No.

In the Supreme Court of the United States

ALICIA THOMPSON, PETITIONER

v.

JANELLE HENDERSON, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Washington Supreme Court created a novel, unworkable standard for granting a new civil trial when a party alleges that implicit or unconscious racial bias affected the verdict. Under this standard, a party "makes a prima facie showing" of "racial bias"—requiring an evidentiary hearing—whenever an "objective observer (one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State) could view race as a factor in the verdict." App.3a. "At the hearing, the trial court is to presume that racial bias affected the verdict" and order a new trial unless the non-moving party proves "racial bias had no effect on the verdict." App.20a.

The Washington Supreme Court applied the first portion of its new standard here, finding a prima facie showing of racial bias. This ruling rested solely on defense counsel's race-neutral, evidence-based closing arguments addressing witness credibility. App.20a-25a. These are the same types of arguments made every day in trial courts throughout our nation, and they are consistent with Washington's own Pattern Jury Instructions.

The questions presented are:

1. Whether the Washington Supreme Court's novel standard addressing implicit bias violates the Due Process Clause—by prohibiting counsel from presenting race-neutral, evidence-based arguments, in certain circumstances, while placing a burden on the non-moving party that is practically impossible to satisfy.

2. Whether the Washington Supreme Court's novel standard addressing implicit bias violates the Equal Protection Clause—by unconstitutionally injecting race-based decisionmaking into the judicial process.

PARTIES TO THE PROCEEDING

Petitioner Alicia Thompson was the defendant in the trial court and the appellee in the Washington Supreme Court. During this litigation, she changed her name to Alicia Salmond.

Respondent Janelle Henderson was the plaintiff in the trial court and the appellant in the Washington Supreme Court.

RELATED PROCEEDINGS

1. The Superior Court of Washington, King County denied respondent's motion for a new trial in *Henderson v. Thompson*, No. 17-2-11811-7 (July 17, 2019).

2. The Superior Court of Washington, King County denied respondent's motion for an evidentiary hearing in *Henderson v. Thompson*, No. 17-2-11811-7 (Aug. 7, 2019).

3. The Superior Court of Washington, King County entered final judgment for respondent in the amount of $9,200 pursuant to the jury's verdict in *Henderson v. Thompson*, No. 17-2-11811-7 (Oct. 29, 2019).

4. The Washington Supreme Court reversed and remanded in *Henderson v. Thompson*, No. 97672-4 (Oct. 20, 2022).

5. The Washington Supreme Court denied petitioner's motion for reconsideration in *Henderson v. Thompson*, No. 97672-4 (Jan. 23, 2023).

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INTRODUCTION

Appeals to racial bias have no place in a court of law. As this Court recently put it, "The duty to confront racial animus in the justice system is not the legislature's alone." *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 222 (2017). Courts and lawyers alike share the responsibility to ensure trials remain free of statements or arguments that inject racial bias into judicial proceedings. The Washington Supreme Court thus rightly recognized that "our legal system is based on the premise of judicial neutrality, procedural fairness, and equal treatment" for all. App.32a.

But the novel implicit-racial-bias standard the Washington Supreme Court created to pursue these important goals injects—rather than eliminates—considerations of racial stereotypes throughout judicial proceedings.

The standard unconstitutionally prohibits trial counsel from making legitimate, race-neutral, evidence-based arguments in certain circumstances. It does this by creating an outlier standard for granting a new civil trial when a party alleges that "implicit, institutional, and unconscious" racial bias affected the verdict. App.19a-20a. Under this standard if counsel's race-neutral arguments about witness credibility implicitly "*could* evoke racist stereotypes," then the trial court must "presume that racial bias affected the verdict, and the party benefitting from the alleged racial bias has the burden to prove it did not." App.24a-25a.

The serious due-process and equal-protection violations caused by this standard warrant this Court's immediate attention. The opinion below would upend civil trials, prohibiting, in certain circumstances, common arguments addressing witness credibility—such as those concerning financial interest, coaching, bias, or trial conduct and

demeanor. They are the types of arguments made countless times every day in courtrooms throughout the country and are wholly appropriate as Washington's own Pattern Jury Instructions confirm. Yet the Washington Supreme Court denounces them as racial discrimination—even holding that counsel can be *sanctioned* for making such arguments. App.31a-32a & n.15.

The trial transcript confirms that each of the statements in defense counsel's closing argument that the Washington Supreme Court found improper is race-neutral and tethered to the evidence:

- Counsel suggested that respondent's medical testimony did not support the "exceptional" damages sought, questioned respondent's motivation for seeking "$3.5 million" in "a simple rear-end" car accident case, and highlighted that respondent did not "bother to mention that she's just been in an accident" during a doctor's appointment three days after the collision. App.101a, 104a, 127a.
- Counsel stated that witness testimony from respondent's "friends and family" was "inherently biased," recognized that multiple witnesses testified "us[ing] the exact same phrase when describing [respondent] before the accident: life of the party," and contended this was "almost like someone had told them to say that." App.119a, 122a.

- Counsel noted the possible bias of respondent's chiropractor by observing, as the chiropractor admitted, that "he has more than just a patient/physician relationship with [respondent]" because they are friends. App.112a.
- And counsel addressed "credibility factors," describing respondent as "combative" and "confrontational" for her "challenge," arguing with counsel and appearing unwilling to answer certain questions during cross-examination, while contrasting petitioner's "emotional" and "intimidated" testimony. App.101a-102a, 128a-129a.

These arguments are the entire basis for the court's finding of a "prima facie showing" of "racial bias." App.6a-8a, 12a. But the trial court below—which heard and saw witness testimony firsthand—correctly concluded, after full briefing and argument, that counsel's arguments did not appeal to racial bias. App.45a-48a. Nor did respondent object to any of these arguments during closing or before the jury's verdict. Instead, she only moved for a new trial after the jury returned a damages award of $9,200 instead of the $3.5 million sought. App.42a, 47a.

This Court should summarily reverse the Washington Supreme Court's outlier decision. *See, e.g.*, *Sears v. Upton*, 561 U.S. 945, 946 (2010) (summarily reversing because "it is plain from the face of the state court's opinion that it failed to apply the correct prejudice inquiry we have established"). This standard violates due process by prohibiting parties from "'present[ing] every available defense'" that is race-neutral and evidence-based. *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *Am. Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)). The standard also

violates equal protection by "inject[ing] racial considerations" pervasively throughout the judicial process to inappropriately stifle a party's arguments. *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 543 (2015).

Alternatively, the Court should either grant this petition for plenary review, or hold this petition and grant, vacate, and remand in light of cases pending before this Court addressing when racial considerations can be injected into government decisionmaking. *See Students for Fair Admissions v. President & Fellows of Harvard Coll. & Univ. of N.C., et al.*, Nos. 20-1199 & 21-707; *Haaland, et al., v. Brackeen, et al.*, Nos. 21-376, 21-377, 21-378, & 21-380.

In all events, this Court's review is needed now. This new implicit-bias standard now controls in every state trial court throughout Washington, leaving litigants and their counsel "operating in the shadow of . . . a rule . . . the constitutionality of which is in serious doubt." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486 (1975). Moreover, news reports already confirm that "supporters call the court's efforts to address racial bias 'revolutionary,' and say *other states are poised to follow*."[1]

OPINIONS BELOW

The opinion of the en banc Washington Supreme Court (App.1a-36a) is reported at 518 P.3d 1011. The judgment of the trial court (App.149-150a) is available at 2019 WL 8165903.

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[1] Amy Radil, *With rulings against racial bias, WA Supreme Court starts 'hard discussions,'* KUOW.org NPR (Feb. 7, 2023), https://www.kuow.org/stories/with-racial-bias-rulings-wa-supreme-court-starts-hard-discussions (emphasis added).

JURISDICTION

The Washington Supreme Court issued its opinion on October 20, 2022, and denied petitioner's motion for reconsideration on January 23, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend. XIV, § 1.

STATEMENT

A. Respondent Janelle Henderson sued petitioner Alicia Thompson to recover damages for personal injuries allegedly suffered when petitioner's vehicle collided with respondent's. App.3a. Respondent is a "Black woman," and petitioner is a "white woman." App.3a. Petitioner admitted fault in the collision, and the parties proceeded to trial on the issue of damages alone. App.3a. Respondent sought $3.5 million. App.5a.

1. At trial, respondent testified that the collision and resulting stress amplified her preexisting Tourette's Syndrome and musculoskeletal problems. App.5a.

On cross-examination, respondent argued with petitioner's counsel. For example, counsel asked, "Upon impact you were not pushed into any car in front of you, correct?" Respondent answered, "No. But I feel like I'm on trial and I didn't do anything. I—I was driving and I got hit. So, I feel like you're, like, putting me on trial for

somebody else's—for somebody else hitting me." App.80a. Counsel then explained that attorneys for both parties can ask questions of both parties, and respondent stated, "Uhm, well, you're still putting me on trial, so." App.81a. Respondent also repeatedly answered "I don't know" or "I don't remember" when counsel asked about her chiropractor and neurologist visits. App.83a-88a.

Respondent's chiropractor and physicians testified that her conditions had likely worsened since the collision. App.90a. Respondent's neurologist acknowledged, however, that his notes from respondent's visit three days after the accident do not contain any mention of respondent having been in a collision. App.103a-104a. And respondent's chiropractor described his "relationship with [respondent]" as "friendly," stating that he had "known her a long time." App.145a.

Three of respondent's friends also testified, with each stating that respondent had been "the life of the party" before the accident. App.141a, 142a, 146a.

Petitioner testified about the collision as well. App.128a, 148a. And two medical experts, a neurologist and a chiropractor, testified in petitioner's defense. Both medical professionals found it unlikely that the collision significantly worsened respondent's Tourette's Syndrome or resulted in lasting physical harm. App.108a-110a.

Respondent's counsel separately called petitioner as a witness during her rebuttal. Observing petitioner on the stand, respondent's counsel asked petitioner, "Are you okay? . . . Are you sure?"—at which point the court said, "hold on just a sec. We're going to—[off the record discussion]." App.148a.

2. During closing arguments, both parties' counsel challenged the credibility of opposing witness testimony.

It was the very first argument pressed by *respondent*'s counsel: "the first thing that I want to talk to you about is the credibility of the witnesses." App.89a. Respondent's counsel then discussed in detail the amount petitioner's expert witnesses were paid, arguing that their testimony was "bought and paid for." App.97a. She asserted that they "haven't been completely honest." App.97a. Counsel suggested that petitioner, as an insured, did not know what was "going on" because her "agents" were acting as the "puppet master." App.138a. Respondent's counsel then concluded: "We're here for a simple car crash case. And they've turned it into this incredible situation. Ask yourself why." App.98a.

Petitioner's counsel began her closing by responding to opposing counsel's rhetorical question, while addressing respondent's conduct and demeanor during cross-examination:

> Now, you'll recall that during my cross-examination of [respondent] a couple of days ago, she was confrontational with me, asking to know why I was putting her on trial. Her point was, I was hit; I was rear-ended; I have injuries. And she wants the inquiry to end there. And [respondent's counsel] just spent almost 45 minutes talking to you largely about the efforts that the Defense has taken to defend [petitioner] against this. It's just a simple car accident; it's a simple rear-end; why are we going through this exercise? And it seems pretty evident that the reason we're going through this exercise is because the ask is for three and a half million dollars.

. . . .

> So, the thing about this case and what I—I find interesting about [respondent's] challenge during my cross-examination of her was that she, in fact, carries the burden of proof, and that perhaps is why she was feeling like she's on trial.

App.101a-102a.

Later, counsel probed the discrepancies in evidence relating to respondent's claimed injuries, explaining that respondent visited her doctor just three days after the collision but did not mention the collision at all:

> And she doesn't bother to mention that she's just been in an accident . . . And she doesn't mention that to her doctor. And you have to ask yourself why? Is it because $3.5 million hadn't coalesced in her mind yet?

App.104a. Petitioner's counsel argued that the damages sought were "exceptional" considering the actual evidence of injury. App.127a (stating that even an alternative damages calculation would result in "$60,000 for a rear-end accident. That's a lot of money.").

Like respondent's counsel, petitioner's counsel discussed the bias of respondent's witnesses:

> So, let's set aside the—the well-meaning, but, frankly, inherently biased testimony of [respondent's] friends and family. . . .

App.122a. And counsel directed the jury to consider that multiple witnesses for respondent used the same exact phrase to describe respondent:

> I thought it was interesting also that all four of those witnesses used the exact same phrase when describing [respondent] before the accident: life of the party. Almost—almost like someone had told them to say that. It was—it was like a tape on repeat.

App.119a.[2]

Petitioner's counsel additionally noted the possible bias of respondent's chiropractor, due to his friendship with respondent:

> In terms of bias, I thought it was interesting that [respondent's chiropractor] kind of threw out there the tidbit that suggests that nothing untoward, of course, but he has more than just a patient/physician relationship with—with [respondent].

App.112a.

Finally, counsel returned to "credibility factors" and the "manner of [respondent's] testimony," highlighting the portions of testimony where respondent argued with counsel and appeared unwilling to answer certain questions:

> But when it's my turn to cross examine her, she's not interested in the search for truth; she's interested in being combative. Why are you putting me on trial? I don't know what I told my doctors. I don't know when I saw my doctors. I don't know what they have in my reports. I didn't read the medical records. You know, it was—it was quite

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[2] Counsel misspoke: The transcript reflects that three, rather than four, of respondent's witnesses used the phrase "life of the party." App.141a, 142a, 146a.

> combative. There's—there's definitely no search for the truth there.
>
> By comparison, my client took the stand, obviously feeling, I think intimidated and emotional about the process—and rightly so, and provided you with—with genuine and authentic testimony.

App.128a.

Respondent's counsel did not object to these statements during closing argument or before the jury's verdict. After five hours of deliberation, the jury awarded respondent $9,200 in general damages. App.149a-150a.

B. Dissatisfied with that verdict, respondent moved for a new trial or increased damages, invoking Washington Civil Rule 59(a)(9), which provides in relevant part for a new trial where "substantial justice has not been done." App.42a, 45a. Respondent argued, for the first time, that defense counsel's statements in closing likely influenced the jury's unconscious racial bias against her. App.45a. Respondent also argued for a new trial by asserting that petitioner's private investigator destroyed or withheld video footage and notes, which should have warranted a spoliation instruction. App.43a-44a.

After hearing argument, the trial court denied respondent's motion. The trial court found no evidence of attorney misconduct or spoliation. App.43a, 45a. The court explained that the challenged closing arguments "were tied to the evidence in the case." App.45a. For example, it was "not unfair to describe [respondent's demeanor] as combative given her unwillingness to answer questions" on cross-examination. App.45a. Moreover, the "jury's verdict was not outside the evidence presented in the case." App.47a. The trial court stated it was not aware

of any case holding "that the *possibility* of implicit bias is grounds for a new trial or additur." App.45a. "In the absence of specific evidence of impermissible racial motivations by the jury, or misconduct by defense counsel," the court "decline[d] to use the possibility of implicit racial bias to overturn the jury's verdict or grant additur." App.47a. The court also held that respondent "failed to show that [the allegedly spoliated evidence] existed, much less that [it] was withheld or destroyed." App.44a.

The next day, the Washington Supreme Court decided *State v. Berhe*, 444 P.3d 1172 (Wash. 2019), which addressed allegations of bias during juror deliberations in a criminal trial. *Berhe* held that an evidentiary hearing for a new-criminal-trial motion must occur where the criminal defendant makes the "prima facie" showing that "the evidence, taken as true, permits an inference that an objective observer who is aware of the influence of implicit bias could view race as a factor in the jury's verdict." *Id.* at 1182.

Respondent moved the trial court for an evidentiary hearing in light of *Berhe*. The trial court denied the motion: "Other than the verdict being significantly less than plaintiff's request, and the allegation that defense used racially coded language, there is no specific evidence that implicit bias was the cause of the verdict." App.38a. The court reiterated that it had "already found defense counsel's arguments to be tied to the evidence, rather than being used as a racist dog whistle." App.39a.[3]

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[3] The trial court also addressed respondent's argument that she was removed from the courtroom at the behest of the jury. App.38a-39a n.1. The trial court explained that "[t]he jury did not make such a

C. Respondent appealed the trial court's denial of her motion for new trial. App.12a. The Washington Supreme Court took respondent's appeal on discretionary direct review. Wash. R. App. P. 4.2.

In Part I of the opinion below, the court created a novel new-trial standard broken into two parts. The court first extended *Berhe*'s prima facie standard from criminal prosecutions to civil lawsuits and from juror deliberations to counsel's arguments. It then created an additional presumption and burden-shifting framework that was not present in *Berhe*, ordering that the evidentiary hearing following the prima facie showing must *presume* bias and the *non-movant* must prove that counsel's presumptively biased statements had *no effect* on a verdict:

> [1] We hold that upon a motion for a new civil trial, courts must ascertain whether an objective observer who is aware that *implicit, institutional, and unconscious biases, in addition to purposeful discrimination*, have influenced jury verdicts in Washington State *could* view race as a factor in the verdict.
>
> [2] When a civil litigant makes a prima facie showing sufficient to draw an inference of racial bias under this standard, the court must grant an evidentiary hearing to determine if a new trial is warranted.

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request. This court had a practice of asking *all parties* to wait outside *after a verdict* to allow the jurors to speak to counsel, if they wished. The court has done that in every jury trial, regardless of the race of the parties and regardless of the outcome of the trial." App.39a n.1 (emphases added); *see also* App.39a n.1 (apologizing and noting it changed this practice).

> At the hearing, the trial court is to presume that racial bias affected the verdict, and the party benefiting from the alleged racial bias has the burden to prove it did *not*. If they cannot prove that racial bias had no effect on the verdict, then the verdict is incompatible with substantial justice, and the court should order a new trial under CR 59(a)(9).

App.19a-20a (emphasis in original; citations omitted).

The Washington Supreme Court "t[ook] th[e] opportunity to provide guidance on how this prima facie showing should be assessed." App.20a. It held that four sets of evidence-based closing arguments made by petitioner's counsel "*could* evoke racist stereotypes"—although none of the stereotypes the court identified were mentioned by petitioner's counsel. App.24a.

The court found counsel's suggestion that respondent exaggerated her alleged injuries while seeking $3.5 million in damages could have evoked "racist stereotypes about Black women as untrustworthy and motivated by the desire to acquire an unearned financial windfall," which could have allowed "jurors to make decisions on impermissible grounds rooted in prejudice or biases about race and money." App.21a-22a; *see* App.22a n.9 (equating counsel referring to the $3.5 million respondent sought as alluding to a "welfare queen" stereotype, citing, among other sources, Brittany Cooper, *Eloquent Rage: A Black Feminist Discovers Her Superpower* 197 (2018)).

Additionally, the court held that counsel, in characterizing respondent's argumentative responses and unwillingness to answer questions as "combative" and "confrontational," could have evoked "the harmful stereotype of an "'angry Black woman.'" App.20a-21a (citing Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters &*

White Fragility: Deconstructing the Trope of the Angry Black Woman, 102 Iowa L. Rev. 2017, 2049 (2017)). The court also ruled that counsel "directly contrasted her description of [respondent's] demeanor with [petitioner's]," which could have "invited the jury to make decisions on improper bases like prejudice or biases about race, aggression, or victimhood." App.21a & n.8 (citing Megan Armstrong, *From Lynching to Central Park Karen: How White Women Weaponize White Womanhood*, 32 Hastings L.J. 27, 32-42 (2021)).

The court next asserted that by noting multiple witnesses for respondent used the same phrase to describe respondent before the collision—"life of the party"—petitioner's counsel could have implicated "racist stereotypes about Black people and us-versus-them descriptions" that could invite jurors "to make decisions based on biases about race and truthfulness." App.22a-23a.

Finally, the court stated that counsel's suggestion that respondent's chiropractor may be biased due to his friendship with respondent "could open the door to speculation that plays directly on prejudice or biases about race and sexuality." App.23a.

The Washington Supreme Court reversed and remanded, ordering a *different trial judge*—who did not observe the testimony or closing argument—to conduct the evidentiary hearing. App.26a. At this hearing, the judge must "presume that racial bias affected the verdict," and petitioner must conclusively prove racial bias "had no effect on the verdict" to avoid a new trial. App.20a. The court later invited the different trial judge to also consider whether petitioner's counsel "should be sanctioned for making appeals to racial bias throughout trial." App.31a;

see App.32a n.15 ("The trial court may consider in its sanction analysis . . . defense counsel's conduct during trial.").

Part II of the opinion below separately found that the "defense team failed to produce relevant evidence," and that the different trial judge on remand must "determine whether to impose discovery sanctions up to and including a new trial." App.32a.

Justice McCloud, joined by Justice Madsen, wrote separately "to express disagreement with the majority's characterization of certain aspects of defense's closing argument." App.34a.

D. Petitioner filed a timely motion for reconsideration, arguing that the "newly announced standard violates [petitioner's] . . . federal . . . due process and equal protection rights." App.51a. The Washington Supreme Court denied the motion for reconsideration in a single-sentence order on January 23, 2023. App.49a.

REASONS FOR GRANTING THE PETITION

I. The Washington Supreme Court's novel standard for granting a new civil trial based on implicit racial bias violates established Due Process Clause precedent.

The Washington Supreme Court's novel standard violates the Due Process Clause in at least two independent ways. First, it deprives litigants of a full hearing where all legitimate, evidence-based arguments may be presented by setting an impermissibly low, arbitrary, and vague threshold for establishing a prima facie showing of racial bias. Second, it imposes a functionally impossible burden on the non-movant by *presuming* racial bias after the prima facie stage and requiring the *non-moving* party to prove no effect on the verdict.

A. This standard deprives litigants of legitimate, evidence-based arguments by setting an impermissibly low, arbitrary, and vague threshold for a prima facie showing of bias.

1. The Washington Supreme Court's standard prohibits certain legitimate arguments that are race-neutral and evidence-based. But this Court's due process precedent mandates that parties must have a "meaningful opportunity to present their case"—"at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 349 (1976) (citation omitted). This includes the right "'to present every available defense.'" *Lindsey*, 405 U.S. at 66 (quoting *Am. Surety*, 287 U.S. at 168). Consequently, a party's counsel must be able to zealously raise all legitimate, evidence-based arguments. After all, a witness's "credibility is in issue whenever he [or she] testifies." *Stewart v. United States*, 366 U.S. 1, 6 n.13 (1961).

Due process is denied when courts "arbitrarily" refuse to hear counsel's arguments. *Powell v. Alabama*, 287 U.S. 45, 69 (1932); *see Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) ("'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.'" (quoting *Powell*, 287 U.S. at 69)).

That is precisely what the Washington Supreme Court's opinion below has done. The court held that common, legitimate trial arguments are improper, arbitrarily decreeing them prima facie evidence of implicit racial bias—and even *sanctionable*. But each of defense counsel's statements during closing argument were neutral as to the race of any witness and directly tethered to the evidence presented.

Financial interest. In response to a rhetorical question posed by respondent's counsel, petitioner's counsel stated: "the reason we're going through this exercise is because the ask is for three and a half million dollars." App.101a. Later, petitioner's counsel addressed how respondent had visited her doctor just three days after the collision: "And she doesn't bother to mention that she's just been in an accident . . . Is it because $3.5 million hadn't coalesced in her mind yet?" App.104a. Petitioner's counsel then suggested that the damages sought were "exceptional" and that respondent exaggerated her alleged injuries compared to the record evidence. App.127a.

In both closing and cross-examination, trial counsel regularly highlight a plaintiff's financial interest in a damages verdict—often by focusing on discrepancies between the evidence of injury and damages sought. *E.g., Marcic v. Reinauer Transp. Cos.*, 397 F.3d 120, 125 (2d Cir. 2005) ("[I]t was not improper for opposing counsel to invoke [plaintiff's financial] incentive in an attempt to impeach

plaintiff."); *Beyar v. N.Y. City Fire Dep't*, 310 F. App'x 417, 419 (2d Cir. 2008) (such arguments are "routine in a case for money damages"); *see* App.35a (McCloud, J., concurring) (counsel permissibly "explore[d] witnesses' financial and other interests that might undermine their credibility").

Such arguments are not only commonplace, they are also critical in an admitted-fault case like this one where the extent of a plaintiff's damages is the primary issue. If there were any doubt, Washington's own Pattern Jury Instructions provide: "In considering a witness's testimony, you may consider . . . any personal interest that the witness might have in the outcome or the issues." Wash. Pattern Jury Instructions Civ. 1.02 (7th ed.).

Witness coaching. Petitioner's counsel also accurately stated that multiple witnesses for respondent used identical language to describe respondent before the collision. App.141a, 142a, 146a. Counsel suggested that respondent's witnesses could have been coached to say the same phrase: "I thought it was interesting also that all four of those witnesses used the exact same phrase when describing [respondent] before the accident: life of the party. Almost—almost like someone had told them to say that. It was—it was like a tape on repeat." App.119a.

Arguments about witness credibility are legitimate —whether for blatant inconsistencies or suspicious consistencies possibly due to coaching. *E.g.*, *United States v. Arias-Santos*, 39 F.3d 1070, 1074 (10th Cir. 1994) (considerations of whether "the testimony of a witness was coached are clearly relevant to a jury's assessment of the reliability of that witness"); *see* App.35a (McCloud, J., concurring) (counsel permissibly "used testimony in

evidence in order to attack the witnesses' credibility by suggesting prior planning").

Witness personal bias. Petitioner's counsel also asserted bias by "friends and family" who testified for respondent. App.122a. This included respondent's chiropractor: "In terms of bias, I thought it was interesting that [respondent's chiropractor] kind of threw out there the tidbit that suggests that nothing untoward, of course, but he has more than just a patient/physician relationship with—with [respondent]." App.112a.

A witness's bias, including because of personal relationship or friendship, is a legitimate consideration that bears on reliability and credibility. This Court has recognized that "[p]roof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *United States v. Abel*, 469 U.S. 45, 52 (1984); *e.g.*, *Williams v. United States*, 452 F.3d 1009, 1013 (8th Cir. 2006) (witness's personal relationship with a party should be considered in evaluating credibility); 1 McCormick on Evidence § 39 (8th ed. 2020) ("friendly feeling toward a party" or "family or business relationship" may compromise credibility (emphasis omitted)); Wash. Pattern Jury Instruction Civ. 1.02 (7th ed.) ("[Y]ou may consider . . . any bias or prejudice that the witness may have shown.").

Witness conduct and demeanor. Petitioner's counsel additionally posited that respondent's argument with counsel and unwillingness to answer questions during cross-examination undermined her credibility. App.127a-128a. Counsel contrasted respondent's conduct and demeanor during direct- versus cross-examination: "[W]hen it's my turn to cross-examine her, she's not interested in

the search for truth; she's interested in being combative." App.128a; App.101a ("[S]he was confrontational with me, asking to know why I was putting her on trial."). And counsel described petitioner, in contrast, as "intimidated and emotional," arguing that petitioner had provided "genuine" and "honest" testimony. App.128a-129a.

