IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Llewellyn M. Huff and Susan Huff	:	
	:	
v.	:	
	:	
Paul D. Leonard and	:	
Paul D. Leonard, Inc.,	:	
Hunt Oil Products, Inc., and	:	
Commonwealth of Pennsylvania,	:	
Department of Transportation	:	
	:	
Appeal of: Paul D. Leonard and	:	No. 2276 C.D. 2007
Paul D. Leonard, Inc.	:	Submitted: October 14, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: December 18, 2008

Paul D. Leonard (Leonard) appeals from the orders of the Court of Common Pleas of the Fifty-Ninth Judicial District (Elk County Branch) (trial court) that entered summary judgment in favor of Hunt Oil Products, Inc. (Hunt Oil) and the Pennsylvania Department of Transportation (DOT).

On September 11, 2006, DOT pursued summary judgment against Leonard and asserted:

> 1. A Civil Complaint was filed by Llewellyn M. Huff and Susan Huff against Paul D. Leonard and Paul D. Leonard, Inc. as a result of an accident that took place on April 21, 2004 . . . .
>
> 2. The accident occurred when a truck being driven by Paul D. Leonard, westbound on S.R. 555 in Jay

Township, Elks County, went off the north berm of the road, then crossed over the eastbound lane of S.R. 555 onto the Huff property adjacent to the roadway, and struck the Huff residence.

3. Defendant Leonard subsequently filed a Complaint to Join Additional Defendants naming Hunt Oil Products and PennDOT as Additional Defendants . . . .

4. The allegations of negligence against PennDOT were stated in paragraph 26 of the Complaint to Join Additional Defendants:

. . . .

K. Designing, building and maintaining a highway . . . which was insufficient in width for traffic to travel thereon;

L. Designing, building and maintaining a highway . . . with an insufficient shoulder or clear zone adjacent to the paved portion of the highway (emphasis added);

M. Designing, building and maintaining . . . a culvert drain less than 24 inches from the paved portion of the highway (emphasis added);

N. Designing, building and maintaining Pa. Route 555 with a drainage ditch channeled directly into an open, two foot deep and two foot wide culvert collection basin, directly into which the tires of an errant vehicle, such as Paul Leonard's would be channeled (emphasis added);

O. Failing to construct the culvert collection ditch so as to provide the same with a grate over which the tires of an errant vehicle would pass . . . (emphasis added);

P. Failing to keep said shoulder, slopped area, and clear zone free and clear of open pitfalls . . . ;

Q. Failing to design the culvert entrance in such a manner as to permit a vehicle to pass over the same without causing a violent collision . . . (emphasis added);

> R. Failing to take the corrective measure of removing the open culvert entrance hold and replacing the same with a concrete basin box . . . . (emphasis added).
>
> 5. Paul D. Leonard testified that the reason his truck went off the north berm of S.R. 555 was that he thought the Hunt Oil truck travelling eastbound S.R. 555 was going to cross the centerline, so he steered his truck off to the right, off of the roadway . . . .
>
> 6. State Trooper William D. Brown, the investigating trooper, stated there was nothing about the road that caused Mr. Leonard to drive his truck off the paved portion of the road . . . . (emphasis added).
>
> 7. Trooper Brown stated that the road in the direction Mr. Leonard was coming was straight . . . .
>
> 8. Case law has established that in order for a Commonwealth agency to be liable under the Sovereign Immunity Act, 42 Pa. C.S.A. § 8521 et seq., a two prong test must be met. (emphasis added).
>
> 9. The initial element of the test is that a party seeking to recover from the Commonwealth, must first establish a statutory or common law cause of action in negligence against it.
> . . . .
> 11. Mr. Leonard can give no reason why his truck left S.R. 555 other than he thought the Hunt Oil Truck was going to cross the centerline, and Trooper Brown did not find anything about the road caused Mr. Leonard to go off it. (emphasis added).

DOT's Motion for Summary Judgment, September 11, 2006, Paragraphs 1-9 and 11 at 1-3; Reproduced Record (R.R.) at 112a-14a.

