STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

AMERISURE INSURANCE COMPANY, and AMERISURE MUTUAL INSURANCE COMPANY,

Plaintiffs,

Case No. 23-199600-CB

Hon. Victoria A. Valentine

v

MADISON HEIGHTS GLASS COMPANY, INC., TURNER CONSTRUCTION COMPANY, and LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Defendants,

and

MADISON HEIGHTS GLASS COMPANY, INC.,

Counter-Plaintiff,

v

AMERISURE INSURANCE COMPANY, and AMERISURE MUTUAL INSURANCE COMPANY,

Counter-Defendant,

and

MADISON HEIGHTS GLASS COMPANY, INC.,

Cross-Plaintiff,

v

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Cross-Defendant.

OPINION AND ORDER REGARDING: (1) AMERISURE MUTUAL INSURANCE COMPANY AND AMERISURE INSURANCE COMPANY'S MOTION FOR PARTIAL SUMMARY DISPOSITION AS TO LIBERTY MUTUAL FIRE INSURANCE COMPANY; (2) MADISON HEIGHTS GLASS CO., INC.'S MOTION FOR PARTIAL SUMMARY DISPOSITION AGAINST LIBERTY MUTUAL FIRE INSURANCE COMPANY; and (3) LIBERTY MUTUAL FIRE INSURANCE COMPANY'S CROSS-MOTION FOR SUMMARY DISPOSITION

The instant action is before the Court on: (1) Amerisure Mutual Insurance Company and Amerisure Insurance Company's Motion for Partial Summary Disposition as to Liberty Mutual Fire Insurance Company; (2) Madison Heights Glass Co., Inc.'s Motion for Partial Summary Disposition Against Liberty Mutual Fire Insurance Company; and (3) Liberty Mutual Fire Insurance Company's Cross-Motion for Summary Disposition.[1] The Court has reviewed the pleadings as well as the Motions, Responses, and Replies filed by the parties and has heard oral argument.

I.

Overview

On July 26, 2017, Defendant Turner Construction Company ("Turner") entered into a contract with Johns Hopkins University Applied Physics Laboratory, LLC ("Johns Hopkins") to serve as a construction manager on a project at the Johns Hopkins Applied Physics Laboratory Building located in Baltimore, Maryland (the "Project"). Turner and Defendant Madison Heights

[1] Liberty Mutual filed one document entitled "Liberty Mutual Fire Insurance Company's Response Brief in Opposition to Amerisure Insurance Company and Madison Heights Glass Company's Motion for Partial Summary Disposition, and Liberty's Cross-Motion for Partial Summary Disposition."

Glass Company, Inc. ("Madison Glass") entered into a subcontract agreement whereby Madison Glass was to furnish and install the curtain wall and exterior glazing at the Project.

In September 2020, Madison Glass initiated suit in the United States District Court for the Eastern District of Michigan against Turner for non-payment under the subcontract and for damages related to lost profits. Madison Glass and Turner subsequently entered into an arbitration agreement and voluntarily dismissed the lawsuit. On January 21, 2022, Turner filed a "Counter-Claimant Detailed Statement of Claim and Answer" wherein Turner sought payment for costs allegedly associated with the delay of the installation of the curtainwall and punch window fabrication and installation deficiencies.[2]

In correspondence dated January 27, 2022, counsel for Madison Glass requested a defense and indemnification on Turner's Counterclaim under Liberty Mutual Fire Insurance Company Commercial General Liability Policy No. TB2-625-095152-017 issued to Turner under a Contractor Controlled Insurance Program (the "Liberty Mutual Policy").[3] On November 11, 2022, Liberty Mutual denied coverage and declined to defend and/or indemnify Madison Glass with respect to the Turner Counterclaim.[4]

Subsequently, Madison Glass tendered Turner's counterclaim to Amerisure Insurance Company ("Amerisure") under Commercial General Liability and Commercial Umbrella insurance policies issued by Amerisure to Madison Glass. Amerisure agreed to defend Madison Glass under a reservation of rights.

[2] Madison Glass Motion, Exh K, Turner Counterclaim.
[3] *Id.,* 1/27/22 Request for Defense/Indemnity.
[4] *Id.*, Exh N, Denial of Request for Defense/Indemnity.

The matter proceeded in arbitration with Madison Glass defended by a law firm retained by Amerisure. An arbitration hearing was held in April 2023. In May 2023 an Arbitration Order was entered. Madison was awarded $ 2.7 million in damages and Turner was awarded approximately $16,000 related to defects in the windows.

Plaintiffs Amerisure Insurance Company and Amerisure Mutual Insurance Company ("Amerisure") filed the instant action against Madison Heights Glass Company, Inc. ("Madison Glass"), Turner Construction Company ("Turner"), and Liberty Mutual Insurance Company ("Liberty Mutual") seeking a declaratory judgment that:

> it owes no duty to defend Madison under its commercial general liability policies and commercial umbrella liability policies in connection with certain claims made by Turner relating to work performed by Madison at the Johns Hopkins university Applied Physics Laboratory Building located in Baltimore, Maryland ("the Project"), which was arbitrated in a private AAA Arbitration ("the Arbitration"). Amerisure further maintains that no coverage obligation is owed to Madison in connection with the arbitration award entered in favor of Turner and against Madison for $16,388.00 and Amerisure owes no obligation for other amounts allegedly incurred by Madison in litigation and in the Arbitration.
>
> Amerisure further seeks reimbursement from Liberty of all attorneys' fees, costs, expenses (herein "Amerisure' s Incurred Defense Fees") paid by Amerisure in defending Madison from claims alleged by Turner in the Arbitration (*i.e.*, " Turner's Statement of Claims").
>
> Amerisure requests that this Court declare the rights and obligations of the parties under Amerisure' s insurance policies and the Liberty CCIP (as defined herein). Amerisure requests that this Court find and declare the following: Amerisure does not owe an obligation to reimburse any additional litigation fees and costs incurred by Madison; Amerisure does not owe an obligation to reimburse Madison for Madison' s Employee Costs (as defined herein), and; Amerisure does not owe a coverage obligation for the Arbitration Award. [5]

Madison Glass filed a Counterclaim against Amerisure alleging in Count I that Amerisure breached its contractual obligations under Commercial General Liability and Umbrella insurance

[5] First Amended Complaint, ¶¶ 1-5. Amerisure alleges that, as of the time of filing the First Amended Complaint, it had incurred defense fees of approximately $968,694.53. *Id.* at 55.

policies by delaying its defense of Madison Glass and refusing to negotiate a settlement in good faith in the underlying arbitration. Madison Glass also seeks the entry of a declaratory judgment that Amerisure had a duty to defend and indemnify Madison Glass with respect to the arbitration and also that Amerisure was obligated to reimburse Madison Glass for losses on the Project.[6]

Madison Glass also filed a Crossclaim against Liberty Mutual alleging a breach of Liberty Mutual's contractual obligation to defend and indemnify Madison Glass against Turner's claims in the arbitration and seeking entry of a declaratory judgment that Liberty Mutual had a duty to defend and indemnify Madison Glass with respect to the arbitration and also that Liberty Mutual was obligated to reimburse Madison Glass for losses on the Project.[7]

Amerisure and Madison Glass have filed motions for summary disposition. Liberty Mutual has filed a combined response/"cross-motion" for summary disposition.

Amerisure seeks partial summary disposition under MCR 2.116(C)(8) and (C)(10) as to Liberty Mutual's primary duty to defend Madison Glass.

Madison Glass seeks summary disposition in its favor under MCR 2.116(C)(8) and (C)(10) on its crossclaims that Liberty Mutual breached its duties to defend and indemnify with respect to Turner's claims in the Arbitration.

Lastly, Liberty Mutual asserts that summary disposition in its favor is proper under MCR 2.116(C)(8) and (C)(10) regarding the claim of Amerisure and the crossclaims of Madison Glass.

[6] Counterclaim filed June 6, 2023.
[7] Crossclaim filed June 6, 2023.

II.

Standard of Review

MCR 2.116(C)(8)

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, not whether the complaint can be factually supported. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160; 934 NW2d 665 (2019); *Pawlak v Redox Corp*, 182 Mich App 758, 763; 453 NW2d 304 (1990). A motion for summary disposition based on the failure to state a claim upon which relief may be granted is to be decided on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013); *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357, 360; 466 NW2d 404 (1991).

"All well-pleaded factual allegations are accepted as a true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Wade v Dep't of Corrections*, 439 Mich 158, 162; 483 NW2d 26 (1992). Summary disposition is proper when the claim is so clearly unenforceable as a matter of law that no factual development can justify a right to recovery. *Parkhurst Homes*, 187 Mich App at 360; *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

MCR 2.116(C)(10)

A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Universal Underwriters Group v Allstate Ins Co,* 246 Mich App 713, 720; 635 NW2d 52 (2001). The court, in reviewing a motion under MCR 2.116(C)(10), "considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion." *Quinto v Cross and Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996) (citation omitted). The motion may be granted "if the affidavits or

other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.*

III.

Applicable Law/Choice of Law

The Parties' Arguments

The parties disagree as to which state's law applies to the interpretation of the Liberty Mutual Insurance Policy. Amerisure argues that either Maryland or Michigan law should apply. This is because, according to Amerisure, Maryland was the place of performance and location of the subject matter of the Liberty Mutual Policy which was specifically purchased for the purpose of insuring the operation of contractors working on the Project and the insured, Madison Glass is a Michigan entity. Amerisure argues that there is no substantive distinction between Michigan and Maryland law regarding the interpretation of insurance contracts.

Madison Glass argues that Michigan law applies because Michigan is the place of contracting, the place of negotiation, the place of performance and the place of the subject matter of the Liberty Mutual Policy, and the place of incorporation of Madison Glass and a place where Liberty Mutual does business.

Lastly, Liberty Mutual argues that New Jersey law applies because "the contracting parties contracted in New Jersey and negotiated the terms of the Liberty policy in New Jersey."[8] It argues that Liberty and Turner are the parties to the insurance contract, not Liberty and Madison Glass or Liberty and Amerisure.

[8] Libert Mutual Motion, p 8.

The choice of law issue is alleged to be relevant because of a difference between Michigan/Maryland law and New Jersey law.[9] Under Michigan law "[a]n insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy." *American Bumper and Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 451-452; 550 NW2d 475 (1996) (quotation marks and citations omitted). *See also South Macomb Disposal Authority v American Ins Co,* 225 Mich App 635, 69; 572 NW2d 686 (1997) ("[A]n insurer has a duty to defend, even where only some of the theories of liability are covered by the policy.") The same rule apparently applies under Maryland law. *See Perdue Farms, Inc v Travelers Cas and Surety Co of America*, 448 F3d 252, 257 (CA 4, 2006) (applying Maryland law) (quotation marks and citations omitted) ("if any claims potentially come within the policy coverage, the insurer is obligated to defend all claims, notwithstanding alternative allegations outside the policy's coverage.")

