IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES EARL RIPPY, CASE NO.: SC09-1677

Petitioner,

vs.

JAMES SHEPARD,

Respondent.

ANSWER BRIEF ON THE MERITS

ON REVIEW FROM THE DISTRICT COURT OF APPEAL,
FIRST DISTRICT OF FLORIDA

DELL GRAHAM, P.A.
Jennifer Cates Lester
Florida Bar No. 0945810
Andrew A. Morey
Florida Bar No. 28159
203 N. E. First Street
Post Office Box 850
Gainesville, Florida 32602
Telephone: (352) 372-4381
Facsimile: (352) 376-7415
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

PRELIMINARY STATEMENT

The petitioner in this case, James Earl Rippy, shall be referred to as the petitioner. The respondent, James Shepard, shall be referred to as the respondent. References to the Record on Appeal shall be designated by an "R", followed by the appropriate page number.

STATEMENT OF THE CASE AND OF THE FACTS

As the petitioner's Statement of the Case and Facts is argumentative and incomplete, the respondent files this Statement of the Case and Facts. This case arose when the petitioner sued the respondent for negligence. The petitioner alleged in his complaint that on December 16, 2004, Michael Rose operated respondent's tractor with his knowledge and consent on respondent's farm land located in Chiefland, Levy County, Florida. R2. The tractor was a 1961 or 1962 Ford tractor, which operates at no more than 15 miles per hour, is approximately 12 feet long, and weighs approximately 4000 pounds. R2. The tractor was pulling a five foot bush hog, which had operational blades to cut grass. R2.

The petitioner alleged that on December 16, 2004, Michael Rose drove the tractor to the respondent's residence. R2. Once at the respondent's residence, Michael Rose continued to operate the tractor, and it struck the petitioner. R2. As a result, the petitioner suffered bodily injury. R3. The petitioner does not allege that the respondent was negligent. R2-3.

The petitioner asserts that the respondent's farm tractor is a dangerous instrumentality and that the respondent is therefore vicariously liable for the farm tractor's negligent use. R3. The respondent filed a motion to dismiss for failure to state a cause of action. R4. The trial court granted the respondent's motion, ruling that a farm tractor is not a dangerous instrumentality, and dismissed the case with

prejudice. R13. The petitioner appealed to the First District Court of Appeal. R14. The First District Court of Appeal affirmed the trial court's order in *Rippy v. Shepard*, 15 So. 3d 921 (Fla. 1st DCA 2009).

SUMMARY OF ARGUMENT

The petitioner sets forth a new test to determine whether a motor vehicle should be deemed a dangerous instrumentality for purposes of imposing vicarious liability on the instrumentality's owner. Under the petitioner's test, a farm tractor should be considered a dangerous instrumentality because it is "inherently dangerous." This Court should reject the petitioner's novel approach, and rely upon the traditional factors employed in the dangerous instrumentality analysis: (1) the degree of regulation by the legislature, and (2) the danger that the instrumentality poses to the public.

As recognized by the District Court, farm tractors are subject to minimal legislative regulation. This demonstrates that the legislature does not consider farm tractors to be dangerous instrumentalities. Additionally, courts strongly consider the location where the negligent operation occurred when determining whether a vehicle is a dangerous instrumentality. Thus, the dangerous instrumentality doctrine is more likely to apply when a vehicle is negligently operated on the public roadways or in public areas and less likely to apply on private property. In this case, the farm tractor was negligently operated on the respondent's private farm.

When applying the established factors to the facts of the instant case, this Court should conclude that the instant farm tractor was not a dangerous

instrumentality. Therefore, this Court should decline to extend the dangerous instrumentality doctrine to the farm tractor at issue here. Accordingly, the trial court's ruling on respondent's motion to dismiss should be affirmed.

ARGUMENT

THE PETITIONER HAS FAILED TO STATE A CAUSE OF ACTION FOR NEGLIGENCE AGAINST THE RESPONDENT BECAUSE THE FARM TRACTOR AT ISSUE WAS NOT A DANGEROUS INSTRUMENTALITY.

Standard of Review

The petitioner claims that the trial court erred by granting the motion to dismiss petitioner's Amended Complaint. "Whether a complaint is sufficient to state a cause of action is an issue of law. Consequently, a ruling on a motion to dismiss for failure to state a cause of action is *reviewable on appeal by the de novo standard of review*." *Warren v. K Mart Corp.*, 765 So. 2d 235 (Fla. 1st DCA 2000) (emphasis in original).

