IN THE SUPREME COURT OF FLORIDA

ANTHONY NEWTON,

Petitioner,

v.

Case No. SC17-67

CATERPILLAR FINANCIAL SERVICES CORPORATION, et al.,

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

Respondents.

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

PETITIONERS' JURISDICTIONAL BRIEF

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INTRODUCTION

Historically, the dangerous instrumentality doctrine has applied with near uniformity to "peculiarly dangerous" motorized vehicles, including construction equipment. And, recently, this Court confirmed the reach of the doctrine by holding that farm tractors are dangerous instrumentalities. But now, the Second District Court of Appeal has held that a multi-terrain loader—an 8,100-pound piece of construction equipment capable of lifting 2,000 pounds nearly ten feet in the air (A.5, 10)[1]—is not a dangerous instrumentality. This conclusion expressly and directly conflicts with the holdings of this Court and other district courts. This Court should resolve this conflict.

STATEMENT OF THE CASE AND FACTS

Respondent, Caterpillar Financial Services Corporation, owns the multi-terrain loader at issue in this case. (A.2). Caterpillar's loader seriously injured Petitioner, Anthony Newton. (A.2). The injury occurred while Mr. Newton was working with a hauling company, clearing debris from a residential lot. (A.2). For this job, the hauling company had leased the loader from Caterpillar. (A.2).

On the day of Mr. Newton's injury, an agent of the hauling company was using the loader to dump heavy debris into a trailer. (A.2). At some point, the trailer became full, and Mr. Newton was told to climb in to pack down the debris.

[1] "A" refers to the appendix containing the Second District's opinion.

(A.2). Soon after, the agent used the loader to pick up a large tree stump and dump it into the trailer. (A.2). But, Mr. Newton was still inside. (A.2). The stump rolled into Mr. Newton's left hand, severing one of his fingers. (A.2).

Mr. Newton filed suit against Caterpillar, and both parties moved for summary judgment on the question of whether a multi-terrain loader qualifies as a dangerous instrumentality. (A.3). The trial court answered that question in the negative. (A.3).

The Second District affirmed, holding that the loader, although having "the potential to cause serious injury," was not a dangerous instrumentality. (A.1-11). The Second District reached this conclusion based on a number of factors, including the location of the loader (A.6-8, 10), the type of injury Mr. Newton suffered (A.9), that Mr. Newton was not an innocent bystander (A.8), and that the loader was not an automobile (A.6).

The Second District also limited its holding to the record facts of this case rather than relying on a common understanding of loaders generally. Under this case-by-case analysis of the facts, the same loader might or might not be a dangerous instrumentality depending on the location of the injury, the nature of the injury, and the identity of the plaintiff. As we demonstrate below, the Second District's ultimate conclusion, as well as virtually every step in its analytical framework, conflicts with established Florida law.

SUMMARY OF THE ARGUMENT

The Second District's decision creates an express and direct conflict. If a tractor, golf cart, crane, and tow motor are all dangerous instrumentalities, then surely a loader is too. Even worse, the Second District reached its conflicting decision by focusing on specific factors that this Court has discounted. The Second District misapplied the law by focusing on where and how Mr. Newton was injured, whether he was an innocent bystander to the accident, where loaders normally operate, and whether loaders are automobiles.

Finally, the Second District ignored this Court's prior rulings by allowing its holding to be limited by case-specific circumstances. This Court has always applied the dangerous instrumentality doctrine categorically. Thus, all tractors are dangerous instrumentalities, regardless of where they are operated or how they injure someone. So too for all golf cars, and for all automobiles. This categorical approach provides certainty to litigants and trial courts. Not so under the Second District's approach. Now, an instrument may be dangerous in one situation but not another, depending on who was injured, and how, and where. The confusion and unpredictability introduced by this case warrants this Court's attention.

ARGUMENT

The Second District's holding is directly contrary to Florida law, which has held that tractors and construction equipment are dangerous instrumentalities.

Moreover, the Second District relied on factors that this Court said to disregard. And, finally, the Second District created a further conflict by finding that the application of the dangerous instrumentality doctrine should be constrained by the particular circumstances of this case.

If tractors and construction equipment (and golf carts!) are dangerous instrumentalities, then so too is a multi-terrain loader.

The dangerous instrumentality doctrine imposes vicarious liability on owners who entrust their vehicles to others. *Rippy v. Shepard*, 80 So. 3d 305, 306 (Fla. 2012). "The doctrine applies to any instrumentality of known qualities that is so peculiarly dangerous in its operation as to justify application of this common law principle." *Id.* (emphasis added, internal quotations omitted).

