

STATE OF MINNESOTA

IN COURT OF APPEALS

NO. A08-1402

Jarvis & Sons, Inc., et al.,

Respondents,

v.

International Marine Underwriters, et al.

Appellants,

and

Dolliff, Inc., Susan Schreiner and Ronald Schreiner

Respondents,

and

Dolliff, Inc.

Third Party Plaintiff,

v.

Kim Brown,

Third Party Defendant.

RESPONDENT SCHREINERS' BRIEF AND APPENDIX

ROBINS, KAPLAN, MILLER &
CIRESI L.L.P.
Philip Sieff (#169845)
Cindy L. Butler (#0328248)
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402
(612) 349-8500
*Attorneys for Respondents
Susan and Ronald Schreiner*

TEWKSBURY & KERFELD, P.A.
Keith J. Kerfeld (#143066)
Grim Daniel Howland (#336841)
88 South Tenth Street, Suite 300
Minneapolis, Minnesota 55403
(612) 334-3399

HANSEN, DORDELL, BRADT,
ODLAUG & BRADT, P.L.L.C.
Stacey H. Sorensen (#0387040)
J. Mark Catron (\$15829)
3900 Northwoods Drive, #250
St. Paul, Minnesota 55112-6973
Attorneys for Respondents

STICH, ANGELL, KREIDLER &
DODGE
Kenneth W. Dodge
Suite 120, The Crossings
250 Second Avenue South
Minneapolis, Minnesota 55401
*Attorneys for Third Party
Defendant, Kim Brown*

BELGRADE & O'DONNELL
George Velcich (#0312772)
Suite 1900, Civic Opera Building
20 North Wacker Drive
Chicago, Illinois 60606
(312) 422-1700
Attorneys for Appellants

THOMAS E. HARMS, P.L.L.C.
Thomas E. Harms
7601 France Avenue South, Suite
275
Edina, Minnesota 55435
*Attorneys for Defendant and Third
Party Plaintiff, Dolliff, Inc.*

Lee A. Henderson
222 South Ninth Street, Suite 400
Minneapolis, Minnesota 55402
*Co-counsel for Defendant and Third
Party Plaintiff, Dolliff, Inc.*

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF LEGAL ISSUES

Whether the trial court correctly held that the plain, unambiguous language of the insurance policy provides coverage for personal injuries that occur while the vessel is moored at the dock.

The trial court held that the plain, unambiguous language of the policy provides coverage for personal injuries that occur while the vessel is moored at the dock.

Apposite Authorities:

Steele v. Great West Cas. Co., 540 N.W.2d 885 (Minn. Ct. App. 1995), rev. denied, (Minn. Feb. 9, 1996)

Travelers Indem. Co. v. Bloomington Steel & Supply Co., 718 N.W.2d 888 (Minn. 2006)

Wanzek Const., Inc. v. Employers Ins. of Wausau, 679 N.W.2d 322 (Minn. 2004)

Providence Washington Ins. Co. v. Lovett, 119 F. Supp. 371 (D.R.I. 1953)

STATEMENT OF THE CASE

In this appeal, International Marine Underwriters and Northern Assurance Company of America (collectively, “IMU”) challenge the trial court’s Order, which held that IMU was required to provide insurance coverage to Jarvis & Son’s Inc. and Afton-St. Croix Company (“Jarvis”) for the severe personal injuries that Susan Schreiner sustained when she fell through an open hatch on Jarvis’s vessel, the Afton Princess, which at the time was moored at its dock. (See Trial Court’s Order Granting Declaratory Judgment and Memorandum (“Order”); RA¹ 1-9.)

