100039-1

Case No. 80233-0-I

COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON

ANTONIO HILL, individually, ISAIAH IFANSE, individually, and ERON KROSS, individually

Appellants,

v.

WASHINGTON INTERSCHOLASTIC ACTIVITIES ASSOCIATION, a Washington non-profit Corporation, inclusive;

Respondent.

APPELLANT'S REVISED PETITION FOR REVIEW

SMYTHE & JONES, PLLC
Marianne K. Jones, WSBA # 21034
400 112th Ave., Suite #200
Bellevue, WA 98004
425-436-5777

Attorney for Appellants
Antonio Hill and Isaiah Ifanse

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Statutes and Codes

Case Law

APPENDIX

Decision 5/10/21

Order Denying Motion to Publish and Motion for Reconsideration 6/28/21

1.0 INTRODUCTION

The Washington Law Against Discrimination was designed to eliminate discrimination in the state of Washington. However, the trial court would not apply that law to the Washington State Interscholastic Activities Association ("WIAA") because it concluded there is no law in Washington as to whether the WIAA, which controls interscholastic activities for over 800 public and private schools in the state of Washington can discriminate in their actions. The appellate court did not reach that decision because it determined the investigators were not targeting persons of color when they created a list of those to focus an investigation on which were 83% persons of color. The subtleties of discrimination need to be addressed by this court so that a jury and not an appellate court decides whether certain actions were acts of discrimination. In addition, it is a significant question of law under the Washington Law Against Discrimination to determine whether the WIAA is a place of public accommodation, and/or what place of public accommodation means when the legislature uses the Washington Law Against Discrimination as a prohibition in other statutes.

2.0 PETITIONERS' IDENTITY

Antonio Hill ("Hill"), Isaiah Ifanse ("Ifanse"), and Eron Kross ("Kross") filed suit against both the WIAA and the Bellevue School District ("BSD") for Negligence; Violation of the Washington law against Discrimination and

Discrimination in Violation of Civil Rights. CP 1240-1254. The discrimination claims are only related to Hill and Ifanse and only they are in a protected class. Kross and the BSD are not parties to this appeal.

3.0 CITATION TO APPELLATE DECISION TO BE REVIEWED

Hill and Ifanse request the Washington Supreme Court review the Washington State Court of Appeals Non-Published decision in *Antonio Hill et. al. v. The Washington Interscholastic Activities Association et. al.* No. 80233-0-1, Washington Court of Appeals, Division One, (May 10, 2021), herein the "Opinion." A copy of the Opinion is included in the Appendix. In addition, Hill and Ifanse request that the Washington Supreme Court Review the Washington State Court of Appeals decision Denying Motions for Reconsideration and to Publish filed June 28, 2021.

4.0 ISSUES PRESENTED FOR REVIEW

Issue One. (From the Trial Court) Whether the Washington Law Against Discrimination Applies to the WIAA and if so, then how is the jury instructed as to a "place" of accommodation.

Issue Two. (From the Appellate Court) Whether the Court of Appeals can conclude on summary judgment differently than the trial court without reversing and remanding the decision as to whether there was sufficient evidence of discrimination to allow a jury to decide whether the treatment of Hill and Ifanse was discriminatory when Hill and Ifanse's position was that they were not transfer students and the

evidence in the record that the investigator's compilation of the list of transfer students was based upon race.

5.0 STATEMENT OF THE CASE

Hill, Ifanse, and Kross were each interviewed by former federal prosecutors (Bob Westinghouse and Carl Blackstone) as to whether they improperly transferred to Bellevue High School such that the WIAA recruiting rules would be violated. CP 580-582.

Kross, the white student, was a transfer student from Florida. CP 565-6; 582. Hill and Ifanse, both black, attended the local middle school that feeds into Bellevue High School and therefore were not transfer students under any reading of the WIAA rules. CP 177. During the interview, the prosecutors asked Hill, Ifanse, and their respective mothers who also attended the interviews, such questions as how they can afford to live in Bellevue, how they afford to buy groceries, and directed to Hill's mother, whether she cares about her children. CP 660-5. Hill's mother is a Captain in the United States Army and had listed guardians for her children including her mother, brother and two sisters because she had been deployed to Afghanistan and also was obtaining her masters by attending school in in Texas, while her children resided in Washington. CP 660-5.

Kross, the white student, who transferred to Bellevue was not suspect as were the black families as to how they could afford to live in Bellevue and Kross publicly spoke about his belief that racial targeting and insinuating black families could not afford to live in Bellevue was part of the investigation. CP 582-584.

Kross had stood up and spoke out during open comment to the Bellevue School Board about a Seattle Times article covering issues of racial bias about the WIAA investigation into the Bellevue Football program. CP 584-5.

In August 2015, the WIAA initiated an investigation into the Bellevue High School Football Program ("the investigation"). CP 181. BSD authorized the investigation but told the WIAA that the scope would be limited to five specific issues. CP 181-2. WIAA told BSD one of the benefits of "asking" for the investigation was that BSD could control the scope. CP 181.

The WIAA hired two former federal prosecutors ("the prosecutors/the investigators") to investigate. CP 186. Rather than limiting the scope to whether WIAA Rule violations had occurred in five specific areas, the WIAA authorized the prosecutors to "look under rocks, under rocks, under rocks." CP 217. In other words, the WIAA wanted the prosecutors to keep on digging, looking, and displacing the "rocks" until there were no more rocks. CP 217; 239. As BSD's John Harrison put it, the prosecutors were told by the WIAA to "leave no stone unturned." CP 217.

BSD had problems with the prosecutors and the WIAA from the beginning of the investigation. CP 181. Mr. Harrison and Mr. Lowell were leading up the coordination of the investigation and set certain ground rules with the WIAA. CP 182.

One significant item that the prosecutors wanted but could not get from BSD was a list of transfer students. CP 368-9; 374; 489; 606. Transfer students

under the WIAA rules are those students who transfer to one high school after already enrolling in and attending a different high school. CP 368-9; 374; 489; 606. When BSD would not provide the list of transfer students because BSD believed it violated FERPA, the prosecutors made up their own purported list of 42 'transfer' students which was nothing but a list of 35 black/mixed race athletes on the Bellevue High Football team comprised of students ranging from 2003 through 2015. CP 368-9; 374; 489; 606. Over one half of the students listed on the 35 of 42 list of non-white persons did not transfer to Bellevue High School. CP 368-9; 374; 489; 606. Rather, over one half of the students attended all four years at Bellevue High School without ever attending any other high school. CP 368-9; 374; 489; 606.

The WIAA initially provided a list of students who had gone through the WIAA eligibility hearings and been approved by the WIAA. CP 606. The prosecutors then created the rest of the list on their own using football rosters. CP 606. Of the individuals on this list for the investigation and possible interviews with the prosecutors, 35 out of 42 were black and/or minority mixed race. CP 368-9; 374; 489; 606. A simple mathematical calculation proves that in no way did the prosecutors select students based on the merit of the investigation (i.e. potentially recruited athletes). CP 368-9; 374; 489; 606. It is statistically impossible to come up with a list which contains 83.33% black and mixed race, non-white athletes without racial targeting. CP 374; 606. Eron Kross testified that the football team is not made up of a vast majority (83%) of people of color. CP

606. The allegation by Hill and Ifanse that they want the jury to decide is that the prosecutors' selection of who to target was done purely based on race as evidenced by the list of those being investigated being primarily persons of color. CP 368-9; 606. With nearly 100 football players in the program each year, statistically 3% of them being black or mixed race would be normal, but to only target the black/mixed race students on a list that would have had approximately 1.45 black transfer students per year over a 12-year period is targeting; CP 368-9; 374; 489; 606 and 1075.

