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,

vs.

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

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

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MEMORANDUM OF PARTIES

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I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

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

II. STATEMENT OF FACTS

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

been a public swimming area for many years and was called Wyles Beach. Deposition of James McClelland, page 17, lines 18 through 23 and page 18, line 1.

Depositions and documents establish that the Barge Line Defendants had actual knowledge that children were using the mooring chains to climb out on and dive from the barge. In her deposition, Sandra Strom testified that she lived directly across the street from the river and barge and that she called Ott Atkins, the barge company's general manager, and told him that she was "scared to death" that someone was going to drown or get hurt because kids were climbing out onto the barge and diving into the river. See Sandra Strom Deposition, page 7, lines 1 through 14, attached as Exhibit 1. Her husband, David Strom, in his deposition, said that he thought the barge and children's swimming was a very dangerous situation and he made an appointment and spoke with Mr. Adkins personally. See David Strom Deposition, pages 6 and 7, attached as Exhibit 2. More importantly, nine years before the death of Randall Vaughan, the Department of Defense, Corps of Engineers, personally contacted Adkins and advised him that kids were climbing out the chains of the barge on a regular basis. The internal memo indicates that Adkins said he would do what was necessary to insure safety. See Conversation Record, attached as Exhibit B to Plaintiff's Reply to Defendants' Response to Motion for Partial Summary Judgment. Notwithstanding the knowledge of the Barge Line Defendants that swimming upstream from a barge could cause serious injury or death, nothing was done to insure safety. The training manual for their employees advises them that even a strong swimmer would be in danger of being washed under the barge if a person were in the water above or upriver from the

barge. See Page 9, Fall Overboard Prevention, attached as Exhibit A to Plaintiff's Reply to Defendants' Response to Motion for Partial Summary Judgment.

The Cabell County E-911 report shows that responders at the scene found two kids' bikes and some clothes on the bank of the Ohio River next to the barge with footprints leading into the water. See copy of 911 Report, attached as Exhibit 3. William Howard, a Park Board employee, arrived at the scene and saw clothes, bicycles, and footprints leading into the water 10 to 15 feet from the barge. See Howard Deposition, pages 10 and 11. Stephanie Durst, the mother of one of the boys who drowned, testified at her deposition that when she arrived at the scene, she saw several muddy footprints going up the side of the front of the barge. See Stephanie Durst Deposition, page 48, line 7, attached as Exhibit 4.

III. STANDARD OF REVIEW

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

IV. RESPONSE TO ARGUMENTS

PRELIMINARY MATTER

There is an issue that has not been addressed by the underlying Court, and resolving that issue at this juncture will involve little time or effort by the Court and may well make the issue with the Barge Line Defendants' Appeal on the Recreational Immunity matter moot. WEST VIRGINIA CODE §19-25-7 provides that if the Barge Line Defendants had liability insurance in effect at the time of this incident, the policy would

be read to waive and agree not to assert the immunity defense. In Plaintiff's Third Set of Discovery, Vaughan asked for a copy of any liability insurance that covered the incident on behalf of the Barge Line Defendants. Vaughan received and reviewed the policy. The policy received by Vaughan did not have the statutorily required rejection in writing. It is presumed when the Barge Line Defendants receive this Response they will provide the Court and Vaughan's Counsel the required written rejection or send a letter withdrawing this appeal because clearly his clients cannot assert the immunity defense provided by the Recreational Use Statute.

INTRODUCTION

The purpose of the West Virginia Recreational Use Statute is clear -- to encourage landowners to make available to the public land for recreational purposes. In their Brief, the Barge Line Defendants make the following statements regarding that issue: "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...." "If Randall Wayne Vaughan and Justin Smoot were on the barge prior to their deaths they did not have permission to be there." "The Barge Line Defendants assert through their theories of defense that there was no invitation to use the barge for recreational purpose and that Randall Wayne Vaughan was a trespasser to whom they owed no duty of care." If they admit the Statute did not encourage them and they did not make available the land to the public for recreational purposes, it inconceivable they can claim the immunity provided by the Statute. This is the very same argument they made to the underlying Court. When discussing Judge Pancake's finding

that they did not hold out the property for recreational use, they said, "The Barge Line Defendants agree they not intend to do so." With those direct statements, they still maintain they are entitled to immunity provided by the West Virginia Recreational Use Statute; and, therefore, Judge Pancake's grant of a summary judgment was wrong. If the purpose of the statute is to encourage landowners to make land available to the public for recreational purposes, WEST VIRGINIA CODE §19-25-1, it is impossible to argue the statute applies when you specifically state that you did not make the land available for that purpose. After the Barge Line Defendants took the same approach in their Response to the Motion for Summary Judgment, the Circuit Court made the logical and common sense judgment the immunity was not available to a landowner who admits that it did not hold the property out to the public. There were no disputed facts on that issue. Although this Court has never addressed this specific issue, as will be pointed out, other State and Federal Courts have reached the same decision that the Circuit Court did under the same or similar facts.

Although they admit they did not do what the statute required them to do to try escape liability, by pointing to Vaughan's Answer to an Interrogatory during discovery, the Barge Line Defendants argue the answer creates a genuine issue of material fact. The Interrogatory Question asked, "Please identify any information in your possession indicating that the decedent, 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." Vaughan's Answer regarding the direct question of his **permission** does not in any way defeat his position that the barge was not offered to the public as a result of the encouragement of the West Virginia Recreational Use Statute.

