Dangerous Instrumentality Doctrine: Problem and Solution

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Overview of the Dangerous Instrumentality Doctrine

In Florida, the dangerous instrumentality doctrine is a judicially-created doctrine. *Salsbury v. Kapka*, 41 So. 3d 1103, 1104-05 (Fla. 4th DCA 2010); *see also S. Cotton Oil Co. v. Anderson*, 86 So. 629 (Fla. 1920) (first case to apply the dangerous instrumentality doctrine to an automobile). Florida is the only state to have adopted the doctrine by judicial decision. *See Burch v. Sun State Ford, Inc.*, 864 So. 2d 466, 470 (Fla. 5th DCA 2004). Under this doctrine, vicarious liability is imposed upon the owner of a dangerous instrumentality who voluntarily entrusts that instrumentality to an individual whose negligent operation causes damage to another, unless the operation occurs as the result of theft or conversion. *Rippy v. Shepard*, 80 So. 3d 305, 306 (Fla. 2012); *Burch*, 864 So. 2d at 470. The underlying premise of the dangerous instrumentality doctrine is "that the one who originates the danger by entrusting the [instrumentality] to another is in the best position to make certain that there will be adequate resources with which to pay the damages caused by its negligent operation." *Kraemer v. Gen. Motors Acceptance Corp*., 572 So. 2d 1363, 1365 (Fla. 1990).

The dangerous instrumentality doctrine imposes strict vicarious liability upon the instrumentality's "owner." *Aurbach v. Gallina*, 753 So. 2d 60, 62 (Fla. 2000). The person to be held vicariously liable must have an identifiable property interest in the instrumentality, such as ownership, rental, bailment, or a leasehold interest. *Id*. Liability is said to be strict because a plaintiff need not prove that an owner negligently entrusted the vehicle to its operator for liability to attach; the plaintiff need only prove some fault on the part of the operator, which is then imputed to the owner under vicarious liability principles. *Burch*, 864 So. 2d at 470. This liability is imputed even when the operator disobeys restrictions on the use of the instrumentality, unless the disobedience rises to the level of theft or conversion. *Id*. For example, the Florida Supreme Court has held that an ex-husband was a "beneficial owner" of an automobile he had bought for his ex-wife as he had never transferred his co-ownership interest in the automobile, and thus the ex-husband could be vicariously liable for his ex-wife's negligent driving under the dangerous instrumentality doctrine. This was so even though the ex-husband did not use the automobile, no longer lived with his ex-wife, and retained no real control of the operation of the automobile. *Christensen v. Bowen*, 140 So. 3d 498 (Fla. 2014).

Although in application the doctrines may produce similar results, the vicarious liability imposed under the dangerous instrumentality doctrine is conceptually distinct from joint and several liability. Joint and several liability exists where two or more tortfeasors engage in negligent acts which operate concurrently to cause an injury. *Albertson's, Inc. v. Adams*, 473 So. 2d 231, 233 (Fla. 2d DCA 1985). The doctrine allows a plaintiff to recover all damages from one of either of the tortfeasors even though that particular tortfeasor may be the least responsible. *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239, 1257 (Fla. 1996). In contrast, a vicariously liable party has not engaged in any wrongful conduct but is simply liable for another's negligence based on a relationship or, as here, based on ownership of a dangerous instrumentality that is used by the tortfeasor. Similar to joint and several liability, the vicariously liable party is liable for the entire share of the fault assigned to the tortfeasor, but the vicariously liable party is liable based solely on the legal imputation of responsibility for that tortfeasor's acts. *See Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp*., 908 So. 2d 459, 467-68 (Fla. 2005). In 2006, the Florida Legislature abolished joint and several liability, and today a tortfeasor may only be held liable for his or her percentage of fault. *See* Fla. Stat. § 768.31 (2006).

