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ADALBERT H. MCINTOSH, SR. *v.* JAMES F. SULLIVAN, COMMISSIONER OF TRANSPORTATION
(SC 17094)

Norcott, Katz, Palmer, Zarella and Gilardi, Js.

*Argued October 21, 2004—officially released July 5, 2005*

*Lorinda S. Coon*, for the appellant (defendant).

*Bruce W. Diamond*, for the appellee (plaintiff).

*Opinion*

PALMER, J. The plaintiff, Adalbert H. McIntosh, Sr., brought this highway defect action under General Statutes § 13a-144[1] against the defendant, James F. Sullivan, the commissioner of transportation (commissioner), seeking damages for injuries that the plaintiff had sustained when the automobile that he was operating on a state highway in Waterbury was struck by falling rocks and debris. The commissioner filed a motion to dismiss the action on the ground that the complaint failed to state a claim under § 13a-144. The trial court denied the motion to dismiss, and the commissioner appealed to the Appellate Court, which affirmed the trial court's denial of the commissioner's motion to dismiss.[2] See *McIntosh* v. *Sullivan*, 77 Conn. App. 641, 645, 825 A.2d 207 (2003). We granted the commissioner's petition for certification to appeal limited to the following issue: "Did the Appellate Court properly conclude that the plaintiff's allegations did not fall outside the scope of . . . § 13a-144 as not involving a highway defect?" *McIntosh* v. *Sullivan*, 266 Conn. 926, 835 A.2d 475 (2003). We answer that question in the negative and, accordingly, reverse the judgment of the Appellate Court.

The following facts and procedural history are relevant to our analysis of the commissioner's claim. The plaintiff commenced this highway defect action against the commissioner alleging that, on March 1, 2000, the plaintiff was operating his automobile in the eastbound lane of a connector between exit 23 of Interstate 84 and Route 69 in Waterbury when his automobile "was struck by a large quantity of rocks, boulders, ice and dirt [that] had dislodged from an area adjacent to and above [the] highway," causing the plaintiff serious injuries. The plaintiff further alleged that his injuries were the result of the commissioner's failure to discharge his duties under the highway defect statute in one or more of the following ways: "(a) in that the highway was located dangerously close to raised rocky cliffs; (b) in that no attempt was made or inadequate attempts were made to stabilize the loose rocks; (c) in that the [commissioner] failed to erect barriers along the side of such roadway of sufficient height and strength to prevent falling rocks and debris from entering the highway and falling into the path of or onto vehicles making use of the highway; (d) in that there were no warning signs in the area to warn approaching motorists of the hazardous and dangerous conditions then and there existing; (e) in that the highway was not reasonably safe for purposes and uses intended; (f) in that the [commissioner] knew or in the exercise of reasonable care and inspection should have known of the conditions and remedied and corrected them; [and] (g) in that the conditions had existed for a sufficient period of time so that the [commissioner] knew or should have

known of them and should have taken measures to remedy and correct them . . . .''

The commissioner filed a motion to dismiss the action on the ground that the allegations of the complaint were insufficient, as a matter of law, to state a claim under § 13a-144. The trial court denied the motion without comment, and the commissioner filed a motion to reargue, which the court also denied, noting only that ''the commissioner's claim challenges liability, not the jurisdiction of the court.''[3]

The commissioner appealed to the Appellate Court, claiming that the plaintiff's allegations fell outside the scope of § 13a-144. *McIntosh* v. *Sullivan*, supra, 77 Conn. App. 642. In rejecting the commissioner's claim, the Appellate Court relied on its analysis and conclusion in *Tyson* v. *Sullivan*, 77 Conn. App. 597, 824 A.2d 857, cert. denied, 265 Conn. 906, 831 A.2d 254 (2003), a case brought by a passenger in the automobile that the plaintiff in the present case was driving when that vehicle was struck by the falling rocks and debris. See *McIntosh* v. *Sullivan*, supra, 644. In *Tyson*, the Appellate Court affirmed the trial court's denial of the commissioner's motion to dismiss; see *Tyson* v. *Sullivan*, supra, 609; reasoning that ''[i]t [was] of no consequence that . . . the rock ledge and its accumulation of debris were not on or within the highway prior to the accident. . . . A defect within the scope of the statute includes a condition located near the traveled path that, from its nature and position, would be likely to obstruct or to hinder one's use of the highway for traveling.'' (Citation omitted.) Id., 604. The court in *Tyson* also concluded, contrary to the contention of the commissioner, that that case was not controlled by *Comba* v. *Ridgefield*, 177 Conn. 268, 413 A.2d 859 (1979); see *Tyson* v. *Sullivan*, supra, 603; a case in which this court held that a branch that fell from a tree and struck a motor vehicle as that vehicle was traveling on the highway was not a highway defect for purposes of General Statutes § 13a-149, the municipal highway defect statute.[4] *Comba* v. *Ridgefield*, supra, 270–71. In light of its conclusion in the present case that the trial court ''properly [had] determined that sovereign immunity did not deprive the court of subject matter jurisdiction''; *McIntosh* v. *Sullivan*, supra, 644; the Appellate Court found it unnecessary to address the commissioner's claim that ''§ 13a-144 does not apply to the plaintiff's allegations that suggest defects in the highway's design.'' Id. Rather, the Appellate Court stated that, ''[t]o the extent that [that] issue [was] not subsumed by [its] previous discussion in *Tyson*, the [commissioner could] raise the issue by way of an appropriate motion to the trial court.'' Id., 644–45.

On appeal to this court, the commissioner renews his contention that, regardless of how the plaintiff's claim is characterized, the allegations of the complaint

fail as a matter of law because the falling rocks and debris did not constitute a highway defect for purposes of § 13a-144. We agree with the commissioner.

We begin our review of the commissioner's claim by setting forth the governing legal principles. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the court's ultimate legal conclusion and resulting [determination] of the motion to dismiss will be de novo. . . . Moreover, [t]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Citation omitted; internal quotation marks omitted.) *Filippi* v. *Sullivan*, 273 Conn. 1, 8, 866 A.2d 599 (2005).

