

Concerns of the systemic harm to the administration of justice and to individual parties caused by explicit and implicit racial bias among jurors have been rightfully identified by this Court. With that recognition, guidance from the Court has followed, most recently in *State v. Berhe*, 193 Wn.2d 647, 444 P.3d 1172 (2019). Our evolving recognition of implicit racial bias and efforts to ensure fair trials by impartial juries cannot mean, however, that an assertion by a party displeased with the result of a civil trial can successfully seek direct Supreme Court review with broad allegations of implicit racial bias, particularly where the party cannot make a prima facie showing of such bias. To the extent review of orders entered by the trial court are not time barred, Plaintiff's request for direct review should be declined because this case does not involve a fundamental and urgent issue of broad public import which requires prompt and ultimate determination by this Court.

I. Nature of the Case and Decisions

Following a seven-day trial, the jury awarded Plaintiff Janelle Henderson \$9,200 in general damages arising out of a motor vehicle accident after she advocated for an award in excess of \$3.5 million dollars. Plaintiff Henderson, diagnosed with severe Tourette's Syndrome decades earlier, argued that her case had significant value because the accident exacerbated the manifestations of her Tourette's Syndrome. The defense

evidence showed otherwise.

Evidence at trial demonstrated that Plaintiff's treating doctors relied only on her subjective complaints – not objective findings – to conclude that she suffered soft-tissue injuries and worsened Tourette's Syndrome after the accident. Jurors learned that Plaintiff treated with a chiropractor for eight months after the accident, then stopped treating for six months. The jury watched a 17-minute video of Plaintiff working at Costco during that six-month gap in treatment, bagging items, jogging to and from the checkout stand, moving large items on carts, and engaging with customers – all without any visible tics or physical difficulty. Finally, jurors heard from the defense medical experts who rejected the assertion that the accident exacerbated Plaintiff's Tourette's Syndrome on a more probable than not basis.

Before suit was filed, Defendant Alicia Thompson's insurer hired Probe Northwest to conduct surveillance of Plaintiff Henderson. Probe Northwest employee Tyler Slaeker was assigned to work one of several days of surveillance. Mr. Slaeker captured the 17-minute Costco footage shown to the jury. Plaintiff moved *in limine* to exclude Mr. Slaeker or, alternatively, for a spoliation instruction based on disputed allegations that he destroyed or failed to produce notes, correspondence, and reports related to the surveillance. Ex. B to Plaintiff's Statement of Grounds.

Defendant opposed both requests. Ex. 1, Defendant's Amended Opposition to Plaintiff's Motions in Limine at pp. 4-5. The trial court heard argument on motions *in limine* one the first day of trial. Plaintiff withdrew her request to exclude Mr. Slaeker and asked only for a spoliation instruction, which was granted. The next day, Defendant moved for reconsideration or that the court reserve ruling until after the close of evidence, arguing that a spoliation instruction was not warranted under prevailing case law. Ex. 2, Defendant's Motion for Reconsideration re Spoliation. On April 16, 2019, a discussion about Defendant's motion for reconsideration occurred on the record. The trial court ordered the response to be filed by April 23 and reply on April 25. After clarifying with the court via email that a response was requested, Plaintiff served her opposition on April 23. Ex. 3, Declaration of Heather M. Jensen in Opposition to Plaintiff's CR 59 Motion at subjoined Ex. 2. Having considered the pleadings, including Plaintiff's response, the court reserved ruling on Defendant's motion until after the testimony of Mr. Slaeker, but allowed Plaintiff to cross examine him on all aspects of the allegedly missing evidence and to reference the missing documents in opening statement. Ex. C to Plaintiff's Statement of Grounds. At the close of evidence and following argument from both parties, the court denied the requested spoliation instruction. In a subsequent order denying Plaintiff's

CR 59 motion for a new trial, the court explained that Plaintiff failed to show the existence of videos, notes, or other tangible evidence from Probe Northwest, or that evidence was destroyed by the Defendant. Absent such evidence, a spoliation instruction was not warranted pursuant to case law. *See* Ex. I to Plaintiff’s Statement of Grounds at pp. 2-3.

During closing argument, Plaintiff’s counsel suggested using a \$250 per-day value to calculate Plaintiff Henderson’s damages. In the defense closing, counsel noted that \$250 per day, “seems exceptional,” but “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 competent medical records...” Ex. A to Plaintiff’s Statement of Grounds at 58:3-5, 8-13. That period, defense counsel suggested, was no more than the eight months of chiropractic treatment Ms. Henderson underwent immediately after the accident. *Id.* at 58:13-18. If the jury elected to apply that calculation, the amount would total \$60,000, which defense counsel noted was “a lot of money.” *Id.* at 58:17-18. As stated, the jury awarded \$9,200. In her order denying Plaintiff’s motion for additur, the trial court noted that the question of whether Ms. Henderson’s Tourette’s worsened after the accident was “hotly disputed,” that defense counsel did not concede Plaintiff’s method for calculating damages was the appropriate method,

and that the jury's verdict was not outside the evidence presented in the case. The court concluded that the "jury was entitled to disbelieve the plaintiff's witnesses." Ex. I to Plaintiff's Statement of Grounds at pp. 4-5.

