IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO POLICY NUMBER 13-000093,	)	
Plaintiffs,	)	**NO. 3:17-cv-00274**
v.	)	**JUDGE CAMPBELL MAGISTRATE JUDGE FRENSLEY**
SUNBELT RENTALS, INC.,	)	
Defendant.	)	

MEMORANDUM

Pending before the Court are the parties' competing Motions for Summary Judgment. (Doc. Nos. 29 & 32). For the reasons discussed below, Plaintiff's and Defendant's Motions are **GRANTED** in part and **DENIED** in part.

I. FACTUAL BACKGROUND

The facts of this case are fairly straightforward with little in dispute. The parties, however, disagree over the interpretation of three contracts. The case arises from water damage that occurred on November 20, 2014, at 1505 Demonbreun Street in Nashville, Tennessee (the "Insured Project") when a sprinkler head on the fourth floor activated, causing water to discharge. (Doc. No. 1 at 5; Doc. No. 34 at 5). Prior to that date, Plaintiffs/Underwriters insured FCA-Demonbreun, LLC and Faison & Associates, LLC (the "Named Insured") under an all-risk builder's risk policy, bearing policy number 13-000093, with effective dates from May 6, 2013, to December 4, 2014, (the "Policy") (*see* Doc. No. 34-1). (Doc. No. 34 at 1). The Policy insured the Insured Project

against direct physical loss or damage, and contained the following "Additional Insured" provision:

> To the extent required by any contract or subcontract, and then only as their respective interests may appear, any individual(s) or entity(ies) specified in such contract or subcontract are recognized as Additional Insured. As respects Architects, Engineers, Manufacturers and Suppliers, the foregoing is limited to their site activities only precluding coverage respectively under policies for Professional Liability and Products Liability and Warranty coverage as applicable.

(*Id.*). In addition, the Policy included the following "Subrogation" provision:

> If the Company pays a claim under this policy, it will be subrogated, to the extent of such payment, to all the Insured's rights of recovery from other persons, organizations and entities. The Insured will execute and deliver instruments and papers and do whatever else is necessary to secure such rights.
>
> The Company will have no rights of subrogation against:
>
> A. Any person or entity, which is a Named Insured or an Additional Insured;
>
> B. Any other person or entity, which the Insured has waived its rights of subrogation against in writing before the time of loss;

(*Id.* at 2).

On or about March 8, 2013, the Named Insured entered into a written contract with Balfour Beatty Construction, LLC, to act as the general contractor for the Insured Project (the "Balfour Contract") (*see* Doc. No. 34-2). (Doc. No. 34 at 3). In addressing property insurance, sub-paragraph 11.3.6 of the Balfour Contract provided:

> The Owner and Contractor waive all rights against (1) each other and the Subcontractor, Subcontractors [sic], agents and employees of each other, and (2) the Architect and separate contractors, if any, and their subcontractors and sub-contractors, for all damages caused by fire or other perils to the extent covered by insurance obtained pursuant to this paragraph 11.3 or any other property insurance applicable to the Work, except such rights as they may have to the proceeds of such insurance held by the Owner as trustee. The foregoing waiver afforded the Architect, his agents and employees shall not extend to the liability imposed by Subparagraph 4.18.3. The Owner or the

> Contractor, as appropriate, shall require of the Architect, separate contractors, Subcontractors and Sub-subcontractors by appropriate agreements, written where legally required for validity, similar waivers each on the favor of all other parties enumerated in this Subparagraph 11.3.6.

(*Id.*). Additionally, Item 10 of "Schedule A – Insurance Requirements" to the Balfour Contract provided:

> Owner will provide All Risk Builder Risk-Completed Form Insurance for the full value of the Work and will absorb deductible losses not covered by such insurance, without, however, waiving its rights to proceed against any negligent party. The builders risk policy will list as Insured's [sic], the Owner, Contractor, and any Subcontractor, as their respective interest may appear and shall include permission to occupy. The policy will cover flood and earthquake and will also cover all materials and supplied [sic] intended to become a permanent part of the Work, including temporary forms and scaffolding, while on or about the Site, at other locations, or while in off-sit storage at such locations.

(Doc No. 34 at 3-4).

In November 2014, Balfour entered into a contract with Defendant to provide/rent various pieces of equipment to Balfour for the Insured Project (the "Subcontract") (*see* Doc. No. 34-3). (Doc. No. 34 at 4). The rented equipment included several torpedo heaters, which were used on several floors of the Insured Project. (*Id.*). Defendant delivered the torpedo heaters to the Insured Project and connected them to the gas supply. (*Id.*). Article 13 of the Subcontract, titled "Release and Indemnification," contained the following language:

> To the fullest extent permitted by law, Customer indemnifies, releases, holds Sunbelt harmless and, at Sunbelt's request, defends Sunbelt …, its affiliates and their officers, directors, and employees (individually and collectively "Sunbelt Indemnitees") from and against and pay or reimburse them for any and all liabilities, claims, losses, damages, and expenses (including reasonable attorney's fees and expenses) however arising or incurred, related to any incident, any damage to property, injury to, or death of, any person or any contamination or alleged contamination, or violation of law or regulation to the extent caused by the use, possession or control of the Equipment during the Rental Period or breach of this Agreement, provided however this provision will not apply to the negligence or willful misconduct of such Sunbelt Indemnitee …

(*Id.*). Article 14 of the Subcontract, titled "Insurance," required both parties to maintain various types of insurance. With respect to Balfour, the Subcontract provided:

> During the Rental Period, Customer shall maintain, at its own expense, the following minimum insurance coverages: (i) general liability insurance of not less than $2,000,000 per occurrence, including coverage for Customer's contractual liabilities herein (such as the release and indemnification clause contained in Section 12); (ii) property insurance against loss by all risk to the Equipment . . .

(*Id.* at 4-5). With respect to Sunbelt, the Subcontract stated:

> During the Rental Period, Sunbelt shall maintain, at its own expense general liability insurance of not less than $2,000,000 per occurrence … for Sunbelt's contractual liabilities herein (including the release and indemnification clause contained in Section 12).

(Doc. No. 34 at 5).

On or about November 20, 2014, Balfour discovered water damage at the Insured Project when a sprinkler head activated on the fourth floor causing water to discharge. (*Id.*). Under the terms of the Policy, Plaintiffs reimbursed the Named Insured for the damage caused by the water discharge. (*Id.*). Plaintiffs then contacted Sunbelt regarding the water damage, alleging that one of the torpedo heaters provided by Sunbelt malfunctioned causing the sprinkler damage to the Insured Project. (*Id.*). Sunbelt denied Plaintiffs' allegations and demanded recognition as an Additional Insured under the Policy, a request Plaintiffs rejected. (*Id.*).

Plaintiffs filed this declaratory judgment action on February 10, 2017. (Doc. No. 1). Plaintiffs' Complaint and summary judgment motion ask the Court to: (1) declare that Sunbelt is not an Additional Insured under the Policy; and (2) declare that if Sunbelt is an Additional Insured under the Policy, its status is limited to Sunbelt's interest in its tools and equipment, and does not extend to shield Sunbelt from liability for the loss or damage the Named Insured sustained from the sprinkler damage. (Doc. Nos. 1, 32). Defendant's summary judgment motion asks the Court

to declare that it is immune from suit by Plaintiff because: (1) it is an Additional Insured under the Policy; and (2) because the Named Insured waived its rights of subrogation against Sunbelt before the loss.

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The party seeking summary judgment has the initial burden of establishing the basis for its motion and identifying portions of the record that demonstrate the absence of a genuine dispute over material facts. *Rodgers v. Banks,* 344 F.3d 587, 595 (6th Cir. 2003). The moving party may satisfy this burden by presenting affirmative evidence that negates an element of the non-moving party's claim or by demonstrating an absence of evidence to support the nonmoving party's case. *Id.*

In evaluating a motion for summary judgment, the court views the facts in the light most favorable for the nonmoving party, and draws all reasonable inferences in favor of the nonmoving party. *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 242 (6th Cir. 2015); *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir. 2003). The Court does not weigh the evidence, judge the credibility of witnesses, or determine the truth of the matter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Rather, the Court determines whether sufficient evidence has been presented to make the issue of material fact a proper jury question. *Id.* Because the interpretation of written agreements, including insurance policies, is a matter of law and not of fact, such issues "are especially appropriate for summary judgment." *Canal Ins. Co. v. Axley*, 680 F. Supp. 2d 923, 925 (W.D. Tenn. 2009). *See also Pear Tree Properties, LLC v. Acuity*, 2016 WL 9414100, at *1 (M.D. Tenn. 2016).

III. ANALYSIS

A. Principles of Contract Interpretation

A federal court sitting in diversity applies the substantive law of the forum state. *Pennington v. State Farm Mut. Auto. Ins. Co.*, 553 F.3d 447, 450 (6th Cir. 2009). Tennessee applies the same rules of construction and enforcement to insurance contracts that it does to other types of contracts. *McKimm v. Bell*, 790 S.W.2d 526, 527 (Tenn. 1990). In the absence of fraud or mistake, an insurance contract should be interpreted as written and its terms should be given their natural and ordinary meaning. *Standard Fire Ins. Co. v. Chester O'Donley & Associates, Inc.*, 972 S.W.2d 1, 7 (Tenn. Ct. App. 1998).

An insurance contract "should be construed as a whole in a reasonable and logical manner." *Id.* *See Aetna Cas. & Sur. Co. v. Woods*, 565 S.W.2d 861, 864 (Tenn. 1978) ("The proper construction of a contractual document is not dependent on any name given to the instrument by the parties, or on any single provision of it, but upon the entire body of the contract and the legal effect of it as a whole."). Additionally, it is well-settled in Tennessee that the "particular and specific provisions of a contract prevail over general provisions." *Lamar Advert. Co. v. By-Pass Partners*, 313 S.W.3d 779, 794 (Tenn. Ct. App. 2009).

B. Sunbelt's Status as an Additional Insured Under the Policy

Plaintiff claims Defendant is not an Additional Insured under the Policy's Additional Insured provision (*see* Doc. No. 34-1 at 6); Defendant claims that it is. In order to qualify as an Additional Insured, Defendant argues there need only be a contract or subcontract that requires it to be named as an additional insured, and he Balfour Contract requires the Named Insured to obtain "All Risk Builders Risk – Completed Form" insurance and "the Owner, Contractor and any Subcontractor" be listed as insured. (Doc. No. 30 at 7). Further, Defendant argues that Plaintiff

acknowledges the Subcontract between Balfour and Defendant, and refers to it as a "subcontract." (*Id.*).

In response, Plaintiff argues Defendant is not an Additional Insured because neither the underlying Subcontract nor the Balfour Contract required Defendant to be added as an Additional Insured. (Doc. No. 33 at 10). Plaintiff argues the Subcontract did not require Defendant to be added to the Policy as an Additional Insured and did not mention builder's risk coverage at all. (*Id.*). Plaintiff additionally argues the Balfour Contract: 1) only generally referenced contractors and subcontractors, which is not enough to assert Additional Insured status under the Policy; 2) contained several exhibits pertaining to subcontracts and none of them specify Defendant; and 3) defined a subcontractor as having a "direct contract with the Contractor to perform any of the Work at the site," and Defendant's involvement was limited to renting equipment to Balfour.[1] (*Id.*).

Plaintiff alternatively argues that if Defendant qualifies as an Additional Insured under the Policy, the language "and then only as their respective interests may appear" limits Defendant's Additional Insured status solely to its ownership interest in the equipment it rented to Balfour. (Doc. No. 33 at 11). Plaintiff asserts that Defendant's interests must be limited to those appearing in the underlying Balfour Contract and Subcontract, and that Defendant cannot artificially enlarge its interests to encompass liability arising from its equipment. (*Id.*).

Interpreting the Policy as written, and construing it as a whole with reference to the Balfour Contract and the Subcontract, the Court finds that the undisputed facts establish Defendant qualifies as an Additional Insured under the Policy. The Balfour Contract requires the Named Insured to obtain a builders' risk policy and to list "the Owner, Contractor, and any Subcontractors,

[1] The plain language of the Policy shows Plaintiff contemplated coverage for parties other than the Named Insured. A reasonable interpretation of the Policy does not support Plaintiff's contention that Defendant is not an Additional Insured simply because, as a subcontractor involved after the issuance of the Policy, Defendant was not identified by name.

as their interests may appear" as insureds. (Doc. No. 34-2 at 113). Defendant's underlying Subcontract with Balfour also clearly identifies Defendant as a subcontractor. Thus, Defendant's status as a subcontractor of the Balfour Contract qualifies it as an Additional Insured under the Policy.

Defendant's status, however, is limited by the plain language of the Policy's Additional Insured provision, reading: "and then only as their respective interests may appear." (Doc. No. 34-1 at 6). This language, which is also found in the Balfour Contract's builder risk policy provision (*see* Doc. No. 34-2 at 113), makes evident that the parties did not intend for the Policy to cover *any* loss or liability arising from Defendant's equipment. Instead, the Policy covers Defendant as an Additional Insured only with respect to its ownership interest in the equipment it rented to Balfour. To hold otherwise would afford Defendant greater protection under the Policy than was afforded under the Balfour Contract and Subcontract.

The Court's holding is further supported by language in the Balfour Contract regarding negligent parties. The Balfour Contract's builder risk policy provision expressly reserves the Named Insured's "right to proceed against any negligent party." (Doc. No. 34-2 at 113). This language signifies the parties' intent that the builders risk policy not encompass liability coverage by the Named Insured for a contractor or subcontractor's negligence.[2] Accordingly, Defendant may not shield itself from liability for its potential negligence based solely on its status as a subcontractor and additional insured.

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[2] The Subcontract contains a similar release and indemnification provision excluding acts of negligence or willful miscount. (Doc. No. 34-3 at 4). Although this provision applies between Balfour and Defendant, it highlights that not even the Subcontract provided Defendant with liability coverage for negligence or willful misconduct. In fact, the Subcontract required Defendant to maintain its own "general liability insurance of not less than $2,000,000 per occurrence . . ."

C. Waiver of Subrogation Rights

To avoid liability entirely, Defendant advances two subrogation waiver arguments. The undisputed material facts establish that neither argument is viable. First, Defendant argues that the subrogation provision of the Policy prohibits the Named Insured from asserting subrogation rights against "an Additional Insured," and unlike the Additional Insured provision of the Policy, does not contain any language limiting those interests. (Doc. No. 30 at 8). In other words, Defendant argues that the capitalized term "Additional Insured" in the Policy's Additional Insured provision differs from the capitalized term "Additional Insured" in the Policy's subrogation provision.

The court finds otherwise. The relevant portion of the Additional Insured provision reads: "[t]o the extent required by any contract or subcontract, and then only as their respective interests may appear, any individual(s) or entity (ies) specified in such contract or subcontract are recognized as Additional Insured." (Doc. No. 34-1 at 6). Construing the Policy as a whole in a reasonable manner, and interpreting the terms of this provision using their natural and ordinary meaning, the Court finds that "Additional Insured" is a defined term. This is evidenced by the language in the first portion of the sentence explaining what qualifies as an Additional Insured followed by the fragment "are recognized as Additional Insured." This finding is further supported by the capitalization of "Additional Insured" each time thereafter in the Policy. Accordingly, the subrogation provision of the Policy only limits the Named Insured's right to recover against Defendant with respect to its ownership interest in the equipment it rented to Balfour.

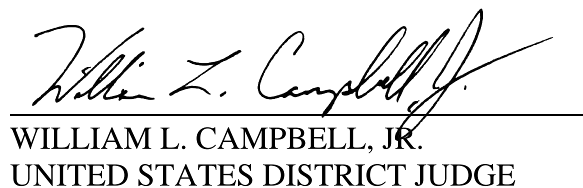
Defendant additionally argues the Named Insured (and therefore Plaintiff) waived its subrogation rights against Defendant with Article 11.3.6 of the Balfour Contract, providing "[t]he Owner and Contractor waive all rights against (1) each other and the Subcontractor, Subcontractors

[sic], agents and employees of each other . . . for all damages caused by fire or other perils to the extent covered by insurance obtained pursuant to this paragraph 11.3 or any other property insurance applicable to the Work." (Doc. No. 30 at 12). Read alone, this provision appears to waive subrogation rights against Defendant. However, the Court must construe the Balfour Contract as a whole in a reasonable and logical manner. The Balfour Contract contains a specific provision relating to builders' risk insurance – the type of insurance provided by the Policy – that reserves Balfour's and Named Insured's right to "proceed against any negligent party." (Doc. No. 53 at 4). This specific provision regarding builders' risk insurance prevails over the more general language of Article 11.3.6 pertaining to "damages caused by fire or other perils." *See Lamar Advert. Co.,* 313 S.W.3d at 794. Accordingly, Article 11.3.6 of the Balfour Contract does not waive subrogation rights against Defendant for negligent acts.

IV. CONCLUSION

In conclusion, the Court **GRANTS** in part and **DENIES** in part Plaintiff's and Defendant's Motions for Summary Judgment, finding: 1) Defendant qualifies as an Additional Insured under the Policy, but only with respect to its ownership interest in the equipment it rented to Balfour; 2) the subrogation provision of the Policy only limits the Named Insured's right to recover against Defendant with respect to its ownership interest in the equipment it rented to Balfour; and 3) the Named Insured did not waive its subrogation rights against Defendant for negligent acts. Having declared the parties' rights, which is the sole relief sought in the Complaint, the Court dismisses the action.

