

NO. A08-1402

State of Minnesota
In Court of Appeals

Jarvis & Sons, Inc., et al.,

Respondents,

v.

International Marine Underwriters, et al.,

Appellants,

and

Dolliff, Inc., et al.,

Defendants,

and

Dolliff, Inc.,

Third Party Plaintiff,

v.

Kim Brown,

Third Party Defendant.

**FORMAL BRIEF OF APPELLANTS INTERNATIONAL MARINE
UNDERWRITERS AND NORTHERN ASSURANCE COMPANY OF AMERICA**

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TABLE OF CONTENTS

Table of Contents.....ii

Table of Authorities.....iii

Statement of Legal Issues.....1

Statement of the Case.....2

Statement of Facts.....3

Argument.....7

 A. Standard of Review.....7

 B. The trial court erred in finding that Jarvis is not entitled to insurance coverage under the IMU Policy because the *Shreiner* accident took place during preparation for an excursion that took place in violation of the Policy’s lay-up provisions.....7

 1. Insurance Policy Interpretation.....7

 2. The courts have long recognized and enforced lay-up warranties in maritime insurance policies.....8

 3. The trial court erred by ruling that coverage existed because the term “laid up and out of commission” was not defined in the Policy.....12

 4. Jarvis breached the Policy’s lay-up provision by holding an excursion on a date outside the lay-up period.....16

Conclusion.....18

TABLE OF AUTHORITIES

| | |
|---|-----------|
| <i>Aguirre v. Citizens Casualty Co. of New York</i> , 441 F.2d 141 (5th Cir. 1971)..... | 17 |
| <i>Anderson v. Anoka Hennepin Indep. Sch. Dist. 11</i> , 678 N.W.2d 651 (Minn. 2004)..... | 7 |
| <i>AXA Global Risks, Ltd., v Webb</i> , 2000 WL 33179617 (M.D. Fla. 2000)..... | 9, 11 |
| <i>Campbell v Hartford Fire Insurance Co.</i> , 533 F.2d 496 (9 th Cir. 1976)..... | 10 |
| <i>Eden Stone Co. v. Oakfield Stone Co.</i> , 166 Wis. 2d 105, 479 N.W.2d 557 (Wis. Ct. App. 1991)..... | 8 |
| <i>Gelb v. Automobile Ins. Co. of Hartford. Conn.</i> , 168 F.2d 774 (2nd Cir. 1948)..... | 12 |
| <i>Gleason v. Metro. Council Transit Operations</i> , 582 N.W.2d 216 (Minn. 1998)..... | 7 |
| <i>Goodman v Fireman’s Fund Insurance Company</i> , 600 F.2d 1040 (4 th Cir., 1979)..... | 10, 12 |
| <i>Hous. & Redevelopment Auth. v. Norman</i> , 696 N.W.2d 329 (Minn. App. 2005)..... | 7-8 |
| <i>Marine Charter & Storage, Ltd. v. All Underwriters at Lloyds of London</i> , 628 F.Supp. 740 (S.D. Fla. 1986)..... | 9 |
| <i>Marine Charter & Storage, Ltd., Inc. v. All Underwriters at Lloyds of London</i> , 568 So.2d 944 (Fla. Dist. Ct. App., 1990)..... | 15-16 |
| <i>McCann v. Continental Casualty Co.</i> , 8 Ill. 2d 476, 134 N.E.2d 302 (1956)..... | 7-8 |
| <i>McDonald’s Operators Risk Mgmt Ass’n v. Coresource, Inc.</i> , 307 Ill. App.3d 187, 717 N.E.2d 485 (1 st Dist. 1999)..... | 8 |
| <i>New Hampshire Ins. Co. v. Dagnone</i> , 394 F. Supp. 2d 480 (D.R.I. 2005)..... | 13-14, 16 |

