IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC09-1677

JAMES EARL RIPPY,

Petitioner,

v.

JAMES SHEPARD,

Respondent.

On appeal from the Eighth Judicial Circuit
Court in and for Levy County, Florida

L.T. CASE NO.: 38-2007-CA-00528

AMICUS BRIEF OF FLORIDA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF THE POSITION OF RESPONDENT, JAMES SHEPARD

SHARON C. DEGNAN, ESQ.
CARYN L. BELLUS, ESQ.
KUBICKI DRAPER, P.A.
Counsel for FDLA
25 West Flagler Street, Penthouse
Miami, Florida 33130
Direct Line: (305) 982-6634
Facsimile: (305) 374-7846

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

OTHER AUTHORITIES

PAGE NO.

STATEMENT OF IDENTITY AND INTEREST

This brief is submitted by the Florida Defense Lawyers Association ("FDLA"). FDLA is a statewide organization, formed in 1967, of defense attorneys and has a membership of over 1,000 members. Among the aims of FDLA and its members are "impro[ving] the adversary system of jurisprudence and . . . the administration of justice." See www.fdla.org/ByLaws.asp. The FDLA maintains an active amicus curiae program in which FDLA members donate their time and skills to submit briefs in important cases pending in state and federal appellate courts. The FDLA screens those cases for their content of significant legal issues which affect the interests of the defense bar or the fair administration of justice. See www.fdla.org/about/amicus.asp. This case has the potential to carry statewide impact because of Plaintiff/Petitioner's attempt to expand the dangerous instrumentality doctrine to include farm tractors.

SUMMARY OF THE ARGUMENT

Injuries do arise from the misuse of farm tractors. However, and what has been overlooked in Plaintiff's position is that simply because something can be dangerous if it is misused does not and cannot translate into a finding that the product is "inherently dangerous." Notwithstanding Plaintiff's contrary assertion

throughout his initial brief on the merits, the courts in Florida have never focused their inquiry as it pertains to the dangerous instrumentality doctrine on whether or not a product is inherently dangerous. To the contrary, the analysis utilized by the Florida courts when deciding whether a product is a dangerous instrumentality has focused upon the need to protect the public-at-large by imposing liability upon an owner who subjects the general public to danger by entrusting his motor vehicle to one who negligently operates it on the roadways. The First District's analysis below was consistent with longstanding and well-settled precedent and its conclusion that a farm tractor being used on private farmland is not a dangerous instrumentality was correct.

Unlike a golf cart, which is used by the public and treated by the Florida Legislature as a "motor vehicle" since it is used to transport persons and property on the roadways, a farm tractor has not been treated comparably. Instead, a farm tractor is treated by the Legislature as a piece of machinery since it is only used incidentally on the public roadways to transport itself and not to transport persons and property.

ARGUMENT

THE DANGEROUS INSTRUMENTALITY DOCTRINE SHOULD NOT BE EXTENDED TO A

FARM TRACTOR BEING OPERATED ON

PRIVATE FARMLAND.

Plaintiff presents three primary reasons that a farm tractor constitutes a "dangerous instrumentality." First, because it is inherently dangerous. Second, because it falls within the definition of "motor vehicle" under Florida law. Finally, because it is regulated by the Legislature and is operated on both public and private property. FDLA herein joins the Defendant/Respondent in his position that the arguments asserted in Plaintiff's initial brief on the merits are legally unsound and cannot justify the extension of Florida's dangerous instrumentality doctrine to a farm tractor being operated on a private farm.

A. A Farm Tractor Is Not Inherently Dangerous and Plaintiff's Request For This Court to Intermingle The Concepts of Dangerous Instrumentality and Inherently Dangerous Is Legally Unsound and Contrary to Florida Law.

