STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: AUGUST 10, 2012)

LANA M. GRANDE, AS ADMINISTRATRIX OF THE ESTATE OF DAVID DALLAS	:	
vs.	:	**C.A. NO. KC-2009-0192**
WARWICK CENTRAL BAPTIST CHURCH and JOHN DOE	:	

DECISION

K. RODGERS, J. This premises liability action arises out of a 2007 incident in which David F. Dallas ("Dallas") allegedly tripped on a portion of concrete curb located in the parking lot owned by and serving Defendant Warwick Central Baptist Church (the Church) at 3262 Post Road in Warwick (the Property). Dallas filed suit in 2009, but passed away on June 22, 2011. His wife, Lana M. Grande (Grande), was substituted as Plaintiff in her capacity as administratrix of his estate.

The parties waived in writing the previous demand for a jury trial and agreed that the matter be tried to the Court on stipulated facts, photographs, and portions of Dallas' deposition testimony on July 8, 2010. This Court has jurisdiction pursuant to G.L. 1956 § 8-2-13 and renders its decision in accordance with Rule 52 of the Rhode Island Superior Court Rules of Civil Procedure. For the reasons set forth below, judgment shall enter for Defendant.

I
Facts and Travel

Having reviewed the stipulated facts, photographs, and designated portions of Dallas' deposition testimony, the Court makes the following findings of fact.

On the day in question, Dallas was on the Property to attend a meeting of an Alcoholics Anonymous group, which met in the Church basement. Dallas had been a member of the support group for six years at the time of the incident, and met on almost a weekly basis at the Church during those six years. More than sixty other members regularly attended the support meetings.

For each of the weekly meetings he attended over six years, Dallas parked his car in the Church parking lot in the rear of the Property and entered and exited the Church building using a handicap ramp on the side of the building. At the bottom of the ramp, the corner of the Church building stands to the right from the perspective of a person leaving the building and approaching the parking lot. See Jt. Exs. 3-9. Beyond the corner of the building, a concrete curb extends from the building in the direction of the parking lot. Id. A guardrail runs perpendicular to the concrete curb and parallel to the back wall of the Church. Id. In the space between the guardrail and the building, there is a metal grate that protrudes from the ground. This grate is behind the curb at the bottom of the ramp. Id. The presence of the concrete curb prevents pedestrians from having contact with either the end of the guardrail or the grate. At all material times, Dallas was aware of the existence of the guardrail and the raised metal grate.

On the day in question, between 4:30 pm and 5:00 pm in the mid-autumn afternoon daylight, Dallas left the Church and proceeded down the handicap ramp carrying a small styrofoam cup of coffee in his left hand. As he took a right-hand turn at

the bottom of the ramp, Dallas tripped on a portion of the concrete curb stretching out from the corner of the building. Dallas alleged that his right foot struck the curb when he tried to step over it, causing him to become suspended two to three feet in the air. In an attempt to avoid landing on his left knee, which had been surgically repaired, he turned in the air and landed on the parking lot, striking and allegedly injuring his right knee. At the time of the fall, there were no physical obstacles that prevented Dallas from seeing the ground in front of him, including the curb.

Dallas maintains that in the six years he had been using the parking lot and handicap ramp on an almost weekly basis, he was never aware of the presence of the concrete curb. Rather, the first time he became aware of any feature of the curb was when he tripped on it the day he was injured.

Sometime following the incident, Grande complained to the Church about the location of the curb. Some weeks or a month or more after the incident, the concrete curb was shortened, presumably by the Church. Plaintiff presents no photographs or measurements depicting how the concrete curb looked or how far the curb extended beyond the guardrail at the time of the incident, or the extent to which the concrete curb was shortened. The only photographs in evidence before the Court reflect how the concrete curb looked at the time of Dallas' July 8, 2010 deposition. See Jt. Exs. 3-9. Similarly, there were no witnesses to Dallas' fall, nor any testimony offered to describe the condition of the curb before it was allegedly shortened to its present size.

Following his fall, Dallas elected not to report the cause of his fall to the members of his support group who used the same ramp to enter and exit the Church for the meetings, stating that it "was none of their business." (Jt. Ex. 2, at 29.) He knew of no

other person who ever complained to the Church about the presence of the concrete curb, either before or after his fall.

