

NO. A08-1402

State of Minnesota
 In Court of Appeals

Jarvis & Sons, Inc., et al.,

Respondents,

vs.

International Marine Underwriters, et al.,

Appellants,

and

Dolliff, Inc.,

Respondent,

v.

Kim Brown,

Respondent.

REPLY BRIEF OF APPELLANTS INTERNATIONAL MARINE
 UNDERWRITERS AND NORTHERN ASSURANCE COMPANY OF AMERICA

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ARGUMENT

A. The trial court erred in finding that Jarvis is entitled to insurance coverage under the IMU Policy because the Schreiner accident took place during preparation for a cruise that took place in violation of the Policy's lay-up provisions.

In their briefs, the Respondents all place great emphasis on the language of the IMU Policy Endorsement No. 4, which is entitled “Port Risk Endorsement.”¹ The Respondents all defend the lower court’s incorrect analysis of the IMU Policy, which focused solely on that Endorsement and disregarded the other critical provisions of the Jarvis policy, all in violation of Minnesota law, which requires insurance policies to be read and interpreted in their entirety. In doing so, the lower court effectively nullified the express language of Endorsement No. 2, which unequivocally requires that the Jarvis vessels be laid-up and out of commission during the winter months, including the date of the Schreiner accident. Not surprisingly, the court did so without citing a single legal authority or precedent. The Respondents likewise cite no case that held that the limited in-port coverage afforded by Port Risk Endorsement language here did not require compliance with the policy’s overall lay-up provisions. By doing so, the lower court was then and all the Respondents are now in error.

First of all, it is undisputed that the lay-up requirements of Endorsement No. 2

¹ In this Reply Brief, IMU replies to the all the response briefs filed by Respondents Jarvis & Sons, Inc.; Afton-St. Croix Co.; Susan and Ronald Schreiner; and Dolliff, Inc. (referred to collectively herein as “Respondents”).

forbid operation of the Jarvis vessel during winter months, commencing on October 1. More so, the Endorsement emphatically imposes on Jarvis, the insured, the *affirmative obligation* to have the vessel laid-up and out of commission during those months:

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.

(A. 58; emphasis added)

The evidence is undisputed that Jarvis failed to fulfill this warranty and that its vessel was *not* layed-up or out of commission at the time of the accident.² To the contrary, the vessel was instead fully prepared to board passengers, leave port and sail on a cruise. In fact, it did sail, within hours of the Schreiner accident. As demonstrated in IMU's initial brief, an owner who fails to take his boat out of commission and prepare it for off-season storage is in violation of the lay-up provisions even without moving the

² In its brief, Jarvis contends that by merely not operating the vessel outside its home port in Afton, it complied with the policy's lay-up provisions. (Jarvis Brf. p. 11) In support of this claim, Jarvis cites a Merriam-Webster Dictionary definition of "out of commission" – "out of active service or use." However, the same dictionary entry also contains another definition for the term: "out of working order" – clearly a more apt meaning in the context of seasonal maritime navigation.

But even more revealing is the same dictionary's definition for the opposite of "out of commission," "in commission". Merriam-Webster defines "in commission" in this way: "*of a ship*: ready for active service" (emphasis in original). Clearly, at the time of the Schreiner accident, only hours before sailing, the Jarvis vessel was "ready for active service". Thus, according to Jarvis' own authorities, at the time of the incident, its boat was actually "in commission." Therefore, Jarvis was in violation of the policy warranty. <http://www.merriam-webster.com/dictionary/out%20of%20commission>

vessel from its moorings. *Goodman v Fireman's Fund Insurance Company*, 600 F.2d 1040, 1042-43 (4th Cir., 1979)

Here, there is no evidence that Jarvis had taken any steps to lay-up or take the vessel out of commission at the time of the Schreiner accident. There is likewise no evidence that Jarvis did anything to make the vessel inoperable. In short, there is absolutely no evidence that Jarvis complied with the lay-up provision of Endorsement No. 2. Consequently, as the policy itself dictates, by breaching this key contractual obligation, Jarvis voided the coverage afforded under the policy for the time period of the breach, since "any breach of these warranties shall render this policy void for the period of such breach." Without citing any authority, the trial court erroneously disregarded this failure and breach of warranty on the part of Jarvis.

