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Trial News

WASHINGTON STATE ASSOCIATION for JUSTICE

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Special Focus: Diversity, Equity, and Inclusion

Henderson v. Thompson: A Groundbreaking Decision

By Kory Queen

"Whether explicit or implicit, purposeful or unconscious, racial bias has no place in a system of justice."


Kory Queen

If someone had shown me this quote without context a few months ago, I would have nodded in wholehearted agreement. At the same time, I would have felt a tinge of regret that however true it *should* be, the reality of the justice system is not nearly so equitable. Most of our cases are in the famously progressive King County, yet racial stereotypes are very often used against our diverse clients. Racism should have no place in the justice system, but it undoubtedly does.

Fortunately, I wasn't shown the quote without context. I read it in *Henderson v. Thompson*, which came down from the Supreme Court of Washington on October 20, 2022. It is no exaggeration to say that when I read the Court's decision that day, I sprang out of my chair and broke into an all-out celebration right there in my office—an office lined with images of Malcolm X, Michelle Obama, Colin Kaepernick, Nipsey Hussle, Martin Luther King, Jr., and with the well-known quote, "Injustice anywhere is a threat to justice everywhere," written on the wall beside our front door. Anti-racism is the air we breathe.

We don't typically break out the shot glasses after reading case law, but then it's not every day that a case fundamentally shifts the justice system in such a positive direction. Never has implicit racial bias been grounds for overturning a civil jury verdict. It has always been understood that the defense could get away with using our clients' race against them, and we would just have to deal with it the best we could. Just a couple of months ago we had a defense attorney argue at trial that our forty-year-old Black client, who was perfectly healthy before the tractor-trailer collision, improved after his spinal fusion because of the placebo effect. (Not-so-subtle subtext: "Members of the jury, what you're looking at is a malingering Black man who got an unnecessary surgery to cash out at trial. Because let's face it, he probably doesn't have much, now does he?") Never mind that our client was a successful business owner and had MRI imaging that showed a bulging disc pressing on his spinal cord. That wasn't the point, and the defense knew it. The point was that jurors are often skeptical about whether Black men really are injured and aren't just trying to cash out. Since the racism wasn't overt, the defense got away with it.


Vonda Sargent

In *Henderson*, the defense attorneys played on the "angry Black woman" and Reagan's lamentably resilient "welfare queen" tropes by making out Janelle Henderson, the Black female plaintiff, to be "combative" and claiming she only sought treatment to increase the value of her legal claim. (Again with the not-so-subtle subtext: "Could this angry Black woman *really* have been hurt by my frail and helpless white female client? Of course not. She's just gaming the system like all the other welfare queens!") It made no difference that the tropes are fictional and rely solely on racism. The defense thought the jury might just buy it, and that's precisely what happened: the jury returned a verdict that was surprisingly low considering how badly Ms. Henderson was hurt.

For Vonda Sargent and Carol Farr, the attorneys who carried the case to victory, the battle to make *Henderson* a reality was taxing, to say the least. I had a chance to talk the case over with them, and they knew long before the case ever reached our Supreme Court that racism would play an inappropriately central role in the outcome.

"I believe it was actually a scheme," said Farr, "because our client, who was clearly damaged, was hit while she was at a standstill at 40 miles an hour, yet they never offered one dollar. I think their whole approach was that they could defeat this because of the client." Sargent described how at trial the defense presented their client as "a small-framed white woman who shook and trembled—but only in front of the jury." They made out the defendant to be the victim, characterizing her as "clearly being honest and wanting to know the truth." Conversely, according to the defense, Ms. Henderson was "obviously angry and combative and uninterested in the truth." The defense also implied (without one shred of evidence) that Ms. Henderson's chiropractor was only testifying on her behalf because of a sexual relationship, and they even went so far as to claim that the plaintiff and all her Black witnesses were "inherently untruthful." Let that sink in. *Inherently*.

Sadly, it didn't stop there. Sargent herself was often the target. The defense attorney told the jury that her (affectedly) trembling white client was intimidated by Sargent, "*and rightly so*." And when one defense witness indicated Sargent and asked the court, "What do I do when she attacks me?", the court did not correct the false characterization of Sargent as an aggressor but instead simply answered the question as though it had been a valid one. Further, this exchange came only after the court *sua sponte* called that witness to the stand to help the defense bring sufficient evidence to overturn spoliation sanctions—sanctions that had been very appropriately entered against the defense before trial. At the beginning of trial, the court granted a motion to reconsider the sanctions despite the defense presenting zero additional evidence, then called this witness to the stand and coached him on how to respond to Sargent's cross-examination.

Indeed, the defense got away with numerous violations. They were allowed to destroy mountains of evidence and defy discovery orders without so much as a slap on the wrist; they were allowed to badger Ms. Henderson, over plaintiff counsel's objections, about the minutia from decades-old doctor's visits only to paint Ms. Henderson as combative for not remembering said minutia; and they were, as already discussed, allowed to wield racism against Ms. Henderson, her witnesses, and her attorney. The trial court held that "the court cannot require attorneys to refrain from using language that is tied to the evidence in the case, even if in some context the language has racial overtones." The deck was stacked against Ms. Henderson and her team from day one.