Mrs. Schreiner and her husband brought suit against Jarvis for personal injury damages, and when IMU denied coverage for those damages, Jarvis initiated a declaratory judgment action. Thereafter, Jarvis and IMU filed competing motions for summary judgment, which were heard by the Minnesota District Court, the Honorable Gary R. Schurrer presiding, on November 13, 2007. (*Id.*) On December 3, 2007, the court issued its Order and Memorandum granting Jarvis’s motion for summary judgment against IMU – a motion that all of the other parties to the declaratory judgment action joined – and concluding that IMU was required to provide coverage for the Schreiners’ damages. (*Id.*)

In granting summary judgment, the court noted that Endorsement No. 4 of IMU’s policy states that if a “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**

¹ “RA” refers to Respondents Susan and Ronald Schreiner’s Appendix.

moorings to depart from the above-named port.” (RA 6, emphasis in court’s Order.) The court further noted that Endorsement No. 4 also states that the terms of Endorsement No. 4 “prevail[ed] over any policy provisions inconsistent therewith.” (RA 5.) The court concluded that “it is clearly the act of leaving the port which causes the insurance to terminate.” (RA 6.) The Afton Princess (Jarvis’s vessel) had not left the port at the time that Mrs. Schreiner was injured. The court therefore found that IMU’s policy provided coverage for the incident. (*Id.*) The court further held that “[t]he policy endorsements must be construed together,” and that “endorsement 4, which clearly provides for coverage during the layup period unless the vessel leaves the port, prevails over inconsistent policy provisions.” (RA 7-9.) Finally, the court concluded that, “[e]ven if an ambiguity existed, such ambiguity would be construed in favor of [Jarvis].” (RA 9.)

On January 28, 2008, the court denied IMU’s request for reconsideration. (RA 10.) After entering judgment in Jarvis’s favor, requiring IMU to pay attorneys fees and costs, the court entered an Order on July 14, 2008, which, *inter alia*, rendered its ruling on the parties’ motions for summary judgment final and appealable. (RA 11-13.)

IMU brings the instant appeal challenging the court’s Order that IMU is required to provide insurance coverage under its policy with Jarvis for the severe injuries that Susan Schreiner sustained aboard the Afton Princess. In the meantime, the Schreiners’ personal injury damages claim remains on hold indefinitely, until the insurance coverage dispute is resolved. The Schreiners respectfully request that this Court affirm the trial court’s Order in all respects.

STATEMENT OF FACTS

On October 22, 2005, Susan Schreiner was seriously injured when she fell through an open hatch on the Afton Princess, a cruise vessel owned by Jarvis. It is undisputed that the Afton Princess was moored at its lay-up port in the Afton Marina at the time Mrs. Schreiner was injured. (RA 35-38, 41, 75-76.)

IMU insures Jarvis and its vessels, including the Afton Princess, for personal injury damages. (RA 14-33.) The IMU policy at issue was in effect from June of 2005 through June of 2006. (RA 14.) The IMU policy contains a number of endorsements, but the critical endorsements are Endorsements Nos. 2 and 4. (RA 20-33.)

The Port Risk Endorsement, attached to the policy as Endorsement No. 4, reads in pertinent part:

The clauses set forth below shall prevail over any Policy provisions inconsistent therewith.

This insurance is subject to the following warranties:

(1) The Vessel shall be laid-up in the port of Afton, MN with liberty to shift (in tow or otherwise) between approved lay-up sites within the port or to proceed to cargo or fitting out berths within said port prior to commencing or preceding [sic] 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.

(RA 25, emphasis added.)

Endorsement No. 2 contains a "Navigation Lay-Up" provision. That provision states that the vessel "shall be laid up and out of commission from October 1st until April 30th, both dates included, **as per Port Risk Endorsement 57A-5 attached.**" (RA 22,

emphasis added.) Endorsement No. 2 refers to Port Risk Endorsement 57A-5. It is undisputed that there is no endorsement specifically identified as “Port Risk Endorsement 57A-5,” and that the reference to “Port Risk Endorsement 57A-5” is actually a reference to Endorsement No. 4. (RA 53-54.)²

Endorsement No. 2 specifically refers to the provisions of Endorsement No. 4 to define what it means to be “laid up and out of commission.” It is undisputed that the phrase “laid up and out of commission” is not defined elsewhere in the policy. (RA 50-51, 85-86, 91-92.)

