STATE OF MICHIGAN

COURT OF APPEALS

ZURICH INSURANCE COMPANY,

Plaintiff-Appellant,

v

MIDWEST MANAGEMENT, INC.,

Defendant/Cross-Plaintiff/Appellee,

and

THORPE CORPORATION,

Defendant/Cross-Defendant/Appellee.

UNPUBLISHED
December 30, 1996

No. 185055
LC No. 93-453979

CONTINENTAL INSURANCE COMPANY,

Plaintiff-Appellant,

v

MIDWEST MANAGEMENT, INC., and
THORPE CORPORATION,

Defendant-Appellees.

No. 185056
LC No. 93-456708

Before: Doctoroff, C.J., and Corrigan and R.J. Danhof,* JJ.

PER CURIAM.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

In these consolidated appeals, plaintiffs Zurich Insurance Company and Continental Insurance Company appeal by right the order granting summary disposition to defendants on plaintiffs' claims of breach of contract, negligence, and breach of implied warranty. We affirm.

In July 1991, Horizon Development and Management, Ltd, contracted with defendant contractor, Midwest Management, for the exterior renovation of its building. Midwest hired defendant Thorpe Corporation, a subcontractor, to aid in the renovation. In turn, Thorpe subcontracted with Gary Butler to excavate concrete. In August 1991, Butler severed a 4,800 volt electrical cable while using a backhoe to remove old concrete. Butler claimed that he was unaware that electrical cables were under the concrete. Neither Butler, Thorpe nor Midwest had called Miss-Dig to mark the utility lines before the accident. The resulting damage cost approximately $226,000. Plaintiffs insured Horizon for the losses and paid the claims. After paying the claims, plaintiffs filed suit separately against Midwest and Thorpe as subrogees of their insured, Horizon. The lower court cases were consolidated thereafter. Both defendants filed third-party complaints against Butler. Numerous other cross-claims and counterclaims followed.

Midwest and Thorpe eventually moved for summary disposition, claiming that the terms of the renovation contract between Midwest and Horizon precluded the suit. Section 11.3.6 of the general conditions of the contract provided that both parties waived all rights against each other and all subcontractors for damages to the work caused by fire and other perils if the damages were covered by insurance. The trial court granted summary disposition, holding that the contract provided for a waiver of plaintiffs' subrogation rights. Because Horizon had no right to sue under the contract, plaintiffs likewise had no right to sue.

Plaintiffs argue that the trial court committed error requiring reversal in holding that Horizon had released their subrogation rights based on the terms of the contract. They claim that the contract is ambiguous, has conflicting clauses, and is void against public policy. We disagree.

First, the contract does not contain conflicting clauses and thus is not ambiguous. The two clauses at issue are:

4.18.1 INDEMNIFICATION

> 4.18.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, the Architect, the Construction Manager, and their agents and employees from and against all claims, damages, losses and expenses, including, but not limited to, attorneys fees arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property other than the Work itself, including the loss of use resulting therefrom and (2) is caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part

> by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Paragraph 4.18.

and,

> 11.3.6 The Owner and the Contractor waive all rights against (1) each other and the Subcontractors, Sub-subcontractors, agents and employees of each other, and (2) the Architect, the Construction Manager and separate contractors, if any, and their subcontractors, sub-subcontractors, agents and employees for damages caused by fire or other perils to the extent covered by insurance obtained pursuant to this Paragraph 11.3 or any other property insurance applicable to the Work, except such rights as they may have to the proceeds of such insurance held by the Owner as trustee. The foregoing waiver afforded the Architect, the Construction Manger, their agents and employees shall not extend to the liability imposed by subparagraph 4.18.3. The Owner or the contractor, as appropriate shall require of the Architect, the Construction Manager, separate contractors, Subcontractors and Sub-subcontractors by appropriate agreements, written where legally required for validity, similar waivers each in favor of all other parties enumerated in this Subparagraph 11.3.6.

The plain language of the clauses reflects that they are not in conflict. Additionally, each clause serves a different purpose within the contract.

