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

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

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

Over the last century, the dangerous instrumentality doctrine has been applied, virtually without exception, to all types of motorized vehicles, including construction equipment used on job sites. Caterpillar's answer brief scrupulously avoids this practical reality, minting a never-before-enunciated six-factor "test" that would turn the doctrine on its head.

There are many problems with Caterpillar's test. First, and most obviously, it reaches a result irresolvable with 100 years of precedent. This is because Caterpillar ignores what is really the doctrine's core inquiry: whether a particular type of instrument is a motorized vehicle peculiarly dangerous in its operation. Second, by focusing on the facts of an accident instead of the nature of the instrumentality, Caterpillar introduces uncertainty into the doctrine, which historically has been applied much more uniformly to categories of vehicles. Third, Caterpillar's test includes factors that this Court already invalidated, such as where an instrumentality-caused accident occurred, where an instrumentality most commonly operates, and who was injured.

The test need not be so complicated. The question should be whether an instrumentality is a motorized vehicle that is particularly dangerous to others when used improperly. When viewed through the lens of this core inquiry, the outcome here becomes clear and predictable. The loader is a dangerous instrumentality.

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

This case is not about comparing the loader to a golf cart. In fact, the initial brief primarily cited to cases involving construction vehicles. Caterpillar largely ignores this construction-vehicle authority, except to claim that we have offered a different argument on the merits than we did at the jurisdictional stage. Not so. We have never claimed entitlement to a ruling that "all pieces of construction equipment" (even a hammer!) are dangerous instrumentalities. (ABR, p.12). Rather, we simply applied Florida precedent uniformly treating motorized construction vehicles as dangerous instrumentalities. The result reached by this precedent is unsurprising. Construction vehicles are big, motorized, and dangerous while in motion. Thus, Caterpillar need not worry about the doctrine being extended to hammers, which are none of those things. (ABR, pp.32-33).

Caterpillar's six-factor test obviously does not work. If construction workers are not considered worthy of protection, if the vehicle must always meet the statutory definition of a motor vehicle, and if the location of the accident on private property are all dispositive factors, then construction vehicles on a jobsite would never pass the test. Clearly, the Second District's use of this test cannot be reconciled with the many years of precedent reaching the opposite conclusion. The conflict created by the decision below should be resolved by this Court.

II. The Second District erred by constraining its holding to case-specific facts.

In the initial brief, we argued that the Second District had rejected a common-knowledge, categorical approach to the dangerous instrumentality doctrine. Now, a vehicle's status as a dangerous instrumentality is changeable (and unpredictable)—it shifts depending on where a vehicle is operating, who was injured, or how the injury occurred. And that goes for already-existing dangerous instrumentalities, too. Under the Second District's reasoning, a plaintiff injured by an existing dangerous instrumentality—like, say, a farm tractor—might discover at trial that this particular farm tractor is not a dangerous instrumentality, because this plaintiff was standing on a private lot when the injury occurred, or because the tractor's manufacturer was willing to sign an affidavit saying that this type of farm tractor is not dangerous.

But this Court has rejected this type of "on-again off-again approach to the owner's liability for the permittee's negligent operation of [a] vehicle." *See Reid v. Associated Engineering of Osceola, Inc.*, 295 So. 2d 125, 129 (Fla. 4th DCA 1974); *Meister v. Fisher,* 462 So. 2d 1071, 1073 (Fla. 1984) (quoting *Reid* for proposition that to condition the doctrine's application on "whether the vehicle is on or off the public highway simply leads to absurd results"). The doctrine is instead applied categorically, and regardless of any case-specific factual wrinkles.

For example, *all* automobiles are dangerous instrumentalities, regardless of their design or size. Thus, small sedans are dangerous instrumentalities, *Leonard v. Susco Car Rental Sys. of Fla., Inc.*, 103 So. 2d 243, 243 (Fla. 3d DCA 1958), and so are much larger pickup trucks, *Reid*, 295 So. 2d 125. This is true even though a sedan owner might argue, as Caterpillar does here, that his or her car "weighs just half [as] much" as a pickup truck. (ABR, p.39).