Garold Jarvis is the president of Jarvis & Sons, Inc., the owner of the Afton Princess. (RA 39.) Mr. Jarvis states in sworn testimony that the phrase “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.” (RA 39-41, ¶¶ 6, 9, 17.) Mr. Jarvis testified under oath that, pursuant to local custom, the phrase “laid up and out of commission” and the phrase “winterization” have different meanings. (RA 39, ¶ 5.) He further testified that “[a] vessel can be laid up without being winterized.” (RA 39, ¶ 6) Mr. Jarvis testified that,

² IMU’s criticism of the trial court in its Appeal is completely unwarranted. IMU claims that the trial court committed “clear error,” when it stated that “[t]here is no Port Risk Endorsement 57-A attached to the policy.” (See IMU’s Brief, p. 6.) To the extent that IMU appears to be suggesting that the trial blatantly ignored one of the policy’s provisions, such a suggestion is baseless. IMU even acknowledges that the trial court discussed and quoted Endorsement No. 4 in its Order. (*Id.*) Moreover, even a brief perusal of the trial court’s Order makes it apparent that the trial court thoroughly understood the interrelationship between Endorsement No. 2 and Endorsement No. 4. (RA 1-9.) For the purposes of this brief, all references to Port Risk Endorsement 57A-5 and Endorsement No. 4 are meant to be synonymous and are used interchangeably.

pursuant to local custom, the Afton Princess is not winterized until "December or January." (RA 40, ¶ 10.) Nowhere does Mr. Jarvis, or anyone else, testify that it was the custom of the Port of Afton, MN to winterize vessels such as the Afton Princess by October 1st, the first day of the lay-up period. Mr. Jarvis's testimony is undisputed.

The term "winterization" is not used anywhere in the IMU policy. Roberta Appleby is a senior underwriter for IMU. (RA 43.) She testified under oath that the local custom of the Afton Princess's home port dictates when and how the vessel is placed out of commission, as that phrase is used in IMU's policy. (RA 71-73.) She further testified that "Mr. Jarvis, who is knowledgeable of the local conditions in Minnesota, would be one who would be reasonably able to interpret how the Afton Princess would have been put out of commission." (RA 71.)

When Susan Schreiner fell approximately 8 feet through an open hatch in the floor of the Afton Princess, she suffered multiple comminuted crushing fractures of the bones in her left foot. Mrs. Schreiner was hospitalized for nearly a week and required surgical intervention, including the placement of hardware in her foot, as well as extensive physical therapy. When the hardware was removed, Mrs. Schreiner's doctors discovered that part of a screw was imbedded in one of her bones and was impossible to retrieve. Mrs. Schreiner has severe posttraumatic arthritis in her foot, which will require another surgery in the future. Her injuries have had a significant detrimental impact on her ability to return to her work as a substitute teacher.

ARGUMENT

THE TRIAL COURT CORRECTLY HELD THAT THE PLAIN, UNAMBIGUOUS LANGUAGE OF THE INSURANCE POLICY PROVIDES COVERAGE FOR PERSONAL INJURIES THAT OCCUR WHILE THE VESSEL IS MOORED AT THE DOCK.

A. Standard of Review.

An appellate court reviews a grant of summary judgment to determine whether there are genuine issues of material fact and whether the district court erred in applying the law. Schroeder v. St. Louis County, 708 N.W.2d 497, 503 (Minn. 2006) (citation omitted). The court must consider the evidence “in the light most favorable to the nonmoving party.” Id.

The interpretation of an insurance policy is a question of law properly decided on summary judgment. Steele v. Great West Cas. Co., 540 N.W.2d 885, 888 (Minn. Ct. App. 1995), rev. denied, (Minn. Feb. 9, 1996) (citation omitted).³ Where possible, an insurance policy should be construed so as to give effect to all provisions. Id., citing Bobich v. Oja, 258 Minn. 287, 294-95, 104 N.W.2d 19, 24 (1960). Courts will avoid an interpretation of an insurance contract that forfeits the rights of the insured unless such an intent is manifest in clear and unambiguous language. Thommes v. Milwaukee Ins. Co., 641 N.W.2d 877, 883 (Minn. 2002). Any ambiguity in the policy must be construed against the insurer and in favor of coverage. Travelers Indem. Co. v. Bloomington Steel

³ State law governs the interpretation of marine insurance contracts. New Hampshire Ins. v. Dagnone, 475 F.3d 35, 37 (1st Cir. 2007) (“Because there is no established federal admiralty rule governing the interpretation of marine insurance contracts, we look to state law to interpret the policy.”).

