

IN THE COURT OF APPEALS OF IOWA

No. 7-265 / 96-0421

000087

ROBERT DUNSTER JULIUS COOK,

Plaintiff-Appellant,

vs.

WAL-MART STORES, INC.,

Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Linda R. Reade, Judge.

Robert Cook appeals from an adverse judgment in his personal injury action against Wal-Mart Stores, Inc. **AFFIRMED.**

James R. Cook, West Des Moines, for appellant.

Fred L. Morris of Peddicord, Wharton, Thune & Spencer, P.C., Des Moines,
for appellee.

Considered by Sackett, P.J., and Huitink and Vogel, JJ. Streit, J., takes no part.

HUITINK, J.

Plaintiff Robert D. Cook appeals from an adverse judgment against Wal-Mart Stores, Inc. We affirm.

I. Background Facts and Proceedings.

The dispute between the parties arose out of an incident at a Des Moines Wal-Mart store in which Cook sustained an injury to his right foot. On November 16, 1994, Cook and a friend were shopping at the store when they stopped to talk to a cashier they knew. The men were facing the check-out lanes when they observed a customer, later identified as Jason Bailey, approach a two-wheel dolly loaded with a box approximately two feet wide and six to seven feet tall and weighing approximately 219 pounds. Bailey began to wheel the dolly toward the three men and then came to a stop in front of the exit door. The cashier told Bailey that another employee would assist him in transporting the merchandise to his vehicle. A few seconds later, the box fell off the dolly and dropped on Cook's foot. Cook's friend took him to a hospital where he was diagnosed with a broken great toe on his right foot.

In February 1995, Cook sued Wal-Mart seeking damages for the injuries he received at the store. He claimed the store was negligent in failing to provide safe, suitable equipment for the customer, in addition to failing to supervise the moving of the merchandise. He sought damages for pain and suffering, medical expenses, and lost time from employment. Wal-Mart claimed Cook's negligence was the proximate

cause of his injury or, alternatively, Cook's recovery should be reduced by his comparative fault.

Following a bench trial in February 1996, the court entered judgment in Wal-Mart's favor. The trial court concluded Cook failed to prove Wal-Mart was negligent. The court noted Wal-Mart's policy of assisting customers move merchandise on dollies out of the store and that this procedure was followed in this case. The court also found Bailey declined such assistance by moving the dolly himself. Under these circumstances, the court concluded Wal-Mart discharged its duty to Cook and, accordingly, was not at fault.

Cook appeals asserting that Wal-Mart knew of the danger posed by Bailey's actions and was negligent in failing to stop him from using the two-wheel dolly. He also contends Bailey's conduct was not a subsequent intervening cause relieving Wal-Mart of liability.

II. Standard of Review.

Cook's petition was filed at law so our review is on error. Iowa R. App. P. 4; *Tim O'Neill Chevrolet v. Forristall*, 551 N.W.2d 611, 614 (Iowa 1996). If supported by substantial evidence, the trial court's findings are binding on us. *Tim O'Neill Chevrolet*, 551 N.W.2d at 614. Its legal conclusions, however, are not. *Id.* Evidence is substantial if reasonable minds could accept it as adequate to reach the same findings. *Id.*

We view the evidence in a light most favorable to the judgment. *Id.* We

liberally construe the trial court's findings to uphold, rather than defeat, the result reached. *Claus v. Whyte*, 526 N.W.2d 519, 523 (Iowa 1994). The question is not whether the evidence might support a different finding, but whether the evidence supports the finding actually made. *Second Injury Fund of Iowa v. Braden*, 459 N.W.2d 467, 468 (Iowa 1990).

III. Premises Liability.

Cook argues Wal-Mart's duty to exercise ordinary care required the store prevent the customer from using the two-wheel dolly. He cites the testimony of the assistant manager who explained that Wal-Mart had a company policy requiring employees to transport merchandise loaded on dollies to prevent "things like this from happening."

Wal-Mart's duty to Cook originates in the Restatement (Second) of Torts section 343 as originally adopted by the Iowa Supreme Court. *See Wieseler v. Sisters of Mercy Health Corp.*, 540 N.W.2d 445, 449 (Iowa 1995) (citations omitted):¹

¹ Under Iowa premises liability law, the scope of the duty of care that a possessor of land owes to the entrant is based on the entrant's legal status as either a trespasser, licensee, or invitee. *Id.*, *Morgan v. Perlowski*, 508 N.W.2d 724, 727 (Iowa 1993). Invitees are defined by the Restatement as follows

(1) An invitee is either a public invitee or a business visitor.

(3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land

Restatement (Second) of Torts § 332 (1965); *see Konicek v. Loomis Bros., Inc.*, 457 N.W.2d 614, 618 (Iowa 1990). The trial court determined, and we agree, that Cook was a business invitee

Dangerous Conditions Known to or Discoverable by Possessor

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.

Wieseler, 540 N.W.2d at 450.

In order for Cook to recover on his claim, he was required to prove the following by a preponderance of the evidence: (1) Wal-Mart knew or in the exercise of reasonable care should have known of a condition on its premises that involved an unreasonable risk of injury to a person in Cook's position; (2) the condition was one that a person in Wal-Mart's position should have expected would not have been discovered or realized by Cook or one that Wal-Mart should have expected Cook would fail to protect himself from; (3) Wal-Mart was negligent in failing to supervise the moving of the dolly; (4) the negligence was a proximate cause of Cook's damages; and (5) the amount of damage. *See* W. Prosser, *Handbook of the Law of Torts*, § 30, at 143 (4th ed. 1971).

Under our limited standard of review in this case, we are unable to say the trial court erred in finding Cook failed to meet his burden of proof on each element of his claim. There is substantial evidence supporting the court's finding that Wal-Mart followed established procedure for moving merchandise on dollies out of the store.

Cook conceded at trial that the cashier advised the customer that another employee would assist him. A few seconds later, as the customer began to move the dolly himself, the box fell off onto Cook's foot. Under the circumstances, we find Wal-Mart discharged its duty to Cook. The record supports the conclusion Wal-Mart was not negligent.

Cook has also challenged the theory that the customer's actions amounted to a subsequent intervening cause that relieves Wal-Mart of liability. He notes the trial court did not consider this issue in its ruling denying him recovery. We have already found substantial evidence supporting the trial court's conclusion that Cook failed to prove Wal-Mart was at fault. Accordingly, we do not need to consider this argument.

AFFIRMED.