IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES EARL RIPPY,

Petitioner,

v. **Case No. SC09-1677**

JAMES SHEPARD,

Respondent.
_____/

PETITIONER'S REPLY BRIEF

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

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

ARGUMENT IN REPLY

The Respondent and his amicus[1] both argue that this Court should apply the "familiar factors" and reject any attempt to clarify or simplify the application of the dangerous instrumentality doctrine. The obvious problem, however, is that these "familiar factors" have led to an array of decisions reaching obviously contradictory conclusions. For example, in applying these "familiar factors," Florida courts have determined that a golf cart and fork lift are considered dangerous instrumentalities, but a road grader and a farm tractor are not. There is no principled way these decisions can be reconciled and Respondent makes no attempt to do so. Thus, Respondent's focus on factors such as the degree of regulation or the location of the injury results in a complete lack of consistency and predictability, as evidenced by the disparate results reached by Florida courts.

Our point is that the district court below lost its way by ignoring the obvious. Farm tractors are extremely dangerous when operated incorrectly. No amount of regulatory parsing can escape that fact. Thus, as we discuss below, the first and primary step in any analysis is whether the vehicle in question is dangerous. Indeed, every motor vehicle is dangerous when operated incorrectly, and we believe that the simplest and fairest test is simply to classify all motor vehicles, as defined by the legislature in Chapter 316, as subject to the dangerous

[1] Respondent Shepard and his Amicus both make the same argument and we refer to them jointly as "Respondent" in this reply.

instrumentality doctrine. Moreover, even if one adopts the alternative test that Respondent seems to propose -- whether the vehicle poses a danger to the public at large and is subject to legislative regulation -- farm tractors, like golf carts, easily fit within that test. Finally, as the Respondent's briefs make evident, it is impossible to simply declare, as a matter of law, that farm tractors are not dangerous in the absence of any evidentiary record.

I. A farm tractor is "peculiarly dangerous" when in use, and thus subject to the dangerous instrumentality doctrine.

Respondent engages in semantics when it focuses on the distinction between an "inherently dangerous" object and a dangerous instrumentality. *See* Answer Brief at 5. All we have suggested is that the primary focus of any analysis is whether the vehicle in question is dangerous when used improperly. In other words, the dangerous instrumentality doctrine applies to motor vehicles such as farm tractors because they are "inherent[ly] dangerous…while in use." *See Orefice v. Albert*, 237 So. 2d 142, 144 (Fla. 1970).

This was precisely the focus of the courts as the dangerous instrumentality doctrine developed. Originally, courts declared "inherently dangerous" items such as explosives, fire and floods, which are dangerous *per se*. The doctrine was later expanded to include automobiles as this Court first expressed in *Anderson v. Southern Cotton Oil Co.*, 73 Fla. 432, 74 So. 975 (Fla. 1917) and *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629, 638 (Fla. 1920). This Court

explained that the "dangerous instrumentality doctrine" should be extended to automobiles because automobiles operated on public highways were responsible for "carnage" on the nation's roadways, as recognized by the legislative regulations addressing the dangers, and thus, "the principles of common law do not permit the owner of an instrumentality that is not dangerous per se, but is peculiarly dangerous in its operation, to authorize another to use such instrumentality on the public highways without imposing upon such owner liability for negligent use." *Anderson v. Southern Cotton Oil Co.,* 73 Fla. 432, 74 So. 975, 978 (Fla. 1917). *See also Southern Cotton Oil Co. v. Anderson,* 80 Fla. 441, 86 So. 629 (Fla. 1920).

This Court noted that the rule was not a new rule, but merely the application of "an old and well-settled principle to new conditions." *Southern Cotton Oil,* 86 So. at 631. The Court cited Pollock on Torts in noting: "the law takes notice that certain things are a source of extraordinary risk, and a man who exposes his neighbor to such a risk is held, although his act is not of itself wrongful, to ensure his neighbor against any consequent harm not due to some cause beyond human foresight." *Id.* The Court chose to extend the doctrine to automobiles because: "an automobile is nearly as deadly as, and much more dangerous than, a street car, or even a railroad car…" *Id.*

Although the Court in *Southern Cotton Oil* noted that automobiles are operated on public roadways and are heavily regulated by the legislature, the Court's primary focus was on the inherent dangerousness of an automobile, questioning whether its qualities were so "*peculiarly dangerous*" in their operation to justify the application of vicarious liability. *Id*. at 638. The Court explained: "an automobile being a dangerous machine, its owner should be held responsible for the manner in which it is used; and his liability should extend to its use by anyone with his consent." *Id.* at 635.