Purpose of the Doctrine as Applied to Automobiles

The doctrine is intended to prevent a "master" from shifting responsibility of a dangerous instrument to a "servant." *See S. Cotton Oil Co.* at 629. While the dangerous instrumentality doctrine has existed at common-law for some time, it was extended to automobiles in 1920. *See Id*. This occurred despite the court's acknowledgement that many other states had declined to do the same. *Id.* at 632 ("We are not unmindful that a goodly unmber [sic] of courts lay down a different rule…."). The doctrine originally concerned instruments involving fire, flood, water, or poisons, though British case law had extended it to include firearms and explosives by 1816. *See Dixon v. Bell*, 5 M. & S. 198 (1816). The Florida Supreme Court stated the doctrine was "extended to include other objects that common knowledge and common experience proved to be as potent sources of danger as those embraced in the earlier classifications," *S. Cotton Oil Co.*, 86 So. at 631, and used this as reason to include automobiles in the class of dangerous instrumentalities.

The Court believed statistics showed that automobiles were inherently dangerous instrumentalities, citing the National Safety Council's statement that automobiles had "become the most deadly machine in America." *Id.* at 633. After concluding that automobiles were in fact inherently dangerous when operated, the court next determined that vehicle owners must be liable for injuries that occur through the negligence of an individual entrusted to drive. *See Id*. at 636 ("In intrusting [sic] the servant with this highly dangerous agency, the master put it in the servant's power to mismanage it, and as long as it was in his custody or control the master was liable for any injury which might be committed through his negligence."). Thus, the Court viewed the rising number of injuries involving automobiles to be of great concern, and reasoned that these injuries evidenced that automobiles were dangerous instruments. As such, in the court's view, an owner of a vehicle should be held vicariously responsible for those he or she entrusts with use of the vehicle, so as to provide for extra caution and care, and ensure the safety of others.

Elements of the Dangerous Instrumentality Doctrine

The factors used by courts to determine whether an object is a dangerous instrumentality defies routine application. *See Rippy*, 80 So. 3d at 308 ("no one test is determinative of whether an instrumentality is dangerous"). Likewise, no one single factor is determinative, either. *See Newton v. Caterpillar Fin. Servs., Corp.*, 253 So. 3d 1054, 1056 (Fla. 2018). Florida courts consider a "variety of factors" in applying the doctrine, including whether an instrumentality is a motor vehicle, the instrumentality's "peculiar dangers relative to other objects," whether the instrumentality is operated near the public, and how extensively the legislature has regulated the instrumentality. *Id*. Additionally, courts have considered the "weight, speed, and mechanism" of the instrumentality. *See Rippy*, 80 So. 3d at 309.

Most if not all dangerous instrumentalities are types of motor vehicles. Indeed, "[a] primary factor in determining whether an object is a dangerous instrumentality is whether the object at issue is a motor vehicle." *Id*. Thus, the doctrine has been extended to a variety of motor vehicles, including golf carts, trucks, buses, airplanes, tow-motors, tractors, and forklifts. *Id*. at 307, 309 (collecting cases and holding that a tractor is a dangerous instrumentality). However, the fact that an object is a motor vehicle is not controlling. *See Edwards v. ABC Transp. Co*., 616 So. 2d 142, 144 (Fla. 5th DCA 1993) (holding that a trailer is not a dangerous instrumentality even though it meets the statutory definition of a motor vehicle); *Harding v. Allen-Laux, Inc*., 559 So. 2d 107, 108 (Fla. 2d DCA 1990) (holding that a forklift is a dangerous instrumentality although not a "motor vehicle").

Another factor is whether "common knowledge and experience" prove the object to be a "potent source[] of danger." *Rippy*, 80 So. 3d at 306-07 (internal quotation marks omitted). That common knowledge and experience is often based on the number and seriousness of accidents caused by the object. *See S. Cotton*, 86 So. at 633-36 (holding that automobiles are dangerous instrumentalities and listing figures for the number of deaths caused by automobiles); *Meister v. Fisher*, 462 So. 2d 1071, 1073 (Fla. 1984) (concluding golf carts are dangerous instrumentalities and quoting expert witness's statement 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" (emphasis omitted)); *Festival Fun Parks, LLC v. Gooch*, 904 So. 2d 542, 543 (Fla. 4th DCA 2005) (holding that concession go-karts are not dangerous instrumentalities and noting testimony that "less than 3% of all [concession go-kart] riders have 'incidents' and that less than 1% are injured seriously enough to require emergency room treatment"). Thus, a number of courts have required some showing that the object has caused significant harm or is likely to cause such harm. For example, in *Salsbury v. Kapka*, the Fourth District reversed a trial court's holding that an ATV is a dangerous instrumentality because the trial court did not compile an adequate factual record, remanding the case to the trial court to "examine specific facts regarding the inherent danger of ATVs to determine whether the dangerous instrumentality doctrine should be extended to those vehicles." 41 So. 3d at 1104.

