

*RODRIGUEZ V. DEPARTMENT OF TRANSPORTATION: AN
OPPORTUNITY TO EXPAND THE REAL ESTATE
EXCEPTION TO SOVEREIGN IMMUNITY*

I. INTRODUCTION

When motor vehicle accidents occur, many questions, mostly concerning liability, arise. Those questions become increasingly complex when an external factor, such as the condition of the road, may have contributed to the accident. The Pennsylvania Constitution allows civil suits to be filed against the Commonwealth¹ in limited situations.² One of the exceptions to sovereign immunity is the real estate exception, set forth in section 8522(b)(4) of the Pennsylvania Consolidated Statutes.³ Under the real estate exception, the Commonwealth may not use sovereign immunity as a defense when injury has been caused by "[a] dangerous condition of Commonwealth . . . highways under the jurisdiction of a Commonwealth agency."⁴ This particular exception has been subject to litigation related to motor vehicle accidents in the last ten to fifteen years.⁵

The Supreme Court of Pennsylvania reviewed this issue in 2000 when it decided *Dean v. Department of Transportation*.⁶ In *Dean*, the court specifically addressed the issue of whether the Pennsylvania Department of Transportation's (PennDOT) failure to erect a guardrail fell within the real estate exception to sovereign immunity.⁷ The court held PennDOT's failure to erect a guardrail on a highway did not constitute a dangerous condition, and, therefore, was not included within the real estate exception to

¹ PA. CONST. art. 1, § 11.

² 1 PA. CONS. STAT. § 2310 (Supp. 2001).

³ 42 PA. CONS. STAT. § 8522(b)(4) (2011).

⁴ *Id.*

⁵ *See generally* *Dean v. Dep't of Transp.*, 751 A.2d 1130, 1132-34 (Pa. 2000) (discussing lower court decisions related to the Pennsylvania Department of Transportation's (PennDOT) liability in accidents involving dangerous highway conditions).

⁶ *Dean v. Dep't of Transp.*, 751 A.2d 1130 (Pa. 2000).

⁷ *Id.* at 1130.

sovereign immunity.⁸ PennDOT was entitled to summary judgment as a matter of law.⁹ Since *Dean*, the Commonwealth Court of Pennsylvania has addressed similar issues related to structures (or lack thereof) and PennDOT's liability.¹⁰ The Commonwealth Court of Pennsylvania has consistently applied *Dean* to these other cases, calling on the legislature to amend the statute if the exception should encompass such things.¹¹

Included in this litany of post-*Dean* litigation is *Rodriguez v. Department of Transportation*,¹² the focus of this survey. *Rodriguez* is unique because PennDOT was *aware* of the danger of cross-over accidents on the highway in question, but elected not to install a protective median barrier.¹³ Had PennDOT installed a barrier in this area, the accident would not have occurred.¹⁴ The court held PennDOT was immune from suit because the purpose of the highway was for "travel on the roadway," and the lack of a median barrier did not interfere with that intended purpose.¹⁵ This case illustrates the Commonwealth Court of Pennsylvania's adherence to precedent when deciding these cases.

This survey acknowledges that the initial reaction in these situations is a desire for an amendment to the real estate exception that would encompass all situations in which PennDOT's failure to erect a safety structure contributed to a serious motor vehicle accident. However, the motor vehicle violations of those involved in the accidents, and the flood of litigation that would stem from such an amendment, support the judiciary's position. PennDOT should not be held liable for accidents when the conditions of the highway were aggravating factors in a crash. *Rodriguez* presents a

⁸ *Id.* at 1134.

⁹ *Id.* at 1134-35.

¹⁰ See *Svege v. Interstate Safety Serv., Inc.*, 862 A.2d 752, 755 (Pa. Commw. Ct. 2004); *Fagan v. Dep't of Transp.*, 946 A.2d 1123, 1125-26 (Pa. Commw. Ct. 2008); *Stein v. Pa. Turnpike Comm'n*, 989 A.2d 80, 82, 84, 88 (Pa. Commw. Ct. 2010); *Lambert v. Katz*, 8 A.3d 409, 413, 417-19 (Pa. Commw. Ct. 2010); *Quinones v. Dep't of Transp.*, 45 A.3d 467, 469-70, 473 (Pa. Commw. Ct. 2012).

