2013 IL App (4th) 130110-U

NO. 4-13-0110

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 18, 2013
Carla Bender
4th District Appellate
Court, IL

EDWARD "BEN" HENDERSON,	)	Appeal from
Plaintiff-Appellant,	)	Circuit Court of
v.	)	Macon County
JEFFREY BYRKIT and GRETCHEN BYRKIT,	)	No. 10L135
Defendants-Appellees,	)	
and	)	
CASE McGEE, NATALIE McGEE, JAMES R.	)	Honorable
WILLIAMS, and PAMELA S. WILLIAMS,	)	Thomas E. Little,
Defendants.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Appleton and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court committed no error in granting defendants' motion for summary judgment where the record failed to show they had either actual or constructive knowledge that a condition on their property posed an unreasonable risk of harm to plaintiff.

¶ 2 Plaintiff, Edward "Ben" Henderson, filed a negligence action against defendants, Jeffrey and Gretchen Byrkit, Case and Natalie McGee, and James R. and Pamela S. Williams, for injuries he sustained as the result of two separate accidents on properties either leased or owned by defendants. Only plaintiff's claim against the Byrkits is at issue on appeal. The trial court granted summary judgment in favor of the Byrkits on that claim, and plaintiff appeals. On appeal, he argues the court erred (1) in finding there was no genuine issue of material fact with respect to his negligence claim and (2) by finding his deposition testimony contained judicial

admissions. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The record reflects plaintiff was an electrician and, on April 7, 2010, was assigned by his employer to perform electrical work at the Byrkits' residence, located at 1505 West Macon Street, Decatur, Illinois (the Macon Street property). The Byrkits began living at that location in 2000, but on March 16, 2010, sold the Macon Street property to the McGees. They continued to live on the property until June 2010, leasing it from the McGees. The record contains the McGees' and Byrkits' lease agreement, which required the Byrkits to keep and maintain the property in good repair and held them responsible for regular, necessary, and ordinary repairs.

¶ 5 On March 4, 2011, plaintiff filed a second amended complaint, alleging three counts of negligence against defendants. Count I of the complaint raised a claim against the Williamses for injuries plaintiff allegedly sustained on their property, on March 4, 2009, in Piatt County, Illinois. Count I is not at issue on appeal. Counts II and III of the complaint, against the McGees and Byrkits, respectively, concerned injuries plaintiff sustained on April 7, 2010, on the Macon Street property. Plaintiff's claim against the McGees has been settled and only his claim against the Byrkits is at issue on appeal.

¶ 6 In count III of his complaint, plaintiff alleged the following: (1) on April 7, 2010, he was a lawful business invitee on the Macon Street property, property possessed, owned, and/or leased by the Byrkits; (2) the Byrkits caused and permitted a brick walkway on the property to become and remain a dangerous condition; (3) the Byrkits knew or, through the exercise of ordinary care, should have known about the dangerous condition on the property; (4) the Byrkits had a duty to provide plaintiff and other invitees with a safe means of entering and

exiting the property and to own, operate, manage, maintain, and control the property so as not to cause plaintiff injury; (5) the Byrkits breached their duty of care by failing to (a) maintain the sidewalk so that bricks became loose, (b) provide a safe entrance to the property, and (c) warn plaintiff about the dangerous loose brick sidewalk; (6) on April 7, 2010, plaintiff sustained injuries while on the property; and (7) plaintiff's injuries and resulting medical care were the direct and proximate result of the Byrkits' negligent acts or omissions.

¶ 7 The record shows a brick sidewalk was located on the Macon Street property. The brick sidewalk began at the city sidewalk and had a row of bricks that were turned on their side and formed a step. The narrower side of the row of bricks faced upward and are known as a "rowlock course" (the parties also refer to that row of bricks as a "soldiers course"). Plaintiff alleged that, while working on the property on April 7, 2010, he fell and sustained injuries, including injury to his left hip, after stepping up from the city sidewalk onto the brick sidewalk. During his deposition, plaintiff asserted, as he stepped up onto the brick sidewalk, the rowlock course, which formed the step, "rolled up" and caused him to fall. According to plaintiff, that row of bricks had become unattached from the adjacent course of bricks that formed the main walkway surface.

