

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ALLIE BELL,

Plaintiff-Appellant,

v

RANDAZZO FRUIT & VEGETABLE MARKET,

Defendant-Appellee.

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UNPUBLISHED

September 24, 1996

No. 179419

LC No. 93-304165-NO

Before: Jansen, P.J., and Reilly and M.E. Kobza,\* JJ.

PER CURIAM.

Plaintiff appeals as of right from the jury verdict of no cause of action in this premises liability action. The trial court denied her motion for a new trial in an order dated September 21, 1994. We affirm.

This case arises from a slip and fall on a tomato while plaintiff was shopping at defendant's produce market. The incident occurred in February 1992 and the fall resulted in the eventual total knee replacement of plaintiff's right knee. The case then went to trial and was tried before a jury in the Wayne County Circuit Court during the week of April 25, 1994. The jury returned a verdict of no cause of action in defendant's favor and the order of judgment was entered on June 22, 1994. Plaintiff then moved for a new trial in a motion dated July 12, 1994. The basis of the motion for new trial was the claim that City of Detroit residents were systematically excluded from the Wayne County Circuit Court jury arrays. On September 21, 1994, the trial court denied plaintiff's motion for a new trial. On appeal, plaintiff raises the same issue that was raised in her motion for a new trial.

Defendant first argues that the issue should not be considered on appeal because it was not raised in a timely manner below and that this Court should deem the issue to be waived. Generally, objection to the composition of a jury is waived if the objecting party fails to exhaust its peremptory challenges and expresses satisfaction with the jury impaneled. *People v Dixon*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 154939, issued July 5, 1996), slip op, p 2; *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994); *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228,

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\* Circuit judge, sitting on the Court of Appeals by assignment.

241; 445 NW2d 115 (1989). At trial, plaintiff did not exercise any peremptory challenges and expressed satisfaction with the jury. Plaintiff did not raise any objection with the jury array until after trial. Normally, this issue would be waived for appellate review, however, plaintiff did not have sufficient information upon which to base her objection to the jury array before the jury was sworn. It was not until July 8, 1994 that plaintiff received a letter from Chief Judge James J. Rashid indicating that only two members of the twenty-person jury array impaneled in this case were City of Detroit residents. Plaintiff then timely raised a motion for a new trial raising the issue of systematic exclusion. Under these circumstances, we will address the substantive merits of plaintiff's claim.

First, plaintiff argues that the jury selection process used systematically underrepresented the African-American population of Wayne County.<sup>1</sup> Plaintiff claims that the jury selection process should be deemed to be unconstitutional as violative of the equal protection clauses (1963 Const, art 1, § 2 and US Const, Am XIV) because the jury selection process is unable to achieve a high percentage of qualified Detroit candidates and has the effect of discriminating on the basis of race. Apparently, under the automated jury selection process, 56% of the City of Detroit residents failed to respond to the juror questionnaires mailed to them, compared to 24% of non-Detroit residents who failed to respond.

This same issue has been recently addressed and resolved by this Court. In *Harville v State Plumbing & Heating, Inc.*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 175256, issued August 16, 1996), this Court held that the equal protection clauses of both the Michigan and federal constitutions prohibit only intentional or purposeful discrimination. Disparate impact may constitute evidence that demonstrates an intent to discriminate, but disparate impact alone is insufficient to prove a violation of Const 1963, art 1, § 2. *Harville, supra*, slip op, p 8. This Court in *Harville* concluded that the plaintiffs' equal protection claim failed because the plaintiffs did not contend that Wayne County's jury selection process was intentionally discriminatory.

In the present case, plaintiff contends that the failure to introduce objective measures to correct the underrepresentation of residents of the City of Detroit and produce jury arrays that reflect a fair cross-section of the entire county population after the Wayne County Circuit Court system became aware of the low yield of Detroit residents constitutes intentional discrimination. The evidence in this case reveals that a new automated system was implemented in Wayne County in May 1993. Under this system, the county jury commission estimates the number of prospective jurors needed in an upcoming year. From a randomized source list of county residents possessing a valid driver's license or identification card,<sup>2</sup> one year's worth of prospective jurors are selected as being eligible to receive questionnaires. Jurors for the Wayne County Circuit Court are selected to ensure that the list of prospective jurors is inclusive of Wayne County residents, including the City of Detroit. The county can summon a person for jury duty only after the questionnaire has been returned. Under this system, approximately 56% of City of Detroit residents did not respond to the juror questionnaires. However, after noting that such a high percentage of City of Detroit residents were not returning the questionnaires, the county began sending second questionnaires and approximately 50% to 60% of the second questionnaires are returned. Therefore, the evidence indicates that the county attempted to correct the problem of low returns on the questionnaires. The fact that the county has attempted to correct the problem shows that there is no intentional or purposeful discrimination.

