NO. 102492-4

SUPREME COURT OF THE STATE OF WASHINGTON

ANGELIQUE S. LANTZ, as Personal Representative of the Estate of JUSTINE M. ROWE,

Respondent,

v.

STATE OF WASHINGTON; DEPARTMENT OF SOCIAL AND HEALTH SERVICES; and CHILD STUDY AND TREATMENT CENTER,

Petitioners.

PETITIONERS' REPLY TO ISSUES RAISED BY RESPONDENT

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I. INTRODUCTION

In response to the Defendants' Petition for Review, Plaintiff argues that, if the Court accepts review of the issue raised by Defendants, this Court should also grant review on three issues not addressed by the Court of Appeals' decision and not raised in the trial court. *See* RAP 13.4(d). These new issues include: (1) whether the "could" test to identify a prima facie case of implicit racial bias that this Court adopted in *Henderson v. Thompson*, 200 Wn.2d 417, 518 P.3d 1011 (2022), is unconstitutional, (2) whether that test (presumably assuming it does not violate the constitution) should also apply to identifying implicit bias based on protected classes other than race, and (3) whether conduct by the State at trial demonstrates a prima facie case of implicit bias under *Henderson*. As this case is procedurally and factually postured, none of these issues warrant review under RAP 13.4(b). Accordingly, this Court should reject Plaintiff's arguments and grant review only on the issue raised by Defendants: whether the trial court should have held an

evidentiary hearing on implicit racial bias and Plaintiff's allegations of juror misconduct before granting a new trial.

II. COUNTERSTATEMENT OF NEW ISSUES RAISED BY PLAINTIFF

1. Does the test adopted in *Henderson* to identify a prima facie case of implicit racial bias requiring an evidentiary hearing – that is, whether an objective observer who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State could view race as a factor in the verdict – violate the Equal Protection and Due Process Clauses of the 14th Amendment to the U.S. Constitution?

2. Should the *Henderson* framework for identifying and remedying implicit racial bias be extended to apply to implicit bias based on gender and disability?

3. Has Plaintiff demonstrated a prima facie case of implicit racial bias under *Henderson*, such that an objective observer could view race as a factor in the defense verdict based

on conduct by the State at trial, thereby requiring an evidentiary hearing?

III. REASONS REVIEW SHOULD NOT BE GRANTED ON PLAINTIFF'S NEW ISSUES

A. Plaintiff's Fourteenth Amendment Challenge to *Henderson* is Unfounded

This Court has unequivocally declared that each member of the legal community "owe[s] a duty to increase access to justice, reduce and eradicate racism and prejudice, and continue to develop our legal system into one that serves the ends of justice." *Henderson*, 200 Wn.2d at 421. In line with that directive, this Court established the *Henderson* analytical framework to prevent the pernicious effect of implicit racial bias from infecting civil trial court proceedings. *Id*. at 422-23. Under that framework, following a prima facie showing that an objective observer "could" view race as a factor influencing trial court proceedings, the trial court *must* hold a hearing where the party seeking to preserve the decision bears the burden to show that race was not a factor. *Id*. As it applies here, the *Henderson*

analysis requires that, if Defendants have made a prima facie showing of implicit racial bias, then the trial court must oversee an evidentiary hearing to ensure that misconduct by Juror 4 and not implicit racial bias is the basis for ordering a new trial.

That is all that *Henderson* does: it provides the bench and bar with an important two-step analytical process to identify, evaluate, and remedy the insidious effect of implicit racial bias on civil trial proceedings. While the answer to step one may require an evidentiary hearing, step two does *not* dictate what results will flow from the evidentiary hearing or even what parameters the trial court will set in conducting the evidentiary hearing. Indeed, this Court has recognized that "[i]mplicit racial bias is a unique problem that requires tailored solutions," *State v. Berhe*, 193 Wn.2d 647, 663, 444 P.3d 1172 (2019), and it is expected that each evidentiary hearing conducted in compliance with *Henderson* will be particular to the unique and diverse range of factual circumstances presented.

Plaintiff seeks to invalidate the *Henderson* procedural framework because, she asserts, it violates the Fourteenth Amendment. Answer at 11. She is incorrect, both as to her equal protection and due process challenges.

