

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHEROKEE COUNTY  
R. Keith Kelly, Circuit Court Judge

Case No. 2018-001559

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Nicky Ted Phillips and Gloria E. Phillips,

Appellants.

v.

American National Property and Casualty Company, Clyde McNeill Agency, and Clyde Edwin McNeill, individually and in his capacity as agent of American National Property and Casualty Company,

Respondents.

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INITIAL BRIEF OF RESPONDENT  
AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY

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**RECEIVED**

MAR 25 2019  
SC Court of Appeals

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AND CASUALTY COMPANY

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2. ANY DISPUTE ABOUT WHEN THE UIM SELECTION WERE WRITTEN IN THE SELECT/REJECT FORM IS NOT A GENIUNE ISSUE OF MATERIAL BECAUSE PLAINTIFF SPECIFICALLY SIGNED AN ACKNOWLEDGMENT STATEMENT AND DID NOT READ THE FORM.

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT CORRECTLY DETERMINE THAT THE AUTO POLICY UIM SELECT/REJECT FORM, AS EXECUTED, COMPLIED WITH S.C. CODE ANN. 38-77-350 IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS ON APPELLANTS' CAUSES OF ACTION?
2. DID THE TRIAL COURT CORRECTLY DETERMINE THAT IT WAS NOT A GENUINE ISSUE OF MATERIAL FACT WHETHER THE AMOUNT OF SELECTED UIM COVERAGE WAS WRITTEN BEFORE OR AFTER APPELLANT'S SIGNATURE ON THE AUTO POLICY UIM SELECT/REJECT FORM?

## STATEMENT OF THE CASE

Appellants brought the present action against Respondents American National Property and Casualty Company (“Respondent ANPAC”), Clyde McNeill Agency, and Clyde Edwin McNeill, Individually and in his capacity as agent of American National Property and Casualty Company (“Respondent McNeill”) (Collectively “Respondents”) alleging a dispute regarding the amount of underinsured motorist (UIM) coverage on a personal automobile insurance policy. On December 7, 2016, Plaintiffs filed this present action alleging that Appellant Nicky Phillips had requested Respondent Clyde McNeill, his insurance agent, raise all his insurance coverage levels (including UIM), but that after an automobile accident, Appellant discovered the UIM coverage on the automobile insurance policy remained at \$25,000 per person / \$50,000 per accident. (Compl. p.18.)

Appellants asserted causes of action in negligence, breach of fiduciary duty, negligent misrepresentation, fraud, violation of the South Carolina Unfair Trade Practices Act, and a declaratory judgment that ANPAC failed to make a meaningful offer of UIM. (Compl. p.7-12.) Appellants seek reformation of the personal automobile insurance policy to provide UIM coverage equal to the amount of liability coverage afforded under the policy (\$250,000 per person/\$500,000 per accident). (Id.)

On February 21, 2018, Respondent ANPAC filed a motion for summary judgment on the issue that the Offer of Optional Additional Uninsured Motorist Coverage and Optional Underinsured Motorist Coverage form (“UIM select/reject form”), as executed by Appellant Nicky Ted Phillips on October 28, 2013, complied with S.C. Code Ann. 38-77-350(A) and entitled Respondent ANPAC to a statutory presumption of a meaningful offer and statutory immunity. (Mot. Summ. J. at 1-2.) A hearing on Respondent’s motion for summary judgment was held on

May 9, 2018 before Judge R. Keith Kelly. By Order of June 11, 2018, the circuit court granted partial summary judgment to Respondents, leaving only Appellants' claim for reformation of a commercial auto policy as the sole remaining issue. (Order granting Mot. Summ. J. at 8.) On June 22, 2018, Appellants filed a motion to alter or amend the circuit court's judgment pursuant to Rule 59(e), and on July 17, 2018, the circuit court denied Appellants' motion to reconsider. (Order denying Mot. to Reconsider at 1.) Appellants filed a notice of appeal on August 15, 2018. (Not. of App.)

## FACTS

### ANPAC Personal Automobile Policy

Appellants' personal automobile insurance policy, ANPAC Policy 39-A-448-05L-0, was in place since 2010 with liability policy limits of \$50,000.00 per person/\$100,000 per accident and underinsured motorist (UIM) coverage limits of \$25,000.00 per person/\$50,000 per accident (hereinafter the "Auto Policy"). (Nicky Phillips Dep. at 21:10-22:8, Dep. Ex. 1.) On March 20, 2011, Appellants made a change to the policy to delete one vehicle and add a 2005 Toyota Tacoma, the vehicle that was involved in an August 9, 2014 automobile accident. (Id. at 23:4-24:2, Dep. Ex. 3.) The Auto Policy continued unchanged until October 14, 2013 when the liability limits were raised to \$250,000 per person / \$500,000 per accident.<sup>1</sup> (Id. at 29:7-30:19, Dep. Ex. 9; Clyde McNeill Dep. at 52:15-54:5, Dep. Ex. 3, 4.) However, the Auto Policy's UIM coverage limits remained at \$25,000 per person / \$50,000 per accident. (Id.)