Accordingly, plaintiff has not shown that the county intended to discriminate against African-Americans to prevent them from serving on Wayne County juries. For this reason, plaintiff's equal protection claim must fail.

Plaintiff next contends that the jury selection process violated due process. Plaintiff claims that Wayne County's system of jury selection violated due process because her right to an impartial jury was infringed. Plaintiff also contends that the selection procedure is constitutionally inadequate because it violates the requirement that the venire reflect a cross-section of the qualified population.

Both the state and federal constitutions provide that no person shall "be deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17; US Const, Am V. We cannot agree that plaintiff was denied due process because she has not shown a prima facie violation of the fair cross-section guarantee. This requires proof that (1) the group alleged to be excluded is a distinctive group in the community, (2) the representation of the group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community, and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process. *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979); *People v Hubbard*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (Docket No. 145054, issued July 9, 1996), slip op, p 6. However, this fair cross-section requirement does not entitle litigants to a petit jury that mirrors the community and reflects the various distinctive groups in the population. *Id.* Rather, the fair cross-section requirement guarantees an opportunity for a representative jury by requiring that jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community that fail to constitute a fair cross-section of the community. *Id.*

The parties do not dispute that the jury selection system is neutral on its face. Plaintiff has also failed to satisfy the second and third prongs of the test in *Duren*. This Court has recently held that although a certain segment of Detroit residents chose not to respond to the questionnaires, it cannot be considered to be inherent to the jury selection process. *Kellogg v City of River Rouge*, unpublished opinion per curiam of the Court of Appeals (Docket No. 178760, issued August 2, 1996), slip op, p 2, citing *People v Guy*, 121 Mich App 592, 600; 329 NW2d 435 (1982). Further, as in *Kellogg*, plaintiff has presented no evidence of a long-standing statistical disparity between Detroit and non-Detroit jurors. Rather, the record indicates that Wayne County took measures to correct the underrepresentation of Detroit residents in the jury arrays by sending second questionnaires. Finally, a "systematic exclusion is not shown by one or two incidents of a venire being disproportionate." *Hubbard, supra*, slip op, p 11.

Plaintiff has failed to show that she was deprived of due process because she has failed to establish a prima facie violation of the fair cross-section requirement.

Finally, there is no violation of MCL 600.1376(2)(b); MSA 27A.1376(2)(b) (the courts must provide a fair, impartial, and objective method of selecting persons for jury service wherever mechanical or electronic equipment is used) or MCL 600.1301b(1); MSA 27A.1301(2)(1) (the court shall develop a system of jury selection which broadens citizen participation in the jury system and distributes

the responsibility for participation in as fair a manner as possible). Here, there is no systematic exclusion inherent in the particular jury selection system where a certain segment of Detroit residents choose not to respond to the questionnaires. See *Duren, supra*, p 366; *Kellogg, supra*, slip op, p 2. For the same reason, we find no violation of the ABA standards even were we to find that those standards confer some substantive right on plaintiff.

Accordingly, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial. Plaintiff has not proven a systematic exclusion of African-Americans from jury arrays in Wayne County.

Affirmed.

/s/ Kathleen Jansen  
/s/ Maureen Pulte Reilly  
/s/ Michael E. Kobza

<sup>1</sup> Approximately 92% of the African-American population of Wayne County resides in the City of Detroit. The City of Detroit's population is approximately 75% African-American.

<sup>2</sup> Pursuant to MCL 600.1304(2); MSA 27A.1304(2), the jury board must select from a list which combines the driver's license list and the personal identification cardholder list the names of persons to serve as jurors. Thus, Wayne County's system is in accord with this statutory requirement.