

CASE NO. A08-1402

State of Minnesota
In Court of Appeals

JARVIS & SONS, INC. AND AFTON-ST. CROIX COMPANY,
Respondents,

vs.

INTERNATIONAL MARIE UNDERWRITERS, et al.,
Appellants,

and

DOLLIFF, INC.,
Third-Party Plaintiff/Respondent,

vs.

KIM BROWN,
Third-Party Defendant/Respondent.

FORMAL BRIEF OF RESPONDENTS JARVIS & SONS, INC.
AND AFTON-ST. CROIX COMPANY

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STATEMENT OF LEGAL ISSUE

Whether the trial court properly ruled that Appellant IMU is required to defend Respondents Jarvis & Sons, Inc. and Afton-St. Croix Co. in the lawsuit brought by Susan and Ronald Schreiner per the terms of IMU Policy No. N5JH 40106.

The trial court held: in the affirmative.

STATEMENT OF THE CASE

Respondents Jarvis & Sons, Inc. and Afton St. Croix Company initiated this declaratory judgment action seeking a ruling that Appellants International Marine Underwriters and Northern Assurance Company of America have a duty to defend and indemnify Respondents against claims arising out of an October 22, 2005 injury sustained by Susan Schreiner aboard a moored Jarvis & Sons vessel.

Appellants issued Policy No. N5JH 40106 to Jarvis & Sons providing coverage for its vessels from June 7, 2004 to June 7, 2005. This policy provided that Jarvis & Sons vessels be laid up and out of commission from October 1, 2005 to April 30, 2006, and that coverage did not terminate until the vessel left its moorings at the Port of Afton.

In response to cross-motions for summary judgment and because IMU failed to define the terms of its policy and the vessel at issue was moored at the port of Afton when Susan Schreiner was injured on December 3, 2007, the District Court granted Respondents' motion for summary judgment, finding: (1) the policy at issue contemplated coverage unless the vessel left its moorings; (2) Appellants are obligated to defend and indemnify Respondents for damages arising from the injuries sustained by Susan Schreiner; and (3) Respondents are entitled to reasonable costs and attorneys' fees. Appellants' motion for summary judgment was denied.

On June 20, 2008, the court entered judgment awarding attorneys' fees to Respondents. On July 14, 2008, the court entered an order rendering all previous orders regarding summary judgment and attorneys' fees final and appealable.

STATEMENT OF FACTS

Respondent Jarvis & Sons operates a charter boat company on the St. Croix River out of the Port of Afton, Minnesota. (A9). Jarvis & Sons and Appellant IMU entered into an insurance agreement whereby IMU agreed to insure three of Jarvis & Sons' vessels, including the Afton Princess, in exchange for an annual premium. (A1-A20). Policy No. N5JH 40106 was in effect from June 7, 2004 to June 7, 2005. (A1). Under the policy, IMU agreed to “. . . become legally liable to pay and shall have paid on account of: [l]oss of life, or injury to, or illness of, any person . . . [and] [c]osts and expenses, incurred with this company's approval, of investigating and/or defending any claim or suit against the assured arising out of a liability or an alleged liability of the assured covered by this policy.” (A5).

According to the Navigation Lay-Up provision of the policy, “[i]t 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.” (A12). There is no Port Risk Endorsement 57A-5 attached to the policy. However, according to IMU, Endorsement No. 4 is Port Risk Endorsement 57A-5. (A92). Endorsement No. 4 states that “[t]he vessel shall be laid up in the port of Afton, MN.” (A9). Endorsement No. 4 explains, “[i]f 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.**” (*Id.*) (emphasis added). Endorsement No. 4 also expressly states that it “shall prevail over any policy provisions inconsistent herewith.” (*Id.*).

The term “laid up and out of commission” is not defined anywhere in Policy No. N5JH 40106. (A1-A20). According to Roberta Appleby, Appellant’s own senior underwriter, the term “laid up and out of commission” means that the vessel cannot operate at all and usually it has to be winterized depending upon local custom. (A91). IMU expects the insured to know the meaning of the phrase “laid up and out of commission” because it is a common phrase in the marine industry. (A92). The term “winterized” does not appear anywhere in Policy No. N5JH 40106, by definition or otherwise. (A1-A20). According to Appleby, IMU does not indicate how a boat should be winterized in its policies because it acknowledges that all boats are not winterized in the same manner. (A94-A95).

