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 JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Plaintiff/Petitioner Newton was working with C&J Bobcat and Hauling, LLC and its agent Cram to clear debris from a job site. (A.2). To move the debris into a box trailer for hauling away, C&J leased from Caterpillar Financial Services Corporation a multi-terrain loader: a loader with a continuous rubber track (instead of wheels) used on off-road or unimproved surfaces. (A.2, 4, 7).

After hauling the loader to the job site in the box trailer, Cram backed the loader on to the street and drove it onto the private lot. (A.2). At one point when Newton was in the trailer packing down debris, Cram used the loader to dump a tree stump in to the trailer, and the stump rolled into Newton's hand, severing his finger. (A.2).

Newton sued Caterpillar Financial, alleging liability for his injury under the dangerous instrumentality doctrine. (A.2-3). Newton and Caterpillar Financial each moved for summary judgment on whether the doctrine applied to a multi-terrain loader. (A.3). Caterpillar Financial argued that the dangerous instrumentality doctrine did not apply because the loader is not a motor vehicle and is not heavily regulated; in addition, Caterpillar Financial offered evidence that multi-terrain loaders are not routinely operated in proximity to the public and that a multi-terrain loader injures only one third party (i.e., non-operator) for every 1,102

years of continuous operation. (A.4-6). Newton argued that the loader was dangerous primarily because of its physical characteristics. (A.5).

The trial court found the loader was not a dangerous instrumentality and entered judgment for Caterpillar Financial. (A.3). Newton appealed to the Second District Court of Appeal, which affirmed the trial court's decision. (A.1-11).

The Second District relied extensively on this Court's decision in *Rippy v. Shepard*, 80 So. 3d 305 (Fla. 2012), as well as other decisions from this Court and its sister appellate courts. From these decisions, the Second District culled the factors courts consider to resolve whether an object is a dangerous instrumentality:

- whether the object at issue is a motor vehicle;
- the extent to which an object is regulated;
- the relative danger posed by the instrumentality;
- the physical characteristics of the object; and
- whether the instrumentality operates in close proximity to the public.

(A. 3-4).

The Second District highlighted that "[n]o 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." (A.4).

The record showed that a multi-terrain loader:

- is not an automobile or other motor vehicle under Florida law;
- is not heavily regulated by the Florida legislature;
- posed a low level of danger to the public; and
- is not intended to operate, nor in fact is routinely operated, in close proximity to the public.

(A. 6-10). Although the Second District acknowledged a multi-terrain loader's physical characteristics that could make it dangerous, it reiterated that this was only one of many factors to consider in determining application of the dangerous instrumentality doctrine. (A.10-11). Weighing all the factors, the Second District found a multi-terrain loader is not a dangerous instrumentality.

SUMMARY OF ARGUMENT

The Second District correctly applied the law of this Court and other district courts of appeal in reaching its conclusion that a multi-terrain loader is not a dangerous instrumentality. The Second District applied each factor this Court considered in *Rippy*. When analyzing the dangerous instrumentality doctrine, courts may appropriately reach different conclusions as to different types of construction equipment. In addition, not one case Newton cites involves a 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. Because this case

does not involve substantially the same facts as a prior case, it cannot conflict with a rule previously announced by this Court or another district.

To establish conflict jurisdiction, Newton claims *Rippy* stands for the proposition that any piece of construction equipment is a dangerous instrumentality. Newton also focuses on statements made in isolation of the Second District's full analysis to argue the court did not apply *Rippy*.

Newton misreads *Rippy* and the Second District's opinion. In point of fact, *Rippy* conducted the exact analysis the Second District employed to determine if a ***specific*** type of construction equipment – a tractor – fell within the dangerous instrumentality doctrine. When the entirety of the Second District's opinion is properly viewed through a lens of a party not straining to manufacture an express and direct conflict, none appears.

ARGUMENT

I. THE SECOND DISTRICT EMPLOYED THE *RIPPY* FACTORS TO A CASE NOT INVOLVING SUBSTANTIALLY THE SAME FACTS AS ANY OTHER FLORIDA APPELLATE DECISION

"This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law." *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). This Court's jurisdiction to review decisions of courts of appeal for express and direct conflict is "invoked by (1) the announcement of a

rule of law which conflicts with a rule previously announced by this court or another district, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case." *Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975). As shown below, the Second District's decision implicates neither type of conflict.

A. The Second District Correctly Applied *Rippy*'s Rule of Law

Newton claims the Second District announced a conflicting rule of law by following the *Rippy* dissent instead of the *Rippy* majority. (Pet. 6). Only a myopic review of the Second District's opinion can sustain this assertion. *Rippy*'s majority considered factors to determine whether a farm tractor was a dangerous instrumentality, and the Second District followed this same analysis:

> *Rippy* majority: "[W]e first applied the dangerous instrumentality doctrine to an automobile," *Rippy*, 80 So. 3d at 307, then stating that "[a] primary factor in determining whether an object is a dangerous instrumentality is whether the object at issue is a motor vehicle." *Id.* at 308.
>
> *Newton*: Finding first that "[t]he loader is not an automobile under Florida law," (A.6), then finding that it is not a motor vehicle under section 320.01(1)(a), Fla. Stat. (2013). (A. 3, 6-7, 7 n.2).