This Court should reject Plaintiff's invitation to create a "simple test" with respect to the application of the Florida dangerous instrumentality doctrine by merely asking whether a farm tractor is inherently dangerous. Notwithstanding Plaintiff's position in his initial brief on the merits, if this Court were to implement such a test, it would not only be unprecedented, but would, in fact, be an outright departure from longstanding and well-settled Florida case law, which has clearly

and consistently over the years acknowledged a distinction between the doctrine of dangerous instrumentality and the inherently dangerous doctrine. See Southern Cotton Oil Co. v. Anderson, 86 So. 629, 632 (Fla. 1920); Seitz v. Zac Smith & Co., 500 So. 2d 706, 710 (Fla. 1st DCA 1987); Lollie v. General Motors Corp., 407 So. 2d 613, 615 (Fla. 1st DCA 1981), rev. denied, 413 So. 2d 876 (Fla. 1982); see also Northern Trust Bank of Fla. v. Construction Equip. Int'l, Inc., 587 So. 2d 502, 504 (Fla. 3d DCA 1991) (distinguishing the dangerous instrumentality doctrine from the inherently dangerous activity doctrine and explaining that although a case involving a crane accident would implicate the inherently dangerous doctrine, it would not fall within the dangerous instrumentality doctrine because the crane was in use for construction, did not pose a sufficient danger to the general public and was not used as a motor vehicle or commonly found on the highways at the time of the accident).

Several of the cases discussing the interplay between these two doctrines have pointed out that although the terms have sometimes been used interchangeably, the two concepts are separate and distinct and do not mean the same thing.[1] Seitz, 500 So. 2d at 710; Lollie, 407 So. 2d at 710. Tellingly, the

[1]It seems clear after a thorough review of the case law that any confusion that has emerged under Florida law with respect to designating certain types of machinery - most notably cranes - as a dangerous instrumentality is the result of the courts

example most often used by the Florida courts to demonstrate the distinction between the doctrines of dangerous instrumentality and inherently dangerous is the automobile, which has long been held by the courts in Florida to be a dangerous instrumentality, but has not been found to be inherently dangerous. See Seitz, 500 So. 2d at 710 (explaining that "[w]hile an automobile has long been held to be a dangerous instrumentality, it is not inherently dangerous in and of itself, rather it is dangerous only in its use and operation"); Lollie, 407 So. 2d at 625 (explaining that "[a]lthough an automobile has long been held to be a dangerous instrumentality, it is so because of the dangers in its use and operation, not because it is dangerous in and of itself"); see also Chrysler v. Wolmer, 499 So. 2d 823, 826, n. 1 (Fla. 1986) (pointing out that "[a]lthough an automobile has long been held to be a dangerous instrumentality, it is not inherently dangerous in and of itself. Rather, an automobile is dangerous only in its use and operation."). In

---

using the term "dangerous instrumentality" interchangeably with the term "inherently dangerous." See, e.g., Scott & Jobalia Const. Co., Inc. v. Halifax Paving, Inc., 538 So. 2d 76, 79-80 (Fla. 5th DCA 1989) (relying on case law holding that cranes are inherently dangerous to support the proposition that "a crane being used on a construction site is a 'dangerous instrumentality' which can subject its owner to vicarious liability"); Mann v. Pensacola Concrete Const. Co., Inc., 527 So. 2d 279, 280 (Fla. 1st DCA), rev. denied, 534 So. 2d 400 (Fla. 1988) (relying on case law holding that cranes are inherently dangerous to support the proposition that the owner of a crane may be held vicariously liable as the owner of a dangerous instrumentality).

stark contrast with the position taken in Plaintiff's brief, therefore, a review of the existing case law in Florida amply demonstrates that the courts have invariably rejected the very assertion which Plaintiff now asks this Court to embrace.

Accordingly, Plaintiff's position that the First District's opinion below is inconsistent with many cases that have applied the dangerous instrumentality doctrine to various types of vehicles based on a conclusion that they are inherently dangerous is simply not an accurate recitation of Florida law. Although Plaintiff asserts that this Court utilized his "simple and practical 'inherently dangerous'" test in Meister v. Fisher, 462 So. 2d 1071 (Fla. 1984) to conclude that a golf cart is a dangerous instrumentality, a review of the Meister opinion belies Plaintiff's contention. Nowhere in the Meister decision is there any mention whatsoever of the notion of a golf cart being inherently dangerous. In fact, and completely consistent with the analysis utilized by the First District below, the primary grounds to justify this Court's decision regarding a golf cart being a dangerous instrumentality in Meister were the fact that the Florida Legislature imposed restraints, regulations, and restrictions upon the use of golf carts for the protection of the public as well as the reality that golf carts are used in the same manner as an automobile and pose a sufficient danger to the public so as to justify the imposition of vicarious liability. Id. at 1072-73.

