

IN THE SUPREME COURT OF MISSISSIPPI

CAUSE NO. 2008-CA-02111

J.B. HUNT TRANSPORT, INC.

APPELLANT

VS.

**GEORGE E. MCGEE, M.D., AND
FORREST GENERAL HOSPITAL**

APPELLEES

REPLY BRIEF OF APPELLANT

Appealed from the Circuit Court of Forrest County, Mississippi

ORAL ARGUMENT REQUESTED

David C. Dunbar, Esq. (MSB # [REDACTED])
Morton W. Smith, Esq. (MSB # [REDACTED])
DunbarMonroe, P.A.
270 Trace Colony Park, Suite A
Ridgeland, Mississippi 39157
Telephone: (601) 898-2073
Facsimile: (601) 898-2074

TABLE OF CONTENTS

Table of Authorities	iii
Statement of Issues	1
Summary of Argument	1
Argument	3
A. AS A RESULT OF A UNIQUE RULE OF LAW, HUNT WAS LIABLE FOR THE WRONGFUL DEATH OF MRS. HALL AS A MATTER OF LAW, THUS SETTLEMENT WAS UNDER COMPULSION, NOT VOLUNTARY	3
B. HUNT'S RIGHT TO COMMON LAW INDEMNITY EXISTS OUTSIDE THE JOINT TORTFEASOR STATUTE; THUS A DISTINCTION OF HUNT AS A JOINT TORTFEASOR, IF ANY, IS MISPLACED	5
1. Even If Hunt and FGH Were Joint Tortfeasors, Hunt's Negligence Was Passive and Hunt Still Has A Right to Seek Common Law Indemnity	8
C. HUNT'S CLAIM AGAINST FGH IS ONE FOR COMMON LAW INDEMNITY OR IMPLIED INDEMNITY, RATHER THAN A WRONGFUL DEATH CLAIM	11
Conclusion	12
Certificate of Service	15

TABLE OF AUTHORITIES

Mississippi Cases

<i>Barfield v. Madison Co.</i> , 212 F.3d 269, 272 (5 th Cir. 2000).....	9, 10
<i>Bush v. City of Laurel</i> , 215 So.2d 256, 259, 260 (Miss.1968)	5, 6, 7, 8, 9
<i>Certain Underwriters at Lloyd's of London v. Knostman</i> , 783 So. 2d 694 (Miss. 2001).....	7
<i>D&W Jones, Inc. v. Collier</i> , 372 So. 2d 288 (Miss. 1979)	4, 8, 10
<i>Hartford Cas. Ins. Co. v. Halliburton Co.</i> , 826 So. 2d 1206, 1216 (Miss. 2001)	7
<i>Home Ins. Co. v. Atlas Tank Mfg. Co.</i> , 230 So. 2d 549, 551 (Miss. 1970)	8
<i>Hopton Building Maintenance, Inc. v. United Parcel Service, Inc.</i> , 559 So.2d 1012, 1014 (Miss.1990).....	7
<i>Keys v. Rehabilitation Centers, Inc.</i> , 574 So. 2d 579. 584 (Miss. 1990).....	7
<i>Medlin v. Hazlehurst Emergency Physicians</i> , 889 So. 2d 496, 500 (Miss. 2005).....	3, 4, 5, 6, 7, 8, 10, 13

Mississippi Statutes

Miss. Code Ann. § 85-5-7	1, 3, 6, 8, 11
--------------------------------	----------------

STATEMENT OF ISSUES

- A. AS A RESULT OF A UNIQUE RULE OF LAW, HUNT WAS LIABLE FOR THE WRONGFUL DEATH OF MRS. HALL AS A MATTER OF LAW, THUS SETTLEMENT WAS UNDER COMPULSION, NOT VOLUNTARY.
- B. HUNT'S RIGHT TO COMMON LAW INDEMNITY EXISTS OUTSIDE THE JOINT TORTFEASOR STATUTE; THUS A DISTINCTION OF HUNT AS A JOINT TORTFEASOR, IF ANY, IS MISPLACED.
 - 1. Even If Hunt and FGH Were Joint Tortfeasors, Hunt's Negligence Was Passive and Hunt Still Has A Right to Seek Common Law Indemnity.
- C. HUNT'S CLAIM AGAINST FGH IS ONE FOR COMMON LAW INDEMNITY OR IMPLIED INDEMNITY, RATHER THAN A WRONGFUL DEATH CLAIM.

