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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000455-MR

SOLHEIM ROOFING, LLC;
ROGER M. SOLHEIM, II; AND
DONNA P. SOLHEIM — APPELLANTS

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 05-CI-01395

GRANGE MUTUAL CASUALTY
COMPANY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON AND STUMBO, JUDGES; KNOPF,[1] SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Solheim Roofing, LLC, Roger M. Solheim, II, and Donna P. Solheim appeal from the Franklin Circuit Court's entry of summary

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

judgment in favor of Grange Mutual Casualty Company in an action for underinsured (UIM) motorists benefits. The circuit court provided two general grounds for its decision: (1) Appellants – specifically Donna – had released any potential UIM claim against Grange Mutual when she settled with the tortfeasor; and (2) the UIM policy in question – a commercial automobile policy – did not provide coverage to Donna under the facts of this case because she was not in a covered auto or engaged in the conduct of business at the time of the subject motor vehicle accident. Although we disagree with the circuit court's conclusion that Donna had released Grange Mutual, we agree with the court that she was not entitled to UIM coverage because of the express terms of the policy. Thus, we affirm.

FACTS AND PROCEDURAL HISTORY

On March 2, 2005, Donna was involved in an automobile accident with Daniel W. Downey while en route to her job at the Kentucky Finance and Administration Cabinet. As a result of the accident, Donna suffered serious injuries, including a fracture and dislocation of her right ankle, a fractured ulna in her left arm, a laceration to her forehead, head trauma, and neck and back injuries. Downey was ultimately considered to be at fault in the incident.

Following the accident, Donna placed three insurers on notice that she would be filing claims to recover for her injuries: (1) Shelter Insurance Company, which provided liability coverage to Downey up to a limit of $50,000 per person; (2) Indiana Insurance Company, which provided UIM coverage to Donna up to a

limit of $100,000 per person by virtue of a personal policy of automobile insurance issued to her, individually, as the named insured; and (3) Grange Mutual, which provided $100,000 in UIM coverage to appellant Solheim Roofing by virtue of a commercial automobile policy. Both Donna and her husband Roger were owners and members of this limited liability company.

Grange Mutual acknowledged Donna's UIM claim but subsequently sent her a "Reservation of Rights" letter on the issue of UIM coverage. In that letter, Grange Mutual advised Donna that it did not appear that UIM coverage was available in this case because the vehicle Donna was driving at the time of the accident – a 2001 Chrysler Sebring – was not a vehicle specifically listed for coverage under the policy. Although the basis for this position was not explicitly spelled out in the letter, the parties agree that Grange Mutual was relying upon the insurance policy's "Endorsement CA 36," which provided, in relevant part, as follows:

> III. **Underinsured Motorists Coverage Endorsement**
>
> A. Paragraph B. WHO IS AN INSURED is replaced by the following:
>
> B. **WHO IS AN INSURED**
>
> 1. The Named Insured, subject to the following:
>
> ***
>
> d. If the Named Insured is a limited liability company, only members of the limited liability company while "occupying" a covered "auto" owned, hired or borrowed by the Named Insured and while acting within

> the scope of their duties in the conduct of the Named Insured's business[.]

The "Named Insured" is identified on the policy's "Declaration of Coverages" page as "Solheim Roofing, LLC," and the given "Business Description" is "Roofing Contractor." The policy explicitly covers three commercial vehicles – a 2000 Chevrolet K1500, a 1983 Chevrolet C30, and a 1981 Dodge D-150 – but not Donna's Chrysler Sebring. The record reflects – without dispute – that Donna was not occupying a "covered auto" or acting in her capacity as an owner-member of Solheim Roofing at the time of her accident.

On June 30, 2005, Donna received a policy-limit offer of $50,000 from Shelter Insurance (on behalf of Downey) to resolve the underlying liability claim. Her attorney subsequently sent a *Coots*[2] letter to Indiana Insurance and Grange Mutual in order to preserve her right to seek UIM benefits. On July 8, 2005, Indiana Insurance sent a letter in response in which it waived its subrogation rights and authorized Donna's settlement with Shelter Insurance. On August 3, 2005, Grange Mutual sent a similar letter to Donna's attorney but reiterated that it was not conceding the existence of UIM coverage under its policy or that the value of Donna's claim exceeded Shelter's policy limits.

