STATE OF MICHIGAN

COURT OF APPEALS

AUTO-OWNERS INSURANCE COMPANY, Plaintiff-Appellee, v KEIZER MORRIS, INC., Defendant, and GARY HAYWARD, Intervening Defendant-Appellant.	UNPUBLISHED June 28, 2011 No. 297657 Oakland Circuit Court LC No. 2007-086901-CK

Before: METER, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

In this action for a declaratory judgment, intervening defendant Gary Hayward appeals by delayed leave granted from a trial court order granting summary disposition to plaintiff pursuant to MCR 2.116(C)(10) and declaring that plaintiff has no duty to defend or indemnify defendant Keizer-Morris, Inc., in an underlying action brought by Hayward against Keizer-Morris. We affirm.

Hayward was injured in an explosion of an "asphalt hot box reclaimer" manufactured and sold by plaintiff's insured, defendant Keizer-Morris, to Hayward's employer. Hayward brought an action against Keizer-Morris that included a claim for breach of implied warranty. Plaintiff filed this declaratory judgment action, seeking a declaration that it was not obligated to defend or indemnify Keizer-Morris in the underlying proceeding. In a prior appeal, this Court determined that Hayward had a right to intervene in this action. *Auto-Owners Ins Co v Keizer-Morris, Inc*, 284 Mich App 610; 773 NW2d 267 (2009).

The present appeal concerns the interpretation and applicability of an exclusion in an endorsement to the commercial general liability policy issued by plaintiff to defendant. The exclusion states that "[t]his insurance does not apply to 'bodily injury' or 'property damage' included within the 'products – completed operations hazard.'" The definition section of the policy states:

"Products-completed operations hazard"

includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work . . . ."

The policy defines "Your product" as follows:

a. Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by[:]

(1) You.

* * *

b. Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

"Your product" includes:

a. *Warranties* or representations *made* at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

b. The providing of or failure to provide warnings or instructions. [Emphasis added.]

The parties disagree whether the exclusion applies to implied warranties. Hayward argues that implied warranties are not "made" and, therefore, are not within the scope of "Your product" and not within the definition of "Products-completed operations hazard." The parties raised the issue below in cross-motions for summary disposition. The trial court rejected Hayward's argument and determined that the policy unambiguously excluded coverage for Hayward's injuries.

On appeal, Hayward maintains that implied warranties are not "made," but instead arise through operation of law. Therefore, he argues, implied warranties are not within the definition of "your product," and the exclusion does not apply. We disagree.

Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). This Court also reviews de novo questions involving the interpretation of a contract. *Hastings Mut Ins Co v Safety King, Inc*, 286 Mich App 287, 291; 778 NW2d 275 (2009). As this Court explained in *Hastings Mut Ins Co*:

The same contract construction principles apply to insurance policies as to any other type of contract because it is an agreement between the parties. Thus an insurance policy must be read as a whole to determine and effectuate the parties' intent. The terms of the contract are accorded their plain and ordinary meaning.

> If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law. Clear and specific exclusionary provisions must be given effect, but are strictly construed against the insurer and in favor of the insured. [*Id*. at 291-292 (citations omitted).]

"Warranties . . . made at any time" includes implied warranties. In *Tiano v Aetna Cas & Surety Co*, 102 Mich App 177, 183, 185; 301 NW2d 476 (1980), this Court found instructive the federal district court's opinion in *Roberts v P & J Boat Service, Inc*, 357 F Supp 729 (ED La, 1973). In *Roberts*, the court examined a policy endorsement that excluded coverage for "completed operations hazard" and "products hazard." The policy stated that "products hazard" includes

> bodily injury and property damage arising out of the named insured's products or reliance upon a representation or warranty made at any time with respect thereto, but only if the bodily injury or property damage occurs away from premises owned by or rented to the named insured and after physical possession of such products has been relinquished to others . . . . [*Id*. at 732.]

Similar to Hayward, the plaintiff argued that the "'completed operations hazard' and 'products hazard' refers only to 'express warranty' so that bodily injury arising out of reliance upon an 'implied warranty' would not be excluded by the endorsement excluding these hazards." *Id*. at 734. The court disagreed, reasoning:

> The words "reliance upon a representation or warranty made at any time with respect thereto" in the hazard definitions are not, as urged by plaintiff, clearly a reference to "express warranty" and not "implied warranty". Warranties are either made expressly or made by implication. There is nothing in the language used indicating that only those warranties expressly made were intended. [*Id*.]

Hayward urges this Court to examine the dictionary definitions of "make." He contends that they show affirmative conduct that is incompatible with implied warranties, which exist by operation of law. If a term is not defined in an insurance policy, courts interpret the term in accordance with its "commonly used meaning." *Allstate Ins Co v McCarn*, 466 Mich 277, 280; 645 NW2d 20 (2002).

In the phrase "Warranties or representations made at any time . . . ," "made" is used as the past participle for "make." The pertinent definitions of "make" are: (1) "to cause to exist or happen," (2) "to establish; enact," and (3) "to provide." Random House Webster's College Dictionary (2d ed, 1997). In light of these definitions, we are not persuaded by Hayward's argument that "made" denotes affirmative conduct that is incompatible with implied warranties. Moreover, this Court's decisions have referred to implied warranties being "made." See, e.g., *Thomas v Process Equip Corp*, 154 Mich App 78, 82; 397 NW2d 224 (1986); *Uganski v Little Giant Crane & Shovel, Inc*, 35 Mich App 88, 99; 192 NW2d 580 (1971); *Economy Mills of Elwell, Inc v Motorists Mut Ins Co*, 8 Mich App 451, 456; 154 NW2d 659 (1967).

Thus, the trial court correctly granted summary disposition to plaintiff because the exclusion unambiguously excludes coverage for Hayward's injuries.

Affirmed.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto