No. 22-823

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

BRIEF IN OPPOSITION

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May 1, 2023

QUESTION PRESENTED

The Washington Supreme Court issued a decision remanding this state tort suit for evidentiary hearings on issues of state law and that have yet to occur. That decision does not address any federal issue, as none were properly presented at the trial level or on appeal. That being the case, the question presented is:

Whether this Court has the jurisdiction to intervene in ongoing state court proceedings where any federal issues, (a) were not properly presented, (b) are premature and have been not finally adjudicated, and (c) may be rendered moot by the ongoing proceedings?

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INTRODUCTION

The Petition seeks federal interference in ongoing, non-final state-court proceedings on an issue of state law. No federal issue was properly presented below and the ongoing state proceedings may moot the newly-asserted federal issues. It would be an extreme aberration from precedent, practice, and statutory authority for this Court to halt administration of a state trial court's ongoing evidentiary inquiry on issues of state law based upon speculation about how the hearing might play out.

The Petition should be denied.

STATEMENT OF THE CASE[1]

In 2014, at roughly 40 miles-per-hour, Petitioner

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[1], Respondent objects the Petition's factual background. The Petition includes selective excerpts of the trial record, ignores the arguments made by Respondent below unmentioned in the ruling below, and offers a misinterpretation the ruling. The Washington decision was based on the entire trial record; its opinion offered "examples" (not an exhaustive list); and, contrary to the suggestion in the Petition, the determination was not limited to defense counsel's closing arguments. *Compare* Pet. (i) (question presented asserting the decision below rested "solely on" the defense's closing arguments), 2, 10, 17, & 30 (framing the record below as pertaining to defense counsel's closing argument), *with* Pet. App. 20a (focusing on appeals to racial bias "throughout the trial" and then offering examples), *id.* at18a (framing Petitioner's argument as concerning cross-examination, closing arguments, and the jury's "astonishingly small award" as supporting a conclusion that appeals to racial bias impacted the verdict), and *id.* 36a (McCloud, J., concurring) (relying on the "balance of the transcript" for the conclusion that the "trial was infected with racial bias). Given the jurisdictional defects with the Petition, these issues are not worth substantive discussion.

Alicia Thompson rear-ended Respondent Janelle Henderson while driving. Pet. App. 4a. There is no dispute Petitioner caused the accident. *Id.* at 4a, 128a. Nonetheless, Respondent was forced to bring a state tort suit against Petitioner (*i.e.*, her insurance company) for damages she suffered when Petitioner crashed into her car. In addition to whiplash and distress, Respondent sought damages for exacerbation of a preexisting condition. *Id.*

In discovery, Petitioner's counsel hired an investigator to surveil Respondent for nearly 79 hours over nine months. *Id.* at 8a-9a. This included taking clandestine videos of Respondent. *Id.* Once alerted to the surveillance, Respondent took "painstaking efforts" to obtain evidence about it, including trying to obtain all videos, any notes taken by investigators, and information about how extensive the monitoring was. *Id.* at 32a. Despite a court order, Petitioner stonewalled discovery into nearly 79 hours of surveillance aside from producing one 17-minute video of Respondent. *Id.* at 8a-10a.

The trial was (surprisingly) contentious given liability was undisputed. The 17-minute video was played for the jury, though Petitioner's witnesses failed to account for the other nearly 79 hours of surveillance. Respondent was hamstrung in her ability to demonstrate the 17-minute snippet was not representative of the harm caused in the crash. Pet. App. 8a-10a. In the end, Respondent suggested the jury award damages at $250 per day for several years, and requested an award of $3.5 million. *Id.* at

95a-96a. Petitioner suggested the $250 figure apply for eight months, pegging damages at $60,000. *Id.* at 127a. The jury entered an "astonishingly small" verdict of $9,200. Pet App. 18a, 149a.

Respondent moved for a new trial or for additur for an award of $60,000, arguing Petitioner's discovery violations and the likelihood of racial bias affected the surprisingly low verdict. *See* Pet. App. 10a-11a. Soon after, drawing on precedent from the 1990s, the Washington Supreme Court decided *State v. Berhe* which described an objective two-step inquiry for determining whether an allegation that racial bias has affected a verdict demands an evidentiary hearing under Washington law. 193 Wash.2d 647, 665-69 (2019) (citing *State v. Jackson*, 75 Wash. App. 537 (1994)); Pet. App. 12a. Under *Berhe*, if a party makes a *prima facie* showing that an objective observer could view race was a factor in the verdict, the court must conduct an evidentiary hearing to determine whether race in fact played a role in the jury's verdict and if so order a new trial. 193 Wash.2d at 665. Respondent sought a *Berhe* hearing and Petitioner responded in opposition. The motion was denied. Pet. App. 12a, 37a.

Respondent appealed to the Washington Supreme Court arguing a new trial was warranted due to the discovery violations and on the basis racial bias impacted the verdict, the latter of which Respondent argued at least required an evidentiary hearing. under *Berhe. Id.* at 37a. In response, Petitioner did not argue *Berhe*'s rules for conducting

post-trial evidentiary hearings or governing a *prima facie* showing of racial bias were novel, unconstitutional, or unlawful. *See generally* BIO Appendix. Instead, Petitioner admitted that "*Berhe* reaffirmed the standard in *State v. Jackson* that for a motion for a new trial based on allegations of juror racial bias, the trial court should conduct an evidentiary hearing before ruling on a new trial motion." *Id.* at 60a. Invoking *Berhe* and *Jackson*, Petitioner argued a *prima facie* case had not been made and so no evidentiary hearing was required. *Id.* at 60a-62a.

The Washington Supreme Court reversed. As to Petitioner's refusal to produce discovery about the surveillance, the Court found the "degree of the defense team's refusal to cooperate in this case was egregious," as Petitioner's team "failed to produce relevant evidence despite [Respondent's] counsel's painstaking efforts to obtain it through the discovery rules." Pet. App. 32a. Recognizing the trial court's role to address sanctions in the first instance, the court remanded to determine the extent of appropriate sanctions up to and including a new trial that excludes the 17-minute video. *Id.*

As to the racial bias issue, the state trial judge had erred as a matter of state law by making a subjective determination rather than an objective one. *Id.* at 24a. Under the applicable state rule, Respondent had made a *prima facie* case that racial bias might have affected the verdict in light of the "astonishingly small award" and the *entire* trial

proceedings. *Id.* at 18a. As above, the high court recognized the trial court's role to conduct factual development in the first instance and remanded for an evidentiary hearing. *Id.* at 18a-20a.

The Washington Supreme Court did not overrule any precedent or augment Washington's pattern jury instructions. *Id.* Instead, every Justice on the Washington Supreme Court agreed implicit racial bias could have impacted the verdict, and so a state-law evidentiary hearing for further factual development and resolution of that issue was appropriate. *Id.* at 20a-26a; *id.* at 34a-36a. Justice McCloud concurred to emphasize that some of the defense arguments in isolation were routine (and permissible) attacks on witness credibility, and the Court's decision was not overruling established precedent endorsing vigorous cross-examination, *id.* at 35a n.1. Regardless, as a matter of state law, remand was required because the "balance of the transcript provides a *prima facie* showing that the trial was infected with racial bias." *Id.* at 36a.

Respondent filed a motion to reconsider that for the first time attacked the *Berhe* hearing procedure and asserting federal issues not previously raised before the trial court or on appeal. Pet. App.50a. The motion was denied without opinion. *Id.* at 49a.

The state-court proceedings are ongoing and the evidentiary hearings have yet to occur.

REASONS FOR DENYING THE WRIT

I. BECAUSE JURISDICTION IS LACKING, THIS CASE PRESENTS AN EXTREMELY POOR VEHICLE

This Court's review of state court decisions is limited under 28 U.S.C. § 1257, which conscribes review to final judgements involving issues of federal law. The Petition should be denied, and jurisdiction is lacking, because (1) the newly-asserted federal issues were not properly presented, (2) the federal issues are unripe, and (3) the decision below did not finally adjudicate any federal issues and the ongoing proceedings may moot the newly-raised federal issues entirely.

A. The New Federal Claims Were Not Properly Presented

This Court "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision." *Adams v. Robertson*, 520 U.S. 83, 86 (1997); *see also Illinois v. Gates*, 462 U.S. 213, 218-19 ("[T]here are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review.") (citations omitted). These rules apply here.

1. Where the "sole federal question argued" has not "been raised, preserved, or passed upon in the state courts below," jurisdiction is lacking under § 1257 and review must be denied. *Cardinale v.*

Louisiana, 394 U.S. 437, 438 (1969). Additional structural concerns animate this rule. For one, "[q]uestions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." *Id.* This Court does not conduct initial review because "in a federal system it is important that state courts be given the first opportunity to consider the applicability of state [rules] in light of constitutional challenge," since state rules "may be construed in a way which saves their constitutionality." *Id.* An issue may also be mooted or resolved on an adequate and independent state ground, and the State "should be given the first opportunity to consider them." *Id.*

Though *Berhe* had established the objective, *prima facie* standards and requirement for an evidentiary hearing now challenged, Petitioner did not assert any federal issues to these state rules at the trial level or before the Washington Supreme Court issued its decision. As a result, the petition must be denied.

The Petition apparently assumes, without saying so directly, that Petitioner's belated challenge to the *Berhe* procedure *after* the decision below was issued is sufficient to warrant certiorari and can even supply the basis for the extreme measure of summarily reversing. Pet. 3. If that is the assumption, Petitioner is mistaken. Not only would intervention exceed jurisdiction, contradict federalism, and rely on an inadequate record, it

would reward litigants who forfeit arguments in state courts and then attempt to obtain this Court's review simply through filing an *ex post* petition for reconsideration. This Court has rejected such maneuvers, and petitions that present "issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question" are properly denied. *Adams*, 520 U.S. at 89 n.3; *Bd. of Dir. of Rotary Int'l v. Rotary of Duarte* 481 U.S. 537, 549-50 (1987) (denying petition where petitioner did not "present the issues squarely to the state courts until they filed their petition for rehearing," and "[t]he court denied the petition without opinion").

2. Intervening in an ongoing state proceeding where additional state procedures are set to play out is also contrary to this Court's doctrines forbidding federal interference "where the proceedings were already pending in a state court." *Ex Parte Young*, 209 U.S. 123, 162 (1908); *see Juidice v. Vail*, 430 U.S. 327 (1977) (abstention required for ongoing state civil proceedings); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (same); *Younger v. Harris*, 401 U.S. 37 (1971) (same for ongoing criminal proceedings).

Petitioner is not "permitted the luxury of federal litigation of issues presented by ongoing state proceedings," *Huffman*, 420 U.S. at 605. Premature federal review is especially inappropriate here as federal questions may be mooted (or at least addressed) in the ongoing proceedings the Washington high court itself recognized should be first decided by a trial judge for fact finding.

3. Review is also inappropriate because are "obvious methods for securing a definitive ruling in the state courts." *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941). In the hearing dedicated to Petitioner's defenses, should Petitioner believe federal issues apply, she will have the opportunity to raise them in state court. And, if she wants to preserve federal review over these state court procedural rules, she must.

B. The Newly-Alleged Federal Claims Are Unripe

Even if federal issues were hypothetically properly presented, any challenge to the state-law procedures remains premature. Claims "contingent [on] future events that may not occur as anticipated, or indeed may not occur at all," are unripe for adjudication. *Texas v. United States*, 523 U.S. 296, 300 (1998) (citing *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-81(1985)).

This "case is riddled with contingencies and speculation that impede judicial review." *Trump v. New York*, 141 S. Ct. 530, 535 (2020). For example, the trial court could grant a new trial due to the discovery violations, mooting the racial bias issue altogether because vacatur of the prior verdict ends the inquiry about whether the already-vacated verdict should be vacated on a separate basis.[2]

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[2] Due to retirement, the judge who will oversee the hearings is currently undetermined. Once assigned, Respondent intends to

If the *Berhe* hearing does happen, the trial judge will make a number of routine determinations about what evidence will be admitted, and then make its findings about the issue based upon that record. Petitioner engages in imaginative speculation about what evidence will be admitted or excluded at the evidentiary hearing and what arguments will "seemingly" be permitted or off-limits. Pet. 25. But, as the Petition acknowledges, the Washington Supreme Court did not address or provide "guidance" on these state-court evidentiary issues. *Id*. Instead these routine fact issues about what evidence or arguments will be permitted in a state-court hearing will be decided by the state-court trial judge in the first instance.

