SHORT FORM ORDER

SUPREME COURT-STATE OF NEW YORK

PRESENT:

HON. BRUCE D. ALPERT

Justice
TRIAL/IAS, PART 4

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EDITH BURKE,

                              Plaintiff,

Motion Sequence No. 1

Index No. 2289/03

Motion Date: August 18, 2004

-against-

GRACE EVANGELICAL LUTHERAN
CHURCH, BELLMORE, L. I.,

                              Defendant.

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The following papers read on this application for summary judgment:

Notice of Motion	X
Opposing Papers	X
Reply Papers	X

Upon the foregoing papers it is ordered that the defendant's application

directed toward the summary dismissal of the plaintiff's complaint, pursuant to

CPLR 3212, is determined as hereinafter set forth.

The instant action was initiated to recover damages for personal injuries

claimed to have been sustained by the plaintiff when, it is contended, she was

caused to trip and fall while walking along a concrete walkway in close proximity

to the entrance of the defendant's house of worship. The plaintiff alleges "[t]he tip of [her] shoe got stuck on an uneven part of the sidewalk." (Plaintiff's EBT, p 17)

Counsel for the defendant argues that the action should be dismissed and characterizes the flagstone disparity that is asserted to have precipitated the plaintiff's fall as "trivial".

Notably, the defendant concedes making repairs to the accident situs two to three years *before* the occurrence on which the instant action is premised. Whether the ameliorative efforts represented by the "patching" undertaken by one of the defendant's parishioners exacerbated the pre-existing condition is but one of several glaring issues which the defendant fails to address.

Significantly, neither the grainy photocopies of photographs submitted by the defendant, though withheld until this application from the plaintiff based on a myopic view of the defendant's discovery obligations, nor the color photographs exchanged by the plaintiff identify where along the lengthy defect the plaintiff is alleged to have caught her shoe. (annexed, respectively, as exhibits "F" & "J" to the moving papers)

However, the photographs taken on plaintiff's behalf (annexed as exhibit "F" to the motion papers) indicate that though the disparity between the flagstones which comprise a portion of the defendant's walkway may not have been very

deep, its uneven surface and resulting sharp edge may act as a tripping hazard for those entering the defendant's premises. (see, Nin v Bernard, 257 AD2d 417 [1st Dept.]; cf., Kosarin v W & S Associates, LP, 6 AD3d 503, 504)

Generally, whether a dangerous condition exists on real property so as to impose liability upon its owner or occupier depends on the peculiar facts and circumstances of each case, and presents a question of fact for the jury. (see, Corrado v City of New York, 6 AD3d 380; Tineo v Parkchester South Condominium, 304 AD2d 383 [1st Dept.])

As noted by the Court of Appeals in Trincere v County of Suffolk (90 NY2d 976, 977), "there is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable."

Moving counsel's narrow focus on a measurement taken years after the occurrence is, in this Court's view, too thin a reed upon which to premise the drastic relief herein sought.
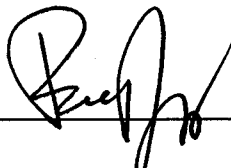
In any event, the "mechanistic disposition of a case based exclusively on the dimension of the sidewalk defect is unacceptable." (Trincere v County of Suffolk, (90 NY2d 976, 977-978)

Viewing the photographs taken on the plaintiff's behalf with the deposition testimony of the parties and affording the plaintiff the benefit of all reasonable

inferences that may be drawn therefrom, the Court is unable to conclude that the

defect is too trivial to be actionable and, therefore, not inherently dangerous as a

matter of law. Unlike the fact pattern in Kosarin v W & S Associates, LP (supra),

the plaintiff's proof suggests that the defective condition had the attributes of a

snare or trap.

Based on the foregoing, the defendant's application is denied.

DATED: November 30, 2004

J.S.C.

ENTERED

DEC 0 3 2004

NASSAU COUNTY
COUNTY CLERK'S OFFICE