FSTCV095012770S

DAVID LEGERE

VS.

CITY OF NORWALK

CONNECTICUT SUPERIOR COURT

JUDICIAL DISTRICT OF STAMFORD/

NORWALK AT STAMFORD

October 10, 2013

MEMORANDUM OF DECISION – MOTION FOR SUMMARY JUDGMENT
(#135.00)

Nature of the Proceeding

This is an action arising from an incident that occurred at Veteran's Park, a municipal park in Norwalk. Plaintiff was attempting to load his boat onto a trailer, at a location in the park designed to facilitate launching boats into the water and/or retrieving them from the water. While standing on a submerged ramp dedicated to this function (launching and retrieving boats), plaintiff slipped on an accumulation of algae and other substances that had accumulated on the surface of the ramp. His fall resulted in injuries for which he seeks compensation. Plaintiff has sued the city, claiming liability under the provisions of General Statutes §13a-149, generally referred to as the highway defect statute.

Defendant city has moved for summary judgment, claiming that plaintiff cannot prevail, as a matter of law. Defendant's initial motion asserted numerous claimed defects in the proceedings, resulting in an excessively-lengthy memorandum of law (57 pages; cf. *Practice Book* §4-6). Plaintiff filed an objection to the motion, and both parties filed supplemental memoranda addressing the issues. At argument on July 22, 2013, essentially all claims but the central claim discussed below were explicitly or implicitly abandoned for purposes of this motion.

The issue, as ultimately narrowed/focused, is whether the area in which plaintiff fell, under the circumstances described, comes within the scope of the

highway defect statute – can a submerged boat ramp, being used to retrieve (or launch) a boat, be a highway for purposes of the statute, such that an alleged defective condition can give rise to liability under §13a-149?

Legal Standards

Summary Judgment

> "Practice Book § 17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Sherman* v. *Ronco*, 294 Conn. 548, 553-54 (2010).
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> "In seeking summary judgment, it is the movant who has the burden of showing the nonexistence of any issue of fact. The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issue as to all the material facts, which, under applicable principles of substantive law, entitle him to a judgment as a matter of law. . The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that it is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. . . . As the burden of proof is on the movant, the evidence must be viewed in the light most favorable to the opponent.... When documents submitted in support of a motion for summary judgment fail to establish that there is no genuine issue of material fact, the nonmoving party has no obligation to submit documents establishing the existence of such an issue.... Once the moving party has met its burden, however, the opposing party must present evidence that demonstrates the existence of some disputed factual issue.... It is not enough, however, for the opposing party merely to assert the existence of such a disputed issue. Mere assertions of the claim should have been brought under fact . . . are insufficient to establish the existence of a material fact and, therefore, cannot refute evidence properly

presented to the court under Practice Book § [17-45]." (Internal quotation marks omitted.) *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 10-11 (2008).

"A material fact . . . [is] a fact that will make a difference in the result of the case...." *Hurley* v. *Heart Physicians P.C.* (Internal quotation marks omitted.) 278 Conn. 305, 314 (2006).

In deciding a motion for summary judgment, the court is not concerned about relative weakness or strength of positions; the court's only concern is whether, as a matter of law, there can be only one possible outcome. *Mott v. Wal-Mart Stores East, LP*, 139 Conn. App. 618, 631 (2012).

Highway Defect Claims

"To recover under § 13a-149, a plaintiff must prove, by a fair preponderance of the evidence, (1) that the highway was defective as claimed; (2) that the defendant actually knew of the particular defect or that, in the exercise of its supervision of highways in the city, it should have known of that defect; (3) that the defendant, 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." *Lombardi v. East Haven*, 126 Conn. App. 563, 573-74 (2011) (internal quotation marks omitted.)

Discussion

The issue, as ultimately submitted to the court, requires an exploration of the limits of the concept of "highway" for purposes of the highway defect statute. There do not appear to be any material factual issues concerning core facts – what

happened, etc.[1] The issue for the court relates to how the law applies to those facts, and especially whether the boat ramp and surrounding area come within the scope of §13a-149, under the circumstances of this case.