The waiver clause, § 11.3.6, precludes the owner from suing the contractor or its subcontractors if insurance covers the loss. The contract further provides that Horizon was responsible for obtaining insurance to cover the work. The purpose of the waiver clause was to insure that insurance covered losses to the work so that the construction project could continue unimpeded, without the parties to the contract being involved in litigation. See *Tokio Marine & Fire Ins Co v Employers Ins of Wausau*, 786 F2d 101, 104-105 (CA 2, 1986). Plaintiffs, as subrogees, necessarily are precluded from suing because of the waiver clause. Subrogation allows an insurance company to step into the insured's shoes and assert any claims the insured may have. See *Citizens Ins Co of America v American Community Mutual Ins Co*, 197 Mich App 707, 709; 495 NW2d 798 (1993). The doctrine of subrogation provides, however, that insurers have no greater rights than the insured. *Id.* The insured here waived its right to sue.

Section 4.18.1, the indemnification clause, serves a different purpose within the contract. A clause providing for indemnification is useful where a third party sues the indemnitee (here Horizon) for the indemnitor's negligence and the indemnitor (here Midwest) is bound to make the payment. See *MSI Construction Mangers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340, 342-344; 527 NW2d 79 (1995). Midwest agreed under the indemnification provision to pay the owner if the owner was sued by a third party for damages other than damages to the work. Indemnification does not arise here. Horizon was not sued by a third party and is not seeking to have Midwest make the payments. Further, the indemnity clause specifically does not pertain to damages to the work itself, which is the issue in this

case. Because the contract, read as a whole, is not ambiguous and the clauses do not conflict or create ambiguity, its terms should be enforced as written.

Plaintiffs next argue that even if the clauses are not conflicting, the waiver clause itself is ambiguous. Plaintiffs argue that if the clause truly was intended to relieve defendants of liability for their own negligence, the clause would have specifically set forth that Horizon was waiving its right to sue even if defendants acted negligently. Plaintiffs argue that when a party attempts to exculpate itself from liability stemming from its own negligence, the term "negligence" must be set forth in the exculpatory clause so that the clause is unequivocal. *American Empire Ins Co v Koenig Fuel & Supply Co,* 113 Mich App 496, 499; 317 NW2d 335 (1982). While the above proposition generally may be true, it is inapplicable in this case. The waiver clause at issue is not a straight exculpatory clause like that found in *Koenig, supra*. Instead, the clause mutually absolves both parties from liability where insurance covers the loss. The clause here was not formulated to protect one party from its own negligence like the clause in *Koenig*. Rather, it was designed for the benefit of both parties.

In *Chadwick v CSI, Ltd,* 629 A2d 820 (NH, 1993), the New Hampshire Supreme Court adopted the approach that the standard construction waiver clause is not a straight exculpatory provision:

> We disagree with . . . characterization of these contract terms as straight exculpatory provisions. They exist in the contract as part of a larger comprehensive approach to indemnifying the parties involved in the construction project, allocating the risks involved, and spreading the costs of different types of insurance. These paragraphs do not present the same concerns as naked exculpatory provisions. . . . [T]he insurance provisions of the standard AIA contract are not designed to unilaterally relieve one party from the effects of its future negligence, thereby foreclosing another party's avenue of recovery. Instead, they work to ensure that injuries or damage incurred during the construction project are covered by the appropriate types and limits of insurance, and that the costs of that coverage are appropriately allocated among the parties. . . . Not only have we acknowledged that this contractual approach to allocating insurance burdens is not contrary to public policy, we have acknowledged that it is of particular value to those involved in the construction industry. [*Id.* at 825-826.]

See also, *Willis Realty Associates v Cimino Construction* Co, 623 A2d 1287 (Me, 1993). We agree with those rulings. Further, we note that the clause at issue is not limited in its scope. The owner and contractor agreed to waive *all* claims against each other for the work if insurance covered the claims. The claim here fits within the waiver clause and the clause itself was not vague or ambiguous.

Plaintiffs next argue that if the clause was not ambiguous in and of itself, it violated public policy and should not be enforced. We disagree. Although the type of waiver clause at issue has never been evaluated by this Court, we recently stated: "It is not contrary to this state's public policy for a party to contract against liability for damages caused by its own ordinary negligence." *Skotak v Vic Tanny Int'l, Inc*, 203 Mich App 616, 617-618; 513 NW2d 428 (1994).