Discussion

I. A farm tractor is not inherently dangerous, and therefore cannot be subject to the dangerous instrumentality doctrine under the test set forth by the petitioner.

The petitioner's primary argument is that a farm tractor constitutes a dangerous instrumentality because, the petitioner contends, a farm tractor is "inherently dangerous." The Court should reject the petitioner's argument because such a standard is unsupported by legal authority and displaces the established framework for determining when the dangerous instrumentality doctrine applies. Furthermore, the petitioner's argument is directly contradicted by case law which states that even automobiles, which are dangerous instrumentalities, are not

"inherently dangerous." Accordingly, this Court should find the petitioner's argument without merit, and affirm the lower court's ruling.

In support of his argument, the petitioner claims that many cases hold "that vehicles [are] inherently dangerous regardless [of] where they [are] being operated." Petitioner's Brief on the Merits, p. 5. The petitioner further argues that "the dangerous instrumentality doctrine is first and foremost concerned with whether a vehicle is *inherently dangerous*." Petitioner's Brief on the Merits, p. 6. Finally, the petitioner argues that "the determination of what constitutes a dangerous instrumentality has always focused on the inherently dangerous nature of the product." Petitioner's Brief on the Merits, p. 8. While the petitioner's assertions fit conveniently into his argument, they have no basis under Florida law.

It is well established that an automobile is not inherently dangerous. In *Anderson v. Southern Cotton Oil Co.*, 73 Fla. 432, 441, 74 So. 975, 978 (Fla. 1917), this Court wrote that an automobile is not "inherently dangerous per se, but peculiarly dangerous in its use. . . ." Three years later, in *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 449, 86 So. 629, 632 (Fla. 1920), this Court added that an automobile is not "inherently dangerous per se" because "an automobile, like a locomotive or a trolley car, has no inherent elements of danger, but that it is peculiarly dangerous in its operation and use of [sic] the public highways."

Courts since *Southern Cotton* have similarly concluded that an automobile is not inherently dangerous. The First District Court of Appeal explained that "Although 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." *Lollie v. General Motors Corp.*, 407 So. 2d 613, 615 (Fla. 1st DCA 1981) (*citing Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920)). Similarly, in *Chrysler Corp. v. Wolmer*, 499 So. 2d 823, 826 n.1 (Fla. 1986) this Court reiterated that an automobile is not inherently dangerous: "Although 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." Finally, to further clarify the distinction between the inherently dangerous doctrine and the dangerous instrumentality doctrine, the First District Court of Appeal explained that

> While the phrase "dangerous instrumentality" and "inherently dangerous instrumentality" have often been used interchangeably, it should be remembered that they do not mean the same thing. While 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.

Seitz v. Zac Smith & Co., Inc., 500 So. 2d 706, 710 (Fla. 1st DCA 1987).

As case law clearly holds that an automobile is not inherently dangerous, this Court should similarly conclude that a farm tractor is not inherently dangerous. Therefore, if the Court accepts the petitioner's "simple and practical 'inherently

dangerous' test" to determine whether a farm tractor is a dangerous instrumentality, the Court would have to conclude that a farm tractor, not being inherently dangerous, is not subject to the dangerous instrumentality doctrine. See Petitioner's Brief on the Merits, p. 10. Accordingly, the Court's inquiry would end here.

Notwithstanding that a farm tractor is not inherently dangerous, there are other difficulties with the proposed standard or "simple test" set forth by the petitioner. At times, the petitioner appears to argue that a farm tractor is inherently dangerous because it is dangerous. Such a circular standard eliminates the factors usually employed by Florida courts when deciding whether to impose the dangerous instrumentality doctrine. Such factors include legislative regulation and the danger posed to the public. While the petitioner claims that "This simple and practical 'inherently dangerous' test is precisely what this Court utilized in *Meister* [*v. Fisher*, 462 So. 2d 1071 (Fla. 1984)] when it held that a golf cart constitutes a dangerous instrumentality," this Court never used the words "inherently dangerous" and makes no allusion to an "inherently dangerous test" in its *Meister* decision. Petitioner's Brief on the Merits, p. 10. Further, the petitioner's proposed "inherently dangerous test" finds no support from other Florida cases addressing the dangerous instrumentality doctrine.