"The state highway liability statute is a legislative exception to the common law doctrine of sovereign immunity and is to be strictly construed in favor of the state. While negligence was a common law tort, there was no liability of the sovereign at common law for a defective highway in negligence or on any other common law theory. . . . The state highway liability statute imposes the duty to keep the state highways in repair upon the highway commissioner; that is the statutory command. Therefore, because there was no right of action against the sovereign state at common law, a plaintiff, in order to recover, must bring himself within § 13a-144." (Citations omitted.) *White* v. *Burns*, 213 Conn. 307, 321, 567 A.2d 1195 (1990). Moreover, "[w]hether a highway is defective may involve issues of fact, but whether the facts alleged would, if true, amount to a highway defect according to the statute is a question of law . . . ." *Sanzone* v. *Board of Police Commissioners*, 219 Conn. 179, 201, 592 A.2d 912 (1991); accord *Ferreira* v. *Pringle*, 255 Conn. 330, 341–42, 766 A.2d 400 (2001). "To prove a breach of statutory duty under this state's defective highway statutes, the plaintiff must prove by a preponderance of the evidence: (1) that the highway was defective as claimed; (2) that the [commissioner] actually knew of the particular defect or that, in the exercise of [his] supervision of highways in the city, [he] should have known of that defect; (3) that the [commissioner], having actual or constructive knowledge of this defect, failed to remedy it having had a reasonable time, under all the circumstances, to do so; and (4) that the defect must have been

the sole proximate cause of the injuries and damages claimed, which means that the plaintiff must prove freedom from contributory negligence.'' (Internal quotation marks omitted.) *Ormsby* v. *Frankel*, 255 Conn. 670, 675–76, 768 A.2d 441 (2001).

''We have held that a highway defect is [a]ny object in, upon, or near the traveled path, which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon, or which, from its nature and position, would be likely to produce that result . . . . In *Hewison* [v. *New Haven*, 34 Conn. 136, 143 (1867)], we distinguished such highway defects from those objects which have no necessary [connection] with the road bed, or the public travel thereon, and which may expose a person to danger, not as a traveler, but independent of the highway . . . . We explored this distinction more recently in *Comba* v. *Ridgefield*, [supra, 177 Conn. 268]. In that case, [we] reject[ed] the . . . assertion that an overhanging tree limb, which subsequently fell on a traveling automobile, could be a highway defect, [explaining]: [I]f there is a defective condition that is not in the roadway, it must be so direct a menace to travel over the way and so susceptible to protection and remedial measures which could be reasonably applied within the way that the failure to employ such measures would be regarded as a lack of reasonable repair. Id., 271.'' (Citations omitted; internal quotation marks omitted.) *Sanzone* v. *Board of Police Commissioners*, supra, 219 Conn. 202. We consistently have held, moreover, that ''[t]he state is not an insurer of the safety of travelers on the highways which it has a duty to repair. Thus, it is not bound to make the roads absolutely safe for travel. . . . Rather, the test is whether or not the state has exercised reasonable care to make and keep such roads in a reasonably safe condition for the reasonably prudent traveler.'' (Internal quotation marks omitted.) *Hall* v. *Burns*, 213 Conn. 446, 462–63, 569 A.2d 10 (1990).

Because the state is not an insurer of the safety of travelers on the highways, the ''statutory obligation under § 13a-144 to keep the highway safe from defects is a reactive obligation, not an anticipatory obligation. That is, the [commissioner's] obligation under § 13a-144 is to remedy a highway defect once he: (1) has actual notice of a specific defect; or (2) is deemed to have constructive notice of a specific defect. As we have noted previously, his obligation does not sound in general negligence. See, e.g., *White* v. *Burns*, 213 Conn. 307, 322–23, 567 A.2d 1195 (1990); *Lamb* v. *Burns*, 202 Conn. 158, 169, 520 A.2d 190 (1987); *McManus* v. *Jarvis*, 128 Conn. 707, 710, 22 A.2d 857 (1938); *Shirlock* v. *MacDonald*, 121 Conn. 611, 613, 186 A. 562 (1936); *Dunn* v. *MacDonald*, 110 Conn. 68, 77, 147 A. 26 (1929). Thus, the [commissioner's] statutory obligation is to act reasonably in remedying a defect of which he has actual or constructive notice. [In the absence of] such

actual or constructive notice, his obligation does not extend to inspecting streets in order to prevent dangerous conditions, even when it is reasonably likely that such conditions may occur. See *Prato* v. *New Haven*, [246 Conn. 638, 646, 717 A.2d 1216 (1998)].'' *Ormsby* v. *Frankel*, supra, 255 Conn. 676–77. Thus, ''conditions that are likely to produce a defect and the defect itself are distinguishable, and . . . liability attaches under the highway defect statute only if [the commissioner] has notice of the defect itself.'' *Prato* v. *New Haven*, supra, 643. ''Similarly, the predictability of a future defect is insufficient to prove that [the commissioner] had notice of a defect.'' Id.

Finally, with respect to the plaintiff's claim that the highway was defectively designed, it is well established that ''a public authority acts in a quasi-judicial or legislative capacity in adopting a plan for the improvement or repair of its streets or highways and ordinarily will not be liable for consequential damages for injuries due to errors or defects in the plan adopted.'' *Donnelly* v. *Ives*, 159 Conn. 163, 168, 268 A.2d 406 (1970). Thus, as we stated in *Hoyt* v. *Danbury*, 69 Conn. 341, 37 A. 1051 (1897), ''[a] defect in the plan upon which [a] highway [is] constructed . . . [does] not [come] within the [highway defect] statute. If such a defect naturally results in a direct injury to an owner of adjacent land, he has his action at common law for this invasion of his proprietary right. . . . But injuries which it may occasion to travelers cannot be made the subject of any action in their favor. They are the result of an error of judgment on the part of the officers of a public corporation, on which has been cast the burden of discharging a governmental duty of a quasi-judicial character. For consequential damage thus occasioned to members of the general public, the common law never gave a remedy; nor has the statute changed the rule.'' (Citation omitted.) Id., 351–52.