SUMMARY OF THE ARGUMENT

J.B. Hunt Transport, Inc. (hereinafter "Hunt") was liable for the injuries and death of Mrs. Hall (hereinafter "Hall") as a matter of established Mississippi law. As Hunt was negligent in causing the injuries to Hall that required medical care, and was liable even for negligent medical care, Hunt had no defense as to liability. Therefore, payment could not have been voluntary, and was under compulsion. However, Mississippi law also provides a mechanism for Hunt equitably to recover an amount that Hunt had to pay due to Forrest General Hospital's separate negligent actions that caused a separate, distinct injury. Common law indemnity provides Hunt a remedy against Forrest General Hospital.¹

Forrest General Hospital's (hereinafter "FGH") entire Response rests on a misguided and contradictory interpretation of law and statute. First, FGH admits that Hunt is liable for the initial

¹ Hunt would respectfully show that such common law indemnity claims for later medical negligence are not novel. In *Reichelderfer v. Illinois Central Gulf R.R.*, 513 F.Supp 189 (N.D. Miss. 1981), Illinois Central Railroad was sued for injuries to Reichelderfer sustained in a truck-train accident, and was also sued for the later medical negligence allegedly causing Reichelderfer's death. *Reichelderfer*, 513 F.Supp at 191. The district court's opinion discussed other procedural grounds, but this case is instructive in that a jury trial was allowed on the initial tortfeasor, Illinois Central's, common law indemnity claim against the negligent medical provider.

injury and the negligent medical treatment provided by FGH. Next, FGH contradicts this agreed principle by arguing that the joint and several liability statute, found in Miss. Code Ann. §85-5-7, controls and that each actor is responsible only for his own fault. Thus, FGH reasons, Hunt's payment must have been voluntary. After admitting that Hunt was liable for the actions of all parties, it is clear that these arguments contradict each other, and cannot coexist logically.

Next, FGH states that Hunt's negligence was still "active" in causing the harm to Hall, thus rendering Hunt unable to recover from FGH under theories of common law indemnity. Finally, FGH argues that Hunt had no standing to sue for the wrongful death of Hall.

These arguments are all misguided. The facts of this case, which must be assumed as true, are that Mrs. Hall, after being injured by Hunt, was in the hospital for eight (8) days, was recovering, had made considerable improvement, and was out of "harm's way" when a separate act of negligence, that of FGH failing to suction the breathing tube of Mrs. Hall, caused her death. It is agreed by all parties that this Court's precedent establishes that Hunt was liable for later negligence by FGH. Accordingly, FGH's arguments that fault should be apportioned under the joint and several liability statute are misplaced. The facts show that FGH's actions or omissions caused a wholly separate injury to Mrs. Hall, resulting in Hall's death. The passage of time and improvement in Hall's health establish that Hunt's negligence was not a proximate cause of or active in Hall's death, thus common law indemnity theories are applicable and properly asserted. At worst, whether Hunt's negligence was still active or passive at the time of Mrs. Hall's death is a question for the jury, and improperly decided by the trial court on summary judgment.

Finally, Hunt is not pursuing a wrongful death claim for the beneficiaries. Hunt completely and wholly extinguished the wrongful death claim during settlement, as Hunt knew that it was liable

as a matter of law for all damages to Hall. The instant suit is premised on a cause of action for common law indemnity only.

Accordingly, this Court should reverse the trial court's ruling of summary judgment for FGH, and should direct that Hunt is entitled to a trial by jury as to FGH's negligence and the amount for which FGH is liable to Hunt for indemnity for the wrongful death of Melissa Hall.

ARGUMENT

- A. AS A RESULT OF A UNIQUE RULE OF LAW, HUNT WAS LIABLE FOR THE WRONGFUL DEATH OF MRS. HALL AS A MATTER OF LAW, THUS SETTLEMENT WAS UNDER COMPULSION, NOT VOLUNTARY.