Another difficulty with petitioner's "simple and practical 'inherently dangerous' test" is its reliance on case law that discusses "dangerous instrumentalities" that are not subject to the dangerous instrumentality doctrine. The petitioner cites *Skinner v. Ochiltree*, 148 Fla. 705, 5 So. 2d 605 (Fla. 1941), a case addressing a gun injury, for the proposition that "because the use of a dangerous instrumentality involves such a high degree of risk of serious injury or death, whoever deals in such instrumentalities must exercise the 'highest degree of care.'" Petitioner's Brief on the Merits, p. 8. The petitioner then argues that farm tractors are dangerous instrumentalities because, among other things, they "require the exercise of the highest degree of care." Petitioner's Brief on the Merits, p. 9.

While a gun is considered a "dangerous instrumentality" and may require "the highest degree of care," *Skinner v. Ochiltree*, 148 Fla. 705, 708, 5 So. 2d 605, 606 (Fla. 1941), the misuse of a gun does not impose vicarious liability on the gun's owner. *See Foster v. Arthur*, 519 So. 2d 1092, 1094 (Fla. 1st DCA 1988) (writing that "owner of a firearm is not liable for its negligent or intentional use by another, unless the owner knew, or should have known, that the other person was likely to use it in a manner involving an unreasonable risk of harm to others."); *Williams v. Bumpass*, 568 So. 2d 979, 981 (Fla. 5th DCA 1990) (holding that "liability is not predicated upon ownership of the firearm but rather upon whether the harm was or should have been foreseeable by the person entrusting or

delivering the weapon to another."). Thus, it does not logically follow that because "tractors require the exercise of the greatest degree of care," that owner liability is warranted. The petitioner improperly intermingles concepts from a gun case into the instant case which addresses the dangerous instrumentality doctrine in the context of motor vehicles.

Finally, the petitioner cites statistics that were provided neither to the trial court nor to the district court below. As such, the respondent objects to their use. Should the Court examine the statistics, however, it will be clear that they do not disclose how many of the 2,165 deaths that took place over a ten-year period in a country of over 300,000,000 people occurred in Florida (if any). The petitioner's statistics also do not disclose how many of those deaths occurred on public roadways versus private farms. Furthermore, the petitioner's statistics do not address whether "the types of accidents caused by the operation of [farm tractors] are . . . *identical to those involving other motor vehicle* accidents." *Meister*, 462 So. 2d at 1073. In fact, the website cited by the petitioner focuses on tractor overturns, and recommends roll bars in conjunction with seatbelts on farm tractors. It appears the main concern is protecting the operator of the tractor, rather than protecting the general public. Therefore, the statistics do not support the petitioner's argument, as the primary factor used by courts to determine if the dangerous instrumentality doctrine applies is the danger posed to the public.

In sum, the petitioner's proposed test uses a legal doctrine—the inherently dangerous doctrine—which is inconsistent with how Florida courts assess whether the dangerous instrumentality doctrine should apply to a motor vehicle or motorized equipment. Rather than jettison 90 years of legal precedent, this Court should apply the familiar factors—including the danger posed to the general public and regulation and licensing requirements—to determine whether the owner of a farm tractor should be liable for its negligent use. Alternatively, should the Court accept the inherently dangerous test proposed by the petitioner, the Court should find that a farm tractor is not inherently dangerous.

II. Because farm tractors are not extensively regulated by the legislature, the designation of a farm tractor as a "motor vehicle" has no bearing on whether the dangerous instrumentality doctrine should apply.

The petitioner urges this Court to hold that all motor vehicles as defined by statute be considered "dangerous instrumentalities" under the law. See Petitioner's Brief on the Merits, p. 11. This Court should reject the petitioner's argument for two reasons: (1) the statutory definition of a "motor vehicle" is not controlling in determining whether a device is a dangerous instrumentality; and (2) the designation of "motor vehicle" is not evidence of a farm tractor's danger to the public. Accordingly, the petitioner's argument is without merit.