On September 25, 2006, Hunt Oil sought summary judgment and asserted:

> 1. On April 21, 2004, Paul D. Leonard, a 68-year old, insulin-dependent diabetic with low blood sugar, was driving an unregistered and uninsured tandem dump-truck on State Route 555 . . . when he lost control, went off the road, and drove his truck into the home owned by Plaintiffs, Llewellyn and Susan Huff.
>
> . . . .
>
> 3. As to PennDOT, Mr. Leonard alleged in his Joinder Complaint that State Route 555 was improperly designed and constructed, and that said defects contributed to his losing control of the vehicle. (emphasis added).
>
> 4. As to Hunt Oil, Mr. Leonard alleged in his Joinder Complaint that a Hunt Oil truck traveling in the opposite direction on State Route 555 'began moving toward and on the centerline of the roadway' . . . and that Mr. Leonard, fearing a head-on collision, 'steered the truck onto the berm of the highway, after which traveling on the berm, he struck an open culvert, lost control and collided with Plaintiffs' home.' (emphasis added).
>
> . . . .
>
> 6. Significantly, Mr. Leonard's Joinder Complaint does not allege, nor has there been any evidence derived during discovery, that the Hunt Oil truck ever entered Mr. Leonard's lane of travel. (emphasis added).
>
> . . . .
>
> 8. Even if Mr. Leonard's pleadings and deposition testimony, that the Hunt Oil truck either approached or touched the centerline of State Route 555, are accepted as true (which they are not), a vehicle merely approaching or touching the centerline of a roadway is not negligence. (emphasis added).
>
> 9. There is no statutory or common law authority in Pennsylvania which supports any allegations or a finding of negligence against Hunt Oil.
>
> 10. There are no genuine issues of material fact. (emphasis added).

Hunt Oil's Motion for Summary Judgment, September 25, 2006, Paragraphs 1, 3-4, 6, and 8-10 at 1-3; R.R. at 48a-50a.

On September 27, 2006, Leonard responded to DOT's motion for summary judgment:

> 2. The evidence as set forth . . . establishes the facts essential to the Original Defendant, Paul D. Leonard's cause of action against the Commonwealth of Pennsylvania, Department of Transportation as said evidence establishes that Mr. Leonard veered to the right to avoid colliding with an oncoming vehicle.
>
> 3. Paul D. Leonard can identify the reason why his vehicle left the roadway, to wit: so as to avoid a collision with an oncoming vehicle which had crossed into his lane of travel, which meets the first element of the test of liability against PennDOT. (emphasis added).
>
> 4. The evidence of record . . . establishes a statutory cause of action in negligence against the Commonwealth, PennDOT, by reason of forseeability of Paul D. Leonard being forced off of the roadway by an oncoming vehicle.
>
> 5. There is a genuine issue of material fact and justifies an inference of causation against PennDOT, insofar as this Motion for Summary Judgment is concerned. (emphasis added).

Defendant Paul D. Leonard's Response to PennDOT's Motion for Summary Judgment, September 26, 2006, Paragraphs 2-5 at 2-3; R.R. at 116a-17a.

On October 13, 2006, Leonard also responded to Hunt's motion for summary judgment:

> 1. A. [Leonard] . . . did not experience any symptoms of low blood sugar . . . .
> . . . .
> C. The allegation that Mr. Leonard 'lost control' is unsupported by the facts in the record as he intentionally veered to the right in order to avoid a collision with an oncoming truck . . . .

> D. Mr. Leonard further testified that although he did not see the Hunt Oil vehicle traveling in the opposite direction toward him, actually in the Leonard lane of travel, 'the position the [Hunt] truck was in, it was going to come over there. So I tried to avoid an accident . . . . (emphasis added).
>
> E. . . . 'He [the driver of the Hunt Oil truck] come [sic] across the first one [yellow line] and onto the second one . . .' and '. . . the position the truck was in, it was going to come over there. So I tried to avoid an accident' . . . .
> . . . .
> 3. Said evidence, as set forth above, further places the conduct of the Hunt Oil driver in question with reference to 75 Pa.C.S.A §3309, which required said driver to drive 'as nearly as practicable entirely within a single lane and shall not be moved from the lane . . . .' (emphasis added).
>
> 4. There exists a genuine issue of material fact . . . as the evidence indicates that the wheels of the truck were over the first double yellow line and onto the second double line . . . . (emphasis added).

