STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-2018-530

CONTINENTAL WESTERN INSURANCE CO.,

Plaintiff,

v.

GEORGE BEAM, FEDERAL INSURANCE CO., and FRANKENMUTH MUTUAL INSURANCE CO.,

Defendants.

ORDER ON PLAINTIFF'S MOTION FOR CONTEMPT

Before the Court is Plaintiff Continental Western Insurance Company's ("Continental") Motion for Contempt. Continental alleges that Defendant Frankenmuth Mutual Insurance Company ("Frankenmuth") failed to comply with this Court's June 1, 2021 Order on Continental's Motion for Summary Judgment ("June 1 Order"). For the following reasons, the Court denies Continental's Motion.

I. Background

This declaratory judgment action arises out of a separate personal injury action brought by George Beam against Auburn Plaza, Inc. ("Auburn Plaza"), Docket No. CV-2018-67, in the Androscoggin County Superior Court ("the Underlying Action"). In the Underlying Action, Mr. Beam alleged that he was injured when he fell through a skylight in the Auburn Mall while servicing an HVAC unit for General Nutrition Corporation ("GNC"), a tenant of Auburn Plaza. The Court has been advised that the Underlying Action has settled.

At the time of the accident, Auburn Plaza was insured by Continental, Mr. Beam's employer was insured by Frankenmuth, and GNC was insured by Federal Insurance Company ("Federal"). Continental defended Auburn Plaza in the Underlying Action. In this action, Continental seeks a declaratory judgment concerning Frankenmuth and Federal's duties to defend and indemnify with respect to the Underlying Action.

The June 1 Order granted Continental's Motion for Summary Judgment on the issue of Frankenmuth's duty to defend in the Underlying Action. The Court also ordered Frankenmuth to pay "one half of all defenses costs and attorney's fees associated with its defense of Auburn Plaza, Inc. in the Underlying Action." The Court later denied Federal's Motion for Summary Judgment on the issue of its duty to defend.

Continental has filed a Motion for Contempt, alleging that Frankenmuth failed to reimburse Continental for defense costs.

II. Legal Standard

M.R. Civ. P. 66 provides the procedures for contempt proceedings. Pursuant to M.R. Civ. P. 66(d)(2), a plenary proceeding for remedial sanctions may be "initiated by the court on its own motion or at the suggestion of a party." M.R. Civ. P. 66(d)(2)(A). "Contempt" may be found where a party has failed "to comply with a lawful judgment, order, writ, subpoena, process, or formal instruction of the court." M.R. Civ. P. 66(1)(2)(A)(ii); *see Edwards v. Campbell*, 2008 ME 173, ¶ 9, 960 A.2d 324.

III. Discussion

Under Maine law, an insurer's duty to defend is distinct from and broader than the duty to indemnify. *Haskell v. State Farm Fire & Cas. Co.*, 2020 ME 88, ¶ 12, 236 A.3d 458 (quoting *Elliott v. Hanover Ins. Co.*, 1998 ME 138, ¶ 11, 711 A.2d 1310). The only issue presented in Continental's Motion for Summary Judgment was that of Frankenmuth's duty to defend in the Underlying Action. The issues of indemnification and contribution

were not yet properly before the Court when it entered the June 1 Order. Thus, the Court recognizes that it should not have apportioned defense costs in the June 1 Order, and that the portion of the June 1 Order requiring Frankenmuth to immediately reimburse Continental for one half of its defense costs was premature. *See State Farm Mut. Auto. Ins. Co. v. Universal Underwriters Ins. Co.*, 513 A.2d 283, 287 (Me. 1986) ("Where two insurers cover the same risk, it is appropriate that legal fees 'also be shared between them pro rata in proportion to the respective coverage afforded by them to the insured.'" (quoting *Continental Ins. Co. v. Morgan, Olmstead, Kennedy & Gardner, Inc.*, 148 Cal. Rptr. 57, 66 (Cal. Ct. App. 1978))).

After entry of the June 1 Order, the Court denied Federal's Motion for Summary Judgment on its duty to defend, and the Underlying Action settled. This matter is now proceeding to resolution of indemnification and contribution issues. Defense costs will more appropriately be apportioned concurrently with the resolution of those claims. *See State Farm Mut. Auto. Ins. Co.*, 513 A.2d at 287; *Haskell*, 2020 ME 88, ¶ 12, 236 A.3d 458. Accordingly, the Court will not find Frankenmuth in contempt at this time.

IV. Conclusion

For the foregoing reasons, the Court denies Continental's Motion for Contempt.

The entry is:

Plaintiff Continental Western Insurance Company's Motion for Contempt is DENIED.

The Clerk is directed to incorporate this Order into the docket by reference pursuant to Maine Rule of Civil Procedure 79(a).

Dated: 08/12/2022

MaryGay Kennedy, Justice
Maine Superior Court

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-2018-530

CONTINENTAL WESTERN INSURANCE CO.,

Plaintiff,

v.

GEORGE BEAM, FEDERAL INSURANCE CO., and FRANKENMUTH MUTUAL INSURANCE CO.,

Defendants.

ORDER ON PLAINTIFF'S MOTION TO COMPEL

Before the Court is Plaintiff Continental Western Insurance Company's ("Continental") Motion to Compel. Continental requests an order compelling Defendant Frankenmuth Mutual Insurance Company ("Frankenmuth") to comply with the terms of this Court's June 1, 2021 Order. For the following reasons, the Court denies Continental's Motion.

I. Background

This declaratory judgment action arises out of a separate personal injury action brought by George Beam against Auburn Plaza, Inc. ("Auburn Plaza"), Docket No. CV-2018-67, pending in the Androscoggin County Superior Court ("the Underlying Action"). In the Underlying Action, Mr. Beam alleges that he was injured when he fell through a skylight in the Auburn Mall while servicing an HVAC unit on the roof. At the time of the accident, Auburn Plaza was insured by Continental under a commercial general liability policy and an excess liability policy. Continental has been defending Auburn Plaza in the

Underlying Action. Mr. Beam's employer was insured by Frankenmuth at the time of the accident.