As a preliminary matter, the court should identify certain issues raised by the parties that the court does not believe to be germane to the narrowed issue before the court (notwithstanding the claims of the parties). The court does not believe that the existence of a fee that was supposed to have been paid is probative of whether something is a public road or not – tolls on the Connecticut Turnpike and the Merritt Parkway did not preclude their being characterized as public roads. See, e.g. *White v. Burns*, 213 Conn. 307 (1990). (Additional restrictions, if they existed, might be relevant; see, *Read v. Plymouth*, 110 Conn.App. 657 (2008), but the closure of a park at night (see footnote 1) does not appear to be the kind of restriction contemplated.[2])

Additionally, although there is a large degree of overlap between the state and municipal highway defect statutes, care must be taken when relying on a rule of exclusion applicable to a state road, when considering the law pertaining to municipal roads. For example, *Amore v. Frankel*, 228 Conn. 358 (1994), a case cited by defendant, turned upon the fact that the driveway in question was not a road for which the Commissioner of Transportation had the obligation of maintenance and repair, as it was subject to control by a different state agency. The

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[1] The court does wish to note that the affidavit of Mr.Mocciae (part of #137.00) contains what appears to be a fairly obvious error – a reversal of terms. In ¶11, he states that the park is open from dusk to dawn. (That statement is incorporated into defendant's brief.) In effect, the statement affirmatively avers that the park is open throughout the night and implies that it is not open during the day. While not material to the issues before the court, the court assumes that if any Norwalk parks are open less than 24 hours each day, it would be the daylight hours that they are open rather than the overnight hours.

[2] The trial court decisions in *Read v. Plymouth* are discussed below.

case did not depend on whether the driveway might *properly* be considered a public road (and in a municipal setting, *Novicki v. New Haven*, 47 Conn.App. 734 (1998), discussed infra, would seem to dictate that it likely would be so considered) but rather the result was dictated by the undisputed fact that the Commissioner *had not agreed to accept responsibility* pursuant to General Statutes §13b-30.

That, in turn, provides a natural segue to another point. Defendant argues that it is significant or potentially significant that this area was not being maintained by the Department of Public Works, the department responsible for roads and highways within the City of Norwalk, but instead was within the jurisdiction of the Recreation and Parks Department, the department charged with maintaining recreational properties. Unlike the situation with respect to the state, where under §13a-144, the road must be the responsibility of the *Commissioner of Transportation*, there is no distinction under the municipal highway defect statute as between various departments within a municipality – all that matters is that it be a municipal responsibility.[3] (That is not to say that the recreational quality of the area in question is irrelevant, but rather what is irrelevant is the internal choice of personnel charged with maintenance.)

The court also does not believe that subject matter jurisdiction is implicated by defendant's motion, as narrowed. Subject matter jurisdiction is the power of the court to adjudicate a dispute, and while the failure to comply with conditions precedent to statutory causes of action often are deemed to be subject matter jurisdictional defects, e.g. sufficiency of statutory notice (*Ortiz v. Metropolitan District*, 139 Conn.App. 487 (2012)) or timeliness of notice (*Hillier v. East Hartford*, 167 Conn.

[3] *Novicki*, supra, does recognize that if a *legally-distinct* municipal entity has maintenance responsibility, that distinct entity is the one that might have liability under the statute (and in *Novicki*, it was the Board of Education). There is no claim that the Department of Public Works or the Recreation and Parks Department is in any way legally distinct from the city.

100 (1974)),[4] the actual merits of the dispute are not, *Davis v. Board Of Education*, 3 Conn. App. 317 (1985). Indeed, as has been judicially observed, an overbroad application of subject matter jurisdiction to the elements of a statutory cause of action would result in the anomaly that after a trial on the merits, a finding that a plaintiff had not proved a required element would seem to require dismissal, *Gurliacci v. Mayer*, 218 Conn. 531, 544-45 (1991).[5]

In attempting to explore the parameters of "highway," Novicki, supra, is an appropriate starting point. In *Novicki*, the question was whether a walkway leading from a public sidewalk and road to a public building (school) constituted a "highway" for purposes of possible municipal liability under the statute.

