IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RITA KEES LAMBERT, INDIVIDUALLY,
AND AS PERSONAL REPRESENTATIVE OF ALL
WRONGFUL DEATH BENEFICIARIES AND
HEIRS-AT-LAW OF THE DECEDENT,
BRIAN MICHAEL KEES — APPELLANTS

VS. — Cause No. 2011-CA-00166

SAFECO INSURANCE COMPANY
OF AMERICA AND AL ELLIS — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF RANKIN COUNTY, MISSISSIPPI

BRIEF OF SAFECO INSURANCE COMPANY OF AMERICA, APPELLEE

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

In order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

a. Rita Kees Lambert and all heirs-at-law and wrongful death beneficiaries of Brian Michael Kees, Appellants;

b. Daniel W. Kitchens, Matthew W. Kitchens, Kitchens Law Firm, P.A., Counsel for Appellants;

c. Safeco Insurance Company of America, Appellees;

d. W. Wright Hill, Jr., Melissa A. Rose, Jan F. Gadow, Page Kruger & Holland, P.A., Counsel for Appellee Safeco Insurance Company of America;

e. Al Ellis, Defendant below;

f. Louis Guichet, III, Guichet Law Firm, PLLC, counsel for Michael Kees;

g. Honorable Samac S. Richardson, trial judge.

THIS, the 16 day of October, 2011.

W. Wright Hill, Jr.
Jan F. Gadow

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STATEMENT REGARDING ORAL ARGUMENT

Appellee submits that oral argument is not necessary to a resolution of the issue on appeal. The issue presented involves unambiguous policy language, undisputed facts, well established law, and a clear and uncomplicated record. The facts and legal arguments are adequately presented in the briefs and appellate record and the decisional process of this Court would not be significantly aided by oral argument. M.R.A.P. 34 (a)(3).

STATEMENT OF THE ISSUE

A. THE TRIAL COURT PROPERLY GRANTED SAFECO'S MOTION FOR SUMMARY JUDGMENT BECAUSE, AS A MATTER OF LAW, THE UNAMBIGUOUS LANGUAGE OF THE SUBJECT POLICY OF HOMEOWNER'S INSURANCE PROVIDES NO COVERAGE TO AL ELLIS FOR THE DAMAGES RESULTING FROM HIS INTENTIONAL SHOOTING.

I. INTRODUCTION

Al Ellis pled guilty and was convicted of manslaughter by culpable negligence for the shooting death of Brian Kees. Brian's mother, Rita Kees Lambert, obtained a civil judgment against Ellis, in a wrongful death action, for $75,000. Lambert wants Ellis' homeowner's insurance, Safeco Insurance Company of America, to satisfy this judgment; however, as a matter of law, Ellis' policy does not provide coverage for his illegal act, or for damages expected or intended by Ellis, or for damages that are not the result of an "occurrence" as defined by Ellis' policy.

II. STATEMENT OF THE CASE

Rita Kees Lambert, individually and on behalf of the "wrongful death heirs at law" of Brian Michael Kees, filed suit against Al Ellis and 10 John Does in the Rankin County Circuit Court in August 2005. Lambert's complaint alleges that her son, Brian Michael Kees, suffered personal injuries and death as a result of Ellis' gross negligence, warranting not only compensatory but punitive damages. (C.P. 10-12) Ellis answered, denying liability for damages. (C.P. 19-22) Lambert filed a motion for partial summary judgment, as to Ellis' liability only, but before this motion was set for hearing, Ellis' insurer, Safeco, filed a motion to intervene and for a stay pending the U.S. District Court[1]'s disposition of a pending declaratory relief action. (C.P. 31-32, 38-39) Lambert then filed an affidavit stipulating that the amount in controversy was less than $75,000, in response to which the U.S. District Court dismissed the declaratory relief matter for lack of diversity jurisdiction. (C.P. 43) Safeco thereafter moved to withdraw its previous motion to stay and the trial court entered an Agreed Order. (C.P. 42-44, 46)

Safeco's intervening complaint for declaratory relief in the trial court followed, asserting that the subject Safeco homeowner's insurance policy did not provide Al Ellis with liability coverage or the right to a defense or indemnification for any claims arising out of Lambert's initial wrongful death suit. (C.P. 48-54) Lambert timely answered, then Safeco moved for summary judgment. (C.P. 56-61, 90-93) Following an on-the-record hearing, the trial court denied Safeco's motion. (C.P. 191, 193) Safeco then sought an interlocutory appeal, but this Court declined. (C.P. 197) Safeco's motion for reconsideration was likewise denied. (C.P. 199)

[1] Southern District of Mississippi.

Upon return to the circuit court, the trial judge granted partial summary judgment in favor of Lambert regarding Al Ellis' liability. (C.P. 202) The trial court then entered an Agreed Order assessing damages in the amount of $75,000 against Al Ellis. (C.P. 209) Subsequently, Lambert and Safeco requested that the trial court conduct a bench trial on the remaining issue of whether Safeco owed liability coverage to Ellis for Lambert's claim. The parties thereafter submitted their respective trial briefs to the circuit judge. In December 2010, the trial court rendered final judgment in favor of Safeco, finding that Al Ellis is not entitled to liability coverage under the Safeco homeowner's insurance policy for any of Lambert's claims. (C.P. 362-66) Lambert filed a timely notice of appeal to this Court. (C.P. 383)

III. STATEMENT OF THE FACTS[2]

On August 13, 2005, Brian Kees and his father, Michael, were guests at a party at Al Ellis' home. At around 9:00 or 10:00 p.m., Brian and Michael Kees were leaving the party, in Michael Kees' automobile, when Al Ellis willfully and intentionally fired a gun at the vehicle. Ellis thought Michael Kees had stolen some cash from his house and he was trying to disable and stop the Kees' car. Unfortunately, one of Ellis' bullets ricocheted and struck Brian Kees, who subsequently died as a result of the gunshot wound.