New Jersey law, like Michigan and Maryland, recognizes that the duty to defend is broader than the duty to indemnify. *See Grand Cove II Condo Ass'n, Inc v Ginsberg*, 291 NJ Super 58, 72: 676 A2d 1123 (App Div, 1996). However, Liberty Mutual, citing *Grand Cove*, argues that under New Jersey law the duty to defend "is not broader in the sense that it extends to claims not covered by the covenant to pay. It is only when the allegation in the complaint and the language in the policy correspond that the duty to defend *against that claim* arises. If an excluded claim is made, the insurer has no duty to undertake the expense and effort to defeat it, however frivolous it may appear to be." *Id.* (quotation marks and citations omitted) (emphasis in original).

[9] At oral argument the parties acknowledged that there is no material difference between Michigan and Maryland law regarding the duty to defend determination at issue in these Motions.

Choice of Law Analysis

The parties agree that the Liberty Mutual Policy does not contain a choice of law provision. Under this circumstance, Michigan courts consider the principles discussed in *Chrysler Corp v Skyline Indus Servs Inc*, 448 Mich 113, 125-126; 528 NW2d 698 (1995). *See Farm Bureau Ins Co v Abalos*, 277 Mich App 41, 45; 742 NW2d 624 (2007).

In *Skyline* the Michigan Supreme Court noted that "[t]he predominant view in Michigan has been that a contract is to be construed according to the law of the place where the contract was entered into." *Skyline*, 448 Mich at 122. However, the court went to state that "[t]he trend nationally, however, has been to adopt the Restatement approach emphasizing the law of the place having the most significant relation with the matter in dispute." *Id.* The Michigan Supreme Court determined that "§§ 187[10] and 188 of the [Second Restatement Conflict of Laws], with their emphasis on examining the relevant contacts and policies of the interested states, provide a sound basis for moving beyond formalism to an approach more in line with modern-day contracting realities." *Id.* at 124.

Section 188 of the Second Restatement-Conflict of Law provides:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.
>
> (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,

[10] Section 187 applies to situations where the contract at issue contains a choice-of-law provision and therefore, is not applicable to this matter.

(d) the location of the subject matter of the contract, and
(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189- 199 and 203.

Analysis of § 188 Factors

A. The Place of Contracting

"'[T]he place of contracting is the place where [the last necessary act occurred], under the forum's rules of offer and acceptance.'" *Amerisure Mutual Ins Co v Transatlantic Reinsurance Co*, 573 F Supp3d 1176, 1184 (ED Mich, 2021) quoting Restatement (Second) of Conflict of Laws § 188 comment 2. "For insurance contracts, generally the insurer's 'countersigning is the last act and the place of countersigning is the place where the contract is made.'" *Amerisure*, 573 F Supp 3d at 1184 quoting *Morbark Ind, Inc v Western Employers Ins Co*, 170 Mich App 603, 615; 429 NW2d 213 (1988).

Liberty Mutual argues that the place of contracting is New Jersey because the Policy was issued to Turner at its New Jersey address.[11] Madison Glass argues that "Michigan is the place of contracting between Madison and Liberty Mutual for the insurance policy because Madison is a Michigan entity and was in Michigan when entering into the insurance contract." Amerisure makes no argument as to the place of contracting factor.

[11] Liberty Mutual Motion/Response, Exhibit E, Affidavit of Director of Insurance Programs at Turner.

The Court finds that this factor is inconclusive. While Liberty Mutual states that the Policy was issued to Turner at its New Jersey address, it provides no information as to where the countersigning of the Policy by Liberty Mutual occurred. *See Amerisure*, 573 F Supp 3d at 1184. The Policy has signatures of the secretary and president of Liberty Mutual and lists an address in Boston, Massachusetts.[12] Additionally, the Declarations Page states that the Policy is issued by Liberty Mutual, and the Issuing Office is New York, NY.[13] The Court cannot conclude that the place of contracting was New Jersey.

The Court agrees with Liberty Mutual that the case relied on by Madison Glass in support of its argument that Michigan was the place of contract, *Ric-Man Constr, Inc v Pioneer Special Risk Ins Serv, Inc*, 522 F Supp 3d 255 (ED Mich, 2021), is distinguishable from the instant case because the Policy in this case was not issued in Michigan.[14] Moreover, as was explained above, the place of contracting is determined by the last necessary act occurred and Madison Glass has not presented evidence that the Policy was signed or countersigned in Michigan.

Based upon the foregoing, the Court concludes that the place of contracting factor is inconclusive.[15]

B. The Place of Negotiation of the Contract

Madison Glass, again relying on *Ric-Man*, argues that "the place of negotiation is Michigan because Madison is a Michigan entity." Liberty Mutual asserts that the place of negotiation is New

[12] Liberty Mutual's Motion/Response, Exh D, Form LIL 90 04 06 13, Annual Meeting Notice.
[13] *Id.* Form LC 00 04 08 12, Declaration Page.
[14] Furthermore. the reasoning of *Ric-Man* regarding the place of contracting and negotiation has been called into doubt by the only subsequent case citing the *Ric-Man* opinion. *See Amerisure Mutual Ins Co v Transatlantic Reinsurance Co*, 573 F Supp3d 1176, 1184-1185 (ED Mich, 2021).
[15] Additionally, even if New Jersey were the place of contracting this is not enough to invoke New Jersey law. "'[S]tanding alone, the place of contracting is a relatively insignificant contact.' Put differently, the contact's weight increases if other contacts also favor [that state's] law." *Amerisure*, 573 F Supp3d at 1184 quoting Restatement (Second) of Conflicts of Law § 188 comment 2.