> "Since the walkway on which the plaintiff was injured was on public property and led from a city street to a public school, it was reasonably anticipated that the public would make use of it. Accordingly, we conclude that the walkway is a road or bridge for purposes of the highway defect statute and, in that respect, the plaintiff's allegations are sufficient to state a cause of action against the governmental entity bound to keep the walkway in repair." 47 Conn.App. 740.

Novicki indicates that a relatively broad interpretation should be given to the concept of "highway," notwithstanding the general proposition that statutes in

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[4] But see *Williams v. CHRO*, 54 Conn.App. 251 (1999); reversed, 257 Conn. 258, 266-70 (2001), where the Supreme Court signaled that as to time limits in statutory cause of action, the court would require greater scrutiny as to whether a time limit truly was jurisdictional or merely the equivalent of a statute of limitations embedded in the cause of action.

[5] To the extent that defendant did raise issues relating to sufficiency of notice and whether the notice was delivered to a proper person, issues that do implicate subject matter jurisdiction and therefore must be addressed when raised (*Honan v. Dimyan*, 85 Conn.App. 66, 69 (2004)), the court notes that defendant does not point to any wholly-omitted element of required notice but instead points to a number of claimed inaccuracies or confusing assertions, all of which would appear to come within the scope of the so-called savings clause rather than being jurisdictional flaws. While notice delivered to a proper person is a jurisdictional requirement, defendant does not cite any persuasive authority to the effect that in a municipality with both a town clerk and a city clerk, delivery of notice to the "wrong" municipal clerk is a fatal defect.

derogation of common law, and in particular governmental (municipal) immunity, are to be strictly construed. *Ahern v. New Haven*, 190 Conn. 77, 82 (1983). *Novicki* has been cited with approval in Supreme Court decisions. *Kozlowski v. Commissioner*, 274 Conn. 497, 505 (2005).[6]

Bartram v. Sharon, 71 Conn. 686, 693-94 (1899) provides an alternate perspective. In *Bartram*, the court traced the history of the highway defect statute back to colonial times, observing that it was the result of a delegation by the state to the local towns of responsibility for maintenance of certain roads. The court also observed that the statute was penal in nature and in derogation of the common law such that it required a strict/narrow interpretation.

This court has been unable to find an all-inclusive definition of highway or street or any other statutorily-relevant noun that would address the situation here. Although intended for a relatively narrow purpose, General Statutes §13a-110a(11) comes close:

> "'Municipal road' means any public highway, road, street, avenue, alley, driveway, parkway or place, under the control of a municipality of the state, dedicated, appropriated or opened to public travel"

[6] *Novicki* negates the significance of assertions in the Mocciae affidavit to the effect that the ramps were not considered to be part of the city's highway system nor were they maintained by highway personnel. A walkway leading from a public road/sidewalk to a school building is unlikely to be part of any governmental organization's highway system and most likely had not been considered to be within the concept of a public sidewalk for purposes of the statute, prior to the decision being rendered. *Novicki* recognizes that there can be an issue as to which municipal/governmental entity is responsible for maintenance of a walkway, but a denial by an agency head of any responsibility for his/her agency to maintain an area would not suffice to negate city responsibility for purposes of this motion. (It does not make "clear what the truth is.") Thus. responsibility of Norwalk's Recreation and Parks Department, rather than the Department of Public Works, as asserted in that affidavit, does not appear to be material to the issue of the city's potential liability.

and if one adds in sidewalks (*Hornyak v. Fairfield*, 135 Conn. 619 (1949)) and walkways (*Novicki*), the "definition" becomes closer to comprehensive. To be truly comprehensive, a definition also would have to encompass (defective) areas "in such proximity to the highway so as to be considered in, upon, or near the traveled path," *Serrano v. Burns*, 248 Conn. 419, 429 (1999) (internal quotation marks, omitted).

Section 14-1(40) contains a similar definition:

> "'highway' includes any state or other public highway, road, street, avenue, alley, driveway, parkway or place, under the control of the state or any political subdivision of the state, dedicated, appropriated or opened to public travel or other use."