& Supply Co., 718 N.W.2d 888, 894 (Minn. 2006) (ambiguities construed against insurer); Wanzek Const., Inc. v. Employers Ins. of Wausau, 679 N.W.2d 322, 325 (Minn. 2004) (ambiguities construed in favor of coverage).

B. The Explicit Terms of IMU's Policy Provide Coverage for Mrs. Schreiner's Injuries.

1. The Phrase "Laid Up and Out of Commission" in Endorsement No. 2 is Clarified by the Incorporation of Endorsement No. 4.

Endorsement No. 2 of IMU's policy states that a vessel insured under the policy is deemed "**laid up and out of commission** from October 1st until April 30th, both dates included, **as per Port Risk Endorsement 57A-5 attached.**" (RA 22, emphasis added.) The phrase "laid up and out of commission" is not specifically defined anywhere in IMU's policy. Instead, Endorsement No. 2 clarifies the meaning of the phrase "laid up and out of commission" by incorporating by reference Port Risk Endorsement 57A-5. Again, Port Risk Endorsement 57A-5 is actually identified as Endorsement No. 4 in IMU's policy.

Endorsement No. 4 states that "[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." (RA 25, emphasis added.) Under the lay-up provision of the policy, as clarified by Endorsement No. 4, coverage remains in place until the vessel "leaves her moorings." It is undisputed that the Afton Princess was still tied to her moorings in the Port of Afton when Mrs.

Schreiner sustained her injuries. Thus, the policy's unambiguous language provides coverage for Mrs. Schreiner's injuries.

IMU claims that the phrase "laid up and out of commission" means that the vessel must be inoperable. (See IMU's Brief, p. 11, stating that the policy "prohibited use of the Jarvis vessels during the lay-up period.") IMU also claims that if the vessel is not properly "laid up and out of commission" in accordance with Endorsement No. 2, then the policy is void, and a court should never even look to Endorsement No. 4. (See IMU's Brief, p. 9.) However, IMU's argument contradicts the plain language of Endorsement No. 2 by ignoring the explicit modifying phrase "**as per Port Risk Endorsement 57A-5**" and the plain language of Endorsement No. 4.

Furthermore, IMU's argument would make Endorsement No. 4 meaningless. Under IMU's argument, the rule in Endorsement No. 4 that coverage terminates when the vessel leaves her moorings would **never** apply. Therefore, IMU's interpretation would inexplicably, and impermissibly, render Endorsement No. 4 useless verbiage. Steele, 540 N.W.2d at 888 (where possible, a policy should be construed so as to give effect to all provisions) (citation omitted).

Endorsement No. 4 plainly states that the policy does not terminate until the vessel "leaves her moorings." Endorsement No. 4 also states that "[t]he Vessel shall be laid-up in the port of Afton, MN with **liberty to shift (in tow or otherwise) between approved lay-up sites within the port or to proceed to cargo or fitting out berths** within said port prior to commencing or preceeding [sic] on a voyage." (RA 25, emphasis added.)

The plain language of Endorsement No. 4 permits (and expects) that the vessel would be in use, even during the lay-up period. In other words, the policy **does not prohibit** all uses of the vessel during the lay-up period, as IMU contends.

IMU recognizes the fallacy of its argument. IMU first alleges that the policy prohibits all use during the lay-up period. However, IMU then contends that “Endorsement No. 4 ... serves to define the insured’s **permitted activities**” during the lay-up period. (See IMU’s Brief, p. 11, emphasis added.) IMU cannot have it both ways. Either all use of the vessel is prohibited during the lay-up period or it is not. The answer is found in the plain language of Endorsement No. 4, which foresees that certain uses, including voyages, may occur during the lay-up period and explicitly addresses coverage in that event by providing that coverage does not terminate until the vessel “leaves her moorings.”