The 35 of 42 list above was not created based on who was a transfer, the list included whoever was black or mixed black and a few others. CP 368-9; 374; 489; 606, 1075. The prosecutors had a racist mind-set and asked only the black and mixed-race black persons how they could afford to live in a place like Bellevue. CP 661 191. All the while the WIAA knew that the prosecutors were being accused of being racially biased because it was brought up in school board meetings. CP 237.

On December 4, 2015, Executive Director of Schools Bellevue School District, Mr. John Harrison, wrote a memo to the WIAA Executive Board detailing the following concerns:

> (1) tone and direction of the current investigation being conducted by Mr. Blackstone and Mr. Westinghouse;
> (2) manner in which the interviews were conducted;
> (3) Mr. Blackstone and Mr. Westinghouse disagreed with the district protecting student information by following a protocol to contact parents of students;

(4) investigators were not satisfied with district responses to questions and insisted that there was no response;
(5) the failure of the WIAA to produce a document refuting Blackstone and Westinghouse's contention that they had been encouraged to leave no stone unturned;
(6) district finds itself being either accused or threatened based on whether the investigators deemed that they had received cooperation as defined by them;
(7) concern that the investigation was not fair and unbiased as promised;
(8) investigation had become based on the community gossip about BHS football program rather than conducting an unbiased investigation which focused on the facts; and
(9) concern that the investigation had morphed into a trial. CP 215-8.

The prosecutors initiated the interviews by introducing themselves as "former federal prosecutors". CP 365. Their tones were aggressive, demanding, and would only take the answer they wanted to hear. CP 359; 364; 368; 593. The under-aged students were intimidated by the hostile nature but answered the questions as best they could, given the threat that failure to do so would hurt their reputation with their school and their football program's reputation. CP 595. This threat by BSD and the WIAA held true as the reputations of individuals who did not participate in the interviews were negatively tarnished. CP 706. Despite the explicit and implicit threats, the prosecutors asked/stated to Hill, Ifanse, Kross as follows:

1) Ifanse and Hill: "Bellevue is an expensive place to live"; CP 366; 532.
2) Hill understood that white people were not asked did you care for your son or how do you afford groceries. CP 370
3) The prosecutors never asked Ifanse about any other white students who moved to Bellevue; CP 370.
4) Ifanse: "How can your family afford training" when referring to conditioning and non-sport specific athletic training Ifanse was engaged in; CP 452-3.
5) Ifanse and Hill: How much do their parents pay for rent; CP 444.
6) Ifanse and Hill: How do their parents afford rent; CP 377; 444.

7) Ifanse and Hill: How much do their parents pay for food, how can they afford food, CP 366; 370; 442-6; 450.
8) Ifanse and Hill: Implying their parents shouldn't be able to afford to live in a place like Bellevue; CP 442-6.
9) Ifanse felt that being asked how they can afford groceries was disrespectful CP 443
10) Kross: prosecutors implied Kross was a smart man and implied that his college or future job opportunities would be affected if he did not correct his statement about the prosecutors. CP 593.

Both Hill and Ifanse left these interviews distraught. CP 592. They attempted to seek help through their school district through written complaints and were left with no solution, no rationale, and no apology. CP 378-9; 383-4; 389-91; 385-388.

4.0 ARGUMENT

A. Standard of Review

Review of summary judgment is *de novo*. *Ellis v. City of Seattle,* 142 Wn.2d 450, 458, 13 P.3d 1065 (2000), *citing Benjamin v. Washington State Bar Ass'n*, 138 Wn.2d 506, 515, 980 P.2d 742 (1999). Summary judgment is proper only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Ellis,* at 458, *citing Clements v. Travelers Indem. Co.,* 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); CR 56(c). All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. *Id.*

B. Issues On Review: WLAD Applying to The WIAA And Whether There Is Substantial Evidence Of Discrimination Under The Law.

The Washington Law Against Discrimination was designed to deter and eradicate discrimination in the state of Washington. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles,* 148 Wn.2d 224, 246, 59 P.3d 655 (2002).

There is no law in Washington as to whether the WIAA, which controls interscholastic activities for over 800 public and private schools in the state of Washington can discriminate in their actions. The appellate court did not reach that decision because it determined that the facts of this case were not sufficient for a jury to determine that discrimination occurred. However, it is a significant question of law under the Washington Law Against Discrimination to determine whether the WIAA is a place of public accommodation, and/or what place of public accommodation means when the legislature uses the Washington Law Against Discrimination as a prohibition in other statutes. The trial court dismissed the case on summary judgment for that reason because at trial the trial court could not determine whether the WIAA was a place of accommodation and how to instruct the jury as to what that means under the WLAD.

The law in Washington is clear that the WLAD is construed liberally to accomplish the purpose of the WLAD to eradicate discrimination in Washington. *See W.H. v. Olympia Sch. Dist.,* 195 Wn.2d 779, 784, 465 P.3d 322 (2020) (quoting RCW 49.60.020).

The record shows that the Hill and Ifanse (and Kross), and many others in the community saw racial targeting, profiling, and interrogation of black persons by the WIAA prosecutors throughout the investigation. The court of appeals however felt that the evidence lacked proof that a list of persons to investigate being 83% persons of color was not proven by either the demographics of the football rosters throughout the years or simply by the demographics of the City of Bellevue which is the demographics of the school because the public-school attendance area is only the City of Bellevue. The court of appeals also determined that there was a basis for the structural questions that were asked by the WIAA investigators. Therefore, the court of appeals never was able to reach the primary issue from the trial court as to how to apply the Washington Law Against Discrimination to the WIAA, particularly as to the issue of place of public accommodation. That issue needs to be addressed in the state of Washington given the fact that the WLAD is referenced in the Revised Code of Washington as applying to many other circumstances, including the WIAA in RCW 28A.600.200(1) but the courts have no instructions as to whether the statutory language of "place of accommodation" must be decided by the jury.

Another reason that the decision should be reviewed is that discrimination based upon race is certainly a public interest issue. The courts are a significant part of eliminating discrimination in Washington which is the fundamental goal of the Washington Law Against Discrimination and the public will be served by a decision in this case further guiding the lower courts on use of the Washington

Law Against Discrimination and a proper application of determining places of accommodation and whether that includes the WIAA.

1. There Was Production of Evidence That The Transfer List of 35 of 42 Created By The Prosecutors Was Targeting Persons of Color Including Hill and Ifanse.

In this case, whether the prosecutors compiling a list of persons to investigate was racially targeting should not be disregarded by the court of appeals as not targeting persons of color. Rather, whether placing Hill and Ifanse on a list of transfers with 83% persons of color was targeting Hill and Ifanse based upon their race should be a question for the jury. Simply because the lower court imagined an anomaly of 83% persons of color being reflected on a football roster for multiple years, does not make such a list non-discriminatory. Discriminatory acts cannot be determined on summary judgment simply because there may be an alternate available excuse for someones actions that are not discriminatory but that alone does not eliminate the objective belief by persons of color that the actions were discrimination. It then should be a question for the jury.

