and cables for recreational purposes. Mr. Vaughan's theory in this

²¹ See Transcript of June 14, 2007 hearing at page 8, a copy of which is attached hereto as Exhibit A.

²² *Id.* at page 11.

²³ *Id.*

²⁴ See W. Va. Code §19-25-2.

regard is also evident by his reliance on the "Dangerous Instrumentality" Doctrine as a theory of liability.

Looking at the pleadings filed in this case and the discovery answers served by Mr. Vaughan, it is clear that a genuine issue of material fact exists as to whether the Barge Line Defendants are entitled to the protection afforded by W. Va. Code §§ 19-25-1, *et seq.* This question of fact precludes summary judgment and must be resolved at trial.

Mr. Vaughan states that:

. . . [By] allowing placement of the barge in the riverbank in the Park and by maintaining the premises in or around the barge, [the Barge Line Defendants] ***invited*** the ***public***, including children, onto and to use the barge. ***By its placement on the Park premises, the barge became part and parcel of the Park and invited children on or around it.***

Plaintiff's Amended Complaint, Paragraph 26. (Emphasis added.)

Mr. Vaughan has proceeded on this theory throughout the development of this case. **Yet, Mr. Vaughan has not stipulated that if the decedent ventured onto the barges, he did so as a trespasser.** On November 21, 2006, Mr. Vaughan filed Verified Answers to the Interrogatories of Ingram and the Ohio River Terminals which contend, and which cite "facts" which purportedly support the contention, that Randall Wayne Vaughn boarded the barges for recreational purposes with the express or implied permission of the Barge Line Defendants.

The Barge Line Defendants' Interrogatory No. 7 states: "Please identify any information in your possession indicating that the decedent [Randall Wayne Vaughan], at any time, ever obtained permission from Ingram Barge Company and/or The Ohio

River Terminals Company LLC to climb, walk, sit, dive or jump from the barge.”

Mr. Vaughan's Verified Answer to this Interrogatory was as follows:

[Randall Wayne] Vaughan had express and implied permission from Ingram Barge Company and/or The Ohio River Terminals Company to climb, walk, sit, dive or jump from the Barge.

a. Express Permission

The Ohio River Company and or the Ohio River Terminals Company expressly and affirmatively invited the public, by way of a 10 foot right of way, to come from the 27th Street Park to the Ohio River bank and into the Ohio River. This invitation is contained in the Corrective/Confirmatory Deed filed in the Cabell County Clerk's Office on February 16, 2000.

While the Ohio River Company and Ohio River Terminals Company's deeds only expressly invited the public to fish, it was/is reasonably foreseeable that the public would/will make other uses of the 300 foot easement associated with the invitation, i.e., swimming, camping, playing, tree climbing, rope swinging, and climbing aboard the barges, especially since it is immediately next to a public park. The companies failed to advise, warn, restrict, prohibit and police the pedestrians from the other uses.

b. Implied Permission

The GHPRD 27th Street Park has a parking lot on the east side. To the east of the parking lot are tennis and basketball courts. A sign identifying GHPRD as the owner of the park is posted on the tennis court's fence. The sign does not advise the public that any parts of the land, rivers edge, or water is off limits or that a person would be trespassing and or may incur serious injury or death by venturing past a particular point.

On the day of the decedent's [Randall Wayne Vaughan's] death, there were two (2) rope swings hanging from the trees near the Ohio River bank. The swings were made from industrial barge ropes. It is believed that rope swings have hung in the trees in that area for years. The trees are located on the property owned either by the Ohio River

Company and the Ohio River Terminals Company or the GHPRD. The location of the tree swing results in a person swinging out and landing in the Ohio River just a short distance upriver from the bow of Barge F-14002. The swing is an invitation to the park's visitors to venture to the riverbank, play on the swing and jump in the river just a few feet in front of the bow of Barge F-14002.

On the day of the decedent's death there was a large anchor chain present. The anchor chain is anchored to the ground by a deadman, runs to the barge, and is tied to the deck of the barge. It is made of smooth, thick and round iron links, which are large enough to walk on. The anchor chain is in plain view and within the play area of the park. The anchor chain was easily accessible to the children and guests using the Park. It was reasonably foreseeable that the children and guests using the Park would utilize the anchor chain as "monkey bars" and/or a means of accessing the barge. This created an implied invitation to the park's children and guests to climb aboard the barge. Upon information and belief, the anchor chain was the usual way the kids boarded Barge F-14002. To access the barge via the anchor chain, the children or adults would walk in a squatting stance, steadying themselves with their hand, across the anchor chain. Upon information and belief, gaining access to Barge F-14002 via the anchor chain took about 60 seconds.

On the day of the decedent's death there was an industrial barge rope, which was hanging off of the south side of Barge F-14002. It is believed that it was not uncommon for the barge ropes to dangle off the side of Barge F-14002 and into the Ohio River near the river's edge. On the day of the decedent's death, Barge F-14002 was located approximately two feet from the riverbank. The industrial barge rope was draped next to the sandy and muddy Ohio River bank. It is believed that the presence of the rope was at least one of the reasons that the decedent was attracted to the barge. It is believed that the rope was utilized by the decedent as a means of climbing aboard Barge F-14002.

There are oak trees in the Park, and which grow just feet from Barge F-14002. The area around these trees and Barge F-14002, is an area which is regularly traveled by the park's guests. This is readily apparent as the grass is worn down in areas, creating a foot path. In fact, this is the area where the decedents' [Randall Wayne Vaughan's and Justin

Smoot's] bicycles were found on the day of the decedent's death. The oak trees have low limbs, which are easily accessible to the park's children and guests. The limbs stretch out toward the Ohio River and right to the south side of Barge F-14002.

On the day of the decedent's death, Barge F-14002 was located approximately two feet from the water line. On that day, Stephanie Durst, in a frantic and desperate search for her son [Justin Smoot], easily boarded Barge F-14002. She boarded the barge by stepping on the branch of an oak tree, and within a few steps later, simply and easily stepped onto Barge F-14002. It is believed that Barge 14002 is regularly in this proximity to the riverbank. The trees limbs act as a means of access, a "cat-walk" or ladder, and are an invitation to climb aboard the barge.

Children are naturally curious and exploratory. Climbing on ropes, chains, and trees, exploring, playing "hide-and-go-seek", and swimming is typical child's play. It is reasonable to foresee that a child's curiosity might cause the child to want to venture aboard a big boat like Barge F-14002. The Ohio River Company and the Ohio River Terminals Company failed to prevent access to the barge, so as to curtail the children's tendencies to explore. The location of the barge in the Park, together with the failure of the Defendants to prevent access to the barge, created a situation where the park guests would not be able to distinguish between the recreational uses associated with the Park and the operations of the barge. The children and guests were given implied permission to continue their Park ventures on to the chains, ropes and trees, and the barge.

Importantly, to date, Mr. Vaughan has not withdrawn his Answer to Interrogatory No. 7, thereby, alleging under oath, that the public has express and implied permission to use the barges and/or the mooring structures for recreational purposes.

Mr. Vaughan's counsel's reply is that the Barge Line Defendants misunderstand Mr. Vaughan's answer. What Mr. Vaughan's Answer to the Interrogatory says is that children were drawn to this dangerous condition out of curiosity and pleasure. Although it is not called such in West Virginia, the theory is that the mooring barge, based upon

its location, is an Attractive Nuisance. The characteristics of the barge invite children, out of curiosity, to use the barge to swim around and dive from, not that the Barge Line Defendants hold out and offer the barge as a facility to dive from and swim around.²⁵

Although Mr. Vaughan's counsel would like to explain away Mr. Vaughan's sworn Answers, there has been absolutely no effort to withdraw these sworn Answers.

Mr. Vaughan himself has created this question of fact, to wit: Is the public either explicitly or implicitly invited to use the barge for recreational purposes? Mr. Vaughan bases his entire theory of liability on the premise that the Barge Line Defendants, by the actions in supposedly allowing access to the moorings and the barges, have explicitly or impliedly invited or permitted the public to use the Fleeting Area for recreation. The Barge Line Defendants deny this allegation and assert that Randall Wayne Vaughn was a trespasser.