¹¹ See *Stein*, 989 A.2d at 88.

¹² *Rodriguez v. Dep't of Transp.*, 59 A.3d 45 (Pa. Commw. Ct. 2013).

¹³ *Id.* at 47 (emphasis added).

¹⁴ *Id.*

¹⁵ *Id.* at 50.

unique opportunity for the Supreme Court of Pennsylvania to examine the issue a second time. This survey argues the court should make a small exception for the cases in which the Commonwealth was on notice of the dangerous condition, yet failed to prevent injury. Part II of this survey discusses the sovereign immunity statute and case law leading up to the *Rodriguez* decision. Part III examines the facts of *Rodriguez* and its outcome. Part IV of the survey evaluates the Commonwealth Court of Pennsylvania's decision and the potential counter to the court's current position. Finally, Part V summarizes the issue at hand.

II. BACKGROUND

A. Statutory Framework

The Pennsylvania Constitution has limited Commonwealth liability to certain circumstances as prescribed by the legislature.¹⁶ Title 1 of the Pennsylvania Consolidated Statutes reaffirms the right of sovereign immunity and states that suit may be brought only as directed in title 42.¹⁷ Section 8522 states that damages arising out of negligent acts, which would be recoverable under the common law or a statute, may be pursued if they fall within certain named exceptions.¹⁸ The Commonwealth real estate, highways, and sidewalks are one category of exceptions under the statute; related to this is the section on potholes and "other dangerous conditions."¹⁹ Under the real estate exception, dangerous conditions of highways under the jurisdiction of a Commonwealth agency waive immunity.²⁰ Notably, the pothole exception to sovereign immunity allows an individual to recover if a dangerous condition of a Commonwealth highway, due to potholes, can be shown to have "created a *reasonably foreseeable risk of the kind of injury which was incurred.*"²¹ The plaintiff must prove that the

¹⁶ PA. CONST. art. 1 §11.

¹⁷ 1 PA. CONS. STAT. § 2310 (Supp. 2001).

¹⁸ 42 PA. CONS. STAT. § 8522(a) (2011).

¹⁹ *Id.* § 8522(b)(4)-(5).

²⁰ *Id.* § 8522(b)(4).

²¹ *Id.* § 8522(b)(5) (emphasis added).

Commonwealth had "written notice of the dangerous condition" and sufficient time to take measures to protect against injury from that condition.²²

When examining a case brought under the real estate exception, the court will strictly construe the statute because the legislature intended to insulate the Commonwealth from liability, except for limited situations.²³ The court must use the plain meaning of the language in the statute; therefore, the dangerous condition must "derive, originate from or have as its source [in] the Commonwealth realty."²⁴ The property must be safe for the activities for which it is regularly used, but also for activities it is intended to be used for, or could reasonably be foreseen to be used for.²⁵ The dangerous condition must be the *direct cause* of the injury, not a concurrent cause or aggravating factor.²⁶

B. Case Law – The "Intended Use" Analysis

In *Bendas v. Township of White Deer*,²⁷ the Supreme Court of Pennsylvania held that because the Commonwealth has a "duty to make its highways reasonably safe for their intended purpose[s]," the issue of what is a dangerous condition must be answered by the jury.²⁸ Following this decision, the issue of sovereign immunity under the real estate exception was treated inconsistently.²⁹ In 2000, the Supreme Court of Pennsylvania again addressed the issue in *Dean*.³⁰ In *Dean*, the appellant, Stacy Dean, was involved in a serious motor vehicle accident which left her a quadriplegic.³¹

²² *Id.*

²³ *Snyder v. Harmon*, 562 A.2d 307, 311 (Pa. 1989).

²⁴ *Id.*

²⁵ *Id.* at 312.

²⁶ *Id.* (emphasis added) (waiving immunity, but note, however, that after *Dean*, concurrent cause of injury was acceptable).

²⁷ *Bendas v. Twp. of White Deer*, 611 A.2d 1184 (Pa. 1992).

²⁸ *Id.* at 1187.