Paul D. Leonard's Response to Hunts Oil's Motion for Summary Judgment, October 13, 2006, Paragraphs 1 and 3-4 at 1-3; R.R. at 94a-96a.

The trial court entered summary judgment in favor of DOT and Hunt Oil:

> When reviewing the record in a light most favorable to defendants Leonard and Leonard, Inc., there are no genuine issues of material fact as to PennDot's causation of why Leonard's truck left the roadway as the record does not support any act or failure to act or the breach of any duty by PennDot which resulted in Leonard driving off the road into a drainage ditch and ultimately into plaintiffs Huff's [sic] house . . . .
>
> Defendant Paul D. Leonard's perception alone that the truck operated by the agent of additional defendant Hunt Oil Products, Inc. was about to cross the double yellow

> center lines into Leonard's lane of traffic is insufficient to create a genuine issue of material fact when the record clearly indicates that the Hunt Oil truck tires did not cross the center line and travel into Leonard's lane.

Order of the Trial Court, January 24, 2007, at 1-2; R.R. at 118a-19a.

I. Whether The Evidence Viewed In The Light Most Favorable To The Non-Moving Party Established A Genuine Issue Of Material Fact That The Hunt Oil Truck Crossed Over The Center Lines?

Initially, Leonard contends[1] that pursuant to Section 3301 and Section 3302 of the Vehicle Code, 75 Pa. C.S. §§ 3301 and 3302, a driver must maintain his vehicle on the right half of the roadway and yield at least one-half of the main traveled portion of the roadway as nearly as possible to the other driver. Leonard asserts that the issue of whether the driver of the Hunt Oil truck crossed over the center line into his lane of travel is a question for the jury.

In Herczeg v. Hampton Township Municipal Authority, 766 A.2d 866, 871 (Pa. Super. 2001), our Superior Court enunciated the criteria necessary to establish negligence: "a duty or obligation recognized by law, breach of that duty by the defendant, a causal connection between the defendant's breach of that duty

[1] This Court's review of a trial court's grant of summary judgment is limited to a determination of whether the trial court abused its discretion or committed an error of law. D.C. v. School District of Philadelphia, 879 A.2d 408, 413 n.3 (Pa. Cmwlth. 2005). The standard of review of a grant of summary judgment requires the evidence to be viewed in the light most favorable to the nonmoving party. All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Garcia v. Community Legal Service Group, 524 A.2d 980, 985 (Pa. Super. 1987). Summary judgment is only proper where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to a judgment as a matter of law. Kincel v. Department of Transportation, 867 A.2d 758, 761 n.7 (Pa. Cmwlth. 2005).

and the resulting injury, and actual loss or damage suffered by complainant." (emphasis added). "It has long been hornbook law that a duty arises only when one engages in conduct which foreseeably creates an unreasonable risk of harm to others." (emphasis added). Amarhanov v. Fassel, 658 A.2d 808, 810 (Pa. Super. 1995).

First, Leonard alleged that the driver of the Hunt Oil truck created an unreasonable risk of harm to him when the driver failed to stay in his lane of travel and touched the double yellow line in violation of the Vehicle Code.[2]

Assuming *arguendo* that the driver of the Hunt Oil truck momentarily touched or crossed the centerline, this allegation even if accepted as true would be insufficient to establish a breach of duty by the driver that resulted in Leonard's injury.