Mr. Vaughan claimed that the court should not have found against him on summary judgment even though he lists a great number of facts which he at one time argued, supported the allegation that the decedent had express or implied permission to venture onto the barges. He now argues this was merely a "dangerous instrumentality" argument and the Court accepted this story. However, the Barge Line Defendants are the non-movants and the court, in reviewing the motion for summary judgment, was bound to consider all facts and inferences in a light most favorable to the non-movant. Matsushita Elec. Indus. Corp., 475 U.S.574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538, 553 (1986). For this reason, although Mr. Vaughan may argue these facts support

²⁵ See Plaintiff's Reply to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment on the Issue of the Claim of Defendants Ingram Barge Company, the Ohio River Company, LLC and The Ohio River Terminals Company, LLC, that the West Virginia Recreational Immunity Statute Applies to the Facts of this Case, filed June 7, 2007.

a dangerous instrumentality theory, he cannot obtain summary judgment on that argument.

Mr. Vaughan's counsel attempts to extricate himself from this factual question by merely re-characterizing Mr. Vaughan's sworn Answers to Interrogatories. Mr. Vaughan's quandary is this: If he stands by his sworn Answers to Interrogatories, then the Barge Line Defendants are entitled to the protection afforded by W. Va. Code §§ 19-25-1, *et seq.* If he alters his sworn Answers to Interrogatories, then Randall Wayne Vaughan was a trespasser to which no duty of care is owed by the Barge Line Defendants. So, Mr. Vaughan is left with attempting to side step and re-characterize his sworn Answers to Interrogatories. Unfortunately, the Circuit Court gave credence to the characterization to the exclusion of the sworn Answers.

The Circuit Court erred in not considering Mr. Vaughan's sworn Answers to Interrogatories and, instead, accepting this re-characterization offered by Mr. Vaughan's counsel. These sworn Answers, and the inferences which arise from them, must be accepted by the Circuit Court in considering the non-movant Barge Line Defendants' response to Mr. Vaughan's Motion for Partial Summary Judgment.

In finding that there was no question of fact, the only other thing the Circuit Court considered was the testimony of the employees of the Barge Line Defendants. The testimony of the Barge Line Defendants' employees does nothing more than confirm the position which has been taken by the Barge Line Defendants: If Randall Wayne Vaughan and Justin Smoot were on the barge prior to their deaths, they did not have permission to be there. However, as discussed above, it is Mr. Vaughan's contention

through his Amended Complaint and sworn Answers to Interrogatories that Randall Wayne Vaughan was invited or permitted to use the large fleet for swimming.

If Mr. Vaughan intends to submit testimony at trial which would lead a jury to conclude that Randall Wayne Vaughan had express or implied permission from the Barge Line Defendants to use the barges and or their mooring chains and cables for swimming or diving—as would seem apparent from Mr. Vaughan’s Interrogatory Answers—how can he not have created a question of fact which precludes summary judgment on this issue?

The Circuit Court must look at the record as a whole when determining whether to grant summary judgment. It must not ignore sworn statements that are contained in the record which create questions of fact. It is well established that “[s]ummary judgment is appropriate **where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, . . .**” Shaffer v. Acme Limestone Co., Inc., 206 W.Va. 333, 339, 524 S.E.2d 688, 694 (1999) *citing* Syllabus point 4, Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755, (1994). (Emphasis added.)

This Court has instructed that “[i]nsofar as ‘appellate review of an entry of summary judgment is plenary, this Court, like the circuit court, must view the entire record in the light most hospitable to the party opposing summary judgment, indulging all reasonable inferences in that party’s favor.” Wilson v. Daily Gazette Co., 214 W. Va. 208, 213, 588 S.E.2d 197, 202 (2003), *citing* Provident Life and Accident Ins. Co. v. Bennett, 199 W. Va. 236, 238, 483 S.E.2d 819, 821 (1997), *quoting* Asaad v. Res-Care, Inc., 197 W. Va. 684, 687, 478 S.E.2d 357, 360 (1996).

Not only must the Circuit Court look at the entirety of the record,

in assessing the record to determine whether there is a genuine issue as to any material facts, the circuit court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought. The inferences to be drawn from the underlying affidavits, exhibits, *answers to interrogatories*, and depositions must be viewed in the light most favorable to the party opposing the motion.

. . . . To be specific, if there is any evidence in the record from any source from which a reasonable inference can be drawn in favor of the nonmoving party, summary judgment is improper.

Hanlon v. Chamber, 195 W. Va. 99, 105, 464 S.E.2d 741, 747 (W. Va. 1995).

(Emphasis added.)

In short, in the case at bar the Circuit Court is required to look at the entirety of the record, including Answers to Interrogatories, and draw all factual inferences in favor of the Barge Line Defendants as the nonmoving parties to Mr. Vaughan's Motion for Partial Summary Judgment.

However, in the case at bar, the Circuit Court acknowledged that its ruling was "not based on an answer to an interrogatory that was perhaps inartfully worded" even though it is Mr. Vaughan's sworn Interrogatory Answer which creates the question of fact.

All of the evidence in the record which tends to answer this question must be considered. When it is, there is but one conclusion. The answer differs depending upon whose evidence you believe. The Barge Line Defendants assert through their theories of defense that there was no invitation to use the barge for recreational purposes and that Randall Wayne Vaughan was a trespasser to whom they owed no

duty of care. Mr. Vaughan asserts that there was both implicit and explicit permission for Randall Wayne Vaughan to use the barge for recreational purposes.

On its face, these two diametrically opposed positions of the parties create a genuine issue of material fact. The only basis for the Circuit Court's finding that there was no question of fact was Mr. Vaughan's counsel's re-characterization of Mr. Vaughan's "inartfully worded" sworn Answers to Interrogatories. The Circuit Court was, however, not required to determine the intent of the Answers to Interrogatories. Rather, had the Circuit Court simply considered the "facts" alleged by Mr. Vaughan - that the boys gained access to the barges by way of the moorings, which were located in the Park, that the barges were feet from the shore, that the Barge Line Defendants did not do enough to restrict access - and later, those in favor of the non-movant, then it is clear that summary judgment was inappropriate. Does anyone believe that Mr. Vaughan will not attempt to prove these very facts up at trial? Therefore, the Barge Line Defendants are entitled to present the defense available under W. Va. Code §§ 19-25-1, *et seq.*, to a jury.

B. The Circuit Court Implied Wording Into the Statutes When Summary Judgment Was Not Appropriate According to the Unambiguous Language of the Statute.

The sole basis for the Circuit Court's decision was that the Barge Line Defendants "did not hold out their real or personal property for recreational use and that, therefore, W. Va. Code §§ 19-25-2, *et seq.*, does not shield the Barge Line Defendants in this case." The Circuit Court's construction of the statute and its holding were erroneous because W. Va. Code §§ 19-25-2, *et seq.*, does not require a jury to decide whether the real or personal property was "held out," as the Circuit Court decided, but,

instead, to decide whether "an owner of land . . . either directly or indirectly invite[d] or permit[ed] without change . . . any person to use such property for recreational . . . purposes . . .". Webster's Dictionary defines the verb "holdout" as a synonym to "proffer", meaning to present for acceptance. Clearly the Court concluded there was no intent to present the real or personal property for recreation. The Barge Line Defendants agree, but that is not the question under the statute. The Circuit Court added a requirement to the Recreational Immunity Statute which does not exist in its text. Courts may not add terms to the plain wording of statutes.²⁶ The statute is unambiguous and need not be construed.²⁷ Rather, the Circuit Court should only have inquired as to whether, viewing the facts and inferences in a light most favorable to the non-movant Barge Line Defendants, any reasonable person could have concluded that a genuine issue exists whether the Barge Line Defendants directly or indirectly invited or permitted persons to use any of the real or personal property for recreation. Instead, the Circuit Court seems to have concluded that since the Barge Line Defendants did not hold out their Property (*i.e.*, they did not intentionally invite the public), they were not entitled to the protection of W. Va. Code §§ 19-25-1, *et seq.* The Barge Line Defendants agree they did not intend to do so but they respectfully submit that the question before the Circuit Court is whether a jury could conclude, given the "facts" as alleged by Mr. Vaughan, that the Barge Line Defendants gave implied permission and, if a jury could reach that conclusion, the Barge Line Defendants are required by W. Va. Code §§ 19-25-1, *et seq.*, only to refrain from acting in a wilful and wanton manner.

²⁶ "It is not for this Court arbitrarily to read into [a West Virginia statute], that which it does not say." Banker v. Banker, 196 W. Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996).