The law in Washington must be clarified to allow for non-discriminatory reasons to exist but still the possibility that the actions were discrimination. The law was stated properly by the court but misapplied when it comes to determining objective discriminatory conduct. The opinion holds, “The liability inquiry focuses on whether actions led to discrimination, not whether the proprietor of a place of public accommodation intended to discriminate. *Floeting,* 192 Wn.2d at 853. “[T]he asserted discriminatory conduct must be objectively discriminatory. By this we mean

that it must be of a type, or to a degree, that a reasonable person who is a member of the plaintiff's protected class, under the same circumstances, would feel discriminated against." *Floeting*, 192 Wn.2d at 85817 (quoting *Floeting v. Grp. Health Coop.,* 200 Wn. App. 758, 773-74, 403 P.3d 559 (2017)).

Compiling a list of transfer students, including Hill and Ifanse on it when they were not transfer students, and the list of suspected recruited athletes was comprised of 83% persons of color is objectively discriminatory. Given a summary judgment standard of viewing the facts in the light most favorable to the defendant, the court of appeals should not have decided that creation of the list and Hill and Ifanse being on the list was not discriminatory. This is particularly so, when the trial court determined that there were issues of fact as to discrimination, but no law of discrimination to apply to the WIAA because it was not a place of public accommodation.

2. There Was Production of Evidence That The Interviews Were Conducted In A Discriminatory Manner Towards Hill And Ifanse.

As to the prosecutor's conduct during the interview, the appellate court created a single excuse or reason to justify the questions asked and therefore failed to recognize that whether a question is asked in a racially discriminatory manner depends on more than just the words of the question spoken and whether those words have a legitimate purpose to be spoken to a person of color. Discrimination in an interview of questions can also include the timing, manner, tone, body language, eye contact, and subtleties that may not come through in just

the written questions. Hill and Ifanse, and their mothers and Kross, and his mother, all attempted to describe for the record the subtleties that Hill and Ifanse faced that Kross did not face. The jury should hear that evidence so that a jury can decide whether the facts with all of the intricacies being considered was discrimination. The court of appeals should not be manufacturing excuses or reasons for the prosecutors' actions which Hill and Ifanse assert are discrimination.

The appellate court ignored the content of the interviews for acts of discrimination and focused on only whether it was discriminatory to interview certain persons. The interviews were equally divided, roughly, between black and white participants. When asked, counsel agreed that the prosecutors interviewed an equal number of white players and black players. However, that fact does not excuse or justify discriminatory acts that occurred within the interview. T

The Opinion states the law as "To overcome summary judgment, a plaintiff need only show that a reasonable jury could find the plaintiff's protected trait was a substantial factor motivating the defendant's adverse actions. *Scrivener v. Clark Coll.,* 181 Wn.2d 439, 445, 334 P.3d 541 (2014). "This is a burden of production, not persuasion, and may be proved through direct or circumstantial evidence.' " Scrivener, 181 Wn.2d at 445 (quoting *Riehl v. Foodmaker, Inc.,* 152 Wn.2d 138, 149, 94 P.3d 930 (2004), abrogated on other grounds by *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas County,* 189 Wn.2d 516, 404 P.3d 464 (2017))."

The Court concludes that the investigators were rude and unnecessarily aggressive to all persons and not just the persons of color in particular Hill and Ifanse. While it is true that the prosecutors were rude and unnecessarily aggressive that fact does not discount the fact that Hill and Ifanse were asked questions that white persons were not asked, nor does it eliminate the objective discrimination that a person of color feels when they are asked such questions. Treatment through aggression and acts of discrimination are not mutually exclusive. It can be only abusive to white persons and it can be both abusive and discriminatory to a person of color.

The record clearly shows that Kross testified he was treated very differently than Hill and Ifanse. Reply brief at 10 citing CP 582: 1-8; CP 578-614. The record reflects that Ifanse and Hill were asked: How much do their parents pay for rent; CP 444.Ifanse and Hill were also asked: How do their parents afford rent; CP 377; 444. Kross was not asked how his family could afford to live in Bellevue, how they paid for groceries, etc. The court's decision ignores the racial bias in asking Hill and Ifanse when they are black, and not transfer students, these questions and not asking Kross, who is a transfer student and white these same questions. The court instead glosses over the specifics of what was said and how it was said to the black persons in the admittedly rude and aggressive manner and by determining that it was within the scope of the investigation to ask questions about rent and finances. When the court glosses over the tone, innuendo, targeting, listing without them being transfers,

and response of the investigators that they don't believe the answers, the court misses the discrimination.

Here the discrimination is that the black persons Hill and Ifanse were asked specific questions in a manner that infers Hill and Ifanse do not have money for rent or groceries or that they should not have the ability to live in Bellevue. However, Kross' questions never reach that level of inference. Kross testified that in his interview it was not assumed that his family could not afford to live in Bellevue. CP578-614 The fact that Kross was asked the same subject matter of questions but in a completely different tone and manner expressed by Hill and Ifanse in the citation to the record is evidence that the prosecutors asked different questions of Hill and Ifanse based upon their race. The questions to Kross, while they are the same subject matter, do not contain the same inferences and it is completely logical that a jury would conclude that the reason for the difference is because the investigators assumed that Kross' family could afford their rent and groceries because they are white and that Hill and Ifanse's families could not afford their rent and groceries because they are black.

On summary judgment and appeal it is difficult to show the tone and manner but the words of the pages of deposition testimony show the tone and manner when Hill and Ifanse reference the disrespect that they felt, the disbelief, the feeling of wanting to leave, the sleepless nights, the tears and the feeling of not belonging in their high school anymore. The Court should consider that when a jury hears the live testimony of Hill, Ifanse and Kross as to this issue, the jury may reasonably conclude

that Hill and Ifanse were treated differently and discriminatorily based upon their race than Kross in comparison.

The Court's decision also does not address all the comparative evidence that is in the record. It only concludes a single area where all persons were treated similarly as "rude" and "aggressive" as being evidence that there was no difference in the treatment based upon race. The Court must use the same analysis on all of the other comparator evidence which supports why Hill and Ifanse are claiming discriminatory actions.

Hill testifies that he was selected for the interview because he was African American. CP 370 Remember he is not a transfer student and neither is Ifanse, so they were selected for interviews not for that reason but why? Because they were suspected of being transfer students. Why? They were not on any WIAA eligibility hearing list so why where they placed on the list? Because when investigators chose 25 persons who were not transfers to Bellevue High School on a list most of whom are persons of color, they are chosen because of their race.

Hill goes on to testify that white players like Ryan Crnkovich and Eron Kross were asked questions about them (meaning Hill and Ifanse). This is cited on page 13 of the opening brief and the enumerated differences in how Hill and Ifanse were treated is in the Substantive Statement of the case.

The Court should reconsider its decision correcting the dates of the investigators list to 2003-2015, because that is what is in the record and the facts should be seen in light most favorable to the non-moving party which was Hill and

Ifanse. The Court should also reconsider its determination that there is no evidence to support the discriminatory elements of Hill and Ifanse's case. There is evidence in the record of the discrimination and specifically of the conclusions that the Court reached. The evidence is there, cited in the briefs and in the record. The court of appeals should be instructed to revise its decision to honor the record on appeal and find that Hill and Ifanse have the ability to present their evidence to a jury for a factual determination as to whether their evidence shows that the prosecutors were racially motivated and treated Hill and Ifanse differently based upon race.