Defense counsel also addressed the credibility of the parties during closing, comparing their manner while testifying. Counsel observed that Defendant Thompson "took the stand, obviously feeling, I think, intimidated and emotional about the process, and rightly so, and provided you with genuine and authentic testimony." *Id.* 59:17-20. By contrast, counsel reminded jurors that when Plaintiff took the stand, she accused defense counsel of "putting her on trial," and in response to questions about her medical care, testified that: "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. *Id.* at 59:9-15. Defense counsel described Plaintiff's manner while testifying as "combative." *Id.* Defense also described Plaintiff's manner during her CR 35 exam as "combative." *Id.* at 60:13-62:16. Audio from the exam was played in full for the jury by the defense during her presentation of evidence and is the best evidence of her tone, demeanor, and responses to the defense medical experts. The trial court addressed Plaintiff's challenge to the defense use of the term "combative" in her Order Denying Plaintiff's CR 59 Motion for New Trial, writing that:

In this case, the use of the terms that the plaintiff now complains of was not objected to when defense counsel made her argument. The terms were tied to the evidence in the case, rather than being raised as a racist dog whistle with no basis in the testimony. Ms. Henderson was very uncomfortable being cross examined and submitting to the CR 35 examination. There are a multitude of ways to describe her demeanor and it was not unfair to describe her as combative given her unwillingness to answer questions. Ms. Thomas was also uncomfortable testifying, although she did not avoid plaintiff counsel's questions. It was not unfair to describe her as intimidated, especially when the reference to the process and not intimidated by plaintiff's counsel. The court cannot require attorneys to refrain from using language that is tied to the evidence in the case, even if in some contexts the language has racial overtones.

Ex. I to Plaintiff's Statement of Grounds at pp. 3-4.

Also relative to witness credibility, defense counsel addressed the testimony of Plaintiff's friends, including Schontel Delaney, who earned a Doctor of Pharmacy degree but testified as a lay witness. Defense counsel referred to Dr. Delaney twice in closing argument. First when listing Plaintiff's lay witnesses:

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.

Id. at 43: 18-21. The audio of the closing demonstrates there was no mispronunciation of Dr. Delaney's name. The second reference concerned Dr. Delaney's description of Plaintiff Henderson's Tourette's Syndrome prior to the accident. Counsel mistakenly referred to Dr. Delaney by her

first name, but immediately corrected herself; “I think Schontel talked about an occasional -- excuse me. Ms. Delaney talked about an occasional shoulder shrug.” *Id.* at 44:1-3. The trial court addressed this testimony in her Order Denying Plaintiff’s Motion for New Trial, writing that “Dr. Delaney was not testifying as an expert witness and referring to her as Ms. Delaney or by her first name does not necessarily invoke racial stereotypes.” Ex. I to Plaintiff’s Statement of Grounds at p. 4. In doing so, the court discussed *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011), and distinguished the misconduct by the prosecutor in that case, finding no misconduct here. The court wrote, “[t]he facts of his case, and the substance of the argument in this case, are materially different with evidentiary based reasons for defense counsel’s argument.” *Id.*

Finally, during closing, defense counsel argued at length that Plaintiff’s treating chiropractor, Dr. Devine, was not a credible witness. Among the many arguments advanced in this regard, counsel raised Dr. Devine’s bias:

In terms of bias, I though 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.

Id. at 38:23–39:5. The trial court confirmed that the argument was proper, finding that, “Dr. Devine provided Ms. Henderson with work when she needed it, which is more than a doctor-patient relationship, so asking the jury to consider that testimony to evaluate his credibility was not inappropriate.” Ex. I to Plaintiff’s Statement of Grounds at p. 4.

The jury returned the verdict on June 7, 2019. After the jury was polled and discharged, the trial court asked the only party present – Ms. Henderson – to wait in the hall to allow the jurors to speak with counsel if they wished. In a declaration, Plaintiff explained she was embarrassed by the request. When the trial court subsequently learned of Plaintiff’s embarrassment and the misunderstanding by Plaintiff’s attorneys, she explained in open court and reiterated in footnote 1 to her Order Denying Motion for Evidentiary Hearing the following:

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

Ex. L to Plaintiff's Statement of Grounds at p. 2.

On June 13, 2019, the trial court forwarded an email it had received from a juror following the conclusion of the trial to counsel for the parties. The juror wrote:

I just received a phone call from a Private Investigator, on behalf of Vonda Sargent [Plaintiff's counsel], asking questions related to the case and our "experience". I was taken off guard and declined to comment, but wanted to let you know as I'm not sure if this is normal behavior or not. My understanding was that they could only ask us questions within the court room and could not leverage our contact information.

Ex. 4, Declaration of Heather M. Jensen in Support of Opposition to Plaintiff's Motion for Evidentiary Hearing and attached Ex. 1 at p. 3. The court's bailiff responded to the juror, assuring him that the court did not provide his contact information to either party, although, some of his demographic information was given to the parties as part of *voir dire*. *Id.* at 2. Additionally, she wrote, "[w]hile it is uncommon for an attorney to contact you after trial, it is not prohibited. As stated after the verdict, it remains up to your discretion and it is your choice whether you wish to talk about the case at all." *Id.* Defense counsel did not attempt to contact any juror after trial other than to make themselves available to the jury in the courtroom immediately following the verdict to the extent any juror wanted to discuss the case, nor did they hire any agents to do so.

Additionally, no juror contacted defense counsel to discuss the trial. *Id.*

Plaintiff subsequently moved for a new trial under CR 59 or additur in the alternative, arguing in part that the verdict amount was evidence of the juror's implicit racial bias against Plaintiff. Ex. J to Plaintiff's Statement of Grounds. The trial court denied Plaintiff's motion by order dated July 17, 2019. *Id.* at Ex. I. Recognizing that implicit biases exist, the court held that the mere possibility of implicit bias is not enough to order a new trial or additur. The court distinguished the conduct of the defense in this case from that of counsel in *State v. Monday*, noting that unlike the conduct in *Monday* the conduct Plaintiff complained of in this case was "tied to the evidence...rather than being raised as a racist dog whistle with no basis in the testimony." The court held that, "in the absence of specific evidence of impermissible racial motivations by the jury, or misconduct by defense counsel, the court declines to use the possibility of implicit racial bias to overturn the jury's verdict..." *Id.*

Thirty days passed after entry of the order without a notice of appeal being filed.