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Rippy majority: "Additionally, the Legislature has enacted regulations to ensure the safe operation of farm tractors," and describing specific legislative safety requirements for tractors, *Rippy*, 80 So. 3d at 308.

Newton: "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." (A. 3, 8).

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Rippy majority: "Furthermore, farm tractors frequently operate along state roads and other public areas, thereby subjecting the public to danger of injury." *Rippy*, 80 So. 3d at 309.

Newton: "There was no evidence presented that these loaders were routinely operated in close proximity to the public." (A. 4, 10).

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Rippy majority: Based on "common knowledge and common experience," a farm tractor is a "potent source of danger." *Rippy*, 80 So. 3d at 309.

Newton: "Further, we consider the relative danger posed by the loader" and finding, after reviewing the record, that "the relative danger posed by the instrumentality is low." (A. 3-4, 8-10, 10-11).

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

Newton: "[T]he physical characteristics of the loader constitute only one of the factors to consider in determining whether a piece of machinery is a dangerous instrumentality." (A. 11).

****

In short, the Second District recognized and applied the *Rippy* majority's factors. Nothing in *Rippy* supports Newton's argument that the overarching consideration is whether an instrumentality merely has the potential to be "dangerous." (Pet. 5).

Claiming that the Second District nevertheless got it wrong, it is ***Newton*** who asks this Court to apply the *Rippy* dissent's logic. Newton suggests that if a golf cart is a dangerous instrumentality, then surely a loader is, too. (Pet. 4). This analysis, however, was rejected by the *Rippy* majority, which criticized the dissent's argument that a golf cart "has become the one touchstone by which all other instrumentalities are measured." *Id.* at 308. *Rippy* stated that "no one test is determinative of whether an instrumentality is dangerous." *Id.*

Newton also incorrectly asserts that the Second District considered prohibited factors, such as the multi-terrain loader's location, the type of accident,

and the injury. (Pet. 6-8). When read in context, these discussions were not determinative, but were mentioned as part of the *Rippy* factors outlined above.

And finally, Newton attacks alleged erroneous findings, rather than conflicting rules of law. For instance, Newton complains that the Second District should have found the multi-terrain loader a motor vehicle. (Pet. 8). But as an initial matter, and as the Second District found, a 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 in either the sense of the word or under sections 316.003(48) and 320.01(1)(a), Florida Statutes.

Moreover, if the Second District applied the correct factors to different facts to reach a result with which Newton – or even this Court – disagrees, no conflict jurisdiction exists. Constitutionally, this Court is not an error-correcting court. *Whipple v. State*, 431 So. 2d 1011, 1014 (Fla. 2d DCA 1983) (noting that district courts conduct the error-correcting function, leaving this Court to clarify the law and promulgate new rules of law). Because the Second District correctly applied the rule of law from *Rippy*, conflict jurisdiction does not exist.

B. The Facts Before The Second District Are Not Substantially The Same Controlling Facts As Any Prior Case

No dangerous instrumentality case before now has involved a loader, let alone a loader with a continuous rubber track that must be carried to its location

because it is designed for off-road use or unimproved surfaces. To avoid this problem, Newton argues that *Rippy* stands for the proposition that *all* construction equipment is a dangerous instrumentality. (Pet. 4-5). But if *Rippy* had categorically concluded that every piece of construction equipment is a dangerous instrumentality, it would have said so – and it would have been a short opinion, indeed. *Rippy*'s holding was in fact limited to the object before it: a tractor.

Also, while *Rippy* relies on common knowledge and experience in evaluating the factors, there will be instances where there is no common understanding of how a specific category of construction equipment operates. Here, ***both*** parties developed the record about how a multi-terrain loader operates. This Court similarly reviewed record evidence to find a golf cart a dangerous instrumentality. *See Meister v. Fisher*, 462 So. 2d 1071, 1073 (Fla. 1984) (noting expert affidavit showing 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").

Newton's suggestion that all pieces of construction equipment are dangerous instrumentalities would require Florida courts to base their decisions on a presumption. And while the "the power to establish a presumption 'is reserved solely to the courts and the legislative branch,'" *Chandler v. Dep't of Health & Rehabilitative Servs.*, 593 So. 2d 1183, 1184 (Fla. 1st DCA 1992), a conclusive

presumption violates the due process clause if it cannot be fairly rebutted. *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596 (Fla. 1987).

Rippy cannot be read to support such an unconstitutional presumption. Nor would one be logical. Adopting Newton's *Rippy* rule would render all pieces of construction equipment – such as stationary concrete mixers, handheld jack hammers, and elevator buck hoists – dangerous instrumentalities without any analysis whatsoever. While Newton demands predictability in applying the dangerous instrumentality doctrine (Pet. 10), such a concern cannot override due process.

CONCLUSION

Because the Second District applied the correct rule of law and its decision does not involve substantially the same facts as a prior case, conflict jurisdiction does not exist. This Court should deny Petitioner Newton's request for this Court to exercise its discretionary jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 7, 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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