Courts repeatedly recognize witness conduct and demeanor as a key consideration for evaluating witness credibility. *E.g.*, *Stewart*, 366 U.S. at 6 ("[W]henever a witness takes the stand, he necessarily puts the genuineness of his demeanor into issue."); *Reagan v. United States*, 157 U.S. 301, 308 (1895) (approving instruction that jury consider "demeanor and conduct upon the witness stand and during the trial" (citation omitted)); Wash. Pattern Jury Instruction Civ. 1.02 (7th ed.) ("[Y]ou may consider . . . the manner of the witness while testifying.").

Courts and counsel therefore regularly characterize testimony of witnesses—of any race—as "combative," "confrontational," "emotional," or "evasive," where it is a permissible inference from the evidence presented. *E.g.*, *Fiallos v. Hamzah Slaughter House, LLC*, 2022 WL 16540001, at *2 (D. Md. Oct. 28, 2022) (plaintiff's "testimony was somewhat combative"); *Pagan-Romero v. United States*, 2022 WL 15523367, at *5 (D.P.R. Oct. 27, 2022) (government discussing "[witness's] combative and evasive demeanor"); *United States v. Kelly*, 2022 WL 2316177, at *21 (E.D.N.Y. June 29, 2022) (court describing a "combative witness").

The Washington Supreme Court nevertheless found that each of the common trial arguments described above were prima facie evidence of racial bias, insisting each "could" have "evoke[d]" or "alluded to" racial stereotypes. App.20a-21a. This holding stifles a party's defense and

prevents counsel's zealous advocacy. Under certain circumstances, Washington litigants and their counsel can no longer meaningfully confront adverse witnesses regarding motivation, bias, conduct, and demeanor, for fear that such arguments may be deemed an appeal to implicit racial bias. *See* App.24a-25a.

Indeed, it is wholly unclear what arguments—if any—remain for petitioner on remand. Counsel may no longer point to respondent's personal interest in the verdict, the discrepancy between the evidence of damages presented and the extent of the damages sought, the potential personal biases or motivations of respondent's witnesses, or the manner of witness testimony. But under the Washington Rules of Professional Conduct, "A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force." Rule 3.3 cmt. 2.

To be clear, "[t]he Constitution prohibits racially biased [attorney] arguments." *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987). In fact, the opinion below quotes multiple other cases in which that is precisely what occurred. App.14a-15a. But the Washington Supreme Court's standard announced here sweeps far more broadly to prohibit legitimate, race-neutral, evidence-based arguments under certain circumstances. This arbitrarily restricts litigants' rights to present full, vigorous defenses and therefore violates due process. *See Boddie v. Connecticut*, 401 U.S. 371, 379-80 (1971) (due process right to a meaningful opportunity to be heard "must be protected against denial by particular laws that operate to jeopardize it for particular individuals").

2. The Washington Supreme Court's unconstitutional standard prohibits legitimate arguments by setting an

arbitrarily low and vague threshold for establishing a "prima facie showing sufficient to draw an inference of racial bias." App.19a-20a. According to the opinion below, courts must start from the premise that "an objective observer . . . is aware that *implicit, institutional, and unconscious biases, in addition to purposeful discrimination*, have influenced jury verdicts in Washington State." App.19a. Then, courts must ask whether such an observer "*could* view race as a factor in the verdict." App.19a.

This new standard finds a prima facie showing of racial bias on (1) the uncertain possibility ("could"); (2) that an indeterminate quantity ("a factor"); (3) of an unconsciously held thought arising from legitimate trial arguments ("implicit, institutional, and unconscious") affected the verdict. App.19a. "Could" merely expresses a "possibility, especially slight or uncertain." *Could*, Cambridge Dictionary, bit.ly/3fCpxjG. And the language "a factor" pushes the standard even further into the realm of merely conceivable: "When used as an indefinite article, 'a' means 'some undetermined or unspecified particular.'" *McFadden v. United States*, 576 U.S. 186, 191 (2015) (quoting Webster's New International Dictionary 1 (2d ed. 1954)). Furthermore, bias that is implicit or unconscious is, by definition, "present but not consciously held or recognized." *Implicit*, Merriam-Webster Dictionary, bit.ly/3JSfofB; *Unconscious, id.*, bit.ly/3JPpFsT ("not consciously held or deliberately planned or carried out").

This exceedingly low threshold will wreak havoc on civil trials. It is also vague and arbitrary as it does not provide parties fair notice of "what is required of them so they may act accordingly," and it invites "arbitrary" application. *FCC. v. Fox Tel. Stations, Inc.*, 567 U.S. 239, 253 (2012). The Washington Supreme Court identified no

procedures or other mechanisms counsel can use to determine whether their statements trigger implicit or unconscious bias that *could* be *a* factor in the verdict.

Consider the various problems trial counsel will face. For example, it is unclear whether counsel must now try to identify the race(s) of all parties and witnesses—perhaps by issuing interrogatories or asking during deposition or at trial. It is unclear what sources counsel can—or must—use to identify stereotypes applicable to the different potential races of the parties and witnesses. It is unclear whether and how counsel or the court must probe juror awareness of implicit bias. It is unclear whether counsel must request a sidebar with the trial judge and make a proffer before presenting arguments and posing questions opposing counsel might later challenge.

This Court already has recognized, in contexts even beyond due-process cases, that standards addressing allegations of racial discrimination or bias must have "adequate safeguards," as this ensures "race" is not "used and considered in a pervasive way"—which raises "serious constitutional questions." *Inclusive Communities*, 576 U.S. at 542-43. This is required even when the government seeks "to counteract unconscious prejudices and disguised animus." *Id.* at 540. For example, to overcome the no-impeachment rule and probe juror deliberations on an allegation of racial bias, a party must establish a "clear statement" of "overt racial bias" indicating that "racial stereotypes or animus" was a "significant motivating factor" in the verdict. *Peña-Rodriguez*, 580 U.S. at 225.

Circuit courts therefore routinely reject claims related to implicit racial bias.[4]

Courts, of course, must prohibit the "invocation of race stereotypes" in all judicial proceedings. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991). But in deeming proper, race-neutral, and evidence-based arguments to be racial bias wherever such statements implicitly "*could* evoke" a stereotype, the Washington Supreme Court's test for a prima facie case of racial bias creates rather than ameliorates constitutional concerns.

B. The standard violates due process by presuming racial bias and imposing a functionally impossible burden on the non-moving party.

While creating an exceedingly low bar for the movant's prima facie showing, the opinion below simultaneously creates a virtually impossible burden for the nonmovant. After the prima facie showing, a court must "presume that racial bias affected the verdict," and the nonmovant must prove that bias "had *no effect* on the verdict." App.20a (emphasis added). This violates due process by

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[4] *E.g.*, *United States v. Young*, 6 F.4th 804, 808 (8th Cir. 2021) (declining to instruct jury on implicit bias because court's responsibility is to "eliminate *reasonable* possibilities of bias, not *every* possibility of bias"); *United States v. Brooks*, 987 F.3d 593, 605 (6th Cir. 2021) ("*neutral* statements that may suggest unexpressed racial biases" are insufficient to overcome no-impeachment rule); *United States v. Norwood*, 982 F.3d 1032, 1057 (7th Cir. 2020) (allegation seeking hearing under *Peña-Rodriguez* insufficient if it "require[d] substantial speculation" and was not "a clear statement of overt racial bias"); *United States v. Baker*, 899 F.3d 123 (2d Cir. 2018) (no evidentiary hearing warranted where race-neutral statement merely "*could possibly indicate*" that juror determined guilt "based on racial stereotypes or animus" (citation omitted)).

presuming that legitimate trial arguments evoke racial bias while placing the burden on the non-moving party—and this standard is unlike any other burden-shifting framework addressing racial bias recognized by this Court.

1. It is difficult to conceive how a non-movant could ever show that implicit or unconscious bias had "no effect on the verdict," particularly when courts must "presume" that even legitimate, evidence-based arguments improperly evoked bias and *did* affect the verdict. App.20a. But "a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Heiner v. Donnan*, 285 U.S. 312, 329 (1932). Claims of implicit racial bias, additionally, must be "properly limited" to allow counsel "leeway to state and explain the valid interest served" by their "legitimate" arguments. *Inclusive Communities*, 576 U.S. at 541, 544.

Tellingly, the Washington Supreme Court provides no guidance as to how a party is to demonstrate that implicit or unconscious bias had *no effect* on a verdict. At the first "prima facie" step, the Washington Supreme Court already concluded that defense counsel's statements "could" have appealed to racial bias. App.20a, 25a. As a result, petitioner seemingly cannot rely on the fact that the statements were race-neutral and evidence-based to *prove*, with any degree of certainty, that bias "had no effect on the verdict." App.20a. Even if petitioner could secure juror testimony confirming that counsel's statements did *not* in fact evoke racial bias, respondent could simply counter that jurors are unaware of their implicit, unconscious biases. *See Unconscious,* Merriam-Webster Dictionary, bit.ly/3JPpFsT (bias "not consciously held or deliberately . . . carried out").

So there is no practical way for petitioner to succeed in rebutting the "prima facie" showing. She cannot rely on the race-neutral nature of the common trial arguments her counsel made. She cannot assert that these arguments were all tethered to the trial evidence. And she cannot prove the absence of what is "not consciously held" in jurors' minds. Dissatisfied litigants in these circumstances are essentially guaranteed a new trial.

2. This practically impossible standard bears no resemblance to other decades-old burden-shifting frameworks addressing racial bias. Other frameworks this Court has recognized (1) require the movant to produce affirmative evidence; (2) allow the non-movant to offer race-neutral, "legitimate, nondiscriminatory" reasons rebutting any presumption of racial bias; and (3) place the ultimate burden of persuasion on the movant to show these reasons were a "pretext" for discrimination. *E.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 804 (1973).

In the employment-discrimination context, for example, once the movant (plaintiff) has shown "by the preponderance of the evidence a prima facie case of discrimination," the burden shifts to the non-movant (defendant) to produce a "'legitimate, nondiscriminatory reason'" for its action. *Texas Dep't. Cmty. Affs. v. Burdine*, 450 U.S. 248, 252-53 (1981) (quoting *McDonnell Douglas*, 411 U.S. at 802). If the defendant provides a legitimate reason, the presumption is rebutted and the burden shifts back to the plaintiff. *Id.* at 253. The plaintiff may then challenge the defendant's explanation as "a pretext for discrimination," but the plaintiff "retains the burden of persuasion." *Id.* at 253, 256.

Likewise, in the context of excluding jurors, the movant (defendant) must provide evidence that the "circumstances raise an inference that the prosecutor" struck "veniremen from the petit jury on account of their race." *Batson v. Kentucky*, 476 U.S. 79, 96 (1986). The burden then "shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.* at 97. The movant "ultimately carries the 'burden of persuasion' to 'prove the existence of purposeful discrimination.'" *Johnson v. California*, 545 U.S. 162, 170-71 (2005) (quoting *Batson*, 476 U.S. at 93).

In the Fair Housing Act's disparate-impact inquiry, too, the movant (plaintiff) must make a "prima facie showing . . . that a challenged practice caused or predictably will cause a discriminatory effect"—through a material "statistical discrepancy" with a "robust causality requirement." *Inclusive Communities*, 576 U.S. at 527, 542 (citation omitted). The defendant, then, must "explain the valid interest served" by its action, *id.* at 541, and "must not be prevented from achieving legitimate objectives," *id.* at 544. When a defendant provides legitimate, non-discriminatory reasons, the plaintiff retains the burden to prove defendant's action creates "'artificial, arbitrary, and unnecessary barriers.'" *Id.* at 544 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

The Washington Supreme Court's novel standard bears none of the same hallmarks. Other burden-shifting frameworks require the movant to make an affirmative evidentiary showing and allow non-movants to offer race-neutral or non-discriminatory explanations rebutting the prima facie case. *Supra* p.26-27. Here, respondent relies on only legitimate, evidence-based arguments for which there is an appropriate, race-neutral explanation. *Supra*

p.7-10. But the Washington Supreme Court dictated that these explanations are the very basis for presuming racial bias. App.20a, 25a. Other burden shifting frameworks also acknowledge that the ultimate burden of persuasion remains with the movant. *Supra* p.26-27. The Washington Supreme Court, however, demands the non-movant essentially prove an unprovable.

II. The Washington Supreme Court's novel standard violates established Equal Protection Clause precedent by unconstitutionally injecting race-based decisionmaking into judicial proceedings.

The Washington Supreme Court's outlier standard for a new trial based on implicit racial bias similarly violates the Equal Protection Clause. It unconstitutionally "inject[s] racial considerations" into the evaluation of counsel's legitimate, evidence-based arguments. *Inclusive Communities*, 576 U.S. at 543. In so doing, the standard mandates governmental "race-based decisionmaking," which is "inherently suspect" and triggers strict scrutiny. *Miller v. Johnson*, 515 U.S. 900, 915 (1995) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 218 (1995)). The Washington Supreme Court never applied strict scrutiny, which this standard fails in any event.

A. The Washington Supreme Court's standard raises "serious constitutional questions" because it "cause[s] race to be used and considered in a pervasive and explicit manner." *Inclusive Communities*, 576 U.S. at 542-43. And "constitutional wrong occurs when race becomes the dominant and controlling consideration." *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (citation omitted). This is so even when, as here, the government seeks "to counteract unconscious prejudices and disguised animus." *Inclusive*

Communities, 576 U.S. at 540. Ultimately, counsel's legitimate, evidence-based arguments do not "arbitrar[ily] . . . operate invidiously to discriminate on the basis of rac[e]." *Griggs*, 401 U.S. at 431.

Under the Washington Supreme Court's standard, however, trial counsel must now consider race at every turn to avoid allegations of implicit or unconscious bias. For example, trial counsel will have to (1) determine the race of all litigants and witnesses; (2) identify any racial stereotypes and their potential effects on jurors; and (3) then avoid any argument, no matter how race-neutral or evidence-based, if the argument "*could*" evoke an unknowable implicit bias. App.19a. Courts must do the same, placing the race of litigants and witnesses front and center, while evaluating the potential unknowable effects of common, evidence-based arguments. Every aspect of the trial must now be viewed through a racial lens, which "tend[s] to perpetuate race-based considerations rather than move beyond them." *Inclusive Communities*, 576 U.S. at 543; *see Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007) (plurality op. of Roberts, C.J.) (observing that racial classifications "endorse race-based reasoning and the conception of a Nation divided" (citation omitted)).

Beyond that focus on race, the Washington Supreme Court's novel standard prevents trial counsel "from achieving legitimate objectives": defending clients in lawsuits by raising race-neutral, evidence-based arguments. *Inclusive Communities*, 576 U.S. at 544. This, too, raises "serious constitutional questions" because the standard's race-based decisionmaking mandates "the displacement of valid governmental policies" underlying an adversarial judicial system dependent on zealous advocacy. *Id.* at 540.

As explained above (at pp.17-20), each of the closing arguments referenced by the Washington Supreme Court's opinion are precisely the kind made on a regular basis by trial counsel every day across the State and nation. Each pertained to witness credibility, specifically motivation, bias, or conduct and demeanor—all criteria Washington's Pattern Jury Instructions ask juries to consider. Each directly addressed the testimony and evidence presented at trial. And each was neutral as to the race of any litigant or witness.

Washington's standard thus prohibits these common, evidenced-based arguments against some litigants but not others. In one case, counsel can argue that the party or witnesses were financially motivated, combative, biased, or coached—but in another, counsel may not make those same arguments. As a result, in two cases with the same fact pattern, what is permissible will differ depending on race. This violates the "central mandate" of the Equal Protection Clause: "racial neutrality in governmental decisionmaking." *Miller*, 515 U.S. at 904.

B. The Washington Supreme Court's new-trial standard triggers and fails strict scrutiny because it injects race-based decisionmaking throughout judicial proceedings. *E.g.*, *id.* at 915; *Adarand*, 515 U.S. at 220.

"No one doubts that there has been serious racial discrimination in this country." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality op.). And "[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (op. of Powell, J.). But to survive strict scrutiny, race-based governmental decisionmaking first "must serve a compelling

governmental interest," *Adarand*, 515 U.S. at 235, demonstrated by at least a "'strong basis in evidence'" that this particular remedial action is "necessary," *Ricci v. DeStefano*, 557 U.S. 557, 582 (2009) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989), in turn quoting *Wygant*, 476 U.S. at 277 (plurality op.)). Second, it "must be narrowly tailored to further that interest." *Adarand*, 515 U.S. at 235. The Washington Supreme Court improperly eschewed the strict-scrutiny framework mandated by this Court's precedent.

1. The decision below invoked past and broad societal discrimination to justify its new standard, observing that "[r]acism is endemic" and there is a "legacy of injustices built into our legal systems." App.2a, 33a. But it is insufficient for government to simply offer a "generalized assertion that there has been past discrimination," *Croson*, 488 U.S. at 498—or to rely on "societal discrimination," *Wygant*, 476 U.S. at 276 (plurality op.).

Rather, "certain government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a strong basis in evidence that the remedial actions were necessary." *Ricci*, 557 U.S. at 582 (citation omitted). Barring counsel from making race-neutral, evidence-based arguments is not the type of government action that could be justified by this "strong basis in evidence" standard. *Supra* Part I.

Regardless, the Washington Supreme Court did not identify a "strong basis in evidence" establishing that it is "necessary" to prohibit counsel's legitimate, evidence-based arguments. *Ricci*, 557 U.S. at 582 (citation omitted). This is because, "for the governmental interest in remedying past discrimination to be triggered 'judicial,

legislative, or administrative findings of constitutional or statutory violations' must be made." *Croson*, 488 U.S. at 497 (plurality op.) (quoting *Bakke*, 438 U.S. at 307 (op. of Powell, J.)). The court below cited various examples of overt racial bias from other cases, App.14a-15a, briefly included anecdotal cites to an amicus brief, App.13a-14a, and made broad observations about "implicit, institutional, and unconscious biases," App.3a. But "[n]one of these 'findings,' singly or together, provide the [court] with a strong basis in evidence for its conclusion that remedial action was necessary" to bar counsel across Washington from making legitimate arguments at trial. *Croson*, 488 U.S. at 500 (citation omitted).

2. Nor is the Washington Supreme Court's standard "narrowly tailored"—as to either the prima facie threshold or the non-movant's burden to rebut presumed bias. *Adarand*, 515 U.S. at 235.

The prima facie threshold does not provide "adequate safeguards" and "examine with care whether a plaintiff has made out a prima facie case" of racial discrimination. *Inclusive Communities*, 576 U.S. at 543. Instead, it broadly finds a prima facie showing of implicit racial bias by concluding that counsel's legitimate, race-neutral, evidence-based arguments implicitly "*could* evoke racist stereotypes" never once mentioned by counsel. App.24a.

The second half of the standard is likewise exceedingly overinclusive. Requiring the *non-movant* to disprove *presumed* implicit racial bias means this standard will cover all sorts of legitimate arguments rather than just those that "arbitrar[ily] . . . operate invidiously to discriminate on the basis of rac[e]." *Griggs*, 401 U.S. at 431. A narrowly tailored approach would attempt to "redress the wrongs worked by specific instances of racial

discrimination," *Bakke*, 438 U.S. at 307 (op. of Powell, J.)—as Washington courts correctly did in the overt racial bias cases cited by the decision below. App.14a-15a.

III. There are no vehicle issues impeding this Court's review of the important questions presented.

No vehicle issues impede this Court's review of the exceptionally important questions presented. After the Washington Supreme Court created its new standard and remanded for an evidentiary hearing and discovery sanctions, petitioner moved for reconsideration expressly raising both federal due-process and equal-protection arguments. App.50a-51a. The court denied this motion. App.49a.

Although the Washington Supreme Court remanded for further proceedings, the opinion is nevertheless final under 28 U.S.C. § 1257 for at least two independent reasons. First, "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. Second, "the subsequent state court proceedings would themselves deny the federal right for the vindication of which review is sought in the Supreme Court." Stephen M. Shapiro et al., *Supreme Court Practice*, § 3.7, at 3-31 (11th ed. 2019) (collecting cases). If there is any disagreement as to whether the decision below is final under 28 U.S.C. § 1257, that is just another reason this Court should grant review and provide guidance on this important issue.

A. This case falls comfortably within the second category of cases identified in *Cox* where the judgment below is final under 28 U.S.C. § 1257 although further state-court proceedings remain. The important federal due-

process and equal-protection questions presented "will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. This *Cox* category covers cases where "for all practical purposes the ruling on the federal issue is final," as "the state court decision on the federal issue is considered separable and distinct from the subsequent proceedings, so much so that the federal issue will be unaffected and undiluted by the later proceedings." *Supreme Court Practice*, § 3.7, at 3-30 (collecting cases).

This case squarely fits this description. The Washington Supreme Court's new standard will "survive and require decision" regardless of what happens in future state-court proceedings in this case. *Cox*, 420 U.S. at 480. Any evidentiary hearing(s) or new trial(s) yet to occur will not affect or dilute the fact that the Washington Supreme Court's opinion below created an unconstitutional new-trial standard. Any sanctions imposed on remand cannot "moot[]" the federal questions presented here, which remain "independent of" any state-law issues. *Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963) (citation omitted); *New York v. Cathedral Acad.*, 434 U.S. 125, 128 n.4 (1977) (decision "final for purposes of review" where "further proceedings cannot remove or otherwise affect th[e] threshold federal issue"). Even if the trial court on remand orders a new trial either as a discovery sanction or for implicit racial bias (or both), this new trial will operate under the standard set by the opinion below, thereby prohibiting counsel from making certain legitimate arguments and raising the same constitutional infirmities presented here.

As in *Cox*, refusing immediate review not only subjects petitioner to burdensome litigation, but also leaves

countless *other* trial litigants across Washington "operating in the shadow of . . . a rule . . . the constitutionality of which is in serious doubt." 420 U.S. at 486. Allowing the Washington Supreme Court's decision to stand pending further proceedings would "seriously erode federal polic[ies]" enshrined in the Due Process and Equal Protection Clauses, creating an "uneasy and unsettled constitutional posture" for attorneys and litigants forced to try cases under this unconstitutional rule. *Id.* at 483, 485. Courts throughout Washington will be forced to apply this recently established standard in the interim, depriving numerous counsel and parties of legitimate trial arguments.

In short, this case is final and reviewable because the "distinct issue of federal law" raised by the unconstitutional new-trial standard will "survive and require decision no matter how further proceedings" occur on remand. *First English Evangelical Lutheran Church of Glendale v. L.A. Cnty.*, 482 U.S. 304, 309 n.3 (1987).

B. The opinion below is also final under 28 U.S.C. § 1257 because "the subsequent state court proceedings would themselves deny the federal right for the vindication of which review is sought in the Supreme Court." *Supreme Court Practice*, § 3.7, at 3-31. This Court treats decisions as final where the further process to occur in state court itself violates the U.S. Constitution. *E.g.*, *Klopfer v. North Carolina*, 386 U.S. 213, 214-16 (1967). In the analogous 28 U.S.C. § 1291 context, this Court recognizes the same principle. *E.g.*, *Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (Speech or Debate Clause protects individuals "not only from the consequences of litigation's results but also from the burden of defending themselves" (citation omitted)); *Abney v. United States*, 431 U.S. 651, 662 (1977)

(Double Jeopardy Clause question "must be reviewable before that subsequent exposure occurs").

Here, the Washington Supreme Court has ordered proceedings where petitioner bears an improper burden and then cannot make the legitimate, evidence-based arguments already discussed. *Supra* p.16-25. This process deprives petitioner of due-process and equal-protection rights throughout any evidentiary hearing and likely "preordained" retrial. *Cox*, 420 U.S. at 479. And these constitutional violations will occur even in the unlikely event that a new trial is the result of discovery sanctions alone.

Consider what would occur if this Court waited to review the federal questions presented in this petition until the Washington Supreme Court issues a decision with no further state-court proceedings to occur. Petitioner will have to undergo at least one evidentiary hearing at which she is required to essentially prove an unprovable, and she will almost certainly have at least one unconstitutionally imposed retrial in which she cannot deploy numerous legitimate arguments regarding witness credibility or the extent of damages. She will then have to appeal up through the Washington Supreme Court, only to return to this Court raising the same questions presented in this petition.

The Washington Supreme Court's new standard is set in stone until this Court reviews it. It already applies in every state trial courtroom in Washington. And the federal constitutional violations raised here will only get worse if this outlier opinion is adopted by other jurisdictions. So "immediate rather than delayed review" is necessary "to avoid the mischief of economic waste and of delayed justice." *Cox*, 420 U.S. at 477-78 (citation omitted).

CONCLUSION

The Court should summarily reverse the judgment of the Washington Supreme Court. Alternatively, the Court should grant this petition for plenary review, or hold this petition and then grant, vacate, and remand in light of *Students for Fair Admissions*, Nos. 20-1199 & 21-707; or *Haaland*, Nos. 21-376, 21-377, 21-378, & 21-380.

Respectfully submitted.

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FEBRUARY 2023

APPENDIX

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APPENDIX A — Opinion of the Supreme Court of Washington, En Banc, Filed October 20, 2022

SUPREME COURT OF WASHINGTON,
EN BANC

No. 97672-4

JANELLE HENDERSON,

Petitioner,

v.

ALICIA THOMPSON,

Respondent.

March 16, 2021, Argued;
October 20, 2022, Filed

Opinion

MONTOYA-LEWIS, J.