²⁹ See generally 3 S. GERALD LITVIN & GERALD AUSTIN MCHUGH, JR., WEST'S PENNSYLVANIA PRACTICE SERIES, TORTS: LAW AND ADVOCACY § 10.42 (2012 ed.) (noting there was a "long series of conflicting decisions" in this area of the law).

³⁰ *Dean v. Dep't of Transp.*, 751 A.2d 1130, 1130 (Pa. 2000).

³¹ *Id.* at 1131.

The truck she was a passenger in fishtailed on a snowy highway and went down into an embankment.³²

The appellant filed suit against PennDOT, alleging negligence for failure to erect a guardrail where the accident had occurred and for failing to properly maintain a safe highway.³³ Although PennDOT sought summary judgment, the trial court, relying on *Bendas*, held the case over for a jury trial.³⁴ Due to a simultaneous holding issued by the Commonwealth Court of Pennsylvania, which conflicted with this decision, PennDOT filed a second motion for summary judgment.³⁵ The second motion was granted; Dean appealed.³⁶

On appeal, the Supreme Court of Pennsylvania determined that sovereign immunity may only be waived if the plaintiff is able to establish a negligence action under common law.³⁷ Additionally, the plaintiff must also be able to classify the cause of action within one of the statutory exceptions to the sovereign immunity doctrine set forth in title 42 of the Pennsylvania Consolidated Statutes.³⁸ The court refused to waive liability based merely on the fact that there was a concurrent cause of injury (snow on the road).³⁹ However, the court did find that the lack of a guardrail did not render the highway unsafe for its intended purpose – travel.⁴⁰ Therefore, the fact that the injuries could have been mitigated or avoided if there had been a guardrail did not establish liability.⁴¹ The court noted that the question was not an issue of fact, related to whether the lack of a guardrail created a dangerous condition, but whether the overall claim fell within the real estate exception to sovereign immunity.⁴² If PennDOT's failure to erect a guardrail

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Dean*, 751 A.2d at 1131.

³⁷ *Id.* at 1132.

³⁸ *Id.*

³⁹ *Id.* at 1133 (establishing a change from how causation was previously analyzed).

⁴⁰ *Id.* at 1134.

⁴¹ *Id.* at 1134 & n.8.

⁴² *Dean*, 751 A.2d at 1135.

should be included within the statutory exemption, the legislature would be responsible for such a directive.⁴³

Following *Dean*, there have been various unsuccessful attempts to expand the real estate exception in relation to vehicle accidents. In *Svege v. Interstate Safety Service, Inc.*,⁴⁴ three members of a family were killed after a tractor-trailer crashed through a concrete safety barrier on the turnpike.⁴⁵ The complaint filed by the family against the Commonwealth alleged that the Turnpike Commission had been negligent in its design, construction, and maintenance of the highway, resulting in a dangerous condition.⁴⁶ The type of barrier involved was known to have defects and had not been replaced.⁴⁷ Based on *Dean*, the court concluded that if the absence of a barrier or guardrail had not been enough to waive immunity, the potential ineffectiveness of a barrier could not waive immunity either.⁴⁸

Consistently, the Commonwealth Court of Pennsylvania held, in subsequent cases, that outdated or ineffective guardrails and barriers could not establish a claim within the real estate exception to sovereign immunity.⁴⁹ The court noted the fatal injuries sustained in the majority of crashes involving these types of defects, but deferred the issue to the legislature.⁵⁰ In support of this adherence to precedent, the Commonwealth Court of Pennsylvania cited public policy grounded in history, morals, and justice, in which society has traditionally placed the loss on the party with the

⁴³ *Id.* at 1134-35.

⁴⁴ *Svege v. Interstate Safety Serv., Inc.*, 862 A.2d 752 (Pa. Commw. Ct. 2004).

⁴⁵ *Id.* at 753.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 755.

⁴⁹ See *Fagan v. Dep't of Transp.*, 946 A.2d 1123, 1127, 1129 (Pa. Commw. Ct. 2008) (holding that a turned down guardrail and gravel berm, which did not stop a vehicle from leaving the road, were not enough to qualify the claim for the exception); *Stein v. Pa. Turnpike Comm'n*, 989 A.2d 80, 81, 88 (Pa. Commw. Ct. 2010) (holding that an outdated "boxing glove" end cap on a guard rail did not qualify the claim for the real estate exception); *Lambert v. Katz*, 8 A.3d 409, 412, 420 (Pa. Commw. Ct. 2010) (holding that poor maintenance on guard cables was not sufficient to distinguish the case from *Dean*).

