IN THE SUPREME COURT

OF FLORIDA

CASE NO. 64,223

MILDRED K. MEISTER AND ABRAHAM MEISTER, her husband,

Petitioners,

vs.

PAUL FISHER, ET AL.,

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

PETITIONERS' BRIEF ON THE MERITS

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I.

STATEMENT OF THE CASE AND FACTS

On August 20, 1978, the Emerald Hills Country Club rented a golf cart to Paul Fisher. (R. 2, 276). [1] Mr. Fisher negligently operated the cart on the golf course, striking the Meisters' cart in the rear and seriously injuring Mrs. Meister. (R. 2, 552). In 1979, the Meisters sued Mr. Fisher, the Country Club and their respective insurers. (R. 1-5).

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[1] Unless otherwise indicated, all emphasis is supplied.

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In due course, the Country Club moved for a partial summary judgment contending it was not liable under the dangerous instrumentality doctrine. (R. 552-554). The Meisters' opposed the motion, filing affidavits showing that golf carts had to be licensed and inspected when operated on the public streets. (R. 629-634). The Meisters' also filed a safety engineer's affidavit stating in pertinent part:

> Over the past 10 years I have investigated numerous accidents involving golf carts and other small electric and gas powered vehicles. These accidents have occurred on golf courses and other areas not related to golf courses. My experience in research indicated that the types of accidents caused by the operation of the carts are due to the particular design features of the carts and are identical to many of those involving other motor vehicle accidents. Additionally, the environment of use has contributed to accident causation and resulting injuries.
>
> I am familiar with the facts of the injuries to Mildred Meister which occurred when she was struck while alighting from her cart by the Fishers who were in a three-wheeled E-Z-GO Cart on the Emerald Hills Golf Course.
>
> I am also aware that these carts can be licensed in the State of Florida to operate on public streets and highways if they are equipped with certain items required by the State which, in fact, enhance their safety.
>
> I am also aware that the operation of these carts can cause peril to life and property.
>
> Based on my educational experience and background in the areas of human factors and safety engineering and particularly with respect to the analysis of motor vehicle accidents, including golf carts, <u>it is my opinion that they are dangerous instrumentalities.</u>

> This opinion is based on reasonable engineering probability. (R. 635-636).

The trial court granted the Country Club's motion, holding:

> ORDERED AND ADJUDGED that the Defendants', EMERALD HILLS COUNTRY CLUB, INC. and CONTINENTAL INSURANCE COMPANY, Motion for Partial Summary Judgment be and the same is hereby granted. The Court finds as a matter of law that the golf cart herein is not a dangerous instrumentality and the Defendants, EMERALD HILLS COUNTRY CLUB, INC., and CONTINENTAL INSURANCE COMPANY, are not vicariously liable for the acts of the Co-Defendant, PAUL FISHER, who operated the cart when the accident herein occurred. (R. 656).

The Meisters' attempted to appeal this order, but the Fourth District Court of Appeal held in an order dated November 16, 1981, that an interlocutory appeal could not be taken from the order. Thereafter, the Meisters' abandoned their remaining claims against the respondents and a final judgment was entered in the latters' favor. (R. 661-662). On appeal from this final judgment (R. 663), the Fourth District Court of Appeal affirmed, holding in pertinent part:

> Under all of these circumstances, we conclude that a golf cart on a golf course fulfills all the requirements of the dangerous instrumentality doctrine as established by the Southern Cotton Oil and as expanded by Reid v. Associated Engineering of Osceola, Inc., 295 So.2d 125 (Fla. 4th DCA 1974), except for the public policy considerations noted above. We therefore hold that based on the present record golf carts on golf courses are not within the dangerous instrumentality doctrine. However, we certify this question to the Supreme Court as one of great public importance:

SHOULD GOLF CARTS BE INCLUDED WITHIN THE DANGEROUS INSTRUMENTALITY DOCTRINE ENUNCIATED IN Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920), AND AS EXPANDED IN Reid v. Associated Engineering of Osceola, Inc., 295 So.2d 125 (Fla. 4th DCA 1974)?

II.

POINT ON CERTIORARI

The point on certiorari is:

WHETHER THE FOURTH DISTRICT COURT OF APPEAL ERRED IN HOLDING AS A MATTER OF LAW THAT A COMMERCIAL LESSOR OF A GOLF CART IS NOT LIABLE FOR THE GOLF CART'S NEGLIGENT OPERATION UNDER FLORIDA'S DANGEROUS INSTRUMENTALITY DOCTRINE.

III.

ARGUMENT

For the reasons which follow, it is respectfully submitted that the final judgment below should be reversed.