¶1 This court has stated, unequivocally, that we owe a duty to increase access to justice, reduce and eradicate racism and prejudice, and continue to develop our legal system into one that serves the ends of justice. Open Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty. 1 (June 4, 2020), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20

Legal%20Community%20SIGNED%20060420.pdf. Recognizing that a verdict affected by racism violates fundamental concepts of fairness and equal justice under law, we recently held in a criminal case that race-based prosecutorial misconduct can never be "harmless error." *State v. Zamora*, 199 Wn.2d 698, 722, 512 P.3d 512 (2022). Today we emphasize that while the legal framework differs in the civil context, the same principle applies. Racism is endemic, and its harms are not confined to any place, matter, or issue. "We show up with the same melanin in our skin whether it is a civil case or … a criminal case." Wash. Sup. Ct. oral argument, *Henderson v. Thompson*, No. 97672-4 (Mar. 16, 2021), at 56 min., 01 sec. to 56 min., 8 sec., *video recording by* TVW, Washington State's Public Affairs Network, http://www.tvw.org. Whether explicit or implicit, purposeful or unconscious, racial bias has no place in a system of justice.[1] If racial bias is a factor in the

1. *See, e.g.*, *State v. Towessnute*, 197 Wn.2d 574, 575, 486 P.3d 111 (2020) (recalling the mandate of *State v. Towessnute*, 89 Wash. 478, 154 P. 805 (1916), because the 1916 opinion's racist language and conclusions "continue[d] to perpetrate injustice by their very existence"); *Garfield County Transp. Auth. v. State*, 196 Wn.2d 378, 390 n.1, 473 P.3d 1205 (2020) (overturning as incorrect and harmful *Price v. Evergreen Cemetery Co. of Seattle*, 57 Wn.2d 352, 357 P.2d 702 (1960), which permitted a cemetery to refuse to allow a Black family to bury their child there); GR 37(a) (rule intended to eliminate the unfair exclusion of potential jurors based on race or ethnicity); *State v. Berhe*, 193 Wn.2d 647, 665, 444 P.3d 1172 (2019) (adopting the GR 37 objective observer standard to assess whether one could view implicit racial bias as a factor in the jury's verdict, necessitating a new trial); *State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011) (condemning appeals to racial bias as "fundamentally undermin[ing] the principle of equal justice").

decision of a judge or jury, that decision does not achieve substantial justice, and it must be reversed. *See Zamora*, 199 Wn.2d at 721.

¶2 In this case, Janelle Henderson, a Black woman, and Alicia Thompson, a white woman, were involved in a motor vehicle collision. Thompson admitted fault for the collision but made no offer to compensate Henderson for her injuries. Henderson claimed that her preexisting condition was seriously exacerbated by the collision and sued for damages. During the trial, Thompson's defense team attacked the credibility of Henderson and her counsel—also a Black woman—in language that called on racist tropes and suggested impropriety between Henderson and her Black witnesses. The jury returned a verdict of only $9,200 for Henderson. Henderson moved for a new trial or additur on the ground that the repeated appeals to racial bias affected the verdict, yet the trial court did not even grant an evidentiary hearing on that motion. The court instead stated it could not "require attorneys to refrain from using language that is tied to the evidence in the case, even if in some contexts the language has racial overtones." 1 Clerk's Papers (CP) at 180-81.

¶3 That reasoning gets it exactly backward. In ruling on a motion for a new civil trial, "[t]he ultimate question for the court is whether an objective observer (one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State) could view race as a factor in the verdict." *State v. Berhe*, 193 Wn.2d 647, 665, 444 P.3d 1172 (2019). A trial court *must* hold a hearing on a

new trial motion when the proponent makes a prima facie showing that this objective observer could view race as a factor in the verdict, regardless of whether intentional misconduct has been shown or the court believes there is another explanation. At that hearing, the party seeking to preserve the verdict bears the burden to prove that race was not a factor. If that burden is not met, the court must conclude that substantial justice has not been done and order a new trial. CR 59(a)(9). Here, the trial court abused its discretion by failing to grant an evidentiary hearing and also by failing to impose any sanctions for Thompson's discovery violations. We reverse and remand for further proceedings consistent with the framework we announce today.

FACTUAL BACKGROUND

¶4 In June 2014, Thompson rear-ended Henderson's car, injuring Henderson with whiplash. Henderson had a preexisting condition of Tourette's syndrome, a neurological disorder characterized by repetitive, involuntary movements and vocalizations called "tics." She claimed the injury and stress from the collision seriously exacerbated her symptoms, causing aggravated tics and debilitating chronic pain. Henderson filed suit against Thompson, seeking compensation for physical and mental pain and for medical care necessitated by the collision. Thompson admitted that she caused the collision but made no offer in settlement, and the parties proceeded to a jury trial on the question of damages.

Appendix A

A. Trial

¶5 Henderson's lead trial counsel was a Black woman; Thompson's was a white woman. The judge was a white woman, and there were no Black jurors. The only Black people in the courtroom were Henderson, her attorney, and her lay witnesses.

¶6 Henderson testified that she managed her Tourette's syndrome with physical therapy and other medical care for most of her life, but since the collision, her increased symptoms have included new and more intense tics and severe pain. She requested a damages award of approximately $3.5 million, based on an amount of $250 per day and actuarial estimate of her life expectancy.

¶7 Henderson's treating physicians and several friends and family members testified that the injury from the collision had a profound effect on her Tourette's symptoms, pain, and quality of life. In challenging the extent of Henderson's injuries, the defense presented a short surveillance video of Henderson taken about nine months after the collision, where she appeared at work with no observable tics. Two medical experts for the defense opined that any injury from the collision was likely minor and resolved within about nine months, based, in part, on the video.

¶8 Henderson's four lay witnesses each characterized Henderson as active and energetic prior to the accident, despite minor tics like occasional shrugging and coughing. But they said after the collision she was plagued by chronic pain and pronounced tics that prevented her

from exercising and going out in public. Three of her testifying friends and family were Black women, and those witnesses each used the phrase "life of the party" to describe Henderson prior to the collision, in contrast with her condition after the collision. 1 Verbatim Report of Proceedings (VRP) (May 29, 2019) at 344; 2 VRP (May 30, 2019) at 482, 516.

¶9 At closing, defense counsel argued that Henderson and her witnesses were not credible. Henderson points out several instances from Thompson's closing argument as appeals to racial bias.

¶10 First, defense counsel characterized Henderson as "confrontational" and "combative" in her manner of testimony. In describing her cross-examination of Henderson, defense counsel said Henderson "was confrontational with me" and called one of her answers "Ms. Henderson's *challenge*." 3 VRP (June 6, 2019) at 1195-96 (emphasis added). Later, she characterized Henderson as "combative" and therefore not credible: "But when it's my turn to cross-examine her, she's not interested in the search for truth; she's interested in being combative. … You know, it was—it was *quite combative*. There's—there's definitely no search for the truth there." *Id*. at 1222 (emphasis added). Defense counsel also directly contrasted her description of Henderson's demeanor with Thompson's, using similarly charged terms: "By comparison, my client took the stand, obviously feeling, I think, *intimidated and emotional* about the process and—and rightly so, and provided you with—with *genuine and authentic* testimony." *Id*. (emphasis added).

¶11 Second, defense counsel suggested that the only reason for the trial was Henderson's desire for a financial windfall. She said, "It's just a simple car accident; it's a simple rear-end; why are we going through this exercise? And it seems pretty evident that the reason we're going through this exercise is because the ask is for three and a half million dollars." *Id.* at 1195. To put a finer point on it, she suggested that Henderson waited to report the collision to her neurologist until she realized she could profit from the collision: "And she doesn't mention that to her doctor. And you have to ask yourself why. *Is it because $3.5 million hadn't coalesced in her mind yet?*" *Id.* at 1198 (emphasis added). As to the amount of damages, defense counsel called Henderson's calculation of damages at $250 per day "exceptional," but told the jury that if they found that Henderson was injured and her condition was aggravated by the collision, they should apply that value only to the first 8 months of the collision. *Id.* at 1221. She calculated that "by those numbers, that's $60,000 for a rear-end accident. That's a lot of money." *Id.*

¶12 Additionally, she described the testimony of Henderson's friends and family as "inherently biased." *Id.* at 1216. She suggested the Black lay witnesses' shared use of a popular idiom to describe Henderson was a sign of collusion: "I thought it was interesting also that all [three] of those witnesses used the exact same phrase when describing Ms. Henderson before the accident: life of the party. *Almost—almost like someone had told them to say that.*" *Id.* at 1213 (emphasis added). She also underscored the detail that at one point, Henderson's chiropractor gave her a job in his office, as if it suggested some impropriety

in their relationship: "In terms of bias, I thought it was interesting that [her chiropractor] kind of threw out there the tidbit that suggests that nothing untoward, of course, but he has more than just a patient/physician relationship with—with Ms. Henderson." *Id.* at 1206.

¶13 The jury found that Henderson was injured in the collision but awarded her damages of only $9,200. Following the verdict, Henderson was asked to leave the courtroom before the jury returned. This occurred off the record. Henderson and her legal team recall this coming as a request from the jury.

B. Discovery Issues

¶14 This case also presents issues related to violations of the discovery rules. After the collision, Thompson's defense team hired the private investigation company Probe Northwest Inc. to conduct surveillance on Henderson. The defense identified a Probe employee named Tyler Slaeker as an expert witness who "took video recordings of the surveillance." 2 CP at 217.[2] When Henderson issued a subpoena duces tecum for documents regarding surveillance, the defense produced only Slaeker's resume and a 17-minute video of Henderson taken in March 2015.

¶15 When deposed, Slaeker equivocated about whether and how much documentation or other video existed. He

2. The defense repeatedly referred to "video recordings" and "CDs of video surveillance" in the plural, later taking the position that they had done so in error and that the items were actually singular. 2 CP at 217; 1 CP at 72.

believed Probe conducted surveillance on Henderson for about 9 months following the collision, though he followed her only on the day of March 11, 2015. Initially, he said he watched her for over 4 hours and recorded video for about 1 hour; then, he said he recorded for only part of that time. Slaeker also said he had sent surveillance notes via text message to his supervisor, which she used to write a report. But he had no record of the messages, and Thompson's counsel told him the report was privileged. He said he prepared for the deposition by reviewing the 17-minute video and some "notes" for 3 hours, but he equivocated about whether they were his original surveillance notes, the Probe report, or new notes he took while reviewing the video. 1 CP at 40, 64.

¶16 Henderson made numerous attempts to obtain more information about the surveillance on her. The court denied her first motion to exclude Slaeker as a witness or compel him to produce responsive documents under the subpoena duces tecum. The court did order Slaeker to produce the notes that formed the basis of the report, but he never did. When Henderson issued interrogatories and requests for production regarding the surveillance, the defense produced a single responsive document indicating that Probe billed $5,833.68 for 78.83 hours of surveillance on Henderson between July 2014 and March 2015. They claimed the only other person who conducted surveillance on Henderson was the Probe owner, who drove to Henderson's home at one point but took no notes. They provided no information about who conducted the other 70-some hours of surveillance or what they observed.

¶17 Over a year and a half of litigation, despite the court order and Henderson's various attempts to obtain additional information through the discovery rules, the defense never turned over any notes or additional video. When Henderson again moved to exclude Slaeker's testimony or to issue a spoliation instruction for the jury, the trial judge initially granted the instruction. But Thompson moved for reconsideration, and the judge reserved ruling until after Slaeker's testimony, despite noting that "such a failure to keep the raw data is sloppy at best and manipulative at worst." 1 CP at 103. The defense team finally produced what it represented to be the Probe report two weeks before trial, when the court ruled it was not work product.

¶18 At trial, the 17-minute surveillance video was played for the jury, and Slaeker was permitted to testify about his day of surveillance. Neither Slaeker nor Thompson could provide any relevant testimony regarding the document calculating 78.83 hours of surveillance work, the rest of the surveillance, or any withheld evidence. The court eventually ruled that it would not instruct the jury on spoliation, even though it "share[d] Plaintiff's deep suspicion that there is other video out there." 3 VRP (June 4, 2019) at 1145. The court did not impose any sanctions.

C. Procedural History

¶19 After the verdict, Henderson filed a CR 59 motion for a new trial or, in the alternative, for additur for an award of $60,000—the amount defense counsel proposed in closing argument. Henderson argued that the court

erred in failing to give a spoliation instruction regarding the surveillance and, moreover, that defense counsel's "biased statements in closing likely influenced the jury's unconscious bias against plaintiff such that justice was not done." 1 CP at 134. She pointed to the award far below even the amount the defense had suggested and to the request for Henderson to leave the courtroom as evidence showing the appeals to racial bias must have affected the verdict. She and her attorneys also filed declarations recalling the judge saying the jury wanted Henderson to leave the courtroom before they would exit the jury room, which was "humiliating and embarrassing." *Id.* at 172-77.

¶20 The court denied Henderson's motion. With respect to spoliation, the court concluded that there was "scant specific evidence" that additional video or notes had been withheld or destroyed. *Id.* at 179. With respect to the exclusion of Henderson from the courtroom, the judge said it was her own regular practice to ask parties to leave the courtroom before the jury returned after a verdict and not a request by the jury. As to racial bias, the court acknowledged that "using the terms combative in reference to the plaintiff and intimidated in reference to the defendant can raise such bias" but decided "[t]he terms were tied to the evidence in the case, rather than being raised as a racist dog whistle with no basis in the testimony" and "[t]he court cannot require attorneys to refrain from using language that is tied to the evidence in the case, even if in some contexts the language has racial overtones." *Id.* at 180-81.

¶21 This court's decision in *Berhe* was filed the next day. Henderson brought a motion for an evidentiary hearing under *Berhe*, but the court denied her request. She appealed the court's denial of her motions for a new trial and for discovery sanctions; we granted direct review. The Loren Miller Bar Association (LMBA) and the American Civil Liberties Union of Washington, Disability Rights Washington, and the Seattle Chapter of the National Lawyers Guild filed briefs of amici curiae.

ANALYSIS

¶22 We hold that Henderson is entitled to an evidentiary hearing on her new trial motion under CR 59 because she presented a prima facie case that an objective observer could conclude that racial bias was a factor in the jury's verdict. At that hearing, the court must presume racism was a factor in the verdict and Thompson bears the burden of proving it was not. We also hold that the trial court abused its discretion by failing to provide any remedy for Thompson's multiple discovery violations, and that Henderson is entitled to a hearing to assess appropriate sanctions. We reverse and remand for further proceedings consistent with this opinion.

I. Substantial Justice

¶23 We have long recognized that Washington courts have the inherent power to grant a new trial on the ground that substantial justice has not been done. *Cabe v. Dep't of Lab. & Indus.*, 35 Wn.2d 695, 697, 215 P.2d 400 (1950). Indeed, at common law, the right to a jury trial has "existed side

by side for centuries" with the trial judge's "historically inherent power" to set a verdict aside and grant a new trial on the ground that substantial justice has not been done. *Bond v. Ovens*, 20 Wn.2d 354, 356-57,147 P.2d 514 (1944). We have described this power to grant a new trial when substantial justice has not been done not only as within a trial judge's *authority* but as part of their affirmative *duty*. *See, e.g.*, *Severns Motor Co. v. Hamilton*, 35 Wn.2d 602, 604, 214 P.2d 516 (1950); *Potts v. Laos*, 31 Wn.2d 889, 897, 200 P.2d 505 (1948); *Brammer v. Lappenbusch*, 176 Wash. 625, 631, 30 P.2d 947 (1934). Courts retain this inherent power, even while court rules and statutes codify it. *Brammer*, 176 Wash. at 629-32; CR 59(a)(9). We review a trial court's decision on a motion for a new trial for abuse of discretion. *Turner v. Stime*, 153 Wn. App. 581, 588, 222 P.3d 1243 (2009).

¶24 Our commitment to substantial justice rings hollow if we fail to recognize that racial bias often interferes with achieving justice in our courts.[3] The LMBA amicus briefing shares perspectives from its members, demonstrating that racial bias continues to affect litigants' ability to receive a fair and impartial civil trial. Its members "have witnessed the effect of bias in Washington's courts and suffered

3. *See* Derrick A. Bell, Jr., *Racism In American Courts: Cause For Black Disruption Or Despair?*, 61 Cal. L. Rev. 165, 165-66 (1973) ("Perhaps unconsciously, those who have major authority in the legal process tend to underplay the seriousness of racism in the judicial system, acknowledging the need for more progress, while extolling the elimination of overt segregation in the courts. These attitudes show little understanding of the continuing impact of racial bias on [B]lack victims of judicial injustice.).

humiliation, condescension, and contempt expressed or allowed by judges in the courtroom. They have been improperly referenced during court proceedings, singled out, and had their expertise questioned due to bias." Amicus Curiae Br. of LMBA at 5-6. This kind of treatment diminishes the legal profession by continuing to tell lawyers of color that their presence seems unusual and surprising. It also undermines litigants' rights.[4] For example, "[o]ne [LMBA] member described how they must consider not only how the jury will perceive their civil clients but also the biases opposing counsel may seek to use to undermine a person's credibility; it is difficult when members hear colleagues say, 'she is very Black—how will she come off to the jury?'" *Id.* at 7; *see also Turner*, 153 Wn. App. at 592-93 (recognizing juror misconduct involving racial bias directed at an attorney likely affected the verdict).

¶25 Washington courts have recognized that racist misconduct by the prevailing party or jurors may justify a new trial under CR 59(a)(2). For example, in 1931, this court ordered a new trial when a white attorney in a civil case argued for a verdict against a company based in Japan because "'we don't like Japanese [people] and they don't like us.'" *Schotis v. N. Coast Stevedoring Co.*, 163 Wash. 305, 316, 1 P.2d 221 (1931) (quoting the record). More recently, we ordered a new criminal trial when the prosecutor

4. *Cf. In re Takuji Yamashita*, 30 Wash. 234, 70 P. 482 (1902) (denying a bar applicant's admission on the basis of race), *disapproved*, 143 Wn.2d xxxiii-lix (2001); *People v. Hall*, 4 Cal. 399, 404-05 (1854) (excluding the testimony of witnesses of color on the basis of race).

exaggerated the pronunciation of the word "police" as "'po-leese'" and argued that Black witnesses were not credible because "'[B]lack, folk don't testify against [B]lack folk.'" *State v. Monday*, 171 Wn.2d 667, 671-74, 257 P.3d 551 (2011) (quoting the record). We strengthened the rule in *Monday* just last term by recognizing that appeals to racial bias that affect a verdict are not subject to review for harmless error—they require reversal. *Zamora*, 199 Wn.2d at 721. In *Zamora*, we vacated convictions after a prosecutor repeatedly invoked negative stereotypes about Latinx people, immigration, and crime during voir dire, with the apparent purpose to highlight the defendant's perceived ethnicity. *Id.* at 719.

¶26 The Court of Appeals has also affirmed the grant of a new trial based on racial bias in a civil case, where during deliberations some jurors referred to counsel, who was of Japanese descent and whose last name was "Kamitomo," as "'Mr. Kamikazi' or 'Mr. Miyashi' or 'Mr. Miyagi.'" *Turner*, 153 Wn. App. at 585-86 (quoting the record). Similarly, the Court of Appeals ordered a new trial for the Black defendant in *State v. Jackson*, where a Black juror overheard a white juror discussing how he disliked "'socializ[ing] with the coloreds [sic],'" because, "[p]resumptively, these statements demonstrated that juror X held certain discriminatory views which could affect his ability to decide Jackson's case fairly and impartially." 75 Wn. App. 537, 540, 543, 879 P.2d 307 (1994) (quoting the record). Each of these cases underscores that a new trial is warranted when racial bias is likely to have influenced a verdict.

¶27 While racial bias is often analyzed in terms of misconduct by the jury or the party who prevails at trial, this case demonstrates why CR 59(a)(2) cannot address every instance of racism in our civil justice system.[5] Racial bias can affect a verdict even when it is not the product of intentional misconduct by the prevailing party or jury. "Not all appeals to racial prejudice are blatant. Perhaps more effective but just as insidious are subtle references."[6] *Monday*, 171 Wn.2d at 678. Coded "dog whistle" language impermissibly allows the speaker to appeal to racial bias and then excuse that behavior by arguing they did not

5. CR 59(a)(2) permits a new trial on the basis of "[m]isconduct of prevailing party or jury." Under that part of the rule, a new trial is warranted when "(1) the conduct complained of is misconduct, (2) the misconduct is prejudicial, (3) the moving party objected to the misconduct at trial, and (4) the misconduct was not cured by the court's instructions." *Teter v. Deck*, 174 Wn.2d 207, 226, 274 P.3d 336 (2012). That basis for a new trial contains procedural prerequisites that may render it inapplicable here. In particular, Henderson is the prevailing party, as the jury rendered a small judgment in her favor.

6. For example, racial microaggressions are "often carried out in subtle, automatic, or unconscious forms," but their cumulative effects take a toll both psychologically and physiologically. Daniel G. Solórzano & Lindsay Pérez Huber, Racial Microaggressions: Using Critical Race Theory to Respond to Everyday Racism 34 (James A. Banks ed., 2020). "For example, those targeted by everyday racism can become angry or frustrated and develop feelings of self-doubt; their blood pressure may rise and their heart rate may increase. Over time, they may develop more serious symptomatic conditions such as hypertension, depression, and anxiety." *Id.* at 42 (citations omitted) (citing studies). "Some studies have attributed more fatal conditions such as cardiovascular disease and even increased morbidity to race-related stressors such as microaggressions." *Id.* at 43 (citing studies).

intend to say anything racist.[7] *See id.* at 678-79 ("Like wolves in sheep's clothing, a careful word here and there can trigger racial bias." (citing studies)).

¶28 Moreover, racial bias "can influence our decisions without our awareness," making it uniquely pernicious because "people will act on … bias far more often if reasons exist giving plausible deniability." *Berhe*, 193 Wn.2d at 657; *State v. Saintcalle*, 178 Wn.2d 34, 49, 309 P.3d 326 (2013) (plurality opinion) (citing studies), *abrogated on other grounds by City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017); *see also* Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 Yale L.J. 1717, 1757-61, 1764-69 (2000) (describing how discrimination models that centralize intent fail to address many forms of racism); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 330 (1987) ("[Racism] is a part of our common historical experience and, therefore, a part of our culture. It arises from the assumptions we have learned to make about the world, ourselves, and others as well as from the patterns of our fundamental social activities. …

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7. The term "dog whistle" refers to speaking in code to a target audience, where the use of coded language permits the speaker to claim plausible deniability as to that objective. Ian Haney López, Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism & Wrecked the Middle Class 4 (2014). See Adam R. Shapiro, *The Racist Roots of the Dog Whistle*, WASH. POST, Aug. 21, 2020, https://www.washingtonpost.com/outlook/2020/08/21/racist-roots-dog-whistle/ [https://perma.cc/59C3-JKYG], for a discussion of the origins and evolution of this term.

We attach significance to race even when we are not aware that we are doing so."). Courts must therefore focus on the effect of racially biased comments or actions, not the intent of the actor, when evaluating whether a verdict has been affected by racism. By focusing on whether substantial justice has been achieved, CR 59(a)(9) provides the appropriate lens for assessing the effect of racial bias instead of the intent of any individual in determining whether a new trial is warranted. A verdict affected by racial bias is incompatible with substantial justice and requires a new trial under CR 59(a)(9).

¶29 Henderson appropriately invokes CR 59(a)(9) as one basis for her new trial motion. She argues that substantial justice has not been done because defense counsel's comments during cross-examination and closing arguments that drew on racial stereotypes, along with the jury's astonishingly small award and the request to remove Henderson from the courtroom, support the conclusion that appeals to racial bias affected the verdict.

A. The *Berhe* Inquiry

¶30 This court recently announced, in a criminal case, a two-step inquiry for determining whether racial bias has affected the verdict. *Berhe*, 193 Wn.2d at 665-69. Under *Berhe*, the court must grant an evidentiary hearing upon a prima facie showing of evidence that, if "taken as true, permits an inference that an objective observer who is aware of the influence of implicit bias could view race as a factor in the jury's verdict." *Id.* at 666. This standard speaks to possibility, not certainty, and to impact, rather than intent.

¶31 Civil and criminal litigants are equally entitled to a trial by an unbiased jury. Contrary to Thompson's contention, the right to a trial by an unbiased jury is not limited to those accused of committing crimes. "'The right to trial by jury includes the right to an unbiased and unprejudiced jury, and a trial by a jury, one or more whose members is biased or prejudiced, is not a constitutional trial.'" *Mathisen v. Norton*, 187 Wash. 240, 245, 60 P.2d 1 (1936) (civil case) (quoting *Alexson v. Pierce County*, 186 Wash. 188, 193, 57 P.2d 318 (1936) (civil case)); *see also Allison v. Dep't of Lab. & Indus.*, 66 Wn.2d 263,265, 401 P.2d 982 (1965) (civil case). "An 'impartial jury' means 'an unbiased and unprejudiced jury,' and allowing bias or prejudice by even one juror to be a factor in the verdict violates a defendant's [or a plaintiff's] constitutional rights and undermines the public's faith in the fairness of our judicial system." *Berhe*, 193 Wn.2d at 658 (quoting *Alexson*, 186 Wash. at 193). There is no reason to hold our state's courts to any lower standard than the "objective observer" articulated in GR 37 or to tolerate a lesser standard of justice in a civil setting than what we require in a criminal setting under *Berhe*.

¶32 Therefore, we apply a similar framework when a civil litigant seeks a new trial on the basis that racial bias affected the verdict. We hold that upon a motion for a new civil trial, courts must ascertain whether an objective observer who is aware that *implicit, institutional, and unconscious biases, in addition to purposeful discrimination*, have influenced jury verdicts in Washington State *could* view race as a factor in the verdict. *See id.* at 665. When a civil litigant makes a prima

facie showing sufficient to draw an inference of racial bias under this standard, the court must grant an evidentiary hearing to determine if a new trial is warranted. *Id*. at 665-66. At the hearing, the trial court is to presume that racial bias affected the verdict, and the party benefiting from the alleged racial bias has the burden to prove it did *not*. *Cf. Monday*, 171 Wn.2d at 680 (placing the burden of proof on the State when a prosecutor allegedly appeals to racial bias). If they cannot prove that racial bias had no effect on the verdict, then the verdict is incompatible with substantial justice, and the court should order a new trial under CR 59(a)(9).

¶33 We conclude that Henderson has made a prima facie showing that an objective observer could view race as a factor in the verdict, and the trial court erred in denying an evidentiary hearing. We take this opportunity to provide guidance on how this prima facie showing should be assessed.

B. Henderson Has Established a Prima Facie Case

¶34 Henderson alleges that Thompson's counsel primed the jurors with appeals to racial bias throughout the trial. Henderson points to numerous instances that permit an inference that an objective observer could conclude race was a factor in the verdict. *Berhe*, 193 Wn.2d at 666. For example, defense counsel repeatedly characterized Henderson as "combative" and "confrontational." These terms evoke the harmful stereotype of an "angry Black woman." *See* Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility:*

Deconstructing the Trope of the Angry Black Woman, 102 Iowa L. Rev. 2017, 2049 (2017). This harmful negative stereotype affects the way others perceive and interact with Black women, and it can have significant negative social and interpersonal consequences for Black women, including influencing their experience and reasonable expression of anger.

¶35 Defense counsel also directly contrasted Henderson with Thompson, describing Thompson as, "[b]y comparison, … intimidated and emotional about the process and—and rightly so, and provid[ing] … genuine and authentic testimony." 3 VRP (June 6, 2019) at 1222. The direct contrast between defense counsel's depiction of Henderson as "confrontational" and "combative" and her depiction of Thompson as "rightly" "intimidated" and "emotional" distorted the roles of plaintiff and defendant, casting Thompson—the person responsible for injuring Henderson—in the role of the victim to whom the jury owed more sympathy than the actual injured party. This invited the jury to make decisions on improper bases like prejudice or biases about race, aggression, and victimhood.[8]

¶36 During closing arguments, Thompson's counsel alluded to racist stereotypes about Black women as untrustworthy and motivated by the desire to acquire an unearned financial windfall. Defense counsel argued that Henderson's injuries were minimal and intimated that the

8. *See* Megan Armstrong, *From Lynching to Central Park Karen: How White Women Weaponize White Womanhood*, 32 Hastings Women's L.J. 27, 32-42 (2021).

sole reason she had proceeded to trial was that she saw the collision as an opportunity for financial gain. *Id.* at 1195 ("And it seems pretty evident that the reason we're going through this exercise is because the ask is for three and a half million dollars."), 1198 (arguing that Henderson did not inform one of her doctors about the collision soon enough "because $3.5 million hadn't coalesced in her mind yet"). Defense counsel's argument that Henderson was exaggerating or fabricating her injuries appealed to these negative and false stereotypes about Black women being untrustworthy, lazy, deceptive, and greedy.[9] Presenting a case in this way can allow jurors to make decisions on impermissible grounds rooted in prejudice or biases about race and money.

¶37 Additionally, defense counsel relied on racist stereotypes about Black people and us-versus-them descriptions to undermine the credibility of Henderson and her witnesses. For example, defense counsel suggested that Henderson had probably asked her friends and family to lie for her, as evidenced by their shared use of a popular idiom—"life of the party"—to describe her. *Id.* at 1213.

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9. *See* Marilyn Yarbrough & Crystal Bennet, *Cassandra and the "Sistahs": The Peculiar Treatment of African American Women in the Myth of Women as Liars*, 3 J. Gender Race & Just. 625, 636-39 (2000) (describing the myths of the "Jezebel" and the "welfare queen," among others). The myth of the "welfare queen" refers to a woman who purposefully "shuns work" in order to live off public benefits, "a non-existent social phenomenon based on a singular incident of abuse of welfare benefits by one woman in Chicago in the 1970s." *Id.*; Brittney Cooper, Eloquent Rage: A Black Feminist Discovers Her Superpower 197 (2018) (explaining the harm of the "welfare queen" myth).

This argument was akin to the prosecutorial misconduct we condemned in *Monday*, where the prosecutor asserted that Black witnesses were unreliable because there was a "code" that "'[B]lack folk don't testify against [B]lack folk.'" 171 Wn.2d at 676 (quoting the record). Intimating that the Black witnesses had joined together to lie for the Black plaintiff could invite jurors to suspect them as a group and to make decisions based on biases about race and truthfulness. Similarly, defense counsel argued that Henderson's chiropractor was likely to lie for her because they had more than just a doctor-patient relationship, implying that hiring her to work in his office demonstrated impropriety in their relationship. This strategy could open the door to speculation that plays directly on prejudice or biases about race and sexuality.

¶38 Trial judges abuse their discretion in denying an evidentiary hearing on a motion for a new trial when presented with a prima facie showing that an objective observer could view race as a factor in the verdict. *Berhe*, 193 Wn.2d at 665. Courts have an *obligation* to ensure that trials are conducted fairly and to recognize when substantial justice has not been done. *Id.* at 661-62; *Severns Motor Co.*, 35 Wn.2d at 604. In this case, the trial judge acknowledged that the comments defense counsel made in closing had "racial overtones" "in some contexts" but then failed to engage in any analysis of what effect the racially coded language could have had on the jury. 1 CP at 181. This was an opportunity missed to apply that acknowledgement to the case and to recognize how an objective observer could view the defense's comments as causing racial bias to become a factor in the verdict. *Berhe*, 193 Wn.2d at 665.

¶39 Rather than considering the perspective of the objective observer under *Berhe*, the trial court judge viewed the facts from her own perspective. She agreed with Thompson's counsel that it was fair to describe Henderson's demeanor during cross-examination as "combative" and "confrontational," opining that this language should be excused because the term was "race neutral" and tied to the evidence. Br. of Resp't at 34-39; 1 CP at 180. Paradoxically, the trial court also acknowledged that "using the terms combative in reference to the plaintiff and intimidated in reference to the defendant *can* raise such bias." 1 CP at 180 (emphasis added). As this court explained in *Berhe*, a race-neutral alternative explanation does not excuse the effect of language that appeals to racial bias. 193 Wn.2d at 666.

¶40 When a participant in the trial uses language that *could* evoke racist stereotypes, courts should not presume that such language has no effect—on them or on the jurors. The harm in an appeal to racial bias is in its effect on the decision-maker, regardless of the intent behind the reference, because "people will act on … bias far more often if reasons exist giving plausible deniability." *Saintcalle*, 178 Wn.2d at 48-49. Indeed, trial courts should be deeply concerned about the possibility that racism has affected any trial, and courts should grant a new trial when an objective observer *could* conclude that racism was a factor in the verdict. *Cf. State v. Lahman*, 17 Wn. App. 2d 925, 938, 488 P.3d 881 (2021).

¶41 An objective observer could conclude that the themes and arguments advanced by defense counsel

suggested Henderson and her witnesses were not credible because of their race, and considering the totality of the circumstances of this trial, an objective observer could therefore conclude that racism affected the verdict. *Berhe*, 193 Wn.2d at 666. Henderson has established a prima facie case entitling her to an evidentiary hearing on her motion for a new trial.

C. The Burden at the Hearing

¶42 When a party raises a prima facie claim that racial bias affected the verdict, the court must hold a hearing to determine whether an objective observer under the GR 37 standard could conclude that racial bias was a factor in the verdict. *Id.*; CR 59(e). If the evidence, taken as true, permits an inference that an objective observer could reach this conclusion, the party has made a prima facie showing that a new trial should be ordered. *Berhe*, 193 Wn.2d at 666. At that juncture, the trial court must presume that it affected the verdict, and the party allegedly responsible for introducing the appeals to bias has the burden to prove it did not affect the verdict. *Cf. Monday*, 171 Wn.2d at 680 (placing the burden on the State to prove that prosecutorial misconduct did not affect the verdict in a criminal case). If the party that benefited from an appeal to racial bias cannot prove it did not affect the verdict, then substantial justice has not been done, and the court must order a new trial. As in the criminal context, where racial bias has had an effect on the verdict, we will not consider any claim that the error was harmless. *Zamora*, 199 Wn.2d at 721.

¶43 Applying this standard, we reverse the decision below and remand for the trial court to conduct a hearing on Henderson's motion for a new trial. On remand, Henderson's case should be reassigned to a different judge in light of the opinions the judge has already expressed as to the reasons for Thompson's counsel's behavior, as well as the reasons Henderson was excluded from the courtroom when the jury returned its verdict. *State v. McEnroe*, 181 Wn.2d 375, 387, 333 P.3d 402 (2014) (A case may be reassigned if "the trial judge will exercise discretion on remand regarding the very issue that triggered the appeal and has already been exposed to prohibited information, expressed an opinion on the merits, or otherwise prejudged the issue." (footnotes omitted)).

¶44 We next turn to Henderson's claim that the trial court erred by refusing to consider sanctions for Thompson's discovery violations.

II. Discovery Sanctions

¶45 "[A] spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 342, 858 P.2d 1054 (1993). Our civil rules require parties to engage in discovery in good faith and provide sanctions for violations of the rules. CR 26, 37. Parties "must *fully* answer all interrogatories and all requests for production, unless a specific and clear objection is made." *Fisons*, 122 Wn.2d at 354 (citing CR 33(a), 34(b)). Our liberal discovery rules aim to make civil trials "'a fair contest with the

basic issues and facts disclosed to the fullest practicable extent.'" *Id.* at 342 (internal quotation marks omitted) (quoting *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 280, 686 P.2d 1102 (1984)). "'This system obviously cannot succeed without the full cooperation of the parties,'" so courts have authority to deter "'unjustified or unexplained resistance to discovery'" through sanctions. *Id.* (quoting *Gammon*, 38 Wn. App. at 280). The sanction rules grant judges considerable discretion "'to determine what sanctions are proper in a given case'" in order to "'reduce the reluctance of courts to impose sanctions.'" *Id.* at 339 (internal quotation marks omitted) (quoting *Cooper v. Viking Ventures*, 53 Wn. App. 739, 742-43, 770 P.2d 659 (1989)).

¶46 When a party intentionally withholds or destroys evidence, the trial court may issue a spoliation instruction for the jury to draw an inference that the missing evidence would be unfavorable to the party at fault. *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977) ("[W]here relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and [they] fail[ ] to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to [them]."). Courts consider the potential importance or relevance of the missing evidence and the culpability of the adverse party. *Henderson v. Tyrrell*, 80 Wn. App. 592, 607, 910 P.2d 522 (1996). The culpable conduct "must be connected to the party against whom a sanction is sought." *Cook v. Tarbert Logging, Inc.*, 190 Wn. App. 448, 462, 360 P.3d 855 (2015).

Courts consider "[w]hether destruction of the evidence gave the culpable party an investigative advantage." *Id.* Sanctions decisions are reviewed for an abuse of discretion involving a decision that is manifestly unreasonable or based on untenable grounds. *Fisons*, 122 Wn.2d at 338-39.

¶47 Here, Henderson sought information about Probe's surveillance throughout the discovery period—repeatedly, using multiple mechanisms provided in the civil rules. Henderson issued a subpoena duces tecum and deposed Slaeker, the person the defense team identified as responsible for the surveillance video. When Slaeker indicated that his notes informed a report on Probe's surveillance of Henderson, Henderson served interrogatories and requests for production seeking the report. But the defense team avoided producing any additional information and evaded a court order directing it to do so. They produced the purported report over a year later, just two weeks before trial—only after a court order ruling it was not privileged—and too late for Henderson to conduct additional discovery. Henderson had no opportunity to verify its contents or authorship. *Cf. Cook*, 190 Wn. App. at 462; *Henderson*, 80 Wn. App. at 607-08. This is, by definition, prejudice to the litigant.

¶48 Additionally, Slaeker repeatedly stated he reviewed notes that were in existence at the time of his deposition. Slaeker equivocated about which notes these were, but he was consistent about the fact that he used some surveillance-related documentation to prepare for the deposition for hours—documentation that was never produced to Henderson.

¶49 Last, the defense produced a document indicating that Probe conducted more than 78 hours of surveillance on Henderson over a period of 9 months and repeatedly indicated that multiple surveillance recordings existed; yet, the defense never produced more than the 17 minutes of video from March 15, 2011. They never provided an explanation for why there was no video from any other day of surveillance in those 9 months. Even if there truly was no other video beyond what the defense produced, almost all of the 78 hours of surveillance remained unaccounted for. The absence of any additional surveillance video conflicts with Slaeker's testimony that he had handwritten notes and text messages (that he did not produce) from those hours of surveillance. If he did not see Henderson during that surveillance and saw her only for the 17 minutes of video produced, there seems to be no need to take detailed, but unproduced, notes nor any need to have discussions via text message.

¶50 It is difficult to conceive of what more Henderson could have done to identify the evidence she was seeking, determine that it was discoverable, and utilize the rules of civil procedure to obtain the material. *Cf. Fisons*, 122 Wn.2d at 354. Rather than meeting the expectation of cooperation and forthrightness we require in our civil legal system, the defense took advantage of every opportunity to avoid complying with Henderson's very clear and reasonable requests. *Id.* at 342. There is no doubt that Thompson's defense team understood the relevance and significance of the video. *Cook*, 190 Wn. App. at 462. Particularly given how the defense team continued to behave toward Henderson and her legal team at trial,

it is difficult to explain this conduct as anything other than a pattern of underestimating and undervaluing the position of both Henderson and her counsel. *See* Frank M. McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 Rutgers L. Rev. 761, 761-74, 795-96 (1996) (explaining how private attorneys often improperly consider the race of both plaintiffs and their attorneys in evaluating the value of tort cases). Even absent the later appeals to racial bias during trial, this kind of obstructionist discovery behavior would typically incur sanctions ranging from limitations of the use of the material at trial, instructions to the jury on spoliation, monetary sanctions against the party engaging in these tactics, or, in the most egregious of circumstances, dismissal of the matter entirely. *Henderson*, 80 Wn. App. at 605 ("the severity of a particular act … determines the appropriate remedy").

¶51 Henderson demonstrated prejudice resulting from the defense's refusal to produce any additional surveillance-related evidence. As Henderson's claim involved a preexisting condition that was aggravated by the collision, the defense's strategy was to prove that her symptoms had either remained in or returned to a relatively manageable status. The 17-minute surveillance video depicting Henderson at work with no observable tics could be viewed as strong evidence that she was not suffering 9 months after the collision, and it formed the basis of the defense experts' opinions to that effect. Without any information about what the other 9 months of surveillance revealed, Henderson was completely unable to show that those 17 minutes were not representative of how she was managing

after the collision. Given that the withheld evidence would have been crucial to Henderson's ability to challenge the 17-minute surveillance video and the defense's repeated refusals to comply with Henderson's many clear requests, we agree that a spoliation instruction should have issued and that some additional sanction also would have been proper. Instead, the trial court chose not to sanction the defense's conduct at all, resulting in an effective endorsement of the defense team's conduct.

¶52 Trial courts have wide latitude to determine what sanctions are appropriate. *Fisons*, 122 Wn.2d at 355. Henderson has continued to request sanctions under *Fisons* for the defense team's conduct during discovery, and she also argues that the defense should be sanctioned for making appeals to racial bias throughout trial. Sanctions are mandatory when a party violates a civil rule. *Id*. The court should determine the severity of the sanction commensurate with the severity of the wrongdoing in order to serve the purposes of sanctions "to deter, to punish, to compensate[,] and to educate." *Id.* at 356. Intent is not a prerequisite to imposing sanctions, though the court may take the wrongdoer's state of mind into account when determining the severity of the sanctions to impose. *Id*. at 345, 356. When the court finds intent to spoil or hide evidence—which appears likely to have occurred here—the more severe sanctions would be appropriate. Sanctions can range from reprimands,[10]

10. *See Miller v. Badgley*, 51 Wn. App. 285, 303, 753 P.2d 530 (1988).

excluding evidence,[11] instructions on negative inference,[12] default judgment or dismissal,[13] or monetary sanctions on the party, attorney, or firm.[14] While some delaying tactics might be common in civil trials, the degree of the defense team's refusal to cooperate in this case was egregious. Thompson's defense team failed to produce relevant evidence despite Henderson's counsel's painstaking efforts to obtain it through the discovery rules. Ultimately, it is the trial court's role to determine what sanctions should be imposed and against whom. *Id.* at 355. We therefore remand to the trial court to determine whether to impose sanctions up to and including a new trial excluding the surveillance video, Slaeker's testimony, or both, as well as reasonable costs and attorney fees for the first trial.[15] *Id.*

CONCLUSION

¶53 Our legal system is based on the premise of judicial neutrality, procedural fairness, and equal treatment. We

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11. *See Scott v. Grader*, 105 Wn. App. 136, 142, 18 P.3d 1150 (2001).

12. *See Henderson*, 80 Wn. App. at 606-07.

13. *See Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 583-84, 220 P.3d 191 (2009); *Rivers v. Wash. State Conf. of Mason Contractors*, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002).

14. *See Fisons*, 122 Wn.2d at 356; *Madden v. Foley*, 83 Wn. App. 385, 392, 922 P.2d 1364 (1996).

15. The trial court may consider in its sanctions analysis these pretrial discovery violations as well as defense counsel's conduct during trial.

know our system has not lived up to its promises, even as we have reaffirmed our commitment to them. The legal system is made up of people—lawyers, judges, jurors, and others—and it shares in our human strengths and weaknesses. All of us have the capacity to push our system closer to the ideals and promises of justice; we also have the ability to continue to perpetuate harm. To turn our system squarely toward fairness requires conscious effort and honesty when we fail.

¶54 Courts take a step toward achieving greater justice when the people who comprise them comprehend the legacy of injustices built into our legal systems, actively work to prevent racism before it occurs, and also recognize how our participation in these systems may reify them. One way judges can do so is to ensure that we bring reality into sharp focus in our legal analysis. When a new trial is sought on the ground that racial bias affected the verdict, the facts must be viewed through the lens of an objective observer who is aware "that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State." *Berhe*, 193 Wn.2d at 665. In a hearing based on prima facie evidence that racial bias possibly affected the verdict, the court must presume that it did and the party seeking to uphold the verdict must prove how it did not. If they cannot prove that racial bias was not a factor, that verdict is fundamentally incompatible with substantial justice. We reverse and remand to the trial court for further proceedings consistent with this opinion.

GONZÁLEZ, C.J., and JOHNSON, MADSEN, OWENS, STEPHENS, YU, and WHITENER, JJ., concur.

GORDON McCLOUD, J. (concurring)

¶55 GORDON MCCLOUD, J. (concurring) — I agree with the majority's conclusion that misconduct tainted the discovery process and that racism against the Black female plaintiff, Janelle Henderson, tainted the jury trial. I also agree with the majority's decision that the remedy for Henderson's prima facie showing that racial bias was a factor in the verdict is a trial court evidentiary hearing in which the defendant bears the burden to prove that it was not such a factor. And I further agree with the majority's direction to the trial court to determine the appropriate sanctions for defendant's discovery violations.

¶56 I write separately only to express disagreement with the majority's characterization of certain aspects of defense's closing argument. As the majority notes, three of Henderson's lay witnesses used an identical phrase, "life of the party," to describe Henderson before the accident. Majority at 424. In closing argument, defense counsel argued that the witnesses' shared use of this phrase suggested that they coordinated their testimony in advance of trial. 3 Verbatim Report of Proceedings (June 6, 2019) at 1213.

¶57 The majority characterizes this argument as an impermissible appeal to racial bias and compares it to the prosecutorial misconduct we condemned in *State v. Monday*, 171 Wn.2d 667, 678-79, 257 P.3d 551 (2011).

Majority at 437. In that case, the prosecutor explicitly argued that Black witnesses were unreliable because there was a "code" that "'[B]lack folk don't testify against [B]lack folk.'" *Monday*, 171 Wn.2d at 676 (quoting the record). We condemned the prosecutor's argument because there was no evidence in the record to support it and because it amounted to an "attempt to discount several witnesses' testimony on the basis of race alone." *Id.* at 678.

¶58 By contrast, in this case, the defense used testimony in evidence in order to attack the witnesses' credibility by suggesting prior planning. In other words, there was evidentiary support for the limited argument that these three witnesses' testimony suggested that they might have coordinated their approach. In my view, that limited argument was not an improper appeal to racial bias.

¶59 Similarly, I believe that parties must be able to explore witnesses' financial and other interests that might undermine their credibility. For that reason, I disagree with the majority's conclusion that it was an improper appeal to racial bias for defense counsel to argue that the trial was all about "Henderson's desire for a financial windfall." Majority at 425.[16]

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16. I do not read the majority's decision to undermine our precedent concerning the importance of probing cross-examination designed to address witness credibility. Our adversarial system requires courts to permit searching cross-examination of witnesses to test their perception, recall, and reliability. *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."); *Anderson*

¶60 I nevertheless agree with the majority that the balance of the transcript provides a prima facie showing that the trial was infected with racial bias. I therefore fully join the rest of the opinion.

MADSEN, J., concurs with Gordon McCloud, J.

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v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 607, 260 P.3d 857 (2011) ("[E]vidence is tested by the adversarial process within the crucible of cross-examination, and adverse parties are permitted to present other challenging evidence." (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993))); *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).

APPENDIX B — Order of the Superior Court of the State of Washington in and for the County of King, Dated August 7, 2019

IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JANELLE HENDERSON,

Petitioner,

v.

ALICIA THOMPSON,

Respondent.

No. 17-2-11811-7 SEA

ORDER DENYING MOTION FOR EVIDENTIARY HEARING

Plaintiff moves the court for an evidentiary hearing pursuant to *State v. Berhe*, 2019 WL 3227312, to determine if the jurors were influenced by racial bias during their deliberations.

The Plaintiff's motion is DENIED. Although the Plaintiff is concerned about implicit bias because of the discrepancy between the verdict and the request for damages, as well as Plaintiff's belief that defense

counsel used language that would trigger implicit bias, the circumstances in this case are significantly different than those in *Berhe*. In *Berhe*, the sole African-American juror alleged juror misconduct due to racial bias against her. Specifically, the juror signed a declaration to the court that stated she did not agree with the verdict, that she believed her viewpoints were marginalized because of her race, and that "[she] felt emotionally and mentally exhausted from the personal and implicit race-based derision from the other jurors." The juror further declared that she felt mocked in a way the other dissenting jurors were not mocked and she felt physically intimidated. The trial court held a hearing where the court considered a declaration from the African-American juror, as well as several white jurors who denied racial bias against the offended juror and denied observing anything that was racially biased. The trial court essentially weighed all the jurors' credibility in finding an evidentiary hearing was unnecessary. The Washington Supreme Court found the information provided by the juror necessitated an evidentiary hearing to determine if racial bias influenced deliberations.

In this case, however, the plaintiff fails to establish a prima facie case or any specific basis for an evidentiary hearing. Other than the verdict being significantly less than plaintiffs request, and the allegation that defense used racially coded language, there is no specific evidence that implicit bias was the cause of the verdict[1]. There are

1. In plaintiff's reply brief, she asserts that after the verdict the jury requested that Ms. Henderson wait outside when the jury left to allow the jury to speak with counsel if they wished.

no declarations from any of the jurors that raises the issue of implicit bias. The court has already found defense counsel's arguments to be tied to the evidence, rather than being used as a racist dog whistle. A low verdict is not enough to pierce the veil of jury deliberations.

> Central to our jury system is the secrecy of jury deliberations. Courts are appropriately forbidden from receiving information to impeach a verdict based on revealing the details of the jury's deliberations ... [F]acts that link to the juror's motive, intent, or belief, or describe their effect upon the jury inhere in the verdict and cannot be considered. This includes facts touching on the mental processes by which individual jurors arrived at the verdict, the effect the evidence may have had on the jurors, and the weight particular jurors may have given to particular evidence.

Long v. Brusco Tug & Barge, Inc, 185 Wn.2d 127 (2016), *citations* and *quotations omitted* While it is clear

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As discussed at oral argument on July 16, 2019, that is untrue. The jury did not make such a request. This court had a practice of asking all parties to wait outside after a verdict to allow the jurors to speak to counsel, if they wished. The court has done that in every jury trial, regardless of the race of the parties and regardless of the outcome of the trial. As a result of the plaintiff's prior declaration in this case explaining how she felt about that process, the court has changed its practice. The court sincerely apologizes for any misunderstanding by the plaintiff and how the process made her feel. That was not the court's intention.

that the Washington Supreme Court in Berhe is more willing to consider the contents of juror deliberations when racial bias is alleged, there still remains the need to have evidence of racial bias existing in juror deliberations. The court cannot and will not engage in an investigation in the absence of evidence.

The court does not distinguish between civil trials and criminal trials in making this analysis. Racial bias, including implicit bias, has no place in any juror deliberations or in any trial. Although criminal defendants may have heightened due process rights, the fact that *Berhe* is a criminal case does not change this court's reasoning of when it is appropriate to conduct an evidentiary hearing. If a juror in this case had indicated that the jury acted with inappropriate racial motivations, or ifthis court found that defense counsel's arguments were racist and not tied to the evidence, the court would conduct an evidentiary hearing to determine the facts, the scope, and the extent of the bias. However, we do not have the threshold facts that were present in *Berhe* to justify an evidentiary hearing.

The court is sympathetic to the Plaintiff's concerns, and further recognizes that implicit bias exists and can impact a jury's deliberations. Nevertheless, the plaintiff still must meet her burden of presenting a prima facia showing that implicit bias was present. She fails to do so.

The Plaintiff's re-raising of the procedural process of how the court reconsidered the giving of the spoliation jury instruction is not well taken. Plaintiff misstates the

record when she claims she was not given the opportunity to respond to the motion to reconsider. As stated in the court's prior order, a briefing schedule was set, counsel was given a chance to respond and plaintiff did, in fact, file a response brief to the motion to reconsider. A disagreement with the court on the result of the motion is not the same as not being permitted to respond.

DATED this 7th day of August, 2019.

/s/_____
Judge Melinda J. Young

APPENDIX C — Opinion of the Superior Court of the State of Washington for King County, Filed July 17, 2019

JUDGE MELINDA J. YOUNG

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
FOR KING COUNTY

No. 17-2-11811-7 SEA

JANELLE HENDERSON, AN INDIVIDUAL,

Plaintiff,

vs.

ALICIA M. THOMPSON, AN INDIVIDUAL,

Defendant.

ORDER DENYING PLAINTIFF'S CR 59 MOTION FOR A NEW TRIAL OR IN THE ALTERNATIVE FOR ADDITUR

THIS MATTER having come before the Court upon Plaintiff's Motion for Partial Summary Judgment ("Motion") and the Court having reviewed the following:

1. Plaintiff's Motion for New Trial or in the Alternative for Additur;

2. Declaration of Vonda Sargent in Support of Motion for a New Trial;

3. Defendant Thompson's Opposition to Plaintiff's Motion for New Trial or in the Alternative for Additur;

4. Declaration of Heather M. Jensen in Opposition to Plaintiff's Motion for New Trial or in the Alternative for Additur with exhibits;

5. Plaintiff's Reply; and

The Court, having reviewed the files and records herein, and having heard oral argument, and deeming itself advised in the matter, now therefore,

ORDERS, ADJUDGES and DECREES that Plaintiff's Motion for New Trial or in the Alternative for Additur is DENIED.

With respect to the motion for a new trial on the grounds of judicial error for failure to give a jury instruction on spoliation, the Court does not believe it was error to omit the instruction. The court set a briefing schedule on the motion to reconsider, plaintiff briefed the issue, and plaintiff was given the opportunity to argue the motion to reconsider. There was no procedural error and any argument otherwise misstates the record.

Moreover, this case had scant specific evidence that the videos, notes, or other tangible evidence from the private investigator company existed, much less was destroyed by the defendant. The case law requires the plaintiff to show the existence of the evidence, as well as show it was

intentionally destroyed (or withheld). The plaintiff failed to show that videos, notes, or other evidence existed, much less that was withheld or destroyed. The addition of a 's' onto records provided to the defendant's medical expert was insufficient to show more video existed. The length of surveillance as compared to the minutes of video was suspicious, as the court already recognized, but that was also insufficient to show that other video must have existed.

Additionally, Tyler Slaeker's testimony and deposition as a whole did not support that he had notes from surveillance that he destroyed. The only item that clearly existed at some point, but no longer existed at the time of trial were texts from Tyler Slaeker to Probe Northwest. As the testimony supported that the texts were incorporated into the report and texts are not typically kept as a stand-alone evidentiary item, the loss of the texts were not grounds for a spoliation instruction in and of itself. While the defendant had control of any possible additional videos or notes, it cannot be shown that they probably existed, that they were probably destroyed, and that they were probably destroyed with a culpable state of mind. All of those circumstances were permissible inferences from the evidence before the jury. However, it would have been error to instruct the jury that they should assume the evidence was destroyed because it was favorable to the plaintiff. The best course was to allow the plaintiff to argue the evidence showed there were hours of surveillance, minutes of video, and the juxtaposition meant the defense was hiding something. Contrary to plaintiff's argument, this is a penalty for the defense's

failure to turn over the report earlier or otherwise explain what occurred in the other surveillance. It allowed the plaintiff to rebut the video that was produced and call into question the defendant's credibility. It was within the jury's province to determine if that is how they chose to interpret this evidence.

The motion for a new trial or additur based on implicit bias also fails. The Court recognizes that implicit bias exists. The Court recognizes the specific bias against African American women and the stereotypes of the "angry black woman," or "welfare queen," or "Jezebel." The court further recognizes that using the terms combative in reference to the plaintiff and intimidated in reference to the defendant can raise such bias. What makes implicit bias insidious is the subtle nature of the animus and the difficulty in determining its presence. It can be difficult for a person with implicit bias to recognize it in him or herself, much less recognize when triggered by racial stereotypes. However, there is no case that finds that the possibility of implicit bias is grounds for a new trial or additur.

In this case, the use of the terms that the plaintiff now complains of was not objected to when defense counsel made her argument. The terms were tied to the evidence in the case, rather than being raised as a racist dog whistle with no basis in the testimony. Ms. Henderson was very uncomfortable being cross examined and submitting to the CR 35 examination. There are a multitude of ways to describe her demeanor and it was not unfair to describe her as combative given her unwillingness to

answer questions. Ms. Thompson was also uncomfortable testifying, although she did not avoid plaintiff counsel's questions. It was not unfair to describe her as intimidated, especially when the reference was to the process and not intimidated by plaintiff's counsel. The court cannot require attorneys to refrain from using language that is tied to the evidence in the case, even if in some contexts the language has racial overtones. Dr. Devine provided Ms. Henderson with work when she needed it, which is more than a doctor-patient relationship, so asking the jury to consider that testimony to evaluate his credibility was not inappropriate. Dr. Delaney was not testifying as an expert witness and referring to her as Ms. Delaney or by her first name does not necessarily invoke racial stereotypes. The argument in this case is significantly and materially different from the prosecutor's argument in *State v. Monday*, 171 Wn.2d 667 (2011), where the prosecutor assumed an accent of the word "police" and argued about a code that "black folk don't testify against black folk", which was the impermissible interjection of racial bias into the trial. The Washington Supreme Court noted the prosecutor intentionally and improperly argued about the "antisnitch code" as belonging to African Americans only and used the racial bias to undermine the credibility of witnesses. While the court recognized the use of the word "pol-eese" was a more subtle appeal to racial bias, closer to the implicit bias argument the plaintiff makes in this case, the Supreme Court in *Monday* tied it to the overall racial overtones of the case and found the only reason to use the word "po-leese" was to call the jury's attention to the witness's race. The facts of this case, and the substance of the argument in this case, are materially different with

evidentiary based reasons for defense counsel's argument. The court declines to find misconduct by defense counsel in this case.

While the amount of the verdict was well below what the plaintiff had asked for, and below what defendant had suggested would be appropriate if the jury found plaintiff's calculation of damages to be appropriate, that does not prove implicit bias. The defendant did not concede that Ms. Henderson's Tourette's worsened after the collision; indeed that fact was hotly disputed at trial. Nor did the defendant concede that the plaintiff's method for calculating damages was the appropriate method. The court understands the plaintiff's suspicions about how race may have influenced the verdict, race can influence many things and juries are not immune to bias. However, in the absence of specific evidence of impermissible racial motivations by the jury, or misconduct by defense counsel, the court declines to use the possibility of implicit racial bias to overturn the jury's verdict or grant additur. The jury's verdict was not outside the evidence presented in the case so as to necessarily be the result of passion or prejudice. As the court noted in oral argument, the remedy of additur is only in such extraordinary circumstances in which the verdict must be the result of passion or prejudice. A court has no discretion to invade the province of the jury if the verdict was within the range of the evidence and judge cannot substitute its judgment for that of the jury. *Herriman v. May*, 142 Wn. App. 226 (2007). The evidence in this case was contested and conflicted as to whether Ms. Henderson's Tourette's was exacerbated by the motor vehicle collision, which was the basis for the

higher award request by plaintiff. They jury was entitled to disbelieve the plaintiff's witnesses. The court finds it would be an abuse of its discretion to disregard the jury's verdict in this case.

IT IS SO ORDERED.

DATED this 17th day of July, 2019.

/s/ Melinda J. Young
Judge Melinda J. Young

APPENDIX D — Denial of Reconsideration of the Supreme Court of Washington, Filed January 23, 2023

THE SUPREME COURT OF WASHINGTON

No. 97672-4

JANELLE HENDERSON,

Petitioner,

v.

ALICIA THOMPSON,

Respondent.

ORDER DENYING MOTION FOR RECONSIDERATION

The Court considered the "RESPONDENT'S MOTION FOR RECONSIDERATION OF SUPREME COURT OPINION".

It is hereby

ORDERED:

That the motion for reconsideration is denied.

DATED at Olympia, Washington this 23rd day of January, 2023.

For the Court

/s/_____
CHIEF JUSTICE

APPENDIX E — Motion for Reconsideration of Supreme Court Opinion in the State of Washington, Dated November 9, 2022

No. 97672-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JANELLE HENDERSON,

Appellant,

v.

ALICIA M. THOMPSON,

Respondent.

RESPONDENT'S MOTION FOR RECONSIDERATION OF SUPREME COURT OPINION

I. IDENTITY OF MOVING PARTY

The moving party is Respondent Alicia M. Thompson.

II. STATEMENT OF RELIEF SOUGHT

Respondent Alicia Thompson requests that this Court reconsider the standard set forth in the Opinion regarding whether and when a counsel's race-neutral

statements, directly tethered to witness demeanor and trial testimony, can allow the opposing party to obtain a new trial hearing and new trial by alleging "implicit, institutional, and unconscious biases" on account of race. In the alternative, this Court should withdraw its opinion and affirm the jury's verdict in Ms. Thompson's favor.

This Court's newly announced standard violates Ms. Thompson's, as well as future litigants', federal and state due process and equal protection rights, and the state constitutional right to a jury trial. And in practice, this standard will operate to prevent counsel from honoring their ethical duties to zealously represent their clients by making arguments about witness demeanor and testimony—the same arguments lawyers make in countless trials throughout our Nation each and every day.

III. RELEVANT FACTUAL BACKGROUND

On October 20, 2022, the Court announced, for the first time, a new standard for when a party in a civil action is entitled to a hearing on a motion for a new trial under CR 59(a)(9) where the party alleges that implicit racial bias affected the jury's decision. The Court held that to receive such a hearing, a litigant need only show that "an objective observer who is aware that *implicit, institutional, and unconscious biases, in addition to purposeful discrimination*, have influenced jury verdicts in Washington State *could* view race as a factor in the verdict." Op. at 19. According to the Court, the bias may be implicit or unconscious and may occur because of race-neutral statements at trial. Op. at 19, 23-24.

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The Court also announced, for the first time, a new standard governing *whether*, following the hearing, the trial court should order a new trial. The Court held that the trial court is "to *presume* that racial bias affected the verdict, and the party benefiting from the alleged racial bias [including *unconscious or implicit* bias arising from race-neutral statements] has the burden to prove it did *not*." Op. at 19 (emphases added).

Applying this standard, this Court concluded that Plaintiff Janelle Henderson had met the requisite showing based on statements by Ms. Thompson's attorney during closing argument, although counsel for Ms. Henderson did not object to these statements on the grounds of racial bias, either during or following the argument. *See* RP 1194-1230. The Court then remanded for the new trial hearing consistent with the new standard outlined in its Opinion.

This Court stated:

> We hold that upon a motion for a new civil trial, courts must ascertain whether an objective observer who is aware that *implicit, institutional, and unconscious biases, in addition to purposeful discrimination*, have influenced jury verdicts in Washington State *could* view race as a factor in the verdict. *See Berhe*, 193 Wn.2d at 665.
>
> When a civil litigant makes a prima facie showing sufficient to draw an inference of racial

> bias under this standard, the court must grant an evidentiary hearing to determine if a new trial is warranted. *Id.* at 665-66.
>
> At the hearing, the trial court is to presume that racial bias affected the verdict, and the party benefiting from the alleged racial bias has the burden to prove it did *not*. *Cf. Monday*, 171 Wn.2d at 680 (placing the burden of proof on the State when a prosecutor allegedly appeals to racial bias). If they cannot prove that racial bias had no effect on the verdict, then the verdict is incompatible with substantial justice, and the court should order a new trial under CR 59(a)(9).

Op. at 19.

IV. GROUNDS FOR RELIEF AND ARGUMENT

This Court should reconsider its Opinion setting out the new standard governing new trial hearings and new trials due to alleged racial bias under CR 59(a)(9). This standard violates the Due Process Clause and the Equal Protection Clause of the United States and Washington Constitutions and violates the civil jury trial right under the Washington Constitution. *See* U.S. Const. amend. XIV; Wash. Const. art. 1, §§ 3, 12, 21.

(A) First, the standard violates due process because it is impermissibly low, requiring only a showing that implicit or unconscious bias "*could*" have been "a" factor

in the verdict and imposing an inference of bias drawn from other litigation in the State of Washington. The result is that attorneys in Washington will be hampered in zealously advocating for their clients via common arguments, tethered to the evidence at trial.

It violates the Washington State constitutional right to a civil jury trial because it deprives citizens of the benefit of verdicts duly rendered.

(B) The standard also violates the Equal Protection Clause as it constitutes impermissible race-conscious government action. In practice, it sets a different new trial standard for minority litigants displeased with the trial verdict and insulates minority litigants from common arguments regarding, for example, bias and motive.

It violates the right to a civil jury trial under Washington Constitution article 1, § 21, because it operates differently depending on the race of the litigants.

While expressions of racial bias have no place in the courtroom, if the Opinion is not reconsidered, an attorney opposing a minority litigant will be constrained from making any number of commonplace, race-neutral arguments in closing. For example, under factual circumstances similar to those here, an attorney opposing a minority litigant likely will not argue about the litigant's demeanor; about the litigant's possible financial motivations in seeking a sizeable verdict; about the degree of severity of a litigant's injuries; or about the credibility of the litigant's lay witnesses. In short,

the Opinion will interfere with the fair administration of justice in Washington State.

A. This Court's New Standard Violates Fundamental Notions of Fairness Afforded by the Due Process Clause of the United States and Washington Constitutions and the Jury Trial Right under the Washington Constitution.

The new standard violates the Due Process Clause of the United States and Washington Constitutions[1] for two primary reasons: First, the Court relieves the movant of any burden to show evidence that actual racial bias affected the verdict, holding that a mere *possibility* that "implicit or unconscious" bias from race-neutral statements, tethered to witness demeanor and testimony, "*could*" have been "*a*" factor is sufficient to secure an evidentiary hearing and then presumptively a new trial. This standard functions to effectively prohibit counsel from fully discharging their duty to advocate for their clients through common, evidence-based arguments. Second, the Court sets up a presumption of racial bias that is, in practice, irrebuttable because it will be impossible for a non-moving party ever to prove the required negative—that "implicit or unconscious" "racial bias had *no effect* on the verdict." Op. at 19.

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1. *See* U.S. Const. amend. XIV, § 1; Wash. Const. art. 1, § 3 ("No person shall be deprived of life, liberty, or property, without due process of law").

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1. Permitting the Movant to Show that Implicit or Unconscious Bias Arising from Race-Neutral Statements "*Could*" Have Been "a" Factor Sets an Impermissibly Low Standard, Sweeping in Commonplace and Proper Trial Arguments.

The new standard compels an evidentiary hearing when "an objective observer who is aware that implicit, institutional, and unconscious biases . . . have influenced jury verdicts in Washington State *could* view race as *a* factor in the verdict." Op. at 19 (emphasis added). The Court's mandate, that an evidentiary hearing is warranted whenever an observer, taking into account biases from *other* litigation, "*could* view race as *a* factor," effectively relieves a moving party of *any* burden in order to secure an evidentiary hearing under 59(a)(9). And because the Court found this standard met based on race-neutral statements that were tethered to the evidence at trial, counsel in future cases will be effectively precluded from relying on commonplace trial arguments when minority parties are involved.

a. The standard is impermissibly low.

The Court's standard combines multiple speculative thresholds. "Could" "merely expresses a contingency that may be possible and nothing more." *Welch v. State*, 13 Wn.App. 591, 592, 536 P.2d 172, 173 (Wash. Ct. App. 1975) (internal quotations omitted). At some level, anything "could" be possible and as a result, this standard in effect does not require a prima facie showing. *See W. & A.R.R. v. Henderson*, 279 U.S. 639, 643 (1929) (prima facie

requirement is arbitrary where "[r]easoning does not lead from the occurrence back to its cause").

That is particularly so here, where "could" is informed by mandatory consideration of "implicit, institutional, and unconscious biases" from *other* verdicts in Washington State. This "is a case of indulging in a presumption in order to support a conjecture." *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.2d 144, 163-64, 106 P.2d 314, 323 (Wash. 1940). Due process, however, requires a tribunal "to decide the case solely on the evidence before it"—not on mere presumptions or inferences, much less presumptions or inferences originating from *other*, unrelated litigation. *See Smith v. Phillips*, 455 U.S. 209, 217 (1982); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) ("[J]udges are confined by a record comprising the evidence the parties present.").

The addition of the language "*a* factor" pushes the standard even further into the realm of merely conceivable. "When used as an indefinite article, 'a' means 'some undetermined or unspecified particular.'" *McFadden v. United States*, 576 U.S. 186, 191 (2015) (alteration adopted) (quoting Webster's New International Dictionary 1 (2d ed. 1954)). By layering mere possibility ("could") and unspecified quantity ("a"), the new standard permits an evidentiary hearing for any litigant who raises a remotely plausible—no matter how unlikely—argument that racial bias could have had some effect on the verdict. *Cf. Prentice Packing & Storage Co.*, 5 Wn.2d at 164, 106 P.2d at 323 ("Presumptions may not be pyramided upon presumptions, nor inference upon inference.").

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This Court's new civil standard is a sharp departure from standards generally applied by the state and federal courts where allegations of racial bias are raised post-verdict. In *Peña-Rodriguez v. Colorado*, for example, the U.S. Supreme Court considered a criminal defendant's request to overcome the "no-impeachment rule"—an evidentiary rule generally barring a juror from giving evidence about any statement made during the jury's deliberations—in order to offer evidence in support of a motion for new trial. 137 S. Ct. 855, 862-63 (2017). The Supreme Court held that to surmount the rule in a case alleging racial bias by a juror, a defendant must show that "a juror ma[de] a clear statement" indicating "racial stereotypes or animus" that "tend[s] to show that racial animus was a *significant motivating factor* in the juror's vote to convict." *Id*. at 869 (emphasis added); *accord, e.g.*, *United States v. Brooks*, 987 F.3d 593, 604 (6th Cir. 2021) (requiring that the "challenged statement … played a *significant role* in the juror's vote to convict" (internal quotations omitted and emphasis altered)).[2] The Washington Court of Appeals has applied a similar standard to new-trial motions alleging racial bias, granting an evidentiary hearing where a juror's "statements reveal[ed] [an] aversion toward associating with African-Americans and a predisposition toward making generalizations about African-Americans" and raised a "*clear inference of racial bias*," *State v. Jackson*, 75 Wn.App. 537, 543, 879 P.2d 307, 311 (Wash. Ct. App.

2. *Peña-Rodriguez* did not reach "the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted." 137 S. Ct. at 870.

1994) (emphasis added), not that racial bias *could* have been *a* factor.

b. In practice the standard departs from established precedent and prevents attorneys from zealously advocating for their clients via common, race-neutral arguments, tethered to the evidence at trial.

The Court's standard further departs from the Washington cases it relies on, *see* Op. at 14—and from federal jurisprudence—by crediting allegations of *unconscious or implicit bias* based on *race-neutral* statements tethered to the evidence at trial. In *Schotis v. N. Coast Stevedoring Co.* 163 Wash. 305, 316, 1 P.2d 221, 226 (Wash. 1931), for example, the statements were overt and explicit. The defendant was a Japan-based company, and counsel stated, "[W]e don't like Japanese [people] and they don't like us." Similarly, in *State v. Monday*, 171 Wn.2d 667, 671-74, 257 P.3d 551, 553-54 (Wash. 2011), the prosecutor exaggerated the pronunciation of the word "police" as "po-leese" and argued that Black witnesses were not credible because "[B]lack folk don't testify against Black folk." And in *Turner v. Stime*, 153 Wn.App. 581, 588, 222 P.3d 1243, 1246 (Wash. Ct. App. 2009), the jurors referred to an attorney of Japanese descent as Mr. Kamikazi or Mr. Miyagi.

These statements demonstrating bias under Washington law are similar to statements found sufficient to justify setting aside the no-impeachment rule in *Peña-Rodriguez* and in the federal courts of appeal. The Supreme Court clarified in *Peña-Rodriguez* that overcoming the no-impeachment rule

required a showing of "overt racial bias" and that "[n]ot every offhand comment indicating racial bias or hostility" would suffice 137 S. Ct. at 869; *see also United States v. Norwood*, 982 F.3d 1032, 1057 (7th Cir. 2020); *United States v. Baker*, 899 F.3d 123, 133-34 (2d Cir. 2018); *Jackson*, 75 Wn.App, at 543, 879 P.2d at 311 (new trial appropriate where racial statements raised a "clear inference of racial bias").

The Sixth Circuit had occasion to apply the U.S. Supreme Court's standard from *Peña-Rodriguez* in *United States v. Brooks*, 987 F.3d 593 (6th Cir. 2021). In *Brooks*, the court considered defendant's argument that, because jurors allegedly pressured a Black juror to vote to convict, "the other jurors' race-neutral comments might nevertheless show evidence of their implicit bias against African-Americans." *Id*. The court denied the defendant's request for an evidentiary hearing, reasoning that "if the race-neutral statements alleged … were enough" to allow evidentiary hearings "compelling jurors to articulate the subjective motivations behind their neutral statements, this purportedly 'rare' exception would eventually swallow the rule." *Id*. at 604; *see also Smith v. Phillips*, 455 U.S. at 215 ("The remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to *prove actual bias*" (emphasis added)).

While statements expressing racial bias or hostility are inexcusable in any context, the statements relied on by this Court here are neutral as to race and are directly tethered to witness demeanor and testimony. The credibility of witnesses and their motives are common every-day trial themes employed across jurisdictions in this country regardless of the race of the litigants,

the attorneys, the judge,[3] or the jury. The standard nevertheless operates to effectively ban these arguments whenever one of the litigants is a minority.

Defense counsel: (1) described Ms. Henderson's testimony as "confrontational" and "combative" in closing; (2) argued that Ms. Henderson saw the collision as an opportunity for financial gain; (3) argued that Ms. Henderson exaggerated or fabricated her injuries; (4) pointed out that four of Ms. Henderson's witnesses "used the exact same phrase when describing Ms. Henderson before the accident" and suggested someone could have told them to say that,[4] and (5) pointed to inconsistencies in testimony from Ms. Henderson's chiropractor.[5]

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3. The Court alludes to, but does not find, improper behavior by the trial court judge in excusing Ms. Henderson from the courtroom before the verdict was rendered. The defendant, Ms. Thompson, was not in the courtroom either, and the trial court explained on the record that it was her practice to excuse *both* parties before the verdict and that the request did *not* come from the jury. RP 1255:3-11.

4. The Opinion incorrectly states "defense counsel suggested that Henderson had probably asked her friends and family to lie for her as evidenced by their shared use of a popular idiom – 'life of the party' – to describe her." Op. at 22. At no time did defense counsel argue that Ms. Henderson asked her friends to "lie" for her. Defense counsel did point to the nearly identical testimony by four witnesses, raising a credibility inference that those witnesses had been coached or had collaborated (RP 1213) ("I thought it was interesting also that all four of those witnesses used the exact same phrase when describing Ms. Henderson before the accident: life of the party. Almost like someone had told them to say that.").

5. And the Opinion incorrectly states "defense counsel argued that Henderson's chiropractor was likely to lie for her

But evidence-based argument concerning a witness's demeanor, whether confrontational, fidgety, angry, or calm, is not only common, it is explicitly permissible. Washington Pattern Jury Instructions, for instance, admonish the jury that in considering witness testimony, it may consider "the manner of the witness while testifying." WPI 1.02. Indeed, the ability to observe and evaluate the demeanor of parties and witnesses is a critical aspect of jury trials and other in-court proceedings. *See, e.g.*, *Thompson v. Keohane*, 516 U.S. 99, 111 (1995) (factual issues that "involve the credibility of witnesses" such as "competency" or "juror bias" "depend heavily on the trial court's appraisal of witness credibility and demeanor"); *Ryckman v. Johnson*, 190 Wn. 294, 300-01, 67 P.2d 927 (Wash. 1937) (trier of fact has "the peculiar advantage of seeing the witnesses, observing their demeanor, weighing their testimony, and considering it in the light of all the

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because they had more than a doctor-patient relationship." Op. at 22 At no time did defense counsel argue that Ms. Henderson's chiropractor, Dr. Devine, was likely to lie for her. Defense counsel did argue that Dr. Devine's testimony was not credible, citing a discrepancy between Dr. Devine's testimony about Ms. Henderson dragging her foot and the lack of any documentation of that symptom in the records (RP 1205-1206); citing evidence from Dr. Devine's testimony that he was minimizing the amount of times Ms. Henderson was seeing him *before* the accident (RP 1206); noted that Dr. Devine had employed Ms. Henderson (RP 1206); and pointing out that testimony from Dr. Devine that he did not think Ms. Henderson had any vocal tics before the accident contradicted the records in evidence (RP 1206-1206).

evidence"). For this reason, counsel across the State and Nation regularly call attention to the manner or demeanor of the testifying witnesses.[6]

Likewise, highlighting that a plaintiff seeks a large verdict is not an allusion to any racial stereotype but rather to the bias in favor of their own financial interest shared by people of all races. Washington Pattern Jury Instruction 1.02 provides that "[i]n considering a witness's testimony, you may consider . . . any personal interest that the witness may have in the outcome or the issues." WPI 1.02. And evidence that a "witness has a financial interest in the outcome of the lawsuit" "tends to show a witness'[s] bias." *Alston v. Blythe*, 88 Wn.App. 26, 41, 943 P.2d 692, 700 (Wash. Ct. App. 1997); *see also Galdamez v. Potter*, No. CV. 00-1768-PK, 2006 WL 2385290, at *2 (D. Or. Aug. 17, 2006) ("Financial interest may be some evidence of bias and it is not inappropriate to argue credibility based on bias to the jury."). Courts in this state have declined to find misconduct when counsel explicitly urged a jury to consider personal financial interest in language much stronger than used in this case. *See, e.g.*, *M.R.B. v. Puyallup Sch. Dist.*, 169 Wn.App. 837, 856-57, 860 282 P.3d 1124, 1134, 1136 (Wash. Ct. App. 2012) (defense counsel did not commit misconduct when attacking the [plaintiffs] as

6. And courts regularly presume that jurors will fulfill their duty to weigh these indicia of credibility in a fair and unbiased manner, often highlighting this expectation in jury instructions like the one given in this case. *See* WPI 1.02 (admonishing jurors that "[i]n assessing credibility, [they] must avoid bias, conscious or unconscious, including bias based on religion, ethnicity, race, sexual orientation, gender or disability").

'greedy,' and arguing that the [plaintiffs] had a personal interest in the outcome of the case and the jury should take that bias into account").

And attorneys regularly rely on common impeachment arguments, including whether a witness testified consistently or inconsistently with his or her own prior testimony or the testimony of others—regardless of race—in order to question the credibility of a witness. Such argument is not only permissible, it is broadly employed. *See Faust v. Albertson*, 167 Wn.2d 531, 544, 222 P.3d 1208, 1215 (Wash. 2009) ("The credibility of a witness may be attacked by any party."); *State v. Fisher*, 165 Wn.2d 727, 752, 202 P.3d 937, 950 (Wash. 2009) ("[D]efendant has a right to confront the witnesses against him with bias evidence so long as the evidence is at least minimally relevant." (internal citation, quotation marks, and emphases omitted)).

This is likely why Ms. Henderson's attorney did not object either during or following opposing counsel's closing argument. Instead, counsel for Ms. Henderson raised her racial bias arguments for the first time in her new trial motion. Under Washington law, these arguments have been waived. *See Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 333, 858 P.2d 1054, 1072 (Wash. 1993) ("[F]ailure to make contemporaneous objections usually waives any error[.]").

The consequence of this Court's new standard is to effectively ban common trial themes and arguments whenever one of the litigants is a minority, as the risks

of deploying these standard adversarial tactics will be too high. Following this Court's opinion, attorneys in Washington may be dissuaded from referring to financial motivations in relation to a minority witness; suggesting that minority lay witnesses were coached or coordinated their testimony; or pointing to evidentiary discrepancies regarding the extent or severity of an injury of a minority plaintiff. Indeed, in an admitted fault case like the one at issue, it is fair to ask whether defense counsel would be left with any significant points to argue when witness demeanor, financial motivation, injury severity, and witness credibility are taken off the table. And the factual circumstances presented in this case do not raise the numerous other arguments that may now also be unavailable against a minority litigant.

Because Washington attorneys may now be reluctant to pursue common, race-neutral arguments about witness demeanor, motivation, credibility, and likely more, the standard operates to hamper their fulfillment of their ethical duties to zealously represent their clients.

2. The "Rebuttable Presumption" Embedded in the New Standard Cannot, In Practice, Be Rebutted.

The new standard requires the trial court, at the new trial hearing, "to presume that racial bias affected the verdict" and places the burden on the non-moving party "to prove it did *not*." Op. at 19. If the non-moving party "cannot prove that racial bias [even implicit or unconscious bias] *had no effect* on the verdict, then . . . the court should

order a new trial." *Id.* (emphasis added). This standard not only places a burden on the non-moving party to prove a negative—that the bias had no effect—but also permits the bias to be implicit or unconscious, arising from race-neutral statements tethered to the evidence at trial. In short, this Court has created a standard that violates due process by establishing a rebuttable presumption that cannot be rebutted.

