

2019 IL App (1st) 180447-U  
No. 1-18-0447  
Order filed September 26, 2019

Fourth Division

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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LAWRENCE BURNS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No.16 L 0670
	)	
COMPASS MINERALS AMERICA, INC., f/k/a North	)	Honorable
American Salt Company, and f/k/a IMC Salt Inc.,	)	Marcia Maras,
	)	Judge, presiding.
Defendant-Appellee.	)	

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JUSTICE LAMPKIN delivered the judgment of the court.  
Justices Reyes and Burke concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Where the plaintiff truck driver alleged that he was injured when he tried to unload the excess salt that the defendant salt vendor had negligently loaded onto plaintiff's truck, the trial court erroneously granted summary judgment in favor of defendant on the bases that defendant did not owe plaintiff a duty of care and his injury was not proximately caused by defendant's breach of any duty as a matter of law.
- ¶ 2 Defendant Compass Minerals America, Inc. (Compass) operated a facility that sold salt to independent trucking companies and loaded the salt onto those companies' trucks. Plaintiff

Lawrence Burns drove his employer's truck to Compass's facility and obtained a truckload of salt. Before Burns drove away, he attempted to unload the excess salt Compass had put on his truck so that he would not violate state highway weight restrictions. Compass did not help him remove the excess salt, and he was injured when he attempted to remove a boulder of salt that became jammed in his truck's liftgate and prevented it from closing. Burns thereafter sued Compass for negligence.

¶ 3 The trial court granted Compass's motion for summary judgment. On appeal, Burns argues that the trial court erred in finding that Compass did not owe him a duty of care and there was no proximate cause, as a matter of law, between any act or omission by Compass and his injury. Burns also argues that the trial court erroneously struck portions of his affidavit, which complied with the rule governing requirements for affidavits in opposition to summary judgment motions.

¶ 4 For the reasons that follow, we reverse the judgment of the circuit court granting summary judgment in favor of Compass and remand for further proceedings. We affirm, however, the circuit court's order striking portions of Burns' affidavit.<sup>1</sup>

¶ 5 I. BACKGROUND

¶ 6 According to the pleadings, depositions and affidavits filed in this matter, in the early morning hours of January 24, 2014, Burns drove his employer's dump truck to Compass's facility, and Compass's employees loaded salt onto the truck. The truck scales provided by Compass indicated that Burns' truck and load of salt exceeded state highway weight restrictions, violations of which were subject to heavy fines. Burns drove to the area Compass provided for

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<sup>1</sup> In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

unloading excess salt and attempted to unload the overweight amount by unlocking the liftgate at the rear of his truck and raising the front end of the box of his truck at a slight angle so that an excess amount of salt would slide to the rear of the box, push against the inside of the liftgate, and spill out onto the ground. When he used this technique, a large boulder of salt became wedged in the liftgate and prevented it from closing. When Burns used a crowbar to rectify the situation, the boulder dislodged suddenly and the liftgate slammed closed on his right hand.

¶ 7 In January 2016, Burns sued Compass to recover damages for the injuries he suffered when he attempted to unload the overweight amount of salt Compass's employees had allegedly improperly loaded onto his truck. Burns alleged that Compass negligently (1) failed to adequately instruct its employees to properly load and not overload the truck; (2) advised Burns that the truck was properly loaded even though it was overloaded and included blocks of salt that were difficult and impossible for Burns to unload; (3) failed to have proper equipment to weigh the amount of salt being loaded onto the truck, unload the overloaded salt, and break up blocks of salt; (4) loaded blocks of salt onto the truck so that the blocks could not be removed, blocked the removal of the overloaded salt, and prevented the truck's liftgate from closing; and (5) failed to help Burns unload the excess salt.

¶ 8 Compass denied the allegations of negligence and breach of any duty imposed by law. In its affirmative defenses, Compass alleged that Burns was contributorily negligent, the condition of the overloaded salt was open and obvious, Burns' independent and superseding actions caused his damages, he failed to mitigate his damages, and he assumed the risk when he attempted to unload the overweight amount of salt.