An indication of the propriety of a broad interpretation of the scope of highway defect statutes is suggested by a statutory *limitation* of potential state liability. Section 13a-153 provides:

> "Each person ... using the pedestrian walks, bicycle paths, bridle paths, entrances or exits provided for in section 13a-141, 13a-141a or 13a-142e, or using any lane or other part or facility of any highway, road, bridge or parking facility provided by the state for bicycle traffic or using the walk or path connections provided for in section 13a-142, shall do so at his, her or its own risk, and no liability shall accrue to the state or any agency ... for any injuries or damages to any person or property which may result, either directly or indirectly, from the use of such walks, paths, entrances, exits or connections."

Indeed, Title 13a of the Connecticut General Statutes is intended generally to collect the laws applicable to highways and bridges, and the scope of thoroughfares and accessways encompassed in that title would seem to provide a suitable (if general) reference point for determining the scope of the term highway as used in §13a-149.

A complementary approach focuses on the "traveler" component. A highway is intended for use by travelers and must be in use for purposes of travel, for a highway defect statute to be applicable/Invocable. The Connecticut Supreme Court has recognized that areas not specifically part of a road but closely associated with travel and within the control of the relevant governmental entity, can come within the scope of a highway defect statute. *Serrano v. Burns*, supra. The duty is one directed to travel – reasonable efforts must be made to keep the road reasonably safe for travel. *Machado v. Hartford*, 292 Conn. 364, 374, 375 (2009). The duty is for the benefit of those using the road for travel purposes, *Frechette v. New Haven*, 104 Conn. 83, 88 (1926), and for the statute to be applicable, the injury has to be sustained while in use of the road as a traveler, *O'Neil v. New Haven*, 80 Conn. 154 (1907).[7]

Plaintiff largely relies on general statements concerning highway liability coupled with reliance on public access to the boat ramp in question. Perhaps the most case-specific assertion/argument made is the implication that a boat is a means of transportation such that transitioning from land travel to water travel is consistent with the notion of being a traveler on a road:

> "As such, a member of the general public wishing to travel by boat over the waters of Long Island Sound (whether for recreational purposes or otherwise) by utilizing the public boat launch at the park would, by necessity, have to drive a vehicle from the adjacent city street, across the parking lot, and onto the boat ramp." (pp. 7-8 of memorandum in opposition (#142.00))

[7] Although not a claim arising under a highway defect statute, see *Valin v. Jewell*, 88 Conn. 151 (1914), holding that a person clearing a public sidewalk of ice was not a traveler on that sidewalk.

Attempting to synthesize all of the foregoing, the court has concluded that summary judgment should be granted. From the perspective of determining the broad parameters of what might constitute a road or thoroughfare, all of the roads identified in statutes and case law share at least two basic features. First, they all relate to travel on land. Second, they are all "ways" intended for use by pedestrians and/or vehicles (generally land-based and wheeled) – in an earlier era, that would have included animals being ridden as well as vehicles propelled/drawn by animal power. [8] To put a label on this inductive process, the doctrine of *ejusdem generis* seeks to identify the universe of terms similar to those enumerated.

Plaintiff has not cited any authority for the proposition that the highway defect statute applies to water travel in general, or more narrowly, submerged land or structures (specifically, a ramp). Water travel is particularly ill-suited for inclusion in the scope of a statute dealing with roads, since roads are generally reasonably well-defined, and the duty of maintenance primarily focuses on the interface between road and traveler, i.e. the surface. In this regard, it is not clear what plaintiff's claim actually is – is he claiming that the ramp was the traveled way, or, as suggested by certain assertions, that the condition was in sufficient proximity to a road that it constituted a highway defect?