Similarly, the dangerous instrumentality doctrine has always been applied categorically to heavy equipment on job sites. For a court to correctly apply this precedent to Caterpillar's loader—a kind of heavy equipment used on job sites—would not, as Caterpillar claims, constitute a due-process violation visited upon construction rental companies. Rather, this uniform approach would simply restore predictability to the doctrine.

This long-standing precedent also belies the answer brief's dire policy prognostications. Caterpillar threatens that, if this Court reverses the Second District, construction rental companies "will have to reconsider leasing in Florida." (ABR, p.39). But again, construction vehicles have been subject to the dangerous instrumentality doctrine for *decades*, and calamity has not followed. This Court will hardly be driving rental companies out of Florida by correcting the Second District's aberrant ruling and returning the doctrine to its previously settled state.

III. The 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 focused on whether the loader routinely operated near the public, and also on whether the loader here was operating on public or private land. *Newton v. Caterpillar Fin. Svcs. Corp.*, 209 So. 3d 612, 617 (Fla. 2d DCA 2016). Caterpillar claims that the Second District was correct to make these two inquiries, which appear as factors five and six in Caterpillar's test. (ABR, p.13).

But this Court's rulings to the contrary could not have been clearer. Start with where the loader commonly operates. As explained the initial brief, this Court held that a tractor was a dangerous instrumentality even though it is most commonly operated away from other people. *Rippy v. Shepard*, 80 So. 3d 305, 309 (Fla. 2012); *id.* at 313 (Polston, J., dissenting) (discussing majority's recognition of fact "that farm tractors are 'most commonly operated on farm property' away from the public" and that a device may be a dangerous instrumentality where "used around the public sometimes but not primarily"). Tellingly, the answer brief ignores this holding entirely. (ABR, pp.27-33).

Caterpillar instead focuses on a lack of record evidence, arguing that the Second District had the right of it because Mr. Newton "offered no evidence in the trial court of how frequently Multi-Terrain loaders operate near the public." (ABR, p.29). Of course, the exact same argument could have been made in *Rippy*,

where there was no record evidence—of any kind—about where tractors commonly operate. Yet this Court, based on nothing more than common knowledge and experience, concluded that tractors are operated near the public "in road right-of-way maintenance, *commercial landscaping*, and in *construction settings*." *Id.* at 309 (emphasis added).

This Court does not need record evidence to reach the same conclusion here. Indeed, a farm tractor's exposure to the public presented a much more difficult question, because tractors are often operated on remote farmland away from other people. Not so with loaders, which are operated primarily in construction settings. And in construction settings there are other people—construction workers—who are at risk. *See Scott & Jobalia Const. Co., Inc. v. Halifax Paving, Inc. for Use & Benefit of U.S. Fid. & Guar. Co.*, 538 So. 2d 76, 78 (Fla. 5th DCA 1989), *aff'd* 565 So. 2d 1346 (Fla. 1990) (crane-caused injury on construction site). Also, loaders are similar to tractors in that they are used on commercial landscaping jobs (as the facts here illustrate), and on farms. In all these settings, the loader is being operated around people, who are protected under the doctrine.

Caterpillar and the Second District, however, seem to think that workers like Mr. Newton are exempt from the doctrine. This view finds no support in the case law. *See id.* (injured party was construction worker); *Rippy*, 80 So. 3d at 306 (worker on farm); *Meister*, 462 So. 2d at 1072 (golfer at a country club). And

Caterpillar never explains why Mr. Newton does not rate as a "member of the public." (ABR, p.8). Not that there is much Caterpillar could say. The loader disfigured Mr. Newton while he was working his day job. It is unfathomable that his injury would be excepted from the doctrine while an injury caused by a rear-end golf-cart collision would be covered. *See Meister*, 462 So. 2d at 1072.

