IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC17-67

ANTHONY NEWTON,

Petitioner,

v.

CATERPILLAR FINANCIAL SERVICES CORPORATION, et al.,

Respondents.

Case No. SC17-67

L.T. Case Nos.: 2D15-2927; 14-004515-CI

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

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# PETITIONER'S INITIAL BRIEF ON THE MERITS

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## INTRODUCTION

Florida's dangerous instrumentality doctrine protects against "peculiarly dangerous" vehicles by holding their owners vicariously liable for the vehicles' negligent operation. Historically, courts have applied the doctrine to virtually every type of motorized vehicle (even golf carts!), including moving construction equipment like cranes and forklifts. And, recently, this Court confirmed the scope of the doctrine by applying it to farm tractors, which share the same "peculiarly dangerous" features as other motorized vehicles. But now, the Second District Court of Appeal has decided that a multi-terrain loader—an 8,100-pound piece of moving construction equipment capable of lifting 2,000 pounds—does not qualify as a dangerous instrumentality. This decision is irreconcilable with past precedent. On the most basic level, it is impossible to logically conclude that a crane, forklift, tractor, or golf cart is a dangerous instrumentality but a multi-terrain loader is not.

The Second District, instead of focusing on whether the loader is dangerous (and it most certainly is), incorrectly descended into an overcomplicated analysis of the particular facts of this (and only this) accident. Thus, the same loader might or might not be a dangerous instrumentality depending on who it injured, or where or how the injury occurred. As we will show, the Second District's ultimate conclusion, as well as virtually every step in its analytical framework, runs contrary to the prior rulings of this Court and other courts of appeal.

## STATEMENT OF THE CASE AND OF THE FACTS

A multi-terrain loader owned by the Respondent, Caterpillar Financial Services Corporation, injured the Petitioner, Anthony Newton. Mr. Newton filed suit against Caterpillar, alleging that the loader was a dangerous instrumentality. This was a dispositive issue: if the loader was in fact a dangerous instrumentality, then Caterpillar was vicariously liable for its negligent use. The trial court held that the loader was not a dangerous instrumentality (R455-56), and the Second District affirmed. *Newton v. Caterpillar Fin. Servs. Corp.*, 209 So. 3d 612 (Fla. 2d DCA 2016), *review granted*, No. SC17-67 (Fla. June 30, 2017).

### The loader is a powerful vehicle used on job sites.

The multi-terrain loader resembles a compact bulldozer. (R392). Caterpillar makes the loader in several models, which can come equipped with various work tools. (R159-174). The loader here runs on crawler treads (some models come with wheels) and its work tool is a dirt bucket. (R104). The loader moves at around seven miles per hour. (R104, 398).

Although compact and maneuverable, the loader is still a large and powerful piece of machinery: it weighs 8,100 pounds (R104), is 11-feet long (including the dirt bucket) (R398), and is just under seven-feet tall (R175, 398). The loader's dirt bucket can lift 2,000 pounds nearly ten feet in the air. (R163, 200, 398).

The loader is versatile; it can be used on a variety of terrains and for landscaping, construction, and agricultural jobs. (R97-98), *see* Cat Resource Center, http://www.catresourcecenter.com/machine/agriculture/loaders/ ("To keep your farming or ranching operations at maximum production, choose a Cat® Compact Track or Multi Terrain Loader.") (last visited Aug. 23, 2017).[1]

**Mr. Newton suffers a gruesome injury.**

Caterpillar leased the loader at issue here to a hauling company, C & J Bobcat and Hauling, LLC. (R104). C & J hired Mr. Newton, as an independent contractor, to help clear debris from a residential property in a small St. Petersburg neighborhood. (R34-35, 63, 65, 72, 104). On the day of the accident, the loader was towed to the neighborhood inside of a 20-foot-long box trailer, which was parked on the street fronting the property. (R34-45, 104). An agent of C & J drove the loader out of the box trailer, into the street, and then onto the residential property. (R35, 104).

The box trailer was left on the road. (R35, 104). C & J's driver used the loader to deposit debris from the property into the trailer, which could later be towed away. (R34, 103-04). At some point, the box trailer became full, and Mr. Newton was sent into the trailer to pack down the debris to make more room. (R35, 103-04). So, Mr. Newton climbed in the box trailer. (R35, 103-04).

[1] For a permanent hyperlink to this website, *see* https://perma.cc/TPL8-32LR.

While Mr. Newton was in the trailer, C & J's driver used the loader to pick up a large palm-tree stump. (R34-37, 103-04). Although the loader had a high enough dump clearance to deposit debris into the seven-foot-tall trailer, the driver could not see over the trailer's lip from the loader's cab. (R35, 396). C & J's driver, without checking to make sure Mr. Newton was clear, released the stump into the trailer. (R34-37, 103-04). Mr. Newton was still inside. (R36, 103-04).

When Mr. Newton realized what was happening, he began to scramble toward the back of the trailer. (R36, 103-04). The released stump rolled in the same direction. (R36, 103-04). Before the stump reached him, Mr. Newton was able to grab the lip of the trailer and swing himself over the edge. (R36). But, Mr. Newton could not release his grip in time: the stump rolled into his left hand—still clinging to the trailer's lip—and severed one of his fingers. (R36, 103-04).