Although farm tractors are defined as "motor vehicles" by certain Florida statutes, this statutory definition does not control whether the dangerous

instrumentality doctrine applies. *See Festival Fun Parks, LLC v. Gooch*, 904 So. 2d 542, 545-46 (Fla. 4th DCA 2005); *Edwards v. ABC Transp. Co.*, 616 So. 2d 142, 143 (Fla. 5th DCA 1993); *Harding v. Allen-Laux, Inc.*, 559 So. 2d 107, 108 (Fla. 2d DCA 1990). The *Harding* court explained:

> For the purposes of the judicially created dangerous instrumentality doctrine, the various definitions of "motor vehicle" within the Florida Statutes are not dispositive. The doctrine is not necessarily invoked by any statutory definition of motor vehicle. Instead, it is invoked by a judicial decision that "an instrumentality of known qualities is so peculiarly dangerous in its operation as to" justify the doctrine.

559 So. 2d at 108 (quoting *Southern Cotton Oil Co. v. Anderson*, 86 So. 629, 638 (Fla. 1920)). The district court below similarly concluded that the definitions of "motor vehicle" are not controlling in determining whether a device is a dangerous instrumentality. *Rippy v. Shepard*, 15 So. 3d 921, 922 (Fla. 1st DCA 2009).

More importantly, the use of the words "motor vehicle" to describe a farm tractor has no bearing on whether it should be deemed a dangerous instrumentality because farm tractors are subject to such minimal regulation. Therefore, the words "motor vehicle" are not evidence of a farm tractor's dangerousness. As the Fourth District Court of Appeal explained in *Gooch*, "When the Supreme Court extended the dangerous instrumentality doctrine to golf carts in *Meister*, it did so not simply because golf carts are defined as motor vehicles. The Court deemed it significant that golf carts, like automobiles, are extensively regulated by the Florida legislature." 904 So. 2d at 546. Therefore, this Court should focus on the degree of

regulation and licensing requirements that apply to farm tractors, rather than mere nomenclature.

III. A farm tractor should not be considered a dangerous instrumentality because it is not extensively regulated by the legislature and, in the instant case, was operating on private property in Levy County, Florida.

This Court should apply the established framework for determining when the dangerous instrumentality doctrine applies to a motor vehicle. This Court should examine both the legislature's regulation of farm tractors, as well as the danger posed to the public by the farm tractor in the instant case. Because farm tractors are subject to such minimal regulation and because the farm tractor in the instant case posed little danger to the general public, this Court should affirm the lower court's order.

a. A farm tractor is not extensively regulated by the legislature.

The District Court below correctly concluded that "farm tractors are not extensively regulated by the legislature." *Rippy v. Shepard*, 15 So. 3d 921, 923 (Fla. 1st DCA 2009). The District Court found that "The only requirements for operating a farm tractor on a public highway is that it be outfitted with lights, reflectors, slow moving emblems, and proper tires." *Id.* "In fact, farm tractors are exempt from most motor vehicle regulations." *Id.* The petitioner appears to agree with the concept that "the more regulation, the more dangerous the vehicle, thus justifying application of the dangerous instrumentality doctrine." Petitioner's Brief

on the Merits, p. 13. Therefore, this Court should find that because farm tractors are subject to such minimal regulation, the dangerous instrumentality doctrine should not apply.

As explained and listed by the District Court below, there are few regulations that apply to farm tractors, and most statutes are in fact exemptions from regulation. *Rippy*, 15 So. 3d at 923. For example, the petitioner contends that Section 450.061, Florida Statutes, is a restriction placed on the operation of farm tractors. See Petitioner's Brief on the Merits, p. 17. However, Section 450.061 is truly an exemption from motor vehicle regulations, allowing 14 and 15 year olds to drive farm tractors for work. *Rippy*, 15 So. 3d at 923. Rather than applying more stringent regulations to farm tractors, as the petitioner suggests, this statute lessens the regulations that apply to farm tractors.

While the petitioner argues that "There is no less regulation of farm tractors in our case than there is of golf carts in the *Meister* case," the petitioner fails to point out much of the legislation directly addressing the use of golf carts on public roadways. Petitioner's Brief on the Merits, p. 16. Unlike farm tractors, the operation of golf carts is subject to a comprehensive statute that details the legal operation of golf carts on certain roadways. § 316.212, Fla. Stat. (amended by 2010 Fla. Sess. Law Serv. Ch. 2010-223 (West)). For example,

> A golf cart may be operated only upon a county road that has been designated by a county, or a municipal street that has been designated

> by a municipality, for use by golf carts. Prior to making such a designation, the responsible local governmental entity must first determine that golf carts may safely travel on or cross the public road or street, considering factors including the speed, volume, and character of motor vehicle traffic using the road or street. Upon a determination that golf carts may be safely operated on a designated road or street, the responsible governmental entity shall post appropriate signs to indicate that such operation is allowed.

