

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2015-CA-01013

HYUNDAI MOTOR AMERICA, ET AL.

APPELLANTS

v.

JOYCE D. HUTTON, ET AL.

APPELLEES

**On Appeal from the Circuit Court of Bolivar County, Mississippi
Second Judicial District**

***AMICI CURIAE* BRIEF OF AMERICAN TORT REFORM ASSOCIATION,
MISSISSIPPIANS FOR ECONOMIC PROGRESS, MISSISSIPPI AUTOMOBILE
DEALERS ASSOCIATION, MISSISSIPPI BUSINESS AND INDUSTRY POLITICAL
EDUCATION COMMITTEE (BIPEC), AND NATIONAL FEDERATION FOR
INDEPENDENT BUSINESS IN SUPPORT OF APPELLANTS**

C. R. Montgomery, MSB No. 3413
MONTGOMERY MCGRAW, PLLC
151 West Peace Street
Canton, MS 39046
(601) 859-3616
bmontgomery@montgomerymcgraw.com

Counsel for *Amici Curiae*

CERTIFICATE OF INTERESTED PERSONS

Counsel for *amici* certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Hyundai Motor America, an Appellant/Defendant;
2. Hyundai Motor Company, an Appellant/Defendant;
3. Thomas N. Vanderford, Jr., Assistant General Counsel for Hyundai Motor America;
4. Kevin C. Newsom, Zachary A. Madonia, Michael J. Bentley, and the law firm of Bradley Arant Boult Cummings LLP, attorneys for the Appellants/Defendants;
5. J. Collins Wohner Jr. and the law firm of Watkins & Eager PLLC, attorneys for the Appellants/Defendants;
6. William O. Lockett, Jr. and the Lockett Tyner Law Firm, P.A., attorneys for the Appellants/Defendants;
7. Robert W. Maxwell and Carl J. Griffin, Jr., and the law firm of Bernard, Cassisa, Elliott & Davis, APLC, attorneys for the Appellants/Defendants;
8. Joyce D. Hutton, an Appellee/Plaintiff;
9. Derek Bell, an Appellee/Plaintiff;
10. Ralph E. Chapman and Sara B. Russo, and the law firm of Chapman, Lewis & Swan, attorneys for the Appellees/Plaintiffs;
11. Andrew M. Westerfield and Warren B. Bell, and the law firm of Westerfield, Janoush & Bell, PA, attorneys for the Appellees/Plaintiffs;
12. S. David Norquist and the law firm David Norquist Law, PLLC, attorneys for the Appellees/Plaintiffs;
13. Honorable Johnnie E. Walls, Jr., trial judge (retired)
14. C. R. Montgomery and the law firm of Montgomery McGraw, PLLC, attorneys for *amici curiae*.

Amici Curiae

15. American Tort Reform Association
16. Mississippians for Economic Progress
17. Mississippi Automobile Dealers Association
18. Mississippi Business and Industry Political Education Committee
19. National Federation for Independent Business