Plaintiff next sought an evidentiary hearing pursuant to *State v. Berhe*. Ex. K to Plaintiff's Statement of Grounds. Because there was no evidence of jury misconduct akin to the facts of *Berhe*, Plaintiff cited to the various trial issues discussed above as the basis for her request.

Defendant opposed the motion. Ex. 5, Defendant’s Opposition to Motion for an Evidentiary Hearing. Briefing, exhibits, and oral argument were presented. The court subsequently explained in a written order that she would have conducted an evidentiary hearing “if a juror in this case had indicated that the jury acted with inappropriate racial motivations, or if this court found that defense counsel’s arguments were racist and not tied to the evidence ...” Ex. L to Plaintiff’s Statement of Grounds. But a prima facie showing of facts consistent with *Berhe* was not present to justify an evidentiary hearing. The court noted the “significant difference” in the facts of the instant case and *Berhe*, where “the sole African-American juror alleged juror misconduct due to racial bias against her.” Despite the significant difference between this case and *Berhe*, the court nonetheless conducted an inquiry to determine whether Plaintiff made a prima facie showing of racial bias in the juror deliberations in her review of all material submitted in support of the motion and questioning counsel during argument. In doing so, the court did not distinguish between civil and criminal trials even though a criminal defendant enjoys heightened due process rights. Based on her inquiry, the court concluded that she “is sympathetic to Plaintiff’s concerns and recognizes that implicit bias exists and can impact a jury’s deliberations. Nevertheless, the plaintiff still must meet her burden of presenting a prima facia (*sic.*) showing that implicit

bias was present. She fails to do so.” *Id.* at p. 3.

Plaintiff filed her notice of direct appeal to the Supreme Court on September 6, 2019.

II. There are Insufficient Grounds for Direct Review

The only procedural basis cited for direct Supreme Court review is RAP 4.2(a)(4), reserved for a case “involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.” To the extent Plaintiff’s appeal is timely, none of the issues identified for review call upon this Court to grant Plaintiff’s request. Plaintiff relies on scattershot allegations of trial errors, none of which amount to a prima facie showing of racial animus in the conduct of the trial either individually or collectively. This is not a public issue case.

Issue 1. Plaintiff failed to timely appeal her CR 59 Motion for a New Trial.

Plaintiff may not seek review of her CR 59 Motion for New Trial or in the Alternative for Additur because she failed to timely file a notice of appeal within 30 days of the order denying the motion as required by RAP 5.2(e). The trial court entered the order denying her motion on July 17, 2019, and Plaintiff did not file her notice of appeal until 51 days later, on September 6, 2019.

Issue 2: The trial court in this civil case conducted an inquiry and properly determined there were not grounds to proceed

with an evidentiary hearing under *State v. Berhe*.

Plaintiff seeks to appeal the trial court's denial of her Motion for Evidentiary Hearing Pursuant to *State v. Tomas Mussie Berhe* and implies that the constitutional harmless error standard set out in *State v. Monday* should have guided the trial court's decision. But Plaintiff's argument, coupled with the merits and procedural history of this specific case, do not give rise to "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination" by the Supreme Court. The trial court recognized and adopted the tenets of *State v. Berhe* and *State v. Monday* even though the instant case involves a civil matter rather than a criminal prosecution. Further, the court conducted the initial inquiry identified in *Berhe* by considering briefing, oral argument, her prior rulings, and observations made during the course of trial to determine that Plaintiff failed to make a prima facie showing of implicit racial bias or any other specific basis for an evidentiary hearing. Though Plaintiff attempted to contact jurors, none came forward by affidavit or otherwise to attest that racial bias affected deliberations or the verdict. Under the circumstances, the trial court declined to call the jury back and pierce the veil of deliberations as documented in her thoughtful and detailed written order denying the motion. While the merits of the trial court's decision are subject to appellate review under the abuse of discretion standard, this

case does not call for immediate Supreme Court intervention.

Issue 3: The trial court's rulings on jury instructions are case specific and properly reviewable by the appellate court; they do not invoke a public issue.

Plaintiff takes issue with the trial court's decisions related to jury instructions on spoliation. The propriety of the court's decision is subject to appellate court review for abuse of discretion. *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). Though Plaintiff asserts that the trial court's reservation of her decision on whether to instruct the jury on spoliation upon a motion for reconsideration, and then declining to give the instruction after hearing all of the evidence "may be evidence of unconscious bias," this is a case-specific inquiry and does not involve a fundamental and urgent issue of broad public import.

Issue 4: The trial court's request that parties to a lawsuit wait in the hall while jurors speak to the attorneys after being discharged is not evidence of bias where the court makes the same request of all parties in all lawsuits.

Finally, Plaintiff seeks direct Supreme Court review of the trial court's practice of asking parties to wait in the hall while jurors speak to the attorneys if they wish. Though Plaintiff submitted declarations indicating that this was a request by the jury, the trial court emphatically corrected the oral and written record, making it clear it was a practice of the court across all cases, regardless of the race of the party or the

outcome of the trial. To the extent this is an issue for consideration by the appellate court, it does not involve fundamental and urgent issue of broad public import.

III. Conclusion

Though defense counsel and the trial court recognize the dangers of implicit bias and the potential impact on jury deliberations, this case does not present a public issue requiring direct review. Here, the trial court did conduct an inquiry into whether implicit racial bias was present or impacted the verdict. The court considered recent Supreme Court case law, briefing, argument, and the facts of this particular case as part of its inquiry and concluded that neither a new trial, additur, nor an evidentiary hearing were appropriate. To the extent the court's orders have been timely preserved for appeal, they do not involve fundamental and urgent issues of broad public import. Rather, they are case specific and appropriate for traditional appellate court review.

