

**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' MEMORANDUM IN SUPPORT OF
MOTION FOR DECLARATORY JUDGMENT /
PARTIAL SUMMARY JUDGMENT RE: SCOPE OF COVERAGE**

COME NOW THE PLAINTIFFS, by and through undersigned counsel, and file this, their Motion for Declaratory Judgment / Partial Summary Judgment and, in support thereof, state as follows:

INTRODUCTION

1. Plaintiffs initiated this Civil Action by filing their Complaint in the Circuit Court of Harrison County, Mississippi on August 28, 2006. State Farm recently removed this cause to this Honorable Court, which denied Plaintiffs' Motion to Remand on January 13, 2009.

2. This lawsuit involves separate claims under two separate insurance policies, a "Homeowner's Policy" covering Danny and Celeste O'Keefe's home in Jackson County, and a "Business Policy" covering the business structure, and business operations conducted out of the Plaintiffs' business located at 10265 Rodriguez Street, D'Iberville, Mississippi.

3. With regard to the "Business Policy", Plaintiffs are seeking compensation for damages to the structure of the building located at 10265 Rodriguez Street, D'Iberville, Mississippi, damage to the contents thereof, and for loss of business income. State Farm denied the claim for

“business income”, *in toto*, based upon the false assertion that the subject policy of insurance does not insure the business activities of Dancel – since the only “named insureds” on the Dec Page are Danny and Celeste O’Keefe. The facts are undisputed that the Dancel Group, Inc. is a business solely owned by Danny and Celeste O’Keefe. whose principal place of business is the premises identified on the subject Business Policy Declarations Page, 10265 Rodriguez Street, D’Iberville, Mississippi; and that the premiums for the subject Business Policy were paid by Dancel. In essence, State Farm contends that the “Business Policy” it sold the Plaintiffs actually does not provide any coverage for loss of “business” income suffered, as a result of the interruption of business “operations” conducted out of the premises described on the Declarations Page, as a result of Hurricane Katrina.

ARGUMENT

4. Contrary to State Farm’s position, the “Business Policy”, by its own clear and unambiguous terms and conditions, covers the business operations conducted out of 10265 Rodriguez Street, D’Iberville, Mississippi. Alternatively, the subject policy of insurance is ambiguous about what business operations are covered under Coverage Part C, “Loss of Income”, and that ambiguity must be resolved in favor of the greatest amount of coverage for the Plaintiffs, meaning the business operations of Dancel are covered. A ruling that the policy operates in the fashion argued by State Farm would make Coverage Part C “Loss of Income” in the “Business Policy” State Farm sold to the Plaintiffs, and collected premiums on, illusory.

5. State Farm’s denial of Plaintiffs’ claim for loss of income to the business “operations” being conducted out of the premises described on the Declarations Page, which business is solely owned by Danny and Celeste O’Keefe, is a classic example of bad faith. Contrary to State Farm’s coverage position, the subject policy clearly and unambiguously provides, in pertinent part:

[The “described premises” on the Declarations Page is 10265 Rodriguez Street, D’Iberville, Mississippi – the principle place of business of the Dancel Group, Inc.] (See “Exhibit 1”, DANCEL000074)

DEFINITIONS: Throughout this policy, the words “you”, and “your” refer to the Named Insured shown in the Declarations **and any other person or organization qualifying as a Named Insured under this policy.** . . . (See “Exhibit 1”, DANCEL000076) (emphasis added)

Coverage C – Loss of Income: If Loss of Income is shown in the Declarations, we will pay

1. for the actual loss of “business income” you sustain due to the necessary suspension of your “**operations**” . . . [caused by a covered loss] **at the described premises** . . . (See “Exhibit 1”, DANCEL000079) (emphasis added)

[Coverage C] **Definitions:** “**operations**” means **the type of your business activities occurring at the premises shown in the Declarations** (See “Exhibit 1”, DANCEL000080) (emphasis added)

By its own terms, the subject policy of insurance **does** cover the business “operations” occurring at the premises described on the Declarations Page – the principle place of business of Dancel Group, Inc., a business solely owned by the “named insureds”, Celeste and Danny O’Keefe.

