IN THE SUPREME COURT OF FLORIDA

CASE NO.: 76,074

FRANK ROCA, as Personal Representative of the Estate of Frank J. Roca, Jr., deceased,

Petitioner,

vs.

VOLKSWAGEN CREDIT, INC., a foreign corporation,

Respondent.

PETITIONER'S REPLY BRIEF ON THE MERITS

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Argument

I. WHETHER THE DISTRICT COURT ERRED IN CONCLUDING THAT A "LONG-TERM" LESSOR WAS NOT LIABLE UNDER THE DANGEROUS INSTRUMENTALITY DOCTRINE.

Respondent, Volkswagen Credit, argues that proponents of applying the dangerous instrumentality doctrine cannot direct this Court's attention to any decision which supports the proposition that it has applied to long-term lessors for a substantial period of time entirely ignores the Supreme Court's decision in Susco Car Rental Systems of Florida v. Leonard, 112 So.2d 832 (Fla. 1959). This omission is significant because Respondent's argument is premised on the fact that vicarious liability under the dangerous instrumentality doctrine is based on dominion and control. (See pg. 22 of Respondent's brief) However, as noted in Petitioner's initial brief, this argument has been expressly rejected by this Court in Susco:

> In the final analysis, while the rule governing liability of an owner of a dangerous agency who permits it to be used by another is based on consent, the essential authority or consent is simply consent to the use or operation of such instrumentality beyond his own immediate control. Only to that limited extent is the issue pertinent when members of the public are injured by its operation, and only in a situation where the vehicle is not in operation pursuant to his authority, or where he has in fact been deprived of the incidence of ownership, can such an owner escape responsibility. Certainly the terms of a bailment, either restricted or general can have no bearing upon that question.

112 So.2d at 837. See also: Union Air Conditioning, Inc. v.

Troxtell, 445 So.2d 1057 (Fla. 3d DCA), review denied, 453 So.2d 45 (Fla. 1984); Tribbitt v. Crown Contractor's, Inc., 513 So.2d 1084 (Fla. 1st DCA 1987). The foregoing demonstrates that control over a motor vehicle has never been the crucial fact in the determination of liability.

Volkswagen Credit does not cite to one case by this Court which does not apply the dangerous instrumentality doctrine to an owner/lessor. Instead, Volkswagen Credit relies heavily on the Second District Court of Appeal's decision in Perry v. G.M.A.C. Leasing Corp., 549 So.2d 680 (Fla. 2d DCA 1989), review denied, 558 So.2d 18 (Fla. 1990) and Kraemer v. General Motors Acceptance Corp., 556 So.2d 431 (Fla. 2d DCA 1989). Kraemer is presently pending before this court, review granted (June 22, 1990; case number 75,580). Volkswagen Credit does not even address Petitioner's argument set forth in the initial brief concerning the faulty reasoning of Perry and Kraemer and the crucial factual distinctions between those cases which involve a conditional lease and this case which concerns a true lease agreement with no option to buy. Volkswagen Credit merely quotes these cases almost verbatim in its answer brief on pps. 14-18.

Volkswagen Credit argues that there is no meaningful distinction between an outright sale and a long-term lease since in each instance beneficial ownership is transferred to the purchaser or owner. As set forth in Petitioner's initial brief, in Perry and Kraemer the Second District latched on to the concept of beneficial ownership set forth in Palmer and confused the concept of "beneficial ownership"

with that of "possession and control". Palmer v. R.S. Evans Jacksonville, Inc., 81 So.2d 635 (Fla. 1955). Palmer involved a conditional sale which creates a beneficial ownership whereas a lease agreement only transfers possession and control. Here, Volkswagen Credit is an owner, not a conditional vendor. The lease in this case which did not contain an option to purchase and imposed significant restriction on the lessee's use of the vehicle (R. 31), clearly did not transfer beneficial ownership of the vehicle to the lessee. A lease, by definition, transfers only possession and not beneficial ownership of the vehicle. Once again, control over a motor vehicle has never been the crucial fact in a determination of liability under the dangerous instrumentality doctrine. See: Susco, 112 So.2d at 837. Accordingly, the holding in Perry and Kraemer that a long-term lease transfers "beneficial ownership" is simply wrong.