§ 316.212(1), Fla. Stat.

Since the *Meister* opinion, the legislature has further regulated golf carts. Section 316.2125, Florida Statutes, addresses the operation of golf carts within a retirement community. Among other things, section 316.2125 provides that

> A county or municipality may prohibit the operation of golf carts on any street or highway under its jurisdiction if the governing body of the county or municipality determines that such prohibition is necessary in the interest of safety.

§ 316.2125(2)(a), Fla. Stat. Furthermore,

> A local government entity may enact an ordinance regarding golf cart operation and equipment which is more restrictive than those enumerated in this section. Upon enactment of any such ordinance, the local government entity shall post appropriate signs or otherwise inform the residents that such an ordinance exists and that it shall be enforced within the local government's jurisdictional territory. An ordinance referred to in this section must apply only to an unlicensed driver.

§ 316.2125(3), Fla. Stat. Yet another statute, section 316.2126, Florida Statutes, addresses the use of golf carts and utility vehicles by municipalities. By contrast, farm tractors have no comparable statutory scheme that regulates their use so extensively. It is difficult to understand the petitioner's assertion that the

difference in regulation between farm tractors and golf carts is "minimal and irrelevant." Petitioner's Brief on the Merits, p. 17.

It is clear from the absence of extensive regulation and licensing requirements that the legislature deemed farm tractors not to be dangerous instrumentalities. Furthermore, the lack of extensive regulation is consistent with the more important evaluation of the danger that this farm tractor, under the facts of this case, posed to the public.

b. Whether a motor vehicle is "peculiarly dangerous" is based primarily on the degree of danger it poses to the public.

The First District, writing below, stated that farm tractors "are neither used as a mode of transportation nor routinely operated in public places as to pose a sufficient danger to the public." *Rippy v. Shepard*, 15 So. 3d 921, 923 (Fla. 1st DCA 2009). The First District's opinion recognized that the degree of danger posed to the public is a significant factor, if not the key factor, in cases addressing the dangerous instrumentality doctrine. In this case, the negligent operation of the farm tractor on private property in Levy County, Florida did not pose a sufficient danger to the public to justify the imposition of vicarious liability, and therefore the decision below should be affirmed.

The key consideration when measuring the degree of danger posed to the public is the instrumentality's proximity to the public. The petitioner concedes as much: "the more often people are exposed to the potentially dangerous nature of

the vehicle, the more likely the vehicle should be included within the realm of the dangerous instrumentality doctrine." Petitioner's Brief on the Merits, p. 14. While the Fourth District Court of Appeal in *Reid v. Associated Engineering of Osceola, Inc.*, 295 So. 2d 125 (Fla. 4th DCA 1974) and this Court in *Meister v. Fisher* have clarified that operation on a public roadway is not necessary for the application of the dangerous instrumentality doctrine, it is nonetheless clear that Florida courts place great emphasis on the location of a vehicle's negligent operation, and specifically its proximity to the public, when deciding whether to invoke the doctrine.

A series of opinions illustrate that an instrumentality must pose a sufficient danger to the public before courts will impose liability under the dangerous instrumentality doctrine. In *Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1984), this Court held that a golf cart, when operated on a golf course, is a dangerous instrumentality. After reviewing the legislative regulation of golf carts, the Court turned to the issue of whether golf carts "pose a sufficient danger to the public to impose vicarious liability." *Id.* at 1073. The Supreme Court explained that

> Florida's tremendous tourist and retirement communities make golf carts and golf courses extremely prevalent in this state. And there is evidence in this record from an expert who stated he has investigated numerous accidents involving golf carts 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 those involving other motor vehicle accidents.*" Furthermore, as we discussed earlier in the opinion, the recent legislation concerning golf carts indicates the

legislature's concern about the dangers of golf carts to the public. *Id.* at 1073. Rather than hold that golf carts, wherever operated, are dangerous instrumentalities, the *Meister* Court limited its holding to golf carts that are operated on golf courses, a place accessible to the public.[1] *Id.* at 1071, 1073. Therefore, this Court found that golf carts pose a sufficient danger to the public while operated on golf courses to justify invoking the dangerous instrumentality doctrine. *Id.*