As a matter fact, the Answer is consistent with both West Virginia and other states' laws regarding when a person is an invitee. Vaughan's Answer does not say he was invited by the Barge Line Defendants; he is saying the condition of the park and the barge invited the deceased to the premises for swimming and diving. In other words, due to the condition of the premises, the children were misled into thinking they could go on and use the property. As will be set out in detail below, to be an invitee, two elements are required -- an invitation and permission. An invitation can occur from the condition of the premises; permission comes from the act of the landowner letting you know he desires you to be there. In this case, the owners of the barge, by the testimony of their officers and their statement made before this Court, state clearly no permission was given by them; and, as a matter of fact, anyone on the barge was a trespasser. The fact that Vaughan said the condition of the premises invited him out of curiosity to dive and swim around the barge does not create a genuine issue of material if the material fact is the Barge Line Defendants offered the barge to the public for recreational purposes. They said they did not.

The Barge Line Defendants have argued in every pleading that this is a tort committed on navigable water and, therefore, general admiralty law governs the case. Isn't the first question to be addressed can the West Virginia Recreational Use Statute be applied to this tort committed on navigable water? As will be pointed out, it cannot. After that determination, the following questions need to be addressed: Was the barge offered to the public for recreational purposes? Were the Barge Line Defendants, as a result of an act of the Legislature, encouraged to offer the barge for recreational purposes? Did the Barge Line Defendants take any positive steps, by word or act, to

invite the public to the barge? Is the position they take that the Barge was offered to the public for recreational purposes defeated by their use of "No trespassing" signs and the resort to calling the police when people are seen on the barge? Is the position they take that the barge was offered to the public defeated as a result of the fact that the area that the Barge is situated in is already owned by the public? Does the Recreational Use Statute apply to personal property such as a barge when the owner has no land to offer to the public? Even if it were, is the Barge something the Legislature envisioned would be included in a scheme to limit liability? In other words, is an old empty retired coal barge now used to tie off coal barges suitable for recreational use, especially on the Ohio River? Although the answers are obvious, they will be discussed in detail below.

Additionally, what the Barge Line Defendants overlook is if Vaughan proves that the barge was dangerous and that the Barge Line Defendants knew of the danger but did not warn people known to be using the barge to dive and swim about it, they can be liable. The Statute provides no immunity for deliberate, willful or malicious injuries. The Circuit Court's Order did not address that issue nor is it before this Court on Appeal. The Barge Line Defendants' knowledge that the mooring barge was dangerous to people in the water above or up river from the barge is established by their internal documents. The Man Overboard Manual, which is used to train the employees of the Barge Line Defendants, provides a diagram of a river and a barge with a person upstream and states, "The dotted lines represent a path that would place even a strong swimmer **in danger of being washed under the fleet"** (emphasis added). Copy attached as Exhibit A to Plaintiff's Reply to Defendants' Response to Motion for Summary Judgment. In addition to other witnesses, the Barge Line Defendants' knowledge that kids were using the barge

for their curiosity and pleasure can be demonstrated by a Conversation Record given by the Coast Guard to the local manger, Otis Adkins. This Record clearly shows that the Barge Line Defendants knew that children were using the chain securing the barge to climb onto the barge. See Conversation Record, attached as Exhibit B to Plaintiff's Reply to Defendants' Response to Motion for Partial Summary Judgment. Vaughan believes the reason the Barge Line Defendants argue Randall Vaughan was a trespasser and was not invited on the barge is because to do otherwise creates clear liability, given the knowledge of the Barge Line Defendants that the water above the barge was dangerous even to a strong swimmer and surely to children who they knew were using the barge as a playground on a continuous basis. Although this Court has not decided a similar issue under the Statute, other courts have held, "In regard to this duty as imposed by the recreational use statute, a failure to warn of a dangerous condition connotes a conscious course of action, and is deemed willful or malicious when action is knowingly taken or not taken, which would likely cause injury, with conscious indifference to consequences thereof. *Lambert, et al v. State of Louisiana, et al.* 912 So.2d 426, 434 (2005).

A. The West Virginia Recreational Use Statute cannot be applied to this admiralty action.

The Barge Line Defendants have argued, and Vaughan has conceded, that this action involves a Maritime Tort and that Maritime law controls this case. In admiralty cases, unless there is a relevant statute, the general maritime law, as developed by the judiciary, applies. *McMellon v. United States*, 338 F.3d 287 (4th Cir. 2003). Unlike in the companion issue before this Court regarding the use of the West Virginia Wrongful Death Statute where the Death on the High Seas Act, *46 U.S.C.A. §761 (1975),*

specifically provides for the use of state wrongful death statutes, there is no Federal statute providing for the use of state recreational use statutes in maritime tort actions. Based upon this absence of statute, the Fourth Circuit has held, "Thus, application of the recreational use statute of the state where a maritime accident happened to occur would lead to disparate results based only on the fortuity of geography and would frustrate the goal of developing a uniform body of maritime law. Accordingly, we conclude that state recreational use statutes cannot be applied in admiralty actions." *Id.,* 303. The Court noted it had found no other Federal circuit court opinions applying a state recreational use statute in an admiralty case. Clearly, the Barge Line Defendants are not entitled to the immunity for this reason alone.

