

In the Supreme Court of Pennsylvania

No. _____

ELLEN P. SCHMIDT as the Administratrix of the
ESTATE OF GEOFFREY J. SCHMIDT, Deceased, Petitioner

v.

PENNSYLVANIA DEPARTMENT OF TRANSPORTATION; UPPER
MERION TOWNSHIP; THE SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY; THE VALLEY FORGE HISTORICAL
SOCIETY; THE FRIENDS OF VALLEY FORGE and JOHN DOES (1-10)

PETITION FOR ALLOWANCE OF APPEAL

On Petition for Allowance of Appeal from the Judgment of the
Commonwealth Court of Pennsylvania at No. 33 CD 2023, filed October 11,
2024, Reversing the Order of the Court of Common Pleas of Montgomery
County, Pa. Entered December 9, 2022 at No. 2019-12057

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Published, precedential opinion of the Commonwealth Court of Pennsylvania filed October 11, 2024, including dissenting opinion of Judge Wolf	Exhibit A
Trial court’s Pa. R. App. P. 1925(a) opinion dated February 27, 2023	Exhibit B
Trial court’s order denying defendant PennDOT’s motion for summary judgment entered December 9, 2022	Exhibit C

I. REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW

Judge Lori A. Dumas issued the Commonwealth Court's published, precedential opinion in this case, in which President Judge Renée Cohn Jubelirer joined, on October 11, 2024. A copy of the opinion is attached as Exhibit A. Judge Matthew S. Wolf issued a dissenting opinion, which is attached at Exhibit A following the three-judge panel's majority opinion.

Judge Jeffrey S. Saltz of the Court of Common Pleas of Montgomery County, Pennsylvania, issued an opinion in support of his order denying respondent PennDOT's motion for summary judgment asserting sovereign immunity on February 27, 2023. A copy of Judge Saltz's opinion is attached as Exhibit B.

II. THE ORDER IN QUESTION

In conjunction with its decision on appeal in this matter, the Commonwealth Court issued the following order:

AND NOW, this 11th day of October, 2024, the order of the Court of Common Pleas of Montgomery County (trial court), entered December 9, 2023, is REVERSED, and the matter is REMANDED to the trial court for the entry of summary judgment in favor of the Pennsylvania Department of Transportation.

Jurisdiction relinquished.

See Exhibit A at 17.

III. QUESTION PRESENTED

This case presents an important question of first impression concerning the real estate exception to Commonwealth sovereign immunity that has evenly divided the four lower court judges who considered this case below and that has given rise to conflicting Commonwealth Court case law.

The question presented is:

Whether the Commonwealth's waiver of sovereign immunity under the real estate exception allows recovery against PennDOT where the defective, rotted, and diseased portion of a tree that failed, fatally injuring a motorist traveling below, was located directly above PennDOT's roadway and within PennDOT's right-of-way, or does the fact that the base of the tree connected to the ground on the adjoining property of a third-party preclude PennDOT's liability, as the majority on a sharply divided three-judge Commonwealth Court panel concluded?

IV. STATEMENT OF PLACE OF RAISING OR PRESERVATION OF ISSUES

Plaintiff preserved the issues presented for review herein in her response in opposition to PennDOT's motion for summary judgment filed in the trial court, R.263a-265a,* and in her surreply in opposition to PennDOT's motion for summary judgment filed in the trial court, R.374a-377a.

And as the Commonwealth Court's majority and dissenting opinions issued in this case confirm, *see* Exhibit A hereto, plaintiff further preserved the issues presented for review herein in her Brief for Plaintiff/Appellee filed in the Commonwealth Court.

* Cites herein to "R." followed by a page number refer to the Reproduced Record filed in the Commonwealth Court. In accordance with Pa. R. App. P. 1112(d), petitioner has lodged a copy of that Reproduced Record with this Court.

V. STATEMENT OF THE CASE

A. Relevant Factual History

On March 2, 2018, Geoffrey J. Schmidt was driving his automobile along South Gulph Road in Upper Merion Township, Pennsylvania when the leader of a large tree fell from above the roadway and crushed his vehicle, causing him fatal injuries. R.235a, 258a, 273a. It is undisputed that the roadway where Mr. Schmidt was killed is a Commonwealth roadway under PennDOT's control. R.248a.