Caterpillar is also wrong in claiming that it mattered whether the loader was on "private" land when it caused Mr. Newton's injury. *See id.* This Court has never declined to extend the doctrine based on where a specific accident occurred. *See Rippy*, 80 So. 3d at 306 (accident occurred on private farm); *Meister*, 462 So. 2d at 1072 (country club golf course); *see also Scott & Jobalia Constr. Co.*, 538 So. 2d at 77-80 (construction site); *Reid*, 295 So. 2d at 126, 129 (private property). In fact, this Court has made it perfectly clear that the location of an injury should not factor into the analysis at all, because a "*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 (same).

Rather than following this Court's recent precedent, the Second District relied on now-defunct case law from other district courts and assigned significance to the location of Mr. Newton's injury, which "occurred on a private lot." *Newton*, 209 So. 3d at 617 (citing *Canull v. Hodges*, 584 So. 2d 1095 (Fla. 1st DCA 1991); *N. Trust Bank of Fla. v. Constr. Equip. Intern., Inc.*, 587 So. 2d 502 (Fla. 3d DCA

1991)). In the answer brief, Caterpillar tries to breathe life into *Canull* and *N. Trust*, arguing that neither case suggested the location of a vehicle-caused injury was salient. (ABR, p.34). Caterpillar is wrong; both cases did precisely that. *See Canull*, 584 So. 2d at 1097 (listing location of vehicle as a factor and noting that road grader was "operating on an airport construction site"); *N. Trust*, 587 So. 2d at 504 (finding crane fell outside doctrine because it "was in use for construction" and "was generally fenced and not exposed to the general public").

In short, Caterpillar's focus on the location of the accident creates a clear conflict with *Rippy*. *See Rippy*, 80 So. 3d at 308.

This is not to say that loaders are exclusively driven on private land. It is common knowledge that construction vehicles, while not designed primarily for transportation, will be taken onto public roads during a job. Indeed, who hasn't seen a construction vehicle—or this type of loader specifically (R392, 472-73)—driven onto a public street during work on a job site? Who hasn't had to wait while one of these crossed the street, or backed up to pick up a load, or was moved slowly down the road from one job site or the other? It defies common experience to pretend that loaders will not be "seen on public highways and rights-of-way, performing these varied services." *Id.* at 309.

Further, the loader's ease of use, compact size, and low rental cost mean that it can also be used in a variety of non-construction settings. It would be startling to

see a crane sitting on your neighbor's lawn. But a loader would not be out of place at all. Indeed, the loader here was operating in a small St. Petersburg neighborhood. And Mr. Cram used the loader to dump heavy debris into a trailer that sat on a public road running through that neighborhood.

Eschewing common knowledge (and common sense), Caterpillar proclaims that "[a] Multi-Terrain Loader does not travel on roads." (ABR, p.20). But Caterpillar's contention is disproved by reality: Mr. Cram *did* drive the loader on a road here. *See Newton*, 209 So. 3d at 613 (recognizing that loader was driven on public street). This is precisely why Caterpillar's owner's manual contains a section instructing on the proper procedures for "roading" the loader.[1] (R229-34).

But this is all a side show. Caterpillar's focus on location ignores the most important fact of all, which is that loaders are dangerous—to motorists, neighbors, construction workers, and passers-by—regardless of where they operate.

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

The Second District's multi-factor test closely tracks the *dissent* in *Rippy*, where Justice Polston laid out assorted factors that appellate courts have considered in dangerous-instrumentality cases. *See Rippy*, 80 So. 3d at 311-12

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[1] The Second District erroneously stated that the manual provides that a loader "may be equipped with tires and modified to drive on the road." *Newton*, 209 So. 3d at 616 n.2. There is nothing in the manual suggesting that a loader with treads cannot or will not be taken onto roads. (R229-34).

