

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

QBE INSURANCE CORPORATION,

Respondent,

-against-

No. 25

JINX-PROOF INC.,

Appellant.

20 Eagle Street
Albany, New York 12207
January 15, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

JOHN M. DENBY, ESQ.
DEVITT SPELLMAN BARRETT, LLP
Attorneys for Appellant
50 Route 111
Suite 314
Smithtown, NY 11787

ANTHONY M. NAPOLI, ESQ.
THOMAS M. BONA, P.C.
Attorneys for Respondent
123 Main Street
White Plains, NY 10601

Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 25.

2 Counselor, do you want any rebuttal time?

3 MR. DENBY: Yes, two minutes, please, Your
4 Honor.

5 CHIEF JUDGE LIPPMAN: Two minutes, sure.
6 Go ahead.

7 MR. DENBY: May it please the court. My
8 name is John Denby, and I'm appearing on behalf of
9 the defendant Jinx-Proof Inc.

10 Plaintiff's motion for summary judgment
11 should never have been granted in this case.
12 Plaintiff failed to attach a complete copy of the
13 insurance policy to its motion papers. It failed to
14 include the liquor liability coverage endorsement.

15 JUDGE PIGOTT: Did you raise that in
16 opposition or in your cross-motion?

17 MR. DENBY: This - - - those arguments were
18 not raised. It goes to the burden that plaintiff has
19 to establish its entitlement to judgment as a matter
20 of law. This plaintiff has to adduce all evidentiary
21 proof to remove any question of fact.

22 JUDGE SMITH: So if there's a flaw in his
23 showing, don't you have to point it out to the trial
24 court before you come point it out to us?

25 MR. DENBY: Well, in the - - - in the trial

1 court and in the Appellate Division they have the
2 power to search the record and they can - - - they
3 can search the record and find that.

4 JUDGE PIGOTT: But you said the record
5 wasn't there?

6 MR. DENBY: Pardon?

7 JUDGE PIGOTT: You said that the dram shop
8 exclusion wasn't there - - -

9 MR. DENBY: The - - -

10 JUDGE PIGOTT: - - - in the record.

11 MR. DENBY: It's not the dram shop
12 exclusion; it's the liquor liability coverage form.

13 JUDGE PIGOTT: Okay.

14 MR. DENBY: It was not included in the
15 policy - - -

16 JUDGE PIGOTT: But - - -

17 MR. DENBY: - - - and - - -

18 JUDGE PIGOTT: But if it wasn't in the
19 record, how can they search it?

20 MR. DENBY: Well, it's - - - it's in the
21 record in this sense, in the sense that they - - -
22 they issued reservation of rights letters and they
23 said that there was coverage under the liquor
24 liability form - - -

25 JUDGE PIGOTT: Oh, I see. So you're saying

1 it was - - - it was in the case in other - - - in
2 other documents; it's just that that - - -

3 MR. DENBY: It's - - -

4 JUDGE PIGOTT: - - - that rider was not on
5 the insurance policy.

6 MR. DENBY: Absolutely. In the second
7 reservation of rights letter, the - - - the insurer
8 says that there's liquor liability coverage and we
9 will provide a defense under the liquor liability
10 coverage form. That's in the record. And they have
11 not established their entitlement to judgment of law
12 by - - - as a matter of law by - - - by adducing the
13 entire insurance policy. They - - - this liquor
14 liability coverage form is not subject to the assault
15 and battery exclusion and they - - -

16 JUDGE PIGOTT: But then did you raise - - -
17 you cross-moved too, right, didn't you?

18 MR. DENBY: We cross-moved, yes.

19 JUDGE PIGOTT: All right. Did you raise
20 that then?

21 MR. DENBY: It's not raised as an argument
22 in the record.

23 JUDGE PIGOTT: Okay.

24 MR. DENBY: It is - - - it is a legal
25 question that is available for review - - - review by

1 this court because it's dispositive.

2 JUDGE SMITH: Well, it would be easier to
3 review, obviously, if we had the liquor - - - the
4 text of the liquor exclusion.

5 MR. DENBY: Absolutely, and they should
6 have put that in.

7 JUDGE SMITH: Yeah - - -

8 MR. DENBY: It was their burden.

9 JUDGE SMITH: - - - but if you had made the
10 argument, then presumably they - - - they could have
11 put it in. They could have said, what do you mean
12 it's not - - - it's not - - - look at page 18; it's
13 right there.

