

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

BRIEF OF APPELLANTS

ORAL ARGUMENT NOT REQUESTED

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### CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Rita Kees Lambert, individual plaintiff and personal representative of all wrongful death beneficiaries and heirs at law of the decedent, Brian Michael Kees;

2. Appellant has identified the following nine (9) wrongful death beneficiaries of the decedent, Brian Michael Kees:

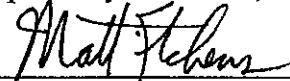
- a. Petitioner Rita Kees Lambert (adoptive mother);
- b. Reggie Matthew Lambert (natural whole-blood brother, also adopted);
- c. Whitney Elizabeth Lambert (natural whole-blood sister, also adopted);
- d. Jennifer Helena Lambert (natural whole-blood sister, also adopted);
- e. Aaron Patrick Hatch (half-blood brother as a result of adoption);
- f. Michael Edward Kees (adoptive father);
- g. Michael Edward Kees, II (half-blood brother as a result of adoption);
- h. Madison Paige Kees (half-blood sister as a result of adoption); and,
- i. Ashton Jackson Beale (half-blood brother as a result of adoption).

3. Appellant has identified the following five (5) heirs at law of the decedent, Brian Michael Kees:

- a. Petitioner Rita Kees Lambert (adoptive mother);

- b. Reggie Matthew Lambert (natural whole-blood brother, also adopted);
  - c. Whitney Elizabeth Lambert (natural whole-blood sister, also adopted);
  - d. Jennifer Helena Lambert (natural whole-blood sister, also adopted); and,
  - e. Michael Edward Kees (adoptive father).
- 4. Al Ellis, defendant/appellee;
  - 5. Safeco Insurance Company of America, defendant/appellee;
  - 6. W. Wright Hill, Jr., Esq., and Jan F. Gadow, Esq., Page Kruger & Holland, P.A., attorneys for Appellee, Safeco Insurance Company of America;
  - 7. Louis J. Guichet, III, Guichet Law Firm, PLLC, attorney for Michael Kees;
  - 8. Matthew W. Kitchens, Daniel W. Kitchens and John W. Kitchens, Kitchens Law Firm, P.A., counsel for the appellants; and,
  - 9. Honorable Samac S. Richardson, Trial Judge.

Respectfully submitted,



Matthew W. Kitchens, one of Appellant's attorneys

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### **STATEMENT OF THE ISSUES**

- I. Whether the Trial Court erred in finding that Al Ellis is not entitled to liability coverage under the Homeowner's Insurance Policy issued to him by Safeco Insurance Company of America for the Judgment entered against him as a result of the death of Brian Michael Kees.

## STATEMENT OF THE CASE

### I. Course of Proceedings Below

Rita Kees Lambert, individually, and as personal representative of all heirs and wrongful death beneficiaries (collectively referred to as "Lambert"), filed this wrongful death lawsuit on August 15, 2005, in the Circuit Court of Rankin County, Mississippi, naming as Defendants Al Ellis ("Ellis") and John Does 1 through 10 (R.E. at 206).

On or about May 22, 2008, following the dismissal of its federal court declaratory judgment action on jurisdictional grounds, the Circuit Court of Rankin County entered an Agreed Order permitting Safeco Insurance Company of America ("Safeco"), Ellis's homeowner's insurance carrier, to intervene in this wrongful death action. On June 4, 2008, Safeco filed a complaint for declaratory judgment on the issue of insurance coverage. The complaint was answered by Lambert, and an itemization of stipulated facts was subsequently filed by the parties (R.E. at 88).

Safeco then filed a motion for summary judgment, alleging that Ellis's homeowner's insurance policy has no application in this case. (R.E. at 154.) The trial court denied Safeco's motion, finding genuine issues of material fact on the issue of coverage. (R.E. at 230.) Safeco filed an interlocutory appeal, which was denied by the Mississippi Supreme Court. (R.E. at 231.) Safeco then filed a Motion for Rehearing, which also was denied. (R.E. at 232.)

Lambert moved for and was granted partial summary judgment on the issue of Ellis's liability. (R.E. at 233-256 (Lambert's Motion and Memorandum in Support); R.E. at 257

(Order Granting Partial Summary Judgment.)) Lambert also moved for and was granted summary judgment on the issue of damages, which were assessed against Ellis in the amount of \$75,000. (R.E. at 258.) The time to appeal these rulings expired without Ellis or Safeco taking an appeal. Therefore, liability and damages have been determined in favor of Lambert and those issues are not before this Court.