As was pointed out in Hunt's brief, the first question of law to be resolved is whether by operation of established law, Hunt was legally liable for the negligence of FGH. As recognized by FGH in its brief,

If the actor's [Hunt's] negligence results in harm to another which requires him to submit to hospital treatment, the actor [Hunt] is responsible for injuries resulting from the improper manner in which any member of the staff [of FGH] does his part in the normal treatment of his injuries. He [Hunt] is therefore as fully responsible for the negligent manner in which the nurses or clerical staff [of FGH] perform their part as he [Hunt] is for the negligent manner in which a physician or surgeon [at FGH] treats the case or diagnoses the injuries or performs an operation.

(Brief of Appellee, p. 6-7, 9) citing *Medlin v. Hazlehurst Emergency Physicians*, 889 So. 2d 496, 500 (¶17) (Miss. 2005). FGH cites this rule of law in its Brief of Appellee, and admits that this rule means Hunt is liable for all damages to Hall. However, even while admitting that this rule is controlling law, FGH illogically states that Hunt could never be liable because the joint and several liability statute found in Miss. Code Ann. §85-5-7 provides that joint tortfeasors are liable, each for their own percentage of fault. The case of *Medlin*, importantly, was decided after the passage of the amended joint tortfeasor statute. Clearly, if the rule of law is that Hunt is liable for all damages to

Hall, even for FGH's acts in treatment of Mrs. Hall, then fault could not be apportioned in that proceeding.

The main fallacy in FGH's argument is its reliance on the joint and several liability statute. In short, the joint and several statute is simply inapplicable in the instant case. FGH cites the statute and argues that this case involves a civil action in which two (2) or more parties are at fault, thus an apportionment of damages should have been conducted. In the instant case, controlled by *Medlin*, Hunt was liable for all actions, and the joint tortfeasor statute cannot apply to this specific situation. Hunt's and FGH's actions were not in concert, and there was no single, indivisible injury. Hunt's settlement simply could not be seen as "voluntary", when faced with this clear rule of law.

FGH's misinterpretation can best be illustrated through an analogy. This case is much like that of vicarious liability – where an employer that employs a driver, and has the driver making a delivery for the employer. If the employee runs a stop sign and injures a person, that employer is liable, by operation of law, through the doctrines of *respondeat superior*, agency or vicarious liability. The injured motorist has the option of suing the driver, the employer or both. Thus the employer can do its moral, legal and ethical duty and compensate the injured party, but the employer is not prohibited from seeking indemnity from its driver. The cases of *Medlin* and *Collier* impose a similar duty on Hunt; that of causing Hunt to be liable for **all** damages, even though another's negligence may have been the separate and different cause of death. Much like the law of vicarious liability, the liability for "downstream" medical negligence is imposed on Hunt, but the law does not prohibit Hunt from seeking indemnity for FGH's negligence.

FGH next argues that no right of common law indemnity can exist unless the parties are joint tortfeasors. As pointed out above, there are a number of situations that fall outside the province of a “joint liability” situation, rendering the statute inapplicable. Here, liabilities are controlled by *Medlin*, and do not involve the joint and several liability statute much like the doctrine of vicarious liability. With no legal defenses, Hunt was simply compelled by the controlling law of *Medlin*, and as cited in the Restatement (second) of Torts §467, to fully compensate the Halls for **all** damages to Ms. Hall, including her death, and to extinguish that wrongful death claim. Importantly, the instant suit between Hunt and FGH is **not** a wrongful death claim. As pointed out in Hunt’s brief, the wrongful death claims were fully satisfied and extinguished through settlement, as it was Hunt’s legal moral, and ethical obligation to do so. The only cause of action in this suit is Hunt’s common law indemnity claim against FGH for any amount Hunt paid attributable to FGH’s negligence. Therefore, such arguments of standing and the assignment of a wrongful death claim are not applicable, and the trial court was, respectfully, in error in ruling that this suit was a wrongful death case.

B. HUNT’S RIGHT TO COMMON LAW INDEMNITY EXISTS OUTSIDE THE JOINT TORTFEASOR STATUTE; THUS A DISTINCTION OF HUNT AS A JOINT TORTFEASOR, IF ANY, IS MISPLACED.