²⁷ "A statute that is ambiguous must be construed before it can be applied." Sizemore v. State Farm Gen. Ins. Co., 202 W. Va. 591, 596, 505 S.E.2d 654, 659 (1998), *quoting* Syllabus point 1, Farley v. Buckalew, 186 W.Va. 693, 414 S.E.2d 454 (1992).

C. The Circuit Court's Narrow Construction of W. Va. Code §§ 19-25-1, et seq., Was Against Public Policy.

The Ohio River Company (predecessor to The Ohio River Company LLC) donated the land upon which the 27th Street Park is located to the GHPRD at the request of GHPRD upon two primary conditions:

1. The land is to be for the benefit of the public and recreation; and
2. The Ohio River Company, through its affiliated companies, shall retain its riparian rights, shall retain the right to use, maintain and construct barge mooring facilities and shall retain the right to conduct its fleeting operations free of any interference from the GHPRD and, by implication, its patrons.

If W.Va. Code §§ 19-25-1, *et seq.*, does not protect those who donate land for use solely for public recreation, while retaining rights in that land to use, construct, and maintain facilities on the donated land (here, mooring structures) and to conduct business using equipment attached (but, in this case, afloat on navigable waters) to that property, then there will be a chilling effect which undoubtedly will prevent other landowners from making donations of this type. Those who might otherwise provide recreational land to the people of West Virginia, while retaining some right to make use of the property themselves, will be deprived of the protection of this statute and exposed to more liability than if they had retained ownership of the property and barred the public from making any use of it at all. Fear of litigation by property owners was obviously thought by the West Virginia legislature to be such a concern of property owners that a law had to be enacted to protect them and encourage them to allow public recreation.

The holding of the Circuit Court in this case frustrates the purpose of the W. Va. Code § 19-25-1, which states: "The purpose of this article is to encourage owners of

land to make available to the public land and water areas for . . . recreational . . . purposes by limiting their liability for injury to persons entering thereon. . . .”

In this case, there is no dispute that the Barge Line Defendants did not intend for the public to make recreational use of the barges themselves but the Park Property which the Barge Line Defendants donated, and in which they retained riparian rights, mooring rights, and ingress and egress to conduct their business in an unfettered matter, was held out only for public recreation by the GHPRD. W.Va. Code §§ 19-25-1, *et seq.*, should protect those who, at no profit to themselves, provide the public with land for a municipal park. At worst, there is a genuine issue of material fact about this issue which the Circuit Court’s ruling prevented a jury from deciding.

D. Through its Ruling, the Circuit Court has Created an Improper Loophole in a Statutory Defense Available to the Barge Line Defendants.

In essence, what has happened in this case is that the Circuit Court has improperly created an exception to the protection afforded by W. Va. Code §§ 19-25-1, *et seq.*, by and through West Virginia’s version of the “Dangerous Instrumentality” Doctrine.

Mr. Vaughan attempts to avoid the genuine issue of material fact created by his sworn Answers to Interrogatories by arguing the “Attractive Nuisance” theory of liability.

What the Barge Line Defendants overlook is that the Plaintiff has to prove in his case in chief that they (the Barge Line Defendants) knew or should have known that the mooring barge was a dangerous instrumentality and that it created a dangerous condition that attracted children out of curiosity and pleasure. Whether or not they are invited is irrelevant.

Sutton v. Monogahela Power Co., [151 W. Va. 961,] 158 S.E.2d 98 [(W. Va. 1967)].^[28]

There is a major flaw in Mr. Vaughan's use of the "Attractive Nuisance" theory of liability. This theory is not applicable to the case at bar. Judge Pancake has already found that the decedent, having had his 14th birthday, was no longer a child for the purposes of assessing comparative negligence. As this Court recognized in Sutton v. Monongahela Power Co., 151 W. Va. 961, 158 S.E.2d 98 (1967), which Mr. Vaughan relied upon to support his theory, "[i]n West Virginia an infant between the ages of 7 and 14 years is presumed not to be capable of contributory negligence, although it is a rebuttable presumption." Sutton, 151 W. Va. at 975, 158 S.E.2d at 106 (1967). The public policy behind this rule is the recognition that children are often heedless and, because of their inexperience and immaturity, cannot fully appreciate the harm that can occur from a dangerous condition or instrumentality. Therefore, the Court has created some common law protections for these children of lesser maturity.

However, these concerns are not present with a child over the age of fourteen, such as Randall Wayne Vaughn. Such adolescents are presumed to have greater maturity and are able to appreciate dangers and act accordingly. For adolescents aged fourteen and older, the burden/presumption shifts. In these cases, a person over the age of fourteen, such as Randall Wayne Vaughan, "is presumed to possess sufficient mental capacity to comprehend and avoid danger, and if he relies on his want of such capacity the burden of proving it is on him[.]" Pino v. Szuch, 185 W. Va. 476, 477, 408 S.E.2d 55, 56 (W.Va. 1991) quoting French v. Sinkford, 132 W. Va. 66, 68, 54 S.E.2d

²⁸ See Plaintiff's Reply to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment on the Issue of the Claim of Defendants Ingram Barge Company, the Ohio River Company, LLC and The Ohio River Terminals Company, LLC, that the West Virginia Recreational Immunity Statute Applies to the Facts of this Case, filed June 7, 2007.

38, 39 (1948), *quoting* Syllabus point 5, in part, Ewing v. Lanark Fuel Co., 65 W. Va. 726, 65 S.E. 200 (1909).

In Huffman v. Appalachian Power Co., 187 W. Va. 1, 415 S.E.2d 145 (1991), an 18 year old sought to hold a power company liable for personal injuries under the Dangerous Instrumentality Doctrine. The Court held that doctrine did not apply to an 18 year old because he was not under 14 and thus was not legally presumed to “lack the intelligence, maturity, and judgmental capacity to be held accountable for their actions.” Huffman, 187 W. Va. at 9 n.12, 415 S.E.2d at 153 n.12, *quoting* Pino, 185 W. Va. at 479, 408 S.E.2d at 58 (1991). While the plaintiff in Huffman had achieved adult status,²⁹ the Court relied heavily upon Pino and its reasoning that persons 14 and older are presumed by the law to be competent to perceive risk and, thus, do not require the protection of the Dangerous Instrumentality Doctrine.

What Mr. Vaughan is arguing is that, by operation of common law, the Barge Line Defendants indirectly invited the public onto Barge F-14002. Therefore, if Mr. Vaughan is permitted to assert this legal theory, then the Barge Line Defendants are entitled to the defense available through W. Va. Code §§ 19-25-1, *et seq.*

The West Virginia legislature may be presumed to be aware of the Dangerous Instrumentality Doctrine. If it had wanted to imply an exception into the statute for cases of dangerous instrumentality, it would have done so. The Circuit Court, it is respectfully submitted, should not create such an exception where the West Virginia legislature has not. Courts are required when reviewing a statute to “ascertain and give effect to the intention of the Legislature[.]” Syllabus point 8, Vest v. Cobb, 138 W. Va. 660, 661, 76 S.E.2d 885, 887 (1953), and may not “add to statutes something the Legislature

²⁹ See Huffman, 187 W. Va. at 9-10, 415 S.E.2d at 153-54 (1991).

purposely omitted.” Banker, 196 W. Va 535, 547, 474 S.E.2d 465, 477 (1996), *citing* Bullman v. D & R Lumber Co., 195 W. Va. 129, 464 S.E.2d 771 (1995); Donley v. Bracken, 192 W. Va.383, 452 S.E.2d 699 (1994). The Circuit Court should not have accepted Mr. Vaughan’s claim that he created no question of fact because his Interrogatory Answers supported a claim of dangerous instrumentality.

E. The Mitigation Agreement Stipulates the Ohio River Company Is Protected by W. Va. Code §§ 19-25-1, *et seq.*

The Barge Line Defendants are entitled to present the defense afforded by W. Va. Code §§ 19-25-1, *et seq.*, in their capacity as easement holder. It is important to understand the chain of title of the Ohio River Company.³⁰

The Ohio River Company was the owner of the Property upon which most of the current 27th Street Park is now located until December 1, 1993, when the Ohio River Company transferred the Property to the GHPRD by virtue of the Special Warranty Deed. The Special Warranty Deed reserves several rights to the Ohio River Company, including riparian rights; the right to conduct fleeting business without interference from the GHPRD; the right to maintain, use, and construct mooring facilities on the Property; and an easement for the purpose of fishing (which the Ohio River Company was required by the Public Lands Corporation to make available to the public).