⁵⁰ *Stein*, 989 A.2d at 88.

most responsibility.⁵¹ The court further noted it would be "jurisprudentially unsound" and a violation of *stare decisis* to disrupt an area of law so recently settled.⁵²

C. A Shift in the Analysis

Despite the court's reliance on *stare decisis*, there was a slight shift in how claims under the real estate exception were reviewed in 2012. In *Quinones v. Department of Transportation*,⁵³ the court reviewed a case involving cross-over accidents.⁵⁴ In this case, the plaintiff had been severely injured when another driver, deceased as a result of the accident, lost control of his vehicle and crossed over a grass median.⁵⁵ The complaint alleged PennDOT had been negligent in the design, construction, and maintenance of the highway, which created a defect that caused the accident.⁵⁶ The plaintiff argued the median was intended to impede the flow of highway traffic and, therefore, failed its intended use, which qualified it under the real estate exception to sovereign immunity.⁵⁷

In examining the plaintiff's appeal, the court employed an analysis that was reminiscent of pre-*Dean* litigation.⁵⁸ Rather than focusing solely on whether the claim fell within the sovereign immunity exception based on the intended use of the highway,⁵⁹ the court initially sought to determine whether PennDOT had a duty under common law negligence principles to erect a barrier to prevent accidents.⁶⁰

In order to prevail under a common law negligence action, the plaintiff must establish that "the defendant owed a duty of care to the plaintiff," that the duty owed was breached, that the breach was the cause of the plaintiff's injury, and that "the plaintiff suffered an

⁵¹ *Fagan*, 946 A.2d at 1129.

⁵² *Id.* at 1127.

⁵³ *Quinones v. Dep't of Transp.*, 45 A.3d 467 (Pa. Commw. Ct. 2012).

⁵⁴ *Id.* at 469.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 470; *see supra* notes 24-26 and accompanying text.

⁵⁹ *See supra* Part II.B.

⁶⁰ *Quinones*, 45 A.3d at 470.

actual loss or damages."⁶¹ The court had not previously ruled explicitly on whether PennDOT had a duty to erect a median barrier.⁶² Under *Dean*, the failure to erect a guardrail does not create a dangerous condition, therefore, the Commonwealth did not have a duty to do so; accordingly, there was no duty to erect a median barrier and prevent cross-over accidents.⁶³

The court then deferred to the analysis regarding intended use, and concluded that the absence of safety features, such as a median barrier, does not affect the use of the highway for its intended purpose – travel.⁶⁴ Since case law had not recognized a duty to maintain guardrails or the berm on the highway, the court could not impose a duty to construct a barrier to prevent accidents.⁶⁵ Additionally, noting that the lack of a barrier did not cause the accident, but only facilitated additional injury, the court affirmed the order of summary judgment in favor of PennDOT.⁶⁶

III. *RODRIGUEZ V. DEPARTMENT OF TRANSPORTATION*

A. Facts of Rodriguez

On August 12, 2001, Scott Shoffstall lost control of his vehicle while driving eastbound on Route 30.⁶⁷ Both the eastbound and westbound lanes were straight, separated by a flat grass median strip.⁶⁸ Shoffstall's vehicle left the highway, crossed over the grass median, and struck the decedent's vehicle head-on.⁶⁹ Shoffstall, his passenger, and the decedent were all pronounced dead at the scene.⁷⁰

⁶¹ *Id.* (quoting *Brown v. Dep't of Transp.*, 11 A.3d 1054, 1056 (Pa. Commw. Ct. 2011)).

⁶² *Id.* at 472.

⁶³ *Id.* at 470.

⁶⁴ *Id.* at 471.

⁶⁵ *Id.* at 472.

⁶⁶ *Quinones*, 45 A.3d at 473.