Plaintiff's challenge to *Henderson* based upon the Equal Protection Clause contorts the way in which the framework operates and muddies its purpose. Under the Equal Protection Clause, race-based classifications trigger strict scrutiny review to ensure they are narrowly tailored to further compelling governmental interests. *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 309 (2013). Plaintiff would equate the framework set forth in *Henderson*, which confronts and seeks to eliminate implicit racism, with a race-based classification or distinction. It is not. The analysis that *Henderson* requires when concerns of implicit racial bias are raised does not ask a trial court to favor (or disfavor) one race over another in any fashion. And it certainly does not "presumptively deny Rowe a new trial" based on race. *See* Answer at 15.

In addition, even if one could construe *Henderson* as making a race-based classification, the *Henderson* analytical framework passes strict scrutiny. That analysis is a narrowly tailored process to identify and, where established at an evidentiary hearing, to remedy the immediate effects of racial bias on a particular case. It is not merely addressed to the generalized effects of "societal discrimination." *See Shaw v. Hunt*, 517 U.S. 899, 909 (1996). Eliminating racial discrimination in the court room in a particular case following an evidentiary hearing is a compelling government interest that survives strict scrutiny. *See 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."); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 630 (1991) (racial bias "mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality"); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (the purpose of the Fourteenth Amendment is "to

eliminate racial discrimination emanating from official sources in the States").

Further, the *Henderson* framework likewise does not implicate the Due Process Clause of the Fourteenth Amendment. Plaintiff asserts that the test imposes a presumption without a fair opportunity to rebut it. Answer at 14-15. But, the test expressly does the opposite: following Defendants' prima facie showing that Plaintiff's motion for a new trial was tainted by implicit racial bias, she will not only have the *opportunity* to rebut the presumption and demonstrate that misconduct by Juror 4 warrants a new trial, but she will be *required* to do so. *See Henderson*, 200 Wn.2d at 423. Plaintiff's assertion that the *Henderson* procedure deprives her of due process fails because nothing in that procedure prevents her from being heard.

Given the unfounded nature of Plaintiff's constitutional challenges to the *Henderson* framework, she presents neither a "significant question of law" under the U.S. Constitution nor an

"issue of substantial public interest." *See* RAP 13.4(b)(3), (4). Review of this issue is not warranted.

B. Plaintiff's Unpreserved Attempt to Expand *Henderson's* Application to Other Protected Classes is Beyond the Scope of the Court of Appeals' Opinion

While in one breath Plaintiff attacks the *Henderson* implicit racial bias framework as unconstitutional, in the next she asks this Court to *expand* its application to implicit bias based on gender and disability. Answer at 18. But this request is untimely, undeveloped, and unaddressed by the Court of Appeals' decision. As such, while the potential for expanding the *Henderson* framework may, in the proper case, constitute an "issue of substantial public interest," this case is a poor vehicle for this Court to address that question. *See* RAP 13.4(b)(4). Review on this issue should be denied.

C. Plaintiff's Unpreserved Objection to Defendants' Trial Conduct is Also Beyond the Scope of the Court of Appeals' Opinion

Finally, Plaintiff makes an untimely request for this Court to evaluate whether she has made a prima facie case of implicit

racial bias by Defendants during trial, when the Court of Appeals' opinion does not reach that issue. *See* Answer at 15-19. Defendants agree that their conduct is equally subject to evaluation under the analytical framework adopted in *Henderson*. But unlike the legal error committed by the Court of Appeals in analyzing Plaintiff's motion for new trial for implicit racial bias, which merits this Court's review and correction under RAP 13.4(b)(1) and (4), the proper place for the fact-intensive evaluation of Defendants' conduct to occur is in the trial court.

Plaintiff, however, has waived the issue of Defendants' conduct by not raising it before the trial court. Further, even if Plaintiff has not waived this issue, Plaintiff can raise it to the trial court if this Court vacates the order granting and new trial and remands for an evidentiary hearing. Alternatively, if this Court affirms the order granting Plaintiff a new trial, then the issue of whether Defendants' conduct warrants a new trial will be moot. Accordingly, review of this issue is not warranted under RAP 13.4(b)(4).

IV. CONCLUSION

For all the foregoing reasons and the reasons set forth in Defendants' Petition for Review, this Court should accept review solely to determine whether the trial court should have held an evidentiary hearing on implicit racial bias and Plaintiff's allegations of juror misconduct before granting a new trial.

This document contains 1,540 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 26th day of December, 2023.

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CERTIFICATE OF SERVICE

I certify that on the date below I electronically filed the PETITIONERS' REPLY TO ISSUES RAISED BY RESPONDENT with the Clerk of the Court using the electronic filing system which caused it to be served on the following electronic filing system participant as follows:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 26th day of December, 2023 at Olympia, Washington.

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