IN THE COURT OF APPEALS 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 — APPELLANT

VS. — CASE NO. 2011-CA-00166

SAFECO INSURANCE COMPANY
OF AMERICA and AL ELLIS — APPELLEE

APPEAL FROM THE DECISION OF THE
RANKIN COUNTY CIRCUIT COURT

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT NOT REQUESTED

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INTRODUCTION

The record is clear and uncontradicted. Ellis, believing he was the victim of theft and in a negligent attempt to stop the thief, fired his pistol at a vehicle he believed contained the fleeing thief. He did not know Brian was in the vehicle. Tragically, a bullet ricocheted off the road into the vehicle, striking and killing Brian. Ellis was indicted for murder. He pled to manslaughter by culpable negligence. At his plea hearing, the presiding judge stated that he did not believe Mr. Ellis had any criminal intent, that "this was an act of negligence." (R.E. at 327.) The trial judge in the case at bar, knowing about Ellis's plea, his testimony there and in his deposition, and being advised of the applicable law, found genuine issues of material fact and refused to grant summary judgment. This Court agreed, refusing to allow an interlocutory appeal. Then, inexplicably, the trial judge, based on the same testimony, the same facts, and the same law, erroneously ruled in favor of Safeco. None of the exclusions in the Safeco policy preclude coverage, and the trial judge erred in determining otherwise.

ARGUMENT

1. The Safeco policy exclusions do not apply.

Safeco's entire brief, and everything else it has filed and argued in this case, can be summarized into one erroneous theory: Ellis's conviction means there is no coverage. However, this is, with all due respect, an overly simplistic view of the facts and the controlling law. Ellis's conviction must be viewed in conjunction with all of the surrounding circumstances, the uncontested facts, and the applicable precedent of this Court.

Allstate Ins. Co. v. Peasley, 932 P.2d 1244 (Wash. 1997), cited by Safeco, is a non-binding, decision out of Washington, with a concurring opinion and dissent, and is distinguishable. First, the exclusion at issue in ***Peasley*** was significantly different than that at

issue here. It provided: "We do not cover any bodily injury which may reasonably be expected to result from the intentional or criminal acts of an insured person or which are in fact intended by the insured person." ***Id.*** at 1247. Thus, it sought to cover injury that was reasonably expected based on the intentional or criminal acts of an insured, or which are intended by the insured. Conversely, the exclusion here simply seeks to exclude from coverage personal injury "arising out of any illegal act committed by or at the direction of any insured." (C.P. at 134.)

The concurring opinion in ***Peasley*** observed that the policy did not define crime or criminal, and that, accordingly, they should be ascribed the meaning that would be held by the average person purchasing insurance. ***Id.*** at 1251. It further observed that "the focus of the inquiry is not simply the statutory elements of the offense of which the insured has been convicted, but rather the plea and the insured's statement on plea of guilty." ***Id.***

The dissent in ***Peasley*** also focused on whether an average purchaser of insurance would consider the acts complained of to be criminal, and stated:

> Applying that test here, we must determine whether an average purchaser of insurance would find Mr. Peasley's admission of "recklessly discharg[ing] a firearm in a manner which caused a substantial risk of bodily harm or death" was an act done with malicious intent, from evil nature, or with a wrongful disposition to harm. As a matter of law, I would hold Mr. Peasley's admission of criminal recklessness does not amount to an act which an average purchaser of insurance would view as one made with malicious intent, from evil nature, or with a wrongful disposition to harm.

Id. (Internal citations omitted.) In ***Young v. Brown***, 658 So.2d 750, 753 (La.Ct.App. 1995) the plaintiff was negligently injured after defendant Brown's gun accidentally discharged; Brown subsequently pled guilty to negligent injuring. ***Young***, 658 So.2d at 753. The court reversed the trial court's grant of summary judgment, finding that the policy exclusion regarding damages from an insured's criminal acts was ambiguous because it potentially encompassed non-intentional criminally negligent behavior:

> The term " criminal acts," as used in the coverage exclusion is susceptible of more than one meaning. Allstate reads the term to mean any action that results in a criminal charge.