Compounding the contingencies, still operating on the uncertain assumption a *Berhe* hearing even happens, the trial court could find racial bias did not impact the verdict; *i.e.*, that Petitioner should prevail. If Petitioner wins at the *Berhe* hearing, the claims that it is "functionally impossible" to prevail and there is "no practical way for petitioner to succeed" will be proven incorrect. Pet. 24. It is of course speculative to portend what rationale might support such a hypothetical but one obvious alternative could be a finding that the surprisingly low verdict was due to the egregious discovery

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ask the judge to bifurcate the issues and address her request for a new trial excluding the 17-minute video as a discovery sanction apart from and in advance of the *Berhe* hearing. If Respondent obtains that relief, the *Berhe* issue will be moot.

violations and not any form of racial bias. Or the trial court could find racial bias did not impact the jury's verdict for some other reason. The speculative nature of these issues precludes review.

The Petition's suggestion that any new trial, if ordered, will necessarily implicate federal issues related to racial bias stacks speculation upon speculation. Pet. 30. Even putting to the side all of the different paths that may lead to a new trial, the Petition assumes there will again be a verdict Respondent believes was impacted by racial bias. *Id.* But, there is no reason to assume that another trial even in this same case should be expected to raise issues of racial bias at all. Any assumption made by Petitioner or *amici* that basically every trial in Washington might implicate issues of racial bias is extremely troubling and unfounded. The racial bias issues in the trial below, and that every member of the Washington Supreme Court found implicated state standards, should be presumed as an outlier not the routine. More important, whether a new trial implicates any state-law issue of racial bias, let alone any federal issue on top of that, is pure speculation insufficient to permit review now.

C. The Decision Below Does Not Involve A Final Adjudication of Any Federal Issue

There has been no final state-court determination about issues of state law. And, unsurprising given the lack of presentment, there

has been no final state-court determination about any issues potentially implicating federal law. There is a "strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982) No extraordinary circumstances exist here.

1. By definition, the now-asserted procedural due process issues cannot be final, as the process remains ongoing. A procedural due process claim is not "complete" until "'the State fails to provide due process.'" *Zinermon* v. *Burch*, 494 U. S. 113, 126 (1990). Under established law, a petitioner cannot challenge state process as inadequate while that process is ongoing. The Washington Supreme Court's decision remanded for an evidentiary hearing and the petition's claims depend upon an absolute failure of state-court process in those yet-to-be had hearings. Regardless of the merits of the issue, any federal review is premature.

2. The same problems with finality preclude review of any asserted equal protection claim at this juncture. Such a claim depends entirely on what will happen in state court.

None of these issues were addressed below, as they were not presented before the Washington Supreme Court issued its decision. Nonetheless, the Petition purports to criticize the Washington Supreme Court because it "never applied strict

scrutiny," Pet. 28, and even asserts Washington "improperly eschewed the strict-scrutiny framework." These are bold statements. But, they are wrong (and misleading). The Washington Supreme Court never considered strict scrutiny because the *Berhe* procedure now complained of was not challenged as unconstitutional in the state court proceedings. If Petitioner believed the state-court evidentiary rule in *Berhe* violated equal protection, she had the opportunity to argue that to the state courts before they reached their decisions. It is no fair criticism of a judicial opinion that it did not addressing issues that were not raised until *after* the decision was issued. The newly-asserted federal issues were neither raised nor finally decided below.

3. Despite the defects therein, the Petition seeks to invoke a narrow exception for review of non-final decisions where "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 Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975). This attempt fails. For one, the asserted federal claims were "finally decided" by the Washington Supreme Court (as they were not properly presented), and because the decision remanded for additional factual development. *Cf. Florida v. Thomas*, 532 U.S. 774, 779 (2001). For the same reasons the Petition is unripe, there is zero "guarantee" any federal issue will require decision regardless of the outcome of future proceedings. The myriad contingencies

described confirm any federal issue potentially implicated by the decision below is not "final."

II. THE PETITION SEEKS EXTREME INTERFERENCE OVER ONGOING STATE COURT RULEMAKING ANTITHETICAL TO FEDERALISM

The Petition repeatedly claims that Washington's *Berhe* rule is "novel" and calls it an "outlier." These labels fuel the insinuation that a simple state-court post-trial rule for an evidentiary hearing has somehow upended Washington's courts. Even if the assertion about being "novel" were correct, it would be irrelevant. Nor have Washington courts been upended.

1. Assuming *arguendo* Washington's rule for granting a post-trial evidentiary hearing on a claim that racial bias impacted a verdict is "novel" or an "outlier" among the states, that fact does not permit this Court's review. In our system, states are "independent sovereigns with plenary authority to make and enforce their own laws as long as they do not infringe on federal constitutional guarantees." *Danforth v. Minnesota*, 552 U.S. 264, 280 (2008). States are permitted to "define crimes, punishments, rules of evidence, and rules of criminal and civil procedure in a variety of different ways." *Id.* In the same way state courts are free to choose to evaluate experts based on *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579

(1993), or neither, they are permitted to create rules about the administration of their own courts. *Danforth*, 552 U.S. at 280; *see also Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938) (describing state independence over court administration).

2. States are empowered, as laboratories of democracy and in virtue of their sovereignty, to devise their own practices, even if they are "novel." As part of our system of dual sovereignty, "this Court has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems.'" *Arizona State Legislature v. Arizona Independent Redistricting Comm'n,* 576 U.S. 787, 817 (2015) (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009)). Deference to the states is at its zenith when devising "various solutions where the best solution is far from clear." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973). This Court recently made this point emphatically in permitting states to regulate reproductive health laws that are "novel" and disputed. *Dobbs v. Jackson Women's Health,* 142 S. Ct. 2228, 2239 (2022).

Purging the administration of justice from the vestiges of racism is no different. Racial bias implicates unique historical, constitutional, and institutional concerns that, "if left unaddressed, would risk systemic injury to the administration of justice." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 224 (2017). Racial bias "mars the integrity of the judicial system and prevents the idea of democratic

government from becoming a reality." *Edmonson v. Leesville Concrete Co., Inc.,* 500 U.S. 614, 628 (1991). Permitting bias "in the jury system damages 'both the fact and perception' of the jury's role as a 'vital check against the wrongful exercise of power by the State." *Powers v. Ohio*, 499 U.S. 400, 411 (1991).

This Court has never held—and it would be anathema to state sovereignty to hold—that states are not permitted to adopt creative, if novel rules of in this area. Instead, as *Dobbs* just held and other authorities confirm, states are free to develop their own procedures beyond what this Court has required as a constitutional minimum. *E.g. Miranda v. Arizona*, 384 U.S. 436, 490 (1966) (adopting a rule but confirming "the States are free to develop their own safeguards" concerning constitutional rights).

Washington has adopted a race neutral standard that aims to remove race-based decision making from the judicial system. Pet. App. 19a. Under this standard, any party, *regardless of their race*, may present a prima facie case that racial bias played a role in the outcome of their trial. *Id*. The inquiry is objective, rather than subjective. *Id.* Similar to this Court's decisions concerning race and in other areas, the objective inquiry focuses on the "perception and reality" of the proceedings not merely the subjective intent of participants. *Powers*, 499 U.S. at 411; *see also Georgia v. McCollum*, 505 U.S. 42, 53 (1992) (pointing to the impact of perception caused by the removal of a juror based on race); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988)

(noting that promoting confidence in the judiciary requires avoiding the *appearance* of impropriety).

Washington has a post-trial method for inquiring about whether a verdict has been impacted by racial bias that focuses on perception rather than intent. If Petitioner believes these rules are "overinclusive" or imperfect as a policy matter, her relief is to Washington's democratic processes not this Court. Pet. 32. These are the sorts of decisions where this Court "is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to [complicated] problems and to keeping abreast of ever-changing conditions." *Rodriguez*, 411 U.S. at 43.

3. The "parade of horribles" speculated about by Petitioner and *amici* are an unfounded distraction. Washington courts are entrusted with their own administration and so in the obviously unlikely event a simple rule allowing certain post-trial evidentiary hearings in will upend civil courts, that is a matter for Washington courts and not this one.

However, the sky is not falling. The *Berhe* standard has existed for four years, and General Rule 37, which concerns peremptory challenges and from which the objective test derived, has existed for five. *State v. Jefferson*, 429 P.3d 467, 477 (2018). Trials have not ground to a halt due to *Berhe* or the decision below. Instead, Washington State has remained

productive in administering trials. At the height of the Covid-19 pandemic, a year after *Berhe* was decided, King County (the most populous county in Washington State and where this case originated) administered at least 29 felony criminal trials between March and December 2020. King County Data Dashboard, https://tinyurl.com/4ubynytx. There were at least 116 felony criminal trials in 2021; at least 124 in 2022; and have been at least 34 in the first few months of 2023. *Id.* Particularly because criminal trials are more frequent than civil trials, there is no evidence whatsoever that *Berhe* or the decision below have had, or will cause, any of the grievous impacts imagined by Petitioner and *amici*.

III. THE NEWLY-ASSERTED FEDERAL ISSUES ARE MERITLESS

Though this Court should not reach them, Petitioner's constitutional claims fail.

1. The Due Process claim here is premature, as the process complained of is ongoing. *Zinermon*, 494 U. S. at 126. Procedural due process requires parties be given notice and the opportunity to be heard. *Mathews v. Eldridge,* 424 U.S. 319, 348, (1976). An entire evidentiary hearing is contemplated to provide Petitioner the opportunity to present evidence she believes rebuts the *prima facie* finding that racial bias may have impacted the verdict. Petitioner may very win the hearing (assuming it happens and is not mooted by the order of a new trial due to the discovery violations). This "fair

opportunity for rebuttal" is beyond sufficient. *Wilkinson v. Austin*, 545 U.S. 209, 211 (2005).

Petitioner nonetheless argues "'[d]ue process requires that there be an opportunity to present every available defense.'" *Lindsey v. Normet* 405 U.S. 56, 66 (1972) (quoting *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)). However, as here, the due process claim in *Lindsey* failed because there were "available procedures to litigate any claims" in state court. *Id.* Respondent has not been deprived of raising any defense at a forthcoming hearing. In fact, given that Petitioner concedes the decision below offered "no guidance" on how it will be administered, Pet. 25, the suggestion Petitioner's counsel will be "stifled" from engaging in "zealous advocacy" in a manner sufficient to implicate due process despite the existence of an entire hearing devoted giving Petitioner the opportunity to make her case rings hollow. *Id.* 20-21. Contrary to the implication of the Petition, the Washington Supreme Court did not *sub silentio* overrule decades of precedent or its own pattern jury instructions that permit challenging credibility. Indeed, the concurrence below emphasized that Washington did not forbid cross-examination or evidence-based arguments Petitioner now asserts are precluded. Pet. 35a. Due Process is simply not implicated here.

The Petition also argues *Heiner v. Donnan*, 285 U.S. 312, 329 (1932), holds that "a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment". Pet. 25. While Petitioner does not

agree with that characterization, the presumption at issue in *Heiner* was irrebuttable and thus afforded *no* opportunity to be heard. *Heiner*, 285 U.S. at 320 n. 1, 325. That is quite unlike the explicitly rebuttable presumption in this case where an evidentiary hearing is *required* to afford Petitioner an opportunity to present her evidence.

2. Petitioner's Equal Protection claim likewise fails. Nothing in the decision below classifies any person by their race or advantages one person, based on race, against another.[3] The opinion below does not require, in any measure, counsel to consider race "at every turn" or view "[e]very aspect" of the trial through a racial lens. Pet. 29. The decision below permits, in some instances, a post-trial evidentiary about whether racial bias impacted a verdict.