Safeco and Lambert agreed for the trial court to sit as the trier of fact and decide, on the pleadings, without further hearing or trial, the remaining issue of whether Ellis's homeowner's insurance policy provides coverage to him for the damages assessed against him. On February 4, 2011, Lambert filed her Trial Brief (R.E. at 13),<sup>1</sup> and on December 9, 2010, Safeco filed its Trial Brief (R.E. at 421).<sup>2</sup>

On December 30, 2010, the trial court entered its Final Judgment finding no coverage and dismissing this action (R.E. at 8). Lambert timely filed her Notice of Appeal on January 28, 2011.

## **II. Statement of Relevant Facts**

On August 13, 2005, Brian Michael Kees ("Brian") was a guest of Ellis at his home

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1

Lambert served her trial brief on the trial judge and counsel opposite November 10, 2010. Pursuant to Rule 2.05 of the Uniform Rules of Circuit and County Court Practice, the trial brief was not initially filed with the Circuit Clerk. Instead, with permission of counsel opposite, the brief was filed on February 4, 2011, after entry of the trial court's Final Judgment, so it would be a part of the record on appeal.

2

A copy of Safeco's Trial Brief, without accompanying exhibits, is included in Appellant's Record Excerpts. The exhibits are not included because the same exhibits are also attached as exhibits to Appellant's Trial Brief. Also, a full copy, with exhibits, of Safeco's Trial Brief was included by Appellee in the Designation of the Record.



in Brandon, Rankin County, Mississippi. Ellis was hosting a swimming pool party and had invited Brian and his father, Michael Kees ("Michael"), who was a billiards teammate of Ellis. During the pool party, sometime between 9:00 and 10:00 p.m., Michael went into Ellis's home and, according to Ellis, stole money. Michael exited the house and hurried to his car. Concluding that Michael had stolen money from him, Ellis retrieved his pistol and followed. Outside, Michael and Brian were pulling out of Ellis's driveway in Michael's car. In an attempt to disable and stop the car, Ellis fired his pistol into the radiator and toward the car's tires. Ellis did not know Brian was in the vehicle. One of the bullets ricocheted off the pavement and hit Brian. Brian later died from the gunshot wound. (R.E. at 88, Itemization of Stipulated Facts.)

Ellis was arrested and charged with Brian's murder. The offense was properly reduced to manslaughter by culpable *negligence*, an offense that does not require criminal intent. (R.E. 322, 327.) Ellis pleaded guilty and was sentenced to time served, house arrest and probation. (R.E. 325.)

### SUMMARY OF THE ARGUMENT

The complaint alleges only negligence. It does not allege any intentional conduct by Ellis, nor does it seek recovery against Ellis for any intentional tort. The trial court entered judgment against Ellis in the amount of \$75,000 for his negligence in causing Brian's death. The issue in this appeal is whether Ellis's homeowner's insurance policy provides coverage to him for the damages assessed.

The trial judge erroneously determined that the policy provides no coverage because (1) Ellis committed an illegal act; (2) Ellis intended to discharge a firearm in the direction of the vehicle, thus his actions were not accidental and not an "occurrence" as required under the policy; and, (3) Ellis's actions were intentional, thus coverage is barred by the policy's intentional act exclusion.

The trial judge erred because, though Ellis intended to discharge his firearm, the uncontradicted evidence establishes that he did not intend the consequences of his act: the tragic and untimely death of Brian Michael Kees. Controlling precedent from the Mississippi Supreme Court establishes that, *inter alia*, (1) uncontradicted evidence must be accepted as true and (2) 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.

In *Southern Farm Bureau Casualty Insurance Company, et al. vs. George D. Allard, et al.*, 611 So.2d 966 (Miss. 1992), Allard, intending to shoot the ground, accidentally shot his brother-in-law in the foot. His insurance carrier denied coverage, contending there was

no coverage because Allard intended to discharge the weapon, even though he did not intend to cause harm. Because the jury had found the firing of the gun intentional but had also found that Allard had not intended the resulting consequences (shooting his brother-in-law), the Court affirmed the verdict and the insurance company's obligation to pay.

