

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION**

**DANIEL B. O'KEEFE,
CELESTE A. FOSTER O'KEEFE,
and THE DANCEL GROUP, INC.**

PLAINTIFFS

VS.

Civil Action No. 1:08cv600 HSO-LRA

**STATE FARM FIRE AND CASUALTY
COMPANY and MARSHALL J. ELEUTERIUS**

DEFENDANTS

**PLAINTIFFS' REBUTTAL IN OPPOSITION TO DEFENDANTS'
[67] RESPONSE IN OPPOSITION TO PLAINTIFFS'
MOTION FOR DECLARATORY JUDGMENT /
PARTIAL SUMMARY JUDGMENT RE: SCOPE OF COVERAGE**

COME NOW THE PLAINTIFFS, by and through undersigned counsel, and file this, their Rebuttal to Defendants' [67] Response in Opposition to Plaintiffs' Motion for Declaratory Judgment / Partial Summary Judgment¹, as follows:

1. Defendants' [67] response is heavy on argument, but light on facts. Plaintiffs submit the affidavit of Celeste A. Foster O'Keefe, which is attached as "Exhibit 1". As set forth therein and in the attachments thereto, contrary to State Farm's argument, the pertinent facts in this issue include:

a. State Farm's agent was expressly asked to provide business interruption coverage for Dancel through the subject policy;

b. State Farm's agent represented to the Plaintiffs that the subject business policy would and did provide coverage for loss of business income sustained as a result of a

¹ This pleading is a rebuttal to Defendants' response in opposition to motion for summary judgment / declaratory judgment only. Plaintiffs will file a separate response to Defendants' [68] [69] Cross Motion for Summary Judgment that was incorporated into the same pleading. That response is not due until April 13, 2009.

necessary interruption of the business operations of Dancel, the primary business owned by the O'Keefes and operated out of the premises described on the Declarations page of the subject business policy;

c. The application for the subject policy was filled out by the agent, and states that the named insureds owned the business interests sought to be insured for at least 10 years, and that the named insureds have been operating the business interests sought to be insured for 3 ½ years;

d. At the time the application for the subject policy was signed on June 23, 1999, the only business Celeste Foster O'Keefe was seeking to insure that she had owned for at least 10 years was Dancel;

e. At the time the application for the subject policy was signed on June 23, 1999, the business Celeste O'Keefe sought to insure, Dancel, had been operating out of 10265 Rodriguez Street for 3 ½ years;

f. The Plaintiffs did not even own the premises at 10265 Rodriguez Street at the time the application for the subject policy was signed on June 23, 1999, thus it would have been impossible for Plaintiffs to buy, and for State Farm to sell the Plaintiffs loss of business income insurance to cover loss of rents for the subject premises at that time;

g. Premium payments for the subject policy were made by Dancel, and accepted and negotiated by State Farm with knowledge they were being made by Dancel;

h. Plaintiffs understood the clear and unambiguous terms of the policy to say that they were covered for loss of business income sustained due to necessary interruption of the business operations conducted out of the premises identified on the policy, including the business operations of Dancel; and at all material times the business operations of Dancel

were the primary business operations conducted out of the premises described on the subject business policy; and

i. State Farm, by and through Eleuterius, knew at all material times that Dancel was owned by he O’Keefes, and that the business operations of Dancel were the primary business activities conducted out of the premises described on the Declarations page for the subject business policy, because Celeste Foster O’Keefe told them so.

(See “Exhibit 1”).

The Unambiguous Terms of the Policy Support Plaintiffs’ Position

2. State Farm devotes a large part of its response to arguing that Plaintiffs cannot prove the subject policy of insurance is ambiguous as to what business activities it covers. State Farm’s argument is misplaced, however; and State Farm fails to acknowledge that Plaintiffs’ position, first and foremost, is that the policy is *not* ambiguous, but that the loss of business income suffered as a result of the interruption of Dancel’s business activities conducted out of the premises identified on the Declarations are covered pursuant to the clear and unambiguous terms thereof. (See ¶¶ 4-7 of Plaintiffs’ [61] Memorandum). The Affidavit of Celeste Foster O’Keefe further confirms this position, and that the Plaintiffs understood the words of the policy to mean exactly what they say:

a. that the policy provided coverage for “the actual loss of ‘business income’ you sustain due to the necessary suspension of your ‘operations’ during the ‘period of restoration’”;

b. that the policy expressly defines “business income”, in the section discussing coverage for loss of business income, as “the net income (net profit or loss before Income

taxes) that would have been earned or incurred and continuing normal operating expenses, including payroll, incurred during the ‘period of restoration’”;

c. that the policy expressly defines “operations”, in the section discussing coverage for loss of business income, as “the **type of your business activities occurring at the premises shown in the Declarations.**” (emphasis added); and that

d. the Declarations for the subject policy identifies the “premises” as 10265 Rodriguez Street, D’Iberville, Mississippi 39540.