⁶⁷ *Rodriguez v. Dep't of Transp.*, 59 A.3d 45, 47 (Pa. Commw. Ct. 2013).

⁶⁸ *Id.* at 46-47.

⁶⁹ *Id.* at 47.

⁷⁰ *Id.*

B. Procedural History

Carol Rodriguez filed a negligence and wrongful death suit against PennDOT.⁷¹ The complaint alleged PennDOT knew, or should have known, that the strip of the highway where the accident occurred was susceptible to cross-over vehicle accidents, which created an unreasonably dangerous highway condition.⁷² The plaintiff further argued that because this was a foreseeable risk, and measures to prevent these accidents had not been taken, PennDOT was solely responsible for the accident that resulted in the death of her husband.⁷³ PennDOT admitted that it was responsible for the maintenance of Route 30; however, it denied negligence and asserted the defense of sovereign immunity.⁷⁴

During pretrial discovery, the plaintiff obtained a forensic engineer's report, dated December 2009.⁷⁵ The report stated that based on traffic patterns and PennDOT's current safety standards, a median barrier should have been erected in the location of the accident in 1993.⁷⁶ Additionally, based on accident reconstruction reports, despite the fact Shoffstall had been traveling at eighty miles per hour, if there had been a median barrier in place, his vehicle would not have crossed over to the westbound lane of travel; therefore, the accident would not have occurred.⁷⁷ The trial court granted PennDOT's motion for summary judgment based on *Dean*, concluding PennDOT had no duty to erect a median barrier.⁷⁸

C. Issue on Appeal

On appeal, the plaintiff argued that PennDOT's failure to install the median barrier, despite the known risk of cross-over accidents, was negligence.⁷⁹ The median was part of the highway

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Rodriguez*, 59 A.3d at 47.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Rodriguez*, 59 A.3d at 48.

and, therefore, fell within the sovereign immunity real estate exception.⁸⁰

D. Plaintiff's Argument

Rodriguez argued that, despite the current law, which provided immunity in guardrail cases, a median barrier should be treated differently.⁸¹ The plaintiff argued this case was distinguishable from precedent because the motorists never left the highway.⁸² The median is part of the highway as a whole, and the absence of a barrier rendered the highway unsafe for its intended use – travel.⁸³ Furthermore, plaintiff argued, *Svege* was not controlling because the plaintiff in that case was not able to form a causal connection between the barrier and the injury.⁸⁴

E. Defendant's Argument

PennDOT argued that *Svege* and *Quinones* were controlling, and, therefore, the Commonwealth had no duty to erect a barrier.⁸⁵

F. The Court's Analysis

The court agreed with PennDOT that *Svege* and *Quinones* were on point.⁸⁶ The court stated in *Svege* that PennDOT was granted sovereign immunity, despite a defective median barrier; the lack of a causal relationship was related to other defendants involved in the case and was dicta.⁸⁷ In *Quinones*, the facts were similar to what was presented in the case at bar.⁸⁸ The court in *Quinones* held the action was barred by sovereign immunity because PennDOT did not have a duty to erect a median barrier, and the "lack of [a] barrier did not 'render the highway unsafe for

⁸⁰ *Id.*

⁸¹ *Id.* at 49.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Rodriguez*, 59 A.3d at 49.

⁸⁶ *Id.* at 49-50.

⁸⁷ *Id.* at 50.

⁸⁸ *Id.*

[its] purpose[.]'"⁸⁹ The court recognized that the government could be found liable if the act fell within one of the nine statutory exceptions and within a common law negligence claim; however, this case did "not fall within the real estate exception."⁹⁰

G. The Holding

The court held that PennDOT was immune from suit because the purpose of the highway was for travel and a lack of a median barrier did not create unsafe travel.⁹¹ PennDOT had no duty to erect a median barrier or to maintain the median in order to prevent cross-over accidents.⁹² The median was not meant for travel; therefore, the claim did not fall within the sovereign immunity real estate exception, and summary judgment in favor of PennDOT was correct.⁹³

IV. EVALUATION

Prior to the Supreme Court of Pennsylvania's decision in *Dean*, the court reviewed sovereign immunity claims based on a strict statutory construction, and required the dangerous condition "derive, originate from or have as its source the Commonwealth realty."⁹⁴ Additionally, the safety of the highway was not only reviewed based on its intended use, but a reasonably foreseeable use.⁹⁵ The Commonwealth real estate also had to be the direct cause of the loss.⁹⁶ In *Dean*, the court limited its analysis to the intended use of the highway, but expanded the causation element, including concurrent causation as a factor.⁹⁷

The dissent in *Dean* argued that when determining whether a claim falls within the real estate exception to sovereign immunity,

⁸⁹ *Id.* (quoting *Quinones v. Dep't of Transp.*, 45 A.3d 467, 472 (Pa. Commw. Ct. 2012)).