The U.S. Supreme Court has held that "a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment." *Heiner v. Donnan,* 285 U.S. 312, 329 (1932); *accord Vlandis v. Kline*, 412 U.S. 441, 446 (1973) ("Statutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments."). *Western & A.R.R. v. Henderson*, for example, considered a Georgia statute raising a presumption of negligence from "[t]he mere fact of [a] collision between a railway train and vehicle at a highway grade crossing." 279 U.S. at 643-44. The Court concluded that the statute was unreasonable and arbitrary in violation of the due process clause because it "permitted the presumption to be considered and weighed as evidence" despite testimony "tending affirmatively to prove such operation was not negligent in any respect." *Id.* at 642. *See also Manley v. State of Georgia*, 279 U.S. 1, 7 (1929) (finding arbitrary and capricious a standard that impermissibly required non-moving party to "negative[] *every fact*, . . . from which [the presumption] might result" (emphasis added)).

The standard here violates due process because it creates a presumption of racial bias absent any meaningful mechanism for rebuttal. Once an evidentiary hearing is ordered, "the trial court is to presume that racial bias affected the verdict," and if the civil defendant "cannot prove that racial bias had no effect on the verdict," then the court is instructed to order a new trial. This standard not only flips the conventional burden, it requires the opposing party to prove a negative. Multiple Washington cases have recognized the difficulty of proving a negative. *See e.g.*, *Clarity Capitol Mgmt. Corp. v. Ryan*, No. 82022-2-I, 2021 WL 3144923, at *5 (Wash. Ct. App. July 26, 2021); *Prosser Hill Coal. v. Spokane County*, 176 Wn.App. 280, 291, 309 P.3d 1202, 1208 (Wash. Ct. 2013); *Ferry County v. Concerned Friends*, 155 Wn.2d 824, 844, 123 P.3d 102, 112 (Wash. 2005) (Johnson, J., dissenting). And given that the presumed bias here may be implicit and may be evoked by race-neutral statements, it is hard to conceive how a litigant could ever disprove its existence.

For the same reasons, the new standard violates Washington citizens' right to a civil jury trial under Washington Constitution article 1, § 21, by depriving citizens of the benefit of verdicts duly rendered, based on the irrebuttable presumption that implicit or unconscious bias could have been a factor in the verdict.

This Court's newly announced *presumption* of implicit racial bias stands in stark contrast to other decades-old, burden-shifting frameworks also crafted to counter the insidious effects of racial discrimination. In the *Batson*-challenge context, for instance, a defendant carries the

initial burden of establishing a prima facie showing that a peremptory challenge has been exercised on the basis of race. If he does so, the burden shifts to the prosecutor to offer *a race-neutral basis* for striking the juror in question. *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986), *holding modified by Powers v. Ohio*, 499 U.S. 400 (1991). To carry his burden, a prosecutor may not "rebut the defendant's case merely by denying that he had a discriminatory motive" but "must articulate a neutral explanation related to the particular case to be tried." *Id*. at 98. The trial court then determines whether the defendant has established purposeful discrimination—without a presumption in favor of either party. *Id*.

Similarly, under the *McDonnell Douglas* framework, *see* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., a plaintiff bears the initial burden of demonstrating "by the preponderance of the evidence a prima facie case of discrimination." *Tex. Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981) (discussing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). The burden then shifts to the defendant to produce *a race-neutral explanation* for its action. *See id*. at 255. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted and the burden shifts back to the plaintiff. *Id*. The plaintiff may then challenge the defendant's explanation as pretextual, but without any presumption and the "plaintiff retains the burden of persuasion." *Id.* at 256.

Under this Court's new standard, the responding party must do far more than provide a race-neutral, evidence-

based explanation for any challenged statements. The responding party instead must overcome a *presumption* of racial bias and show that the challenged, race-neutral statement "had *no effect* on the verdict." Op. at 19 (emphasis added). But the Court's opinion provides no hint of how a litigant could possibly ever conclusively prove the required negative and overcome the presumption of implicit or unconscious racial bias under those circumstances. Because the new standard incorporates "a presumption which operates to deny a fair opportunity to rebut it," it is arbitrary and violates due process. *See Heiner,* 285 U.S. at 329.

A standard for a new trial hearing and new trial that is so easily met could result in an endless loop of new trial motions and new trials for minority litigants dissatisfied with the outcome of the jury's verdict, further burdening an already burdened judicial system.

B. The Court Should Reconsider the Standard Set Out in its Opinion Because It Violates the Equal Protection Clause Found in the Fourteenth Amendment of the United States Constitution.

The new standard also violates the Equal Protection Clauses of the United States and Washington Constitutions[7] because it impermissibly injects racial categorization into the analysis of when a litigant is entitled to a new trial hearing and a new trial.

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7. *See* U.S. Const. amend XIV, § 1; Wash. Const. art. 1, § 12.

The practical consequences of the new standard are also significant under the Equal Protection Clauses, because, in practice, the standard operates to unfairly benefit minority litigants. It affords them a lower standard for new trial and insulates them from vigorous adversarial examination and argument.

1. The Court's standard requires race-conscious government action that will operate to disproportionately benefit minority litigants.

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Likewise, Article 1 section 12 of the Washington State Constitution provides, "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations." Wash. Const. art 1, § 12. Laws that categorize "individuals on racial grounds fall within the core of that prohibition." *See Shaw v. Reno*, 509 U.S. 630, 642 (1993).

The Court's standard requires the objective observer, the trial judge, and the opposing party (tasked with rebutting the presumption of racial bias) to place litigants into racial categories in order to ask whether statements, including race-neutral statements, *could* have appealed to racial bias, even implicit or unconscious racial bias. This categorization is evidenced by the Court's own

analysis here. The Court examined counsel's race-neutral statements made during closing and asked whether they could have appealed to unconscious or implicit bias by evoking stereotypes of Black people. *See* Op. at 20-24.

The Supreme Court has instructed that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). This principle holds *irrespective of purpose*: for example, "remedying past societal discrimination does not justify race-conscious government action." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731 (2007) (plurality opinion); *cf.* Op. at 1.[8]

And even laws that are ostensibly neutral as to race may still be "an obvious pretext for racial discrimination" and therefore unconstitutional. *See Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). In *Feeney*, the Court examined the constitutionality of the Massachusetts veterans' preference statute, which mandated that veterans who qualify for state civil service positions be considered ahead of qualifying non-veterans. *Id.* at 259. On its face the statute was ostensibly neutral. The Court, however, analyzed how the law operated in practice

8. *See also, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (impermissible race-based preferences in government contracts); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-76 (1986) (plurality opinion) (finding impermissible discrimination where layoff of teachers was tied to the percentage of minority students enrolled in the school district even if the goal was to provide "role models" for minority students).

and found that the preference for veterans "*operates* overwhelmingly to the advantage of males." *Id.* (emphasis added).

Here the Court's test "operates overwhelmingly" to the advantage of minorities. First, it imbues the prima facie inquiry with implicit and unconscious bias from *other* jury verdicts in Washington, and second, it requires the trial court to *presume* that racial bias affected the verdict. In so doing it places a *heavy* thumb on the scale in favor of a new trial where there are allegations of racial bias—even unconscious or implicit bias arising from race-neutral statements. In practice, largely if not exclusively, minority litigants will be permitted to take advantage of this lower standard for a new trial. *Cf. Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252 (10th Cir. 1996) (observing that the burden shifting framework in Title VII does not apply "when the plaintiff is a member of an historically favored group").

For the same reason, the standard also operates to deny civil defendants in Washington state equal protection under the law regarding the fundamental right of trial by jury, *see* Wash. Const. art. 1, § 21, because civil litigants will be treated differently on the basis of race.

Moreover, as a consequence of this Court's standard, attorneys, seeking to avoid the prospect of a new trial motion, will not employ certain evidence-based arguments regarding, for example, credibility and motive when litigating against minority parties. The operational effect is again overwhelmingly to the advantage of minorities,

cf. Feeney, 442 U.S. at 272, who will be free from rigorous and appropriate advocacy designed to test credibility and motive. *See, e.g.*, Washington Pattern Jury Instructions 1.02 (describing as proper considerations "the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence").

2. The standard does not survive strict scrutiny.

Despite imposing a new race-conscious standard, the Court's opinion does not demonstrate that (or even discuss whether) this standard survives strict scrutiny. The Court must ensure that the standard will survive this high threshold—it must be a "narrowly tailored measure[] that further[s] compelling governmental interests." *Johnson v. California*, 543 U.S. 499, 505 (2005). "[T]he level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 273 (1986).

The opinion mentions, in broad terms, the desire to "develop [the] legal system into one that serves the ends of justice" and to "reduce and eradicate racism and prejudice." Op. at 1. But the U.S. Supreme Court has observed that "societal discrimination" alone is an "inadequate basis for race-conscious classifications." *Cty. of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497

(1989) (describing the holding in *Wygant*, 476 U.S. 267). Rather, "government actions to remedy past racial discrimination—actions that are themselves based on race—are constitutional only where there is a 'strong basis in evidence' that the remedial actions were necessary." *Ricci v. DeStefano*, 557 U.S. 557, 582 (2009) (quoting *Croson*, 488 U.S. at 500); *see also Wygant*, 476 U.S. at 276 ("In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.").

Nor does this Court make any effort to demonstrate that the standard is narrowly tailored. Remedies must be tailored to the specific injuries identified and supported by appropriate findings. *See, e.g.*, *Missouri v. Jenkins*, 515 U.S. 70, 102 (1995). This Court's "generalized assertion that there has been past discrimination," *Croson*, 488 U.S. at 498—that implicit and unconscious bias "have influenced jury verdicts in Washington," Op. at 19—"provides no guidance for [the trial courts] to determine the precise scope of the injury" they must "remedy" in the case before them. *Croson*. 488 U.S. at 498.

V. CONCLUSION

For the foregoing reasons, this Court should reconsider its Opinion or in the alternative withdraw its Opinion and affirm the jury's verdict.

I certify that this memorandum contains 5,977 words, in compliance with RAP 18.17(b).

DATED this 9th day of November, 2022.

Appendix E

DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on November 9th, 2022, I caused a true and correct copy of the foregoing in Supreme Court Cause No. 97672-4 to be served via the methods below:

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Appendix E

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Appendix E

EXECUTED this 9th day of November, 2022 at Federal Way, Washington.

/s/Grace Kositzky
Grace Kositzky

APPENDIX F — Excerpt of Transcript in the Superior Court of the State of Washington in and for the County of King, Dated June 7, 2019

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

Cause No. 17-2-11811-7 SEA
Appeals No. 97672-4
PAGES 768-1246

JANELLE HENDERSON,

Plaintiff,

v.

ALICIA M. THOMPSON,

Defendant.

VERBATIM REPORT OF DIGITALLY-RECORDED PROCEEDINGS

VOLUME III

June 4, 2019, DR W817
June 5, 2019, DR W817
June 6, 2019, DR W817
June 7, 2019, DR W817

HEARD BEFORE THE HONORABLE
MELINDA YOUNG

[891]A I did both, yes.

Q Okay. Thank you.

MS. JENSEN: I'm done with that exhibit. If you'd like me [inaudible]. May I, Your Honor?

THE COURT: You may.

BY MS. JENSEN:

Q Now, in terms of the accident, it's true that as you were crossing the West Seattle Bridge, going back to June 14th, 2014, you were paying attention to where you were going, correct?

A Yes.

Q And it's true, isn't it, that you did not see Ms. Thompson or her car before the moment of the collision; is that right?

A Yes.

Q Okay. So, you don't know how fast she was coming up behind you or how slow or whether she braked before impact; is that fair to say?

A I didn't hear any braking. I just felt a great big boom, and I was—before I even knew what hit me, I was hit. And I was hit hard. And I know the impact was very forceful. I know the speed limit there is 40 to 45 miles an hour. And that's—yeah.

Q Okay. But, again, my point is that you didn't see her so you don't know if she was slowing down or what rate of travel she was going before the—before the impact?

[892]A Well, she said she was going 40 miles an hour—

Q Sure.

A —40 to 45 miles an hour. And—

Q And braking?

A —I can't—well, I didn't hear any braking, so I don't know what she was doing. But I can't see what she's doing behind me, I'm paying attention to the road going forward.

Q Upon impact you were not pushed into any car in front of you, correct?

A No. But I feel like I'm on trial and I didn't do anything. I—I was driving and I got hit. So, I feel like you're, like, putting me on trial for somebody else's—for somebody else hitting me.

Q Well, you heard my client testify, correct? On—

A I heard what?

Q —Day 2? You heard—you were here for my client's testimony on Day 2 of trial, right?

A Yes.

Q And your attorney was allowed to ask her questions; do you remember that?

A Sure.

Q And she was allowed to ask her questions even though my client has admitted that she caused the accident and that she's responsible for your injuries to the extent they were caused by the accident; did you hear that?

[893]A Uhm, well, you're still putting me on trial, so.

Q Well, as—

A I mean, you're—I feel like that, I guess I should say.

Q Sure. But, in our civil litigation system, my client doesn't have to simply roll over and accept everything that you want to say about what was caused by the accident; do you [inaudible]—

A That I was injured and my Tourette's were exacerbated? That that's not—I don't—

Q Correct.

A —I have to sit there and be—I have to have my tics be exacerbated by somebody else's, uhm—uhm, uh, something that they did? I—so, she doesn't have to roll over, but I do; is that what I'm understanding?

Q Well, the Judge is going to instruct the jury on the law and the standard and the burden of proof and the—the legal aspect of this case. But you'll agree with me—or you understand, don't you, that you carry the burden of proof in this case?

MS. SARGENT: Your Honor, I'm going to object to this whole line of questioning at this point.

THE COURT: Sustained. Counsel, if you can move on.

BY MS. JENSEN:

Q Going back to the accident. You were able to get out of the car on your own after the impact; is that right?

A Yes.

[894] Q Okay. And you drove your car from the scene of the accident?

A Yes.

Q And it's true, isn't it, that you continued to drive that car until 2016 when you sold it for a different car; is that right?

A Yes.

Q I want to go over some medical records with you. And if—and they're all in this binder.

MS. JENSEN: May I approach, Your Honor, [inaudible]?

THE COURT: You may.

MS. JENSEN: Thank you.

BY MS. JENSEN:

A I mean, I didn't—I don't write the medical—

Q Now, I know that you had testified earlier that you've never seen your medical records; did I—did I get that testimony, I think, from Day 1 or Day 2?

A Correct.

Q Okay. That's not actually accurate, is it? Do you recall saying something different in your deposition?

A I don't know.

MS. JENSEN: I'm just going to put this in the corner so she can open it. May I approach?

THE COURT: You may.

BY MS. JENSEN:

Q Ms. Henderson, do you remember your deposition taking place

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[899]as least as far back as 2004 that you've reported to Dr. Vlcek intense, frequent, and very loud phonic tics?

MS. SARGENT: Your Honor, it's the same objection. This is not a document that was generated by Ms. Henderson. The proper person to be questioning about his chart notes is Dr. Vlcek. Ms. Henderson has absolutely no control over what Dr. Vlcek puts in his chart notes.

THE COURT: That'll be overruled. She can ask whether or not Ms. Henderson remembers making that report to her doctor.

MS. SARGENT: But she's reading from the actual chart itself.

THE COURT: I understand. It'll be—

MS. SARGENT: Okay.

THE COURT: —overruled.

BY MS. JENSEN:

Q Do you recall making that report to Dr. Vlcek?

A I—I don't recall this whole visit. So, I mean, it was 10 years ago so, no, I can't—I can't say—all I can say is, no, I don't remember.

Q Well, will reviewing—do you have any reason to doubt that Dr. Vlcek accurately recorded what you were telling him and what your condition was each time you met with him?

A I don't know what Dr. Vlcek writes in his notes. He is the doctor and he's going to write what he feels he wants to write.

[900]Q Does it refresh your recollection to review this chart note, that paragraph—

A No.

Q —as to what you were reporting?

A No, it doesn't.

Q Do you have—are you telling us that you have no memory of whether dating back 10 years you were reporting to Dr. Vlcek you had vocal tics, exhalations—

A I—

Q —Tourette's?

A I cannot—

MS. SARGENT: Your Honor, I'm going to object as asked and answered. This is the same question that's been asked now three separate times. She's testified that she doesn't recall one visit 10 years ago.

THE COURT: It'll be overruled for this question, but this would be it, this last one.

BY MS. JENSEN:

A I cannot remember this visit or what I said in the visit or what the visit was about or anything.

Q You'll agree with me that you've had long-term chiropractic care for your neck pain, right?

A Yes.

Q And I think we had Dr. Devine in testifying that—with records at least beginning in 2003. Do you recall whether or not you [901] saw a chiropractor in 2012 or 2011?

A I've been seeing Dr.—or Dr. Devine for a long time. I don't remember the exact date I started.

Q Do you remember what year it was?

A I don't.

Q Did you see a chiropractor before Dr. Devine?

A Yes, maybe.

Q Who was that?

A I don't know.

Q Do you remember the first time you went to a chiropractor for your neck pain?

A I do not.

Q You'll agree with me that before the accident you had diagnostic studies of your neck done; is that right?

A Uh, I don't remember, to be honest with you. I just—

Q Do you—do you remember getting a cervical x-ray in January of 2013?

A I don't remember dates, and I don't remember—I—I don't remember.

Q If I showed you the medical record, would that refresh your memory?

A No.

Q Do you remember getting an MRI of your neck—

A I—

Q —in March of 2014 before the accident?

[902]A I do not.

Q Do you remember getting in the MRI machine, where you're laid down and they roll you into the machine to take the imaging?

A I—I do not remember.

Q And if I showed you a medical record, would that refresh your memory?

A No.

Q Do you remember any of your appointments with Dr. Sheffield before the accident?

A Vaguely, I guess?

Q And she was your primary care provider for a period of time before the accident; is that right?

A For a short, short period of time, yes.

Q Okay. Perhaps 2012, 2013; does that sound right?

A I don't even know if it was that long. I don't know for sure.

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[1169] MS. JENSEN: —the Defense.

THE COURT: —reverse order—

MS. SARGENT: No, Your Honor.

THE COURT: —bring out the jury, read the instructions. Okay, thank you.

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[Off-the-record discussion.]

THE BAILIFF: Please rise for the jury.

[Jury present, 1:35 p.m.]

THE COURT: Please be seated.

[Court instructs the jury, not transcribed, from 1:36 p.m. to 1:52 p.m.]

THE COURT: Okay. Members of the jury, please turn your attention Ms. Sargent for closing arguments.

MS. SARGENT: Thank you, Your Honor, Counsel.

CLOSING ARGUMENT BY THE PLAINTIFF

MS. SARGENT: Members of the jury, I'd like to take this opportunity to thank you for your attention. I'm going to keep my comments as brief as possible. We've been with one another for two weeks. I'm not going to reiterate and go over all of the vast amount of evidence that has been before you. But, it is important that I go over some of it. And I'm going to work through the jury instructions because that's the law of this case.

The first thing that I want to talk to you about is the credibility of the witnesses. And that's something that you [1170]are the only ones that determine who's

credible and who isn't credible. And we had a lot of witnesses. We had the treating doctors of Janelle. We had Dr. Wall and Dr. Vlcek and Dr. Devine, all of whom told you that her Tourette's has been intensified and added to. You remember Dr. Wall wrote a letter and said it was debilitating. You have the testimony from paid experts. One is Dr. Sutton, and one is Dr. Rappaport. And despite the fact that they said a whole bunch of things about Janelle, a whole bunch of things, at least Dr. Sutton understands that she was hurt. Said just a little bit. Just a little bit. He said she was hurt. He admitted it. Remember we went back and forth on it? I said, well, you said here that she wasn't hurt; then you said over here she was. Which one is it? And he says, well, yeah, she is. So, are you changing your test—are you changing your report? You remember that. We went back and forth. But, at least Dr. Sutton says that she was injured as a direct result of this collision. And the Defendant herself told you that she was going at least 40 miles per hour before she struck my client, Ms. Henderson. She described it as her car going under my client's bumper. That's how fast she was going. The car dipped down and went under her car and scrunched up—were her words—scrunched up her—her hood.

So, when you're talk—when you're thinking about the credibility of these witnesses, I also want you to do is

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[1173] we have Drs. Rappaport and Dr. Sutton, both of whom told you they know better than Dr. Vlcek, Dr. Wall, and Dr. Devine in that one hour of time, that they know her better.

Think about that. Does that make sense? The instructions say to use your commonsense. Does that make sense? You have somebody who's—your—not somebody, your doctor who's known you for 30 years, and then you have a hired gun that wants to come in and say, I know her better than her own doctor. I know her better than her cousin, her mother, her friends. It doesn't make sense. It's not credible. And we know why Dr. Rappaport said what he said at 18 dollars and 33 minutes—$18.33 a minute. I'm kind of not mad at him. That's a lot of money. That's a heck of a lot of money for every minute [inaudible]. And think about who hired him. If you don't give your customer what they want, you don't get hired again. $18.33 a minute. Minimum wage in Seattle is $15. And think about how he's answering my questions. I'd ask him a simple question, and he'd just wax on and on and on. Cha-ching, cha-ching, cha-ching, cha-ching.

The same with Dr. Sutton. He was here for a full day at $425 an hour I do believe he said—sorry, it was $525 an hour. So, they have every reason to say and do what it is that they did. Not even talking about the report that they wrote and the records they reviewed. Dr. Sutton told you that he got an additional 2,000 pages of records. Started out with [1174]1600. But, he said they got an additional 2,000. So, let's just take

the 2,000 pages. Give him a wash on the 1600 pages. His records review, $525 an hour, which is what he testified to, just reading the records, he made $17,500.

MS. JENSEN: Objection. That's not in the record.

MS. SARGENT: If we—

THE COURT: Hold—hold on a second, Ms. Sargent. I'll just instruct the jury to rely on your own memories as to what the testimony of the witnesses is.

MS. SARGENT: If we assume that he took a minute a page, that calculates to [inaudible] $17,500. Just a minute a page, and that's rapid; that's pretty quick reading, a minute a page for a record review. His portion of the report was 12 pages. Once again, $525 an hour calculates out to another $1,050 for 12 pages. Think about that when you think about the credibility of witnesses and who came here and told you what was really going on.

Let's talk about Dr. Rappaport, his exam. He told you during my direct of him that he charges $550 for every 30 minutes with a three-hour minimum. And you watched the video. It was four hours and 20 minutes. But it's a 30-minute [inaudible] four and a half hours that he charged just for his deposition. Just for the deposition. So, the deposition, $4,950.

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You notice that you didn't hear a bunch of questionings [1175]from Janelle's treatment providers about how much money they made. One doctor has charged less than what it was that he would make for an office visit. One doctor. They paid two doctors. They paid for surveillance. And I'll go over these numbers for you when we start talking about damages. But, they spent almost $50,000 to come in here to try to convince you that Janelle wasn't injured while saying that she was injured. Which one is it? She wasn't injured or she was injured, because Rappaport said, well, she might have been injured. I think, uh, but maybe, possibly. He—he was all over the place. He was all over the place. And you wonder why. Did his conscience start getting to him? I don't think so. He had to maintain that she wasn't injured because that's what his customer needed, the person who's paying him. You don't have to be a Rhodes Scholar to figure it out. You get what you pay for. You don't pay someone $1,100 an hour for them to tell you that she's injured. That's not how that works. That's not how any of this works. And [inaudible], these are treating doctors. We didn't have experts; we had people that have actually known her and treated her.

So, let's talk about the differences in Janelle. Remember during opening I told you, you're going to hear that she loves to dance, life of the party, vivacious, fun to be around. And time after time after time after time, the people who have known her for years told you she's different. She

[1183]collision Janelle had been getting better. Her neck and her back had been getting better, which was borne out when I had Dr. Sutton on the stand and he said to you the month before the collision—it's very important—he didn't put it in the report, but he wanted you to know it was very, very important, and we went painstakingly over those chart notes one by one by one, date by date by date, and it showed her pain levels were threes and fours. She had a spike up to seven. He said, oh, there's one at an eight, and I said, show it, and he couldn't do it.

They're relentless. They're relentless in their efforts to try to say that Janelle wasn't injured. You wonder why. Why is that? Why are they so relentless? Because this type of case is not a small case. Someone who's already compromised doesn't get better the same way somebody who is healthy. That's why they [inaudible]. They know that this is a big case. That's why they would do these things. You don't do it otherwise. You don't spend almost $50,000 to try to [inaudible] and give you partial information. You know, that's not how this works. It's not how any of this—this whole system doesn't work like that. They're not supposed to do these sorts of things. We're not supposed to come in here and give you half-truths and to withhold evidence and to say one thing and then, oh, I didn't really mean that. That's not our system is supposed to work. All that goes to all

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[1189]out because there is—there's nothing in the rules or the law that tells you how to determine this. It's up to you. But, one way to do it is look at how the Defense values time. Look at how the Defense values time. For one of their experts, they valued it at $1100 an hour. $1100 an hour, that's how they value time. There's another expert, $525 an hour is how they value time.

I've done some calculations. So, if we—Janelle, there is a mortality table, and that is used when there's a situation in evidence of a situation that's not going to get better. Dr. Wall said it's not getting better. Dr. Devine said it's not getting better. And more importantly, the neurologist, Dr. Vlcek, said it's not getting better. So, we have this mortality table and Instruction No. 13. And it tells you that Janelle is going to live another 38.67 years. So, if we just use how the Defense values time and gave Janelle—awarded Janelle $525 a day, not an hour, $525 a day for the rest of her life, that'd be $7,367,562.50 [sic]. If we use Rappaport's $1100 a day, that'd be $15,457,750. I think that's way too much. I think that's obscene. Janelle told you time after time she's not a doctor. Told you time after time. I don't think they should be paid that amount, but that's how the Defense values time. That's how they value their time. So, that's one way to look at this.

What I'm proposing that you do is that you award Janelle [1190]$250 a day, not an hour, a day for pain,

suffering, loss of enjoyment of life, humiliation. She didn't sign off on this. She didn't ask for this. And I don't think that anybody would sign on and ask for this. Nobody [sic]. None of this is Janelle's fault. Not any of this is Janelle's fault. And she's been to put through the wringer trying to get a measure of justice.

So, at $250 a day, that total is $3,513,125. $250 a day. And it's not getting any better, and it's not her fault. She didn't do any of this. All Ms. Thompson had to do was pay attention. And the reason why the Defense has done everything that they've done with the surveillance and hiring of doctors and putting her through the wringer and—and saying that she's all in her head and that she's crazy and that she's got disability [inaudible] and somatoform—I kept calling it somatome—but it's somatoform [inaudible]—and disability [inaudible] and all these other very humiliating things about her, it's because they know. They know that in this type of case, on this type of case, it's a big case. When someone's already been compromised, you start out already compromised, you can't make them worse. That's why you pay attention to what you're doing. That's why we have rules of the road. We expect everybody when they get into their car to, at the bare minimum, pay attention. That's the least we can do for one another in our society is pay attention in what we're [1191]doing and what's going on. But, you don't spend $49,000. The surveillance was $5,833, you know. Sutton testified for seven hours. He got 35—$3,675.

