IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2015-TS-01886

HYUNDAI MOTOR AMERICA AND HYUNDAI MOTOR COMPANY ***Defendants-Appellants***

v.

OLA MAE APPLEWHITE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF AND WRONGFUL DEATH BENEFICIARIES OF DOROTHY MAE APPLEWHITE, DECEASED, CEOLA WADE, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF AND WRONGFUL DEATH BENEFICIARIES OF ANTHONY J. STEWART, DECEASED, AND KENNETH CORDELL CARTER, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF AND WRONGFUL DEATH BENEFICIARIES OF CECILIA COOPER, DECEASED ***Plaintiffs-Appellees***

On Appeal from the Circuit Court of Coahoma County, Mississippi
Eleventh Judicial District

AMICI CURIAE BRIEF OF AMERICAN TORT REFORM ASSOCIATION, MISSISSIPPIANS FOR ECONOMIC PROGRESS, MISSISSIPPI AUTOMOBILE DEALERS ASSOCIATION, MISSISSIPPI ASPHALT PAVEMENT ASSOCIATION, ASSOCIATED GENERAL CONTRACTORS OF MISSISSIPPI, MISSISSIPPI POULTRY ASSOCIATION, MISSISSIPPI BUSINESS AND INDUSTRY POLITICAL EDUCATION COMMITTEE (BIPEC), AND NATIONAL FEDERATION FOR INDEPENDENT BUSINESS IN SUPPORT OF DEFENDANTS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Counsel of record 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 the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Ola Mae Applewhite, in her capacity as representative of the Estate of Dorothy Mae Applewhite, an Appellee/Plaintiff;
2. Ceola Wade, in her capacity as representative of the Estate of Anthony J. Stewart, an Appellee/Plaintiff;
3. Kenneth Cordell Carter, as representative of the Estate of Cecilia Cooper, an Appellee/Plaintiff;
4. Alecia Shavonne Applewhite, daughter of Dorothy Mae Applewhite;
5. Brandon O'Keith Applewhite, son of Dorothy Mae Applewhite;
6. Latisha Kiara Applewhite, daughter of Dorothy Mae Applewhite;
7. Ralph E. Chapman, Sara Russo, and the law firm of Chapman, Lewis & Swan, attorneys for the Plaintiffs/Appellees;
8. C. Kent Haney, Haney Law Office, attorney for the Plaintiffs/Appellees;
9. Dennis Sweet, III and the law firm of Sweet & Associates, PLLC, attorneys for the Plaintiffs/Appellees;
10. Hyundai Motor America, an Appellant/Defendant;
11. Hyundai Motor Company, an Appellant/Defendant;
12. Kevin C. Newsom, Michael J. Bentley, and the law firm of Bradley Arant Boult Cummings LLP, attorneys for the Appellants/Defendants;
13. J. Collins Wohner, Jimmy B. Wilkins and the law firm of Watkins & Eager PLLC, attorneys for the Appellants/Defendants;
14. Bill Luckett and the Luckett Tyner Law Firm, P.A., attorneys for the Appellants/Defendants;

15. Robert W. Maxwell and the law firm of Bernard, Cassisa, Elliott & Davis, APLC, attorneys for the Appellants/Defendants;

16. Walter E. McGowan and the law firm of Gray, Langford, Sapp, McGowan, Gray, and Nathanson, attorneys for the Appellants/Defendants;

17. C. R. Montgomery and the law firm of Montgomery McGraw, PLLC, attorneys for *Amicus Curiae* American Tort Reform Association, Mississippians for Economic Progress, Mississippi Automobile Dealers Association, Mississippi Asphalt Pavement Association, Associated General Contractors of Mississippi, Mississippi Poultry Association, Mississippi Business and Industry Political Education Committee, and National Federation for Independent Business;