**Mr. Newton files suit against Caterpillar.**

Mr. Newton filed suit against Caterpillar, the owner of the loader. (R34, 104). Mr. Newton alleged the loader was a dangerous instrumentality and that, as a result, Caterpillar was vicariously liable for C & J's negligence. (R33, 37, 105). (Caterpillar would later file a third-party complaint against C & J and the driver. R46.) Both Mr. Newton and Caterpillar agreed that whether the loader qualified as a dangerous instrumentality was a question of law (R77-79, 105), and the parties filed competing motions for summary judgment (R77, 103).

In support of his motion, Mr. Newton filed the affidavit of an expert engineer. (R393, 436-41). The affidavit stated that the loader is dangerous due to its weight, lifting capacity, and lifting height. (R396). These dangers were echoed in Caterpillar's operation manual for the loader, which spends its first 30 pages describing the loader's assorted hazards. (R126-58).

Both Mr. Newton and Caterpillar discussed dangerous instrumentality case law. (R79-82, 105-118). The trial court was presented with cases holding that automobiles, cranes, buck hoists (construction elevators), tractors, forklifts, and golf carts were dangerous instrumentalities. (R79-82, 105-18). At the summary judgment hearing, Mr. Newton argued that the loader was very similar to a forklift, (R475-76), and could even become a forklift when outfitted with a forklift work tool (R167-71, 221-22, 324-25, 475-76). Mr. Newton also pointed out that the loader, like a crane, presents a specific type of danger in the form of errantly dropped objects. (R479, 482-84).

And, Mr. Newton argued that if a golf cart is a dangerous instrumentality, then surely a multi-terrain loader is one also. (R82, 475-76). Some golf carts have a top speed of ten miles per hour. (R399). The loader travels at a slightly slower speed—seven miles per hour—but it weighs 7,000 pounds more than a golf cart and can lift thousands of pounds in the air. (R398-99).

Caterpillar, in support of its motion for summary judgment, filed an affidavit of an officer at Caterpillar. (R97). The affidavit stated that the loader was not "designed to be primarily operated on roads." (R98). But, as Mr. Newton would argue, this did not mean loaders were not dangerous: "These things are everywhere. Some of them are on the highway. Some of them are in remote areas. But this particular [loader], Judge, was being used on private residential property right there around other homes." (R514).

Ultimately, the trial court found that the loader was not a dangerous instrumentality and entered final judgment in Caterpillar's favor. (R455-57).

**The Second District concludes that while it is "beyond question" that the loader is dangerous, it is not a dangerous instrumentality.**

The Second District affirmed on appeal. The Second District conceded "that based on its physical characteristics the loader has the potential to cause serious injury," and that "[i]t is beyond question that the loader is a serious piece of machinery with the capacity to do great harm." *Newton*, 209 So. 3d at 618. Yet, the Second District did not think the loader was a dangerous instrumentality. *Id.*

The Second District looked past the loader's basic danger in favor of a multi-factor test that focused (among other things) on the location of the loader (at the time of the accident and generally), how the loader injured Mr. Newton, and whether Mr. Newton was an "innocent bystander." *Id.* at 615-17. The Second

District also limited its holding to the specific facts of this case. *See, e.g., id.* at 617 (refusing to consider where loaders operate without record evidence).

This Court granted review because this decision conflicts with decisions of this Court and of other district courts of appeal, which have held tractors and similar construction equipment to be dangerous instrumentalities.

## SUMMARY OF THE ARGUMENT

The Second District's decision here stands out from the last century of dangerous-instrumentality case law. Tractors, forklifts, cranes, construction hoists, tow-motors, and golf carts are dangerous instrumentalities. But somehow a multi-terrain loader—an 8,100-pound construction vehicle—is not. The Second District reached this aberrant holding by devising and following a multi-factor test that marginalized the importance of the loader's danger. More than that, many of the Second District's factors had already been rejected by this Court. The Second District relied on them anyway, improperly focusing on where and how Mr. Newton was injured, whether he qualified as an "innocent bystander," and where the loader operated routinely and at the time of the accident.

Even worse, the Second District limited itself to just the circumstances of this accident in deciding whether the loader is a dangerous instrumentality. The doctrine has never been applied so narrowly. Courts have always relied on common knowledge and experience to apply the doctrine categorically. Thus, all

tractors, all airplanes, and all cars are dangerous instrumentalities no matter how or where they are being operated. This categorical approach provides certainty to litigants and trial courts. Not so under the Second District's analysis. Now, an instrument may be dangerous in one situation but not another, depending on who was injured, and how, and where. This robs the doctrine of any predictability.

This case is far less complicated than the Second District makes it out to be. The loader is a motorized vehicle that is unquestionably dangerous while in use, just like a forklift, tractor, tow-motor, or crane. Thus, the loader is a dangerous instrumentality. It is as simple as that.