The tree whose leader failed and crushed Mr. Schmidt's car had its base on land owned by SEPTA located next to PennDOT's right-of-way. The tree grew at a sharp angle from its base so that most of the tree was located not on SEPTA's property but over PennDOT's roadway. R.273a.

According to plaintiff's expert witness arborist and tree risk assessor, John Rockwell Hosbach Jr., the tree in question had sustained a lightning strike approximately 15 years before the accident. R.273a, 281a. Mr. Hosbach opined that the lightning strike caused the tree's leader to become rotted, decayed, and diseased. R.273a. Of greatest pertinence to this case, Mr. Hosbach opined that the part of the tree that was rotted, decayed, and diseased, causing the tree to represent a dangerous risk to those traveling in

vehicles below on PennDOT's roadway, was located directly above PennDOT's roadway and within PennDOT's right-of-way. R.273a.

PennDOT's collateral order appeal to the Commonwealth Court expressly limited itself to challenging the trial court's holding that plaintiff's claim against PennDOT can proceed under the so-called real estate exception to Commonwealth sovereign immunity. *See* PennDOT's Commw. Ct. Opening Br. at 18. Thus, while PennDOT's brief explained that a plaintiff must also "be able to meet the familiar requirements of any negligence claim," PennDOT did not challenge plaintiff's ability to meet those requirements on appeal. *See id.*

Thus, plaintiff will not recount in detail here all of the relevant facts regarding PennDOT's negligence. However, it is noteworthy that PennDOT, in advance of the tragedy that occurred, received an inquiry from a member of the general public asking whether the particular tree leader that crashed into Mr. Schmidt's motor vehicle was a dangerous condition due to its obviously rotted and diseased nature that should be removed by PennDOT to avoid the type of tragedy that it ultimately produced. R.243a, 248a. In response to that inquiry, an admittedly unqualified PennDOT employee visited the portion of the road in question to eyeball the overhanging portion

of the tree from her vehicle, but the employee negligently concluded that the tree presented no risk to motor vehicles traveling on the roadway below. R.243a. PennDOT thus did nothing to remedy or remove the risk that the diseased tree branch located directly above its roadway presented, resulting in the tragic consequences at issue here.

B. Relevant Procedural History

In May 2019, plaintiff Ellen P. Schmidt, Mr. Schmidt's widow and the administratrix of his estate, commenced this suit against PennDOT and various other defendants seeking to recover damages arising from her husband's untimely death. R.1a.

PennDOT ultimately moved for summary judgment, asserting among other things that it could not be held liable as a matter of law because the base of the tree whose leader fell onto Mr. Schmidt's automobile, killing him, was not located on PennDOT property. R.9a. After briefing and oral argument, the trial court denied PennDOT's summary judgment motion. *See* Exhibit C hereto (order denying summary judgment); R.405a-06a.

After carefully reviewing relevant case law from this Court and from the Commonwealth Court of Pennsylvania, the trial court concluded that

where the defect contained in a tree that crashes down into a vehicle below, inflicting injury or death on its occupants, is located on PennDOT property (meaning, in the circumstances of this case, directly above PennDOT's roadway and right-of-way), the Commonwealth's waiver of sovereign immunity under the real estate exception applies even if the base of the tree is located on another's property. Tr. ct. op. at 1, 5-9.

The trial court recognized that the Commonwealth Court's precedents compelled this result. *Id.* at 5-9. The trial court further recognized that a landowner has the responsibility not only for dangerous defects that are present on the surface of land but also for dangerous defects that exist above and below the surface of their land. *Id.* at 13.

PennDOT appealed to the Commonwealth Court under the collateral order doctrine from the trial court's denial of summary judgment. R.407a. PennDOT's appeal focused solely on whether the trial court was correct in ruling that PennDOT was not entitled to summary judgment under the real estate exception to sovereign immunity.

