STATE OF MICHIGAN

COURT OF APPEALS

GOLDEN ISLAND JEWELRY, ZOUHAIR ALAYAN, and MARWAN ISLAND a/k/a MARWAN ALAYAN,

Plaintiffs-Appellants,

v

SECURITY CONTROL ACQUISITION CORPORATION d/b/a SONITROL SECURITY INC. and/or SECURITY CONTROLS, INC.

Defendant-Appellee.

UNPUBLISHED
November 7, 1997

No. 194696
Macomb Circuit Court
LC No. 95-003396

Before: Murphy, P.J., and Kelly and Gribbs, JJ.

PER CURIAM

Plaintiffs appeal as of right from entry of judgment in their favor for $1,000 after defendant's motion to limit damages to that amount was granted. We affirm.

Plaintiffs filed suit against defendant after being robbed two times during which their security system failed to operate The first incident occurred in July 1992, when four people robbed the store, shot plaintiff Zouhair Alayan and assaulted plaintiff Marwan Alayan. Marwan Alayan allegedly triggered the burglar alarm during the incident, but it did not work. Plaintiffs alleged that defendant inspected the alarm after the robbery and made necessary repairs. Two years later, in August 1994, a second robbery took place and plaintiffs alleged that the alarm failed again. No personal injuries resulted the second time.

Plaintiffs first argue that the damage limitation clause found in the contract between the parties should not have applied in this case. The clause provided that defendant was not an insurer, that damages caused by a failed alarm would be difficult to ascertain, and that defendant's liability was for personal injury or property loss was limited "to a sum equal to the total of one-half year's monitoring payments, or five hundred dollars, whichever is the lesser." Plaintiffs claim that this Court should adopt

the proposition that a party may not limit damages in the event that personal injuries occur. We disagree because of the unique circumstances of the contract at issue.

In *St Paul Fire and Marine Ins Co v Guardian Alarm*, 115 Mich App 278; 320 NW2d 244 (1982), this Court upheld a damage limitation clause in a burglar alarm monitoring contract. We did so because we recognized that alarm companies are not insurers and that ascertaining damages caused by a failed alarm as opposed to other causes of loss, such as the crime itself, is difficult. *Id.* at 282-283. It is impossible to prove that the damages would not have occurred had the alarm functioned properly. Moreover, we held that a liquidated damages clause in a burglar alarm contract is not contrary to public policy. *Id.* at 283. A party may contract against liability for damage caused by its ordinary negligence. *Id.*

The clause that was upheld in *St Paul Ins, supra* was substantially similar to the one in this case. It limited damages to $250 or six months of monitoring costs and applied to personal injury and property losses. *Id.* at 280. In upholding the damage limitation clause, this Court did not specifically address whether it would be upheld in the event that the claim was one for personal injuries as opposed to one for property loss only. It was unnecessary to address that specific aspect of the clause because there were no personal injuries in that case. However, we now hold that damage limitation clauses in burglar alarm contracts validly operate to limit damages where the claim is one for personal injuries. The same rationale as set out in *St Paul Ins, supra,* applies whether the damage is personal injury or property loss. Burglar alarm companies are not insurers against personal injury. Other jurisdictions have upheld this proposition for the same reasons. See for example *Schrier v Beltway Alarm Co,* 73 MD App 281; 533 A2d 1316 (Md App, 1987); *Elksen v Network Multi-Family Security Corp,* 838 P2d 1007 (Okla, 1992). Moreover, our holding is in accord with previous holdings in this state. In *Universal Gym v Vic Tanny, Inc,* 207 Mich App 364, 366; 526 NW2d 5 (1994), and *Skotak v Vic Tanny, Inc,* 203 Mich App 616, 617-618; 513 NW2d 428 (1994), this Court held that a party can contract away liability for personal injury damages caused by ordinary negligence.

Plaintiffs also argue that even if damage limitation clauses can be upheld in personal injury cases, the clause in this case was an invalid penalty and should not be upheld. This Court considered the damage limitation provision in *St Paul Ins, supra,* to be a liquidated damage provision. Traditionally "[t]he distinction between a valid liquidated damages clause and an illegal penalty depends on the relationship between the amount stipulated to" in the clause and the subject matter of the action. *Papo v Aglo Restaurants,* 149 Mich App 285, 294; 386 NW2d 177 (1986). See also *Curran v Williams,* 352 Mich 278, 282; 89 NW2d 602 (1958); *Roland v Kenzle,* 11 Mich App 604, 611-612; 162 NW2d 97 (1968).

Plaintiffs' argument ignores that the amount of liquidated damages is usually related to the contract at issue. See *Papo, supra* at 295, where this Court ruled that the liquidated amount should not be out of proportion to the contract at issue. See also *Solomon v Dep't of State Highways,* 131 Mich App 479, 484-485; 345 NW2d 717 (1984), where this Court held that the liquidated damage sum was not a penalty because it was "not unreasonable, considering the original contract amount." Cf *Curran,*

supra; *Roland, supra*. So, although damages should reflect potential injury, the damages should be related to the contract.

In *St Paul Ins, supra*, this Court ruled that the primary consideration was whether the contract clause limiting liability was reasonable based on the facts of the case:

> Reasonableness is the primary consideration. The contract clause limiting defendant's liability to the aggregate of six monthly payments or $250 is manifestly reasonable under the circumstances of this case. Defendant is not in the insurance business. Rather it provides an alarm service for a specific sum. That sum is not a premium for theft insurance. The contract in question made that clear. [*Id.* at 284.]

In this case, the agreed upon damage amount is reasonable in relation to the contract at issue and the circumstances of the case. Defendant merely provided a service for a fee and that fee was not a premium for personal liability insurance. Defendant only received $68 per month from plaintiffs and the parties agreed that defendant, rather than accepting unknown liability for future damages, should agree to pay a damage related to the charges for its services. Moreover, as was previously noted, it is impossible to determine what damages would have occurred even if the alarm had operated properly. The trial court properly applied the liquidated damage clause in this case.

Finally, plaintiffs argue that they pleaded gross negligence and therefore, the damage limitation clause should not have applied. While the general rule in Michigan is that a party cannot contract away liability for gross negligence, *Universal Gym, supra*; *Shelby Mutual Ins Co v City of Grand Rapids*, 6 Mich app 95, 98; 148 NW2d 260 (1967), plaintiffs failed to plead a cause of action for gross negligence in this case. Plaintiffs did not plead that defendant's conduct was reckless or that it demonstrated a substantial lack of concern about whether injury would occur. Rather, plaintiffs pleaded a simple negligence claim. Therefore, there was no need for the trial court to whether the limitation clause applies where there is gross negligence.

MCR 2.111 (B)(1) provides that a plaintiff must inform the adverse party of the nature of the claims against it. The pleading must be clear, concise, and direct. MCR 2.111(A)(1). Plaintiffs' pleading did not alert defendant as to what claims of gross negligence there may have been. Although plaintiffs included the term "grossly negligently" in their complaint, this did not qualify as pleading gross negligence. Where plaintiffs failed to plead gross negligence, never moved to amend to plead gross negligence, and failed to offer any evidence that would support a finding of gross negligence, they should not be allowed to do so now.

Affirmed. Defendant being the prevailing party, it may tax costs pursuant to MCR 7.219.

/s/ Roman S. Gribbs

Concurring in result only.

/s/ William B. Murphy