¶ 8 Plaintiff testified he fell the first time he attempted to use the brick sidewalk. He was accompanied by his coworker, Scott Carter, who had been walking ahead of plaintiff but, according to plaintiff, did not encounter the rowlock course as Carter "stepped further up on the step than [plaintiff] did." At the time of his fall, plaintiff weighed approximately 235 to 240 pounds and was carrying equipment, which he described as "relatively" heavy but not 20 pounds or more. Although it was raining on the day of his accident and the walkway surfaces were wet,

he did not believe that they were slick.

¶ 9 During plaintiff's deposition, the following colloquy occurred between plaintiff and the Byrkits' attorney:

"Q. Did you notice anything about that course of brick that you ultimately tripped on before you fell?

A. No, sir.

Q. If one were to look at that course of brick before your fall, was there anything about it that indicated it was unattached from the surrounding mortar?

A. Nothing whatsoever.

Q. So you were surprised or first alerted, at least, to this situation when you fell on it, or stepped on it?

A. Yes, sir.

Q. Before that, had you looked at it, you wouldn't have noticed anything that would have caught your eye as to a potential hazard; is that a correct statement?

A. That is correct.

Q. Could you see a gap in the mortar as you reflect now on what you had seen?

A. No, sir.

* * *

Q. So there had to be a crack, albeit perhaps a hairline

crack, that separated the mortar from that course of brick; would that be a correct statement?

A. I believe so.

Q. And I'm not speculating. I'm asking you based on your observations.

A. After the fall, yes. I put my foot on it to see what happened 'cuz I---I didn't know what happened 'cuz it fell back into place. Didn't look like anything happened. I put my foot on it, and when I put my foot on it, it raised up. The mortar at the end of the brick was still on the---on this course, but was not on the following course."

Plaintiff stated he described his fall to Carter, who did not believe that the bricks had moved. Plaintiff then demonstrated to Carter how the bricks moved by putting his foot on the bricks so that they "rolled up."

¶ 10 The record contains a statement signed by Carter, asserting he observed the bricks after plaintiff's fall. Carter noted "the bricks did not have adequate mortar and some bricks rolled back." He stated he observed ants underneath the bricks that came loose. Carter did not observe any bricks out of place prior to plaintiff's fall.

¶ 11 Jeffrey Byrkit testified he was a licensed architect but designed buildings rather than walkways. He was familiar with the term mortar but had never done any cement work in his life. Jeffrey agreed that normal weather conditions would "most probably" cause mortar to degrade gradually.

¶ 12 Jeffrey denied ever having performed any work on the rowlock course or the beginning of the brick walkway while he lived on the Macon Street property but was aware that the McGees had the sidewalk repaired sometime after plaintiff's accident. He estimated that, prior to April 7, 2010, he went in the area of the rowlock course a couple of times a month but was unsure whether he stepped on the rowlock course at any given time. He did not know whether the rowlock course was loose prior to April 7, 2010. However, before plaintiff's accident, Jeffrey did not recall having observed the rowlock course to be in a condition where the mortar had fallen through or withered away and never saw anything that would have alerted him that there was no mortar holding the rowlock course in place. Following plaintiff's accident, Jeffrey looked at the rowlock course and noticed a crack on the left side and along the top of the bricks and observed that the course of bricks moved when stepped on.

¶ 13 Gretchen Byrkit testified she walked from the city sidewalk to the brick sidewalk on the Macon Street property many times while living on the property. She denied that the rowlock course ever moved when she placed her foot on the bricks and was unaware of any problem with the step that constituted the rowlock course at any time on or before the date of plaintiff's accident. Gretchen estimated she sat on the step "an average of once a week," except for the very snowy months of the year, to watch her children playing. She did not specifically recall sitting on the step in April 2010, but stated it would have been her custom and practice to do so. She also probably sat on the step in March 2010. She never noticed a problem with the bricks when sitting on the step.

¶ 14 Following plaintiff's accident, Gretchen observed the portion of the brick sidewalk at issue and noticed "what appeared to be a crack in between the vertically lined bricks and

horizontally lined bricks" that did not go all the way across the sidewalk. At that time, the row of bricks could be moved away from the other bricks. Gretchen asserted that the condition of the bricks she observed after plaintiff's accident did not exist before the accident.