Ellis was arrested and charged with murder, but subsequently pled guilty to manslaughter by culpable negligence, the elements of the charge being that he: "did *knowingly, willfully*, through culpable negligence through his acts, manifesting extreme indifference to the value of human life, by shooting into a moving automobile, kill Bryan

[2] Taken primarily from the parties' joint Itemization of Stipulated Facts. (C.P. 76-89)

Keyes [sic], but it *was not in necessary self-defense and without authority of law.*" (C.P. 274-75) (emphasis added)

At the time of the shooting, Ellis was insured under a homeowner's insurance policy issued by Safeco Insurance Company of America, which provided liability coverage in the amount of $100,000 per occurrence. Lambert seeks to recover damages for the death of Brian Kees from this Safeco policy; but, as a matter of law, this policy provides no coverage for such damages.

IV. SUMMARY OF THE ARGUMENT

Lambert and Safeco agree on all relevant and material facts, which leaves only a question of law, to wit: whether the clear language of Al Ellis' homeowner's insurance policy provides liability coverage to Ellis for the personal injury and wrongful death damages Lambert suffered as a result of Ellis' intentional shooting, which resulted in Brian Kees' death. Pursuant to at least three unambiguous provisions of the Safeco policy, there is no coverage available for these damages. First, Ellis' act is illegal, therefore damages arising from this act are not covered under the policy. Next, the damages were "expected and intended" by Ellis, are the foreseeable result of Ellis' intentional act, and therefor, are excluded from coverage. Finally, Ellis' intentional act of shooting does not constitute an "occurrence" that would trigger coverage under the Safeco policy. Any *one* of these three provisions, standing alone, is sufficient to prevent coverage for damages caused by Ellis' shooting. The trial court properly granted summary judgment in favor of Safeco and, respectfully, this Court must affirm.

V. LEGAL ARGUMENT

A. THE TRIAL COURT PROPERLY GRANTED SAFECO'S MOTION FOR SUMMARY JUDGMENT BECAUSE, AS A MATTER OF LAW, THE UNAMBIGUOUS LANGUAGE OF THE SUBJECT POLICY OF HOMEOWNER'S INSURANCE PROVIDES NO COVERAGE TO AL ELLIS FOR THE DAMAGES RESULTING FROM HIS INTENTIONAL SHOOTING.

This Court reviews a circuit court's grant of summary judgment *de novo.* ***Kimbrough v. Keenum,*** 2011 WL 1467623, at *2 (¶ 9) (Miss.App. Apr. 19, 2011) (citations therein omitted); ***Hynes v. Ambling Management,*** 66 So.3d 712, 714 (¶ 5) (Miss.App. 2011) (citation therein omitted). If the evidence, viewed in the light most favorable to the non-movant, reveals no genuine issue of material fact and the moving party is entitled to judgment in his favor, summary judgment is appropriate. ***Kimbrough,*** 2011 WL 1467623, at *2 (¶ 9). The evidence considered includes all pleadings, depositions, answers to interrogatories and admissions, as well as any affidavits. ***Hynes,*** 66 So.3d at 714 (¶ 5).

The non-movant may not rest on the pleadings, but must set forth specific facts showing there is a genuine issue for trial. ***Kimbrough,*** 2011 WL 1467623, at *2 (¶ 9). The non-movant's rebuttal must be supported by significant, probative evidence on each element of his claim, which requires more than a "'mere scintilla of colorable evidence; it must be evidence upon which a fair-minded jury could return a favorable verdict.'" ***Hynes,*** 66 So.3d at 715 (¶ 10) (quoting ***Lott v. Purvis,*** 2 So.3d 789, 792 (¶ 11) (Miss. App. 2009)); ***Kendrick v. Quin,*** 49 So.3d 645, 648 (¶ 7) (Miss. App. 2010) (citation therein omitted). Bare assertions are insufficient to avoid summary judgment. ***Hynes,*** 66 So.3d at 715 (¶ 10) (citations therein omitted). If the non-movant fails to sufficiently establish any essential element of his claim, summary judgment is

mandated. ***Patterson v. Tibbs,*** 60 So.3d 742, 753 (¶ 41) (Miss. 2011) (citing ***Buckel v. Chaney,*** 47 So.3d 148, 153 (Miss. 2010)); ***Albert v. Scott's Truck Plaza,*** 978 So.2d 1264, 1266 (¶ 6) (Miss. 2008) (citations therein omitted).

Interpretation of insurance policy language is a question of law, which is also reviewed *de novo.* ***Deaton v. Mississippi Farm Bureau,*** 994 So.2d 164, 167 (¶ 6) (Miss. 2008) (citations therein omitted); ***Progressive Gulf Ins. Co. v. We Care Day Care,*** 953 So.2d 250, 253 (¶ 11) (Miss. App. 2006) (citation therein omitted). Notwithstanding clear limiting language, an insurer cannot limit recovery for benefits for which an insured has paid a premium. ***Progressive Gulf,*** 953 So.2d at 254 (¶ 12) (citation therein omitted). Limiting policy language is strictly construed and "'must be written in clear and unmistakable language.'" ***Progressive Gulf,*** 953 So.2d at 254 (¶ 12) (quoting ***Miss. Farm Bureau v. Jones,*** 754 So.2d 1203, 1204 (¶ 8) (Miss. 2000)). "But, when stated without uncertainty or ambiguity, exclusionary language is binding upon the insured." ***Progressive Gulf,*** 953 So.2d at 254 (¶ 12) (citing ***Lewis v. Allstate,*** 730 So.2d 65, 70 (¶ 25) (Miss. 1998)).

1. The damages claimed by Lambert arose out of an illegal act committed by Ellis.

Presuming without conceding that Brian Kees' death resulted from an "accident" or "occurrence",[3] thereby entitling Ellis to liability coverage under the subject Safeco policy, the "illegal acts" exclusion in the policy negates such coverage. This exclusion states:

> **II. Coverage E – Personal Liability** does not apply to:
>
> a. Liability:

[3] Which presumption will be addressed and laid to rest subsequently herein.