Mr. Newton can attest to the fact that a multi-terrain loader is peculiarly dangerous in its operation. And, significantly, the Second District agreed:

> 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.

(App.10-11).

But, the Second District nevertheless held that the loader is not a dangerous instrumentality. This holding conflicts with decisions from Florida's Third, Fourth, and Fifth Districts, which have extended the dangerous instrumentality

doctrine to construction equipment—such as cranes *Scott & Jobalia Const. Co., Inc. v. Halifax Paving, Inc. for Use & Benefit of U.S. Fid. & Guar. Co.*, 538 So. 2d 76, 79 (Fla. 5th DCA 1989), and construction hoists, *Lewis v. Sims Crane Serv., Inc.*, 498 So. 2d 573, 575 (Fla. 3d DCA 1986), and buck hoists, *General Portland Land Development Co. v. Stevens*, 395 So. 2d 1296 (Fla. 4th DCA 1981), and tow motors, *Eagle Stevedores, Inc. v. Thomas,* 145 So. 2d 551 (Fla. 3d DCA 1962).

Most recently, in *Rippy*, this Court corrected an aberration in the doctrine: the First District's decision that farm tractors are not dangerous instrumentalities. This Court quashed the First District, holding that the "weight, speed, and mechanism of farm tractors render their negligent use peculiarly dangerous" to the public. *Rippy*, 80 So. 3d at 309. *Rippy* followed a previous decision of this Court, which held that even a golf cart is dangerous while in operation. *See Meister v. Fisher,* 462 So. 2d 1071, 1073 (Fla. 1984). Certainly the loader is more dangerous than that.

At bottom, the Second District's decision cannot be squared with the holdings of this Court or other district courts, which have found that similar types of movable construction equipment are dangerous instrumentalities. The multi-terrain loader's size and lifting ability make it dangerous in the same way that tractors, cranes, hoists, and tow motors are dangerous. The Second District's holding to the contrary presents a conflict in the law.

The Second District's emphasis on where and how this loader caused an injury, and on its status as an automobile, demonstrates conflict.

As stated above, the dangerous instrumentality doctrine is first and foremost concerned with whether a vehicle is "peculiarly dangerous in its operation." *See Rippy*, 80 So. 3d at 309. The Second District's decision demotes this central concern, deeming it just one of many factors to be considered along with other circumstances of the case. *See* (A.9-10) ("potential to cause severe harm" just one factor); (A.10-11) ("potential to cause serious injury" just one factor). But, the Second District's approach does not accord with this Court's holding in *Rippy*.

If anything, the Second District's decision follows the *dissent* in *Rippy*, which laid out all the various factors appellate courts have followed in dangerous-instrumentality cases. *Id.* at 311-12. The Second District appears to have tracked the dissent exactly, considering these factors and giving equal weight to each. *See* (A.3-10). The Second District focused on where the loader was operated (A.10), the type of accident (A.9), and who was injured (A.8). The Second District also focused on whether the loader is an automobile. (A.6). As we show below, each of these steps in the analysis conflicts with this Court and other district courts.

The loader's location. In *Rippy*, this Court held that the location of a vehicle-caused injury is immaterial. *Id.* at 308. This Court took issue with the notion that a tractor "somehow ceases to be a dangerous instrumentality the instant the driver causes it to turn off the public street or highway and onto a private drive

or other private property." *Id.* (quoting *Meister*, 462 So. 2d at 1073). This Court also rejected the First District's reliance on where tractors most often operate: "[E]ven though a tractor is most commonly operated on farm property, it is not solely operated in that context. Tractors are also operated in road right-of-way maintenance, commercial landscaping, and in construction settings...." *Id.* at 309.

Nevertheless, the Second District based its holding on the precise factors this Court had said to ignore, finding that the loader was not operated near the public "routinely or at the time of the accident" (A.10). Notably, this is the *exact* same reasoning used by the First District in *Rippy*: that tractors are "neither used as a mode of transportation nor routinely operated in public places." *Rippy v. Shepard*, 15 So. 3d 921 (Fla. 1st DCA 2009). As this Court's holding in *Rippy* makes clear, the question is whether a vehicle is dangerous, not where an accident occurred.

The type of accident. The Second District found the accident here is not like other "accidents caused by the operation of motor vehicles," because the loader did not collide with Mr. Newton. (A.9). But, the plaintiff in *Rippy* was injured in an unspecified way on private land, and yet this Court still focused on completely different scenarios in finding the doctrine satisfied. *Id.* at 307-09.