¶ 9 Thereafter, Compass moved for summary judgment, arguing that this was a premises liability case and (1) Burns could not meet his burden of establishing a duty because (a) his truck was not a condition on Compass's property and it would be unreasonable to hold a landowner accountable for someone who brings equipment onto a property and creates a danger with that equipment, (b) Burns was injured by a risk that was inherent in his work duties, and (c) it would be unreasonable to place on Compass the burden of having expertise about the truck equipment of the drivers; (2) Compass had no duty to protect Burns from an activity on its land that presented an open and obvious danger; (3) there was no basis to impose Burns' "laundry list" of supposed duties and he could not establish that any alleged failure to perform those duties proximately caused his injury because Compass was not required and never assumed a duty to monitor his truck weight requirements, assist him if his truck was overloaded, or provide him with any particular type or quality of salt, and Burns was injured because his own choices created a dangerous situation; and (4) Burns' conduct was contributorily negligent as a matter of law because he was responsible for unloading his own truck and chose to use a crowbar to dislodge a salt block that was jammed in his liftgate.

¶ 10 Compass submitted as exhibits to its motion for summary judgment the deposition transcripts of Burns and Joseph Cummins, Compass's plant supervisor. Compass also submitted the scale ticket for the transaction related to this claim, which showed the weight of Burns' truck when he entered Compass's facility and when he left.

¶ 11 According to Burns' deposition, he worked as a truck driver for Barge Terminal Trucking Company (Barge) since December 2003. The general procedure to pick up a load of salt from Compass involved waiting in a long line of trucks for the facility to open and, on Mondays only,

driving onto a scale to get the empty truck weighed. The trucks then waited in line to get loaded. About 20 trucks backed up to a large pile of salt on the ground and a Compass employee was informed of the amount of salt to load onto the trucks. The Compass employee who operated a front end loader, a large four-wheeled vehicle with a big shovel in front, scooped buckets of salt from the pile onto the trucks. For safety reasons, the drivers were supposed to remain in their vehicles during the loading process. Then the trucks waited in line to get weighed and the drivers picked up their scale tickets from Compass's office and drove away to deliver their loads.

¶ 12 However, if a driver's loaded truck exceeded state highway weight restrictions, he drove to an area designated by Compass to "shake off" the excess amount of salt. The process could take another hour, but police officers sat right outside Compass's facility and would stop trucks that looked overloaded. Ticketed violations incurred steep fines of \$1 for every pound that exceeded a truck's maximum weight limit. After the driver attempted to shake off the excess amount of salt, he drove back in line to get weighed again. If the load was too light, the driver would have to get back in the loading line to get more salt. If the load was still too heavy, the driver would go back to the designated area, attempt to shake off the correct amount of excess salt, get back in line to get weighed again, and then hopefully be a proper weight to be able to leave the facility after picking up the scale ticket.

¶ 13 Burns testified that Compass "usually" overloaded or under loaded his truck "every time," and Compass never assisted drivers in unloading the excess salt. At the time of his injury, another salt facility in Lemont had scales on its front end loaders that weighed the amount of salt scooped from the pile before it was loaded onto the trucks. Burns was told Compass currently

used these scales on its front end loaders but this device was not in use on the day he was injured.

¶ 14 Burns explained that boulders of salt would always form in the large salt pile at the facility because the pile was exposed to the weather. These boulders caused problems for drivers who could not remove them. When drivers delivered the loads to their customers, the drivers removed the tarp covering the load and the customers climbed onto the truck and looked for boulders or a bad color. If customers saw boulders, they rejected the entire load because they could not crush the boulders with their small machines. To prevent boulders from being loaded onto drivers' trucks, Compass was supposed to scoop salt from the pile, "backtrack it back," drive over it, and then scoop it up and load it onto a truck. Although the problem of loads containing boulders occurred at other facilities, they took care of the problem when a driver informed them that his load contained boulders. Compass, however, did not.