Dallas was unable to identify with any degree of certainty the date on which he fell. His initial assertion that, "I know it happened on a Wednesday", is contradicted by later testimony and evidence presented to him at his deposition. The inquiry proceeded as follows:

> "Q. The calendar reflects that in October 2007, Wednesday, the last Wednesday was October 31st; does that purport [sic] with your recollection?
> A. I don't recollect it.
> Q. But you know it was a Wednesday?
> A. Yes.
> Q. It was the last week in October?
> A. I believe so.
> Q. If it was a Wednesday, if it were a Wednesday, then your accident happened on Halloween, October 31st 2007; correct?
> A. It sounds correct, yes." (Tr. at 31, 32.)

Later, when confronted with a report by his treating physician indicating that his injury occurred on November 1, 2007, Dallas testified:

> "Q. Now, this is a two-page report of Dr. Kornwitz, and he is the physician who did your left knee replaconcrete, that he had discussed with you in June of 2007 of having a total knee replaconcrete of your right knee, and you saw him on November 2nd; is that correct?
> A. Yes.
> Q. The second sentence of that report says, "Apparently he tripped over a piece of concrete in the church parking lot yesterday landing on his knee," yesterday would make the accident November 1st, is that correct, or he is inaccurate?
> A. I believe it was the 31st.
> Q. So this statement of his, that the accident occurred essentially on November 1st is inaccurate?
> A. No, because I saw him a couple of days afterward that I did that [sic].
> Q. It says, the report and date of your examination is November 2nd, and when he says, you tripped yesterday,

he would be referring to November 1st, which would not be correct?
A. Yes." (Tr. at 54-55.)

However, when confronted with a lost wages report from his employer, which indicated that the date of his accident was October 30, 2007, Dallas offered the following:

"Q. [W]hat is the reason for the absence that Home Depot states, could your read that to us, please?
A. All I have is the date, 10/30/07.
Q. Is that correct?
A. I believe so.
Q. I thought you told me that your accident happened on October 31st?
A. Well, I didn't—as far as I know, I thought I was right, but I could have been wrong with the date.
Q. Did you tell Home Depot it occurred on October 30th?
A. Yes.
Q. October 30th was a Tuesday?
A. Yes.
Q. Is that the date the accident happened?
A. I am not sure, sir." (Tr. at 83-84.)

Dallas filed the Complaint on February 11, 2009, alleging that the concrete curb was a dangerous and defective condition on the Church's Property and that the Church negligently failed to fulfill its duty to keep and maintain the premises in a reasonably safe condition, causing Dallas' injury.[1] (Compl. ¶¶4-9.)

[1] Dallas included a similar count against Defendant John Doe. (Compl. ¶¶10-17.). Plaintiff has failed to identify and substitute this John Doe defendant. While G.L. 1956 § 9-5-20 permits a plaintiff to toll an applicable statute of limitations against a known but then unidentifiable defendant at the time of the filing of a civil action by designating that unidentified defendant by means of a fictitious name, § 9-5-20 does not permit a plaintiff to abandon the search for the identity of the real defendant. Plaintiff must exercise due diligence to bring the real defendant into the litigation. Grossi v. Miriam Hospital, 689 A.2d 403, 404 (R.I. 1997). Having been presented to this Court for trial on a record to which the parties stipulated, it is evident that Plaintiff has failed to exercise due diligence and has not proceeded on Count II at the time of trial. Accordingly, Count II is dismissed by this Court pursuant to Super. R. Civ. P. 41(b)(1).