FGH’s Brief suggests that a right to common law indemnity “only exists in Mississippi...where there are joint tortfeasors, and where one of those is liable passively for the active negligence of another.” This is simply mistaken. In fact, the well-established precedent on common law indemnity sets out a specific test to determine whether an indemnity claim may be made, and that test does not even reference “joint tortfeasors.” This Court stated in *Bush v. City of Laurel*, 215 So.2d 256, 259 (Miss. 1968), that an obligation to indemnify can arise from a

“contractual relation, from an implied contractual relation, or out of liability imposed by law.” Clearly situations such as contractual and implied contractual relations operate outside of the joint tortfeasor scenario, yet indemnity is still allowed. In Bush, the city of Laurel was sued when a pedestrian fell in a ditch around the roadway. *Id.* at 257. The city had hired and authorized an independent contractor, Bush, to perform work at the site. *Id.* at 260. The Mississippi Supreme Court held that the city consented to the work by Bush, and the city had a legal duty to the pedestrians to maintain safe roads and sidewalks. *Id.* at 260. While the city was legally liable to the pedestrian, the city also had a right to seek indemnity from its contractor, Bush, that caused the dangerous defect. *Id.* Finally, the Court held that the parties, the city of Laurel and Bush, were not joint tortfeasors because the injury did not result from the concurring negligence of both parties. *Id.* This Court added that the City’s right to indemnity was not cut off even though the city “consented to the operation which caused the defect or obstruction.” *Id.*

Much like *Bush*, here Hunt owed a duty to the Halls, to fully compensate them for the injury and death of Hall, and that duty was one clearly established by this Court in *Medlin*. However, Hunt’s negligent act was one that injured Hall, and put Hall in the hospital. After some time, and continued medical improvement, FGH acted independently, as a separate negligent actor, and caused Hall’s death. The instant case might be a closer call had Hall’s injuries caused her health to continually deteriorate, such that Hall might pass away without FGH’s negligent actions. Instead, the medical proof shows that Ms. Hall had improved daily, and was out of danger when FGH’s negligence caused Hall’s death. Drawing from this Court’s rationale in *Bush*, Hunt and FGH were not joint tortfeasors, thus Miss. Code 85-5-7 does not apply.

As pointed out in Hunt’s primary brief, a party can maintain an indemnity claim if it can

show that “(1) it was legally liable to an injured third party, (2) it paid under compulsion, and (3) the amount it paid was reasonable.” *Hartford Cas. Ins. Co. v. Halliburton Co.*, 826 So. 2d 1206, 1216 (¶36) (Miss. 2001) (quoting *Certain Underwriters at Lloyd's of London v. Knostman*, 783 So. 2d 694 (¶10) (Miss. 2001)). The first prong of this test is governed by the standard of *Medlin*, and has been discussed fully *supra*. The parties both agree that Hunt was negligent, and was wholly liable, by operation of law, for the injuries and death of Melissa Hall. Therefore, the first prong of the common law indemnity test is satisfied.

The second part of the common law indemnity test asks whether Hunt settled the claims of Hall's wrongful death beneficiaries under compulsion. This Court has held that a “payment made after liability has been established is one made under compulsion.” *Keys v. Rehabilitation Centers, Inc.*, 574 So.2d 579, 584 (Miss. 1990) (citing *Bush v. City of Laurel*, 215 So.2d 256, 260 (Miss.1968); *Hopton Building Maintenance, Inc. v. United Parcel Service, Inc.*, 559 So.2d 1012, 1014 (Miss.1990)). While Hunt's liability for Hall's death had not been formally established by a court of law prior to settlement, the facts of this matter and Hunt's admission clearly establish that Hunt was liable for causing the accident which led to Hall's hospitalization. FGH has admitted the same. (Brief of Appellee, p. 6).