## ARGUMENT

### Standard of Review.

Whether a vehicle is a dangerous instrumentality presents a pure issue of law that is reviewed de novo. *Rippy v. Shepard*, 80 So. 3d 305, 306 (Fla. 2012).

### Framework of the analysis.

Caterpillar owns the multi-terrain loader, which was leased to C & J. Thus, if the loader is indeed a dangerous instrumentality, Caterpillar will be held strictly and vicariously liable for the loader's negligent operation. *See Burch v. Sun State Ford, Inc.*, 864 So. 2d 466, 470 (Fla. 5th DCA 2004) (doctrine extends to lessor-lessee relationships) (citing *Lynch v. Walker*, 31 So. 2d 268 (Fla. 1947)).

Florida law has long imposed vicarious liability in this situation. The dangerous instrumentality doctrine grew out of the common law and has, since its inception, held the owner of a dangerous instrument vicariously responsible for any harm caused after entrusting that instrument to another. *S. Cotton Oil Co. v. Anderson*, 86 So. 629, 632 (Fla. 1920). In its earliest days, the doctrine applied to objects that were inherently dangerous even without human aid, such as poisons, firearms, and explosives. *Id.* at 631-32. The doctrine gradually expanded, though, to include instruments that were "peculiarly dangerous" while in operation, like locomotives and street cars. *Id.* at 631.

In 1920, this Court identified a new type of "peculiarly dangerous" instrumentality—the automobile. *Id.* at 636. In extending the dangerous instrumentality doctrine to automobiles, this Court looked "to deter vehicle owners from entrusting their vehicles to drivers who are not responsible by making the owners strictly liable for any resulting loss." *See Burch*, 864 So. 2d at 470. Further, as this Court has noted, the owner of a vehicle is generally "in the best position to make certain that there will be adequate resources with which to pay the damages caused by its negligent operation." *Rippy*, 80 So. 3d at 307.

Over the last 100 or so years, the doctrine has been applied with near uniformity to all types of motorized vehicles. Motorcycles, trucks, buses, boats,

airplanes, forklifts, cranes, construction hoists, and tow-motors[2] are all dangerous instrumentalities. *Rippy*, 80 So. 3d at 307-08; *Harding v. Allen-Laux, Inc.*, 559 So. 2d 107, 108 (Fla. 2d DCA 1990); *Lewis v. Sims Crane Serv., Inc.*, 498 So. 2d 573, 575 (Fla. 3d DCA 1986); *Keller v. Eagle Army-Navy Dep't Stores, Inc.*, 291 So. 2d 58, 60 (Fla. 4th DCA 1974). Even a golf cart is peculiarly dangerous enough to qualify. *Meister v. Fisher,* 462 So. 2d 1071, 1073 (Fla. 1984).

Recently, this Court corrected an aberration in the doctrine: a decision from the First District stating that farm tractors were not dangerous instrumentalities. *Rippy v. Shepard*, 15 So. 3d 921, 923 (Fla. 1st DCA 2009). This Court quashed the First District, holding that the "weight, speed, and mechanism of farm tractors render their negligent use peculiarly dangerous to others." *Rippy*, 80 So. 3d at 309. This Court clarified the state of dangerous-instrumentality law, re-directing the focus toward the dangerous instrumentality doctrine's primary inquiry: whether a motor vehicle is peculiarly dangerous. *Id.*

This clarity was short-lived, however. The Second District has now held that a multi-terrain loader is not a dangerous instrumentality. As we discuss in section I, the Second District's holding conflicts with the last 100 years of

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[2] A tow-motor is similar to a forklift in appearance and operation. *See Wurzel v. Whirlpool Corp.*, 482 F. App'x 1, 2 (6th Cir. 2012) (defining a tow-motor as a type of forklift); http://www.towmotorforklift.com.sg/webpages/home.aspx ("In 1933, Towmotor unveiled the world's first forklift—a vehicle that used front forks to lift and carry cargo....") (last visited Aug. 27, 2017).

dangerous-instrumentality case law. In sections II and III, we show how the Second District reached this aberrant holding; namely, by ignoring *Rippy* and erroneously relying on case-specific facts and on the loader's location. Lastly, in section IV, we explain why the loader is a dangerous instrumentality: because it is a motor vehicle that is dangerous while in use.

## I. The Second District's opinion is irreconcilable with nearly a century of dangerous instrumentality case law.

As explained above, the dangerous instrumentality doctrine has been applied to virtually all motorized vehicles, including "heavy equipment on job sites." *Harding*, 559 So. 2d at 108. In fact, in the history of the doctrine, there are only three cases holding that a motorized vehicle is *not* a dangerous instrumentality. Two of those cases, *Canull v. Hodges*, 584 So. 2d 1095 (Fla. 1st DCA 1991) (road grader), and *N. Trust Bank of Fla. v. Constr. Equip. Intern., Inc.*, 587 So. 2d 502 (Fla. 3d DCA 1991) (crane), are no longer good law. As we explain below, both were effectively overruled by this Court in *Rippy*. (Indeed, the First District, in the later-quashed *Rippy*, explicitly relied on *Canull*. 15 So. 3d at 923.)