Next the court of appeals concludes incorrectly from the record that "None of the complaints included concerns that the investigators asked racially motivated questions or that they treated people differently based upon their race." Decision at 17. The record supports the opposite. In Hill, Ifanse and Kross' opening brief at page 10, citation to the record at CP 237 shows the deposition testimony of Michael Colbrese who was the Executive Director of the WIAA. In his deposition it is admitted that a source of tension "was appearances—the school board meetings were--- there were claims that the fact-finders were racially biased, and that caused some tension with Bob and Carl obviously." CP 237. Therefore, the WIAA itself admitted that there were complaints that the prosecutors were racially biased.

The briefing shows that the community was in an uproar about the discriminatory actions of the prosecutors and went to school board meetings and spoke during open public comment that this should not be allowed. The cite for this is CP 200 on page 6 of the opening brief which was a list of the persons that have

been interviewed by the prosecutors. CP 200. The cite should have also included CP 201 which is a document listing the actions or inactions which created mistrust from the community regarding BSD and WIAA. It includes a complaint that the WIAA is targeting African American students regarding residency and financial situation of families. Assumed lower financial ability for African American students and switched to interviewing Caucasian students after report of inequity. CP 201. There is no question that such complaints are about the WIAA investigators treating people differently based upon race by asking them racially motivated questions. The question asking black persons regarding their residency and financial situations assumed lower financial ability for black students living in Bellevue. It is racially motivated to assume that only black persons cannot afford to live in Bellevue.

The record and briefing further cites the Declaration of Tina Alexieff a disinterested community member who supported the parents of Hill and Ifanse to file Harassment Intimidation and Bullying complaints. Ms. Alexieff cites that her purpose was to assist the families including Hill and Ifanse to be a voice to try to obtain assurances that "this type of treatment of black student athletes, and their families, and those that stand up for them, would not be tolerated" CP 42-54 There is no question that Ms. Alexieff's declaration is evidence in the record that supports the assertion that the prosecutors treated people differently (particularly Hill and Ifanse) differently based upon their race. *Id.*

The investigators asked the white people about the black people but not vice versa. Is this treating white people differently or black people? The protected class is

being treated differently because it is their race that is the cause of questions being raised about them to others. CP 589-591. Kross testified that the investigators asked about various person on the 35 of 42 list to see if they were transfers. CP 589-591. This is cited in the opening brief. The investigators focused on the persons of color in the testimony as seen through the pages because Kross testifies as to whether the persons discussed were persons of color. CP 589-591. The record has no persons of color being asked about white persons, only white persons being asked by the investigators about persons of color. The fact that the investigators only asked about black persons to the white persons and did not ask the black persons about the white persons is evidence that black persons were treated differently in their in their interviews based upon race. The entire issue raised with Kross was that he pointed out this racial bias and then the prosecutors aggressively attempted to get him to withdraw his statements and observations about the racial bias he was witnessing in the investigations. This in and of itself is a complaint and concern that the prosecutors were racially motivated or that they treated people differently based upon their race. Kross' entire experience which is cited in the briefing and spelled out in the record in his deposition is evidence that he complained and had concerns. CP578-614. The court cannot conclude that Kross' experience that he testified to under oath is not production of evidence of a complaint that the investigators treated people differently based upon race. If a white person, Kross came to that conclusion during the investigation, then a jury could reasonably come to that conclusion as

well. The court of appeals should not insert a different conclusion than the production of evidence supports as to racial discrimination.

7.0 CONCLUSION

In viewing the facts of discrimination in the light most favorable to the non-moving party, it certainly seems that Hill and Ifanse have presented sufficient evidence that they were treated differently because of their race based upon from an objective viewpoint. Therefore, it would be reasonable for the jury to determine that Hill and Ifanse were discriminated against. The appellate court should address the other issues under the Washington Law Against Discrimination that it did not address in its decision as to whether the WIAA is a place of public accommodation.

Dated this 16th day of August, 2021.

Respectfully submitted,

SMYTHE & JONES PLLC

By: */s/ Marianne K. Jones*
Marianne K. Jones, WSBA # 21034
Jordan E. Jones, WSBA #52951
400 112th Ave NE Suite 200
Bellevue, WA 98004
425-576-8899

Attorneys for Appellants
Antonio Hill and Isaiah Ifanse

PROOF OF SERVICE

I HEREBY CERTIFY, under the penalty of perjury under the laws of the State of Washington, that on August 16, 2021, I caused a true and correct copy of the foregoing APPELLANTS' REVISED PETITION FOR REVIEW to be served upon counsel of record listed below in the manner shown:

Attorneys for Respondent Washington Interscholastic Activities Association
Angelo J. Calfo, WSBA #27029
Patricia Anne Eakes, WSBA # 18888
Alicia Jean Cullen, WSBA # 50552
Calfo Eakes & Ostrovsky PLLC
1301 2nd Avenue, Suite 2800
Seattle, WA 98101
Emails: patty@calfoeakes.com, angeloc@calfoeakes.com, aliciac@calfoeakes.com.
Via E-Mail

DATED this 16th day of August, 2021.

/s/ Marianne K. Jones
MARIANNE K. JONES

Case No. 80233-0-I

COURT OF APPEALS, DIVISION ONE,
OF THE STATE OF WASHINGTON

ANTONIO HILL, individually, ISAIAH IFANSE, individually, and ERON KROSS, individually

Appellants,

v.

WASHINGTON INTERSCHOLASTIC ACTIVITIES ASSOCIATION, a Washington non-profit Corporation, inclusive;

Respondent.

APPENDIX FOR APPELLANTS' PETITION FOR REVIEW

SMYTHE & JONES, PLLC
Marianne K. Jones, WSBA # 21034
400 112th Ave., Suite #200
Bellevue, WA 98004
425-436-5777

Attorney for Appellants
Antonio Hill and Isaiah Ifanse

FILED
5/10/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ANTONIO HILL, individually; ISAIAH IFANSE, a minor through his mother JENNIFER IFANSE; and ERON KROSS, individually, Appellants/Cross Respondents, v. THE WASHINGTON INTERSCHOLASTIC ACTIVITIES ASSOCIATION, a Washington non-profit Corporation, Respondent/Cross Appellant, and BELLEVUE SCHOOL DISTRICT NO. 405, a municipal corporation and subdivision of the State of Washington, Defendant.	)	No. 80233-0-I DIVISION ONE UNPUBLISHED OPINION

BOWMAN, J. — A group of former Bellevue High School (BHS) students sued the Bellevue School District (BSD) and the Washington Interscholastic Activities Association (WIAA), alleging that investigations into possible athletic rule violations were negligent and discriminatory contrary to the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW; and the common school provisions of chapter 28A.642 RCW. WIAA argued it was immune from liability under the Washington Act Limiting Strategic Lawsuits Against Public

Participation (anti-SLAPP) statute, RCW 4.24.510. The trial court concluded that immunity did not protect WIAA but dismissed the students' claims on summary judgment. We affirm.

FACTS

WIAA is a nonprofit organization authorized to oversee and administer policies, rules, and regulations for high school interscholastic activities, including athletics, for nearly 800 member schools in Washington. BSD is a member school district of WIAA.