3. The facts are undisputed that the primary type and most significant business activities Danny and Celeste O’Keefe conducted out of, and that occurred at 10265 Rodriguez Street, D’Iberville, Mississippi 39540 during the entire time the subject policy was in force were the business activities of Dancel, a corporation solely owned by Danny and Celeste O’Keefe. Business owners such as the O’Keefes essentially can only read the contracts available to them and choose the one that they believe best serves their needs. Because the subject business policy is a contract of adhesion, its terms must be construed strongly against the drafter – State Farm. See J&W Foods Corp. vs. State Farm Mutual Automobile Ins. Co., 723 So.2d 550, 552 (Miss. 1998). Had State Farm wished to define business “operations” as being “limited to the business activities conducted by the insured named on the Declarations **in its own name**”; or wished to exclude “business activities conducted in the name of a business solely owned by the insureds named on the Declarations **if the business entity is not separately listed as a named insured**”, it could have done so. Having failed to do so, however, State Farm may not be allowed to now re-write the policy to narrow coverage provisions and/or expand on exclusions to coverage not expressly enumerated in the contract purchased by the Plaintiffs.

4. Indeed, State Farm’s argument that the business activities conducted out of 10265 Rodriguez Street are *only covered under the subject business policy if the business entity under whose name they are performed is a named insured on the Dec Page* is belied by State Farm’s own conduct in this case. State Farm readily admits that it paid “loss of rents” sustained as a result of Hurricane Katrina’s destruction of the premises at 10265 Rodriguez Street. The Commercial Lease Agreement attached as “Exhibit H” [67-8] to State Farm’s own response demonstrates that the premises at 10265 Rodriguez Street were leased, **not by “individuals” Danny and Celeste O’Keefe**, but by “O’Keefe Properties”, which is identified as the “Landlord” under the subject lease agreement. The facts are undisputed that “O’Keefe Properties” is **not a named insured under the subject policy of insurance**, but that State Farm none the less paid for lost rents suffered by that landlord – because the rental of the subject property constituted some of the business activities of a declared business operated by the individuals named on the Declarations occurring at the premises described on the Declarations. By its own actions, State Farm has judicially admitted that a “business” owned and operated by Danny and Celeste O’Keefe need not be separately identified on the Declarations for coverage for loss of business income to be extended; and that its denial of lost income suffered as a result of the necessary interruption of the business activities of Dancel, the primary business conducted out of 10265 Rodriguez Street which is solely owned by Danny and Celeste O’Keefe, was improper.

**Alternatively, the Policy is Ambiguous and/or Illusory,
and Must be Construed in Favor of Plaintiffs**

5. Plaintiffs’ argument that the terms of the subject policy are ambiguous are submitted solely in the alternative to Plaintiffs’ argument that the terms of the contract are unambiguous. (See ¶¶ 8-10 of Plaintiffs’ [61] Memorandum). Plaintiffs contend that the interpretation of the

subject contract advanced by the Plaintiffs, set forth above and in their [61] Memorandum, is a reasonable interpretation of the clear and unambiguous terms of the contract. Should the Court conclude that the contrary interpretation urged by State Farm is also reasonable (a conclusion belied by State Farm's own actions as set forth above), then the relevant terms of the subject contract are ambiguous, and must be construed in favor of the Plaintiffs. See *Mississippi Farm Bureau Mut. Ins. Co. vs. Walters*, 908 So.2d 765 (Miss. 2005).

6. State Farm's argument that its payment of lost rents suffered by O'Keefe Properties defeats Plaintiffs' argument that the loss of business coverage is illusory actually *supports* Plaintiffs' position. As shown above, State Farm paid for lost rents incurred by Landlord "O'Keefe Properties", an entity that is NOT a "named insured" on the Declarations. State Farm obviously paid these benefits because the rental activities of "O'Keefe Properties" was one type of business activities Danny and Celeste O'Keefe conducted out of the premises described on the Declarations, even though it was not the specific business operations applied for in connection with the subject policy of insurance. The undisputable facts demonstrate that rental of the premises at 10265 Rodriguez Street were not the business operations Plaintiffs applied to insure, and which State Farm agreed to insure in 1999. The business activities concerning rental of the premises at 10265 Rodriguez Street by the O'Keefes d/b/a "O'Keefe Properties" were **non existent when the subject policy was sold**, as State Farm's own exhibits demonstrate the O'Keefes did not even acquire an ownership interest in the premises at 10265 Rodriguez Street until after the subject policy was applied for. Rather, the primary business activities by Danny and Celeste O'Keefe operated out of 10265 Rodriguez Street when the policy was applied for were the business operations of Dancel, a corporation solely owned by Danny and Celeste O'Keefe. Although Celeste Foster O'Keefe was not shown, and did not fill out the second page