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Another thing that was very interesting to me, one of the first things out of Dr. Sutton's mouth is, oh, my son has Tourette's. What does that have to do with anything other than to try and bolster his credibility? That's all. There's no proof of that. And they know that they haven't been completely honest with us to begin with, so we fully and fairly question what they say to you. And fully and fairly question all of their testimony. It's bought and paid for, bought and paid for. They don't [inaudible]. They wanted—wanted you to believe that she was uncooperative. All of these things where they finally said, oh, no, the gap in treatment, even Dr. Sutton on the stand to tell you you're right, there was—there was that Botox. He pushed back on the physical therapy. No, there was no physical therapy. But, he admitted that there was Botox in that so-called gap in treatment. He admitted to that. There's no gap in treatment. She was using Botox. She was using the modality that had been prescribed to her.

So, let's talk about justice. There is an instruction here that tells you the purpose, Instruction No. 11. "The purpose of awarding compensation to an injured party is to repair his or her injury or to make him or her whole again [1192]as nearly as that may be done by an award of money." That's the purpose. We're not an eye for an eye. We're not going to put Alicia in a car and bang her up until she's doing this. We're not going to do that. We're not going to hurt her until she's permanently damaged. That's not how our society works. And the only thing we have is money. That's

it. And so we have—have a [inaudible] justice in this case.

So, when you're thinking about this case and you're deliberating about this case, ask yourselves why the Defense has done everything that they've done in this case. Why did Facebook stalking somebody? Everybody knows how social media works. You can't take a picture and say, oh, look, you were over here at a football game as if Janelle can't go to a football game. But, notwithstanding that, the point is is the steps and how far they went, how far they were willing to go. This is a car crash case. They're happening—right now someone just got [inaudible]. They happen all the time. This is a simple car crash case; that's what this is. We're here for a simple car crash case. And they've turned it into this incredible situation. Ask yourself why. And it's because of [inaudible] like this is a big dollar case. That's why. That's why.

I'm going to ask you to retire to the jury—and I have another opportunity to come back and speak to you. But, I'm trying to be cognizant of your time. But, I want you to think [1193]about these things, and I want you to think about these things when the Defense gets up and starts telling you about who said what and who said the other. Think about the credibility of the witnesses. Think about who has known Janelle, had the opportunity to observe her. And then think about who's getting paid to say what it is that they said.

Thank you for your time.

THE COURT: So, members of the jury, we need to take our afternoon recess. We will complete everything today. So, we will—we'll take 15 minutes right now, and then we'll come back and hear Ms. Jensen's closing. Okay.

THE BAILIFF: Please rise.

[Jury absent, 2:39 p.m.]

THE COURT: All right. We will be in recess until five to four. Ms. Jensen—

MS. SARGENT: Five to three?

THE COURT: —I will—sorry, five to three. I'm thinking of the next part. So, Ms. Jensen, I will give you until five to four. And then Ms. Sargent, I'll give you another 10 minutes after that, so we'll go past four o'clock. But, we—your—your main closing was significantly longer than you had anticipated—

MS. SARGENT: Understood, Your Honor.

THE COURT: —which is fine.

MS. SARGENT: Understand.

[1194] THE COURT: But, we do—we just have to be done by four. So, we can go a little bit past that.

MS. SARGENT: Understood.

THE COURT: But, I will then start to hold to limits to make sure that everybody can have the same time and whatnot.

MS. SARGENT: Understood.

THE COURT: Okay? We'll be in recess for the next 15 minutes.

[Recess taken from 2:41 p.m. to 2:54 p.m.]

[Jury absent.]

THE COURT: Please be seated. All right. Is there anything before we bring in the jury?

MS. SARGENT: Nothing from the Plaintiff, Your Honor.

MS. JENSEN: Not from the Defense. Thank you.

THE COURT: All right. Thank you.

THE BAILIFF: Please rise for the jury.

[Jury present, 2:54 p.m.]

THE COURT: Please be seated. All right. Members of the jury, if you could please turn your attention to Ms. Jensen?

MS. JENSEN: Thank you, Your Honor, Counsel.

Appendix F

CLOSING ARGUMENT BY THE DEFENSE

MS. JENSEN: Ladies and—members of the jury, Alicia Thompson, as you know, is here to accept responsibility for the accident. And you can tell that from having watched her testify and having watched her response [1195]to the testimony of other witnesses and everything that's happened as we've gone through the process of this trial. It's no laughing matter for her. There is nothing but seriousness with respect to what is happening in this courtroom as it relates to my client.

Now, you'll recall that during my cross-examination of Ms. Henderson a couple of days ago, she was confrontational with me, asking to know why I was putting her on trial. Her point was, I was hit; I was rear-ended; I have injuries. And she wants the inquiry to end there. And Ms. Sargent just spent almost 45 minutes talking to you largely about the efforts that the Defense has taken to defend Alicia against this. It's just a simple car accident; it's a simple rear-end; why are we going through this exercise? And it seems pretty evident that the reason we're going through this exercise is because the ask is for three and a half million dollars.

There's a saying in the practice that when you have the evidence on your side, you argue the facts. When you don't have the evidence, you attack the party. And that's largely what we just heard for the last 40 minutes. But, that's not what I'm going to talk about.

I'm going to talk about the evidence.

So, the thing about this case and what I—I find interesting about Ms. Henderson's challenge during my cross-[1196]examination of her was that she, in fact, carries the burden of proof, and that perhaps is why she was feeling like she's on trial. But, the truth of it is she is on trial. It's her burden to prove that she was injured in the accident. And if you believe she was injured, it's her burden to prove damages. And you know that because that's what the jury instructions tell you. I'm going to just click through these quickly, but in Jury Instruction No. 7 it talks about the burden of proof with respect to the jury. In Jury Instruction No. 12, there's a section that talks about burden of proof with respect to damages.

So, let's break down what Ms. Henderson has told you in terms of her theory of injury to kind of its most basic elements because I think during the course of trial, the theory of injury was a little amorphous. Is it—is it the car accident gave me whiplash and that exacerbated my Tourette's? Or is it that the car accident caused stress and exacerbated my—my Tourette's syndrome? I don't know if it was quite coalesced. But, I think Ms. Henderson did, during her testimony, essentially say, I have whiplash, and now my Tourette's—my tics are worse.

So, let's now think about what we know about the accident, Ms. Henderson's situation after the accident. So, we know she walked away—she drove away

from the accident. She did so without any fractures, bruising. There was no shoulder joint [1197]injury. She didn't go to the emergency room. You did not hear that—about findings of any diagnostic studies like x-rays, MRI imaging, CT scans of the head. None of that happened after the accident, indicating that none of her providers thought her injuries warranted any kind of any diagnostic workup to the extent that she had any injuries.

But, you did hear from—and I want to focus this next part of my closing, I want to focus on the medical testimony from the medical doctors as compared to the chiropractor—chiropractors or other types of witnesses. You heard from three medical doctors. Let's talk about Ms. Henderson's treating physicians: Dr. Vlcek and Dr. Wall. And what you heard from both of these physicians in terms of objective findings and injury is not that they conducted an examination of Ms. Henderson after the—after the accident and identified objective findings of injury, they relied on her report to them. She came in and told them that she had a whiplash injury.

Speaking with respect to Dr. Vlcek specifically, her neurologist for decades, Ms. Henderson goes to see Dr. Vlcek three days after the accident. And she's there because her Tourette's, her tics have gotten so bad that now she is at the point where she is going to be evaluated for the experimental treatment of deep brain stimulation, the DBS treatment that Dr. Rappaport kind of explained where you get [1198]

wires in your brain that send electric shocks, and those shocks help to mitigate, control, or stifle the tics. That is where Ms. Henderson is at the time of the accident. And so, she's in Dr. Vlcek's office being, as—as he describes, doing a comprehensive neurological evaluation to determine whether or not this is appropriate. And so, they're going over her entire history, everything about her, to see if—if they can go into her brain, right, and implant these—these wires. And she doesn't bother to mention that she's just been in an accident that, by her accounts—but that night, when she got home, she was on fire in terms of her tics, right? And she doesn't mention that to her doctor. And you have to ask yourself why? Is it because $3.5 million hadn't coalesced in her mind yet? Dr. Vlcek, when he was questioned about this, also testified that if she had told him about the accident, he would have put it in her notes.

So, Dr. Vlcek sees her six months later, and that is the appointment where he talked about during his testimony and he confirmed that he did not independently verify any—any injury.

[The following is a transcript of the portion of Dr. Vlcek's video deposition being played at 3:02 p.m.]

MS. JENSEN: Did you form any opinions about what physical injuries the accident would have caused?

DR. VLCEK: My understanding was that she was diagnosed as [1199] having a whiplash injury. That—what I had testified to earlier.

MS. JENSEN: Okay. Did you conduct any ortho—an orthopedic exam or any test to determine what injuries were caused by the accident?

DR. VLCEK: I'm not an orthopedist. I'm not a chiropractor. I'm not—I wasn't the emergency room doctor or whomever in treating her for the—that kind of injury or whiplash. I was seeing her in regards to her Tourette's syndrome and her tics, and the fact that the cervical head tic and truncal tic had, by report, and I felt probably by observation, by report had greatly increased in intensity and frequency following that motor vehicle accident. And I have seen that occasionally in other patients, and I've seen that in some patients who have had other kind of injury or a nidus that greatly intensified their tics. So, I was not treating her arthritis, if she had, or to what degree. I wasn't treating her musculoskeletal pain. I wasn't doing physical therapy if she had some of that. I wasn't doing chiropractic treatment. I wasn't—so, I'm not—so—

[Normal testimony resumes at 3:04 p.m.]

MS. JENSEN: So, in other words, he can't tell you she was injured.

Dr. Wall testified, if you remember, and Dr. Eric Wall was Ms. Henderson's primary care physician just around the [1200] time of the accident. He had seen her, if you recall, two times in the months leading up to the accident. It was for knee pain. Ms. Henderson

has had to meniscus repairs, one on each knee, one before the accident and one shortly after the accident. And that's why he was seeing her before June 2014.

The first time Dr. Wall sees Ms. Henderson in person after the accident, six months later actually during this—the same month that she sees Dr. Vlcek, December 2014, and it was at that time that he learned that she had been in accident. And he also, like Dr. Vlcek, did not do any exam. And, sure, Dr. Vlcek's a neurologist. But, Dr. Wall is a family physician, certainly qualified to run through a physical exam to determine whether or not there's any objective finding of injury, but he didn't do it. Again, they relied on Ms. Henderson's testimony.

Oh, I'm sorry. I'm having technical difficulties, and they're my own.

You'll recall during his testimony that I asked Dr. Wall the question: "In this instance, six months after the accident, Ms. Henderson is there to talk to you about the accident, and she reports to you that her Tourette's has worsened, which has exacerbated her neck and shoulder pain; is that right? That's what she's reporting to you?" "Yes, that's what she is reporting to me."

And then he was asked, "Is there documentation between [1201]your first visit with" Mr.—"Ms. Henderson and this visit with Ms. Henderson about differences in her neck pain or shoulder pain?" And

his answer is, "No." And we know she has neck pain and shoulder pain because well before the accident she has severe degeneration and pain in her—in her spine, in her neck, her back, in her shoulders, and that's why she's going to a chiropractor constantly [sic].

So, Wall—another thing I want to point out about Dr. Wall's testimony is that it seems on some level he was brought in to testify that, okay, so I reviewed all of her records. Once I found out this was going to litigation, I got curious, and so I did my own style of investigation and I went through the records I had access to, which did not include physical therapy, which did not include chiropractic care, which did not include her appointments with Dr. Vlcek. They included her primary care appointments. And he told you that it was his impression that her primary care appointments had doubled after the accident. But, when I pressed him on cross-examination, can you name one date or one time when she came to her primary care—to a primary care appointment after the accident, he couldn't identify one single date. He said, well, I'd have to go back to my notes.

So, let's talk about the medical testimony that was provided to you where people are actually conducting an examination of Ms. Henderson, and that's Dr. Rappaport. And [1202]you heard about—from his perspective, and—and you heard this from Dr. Sutton a little bit, too, but the benefit of having a doctor for the Defense—and obviously we have to hire them;

no one is doing this work for free, and we can't just rely on the testimony of medical providers—Alicia is absolutely entitled to explore her defenses in this case. And if there's questions about medical records that suggest that there isn't an—an injury related to the accident, certainly we're entitled to hire professionals to take a look at the records.

And so what do they do? Dr. Rappaport, Dr. Sutton, they get the complete picture. They get almost all of the medical records for Ms. Henderson from when she was first diagnosed with Tourette's as a teenager until, what, 2017 I think the—the records were in this case. And then they get to examine her; they get to question her; they get to actually conduct the tests, observe her responses, see if there's objective findings. They get the complete picture, where, as compared to Dr. Vlcek who said I've never seen PT records, I've never seen chiro, he's never even seen primary care records; maybe he's seen some Botox records. Dr. Wall, same thing, very limited scope. Dr. Devine, he's only seen chiropractic records. But, with Dr. Rappaport, he gets a bird's eye view. And taking all that information into account, he told you that he could not conclude on a more probable than not basis that Ms. Henderson was injured in the accident, even though [1203]he allowed that it was a possibility.

[The following is a transcript of the portion of Dr. Rappaport's video deposition being played at 3:09 p.m.]

MS. JENSEN: —provide the jury, if you can, with a summary of your opinions in this case within the scope of your expertise.

DR. RAPPAPORT: My understanding is that she did develop—or at least started to complain of neck, upper back, and low back pain after the accident. It was difficult on a more probable than not basis to state that a significant amount of neck, mid-back, and low-back pain was due to this accident, but it was possible that a minor cervical, dorsal, and lumbar strain could have resulted from the June 2014 accident but not on a more probable than not basis, and that at the time I saw her on January 11th, 2018 there was no objective evidence to substantiate that there were ongoing issues with strain or sprain or spasms or actual tenderness in these areas.

[Normal testimony resumes at 3:10 p.m.]

MS. JENSEN: So, there's no medical doctor who treated Ms. Henderson who can—who came in and could say, yes, she was injured as a result of the accident. Dr. Rappaport says it doesn't appear that there was on a more probable than not basis even though it's a possibility.

So, Plaintiff, rather than—the Plaintiff put on her [1204]chiropractor, Dr. Devine, who testified, and relied quite heavily during the presentation of evidence on his testimony. And both from Dr. Devine's testimony himself and on cross-examination of Dr.

Sutton, right, you'll recall we went through—Ms. Sargent went through page after page after page of records, trying to show that according to the chiropractor notes, before the accident Ms. Henderson was improving, and afterwards she took a nosedive and in—in order to prove to you that she was injured.

But, let's talk about Dr. Devine, and I want to do so in the context of the jury instructions regarding credibility. And Ms. Sargent shared with you the credibility instructions a little bit, but I want to go into them in a little bit more detail.

Jury Instruction No. 1, it's kind of buried in there, the discussion of credibility. But, part of the instruction says that "You are the sole judges of credibility of each witness and of the value or weight to be given to the testimony of each witness." And what this section of the—of the jury instructions does is it empowers you to actually put the microscope on all of the witnesses, all of their motives, all of their bias, what they said, what they didn't say, what was contradicted. And it empowers you. If you find that a witness is not credible, it empowers you to disregard their testimony. Just because someone took the stand, just because [1205]Dr. Devine took the stand and told you she was better before and she was worse after does not mean that you have to believe it. And that instruction provides you with different types of factors that you can apply to the analysis of credibility. And it's not limited to what's in the instruction. It—it lists several different things you can consider, but it doesn't

say these are the only things you can consider. So, if you have something you use to evaluate credibility, please do so with all the witnesses that came across that witness stand.

But, with respect to Dr. Devine I want to talk about these particular points—or factors for—in analyzing the credibility: quality of the witness's memory while testifying; bias or prejudice and the reasonableness of the witness's statement in light of all the other evidence. So, this is what I have for Dr. Devine from my notes. You, frankly, may have more, and I don't want to limit you and have you disregard your notes. But, there are actually a lot of questions about his testimony. For example, I think one of the first things that he talked about was that Ms. Henderson, after the accident, started dragging her foot. You'll recall that, right, of bumping into walls? But, the evidence from all of the medical doctors who evaluated Ms. Henderson and took a look specifically at her gait found that she was walking normally. There's no evidence in the medical [1206]records that there is—that there is a foot drag or foot drop, she's dragging her foot, or she's wearing out her shoes.

He talked about her increase—the increased number of visits ever since the accident. But, he couldn't even begin to put a number on it himself. He had no idea. Before the accident, though, he testified that from January to, what, June I think 10th maybe, right before the accident, that he had seen her 26 times. But, Dr. Rappaport was actually in the records

counting, and he counted 47 visits. So. Dr. Devine's trying to minimize how many times Ms. Henderson is seeing him before the accident to conflate what's happening afterwards.

He testified that without chiropractic treatment, she—she'd go south, I think is the phrase he used. But, we all know and he acknowledged that after the—after eight months of chiropractic care following the accident, there was that six-month gap of care where there was nothing besides a Botox injection.

In terms of bias, I thought it was interesting that Dr. Devine kind of threw out there the tidbit that suggests that nothing untoward, of course, but he has more than just a patient/physician relationship with—with Ms. Henderson. You'll recall that he talked about how he actually hired her. He—he allows her to come in and work or—when she was in college, I think, and she was strapped for cash, he gave—he gave her a job.

[1207] He testified that he did not think she had any vocal tics before the accident. But, we know that her vocal tics were documented. I mean, even her friends and—friends and family talked about how she had vocal tics, right? And going back to 2004, the 2004 appointment with Dr. Vlcek, 10 years before the accident, at that point the vocal tics are described as loud and frequent and intense.

He tells you that he helped—after the accident he helped coordinate her care. But, when pressed on—on cross-examination, and I think maybe in response to a jury question, what came of that truth of it was that he thinks maybe he—he had a conversation with her physical therapist. He can't tell you who, he can't tell you when, he can't tell you what they talked about; it was just a maybe. There's no coordinating care.

He testified that he took x-rays. He can't tell you when, what the results were. And, frankly, there's no evidence before you that he ever took x-rays at all. He examined Ms. Henderson two days after the accident. And as you'll recall, there was testimony about, you know, he ran through all these tests and discovered, you know, she had all these significant injuries, including radiating arm pain. She's telling him, I can barely write because of the numbness in my—in my arm, and I'm having trouble walking. My feet and legs aren't doing what I tell them to do, and I'm trouble [1208]walking. And he acknowledged that these—these concerns, if this is really what's happening with someone, your concern is that they have a disc herniation, that, you know, there's something really significant going on with the structure of their spine. And what you do is you get an MRI, and you send someone to an orthopedic referral to find out what really is going on and what did he do. Nothing. He did nothing different than what he'd done before the accident.

Dr. Devine didn't mention—there's—there's no mention of Tourette's in his chart notes until 2017. And I'll give him that, you know, he's seen Ms. Henderson so frequently that maybe he's not documenting Tourette's in every single. He documented it in one in 2017. But, more importantly, what he failed to document entirely was what her tics were like before the accident and how they changed after the accident. There's nothing in his records about that whatsoever.

And I guess this comes as no surprise because the Chiropractic Quality Assurance Commission found that he committed unprofessional conduct with respect—

MS. SARGENT: Objection, Your Honor. Objection, Your Honor. That is not what he testified to.

THE COURT: Okay. Ms. Sargent, the jury shall rely on their own memories as to what the evidence and the testimony of the witnesses showed.

MS. JENSEN: You'll recall he admitted when I cross-[1209]examined him about whether or not he was found to have committed unprofessional conduct with respect to recordkeeping. And he acknowledged that.

So, finally, Dr. Devine's records suggest that Ms. Henderson was improving in the months before the accident, right? There's this theory, there's this theme, she's improving, she's gaining mobility, she's getting

better according to the chiropractic records. And then after the accident she's not. But, what does the medical evidence show about what was happening in the four months before the accident? It shows that Ms. Henderson—or even six months before accident. It shows Ms. Henderson was seeing Dr. Young, an orthopedic surgeon at OPA Orthopedics, and Dr. Young had—there had been a recommendation for an MRI and an x-ray, both of which showed severe cervical degeneration or severe arthritis in the spine. She had been referred out to physical therapy and gone to a handful of physical therapy appointments. And Dr. Young was considering a cervical facet injection, not Botox injections, but an injection into the joints in her neck because her neck pain had gotten to the point where it was that severe.

Taking all of this into account, what I suggest to you is that you can completely disregard Dr. Devine's testimony about Ms. Henderson's pre- and post-accident condition. Every factor in terms of the credibility analysis that you apply [1210]to his testimony, he fails.

So, stepping back from Dr. Devine and talking about Ms. Henderson's obligation to prove that she was injured in the accident. And let's assume—stepping away from Dr. Rappaport's testimony and—and other medical testimony, let's assume that you're persuaded that she was, in fact, injured, that the 40-mile-an-hour hit caused injuries. Then the burden shifts to damages. Ms. Henderson still has

to prove her damages. The burden of proof is talked about in Jury Instruction No. 12. And that says in part that the burden of proving damages rests upon Ms. Henderson, and it is for you to determined, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence. Importantly, your award must be based upon evidence, not speculation, guess, or conjecture. And the law has not furnished us with any fixed standards by which to measure non-economic damages. You'll recall during jury selection people were hoping to get some kind of precedent or a chart or grid or something to help guide their way. But, we don't—the law doesn't provide that.

So, with reference to these matters, you must be governed by your own judgment, the evidence in the case, and these instructions. So, in short, any award of damages has to be based on the evidence, and you have to exercise your good judgment.

[1211] So, let's break down Ms. Henderson's theory of damages in its most basic elements. Essentially, I was managing before the accident; I'm not managing now. My Tourette's, my [inaudible], my tics have gotten much worse and they're making my life more difficult. So, we heard from—in support of her damages argument, we heard from friends and family. And, just like all of the other witnesses in this case, you get to analyze the credibility of these witnesses as well, applying the—the factors and from the jury instructions. And for these witnesses, I think that

bias or prejudice and the reasonableness of their testimony are particularly relevant in evaluating their credibility.

So, of course, you know, we heard from Ms. Hinds. We heard from Kanika Green, Jolyn Gardner-Carter [sic] I believe her name is—Campbell, excuse me, and Schontel Delaney by a videotape. And they were all pretty consistent in their description of Ms. Henderson's Tourette's before the accident. You'll recall sniffs, maybe a cough like she had a cold or allergies, but otherwise, they—that was kind of the sum of their description. There were a couple other additions. I think Schontel talked about an occasional—excuse me, Ms. Delaney talked about an occasional shoulder shrug. Ms. Gardner talked about an occasional leg tic. But, Ms. Green, the witness with—with—who went to Trevor Noah and out to dinner and various events with Ms. Henderson, said very [1212] specifically there will—there were no truncal tics, no leg tics, no kicks. The friends and family who are trying to—in this courtroom are trying to support someone that they love and treasure, what they had to say is not supported by the medical records, by the doctors who are [inaudible]—whose job it is is to provide accurate information.

[The following is a transcript of the portion of Dr. Wall's video deposition being played for the jury at 3:24 p.m.]

MS. JENSEN: So, you saw Ms. Henderson—if you need to refer to the chart notes, please do to refresh your memory, but you saw Ms. Henderson in May—May 19th of 2004. I think at the time she was about 29, 28 or 29. And it's true, isn't it, that at that appointment—

MS. SARGENT: I'm going to object real quickly. It's beyond the scope of the direct.

MS. JENSEN: —that at that appointment you described Ms. Henderson's tics as quite severe; that they were intense, frequent, very loud phonic tics with exhalations, grunts, yells, and quick exhalations. You described truncal body jerk tics, big head jerk tics, facial tics, arm tensing, head jerking tics, and neck muscle-tensing tics with quick head extension. These were all frequent, intense, and almost constant.

MS. SARGENT: I'm also going to object to Counsel's [1213]testifying.

MS. JENSEN: Is that what you documented in your chart note of May 19th, 2004?

DR. WALL: Yes. She's had—as I had testified earlier, she's—in my experience with her, she's had pretty severe Tourette's syndrome.

[Normal testimony resumes at 3:26 p.m.]

MS. JENSEN: And you wouldn't know that from the friends and family.

I thought it was interesting also that all four of those witnesses used the exact same phrase when describing Ms. Henderson before the accident: life of the party. Almost—almost like someone had told them to say that. It was—it was like a tape on repeat. She was described as a model with a slender body to die for who gained significant weight after the accident. Obviously, Ms. Henderson was interested in fashion. They said she loved to shop and dress in colorful outfits, but could no longer shop for those outfits after the accident. But, again, information that's directly controverted by even Ms. Henderson's own medical—medical providers.

[The following is a transcript of the portion of Dr. Wall's video deposition played for the jury at 3:27 p.m.]

MS. JENSEN: … field address, one was her constant—Ms. Henderson's constant fatigue; do you see that as [1214]underlying?

DR. WALL: Yes.

MS. JENSEN: And—and there was a discussion about whether or not that was connected to Ms. Henderson's Tourette's syndrome, perhaps because she wasn't able to get restorative sleep; is that right?

DR. WALL: Yes.

MS. JENSEN: Which is part—

[Normal testimony resumes at 3:27 p.m.]

MS. JENSEN: Actually, I'm—before we start playing this, I'm going to set the context. Dr. Wall is being questioned about Ms. Henderson's appointment with Pamela Sheffield, who was her primary care provider for a period of time. And she had gone to—the evidence was that she'd gone to establish care with Dr. Sheffield in 2012. And Dr. Sheffield and Dr. Wall are in the same practice. Dr. Wall took over—if you'll recall, he took over primary care after Dr. Sheffield retired, I believe. And we're having Dr. Wall review that initial note with Dr. Sheffield in 2012.

Like this—Ms. Sargent said, this came on the heels of Ms. Henderson's mother's passing. We'll certainly acknowledge that. Nonetheless, this is what—what's being talked about isn't an increase in her tics and Tourette's syndrome as a result of stress; it's fatigue, weight gain—fatigue and weight gain basically that are unrelated to her mother's [1215] passing. And hopefully this will work.

[The following is a transcript of the portion of Dr. Wall's video deposition being played at 3:28 p.m.]

MS. JENSEN: … that Ms. Henderson and Dr. Sheffield address, one was her constant—Ms. Henderson's constant fatigue; do you see that as underlying?

DR. WALL: Yes.

MS. JENSEN: And—and there was a discussion about whether or not that was connected to Ms. Henderson's Tourette's syndrome, perhaps because she wasn't able to get restorative sleep; is that right?

DR. WALL: Yes.

MS. JENSEN: Which is part of the reason why she was so exhausted—

DR. WALL: Uh-huh.