B. There is no genuine issue of material fact that the Barge Line Defendants did not offer the barge to the public for recreational purposes.

Both from the Brief before this Court and in the discovery testimony of witnesses Adkins and Liest, who managed and conducted the daily operation of the Barge Line Defendants for many years, it was established and proven that the barge was not offered to the public for recreational purposes. The purpose of the West Virginia Recreational Use Statute is to encourage owners of land to make land and waterways available to the public for recreational purposes. WEST VIRGINIA CODE §19-25-1. Vaughan believes the words "make available" mean to offer or hold out the property to the public for recreational use. In other words, if someone uses the land for recreational purposes, the owner of the land is saying you have my permission to do so. In their Brief to this Court, it is clear this was not the intention of the Barge Line Defendants. They consistently say,

"The Barge Line Defendants agree they did not intend to do so." They tell this Court Vaughan was a trespasser. In answers to Discovery, the Defendants have consistently argued the deceased was a trespasser and they put "No Trespassing" signs on the barge. See Deposition of Otis Adkins, page 49, line 13. In addition to the "No Trespassing" signs, the Defendants even called the police when they saw people on the barge. See Deposition of James E. Leist, page 20, lines 8-23; and page 21, lines 1-23. You are not inviting the public on the land if there are "No Trespassing" signs and you call the police when they get on your property. You either offer **(make available)** the area to the public as required by the statute or you call the police and put up "No Trespassing" signs and say keep away. You cannot have it both ways.

More importantly, in the depositions taken of the Barge Line Defendants' Terminal Manager, Otis Adkins, and the deposition of Randy Workman, the Assistant Terminal Manager, both of who have worked for the Defendants for over thirty years, when asked specifically if "...either one of these defendants ever offered that barge for recreational purposes," Mr. Adkins said; "No, sir, they have not." See Adkins Deposition, page 6, lines 9 - 23; page 7, lines 1 - 23; page 8, lines 1 – 23. Mr. Workman, the Assistant Terminal Manager, when asked specifically if his company offered the barge for recreational purposes, said, "No, sir." See Workman Deposition, page 32, lines 15 – 17.

There simply is no evidence that exits or could be developed with further discovery creating a genuine issue of material fact whether or not the Barge Line Defendants offered the fleeting/mooring barge to the public for recreational purposes.

Likewise there is no evidence those who took advantage of using the barge to dive and swim did so with the permission of the Barge Line Defendants.

In their Brief, the Barge Line Defendants want to ignore the clear intent of the Statute by saying, "The correct factual issue is whether the Barge Line Defendants "directly or indirectly invited or permitted, without charge, any person to use such property for recreational purposes...." This language is from section 2 of the act and has no meaning without reading the entire act. They may be able to argue they knew children were using the barge and they did nothing to prevent it, which they did; but this does not mean they made the barge available to them for recreational purposes as required by the Statute. This position would defeat the purpose and meaning of the Statute. It is Vaughan's position that the section presumes, or takes into consideration, that the person is on the land with permission, or in other words, is not a trespasser. Although the section does use the words "invites" or "permits," it is clear, as will be set out, the law does not contemplate a person being an invitee without permission from the owner. The Barge Line Defendants set up this argument in their Brief by saying, "Mr. Vaughan himself created this question of fact, to wit, Is the public either expressly or implicitly invited to use the barge for recreational purposes?" As set out in the Introduction, the Interrogatory Question asked if Vaughan had permission to use the barge. Vaughan's Answer regarding the direct question of his permission does not in any way defeat his position that the barge was not offered to the public for recreational purposes or as a result of the encouragement of the West Virginia Recreational Use Statute. As a matter fact, the Answer is consistent with both West Virginia and other states' laws on the subject of invitees. Vaughan's Answer does not create a genuine issue of fact regarding

the Barge Line Defendants offering the land for recreational use to the public, it only says he went to the barge out of curiosity due to the physical condition of the park and the barge. In other words, due to the condition of the Park, the deceased was misled into thinking he could go on and use the barge. Permission infers Vaughan was present with the consent of the owners. Clearly, by their (the Barge Line Defendants) own admission, he was not. An invitation can occur from the condition of the premises; permission comes from the act of the landowner letting you know he desires you to be there. The Defendants' Interrogatory wanted Vaughan to admit his son was a trespasser on the premises at the time of the accident. This Court has recognized this distinction in *Cole v. Fairchild, et al.* 482 S.E.2d 913 (1996). In making this analysis, the Court said, "Additionally, it is important to recognize the distinction between an "invitation" to enter upon the premises and mere "permission" to enter upon premises." The Court said, "An invitation occurs when a possessor of certain premises exhibits conduct which makes others believe the possessor wants them to be on the premises. An invitation is the act of one who solicits or incites to enter upon, remain in, or make use of, his property or structures thereon, or who so arranges the property or the means of access to it or of transit over it as to induce the reasonable belief that he expects and intends that others shall come upon it or pass over it." *Id.*, 919. The Court then said, "On the other hand, "permission" indicates the possessor of the premises will allow an individual to be on the premises if the individual so desires." *Id.,* 919. The Court said, "An invitation, by itself, will not establish a person as an invitee." *Id.*, 919. Vaughan's Answer was an attempt to answer the question honestly based upon this Court's instruction under similar circumstances. This Court has said, "The general rule is that one who unlawfully enters