The Ohio River Company LLC, is the successor-in-interest to the Ohio River Company (hereafter “West Virginia ORC”) and, accordingly, has inherited all of West Virginia ORC’s rights and obligations.³¹ West Virginia ORC, was a West Virginia corporation. Midland Enterprises, Inc., incorporated TORC, Inc., in Delaware and

³⁰ The documents which support the chain of title discussed herein are attached to the Briefs of the parties. Many of the facts cited here are also referenced in Mr. Vaughan’s Answer to Interrogatory No. 7, discussed above

³¹ See W.Va. Code § 31E-11-1104.

merged the West Virginia ORC into TORC, Inc., effective 9:00 a.m. on July 1, 2002. TORC, Inc., was the survivor entity and its name was changed to the Ohio River Company. The Ohio River Company was then converted into a Delaware limited liability company and its name was changed to the Ohio River Company LLC, effective 4:00 p.m. on July 1, 2002.

The Mitigation Agreement sets out in paragraph 2 that:

- a. The [Ohio River] Company shall convey the property to the GHPRD;
- b. The Company shall retain the riparian rights, easements, and the right to use the riverbank needed to moor barges so they could continue their fleeting operations; and
- c. Shall reserve an easement for the public.

In the very next paragraph, the Mitigation Agreement provides that any "Liability of the company for injury or damage to persons or property utilizing the subject area is limited . . ." by W. Va. Code §§ 19-25-1, *et seq.*

The Mitigation Agreement, as set out in the Statement of Facts, clearly provides that the liability of the Ohio River Company for personal injury or property damage on the "subject property" is limited to that found in W. Va. Code §§ 19-25-1, *et seq.* The Circuit Court did not even discuss the Mitigation Agreement or its application to this case in its opinion and apparently did not consider it in reaching its judgment.

The Ohio River Company, it must be presumed, relied upon this express extension of the limited liability shield to cover the ownership and the operation of the

Fleeting Area, their riparian rights, and the mooring rights when it deeded the Property to the GHPRD for the exclusive purpose of public recreational use.

The Ohio River Terminals and Ingram should also be shielded by the Recreational Immunity Statute as provided in the Mitigation Agreement. W. Va. Code § 19-25-5 states "the term 'owner' shall include, but not be limited to, tenant, lessee, occupant or person in control of the premises." It is undisputed the Ohio River Terminals was the operator of the Fleeting Area, the moorings, and the entity which exercised riparian rights in its day-to-day operation of the fleets. Ingram was the title owner of the mooring Barge F-14002, which was chartered to the Ohio River Terminals for use in the Fleeting Area. They are owners (or at the very least there may be a question of fact) as defined by W. Va. Code § 19-25-5. The West Virginia legislature defined "land" in W. Va. Code § 19-25-5(a) by stating it "shall include, but not be limited to, roads, water, watercourses, private ways and building and structures and machinery or equipment thereon when attached to the realty." (Emphasis added.) The West Virginia legislature intended a broad reading of the terms "owner" and "land." The Model Act drafted by the Council of State Governments (1965) (attached hereto as Exhibit "B") defines "land" and "owner" in more restrictive ways than does the Recreational Immunity Statute. The Model Act merely lists the categories of persons or interests which are "owners" of "land" and therefore covered by the Model Act. The West Virginia legislature broadened these already expansive definitions by stating that the terms "owner" or "land" "shall include, but not be limited to" the categories of persons or interests identified in the Model Act.

As stated, the Ohio River Company LLC, as successor in interest to the Ohio River Company, also possesses an easement which was required in the Mitigation Agreement. According to the Public Lands Corporation, any liability which the Ohio River Company might have was to be limited by W. Va. Code §§ 19-25-1, *et seq.*

In addition to the limited liability which is prescribed for owners of land by W. Va. Code § 19-25-2, W. Va. Code § 19-25-3 ("Limiting duty of landowner who grants a lease, easement or license of land to federal, state, county or municipal government or any agency thereof") states:

Unless agreed otherwise in writing, an owner who grants an . . . easement . . . to the federal government or any agency thereof, or the state or any agency thereof, or any county or municipality or agency thereof, for . . . recreational . . . purposes owes no duty of care to keep that land safe for entry or use by others or to give warning to persons entering or going upon the land of any dangerous or hazardous conditions, uses, structures or activities thereon. An owner who grants an . . . easement . . . to the . . . state or any agency thereof, or any county or municipality or agency thereof, for military training or recreational or wildlife propagation purposes does not by giving a lease, easement or license: (a) extend any assurance to any person using the land that the premises are safe for any purpose; or (b) confer upon those persons the legal status of an invitee or licensee to whom a duty of care is owed; or (c) assume responsibility for or incur liability for any injury to person or property caused by an act or omission of a person who enters upon the leased land.

This provision applies in this case since the Public Lands Corporation required in the Mitigation Agreement that the Ohio River Company preserve an easement across the Park Property for the purpose of fishing. The general provision of W. Va. Code § 19-25-2 must also apply to the case at bar. Accordingly, where Mr. Vaughan states in his Answer to Interrogatory No. 7 that Randall Wayne Vaughan was provided express

permission by virtue of the easement to use the property for recreation, there is no doubt that the liability of the Ohio River Company should be limited by W. Va. Code §§ 19-25-1, *et seq.*

F. Mr. Vaughan's Motion for Partial Summary Judgment Was Improperly Granted Prior to the Close of Discovery.

As will be discussed in further detail below, the Interrogatory Answers filed by Mr. Vaughan include numerous factual allegations which must be investigated through additional discovery. Discovery had not closed at the time Mr. Vaughan's Motion for Partial Summary Judgment was granted. "It has been recognized that '[s]ummary judgment is appropriate only after the opposing party has had adequate time for discovery.'" Drake v. Snider, 216 W. Va. 574, 577, 608 S.E.2d 191, 194 (2004) *citing* Cleckley, *Litigation Handbook*, § 56(f), at 944 (2002). Further, "a decision for summary judgment before discovery has been completed must be viewed as precipitous." Drake, 216 W. Va. at 577, 608 S.E.2d at 194 (2002), *citing* Board of Educ. of the County of Ohio v. Van Buren & Firestone Architects, Inc., 162 W. Va. 140, 144, 267 S.E.2d 440, 443 (1980).

The fact that there was discovery remaining to be completed on this issue precludes the Circuit Court's grant of summary judgment. Assuming *arguendo* that there was sufficient discovery on this issue, there exists a genuine issue of material fact that must be decided by a Jury. Mr. Vaughan has indentified several fact witnesses, including friends of the decedent, police officers and the coroner who may possess information which could be relevant to the issue of whether the decedent believed he had implied permission to use the barges, whether he did use the barges and, if so, how he allegedly gained access to the barges.

Conclusion

As discussed above, the Circuit Court erred in granting Mr. Vaughan's Motion for Partial Summary Judgment. The material question of fact at issue, as was framed by the Circuit Court, is this: "Whether the barge was held out to the public for recreational purposes?"

Pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure, summary judgment is not proper when the non-moving party demonstrates that a genuine issue of material fact exists. Shaffer v. Acme Limestone Co., Inc., 206 W. Va. 333, 339 524 S.E.2d 688, 694 (1999); Williams v. Precision Coil, Inc., 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995); Painter v. Peavy, 192 W. Va. 189, 192, 451 S.E.2d 755, 758 (1994); Andrick v. Town of Buckhannon, 187 W. Va. 706, 708, 421 S.E.2d 247, 249 (1992); Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York, 148 W. Va. 160, 171, 133 S.E. 2d 770, 777 (1963).

This Court has explained that:

Roughly stated, a "genuine issue" for purposes of West Virginia Rule of Civil Procedure 56(c) is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party. The opposing half of a trialworthy issue is present where the non-moving party can point to one or more disputed "material" facts. A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law.

Shaffer, 206 W. Va. at 339, 524 S.E.2d at 694 (1999), *citing* Syllabus point 5, Jividen v. Law, 194 W. Va. 705, 461 S.E.2d 451 (1995).