Volkswagen Credit attempts to rely on several cases which it claims have redefined the dangerous instrumentality doctrine from one of mere ownership imposing liability to one of "authority and control" imposing liability. First, Respondent relies on Palmer v. R.S. Evans Jacksonville, Inc., 81 So.2d 635 (Fla. 1955). However, as stressed by the Petitioner in his initial brief, Palmer involved a conditional sale in which "beneficial ownership" had been transferred to the buyer. Accordingly, Palmer is entirely inapplicable to the owner/lessor situation involved in this case. Moreover, the quote from Palmer relied upon by Respondent for its "authority and control" argument does not contain the word "control" but rather only the word "authority". It is apparent that when a vehicle is sold, the seller

has no "authority" to decide whom to entrust the vehicle's operation. Thus it is the loss of "authority" and not the loss of "control" which creates the distinction for conditional sales.

Volkswagen Credit's reliance on cases from other jurisdictions such as Lee v. Ford Motor Credit Company, 595 F. Supp. 1114 (D.D.C. 1984) and Moore v. Ford Motor Credit Company, 420 N.W. 2d 577 (Mich. App. Ct. 1988) is misplaced. These cases are from jurisdictions where there is no common law doctrine as in Florida, which imposes liability upon a vehicle owner regardless of whether he has the "immediate right to control the use of the vehicle at the time of the accident." Lee, 595 F. Supp. at 1116. Rather, in those jurisdictions, the owner's liability is statutory in origin and is expressly limited in its scope by the applicable statute.

Respondent next attempts to rely on several decisions where the courts have found exceptions to the dangerous instrumentality doctrine. See: Fry v. Robinson Printers, Inc., 155 So.2d 645 (Fla. 2d DCA 1963); Fahey v. Raftery, 353 So.2d 903 (Fla. 4th DCA 1977); Castillo v. Buckley, 363 So.2d 792 (Fla. 1978); Michalek v. Shumate, 524 So.2d 426 (Fla. 1988). However, the holdings in these cases are very narrow and expressly limited to the facts of those cases. For example, in Castillo the Supreme Court specifically recognized that "an automobile owner is generally able to select the persons to whom a vehicle may be entrusted for general use, but he rarely has authority and control over the operation or use of the vehicle when it is turned over to a firm in the business of service and repair". 363 So.2d at 793. Accordingly, these cases stand for the proposition

that an owner who turns an automobile over to an automotive service agency or valet service is not liable for the negligent operation of the vehicle by someone to whom the service agency or valet service has entrusted the vehicle.

The narrowness of the exception to the dangerous instrumentality doctrine created in Castillo was emphasized by the Supreme Court's subsequent decision in Michalek v. Shumate, 524 So.2d 426 (Fla. 1988). In that case, this Court refused to extend the narrow exception created in Castillo to negligent operation by a serviceman to whom the owner had directly entrusted the car and stated "an owner who authorizes another to transport his car to a service agency remains in control thereof and ultimately liable for its negligent operation until it is delivered to an agency for service". Id. at 427. This court recognized that the crucial fact in requiring application of the dangerous instrumentality doctrine is the ability to control to whom the vehicle is entrusted and that its application did not depend upon who has "possession or control" of the vehicle.

None of the above decisions relied upon by Volkswagen Credit contradict Petitioner's argument that application of the dangerous instrumentality doctrine does not hinge upon who has "possession and control" of the vehicle at the time of the accident. To the contrary, each of the above decisions merely demonstrate that the dangerous instrumentality doctrine turns upon who has the "authority" to entrust the owned vehicle. Pursuant to a leasing agreement, as the lease agreement at issue in the instant case, the owned vehicle is entrusted directly to the lessee. Accordingly, this Court's

rationale in Michalek is applicable to the facts of this case rather than the limited exceptions created in Castillo, Fry and Fahey. Respondent clearly had the necessary "authority to entrust" in the instant case. Volkswagen Credit entrusted the vehicle to Mary Beth Saibi under a lease which contained conditions and stipulations concerning the use and maintenance of the automobile. (R. 31) The lease did not contain an option to purchase the vehicle. (R. 31)

Petitioner submits that the public policy reasons behind application of the dangerous instrumentality doctrine to owners/lessors are obvious. It provides strong incentive for owners/lessors to carefully screen potential lessees' driving records and credit histories before they entrust their vehicles to lessees.