[2] *Coots v. Allstate Ins. Co.*, 853 S.W.2d 895 (Ky. 1993). Under *Coots*, an injured party with a claim for UIM benefits may settle her underlying claim with the alleged tortfeasor for his policy limits without waiving her right to seek UIM benefits by giving notice to her UIM insurer "of the parties' intent to settle and affording the UIM insurer the opportunity to preserve its subrogation rights against the tortfeasor by paying the injured party the policy limit amount." *True v. Raines*, 99 S.W.3d 439, 445 (Ky. 2003); *see also* KRS 304.39-320(3) (codifying the *Coots* procedure).

Shelter Insurance subsequently paid Donna the maximum $50,000 provided for by Downey's liability coverage. In exchange, Donna signed a "Release of All Claims and Indemnity Agreement" that had been prepared by the company. That release was broad in nature and provided, in relevant part, as follows:

> FOR AND IN CONSIDERATION OF the payment of the total sum of FIFTY THOUSAND DOLLARS AND NO CENTS ($50,000.00), the receipt of which is hereby acknowledged, the undersigneds, DONNA SOLHEIM and ROGER SOLHEIM, do and on behalf of themselves and their successors, administrators and assigns, release and forever discharge DANIEL DOWNEY, REGINA DOWNEY and SHELTER INSURANCE COMPANIES, and any and all other insurers, from any and all past, present and future actions, causes of action, claims, demands, damages, costs, loss of services, expenses, compensation, third party actions, suits at law or in equity, including claims or suits for contribution and/or indemnity, of whatever nature, and all consequential damage on account of, or in any way growing out of any and all known and unknown personal injuries, death and/or property damage resulting or to result from a motor vehicle accident which occurred on Millville Road in Frankfort, Franklin County, Kentucky, on or about May 2, 2005.
>
> ***
>
> It is understood by DONNA SOLHEIM and ROGER SOLHEIM that the parties hereby released admit no liability of any sort by reason of said event and that said payment and settlement in compromise is made to terminate further controversy respecting all claims for damages of DONNA SOLHEIM and ROGER SOLHEIM heretofore asserted or that DONNA SOLHEIM and ROGER SOLHEIM or the personal representatives of DONNA SOLHEIM and ROGER SOLHEIM may assert in the future.

> THIS IS A FULL AND FINAL RELEASE.
> Others not mentioned in the Release are also released.
> DONNA SOLHEIM and ROGER SOLHEIM have been
> fully compensated for all damages and this Release
> constitutes payment in satisfaction of all claims.

Following execution of this release, Indiana Insurance paid Donna $100,000 to satisfy her UIM claim under her personal automobile policy.

Grange Mutual, on the other hand, continued to question coverage and ultimately filed a complaint in Franklin Circuit Court on October 4, 2005, in which it sought a declaratory judgment that Donna was not entitled to UIM coverage under the subject policy. Grange Mutual argued that Donna was not covered under the policy because she was operating her own personal vehicle – and not one listed in the policy – at the time of the accident. Appellants responded with an answer and counterclaim seeking UIM coverage for Donna under the policy.

The parties eventually filed competing motions for declaratory and summary judgment on the issue of UIM coverage. In its motion, Grange Mutual reiterated the allegations raised in its complaint along with new contentions that Donna was not entitled to coverage because: (1) she was not engaged in company business at the time of the accident; (2) pursuant to *Abney v. Nationwide Mut. Ins. Co.*, 215 S.W.3d 699 (Ky. 2006), she had waived the possibility of UIM coverage in executing her release with the tortfeasor's liability insurance carrier because the release clearly and unambiguously released *all* insurers from all other claims; (3) she had no subjective "reasonable expectation" of UIM coverage under the policy; and (4) she was an "insured of the second class."

