

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

BRIEF OF APPELLANT

Appealed from the Circuit Court of Forrest County, Mississippi

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to *Mississippi Rules of Appellate Procedure* 28(a)(1) and 28(b), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Mississippi Supreme Court and/or the judges of the Mississippi Court of Appeals may evaluate possible disqualification or recusal.

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2. Forrest General Hospital, *Appellee*
3. David C. Dunbar, Esq.
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Counsel for Appellees

5. Hon. Robert B. Helfrich
Forrest County Circuit Court, *Trial Judge*

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mort W. Smith", is written over a horizontal line.

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STATEMENT OF ISSUES

- A. THE TRIAL COURT ERRED IN FINDING THAT HUNT DID NOT HAVE STANDING TO BRING A COMMON LAW INDEMNITY SUIT AGAINST FORREST GENERAL HOSPITAL
1. Hunt Was Liable to the Wrongful Death Beneficiaries By Operation Of Law, Thus Settlement Was Not Voluntary.
 2. Hunt's Claim Against FGH Is For Common Law Indemnity, Rather Than For Wrongful Death.
- B. THE TRIAL COURT ERRED IN FINDING THAT HUNT SOUGHT INDEMNITY FOR SEVERED ASPECTS OF A WRONGFUL DEATH CLAIM

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition

Appellant, J.B. Hunt Transport, Inc. (hereinafter "Hunt") filed its complaint on April 16, 2007 against Forrest General Hospital (hereinafter "FGH"). (R. at 7-15). On or about November 16, 2007, FGH filed its motion to dismiss, or in the alternative for summary judgment. (R. at 92-117). Appellant, Hunt, filed its motion and memorandum brief in response on December 14, 2007. (R. at 123-148). On August 27, 2008, the trial court issued its Opinion and Order dismissing FGH with Prejudice from the subject suit. (R. at 180-184). This Order was followed by a Judgment dismissing FGH. Hunt properly and timely filed its notice of appeal¹ and now files its Brief of Appellant with this Honorable Court.

B. Statement of the Facts

The facts set forth below are found in Hunt's complaint (R. at 8-12), and in Hunt's response and affidavits at (R. 123-148), and for the purposes of this appeal must be assumed as true. On

¹ Hunt's counsel did not receive notice of the Opinion and Order or Judgment initially, and moved to re-open the time for appeal. That motion was granted on December 8, 2008, and Hunt's notice of appeal was subsequently timely filed. (R. at 227).

March 8, 2006, Melissa McNease Hall ("Hall") was injured in a motor vehicle accident involving a tractor trailer operated by Hunt. Hall was transported to the Emergency Room at FGH via ambulance following the accident. There, she was stabilized and subsequently diagnosed with a closed head injury and various other injuries secondary to the motor vehicle accident. Specifically, initial CT scans indicated a traumatic subarachnoid hemorrhage, subdural hematoma and brain contusion, as well as injuries to other portions of her body. Hall was intubated in the emergency room for airway protection. She was then admitted to the intensive care unit. A follow-up CT scan, performed the next day revealed less cerebral edema, coinciding with improvement in Hall's neurological status. Indeed, all indications in Hall's medical records showed that she would survive the injuries she sustained in the motor vehicle accident. (R. at 127-129). Her condition continued to improve, and on or about March 13, 2006, another follow-up CT scan was performed revealing improved areas of intracranial hemorrhage compared with the study from March 9, 2006.

On the morning of March 16, 2006, Hall underwent surgical placement of a tracheostomy tube, placement of a gastrostomy feeding tube and insertion of a left subclavian central venous catheter by Defendant McGee without complications. (R. at 127-129). However, McGee failed to give an order for suctioning of the tracheostomy tube periodically. This was so despite Hall's history of a severe, productive cough. Hall was transported back to the intensive care unit in stable and satisfactory condition following the surgery. By 21:00, Hall had actually gone seven and a half hours without being suctioned. At approximately 21:00 on March 16, 2006, Hall's nurse encountered trouble with the tracheostomy tube while bathing Hall. Specifically, the breathing tube became dislodged. Hall began coughing and her oxygen saturations declined. Suctioning of the tracheostomy tube was attempted, but the suction catheter was unable to be passed. Hall's pulse rate

declined, she went into cardiopulmonary arrest and a code blue was called after 30 minutes.

