

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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S & M GOLDEN, INC., d/b/a FOODLANE  
MARKET,

UNPUBLISHED  
January 19, 2006

Plaintiff-Appellant,

v

ALARM MANAGEMENT II, L.L.C., d/b/a  
SONITROL TRI COUNTY,

No. 263722  
Wayne Circuit Court  
LC No. 04-430804-CZ

Defendant-Appellee.

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Before: Cavanagh, P.J., and Cooper and Donofrio, JJ.

PER CURIAM.

Plaintiff S & M Golden, Inc. appeals as of right the trial court's order granting defendant Alarm Management II's motion for summary disposition pursuant to MCR 2.116(C)(10) in this action for breach of contract and gross negligence. We affirm.

I. Facts and Procedural History

Plaintiff contracted with defendant to provide security monitoring services at its place of business, Foodlane Market. In exchange for a \$60 monthly fee, defendant agreed to monitor plaintiff's security system and, "when warranted," to notify the police if the system detected an unauthorized entry or other emergency. The parties' service contract included a conspicuous "limitations of damages" provision. That provision stated, in relevant part, that defendant "is not an insurer and that insurance, if any, covering personal injury and property loss or damage . . . shall be obtained by [plaintiff], at [plaintiff's] sole expense." The contract also included a liquidated damages clause, which limited plaintiff's monetary damages in the event that defendant was found liable for any loss incurred:

**CLIENT UNDERSTANDS AND AGREES THAT IF DEALER SHOULD BE FOUND LIABLE FOR ANY LOSS OR DAMAGE DUE FROM A FAILURE TO PERFORM ANY OF ITS OBLIGATIONS . . . DEALER'S LIABILITY SHALL BE LIMITED TO A SUM EQUAL TO THE TOTAL OF ONE-HALF YEAR'S MONITORING PAYMENTS, OR FIVE HUNDRED DOLLARS (\$500) WHICHEVER IS THE LESSER, AS LIQUIDATED DAMAGES . . . AND THIS LIABILITY SHALL BE EXCLUSIVE AND SHALL APPLY IF LOSS OR DAMAGE, IRRESPECTIVE OF CAUSE OR**

ORIGIN, RESULTS DIRECTLY OR INDIRECTLY TO PERSONS OR PROPERTY FROM PERFORMANCE OR NON-PERFORMANCE OF ANY OF **DEALER'S** OBLIGATIONS OR FROM NEGLIGENCE, ACTIVE OR OTHERWISE OF **DEALER**, ITS EMPLOYEES OR AGENTS.<sup>[1]</sup>

At 4:53 a.m. on June 22, 2004, the security system at plaintiff's store detected an unauthorized entry. The console operator at defendant's headquarters immediately notified the local police department and plaintiff's designated representative. The officers who responded to the scene informed the console operator that there was no sign of forced entry. Therefore, the operator determined that the signal was only a false alarm. The following night, the same console operator received an alarm signal that plaintiff's system had again detected an unauthorized entry. The operator, acting alone, decided that this was another false alarm and, as a result, failed to contact law enforcement or plaintiff's representative. In the morning, one of plaintiff's employees discovered that Foodlane Market had, in fact, been burglarized during the night. As a result, plaintiff suffered \$60,000 in damages.

Defendant admitted that its operator violated company policy by failing to notify the proper authorities of the alarm and offered plaintiff \$360, the maximum liquidated damages for its loss. Plaintiff refused this offer and filed suit. Plaintiff contended that the liquidated damages clause was inapplicable under the circumstances, as the conduct of defendant's console operator amounted to gross negligence. Although plaintiff had served notice of its intent to depose the chief executive officer of defendant's corporation, the trial court granted defendant's motion for summary disposition prior to the close of discovery. The trial court determined based on the pleadings that the plaintiff could not create a question of fact on the issue of gross negligence. Accordingly, the court determined that plaintiff's recovery was limited by the contract and dismissed its claims against defendant.

## II. Summary Disposition

Plaintiff contends that the trial court improperly, and prematurely, granted defendant's motion for summary disposition. While defendant's employee clearly should have notified the police of the alarm, we must agree with the trial court that plaintiff cannot support its claim of gross negligence.