* * *

(4.) arising out of any illegal act committed by or at the direction of any **insured.**

(C.P. 134)

Ellis' discharge of his firearm within the city limits on the occasion complained of in Lambert's complaint, without more, was illegal pursuant to Code of Ordinances of Pearl, Mississippi, Ch. 16, Art. 1, Sec. 16-3. Further, and more importantly, given Brian Kees' resulting death, Ellis was criminally charged with murder and eventually pled guilty to and was convicted of manslaughter by culpable negligence. (C.P. 178, 235, 270, 274-75, 353) In light of his voluntary plea and conviction of the crime of manslaughter, there can be no doubt or dispute that Ellis committed an illegal act. Lambert urges that the trial court erred by considering Ellis' manslaughter conviction as proof that he committed an illegal act. Yet even in his deposition, which was taken after Ellis had entered his guilty plea, he confirmed that he understood he had pled guilty to an illegal and unlawful act and that he did intend to fire his gun at the Kees' vehicle when he knew there was at least one person in the vehicle[4]. (C.P. 300-01)

According to Lambert, the Safeco policy excludes coverage for illegal *acts*, not *convictions* of illegal acts; also according to Lambert, illegal *acts* require criminal intent. The policy provision specifically states that there is no coverage for "[l]iability arising out of *any* illegal act committed by or at the direction of any insured." (emphasis added) (C.P. 134) Safeco agrees that no conviction is necessary to trigger this exclusion; just

[4] Lambert represents in her brief that the testimony is uncontradicted that Ellis did not know anyone was in the Kees vehicle when he shot at it. However, Ellis' deposition testimony is clear and to the point: "Q: And at that time [when you intentionally fired the gun at the Kees vehicle]

an illegal act. Ellis' guilty plea and conviction are not necessary to trigger this exclusion; instead, his guilty plea and conviction are evidence that conclusively establish the fact that Ellis committed an illegal act, thereby preventing Safeco from having to prove that Ellis committed an illegal act. Although the manslaughter statute under which Ellis pled guilty, Miss. Code Ann. § 97-3-47[5], may apply when the *killing* is not willful, willful *acts* can cause a negligent, unintentional killing sufficient to support a conviction under this statute. ***Capitol City Ins. Co. v. Hurst,*** 632 F.3d 898, 904 (5th Cir. 2011). So regardless of whether Ellis intended to *kill*, his intentional act of *shooting* into the Kees vehicle, which resulted in Brian Kees' death, is nonetheless illegal. This act is illegal and sufficient to trigger the "illegal acts" exclusion from coverage regardless of whether there is also a criminal conviction; but Ellis did in fact plead guilty and was convicted of a crime. So by virtue of Ellis' guilty plea and conviction, the existence of an illegal act is affirmatively established, as a matter of law.

Lambert also argues that the illegal act exclusion only applies to intentional crimes/acts, not negligent crimes such as manslaughter by culpable negligence, to which Ellis pled guilty. However, the Safeco policy does not specify that coverage is excluded only if damages result from an *intentional* illegal act. Courts in numerous jurisdictions have interpreted similar illegal act provisions. Importantly, these courts have held that in such exclusionary clauses, the phrase "criminal acts" or "illegal acts" does not distinguish between intentional and unintentional crimes, but rather excludes both from coverage. *See, e.g,* ***Allstate Ins. Co. v. Peasley,*** 932 P.2d 1244, (Wash. 1997).

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you knew that there was at least one, if not two, occupants of the Kees vehicle? A: Yes." (C.P. 301)

In ***Peasley***, the claimant, Parker, was a guest in the home of Allstate's insured, Peasley. While Parker was at Peasley's home, Peasley shot Parker in the stomach and he sustained serious, but nonfatal injuries. Both Peasley and Parker maintained that the shooting was accidental. Peasley bargained with the prosecutor and pleaded guilty to second degree reckless endangerment in exchange for the prosecutor's recommendation of a suspended sentence. ***Id.*** at 1246. At the time of the shooting, Peasley had a homeowner's insurance policy with Allstate.

Allstate brought an action against Peasley and Parker, seeking a declaration that the policy's criminal acts provision excluded coverage for Parker's injuries because they were the result of Peasley's criminal acts. Peasley argued that the criminal acts exclusion was ambiguous and only applied to *intentional* crimes. The ***Peasley*** court specifically held that the exclusion encompassed *any* crime, including the crime of reckless endangerment, despite the fact that such a crime is "unintentional." ***Id.*** at 1249-50.

The ***Peasley*** court further interpreted the Allstate Policy's provision excluding "intentional" acts as separate from the exclusion of "criminal" acts. The court stated that the "intentional acts" exclusion encompasses *all* intentional acts, whether criminal or not. If the "criminal acts" exclusion were restricted to only *intentional* criminal acts, the "criminal acts" exclusion would be meaningless and superfluous since other language would already encompass all intentional acts. ***Id.*** at 1249. The same can be said of the Safeco policy. *See also* ***Alfa Ins. Corp. v. Walden,*** 117 F.3d 1416 (5th Cir. 1997), 1997 WL 335825, at *3 (unpublished) (if criminal acts exclusion applies only to *intentional*

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[5] (C.P. 344)

criminal acts, intentional acts exclusion in same policy would be meaningless repetition)(citations therein omitted). Likewise, the Safeco Policy illegal acts exclusion excludes coverage for illegal conduct regardless of whether the crime is intentional or unintentional. It follows that Ellis' illegal act bars coverage.

The ***Peasley*** court cited to various cases from other jurisdictions around the country which have interpreted the exclusion in the same way. *See, e.g.,* ***Allstate Ins. Co. v. Brown,*** 16 F.3d 222 (7th Cir. 1994) (criminal acts exclusion clause encompasses criminal recklessness); ***Allstate Ins. Co. v. Burrough,*** 914 F.Supp. 308, 312 (W.D.Ark. 1996) (criminal acts exclusion "includes all criminal acts, no matter what the mental state required for their commission"); ***Hooper v. Allstate Ins. Co.,*** 571 So. 2d 1001, 1003 (Ala. 1990); ***Allstate Ins. Co. v. Schmitt,*** 570 A.2d 488 (N.J. 1990) ("words 'criminal act' are not modified by any descriptive culpability requirement"); ***Steinke v. Allstate Ins. Co.,*** 621 N.E.2d 1275, 1279 (Ohio App. 3d Dist. 1993) (disorderly conduct, a crime with recklessness as an element, triggers the exclusionary clause); ***Allstate Ins. Co. v. Sowers,*** 776 P.2d 1322, 1323 (Or.App. 1989) (insured's resisting arrest fit the criminal acts exclusion despite insured's lack of intent to injure officer). Furthermore, as a matter of Mississippi public policy, people and businesses cannot purchase insurance coverage for illegal actions. ***Farmland Mut. Ins. Co. v. Scruggs,*** 886 So.2d 714, 720 (¶ 24) (Miss. 2004); ***Delta Pride Catfish, Inc. v. Home Ins. Co.,*** 697 So.2d 400, 405 (Miss.1997). "[W]e do not allow corporations or persons 'to insure themselves against acts prohibited by law.' " ***Delta Pride,*** 697 So.2d at 405 (*quoting* ***Graham Resources, Inc. v. Lexington Ins. Co.,*** 625 So.2d 716, 721 (La.Ct.App.1st Cir. 1993)).