Whether an implied permission or invitation to use the moorings on the barges for recreational purposes existed, in view of the facts contained in Mr. Vaughan's

Interrogatory Answer, there is most certainly an issue of “material fact . . . that has the capacity to sway the outcome of the litigation under the applicable law.”³² If W. Va. Code §§ 19-25-1, *et seq.*, apply to this case, then the Barge Line Defendants are immune from liability. Therefore, they must be dismissed.

This Court has instructed circuit courts that “[t]he circuit court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Painter, 192 W. Va. at 192, 451 S.E.2d at 758 (W.Va. 1994), *quoting* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, (1986). Furthermore, when considering a summary judgment motion, the benefit of the doubt is given to the non-moving party and all inferences are to be made in favor of the non-moving party.³³

In the case at bar, the Circuit Court acknowledged the conflict in evidence. Then the Circuit Court weighed the evidence. Specifically, testimony of employees of the Barge Line Defendants was weighed against Mr. Vaughan’s counsel’s re-characterization of Mr. Vaughan’s sworn statement. The factual statements in Mr. Vaughan’s Interrogatory Answers are important, not his alleged reason for making them. Mr. Vaughan’s actual sworn Interrogatory Answer was not considered by the Circuit Court, despite the requirement to consider all of the evidence in the light most favorable to the Barge Line Defendants.

The resolution of the material factual dispute in this case necessarily involves the weighing of the evidence. The weighing of the evidence in order to resolve this factual question must be done by the jury. “The circuit court’s function at the summary

³² *Id.*

³³ See Harris v. Jones, 209 W. Va. 557, 550 S.E.2d 93 (2001).

judgment stage is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Syllabus point 3, Painter, 192 W. Va. at 192, 451 S.E.2d at 756 (1994). In the case at bar, the Circuit Court clearly improperly weighed the evidence in order to reach its conclusion.

At a minimum, there is a dispute over the conclusions that can be drawn from the facts presented by all parties. This dispute over conclusions to be drawn from the evidence likewise prevents summary judgment. "Summary judgment should be denied "even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom."" Wilson v. Daily Gazette Co., 214 W. Va. 208, 213, 588 S.E.2d 197, 202 (2003), *citing* Williams v. Precision Coil, Inc., 194 W. Va. 52, 61, 459 S.E.2d 329, 338 (1995), *quoting* Pierce v. Ford Motor Co., 190 F.2d 910, 915 (4th Cir.1951). There is a genuine question as to whether the Barge Line Defendants indirectly permitted, without charge, any person to use the moored barge for recreational purposes. The Barge Line Defendants submit that they did not. Mr. Vaughan must necessarily argue that the Barge Line Defendants did directly or indirectly permit the use of the moored barge.³⁴

An unambiguous intent of the Mitigation Agreement was to shield the owners and operators of the Fleeting area from liability to park patrons. In the Mitigation Agreement, the Public Lands Corporation recognized that the land would be given to the GHPRD, that the fleet would continue to operate, and that an easement would be reserved in the Special Warranty Deed for the benefit of the public. The Public Lands Corporation then declared that the Ohio River Company would be shielded from liability by the

³⁴ If the Barge Line Defendants did not, directly or indirectly, permit the use of the moored barge, then Randall Wayne Vaughan was a trespasser to which no duty of care was owed by the Barge Line Defendants.

Recreational Immunity statute. Clearly, summary judgment was not appropriate when one takes the Mitigation Agreement into consideration.

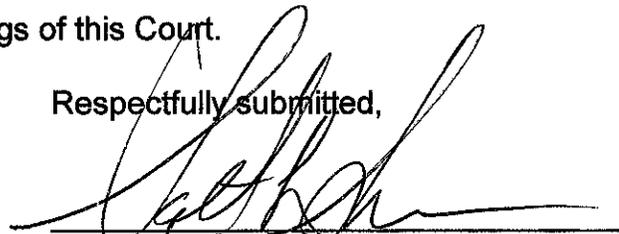
The public policy of the "Recreational Immunity" Statute is to encourage private entities to allow public recreation on land in which they hold some ownership or operational control. The narrow interpretation of this statute by the Circuit Court is contrary to that public policy.

For the reasons stated herein, it is clear that the Circuit Court erred in granting Mr. Vaughan's Motion for Partial Summary Judgment.

RELIEF PRAYED FOR

The Defendants-Appellants, the Ohio River Company LLC, the Ohio River Terminals Company LLC, and Ingram Barge Company hereby pray that the Order of the Circuit Court of Cabell County entered on the 29th day of October, 2007, be reversed and that this case be remanded to the Circuit Court of Cabell County, West Virginia for further proceedings consistent with the rulings of this Court.

Respectfully submitted,



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2 CARL WAYNE VAUGHAN, Individually and
3 as Administrator of the Estate of
4 RANDALL WAYNE VAUGHAN, and BARBARA
VAUGHAN,

5 Plaintiffs,

Civil Action No.
05-C-767

6 vs.

7 GREATER HUNTINGTON PARK and
RECREATION DISTRICT, INGRAM BARGE
8 COMPANY, OHIO RIVER COMPANY and THE
OHIO RIVER TERMINAL COMPANY, LLC,

9 Defendants.

10 TRANSCRIPT of proceedings had in the hearing of the above
11 styled action before the Honorable David M. Pancake, Judge, on
12 Thursday, the 14th day of June, 2007.

13 APPEARANCES:

14 MR. CHARLES M. HATCHER, Huntington, West Virginia, Counsel for
15 the Plaintiffs.

16 MR. CARL J. MARSHALL, Paducah, Kentucky, Counsel for the
17 Defendants.

18 MR. ROBERT H. AKERS, Charleston, West Virginia, Counsel for
19 the Defendants.

20 MR. W. JOSEPH BRONOSKY, Huntington, West Virginia, Counsel for
21 the Defendants.

22 MARCIA D. NOBLE
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COPY

3
4 Terminal Company, filed a response on May the 24th. I was in
5 trial and I appreciate your all's cooperation. So originally
6 having been set for the 29th, it was changed to today and the
7 plaintiff filed their reply to the response on June the 8th,
8 2007.

9 So, Mr. Hatcher, I'll be glad to hear any argument that
10 you have. I've read everything that's been filed.

11 MR. HATCHER: Your Honor, there's nothing I can add that
12 I haven't put in the motion and in the reply.

13 We anticipated that they were going to raise that
14 Interrogatory No. 7, and I think the most telling point is
15 whether or not the defendants, as opposed to the object, the
16 barge, attracted these children, and I think the defendants --
17 the company say that they did not comply with that statute and
18 I think that's a mixing of words.

19 THE COURT: Mr. Marshall or Mr. Akers, who's going to
20 argue?

21 MR. MARSHALL: Your Honor, if it please the Court. I
22 think that there is a fine line here and it primarily turns on
23 this. That the issue of material fact which exists and which,
24 in fact, has been created by the plaintiff and not been
25 withdrawn from consideration by a jury, is whether the Ohio
26 River Terminal Company, LLC, Ingram Barge Company, and Ingram
27 Barge Company directly or indirectly invited or permitted

2
3 BE IT REMEMBERED that heretofore, to wit, on Thursday,
4 the 14th day of June, 2007, on the calling of the above styled
5 action, the following proceedings were had:

6 THE COURT: Vaughan vs. Greater Huntington Park and
7 Recreation District.

8 Okay, this is Carl Wayne Vaughan, individually, and as
9 administratrix of the estate of Randall Wayne Vaughan,
10 deceased, and Barbara Vaughan vs. The Greater Huntington Park
11 and Recreation District, Ingram Barge Company, Ohio River
12 Company, Ohio River Terminal Company, 05-C-767.

13 Plaintiff represented by Charles M. Hatcher, Jr. The
14 Ingram Barge Company, Ohio River Company, and Ohio River
15 Terminal Company by -- you're not Mike Fisher.

16 MR. AKERS: Your Honor, Rob Akers.

17 THE COURT: Okay, and Carl J. Marshall.

18 We're here today on the plaintiffs' motion for partial
19 summary judgment on the issue of the claim of the
20 defendants -- is Mr. Bronosky here? For Greater Huntington
21 Park and Recreation Board, I apologize.

22 Ingram Barge and Ohio River Company, that the West
23 Virginia Recreational Immunity statute applies to the facts of
24 this case. This motion was filed on May the 8th. It was
25 noticed on May the 8th for May the 29th. The defendants
26 Ingram Barge Company, Ohio River Company and Ohio River

4
5 without charge any person to use such property for
6 recreational purposes.