The third outlying case addresses the danger posed by concession go-karts. *Festival Fun Parks, LLC v. Gooch*, 904 So. 2d 542 (Fla. 4th DCA 2005). And, while the Second District did compare the relative danger of go-karts and loaders, *Newton*, 209 So. 3d at 614, the two vehicles could not have less in common. Go-

karts are small, recreational vehicles that are typically driven on a closed track at relatively low rates of speed and under controlled conditions.

Mr. Newton, conversely, was injured by an 8,100-pound multi-terrain loader, a vehicle that is used on construction sites and farms. Florida courts, including this Court, have overwhelmingly found similar construction and agricultural vehicles to be dangerous instrumentalities. *Rippy,* 80 So. 3d at 306 (tractor); *Sherrill v. Corbett Cranes Services, Inc.*, 656 So. 2d 181 (Fla. 5th DCA 1995) (crane); *Larzelere v. Employers Ins. of Wausau*, 613 So. 2d 510 (Fla. 2d DCA 1993) (crane); *Harding*, 559 So. 2d at 108 (forklift); *Scott & Jobalia Const. Co., Inc. v. Halifax Paving, Inc. for Use & Benefit of U.S. Fid. & Guar. Co.*, 538 So. 2d 76 (Fla. 5th DCA 1989) (crane); *Lewis v. Sims Crane Serv., Inc.*, 498 So. 2d 573 (Fla. 3d DCA 1986) (construction hoist); *Eagle Stevedores, Inc. v. Thomas,* 145 So. 2d 551 (Fla. 3d DCA 1962) (tow-motor).

The loader is no different. Not only is it used in the same settings as these other vehicles, but it also serves the same purposes and poses the same dangers. Loaders, just like forklifts, tow-motors, and cranes, are designed to lift and transport heavy materials. As a result, and as evidenced by Mr. Newton's injury, the loader poses a similar danger—it can drop heavy objects on workers or bystanders. *See Scott & Jobalia Constr. Co.*, 538 So. 2d at 78 (worker injured when crane dropped pipe). The loader can also collide with other vehicles. *See*

*Harding*, 559 So. 2d at 108 (forklift collided with car driven by plaintiff). Or it can run people over. *See Eagle Stevedores*, 145 So. 2d at 552 (plaintiff "was struck and injured by a small motor operated vehicle referred to as a 'tow-motor'").

In short, the Second District's decision here cannot be squared with the holdings of this Court and other district courts, which have found that similar types of vehicles are dangerous instrumentalities. The multi-terrain loader's size and lifting ability are dangerous in the same way that tractors, cranes, hoists, and tow-motors are dangerous.

## II. The Second District erred by constraining its holding to case-specific facts and by focusing on the loader's location.

The Second District believed that its holding had to be predicated on only the facts of this case. This case-specific focus was a theme throughout the decision. For instance, the Second District was unwilling to say whether loaders were routinely operated near the public because there was "no evidence in the record" saying as much. *Newton*, 209 So. 3d at 617. Similarly, the Second District said the loader had a low "relative" danger because "[t]here is no record evidence to...suggest that the loader has a high accident rate." *Id.*

But, Florida courts are not limited to case-specific record facts in applying the doctrine. Instead, courts have always relied on "common knowledge and common experience" in deciding whether a vehicle is a dangerous instrumentality. *Rippy*, 80 So. 3d at 309 (citing *S. Cotton Oil Co.,* 86 So. at 631, 638).

That is precisely what this Court did in *Rippy*. There, the case never progressed past the motion-to-dismiss stage at the trial court. As a result, this Court did not have the benefit of *any* record evidence. There were no statistics about the dangers of farm tractors. There was no evidence about where tractors were normally operated. There was nothing in the record about how tractors normally injure people. The *Rippy* decision did not even identify how the tractor at issue injured the plaintiff. Nevertheless, this Court still held, as a matter of law, that farm tractors, as a class of vehicles, were dangerous instrumentalities because of their "weight, speed, and mechanism," and because "farm tractors frequently operate along state roads and other public areas." *Id.* These were conclusions based on nothing more than "common knowledge and common experience." *Id.*

Allowing reliance on common knowledge accords with the broad and practical purpose of the dangerous instrumentality doctrine: protecting the public against instrumentalities capable "of causing death or destruction." *Id.* at 307 (quoting *Meister*, 462 So. 2d at 1072). This Court did not need record evidence to know that a farm tractor may cause death and destruction. The size, weight, and use of the tractor made this conclusion self-evident.

So too here. Common knowledge and experience tell us that Caterpillar's multi-terrain loader is "peculiarly dangerous." The loader is huge, used to lift heavy loads very high in the air, is easily maneuverable, and is often operated

around other people. This Court does not need record evidence to know that the loader is a dangerous instrumentality.

