IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

ANTHONY NEWTON, Petitioner, vs. CATERPILLAR FINANCIAL SERVICES CORPORATION; JOSHUA CRAM; CHARLES CRAM; and C&J BOBCAT AND HAULING, LLC, Respondents. /	)	CASE NO: SC17-67

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

RESPONDENT CATERPILLAR FINANCIAL SERVICES CORPORATION BRIEF ON THE MERITS

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INTRODUCTION

> *Our decision today is in accord with these criteria and is not based, as the dissent suggests, simply on "a comparison between the device at issue and a golf cart."*
>
> *Rippy v. Shepard*, 80 So. 3d 305, 309 (Fla. 2012) (Labarga, J., writing for the majority)

What makes an object a "dangerous instrumentality"? According to Newton, the Second District Court of Appeal "overcomplicated" the issue and should have sought to answer only two simple questions: Is the object a motor vehicle? Is the object dangerous in its operation? Newton theorizes that if forklifts, tractors, and golf carts are dangerous instrumentalities, then a multi-terrain loader must be one, too.

Newton's argument flies in the face of nearly 100 years of precedent. Starting in 1920, this Court has consistently articulated a multi-faceted test that considers at least six criteria. And it has consistently rejected the notion that an instrumentality is dangerous merely because its physical appearance is more imposing than a golf cart. This Court need only revisit the words of *Rippy*'s majority to realize that the Second District followed this Court's precedent to the letter.

STATEMENT OF THE CASE AND FACTS

I. C&J Hauling Leases a Multi-Terrain Loader for Its Business.

Respondent Caterpillar Financial Services Corporation is a Tennessee-based construction equipment financing company. (R46-47). Joshua Cram of C&J Bobcat and Hauling, LLC contracted with Caterpillar Financial for the long-term lease of a Caterpillar model 257B3 multi-terrain loader ("Multi-Terrain Loader") for his hauling business. (R40, 54-58).

The Multi-Terrain Loader Mr. Cram selected is a 66-inch wide by 107-inch long by 80-inch high piece of construction equipment that runs on belt-like crawler treads up to a maximum speed of 6.9 miles per hour, which he outfitted with a dirt bucket. (R98, 104, 128-29, 134, 159, 175; IB at 2). C&J Hauling used the Multi-Terrain Loader to move debris on job sites. (R34, 77-78). In moving it from one job site to another, the Multi-Terrain Loader required transportation of its own, as it has no wheels. (R34-35, 98). Rather, it had to be packed into a trailer and taken to C&J Hauling's various job sites. (R34-35).

II. Newton Suffers an on-the-Job Injury When a C&J Hauling Employee Releases a Tree Stump From the Multi-Terrain Loader Into the Trailer Where Newton Was Working.

On June 26, 2013, C&J Hauling transported the Multi-Terrain Loader in a box trailer to a residential property job site for a debris removal project. (R34-35, 71, 514). The Multi-Terrain Loader was backed down from the trailer and onto the

street for a brief moment, before proceeding to the debris that needed removed from the private residential lot. (R35, 104). Petitioner Anthony Newton was working with Charles Cram to clear the debris. (R34). While Newton was still in the box trailer making room for additional debris, Charles Cram released a tree stump from the Multi-Terrain Loader into the box trailer, and the stump rolled back in the trailer, severing Newton's finger. (R35-36).

III. Newton Sues Caterpillar Financial Under the Dangerous Instrumentality Doctrine, and the Parties Submit to Summary Judgment.

In seeking to recover for his injuries, Newton sued only Caterpillar Financial, claiming that under Florida's dangerous instrumentality doctrine, the lessor was liable for his damages, even though the lessor had no control over the equipment or the activity being performed at the job site. (R31-38, 46). Caterpillar Financial filed a third-party complaint seeking indemnity against the alleged active tortfeasor (Charles Cram), the employer (C&J Hauling), and the lessee of the equipment (Joshua Cram). (R46-58).

Caterpillar Financial disputed the application of the dangerous instrumentality doctrine, asserting that a Multi-Terrain Loader does not meet the six factors courts consider in imputing financial responsibility for damages to an instrumentality's owner. (R42). The parties filed competing summary judgment motions on this issue and presented evidence to the trial court on the various

factors. (R77-86, 95-454). At the summary judgment hearing, Caterpillar Financial highlighted Newton's failure to argue that a Multi-Terrain Loader fits within any Florida statutory definition of "motor vehicle" and his concession that a Multi-Terrain Loader is "special mobile equipment." (R481-82). Counsel for Newton did not disagree. (R506, 513-20, 522-33).

Upon consideration of the evidence presented and the applicable legal authorities, the trial court found that a Multi-Terrain Loader is not a dangerous instrumentality and entered a final summary judgment in favor of Caterpillar Financial. (R455-56).

IV. Newton Appeals, and the Second District Applies a Multi-Factor Test to Test Whether a Multi-Terrain Loader is a Dangerous Instrumentality.

Newton appealed the trial court's entry of summary judgment to the Second District Court of Appeal. (R458-60).

Reviewing the matter *de novo*, the Second District evaluated the trial court's conclusion that a Multi-Terrain Loader is not a dangerous instrumentality by considering a number of factors: (1) whether a Multi-Terrain Loader is a motor vehicle; (2) whether a Multi-Terrain Loader is extensively regulated; (3) whether a Multi-Terrain Loader poses a significant relative danger; (4) whether a Multi-Terrain Loader's physical characteristics have the potential to cause significant harm; (5) whether Multi-Terrain Loaders operate in close proximity to the public;

and (6) whether the Multi-Terrain Loader was operating in close proximity to the public at the time Newton was injured. *Newton v. Caterpillar Financial Services Corporation*, 209 So. 3d 612, 614 (Fla. 2d DCA 2016). The Second District noted that the six articulated factors are not the only factors that could be considered and that although the first factor is the "primary factor," no single factor is determinative of the inquiry. *Id.*

Using this framework, the Second District analyzed the evidence presented to the trial court and the legal arguments advanced by the parties. *Id.* at 615-18.

1. The Second District Finds That a Multi-Terrain Loader Is Not a Motor Vehicle.

The Second District found that a Multi-Terrain Loader is not a motor vehicle. *Id.* at 615. A Multi-Terrain Loader is instead best classified as "special mobile equipment" under section 316.003(48), Florida Statutes, because its ability to transport persons or property "is incidental to its primary construction and industrial functions." *Id.* (noting that special mobile equipment is excluded from the statutory definition of motor vehicle set forth in section 320.01(1)(a), Florida Statutes). Indeed, a Multi-Terrain Loader itself is transported from job site to job site, given that it was not designed to be primarily operated on public highways. *Id.* at 615-16.