DATED this 23rd day of December, 2019

Respectfully submitted,

LEWIS BRISBOIS BISGAARD & SMITH LLP

/s/ Heather M. Jensen

Heather M. Jensen, WSBA No. 29635

Attorneys for Defendant Thompson

DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on December 23, 2019 I caused a true and correct copy of the foregoing Respondent Thompson’s Answer to Statement of Grounds for Direct Review in Supreme Court Cause No. 97672-4 to be served via the methods below:

Vonda M. Sargent Law Offices of Vonda M. Sargent 119 1 st Avenue S., Suite 500 Seattle, WA 98104 <i>Attorney for Plaintiff</i>	<input checked="" type="checkbox"/> via U.S. Mail <input type="checkbox"/> via Legal Messenger <input type="checkbox"/> via Facsimile: <input checked="" type="checkbox"/> via E-mail: sisterlaw@me.com carolfarr@gmail.com
C. Steven Fury FURY DUARTE, PS 1606 148 th Ave SE, Suite 200 Bellevue, WA 98007 <i>Attorney for Plaintiff</i>	<input checked="" type="checkbox"/> via U.S. Mail <input type="checkbox"/> via Legal Messenger <input type="checkbox"/> via Facsimile: <input checked="" type="checkbox"/> via E-mail: steve@furyduarte.com

Original e-filed with:

Washington State Supreme Court
 Clerk’s Office
 Temple of Justice
 P.O. Box 40929
 Olympia, WA 98504-0929

EXECUTED this 23rd day of December 2019 at Seattle, Washington.

/s/ Logan Platvoet
 Logan Platvoet

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Exhibit 1

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

JANELLE HENDERSON, an individual

No. 17-2-11811-7 SEA

Plaintiff,

vs.

DEFENDANT’S AMENDED RESPONSE TO
PLAINTIFF’S MOTIONS *IN LIMINE*

ALICIA M. THOMPSON, an individual,

Defendant.

I. INTRODUCTION

Defendant Alicia M. Thompson, by and through her undersigned counsel of record, replies to Plaintiff’s General Motions *in Limine* as follows below.

II. GENERAL STATEMENT OF FACTS

Defendant incorporates by reference her statement of facts as set forth in her Trial Brief.

III. EVIDENCE RELIED UPON

Defendant relies upon the pleadings and files already on record herein.

IV. ARGUMENT

1. Mention of Effect of Taxation

No objection.

2. Lack of Insurance; Defendant’s Pocket

No objection, however, no witness nor Plaintiff’s counsel should be permitted in testimony, argument or otherwise to mention before the jury any suggestion that there is

1 insurance or make references to Defendant Thompson as a prosperous person. Whether a
2 defendant has insurance, no insurance, insufficient funds, or a vast fortune, is irrelevant to issues
3 of liability, causation, or damages. Such evidence is not only irrelevant, but would be unfairly
4 prejudicial and must be excluded under ER 402 and 403. *Brown v. Quick Mix Co.*, 75 Wn.2d
5 833, 454 P.2d 205 (1969).

6
7 **3. Existence of Liability Insurance**

8 No objection.

9 **4. Other Collisions**

10 No objection.

11 **5. Failure to Call a Witness**

12 To the extent that Plaintiff testifies about treatment she received from providers who do
13 not testify at trial, the absence of those doctors may be a relevant area of inquiry that the defense
14 should be entitled to explore on cross examination and discuss during closing argument.

15
16 **6. Unavoidable Accident**

17 No objection.

18 **7. Hypothetical Medical Conditions**

19 No objection.

20
21 **8. Circumstances of Hiring Counsel**

22 The timing and circumstances of hiring counsel is relevant to a Plaintiff's bias. In the
23 instant case, a chart note from physician's assistant Linda Wilson at UW Medicine documents
24 that Ms. Henderson had an attorney by June 18, 2014 – four days after the accident – and that her
25 attorney suggested she see her primary care physician. This is appropriate for cross examination.

26 **9. Settlement Negotiations**

27 No objection.

1 **10. Collateral Sources**

2 As drafted, the motion relates to someone named “Ms. Condon,” *see* p. 10. To the extent
3 that Ms. Henderson intends to testify that she failed to seek care due to a lack of insurance or
4 funding, the defense should be able to conduct cross-examination on the fact that she receives
5 Medicare as a result of her Tourette’s syndrome.
6

7 **11. Any Reference to Plaintiff’s Response to Statement of Damages**

8 The defense does not intend to introduce Plaintiff’s response to the Request for a
9 Statement of Damages as affirmative evidence, however, the document may be used to impeach
10 Plaintiff if appropriate. The authority for the defense to request a statement “setting forth
11 separately the amounts of any special damages and general damages sought,” is derived from
12 RCW 4.28.360, which was enacted in 1975-76. Plaintiff relies on *City of Tacoma v. Wetherbee*,
13 57 Wash. 295, 106 Pac. 903 (1910) in support of her motion, but this case is inapplicable as it
14 was decided 65 years earlier.
15

16 **12. To Prohibit References to What Plaintiff Might Use the Proceeds of Any Judgment For**

17 No objection.
18

19 **13. Exclusion of Witnesses**

20 No objection.
21

21 **14. Expressions of Apology or Remorse**

22 Defendant Thompson regrets having caused the accident and immediately apologized to
23 Plaintiff Henderson. She continues to feel remorse for the accident and does not contest liability.
24 Were the Court to prevent Ms. Thompson from expressing remorse during her testimony, she
25 would suffer far more prejudice in the eyes of the jury who most certainly expect to hear an
26 apology. The likelihood that the jury would unfairly consider Ms. Thompson is great, whereas
27

1 the likelihood that the jury would somehow disfavor Plaintiffs if Ms. Thompson apologized is
2 low to nonexistent. Precluding this testimony will cause undue prejudice to Ms. Thompson. ER
3 403.