This is not to say that courts should ignore record facts entirely. That a vehicle harmed a specific plaintiff in a specific way is certainly helpful in understanding a vehicle's broader danger. But, courts have never been limited to the facts of a particular accident in deciding on the applicability of the doctrine. Instead, the doctrine has always been applied categorically. Thus, all tractors are dangerous instrumentalities, regardless of whether they are operating on a public road or a private farm. *See id.* The same is true for all golf carts, *Meister*, 462 So. 2d 1071; for all airplanes, *Orefice v. Albert*, 237 So. 2d 142 (Fla. 1970); for all cars, *S. Cotton Oil Co*, 86 So. 629; and for all trucks, *Reid v. Associated Engineering of Osceola, Inc.*, 295 So. 2d 125 (Fla. 4th DCA 1974). It would make little sense to create a categorical rule based on a vehicle's case-specific operation.

The Second District, however, has done exactly that. The decision here treats a vehicle's dangerous-instrumentality status as a mutable designation—one that changes under some factual scenarios but not others. *See also Newton*, 209 So. 3d at 617 (finding that "accident occurring *in this case* and the evidence of other accidents" are not similar to other dangerous-instrumentality accidents); *id.* ("Additionally, the type of injury *in this case* favors a finding that the loader is not a dangerous instrumentality.") (emphasis added).

Significantly, the Second District used this "on-again off-again" approach to the doctrine, *see Reid*, 295 So. 2d at 129, to provide distance from its prior precedent in *Harding*, 559 So. 2d 107, which held that a forklift was a dangerous instrumentality. We had argued on appeal that *Harding* was controlling given how similar the loader is to a forklift. In fact, the loader can *become* a forklift when equipped with a fork work tool instead of a dirt bucket. (R167-71, 221-22, 324-25). Plus, the loader—even when outfitted with a dirt bucket—is still very similar to a forklift in purpose and operation: both are relatively compact machines used in industrial and construction settings to move, transport, and lift very heavy items.

But the Second District said these similarities were of no matter, because "[t]he court in *Harding* was presented with a different situation than present here." *Newton*, 209 So. 3d at 616. Specifically, the forklift in *Harding* collided with a car on a highway, while the Second District believed the loader here injured Mr. Newton on a residential lot. *Id.* (And, while the location of a vehicle-caused injury should not make a difference, as we discuss in the next section, it is worth noting that the Second District was wrong on the specifics of Mr. Newton's injury; in truth, he was inside a box trailer sitting on a *public street* when the loader released the tree stump. R35, 104.)

Implicit in the Second District's rationale is the notion that a forklift's status as a dangerous instrumentality changes based on where and how an injury occurs,

and who ends up injured. This is a significant departure in how the doctrine is applied, and one with major consequences. The benefit of a category-by-category, common-knowledge approach to dangerous instrumentalities is that it makes the doctrine predictable in its application. But now, a vehicle is only sometimes a dangerous instrumentality depending on the circumstances. This means litigants and trial courts no longer know whether *any* vehicle, particularly construction equipment, qualifies as a dangerous instrumentality.

Worse still, the Second District has opened the door for defendants to challenge whether the doctrine should apply to already-established dangerous instrumentalities. Take forklifts as an example. Previously, forklifts were dangerous instrumentalities, period. After the Second District's decision, however, a forklift's dangerous-instrumentality status is in constant flux.

As a result, the doctrine, as stated and analyzed by the Second District, offers more questions than answers. We know, based on the specific facts of *Harding*, that a forklift colliding with a car on a public street is a dangerous instrumentality. But, what if a forklift dropped a pallet on a bystander? Would it matter if the pallet was dropped in a warehouse? Or on a public street? What if the injured party was an independent contractor? Would it make a difference if the injured party was a pedestrian standing on a public road?

Not one of these questions has a definite answer under the Second District's analysis, which singlehandedly throws the dangerous instrumentality doctrine into disarray. This Court should quash the decision below so that the doctrine can be restored to its previously settled state.

## III. Second District improperly based its decision on where the loader was operating (both at the time of the accident and generally), which is the precise approach rejected by this Court in *Rippy*.

The Second District found 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." *Newton*, 209 So. 3d at 617. To reach this conclusion, the Second District relied on two cases: *Canull*, 584 So. 2d at 1097; and *N. Trust Bank of Fla.*, 587 So. 2d at 504. Both *Canull* and *N. Trust* thought it significant that the vehicles in question—a road grader and a crane, respectively—were being operated on "private" construction sites.

But these cases are no longer good law. They were effectively overruled by this Court in *Rippy*, which held that the location of a vehicle-caused injury is immaterial. *Id.* at 308. The farm tractor in *Rippy* injured someone on a private farm. Yet, this Court, following its own precedent in *Meister*, found that the location of the injury did not matter, because "*common sense tells us that in all other respects such vehicle while in motion is equally dangerous to persons and property no matter where it is operated.*" *Rippy*, 80 So. 3d at 308 (emphasis in

original); *see also Meister*, 462 So. 2d at 1072 (golf cart operated on country club golf course was a dangerous instrumentality); *Scott & Jobalia Constr. Co.*, 538 So. 2d at 79-80 ("It is well established that a crane being used *on a construction site* is a dangerous instrumentality....") (emphasis added); *Reid*, 295 So. 2d at 129 (rejecting idea that doctrine would "suddenly and momentarily" attach to a truck once it "crossed the property line and entered onto the public street" and then "just as quickly [] vanish[]" once "the truck again left the public street").