The Second District rejected Newton's argument that a Multi-Terrain Loader is a "motor vehicle" because it is ***capable*** of being "roaded" (if equipped with tires and modified to drive on the road). *Id.* at 616 n.2. The Second District held that its analysis must "focus on the loader as equipped, not as it could be modified." *Id.*

2. The Second District Finds That Multi-Terrain Loaders Are Not Extensively Regulated by the Legislature.

The Second District found that Multi-Terrain Loaders are not substantially regulated. *Id.* at 616. As an initial matter, the Second District found that a Multi-Terrain Loader, like other special mobile equipment, is exempt from some of the regulations cited by Newton. *Id.* Furthermore, many of the other regulations cited by Newton would apply only if a Multi-Terrain Loader had tires so that it was "roaded" – which is not the case with a Multi-Terrain Loader. *Id.*

3. The Second District Finds That a Multi-Terrain Loader Does Not Have A High Relative Danger.

After considering the record evidence presented to the trial court, the Second District concluded that a Multi-Terrain Loader does not pose a high relative danger. *Id.* at 617. Some of this record evidence showed that accidents involving injury caused by Multi-Terrain Loaders are "exceedingly rare," occurring only once every 1102 years of continuous Multi-Terrain Loader operation. *Id.* Other record evidence demonstrated that most Multi-Terrain Loader incidents involved injury to the Multi-Terrain Loader operator, not to third parties. *Id.* The Second

District acknowledged the lack of any record evidence presented by Newton to contradict this evidence. *Id.*

4. The Second District Evaluates a Multi-Terrain Loader's Physical Characteristics.

The Second District recognized that a Multi-Terrain Loader weighs over 8,000 pounds and can lift a one-ton load nine feet into the air, and that although it has a low rate of speed, its sheer size and weight give it the ability to generate a substantial amount of momentum. *Id.* at 617-18. But the Second District found that even though a Multi-Terrain Loader has the potential to cause serious injury, this factor alone does not determine whether an object is a dangerous instrumentality – a conclusion supported by the fact that Multi-Terrain Loaders are rarely involved in accidents with serious injuries. *Id.* at 618. The Second District also noted that a Multi-Terrain Loader's nine-foot lifting capacity is far shy of that of a crane. *Id.* at 617.

5. The Second District Finds That a Multi-Terrain Loader Does Not Routinely Operate In Close Proximity To The Public.

The Second District noted the lack of record evidence that Multi-Terrain Loaders routinely operate in close proximity to the public. *Id.* In fact, the affidavit filed by Caterpillar Financial demonstrated that due to its continuous rubber track undercarriage, a Multi-Terrain Loader "is not designed to be primarily operated on roads, and is instead designed and intended to be primarily operated on off-road or

unimproved surfaces." (R98). The evidence also showed that a Multi-Terrain Loader "is not often, routinely, or regularly operated on improved or finished public highways, right-of-way, golf courses, or other areas where the public tends to be." (R98-99).

Even though Newton's counsel argued that based on his experience, similar loaders are "everywhere," (R592), the Second District noted that arguments of counsel are not evidence. *Newton*, 209 So. 3d at 617. Thus, there was no evidence that "the public is sufficiently exposed to loaders of this type as to justify application of vicarious liability." *Id.*

6. The Second District Finds That Newton's Injury In This Case Did Not Occur on Public Property.

The Second District found there was no evidence in the record establishing that the Multi-Terrain Loader was operating in close proximity to the public at the time of the accident. *Id.* The accident occurred on a private lot, and the injured party was an independent contractor hired to assist with the job, not a member of the public who suddenly encountered a motor vehicle that had been injected into the public domain. *Id.*

V. The Second District Affirms the Trial Court's Entry of Summary Judgment in Favor of Caterpillar Financial, Finding that a Multi-Terrain Loader is Not a Dangerous Instrumentality.

Finding that the vast majority of factors were not satisfied, the Second District agreed with the trial court that a Multi-Terrain Loader is not a dangerous instrumentality and affirmed the trial court's entry of summary judgment in favor of Caterpillar Financial. *Id.* at 618. Because of its ruling that a Multi-Terrain Loader is not a motor vehicle, *id.* at 615-16, the Second District did not need to address Caterpillar Financial's argument that Newton had waived his claim that a Multi-Terrain Loader falls under the definition of "motor vehicles" contained in the Florida Statutes.

Newton petitioned for review by this Court, arguing that the Second District's opinion conflicts with legal precedent established by this Court and other district courts. Newton maintained that, categorically, all pieces of construction equipment are dangerous instrumentalities. Caterpillar Financial disputed this contention and argued that the Second District's opinion correctly followed this Court's precedent by applying each factor announced in *Rippy* to determine whether this specific piece of construction equipment – a Multi-Terrain Loader – is a dangerous instrumentality. This Court has accepted jurisdiction.

SUMMARY OF ARGUMENT

To determine whether a Multi-Terrain Loader is a dangerous instrumentality, the Second District applied the rule of law articulated in *Rippy* and other Supreme Court precedent to the letter. The Second District recited six criteria in the multi-factor test, recognized that no single one is determinative, and gave each one the appropriate amount of consideration.

The Second District devoted most of its attention to Factor 1 (Is the instrumentality a motor vehicle?) as the "primary factor." Also receiving significant attention was a Multi-Terrain Loader's physical characteristics (Factor 4), such as its lift capacity, weight, and potential momentum. The Second District spent the least amount of time discussing the only case-specific factor (Factor 6). As shown below with a more detailed analysis than permitted by the jurisdictional briefs, given the Second District's correct application of precedent to the facts at issue in this case, it is questionable whether conflict jurisdiction exists at all.

To the extent this Court has jurisdiction, it should affirm the Second District's holding that Multi-Terrain Loaders are not dangerous instrumentalities. Not only does a Multi-Terrain Loader not meet any definition of "motor vehicle," its primary purpose is for use outside public areas and roads, i.e. where the surface is unimproved. Multi-Terrain Loaders are not intended to be "injected" into the public domain, the very foundation for the dangerous instrumentality doctrine.