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<sup>1</sup> Around this same date (October 15, 2013), Appellant Nicky Ted Phillips also purchased a commercial auto policy to insure a 1984 International Harvester dump truck. (Clyde McNeill Dep. at 40:24-42:6.) This commercial auto policy was not at issue in ANPAC's motion for summary judgment.

October 28, 2013 UIM Select/Reject Form

On October 28, 2013, Appellant Nicky Phillips went to the office of Clyde McNeill Agency to discuss these changes to his policy.<sup>2</sup> (Nicky Phillips Dep. at 31:8-24; Clyde McNeill Dep. at 40:24-42:18.) At this meeting, Nicky Phillips signed ANPAC's UIM select/reject form in three (3) places, selecting UIM coverage levels in the amount of \$25,000 per person and \$50,000 per accident on the Auto Policy. (Nicky Phillips Dep. at 42:9-43:7, Dep. Ex. 12; Clyde McNeill Dep. at 44:20-46:18; 83:1-91:6, Dep. Ex. 7.) Phillips acknowledged that he signed the UIM select/reject form. (Id.)

The UIM select/reject form contains four (4) sections. Section I provides a description of both uninsured motorist (UM) and underinsured motorist (UIM) coverages. (Nicky Phillips Dep. Ex. 12, Clyde McNeill Dep. Ex. 7.) Section I also provides the address and contact information for the South Carolina Department of Insurance. (Id.) Section III of the UIM select/reject form contains the various levels of available UIM bodily injury coverage and the amount of premium for each level. (Id.) Section III contains a question "Do you wish to purchase Underinsured Motorist Bodily Injury Coverage?" and the box beside the word "Yes" is marked in a handwritten "x." (Id.) The numbers "25/50" are also handwritten on the line indicating the amount of UIM selected. (Id.) Phillips testified that he does not remember those handwritten numbers being on the form when he signed it. (Nicky Phillips Dep. at 43:3-44:1; 56:20-57:24.) Last, Section IV contains the "Applicant's Acknowledgement," and Appellant Phillips signed and acknowledged that, among many other things, he "understand[s] the coverages as they have been explained ..., and the types and amounts of coverage marked on the preceding pages have been selected by me. This

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<sup>2</sup> This same date (October 28, 2013), Nicky Ted Phillips signed an application for a farm umbrella insurance policy (Policy No. 3901B0413) that is not at issue in this case. (Clyde McNeill Dep. at 46:13-18.) The umbrella policy went into effect on that date.

is the type and amount of insurance coverage I wish to purchase.” (Nicky Phillips Dep. Ex. 12, Clyde McNeill Dep. Ex. 7.)

Appellant Nicky Ted Phillips was involved in an automobile accident on August 9, 2014, while driving the 2005 Toyota Tacoma truck, and Appellant Gloria Phillips (spouse) was riding as passenger. The Auto Policy in place at the time of the accident was for the policy period March 30, 2014 to September 30, 2014 and contained liability coverage of \$250,000 per person / \$500,000 per accident and UIM coverage of \$25,000 per person and \$50,000 per accident. (Nicky Phillips Dep. at 46:4-19, Dep. Ex. 13.) Importantly, Appellants would have received a copy of the declarations page around March or April of 2014, but they did not read their policy to verify the UIM coverage amount. (Nicky Phillips Dep. at 46:20-47:4.)

#### ARGUMENTS

1. THE UNDERINSURED MOTORIST (UIM) COVERAGE SELECT/REJECT FORM EXECUTED BY APPELLANT NICKY TED PHILLIPS AND DATED OCTOBER 28, 2013, COMPLIED WITH S.C. CODE ANN. 38-77-350 AND CREATED A CONCLUSIVE PRESUMPTION OF A MEANINGFUL OFFER OF UNDERINSURED MOTORIST (UIM) COVERAGE AND ENTITLED RESPONDENT ANPAC TO IMMUNITY FROM LIABILITY.