6. The law in the State of Mississippi has long been that “[q]uestions concerning the construction of contracts are questions of law that are committed to the court rather than questions of fact committed to the fact finder.” See, eg. Facilities, Inc. v. Rogers-Usry Chevrolet, Inc., 908 So.2d 107, ¶ 5 (Miss. 2005) (citations omitted). State Farm is attempting to construe and apply the scope of what business “operations” are covered under Coverage Part C – Loss of Income in a manner that is contrary to the clear, unambiguous terms of the subject policy of insurance. Words used in written contracts should be given their ordinary meaning. The most basic principle of contract law requires that a Court interpret a contract by an objective, rather than subjective, standard. *Cherry v. Anthony, Gibbs, Sage*, 501 So.2d 416, 419 (Miss. 1987).

7. The facts are undisputed that the principal business “operations” conducted out of the premises described on the Declarations Page are the business operations of the Dancel Group. Indeed, the premiums for the subject policy were paid by Dancel, and accepted by State Farm. Since Dancel is solely owned by Danny and Celeste O’Keefe, the loss of income by Dancel is clearly a loss of “business income” the O’Keefes sustained due to the necessary suspension of the business “operations” they conducted out of 10265 Rodriguez Street, as a result of Hurricane Katrina. (See “Exhibit 1”, DANCEL000079) (emphasis added). Plaintiffs respectfully submit that, as a matter of law, the clear and unambiguous terms of the subject policy of insurance demonstrate that the business “operations” of Danny and Celeste O’Keefe, d/b/a the Dancel Group, are covered under the subject State Farm Business Policy.

8. Alternatively, the terms of the subject policy about exactly what business “operations” are covered under Coverage Part C – Loss of Income are ambiguous. “Ambiguity, in its simplest form, is the state of having multiple interpretations.” *Miss. Farm Bureau v. Walters*, 908 So. 2d 765, 769 (Miss. 2005). State Farm contends that the only business operations covered under the policy are those operations that involve the lease of the premises by Danny and Celeste O’Keefe, who personally owned the premises at 10265 Rodriguez Street, to Dancel (See “Exhibit 2” to Motion). Plaintiffs contend, on the other hand, that Dancel’s principle place of business is the premises described on the Declarations Page, and that the business operations of Dancel are the “type of [Plaintiffs’] business activities occurring at the premises shown in the Declarations [page for the subject policy of insurance].” (See “Exhibit 1”, DANCEL000080).

9. When an insurance policy is subject to two or more reasonable meanings, “that which gives the greater indemnity to the insured should be adopted.” *State Farm Mut. Auto Ins. Co. v. Scitzs*, 394 So. 2d 1371, 1372 (Miss. 1981). Stated more simply, any provision that limits or excludes coverage is to be construed liberally in favor of the insured and most strongly against

the insurer. *Nationwide Mut. Ins. Co. v. Garriga*, 636 So. 2d 658, 662 (Miss. 1994). Ambiguous and unclear policy language must be resolved in favor of the non-drafting party, i.e., the insured. *Harrison v. Allstate Ins. Co.*, 662 So. 2d 1092, 1094 (Miss. 1995).

10. Clearly, the interpretation urged by the Plaintiffs, which would result in coverage by State Farm for the substantial loss of income suffered by the Plaintiffs as a result of the necessary suspension Dancel's business operations caused by Hurricane Katrina, would be most favorable to the insureds, the Plaintiffs herein.

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 Dancel Group, Inc., a business solely owned by Danny and Celeste O'Keefe which operates out of 10265 Rodriguez Street, D'Iberville, Mississippi.

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 March, 2009.

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

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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 March, 2009.

DANIEL B. O'KEEFE, CELESTE A. FOSTER
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By: */s/ Christopher C. Van Cleave*

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