/s/ C.R. Montgomery
C. R. Montgomery, MSB No. 3413

TABLE OF CONTENTS

STATEMENT OF INTEREST1

INTRODUCTION1

ARGUMENT2

I. THE CIRCUIT COURT’S LAX APPROACH TO
EXCUSING JURORS VIOLATED MISSISSIPPI LAW2

 A. Mississippi’s Jury Service Law Embodies and
 Ensures That Citizens Perform Their Civic Duty2

 B. Representative Juries Help to Ensure Proper Functioning
 of the Judicial System and Fairness to Litigants4

 C. Courts Must Follow the Statutory Procedures
 and Standards for Excusing Jurors5

CONCLUSION8

CERTIFICATE OF SERVICE9

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Adams v. State</i> , 537 So. 2d 891 (Miss. 1989)	7
<i>Page v. Siemens Energy & Automation, Inc.</i> , 728 So. 2d 1075 (Miss. 1999)	7
<i>Parker v. State</i> , 29 So. 2d 910 (Miss. 1947)	3, 5
<i>Thiel v. S. Pac. Co.</i> , 328 U.S. 217 (1946)	1
 <u>STATUTES AND LEGISLATION</u>	
H.B. 13, § 8, Spec. Sess. (Miss. 2004)	1
Miss. Code. Ann. § 13-5-2	4
Miss. Code. Ann. § 13-5-23	<i>passim</i>
Miss. Code Ann. § 13-5-33	2
 <u>OTHER AUTHORITIES</u>	
Am. Tort Reform Ass’n, <i>Jury Service Reform</i> , at http://www.atra.org/issue/jury-service-reform/	1
Mark A. Behrens & Cary Silverman, <i>Building on the Foundation: Mississippi’s Civil Justice Reform Success and the Path Forward</i> , 34 Miss. C. L. Rev. 113 (2015)	8
Joe S. Cecil et al., <i>Jury Service in Lengthy Civil Trials</i> (Fed. Jud. Ctr. 1987), at http://www.fjc.gov/public/pdf.nsf/lookup/jurylnth.pdf/\$file/jurylnth.pdf	5
Nat’l Center for State Courts, Nat’l Center for State Courts, <i>Jury Managers’ Toolbox: Best Practices for Excusal Policies</i> (2009), at http://www.ncsc-jurystudies.org/~media/Microsites/Files/CJS/Toolbox/Best%20Practices%20for%20Excusal%20Policies.ashx	3
Samuel R. Sommers, <i>On Racial Diversity and Group Decision-making: Identifying Multiple Effects of Racial Composition on Jury Deliberations</i> , 90 J. of Personality & Social Psychology 597 (2006)	4
U.S. Dep’t of Labor, Bureau of Labor Statistics, at https://data.bls.gov/map/MapToolServlet	7
Valerie Hans & Neil Vidmar, <i>The Verdict on Juries</i> , 91 Judicature 226 (2008)	4
Walter Olson, <i>The Art of the Runaway Jury</i> , Del. Law., Fall 2005, at 24.	5

STATEMENT OF INTEREST

Amici support efforts to improve the civil justice system and, as particularly relevant here, to facilitate representative juries through making jury service more user-friendly and requiring all people to serve unless they would experience undue hardship. *See, e.g.*, Am. Tort Reform Ass'n, *Jury Service Reform*, at <http://atra.org/issues/jury-service-reform>. *Amici* supported Mississippi's 2004 civil justice legislation, which included jury service improvements that are at issue in this case. *See* H.B. 13, § 8, Spec. Sess. (Miss. 2004).

INTRODUCTION

In order to ensure that Mississippi juries fully reflect the community, Mississippi mandates that trial courts follow particular procedures and detailed standards when addressing excusal requests from jurors summoned for service. Mississippi law declares that all qualified citizens have both the opportunity and the obligation to serve as jurors when called to do so. When juries properly represent the community, the quality of justice improves.

Fulfilling the purpose and promise of Mississippi's jury service laws requires the courts to adhere to the statutory directives. Excusal from service should occur only when the statute's strict procedures are followed and the juror has met the statute's requirements. Evidence shows that the Circuit Court of Bolivar County has a practice of excusing qualified jurors without the required documentation or a request presented in open court, and followed that practice in this case. This violated the mandates of the jury service statute, resulted in a jury venire that did not reflect a fair cross-section of the population, and undermined the reliability and fairness of the fact-finding process. A verdict clouded by violations of the jury service statute should not stand. This Court should require trial courts to adhere to Miss. Code. Ann. § 13-5-23.

ARGUMENT

I. THE CIRCUIT COURT’S LAX APPROACH TO EXCUSING JURORS VIOLATED MISSISSIPPI LAW

The Supreme Court of the United States has said that “[t]he American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community.” *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946). This “fair cross-section” aspect of the jury-trial system is rooted in fundamental fairness and has deep-seated constitutional underpinnings. From history we know that non-diverse, unrepresentative juries can lead to miscarriages of justice.

To ensure that today’s litigants receive trials before representative juries, the Legislature enacted specific procedures and rigorous standards for excusing summoned jurors from service. Reversal is appropriate in this case because the Circuit Court departed from those procedures and standards in favor of a more lenient approach.

A. Mississippi’s Jury Service Law Embodies “Best Practices” and Ensures That Citizens Perform Their Civic Duty

Mississippi law flexibly allows summoned jurors to reschedule their service for the sake of convenience,¹ but strictly limits outright excusals to situations of “undue or extreme physical or financial hardship.” Miss. Code Ann. § 13-5-23(3)(a). A judge may only excuse a summoned juror upon a showing that the person is unable to obtain an appropriate substitute caregiver, will incur costs that will have a substantial adverse impact paying daily living expenses, or could become ill from serving. *See id.* Those seeking to be excused for hardship may be required to

¹ Mississippi law provides every summoned juror with the ability to automatically postpone and reschedule jury service one time for any reason to another date within six months of the summoned date. *See* Miss. Code Ann. § 13-5-33.

provide a judge with documentation that clearly supports the request. *See id.* In general, nobody is deemed to be too busy or important to serve.