By Order dated June 1, 2021, the Court granted Continental's Motion for Summary Judgment on the issue of Frankenmuth's duty to defend in the Underlying Action and ordered Frankenmuth to pay "one half of all defenses costs and attorney's fees associated with its defense of Auburn Plaza, Inc. in the Underlying Action." Frankenmuth appealed the Court's June 1, 2021 Order to the Law Court. The Law Court dismissed the appeal as interlocutory because this Court has not yet disposed of a claim pending against Federal Insurance Company.

Now, Continental has filed a "Motion to Compel," alleging that Frankenmuth has failed to comply with its obligations to share in defense costs, and seeking an order compelling Frankenmuth to comply with its payment obligations under the June 1, 2021 Order.[1] Continental does not specify under which Rule of Civil Procedure it brings the Motion, and it is not immediately apparent to the Court. However, because the relief sought in the Motion is most akin to relief available in a plenary contempt proceeding, the Court interprets the motion as a motion for contempt seeking remedial measures.[2]

II. Legal Standard

M.R. Civ. P. 66 provides the procedures for initiating contempt proceedings. Pursuant to M.R. Civ. P. 66(d)(2), a plenary proceeding for remedial sanctions may be "initiated by the court on its own motion or at the suggestion of a party. The motion of a party shall be under oath and set forth the facts that give rise to the motion or shall be

[1] In its opposition, Frankenmuth asserts that it is not required to comply with the June 1, 2021 Order because it is not an appealable final judgment. The Court notes that noncompliance with interlocutory orders may also subject a party to sanctions or a contempt proceeding.

[2] Apparently, Continental seeks only compelled compliance with Frankenmuth's payment obligations under the June 1, 2021 Order. Nothing in Continental's Motion suggests that punitive sanctions are sought.

accompanied by a supporting affidavit setting forth the relevant facts." M.R. Civ. P. 66(d)(2)(A).

III. Discussion

M.R. Civ. P. 11 states that "[e]xcept when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit." M.R. Civ. P. 11(a). M.R. Civ. P. 66(d)(2)(A) creates an exception to the general rule of M.R. Civ. P. 11. Accordingly, an attorney's signature, alone, does not satisfy the procedural requirements of M.R. Civ. P. 66. *In re Est. of Lake*, 2016 ME 64, ¶ 9, 138 A.3d 483. Because Continental's Motion is signed only by counsel and is unaccompanied by a supporting affidavit, the Court must deny the Motion.

IV. Conclusion

For the foregoing reasons, the Court denies Continental's Motion to Compel.

The entry is:

Continental Western Insurance Company's Motion to Compel is DENIED.

The Clerk is directed to incorporate this Order into the docket by reference pursuant to Maine Rule of Civil Procedure 79(a).

Dated: 02/10/2022

MaryGay Kennedy, Justice
Maine Superior Court

Entered on the Docket: 2/11/22

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-18-530

CONTINENTAL WESTERN INSURANCE COMPANY,

Plaintiff,

v.

GEORGE BEAM, et al.,

Defendants.

ORDER ON DEFENDANT FEDERAL INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

Before the court is Defendant Federal Insurance Company's Motion for Summary Judgment against Plaintiff Continental Western Insurance Company. For the following reasons, the motion is denied.

I. Summary Judgment Factual Record

This matter arises out of a personal injury action brought by George Beam against Auburn Plaza, in which Mr. Beam seeks to recover damages for serious injuries he sustained after falling through a skylight on the roof of the Auburn Plaza (the "Underlying Action"). Mr. Beam was on the roof to service an HVAC unit for General Nutrition Corporation ("GNC"), a tenant of Auburn Plaza ("the Mall"). At the time of the incident, Auburn Plaza was insured by Plaintiff Continental Western Insurance Company ("Continental"), and GNC was insured by Defendant Federal Insurance Company ("Federal").

GNC has been a tenant of the Mall since 1991. (Supp'g S.M.F. ¶ 1.) Under the terms of its lease, GNC is contractually obligated to maintain the rooftop HVAC system that services the leased premises. (Supp'g S.M.F. ¶ 12.) Auburn Plaza (as landlord) is charged

with the operation, maintenance, and repair of all common areas, and these obligations include snow and ice removal on the roof. (Supp'g S.M.F. ¶¶ 6-9.)

On February 18, 2015, Mr. Beam, an employee of Atlantic Comfort Systems ("ACS"), arrived at the Mall to perform service on GNC's HVAC unit. (Supp'g S.M.F. ¶ 15.) In accordance with ACS's procedures, Mr. Beam signed in at the Mall's office and asked about accessing the unit. (Supp'g S.M.F. ¶ 17.) It was the standard practice of ACS technicians to contact Mall security rather than the individual customer to gain access to the roof. (Supp'g S.M.F. ¶ 18.) An agent of the Mall's security company escorted Mr. Beam to a maintenance room and instructed him that the roof was accessed by a ladder, which in turn was accessible through a latched door. (Supp'g S.M.F. ¶ 19.) While walking on the roof, Mr. Beam stepped on a skylight that was located above a common area of the Mall. (Supp'g S.M.F. ¶ 20.) At the time of the fall, he was not near GNC's leased premises nor its HVAC system. (Supp'g S.M.F. ¶ 21.) He did not see the skylight because it was covered with snow and not visible. (Supp'g S.M.F. ¶ 22.) Mr. Beam fell over 20 feet to the cement floor of the Mall below. (Supp'g S.M.F. ¶ 23.)

On or about May 29, 2018, Mr. Beam filed suit against Auburn Plaza, *George Beam v. Auburn Plaza, Inc.*, Docket No. CV-18-67, pending in the Androscoggin Country Superior Court, alleging that the Mall knew or should have known of the dangerous skylight condition and failed to warn him about it, among other allegations that it breached its duty of care to him. (Supp'g S.M.F. ¶ 25.) On November 13, 2018, Continental filed a Complaint for Declaratory Judgment, seeking a declaration that Auburn Plaza qualifies as an additional insured under GNC's commercial general liability policy with Federal, and that Federal is therefore contractually obligated to provide Auburn Plaza with a defense in the Underlying Action. Federal now moves for summary judgment on all counts alleged against it in Continental's Complaint.