Endorsement No. 2 explicitly incorporates Endorsement No. 4 to establish the boundaries of, and clarify the meaning of, the phrase “laid up and out of commission.” Consequently, Endorsements Nos. 2 and 4 are consistent with each other. Accordingly, the trial court correctly held that the plain language of the policy provides that, consistent with both Endorsements, coverage does not terminate until the vessel “leaves her moorings.” Since the vessel was still tied to its moorings when Mrs. Schreiner was injured, IMU’s policy provides coverage for those injuries.

2. The Language of Endorsement No. 4 Prevails.

IMU argues a forced interpretation of the phrase “laid up and out of commission” that is completely inconsistent with Endorsement No. 4. The plain language of Endorsement No. 4 states that “[t]he clauses set forth below shall prevail over any Policy provisions inconsistent therewith.” Thus, even if the provisions of Endorsements Nos. 2 and 4 were found inconsistent (which they are not), the language of Endorsement No. 4 would govern. And, Endorsement No. 4 specifically states that coverage under the policy does not terminate until the vessel “leaves her moorings.”

It makes no difference that IMU claims that the phrase “laid up and out of commission” means that the vessel must be inoperable, because that interpretation is entirely inconsistent with the language of Endorsement No. 4. When there is an inconsistency, Endorsement No. 4 prevails. Because it is undisputed that the vessel had not left her moorings at the time that Mrs. Schreiner was injured, the policy provides coverage for her injuries.

Based on the plain, unambiguous language of the policy, the Schreiners respectfully request that this Court affirm the trial court’s decision finding coverage for their personal injury damages.

C. Alternatively, Local Custom Determines the Meaning of the Phrase “Laid Up and Out of Commission.”

The phrase “laid up and out of commission” is not explicitly defined anywhere in the policy. However, as explained above, the phrase “laid up and out of commission” is clarified by Endorsement No. 4. Therefore, this Court need look no further.

An alternative basis for coverage also exists based on the local custom of the vessel's port. Put differently, a court may, if necessary, examine the local custom of a vessel's port to interpret the phrase "laid up and out of commission." See, e.g., Goodman v. Fireman's Fund Ins. Co., 600 F.2d 1040, 1042-43 (4th Cir. 1979); Providence Washington Ins. Co. v. Lovett, 119 F. Supp. 371, 372-43 (D.R.I. 1953).

1. Jarvis's Vessel Was Properly "Laid Up and Out of Commission" In Accordance with Local Custom.

The deposition testimony and Affidavit of Garold Jarvis is the only evidence in the record regarding the local custom of the port where the Afton Princess was moored. According to Mr. Jarvis, "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." (RA 39-41, ¶¶ 6, 9, 17.)

IMU has not challenged the testimony of Mr. Jarvis in any way. IMU has not produced any independent evidence of its own to contradict Mr. Jarvis. Mr. Jarvis's testimony stands as undisputed evidence of the local custom defining the phrase "laid up and out of commission."

IMU's senior underwriter, Roberta Appleby, conceded that "local custom would dictate how a boat is placed out of commission as [the] phrase is used in the policy." (RA 71.) She also conceded that Mr. Jarvis "is knowledgeable of the local conditions in Minnesota," and he "would be one who would be reasonably able to interpret how the Afton Princess would have been put out of commission." (Id.) Consequently, IMU has

admitted that Mr. Jarvis's interpretation that a vessel is "out of commission" when it is moored to the dock and connected to its power supply is undisputed.

The Afton Princess was moored to its dock and connected to its power supply at the time of Mrs. Schreiner's accident. (RA 41, ¶ 17.) Therefore, the policy's requirement that the vessel be "laid up and out of commission," as interpreted by local custom, was complied with.