Mississippi's hardship standard is tightly defined to promote juries that include a mix of people from all walks of life, including those who work for businesses of all sizes, the self-employed, retirees, students, and the unemployed. The law is intended to ensure that busy professionals – such as doctors, lawyers, executives, small business owners, and farmers – serve alongside everyone else. For that reason, the statute explicitly states that a judge may not excuse a juror on the basis that he or she would need to miss work in order to serve and may require documentation showing the claimed hardship. *Id.* § 13-5-23(3)(b), (e). The National Center for State Courts has lauded this approach as a “best practice,” because it facilitates representative juries and ensures that no segment of the community shoulders a disproportionate burden. *See* Nat'l Center for State Courts, *Jury Managers' Toolbox: Best Practices for Excusal Policies* (2009).

Mississippi law complements this high bar for excusal with a requirement that excusal requests be considered and decided by judges in open court, rather than by clerks through private correspondence. *See* Miss. Code Ann. § 13-5-23(3)(c). This requirement, which predates the current statute, not only signals the importance of service but also discourages scofflaws. As this Court correctly observed years ago, “[i]t is much easier and less embarrassing to present a feigned excuse in private than in public.” *Parker v. State*, 29 So. 2d 910, 912 (Miss. 1947). Only when a summoned juror is too sick to appear in open court, as documented by a certificate from a licensed physician, may a clerk excuse the person from jury service. *See* Miss. Code Ann. § 13-5-23(2).

This liberal-deferral/strict-excusal system advances Mississippi's public policy in fostering juries that represent “a fair cross selection of the population” and ensures that all

qualified citizens have both “an opportunity and obligation” to serve as jurors when summoned. Miss. Code Ann. § 13-5-2.

B. Representative Juries Help to Ensure Proper Functioning of the Judicial System and Fairness to Litigants

Mississippi’s jury service laws are important not only for would-be jurors, but also for individual litigants. When circuit courts do not properly apply the hardship standard and allow those who are summoned to avoid jury duty without even appearing before a judge in court, litigants are far less likely to have their cases decided by a jury that properly reflects community attitudes and values.

All parties benefit from a representative jury. Litigants and the public are more likely to accept verdicts rendered by juries that reflect the community. Diverse juries also enhance the deliberation process. *See Valerie Hans & Neil Vidmar, The Verdict on Juries*, 91 *Judicature* 226, 227 (2008). Diverse juries are more likely to carefully examine the evidence, consider the court’s instructions on the law, and engage in vigorous debate. *See Samuel R. Sommers, On Racial Diversity and Group Decision-making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 *J. of Personality & Social Psychology* 597, 608 (2006) (finding that racially diverse juries deliberated longer, considered a wider range of evidence, and made fewer factual errors). The presence of alternative views challenges individual assumptions and biases, and may avoid groupthink. Put simply, a representative jury is more likely to “get it right.”

It is particularly important in complex civil cases to have a jury that includes people with a wide range of experiences. Product liability trials involve highly technical subjects, the testimony of conflicting experts, and what may or may not be reliable scientific evidence. Jurors may be asked to decide the feasibility of two or more alternative designs for a product with which they are unfamiliar. The civil justice system generally does not rely on jurors with special

expertise in the field at issue. It is thus essential that people of all backgrounds fulfill their obligation to serve on the jury. The collective wisdom of a truly representative jury provides the foundation for hearing and deciding product liability cases in a fair and reasoned way.

Without proper application of the hardship standard, jurors on lengthy trials, like the one here, are likely to be disproportionately unemployed or retired, and less likely to have a college education. *See Joe S. Cecil et al., Jury Service in Lengthy Civil Trials* 19-21 (Fed. Jud. Ctr. 1987) (finding the “most likely explanation” for this is “the judicial policy of excusing some persons from jury service in lengthy trials”). That skewed jury pool can result in skewed results. Some have suggested, for instance, that juries lacking a broad range of experiences are more prone to return “outlier” verdicts. *See, e.g., Walter Olson, The Art of the Runaway Jury*, Del. Law., Fall 2005, at 24, 29.