Jersey because Turner's insurance broker is in New Jersey and the Liberty Policy was issued to Turner in New Jersey. Amerisure makes no argument regarding the "place of negotiation" contact.

> The place where the parties negotiate and agree on the terms of their contract is a significant contact. Such a state has an obvious interest in the conduct of the negotiations and in the agreement reached. *This contact is of less importance when there is no one single place of negotiation and agreement*, as for example, when the parties do not meet but rather conduct their negotiations from separate state by mail or telephone. [Restatement (Second) of Conflicts of Law § 188 comment 2I (emphasis added).]

The court finds that this factor is also inconclusive. As this Court previously discussed, the case relied on by Madison Glass in support of its argument that the place of negotiation is Michigan is distinguishable from the instant case. Additionally, although Liberty Mutual relies on an affidavit from the Director of Insurance Programs at Turner stating that the Liberty Mutual Policy was issued to Turner at Turner's New Jersey address and that the insurance broker Turner utilized is located in New Jersey this does not establish New Jersey as the "place of negotiation."[16] Liberty Mutual has not asserted any facts which would lead to a finding that that the terms of the insurance policy were ever in dispute or that there was meaningful negotiation over the insurance policy. Accordingly, this contact favors neither Michigan nor New Jersey. *See Amerisure*, 573 F Supp 3d at 1185 citing *Pacific Employers Ins Co v Global Reinsurance Corp of America*, 693 F3d 417, 437 (CA 3, 2012) ("[I]t is difficult to speak at all of a 'place of negotiation'" where there the terms of conditions of the insurance contract were never in dispute and therefore no meaningful negotiations occurred.)

Based upon the foregoing, this Court concludes that the "place of negotiation of the contract" factor favors the application of neither Michigan nor New Jersey law.

[16] Liberty Mutual Motion, Exhibit E, Francavilla Affidavit.

C. The Place of Performance

Madison Glass argues that the place of performance of the Liberty Mutual Policy is Michigan because Michigan is the location of Madison's liability and because a majority of Madison's work for the construction project took place in Michigan. Liberty Mutual argues that the place of performance factor is neutral because performance of the insurance contract occurred in New Jersey (payment of premium by Turner), and in Michigan and Maryland (states where the conduct that was the subject of the arbitration arose). Amerisure argues that the place of performance was Maryland because the Liberty Policy was specifically purchased for the purpose of insuring operations at the project location in Baltimore.

This Court agrees with Liberty Mutual's assertion that Michigan law is not clear regarding what constitutes "the place of performance." In *Amerisure*, the court stated that "[f]or insurance contracts, place of performance is where "[t]he incident for which coverage is claimed." *Ric-Man*, 522 F. Supp. 3d at 261; *see Holka*, 984 F. Supp. 2d at 694 (noting that place of performance is where payment is made on the insurance policy)." *Amerisure*, 573 F Supp 3d at 1185 However, the *Amerisure* court also cited the Michigan Supreme Court decision in *Skyline* where the Michigan Supreme Court found that a trial court correctly determined that the place of performance may not have been Illinois where the construction work was done but in Michigan.[17] The Michigan Supreme Court noted that courts "have taken the view that the place of performance of an indemnification agreement is the place where the indemnitee is found subject to liability." *Skyline Indus Servs, Inc*, 448 Mich at 128. The Supreme Court concluded that "[s]ince the place of performance of indemnification is unclear, merely because the contract was for construction in

[17] In *Skyline* the indemnification contract contained a choice of law provision designating the application of Michigan law.

Illinois does not provide a compelling basis for concluding that Illinois has a "materially greater interest' than Michigan regarding indemnification.[18] *Id.*

This Court concludes that the place of performance contact does not favor the application of New Jersey law. None of the considerations discussed above appear to favor the application of New Jersey law. Liberty Mutual asserts that payment of the premium was made in New Jersey, however, even if this is so, the above-noted case law refers to the location of payment *under* the policy. *See Holka*, 984 F Supp 2d at 694.

With regard to "[t]he incident for which coverage is claimed," *Ric-Man*, 522 F Supp 3d at 261, both Michigan and Maryland have contacts. Here the project was in Maryland, but it is also asserted that fabrication occurred in Michigan. Additionally, with regard to where payment on the insurance policy occurred or "where the indemnitee has been found subject to liability," *see Holka*, 984 F Supp 2d at 694; *Skyline Indus Servs, Inc*, 448 Mich at 128, it is argued that enforcement of the Arbitration Award is proper in Michigan.

Based on the foregoing, the Court concludes that this factor favors the application of either Michigan or Maryland law.

D. The location of the subject matter of the contract

> When the contract deals with a specific physical thing, such as land or a chattel, or affords protection against a localized risk . . . the location of the thing or risk is significant. [Restatement (Second) Conflict of Laws § 188, comment 2.]