The United States District Court for the Southern District of Mississippi made an ***Erie*** guess in the case of ***Allstate Insurance Co. v. Blackmon***, 918 F.Supp. 168 (S.D.Miss. 1995), regarding whether a "criminal acts" exclusion similar to the one at issue in the case at bar should be applied according to its plain and unambiguous terms. The court answered in the affirmative. ***Id.*** at 173. Where the decedent's death was caused by a bullet fired from a gun held by the insured, the resulting damages were not covered under the subject homeowner's policy because the insured had committed a crime. Specifically, the insured pled guilty to voluntary manslaughter. ***Id.*** at 169.

There is no question of fact: Ellis pled guilty to committing manslaughter, a serious *illegal* act which resulted in the damages complained of in Lambert's complaint. Pursuant to the plain language of the illegal acts exclusion at issue and in accord with the logical interpretation of the "illegal acts" exclusion by jurisdictions all over the country, this exclusion negates coverage and any duty to defend and provide indemnity under the subject Safeco policy language, *regardless* of Ellis' intent.

Lambert's argument that Ellis was merely trying to make a citizen's arrest is a valiant attempt to put a noble spin on Ellis' actions. While a citizen's arrest may be a lawful act, during his sentencing hearing Ellis stated that he shot at the Kees vehicle because he wanted to stop the car and get his money back; he wanted justice. (C.P. 314, 326) Moreover, Ellis' guilty plea to manslaughter by culpable negligence establishes that Ellis was acting "*without authority of law*", which puts to rest any claim that he was making a valid and legal citizen's arrest. (C.P. 275) (emphasis added) Lambert also asserts that if Ellis had successfully disabled the car without harming anyone, he would have accomplished a lawful citizen's arrest. That may be. But if Ellis

had successfully disabled the car without harming anyone, he would not have been charged with murder, would not have pled guilty to and been convicted of culpable negligence manslaughter, and Safeco would be required to prove the existence of a criminal act.

Instead, Ellis relieved Safeco of this burden when he admitted, in his plea hearing, that he killed Brian Kees by "knowingly, willfully, through culpable negligence through his acts . . . shooting into a moving automobile . . . without authority of law." (C.P. 275) Ellis voluntarily admitted to the Circuit Court of Rankin County, Mississippi, that he committed an illegal act and he was ultimately sentenced to twenty years in prison for that illegal act. (C.P. 353-54) Lambert cannot now seriously suggest that the crime of manslaughter, which Ellis admitted he committed, is not an illegal act. The act of shooting a gun into a moving vehicle with knowledge there is at least one person within the vehicle, and which results in the death of a person within the vehicle is, without question, a serious illegal act pursuant to Mississippi law and pursuant to the terms of the Safeco policy. There is no fact question for a jury to determine. Pursuant to the plain language of the "illegal acts" exclusion, there is no coverage under the Safeco policy for the death of Brian Kees, which resulted from Ellis' illegal act.

2. The damages claimed by Lambert were expected or intended by Ellis or were the foreseeable result of an act he intended.

Again presuming without conceding that Brian Kees' death resulted from an "accident" or "occurrence", the Safeco policy includes an intentional act exclusion which negates or voids any coverage to which Ellis would otherwise be entitled. This exclusion reads:

LIABILITY LOSSES WE DO NOT COVER

1. Coverage E – Personal Liability and **Coverage F – Medical Payments to Others** do not apply to **bodily injury** or **property damage:**

    a. which is expected or intended by any **insured or** which is the foreseeable result of an act or omission intended by any **insured.**

(C.P. 132)

This policy language clearly states that coverage does not apply to bodily injury expected or intended by the insured. In determining whether this exclusion applies, the pertinent question is whether Lambert's complaint alleges that Ellis' *actions* were intended, which must be distinguished from the question of whether the *consequences* of his actions were intended. In the context of the "expected or intended" exclusion, "the question of intent does not relate to whether the defendant intended to harm the plaintiff, but rather to *whether the defendant intended to take the action to cause the harm.*" ***Berry v. McLemore,*** 795 F.2d 452, 457 n.4 (5th Cir. 1986) (emphasis added.) *See also* ***Virginia Ins. Reciprocal v. Forrest County General Hospital***, 814 F.Supp. 535, 537 (S.D. Miss. 1993). In ***U.S. Fidelity & Guarn. Co. v. Omnibank***, 812 So.2d 196, 201 (¶ 20) (Miss. 2002), this Court makes clear that even where damages are greater than expected or intended, a claim resulting from intentional conduct is not covered and negligent acts intentionally caused are not covered. There is no dispute regarding whether Ellis intended to shoot into the Kees' vehicle. As a matter of law, he did.

The Mississippi Supreme Court has cited ***OmniBank*** with approval on several occasions in this regard. *See, e.g.*, ***Scruggs***, 886 So.2d at 720. In ***Scruggs***, a seed supplier sought coverage and defense from its insurance carrier in a suit brought by a

manufacturer of genetically modified seeds for conversion and patent infringement. The ***Scruggs*** Court, in denying coverage, stated that CGL policies exclude coverage for intentional acts and even though the insured did not intend the consequences of its acts, it did intend the act which resulted in damages to another. As a result, there was no coverage due to the intentional acts exclusion. ***Scruggs***, 886 So.2d at 720.

Mississippi case law provides that where an issue of fact has been established in one case, by a valid and final judgment, it cannot be re-litigated. *See, e.g.,* ***Thomas v. State Farm Fire & Cas. Co.,*** 856 So.2d 646, 649 (¶ 11) (Miss.App. 2003); ***Jordan v. McKenna,*** 573 So. 2d 1371 (Miss. 1990). Ellis fired seven gunshots at a car that he knew contained at least one person. (C.P. 281, 294-95, 301) He pleaded guilty to knowingly and willfully shooting his gun into the Kees' vehicle. (C.P. 275, 277) Ellis voluntarily admitted that he willfully and knowingly committed this act of shooting and the crime of manslaughter. (C.P. 235-38, 275, 277, 278, 280, 281) Lambert is correct that Ellis' intent is critical to the issue presented - not as to the illegal act exclusion, but as to the expected or intended exclusion. Ellis' own sworn testimony and statements affirmatively establish that *he intended to shoot at the Kees vehicle, which he knew contained at least one occupant.* Ellis' statements of regret do not transform his willful shooting into an unintentional act. *See* ***Allstate Ins. Co. v. Hanks,*** 1999 WL 33537207, at *2 (N.D.Miss. May 24, 1999). Despite her attempts to do so in the trial court, Lambert is collaterally estopped from arguing that Ellis' actions were unintentional. Instead, Lambert is bound by Ellis' prior admissions. ***Thomas,*** 856 So.2d at 649 (¶ 11); ***Jordan,*** 573 So. 2d 1371. There simply are not any issues of fact left to be determined concerning whether Ellis intended this act. As a matter of law, he did.

Consider ***Hurst,*** with facts strikingly similar to those presented in the case at bar. Lecedrick Hurst and Darral Bell argued at a friend's home and threatened each other. When asked to leave the premises, Bell left in his employer-owned vehicle and Hurst followed in his own vehicle. Hurst at some point drove alongside Bell in an apparent effort to pass him, but the vehicles collided and Hurst died from injuries he suffered in the collision. Bell was indicted on murder charges, was tried, and convicted on heat of passion manslaughter. Lecedrick's wife, Latasha Hurst, brought a wrongful death action against Bell and Pinewood Logging, his employer (and owner of the vehicle). Capital City Insurance Company, who insured Pinewood's vehicle at the time of the accident, brought a separate action seeking a declaratory judgment that the collision was excluded from the policy's coverage under its "expected or intended injury" exclusion. ***Hurst,*** 632 F.3d at 900-01.

Capital City moved for summary judgment, urging that Bell's manslaughter conviction collaterally estopped the wrongful death plaintiffs from re-litigating the question of whether Bell intended to cause the death. The district court granted Capital City's motion, noting the voluntary statement Bell had made at trial, admitting that he was driving in the middle of the road to prevent Hurst from passing him. The district court determined Bell's conduct was intentional and, therefore, excluded from the policy's coverage. The wrongful death plaintiffs/declaratory judgment action defendants ("Hurst wrongful death beneficiaries") appealed, asking the court to review the district court's determination that Bell's driving in the middle of the road to stop Hurst from passing him was an "intentional act" which precluded policy coverage and its determination that the criminal manslaughter conviction precluded further litigation on

the question of whether Bell's conduct was an "intentional act" under the policy. The Hurst wrongful death beneficiaries argued that there was a question of fact in both issues as to whether Bell intended to kill Hurst and, in order for the policy's "expected or intended" exclusion to apply, whether Mississippi law required specific intent to injure or kill. ***Hurst,*** 632 F.3d at 903.

Applying Mississippi law, the Fifth Circuit noted that collateral estoppel requires (1) that a party is seeking to relitigate a specific issue, (2) that the issue has already been litigated in a previous lawsuit, (3) that the issue was actually determined in the prior lawsuit, and (4) that determination of the issue was essential to the judgment in the prior suit. ***Hurst,*** 632 F.3d at 903 (citations therein omitted). The Hurst wrongful death beneficiaries sought to relitigate whether the collision was an accident, but because willfulness is an essential element of heat of passion manslaughter, by virtue of Bell's conviction a jury had already considered and determined that issue, which was essential to Bell's conviction. ***Hurst,*** 632 F.3d at 904. Though identity of the parties is a requirement, strict identity of the parties is not necessary if a nonparty is in privity with a party to the prior action. ***Hurst,*** 632 F.3d at 903 (citations therein omitted). Capital City filed the declaratory action, naming Bell and the Hurst wrongful death beneficiaries as defendants. The Fifth Circuit found there was sufficient identity between Latasha Hurst (victim's wife) and Bell (perpetrator) in the criminal case that she was bound in the subsequent civil suit by the criminal case determination that Bell intentionally killed her husband. ***Hurst,*** 632 F.3d at 905. "'[A] conviction of manslaughter will collaterally estop litigation of the same facts in the wrongful death suit.'" ***Hurst,*** 632 F.3d at 905 (quoting ***Gollott v. State,*** 646 So.2d 1297, 1301 (Miss. 1994)). "'[A] conviction in a prior criminal case is conclusive, in a subsequent civil action, of the facts upon which the

conviction was based.'" ***J.R. v. Malley,*** 62 So.3d 902, 905 (¶ 11) (Miss. 2011) (quoting ***Jordan,*** 573 So.2d at 1376).

The policy at issue in ***Hurst*** excluded coverage for bodily injury "expected or intended from the standpoint of the insured." ***Hurst,*** 632 F.3d at 905. Bell was convicted of heat of passion manslaughter, which requires that the killing be willful; therefore, Bell's conviction conclusively established that he willfully and intentionally killed Lecedrick Hurst and the "expected or intended" exclusion applied to prevent coverage. ***Hurst,*** 632 F.3d at 906.

Lambert seeks to relitigate whether Elllis' shooting was intentional, but because willfulness of the shooting is an essential element of culpable negligence manslaughter, by virtue of Ellis' conviction via guilty plea, that issue (willfulness of the shooting) has already been determined and was essential to Ellis' conviction. ***Hurst,*** 632 F.3d at 904. (C.P. 68, 237, 270-71, 275, 277) Safeco filed the declaratory action, naming Al Ellis and the Kees wrongful death beneficiaries as defendants. As in ***Hurst,*** there is sufficient identity between Rita Kees Lambert (victim's mother) and Al Ellis (perpetrator) in the criminal case that she is bound in this civil suit by the criminal case determination that Ellis intentionally shot into the vehicle, which resulted in the death of her son. ***Hurst,*** 632 F.3d at 905. "'[A] conviction of manslaughter will collaterally estop litigation of the same facts in the wrongful death suit.'" ***Hurst,*** 632 F.3d at 905 (quoting ***Gollott,*** 646 So.2d at 1301). The underlying facts of manslaughter by culpable negligence, including the willfulness of the shooting, are now established facts, courtesy of Ellis' guilty plea and conviction. ***J.R.,*** 62 So.3d at 906 (¶¶ 13, 14) (citations therein omitted). As a matter of law, Ellis intended the shooting.