The BHS football program is "one of the most successful . . . in the entire nation." In 2015, BSD asked WIAA to investigate claims of rule violations by the BHS football program that had appeared in a Seattle Times news article. Sources accused the school of improperly recruiting athletes from outside the district and subsidizing their tuition at the Academic Institute Inc.,[1] housing, and athletic training after relocating to the city of Bellevue.[2] WIAA hired two former federal prosecutors experienced with public school district inquiries to investigate the allegations.

The investigators asked BSD to provide a list of transfer students and their records to help focus the investigation. BSD refused, citing the family educational and privacy rights act, 20 U.S.C. § 1232g. Since the investigators were not agents or employees of the school, attorneys for BSD would not disclose the information without parent authorization. The investigators asked

[1] The Academic Institute is a small private school within the BSD that does not have an athletics department. Students at a private school without a football team can play for a public school in the same district.

[2] Sources also accused BSD of lenient curriculum requirements for football players.

BSD to commission them as agents to gain access to the records but BSD refused.

Without help from the school, the investigators compiled a list of 42 current and former football players they believed had transferred to BSD between 2008 and 2015. An anonymous source told them that certain players on the list had lied about their addresses so they would be eligible to play football at BHS. An interview with a coach outside the district corroborated the tip. Acting on the information, investigators requested interviews with 9 students. BSD sent a letter to the students' parents and guardians, encouraging them to "support your son meeting with the WIAA investigators to answer their questions" and welcoming the parents' presence at the interviews. The letter clarified that the interviews were voluntary but also that "[a] failure to cooperate may contribute to an adverse inference in the investigative report[,] which may be detrimental to the interests of [BHS] and its football program."

Of the nine students that received interview requests, seven agreed to the interviews—three white students and four students of color. A parent and school administrator was present for each interview. The school administrator and the investigators agreed on the scope of the interviews beforehand. During the interviews, investigators would seek to answer five specific questions:

> [1.] Whether coaches directed athletes to attend the Academic Institute
> [2.] Whether [the] Booster [Club] had paid tuition of athletes at [the] Academic Institute
> [3.] Whether athletes used false addresses to gain eligibility
> [4.] Whether athletes received subsidized housing to gain eligibility
> [5.] Whether coaches are coordinating tuition payment for athletes.

After the interviews, students Antonio Hill, Isaiah Ifanse, and Eron Kross accused investigators of using aggressive, bullying tones and mannerisms and asking inappropriate questions about socioeconomic circumstances beyond the investigation's scope. Hill and Ifanse also alleged that the investigators targeted them based on their race.[3] The three students filed harassment, intimidation, and bullying complaints with BSD. The district determined that some of the investigators' interview questions exceeded the scope of the investigation but did not rise to the level of harassment, intimidation, or bullying.

The students then filed a complaint for damages in superior court.[4] They alleged BSD and WIAA conducted their investigation negligently. Hill and Ifanse also sought damages for racial discrimination under the WLAD; chapter 28A.642 RCW, the common school provision prohibiting discrimination in public schools; and the right to freedom from discrimination statute, RCW 49.60.030.[5] The complaint sought attorney fees and costs and damages for emotional distress.

BSD and WIAA each filed motions for summary judgment. WIAA argued that the negligence and discrimination claims failed as a matter of law. WIAA also asserted immunity from any liability under RCW 4.24.510.

In opposition to WIAA's motion for summary judgment, the students offered expert testimony from University of North Carolina Greensboro Associate Professor Dr. Steven Cureton. Dr. Cureton has a doctorate in sociology with an emphasis on criminology, family, and race in America. Dr. Cureton used a

[3] Hill and Ifanse are black. Kross is white.

[4] Ifanse's mother Jennifer Ifanse was also a named plaintiff.

[5] Plaintiffs also cited the WAC.

process called "content analysis theory," which examines words and word patterns to identify discriminatory themes and resulting adverse symptomology. He applied this analysis to Kross, Hill, and Ifanse's depositions. Dr. Cureton also used "critical race theory" to interpret their depositions. Dr. Cureton concluded that all three students experienced discrimination.

The trial court granted BSD's motion for summary judgment with prejudice and dismissed BSD as a defendant. The court concluded BSD owed no duty to the students because it was not acting in loco parentis[6] at the time of the interviews.[7] The trial court granted in part and denied in part WIAA's motion for summary judgment. It determined that WIAA was not immune under RCW 4.24.510 but dismissed the students' negligence claims because they "failed to meet the objective symptomology requirement to support their claim." Hill and Ifanse's discrimination claims remained.

WIAA then moved to exclude Dr. Cureton's testimony. The trial court granted WIAA's motion, finding that "it would not be helpful" to the trier of fact under ER 702. The court also concluded that "content analysis is not a generally accepted methodology to assess discrimination and its effects" under Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).[8]

---

[6] "The term 'in loco parentis' means, '[i]n the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities.' " Zellmer v. Zellmer, 164 Wn.2d 147, 164, 188 P.3d 497 (2008) (quoting BLACK'S LAW DICTIONARY 787 (6th ed.1990)).

[7] The students do not appeal the dismissal of their claims against BSD.

[8] The Frye standard allows a court to admit scientific evidence only if it is generally accepted in the relevant scientific community. State v. Copeland, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996).

The trial court then dismissed Hill and Ifanse's remaining claims under the WLAD and chapter 28A.642 RCW. The court concluded that "WIAA is not a place of [public] accommodation" under chapter 49.60 RCW and Title 28A RCW did not establish a cause of action against WIAA.

The students appealed. WIAA cross appealed, arguing the trial court erred in dismissing its immunity defense.

ANALYSIS

Anti-SLAPP Immunity

WIAA argues that the trial court "improperly rejected" their immunity defense because the students' allegations "all 'stem from' the investigators' report that WIAA provided to BSD," and the anti-SLAPP statute "immunizes all such claims." The students argue the anti-SLAPP statute does not confer immunity to WIAA because the investigators' conduct was not "based upon"[9] WIAA's communication to BSD.[10] We agree with the students.

We review the grant or denial of an anti-SLAPP motion de novo. Dillon v. Seattle Deposition Reporters, LLC, 179 Wn. App. 41, 70, 316 P.3d 1119 (citing City of Longview v. Wallin, 174 Wn. App. 763, 776, 301 P.3d 45, review denied, 178 Wn.2d 1020, 312 P.3d 650 (2013)), review granted, 180 Wn.2d 1009, 325 P.3d 913 (2014). RCW 4.24.510, also known as the "anti-SLAPP statute," grants

[9] See RCW 4.24.510.

[10] The students also argue that WIAA is not a protected "person" under RCW 4.24.510 because it is an entity delegated to act by a government agency. But our Supreme Court recently held in Leishman v. Ogden Murphy Wallace, PLLC, 196 Wn.2d 898, 899, 479 P.3d 688 (2021), that a "government contractor hired to perform an independent investigation is a 'person' " under the anti-SLAPP statute.

immunity from civil liability to a person who reports potential wrongdoing to government authorities. RCW 4.24.510 states, in pertinent part:

> A person who communicates a complaint or information to any branch or agency of federal, state, or local government, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization.

The legislature enacted the anti-SLAPP statute to encourage the reporting of potential wrongdoing to governmental entities by protecting reporting parties from the threat of retaliatory lawsuits. Aronson v. Dog Eat Dog Films, Inc., 738 F. Supp. 2d 1104, 1109 (W.D. Wash. 2010). The statute recognizes that "information provided by citizens concerning potential wrongdoing is vital to effective law enforcement" and that "the threat of a civil action for damages could be a deterrent to citizens who wish to report such information to law enforcement agencies." Tham Thi Dang v. Ehredt, 95 Wn. App. 670, 681, 977 P.2d 29 (1999) (citing RCW 4.24.500).