¶ 15 If customers ordered fresh salt, drivers drove to another area at Compass's facility and a Compass employee pumped the fresh salt directly onto the trucks from a silo. This was the "nice stuff," which did not contain boulders and usually was dyed a color.

¶ 16 On the date in question, plaintiff left his home about 3:30 a.m. and drove 80 miles to Compass's facility, which was the only salt facility open in the winter. The temperature was below freezing. He arrived about 5 a.m. and many trucks were lined up way down the road waiting for salt. The weight limit for Burns' truck was 72,000 pounds, so he ordered 22 tons (44,000 pounds) of salt, which generally meant two scoops of salt from the front end loader. When Burns' loaded truck was weighed, it was about 8,000 pounds over his limit. He drove to

the designated area to shake off the excess amount using the same technique he and other drivers used.

¶ 17 Burns testified that the designated area had many small piles of salt all around it from previous drivers who had unloaded excess salt. Burns backed his truck up to a small pile of salt and, while still in his truck, raised the front end of the box of his truck a little and drove forward about 8 feet. Then he raised the front end of the box about 4 or 5 feet, reversed, and braked at the same time that he hit the button to release the liftgate. The weight of the load pushed against the inside of the unlocked liftgate and caused it to open. Using his mirror, he watched the salt trickle off the rear of the box. Then, judging from the size of his pile of spilled salt, he dropped the box down when he thought he had unloaded roughly 8,000 pounds of excess salt. He exited his truck wearing his gloves and walked to the rear of his truck to clean off the back of the liftgate before he would hit the button inside the truck to lock the liftgate. However, a large boulder of salt, about 4 feet in diameter, was wedged in the liftgate, holding it open.

¶ 18 Burns got back in his truck, raised the box a little higher, pulled forward, and then reversed and hit the brakes, but the bolder remained lodged and held the liftgate open. He asked a Compass loader to scrape off some overloaded salt from the top of his truck, but the loader refused. When plaintiff asked the loader to lift the liftgate up so that the boulder would fall out, the loader told him to ask someone else. Burns thought that would be futile because few Compass employees spoke English.

¶ 19 Because the liftgate itself was not too heavy, plaintiff used a crowbar and tried, as he had done on previous occasions, to pry the liftgate open a little more so that the bolder would fall out. However, when he used his two hands on the crowbar, he slid on the icy ground and the crowbar

kept “popping out” of position. So Burns put his right hand on what he thought was a safe spot where there was a “lip” between the box and the liftgate. He now had a “good hook on it” and “was hanging” on the crowbar and the liftgate finally moved. But the boulder fell out suddenly, the liftgate slammed down on Burns’ right hand, and the crowbar fell to the ground. He had spent about one hour trying to remove that boulder. Now, his middle, ring and pinky fingers were caught between the liftgate and the box. He motioned to another Barge driver to help him free his hand, but the driver did not want to exit his truck because it was too cold outside and perhaps did not understand Burns’ dilemma.

¶ 20 Burns used his foot to drag the crowbar near him, picked it up and used it to pry his hand free. It took about 10 minutes for him to free his hand. Burns believed he was in shock as he went about his usual routine. He slowly walked back to the front of his truck, hung up his crowbar, and lowered the box. After he cleaned off the back of his truck, he went back inside his truck and then felt his whole arm “throbbing.” He started shaking and called his employer on the radio but was stuttering and had trouble talking. Burns decided not to request an ambulance because he did not want to be stuck in that area all day. His dispatcher told him to get his scale ticket and deliver his load. Burns’ hand felt numb. He exited his truck but none of the other Barge drivers would help him. He went in Compass’s office, told the female at the counter who spoke a little English that Compass had loaded his truck with boulders, and asked if someone could look at this hand. Someone took a picture of his hand and gave him a bandage. He obtained medical treatment for his hand later that day.