The trial court then compounded its error by overlooking additional express language in Endorsement No. 4, the very provision which the court mistakenly reasoned afforded coverage to Jarvis. Warranty No. 1 of the Endorsement explicitly restates Jarvis's obligation to lay-up and take the vessel out of commission:

- (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 proceeding on a voyage.

(A. 61; emphasis added)

The trial court ignored this portion of Endorsement No. 4, and failed to apply any lay-up requirement whatsoever in reaching its decision. In effect, the trial court (and the Respondents in their briefs) treat the policy as if it contained no lay-up provision at all,

since the court's reasoning would reach the same result in the absence of such a provision. Without question, the plain language of the Warranty No. 1 of Port Risk Endorsement at issue here requires that the insured's vessel be "laid-up" in the port of Afton, Minnesota for the endorsement to provide any coverage at all. Contrary to the trial court's ruling and the Respondents' claims, the Port Risk Endorsement is neither inconsistent with the rest of the Policy nor ambiguous. Instead, Endorsement No. 4 serves to define the insured's permitted activities once the vessel is laid up and out of commission. The Endorsement reaffirms, rather than nullifies, Endorsement No. 2's lay-up requirements. According, the Endorsement does not afford coverage to Jarvis for the *Schreiner* lawsuit, because Jarvis failed to comply with the Endorsement's express requirements. Because the trial court miscomprehended the meaning and intention of the IMU policy endorsements, its ruling was in error and should be reversed.

Both the trial court and the respondents place much emphasis on the fact that the Schreiner accident took place while the vessel was berthed in Afton before it actually took on passengers and commenced sailing on the unauthorized wedding cruise. They suggest that perhaps the location of the vessel in Afton satisfies all undefined lay-up requirements that may have existed. Their reliance on that circumstance is misplaced, because under maritime law, the lay-up provisions of a marine policy require more than temporary mooring.

As demonstrated in IMU's opening brief, the decision in *New Hampshire Insurance Co. v. Dagnone*, 475 F.3d 35 (1st Cir, 2007), illustrates the significance that the courts have attributed to lay-up provisions in maritime insurance contracts. In *Dagnone*,

the First Circuit examined the idea of a boat being “laid up and out of commission.” Like here, the insured’s vessel was not on a cruise on the night it was damaged. The policy required the vessel to be layed-up and out of commission from October 31 to April 15. The owner arranged for dry storage and had the boat berthed in water at a storage facility, awaiting the completion of its winterizing. However, before the winterizing took place, a severe storm struck on December 6, causing the boat to break loose and sustain substantial damage. The appellate court concluded that the vessel’s owner had failed to comply with the policy’s lay-up obligations and ruled that because the vessel was still fully operable, it had not been “laid up and out of commission”, and the insurer owed no coverage for the loss. 475 F.3d at 38.

Respondents contend that the *Dagnone* decision is inapplicable here because that policy’s lay-up warranty also required that the vessel “not [be] used by the insured for any purpose” during the lay-up period. Like IMU’s policy, the *Dagnone* endorsement did not define “laid up and out of commission” or otherwise impose any specific requirements, such as winterizing. Significantly, the *Dagnone* court based its ruling entirely on its analysis of whether the boatowner complied with his obligations to have the boat be “laid up and out of commission.” A fuller quotation from the opinion illustrates the court’s sound reasoning:

It is true that *Dagnone* was not taking the yacht out for a brisk December cruise on the night it was damaged, however, the vessel was still fully operable. The yacht was still "being used" in the sense that it was in the water, having just been motored to Hinckley, and awaiting hauling out, rather than being “laid up and out of commission.” as required, i.e., being "inoperable." 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 the winter, but to take affirmative steps to winterize their boats so that they are “laid up and out of commission.” Thus, we find that the policy's exclusions clause is susceptible of 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. at 38; emphasis added. Thus, the key deciding fact in *Dagnone* was not that the vessel had been put to use during lay-up, but rather that it remained fully operable, just like the Jarvis vessel. In the same way here, at the time of the accident, the Jarvis vessel was being decorated for an unauthorized dinner cruise a few hours away and was fully operable three weeks into its lay-up period. Following the accident, it successfully completed the wedding cruise. Accordingly, it cannot be said to have been “laid up and out of commission.”

Moreover, Jarvis’ conduct before the accident demonstrates that it fully understood the consequences of the policy’s lay-up provisions and the fact there was no coverage for the any losses connected to the October 22 cruise. It is simply disingenuous for the Respondents to now argue that there was coverage under the policy for this accident. Indeed, the actions of Jarvis, Brown and Dolliff speak louder than their words and belie their self-serving argument.