In Commonwealth v. Gleason, 567 Pa. 111, 785 A.2d 983 (2004) our Pennsylvania Supreme Court determined that a police officer was not justified when he stopped a licensee for violation of the Vehicle Code "based upon his observation that the licensee's vehicle crossed the berm line by six to eight inches on two occasions for a period of a second or two over a distance of approximately one quarter of a mile." The Supreme Court concluded that before there is a

[2] Section 3301 of the Vehicle Code, 75 Pa. C.S. § 3301, provides that "[u]pon all roadways of sufficient width, a vehicle shall be driven upon the right half of the roadway . . . ." Section 3302 of the Vehicle Code, 75 Pa. C.S. § 3302, provides that "[d]rivers of vehicles proceeding in opposite directions shall pass each other to the right and, upon roadways having width for not more than one lane of traffic in each direction, each driver shall give to the other at least one-half of the main-traveled portion of the roadway as nearly as possible."

legitimate stop of a vehicle there must be an outward sign that the licensee violated the Vehicle Code. Gleason.

Second, Leonard alleged that the driver of the Hunt Oil truck crossed into his lane of travel which caused him to lose control of his vehicle. However, this allegation, even if accepted as true, was refuted by Leonard's own deposition testimony.

In his deposition, Leonard stated that he never actually saw the driver of the Hunt Oil truck cross the center line of State Route 555 and head toward him:

> Q: Sir, is it your testimony that you saw the Hunt Oil truck vehicle touch the centerline of the roadway?
>
> A: Yes.
>
> Q: Both of them?
>
> A: Yes.
>
> Q: But it didn't go over the centerline; did it?
>
> A: Well, there's two lines there. Which one are you calling the centerline? He come across the first one and onto the second one.
>
> Q: He did not enter your lane of travel. You didn't see that occur; did you? (emphasis added).
>
> A: No, I didn't; but the position the truck was in, it was going to come over there. So I tried to avoid an accident. (emphasis added).
>
> Q: Tell us what you did to avoid the accident.
>
> A: Steered to the right.

> Q: Did you apply your brakes? (emphasis added).
>
> A: Yes. (emphasis added).
>
> . . . .
>
> Q: Do you recall receiving a citation for careless driving as a result of this incident?
>
> A: I may have. I received several; but I don't remember that, careless driving.

Deposition of Paul D. Leonard, February 9, 2006, at 31-33; R.R. at 66a-68a.

Here, the evidence established that there was no genuine issue of fact but that Leonard's accident occurred when he "steered to the right" and lost control of his vehicle. In fact, Leonard admitted that he never saw Cole enter into his lane of travel. "Thus, summary judgment is proper only when the uncontroverted allegations in the pleadings, depositions[3], answers to interrogatories, admission of

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[3] Pennsylvania State Trooper William D. Brown (Trooper Brown), Tammy Newell (Newell), a paramedic, Donald Logan (Logan), a paramedic, and Jeffrey Cole (Cole), the driver of the Hunt Oil truck, were also deposed.

Trooper Brown stated that when he arrived at the scene there were no brake marks on State Route 555 or on the Huffs' lawn. Deposition of William D. Brown (Brown Deposition), July 26, 2006, at 32; R.R. at 77a. In fact, Trooper Brown stated that Leonard did not apply his brakes at any time prior to striking the Huffs' house. Brown Deposition at 33; R.R. at 77a. Trooper Brown issued a number of citations to Leonard at the scene including one for careless driving. Brown Deposition at 28; R.R. at 73a.

Newell stated that "[w]e got dispatched at 10:05, we were on route at 10:06 and we got on the scene at 10:16 . . . [w]e arrived at the patient at 10:17." Deposition of Tammy J. Newell (Newell Deposition), July 26, 2006, at 13; R.R. at 81a. "He was conscious, alert . . . [h]e stated to us that he remembered everything . . . [h]e said he just got off onto the south-off the road onto the shoulder and lost control." Newell Deposition at 13; R.R. at 81a.

Logan stated that a BGL (blood glucose level) was performed on Leonard, an insulin dependent diabetic, and the result was a 69 mg/dl (milligrams per decimal). Deposition of Donald Logan (Logan Deposition), July 26, 2006, at 22-23; R.R. at 90a-91a. Logan stated a 69 mg/dl was considered hypoglycemic (low blood sugar). Logan Deposition at 23; R.R. at 91a. One amp of D50 (basically a sugar solution) was administered by an IV to Leonard to raise his low blood sugar level and to correct his lightheadedness. Logan Deposition at 19 and 24; R.R. at

(Footnote continued on next page…)

record and submitted affidavits demonstrate that no genuine issue of material fact exists . . . ." Harahan v. AC & S, Inc., 816 A.2d 296, 297 (Pa. Super. 2003). The trial court properly entered summary judgment in favor of Hunt Oil.