Courts also consider whether "[t]he weight, speed, and mechanism" of the object renders its "negligent use peculiarly dangerous to others." *Rippy*, 80 So. 3d at 309; *see, e.g., Festival Fun Parks*, 904 So. 2d at 543 (noting that the top speeds of concession go-karts only range from 14 to 20 miles per hour); *Canull v. Hodges*, 584 So. 2d 1095, 1097-98 (Fla. 1st DCA 1991) (holding that road graders are not dangerous instrumentalities and noting that road graders cannot lift items or people high off the ground). For example, in holding that a tractor is a dangerous instrumentality the Florida Supreme Court observed that "it is common knowledge that tractors vary in size but are often powerful vehicles of such size and speed that wherever they are operated, they can be dangerous to those persons who come into contact with them." *Rippy*, 80 So. 3d at 309.

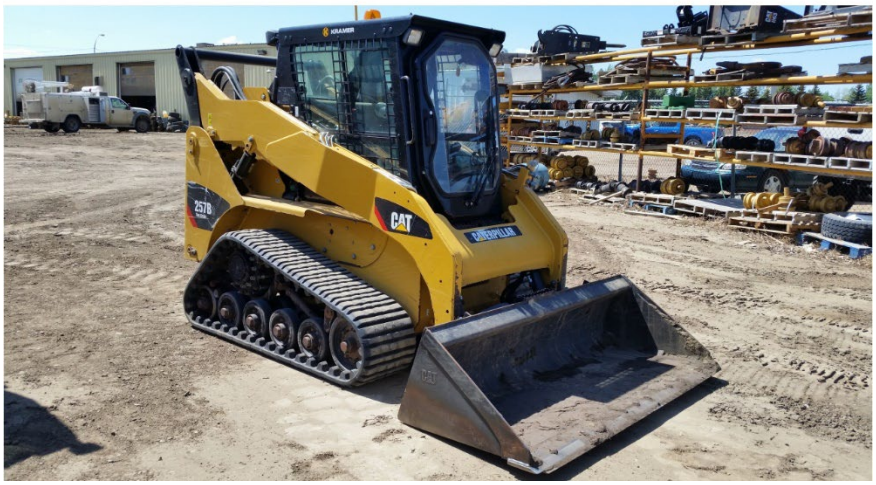
Another factor considered by courts is whether the instrumentality is routinely operated in close proximity to the public or operated in or near public places. Id. (noting that "farm tractors routinely operate along state roads and other public areas, thereby subjecting the public to danger of injury"); *Meister*, 462 So. 2d at 1073 ("Florida's tremendous tourist and retirement communities make golf carts and golf courses extremely prevalent in this state."); *Harding*, 559 So. 2d at 108 (considering the fact that the forklift was operating on a public highway at the time); *Eagle Stevedores, Inc. v. Thomas*, 145 So. 2d 551, 552 (Fla. 3d DCA 1962) (observing that the tow-motor caused the injury on a public street).

Additionally, courts have considered the extent to which the Legislature has regulated an instrumentality as part of the dangerous instrumentality analysis. *See S. Cotton Oil*, 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 which the Legislature felt it was its duty to regulate and restrain for the protection of the public."); *Meister*, 462 So. 2d at 1072 (noting that the legislature has placed various restrictions on the operation of golf carts during its determination that golf carts are dangerous instrumentalities); *Festival Fun Parks*, 904 So. 2d at 546 (stating that go-karts are not extensively regulated by the state as a reason go-karts are not dangerous instrumentalities.).