II. THE TRIAL COURT ERRED IN ENTERING JUDGMENT IN FAVOR OF THE OWNER/LESSOR PURSUANT TO SECTION 324.021(9)(b), FLORIDA STATUTES BASED ON ITS FINDING THAT THIS STATUTE ABROGATED THE COMMON LAW TORT LIABILITY OF THE OWNERS/LESSORS OF MOTOR VEHICLES.

Volkswagen Credit's argument that section 324.021(9)(b) is plain, clear and unambiguous fails to address the well-settled case law that a statute which purports to displace the common law must speak in clear, unequivocal terms. Carlisle v. Game and Freshwater Fish Commission, 354 So.2d 362 (Fla. 1977). Under this rule of strict construction, the phrase "notwithstanding any other provision of the Florida Statutes or existing case law" contained in section 324.021(9)(b) must be read to refer to statutes such as 627.7263 and case law on the specific subject of insurance requirements of lessors

and lessees.

Volkswagen Credit and its amici's argument that the language contained in section 324.021(9)(b) is clear and unambiguous is clearly weakened by their reliance on the legislative floor debate. If the statute is so clear, they would not need to look beyond the language of the statute and consider the legislative debate. Consideration of this floor debate violates the "first rule of statutory construction", that the legislative history of an act is to be consulted only when there is doubt as to what is meant by the language of the statute itself. Rinker Materials Corporation v. City of North Miami, 286 So.2d 552, 554 (Fla. 1973).

Volkswagen Credit relies on the portion of section 324.021(9)(b) which states "the lessor... shall not be deemed the owner ... for the acts of the operator in connection therewith". The statute reads, however, that "the lessor... shall not be deemed the owner of said motor vehicle for the purpose of determining financial responsibility for the operation of said motor vehicle or for the acts of the operator in connection therewith... ." (emphasis added) This phrase is not clear and unambiguous and does not state that it was intended to abrogate the dangerous instrumentality doctrine.

Volkswagen Credit relies on Perry v. G.M.A.C. Leasing Corp., 549 So.2d 680 (Fla. 2d DCA 1989), reviewed denied, 558 So.2d 18 (Fla. 1990), and Folmar v. Young, 560 So.2d 798 (Fla. 4th DCA 1990), in support of its argument that in enacting section 324.021(9)(b) the legislature has placed long-term lessors in the same category as conditional vendors. A thorough discussion of the flaws in these

decisions is set forth in Petitioner's initial brief. Moreover, Petitioners would note that the Fourth District has recently withdrawn its decision in Folmar and granted an en banc rehearing in that case.

Volkswagen Credit refers to the fact that the Folmar court engaged in a detailed analysis of the legislature's discussion. However, the legislative intent is to be determined primarily from the language of the statute itself and not from conjecture as to the subjective intent of the legislature. Board of Commissioner's of State Institutions v. Tallahassee Bank and Trust Company, 108 So.2d 74 (Fla. 1st DCA 1958). Thus, where, as in the instant case, a statute is in derogation of the common law, the legislature is required to explicitly declare an intention to abrogate the dangerous instrumentality doctrine. As stated in Sand Key Associates, Ltd. v. Board of Trustees, 458 So.2d 369, 371, (Fla. 2d DCA 1984):

> Presumption is that no change in the common law is intended unless the statute explicitly so states. Inference and implication cannot be substituted for clear expression.

Volkswagen Credit's amici argues that the notion that the change effected by section 324.021(9)(b) that a long-term lessor should still retain liability under the dangerous instrumentality doctrine but no longer be required to satisfy the financial responsibility provisions of Chapter 324 is nonsensical. To the contrary, the statute increases the insurance to be maintained by the lessee, insurance that would otherwise have to be provided by the lessor. The statute, as it plainly states, adjusts financial responsibility

for maintaining insurance without affecting common law liability. The lessor's cost of only having to maintain insurance coverage in excess of $100,000/$300,000 or in the event the lessee fails to maintain the required levels of insurance is obviously lower. In fact, Volkswagen Credit has substantial insurance coverage for the leased vehicle at issue in this case.