The third and final prong of the common law indemnity test is whether Hunt settled the wrongful death claim on reasonable terms. The affidavit of Patrick H. Zachary, Esq., was attached as *Exhibit “D”* to Hunt's response in opposition to FGH's motion to dismiss. Zachary, an attorney of over twenty-four (24) years of experience, opines that Hunt's settling of the wrongful death claim, as well as the amount paid in settlement, were reasonable under the circumstances. This evidence is uncontradicted and creates a fact question as to the final prong of the test.

As shown by the *Bush* Court, Hunt and FGH were not jointly liable tortfeasors. Additionally, Hunt has produced evidence, which must be assumed as true for the purpose of FGH's summary judgment motion, that satisfies all elements of this Court's test for common law indemnity. As noted by this Court in *Home Ins. Co. v. Atlas Tank Manufacturing Co.*, 230 So. 2d 549 (Miss. 1970), the question of "whether indemnity should be allowed must of necessity depend on the facts of each case." At a minimum, Hunt has shown sufficient evidence to create a jury question and avoid summary judgment. Therefore, the trial court's grant of summary judgment should be reversed.

1. Even If Hunt and FGH Were Joint Tortfeasors, Hunt's Negligence Was Passive and Hunt Still Has a Right To Seek Common Law Indemnity.

First, as argued above, Hunt does not believe that the joint and several liability statute applies to this suit. Instead, Hunt would respectfully show that the instant case is controlled by long-standing precedent in *Bush*, *Collier* and *Medlin*, which provide a separate analysis of liability. Essentially, as argued above, the liability for later "downstream" medical treatment negligence means that the initial tortfeasor is liable for all damages, as is admitted by FGH repeatedly.

FGH spends much of its response arguing that it and Hunt are joint tortfeasors, and that Mississippi law prohibits contribution among joint tortfeasors. Hunt would agree that in certain circumstances, Miss. Code Ann. §85-5-7 prohibits contribution. However, even if the joint tortfeasor statute in Miss. Code Ann. §85-5-7 applied, Hunt would still have a right to seek common law indemnity from FGH, and the trial court erred in granting summary judgment.

As admitted by FGH in its Brief of Appellee, p. 11, the cause of action of common law indemnity provides an exception to the rule [prohibiting indemnity among joint tortfeasors], and allows one tortfeasor to recover from another if that first tortfeasor was not guilty of active

negligence and was only passively active for the negligence of the other active tortfeasor. (Appellee's Brief, p.11, drawing from *Bush v. City of Laurel*, 215 So. 2d 256 (Miss. 1968)). The instant case is exactly the situation contemplated by this Court's reasoning in *Bush*. In *Bush*, the city failed to maintain sidewalks, but the contractor, Bush, who actively created the ditch was deemed the actively negligent party and owed indemnity to the city of Laurel. *Bush*, 215 So. 2d 259-260.

Also, as stated in *Barfield v. Madison Co.*, 212 F.3d 269, 272 (5th Cir. 2000),

“[t]he general rule governing implied indemnity for tort liability is that a joint tortfeasor, whose liability is secondary as opposed to primary, or is based on imputed or passive negligence, as opposed to active negligence...may be entitled, upon equitable consideration, to shift his responsibility to another joint tortfeasor.”

In the instant case, Ms. Hall was injured by Hunt and was treated for eight (8) days before a separate and discreet act of negligence by FGH caused her death. [It is admitted that Hunt was actively negligent at the time of the accident, in that Hunt's driver caused the accident and injured Ms. Hall. However, Hunt's negligence was too far removed in time from the death of Ms. Hall, to have still been actively negligent at the time Ms. Hall died. Further, Hall had continually improved medically and was making a recovery. The medical evidence, as submitted at the trial court level and which must be taken as true, shows clearly that Ms. Hall would have survived with only mild to moderate disability, but for the separate negligent acts of FGH causing Hall's sudden death. These facts, as detailed in Hunt's Brief of Appellant, show that Hunt's negligence was remote enough to have become passive negligence at the time of FGH's negligent actions.] Also, the injuries Hunt caused had resolved sufficiently to make death a remote and highly unlikely result, but for the negligent act of FGH. [FGH's actions, instead, directly caused an entirely different result from the injuries caused by Hunt. Therefore, Hunt's actions, at least by the eighth day after the accident, at

worst placed Hall at the location of FGH's negligence where instead, FGH's actions/omissions actively and positively caused Hall's death. The controlling law of *Medlin* imputed the liability to Hunt, but Hunt was in no direct contact or control regarding the treatment given to Hall, and did not affirmatively participate in the later negligent medical care. See *Barfield*, 212 F.3d at 272.