Expansion of the Doctrine

Over time, the doctrine has been expanded to include a wide array of vehicles and equipment. *See Western Union Telegraph, Co. v. Michel*, 163 So. 86, 87-88 (Fla. 1935) (finding motorcycles to be dangerous instrumentalities); *Orefice v. Albert*, 237 So. 2d 142, 145 (Fla. 1970) (finding airplanes to be dangerous instrumentalities); *Meister*, 462 So. 2d at 1073 (finding golf carts to be dangerous instrumentalities); *Eagle Stevedores*, 145 So. 2d at 552 (finding tow-motors to be dangerous instrumentalities); *Rippy*, 80 So. 3d at 309 (finding tractors to be dangerous instrumentalities); *Harding*, 559 So. 2d at 108 (finding forklifts to be dangerous instrumentalities); *Lewis v. Sims Crane Serv., Inc.*, 498 So. 2d 573, 575 (Fla. 3d DCA 1986) (finding construction hoists to be dangerous instrumentalities); *Geffrey v. Langston Const. Co.*, 58 So. 2d 698 (Fla. 1952) (finding cranes to be a dangerous instrumentality); *see also* Fla. Stat. § 327.32 (stating boats are to be considered dangerous instrumentalities in Florida).

In 2018, the Court again expanded the doctrine, this time to include loaders. *See Newton v. Caterpillar Fin. Servs. Corp.*, 253 So. 3d 1054 (Fla. 2018). In doing so, the Supreme Court reversed a Second DCA opinion holding to the contrary. In *Newton*, an independent contractor, Mr. Newton, had been hired by C&J Bobcat and Hauling, LLC to provide assistance to its agent, Mr. Cram, in clearing debris on a private residential lot. *See Newton v. Caterpillar Fin. Servs. Corp.*, 209 So. 3d 612, 613 (Fla. 2d DCA 2016). The work involved the use of a front-end loader that C&J had leased from Caterpillar Financial Services. *Id*. Included immediately below as a visual aid is a picture of a front-end loader. Mr. Newton was injured in an accident involving the loader and proceeded to file suit against Caterpillar Financial Services. *Id*. Mr. Newton's theory was that the loader was a dangerous instrumentality, and thus Caterpillar should be held vicariously liable as its owner. *Id*. at 614. Mr. Newton did not file suit against Mr. Cram or against C&J, likely because both lacked insurance or substantial assets.



1. A front-end loader, as was used in the accident occurring in *Newton.*

Both parties to the suit provided expert witnesses to support their opinions, but the Second DCA was persuaded that a loader did not meet the standard of a dangerous instrumentality. *Id*. at 615. The Second DCA supported its conclusion by noting that loaders are not automobiles, that loaders are not designed to be operated primarily on highways, that the loader in question was not being

operated in a public setting or in close proximity to the public, that loaders are not substantially regulated, and that the relative danger posed by loaders is low. *Id*. 615-17.

Despite the Second DCA's careful and well-articulated analysis, the Supreme Court, in a 4-3 decision, reversed the opinion. *See Newton*, 253 So. 3d at 1057. The Supreme Court noted that because loaders are "self-propelled, powered by an engine, and can be wheeled conveyances…[c]ommon knowledge" dictates that loaders are motor vehicles for the purposes of the dangerous instrumentality doctrine. *Id*. Furthermore, the Court stated loaders are "frequently used to clear private lots near public streets," exhibiting that loaders "operate near the public frequently." *Id*. Finally, because a loader can lift 2300 pounds up to a height of 9.5 feet, and because its design restricts an operator's visibility, "[c]ommon knowledge demonstrates" that a loader "has the ability to cause serious injury when operated near or over a public street…." *Id*. Thus, the Supreme Court concluded loaders are in fact a dangerous instrumentality. *Newton* will likely have a chilling effect, dissuading equipment companies from leasing construction equipment out of fear of liability in cases of misuse. The dangerous instrumentality doctrine has been stretched extremely thin by Florida courts.

Proposed Solution

Fortunately a viable solution exists. In 2005, the federal government enacted the Graves Amendment, 49 U.S.C. § 30106, which provides that a motor vehicle owner who rents or leases the vehicle will not be liable for harm arising out of the lessees use, operation, or possession of the vehicle during the rental period, so long as the owner is engaged in the trade or business of renting or leasing motor vehicles and there is no negligence or criminal wrongdoing on the party of the owner. *See* 49 U.S.C. § 30106(a). In *Vargas v. Enterprise Leasing Co.*, the Florida Supreme Court determined that this federal statute preempted state law, and that neither long-term lessors or short-term lessors may be held vicariously liable for the acts of the lessee, so long as the lessor fits the Graves Amendment qualifications. 60 So. 3d 1037, 1043 (Fla. 2011). Prior to *Vargas*, Florida had already eliminated vicarious liability for long-term lessors and placed caps on the economic damages one could recover from a short-term lessor. *See Id*. at 1041.