> "In short, there is, at the very least, an issue of fact as to whether the area of the car ramp/boat launch where the plaintiff fell was in, upon or near the traveled path of the highway such as to make applicable Section 13a-149." (p. 8 of memorandum in opposition (#142.00))

(If proximity to a road or walkway is the claim, it does not seem possible for the ramp to have interfered with travel on some other area constituting a road or way, particularly as described in the complaint and submissions – plaintiff was on the

[8] In winter, possibly including sleighs or other non-wheeled vehicles for getting through (over) snow.

ramp, and engaging in activity on and limited to the ramp, such that the ramp could not be a defective condition affecting travel on a road or way nearby. An alternate perspective for this point: a claimed defect based on proximity implicitly requires the existence of a nearby road – the dock or the water are the only candidates and the ramp did not interfere with travel over either medium.)

The court has found only one situation where a submerged area is referenced, and the fact that it specifically is called out in a very limited context implies that the statutory duty of a municipality does not more generally extend to the situation here. General Statutes §13a-99 provides:

> "Towns shall, within their respective limits, build and repair all necessary highways and bridges, and all highways to ferries as far as the low water mark of the waters over which the ferries pass, except when such duty belongs to some particular person. Any town, at its annual meeting, may provide for the repair of its highways for periods not exceeding five years and, if any town fails to so provide at such meeting, the selectmen may provide for such repairs for a period not exceeding one year." (emphasis added)

Section 13a-99 is of particular significance to any discussion of §13a-149 because that is the statute that creates the duty, the breach of which gives rise to a remedy under §13a-149.

Even if §13a-99 created a maintenance obligation with respect to other submerged or partially submerged thoroughfares, plaintiff's involvement with the boat ramp still suffers from additional impediments to applicability of the statute. Generally speaking, a boat ramp does not appear to be intended for use by pedestrians, wheeled vehicles, or in times past, horses or other animals being ridden, but rather is a structure intended for launching and removal of boats (a partial tautology). Still further, even if in some sense, boats were in the realm of

vehicles intended for coverage under the highway defect statute, the events giving rise to this lawsuit did not involve travel by boat but rather efforts to transfer a boat from the water to a trailer, *O'Neil*, supra. The fact that plaintiff had his feet on the ramp and may have been moving his feet – walking – does not alter the fact that he was not in the process of going from one place to another, or doing anything attendant to going from one place to another, *Serrano*, supra, but instead was engaged in a non-travel activity (trying to move a boat onto a trailer). (*Serrano* indicates that in determining whether an area in proximity to a road comes within the scope of the highway defect statute, the actual use of such proximate area is a significant consideration.)

The fact that the area is generally open to the public does not narrow the issue appreciably, for purposes of this analysis.[9] A hallway in a public building is, in a sense, open to the public and used by "pedestrians" for getting from one place (in the building) to another, but would not seem to come close to being deemed a road. The runway of a municipal airport likewise is, in a sense, open to the public and used for transportation, but again, would not seem to come within the scope of a road or highway, for purposes of the statute. In terms of logical analysis, access by the public is a necessary but by no means sufficient condition. Involvement with movement also is a necessary but by no means sufficient condition. A road must be a way intended for use in travel, generally available to the public, and actually in use for travel.

In his reply memorandum, plaintiff relies on *Covello v. Darien*, 2010 Ct. Sup. 20469, 51 CLR 40 (J.D. Stamford, FST CV 08 5008909 S (Oct. 22, 2010) (Tierney, JTR)), and attempts to identify as many analogous facts as possible. A close

[9] In some situations, extensive limitations on use/access potentially could be determinative, as in the town dump/transfer station cases discussed later in this decision.

reading of *Covello*, and in turn its discussion of *Read v. Plymouth,* supra (and especially the discussion of the trial court decisions in *Read*), undermines its value to plaintiff.

Judge Tierney's recitation of the facts in *Covello* demonstrates why *Covello*, itself, is essentially of no value to the analysis here.

> "In this instant Covello case the facts appear uncontradicted. The commercial truck operated by the plaintiff was operated on roads laid out in the Town Dump for vehicle traffic. The plaintiff stopped the truck on the traveled portion of the road. He exited the truck and fell on ice that had accumulated on the road. He did not fall on a sidewalk, a walkway or a dumpster area. He did not fall when he was doing anything other than walking immediately adjacent to his truck."