##### A. Standard of Review

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” Williams v. Lancaster County School Dist., 369 S.C. 293, 301, 631 S.E.2d 286, 291 (Ct. App. 2006) (quoting George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)). “A motion for summary judgment shall be granted ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Id. (citing Rule 56(c) SCRCPP). “When reviewing the grant of a summary judgment motion, [the appellate court] applies the same standard which governs the trial court under Rule 56(c), SCRCPP.” Id. at 301-02, 631 S.E.2d at 291. (citing Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)).

“Evidence...is not sufficient to overcome summary judgment if it is introduced ‘solely in a vain attempt to create an issue of fact that is not genuine.’” Cox & Floyd Grading, Inc. v. Kajima Construction Servs., Inc., 356 S.C. 512, 516, 589 S.E.2d 789, 791 (Ct. App. 2003) (quoting Main v. Corley, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984)). “For purposes of summary judgment, an issue is ‘material’ if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action.” Nelson v. Piggly Wiggly Central, Inc., 390 S.C. 382, 388, 701 S.E.2d 776, 779 (Ct. App. 2010)(quoting PPG Indus., Inc. v. Orangeburg Paint & Decorating, Ctr., Inc., 297 S.C. 176, 179, 375 S.E.2d 331, 332, (Ct. App. 1988)). “[S]ummary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” Id. (quoting David v. McLeod Reg’l Med. Ctr., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006)).

**B. Respondent ANPAC Complied with Statute and Made a Meaningful Offer of UIM to Appellants**

Automobile insurance carriers are required to offer “at the option of the insured, underinsured motorist coverage up to the limits of the insured liability coverage to provide coverage in the event that damages are sustained in excess of the liability limits carried by an at-fault insured or underinsured motorist.” S.C. Code Ann. 38-77-160. Further, the insurer bears the burden of establishing it made a meaningful offer to an insured. See Butler v. Unisun Ins. Co., 323 S.C. 402, 405, 475 S.E.2d 758, 759 (1996). Only if the insurer fails to comply with its duty to

provide a meaningful offer, the policy will be reformed to include UIM coverage up to the limits of liability insurance carried by the insured. *Id.* at 405, 475 S.E.2d at 760.

The insurer enjoys a presumption that a meaningful offer has been made when a form offering UIM coverage complies with the requirements set forth in S.C. Code Ann. 38-77-350(A) and is signed by the named insured. See Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 262, 626 S.E.2d 6, 11 (2005). The circuit court correctly held there was no genuine issue of material fact that the UIM select/reject form executed by Appellant Nicky Ted Phillips on October 28, 2013, complies with S.C. Code Ann 38-77-350(A).

According to S.C. Code Ann. 38-77-350(A), the offer form must provide:

- (1) a brief and concise explanation of the coverage;
- (2) a list of available limits and the range of premiums for the limits;
- (3) a space to mark whether the insured chooses to accept or reject the coverage and a space to state the limits of coverage the insured desires;
- (4) a space for the insured to sign the form that acknowledges that the insured has been offered the optional coverages;
- (5) the mailing address and telephone number of the insurance department that the applicant may contact if the applicant has questions that the insurance agent is unable to answer.

S.C. Code Ann. 38-77-350(A).

The circuit court correctly held that the UIM select/reject form complied with the requirements of S.C. Code Ann. 38-77-350(A). First, this form meets the five (5) statutory requirements of S.C. Code Ann. 38-77-350(A), and the circuit court acknowledged Appellants did not contest that the form was compliant. (Order granting Summ. J. at 7.) At the May 9, 2018 hearing, counsel for Appellants acknowledged “I am of an agreement that 38-77-50(A), I think this form as it’s outlined here is perfectly fine.” (Hearing Transcript, 29:16-17.)

#### Respondent ANPAC is Entitled to Immunity from Liability

There is no genuine issue of material fact that Respondent ANPAC is entitled to the

conclusive presumption that ANPAC made a meaningful offer and that Appellant Nicky Phillips made an informed and knowing selection and that Respondent ANPAC is not liable to the insured on account of the selection. S.C. Code Ann. 38-77-350(B) states:

If this form is signed by the named insured, after it has been completed by an insurance producer or a representative of the insurer, it is conclusively presumed that there was an informed, knowing selection of coverage and neither the insurance company nor an insurance agent is liable to the named insured or another insured under the policy for the insured's failure to purchase optional coverage or higher limits.

S.C. Code Ann. 38-77-350(B).

Further, S.C. Code Ann. 38-77-350(D) states:

Compliance with this section satisfies the insurer and agent's duty to explain and offer optional coverages and higher limits and no person, including, but not limited to an insurer and insurance agent is liable in an action for damages on account of the selection or rejection made by the named insured.