The Safeco policy excludes coverage for bodily injury "expected or intended by any insured or which is the foreseeable result of an act or omission intended by any insured". (C.P. 260, 268) Ellis pled guilty to manslaughter by culpable negligence, which requires that the shooting was willful; therefore, Ellis' conviction conclusively established that he "knowingly, willfully" shot into the vehicle, which resulted in the death of Brian Kees. (C.P. 275) It follows that Safeco's "expected or intended" exclusion applies, as a matter of law, to prevent coverage. ***Hurst,*** 632 F.3d at 906. See also ***Evans v. State***, 562 So.2d 91, 95 (Miss. 1990) (manslaughter by culpable negligence involves conduct tantamount to willfulness.)

Lambert seeks damages suffered as a result of Ellis' shooting Brian Kees. The allegations of Lambert's complaint against Ellis describe intentional and deliberate acts. (C.P. 11) Moreover, Lambert also asserts claims for punitive damages against Ellis. (C.P. 12) It is undisputed that Ellis intentionally and knowingly shot his gun at the Kees' vehicle; this is not a case of accidental discharge of a firearm. It follows, as a matter of law, that Lambert's claims trigger the Safeco policy's "expected or intended" exclusion. ***Omnibank,*** 812 So. 2d at 201 (¶ 20). Therefore, any resulting damage and injury claimed are excluded from coverage. As a matter of law, the intentional acts exclusion of the Safeco policy applies and negates any duty to defend or to provide coverage/indemnity under the policy.

3. The damages claimed by Lambert are not the result of an "occurrence."

In the unlikely event this Court gets beyond the two unambiguous exclusions previously addressed, there is no coverage in the first instance because the damages

alleged by Lambert's complaint are not the result of an "occurrence". The liability coverage of the subject Safeco policy provides, in pertinent part, as follows:

> If a claim is made or a suit is brought against any **insured** for damages because of **bodily injury** or **property damage** caused by an **occurrence** to which this coverage applies, we will:
>
> > pay up to our limit of liability for the damages for which the **insured** is legally liable; and
> >
> > provide a defense at our expense by counsel of our choice even if the allegations are groundless, false, or fraudulent. . . .

(C.P. 132) Based on the foregoing policy language, Safeco only owes a defense and indemnity if the damages alleged are the result of an "occurrence."

The subject Safeco Policy defines an "occurrence" as follows:

> **"Occurrence"** means an accident, including exposure to conditions, which results in:
>
> **bodily injury; or**
>
> **property damage**
>
> during the policy period. Repeated or continuous exposure to the same general conditions is considered to be one occurrence.

(C.P. 140) The word "accident" is not defined in the Safeco policy; however, the Mississippi Supreme Court has provided the following guidance for defining the term "accident" in the context of insurance coverage:

> An accident by its very nature produces unexpected and unintended results. It follows that bodily injury or property damage, expected or intended from the standpoint of the insured, cannot be the result of an accident.

OmniBank, 812 So.2d at 200. *See also* ***Scruggs,*** 886 So.2d at 718-19 (¶ 17).

Mississippi law is plain that, when "occurrence" is defined as an "accident", there is no "occurrence" if the harm for which recovery is sought resulted from an insured's

intentional or deliberate actions, regardless of whether the insured intended the harm. ***Allstate Ins. Co. v. Green,*** 2010 WL 4817135, at *7 (S.D. Miss. Nov. 22, 2010) (citation therein omitted). "If the acts themselves were not accidental, even if they may have been negligent, then there is no 'occurrence.'" ***Green,*** 2010 WL 4817135, at *7 (citation therein omitted).

The Mississippi Supreme Court has also clearly held that in determining whether there is an "occurrence" as required by an insurance policy, it is necessary to look to whether the insured intended the *act* which caused harm to the claimant, not whether the insured intended to actually *harm* the claimant. ***Allstate Ins. Co. vs. Moulton,*** 464 So.2d 507 (Miss. 1985); ***OmniBank,*** 812 So.2d 196 (Miss. 2002). The Mississippi Court of Appeals' opinions are in accord. *See* ***Rogers v. Allstate Ins. Co.***, 938 So.2d 871, 876 (¶ 20-21) (Miss. App. 2006).

In both ***Moulton*** and ***OmniBank***, the Mississippi Supreme Court considered and defined what constitutes an "occurrence" and specifically held that in determining whether there is an "occurrence," courts should look at the insured's actions and not whatever unintended damages flow from those actions. In other words, the focus is on whether the insured intended the *act* which caused harm, not whether the insured intended the resulting *harm*. If the insured intended the act which caused harm, then there is no "accident"; thus, no "occurrence" and no coverage. This is true even if the insured did not intend to harm the claimant. If the insured did *not* intend the act, then the damages were caused by an "accident" or "occurrence" and, consequently, coverage applies. In the instant matter, the parties have stipulated that Ellis intended to fire the shots which killed Brian Kees and, further, that Ellis intended to aim the gun at the car in which Brian Kees was riding. (C.P. 77, 178) Consequently, Brian Kees'

death did not result from an "occurrence" and coverage is not available under the Safeco policy.

In ***Moulton***, 464 So.2d 507, Allstate's insured filed criminal charges against another person, who subsequently sued the insured for malicious prosecution. The insured requested that Allstate defend her under her homeowner's policy, which contained language concerning "accident" and "occurrence" similar to that found in Safeco's policy. ***Id.*** at 508-09. In ruling that the insured was not entitled to coverage, the ***Moulton*** Court noted that the insured intended to file charges against the other person and, because the insured intended that act, the insured's act was not an "occurrence" as required under the policy. Portions of the ***Moulton*** opinion are set forth here:

> The implication is clear that, whether prompted by negligence or malice, (1) appellant's acts were committed consciously and deliberately, without the unexpected intervention of any third force, and (2) the likely and actual effect of those acts was well within the appellant's foresight and anticipation.
>
> * * *
>
> At the heart of the instant controversy is whether this Court will interpret the word "accident" as referring to Ms. Moulton's actions swearing out a Complaint that Anthony Walls had stolen her dog, or whether "accident" refers to the consequences of that act.
>
> Mrs. Moulton obviously intended to swear out the Complaint against Anthony Walls. Although she may not have intended for him to suffer humiliation or embarrassment, she certainly intended for him to be arrested.