¶ 15 The record contains a home inspection report provided for Natalie McGee and dated February 23, 2010. Regarding the exterior of the home, the report has a "minor points" section. Number six of that section states as follows:

> "Driveway/Walkways/Patio: settled deteriorated trip hazard
>
> Raise/repair to level/drain Backfill settlement voids likely."

The words "Walkways/Patio" and "trip hazard" were underlined and accompanied by a notation that stated "flat brick work prone to deterioration (RM) – maint mortar – sealant."

¶ 16 Natalie McGee testified, between February 2010 and the date of plaintiff's accident, she visited the Macon Street property and went in the area of the rowlock course 10 to 20 times. She stated she stepped directly on the bricks that formed the rowlock course and denied that any of the bricks ever moved when she walked in the area. Following plaintiff's accident, Natalie took photographs and a video of the area where plaintiff fell, which she identified during her deposition. She stated the rowlock course of bricks moved when she stepped onto it and put "all of [her] weight into it." She estimated her weight to be approximately 115 pounds. Natalie was also present during the February 2010 home inspection. She did not recall the home inspector doing anything to the brick sidewalk other than stepping on it and observing it.

¶ 17 During his deposition, Case McGee testified he had been to the Macon Street property prior to purchasing it in March 2010. He did not specifically recall stepping on the

rowlock course but was confident that he would have when entering and exiting the property. Case stated the rowlock course did not move at any time that he was at the property. After plaintiff's fall, Case observed the rowlock course to be loose and stated, when weight was applied, it could be separated from the rest of the sidewalk.

¶ 18 The record further contains the affidavit of John Van Ostrand, a licensed architect retained by plaintiff to investigate and review plaintiff's April 2010 accident. Van Ostrand stated he reviewed photographs and video clips taken by Natalie McGee after the accident, as well as photographs attached to Gretchen Byrkit's deposition. He opined "the masonry walkway posed an unreasonable safety hazard to persons who would use the walkway because of its deteriorated and unstable condition for a substantial time prior to the time of the incident."

¶ 19 Van Ostrand noted "mortar brick walkways are highly prone to serious deterioration from moisture intrusion and the freeze/thaw cycles that are known to exist in Decatur, Illinois." He found "the issue of deterioration of the brick walkway was noted in the February 2010 property inspection report" and that report constituted "a warning of the potentially hazardous condition to those who had access to th[e] report." Additionally, Van Ostrand determined the photographs and videos he reviewed showed the mortar near the end of the walkway "to be generally broke with missing parts" and "weeds growing out of the mortar joints." He opined such conditions were confirmation "that the mortar and brickwork was substantially deteriorated for an extended period of time prior to [plaintiff's accident]."

¶ 20 Van Ostrand also opined the walkway was not maintained in compliance with the Decatur Building Code, which required property owners to keep all sidewalks and walkways in a proper state of repair and maintained free from hazardous conditions. He determined the damage

to the brick walkway developed over time and "posed a safety hazard likely to result in someone falling as a result [of] the unsound nature of the walkway."

¶ 21 On November 29, 2012, the trial court granted summary judgment in favor of the McGees and Byrkits. It first found no evidence that a dangerous condition existed prior to plaintiff's April 7, 2010, fall and specifically found "no evidence that the bricks in the area of the step were loose prior to the plaintiff's fall." The court also found neither the McGees nor the Byrkits had actual or constructive knowledge of a dangerous condition or unreasonable risk of harm to plaintiff. It pointed out that the Byrkits used the walkway often without ever encountering problems with the brick step. The court additionally found that neither the home inspection report nor Van Ostrand's affidavit created a genuine issue of material fact. Finally, it concluded plaintiff's testimony "demonstrated that the mortar was intact at the time of the occurrence" and stated as follows:

> "Moreover, Plaintiff's statements show in clear terms that prior to stepping on the bricks, there was no apparent defect and even after the fall, the plaintiff could not tell what happened. He stated that the mortar was intact and attached to the soldier's course of bricks. Under these circumstances and based on this evidence, the court finds that the Plaintiff's statements constitute judicial admissions in that they are deliberate, clear, unequivocal statements about a concrete fact within the Plaintiff's knowledge."