¶ 21 According to Cummins’ deposition, he was the plant supervisor in charge of Compass’s day-to-day operations to meet customers’ orders. Compass’s operations involved two processes:

managing the large salt pile and loading the trucks. Compass processed the salt on the ground before loading it onto trucks by running over chunks of salt with the front end loader to break them down. However, Compass did not have a quality control system, rules or regulations to ascertain whether the salt was free flowing and did not contain boulders.

¶ 22 Cummins testified that the Compass employee operating the front end loader would attempt to estimate the proper amount of salt to scoop from the pile and load onto the trucks to meet the weight requested in the customers' orders. Cummins did not know whether Compass's front end loaders had scales to weigh the amount of salt scooped and loaded onto the trucks either now or at the time of Burns' injury. Cummins initially agreed that it was important not to overload a truck but then said it was not "really a big deal" because it was "just a time thing." Cummins did not know that drivers could be fined \$1 for each pound of an overload. Cummins did not think that the Compass employee operating the front end loader was capable of ascertaining whether he was overloading a truck, but that operator would visually try to ascertain that the salt he was loading was loose and free-flowing. Truck drivers were "on [their] own" if they needed to unload excess salt in Compass's designated area.

¶ 23 Cummins wrote an injury report regarding Burns and had a picture of his hand taken. Cummins thought that the gate of Burns' truck opened manually and Burns had injured his hand when he improperly used a crowbar to prop the gate open while he used a shovel to scoop the excess salt off his truck and the gate fell on his hand. Cummins thought that Burns should not have unloaded the excess salt in that manner but did not know a better way to do it. Drivers were responsible for unloading the trucks that Compass had overloaded, and Compass assumed that drivers were instructed about the safe way to operate their vehicles, including regarding the

unloading of excess material. Cummins did not recall whether Burns said that boulders were in his load, but Cummins believed he would have documented such a statement if it had been made.

¶ 24 In Burns' response to the motion for summary judgment, he explained that his claim was not based on a theory of premises liability but rather on the alleged negligent conduct of Compass personnel in loading the salt onto his truck. Burns argued that Compass's duty of care arose from the usual custom and practice in the industry and expectations from the relationship between Compass and Burns' employer. Compass overloaded Burns' truck by putting in more salt than instructed, loaded salt that contained large boulders, and declined to assist Burns when a four-foot-diameter boulder of salt became jammed in the liftgate of his truck and prevented the liftgate from closing. Burns asserted that Compass had procedures for crushing boulders, and the Compass employee who operated the front end loader was in a far better position than Burns to view the load of salt during the loading process and observe any boulders. Burns asserted that Compass's negligence forced him to try to dislodge the boulder of salt before he could drive away from the facility and, thus, his conduct did not constitute comparative or contributory negligence or an assumption of risk. Burns supported his response with his four-page affidavit.

¶ 25 Thereafter, Compass moved the court to strike portions of Burns' affidavit, arguing that he (1) failed to disclose prior to the close of discovery that he would be testifying to industry custom and practice, in violation of Illinois Supreme Court Rules 213(f)(1) (eff. Jan. 1, 2018); and (2) contradicted his deposition testimony, testified to facts outside his personal knowledge, and stated conclusions rather than admissible facts, in violation of Illinois Supreme Court Rule 191 (eff. Jan. 1, 2013).

¶ 26 In response, Burns argued, *inter alia*, that he did not aver in his affidavit about industry customs and practices but rather about the practices he and Compass had used during his 10 years of hauling loads. Burns asserted that the statements in his affidavit referred to matters that he would testify to regarding what had occurred, what he had seen, and what he had done. Burns also argued that Compass's motion to strike failed to indicate which statements allegedly consisted of conclusions rather than facts admissible in evidence, were not within his personal knowledge, or lacked a proper foundation. Burns also argued that there was no conflict between his deposition testimony and affidavit.

