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UNPUBLISHED

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

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

MICHAEL J. KELLY (dissenting).

I believe that plaintiffs adequately pleaded a claim of gross negligence and, thus, the trial court's grant of defendant's motion to limit damages as to plaintiffs' ordinary negligence claim should not be read to extend to summary dismissal of plaintiffs' gross negligence claim. Accordingly, I respectfully dissent, and would remand this matter for trial on plaintiffs' claim of gross negligence. At the very least, since the issue of the adequacy of pleadings is raised and addressed for the very first time on appeal, the majority should remand this matter to allow plaintiffs the opportunity to amend their pleadings pursuant to MCR 2.118.

A complaint must provide reasonable notice to opposing parties regarding the claims that are being brought against it. MCR 2.111; *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992). This rule strikes a balance between extreme formalism and extreme ambiguity, and their concomitant evils. *Id.* With this principle in mind, we are not strictly bound to the label affixed to a claim, but may look beyond the label to determine the exact nature of the allegation made. *Li v Feldt (On Second Remand)*, 187 Mich App 475, 478; 468 NW2d 268 (1991), rev'd on other grounds 439 Mich 457; 487 NW2d 127 (1992); see also *Randall v Harrold*, 121 Mich App 212; 328 NW2d 622 (1982).

In their complaint, plaintiffs alleged that they entered into a contract with defendant in which defendant agreed to provide them with an operational, properly installed alarm/security system for their

jewelry business. Plaintiffs alleged that they executed the contract primarily because defendant assured them that it had the proper "knowledge, skill and judgment" necessary to provide plaintiffs with the appropriate equipment. On July 27, 1992, plaintiffs were robbed at gunpoint of all of their stock at the jewelry store, resulting in a financial loss of approximately $150,000. Additionally, plaintiffs were assaulted and battered by the robbers, who shot plaintiff Marwan Alyan. Plaintiffs alleged that during the robbery they depressed the emergency button, but the alarm system did not activate. Defendant inspected the alarm system, and represented to plaintiffs that it made necessary repairs to the system. On August 26 or 27, 1994, plaintiffs were again robbed of jewelry valued at $80,000. Once more, the alarm system did not work, because, as plaintiffs alleged, defendant had not properly installed or maintained it.

Plaintiffs incorporated the foregoing facts into Count II of their complaint, which they labeled "Negligence/Implied Warranty in Tort." In paragraph 27, plaintiffs stated, "That because of the aforementioned defects and problems with said security system, the Defendant . . . did negligently and/or grossly negligently breach said duties to Plaintiffs." I believe that, under the circumstances and facts of this case, we can look past the label that plaintiffs attached to their third count, and find that plaintiffs reasonably apprised defendant of the fact that they were claiming gross negligence. First, the factual allegations in this case at least raise the specter of gross negligence, in that plaintiffs claimed that defendant failed on two separate occasions to provide them with a working alarm system, resulting in personal injury and property losses to plaintiffs. It is readily apparent "as to what claims of gross negligence there may have been," because defendant, already having notice that its alarm system had failed to work at a time of crisis, appears to have compounded its failure by carelessly or willfully failing to ensure that the alarm system would work properly in the event of further emergency. See *Jennings v Southwood*, 446 Mich 125, 136, 145; 521 NW2d 230 (1994) (gross negligence includes "conduct so reckless as to demonstrate substantial lack of concern for whether injury results"). Second, to the extent that it was at least questionable whether plaintiffs had succeeded in adequately raising a claim of gross negligence so as to adequately inform defendant of the nature of the claim against it, the arguments in plaintiffs' brief in response to defendant's motion for summary disposition as to damages largely concern their gross negligence claim and expand on the allegations in their complaint. Defendant did not challenge plaintiffs' characterization of their claim against it in any response brief or motion, nor did it raise any objection in the trial court to plaintiffs' asserted gross negligence claim. Elsewhere, in similar circumstances, "issues not raised in a pleading may be tried by implied consent and then treated as if they had been raised in the pleadings." *Grebner v Clinton Twp*, 216 Mich App 736, 744; 550 NW2d 265 (1996). Here, I would similarly find implied consent where defendant completely failed to object to, or otherwise address, plaintiffs' characterization of their claim as one for gross negligence.

Because I conclude that plaintiffs adequately pleaded a claim for gross negligence against defendant, I find the trial court's summary dismissal of this part of the claim to be erroneous. The damages limitation clause in the parties' contract has bearing only as to a claim for ordinary negligence. As stated in *Universal Gym Equipment, Inc v Vic Tanny Int'l, Inc*, 207 Mich App 364, 367; 526 NW2d 5 (1994), it is against public policy to allow a party to insulate itself from liability for damages due to its own gross negligence. See also *Shelby Mutual Ins Co v Grand Rapids*, 6 Mich App 95, 98; 148 NW2d 260 (1967).

I would reverse.

/s/ Michael J. Kelly