Id. at 509-10.

Based on the above, in determining whether there is an "occurrence" as required by the Safeco policy, courts must look at whether the insured intended the act, not

whether the insured intended the resulting damages. Because Ellis intended to shoot the gun and intended to shoot the gun at the car in which Brian Kees was riding, his action was not an "accident" or "occurrence". It follows that Ellis is not entitled to coverage under the subject Safeco policy. Whether Ellis intended to harm Brian Kees is irrelevant to this determination.

Lambert urges that ***Moulton*** doesn't apply because it is a malicious prosecution case and no intentional torts were pled in her complaint; rather, Ellis pled guilty to culpable negligence manslaughter – not an intentional tort. Lambert is misguided on this point. The ***Moulton*** insured filed criminal charges against another person, who subsequently sued the insured for malicious prosecution – an intentional tort. The Safeco insured, Al Ellis, shot into the Kees vehicle, killing Brian Kees, and Brian's mother subsequently sued Ellis for wrongful death – an intentional tort. Moreover, Ellis intentionally shot into the Kees vehicle and did so knowing that at least one person was in the vehicle, therefore his action, as a matter of law, was not an "accident" or "occurrence". ***Moulton,*** at 509-10. With no "accident" or "occurrence", Ellis is not entitled to coverage under the Safeco policy.

The Fifth Circuit addressed the same issue in ***Berry***. In that case, a police officer shot Berry during an arrest. Berry subsequently obtained a judgment against the police officer and demanded payment from the City's liability insurer. ***Id.*** at 453-54. Like the subject Safeco policy, the City's liability policy in ***Berry*** provided that it would only pay on behalf of the insured all sums the insured is legally obligated to pay as body injury or property damage "caused by occurrence." ***Id.*** at 456.

In accord with the ***Moulton*** opinion, the Fifth Circuit noted that because the police officer intended to fire his gun, his actions did not constitute an "accident" or

"occurrence"; therefore, he was not entitled to liability coverage for Berry's claim. ***Id.*** at 458. The ***Berry*** Court stated that whether the insured intended to cause harm was irrelevant; rather, the question was whether the insured intended the *act* which caused the harm.

> [W]e accept McLemore's testimony that he did not intend the consequences of his act, that is, harming Berry. There is no dispute, however, over the fact that McLemore intentionally discharged his weapon in Berry's direction and that the harm to Berry was foreseeable. As the intent to fire is the only fact significant to the legal determination of whether McLemore's act was intentional, the District Court properly granted NHI a directed verdict on the ground that the policy did not extend coverage to the acts in question.

Id. The very same can be said of the facts in the subject case.

In 1992, the Mississippi Supreme Court rendered an opinion in the case of ***Southern Farm Bureau Casualty Insurance Company vs. Allard,*** 611 So.2d 966 (Miss. 1992). In ***Allard***, Farm Bureau's insured shot and injured his brother-in-law. The brother-in-law subsequently sued and the insured sought coverage under his homeowner's liability policy with Farm Bureau. The Court held that "an act is intentional if the actor desires to cause the consequences of his act, or believes that the consequences are substantially certain to result from it." ***Id.*** at 968. The Court further noted that "the word 'intent' denotes that the actor desires to cause the consequences of his act." ***Id.*** So the ***Allard*** Court focused on whether the insured intended to *harm*, as opposed to whether the insured intended the *act* which caused the harm. However, the crux of the ***Allard*** case was Farm Bureau's claim that the insured's actions were not covered by the policies because of the intentional act exclusions. ***Id.*** at 967. The ***Allard*** Court neither addressed nor overruled ***Moulton***.

Subsequently, the Mississippi Supreme Court came back and clarified any perceived ***Moulton-Allard*** conflict in ***OmniBank***. In ***OmniBank***, a borrower sued her lender to recover for force placed insurance coverage which the borrower contended was not needed and for which she was allegedly overcharged. OmniBank requested that USF&G defend the suit/claim under its Commercial General Liability Policy. ***Id.*** at 198. That policy, like the subject Safeco policy, provided that it only covered damages which were caused by an "occurrence." Specifically, the ***Omnibank*** Court stated:

> We are asked to determine whether, under Mississippi law, an insurer's duty to defend under a General Commercial Liability Policy for injuries caused by accidents extends to injuries unintended by the insured but which resulted from intentional acts of the insured if those actions were negligent but not intentionally tortious.

Id. at 197.

In distinguishing ***Allard*** and reaffirming the prior holding in ***Moulton***, the ***OmniBank*** Court again held that in determining whether there is an "occurrence" as required by the policy, courts should look at whether the insured intended the *act* which caused damages, not whether the insured intended the resulting *damages*. The ***OmniBank*** opinion also merits a lengthy quotation:

> We held that the term "accident," as defined by the policy, referred to Moulton's action and not whatever unintended damages flowed from that act....although Moulton did not intend Walls to suffer humiliation or embarrassment, she did intend for him to be arrested. Thus, her actions were not accidental, and as such the insurer was under no obligation to defend.
>
> * * *
>
> Here, OmniBank intended to make a loan to Ramsay, intended to require Ramsay to maintain insurance, intended to place collateral protection insurance provision in the loan, and intended to include the premium in the finance charge. Clearly under the rational of ***Moulton***, USF&G is under no duty to defend against the complaints alleged in the Ramsay lawsuit.
>
> * * *

> Contrary to OmniBank's position, ***Allard*** does not constitute a change in the law. ***Allard*** emphasized that a fact issue existed as to whether the insured intended to harm the victim. This is relevant because the scope of our query was whether such act constituted an "occurrence" or "incident" as defined in the policies. We did not address whether specific damages must have been intended in order for the "intentional acts" exclusion of the policy to be applicable. ***Moulton*** held that the term "accident" refers to Mrs. Moulton's action and not whatever unintended damages flowed from that act. Thus, ***Allard*** and ***Moulton*** are consistent in that they both address the nature of the insured party's conduct, not the resulting damages of that conduct.
>
> * * *
>
> OmniBank would have us declare that an insured has coverage for intended acts so long as there is no intent to cause bodily injury or property damage. Mississippi Federal Courts have correctly held that a claim resulting from intentional conduct which causes foreseeable harm is not covered, even though the actual injury or damages are greater than expected or intended.
>
> * * *
>
> We reject as illogical OmniBank's argument that coverage exists if an insured does not intend the precise damages resulting from its intentional act . . . . Accordingly, we hold that an insurer's duty to defend under a General Commercial Liability Policy does not extend to negligent actions that are intentionally caused by the insured.