[18] In *Skyline* the contract between the parties contained a Michigan choice of law provision. Accordingly, the Michigan Supreme Court was addressing whether, under Section 187(2)(b), Illinois had a "materially greater interest" than Michigan.

Additionally, the Second Restatement contains a provision that applies specifically to insurance contracts. *Aetna Cas. & Sur. Co. v. Dow Chem. Co.*, 883 F Supp.1101, 1106 (E.D. Mich. 1995) citing Restatement (Second) Conflict of Laws § 193. Section 193 provides that the principal location of the insured risk during the term of the policy is the most important factor to the determination of which state's law to apply.[19] Comment (b) to § 193 describes the principal location of the risk as the state where it will be located during "the major portion of the insurance period." Restatement (Second) of Conflict of Laws § 193, comment b.

This contact favors Maryland law. The Liberty Policy at issue "corresponds" to the John Hopkins Project.[20] Therefore, Maryland was the location of the insured risk during the term of the Liberty Mutual Policy.

E. <u>The place of incorporation, domicile, and place of business of the parties</u>

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[19] Section 193 states:

> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

The rule of Section 193 "applies to contracts of fire insurance, surety insurance and the various kinds of casualty insurance, such as theft insurance, liability insurance, collision insurance, workmen's compensation insurance and fidelity insurance." Restatement (Second) Conflict of Laws § 193, comment a. Accordingly, the Liberty Mutual Commercial General Liability policy in this case would fall under § 193.

[20]Amerisure Motion, Exh A, Liberty Policy. The coversheet states:

> This policy corresponds with the following Turner CCIP project:
>
> JHU APL Building 201 300343-171284
>
> The attached Policy and/or Endorsement(s) is issued to you for the above project since you are an Enrolled Party in the Turner Contractor Controlled Insurance Program (CCIP) . . . .

There is no dispute that the Turner CCIP project identified as "JHU APL Building 201 300343-171284" is the John Hopkins Project. *See* Amerisure Motion, Exhibit C, Contractor/Subcontractor Agreement.

Madison Glass is a Michigan corporation with its primary place of business in Ferndale, Michigan. Liberty Mutual asserts that it is incorporated in Wisconsin and that its principal place of business is Massachusetts. Liberty Mutual admits that it conducts business in the state of Michigan.[21] Turner is a New York corporation with a risk management office in New Jersey. Turner has contacts with Michigan and Maryland. Amerisure is a Michigan corporation.

Liberty Mutual argues that the location of Madison Glass and Amerisure is not relevant because only Liberty Mutual and Turner were parties to the insurance contract. However, there is no dispute that Madison Glass was an "insured" under the Liberty Policy and therefore, may seek to enforce the terms of the policy.[22] Liberty Mutual references several cases where the insured was the party contracting with the insurance company. However, Liberty Mutual does not cite any authority to support the conclusion that the location or place of business of a named insured cannot be considered under this factor.

The Court concludes that this contact favors Michigan. The insured "Madison Glass" is a Michigan corporation with its place of business in Michigan. Liberty Mutual acknowledges that "Liberty and Turner" have offices and do business in Michigan.[23]

Michigan law applies

Based on the foregoing, the Court concludes that no contact favors the application of New Jersey law.[24] Rather, as was discussed, under the § 188 contacts, Michigan and/or Maryland has

[21] Liberty Mutual Answer to First Amended Complaint, ¶ 8.
[22] *Id.* at ¶ 26.
[23] Liberty Mutual Answer to First Amended Complaint, ¶ 8; Libert Mutual Motion, p 14.
[24] Liberty Mutual asserts that "[i]n a similar coverage dispute, the United States Court of Appeals for the Fourth Circuit applied New Jersey law to a Turner Construction CCIP umbrella liability policy for a construction project in Bethesda, Maryland." However, the unpublished case cited by Liberty Mutual contains no choice of law analysis and, in fact, states that the parties agreed that New Jersey law governed the policy. *Schnabel Foundation Company v Nat'l Union Fire Ins Co of Pittsburgh, Pa*, 780 Fed Appx 5, 10 (CA 4, 2019).

the most significant relation with the matter in dispute. The parties agreed at oral argument that there is no substantive difference between Michigan and Maryland law regarding the interpretation of insurance contracts or the duty to defend issues in this case. Accordingly, there is no "true conflict" between Michigan law and Maryland law with regard to this matter and this Court will apply Michigan law.[25] *See Centra, Inc v Estrin*, 538 F3d 402, 409 (CA 6, 2008) (No need to address choice of law principles where Michigan rules of professional conduct were consistent with other possible sources of law.) *See also In re FCA US LLC Monostable Electronic Gearshift Litigation*, 598 F Supp 3d 639. 649 (ED Mich, 2022) (A "true conflict" exists if two or more states have a legitimate interest in a particular set of facts in litigation and the laws of those states differ or would produce a different result.)

IV.

A.

The Duty to Defend

> The duty to defend is related to the duty to indemnify in that it arises only with respect to insurance afforded by the policy. If the policy does not apply, there is no duty to defend. However, the scope of the two duties is not identical; the duty to defend is broader than the duty to indemnify. If the allegations of a third party against the policyholder even arguably come within the policy coverage, the insurer must provide a defense. [*American Bumper and Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 481; 550 NW2d 475 (1996) (citations omitted).]

See also Utica Mut Ins Co v Miller, 130 Md App 373, 381; 746 A2d 935 (2000) ("The duty to defend an insured is broader than the duty to indemnify").