| | |
|---|-----------|
| <i>New Hampshire Ins. Co. v. Dagnone</i> , 475 F.3d 35 (1 st Cir. 2007)..... | 13-14, 16 |
| <i>Port Lynch Inc., v New England International Assurety of America, Inc.</i> , 754 F.Supp 816 (W.D. Wash., 1991)..... | 9 |
| <i>Providence Washington Ins. Co. v. Lovett</i> , 119 F.Supp. 371 (D.R.I. 1953)..... | 12 |
| <i>Robinson v Home Ins. Co.</i> , 73 F.2d 3 (5 th Cir. 1934)..... | 9 |
| <i>Sun Mutual Insurance Co. v. Ocean Insurance Co.</i> , 107 U.S. 485, 27 L.Ed. 337, 1 S.Ct. 582 (1883)..... | 17 |
| <i>Tsalapatas v. Phoenix Ins. Co.</i> , 236 S.C.508, 115 S.E.2d 49 (1960)..... | 14-15, 16 |
| <i>Thompson v. City of Minneapolis</i> , 707 N.W.2d 669 (Minn. 2006)..... | 7 |
| <i>Wigle v. Aetna Cas. & Sur. Co.</i> , 177 F.Supp. 932 (E.D. Mich. 1959)..... | 12 |
| <i>William Blair and Co., LLC v. FI Liquidation Corp.</i> , 358 Ill.App.3d 324, 830 N.E.2d 760 (1 st Dist. 2005)..... | 8 |

STATEMENT OF LEGAL ISSUES

Whether the trial court erred in ruling that the IMU Policy afforded coverage to Jarvis for underlying *Schreiner* lawsuit despite the fact that the policy's provisions require that the vessel be laid up and out of commission during the winter season from October 1 to April 30, and the underlying accident took place while the vessel was being prepared for an unauthorized excursion cruise on October 22, in violation of the those policy provisions.

The trial court incorrectly ruled that the policy's lay-up provisions only exclude coverage during the winter season if the vessel is moved from its berth. According to the trial court, the vessel is covered even during the winter season, even if it is not laid up and out of commission, so long as it does not leave its moorings.

Case law does not support the trial court's ruling and judgment:

New Hampshire Ins. Co. v. Dagnone, 394 F. Supp. 2d 480 (D.R.I. 2005),
aff'd. 475 F.3d 35 (1st Cir. 2007)

Tsalapatas v. Phoenix Ins. Co., 236 S.C. 508, 115 S.E.2d 49 (1960)

Campbell v Hartford Fire Insurance Co., 533 F.2d 496 (9th Cir. 1976)

Goodman v Fireman's Fund Insurance Company, 600 F.2d 1040 (4th Cir., 1979)

STATEMENT OF THE CASE

This litigation arises out of a claim for insurance coverage with respect to an alleged personal injury accident that took place on October 22, 2005 aboard a cruise vessel owned and operated by Plaintiffs-Appellees, Jarvis & Sons, Inc. and Afton Cruise Line (collectively referred to herein as "Jarvis"). IMU had previously issued a marine liability insurance policy to Jarvis. The Policy contained an express provision requiring that the vessel be laid up and out of commission from October 1, 2005 to April 30, 2006.

Recognizing the nature of its coverage, but having scheduled a dinner cruise for October 22, 2005, Jarvis asked its brokers, Kim Brown and Dolliff, to obtain an extension of coverage for the day of the cruise. However, the brokers failed to inform IMU of request and thus, no extension was granted for the October 22, 2005 cruise. Nonetheless, the cruise took place as scheduled and the underlying plaintiff, Susan Schreiner, was allegedly injured during the preparation for the cruise. In the underlying *Schreiner* lawsuit, she and her husband brought suit against Jarvis.

After IMU denied coverage to Jarvis, citing the violation of the Policy's lay-up provisions, Jarvis initiated the instant declaratory judgment litigation. In the trial court, IMU and Jarvis filed motions for summary judgment. Thereafter, on December 3, 2007, Judge Gary R. Schurrer granted Jarvis's motion, ordering IMU to afford a defense and insurance coverage to Jarvis for claims brought in the *Schreiner* lawsuit.