None of the cases cited by IMU are applicable here. Most are inapplicable because they address instances where the insured's breach of the lay-up clause was either admitted or there was a clear breach of an explicit provision in a policy defining when a vessel was considered "laid up." See Campbell v. Hartford Fire Ins. Co., 533 F.2d 496, 497 (9th Cir. 1976) (insured "admit[ed] failure to comply with the lay-up warranty"); AXA Global Risks, Ltd. v. Webb, 2000 WL 33179617, *2 (M.D. Fla. 2000) (vessel sank when docked in water, though insured's application specified vessel would be laid up "on shore"); Marine Charter & Storage, LTD v. All Underwriters at Lloyds of London, 628 F. Supp. 740, 742 (S.D. Fla. 1986) (vessel sank when it was away from its specified lay-up location); Robinson v. Home Ins. Co., 73 F.2d 3, 4 (5th Cir. 1934) (vessel burned when it was away from its specified lay-up location).

The cases cited by IMU involving construction of the phrase "laid up and out of commission" do not aid IMU's argument. In those cases, the local custom required certain steps that were not taken by the insured, and it was the insured's failure to comply

with local custom that constituted a breach of the lay-up warranty. Such is not the case here.

In Goodman v. Fireman's Fund Ins. Co., 600 F.2d 1040, 1042 (4th Cir. 1979) the court followed the rule that, "[w]hether a vessel is laid up during the time warranted in a marine insurance policy depends upon local custom." The court specifically found that the local custom for rendering a vessel "laid up and out of commission" required the insured to "at least close the port and starboard sea valves." Id. at 1041-43. In Goodman, the insured failed to comply with that local custom. The court therefore found that the vessel was not properly laid up and that the insurer did not have to cover the loss. Id.

Similarly, in New Hampshire Ins. Co. v. Dagnone, 475 F.3d 35, 38-39 (1st Cir. 2007), the court examined what the local custom required in terms of the vessel being "laid up and out of commission." In Dagnone, it was undisputed that "full winterization" was required for the vessel at issue to be "laid up and out of commission." Id. at 39. Pursuant to local custom, full winterization required that the insured anti-freeze the engines of the vessel. Id. It was undisputed in Dagnone that the engines of the vessel at issue had not been anti-frozen. Accordingly, the court upheld the determination that the vessel had not been fully winterized and therefore was not "laid up and out of commission," thus rendering coverage inapplicable. Id.⁴

⁴ The decision in Tsalapatas v. Phoenix Ins. Co., 115 S.E.2d 49 (S.C. 1960) is also inapposite. There, the vessel had been properly laid up and out of commission in accordance with the policy, but the owner then decided to take the boat out for the purposes of making inspection and repairs. The damage to the boat occurred while the owner was navigating it in open waters. Clearly, under those circumstances, the boat was

This case is distinguishable from Goodman and Dagnone. First, in both Goodman and Dagnone, there was a specific local custom defining when a vessel was “laid up and out of commission” that was breached by the insured. By contrast, here, there is no evidence of a local custom that was violated by the putative insured, Jarvis. Second, in Goodman and Dagnone, the policies at issue did not contain a separate prevailing policy provision which specifically addressed the circumstance at issue. However, in this case, a “prevailing” provision of the policy, namely, Endorsement No. 4, explicitly establishes the point at which coverage terminates in the event of a lay-up voyage. IMU cannot impose a construction upon the phrase “laid up and out of commission” which conflicts with the “prevailing” provisions of Endorsement No. 4.

2. Local Custom Does Not Require Winterization or Inoperability.

Contrary to IMU’s contention, Dagnone is not directly on point with the instant case. Dagnone does not support IMU’s proposition that the Jarvis vessel had to be fully winterized and inoperable to be considered “laid up and out of commission.” IMU’s contention that the phrase “laid up and out of commission” requires that a boat be fully winterized and inoperable is entirely misleading and ignores the facts of Dagnone, which distinguish it from the instant case.

As noted above, the local custom of the port of the vessel at issue in Dagnone required that the vessel be fully winterized in order to be considered “laid up and out of

not laid up and out of commission at the time the damage occurred, and the court found it unnecessary to rely upon local custom for the meaning of that phrase. Id. at 52.

commission.” In contrast, the local custom in the Port of Afton (the home port of the vessel at issue here) **does not require full winterization**, in order for a vessel to be considered “laid up and out of commission.” The undisputed testimony here is that, pursuant to the local custom of the Port of Afton, the phrases “laid up and out of commission” and “winterization” have different and distinct meanings. (RA 39, ¶ 5.) It is undisputed that a vessel “can be laid up without being winterized.” (RA 39, ¶ 6.) It is undisputed that, pursuant to the local custom of the Port of Afton, a vessel like the Afton Princess is not winterized until “December or January.” (RA 40, ¶ 10.) There is nothing in the record reflecting that the custom of the Port of Afton required full winterization of vessels such as the Afton Princess by October 1st, which is the first day of the lay-up period designated by IMU’s policy.