Thus, after *Vargas*, there is a clear exception to Florida's dangerous instrumentality doctrine for rental vehicles. To remedy issues compounded by the Court's expansion of the doctrine, the Legislature should pass legislation extending this exception to rentals of special mobile equipment. In fact, such a proposal is currently before the Legislature, having been introduced by Representative Thomas Leek as part of House Bill 355 and Senator Kelli Stargel as part of Senate Bill 862. The operative part provides in full:

> (2) Notwithstanding any other law, a lessor, under a lease agreement for the rental or lease of special mobile equipment 30 which requires the lessee to maintain insurance coverage with 31 limits of at least $100,000/$300,000 for bodily injury liability 32 and $50,000 for property damage liability, or at least $500,000 33 for combined property damage liability and bodily injury 34 liability, is not liable for acts of the lessee or the lessee's 35 agent or employee in connection with the rental or lease, 36 including any bodily injury, death, or property damage resulting 37 from operation, maintenance, or use of the special mobile 38 equipment. The failure of the lessee to obtain or maintain 39 insurance coverage required by the lease

agreement does not 40 impose liability on the lessor. However, the lessor may be 41 liable if the bodily injury, death, or property damage:

(3) Notwithstanding subsection (2), any special mobile equipment that causes injury, death, or damage while leased under a written lease agreement that requires the lessee to maintain insurance coverage that contains limits not less than $100,000/$300,000 bodily injury liability and $50,000 property damage liability or not less than $500,000 combined property damage liability and bodily injury liability is not a dangerous instrumentality. However, the lessor of special mobile equipment may be liable for damages that:

(a) Occurred while the lessor's employee or contractor was operating, maintaining, or using the equipment; or

(b) Resulted from the lessor's gross negligence or criminal wrongdoing.

Special mobile equipment has the same meaning as defined in Fla. Stat. § 316.003(75) ("Any vehicle not designed or used primarily for the transportation of persons or property and only incidentally operated or moved over a highway, including, but not limited to, ditchdigging apparatus, well-boring apparatus, and road construction and maintenance machinery, such as asphalt spreaders, bituminous mixers, bucket loaders, tractors other than truck tractors, ditchers, leveling graders, finishing machines, motor graders, road rollers, scarifiers, earthmoving carryalls and scrapers, power shovels and draglines, and self-propelled cranes and earthmoving equipment. The term does not include house trailers, dump trucks, truck-mounted transit mixers, cranes or shovels, or other vehicles designed for the transportation of persons or property to which machinery has been attached.").

A resolution of this issue is necessary post-*Newton*. It is important that leasing companies have the ability to provide equipment to a variety of entities, from professional construction corporations to private individuals, without fear of liability resulting from negligence that is not their own. This is particularly true in Florida, where the equipment leasing companies provide is often used in disaster relief or debris cleanup in the aftermath of a hurricane. Currently, leasing companies worry that they may be held liable for any minor or freak accident occurring to any person to which they lease equipment, which may have a chilling effect and delay relief efforts.

House Bill 355 strikes a delicate balance, enabling leasing companies to operate without fear of liability in the event of an accident to which they played no part, while still ensuring that an injured party is able to seek just compensation. For a leasing company to fall within the new exception, the written lease agreement must require the lessee to maintain insurance coverage meeting certain minimum standards. In doing so, an injured party will be guaranteed the opportunity to seek appropriate relief, while leasing companies will be free from having have to constantly peer over their shoulders dreading the potential mistakes or negligence of others.

Florida courts have stretched the dangerous instrumentality doctrine far past its logical conclusions, and now is an opportune time for the Legislature to step in and amend the errors of the courts, by clarifying that lessors of certain construction equipment do not have to operate in constant fear of vicarious liability under the dangerous instrumentality doctrine. This is a logical extension of the rental vehicle exception already provided for by law and can be done in a manner that ensures fairness for all parties involved.