The fact that automobiles are operated on public roadways and are heavily regulated by the Legislature merely served to support this Court's conclusion that automobiles are, in fact, "peculiarly dangerous" when in use. Accordingly, this Court extended the dangerous instrumentality doctrine to automobiles in order to "foster greater financial responsibility to pay for injuries caused by motor vehicles because the owner is in the best position to ensure that there are adequate resources to pay for damages caused by its misuse." *See Saullo v. Douglas,* 957 So. 2d 80 (Fla. 5th DCA 2007) *citing Aurbach v. Gallina,* 753 So. 2d 60, 62 (Fla. 2000).

This Court had the same focus in *Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1984). In *Meister*, this Court again explained that the dangerous instrumentality doctrine imposes vicarious liability on the owner of the instrumentality based on "the practical fact that the owner of an instrumentality which [has] 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." *Id.* at 1072. Neither the location of the injury nor the extent of the regulatory framework was dispositive in *Meister*, but instead the Court simply noted that golf carts could cause great injury if operated improperly. *See Meister*, 462 So. 2d at 1073 (focusing on the inherently dangerous nature of golf carts and noting: "Similarly, a golf cart when negligently operated on a golf course, has the same ability to cause injury as does any motor vehicle operated on a public highway.")

The thread that runs through all of the dangerous instrumentality cases is as simple as this: Is the vehicle "peculiarly dangerous"? *See Southern Cotton Oil*, 86 So. at 638. In other words, is there a reason to apply the dangerous instrumentality doctrine to the item in question? Does the instrumentality have the propensity to kill or seriously injure another person if operated negligently? Because a farm tractor is dangerous to others when in operation, a farm tractor, as a dangerous motor vehicle, should be subject to the dangerous instrumentality doctrine.

Although exposure to the public and legislative regulation are certainly two helpful indicators in applying this test, they are not dispositive. In fact, numerous courts have held that the fact that a vehicle is operated in "public" or "private" is irrelevant. For example, in *Reid v. Associated Engineering of Osceola*, 295 So. 2d 125 (Fla. 4th DCA 1974), the Fourth District Court of Appeal explained that the

mere fact that a vehicle is not operated on the public roadways does not suddenly erase the "peculiarly dangerous" nature of the vehicle:

> …the numerous Florida cases in which the dangerous instrumentality doctrine has been applied to motor vehicles virtually without exception have made reference to the fact that such vehicle is a dangerous instrumentality while operated upon the public highways of this state. Indeed it is! But, we do not understand this long established doctrine to mean, conversely, that a motor vehicle in operation is not a dangerous instrumentality while operated elsewhere than upon the public highways of this state. In other words, the reference to the motor vehicle being a dangerous instrumentality while operated upon the public highways is not a qualification or limitation upon the doctrine so as to make it applicable only when the motor vehicle is on the public highway. The qualification is that the automobile, not dangerous per se, becomes such when put into operation.

Id. at 128. *See also Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1984) (holding that a golf cart is a dangerous instrumentality despite the fact it is not operated on public roadways).

Similarly, although the degree of legislative regulation may have some marginal relevance in determining whether an instrumentality is dangerous, it cannot be a determining factor because legislative regulation is not necessarily consistent with whether an object is dangerous. Certainly, automobiles are more heavily regulated simply because they are more prevalent, not because they are more dangerous or less dangerous than farm tractors.

Bypassing "dangerousness" in favor of focusing on isolated factors such as the degree of regulation or the location of the injury allows courts to cherry-pick

the factors, leading to inconsistent and unpredictable results. The First District admitted as much in *Canull v. Hodges,* 584 So. 2d 1095 (Fla. 1st DCA 1991). According to the Court, "the criteria used by the court in the two opinions in the *Southern Cotton Oil* cases have been selectively abandoned or utilized to expand the list of instruments deemed to be dangerous to include the following: automobiles not operated on public highways." *Id*. at 1097.[2] Ironically, the Court then applied these isolated factors to reach the conclusion that a vehicle as dangerous as a road grader was not a dangerous instrumentality. *Id*. at 1097.