Rather, a Multi-Terrain Loader has a continuous rubber track undercarriage and belt-like crawler treads (instead of tires), so that it can traverse unimproved surfaces, such as construction sites. In fact, a Multi-Terrain Loader requires transportation of its own to a job site, as it is unable to travel any meaningful distance on the public highways. Further, the record evidence presented below demonstrated that accidents involving Multi-Terrain Loaders are exceedingly rare, and that when they do occur, they injure the operator, not members of the public.

Not only is Newton's argument substantively flawed, it also suffers from a procedural defect. The federal Graves Amendment provides a legislative exemption to the dangerous instrumentality doctrine for long-term lessors of "motor vehicles." Knowing this, Newton avoided arguing in the trial court that a Multi-Terrain Loader is a motor vehicle under Florida's statutory definition. He instead agreed with Caterpillar Financial that it is "special mobile equipment," not regulated extensively. Newton has waived this argument for appeal.

And finally, the Second District's opinion does not create undue uncertainty. By their very nature, multi-factored tests create some uncertainty. Indeed, this Court held that no one factor is determinative under the dangerous instrumentality doctrine, an implicit recognition of uncertainty. More importantly, characterizing all motorized construction equipment the same for certainty's sake risks creating a legally invalid presumption.

ARGUMENT

I. THE SECOND DISTRICT CORRECTLY STATED AND APPLIED *RIPPY*'S RULE OF LAW

Having abandoned his jurisdictional argument that *Rippy* mandated a finding that all pieces of construction equipment are dangerous instrumentalities, Newton now – and incorrectly – argues that the Second District ignored this Court's *Rippy* precedent and invented a new test for the dangerous instrumentality doctrine.

In fact, to read Newton's Initial Brief, one would think the Second District determined Multi-Terrain Loaders are not dangerous instrumentalities simply because Newton was an innocent bystander injured on a private residential lot while working for a landscaping company, without any analysis of a Multi-Terrain Loader's characteristics generally. *See* IB at 1, 7, 18, 22 (arguing that the Second District improperly "demoted" the motor vehicle factor and instead "focused" on where and how Newton was injured, ultimately reaching its conclusion "because" the Multi-Terrain Loader was not operated in close proximity to the public routinely or at the time of the accident).

That is not what the Second District did. It instead re-stated the multi-factor test applied by this Court in *Rippy*, and then methodically applied each of the *Rippy* factors to a Multi-Terrain Loader. *Newton*, 209 So. 3d at 614-18 (citing to *Rippy* four times alone in articulating the test to be applied). Upon further review,

this Court might even conclude that the Second District's opinion does not conflict with *Rippy* or other precedent, and dismiss this appeal on the basis that this Court improvidently granted jurisdiction. *See Yee v. State*, 214 So. 3d 540 (Fla. 2017); *Shaw v. Hunter*, 212 So. 3d 362 (Fla. 2017).

A. The Second District's Multi-Factor Test Was Taken Directly from *Rippy* and Other Supreme Court Precedent

Starting with *Southern Cotton Oil* in 1920, and continuing through *Meister* (1984) and *Rippy* (2012), this Court has made clear that the dangerous instrumentality doctrine requires a multi-factor analysis. This Court first articulated the factors in *Southern Cotton Oil*:

> Factor 1 – Meets statutory definition of "motor vehicle"
> Factor 2 – Extensively regulated by the Legislature
> Factor 3 – High frequency and degree of seriousness of injuries caused (also referred to as the instrumentality being "relatively" dangerous)
> Factor 4 – Dangerous physical characteristics
> Factor 5 – Routinely operated in close proximity to the public
> Factor 6 – Accident occurred on public property

S. Cotton Oil Co. v. Anderson, 86 So. 629 (Fla. 1920). Five of the factors (all but Factor 6) relate to the instrumentality's characteristics generally, having nothing to do with the particular plaintiff's injury.

In all three seminal Supreme Court cases considering the dangerous instrumentality doctrine, this Court found that a majority of the factors considered were satisfied and thus found the doctrine applicable to the instrumentality at issue.

In *Southern Cotton Oil*, for example, all six factors were satisfied, rendering the automobile's owner liable for damages caused by the automobile's operator. *S. Cotton Oil Co.*, 86 So. at 634-36.

In *Meister*, this Court again considered all six factors, but found that Factor 6 (Accident occurred on public property) was not satisfied with respect to the golf cart at issue in that case. *Meister v. Fisher*, 426 So. 2d 1071, 1072-73 (Fla. 1984). Nevertheless, this Court found that the absence of Factor 6 did not preclude application of the dangerous instrumentality doctrine, making the golf cart's owner liable for damages caused by the golf cart's operator. *Id.* at 1073.

And most recently in *Rippy*, this Court considered five of the six factors (all but Factor 3):

> [Factor 1:] A primary factor in determining whether an object is a dangerous instrumentality is whether the object at issue is a motor vehicle. . . . [Factor 2:] Additionally, the Legislature has enacted regulations to ensure the safe operation of farm tractors. . . .
>
> . . . [Factor 6:] [T]he fact "[t]hat the vehicle is being operated on the public highways of this state is likewise not required before the dangerous instrumentality doctrine can come into play." . . .
>
> … [Factor 5:] It is an instrumentality often seen on public highways and rights-of-way, performing these varied services. [Factor 4:] Moreover, it is common knowledge that tractors vary in size but are often powerful vehicles of such size and speed that wherever they are operated, they can be dangerous to those persons who come into contact with them. . . .

> Our decision today is in accord **with these criteria** and is not based, as the dissent suggests, simply on "a comparison between the device at issue and a golf cart."

Rippy, 80 So. 3d at 308-09 (emphasis added).

Although this Court did not mention Factor 3 (High frequency and degree of seriousness of injuries caused), one can surmise that the reason for that omission was that the case came to the Court following an order of dismissal by the trial court, and therefore the record lacked any evidence of how often farm tractors cause serious injury. *See id.* at 306.

In *Rippy*, this Court found that four of the factors (Factors 1, 2, 4, and 5) were satisfied. *Id.* at 308-09. Like *Meister*, *Rippy* confirmed that the absence of Factor 6 was insufficient to preclude application of the dangerous instrumentality doctrine. *Id.* at 308. In concluding that a farm tractor is a dangerous instrumentality, *Rippy* re-affirmed the rule of law set forth in *Southern Cotton Oil* and *Meister*:

- The dangerous instrumentality doctrine requires a multi-factor analysis.
- Factor 1 is the "primary factor."
- No one factor is determinative.
- The absence of Factor 6 does not preclude a finding that the dangerous instrumentality doctrine is applicable.