MS. JENSEN: —is that right?

DR. WALL: Yes.

MS. JENSEN: So, going on, there's—it looks like the second topic they talked about at that point was weight gain?

DR. WALL: Yes.

MS. JENSEN: That Ms. Henderson was reporting a significant gain of about 50 pounds; is that right?

DR. WALL: Yes.

MS. JENSEN: Something obviously that—that Dr. Sheffield noted she was unhappy about; do you see that?

[1216] DR. WALL: Yes.

MS. JENSEN: And then she notes that, "Although Ms. Henderson was in fashion, she couldn't even go shopping because of her weight;" do you see that note?

DR. WALL: Yes.

MS. JENSEN: Also, that she was "unable to exercise due to significant pain in her body"?

DR. WALL: Yes.

MS. JENSEN: Okay. There's also a discussion in the notes from Dr. Sheffield about perhaps a relationship between Tourette's syndrome and Ms. Henderson's—and Ms. Henderson being unable to resist cravings for food; do you see that?

DR. WALL: Yes.

[Normal testimony resumes at 3:30 p.m.]

MS. JENSEN: So, let's set aside the—the well-meaning, but, frankly, inherently biased testimony of Ms. Henderson's friends and family, and let's talk about what was actually going on in her life. You've seen a version of this life before. But, I want to focus on is obviously the period from February to August 2015. So, Ms. Henderson has had eight months of chiropractic care after the accident at this point. And then she has a period of six months where she's

not getting chiropractic care, no massage care, no physical therapy. She's not seeing Dr. Vlcek.

We do know what she was doing this period of time. Okay. [1217]Right? We've got the 17 minutes of footage from Costco. And I understand that Plaintiff takes issue with this footage. And I'll suggest to you that the arguments about this are a red herring. This is objective evidence of what Ms. Henderson was like on March 11th of 2015. Now, I understand that there—that there had been many days where surveillance was conducted of Ms. Henderson. But, use your commonsense and think about Tyler Slaeker's testimony. Just because someone is out conducting surveillance doesn't mean they're capturing video footage. There is not one piece of information that has been presented to you that there was video that existed and that has been destroyed. What is before you is that people tried—they did surveillance and tried to capture footage. This is the footage that was caught.

Ms. Sargent tries to—to undermine that fact during her—or tried to when she was cross-examining Dr. Rappaport, right? And she went on and on about CDs, the "S" on CDs, someone had sent him a letter with the video surveillance and another CD. Why CDs with an "S"? And, you know, the interesting thing about that is Dr. Rappaport said, if we're here for a search—search for truth, and she questions whether or not Dr. Rappaport received more than 17 minutes of video when everyone's burying it, she could have

subpoenaed his file. He tells you that happens all the time. And she didn't.

So, even if you had a suspicion about that—and, again, I [1218]suggest there's no evidence of it to support it—the video and what it's showing is consistent with what else is happening with Ms. Henderson during this gap in care, right, this six-month gap in care? So, she's—we know she's working at Costco. We know she works there, she admitted, for three months. And she doesn't leave that job for a period of respite at home because it's been so terrible for her. She leaves that job and goes to a job where she's in a standing position as a cashier at Walgreen's. And she's at Walgreen's through October. And she leaves Walgreen's, again not because she's physically incapable of doing the job, but she's going back to school.

Now, you'll also recall that the Plaintiff tried to muddy—muddy the water about this six-month gap in care, likely because it's such a powerful snapshot into how Ms. Henderson was doing after this eight months of chiropractic care. And one of the things she—she questioned Dr. Sutton about to challenge him was the Botox, right, that there is a June 17th, 2015 appointment where Ms. Henderson gets Botox? So, it's well after that March 11, 2015 surveillance video. So, there's no suggestion that the day the surveillance video was taken, there's no evidence to support that she'd just gotten a Botox injection and she was feeling at her prime. That's not the evidence. The evidence is

that she had an injection in June, two months later. And, importantly, the injection [1219]is not—you know, Ms. Henderson talked about how after the accident her tics have gotten so much worse that she's getting injections into the muscles in her neck because she's—she's got much more violent—violent jerks. But, that's not what the Botox injections are doing. Per the medical report that Ms. Sargent questioned Dr. Sutton about, it says that she is receiving Botox injections. She's at the clinic for hoarseness, vocal tics, facial spam, and blepharospasm, which are eye tics.

On June 17th, 2015, she gets Botox into the left TA for her voice. The TA is the muscle that controls your vocal chords. She gets Botox into the lateral periorbital region, around her eyes, bilaterally, both sides. She gets Botox into the glabellar, which is in between your eyes. She gets Botox in the nasal dorsum, in her nose. She gets a left TA injection for her voice. That's what this [inaudible] says.

There is no—the—the—as Dr. Sutton testified, there are notes here from 2013 where there were three visits, 2014 where there were two visits, 2015 another three visits, 2016 another three visits. In none of those visits after the accident is there any documentation that she's getting injections—Botox injections into the muscles in her neck. Her traps, her scalenes, and I can't remember all the names of the muscles in the neck, but you may recall from Dr. Sutton's testimony. So, this is a red herring.

[1220] You also recall that there was a suggestion that there had been a physical therapy appointment on March 2, 2005. Ms. Sargent kept referring to it as a chart note. It's not a chart note; it's a letter. And the letter is from Ms. Henderson's physical therapy provider, and she said that "Ms. Henderson was evaluated on June 17th after the accident, had two visits, came back in September of 2014, and on that date at that visit we determined that the schedule needs that Janelle had did not match up" that—"with the hours we offered and that she would be better served in an alternate facility." There was no alternate facility. There was no more physical therapy. But, there was also no treatment in March of 2015.

But, we're here because Ms. Henderson is seeking financial compensation. So, let's talk about damages. And I'll talk about Exhibit No. 10. Ms. Sargent mentioned this a little bit in her closing. And it's an instruction about how do you deal with a situation when you have someone who's compromised before there's an accident. It's absolutely true that in our society if—if you're compromised and—and you get hurt, you still get to recover. We're not going to disregard you because you—you come to the scene of the accident already compromised. However, you do not get extra benefit because you were compromised before. You get—you can compensated for that exacerbation for that period of time when your poor condition is made worse.

[1221] So, normally I don't suggest a number when doing

closing arguments, but I thought that Ms. Sargent's calculation for damages, how you go about calculating damages, was—was pretty interesting. $250 a day, that seems—that seems exceptional, frankly, when we're talking about someone who was severely compromised before the accident. But, let's use that number; let's use $250 as the method by which to calculate damages. My suggestion to you would be that if you believe she was injured and if you believe her condition's been aggravated, that that—you apply that $250 only to that period of aggravation or exacerbation reflected by the competent medical evidence. And that would be the six-month period—or excuse me, that would be the eight months leading up to that six-month gap in care, leading up to the time when she felt like she was able to take on that job at Costco, to take on that job at Walgreen's and stop the treatment. And by those numbers, that's $60,000 for a rear-end accident. That's a lot of money.

And last thing I want to talk about before I sit down are the credibility factors as they apply to Ms. Henderson because they do apply to her as well. The first one I want to talk about is the manner of her testimony. And I don't want to belabor this too much, but, you know, certainly when her own attorney is asking her questions, she is trying to be forthcoming with information. But by the time she [1222]testified and by the time I cross-examined her, she'd been sitting in trial for four days with witnesses, watching them testify and watching how the process works, right? At least she doesn't have to roll over

and accept everything that's happening, right? She has an attorney that gets to challenge the evidence. And Ms. Henderson saw that. She saw Ms. Sargent would call a witness. I would do cross-examination. She would do direct, back and forth. But when it's my turn to cross-examine her, she's not interested in the search for truth; she's interested in being combative. Why are you putting me on trial? I don't know what I told my doctors. I don't know when I saw my doctors. I don't know what they have in my reports. I didn't read the medical records. [Inaudible] the medical records. You know, it was—it was quite combative. There's—there's definitely no search for the truth there.

By comparison, my client took the stand, obviously feeling, I think, intimidated and emotional about the process and—and rightly so, and provided you with—with genuine and authentic testimony. In fact, you know, the evidence is that Ms. Henderson didn't know she was going to get hit. She was looking ahead when the accident happened. She didn't see my client coming. She doesn't know how fast she was traveling, right? My client could have gotten on the stand and said, yeah, you know, I—I glanced away and I looked back and I saw that Ms. Henderson's car was stopped, but I had plenty of [1223]distance and I started to slow and, you know, I—I bumped her 10, 15 miles an hour maybe. And that, frankly, would have benefitted Alicia's case, right? That's not what she did. She told the truth. She was traveling 40, maybe 45 miles an hour. She brakes, but she isn't framing the testimony

or framing the evidence in a way that would benefit her. She's being honest.

Let's talk about the quality of the witnesses' memory while testifying. And, actually I've talked about that a little bit in terms of Ms. Henderson refusing to provide any information on cross-examination about her condition or her care before the accident. But, you also heard this during the examination by Dr. Rappaport and Dr. Sutton. You'll recall I played that hour-long examination, which included the—all the parts of the examination, right; the history and the physical examination. And Ms.—like with me, Ms. Henderson was—was quite combative.

[The following is a transcript of the portion of Ms. Henderson's IME being played for the jury at 3:43 p.m.]

MS. HENDERSON: …right.

DR. SUTTON: Okay. Hip flexion is 120 degrees both right and left. There is full internal and external rotation on the right/left—let me back up. Hip flexion, 120 degrees on left, 100 degrees on the right. She complains of lower back pain both right and left. There's full internal and external [1224] rotation to the right and left hips.

Straighten this leg for me. Bring your—your heel and put it up over here for me, just on your knee. Yeah, just like—

MS. HENDERSON: Yeah, I can't do that.

DR. SUTTON: And because of why?

MS. HENDERSON: It's just bad—it hurts my knees.

DR. SUTTON: Ah-ha. And on this side? And the—so you—

MS. HENDERSON: It's—yeah.

DR. SUTTON: Those hurt your knees.

MS. HENDERSON: Uh-huh.

DR. SUTTON: But the knees aren't from the accident. Or are the knees from your accident?

MS. HENDERSON: I don't—no, no.

DR. SUTTON: FABER's test is unable to be performed because of knee pain. She is unable to determine whether she has knee pain from the auto accident or from some other source.

Go ahead and bring this up for me. Does it bother you if I bring this back?

MS. HENDERSON: Yes.

DR. SUTTON: Okay. Where does that bother you?

MS. HENDERSON: That hurts my back.

DR. SUTTON: Those hurt your back, huh? Okay.

Extension is limited by back—rather, knee extension is limited by back pain.

Any pain when I do this?

[1225] MS. HENDERSON: Yeah. Why are you doing all of this?

DR. SUTTON: We're—

MS. HENDERSON: Because I don't understand. Like, I feel like—my neck hurts, not my knees.

DR. SUTTON: But you just told me you don't know if your knees are related to the auto accident or not.

MS. HENDERSON: I—I—you have my medical records, so.

DR. SUTTON: Right.

[Normal testimony resumes at 3:44 p.m.]

MS. JENSEN: Let's talk about personal interest that Ms. Henderson has in this lawsuit. Obviously she's got a financial interest. But, if you're persuaded by Dr. Rappaport's testimony that her physical complaints don't match up anatomically with her

complaints of—of injury and there's got to be another explanation, and that explanation is probably some psychiatric or psychological feature, then, you know, arguably Ms. Henderson has an investment, whether it's subconscious or not, in having a jury endorse what she's saying, endorse her report that her—she was injured in the accident and she's gotten so much worse in terms of her Tourette's.

[The following is a transcript of the portion of Dr. Rappaport's video deposition being played for the jury at 3:45 p.m.]

MS. JENSEN: … that you got positive—well, that you're [1226]seeing nonorganic signs?

DR. RAPPAPORT: Well, it goes back to the psychological features affecting physical condition; that this is how we help determine that if—if I believe her and that she's really having this pain and believes these things are worsening her pain, then it's a psychological feature. If I don't believe it, it's malingering, and that it's faking or lying. And I wasn't saying that about her. So, we don't have a lot of, you know, explanations other than those two things. That clearly moving you from your ankles doesn't cause neck pain. Clearly doing a small squat doesn't hurt your neck. So, either you're faking it and lying, or you have a psychological feature affecting your condition. So, that's what it tells me.

MS. JENSEN: Did you draw a conclusion between those two options with respect to Ms. Henderson?

DR. RAPPAPORT: I felt she had psychological features affecting physical condition, which was why I discussed earlier that that was one of my diagnoses.

MS. JENSEN: Okay. Not—

DR. RAPPAPORT: I don't believe she's lying.

MS. JENSEN: Not that she was lying and trying to manipulate the exam.

DR. RAPPAPORT: Correct.

MS. JENSEN: All right.

[Normal testimony resumes at 3:46 p.m.]

[1227] MS. JENSEN: And that's not what we're suggesting. We're not suggesting she's lying. But, she is invested in the outcome of the case, so you have to question what she's putting out there in support of ultimately her request for financial compensation.

So, finally, I wanted to review Ms. Henderson's testimony in terms of the reasonableness of—as compared to the context of the other evidence in this case. I'm not going to go through, you know, her 2004 report—or appointment with Dr. Vlcek or—or things I've talked about ad nauseum. What I wanted

to talk about is the first day of testimony you'll recall she—she really focused on her leg tic and how that was getting worse and—and her foot. She said, you know, now I'm dragging—since the accident I'm dragging my foot, and I can't wear high-heeled shoes and I'm—I'm cause—I'm rubbing holes in my shoes since I'm dragging my foot so much.

I did mention before that that finding is totally not supported by any of the medical testimony. The medical doctors looking at her gait said everything is normal. Not one said there's a dropped foot. And you saw that also with the examination of Dr. Rappaport and Sutton.

But, setting that aside, Ms. Henderson signed under penalty of perjury on September 8th, 2017 a document that was part of the litigation. And in that document under penalty of perjury she herself said, "Since the accident I have seen [1228]therapists for my neck, shoulder, and foot." The foot is not related to the accident. 2017 is when she said that.

In an effort, I think, later to explain this away on the stand, she's testified that she introduced the idea of her tics are evolving and changing. And, again, not supported by her own medical provider, Dr. Vlcek.

[The following is a transcript of the portion of Dr. Vlcek's video deposition played for the jury at 3:49 p.m.]

MS. SARGENT: Defense asked you a series of questions about new tics, different tics. At no point in any of your chart notes did you say there were new or different tics; is that correct, as a result of the June 14, 2014 collision?

MS. JENSEN: Objection, mischaracterizes his testimony.

MS. SARGENT: And, in fact, didn't you say that it was an exacerbation of her tics that she already has?

DR. VLCEK: I would say it was primarily an exacerbation of tics that she already has. It wasn't that she had a bunch of entirely different tics.

[Normal testimony resumes at 3:49 p.m.]

MS. JENSEN: And then I ask you, if she really has a—a new symptom, a foot drop, dragging her foot as a result of the accident that's just developing, why isn't she back seeing Dr. Vlcek? Why is it the last time that she saw her neurologist, her 30-year neurologist, is in 2014? Where are [1229]the new studies? Where is—where—where is the treat—or the—the pursuit of treatment for that new symptom?

So, ladies and gentlemen, we discussed empathy during jury selection. And there's no question that Ms. Henderson has been dealt a really difficult hand. You know, she deals with things that are I think difficult for any of us to imagine. But the work that you do in

the jury room can't be driven by empathy or sympathy, and you'll that find that in the jury instructions. The work you do and the decisions you make in the jury room have to be based on the evidence and your good judgment. They have to be based on the facts of the case. And I'd submit that the facts in this case simply don't support Ms. Henderson's theory of the case.

[The following is a transcript of the portion of Dr. Rappaport's video deposition played for the jury at 3:51 p.m.]

DR. RAPPAPORT: —unusual behaviors during the exam that may—that were of what we call a nonorganic basis, "organic" meaning that they were true, objective findings from an examination, things like asking someone to do a squat and rise, and she said that she could only do about 10 percent of normal because it hurt her neck. There physically—we would say it's basically impossible to hurt your neck doing a squat and rise; that, if anything—I mean, I could understand for her if—knee pain might be a reason, but neck pain does not [1230]make clinical sense as a reason to limit your ability to do that.

[Normal testimony resumes at 3:52 p.m.]

MS. JENSEN: Thank you for your time and attention.

MS. SARGENT: You know what I find—

MS. JENSEN: Your Honor, we discussed—

MS. SARGENT: She has everything.

MS. JENSEN: Okay.

THE COURT: Okay.

REBUTTAL ARGUMENT BY THE PLAINTIFF

MS. SARGENT: You know what I find interesting about Defense Counsel's closing is that the first thing she said is that I spent a lot of time talking about whether they're telling the truth. Well, actually that's not true. The first thing she said is the reason why we're here is because we're asking for $3.5 million. And that's just not true. The reason why we're here is because the Defendant hit my client at 40 miles per hour and then told her to sue me; offered her nothing to resolve this case.

MS. JENSEN: Objection, motions in limine.

MS. SARGENT: Your Honor, they opened the door. They said the reason—

THE COURT: Sustained.

MS. SARGENT: —why we're here is because we were the—

THE COURT: Counsel, please don't argue with me in front

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[1236] MS. JENSEN: Objection.

THE COURT: Overruled.

MS. SARGENT: Alicia Thompson doesn't have to frame the issues because her agents have done it for her. She doesn't know what's going on [inaudible]. She didn't know there was surveillance. She didn't pay them. She didn't see the video. She has someone else back there, the puppet master that's doing it. And it's not her. So, she didn't have to. She had one law firm that started it, then hired a second law—law firm, and they're doing this now. So, it's your duty to decide who here essentially is telling the truth. That's what it all boils down to. When we get rid of all the little words that we use and all the words that we try to—to say what is and what isn't, it's who's telling the truth. That's what it all boils down to. Whether you believe Dr. Vlcek when he says that it was a big increase in her Tourette's; whether you believe Dr. Devine when says that he saw a difference in her; and whether you believe Dr. Wall when he—December 17 he said that the Tourette's had worsened to the point where it was [inaudible]. You have to decide that. Absolutely have to decide who it is you believe. That's what this all boils down to at this point.

Appendix F

Their whole case is don't believe anything that her doctors have said because her doctors haven't read everybody's chart notes. And I tell you this: nothing would

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APPENDIX G — Excerpt of Transcript of the Superior Court of the State of Washington in and for the County of King, Filed March 2, 2020

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON IN AND
FOR THE COUNTY OF KING

Cause No. 17-2-11811-7 SEA
Appeals No. 97672-4
PAGES 376-767

JANELLE HENDERSON,

Plaintiff,

v.

ALICIA M. THOMPSON,

Defendant.

VERBATIM REPORT OF DIGITALLY-
RECORDED PROCEEDINGS

VOLUME II

May 30, 2019, DR W817
June 3, 2019, DR W817

HEARD BEFORE THE HONORABLE
MELINDA YOUNG

Appendix G

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[482]Q Can you tell the jury sort of activities that you and Janelle used to enjoy before the collision?

A Yes. We would go out to all of the clubs in Seattle. We would go dancing. We would go to the movies. We would go to the opera. We just had a very active life, bike-riding, that sort of thing.

Q After the collision, can you tell the jury what—the jurors what changes in your relationship occurred?

A Janelle used to be the life of the party. She used to be the fun one. And now she's—she's not. She's always in pain and, quite frankly, she's a bit of a drag to be around. And that's hard to say. I've not told her that, but there have been times when she's wanted to—like, when we would go to the opera or she would want to go to the opera, and I would just tell her, oh, no, I'm not going to the opera this month, 'cause that used to be something I would do all the time. But, at the opera you have to be quiet; you have to be still so that you can really get the story and not disturb other people. You know, it's a quiet event. And now with how Janelle's tics are, they are more pronounced, and it's embarrassing to have your friend not be able to control herself sitting in the seat next to you, and then constantly being on guard to defend her because you know someone's going to say something rude or someone's going to get up suddenly and huff and puff and act all agitated because someone can't

[516]A Yes.

Q Okay. So, I'm going to talk about the period of time before the collision you guys—when you guys were going out and spending time with one another. What sort of things would you do?

A We loved to go dancing together. Uh, Janelle's a dancer. And, uhm, Janelle, I would describe her as the life of the party. She always wanted to go out and have fun. She was always wanting to be in the mix, meaning anytime there was an event, Janelle wanted to go. I was her go-to; she would always call me, uh, to do something. Whatever was going on in Seattle, she wanted to be there.

Q And, so what sort of things would you do?

A Uhm, mainly we would go dancing. Uh, we would go out to eat. Uhm, we would go basically any kind of activity where it was going out to play pool, going bowling, uhm, any, uh, recreational activity, we would do it.

Q And how often would you spend time with Janelle?

A Every weekend.

Q Okay. How long, from your 20s until the present, did you go out with her every weekend?

Appendix G

A Uhm, well, now we don't go out.

Q When did you stop going out?

A Uh, probably about four years ago is when I noticed that she never wanted to do anything.

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APPENDIX H — Excerpt of Transcript of the Superior Court of the State of Washington in and for the County of King, Filed March 2, 2020

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON IN AND
FOR THE COUNTY OF KING

Cause No. 17-2-11811-7 SEA
Appeals No. 976724
PAGES 1-375

JANELLE HENDERSON,

Plaintiff,

v.

ALICIA M. THOMPSON,

Defendant.

VERBATIM REPORT OF DIGITALLY-
RECORDED PROCEEDINGS

VOLUME I

April 15, 2019, DR W817
April 16, 2019, DR W817
May 28, 2019, DR W817
May 29, 2019, DR W817

HEARD BEFORE THE HONORABLE
MELINDA YOUNG

[203]bad that she's, you know, doing a lot of this while I'm trying to treat her. It's just kind of hard to adjust her, you know. So, but, you know, I try not to make it obvious, and, you know, I don't—don't want to make her feel bad. And I just kind of wait for her and then I just adjust her.

Q I want to make clear, you—you can—how—how do you consider your relationship with Janelle?

A Friendly, yeah. I mean, doctor/patient, but also friendly. You know, I've known her a long time, and she's great. I mean, I—I remember one time—you know, I've known her since she was going to college. And she had some financial difficulties. And, you know, she—that's sometimes making— tough time making ends meet. And so, a couple times we just hired her for, like, you know, contract labor, doing stuff from, like—I mean, she's mopped floors. She's done, you know, filing, whatever it's—I mean, and it's just like, you know, stuff that she could help around the office with.

Q And, this is while she was going to college?

A Yes.

Q Before the collision, how did you know whether or not the treatments were helping Janelle, whether they were giving her any sort of relief?

A You know, based on re-exams; based on what she tells me; based on what I, you know, see with my eyes and feel with my hands. She's definitely making, you know, improvement. Now,

* * *

[344]employees. I mentor; I educate; I hire; I come up with labor and business plans; I make sure that my pharmacy plan is compliant for state and federal law and regulations.

Q And, are you here to give an opinion as your—in the capacity as a doctor?

A No.

Q Okay. What is your relationship to Janelle Henderson?

A Janelle Henderson is my cousin.

Q So, would it be safe to say that you've known Janelle pretty much your whole life?

A Yes.

Q Okay. Can you describe to the jurors what Janelle was like before this collision that occurred?

A Before the collision, Janelle was very exuberant, very high energy, life of the party. You know, walked through the door and wanted to meet everyone, talk to everyone. Liked to go out, liked to dance. She just was the life of the party.

Q And can you describe to the jurors some of the activities that you and Janelle would engage in before this collision?

A Well, as children, Janelle and I would do all the typical things. We would ride bikes together; we would go swimming, camping, skating. When we were little children, I'd say probably age of five to 10, we were obsessed with Barbies, so we'd play Barbie dolls together. Our parents would kind of coordinate for Christmas on, you know, what they were

* * *

[354]MR. REICHMAN: All right. This concludes the deposition of Dr. Schontel Delaney. We're now off the record. The time is 1:26 p.m.

[Normal testimony resumes at 3:39 p.m.]

THE COURT: Thank you. Ms. Sargent, do you have another witness?

MS. SARGENT: Yes. We will call the Defendant, Alicia Thompson.

THE COURT: Okay. Ms. Thompson, go ahead and come forward. If you could raise your right hand. Do you swear or affirm the testimony you give will be the truth, the whole truth, and nothing but the truth?

MS. THOMPSON: Yes.

Appendix H

THE COURT: Okay. Go ahead and have a seat.

[Defendant takes the stand.]

[Off-the-record discussion.]

DIRECT EXAMINATION

BY MS. SARGENT:

Q Are you okay?

A Yeah.

Q Are you sure?

A Yeah.

THE COURT: Hold on just a sec. We're going to—

[Off-the-record discussion.]

BY MS. SARGENT:

[355]Q Are you—are you sure you're okay?

A Yeah, thanks. Yeah.

Q I'm just going to ask you a few questions, okay? You have been involved in a—in a car collision—

* * * *

APPENDIX I — Judgment of the Superior Court of the State of Washington in and for the County of King, Dated October 29, 2019

SUPERIOR COURT OF WASHINGTON
KING COUNTY

No. 17-2-11811-7 SEA.

JANELLE HENDERSON,

Plaintiff,

v.

ALICIA M. THOMPSON,

Defendants.

October 29, 2019.

JUDGMENT

Honorable Melinda J. Young, Judge.

JUDGMENT SUMMARY

1. Judgment Debtor:	Janelle Henderson
2. Judgment Creditor:	Alicia M. Thompson
3. Principal Judgment Amount:	$9,200.00
4. Total Judgment Amount:	**$9,200.00**

5. Interest to Date of Judgment: $0.00
6. Principal Judgment Amount shall bear Interest at the highest rate permitted by law.
7. Attorneys fees, costs, and other Recovery Amounts shall bear interest at the highest rate permitted by law.

THIS MATTER having come on by stipulation between the Janelle Henderson Plaintiff and Alicia M. Thompson Defendant, with the Court finding that there is no just reason for delay in entering judgment, it is now, therefore ORDERED, ADJUDGED AND DECREED that Plaintiff is hereby granted judgment against Defendant Alicia M. Thompson in the amount of $9,200.00 together with statutory costs pursuant to RCW 4.84.010 and RCW 4.84.090.

Dated this 29th day of October, 2019.

By /s/_____
The Honorable Melinda J. Young

Stipulated and Notice of Presentation Waived By:

THE LAW OFFICE OF VONDA M. SARGENT
By: _____
Vonda M. Sargent, WSBA No. 24552
Attorney for Plaintiff Janelle Henderson

Appendix I

LEWIS BRISBOIS BISGAARD & SMITH LLP
By: _____
Heather M. Jensen, WSBA No. 29635
Attorney for Defendant Alicia M. Thompson