14 MR. DENBY: But - - -

15 JUDGE SMITH: We just don't know.

16 MR. DENBY: - - - it's their obligation as
17 - - - in moving - - -

18 JUDGE SMITH: Even when you don't raise the
19 point?

20 MR. DENBY: It's their obligation, in
21 moving for summary judgment, to remove all questions
22 of law, to establish their - - -

23 JUDGE PIGOTT: Yeah, but you know,
24 sometimes page 18 is still on the photocopy machine.
25 I mean, it just - - - it just got - - - didn't get

1 into the papers.

2 MR. DENBY: This is more than page 18; this
3 is - - -

4 JUDGE PIGOTT: I know; I'm not disagreeing
5 with you, but I guess what we're repeating too much
6 is why wouldn't you have said, hey, the liquor
7 liability exclusion is not in their papers?

8 MR. DENBY: It should have been - - - it
9 should have been raised. It was argued in - - - in
10 the First Department. It's an argument that's - - -
11 that is available for review by this court because it
12 doesn't rely on any extraneous facts. All of the
13 facts are in the record. It's a legal argument. It
14 goes to their burden of proof on a motion for summary
15 judgment.

16 JUDGE ABDUS-SALAAM: Counsel, on - - -

17 MR. DENBY: They can't - - -

18 JUDGE ABDUS-SALAAM: - - - on that issue, I
19 admit the letters, the reservation of
20 rights/disclaimer, I know - - - I know that's a
21 dispute too - - - letters indicate that first there
22 was no liquor liability coverage and then in the
23 second letter, they say it was liquor liability
24 coverage, but under what? Was that a separate - - -
25 was that a separate coverage or was it under the

1 commercial general liability?

2 MR. DENBY: It's - - -

3 JUDGE ABDUS-SALAAM: I'm not sure about
4 that.

5 MR. DENBY: If you look at the declarations
6 page - - - I think it's at 75 of the record - - - the
7 declaration page lists all the coverages. It lists
8 three coverages: There's property damage, there's
9 general liability, and there's liquor liability
10 coverage. The coverage was there. If you look at
11 the assault and battery exclusion, it only applies to
12 the other coverages - - -

13 CHIEF JUDGE LIPPMAN: Counsel, what do you
14 make of the letters that the - - - whatever you want
15 to call it, the inaccuracies in it? Was it an
16 attempt to deceive you, or they were mistakes, or
17 what - - - what was the - - - you know, behind the
18 letters, what was the purpose of the letters and that
19 they were kind of off in certain regards?

20 MR. DENBY: There are several - - -

21 CHIEF JUDGE LIPPMAN: What do you attribute
22 that to?

23 MR. DENBY: There are several serious
24 problems with these letters. The first is the
25 insurance company issued a reservation of rights

1 letter. That creates a conflict of interest, a
2 profound conflict of interest that requires the
3 insurance company to advise the insured that they're
4 entitled to separate and independent counsel at the -
5 - -

6 CHIEF JUDGE LIPPMAN: Right, but do you - -
7 -

8 MR. DENBY: - - - insurance company's
9 expense.

10 CHIEF JUDGE LIPPMAN: - - - attribute it to
11 just mistakes in the letters, or is there a design to
12 those letters?

13 MR. DENBY: The failure to - - - I don't
14 attribute it one way or the other. I - - - I just
15 look at the fact, and the fact is that the - - - the
16 duty to advise the insured that they were entitled to
17 separate counsel was not provided.

18 JUDGE ABDUS-SALAAM: Didn't they tell you
19 that about the assault and battery charges, though?
20 Didn't they say - - -

21 MR. DENBY: No - - -

22 JUDGE ABDUS-SALAAM: - - - you should
23 consult your own lawyer; we're not going to defend
24 you; we're not going to indemnify you - - -

25 MR. DENBY: They said - - -

1 JUDGE ABDUS-SALAAM: - - - on assault and
2 battery - - -

3 MR. DENBY: - - - that there's a
4 possibility that there could be an excess verdict and
5 said you may want your - - - your separate private
6 counsel to work with our - - -

7 JUDGE SMITH: But didn't they also say, in
8 so many words, we're not covering you for - - - we're
9 not defending or indemnifying you for assault and
10 battery?

11 MR. DENBY: On the general liability
12 coverage, not on the liquor liability coverage form.
13 They can't do that, because assault and battery
14 doesn't - - - that exclusion does - - -

15 JUDGE SMITH: Well, whether they can do it
16 or not, they did it, didn't they? I mean - - -

17 MR. DENBY: They did it, and they're wrong.

18 JUDGE PIGOTT: What does liquor liability
19 coverage cover?

20 MR. DENBY: Pardon?

21 JUDGE PIGOTT: What does liquor liability -
22 - -

23 MR. DENBY: That's a - - -

24 JUDGE PIGOTT: - - - coverage - - -

25 MR. DENBY: - - - good question, Your

1 Honor. That's a very good question.

2 JUDGE ABDUS-SALAAM: Well, if - - -

3 MR. DENBY: I would love to know that.

4 JUDGE ABDUS-SALAAM: If it's under the dram
5 shop - - -

6 MR. DENBY: I'd love to see the policy.

7 What?

8 JUDGE ABDUS-SALAAM: Counsel, if it's under
9 the dram shop claims, and the Supreme Court
10 essentially dismissed those claims, doesn't the
11 liquor liability coverage become irrelevant, and
12 whether you had an assault and battery coverage under
13 that or not, it becomes irrelevant because the dram
14 shop claims are out of this, right?