On February 11, 2009, the circuit court entered an Opinion and Order granting summary judgment to Grange Mutual and finding that Donna was not entitled to UIM coverage. The court concluded that Donna had released Grange from any UIM claim when she signed the release from Shelter Insurance that disposed of the underlying liability claim. The court further found that UIM coverage was not available to Donna under the terms of the policy. The specifics of the court's Opinion and Order will be elaborated upon below, as necessary. This appeal followed.

STANDARD OF REVIEW

The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996); Kentucky Rules of Civil Procedure (CR) 56.03. "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision and will review the issue *de novo*." *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). The relevant facts of this case are not in dispute; therefore, we must decide whether the circuit court correctly found that Grange Mutual was entitled to judgment as a matter of law. In doing so, we note that the two general issues before us both appear to be matters of first impression under Kentucky law.

ISSUES

1. Did the "Release of All Claims and Indemnity Agreement" Executed by Donna to Settle Her Liability Claim Also Release Grange Mutual From Any Obligation to Pay UIM Benefits?

Appellants first argue that the circuit court erroneously concluded that Donna released Grange Mutual from any obligation to satisfy her UIM claim by executing the "Release of All Claims and Indemnity Agreement" prepared by Shelter Insurance Company. As noted above, the release resolved Donna's liability claim and purported to "release and forever discharge DANIEL DOWNEY, REGINA DOWNEY and SHELTER INSURANCE COMPANIES, *and any and all other insurers*" from any causes of action or claims resulting from the subject automobile accident. (Emphasis added).

Although Appellants acknowledge that the language of the subject release was broad in scope in terms of who and what was being released, they contend that it should not be read as discharging Grange Mutual's obligation to pay UIM benefits because they had properly followed the *Coots* procedure prior to settling with the tortfeasor and had made Grange Mutual fully aware that they wished to continue their pursuit of a UIM claim on Donna's behalf against the company. In response, Grange Mutual contends that the plain language of the release compels the result reached by the trial court and that the result was further required by *Abney v. Nationwide Mutual Insurance Company*, *supra*, and KRS 411.182(4).[3]

[3] KRS 411.182 is entitled, "Allocation of fault in tort actions; award of damages; effect of release." Section (4) of the statute provides: "A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable, shall discharge that person from all liability for contribution, but it shall not be considered to discharge any other persons liable upon

Although Grange Mutual relied primarily upon *Abney* in its arguments below, the circuit court determined that that decision – and KRS 411.182(4) in general – were inapplicable under the facts of this case. In *Abney*, the Supreme Court of Kentucky held that a general release agreement containing broad language similar to that at issue here tendered to one tortfeasor served to release all other potential joint tortfeasors from liability in a motor vehicle accident case pursuant to KRS 411.182(4). *Id.* at 703-04. Grange Mutual contends that a similar result must be reached here. However, in *Kentucky Farm Bureau Mutual Insurance Company v. Ryan*, 177 S.W.3d 797 (Ky. 2005), the Supreme Court held that KRS 411.182 "expressly does not apply to contractual claims, including those for UIM and UM coverage[,]" because the statute "limits itself to tort actions." *Id.* at 800. Because a UIM action is based in contract, any payment by a UIM insurer is necessarily made in performance of a contractual obligation and cannot be characterized as payment of legal damages pursuant to tort liability." *Id.* at 801. Thus, because KRS 411.182 confines itself to tort actions, it – and *Abney* – are inapplicable here because a UIM claim is at issue.