It is so **ORDERED**.



WILLIAM L. CAMPBELL, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO POLICY NUMBER 13-000093, **Plaintiffs,** **v.** **SUNBELT RENTALS, INC.,** **Defendant.**	**No. 3:17-cv-00274**

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Comes now Defendant, Sunbelt Rentals, Inc., by and through counsel of record, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and in support of its Motion for Summary Judgment states as follows:

I. FACTS AND PROCEDURAL HISTORY

This case arises out of a water loss that occurred on November 20, 2014 at 1505 Demonbruen Apartments in Nashville, Tennessee. (Complaint, DE # 1, ¶ 24). Prior to that date, Balfour Beatty Construction, LLC ("Balfour") entered into a contract with Demonbruen – FCA, LLC, ("FCA") the owner, to construct the apartment complex. (Complaint, DE # 1, ¶ 15). FCA's manager was Faison & Associates, LLC.[1] As part of the construction contract, FCA was required to maintain a builder's risk policy which was done through Certain Underwriters at Lloyd's of London ("Certain Underwriters").

[1] Demonbruen – FCA, LLC, and Faison & Associates, LLC will be collectively referred to as "FCA" throughout this pleading for ease of reference.

(Complaint, DE # 1, ¶ 8).

During the course of construction, Balfour contracted with Sunbelt Rentals, Inc. ("Sunbelt") who provided space heaters that were placed in the hallways of the property. (Complaint, DE # 1, ¶¶20 and 25). In underlying tort litigation, it is alleged that one of the heaters malfunctioned causing the heater to generate such heat that a sprinkler head was triggered resulting in the water damage to the building. (Complaint, DE # 1, ¶ 25). Prior to the filing of the underlying lawsuit, a demand was made by FCA for Sunbelt to pay for those damages. (DE # 1-3).

The policy issued by Certain Underwriters to FCA states in part:

> Additional Insured
>
> To the extent required by any contract or subcontract, and then only as their respective interests may appear, any individual(s) or entity(ies) specified in such contract or subcontract are recognized as Additional Insured. As respects Architects, Engineers, Manufacturers and Suppliers, the foregoing is limited to their site activities only precluding coverage respectively under policies for Professional Liability and Products Liability and Warranty coverage as applicable.
>
> (DE # 1-1).

The policy lists the named insured as "FCA – Demonbruen, LLC; Faison & Associates, LLC" with an address located in North Carolina. (DE # 1-1). The policy additionally states:

> **Part D – General Conditions**
> …
> 11. Subrogation
> If the Company pays a claim under this policy, it will be subrogated, to the extent of such payment, to all the Insured's rights of recovery from other persons, organizations and entities. The Insured will execute and deliver instruments and papers and do whatever else is necessary to secure such rights.
>
> The Company will have no rights of subrogation against:

A. Any person or entity, which is a Named Insured or an Additional Insured;
B. Any other person or entity, which the Insured has waived its rights of subrogation against in writing before the time of loss;
(DE # 1-1).

The policy does not specifically name any additional insureds. (DE # 1-1). Sunbelt has demanded recognition as an additional insured and, therefore, immunity from subrogation. (DE # 1-3).

There are two additional operative contractual agreements. The first was entered into between FCA and Balfour. (DE # 1-2). That contract provides in part that Balfour will indemnify FCA for any damages resulting from the negligence of Balfour and/or the negligence of any subcontractor of Balfour for which it is vicariously liable. (DE # 1-2, PageID # 152). The contract further requires that Balfour maintain liability insurance and that FCA maintain liability insurance and property insurance[2]. (DE # 1-2, PageID # 165). The Balfour contract additionally sets out a schedule of insurance requirements for both Balfour and FCA as an exhibit. For instance, the schedule sets forth the limits and ISO form required for the CGL policy to be purchased by Balfour. (DE # 1-2, PageID # 173. Paragraph 10 of Schedule A states:

> [FCA] will provide All Risk Builders Risk – Completed Form Insurance for the full value of the Work and will absorb deductible losses not covered by such insurance, without, however, waiving its right to proceed against any negligent party. The builders risk policy will list as Insured's, [FCA], [Balfour], and any Subcontractors, as their interest may appear and shall include permission to occupy.

(DE # 1-2, PageID # 174).

That contract also states that Balfour shall require each Subcontractor to be bound to

[2] The property insurance provision, §11.3 of the General Conditions, refers to schedule A #8. However, reference to that provision of the schedule has nothing to do with procuring property insurance.

the Contractor by the terms of the Contract Documents. (DE # 1-2, PageID # 154). The contract states in part:

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

(DE # 1-2, PageID # 166). The second is a subcontract entered into between Sunbelt and Balfour. (DE # 2). That contract states in part:

> 13. **RELEASE AND INDEMNIFICATION**. To the fullest extent permitted by law, Customer indemnifies, releases, holds Sunbelt harmless…from and against…any and all liabilities…however arising or incurred, related to an Incident, any damage to property…to the extent caused by the use…of the Equipment during the Rental Period or breach of this Agreement, provided however this provision will not apply to the negligence or willful misconduct of such Sunbelt Indemnitee….To the fullest extent permitted by law, Sunbelt indemnifies…Customer…from and against…however arising or incurred, related to any incident, any damage to property…to the extent caused by the negligence of Sunbelt….
> 14. **INSURANCE**.
>   a. Customer Insurance. During the Rental Period, Customer shall maintain, at its own expense, the following minimum insurance coverages: (i) general liability insurance of not less than $2,000,000 per occurrence, including coverage for Customer's contractual liabilities herein (such as the release and indemnification clause contained in Section 12)….Such policies shall be primary, non-contributory, on an occurrence basis, contain a waiver of subrogation against the Sunbelt Indemnities, name Sunbelt as an additional insured (including an additional insured endorsement) and loss payee….

(DE # 2). Sunbelt is immune from suit by Plaintiff for two reasons: 1) Sunbelt is an additional insured under the policy of insurance, and 2) FCA waived its rights of subrogation against Sunbelt in writing before the loss.

II. LAW AND ARGUMENT

A. Conflict of Laws

Tennessee follows the *lex loci contractus* rule for claims based on contract. Vantage Technology, LLC v. Cross, 17 S.W.3d 637, 650 (Tenn. Ct. App. 1999). Under this rule, a contract is presumed to be governed by the law of the jurisdiction in which it was executed, absent a contrary intent. Id. (See also Ohio Cas. Ins. Co. v. Travelers Indem. Co., 493 S.W.2d 465, 467 (Tenn. 1973)).

North Carolina General Statutes Annotated § 58-3-1 states:

> All contracts of insurance on property, lives, or interest in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made in this State and are subject to the laws thereof.

The Supreme Court of North Carolina interpreted N.C.G.S.A. S 58-3-1 in Collins & Aikman Corp. v. Hartford Acc. & Indem. Co., 436 S.E.2d 243, 244 (1993). In that case, the court noted that the law of the state in which the insurance policy was issued will apply. Id. Here, because the Policy was issued in North Carolina, North Carolina law will apply.

B. Interpretation of Insurance Contracts

Under North Carolina law, "[i]t is well established that contracts for insurance are to be interpreted under the same rules of law as are applicable to other written contracts. One of the most fundamental principles of contract interpretation is that ambiguities are to be construed against the party who prepared the writing. Therefore,

in an insurance contract all ambiguous terms and provisions are construed against the insurer." *Chavis v. Southern Life Ins. Co.,* 318 N.C. 259, 262, 347 S.E.2d 425, 427 (1986) (internal citations omitted).

> When an insurance company, in drafting its policy of insurance, uses a "slippery" word to mark out and designate those who are insured by the policy, it is not the function of the court to sprinkle sand upon the ice by strict construction of the term. All who may, by any reasonable construction of the word, be included within the coverage afforded by the policy should be given its protection. If, in the application of this principle of construction, the limits of coverage slide across the slippery area and the company falls into a coverage somewhat more extensive than it contemplated, the fault lies in its own selection of the words by which it chose to be bound.

Cowell v. Gaston Cty., 190 N.C. App. 743, 746, 660 S.E.2d 915, 918 (2008)(quoting Grant v. Emmco Ins. Co., 243 S.E.2d 894, 897 (N.C. 1978)).

> [T]he intention of the parties as gathered from the language used in the policy is the polar star that must guide the courts in the interpretation of such instruments. "The heart of a contract is the intention of the parties which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." Therefore, in the interpretation of language contained in an insurance policy, the court may take into consideration the character of the business of the insured and the usual hazards involved therein in ascertaining the intent of the parties.

Cowell v. Gaston Cty., 660 S.E.2d 915, 918 (2008)(citing McDowell Motor Co. v. New York Underwriters Ins. Co., 233 N.C. 251, 253-54, 63 S.E.2d 538, 540-41 (1951)).

C. Sunbelt is an Additional Insured Under the Policy

The policy issued by Certain Underwriters states:

> Additional Insured
>
> To the extent required by any contract or subcontract, and then only as their respective interests may appear, any individual(s) or entity(ies) specified in such contract or subcontract are recognized as Additional Insured. As respects Architects, Engineers, Manufacturers and Suppliers, the foregoing is limited to their site activities only precluding coverage respectively under policies for Professional Liability and Products Liability and Warranty coverage as applicable.

Case 3:17-cv-00274 Document 30 Filed 02/14/18 Page 6 of 17 PageID #: 286

Under that provision, in order to be considered an additional insured, there need only be a contract or subcontract that requires an entity to be named as an additional insured. The FCA-Balfour contract requires that FCA obtain "All Risk Builders Risk – Completed Form" insurance and that "the Owner, Contractor, and any Subcontractor" be listed as insureds. (DE # 1-2, PageID 174). Plaintiff, in its Complaint, even acknowledges this provision. (DE # 1, ¶ 16). Further, Plaintiff acknowledges the existence of a contract between Balfour and Sunbelt for the provision of the space heaters. (DE # 1, ¶ 20). Strikingly, Plaintiff refers to that agreement as a "subcontract" making Sunbelt a "subcontractor." (DE # 1, ¶ 20).

It is expected that Plaintiff will argue that such status is limited by the language "as their respective interest may appear." It is also expected that Plaintiff will argue that the FCA-Balfour Contract preserved FCA's rights to proceed against any negligent party. However, both of those arguments must fail as will be discussed further herein.[3]

As an initial matter, Sunbelt undoubtedly qualifies as an additional insured under the policy of insurance. The policy mandates only that "any" contract require an entity to be named as an additional insured. The FCA-Balfour contract requires that FCA obtain the Certain Underwriters policy and that "any subcontractor" be named as an insured. As such, Sunbelt qualifies as an additional insured due to its status as a subcontractor of the FCA-Balfour contract.

Plaintiff's policy of insurance further states that it will have no right of subrogation against "any person or entity, which is a Named Insured or an Additional Insured." (DE

[3] Plaintiffs' reference in its Complaint to various provisions of the Balfour-Sunbelt subcontract, as well as the "as their interest may appear" language brings to mind Occam's Razor – where there exist two explanations for an occurrence, the simpler one is usually the better.

#1-1). Policies of insurance are to be given their plain meaning. The policy of insurance at issue clearly and unambiguously waives subrogation against an additional insured. Therefore, Sunbelt is immune from a subrogation suit by, or on behalf of, Plaintiff.

1. Plaintiff's Waiver of Subrogation is not Limited.

It is anticipated that Plaintiff will argue language of the Additional Insured provision of the policy limits Sunbelt's status as an additional insured. In particular, Plaintiff's Complaint asserts that the Additional Insured provision limits Sunbelt's status as an addition insured to Sunbelt's interest as the owner of the heaters provided for use at the construction site. This argument, however, fails to recognize that the Subrogation provision of the policy does not contain similar limiting language. Assuming *arguendo* that the language "as their respective interest may appear" of the Additional Insured provision does limit Sunbelt's status, the Subrogation provision does not. That provision states that Certain Underwriters "will have no rights of subrogation against: A. Any person or entity, which is … an Additional Insured." Had Plaintiff wanted to limit the scope of this waiver of its rights it very well could have done so by including appropriate limiting language. But it did not. Instead, Plaintiff waived any and all subrogation rights against an "additional insured."

> When an insurance company, in drafting its policy of insurance, uses a "slippery" word to mark out and designate those who are insured by the policy, it is not the function of the court to sprinkle sand upon the ice by strict construction of the term. All who may, by any reasonable construction of the word, be included within the coverage afforded by the policy should be given its protection. If, in the application of this principle of construction, the limits of coverage slide across the slippery area and the company falls into a coverage somewhat more extensive than it contemplated, the fault lies in its own selection of the words by which it

chose to be bound.

Cowell v. Gaston Cty., 190 N.C. App. 743, 746, 660 S.E.2d 915, 918 (2008)(quoting Grant v. Emmco Ins. Co., 243 S.E.2d 894, 897 (N.C. 1978)).

If anything, the inclusion of allegedly limiting language in the Additional Insured provision while granting a blanket waiver of subrogation in the Subrogation provision creates an ambiguity. North Carolina, like Tennessee, construes ambiguities against the drafter of the contract. Therefore, Sunbelt's status as an additional insured, whether limited or not, results in a waiver of subrogation against Sunbelt. The Court's declaration of such makes the underlying litigation moot thereby making this litigation moot and subject to dismissal.

2. Sunbelt's Status as an Additional Insured is not Limited.

It is anticipated that Plaintiff will argue that the phrase "as their respective interests may appear" contained within the additional insured provision of the policy limits Sunbelt's status as an additional insured to its ownership of the heaters used in the construction work. However, that argument is misguided.

The case of *Harvey's Wagon Wheel, Inc. v. MacSween*, 606 P.2d 1095 (Nev. 1980) is instructive. In that case, Harvey's Wagon Wheel owned a motel and casino and hired Ian MacSween and Tom Johnson to perform various construction work at that location. Id. at 1096. Harvey's was insured through a policy issued by Fireman's Fund Insurance Company, and that policy was amended at the time of construction to include as insureds during the course of construction "Harvey's Wagon Wheel, Inc. and their subcontractors and materialmen As their interests may appear; Ian MacSween…[and] its subcontractors and materialmen As their interests may appear." Id. On May 15, 1973, the motel and casino suffered an extensive fire for which Fireman's paid in

excess of $1,000,000. Id. Thereafter, Harvey's filed suit against MacSween, Johnson and various subcontractors for damages which included the subrogation claim of Fireman's. Id. MacSween and Johnson filed motions for partial summary judgment arguing they were immune from suit as co-insureds under the policy. Id. Harvey's asserted that the language "as their interests may appear" limited the protection afforded MacSween and Johnson under the policy to the extent of their property interests damaged by the fire. Id. at 1097.

On appeal, following a grant of the motions for partial summary judgment, the Nevada Supreme Court first noted that courts deciding this issue are split.[4] Id. The court then examined the case of *Baugh-Belarde Const. Co. v. College Utilities*, 561 P.2d 1211 (Alaska 1977) which held that coverage from an all-risk policy of insurance included losses resulting from the negligence of any insured such that an insurer could not subrogate against a subcontractor who qualified as an insured. Id. at 1098. The Alaska Supreme Court, in reaching that decision, relied in part on public policy considerations in reaching that decision. Id. The Nevada court relied on that rationale in reaching its determination that Johnson and MacSween were immune from suit in subrogation by Fireman's. Those public policy considerations included:

> If an insurer is permitted to recover from an insured, a severe conflict of interest arises because the insurer could use its investigation of the loss to build a liability case against its own insured. Secondly, the cost of subrogation litigation, otherwise passed on to the public, may be avoided if the insurer is barred from subrogation regardless of the extent of the insured's property interest. Finally, if each subcontractor is forced to protect against liability for loss to the entire project by paying huge premiums for its own liability insurance, the public will suffer from the increased costs of construction.

[4] Citing Turner Const. Co. v. John B. Kelley Co., 442 F.Supp. 551 (E.D. Penn. 1976) for the proposition that "as their interest may appear" limits a subcontractor's protection under a policy of insurance.

Harvey's, at 1098.

The Nevada court also noted that summary judgment was appropriate on the basis that ambiguous language in an insurance policy is construed against the insurer. Id. The court held that "the phrase, 'as their interests may appear', may reasonably be read to limit the recovery by the added insureds in case of loss, but not to shift the risk of loss from Fireman's to MacSween and Johnson." Id. The court reasoned that an insurer intending to restrict coverage under a policy of insurance should do so clearly and precisely, and that Fireman's failed to do so. Id. Therefore, the court held as a matter of law that "coinsureds are immune from a subrogation claim by their insurer absent an explicit proviso to the contrary." Id.

In this case, Plaintiff argues that the additional insured provision of the policy limits Sunbelt's status as an insured to its interest in the heaters used in the construction work. However, as in the *Harvey's* case, that policy language is at best ambiguous. This is especially true where the subrogation provision of the policy grants a blanket waiver of Plaintiff's subrogation rights as to an insured without any reference to the alleged limitation of the additional insured provision. Had Plaintiff truly wanted to limit the interests of Sunbelt as an additional insured, it could have done so with clear and unambiguous language in both the additional insured provision and subrogation provision. Plaintiff, however, failed to do such. Therefore, either the policy is ambiguous or there is blanket protection from subrogation for an additional insured. Either way, Sunbelt is immune from suit by Plaintiff.