Recognizing that an unduly rigid application of this rule could work an injustice in certain circumstances, however, the court in *Hoyt* also stated, in dictum, that, ''[i]f . . . a defect in the plan of construction should be so great as soon to require repairs in order to make the highway safe for travel, a neglect to make these repairs might [support] an action; but the plaintiff's case would be no stronger than if the road had been originally built in the best manner. So, were the plan of construction adopted one which was totally inadmissible . . . the highway would have been in such a defective condition as to have been out of repair from the beginning.'' Id., 352; see also *Donnelly* v. *Ives*, supra, 159 Conn. 168 (recognizing ''so-called *Hoyt* exception'' to general rule of nonliability for error of judgment in plan of design when plan renders highway defective from beginning). Thus, notwithstanding the general rule that the state is not liable for damages sustained by a traveler due to a defect in a highway's design, the state nevertheless may

be liable if such a defect gave rise to a hazard that otherwise would be actionable under § 13a-144.

The commissioner maintains that the reasoning and conclusion of the Appellate Court are inconsistent with the foregoing principles. In particular, the commissioner claims that the Appellate Court's holding violates the bedrock tenet, first articulated in *Hewison* v. *New Haven*, supra, 34 Conn. 136, and consistently applied by our courts thereafter, that a condition or hazard is not a highway defect for purposes of the statute unless and until the condition or hazard is in the roadway or so close to it that it actually obstructs or impedes travel upon the roadway. See id., 142. The commissioner further claims that the Appellate Court's holding contravenes the well established rule, articulated most recently in *Ormsby* v. *Frankel*, supra, 255 Conn. 670, that ''the [commissioner's] statutory obligation under § 13a-144 to keep the highway safe from defects is a reactive obligation, not an anticipatory obligation . . . [and] does not extend to inspecting streets in order to prevent dangerous conditions, even when it is reasonably likely that such conditions may occur.'' (Citations omitted.) Id., 676–77. Finally, the commissioner asserts that, to the extent that the plaintiff's complaint alleges a defect in the highway's plan of design, that claim also is not actionable under § 13a-144. We agree with all three of the commissioner's contentions.

In *Hewison*, a case long relied on by this court in addressing claims materially similar to the claim raised in the present case, a driver was injured when an iron weight that was attached to a banner suspended over the roadway and affixed between buildings on either side of the roadway fell and struck him in the head. *Hewison* v. *New Haven*, supra, 34 Conn. 137. In rejecting the claim of the plaintiff, Clara Hewison, under the highway defect statute, we stated: ''[O]bjects which have no necessary [connection] with the road bed, or the public travel thereon, and which may expose a person to danger, not as a traveler, but independent of the highway, do not ordinarily render the road defective. For example, trees or walls of a building standing beside the road, and liable to fall by reason of age and decay, or from other cause; or any object suspended over the highway so high as to be entirely out of the way of travelers; these, and like objects, may be more or less dangerous, but they do not obstruct travel. A person may be injured by them, but the use of the way, as such, does not necessarily conduce to the injury; he will be quite as likely to be injured while standing on the way, as while in motion; quite as likely to be injured while off the way as while on it. The tree or other object may or may not fall; it may or may not fall upon the highway; if it does, it may or may not fall upon a person traveling thereon; such a coincidence may possibly occur; but it is certainly not to be expected as a probable event. Such objects may be nuisances, which ought to

be removed; but the [highway defect statute] has not imposed that duty upon [the commissioner].'' Id., 143.

We also observed in *Hewison* that ''there may be objects off the road bed, yet so near it, either on one side or over it, as seriously to impede the public travel. That it was intended to make it the duty of [the commissioner] to keep the highway clear of such obstructions, seems hardly to admit of a doubt.

''To define in general terms the precise limits of the duty of [the commissioner] in these cases is not an easy matter, as each case must depend very much upon its own peculiar circumstances. The following however may be an approximation to it. Any object in, upon, or near the traveled path, which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon, or which, from its nature and position, would be likely to produce that result, would generally constitute a defect in the highway. For example, branches of a tree hanging over the road bed near the ground, necessarily obstruct the use of the way, and should be removed by the [commissioner] . . . .'' Id., 142; see also *Ferreira* v. *Pringle*, supra, 255 Conn. 342; *Sanzone* v. *Board of Police Commissioners*, supra, 219 Conn. 202; *Comba* v. *Ridgefield*, supra, 177 Conn. 270; *Riccio* v. *Plainville*, 106 Conn. 61, 63, 136 A. 872 (1927). Thus, *Hewison* and its progeny establish the principle that an object located above and out of the way of the road is not a defect cognizable under § 13a-144. This principle, coupled with the fact that the commissioner's responsibility under § 13a-144 is a reactive one, leads inexorably to the conclusion that the rocks and debris that fell onto the plaintiff's vehicle did not constitute a highway defect until they fell onto the road *and* the commissioner knew or reasonably should have known that they had fallen and actually were obstructing travel on the highway.

The Appellate Court in *Tyson* nevertheless relied on *Hewison* in support of its determination that the rocks and debris that struck the plaintiff's automobile while he was operating it constituted a highway defect. See *Tyson* v. *Sullivan*, supra, 77 Conn. App. 604–605. In reaching this conclusion, the court underscored the fact that the ''ledge [from which the rocks and debris fell] was located directly alongside the highway, thus 'near the traveled path' ''; id., 604; and the fact that ''[l]oose rocks and other debris situated on a rock ledge are objects that, by their very 'nature and position,' likely could dislodge and roll onto the lane of a highway thus obstructing or hindering travel.'' Id. The Appellate Court's reliance on *Hewison* is misplaced.

This court recognized in *Hewison* that, although § 13a-144 generally covers only those defective conditions that are in or part of the roadway itself, there may be circumstances in which an object or hindrance that is not part of the roadway, but that, from its nature and

position in, upon, or near the roadway, could constitute a highway defect *if that object or hindrance actually obstructs travel.* The example of such a defect that we gave in *Hewison* was "a tree hanging over the road bed near the ground, *necessarily obstruct[ing] the use of the way* . . . ." (Emphasis added.) *Hewison* v. *New Haven*, supra, 34 Conn. 142. A low lying tree limb directly obstructing the right-of-way in a traveled path is fundamentally different from a rocky ledge suspended high above the traveled path, *entirely out of the traveler's way*.[5] Moreover, the example of the low lying tree limb must be viewed in the context of our broader holding in *Hewison*, namely, that objects suspended above the road are not defects within the meaning of the highway defect statute. Id., 143. Thus, contrary to the Appellate Court's analysis in *Tyson* and in the present case, the relevant inquiry under *Hewison* and its progeny is not whether the rocky ledge constitutes an object or condition near the traveled path. Clearly it does. The inquiry, rather, is whether the rocky ledge is an object or condition near the traveled path "*which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon* . . . ." (Emphasis added.) Id., 142. Under that standard, the plaintiff's complaint must fail because the ledge, like the suspended iron weight in *Hewison*, did not, in and of itself, obstruct or hinder one's use of the highway.