¶ 27 On January 31, 2018, the trial court granted Compass's motion to strike portions of Burns' affidavit but did not strike all the portions recommended by Compass. The trial court also granted summary judgment in favor of Compass, finding as a matter of law that "there is no duty from" Compass to Burns and his injury was not proximately caused by any breach.

¶ 28

## II. ANALYSIS

¶ 29 On appeal, Burns argues that summary judgment in favor of Compass was improper because Compass owed him a duty of care and there are genuine issues of material fact as to whether Compass's alleged acts or omissions caused his injuries. He argues that the trial court misapplied the element of foreseeability that is common to both the duty and proximate causation analyses. Specifically, he contends that the trial court took the issue of proximate cause, which considers whether the alleged negligent act caused an injury that is of a type which a reasonable man would see as a likely result of his conduct, away from the jury by making that determination in the guise of a ruling on the issue of whether Compass owed Burns a duty of

reasonable care, which considers the reasonable foreseeability of the plaintiff's injury as one of four factors.

¶ 30 Summary judgment is a drastic means of disposing of litigation and should be entered only when the right of the moving party is clear and free from doubt. *Gilbert v. Sycamore Municipal Hospital*, 156 Ill. 2d 511, 518 (1993). A defendant moving for summary judgment may meet the initial burden of production by either affirmatively showing that some element of the case must be resolved in defendant's favor, or by showing the absence of evidence supporting the plaintiff's position on one or more elements of the cause of action. *Hutchcraft v. Independent Mechanical Industries, Inc.*, 312 Ill App. 3d 351, 355 (2000). The plaintiff is not required to prove his case at the summary judgment stage; in order to survive a motion for summary judgment, he must present a factual basis that would arguably entitle him to a judgment. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335 (2002).

¶ 31 Summary judgment is only appropriate "if 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 2016). The court must construe these documents and exhibits strictly against the moving party and liberally in favor of the nonmoving party. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill. 2d 307, 315 (2004). The court may draw reasonable inferences from the undisputed facts, but where reasonable persons could draw divergent inferences from the undisputed facts, the issue should be decided by a trier of fact and the motion for summary judgment denied. *Siegel v. Village of Wilmette*, 324 Ill. App. 3d 903, 907 (2001); *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 271-272 (1992). We review a trial court's grant of summary

judgment *de novo*. *Home Insurance Co.*, 213 Ill. 2d at 315. That is, we perform the same analysis as a trial court and may make our decision on any basis in the record, regardless of whether the trial court relied on that basis. *Guterman Partners Energy, LLC v. Bridgeview Bank Group*, 2018 IL App (1st) 172196, ¶¶ 48-49.

¶ 32 We note that, on appeal, Burns has not provided any transcripts or bystander’s report of proceedings from any hearings before the circuit court, although the record suggests that oral arguments were heard on the motion for summary judgment. It is the appellant’s duty to provide on appeal a sufficiently complete record of the lower court proceedings to support his claims of error. *Midstate Siding & Window Co. v. Rogers*, 204 Ill. 2d 314, 319 (2003). “[I]n the absence of such a record on appeal, the reviewing court will presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis [citations.] The court will resolve any doubts arising from the incompleteness of the record against the appellant.” *Id.*

¶ 33 A. Duty

¶ 34 “In a negligence action, the plaintiff must plead and prove the existence of a duty owed by the defendant, a breach of that duty, and injury proximately resulting from that breach.” *Bruns v. City of Centralia*, 2014 IL 116998, ¶ 12. Unless a duty is owed, there is no negligence, and whether a duty exists is a question of law for the court to decide. *American National Bank & Trust Co. of Chicago v. National Advertising Co.*, 149 Ill. 2d 14, 26 (1992). Determining whether a duty exists turns in large part on public policy considerations. *Jones v. Chicago HMO Ltd. of Illinois*, 191 Ill. 2d 278, 303 (2000).