Case law recognizes that where it is the custom of the port to delay certain lay-up precautions such as dry docking until later in the season, a vessel’s compliance with that custom will not be considered a breach of the lay-up warranty. See Providence Washington Ins. Co. v. Lovett, 119 F. Supp. 371 (D.R.I. 1953) (where lay-up period began on November 1st and custom of port provided that yachts could be maintained in wet storage for a reasonable length of time pending hauling ashore, and in no circumstances later than the fifteenth day of December, insured did not breach the lay-up clause by having yacht winterized and in wet storage on November 25th). Here, Mrs. Schreiner’s accident on the Afton Princess occurred in October. The local custom of the Port of Afton did not require winterization of the Afton Princess until December or

January. Given the explicit extension of lay-up coverage in IMU's policy to the point of unmooring, and given that all evidence indicates the custom of the port regarding this vessel was to winterize in December or January, there is no basis for IMU's argument that coverage terminated on October 22nd before the vessel unmoored, simply because she was not fully winterized.⁵

IMU's argument that the vessel was to have been rendered inoperable is spurious.⁶ IMU's policy does not state that the vessel must be rendered inoperable before it is considered "laid up and out of commission." Likewise, there is no evidence in the record that the local custom of the Port of Afton required that the Afton Princess be inoperable in order to be considered "laid up and out of commission." IMU's reliance on Dagnone to support its argument that the Afton Princess had to be rendered inoperable is

⁵ IMU contends, in a footnote, that there are genuine issues of material fact that made a decision on the motion for summary judgment inappropriate. (See IMU's Brief, p. 18 n.2.) But IMU filed its own motion for summary judgment, from which it can be concluded that IMU did not believe there were questions of material fact making summary judgment inappropriate. Moreover, the alleged question of material fact has to do with the winterization of the boat. The undisputed testimony in this case is that local custom did not require winterization of the Afton Princess at the time that Mrs. Schreiner was injured in October. As previously discussed, the cases that IMU relies upon to support reading a "winterization" requirement into the phrase "laid up and out of commission" are distinguishable and do not stand for that proposition.

⁶ IMU attempts to force significance into the fact that Jarvis had booked a wedding cruise for later that afternoon. The planned cruise is a red herring. The simple truth is that, at the time Mrs. Schreiner sustained her injuries, the vessel was still moored at the dock in compliance with the terms of the policy. The critical time for this Court to examine is the point at which Mrs. Schreiner fell through the open hatch aboard the Afton Princess. At that precise moment, the vessel had not "left her moorings," and coverage still existed under the policy. Any activities that were planned for, or that occurred, after the point in time that Mrs. Schreiner was injured are irrelevant.

misplaced. In Dagnone, the policy itself specifically stated that the vessel at issue had to “be laid up and out of commission **and not used by the insured for any purpose.**” Dagnone, 475 F.3d at 36. There is no similar language in IMU’s policy which is at issue here.

IMU could have easily provided policy language prohibiting “any use” of the vessel or requiring that it be “inoperable,” if that is what it wanted. However, IMU chose not to do so. IMU cannot now ask the Court to read into IMU’s own policy a requirement that is clearly not in the policy, and which IMU on its own accord chose not to include.

The trial court correctly determined that Jarvis did not breach a local custom and that coverage applied for Mrs. Schreiner’s damages. Accordingly, the Schreiners respectfully request that this Court affirm the trial court’s decision finding coverage.