D. FCA Waived Subrogation Rights Against Sunbelt by Contract.

Plaintiff's Complaint notes a provision of the FCA-Balfour Contract by which FCA

purports to preserve its rights against a negligent party. (DE # 1, ¶ 41). Plaintiff correctly cites that provision of the contract that is contained within an exhibit thereto known as "Schedule A." However, Plaintiff ignores other provisions of the FCA-Balfour Contract, that when read as a whole, show the clear intent for FCA to waive all subrogation rights against a subcontractor where the negligence of a subcontractor causes damage covered by Plaintiff's policy. The Subrogation provision of that policy states that Plaintiff "will have no rights of subrogation against:…B. Any other person or entity, which the Insured has waived its rights of subrogation against in writing before the time of loss."

Significantly, the FCA-Balfour contract mandates that Balfour shall require each subcontractor to be bound by the terms of the contract. (DE # 1-2, PageID # 154). Article 11.3.6 of the FCA-Balfour contract states that FCA and Balfour "waive all rights against (1) each other and the Subcontractors, Subcontractors, agents and employees of the other…for all damages cause by fire **or other perils to the extent covered by insurance obtained pursuant to this paragraph 11.3 or any other property insurance** applicable to the Work." (DE # 1-2, PageID # 166)(emphasis added). That paragraph goes on to require that FCA and Balfour obtain similar waivers from all separate contractors, subcontractors and sub-subcontractors. Id.

Courts have held these waiver provisions valid and enforceable. Lexington Ins. Co. v. Entrex Communication Services, Inc., 749 N.W.2d 124 (Neb. 2008); Universal Underwriters Ins. Co. v. A. Richard Kacin, Inc., 916 A.2d 686 (Sup. Ct. Pa. 2007); State ex rel. Regents of New Mexico State Univ. v. Siplast, Inc., 877 P.2d 38 (N.M. 1994).

Under North Carolina law, "the doctrine of subrogation allows a party who has

compensated a creditor under the color of some obligation, to step into the shoes of the creditor, thereby succeeding to the creditor's rights to proceed against the debtor for reimbursement." In re Declaratory Ruling by N. Carolina Com'r of Ins. Regarding 11 N.C.A.C. 12.0319, 517 S.E.2d 134, 137 (1999). In subrogation, a "subrogee's rights are derivative, and if the insured has no right against a third part, neither does the insurer." Lexington Ins. Co. v. Tire Into Recycled Energy and Supplies, Inc., 522 S.E.2d 798, 800 (N.C. App. 1999). An insurer is bound by an insured's waiver of rights of recovery against another party. Id. In other words, if FCA's waiver of subrogation as to Balfour and Balfour's subcontractors is valid, then Plaintiff has no standing to pursue subrogation against Sunbelt.

In *Universal Underwriters Ins. Co. v. A. Richard Kacin, Inc.*, 916 A.2d 686 (Sup. Ct. Pa. 2007), a wall of an auto dealership collapsed following a rain storm. Universal Underwriters, at 688. The auto dealership entered into a contract prior to that event with Kacin as the general contractor who in turn hired Bassett Masonry, Inc. as a subcontractor among others. Id. Following the loss, Universal Underwriters paid for the damages to the auto dealership and then filed suit in subrogation against Kacin, Bassett and other subcontractors asserting their negligence as the cause of the loss. Id. The construction contract between the dealership and Kacin stated in part:

> **11.3.7 Waivers of Subrogation.** The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other…for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this Paragraph 11.3….
> Universal Underwriters, at 688.

Bassett and Kacin filed a motion for partial summary judgment based on this provision

asserting that the insurer had no right to pursue subrogation against them. Id. at 689. The insurer argued, in part, that the waiver provision was unenforceable because the insurer was not a party to that contract and was not given notice of the waiver provision. Id. at 692. The appellate court rejected that argument. Id. The court first noted that subrogation arises in equity "as a means of placing the ultimate burden of a debt upon the one who in good conscience ought to pay it, and is generally applicable when one pays out of his own funds a debt or obligation that is primarily payable from the funds of another." Id. (internal quotation omitted). The court also noted that other courts addressing the effect of such a waiver provisions are split as to their enforceability. Id. at 693.[5] Ultimately finding the waiver provision enforceable, the court recognized that "through the waiver of subrogation clause in the construction contract, [Kacin and Bassett] and [the auto dealership] agreed to share the burden of either party's negligence by requiring the purchase of property insurance covering the construction work and by agreeing not to sue each other for damages covered by that insurance." Id. By doing so, each of those parties were considered insureds under the policy and none were considered third-party tortfeasors. Id. The court also noted that subrogation rights are derivative and the subrogee's rights rise only as high as those of the subrogor. Id. The court held that because the auto dealership waived its rights against Kacin and Bassett then the insurer had no legally cognizable claim either. Id. at 694.

This case is similar to the *Universal Underwriters* case. Here, there is no question that the policy of insurance provided coverage for the loss as a covered peril

[5] Citing Lopez v. Concord General Mut. Ins. Group, 583 A.2d 602 (Vt. 1990)(arising in the context of an auto policy wherein Vermont requires a subrogation provision; and allowing waiver by subrogor only where such waiver was unequivocal); and St. Paul Fire & Marine Ins. Co. v. Amerada Hess Corp., 275 N.W.2d 304 (N.D. 1979)(waiver of subrogation cannot not be by subrogor).

as Plaintiff has noted in its Complaint and for which it seeks subrogation in the underlying action. Further, in a strikingly similar fashion, FCA and Balfour agreed in writing to waive their respective rights of subrogation against each other and all subcontractors such as Sunbelt. Plaintiff's Complaint concedes that Sunbelt is a subcontractor. Like Pennsylvania's law of subrogation, North Carolina recognizes the limitation that a subrogee's rights against a third party are no greater than that of the subrogor. Regardless of whether Plaintiff was aware of the waiver provision or not is of no consequence. FCA and Balfour, and all similar parties, should be allowed autonomy to contract as they see fit. Because they have agreed to waive all rights of subrogation against subcontractors, Plaintiff has no right to recovery against Sunbelt. And Plaintiff's policy specifically states such: Plaintiff "will have no rights of subrogation against:…B. Any other person or entity, which the Insured has waived its rights of subrogation against in writing before the time of loss." Therefore, Defendant's Motion for Summary Judgment should be granted.

E. The Balfour-Sunbelt Subcontract Mandates Additional Insured Status.

In the alternative, to the extent that the FCA-Balfour contract is not deemed to have required Sunbelt to be an additional insured, the contract between Sunbelt and Balfour does mandate additional insured status. That contract states in part:

> 14. **INSURANCE**.
>   a. Customer Insurance. During the Rental Period, Customer shall maintain, at its own expense, the following minimum insurance coverages: (i) general liability insurance of not less than $2,000,000 per occurrence, including coverage for Customer's contractual liabilities herein (such as the release and indemnification clause contained in Section 12)….Such policies shall be primary, non-contributory, on an occurrence basis, contain a waiver of subrogation against the Sunbelt Indemnities, name Sunbelt as an

> additional insured (including an additional insured endorsement) and loss payee….

(DE # 2).

That provision, while mentioning a specific general liability insurance policy requirement, states that Balfour must maintain "the following minimum insurance coverages." In other words, the general liability policy is not the only contract of insurance contemplated by the parties. Balfour, under that provision, is required to name Sunbelt as an additional insured on any and all policies contemplated by their agreement. That same contract requires that Balfour indemnify Sunbelt for any liability to the extent such liability arises out of the use of the equipment rented by Balfour from Sunbelt. Certainly, the builder's risk policy issued by Plaintiff is a policy contemplated by Balfour and Sunbelt as one in which Sunbelt would be named as an additional insured. That policy would provide coverage for damages arising out of the use of equipment provided by Sunbelt for use by Balfour in the construction work. In order to qualify as an additional insured under Plaintiff's policy, there need only be "any contract or subcontract" mandating a subcontractor's status as such. Here, the subcontract between Balfour and Sunbelt requires that Balfour maintain policies of insurance naming Sunbelt as an additional insured. Therefore, Sunbelt qualifies as an additional insured under Plaintiff's builder's risk insurance policy.

III. CONCLUSION

Based upon the foregoing, Defendant requests that this Court grant its Motion for Summary Judgment and dismiss all of Plaintiff's claims with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was served upon counsel of record for Plaintiffs:

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by electronic means *via* the Court's CM/ECF electronic filing system or by U.S. Mail, postage prepaid.

This the 14th day of February, 2018.

s/ Jonathan D. Stewart

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO POLICY NUMBER 13-000093, Plaintiffs, - against - SUNBELT RENTALS, INC., Defendant.	Case No. 3:17-cv-00274 **PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

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TABLE OF CONTENTS

I. PRELIMINARY STATEMENT 1

II. STATEMENT OF UNDISPUTED FACTS 3

III. LEGAL ARGUMENT 6

A. Standard for Summary Judgment 6

B. Sunbelt is not an Additional Insured 7

C. Even if Sunbelt Qualified as an Additional Insured Under the Policy, Sunbelt's Interests Under the Policy are Limited to Physical Loss or Damage to its Equipment 8

IV. CONCLUSION 16

TABLE OF AUTHORITIES

Cases

Baltimore Contractors, Inc. v. Circle Floor Co. of Washington, 318 F. Supp. 106 (D. Md. 1970) 10, 11
Canal Ins. Co. v. Axley, 680 F. Supp. 2d 923, 925 (W.D. Tenn. 2009) 7
Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) 6
Chao v. Hall Holding Co., 285 F.3d 415, 424 (6th Cir.2002) 6
Leary v. Daeschner, 349 F.3d 888, 897 (6th Cir.2003) 6
Lewis v. Philip Morris Inc., 355 F.3d 515, 533 (6th Cir. 2004) 6
Pear Tree Properties, LLC v. Acuity, 2016 WL 9414100, at *1 (M.D. Tenn. 2016) 7
Pub. Serv. Co. of Okl. v. Black & Veatch, Consulting Engineers, 328 F. Supp. 14 (N.D. Okla. 1971) 8, 11-3
Sagamore Ins. Co. v. Volvo Grp. N. Am., LLC, 2015 WL 5968224, at *1 (M.D. Tenn. 2015) 6
Transamerica Ins. Co. v. Gage Plumbing & Heating Co., 433 F.2d 1051 (10th Cir. 1970) 10
Turner Const. Co. v. John B. Kelly Co., 442 F. Supp. 551 (E.D. Pa. 1976) 9, 10

Rules

Fed. R. Civ. P. 56 ..... 1, 6

Certain Underwriters at Lloyd's, London, Subscribing to Policy Number 13-000093 ("Certain Underwriters"), by their undersigned attorneys, submit this memorandum of law in support of their motion pursuant to Federal Rule of Civil Procedure 56 for an order of summary judgment on all counts against Defendant Sunbelt Rentals, Inc. ("Sunbelt").

I. PRELIMINARY STATEMENT

Underwriters insured FCA-Demonbreun, LLC and Faison & Associates LLC (the "Named Insured") under a first-party all-risk builder's risk policy (the "Policy"). The Policy's Insuring Agreement clearly and unambiguously stated that "[t]his policy … insures against risks of direct physical loss of or damage to insured property from perils not otherwise excluded …". (Exh. A, Part A—Coverage, p.1) (emphasis added). The Policy afforded limited additional insured status, to the extent required by any contract or subcontract, to any individuals or entities specified in such contract or subcontract, and then only as their respective interests may appear. (Exh. A, Supplemental Declarations, p. 1) (emphasis added). The Policy did not afford liability coverage to anyone, not even to the Named Insured. Yet, Sunbelt, who did not entertain a contractual relationship with the Named Insured and who was not identified in the Policy as an additional insured, demands to be recognized as an additional insured for the sole purpose of shielding itself from liability for the damage that Sunbelt's equipment caused to the property of the Named Insured.

Not only does Sunbelt's argument defy the nature of the Policy as a first-party all-risk builder's risk policy, but it also seeks to impart on Sunbelt greater rights under the Policy than it has in the underlying Balfour Contract and the Subcontract. In this regard, neither contract required or specified that Sunbelt be added as an additional insured to the Policy. Moreover, in their respective provisions pertaining to the parties' insurance requirements, the Balfour Contract

and the Subcontract explicitly distinguished between first-party property coverage and third-party liability coverage. The Balfour Contract imposed on the Named Insured the duty to obtain all-risk builder's risk coverage, yet expressly carved out the Named Insured's right to proceed against any negligent party, including Sunbelt. (Exh. B, Schedule A—Insurance Requirements, at ¶10) The Subcontract, for its part, imposed on Balfour the duty to obtain all-risk first-party property coverage against loss to Sunbelt's equipment. (Exh. C, Master Rental Agreement, at ¶ 14). Like the Balfour Contract, the Subcontract contained an express carve-out for Sunbelt's negligence or willful misconduct. *Id.* at ¶ 13. Finally, the Subcontract imposed on Sunbelt the duty to obtain general liability coverage, with which requirement Sunbelt complied. *Id.* at ¶ 14. In short, nothing in the Balfour Contract or the Subcontract supports Sunbelt's argument that it qualifies as an additional insured under the Policy to avoid liability for the loss or damage its equipment caused to the property of the Named Insured at the Insured Project. And, even if Sunbelt is determined to be an additional insured in some capacity, its interest is limited to damage to its own property.

In bringing the instant action, Underwriters respectfully ask the Court to declare that Sunbelt's interests, as they appear in the Subcontract and the Balfour Contract, are limited to Sunbelt's interests in its equipment. Sunbelt's interest under the Policy cannot be greater than Sunbelt's interests under the Balfour Contract or the Subcontract. To agree with Sunbelt, the Court would have to disregard the key Policy language as well as the pertinent language of the Balfour Contract and the Subcontract. The result would be highly inequitable in that it would leave Underwriters without recourse for the loss or damage Sunbelt's equipment caused to the Insured Project. Accordingly, summary judgment is required here because (1) the language of the Balfour Contract and the Subcontract is unambiguous and contrary to Sunbelt's position, and (2) the Policy

clearly and unambiguously limits Sunbelt's additional insured status, if any, to Sunbelt's interest in its equipment at the Insured Project.

II. STATEMENT OF UNDISPUTED FACTS

Underwriters insured FCA-Demonbreun, LLC and Faison & Associates LLC under the Policy, which afforded all-risk builder's risk coverage with effective dates from May 6, 2013 to December 4, 2014. (Joint Statement Of Undisputed Facts, at ¶ 1). The Policy insured a 209-unit residential project, located at 1505 Demonbreun Street in Nashville, Tennessee (the "Insured Project") against direct physical loss or damage. *Id*. at ¶ 2. The Policy also contained the following "Additional Insured" provision:

> To the extent required by any contract or subcontract, and then only as their respective interests may appear, any individual(s) or entity(ies) specified in such contract or subcontract are recognized as Additional Insured. As respects Architects, Engineers, Manufacturers and Suppliers, the foregoing is limited to their site activities only precluding coverage respectively under policies for Professional Liability and Products Liability and Warranty coverage as applicable.

(Exh. A, Supplemental Declarations, p. 1) (emphasis added). According to the above, to the extent required by any contract or subcontract, the Policy afforded limited additional insured status to any individuals or entities specified in such contract or subcontract, and then only as their respective interests may appear.

On or about March 8, 2013, the Named Insured entered into a written contract with Balfour Beatty Construction, LLC ("Balfour") according to which Balfour agreed to act as the general contractor for the Insured Project (the "Balfour Contract"). (Joint Statement Of Undisputed Facts, at ¶ 6). The Balfour Contract provided, in pertinent part:

> Owner will provide All Risk Builder Risk-Completed Form Insurance for the full value of the Work and will absorb deductible losses not covered by such insurance, without, however, waiving its rights to proceed against any negligent party. The builders risk

> policy will list as Insured's [sic], the Owner, Contractor, and any Subcontractor, as their respective interest may appear and shall include permission to occupy. The policy will cover flood and earthquake and will also cover all materials and supplied [sic] intended to become a permanent part of the Work, including temporary forms and scaffolding, while on or about the Site, at other locations, or while in off-site storage at such locations.

(Exh. B, Schedule A—Insurance Requirements, at ¶10) (emphasis added). According to the Balfour Contract, the Named Insured was required to procure all-risk builder's risk insurance, which was to list the Named Insured, Balfour, and any subcontractor, as their respective interest may appear, as insureds. However, the Named Insured expressly preserved its right to proceed against any negligent party.

In November 2014, Balfour entered into a contract with Sunbelt for Sunbelt to provide/rent various pieces of equipment to Balfour to the Insured Project (the "Subcontract"). (Joint Statement Of Undisputed Facts, at ¶ 9). The rented equipment included several torpedo heaters, which were used on several floors of the Insured Project. *Id.* at ¶ 10. With regard to the torpedo heaters, Sunbelt only delivered them to the Insured Project and connected them to the gas supply. *Id.* at ¶ 11.