According to Plaintiff, the reason that farm tractors, along with cars, trucks, and golf carts, should all be found to be dangerous instrumentalities is because they are all inherently dangerous given that they "are all products that are likely to cause serious injury or death when they are being misused." [Initial Brief at 4]. Plaintiff reiterates this argument on page 9 of his brief when he argues that "[f]arm tractors have proven themselves to be inherently dangerous" since "the misuse of a tractor can certainly cause death and destruction." Although it is true that the misuse of a farm tractor can lead to serious injury or death, this reality does not establish that farm tractors are inherently dangerous under Florida law. If anything, Plaintiff's argument shows just the contrary to be true in that although a farm tractor may be dangerous if misused or operated negligently, it is not inherently dangerous.

The "inherently dangerous" test proposed by Plaintiff in his initial brief on the merits demonstrates a fundamental misunderstanding of the inherently dangerous doctrine and, in particular, a misconception regarding what makes a product inherently dangerous as a matter of law. In Seitz, 500 So. 2d at 710, the First District addressed this issue stating the following:

> courts have applied the concept of inherently dangerous instrumentality or commodity to explosives, firearms, electricity, natural gas, drugs, highly toxic materials, and cranes or construction hoists . . . From all that we can

> determine, something which is inherently dangerous must be so imminently dangerous in kind as to imperil the life or limb of any person who uses it, or as stated in Tampa Drug Company v. Wait, "a commodity burdened with a latent danger which derives from the very nature of the article itself." "Inherently dangerous" has also been said to mean a type of danger inhering in an instrumentality or condition itself at all times, requiring special precautions to be taken to prevent injury, and not a danger arising from mere casual or collateral negligence of others under particular circumstances.

What Plaintiff's position overlooks is that the fact that a farm tractor - or any other vehicle, for that matter - can be dangerous when it is misused and operated negligently does not make it inherently dangerous. In fact, this was the very point acknowledged by this Court back in 1920 in Southern Cotton Oil Co., 86 So. at 632 when it formally adopted the dangerous instrumentality doctrine in order to impose liability on automobile owners for the negligent use of their vehicles by others. The Court stated as follows:

> Wild animals and high explosives are dangerous per se; that is, they may inflict injury without the immediate application of human aid or instrumentality. Neither a locomotive, a trolley car, nor an automobile is dangerous per se-by or through itself-in that neither can inflict injury to a person, except by its use or operation. A locomotive in the roundhouse, a trolley car in the barn, an automobile in a garage, are almost as harmless as canary birds; but in operation they are dangerous instrumentalities, and the master who intrusts them to another to operate -the one, on its right of way; the others, on the public highways-cannot exonerate himself

> from liability for injury caused to others by the negligence of those to whom they are intrusted.

Id. Therefore, and as adeptly explained by this Court in Southern Cotton Oil, the very reason that the dangerous instrumentality doctrine was formally incorporated into Florida's jurisprudence was based on the premise that motor vehicles are not inherently dangerous. Plaintiff's request, therefore, that this Court apply a "simple test" with respect to the application of the Florida dangerous instrumentality doctrine by merely asking whether a farm tractor is inherently dangerous is legally unsound and fundamentally inconsistent with longstanding Florida precedent.

B. The Fact That A Farm Tractor Falls Within A Statutory Definition of "Motor Vehicle" Cannot Justify Application of the Dangerous Instrumentality Doctrine.

Plaintiff again - under the guise of adding "consistency and reliability to the dangerous instrumentality doctrine" - invites this Court to implement yet another "simple test" by holding in this case that all motor vehicles as defined by statute are dangerous instrumentalities under the law. According to Plaintiff, because a farm tractor falls within the definition of "motor vehicle" as set forth in §316.003(21), Fla. Stat., it should be considered a dangerous instrumentality. While Plaintiff's efforts to simplify the doctrine of dangerous instrumentality may

be well intentioned, the exceedingly oversimplified analysis urged - if incorporated by this Court - would have the antithetical effect of turning the dangerous instrumentality law in Florida on its head by completely disregarding the analysis that has been utilized by the courts for the past 90 years.