onto the property of another by mistake or accident, particularly where he was misled into doing so by some conduct of the owner or occupant of the property, has not committed such a trespass as will preclude him from recovering damages for injuries incurred on the premises as a result of the negligence of the owner or occupant." *Huffman v. Appalacian Power Company,* 415 S.E.2d 145, 149. The Recreational Use statute uses the term "permit." In this case, the owner of the barge, by the testimony of its officers and its statement made before this Court, states clearly no permission was given by them and as a matter of fact anyone on the land was a trespasser. The condition of the premises invited Vaughan, but he did not have permission to be on the barge, its owner considered him a trespasser.

For Vaughan to have been invited, either expressly or impliedly, and, therefore, to have been qualified to receive the term "invitee," two things would have to occur. One, an invitation and, two, permission to be there. The Barge Line Defendants say Randall Vaughan was a trespasser. The fact Vaughan feels his son was expressly or impliedly attracted to the premises simply does not rise to a level that he was there by permission. Other state Courts agree with Vaughan's position. In *Cassidy v. Bonham,* 102 P.3d 748 (2004), the Court recognized, "An invitation may be expressed or implied by the land owner." *Id.*, 751. The Court referred to *Restatement (Second) of Torts Sec. 332, comment b (1965)* and said, "In determining whether or not a particular person is an invitee, the important thing is the desire or willingness to receive that person which a reasonable man would understand as expressed by the words or other conduct of the possessor." The Barge Line Defendants offer no evidence that satisfies this requirement.

As a matter of fact, they say Vaughan was not welcome and there was no desire or willingness for him to use the barge for recreational purposes.

The Barge Line Defendants also suggest that Vaughan has not made an attempt and should withdraw the Answer to the Interrogatory. They say, "If he alters his sworn Answers to Interrogatories, then Randall Vaughan was a trespasser to which no duty of care is owed by the Barge Line Defendants." Vaughan does not intend to withdraw his Answer based upon what is certainly the Barge Line Defendants' misunderstanding or misstatement of maritime law. The 4th Circuit has recognized and concluded that the United States Supreme Court decision, *Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959),* rejected the common law labels of invitee, licensee, and trespassers in admiralty claims. In that case, the Court said, "Thus, we find unavailing the government's efforts to characterize the plaintiffs as trespassers so as to reduce the duty of care owed to the plaintiffs by the government." *McMellon, Ibid.*, 301. As set out in detail below, Randall Vaughan was not a trespasser. He was swimming in the Ohio River, which is owned by the State of West Virginia and in which he has the right to swim with or without the permission of the Barge Line Defendants. Nor, as will be set out in detail below, is the Barge Line Defendants' statement that if Vaughan is a trespasser, they owe him no duty of care.

C. The Circuit Court's construction of the Statute and its holdings were not erroneous.

The Barge Line Defendants argue that the Circuit Court's interpretation of the Statue was erroneous in that it added a word to the statute when it ruled that the

Defendants did not "hold" out the barge for recreational purposes. They argue, "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 protections of W.Va. Code 19-25-1, *et seq.*" In the next sentence, they agree they did not intend to do so. How is this argument sensible, given any reading of the statute? The statute says its purpose is to encourage owners of land **to make available** to the public land and water areas for recreational purposes. The Barge Line Defendants admit it was not their intention! This position is inconsistent to logic and to the position of other state courts that have addressed the issue and the words "make available."

The Delaware Supreme Court in *Gibson v. Keith, 492 A.2d 241(*1985*)* interpreted "available" to require an affirmative act of a landowner, as stated to make the land available. The Court further stated, "We hold that the statute must be construed as intended only for the benefit of owners of private property who evidence intent to permit the public to enter for recreational use. Thus, the statute may not be invoked against one who enters as a trespasser and not a statutory invitee of the owner." *Id.*, 246. Importantly, as the facts in this case demonstrate, the Court held the statute was not intended to protect a property owner who takes affirmative steps to deny the public access. As stated above, the Barge Line Defendants used "No Trespassing" signs and called the police on users of the barge. The Minnesota Supreme Court, in *Hughes v. Quarve*, 338 N.W.2d 422 (1983), said in a case in which "no trespassing" signs were used and the police were called, "We agree with the trial court that the Recreational Use Statute has no application where the defendant landowner does not offer the quarry pond