18. Lee Mickus and the law firm of Taylor Anderson L.L.P., attorneys for *Amicus Curiae* American Tort Reform Association, Mississippians for Economic Progress, Mississippi Automobile Dealers Association, Mississippi Asphault Pavement Association, Associated General Contractors of Mississippi, Mississippi Poultry Association, Mississippi Business and Industry Political Education Committee, and National Federation for Independent Business;

19. Honorable Alfred B. Smith, trial judge.

Amicus Curiae

20. Mississippians for Economic Progress

21. American Tort Reform Association

22. Mississippi Automobile Dealers Association

23. Mississippi Asphalt Pavement Association

24. Associated General Contractors of Mississippi

25. Mississippi Poultry Association

26. Mississippi Business and Industry Political Education Committee

27. National Federation for Independent Business

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

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STATEMENT OF INTEREST

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that, since 1986, have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than two decades, ATRA has filed *amicus curiae* briefs in cases that have addressed important civil justice issues.

Mississippians for Economic Progress (MFEP) is a non-profit organization created to research, educate the public, and introduce legislation to pass meaningful civil justice reform in Mississippi. Founded in 2001, MFEP is committed to fairness in our courts and has united hundreds of members including professional, trade and medical associations; businesses; and individual Mississippians to foster economic progress by promoting a just legal system.

The Mississippi Automobile Dealers Association (MADA) is a trade association representing Mississippi's franchised automobile and truck dealers. MADA was established in 1941 to provide a collective "voice of the dealer" on legislative, regulatory, and public policy issues related to the automobile industry. In addition to promoting civil justice reform, MADA has advanced efforts to promote the consideration of seat belt non-usage in cases arising from motor vehicle collisions.

The Mississippi Asphalt Pavement Association is a non-profit trade association representing the asphalt industry of Mississippi. Associated General Contractors of Mississippi (AGC) is comprised of Mississippi's leading general contractors, utility contractors, specialty contractors, suppliers, and road and bridge builders. The Mississippi Poultry Association (MPA) is a coalition of poultry growers, poultry processors and allied companies working in the poultry industry, which produces Mississippi's largest agricultural commodity. The Business and

Industry Political Education Committee (BIPEC) is a non-profit organization that represents broad-based business and professional interests in Mississippi, including individuals, numerous Mississippi companies, professional firms, and trade associations that have business and marketing operations in Mississippi. The National Federation for Independent Business (NFIB) represents hundreds of thousands of members nationwide from every industry and sector. These organizations represent their respective industries on judicial issues that promote Mississippi's economic progress and advance free enterprise. They recognize that the civil justice system works best when citizens participate. Collectively, these organizations have promoted judicial reform aimed at encouraging civic engagement.

Amici all 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.*, ATRA, *Jury Service Reform*, *available 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. *Amici* have also engaged in efforts, including through public discussion, to open courts to seat belt non-usage evidence in lawsuits arising from motor vehicle collisions, in order to allow juries to consider the complete factual circumstances involved in a case.

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 statute declares 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 that the juror has met the specific requirements for excusal from service. In this case, however, the mandates of the jury service statute were violated. The wholesale excusal of qualified jurors from service allowed in the Circuit Court undermined the justice system. A trial outcome clouded by violations of the jury service statute should not stand. This Court should uphold Miss. Code. § 13-5-23.[1]

Similarly, fairness and balance in the civil justice system is promoted when a litigant may present all properly admissible, relevant evidence to the jury for consideration. Mississippi, as a matter of public policy, embraces seat belt usage and encourages its residents to contemplate seat belt usage every time they drive. Seat belt usage or non-usage substantially affects crash survivability, injury causation, and the perceived performance of vehicle design. These are all issues that lie at the heart of automobile product liability lawsuits.

Although Miss. Code Ann. § 62-2-3 creates some constraints, the Mississippi Legislature did not intend the statute to forbid outright the admission of evidence of seat belt non-usage. The Court in this case, however, erroneously interpreted the statute's terms as effectively a de facto blanket prohibition on the admissibility of seat belt non-usage for all purposes. The Court's improper exclusion of such evidence resulted in a distorted picture of events critical to the jury's findings. This error was not harmless, and requires reversal.