Section 316.003(21), Fla. Stat., defines "motor vehicle" as "any self-propelled vehicle not operated upon rails or guideway, but not including any bicycle, motorized scooter, electric personal assistive mobility device or moped."[2] As pointed out in Plaintiff's initial brief on the merits, a farm tractor falls within this definition. However, but not addressed by Plaintiff in his brief, notwithstanding that a farm tractor may fall within the definition of "motor vehicle" under §316.003(21), Fla. Stat., it does not come within the definition of "motor vehicle" contained in many other places throughout Florida Statutes. For example, §320.01(1)(a), Fla. Stat., which is the chapter in Florida Statutes governing licensing, defines the term "motor vehicle" as "an automobile, motorcycle, truck, semitrailer, truck tractor and semitrailer combination, or any other vehicle ***operated on the roads of this state, used to transport persons or property***, and propelled by power other than muscular power, but the term does

[2]The term "farm tractor" is specifically defined in §316.003(12), Fla. Stat., as "any motor vehicle designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry."

not include traction engines, road rollers, such vehicles as run only upon a track, bicycles or mopeds." (emphasis added). This definition would seem to exclude farm tractors, which are not used as a mode of transportation to carry persons or property on the public roadways.

FDLA respectfully submits that the unsoundness in the analysis used in the Plaintiff's initial brief on the merits is that it fails to recognize that although a farm tractor may be generally characterized as a "motor vehicle" insofar as it is a "self-propelled vehicle," it is not a motor vehicle for purposes of the dangerous instrumentality analysis. Quite simply, it is not and has never been utilized as either a mode of transportation or an instrumentality that is accessible on a regular basis to the general public. This was among the legal grounds relied upon by the First District below in refusing to conclude that a farm tractor being used on private farmland is a dangerous instrumentality.

Notwithstanding that a farm tractor falls within the definition of "motor vehicle" contained in §316.003(21), Fla. Stat., it also comes within the definition of "Special Mobile Equipment" contained in §316.003(48), Fla. Stat., since it is used only incidentally on the public roadways to transport itself and not to transport persons and property. Not only is a tractor specifically included by name in the various pieces of machinery mentioned in §316.003(48), Fla. Stat., but

it also falls squarely into the statute's definition of "Special Mobile Equipment" insofar as it is a "vehicle not designed or used primarily for transportation of persons or property, and only incidentally operated or moved over a highway." As explained by the Fifth District in Crane Rental of Orlando, Inc. v. Hausman, 518 So. 2d 395, 398 (Fla. 5th DCA 1987), dec. approved, 532 So. 2d 1057 (Fla. 1988), by virtue of defining "Special Mobile Equipment" in §316.003(48), Fla. Stat., the Legislature intended to distinguish motor vehicles, which are used primarily to transport persons and property from machinery that requires the use of public highways as a means to transport itself. See also M.J.S. v. State, 453 So. 2d 870, 871 (Fla. 2d DCA 1984) (recognizing that a backhoe, which is a tractor, does not qualify as a motor vehicle because it is not designed or primarily used for the transportation of persons or property and while it may be self-propelled, such movement is only incidental to its main function as a piece of machinery). Thus, a farm tractor, because it is primarily a piece of machinery and is not operated on a regular basis as a mode of transportation on the public roadways, is not a "motor vehicle" as contemplated by the Florida Legislature. As such, and consistent with the First District's decision in Canull v. Hodges, 584 So. 2d 1095 (Fla. 1st DCA 1991), rev. denied, 595 So. 2d 556 (Fla. 1992), because a farm tractor, like a road grader is not regulated like an automobile, which primarily operates on the public

roadways, it should not be found to be a dangerous instrumentality. See §320.51(1), Fla. Stat., (wherein the Florida Legislature exempted from the motor vehicle registration, license tax, and license plate display requirements motor vehicles operated principally on farms, groves, or orchards in agricultural or horticultural pursuits if operated only incidentally on roads of the state while going to or from such farms, groves, or orchards).