Article 14 of the Subcontract required both parties to maintain various types of insurance. Specifically, as to Balfour's insurance requirements, the Subcontract provided in Article 14.a:

> During the Rental Period, Customer shall maintain, at its own expense, the following minimum insurance coverages: (i) general liability insurance of not less than $2,000,000 per occurrence, including coverage for Customer's contractual liabilities herein (such as the release and indemnification clause contained in Section 12); (ii) property insurance against loss by all risk to the Equipment …

(Exh. C, Master Rental Agreement, at ¶14) (emphasis added). According to the above provision, Balfour was required to procure all-risk property insurance against loss to the Sunbelt's Equipment. As to Sunbelt's insurance requirements, Article 14.b of the Subcontract provided:

Case 3:17-cv-00274 Document 33 Filed 02/14/18 Page 7 of 20 PageID #: 313

> During the Rental Period, Sunbelt shall maintain, at its own expense general liability insurance of not less than $2,000,000 per occurrence … for Sunbelt's contractual liabilities herein (including the release and indemnification clause contained in Section 12).

Id. (emphasis added). Sunbelt was required to procure general liability insurance for its contractual liabilities. In fact, Sunbelt procured Commercial General Liability Coverage under ACE Policy Number OGLG24876561 and Commercial Umbrella Liability Coverage under ACE Policy Number G27239316 00. (Plaintiffs' Statement Of Material Undisputed Facts). Both policies were in effect from September 30, 2014 to September 30, 2015. *Id.*

Moreover, Article 13 of the Subcontract, entitled "Release And Indemnification," contained the following provision:

> To the fullest extent permitted by law, Customer indemnifies, releases, holds Sunbelt harmless and, at Sunbelt's request, defends Sunbelt …, its affiliates and their officers, directors, and employees (individually and collectively "Sunbelt Indemnitees") from and against and pay or reimburse them for any and all liabilities, claims, losses, damages, and expenses (including reasonable attorney's fees and expenses) however arising or incurred, related to any incident, any damage to property, injury to, or death of, any person or any contamination or alleged contamination, or violation of law or regulation to the extent caused by the use, possession or control of the Equipment during the Rental Period or breach of this Agreement, provided however this provision will not apply to the negligence or willful misconduct of such Sunbelt Indemnitee …

(Exh. C, Master Rental Agreement, at ¶ 13) (emphasis added). Based on the above Release And Indemnification provision, Balfour was not required to hold Sunbelt harmless and/or defend Sunbelt for Sunbelt's negligence or willful misconduct.

On or about November 20, 2014, Balfour discovered water damage at the Insured Project. (Joint Statement Of Undisputed Facts, at ¶ 16). Specifically, a sprinkler head on the fourth floor of the Insured Project activated, causing water to discharge. *Id.* at ¶ 17. Underwriters reimbursed the Named Insured in the amount of $976,201, net of the $10,000 Policy deductible, for the

damages caused by the water discharge according to the terms and conditions of the Policy. *Id.* at ¶ 18. Underwriters then contacted Sunbelt regarding the water damage to the Insured Project. Specifically, Underwriters allege that one of the torpedo heaters, which were placed in the hallways of the Insured Project, malfunctioned causing the sprinkler damage and resulting damage to the Insured Project. Sunbelt has denied Underwriters' allegations. *Id.* at ¶ 19. Instead, Sunbelt has demanded recognition as an additional insured under the Policy, which request has been rejected by Underwriters. *Id.* at ¶ 20. Sunbelt is not seeking to recover under the Policy for the damage sustained to its equipment at the Insured Project. *Id.* at ¶ 21.

III. LEGAL ARGUMENT

A. Standard for Summary Judgment

Summary judgment is appropriate "where there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." *Sagamore Ins. Co. v. Volvo Grp. N. Am., LLC*, 2015 WL 5968224, at *1 (M.D. Tenn. 2015); Fed.R.Civ.P. 56(c). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Leary v. Daeschner,* 349 F.3d 888, 897 (6th Cir.2003). Once met, the burden shifts to the non-moving party to "come forward with specific facts to demonstrate that there is a genuine issue for trial." *Chao v. Hall Holding Co.,* 285 F.3d 415, 424 (6th Cir.2002). Importantly, the non-moving party cannot rely on speculation, conjecture, or fantasy to meet its burden. *Lewis v. Philip Morris Inc.*, 355 F.3d 515, 533 (6th Cir. 2004). Because the interpretation of written agreements, including insurance policies, is a matter of law and not of fact, such issues "are especially appropriate for summary judgment." *See, e.g.*, *Canal Ins. Co. v. Axley*, 680 F. Supp. 2d 923, 925 (W.D. Tenn. 2009); *Pear Tree Properties, LLC v. Acuity*, 2016 WL 9414100, at *1 (M.D. Tenn. 2016).

B. Sunbelt is not an Additional Insured

The Policy, which provided first-party builder's risk coverage to the Named Insured, does not identify Sunbelt as an additional insured. The Policy afforded limited additional insured coverage to any individuals or entities to the extent required by contract or subcontract and specified therein. (Exh. A, Supplemental Declarations, p. 1) (emphasis added). As discussed in greater detail below, neither the Subcontract, nor the Balfour Contract, required or specified that Sunbelt be added as an additional insured to the Policy.

According to the Subcontract—the contract between Sunbelt and Balfour, to which neither the Named Insured nor Underwriters were a party—Sunbelt agreed to provide various rental torpedo heaters to Balfour. The Subcontract did not require that Sunbelt be added to the Policy as an additional insured. In fact, the Subcontract does not even mention builder's risk coverage at all, which is the precise type of coverage afforded by the Policy. Accordingly, the Subcontract cannot form the basis for Sunbelt's argument that it qualifies as an additional insured under the Policy.

Similarly, Sunbelt cannot rely on the Balfour Contract, which governed the contractual relationship between the Named Insured and Balfour, to assert additional insured status under the Policy. According to the Balfour Contract, the Named Insured was required to obtain all-risk builder's risk insurance and to list Balfour and any subcontractor as insureds, as their respective interest may appear. (Exh. B, Schedule A—Insurance Requirements, at ¶10). The Balfour Contract defined "Subcontractor" as "a person or entity who has a direct contract with the Contractor to perform any of the Work at the site." (Exh. B, General Conditions Of The Long Form Construction Contract, at Art. 5.1.). "Work" was defined as "the construction and services required by the Contract Documents … and includes all other labor, materials, equipment and

services provided or to be provided by the Contractor to fulfill the Contractor's obligations." *Id.* at Art. 1.1.3. The Balfour Contract defined "Contract Documents" to include "the Owner-Contractor Agreement and Exhibits ...". *Id.* at Art. 1.1.1. Indeed, the Belfour Contract contained several Exhibits pertaining to subcontractors, however, none of them specify Sunbelt. Rather, there is only a generic reference to contractors and subcontractors, which is not sufficient to assert additional insured status under the Policy. *See, infra, Pub. Serv. Co. of Okl. v. Black & Veatch, Consulting Engineers*, 328 F. Supp. 14 (N.D. Okla. 1971). Moreover, Sunbelt's involvement with the Insured Project was limited to the provision of rental equipment, including several torpedo heaters, to Balfour.

Consequently, in light of the foregoing, it is evident that Sunbelt cannot point to any contract or subcontract that required or specified that Sunbelt be added as an additional insured to the Policy.

C. Even if Sunbelt Qualified as an Additional Insured Under the Policy, Sunbelt's Interests Under the Policy are Limited to Physical Loss or Damage to its Equipment

Even if Sunbelt were to qualify as an additional insured under the Policy—a proposition that Underwriters expressly reject—the Policy's Additional Insured provision clearly and unambiguously limits Sunbelt's additional insured status, if any, to its ownership interest in the equipment it rented to Balfour. This is squarely supported by the Policy's Additional Insured clause which states, in pertinent part, as follows:

> To the extent required by any contract or subcontract, and then only <u>as their respective interests may appear</u>, any individual(s) or entity(ies) specified in such contract or subcontract are recognized as Additional Insured.

(Exh. A, Supplemental Declarations, p. 1) (emphasis added). According to the clear and unambiguous mandate of the Additional Insured clause, <u>a contractor's or subcontractor's interests</u>

are limited to those that appear in the underlying contract or subcontract. Here, as the analysis below demonstrates, Sunbelt's interests are limited to its ownership in the equipment that it provided to Balfour at the Insured Project. Sunbelt's interests cannot be artificially enlarged to encompass liability arising from its equipment, which coverage the Policy does not even provide to the Named Insured. In other words, Sunbelt cannot seek greater protection under the Policy than it was afforded under the Subcontract and the Balfour Contract, both of which merely required protection of Sunbelt's interests in its own property.

Although Underwriters were unable to identify any Tennessee decisions analyzing the operative phrase "as their interests may appear" in the first-party insurance context, courts in other jurisdictions have considered this language. Towards this end, the decision in *Turner Const. Co. v. John B. Kelly Co.*, 442 F. Supp. 551 (E.D. Pa. 1976) is instructive and squarely on point. In *Turner*, the subcontractor's negligence caused fire damage to the ongoing construction project. The general contractor, Turner Construction Company ("Turner"), had obtained first-party property coverage with various insurance carriers. Following the loss, Turner's insurers paid the full amount of the loss and subsequently initiated subrogation proceeding against the subcontractor, John B. Kelly Co. ("Kelly"). Turner's underlying property policy contained the following provision:

> It is specifically understood and agreed that this policy covers both the interest of the Assured and contractor(s) and sub-contractor(s) as additional Assureds hereunder, as their interests may appear.

Id. at 552 (emphasis added). Relying on this language, Kelly argued that it qualified as an additional insured under the policy and that the contractor's insurance carriers were therefore precluded from pursuing Kelly for its negligence. The United States District Court for the Eastern District of Pennsylvania disagreed with this position and held that "if Kelly negligently caused a

fire damage loss to Turner [the contractor], Turner may recover against Kelly, and Turner's insurance carrier has the right to proceed against Kelly as the subrogee of Turner." *Id*. at 555.

The court provided multiple reasons in support of its holding. First, the court noted that the policy did not specifically name Kelly as an insured or co-insured. *Id*. at 553. Rather, it only generically referred to contractors and subcontractors of Turner. Second, turning to the operative phrase "as their interests may appear," the court observed that the parties never intended for Kelly to be insured for its legal liability under the policy or to be relieved of its liability to Turner. Specifically, according to the contract between Turner and Kelly, Kelly was required to maintain liability insurance, which Kelly did. This fact, according to the court, distinguished the instant case from other cases, like *Transamerica Ins. Co. v. Gage Plumbing & Heating Co.*, 433 F.2d 1051 (10th Cir. 1970), where the subcontractor did not procure liability insurance of its own, but relied solely on the contractor for coverage purposes. According to the *Turner* court, a distinction had to be drawn between "a subcontractor who is insured against property damage alone as opposed to a subcontractor who is additionally protected for his legal liability." *Turner*, 442 F. Supp. at 554. Consequently, Kelly was not an additional insured under the policy for liability purposes. *Id*. at 555.

Similarly, in *Baltimore Contractors, Inc. v. Circle Floor Co. of Washington*, 318 F. Supp. 106 (D. Md. 1970), the subcontractor negligently caused fire damage to an ongoing construction project. The general contractor, Baltimore Contractors, Inc. ("BC"), had obtained all risk builder's risk coverage with Underwriters at Lloyd's of London, which described the Assured as: "Baltimore Contractors, Inc., Building Owners and/ or Sub-contractors As Their Interests May Appear." *Id*. at 110 (emphasis added). The subcontract between BC and Circle Floor Co. of Washington

("Circle") required Circle to procure comprehensive liability coverage. *Id.* at 108. Circle complied with this requirement by purchasing a Comprehensive General Liability policy with Liberty.

Asked to determine whether Circle qualified as an insured under BC's builder's risk policy with Lloyd's, the court—applying Maryland law—construed the Lloyd's policy as a whole, and took the relevant provisions of the underlying contracts, specifically the subcontract between BC and Circle, into account. *Id.* at 110. Based on this analysis, the court concluded that Circle was not an insured under the builder's risk policy, for the following reasons:

> The Assured, BC, did not request that Circle be included as an Assured in the Lloyd's policy, and Circle did not ask BC to do so. No property of Circle was valued or schedules for purposes of coverage or the calculation of the premium on the Lloyd's policy. Circle made no claim under the Lloyd's policy after the fire, and no payment was made by Lloyd's with respect to any of Circle's property or work. *Moreover, as required by Paragraph VI of the subcontracts, quoted above, Circle carried its own liability insurance, which covered Circle's contractual liability as well as its liability for negligence*, and Liberty issued to BC a customary certificate of such insurance.

Id. (emphasis added). Like the *Turner* court, the *Circle Floor* court drew a distinction between first-party property coverage, on the one hand (which was afforded by BC's builder's risk policy), and liability coverage, on the other hand (which was not afforded by BC builder's risk policy but, instead, by Circle's Comprehensive General Liability policy with Liberty). Consequently, the operative policy term "as their interests may appear," when construed with the insurance requirements of the underlying subcontract, could not be expanded to afford liability coverage to Circle.

Pub. Serv. Co. of Okl. v. Black & Veatch, Consulting Engineers, 328 F. Supp. 14 (N.D. Okla. 1971) is yet another decision that stands for the proposition that the nature of the underlying first-party property policy must be considered when analyzing the phrase "as their interest may appear." In that case, plaintiffs and their insurers—as subrogees—sought to recover from one of

plaintiffs' contractors, Black & Veatch, Consulting Engineers ("Black & Veatch"), for damage to a turbine as a result of Black & Veatch's negligent design. The policies at issue were "Property Floater" policies, which insured the plaintiffs against physical loss or damages to the insured property (*i.e.* first-party property coverage). *Id*. at *15. In addition to the plaintiffs, the policies also identified Black & Veatch as a named insured "as their interest may appear." Moreover, the policies contained the following endorsement pertaining to contractors and subcontractors:

> It is agreed that this policy, subject to all its terms, conditions and exclusions shall also cover contractors and subcontractors as co-assureds.

Id. at *16. Relying on this provision, and the fact that it was listed as a named insured, Black & Veatch argued that the plaintiffs and their insurers could not pursue it for the damages to the turbine. Black & Veatch moved to dismiss the insurance carrier from the case. *Id*. Plaintiffs opposed the motion, arguing that Black & Veatch were named insureds only as to their interests in the insured property, *i.e.*, the turbine. However, to the extent Black & Veatch's negligence in designing the turbine caused plaintiffs' loss and damage, Black & Veatch could not use its additional insured status as a shield from liability. *Id*.

The court agreed with plaintiffs and denied Black & Veatch's motion. *Id*. The court reasoned as follows:

> [I]f through negligence the Defendant damaged property owned solely by the Plaintiff Public Service which was within the coverage of the insurance policies, it would seem that equity and good conscience should required [sic] the Defendant through subrogation to pay for its negligence to those who have compensated the Plaintiff Public Service for such damage. Certainly a different result would attach if the Defendant damaged its own property which was covered by the policy. In this case its insurer could not recover from it. But no equitable reason is believed to exist to support the proposition that the Defendant should not be liable to the three insurance companies above mentioned for its negligence in damaging the property of another even though the damage was to

> property of a named co-insured and the property was included as insured property by the terms of the policies.

Id. at * 17. According to the *Black & Veatch* court, the defendant could not hide behind its additional insured status to escape liability for loss or damage its negligence had caused to the property of another. The phrase "as their interest may appear" solely pertained to Black & Veatch's interest in the property it owned.

Turner, *Circle Floor*, and *Black & Veatch* offer a logical analysis of the operative language "as their interest may appear," and Underwriters urge the Court to apply the same logic in the instant case. Importantly, *Turner*, *Circle Floor*, and *Black & Veatch* correctly suggest that the phrase "as their interest may appear" must be construed with the underlying contracts and subcontracts in mind. Here, the Subcontract—the contract to which Sunbelt actually was a party and which, therefore, is the initial document to be considered—did not even explicitly mention builder's risk coverage, but, with regard to first-party property coverage, required Balfour to maintain "property insurance against loss by all risk to [Sunbelt's] Equipment …". (Exh. C, Master Rental Agreement at ¶14) (emphasis added). The emphasized language is significant because it confirms that any first-party property policy, like the Policy at issue here, was to provide coverage against loss to Sunbelt's equipment only and not extent to loss by Sunbelt's equipment.

This is further corroborated by the fact that both the Subcontract and the Balfour Contract contained an express carve-out for any negligent conduct by a contractor or subcontract with regard to the Policy. These carve-outs for negligence are critical language that simply cannot be ignored. Specifically, the Balfour Contract set forth as follows:

> Owner will provide All Risk Builder Risk-Completed Form Insurance for the full value of the Work and will absorb deductible losses not covered by such insurance, without, however, waiving its rights to proceed against any negligent party. The builders risk policy will list as Insured's [sic], the Owner, Contractor, and any Subcontractor, as their respective interest may appear and shall

> include permission to occupy. The policy will cover flood and earthquake and will also cover all materials and supplied [sic] intended to become a permanent part of the Work, including temporary forms and scaffolding, while on or about the Site, at other locations, or while in off-site storage at such locations

(Exh. B, Schedule A—Insurance Requirements, at ¶10) (emphasis added). Accordingly, the Balfour Contract did <u>not</u> require that the builder's risk policy provide liability coverage for any contractor or subcontractor. Instead, the Balfour Contract expressly carved out the Named Insured's right to proceed against <u>any</u> negligent party, which includes Sunbelt.