in question for public use and indeed claims here that it discouraged the public from using the pond as a public facility." *Id.*, 427. The Louisiana Supreme Court, in *Craig, et al v. Donald Sepolvado, e. al.*, 709 So.2d 229 (1998), said, "A landowner who does not evidence an intent to permit the public to enter without charge for recreational use may not invoke the recreational use statute's protective benefits against liability." *Id.*, 230. The Illinois Supreme Court, in *Hall v. Henn,* 802 N.E.2d 797 (2003), said, "When specifically asked whether the run was open to the public, defendants testified that it was not. In light of these admissions, defendants cannot claim the Act's protection, and they were not entitled to summary judgment." *Id.*, 332. The Utah Supreme Court, in *Crawford v. Tilley,* 780 P.2d 1248 (1989), said, "To extend application of the Landowner Liability Act to landowners who actively discourage or preclude access to their property would be to disregard the legislature's intent and to derogate the purpose of the statute." *Id.*, 1251. The Court also adopted other state courts' decisions that the recreational use statute did not protect landowners who discouraged public access to their property by posting "no trespassing" signs. In *Coursey v. Westvaco,* 790 S.W.2d 229 (1990), the Kentucky Supreme Court said, "If the landowner is not required to affirmatively make his land available or at least have an intent to do so, then the legislation is in essence a blanket grant of immunity without any rational basis." *Id.*, 231. The Court adopted other state courts' holdings that a landowner who undertakes affirmatively to either warn or bar the public entry cannot come within the protection of the statute. The Georgia Supreme Court, in *Georgia Power Company v. McGruder,* 194 S.E.2d 440 (1972), said, "In our opinion the statute is not applicable where, as here, the use of the land was expressly denied to the deceased boy by the posting of "keep out" signs in the area." *Id.*, 812.

Reason and common sense dictates the determination that the West Virginia Legislature did not intend to bar immunity to a landowner who openly admits the land was not offered to the public.

D. The Circuit Court's construction of the Recreational Use Statute was not against public policy.

The Barge Line Defendants' Deed of a tract of land to the Greater Huntington Parks and Recreational District has nothing to do with their ability to seek the protection of the statute. The Barge Line Defendants did not give the land out of some civic obligation or benevolent purpose, or as they say "at no profit to themselves," they did it so that they could run their fleeting station, the mooring barge, for profit. The Mitigation Agreement with the Public Land Corporation gave them a license to allow the barge to float, attached, in the river and without which they could not be there. The Agreement clearly shows the purpose of the Deed to the Park Board. Copy attached as Exhibit 5. It is an agreement with the Public Land Corporation. The agreement says, "Whereas the activities of the Company which have been authorized by the Division will result in certain environmental impacts to the Ohio River, and Whereas the parties desire to enter into this agreement for the purpose of mitigation and compensating for the environmental and recreational impacts of the facilities to be constructed and expanded by the Company..." The Barge Line Defendants' Deed to the Park Board was for that purpose and not to provide the park land for recreational purposes.

As set out in more detail below, the Barge Line Defendants do not have to offer the river to Vaughan or any other member of the public for it to be used by them, the public has every right to use the river owned by the State and do not need the permission of the Barge Line Defendants. All they have is a license from the public to use the area

for their mooring barge. See License Agreement attached as Exhibit 6. The License Agreement specifically recognizes that the Barge Line Defendants' use of the licensed area is limited to the paramount right of the general public.

More importantly, the barge is floating in the river. Vaughan died while swimming in the river not on the fenced Park property, which is on the bank 50 feet or better away. The Deed from the Barge Line Defendants to the Park Board deeded to them the land to the river's edge. Copy of pertinent portions of the Deed is attached as Exhibit 5.

The Barge Line Defendants then make an incredible argument in support of their position that the underlying Court's narrow construction of the statute was against public policy. The say if the Recreational Use Statute does not protect a person who donates land to another for public recreation, "there will be a chilling effect to other landowners from making donations of this type." First, this was not a donation. It was a business decision for substantial consideration from the State of West Virginia, Public Land Corporation. Second, they argue, "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." The injuries and death they seek immunity for did not happen on the Park Board property. It happened in the river on and around their barge, which they admit they did not intend to offer to the deceased or the public. Third, surely the Barge Line Defendants do not think the statute implies they get to piggyback the immunity of the Statute when land is donated nearby to others who use it for recreational purposes. It is just not the intent of the Statute from any reading.

E. The Circuit Court's ruling did not create an exception, or "Loophole," in the Recreational Use Statute.

The Barge Line Defendants next argue that the Circuit Court created an exception, or "loophole," to the statute by considering the Attractive Nuisance Doctrine and the Dangerous Instrumentality Doctrine. The Court did not have to consider either doctrine to reach a decision. After considering the Barge Line Defendants' statements admitting that they did not offer the barge to the public for recreational purposes and after reading the clear purpose of the doctrine granted, the Court simply applied to purpose to the Barge Line Defendants intent and granted Summary Judgment based upon that fact. For whatever reason, the deceased was on and around the barge; he was not there because the Barge Line Defendants offered it to him or to the public for recreational purposes.