According to IMU, winterizing a boat is a matter of local custom. (*Id.*). IMU defers to the expertise and opinions of its insured when it comes to winterization. According to Ms. Appleby, Garold Jarvis, president of Jarvis & Sons, Inc. and Afton-St. Croix Co., is knowledgeable in the marine industry and thus would understand what it means to winterize a boat. (A94). IMU acknowledges that Mr. Jarvis’ understanding of what it means to winterize a boat according to his local custom may differ from the understanding in other states. (*Id.*).

Garold Jarvis has 25 years of experience operating and maintaining boats. (A97). Jarvis & Sons purchased the Afton Princess, an excursion boat made by Sutter Ship Building in Florida, in 1993. (*Id.*). The owner and operator of a charter boat company, Garold Jarvis stated that the terms “laid up and out of commission” and “winterization” have different meanings. (*Id.*). In Jarvis’s experience, the term “laid up and out of

commission” means that the vessel is moored to the dock at its home port and connected to its power supply. (*Id.*) Winterization, on the other hand, is the process of preparing the boat for the winter and when winterization takes place depends on the type of vessel as well as the weather conditions. (*Id.*) According to Jarvis, a vessel can be “laid up and out of commission” without being “winterized.” (*Id.*)

The local custom for winterization of a vessel in Minnesota depends on the type of vessel. The process of winterizing the Afton Princess differs from the process used on other boats owned by Jarvis & Sons. (A98). The process of winterizing a boat like the Afton Princess takes place in stages over the course of several months, and the timing of the winterization varies depending on the weather conditions. (*Id.*) The Afton Princess is laid up and out of commission each year at its home port, the Afton Marina. When it is laid up and out of commission, it is moored to the dock and connected to its power supply. (*Id.*) The Afton Princess is generally “laid up and out of commission” beginning in October and not winterized until December or January. (*Id.*)

The Afton Princess is a very large boat that cannot be pulled out of the water because there is not a lift large enough on the St. Croix River. (*Id.*) Because the Afton Princess remains in the water moored to the dock at the Afton Marina all winter long, bubblers are attached to the dock and placed into the water to keep the water near the boat circulating. (*Id.*) The bubblers are not placed in the water until January of each year because there is no risk of the water freezing until then. (A98).

The Afton Princess is heated throughout the winter months via an electrical power source located at the Afton Marina. (*Id.*) The electrical power source also powers the

boat's high water alarm system. (*Id.*). Because the boat remains in the water year-round, it is necessary that the boat's alarm system remain in proper working order at all times. (*Id.*). The only portion of the Afton Princess that is not heated is the second floor bathroom. Because this area is not heated, it is necessary to drain the water from the bathroom. This generally does not occur until December or January. (*Id.*).

The water tanks on the Afton Princess are drained only when real cold hits and the risk of freezing increases. (*Id.*). During the recent warm winters, this part of the winterization has not occurred until at least December or January. (*Id.*). If the Afton Princess' water tanks have been drained, it takes approximately 15 to 20 minutes to fill them. (A99). At that point, the Afton Princess is ready to navigate the St. Croix River. (*Id.*). If the tanks have not been drained, it takes only a few minutes to prepare the Afton Princess for cruising at any point during the year. (*Id.*).

The Afton Princess is moored at the Port of Afton Marina. (*Id.*). When the Afton Princess is preparing for a cruise, it is then moved from the marina to the Afton City Docks, where passengers board the vessel. (A74-A75).

Pursuant to the terms of the policy and common practice, whenever Jarvis & Sons wished to run the Afton Princess during the lay-up period, it sought an endorsement providing coverage for a specific period of time. Jarvis & Sons requested endorsements for voyages on October 16, 18 and 22, 2005, but IMU claims the October 22 that endorsement was never obtained. (A48, A78).