Having reached this conclusion, however, the circuit court nonetheless found that the subject release still served to release Grange Mutual from any UIM claim because of its "broad and unambiguous" terms. Looking at the release as a stand-alone item, the court's decision is understandable. However, this Court has

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the same claim unless it so provides. However, the claim of the releasing person against other persons shall be reduced by the amount of the released persons' equitable share of the obligation, determined in accordance with the provisions of this section."

previously held that "[t]he validity and scope of a release is determined by the intent of the parties, which must be gathered from the terms of the release in light of the particular facts and circumstances[,]" a conclusion that has been echoed by our Supreme Court. *Liggons v. House & Associates Ins.*, 3 S.W.3d 363, 364-65 (Ky. App. 1999); *see also Ohio Cas. Ins. Co. v. Ruschell*, 834 S.W.2d 166, 169 (Ky. 1992), *quoting Cingoranelli v. St. Paul Fire & Marine Ins.*, 658 P.2d 863, 865 (Colo. 1983) (holding that releases must be considered "in light of the nature of the claim and the objective circumstances underlying the execution of the instrument"). Thus, while the terms of a release are obviously an important consideration in determining its scope, so, too, are the facts and circumstances surrounding it.

Here, prior to settling with the tortfeasor's liability carrier, Donna complied with *Coots* and advised both UIM carriers that she wished to continue pursuit of her UIM claim. Thus, there is little question that Grange Mutual was on notice of Donna's wish to proceed with her UIM claim. Moreover, her efforts demonstrated that her injury claims were not fully satisfied by her settlement with the liability carrier. Therefore, the objective facts and circumstances of this case reflect that Donna did not wish to waive her UIM claim against Grange Mutual in settling her liability claim against the tortfeasor. "When all else is said and done, common sense must not be a stranger in the house of the law." *Coots*, 853 S.W.2d at 900, *quoting Cantrell v. Kentucky Unemployment Ins. Co.*, 450 S.W.2d 235, 236-37 (Ky. 1970). Common sense in this case reflects that in settling with a

tortfeasor, Donna had no desire to release a contractual claim against her own UIM carrier. This conclusion is further supported by the fact that the release provides that the Solheims "have been fully compensated for all damages[.]" Since payment made in satisfaction of a contractual obligation is not considered payment for "damages," the liability of a UM or UIM carrier under its policy cannot be considered "legal liability for damages." *Philadelphia Indem. Ins. Co. v. Morris*, 990 S.W.2d 621, 625 (Ky. 1999), *quoting State Farm Mut. Ins. Co. v. Fireman's Fund American Ins. Co.*, 550 S.W.2d 554, 557 (Ky. 1977). Thus, the "full compensation" portion of the release cannot be read as releasing Grange Mutual.

We further note that in *Ohio Casualty Insurance Company v. Ruschell*, *supra*, our Supreme Court dealt with a similar situation in which a no-fault insurer asserted that a general release agreement that the plaintiff had executed to settle her tort claim effectively released the no-fault carrier from any further liability for basic reparations benefits. Citing to *Holzhauser v. West American Insurance Company*, 772 S.W.2d 650 (Ky. App. 1989), the Court noted a "clear dichotomy" between a "*contractual* claim for BRB benefits" and "the *tort* claim governed by the general release," *Ruschell*, 834 S.W.2d at 167 (Emphasis in original), and concluded that "a tort release will not release a no-fault claim unless there is a *specific designation* of the no-fault claim in the tort release[.]" *Id.* at 169 (Emphasis in original). We believe that a similar conclusion should be reached here with respect to UIM contractual claims and hold accordingly. Therefore, we conclude that the circuit court erred in finding that Donna Solheim waived her

UIM claim against Grange Mutual by executing the "Release of All Claims and Indemnity Agreement" in issue.

2. Did the Circuit Court Correctly Conclude That the Grange Mutual UIM Policy Properly Limits Coverage to LLC Members Who Were Occupying Covered Autos and Were Engaged in the Conduct of Business at the Time of the Accident?

Appellants next contend that the circuit court erred in finding that Donna did not meet the definition of an insured under the Grange Mutual UIM policy and, therefore, did not qualify for coverage. As noted above, "Endorsement CA 36" of the policy provides that "[i]f the Named Insured is a limited liability company, only members of the limited liability company while "occupying" a covered "auto" owned, hired or borrowed by the Named Insured and while acting within the scope of their duties in the conduct of the Named Insured's business" are considered insureds. The record reflects – without dispute – that Donna was not occupying a "covered auto" or acting in her capacity as an owner-member of Solheim Roofing at the time of her accident. Thus, under the plain language of the policy, she was not entitled to UIM coverage. The question then becomes whether that language is somehow inapplicable in this case and Donna's UIM claim remains valid.