Thereafter, IMU requested the trial court to reconsider its December 3, 2007 ruling. The trial court denied IMU's request for reconsideration on January 28, 2008. On June 20, 2008, the court entered judgment awarding attorneys' fees to Jarvis. On July 14,

2008, the court entered an order rendering all previous orders regarding summary judgment and attorneys' fees final and appealable.

IMU has brought this timely appeal of the trial court's decisions and orders.

STATEMENT OF FACTS

Jarvis operated three tourist sightseeing boats on the St. Croix River near Afton, Minnesota. Jarvis also made its vessels available for charter parties. One of Afton's vessels was known as the "*Afton Princess*." (Ex. 2, Dep. of G. Jarvis, pp. 6-8)

IMU issued a marine liability insurance policy numbered N5JH 40106 to Jarvis effective from June 7, 2005 to June 7, 2006 (the "Policy"). The Policy contained a common maritime insurance provision that restricts coverage during the winter months, when Jarvis would not operate its vessels. Those restrictions were contained in the Policy's Endorsement No. 2, which provides as follows in pertinent part:

SPECIAL CONDITIONS

2. NAVIGATION LAY-UP

It is warranted the vessel(s) hereby insured shall be laid up and out of commission from October 1st until April 30th, both dates inclusive, as per Port Risk Endorsement 57A-5 attached.

Any breach of these warranties shall render this policy void for the period of such breach.

(Ex. 1; emphasis added)

In other words, the Policy provided that the Jarvis vessels were only covered while operated from May 1 to September 30. The express provision required that the vessels be

laid up and out of commission the remainder of the year (October 1 to April 30). Any occurrences taking place during October 1-April 30 lay-up period were expressly not covered under the terms of the Policy.

On October 13, 2005, Jarvis, through its broker, Kim Brown and Dolliff Inc., requested that IMU add coverage for excursions on two days in October: October 16 and October 18, 2005. IMU granted Jarvis's request by issuing an endorsement expanding coverage for those two specific dates and charged no additional premium. (Ex. 1)

Despite the plain and unambiguous language detailing the lay-up requirements contained in the IMU Policy and the warning that accompanied the specific endorsement, Jarvis took no steps to have its vessel "laid-up and out of commission." In this regard, although winterization of the vessel required emptying of water tanks, the vessel remained operational. (Ex. 2; Dep. of G. Jarvis, p. 125) Indeed, Jarvis prepared the vessel to set forth on a wedding cruise that Jarvis had scheduled for October 22, 2005. However, neither of Jarvis' brokers informed IMU of the October 22, 2005 event or requested any extension of coverage for that date.

In the underlying *Shreiner* lawsuit, Susan and Ronald Schreiner have alleged that on October 22, 2005, Susan Shreiner was aboard the Jarvis vessel *Afton Princess* as a patron in order to decorate the vessel for the wedding cruise scheduled to begin a few hours later. Shreiner further alleges that while aboard the vessel, she fell into a deck opening and sustained serious injuries to her leg and foot. Despite her injuries, Shreiner remained aboard the vessel as it cruised on an excursion on the St. Croix River. Shreiner and her husband subsequently brought suit against Jarvis, alleging negligence and

seeking monetary damages as a result of her injuries. (Ex. 3 is a copy of Shreiner's complaint in the lawsuit entitled *Susan Shreiner and Ronald Shreiner v. Jarvis & Sons, Inc., et al.*, pending in the Tenth Judicial Circuit, County of Washington, State of Minnesota; hereinafter, the "*Shreiner* lawsuit".)

Jarvis made a claim with IMU for coverage with respect to the *Shreiner* lawsuit. IMU issued a timely denial of coverage, citing the Policy's lay-up provisions. Jarvis then brought the instant action seeking a judicial declaration that it is entitled to coverage for the *Shreiner* lawsuit. For its part, IMU has filed a counterclaim for a declaratory judgment that no coverage is owed under its Policy.

On December 3, 2007, the trial court ruled on the parties' various motions for summary judgment. Although the trial court recognized that Endorsement No. 2 required the vessel to be laid up and out of commission on the date of Shreiner's accident, the court quoted from another policy provision, Endorsement No. 4, entitled "Port Risk Endorsement",

If the Vessel commences, or proceeds, on, a voyage during the term of this insurance, this Policy shall thereupon terminate as soon as the Vessel leaves her moorings to depart from the above named port.