¶ 35 The Illinois Supreme Court has “long recognized that every person owes a duty of ordinary care to all others to guard against injuries which naturally flow as a reasonably probable

and foreseeable consequence of an act, and such a duty does not depend upon contract, privity of interest or proximity of relationship.” (Internal quotation marks omitted.) *Doe v. Coe*, 2019 IL 123521, ¶ 37. In deciding whether a duty exists in a particular case, courts consider four factors: (1) the reasonable foreseeability of the plaintiff’s injury, (2) the likelihood of the occurrence, (3) the magnitude of the burden of guarding against it, and (4) the consequences of placing that burden on the defendant. *Bogenberger v. Pi Kappa Alpha Corp., Inc.*, 2018 IL 120951, ¶ 22. “The weight to be accorded these factors depends upon the circumstances of a given case.” *Bruns*, 2014 IL 116998, ¶ 14.

¶ 36 Here, Burns alleged, *inter alia*, that Compass’s employees negligently loaded the salt onto his truck by overloading it by about 8,000 pounds over the 44,000 pounds requested in his order and including within that load blocks of salt that were difficult or impossible for him to remove. Burns also alleged that Compass failed to have the proper equipment to weigh the amount of salt being loaded onto the truck, unload the excess salt, and break up blocks of salt. Further, Burns alleged Compass failed to help him remove the excess amount of salt Compass had loaded onto his truck.

¶ 37 It is certainly foreseeable and likely that a truck driver could be harmed when he must individually and manually remove thousands of pounds of excess salt without any assistance from Compass, whose employees had to use large and heavy equipment to load that material onto the truck. Furthermore, the magnitude of the burden to guard against that harm and the consequences of placing that burden on Compass is small. Cummins, Compass’s plant supervisor, testified that its operations consisted of both managing the large pile of salt and loading it onto the trucks. Cummins also testified that Compass’s front end loader operator was

supposed to look for chunks of salt as he scooped salt from the pile and break down the chunks by driving over the scoop of salt before loading it onto a truck. Furthermore, plaintiff knew that, at the time of his injury, another salt facility used scales to weigh the amount of salt scooped in the bucket of the front end loader before that scoop was loaded onto a truck. This indicates that the technology to prevent overloads was available, and Cummins acknowledged that Compass's front end loader operator was not able to discern visually whether he was overloading a truck. We find that Compass had a duty to Burns to load his truck with salt reasonably.

¶ 38 Contrary to Compass's arguments on appeal, the court does not determine the existence of a duty here by considering whether Compass undertook a duty to not overload Burns' truck, not load salt boulders onto his truck, or help him remove any boulders contained in his load. Such a construction of the duty existence issue improperly restates the issue of a breach of duty, which is a factual matter for the jury to decide, as if that matter determined the existence of a duty. See *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 443-44 (2006) (warning courts not to conflate the concepts of duty and breach when determining the existence of a duty by using a fact-specific formulation that actually asks the court to determine, as a matter of law, that the party did not *breach* its duty of care). Rather, the proper consideration here to determine the existence of a duty is whether Compass owed Burns a duty to load his truck with salt with reasonable care. We conclude that Compass does owe Burns that duty. The questions of whether Compass breached that duty by overloading Burns' truck, including boulders in his load, and refusing to assist him to remove the boulders are questions of fact that are not part of the court's duty analysis.

¶ 39

B. Proximate Cause

¶ 40 Proximate cause is generally an issue of material fact in a negligence suit. *Gatlin v. Ruder*, 137 Ill. 2d 284, 293 (1990). “Although the issue of proximate cause is ordinarily a question of fact determined by the trier of fact, it is well settled that it may be determined as a matter of law by the court where the facts as alleged show that the plaintiff would never be entitled to recover.” *Abrams v. City of Chicago*, 211 Ill. 2d 251, 257–58 (2004).