Id. at 308-09. *Rippy*'s application of a multi-factor test undermines Newton's argument that this Court had "rejected" many of these factors in favor of a simple two-part inquiry. IB at 7; *see also* IB at 22 (arguing that the dangerous instrumentality doctrine should consider only whether the instrumentality is a motor vehicle and is dangerous in its operation).

B. The Second District Correctly Applied *Rippy*, Giving Each Factor the Appropriate Amount of Consideration

After reciting the relevant record facts and the purpose of the dangerous instrumentality doctrine, the Second District laid out the test to be applied:

- In deciding whether something is a dangerous instrumentality, courts consider a number of factors.
- A primary factor in determining whether an object is a dangerous instrumentality is whether the object at issue is a motor vehicle.
- Courts also evaluate the extent to which an object is regulated because legislative regulation is a recognition of the danger posed by the use of the evaluated instrumentality.
- Another factor is the relative danger posed by the instrumentality.
- The physical characteristics of the object are also pertinent to the dangerous instrumentality inquiry.
- Courts also consider whether the instrumentality at issue is operated in close proximity to the public.

Newton, 209 So. 3d at 614 (internal citations omitted). The Second District continued by stating, "No single factor is determinative of the inquiry, and this list of factors is not exhaustive. Rather, these factors exist to assist courts in

determining whether an application of the dangerous instrumentality doctrine is justified." *Id.*

a. As required, the Second District correctly devoted the most attention to whether a Multi-Terrain Loader is a motor vehicle

The Second District gave the most attention to whether a Multi-Terrain Loader is a motor vehicle, expressly recognizing it as the "primary factor." *Id.* at 615. Of the eight substantive paragraphs in the Second District's opinion, three are devoted to Factor 1, as compared with one paragraph for Factor 2, one paragraph for Factor 3, two paragraphs for Factor 4, and one paragraph for Factors 5 and 6 collectively. *Id.* at 615-18. Newton's argument that the Second District improperly "demoted" the motor vehicle factor from being the "core inquiry," IB at 22, is unsupported.

Newton is also incorrect that in considering Factor 1, the Second District applied the wrong test. IB at 22-23. While it is true the Second District recognized in its analysis of Factor 1 that a Multi-Terrain Loader is not an "automobile" (as opposed to a "motor vehicle"), the context of the opinion demonstrates that the Second District was, in fact, judging whether a Multi-Terrain Loader is a motor vehicle.

For one thing, in articulating Factor 1, the Second District correctly noted that the test is whether a Multi-Terrain Loader is a "motor vehicle." *Id.* at 614.

Secondly, in applying Factor 1, the Second District used the phrase "motor vehicle" three times when referring to various statutory definitions as justification for its conclusion that a Multi-Terrain Loader is not a motor vehicle. *Id.* at 615. And third, in rejecting Newton's argument that *Harding v. Allen-Laux, Inc.*, 559 So. 2d 107 (Fla. 2d DCA 1990), compels the conclusion that a Multi-Terrain Loader is a motor vehicle, the Second District again used the phrase "motor vehicle" twice. *Id.* at 616. In other words, despite the Second District's interchanging of the phrases "motor vehicle" and "automobile," the test ultimately applied was the correct one.

And finally, Newton improperly criticizes the Second District's determination that a Multi-Terrain Loader is not a motor vehicle. IB at 23-24. As the Second District found, a Multi-Terrain Loader with a continuous rubber track that must be carried to its location in a trailer because it is designed for off-road use or unimproved surfaces is not a motor vehicle either in the sense of the word or under sections 316.003(48) and 320.01(1)(a), Florida Statutes. *Id.* at 615. A Multi-Terrain Loader does not operate "upon a highway," "upon a pubic highway," or "on the roads of this state" (except for the briefest of moments when it is unloaded from a box trailer before moving onto a job site), and it is not used to transport persons or property upon a highway. Fla. Stat. §§ 316.003(21), (75);

322.01(27), (43); 320.01(1). Indeed, it requires its own transportation (i.e., a box trailer) just to get from job site to job site.

b. The Second District correctly analyzed the extent to which Multi-Terrain Loaders (and not some hypothetical modification of Multi-Terrain Loaders) are legislatively regulated

Newton argues that Factor 2 (Extensively regulated by the Legislature) is not a consideration at all in the dangerous instrumentality doctrine. IB at 22 (arguing that the dangerous instrumentality doctrine is a simple two-part inquiry).

But this Court has always considered the extent of legislative regulation a part of the dangerous instrumentality doctrine. *S. Cotton Oil Co.*, 86 So. at 534 (after reciting the various regulations governing automobiles, stating "It 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"); *Meister*, 462 So. 2d at 1072 (quoting the aforementioned statement from *Southern Cotton Oil* and stating "This observation applies with equal force to the restrictions that the legislature has now placed upon the operation of golf carts"); *Rippy*, 80 So. 3d at 308 ("Additionally, the Legislature has enacted regulations to ensure the safe operation of farm tractors," and then proceeding to cite to such regulations). In fact, when this Court extended the dangerous instrumentality

doctrine to airplanes in 1970, Factor 2 was a significant consideration. *Orefice v. Albert*, 237 So. 2d 142, 145 (Fla. 1970).

In addition, Newton incorrectly contends that the Second District misapplied Factor 2. IB at 24-25. Newton states that the Second District "narrowly focused on the regulatory framework as an end in itself," instead of recognizing that (1) a Multi-Terrain Loader is, in fact, "regulated when it travels on roads" and (2) in any event, regulations are "hardly necessary" because a Multi-Terrain Loader's "dangerousness is all too apparent." IB at 24-25.

Newton bases this analysis on non-existent facts. A Multi-Terrain Loader does not travel on roads. Its very name reveals its purpose: to travel on multi-terrain surfaces (i.e., NOT public roads). For this reason, it is designed with a continuous rubber track undercarriage (belt-like crawler treads). A Multi-Terrain Loader has no tires. A loader with tires is an entirely distinct instrumentality: a Skid Steer Loader. (R98-99); *cf. Foster*, 226 So. 2d at 283 (holding that analyzing whether a trailer is a dangerous instrumentality requires evaluating the trailer in its original condition, without regard to what it might become if modified; further holding that a trailer is not a dangerous instrumentality even though it can be loaded with weight and attached to a truck, as doing so creates a "[n]ew vehicle").