This Court's focus on the location of the negligent operation is further illustrated in *Kraemer v. General Motors Acceptance Corp.*, 572 So. 2d 1363 (Fla. 1990). In *Kraemer*, this Court addressed whether an automobile's lessor could be held vicariously liable under the dangerous instrumentality doctrine. This Court stated that

> The dangerous instrumentality doctrine seeks to provide greater financial responsibility to pay for the carnage on our roads. It is premised upon the theory that the one who originates the danger by entrusting the automobile to another is in the best position to make certain that there will be adequate resources with which to pay the damages caused by its negligent operation. If Florida's traffic problems were sufficient to prompt its adoption in 1920, there is all the more reason for its application to today's high-speed travel upon crowded highways.

[1] The Supreme Court stated in *Meister* that "We . . . hold that a golf cart that is being operated on a golf course is included within the dangerous instrumentality doctrine." *Id.* at 1071. Furthermore, "[A] golf cart when negligently operated on a golf course, has the same ability to cause serious injury as does any motor vehicle operated on a public highway." *Id.* at 1073.

Id. at 1365. Thus, while operation on public roads is not necessary to invoke the doctrine, a vehicle's negligent operation on public roads and public areas, and thus the vehicle's potential to cause "carnage" to the public, is a key factor.

Similarly, in *Harding v. Allen-Laux, Inc.*, 559 So. 2d 107 (Fla. 2d DCA 1990), the Second District Court of Appeal found that a forklift can be a dangerous instrumentality when operated in close proximity to the public. The plaintiff, who was driving a car, was involved in a collision on State Road 43 with "a 16,000-pound forklift." *Id.* at 108. The forklift was being used to install sod along the side of the state road and "often operated on the roadway in this work zone." *Id.* The *Harding* Court found

> If an owner of a golf cart is liable under Florida's dangerous instrumentality doctrine for the golf cart's operation on a golf course by a lessee, surely the owner of this larger, four-wheel vehicle with protruding steel tusks is liable under this doctrine for its operation on a public highway by a lessee.

Id. (citations omitted). In forming its decision that a forklift should be treated as a dangerous instrumentality, the *Harding* Court stated that

> The legal rules of liability for the authorized use of peculiarly dangerous instrumentalities are especially applicable to the negligent operation on the public highways of motor vehicles whose weight, speed, and mechanism render the negligent or inefficient use of them perilous to the public, who have a right to travel the highways without being subjected to undue dangers of injury by others.

Id. at 108. The *Harding* Court held that "*this* forklift is a dangerous instrumentality *under the facts of this case*." *Id.* (emphasis added).

The *Harding* Court emphasized that the forklift was operated on a state road where it threatened "the public, who have a right to travel the highways," and, furthermore, that the doctrine is "especially applicable to the negligent operation on the public highways." *Id.* The *Harding* decision is most appropriately read as applying the doctrine to a forklift when that forklift is intermingled with other motor vehicles driven by the public on public roads. The *Harding* decision appears limited to the facts of the case and does not create a *per se* rule that a forklift is a dangerous instrumentality. *See, id.*

Finally, in *Canull v. Hodges*, 584 So. 2d 1095 (Fla. 1st DCA 1991), the First District addressed whether a road grader was a dangerous instrumentality when operated on an airport construction site by a fellow employee of the plaintiff. The First District narrowly interpreted *Reid* as applying to automobiles, but not to road graders. Thus, the First District felt the most analogous cases were those involving cranes "operating in areas not accessible to the general public." *Id.* at 1097. Because road graders did not lift loads or persons, the First District found that the dangerous instrumentality doctrine did not apply. Thus, the First District's decision, likes those before it, focused on the location of the road grader's operation, and the corresponding peril posed to the public.

In the instant case, there is neither precedent nor any allegation contrary to the trial court's finding that this farm tractor was not a dangerous instrumentality

based on the location of its operation. In the instant case, Michael Rose operated the tractor on private farm land. At the time of the accident, the petitioner was neither a motorist nor a traveler on a public highway. The tractor was owned by a private individual, operated by a private individual and the accident occurred on private land. The tractor in this case posed no threat to the public. The instant case is unlike *Harding* where the forklift was negligently operated on a state road over which the public had a right to travel. In this case, the negligent operation of the tractor occurred on the respondent's private property.