15 MR. DENBY: You can't make that conclusion
16 from what's in the record here. As I've stated, they
17 did not attach the liquor liability coverage form to
18 their motion papers.

19 JUDGE ABDUS-SALAAM: Well, if we know that
20 - - -

21 MR. DENBY: There is no - - -

22 JUDGE ABDUS-SALAAM: If we know that the
23 liquor liability coverage is separate from the CGL
24 and the other coverage that you had, and the other
25 two exclude assault and battery coverage, and the

1 liquor liability form is the only one that could have
2 included assault and battery coverage, once the dram
3 shop claims are gone, isn't the liquor liability
4 coverage also - - -

5 MR. DENBY: No, there's nothing in this
6 record that suggests that liquor liability coverage
7 is limited to dram shop claims.

8 JUDGE SMITH: As I understand it, the
9 original letter, which mistakenly said you're not
10 covered for anything to do with serving liquor, would
11 have been right but for the existence of this liquor
12 liability coverage form?

13 MR. DENBY: I'm - - -

14 JUDGE SMITH: I mean, I guess maybe I
15 misunderstood. I thought the liquor liability
16 coverage form essentially added into the policy
17 coverage that arose out of serving liquor which
18 otherwise would not have been covered.

19 MR. DENBY: That's - - - that's correct.

20 JUDGE GRAFFEO: Is it a special rider - - -

21 JUDGE SMITH: So the whole - - -

22 JUDGE GRAFFEO: Is it a special rider to
23 the policy?

24 MR. DENBY: It indicates that it is - - -
25 it is a - - - the declarations page says it's a - - -

1 a separate part, which indicates to me that it's much
2 more than just a rider.

3 JUDGE SMITH: But if it had not been in the
4 policy, then this whole incident would have been
5 completely uncovered, is that right?

6 MR. DENBY: If it had not been in the
7 policy, then the liquor - - - then the assault and
8 battery exclusion would apply - - -

9 JUDGE SMITH: Forget about the assault and
10 battery exclusion; would there have been coverage for
11 the incident?

12 MR. DENBY: Yes, there would have been
13 coverage - - - there would have been - - -

14 JUDGE SMITH: But even without - - -
15 without the liquor coverage rider?

16 MR. DENBY: Yes, yes, there would have been
17 coverage. The only reason there wasn't coverage was
18 because the - - - of the assault and battery
19 exclusion. That's the only reason there wasn't
20 coverage. The - - - the reservation of rights - - -

21 JUDGE GRAFFEO: There's multiple writings
22 here in the Appellate Division. What - - -

23 MR. DENBY: Correct.

24 JUDGE GRAFFEO: What are you asking us to
25 do, and on - - -

1 MR. DENBY: I'm asking you - - -

2 JUDGE GRAFFEO: - - - and on what rationale
3 are you recommending?

4 MR. DENBY: I'm asking you to find that
5 these letters did not suffice as notices of
6 disclaimer. I'm asking you to find - - -

7 JUDGE ABDUS-SALAAM: Why not?

8 MR. DENBY: Pardon?

9 JUDGE ABDUS-SALAAM: Why not?

10 MR. DENBY: Because they're confusing and
11 they're contradictory and they fail to advise the
12 insured - - - the insureds of their right - - -

13 JUDGE ABDUS-SALAAM: What's confusing about
14 we're not either - - -

15 MR. DENBY: Well - - -

16 JUDGE ABDUS-SALAAM: - - - indemnifying or
17 defending you on assault and battery - - -

18 MR. DENBY: We're - - -

19 JUDGE ABDUS-SALAAM: - - - what's confusing
20 about that?

21 MR. DENBY: Right. We're - - -

22 JUDGE ABDUS-SALAAM: Both of them said
23 that.

24 MR. DENBY: They said that we're not - - -
25 we're not defending or indemnifying you on assault

1 and battery under the commercial general liability
2 policy, but we are defending you and we are covering
3 you under liquor liability policy. And there's never
4 been a disclaimer under the liquor liability policy
5 form. So - - -

6 CHIEF JUDGE LIPPMAN: What's the
7 consequence of their conduct? What do you want us to
8 - - - to hold?

9 MR. DENBY: Well, number one is they
10 violated their duty to defend by failing to advise
11 the insured that they had a right to separate and
12 independent counsel. They appointed counsel that
13 represented parties with conflicting interests.