> An insured, however, could justifiably conclude otherwise. Nestled between exclusions for injuries resulting from intentional acts and for intentionally inflicted injuries, a reasonable purchaser could have understood the basis of the exclusion to be intentional misconduct or intentional criminal acts, thereby allowing coverage for damages resulting from criminal negligence. An exclusion for negligent acts, albeit criminally negligent acts, is thus counter-intuitive to the wording of the exclusion and serves to circumvent the very purpose for which liability insurance is purchased. Such an exclusion is likewise contrary to Louisiana's public policy that liability insurance should protect innocent accident victims from losses resulting from the negligent acts of an insured.

Young, 658 So.2d at 754. In finding that the language " criminal acts" in the policy was ambiguous, the court stated:

> the term criminal acts is equivocal and susceptible of more than one interpretation based upon its usage and the tenor of the exclusionary language. A reasonable liability insurance buyer could construe the instant exclusion to deny coverage only for intentional criminal acts, thereby allowing coverage for damages arising out of non-intentional, criminal negligence. In light of this ambiguity, we construe the policy to provide coverage for damages arising from non-intentional acts that may rise to the level of criminal negligence. Such an interpretation recognizes the insured's reasonable expectations of coverage while voiding the exclusion only to the extent that it violates public policy.

Id., p. 8, 658 So.2d at 754-55. Thus, while the court found " criminal acts" to be susceptible of differing interpretations, it also determined that a reasonable insurance buyer could construe the language as denying coverage for only intentional criminal acts. ***Id.***

Limiting policy language is strictly construed and "must be written in clear and unmistakable language." ***Progressive Gulf Ins. Co. v. We Care Day Care***, 953 So.2d 250, 254 (Miss. App. 2006)

The Safeco policy at issue here ambiguously fails to define the term "illegal." The question then, is how would the average insurance purchaser, such as Ellis, read the policy and what meaning would he give to the language drafted by Safeco? The answer lies in Ellis's uncontradicted sworn testimony:

> Q. Now, did you believe when you purchased [the Safeco policy] and on the day that this happened that it provided coverage for instances like this?
> A. Yes

Q. And would you term this as an accident?
A. Yes.
Q. This what happened, was it an accident?
A. In my own judgment, yes.

(R.E. at 392.) This sworn testimony is the only evidence before the Court on this issue. Ellis clearly expected his insurance to provide coverage. Such a belief is reasonable, given that he acted without malice, without premeditation, and without any intent to cause harm.

In ***Tower Ins. Co. v. Judge***, 840 F. Supp. 679 (D. Minn. 1993), a similar criminal exclusion act provision was held to be against public policy and in need of judicial modification to conform to the reasonable expectation of the insureds. There, the heirs of Meyer brought a wrongful death suit following the electrocution death of their son. Meyer was electrocuted when the defendants attempted to awaken him by jolting him with electrical currents. Criminal charges were brought against the defendants, all of whom pleaded no contest to second degree reckless homicide, endangering safety by use of a dangerous weapon, and battery. After the criminal action, Meyer's estate brought suit against two of the defendants, who tendered the defense of the wrongful death action to their respective insurance companies. 840 F. Supp. at 683.

The insurance companies sought declarations that their policies excluded coverage for Meyer's death. ***Id.*** at 685. The original policy specifically excluded "bodily injury ... which is expected or intended by the insured." After issuing a policy with that exclusion, the insurance company amended its policy to provide an exclusion for bodily injury that "... (3) results from the criminal acts of an insured."

The Minnesota Court refused to apply the exclusion and concluded that in that case the "denial of coverage would conflict with the reasonable expectations of the insureds." ***Id.*** at 693. The Court also stated that public policy favored a narrow construction of the criminal act exclusion. ***Id.*** "This Court is convinced that it would be bad policy to find that the exclusion applies in this case just because the state of Wisconsin decided to pursue criminal charges." ***Id.***

See also ***Allstate Ins. Co. v. Zuk***, 78 N.Y.2d 41, 571 N.Y.S.2d 429, 574 N.E.2d 1035 (Ct. App. 1991), ***Country Mutual Ins. Co. v. Duncan***, 794 F.2d 1211 (7th Cir. 1986), and ***Green v. Allstate Ins. Co.***, 177 A.D.2d 871, 576 N.Y.S.2d 639 (A.D. 3 Dept. 1991).