Here, Ellis provided uncontradicted testimony that, *inter alia*, he did not intend to injure Brian or anyone else; he did not believe his actions would result in any injury to Brian (who he did not even know was in the vehicle) or anyone else; Brian's death was a tragic accident; by shooting his firearm he was simply trying to stop Michael Kees's vehicle to retrieve money he believed was stolen from him; and, he reasonably believed his actions were justified and lawful because he was the victim of theft. This testimony was uncontradicted and under oath, and was the only evidence before the trial court on the central issue of Ellis's intent.

The trial judge denied Safeco's motion for summary judgment, finding genuine issues of material fact. In his Final Judgment, the trial judge acknowledged that "there is no proof that Mr. Ellis intended to harm or kill [Brian] . . ." (R.E. at 11.) However, the trial judge then curiously ruled in favor of Safeco, because he found that Ellis intended to discharge his firearm. Such conclusion is in direct conflict with established precedent of the Supreme Court, and the uncontradicted facts of this case. Because Ellis did not intend the consequences of his act, because he reasonably believed his actions were lawful and justified, and because Brian's death was an unforeseeable accident, the trial judge erred in finding that the policy provides no coverage.

## ARGUMENT

- I. Whether the Trial Court erred in finding that Al Ellis is not entitled to liability coverage under the Homeowner's Insurance Policy issued to him by Safeco Insurance Company of America for the Judgment entered against him as a result of the death of Brian Michael Kees.**

"A circuit court judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor," and his findings are safe on appeal where they are supported by substantial, credible, and reasonable evidence. *Puckett v. Stuckey*, 633 So. 2d 978, 982 (Miss. 1993). An appellate court is charged with examining the entire record. In so doing, that evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's finding of fact, must be accepted. If there is substantial evidence to support the findings made by the trier of fact, those findings must be affirmed on review. *Culbreath v. Johnson*, 427 So.2d 705, 707-08 (1983). Finally, the Supreme Court has long held that uncontradicted testimony which was not impeached must be accepted as true. *See James v. Mabus*, 574 So. 2d 596 (Miss. 1990).

On January 6, 2009, Safeco moved for summary judgment. The trial court denied the motion, finding the existence of genuine issues of material fact to be determined by the trier-of-fact. Sitting as such, the trial court was asked to determine (1) whether Ellis intentionally shot Brian; (2) whether Brian's death was a foreseeable consequence of Ellis's act; and, (3) whether Ellis's act of shooting was illegal. All of the evidence necessary, and ascertainable, for such determinations mandates judgment for Lambert.

Nonetheless, the trial court's December 30, 2010, Final Judgment erroneously concluded that (1) Ellis's actions were illegal, and therefore excluded under the policy language; (2) because Ellis intended the act of shooting his gun, his actions were not an accident, and thus did not constitute an "occurrence" as required under the policy language; and (3) because Ellis intended to discharge his firearm at or towards the Kees's vehicle, his actions were intentional and coverage is barred by the Intentional Act Exclusion in the Safeco policy (R.E. at 10-12).

The trial court's final judgment cited *Allstate Insurance Company vs. Moulton*, 464 So. 2d 507 (Miss. 1985), *U. S. Fidelity & Guarn. Co. vs. Omnibank*, 812 So. 2d 196 (Miss. 2002), and *Rogers vs. Allstate Insurance Co.*, 938 So. 2d 871 (Miss. Ct. App. 2006), all of which are distinguishable from the case at bar.<sup>3</sup>

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Additionally, in the lower court, Safeco relied on *Berry vs. McLemore*, 795 F.2d 452 (5th Cir. 1986), and *ACS Construction Company vs. CGU*, 332 F.3d 885 (5th Cir. 2003), however, both of these cases are also distinguishable, and offer Safeco no support.

*Berry* is a pre-*Allard*, non-binding federal case, and it is distinguishable. The officer, against whom the judgment was obtained, had struck the plaintiff in the face at least twice and had shot the plaintiff in the stomach, the arm and in the back. It was clear to the Court that the officer/defendant intended not only his actions but also the consequences of his actions. The *Berry* Court placed great weight on the fact that the complaint alleged intentional torts and only mentioned negligence once. Only negligence is pled in the case *sub judice* and Ellis has already been adjudicated negligent in the criminal case.