4 **15. Filing of Motions**

5 No objection.

6
7 **16. The Effect of Any Lawsuit Upon Insurance Rates, Premiums, or Charges,
8 Either Generally or as Particularly Applied to the Parties Herein**

9 No objection.

10 **17. The Reduction of Economic Damages to Present Value**

11 Because it appears from Plaintiff's jury instructions that she is not pursuing a wage loss
12 claim, no objection.

13 **18. Motion to Exclude Private Investigator Tyler Slaeker for Failure to Comply
14 With Lawful Court Order**

15 Counsel seeks to exclude the testimony of the defense private investigator who captured
16 17 minutes of video while surveilling Ms. Henderson while she worked at Costco on March 11,
17 2015. Alternatively, counsel seeks a spoliation instruction. Both requests should be denied.

18 First, Mr. Slaeker complied with the Court's February 7, 2018 Order requiring that Mr.
19 Slaeker provide notes taken on March 11, 2015, and given to Susan Wakeman. See
20 Supplemental Declaration of Heather M. Jensen, exhibit A (order). On February 27, 2018, Mr.
21 Slaeker stated by Declaration that any notes were delivered via text or verbally to Sue Wakeman
22 at Probe Northwest. He references deposition testimony where he testifies that he is not in
23 possession of such notes. Jensen Decl. Ex. B. Sue Wakeman signed a Declaration attesting that
24 she received any reporting by text or verbally, and the messages were not saved. Specifically, she
25 did not have a text or voice message from Mr. Slaeker regarding the March 11, 2015
26 surveillance. Jensen Decl. C. In short – there were no notes to be produced and Mr. Slaeker is not
27

1 in violation of any order or subpoena. And to the extent that counsel questions the manner in
2 which records are kept by the investigator, that topic can be used on cross examination. Further,
3 Ms. Henderson has admitted in response to Requests for Admission that she is the person being
4 filmed in the surveillance; that she was in fact working at Costco that day. Jensen Decl. Ex. D.
5 There is no basis for a spoliation instruction and no basis to exclude.

6
7 **19. Lay Witness Testimony Concerning Pain and Suffering**

8 No objection to the extent the witnesses are queried in accord with the limitations set
9 forth in case law.

10 **20. Conscience of the Community Argument Allowed in Bad Faith Insurance**
11 **Cases**

12 No objection.

13 **VI. CONCLUSION**

14 For the reasons stated herein, Defendant respectfully requests that the Court deny certain
15 Plaintiff's motions to the extent opposed above.

16 I certify that this memorandum contains 1,003 words, in compliance with the Local Civil
17 Rules

18
19 **DATED THIS 31st** day of January 2019.

20 LEWIS BRISBOIS BISGAARD & SMITH LLP

21
22 By: s/Heather M. Jensen

23 Heather M. Jensen, WA Bar No. 29635
24 1111 Third Ave, Suite 2700
25 Seattle, Washington 98101
26 (206) 436-2020
27 Heather.Jensen@lewisbrisbois.com
Attorney for Defendant

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1 **DECLARATION OF SERVICE**

2 I hereby declare under penalty of perjury under the laws of the State of Washington that I
3 caused a true and correct copy of the foregoing DEFENDANT’S RESPONSE TO PLAINTIFF’S
4 GENERAL MOTIONS *IN LIMINE* to be served via the methods below on this 31st day of
January, 2019 on the following counsel/party of record:

<p>5 Vonda M. Sargent 6 Law Offices of Vonda M. Sargent 7 119 1st Avenue S., Suite 500 8 Seattle, WA 98104 9 <i>Attorney for Plaintiff</i></p>	<p><input type="checkbox"/> via U.S. Mail, first class, postage prepaid <input type="checkbox"/> via Legal Messenger Hand Delivery <input checked="" type="checkbox"/> via Facsimile: (206) 682-3002 <input checked="" type="checkbox"/> King County E-Service <input checked="" type="checkbox"/> via E-mail: sisterlaw@me.com carolfarr@gmail.com</p>
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11 s/Logan Platvoet
12 Logan Platvoet

Exhibit 2

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

JANELLE HENDERSON, an individual,

Plaintiff,

vs.

ALICIA M. THOMPSON, an individual,

Defendant.

No. 17-2-11811-7 SEA

DEFENDANT'S MOTION FOR
RECONSIDERATION OF RULING
GRANTING PLAINTIFF'S REQUEST FOR
A SPOILIATION INSTRUCTION

I. RELIEF REQUESTED

On the first day of trial, the Court granted Plaintiff's request for a jury instruction on spoliation related to the work performed by Tyler Slaeker, an employee of Probe Northwest, Inc. Defendant requests that the Court reconsider its ruling with the advantage of briefing on the issue of spoliation.

II. STATEMENT OF FACTS

A. Surveillance Occurs in March 2015

As the Court is well aware, this matter arises out of a June 14, 2014 auto accident. On March 11, 2015, Tyler Slaeker, conducted surveillance of Plaintiff Henderson. Declaration of Heather M. Jensen, Ex. 1, Excerpts from the Deposition of Tyler Slaeker at p. 5. Mr. Slaeker performed the surveillance as an employee of Probe Northwest, Inc. *Id.* at p. 7. Susan Wakeman owns Probe Northwest. *Id.* at p 8.