Application of *Meister* leads to a similar outcome. "Common knowledge and common experience" indicates that the "tremendous tourist and retirement communities" that make golf carts a risk to the public are not having the same effect on farm tractors. Farm tractors are not operated on golf courses open to the public. To the contrary, farm tractors are most often operated on private property and only rarely on public roads. Moreover, farm tractors are operated most commonly in bucolic settings rather than on bustling golf courses open to the public. Therefore, the concern that the legislature expressed about the dangers of golf carts to the public does not apply to farm tractors.[2]

[2] Even if this case involved a golf cart instead of a farm tractor, the *Meister* opinion would not necessarily require the application of the dangerous instrumentality doctrine to this case. A golf cart driven on private lands in Levy County, Florida is readily distinguishable from a golf cart driven on the heavily populated and publicly accessible golf courses found in other parts of this state

In accordance with this Court's focus on the location of the negligent operation, as demonstrated in *Meister*, this Court should find that under the circumstances of this case, this farm tractor, while operated on private property in Levy County, was not a dangerous instrumentality.

IV. The petitioner waived the argument that either the trial court or the district court erred by resolving the question on a motion to dismiss.

The respondent objects to the petitioner's argument that this case should be remanded for evidentiary development. This Court has held repeatedly that "it is not appropriate for a party to raise an issue for the first time on appeal." *Sunset Harbour Condominium Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005). Thus, this Court held in *Robbins* that the appellants "waived any objection to the validity of the asserted affirmative defense because no objection was raised in either the trial court or the district court." *Id.*; *see also Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999) (a claim not raised in the trial court will not be considered on appeal); *Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981) (appellate court will not consider issues not presented to the trial judge on appeal from final judgment on the merits). This Court in *Robbins* further explained:

---

such as Broward County. The degree of danger posed to the public in *Meister* and *Harding* is simply absent in the instant case.

> In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the *specific legal argument* or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved.

914 So. 2d at 928 (quoting *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985)) (emphasis added); *see also Abrams v. Paul*, 453 So. 2d 826, 827 (Fla. 1st DCA 1984) (writing that "in the absence of jurisdictional or fundamental error, it is axiomatic that it is the function of the appellate court to review errors allegedly committed by trial courts, not to entertain for the first time on appeal issues which the complaining party could have, and should have, but did not, present to the trial court."); *Kozich v. Hartford Ins. Co. of Midwest*, 609 So. 2d 147, 148 (Fla. 4th DCA 1992) (holding that because appellant did not make specific argument in the trial court, appellant was prevented from offering it for the first time on appeal).

In the instant case, the petitioner failed to argue at the trial court level that further evidentiary development was needed. Similarly, while the district court specifically addressed each of the points raised by petitioners, the need for further factual development was not among petitioner's arguments. Now, for the first time, petitioner asserts the argument that the determination of whether an object is a dangerous instrumentality requires factual development by the trial court. As the trial court and the appellate court were not given the opportunity to rule on this argument, this Court should decline to address it.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed and this Court should hold that a farm tractor is not a dangerous instrumentality under the facts of this case.

Respectfully submitted,

by: _____

Jennifer Cates Lester
Florida Bar Number: 0945810
Andrew A. Morey
Florida Bar Number: 28159
Post Office Box 850
Gainesville, FL 32602-0850
(352) 372-4381
Attorneys for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 21, 2010, a true and correct copy of the foregoing has been furnished by mail to the following: Steven L. Brannock, Esquire, Brannock & Humphries, 400 North Ashley Drive, Suite 1100, Tampa, Florida 33602, and Caryn L. Bellus, Esquire, Kubicki Draper, P.A., 25 West Flagler Street, Penthouse, Miami, FL 33130.

DELL GRAHAM, PA

by: _____
Jennifer Cates Lester
Florida Bar Number: 0945810
Andrew A. Morey
Florida Bar Number: 28159
Post Office Box 850
Gainesville, FL 32602-0850
(352) 372-4381
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this motion complies with the font requirements of Rule 9.210(a).

by: _____
Jennifer Cates Lester