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[1] The prejudice caused by the Circuit Court's failure to follow the jury-service statute may well have been compounded by improper third-party influence on the jury's verdict in this action (and perhaps in other Mississippi trials, as well). *See* R. 3366-67. Hyundai has made serious allegations of such influence, and has supported its argument not only with affidavits and documentary evidence, but also with the sworn testimony of three Jackson-based lawyers. *See* R. at 3273-3448, 3496-3501. Nevertheless, the Circuit Court dismissed Hyundai concerns as "speculative at best" and refused to permit further investigation. *See* R. at 3548. This Court should consider whether the Circuit Court abused its discretion in refusing to grant Hyundai any relief or, at minimum, authorize further investigation through discovery as to whether there was improper juror contact.

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 nondiverse, unrepresentative juries can lead to miscarriages of justice.

To ensure that today's litigants receive trials before representative juries, the Mississippi Legislature has 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 liberally allows summoned jurors to reschedule their service for the sake of convenience,[2] but strictly limits outright excusals to situations of "undue or extreme physical or financial hardship." Miss. Code Ann. § 13-5-23(3)(a).[3] In general, no one is deemed to be too busy or important to serve.

The hardship standard is tightly defined to facilitate juries that include a mix of people from all walks of life, including those who work for businesses of all sizes and those who are

[2] 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.

[3] 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.* § 13-5-23(3)(a).

self-employed, as well individuals who are retired, students, or otherwise not employed. It 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 Mississippi's 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. S*ee* 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. Not only is the public (and are litigants) more likely to accept verdicts rendered by juries that reflect the community, but 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 viewpoints 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. For that reason, it is essential that people of all backgrounds have

both an opportunity and 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, E. Allan Lind & Gordon Bermant, *Jury Service in Lengthy Civil Trials* 19-21 (Federal Judicial Center, 1987), *at* http://www.fjc.gov/public/pdf.nsf/lookup/jurylnth.pdf/$file/jurylnth.pdf (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, not surprisingly, in skewed results. Some have suggested, for instance, that juries lacking a broad range of experiences are more prone to return "runaway" or "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, it appears that the Circuit Court handled excusal requests in a manner contrary to the plain terms of the governing statute.

The Circuit Court summoned 348 prospective jurors. R. at 3325 (Testimony of Charles A. Oakes, Circuit Court Clerk). Only seventy of the summoned jurors (roughly one in five)

appeared at the venire. Precisely how or why this occurred is unclear, as the Circuit Court unfortunately lost many of the documents pertaining to juror selection within four months of the trial. *See id.* at 3350-51.

There may be legitimate reasons for the absence of some potential jurors, such as changes of address and senior citizens opting not to serve. There may also have been some no-shows. But the record reveals another, more problematic contributor: a relaxed process for excusing jurors that violated the Mississippi Code. According to the sworn testimony of the Coahoma County Circuit Clerk, his office excused jurors for claimed medical reasons or general "hardship," sometimes without documentation. *See id*. at 3336-37, 3344. Further, without consulting a judge, the clerk informed jurors that they were excused from service and did not need to appear in court. *See id*. at 3337. The Jury Panel Report shows that, prior to the trial, the clerk recorded the basis for the excuse by simply scribbling words such as "hardship" or "medical" in the margin. *See id.* at 3101-12. In fact, the clerk acknowledged that, for at least fifteen or twenty years, it has been Coahoma County Circuit Court practice to authorize every clerk to unilaterally grant requests for excuses and simply place the juror's request in a file. *See id.* at 3337.

These are clear violations of the jury service statute. *See* Miss. Code Ann. § 13-5-23(2), (3). Unfortunately, the Circuit Court's staff seems to have been unfamiliar with the statutory standards strictly limiting the acceptable excuses from jury service. *See* R. at 3333. Perhaps, since the Circuit Court's informal procedure has been in place for so long, the staff may have not have fully understood the strengthened standard and procedures that the Legislature adopted in 2004. *See* H.B. 13, § 8, Spec. Sess. (Miss. 2004) (amending Miss. Code Ann. § 13-5-23). Regardless, a court clerk cannot do what the law expressly forbids – and when he or she does, reversal is required. *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 in 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).