As *Canull* itself demonstrates, focusing on the location of injury or the degree of litigation has lead to unpredictability and inconsistency. For example, a golf cart, a crane, a tow-motor and a fork lift are dangerous instrumentalities, but a road grader and a farm tractor are not. *See e.g. Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1984) (golf cart is a dangerous instrumentality); *Mann v. Pensacola Concrete Const. Co., Inc.*, 527 So. 2d 279 (Fla. 1st DCA 1998) (crane is a dangerous instrumentality), *disapproved of on other grounds, Halifax Paving, Inc. v. Scott &*

[2] The court cited several cases as examples. Here is the court's list in the court's language: "*Reid v. Associated Engineering of Osceola, Inc. et. al*, 295 So. 2d 125 (Fla. 4th DCA 1974); motor vehicles operated in a public place but not licensed or regulated, *Eagle Stevedores, Inc. v. Thomas*, 145 So. 2d 551 (Fla. 3d DCA 1962); heavy machinery not licensed or regulated but operating on a public right of way, *Harding v. Allen-Laux, Inc.*, 559 So. 2d 107 (Fla. 2d DCA 1990); motor vehicles licensed and regulated and operated in an area accessible to the golfing public, *Meister v. Fisher*, 462 So. 2d 1071 (Fla. 1984); and cranes not licensed or regulated and operating in areas not accessible to the general public, *Mann v. Pensacola Concrete Constr. Co., Inc.*, 527 So. 2d 279 (Fla. 1st DCA) . . ."

Jobalia Const. Co., Inc., 565 So. 2d 1346, 1348 (Fla. 1990); *Eagle Stevedores, Inc. v. Thomas*, 145 So. 2d 551 (Fla. 3d DCA 19861) (tow-motor is a dangerous instrumentality); *Harding v. Allen-Laux, Inc.*, 559 So. 2d 107 (Fla. 2d DCA 1990) (fork lift is a dangerous instrumentality); *Canull v. Hodges*, 584 So. 2d 1095 (Fla. 1st DCA 1991) (road grader is not a dangerous instrumentality).

In short, the prime focus of the cases should be simply: is the vehicle peculiarly dangerous when operated incorrectly. Other factors might be useful in answering that question, but should not be dispositive. Respondent's approach, which focuses simply on the degree of regulation and the location of the injury, is unhelpful and should be rejected.

II. This Court should hold that all vehicles specifically defined as motor vehicles constitute "dangerous instrumentalities."

For purposes of predictability and consistency, we respectfully urge this Court to hold that all vehicles designated as motor vehicles pursuant to Chapter 316, Florida Statutes, be deemed subject to the dangerous instrumentality doctrine. Respondent suggests that such a ruling would be in contravention to this state's ninety-year history in adjudicating these sorts of cases. We disagree. Currently, the vehicles designated as "motor vehicles" by statute include heavy and dangerous vehicles that have already been characterized by the courts as dangerous instrumentalities. These include buses, motorcycles, road tractors, school buses, trucks, truck tractors, golf carts, and farm tractors. *See* Section 316.003 (12), (22),

(41), (45), (59), (60), (68). Such a policy would exclude such vehicles as bicycles, trailers, and mopeds and motorized scooters which operate at less than 30 miles per hour. *See* Section 316.003(2), (58), (77), (82). For purposes of consistency and fairness, it makes sense for this Court to characterize all instrumentalities deemed "motor vehicles" by the Legislature pursuant to Chapter 316 as "dangerous instrumentalities."[3]

Respondent points out that it is not clear whether farm tractors are subject to the definition of motor vehicles as expressed in Chapter 320, Florida Statutes. Respondent also complains that Chapter 320 includes trailers in its definition of motor vehicles, even though courts have already held that trailers are not dangerous instrumentalities. Respondent focuses on the wrong statute. Chapter 320 deals with licensing and registration of vehicles. Chapter 316 is where the Legislature addresses the regulation of motor vehicles in operation and other safety issues that are relevant such as speed limits, penalties for traffic violations, and other "rules of the road." Because a "farm tractor" is specifically defined as a

[3] We do not suggest that *only* motor vehicles defined by Chapter 316 are dangerous instrumentalities, but rather that all such vehicles are dangerous instrumentalities by definition. Other vehicles such as forklifts and road graders are also peculiarly dangerous and should be subject to the doctrine.

motor vehicle pursuant to Section 316.003 (12), this Court should rule that a farm tractor constitutes a dangerous instrumentality.[4]

III. Even in applying Respondent's "test," a farm tractor constitutes a dangerous instrumentality because it poses a danger to the public and it is regulated by statute.