*ACS* is a federal case where a contractor hired a subcontractor whose work was faulty, resulting in damages. The federal court found the subcontractor's actions intentional, and thus the policy exclusion applied, because he had purposefully installed the faulty materials. The federal court went on to assert in *dicta* that, in *Omnibank*, the Mississippi Supreme Court had resolved the "so-called tension between *Allard* and *Moulton* and reaffirmed its holding in *Moulton*." However, were the federal court correct, *Allard* would no longer be good law, a course which our Supreme Court declined to follow in *Omnibank*, and in the case at bar when it denied Safeco's petition for interlocutory appeal.

*Moulton* was decided prior to *Allard*, and is thus affected by the Supreme Court's holding there. Further, *Moulton* was a malicious prosecution case, an intentional tort. No intentional torts were pled in Lambert's complaint and none are alleged. Ellis pleaded guilty (and his guilty plea was accepted) to *manslaughter by culpable negligence*, thus further distinguishing it from *Moulton*.

*OmniBank* is a factually dissimilar case involving the Court's interpretation of a commercial insurance policy. The *OmniBank* Court also upheld *Allard*, saying that the *Allard* facts created a jury question as to whether the victim was intentionally harmed.

*Rogers* was handed down by the Court of Appeals, which like the federal courts in *Berry* and *ACS*, *supra*, is bound to follow the Supreme Court's precedent in *Allard*. Moreover, *Rogers* offers Safeco no support in that it turned on the fact that the complaint sought damages for financial loss and damage to reputation whereas the policy only provided coverage for bodily injury and property damage.

*Southern Farm Bureau Casualty Insurance Company, et al. vs. George D. Allard, et al.*, 611 So.2d 966 (Miss. 1992), is the controlling case. None of the cases relied on by the trial court and/or Safeco overrule *Allard*, and the *Omnibank* case specifically affirmed it. Moreover, the Mississippi Supreme Court denied Safeco's requests in its petition for interlocutory appeal and its motion for rehearing that the rule in *Allard* be overruled. Therefore, *Allard* remains controlling precedent, it is directly on point, and, when the evidence before the trial court is viewed as a whole, it mandates judgment for Lambert.

*Allard* is from Madison County, the same Circuit Court District as the case *sub judice*.

Attempting to fire a shotgun into the ground at his angry brother-in-law's feet, Allard missed and hit the man in the foot. *Id.* at 968. Farm Bureau contended the shooting was an intentional act not covered by Allard's homeowner's insurance policies. The Mississippi Supreme Court disagreed, holding 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.* The Supreme Court found a jury question as to whether Allard intended to shoot his brother-in-law, or intended to shoot the ground in front of him. Since the jury had found the firing of the gun intentional, but had also found that Allard had not intended the resulting consequences (shooting his brother-in-law) the Court affirmed the verdict and the insurance company's obligation to pay.

Ellis provided uncontradicted, sworn testimony that he accidentally shot Brian. In *State of Mississippi vs. Al Ellis*, Cause Number 17,192, in the Circuit Court of Rankin County, Circuit Court Judge William E. Chapman, III, accepted Ellis's account of the shooting and, in accordance therewith, adjudicated him to be guilty of manslaughter by culpable *negligence*. During sentencing, Judge Chapman said, *inter alia*, the following: "And my belief, as I said, that this was an act of negligence, not criminal intent." (R.E. at 327.)

Among other things, Ellis testified during sentencing that:

"When I said guilty, I wanted this to be over with. But I didn't intend to do anything to the boy or the father, but I wanted justice, whatever, it's in God's hands" (R.E. at 304); "... honestly, I never even dreamed that anybody was even scratched in that car." (R.E. 315-16).