Defendants Susan and Ronald Schreiner contracted with Jarvis & Sons for a private boat cruise aboard the Afton Princess for their daughter's wedding reception to

occur on October 22, 2005, at 4:00 p.m. (A22). Ms. Schreiner and her daughter arrived at the marina at the Port of Afton, not the dock, around 3:00 p.m. to decorate the Afton Princess for the reception. (*Id.*) Ms. Schreiner was informed that when she arrived to decorate, she would be boarding the Afton Princess at “the marina where they stored the boats” and then she would have to get off the vessel while they moved it to the “public docks where they would pick up the guests.” (*Id.*) When Ms. Schreiner arrived at the Afton Princess around 3:00 p.m. on October 22, 2005, it was moored at the marina. (A22-A23). Shortly after Ms. Schreiner boarded the Afton Princess, she fell through an open hatch in the floor and injured her left foot. (A24).

After being notified of Ms. Schreiner’s injury on October 22, 2005, Jarvis & Sons submitted a claim for coverage to IMU. (A39-A40). IMU denied coverage in writing by a letter dated November 14, 2005. (A80-A81). On November 27, 2006, after Jarvis & Sons was notified that the Schreiners planned to pursue their claims in district court, Jarvis & Sons resubmitted the claim for coverage and tendered the defense to IMU. (A85-A86, A88). Once again, IMU denied coverage. (*Id.*, A87). Jarvis & Sons is currently defending personal injury claims made by the Schreiners’ in Washington County, Case No. 82-C5-07-000731.

After IMU’s denial of coverage for the Schreiners’ claim, Garold Jarvis, president of Jarvis & Sons, sought clarification from Shelley Chapin, an agent at Dolliff, about Jarvis & Sons’ coverage under Policy No. N5JH 40106 during the lay-up period. (A82-A84). In turn, Ms. Chapin e-mailed Roberta Appleby, senior underwriter at IMU, asking, “[i]s there coverage for people going onto the boats during the winter months to look at

them so they can decide if they want to charter for weddings, etc? In case someone slips and falls while the boat is docked during the winter?” (*Id.*). On November 1, 2005, Roberta Appleby responded by saying, “I have confirmed with our claims department that **coverage would apply [as long as the vessel is properly laid up and out of service during the lay-up period] for a claim of someone injured on board while being shown the vessel for a prospective future charter.**” (*Id.*) (emphasis added). This statement confirmed Garold Jarvis’ understanding that Policy No. N5JH 40106 provided coverage for injuries sustained by anyone aboard the Afton Princess while moored at the Port of Afton Marina year round. (*Id.*, A77).

Mr. Jarvis sought this clarification because when the Afton Princess is moored at the marina, there are occasions when people board the vessel in order to make deliveries. (A75). On some occasions, Jarvis & Sons employees make the deliveries. (A76). On other occasions, non-employees, including customers, board the vessel for other purposes, such as to view the vessel in preparation for booking a cruise. (A76-A77).

On October 22, 2005, at the time of Ms. Schreiner’s injury, around 3:00 p.m., the Afton Princess was moored at the Afton Marina and was connected to its power source. (A99). Thus, in Mr. Jarvis’ opinion, the Afton Princess was “laid up and out of commission.” (*Id.*). The Afton Princess was taken out of lay-up and put back into commission around 4:00 p.m. on October 22, 2005, when it was disconnected from its power supply and moved to the Afton City Docks for passenger boarding. (*Id.*).

Under Jarvis’ IMU policy, there is coverage during the policy’s lay-up period, between October 1st and May 30th, if Jarvis were to bring someone on board his vessel as

long as the vessel is “laid up and out of commission.” (A92-A93). Jarvis & Sons’ IMU insurance policy did not place any limitations on who can board the boat during the lay-up period when the vessel is “laid up and out of commission” or the number of people who could board the boat during the lay-up period when the vessel is “laid up and out of commission.” (A95).