Other than the plaintiff being outside of his vehicle, virtually nothing in this recitation is truly analogous to plaintiff's situation.

The *Covello* court's discussion of *Read* is also significant to this case. In contrast to *Covello*, in *Read*, the plaintiff was inside the transfer station and there was evidence of limited access to the interior of the transfer station in support of the contention that this was not an area accessible to the public and therefore could not be a public road. Against that background, Judge Tierney's observations seem to be particularly damaging:

> "This court is of the opinion that it was not necessary that the trial judge in *Read* make a determination as to whether the limited access to the dump met the definition of 'road' since the area where Mr. Read fell was neither a highway, where vehicles traveled, nor was it a sidewalk used by the public. Therefore, this court believes that Judge Shapiro properly granted the motion for summary judgment and the Appellate Court properly affirmed that ruling. Neither court had to decide the issue of whether limitation of access to a municipal road in a town dump prevented a defective highway claim. Under this court's view the place where Richard Read fell was not a 'road' or 'highway' or

> even a 'sidewalk.' . . . we must follow the precedent of our Supreme Court along the path which our considered reading of that precedent lays out for us. Judicial holdings must be read with reference to the underlying facts of the case. Indeed, any discussion in a judicial opinion that goes beyond the facts involved in the issues is mere dictum and does not have the force of precedent.
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> "This court believes that this is the very reason the Supreme Court denied certification. The *Read* court did not determine that the mere restriction of access of what otherwise would be the traveled public municipal road used by vehicles would prevent the plaintiff from properly filing a defective highway claim under Gen. Stat. § 13a-149." (citations and internal quotation marks, omitted; emphasis added)

Covello, then, offers no direct support to plaintiff, and the discussion of *Read*[10] is generally consistent with this court's analysis – at some point, the activity is sufficiently remote from the concept of travel, and the locus sufficiently remote from any common-sense meaning of road, that the highway defect statute is (or should be) inapplicable.[11]

Indeed, the analysis in *Covello* started with the presumed (acknowledged) existence of a traveled road, and then proceeded to discuss whether limitations on access took it outside the scope of the highway defect statute.[12] Here, there is no such threshold presumption or acknowledgment – the fact accepted as a premise for the analysis in *Covello* is the issue here.

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[10] Unlike the present situation, the plaintiff in *Read* asserted a claim under the highway defect statute and claims of negligence properly considered under the more general provisions of §52-557n.

[11] See, also, *Grady v. Somers*, 294 Conn. 324 (2009), yet another dump/transfer station case in which the plaintiff asserted only negligence claims and there was no suggestion that pursuant to §52-557n, the claim should have been brought (exclusively) under the provisions of §13a-149.

[12] "The issue before this court is whether a traveled road owned by a municipality which has limited access is a 'highway' under Gen. Stat. §13a-149."

Plaintiff is correct that in many, perhaps most, instances, issues arising under the highway defect statute are factual disputes that properly are to be determined by the jury, e.g. whether a condition constitutes a defect, whether the governmental entity had constructive notice of the condition, existence of sole proximate cause, etc. (notwithstanding defendant city's attempt to argue for summary judgment based on those issues, too.) Some issues, however, can be determined as a matter of law, including whether a particular condition comes within the scope of the highway defect statute (malfunctioning traffic control signal/device – *Sanzone v. Board of Police Commissioners*, 219 Conn. 179, 203 (1991)) or whether the highway defect statute applies to or controls a particular fact pattern (*Ferreira v. Pringle*, supra).

Ultimately, the court believes that this case is the obverse of *Ferreira v. Pringle* – a non-highway situation being brought under the highway defect statute. Notwithstanding the breadth of the term "highway" as envisioned by *Novicki*, the term "highway" cannot be stretched to encompass a submerged boat ramp being used for loading or unloading a boat onto a trailer at a public park – the facts in this case.

Accordingly, defendant's motion for summary judgment is granted.

POVODATOR, J. 10/10/13

Decision entered in accordance with the foregoing. All counsel and pro-se parties of record notified on 10/10/13
Signed Krystal E Salerno TAC