In sum, parties, as well as the justice system as a whole, suffer harm when the jury fails to reflect the diverse experiences and abilities of the community.

C. Courts Must Follow the Statutory Procedures and Standards for Excusing Jurors

This Court has held that trial courts must apply the statutory procedures for jury service whenever practicable. *See Parker*, 29 So. 2d at 912 (recognizing that while there may be circumstances where literal compliance with the statute is impossible, the statute “should be complied with where it is practicable to do so”). Although there was no impracticability here, the record shows that the Circuit Court handled excusal requests in a manner contrary to the plain terms of the governing statute.

The Circuit Court summoned 250 prospective jurors. Tr. at 108 (Testimony of Gail P. Thompson, Bolivar County Staff Attorney); *see also* Hyundai Ex. 2 (Jury Panel Report including all summoned jurors). When the jury panel report was provided to counsel for the parties,

however, it had significant gaps indicating that many summoned jurors were removed from the list before the trial date. *See id.* at 102-06; *see also* Hyundai Ex. 1 (Jury Panel Report provided to parties). Notations on Jury Panel Reports indicate that the court administrator properly removed approximately 40 summoned jurors from the list because they moved out of the county, were over 65 or full-time students and requested to be excused, had medical excuses and submitted supporting medical documentation, or were convicted felons. *See* Hyundai Ex. 6, 7. In addition, 42 summonses were returned to the court as undeliverable. *See* Hyundai Ex. 2.

In many instances, however, the court administrator—not a judge—improperly excused prospective jurors for claimed hardships. *See* Tr. at 106-07; *see also* Ex. 6, 7. Some of these excuses were called in, while others were mailed or brought in; none were presented to a judge in open court. *See* Tr. at 108, 128-29. The record indicates that the court administrator dismissed summoned jurors for unexplained or undocumented “financial loss,” Tr. at 148-49, 153-54; unspecified and undocumented “medical reasons,” Tr. at 153, absence from work or other work-related reasons, Tr. at 149-51; reasons that did not meet the statutory criteria for excusal, Tr. at 150-51; or where no reason was provided at all, Tr. at 153-54. The court administrator appears to have improperly excused nearly 40 jurors. *See* Hyundai Exs. 6, 7.

After subtracting 42 no shows, just 87 summoned jurors appeared in court for the venire. *See* Hyundai Ex. 3 (present jurors circled). In sum, putting aside undeliverable summonses, unqualified or legitimately excused jurors, and no shows, the court administrator improperly dismissed nearly one-third of the remaining jurors.

As Appellants’ brief indicates, at minimum, the resulting jury venire did not reflect the surrounding community. *See* Appellant Br. at 46-49. For example, just 31% of the venire ended up being male (*see* Ex. 5), as compared to 46.5% of the overall population of Bolivar County at that time (R.1087)). The jury venire also appears to have deviated in other significant respects,

such as the overrepresentation of unemployed people because individuals were excused simply because they would miss work. In fact, 17 jurors were improperly excused by the court administrator for “financial hardship” or other work-related reasons (*see* Exs. 6, 7),² which resulted in a jury venire with a 20% unemployment rate (Ex. 5). By contrast, the national unemployment rate at that time was under 6% (*see* Tr. at 149-50, 155) and the unemployment rate for Bolivar County was approximately 8%.³ The Circuit Court considered this evidence, but found the statutory violations insufficient to warrant a mistrial. Instead, the Circuit Court found that improper practices in jury selection are not enough to quash the venire absent a showing of “actual fraud” or a “flagrant violation of the Court’s duty” that violates the rights of the defendants. Tr. at 167.

A court administrator, however, cannot do what the law expressly forbids – and when that happens, reversal is required, particularly where, as here, it results in a jury venire that does not reflect a fair cross section of the population. *See Page v. Siemens Energy & Automation, Inc.*, 728 So. 2d 1075, 1080-81 (Miss. 1999) (ordering new trial after defense verdict in product liability case where clerk automatically excluded all persons who had been summoned within the previous two years); *Adams v. State*, 537 So. 2d 891, 893-94 (Miss. 1989) (reversing criminal conviction where clerk unilaterally struck senior citizens from jury list). The process used by the