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

On appeal from summary judgment, the court determines whether there are genuine issues of material fact and whether the district court erred in applying the law. *Watson by Hanson v. Metropolitan Transit Com’n*, 553 N.W.2d 406, 411 (Minn. 1996). The court must view the evidence in the light most favorable to the nonmoving party, in this case, the appellants. *See Gleason v. Metropolitan Council Transit Operations*, 582 N.W.2d 216, 217 (Minn. 1998).

II. THE TRIAL COURT CORRECTLY DETERMINED THAT JARVIS IS ENTITLED TO INSURANCE COVERAGE UNDER THE IMU POLICY NO. N5JH 40106 UNDER THE PLAIN LANGUAGE OF THE POLICY.

A. The plain language of IMU Policy No. N5JH 40106 clearly states that coverage during the lay-up period does not terminate until the vessel leaves its moorings.

In Minnesota, “[t]he construction of an insurance policy presents a question of law which the district court may properly decide on summary judgment. . .” *Steele v. Great West Cas. Co.*, 540 N.W.2d 886, 888 (Minn. Ct. App. 1995) (citing *Iowa Kemper Ins. Co. v. Stone*, 269 N.W.2d 885, 887 (Minn. 1978)). An insurance policy must be construed as a whole, and unambiguous language must be given its plain and ordinary

meaning. *Illinois Farmers Ins. Co. v. Glass Service Co.*, 683 N.W.2d 792, 799 (Minn. 2004); *Henning Nelson Const. Co. v. Fireman's Fund American Life Ins. Co.*, 383 N.W.2d 645, 652 (Minn. 1986).

If an insurance policy is ambiguous, any reasonable doubt as to its meaning must be resolved in favor of the insured. *See Nordby v. Atlantic Mut. Ins. Co.*, 329 N.W.2d 820, 822 (Minn. 1983). Where there is no ambiguity, there is no room for construction. *See Dairyland Ins. Co. v. Implement Dealers Ins. Co.*, 294 Minn. 236, 244, 199 N.W.2d 806, 811 (Minn. 1972).

Further, once an insurance carrier is aware of a claim, it must provide its insured with a defense. In order to avoid the duty to defend or indemnify, the insurer must meet the “heavy burden” of establishing that no part of the claim can even arguably fall within the scope of coverage. *In re Liquidation of Excalibur Ins. Co.*, 519 N.W.2d 494, 497 (Minn. Ct. App. 1994).

Applying the plain and ordinary meaning of the language of Policy No. N5JH 40106 as a whole, IMU has no legal basis to avoid coverage. In support of its denial of coverage, IMU cites the Navigation Lay-up provision of Policy No. N5JH 40106. (A12). This provision states “[i]t is warranted the vessel(s) hereby insured shall be laid up and out of commission from October 1st until April 30th.” (*Id.*). IMU could have, but chose not to, define the terms “laid up” and “out of commission” in Policy No. N5JH 40106. However, Endorsement No. 4 helps ascertain the meaning of these phrases. Endorsement No. 4 states,

(1) The vessel shall be laid up in the port of Afton, MN with liberty to shift (in tow or otherwise) between . . . cargo or fitting berths within said port **prior to commencing on or proceeding on a voyage.**

....

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.**

(*Id.*) (emphasis added). In order to determine the plain and ordinary meaning of the phrases “laid up” and “out of commission,” it is also helpful to look to their dictionary definitions. Merriam-Webster’s Dictionary defines “laid up” and “out of commission” as “out of active service or use.” MERRIAM-WEBSTER DICTIONARY, Online Edition, available at <http://www.merriam-webster.com> (last modified 2007). Before every chartered voyage, the Afton Princess was moved from the dock at the Port of Afton to the Afton City Docks for passenger boarding. (A74-A75). As such, any time the Afton Princess was moored at the Port of Afton, it was out of active service. Per Endorsement No. 4, the Afton Princess was only placed into active service when it left its moorings at the Port of Afton.

Whenever Jarvis & Sons wished to navigate the Afton Princess during the lay-up period, it sought an endorsement from IMU providing coverage for a specific period of time. Jarvis & Sons obtained such an endorsement for voyages on October 16 and 18, 2005. (A18). IMU argues that because Jarvis & Sons did not have an endorsement for October 22, 2005, there was no coverage under the policy.