of the business insurance application when State Farm Agent Eleuterius² gave her a single page application to sign in June, 1999; the second page of what State Farm purports to be the application for the subject policy (filled out by the agent) does reflect that Danny and Celeste O’Keefe “owned and operated this business” [the business they were seeking to insure through the subject policy] for “10 years”, and that the business they were seeking to insure had been operating “at this location” for “3 ½ years”. (See “Exhibit 1”, attached hereto, and page 2 of [67-7] “Exhibit G” to State Farm’s Response). The only business Mrs. O’Keefe was seeking to insure when she signed the subject application that she had owned for at least 10 years was Dancel. (See “Exhibit 1”, ¶ 15). Likewise, at the time Mrs. O’Keefe signed the one page application she was asked to sign for the subject business policy, Dancel was the business that had been operating out of 10265 Rodriguez Street for 3 ½ years (See “Exhibit 1”, ¶ 16). In summary, the application State Farm contends was made for the subject business policy predated the existence of any rental business activities for the premises located at 10265 Rodriguez Street; and Dancel is the business that is specifically referenced on the policy application – which application was filled out by State Farm’s agent.

7. As noted, Dancel is the business State Farm’s agent was referencing when he filled out the subject policy application to represent that the business sought to be insured had been owned by Danny and Celeste O’Keefe (the named insureds) for at least 10 years; and Dancel is the business State Farm’s agent was referencing when he filled out the subject policy application to note that the named insureds had been operating the business interests, sought to be insured under the loss of business income provisions of the policy, out of 10265 Rodriguez Street for 3 ½ years. If the policy *really* does not cover the business activities of Dancel – which are

² Mississippi’s liberal statute for determining whether one was acting as an “agent” for an insurance company, Miss. Code Ann. 83-17-1 (1991), was still in effect in June, 1999.

undisputedly “the **type of your business activities occurring at the premises shown in the Declarations**” (see policy), then this *business policy*’s purported coverage for loss of business income is indeed illusory, and was so when it was sold to the Plaintiffs in 1999.

8. An insurance policy must be more than a paper “where the big print gives it to you and the small print takes it away.” As noted by the Mississippi Supreme Court

The policies are prepared by the experts of the companies, they are highly technical in their phraseology, they are complicated and voluminous . . . and in their numerous conditions and stipulations furnishing what may be veritable traps for the unwary . . . [C]ourts, while zealous to uphold legal contracts, should not sacrifice the spirit to the letter *nor should they be slow to aid the confiding and innocent.*

Crawley vs. American Public Life Ins. Co., 603 So.2d 835, 841 (Miss. 1992) (emphasis in original) (quotations omitted). The Court continued

What does an insurance company owe its policyholders and those it induces to become policyholders? First, simple, open honesty and fair dealing in taking reasonable steps to be certain that the insured is not being misled as to his coverage, but understands it; and second, an insurance company, just like everybody else, should pay its bills when they are due. The law of this state requires no more, neither will it tolerate less.

Crawley, supra.

9. The subject policy promised to pay for loss of business income suffered as a result of a necessary interruption of business activities occurring at 10265 Rodriguez Street. The O’Keefes, the named insureds on the Declarations Page, conducted two types of business activities out of those premises, *neither of which was conducted in their own name.* They conducted rental activities, doing business as O’Keefe Properties, of renting the actual premises to Dancel – although they did not begin those activities until after the subject policy was applied for and purchased. Even so, State Farm paid for the loss of rents suffered by O’Keefe Properties as a result of Hurricane Katrina, as these were business activities conducted out of the insured

location. The O'Keefes also conducted the business of Dancel, a corporation solely owned by Danny and Celeste O'Keefe, as the primary business activities conducted out of the described premises. Dancel's business activities were the only business activities sought to be insured that existed when the subject policy was applied for; and the only business activities referenced by State Farm's agent on the application. State Farm paid for interruption of one of the business activities conducted from the premises in the name of an entity other than Celeste and Danny O'Keefe, but solely owned by them; however State Farm wrongfully denied coverage for interruption of the business activities described by its Agent on the subject policy's application; the most significant business activities conducted out of the named premises in the name of an entity other than Celeste and Danny O'Keefe, but solely owned by them. State Farm failed to keep its promise, and failed to pay its bills when due, and its conduct must not be tolerated by this Honorable Court.