On January 8, 2013, the court entered an order pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), finding no just reason for delaying either enforcement or appeal of its order

granting the McGees' and Byrkits' motions for summary judgment.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 Plaintiff argues the trial court erred in granting the Byrkits' motion for summary judgment. He contends the Byrkits, as land possessors, had actual and constructive notice that the brick sidewalk was unreasonably unsafe and posed a risk of harm to plaintiff, should have expected that plaintiff would not discover or realize the unsafe condition of the sidewalk, and failed to exercise reasonable care to protect plaintiff from the unsafe condition. Plaintiff further maintains that, in reaching its decision, the court misstated testimony, ignored evidence, improperly passed on the credibility of witnesses, and erroneously determined plaintiff made certain judicial admissions.

¶ 25 Summary judgment is appropriate where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2010). The record must be construed strictly against the party moving for summary judgment and liberally in favor of the motion's opponent. *Adames v. Sheahan*, 233 Ill. 2d 276, 295-96, 909 N.E.2d 742, 753 (2009). "A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts." *Adames*, 233 Ill. 2d at 296, 909 N.E.2d at 753.

¶ 26 "Summary judgment is a drastic means of disposing of litigation and, therefore, should be granted only when the right of the moving party is clear and free from doubt."

Adames, 233 Ill. 2d at 296, 909 N.E.2d at 753. The trial court's ruling on a motion for summary judgment is subject to *de novo* review. *Howle v. Aqua Illinois*, *Inc.*, 2012 IL App (4th) 120207, ¶ 41, 978 N.E.2d 1132.

¶ 27 "To succeed in an action for negligence, the plaintiff must establish that the defendant owed a duty to the plaintiff, that defendant breached that duty, and that the breach proximately caused injury to the plaintiff." *Choate v. Indiana Harbor Belt Railroad Co.*, 2012 IL 112948, ¶ 22, 980 N.E.2d 58. "Unless the plaintiff can demonstrate the existence of a duty on the defendant's part, no recovery by the plaintiff is possible as a matter of law and summary judgment in favor of the defendant is proper." *Lake v. Related Management Co., L.P.*, 403 Ill. App. 3d 409, 412, 936 N.E.2d 704, 706 (2010). "One factor to be considered in determining whether a duty exists is the reasonable foreseeability of injury." *Lake*, 403 Ill. App. 3d at 412, 936 N.E.2d at 706.

¶ 28 "When a plaintiff alleges an injury caused by a condition on a defendant's property while on the property as an invitee, this court analyzes the foreseeability factor under section 343 of the Restatement (Second) of Torts." *Ford v. Round Barn True Value, Inc.*, 377 Ill. App. 3d 1109, 1116, 883 N.E.2d 20, 26 (2007); see also *LaFever v. Kemlite Co., a Division of Dyrotech Industries, Inc.*, 185 Ill. 2d 380, 389, 706 N.E.2d 441, 447 (1998). That section provides as follows:

> "A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it

involves an unreasonable risk of harm to such invitees, and

(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and

(c) fails to exercise reasonable care to protect them against the danger." Restatement (Second) of Torts § 343, at 215-16 (1965).

"An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein." Restatement (Second) of Torts § 343, Comment *d*, 215-216 (1965)

¶ 29 Thus, to establish liability based on a premises liability claim, the plaintiff must show the defendant had either actual or constructive knowledge of a dangerous or defective condition on the property. *Tomczak v. Planetsphere, Inc.*, 315 Ill. App. 3d 1033, 1038, 735 N.E.2d 662, 666 (2000). Generally, to prove constructive notice, a plaintiff "must establish that the dangerous condition existed for a sufficient time or was so conspicuous that the defendant should have discovered the condition through the exercise of reasonable care." *Smolek v. K.W. Landscaping*, 266 Ill. App. 3d 226, 228-29, 639 N.E.2d 974, 977 (1994). "One will be considered to have constructive knowledge if he receives facts that would make the dangerous condition known to any ordinary prudent person." *Stackhouse v. Royce Realty & Management Corp.*, 2012 IL App (2d) 110602, ¶ 30, 970 N.E.2d 1224.