In addition, though strict scrutiny should not apply because this is not a race-based classification, Petitioner admits that "judicial, legislative, or administrative findings must be made" in order for assessment of an equal protection claim. Pet. 32

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[3] As a result, nothing in this Court's prior or anticipated decisions concerning whether universities can specifically consider a person's race in admissions in any way impact the decision below or provide a basis for delaying denial of the Petition. In the same vein, the Petition relies heavily on *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015), which was a Fair Housing Act case, and did not address equal protection. Likewise, *Ricci v. DeStefano*, 557 U.S. 557, 582, (2009), interpreted Title VII, not the Equal Protection Clause.

(citations omitted). But, again, no explicit equal protection findings were made here because the issue was not raised below and the record was "not compiled with those questions in mind." *Cardinale*, 394 U.S. at 438.

That said, the decision below did point to evidence about racial discrimination in our courts. Pet. App. 15a, 17a. And there is no reasonable dispute that racial bias in the administration of courts and trials is a compelling state interest. *See, e.g.*, *Buck v. Davis*, 580 U.S. 100, 124 (2017) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.") (citations omitted); *Edmonson,* 500 U.S. at 630. That is the exact purpose of the Fourteenth Amendment—"to eliminate racial discrimination emanating from official sources in the States." *McLaughlin v. Florida,* 379 U.S. 184, 192 (1964). The claim fails.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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May 1, 2023

APPENDIX

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APPENDIX

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

[Filed: November 10, 2020]

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No. 97672-4

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JANELLE HENDERSON,

Appellant,

v.

ALICIA M. THOMPSON,

Respondent.

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BRIEF OF RESPONDENT

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I. INTRODUCTION

Janelle Henderson ("Henderson") is not entitled to a new trial. The "right of trial by jury shall remain inviolate." Wash. Const. Art. I, § 21. As discussed in *Davis v. Cox*, "'inviolate connotes deserving of the highest protection' and 'indicates that the right must remain the essential component of our legal system that it has always been.'" 183 Wn.2d 269, 288, 351 P.3d 862 (2015) (quotation omitted). "At its core, the right of trial by jury guarantees litigants the right to have a jury resolve questions of disputed material facts." *Id.* at 289.

Henderson was injured in an uncontested liability automobile collision with Alicia Thompson ("Thompson") on June 14, 2014. Henderson filed suit against Thompson for personal injuries suffered in the collision and made the tactical decision to seek only general damages at trial. The crux of Henderson's damages claim was that the collision and resulting stress caused her pre-existing Tourette's Syndrome to worsen, increasing the nature and frequency of her tics and increasing her chronic neck pain. Thompson presented two medical experts, who rejected Henderson's injury claim and concluded that at most, she had minimal to mild exacerbation of preexisting musculoskeletal complaints. Following seven days of trial, twelve witnesses, and five hours of deliberation, the jury awarded Henderson $9,200 in general damages.

Henderson appeals, arguing the trial court abused its discretion in denying her motions for a new trial and a *Berhe* evidentiary hearing. Henderson asserts that arguments made by Thompson's counsel in closing argument triggered the jury's implicit racial bias against Henderson, who is Black, and the jury returned a verdict based solely on that implicit bias.

No juror came forward to make any claim of explicit or implicit bias during the trial or deliberations. The jury's verdict was supported by the evidence and reflected the defense theory of the case that Henderson had a mild exacerbation of pre-existing musculoskeletal issues for which she received limited chiropractic care and physical therapy before a lengthy gap in care, during which time she started a physically demanding job. The trial court reviewed the parties' briefing on both motions, held oral argument on the motion for new trial, and issued detailed orders denying both motions.

Contrary to Henderson's assertions, the jury's verdict cannot be said to reflect implicit racial bias against her. It reflects the jury's belief that Henderson had a panoply of well-documented, pre-existing health issues and the accident mildly and temporarily exacerbated those issues but made no permanent impact. Henderson relies on blatant misstatements of the record and unsupported, self-serving assertions to make her arguments for implicit bias. Henderson was not the victim of a biased jury verdict or implied racial animus. She sought over three million dollars from the jury who did not believe her claim for injuries. The jury's verdict was based on competent medical testimony and the medical records.

Finally, the trial court did not abuse its discretion in concluding a *Berhe* hearing was inappropriate as Henderson did not make a prima facie showing the jury's verdict was the result of implicit bias. The evidence in the record was insufficient to warrant any further inquiry or pierce the veil of jury deliberations. This Court should affirm the trial court in all respects.

II. COUNTERSTATEMENT OF THE ISSUES RELATING TO APPELLANT'S ASSIGNMENTS OF ERROR

Henderson did not set forth a statement of the issues separate from her assignments of error. Thompson sets forth her statement of issues below and believes the issues are more appropriately formulated as follows:

> 1. Did the trial court properly exercise its discretion in denying Henderson's motion for a new trial when there was no evidence of jury misconduct or counsel misconduct during closing arguments and the jury verdict reflects an award consistent with the defense's theory of the case?
>
> 2. Did the trial court properly exercise its discretion in not holding a *Berhe* evidentiary hearing when Henderson failed to make a prima facie showing of implicit racial bias in the jury's verdict?
>
> 3. Did the trial court properly exercise its discretion in reconsidering the spoliation instruction after the conclusion of the evidence and testimony?
>
> 4. Did the trial court properly exercise its discretion to run its courtroom by asking all parties to leave the courtroom following the conclusion of the trial and the jury's verdict?

III. COUNTERSTATEMENT OF THE CASE

A. Substantial Evidence Showed that the Case Implicated Significant Symptomatic Pre-Accident Conditions, an Auto Accident,

Temporary Aggravation of Symptoms, and a Jury Verdict Consistent with the Evidence.

1. Henderson's Pre-Accident Medical Condition

As a child, Henderson was diagnosed with Tourette's Syndrome. RP 490. Henderson's medical records evidenced worsening Tourette's symptoms since age 25. RP 568. In 2012, her neurologist described her Tourette's as severe to very severe. RP 244; RP 448. Henderson's medical records documented Tourette's symptoms including tics and vocalizations, motor movements of her neck, arms and legs, and pain associated with those movements. RP 982-83. As early as 2009, she received Botox injections into her larynx and facial muscles due to her tics, and her neurologist recommended she consider additional Botox for large muscles. RP 243, 458, 983-84. Her health was described as "poor" and she failed to progress with chiropractic care for chronic cervical, thoracic, and lumbar complaints. RP 248-49. In the months preceding the accident, Henderson saw her chiropractor, Dr. Devine, regularly, including eleven times in the month prior to the collision and forty-seven visits in the five months preceding the accident for neck and back complaints. RP 569, 994. Prior to the collision, she had physical therapy for severe neck pain, upper extremity numbness, and tingling and was sent for an MRI that showed significant degenerative changes in her spine. RP 569; 990-91. She had been referred for facet joint injections in April 2014 but did not pursue them. RP 782-83. Henderson had also gained 50 pounds as of May 2014; she could not go shopping due to her weight and could not exercise. RP 852. In large part, her pre-accident and post-accident medical records document that her condition remained relatively unchanged as a result of the accident. See RP 238-41.

2. The June 14, 2014 Accident

On June 14, 2014, Henderson was driving her 2004 Mercedes-Benz C240 east on the West Seattle Bridge. CP 193-195, RP 355. Thompson was following her. Thompson glanced away for a brief moment, then looked ahead to discover that traffic had stopped. RP 388. She hit her brakes but was not able to avoid the collision. RP 387. Henderson called the police, but police did not respond. RP 364. Each party drove their own vehicle from the scene. RP 347. Thompson admitted liability for the accident. RP 355.

3. Henderson's' Post-Accident Condition and Treatment

Henderson claimed the accident worsened her Tourette's symptoms, including more frequent and intense leg kicks, foot drag, neck tics, head jerks/tics, and a bunion. RP 495, 496, 502-03, 544-45. She claimed an increase in her chronic neck pain and some headaches. RP 782.

Following the accident, she received chiropractic care, massage therapy, Botox injections in her neck, and three physical therapy visits. RP 540-42, 780. Henderson continued chiropractic care with Dr. Devine, her pre-accident chiropractor. RP 224. In October 2014, Henderson switched chiropractic providers to DeSautel Chiropractic and received chiropractic and massage therapy treatments there from October 16, 2014 through February 2, 2015. RP 541, 571. Six months later, on August 7, 2015, Henderson returned to Devine Chiropractic to resume her regular chiropractic care. RP 237. From February 2 to August 7, there were no treatment records for massage therapy, physical therapy, or visits to her neurologist. RP 571-72. At the time she resumed care in August, her

chiropractic records reflected the same level and nature of complaints as existed pre-accident. RP 238-41, 573, 996-97. Her medical records were devoid of references to foot drags, observed increased or new tics, or bunions. RP 575, 861-62.

Henderson also met with her long-standing neurologist, Dr. Vlcek, three days after the accident but did not discuss the accident with him at all. RP 477-78. Dr. Vlcek also testified that Henderson had an element of disability both indirectly and directly from her Tourette's that preceded the accident. RP 474. Dr. Vlcek's records following the accident did not document exacerbated Tourette's symptoms. RP 978. Her last appointment with Dr. Vlcek was in December 2014. RP 410.

Henderson started a front-end assistant position at Costco in March 2015. RP 884. Her job responsibilities included moving shopping carts around, loading carts with groceries, moving warehouse boxes, and interacting with customers. RP 887-88. The jury saw a 17-minute video of Henderson working at Costco during the 2015 gap in care showing her bagging items, jogging to and from the checkout stand, and moving large items on carts without any visible tics or difficulty. RP 881; CP 132 (Ex. 101). After three months at Costco, she moved onto a cashier position at Walgreens, where she spent the day standing. RP 890.

4. CR 35 Examination and Defense Expert Opinions

As part of the litigation, Thompson retained two medical experts who reviewed records and examined Henderson: Dr. Mark Sutton, a chiropractor, and Dr. Harold Rappaport, a neurologist and psychologist. RP 564, 930. Henderson was accompanied to the CR 35

examination. RP 576. It was recorded and excerpts were played for the jury. See e.g., RP 596-647; CP 133 (Ex. 119). The CR 35 examination started with the doctors posing questions regarding Henderson's medical history, accident, and current complaints. RP 576-77. Henderson declined to provide information during the history as to the accident or her medical history. RP 579, 597-601, 607, 617, 623-24, 1001, 1020-23. Instead, Henderson told them to rely on her medical records for her medical history and areas of her body that bothered her following the accident. RP 580, 1021-22. During the physical examination, Henderson was defensive. She asked questions such as, "Why are you doing all of this?" and accused the doctors of purposely hurting her. RP 646:5, 15-16, 25; 647:1. Henderson explained that she did not trust them and did not feel safe. RP 922:8-13. Following the physical examination, Drs. Rappaport and Sutton concluded there were no objective findings supportive of her pain complaints. RP 583, 1007. Dr. Rappaport noted her physical exam demonstrated "unusual behaviors." RP 1003:25-1004:15.

Based on his review of the medical records and examination of Henderson, Dr. Sutton concluded Henderson had longstanding musculoskeletal complaints in her neck, back and upper extremity and the had treated actively on a regular basis with chiropractic care. RP 566:11-14. The accident minimally to mildly exacerbated those conditions and did not cause any new conditions. *Id.* at 17-18 A short term of chiropractic and physical therapy would have been reasonable. RP 567:6-21.

Dr. Rappaport noted she had a minor cervical, dorsal, and lumbar strain following the accident that did not result in any ongoing issues. RP 971: 13-24. Dr.