An emergency room physician was the first physician to arrive on scene and noted that Hall's cardiac rhythm was one of pulseless electrical activity. The tracheostomy tube had become dislodged from Hall's coughing (due to failure to suction the tube). Dr. Martin was unable to re-insert the tracheostomy tube while cardiopulmonary resuscitation was in progress. As he was preparing for endotracheal intubation, Dr. Romero arrived and was able to re-insert the tracheostomy. Dr. Romero noted that Hall was pulseless and cyanotic from the neck upward. Dr. Romero also noted that Hall had a severe cough and had copious amounts of secretions which led to aspiration. Tragically, the efforts to resuscitate Hall failed, and she was pronounced dead at 22:12 on March 16, 2006.

The affidavits of Steven M. Koenig, M.D., Crystal Keller, R.N., and Howard T. Katz, M.D., were attached to Hunt's response as Exhibits A, B, and C, respectively. (See R. at 123-148). Dr. Koenig opines that FGH and/or its agents committed medical malpractice in treating Hall, and that but for that malpractice, Hall would have survived the injuries that she sustained in the motor vehicle accident of March 8, 2006. (R. at 127-129). Nurse Keller opines as to nursing negligence by the staff of FGH. (R. at 132-133). Dr. Katz opines that, had Hall survived her stay with FGH, she would have recovered to the point of having mild to moderate disability. (R. at 137-142). Each of these experts state that their opinions are to a reasonable degree of medical certainty.

Hunt was not active, had no involvement in and did not participate in the negligent medical care rendered to Hall that proximately caused her death. Nevertheless, as the tortfeasor involved in the motor vehicle accident causing Hall's initial injuries, Hunt was liable by operation of law for the medical negligence of FGH and its employees and/or agents in caring for Hall's injuries arising from

the motor vehicle accident. This fact has been generally admitted by FGH. (R. at 109, Hearing Transcript, p. 6). Faced with claims by both the estate and the wrongful death beneficiaries of Hall which, if brought via lawsuit, could easily have resulted in a multi-million dollar verdict, Hunt was compelled to minimize its damages through settlement. Under an actual threat of imminent suit, Hunt fully settled the claims of both the estate and the wrongful death beneficiaries of Hall. This settlement was not voluntary, but rather was consummated under compulsion. (R. at 144-148).

Having made both claimants (estate and wrongful death beneficiaries) whole, Hunt sought indemnity from FGH for its negligent conduct, and for that of its agents/employees for the wrongful death component of the claim it settled. Hunt alleged, in its complaint against FGH, cognizable claims under Mississippi law. As such, FGH's request for relief under Miss. R. 12(b)6 should have been denied by the trial court. Hunt would further submit that the four affidavits, attached to its response to FGH's motion demonstrate that there are genuine, material issues to be decided by the trier of fact, and that FGH's request for summary judgment should have been denied.

STANDARD OF REVIEW

In considering a motion to dismiss under Miss. R. Civ. P. 12(b)6, "the allegations in the complaint must be taken as true and the motion should not be granted unless it appears beyond reasonable doubt that the plaintiff will be unable to prove any set of facts in support of [its] claim." *Saul v. Jenkins*, 963 So. 2d 552, 553-554 (¶5) (Miss. 2007) (quoting *Howard v. Estate of Harper*, 947 So. 2d 854, 856 (¶5) (Miss.2006)). "If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment." *Jones v. Regency Toyota, Inc.*, 798 So. 2d 474, 475 (¶4) (Miss. 2001) (quoting Miss. R. Civ. P. 12(b)6). A motion to

dismiss under Rule 12(b)(6), Miss. R. Civ. P. raises an issue of law, and as such, a trial court's ruling must be reviewed, *de novo*.