The cases cited by Safeco are distinguishable, as shown above. They are further distinguishable in that in each case relied upon by Safeco the insured took action against the person who ultimately was injured. The insured was aware of the presence of the injured person, and was aware, at least objectively, that his actions could cause harm to that person. Here, Ellis did not know Brian was even in the car.

Safeco argues that Ellis admitted that he killed Brian by "knowingly, willfully, through culpable negligence through his acts . . . shooting into a moving automobile . . . without authority of law." (Appelle's Brf. at 12.) It contends that such admissions prove he intended his actions and that he acted illegally, without authority of law. However, a review of Ellis's plea petition reveals that he admitted the following:

> 7. I wish to plead guilty and request the court to accept my plea of guilty on the basis of the following . . . On the date (s) as set forth in the indictment . . ., I did, in Rankin County, Mississippi, willfully, unlawfully, feloniously, and knowingly on August 13, 2005, did discharge my weapon into a 1997 Mitsibishi Eclipse causing the death of Brian Kees.

(R.E. at 271-72.) Further, Ellis testified in his deposition that he was attempting to make a citizen's arrest and that, as a victim of theft, he believed he had the legal right to do so (R.E. at 386, 390, 394). Although one of the shots did strike and kill Brian, the focus must remain on what Ellis intended and what he could have foreseen.

Another Safeco exclusion seeks to exclude bodily injury "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.) As with the other exclusions it urges to avoid coverage, the crux of this one is to bar coverage for intentional and/or foreseeable acts. Such an approach is in line with the precedent

of this Court and the Supreme Court, and with the public policy of Mississippi to prohibit insurance coverage for intentional conduct which causes foreseeable harm. However, it has no application in this case because Ellis did not intend to harm anyone, especially Brian, and because harm to Brian was not reasonably foreseeable to Ellis, either subjectively or objectively, because he did not know Brian was in the car.

The record is replete with testimony from Ellis that he did not intend to harm Brian. Indeed, Safeco's attorney admitted in Ellis's deposition that they "know and agree [that Ellis] did not intend to shoot Brian Kees . . . or to harm Brian Kees." (R.E. at 387.) Counsel further admits that he does not disagree that Ellis was negligent in hitting Brian which resulted in his death. (***Id.***) The trial judge taking Ellis's guilty plea acknowledged the lack of any intent to harm. Further, the record is clear that Ellis was simply trying to disable the vehicle, that none of the shots he fired into the vehicle struck anyone, and that, but for, Brian's unexpected presence and the unexpected ricochet of the bullet into the car, no one would have been hurt.

United States Fidelity & Guaranty Company v. Omnibank, 812 So.2d 196 (Miss. 2002), and ***Allstate Ins. Co. v. Moulton***, 464 So.2d 507 (Miss. 1985), relied upon heavily by Safeco, are factually dissimilar and distinguishable, as pointed out in Lambert's initial brief. Still, those cases are not inconsistent with Lambert's position, and they are consistent with the seminal and controlling case on this issue from the Mississippi Supreme Court: ***Southern Farm Bureau Cas. Ins. Co. v. Allard***, 611 So. 2d 966 (Miss. 1992).

Moulton found no coverage for unintended damages arising out of a malicious prosecution claim. 464 So. 2d 507. Believing the defendant, Walls, stole her dog, Moulton swore out an affidavit against her. After Walls was acquitted, she sued Moulton who requested defense and indemnity from her insurance carrier claiming that she did not intend for Walls to suffer humiliation and embarrassment associated with her complaint. ***Id.*** The Supreme Court

found no duty to defend because "the chain of events leading to the injuries complained of were set in motion and followed a course consciously devised and controlled by [the insured] without the unexpected intervention of any third person or extrinsic force." ***Id.*** at 509 (internal citations omitted) (emphasis added). Because Moulton intended for Walls to be arrested, her actions were not accidental and the insurer had no duty to defend. ***Id.***

In ***Omnibank***, the Court found that the insured intentionally set into motion a chain of events, which it had consciously devised, followed, and controlled, without the unexpected intervention or any third person or extrinsic force. 812 So. 2d 196, 201 (emphasis added).

In ***Allard***, cited with approval in ***Omnibank***, the insured shot his brother in law in the leg while attempting to shoot the ground. He testified he intended to pull the trigger and fire the shot in his brother in law's general direction, but did not intend to harm him, and he testified his brother in law unexpectedly stepped into the path of the bullet. 611 So. 2d 966, 968. Affirming the finding of coverage, the Supreme Court looked at what Allard intended to do - at the nature of his conduct - not the resulting damages of that conduct. ***Id.*** But for Allard's brother in law's unexpected intervention, there would have been no injury.

Paralleling the ***Allard*** facts are those in the case *sub judice*. Both involved the intentional discharge of a firearm in an attempt to thwart another person's movement. Both involved an accidental and unintended injury, that resulted from the unexpected intervention of a third party (here, the unexpected presence/intervention of Brian; in ***Allard***, the brother in law moving into the path of the bullet). Both involve almost identical language in a residential homeowner's policy. Both involve cases in which negligence has previously been adjudicated by a circuit court. *Stare decisis* directs that the Mississippi Supreme Court's ruling in *Allard* be followed.

Safeco also seeks to deny coverage based on the illogical argument that there is no occurrence, as defined by its policy. Per its policy, an "'[o]ccurrence' means an accident,

including exposure to conditions, which results in . . . bodily injury." (C.P. 140.) Accident is not defined in the policy. It has, however, been defined by the Mississippi Supreme Court as follows:

> 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.

Safeco argues that ***Moulton*** and ***Omnibank*** preclude coverage because those cases found no occurrence where the insured intended the act that caused harm, even though they may not have intended the particular consequences. Those cases, and that issue, have already been distinguished herein and in Lambert's principal brief. Simply stated, in both cases, the insured intended to commit an act against the person who was harmed, and the damages that resulted were substantially certain based on the particular conduct committed. There was no "unexpected intervention of any third force . . . and the likely and actual effect of those acts was well within [the insured's] foresight and anticipation." ***Moulton***, 464 So.2d at 509.[1]

Here, Ellis provided uncontradicted testimony that he did not intend to harm anyone. However, assuming, without conceding, that he intended to harm Michael Kees, he certainly intended no harm to Brian, who he did not even know was in the vehicle. Brian's presence constituted an "unexpected intervention" that could not have been foreseen by Ellis, and Brian's injury and tragic death could not have been within Ellis's "foresight and anticipation," as those terms are dispositively used in ***Moulton*** and ***Omnibank.*** Accordingly, notwithstanding Safeco's

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[1]Safeco also opines that this case is like ***Moulton*** because Lambert, in filing a wrongful death lawsuit, sought recovery for the commission of an intentional tort. (Brf. of Appellee at 22.) However, a cursory review of Lambert's complaint reveals that it sought recovery for negligence only. (R.E. at 206.) While a wrongful death suit can be based on intentional torts, clearly this case was brought strictly based on Ellis's negligence because the uncontested facts establish that Ellis's actions were negligent, not intentional.

arguments to the contrary, Ellis's actions did constitute an occurrence within the meaning of the Safeco policy, as such language has been interpreted by the Courts of this state.

2. Collateral estoppel does not apply.

Safeco asserts that Lambert is collaterally estopped from re-litigating the issue of whether Ellis committed an illegal act because that issue was conclusively decided when he pled guilty. Safeco argues that Lambert is in privity with Ellis and his bound by his admissions. For support, it relies on ***Thomas v. State Farm Fire and Cas. Co.***, 856 So.2d 646 (Miss. App. 2003), ***Thomas v. State Farm Fire & Cas. Co.***, 865 So.2d 646 (Miss. App. 2003), and ***Capitol City Ins. Co. v. Hurst***, 632 F.3d 898 (5th Cir. 2011), all of which are distinguishable.