We fail to see the logic in the holding below that the courts know so much about golf carts that they can be judicially noticed as "non-dangerous" instrumentalities. Respondents offered no testimony below of any kind that such carts are harmless and the petitioners offered expert testimony to the contrary. Yet, the court below ignored the expert's affidavit and found as a matter of law "that the golf cart herein is not a dangerous instrumentality." (R. 656).

Admittedly, Florida has no case squarely in point. However, the line of demarcation appears to be whether a vehicle is self-propelled. Trailers are not and have been excluded from the doctrine.[2] On the other hand, a "small [unlicensed] motor operated vehicle referred to as a 'tow-motor'" is a dangerous instrumentality. Eagle Stevedores, Inc. v. Thomas, 145 So.2d 551 (Fla. 3d DCA 1962). In Stewart v. Aderholt, 347 So.2d 1097 (Fla. 2d DCA 1977), the court suggests that an ordinary bicycle is not a dangerous instrumentality.

In Jordan v. Kelson, 299 So.2d 109, 111 (Fla. 4th DCA 1974), the Court remarked (admittedly in an auto case) that:

> ...This form of vicarious liability is not based on respondaet superior or an agency conception, but on the practical fact that the owner of an instrumentality which had the capability of causing death or destruction should in justice answer for misuse of this instrumentality by anyone operating it with his knowledge and consent. Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920).

A golf cart surely qualifies as such an instrumentality and the dangerous instrumentality doctrine should be equally applicable whether the injury is inflicted by a golf cart or a moped or a motorcycle or a tow-motor or a sub-compact auto.

In Vander Veer v. Tyrrell, 29 A.D.2d 255, 261, 287 NYS2d 228 (1968), a golf cart accident case, the court states:

> Finally, if the injury is found to be caused by the negligence of Tyrrell alone in the operation of the cart, as the cross claim sixth alleges, the appellant could still be

[2] E.G., Powell v. Henry, 224 So.2d 730 (Fla. 2d DCA 1969); Foster v. Lee, 226 So.2d 282 (Fla. 2d DCA 1969); Garcia v. Mid-Florida Hauling, Inc., 350 So.2d 1141 (Fla. 1st DCA 1977).

> liable as lessor or owner for allowing a dangerous instrumentality on the premises but such liability would be passive only.

The dangerous instrumentality doctrine was created by this Court in 1920, Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920). In those days, a speed of 25 miles per hour for one-eighth of a mile was prima facie evidence of reckless driving. Ch. 727(18), Laws of Florida (1917). Moreover, we are not at all sure that the Model T's driven in those days were any heavier or faster than today's golf carts. Yet the dangerous instrumentality doctrine was created to apply to the Model T and other 1920 vintage motor vehicles.

What legislation there is points towards the conclusion that golf carts are indeed dangerous instrumentalities. The same license is required for golf carts as for all other motor vehicles that are used on public roadways. Section 320.01(1)(a) provides:

> 320.01 Definitions, general. - In construing these statutes, when applied to motor vehicles, and when the context permits, the word, phrase, or term:
>
> (1) "Motor vehicle" includes:
>
> (a) Automobiles, motorcycles, motor trucks, trailers, semitrailers, tractor trailer combinations, and all other vehicles operated over the public streets and highways of this state and used as a means of transporting persons or property over the public streets and highways and propelled by power other than muscular power, but does not include traction engines, road rollers, such vehicles as run only upon a track, bicycles, or "mopeds," as defined in subsection 316.003(2).

A golf cart is likewise a motor vehicle under Chapter 316, State Uniform Traffic Control. § 316.00(21), Fla. Stat. (1981), defines a motor vehicle as follows:

> MOTOR VEHICLE. - Any vehicle which is self propelled and every vehicle which is propelled by electric power obtained from overhead trolley wires, but not operated upon rails, but not including any bicycle or moped as defined in subsection (2).

Since mopeds and bicycles are the only vehicles excepted by the Legislature, this strongly suggests that golf carts should be held motor vehicles within the meaning of the dangerous instrumentality doctrine.

Finally, it should be noted that respondents are a commercial lessor of golf carts and the insurer of this business operation. Where one rents large numbers of golf carts for use in a limited area and is insured besides, there are special reasons for holding the doctrine applicable. Whatever may be the rule in the case of an uninsured individual golf cart owner, the doctrine should apply on the instant facts.

IV.

CONCLUSION

It is respectfully submitted that the decision below should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of September, 1983, a true copy of the foregoing Petitioners' Brief on the Merits was mailed to: CONRAD SCHERER & JAMES, P. O. Box 14723, Fort Lauderdale, FL 33302; and JOHN E. DONAHOE, ESQUIRE, P. O. Box 21746, Fort Lauderdale, FL 33335.

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