Volkswagen Credit presents extensive statutory arguments on pages 26 through 29 relying primarily on Folmar and Perry. The flaws in Folmar and Perry have been thoroughly addressed in Petitioner's initial brief and will not be reiterated here.

Amici argues that the definition of the word "owner" contained in section 324.021(9), Florida Statutes, (1985) exempts certain classes of owners from financial responsibility requirements and concurrently from vicarious liability imposed under the dangerous instrumentality doctrine. To the contrary, Petitioner submits that this definition relieves the owner/lessor from the minimum insurance requirements of Chapter 324 and contains no words which even arguably address liability under the "dangerous instrumentality doctrine". The definition section of Chapter 324 contained in 324.021 specifically provides that:

> The following words and phrases when used in this chapter shall, for the purpose of this chapter, have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning:

This Court has itself stated that the provisions in Chapter 324 relate solely to minimum insurance requirements and that Chapter 324

has nothing to do with other obligations attaching to ownership of a motor vehicle, such as application of the dangerous instrumentality doctrine. See: Insurance Company of North American v. Avis Rent-A-Car System, Inc., 348 So.2d 1149, 1153 (Fla. 1977); Accord, Racecon, Inc. v. Mead, 388 So.2d 266, 268 (Fla. 5th DCA 1988) (Independent of any insurance requirement, there is a common law obligation of owners of motor vehicles which make them responsible for injuries caused by such vehicles in the course of its use.) The foregoing demonstrates that application of the dangerous instrumentality doctrine is independent of, and does not turn upon, the definition of "owner" for the purpose of Chapter 324.

III. THE TRIAL COURT ERRED IN HOLDING THAT SECTION 324.021(9)(b) WAS CONSTITUTIONAL.

Initially, Volkswagen Credit contends that Petitioner's argument concerning the constitutionality of section 324 has been waived because the Petitioner failed to allege this argument as an avoidance to Volkswagen Credit's affirmative defense. Volkswagen Credit relies on North American Phillips Corp. v. Boles, 405 So.2d 202 (Fla. 4th DCA 1981) for the proposition that when a plaintiff simply denies an affirmative defense he is not entitled at trial to raise new matters in avoidance thereof. However, this case is entirely inapplicable to the facts of this case. For example, in Boles, the plaintiff filed a two-count complaint asking for damages or specific performance of a stock option agreement. The defendant answered and asserted three affirmative defenses, one of which was that Boles had not fulfilled certain conditions precedent. Boles filed a reply which denied the

affirmative defenses.

At trial, Boles introduced a letter wherein he sought to exercise the stock option agreement. Although the letter did not satisfy all the conditions precedent required by the agreement, Boles took the position that strict compliance had been waived due to certain actions by the defendant corporation. Defense counsel objected to this line of testimony on the grounds that it was irrelevant to the issues framed by the pleadings. The court overruled the objection and ultimately entered a verdict for the plaintiff.

The Fourth District Court of Appeal reversed holding that rule 1.100(a) makes a reply mandatory when a party seeks to avoid an affirmative defense. (emphasis added). The court, citing to Moore Meats, Inc. v. Strawn, 313 So.2d 660 (Fla. 1975) noted that the rationale for this requirement is that "this is necessary in order to lay a predicate for such proofs so that the parties may prepare accordingly." Id. at 203.

In Moore Meats, Inc., the Supreme Court recognized the confusion over when a reply was necessary pursuant to rule 1.100(a) and thus set forth a thorough explanation of the same. In that case, the Supreme Court agreed with the trial court's finding that the rule does not require a reply merely to deny allegations of the affirmative defense or to show that the pleader lacks knowledge of the truth or falsity of those allegations.

Rather, the Supreme Court noted that rule 1.100(a) only requires a reply to an affirmative defense when the opposing party seeks to avoid that defense by pleading new matters or defenses. Otherwise,

the Court held that a simple denial is sufficient. See also: Reno v. Adventist Health Systems Sunbelt, Inc., 516 So.2d 63 (Fla. 2d DCA 1987); Kitchen v. Kitchen, 404 So.2d 203 (Fla. 2d DCA 1981); Hertz Commercial Leasing v. Seebeck, 399 So.2d 1110 (Fla. 5th DCA 1981).