Pursuant to its commercial lease with Auburn Plaza, GNC is required to obtain commercial general liability insurance "applicable to the Leased Premises and its appurtenances," and Auburn Plaza must be covered under the policy as an additional insured. (Supp'g S.M.F. ¶ 13-14.) According to GNC's policy with Federal, Lessors of Premises are insureds subject to the following caveats:

> Persons or organizations from whom [GNC] lease[s] premises are insureds, but they are insureds only with respect to the ownership, maintenance or use of that particular part of such premises leased to [GNC] and only if [GNC is] contractually obligated to provide them with such insurance as is afforded by this contract.
>
> However, no such person or organization is an insured with respect to any:
> - Damages arising out of their sole negligence;
> - Occurrence that occurs, or offense that is committed, after [GNC] cease[s] to be a tenant in the premises; or
> - Structural alteration, new construction or demolition performed by or on behalf of them.
>
> (Supp'g S.M.F. ¶ 29.)

In the instant motion, Federal seeks summary judgment on the basis of two provisions in the Lessors of Premises endorsement: first, that Mr. Beam's injuries did not occur "with respect to the ownership, maintenance or use" of the leased premises, and second, that Auburn Plaza's negligence was the sole cause of Mr. Beam's injuries. Federal argues that Auburn Plaza does not qualify as an additional insured in this case, and therefore has no duty to defend Auburn Plaza in the Underlying Action.

II. Standard of Review

A party is entitled to summary judgment when review of the parties' statements of material facts and the record to which the statements refer demonstrate that there is no genuine issue as to any material fact in dispute, and that the moving party is entitled to judgment as a matter of law. *Dyer v. Dep't of Transp.*, 2008 ME 106, ¶ 14, 951 A.2d 821;

M.R. Civ. P. 56(c). A contested fact is "material" if it could potentially affect the outcome of the case. *Id.* A "genuine issue" of material fact exists if the claimed fact would require a factfinder to "choose between competing versions of the truth." *Id.* (quoting *Farrington's Owners' Ass'n v. Conway Lake Resorts, Inc.*, 2005 ME 93, ¶ 9, 878 A.2d 504).

When deciding a motion for summary judgment, the court reviews the evidence in the light most favorable to the non-moving party. *Id.* A plaintiff opposing a summary judgment motion must establish a prima facie case for each element of each of his or her claims. *Tri-Town Marine, Inc. v. J.C. Milliken Agency, Inc.*, 2007 ME 67, ¶ 7, 924 A.2d 1066. The evidence offered in support of a genuine issue of material fact "need not be persuasive at that stage, but the evidence must be sufficient to allow a fact-finder to make a factual determination without speculating."[1] *Estate of Smith v. Cumberland Cty.*, 2013 ME 13, ¶ 19, 60 A.3d 759.

III. Discussion

In its Motion for Summary Judgment, Federal admits that Auburn Plaza is a lessor of premises and, as such, qualifies as an additional insured under GNC's general liability policy pursuant to the Lessors of Premises endorsement. (Def.'s Mot. Summ. J. 8.) It argues, however, that coverage limitations that are part of that endorsement preclude coverage for Auburn Plaza with regard to the Underlying Action. *Id.* Federal makes two arguments to support its position. First, it argues that Mr. Beam's injuries did not occur "with respect to the ownership, maintenance or use" of the leased premises, which is a prerequisite to coverage as an additional insured. Second, Federal asserts that Auburn

[1] Each party's statements must include a reference to the record where "facts as would be admissible in evidence" may be found. M.R. Civ. P. 56(e). A party's opposing statement of material facts "must explicitly admit, deny or qualify facts by reference to each numbered paragraph, and a denial or qualification must be supported by a record citation." *Stanley v. Hancock Cty. Comm'r*, 2004 ME 157, ¶ 13, 864 A.2d 169.

Plaza's negligence is the sole cause of Mr. Beam's injuries, which disqualifies it from coverage pursuant to the plain language of the Lessors of Premises endorsement.

Whether an insurer has a duty to defend is a question of law. *Harlor v. Amica Mut. Ins. Co.*, 2016 ME 161, ¶ 7, 150 A.3d 793. The duty to defend "is determined by comparing the allegations in the underlying complaint with the provisions of the insurance policy." *Commercial Union Ins. Co. v. Alves*, 677 A.2d 70, 72 (Me. 1996). "[T]he threshold for triggering an insurer's duty to defend is low." *Irving Oil, Ltd. v. ACE INA Ins.*, 2014 ME 62, ¶ 12, 91 A.3d 594. The Law Court has held that "[r]egardless of extrinsic evidence, if the complaint—read in conjunction with the policy—reveals a mere *potential* that the facts may come within the coverage, then the duty to defend exists." *Cox v. Commonwealth Land Title Ins. Co.*, 2013 ME 8, ¶ 9, 59 A.3d 1280 (emphasis in original). Here, the threshold issue before the court is whether Auburn Plaza qualifies as an "additional insured" under the GNC policy with regard to the incident giving rise to Mr. Beam's complaint.

a. Ownership, Maintenance or Use of the Leased Premises

GNC's policy provides that Auburn Plaza, as the lessor of premises, qualifies as an additional insured "only with respect to the ownership, maintenance or use of that particular part of such premises leased to [GNC]." (Supp'g S.M.F. ¶ 29.) In arguing that this provision disqualifies Auburn Plaza as an additional insured in the Underlying Action, Federal emphasizes the location of Mr. Beam's fall. Federal notes that the "Leased Premises," as defined in the Lease, do not include the roof of the Mall, where the injury actually occurred. (Def.'s Mot. Summ. J. 9.) The roof is a common area and GNC has only a non-exclusive license to use it, at all times subject to Auburn Plaza's "exclusive control and management." *Id.* Federal also argues that there is no coverage for Auburn Plaza under the Lessors of Premises endorsement because the Underlying Action does

not reference or implicate GNC[2] or the leased premises. (Def.'s Mot. Summ. J. 11.) It asserts that the limiting phrase "but only with respect to" necessitates a connection between the injury and the activities enumerated in the endorsement—the ownership, maintenance, or use of the leased premises—and that the allegations in the Beam complaint demonstrate that no such connection exists. (Def.'s Mot. Summ. J. 13.) Federal concludes that the connection between Mr. Beam's injuries and "that particular part of such premises leased to [GNC]" is a "purely incidental one." (Def.'s Mot. Summ. J. 15.)

In response, Continental argues that Mr. Beam's negligence allegations against Auburn Plaza trigger Federal's duty to defend because Auburn Plaza's exposure in the Beam action relates to the maintenance obligations of GNC's leased premises. (Pl.'s Opp'n to Def.'s Mot. Summ. J. 6.) GNC was required to maintain the rooftop HVAC system and had a license to use the roof for that purpose, and it was in the course of carrying out that maintenance obligation that Mr. Beam was injured. Continental argues that the so-called "incidental" relationship between Auburn's exposure to liability and GNC's leased premises is enough to satisfy the requirements of the endorsement, and that Federal is demanding too strong of a causal relationship. (Pl.'s Opp'n to Def.'s Mot. Summ. J. 12.)

It does not appear that Maine courts have addressed this particular endorsement language. Nethertheless, the fact that Mr. Beam's injuries occurred outside of the parameters of GNC's leased premises has little bearing on whether the injury occurred

[2] In its Statement of Material Facts, Plaintiff Continental points out that Mr. Beam does in fact reference GNC twice in his complaint. Paragraph 6 of the underlying complaint states that "GNC called ACS requesting HVAC services for the HVAC system on the rooftop of said Auburn Mall," and Paragraph 8 of the underlying complaint states that "Plaintiff, an invitee of GNC, arrived at Auburn Mall in response to the service call placed by GNC to ACS." (Add. S.M.F. ¶¶ 2-3.)

"with respect to the ownership, maintenance or use" of the leased premises.[3] As Continental points out in its brief, the broad language of the additional insured endorsement does not restrict coverage to incidents occurring "inside" the leased space. When comparing the allegations in the Beam complaint with the language of the policy, and in light of the low threshold for triggering an insurer's duty to defend under Maine law, the court concludes that there is a possibility that Auburn Plaza's liability arises out of GNC's "ownership, maintenance or use" of the leased premises, and therefore qualifies as an additional insured under GNC's policy with Federal.

Defendant Federal Insurance Company has not demonstrated that, as a matter of law, there is no possibility or construction of Federal's policy language that would preclude a duty to defend Auburn Plaza in the Underlying Action. Summary judgment is denied.

b. Sole Negligence

Federal next argues that even if it could be shown that Mr. Beam's injuries arose "with respect to the ownership, maintenance or use" of the leased premises, it has no duty to defend Auburn Plaza because Auburn Plaza's own negligence is the sole cause of Mr. Beams injuries, and GNC's Policy states that organizations from whom GNC leases premises are not insureds "with respect to any . . . [d]amages arising out of their sole negligence." (Supp'g S.M.F. ¶ 29.) In response, Continental notes that no factfinder has concluded that Auburn's conduct was the sole cause of Mr. Beam's injuries. As Continental posits in its reply brief, it is entirely possible that a jury could find Auburn

[3] The court is not convinced that the narrow language specifying that the ownership, maintenance, or use must relate to "that particular part of such premises leased to [GNC]" changes this analysis, an argument that Federal raises in its Corrected Reply Brief to Plaintiff's Opposition to Defendant's Motion for Summary Judgment.

Plaza not liable or only partly liable for the plaintiff's injuries, precluding the application of the "sole negligence" exception. The court agrees that this is a fact-intensive analysis, and the question of whether Auburn Plaza is solely liable cannot be answered simply by reading Mr. Beam's complaint.

Thus, viewing the evidence in the light most favorable to the nonmoving party, there exists a genuine dispute as to whether Auburn Plaza was solely negligent for Mr. Beam's injuries. Summary judgment is denied on this ground.

IV. Conclusion

For the foregoing reasons, Defendant Federal Insurance Company's Motion for Summary Judgment is DENIED.

The Clerk is directed to incorporate this Order into the docket by reference pursuant to Maine Rule of Civil Procedure 79(a).

Dated: 3/4/2021

MaryGay Kennedy, Justice
Maine Superior Court

Entered on the Docket: 3/24/2021

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-18-530

CONTINENTAL WESTERN INSURANCE COMPANY,

Plaintiff

v.

GEORGE BEAM, FEDERAL INSURANCE COMPANY and FRANKENMUTH MUTUAL INSURANCE COMPANY

Defendant

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Before the court is plaintiff Continental Western Insurance Company's ("Continental") motion for summary judgment against defendant Frankenmuth Mutual Insurance Company ("Frankenmuth"). For the following reasons, the motion is granted.

I. Summary Judgment Factual Record

This declaratory judgment action arises out of a personal injury action brought by George Beam ("Mr. Beam") against Auburn Plaza, Inc. ("Auburn Plaza"), George Beam v. Auburn Plaza, Inc., Docket No. CV-18-67, pending in the Androscoggin Country Superior Court. Mr. Beam's lawsuit (the "Underlying Action") seeks to recover damages for injuries he sustained on February 18, 2015, after falling through a skylight on the roof of the Auburn Mall. (Pl.'s Ex. 1 ¶¶ 8, 15-17.) Mr. Beam alleges that his injuries were caused by Auburn Plaza's negligent failure to remove snow that was concealing the skylight, and its failure to warn of, or otherwise mark the location of the skylight. (*Id.* ¶ 26.)

The accident occurred while Mr. Beam was on the roof servicing an HVAC unit for General Nutrition Corporation ("GNC"), a tenant of the Auburn Mall. (Supp.'g S.M.F. ¶ 4.) Pursuant to

GNC's commercial lease with Auburn Plaza, GNC was contractually obligated to maintain the rooftop HVAC system that services the leased premises. (*Id.* ¶ 7.) Mr. Beam was an employee of Atlantic Comfort Systems ("Atlantic"). (*Id.* ¶ 2.) Facility Source, a maintenance services broker and one of Atlantic's customers, hired Atlantic to service GNC's HVAC system. (*Id.* ¶¶ 9-10.)

Continental is currently defending Auburn Plaza in the Underlying Action pursuant to its obligation as Auburn Plaza's insurer. (*See Id.* ¶ 23.) According to the terms of GNC's commercial lease with Auburn Plaza, any contractor GNC brings onto the leased premises must carry commercial general liability coverage with limits of $ 3,000,000 and the contractor must designate Auburn as an additional insured. (*Id.* ¶ 4.) Atlantic was insured under a commercial general liability policy issued by Frankenmuth (the "Frankenmuth Policy"). (*Id.* ¶ 15.)