Rappaport did conclude that there were psychological features to her complaints. *Id.* at 24. He also concluded that her Tourette's syndrome was unaffected by the accident. Her medical records evidenced a long history with Tourette's that at times caused significant pain problems, difficulties getting jobs, being in social situations, inability to tolerate any medication management, and failing treatments with repeated recommendations of more aggressive treatment with Botox and-and deep brain stimulation prior to the accident. RP 976:3-977:4. Henderson's medical records documented that her complaints were the same pre-accident and post-accident, waxing and waning. RP 997:6-8. Dr. Rappaport concluded it was possible she sustained a temporary exacerbation of her chronic neck and back complaints and a short course of twelve chiropractic and physical therapy visits would have been appropriate. RP 1009:10-12.

5. Henderson Declined to Answer Questions and Complained of Being "Put on Trial"

The case was scheduled to go to trial on April 15, 2019 but went forward on May 29, 2019. CP 101. The jury heard testimony regarding Henderson's pre-accident medical condition, her post-accident condition, and her employment. They heard from two defense medical experts, the parties, four of Henderson's friends and family, one private investigator, and three of her treating doctors.

Henderson could only testify in a "global sense" as to her medical history on direct examination. RP 493:12-14. But on cross-examination, just as during the CR 35 examination, Henderson declined to answer questions about her prior medical records, even when prompted to review the records to refresh her

recollection on specific visits. RP 896-903. She did not recall ever getting x-rays or an MRI. RP 901:16-902:8.

Toward the beginning of cross-examination when asked questions regarding the accident,[1] Henderson was combative and evasive:

> 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, you're putting me on trial for somebody else's — for somebody else hitting me.
>
> * * *
>
> 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?
>
> 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 simply have to roll over and accept everything that you want to say about what was caused by the accident; do you [inaudible]

[1] Henderson's testimony on direct examination that Thompson was traveling 40-45 mph. RP 537.

> 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?

RP 892:8-893:14.

6. Henderson's Long-Time Chiropractor Testified to a History of Friendship and to Employing Henderson

Dr. Devine, Henderson's longtime chiropractor, testified as to his treatment and observations of Henderson and his history with Henderson, including volunteering the following:

> 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.

RP 203:6-17.

7. *Henderson's Friends and Family Offered Identical Testimony on Her Pre-Accident Demeanor and Tourette's Symptoms*

Henderson called four lay witnesses to testify on her behalf. Schontel Delaney, PharmD testified via deposition. Dr. Delaney is Henderson's cousin. RP 344. Dr. Delaney described Henderson as follows:

> 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. Like to go out, liked to dance. She just was the life of the party.

RP 344:14-17.

Jolyn Gardner Campbell, a friend of Henderson's for twenty years, also described Henderson as the "life of the party":

> A. Janelle used to be the life of the party. She used to be the fun one.

RP 482:9-10.

Finally, Kanika Green, a friend of Henderson's for seventeen years, also described Henderson as the "life of the party":

> 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.

RP 516:6-8.

As to Henderson's pre-accident Tourette's symptoms, Ms. Gardner Campbell described the symptoms as "cold-like symptoms, so, a lot of coughing or clearing of the throat" and occasional foot kicks. RP 481:14-18.

Dr. Delaney described Henderson's pre-accident tics as intermittent "throat-clearing and slight shrug of the shoulders." RP 346:24-347:1. Ms. Green also noted Henderson's Tourette's pre-accident symptoms were "like a sneeze, cough-type sound." RP 517:19-20.

8. Henderson Called Thompson in Rebuttal at the End of Trial

After the defense rested, Henderson called Thompson in rebuttal. Prior to Thompson getting on the stand, the trial court inquired as follows:

> THE COURT: Can you tell us just generally what the subject [for rebuttal] is?
>
> MS. SARGENT: It's strictly in rebuttal, Your Honor. It's just two questions, and it's strictly in rebuttal. I didn't realize I'd have to give a – a preview of rebuttal questioning.
>
> THE COURT: I just want to be sure that it is for rebuttal. I'm not going to ask you to give me a full thing, but it is a little unusual.
>
> * * *
>
> MS. SARGENT: -it's – it- I-I don't want to give the Defendant an opportunity to go outside and try to figure out some answer to some question about that.
>
> THE COURT: We're going to call the jury in right afterwards. I-I understand what you're saying with that –
>
> MS. SARGENT: It's in -
>
> THE COURT: -but-
>
> MS. SARGENT: -relation to what Dr. Rappaport said about what he observed on

> Janelle – or what he didn't observe on – as far as damage.
>
> THE COURT: On the car?
>
> MS. SARGENT: Yeah, that's it.

RP 1112:10-17; 1113:3-14.

Following a short discussion on bringing in the jury and timing, Henderson's counsel then went on to ask three questions about the damage to Henderson's vehicle which she described as "Minor damage. I mean, I scratched her bumper I believe." RP 1116:7.

9. Despite Offering No Evidence of Medical Bills or Wage Loss, Henderson Asked the Jury for $3,514,125.00

In her closing argument, Henderson's counsel emphasized it was within the jury's province to ascertain witness credibility:

> The first thing that I want to talk to you about is the credibility of the witnesses. And that's something that you are the only ones who determine who's credible and who isn't credible.

RP 1169:24-1170:2.

Henderson went on to emphasize the credibility of her witnesses as the people who knew Henderson the longest and best and her long-time treating doctors. RP 1171-72. In contrast, she argued the defense's highly paid witnesses lacked credibility and the defense was spending $50,000 "to convince you that Janelle wasn't injured." RP 1174-75, 1177-93.

> 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.

RP 1183:11-14.

Henderson then asked the jury to award her $3,513,125.00, reflecting $250 a day for her pain and suffering for the next 38.67 years. RP 1189:14-1190:8.

In starting her rebuttal closing, Henderson's counsel attempted to violate a motion in limine:

> MS. SARGENT: . . . 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 of –
>
> MS. SARGENT: I apologize –
>
> THE COURT: – the jury.
>
> MS. SARGENT: – Your Honor.
>
> THE COURT: Thank you.
>
> MS. SARGENT: I apologize.
>
> THE COURT: That's ok. Please just continue.

RP 1230:16-1231:7.

In rebuttal, Henderson again argued the jury was tasked with deciding who was telling the truth. RP

1236:10-12. Henderson asked the jury to award past general damages for her pain and suffering in an amount the jury was to determine. RP 1238:2-4.

10. The Jury Awarded $9,200 in Damages

The trial court's instructions to the jury included Jury Instruction No. 1:

> 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. In assessing credibility, you must avoid bias, conscious or unconscious, including bias based on religion, ethnicity, race, sexual orientation, gender or disability.
>
> In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testified about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; 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 the witness may have shown; the reasonableness of the witness's statements in the context of all the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.
>
> * * *

CP 366-67.

The jury received the case in the morning on June 7, 2019. RP 1242-1243. By 2:14 p.m., it had reached a

verdict in favor of Henderson and awarding $9,200. RP 1243:10-12; CP 130.

B. The Trial Court Exercised Its Discretion to Consider and Deny a Spoliation Instruction.

Prior to trial, Henderson's *motions in limine* included a request to exclude defense witness Tyler Slaeker from testifying or "[i]n the alternative, plaintiff should be granted a spoliation instruction."[2] CP 15-20. Thompson opposed both the motion to exclude Mr. Slaeker's testimony and an instruction on spoliation. CP 399-405. During a pre-trial motion hearing, Henderson withdrew her request to exclude Mr. Slaeker's testimony and relied only on her request for a spoliation instruction. RP 21. The trial court orally granted the motion:

> THE COURT: I am going to grant Plaintiff's request for a spoliation instruction. I am going to allow Plaintiff to cross-examine Mr. Slaeker regarding his possession of the notes at one point and then not having the notes shortly thereafter. I am going to allow the Plaintiff to cross-examine Mr. Slaeker regarding the fact that there was extensive surveillance, but only 17 minutes of video turned over. If Mr. Slaeker's going to sat that's all the video that there is entirely, then-

[2] In short, Mr. Slaeker is a private investigator who surveilled Henderson. RP 29:3-4. During discovery, Slaeker was deposed and his documents were subpoenaed. RP 294. He did not produce any documents in response to the subpoena but alluded to "notes" during his deposition. RP 294:18-19; CP 93. Ultimately, it was determined the notes were only text messages sent to his employer Probe Northwest, who used the texts to draft the "Probe Report." RP 287:22-288:9. No subpoena was ever sent to Probe Northwest for its file or deposition of Probe Northwest noted. CP 95.

> then that's his testimony. But I think Plaintiff is entitled to challenge his credibility on that.

RP 55:20-56:5.

Thompson moved for reconsideration of this order (filing it the next day on April 16), arguing that a spoliation instruction was not warranted under prevailing case law and the facts of the case, which included the relative insignificance of the purported missing evidence, an absence of culpability or bad faith, and absence of proof of destruction of evidence. CP 92-99. Alternatively, Thompson requested that the trial court reserve ruling on the spoliation instruction until after the close of evidence. *Id.* On May 28, 2019, following the parties' briefing, the trial court heard arguments on the motion for reconsideration and the production of the Probe Report, which was provided to Henderson on May 14th. RP 157. The trial court would not permit Henderson to engage in a line of misleading questions regarding the production of the report (i.e., that it was never produced) but would permit her to inquire regarding Mr. Slaeker's inconsistent testimony regarding any notes he took, the length of surveillance, and the delay in producing the report: precisely what the trial court indicated Henderson could cross-examine him about at the April 15th hearing. *Compare* RP 55, 176-78. The trial court also ruled the report itself was not being admitted into evidence nor could Mr. Slaeker rely on it. RP 175:20-21; 178:3-4. The trial court then reserved ruling on Thompson's motion until after the testimony of Mr. Slaeker. CP 102-03.

Prior to his testimony, Mr. Slaeker spoke to the trial court and explained that the notes he generated were sent via text to his boss, who then generated the

report and he no longer had that phone. RP 284-88. Henderson called Mr. Slaeker as part of her case in chief and examined him about his note taking (RP 305-06, 317-18), his failure to turn over an email from prior defense counsel at his deposition (RP 301-02), and the time of surveillance versus the time of the produced videotape (RP 317-28, 336).[3] Mr. Slaeker explained that he was at Costco for an hour but Henderson was only out in public to be videotaped for seventeen minutes, hence the seventeen minutes of video. RP 340:13-21; *see also* RP 319:15-16 ("I videotaped her for 17 minutes over the course of one hour. I think that might be where the confusion is.").

At the close of evidence and following oral argument, the trial court denied a spoliation instruction. RP 1143-47. There had been no evidence presented as to other video recording of Henderson. RP 1145:3-4. The trial court noted there was "conflicting evidence at best" about whether there were notes separate from the texts Mr. Slaeker no longer maintained. RP 1145:21-23. The trial court permitted a permissible inference based on 78 billed hours of surveillance of Henderson but only 17 minutes of video. RP 1146:5-13. While the trial court called the situation "deeply suspicious," there was not sufficient evidence to conclude any video or notes were intentionally destroyed. RP 1147:1-11. Henderson spent a considerable amount of time during closing argument discussing the testimony of Mr. Slaeker and the "missing" video. RP 1172, 1177-78, 1234-36.

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[3] Henderson conflates surveillance and videotaping. Simply because one is being surveilled does not mean one is getting videotaped.

C. Thompson's Closing Tracked the Evidence and Was Without Racial Bias.

During closing, Thompson also referred to witness credibility:

> 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 . . . 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.

RP 1195:6-17.

* * *

> 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.

RP 1206:18-25.

This paragraph was a small part of many minutes dedicated to questioning the credibility of Dr. Devine, whose testimony was largely inconsistent with the medical records. RP 1204-09.

In furtherance of the arguments on credibility, Thompson directed attention to Henderson's lay witnesses and their bias or prejudice:

> 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 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 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 to provide accurate information.

RP 1211:13-1212:6.

Henderson's medical records were wholly inconsistent with her friends' testimony on her pre-accident Tourette's symptoms, which her own doctors described as "severe." RP 244, 448. Similarly, Henderson's three friends described her in precisely the same language

and painted the same pre-accident picture of her, which was also inconsistent with the medical records:

> 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.
>
> * * *

RP 1213:10-21.