II. Whether The Evidence Reviewed In A Light Most Favorable To The Non-Moving Party Established A Genuine Issue Of Material Fact That DOT Had A Duty To Cover The Unprotected Culvert?

Leonard next contends that after he was forced off the road he struck a ditch which channeled his truck into an open an unprotected culvert which DOT had the duty to cover.

> 42 Pa. C.S. § 8522 (Exceptions to sovereign immunity) provides:
>
> **(b) Acts which may impose liability.-**The following acts by a Commonwealth party may result in the imposition of liability on the Commonwealth and the defense of sovereign immunity shall not be raised to claims for damages caused by:

(continued…)

89a and 92a. Finally, Logan stated that Leonard never mentioned that he was forced off the road but that "he went off the road and . . . tried to get back up on [the road and that he] hit the loose gravel and it threw [him] to the other side of the road, to the house." Logan Deposition at 25; R.R. at 93a.

Cole, driver of the Hunt Oil truck, observed that Leonard's passenger wheel left the road, [when] I was approximately 300 feet from him . . . [w]hen he was completely in the ditch, I was probably a good 50 to 75 feet from him; and then he was completely in the ditch when I passed him." Deposition of Jeffrey Cole (Cole Deposition), February 9, 2006, at 13; R.R. at 55a. Cole stated that Leonard gradually went off the road and that he noticed Leonard "had both hands on the wheel" and he was slumped over in about half the vehicle, half the cab." Cole Deposition at 18; R.R. at 59a. Cole stated that he remained in his own lane and never crossed the center line. Cole Deposition at 23; R.R. at 60a. Cole said that Leonard was "flat wrong" when he alleged that his truck moved towards and then onto the center line of the roadway. Cole Deposition at 31; R.R. at 61a.

> . . . .
> **(4) Commonwealth real estate, highways and sidewalks.-**A dangerous condition of Commonwealth agency real estate and sidewalks, including Commonwealth-owned real property, leaseholds in the possession of a Commonwealth agency and Commonwealth-owned real property leased by a Commonwealth agency to private persons, and highways under the jurisdiction of a Commonwealth agency . . . . (emphasis added).

Our appellate courts have consistently stated that [t]he question of what constitutes a dangerous condition is a question of fact . . . [h]owever, the determination of whether an action is barred by sovereign immunity is entirely a matter of law." (emphasis added). Cowell v. Department of Transportation, 883 A.2d 705, 708 (Pa. Cmwlth. 2005), citing Bendas v. Township of White Deer, 531 Pa. 180, 611 A.2d 1184 (1992) and Taylor v. Jackson, 643 A.2d 771 (Pa. Cmwlth. 1994).

While not factually similar, the rationale in Dean v. Department of Transportation, 561 Pa. 503, 751 A.2d 1130 (2000),[4] is instructive. In Dean, our Pennsylvania Supreme Court revisited Snyder v. Harmon, 522 Pa. 424, 562 307 (1989) and addressed the issue of whether the absence of a guardrail constituted a dangerous condition of Commonwealth real estate:

[4] In Dean Stacey L. Dean (Dean) had been a passenger in a 1987 Ford Ranger driven by Ronald Eugene Bell (Bell) when Bell lost control of his truck on snow covered Route 22. The truck "left the graveled portion of the highway and traveled over a steep, declining embankment where it overturned. Id. at 505, 751 A.2d at 1131. Dean filed a complaint against DOT and alleged that it "was negligent in failing to properly shield the steep embankment with a guardrail on the portion of the highway where the accident occurred and for failing to properly design, construct and maintain a safe highway." (footnote omitted). Id. at 505, 751 A.2d at 1131.