Who qualifies as an additional insured under the Frankenmuth Policy is governed by the terms of the Frankenmuth Policy's Additional Insured Endorsement. (*Id.* ¶ 17.) Continental brought this action against Frankenmuth, among others, seeking a declaratory judgment that Auburn Plaza is an "additional insured" under the Frankenmuth Policy, and that Frankenmuth is obligated to defend and indemnify Auburn Plaza in the Underlying Action. (Compl. ¶ 28.) Frankenmuth moved for summary judgment, arguing that it had no obligation to defend or indemnify Auburn Plaza with respect to the allegations in the Underlying Action. (Supp.'g S.M.F. ¶ 18.) The court denied Frankenmuth's motion for summary judgment because there are several issues of material fact as to whether Auburn Plaza qualifies as an additional insured under the terms of the Additional Insured Endorsement. (Order Def. Frankenmuth Mot. Summ. J. at 7, 9.)

Continental has filed this motion for summary judgment against Frankenmuth claiming that there are no issues of material fact with respect to Frankenmuth's duty to defend Auburn Plaza

in the Underlying Action. Frankenmuth opposed the motion and filed a cross-motion for summary judgment of its own.

III. Standard of Review

A party is entitled to summary judgment when a review of the parties' statements of material facts and the record to which the statements refer demonstrate that there is no genuine issue as to any material fact in dispute, and that the moving party is entitled to judgment as a matter of law. *Dyer v. Dep't of Transp.*, 2008 ME 106, ¶ 14, 951 A.2d 821; M.R. Civ. P. 56(c). A contested fact is "material" if it could potentially affect the outcome of the case. *Id.* A "genuine issue" of material fact exists if the claimed fact would require a factfinder to "choose between competing versions of the truth." *Id.* (quoting *Farrington's Owners' Ass'n v. Conway Lake Resorts, Inc.*, 2005 ME 93, ¶ 9, 878 A.2d 504).

When deciding a motion for summary judgment, the court reviews the evidence in the light most favorable to the non-moving party. *Id.* The evidence offered in support of a genuine issue of material fact "need not be persuasive at that stage, but the evidence must be sufficient to allow a fact-finder to make a factual determination without speculating." *Estate of Smith v. Cumberland Cty.*, 2013 ME 13, ¶ 19, 60 A.3d 759.

IV. Discussion

Continental's motion is based on the court's reasoning in denying Frankenmuth's earlier motion for summary judgment. Specifically, the court said that there was an issue of material fact as to whether the Frankenmuth Policy extends to Auburn Plaza. (Order Def. Frankenmuth Mot. Summ. J. at 8-9.) Continental argues that this implies Frankenmuth has a duty to defend Auburn Plaza in the Underlying Action.

Whether an insurer has a duty to defend is a question of law. *Harlor v. Amica Mut. Ins. Co.*, 2016 ME 161, ¶ 7, 150 A.3d 793. In a typical coverage dispute, the Court compares the allegations in the underlying complaint with the coverage provided in the insurance policy. *Id.* ¶ 8. "The facts alleged in the [underlying] complaint need not make out a claim that specifically and unequivocally falls within the coverage. Rather, where the events giving rise to the complaint may be shown at trial to fall within the policy's coverage, an insurer must provide the policyholder with a defense."[1] *Mitchell v. Allstate Ins. Co.*, 2011 ME 133, ¶ 10, 36 A.3d 876 (quotation marks omitted) (citations omitted).

Frankenmuth's opposition to this motion mostly repeats the arguments they put forward on its earlier motion for summary judgment. Frankenmuth argues that none of the requirements of the Additional Insured Endorsement were met, so Auburn Plaza was not an additional insured under the Frankenmuth Policy. The Additional Insured Endorsement reads, in the relevant part:

> Who is an insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. But:
>
> 1. Such person or organization is an additional insured only with respect to liability for "bodily injury," "property damage," or "personal and advertising injury" caused, in whole or in part, by:
>
>   a) Your acts or omissions; or
>   b) The acts or omissions of those acting on your behalf in the performance of "your work" for the additional insured
>
> 2. Such written contract or agreement must be:
>   a) Currently in effect or becoming effective during the term of this policy; and
>   b) Executed prior to the "bodily injury," "property damage," or "personal and advertising injury."

[1] "[A]n insurer's duty to defend should be decided summarily and in favor of the insured if there exists any legal or factual basis, which could be developed at trial, that would obligate the insurer to pay under the policy." *Mullen v. Daniels*, 598 A.2d 451, 453 (Me. 1991) (quotations omitted) (citation omitted).

(Frankenmuth Mot. Summ. J. Supp.'g S.M.F. Ex. D.) The Additional Insured Endorsement would require three findings for there to be coverage in this case: (1) that Atlantic was performing services for Auburn Plaza at the time of the accident; (2) that there was a written contract;[2] and (3) that Mr. Beam's injuries were caused, in whole or in part, by the acts or omissions of either Auburn Plaza or those acting on its behalf in the performance of the work for the additional insured.

The written contract requirement and the scope of the coverage were both litigated on Frankenmuth's motion for summary judgment. The court found that there remained issues of material fact as to both of these requirements and denied the motion. Contrary to Frankenmuth's assertions, nothing has changed in the record to suggest that it has been "confirmed" that no written contract existed between Auburn Plaza and GNC. (Reply Opp. Cross Mot. Summ. J. at 2.) Furthermore, even if there was no written contract between Auburn Plaza and GNC, the requirement could still be satisfied with a written contract between GNC and Atlantic or Facility Source and Atlantic if the contract required Auburn Plaza be named as an additional insured. *See Pro Con*, 794 F. Supp. 2d at 250-53. The court will not duplicate its analysis here. There remain issues of material fact as to the written contract requirement and the scope of the coverage.

Frankenmuth did not argue that Atlantic was not performing services for Auburn Plaza at the time of the accident on its earlier motion for summary judgment. The court did not discuss the issue in its order because the parties did not raise it. Now Frankenmuth argues that because maintenance of the rooftop HVAC system was GNC's responsibility under the lease, Atlantic

[2] As discussed in the court's order on Frankenmuth's motion for summary judgment, the written contract need not be between Auburn Plaza and Atlantic. A written contract between the insured party and its subcontractor requiring that another party be named as an additional insured also satisfies the written contract requirement. *Pro Con, Inc. v. Interstate Fire & Casualty Co.*, 794 F. Supp. 2d 242, 250-53 (D. Me. 2011).

was not performing work for Auburn Plaza when the accident occurred. (*See* Opp. at 5.) Continental argues that even though Atlantic did not contract directly with Auburn Plaza it was still performing services for Auburn Plaza because it was servicing the HVAC system to satisfy GNC's obligation to Auburn Plaza under the lease. (Opp. Cross Mot. Summ. J. at 3.)