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).

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

II. THE TRIAL COURT'S ERRONEOUS REFUSAL TO ALLOW SEAT BELT NON-USAGE EVIDENCE REQUIRES REVERSAL.

A. Mississippi Recognizes That Seat Belt Use Affects Crash Outcomes.

Seat belt use or non-use bears substantially on the chances of surviving a crash. The effectiveness of seat belts at preventing fatalities has been "documented extensively and proven conclusively."[4] Unbelted motorists face a much higher risk of death in a collision. According to a U.S. General Accounting Office report that synthesized numerous safety belt effectiveness studies, "unbelted occupants died at rates of about two to four times those for belted occupants."[5] Similarly, a recent National Highway Traffic Safety Administration publication summarizing

[4] James Hedlund, et al., How States Achieve High Seat Belt Use Rates 3 (National Highway Traffic Safety Administration Report No. DOT HS 810 962, August 2008).

[5] United States General Accounting Office, Highway Safety: Safety Belt Use Laws Save Lives and Reduce Costs to Society 20 (Report to Congressional Requesters, GAO/RCED-92-106, May 1992).

available research concluded that seat belt usage dramatically affects the chances that a crash will result in a fatal injury:

> The simple act of buckling a seat belt can improve an occupant's chance of surviving a potentially fatal crash by from 44 to 73 percent, depending on the type of vehicle and seating position involved.[6]

The consistent findings that seat belt usage has a determinative effect on crash survivability led the Texas Supreme Court to declare, in a case addressing the propriety of admitting seat belt non-usage evidence, "we will not belabor the point with statistics. To do so suggests there is still legitimate debate over the propriety of seat-belt use. That debate has long ended." *Nabors Well Services, Ltd. v. Romero*, 456 S.W.3d 553, 565 (Tex. 2015).[7]

Mississippi also recognizes that survival in a crash depends heavily on whether a motorist chooses to buckle up. The Mississippi Office of Highway Safety estimates that "fatalities are in fact reduced 50 to 65 percent when safety belts are used," and the agency has announced to the public its belief that "[t]here is no doubt that seat belts save lives[.]"[8] Mississippi has gone so far as to adopt a policy of promoting seat belt usage to its residents in order reduce crash-related fatalities and injuries. Since 1990, Miss. Code Ann. § 63-2-5 has mandated the Department of Public Safety to carry out public education programs "to encourage the use of safety belts" that emphasize "the effectiveness of safety belts, the monetary savings and other benefits to the public."

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[6] L.J. Blincoe, et al., The Economic and Societal Impact of Motor Vehicle Crashes, 2010 (Revised) 193 (National Highway Traffic Safety Administration Report No. DOT HS 812 013, May 2015).

[7] *See also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 52 (1983)("[I]f used, seatbelts unquestionably would save many thousands of lives and would prevent tens of thousands of crippling injuries. . . [T]he safety benefits of wearing seatbelts are not in doubt[.]").

[8] Occupant Protection, http://www.highwaysafety.ms.gov/SitePages/Occupant%20Protection.aspx (last visited June 3, 2016).

B. Seat Belt Non-Usage Evidence Is Admissible To Address Crash Survivability, Injury Causation and Vehicle Design Issues.

