

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 17, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP1670

Cir. Ct. No. 2010CV433

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

EBA DESIGN, INC.,

PLAINTIFF-APPELLANT,

V.

NICHOLE M. MEEKER,

DEFENDANT-RESPONDENT,

ROBERT C. MEEKER, JR.,

DEFENDANT.

APPEAL from an order of the circuit court for Sauk County: GUY
D. REYNOLDS, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Sherman, JJ.

¶1 PER CURIAM. EBA Design, Inc. appeals an order that dismissed its negligence claim against a former employee, Nichole Meeker, following a trial to the court.¹ The circuit court ruled that the at-will employment doctrine precluded EBA Design from recovering tort damages for losses stemming from negligent performance of an employment contract. We affirm on a different ground. We conclude that public policy considerations bar recovery for negligence based upon the specific facts of this case.

BACKGROUND

¶2 According to the circuit court's factual findings, EBA Design employed Meeker at its tattoo parlor. Meeker's duties included collecting and counting daily cash receipts for the business and keeping them in a small safe. At least once a month, she was to deposit the receipts at the bank.

¶3 On August 27, 2009, Meeker took the monthly receipts to the bank at the end of the work day. However, the bank was closed by the time she arrived, and the money bag was too large to fit in the night deposit slot. Rather than return to work to put the receipts back in the safe, Meeker drove home and placed them in a cabinet in her home office, intending to take them to the bank the following morning.

¶4 Meeker and her family then left home to attend a football game. When they returned several hours later, they discovered that the house had been burglarized, and the receipts were among the items stolen.

¹ The circuit court also found that EBA Design had failed to meet its burden of proof on two theft claims, but EBA Design does not challenge the dismissal of those causes of action on this appeal.

STANDARD OF REVIEW

¶5 We uphold the factual findings of the circuit court unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2009-10).² Here, the circuit court’s findings were directly supported by Meeker’s testimony. Although EBA Design’s brief indicates that it is skeptical about whether its receipts were actually stolen by a burglar from Meeker’s home, we have no basis to set aside the circuit court’s factual findings.

¶6 Whether public policy precludes the imposition of liability for negligence upon a given set of facts is a question of law solely for judicial determination. *Fandrey v. American Family Mut. Ins. Co.*, 2004 WI 62, ¶6, 272 Wis. 2d 46, 680 N.W.2d 345 (citation omitted).

DISCUSSION

¶7 The elements of a negligence claim are: “(1) the existence of a duty of care on the part of the defendant, (2) a breach of that duty of care, (3) a causal connection between the defendant’s breach of the duty of care and the plaintiff’s injury, and (4) actual loss or damage resulting from the injury.” *Gritzner v. Michael R.*, 2000 WI 68, ¶19, 235 Wis. 2d 781, 611 N.W.2d 906 (citation omitted). However, there are instances in which public policy may preclude liability notwithstanding the presence of all the elements of a negligence or strict liability claim. *Alwin v. State Farm Fire & Cas. Co.*, 2000 WI App 92, ¶12, 234 Wis. 2d 441, 610 N.W.2d 218. The factors to consider on a case-by-case basis are

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

whether: (1) the injury is too remote from the negligence; (2) the injury is wholly out of proportion to the culpability of the negligent tortfeasor; (3) in retrospect, it appears too highly extraordinary that the negligence should have brought about the harm; (4) recovery would place too unreasonable a burden on the negligent tortfeasor; (5) allowing recovery would be too likely to open the way for fraudulent claims; or (6) allowing recovery would open a field having no sensible or just stopping point. *Id.* (citation omitted).

¶8 We will begin by assuming, as did the circuit court, that Meeker breached her duty of care to her employer by failing to employ proper protocols in her handling of the receipts. We also accept the circuit court's factual finding that Meeker did not take the deposit home with the intention of keeping the money. With this in mind, we turn to the public policy considerations.

¶9 First, the employer's loss of the receipts is remote from the employee's conduct in taking them home because the loss would not have occurred without the additional intervention of the burglar. Second, the loss is disproportionate to the employee's culpability because, in the normal course of events, the employee would simply have taken the deposit to the bank the following morning. Third, it was highly extraordinary that the employee's home would be burglarized on the very same day that she had brought receipts home. Fourth, it would be unreasonable to make an employee responsible for a loss that occurred primarily as the result of the intentional act of a third party. Fifth, we see little to no risk that allowing recovery here would be likely to open the way to fraudulent claims, since it was undisputed that the receipts did go missing from the employee's possession. And finally, while we doubt this specific situation would recur with much frequency, there could be a wide range of other situations in

which an employee's minor negligence could be exploited or compounded by the intentional acts of a third party to the detriment of the employer.

¶10 In sum, since five of the six public policy factors weigh against allowing recovery, we conclude that it was proper for the circuit court to dismiss EBA Design's negligence claim against its employee, even though the circuit court based its decision on other grounds. *See State ex rel. Hams v. Milwaukee City Fire & Police Comm'n*, 2012 WI App 23, ¶99, 339 Wis. 2d 434, 810 N.W.2d 488 (citation omitted) ('[W]e need not base our affirmance on the reasons relied upon by the trial court.').

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