(Polston, J., dissenting). But the *Rippy* dissent was not recognizing a six-factor test. To the contrary, these factors were identified to illustrate that courts pick and choose factors and that the doctrine "lacks any precise legal standards." *Id.* at 311.

Our point here is not that these factors are necessarily unworthy of consideration, just that they are not an end to themselves. Instead, the factors should be considered holistically to determine whether a motor vehicle is dangerous while in use. Caterpillar takes the opposite view of the doctrine, conceptualizing a test where each factor is isolated and then tallied. The result of this checklist approach is a variable test that, as shown by the result reached here, will lead to wildly inconsistent outcomes and a complete lack of certainty.

As *Rippy* demonstrates, this analysis need not be complicated to reach consistent and predictable results. Is the instrumentality driven by a motor? Is it particularly dangerous? Is the danger to those around the vehicle caused by its motion? If so, the instrumentality falls within the doctrine.

The loader is a motor vehicle; that is, a motorized vehicle in motion.

At the outset, we note that Caterpillar concedes that the Second District was wrong to focus on whether the loader is an automobile. (ABR, p.17). The dangerous instrumentality doctrine applies to all types of motor vehicles.

And whether an instrument qualifies as a motor vehicle cannot depend solely on a statutory definition. *See Harding v. Allen-Laux, Inc.*, 559 So. 2d 107, 108

(Fla. 2d DCA 1990) ("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."); *see also Edwards v. ABC Transp. Co.*, 616 So. 2d 142, 144-45 (Fla. 5th DCA 1993) (holding trailer was not a motor vehicle under dangerous instrumentality doctrine even though it satisfied statutory definition).

That is precisely what Mr. Newton's counsel argued at the trial court: "The *Harding* court...talked about the definitions of motor vehicle and said Florida statutes *are not dispositive with respect to whether something's a motor vehicle*...." (T481) (emphasis added). Thus, Caterpillar is incorrect in suggesting that we somehow waived or conceded the motor-vehicle factor. (ABR, pp.35-36). Our argument has always been that the loader is a motor vehicle for purposes of the doctrine even if not statutorily defined as one.[2] Again, the reason why is not complicated. The loader is powered by a motor and can be driven in a way where its motion causes danger to people around it.

To illustrate why any single statutory definition should not control a vehicle's motor-vehicle status, consider a non-motorized trailer. A trailer is

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[2] Nor was there any concern over whether the loader would run afoul of the Graves Amendment, which defines a motor vehicle as a vehicle that is *primarily* used on public roads. *See* 49 U.S.C. § 30102(a)(7). Neither the dangerous instrumentality doctrine nor section 316.003(40), Florida Statutes, defines a motor vehicle so narrowly.

statutorily defined as a motor vehicle. §320.01(1)(a), Fla. Stat. (Notably, the Second District relied on section 320.01(1)(a) in concluding that the loader was not a motor vehicle. *Newton*, 209 So. 3d at 615-16.) But appellate courts have nevertheless (correctly) held that a trailer is not a motor vehicle for purposes of the dangerous instrumentality doctrine. *See, e.g., Edwards*, 616 So. 2d at 144-45.

Conversely, many established dangerous instrumentalities would not meet the statutory definition used by the Second District here. Cranes, tow-motors, forklifts, and buck hoists—to say nothing of airplanes or boats—are "not designed to be primarily operated on public highways." *See Newton*, 209 So. 3d at 615-16. Yet they are all dangerous instrumentalities. The loader, a motorized vehicle operated by a driver, is no less a motor vehicle than any of these instrumentalities.

The loader is dangerous.