Following briefing and oral argument, the majority on a sharply divided three-judge panel of the Commonwealth Court reversed the trial court's order denying PennDOT's motion for summary judgment. *See*

Exhibit A hereto. According to Judge Dumas's majority opinion, it did not matter that the diseased portion of the tree that fell onto Mr. Schmidt's car, resulting in his death, had been located directly above PennDOT's roadway and right-of-way. Rather, because the base of the tree connected to the ground on the adjoining property of third-party SEPTA, "this tree did not originate from Commonwealth realty." Majority op. at 15. The majority opinion concluded:

This Court is constrained to narrowly construe exceptions to the Commonwealth's sovereign immunity. In this case, the trial court erred when it broadened the scope of the real estate exception. To trigger this exception, a dangerous condition must derive, originate from, or have as its source the Commonwealth realty. However, in this case, the dangerous condition was the branch of a tree that originated from beyond PennDOT's right-of-way. This is insufficient to trigger the real estate exception to the Commonwealth's sovereign immunity.

Id. at 16.

Judge Wolf dissented. He explained that "[t]he Majority opinion reversing the trial court's order [denying PennDOT's motion for summary judgment] is not consistent with existing precedent." Dissenting op. at 1.

Judge Wolf accurately described the facts of this case as follows:

[T]his case deals with the upper portion of the main part of the tree, not a branch and not the base of the trunk of the tree. Central and critical to the disposition of this matter, the leader was

alleged to have been at all times within the right-of-way of PennDOT property while the base of the tree was on property of the Southeastern Pennsylvania Transportation Authority (SEPTA). Most notably, the entire tree did not fall and kill Mr. Schmidt; its base remained fully intact. [R.] at 277a-78a. PennDOT cut down the remaining tree after the tragedy and took a “post-incident photograph showing the level of rot and decay at the point where the main leader failed which was within the PennDOT [right-of-way].” *Id.* at 278a.

Id. at 2.

As Judge Wolf’s dissenting opinion explained, “‘the main northern leader which was decayed, failed and crushed Mr. Schmidt’s car, [which] was inside of PennDOT’s [right-of-way].’ [R.] at 387a. While the base of the subject tree was on SEPTA property, the failed leader was within PennDOT’s right-of-way ‘before, during and after it fell.’ R.R. 392a.” *Id.* at 3.

Judge Wolf continued:

I agree with the Majority that the relevant inquiry for purposes of the real estate exception to sovereign immunity is whether the dangerous condition derives, originates, or has as its source the Commonwealth realty. *Snyder v. Harmon*, 562 A.2d 307 (Pa. 1989); *Jones v. Se. Pa. Transp. Auth.*, 772 A.2d 435 (Pa. 2001). I disagree, however, with the Majority’s conclusion that because this case involves fatal injuries from a tree, the location of the tree’s base is the dispositive factor in that analysis. *Schmidt v. Dep’t of Transp.*, __ A.3d __ (Pa. Cmwlth., No. 33 C.D. 2023, filed October 11, 2024) (Majority Opinion), slip op. at 15-16.

Without reference to precedent, one could reasonably conclude that a rotted, diseased upper portion of a tree towering

over a state-owned roadway within the right-of-way is a dangerous condition that derives, originates, or has at its source the Commonwealth realty. The Majority focuses solely on the location of the base of the tree, without reliance on the location of the portion of the tree that caused the death, the leader, which was in the right-of-way of PennDOT's road.

Because the record establishes that the dangerous condition was not the tree's base, which remained intact, but rather the leader of the tree undisputedly located within PennDOT's right-of-way, I would deny PennDOT's attempt to invoke sovereign immunity at the summary judgment stage and allow the matter to proceed below.

Id. at 3-4.

Judge Wolf explained that the majority's decision reversing the trial court's denial of PennDOT's motion for summary judgment was in conflict with the Commonwealth Court's earlier decisions in *Patton v. Commw., Dep't of Transp.*, 669 A.2d 1090 (Pa. Commw. Ct. 1996), and *Clark v. Commw., Dep't of Transp.*, 962 A.2d 692 (Pa. Commw. Ct. 2008). In *Clark*, the Commonwealth Court explained that *Patton* held that liability could be imposed on PennDOT under the real estate exception to sovereign immunity where "the overhanging *limb* constituted a dangerous condition of the road and the overhanging *limb* caused the fatal injuries when it fell and hit the car." *Clark*, 962 A.2d at 697.

