IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES EARL RIPPY,

Petitioner,

v.

JAMES SHEPARD,

Respondent.

_____/

Case No. SC09-1677
Lower Tribunal No(s).: 1D07-6626, 38-2007-CA-00529

RESPONDENT'S BRIEF ON JURISDICTION

On Review from the District Court of Appeal, First District of Florida

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DELL GRAHAM, PA

by:_____
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PRELIMINARY STATEMENT

The Petitioner in this case, James Earl Rippy, shall be referred to as Petitioner. The Respondent, James Shepard, shall be referred to as Respondent. References to the Opinion of the First District Court of Appeal in this case shall be designated as "Opinion," 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 contains facts outside the First District Court of Appeal's opinion, the Respondent files this Statement of the Case and of the Facts. This case arose when the Petitioner sued the Respondent as a result of an accident with a farm tractor. Opinion at 1. The circuit court dismissed the case, finding that a farm tractor was not a dangerous instrumentality. The Petitioner appealed. The First District considered the case and found that a farm tractor was not a dangerous instrumentality. In doing so, the First District relied on case law from this Court, as well as other districts. Opinion at 3. The First District then affirmed the circuit court's dismissal. Opinion at 1.

SUMMARY OF THE ARGUMENT

In order for this Court to exercise its conflict jurisdiction, the conflict must be express and direct and contained within the four corners of the opinion sought to be reviewed. In this case, the only facts the First District Court of Appeal cited in its opinion are that: 1) farm tractors are not extensively regulated; 2) they are not used as a mode of transportation; and 3) they are not routinely operated in public places. The First District then applied well-established Florida precedent regarding the dangerous instrumentality doctrine to those facts, and, therefore, there is no conflict.

The Petitioner argues that *Rippy v. Shepard* conflicts with two other appellate cases: *Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1984) and *Harding v. Allen-Laux, Inc.*, 559 So. 2d 107 (Fla. 2d DCA 1990). However, the First District relied on the same factors relied upon by this Court in *Meister*, and included the factor considered by the *Harding* Court. However, as the facts in this case differ from the facts in *Meister* and *Harding*, the First District reached a different conclusion. This does not create a conflict of law, either express or direct, among the cases. Therefore, this Court should decline to exercise its jurisdiction to review this case.

ARGUMENT

In this case, Petitioner is seeking this Court's review of an opinion of the First District Court of Appeal based on the grounds that the opinion expressly and directly conflicts with the opinions of the Second District Court of Appeal in *Harding v. Allen-Laux, Inc.*, 559 So. 2d 107 (Fla. 2d DCA 1990) and of this Court in *Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1984). However, as demonstrated below, the First District's opinion does not conflict with those opinions, and, therefore, this Court should decline to exercise its discretionary jurisdiction.

Florida law provides the framework for this Court's discretionary review. Article V, section 3(b)(3) of the Florida Constitution provides that the Florida Supreme Court may review any decision of a district court of appeal that "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Similarly, Rule 9.030, Florida Rules of Appellate Procedure, provides:

> **(a) Jurisdiction of Supreme Court.**
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> * * * * *
>
> (2) *Discretionary Jurisdiction*. The discretionary jurisdiction of the supreme court may be sought to review
>
> (A) decisions of district courts of appeal that
>
> * * * * *

> (iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law.

In order for the Supreme Court to exercise its conflict jurisdiction under this provision, the conflict must be express and direct and contained within the four corners of the opinion sought to be reviewed. *Reaves v. State*, 485 So. 2d 829 (Fla. 1986). Furthermore, "[i]n those cases where the district court has not explicitly identified a conflicting decision, it is necessary for the district court *to have included some facts in its decision* so that the question of law addressed by the district court in its decision can be discerned by the Court." *Gandy v. State*, 846 So. 2d 1141, 1144 (Fla. 2003) (quoting *Persaud v. State*, 838 So. 2d 529, 532 (Fla. 2003))(emphasis in original).

In this case, the only facts the First District cited in its opinion are that: 1) farm tractors are not extensively regulated; 2) they are not used as a mode of transportation; and 3) they are not routinely operated in public places. Opinion at 4-5. These facts are in harmony with and do not conflict with Florida precedent applying the dangerous instrumentality doctrine, and, therefore, there is no conflict.

Petitioner's Brief improperly cites facts outside the First District's opinion in order to manufacture conflict and relies on facts not contained within the four

corners of the opinion. For example, the Petitioner discusses and emphasizes the physical characteristics of the tractor and its location. However, the opinion does not recite these facts. The only facts referenced by the First District are recited above. Furthermore, the Petitioner's Jurisdictional Brief improperly incorporates the record below into the Brief. As explained by *Reaves v. State*, 485 So. 2d 829, 830 n. 3 (Fla.1986):

> This case illustrates a common error made in preparing jurisdictional briefs based on alleged decisional conflict. The only facts relevant to our decision to accept or reject such petitions are those facts contained within the four corners of the decisions allegedly in conflict. As we explain in the text above, we are not permitted to base our conflict jurisdiction on a review of the record or on facts recited only in dissenting opinions. Thus, it is pointless and misleading to include a comprehensive recitation of facts not appearing in the decision below, with citations to the record, as petitioner provided here. Similarly, voluminous appendices are normally not relevant.