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1 **B. Suit is Filed Over two Years Later in May 2017 and Discovery Commences**

2 Over two years later, on May 9, 2017, Plaintiff Henderson filed suit against Defendant
3 Thompson. Dckt. Sub. 1. On December 4, 2017, Defendant identified Mr. Slaeker as an expert
4 witness in her Primary Witness Disclosure. And while he was listed under “expert” witnesses,
5 that designation is inapplicable because Mr. Slaeker offers no “scientific, technical, or other
6 specialized knowledge,” as conceived of under ER 702; rather, he would testify to his
7 observations. Dckt. Sub. 13 at p. 6. Plaintiff subsequently issued an Amended Subpoena Duces
8 Tecum to Mr. Slaeker. Jensen Decl. at Ex. 2. On January 4, 2018, the defense sent Plaintiff a
9 letter via legal messenger confirming that there were no records responsive to the subpoena and
10 producing a copy of Mr. Slaeker’s video footage taken three years prior on March 11, 2015. Ex.
11 3, letter.

12 Plaintiff’s counsel deposed Mr. Slaeker on January 18, 2018. He was questioned at length
13 about whether and what types of documentation he made relative to his surveillance of Ms.
14 Henderson. During the course of the deposition, Mr. Slaeker testified about “notes” he made Ex.
15 1 at pp. 8, 18, 27, 28. Mr. Slaeker searched his email and found nothing about his work on this
16 matter, concluded that all of his communications were conducted over text message, and he no
17 longer was in possession of those texts. *Id.* at 28.

18 Counsel also questioned Mr. Slaeker about the 17-minute surveillance video. Mr. Slaeker
19 testified that while he conducted surveillance of Ms. Henderson at Costco, he did not videotape
20 her during that entire time. Rather, he recorded every opportunity he had during that period of
21 time, which is the 17 minutes produced. *Id.* at 34-35.

22 Plaintiff subsequently filed a Motion to Exclude or Compel Witness Slaeker to produce
23 documents. Dckt. Sub. 21. Judge Helen Halpert denied the motion to exclude but ordered that:

24 the notes taken by Tyler Slaeker on March 11, 2015 and given to Susan Wakeman
25 to prepare her report should be provided by March 1, 2018 (see Depos of Slaeker,
26 p. 8, lines 9-12).
27

1 Dckt. Sub. 34. The order is silent on any other potentially outstanding documents requested in
2 the subpoena duces tecum or addressed during the deposition, such as emails, text messages,
3 voicemails or any original data associated with the video footage. *Id.* In response, the defense
4 provided Plaintiff with Declarations from Mr. Slaeker and Ms. Wakeman, advising that neither
5 possessed any notes. Jensen Decl., Ex. D, February 28, 2018 letter from Jennifer Kim to Vonda
6 Sargent, enclosing Declarations of Tyler Slaeker and Susan Wakeman.

7 Specifically with respect to the notes identified in Judge Halpert's order, Mr. Slaeker
8 declared under penalty of perjury that he did not have any notes, including handwritten or typed
9 notes; all notes regarding the assignment were delivered via text message or verbally. He
10 reconfirmed he had none of the text messages, referencing his sworn deposition testimony. *Id.*
11 Ms. Wakeman declared, also under penalty of perjury, that she was "not in possession of any
12 notes, texts, or voice reports from Tyler Slaeker regarding the March 11, 2015 surveillance of
13 Janelle Henderson." *Id.* She confirmed that all reporting was delivered to her via text or verbally,
14 and that no text or voice message was saved. *Id.*

15 Plaintiff subsequently served the defense with written discovery captioned, "Plaintiff's
16 Interrogatories and Requests for Production to Tyler Slaeker." Jensen Decl., Ex. E. Though the
17 discovery was directed to a non-party in violation of CR 33, then-counsel for Ms. Thompson,
18 Jennifer Kim, responded and signed the Attorney Certification. Jensen Decl., Ex. F, Defendant
19 Thompson's Answers and Objections to Plaintiff Henderson's Interrogatories and Requests for
20 Production to Tyler Slaeker. Notably, Defendant Alicia Thompson did not sign the answers and
21 objections. *Id.*

22 In response to Plaintiff's discovery, attorney Kim stated that email correspondence were
23 maintained by Probe Northwest, Inc. for a month, phone messages and texts were kept for a day
24 or two. *Id.* In other words, Mr. Slaeker's texts and voicemail messages would not have been kept
25 with respect to surveillance conducted years ago as a matter of practice – not with a specific
26 intention to destroy evidence in this particular case. Attorney Kim also answered that the 17-
27 minute video was unedited. With respect to any request issued by Plaintiff that could have

1 conceivably been interpreted to be a request for any report prepared by Probe Northwest, Inc.,
2 attorney Kim asserted the attorney work product privilege. *Id.*

3 At no time prior to discovery cutoff did Plaintiff serve a subpoena duces tecum on Probe
4 Northwest, Inc., seek to depose Ms. Wakeman, or issue discovery directed to Defendant
5 Henderson requesting the production of a copy of the Probe Northwest, Inc. report. Jensen Decl.
6 at ¶ 3.

7 **II. STATEMENT OF ISSUE**

8 Whether the Court should reconsider its ruling granting Plaintiff's request
9 for a spoliation instruction and deny said request?

10 In the alternative, should the Court reconsider its ruling and revisit
11 Plaintiff's request at the close of evidence?

12 **IV. EVIDENCE RELIED UPON**

13 Defendant relies upon the pleadings and files already on record herein, together with the
14 Declaration of Heather M. Jensen and attached exhibits.