In ***Thomas***, Mallard pled guilty to aggravated assault after shooting Thomas in the abdomen at her home. ***Id.*** at 648. Thomas then sued Mallard, who did not respond, and default was entered against her. During Mallard's subsequent bankruptcy, it was revealed that she possessed a homeowner's insurance policy, which Thomas sought to collect. ***Id.*** The insurer refused to pay, arguing that its illegal acts exclusion barred coverage[2] and that Mallard's failure to give it notice of the suit and to allow default to be entered voided the policy. ***Id.*** at 649. The trial judge granted summary judgment to the insurer, and Thomas appealed to this Court.

First, the Court looked at the validity of the illegal acts exclusion. Citing ***Allard***, *supra*, the Court determined that the exclusion applied because, unlike Allard, Mallard "believed the consequences which occurred [from her act] were substantially certain to occur." ***Id.*** (Emphasis added.) The Court further found that "the distinguishing factors between ***Allard*** and the case *sub judice* are that the intentions of the shooter in ***Allard*** were never contradicted by the shooter or the victim." ***Id.*** The Court reviewed Mallard's sentencing hearing, at which Thomas testified

[2]The exclusionary provision relied upon by the insurer went much farther than the one in the case at bar, and provided that coverage does not apply to bodily injury "to any person which is the result of willful and malicious acts of an insured." ***Thomas***, 856 So.2d at 647.

that Mallard should pay her medical bills and the two exhibited obvious ill will towards one another. ***Id.*** However, later, when deposed by the insurer, after the lawsuit was filed, both were in agreement that the shooting was accidental and may have even been caused by Thomas. ***Id.***

The Court found that Thomas was bound by Mallard's admissions in her guilty plea largely because of her own inconsistency. She had taken the position in Mallard's criminal matter that the shooting was intentional, but had taken the opposite position in her own civil case, when she needed it to have been an accident in order to obtain coverage. ***Id.*** at 649-50. The Court concluded that, because her interests were aligned with Mallard's, and because she herself sought to take inconsistent positions in each action, she was collaterally estopped from arguing in her civil action that the shooting was accidental. ***Id.*** The Court concluded that summary judgment was appropriate, not because of the shooter's acts and admissions, but rather because of Thomas's own inconsistent positions. ***Id.*** at 650.

The case at bar is easily distinguishable. It is strikingly similar to ***Allard***, in that there has been no evidence produced that Ellis intended to harm Brian, and Ellis's intentions in shooting at the Kees's vehicle have never been contradicted by Ellis, Lambert, or anyone. He clearly was trying to disable the vehicle and retrieve his personal property, and this position has been maintained consistently by Ellis and Lambert in every pleading and hearing related to this matter. Ellis testified in deposition that he had not spoken with Brian's family since sentencing (R.E. at 388). There, Ellis and Brian's family acknowledged they had not spoken about the matter, and the trial judge specifically found that they had not colluded. (R.E. at 146.) Lambert testified at Ellis's sentencing hearing that she and the rest of the family knew he did not intend to harm Brian, and she asked the Court to release him from custody (R.E. at 120-24.) When Lambert sued Ellis, he answered the Complaint, denying liability. Put simply, the apparent

collusion and inconsistent positions of the shooter and the plaintiff present in ***Thomas*** simply do not exist in this case.

Safeco also seeks reliance on ***Jordan v. McKenna***, 573 So.2d 1371 (Miss. 1990), in support of its collateral estoppel argument. However, ***Jordan*** held that a man convicted in a criminal trial of raping a woman was bound by that finding in a subsequent civil action brought against him by the same woman. ***Id.*** at 1374-75. The Court also stated that "the rule [of collateral estoppel] is neither mandatory nor mechanically applied, however, where there are overriding public policy considerations, counsel and otherwise." ***Id.*** at 1375.