The trial court then concluded, without supporting legal authority, that the language of Endorsement No. 4 somehow created coverage even within the lay-up period, so long as the vessel remained at its berth:

Therefore, it is clearly the act of leaving the port which causes the insurance to terminate. Had the *Afton Princess* left the port on October 22, 2005 without obtaining the proper exception coverage, through the negligence of Dolliff Inc. or Ms. Brown, the policy would clearly have been violated and there would be no coverage...However, this is not the

case, as the Afton Princess was clearly moored at the marina approximately one hour prior to departing on a cruise, when the injury to Ms. Schreiner occurred.

Later in its opinion, the court concluded that Endorsement No. 4, by its own terms, takes precedence over other policy provisions and “excludes coverage only if the vessel leaves the port”.

In addition, the court also incorrectly found that although Endorsement No. 2 made reference to a Port Risk Endorsement 57-A, “[t]here is no Port Risk Endorsement 57-A attached to the policy.”

On the basis of this clear error on the part of the court, IMU requested the trial court to reconsider its decision pursuant to Minn. Gen. R. Prac. 115.11, asserting, among other things, that in fact, the Policy *did* contain a Port Risk Endorsement 57-A, in the form of Endorsement No. 4, to which the Court *did* refer and even quote in its decision. IMU argued that the trial court failed to understand that Endorsement No. 4, which serves to define the insured’s permitted activities during the lay-up period, does not create *new* coverage while the vessel is in port during that lay-up period. The trial court denied IMU’s request on January 28, 2008. On June 20, 2008, the court awarded attorney’s fees to Jarvis and on July 14, 2008, entered an order rendering all previous orders final and appealable.

ARGUMENT

A. Standard of Review

In reviewing an appeal of the entry of summary judgment, an appellate court must determine whether there are genuine issues of material fact and whether the lower court erred in applying the law. *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 655 (Minn. 2004). In doing so, the appellate court should consider the evidence in the light most favorable to the nonmoving party. *Gleason v. Metro. Council Transit Operations*, 582 N.W.2d 216, 217 (Minn. 1998). Summary judgment decisions should be reviewed *de novo*. *Id. at 219*. *Thompson v. City of Minneapolis*, 707 N.W.2d 669, 673 (Minn. 2006).

B. The trial court erred in finding that Jarvis is entitled to insurance coverage under the IMU Policy because the *Shreiner* accident took place during preparation for an excursion that took place in violation of the Policy's lay-up provisions.

1. Insurance Policy Interpretation

Insurance law is very clear that an insurance contract should be interpreted by examining the language contained within its four corners. For example, one court has explained the limits on its role as follows:

The circumstances which courts may consider in determining the construction of a contract are those arising in the contract itself -- that is, before a court may look at the surrounding circumstances there must be ambiguity in the language of the instrument. Unless such be found in the language of the contract the meaning must be determined from the words used and from no other source.

McCann v. Continental Casualty Co., 8 Ill. 2d 476, 484, 134 N.E.2d 302, 306 (1956).
See also Hous. & Redevelopment Auth. v. Norman, 696 N.W.2d 329, 337, 2004 Minn. App. LEXIS 568 *20 (2005). It has also been held that if the intent of the parties “can be determined with reasonable certainty from the face of the contract itself, there is no need to resort to extrinsic evidence.” *Eden Stone Co. v. Oakfield Stone Co.*, 166 Wis. 2d 105, 116, 479 N.W.2d 557, 562 (Wis. Ct. App. 1991). Similarly, “whether a contract is ambiguous is a question of law to be decided by the court, from an examination of the instrument as a whole without first considering extrinsic evidence.” *McDonald’s Operators Risk Mgmt Ass’n v. Coresource, Inc.*, 307 Ill. App.3d 187, 194, 717 N.E.2d 485, 491 (1st Dist. 1999).