The Subcontract contained a similar carve-out for the negligent or willful misconduct of Sunbelt, as follows:

> To the fullest extent permitted by law, Customer indemnifies, releases, holds Sunbelt harmless and, at Sunbelt's request, defends Sunbelt …, its affiliates and their officers, directors, and employees (individually and collectively "Sunbelt Indemnitees") from and against and pay or reimburse them for any and all liabilities, claims, losses, damages, and expenses (including reasonable attorney's fees and expenses) however arising or incurred, related to any incident, any damage to property, injury to, or death of, any person or any contamination or alleged contamination, or violation of law or regulation to the extent caused by the use, possession or control of the Equipment during the Rental Period or breach of this Agreement, <u>provided however this provision will not apply to the negligence or willful misconduct of such Sunbelt Indemnitee</u> …

(Exh. C, Master Rental Agreement at ¶13) (emphasis added). Thus, not even the Subcontract, to which Sunbelt was a signatory, afforded Sunbelt with a shield for its negligence or willful misconduct.

In fact, the Subcontract expressly distinguished between first-party property coverage and liability coverage. Towards this end, the Subcontract required Sunbelt to maintain "general liability insurance of not less than $2,000,000 per occurrence … for Sunbelt's contractual liabilities herein (including the release and indemnification clause contained in Section 12) …". *Id.* at ¶ 14. And, like the insureds in *Turner* and *Circle Floor*, Sunbelt indeed procured Commercial General

Liability Coverage and Commercial Umbrella Liability Coverage. *See* Exhibits D and E. Both policies were in effect on the date of loss and covered Sunbelt for its negligence with regard to third parties, like FCA Demonbreun. Therefore, it would be nonsensical to allow Sunbelt to turn the Policy into a liability policy when the Subcontract expressly mandated that Sunbelt procure separate insurance covering its liabilities.

Finally, Sunbelt was not specifically mentioned in the Policy as a named insured, and even the Balfour Contract does not specifically list Sunbelt as a party to be named as an additional insured. But even if the Balfour Contract had mentioned Sunbelt explicitly, the *Black & Veatch* decision stresses that Sunbelt would be limited to coverage only to the extent of its interest in its property (*i.e.*, the torpedo heaters). Specifically, if Sunbelt's equipment at the Insured Project had been damaged, Sunbelt could recover from Underwriters the costs to repair/replace the heaters by virtue of its additional insured status. Underwriters, logically, could then not subrogate against Sunbelt to recover the funds they advanced to Sunbelt. Here, however, Sunbelt's negligence caused loss or damage to the property of another, namely the Named Insured. Sunbelt, as a subcontractor that mainly provided rental equipment to the Named Insured, had no interest in the property of the Named Insured. Consequently, Sunbelt, like the defendants in the above-mentioned cases, should not be entitled to use this limited additional insured status as a shield to escape liability for the loss or damage its negligence caused to the property of the Named Insured.

Consequently, Sunbelt's position that it qualifies as an additional insured under the Policy to shield itself from liability is not supported by the language of the Balfour contract <u>or</u> the Subcontract. In both documents, Sunbelt's interests are limited to its ownership interest in its very own rental equipment. In fact, Sunbelt's position—if accepted—would lead to the absurd result that the obligations imposed on Underwriters pertaining to Sunbelt under the Policy are far greater

than those required under the Balfour Contract and the Subcontract regarding first-party property coverage. Sunbelt simply cannot demonstrate that it is as an additional insured under the Policy for the purpose of shielding itself from liability.

IV. CONCLUSION

For the reasons set forth here, Underwriters respectfully request that the Court grant summary judgment for Underwriters.

Respectfully submitted,

Dated: Nashville, Tennessee
February 14, 2018

s/ Chris Vlahos

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ATTORNEYS FOR PLAINTIFFS CERTAIN UNDERWRITERS AT LLOYD'S, LONDON

CERTIFICATE OF SERVICE

The undersigned certifies that on February 14, 2018, a true and correct copy of the foregoing document was served by electronic means *via* the Court's CM/ECF electronic filing system upon the following:

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ATTORNEYS FOR DEFENDANT SUNBELT RENTALS, INC.

s/ Chris Vlahos

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO POLICY NUMBER 13-000093, Plaintiffs, v. SUNBELT RENTALS, INC., Defendant.	No. 3:17-cv-00274

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Comes now Defendant, Sunbelt Rentals, Inc., by and through counsel of record, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and in response to Plaintiff's Motion for Summary Judgment states as follows:

I. FACTS AND PROCEDURAL HISTORY

The facts of this case, beyond the language of the various contracts, are succinct. FCA owned a piece of property in Nashville. FCA contracted with Balfour as the general contractor to build some residential condominiums on the property. Pursuant to that agreement, FCA and Balfour entered into a contract. That contract required that FCA obtain a builder's risk insurance policy naming the contractors and subcontractors as additional insureds. FCA obtained such policy of insurance from Plaintiff but failed to specifically name Balfour or any contractors as additional insureds on the policy. Instead, the policy contains an additional insured provision as will be

discussed herein. As the project progressed, Balfour subcontracted with Sunbelt Rentals for, among other things, use of torpedo heaters on various floors of the structure which Sunbelt provided and connected to the gas supply. Thereafter, a sprinkler head in the structure activated causing damage to the property. Plaintiff paid its insured, FCA, for that damage and has since filed a tort lawsuit as subrogee of FCA against Sunbelt alleging Sunbelt's negligence in causing the loss. Effectively simultaneously, Plaintiff filed this declaratory judgment action against Sunbelt seeking a declaration that Sunbelt is not an additional insured under the builder's risk policy, or in the least has a limited additional insured status. Following the loss caused by the sprinkler head, Sunbelt requested that FCA and Plaintiff recognize it as an additional insured, which Plaintiffs refused to do. The question presented to this Court is whether Sunbelt qualifies as an additional insured under Plaintiff's builder's risk policy, and if so, to what effect. As will be seen below, Sunbelt is immune from suit both under the policy of insurance and the FCA/Balfour contract such that Plaintiff's Motion for Summary Judgment should be denied.[1]

As the Court is familiar with the standard for Motions for Summary Judgment, the same will not be restated here.

II. LAW AND ARGUMENT

Plaintiff makes two arguments as to why Sunbelt Rentals should not be immune from suit under the policy of insurance written by Plaintiff and issued to FCA-Demonbruen. These will be taken in reverse order as presented in Plaintiff's Motion for

[1] The effect of a declaration that Sunbelt is immune from suit would not only render this matter moot but would also effectively result in a dismissal of the underlying tort subrogation litigation.

Case 3:17-cv-00274 Document 42 Filed 03/07/18 Page 2 of 24 PageID #: 1417

Summary Judgment.

A. Sunbelt's Status as an Additional Insured is not Limited to its Interest in Equipment.

Plaintiff cites the Court to three district court cases for the proposition that the phrase "as interest may appear" creates a limitation upon an entity's status as an additional insured. Those cases are distinguishable and appear to be the minority position on the issue.[2]

In fact, while not expressly involving a builder's risk policy, one Tennessee Court has noted that in the context of an attempted subrogation action against a negligent subcontractor under a builder's risk policy, "[c]ourts, rather uniformly, have disallowed such subrogation attempts, determining that the subcontractor and the owner/general contractor are coinsureds under the policy." Miller v. Russell, 674 S.W.2d 290, 292 (Tenn. Ct. App. 1983)(citing *Transamerica Insurance Co. v. Gage Plumbing Co.,* 433 F.2d 1051 (10th Cir.1970); *J.F. Shea Co. v. Hynds Plumbing Co.,* 96 Nev. 862, 619 P.2d 1207 (1980); *Board of Education v. Hales,* 566 P.2d 1246 (Utah 1977); *Baugh-Belarde Construction Co. v. College Utilities Corp.,* 561 P.2d 1211 (Alaska 1977); *South Tippecanoe Corp. v. Shambaugh & Son, Inc.,* 395 N.E.2d 320 (Ind.App.1979); *St. Paul Fire Insurance Co. v. Murray Plumbing Corp.,* 65 Cal.App.3d 66, 135 Cal.Rptr. 120 (1976); *Factory Insurance Association v. Donco Corp.,* 496 S.W.2d 331 (Mo.App.1973); *United States Fire Insurance Co. v. Beach,* 275 So.2d 473 (La.App.1973)).

The general rule in Tennessee is that an insurer who has paid a loss to an insured may "be subrogated *pro tanto* to any right of action which the insured may have against a third person whose negligence or wrongful act caused the loss." Miller v.

[2] Dyson & Co. v. Flood Engineers, Architects, Planners, Inc., 523 So.2d 756, 759 (Fl. Ct. App. 1988).

Russell, 674 S.W.2d 290, 291 (Tenn. Ct. App. 1983)(quoting 44 Am.Jur.2d *Insurance* § 1794 (1982); citing Railway Co. v. Manchester Mills, 88 Tenn. 653 (1890)). An exception to that rule exists under Tennessee law, known as the "anti-subrogation rule," providing that "no right of subrogation exists where the wrongdoer is also an insured under the same policy." Id. (quoting 44 Am.Jur.2d *Insurance* § 1794 (1982)). In a similar vein, the treatise *Couch on Insurance* has observed that:

> Construction contracts often contain provisions requiring the owner, general contractor, and subcontractors to procure certain types of coverage in relation to the construction project. Thus, for example, when a general contractor purchases a property policy to cover the interests of the owner, the contractor, and subcontractors in a construction project as required by the general conditions of the construction contract containing a "waiver of subrogation provision" waiving all claims held by the owner and general contractor against each other and against all subcontractors to the extent covered by the property insurance, and where the subcontractor purchases a liability policy as required by the general contractor, regarding injuries to third parties arising from the construction project, liability for water damage to the construction project is covered by the property policy rather than the liability policy.

Couch on Insurance, § 155:42 (3rd ed.)(citations omitted).

1. Language of Operative Contracts

The policy of insurance issued by Plaintiff to FCA states in part:

> Additional Insured
>
> To the extent required by any contract or subcontract, and then only as their respective interests may appear, any individual(s) or entity(ies) specified in such contract or subcontract are recognized as Additional Insured….
>
> …
>
> 11. Subrogation
>
> If the Company pays a claim under this policy, it will be subrogated, to the extent of such payment, to all the Insured's rights of recovery from other persons, organizations and entities. The Insured will execute and deliver instruments and papers and do whatever else is necessary to secure such rights.

> The Company will have no rights of subrogation against:
>
> **A.** Any person or entity, which is a Named Insured or an Additional Insured;
> **B**. Any other person or entity, which the Insured has waived its rights of subrogation against in writing before the time of loss;

As noted, FCA entered into a contract with Balfour for the construction project. That contract has a direct effect on Sunbelt's status as an additional insured and as to whether Sunbelt may be subject to tort liability for its alleged negligence.[3] The contract states in part:

> [FCA] will provide All Risk Builders Risk – Completed Form Insurance for the full value of the Work and will absorb deductible losses not covered by such insurance, without, however, waiving its right to proceed against any negligent party. The builders risk policy will list as Insured's, [FCA], [Balfour], and any Subcontractors, as their interest may appear and shall include permission to occupy.

That contract also states that Balfour shall require each Subcontractor to be bound to the Contractor by the terms of the Contract Documents and also states:

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

Plaintiff's named insured, FCA, failed to list, or to have Balfour, list all subcontractors in

[3] Plaintiff cites only to one small portion of the FCA-Balfour contract pertaining to insurance requirements, ignoring other relevant and important passages set forth herein.

Case 3:17-cv-00274 Document 42 Filed 03/07/18 Page 5 of 24 PageID #: 1420

the construction contract exhibit attached thereto for that very purpose.

Following the execution of the contract between FCA and Balfour, Balfour entered into a subcontract with Sunbelt for the use of the torpedo heaters. That contract states in part:

> 13. **RELEASE AND INDEMNIFICATION**. To the fullest extent permitted by law, Customer indemnifies, releases, holds Sunbelt harmless…from and against…any and all liabilities…however arising or incurred, related to an Incident, any damage to property…to the extent caused by the use…of the Equipment during the Rental Period or breach of this Agreement, provided however this provision will not apply to the negligence or willful misconduct of such Sunbelt Indemnitee….To the fullest extent permitted by law, Sunbelt indemnifies…Customer…from and against…however arising or incurred, related to any incident, any damage to property…to the extent caused by the negligence of Sunbelt….
>
> 14. **INSURANCE**.
>   a. Customer Insurance. During the Rental Period, Customer shall maintain, at its own expense, the following minimum insurance coverages: (i) general liability insurance of not less than $2,000,000 per occurrence, including coverage for Customer's contractual liabilities herein (such as the release and indemnification clause contained in Section 12)….Such policies shall be primary, non-contributory, on an occurrence basis, contain a waiver of subrogation against the Sunbelt Indemnities, name Sunbelt as an additional insured (including an additional insured endorsement) and loss payee….

2. Applicable Majority Position Case Law

As noted, Plaintiff cites three cases for the proposition that Sunbelt's status as an additional insured is limited to its interest in the torpedo heaters utilized in the construction project. As will be discussed later, these cases are distinguishable from this case. However, a survey of various approaches taken by courts regarding the issues presented is helpful in establishing the framework through which this Court's determination will likely be made.

In *E.C. Long, Inc. v. Brennan's of Atlanta, Inc.*, 252 S.E.2d 642 (Ga. Ct. App. 1979), the owner of a restaurant suffered a fire loss due to the alleged negligence of its contractor, E.C. Long, Inc. Brennan's of Atlanta, Inc. ("Brennan's") purchased a building to convert into a restaurant. Id. at 643. Brennan's entered into a contract with E.C. Long, Inc. ("Long") to perform the construction work. Id. Long subcontracted some grading work to B&W Service Company. Id. While B&W was performing its work on the property, a tree was uprooted disrupting a gas line that allowed gas to seep into the restaurant which eventually led to a fire. Id. Brennan's previously procured insurance on the property and was paid for the loss by those three insurers. Id. Brennan's then brought suit against Long and B&W. Id. Defendant Long contended that it was an insured under the policies of insurance and immune from suit for any monies paid under those policies. Id. at 644.

On appeal, the court first noted that the contract between Brennan's and Long stated that Brennan's was to procure insurance on the property. Id. That contract provision stated that the "insurance shall include the interest of the Owner, the Contractor, Subcontractor and Sub-subcontractors in the Work and shall insure Against the perils of Fire, Extended Coverage, Vandalism and Malicious Mischief." Id. The construction contract also stated that "The Owner and Contractor waive all rights against each other for damages caused by fire or other peril to the extent covered by insurance provided under this Paragraph 11.3." Id. at 645. The policies procured by Brennan's were not introduced into evidence, but the court noted that Long was a named insured. Id. at 644. Brennan's argued that the construction contract provided insurance for Long "only to its limited interest" in the construction. Id. at 645. The court

disagreed, noting that Long had an insurable interest in the property and was an insured. Id. As such, the court held that an insurer cannot, directly or indirectly, maintain an action against a co-insured. Id. at 647. Further, the court held that the waiver of rights between the owner, contractor and subcontractors for damages covered by the policy of insurance required by the construction contract operated to preclude suit against Long as the contractor. Id. at 646.

In *Dyson & Co. v. Flood Engineers, Architects, Planners, Inc.*, 523 So.2d 756 (Fla. Ct. App. 1988), the city of Pensacola retained Flood Engineers to design a sewage treatment plant. Dyson & Co.("Dyson") was awarded the construction contract, and pursuant to that contract obtained a builder's risk policy. Id. at 757. The construction contract required that Dyson's builder's risk policy protect Dyson, Pensacola and Flood Engineers. Id. However, Dyson failed to name the city or Flood Engineers on the policy as additional insureds. Id. A fire caused significant damage to the sewage treatment plant for which the builder's risk insurer paid Dyson. Id. Thereafter, Dyson and the insurer filed suit against, among others, Flood Engineers. Id.[4] Flood Engineers requested summary judgment at the trial court level on the basis that Dyson's failure to name it on the builder's risk policy was a breach of contract that precluded subrogation efforts against them. Id. Dyson and the insurer argued that Flood Engineers lacked an insurable interest and therefore the subrogation action was proper. Id. The trial court granted Flood Engineer's motion for summary judgment and an appeal was taken. Id.

On appeal, Dyson and the insurer argued that Flood Engineers lacked an insurable interest in the sewage treatment plant because "'insurable interest' in the

[4] This case was actually consolidated on appeal with a third party action between Flood Engineers and another party wherein Flood Engineers sought indemnity. Having no bearing on the issues in this case, the history of that litigation as recounted in the opinion is not stated herein.

context of builders' risk policies concerns only property interests and the people who were exposed to the risk of property loss during construction." Id. at 758. Dyson additionally argued that Flood Engineer's only interest was that of their potential liability which would be insured under a liability policy but not a builder's risk policy. Id. The appellate court noted that the construction contract that Dyson entered into required that Dyson maintain builder's risk insurance "which shall protect the Contractor, the Owner, and the Engineer *as their interest may appear*." Id. (emphasis in original). The court then stated the general rule that an insurer may not maintain a subrogation action against its own insured. Id. Because of a lack of Florida cases, the court looked to other jurisdictions to determine whether the phrase "as their interests may appear" in a builder's risk policy included both liability and property interests. Id. at 758-59. Referring to it as the minority position, the court cited the case of *Turner Construction Co. v. John B. Kelly Co.*, 442 F.Supp. 551 (E.D. Pa. 1976) as rejecting the majority approach and holding that the "as their interests may appear" in a builder's risk policy did not cover a subcontractor's liability to a general contractor for the subcontractor's negligence.[5] Id. at 759. The court then noted that the majority view holds that "as their interests may appear" includes both liability and property interests under a builder's risk policy. Id. (Citing, Board of Education v. Hales, 566 P.2d 1246 (Utah 1977); Harvey's Wagon Wheel, Inc. v. MacSween, 606 P.2d 1095 (Nev. 1980); South Tippecanoe School Building Corp. v. Shambaugh & Son, Inc., 395 N.E.2d 320 (Ind. Ct. App. 1979)). As an example of the majority position, the court explained:

In *Baugh-Belarde Construction Co. v. College Utilities Corp.*, 561 P.2d

[5] The court also cited Public Service Co. of Okla. v. Black & Veatch Consulting Eng'rs, 328 F.Supp. 14 (N.D. Okla. 1971) as being in the minority position. Thus, the court impliedly rejected the holding of that case which is one case, along with the *Turner* case, relied upon by Plaintiff in this action.