"In determining whether an insurer has a duty to defend its insured, [the Court is] required to look at the language of the insurance policy and construe its terms." *Matouk v Michigan League Liability and Property Pool*, 320 Mich App 402, 409; 907 NW2d 853 (2017). *See also Aetna Cas*

[25] This Court will also reference corresponding Maryland law where applicable.

& Sur Co v Cochran, 337 Md 98, 103; 651 A2d 859 (1995) (The first question to be answered in determined whether there is a duty to defend is "what is the coverage and what are the defenses under the terms and requirements of the policy?")

"Insurance policies are contracts and, absent an applicable statute, are subject to the same construction principles applicable to other contracts." *Skanska USA Building, Inc v M.A.P. Mech Contractors, Inc*, 505 Mich 368, 377; 952 NW2d 402 (2020). *See also Moscarillo v Prof Risk Mgmt Servs, Inc*, 442 Md 529, 540: 921 A2d 245 (2007). "[U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005); *Moscarillo*, 442 Md at 540. "An insurance policy is enforced in accordance with its terms. Where a term is not defined in the policy, it is accorded its commonly understood meaning." *Twichel v MIC General Ins Corp*, 469 Mich 524, 534; 676 NW2d 616 (2004); *Maryland Cas Co v Blackstone Int'l Ltd*, 442 Md 685, 695; 114 A3d 676 (2015).

Next, the underlying complaint, or in this case the underlying counterclaim, is examined. "The duty of an insurance company to provide a defense in an underlying tort action depends upon the allegations in the complaint and extends to allegations which 'even arguably come with the policy coverage.'" *Allstate Ins Co v Freeman*, 432 Mich 656, 662; 443 NW2d 734 (1989) "An insurer has a duty to defend, despite theories of liability asserted against any insured which are not covered under the policy, if there are any theories of recovery that fall within the policy." *American Bumper*, 452 Mich at 451-452 (quotation marks and citations omitted). *See also Utica Mut Ins Co v Miller*, 130 Md App 373, 383; 746 A2d 935 (2000) (quotation marks ad citations omitted) ("[I]f any claims potentially come within the policy coverage, the insurer is obligated to defend all claims, notwithstanding alternative allegations outside the policy's coverage . . . ."): *Bayside Fire*

Protection, LLC v Everest Indemnity Ins Co, 592 F Supp 3d 454, 467 (SD Md, 2022) ("It is necessary under Maryland law only that there be allegations which are potentially covered by a policy. . . .)

"In a case of doubt as to whether or not the complaint against the insured alleges a liability of the insurer under the policy, the doubt must be resolved in the insured's favor." *Matouk v Michigan Municipal League Liability and Property Pool*, 320 Mich App 402, 409; 907 NW2d 853 (2017). *See also Maryland Cas Co v Blackstone Int'l Ltd*, 442 Md 685, 696; 114 A3d 676 (2015) ("[W]here a potentiality of coverage is uncertain from the allegations of a complaint, any doubt must be resolved in favor of the insured.")

B.

The Liberty Mutual CCIP Insurance Policy and the Allegations in the Counterclaim

The Liberty Mutual Policy

There is no dispute that Madison Glass is an "insured" under the Liberty Mutual Policy. The Liberty Mutual Policy originally provided coverage as follows:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.[26]
>
> The Insuring Agreement was amended by Endorsement LD 24 29 09 11 to provide:
>
> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages even if the allegations of the "suit" are groundless, false or

[26] Madison Heights Glass Motion, Exh J, Liberty Mutual Policy, p 1, § I(A)(1)(a) Insuring Agreement for Coverage A.

> fraudulent. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:
>
> (1) The amount we will pay for damages is limited as described in Section III-Limits of Insurance; and
> (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.
>
> No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.[27]

The Policy further provides:

> This insurance applies to "bodily injury" and "property damage" only if:
>
> (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
> (2) The "bodily injury" or "property" damage occurs during the policy period. . . [28]

Coverage Under the Policy

Liberty Mutual asserts that it had no duty to defend Madison Glass against the Turner Counterclaim. Liberty Mutual argues that "Turner's Arbitration claim against [Madison Glass] [sought] damages based on [Madison Glass'] faulty workmanship and economic damages caused by Madison's delay in performing construction work."[29] Liberty argues that the damages alleged in Turner's counterclaim do not describe any "property damage" caused by an "occurrence" and therefore, it owed no duty to defend.[30] Under the Liberty Mutual Policy an "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[31] Pursuant to a "Damage to Your Work Endorsement" (Endorsement LD 24 137 08 15):

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[27] *Id.* Amendment – Insuring Agreement, Endorsement LD 24 29 09 11.
[28] *Id.* § I(A)(1)(b).
[29] Liberty Mutual Motion, p 15.
[30] Liberty Mutual does not argue that coverage is precluded under any policy exclusions.
[31] *Id.,* p 15, § V (13).

> A. Notwithstanding any applicable case law holding that a construction defect may not constitute an "occurrence" an "occurrence" shall include any circumstance where a defect or deficiency in "your work" results in damages because of "property damage," so long as the "property damage" was not intended by you, and including, but not limited to, when "your work" was performed pursuant to a contract or where damages because of "property damage" arise out of a contract.[32]

The term "property damage" is defined, in relevant part, as:

> (a) Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
> (b) Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.[33]

First, to the extent that Liberty Mutual is arguing that "damages based on damage to Madison's work" is not covered, it has not supported its argument. Liberty Mutual relies on New Jersey law for its argument and as this Court has determined, the issues in this case are governed by Michigan law.