7 As the Court is aware, and I will not rehash it, the
8 plaintiffs' alleged clearly in sworn answers to
9 interrogatories that they had express and implied permission
10 to use the barge for the recreational purpose of swimming, but
11 it is not only in the answers to interrogatories that we find
12 that, but it is also in the plaintiffs' complaint that we find
13 that, as I have cited to the Court.

14 At this point, it seems to me that given that the
15 plaintiffs' theory is or appears to be that because the barge,
16 even though lawfully moored, was adjacent to a public park,
17 that there was either an expressed or implied invitation to
18 the public to use that barge for recreational purposes.

19 The plaintiff has not withdrawn its answers to
20 interrogatories, it has not amended its complaint. And, in
21 fact, it has identified witnesses which we believe will
22 provide testimony which could lead a jury to conclude that
23 there was, at least, implied permission on the parts of the
24 defendants to use the barges for recreational purposes. If a
25 jury concluded that, then it's our belief that we would be
26 entitled -- that is the defendants would be entitled to the
27 recreational use statute.

28 Again, I am rehashing a bit and I apologize, but I do

EXHIBIT
A

1 want to make one point that could be lost, which is simply
2 this. There is -- there are three defendants -- three barge
3 line defendants. They're not all the same; they have
4 different roles. And as I have pointed out, one of them is
5 the Ohio River Company, LLC.

6 Apparently, back in early '90s the Greater Huntington
7 Park and Recreation District came to the Ohio River Company,
8 LLC, and said we would really like this land adjacent to the
9 27th Street park so that we can expand this park for the use
10 of the people of Huntington, West Virginia. That company, the
11 Ohio River Company, over the course of a year and through some
12 negotiations, eventually granted it to them free of charge.
13 It gave the land to the Huntington park and recreation
14 district.

15 However, in order to make this transaction work, they had
16 to have the permission of the public lands corporation of the
17 state of West Virginia. The public lands corporation required
18 that an easement be reserved for the benefit of the public for
19 fishing, across the property. There is a statute that
20 specifically refers to those which extend to easements to
21 governmental entities for the use of the public. We would
22 submit that, in essence, that is what has been done here and
23 that the Ohio River Company, LLC, is in a different stead than
24 Ingram Barge Company or the Ohio River Terminal Company, LLC,

1 which don't have any ownership interest in the property or any
2 easement for the benefit of the public, which Ohio River
3 Company, LLC does. So we think that puts them in a different
4 position too.

5 So we just want to -- I guess in an effort to clarify
6 that point, I simply bring that up.

7 It's uncanny how the pleadings and the interrogatory
8 answers which have been filed by the plaintiff track the
9 language of the statute, which simply says that an owner of
10 land who either directly or indirectly invites or permits
11 without charge any person to use such property for
12 recreational purposes does not thereby extend, et cetera. I
13 submit to the Court those words either mean what they say or
14 they don't mean anything. And in fact, the plaintiff has
15 stated in his complaint and in his answers to interrogatories
16 that that was done. That hasn't been withdrawn. It has been
17 recast. It has been said well, that's not the theory that we
18 are pursuing you under. We are pursuing you under another
19 theory. That doesn't change the fact that we believe that at
20 trial they will attempt to prove facts that could lead a jury
21 to conclude that there was expressed or implied permission.
22 If they do that, and if that's the conclusion, then we believe
23 we're entitled to the protection of the statute.

24 Bottom line is, as the court said, in state of West

1 Virginia, when a summary judgment motion is filed before the
2 close of discovery, that motion should be viewed as
3 precipitous.

4 Right now we don't exactly what they intend to try to
5 prove, but if they try to prove that, then we believe we're
6 entitled to the protection of the statute. If they don't,
7 then it seems to me that's a matter to be handled at the jury
8 instruction conference and at trial.

9 THE COURT: I don't disagree with your statement that
10 summary judgments are not to be granted precipitously or
11 early, but this case has been going on for sometime and
12 there's been substantial discovery, and I think we need
13 sufficient discovery to address this issue.

14 Do you have anything else?

15 MR. HATCHER: Your Honor, just the fact that this
16 easement thing. Number one, I'll represent to you that I have
17 tried diligently to have some or all the defendants tell me
18 where this easement is. It doesn't exist. No one -- the
19 document says they're supposed to designate it. I've deposed
20 everyone, and either they're hiding it from me now and know
21 where it is, and number two, telling someone they can come
22 fish, doesn't mean they couldn't jump on top of this barge --
23 climb up on this barge and dive. That's the only point I
24 wanted to make.

1 MR. MARSHALL: If please the Court. That's not what
2 the plaintiffs said in their sworn answers to interrogatories.
3 What they said in their sworn answers to interrogatories is
4 that that easement created an expressed permission to be on
5 the barge, that's what they said. They haven't withdrawn
6 that.

7 I tend to agree. I don't think it does. I don't think
8 an easement for fishing means that they can go jump on the
9 barges. We've always said nobody had permission to jump on
10 the barges, but they intend to prove facts which could lead a
11 jury to that conclusion. If they do so, all we're saying is,
12 we're entitled to the protection of the statute. If they do
13 not, then we're not, but until trial, we're not going to know
14 the answer to that question.

15 THE COURT: Anything else, Mr. Hatcher?

16 MR. HATCHER: No.

17 THE COURT: This motion was filed after the defendants
18 amended their answer pursuant to an April 4, 2007 order of the
19 court. In their amended answer, the defendants alleged that
20 they're immune from liability because they entered into a
21 mitigation agreement with the state of West Virginia.
22 Paragraph 3 of the mitigation agreement states: The company's
23 liability for injury or damage to persons or property
24 utilizing the subject area is limited by Chapter 19 Article

1 25, "Limiting Liability of Landowners," of the official code
 2 of West Virginia, 1931 as amended.
 3 W.Va Code 19-25-1 states: "The purpose of this article is
 4 to encourage owners of lands to make available to the public
 5 land and water areas for military training or recreational or
 6 wildlife propagation purposes by limiting their liability for
 7 injury to persons entering thereon and for injury to the
 8 property or persons entering thereon and limiting their
 9 liability to persons who may be injured or otherwise damaged
 10 by the acts or omissions of persons entering thereon."

11 The plaintiffs' position is that this code section does
 12 not apply to the defendants and that they should not be
 13 afforded the immunity provided for in W.Va Code 19-25-1,
 14 because the barge in question was not held out to the public
 15 for recreational purposes and the statute therefore does not
 16 apply.

17 The West Virginia Supreme Court has held that a motion
 18 for summary judgment should be granted only when it is clear
 19 that there is no genuine issue of fact, and that's determined
 20 to be material fact, to be tried and inquiry concerning the
 21 facts is not desirable to clarify the application of law.
 22 Syl.pt.3 from Atena Cas. & Sur. Co. vs. Federal Ins. Co. of
 23 New York, 148 W.Va. 160, 133 S.E.2d, 770, 1963. The general
 24 rule regarding motions for summary judgment is that the

1 underlying facts and all inferences concerning the litigation
 2 are to be viewed in the light most favorable to the nonmoving
 3 party. Williams vs. Precision Coll, Inc., 194 W.Va. 52, 459
 4 S.E.2d 329, 1995. In Stamper by Stamper vs. Kanawha County
 5 Bd. of Educ., 445 S.E.2d 238, 191 W.Va. 297, 1994, it was held
 6 that the W.Va Code 19-25-2 through whatever it is, generally
 7 provides a landowner who allows the public to use his land for
 8 recreational purposes does not owe a duty of care to keep the
 9 property in safe condition or to warn of dangerous or
 10 hazardous conditions.

11 The question then is whether the barge was held out to
 12 the public for recreational purposes. Otis Adkins, the barge
 13 line defendant's terminal manager, and Randy Workman, the
 14 assistant manager, both provided deposition testimony that the
 15 barge was not held out for recreational purposes.
 16 Specifically, Mr. Adkins in his April 26, 2007 deposition was
 17 asked. "QUESTION: Okay. Now are you telling me today that
 18 you - your company, because that's who you are speaking for -
 19 either of these defendants ever offered that barge for
 20 recreational purposes? ANSWER: No, sir, they have not."
 21 That's page 7, lines 13-20. "QUESTION: Do you - if you put
 22 "No Trespassing" signs on the barge as you allege - right?"
 23 And the answer is "yes." "QUESTION: Then you are obviously
 24 not offering it to the public for any purpose, you are telling

1 them to stay off? ANSWER: Correct." Pages 8, lines 3-9.
 2 Mr. Adkins also testified that terminal employees have
 3 called the police to remove people who came around the barge.
 4 Randy Workman offered essentially the same testimony in his
 5 deposition taken on April the 25th, 2007. "QUESTION: Your
 6 company does not offer it (the barge) to anybody for
 7 recreational use? ANSWER: No." Page 32, lines 15-17.