It was not necessary for the Court to consider Vaughan's Interrogatory Answers to reach the decision. As set out in detail in Section designated B, Vaughan's answer was trying to explain what his reason was for being on the property was and how he got there using this Court's decision in *Cole v. Fairchild, et al.,* 482 S.E.2d 913 (1996) and *Huffman v. Appalacian Power Company,* 415 S.E.2d 145. The Interrogatory asked if the deceased had permission. Vaughan knew when he answered the Interrogatory from the Barge Line Defendants' Discovery Answers, they had taken the position he did not have permission, as is still maintained by them. What he was directly saying is that he was not a trespasser. What he could have said, and perhaps should have said, is that he did not need the permission of the Barge Line Defendants to swim in the river that he, as a citizen of West Virginia, had the right to swim in the state's river. The title belongs to the Public Land Corporation in trust for all the people in the state. *Campbell Brown & Co., Inc. v. Elkins,* 93 S.E.2d 248, 260 (1956). As stated above, the condition of the premises

invited the deceased, not any action by the Barge Line Defendants and certainly not with their permission. An invitation can occur as a result of the condition of the premises. This does not mean the Barge Line Defendants invited him. To be invited by a landowner, it takes their permission to be an invitee. As stated above, this Court has said, "The general rule is that one who unlawfully enters onto the property of another by mistake or accident, particularly where he was misled into doing so by some conduct of the owner or occupant of the property, has not committed such a trespass as will preclude him from recovering damages for injuries incurred on the premises as a result of the negligence of the owner or occupant." *Huffman v. Appalacian Power Company,* 415 S.E.2d 145.

More important, whether or not the deceased was an invitee or a trespasser is not important under maritime law; and Vaughan's Answer to an Interrogatory question explaining his presence on the barge did not have to be considered by the Court in reaching its decision and certainly did not create a genuine issue of material fact as argued by the Barge Line Defendants. As has been discussed, the 4th Circuit has recognized and concluded that the United States Supreme Court decision *Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959)* rejected the common law labels of invitee, licensee, and trespassers in admiralty claims."

In that regard, since the Barge Line Defendants insist this is a maritime action which mandates the application of maritime law, the Circuit Court would have to apply maritime law in determining the duty owed to Vaughan. In *Kermarec,* in rejecting the common law labels regarding persons on land, the Court said, "We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his

legitimate interest the duty of exercising reasonable care under the circumstances of each case." *Id.*, 632. Inimical means, "1. being adverse often by reason of hostility or malevolence 2. having the disposition of an enemy; reflecting or indicating hostility." *Merriam-Webster's Collegiate Dictionary,* Tenth Edition (1999). There is no evidence that the deceased exhibited any such conduct. The evidence is that the deceased was playing on the barge, and that the Barge Line Defendants knew that people did so on a regular basis and knew there was a hidden danger but did nothing.

The fact in this case is that Randall Vaughan went to the river to swim; he did not need anyone's permission to do so. The Barge Line Defendants put a barge on the river that was known to them to create a dangerous undertow to even strong swimmers. The Barge Line Defendants had actual knowledge that people were using the barge to dive from but did not warn of this dangerous and life-threatening condition of the barge. This duty to use reasonable care is a result of Admiralty Law and not the Attractive Nuisance Doctrine or the Dangerous Instrumentality Doctrine.

The real and correct issue that the Court had to decide was the putting in the river the barge done so and held out to be so that the public could use it for recreational purposes. That is the Legislature's stated purpose for the grant of immunity. The Court did not have any other choice but to grant the motion. The Barge Line Defendants said that it was not.

F. The Mitigation Agreement between two parties cannot in and of itself invoke the protection of the Recreational Use Statute.

Private parties cannot enter into an agreement to mitigate the environmental impact to the Ohio River saying the Recreational Use Statute will protect them from any

liability from the use of the property and then not open it up for use by the public for recreational purposes and then expect to be immune from liability. Parties do not determine their liability, Courts do, regardless of whether they rely on the Agreement or not. It is presumed the drafter and signer of the Agreement took the time to read the Recreational Use Statute before relying on it. The purpose of the Statute is clear. The Barge Line Defendants admit they did not offer the barge to the public for recreational use. That is what has to be done to invoke the statute's immunity, not signing a paper saying you are protected by it.

The Barge Line Defendants then attempt to assure themselves this Court will consider them to be the owners of the land as provided in the Recreational Use Statute. Did they own land? What did they own? The Barge Line Defendants' Brief states they are entitled to present the defenses afforded by the statute "in their capacity as an easement owner." Vaughan alleges the injury resulted from the barge, which was floating in the Ohio River. The Barge Line Defendants owned the barge, which is not land but is personal property. The purpose of the Statute is to encourage "owners of land" to make public land and water areas available to the public. The Barge Line Defendants argue that the definition of land contained in the act covers the barge because it was machinery or equipment. However, the Statute also says the machinery or equipment has to be attached to the realty. The Barge Line Defendants did not own the realty. They conveyed the realty to the low water mark to the Park Board. All the Barge Line Defendants owned is set out in that deed of conveyance. The Deed reserves to the Grantor on page 9 what the Barge Line Defendants own. Copy attached as Exhibit 5. One, a 10-foot easement across the property for the purpose of ingress and egress of and

for pedestrians to go to the river and fish. Two, a 300-foot easement of unspecified width of river frontage. Three, all riparian rights appertaining or in anywise belonging to the property. Four, a license from the Public Land Company to keep the barge on and floating in the river.

Was the barge attached to realty owned by the Barge Line Defendants? Did the Barge Line Defendants own anything they could offer to the public for recreational purposes or was the right already available to the public?