During his deposition, Ellis testified as follows:

- Q. Did you intend for any of the bullets that you fired to hit Brian Michael Kees?
- A. No.
- Q. Okay. At the time you fired those bullets, what was your intention?
- A. Disabling the vehicle.
- Q. And why did you want to disable the vehicle?
- A. So I could retrieve my money and call the police and get my money.
- Q. Now, at the time you fired those shots did you believe that you had the right to stop that vehicle?
- A. Yes.
- Q. And did you believe that the driver of that vehicle had committed a crime?
- A. Yes.
- Q. Now, did you know that Brian Kees was in the car?
- A. No.
- Q. You hadn't seen him come from behind that house or anywhere and get in that car?
- A. No.
- Q. Were the windows tinted on that car?
- A. Yes.
- Q. Could you see inside the car at all?
- A. No.
- Q. Now, did you see Michael Kees get in the car?
- A. Yes.
- Q. Did he tell you that Brian was in the car?
- A. No.
- Q. Now, is that the same thing, that scenario, that you told the Court at your sentencing hearing?
- A. Yes.
- Q. Now, you had purchased a policy of insurance, homeowner's insurance; is that right?
- A. Yes.
- Q. And isn't it true that you had also assigned that to the - - any proceeds of that to the estate - - to the wrongful death beneficiaries?
- A. Yes.
- Q. Now, did you believe when you purchased that insurance 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.

Q. Now, you weren't convicted of murdering anybody, were you?

A. No.

Q. You were convicted of manslaughter by culpable negligence?

A. Yes.

Q. And you pled guilty to that crime?

A. Yes.

Q. Was it your understanding that that crime was punishment for accidents, reckless accidents?

A. Yes.

Q. And is that what you believe occurred that day?

A. Yes.

Q. And you intended to shoot the gun but you didn't intend for the gun to -  
- for the bullets to hit Brian Kees?

A. No.

Q. And you didn't intend for them to hit anybody?

A. No. According to the ballistics, the bullet came in an upward direction, which was a ricochet.

Q. But your intent was not for the bullet to ricochet up and hit anybody in the car or to directly hit anybody in the car?

A. No.

Q. When you found out later at the hospital that Brian had been hit by a bullet - - is that right? It was at the hospital where you learned that?

A. Yes.

Q. Did you learn at that time that he had passed away?

A. Yes.

Q. Now, was that the expect result - - the result that you expected when you fired that gun?

A. No.

Q. Did you foresee that was going to occur?

A. No.

(R.E. at 390-93.)

This sworn testimony by Ellis was the only evidence before the trial court on the critical issue of whether Ellis intended to shoot Brian. The Supreme Court has long held that uncontradicted testimony which is not impeached must be accepted as true. *See James v.*

*Mabus*, 574 So. 2d 596 (Miss. 1990) (holding that inherently probable, reasonable, credible, and trustworthy testimony uncontradicted by evidence must be accepted as true). Ellis's testimony is uncontradicted, was accepted by Judge Chapman, and can lead to no other conclusion than that Ellis accidentally shot Brian.

During his sentencing hearing, Ellis testified, *inter alia*, that: "I didn't see [Brian] (R.E. at 313); "I didn't see anybody in the car, period, your Honor (*Id.* at 314); and "I never even dreamed that anybody was even scratched in that car." (*Id.* at 315.) Further, Judge Chapman concluded "... it seems to me that Mr. Ellis saw Michael get into the driver's seat and did not see Bryan in the passenger seat because of the tinted windows." (*Id.*)

As in *Allard*, Ellis intended to fire the gun, but did not intend to shoot anyone. He did not even know that Brian was in the car. His intent was simply to disable the car and retrieve his money. Accordingly, Brian's injuries and resulting death could not have been reasonably foreseeable to Ellis, and, in fact, Ellis has testified under oath that he did not foresee any injury to Brian. Certainly, it is not reasonable that Ellis would - or could - foresee an injury to Brian, who he did not even know was in the car at the time he fired the gun.

In *Allard*, the plaintiff knew with certainty that his brother-in-law was present, yet because he did not foresee the bullet hitting him, the exclusion did not apply. Here, the uncontradicted evidence is that Ellis did not know Brian was in the car, that he did not intend to harm Brian or anyone else, and that Brian's injuries were not foreseeable to Ellis. Accordingly, as in *Allard*, the exclusion cannot apply, and Ellis's policy provides coverage.

The trial court also erroneously found Ellis's act of shooting a firearm at or towards

the vehicle in which Brian was traveling a crime and an illegal act, subject to the illegal acts exclusion in the Safeco policy.

