LAVINE, J., dissenting. I disagree with the majority and conclude that the trial court properly dismissed the action filed by the plaintiff, Armand Cuozzo, for want of subject matter jurisdiction. Once subject matter jurisdiction is challenged, the plaintiff carries the burden of proving that it exists. See *Wilcox* v. *Webster Ins., Inc.*, 294 Conn. 206, 213–14, 982 A.2d 1053 (2009) ("[i]t is the burden of the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute" [internal quotation marks omitted]). In this case, sustaining this burden means that the plaintiff must demonstrate that either the municipal highway defect statute, General Statutes § 13a-149, does *not* apply or that the plaintiff has complied with its notice provisions.

On the basis of my review of the complaint, the motion to dismiss, and the accompanying affidavits, I conclude that the plaintiff has failed to demonstrate that the driveway in question is not public and that the highway defect statute does not apply. Pursuant to the plaintiff's own allegations, the driveway where the alleged incident occurred was on property owned, controlled, and maintained by the defendant, the town of Orange. As alleged, the driveway was situated on property that featured a number of retail stores, including a Sam's Club, and connected the property to a public road. The plaintiff also alleged that the "[defendant] allowed and permitted individuals to operate motor vehicles upon said driveway although it knew, or reasonably should have known, of the existence of said defective, dangerous and unsafe condition . . . ." The only suggestion that the driveway is private in nature is the bare legal conclusion averred in the plaintiff's affidavit that "[t]his is the private driveway that exclusively leads to the Wal-Mart Plaza, which includes Sam's Club." This averment is a legal conclusion and cannot be relied upon. See *Ganim* v. *Smith & Wesson Corp.*, 258 Conn. 313, 326, 780 A.2d 98, 108 (2001) ("[I]n ruling upon whether a complaint survives a motion to dismiss, 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. . . . [This] principle does not apply, however, to legal conclusions alleged." [Citation omitted; internal quotation marks omitted.]).

Upon a motion to dismiss, it was incumbent upon the plaintiff to either establish compliance with § 13a-149 or to demonstrate how that statute is inapplicable. The plaintiff has not met this burden. It was reasonable for the trial court to infer that the driveway was open to the public and thereby fell into the ambit of the

highway defect statute. See, e.g., *Mahoney* v. *Lensink*, 213 Conn. 548, 567–68, 569 A.2d 518 (1990) (complaint that does not specifically allege violation of statute nonetheless may contain allegations sufficient to invoke statute). As the plaintiff failed to provide notice to the defendant pursuant to § 13a-149, the trial court properly dismissed the plaintiff's action.