The courts have also ruled that “in the absence of an ambiguity, a court must construe a contract according to its own language, not according to the parties’ subjective constructions.” *William Blair and Co., LLC v. FI Liquidation Corp.*, 358 Ill.App.3d 324, 335, 830 N.E.2d 760 (First Dist. 2005).

2. The courts have long recognized and enforced lay-up warranties in maritime insurance policies.

Traditionally, maritime insurance contracts reflect the realities of climate and weather. As shown above, in this case, IMU and Jarvis agreed that no coverage would be afforded during the winter season from October 1 to April 30, and Jarvis warranted that its vessels would not operate during that period. Consequently, the IMU Policy issued to Jarvis specified that coverage did not exist for Jarvis’s vessels during the lay-up period of

October 1 to April 30. The express language of the policy's lay-up warranty (Endorsement No. 2) so provides and expressly adds that:

Any breach of these warranties shall render this policy void for the period of such breach.

(Ex. 1; emphasis added)

The underlying *Schreiner* accident occurred on October 22, well within the lay-up period. Under both the express terms of the policy and maritime law, such a breach by the insured of an express warranty in a marine insurance contract renders the entire insurance contract, and any coverage under that contract (including Endorsement No. 4), void. See, e.g., *AXA Global Risks v. Webb*, 2000 WL 33179617 (M.D.FL.) citing *Marine Charter & Storage, Ltd. v. All Underwriters at Lloyds of London*, 628 F.Supp. 740 (S.D. Fla. 1986); *Robinson v Home Ins. Co.*, 73 F.2d 3 (5th Cir. 1934). In other words, before even referring to Endorsement No. 4, Endorsement No. 2 would first obligate Jarvis to have the vessel laid-up and out of commission. Because this was not the case here, no coverage can be found to exist and the trial court was in error in attempting to apply Endorsement No. 4.

The decision in *Port Lynch Inc., v New England International Assurety of America, Inc.*, 754 F.Supp 816 (W.D.Wash., 1991) is illustrative. In *Port Lynch*, the court stated that limits on navigation deal with the "most basic issue of marine insurance," and are essential in determining coverage. Therefore, limits of navigation require uniform rules of law.

Similarly, in *Campbell v Hartford Fire Insurance Co.*, 533 F.2d 496 (9th Cir. 1976), the vessel owner's policy contained a lay-up warranty prohibiting operation of the vessel beyond the specified dates (October 1 to April 13) and restricting the vessel's movements to specific ports. Despite those restrictions, the owner permitted another company to repair and then use the vessel. On October 20, the vessel was damaged and washed ashore during a storm. The court held that the operation of the vessel during the lay-up period was a breach of warranty and the insurance company was not required to respond to the claim for damages.

Courts have enforced lay-up provisions and upheld denials of coverage when vessel owners fail to properly take their vessels out of commission. For example, in *Goodman v Fireman's Fund Insurance Company*, 600 F.2d 1040 (4th Cir., 1979), the vessel owner did not drain his yacht's sea water cooling system and close various sea valves at the end of the operating season. As a result, the vessel sunk. The court held that because the owner failed to prepare the yacht for the off-season, the vessel was not "laid up" as required by the policy. The court ruled that the owner's conduct constituted a breach of the lay-up warranty, and therefore, the insurance company was not obligated to cover the claim.

Significantly, the decision in *Goodman* underscores the error of the trial court here, which concluded that the lay-up restrictions of the IMU policy did not apply unless the Jarvis vessel left its moorings. In *Goodman*, the federal appellate court found that the owner had violated the policy terms simply by failing to take his boat out of commission and preparing it for off-season storage. 600 F.2d 1042-43. The violation occurred

despite the fact that vessel was not moved from its berth. *See also; AXA Global Risks, Ltd., v Webb*, 2000 WL 33179617 (M.D. Fla. 2000), where the court enforced a lay-up provision that required the insured's vessel to be taken out of the water during the lay-up period, but sunk while docked in the water.

Thus, the trial court misapprehended the meaning and intention of the IMU Policy endorsements, which likewise prohibited use of the Jarvis vessels during the lay-up period. Endorsement No. 4, which serves to define the insured's permitted activities once the vessel is laid up and out of commission, does not create new coverage while the vessel is in port during that lay-up period.