⁹⁰ *Id.* at 48, 50.

⁹¹ *Rodriguez*, 59 A.3d at 50.

⁹² *Id.*

⁹³ *Id.* at 50.

⁹⁴ *Snyder v. Harmon*, 562 A.2d 307, 311 (Pa. 1989).

⁹⁵ *Id.* at 312.

⁹⁶ *Id.*

⁹⁷ *Dean v. Dep't of Transp.*, 751 A.2d 1130, 1133-34 (Pa. 2000).

one should look to the condition of the government property.⁹⁸ If that condition created a *reasonably foreseeable risk of harm*, and that *harm actually occurred*, it would be included in the exception.⁹⁹ In Justice Newman's dissenting opinion, this test would not always trigger the exception, but would require the plaintiff show that engineering standards required the Commonwealth to erect a guardrail in order to remedy a dangerous condition.¹⁰⁰ *Rodriguez* presents the perfect scenario for the court to adopt such a test. In *Rodriguez*, unlike the cases before it, PennDOT was on notice of the danger of cross-over vehicle accidents in this location.¹⁰¹ The engineer report, dated December 2009, referenced PennDOT's standards and the volume of traffic in the location at issue.¹⁰² Based on this report, a median barrier should have been installed to prevent cross-over vehicle accidents as early as 1993.¹⁰³ Therefore, based on the Commonwealth's own safety guidelines, it was reasonably foreseeable that a cross-over vehicle accident would occur in this area. The second part of Justice Newman's test requires that the type of foreseeable harm actually occur.¹⁰⁴ Clearly, that harm did occur when Scott Shoffstall's vehicle left the eastbound lane of travel, crossed the median, and collided with the decedent's car. The dissent in *Dean* argued for this exception to only be triggered when there was clear evidence that engineering standards would require a safety structure to be erected in order to prevent accidents.¹⁰⁵ That burden was met here, since the forensic report concluded that the safety standards required such a barrier, and the accident would have been prevented had there been a barrier in place.¹⁰⁶

When evaluating the cases involving the real estate exception, the courts have looked to the plain language of the statute and deferred to the legislature to include any area of the highway other

⁹⁸ *Id.* at 1135 (Newman, J., dissenting).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1136.

¹⁰¹ *Rodriguez v. Dep't of Transp.*, 59 A.3d 45, 47 (Pa. Commw. Ct. 2013).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Dean*, 751 A.2d at 1135 (Newman, J., dissenting).

¹⁰⁵ *Id.* at 1136.

¹⁰⁶ *Rodriguez*, 59 A.3d at 47.

than the actual road.¹⁰⁷ Prior to *Dean*, the Supreme Court of Pennsylvania also included activities that may be reasonably foreseen to occur in its analysis.¹⁰⁸ Surely, vehicle accidents which stray from the white lines on the road are foreseeable. There was no explanation by the court in *Dean* for the strict statutory construction that ignored this previous line of inquiry. The court in *Quinones* appeared to make a small shift towards this pre-*Dean* form of review, which may show potential for change.¹⁰⁹

The Commonwealth Court of Pennsylvania has deferred to the legislature when plaintiffs have attempted to expand the real estate exception beyond *Dean*.¹¹⁰ However, a review of the related "pothole exception" reveals that the legislature, at least in cases involving potholes, found it acceptable to waive immunity when the plaintiff is able to prove the Commonwealth was on notice of the dangerous condition and had ample time to fix the problem.¹¹¹ It seems reasonable that the Supreme Court of Pennsylvania would be able to analogize the intent of the General Assembly to allow recovery in a situation involving potholes to a scenario involving a motor vehicle accident. This argument would not necessarily be successful for Rodriguez because the report was dated 2009 and the accident occurred in 2001; however, there may be additional evidence unknown at this time since the expert concluded that the danger existed since 1993.