This Court also held that it did not matter where tractors usually operate. Although a farm tractor "is most commonly operated on farm property, it is not solely operated in that context." *Rippy*, 80 So. 3d at 309. Tractors are also operated in "road right-of-way maintenance, commercial landscaping, and in construction settings." *Id.* at 309. And tractors, "wherever they are operated...can be dangerous to those persons who encounter them." *Id.*

Likewise here. One glance at a photograph of the loader (R392, 472-73) reveals a ubiquitous piece of construction equipment used to lift and move debris and other heavy items. Common knowledge and experience tell us that loaders are used in the same settings as tractors and are "often powerful vehicles of such size and speed that...they can be dangerous" to the people around them. *Id.*

Tellingly, *Rippy* is nowhere to be found in the Second District's substantive analysis. If anything, the decision here follows the First District's since-quashed

reasoning that "[f]arm tractors, like road graders, are neither used as a mode of transportation nor routinely operated in public places as to pose a sufficient danger to the public." *Rippy*, 15 So. 3d at 923, *decision quashed*, 80 So. 3d 305. But, as this Court made clear, the proper inquiry is whether tractors (or loaders) are "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." *See Rippy*, 80 So. 3d at 309 (emphasis added).

Moreover, the Second District was wrong to conclude that the operation of the loader in this case shows a lack of public danger. Unlike the tractor in *Rippy*, the loader here was not on remote farmland. To the contrary, the loader was being used in a residential neighborhood to dump debris into a trailer sitting on a public road. And, the loader was temporarily driven on that road. These facts illustrate exactly why loaders are dangerous. The loader here could have caused a traffic accident, or it could have run someone over. Or, the loader could have errantly dumped a piece of debris on a bystander or a passing car.

Of course, the loader was not dangerous to only the residents of the neighborhood. It was also dangerous to Mr. Newton, who was working right next to where the loader was being operated. The Second District, however, did not consider Mr. Newton "a member of the unsuspecting public" who would be entitled to protection under the doctrine. *Newton*, 209 So. 3d at 616.

But why not? Mr. Newton was certainly unsuspecting; he did not expect to suffer a gruesome injury when he took a run-of-the-mill landscaping job. And he was a member of the public, too, even though he was working at the time. A hired landscaping worker is no less a member of the public than a worker assisting on a farm, *see Rippy*, 80 So. 3d at 306, or a golfer at a country club, *see Meister*, 462 So. 2d at 1072, or a construction worker on a job site, *see Scott & Jobalia Constr. Co.*, 538 So. 2d at 77-80.

The facts here are straightforward: the loader was dangerous, and it hurt Mr. Newton. The dangerous instrumentality doctrine applies to him regardless of where he was at the time of his injury.

At bottom, the Second District has come up with a fundamentally flawed analysis, and one that will lead to inconsistent results. For an illustration of this reality, we need only look back to *Rippy*. Indeed, the farm tractor there would not have passed muster under the Second District's view of the doctrine. The tractor was not "operated in close proximity to the public routinely or at the time of the accident," caused an accident "not akin to the type of accidents caused by the operation of motor vehicles," and injured someone "not a member of the unsuspecting public." *See Newton*, 209 So. 3d at 615-17.

Simply put, the Second District's decision is in direct conflict with *Rippy*. It should be quashed accordingly.

## IV. Caterpillar's multi-terrain loader is a dangerous instrumentality because it is a motor vehicle that is peculiarly dangerous when in use.

None of this is so complicated as the Second District's decision would suggest. The core inquiry here should be whether the loader is peculiarly dangerous in its operation. The Second District went astray when it demoted this central concern, naming it just one of many factors to be considered and weighed separately. *See Newton*, 209 So. 3d at 617 ("potential to cause severe harm" just one factor); *id.* at 618 ("potential to cause serious injury" just one factor).

It is true that courts have considered various factors in applying the dangerous instrumentality doctrine. But, these factors are not abstract concepts to be analyzed in isolation. Instead, the factors should be viewed holistically to determine whether a motorized vehicle is dangerous while in use.

Here, this determination can be made by answering two simple questions. First, is the loader a motor vehicle? *See Rippy*, 80 So. 3d at 308 ("A primary factor in determining whether an object is a dangerous instrumentality is whether the object at issue is a motor vehicle."). Second, is the loader dangerous in its operation? *See id.* at 309. As we will show, the answer to both questions is yes.

### The loader is a motor vehicle.

We start with the first question: Is the loader a motor vehicle? Notably, the Second District answered a different question altogether, stating that "[a] primary factor in our inquiry is whether the loader is an automobile." *Newton*, 209 So. 3d

at 615. The Second District was wrong. "There is no question that vehicles other than automobiles can qualify as [dangerous] instrumentalities and indeed, the doctrine in Florida has not been so limited." *Meister*, 462 So. 2d at 1072.