¶ 41 Compass argues that the circuit court correctly entered summary judgment on its behalf because Burns cannot satisfy the legal cause requirement of the proximate cause test. According to Compass, Burns used a negligent method when he attempted to dislodge the boulder and negligently placed his right hand in harm’s way during that attempt.

¶ 42 “[T]he term ‘proximate cause’ describes two distinct requirements: cause in fact and legal cause.” *First Springfield Bank & Trust v. Galman*, 188 Ill. 2d 252, 257–58 (1999). A defendant’s conduct is a “cause in fact” of the plaintiff’s injury only if that conduct is a material element and a substantial factor in bringing about the injury. *Id.* at 258. A defendant’s conduct is a material element and substantial factor in bringing about the injury if, absent that conduct, the injury would not have occurred. *Id.* 258. “Legal cause,” by contrast, is largely a question of foreseeability. The relevant inquiry is whether “the injury is of a type that a reasonable person would see *as a likely result* of his or her conduct.” (Emphasis in original.) *Id.* at 260.

¶ 43 Here, Burns presented evidence showing that Compass loaded his truck with salt; that load included a boulder; the amount of salt Compass loaded onto his truck exceeded the amount of Burns’ order and put him over the state highway weight restrictions; Burns had to remove the excess salt to comply with the weight restrictions; when Burns attempted to remove the excess

salt, the boulder Compass put on his truck became lodged in his liftgate and prevented it from closing; when Burns attempted to remove the boulder so that he could close his liftgate, the boulder fell out suddenly and caused the liftgate to close; and Burns' right hand was in harm's way when the liftgate closed on it.

¶ 44 In the instant case, it is not evident that Burns failed to exercise due care and that failure was the sole proximate cause of his injury. Burns' alleged negligence does not prevent a finding of negligence on the part Compass. "It is a fundamental principle that there may be more than one proximate cause of an injury." *Espinoza v. Elgin, Joliet & E. Ry. Co.*, 165 Ill. 2d 107, 118–19 (1995). The facts in this case are not sufficiently one-sided that the court can determine, as a matter of law, that Burns was the sole proximate cause of this accident. Therefore, the fact that Burns' alleged negligence may have partially caused the accident does not preclude a finding that Compass had an opportunity to avoid the accident and that their failure to do so constitutes a proximate cause of Burns' injuries.

¶ 45 There exist genuine issues of material fact regarding Compass's attempt to use reasonable care when it loaded Burns' order of salt onto his truck. We therefore find that triable issues of fact remain regarding whether Compass fulfilled all aspects of its duty under the circumstances, and if it did not, whether these alleged breaches proximately caused Burns' injuries. Accordingly, we conclude that the trial court erred by determining as a matter of law that Burns' injury was not proximately caused by Compass's breach of any duty.

¶ 46 C. Burns' Affidavit

¶ 47 Burns argues that the trial court erroneously struck statements from his affidavit that were admissible facts and not conclusions, were based on his personal knowledge, and did not

contradict his deposition testimony. This court has paraphrased the redacted statements as follows:

1. Compass's front end loader operator had already put one scoop of salt on Burns' truck before he could exit the truck and supervise the loading. Burns climbed the ladder attached to the side of his truck during the loading process and observed the second scoop of salt being loaded onto his truck. Compass's front end loader operator was in a tremendous hurry due to the large number of vehicles waiting in line to be loaded.
2. Burns always immediately advised the people loading salt onto his truck that boulders must not be included in the load because customers would not accept the load and the boulders posed a hazard and made it difficult to lower his truck's gate.
3. Burns immediately went to Compass's office and requested a bobcat to break up the boulder. Compass employees failed to follow instructions and caused the problem.
4. Compass has a procedure for crushing large boulders, which was in use at the time in question and consists of putting a large amount of salt including boulders on the ground and running over the boulders with the end loader and any other equipment Compass owns that can be used to break up boulders.
5. Compass's front end loader operator had completely disregarded Burns' instructions regarding boulders.