Two other seminal highway defect cases, namely, *Comba* v. *Ridgefield*, supra, 177 Conn. 268, and *Dyer* v. *Danbury*, 85 Conn. 128, 81 A. 958 (1911), further illustrate this point. One of the plaintiffs in *Comba* was injured when a large tree limb extending over the traveled portion of the highway broke off and fell onto the vehicle in which she was riding. *Comba* v. *Ridgefield*, supra, 269. The trial court rendered judgment in favor of the defendants, the town of Ridgefield and the commissioner of transportation, on grounds of sovereign immunity; see id.; and we affirmed, stating: "The condition alleged . . . did not obstruct, hinder or operate as a menace to travel. It was a condition that could cause injury, but that injury could result even to one who was not a traveler on the highway. A person could be injured by the limb; but the use of the highway, as such, would not necessarily have led to the injury." Id., 271.

We reached the same conclusion in *Dyer*, in which the plaintiff was injured by a limb that had broken off a tree extending over the sidewalk on which he had been walking. *Dyer* v. *Danbury*, supra, 85 Conn. 130. Although the tree in that case "had existed in its dangerous condition for more than a year, and constituted a nuisance upon the highway"; id.; the overhanging tree limb "did not constitute a defect in the highway . . . [because] [i]t did not obstruct travel thereon . . . ." Id. Precisely the same reasoning applies to the rocks and debris that dislodged and struck the plaintiff's vehi-

cle in the present case. Thus, as the commissioner aptly noted in his brief to this court, ''[t]he necessary connection to the roadbed or travel means that, even though an object is not actually on the road's surface, it still prevents a traveler from safely passing. *Hewison* mentions a tree at the side of the road with branches protruding across the road low enough to interfere with travel or an object that would frighten even gentle horses. This reasoning has also been used to find that broken traffic signals can render a road defective.[6] . . . It has never been used, however, to find that a suspended object, even if it would definitely fall into the road if it fell, had the necessary connection to the roadbed or to travel to render the highway defective.'' (Citation omitted.)

In *Tyson*, the Appellate Court sought to distinguish falling rocks and debris from falling tree branches on public policy grounds, asserting, essentially, that it would be easier for the commissioner to prevent the former than it would be to prevent the latter. See *Tyson* v. *Sullivan*, supra, 77 Conn. App. 605–606. Although we do not necessarily find this assertion to be self-evident, it simply is beside the point. Our cases make it perfectly clear that § 13a-144 does not create a cause of action predicated on negligence; e.g., *Prato* v. *New Haven*, supra, 246 Conn. 645 (''[o]ur cases clearly hold that a cause of action [under the highway defect statute] is not based upon negligence''); and does not require the commissioner to abate all nuisances even though they may pose a potential danger to highway travel. See, e.g., *Comba* v. *Ridgefield*, supra, 177 Conn. 270 (objects such as ''trees, walls of buildings standing beside the road, and objects suspended over the highway which are so high as to be entirely out of the way . . . may be a nuisance that the government unit may have an obligation to abate, but . . . are not defects in the highway''). Moreover, because the commissioner's obligation under § 13a-144 is a reactive obligation rather than an anticipatory one, that obligation ''does not extend to inspecting streets in order to prevent dangerous conditions, *even when it is reasonably likely that such conditions may occur*.'' (Emphasis added.) *Ormsby* v. *Frankel*, supra, 255 Conn. 677. In other words, regardless of whether the commissioner reasonably should be required to inspect and to prevent certain conditions that pose a potential danger to highway travel, including rocks and debris lodged above a highway, the legislature has elected not to impose such a duty on the commissioner. As we recently have explained, the state is ''not liable under § [13a-144] for failure to inspect and discover a potential defect, or a defect that might arise at some future time. . . . [U]nder the highway defect [statute], the [commissioner] must have notice of an actual defect and a reasonable period during which to remedy it. . . . [T]he reasonable duty to inspect and discover defects does not arise until there is an actual

defect in the highway."[7] (Citations omitted.) *Prato* v. *New Haven*, supra, 646.

Finally, we address the plaintiff's contention that "the facts alleged in the . . . complaint properly set forth a cause of action for a design defect pursuant to § 13a-144 . . . ." The plaintiff asserts that, although § 13a-144 does not, as a general rule, impose liability upon the state for defects in the design of a highway, "[t]he courts . . . have carved out a rather broad exception to the rule . . . ." We disagree with the plaintiff's contention that his complaint alleges a cognizable design defect claim.[8]

As we have explained, a defect in the design of a highway generally is not actionable under § 13a-144. E.g., *Donnelly* v. *Ives*, supra, 159 Conn. 168. In *Hoyt* v. *Danbury*, supra, 69 Conn. 352, we recognized a limited exception to that general rule. In *Hoyt*, the plaintiff, Henry W. Hoyt, brought an action against the city of Danbury after he slipped and fell on stairs that were built into the side of a hill that formed part of a municipal sidewalk. See id., 347. After a trial to the court, the court found that the stairs were defective because they were too steep and rendered judgment for the plaintiff. See id., 349–50. On appeal, we reversed the judgment of the trial court; see id., 354; explaining that "[a] defect in the plan upon which [a] highway [is] constructed . . . [does] not [come] within the [highway defect] statute." Id., 351. The court also stated: "As to which, out of any appropriate modes of building the particular sidewalk in question, was to be chosen, it was for the [city] to decide; and so long as the mode selected was an appropriate and lawful one, its decision was not subject to collateral review in a suit of this nature. . . . The Superior Court had the right to determine whether [the stairs] were properly constructed and in good repair, but not to pronounce the walk defective because [they were] not built on an unbroken grade." Id. The court went on to state in dictum, however, that, "[i]f, indeed, a defect in the plan of construction should be so great as soon to require repairs in order to make the highway safe for travel, a neglect to make these repairs might [support] an action; but the plaintiff's case would be no stronger than if the road had been originally built in the best manner. So, were the plan of construction adopted one which was totally inadmissible . . . the highway would have been in such a defective condition as to have been out of repair from the beginning." Id., 352.