> 1211 (Alaska 1977), the Supreme Court of Alaska held that a subcontractor's immunity from liability to the insurer was not limited to the amount of damages to the subcontractor's own property. Rather, the builders' risk policy was held to include losses caused by negligence of any insured. 561 P.2d 1213-14. The court based its decision on several policy considerations including (1) the severe conflict of interest that would exist if an insurer were permitted to recover from one of its own insured; (2) the reduction of litigation; and (3) the tremendous burden that would be placed on subcontractors if a builders' risk insurer were permitted to recover against its own insured. 561 P.2d at 1214-15.

Dyson & Co., at 759.

The *Dyson* court followed the majority position, holding that "where the potential risk to be insured under a builders' risk policy is one of liability for damages to the construction project, such risk will constitute an 'insurable interest' under [the statute defining insurable interest]." Id. The court noted that the construction contract clearly anticipated, and expected, that Flood Engineers would be protected under the builders' risk policy "as their interests may appear." Id. While Flood Engineers did not have any physical property involved in the fire loss, it did have an interest with regard to its potential liability for that loss. Interestingly, the court stated that "Flood Engineers had a sufficient insurable interest to support its right to *enforce compliance with the builders' risk coverage provision of the contract*." Id. (emphasis added).

Other cases have followed this trend. In *General Electric Co. v. Zurich-American Ins. Co.*, 952 F.Supp. 18 (D. Maine 1996) the court held that "an insured's interest in being held free from any liability arising out of its involvement in a construction project is indeed a substantial economic interest of the kind referred to in the [statutory definition of insurable interest]." General Electric, at 21. After noting the split in authority among various jurisdictions, the court held that the builder's risk insurer could not maintain a subrogation action against General Electric as General Electric maintained an insurable

interest sufficient to support its status as a named insured on that policy.[6] Id.

In *Sherwood Medical Co. v. B.P.S. Guard Services, Inc.*, 882 S.W.2d 160 (Mo. Ct. App. 1994), the court held that a security company alleged to have negligently allowed a third party onto a construction site resulting in a water loss was an insured under a builder's risk policy and, thus, immune from suit by the insurer. The contract between the property owner and the general contractor required the owner to maintain a builder's risk policy naming the owner, contractor and all subcontractors as insureds "as their interests may appear." Sherwood Medical Co., at 161. After noting the conflicting approaches between various jurisdictions, the court stated that the security company was a subcontractor with an "interest in remaining free from legal liability" which fell within the "All Risk Builder's Risk Policy's coverage."[7] Id. at 163. As such, the court held that the policy and the construction contract, despite the language "as their interest may appear," did not limit coverage simply to a property interest. Id.

3. Minority Position Case Law

As noted, Plaintiff cites three cases which have been described as the minority position relative to the question of whether the phrase "as their interests may appear" limits an additional insured's status under a builder's risk policy. In *Public Service Co. of Okla. v. Black & Veatch Consulting Engineers*, 328 F.Supp. 14 (N.D. Okla. 1971), the plaintiff, partially as trustee for insurance companies who paid for a claim, sued the defendant for damage to a turbine due to the defendant's alleged negligence in the designing of the turbine. After learning that it was a named insured on three of the insurance policies, the defendant moved to dismiss those carriers from the lawsuit and

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[6] Rejecting the holding in *Turner Construction Co. v. John B. Kelly Co.*, 442 F.Supp. 551 (E.D. Pa. 1976).
[7] Also rejecting the holding in *Turner Construction Co. v. John B. Kelly Co.*, 442 F.Supp. 551 (E.D. Pa. 1976).

to reduce its potential exposure by the amounts paid under the policy. Id. at 15. All three policies were titled "Property Floater Policy" and listed both the plaintiff and defendant as insureds "as their interest may appear." Id. The defendant took the position that the insurers could not recover against it because the defendant was a named insured on the policy. Id. at 16. The plaintiff took the position that the defendant was an insured only as "its interest may appear" thereby limiting the defendant's status as an insured to its portion of the work performed. Id. The court first noted the equitable nature of subrogation and that there did not appear to be a general bar to a subrogation action. Id. The court then set forth the subrogation clauses of the insurance policies which provided that if an insured acquired a right against another for damage to the insured property, the insurer would be subrogated to that right. Id. at 16-17. Without any further elaboration, the court held that the defendant's motion to dismiss was denied as there did not appear to be any "valid argument…as to why in this particular situation the principles and effects of both legal and conventional subrogation cannot be utilized." Id. at 17.

This case is dissimilar to the case before this Court. In this case, the parties to the construction contract agreed that FCA, as owner, would maintain builder's risk insurance. Further, the parties agreed that all subrogation rights against it each would be waived to the extent damages to the project were covered by property insurance obtained pursuant to the terms of the construction contract. Moreover, unlike the *Public Service* case, the policy in this case contains a blanket waiver of subrogation as to any additional insured without reference to the purported limiting language of "as their interest may appear." While the *Public Service* court could find no reason to preclude

application of equitable subrogation, this case has multiple reasons to do so.

In *Turner Construction Co. v. John B. Kelly Co.*, 442 F.Supp. 551 (E.D. Pa. 1976), an insurer paid a general contractor for damage caused by fire allegedly resulting from the negligence of a subcontractor, John B. Kelly Co. ("Kelly"). The insurer subrogated to the general contractor and filed suit against Kelly. The fire insurance policy provided that subcontractors were deemed additional insureds "as their interests may appear." Id. at 552. The policy also contained a provision stating that the insurer waived its rights of subrogation against any insured. Id. Kelly argued that, as a subcontractor, it was an insured and immune from a subrogation action. Id. The court disagreed and denied Kelly's motion for summary judgment. Id. The court first noted the general rule that an insurer may be subrogated to its insured except when the insurer attempts to subrogate against its own insured. Id. at 552-53. The court also noted that Kelly was not specifically named as an insured or additional insured in the policy. Id. at 553. After discussing various cases on the subject, the court stated that the phrase "as their interests may appear" existed to give the subcontractor/defendant "an interest in the building according to the amount of the subcontractor's work and material already utilized," but not to make Kelly an additional insured for all purposes. Id. at 554. As further evidence of the intention of the parties, the court looked to the contract between Turner and Kelly whereby Kelly agreed to maintain liability insurance. Id. Based on that fact, and the language of the policy, the court held that Kelly was not immune from a subrogation action except to the extent of its interest in the construction work performed by Kelly. Id. at 555. Kelly remained liable, according to the court, for its negligence that resulted in damage to other portions of the property. Id.

The *Kelly* decision is dissimilar to the present case as well. Although it is closer to the facts of this case, the *Kelly* case did not have contract language in the construction contract purporting to waive subrogation between the owner, contractor and all subcontractors. In this case, FCA and Balfour entered into a contract whereby they agreed to waive all rights against each other and subcontractors for damages to the property to the extent covered by property insurance. As will be discussed later, this distinction factored in heavily to a more recent decision of the same court involving circumstances very similar to the case at bar.

Lastly, Plaintiff relies upon the case of *Baltimore Contractors, Inc. v. Circle Floor Company of Washington*, 318 F.Supp. 106 (D. Md. 1970). In that case Baltimore Contractors entered into a contract with the city of Baltimore for the construction of two educational facilities. Id. at 107. Baltimore Contractors in turn subcontracted with Circle Floor Company of Washington ("Circle") for certain work on the project. Id. The contract between the city and Baltimore Contractors stated that Baltimore Contractors would be responsible for the acts and omissions of its subcontractors and that it would carry, among other things, property damage insurance made payable to the city and Baltimore Contractors "as their interest may appear." Id. at 107-08. The subcontract between Baltimore Contracts and Circle provided that "[p]rior to completion and final acceptance, the risk of loss or damage to the work from any cause whatsoever caused by Subcontractor shall be upon the Subcontractor." Id. at 108. The subcontract also required that Circle maintain general liability insurance throughout the course of construction. Id. During the course of its work, Circle caused a fire that resulted in extensive damage to the building. Id. at 109. Baltimore Contractors was paid by its

builder's risk insurer for the loss and executed a loan receipt agreement through which the insurer brought the subrogation action against Circle. Id. The court noted that the builder's risk policy issued to Baltimore Contractors listed the insureds as "Baltimore Contractors, Inc., Building Owners and/or Sub-contractors As Their Interests May Appear." Id. at 110. The court also noted that the policy clarified that clause by specifically stating that:

> In respect of operations performed by sub-contractors for the Assured, such sub-contractors may, at the request of the Assured, be included in the name of the Assured buy only as regards property of the aforesaid sub-contractors, the value of which shall have been included in the Contract Price shown in the schedule.

Id. at 110.

Neither Baltimore Contractors, nor Circle, requested that Circle be listed on the policy as a named insured. Id. None of Circle's property was scheduled on the policy and Circle maintained its own liability insurance. Id. Without any further explanation, the court stated that "[s]o construed, it is clear [that] Circle was not an insured under the Lloyd's policy." Id.

The *Baltimore* case is also dissimilar to the facts of the case at bar. In particular, the policy in *Baltimore* made clear that subcontractors could be considered additional insureds limited to their work on the property. In this case, there is no such limitation. The policy does state that subcontractors are additional insureds "as their interests may appear." However, the subsequent waiver of subrogation provision of the policy does not contain similar language that can be interpreted as a limitation. Instead, the policy simply states that Plaintiff will not have rights against any entity which is an additional insured. In addition, the *Baltimore* case did not have any underlying contractual

language whereby the parties agreed to waive all rights against each other for damages covered by the property insurance. As will be seen, this is an important distinction as FCA and Balfour specifically agreed to waive such rights against each other and all subcontractors.

4. "As Their Interest May Appear" Does not Limit Sunbelt's Status

In this case, FCA, Plaintiff's insured, entered into a contract with Balfour for the construction project insured by Plaintiff. Under that contract, FCA was to provide builder's risk insurance listing as insureds FCA, Balfour and "any subcontractors, as their interest may appear." It is undisputed that FCA procured insurance from Plaintiff, but failed to name Balfour, or any subcontractor, as an insured on that policy. Section 11.3.1 of the FCA-Balfour construction contract refers to "Schedule A, #8" and states that "if the Owner (FCA) does not intend to purchase such insurance for the full insurable value of the entire Work, he shall inform the Contractor (Balfour) in writing prior to commencement of the Work." However, Schedule A, #8 does not reference All Risk Builders Risk coverage. Instead, that provision is found in Schedule A, # 10. Then, in section 11.3.6, FCA and Balfour specifically agreed to waive all rights against each other and subcontractors "for all damages caused by fire or other perils to the extent covered by insurance obtained pursuant to this paragraph 11.3 **or any other property insurance applicable to the Work**."

The additional insured provision of the insurance policy issued by Plaintiff states that "[t]o the extent required by any contract or subcontract, and then only as their respective interests may appear, any…entity(ies) specified in such contract or subcontract are recognized as Additional Insured…."

The FCA-Balfour contract specifically required FCA to obtain builder's risk coverage listing Balfour and all subcontractors as insureds. While FCA did purchase a builder's risk policy from Plaintiff, that policy failed to list any contractor or subcontractor as an insured. Such is a breach of the FCA-Balfour contract which precludes Plaintiff as subrogee of FCA or Balfour from seeking reimbursement of their loss. Plaintiff's rights as a subrogee rise only to the level of those possessed by the subrogor. To the extent that FCA failed to comply with the terms of the construction contract as it relates to Sunbelt, which is deemed a breach of that contract, it cannot be said to retain the right to proceed against Sunbelt for reimbursement of damages. If FCA did not retain such right, then is subrogee is precluded from bring the underlying tort action.

It is expected that Plaintiff will argue that FCA did comply with the spirit of the requirement of the construction contract by obtaining a policy with an additional insured provision that covers subcontractors. However, this belies their position that Sunbelt does not qualify as an additional insured under the policy. There is no dispute that Sunbelt was a subcontractor or that its contract with Balfour to provide, among other things, torpedo heaters was a subcontract. Plaintiff even refers to Sunbelt and its contract with Balfour as such in their various pleadings. (See e.g., Complaint DE # 1). To the extent that FCA is deemed to have complied with the requirements of the construction contract by the inclusion of the above-referenced additional insured provision, Sunbelt is still not amenable to a subrogation action by Plaintiff.

The FCA-Balfour contract required that Sunbelt as a subcontractor be named as an insured. The additional insured provision of the policy makes clear that if a contract requires such, then any entity specified in such contract acquires additional insured

status. This provision does not require that the underlying contract specifically identify who the various subcontractors are by name. And as set forth above, the construction contract **specifies** that all subcontractors are to enjoy insured status under the builder's risk policy obtained by FCA. There is no question but that Sunbelt qualifies as an intended insured under the builder's risk policy issued by Plaintiff.

To be clear, both the construction contract and the policy state that such specified subcontractors are to be considered insureds "as their interest may appear." However, this language does not limit Sunbelt's status as an insured under the builder's risk policy to Sunbelt's interest in its property only. And such contention by Plaintiff ignores the blanket waiver of subrogation provision of its own policy as will be explained more fully herein.

In *St. Paul Fire & Marine Ins. Co. v. Turner Construction Co.*, 2008 WL 901709 (E.D. Pa. April 2, 2008), an insurer sought to recover damages paid to its insured from a construction manager. In that case, Cira, the owner of a project, hired Turner Construction to act as construction manager on the project. Id. at * 1. During the course of construction, Turner hired a subcontractor to install a flow meter on a pipe. Id. Subsequently, the flow meter failed resulting in a leak that caused over $5 million in damages that St. Paul Fire & Marine Insurance Company paid to its insured, Cira. Id. St. Paul then pursued subrogation against Turner for the alleged negligence of Turner's subcontractor in an effort to recover those monies. The parties filed cross-motions for summary judgment. The court granted Turner's motion for summary judgment. In reaching its decision, the court first noted the various provisions of the construction contract at issue. Id. at * 1-2. Section 13.1 of the agreement required Turner as the

construction manager to purchase various types of insurance including workers' compensation and general liability. Id. at * 1. The contract required that these policies have various stated minimum limits with the understanding that Turner could purchase insurance in excess of those limits. Id. at * 1-2. The contract also stated that "[n]othing contained in the insurance requirements of this Article 13 is to be construed as limiting the extent of the Construction Manager's responsibility for payment of damages resulting from its operations under [the Agreement]." Id. at * 2. Section 13.2 of the construction contract required Cira, as the owner, to purchase builder's risk insurance in its own name and the name of the contractor and subcontractors. Id. Section 13.2.9 of the contract provided that:

> The Owner and Construction Manager waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other…for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Paragraph 13.2 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary….

St. Paul, at * 2.

The court held that this waiver of subrogation provision precluded St. Paul's attempt to subrogate against Turner. Id. at * 3. St. Paul argued that *Turner Construction Co. v. John B. Kelly Co.*, 442 F.Supp. 551 preserved its subrogation rights. Id. at FN 4. The court disagreed stating that the *Kelly* decision turned on the interpretation of an insurance contract and did not involve a situation where the underlying construction contract contained an express waiver of subrogation clause. Id.

The case before this Court is analogous to the *St. Paul* case. Regardless of the language of the insurance contract, the construction contract contained an express

waiver of subrogation between FCA, Balfour, and all subcontractors. It is undisputed that Plaintiff's builder's risk policy provided coverage for the water loss at issue. In fact, Plaintiff paid its insured under the policy in an amount nearing $1 million. And the subrogation waiver provision applies to all damages caused by a peril covered by any property insurance obtained pursuant to the construction contract. There is no question that FCA purchased the builder's risk policy because it was required by the construction contract. There is no question that Sunbelt is a subcontractor. Therefore, by the terms of the construction contract, FCA waived its rights to proceed against Sunbelt.

It is anticipated that Plaintiff will argue that the builder's risk provision of the construction contract preserves FCA rights to maintain an action against any negligent party. The result of such position, however, would be to render the subrogation waiver provision void and ineffective. To the contrary, these two provisions can be read in harmony. FCA's preservation of its right to proceed against any negligent party is a blanket statement. When read in conjunction with paragraph 11.3.6, it is clear that an exception to the preservation provision exists as to contractors and subcontractors. In other words, FCA still maintains the right to proceed against any third-party who negligently caused damage to the project who is not a contractor or subcontractor. And this reading is in harmony with the policy of insurance at issue in that Plaintiff maintains the right of subrogation against third parties but waives such right as to additional insureds.