"Summary judgments, in whole or in part, should be granted with great caution." *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 363 (Miss. 1983). In moving for summary judgment, it is "not enough" to say that "the evidence is slim and unpersuasive." *Glover ex rel. Glover v. Jackson State University*, 2007 WL 2325291, *4 (¶18) (Miss. 2007). "The evidence must be viewed in the light most favorable to the party against whom the motion has been made." *Price v. Purdue Pharma Co.*, 920 So. 2d 479, 483 (¶10) (Miss. 2006) (citing *Aetna Cas. & Sur. Co. v. Berry*, 669 So. 2d 56, 70 (Miss. 1996)). "The moving party has the burden of demonstrating that no genuine issue of material fact exists, and the non-moving party must be given the benefit of the doubt concerning the existence of a material fact." *Howard v. City of Biloxi*, 943 So. 2d 751, 754 (¶4) (Miss. Ct. App. 2006) (citing *City of Jackson v. Sutton*, 797 So. 2d 977, 979 (¶7) (Miss. 2001)). Indeed, the responding party's "burden of rebuttal arises . . . only after the moving party has satisfied its burden of proving that no genuine issue of material fact exists." *Foster v. Noel*, 715 So. 2d 174, 180 (¶35) (Miss. 1998) (citing *Hurst v. Southwest Mississippi Legal Services Corp.*, 610 So. 2d 374, 383 (Miss. 1992)). Reviewing a trial court's grant of summary judgment is reviewed *de novo*. *Croft v. Grand Casino Tunica, Inc.*, 910 so.2d 66, 72 (Miss. 2005).

SUMMARY OF THE ARGUMENT

Hunt would respectfully show that the trial court made at least three errors in its decision to dismiss Hunt's claim against FGH. First, the trial court stated that Hunt had no standing to bring a common law indemnity suit against FGH, as it was predicated on a wrongful death suit that was paid for without being under duress of a judgment. (R. at 181, 183). Next, the Court stated that Hunt is

not a member of the beneficiary class allowed to sue for wrongful death under Miss. Code. Ann §11-7-13. (R. at 182). Finally, the trial court stated that wrongful death claims cannot be severed, and that Hunt cannot pay in one wrongful death proceeding, then file suit to collect wrongful death compensation in another proceeding. (R. at 183). All of these points are, respectfully, misguided. Hunt would respectfully show that it had admitted that it was liable for all damages in the injuries and death of Melissa Hall, and that liability attached to Hunt by operation of law. (R. at 12). Therefore, Hunt was legally required to pay the claim, a claim for indemnity arose, and Hunt's suit was valid.

Second, Hunt's suit is **not a claim for wrongful death** against Forrest General Hospital. Hunt already compensated the beneficiaries of Melissa Hall for wrongful death. The trial court correctly points out that Hunt is not within the statutory class of WD beneficiaries, but that fact is of no moment. Again, this suit is for the amount FGH owes to Hunt for fully compensating the deceased. At trial, FGH would, no doubt, challenge their level of responsibility for injuries or suffering of the deceased, and this is exactly why a jury must be allowed to hear the suit on indemnity. Further, FGH is not prejudiced by allowing such a suit—in fact, a jury might determine that FGH's actions were reasonable, and that some or all fault lies with Hunt, or that FGH was partially or wholly liable. As Hunt paid for the entire claim, it is in the interests of justice and fairness that Hunt be allowed to seek indemnity from those that may have caused or helped cause Hunt's liability. A ruling to the contrary will only stifle settlements, will dissuade liable parties from doing their duty to the injured, and will cause increased litigation that could last years.

Finally, the trial court stated that wrongful death (sometimes hereinafter "WD") claims cannot be severed, and Hunt's involvement with the beneficiaries was the only time for FGH to be

brought into a suit/potential suit. Again, respectfully, Hunt is not seeking to file a wrongful death claim against FGH, and is not seeking severance of any claims at all. Instead, Hunt has already paid for, and extinguished the entire wrongful death claim, as Hunt was legally obligated to do. However, as FGH's actions were part of the cause of Hunt's liability, Hunt has the right to seek indemnity from FGH for FGH's role. A jury is needed to correctly determine the liability of FGH and, if so, the amount. Not only is the right for Hunt to pursue such a suit against FGH allowed under the law, it is in the interest of public policy. In our system of justice, the interests of fairness dictate that one who causes an ill should be required to pay for it, as Hunt did for injuring Ms. Hall, and if one, such as Hunt pays for all the ill by operation of law, even if some was caused by another, the other party [FGH] clearly should compensate Hunt for their [FGH's] level of negligence. Accordingly, the trial court's dismissal of Hunt's suit for common law indemnity against FGH was in error, and should be reversed.