This is exactly what the Petitioner has done in this case. The Petitioner seeks to create conflict by citing extensively to facts not within the First District's opinion (See Petitioner's Brief at 8) or even in the record (Petitioner's Brief at 5, footnote 1). As the facts within the opinion do not create any conflict, this Court should not exercise its discretionary jurisdiction in this case.

The Petitioner argues that *Rippy v. Shepard* conflicts with two appellate cases: *Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1984) and *Harding v. Allen-Laux, Inc.*, 559 So. 2d 107 (Fla. 2d DCA 1990). However, the Petitioner's argument that

a conflict exists is both conclusory and puzzling. The Petitioner argues that "the First District's overemphasis on the location of the accident and the extent of legislative regulation of farm tractors is misplaced and merits further clarification from this Court." Petitioner's Brief at 3. However, these two factors "overemphasized" by the First District were the precise factors relied upon by the *Meister* court, and include the primary factor considered by the *Harding* court. *Meister*, 462 So. 2d at 1072-1073; *Harding*, 559 So. 2d at 108.

Both the *Meister* court and the First District below considered the regulations imposed by the Florida Legislature on the respective machinery, and both courts considered the danger posed to the public. The Petitioner asserts that the *Meister* court "concluded that it was simply common sense to assume that a vehicle in motion such as a golf cart is dangerous regardless of the location in which it is operated." (Petitioner's Brief at 5). In fact, as evidenced by the quotation from *Meister* placed immediately before the Petitioner's assertion ("a golf cart when negligently operated on a golf course . . . ."), the *Meister* court placed great emphasis on the golf cart's proximity to the public, especially given that "Florida's tremendous tourist and retirement communities make golf carts and golf courses extremely prevalent in the state" and the "legislature's concern about

the dangers of golf carts to the public." *Meister* at 1073. The First District in this case noted no such facts about farm tractors.

Furthermore, consistent with the *Meister* ruling, the First District below noted that unlike the golf carts in *Meister*, farm tractors were not highly regulated by the legislature. Opinion at 4. Finally, the First District analyzed whether farm tractors were routinely operated in public places, so as to create a significant risk to the public. Opinion at 5. This is the same analysis this Court used in deciding *Meister*. *Meister* at 1073. While this Court in *Meister* and the First District below reached a different conclusion, there is no conflict because the First District applied the analysis mandated by this Court, albeit to different facts.

Similarly, the opinion below does not conflict with the opinion of the Second District Court of Appeal in *Harding v. Allen-Laux, Inc.*, 559 So. 2d 107 (Fla. 2d DCA 1990). *Harding*, like *Meister*, emphasized the location of the machinery's operation, a fork lift which was operated on a public highway. In fact, the Second District in *Harding* noted the use of the fork lift on public highways in deciding that a fork lift was a dangerous instrumentality. *Id.* In this case, the First District considered the same factor as the Second District did in *Harding*, but found that since tractors were not routinely operated in public places or on public highways, they were not dangerous instrumentalities. Opinion at 5. Since the First

District applied the same analysis the *Harding* court used, the opinions do not conflict (even though the facts of the cases may differ).

Thus, *Rippy* applies the same criteria as does *Meister* in determining whether a farm tractor is a dangerous instrumentality: 1) regulation and 2) dangerousness to the public. *Rippy* also applies the same criteria as does *Harding*, in determining whether a farm tractor is a dangerous instrumentality: operation on public highways. The analysis all three Courts used is consistent. The facts of the cases simply differ.

The mere fact that the fork lift in *Harding*, the golf cart in *Meister* and the tractor below operate under a different set of facts does not create conflict. Rather, it is important to note that the courts applied the same analysis, but reached different conclusions due to the factual differences between the cases. Instead of defining the conflict, the Petitioner puts forth conclusory statements that lack any genuine analysis ("If a golf cart is a dangerous instrumentality, then surely a farm tractor with operational cutting blades is a dangerous instrumentality," Petitioner's Brief at 7). The Petitioner must do this because *Rippy* is consistent with *Meister* and *Harding*, and applies the same principles to reach the correct result. There is no conflict, either express or direct on the same question of law among the cases. Therefore, this Court should decline to exercise its jurisdiction to review this case.

CONCLUSION

As the opinion below applies the legal analysis established by *Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1985) and *Harding v. Allen-Laux, Inc.*, 559 So. 2d 107 (Fla. 2d DCA 1990), but reaches a different conclusion because of differing facts, no conflict exists between the cases. Therefore this Court should decline to exercise its discretionary jurisdiction and deny the Petitioner's request.

Respectfully submitted,

by: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November ___, 2009, a true and correct copy of the foregoing has been furnished by mail to the following: Mr. Robert J. Healy, Jr., Law Office of Brad Salter, PA, PO Box 10807, St. Petersburg, FL 33733-0807; and Steven L. Brannock, Esquire, 400 North Ashley Drive, Suite 1100, Tampa, Florida 33602

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

by: _____
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