As a plain reading of the endorsements demonstrates, it was a precondition to the application of the entire policy, including Endorsement No. 4, that "the vessel shall be laid-up and out of commission," consistent with Endorsement No. 2. However, on the day of the *Schreiner* accident, the Jarvis vessel was neither laid-up nor out of commission, because Jarvis had scheduled a wedding cruise for *that* very day and the underlying accident occurred in preparation for *that* voyage. Accordingly, by the policy's own terms, including Endorsement No. 4, the policy is rendered "void" for the period of said breach and no coverage can exist for this loss pursuant to the policy's express terms and applicable maritime law.

Indeed, the very conduct of Jarvis demonstrates that it fully understood these terms of the policy and the consequences of the policy's lay-up provisions. For example, prior to the October 22 cruise, it had requested its insurance brokers, Dolliff and Brown, to obtain authorization and permission from IMU for that cruise and two others scheduled

to take place after October 1.¹ (Complaint) Plainly, Jarvis recognized that without express approval from IMU, it had no coverage and therefore, could not operate its vessels after October 1. Thus, the trial court erred in finding, contrary to these facts and the express “breach of warranty” language that rendered the policy “void”, that the October 22 event was covered.

For all of these reasons, the trial court’s decision was in error and should be reversed.

3. The trial court erred by ruling that coverage existed because the term “laid up and out of commission” was not defined in the Policy.

When required to interpret the meaning of the term "laid up and out of commission," courts have looked to the local custom of laying up similar vessels to guide their decisions. *See, e.g., Providence Washington Ins. Co. v. Lovett*, 119 F.Supp. 371, 373-74 (D.R.I. 1953); *Goodman v. Fireman's Fund Ins. Co.*, 600 F.2d 1040, 1042-43 (4 Cir. 1979); *Gelb*, 1948 AMC at 1258, 168 F.2d at 775; *Wigle v. Aetna Cas. & Sur. Co.*, 177 F.Supp. 932, 934 (E.D. Mich. 1959). Moreover, “parties are presumed to contract with reference to general customs and usages which explain the specific meaning of a term used and personal knowledge of the customary meaning need not be had by the parties to the contract.” *Gelb v. Automobile Ins. Co. of Hartford. Conn.*, 1948 AMC 1257, 1258, 168 F.2d 774, 775 (2 Cir. 1948) (applying New York law).

¹ The brokers successfully obtained amendatory endorsements from IMU for the other two dates, but failed to notify IMU of the planned October 22 cruise. (Answers of Dolliff and Brown)

For example, in *New Hampshire Ins. Co. v. Dagnone*, 394 F. Supp. 2d 480 (D.R.I. 2005), affirmed 475 F.3d 35 (1st Cir. 2007), is directly on point. Like here, in *Dagnone*, the marine insurance policy required that the insured's 'yacht be laid-up and out of commission.' This, of course, meant that the boat had to be winterized before the boat was considered "laid up," and this had not been done. The boat was subsequently damaged during a storm. Under N.Y. law, the court found that a breach of a warranty pertaining to risk of marine navigation, transit or transportation on seas or inland waters voids coverage in an insurance policy, regardless of its relationship to the loss. The court then declared that the boat owner's violation of the lay-up warranty voided coverage under the policy:

The Lay-Up Warranty, which conditions coverage on the insured's promise not to navigate the vessel during the winter months, is a warranty in a marine insurance policy that pertains to a risk of navigation, transit or transportation. Consequently, New York law forecloses any coverage under the Yacht Policy if Dagnone was in breach of the Lay-Up Warranty at the time of the accident, irrespective of the relation between the breach and the damage.