The policy concerns supporting sovereign immunity far outweigh the desire to allow all cases involving motor vehicle accidents aggravated by defective or non-existent safety structures. There would be a flood of litigation, and, more than likely, the superseding cause of loss, in the majority of cases, would be motor vehicle code violations. However, in cases where there is an area of the highway which is *known* to have a high risk of a particular type of accident, by the state's own safety standards, action should be required. Allowing the Commonwealth to avoid liability, despite the knowledge that the exact type of injury complained of

¹⁰⁷ See *supra* Part II.

¹⁰⁸ Snyder v. Harmon, 562 A.2d 307, 312 (Pa. 1989).

¹⁰⁹ See *supra* Part II.C.

¹¹⁰ Svege v. Interstate Safety Serv., Inc., 862 A.2d 752, 754-55 (Pa. Commw. Ct. 2004).

¹¹¹ 42 PA. CONS. STAT. § 8522(b)(5) (2011).

by the plaintiff is likely to occur, will only encourage negligence and result in greater harm to the public.

V. CONCLUSION

The Pennsylvania legislature has protected the government from civil litigation through sovereign immunity, except in certain enumerated circumstances.¹¹² One of those exemptions, the real estate exception, has been the subject of litigation related to motor vehicle accidents.¹¹³ Currently, the judiciary refuses to extend that exception to include situations in which a defective guard rail or median barrier, or the lack of such structures, has contributed to or caused a motor vehicle accident.¹¹⁴ In 2000, the Supreme Court of Pennsylvania issued its landmark opinion in *Dean*.¹¹⁵ The court determined that PennDOT did not have a legal duty to erect a guardrail, and that the absence of such a structure did not create a dangerous condition for the intended purpose, travel on the roadway.¹¹⁶

Various cases have been heard by lower courts in an attempt to expand the exception or distinguish situations from *Dean*. In 2013, the Commonwealth Court of Pennsylvania heard *Rodriguez*.¹¹⁷ The court upheld the Commonwealth's claim of sovereign immunity, despite the fact that PennDOT's own standards indicated a median barrier should have been erected in the exact location of the accident at least twenty years before.¹¹⁸ This case represents the Commonwealth Court of Pennsylvania's staunch adherence to the precedent set in *Dean*. Importantly, this case presents an opportunity for a unique appeal to the Supreme Court of Pennsylvania, since this is the only case in which the agency had standards that favored the plaintiff's claim, and the exact type of foreseeable risk is what occurred.

¹¹² 1 PA. CONS. STAT. § 2310 (Supp. 2001).

¹¹³ *See supra* Part II.

¹¹⁴ *See id.*

¹¹⁵ *Dean v. Dep't of Transp.*, 751 A.2d 1130 (Pa. 2000).

¹¹⁶ *Id.* at 1134.

¹¹⁷ *Rodriguez v. Dep't of Transp.*, 59 A.3d 45, 45 (Pa. Commw. Ct. 2013).

¹¹⁸ *Id.* at 47, 50.

Rodriguez was decided correctly based on the precedent and policy decisions of earlier cases. Overall, accidents are just that – accidents – and the government cannot possibly be expected to prevent or mitigate every loss involving a Commonwealth highway. Holding the parties involved responsible encourages responsibility and places the risk on those who had the most liability. Sovereign immunity protects the government from groundless suits and prevents our court system from being overrun with litigation. While there may be some hope for a case like *Rodriguez* to minutely expand the exception to cases where the agency truly had reason to believe action was necessary to prevent injury or harm, it is unlikely the general policy regarding the real estate exception will change in the future.

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* J.D. Candidate, Widener University School of Law (Harrisburg), 2014. This survey is dedicated to my family, friends, and former colleagues; thank you for the guidance and support that you have provided over the past three years. To my parents, thank you for teaching me the value of hard work. And to my husband, Anthony, I am especially grateful for your patience and love; thank you for always believing in me.