That is why a great number of vehicles, and not just automobiles, have been considered motor vehicles covered by the doctrine. The loader should be treated no differently. It is powered by a motor, is operated by a driver, and is driven over a variety of terrain. This makes the loader a motor vehicle under the common meaning of the phrase. *See Meister v. Fisher*, 435 So. 2d 981, 982-83 (Fla. 4th DCA 1983), *decision quashed*, 462 So. 2d 1071 (Fla. 1984) ("A golf cart clearly falls within the definition of a 'motor vehicle.' The American Heritage Dictionary defines 'motor vehicle' as "Any self-propelled, wheeled conveyance that does not run on rails."); *cf. Foster v. Lee*, 226 So. 2d 282, 283 (Fla. 2d DCA 1969) (non-motorized trailer not a dangerous instrumentality).

It is this common meaning of the phrase "motor vehicle"—and not any one statutory definition, as Caterpillar suggested below—that controls here. *See Harding*, 559 So. 2d at 108 ("Assuming that this forklift is 'special mobile equipment' for the purposes of chapter 316, it is still unquestionably a large vehicle powered by a motor and requiring skilled operation."). After all, the doctrine predates any statutory definitions, none of which were drafted with dangerous instrumentalities in mind. What really matters is that the loader is a

motor-propelled vehicle operated by a driver. This makes the loader as much a motor vehicle as a forklift, tow-motor, or crane.

Even so, the loader does fit under a statutory definition of "motor vehicle." Florida's Uniform Traffic Control Law defines a motor vehicle as "a self-propelled vehicle not operated upon rails or guideway, but not including any bicycle, motorized scooter, electric personal assistive mobility device, swamp buggy, or moped." § 316.003(40), Fla. Stat. The loader satisfies these criteria: it is self-propelled, is used to transport persons and property, is not operated on rails, and is not a bicycle, scooter, assistive mobility device, swamp buggy, or moped. The loader is thus statutorily defined as a motor vehicle, too.

The Second District focused on a different statutory definition when considering the extent to which the loader is regulated, noting that the loader could also be classified as "special mobile equipment." *Newton*, 209 So. 3d. at 616. (But, as the Second District was forced to acknowledge, the loader would still be subject to a range of motor vehicle-type regulations when it travels on roads. *Id.*).

The Second District's discussion of the regulation "factor" is emblematic of its flawed approach here. Instead of using regulation as a means to an end; that is, instead of using the existence of regulation to determine whether a vehicle is dangerous when in motion, the Second District narrowly focused on the regulatory framework as an end in itself.

This regulatory framework, however, is useful only to the extent that it reflects a vehicle's dangerousness. *See S. Cotton Oil Co.*, 86 So. at 634 ("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...."). And, for some instrumentalities—those that are not 8,100-pound construction vehicles—the existence of government regulation might belie an instrumentality's seemingly innocent appearance. *See Meister*, 462 So. 2d at 1073 (finding that regulation shows "concern about the dangers of golf carts"); *Festival Fun Parks*, 904 So. 2d at 546 (noting that go-karts, unlike golf carts, "are not extensively regulated").

Here, the loader is regulated when it travels on roads. *Newton*, 209 So. 3d. at 616. But, while these regulations reinforce the correct answer here, they are hardly necessary. The loader is not a go-kart. It is a large construction vehicle, and its dangerousness is all too apparent. Indeed, the loader's physical characteristics alone show its "potential to cause serious injury." *Id.* at 618. And, when a motorized vehicle has the potential to cause serious injury, it is covered by the doctrine.

**The loader is dangerous.**

We have already discussed why the loader is dangerous. It is a large vehicle, and when it moves—whether back and forth along the ground (like a car),

up and down (like a hoist), or both (like a crane or forklift)—it poses dangers to those around it. Even the Second District agreed with this assessment:

> We do recognize that based on its physical characteristics the loader has the potential to cause serious injury. It weighs over 8000 pounds and can lift a one-ton load nine feet into the air. Although it has a low rate of speed, its sheer size and weight give it the ability to generate a substantial amount of momentum. It is beyond question that the loader is a serious piece of machinery with the capacity to do great harm.

*Newton*, 209 So. 3d at 618. The Second District should have stopped there. The loader, like other job-site vehicles, is a dangerous instrumentality because it is "capable of causing death or destruction." *See Rippy*, 80 So. 3d at 307.

The loader presents many potential causes of death and destruction. It can collide with cars. It can run over pedestrians. The loader can, according to Caterpillar's own operation manual, cause burns (R134, 146-47), electrocute workers (R144), catch fire and explode (R135, 147-50), or crush workers with its arms or work-tool attachments (R131, 134-35, 138-43, 146, 225, 268, 287).

The loader can also drop heavy items on bystanders like Mr. Newton. This is precisely the way in which one would expect the loader to be dangerous; indeed, according to Caterpillar, lifting and moving debris are the loader's "principle intended functions." (R174). These functions are thus within the ambit of the dangerous instrumentality doctrine, which "is premised on the belief that a vehicle,

when used for its *designed purpose*, is likely to cause serious injury to others." *See Burch*, 864 So. 2d at 470 (emphasis added).