As Judge Wolf's dissenting opinion explained:

Patton stands for the proposition that a dangerous condition situated in the Commonwealth's right-of-way is sufficient to invoke the real estate exception. This appeal presents facts remarkably analogous to *Patton*. Here, as in *Patton*, the base of the tree is situated on another's land, but the top of the tree, and the dangerous condition arising out of that portion of the tree, is situated in PennDOT's right-of-way.

Dissenting op. at 5.

Judge Wolf concluded by observing that “[c]ontrary to the Majority’s conclusion, affirming the trial court’s order does not expand the real estate exception to the Act — it properly applies it consistent with this Court’s precedent.” *Id.* at 7.

The four lower court judges who have carefully evaluated this Court’s and the Commonwealth Court’s real estate exception cases are thus evenly divided over whether PennDOT is entitled to sovereign immunity in the circumstances of this case. Only this Court can squarely resolve that question and thereby alleviate the tension among conflicting Commonwealth Court precedents that divided the three-judge Commonwealth Court panel in this case.

VI. THE PETITION FOR ALLOWANCE OF APPEAL SHOULD BE GRANTED

Pennsylvania Rule of Appellate Procedure 1114(a) provides that this Court will grant allowance of appeal when there are “special and important reasons therefor.” Pa. R. App. P. 1114(a). This is such a case.

This case satisfies two separate criteria for this Court’s review. Rule 1114(b)(1) is satisfied because, as Judge Wolf and Judge Saltz (the trial court judge) both concluded, the Commonwealth Court majority’s opinion in this case conflicts with the Commonwealth Court’s decisions in two other cases, *Patton v. Commw., Dep’t of Transp.*, 669 A.2d 1090 (Pa. Commw. Ct. 1996), and *Clark v. Commw., Dep’t of Transp.*, 962 A.2d 692 (Pa. Commw. Ct. 2008).

And Rule 1114(b)(3) is satisfied because this case presents an important question of first impression. Pennsylvania is known for having a large number of tree-lined roads, and while that lends tremendous beauty to this Commonwealth’s highways and byways, it also presents an undeniable risk of danger, that the diseased portion of a tree overhanging a road could come crashing down, injuring those below, as this case demonstrates.

Whether the waiver of the Commonwealth's sovereign immunity under the real estate exception applies under the circumstances of this case is thus an extraordinarily important question of first impression for this Court's resolution.

A. Review Should Be Granted To Resolve Whether The Real Estate Exception Allows Recovery Against PennDOT Where The Defective, Rotted, And Diseased Portion Of A Tree That Failed, Killing Someone Below, Was Located Directly Above PennDOT's Roadway And Within PennDOT's Right-Of-Way, Even Though The Base Of The Tree Connected To The Ground On The Adjoining Property Of A Third-Party

A portion of a tree crashed down from above a PennDOT highway, killing the driver of a motor vehicle. According to PennDOT, the real estate exception to Commonwealth sovereign immunity does not apply unless the base of the tree is located on PennDOT property — even if, as in this case, the rotted and diseased portion of the tree was on PennDOT property because it was located directly above the roadway onto which it crashed down during a winter storm, killing plaintiff's husband.

The trial court correctly denied PennDOT's motion for summary judgment invoking sovereign immunity, because the real estate exception to

sovereign immunity permits recovery in this case under the Commonwealth Court's binding precedents.

As relevant here, 42 Pa. Cons. Stat. Ann. §8522(b)(4) sets forth the real estate exception to Commonwealth sovereign immunity. That statute contains a waiver of the Commonwealth's sovereign immunity as follows:

(4) Commonwealth real estate, highways and sidewalks.—A dangerous condition of Commonwealth agency real estate and sidewalks, including Commonwealth-owned real property. . . and highways under the jurisdiction of a Commonwealth agency
. . . .