Relying on Tham Thi Dang, WIAA argues that it is immune from liability for any discriminatory conduct by its investigators because the anti-SLAPP statute "extends not only to allegations based expressly on communications to public entities, but also to allegations based on conduct leading to such communications." In Tham Thi Dang, a bank employee suspected Tham Thi Dang was trying to cash a fraudulent check. Tham Thi Dang, 95 Wn. App. at 672-73. The employee reported the suspicions to police, confiscated her

identification, and would not let her leave until police arrived to investigate. Tham Thi Dang, 95 Wn. App. at 674. The police arrested Tham Thi Dang but later determined the check was not fraudulent and released her. Tham Thi Dang, 95 Wn. App. at 675-76.

Tham Thi Dang sued the bank for unlawful imprisonment. Tham Thi Dang, 95 Wn. App. at 676. The bank claimed immunity under the anti-SLAPP statute and the trial court granted the bank's summary judgment motion. Tham Thi Dang, 95 Wn. App. at 681. We affirmed, adopting the reasoning from Hunsucker v. Sunnyvale Hilton Inn, 28 Cal. Rptr. 2d 722, 724-25, 23 Cal. App. 4th 1498 (1994), that "it was indisputable that all the actions out of which the plaintiff's complaint arose were a result of the communication . . . to the police" and "should be encompassed within the scope of the immunity." Tham Thi Dang, 95 Wn. App. at 684-85. Allowing a cause of action for the events surrounding the communication to police, while immunizing the communication itself, would thwart the policies and goals underlying the immunity statute. Tham Thi Dang, 95 Wn. App. at 683.

Similarly, in Leishman, the Washington State Office of the Attorney General (AGO) retained law firm Ogden Murphy Wallace (OMW) to "conduct an independent investigation into Leishman's discrimination complaint [against the AGO] and his supervisor's allegation that Leishman was inappropriate" during their meeting to discuss his complaint. Leishman, 196 Wn.2d at 901. OMW reported to the AGO that Leishman had not established discrimination and that

his conduct during the meeting " 'violated expected standards of conduct for his position.' " Leishman, 196 Wn.2d at 901. The AGO terminated Leishman.

Leishman sued OMW, arguing that OMW's negligence, negligent misrepresentation, fraud, and discrimination in investigating his discrimination complaint and reporting his conduct during the meeting damaged him. Leishman, 196 Wn.2d at 901-02. Our Supreme Court concluded that OMW was immune from liability under the anti-SLAPP statute because "Leishman's claims regarding OMW's conduct during the investigation are the starting point or foundation of the communication to the government agency, and his damages all stem from that final communication." Leishman, 196 Wn.2d at 910-11.

Unlike Tham Thi Dang's false imprisonment claim stemming from the bank's report that she tried to pass a fraudulent check, or Leishman's termination from employment stemming from OMW's investigatory report, the students' claim of emotional distress does not stem from WIAA's communication to BSD about rule violations. Instead, their claim stems directly from the investigators' misconduct. As a result, the students' claim of emotional distress is not "based upon"[11] WIAA's communication to BSD, and WIAA is not immune from civil liability under the anti-SLAPP statute.[12] The court did not err in rejecting WIAA's immunity defense.

[11] RCW 4.24.510.

[12] Nor would immunizing WIAA investigators from liability for racial discrimination and bullying during the course of their investigation further the policies and goals of the anti-SLAPP statute.

Summary Judgment

The students assert the court erred in dismissing their claims against WIAA on summary judgment. We review a trial court's order granting summary judgment de novo. Frisino v. Seattle Sch. Dist. No. 1, 160 Wn. App. 765, 776, 249 P.3d 1044 (2011).

A trial court properly grants summary judgment when, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 164, 273 P.3d 965 (2012); Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). A defendant can prevail on a motion for summary judgment by challenging the plaintiff's ability to establish an essential element of a cause of action. See Young v. Key Pharm., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The defendant bears the initial burden of showing a lack of evidence. Young, 112 Wn.2d at 225 n.1. The burden then shifts to the plaintiff to establish the essential elements of their claim. Young, 112 Wn.2d at 225. If the plaintiff does not do so, the defendant is entitled to summary judgment. Young, 112 Wn.2d at 225.

Negligence Claim

The students allege that WIAA negligently inflicted emotional distress on them because its investigators were "aggressive, demanding, and would only take the answer they wanted to hear" when interviewing them as part of their investigation into the BHS football cheating allegations. WIAA claims the

students did not show evidence of objective symptomatology necessary to support damages in a claim for negligent infliction of emotional distress. We agree with WIAA.

To prevail on a claim of negligence, plaintiffs must show (1) the defendant owed them a duty, (2) the defendant breached that duty, (3) the plaintiffs suffered an injury, and (4) proximate cause between the breach and the injury. Tincani v. Inland Empire Zoological Soc'y, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994). Failure to establish any of these essential elements is fatal to the students' claim. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

To prove negligent infliction of emotional distress, the plaintiffs must establish the same elements necessary for a negligence action. Strong v. Terrell, 147 Wn. App. 376, 387, 195 P.3d 977 (2008). But in deciding whether to allow damages for emotional distress without physical injury,

> Washington courts have balanced the right to compensation for emotional distress against competing interests in preventing fraudulent claims and ensuring that tortfeasors are held responsible only insofar as commensurate with their degree of culpability.

Bylsma v. Burger King Corp., 176 Wn.2d 555, 560, 293 P.3d 1168 (2013).

As a result, we allow claims for emotional distress without physical injury "only where emotional distress is (1) within the scope of foreseeable harm of the negligent conduct, (2) a reasonable reaction given the circumstances, and (3) manifested by objective symptomatology." Bylsma, 176 Wn.2d at 560. "These requirements were developed to address past concerns that feigned claims of emotional distress would lead to 'intolerable and interminable litigation.' "

Bylsma, 176 Wn.2d at 560-61[13] (quoting Corcoran v. Postal Tel.-Cable Co., 80 Wash. 570, 580, 142 P. 29 (1914)). Objective symptomology requires that a plaintiff's emotional distress "constitute a diagnosable emotional disorder" and that objective medical evidence proves both "the severity of the distress, and the causal link between the [negligent behavior] and the subsequent emotional reaction." Hegel v. McMahon, 136 Wn.2d 122, 135, 960 P.2d 424 (1998); Haubry v. Snow, 106 Wn. App. 666, 678-79, 31 P.3d 1186 (2001).

Here, the students pleaded a negligence action, claiming only emotional distress as damages. But they offered no evidence showing objective symptomology of that emotional distress. While Hill, Ifanse, and Kross each testified that he suffered sleepless nights, periods of depression, stress, and anxiety, none sought medical intervention or mental health treatment. Nor did they offer a medical diagnosis. Indeed, the students' attorney told the court, "[T]here's emotional aspects to it, but not diagnosable, you know, necessarily PTSD[14] type of harm. We're not going to go there." Instead, the students offered the opinion of Dr. Cureton that the investigators engaged in discriminatory conduct. But Dr. Cureton is not a medical doctor nor a mental health professional and is not able to render a medical or mental health diagnosis. As he candidly admitted, "I don't diagnose anything. . . . I'm not qualified to diagnose mental health symptoms."