10. The fact that State Farm ultimately paid for the loss of rents suffered by Landlord O'Keefe Properties with regard to the premises at 10265 Rodriguez Street, under a policy State Farm contends was applied for on June 23, 1999 (see [67-7] "Exhibit G" to State Farm's response), further confirms the business income coverage State Farm sold the Plaintiffs in June, 1999 was illusory if the policy terms mean what State Farm says they do. Based on State Farm's own submissions to this Honorable Court, it would have been impossible for State Farm to sell Celeste Foster O'Keefe coverage for loss of business income to cover loss of rents at 10265 Rodriguez Street on June 23, 1999, **because the O'Keefes did not even own the premises at 10265 Rodriguez Street at that time.** Although the Plaintiffs had been conducting the business operations of Dancel out the premises since 1995 (approximately 3 ½ years) when they applied for the subject policy, they did not acquire an ownership interest in the premises at 10265

Rodriguez Street until more than a month later, when the O'Keefes were granted a warranty deed from David Allison on July 30, 1999. (See "Exhibit 1" attached hereto, and [74] "Exhibit D" to State Farm's Response).

11. Finally, the fact it was impossible for State Farm to sell the Plaintiffs loss of business income insurance to cover loss of rents at 10265 Rodriguez Street when the policy was sold on June 23, 1999; paired with the fact State Farm paid for loss of rents by Landlord O'Keefe Properties after Hurricane Katrina, verifies that the policy terms **mean what the Plaintiffs say they do**. State Farm paid the loss of rents suffered by O'Keefe Properties, which were not even contemplated when the policy was purchased, because such were sustained as a result of necessary interruption of business activities of a business owned and operated by the O'Keefes out of the premises described on the Declarations Page. State Farm must not be allowed to pick and choose coverage solely for the purpose of limiting its ultimate amount of liability.

The "Law" Presented by State Farm Does not Support its Position

12. State Farm's representation that the Mississippi Supreme Court's opinion in *Steinwinder vs. Aetna Cas. and Sur. Co.*, 742 So.2d 1150 (Miss. 1999) addresses a "closely analogous case" is simply incorrect. *Steinwinder* dealt with an attempt to find coverage under a corporate UM policy for an individual who was not a named insured, and who was *not traveling in a non-covered vehicle at the time of his injuries*. There was simply no basis for coverage under the terms of the subject policy.³ Such is not the case in the matter at bar. The business activities of

³ Although *Steinwinder* does not support the position advanced by State Farm, it does state the law applicable to certain facts in this case that are not presently before the Court. The Mississippi Supreme Court reaffirmed longstanding Mississippi jurisprudence that "knowledge acquired by a soliciting agent in the course of his employment in soliciting insurance, preparing and transmitting applications, delivering policies, etc. is ordinarily imputed to the company." 742 So.2d at 1154 (citations omitted). The Court ruled that summary judgment could not be rendered in favor of Aetna on the question of whether the individual who was not named as an insured was covered for injuries received in a non-covered vehicle because there were material questions of fact about whether the agent understood that the

Dancel interrupted by Hurricane Katrina did not occur from, and did not result from damage to a “non-covered” premise. The facts are undisputed that the business operations of Dancel “occurred at” and/or were conducted from, and were interrupted due to the Hurricane’s destruction of, the premises that are expressly covered under the subject insurance policy.

13. Actually, the Court’s reasoning in *Steinwinder* supports the Plaintiffs’ position in the case at bar. Discussing rulings from other jurisdictions, the Mississippi Supreme Court observed

The court reasoned that the policy language of “you” and “your” within the business auto policy clearly referred to the named insured [a business], and common sense dictates that a reasonable layperson knows that a corporation does not have relatives or family members.”

Steinwinder at 1154 (citations omitted). In *Steinwinder*, the Plaintiffs were seeking to extend “business” coverage to individuals. In the case at bar, the Plaintiffs are merely trying to obtain **business coverage** under the **business policy** State Farm sold them. The “named insureds” on this **business policy** are clearly individuals, not businesses, and *common sense dictates* that a reasonable layperson knows that an individual is not a “business”, and that references to “you” and “your” in the context of a **business policy** are clearly references to **businesses** operated by the named individuals out of the premises described on the Declarations.

