

## **Florida May Expand the Dangerous Instrumentality Doctrine to All-Terrain Vehicles**

### ***Product Liability Advisory***

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All-terrain vehicles (ATVs) may soon join a growing list of vehicles classified as "dangerous instrumentalities" under Florida tort law. See *Salsbury v. Kapka*, --- So.3d ---, 2010 WL 3239075 (Fla. 4th DCA 2010).

In *Kapka*, Brian Cullen, a minor, struck and injured Dr. Helen Salsbury while riding an ATV owned by his adult friend, Kenneth Kapka. Salsbury brought suit against Cullen and Kapka; as to Kapka, Salsbury's complaint sought to impose strict liability under Florida's "dangerous instrumentality" doctrine because Kapka was the owner of the ATV. However, the trial court granted Kapka's motion for judgment on the pleadings, ruling that it was "[u]nwilling to usurp the role of the Legislature or the [a]ppellate [c]ourts in extending the doctrine to a new type of vehicle." *Kapka*, 2010 WL 3239075, at \*2.

On Salsbury's appeal, the Fourth District Court of Appeal recognized that Florida is the only state in the nation that classifies "dangerous instrumentalities" by judicial decree, as opposed to jury determination, and correspondingly looked to judicial determinations regarding the classification of a particular vehicle. See *Kapka*, 2010 WL 3239075 at \*2 (citing *Festival Fun Parks, LLC v. Gooch*, 904 So.2d 542, 544 (Fla. 4th DCA 2005)). Courts in other states have concluded that the issue is at least a jury question. See e.g., *Rios v. Smith*, 744 N.E.2d 1156, 1161 (N.Y. 2001) (holding the issue of whether an ATV was a dangerous instrument is a question of fact properly submitted for jury determination); see also, *Coombe v. Kovach*, 2006 WL 3719516 (Conn. Super. 2006) (jury question); *Laing v. American Honda Motor Corp., Inc.*, 628 So.2d 196 (La. 2d Cir. Ct. App. 1993) (jury question); cf. *Morris ex rel. Morris v. Williams*, 834 N.E.2d 622, 628 (Ill. App. 4th Dist. 2005) (relieving landowner from liability to trespasser because "ATV riding is an inherently dangerous activity"). Such a "decree" typically comes after judicial assessment of three factors: (1) whether the instrumentality fits the definition of a "motor vehicle"; (2) whether the instrumentality is extensively regulated by statute; and (3) whether there is record evidence regarding the causes and consequences of accidents involving the instrumentality. The first two factors are questions of law while the latter requires a factual record normally established by expert testimony. See *Meister v. Fisher*, 462 So.2d 1071 (Fla. 1984) (justifying the expansion of the dangerous instrumentality doctrine to golf carts based upon expert testimony equating golf cart design and operational characteristics to motor vehicles).

In Salsbury's case, she had not presented the "record evidence" necessary to a complete analysis by the trial court, and the District Court of Appeal correspondingly remanded the case to the trial court for proceedings to that end. It is anticipated that on remand (if the case is not settled), Salsbury will present evidence supporting all three factors for expansion of the dangerous instrumentality doctrine to ATVs.

The significance of classifying an ATV as a "dangerous instrumentality" cannot be understated: "[T]he dangerous instrumentality doctrine 'imposes strict vicarious liability upon the owner of a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another.'" *Kapka*, 2010 WL 3239075 at \*1. Thus, in a tort suit, a plaintiff's burden of proof would be lessened, liability defenses would be limited, and the scope of potential recovery would be broadened. To be sure, minor children are often the riders of ATVs owned by their parents or other adults (as was the case in *Kapka*), so the imposition of strict liability may create entirely new and broad exposure to claims against assets or homeowners' insurance policies that may not have previously been accessible.

In sum, when the trial court in *Kapka* or a similar case is presented with sufficient evidence justifying expansion of the dangerous instrumentality doctrine, ATVs will join automobiles, trucks, motorcycles, buses, fork-lifts, cranes and even golf-carts as judicially designated "dangerous instrumentalities" in Florida.

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