² The specific summoned jurors who the court administrator improperly excused for “hardship” or other, similar impermissible reasons were: Juror No. 13 (traveling out of town) (Ex. 7); Juror No. 18 (financial hardship) (Ex. 7); Juror No. 22 (financial hardship) (Ex. 7); Juror No. 23 (could not get off work) (Ex. 7); Juror No. 33 (financial hardship) (Ex. 7); Juror No. 70 (financial hardship) (Ex. 7); Juror No. 73 (financial hardship) (Ex. 7); Juror No. 94 (could not get off work) (Ex. 7); Juror No. 104 (financial hardship) (Ex. 7); Juror No. 107 (financial hardship) (Ex. 7); Juror No. 113 (financial hardship) (Ex. 7); Juror No. 125 (financial hardship) (Ex. 7); Juror No. 132 (financial hardship) (Ex. 7); Juror No. 138 (business meeting) (Ex. 7); Juror No. 171 (financial hardship) (Ex. 7); Juror No. 242 (financial hardship) (Ex. 6); and Juror No. 246 (financial hardship) (Ex. 7).

³ For Bolivar County’s October 2014 unemployment statistics, *see* U.S. Dep’t of Labor, Bureau of Labor Statistics.

Bolivar County Clerk for excusing prospective jurors from service violates the specific safeguards provided by Mississippi law that are intended to protect the right to a representative jury. *See* Miss. Code Ann. § 13-5-23(2), (3). It must be corrected.

Anecdotal evidence indicates that this case is part of a troubling pattern of clerks excusing jurors for hardship without requiring them to appear in court and without involving a judge. *See* Mark A. Behrens & Cary Silverman, *Building on the Foundation: Mississippi's Civil Justice Reform Success and the Path Forward*, 34 Miss. C. L. Rev. 113, 135 (2015); *see also* *Page*, 728 So. 2d at 895 (finding that some circuits have failed to heed this Court's instruction that clerks must follow jury service laws).

CONCLUSION

Because the Circuit Court violated Mississippi's jury service statute, this Court should reverse, just as it did in *Adams* and *Page*.

Respectfully submitted,

/s/ C.R. Montgomery
C. R. Montgomery, MSB No. 3413
MONTGOMERY MCGRAW, PLLC
151 W. Peace St.
Post Office Box 1039
Canton, MS 39046
Phone: (601) 859-3616
Facsimile: (601) 859-3622

Counsel for *Amicus Curiae*

Dated: February 6, 2017

CERTIFICATE OF SERVICE

I certify that on February 6, 2017, I electronically filed the foregoing with the Clerk of the Court using the MEC system, which sent notification of such filing to the following:

Ralph E. Chapman
Sara B. Russo
CHAPMAN, LEWIS & SWAN PLLC
501 1st Street
Post Office Box 428
Clarksdale, MS 38614
ralph@chapman-lewis-swan.com
sara@chapman-lewis-swan.com

Andrew M. Westerfield
Warren B. Bell
WESTERFIELD, JANOUSH & BELL PA
307 Cotton Row, Suite 1
Post Office Box 1448
Cleveland, MS 38732
amww@wesjan.com
wbell@wesjan.com

S. David Norquist
DAVID NORQUIST LAW. PLLC
301C Sunflower Road
Post Office Box 1379
Cleveland, MS 38732
david@dnlawpllc.com

Thomas Vanderford, Jr.
HYUNDAI MOTOR AMERICA
10550 Talbert Avenue
Fountain Valley, CA 92728
tomvanderford@hmtusa.com

J. Collins Wohner Jr.
WATKINS & EAGER PLLC
400 East Capitol Street
Post Office Box 650
Jackson, MS 39205
cwohner@watkinseager.com

Kevin C. Newsom
Zachary Madonia
BRADLEY ARANT BOULT CUMMINGS LLP
1819 5th Avenue North
Birmingham, AL 35203
knewsom@babco.com
zmadonia@bradley.com

William D. Lockett
LUCKETT TYNER LAW FIRM, P.A.
Post Office Drawer 1000
143 Yazoo Avenue
Clarksdale MS 38614
wol@luckettyner.com

Michael J. Bentley
BRADLEY ARANT BOULT CUMMINGS LLP
188 East Capitol Street, Suite 400
Post Office Box 1789
Jackson, MS 39201
mbentley@bradley.com

Robert W. Maxwell
Carl J. Giffin, Jr.
BERNARD, CASSISA, ELLIOTT & DAVIS
130 Terra Bella Boulevard
Covington, LA 70433
rmaxwell@bcdlaw.com
giffinc@bcdlaw.com

/s/ C. R. Montgomery
C. R. Montgomery, MSB No. 3413