The policy states that Plaintiff will have no subrogation rights against any additional insured or any other person that FCA waived its right of subrogation against in writing before the loss. Both of these situations apply to Sunbelt. Plaintiff argues that

Sunbelt's status as an additional insured is limited by the language "as their interest may appear." However, the policy then states that Plaintiff has **no** subrogation rights against an additional insured. What the policy does not say is as important as what it does say. The policy does not say that Plaintiff waives subrogation rights against an additional insured as the additional insured's interest may appear. In fact, there is no limiting language at all. It simply states that Plaintiff has no rights against an insured or additional insured. Likewise, and consistent with the underlying contract, the policy waives Plaintiff's rights of subrogation against any party to which FCA waived its subrogation rights in writing. As noted above, and irrespective of whether Sunbelt is an additional insured under the policy, FCA specifically and unquestionably waived all rights against subcontractors for losses covered by the builder's risk policy. At best, this policy language is ambiguous, which in turn would be construed against Plaintiff. However, Sunbelt contends that the policy means what it says. In harmony with the construction contract, Plaintiff waived all subrogation rights against any subcontractor. As such, Plaintiff is precluded from pursuing reimbursement against Sunbelt and Plaintiff's motion for summary judgment should be denied.

Lastly, similar to the majority position case law set forth above, Sunbelt's insurable interest is not limited to its property involved in the loss. Under Tennessee law, a "person has an insurable interest in property, by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property." Cherokee Foundries v. Imperial Assur. Co., 219 S.W.2d 203, 205 (Tenn. 1949)(quoting, Harrison v. Fortlage, 161 U.S. 57 (1896)). Certainly, Sunbelt had an insurable interest in the property on site

at the time of the loss in question. However, as contemplated by the underlying construction contract, Sunbelt, as a subcontractor, had an insurable interest in their potential liability. The parties anticipated this insurable interest by providing a mutual waiver of subrogation provision in the construction contract whereby all parties agreed that no party would be entitled to recover damages otherwise covered by property insurance required by that contract. As such, Sunbelt has both a property interest and liability interest insurable under the applicable builder's risk policy. Consistent with Tennessee's anti-subrogation rule, Plaintiff is precluded from subrogating against its insured, Sunbelt.

B. Sunbelt is an Additional Insured

Plaintiff argues that Sunbelt does not qualify as an additional insured under the policy. Defendant agrees that it was not specifically named as an additional insured on the policy. To that end, neither was Balfour. Yet, the underlying construction contract required both to be so named. Plaintiff also argues that there is no contract that requires Sunbelt to be an additional insured, pointing specifically to the Balfour-Sunbelt subcontract. However, such argument specifically ignores the requirement of the FCA-Balfour contract to name all subcontractors as additional insureds. The policy does not specify whether Sunbelt must be named in a contract, or even which contract must require Sunbelt's naming as an additional insured. Instead, the policy states that "[t]o the extent required by **any contract or subcontract**" any entity specified in that contract is entitled to additional insured status. (emphasis added). The FCA-Balfour contract is "any contract," and it specifies that subcontractors are to be considered additional insureds under the builder's risk policy. Plaintiff's argument to the contrary is

without merit.

III. CONCLUSION

Based upon the foregoing facts and law, Defendant requests that this Court deny Plaintiff's Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was served upon counsel of record for Plaintiffs:

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by electronic means *via* the Court's CM/ECF electronic filing system or by U.S. Mail, postage prepaid.

This the 7th day of March, 2018.

s/Jonathan D. Stewart_______________

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO POLICY NUMBER 13-000093, Plaintiffs, - against - SUNBELT RENTALS, INC., Defendant.	Case No. 3:17-cv-00274 **PLAINTIFFS' OPPOSITION TO SUNBELT'S MOTION FOR SUMMARY JUDGMENT AND IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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TABLE OF CONTENTS

I. PRELIMINARY STATEMENT 1

II. LEGAL ARGUMENT 2

A. Tennessee Law Applies 2

B. Sunbelt's Allegations That It Qualifies as An Additional Insured are Based on a Distorted and Self-Serving Interpretation of the Policy and the Underlying Contracts 2

C. Sunbelt's Focus on the Subrogation Provision is Misplaced and Tries to Create an Ambiguity Where None Exists 6

D. Sunbelt's Interests Under the Policy, if any, are Limited to Physical Loss or Damage to its Equipment 7

III. CONCLUSION 14

TABLE OF AUTHORITIES

Cases

Baltimore Contractors, Inc. v. Circle Floor Co. of Wash., Inc., 318 F.Supp. 106 (D.Md.1970) 12
Baugh-Belarde Const. Co. v. Coll. Utilities Corp., 561 P.2d 1211 (Alaska 1977) 7, 8, 9
Certified Color Mfg. Ass'n v. Mathews, 543 F.2d 284, 296 (D.C.Cir. 1976) 6
Employers' Fire Ins. Co. v. Behunin, 275 F.Supp. 399 (D.Colo.1967) 12
English v. Virginia Sur. Co., 196 Tenn. 426, 430, 268 S.W.2d 338, 340 (1954) 7
Harvey's Wagon Wheel, Inc. v. MacSween, 96 Nev. 215, 606 P.2d 1095 (1980) 7, 8
Horton v. Potter, 369 F.3d 906, 911 (6th Cir. 2004).. 14
McBroome-Bennett Plumbing, Inc. v. Villa France, Inc., 515 S.W.2d 32, 35 (Tex. Civ. App. 1974), *writ refused NRE* (Feb. 26, 1975).. 8
McBroome-Bennett Plumbing, Inc. v. Villa-France, Inc., 515 S.W.2d 32 (Tex.Civ.App.1974)........ 12
Old Line Life Ins. Co. of Am. v. Garcia, 418 F.3d 546, 550 (6th Cir. 2005)............................... 14
Paul Tishman Co. v. Carney & Del Guidice, Inc., 36 A.D.2d 273, 320 N.Y.S.2d 396 (1971), *aff'd*, 34 N.Y.2d 941, 359 N.Y.S.2d 561, 316 N.E.2d 875 (1974)... 12
Phelps v. McClellan, 30 F.3d 658, 663 (6th Cir.1994)) 14
Pub. Employees Mut. Ins. Co. v. Sellen Const. Co., 48 Wash. App. 792, 740 P.2d 913 (1987) .. 10
Public Service Co. of Oklahoma v. Black and Veatch, Consulting Engineers, 328 F.Supp. 14 (N.D.Okl.1971) 12
Puerto Rico Mar. Shipping Auth. v. I.C.C., 645 F.2d 1102, 1112 (D.C. Cir. 1981)...................... 6
Rapp Const. Co. v. Jay Realty Co., 809 S.W.2d 490, 491 (Tenn. Ct. App. 1991) 3
Setters v. Permanent Gen. Assurance Corp., 937 S.W.2d 950, 953 (Tenn.Ct.App.1996) 7
Sisk v. Abbott Labs., 298 F.R.D. 314, 316 (W.D.N.C. 2014) 14
Standard Fire Ins. Co. v. Chester O'Donley & Assocs., Inc., 972 S.W.2d 1, 7 (Tenn. Ct. App. 1998) 7
Tri-State Ins. Co. of Minnesota v. Commercial Grp. W., LLC, 2005 ND 114, ¶ 16, 698 N.W.2d 483, 488–89... 8, 10, 11, 12
Turner Const. Co. v. John B. Kelly Co., 442 F. Supp. 551, 554 (E.D. Pa. 1976)........................ 12
W. Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc., 102 Wash. App. 488, 7 P.3d 861 (2000)... 9, 10, 11, 12

Rules

Fed. R. Civ. P. 56 1
Fed. R. Civ. P. 8(c)(1)... 14

Other Authorities

Jay M. Zitter, *Annotation, Insurance: Subrogation of Insurer Compensating Owner or Contractor for Loss Under "Builder's Risk" Policy Against Allegedly Negligent Contractor or Subcontractor*, 22 A.L.R. 4th 701, 704 (1983). 11

Case 3:17-cv-00274 Document 40 Filed 03/07/18 Page 3 of 19 PageID #: 1390

Certain Underwriters at Lloyd's, London, Subscribing to Policy Number 13-000093 ("Certain Underwriters"), by their undersigned attorneys, submit this memorandum of law in opposition to the cross-motion for summary judgment by Defendant Sunbelt Rentals, Inc. ("Sunbelt") and in further support of their motion pursuant to Federal Rule of Civil Procedure 56 for an order of summary judgment on all counts against Sunbelt.

I. PRELIMINARY STATEMENT

In their Complaint for Declaratory Relief, Certain Underwriters asked this Court to decide the parties' rights and duties under a first-party all-risk builder's risk policy (the "Policy"). The sole issue before this Court is whether Sunbelt, who neither entertained a contractual relationship with FCA-Demonbreun, LLC and Faison & Associates LLC (the "Named Insured") nor was identified in the Policy as an additional insured, nevertheless qualifies as an additional insured under the Policy. The answer to this question is a resounding "No."

In their motion for summary judgment, Certain Underwriters set forth clear and concise reasons why Sunbelt does not qualify as an additional insured under the Policy. Predictably, in its motion for summary judgment, Sunbelt attempts to distract this Court with a legal sleight of hand mischaracterizing the issue presented. In this regard, Sunbelt tries to shift the Court's attention to whether Certain Underwriters can pursue a recovery action against Sunbelt, arguing that the Policy, which provided first-party property coverage to the Named Insured, shields Sunbelt from liability. But whether, and the extent to which, Certain Underwriters can recover in subrogation is an issue to be decided by another court in a separate action. All that is required of this Court is a determination of Sunbelt's rights, if any, under the Policy.

To advance its argument, Sunbelt self-servingly omits crucial language in both the Policy and relevant contracts, attempts to raise a Policy ambiguity where none exists, offers public policy

considerations that are of no concern, and even goes so far as to advance a waiver of subrogation defense that it failed to raise in its responsive pleading. Certain Underwriters address and correct those deficiencies below, and urge the Court to deny Sunbelt's motion for summary judgment and, instead, grant their motion for summary judgment on this issue of first impression.

II. LEGAL ARGUMENT

A. Tennessee Law Applies

In its Memorandum of Law ("Sunbelt Memo"), Sunbelt incorrectly asserts that North Carolina law governs the instant lawsuit. Towards this end, Sunbelt alleges that "the Policy was issued in North Carolina." *See* Sunbelt Memo at p. 5, Page ID # 285. This statement is incorrect because the Policy clearly and unambiguously states that it was issued and delivered in Tennessee. In fact, the Policy provides:

> This insurance contract is with an insurer not licensed to transact insurance in this state and *is issued and delivered as a surplus line coverage pursuant to the Tennessee insurance statutes*.

(Exh. A, Declarations, p. 2, Page ID # 866) (emphasis added). Consequently, Tennessee, rather than North Carolina, law applies to this lawsuit.[1]

B. Sunbelt's Allegations That It Qualifies as An Additional Insured are Based on a Distorted and Self-Serving Interpretation of the Policy and the Underlying Contracts

Sunbelt wants the Court to believe that it qualifies as an additional insured under the Policy so it can shield itself from liability in another action. In support of this position, Sunbelt argues that (1) the Balfour Contract required that "any subcontractor be named as an insured" (Sunbelt Memo, p. 7, Page ID # 287); (2) the contract between Balfour and Sunbelt required Balfour "to

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[1] However, even if North Carolina law were to apply to this action—a proposition that Certain Underwriters expressly reject—Certain Underwriters' analysis in their motion for summary judgment would not change.

name Sunbelt as an additional insured on any and all policies contemplated by their agreement" (Sunbelt Memo, p. 16, Page ID # 296); and (3) Certain Underwriters acknowledged the existence of a contract between Balfour and Sunbelt (Sunbelt Memo, p. 7, Page ID # 287).[2] Conveniently, however, in advancing these arguments, Sunbelt ignores critical provisions of the Policy and the underlying contracts, which mandate that Sunbelt's arguments must be rejected.

The first document that must be considered is the Policy, which provided first-party builder's risk coverage to the Named Insured and did not identify Sunbelt as an additional insured. The Policy afforded limited additional insured coverage to "any individual(s) or entity(ies) specified in such contract or subcontract are recognized as Additional Insured … *[t]o the extent required by any contract or subcontract, and then only as their respective interests may appear…*". (Exh. A, Supplemental Declarations, p. 1, Page ID # 869) (emphasis added). Throughout its analysis, Sunbelt ignores the emphasized language of the Policy's Additional Insured provision, which clearly and unambiguously mandates that whether Sunbelt qualifies as an additional insured under the Policy depends initially on its interests, which are controlled by the requirements set forth in any underlying contract or subcontract. *See, e.g., Rapp Const. Co. v. Jay Realty Co.*, 809 S.W.2d 490, 491 (Tenn. Ct. App. 1991). A review of those agreements (the Balfour Contract and the contract between Sunbelt and Balfour) reveals that Sunbelt's interests are limited, and that Sunbelt seemingly seeks greater rights under the Policy than it has under its very own contract with Balfour.

The second document to be considered is the Balfour Contract. As discussed in Certain Underwriters' Memorandum of Law in support of their motion for summary judgment (ECF Doc.

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[2] Sunbelt invokes the principle of Occam's Razor to advance its position. While certainly a creative approach, Certain Underwriters believe that well-established principles of policy and contract construction should apply in the instant case, rather than a far-fetched philosophical theory.

No. 33), the Balfour Contract governed the contractual relationship between Balfour and the Named Insured. Sunbelt was not a party to that agreement. The Balfour Contract required Balfour and the Named Insured to procure and maintain different types of insurance coverage, including, *inter alia*, "Commercial General Liability Insurance (1986 ISO form or the equivalent)" (Exh. B, Schedule A—Insurance Requirements, at ¶ 2, Page ID # 173); Business Automobile Liability Insurance (*Id*. at ¶ 3); Umbrella Liability Insurance – Coverage (*Id*. at ¶ 4); and Professional Liability (*Id*. at ¶ 5) While the Balfour Contract required the Named Insured to also obtain all-risk builder's risk insurance and to list Balfour and any subcontractor as insureds (Exh. B, Schedule A—Insurance Requirements, at ¶10, Page ID # 174), the Balfour Contract did not expressly identify Sunbelt as a subcontractor in any of its Exhibits pertaining to subcontractors.

Importantly, with regard to all-risk builder's risk insurance—the type of first-party coverage afforded by the Policy—the Balfour Contract contained key limiting language consistent with the limiting language in the Policy. Specifically, the Balfour Contract required contractors and subcontractors to be added to the Named Insured's all-risk builder's risk insurance only *as their respective interest may appear*. *Id*. (emphasis added). Throughout its analysis, Sunbelt downplays this critical language in the Balfour Contract, which reiterates that Sunbelt's interests, if any, are limited by the underlying contracts.

Likewise, Sunbelt ignores critical language contained in the all-risk builder's risk provision of the Balfour Contract which expressly reserved the Named Insured's "right to proceed against <u>any</u> negligent party," including Sunbelt. *Id*. (emphasis added). In other words, and contrary to Sunbelt's assertions, the Balfour Contract did <u>not</u> require that the all-risk builder's risk policy

obtained by the Named Insured (*i.e.*, the Policy at issue here) provide liability coverage for a negligent contractor or subcontractor.[3]

The third document to be considered is the Subcontract. Like the Balfour Contract, the Subcontract—the only agreement to which Sunbelt actually was a party—contained an express carve-out for Sunbelt's negligence. Specifically, Article 13 of the Subcontract, entitled "Release And Indemnification," expressly stated that Balfour would not be required to indemnify, release, or hold Sunbelt harmless for Sunbelt's negligence or willful misconduct. (*See* Exh. C, Master Rental Agreement, ¶ 13, Page ID # 1037.) Rather than addressing this critical nuance of its very own contract with Balfour, Sunbelt argues that the Subcontract required Balfour to add Sunbelt as an additional insured to "any and all policies contemplated by [the parties'] agreement." (*See* Sunbelt Memo, p. 16, Page ID # 296.) Sunbelt's position is a grave mischaracterization of the actual contract language.

Article 14.a of the Subcontract required Balfour to procure (1) general liability insurance; (2) property insurance against loss by all risks <u>to</u> Sunbelt's Equipment; (3) worker's compensation insurance; and (4) automobile liability insurance.[4] (Exh. C, Master Rental Agreement, ¶ 14, Page ID # 1038) (emphasis added). The introductory language preceding this exhaustive list of insurance products stated that Balfour "shall maintain, at its own expense, the following minimum insurance coverages …" (*Id.*) The introductory language did not contain the word "including,"

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[3] Sunbelt tries to invoke the impression that it was able to "foreshadow" Certain Underwriters' arguments pertaining to the limiting "as their respective interest may appear" language and the negligence carve-out in the Balfour Contract. *See* Sunbelt Memo, p. 7, Page ID # 287. However, Certain Underwriters communicated their bases to Sunbelt when rejecting its request to be recognized as an additional insured under the Policy. Therefore, Sunbelt's "farsightedness" in predicting Certain Underwriters' legal theories is contrived.

[4] Sunbelt conveniently leaves out the fact that the Subcontract did not require that Sunbelt be added to the Policy as an additional insured. In fact, it did not even mention builder's risk coverage at all, which is the precise type of coverage afforded by the Policy.

which arguably would have rendered the list into a non-exhaustive one. *See, e.g., Puerto Rico Mar. Shipping Auth. v. I.C.C.*, 645 F.2d 1102, 1112 (D.C. Cir. 1981) (noting that it is hornbook law that the use of the word "including" indicates that the specified list of carriers that follows is illustrative, not exclusive.) (citing *Certified Color Mfg. Ass'n v. Mathews*, 543 F.2d 284, 296 (D.C.Cir. 1976)).