"As a general rule, the construction and legal effect of an insurance contract is a matter of law for the court." *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633, 638 (Ky. 2007). Because the interpretation of

a contract is a question of law, it is subject to *de novo* review. *Coleman v. Bee Line Courier Service, Inc.*, 284 S.W.3d 123, 125 (Ky. 2009).

We first note that we disagree with the circuit court's conclusion that a UIM policy issued to a limited liability company cannot be viewed as being issued to the members of that company. While an LLC is a legal entity distinct from its members, as a practical matter naming an LLC as an insured in a UIM policy is essentially meaningless unless coverage extends to some person or persons associated with the company. It would be nonsensical to limit protection solely to the LLC since that entity – standing alone – cannot occupy or operate a motor vehicle or suffer bodily injury or death. Moreover, it would render any UIM coverage provided to that LLC entirely illusory in nature. *Cf. Morris*, 990 S.W.2d at 626; *Hartford Acc. & Indem. Co. v. Huddleston*, 514 S.W.2d 676, 678 (Ky. 1974). We further note that the policy here implicitly recognizes as much since it applies to "members of the limited liability company" in instances where the named insured is an LLC. Since Donna is a member of Solheim Roofing, LLC, she is a contemplated insured for UIM purposes. The fact that she apparently owns only 1% of the company is irrelevant.

Because of this fact, Appellants argue that Donna is an "insured of the first class" under Kentucky law and therefore entitled to broad UIM coverage. In prior decisions, Kentucky courts have distinguished between "insureds of the first class" and "insureds of the second class" for purposes of UIM coverage

(particularly in the realm of "stacking" coverages). *See James v. James*, 25 S.W.3d 110, 113 (Ky. 2000). The difference is thus:

> Insureds of the first class include the named insured – he or she who bought and paid for the protections, and the members of his or her family residing in the same household. Insureds of the second class are those who fall outside the first class, but who are nevertheless entitled to protection for damages from injury inflicted while they are occupying an insured vehicle.

Id. For purposes of classification – if such must be done – we believe that Donna must be considered an "insured of the first class" in this case since she was an owner/member of the LLC to which the subject policy was issued and sold.

It is certainly true that the protection afforded this first class of insured has been found to be broad in scope. *See Ohio Cas. Ins. Co. v. Stanfield*, 581 S.W.2d 555, 557 (Ky. 1979). Moreover, Kentucky case law has repeatedly expressed an expansive view when deciding the extent of UIM coverage. *See, e.g., Nationwide Mut. Ins. Co. v. Hatfield*, 122 S.W.3d 36, 41-42 (Ky. 2003). Our Supreme Court has expressly recognized "a public policy of broad UIM coverage, the purpose of which is to provide full recovery for the insured[.]" *Morris*, 990 S.W.2d at 627.

Indeed, we can say with no hesitation that the "covered auto" provisions in the subject UIM policy are unenforceable in this case because "[t]he insured's status as an insured is alone a sufficient nexus for a claim of UIM benefits without the insured's actually being in a motor vehicle covered for UIM under the policy." *Dupin v. Adkins*, 17 S.W.3d 538, 543 (Ky. App. 2000).

Kentucky courts have repeatedly emphasized that "UIM coverage is personal to the insured and not connected to a particular vehicle." *Id.* Because of this, UIM coverage "must follow the insured regardless of whether the insured is injured as a motorist, a passenger in a private or public vehicle, or a pedestrian, and is only limited by the actual, valid exclusions of each insurance policy." *Id.* Therefore, to the extent that the Grange Mutual UIM policy required Donna to be in a "covered auto" in order to receive coverage, it is void.