In *Skotak*, *supra*, the deceased had released his right to sue the defendant for negligence by entering into a membership contract. This Court ruled that if the release was made knowingly and one party intended to release the other for ordinary negligence, the release of the right to sue was valid. In this case, where the parties divided the insurance responsibilities and agreed to mutual waivers, the waiver clause allowing defendants to be released from the possibility of suit is not void against public policy. Other jurisdictions have reached the same result. See *Brodsky v Princemont Construction Co*, 354 A2d 440, 445 (Md App, 1976); *Ins Co of North America v Wells*, 300 NE2d 460, 463-464 (Ohio App, 1973).

Plaintiffs next argue that even if the waiver clause was not void and was applicable, defendants breached the contract itself and thus defendants may not use the contract to avoid liability. Specifically, plaintiffs claim that defendants breached the contract by not calling Miss-Dig and by not acting reasonably to insure the safety of the operation. This issue was not raised below or decided by the trial court and is not preserved for appeal. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). We therefore decline to address it.

Plaintiff also contends that defendants acted with gross negligence when they failed to contact Miss-Dig and failed to exercise reasonable care to insure the safety of the operation. Therefore, they argue, even if this Court upholds the waiver clause as allowing defendants to contract away liability arising from their *ordinary* negligence, it should not permit defendants to contract away liability caused by their *gross* negligence. While we agree that a party should not be able to contract away liability for its own gross negligence, we disagree that plaintiffs' contentions require reversal of the grant of summary disposition. First, we note that plaintiffs never pleaded a cause of action for gross negligence or willful misconduct. Gross negligence and ordinary negligence are separate and distinct causes of action. See *Ewing v Detroit (On Remand)*, 214 Mich App 495, 497; 543 NW2d 1 (1995). Where a theory of liability is not pled in the original or amended complaints, the issue is beyond the scope of appellate review. *Lopus v L & L Shop-Rite, Inc*, 171 Mich App 486, 492; 430 NW2d 757 (1988). In addition, we note that while the failure to call Miss-Dig was a violation of MCL 460.701 *et seq.;* MSA 22.190(1) *et seq*., a statutory violation does not create a rebuttable presumption of gross negligence. Rather, it creates a rebuttable presumption of ordinary negligence. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 194; 540 NW2d 297 (1995). No evidence or argument before this Court reflects that defendants intended to harm or acted with reckless indifference by failing to comply with the statute. Accordingly, no evidence of gross negligence exists. *Jennings v Southwood*, 446 Mich 125, 136; 521 NW2d 230 (1994).

Finally, plaintiffs argue that the court should not have granted summary disposition to Thorpe because Thorpe never raised the provisions of the contract as an affirmative defense before filing its motion for summary disposition. Further, they argue that the trial court improperly allowed Thorpe to rely on the provisions of the contract because the court never ruled on Thorpe's motion to add the affirmative defense before the summary disposition hearing. We disagree.

The hearing on Thorpe's motion to amend was scheduled for the same date as the summary disposition hearing. At that hearing, the trial court did not address separately Thorpe's motion to amend

its answer, but the court considered and applied the affirmative defense. The court tacitly ruled in favor of Thorpe on this issue. We hold that the court correctly allowed Thorpe to rely on the affirmative defense. While the court should have considered separately the motion to amend and entered an order on it, the court's failure to entertain the motion was harmless error, especially where the court acted under the assumption that it had granted the motion. See *Seebacher v Fitzgerald, Hodgman, Cawthorne & King, PC*, 181 Mich App 642, 648; 449 NW2d 673 (1989).

Moreover, the court appropriately allowed the amendment. While a defendant should plead affirmative defenses in the first responsive pleading, *Hanon v Barber*, 99 Mich App 851, 855-856; 298 NW2d 866 (1980), courts should give freely leave to amend pleadings, including answers to pleadings and affirmative defenses. *Feliciano v Dep't of Natural Resources*, 158 Mich App 497, 500-501; 405 NW2d 178 (1987). In the absence of undue delay, bad faith or dilatory motive, courts should freely confer leave to amend. *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656-658; 213 NW2d 134 (1973). No surprise or undue prejudice to plaintiffs arose through this amendment. Thorpe did not cause undue delay and exhibited neither bad faith nor dilatory motive. Additionally, plaintiffs did not rely on any of the above reasons when asserting that the court should not have granted the amendment. Thus, the court had no reason to deny the amendment.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Maura D. Corrigan
/s/ Robert J. Danhof