However, any endorsement for October 22, 2005, would have applied only to **navigation** on that date, as the Afton Princess remained covered under the policy during

the lay-up period as long as it remained moored at the Port of Afton. To argue otherwise would be contrary to the plain and unambiguous language of the policy as well as Jarvis & Son's understanding of the policy as it was presented by IMU. IMU's Senior Underwriter, Roberta Appleby, confirmed that ". . . coverage would apply (as long as the vessel is properly laid up and out of service during the lay-up period) for a claim of someone injured on board while being shown the vessel for a prospective future charter." (A82). If there is coverage for a person being shown the boat for a prospective future charter, then there must also be coverage for people onboard the moored vessel for other legitimate business reasons during the lay-up period. Roberta Appleby admitted there was coverage in her e-mail dated November 1, 2005, yet IMU has not reversed its denial of coverage. (*Id.*).

There is no question that on October 22, 2005, when Susan Schreiner boarded the Afton Princess and was subsequently injured, the Afton Princess was moored at the Port of Afton Marina. The fact that there was a charter scheduled for later that day is irrelevant because Ms. Schreiner was injured on the *moored vessel* one hour before the cruise was scheduled to begin. (A24-A25).

B. IMU's argument that Endorsement No. 4 does not apply in this case contradicts the plain language of its own policy as well as its own interpretation of the policy language.

IMU argues that ". . . 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." (Appellants' Brief at 9).

Appellants' argument both creates new requirements for the policy and ignores the provisions that are already there. First, nowhere in the policy does it state that Endorsement No. 2 must first be satisfied before Endorsement No. 4 can apply. To the contrary, Endorsement No. 2 incorporates the terms of Endorsement No. 4 (which, according to IMU, is also known as Port Risk Endorsement 57A-5). Specifically, Endorsement No. 2 states: “[i]t 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.” (A12). Thus, Endorsement No. 2 directs the policyholder to Endorsement No. 4 to clarify what can and cannot occur during the lay-up period. According to Endorsement No. 4, coverage does not terminate until “. . . the Vessel leaves her moorings to depart from the above named port.” (A9).

Second, if, as Appellants suggest, one were to view Endorsements Nos. 2 and 4 as separate, and exclusive of one another (which Jarvis maintains is an incorrect reading of the plain language of the policy), the policy clearly states that Endorsement No 4 “shall prevail over any policy provisions inconsistent therewith.” (*Id.*). If there is an inconsistency between Endorsements Nos. 2 and 4, the terms set forth in Endorsement No. 4 apply. (*Id.*) Coverage does not terminate until the vessel leaves its moorings. (*Id.*).

Moreover, if only the terms of Endorsement No. 2 apply, then why include Endorsement No. 4 in the policy? Its presence in the policy is evidence that its terms were meant to be applied to insured vessels during the lay-up period.

IMU states that Endorsement No. 4 “does not create new coverage while the vessel is in port during that lay-up period.” (Appellants' Brief at 11). Jarvis & Sons is

not arguing that it does. Instead, it is Jarvis' position that Endorsement No. 4 merely clarifies what a vessel can and cannot do during the lay-up period. Per Endorsement No. 4, the insured vessel can "shift (in tow or otherwise) between approved lay-up sites within the port" or "proceed to cargo or fitting out berths within said port prior to commencing or proceeding on a voyage" but the vessel may not "be used as a storage ship or for lightering purposes." (A9). Similarly, the use of the language: "[i]f 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" clearly indicates that there is existing coverage during the lay-up period until the vessel leaves its moorings, as opposed to creating some type of new coverage during the lay-up period. (*Id.*)

C. Jarvis & Sons did not breach the policy's lay-up provision by scheduling an excursion on a date during the lay-up period.