We next examine the applicability of our decision in Snyder v. Harmon. In Snyder, the plaintiff had stopped their car on the berm of a state highway, which was adjacent to a strip mine. In an attempt to avoid being hit by another vehicle that was also on the berm of the road, the plaintiff exited the car, scrambled up an embankment leading to the mine, and fell into the mine. Two individuals sustained serious injuries and one person was killed in the fall. The plaintiffs filed suit against PennDOT, relying on the real estate exception to sovereign immunity. In their complaint, they alleged that PennDOT was negligent in permitting a dangerous condition to exist within its right-of-way. They further asserted that PennDOT failed to warn the public of the existence of the pit either by lighting or by erecting physical barriers or guardrails along the right-of-way.

Our Court held that the plaintiffs' cause of action did not fall under the real estate exception to sovereign immunity. We stated:

> We hold, therefore, that sovereign immunity is waived pursuant to 42 Pa.C.S. § 8522(b)(4), where it is alleged that the artificial condition or defect of the land itself causes an injury to occur. The corresponding duty of care a Commonwealth agency owes to those using its real estate, is such as to require that the condition of the property is safe for activities for which it is regularly used, intended to be used or reasonably foreseen to be used.

Id. at 312. We went on to examine whether the proximity of the highway to the deep chasm and the unlit and deceptive appearance of the shoulder of the road presented an inherently dangerous condition of Commonwealth realty. We held:

. . . .

> It is uncontroverted that the strip mine highwall, at the point where the [plaintiffs] fell was the same distance from the edge of PennDOT's right-of-way. Furthermore, the absence of lighting so as to create a deceptive appearance of the shoulder of

> the road cannot be said to be either an artificial condition or a defect of the land itself. Accordingly, we conclude that Section 8522(b)(4) is inapplicable to this cause of action . . . .
>
> Id. at 312-313.
>
> Applying this law to the instant case, we conclude that the Commonwealth's failure to erect a guardrail on the highway is not encompassed by the real estate exception to sovereign immunity. Similar to the absence of lighting and the deceptive appearance of the shoulder of the road in Snyder, the absence of the guardrail cannot be said to be a dangerous condition of the real estate that resulted in a reasonably foreseeable injury to Appellee. Stated differently, the lack of a guardrail does not render the highway unsafe for the purposes for which it was intended, i.e. travel on the roadway . . . . (footnotes omitted and emphasis added).

Id. at 510-12, 751 A.2d at 1133-34.[5]

More factually similar to the present matter is this Court's decision in Gramlich v. Lower Southampton Township, 838 A.2d 843 (Pa. Cmwlth. 2003).[6]

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[5] The Supreme Court vacated this Court's decision and remanded to the common pleas court to reinstate summary judgment in favor of DOT.

[6] In Gramlich, William Gramlich (Gramlich), a sanitation worker, had sustained a personal injury:

> . . . [W]hile he was collecting recyclable materials during the course of his employment with Waste Automation, Inc. . . . . Gramlich stepped, with his left leg, into the opening around a drainage pipe, which was covered with snow. His leg became stuck . . . . After Gramlich attempted to alert passing automobiles, someone stopped and assisted him by untying his boot lace . . . . The open hole was located on property owned by Gustav and Dorothy Cullman . . . and was adjacent to a public roadway. Shortly after the fall, Gramlich returned . . . observed that the opening of the drainage hole . . . was located 1 to 2 feet from the

(Footnote continued on next page…)

There, this Court reviewed "whether a concrete inlet and opening of a drainage pipe, constructed by a homeowner in the unpaved right-of-way adjacent to the paved portion of the street, comes under the 'streets' or 'real property' exception to governmental immunity [42 Pa. C.S. § 8542(b)(3)(iii)]."[7] Id. at 844. This Court stated:

(continued…)

> paved surface of the street, and that there was no covering or grating on top of the opening . . . .
>
> The Cullmans purchased the East Myrtle Avenue property in 1956 . . . [and] Cullman installed a drainage pipe that ended on his property, approximately 18 to 24 inches from the paved portion of East Myrtle Avenue . . . . To prevent the flattening of the pipe . . . Cullman built a vertical, concrete inlet flush with the road surface in the early 1960s, but left the opening uncovered. Thus, Cullman created an uncovered hole similar to a storm sewer drain. At no time did the Cullmans ever notify the Township or seek the Township's approval to install the drain pipe or to perform any improvements to it.
>
> On February 3, 1997, the Gramlichs filed a complaint against the Cullmans and the Township. The Cullmans settled with the Gramlichs, on a joint tortfeasor basis . . . . A jury trial was held . . . against the Township. At the close of the Gramlichs' case, the Township moved for directed verdict based on governmental immunity. The trial court granted the motion. On appeal, this Court affirmed.