In light of the weighty effect seat belt non-usage has on crash survivability and injury causation, the trial court's exclusion of evidence that the occupants involved in the subject collision failed to buckle up went beyond the directives of Miss. Code Ann. § 63-2-3 and prevented the jury from considering evidence highly probative of central issues. The statute identifies just one issue on which courts may not consider seat belt non-usage: "contributory or comparative negligence."[9] This Court has cautioned against interpretations of Miss. Code Ann. § 63-2-3 that would extend the statute's prohibitions beyond its stated terms. *Herring v. Poirrier*, 797 So.2d 797, 805 (Miss. 2000) ("§ 63-2-3 should be enforced as written and is not given an overbroad application").[10] Unlike other states that have barred consideration of seat belt non-usage evidence on injury causation or other issues,[11] the Mississippi Legislature carefully structured the statute to prohibit consideration on seat belt non-usage only on the issue of "contributory or comparative negligence." Given both the limited reach of the statute and Mississippi's policy of publicly promoting the use of safety belts and recognizing their life-saving effect, it would be incongruous to view Miss. Code Ann. § 63-2-3 as a blanket prohibition against admission of seat belt non-usage evidence.

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[9] *See also Herring v. Poirrier*, 797 So.2d 797, 805 (Miss. 2000) (Miss. Code Ann. § 63-2-3 "does not purport to bar the admission of seat belt non-usage in all cases, . . . but rather forbids such only from being considered as contributory or comparative negligence."); *Estate of Hunter v. General Motors Corp.*, 729 So.2d 1264, 1269 (Miss. 1999)(essentially identical statement).

[10] *See also Gardner v. Chrysler Corp.*, 89 F.3d 729, 736 (10th Cir. 1996) (In considering the Kansas seat belt statute barring evidence on comparative negligence and mitigation of damages, the fact "[t]hat the legislature specifically stated those two instances in which evidence is inadmissible permits the inference other uses are permissible.").

[11] *See, e.g.*, Nev. Rev. Stat. §484D.495(4)(b) (violation of seat belt use requirement "[m]ay not be considered as negligence or as causation in any civil action") (emphasis added); Utah Code Ann. §41-6a-1806 (failure to wear a safety belt "may not be introduced as evidence in any civil litigation on the issue of negligence, injuries, or the mitigation of damages.") (emphasis added).

The trial court should have admitted evidence that Plaintiffs failed to buckle their safety belts. Seat belt non-usage evidence directly bears on the proximate cause of the injuries incurred and whether these vehicle occupants, under the actual circumstances present at the time of the crash, were likely to have survived the collision even with an alternative vehicle design. To exclude this evidence is to preclude the jury from hearing a fact of the crash that Mississippi itself publicly declares will substantially affect crash survivability.[12]

This Court has acknowledged that seat belt non-usage evidence is relevant and admissible on issues at the core of automobile product liability lawsuits, such as injury causation and collision circumstances.[13] This approach is consistent with how many other courts have addressed the admissibility of seat belt non-usage evidence in the context of claims for crashworthiness or "enhanced injury." *Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439, 458 (4th Cir. 2001) ("courts have admitted evidence of seatbelt non-use to show proximate cause in crashworthiness cases, even when state law, like South Carolina, precludes such evidence to show contributory negligence or failure to mitigate damages.").[14] Admitting this evidence will allow the jury to determine, based on a complete understanding of the actual crash events,

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[12] *See* n. 4, *supra*, and accompanying text.

[13] *See, e.g.*, *Herring*, 797 So. 2d at 805 (affirming admission of seat belt usage evidence on issue of injury causation and extent of injuries); *Palmer v. Volkswagen of America, Inc.*, 904 So.2d 1077, 1093 (Miss. 2005) (seat belt non-usage evidence admissible to address causal effect of warning on plaintiff's conduct); *Estate of Hunter*, 729 So.2d at 1269 (finding in crashworthiness case that evidence of seat belt non-usage "would appear to constitute relevant evidence for the jury to consider in understanding the nature of the crash.").