The hypothetical design claim that the court in *Hoyt* used to illustrate what an actionable design claim might resemble reveals the true nature and limitation of the "exception." Specifically, the court described a sidewalk that "had been left with its grade broken simply by a four foot wall, without the provision of steps . . . ." Id. According to the court, such a sidewalk

''would have been in such a defective condition as to have been out of repair from the beginning.'' Id. Thus, the cognizable design defect claim that the court hypothesized in *Hoyt* essentially would consist of an allegation that the plan of design called for a four foot drop or hole in the road. Indeed, the court in *Hoyt* immediately went on to state that, under its hypothetical, the plaintiff's claim would be ''no stronger than if the road had been originally built in the best manner''; id.; because, logically, the highway defect statute covers four foot holes in the middle of the roadbed irrespective of how they came to be there. In other words, a design defect claim can be distinguished from a traditional highway defect claim only insofar as the former includes an allegation that the dangerous condition inhered in the highway's plan of design, that is, the defect was not created by some other external condition, such as a particular occurrence, like a storm, or normal wear and tear. In all other respects, however, a design defect claim is indistinguishable from any other highway defect claim and, accordingly, it is subject to all the same statutory requirements, including the requirement that the alleged defect actually be in the roadbed or so near to it as to ''necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon . . . .'' *Hewison* v. *New Haven*, supra, 34 Conn. 142. In other words, *Hoyt* merely precludes the state from raising sovereign immunity as a defense when the plan of design, as implemented, creates the very type of hazardous condition for which the highway defect statute abrogated governmental immunity in the first place and for which the government otherwise would be liable had the dangerous condition originated through means other than the plan of design.

This was precisely the case in *Perrotti* v. *Bennett*, 94 Conn. 533, 109 A. 890 (1920), the only case in which this court ever has acknowledged that the ''so-called *Hoyt* exception''; *Donnelly* v. *Ives*, supra, 159 Conn. 168; properly had been raised to defeat a defense of sovereign immunity. In *Perrotti*, the town of Hamden had installed a drain pipe twelve inches below the surface of a highway ''in accordance with [a] plan adopted for the construction used in improving [the] highway.'' *Perrotti* v. *Bennett*, supra, 534. Pursuant to the plan of design, twelve inches of sand and gravel were placed between the drain pipe and the surface of the road. Id., 534–35. Several years after construction of the drain pipe, the plaintiff, Domenico Perrotti, was injured when the roadway over the pipe suddenly collapsed under the weight of his truck. Id., 535. The trial court found that ''[t]he drain [had not been] properly protected upon its upper surface from damage by heavy superimposed weight.'' Id. Nevertheless, the trial court concluded that ''there was no negligence or default of [the defendant] the highway commissioner or any of his employees in failing to properly maintain said highway or to keep it

in proper repair. . . . The damage to the plaintiff was not the result of neglect by the highway commissioner to properly maintain or repair said drain or said highway, but it was due to a defect in the original plan of construction of said drain, which did not provide for additional covering or protection of the tile where it came so close to the surface as the place in question, so that it could withstand the weight of the plaintiff's truck and its heavy load.'' (Internal quotation marks omitted.) Id., 535–36. The trial court therefore rendered judgment for the highway commissioner.

On appeal, we reversed the judgment of the trial court. Id., 542. We explained, first, that the plaintiff had the legal right ''to operate a truck the combined weight of which, with that of the load, did not exceed 25,000 pounds''; id., 536; and that ''proper construction and proper material in this case [required] a drain that would support [25,000 pounds].'' (Internal quotation marks omitted.) Id., 536–37. We further stated that, although ''[t]he principle of nonliability for error in the adoption of [a] plan for a municipal improvement is fully established . . . [w]henever the plan *in its execution* creates a nuisance, or causes direct injury to another, liability follows for the damage done. . . . The execution of the plan . . . [and] the operation of the improvement in accordance with the plan . . . are ministerial acts, and if the plan [is to] be executed or the improvement [is to] be operated with negligence, the municipality will be liable for the resulting damage. . . . If the plan [is] defective from the beginning, or if its defect originate[s] shortly after the completion of the improvement, *and injury [is] ultimately necessarily the inevitable or probable result*, the municipality will be liable.'' (Citations omitted; emphasis added.) Id., 539. Applying these principles to the facts, we concluded in *Perrotti*: ''The finding is that the drain was [not] properly protected, due to the covering of the roadway above it. The [trial court's] memorandum of decision attributes this defect in the highway either to the covering above the drain, or to the character of the pipe, or both. Obviously from the time the drain was laid it constituted a defect in the highway, whether this was due to the want of adequate covering, or to the character of the pipe, or both. *Hoyt* v. *Danbury*, [supra, 69 Conn. 352], expressly recognizes . . . this situation as creating an exception to the general rule of nonliability for error of judgment in a plan of municipal improvement . . . .'' *Perrotti* v. *Bennett*, supra, 94 Conn. 541.

*Hoyt* and *Perrotti*, therefore, establish the unremarkable principle that a defect in a plan of construction of a highway may, upon execution of that plan, render the highway ''out of repair from the beginning''; *Hoyt* v. *Danbury*, supra, 69 Conn. 352; such that, if a person were to be injured as a result of the disrepair, he or she would have a cause of action under the highway defect statute. Thus, the exception to the general rule

barring liability under § 13a-144 for design defects is premised on the notion that certain design defects also may constitute highway defects within the meaning of § 13a-144. In other words, *Hoyt* stands for the limited proposition that, when a plaintiff pleads an otherwise actionable claim under § 13a-144—that is, a claim that otherwise comports with all of the statutory requirements—the state may not avoid liability merely by demonstrating that the hazardous condition complained of inhered in the plan of design.