S.C. Code Ann. 38-77-350(D).

Even if the form did not comply with the statute, "failure to comply with section 38-77-350(A) does not automatically require judicial reformation of a policy." Wiegand v. U.S. Auto. Ass'n, 391 S.C. 159, 164, 705 S.E.2d 432, 435 (2011). "Even where the insurer is not entitled to the statutory presumption that a meaningful offer of UIM coverage was made, the insurer can still demonstrate that a meaningful offer of UIM coverage was made to the insured under [the four-part test] outlined in Wannamaker." Ray v. Austin, 388 S.C. 605, 612, 698 S.E.2d 208, 212 (2010). Even if there is an issue whether ANPAC gets the statutory presumption, there is still no genuine issue of material fact that ANPAC made a meaningful offer of UIM coverage, using the Wannamaker test. The circuit court acknowledged that Wannamaker could still apply, but it did not reach the question because it held that Respondents met the statutory presumption of a meaningful offer. (Order Granting Summ. J. at 7-8, n.4.)

In State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 521, 354 S.E.2d 555, 556

(1987), the South Carolina Supreme Court adopted a standard to “determine whether an insurer has complied with its duty to offer [UIM coverage].” The Wannamaker test requires the following:

- (1) The insurer’s notification process must be commercially reasonable, whether oral or in writing;
- (2) The insurer must specify the limits of optional coverage and not merely offer additional coverage in general terms;
- (3) The insurer must intelligibly advise the insured of the nature of the optional coverage; and
- (4) The insured must be told that optional coverages are available for an additional premium.

State Farm Mut. Auto. Ins. Co. v. Wannamaker, 291 S.C. 518, 521, 354 S.E.2d 555, 556 (1987).

It is uncontradicted that Clyde McNeill met in person with Nicky Phillips and explained the various coverages and the UIM select/reject form, section by section, as Nicky Phillips signed the form. (Clyde McNeill Dep. at 84:22-91:6.) This is commercially reasonable. Second, the form contained pre-populated figures specifying the limits of optional UIM coverage amounts and the additional premium for each amount. (Nicky Phillips Dep. at 56:20-57:7; Clyde McNeill Dep. at 83:1-91:6.) Phillips has no evidence that those figures were missing, and McNeill testified that those figures were pre-populated on the form when it was printed. (Id.) Last, it is uncontroverted that McNeill presented Nicky Phillips with the UIM select/reject form which advised of the nature of optional UIM coverage and that it was available for an additional premium. (Nicky Phillips Dep. Ex. 12; Clyde McNeill Dep. Ex. 7.)

2. ANY DISPUTE ABOUT WHEN THE UIM SELECTION WRITTEN IN THE SELECT/REJECT FORM IS NOT A GENUINE ISSUE OF MATERIAL FACT BECAUSE PLAINTIFF SPECIFICALLY SIGNED AN ACKNOWLEDGMENT STATEMENT AND DID NOT READ THE FORM.

In opposing summary judgment, Appellants’ “sole contention is that a question of fact exists as to whether the manner in which the Auto Offer Form was executed complied with

Subsection 38-77-350(B) because the parties dispute whether the handwritten amount of UIM coverage on the form was written before or after Mr. Phillips signed the form.” (Order Granting Summ. J. at 7.) S.C. Code Ann. 38-77-350(B) requires the form to be completed before it is signed by the named insured, and Appellants argue there is disputed testimony between Respondent Clyde McNeill and Appellant as to whether the handwritten information was present on the form before or after Appellant signed. (Appellant’s Brief in Opp’n to Mot. Summ. J., 4.) Respondent McNeill testified that he checked the box and filled out the numbers “25/50” as he explained the coverages and discussed the selections with Phillips before Appellant Phillips signed page 4. (Clyde McNeill Dep. at 87:1-89:12; 90:21-91:6.) Appellant testified that he does not remember the handwritten numbers being on the form when he signed it. (Nicky Phillips Dep. at 43:3-44:1; 56:20-57:24.) However, this is not a genuine issue of material fact, and this is merely Appellants’ attempt to create an issue of fact.

The trial court correctly held that Appellants’ “attempt to create an issue of fact” cannot overcome summary judgment. The trial court noted that Nicky Phillips signed the UIM select/reject form in three (3) separate places and one of the signatures is under the “applicant’s acknowledgment” that stated,

By my signature, I acknowledge that I have read – or I have had read to me – the above explanations and offers of ... optional underinsured motorist coverage. I understand that the above explanations of these coverages are intended only to be brief descriptions of ... optional underinsured motorist coverage, and that payment of benefits ... is subject both to the terms and conditions of my automobile insurance policy and to the laws of the State of South Carolina.