A reply is necessary and permitted only in order to allege new facts that may be legally sufficient to avoid the legal affect of the facts contained in the affirmative defense. In Re: Estate of Grant, 433 So.2d 681 (Fla. 5th DCA 1983). In this case, plaintiff had no new facts or matters to allege but rather was alleging that the statute was unconstitutional as a matter of law and thus did not need to avoid the affirmative defense raised by Volkswagen Credit regarding the applicability of section 324.021(9)(b). Accordingly, the reply filed by the plaintiffs was sufficient in this case.

Moreover, rule 1.140(a)(2), Florida Rules of Civil Procedure provides that "the defense of failure to state a cause of action or a legal defense or to join an indispensable party may be raised by a motion for judgment on the pleadings or at trial on the merits in addition to being raised in either a motion under subdivision (b) or in the answer or reply." (emphasis added) Accordingly, it is apparent that plaintiff's legal defense that section 324.021(9)(b) is unconstitutional may be raised as late as the trial in this matter and thus cannot be deemed waived as a result of not being asserted in the plaintiff's reply.

The cases of Trushin v. State, 425 So.2d 1126 (Fla. 1983), and Brady v. State, 518 So.2d 1305 (Fla. 3d DCA 1987), relied on by Volkswagen Credit, are clearly inapplicable to the facts of this case

since they merely stand for the proposition that the constitutional application of a statute to a particular set of facts is a matter which must be raised at the trial level before it can be considered on appeal. The record demonstrates that Petitioner properly raised the constitutionality of the statute at the trial level and therefore this argument has not been waived.

a. Section 324.021(9)(b) Unconstitutionally Violates the Right of Access to the Courts in Violation of Article I, Section 21 of the Florida Constitution by Abolishing the Right to Recover from the Owners/Lessors of Dangerous Instrumentalities.

Initially, Volkswagen Credit argues that pursuant to Palmer and Perry, because no common law right to recover from a long-term lessor under the dangerous instrumentality existed at the time of the enactment of section 324.021(9)(b), Florida Statutes, the legislature did not abolish a common law right. This argument is thoroughly addressed by Petitioner in point I of their initial and reply briefs and will not be restated here. Once again, this case does not involve a conditional sale or lease as in Palmer and Perry but rather is a true lease which did not contain an option to purchase.

Volkswagen Credit argues that this statute does not alter any common law right but merely no longer allows a plaintiff to sue a non-negligent lessor simply because the lessor owned the vehicle involved in the accident. Volkswagen Credit's position is that because the injured plaintiff retains a right of action against the negligent tortfeasor, section 324.021(9)(b), Florida Statutes neither

abolishes an existing common law right nor fails to leave a "reasonable alternative" to allow persons to redress of their injuries. This argument entirely overlooks the requirement in Kluger v. White, 281 So.2d 1 (Fla. 1973) that if the legislature deprives a citizen of an existing common law right it must in return provide him a reasonable alternative benefit. A victim of vehicular negligence has always had the right to sue the owner, the lessor, the lessee/bailee and the negligent operator, and therefore this argument is without merit. Nor is a "reasonable alternative" demonstrated by the fact that the lessor's immunity is conditioned on the lessee obtaining 100,000/300,000 in liability insurance coverage.

Volkswagen Credit notes that in Lasky v. State Farm Insurance Company, 296 So.2d 9 (Fla. 1974) the Supreme Court held that the tort immunity provisions of the no-fault statute passed the Kluger test because the victim received the right to recover uncontested benefits and the right not to be sued himself in exchange for giving up the right to sue for minimal injuries. In contrast to the no-fault statute in enacting section 324.021(9)(b), the legislature has provided accident victims with no trade-off at all. The victim in this case must still prove liability; gives up the right to collect his full damages, and receives nothing in return.

In determining the reasonableness of an alternative remedy, Volkswagen suggests that this Court look to the fact that the purpose for application of the dangerous instrumentality doctrine is lacking because long-term lessors have no ability to exercise dominion and control. Once again, this argument ignores the fact that control

over a motor vehicle has never been the linchpin in a determination of the application of this doctrine. See: Susco Car Rental Systems of Florida v. Leonard, 112 So.2d 832 (Fla. 1959).