In the present case, we already have concluded that the plaintiff's allegations are insufficient to establish an actionable claim under § 13a-144 because the rocks and debris located above the highway did not impede or obstruct travel thereon. A fortiori, the plaintiff's allegations are insufficient to fall within the limited exception to the general rule precluding liability for design defects.

The dissent rejects our conclusion as ''based [on] an unduly narrow construction of . . . our case law'' and as ''counterintuitive to the public policy underlying the state's waiver of immunity for defective highway claims.''[9] On the contrary, it is the dissent that misperceives our case law and the public policy underlying the highway defect statute.

With respect to the dissent's first contention, our case law makes clear that objects that fall into the roadway are not defects within the meaning of the highway defect statute unless and until: (1) they actually have fallen into the roadway; (2) they actually obstruct traffic; *and* (3) the commissioner has reasonable notice of the obstruction. We have applied this principle to different kinds of potentially dangerous objects, including tree limbs; *Comba* v. *Ridgefield*, supra, 177 Conn. 271; *Dyer* v. *Danbury*, supra, 85 Conn. 130; objects suspended over a roadway; *Hewison* v. *New Haven*, supra, 34 Conn. 142–43; and traffic guideposts. *Aaronson* v. *New Haven*, 94 Conn. 690, 695, 110 A. 872 (1920). The dissent has cited no case—because there is no such case—to support its assertion that the commissioner has a duty, first, to discover a potentially dangerous condition that exists off the roadway, and second, to take remedial measures to ensure that the condition does not become an actual obstruction to travel.

In an attempt to distinguish these cases from the present case, the dissent seizes upon certain language in our prior cases explaining that, with respect to objects that are located off the roadway, a person may be injured by those objects regardless of whether he or she is in the roadway. The dissent then asserts that we rejected the highway defect claims in those prior cases because the plaintiffs in those cases had failed to demonstrate that they would have been injured only while traveling upon the highway and not while off the highway. Finally, the dissent asserts that this case is

distinguishable from those prior cases because it is ''highly improbable . . . that the falling rocks and other debris could have injured anyone other than someone traveling on the highway.'' (Internal quotation marks omitted.) The dissent's logic and conclusion are fatally flawed.

First, the dissent's argument is built upon the proverbial straw man. Although this court has explained that conditions off the highway, such as rotting tree limbs, ''could cause injury, but that injury could result even to one who [is] not a traveler on the highway''; *Comba* v. *Ridgefield*, supra, 177 Conn. 271; that observation was merely illustrative of the court's fundamental point, namely, that such objects are not defects within the meaning of the highway defect statute because they simply ''[do] not obstruct, hinder or operate as a menace to travel.'' Id.; see also *Hewison* v. *New Haven*, supra, 34 Conn. 143 (''any object suspended over the highway so high as to be entirely out of the way of travelers . . . may be more or less dangerous, but [it does] not obstruct travel''). Moreover, it would make no sense to construe the highway defect statute in the manner advanced by the dissent, that is, to render the viability of a cause of action under the statute dependent upon whether the condition that caused the plaintiff injury on the roadway was more or less likely also to have caused injury to a hypothetical person off the roadway. For example, under the analysis employed by the dissent, an overhanging tree limb *would* constitute a highway defect before it falls into the highway if, in view of the tree's particular location off the roadway, it is relatively *unlikely* that the falling limb would have injured a person other than a traveler on the highway; yet an identical overhanging tree limb would *not* constitute a highway defect before it falls into the highway if, in view of the positioning of the tree off the roadway, it is relatively *likely* that the falling limb also would have injured a person other than a traveler on the highway. There simply is no logical reason why the legislature would have intended that such a bizarre distinction be engrafted onto the statute, and the dissent has identified no such reason. Indeed, it is absurd to think that the commissioner's obligation under the statute—an obligation that ''does not arise until there is an actual defect *in the highway*''; (emphasis added) *Prato* v. *New Haven*, supra, 246 Conn. 646; requires him to inspect the state's roadways and the areas adjacent to them for the purpose of attempting to draw the meaningless distinction advocated by the dissent in order to protect the state from liability.[10]

The dissent further contends that our construction of the highway defect statute ''is contrary to sound public policy.'' In support of this contention, the dissent asserts that ''[t]here are critical differences between trees that grow alongside the roadway and rock ledges next to which a roadway is laid.'' Footnote 6 of the

dissenting opinion. In particular, the dissent asserts that ''trees are numerous and have an ever changing condition, [whereas] there are far fewer rock ledges and their condition is far less mutable, thus making it easier for the commissioner to monitor their condition and remediate any hazards.'' Id. Although there may be fewer rock ledges than trees in the state, many miles of highway are bordered by hills and cliffs. Moreover, rocks or ice or other debris situated on a hill or cliff above and off the roadway are likely to be less amenable to inspection than tree limbs hanging directly over the highway. Nevertheless, under the view advanced by the dissent, the commissioner—and presumably all municipalities, as well, because the municipal and state highway defect statutes are coextensive; see footnote 4 of this opinion—would be required to inspect those hills and cliffs for any potentially dangerous conditions. The dissent's unsupported assertion that the burden of performing such inspections would be less onerous than the burden of inspecting our state and municipal highways for overhanging tree limbs is dubious, to say the least.

More fundamentally, however, the dissent ignores the principle, firmly established in our law, that the highway defect statute does not give rise to a cause of action sounding in general negligence. E.g., *Ormsby* v. *Frankel*, supra, 255 Conn. 676. Although the rocks and debris that struck the plaintiff's automobile in the present case may have posed an unreasonable danger to travelers on the road, such that the commissioner's failure to remove them arguably was negligent, any such negligence was manifestly insufficient to support a claim under the highway defect statute.[11] However strongly the dissent may feel that, ''as a matter of public policy, the [commissioner] should have a duty to [alleviate that danger]''; (internal quotation marks omitted); that public policy is not embodied in the highway defect statute.[12] Rather, as this court's many highway defect cases indicate, the legislature has elected to waive sovereign immunity with respect to the repair and maintenance of the state's highways only when the defective condition is in or so near the roadway that it actually obstructs travel and the commissioner has reasonable notice thereof.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to remand the case to the trial court with direction to grant the commissioner's motion to dismiss and to render judgment for the commissioner.