After the end of the regular sailing season, Jarvis requested its insurance brokers, Dolliff and Kim Brown, to obtain authorization and permission from IMU for the Schreiner cruise and two others, to take place after October 1. Plainly, Jarvis recognized that without express approval from IMU, it had no coverage and therefore, could not operate its vessels after October 1.

On October 13, 2005, Jarvis, through its broker, Kim Brown and Dolliff Inc., requested that IMU add coverage for excursions on two additional days in October: October 16 and October 18, 2005. Brown's request to IMU came in the form of an email to IMU's Annie Solomon and identified only two cruises on two dates, neither of which was the Schreiner wedding cruise:

From: Kim Brown
Sent: Thursday, October 13, 2005 10:27 AM
To: Solomon, Annie
Subject: RE: Jarvis & Sons

Annie:
They only have 2 more charters this year.
One on 10-16 and another one on 10-18.
Can we just allow the use of these few days
with no additional premium.
Thanks Kim

(A. 227)

IMU granted Jarvis's request by issuing an endorsement expanding coverage for those two specific dates and charged no additional premium. (A. 67) In an email message agreeing to extend the coverage for those *two* dates only, IMU's underwriter Roberta Appleby expressly reminded Brown (Jarvis' broker and agent) that at the conclusion of the second cruise on October 18, Jarvis's vessels should be laid-up and out of commission for the remainder of the winter season:

From: Appleby, Roberta A.
Sent: Thursday, October 13, 2005 11:39 AM
To: 'Kim Brown'
Subject: RE: Jarvis & Sons N5JH40105 and 106
Importance: High

Dear Kim:

We had provided a quote to extend the policy until November 1st on September 22nd – we did not receive a response from you and as such the vessels were to be laid up and out of commission as of 10/1.

Please note that we can extend policy for those two charters only for no charge – please provide the name of charterer for each cruise and the specific vessel and we will endorse accordingly. **After the 10/18 charter, the vessel must be laid up and out of commission as per policy terms and conditions.**

I appreciate your assistance and look forward to your early reply so we can process the endorsements.

Regards,
Roberta Appleby
Sr. Underwriter
International Marine Underwriters

(A. 226)³

Later, Brown admitted in a signed written statement that although Garold Jarvis had requested that she obtain endorsements from IMU to secure insurance coverage on October 16, 18 and 22, she only requested coverage for October 16 and 18 when communicating with IMU. She admitted that she “forgot to include the request for coverage for October 22, 2005.” (A. 229)

Then, after the accident and IMU’s denial of coverage, Jarvis brought suit against both Dolliff and Brown, alleging that they had failed to procure the necessary authorization for the cruise. In alleging misconduct on the part of its brokers, Jarvis was fully aware that the Schreiner accident took place while its vessel was still moored at port and before its had actually departed on the cruise, the very circumstances that

³ Appleby’s warning to Brown is knowledge attributable to Jarvis, Brown’s principal. *Northland Temporaries, Inc., vs. Turpin*, 744 N.W.2d 398 (2008)

Respondents now contend require coverage to be afforded. However, in requesting its brokers to have coverage extended and then suing those brokers for failing to do so, Jarvis implicitly acknowledged that no coverage existed when the Schreiner accident took place.

For all of these reasons, it is apparent that the trial court was in error when it ruled that coverage existed for the Schreiner accident. Its holding should be reversed.

B. The trial court erred in finding that Jarvis is entitled to insurance coverage under the IMU policy because Jarvis breached its obligation to act in utmost good faith by failing to lay-up and take its vessel out of commission.

As demonstrated in IMU's opening brief, American maritime law imposes on parties to a contract of marine insurance the duty to act in *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) In insurance law, the doctrine of *uberrimae fidei* stands for the proposition that both parties are held to the highest standard of good faith in the transaction. As one court recently held, "insureds were considered morally obligated to disclose all information material to the risk the insurer was asked to shoulder." *Certain Underwriters at Lloyds. London v. Inlet Fisheries Inc.*, 518 F.3d 645 (9th Cir. 2008). In *Underwriters*, the court conducted an in-depth analysis of this doctrine and its application to marine insurance. (In the area of maritime law, courts, including this one, often look outside of their jurisdiction for guidance. Further, the Eighth Circuit Court of Appeals in *Springfield Fire & Marine Ins. Co. v. National Fire Ins. Co. et al*, 51 F.2d 714 (8th Cir. 1931), recognized the application of *uberrimae fidei* in marine insurance.)