It took strength and courage for Sargent and Farr to take *Henderson* to the Supreme Court of Washington. "For me personally, it took a serious toll," said Sargent. "And then to have my colleagues telling me, 'You can't do this, you can't do it like that, it's never been done, you can't make this argument,'" she paused and seemed to savor her next words: "But I did it." Yes, she did. She stood before the Supreme Court of Washington and petitioned with great eloquence to put a stop to the racism so ubiquitously present in the justice system.

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Henderson v. Thompson

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"This is what made the decision exquisitely beautiful," said Farr. "We have the first Native American to ever sit on the Supreme Court in this country [Montoya-Lewis], and she wrote the opinion. During the oral argument, the defense had never responded to our allegations of racism—not in their briefs, not in their oral arguments. They just said, 'Well, she wasn't injured.' Montoya-Lewis asked Greg Worden, the white man defending the case, 'You have not answered these allegations of racism, can you please give me a response now?' And he said, 'No, we don't need to; there was no racism.' The judge is silent. She looks at him, waits a few seconds, then says, '*And how would you know?*'" What an excellent question for any white man feeling skeptical about racism to ask himself.

Now, in any other court in the country, that grossly unfair trial would have been the end of Ms. Henderson's case. She would have gone home with pennies despite the serious harm she suffered, courtesy of racism. The Supreme Court of Washington dared to put a stop to it. "If racial bias is a factor in the decision of a judge or jury," held the Court, "that decision does not achieve substantial justice, and it must be reversed." With those powerful words, never before spoken by any U.S. court in the context of a civil suit, our Supreme Court once again took the lead nationally on seeing racial bias rooted out of the justice system.

Of course, it took no time for critics to show up bemoaning the decision as an act of overreach and asking, "If I'm accused of racism, how do I prove that I wasn't being racist? I can't prove a negative!" Others predicted a dire future in which defense attorneys wield *Henderson* against plaintiffs who use similar tactics. Some characterized the decision as nothing more than the codification of political correctness.

I asked Sargent and Farr if they had any response to those criticisms, and they were happy to respond. "If any plaintiff's attorney in prosecuting a claim for personal injury uses these tactics," began Sargent "—if you use someone's race and gender as the basis for your client being injured, then this *should* happen to you. You *should* get reversed. You *should* have to pay for costs. Because what does it have to do with the fact that someone wasn't paying attention or was driving too fast for the conditions, caused the collision, and injured someone? What does race have to do with it? And if these are the tactics that they use, then Godspeed to Allstate, State Farm, American Family, and all the rest of them with making these arguments—because it doesn't belong. It's not relevant. It's not right. It's not fair. And this is not how we should be practicing law."

Sargent continued: "It is almost amusing to me that people are claiming they have to prove a negative. Well, no, what you have to do is don't engage in this conduct." And as for "political correctness," Sargent observed, "It has been my experience that when there is any modicum of moving the needle towards equity—not equality but *equity*—then those who are against losing their position of entitlement and privilege will say, 'Oh, this is just being politically correct.' No. What this is, is addressing systemic and institutional racism." In a similar vein to Justice Montoya-Lewis's piercing question, Sargent noted that "we live in a country where white men traditionally have all the answers. They are comfortable in feeling they know the answers to any question that is asked. They'll say, 'Oh, I have an opinion on that.' How? How can you have an opinion about what it is to be targeted every day with some form of racism?" Sargent, on the other hand, speaks to this from experience: "I want to pay homage to all of my brothers and sisters who have gone through this and shared with me just how devastating it is—the headaches, the lost sleep, the upset stomachs, the anger, the frustration, the self-doubt, all of what happens when people engage in this kind of casual racism. And when I say 'casual,' I mean it just slips from their lips with such ease and without regard to the impact that it has on the person that it's directed at."

Cheers to Sargent and Farr for advancing the cutting edge of racial justice and seeing *Henderson* through to victory. This could be just one decision in one state, but let's hope it is far more than that. Let's hope it means the tide is turning. Let's hope it portends a fundamental shift in the justice system. The law has always taken a while to catch up to society, and it will take many battles on many fronts to see decisions like *Henderson* gain traction across the country. The fight goes on. Even so, when the courts begin overturning trials on the basis that "racial bias has no place in a system of justice," it marks a huge step in the right direction. And that is something worth celebrating.

***Kory Queen** is an EAGLE member practicing personal injury law at the Law Office of Cleodis Floyd, LLC in Seattle. He is a member of the Trial News Editorial Board.*

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[1]No. 97672-4 (Wash. 2022).
[2]*Id*. at 2.
[3]*Virtual Oral Arguments: Janelle Henderson v. Alicia M. Thompson*, Washington State Supreme Court (Mar. 16, 2021), https://www.tvw.org/watch/?clientID=9375922947&eventID=2021031252.
[4]*Henderson* at 1.