394 F. Supp.2d at 486.

The First Circuit Court of Appeals subsequently affirmed the district court's ruling in *Dagnone*. *New Hampshire Ins. Co. v. Dagnone*, 475 F.3d 35 (1st Cir. 2007) The appellate panel rejected the boat owner's contention (and disagreed with the lower court's holding here) that the "laid up and out of commission" requirement only applies if the vessel is "being used" at the time of the accident. Instead, the court expressly found that despite the policy requirement, the vessel (just like the vessel here) had not been winterized, was still fully operable and, in short, had not been laid up and placed out of

commission for the winter. The court noted that while the boat was not at the time on a cruise, the boat was still being “used” in the sense that it was “in the water” and not “laid up and out of commission.” *Id. at 38*. The court declared that:

To require some higher degree of use for the exclusion to apply would be contrary to the unambiguous meaning of the provision and would also defeat its clear intent: to encourage owners not just to stop using their boats during winter, but to take affirmative steps to winterize their boats so that they are “laid up and out of commission.” *Id.*

Thus, the First Circuit Court of Appeals, having found that the exclusion was unambiguous, declared that it required owners to take affirmative steps to winterize their boats so they are “laid up and out of commission.” 475 F.3d at 37-38. The court concluded, holding in language precisely applicable here:

Thus, we find that the policy’s exclusions clause is susceptible to only one reasonable interpretation: the policy will not cover losses during the specified months if the boat is not “laid up and out of commission.” *Id.*

Similarly, in *Tsalapatas v. Phoenix Ins. Co.*, 236 S.C.508, 115 S.E.2d 49 (1960), the Supreme Court of South Carolina addressed a coverage claim by a vessel owner who had transported his vessel, under its own power, a distance of only 300 yards for inspection, repairs and maintenance. On the return trip, the vessel struck an underwater object and sunk. The vessel’s movements all occurred in January, despite a lay-up provision requiring it to be “laid up and out of commission” from October to April. As here, the owner failed to notify the insurer or seek permission to remove the boat from lay-up.

A lower court had entered judgment for the owner. However, the Supreme Court of South Carolina reversed, enforcing the policy exclusion and rejecting the owner's claim, ruling:

We are of opinion that the risk of striking an underwater object while the boat was being operated under its own power was one of the risks sought to be obviated by the terms of the warranty, that the Order and judgment appealed from should be set aside and judgment entered for defendant [insurer].

236 S.C. at 514.

In the present case, despite the policy's plain language detailing the lay-up requirements and the warning that accompanied the specific endorsement, Jarvis took no steps to have its vessel "laid-up and out of commission." Jarvis's owner admitted that winterization of the vessel required emptying of water tanks. (Ex. 2; Dep. of G. Jarvis, p. 125) However, in violation of that local custom and practice and the policy's requirements, Jarvis did not winterize its vessel and the vessel remained operational. Indeed, in direct violation of the lay-up warranty, on the date of the *Schreiner* accident, the vessel was being prepared for a wedding cruise and clearly was not laid up and out of commission. (Ex. 2; Dep. of G. Jarvis, p. 125)

The *Schreiner* accident (and Schreiner's very presence aboard the vessel that day) was the undisputed result of the breach of warranty by Jarvis. Certainly, if the vessel was laid up and out of commission, there would not been any planned wedding cruise that day and no reason for Schreiner to be aboard and preparing for a cruise. As one court has stated in finding the same exclusionary language to be "perfectly clear and unambiguous,"

We have found no case which supports the proposition that a ship operating on a navigable stream under its own power is “laid-up.”

Marine Charter & Storage, Ltd., Inc. v. All Underwriters at Lloyds of London, 568 So.2d 944, 945 (Fla. Dist. Ct. App., 1990) Similarly, as the vessel here was about to embark on a wedding cruise under its own power, it was clearly not “laid-up” at the time as required under the policy. In short, being in violation of the lay-up warranty, there was no coverage for this claimed loss.

4. Jarvis breached the Policy’s lay-up provision by holding an excursion on a date outside the lay-up period.

As the events described above make patently clear, by the time that Shreiner’s alleged accident took place on October 22, 2005, coverage for excursion operations aboard Plaintiff’s vessels had ceased. By that point in time, rather than preparing its vessel for a wedding reception and river cruise, Jarvis should have taken steps to have the vessel laid up and out of commission for the off-season.