Uberrimae fidei requires the insured to disclose to the underwriter all material facts affecting the risk and to comply with the express warranties in the policy, because the insured's conduct contributes enormously to the insurer's decision to insure the risk. Thus, 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)

While honesty and fair dealing are to be encouraged in commercial relationships, the duty of utmost faith is necessary in the law of marine insurance because of the special nature of marine insurance contracts. Thomas J. Schoenbaum, *The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law*, 29. J. Mar. L. & Com. 1, 3 (1998). In marine insurance cases the particulars of the risk are peculiarly within the knowledge of the assured. *Id.* In this case, without notification or disclosure of any kind, there was no way IMU could know that Jarvis & Sons would be operating a boat cruise on October 22, when the boat was warranted to be laid-up and out of commission, and therefore, there was no way to know of the risk to plaintiff.

The rule of utmost good faith is not merely grounded in the idea of morality, but also in economic efficiency. *Id.* The rule is designed to minimize the costs to both insurers and assureds. *Id.* Jarvis did not want to pay for the particular insurance necessary to operate the *Afton Princess* for the entire year: therefore, in order to reduce costs to Jarvis, IMU provided a policy which did not allow for coverage for any cruise between October 1 and April 1. This was their clear agreement.

With regard to the facts and circumstances surrounding this lawsuit, the conduct of Jarvis was a clear breach of its duty to IMU. Before any recovery under a policy of marine insurance, it must be shown that the loss or damage was “proximately caused” by a peril insured against and claimed under. *Lanassa Fruit Steamship & Importing Co. v. Universal Insurance Co.*, 302 U.S. 556 (1938) While it is true that there is some coverage for the boat when it is laid-up and out of commission, the injury complained of in this case is not one of those situations.⁴ In this case, the peril insured against can by no stretch of the imagination be said to include the risk of the plaintiff coming onto the boat to set up for an unapproved wedding cruise three weeks into the lay-up season.

Indeed, evidencing both parties’ understanding of the nature of the policy, Jarvis requested an expansion of the policy for two specific dates: October 16 and 18. But by granting extensions of coverage for those two specific dates, IMU did not authorize a cruise for October 22. In fact, Jarvis cannot deny that it understood the limits of its coverage and requested its brokers, Dolliff and Kim Brown, to obtain an extension of coverage for the Schreiner cruise.

Because the requested extension was never obtained, IMU was not under any obligation to afford coverage for an accident that took place on a date outside the policy’s

⁴ Examples of the limited coverage provided by the Port Risk Endorsement during the period of lay-up would be for injuries to individuals inspecting the condition of the vessel or security guards on patrol. Likewise, the Endorsement would afford coverage for property damage claims if the boat broke away from its moorings during lay-up and damaged nearby vessels or docks. In each such situation, the peril protected against by the Port Risk Endorsement would not relate to unauthorized cruise operations, such as the injury sustained by Susan Schreiner who was admittedly only aboard the boat to decorate for a wedding cruise scheduled to commence within a few hours.

express operational dates, on a vessel that had not been lay-up and taken out of commission and to a person who was aboard the vessel solely because she was to attend an unauthorized cruise. For the trial court to find coverage under the policy for this accident is in direct conflict with the plain language of the policy and the parties' understanding of the policy's terms and conditions as confirmed by their actions. In short, Jarvis' failure to lay-up its vessel and take it out of commission breached its duty to act in the utmost good faith and voided any coverage under the policy pursuant to maritime law.

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.⁵

WHEREFORE, IMU respectfully requests this Court to:

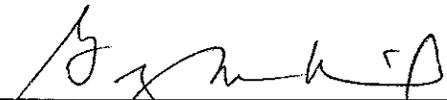
- a) reverse the trial court's ruling of December 3, 2007;
- b) find and declare that there is no coverage under the relevant IMU policy for the claim made the subject of the Schreiner lawsuit;
- c) find and declare that the Schreiner lawsuit does not obligate IMU to provide a defense for Jarvis;

⁵ 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.)

- 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 Schreiner 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.

Respectfully submitted,

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