Thompson went on to play deposition testimony from Henderson's primary care doctor, who confirmed that in 2012, Henderson had gained fifty pounds, was unable to exercise due to pain, and was not going shopping due to her weight gain. RP 1215:18-1216:13.

In addressing Henderson's damages request, Thompson's counsel did not recommend the jury accept Henderson's daily pain and suffering calculation of $250 a day. Rather, counsel commented Henderson's recommendation "was pretty interesting" and seemed "exceptional." RP 1221:3-4. Thompson's counsel went on, "if you believe she was injured, and if you believe her condition has been aggravated, that that – you would apply that $250 only to the period of aggravation or exacerbation reflected by the compe-

tent medical records. . .” *Id.* at 8-12. Thompson suggested that period was no more than the eight months of treatment Henderson had after the accident. *Id.* at 13-14. If the jury elected to do that, the amount would be $60,000, which Thompson noted was “a lot of money.” *Id.* at 17-18.

Thompson closed by discussing the credibility of Henderson, contrasting her response to questioning by her own counsel with cross-examination. Henderson was forthcoming with information on direct examination. RP 1221:23-25. In contrast:

> 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 combative. There’s – there’s definitely no search for the truth there.

RP 1222:8-15.

Similarly, Henderson’s actions with defense experts during her CR 35 exam, which was played in full for the jury, was described as “combative.” RP 1223:16-17. Thompson’s counsel also noted Henderson’s refusal to answer questions about her medical history—testimony that goes to the quality of her memory. RP 1223:8-13.

Thompson’s counsel characterized her client’s time on the stand:

> 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.

RP 1222:16-19.

D. The Jury Never Demanded Henderson Be Removed from the Courtroom.

Following the verdict, court adjourned and the jury was released. CP 129. The trial court explained its post-verdict procedure during a post-trial hearing and in response to Henderson's argument regarding the alleged request by the jury to remove Henderson following the verdict:

> THE COURT: And Counsel, can I just interject there? That-that was not the jury. It is the Court's practice and perhaps it's something the Court should not do anymore, but in every case the Court has asked the parties to wait in the hallway so the jury can speak to the lawyers. That has happened regardless of the race of the parties. It happens regardless of the verdict of the parties. So, that was not a request by the jury. And it is much to my own personal dismay that it was taken as an offense by Ms. Henderson.

RP 1255:3-11.

E. The Trial Court Exercised Its Discretion in Denying the New Trial Motion and Berhe Evidentiary Hearing.

1. Motion for a New Trial

Following the jury's verdict, Henderson filed a motion for a new trial under CR 59(a)(1), (2), (5), or (9) on damages alone or an additur under RCW 4.76.030. CP 134-45. Henderson's motion relied on mischarac-

terization of closing argument, supposed error in addressing the spoliation issue, and the alleged insufficiency of the verdict. *Id.* Henderson's motion failed to discuss the hours of medical testimony supporting the defense's theory of the case or any evidence that supported the jury's verdict. *Id.* The motion also misstated the procedural history on the motion for reconsideration. *Id.* at CP 137.

The trial court held a hearing on the new trial motion on July 10, 2019. RP 1249-67. At the hearing, the trial court addressed Henderson's claims regarding the post-verdict jury request and clarified its procedures. RP 1255. The trial court reviewed some of the supporting authority provided by Henderson before issuing its order denying the new trial motion and additur request on July 17, 2019. RP 1266:11-15; CP 178-82.

As to the spoliation argument, the trial court noted Henderson failed to show the existence of any evidence that was destroyed or that any evidence was intentionally destroyed or withheld. CP 179. Mr. Slaeker's testimony was only that he used to have text messages regarding his surveillance that he sent to Probe Northwest and the content of which was incorporated into the final report. CP 179; RP 317:21-22. He also testified that he took 17 minutes of video during one hour of surveillance. RP 319:15-16. The trial court concluded "it cannot be shown that they [additional videos or notes] probably existed, that they were probably destroyed, and that they were probably destroyed with a culpable state of mind." CP 179. The jury was permitted to make those inferences, however.

As to implicit bias, the trial court noted there was no authority that the mere possibility of implicit bias was grounds for a new trial. CP 180. The terms that

Henderson complained of were (1) not objected to at trial and (2) tied to the evidence:

> 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's 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 this case, even if in some contexts the language has racial overtones.

RP 180-81.

The trial court noted the relationship between Dr. Devine and Henderson was not simply doctor-patient and it was not improper to call Dr. Delaney by her first name or Ms. Delaney as she was not testifying as an expert but as a fact witness. RP 181. The trial court distinguished this case from *State v. Monday* in which the prosecutor injected race into the case and had no evidentiary basis to make his arguments. RP 181. Finally, the trial court noted the defense did not concede Henderson's claimed injuries or method for calculating damages, and the jury was entitled to disbelieve Henderson's witnesses. RP 182. The verdict reflects that disbelief.

2. Motion for Evidentiary Hearing

Henderson filed a motion for evidentiary hearing pursuant to *State v. Berhe*, which was issued two days

after the trial court's order on the new trial motion. In her *Berhe* motion, Henderson made the same allegations of misconduct by defense counsel as well as bias by the trial court. CP 183-84. Following briefing by the parties, the trial court denied the motion for evidentiary hearing in a detailed order. CP 187-90. The trial court found Henderson failed to meet her burden of establishing a prima facie basis of bias for an evidentiary hearing, noting the lower than desired jury verdict was not a sufficient basis to pierce the veil of jury deliberations. RP 188. The trial court reiterated that the arguments were all tied to the evidence and there was no allegation by any juror of bias.[4] RP 189. Finally, the trial court noted Henderson's continuing misstatement of the procedural history was "not well taken." RP 189. Henderson then filed her Notice of Appeal seeking direct review with this Court. RP 296-300.

IV. SUMMARY OF THE ARGUMENT

There is no question that Black people are overrepresented as defendants in the criminal and juvenile justice system. Black litigants are entitled to equal justice and representation in all forms of litigation. Neither explicit nor implicit bias should be sanctioned by the court system to preclude justice to Black litigants. While those truths should be universal, they do not correlate to a new trial in this case where there was no evidence of explicit or implicit bias, argument was based on the evidence and drew attention to issues of witness credibility, and the jury's verdict was wholly supportable by the evidence and

[4] Following the trial, Henderson retained a private investigator to contact the jurors. CP 421, 425. One juror reported the contact to the trial court, who then advised the parties. *Id.*

testimony presented by Thompson. Henderson would have this Court overturn the jury's verdict based on unsupported assertions, misrepresentations of the record, and grossly inaccurate characterizations of the witnesses. The trial court was in the best position to gauge whether justice had been served or whether implicit bias tainted the proceeding. It conducted a thorough review of the record and determined the alleged use of "racist tropes" were in fact not racist statements or imbued with implicit racist inferences, but were statements reflecting the evidence as presented to the jury. Henderson asked for $3.5 million dollars in general damages for a rear-end car accident. She failed to convince the jury the accident did anything more than temporarily aggravate what was already a pre-existing and debilitating condition. She was compensated accordingly. There is no evidence that any implicit biases of the jurors were triggered in coming to the verdict. It is a verdict supported by evidence, not reflecting passion or prejudice.

V. ARGUMENT IN SUPPORT OF AFFIRMANCE

A. The Trial Court Did Not Abuse Its Discretion in Declining to Grant a New Trial Because the Jury's Verdict Was Supported by Substantial Evidence and There Was No Evidence that Counsel or the Jury Engaged in Misconduct.

1. The Correct Standard of Review is Abuse of Discretion, Not Constitutional Harmless Error

The standard for review on a motion for a new trial based on attorney misconduct is abuse of discretion. *Teter v. Deck*, 174 Wn.2d 207, 215, 274 P.3d 336 (2012). Henderson mistakenly asserts that the trial court's order denying the new trial is reviewed for constitutional harmless error and relies on criminal cases

discussing prosecutorial misconduct for such a conclusion. *See State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). There is no precedent to apply a constitutional harmless error standard on a civil motion for new trial nor should that be the standard.

As discussed in *Monday*, a criminal defendant's right to an impartial jury is constitutionally guaranteed, whereas the Washington Constitution simply guarantees civil litigants a right to trial by a jury. *Wash. Const. Art. I, § 21.* Similarly, a criminal defendant's rights related to trial impact constitutional rights to life and liberty, whereas a civil litigant's life and liberty are not at issue. Civil courts apply a review standard that "more generally upholds trial court decisions." *Alcoa v. Aetna Cas. & Sur.*, 140 Wn.2d 517, 539, 998 P.2d 856 (2000) ("Alcoa"). Finally, a prosecutor has an obligation to all the people she represents, including defendants, and part of that obligation is to protect a criminal defendant's right to a constitutionally fair trial. *Monday*, 171 Wn.2d at 676. Thompson is not contending that civil cases should be immune from new trials for misconduct based on bias, but the constitutional error standard used in criminal prosecutorial misconduct cases imports considerations not applicable in civil cases. The review standard for CR 59(a)(2) is abuse of discretion.

a. CR 59(a)(2) New Trial Standards

The trial court is given great deference in addressing a motion for a new trial and whether any alleged misconduct prejudiced a party's right to a fair trial. *Spencer v. Badgley Mullins Turner, PLLC*, 6 Wn. App. 2d 762, 790, 432 P.3d 821 (2018), *review denied*, 193 Wn.2d 1006 (2019). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on

untenable grounds or untenable reasons." *Teter*, 174 Wn.2d at 215. "A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices." *Id.* at 222. "There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence." *State v. Merrill*, 183 Wn. App. 749, 755, 335 P.3d 444 (2014). Substantial evidence is "defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Andren v. Dake*, 14 Wn. App. 2d 296, 306 (2020) (quotation omitted).

A party seeking a new trial under CR 59(a)(2) must establish (1) conduct was misconduct (as opposed to aggressive advocacy); (2) the misconduct was prejudicial; (3) the misconduct was objected to at trial; and (4) the misconduct was not cured by the trial court's instructions. *Spencer*, 6 Wn. App. at 790. As to the second prong, the misconduct must be prejudicial in the context of the entire record. *Alcoa*, 140 Wn.2d at 539. Under CR 59(a)(2), the court considers whether "such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial." *Spencer*, 6 Wn. App. at 790.

Though Thompson disputes Henderson can establish any one of the four elements, Henderson cannot prevail on the two final prongs as the record is unambiguous as to her lack of objection during Thompson's closing, the trial court's ruling on spoliation, or any post-verdict conduct.

2. *Henderson Misapplies GR 37 as GR 37 Does Not Apply to Alleged Attorney Misconduct During Closing Argument in a Civil Trial and Henderson Failed to Show Any Violation Thereof*

Henderson argues that Thompson's counsel's alleged misconduct during closing argument violated GR 37 and was sufficient to warrant a new trial. Henderson relies on the amount of the jury's verdict as the only evidence of implicit bias. There is no juror affidavit or any statement from any juror that race had anything to do with the verdict, unlike in *State v. Berhe*, 193 Wn.2d 647, 44 P.3d 1172 (2019).

GR 37 applies to jury selection and use of peremptory challenges, an issue of historic discrimination in American jurisprudence. In Berhe, the Court extended the principles of GR 37 to a criminal jury verdict: whether an objective observer could view race as a factor in a jury verdict. *Id.* at 665. No Washington court has applied GR 37 to alleged attorney misconduct during closing argument in a civil trial or to a civil jury verdict.