D. Recognized Canons of Construction Support a Finding of Coverage.

Minnesota law prohibits any construction of an insurance policy if there is no ambiguity. Smitke v. Travelers Indem. Co., 264 Minn. 212, 214, 118 N.W.2d 217, 219 (1962) (where there is no ambiguity in a policy, construction is neither required nor permitted). In this case, IMU’s policy explicitly extended coverage during the Afton Princess’s lay-up period unless and until the vessel left her moorings. The phrase “laid up and out of commission,” as it is used in IMU’s policy, is not ambiguous because its meaning is plainly defined by Endorsement No. 4, which states that coverage does not terminate until the vessel “leaves her moorings.”

The clear provisions of IMU's policy state that coverage did not terminate until the Afton Princess left her moorings. However, IMU seeks to re-write IMU's policy to IMU's advantage by construing Endorsement No. 2 as creating a time line for coverage termination that conflicts with the explicit coverage termination language set out in Endorsement No. 4. IMU effectively asks the Court to interpret Endorsement No. 2 as meaning that coverage terminates when a vessel *prepares* for a lay-up voyage by, e.g., having the vessel in an un-winterized state of readiness to depart and allowing a prospective passenger on board.

Even if the phrase "laid up and out of commission" were considered to be ambiguous, IMU's proposed construction still would not be permitted because any ambiguity must be construed against the insurer and in favor of coverage. Travelers, 718 N.W.2d at 894 (ambiguities construed against insurer); Wanzek Const., Inc., 679 N.W.2d at 325 (ambiguities construed in favor of coverage). Courts will avoid an interpretation of an insurance contract that forfeits the rights of the insured unless such an intent is manifest in clear and unambiguous language. Thommes, 641 N.W.2d at 883.

Since such preparations will necessarily precede unmooring in every case, IMU's proposed construction would alter the "moorings" rule in IMU's favor in every case. Thus, IMU's self-serving re-write of Endorsement No. 2 cannot prevail over the explicit "moorings" rule which is more favorable to the insured. If IMU had wanted to set a different time line, it could easily have done so by eliminating the explicit "moorings" rule and stating instead that lay-up coverage terminated at any point when the vessel took

affirmative steps to prepare for a voyage. Having failed to do so, IMU cannot now redraft the policy in its favor.

Finally, Minnesota courts follow the rule that where possible, a policy should be construed so as to give effect to all provisions. Steele, 540 N.W.2d at 888 (citation omitted). IMU has offered no explanation as to what purpose and meaning the “moorings” rule would have under its construction of the contract, since the “moorings” rule would always be trumped by the covert “preparations” rule. IMU’s proposed construction is prohibited because it would render the explicit “moorings” rule an ineffective provision that would never come into play, a deceptive trap for the insured. The Schreiners respectfully request that this Court affirm the trial court’s decision finding that IMU’s policy provides coverage for her injuries.

CONCLUSION

The trial court properly examined the plain, unambiguous language of IMU’s policy, which explicitly extends coverage during the lay-up period until the vessel “leaves her moorings.” The underlying accident occurred before the vessel left her moorings. Accordingly, coverage was in full force and effect at the time of the accident. For this reason, and the additional arguments contained herein, the Schreiners respectfully request that this Court affirm the trial court’s Order in its entirety.

Dated this 10th day of October, 2008.

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By: *Cindy L. Butler*
Philip Sieff (#169845)
Cindy L. Butler (#328248)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2015
(612) 349-8500

**ATTORNEYS FOR RESPONDENTS
SUSAN AND RONALD SCHREINER**

CERTIFICATE

Pursuant to Rule 132.01, subd. 3(a)(1), the undersigned set the type of the foregoing brief in Times New Roman, a proportional 13-point font, on 8-1/2 x 11 inch paper with written matter not exceeding 6-1/2 x 9-1/2 inches. The resulting principal brief contains 5,285 words, as determined by employing the word counter of the word-processing software, Microsoft Word 2003, used to prepare it.

Dated this 10th day of October, 2008.

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

By: *Cindy L. Butler*
Philip Sieff (#169845)
Cindy L. Butler (#328248)

2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2015
(612) 349-8500

**ATTORNEYS FOR RESPONDENTS
SUSAN AND RONALD SCHREINER**