Cranes have the same designed purpose of lifting and carrying heavy items, and they injure people the same way—by dropping those items. That makes cranes dangerous. *See Scott & Jobalia Constr. Co.*, 538 So. 2d at 78. The Second District, however, was not impressed with the loader's lifting capabilities, which were judged to be "far shy" of what a crane can do. *Newton*, 209 So. 3d at 617.

Mr. Newton has a considerably different impression of the loader. Crane or not, the loader was still capable of lifting a tree stump high enough to sever his finger. In fact, Mr. Newton is fortunate that the stump rolled across the top of the box trailer before it struck him. The stump, had it been dropped on Mr. Newton directly, could have killed him. Given that the loader can lift over 2,000 pounds, there is no safe height for bystanders like Mr. Newton.

And, while loaders may be less physically imposing than cranes, loaders can hurt people in more settings thanks to their size and maneuverability. As Mr. Newton observed at the trial court, loaders can be seen everywhere, not just in residential neighborhoods. Common knowledge and experience tell us that loaders are "operated in road right-of-way maintenance, commercial landscaping, and in construction settings. It is an instrumentality often seen on public highways and rights-of-way...." *See Rippy*, 80 So. 3d at 309. Loaders are also used in

agricultural settings "[t]o keep...farming or ranching operations at maximum production." *See* http://www.catresourcecenter.com/machine/agriculture/loaders/.

The multi-terrain loader even had a starring role in a recent news story, which featured a viral video of a father who, in an unconventional display of parental discipline, used a multi-terrain loader to systematically destroy his daughter's luxury car. *See* Francis Scott, *Angry Dad Destroys His Daughter's $13,000 Audi With a Digger Because He Caught Her 'Fooling Around With a Boy Inside,'* Daily Mail (August 26, 2016), http://www.dailymail.co.uk/news/article-3760469/Angry-dad-destroys-daughter-s-10-000-Audi-digger-caught-fooling-boy-inside.html (noting that the loader takes "just two minutes to destroy the [car]").

The multi-terrain loader's ubiquity is hardly surprising: loaders are compact, versatile, and easy to operate. And they are cheap. C & J leased the loader here for just $776.58 a month. (R54). A luxury sedan can cost more than that.

That is likely why the loaders are such popular rental options. *See Tech Innovations Drive Increases in Heavy Equipment Leases and Rentals*, p.3 (2014) http://www.purchasing.com/wp-content/uploads/2014/10/Tech-Innovations-Drive-Increases-in-Heavy-Equipment-Leases-and-Rentals.pdf (stating that there was "an increase of 400% for consumer interest in renting compact track loaders").[3] It is also probably why multi-terrain loaders are the most financed type of construction

[3] For a permanent hyperlink to this report, *see* https://perma.cc/AA94-JAQG.

equipment in Florida (and in the United States). *See* Marcia Gruver Doyle, *The Top-Selling Financed Construction Equipment Models and Types, State by State for 2016* (November 15, 2016), http://www.equipmentworld.com/ctls-highway-contractors-dominate-list-of-top-selling-financed-construction-equipment-models-and-types/ ("In part because they cost less to finance, compact machines dominate this 'most popular' list.").

It would have been difficult for a small company like C & J to procure a crane. But, C & J had no difficulty getting ahold of a multi-terrain loader: "a serious piece of machinery with the capacity to do great harm." *Newton*, 209 So. 3d at 618. Here, that capacity was realized, and the loader did, in fact, cause Mr. Newton to suffer great harm. The dangerous instrumentality doctrine exists to address exactly this type of injury.

## CONCLUSION

The Second District erroneously diminished the importance of a vehicle's dangerousness, focused on location-specific factors that this Court has said to ignore, and improperly limited itself to the particular circumstances of the accident in this case. The result of these errors is an aberrant holding that simply cannot be reconciled with existing dangerous-instrumentality law. This Court should quash the decision below and hold that a multi-terrain loader is a dangerous instrumentality.


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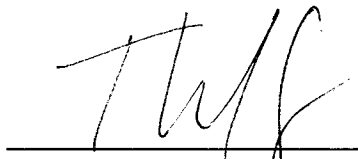
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by email to Hala Sandridge and Blake J. Delaney (hala.sandridge@bipc.com; joanne.volpe@bipc.com), Buchannan, Ingersoll & Rooney PC, SunTrust Financial Center, 401 East Jackson Street, Suite 2400, Tampa, Florida 33602; and Jason A. Herman (Jason@jasonhermanlaw.com), Jason A. Herman, P.A., 111 Second Avenue NE, Suite 353, St. Petersburg, Florida 33701, this 28th of August 2017.



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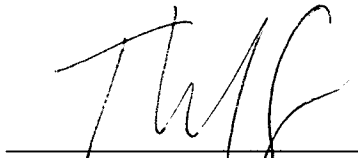
## CERTIFICATE OF COMPLIANCE

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



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