Moreover, and as pointed out in the answer brief of the merits, were the Court to adopt the test suggested by Plaintiff, it would be an outright departure from and rejection of a number of prior cases, all of which have expressly held that the statutory definitions of "motor vehicle" are not controlling when determining whether a vehicle comes within the dangerous instrumentality doctrine. See Festival Fun Parks v. Gooch, 904 So. 2d 542, 545-46 (Fla. 4th DCA 2005) (quoting from Harding v. Allen-Laux, Inc., 559 So. 2d 207, 208 (Fla. 2d DCA 1990), where the court stated "[f]or the purposes of the judicially created dangerous instrumentality doctrine, the various definitions of 'motor vehicle' within Florida Statutes are not dispositive"); Edwards v. ABC Transp. Co., 616 So. 2d 142, 143 (Fla. 5th DCA 1993) (holding that a trailer is not a dangerous instrumentality notwithstanding the fact that it meets the definition of a motor vehicle under Chapter 320 of the Florida Statutes pertaining to motor vehicle

license); U-Haul Co. v. Liberty Mut. Ins. Co., 445 So. 2d 1082, 1083 (Fla. 4th DCA 1984) (although a trailer is a motor vehicle for purposes of licensing or service of process, it is not a motor vehicle under the dangerous instrumentality doctrine).

Finally, Plaintiff incorrectly argues that were the Court to hold that all vehicles defined as "motor vehicles" are dangerous instrumentalities, its holding would be consistent with the Southern Cotton Oil decision which, according to Plaintiff, determined that an automobile was a dangerous instrumentality because it was a motor vehicle. This characterization of the Southern Cotton Oil opinion is not accurate since the Court did not rely upon the statutory definition of "motor vehicle" when adopting the dangerous instrumentality doctrine, but rather looked to the fact that the Legislature has imposed significant restraints, regulations, and restrictions upon the use of automobiles on the roadways thereby demonstrating the need to protect the general public from the dangers surrounding the operation of an automobile.

C. Although a Farm Tractor Is Subject to Some Regulation Pursuant to Florida Statute, the Lack of Intensive Legislative Regulation of Farm Tractors on the Public Roadways Is An Indication That Farm Tractors Should Not Be Subjected to the Dangerous Instrumentality Doctrine.

Plaintiff accurately points out that while many of the Florida decisions applying the dangerous instrumentality doctrine have made reference to a motor vehicle being operated on a public highway, Florida case law has clarified not only that the doctrine can apply to vehicles other than automobiles, but also that operation of the instrumentality on a public roadway is not the determining factor with respect to application of the doctrine. See Meister, 462 So. 2d at 1073 (applying the dangerous instrumentality doctrine to a golf cart being operated on a golf course); Reid v. Associated Engineering of Osceola, Inc., 295 So. 2d 125, 129 (Fla. 4th DCA 1974) (applying the dangerous instrumentality doctrine to a truck being operated on a private road); Harding, 559 So. 2d at 108 (applying the dangerous instrumentality doctrine to a forklift being operated to install sod on a public highway).

The one element, however, that continues to be the common thread running throughout the dangerous instrumentality case law, which appears to be the key consideration when determining whether the doctrine is applicable to a particular instrumentality, is the practical concern for citizens' safety necessitated by the substantial degree of danger and risk posed to the public-at-large. For example, in Meister, 462 So. 2d at 1073, this Court was clear to point out that the underlying justification for its willingness to apply the dangerous instrumentality

doctrine to golf carts used on golf courses was the "sufficient danger" posed to the public as a result of "Florida's tremendous tourist and retirement communities," which make golf carts and golf courses extremely prevalent throughout the state thereby raising a concern about the danger to the public.

It is this crucial element of public danger that is missing with the farm tractor in this case. Thus, Plaintiff's attempts to compare the farm tractor and the golf cart are misplaced. As alluded to in Defendant's answer brief on the merits, unlike the farm tractor which is almost exclusively utilized on private farmland, the golf cart is not relegated to use on the golf course. To the contrary, in many Florida retirement and resort communities, a golf cart has become an alternative mode of transportation to an automobile and, as such, is routinely driven on public roadways where it is in constant contact with pedestrians. As a result of this reality, and in stark contrast with a farm tractor, the operation of a golf cart on public roadways and within retirement communities has become the topic of comprehensive statutory regulation. See §316.212, Fla. Stat. (amended by 2008 Fla. Sess. Laws Serv. Ch. 2008-98 (C.S.S.B. 192)); §316.2125, Fla. Stat. (amended by 2008 Fla. Sess. Laws Serv. Ch. 2008-98 (C.S.S.B. 192)). The Legislature requires golf carts - much like automobiles - to be "equipped with efficient brakes, reliable steering apparatus, safe tires, a rearview mirror, and red

reflectorized warning devices in both the front and rear." See §316.212(5), Fla. Stat. (amended by 2008 Fla. Sess. Laws Serv. Ch. 2008-98 (C.S.S.B. 192)).