And, the Second District's focus on the type of accident conflicts with a holding of the Fifth District, which held that a construction crane is a dangerous instrumentality. *See Scott & Jobalia Constr. Co.,* 538 So. 2d at 78. A crane, like

the loader, can injure people by dropping a dangerously heavy item. *Id.* (worker injured by falling pipe). That cranes and loaders are able to harm people in two different ways makes them more dangerous, not less.

Mr. Newton's injury. The Second District found that Mr. Newton was not the intended recipient of the doctrine's protection (presumably) because he was working at the time and thus was not "a member of the unsuspecting public." (A.6). This finding conflicts with Florida law. As a hired worked, Mr. Newton was no less a member of the public than anyone else. *See Meister*, 462 So. 2d at 1072 (doctrine applied to a golfer at a country club); *Scott & Jobalia Constr. Co.*, 538 So. 2d at 79-80 (doctrine applied to a construction worker).

The loader is a motor vehicle. In *Rippy*, this Court stated, "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 (emphasis added). The Second District, however, identified "whether the loader is an *automobile*" as a primary factor. (A.6) (emphasis added). This expressly conflicts with well-established law. "There is no question that vehicles other than automobiles can qualify as such instrumentalities...." *Meister*, 462 So. 2d at 1072. The loader is a motor vehicle. This is true under certain statutory definitions, *see, e.g.,* § 316.003, Fla. Stat, as well as under the common meaning of the phrase—the loader is powered by a motor, is operated by a driver, and is driven over roads and other terrain.

The Second District's overemphasis on record evidence further shows conflict.

In deciding whether a vehicle is a dangerous instrumentality, courts may rely on "common knowledge and common experience." *See Rippy*, 80 So. 3d at 309. In *Rippy*, the trial court had granted a motion to dismiss ruling that tractors were not dangerous instrumentalities. Despite having no record evidence, this Court still held that farm tractors in general are dangerous instrumentalities. *Id.*

This category-by-category, common-knowledge approach makes the doctrine predictable in its application, which is certainly the reason that this approach has long been utilized by this Court. *See id.* (extending doctrine to "farm tractors" generally); *Meister*, 462 So. 2d 1071 (same as to golf carts); *Orefice v. Albert,* 237 So. 2d 142 (Fla. 1970) (same as to airplanes); *S. Cotton Oil Co. v. Anderson*, 86 So. 629 (Fla. 1920) (same as to automobiles).

The Second District misapplied this law in finding that its holding had to be based on case-specific circumstances: where *this* loader was located, how *this* accident occurred, and who was injured in *this* case. (A.8-10); *see also* (A.10) (refusing to consider where loaders are normally operated because of a lack of record evidence). The result of this misapplication—especially when paired with the Second District's multi-factored approach—is a dangerous-instrumentality framework that can be twisted to accommodate just about conclusion.

For example, apply the Second District's framework here to the farm tractor before this Court in *Rippy*. Under this framework, the tractor cannot be a dangerous instrumentality: the tractor was not an automobile, was not normally operated in public, injured someone who was not an "unsuspecting member of the public," and caused the injury on private land. Thus, the Second District's decision and analytical framework simply cannot be reconciled with existing law.

This conflict is no academic concern. The Second District has injected confusion, and unpredictability into the caselaw. Now, litigants have no way of knowing whether any instrument, particularly construction equipment, qualifies as a dangerous instrumentality. It is a problem the undersigned law firm has experienced firsthand.[2] This Court should accept review to resolve this conflict and restore predictability from the confusion invited by the decision below.

CONCLUSION

For all the foregoing reasons, this Court should grant review and resolve the conflicts presented by this case.

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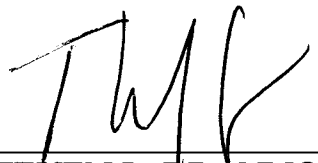
[2] For example, the undersigned was counsel of record in another Second District case, which addressed whether an aerial lift platform was a dangerous instrumentality. The trial court had said it was not, and the Second District per curiam affirmed. *Manning v. Sunbelt Rentals, Inc.*, 206 So. 3d 705 (Fla. 2d DCA 2016); *see* Initial Brief of Appellant, 2015 WL 6384496 (Fla. 2d DCA); Reply Brief of Appellant, 2016 WL 2931398 (Fla. 2d DCA). While we of course recognize that a per curiam affirmance is not a basis for jurisdiction, it does illustrate a practical reality: that the contours of the dangerous instrumentality doctrine are now a complete mystery to us—despite our intimate familiarity with the doctrine—and that we have no idea how to advise our clients as a result.

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 22nd of February 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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