Gramlich, 838 A.2d at 844-45.

[7] This Court is aware that Gramlich involved governmental immunity under 42 Pa. C.S. §§ 8541 and 8542, and not, sovereign immunity under 42 Pa. C.S. §§ 8521 and 8522. However, in Jones v. SEPTA, 565 Pa. 211, 772 A.2d 435 (2001), our Pennsylvania Supreme Court noted:

> Because the legislature's intent in both the Sovereign Immunity and Tort Claims Act [governmental immunity] is to shield government from liability, except as provided for in the statute themselves, we apply a rule of strict construction in interpreting these exceptions . . . . Moreover, as the immunity statutes deal with the same subject matter, we read them consistently. (citation omitted and emphasis added).

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> This Court has distinguished a 'right-of-way' from the paved portion of the street for purposes of the 'highway' exception to sovereign immunity. Babcock v. Commonwealth of Pennsylvania, Department of Transportation, 156 Pa.Cmlwth. 69, 626 A.2 672 (1993), petition for allowance of appeal denied, 536 Pa. 647, 639 A.2d 33 (1994). In that case, the plaintiff was injured when the car she was driving left the paved highway and struck a log located on the grassy area several feet from the paved surface of the highway, but still within the Commonwealth's right-of-way. The Court deemed this insufficient to bring the case within the highway exception to sovereign immunity stating that the highway was not the same as the right-of-way. A highway, for purposes of sovereign immunity, encompasses the 'cartway,' that is, the paved and traveled portion of the highway, and the berm of shoulder, the paved portion to either side of the actual traveled portion of the road . . . not the right-of-way. The Court concluded that the right-of-way off the highway is clearly neither intended to be used nor is regularly used for vehicular travel. Id. at 675 (citations and footnote omitted, emphasis added).

Gramlich, 838 A.2d at 846-47.

Like in Dean and Gramlich, DOT owed a duty of care to maintain the highway, i.e. the paved cartway and adjacent berm in a safe condition for the intended and foreseeable use of vehicular travel. This duty does not extend to hazards not located on the highway. In other words, DOT could not have reasonably foreseen any injury to a driver or his or her traveler when a driver

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(continued…)

Id. at 220, 772 at 440.

inexplicably leaves the traveled portion of the paved road and sustains injuries as a result.[8] Again, the trial court properly entered summary judgment in favor DOT.

Accordingly, this Court affirms.

BERNARD L. McGINLEY, Judge

[8] Critically noted, the evidence failed to establish that the Hunt Oil truck crossed over into Leonard's lane of traffic. Therefore, the rationale of Fidanza v. Department of Transportation, 665 A.2d 1076 (Pa. Cmwlth.), *petition for allowance of appeal denied*, 542 Pa. 667, 668 A.2d 1138 (1995) does not apply. (It is a jury question as to whether the action of a driver crossing over into the lane of another driver was so extraordinary as to be unforeseeable to absolve DOT of all liability).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Llewellyn M. Huff and Susan Huff	:	
	:	
v.	:	
	:	
Paul D. Leonard and	:	
Paul D. Leonard, Inc.,	:	
Hunt Oil Products, Inc., and	:	
Commonwealth of Pennsylvania,	:	
Department of Transportation	:	
	:	
Appeal of: Paul D. Leonard and	:	No. 2276 C.D. 2007
Paul D. Leonard, Inc.	:	

O R D E R

AND NOW, this 18th day of December, 2008, the orders of the Court of Common Pleas of the Fifty-Ninth Judicial District (Elk County Branch) in the above-captioned matter is affirmed.

_____

BERNARD L. McGINLEY, Judge