14 CHIEF JUDGE LIPPMAN: So what happens now?

15 MR. DENBY: You have - - - you have a
16 violation - - -

17 CHIEF JUDGE LIPPMAN: What do you want us
18 to do?

19 MR. DENBY: I want you to reverse the
20 Appellate Division's decision and find that they had
21 an obligation to cover the insureds under - - - under
22 these circumstances.

23 JUDGE SMITH: I'm sorry - - -

24 JUDGE PIGOTT: To defend and indemnify.

25 JUDGE SMITH: I'm sorry - - -

1 MR. DENBY: Defend and indemnify, correct.

2 JUDGE SMITH: I'm sorry; I know you're out
3 of time, but I'm confused about something. I'm
4 looking at the policy. It looks like under
5 exclusions you've got liquor liability at page - - -

6 MR. DENBY: Under - - -

7 JUDGE SMITH: - - - at page 78 of the
8 record, and they exclude bodily injury or property
9 damage "for which any insured may be liable by reason
10 of the furnishing of alcoholic beverages." I see.
11 You're saying that's - - - that's only a dram shop
12 exclusion.

13 MR. DENBY: No, you're looking at - - -
14 you're looking at the reproduced general liability
15 policy.

16 JUDGE SMITH: Yes, I am.

17 MR. DENBY: You're not looking at the
18 liquor liability policy.

19 JUDGE SMITH: I understand. I understand.

20 MR. DENBY: And - - -

21 JUDGE SMITH: I'm trying to figure out
22 whether - - - whether - - -

23 JUDGE GRAFFEO: If it was so important to
24 have this document, why wasn't it raised - - -

25 MR. DENBY: I can't tell you why it wasn't

1 raised.

2 JUDGE GRAFFEO: - - - in Supreme Court?

3 MR. DENBY: All I can tell you - - - I
4 know; it was very important. Plaintiff should - - -
5 plaintiff is the movant. Plaintiff is moving for
6 summary judgment. Plaintiff has to establish his
7 entitlement to judgment as a matter of law. He has
8 to reproduce the entire insurance policy - - -

9 JUDGE GRAFFEO: But when he - - -

10 MR. DENBY: - - - to be entitled to summary
11 judgment.

12 JUDGE GRAFFEO: But when that's not there,
13 there's no obligation on your part to raise that so
14 the court could deal with that issue?

15 MR. DENBY: Well, generally not. I mean if
16 - - -

17 JUDGE PIGOTT: Well, let's assume for a
18 minute they were moving for summary judgment on the
19 basis that the policy had expired, and they attached
20 the binder that says it's good from January 31 to
21 January 31 within a year; they don't have to attach
22 the policy. If their motion is addressed to a
23 particular part, all they have to do is attach the
24 part.

25 MR. DENBY: Their motion was addressed to

1 coverage; they had to establish that there's no
2 coverage. They didn't do that. Their motion should
3 have been denied.

4 CHIEF JUDGE LIPPMAN: Okay, counsel.

5 MR. DENBY: And the Appellate Division's
6 decision should be - - -

7 CHIEF JUDGE LIPPMAN: Thank you.

8 MR. DENBY: - - - reversed.

9 CHIEF JUDGE LIPPMAN: So you'll have
10 rebuttal.

11 MR. DENBY: Thank you.

12 CHIEF JUDGE LIPPMAN: Counselor?

13 MR. DENBY: Thank you.

14 MR. NAPOLI: May it please the court. My
15 name is Anthony Napoli. I represent the plaintiff-
16 respondent.

17 CHIEF JUDGE LIPPMAN: Counselor, did the
18 two letters accurately reflect what you wanted to
19 convey to them?

20 MR. NAPOLI: Yes, Your Honor. I think
21 Judge Manzanet, in particular, said it perfectly,
22 that no reasonable person, having read the letters,
23 can - - -

24 CHIEF JUDGE LIPPMAN: Were they a model of
25 clarity, though?

1 MR. NAPOLI: I think they were, Your Honor.
2 You know, I was thinking about this. For the court
3 and for the attorneys in this area, reservation of
4 rights, disclaimer of liability, denial of coverage,
5 those are all - - -