14. Contrary to State Farm’s argument (at pg. 13 of Response), the Plaintiffs interpretation of the policy would not extend coverage to “any person who transacts business at the same location as the O’Keefes on the date of the loss.” (emphasis in original). Plaintiffs merely maintain that, pursuant to the clear and unambiguous terms of the subject **business policy**, Plaintiffs are entitled

corporate insured intended and believed (based on agent’s representations) that the insurance it was purchasing would extend to cover officers and directors traveling for business in non-covered vehicles. *Id.* at 1155. Similarly, in the case at bar, Plaintiffs would be entitled to have the question of whether the agent’s conduct (discussed above and highlighted in the attached affidavit) subjects State Farm to liability for loss of business income sustained as a result of interruption of Dancel’s business activities *even if* the Court were to determine the policy as written does not provide such coverage. That is a question for another day, however, which need not be considered at any time if the Plaintiffs prevail on the present motion.

to recover for the actual loss of business income incurred a result of the necessary interruption of business activities *of businesses owned and operated by Danny and Celeste O’Keefe at the premises identified on the Declarations*. The facts are undisputed, and undisputable that the “named insureds”, Danny and Celeste O’Keefe, (1) were the sole owners of Dancel; (2) operated Dancel out of the premises expressly identified on the Declarations; (3) were forced to interrupt the business operations of Dancel due to Hurricane Katrina’s destruction of the premises described on the Declarations; and (4) suffered a loss of net income that they would have earned but for the necessary interruption of Dancel’s business activities.

State Farm’s Other Arguments are “Red Herrings”

15. This case does not turn on an analysis of corporate law, as suggested by State Farm. The Court is not presented with issues of piercing the corporate veil, nor of protecting or delineating Dancel’s corporate identity. Rather, this case turns solely on the interpretation of an insurance contract; and whether State Farm may avoid coverage for loss of income suffered as a result of interruption of Dancel’s business activities at premises identified on State Farm’s policy, where Dancel is solely owned by the “individuals” named on the policy; where the agent knew Dancel was the business entity to be insured, and made direct indications of same on the application he filled out; and where State Farm, the drafter of the policy, did not write the policy to explicitly limit or exclude such coverage (as discussed and set forth above). As set forth in the preceding paragraphs, State Farm may not avoid coverage for loss of business income sustained due to necessary interruption of Dancel’s business activities at 10265 Rodriguez Street under the subject policy of insurance.

16. Whether, and to what extent the Plaintiffs may have insurance for the business operations of Dancel under a separate policy of insurance with a separate insurance company **has**

absolutely no relevance to the issue before this Court. Regardless of whether issues pertaining to “other insurance” clauses may ultimately come into effect with regard to the amount of coverage recoverable by the Plaintiffs⁴, the only question currently before this Court is whether the State Farm policy, as written and under the facts before this Court, extends coverage (in an amount to be proved at trial and subject to any set-offs directed by the Court) for the loss of income suffered by the Plaintiffs as a result of the interruption of Dancel’s business activities necessitated by Hurricane Katrina’s destruction of the premises at 10265 Rodriguez Street.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs respectfully request that this Court construe the clear terms and conditions of the State Farm Business Policy, or in the alternative find that those terms are ambiguous about the scope of business “operations” covered thereunder, and enter a Declaratory Judgment / Partial Summary Judgment that Finds, Declares and Adjudges as follows:

a. The State Farm Business Policy, Policy Number 99-35-9935-5 provides coverage, under Coverage Part C, of the “Actual Loss” of business income as defined by the Policy, suffered, as a result of Hurricane Katrina, by the Plaintiffs as a result of the interruption of Dancel’s business activities necessitated by Hurricane Katrina’s destruction of the premises at 10265 Rodriguez Street.

Plaintiffs further request the Court award any and all additional relief, in favor of the Plaintiffs, deemed appropriate by this Honorable Court.

Respectfully submitted, this the 9th day of April, 2009.

DANIEL B. O’KEEFE, CELESTE A. FOSTER

⁴ The facts are undisputed that State Farm made NO effort to invoke “other insurance” provisions or arguments with regard to its denial of coverage for the subject claims.

**O'KEEFE, AND THE DANCEL GROUP, INC.,
PLAINTIFFS**

By: /s/ Christopher C. Van Cleave

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CERTIFICATE OF SERVICE

I, undersigned counsel of record, hereby certify that I have this day electronically filed the foregoing with the Clerk of the Court using the EFC system which sent notification of such filing to the following:

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Respectfully submitted, this the 9th day of April, 2009.

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PLAINTIFFS

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