8 Based on these two depositions, the posted no trespassing
 9 signs and the calls to police to remove people who came around
 10 the barge, it is the plaintiffs' position that the barge was
 11 not held out to the public for recreational use.

12 The defendants, however, cite plaintiffs' own answer to
 13 their interrogatories and plaintiffs' amended complaint as
 14 evidence that there does exist a question of fact as to the
 15 issue. In paragraph 26 of the amended complaint, the
 16 plaintiff states that "by allowing placement of the barge on
 17 the riverbank, in the park and by maintaining the premises in
 18 or about the barge, defendants invited the public, including
 19 children, onto and to use the barge."

20 Interrogatory 7 states "Please identify any information
 21 in your possession indicating that the decedent, at any time,
 22 ever obtained permission from Ingram Barge Company and/or the
 23 Ohio River Terminal Company, LLC, to climb, walk, sit, dive or
 24 jump from the barge." The plaintiffs' response includes the

1 following "While the Ohio River Company and Ohio River
 2 Terminal Company's deeds only expressly invited the public to
 3 fish, it was and is reasonably foreseeable that the public
 4 would or will make other uses of the 300 feet easement
 5 associated with the invitation, i.e. swimming, camping,
 6 playing, tree climbing, rope swinging, and climbing aboard the
 7 barges." The answer goes on to state: "The location of the
 8 barge in the park, together with the failure of the defendants
 9 to prevent access to the barge, created a situation where the
 10 park guests would not be able to distinguish between the
 11 recreational uses associated with the park and the operations
 12 of the barge. The children and guests were given implied
 13 permission to continue their park ventures on to the chain,
 14 ropes and trees, and the barge."

15 As the defendants point out in their reply -- or
 16 response, the plaintiff has not withdrawn his answer to
 17 Interrogatory No. 7. The plaintiff addressed this in their
 18 brief and said "The plaintiff could have, and probably should
 19 have, objected (to Interrogatory No. 7) and state that the
 20 question was irrelevant to this cause of action."

21 Reading on the plaintiffs' answer to Interrogatory No. 7,
 22 the defendants' position that this motion cannot be granted
 23 because the plaintiff made recreational use an issue would be
 24 correct. However, the plaintiffs' answer to the interrogatory

1 does not change the fact that the evidence produced thus far
 2 shows that there is no disputed fact regarding the issue. The
 3 evidence consists of the deposition testimony of barge line
 4 defendant's terminal manager, Otis Adkins, and assistant
 5 manager Randy Workman; the posted no trespassing signs and the
 6 calls to the police to remove people in the vicinity of the
 7 barge. The defendants have offered no evidence disputing any
 8 of these facts. The plaintiffs' motion is based on this
 9 undisputed evidence. It is not based on an answer to an
 10 interrogatory that was perhaps inartfully worded.

11 The Court finds that there is no genuine issue of
 12 material fact and is going to grant the motion for summary
 13 judgment that the West Virginia Recreational Immunity Statute,
 14 W.Va Code 19-25 through 7, is inapplicable to this case.

15 Your objection and exceptions are noted and, Mr. Hatcher,
 16 you'll prepare the order.

17 MR. HATCHER: I will.

18 MR. MARSHALL: Your Honor, may the defendants make a
 19 request?

20 THE COURT: Sure.

21 MR. MARSHALL: The request would be that the Court note
 22 that this order is final and appealable as well. We are
 23 working on an appeal of the previous rulings which brought us
 24 here last time, and we can simply include this at the same

1 time.

2 THE COURT: What ruling was that? I apologize.

3 MR. MARSHALL: Help me out, Charlie.

4 MR. HATCHER: That was -- there's so many issues in this
 5 case, Judge, I don't remember. It had something to do with
 6 the --

7 MR. MARSHALL: It was on the issue of whether the
 8 plaintiffs' motion in limine to exclude a portion of the
 9 economist's testimony should be granted --

10 MR. HATCHER: That's right.

11 MR. MARSHALL: -- as to whether maritime law controlled
 12 that issue or not. As the Court will recall, and now that I
 13 have, and I apologize for taking so long.

14 THE COURT: No, no, that's what we're here for.

15 MR. MARSHALL: As the Court will recall, it had decided
 16 to make that order final and appealable so that we could take
 17 an appeal to the West Virginia Supreme Court, hopefully,
 18 resolve that issue before this case is tried. I'll represent
 19 to the Court I'm working on that. I think it's called
 20 petition for appeal at this time.

21 THE COURT: Was that on the consumption issue?

22 MR. MARSHALL: Yes, sir.

23 MR. HATCHER: Consumption offset.

24 THE COURT: Because I'm reading the order and it

1 doesn't -- that order does not say it's a final and appealable
 2 on it.

3 MR. MARSHALL: It should have. The Court had said that
 4 it would do so.

5 THE COURT: I have no problem with it if you all agree to
 6 it. Everybody signed off on it in its present form.

7 MR. MARSHALL: It's in the transcript.

8 Do you have any problem with that?

9 MR. HATCHER: It just creates some more work, but I don't
 10 have any problem with it. I don't know about this issue.

11 MR. MARSHALL: I understand, and I'm not a big fan of
 12 piecemeal litigation, however --

13 THE COURT: I have a recall, because in that issue,
 14 because I remember my decision, it was based on the fact --
 15 other states and other places had addressed it. In West
 16 Virginia, we haven't changed the law and you think it's ripe
 17 for changing the law.

18 MR. MARSHALL: Yes, sir.

19 THE COURT: And whether it is or not, probably what I
 20 said is that it would -- it might be beneficial to get that
 21 answered so we don't go through this trial and then it's taken
 22 up on appeal and have to come back and redo it or otherwise.

23 MR. HATCHER: That's why I agreed to it.

24 THE COURT: Right. And I don't presume to speak for the

1 court, because that's why we put that language in there. So I
 2 think, number one, that order needs to be modified to include
 3 that and then --

4 MR. MARSHALL: May I do that?

5 THE COURT: Sure. No one is saying that that's an
 6 incorrect statement of what happened, it's just not in the
 7 order, but I have a recall about it and Mr. Hatcher doesn't
 8 seem -- what this inevitably will do, in my opinion, is delay
 9 the trial of this case.

10 MR. HATCHER: That's my problem with it, Judge, but I've
 11 told my clients they don't want to come back a year and a half
 12 from now and retry it, because we have a lot of experts, it's
 13 going to be expensive.

14 THE COURT: But the -- because I think the Court recesses
 15 at the end of June and doesn't come back until September, so
 16 even if you get it up there we're not going to ...

17 I know it was about this time last year I had a similar
 18 matter come up and I knew the Court was in their decision
 19 conference, because I'd served on the Court in a case the
 20 previous week. And I don't know if they'll do it but I know,
 21 let's just type up, have my secretary, and we'll fax it up to
 22 them and see what they'll do with it. And faxed it up and
 23 they read it and said they weren't going to consider it. But
 24 you can't often get that kind of response.

1 But I have no objection to that and I'm not going to
2 interject my own opinion in this. I think there are other
3 reasons in reviewing the statute to find that it does not
4 apply to this case, but I think it's not incumbent on me to
5 either support or try to diminish someone else's record based
6 on what their opinion may or may not be.

7 MR. MARSHALL: Right.

8 THE COURT: Otherwise it might show -- or taken as an
9 indication that I have an unusual interest in the outcome of
10 this case, which I don't, but I --

11 MR. MARSHALL: So I take it the Court's not inclined to
12 make that same finding on this decision?

13 THE COURT: No.

14 MR. MARSHALL: Okay.

15 THE COURT: But it has to do with statutory
16 interpretation and, of course, I think sometimes the luck of
17 the draw as to which justice the case is assigned, if they do
18 accept it. Because Chief Justice Davis and I have a very
19 similar philosophy about judicial or statutory interpretation
20 that another justice who may be assigned to write the opinion
21 may not even be interested in.