42 Pa. Cons. Stat. Ann. §8522(b)(4).

Construing this provision, in *Cagey v. Commw., Dep't of Transp.*, 179 A.3d 458 (Pa. 2018), this Court recognized that “[f]irst, the injury must have resulted from a ‘dangerous condition.’ [And s]econd, the dangerous condition must be a condition ‘of Commonwealth agency real estate.’” *Id.* at 463 (citing 42 Pa. Cons. Stat. Ann. §8522(b)(4)).

Earlier, in *Snyder v. Harmon*, 562 A.2d 307 (Pa. 1989), this Court explained that for the real estate exception to Commonwealth sovereign immunity to allow recovery, the “dangerous condition must derive, originate from or have as its source the Commonwealth realty.” *Id.* at 311.

As the trial court recognized, two of the Commonwealth Court's precedents expressly address and have rejected PennDOT's argument in this case that the real estate exception to sovereign immunity only allows recovery if the base of a tree that struck a car traveling on a Commonwealth highway was located on PennDOT property.

In *Patton v. Commw., Dep't of Transp.*, 669 A.2d 1090 (Pa. Commw. Ct. 1996), *rev'd on other grounds*, 686 A.2d 1302 (Pa. 1997), the Commonwealth Court affirmed a jury's verdict awarding recovery against PennDOT and in favor of the administrator of the estate of a motorist who was killed when a branch overhanging a PennDOT roadway fell and struck his automobile.

The Commonwealth Court's opinion in *Patton* makes clear that the base of the tree in question was located on private property, rather than on PennDOT's property. The opinion explains that "the owners of the property on which the tree stood testified" at trial. *Id.* at 1097. As in this case, *Patton* involved a tree from which the portion that later fell onto a motorist, killing him, had been growing at a sharp angle across the roadway. *Id.* at 1092. Even though the base of the tree at issue in *Patton* was located on private property, rather than on PennDOT property, the Commonwealth Court held as follows: "we conclude that Patton has adequately established that the tree

was a dangerous condition ‘of’ the Commonwealth realty” because the rotted and decayed branch of the tree that fell onto the victim’s car was located above the PennDOT highway. *Id.* at 1096-97.

Characteristic of the careful analysis that the trial court employed in this case, the trial court examined the parties’ appellate briefs filed in the Commonwealth Court in the *Patton* case, which are available on Westlaw at the cites the trial court provided in its opinion. Trial op. at 7 n.6. Those briefs, filed by counsel for PennDOT and for the plaintiff in *Patton*, confirmed that the tree at issue in *Patton* had its base on private property. Indeed, PennDOT’s own brief for appellant filed in the Commonwealth Court in the *Patton* appeal forthrightly stated that the accident “occurred when a limb from a tree on abutting land [meaning the tree’s base was not located on PennDOT’s own property] fell onto the plaintiff’s vehicle.” Brief for Appellant in *Patton*, 1995 WL 17849442, at *4 (emphasis added). And the plaintiff’s brief for appellee likewise confirmed that the tree at issue in that case stood on private property, and not on PennDOT property. Brief for Appellee in *Patton*, 1995 WL 17849440, at *25.

A decision that the Commonwealth Court issued nearly 13 years after its opinion in *Patton* confirms as correct the trial court’s understanding of

Patton's holding. In *Clark v. Commw., Dep't of Transp.*, 962 A.2d 692 (Pa. Commw. Ct. 2008), the rotted and decayed trunk of a tree located on private property failed, resulting in a substantial portion of the tree falling onto a PennDOT roadway, where it collided into a motor vehicle, rendering its passenger paraplegic. The trial court granted a nonsuit in favor of PennDOT, and the Commonwealth Court affirmed. In explaining the basis for its ruling in *Clark*, the Commonwealth Court distinguished its earlier holding in *Patton* as follows:

Patton is distinguishable because, in that case, the overhanging limb grew from a tree that was within the Commonwealth's right-of-way, the overhanging *limb* constituted a dangerous condition of the road and the overhanging *limb* caused the fatal injuries when it fell and hit the car. In contrast, the record in the present case contains no evidence that any portion of the tree which overhung Street Road constituted a dangerous condition. Moreover, there is no evidence that any limb which overhung DOT's right-of-way separated from the decayed tree and impacted the Clarks' vehicle. Instead, the evidence established that the tree separated from its trunk and fell as a single unit from the Miller's property, well outside DOT's right-of-way. Therefore, as a matter of law, the Clarks cannot overcome DOT's entitlement to sovereign immunity.