6 JUDGE PIGOTT: Is there any - - -

7 MR. NAPOLI: - - - those are all buzz
8 words.

9 JUDGE PIGOTT: Is there any doubt - - - I
10 mean, this is not an uncommon situation where
11 somebody gets hurt in a bar. And the complaints
12 generally do allege two things: negligence, and an
13 intentional act. When there's that conflict, the - -
14 - the carrier can't hire the lawyer because, of
15 course, that lawyer, if he's got a brain in his or
16 her head and wants to keep the client, is going to
17 move everything over to the assault. All of the
18 questions are going to be: Isn't it true that this
19 was intentional? Isn't it true, et cetera. All
20 right? So isn't counsel right that you have to
21 provide a lawyer of his choice so that he can be
22 properly protected, and if it turns out that it
23 becomes an assault, fine, but - - - and you don't
24 have to cover it. But in terms of who's going to
25 defend the case, you - - - you can't do it with the

1 idea of hurting your insured.

2 MR. NAPOLI: Your Honor, as far as private
3 counsel, the - - - the insured was advised in both of
4 the letters - - -

5 JUDGE PIGOTT: It's not that; it's - - -
6 it's you don't get to pick. In other words, the
7 lawyer that you had there should not have been there.
8 He - - - the answer that was filed should not have
9 been filed by an insurance company lawyer because
10 there are affirmative defenses, et cetera, that can
11 be asserted that may push the case more to the
12 negligence side than to the intentional tort side,
13 which is of course what - - - what Jinx would want.
14 And that's why they should have the lawyer that then
15 - - - that then does this, right?

16 MR. NAPOLI: Yes, Your Honor, but the
17 relief I requested in my motion was that the court
18 acknowledge that the letters effectively apprised the
19 insured that they weren't covered for the assault and
20 battery.

21 JUDGE PIGOTT: But it didn't tell them that
22 they're entitled to an attorney. The only thing it
23 said, I think counsel mentioned, was that you can go
24 get your own lawyer to defend you on assault. Now,
25 these are civilians, so they think they're now going

1 to pay for a lawyer, when in fact they got bad advice
2 there. You should have said: And we will pay for
3 that lawyer for you; you pick him or her and we'll
4 pay for it. Right?

5 MR. NAPOLI: They're entitled to payment of
6 their - - - their own attorney, Your Honor.

7 CHIEF JUDGE LIPPMAN: But isn't it basic
8 that you tell them that? I think that's what the
9 judge is driving at.

10 MR. NAPOLI: Yes, and I believe that they
11 were apprised of that in both of the - - -

12 CHIEF JUDGE LIPPMAN: The letters said that
13 you're going to pay for it?

14 MR. NAPOLI: I - - - I don't know if they
15 said that we were going to pay for it.

16 CHIEF JUDGE LIPPMAN: No, no - - -

17 MR. NAPOLI: They advised them that - - -

18 CHIEF JUDGE LIPPMAN: - - - but isn't that
19 important? It says go out and get a lawyer, and
20 again, the assumption is, oh, I've got to go and get
21 a lawyer and pay for it, and - - - isn't that a
22 problem? Isn't that important?

23 MR. NAPOLI: Well, even if that was the
24 case, Your Honor, again, the relief that I requested
25 in my motion was just that the court take a look at

1 the - - - and analyze the two letters and determine
2 whether or not when a lay person read those letters
3 they thought that they were going to be covered for
4 those allegations.

5 JUDGE SMITH: So your - - -

6 MR. NAPOLI: Now - - -

7 JUDGE SMITH: - - - your position is that
8 this complied with 3420(d).

9 MR. NAPOLI: Exactly.

10 JUDGE SMITH: Whether - - - and you're
11 saying 3420(d) doesn't require you to say we'll pay
12 for your lawyer. It just requires you to disclaim
13 promptly.

14 MR. NAPOLI: Yes, and not only that, Your
15 Honor, that - - - that was the relief that I
16 requested in the motion.

17 JUDGE PIGOTT: But you have to disclaim
18 properly, too. In other words, you can't - - - you
19 can't say we're not - - - we're not defending you,
20 period.

21 MR. NAPOLI: Right, but that's not part of
22 3420, whether or not I've advised the insured that
23 they - - - that I would pay for counsel of their
24 choosing.

25 JUDGE GRAFFEO: There's no statutory

1 obligation to tell - - -

2 MR. NAPOLI: No.

3 JUDGE GRAFFEO: - - - an insured that - - -

4 MR. NAPOLI: No.

5 JUDGE GRAFFEO: - - - their carrier has to
6 pay for the attorney of their choice?

7 MR. NAPOLI: No. They - - -

8 JUDGE PIGOTT: Wait, if that's true - - - I
9 mean, if you know that you have to provide a lawyer
10 for them because there's this conflict - - - because
11 even though, I mean, the glass got thrown, I don't
12 know, somebody could have said I wasn't aiming at
13 her; I was aiming at the guy at the other table and I
14 happened to hit her; it was an accident. There - - -
15 there are ways that even these assaults can be - - -
16 can look like negligence, in which case you would - -
17 - you would cover it.