However, as made clear in *Allard, supra*, it is *not* always illegal to shoot a gun in town or in the direction of a person. From Ellis's point of view, he had discovered a burglary in progress, which is in every case a felony, and was trying to make a citizen's arrest. (R.E. at 292 ("All I wanted was to stop the vehicle so I could get my money back."); and R.E. at 304 ("When I said I was guilty, I wanted this to be over with. But I didn't intend to do anything to the boy or the father, but I wanted justice . . .").

Ellis's uncontradicted testimony was that he was trying to disable and stop the suspected burglar's vehicle, not to shoot or harm anyone. Mississippi Code Section 99-3-7 gives him the right to make such an arrest. *See also Williams vs. Clark*, 110 So. 2d 365 (Miss. 1959) (poolroom operator had statutory right as private citizen to arrest person he believed had committed a felony). Had Ellis successfully disabled the car without harming its occupants, and had his suspicions been confirmed, the arrest would have been lawfully made. No other evidence was before the trial court.

The trial court also apparently considered Ellis's manslaughter by culpable negligence conviction proof that he committed an illegal act. However, the act itself must be distinguished from the resulting conviction. The policy does not exclude convictions, but illegal acts, which require criminal intent. As this Court is aware, the crime of manslaughter by culpable *negligence* is not a specific intent crime. An accidental, but grossly negligent, shooting is entirely consistent with this form of manslaughter. Ellis has consistently denied

having any criminal intent, and Judge Chapman, in accepting Ellis's guilty plea and sentencing him to time served and house arrest, apparently found such denials credible.

In *Webb vs. Jackson*, 583 So. 2d 946 (Miss. 1991), for purposes of determining the applicability of sovereign immunity, the Mississippi Supreme Court considered whether a police officer committed an assault or not when he fired his weapon at a dog. In order to determine whether the officer committed an assault, the Court first had to determine whether he had the requisite *intent* to commit the crime. In finding that the issue of the officer's intent when acting was a factual issue that could only be resolved by the fact-finder, the Court stated:

The record in this case presents Webb's version of what occurred and Officer Jackson's version. Because their versions differ substantially, the issue of whether Officer Jackson committed the intentional torts of assault and battery should have been submitted to a jury. Whether Officer Jackson possessed the requisite intent to commit an assault is open to question. Webb claims that she was holding the dog when Officer Jackson fired the shot. If believed, then his claim of self-defense is very weak. On the other hand, Officer Jackson claims that the dog was charging at him and that he fired in an attempt to stop the dog. If believed, Jackson's version tends to negate an intent on his part to commit an assault. However, these are questions for a jury who must decide on the credibility of the witnesses. Since Officer Jackson loses immunity if he committed an intentional tort, summary judgment was improper.

*Id.* at 951.

Similar to the issue of intent found in *Webb*, Ellis's intent is critical to the issue before this Court. Again, Ellis provided uncontradicted, sworn testimony in this regard, to-wit:

Q. You testified a minute ago that you had asserted that citizen's arrest is what you were attempting; is that right? That's what you had said at the sentencing hearing, that you - -

A. Yes.

Q. What is your understanding of what that is, what you were doing?

A. Well, I was trying to get my money back from him, off of Michael. And being he kept refusing even to answer me, I tried to disable the vehicle and call the police and have them arrest him.

Q. Did you believe you had a legal right to do that?

A. Yes, I did.

(R.E. at 393-95; R.E. at 102.)

Thus, Ellis's unequivocal testimony was that he believed he had a legal right to fire at Michael Kees's vehicle because he believed Michael had committed a burglary in his presence. Because this testimony is credible and unopposed, and is the only evidence on the issue, the trial judge was bound to accept it as true. *See Stevens v. Stanley*, 122 So. 755 (Miss. 1929) (jury as well as judge is bound by uncontradicted reasonable testimony). The trial judge's failure to do so is reversible error.

### CONCLUSION

In addition to the tragic and untimely death of Brian Kees, Lambert and the other wrongful death beneficiaries and heirs at law have endured years of discovery, hearings, and motion practice. The case has been to federal court and back, and to the Mississippi Supreme Court and back. The uncontradicted facts establish that the consequence of Ellis's act - Brian's death - was not foreseeable and was a tragic accident and that Ellis reasonably believed his actions were lawful and justified, thus he lacked the requisite intent to commit an illegal act. 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,

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

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