¶ 30 In his complaint, plaintiff describes the defective or dangerous condition of the

sidewalk on the Macon Street property as "loose bricks." On appeal, plaintiff elaborates and suggests the rowlock course of bricks might already have been loose at the time of his fall, or they might suddenly have become loose due to deteriorated or missing mortar or inadequate support. He contends the Byrkits had actual and constructive notice that one of these conditions of the brick sidewalk existed and involved an unreasonable risk of harm to plaintiff. We disagree and find the trial court properly determined the Byrkits had neither actual nor constructive knowledge that a condition on the Macon Street property posed an unreasonable risk of harm to plaintiff.

¶ 31 Here, the record shows the Byrkits routinely used the brick sidewalk and the area of the rowlock course while residing on the Macon Street property. Prior to plaintiff's April 2010 accident, they never observed or experienced any problems with the sidewalk. Gretchen testified she typically sat on the step that formed the rowlock course once a week while watching her children play and never observed or noticed any movement of the bricks. The McGees also visited the property and traversed the brick sidewalk, including the area of the rowlock course and experienced no movement of the bricks or other issue. Plaintiff contends a jury would not have to accept the Byrkits' and McGees' testimony as true on this issue; however, the record contains no evidence to contradict their testimony and fails to show the existence of loose bricks in the sidewalk at any point prior to plaintiff's accident. Thus, the record does not reflect the Byrkits had actual or constructive knowledge of the existence of loose bricks.

¶ 32 The record also fails to reflect the Byrkits had actual or constructive knowledge of an unreasonable risk of harm based upon the deterioration of the mortar in the sidewalk. Plaintiff argues "constructive notice is established by the inspection report and the condition of the

sidewalk, finding a hazard to the flat brick walkway." He compares the facts of this case to those presented in *Lombardo v. Reliance Elevator Co.*, 315 Ill. App. 3d 111, 113, 733 N.E.2d 874, 877 (2000), where the plaintiff was injured after a lift he was riding suddenly fell. In that case, an inspection report from the year prior to the plaintiff's accident found the lift's hoist cable was very rusty and dry, and in need of replacement; however, the cable was never replaced. *Lombardo*, 315 Ill. App. 3d at 120, 733 N.E.2d at 882. The First District determined constructive notice could be found because the plaintiff showed that a reasonable inspection revealed the dangerous condition and the condition remained uncorrected for more than a year prior to the accident. *Lombardo*, 315 Ill. App. 3d at 120, 733 N.E.2d at 882.

¶ 33 We find the present case factually distinguishable from *Lombardo*. Here, the home inspection report did not provide notice that the sidewalk had deteriorated to an unreasonably unsafe condition. In fact, the report stated only that "flat brick work [was] prone to deterioration" not that the brick sidewalk on the Macon Street property was deteriorated. Notably, the inspection report listed "deteriorated" as an option for describing the condition of the walkway but that word was not underlined or otherwise singled out on the form.

¶ 34 Further, neither the inspection report's statement that the brick sidewalk was prone to deterioration nor Jeffrey Byrkit's testimony that mortar "most probably" deteriorated gradually supports a finding that the Byrkits had notice that the brick sidewalk posed an unreasonable risk of harm to plaintiff. "The imposition of a legal duty requires more than a mere possibility of occurrence" and "[i]n determining whether a legal duty exists, the occurrence involved must not have been simply foreseeable; it must have been *reasonably* foreseeable." (Emphasis in original.) *Hartung v. Maple Investment & Development Corp.*, 243 Ill. App. 3d 811, 814, 612

N.E.2d 885, 887 (1993). As stated, the record shows the Byrkits and McGees traversed the brick sidewalk and the area of the rowlock course on multiple occasions prior to plaintiff's accident and the record contains no evidence of any loose brickwork or other issue. Knowledge that mortar deteriorates over time, by itself and without more, fails to translate into knowledge that the condition of the brick sidewalk, and the area of the rowlock course in particular, posed an unreasonable risk of harm to plaintiff.