Liberty Mutual does not discuss Michigan law which recognizes that "faulty subcontractor work that was unintended by the insured" may constitute an "occurrence" under a CGL policy. *Skanska USA Building, Inc v MAP Mechanical Contractors, Inc*, 505 Mich 368, 385; 952 NW2d 402 (2020).[34] The failure to provide supporting authority for its position constitutes abandonment of its argument. *See Moses, Inc v Southeast Mich Council of Governments*, 270 Mich App 401,

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[32] *Id.*, Endorsement LD 24 137 08 15.
[33] Madison Heights Glass Motion, Exh J, Liberty Mutual Policy, p 15, § V (17).
[34] In *Skanska* the Court of Appeals determined that there was no occurrence under the CGL policy because the only damage was to the insured's own work product. *Skanska*, 505 Mich at 376. The Supreme Court disagreed:

> Nor is there any support for the Court of Appeals' conclusion that "accident" cannot include damage to the insured's own work product. . . [T]he Court of Appeals accepted that an insured can seek coverage for its damage to a third party's property. But the policy does not limit the definition of "occurrence" by reference to the owner of the damaged property. [*Skanska*, 505 Mich at 382.]

417; 716 NW2d 278 (2006) ("If a party fails to adequately brief a position, or support a claim with authority, it is abandoned.")

Liberty Mutual also asserts that economic losses do not constitute property damage under a CGL policy. Again, Liberty Mutual relies solely on New Jersey law.[35] However, Michigan law appears to permit economic loss as "property damage." In *Dimambro-Northend Assoc v United Constr, Inc*, 154 Mich App 306; 397 NW2d 547 (1986), an insured sought coverage under a CGL policy. The insured was a tunnel construction contractor that caused a fire in a tunnel on which it was working. Because of the fire and resultant delay another contractor could not complete its work on the project as planned. That contractor brought suit against the tunnel contractor for "delay damages" "including lost profits, increased labor costs, overhead costs and the like." *Id.* at 309-310. The Court of Appeals, addressing a definition of "property damage" essentially the same as the definition in the Liberty Policy at issue in this case, determined that the policy covered direct and consequential loss, including lost profits. *Id.* at 315-316. In this case, it is alleged in the Counterclaim that Madison Glass' "assembly and installation failure allowed water to penetrate the punch windows with virtually no pressure" and that "successor work could not proceed until the windows passed the tests. Specifically, Turner could not install electrical, drywall, or ceiling tie-in where the windows did not pass water penetration tests."[36]

Lastly, contrary to Liberty Mutual's assertion, the Counterclaim alleged water intrusion and leaking from the defective windows that allegedly caused damage to other parts of the Project.[37] Additionally, Madison Glass asserts that "repair invoices" from other subcontractors

[35] Additionally, the case relied on by Liberty Mutual, *The Children's Place, Inc v Zurich American Ins Co*, 2021 WL 4237284, Civil Action No. 20-7980(ES)(CLW) (D NJ, 2021) is an unpublished federal district court decision addressing whether a retailer's losses due to covid restriction related closures were "property damages." The language in the policy at issue in that case required "direct physical loss of or damage to Property."
[36] Amerisure Motion, Exhibit B, Counterclaim, ¶¶ 38-41.
[37] Paragraph 57 of the Counterclaim alleges that Turner's damages included:

which reference repair for water damage, and which were exchanged during arbitration, further support the conclusion that property damage was alleged.[38]

Based upon the foregoing analysis the Court determines that Liberty Mutual had a duty to defend Madison Glass against the Turner Counterclaim and breached its duty. As was previously explained, the duty to defend arises "if there are any theories of recovery that fall within the policy." *American Bumper*, 452 Mich at 451-452. Most importantly, any "doubt as to where or not the complaint against the insured alleges a liability of the insured under the policy . . . must be resolved in the insured's favor." *Matouk*, 320 Mich App at 409.

> Costs incurred as a result of [Madison Glass] caused resequencing at the perimeter and because of the punch window water test failures are directly charged to [Madison Glass]. For example, the costs specific to Manganro's replacement of gypsum wall board and NLP repainting due to the come-back at building perimeter is charged as incurred. [Amerisure Motion, Exh B, Counterclaim ¶ 57.]

Manganaro is apparently a drywall contractor and NLP is a painting contractor. *See* Counterclaim, ¶ 59.

[38] The work orders/invoices were filed with this Court under seal.

The invoices can be considered in determining the existence of the duty to defend. "The duty to defend cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible." *Detroit Edison Co v Michigan Mutual Ins Co*, 102 Mich App 136,142; 301 NW2d 832 (1981). A court not restricted to looking only at the complaint in determining whether there is a duty to defend. *See Employers Ins of Wausau v Petroleum Specialties, Inc*, 69 F3d 98, 102 (CA 6, 1995) and *Saoud v Everest Indemnity Ins Co*, 551 F Supp 3d 777, 786-787 (ED Mich, 2021). *See also Sullins v Allstate Ins Co*, 340 MD 503, 509; 667 A2d 617 (1995).