IMU argues that coverage should be denied because Jarvis & Sons scheduled an Afton Princess charter for October 22, 2005, a date that falls within the policy's lay-up period of October 1 to April 30. (Appellants' Brief at 11, 15). IMU argues that planning a future cruise within the lay-up period or having someone on the vessel in connection with a future cruise within the lay-up period precludes coverage under the policy regardless of the condition of the boat. (*Id.* at 15-16). There is nothing in the policy language to support this argument. To accept IMU's argument would require the court to re-write the policy.

Under Policy No. N5JH 40106, Jarvis & Sons' vessels were required to be "laid up and out of commission" between October 1st and April 30th, 2005. (A12). Despite the fact it failed to define the term anywhere in its policy, IMU now suggests that the term "laid up and out of commission" should be construed to require that the vessel should be winterized. (Appellants' Brief at 13). In support of this argument, IMU cites *New Hampshire Ins. Co. v. Dagnone*, 475 F.3d 35 (1st Cir. 2007) where the court found that the vessel at issue was not laid up and out of commission because it had not been fully winterized. *Dagnone*, 475 F.3d at 39. But, in that case, unlike this case, both parties **agreed** that "full winterization was required to render the yacht laid up and out of commission." *Id.* at 39. It is also noteworthy that in *Dagnone*, the Lay-up warranty specifically stated that "the described yacht shall be laid up and out of commission *and not used for any purpose* during the period...." *Id.* at 36 (emphasis added). Policy No. N5JH 40106 contains no such limiting language. (A1-A20).

IMU also cites to *Tsalapatas v. Phoenix Ins. Co. of Hartford, Conn.*, 236 S.C. 508, 115 S.E.2d 49 (S.C. 1960) in which the court found that the vessel in question was in violation of the policy because it was not laid up and out of commission when the vessel sustained damage. In that case, unlike in this case, the vessel was navigating at the time the damage was sustained. *Tsalapatas*, 115 S.E.2d at 49. Also, in that case, unlike this case, the policy specifically stated "the within named yacht shall be laid up and out of commission *on shore in permanent winter quarters* from noon of November 1st to noon of April 15th." *Id.* (emphasis added). Once again, Policy No. N5JH 40106 contains no such limiting language. (A1-A20).

In short, the cases cited by Appellants have no bearing on this one.

The phrase “laid up and out of commission” is not defined in the policy because, according to IMU, insureds are expected to know the meaning of the phrase because it is a common phrase in the marine industry. (A92). IMU acknowledges that the meaning of the phrase “laid up and out of commission” can vary depending upon location and local custom and agrees that those knowledgeable in the industry are in the best position to understand local custom. (A91, A94). As such, in the instant case, IMU cedes authority to define “laid up and out of commission” to the insured. If a term can have several different meanings, then it is ambiguous. If the language of an insurance policy is ambiguous, any reasonable doubt as to its meaning must be resolved in favor of the insured. *See Nordby v. Atlantic Mut. Ins. Co.*, 329 N.W.2d 820, 822 (Minn. 1983).

IMU believes that its insured, Mr. Jarvis, is an informed consumer and someone knowledgeable in the marine industry. (A94). Based upon the undisputed testimony of IMU’s own witness, this court must defer to Mr. Jarvis’ understanding of the term “laid up and out of commission.” According to Mr. Jarvis, the term “laid up and out of commission” means that the vessel is moored at its home port and connected to its power supply. (A98). Based on local custom, a vessel can be “laid up and out of commission” without being winterized. (A97). Because the IMU policy does not expressly require a boat to be winterized to be laid up and out of commission, and in light of Ms. Appleby’s testimony that the term is best defined by the insured, IMU’s legal argument that winterization is a prerequisite for a boat to be laid up and out of commission is specious.

Even if winterization is somehow required as a prerequisite for a boat to be laid up and out of commission, local custom to winterize a boat such as the Afton Princess in October required nothing more than mooring to the dock with a power supply. According to IMU's underwriter, Garold Jarvis would understand what it means to winterize a boat. (*Id.*). It is Ms. Appleby's belief that in his reading of the policy as an informed consumer and someone knowledgeable about boats, Mr. Jarvis would be winterizing his boat in a way he deemed appropriate per his local custom. (*Id.*).