Clark, 962 A.2d at 697.

In denying PennDOT's motion for summary judgment in this case, the trial court correctly recognized that Mrs. Schmidt's expert witness has

opined that the leader of the tree that fell onto her late husband's motor vehicle was rotted and decayed directly above PennDOT's roadway. Tr. ct. op. at 1, 7, 9. And the spot where the leader detached from the rest of the tree was also directly above PennDOT's roadway. *See id.*; *see also* R.273a. Thus, the Commonwealth Court's ruling in *Patton* was directly on point and necessitated affirming the trial court's denial of PennDOT's summary judgment motion seeking to invoke sovereign immunity. Yet the Commonwealth Court's majority opinion in this case inexplicably disagreed.

The Commonwealth Court's description of *Patton*'s holding in *Clark* confirms that the facts of Ms. Schmidt's case are sufficient under the real estate exception to overcome PennDOT's invocation of sovereign immunity. As Judge Wolf's dissenting opinion astutely observed, "[t]he record in this case contains the exact evidence the Court found to be absent in *Clark*." Exhibit A hereto, dissenting op. at 6. Judge Wolf's dissenting opinion correctly recognized that it is the majority opinion in this case that conflicts with the Commonwealth Court's earlier decisions in *Patton* and *Clark*. *See* Exhibit A hereto, dissenting op. at 7.

The Commonwealth Court declined to hear this appeal en banc after the three-judge panel circulated its dueling opinions in the case to the full court before the panel's decision issued to the parties. Thus, only this Court can resolve the havoc and disarray that the conflicting Commonwealth Court decisions will wreak on the law of this Commonwealth in the absence of this Court's intervention.

Not only was the Commonwealth Court's decision in this case wrong as a matter of existing law, but it also fails to persuade as a matter of simple common sense. As Judge Wolf persuasively reasoned in his dissenting opinion:

Without reference to precedent, one could reasonably conclude that a rotted, diseased upper portion of a tree towering over a state-owned roadway within the right-of-way is a dangerous condition that derives, originates, or has at its source the Commonwealth realty. The Majority focuses solely on the location of the base of the tree, without reliance on the location of the portion of the tree that caused the death, the leader, which was in the right-of-way of PennDOT's road.

Because the record establishes that the dangerous condition was not the tree's base, which remained intact, but rather the leader of the tree undisputedly located within PennDOT's right-of-way, I would deny PennDOT's attempt to invoke sovereign immunity at the summary judgment stage and allow the matter to proceed below.

Exhibit A hereto, dissenting op. at 3-4.

As this Court explained in *Cagey*, a “‘dangerous condition’ is unambiguous and plainly encompasses any condition that presents a danger.” *Cagey*, 179 A.3d at 464. And, as this Court further explained in *Snyder*, the “dangerous condition must derive, originate from or have as its source Commonwealth realty.” *Snyder*, 562 A.2d at 311.

The trial court correctly recognized that the Commonwealth’s approach here focuses solely on the surface of the real estate involved, presuming that because the tree whose leader failed had its base on SEPTA property, the dangerous condition did not “derive, originate from or have as its source Commonwealth realty.” But, as the trial court further recognized, a property owner owns not merely the surface of real estate, but also what lies beneath and above it. Tr. ct. op. at 13. This principle of real estate law is so well-established that there exists an ancient Latin phrase to describe it: “*Cuius est solum, eius est usque ad coelum et ad inferos*,” meaning “whoever’s is the soil, it is theirs all the way to Heaven and all the way to Hell.” See *Wheatley v. Baugh*, 25 Pa. 528, 530 (1855); *Jones v. Wagner*, 624 A.2d 166, 168 (Pa. Super. Ct. 1993).