ARGUMENT

A. THE TRIAL COURT ERRED IN FINDING THAT HUNT DID NOT HAVE STANDING TO BRING A COMMON LAW INDEMNITY SUIT AGAINST FORREST GENERAL HOSPITAL

The trial court held that Hunt has no standing to bring a wrongful death action against FGH. Hunt agrees. This is not a wrongful death action. Rather, it is one based upon common law indemnity for the amounts that Hunt paid under compulsion and legal responsibility to the wrongful death beneficiaries of Hall due to operation of law. The trial court's "standing" analysis is flawed for two reasons, as explored more fully below.

1. Hunt Was Liable to the Wrongful Death Beneficiaries By Operation Of Law, Thus Settlement Was Not Voluntary.

First, the trial court erred by stating that Hunt lacked standing to sue FGH for indemnity. The trial court's first rationale for this ruling was that Hunt made voluntary payments, prior to being compelled to do so by a judgment. Essentially, the court stated, Hunt could not hold FGH liable for something that it did voluntarily. The standard for establishing a valid common law indemnity claim is well-settled under Mississippi law. Hunt must 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." *Manford 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 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 the brief in support of its motion, under established law,

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.

Medlin v. Hazlehurst Emergency Physicians, 889 So. 2d 496, 500 (¶17) (Miss. 2005) (cited with approval by FGH at Hearing Argument, p.6). This "causation" law, as labeled by FGH in its memorandum submitted to the trial court, does not condition the liability of the initial tortfeasor upon his active negligence in causing the subsequent harm. Rather, it explicitly provides that the initial tortfeasor, in this case Hunt, is liable not only for all injuries caused by the initial tort, but also

for any injuries caused by others in responding to those initial injuries with medical care. This is so regardless of any actual negligence on the part of Hunt in causing the second tort. Hunt admitted its fault and was therefore legally liable for the wrongful death of Hall Complaint (R. at 12). FGH has admitted this in its pleadings. (R. at 109, Hearing Transcript, p. 6).

The second prong of the common law indemnity test to be resolved is 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 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. Hunt's driver accidentally ran a stop sign. FGH has admitted the same. (R at 20, Hearing Transcript, p. 6).

Precedent from this Court finding that payments were voluntary are clearly distinguishable. For instance, in *Certain Underwriters at Lloyds of London v. Knostman*, 783 So. 2d 694, 699 (Miss. 2001), this Court held payments to be voluntarily, but noted that the paying party was seeking indemnity through a contract provision and had consistently denied liability. Therefore, the paying party was not under compulsion, as it could have potentially defended on liability at trial. Similarly, in *Keys*, 574 So.2d at 584, *supra*, Millcreek paid a pre-suit wrongful death settlement and sued Keys for indemnity. After Millcreek prevailed at the trial court level, the Mississippi Supreme Court reversed, but only did so as Millcreek had many defenses and might have prevailed on liability, and there had been no liability jury determination. *Id.* at 584-586. Importantly, this Court noted that a

jury should determine, in the indemnity case, the corporation's liability to make sure that the corporation was, in fact liable, before imposing a duty to indemnify. *Id.* at 586.; *See also Hartford Casualty Ins. Co. v. Halliburton Co.*, 826 So. 2d 1206, 1217 (Miss. 2001) (examining and approving of the *Keys* decision).

The instant case is analogous to *Keys*, as Hunt settled the wrongful death claim, pre-suit, and seeks indemnity from FGH in litigation. However, here Hunt admits, and FGH agrees, that Hunt was liable for the wrongful death claim. The facts could not establish liability any clearer. In considering FGH's motion, this Court must accept as true the allegation that Hunt was liable for the personal injury of Ms. Hall, and that FGH committed medical malpractice which proximately caused Hall's death. Accepting those allegations as true, and following the law cited in *Medlin* and in the Restatement of Torts, this Court must conclude that Hunt settled the wrongful death claim under compulsion, as Hunt was liable by operation of law, and had no defenses. Much like *Keys*, Hunt should at least be allowed to try its indemnity claim in front of a jury to prove whether it was fully liable. ?