Secondly, Newton illogically argues that the Second District should have ignored the absence of regulations governing a Multi-Terrain Loader with belt-like

crawler treads because its potential danger is "all too apparent." If that were the case, this Court would not have taken the time to analyze the extent of regulations governing automobiles, airplanes, golf carts, or farm tractors. *See Headley v. City of Miami*, 215 So. 3d 1, 9 (Fla. 2017). If it were "all too apparent," the Legislature surely would have regulated Multi-Terrain Loaders.

As special mobile equipment – a conclusion that even Newton concedes, (R559) – Multi-Terrain Loaders are exempt from regulations under Chapter 316 (State Uniform Traffic Control), including requirements for "service brakes" and "brakes on all wheels," as well as regulations contained in Chapter 320 (Motor Vehicle Licenses). Fla. Stat. §§ 316.261(1), 316.261(3)(e), 320.01(1)(a). The Legislature's lack of extensive regulation evinces recognition that Multi-Terrain Loaders are not a significant safety concern to the public on Florida's roadways. After all, protecting the public is the *sine qua non* of the dangerous instrumentality doctrine. See *S. Cotton Oil Co.*, 86 So. at 631-38 (referencing the public, public safety, or public highways forty-six times).

c. The Second District correctly considered the record evidence to conclude that a Multi-Terrain Loader is not relatively dangerous

An instrumentality's relative danger is another factor Newton erroneously contends the Second District should not have considered. IB at 22 (referring to the dangerous instrumentality doctrine as simply a two-part inquiry). And yet an

instrumentality's high frequency and degree of seriousness of injuries caused was the **genesis** of the dangerous instrumentality doctrine:

> The dangerous tendencies of motorized vehicles in ordinary operation, tragically borne out by accident statistics, was the basis of our Supreme Court's initial characterization of those vehicles as "dangerous instrumentalities."

Foster, 226 So. 2d at 283 (citing *S. Cotton Oil Co.*, 86 So. at 633-34, which identified "the greatly increased number of deaths from automobile accidents"). In applying the dangerous instrumentality doctrine to golf carts, this Court observed 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." *Meister*, 462 So. 2d at 1073.

Newton seeks to eliminate consideration of Factor 3 because the only record evidence about a Multi-Terrain Loader's relative danger reveals that accidents caused by Multi-Terrain Loaders are rare. Moreover, when they occur, the injuries are usually not serious and are quite dissimilar to those resulting from typical motor vehicle accidents. (R99-100).

To prove this point, Caterpillar Financial filed an affidavit of Caterpillar Inc.'s Engineering Technical Coordinator. (R97-101). The affiant is not "an officer of Caterpillar." *See* IB at 6. Caterpillar, Inc. is the Multi-Terrain Loader's

manufacturer and a separate entity from the Respondent in this case, Caterpillar Financial Services Corporation, a financing company. (R565).

The Engineering Technical Coordinator averred that approximately 0.03% of units in the Multi-Terrain Loader's model series are involved in some type of incident causing third-party injury, and that only half of such incidents (i.e., 0.015%) are serious. (R99-100). When factoring in the number of hours such Multi-Terrain Loaders are used, the affiant concluded that an injurious incident to a third party can be expected only once every 1,102 years of continuous machine operation. (R100-01).

Newton provided no evidence of his own relating to Factor 3 at the trial court level. Newton therefore now argues that no evidence was necessary because under *Rippy*, the Second District should have concluded based on "common knowledge and experience" that Multi-Terrain Loaders are relatively dangerous. IB at 13. Newton specifically criticizes the Second District's observation that "[t]here is no record evidence to . . . suggest that the loader has a high accident rate." IB at 13 (quoting *Newton*, 209 So. 3d at 617).

Newton's argument misinterprets *Rippy*. To be sure, *Rippy* held that "[b]ased on 'common knowledge and common experience,' there is no doubt that a farm tractor is peculiarly dangerous in its operation so as to justify the imposition of vicarious liability." *Rippy*, 80 So. 3d at 309. But in *Rippy*, which was decided

in the context of an order of dismissal by the trial court, there was no other evidence for this Court to consider. *Id.* at 306.

The instant case arrives at this Court in a different procedural posture. At the trial court level, ***both*** parties had the opportunity to offer evidence about any or all of the factors to be considered, and ***both*** parties actually put evidence into the record before the summary judgment hearing. (R95-454). Newton affirmatively chose to submit evidence directed only at a Multi-Terrain Loader's physical characteristics (Factor 4) (namely, an expert affidavit and a copy of the Multi-Terrain Loader's operating manual), (R123-324, 396); and he affirmatively chose to not offer any evidence to rebut the affidavit submitted by Caterpillar Financial about a Multi-Terrain Loader's relative danger (Factor 3). Thus, the Second District was correct when it found "[t]here is no record evidence to . . . suggest that the loader has a high accident rate," because in point of fact, the only record evidence in this regard was the affidavit of the Multi-Terrain Loader's manufacturer proving just the opposite. *Newton*, 209 So. 3d at 617.

Newton's appeal for "common knowledge and experience" relative to Factor 3 is unavailing. IB at 13. There is no common knowledge and experience about how often a Multi-Terrain Loader causes injury or, if an injury does occur, how serious the injury usually is. Indeed, despite arguing that common knowledge and experience relative to Factor 3 should have been considered by the Second District,

Newton does not even reveal what that supposed common knowledge and experience is. *See* IB at 14-15 (arguing there is a common knowledge and experience relating to a Multi-Terrain Loader's huge size, high lifting ability, maneuverability, and frequent operation around other people, but not about the frequency and types of injuries caused by Multi-Terrain Loaders). As such, the Second District correctly determined that Factor 3 was not satisfied.

d. The Second District recognized the dangerous physical characteristics of a Multi-Terrain Loader, but correctly did not conflate this factor with the dangerous instrumentality doctrine altogether

Another faulty premise of Newton's criticism of the Second District's opinion is that Newton conflates Factor 4 (Dangerous physical characteristics) with the dangerous instrumentality doctrine itself, such that if Factor 4 is satisfied, then the dangerous instrumentality doctrine should apply. But Factor 4 is merely one factor in the analysis. *Rippy*, 80 So. 3d at 309 (noting that one of the factors is an instrumentality's physical characteristics, such as its "size and speed").