15 **V. ARGUMENT**

16 The defense is not requesting that the Court reconsider its determination that Mr.
17 Slaeker's production of 17 minutes of video when he surveilled Ms. Henderson for
18 approximately an hour or failure to keep any text and voicemail messages related to his work on
19 the assignment is appropriate for cross examination. To the contrary, the defense agrees that
20 these areas of inquiry are appropriately within the scope of cross for Mr. Slaeker. What the
21 defense requests is that the Court reconsider and reverse its ruling that Defendant Alicia
22 Thompson should be subject to a spoliation instruction as a result of Mr. Slaeker's actions; there
23 is no general duty to preserve evidence, Defendant Alicia Thompson did not intentionally
24 destroy evidence, Mr. Slaeker is not a party to the lawsuit, and Ms. Thompson should not be
25 punished for his actions.
26
27

1 Spoliation refers to the “intentional destruction of evidence.” *Henderson v. Tyrrell*, 80
2 Wn. App. 592, 605, 910 P.2d 522 (1966). The severity of any particular act determines the
3 appropriate remedy. *Id.* at 605. In instances where there is relevant evidence to a case within the
4 control of an individual party whose interests would be to produce it but neglects to do so, the
5 finder of fact may assume the evidence would be unfavorable to the party. *Pier 67, Inc. v. King*
6 *County*, 89 Wash.2d 379, 573 P.2d 2 (1977). The remedy may be for the Court to apply a
7 rebuttable presumption, which shifts the burden to the party who alters or destroys evidence.
8 *Henderson*, 80 Wn. App. at 6078. But the Court may impose this severe sanction only after
9 considering the following factors: 1) the potential importance or relevance of the missing
10 evidence; and 2) the culpability or fault of the adverse party. *Marshall v. Bally’s Pacwest, Inc.*,
11 94 Wash. App. 372, 381-383, 972 P.2d 475, 480 (1999). In this case, both factors weigh heavily
12 against a spoliation instruction.
13

14 **A. A Spoliation Instruction is not Warranted Because Defendant Alicia**
15 **Thompson is not Connected to the Individual who Failed to Preserve**
16 **Evidence**

17 At the outset, the Court must first find that Ms. Thomson had some control over Mr.
18 Slaeker’s conduct two years before suit was filed against her; “[t]he culpable conduct relied on in
19 seeking a sanction must be connected to the party against whom a sanction is sought,” meaning
20 that the act of destruction was by someone over whom the potentially sanctioned party had some
21 control. *Cook v. Tarbert Logging, Inc.*, 190 Wn. App. 448, 461-62, 360 P.3d 855 (2015) (quoting
22 *Henderson*, 80 Wn. App. at 606). The *Henderson* case is instructive here because the court
23 evaluated several pieces of evidence that the defendant allegedly failed to preserve. *Henderson*
24 involved a single-vehicle accident where the plaintiff and the defendant each claimed that the
25 other was the driver. The appellate court affirmed the trial court’s decision not to give a
26 spoliation instruction in part because it agreed that the failure to preserve two pieces of evidence
27 recovered from the vehicle could not be attributed to the defendant. Specifically, the defendant’s

1 mother and brother had collected pieces of evidence from the car while he was in a coma
2 following the accident and there was no evidence that the defendant was aware of their existence.
3 Later, those items could not be located. However, the court also analyzed the selling off of the
4 vehicle itself before the opposing party could inspect the vehicle. With respect to the destruction
5 of the vehicle, the court found that the action could be connected to the defendant because he
6 owned the vehicle and made the decision to have it salvaged. Even so, a spoliation instruction
7 was not warranted under the particular circumstances of that case. 80 Wn. App. 592.

8 Here, neither Ms. Thompson nor the attorneys retained to defend her after suit was filed
9 had any control over Mr. Slaeker of Susan Wakeman's business practices two years prior. And
10 even assuming, for purposes of argument that the entity which retained Probe Northwest, Inc. to
11 conduct surveillance in 2015 was an agent of Ms. Thompson's, there is absolutely no evidence to
12 suggest that her agent had control or possession of Mr. Slaeker's text or voice messages, and
13 absolutely no evidence that her agent directed the destruction of these items. To the contrary, the
14 only evidence is that Mr. Slaeker does not keep these messages over an extended period of time
15 and that Ms. Wakeman does not preserve those messages as a business practice. There is no
16 connection between the failure to preserve communications and Ms. Thompson.

17 **B. A Spoliation Instruction is not Warranted Because the Potential Importance**
18 **or Relevance of the Missing Evidence is not Significant, Particularly in Light**
19 **of Plaintiff's Ability to Impeach the Credibility of Witness Tyler Slaeker**
20 **Through Cross Examination**

21 The potential importance or relevance of the missing evidence is insufficient to justify a
22 spoliation instruction. Mr. Slaeker's relevance to this case is that on one day in March 2015, he
23 conducted surveillance of the Plaintiff while she was working at Costco. During the period of
24 surveillance, he captured 17 minutes of video of her working. The missing evidence consists of
25 Mr. Slaeker's text and voice messages to his employer, Ms. Wakeman, regarding this
26 assignment. Plaintiff suggests that there is missing footage because Mr. Slaeker testified that he
27 was videotaping Ms. Henderson for approximately an hour and refuses to accept his explanation

1 that he filmed Ms. Henderson as was possible during that hour without getting caught, resulting
2 in the 17-minute video. But unlike the cases addressing spoliation cited herein and in Plaintiff's
3 proposed instructions, there is no actual proof that additional video footage ever existed and was
4 destroyed.

5 Thus, we are left with text and voice communications that were not preserved. There is
6 no evidence that those text or voice messages are in any way probative of the question to be
7 posed to the jury in this case; how was Plaintiff injured in the subject auto accident and what is
8 the value of those injuries. ER 401. This is not a case akin to *Henderson* where the defense
9 parted out the car involved in the accident for salvage before it could be inspected. To the
10 contrary, the communications are irrelevant and collateral, and to instruct the jury on spoliation
11 would only serve to unduly prejudice Ms. Thompson.