6. Burns had no other way to loosen or remove the boulder other than to use a crowbar and use both his hands, even though he knew it was dangerous, to get leverage.
7. Once the boulder was loosened, Compass personnel could remove it and take it to an area where it could be broken up and placed in the overage pile.
8. Drivers had advised Compass personnel that customers would not accept salt in big blocks and boulders.
9. It was approximately 3 to 4 a.m. when Burns attempted to remove the boulder.
10. Burns used the only way to remove the boulder unless Compass personnel helped him.

¶ 48 In general, this court reviews a circuit court’s decision on a motion to strike an affidavit for an abuse of discretion, but when the motion “was made in conjunction with the court’s ruling on a motion for summary judgment,” we employ a *de novo* standard of review with respect to the motion to strike. *Jackson v. Graham*, 323 Ill. App. 3d 766, 773 (2001).

¶ 49 “The form of affidavits used in connection with motions for summary judgment is governed by Supreme Court Rule 191 \*\*\*.” *Harris Bank Hinsdale, N.A. v. Caliendo*, 235 Ill. App. 3d 1013, 1025 (1992). Rule 191 provides in relevant part:

“Affidavits in support of and in opposition to a motion for summary judgment under section 2–1005 of the Code of Civil Procedure \*\*\* shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not

consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto.” Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

¶ 50 “[T]his affidavit is actually a substitute for testimony taken in open court and should meet the same requisites as competent testimony.” *Harris Bank Hinsdale*, 235 Ill. App. 3d at 1025. The circuit court may not consider “evidence that would be inadmissible at trial” when assessing a motion for summary judgment. *Id.* “ ‘If, from the document as a whole, it appears that the affidavit is based upon the personal knowledge of the affiant and there is a reasonable inference that the affiant could competently testify to its contents at trial, Rule 191 is satisfied.’ ” *Doria v. Village of Downers Grove*, 397 Ill. App. 3d 752, 756 (2009) (quoting *Kugler v. Southmark Realty Partners III*, 309 Ill. App. 3d 790, 795 (1999)). “[C]ourts must accept an affidavit as true if it is uncontradicted by counteraffidavit or other evidentiary materials.” *Lindahl v. City of Des Plaines*, 210 Ill. App. 3d 281, 299 (1991); see also *Ligenza v. Village of Round Lake Beach*, 133 Ill. App. 3d 286, 293 (1985) (“When facts within an affidavit are not contradicted by counteraffidavit, they must be taken as true notwithstanding the existence of contrary unsupported allegations in the adverse party’s pleading.”). “[W]hen only portions of an affidavit are improper under Rule 191(a), a trial court should only strike the improper portions of the affidavit.” *Roe v. Jewish Children’s Bureau of Chicago*, 339 Ill. App. 3d 119, 128 (2003).

¶ 51 We agree with Burns’ assessment on appeal that even if his affidavit stands as redacted by the trial court, it does not significantly alter the issues and facts before this court because the portions stricken by the trial court were not particularly relevant to the germane issues

concerning whether Compass owed Burns a duty of care and whether Compass's alleged negligent acts were not, as a matter of law, the proximate cause of Burns' injuries.

¶ 52 Nevertheless, we conclude that the trial court did not err when it struck the statements from Burns' affidavit because items 1, 2, 3, 5, 7 and 9 contained statements that were not consistent with Burns' deposition testimony; items 1, 4, 7 and 8 contained statements that were not within his personal knowledge or lacked a proper foundation; and items 5, 6 and 10 contained statements that were conclusions rather than admissible facts.

¶ 53

### III. CONCLUSION

¶ 54 For the foregoing reasons, we affirm the order of the trial court striking several statements from Burns' affidavit. However, we reverse the judgment of the circuit court granting summary judgment in favor of defendant and remand this matter for further proceedings.

¶ 55 Affirmed in part; reversed in part and remanded.