18 MR. NAPOLI: 3420(d) is very succinct, Your
19 Honor. It - - - it basically deals with timeliness
20 of the - - - your position - - -

21 JUDGE PIGOTT: Right.

22 MR. NAPOLI: - - - whether or not you've
23 actually communicated your position to the insured -
24 - -

25 JUDGE PIGOTT: Right.

1 MR. NAPOLI: - - - and that it basically be
2 in writing if it has to do with bodily injuries. And
3 I think in - - - in this particular situation, we've
4 done all of that.

5 Now, with respect to these red herrings,
6 particularly with respect to what is in the - - - the
7 policy, you know, I think what's telling is is that,
8 you know, I didn't put in, for instance, the
9 pollution damage exclusion; I didn't put in the
10 completed operations endorsement. Those are
11 irrelevant to those issues.

12 JUDGE ABDUS-SALAAM: The liquor liability
13 endorsement was the one that was really important
14 here, wasn't it?

15 MR. NAPOLI: No, Your Honor, I completely
16 disagree. If this wasn't a tavern or wasn't a bar,
17 the only two portions of the policy that you would
18 have would be the property damage and - - - and the
19 CGL policy. But since it was a tavern, you - - -
20 they added, for an additional premium, and you can
21 see on the dec page, they were charged, like, 2,000
22 dollars or something for the liquor liability
23 coverage. The liquor liability coverage doesn't have
24 anything to do with the assault and battery
25 allegations; the liquor liability endorsement or

1 portion of the policy, as you indicated - - -

2 CHIEF JUDGE LIPPMAN: That would be a
3 typical provision in this situation, right - - -

4 MR. NAPOLI: That most - - -

5 CHIEF JUDGE LIPPMAN: - - - for a tavern?

6 MR. NAPOLI: That most taverns would have,
7 exactly.

8 JUDGE GRAFFEO: But if you're making a
9 submission - - -

10 MR. NAPOLI: But they would apply only to
11 the dram shop - - -

12 JUDGE GRAFFEO: If you're making a
13 submission to the court, shouldn't it have all of the
14 provisions of the policy so that - - -

15 MR. NAPOLI: I disagree, Your Honor.

16 JUDGE GRAFFEO: - - - the court could see
17 that?

18 MR. NAPOLI: I tend to agree that, you
19 know, it was streamlined. If it was - - -

20 CHIEF JUDGE LIPPMAN: You don't think it's
21 a good idea to put in all the provisions of the
22 policy? That doesn't make sense to you?

23 MR. NAPOLI: Your Honor, I put - - -

24 CHIEF JUDGE LIPPMAN: I understand the
25 argument that you didn't have to or that - - - but it

1 would have been good to put it in, right?

2 MR. NAPOLI: Well, none of the other
3 justices in the First Department indicated that they
4 - - - their decision rested upon the me putting - - -

5 JUDGE SMITH: Well, as I understand what
6 you're - - -

7 MR. NAPOLI: - - - in portions of the
8 policy or not.

9 JUDGE SMITH: - - - what you're saying, and
10 I'm - - - it's slowly getting through my head, anyway
11 - - - you're saying that this liquor liability
12 coverage was really just as irrelevant to this case
13 as though it were nuclear explosion coverage.

14 MR. NAPOLI: Exactly, Your Honor.

15 JUDGE SMITH: And you said I don't - - - I
16 don't have to put in a - - - on the other hand, on
17 thinking about it, when you're representing an
18 establishment that serves liquor, maybe it would be a
19 little more - - - a little less confusing to have the
20 - - - to have that - - - to have that in front of us
21 so we can see it's irrelevant.

22 MR. NAPOLI: However, the assault and
23 battery exclusion would be part of the CGL policy, if
24 it was like a deli, for instance, and then we would
25 be having the same arguments; but for the liquor

1 liability coverage, it wouldn't even come into play.

2 JUDGE PIGOTT: The accident happened in - -
3 - in 2007, and she sued in - - - in that same year;
4 she sued in December. You made your motion in '11,
5 in 2011, and you said that - - - that you're "not
6 obligated to continue to defend or pay any judgment,
7 that none of the remaining negligence allegations can
8 survive, except the assault, and are deemed to" - - -
9 have been - - - "have arisen from the assault and are
10 thus subject to the assault and battery exclusion".
11 Now, if you were the one that put the lawyer on - - -
12 you know, in the case in 2007 when it was sued, and
13 there was no one there to defend against the assaults
14 because you didn't tell him you could pay for their
15 lawyer to - - - to assert that, how can you win a
16 summary judgment motion without saying we - - - by
17 the way, we didn't pay them for a lawyer?