Finally, Sunbelt's argument that it qualifies as an additional insured under the Policy because Certain Underwriters acknowledged the existence of a contract between Balfour and Sunbelt, or referred to it as "Subcontract," is simple-minded and nonsensical. Whether Sunbelt is technically a "subcontractor" cannot possibly be the end of the analysis. Such an approach ignores the contractual nuances reflecting the true intent of all the parties and runs afoul of well-established principles of contract construction.

In sum, there can be no doubt that neither the Subcontract, nor the Balfour Contract, required or specified that Sunbelt be added as an additional insured to the Policy. Consequently, Sunbelt's arguments must be dismissed as meritless.

C. Sunbelt's Focus on the Subrogation Provision is Misplaced and Tries to Create an Ambiguity Where None Exists

The weakness of Sunbelt's argument regarding the Policy's Additional Insured provision is further highlighted by Sunbelt's focus on the Policy's Subrogation provision. In essence, by alleging that the Subrogation clause does not contain the same limiting "as their respective interest may appear" language as found in the Additional Insured provision, Sunbelt desperately tries to

create an ambiguity where none exists.[5] As noted, however, this case is not about subrogation. That said, Sunbelt's argument defies all principles of policy construction and must be rejected.

Courts applying Tennessee law construe insurance policies "as a whole in a reasonable and logical manner" and give reasonable meaning to all provisions of the contract. *Standard Fire Ins. Co. v. Chester O'Donley & Assocs., Inc.*, 972 S.W.2d 1, 7 (Tenn. Ct. App. 1998) (citing *English v. Virginia Sur. Co.,* 196 Tenn. 426, 430, 268 S.W.2d 338, 340 (1954); *Setters v. Permanent Gen. Assurance Corp.,* 937 S.W.2d 950, 953 (Tenn.Ct.App.1996)). Here, the Policy defines the term "Additional Insured" as follows:

> To the extent required by any contract or subcontract, and then only as their respective interests may appear, any individual(s) or entity(ies) specified in such contract or subcontract are recognized as Additional Insured

(Exh. A, Supplemental Declarations, p. 1, Page ID # 869). The Subrogation clause incorporates that definition by referring to the capitalized term "Additional Insured." (Exh. A, Policy, p. 21, Page ID # 894). This interpretation gives effect to all Policy provisions and leads to the logical result that the limiting "as their respective interest may appear" language of the Additional Insured provision applies equally to the Subrogation clause. Therefore, no ambiguity exists.

D. Sunbelt's Interests Under the Policy, if any, are Limited to Physical Loss or Damage to its Equipment

Sunbelt relies heavily on *Harvey's Wagon Wheel, Inc. v. MacSween*, 96 Nev. 215, 606 P.2d 1095 (1980) and *Baugh-Belarde Const. Co. v. Coll. Utilities Corp.*, 561 P.2d 1211 (Alaska 1977) in an effort to oppose Certain Underwriters' argument that Sunbelt's interests under the Policy, if any, are limited to the physical loss or damage to its equipment at the Insured Project. However,

[5] Remarkably, Sunbelt manages to allege within one page of its Memo that the Policy is "clear and unambiguous" with regard to the Additional Insured provision, yet ambiguous with regard to the Subrogation provision. See Sunbelt Memo, pp. 8-9, Page ID # 288-89. Sunbelt cannot have it both ways.

these decisions can be easily distinguished from the facts of the present case, and, therefore, carry no weight.

Unlike in the present case, the policy in *Harvey's Wagon Wheel* expressly named the general contractor (MacSween) and the contractor (Johnson) as insureds. Both entities had a direct contractual relationship with the insured, Harvey's Wagon Wheel, Inc. Clearly driven by a desire to find coverage for MacSween and Johnson, the *Harvey's Wagon Wheel* court turned to several public policy considerations enunciated by the court in *Baugh-Belarde*. However, as discussed below, these considerations do not apply in the instant case.

First, unlike in *Harvey's Wagon Wheel* and *Baugh-Belarde*, there is not a threat of a "severe conflict of interest" between the insurer and its own insured here. The Named Insured paid the premium for the coverage under the Policy, not Sunbelt. *See*, Exh. A, Policy, Page ID # 908-10. The Named Insured and Sunbelt are two entirely distinct entities that did not even entertain a contractual relationship. These circumstances have been found to extinguish the public policy concern of a conflict of interest as articulated in *Baugh-Belarde*. *See, e.g., Tri-State Ins. Co. of Minnesota v. Commercial Grp. W., LLC*, 2005 ND 114, ¶ 16, 698 N.W.2d 483, 488–89 (finding that insurer's subrogation claim against the subcontractor would not create a conflict of interest between the insurer and its insured because the insured and subcontractor were entirely distinct entities); *McBroome-Bennett Plumbing, Inc. v. Villa France, Inc.*, 515 S.W.2d 32, 35 (Tex. Civ. App. 1974), *writ refused NRE* (Feb. 26, 1975) (finding that subcontractor who did not pay insurance premium was not a direct party to the insurance contract and the named insured's insurance carrier was, therefore, entitled to pursue the subcontract for its negligence).

Second, unlike in *Harvey's Wagon Wheel* and *Baugh-Belarde*, there is no concern here that the costs of a subrogation litigation are passed on to the public and that Sunbelt would be "forced"

into procuring liability insurance. Sunbelt is a sophisticated corporation that rents construction equipment nationwide to other sophisticated entities. As such, obtaining liability insurance to cover its negligence is essential to Sunbelt's business model and in its best interest. In fact, Sunbelt procured Commercial General Liability Coverage under ACE Policy Number OGLG24876561 and Commercial Umbrella Liability Coverage under ACE Policy Number G27239316 00. (*See*, Certain Underwriters' Exh. D to ECF Doc. No. 38 and Exh. E to ECF Doc. No. 36.) Both policies were in effect from September 30, 2014 to September 30, 2015. (*Id.*) Thus, any costs of subrogation litigation would be borne by Sunbelt's liability insurers, not the public.

Finally, several cases have since disagreed with the analysis set forth by the *Baugh-Belarde* court. For example, in *W. Washington Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 102 Wash. App. 488, 7 P.3d 861 (2000), the insured owned a church that sustained fire damage to its partially constructed building. The insured's property carrier indemnified the insured for its loss and then commenced subrogation proceedings against the heating contractor and the propane supplier. Like Sunbelt, the supplier—with whom the insured had no contractual relationship—argued that the insured's property insurer could not subrogate against it because (1) it was a co-insured under the insured's policy and (2) the insured waived its subrogation rights by contract. *Id*. 102 Wash. App. at 490, 7 P.3d at 863. The trial court and the Washington Court of Appeals disagreed with the supplier's arguments, ultimately concluding that the supplier was not insulated from liability for its alleged negligence in causing the fire and the loss to the church building.

In reaching its conclusion, the *Ferrellgas* court looked primarily to the policy language. The court noted that the policy unambiguously covered "[m]aterials, equipment, supplies and temporary structures, on the described premises, used for making additions, alterations or repairs to the building or structure." *Id*. 102 Wash. App. at 502, 7 P.3d at 869. Accordingly, the supplier's

gas tanks were covered, and the supplier arguably qualified as an indirect beneficiary of the insured's policy. *Id*. But whether the supplier was automatically insulated from liability for its negligence depended on the intent of the parties to allocate the risk of loss for the construction project at issue. *Id*. 102 Wash. App. at 505, 7 P.3d at 870 (citing *Pub. Employees Mut. Ins. Co. v. Sellen Const. Co.*, 48 Wash. App. 792, 740 P.2d 913 (1987)). Because the insured and the supplier did not entertain a contractual relationship, the court looked to the contract between the insured and the heating contractor. That contract provided, *inter alia*, that the heating contractor was required to procure liability insurance. Moreover, nothing in that contract or any other evidence showed that the "Church intended to purchase builder's risk insurance on its behalf and thereby insulate Ferrellgas from liability for its negligence with respect to the building." *Ferrellgas*, 102 Wash. App. at 506, 7 P.3d at 871. As a result, the court concluded that the supplier "was not an intended beneficiary of the insurance so as to immunize it from its negligence for damage to the building under construction." *Id*. 102 Wash. App. at 506–07, 7 P.3d at 871.

In *Tri-State Ins. Co. of Minnesota v. Commercial Grp. W., LLC*, *supra*, another decision that rejects *Baugh-Belarde*, the Supreme Court of North Dakota also found that a subcontractor was not protected under the insured's policy from liability for its alleged negligence to the construction project. In *Tri-State*, the underlying builder's risk policy insured the construction of a motel. The insured entered into a contract with CSW, the general contractor, who in turn entered into a separate contract with Lawson. Lawson's negligence relative to works on the motel's roof allowed large amounts of rain to enter the premises, causing water damage. *Tri-State Ins. Co. of Minnesota v. Commercial Grp. W., LLC*, 2005 ND 114, ¶¶ 4-6, 698 N.W.2d 483, 485–86. Having indemnified the insured for its loss, the insurance carrier commenced subrogation proceedings against Lawson, but Lawson argued that it was shielded from liability under the Policy.

Following the analysis of the *Ferrellgas* court, the *Tri-State* court looked primarily to the policy to ascertain to what extent Lawson was protected. Towards this end, the court correctly described the nature of builder's risk insurance as follows:

> A builder's risk policy is a "property loss insurance contract by which a builder, whether the owner of or general contractor on a building, seeks to insulate himself from loss which he might suffer because of damage to or loss of a building in the process of construction."

Tri-State Ins. Co. of Minnesota, 2005 ND 114, ¶ 12, 698 N.W.2d at 487 (citing Jay M. Zitter, *Annotation, Insurance: Subrogation of Insurer Compensating Owner or Contractor for Loss Under "Builder's Risk" Policy Against Allegedly Negligent Contractor or Subcontractor*, 22 A.L.R.4th 701, 704 (1983)). The court then noted that the policy did not expressly name Lawson as a co-insured and also did not extend coverage to property of others. Consequently, Lawson was not entitled to protection for its liability under the policy. *Tri-State Ins. Co. of Minnesota*, 2005 ND 114, ¶ 23, 698 N.W.2d at 490.

As has been discussed above and in Certain Underwriters' Memorandum of Law in support of their motion for summary judgment (ECF Doc. No. 33), the Balfour Contract expressly carved out the Named Insured's right to proceed against <u>any</u> negligent party insureds (Exh. B, Schedule A—Insurance Requirements, at ¶10, Page ID # 174). Thus, the Balfour Contract does not allocate the risk of loss to the Insured Project stemming from negligence to the Named Insured. Moreover, the Policy expressly excludes "[c]ontractor's tools, machinery, plant and equipment … and accessories, whether owned, loaned, hired or leased, and property of a similar nature not destined to become a permanent part of the completed INSURED PROJECT…". (*See*, Exh. A, Policy, p. 13, Page ID # 886.) Thus, an argument can be advanced that Sunbelt's torpedo heaters are not even covered under the Policy, because they were not intended to become a permanent part of the Insured Project.

Taken together, *Ferrellgas*, *Tri-State* and the cases Certain Underwriters discussed in their initial Memorandum of Law relative to the operative "as their interest may appear" language lead to the only logical conclusion, which is that Sunbelt's interests under the Policy are, at the very most, limited to its ownership interest in its own rental equipment.[6] Sunbelt has failed to point to any evidence that suggests that the Policy was intended to shield Sunbelt from its negligence. First, the Policy did not specifically mention Sunbelt as a named insured. Second, the Policy only insured against risks of <u>direct physical loss of or damage to insured property</u> from perils not otherwise excluded …". (Exh. A, Part A—Coverage, p.1, Page ID # 874) (emphasis added). The Policy did not insure the named Insured—or any other entity, for that matter—against liability to other parties. *See, Turner Const. Co. v. John B. Kelly Co.*, 442 F. Supp. 551, 554 (E.D. Pa. 1976) (citing *Public Service Co. of Oklahoma v. Black and Veatch, Consulting Engineers*, 328 F.Supp. 14 (N.D.Okl.1971); *Baltimore Contractors, Inc. v. Circle Floor Co. of Wash., Inc.*, 318 F.Supp. 106 (D.Md.1970); *Employers' Fire Ins. Co. v. Behunin*, 275 F.Supp. 399 (D.Colo.1967); *Paul Tishman Co. v. Carney & Del Guidice, Inc.*, 36 A.D.2d 273, 320 N.Y.S.2d 396 (1971), *aff'd*, 34 N.Y.2d 941, 359 N.Y.S.2d 561, 316 N.E.2d 875 (1974); *McBroome-Bennett Plumbing, Inc. v. Villa-France, Inc.*, 515 S.W.2d 32 (Tex.Civ.App.1974). Third, the Balfour Contract and the Subcontract contained an express carve-out for any negligent conduct by a contractor or subcontract with regard to the Policy. These carve-outs for negligence are critical language that simply cannot be ignored because they demonstrate how the parties intended to allocate the risk of a contractor's/subcontractor's negligence at the Insured Project. This intended allocation of risk is further corroborated by the fact that Sunbelt actually procured Commercial General Liability

[6] *See Turner Const. Co. v. John B. Kelly Co.*, 442 F. Supp. 551 (E.D. Pa. 1976); *Pub. Serv. Co. of Okl. v. Black & Veatch, Consulting Engineers*, 328 F. Supp. 14 (N.D. Okla. 1971); *Baltimore Contractors, Inc. v. Circle Floor Co. of Washington*, 318 F. Supp. 106 (D. Md. 1970).

Coverage and Commercial Umbrella Liability Coverage. *See*, Certain Underwriters' Exh. D to ECF Doc. No. 38 and Exh. E to ECF Doc. No. 36. Both policies were in effect on the date of loss and covered Sunbelt for its negligence with regard to third parties, like FCA Demonbreun. Sunbelt, as a sophisticated entity, was clearly aware of the express distinction between first-party property coverage and liability coverage. To allow Sunbelt to turn the Policy into a liability policy when the Subcontract expressly mandated that Sunbelt procure separate insurance covering its liabilities would be nonsensical. Fourth, even the Subcontract, to which the Named Insured was not a party, clarified that, with regard to first-party property coverage, Balfour was only required to maintain "property insurance against loss by all risk to [Sunbelt's] Equipment …". (Exh. C, Master Rental Agreement, ¶14, Page ID # 1038) (emphasis added).

Consequently, Sunbelt's position that it qualifies as an additional insured under the Policy so that it may shield itself from liability is not supported by the language of the Policy, the Balfour Contract, or the Subcontract. According to these documents and the case law discussed herein, Sunbelt's interests are clearly limited, at best, to its ownership interest in its very own rental equipment. As mentioned, Sunbelt's position—if accepted—would lead to the absurd result that the obligations imposed on Certain Underwriters pertaining to Sunbelt under the Policy are far greater than those provided to Sunbelt under the Balfour Contract and the Subcontract.

E. Sunbelt's Waiver of Subrogation Argument is a Distraction, is Not an Issue Before This Court, and is in Violation of FRCP 8(c)(1)

Sunbelt dedicates nearly four pages of its brief to its waiver of subrogation argument. That argument, however, is not before this Court, but is currently being considered (as it should be) in

the underlying subrogation/recovery action pending in Tennessee state court.[7] To clarify, the sole issue before this Court is whether Sunbelt qualifies as an additional insured under the Policy.

In addition, it should be noted that this is the first time that Sunbelt raises the waiver of subrogation argument in this lawsuit. Even though it could have easily done so, Sunbelt did not raise the argument as an affirmative defense in its Answer to Certain Underwriters' Declaratory Judgment Action (ECF Doc. No. 19). However, Rule 8(c)(1) of the Federal Rules of Civil Procedure unambiguously provides that, "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including … waiver." Courts have consistently held that "[a]s a general rule, failure to plead an affirmative defense results in a waiver of that defense." *Old Line Life Ins. Co. of Am. v. Garcia*, 418 F.3d 546, 550 (6th Cir. 2005) (citing *Phelps v. McClellan*, 30 F.3d 658, 663 (6th Cir.1994)); *see also Sisk v. Abbott Labs.*, 298 F.R.D. 314, 316 (W.D.N.C. 2014) ("the failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case.); *Horton v. Potter, 369 F.3d 906, 911* (6th Cir. 2004) ("failure to plead an affirmative defense in the first responsive pleading to a complaint generally results in a waiver of that defense."). Consequently, Certain Underwriters urge the Court to disregard Sunbelt's waiver of subrogation argument.

III. CONCLUSION

For the reasons set forth here, Certain Underwriters respectfully request that the Court deny Sunbelt's motion for summary judgment with prejudice and grant summary judgment for Certain Underwriters.

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[7] That action is styled *Demonbreun-FCA, LLC v. Sunbelt Rentals, Inc.*, Case No. 17C424 and pending in the Circuit Court for the Twentieth Judicial District at Davidson County, Tennessee.

Respectfully submitted,

Dated: Nashville, Tennessee
March 7, 2018

s/ Chris Vlahos

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CERTIFICATE OF SERVICE

The undersigned certifies that on March 7, 2018, a true and correct copy of the foregoing document, was served by electronic means *via* the Court's CM/ECF electronic filing system upon the following parties and participants:

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