[14] *See also Hodges v. Mack Trucks, Inc.*, 474 F.3d 188, 202 (5th Cir. 2006) (interpreting Texas statute subsequently repealed); *Bayerische Motoren Werke AG v. Roth*, 252 P.3d 649, 660 (Nev. 2011); *General Motors Corp. v. Wolhar*, 686 A.2d 170, 176 (Del. 1996); *MacDonald v. General Motors Corp.*, 784 F.Supp. 486, 499-500 (M.D. Tenn. 1992); *LaHue v. General Motors Corp.*, 716 F.Supp. 407, 416 (W.D.Mo. 1989).

whether any design issue played a role in causing injuries. As the Supreme Court of Delaware explained,

> Permitting a plaintiff to allege that she was injured by a defective vehicular design while, at the same time, preventing the defendant manufacturer from introducing evidence that the plaintiff's failure to use an essential safety device designed and supplied by the manufacturer was the superceding cause of the plaintiff's injuries, would essentially remove the issue of proximate cause in crashworthiness litigation.

General Motors Corp. v. Wolhar, 686 A.2d 170, 176 (Del. 1996) (emphasis added).

Seat belt evidence also is admissible to address whether the design of the subject vehicle, when considered as a whole, provides reasonable protection to occupants in a crash. *See Whitehead v. American Motors Corp.*, 801 P.2d 920, 928 (Utah 1990) ("[E]vidence of how the presence of seatbelts affected the design safety of the vehicle should be admitted.").[15] Seat belts form the very foundation of any vehicle's occupant protection systems. When a plaintiff contends that the vehicle's design caused her to suffer enhanced injuries, more severe than what should have occurred in the subject collision, the jury needs to consider whether the vehicle's safety systems were compromised by the occupant's failure to buckle up:

> Evidence of seatbelt non-use is unquestionably admissible to show the reasonableness of the vehicle's overall design. The jury must know how an individual would be affected upon impact when all of the design features, including the seatbelt, are being used as intended.

Jimenez, 269 F.3d at 458-59.

C. The Trial Court's Erroneous Exclusion of Seat Belt Non-Usage Evidence Requires Reversal.

Due to the acknowledged effectiveness of seat belts as an occupant protection mechanism and their known impact on crash survivability, exclusion of seat belt non-usage evidence

[15] *See also Hodges*, 474 F.3d at 202; *Gardner*, 89 F.3d 736-37; *DePaepe v. General Motors Corp.*, 33 F.3d 737, 746 (7th Cir. 1994).

prevents a jury from conducting a fair and complete evaluation of the subject crash and resulting injuries. Seat belt use is "the most effective method to reduce the risk of injury or death among adults in a crash."[16] When a jury never learns that an occupant failed to utilize the vehicle equipment most capable of preventing a fatal injury, their evaluation of the crash and the producing cause of occupant injuries is necessarily incomplete. As one court noted, "To exclude seat belt evidence would give the jury an unfairly distorted picture of what occurred." *Egbert v. Nissan North America*, Case No. 2:04-CV-00551 PGC, 2006 WL 6503320 at *4 (D. Utah Mar. 1, 2006).

Because seat belt non-usage evidence bears so substantially on any analysis of crash survivability, vehicle safety system design, and the nature of the collision, the improper exclusion of such evidence necessarily prejudices the jury's findings and requires reversal. *See Hodges*, 474 F.3d at 202 ("the district court abused its discretion when it categorically excluded seatbelt evidence. Needless to say, this error was *not* harmless.") (emphasis original); *Jimenez*, 269 F.3d at 459 ("There can be no question that failure to admit the evidence of seat belt non-use was prejudicial to DaimlerChrysler's case.").

CONCLUSION

The Circuit Court's actions in excusal of jurors violated Mississippi's jury service laws. Further, the Circuit Court improperly excluded evidence of seat belt non-usage, evidence that was both admissible and critical to key issues in this crashworthiness lawsuit. Accordingly, the Court should reverse the judgment in this case.

[16] Centers for Disease Control and Prevention, *Vital Signs: Nonfatal, Motor Vehicle – Occupant Injuries (2009) and Seat Belt Use (2008) Among Adults – United States*, 59 Morbidity and Mortality Weekly Report, Jan. 7, 2011 at 1684.

Respectfully submitted,

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Dated: October 7, 2016

CERTIFICATE OF SERVICE

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

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