Henderson's reliance on GR 37 is misplaced and misused. As an example, Henderson relies on GR 37(h) to support her "lack of trust in the system" when GR 37(h)(ii) is specific to a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling. None of that occurred in this case. Similarly, GR 37(g) on "comparing answers" is inapplicable outside of the voir dire context and when the comparison is between the parties' trial testimony. It is not improper to draw a contrast between the two parties based on the substance of their testimony and highlight the credibility factors set out in the jury instructions. The jury was instructed by the trial court that it was the sole judge of the witnesses' credibility, and was not to decide the case based on any prejudice or bias. The jury is presumed to follow a trial court's instructions. *Nichols v. Lackie*, 58 Wn. App. 904, 907, 795 P.2d 722 (1990), *review denied*, 116 Wn.2d 1024

(1991). The presumption that the jury follows the instructions is maintained absent a contrary showing. *Dybdahl v. Genesco, Inc.*, 42 Wn. App. 486, 490, 713 P.2d 113 (1986).

Henderson fails to show that the trial court abused its discretion in concluding that Thompson's statements during closing argument were based on the evidence presented during trial and the jury's verdict reflected adoption of the defense theory of the case. Henderson repeatedly fails to address the evidence presented at trial but instead relies on misstated or incomplete testimony, unsupported assertions, and unfounded accusations. Nothing in the record supports that Thompson relied on falsehoods or any other improper basis in closing argument, Thompson did not disparage Henderson, Thompson did not state that Henderson had a "problematic attitude," and Thompson was not critical of Henderson for allegedly lacking trust in the CR 35 examination doctors. To the extent GR 37 applies to attorney misconduct or a civil jury verdict, Henderson failed to show any violation thereof by Thompson.

3. Defense Counsel's Closing Was Rooted in the Evidence, Not Racial Bias

a. Thompson's Attack on Henderson 's $3,500,000 Request Was Consistent with the Evidence, Jury Instructions on Credibility, and Henderson's Counsel's Argument; It Was Racially Neutral Effective Advocacy

Henderson asked the jury to award her over $3,500,000 in future general damages and an additional undetermined amount for past general damages. Henderson also argued the defense knew this was not

a "small case," had spent in excess of $50,000 on experts defending it, and was "relentless in their efforts" to convince the jury Henderson was not injured. RP 1183. Counsel argued:

> 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.

RP 1192:17-22.

During her closing, Thompson seized on this characterization of a simple car crash turned incredible situation:

> 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 . . . 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.

RP 1195:6-17.

There was no racial stereotyping of Henderson's ask for $3.5M. Henderson argued the defense was "relentless" and made the case an "incredible situation" for seemingly no reason, much like why Thompson was putting "me on trial." RP 893:1. Of course, the reason for doing that was because she was asking for

$3.5 million dollars.[5] It was not a racialized statement but one based on Henderson's own closing arguments, Henderson's own testimony that she was unfairly being put on trial, and her extraordinary request to the jury for a "simple car crash."

Further, Henderson was defensive on the stand, expecting that Thompson should roll over and accept Henderson's version of events and her claims (including the value). It was proper to raise a witness's demeanor as a factor for the jury to consider on credibility as well as remind the jury of Henderson's personal interest in the case. Thompson did not insinuate that she was defrauding the system but rather everyone was there to address Henderson's multi-million dollar request to the jury.

Henderson gravely understates the record to conclude that implicit bias is the only explanation for the jury's verdict. There was a multitude of facts in the record supporting the jury's verdict, including Drs. Sutton and Rappaport's testimony and Henderson's prior records. Henderson simply failed to convince the jury of the injuries and damages she claimed.

b. Thompson's Description of Henderson as Combative and Confrontational Was Consistent with the Evidence, Jury Instruction One, and Race Neutral

One of the factors the jury could consider in addressing credibility was "the manner of the witness while testifying" as well as "any bias or prejudice the witness may have shown." CP 366-67; 6 WASHINGTON

[5] Testimony on prior negotiations or settlement discussions was addressed and excluded by the trial court in a motion in limine. CP 291.

PRACTICE, *Washington Pattern Jury Instructions Civil* 1.02 (7th ed. 2019). Understandably, Henderson may not want to acknowledge that she was confrontational with defense counsel and during the CR 35 examination,[6] but a review of the record supports that it is an accurate description of her demeanor. On cross examination, Henderson was "eager to contend" asking affirmative questions of counsel, questioning why she was being "put on trial." RP 893:1. During the CR 35 examination, she did the same: questioning Drs. Sutton and Rappaport as to why they were doing certain tests and declining to answer questions during the first minutes of the examination or answering "it's in my medical records."[7] RP 1021-22, 1023. That is evasive. Henderson went so far as to accuse the doctors of purposefully trying to hurt her (which was, of course, untrue). RP 646-47.

Describing a person's actual demeanor and comparing how she reacted to her own counsel versus defense counsel does not equate to racial animus. There is no support for the proposition that combative is a racially changed word. It can be and is used to describe anyone. Courts have commonly referenced witnesses' combat-

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[6] In the nearly hour long closing argument, Thompson's description of when Henderson was combative was with respect to those two incidents alone. RP 1222-23.

[7] Henderson had the opportunity to explain why she responded that way to the CR 35 doctors: she felt uncomfortable during the examination and that she did not trust the doctors. RP 922. Henderson also took pains to elicit testimony about Dr. Rappaport's instructions to her on not having to answer questions. See RP 1015-20. The jury listened to the entirety of the examination, including the series of questions at the outset that she would not or could not answer regarding her medical history and injuries. Whether the jury found Henderson or Rappaport's explanations credible was solely within the its province.

iveness as a factor decreasing witness credibility. *See*, *e.g.*, *Pogrebnoy v. Russian Newspaper Dist.*, 289 F. Supp. 3d 1061 (C.D. Cal 2017); *Salinas v. Starjem Rest. Corp.*, 123 F. Supp. 3d 442 (S.D.N.Y. 2015); *U.S. v. Lisyansky*, 2014 U.S. Dist. LEXIS 36186 (S.D.N.Y. Mar. 13, 2014); and *REP MCR Realty v. Lynch*, 363 F. Supp. 2d 984 (N.D. Ill. 2005).

In this case, Henderson was not characterized as an "angry black woman" or described as out of control, physically threatening, loud, or someone to be feared.[8] Henderson was characterized as a poor medical historian and confrontational with the defense; both of those facts were supported by the evidence and are appropriate to call out before the jury when it considers the credibility factors. At most, defense's accurate comments were aggressive advocacy, not misconduct.

c. Characterizing Thompson as Intimidated by the Legal Process Was Consistent with the Testimony, Jury Instruction on Credibility, and Race Neutral

Henderson exaggerates and mischaracterizes closing argument on Thompson feeling intimidated by the legal process. There is no dispute that Thompson was nervous on the stand, as Henderson concedes. Henderson disingenuously analogizes a nervous first-time witness—who is being called to testify by opposing counsel—on the stand as "Central Park Karen." As the trial court noted, it was not improper or unfair to characterize Thompson as uncomfortable and intimidated by the process. CP 180-81. Characterizing her client as being intimidated by the *legal process* and being up on the

[8] See Trina Jones & Kimberly Jane Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trip of the Angry Black Woman*, 102 IOWA L. REV. 2017, 2048 (2017).

stand was not race baiting. It is proper for the jury to consider the manner of the witness during testimony. CP 366-67. That is precisely what Thompson's counsel focused on. There was no argument that either Henderson or her counsel was intimidating and it is not a reasonable inference from any part of Thompson's actual argument.[9]

Moreover, defense counsel only briefly mentioned that Thompson was the only person who could testify as to how fast she was going. RP 1222. There was no police investigation and Henderson did not anticipate the collision. *Id.* This argument was two sentences in an hour long closing.

d. Pointing Out Henderson Failed to Provide Information Was Consistent with the Testimony, Jury Instruction on Credibility, and Race Neutral

Credibility of the parties is a critical issue for the jury's determination. It was the focus of closing arguments and at the forefront of the jury instructions. CP 366-67. The evidence supported that Henderson declined to answer questions about her medical history or discuss her medical records in a case when her chronic medical condition and the status of her health before the accident was in dispute. She could not or would not testify as to those issues and Thompson was permitted to highlight that for the jury as it goes to Henderson's

[9] Henderson skirts her own culpability regarding the trial court's admonishment. Henderson's counsel was asked not to argue in front of the jury in response to her violation of a motion in limine and the trial court attempting to minimize the damage from that misconduct. RP 1230-31. Henderson's counsel later apologized to the court. RP 1240.

credibility. There was no racial overtone, but it was argument reflecting how the parties actually testified.

Henderson was not credible because she could not talk about her medical history and declined to review records to see if they would refresh her recollections. RP 901-902. Her answers to questions regarding her medical history were: "I don't recall," "I cannot remember this visit or what I said in the visit or what the visit was about or anything," and "I do not remember." RP 901, 902, 899. Questioning a plaintiff on her medical history in a case with well-documented pre-existing conditions and disputed medical causation has nothing to do with race but is simply good lawyering.

Henderson also misstates the record on cross-examination questions. After questions regarding the nature and history of her tics (which she could not answer), Henderson's counsel objected and the trial court sustained any further questions to Henderson regarding her treatment with Dr. Vlcek. RP 899-900. There were no more questions on that issue. The court did not sustain objections (to the extent any were made) on additional questions on her medical history, which Henderson again could not answer. RP 900-03, 907.

Likewise, Dr. Rappaport's testimony was clear and the jury heard the tape of Henderson declining to answer the first five questions posed to her regarding what happened in the accident, what symptoms she had following the accident, and what symptoms she currently had. RP 1021-22. Dr. Rappaport was cross-examined and the jury was able to hear his answer admitting Henderson did end up answering some of the questions. RP 1030. All this testimony goes to the

witnesses' credibility, the quality of a witness's memory, and the ability of a witness to observe accurately.

e. Pointing Out Three of Henderson's Lay Witnesses Used Almost Identical Language on Her Pre-Accident Personality and Tourette's Symptoms Was Consistent with the Testimony, Jury Instruction on Credibility, and Race Neutral

Henderson's friends all testified using almost identical language regarding her pre-accident personality and pre-accident Tourette's symptoms. Schontel Delaney, Jolyn Gardner Campbell and Kanika Green all described Henderson as "the life of the party." RP 344, 482, 517. Dr. Delaney, Ms. Gardner Campbell, and Ms. Green also all described Henderson's Tourette's pre-accident as "throat-clearing," "clearing of the throat," and "a sneeze, cough-type sound." RP 346, 479, 517. It is unusual to have three lay witnesses provide almost the exact same testimony, and it is proper to call that out as worthy of notation by the jury, who is tasked to judge witness credibility. In considering witness testimony, the jury was instructed that it could consider any personal interest the witness might have in the outcome as well as any bias or prejudice. CP 366-67. The jury understood Dr. Delaney, Ms. Gardner Campbell, and Ms. Green were lifelong friends of Henderson and that family and friends are there to advocate and provide helpful testimony, regardless of race. Unlike in *State v. Monday*, where the prosecutor argued about an antisnitch "code" that the prosecutor translated into "black folk don't testify against black folk," there was no injection of race into their testimony. 171 Wn.2d

667, 674, 257 P.3d 551 (2011).[10] Here, the race of the witnesses was immaterial; the point was that her friends and family, as her advocates, all said substantively the same thing (using the exact language in the case of "life of the party"), and their testimony conflicted with other evidence in the case. It is proper to call attention to the reasonableness of the witnesses' statements in context of all the other evidence, especially when substantively identical testimony is inconsistent with medical records.

f. A Passing Informal Reference to Schontel Delaney Was Not Misconduct or Evidence of Racial Bias

Henderson imputes another unfounded and negative motivation for defense counsel referring to Schontel Delaney as "Schontel" and then "Ms. Delaney" during closing argument. The trial court properly rejected this argument. Dr. Delaney's testimony was not related to her professional career and did not require her degree as a PharmD. There is no racial undertone in not highlighting a witness's professional credentials which were unrelated to her testimony."