The 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.

Hunt has shown evidence, often uncontradicted, that it meets all elements of this Court's test for common law indemnity. At a minimum, Hunt has shown sufficient evidence to avoid summary

judgment or a motion to dismiss. Accordingly, the Court's ruling that Hunt lacked standing because it had made voluntary payments to the wrongful death beneficiaries is simply in error and must be reversed.

2. Hunt's Claim Against FGH Is For Common Law Indemnity, Rather Than For Wrongful Death.

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). Respectfully, this reasoning is 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. However, Hunt is also allowed to seek indemnity, through common law for the separate negligent acts of another [FGH] in causing Melissa Hall's death for which it was liable.

A review of the pleadings in this suit shows the basis for Hunt's common law indemnity claim against FGH as follows:

1. Hunt's driver was negligent in causing a motor vehicle accident in which Hall was injured. (R. at 8, 13);
2. Following the motor vehicle accident, Hall was admitted to FGH where she was treated for her injuries. (R. at 8);
3. After some initial treatment, Hall's condition stabilized. (R. at 9);

4. FGH and/or its agents subsequently committed medical malpractice which caused Hall's death. (R. at 9, 10);
5. But for the malpractice of FGH and/or its agents, Hall would have survived her injuries with some "mild to moderate disability." Hunt's negligence was therefore not the proximate cause of Hall's death. (R. at 10-12);
6. By operation of established law, Hunt was liable for the negligence of FGH and therefore liable for the wrongful death of Hall and paid to settle the claims Hall's wrongful death beneficiaries under compulsion. (R. at 12); and
7. Under these circumstances, and pursuant to principles of common law indemnity, Hunt is entitled to be indemnified by FGH for any and all amounts that it paid in settlement of the claims of Hall's wrongful death beneficiaries, subject to statutory limits. (R. at 13).

FGH has agreed that Hunt's driver was negligent in causing the motor vehicle accident in which Hall was involved. (R. at 19). Likewise, it is not disputed that Hall was hospitalized at FGH subsequent to the accident. 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 was or was not the proximate cause of Hall's death, and whether Hunt's settlement of the wrongful death claim was reasonable are all questions of fact. By way of affidavits, Hunt presented the trial court with sworn evidence and expert opinion testimony supporting its position that all of these questions must be answered in the affirmative. This leaves several legal questions for the Court to resolve in deciding FGH's motion.

As FGH moved to dismiss Hunt's claims and/or for summary judgment, the above fact questions must be accepted as true. Accordingly, the Court must turn to the question of FGH's

liability for indemnity. "An obligation to indemnify may arise from a contractual relation, from an implied contractual relation, or out of liability imposed by law." *Bush v. City of Laurel*, 215 So. 2d 256, 259 (Miss. 1968) (emphasis added). "When one person is required to pay money which another person in all fairness should pay, then the former may recover indemnity from the latter in the amount which he paid." *Id.* This Court established two prerequisites for a right of noncontractual implied indemnity to arise:

- (1) The damages which the claimant seeks to shift are imposed upon him as a result of some legal obligation to the insured person; and
- (2) it must appear that the claimant did not actively or affirmatively participate in the wrong.

Hartford Casualty Ins. Co. v. Halliburton Co., 826 So. 2d 1206, 1216 (¶35) (Miss. 2001) (quoting *Home Ins. Co. v. Atlas Tank Mfg. Co.*, 230 So. 2d 549, 551 (Miss. 1970); *Bush v. City of Laurel*, 216 So. 2d 256 (Miss. 1968); *Southwest Miss. Elec. Power Ass'n v. Harragill*, 254 Miss. 460, 182 So. 2d 220 (1966)). As discussed above, and as agreed by FGH, there is no question that the damages which Hunt seeks to shift to FGH were imposed upon Hunt by operation of law. Thus, the Court must resolve the question of whether Hunt actively or affirmatively participated in causing Hall's death.