The only requirements for a farm tractor operating on a public roadway, on the other hand, is that it have lights, reflectors, and a slow moving emblem. See §316.2295, Fla. Stat. Additionally, §320.51, Fla. Stat., provides that if a farm tractor will be operated on the public roads, it must be equipped with proper tires. Contrary to the Plaintiff's contention in his initial brief of the merits, the level of regulation pertaining to golf carts and farm tractors on the public roadways is not the same.

This lack of intensive legislative regulation of farm tractors on the public roadways is yet another indication that farm tractors should not be subjected to the dangerous instrumentality doctrine since the Florida Legislature has not treated them as "motor vehicles" under Florida law. See Southern Cotton Oil, 86 So. at 635 (justifying application of the dangerous instrumentality doctrine on grounds that "[i]t is idle to say that the Legislature imposed all these restraints, regulations, and restrictions upon the use of automobiles if they were not dangerous agencies which the Legislature felt it was its duty to regulate and restrain for the protection of the public").

The fact that the farm tractor - whose primary function remains agricultural and is used out of the public arena - has not been subjected to similar statutory regulation demonstrates that this instrumentality is simply not comparable to the golf cart as Plaintiff has suggested. As pointed out above, unlike the golf cart, the farm tractor is neither used as a mode of transportation on public roadways nor operated in public places on a regular basis. The recognition of this fact, and the acknowledgment that a farm tractor is only used incidentally on public roadways while traveling to or from a farm, is evidenced by the fact that the Florida Legislature has exempted farm tractors from motor vehicle registration, payment of license taxes, and the display of a license plates. See §320.51, Fla. Stat.

For the same reason that a farm tractor need not be regulated pursuant to Chapter 320, it should not be considered a dangerous instrumentality. Quite simply, a farm tractor is not and has never been utilized as either a mode of transportation or an instrumentality that is accessible on a regular basis to the general public.

The trial court's ruling and the First District's opinion - which refused to extend the dangerous instrumentality doctrine to a farm tractor operating on private farmland - was entirely correct. The rationale for the dangerous instrumentality doctrine simply does not apply to a farm tractor, which operates at

a speed not exceeding 15 miles per hour, and is utilized, for the most part, away from the public on private, rural farmland. By seeking to apply the doctrine to this scenario, Plaintiff is asking this Court to extend the dangerous instrumentality doctrine far past where it has ever been taken in the past and beyond where it logically can go without rewriting the doctrine.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should approve the decision of the First District below and clarify that the dangerous instrumentality doctrine does not apply to the farm tractor in this case.

KUBICKI DRAPER, P.A.
as Chair of the Amicus Curiae
Committee for FDLA
25 West Flagler Street, Penthouse
Miami, Florida 33130
Direct Line: (305) 982-6634
Facsimile: (305) 374-7846

By: _____
CARYN L. BELLUS, ESQ.
Florida Bar Number: 060445
SHARON C. DEGNAN, ESQ.
Florida Bar Number: 061255

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this _____ day of October, 2010, to STEVEN L. BRANNOCK, ESQ., Brannock & Humphries, 400 N Ashley Drive, Suite 1100, Tampa, Florida 33602 and JENNIFER LESTER, ESQ., Dell Graham, P.A., 203 NE 1st Street, Gainesville, Florida 32601.

CARYN L. BELLUS, ESQ.

CERTIFICATE OF COMPLIANCE

In compliance with Florida Rule of Appellate Procedure 9.210(2), counsel for FDLA, certifies that the size and style of type used in this Brief are 14 point type, Times New Roman.

CARYN L. BELLUS, ESQ.