Regarding the license granted by the State of West Virginia, Public Land Corporation, the Barge Line Defendants claim that the barge is covered by the Immunity Statute because the act covers machinery or equipment attached to the realty. The Barge Line Defendants did not own any land; they deeded it to the Park Board. They did have a license from the State. However, this Court has held, in *Kelly v. Rainelle,* 64 S.E.2d 606 (1951), that, "A license in the aspect here discussed grants to some person the right to do some act or series of acts on the land of another without passing an estate in the land. It is a personal right, is not assignable, and grants no estate in land affected by it." *Id.*, 615. Clearly, the Statute's purpose and meaning when including machinery and equipment attaching to land is referring to the land in the first section of the Act, which states the purpose of the statute is to encourage owners of land to make available to the public the land for recreational purposes. The Barge Line Defendants did not own any land to attach the barge to.

Regarding their argument that the easement contained in the deed entitles them to the immunity, the only easement they could arguably have to which the barge could be attached to is the 300-foot easement of unspecified width of river frontage, because

clearly the injury or death did not occur on the 10-foot easement across the park. That also is not ownership of land required by or anticipated by the statute. Regarding easements, the Court in *Kelly* said, "An easement may be defined as the right one person has to use the lands of another for a specific purpose and is a distinct estate from ownership of the soil itself." *Id.*, 613.

Regarding any claim that the riparian rights preserved in the Deed to the Park Board entitles them to immunity by giving them some ownership in land, the State of West Virginia owns the Ohio River. The title belongs to the Public Land Corporation in trust for all the people in the state. *Campbell Brown & Co., Inc. v. Elkins,* 93 S.E.2d 248, 260 (1956). The riparian rights reserved to the Barge Line Defendants in the Deed to the Park Board does not give them title to the land. This Court, in *Union Sand & Gravel Company v. Northcott,* 135 S.E. 589, 592 (1926), said, "Our decisions say, if they hold anything, that while riparian owners may not acquire title to the bed, banks and shores of the Ohio River to the exclusion of the public for the purpose of commerce and navigation, nevertheless the grant bordering on the river confers title upon the granted; subject to the public easement, to the low water mark, so that trespass may be maintained against the wrongdoer for entering and taking driftwood, sand and gravel." *Id.*, 592. The Barge Line Defendants simply did not own the land on the bank so as to qualify the barge as machinery or equipment attached to the realty. All they had was a license from the Public Land Corporation. The Park Board clearly owned the land to the low water mark. The Barge Line Defendants reserved the riparian rights, which only includes to the low water mark. The Barge was floating in the river. Vaughan was swimming in the river.

The Barge Line Defendants also argue that WEST VIRGINIA CODE §19-25-3 applies to them because of their Deed to the Park Board, an agency of the City of Huntington. The Deed did reserve a 10-foot easement to the public across the Park Board property. However, for this to apply, the injury and death would have had to occur on the 10-foot easement, which it did not, nor is it alleged to have occurred on the 300-foot easement along the river. The Code section says the person giving the easement does not have a duty to keep that land safe. Vaughan claims his son was drowned in the river, a place he does not have to have permission from the Barge Line Defendants to swim in as a member of the public. As previously stated, the state owns the river with the title in the name of the Public Land Corporation. Even the License Agreement recognizes this clear legal principle. It says, "The License shall not attempt to forbid the full and free use by the public of all navigable waters adjacent to the installation." Although Vaughan maintains his son drowned while swimming in the river, if the Barge Line Defendants maintain his death occurred on any easement they had, they should be precluded from alleging and presenting a trespass defense based upon this Court's recent decision in *Smoot v. American Electric Power Company, et al*, 2008 W.Va. LEXIS 79 (2008).

The Barge Line Defendants again argue that they are entitled to immunity by virtue of Vaughan's Answer to an Interrogatory question. As discussed in detail above, the Interrogatory answer is meaningless to the issue of whether or not the Barge Defendants made available to the general public land for recreational use. They say they didn't. Vaughan's Answer does not say he had permission from anyone to get on the barge to dive. What the Answer could have and perhaps should have said is that it is irrelevant. Vaughan drowned in the Ohio River. The deceased did not need permission to

swim in the Ohio River. The Barge Line Defendants could not give him permission or bar his access to the river under both their Licensee Agreement and the law. The title of the Ohio River is in the Public Land Corporation in trust for the public. Vaughan has not sued the State of West Virginia. It was the Barge Line Defendants who put a barge with death-threatening undertow to even strong swimmers at a place known for swimming and allowed it to remain after being repeatedly warned and even begged by citizens about children using the barge as a playground to dive from and swim around. The deceased did not need a right-of-way to get to the river. The entire public park is adjacent to the river and on its bank.