Moreover, based upon the terms of Jarvis’s policy, IMU had no reason to believe that the vessel was not “laid up and out of commission” during the time between the final October 18, 2005 charter and the alleged *Shreiner* occurrence on October 22, 2005. Indeed, under the express terms of the Policy and its endorsements, the *Afton Princess* should not have been performing a charter on October 22, 2005. Based upon those express policy terms and the communications, there was coverage only for navigation up to and including September 30, 2005, plus the two agreed-upon additional dates of October 16 and 18. *See, Dagnone, supra* and *Tsalapatas, supra*.

By arranging for the October 22 excursion and permitting Shreiner and other passengers to board the *Afton Princess*, Jarvis breached the lay-up warranty of its policy, which rendered the policy void. Moreover, by failing to disclose to IMU that the vessel had not been rendered laid up and out of commission as required by the express policy terms, Jarvis breached its obligations to IMU to act in utmost good faith.

It is well-established in American maritime law that representations made by an insured in a contract of marine insurance are subject to the standard of *uberrima fides*, or “utmost good faith.” *Sun Mutual Insurance Co. v. Ocean Insurance Co.*, 107 U.S. 485, 510, 27 L.Ed. 337, 1 S.Ct. 582 (1883). This doctrine requires the insured to disclose to the underwriter all material facts affecting the risk. 107 U.S. at 510. *Sun Mutual* states the test of materiality as being the importance of a particular fact, “to the underwriter as likely to influence his judgment in accepting the risk.” 107 S.Ct. at 509-10.

An insured's agreement to comply with the express warranties in the policy meets the materiality test because it contributes significantly to the underwriter's decision to insure the risk and how to set the premium. Therefore, the breach of an express warranty in a marine insurance policy, automatically suspends coverage under the policy. *Aguirre v. Citizens Casualty Co. of New York*, 441 F.2d 141 (5th Cir. 1971) Consequently, for this reason as well, the vessel was uninsured on that date and IMU properly denied coverage for the accident alleged in the *Shreiner* lawsuit.

CONCLUSION

For all of these reasons, this Court should reverse and overturn the trial court's granting of Jarvis's motion for summary judgment. Moreover, in reviewing the motion de novo, this Court should uphold IMU's denial of coverage and deny Plaintiffs' motion for summary judgment as a matter of law.²

WHEREFORE, IMU respectfully requests this Court to:

- a) reverse the trial court's ruling of December 3, 2007;
- b) find and declare that there is no coverage under the relevant IMU policy for the claim made the subject of the *Schreiner* lawsuit;
- c) find and declare that the *Schreiner* lawsuit does not obligate IMU to provide a defense for Jarvis;
- d) find and declare that the *Schreiner* lawsuit does not obligate IMU to indemnify or otherwise provide monetary coverage of any kind;
- e) find and declare that Plaintiffs are not entitled to summary judgment against IMU with regard to the *Shreiner* claim;
- f) find and declare the Plaintiffs are not entitled to attorneys' fees, costs or expenses incurred in the prosecution of this declaratory judgment action; and
- g) grant such other and further relief as the court deems just and proper under the evidence and circumstances.

² In the alternative, at a minimum, the trial court erred in reaching its conclusions because in doing so, it ignored the existence of genuine issues of material fact that were in dispute and made factual choices that were inappropriate for deciding a motion for summary judgment. For example, although the court recognized that the Jarvis boat was not winterized according to local custom, it nonetheless erroneously concluded that winterization was not a factor in rendering the vessel "laid up and out of commission." (Opinion, pp. 3-4.)

Respectfully submitted,

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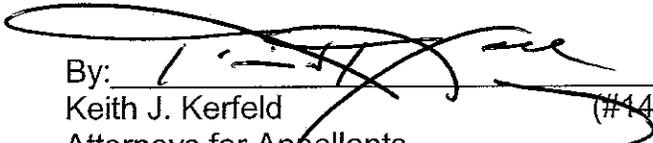
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the length and word count limitation contained in Minn. R. Civ. App. P. 132.01, Subd. 3, for a brief produced using Microsoft Word 2002 SP3 word processing software and contains 5,377 words.

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