Hamilton v. Alabama, 376 U.S. 650 (1964) is inapposite. In that criminal case, the defendant refused to answer any questions unless she was call Miss Hamilton (as opposed to her first name, Mary). The Supreme Court granted the writ of certiorari and reversed the trial court's judgment and finding of contempt for her refusal to answer. Calling Dr. Delaney, "Ms. Delaney" when discussing her lay witness testimony is not equivalent to an Alabama trial court jailing a Black defendant for wanting to be

[10] The prosecutor in *Monday* committed various other acts of misconduct sufficient to warrant a new trial. 171 Wn.2d at 681.

addressed formally. There was no implicit racial animus or import to the reference to Dr. Delaney.[11]

g. Pointing Out the Friendly Relationship between Henderson and Dr. Devine Was Supported by Testimony, Consistent with the Jury Instruction on Witness Credibility, and Race Neutral

The trial court properly rejected any argument for misconduct based on defense counsel's statement that the relationship between Henderson and Dr. Devine was more than a doctor-patient relationship. CP 181. Dr. Devine testified he hired Henderson during college to work around his office when he knew she was low on money. RP 203:6-17. They had a relationship outside of the doctor-patient, whether that be friends or employer-employee. This was an appropriate area of potential bias to call out for the jury during closing and was but one of a litany of reasons to disregard Dr. Devine's testimony and question his credibility. RP 1205-09.

There was no implication that Henderson and Dr. Devine had a sexual relationship when it was expressly noted that it was nothing untoward. RP 1206:20. Henderson cites to an article by Andrea Mathews, who concludes: "Bottom line? We mean what we say and do."[12] Using Ms. Mathews' conclusion, defense counsel

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[11] If there was, Henderson committed the same error in previous trial court filings in which she referred to this witness exclusively as "Schontel Delaney" and "Ms. Delaney" and Schontel Delaney herself signed a declaration void of any mention of her PharmD credential or reference to her as a "Dr." CP 426-36.

[12] Andrea Mathews, LPC, NCC, *"I Didn't Mean It" or "It Didn't Mean Anything," Disclaimers of wholeness,* PSYCHOLOGY TODAY,

meant what she said: there was nothing untoward about the relationship.

h. Pointing Out Henderson Had Significant Pre-Existing Conditions and Disability Was Consistent with the Testimony, Jury Instructions, and Race Neutral

Henderson failed to raise the issue of disability discrimination at the trial court and has waived her right to any appeal on that issue. *John Doe v. Puget Sound Blood Ctr.,* 117 Wn.2d 772, 780, 819 P.2d 370, 374 (1991). Even so, it has no merit. At no point did Thompson argue that Henderson should not be compensated because she had a pre-existing condition or disability. Henderson acknowledged she was compromised prior to the collision during her testimony and in closing argument. RP 924:18-20; RP 1176:16-19. The jury was tasked with determining the extent of any aggravation of Henderson's pre-existing condition. CP 377.

Henderson consistently misrepresents that Thompson argued $60,000 would be an appropriate award for any aggravation. Thompson did not endorse Henderson's suggestion of $250 per day as the measure of damage, but if the jury adopted it, used it to illustrate a possible high-end award. Thompson suggested if the jury found Henderson was injured and applied that $250 per day award, they should do so only for the period of aggravation or exacerbation reflected by the competent medical records, which would be no more than the eight months Henderson received treatment immediately after the accident. Notably, Thompson described

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Feb. 1, 2015, https://www.psychologytoday.com/us/blog/traversing-the-inner-terrain/201502/i-didntmean-it-or-it-didnt-mean-anything.

that $60,000 figure as "exceptional" and "a lot of money." RP 1221.

It is unreasonable to conclude that Thompson's argument on aggravation damages was couched in disability discrimination. $60,000 for a temporary aggravation of her chronic muscle pain for which she treated for approximately eight months would be an exceptional financial recovery. There was never an argument that the jury should not award "full compensation" because Henderson was disabled nor did Henderson cite any part of the record to support such an assertion.

4. Substantial Evidence Supported the Jury's Verdict and Henderson Failed to Meet Her Burden to Show Entitlement to a New Trial under CR 59(a)(1), (5), or (9)

Both CR 59(a)(1) and 59(a)(9) are reviewed to determine if "'such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent [the] litigant from having a fair trial.'" *M.R.B. v. Puyallup Sch. Dist.*, 169 Wn. App. 837, 848, 282 P.3d 1124, 1130 (2012). The new trial remedy under CR 59(a)(9) should be rarely granted given the other available grounds for a new trial under CR 59(a). *Millies v. LandAmerican Transnation*, 185 Wn.2d 302, 319, 372 P.3d 111 (2016). Furthermore, overturning a jury's verdict under CR 59(a)(9) should only occur when the verdict is "clearly unsupported by substantial evidence." *Faust v. Albertson*, 167 Wn.2d 531, 538, 222 P.2d 1208 (2009). All reasonable inferences from the evidence are interpreted in a light favorable to the original non-moving party (i.e., Thompson), and the jury is given deference on issues of credibility, conflicting testimony, and persuasiveness of the evidence. *Id.*

Under CR 59(a)(5), determining the amount of damages falls to the jury, and courts are reluctant to interfere with a jury's fair damage award. *Palmer v. Jensen*, 132 Wn.2d 193, 197-198, 937 P.2d 597, 599 (1997). Denial of a new trial sought under CR 59(a)(5) is reviewed for abuse of discretion. *Wooldridge v. Woolett*, 96 Wn.2d 659, 668, 638 P.2d 566 (1981). An appellate court will look to the record to determine whether there was sufficient evidence to support the verdict. *McUne v. Fuqua*, 45 Wn.2d 650, 652, 277 P.2d 324 (1954). Where sufficient evidence exists to support the verdict, it is an abuse of discretion to grant a new trial. *Id.* at 653.

Giving all reasonable inferences to Thompson, the jury's verdict is well supported by the evidence and any credibility determinations it made. Thompson's medical experts provided hours of testimony regarding their review of the records, citation to records that demonstrated Henderson's Tourette's was more severe pre-accident than she admitted, and evidence of pre-existing degeneration in her neck and complaints of pain was sufficient to warrant an MRI and discussion of injections. Further, the jury witnessed video of Henderson engaged in her front-end position at Costco in March 2015 and heard her testify that she worked in that position for approximately three months before assuming another physically demanding position at Walgreen's. The evidence supported that Henderson had a temporary aggravation of her chronic neck pain and no medically documented change in her Tourette's. Within eight months, she had ceased treating and started her job at Costco. Awarding $9,200 to her for general damages for the short-term aggravation is well within reason. The trial court did not abuse its discretion in denying a new trial under CR 59(a)(1), (a)(5), or (a)(9).

Henderson argues that the jury award was due to implicit bias or the result of passion of prejudice because it was only 15.33% of the amount "suggested by Thompson." Br. at 35. "Alleged passion or prejudice on the part of the jury is grounds for granting a new trial under CR 59(a)(5) only if the record indicates that the verdict was not within the range of proven damages." *James v. Robeck*, 79 Wn.2d 864, 870-71, 490 P.2d 878 (1971).

As discussed above, Henderson misstates the record as to what Thompson "suggested" to the jury as well as ignores the mountain of evidence supporting the jury's verdict. Thompson did not endorse either the proposed $250/day award or a $60,000 verdict, but characterized such an award as "exceptional" and "a lot of money." RP 1221:4, 17-18. Thompson's closing argument focused on the minimal aggravation of Henderson's pre-existing conditions, which were well documented in the records, and resumption of physical activity as evidenced in the March 2015 video. The jury considered the evidence and reached its own determination on the value of Henderson's damages. The award, which only encompassed general damages, reflects damages consistent with the Thompson's presentation of evidence.

Henderson also spins a narrative regarding post-verdict trial court procedures that the trial court itself has debunked.[13] Court had adjourned. CP 129. The trial court's practice was to remove litigants post-

[13] Henderson's assertion that what she and her attorneys allege is now a "fact of the case" finds no support in CR 8(d), which pertains to denials in pleadings. The trial court expressly stated on the record that Henderson's allegation that the jury asked for her removal was untrue during the new trial hearing and again in its Order on the evidentiary hearing. *See R*P 1255, CP 188.

verdict regardless of the race of the parties or outcome of the trial. RP 1255, CP 188, n.1. Thompson was not present for the jury verdict, otherwise she would have been asked to leave as well. Nothing in the record suggests the jurors believed Henderson was "violent, dangerous, or otherwise would make a scene"- to so conclude would be pure speculation, especially in light of the trial court's clarification of its procedures. Further, Henderson takes issue with the trial court's bailiff "calling out to see if Henderson was gone," and the bailiff could have easily looked and "not made further spectacle of Henderson's removal." Br. at 35. Thompson does not dispute that Henderson took offense by the bailiff's words, but there is no nexus to racial animus or bias by the jury, especially given clearing the courtroom was the trial court's procedure. The jurors ultimately did not talk to either attorney after a long trial. The trial court's practice of removing litigants following a verdict is not evidence of juror bias or a basis for a new trial.

5. *The Trial Court's Decision to Deny a New Trial Considered the Entire Record and Totality of the Circumstances*

Henderson contends the trial court failed to consider the totality of circumstances in its order denying the new trial. She could not be more wrong. The trial court's order reflects its detailed and considered review of the record as well as the authorities cited by Henderson. It is Henderson who fails to look at the record as a whole or acknowledge the evidence presented by the defense. Henderson declined to order or review the transcript from closing argument as was evident in the briefing. Her motion for new trial was rife with misstatements and inaccuracies about the trial.

In contrast, the trial court considered the context, circumstance, and most importantly, the record in addressing the motion for a new trial. CP 178-82. As the trial court noted, there was no evidence of implicit bias in the jury's verdict and the verdict was supported by the evidence. CP 181-82. Thompson's arguments during closing were based on the evidence and testimony presented[14] and focused on the credibility factors set out in Jury Instruction No. 1: potential bias or prejudice of witnesses, the quality of a witness's memory, the manner of the witness when testifying, the personal interest, and the reasonableness of witness testimony in the context of all the other evidence. CP 366. There is nothing improper about such arguments as they are the result of appropriate advocacy. The trial court noted Thompson did not concede Henderson's claimed injuries or method of calculating damages. CP 181-82. The trial court also properly noted that the jury was entitled to disbelieve Henderson's witnesses and its verdict was "not outside the evidence presented."[15] CP 182.

Finally, the trial court considered Henderson's authorities, including *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011). In *Monday*, the prosecutor repeatedly asked African American witnesses about

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[14] Yet again, Henderson alleges Thompson's arguments were based on "falsehoods" without any citation or reference to any falsehood. As discussed above, Thompson's arguments were based on the witnesses' testimony, documentary evidence, and the credibility factors set out in the jury instruction.

[15] The trial court did not need to consider that the jury asked for Henderson's removal because that did not happen as the trial court addressed at oral argument. RP 1255:3-11.

an antisnitch "code."[16] *Id.* at 678. In closing argument, he then characterized the "code" as "black folk don't testify against black folk" and returned to that point multiple times during closing. *Id.* at 674. As this Court noted, there was no support in the record (nor is it accurate) to attribute an antisnitch code to African Americans. *Id.* at 678. The prosecutor's pronunciation of police as "po-leese" in the direct examination time and time again served only to highlight race and emphasize the "black folk don't testify against black folk" contention. *Id.* at 679. Combined with the prosecutor's commentary on his office, the veracity of criminal defendants, and the guilt of the defendant, this Court concluded it could not say that the prosecutorial misconduct did not affect the jury's verdict. *Id.* at 681. Citing the dissimilarities between this case and *Monday*, the trial court noted that "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." CP 181. Thompson's closing reflected the parties' testimony and demeanor that the jury witnessed, without any injection of race. Thompson did not refuse to answer questions or confront Henderson's counsel on the stand. Henderson d*Id.* Henderson's long-time friends all used the exact same phrase to describe her personality and similar characterizations of her pre-accident Tourette's symptoms. It was within the bounds of appropriate advocacy to suggest that they had a motivation to support her and provide favorable testimony that was

[16] Henderson misconstrues the Court's discussion in *Monday* regarding the "code." The issue was not the testimony about an antisnitch "code" but the prosecutor's direct connection of it to African-Americans only, for which there was no evidence in the record to support (and is generally rejected by scholars). *Id.* at 678.

unusually identical and did not match up with Henderson's own medical records. If witnesses are all saying the exact same thing, such an argument would be proper regardless of race.