In its trial court brief, FGH repeatedly attempted to classify Hunt as a joint tortfeasor in causing the death of Hall. This is simply not the case. Nor is Hunt seeking "apportionment of fault" as earlier argued by FGH. It is Hunt's position that, while it did cause the motor vehicle accident which led to Hall's hospitalization, clear evidence shows that Hall would have survived her injuries from the accident but for the subsequent, independent tort of medical malpractice committed by FGH. Hunt proffered sworn expert testimony on this issue by way of affidavit. (R. at 127-142).

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Hunt was guilty of no negligence whatsoever in causing Hall's death. Rather, it was only by operation of law that Hunt was liable for the wrongful death of Hall. At a minimum, the question of whether Hunt's actions were a proximate cause of Hall's death is one of fact which requires that FGH's motion be denied. *Phan v. Denley*, 915 So. 2d 504, 507 (¶13) (Miss. Ct. App. 2005).

FGH referred in its trial brief and oral argument to Miss. Code Ann. § 85-5-7, Mississippi's joint and several liability statute. However, as discussed above, this is not a case of joint tortfeasors. Rather, Hunt was liable for the wrongful death of Hall by operation of law, not because of alleged active negligence in causing her death. As such, the cited statute has no bearing on this matter. Whether Hunt's negligence caused Ms. Hall's death is fundamentally a fact question for the jury.

B. THE TRIAL COURT ERRED IN FINDING THAT HUNT SOUGHT INDEMNITY FOR SEVERED ASPECTS OF A WRONGFUL DEATH SUIT.

Finally, the trial court erred as it reasoned that Hunt could not pursue a suit against FGH as it was for wrongful death claims that had been severed. (R. at 183). The trial court continued by stating that Hunt was essentially attempting to sue FGH for part of a wrongful death claim, and that precedent showed that wrongful death claims could not be severed, thus Hunt could not legally pursue this claim. (R. at 183). As shown above, the trial court, respectfully, was in error.

Again, Hunt is *not* suing FGH for wrongful death, nor is there any severance of wrongful death claims. As a general matter, the trial court was correct that only the beneficiaries have a legal right to compensation for wrongful death, and that multiple suits for differing aspects of a wrongful death claim cannot be maintained. *See Adams v. Baptist Memorial Hospital-Desoto, Inc.*, 965 So. 2d 652, 655 (Miss. 2007). Those beneficiaries sought compensation from Hunt; and Hunt, as the party legally responsible to the beneficiaries for that death, fulfilled its legal duty to pay the beneficiaries

for their loss. Hunt has already paid for the whole claim, and fully extinguished the wrongful death claims held by the beneficiaries. Therefore, no wrongful death claim remains.

Also, there is no danger of a multiplicity of suits leading to inconsistent results. There is only one suit present; that of Hunt's indemnity claims against FGH. Accordingly, Hunt seeks common law indemnity as FGH committed separate, intervening acts of negligence, for which Hunt was legally responsible only through operation of law. Hunt's claim should be allowed, and the trial court's ruling should be reversed.

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 the wrongful death beneficiaries for the entire wrongful death claim. At that moment, the claim was extinguished. This suit concerns FGH's negligence and the indemnity owed for creating Hunt's own liability. As shown above, Hunt has both legal right and standing to pursue a common law indemnity claim against FGH for FGH's negligent acts. Finally, Hunt's position serves public policy by fostering the efficient and fair settlement of claims by parties that know their moral and legal duties and seek rightfully to compensate the injured. A holding against Hunt would dissuade liable parties from fulfilling their obligations and would result in protracted litigation that burdens the courts and delays beneficiaries' compensation. Accordingly,

and for the reasons set forth above, Hunt respectfully requests that this Court reverse the trial court's dismissal.

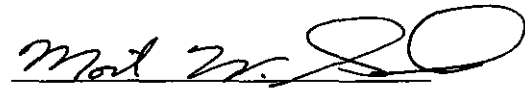
This the 8th day of May, 2009.

Respectfully submitted,

J.B. Hunt Transport, Inc.

By Its Attorneys,

DunbarMonroe, P.A.



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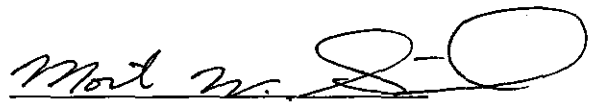
CERTIFICATE OF SERVICE

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

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