[Additionally, FGH argues that Hunt and FGH's actions combined to produce a single injury; that of Hall's death. FGH relies on the case of *D&W Jones, Inc. v. Collier*, 372 So. 2d 288 (Miss. 1979), to state that where two parties act and cause a single injury, the parties are joint tortfeasors and have no right to indemnity. However, FGH's reliance on *Collier* is misplaced as the facts of *Collier* are completely inapposite the current case. In *Collier*, two farmers sprayed pesticide on their lands, and polluted adjoining catfish ponds. *Collier*, 372 So. 2d at 289. The Court held that these facts showed separate, concurrent and successive negligent actions causing a "single, indivisible injury" [the pond contamination]. *Id.* at 294. This *Collier* Court stated that parties were joint tortfeasors and jointly and severally liable.

Unlike *Collier*, [Hunt's negligent act caused an injury, eight days before, separate and divisible from the later medical malpractice of FGH. Ms. Hall was recovering from the personal injury created by Hunt, and was recovering until FGH's acts or omissions caused a completely different damage to Hall, that of her death. In this manner, the injuries caused by Hunt to Ms. Hall were wholly separate and divisible from those caused much later by FGH.

Hunt would respectfully show that the experts' affidavits and medical records show that Hall had improved and was out of danger at the time FGH's negligence caused Ms. Hall's death. This is not a case of a "single injury" as cited by FGH. As Hunt's negligence was not still "active" at the time of Ms. Hall's death, and as Hunt and FGH's acts did not combine to cause a single injury, the joint tortfeasor statute does not bar the ability of Hunt to seek common law indemnity. To hold otherwise would allow FGH to wholly avoid liability for its negligent actions or omissions that caused Ms. Hall's death.

As pointed out earlier, whether, after some initial treatment, Hall's condition fully stabilized, whether FGH and/or its agents subsequently committed medical malpractice which resulted in Hall's death, whether but for the malpractice of FGH and or its agents, Hall would have survived her injuries with some "mild to moderate disability," whether Hunt's negligence caused Hall's death, and whether Hunt's settlement of the wrongful death claim was reasonable, are all questions of fact. Hunt has supported the above questions with affidavits, and at a minimum, a jury should be allowed to make these determinations. Accordingly, Hunt respectfully asks that this Court reverse the trial court's grant of summary judgment, and find that Hunt and FGH's actions did not cause a single indivisible injury, and as such FGH and Hunt are not jointly liable such as to bar indemnity.

C. HUNT'S CLAIM AGAINST FGH IS ONE FOR COMMON LAW INDEMNITY OR IMPLIED INDEMNITY, RATHER THAN A WRONGFUL DEATH CLAIM.

The trial court was also in error as it reasoned that Hunt's claim against FGH was for wrongful death. The trial court's opinion and order correctly noted that the wrongful death statute provides a list of beneficiaries allowed to sue for wrongful death. (R. at 182) As Hunt is not in that class, the trial court reasoned that Hunt did not have standing to sue FGH. (R. at 182). FGH cites

such arguments in its brief. Respectfully, this reasoning was misguided.

As stated above, Hunt, as a negligent party causing injuries to a person, was liable by operation of law for the medical treatment (even including negligent medical care), which resulted in the death of Melissa Hall. Recognizing this fact, Hunt satisfied its moral, legal, and ethical duty in reasonably compensating the beneficiaries for the injuries and death of Melissa Hall, thereby wholly extinguishing the wrongful death claim. One need only to look at the pleadings to see that Hunt paid for all, but is only seeking indemnity for Hall's wrongful death. Hunt is allowed to seek indemnity, through common law, for the separate negligent acts of another [FGH] in causing Melissa Hall's death for which Hunt was liable. Accordingly, FGH's arguments are misplaced, and the trial court was in error when it characterized Hunt's claim against FGH as one for wrongful death. Therefore, the trial court's ruling on summary judgment should be reversed, and Hunt should be allowed a trial by jury as to the common law indemnity claim against FGH.