On this point, Caterpillar does not have much to say, except to echo the Second District's erroneous contention that the danger posed by a vehicle is a small part of the dangerous instrumentality doctrine. In reality, though, dangerousness *is* the doctrine, which is concerned first and foremost with protecting the public from a vehicle that is "peculiarly dangerous in its operation." *Rippy*, 80 So. 3d at 306. The loader is certainly peculiarly dangerous. As the Second District recognized, "It is beyond question that the loader is a serious piece of machinery with the capacity to do great harm." *See Newton*, 209 So. 3d at 618.

Caterpillar does contend that we have not explained the "types of injuries" that loaders cause. (ABR, p.25). This is not true. *See* (IBR, pp. 26-27). As explained in the initial brief, Caterpillar's operation manual provides a laundry list of possible harms, which include burns, electrocution, and being crushed by the loader's arms or work tools. More obviously, the loader can also run people over, collide with cars, or drop heavy items on bystanders. Significantly, the dangerous instrumentality doctrine applies to *any* of these injuries. *See Cheung v. Ryder Truck Rental, Inc.*, 595 So. 2d 82, 85 (Fla. 5th DCA 1992) (applying doctrine to rented truck where plaintiff was struck by a "wheel which only seconds earlier had been attached to the left rear axle of a Toyota Corolla being towed on the rear of [the rented truck]").

Lastly, we address Caterpillar's arguments about the "relative" danger of the loader as expressed in the "statistical evidence" put before the trial court. As explained above, allowing this type of case-specific evidence to dictate whether a vehicle is a dangerous instrumentality is antithetical to the doctrine's categorical nature. Moreover, this type of evidence is not necessary here. In *Rippy*, this Court did not need to consider statistics to know that tractors are dangerous. And while this Court did look at statistical evidence when first creating the doctrine, those statistics were taken from impartial sources that gathered comprehensive,

nationwide data. *S. Cotton Oil Co. v. Anderson*, 86 So. 629, 633 (Fla. 1920). There are no similar statistics about the loader here.

Rather, Caterpillar offered only an affidavit signed by an officer of Caterpillar, Inc.—a company that, even if "a separate entity from the Respondent" (ABR, p.23), hardly seems disinterested. The affidavit does not provide a comprehensive look at loader-caused injuries. Instead, the affidavit draws from Caterpillar's own databases, which show that just 17 loader-related accidents have ever occurred. (R99-100). The problem, however, is that the databases only track accidents involving Caterpillar loaders that were affirmatively reported *to Caterpillar*. (R99-100, 517-19). The flaw in this data-collection method is illustrated by the fact that Mr. Newton's injury was not one of the 17 recorded accidents. (R99-100); *see* (R518-19) (Mr. Newton's counsel argues, "That's how accurate this thing is. It doesn't even list our injury, and we're in the suit.").

What is more, the statistical likelihood of injuries—even if properly reported—can be misleading. Take airplanes as an example. Air travel is regarded as extremely safe. Yet, airplanes are still dangerous instrumentalities. *Orefice v. Albert,* 237 So. 2d 142 (Fla. 1970). Even automobile accidents are relatively infrequent when spread out over the entire population. In 2015, around 45,000 automobiles were involved in fatal crashes. *See* National Highway Traffic Safety Admin., 2015 Data: Passenger Vehicles, 1, 3 (May 2017),

https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812413. While this is a very big number, there were over 260 million registered vehicles on the roads in 2015, *see id.*; meaning that around .00017% of automobiles were involved in a fatal crash. That works out to a little over one automobile-caused fatality for every 100 million miles traveled. *See* National Highway Traffic Safety Admin., 2016 Motor Vehicle Crashes: Overview, 1-2 (Oct. 2017), https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812456.

This is not to say automobiles are not dangerous. They are. Whenever you have vehicles weighing thousands of pounds being operated by and around people, those people will eventually get hurt. The dangerous instrumentality doctrine exists to address these inevitable injuries.

CONCLUSION

This Court should quash the decision below and hold that Caterpillar's loader is a dangerous instrumentality.

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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 8th day of January 2018.

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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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