18 MR. NAPOLI: Because the scope of my
19 summary judgment motion had nothing to do with that.
20 The only thing that I requested in my summary
21 judgment motion was to deem that the letters, one or
22 both of them, satisfied all of the conditions of
23 3420(d). And the Appellate Division didn't even
24 bring up these arguments. The only argument was
25 focused on the analysis of the two letters, whether

1 or not they meet all of the - - - all of the
2 requirements in that particular statute.

3 JUDGE PIGOTT: And then they cross-claimed
4 and said that the letters are confusing, right, and
5 did not suffice to disclaim and that the negligence
6 claims were not merged into the assault.

7 MR. NAPOLI: Yes, and then the Appellate
8 Division did say that there's no argument that the -
9 - - but for the assault and battery allegations,
10 there wouldn't be any negligence allegations.

11 JUDGE PIGOTT: It just seemed to me that
12 that wasn't true. Now, I'm not saying you were
13 saying something false; I mean, I can - - - I can see
14 so many ways that what looks like an assault and
15 battery turns out not to be one. But I guess the
16 argument then is that that wasn't raised in the - - -

17 MR. NAPOLI: Well, let's put it this way,
18 Your Honor. If the assault - - - if the negligence
19 claims weren't put in the summons and complaint in
20 the underlying action, those attorneys knew that
21 there wouldn't be coverage.

22 JUDGE PIGOTT: What attorneys?

23 MR. NAPOLI: The plaintiff's attorneys,
24 Vera Hendrix's attorneys. They - - - the only reason
25 why - - -

1 JUDGE PIGOTT: Well, you can't accuse them
2 of being nefarious in trying to get into the contract
3 - - -

4 MR. NAPOLI: No, Your Honor, but basically,
5 as the Appellate Division indicated, those negligence
6 claims wouldn't exist but for the assault and battery
7 claims. That's why they - - -

8 JUDGE PIGOTT: No, but for the - - -

9 MR. NAPOLI: - - - the Appellate Division
10 focused on that.

11 JUDGE PIGOTT: - - - I don't mean to fence
12 with you over facts, but it wouldn't exist but for
13 the incident that happened. And - - - and aren't I
14 right? I mean, if the - - - if the assailant said,
15 you know, I was trying to hit the Joe Namath picture
16 on the wall because I'm a Buffalo Bills fan, and it
17 slipped out of my hand like so many quarterbacks and
18 - - - for the Buffalo Bills, and it hit that lady,
19 and I'm really sorry and it's terrible; I mean,
20 that's negligence.

21 MR. NAPOLI: Well, Your Honor, I did
22 address all of this in the underlying motion. I put
23 in all of the medical records. I put in all of the
24 deposition testimony, because I thought that was
25 going to be an argument that I would have to clear in

1 order to get - - -

2 JUDGE ABDUS-SALAAM: Counsel, you started
3 to say something about the dram shop, and I'd asked
4 your adversary a question about that. Can you - - -

5 MR. NAPOLI: Yes, Your Honor.

6 JUDGE ABDUS-SALAAM: Can you tell me
7 something - - -

8 MR. NAPOLI: I agreed with your line of
9 questioning to my adversary with respect to the dram
10 - - - the dram shop allegations, because the liquor
11 liability coverage, that he's alleging makes my
12 motion fail because it wasn't part of the motion
13 papers, only has to do with the dram shop
14 allegations.

15 JUDGE SMITH: Your view of this case is
16 it's very simple: Read the disclaimers and see
17 whether you think they're clear or not?

18 MR. NAPOLI: See if they meet the 3420.

19 JUDGE PIGOTT: If they're ambiguous, we
20 lean toward the insured?

21 MR. NAPOLI: Of course, if they're - - -
22 but my position is that they're not.

23 CHIEF JUDGE LIPPMAN: Okay, counselor - - -

24 MR. NAPOLI: I think anybody who reads it -
25 - - -

1 CHIEF JUDGE LIPPMAN: Thanks, counsel.

2 MR. NAPOLI: - - - can't walk away from it
3 with any other impression.

4 CHIEF JUDGE LIPPMAN: Thank you, counsel.
5 Counselor?

6 MR. DENBY: The Appellate Division did
7 address the liquor liability coverage. Judge
8 Andrias, in his dissent, said that the letters did
9 not detail the scope of that coverage, which is a
10 separate coverage part and not a mere portion of the
11 commercial liability coverage part, and did not state
12 whether the assault and battery conclusion (sic)
13 applied to the liquor liability coverage.