[13] Internal quotation marks omitted.

[14] Post-traumatic stress disorder.

Because the students offer no evidence that they suffered a diagnosable emotional disorder, they do not satisfy the element of damages necessary to sustain a claim of negligent infliction of emotional distress. The trial court properly dismissed their claim.[15]

WLAD Claim

Hill and Ifanse argue the trial court erred in dismissing their claims against WIAA alleging disparate treatment in violation of the WLAD. We disagree.

The WLAD prohibits "any person or the person's agent or employee [from committing] an act which directly or indirectly results in any distinction, restriction, or discrimination" based on a person's membership in a protected class. RCW 49.60.215. The purpose of the WLAD is to deter and eradicate discrimination in Washington. Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles, 148 Wn.2d 224, 246, 59 P.3d 655 (2002). We construe the WLAD " 'liberally for the accomplishment of the purposes thereof.' " W.H. v. Olympia Sch. Dist., 195 Wn.2d 779, 784, 465 P.3d 322 (2020) (quoting RCW 49.60.020).

To establish a prima facie case of discrimination under the WLAD, a plaintiff must prove that (1) the plaintiff is a member of a protected class,[16] (2) the defendant's establishment is a place of public accommodation, (3) the defendant discriminated against the plaintiff when it did not treat the plaintiff in a manner comparable to the treatment it provides to persons outside that class, and (4) the

[15] Because we conclude that the students did not produce evidence of objective symptomology, we do not reach the remaining elements of their negligence claim. Celotex Corp., 477 U.S. at 322.

[16] The parties agree that Hill and Ifanse are members of a protected class.

plaintiff's protected status was a substantial factor that caused the discrimination. Floeting v. Grp. Health Coop., 192 Wn.2d 848, 853-54, 434 P.3d 39 (2019) (citing Fell v. Spokane Transit Auth., 128 Wn.2d 618, 637, 911 P.2d 1319 (1996)).

To establish a disparate treatment discrimination case, a plaintiff must show that the defendant treated some people less favorably than it did others because of their protected status. Alonso v. Qwest Commc'ns Co., 178 Wn. App. 734, 743, 315 P.3d 610 (2013). To overcome summary judgment, a plaintiff need only show that a reasonable jury could find the plaintiff's protected trait was a substantial factor motivating the defendant's adverse actions. Scrivener v. Clark Coll., 181 Wn.2d 439, 445, 334 P.3d 541 (2014). " 'This is a burden of production, not persuasion, and may be proved through direct or circumstantial evidence.' " Scrivener, 181 Wn.2d at 445 (quoting Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 149, 94 P.3d 930 (2004), abrogated on other grounds by Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas County, 189 Wn.2d 516, 404 P.3d 464 (2017)).

The liability inquiry focuses on whether actions led to discrimination, not whether the proprietor of a place of public accommodation intended to discriminate. Floeting, 192 Wn.2d at 853.

> "[T]he asserted discriminatory conduct must be objectively discriminatory. By this we mean that it must be of a type, or to a degree, that a reasonable person who is a member of the plaintiff's protected class, under the same circumstances, would feel discriminated against."

Floeting, 192 Wn.2d at 858[17] (quoting Floeting v. Grp. Health Coop., 200 Wn.

[17] Emphasis omitted.

App. 758, 773-74, 403 P.3d 559 (2017)).

Hill and Ifanse do not argue that WIAA was wrong to seek them out for interviews. As their attorney argued below, "The interview is not the problem. We're fine with the interview. It's the particular questions at the end of the interview that were discriminatory and harassing." Specifically, Hill and Ifanse accuse WIAA investigators of having a "racist mind-set" against players and families of color. They claim that the transfer list created by the investigators disproportionally included black players and that the investigators subjected players of color to more disparaging questions during their interviews. The record does not support their contentions.

Hill and Ifanse argue that the investigators' initial list of 42 transfer students targeted black players because 35 of the players were people of color, and it is "statistically impossible" that the list proportionately represented the black population in the Bellevue community. But WIAA did not compile its initial list of transfer students from the Bellevue community at large. Because it was investigating allegations of improper recruiting by the BHS football team, investigators used a list of students who had gone through WIAA "eligibility hearings" and the rosters of BHS football players from 2008 through 2015. Hill and Ifanse offer no evidence of the racial composition of those records. And the investigators eventually narrowed the initial list of 42 to only 9 students from whom they requested interviews. Of those 9 players, 4 were white.[18] Hill and

[18] Ultimately, seven of those nine students agreed to interviews. Of the seven players, three were white and four were black.

Ifanse offer no evidence that the investigators compiled the initial list of transfer students or requested interviews based on race.

Hill and Ifanse next contend that WIAA did not subject white students to belittling questions about their ability to afford living in Bellevue as the black students were. But the record shows that investigators also questioned Kross about why he selected Bellevue, whether his family rented or owned their home, and about his mother's employment. According to Kross, the investigators were also aggressive and disparaging to him. Hill and Ifanse did not produce any testimony from the other two white students interviewed. But the evidence in the record suggests that the investigators asked all of the players similar questions about the same topics regardless of race.[19]

Hill and Ifanse also contend that the investigators questioned black students in more disparaging ways than white students, including asking whether their parents cared for them, using aggressive tones, and not accepting answers they did not like.[20] According to Hill, investigators asked his mother whether she cared about him and whether she talked to him. But the record shows that Hill's mother was absent from the state for long periods of time for military service. So it does not follow that race was a substantial factor motivating the investigators to ask those questions. And only Kross claimed investigators threatened he would suffer adverse consequences if he spoke his opinions publicly that the

[19] WIAA provided the investigators' notes from the three interviews of the white players. The notes reflect questions about living arrangements, how they financed gym training, and recruiting inducements.

[20] The investigators insisted they maintained a professional and polite demeanor during the interviews.

investigation was racially biased. None of the students of color reported similar threats.

The record shows that nearly everyone who interacted with the WIAA investigators complained that they were rude and unnecessarily aggressive. Representatives from BSD complained the investigators launched unfounded accusations and threats against them if they did not agree to the investigators' demands. But none of those complaints included concerns that the investigators asked racially motivated questions or that they treated people differently based on their race. And Hill and Ifanse produced no evidence in support of their allegation that the investigators were disproportionately rude and aggressive toward them because of their race. The trial court did not err in dismissing their claim under the WLAD.[21]

Exclusion of Dr. Cureton's Testimony

Hill and Ifanse contend the trial court erred by excluding their expert witness because his testimony would not help the jury under ER 702 and his content analysis theory was not a generally accepted methodology to assess

[21] Because the students do not establish disparate treatment, we do not address the remaining elements of their WLAD claim, including whether we should consider WIAA a place of public accommodation. Hill and Ifanse also asserted a discrimination claim under chapter 28A.642 RCW, the common school provision prohibiting discrimination in public schools. WIAA claims that Title 28A RCW does not apply to the students' private cause of action. Because we conclude Hill and Ifanse fail to establish facts sufficient to show discrimination, we do not reach that issue.

discrimination and its effects. We disagree.[22]

We review evidentiary rulings for abuse of discretion. In re Det. of McGary, 175 Wn. App. 328, 337, 306 P.3d 1005 (2013) (citing State v. Lormor, 172 Wn.2d 85, 94, 257 P.3d 624 (2011)). The trial court has broad discretion in determining whether an expert's testimony is admissible under ER 702. McGary, 175 Wn. App. at 339. ER 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

To admit expert testimony under ER 702, the trial court must determine that the witness qualifies as an expert and that the testimony will assist the trier of fact. Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 918, 296 P.3d 860 (2013).