In this opinion NORCOTT, ZARELLA and GILARDI, Js., concurred.

[1] General Statutes § 13a-144 provides in relevant part: ''Any person injured in person or property through the neglect or default of the state or any of its employees by means of any defective highway, bridge or sidewalk which it is the duty of the Commissioner of Transportation to keep in repair . . . may bring a civil action to recover damages sustained thereby against the commissioner in the Superior Court. . . .''

[2] We note that, although interlocutory rulings generally are not immediately appealable, the denial of a motion to dismiss based on a colorable claim of sovereign immunity is an exception to this general rule. E.g., *Gordon* v. *H.N.S. Management Co.*, 272 Conn. 81, 91 n.12, 861 A.2d 1160 (2004). Because § 13a-144 ''serves as a waiver of the state's sovereign immunity for claims arising out of certain highway defects''; *Filippi* v. *Sullivan*, 273 Conn. 1, 3 n.1, 866 A.2d 599 (2005); the commissioner was entitled to, and did, appeal from the trial court's adverse ruling on his motion to dismiss.

[3] As the Appellate Court stated, ''the record does not contain a memorandum of decision or a signed transcript of an oral decision [by the trial court]. Nevertheless, because the essential facts are undisputed and the claim involves a question of law, the record is adequate for review. See *Community Action for Greater Middlesex County, Inc.* v. *American Alliance Ins. Co.*, 254 Conn. 387, 395–96, 757 A.2d 1074 (2000) ([when] de novo review applies and facts are not disputed, precise legal analysis undertaken by trial court not essential to reviewing court's review of issue on appeal).'' *McIntosh* v. *Sullivan*, supra, 77 Conn. App. 643 n.4.

[4] The plaintiffs in *Comba* brought their action pursuant to § 13a-144, the state highway defect statute, and § 13a-149, the municipal highway defect statute. See *Comba* v. *Ridgefield*, supra, 177 Conn. 269. ''In interpreting [§ 13a-144] we have on many occasions looked to and applied the rationale in cases involving statutory actions against municipalities under . . . § 13a-149 since there is no material difference in the obligation imposed on the [commissioner] by § 13a-144 and that imposed on municipalities by § 13a-149.'' *Donnelly* v. *Ives*, 159 Conn. 163, 167, 268 A.2d 406 (1970); see also *Smith* v. *New Haven*, 258 Conn. 56, 64 n.6, 779 A.2d 104 (2001) (noting that case law interpreting §§ 13a-144 and 13a-149 can be applied interchangeably). Because ''[t]here is no substantial difference in the duties imposed by those statutes''; *Comba* v. *Ridgefield*, supra, 269–70; we treat them as identical for purposes of this appeal.

[5] We reiterated this same point more recently in *Comba* v. *Ridgefield*, supra, 177 Conn. 268: ''This court in *Hewison* recognized that the defect need not be a part of the roadbed itself. It gave, among other examples, tree limbs overhanging the roadway near the ground which necessarily obstructed the use of the road. On the other hand, the case pointed out that those objects which have no necessary connection with the roadbed or public travel, which expose a person to danger, not as a traveler, but independent of the highway, do not ordinarily render the road defective. This court listed trees, walls of buildings standing beside the road, and objects suspended over the highway which are so high as to be entirely out of the way of travelers, as examples of the latter. It further pointed out that a person could be injured by them, but the use of the highway, as such, does not necessarily bring about the injury. Such objects may be a nuisance that the government unit may have an obligation to abate, but they are not defects in the highway.'' Id., 270; see also *Dyer* v. *Danbury*, 85 Conn. 128, 130–31, 81 A. 958 (1911) (''The overhanging limb did not constitute a defect in the highway. It did not obstruct travel thereon, and the city was not bound to remove it as a part of its duty 'to build and repair' the highways within its limits. . . . If the overhanging limb, by reason of its liability to fall upon the traveled part of the highway, constituted a nuisance, as alleged, it ought to have been removed. If it endangered travel upon the highway it was a public nuisance and the city could and should have caused its removal. But this duty of the city was a public governmental one, for the neglect of which no liability at common law ensued to the city, and no statute imposes any.'' [Citation omitted.]).

[6] As the commissioner notes, we held, in *Sanzone* v. *Board of Police Commissioners*, supra, 219 Conn. 181, 203, that a malfunctioning traffic light that simultaneously signaled green to traffic traveling north and traffic traveling west, thereby causing an accident, constitutes a highway defect for purposes of the municipal highway defect statute. We explained our conclusion in *Sanzone* as follows: ''We have held that a highway defect is [a]ny object in, upon, or near the traveled path, which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon, or which, from its nature and position, would be likely to produce that result . . . . *Hewison* v. *New Haven*, [supra, 34 Conn. 142]; see *Hickey* v. *Newtown*, 150 Conn. 514, 518, 192 A.2d 199 (1963). In *Hewison*, we distinguished such highway defects from those objects which have no necessary [connection] with the road bed, or the public travel thereon, and which may expose a person to danger, not as a traveler, but independent of the highway . . . . *Hewison* v. *New Haven*, supra, 143. We explored this distinc-

tion more recently in *Comba* v. *Ridgefield*, [supra, 177 Conn. 268]. In that case, rejecting the . . . assertion that an overhanging tree limb, which subsequently fell on a traveling automobile, could be a highway defect, we explained: [I]f there is a defective condition that is not in the roadway, it must be so direct a menace to travel over the way and so susceptible to protection and remedial measures which could be reasonably applied within the way that the failure to employ such measures would be regarded as a lack of reasonable repair. Id., 271.