**My signature below further acknowledges that I understand the coverages as they have been explained to me, and the type and amounts of coverage marked on the preceding pages have been selected by me. This is the type and amount of insurance coverage I wish to purchase.**

(Nicky Phillips Dep. Ex. 12; Clyde McNeill Dep. Ex. 7.)

The trial court correctly held that Appellant's signature on this acknowledgment established that Appellant made a knowing and voluntary selection of UIM coverage. (Order Granting Summ. J. at 7.) Second, the trial court correctly found that Appellants cannot create a genuine issue of material fact that the amount of UIM was not written in the form before he signed it when Appellant testified that he did not even read the form prior to signing it. (Order Granting Summ. J. at 8; Nicky Phillips Dep. at 43:2-44:22.) The trial court equated this issue with the alleged deficiency in the Weigand case where an insured attempted to create an issue of fact by disputing which party checked the "no" box on a UIM select/reject form.

In Wiegand v. U.S. Auto. Ass'n, 391 S.C. 159, 164, 705 S.E.2d 432, 435 (2011), an insured was killed in a motor vehicle accident and the insured's wife argued that the insurer did not make a meaningful offer and that the court should reform the automobile insurance policy to add UIM coverage. She argued there was a dispute about who actually filled out the select/reject form and who checked the box "no" next to the question "do you wish to purchase underinsured motorist coverage." The Court held there was no issue of material fact and the insurer could still take advantage of the presumption of Section 38-77-350(B) that a meaningful offer was made to the insured because "[the insured] signed the acknowledgment which included the sentence 'I have indicated whether or not I wish to purchase each coverage in the space provided.'" Id. at 166, 705 S.E.2d 432, 435.

Appellant signed a similar acknowledgment, and Appellant also admitted that he did not read the form. (Nicky Phillips Dep. at 44:2-22.) Clyde McNeill testified clearly that the selection was present before Appellant signed. (Clyde McNeill Dep. at 87:1-89:12; 90:21-91:6.) Appellants cannot now create a genuine issue of material fact by claiming a form he did not read was deficient when he also specifically acknowledged in writing that he understood the coverages and made a

knowing selection. There is no genuine issue of material fact that Respondent met its burden that the conclusive presumption and liability protection of Section 38-77-350(B) and (D) apply. There was a meaningful offer of UIM coverage, and Respondents cannot be liable to Appellants as a matter of law.

#### CONCLUSION

For the reasons stated, this Court should affirm the judgment of the circuit court.

Respectfully submitted,  
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By: \_\_\_\_\_

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Greenville, South Carolina  
March 22, 2018

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHEROKEE COUNTY  
R. Keith Kelly, Circuit Court Judge

Case No. 2018-001559

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Nicky Ted Phillips and Gloria E. Phillips,

Appellants.

v.

American National Property and Casualty Company, Clyde McNeill Agency, and Clyde Edwin McNeill, individually and in his capacity as agent of American National Property and Casualty Company,

Respondents.

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PROOF OF SERVICE

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I, the undersigned employee of Roe Cassidy Coates & Price, hereby certify that the foregoing document was served on all counsel of record via U.S. Mail by serving a true and correct copy to the addresses listed below:

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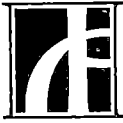
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**SC Court of Appeals**

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**Re: Nicky Ted Phillips and Gloria E. Phillips v. American National Property and Casualty Company, Clyde McNeill Agency, and Clyde Edwin McNeill, individually and in his capacity as agent of American National Property and Casualty Company  
Case No. 2018-001559  
Claim No. 39A2U5160  
RCCP File No. 2830.0005**

Dear Ms. Kitchings:

Enclosed are an original and one copy of the following documents regarding the above-referenced matter:

1. Initial Brief of Respondent American National Property and Casualty Company; and
2. Designation of Matter to be Included in the Record on Appeal.

Please file these documents and return clocked copies to my attention in the self-addressed, stamped envelope provided.

Sincerely,

Ross B. Plyler

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MAR 25 2019

SC Court of Appeals

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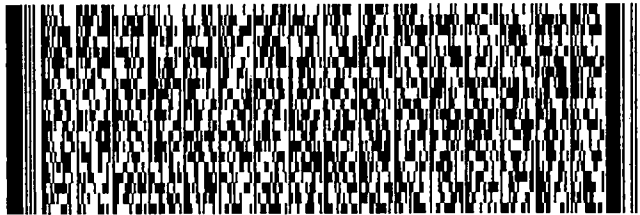
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