According to Mr. Jarvis, local custom for the winterization of a vessel in Minnesota depends on the type of vessel, and the Afton Princess is a type of vessel that requires winterization to take place in stages over the course of several months. (A97-A98). Because the Afton Princess is heated during the winter months, it is not necessary to perform tasks such as draining the tanks and placing the bubblers in the water until at least December or January. (*Id.*). Thus, the only action that must be taken in order to lay-up the Afton Princess and take it out of commission in October is to moor it to the dock at the Afton Marina and connect it to its power supply.

IMU argues that the Afton Princess could not have been "laid up and out of commission" around 3:00 p.m. on October 22, 2005, when Ms. Schreiner was injured, because there was a cruise scheduled to take place later that day. (Appellants' Brief at 11). IMU apparently assumes that Jarvis & Sons needed to engage in substantial preparation in order for the Afton Princess to be ready to cruise after it had been laid up. But the only preparation needed to commence a cruise was to disconnect the power supply and move the boat to the Afton City Docks for boarding.

D. The cases cited by IMU do not relate to the circumstances of this case.

In support of its arguments, IMU points out that the courts have long recognized and enforced lay-up warranties in maritime insurance policies and cites to several federal cases involving lay-up provisions. None of these cases involve facts similar to this case. *See generally Dagnone and Tsalapatas, supra.*

IMU cites *Campbell v. Hartford Fire Ins. Co.*, 533 F.2d 496 (9th Cir. 1976) for the proposition that by operating a vessel beyond the dates specified in the policy, the vessel owner breaches the lay-up warranty. (Appellants' Brief at 10). However, what IMU fails to state is that in *Campbell*, the insured **admitted** a breach of the lay-up provision and the only issue before the court was whether the policy's held-covered clause was applicable to a breach of the lay-up warranty. *Campbell*, 533 F.2d at 497-498. *Campbell* sheds no light on the instant case.

IMU cites *Goodman v. Fireman's Fund Ins. Co.*, 600 F.2d 1040 (4th Cir. 1979) in support of its argument that "[c]ourts have enforced lay-up provisions and upheld denials of coverage when vessel owners fail to properly take their vessels out of commission." (Appellants' Brief at 10). In *Goodman*, a vessel sank while attached to its moorings during the lay-up period because its owner failed to drain the water in the cooling system and close the port and starboard valves which allowed water to enter into the vessel and freeze in the winter. 600 F.2d at 1041-2. The court held that there was no coverage under the lay-up provision because the vessel was not properly laid up per the local custom in the Chesapeake area. *Id.* at 1042-3. This ruling was based on evidence that it was local custom in that area to drain the water in a vessel's cooling system. *Id.* In this

case, the *only* evidence on the record regarding the local custom for laying up a vessel in Minnesota is the testimony of Mr. Jarvis. According to Mr. Jarvis, the Afton Princess was laid up and out of commission per local custom until it left its moorings on October 22, 2005 *after* Ms. Schreiner's injury. (A97-A98).

IMU also cites *AXA Global Risk (UK), Ltd. v. Webb*, No. 6:99-CV-124-ORL-19B, 2000 WL 33179617 (M.D. Fla. July 28, 2000). In that case, the court granted judgment in favor of the insurer because the policy at issue required the vessel to be laid up on shore and the boat was in the water at the time of the loss.

CONCLUSION

The district court properly held that Respondents were entitled to summary judgment; Appellants are obligated under Policy No. N5JH 40106 to defend against the Schreiners' claims. Ms. Schreiner's injury occurred during the lay up period: the policy expressly provided that coverage did not terminate until the Afton Princess left its moorings at the Port of Afton. For all these reasons, Respondents Jarvis & Sons, Inc. and Afton-St. Croix Company respectfully ask this Court to affirm the district court's decision granting Respondents' Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length and word count limitation contained in Minn. R. Civ. App. P. 132.01, subd. 3, for a brief produced using Microsoft Office 2003 word processing software and contains 5,702 words.

Dated: October 8, 2008.

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