II
Standard of Review

Rule 52(a) of the Superior Court Rules of Civil Procedure provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon." Super. R. Civ. P. 52(a). In a non-jury trial, the trial justice sits as the trier of fact as well as of law. Hood v. Hawkins, 478 A.2d 181, 184 (R.I. 1984). "Consequently, he [or she] weighs and considers the evidence, passes upon the credibility of the witnesses, and draws proper inferences." Id. A trial justice's findings of fact will not be disturbed unless such findings are clearly erroneous, the trial justice misconceived or overlooked material evidence, or unless the decision fails to do substantial justice between the parties. Opella v. Opella, 896 A.2d 714, 718 (R.I. 2006) (quoting Bogosian v. Bederman, 823 A.2d 1117, 1120 (R.I. 2003)). While the trial justice's analysis of the evidence and findings need not be exhaustive or "categorically accept or reject each piece of evidence," the trial justice's decision must "reasonably indicate[] that [she] exercised [her] independent judgment in passing on the weight of the testimony and credibility of the witnesses." Notarantonio v. Notarantonio, 941 A.2d 138, 144 (R.I. 2008) (quoting McBurney v. Roszknowski, 875 A.2d 428, 436 (R.I. 2005)). Further, although the trial justice is required to make specific findings of fact, "[e]ven brief findings and conclusions are sufficient if they address and resolve the controlling and essential factual issues in the case." Hilley v. Lawrence, 972 A.2d 643, 651 (R.I. 2009) (quoting Donnelly v. Cowsill, 716 A.2d 742, 747 (R.I. 1998)).

III
Analysis

To properly set forth "a claim for negligence, 'a plaintiff must establish a legally cognizable duty owed by a defendant to a plaintiff, a breach of that duty, proximate causation between the conduct and the resulting injury, and the actual loss or damage.'" Willis v. Omar, 954 A.2d 126, 129 (R.I. 2008) (quoting Mills v. State Sales, Inc., 824 A.2d 461, 467 (R.I. 2003)). Whether a defendant is under a legal duty in a given case is a question of law. Martin v. Marciano, 871 A.2d 911, 915 (R.I. 2005) (citing Volpe v. Gallagher, 821 A.2d 699, 705 (R.I. 2003)).

Premises-liability law in Rhode Island imposes an affirmative duty upon owners and possessors of property "to exercise reasonable care for the safety of persons reasonably expected to be on the premises." Kurczy v. St. Joseph Veterans Ass'n, Inc., 820 A.2d 929, 935 (R.I. 2003) (citing Tancrelle v. Friendly Ice Cream Corp., 756 A.2d 744, 752 (R.I. 2000)). This "duty includes an obligation to protect against the risks of a dangerous condition existing on the premises, provided the landowner knows of, or by the exercise of reasonable care would have discovered, the dangerous condition." Id. In upholding jury instructions delivered by the trial judge, the Rhode Island Supreme Court has confirmed that:

> "A landowner is under no duty to a person reasonably expected to be on the premises, to warn against an open and obvious condition on the premises. The duty imposed upon . . . . the plaintiff [is to] act as a reasonable, and prudent person under the circumstances. And this duty includes the obligation and responsibility to look and take into consideration the conditions and circumstances [that] would be obvious to a reasonable [and prudent] person in the same or similar circumstances." Tancrelle, 756 A.2d at 752 (alterations in original).

Plaintiff has the burden of proving that "sufficient evidence existed to show that the defendants knew or should have known of an unsafe condition on their premises." Bromaghim v. Furney, 808 A.2d 615, 617 (R.I.2002) (quoting Massart v. Toys R Us, Inc., 708 A.2d 187, 189 (R.I. 1998)). While the Church owed Dallas the duty to protect him against the risks of a dangerous condition on its premises, it was not "'required to anticipate and protect him against the unlikely or the improbable."' Jasionowski v. Burrillville Racing Association, 116 R.I. 173, 180, 353 A.2d 617, 620-21 (1976) (quoting Cofone v. Narragansett Racing Ass'n., 103 R.I. 345, 350-51, 237 A.2d 717, 720-21 (1968)). Neither was the Church required "to safeguard [Dallas] against the obvious danger or one that was a matter of common knowledge, as to both of which [Dallas] would ordinarily have assumed the risk." Id.