This precise principle, which is reflected in the Commonwealth Court’s rulings in *Patton* and *Clark*, establishes that where the rotted and

decayed portion of a tree is directly above PennDOT's highway or right-of-way, even though the tree's base enters into the ground on the property of another, the defective condition derives, originates from or has as its source Commonwealth realty, and thus the real estate exception to sovereign immunity allows recovery. *See* 42 Pa. Cons. Stat. Ann. §8522(b)(4).

It is black-letter law in Pennsylvania that where a tree whose base is located on the property of another grows over your property, you have the inherent right to "trim[] or lop[] off the branches to the extent [your] property is encroached." *Jones*, 624 A.2d 171. In fact, the General Assembly has enacted a statute that gives PennDOT the absolute right to trim or cut away any branches that overhang PennDOT property from trees located on adjacent property. *See* 36 Pa. Stat. Ann. §670-410. That statute provides, in pertinent part:

The Department of Transportation shall have the absolute right to trim, cut and remove any trees, grasses, shrubs and vines growing within the legal right of way of any State highway, and to trim and cut away any trees, grasses, shrubs and vines growing on adjacent property in so far as they overhang or encroach upon the legal right of way of any State highway.

Id.

A rotted tree branch located directly above a Commonwealth highway, where as in this case the defect in the tree is itself located above Commonwealth property, is thus necessarily a dangerous condition that derives, originates from, or has as its source Commonwealth realty. Consequently, even if viewed as an original matter, given that this case presents an important question of first impression for this Court, the Commonwealth Court's decision ordering the dismissal of plaintiff's claims against PennDOT fails to persuade.

Before concluding, it is important to note that this Court's ruling in *Snyder v. Harmon, supra*, fails to support the Commonwealth Court's decision in this case. The claims at issue in *Snyder* arose after several people were tragically injured, and one was killed, as the result of falling into a strip mine located adjacent to a PennDOT highway in the dark, early morning hours after the victims had been out drinking. *See Snyder*, 562 A.2d at 308-09. The owner of the mine had constructed an earthen embankment intended to discourage passers-by from venturing over and accidentally falling into the mine. *See id.*

In *Snyder*, this Court rejected plaintiffs' argument that the real estate exception to Commonwealth sovereign immunity allowed recovery because

the harm was not “predicated on a defective condition on Commonwealth land, but rather the knowledge of an inherently dangerous condition contiguous with Commonwealth property.” *Id.* at 312. By contrast, because the dangerous condition of Commonwealth agency real estate that caused Mr. Schmidt’s death was located on (meaning directly above) PennDOT’s roadway and right-of-way (R.273a), the trial court in this case correctly concluded that *Snyder* does not entitle PennDOT to summary judgment here. And, as Judge Wolf’s dissenting opinion cogently concluded, it was the Commonwealth Court’s decision to the contrary that went astray, in conflict with that court’s earlier precedents.

* * * *

As explained above, the divided three-judge Commonwealth Court panel’s decision in this case conflicts with earlier decisions of that court, necessitating this Court’s review and resolution of that conflict. And this case also presents a particularly important question of first impression concerning a risk that motorists traveling within and through the Commonwealth of Pennsylvania confront on a daily basis.

VII. CONCLUSION

For the reasons set forth above, the Petition for Allowance of Appeal should be granted.

Respectfully submitted,

Dated: November 8, 2024

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**CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS**

This petition for allowance of appeal complies with the type-volume limitations of Pa. R. App. P. 1115(f) because this petition contains 4,654 words, excluding the parts of the petition exempted by Pa. R. App. P. 1115(g).

This petition complies with the typeface and the type style requirements of Pa. R. App. P. 124(a)(4) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Book Antiqua font.

Dated: November 8, 2024

/s/ Howard J. Bashman

Howard J. Bashman

CERTIFICATION OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: November 8, 2024

/s/ Howard J. Bashman

Howard J. Bashman

CERTIFICATE OF SERVICE

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