Clearly, collateral estoppel bars re-litigation of the same facts by the same parties. However, Lambert was not a party to Ellis's criminal trial, she had no opportunity to litigate there, she has not taken an inconsistent position, and there is no evidence that she is in privity with Ellis. Public policy considerations mandate that the mother and family of a deceased child not be bound by determinations made in another proceeding in which they were not parties. Moreover, Safeco seeks in its brief to collaterally estop Lambert from re-litigating the issue of whether Ellis's act was intentional. (Brf. of Appellee at 14.) However, neither Lambert nor Ellis have ever asserted or admitted that Ellis intended to shoot Brian. The undisputed evidence is to the contrary.

Capitol City Ins. Co. v. Hurst, 632 F.3d 898 (5th Cir. 2011), another non-binding, federal case relied on by Safeco, is easily distinguishable. There, the decedent, Hurst, had an altercation with the defendant, Bell, in which Hurst slapped Bell and the two threatened one another. Shortly thereafter, Bell and Hurst each got in vehicles, which subsequently collided, killing Hurst. Bell was convicted of heat of passion manslaughter, a crime that requires criminal intent. Hurst's widow filed a wrongful death suit against Bell and his employer, seeking coverage under the employer's commercial general liability insurance policy ("CGL policy"). Bell's employer's

CGL carrier was granted dismissal under the "expected or intended injury" exclusion. Hurst's widow argued that she was not bound by the jury's finding that Bell intended to injure Hurst, and that she could re-litigate that issue. The Court affirmed, finding that Bell's conviction for heat of passion manslaughter necessarily required a finding that he wilfully, knowingly, and intentionally killed Hurst, the object of his rage; thus, the Court held, the issue of whether the injury was "expected or intended" had already been decided.

Hurst dealt with a CGL policy belonging to the defendant's employer, not a negligent defendant's personal homeowner's policy, as is at issue here. The defendant intended to collide his vehicle into that of the decedent's, and the jury found he wilfully intended, by doing so, to cause harm specifically to the decedent. He was convicted of heat of passion manslaughter, a conviction that requires wilfulness and an intent to kill. ***Hurst***, 632 F.3d at 904.

Here, Ellis was convicted of manslaughter by culpable negligence, not heat of passion manslaughter, following his accidental and unforseeable killing of Brian. As recognized by the Fifth Circuit in ***Hurst***, these are two very different offenses under Mississippi law. *See* ***Hurst***, 632 F.3d at 904 (holding that "[h]eat-of-passion manslaughter is not the same as an accidental or negligent killing", which could be manslaughter by culpable negligence); ***see also Sanders v. State***, 781 So. 2d 114, 119 (Miss. 2001) (upholding the district court's refusal to instruct the jury on culpable negligence manslaughter and instead instructing on, *inter alia*, heat-of-passion manslaughter, when "[a]ll the testimony was that [the defendant] *intentionally* hit [the decedent] in the head with a hammer") (emphasis added).

Here, Ellis steadfastly maintained that he had no intent to harm anyone, including Kees (the thief) and Brian; that he was only trying to stop the vehicle and recover his money; and, that

he did not even know Brian was in the car. All of his testimony was uncontradicted, and was correctly accepted by both trial judges who considered it.[3]

Moreover, in ***Hurst***, the jury specifically found that Bell understood the nature and quality of his acts, and that he wilfully killed Hurst after provocation in the heat of passion. Here, there can be no legitimate argument that Ellis understood that by shooting into the ground a bullet could ricochet and kill Brian who he did not even know was in the car.

The ***Hurst*** court also found that the issue of whether the collision was an accident had been litigated, that the jury found it was not an accident, and that such finding was necessary to the verdict. The pivotal issue in ***Hurst*** was that Bell's acts had been conclusively determined to have been intentionally committed against the victim. Here, everyone who spoke on the issue - from the prosecutor, to the judge, to Ellis, to Brian's family - all acknowledged that Brian's death was an accident, that Ellis had no intent to harm Brian at all, and that his actions were taken against Michael Kees simply in an effort to disable Kees's vehicle.