Newton seeks to modify this analytical structure. Newton asserts that a court should consider only two factors: (1) whether the instrumentality is a motor vehicle; and (2) whether the instrumentality is dangerous in its operation. IB at 22. Newton argues the second part is satisfied here because "[t]he loader is huge, used to lift heavy loads very high in the air, is easily maneuverable, and is often

operated around other people." IB at 14-15. In other words, Factor 4 (Dangerous physical characteristics) should take the place of *all* other factors besides Factor 1 (Instrumentality is a motor vehicle).

Newton's suggested rule contradicts this Court's stated rule in *Southern Cotton Oil*, *Meister*, and *Rippy*. The fallacy of Newton's argument is easily seen by realizing that under Newton's theory, the *Rippy* opinion should have been less than one page in length: This Court would have needed to find only that (1) a farm tractor is a motor vehicle and (2) tractors are often powerful vehicles of such size and speed that wherever they are operated, they can be dangerous to those persons who come into contact with them.

Why, then, did this Court discuss regulations enacted by the Legislature to ensure the safe operation of farm tractors? *Rippy*, 80 So. 3d at 308. Or that farm tractors are "often seen on public highways and rights-of-way," performing services such as right-of-way maintenance and commercial landscaping? *Id.* at 309. And why did this Court in *Meister* review and discuss the record evidence relating to the types of accidents caused by the operation of golf carts? *Meister*, 462 So. 2d at 1073. The answer, of course, is that this Court has always recognized that the dangerous instrumentality doctrine requires a multi-factor analysis, and Factor 4 (Dangerous physical characteristics) is but one factor.

By necessity, Newton seeks to consolidate Factors 2, 3, 4, 5, and 6 into a single inquiry that in name evaluates whether an instrumentality is dangerous in its operation, but that in reality evaluates whether the instrumentality is capable of causing harm due to its physical characteristics. In other words, Newton asks this Court to disregard this Court's precedent and create a new rule of law. But to be clear, whether an instrumentality is "peculiarly dangerous" is the overarching question posed by the doctrine, which must be tested by analyzing a series of factors; it is not a synonym for an instrumentality that is physically imposing.

Finally, Newton is incorrect that the Second District improperly focused on "the particular facts of this (and only this) accident," rather than "on whether the loader is dangerous." IB at 1. Compared to the multiple paragraphs discussing the general physical characteristics of a Multi-Terrain Loader and whether Multi-Terrain Loaders are "motor vehicles," the Second District spent a scant three sentences touching on the particular facts of Newton's injury.

e. The Second District correctly considered where Multi-Terrain Loaders routinely or often operate, recognizing the original purpose of the dangerous instrumentality doctrine

Newton boldly asserts that the Second District held "that Caterpillar's loader was not dangerous to the public because it was not 'operated in close proximity to the public routinely or at the time of the accident.'" IB at 18. Nowhere does the

Second District express a direct causal link between the non-satisfaction of Factors 5 and 6 (both of which relate to the location of the Multi-Terrain Loader) and its holding that a Multi-Terrain Loader is not a dangerous instrumentality. Factors 5 and 6 were only two of the six factors considered by the Second District, consuming only one paragraph of its analysis. *Newton*, 209 So. 3d at 617.

Newton's suggestion that the Second District should not have even considered Factors 5 and 6, (IB at 22), is at odds with this Court's recognition of the multi-factor test in *Rippy*. *Rippy*, 80 So. 3d at 308 (discussing Factors 1, 2, 4, 5, and 6). On multiple occasions, this Court has recognized the importance of the location factors:

> 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.

Kraemer v. General Motors Acceptance Corporation, 572 So. 2d 1363, 1365 (Fla. 1990); *see also S. Cotton Oil Co.*, 86 So. at 635 (discussing making streets safe for the traveling public, preventing dangerous instrumentalities from becoming a "menace" to such safety, and the fact that automobiles introduce an "element of

danger to ordinary travelers on the highways, as well as to those riding in the automobiles").

In this case, the Second District correctly considered where Multi-Terrain Loaders typically operate when concluding that Factor 5 was not satisfied. *Newton*, 209 So. 3d at 617. Due to its continuous rubber track undercarriage, a Multi-Terrain Loader "is not designed to be primarily operated on roads," "is instead designed and intended to be primarily operated on off-road or unimproved surfaces," and "is not often, routinely, or regularly operated on improved or finished public highways, right-of-way, golf courses, or other areas where the public tends to be." (R98-99).

Furthermore, similar to the discussion relating to Factor 3 above, Newton incorrectly argues that the Second District should have applied common knowledge and experience to conclude that Factor 5 was satisfied in this case. IB at 13-14. As was the case with Factor 3, Newton offered no evidence in the trial court of how frequently Multi-Terrain Loaders operate near the public, leaving as the only evidence on that point an affidavit from the manufacturer averring that Multi-Terrain Loaders do not "often, routinely, or regularly operate[] on improved or finished public highways, rights-of-way, golf courses, or other areas where the public tends to be." (R99).

While Newton's trial counsel presented his personal observations of how and where Multi-Terrain Loaders operate, those statements were neither evidence nor shown to represent some "common knowledge" about where Multi-Terrain Loaders operate. (R592) ("I see them all over the place."). This Court in *Southern Cotton Oil* rejected a similar argument that an individual's personal opinion about whether an instrumentality is peculiarly dangerous should overcome actual statistics to the contrary. *S. Cotton Oil Co.*, 86 So. at 633-34 (noting that a scholar's "individual opinion" that automobiles are not peculiarly dangerous was "dogmatic" and citing numerous automobile accident statistics as a "complete refutation" of the scholar's opinion).

Moreover, there is simply no "common knowledge and experience" about how frequently a Multi-Terrain Loader operates near the public. A Multi-Terrain Loader has a singular, defined purpose: to primarily operate "on off-road or unimproved surfaces where traction with the operating surface is imperative to productive use." (R98). Many members of the public (i.e., non-construction workers) do not even realize the difference between a Multi-Terrain Loader and a Skid Steer Loader until someone highlights that difference (belt-like crawler treads for traversing unimproved surfaces, versus wheels for travelling on roads). (R472-74). Point of fact: Newton's trial counsel offered a photograph of a Multi-Terrain Loader to orient the trial judge as to what Multi-Terrain Loaders look like, after

which Newton's trial counsel admitted that he was confused as to the difference between a Multi-Terrain Loader with belt-like crawler treads and a Skid Steer Loader with wheels. *Id.*

"Common knowledge" is a fact that is "so notorious that everyone is assumed to possess it." *Huff v. State*, 495 So. 2d 145, 151 (Fla. 1986); *e.g.*, *Matson v. Tip Top Grocery Co.*, 9 So. 2d 366, 368 (Fla. 1942) ("It is common knowledge that there are steps and uneven floor levels in many public places."); *Lewis v. The Florida Bar*, 372 So. 2d 1121, 1122 (Fla. 1979) ("It is common knowledge that lenders universally require borrowers to assume the burden of any taxes imposed upon a loan transaction.").