The Additional Insured Endorsement does not clarify what it means to perform operations for a person or organization. However, in *Pro Con, Inc. v. Interstate Fire & Casualty Co.*, 794 F. Supp. 2d 242, 252 (D. Me. 2011), neither party contested, and United States District Court for the District of Maine held, that a subcontractor was performing work for a general contractor for the purposes of classifying the general contractor as an additional insured even though there was no direct relationship between them. Auburn Plaza is one more degree of separation away from Atlantic than a general contractor, but the work performed by Atlantic was still done to satisfy contractual duties owed to Auburn Plaza just as a subcontractor performs work to satisfy contractual duties owed to a general contractor. "Any ambiguity must be resolved in favor of a duty to defend." *Massachusetts Bay Ins. Co. v. Ferraiolo Constr. Co.*, 584 A.2d 608, 609 (Me. 1990). The court concludes, based on the undisputed facts, that Atlantic was indirectly performing operations for Auburn Plaza within the meaning of the Additional Insured Endorsement when the accident occurred.

To reiterate: "an insurer's duty to defend should be decided summarily and in favor of the insured if there exists any legal or factual basis, which could be developed at trial, that would obligate the insurer to pay under the policy." *Mullen*, 598 A.2d at 453. Genuine issues of material fact exist when the facts in the record would require the factfinder to choose between competing versions of the truth. *Mitchell*, 2011 ME 133, ¶ 10, 36 A.3d 876. The fact that there are issues of material fact as to whether Auburn Plaza is covered as an additional insured under

the Frankenmuth Policy means, therefore, that one version of the truth that could be developed at trial would find coverage under the policy. Summary judgment against Frankenmuth on the duty to defend must be granted. Frankenmuth is therefore liable for half of the defense costs and attorney's fees associated with the defense from the date that it received a tender letter from Continental requesting that it agree to defend and indemnify Auburn. *See Anderson v. Virginia Sur. Co.*, 985 F. Supp. 182, 193 (D. Me. 1998).

The entry is

> Plaintiff Continental Western Insurance Company's Motion for Summary Judgment is GRANTED. Defendant Frankenmuth Mutual Insurance Company is hereby ORDERED to pay Continental Western Insurance Company one half of all defense costs and attorney's fees associated with its defense of Auburn Plaza, Inc. in the Underlying Action.
>
> The Clerk is directed to enter this order into the docket by reference pursuant to M.R.Civ.P. 79(a).

Date: June 1, 2020

MaryGay Kennedy
Justice, Superior Court

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-18-530

CONTINENTAL WESTERN INSURANCE COMPANY, Plaintiff, v. GEORGE BEAM, FEDERAL INSURANCE COMPANY, and FRANKEMNUTH MUTUAL INSURANCE COMPANY, Defendants.	)	ORDER ON DEFENDANT FRANKENMUTH MUTUAL INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendant Frankenmuth Mutual Insurance Company ("Frankenmuth's") Motion for Summary Judgment against Plaintiff Continental Western Insurance Company ("Continental"). For the following reasons, Frankenmuth's Motion is denied.

I. Summary Judgment Factual Record

The subject of this declaratory judgment action arises out of a separate personal injury action brought by George Beam ("Mr. Beam") against Auburn Plaza, Inc. ("Auburn Plaza"), *George Beam v. Auburn Plaza, Inc.*, Docket No. CV-18-67, pending in the Androscoggin Country Superior Court. Mr. Beam's lawsuit (the "Underlying Action") seeks to recover damages for injuries he sustained on February 18, 2015, after falling through a skylight on the roof of the Auburn Mall.[1] (Supp.'g S.M.F. ¶ 3.) Mr. Beam alleges that his injuries were caused by Auburn Plaza's negligent failure to remove snow that

[1] Frankenmuth failed to attach as an exhibit Mr. Beam's underlying complaint against Auburn Plaza. Because Continental attached a copy to its Opposition, the Court will consider Frankenmuth's statements that cite to Mr. Beam's complaint.

For Plaintiff: Doreen Connor, Esq.

For Defendants:
David Marchese, Esq. (for George Beam)
John Wall, Esq. & Gregory Fleming, Esq. (for Federal Ins Co)
Martica Douglas, Esq. (for Frankenmuth Mutual Ins Co)

was concealing the skylight, and its failure to warn of, or otherwise mark the location of the skylight.[2] (Supp.'g S.M.F. ¶ 5.)

The accident occurred while Mr. Beam was on the roof servicing an HVAC unit for General Nutrition Corporation ("GNC"), a tenant of the Auburn Mall. (Supp.'g S.M.F. ¶ 7.) Pursuant to GNC's commercial lease with Auburn Plaza, GNC was contractually obligated to maintain the rooftop HVAC system that services the leased premises. (Add. S.M.F. ¶ 5.) Mr. Beam was an employee of Atlantic Conform Systems ("Atlantic"). (Supp.'g S.M.F. ¶ 6.) Facility Source, a maintenance services broker and one of Atlantic's customers, hired Atlantic to service GNC's HVAC system. (Supp.'g S.M.F. ¶¶ 8-10.) On the day of the accident, Mr. Beam was dispatched by Atlantic, and Atlantic billed Facility for the services Mr. Beam provided. (Supp.'g S.M.F. ¶¶ 11-12; Add. S.M.F. ¶ 2.) Atlantic had been servicing the GNC HVAC system at the Auburn Mall for several years preceding Mr. Beam's accident, and the system is typically serviced four to six times a year. (Add. S.M.F. ¶¶ 7, 10.)

At the time of the accident, Auburn Plaza was insured by Continental under both a commercial general liability policy and an excess liability policy.[3] (Supp.'g S.M.F. ¶ 15.) Continental is currently defending Auburn Plaza in the Underlying Action pursuant to

---

[2] Continental, in its Response to Frankenmuth's Statement of Material Facts, attempts to partially admit Paragraph 5. The Maine Rules of Civil Procedure prohibit such parsing. An admission must begin with the designation "'[a]dmitted' . . . and shall end with such designation." M.R. Civ. P. 56(h)(2). If a party does not expressly admit a fact, then the party must controvert it through a denial or a qualification. *Stanley v. Hancock Cty. Comm'rs*, 2004 ME 157, ¶ 18, 864 A.2d 169.