Volkswagen Credit next argues that the provisions of section 324.021(9)(b) do not operate as a cap, but as a guaranteed floor available to a plaintiff who successfully proves a lessee's liability. This argument entirely overlooks the fact that the legislature has completely abolished a victim's cause of action against the motor vehicle owner and thus has denied those most severely injured by leased vehicles the ability to seek any meaningfully redress for their injuries.

Volkswagen Credit's Amicus, Florida Automobile Dealer's Association, argues that since the dangerous instrumentality doctrine was created by Florida case law rather than statute, only the second prong of Kluger dealing with a 1776 English common law right can apply. According to amicus, because the dangerous instrumentality doctrine was not part of English common law prior to 1776, it could not have been adopted for purposes of the protections of Article I, Section 21 of the Florida Constitution. (Florida Automobile Dealer's Association brief pgs. 12-13) Petitioner submits that these contentions are simply wrong. The phrase "common law" includes decisional law of the judiciary from the beginning to the present, as distinguished from legislative law. See: Overland Construction Company, Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979); State v. Egan, 287 So.2d 1 (Fla. 1973). Moreover, the relevant date for determining the status of the common law for purposes of application of Article

I, Section 21 of the Florida Constitution is not July 4, 1776 but rather the date of the last adoption of the Florida Constitution incorporating Article I, Section 21, which is 1968. See e.g.: Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987); Overland Construction Company, Inc. v. Sirmons, supra; Kluger v. White, supra.

b. Section 321.024(9)(b) Florida Statutes Violates the Equal Protection Clause of the Florida and the United States Constitutions.

Volkswagen Credit argues that there is no unfair treatment because the insurance provisions of section 324.021(9)(b) mandates that the lessee provide higher minimum insurance benefits than would otherwise be required. This argument simply ignores the invidious classification imposed by the statute upon victims of automobile negligence namely the creation of one class of persons who are unable to seek compensation from owners of automobiles, and a separate class who have no limitations on their right of action against vehicle owners. This arbitrary and unreasonable classification denies equal protection of the law to those victims who have the bad luck to be injured by a vehicle leased in excess of one year and thus cannot be upheld.

Volkswagen Credit suggests that where an owner has no right to dominion or control over a vehicle for an extended period of time due to the existence of a long-term lease, no rational basis exists for holding that owner liable for that vehicle's misuse. However, this argument does not provide justification for the differing treatment between long-term lessors and short terms lessors since

relinquishment of control has never been the key to relief from liability under the dangerous instrumentality doctrine. See point I of reply brief.

The classification created by the statute does not bear any reasonable relationship to the legislative purpose. The lease period, one year or more, is clearly an arbitrary one. The lessor does not retain actual physical control over its vehicle, whether the lease is for one week, or for ten years. A long-term leased vehicle is no more likely, nor less likely, to be involved in an automobile accident. Accordingly, the statutory classification created by section 324.021(9)(b) is clearly arbitrary, unreasonable, and in violation of the equal protection provisions of the state and federal constitutions.

c. Section 324.021(9)(b) Violates the Right of Due Process of Law of the Florida and United States Constitutions.

Volkswagen Credit argues that the legislature has in fact served the public welfare by providing a fund from which those injured by tortfeasors can recover. Petitioner submits that the real purpose of this statute is simply to immunize lessors. This immunization of a special interest group violates the due process provisions of Article I, Section 9 of the Florida Constitution. Department of Insurance v. Dade County Consumer Advocates Office, 492 So.2d 1031 (Fla. 1986); United Gas Pipeline Company v. Bevis, 336 So.2d 560 (Fla. 1976).

CONCLUSION

For the above-stated reasons, Petitioner respectfully submits that the summary judgment entered in favor of Volkswagen Credit should be reversed and requests that this court find that "long-term" lessors are liable under the dangerous instrumentality doctrine and that section 324.021(9)(b), Florida Statutes does not apply to this case to limit the lessor's common law liability under the dangerous instrumentality doctrine. In the alternative, Petitioner respectfully requests this Court to find that section 324.021(9)(b) is unconstitutional.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 1st day of November, 1990 to: BART BILLBROUGH, ESQUIRE, One Biscayne Towers, #2500, 2 S. Biscayne Blvd., Miami, Fl 33131.

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