6. The Order Denying New Trial Is Not Racially Biased

There are two threshold issues to address regarding the new trial order. First, Henderson seeks to apply a *Berhe* standard to the new trial order when the *Berhe* decision had not been issued.[17] Henderson did not request an evidentiary hearing at the time of her motion for a new trial. Accordingly, the trial court could not have abused its discretion in denying the motion without an evidentiary hearing when none was requested and before the ruling in *Berhe*.

Second, the language used by Thompson's counsel was not objected to at trial. CP 180; RP 1194-1230. "Absent an objection to counsel's remarks, the issue of misconduct cannot be raised for the first time in a motion for a new trial unless the misconduct is so flagrant that no instruction could have cured the prejudicial effect." *Warren v. Hart*, 71 Wn.2d 512, 518-19, 429 P.2d 873 (1967). In this case, Henderson failed to object to Thompson's closing arguments that she now contends were racist. She cannot now rely on purportedly objectionable statements for a new trial after remaining silent and hoping for a favorable verdict. *Hopkins v. Copalis Lumber Co.*, 97 Wn. 119, 120, 165 P. 1062, 1062 (1917).

Moreover, the trial court's order denying the new trial is not biased on its face. Recognizing that implicit

[17] Berhe was decided on July 18, 2019 and the trial court denied Henderson's motion for a new hearing on July 16.

biases exist, the trial court held that the mere *possibility* of implicit bias was not enough to order a new trial or additur. CP 180. The trial court correctly noted there were no overtly racist statements made or any specific evidence of impermissible racial motivations by the jury, but the trial court did not require either overt racism or specific evidence of bias. CP 182. Instead, the trial court went through the record to address each of the allegations by Henderson and noted that the purportedly objectionable language used in Thompson's closing was not racist dog whistles but reflected the evidence before the jury:

> 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 but 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's counsel's questions. It was not unfair to describe her as intimidated, especially when the reference was to the process and not intimidated by plaintiffs 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.

CP 180-81.

Henderson contends that the trial court should have precluded counsel from using accurate language to describe the parties' testimony. That is an untenable request. As the trial court noted, the descriptions used by defense counsel accurately described the parties' testimony, even though in some contexts (not applica-

ble here) the language may have racial overtones.[18] Limiting counsel's ability to describe witness's testimony accurately would lead to a disparate application and linguistic gymnastics: a combative or argumentative white witness could be described as such but a combative or argumentative Black witness could not be. Using an accurate descriptor of a witness's demeanor does not equate to misconduct or the existence of a biased jury verdict as the trial court recognized.

Henderson also overstates the trial court's inquiry regarding her rebuttal questions to Thompson (who Henderson had called as a witness). The trial court did not ask her to disclose her specific questions but noted it was unusual to call Thompson back on the stand and she was calling the jury back to finish up the trial testimony. RP 1112-13. Henderson expressed concern that Thompson could go outside to figure out an answer to the questions but that simply did not occur. There was a short discussion on timing and then the jury was brought in and Henderson asked the questions about property damage to the Henderson vehicle. RP 1115-16. Henderson was able to accomplish exactly what she wanted; this was all done outside the presence of the jury; and the exchange reflects the trial court's desire to keep the trial moving. It is wholly unclear how this signaled Thompson would be "protected."

Finally, the trial court failed to consider the jury's demand for the removal of Henderson as racially motivated because the jury did not make such a demand. There is no factual support that Henderson

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[18] As a hypothetical example: describing a Black female witness or plaintiff as combative, angry, or out of control without any basis in the testimony.

was asked to leave post-verdict because of her race or for the "comfort" of white people.

B. The Trial Court Did Not Abuse Its Discretion in Not Holding a Berhe Evidentiary Hearing and Not Holding a Hearing Does Not Provide a Basis for a New Trial.

The trial court's ruling on an evidentiary hearing is reviewed for abuse of discretion: "A trial court has significant discretion to determine what investigation is necessary on a claim of juror misconduct." *State v. B*erhe, 193 Wn.2d 647, 661, 44 P.3d 1172 (2019). A central tenant of our litigation system is the secrecy and sanctity afforded to jury deliberations, which cannot be pierced absent "cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged." *Id.* at 658.

Berhe reaffirmed the standard in *State v. Jackson* that for a motion for a new trial based on allegations of juror racial bias, the trial court should conduct an evidentiary hearing before ruling on a new trial motion. 193 Wn.2d at 666. In both *Berhe* and *Jackson*, the trial court was presented with juror statements on potential juror misconduct based on race. *Id.*; *State v. Jackson*, 75 Wn. App. 537, 879 P.2d 307 (1994), *review denied,* 126 Wn.2d 1003, 891 P.2d 37 (1995). Prior to conducting an evidentiary hearing, the moving party must make a prima facie showing of racial bias. Berhe 193 Wn.2d at 666. A possibility of implicit bias is ever-present in our society, but that fact alone is not enough to trigger a *Berhe* evidentiary hearing. The moving party must make a prima facie showing of racial bias.

In addressing a prima facie showing of racial bias, the trial court must determine "whether an objective observer. . . could view race as a factor in the verdict.

If there is a prima facie showing that the answer is yes, then the court must hold an evidentiary hearing." *Id.* At the prima facie stage, if the evidence is unclear, a court must inquire further of a juror "to provide more information or to clarify ambiguous statements." *Id.*

Henderson fails to articulate how she met her burden to show a prima facie case of racial bias in the jury's verdict. Simply stating that implicit bias was a factor in the jury's verdict does not make it so nor is that evidence of juror misconduct. Henderson went so far as to contact jurors but provided no declaration from a juror stating that the jury or a juror engaged in misconduct or expressed concern that the verdict or the deliberation process was not fair. CP 421, 425. This is in stark contrast to the facts in *Berhe* and *Jackson*, both of which involved jurors stepping forward with allegations of potential misconduct. Henderson has only proffered a self-serving theory, based largely on unsupported assertions and demonstrably false statements from the record. CP 183-84. The trial court was not obligated to accept those assertions as true, especially when they could be compared to the record and disregarded as false, as they were not "evidence." The trial court reviewed the briefing and assertions before it and concluded there was no permittable inference that an objective observer aware of the influence of implicit bias could view race as a factor in the jury's verdict. Henderson's only argument was the verdict was so low it could only be the result of bias, which the trial court had already rejected and explained that the verdict was supported by the evidence. CP 182.

In the complete absence of evidence that a verdict was based on racial bias, *Berhe* does not require an evidentiary hearing. The procedure outlined in *Berhe*

is reserved for exceptional circumstances: those in which a juror comes forward asserting misconduct or suspected misconduct occurred. *Berhe* does not suggest that following each trial the court should investigate the rationale behind a verdict when one party is disappointed with the outcome and alleges without evidence that it must be the result of bias. The trial court did not abuse its discretion in denying the motion.

C. The Trial Court Did Not Abuse Its Discretion in Declining to Give a Spoliation Instruction, There Was No Evidence the Ruling Reflected Bias, and the Decision to Decline a Spoliation Instruction Provided No Basis to Order a New Trial.

Henderson fails to show the trial court abused its discretion in denying a spoliation instruction at the close of evidence and by permitting Henderson to argue the inference that Mr. Slaeker was not credible based on the limited video production and inconsistent testimony. As a preliminary issue, Henderson again misstates the record. The Probe Report was produced prior to trial, there were no notes to produce, and the trial court did issue a sanction in permitting an unfavorable inference on the video and excluding the Probe Report from evidence. RP 157, 284-88; CP 179-80; CR 37(b)(2)(B). The trial court's conclusion on not issuing the spoliation instruction followed Henderson's failure to put forth evidence of missing videos or notes that were destroyed by Thompson or her agents. CP 179. Under those circumstances, a spoliation instruction would have been inappropriate. See *Pier 67 v. King County*, 89 Wn.2d 379, 573 P.2d 2 (1977).

The trial court addressed the evidentiary issues based on the record before it. Initially, the trial court

granted Henderson's motion in limine on spoliation based in part on the absence of the Probe Report and excerpts of Mr. Slaeker's deposition testimony. RP 55-56. Following Thompson's motion for reconsideration and a hearing,[19] the trial court permitted Henderson to inquire as to the same videotaping and note taking issues but would not permit Henderson to engage in a line of misleading questions. RP 55, 176-78. The trial court also excluded the report and any reliance on it.[20] RP 178. The trial court reserved ruling on Thompson's motion for reconsideration noting that it was not clear whether notes, independent of the text messages that were not maintained by Mr. Slaeker, existed or were destroyed. CP 102-03. Mr. Slaeker's trial testimony was that there were no additional notes and there was no additional video. RP 306:1-5; 319:15-16.

The trial court did not abuse its discretion in denying the request for a spoliation instruction, and there was no irregularity or abuse of discretion by which Henderson was prevented from having a fair trial.[21] Before Mr. Slaeker's testimony, the trial court was faced with conflicting evidence regarding the existence of any notes or video surveillance. The testimony at trial was that there were no notes aside from the texts that formed the report and those were

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[19] Thompson's motion speaks for itself, including the legal and factual reasons for the trial court to reconsider its position, including addressing culpability and the insignificance of the alleged missing evidence. CP 97-98.

[20] The trial court gave Henderson the opportunity to raise the issue of the late production of the report. RP 312:7-9.

[21] Henderson does not specifically cite any of the enumerated bases for a new trial under CR 59 in her discussion of the spoliation instruction. Thompson therefore assumes she moves under the same subsections identified earlier in her motion.

no longer accessible and there was no other video surveillance. Mr. Slaeker explained why there was only seventeen minutes of video; there was no trial testimony that he videotaped for an hour, nor does Henderson cite to any. Mr. Slaeker was subject to vigorous cross-examination regarding his deposition testimony; whether the jury found him credible was within their province. The trial court's sanction excluding the Probe Report and permitting the inference that there was missing video given the hours of surveillance versus the produced video was reasonable and appropriate following all the evidence regarding the surveillance. Finally, Henderson did not object to the trial court's ruling. RP 1147.

Henderson fails to show the trial court had no basis for its rulings on spoliation—it did—or misapplied the law—it did not. Henderson had every opportunity to cross-examine Mr. Slaeker, argue the unfavorable inference, and did not object the trial court's ultimately ruling on spoliation. There is no basis for a new trial based on the denial of the spoliation instruction.[22]

D. The Trial Court's Practice of Removing the Parties Post-Verdict Was Not Evidence of Bias, Did Not Impact the Verdict, and Provided No Basis to Order a New Trial.

Thompson disputes that Henderson was removed at the jury's request. There is no right to a person to remain in a courtroom following a trial. The court proceeding had concluded so article I, section 10 of the

[22] Finally, Henderson includes a list of other reasons why the trial court was biased, many of which rehash assertions made earlier in her brief and have been addressed. *See* II.A.8, 9; IV.A.3.c; IV.A.6.

state constitution is inapplicable as is *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993), which addressed the sealing of documents. Justice had been administered and trial concluded: the jurors had been excused and the court adjourned. CP 129. The trial court explained that its practice was to ask all the parties and non-attorneys to leave following the trial adjournment, regardless of race. CP 188; RP 1255:3-11. Taking offense at being asked to leave the courtroom post-trial does not equate to an unfair trial or jury bias and Henderson cites no authority in support thereof. Even if the jury made the request, it is pure speculation to conclude it was due to racial animus.

VI. CONCLUSION

Henderson had a lot riding on this trial - $3.5 million. She was able to put on the witnesses she wanted and tell her story to the jury. The jury simply did not believe that this accident caused her $3.5 million in pain and suffering. This Court should affirm the trial court on all issues and award costs on appeal to Thompson. RAP 14.2.

DATED this 10th day of November, 2020.

Respectfully submitted,

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