14 JUDGE ABDUS-SALAAM: Well, is it your
15 position - - -

16 MR. DENBY: That's part of the - - -

17 JUDGE ABDUS-SALAAM: Is it your position
18 that the assault and battery coverage is in the
19 liquor liability coverage?

20 MR. DENBY: It's my position that the
21 assault and battery exclusion does not apply to the
22 liquor liability coverage, and that's because - - -

23 JUDGE ABDUS-SALAAM: So you would be
24 covered for assault and battery?

25 MR. DENBY: Yes.

1 JUDGE SMITH: So you say that the assault -
2 - - that the liquor liability coverage not only
3 removed the - - - the dram shop act exclusion but
4 added a essentially new coverage that wasn't in the -
5 - -

6 MR. DENBY: Well, liquor liability coverage
7 does add new coverage.

8 JUDGE PIGOTT: Where - - -

9 MR. DENBY: He's paying a separate premium.

10 JUDGE PIGOTT: Have we got it now? Have we
11 got that rider? Or you say it's more than a rider.
12 Have we got that document?

13 MR. DENBY: No, it's not in the record.
14 The - - -

15 JUDGE PIGOTT: Well, then, how can you say
16 that? I mean, I'm still trying to figure out what
17 liquor liability coverage - - -

18 MR. DENBY: Well, I'm defending against
19 summary judgment, and - - - and you - - - the court
20 isn't - - - is required to view the facts in the
21 light most favorable - - -

22 JUDGE SMITH: But aren't you really in the
23 position of saying to us, look, if this thing had
24 only been in the record, the court below could have
25 seen that my adversary wasn't entitled to summary

1 judgment. If that's the case, shouldn't you have put
2 it there?

3 MR. DENBY: What I - - -

4 JUDGE SMITH: Because how do we - - - he
5 says it's totally irrelevant. He says it's just as
6 irrelevant as a nuclear accident exclusion. How are
7 we supposed to know?

8 MR. DENBY: That's an attorney at oral
9 argument. I agree with you.

10 JUDGE SMITH: I understand - - -

11 MR. DENBY: How are you supposed to know?

12 JUDGE SMITH: - - - but yeah - - - but - -
13 -

14 MR. DENBY: I'm opposing summary judgment.

15 JUDGE SMITH: Yeah, but - - - yeah, but he
16 left out something that he says is irrelevant, and we
17 - - - we're saying - - - we suggest maybe he ought to
18 put it in anyway because it's clearer, but he says
19 it's irrelevant. You say it's relevant; why didn't
20 you put it in?

21 MR. DENBY: I'm saying now it's - - - now
22 it's a question of fact because you don't know; you
23 can't say whether there's coverage or not. It's my
24 position that there is coverage and this motion
25 should never have been granted.

1 JUDGE ABDUS-SALAAM: Did you make these
2 arguments to the Supreme Court or to the - - -

3 MR. DENBY: We made them - - -

4 JUDGE ABDUS-SALAAM: - - - Appellate
5 Division?

6 MR. DENBY: Again, we made them in the
7 Appellate Division. Judge Andrias adopts those - - -
8 those issues in his dissent at page 9 of the record.
9 In this case, the insurer hired attorneys to
10 represent conflicting interests. They made a motion
11 for partial summary judgment - - - partial.

12 JUDGE PIGOTT: That jumped out at me, but
13 you didn't oppose it on those grounds.

14 MR. DENBY: I didn't oppose the motion for
15 summary judgment on the grounds?

16 JUDGE PIGOTT: When they moved for summary
17 judgment, you - - - in your cross-motion you had two
18 - - - two things. You say the letters are confusing
19 and that the negligence claims are not merged into
20 the assault.

21 MR. DENBY: Well, it's a little bit more
22 than that. We also talk about estoppel. We talk
23 about the conflict of interest which - - -

24 JUDGE GRAFFEO: You know, preservation has
25 to be raised in the trial court.

1 MR. DENBY: In the - - - correct. Correct.
2 And in this case, my position is that they haven't -
3 - -

4 JUDGE GRAFFEO: I mean, it's kind of like
5 neither side here wants us to know what the liquor
6 liability provision is.

7 MR. DENBY: In which case you have to deny
8 summary judgment; you have to remand it back. That's
9 what I'm saying.

10 CHIEF JUDGE LIPPMAN: Okay, counsel.

11 MR. DENBY: Thank you very much.

12 CHIEF JUDGE LIPPMAN: We'll consider your
13 arguments. Thank you both.

14 (Court is adjourned)

15
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of QBE Insurance Corporation v. Jinx-Proof Inc., No. 25 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

AAERT Certified Electronic Transcriber (CET**D-492)

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: January 23, 2014