¶ 35 Plaintiff argues Van Ostrand's affidavit shows the brick sidewalk had been in a deteriorated condition for a substantial period of time and, as a result, supports a finding of constructive knowledge of a dangerous defect by the Byrkits who lived on the property for 10 years. However, Van Ostrand's opinion was based, in part, on the February 2010 inspection report, which he found noted the issue of deterioration of the brick walkway and constituted a warning of the potentially hazardous condition. As discussed, that inspection report indicated only that flat brickwork was "prone" to deterioration and not that the brick sidewalk on the Macon Street property was actually deteriorated. To the extent Van Ostrand's opinions are based upon his interpretation of the inspection report, they are not supported by the record.

¶ 36 Van Ostrand's opinion that the brick sidewalk was "substantially deteriorated for an extended period of time" was also based on photographs and video depicting "the mortar near the end of the brick walkway to be generally broken with missing parts" and "weeds growing out of the mortar joints." We find his affidavit failed to set forth facts which would have put the Byrkits on notice that the deterioration of the brick sidewalk had reached an unsafe or dangerous level. Where a sidewalk or walkway is exposed to the elements it cannot be maintained in perfect condition. See *Hartung*, 243 Ill. App. 3d at 816, 612 N.E.2d at 889. In his affidavit, Van

Ostrand found the brick sidewalk was visibly deteriorated but he failed to identify how this resulted in an unsafe condition. Nowhere in his affidavit or report does Van Ostrand indicate defendants should have been suspicious of the stability or integrity of the rowlock course of bricks based on what was visible to the naked eye. Notably, he referenced "the walk in the area of concern" but made no specific reference to insufficient mortar attaching the rowlock course. Van Ostrand also failed to identify what the Byrkits should have done to keep the sidewalk, and the rowlock course in particular, "maintained" in a safe condition.

¶ 37 As discussed, the record clearly shows the brick sidewalk and the area of the rowlock course was routinely used without incident until plaintiff's April 7, 2010, accident. The record fails to reflect the occurrence of any other accident caused by a condition of the sidewalk prior to plaintiff's fall. Van Ostrand's opinions were based on photographs and video taken two days after plaintiff's accident. However, plaintiff's own testimony shows that, prior to his fall, he observed "nothing whatsoever" about the rowlock course that indicated it was unattached from the surrounding mortar, observed no gap in the mortar, and noticed nothing that he would have identified as a potential hazard. In other words, plaintiff's testimony supports a conclusion that nothing about the appearance of the sidewalk would have put an individual on notice of a dangerous or defective condition.

¶ 38 Although not necessary to our decision, we address plaintiff's argument that the trial court erred in finding he made judicial admissions regarding the condition of the brick sidewalk prior to his fall. "Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge." *In re Estate of Rennick*, 181 Ill. 2d 395, 406, 692 N.E.2d 1150, 1156 (1998). "A judicial admission binds the

party who made the admission." *Herman v. Power Maint. & Constructors, LLC*, 388 Ill. App. 3d 352, 360, 903 N.E.2d 852, 859 (2009).

¶ 39 Here, the trial court determined plaintiff made judicial admissions "that the mortar was intact at the time of the occurrence" and "that the mortar was intact and attached to the [rowlock course] of bricks." We note that, while plaintiff's testimony establishes there was mortar attached to the rowlock course of bricks, it does not establish the mortar was also attached to the bricks adjacent to the rowlock course. For the rowlock course to be secure, the mortar would have to have been attached to both the rowlock course bricks as well as the adjacent bricks. Therefore, plaintiff's testimony does not establish that the rowlock course of bricks was adherent to the adjacent course of bricks at the time of his fall and the trial court's conclusion that it did was unsupported by the "judicial admissions." Thus, plaintiff was free to argue that the rowlock course of bricks was, in fact, loose prior to his fall.

¶ 40 In conclusion, we find the record fails to show the Byrkits had knowledge, actual or constructive, that a condition on the Macon Street property posed an unreasonable risk of harm to plaintiff. As a result, plaintiff's injury was not reasonably foreseeable and the Byrkits owed him no duty. The trial court committed no error in granting the Byrkits' motion for summary judgment.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we affirm the trial court's judgment.

¶ 43 Affirmed.