LANDAU, J., concurring. I concur respectfully with the result reached by the majority, but I disagree with the route taken to reach that result. I also disagree with the plaintiffs' claim that the defendant used the motion for summary judgment as a motion to strike, i.e., to test the legal sufficiency of the complaint, and that the trial court gave the defendant procedural latitude in granting its motion for summary judgment.[1]

A motion to strike tests the legal sufficiency of a complaint to state a recognized cause of action. Practice Book § 10-39. A motion to strike assumes all well pleaded facts are true; it does not challenge the truth of the facts alleged,[2] which falls under the guise of a motion for summary judgment or trial. In deciding a motion for summary judgment, a court must undertake a two step process: First, whether there are any genuine issues of material fact and second, whether the moving party is entitled to summary judgment as a matter of law. *Miller* v. *United Technologies Corp.*, 233 Conn. 732, 745, 660 A.2d 810 (1995). Summary judgment shall be granted if the moving party is entitled to a directed verdict on the same facts. *Connecticut Bank & Trust Co.* v. *Carriage Lane Associates*, 219 Conn. 772, 781, 595 A.2d 334 (1991). Here, the issue is not whether the

plaintiffs alleged a recognized cause of action, which they did, but whether they could prevail on the facts alleged as a matter of law.

The plaintiffs' cause of action rises and falls on how the sidewalk was constructed.[3] No motion to strike could have resolved that issue because that fact was determined by evidence outside the pleadings, not by the allegations of the complaint. The defendants submitted an affidavit from Stephen D. Hayes, who, on the basis of his personal knowledge, attested that the sidewalk was created by the form and pour method. The plaintiffs produced no competent evidence to challenge Hayes' testimony as to how the sidewalk was made. The plaintiffs submitted an affidavit from Edward Halprin, an expert, who attested from his experience, not from facts related to the situation at hand. ''While the court must view the inferences to be drawn from the facts in the light most favorable to the party opposing the motion . . . a party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment.'' (Citation omitted; internal quotation marks omitted.) *Norse Systems, Inc.* v. *Tingley Systems, Inc.*, 49 Conn. App. 582, 591, 715 A.2d 807 (1998). Consequently, the court properly determined that there was no genuine issue of material fact as to how the sidewalk was constructed.

The court then decided as a matter of law that a sidewalk created by the form and pour method was not a product under our products liability act. I agree with that portion of the majority opinion affirming the trial court's resolution of that issue. The court properly rendered summary judgment in favor of the defendant because the defendant would have been entitled to a directed verdict as a matter of law. Because the court rendered summary judgment in keeping with our law and procedure, it did not afford the defendant any procedural latitude by treating the motion for summary judgment as a motion to strike.[4]

For the foregoing reasons, I respectfully concur in the majority opinion.

[1] The plaintiffs appear to have constructed their argument in this court around the sequence of the defendant's argument in the trial court. Appellate courts must resist the temptation to adopt the labels assigned and logic followed by parties if the appellate mind is of a different opinion.

[2] "In an appeal from a judgment following the granting of a motion to strike, we must take as true the facts alleged in the plaintiff's complaint and must construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . A motion to strike admits all facts well pleaded. . . . A determination regarding the legal sufficiency of a claim is, therefore, a conclusion of law, not a finding of fact. Accordingly, our review is plenary. . . . If facts provable in the complaint would support a cause of action, the motion to strike must be denied. . . . Moreover, we note that [w]hat is necessarily implied [in an allegation] need not be expressly alleged.'' (Citations omitted; internal quotation marks omitted.) *Emerick* v. *Kuhn*, 52 Conn. App. 724, 728–29, 737 A.2d 456, cert. denied, 249 Conn. 929, 738 A.2d 653, cert. denied sub nom. *Emerick* v. *United Technologies Corp.*, 528 U.S. 1005, 120 S. Ct. 500, 145 L. Ed. 2d 386 (1999).

[3] The majority states in the first sentence of its introduction that for the plaintiffs to succeed ultimately, they must prove that the sidewalk that the

defendant constructed was a product. Implicitly, before the plaintiffs can prove that the sidewalk was a product, they must prove that there was no genuine issue as to how the sidewalk was constructed.

[4] I also disagree with the majority's citing of *Boucher Agency, Inc.* v. *Zimmer*, 160 Conn. 404, 409–10, 279 A.2d 540 (1971). As this court has twice before stated; see *Gould* v. *Mellick & Sexton*, 66 Conn. App. 542, 554 n.12, A.2d (2001); *Burke* v. *Avitabile*, 32 Conn. App. 765, 772 n.9, 630 A.2d 624, cert. denied, 228 Conn. 908, 634 A.2d 297 (1993); *Zimmer* is anomalous and limited to the unusual facts and procedural posture of that case. At the time that *Zimmer* was decided, a motion for summary judgment could be filed only when the pleadings were closed. Effective October 1, 1992, our rules of practice were amended to permit a motion for summary judgment to be filed at any time. Practice Book § 379, now § 17-44.