[3] Paragraphs 2, 15, 16 and 21 of Frankenmuth's Statement of Material Facts are not properly supported by references to the record considering the Court is not in receipt of Defendant's Request for Admission – the record to which these statements refer. *See* M.R. Civ. P. 56(e). In the absence of specific record references, the proffered facts are not properly before the court. *Levine v. R.B.K. Caly Corp.*, 2001 ME 77, ¶ 9, 770 A.2d 653. The court is neither required nor permitted to independently search a record to find support for facts offered by a party. *Id.*

its obligation as Auburn Plaza's insurer. (Supp.'g S.M.F. ¶ 16.) According to the terms of GNC's commercial lease with Auburn Plaza, any contractor GNC brings onto the leased premises must carry commercial general liability coverage with limits of $ 3,000,000 and the contractor must designate Auburn as an additional insured.[4] (Add. S.M.F. ¶ 4.) Atlantic was insured under a comprehensive general liability policy issued by Frankenmuth (the "Frankenmuth Policy"). (Supp.'g S.M.F. ¶ 17.)

If Facility required Atlantic to name a third party as an additional insured on its policy, Facility would provide the proper verbiage, and Atlantic would then ask its insurance agent to issue a renewal of the certificate of insurance. (Add. S.M.F. ¶ 11.) It is Atlantic's standard practice to arrange for its insurance agent to send certificates of insurance to the owner of the premises serviced by its technicians, and it had previously issued certificates designating Auburn Plaza as an "additional insured." (Supp.'g S.M.F. ¶ 19; Add. S.M.F. ¶ 10.) Mr. Beam would not have been permitted to access the roof without a certificate of insurance confirming that Auburn Plaza was named as an additional insured on Atlantic's policy with Frankenmuth. (Add. S.M.F. ¶ 6.)

A copy of the Certificate of Insurance from Atlantic's insurance agent and issued to Auburn Plaza has been provided and attached as Defendant's Exhibit E. (Supp.'g S.M.F. ¶ 20.) The additional insured's language on the 2015 Certificate of Insurance issued to Auburn Plaza would have been dictated by an earlier agreement between Atlantic and Facility. (Add. S.M.F. ¶ 14.)

[4] Frankenmuth did not reply to Continental's Additional Statement of Material Facts. Consequently, those Additional Statement of Material Facts that are properly supported by record references have been admitted. *See* M.R. Civ. P. 56(h)(4) ("Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted.").

Mr. Beam has been receiving workers' compensation benefits from Atlantic as a result of his injuries; in turn, Atlantic's workers compensation insurance has increased by 240%. (Supp.'g S.M.F. ¶¶ 21-22.) This modification to Atlantic's insurance has disqualified it from bidding on certain jobs. (Supp.'g S.M.F. ¶ 23.)

Continental brought this action against Frankenmuth, among others, seeking a declaratory judgment that Auburn Plaza is an "additional insured" under the Frankenmuth Policy, and that Frankenmuth is obligated to defend and indemnify Auburn Plaza in the Underlying Action. (Def.'s Mot. Summ. J. 3.)

II. Standard of Review

A party is entitled to summary judgment when a review of the parties' statements of material facts and the record to which the statements refer demonstrate that there is no genuine issue as to any material fact in dispute, and that the moving party is entitled to judgment as a matter of law. *Dyer v. Dep't of Transp.*, 2008 ME 106, ¶ 14, 951 A.2d 821; M.R. Civ. P. 56(c). A contested fact is "material" if it could potentially affect the outcome of the case. *Id.* A "genuine issue" of material fact exists if the claimed fact would require a factfinder to "choose between competing versions of the truth." *Id.* (quoting *Farrington's Owners' Ass'n v. Conway Lake Resorts, Inc.*, 2005 ME 93, ¶ 9, 878 A.2d 504).

When deciding a motion for summary judgment, the court reviews the evidence in the light most favorable to the non-moving party. *Id.* The evidence offered in support of a genuine issue of material fact "need not be persuasive at that stage, but the evidence must be sufficient to allow a fact-finder to make a factual determination without speculating." *Estate of Smith v. Cumberland Cty.*, 2013 ME 13, ¶ 19, 60 A.3d 759.

III. Discussion

Whether an insurer has a duty to defend is a question of law. *Harlor v. Amica Mut. Ins. Co.*, 2016 ME 161, ¶ 7, 150 A.3d 793. In a typical coverage dispute, the Court compares the allegations in the underlying complaint with the coverage provided in the insurance policy. *Id.* ¶ 8. "The facts alleged in the [underlying] complaint need not make out a claim that specifically and unequivocally falls within the coverage. Rather, where the events giving rise to the complaint may be shown at trial to fall within the policy's coverage, an insurer must provide the policyholder with a defense."[5] *Mitchell v. Allstate Ins. Co.*, 2011 ME 133, ¶ 10, 36 A.3d 876 (quotation marks omitted) (citations omitted). Here, however, the threshold issue before the Court is whether Auburn Plaza qualified as an "additional insured" under the Frankenmuth Policy.

The dispute centers around Section II, of the Frankenmuth Policy, entitled "Who Is An Insured," which provides:

> Who is an insured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. But:
>
> 1. Such person or organization is an additional insured only with respect to liability for "bodily injury," "property damage" or "personal and advertising injury" caused, in whole or in party, by:
>   a. Your acts or omissions; or
>   b. The acts or omissions of those acting on your behalf;
>   in the performance of "your work" for the additional insured; and
> 2. Such written contract or agreement must be:
>   a. Currently in effect or becoming effective during the term of this policy; and

[5] "[A]n insurer's duty to defend should be decided summarily and in favor of the insured if there exists any legal or factual basis, which could be developed at trial, that would obligate the insurer to pay under the policy." *Mullen v. Daniels*, 598 A.2d 451, 453 (Me. 1991) (quotations omitted) (citation omitted).

b. Executed prior to the "bodily injury", "property damage", or "personal and advertising injury."