"Unquestionably, a malfunctioning traffic light, although not a physical impediment at street level, is, as a matter of law, such a highway defect, or in the language of the statute, part of a defective road." (Internal quotation marks omitted.) *Sanzone* v. *Board of Police Commissioners*, supra, 219 Conn. 202–203. In contrast to the reasoning and conclusion of the Appellate Court in *Tyson* v. *Sullivan*, supra, 77 Conn. App. 597, the rationale and conclusion of *Sanzone* are entirely consistent with our prior cases construing the highway defect statutes. In particular, the hazardous condition in *Sanzone*, namely, the malfunctioning traffic light, actually existed in or so near the highway when the plaintiff in *Sanzone* arrived at the intersection so as to constitute a highway defect for purposes of the municipal highway defect statute because it necessarily hindered and imperiled travelers in the use of the road. See *Hewison* v. *New Haven*, supra, 34 Conn. 142. By contrast, the hazardous condition in the present case, namely, the raised rocky ledge, simply is not a highway defect for purposes of § 13a-144 because the ledge did not actually obstruct or hinder highway traffic until the rocks and debris that were on it dislodged, fell into the road and, thereafter, obstructed it for some period of time.

[7] We made a similar point in *Aaronson* v. *New Haven*, 94 Conn. 690, 110 A. 872 (1920). As we explained in *Prato* v. *New Haven*, supra, 246 Conn. 638: "In *Aaronson* . . . a silent policeman was placed in the roadway to regulate traffic. [*Aaronson* v. *New Haven*, supra], 692. The silent policeman had toppled over into the lanes of travel on numerous occasions. Id., 693. It was dislodged and rolled into the travel lanes at approximately 6:30 p.m. one evening, and someone had notified the police by 7 p.m. Id. It, nevertheless, still remained in the travel lanes at 7:30 p.m., when . . . [a] car [driven by the plaintiff, Abraham Aaronson] collided with it. The plaintiff sued the city of New Haven. We held that the city could be held liable because its officials had actual notice of the highway defect and ample time to remedy it. Id. This court was careful to point out, however, that its decision rested on the one-half hour lapse between the notice and the accident, and not on the fact that the silent policeman had toppled over in the past and had a propensity to topple over in the future. See generally id., 695–96. Despite the other occasions on which it had toppled over into the travel lanes, we indicated that the city did not receive actual or constructive notice of the defect until the police officer in charge was notified of the condition at 7 p.m. See id., 696 . . . ." (Citation omitted.) *Prato* v. *New Haven*, supra, 643–44. Indeed, we stated in *Aaronson* that the trial court "erred in charging that the mere placing of a silent policeman at the intersection of the streets with knowledge that it was liable to be displaced so as to become a dangerous obstruction to traffic, and without fastening or anchoring it so as to prevent or minimize such liability, was a breach of the legal duty which the [city of New Haven] owed to travelers on its streets." *Aaronson* v. *New Haven*, supra, 694. In *Aaronson*, we held that "[t]he jury should have been charged that the city was not liable unless it [had] failed to use reasonable care in discovering the obstruction after it existed, or [had] failed to use reasonable care in removing it after notice." Id., 696. Thus, even though it would have been reasonable to require the city of New Haven to take steps to prevent the silent policeman from toppling into the roadway, to do so would have been contrary to the duty actually imposed on the city by the legislature under the highway defect statute.

[8] We also disagree with the plaintiff's characterization of the breadth of the exception to the general rule precluding liability for design defects. In support of that characterization, the plaintiff relies primarily on dictum in *Langton* v. *Westport*, 38 Conn. App. 14, 658 A.2d 602 (1995), in which the Appellate Court stated that the "exception to the general rule . . . has almost consumed the rule." Id., 18. Although it is true that we recognized the exception to the general rule more than 100 years ago; see *Hoyt* v. *Danbury*, supra, 69 Conn. 352, we have found the exception to be applicable only once. See *Perrotti* v. *Bennett*, 94 Conn. 533, 541–42, 109 A. 890 (1920). More importantly, as we explain more fully hereinafter, the exception is a relatively narrow one; to the extent that the dictum of the Appellate Court

in *Langton* suggests otherwise, it is incorrect.

[9] The dissent also contends that our conclusion is based on an unduly narrow construction of the highway defect statute itself. Neither our construction of the statute nor the dissent's construction of the statute, however, relies upon the language of the statute; both interpretations are predicated on this court's interpretive case law that dates back approximately 150 years. Consequently, the dissent's assertion that our construction of the highway defect statute is unduly narrow is subsumed by its identical assertion regarding our interpretation of the case law.

[10] Indeed, even if the distinction drawn by the dissent were a legitimate one, it would not avail the plaintiff in the present case. Although the dissent asserts that "it is 'highly improbable . . . that the falling rocks and other debris could have injured anyone other than someone traveling on the highway,' " that assertion—which the dissent fails entirely to explain—is wholly unfounded; there simply is no reason why a person working or climbing in the area between the rock ledge and the roadway also would not have been injured by the falling rocks.

[11] Indeed, as we have explained, the commissioner or municipality also may have been negligent in failing to secure or to remove the overhanging tree limbs in *Comba* v. *Ridgefield*, supra, 177 Conn. 269, and *Dyer* v. *Danbury*, supra, 85 Conn. 130, the suspended iron weight in *Hewison* v. *New Haven*, supra, 34 Conn. 136, and the traffic guidepost in *Aaronson* v. *New Haven*, supra, 94 Conn. 692. We nevertheless concluded in those cases that the commissioner or municipality was not liable under the applicable highway defect statute, despite any such negligence, because the alleged defect was not actually obstructing highway travel. See *Comba* v. *Ridgefield*, supra, 271; *Aaronson* v. *New Haven*, supra, 695–96; *Dyer* v. *Danbury*, supra, 130; *Hewison* v. *New Haven*, supra, 143. We hold the same today.

[12] We note, furthermore, that, although the dissent would hold the commissioner to a negligence standard in the present case—even though we consistently have rejected that standard in construing the highway defect statute—the dissent fails to articulate any principled rule or standard for deciding future highway defect cases that involve falling objects. Under the dissent's approach, some objects that are off the roadway, such as the falling rocks and debris in the present case, *are* highway defects before they actually fall into the road and obstruct travel thereon, whereas other objects, such as falling tree limbs, traffic guideposts and suspended iron weights, *are not* highway defects before they fall into the road and obstruct travel. Under the analysis employed by the dissent, it simply is impossible to ascertain whether a particular falling object is a defect within the meaning of the highway defect statute.