22 MR. MARSHALL: So just to make sure I understand. The
23 previous ruling, as the Court had said at that time --

24 THE COURT: Right.

1 MR. MARSHALL: -- is final and appealable, the order
2 needs to be amended to say so.

3 THE COURT: I think it needs to be amended, because a lot
4 of times their first blush is to look at the order --

5 MR. MARSHALL: All right.

6 THE COURT: -- and if that language is not in the order,
7 they will not use it as an excuse, they'll just say
8 procedurally it's not ripe.

9 MR. MARSHALL: Okay, but the issue that we're here about
10 today, does not have the same -- it is not final and
11 appealable?

12 THE COURT: No. I think we've said this -- you asked me
13 to make it final and appealable based on -- since the other
14 one is going up anyway, what harm does it do with this one.

15 MR. MARSHALL: Yes, sir --

16 THE COURT: Okay.

17 MR. MARSHALL: -- that is my position.

18 THE COURT: Because it's not going to make it anymore
19 lengthy or anymore complicated.

20 MR. MARSHALL: And if that issue is resolved, it's one
21 less issue, should we all try the case and get whatever
22 verdict, it simply will not be an issue to assign as any
23 error.

24 THE COURT: I understand.

1 MR. MARSHALL: Yes, sir. Thank you.

2 THE COURT: Okay.

3 MR. HATCHER: Thank you, Judge.

4 THE COURT: So Charlie, if you'll put in -- I apologize,
5 Mr. Hatcher, we're trying to make a record. If you'll put in
6 the language in this order that it's a final and appealable
7 order. That's also a two edge sword, because it starts the
8 clock running before you get it done.

9 Whereupon the proceedings were adjourned.

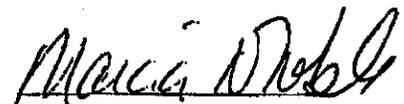
10 * * *

1 STATE OF WEST VIRGINIA,
2 COUNTY OF CABELL, to wit:

3 I, Marcia D. Noble, Official Reporter of the Circuit
4 Court of Cabell County, West Virginia, do hereby certify that
5 the foregoing is a true and correct transcript of the
6 proceedings had in the action of CARL WAYNE VAUGHAN, et al,
7 plaintiffs, vs. GREATER HUNTINGTON PARK AND RECREATION
8 DISTRICT, et al, defendants, Civil Action No. 05-C-767, on
9 June 14, 2007, as reported by me in machine shorthand.

10 I further certify that the transcript within meets the
11 requirements of the Code of the State of West Virginia,
12 51-7-4, and all rules pertaining thereto as promulgated by the
13 Supreme Court of Appeals.

14 Given under my hand this 14th day of Oct, 2007.

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18 Official Reporter, Circuit
19 Court of Cabell County
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SUGGESTED STATE LEGISLATION

Volume XXIV



1965

The Council of State Governments
1313 EAST SIXTIETH STREET
CHICAGO, ILLINOIS 60637

EXHIBIT
B

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Suggested State Legislation

PUBLIC RECREATION ON PRIVATE LANDS:
LIMITATIONS ON LIABILITY

Recent years have seen a growing awareness of the need for additional recreational areas to serve the general public. The acquisition and operation of outdoor recreational facilities by governmental units is on the increase. However, large acreages of private land could add to the outdoor recreation resources available. Where the owners of private land suitable for recreational use make it available on a business basis, there may be little reason to treat such owners and the facilities they provide in any way different from that customary for operators of private enterprises. However, in those instances where private owners are willing to make their land available to members of the general public without charge, it is possible to argue that every reasonable encouragement should be given to them.

In something less than one-third of the states, legislation has been enacted limiting the liability of private owners who make their premises available for one or more public recreational uses. This is done on the theory that it is not reasonable to expect such owners to undergo the risks of liability for injury to persons and property attendant upon the use of their land by strangers from whom the accommodating owner receives no compensation or other favor in return.

The suggested act which follows is designed to encourage availability of private lands by limiting the liability of owners to situations in which they are compensated for the use of their property and to those in which injury results from malicious or willful acts of the owner. In the case of lands leased to states or their political subdivisions for recreational purposes, the legislation expressly provides that the owner will have no remaining liability to recreationists, except as such liability may be incorporated in an agreement, or unless the owner is compensated for the use of the land in addition to consideration for the lease.

Suggested Legislation

[Title should conform to state requirements. The following is a suggestion: "An act to encourage landowners to make land and water areas available to the public by limiting liability in connection therewith."]

(Be it enacted, etc.)

1 Section 1. The purpose of this act is to encourage owners of land
2 to make land and water areas available to the public for recreation-
3 al purposes by limiting their liability toward persons entering there-
4 on for such purposes.

Suggested State Legislation

1 Section 2. As used in this act:

2 (a) "Land" means land, roads, water, watercourses, private ways
3 and buildings, structures, and machinery or equipment when attached
4 to the realty.

5 (b) "Owner" means the possessor of a fee interest, a tenant, les-
6 see, occupant or person in control of the premises.

7 (c) "Recreational purpose" includes, but is not limited to, any of
8 the following, or any combination thereof: hunting, fishing, swimming,
9 boating, camping, picnicking, hiking, pleasure driving, nature study,
10 water skiing, winter sports, and viewing or enjoying historical,
11 archaeological, scenic, or scientific sites.

12 (d) "Charge" means the admission price or fee asked in return
13 for invitation or permission to enter or go upon the land.

1 Section 3. Except as specifically recognized by or provided in
2 Section 6 of this act, an owner of land owes no duty of care to keep
3 the premises safe for entry or use by others for recreational pur-
4 poses, or to give any warning of a dangerous condition, use, struc-
5 ture, or activity on such premises to persons entering for such pur-
6 poses.

1 Section 4. Except as specifically recognized by or provided in
2 Section 6 of this act, an owner of land who either directly or indi-
3 rectly invites or permits without charge any person to use such
4 property for recreational purposes does not thereby:

5 (a) Extend any assurance that the premises are safe for any pur-
6 pose.

7 (b) Confer upon such person the legal status of an invitee or
8 licensee to whom a duty of care is owed.

9 (c) Assume responsibility for or incur liability for any injury to
10 person or property caused by an act of omission of such persons.

1 Section 5. Unless otherwise agreed in writing, the provisions of
2 Sections 3 and 4 of this act shall be deemed applicable to the duties
3 and liability of an owner of land leased to the state or any subdivi-
4 sion thereof for recreational purposes.

1 Section 6. Nothing in this act limits in any way any liability which
2 otherwise exists:

3 (a) For willful or malicious failure to guard or warn against a
4 dangerous condition, use, structure, or activity.

5 (b) For injury suffered in any case where the owner of land
6 charges the person or persons who enter or go on the land for the
7 recreational use thereof, except that in the case of land leased to
8 the state or a subdivision thereof, any consideration received by the
9 owner for such lease shall not be deemed a charge within the mean-
10 ing of this section.

1 Section 7. Nothing in this act shall be construed to:

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Suggested State Legislation

2 (a) Create a duty of care or ground of liability for injury to per-
3 sons or property.

4 (b) Relieve any person using the land of another for recreational
5 purposes from any obligation which he may have in the absence of
6 this act to exercise care in his use of such land and in his activi-
7 ties thereon, or from the legal consequences of failure to employ
8 such care.

1 Section 8. [Insert effective date.]

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IN THE SUPREME COURT OF APPEALS OF
WEST VIRGINIA

Appeal No. 34327

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

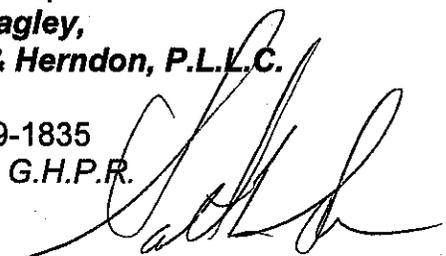
Appellee.

CERTIFICATE OF SERVICE

I, Scott L. Summers, one of the attorneys for Appellants, Ingram Barge Company, The Ohio River Company LLC and The Ohio River Terminals Company LLC hereby certify that on **October 29, 2008**, a true and correct copy of the foregoing "**Appellant Brief of 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:

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