The fact that the State of West Virginia owns the river, which is open to its citizens for their use, in and of itself defeats any argument that The Barge Line Defendants encouraged the public to use the area to swim or fish. The public had that right without The Barge Line Defendants. Of course, the public did not have the right to climb on the personal property of the Barge Line Defendants, which is irrelevant to their immunity issue because they specifically say they did not intend the public to use the barge. What is important, however, is this Court's decision regarding the application of the Recreational Use Statute to public land. Of note, the Park Board did not assert the recreational immunity statute as a defense presumably based upon the Court's decision in *Stamper v. the Kanawha County Board of Education,* 445 S.E.2d 238 (1994). Based upon that decision and the Court's reasoning, the Barge Line Defendants are not entitled to the immunity provided by the Statute because the Ohio River is public land which they do not own and, therefore, cannot offer to the public. The Court in *Stamper* said, "We believe that the legislature did not intend to make it applicable to public property." *Id.*

242. The *Stamper* Court recognized that the Statute applied to real property. *Id.* 239. The only thing the Barge Line Defendants owned was a barge, personal property, which they specifically say they did not offer. It is clear the holding in *Stamper* is that the Recreational Immunity Statute applies only to private **landowners**. The Barge Line Defendants did not own private land anywhere near where Vaughan drowned, did not offer anything to Vaughan that he as a citizen didn't already own, the Ohio River. They cannot argue that the definition of owner as provided in WEST VIRGINIA CODE §19-25-5 applies to them. They did not own the Ohio River by lease, as a tenant, nor were they in control of it.

In a case discussed in *Stamper, Monteville v. Terrebone Parish Consolidate Government,* 567 So.2d 1097, the Court discussed its rationale to not apply the Recreational Use Statute to public land. The Court said, "Since public lands are always acquired, and usually held, for the use of the public, it is unlikely that the legislature's object in such legislation was to encourage the state to permit the people to use its property." *Id.* 16. The Court, as in this Court in *Stamper,* said, "The purpose of the Recreational Use Statutes, their legislative history of the state of the law at the time of the original enactment indicate that the legislature intended to confer immunity only on owners of private lands." *Id.* 15. If for no other reason, the Barge Line Defendants, who owned no private land, cannot now claim immunity to offer to the public something that did not own as it was already owned by the public.

G. Summary Judgment was not improperly granted prior to the close of discovery.

The Barge Line Defendants argue that there was more discovery that they needed to undertake at the time the Motion for Summary Judgment was heard by the trial court. Rule 56(f) of the West Virginia Rules of Civil Procedure provided a remedy to the Barge Line Defendants at the time of the filing of the Motion for Summary Judgment and as well in this Court's decision interpreting the Rule, *Crain v. Lightner,* 364 S.E.2d 778 (1987). This Court's decision is clear that the failure of the Defendants to avail themselves of the protections in the Rule and this Court's not having a record of that proceeding bars the raising of this issue on this appeal. Vaughan's Counsel does not recall, nor does his file contain, the offer to the trial court of the required Affidavit of the Barge Line Defendants' Counsel.

H. Is the barge suitable for recreational use?

Although this Court has not decided the issue, other state courts in interpreting recreational use statutes, have looked at the suitability of the property for recreational use. The New York Supreme Court, in *Morales v. Coram Material Corp. (2008),* said the reason for examining suitability is, "Limiting the reach of the statute to "suitable" property makes sense, as no public purpose is served in inducing landowners to open their property to recreational uses for which the land ill-suited." Did the West Virginia Legislature intend to extend immunity from liability to an old, empty, retired coal barge used to tie off similar barges at a place known for swimmers for a number of years? Would they have intended to encourage barge companies to offer this type of property for recreational purposes, which could only include swimming and diving? Especially in

light of the known fact that the barge created a dangerous and deadly undertow to swimmers up stream from the barge. Vaughan submits the answer is obviously no.

CONCLUSION

The Barge Line Defendants have repeatedly argued that there are genuine issues of material fact that the Circuit Court ignored. They argue these were created by Vaughan's Answer to Interrogatory. Vaughan has discussed that issue in detail herein. However, their argument begs the question, what difference does it make why or for what reason the deceased went to the land as long as the Barge Line Defendants admit he was not there as a result of their making available the barge to him or the public for recreational purposes? That is simply the issue decided by the Circuit Court because that simply is the purpose the Legislature stated in the Statute.

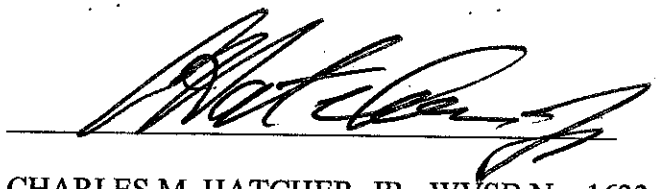
Of equal importance, the Barge Line Defendants' insistence that maritime law controls this action defeats their argument that the West Virginia Recreational Use Statute applies to them. Absent any cases to the contrary, the 4th Circuit Court of Appeals has held it does not.

Additionally, Vaughan died while swimming in the Ohio River. He did not need permission from the Barge Line Defendants, nor could they give it to him. He had that right which is open to all the public to swim in the State's navigable waterway. What happened in this case is the Barge Line Defendants, to further their business interests, put a barge, personal property, just down river from a place that had been used by the public as a beach for a number of years, knowing that it created a danger of drowning even to

experienced swimmers. They affirmatively admit they did not offer the barge to the public for recreational purposes and cannot now claim the immunity under any law of statutory construction. Even if they can prevail on this issue, the Barge Line Defendants can still be held responsible for what Vaughan alleges is willful and wanton misconduct, which is not immune under that Statute.

Therefore, the Circuit Court Order entered October 29, 2007, granting Partial Summary Judgment should be affirmed.

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



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

vs. APPEAL NO. 34327

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

CERTIFICATE OF SERVICE

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

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