Id. at 200-01.

Thus, in ***OmniBank,*** the Mississippi Supreme Court reaffirmed its holding in ***Moulton:*** in determining whether there is an "occurrence" courts must look at whether the insured intended the *acts* which caused harm, not whether the insured intended the resulting *harm*. Because OmniBank had intended to place insurance on its borrower's loan, there was no "accident" or "occurrence," even though OmniBank did not intend to harm the borrower's reputation or credit or cause her emotional distress.

Lambert argues that ***Allard*** is the appropriate standard for determining this issue, but she is wrong. Subsequent to the ***Allard*** and ***Moulton*** opinions, this Court handily reconciled the two in ***OmniBank***. The ***Omnibank*** Court reiterated the ***Moulton***

standard that "the term 'accident' refers to [the person's] action and not whatever unintended damages flow from that act." ***Omnibank,*** 812 So.2d at 201. The ***OmniBank*** Court specifically rejected OmniBank's reliance on ***Allard*** for the proposition that an insured is covered for intended acts so long as there is no intent to cause 'bodily injury' or 'property damage.'" The ***OmniBank*** Court also cited to federal court cases which hold that "a claim resulting from intentional conduct which causes foreseeable harm is not covered, even where the actual injury or damages are greater than expected or intended." ***Id.***

The ***OmniBank*** decision, which came after both ***Allard*** and ***Moulton,*** is the current law in Mississippi. As applied to the instant matter, Ellis intended his actions, whether or not he intended the extent of the damage resulting from those actions. In accord with ***OmniBank***, there is no coverage under the Safeco policy because Ellis intended his actions, which resulted in the death of Brian Kees. Contrary to Lambert's representation, this Court's previous denial of Safeco's Petition for interlocutory appeal on the issue of law presented in this direct appeal does not constitute a decision on the merits and does not indicate a position either in accord with or contrary to that pursued by either Lambert or Safeco. ***In re Knapp,*** 536 So.2d 1330, 1330 (Miss. 1988).

The Fifth Circuit has opined that Mississippi's case law concerning what constitutes an "accident" is slightly inconsistent, citing to ***Allard,*** 611 So.2d 966 (Miss. 1992) ("accident" where unintentional shooting of gun led to unintentional foot injury), ***Moulton,*** 464 So.2d at 509-10 (no "accident" where insured consciously devises and sets in motion a chain of events to the injuries complained of, regardless of whether the injuries were unintended), and ***Omnibank,*** 812 So.2d at 200-01 (adopting ***Moulton*** and distinguishing ***Allard*** on the ground that a fact issue existed in ***Allard*** as to whether the

insured intended to harm the victim; finding ***Allard*** and ***Moulton*** consistent with each other because both address the nature of the insured party's conduct rather than the damages resulting from that conduct). ***Hurst,*** 632 F.3d at 905, n. 3. However, the ***Hurst*** Court also states that these "inconsistencies" are irrelevant where there is no doubt that the killing was *not* an "accident". ***Hurst,*** 632 F.3d at 905, n.3. In the case at bar, just as in ***Hurst,*** there is no doubt that the shooting was *not* an accident.

An insurer has absolutely no duty to defend claims which fall outside the coverage of the policy. ***Scruggs,*** 886 So.2d at 719 (¶ 19) (citations therein omitted). Therefore, to determine if there is coverage and/or a duty to defend or indemnify, this Court looks to the allegations of Lambert's complaint. ***Scruggs,*** 886 So.2d at 719 (¶ 19) (citations therein omitted). Lambert's complaint alleges that Ellis' acts were intentional. The crux of the underlying complaint is that Ellis intentionally shot at Brian Kees. The complaint states: "As the car drove away from the Ellis home, Defendant Ellis fired a shot from a gun which was under his dominion and control." (C.P. 11) See also the agreed Itemization of Stipulated Facts, in which the parties agree that Ellis intentionally shot his gun at the vehicle in which Brian Kees was riding. (C.P. 77) Ellis' act of shooting the gun was clearly intentional, therefore the shooting was not an "accident" or "occurrence." While it is nothing short of tragic that Brian Kees was killed, that fact is not relevant to the issue of coverage. Since the factual allegations of the complaint do not allege any "occurrence" as defined by the Safeco policy or applicable case law, there is no "occurrence" and, concomitantly, no coverage under the policy.

VI. CONCLUSION

The relevant, material facts are not in dispute. The law and the policy language are clear. Pursuant to any one of the three policy provisions cited herein, there is no coverage for the claims contained in Lambert's complaint; therefore, Safeco owes no duty to defend or indemnify Al Ellis against those claims. Safeco Insurance Company of America respectfully requests that this Court affirm the trial court's Order finding that Al Ellis is not entitled to liability coverage under the Safeco homeowner's insurance policy for any of Lambert's claims and Safeco Insurance Company of America has no duty to defend Al Ellis or to provide him with indemnification for the claims contained in Lambert's complaint.

Respectfully submitted, this the 6 day of October, 2011.

Respectfully submitted,

SAFECO INSURANCE COMPANY
OF AMERICA, APPELLEE

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CERTIFICATE OF SERVICE

I, W. Wright Hill, Jr./Jan F. Gadow, do hereby certify that I have this day forwarded, via U.S. mail, postage prepaid, a true and correct copy of the foregoing to:

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THIS, the 6 day of October, 2011.

W. WRIGHT HILL, JR.
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