Common knowledge is not a fact that someone possesses individually by reason of personal investigation and research. *Huff*, 495 So. 2d at 151 (quoting *Amos v. Mosley*, 77 So. 619, 623 (Fla. 1917)). Applying common knowledge is "to be exercised by courts with caution," only in those circumstances where the "requisite notoriety exists." *Id.* Taking judicial notice of something alleged to be common knowledge "is not intended to 'fill the vacuum created by the failure of a party to prove an essential fact.'" *Id.* (quoting *Moore v. Choctawhatchee Electric Co-operative*, 196 So. 2d 788, 789 (Fla. 1st DCA 1967)).

Significantly, the issue is not, as Newton suggests, whether there is common knowledge that a Multi-Terrain Loader **has ever** operated near the public. IB at

19. Rather, the issue is whether there is common knowledge that Multi-Terrain Loaders **often** operate near the public. *Rippy*, 80 So. 3d at 309 (finding farm tractors are "often seen on public highways and rights-of-way"); *Meister*, 462 So. 2d at 1073; *Harding*, 559 So. 2d at 108; *Canull v. Hodges*, 584 So. 2d 1095, 1096 (Fla. 1st DCA 1991).

The video referenced by Newton of a Multi-Terrain Loader destroying a car does no more to prove that Multi-Terrain Loaders are dangerous instrumentalities than Newton's trial counsel's statements that he sees Multi-Terrain Loaders all over the place. IB at 28. Also, citing to a newspaper article and video posted online is inappropriate, as it refers to matters outside the record. *See Konoski v. Shekarkhar*, 146 So. 3d 89, 90 (Fla. 3d DCA 2014) (citing *Thornber v. City of Fort Walton Beach*, 534 So. 2d 754, 755 (Fla. 1st DCA 1988)) ("That an appellate court may not consider matters outside the record is so elemental there is no excuse for an attorney to attempt to bring such matters before the court.").

But assuming this Court may consider such "evidence" on appeal, the Internet contains plenty of videos showing the destruction of cars by implements that are unquestionably not "dangerous instrumentalities," such as hammers, baseball bats, crowbars, and wrenches:

https://www.youtube.com/watch?v=6NjjlW2c81Y;

https://www.youtube.com/watch?v=WbwOkGR7uuY;

https://www.youtube.com/watch?v=q38TVDYXOKQ.

In short, the Second District correctly determined that, based on the record evidence submitted, Factor 5 had not been satisfied.

f. The Second District correctly considered – without "focusing on" – the location of Newton's injury

The fact that a motor vehicle "is being operated on the public highways of this state" at the time an injury occurs is "not required before the dangerous instrumentality doctrine can come into play." *Meister*, 462 So. 2d at 1073. But that principle is a far cry from labeling Factor 6 "immaterial." IB at 18.

Factor 6 is among the criteria used to evaluate whether an instrumentality is peculiarly dangerous because evidence of where the injury occurred is relevant as a check or test on Factor 5 (Routinely operated in close proximity to the public). And it is relevant to understand the relative danger that a particular instrumentality poses to the public. *Eagle Stevedores, Inc. v. Thomas*, 145 So. 2d 551 (Fla. 3d DCA 1962) (referring to the specific location of the injury in question as part of the court's rationale); *Harding*, 559 So. 2d at 107-08 (same); *S. Cotton Oil Co.*, 86 So. at 636 (same).

Newton erroneously argues that *Canull* and *Northern Trust Bank* are "no longer good law" because their decisions hinged on a rule that an injury must occur on public land in order for the dangerous instrumentality doctrine to apply. IB at 11, 18. In truth, neither case stated (or even suggested) that the reason the dangerous instrumentality doctrine does not apply to road graders and cranes is because the injuries in those cases occurred on private land.

In *Canull*, the First District held that the dangerous instrumentality doctrine does not apply to road graders because Factors 1, 2, 4, 5, and 6 were not satisfied. *Canull v. Hodges*, 584 So. 2d 1095, 1096 (Fla. 1st DCA 1991). Similarly, *Northern Trust Bank* held that the dangerous instrumentality doctrine does not apply to cranes because Factors 1, 5, and 6 were not satisfied. *N. Tr. Bank of Fla., N.A. v. Constr. Equip. Int'l, Inc.*, 587 So. 2d 502, 504 (Fla. 3d DCA 1991).

In other words, location is still a relevant consideration, even if its importance is less than other factors. The Second District recognized this when it devoted only one paragraph of its analysis to discussing the location factors (Factors 5 and 6) collectively, with an even smaller portion (three sentences) devoted to the individual facts of this case. After reviewing the entirety of the opinion, it is evident that the Second District correctly applied *Rippy*, giving each factor the appropriate amount of consideration.

II. NEWTON WAIVED HIS MOTOR VEHICLE DEFINITION ARGUMENT BY SEEKING TO AVOID THE FEDERAL STATUTORY PROTECTION ENJOYED BY LONG-TERM LESSORS OF MOTOR VEHICLES

The dangerous instrumentality doctrine extends responsibility for the negligence of a dangerous instrumentality's operator to its owner, which includes long-term lessors. *Kraemer*, 572 So. 2d at 1367. But since *Rippy*, this Court has clarified that the federal Graves Amendment exempts certain long-term lessors of "motor vehicles" from liability under the doctrine. *Rosado v. DaimlerChrysler Financial Services Trust*, 112 So. 3d 1165, 1171 (Fla. 2013) (citing 49 U.S.C. § 30106). If the lessor is "in the trade or business of renting or leasing motor vehicles" and there is "no negligence or criminal wrongdoing" on the part of the lessor, the lessor "can avoid the default financial responsibility imposed upon them by Florida's dangerous instrumentality doctrine." *Id.*; *see* 49 U.S.C. § 30106.