We review a lower court's determination regarding a motion for summary disposition de novo.<sup>2</sup> A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.<sup>3</sup> "In

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<sup>1</sup> Plaintiff does not contend that this contract is unenforceable. In fact, in *St Paul Fire & Marine Ins Co v Guardian Alarm Co of Michigan*, 115 Mich App 278; 320 NW2d 244 (1982), this Court found an identical limitations of damages provision to be enforceable against the client of an alarm monitoring company. See also *USAA Group v Universal Alarms, Inc*, 158 Mich App 633; 405 NW2d 146 (1987).

<sup>2</sup> *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

<sup>3</sup> *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 396-397; 605 NW2d 685 (1999).

reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists.”<sup>4</sup> Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law.<sup>5</sup> As a general rule, a trial court should only grant a party’s motion for summary disposition following the completion of discovery. However, dismissal may be appropriate earlier if “there is no disputed issue [of fact] before the court or if further discovery does not stand a fair chance of finding factual support for the nonmoving party.”<sup>6</sup> The nonmoving party bears the burden of producing “some independent evidence that a factual dispute exists.”<sup>7</sup>

It is undisputed that defendant breached its contract with plaintiff. Defendant admitted that its agent violated company policy and offered plaintiff the applicable liquidated damages amount for its loss. Contrary to plaintiff’s assertion, however, its damages are limited by the parties’ contract. While a party may not contractually limit its liability for gross negligence as a matter of public policy, it may freely limit its liability for ordinary negligence.<sup>8</sup> To establish a claim of ordinary negligence, a plaintiff must show: (1) that the defendant owed the plaintiff a duty; (2) that the defendant breached that duty; (3) causation; and (4) damages.<sup>9</sup> To establish gross negligence, a plaintiff must show that the defendant engaged in “conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.”<sup>10</sup> Evidence of ordinary negligence will not suffice to create a material question of fact concerning gross negligence.<sup>11</sup>

Defendant was clearly negligent. Its employee breached defendant’s contractual duty to notify the police when the alarm system detected a break-in, resulting in a significant loss to plaintiff. However, plaintiff has not established, and could not establish by further discovery,

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<sup>4</sup> *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

<sup>5</sup> *MacDonald*, *supra* at 332.

<sup>6</sup> *VanVorous v Burmeister*, 262 Mich App 467, 476-477; 687 NW2d 132 (2004).

<sup>7</sup> *Id.* at 477, quoting *Michigan Nat’l Bank v Metro Institutional Food Service, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993).

<sup>8</sup> See *Xu v Gay*, 257 Mich App 263, 269; 668 NW2d 166 (2003); *Universal Gym Equipment, Inc v Vic Tanny Int’l, Inc*, 207 Mich App 364, 367-368; 526 NW2d 5 (1994), vacated in part on other grounds 209 Mich App 511; 531 NW2d 719 (1995).

<sup>9</sup> *Henry v Dow Chemical Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005).

<sup>10</sup> *Xu*, *supra* at 269, quoting *Jennings v Southwood*, 446 Mich 125, 136; 521 NW2d 230 (1994). In *Xu*, this Court extended the statutory definition of “gross negligence” found in several immunity statutes and the standard jury instructions, M Civ JI 14.10, to a case involving a contractual waiver of liability. This Court reasoned that a contractual waiver of liability, like an immunity statute, “serves to insulate against ordinary negligence, but not gross negligence.” *Xu*, *supra* at 269.

<sup>11</sup> *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999).

that defendant's conduct amounted to gross negligence. Defendant breached its duty on a single occasion—one night after a purported false alarm at plaintiff's store. This case is similar to this Court's opinion in *USAA Group v Universal Alarms, Inc.*<sup>12</sup> In *USAA Group*, a private home was destroyed by fire. The homeowner and his insurance company asserted that the alarm monitoring company servicing the home was liable for the damages, either because the alarm malfunctioned or because its agents failed to contact the proper authorities.<sup>13</sup> This Court enforced the liquidated damages clause in the parties' contract against the homeowner.<sup>14</sup> Under these circumstances, plaintiff cannot establish that the operator's conduct was so reckless as to demonstrate a substantial lack of concern for whether an injury results. Accordingly, the trial court properly determined that plaintiff's recovery from defendant was limited to the remedy provided by the contract's liquidated damages clause.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Jessica R. Cooper  
/s/ Pat M. Donofrio

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<sup>12</sup> *USAA Group, supra.*

<sup>13</sup> *Id.* at 635.

<sup>14</sup> *Id.*