(Def.'s Ex. D.) In its Motion, Frankenmuth asserts that Auburn Plaza does not qualify as an additional insured because (1) Auburn Plaza and Atlantic never entered into a written contract with Auburn Plaza whereby Atlantic agreed that Auburn Plaza would be added as an additional insured; and (2) coverage for an additional insured is limited to injuries that were caused in whole or in part by the acts or omissions of the insured (Atlantic), or persons acting on its behalf (Mr. Beam). (Def.'s Mot. Summ. J. 5.)

A. *Written Contract or Agreement Requirement*

With regards to the written contract requirement, the record contains evidence of a Certificate of Insurance issued by Frankenmuth, at Atlantic's request, naming Auburn Plaza as an additional insured. (Supp.'g S.M.F ¶ 20; *see* Def.'s Ex. E.) The Certificate of Insurance appears to have been in effect at the time of Mr. Beam's accident. The record demonstrates that Atlantic provided these certificates in the past, consistently designating Auburn Plaza as an additional insured under its policy. (Add. S.M.F. ¶ 10; Pl.'s Opp'n to Def.'s Mot. Summ. J. 6.)

Continental denies Paragraph 14 of Frankenmuth's Statement of Material Facts that "Atlantic Comfort Systems has not had a contractual relationship with Auburn Plaza, Inc." by referencing the Certificate of Insurance. (Supp.'g S.M.F. ¶ 14; Opp. S.M.F ¶ 14.) There is no other evidence of a written agreement between the parties. Nonetheless, even if the Certificate of Insurance is insufficient to satisfy the written contract requirement, as Frankenmuth suggests, an additional insured's endorsement does not necessarily require privity between the party seeking additional insured status and the named insured. *See Pro Con, Inc. v. Interstate Fire & Casualty Co.*, 794 F. Supp. 2d 242, 250-53 (D. Me. 2011). In *Pro Con, Inc.*, the United States District Court for the District of Maine held that a written

contact between the insured party and its subcontractor requiring that another party be named as an additional insured satisfies the written contract requirement.[6] *Id.* Similarly, the facts presented here demonstrate that either a contract between Atlantic and Facility, or between Atlantic and GNC, existed requiring that Atlantic name Auburn Plaza as an additional insured. (Add. S.M.F. ¶¶ 4, 6, 8-11, 13.) The evidence suggests that GNC's was contractually obligated to name Auburn as an additional insured on any contractor policy; its lease provided that "[a]ll policies evidencing Tenant's Insurance shall specify Tenant, Landlord . . . as additional insureds." (Pl.'s Opp'n to Def.'s Mot. Summ. J. 5.) Furthermore, Atlantic's CEO, Mark Tuller, testified that Mr. Beam would not have been allowed to access the roof without a certificate of insurance confirming that Auburn Plaza was an additional insured under its policy. (Add. S.M.F. ¶ 6.)

Thus, viewing the evidence in the light most favorable to the nonmoving party, the Court concludes that that there exists a genuine dispute as to whether the written contract or agreement requirement is satisfied.

B. Scope of Coverage

Frankenmuth next argues that regardless of whether the written contract or agreement requirement is satisfied, coverage only extends to liability for bodily injuries "caused, in whole or in part" by Atlantic's or Mr. Beam's acts or omissions in the performance of its work for the additional insured. (Mot. Summ. J. 7-8.) Frankenmuth

---

[6] The court emphasized that the policy did not say "under written contract *with such additional insured*" or "*with you*" or "*with each other*" Rather, as in this case, the policy stated "[a]ny person or organization for whom you are performing operations when you and such person or organization have agreed in writing in *a contract or agreement* that such person or organization be added as an additional insured on your policy." *Pro Con Inc.*, 794 F. Supp. at 251.

references Mr. Beam's Complaint, which alleges that his injuries were caused solely by Auburn Plaza's negligence. (Supp.'g S.M.F. ¶ 5.) In Continental's reply, it asserts that, despite the allegations in the Underlying Action, it may be established at trial that Mr. Beam and/or Atlantic were comparatively at fault. (Pl.'s Opp'n to Def.'s Mot. Summ. J. 10.)

In interpreting similar "in whole or in part" policy language, the United States District Court for the District of Maine held that coverage for additional insureds can extend to injuries "attributable in part to acts or omissions by both the named insured *and* the additional insured." *Pro Con*, 794 F. Supp. 2d at 256 (emphasis in original). In *Pro Con, Inc.*, the policy language at issue involved an additional insured clause limiting liability to claims "caused, in whole or in part" by the insured's own acts or omissions. *Id.* at 254. In that case, an employee of the named insured was working at a jobsite when he slipped and fell. *Id.* at 257. In the underlying action, he alleged that Pro Con – the general contractor named as an additional insured – was negligent in maintaining the premises in a safe condition. *Id.* The court held, however, that "there also is certainly the potential that facts might be developed at trial that would result in the fact finder determining that [the plaintiff's] injuries were caused, at least in part by, the acts or omissions of [the named insured] (or its agents) . . . ." *Id.* Likewise, Continental contends that it may be established at trial that the accident was at least in part attributable to Mr. Beam's or Atlantic's own negligence, for example, by failing to investigate the presence of skylights on a roof that Atlantic had serviced in the past. (Pl.'s Opp'n to Def.'s Mot. Summ. J. 10.) In light of the requirement that insurance policies be read against the insurer, and "[a]ny ambiguity must be resolved in favor of a duty to defend," *Mass Bay Ins. Co. v. Ferraiolo Constr. Co.*, 584 A.2d 608, 609 (Me. 1990), the inference that Mr. Beam

was at least in part at fault for causing his own injuries is sufficient to raise a genuine issue of material fact as to whether Frankenmuth's policy extends to Auburn Plaza.

Viewing the evidence in the light most favorable to the nonmoving party, the Court concludes that there exists a genuine dispute as to whether Auburn Plaza falls within the scope of Frankenmuth's additional insured endorsement.

IV. Conclusion

For the foregoing reasons, Defendant Frankenmuth Mutual Insurance Company's motion for summary judgment is DENIED.

The Clerk is directed to incorporate this Order into the docket by reference pursuant to Maine Rule of Civil Procedure 79(a).

Dated: Aug 28, 2020

MaryGay Kennedy, Justice
Maine Superior Court

Entered on the Docket: 8/31/2020