Facts similar to the case at bar were considered by the Rhode Island Supreme Court in Glennon v. The Great Atlantic & Pacific Tea Co., 90 R.I. 113, 155 A.2d 330 (1959). In Glennon, the plaintiff tripped and fell over a low concrete wall outside the defendant supermarket's premises as he was leaving and walking towards his car in the parking lot. Id. at 114, 155 A.2d at 330. The plaintiff and his wife had walked around the wall when entering the supermarket, and his wife was able to avoid the wall when the couple later exited. Id. at 115, 155 A.2d. at 331. Although he had been to the store on only one prior occasion, it was not dark outside at the time so as to obstruct the wall's visibility. Id. at 117, 155 A.2d at 331. The plaintiff fell and filed a civil action for damages based upon the supermarket's alleged negligence in maintaining the existence of a dangerous condition in front of the supermarket. In concluding that the trial justice should have directed a verdict in favor of the supermarket, the Court explained that:

> "there is no evidence in the record before us from which the jury could find any act of negligence on the part of defendant. The first count alleges in substance that the wall in question was dangerous. But there is a complete failure of evidence to support such allegation. The testimony describing the location and construction of the wall discloses nothing unusual. The same can be said of the photographs which are in evidence. There is no evidence that the wall was not in good repair or that it was concealed and not visible to customers. In fact plaintiff admitted in cross-examination that the low wall was perfectly visible.
>
> "On the basis of the record before us we are compelled to conclude as a matter of law that there is no evidence to support a finding that the wall was dangerous or that it was negligently constructed or maintained." Id. at 117, 155 A.2d. at 331-332.

Here, Plaintiff has failed to sustain her burden. Like Glennon, there are no facts before this Court which demonstrate that the concrete curb was anything but open and obvious, or that the presence and location of the concrete curb constituted a dangerous condition. Dallas had walked past the concrete curb almost weekly in the six years prior to the incident, and was aware of the guardrail and the metal grate situated behind the concrete curb. See Routhier v. Gaudet, 689 A.2d 407, 408-09 (R.I. 1997) (affirming summary judgment for defendant where evidence did not support conclusion of a dangerous condition when plaintiff had been to defendant's office many times previously and encountered no prior difficulty with bookcase on which she tripped); Glennon, 90 R.I. at 115, 155 A.2d. at 331 (plaintiff and wife successfully circumvented the wall on way into supermarket). Quite incredibly, he maintains that he was unaware of the presence of the concrete curb until he tripped over it. The photographs introduced as evidence by agreement of the parties clearly depict the location and construction of the concrete curb that was shortened by an unknown extent subsequent to the incident. It is

inconceivable that a longer concrete curb was less noticeable than the concrete curb in its present state. In the absence of any photographs, measurements or testimony attesting to the size and condition of the concrete curb at the time of the incident, there is no evidence that the curb was not in good repair, was concealed, was not clearly visible to pedestrians, or was in any way unusual. See Glennon, 90 R.I. at 117, 155 A.2d at 331-32. Moreover, like the plaintiff in Glennon, Dallas's view was not impeded in any way, by obstacles, darkness or otherwise, and nothing prevented him from seeing the concrete curb on his way down the ramp. Thus, the presence of the concrete curb on the day in question was open and obvious and the Church had no duty to warn Dallas of its presence.

The only evidence Grande submits in support of her contention that the concrete curb presented a dangerous condition are photographs taken after it had been modified. Though evidence of such subsequent remedial action is generally admissible under Rhode Island law, see R.I. R. Evid. 407, it is far from sufficient to establish that the curb was in a dangerous condition at the time of the accident. Coupled with Dallas' uncertainty as to the date of the incident, his failure to warn anyone within his support of the allegedly dangerous condition, the lack of eyewitnesses to the event or to the condition of the concrete curb on the day of the incident, this Court concludes that Plaintiff has failed to establish by a preponderance of the evidence that a dangerous condition existed on the Property at the time of Dallas' fall.

Notably, what the evidence does show is that the concrete curb served to protect invitees to the Property from having contact with the end of the guardrail or the raised metal grate, which contact could have resulted in serious injury. In using reasonable care to protect against risks of a dangerous condition on the Property, to wit, the guardrail and

the raised metal grate, the Church did not create another dangerous condition by placing the concrete curb on the lot.

IV
Conclusion

Based on the foregoing, the Court finds that Plaintiff has failed to prove by a preponderance of the evidence that the concrete curb constituted a dangerous condition on the Property. The concrete curb was open and obvious, and the Church was under no duty to warn of such a condition. Accordingly, the Church was not negligent and is entitled to judgment. Counsel for Defendant shall submit an Order dismissing Count II and a Judgment on Count I consistent with this Decision.