On the one hand, Safeco wants this Court to find Lambert bound by the result of Ellis's criminal case. On the other hand, it wants to dispute uncontradicted statements made by Mr. Ellis therein. However, such is not fair, it is not equitable, and it does not promote the public policy of this state. Collateral estoppel does not prevent Lambert from re-litigating the issue of whether Ellis intended to harm Brian because she was not a party to the prior proceeding, she is not in privity with Ellis, and she and Ellis maintained in that proceeding (and in this one) that the shooting was unintentional, and that conclusion was reached by the trial judge when accepting Ellis's guilty plea to an offense that requires no criminal intent. If there is to be any preclusive

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[3]At Ellis's sentencing hearing, the trial judge acknowledged that "this was an act of negligence, not criminal intent" (R.E. at 327), and then suspended all of Ellis's time and put him on one year of house arrest. The trial judge in the case at bar also acknowledged that "there is no proof that Mr. Ellis intended to harm or kill [Brian]." (R.E. at 11.)

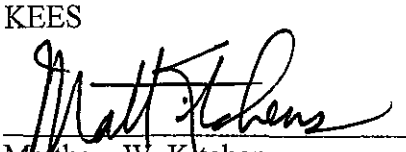
effect, it can only be that the shooting was unintentional, since that is the uncontradicted testimony.

CONCLUSION

Reading the Safeco policy as a whole, and the precedent of this state, it is clear that the intention of the exclusions at issue, and the cases interpreting them, are to prevent an insured who intentionally commits an illegal act against a known person and causes foreseeable harm from being indemnified by his insurance company. Such clearly is not the case here. The purpose of insurance is to indemnify insureds from accidental, unintentional conduct. It is not to give their insurance company a windfall in premiums, and then allow it to escape liability when, as here, there is unexpected intervention of a third party leading to its insured's commission of an accidental act, resulting in unforeseeable injury, which otherwise would be covered under the policy. None of the exclusions relied upon by Safeco apply. Therefore, the Safeco policy provides coverage to Ellis, and the learned trial judge erred in concluding otherwise.

WHEREFORE, PREMISES CONSIDERED, for all of the foregoing reasons, and for those argued in her principal brief and in the proceedings below, Appellant Rita Kees Lambert, Individually, and as Personal Representative of all Wrongful Death Heirs at Law of the Decedent, Brian Michael Kees, respectfully requests that this Court reverse the Final Judgment of the Rankin County Circuit Court and render a verdict for Appellants, or, in the alternative, remand this matter for a new trial.

Respectfully submitted,
RITA KEES LAMBERT, Individually, and as Personal Representative of all Wrongful Death Heirs at Law of the Decedent, BRIAN MICHAEL KEES

BY: 
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CERTIFICATE OF SERVICE

I, Matthew W. Kitchens, one of the attorneys for Appellant, Rita Kees Lambert, do hereby certify that I have this day caused to be delivered, via United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing document to:

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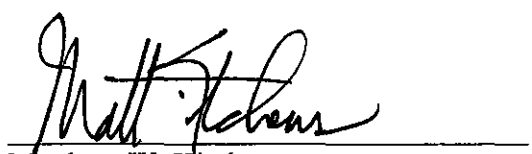
This the 28th day of November, 2011.



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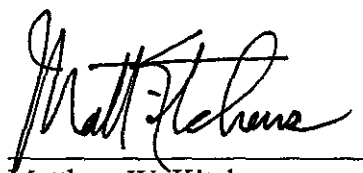
CERTIFICATE OF FILING IN COMPLIANCE WITH RULE 25

I, Matthew W. Kitchens, one of the attorneys for Appellant Rita Lambert, hereby certify, pursuant to Rule 25 of the Mississippi Rules of Appellate Procedure, that I personally will place the original and 3 copies of Appellant's Reply Brief, along with an electronic Portable Document Format (PDF) version of same on compact disc, in the United States mail, postage prepaid, before five o'clock p.m., today, November 28, 2011, addressed as follows:

Honorable Kathy Gillis
Supreme Court Clerk
Post Office Box 117
Jackson, Mississippi 39205

This the 28th day of November, 2011.



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