Where a construction lessor unquestionably satisfies both prongs, a plaintiff's only chance of avoiding the Graves Amendment's fatal blow is to argue that the instrumentality is not a "motor vehicle." But that argument undercuts the plaintiff's ability to satisfy *Rippy*'s "primary factor" of the dangerous instrumentality doctrine: Is the instrumentality a motor vehicle?

So in the trial court, Newton avoided arguing that a Multi-Terrain Loader fits within any Florida statutory definition of "motor vehicle." (R79-80, 481-82).

Newton instead argued that an instrumentality need not literally qualify as a "motor vehicle" in order to satisfy Factor 1. (R79-80, 481-82). And when Caterpillar Financial noted at the summary judgment hearing that Newton's counsel had conceded this point, Newton's counsel never disagreed. (R506, 513-20, 522-33).

But now, on appeal and far removed from the impending reality of a threatened summary judgment, Newton asserts that a Multi-Terrain Loader meets the Florida statutory definition of a "motor vehicle." IB at 24. Because Newton abandoned this argument below, he has waived it and is foreclosed from raising it now. *Bell v. State*, 108 So. 3d 639, 650 (Fla. 2013).

In response to this preservation issue in the Second District, Newton attempted to downplay his waiver by arguing that the definition of "motor vehicle" in the Graves Amendment is not identical to the definition under Florida statutory law. Whether the Graves Amendment bars Newton's claim is not the issue. The point is that to avoid the Graves Amendment trap – and the very distinction he is now making – Newton chose to waive arguing the Florida statutory motor vehicle definition.

Although the Second District did not reach this waiver argument because it concluded that a Multi-Terrain Loader is a not a motor vehicle, this Court should find that Newton waived the current position he takes now on appeal.

III. CERTAINTY OF THE LAW DOES NOT ENTITLE LITIGANTS TO A PRE-DETERMINED OUTCOME, AND NEWTON'S CERTAINTY CREATES AN UNFAIR PRESUMPTION

The "certainty" Newton seeks is not the "certainty" the judicial system strives to provide. The purpose of certainty in the law is to advise citizens what is legally permissible so they can act accordingly and avoid the penalties attendant to violation of the law. *State v. Buchanan*, 191 So. 2d 33 (Fla. 1966) (noting that due process is violated when the law requires that citizens of "common intelligence must necessarily guess at its meaning and differ as to its application" to know "what conduct on their part will render them liable to its penalties"). Once offending conduct occurs, a civil litigant is not entitled to "certainty" whether he or she will win a lawsuit.

The uncertainty Newton complains of (Should an existing rule of law be applied to a new set of facts?) will always exist in the law. Florida law utilizes a variety of "multi-factor" or "multi-prong" tests, which by their very nature are uncertain to some degree. *See, e.g.*, *Mize v. Mize*, 621 So. 2d 417 (Fla. 1993) (applying a multi-factor test to decide whether to permit a primary residential parent to move the child); *Great S. Bank v. First S. Bank*, 625 So. 2d 463, 469 (Fla. 1993) (noting that a cause of action for trademark infringement based on likelihood of confusion requires a court to evaluate a variety of factors). In fact, this Court approved the inherent uncertainty in the dangerous instrumentality doctrine, noting

that "no one test is determinative of whether an instrumentality is dangerous." *Rippy*, 80 So. 3d at 308.

Moreover, the rule Newton asks this Court to endorse to create certainty for litigants is inherently unfair given the foundation of the dangerous instrumentality doctrine. Under the doctrine, lessors – despite the absence of any wrongdoing – are deemed liable for the negligent operation of their equipment. *Kraemer*, 572 So. 2d at 1365-66. But Newton's rule asks this Court to go further, by creating an irrebuttable conclusive presumption that all pieces of motorized construction equipment are dangerous instrumentalities. Such a rule would deprive lessors of due process. *See, e.g.*, *Public Health Trust of Dade Cty. v. Valcin*, 507 So. 2d 596, 599 (Fla. 1987) (finding a conclusive presumption violates due process by failing to provide an adverse party an opportunity to rebut the presumption of negligence).

Considering a Multi-Terrain Loader proves this point. Even though it is manufactured with belt-like crawler treads instead of tires, and therefore not able to be roaded, Newton has argued extensively that a Multi-Terrain Loader is a motor vehicle. IB at 22-25. Indeed, Newton has gone so far as to argue that *Harding* (which involved a forklift – not a Multi-Terrain Loader) is "controlling" with respect to Factor 1 "given how similar the loader is to a forklift." IB at 16 (asserting that a Multi-Terrain Loader "can *become* a forklift" merely by equipping it with "a fork work tool instead of a dirt bucket").

If courts cannot examine the specifics of a Multi-Terrain Loader's design, use, and operation, they would ignore crucial facts Newton omits. First, the forklift in *Harding* was outfitted "with tires similar to tractor tires," thereby enabling it to "often operate[] on the roadway in this work zone," *Harding*, 559 So. 2d at 108, whereas a Multi-Terrain Loader has a "continuous rubber track undercarriage" and is "not designed to be primarily operated on roads, . . . instead designed and intended to be primarily operated on off-road or unimproved surfaces where traction with the operating surface is imperative to productive use." (R98). Second, the forklift in *Harding* weighed 16,000 pounds, *id.* at 108, whereas a Multi-Terrain Loader weighs just half that much. (R98, 104).

For these reasons, *Rippy* could not and did not create a one-size-fits-all presumption that all pieces of motorized construction equipment are dangerous instrumentalities. If Newton seeks certainty, there is one thing certain: If this Court adopts Newton's rule, construction lenders will have to reconsider leasing in Florida, potentially affecting consumers who cannot afford to purchase the construction equipment outright. *See Green v. Toyota Motor CreditCorp*, 605 F. Supp. 2d 430, 435-36 (E.D.N.Y. 2009) (recognizing that vicarious liability laws may "adversely affect the motor vehicle leasing market" because they can cause leasing companies to "cease doing business in states with vicarious liability laws" or to "increase the costs of leasing").

CONCLUSION

The Second District correctly applied the multi-factor framework established by this Court in *Rippy* and earlier precedent. As such, this Court should dismiss this appeal based on the fact that jurisdiction was improvidently granted. Alternatively, this Court should find that based on the multi-factor test consistently recognized by this Court, the Second District correctly concluded that a Multi-Terrain Loader is not a dangerous instrumentality.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 18, 2017, a true and accurate copy of the foregoing has been furnished by Email to:

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CERTIFICATE OF COMPLIANCE

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

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