Expert testimony assists the trier of fact under ER 702 if it helps the jury in understanding matters outside the competence of ordinary lay persons. Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 600, 260 P.3d 857 (2011) (citing Reese v. Stroh, 128 Wn.2d 300, 308, 907 P.2d 282 (1995)). And the testimony must be relevant to a fact at issue. State v. Greene, 139 Wn.2d 64, 73, 984 P.2d 1024 (1999) (citing State v. Riker, 123 Wn.2d 351, 364, 869 P.2d 43 (1994)). Scientific evidence that does not help the trier of fact resolve

[22] WIAA asserts the students did not timely appeal the trial court's order excluding Dr. Cureton's testimony under RAP 5.2. The students assert RAP 2.2(a)(13) allows them to appeal the order. The students' initial notice of appeal designated the trial court's summary judgment orders dismissing their various claims but did not specifically designate the trial court's order excluding Dr. Cureton's testimony. Months later, the students filed an amended notice of appeal, designating the order excluding Dr. Cureton's testimony for the first time. We conclude the order excluding testimony is sufficiently related to the dispositive orders on summary judgment to merit review. See RAP 2.4(b); Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 378-81, 46 P.3d 789 (2002).

any issue of fact is irrelevant and does not meet the requirements of ER 702. Greene, 139 Wn.2d at 73.

Hill and Ifanse contend that Dr. Cureton's testimony was relevant to show that the WIAA investigators subjected them to racially motivated, disparate treatment. It is true that Dr. Cureton concluded that the WIAA investigators engaged in disparaging and humiliating conduct. But he also concluded that all three players, regardless of their race, "were exposed to bullying, intimidation and harassment ruthlessness and; therefore, equally shared in the humiliation, dehumanization and personhood negation." For example, Dr. Cureton concluded:

> Relentlessly bombarding student-athletes [Kross], [Hill] and [Ifanse] with rhetorical questions, accusatory statements and questions with pre-determined answers served the purpose of embarrassing, humiliating and intimidating plaintiffs and their mothers. . . .
>
> . . . .
>
> BSD and WIAA effectively dispossessed [Kross], [Hill] and [Ifanse] of counter-acting forces that would protect them from the abusive line of questions, investigative tactics, gestures and threats issued by [the investigators]. In short, BSD discriminated against [Kross], [Hill] and [Ifanse] because BSD failed to protect student-athletes the same way they protected district employees. WIAA discriminated against [Kross], [Hill] and [Ifanse] because WIAA empowered and positioned [the investigators] to levy an unjust and discretionary methodology that resulted in the dehumanization, belittling, and intimidation of [the three students and their mothers].
>
> . . .
>
> [ ]
>
> . . . In my professional opinion, BSD and WIAA are equally complicit in discrimination by allowing [the investigators'] tactics to be forced on Kross, Hill and Ifanse. Such tactics were oppressive, maligning, alienating, marginalizing, culturally imposing, exploitive, and power dynamic co-optation.
>
> . . . .
>
> . . . Kross, Hill and Ifanse have suffered and will continue to experience the lifelong effects of being the subject of discrimination in this setting.

These conclusions do not reflect different treatment toward the families of color. And Dr. Cureton did not contend that race motivated any differences in the phrasing of the investigators' questions. To the contrary, Dr. Cureton found that all three players and their families "equally" suffered harassment by the investigators, who abused their position of power over student athletes to bully them into submission. The trial court did not abuse its discretion when it determined Dr. Cureton's testimony would not help the trier of fact.[23]

In sum, the trial court properly denied WIAA's claim of immunity and did not abuse its discretion in excluding Dr. Cureton's testimony. Because the students did not show objective symptomology of emotional distress or that racial motivation caused investigators to treat them disparately, the trial court did not err in dismissing their negligence and discrimination claims on summary judgment.

Affirmed.

WE CONCUR:

[23] Because we hold that Dr. Cureton's testimony did not help the trier of fact under ER 702, we do not reach whether "content analysis theory" satisfies the Frye standard.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ANTONIO HILL, individually; ISAIAH IFANSE, a minor through his mother JENNIFER IFANSE; and ERON KROSS, individually, Appellants/Cross Respondents, v. THE WASHINGTON INTERSCHOLASTIC ACTIVITIES ASSOCIATION, a Washington non-profit Corporation, Respondent/Cross Appellant, and BELLEVUE SCHOOL DISTRICT NO. 405, a municipal corporation and subdivision of the State of Washington, Defendant.	)	No. 80233-0-I DIVISION ONE ORDER DENYING MOTIONS FOR RECONSIDERATION AND TO PUBLISH

Appellants/cross respondents Antonio Hill, Isaiah Ifanse, and Eron Kross filed separate motions to reconsider and to publish the opinion filed on May 10, 2021, in the above case. A majority of the panel has determined that both motions should be denied. Now, therefore, it is hereby

ORDERED that appellants/cross respondents' motion for reconsideration is denied. It is further

ORDERED that appellants/cross respondents' motion to publish the opinion is denied.

FOR THE COURT:

Judge

SMYTHE & JONES PLLC

August 16, 2021 - 4:49 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	80233-0
Appellate Court Case Title:	Antonio Hill, et al., Apps./X-Resps. v. WA Interscholastic Activities Assoc., et al., Resps./X-Apps.

The following documents have been uploaded:

- 802330_Petition_for_Review_20210816164933D1109845_7403.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Appendix to Petition.pdf

A copy of the uploaded files will be sent to:

- Pam@ssslawgroup.com
- aliciac@calfoeakes.com
- angeloc@calfoeakes.com
- bret@ssslawgroup.com
- ericak@calfoeakes.com
- jej@smythejones.com
- jill@ssslawgroup.com
- jordan.jones.law@gmail.com
- kristinsilverman@gmail.com
- pattil@calfoeakes.com
- pattye@calfoeakes.com

Comments:

Sender Name: Marianne Jones - Email: mkj@smythejones.com
Address:
400 112TH AVE NE STE 200
BELLEVUE, WA, 98004-5545
Phone: 425-436-5777

Note: The Filing Id is 20210816164933D1109845

SMYTHE & JONES PLLC

August 16, 2021 - 4:48 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	80233-0
Appellate Court Case Title:	Antonio Hill, et al., Apps./X-Resps. v. WA Interscholastic Activities Assoc., et al., Resps./X-Apps.

The following documents have been uploaded:

- 802330_Petition_for_Review_20210816163126D1031424_4812.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Revised Petition For Review.pdf

A copy of the uploaded files will be sent to:

- Pam@ssslawgroup.com
- aliciac@calfoeakes.com
- angeloc@calfoeakes.com
- bret@ssslawgroup.com
- ericak@calfoeakes.com
- jej@smythejones.com
- jill@ssslawgroup.com
- jordan.jones.law@gmail.com
- kristinsilverman@gmail.com
- pattil@calfoeakes.com
- pattye@calfoeakes.com

Comments:

Sender Name: Marianne Jones - Email: mkj@smythejones.com
Address:
400 112TH AVE NE STE 200
BELLEVUE, WA, 98004-5545
Phone: 425-436-5777

Note: The Filing Id is 20210816163126D1031424