Even accepting Respondent's strict parameters that a dangerous instrumentality be heavily regulated and operated in public, the evidence demonstrates that the farm tractor does satisfy this "test." For example, although the primary purpose of a farm tractor is agricultural, farm tractors, like golf carts, are driven every day on public roads. In fact, in this very case, Michael Rose drove the 4,000 pound tractor 4.5 miles across several public roads to Shepard's residence. (R. 2).

Moreover, farm tractors often work alongside the road, just like the forklift in the *Harding* case, which was defined as a dangerous instrumentality. *See Harding*, 559 So. 2d at 107. For example, many farm tractors are responsible for maintaining the grassy shoulders and medians along major highways and interstates and work alongside automobiles traveling at 70 or 80 miles per hour. How is this any different than a golf cart, which is occasionally operated on public roads but primarily utilized on private golf courses? How is this any different from the forklift in *Harding* which was laying sod along a public roadway when the

[4] Notably, trailers are not defined as "motor vehicles" pursuant to Chapter 316. *See* 316.003(58)

injury occurred? If a golf cart and forklift qualify as dangerous instrumentalities, then certainly a farm tractor must also qualify.

Importantly, when a farm tractor is operated on a roadway, it is in many ways even more dangerous than an automobile, because it is usually operated at very slow speeds (in this case, no more than 15 miles per hour), which can cause problems on roads with higher speed limits where its presence may be unexpected. Moreover, due to its design and purpose, farm tractors are not intended to come into contact with smaller vehicles, and thus, cars are not well equipped to protect against accidents with farm tractors. Therefore, there is a danger to the public despite Respondent's argument to the contrary.

Additionally, and just as importantly, farm tractors pose a danger to people even when they are operated on private farms, because farm tractors are often surrounded by field workers, particularly during harvest season. The negligent operation of a farm tractor is likely to lead to the serious injury or death of a field worker, particularly given the loud noise level of the tractor, which could drown out any warning cries. Is Respondent suggesting that farmers, field hands, or other country-dwellers are less deserving of protection than the retirees, tourists, and golfers that this Court protected in *Meister*? That cannot be the law.

Farm tractors are also subject to legislative regulations that deal with safety issues. Because farm tractors are often oversized, heavy, and slow-moving, the

state has enacted various regulations to protect other vehicles and pedestrians from the dangers that the tractors pose. These include: (1) requiring hazard lights in the front and rear, section 316.2295(1), Florida Statutes; (2) requiring headlights and a rear light, section 316.2295(2), Florida Statutes; (3) requiring that the headlights be of a certain intensity, section 316.239(1)(b), Florida Statutes; and (4) requiring that farm tractors be equipped with a slow moving emblem on the rear of the tractor, section 316.2295(5), Florida Statutes. These requirements are not for decorative purposes; the Legislature has enacted these requirements to protect third parties who come into contact with farm tractors on the public roadways. Clearly the Legislature has determined that there is risk when operating a farm tractor on a roadway, and has thus enacted regulations accordingly.

Again, however, we should not miss the forest through the trees. The ultimate point is that farm tractors are very dangerous when in operation and pose a great threat of injury or death to innocent bystanders, whether on the roads or the fields. A farm tractor is a dangerous instrumentality by any reasonable definition.

IV. At the very least, an evidentiary hearing is necessary.

Respondent spends much of its briefs suggesting that farm tractors are not dangerous to other people, without citing any factual basis for its arguments. To the contrary, as discussed above, the dangerousness of a farm tractor is self-evident and the trial court should have denied Respondent's motion to dismiss. At the

least, however, the court should not have decided the issue without giving plaintiff the opportunity to create an evidentiary record. *See Salsbury v. Kapka*, 41 So. 3d 1103 (Fla. 4th DCA 2010) (holding that an evidentiary record was required on the issue of dangerous instrumentality).

CONCLUSION

For all the foregoing reasons, this Court should quash the decision of the First District below and hold that a farm tractor is a dangerous instrumentality. Alternatively, the case should be remanded for factual development of the issue.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to, Robert J. Healy, Jr., Salter, Healy LLC, P.O. Box 10807, Saint Petersburg, Florida 33733-0807, Jennifer Cates Lester, Dell Graham, P.A., 203 N.E. 1st St. Gainesville, Florida 32601, and Sharon C. Degnan and Caryn L. Bellus, Kubicki Draper, P.A., 25 W. Flagler Street, Penthouse, Miami, Florida 33130 on this _____ day of November 2010.

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CERTIFICATE OF COMPLIANCE

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

_____
Attorney