Accordingly, Appellants further contend that the policy's requirement that Donna must have been engaged in a business activity in order to receive coverage similarly must be found unenforceable because of the generally broad scope of UIM coverage and because our Supreme Court has held that "[i]nsureds of the first class are protected regardless of their location or activity from damages caused by injury inflicted by an uninsured motorist." *Stanfield*, 581 S.W.2d at 557. The question of whether a UIM carrier can limit its coverage to accidents arising from the operations of an LLC in a commercial automobile policy appears to be one of first impression. We note that the policy in issue in *Stanfield* did not contain limiting language of the type at issue here. Instead, the "insureds of the first class" in that case were "the named insured and any designated insured and, while residents of the same household, the spouse and relatives of either," and the "insureds of the second class" were "any other person while occupying an insured highway vehicle[.] *Id.* Thus, no restriction or limitation was placed on the "insureds of the first class" in that case. Moreover, the Supreme Court specifically

noted that "*[t]hese policy definitions* create two classes of insureds." *Id.* (Emphasis added). Thus, the classification of insureds in that case – and the scope of coverage – was clearly predicated on the policy language in issue, which contained a broad definition of first-class insureds for UIM purposes. The same can be said for other cases upon which Appellants rely, including *Huddleston*, *supra*, and *James*, *supra*. None of those cases involved explicitly restrictive course-of-employment provisions such as the one at issue here. Consequently, while these cases are useful in our analysis, they are not directly on point.

Instead, the Court finds itself compelled to focus upon the specific contractual terms in this case. There is no question that the coverage limitation here is unambiguous and required Donna to have been "acting within the scope of [her] duties in the conduct of [Solheim Roofing's] business" at the time of the accident. The parties agree that she was not. The circuit court gave great emphasis to the fact that the policy in question was a commercial automobile insurance policy – and not a personal one – in concluding that Donna was not entitled to coverage. The court noted that allowing Donna to recover from a business policy for an accident that occurred while she was in her personal vehicle on personal business would essentially redefine the nature of the risk that Grange Mutual undertook in extending the policy. This conclusion is a sound one.

Ultimately, it is the insured designation and business description contained within a contract of insurance that define the nature and extent of the risk the insurance company is undertaking. The "Named Insured" is identified on

the policy's "Declaration of Coverages" page as "Solheim Roofing, LLC," and the given "Business Description" is "Roofing Contractor." The plain language of the policy reflects that Appellants intended to use it to underwrite the risks to which the business might be exposed in its capacity as a roofing contractor – not the risks personal to Roger and Donna Solheim as individuals. In this case, the risk insured against was the possibility of an insured being injured in an automobile accident with an underinsured motorist while acting in the conduct of business.

Our courts have consistently held that in the absence of ambiguities, public policy, or law to the contrary, the terms of an insurance policy will be enforced as drawn. *See York v. Kentucky Farm Bureau Mut. Ins. Co.*, 156 S.W.3d 291, 294 (Ky. 2005); *Meyers v. Kentucky Medical Ins. Co.*, 982 S.W.2d 203, 209-10 (Ky. App. 1997). "[C]ourts cannot make a new contract for the parties under the guise of interpretation or construction but must determine the rights of the parties according to the terms agreed upon by them." *Meyers*, 982 S.W.2d at 210, *quoting Cheek v. Commonwealth Life Ins. Co.*, 277 Ky. 677, 126 S.W.2d 1084, 1089 (1939). Thus, we "must define an insurer's liability according to the terms and conditions of the policy." *Moore v. Commonwealth Life Ins. Co.*, 759 S.W.2d 598, 599 (Ky. App. 1988).

The record in this case reflects that Appellants paid a premium to insure against risks in the context of their business operations. In light of this fact, we cannot say that the policy limitation in question was against public policy, especially given that it was contained within a commercial automobile policy in

explicit and unambiguous language. "[W]here the terms of an insurance policy are clear and unambiguous, the policy should be enforced as written." *Meyers*, 982 S.W.2d at 210. Accordingly, we conclude that the course-of-business policy limitation at issue here was valid and enforceable and, therefore, Donna Solheim was not entitled to coverage under the Grange Mutual UIM policy.

For the foregoing reasons, the judgment of the Franklin Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANTS:

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BRIEF AND ORAL ARGUMENT FOR APPELLEE:

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