CONCLUSION

For the reasons set forth above, the trial court's Opinion and Order should be reversed, and FGH's motion to dismiss or for summary judgment must be denied. Hunt fulfilled its moral and legal duties as a negligent and responsible party to compensate Hall's estate for her pain and suffering and her the wrongful death beneficiaries for the wrongful death claim. At that moment, the entire claim was extinguished. This suit concerns only FGH's negligence and the indemnity owed for creating and adding to Hunt's own liability.

Despite the misdirection provided in FGH's Brief of Appellee, this case turns on two principles only. First, whether Hunt was liable for all injuries and death of Ms. Hall. This Court's precedent establishes that Hunt was wholly liable to the Halls as a matter of law, as Hunt had no

defenses and all parties agreed that Hunt's negligence caused the motor vehicle collision. FGH apparently agrees.

The second question facing this Court is whether Hunt met the requirements to pursue a common law indemnity claim against FGH. This Court's binding precedent establishes a three-prong test which will determine whether a party can maintain such an indemnity suit. The facts of this suit establish that Hunt meets all three requirements of a common law indemnity action. Further, this rule of law does not depend upon the joint and several liability statute, and as such, that statute has no applicability here. Even if the joint and several statute did apply to this suit, Hunt and FGH did not act in such a way as to create a single indivisible injury to Ms. Hall. The passage of time and improvement of medical condition of Ms. Hall clearly separates the injury from the later death. Effectively, Hunt was, by operation of law and the *Medlin* decision, vicariously liable for FGH's actions. Accordingly, Hunt's negligence was, at worst, passive when FGH's omissions and actions caused Ms. Hall's death, and Hunt must be allowed to pursue a common law indemnity claim.

Finally, Hunt's position is the equitable one that speaks to fundamental fairness, and serves public policy by fostering the efficient and fair settlement of claims by parties. A holding against Hunt would dissuade liable parties from fulfilling their obligations to try to resolve promptly and fairly claims, and would result in protracted litigation that burdens the courts and delays beneficiaries from receiving compensation. Also, principles of fundamental fairness should prohibit a ruling that allows FGH to get off "scott free", where FGH's negligence, which must be assumed as true, changed Hall's injury into death. Accordingly, and for the reasons set forth above, Hunt respectfully requests that this Court reverse the trial court's dismissal.

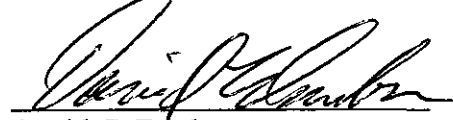
This the 28th day of September, 2009.

Respectfully submitted,

J.B. Hunt Transport, Inc.

By Its Attorneys,

DunbarMonroe, P.A.

A handwritten signature in dark ink, appearing to read "David C. Dunbar", written over a horizontal line.

David C. Dunbar
Morton W. Smith

OF COUNSEL:

David C. Dunbar (MSB [REDACTED])
Morton W. Smith (MSB [REDACTED])
DunbarMonroe, P.A.
270 Trace Colony Park, Suite A
Ridgeland, Mississippi 39157
Telephone: (601) 898-2073
Facsimile: (601) 898-2074

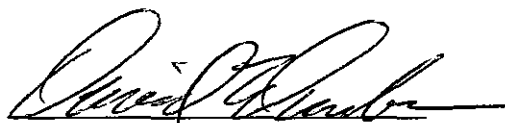
CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have forwarded via United States Mail, postage prepaid, a copy of the above and foregoing ***Reply Brief of Appellant*** to the following:

Honorable Bob Helfrich
Forrest County Circuit Court
Post Office Box 309
Hattiesburg, Mississippi 39403-0309

R. Mark Hodges, Esq.
Kimberly N. Howland, Esq.
Wise Carter Child & Caraway
Post Office Box 651
Jackson, Mississippi 39205-0651

This the 28th day of September, 2009.

A handwritten signature in black ink, appearing to read "David C. Dunbar", written over a horizontal line.

David C. Dunbar
Morton W. Smith