Liberty Mutual argues that the invoices cannot be considered because they have not been authenticated. However, Liberty Mutual makes no argument as to why the invoices are not authentic. "A party may not merely announce its position and leave it to this Court to discover and rationalize the basis for [its] claims or give issues cursory treatment with little or no citation to supporting authority." *Wolfe v Wayne-Westland Community Schs*, 267 Mich App 130, 139; 703 NW2d 480 (2005). And in any event, documentary evidence presented in support of a motion for summary disposition must be "substantively admissible" but does not have to be in admissible form. *Maiden v Rozwood*, 461 Mich 109, 124 n 6; 597 NW2d 817 (1999). *See Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 373; 775 NW2d 618 (2009) (Party moving for summary disposition did not have to lay the foundation for the admission of invoices in order for the court to consider the invoices for purposes of a summary disposition motion.)

Other Issues

Liability for Indemnification

In addition to a declaration regarding the duty to defend, Madison Glass seeks a determination that, in addition to a duty to defend, Liberty Mutual "is liable for indemnity due to its breach of its duty to defend." The cases cited by Madison Glass in this regard do not support its assertion that because there was a breach of the duty to defend, as a matter of law, Liberty "is liable on any judgment against Madison despite theories of liability asserted against Madison which are not covered under the policy."

In *American Bumper* the Michigan Supreme Court was addressing the duty to defend and recoverable defense costs and did not address the issue of indemnification. In *Stockdale v Jamison*, 416 Mich 217, 224-226; 339 NW2d 389 (1982) the Michigan Supreme Court did not say that a breach of the duty to defend creates, as a matter of law, liability for indemnity. Rather, it stated that "when [the insurer] breached its duty to defend, it became liable for any damages arising naturally from the breach or . . . in the contemplation of the parties at the time the contract was made." *Id.* at 225 (quotation marks and citation omitted). In *Stockdale* the insurer did not defend, and a default judgment was awarded against the insured. *Id.* at 222-223. In fact, the court rejected the argument that the entire amount of the default judgment was recoverable and concluded that the loss was the loss the insured would have suffered if the default judgments had been enforced. *Id.* at 227-228.

Madison Glass has not supported its argument that, as a matter of law, there was a breach of the duty to indemnify. Additionally, to the extent that Madison Glass is arguing that the same allegations/extrinsic evidence considered regarding the duty to defend also supports a finding of a

breach of duty to indemnify, the Court disagrees. As has been stated throughout this opinion, the duty to defend is broader than the duty to indemnify. *American Bumper,* 452 Mich at 481.

Amerisure's Argument that the Liberty Policy was Primary and Amerisure is entitled to recover for payments made under its excess policy

Amerisure argues that Liberty Mutual owes primary coverage to Madison Glass and that Amerisure, under its excess policy, did not owe coverage for Turner's Counterclaim until the Liberty Policy was exhausted. Accordingly, Amerisure argues it is entitled to reimbursement from Liberty Mutual. *See Frankenmuth Mut Ins Co, Inc v Continental Ins Co*, 450 Mich 429, 436, 439; 537 MW2d 879 (1995) (applying the rule that excess insurer is liable for defense costs only after the primary insurer is excused under the terms of its policy.)

In its Response/Cross-Motion Liberty Mutual does not dispute that the coverage under its policy was primary, that the Amerisure Policy was excess, and that the coverage under the Liberty Policy was not exhausted. It does not address the argument made by Amerisure that it is entitled to reimbursement for costs of defending the Arbitration Counterclaim. Liberty merely states in its conclusion that this Court should determine that "Amerisure is not entitled to equitable subrogation from Liberty. . . ." However, this is not sufficient. "A party may not merely announce its position and leave it to this Court to discover and rationalize the basis for [its] claims, or give issues cursory treatment with little or no citation to supporting authority." *Wolfe v Wayne-Westland Community Schs*, 267 Mich App 130, 139; 703 NW2d 480 (2005). *See also Moses, Inc v Southeast Mich Council of Governments*, 270 Mich App 401, 417; 716 NW2d 278 (2006) ("If a party fails to adequately brief a position, or support a claim with authority, it is abandoned.") and *Mercurio v Huntington Nat'l Bank*, __ Mich App __ (2023) (Docket No. 361855), 2023 WL 4981374 at p 10

(the trial court did no err by finding that the plaintiff made no substantive response to a legal argument made by the defendant in MSD.)

Based on the foregoing, the Court concludes that Amerisure is entitled to reimbursement from Liberty for amounts incurred to defend Madison Glass against the Arbitration Counterclaim.

ORDER

Based upon the foregoing opinion, the Court hereby orders that:

Amerisure Insurance Company and Amerisure Mutual Insurance Company's Motion for Partial Summary Disposition as to Liberty Mutual Fire Insurance Company is hereby **GRANTED** as to Liability only.

To the extent that Liberty Mutual's "Response and Cross-Motion" is considered to be a Motion for Summary Disposition, it is hereby **DENIED.**

Madison Heights Glass Co., Inc's Motion for Partial Summary Disposition Against Liberty Mutual Fire Insurance Company is hereby **GRANTED** as to Liability only with respect to the Breach of the Duty to Defend and is hereby **DENIED** as to the Breach of the Duty to Indemnify.

IT IS SO ORDERED.

This Order DOES NOT resolve the past pending matter and DOES NOT close the case.

/s/Victoria A. Valentine

HON. VICTORIA A. VALENTINE
CIRCUIT COURT JUDGE

Dated: **8/9/24**