12
13 **C. A Spoliation Instruction is not Warranted Because Defendant Alicia
14 Thompson is not Culpable or at Fault for Tyler Slaeker's Failure to Preserve
15 Text Messages or Voice Messages**

16 "Culpability turns on whether a party acted in bad faith or whether there is an innocent
17 explanation for the destruction." *Marshall*, 94 Wn. App. at 382. There is absolutely no evidence
18 that the destruction of evidence was the result of Ms. Thompson's actions, as discussed above –
19 and certainly no evidence that Mr. Slaeker/Ms. Wakeman's failure to preserve communications
20 was the result of bad faith. Rather, the evidence is simply that Mr. Slaeker does not maintain text
21 and voice messages for any length of time and Ms. Wakeman does not preserve the
22 communications as her business practice. Absent proof of actual bad faith, a spoliation
23 instruction would serve to unnecessarily and unduly prejudice Defendant Thompson.

24
25 **VI. CONCLUSION**

26 For the reasons set forth above, Defendant respectfully requests that the Court reconsider
27 its ruling on the spoliation instruction and deny Plaintiff's request. In the alternative, Defendant

1 requests that the Court reserve its ruling on the request until the presentation of evidence is
2 complete.

3 I certify that this memorandum contains 2,449 words, in compliance with the Local Civil
4 Rules

5 DATED this 15th day of April, 2019

LEWIS BRISBOIS BISGAARD & SMITH LLP

7
8 By: s/ Heather M. Jensen
9 Heather M. Jensen, WA Bar No. 29635
10 Sarah D. Macklin, WA Bar No. 49624
11 1111 Third Avenue, Suite 2700
12 Seattle, Washington 98101
13 Attorneys for Defendant Alicia M. Thompson
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1 **DECLARATION OF SERVICE**

2 I hereby declare under penalty of perjury under the laws of the State of Washington that I
3 caused a true and correct copy of the foregoing Defendant's Motion for Reconsideration of
4 Ruling Granting Plaintiff's Request for a Spoliation Instruction to be served via the methods
5 below on this 16st day of April, 2019 on the following counsel/party of record:
6

7 Vonda M. Sargent
8 Law Offices of Vonda M. Sargent
9 119 1st Avenue S., Suite 500
10 Seattle, WA 98104

11 *Attorney for Plaintiff*

- via U.S. Mail, first class, postage prepaid
- via Legal Messenger Hand Delivery
- via Facsimile: (206) 682-3002
- King County E-Service
- via E-mail:
sisterlaw@me.com
carolfarr@gmail.com

12 Dated April 16, 2019 at Seattle, Washington.

13 
14 _____
15 Logan Platvoet
16 Logan.Platvoet@lewisbrisbois.com

Exhibit 3

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

JANELLE HENDERSON, an individual

Plaintiff,

vs.

ALICIA M. THOMPSON, an individual,

Defendant.

No. 17-2-11811-7 SEA

DECLARATION OF HEATHER M. JENSEN IN SUPPORT OF OPPOSITION TO PLAINTIFF'S MOTION FOR A NEW TRIAL OR ADDITUR

I, HEATHER M. JENSEN, being of legal age, having personal knowledge of all facts contained herein, and being competent to testify thereof, under penalty of perjury under the laws of the State of Washington, declare and state as follows:

- 1. I am the attorney of record for Defendant Alicia M. Thompson in the above-captioned case.
- 2. Attached to this Declaration are true and correct copies of the following documents:
 - A. Transcript from closing arguments, dated June 6, 2019, attached as Exhibit 1;
 - B. Email thread between counsel and the Court, dated April 22 and 23, 2019, attached as Exhibit 2.

DATED this 8th day of July, 2019, at Seattle, Washington.

s/ Heather M. Jensen

Heather M. Jensen

Exhibit 1

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF KING

3 -----

4	JANELLE HENDERSON, an individual,)	
)	
5	Plaintiff,)	
)	
6	v.)	No. 17-2-11811-7 SEA
)	
7	ALICIA M. THOMPSON an individual,)	
)	
8	Defendant.)	
)	

9 -----

10 TRIAL EXCERPT -- CLOSING ARGUMENTS

11 June 6, 2019

12 The Honorable Melinda J. Young Presiding

13 -----

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24 Transcribed by: Shanna Barr, CET
 Reed Jackson Watkins
 Court-Certified Transcription
 206.624.3005

25

A P P E A R A N C E S

1

2

3 On Behalf of Plaintiff:

4 VONDA M. SARGENT

5 CAROL FARR

6 Law Offices of Vonda M. Sargent

7 119 First Avenue South

8 Suite 500

9 Seattle, Washington 98104

10

11

12

13 On Behalf of Defendant:

14 HEATHER M. JENSEN

15 SARAH D. MACKLIN

16 Lewis Brisbois Bisgaard & Smith LLP

17 1111 Third Ave

18 Suite 2700

19 Seattle, Washington 98101

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I N D E X O F P R O C E E D I N G S

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June 6, 2019

(1:52:55)

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

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

The first thing that I want to talk to you about is the credibility of the witnesses, and that's something that you are the only ones that will determine who is credible and who isn't credible. And we had a lot of witnesses. We had the treating doctors of Janelle. We had Dr. Wall and Dr. Vlcek and Dr. Devine, all of whom told you that her Tourette's has been intensified and added to. Remember Dr. Wall wrote a letter and said it was debilitating.

You have the testimony from paid experts. One is Dr. Sutton and one is Dr. Rappaport. And despite the fact that they said a whole bunch of things about Janelle, a whole bunch of things, at least Dr. Sutton on the stand said

1 she was hurt. He said, "Just a little bit. Just a little
2 bit." But he said she was hurt. He admitted it. Remember,
3 we went back and forth on it, and I said, "Well, you said
4 here that she wasn't hurt, and you said over here she was.
5 Which one is it?" And he says, "Well, yeah, she is." I
6 said, "Are you changing your test- -- are you changing your
7 report?" You remember that, and we went back and forth?
8 But at least Dr. Sutton says that she was injured as a
9 direct result of this collision.

10 And the defendant herself told you that she was going at
11 least 40 miles per hour before she struck my client,
12 Ms. Henderson. She described it as her car going under my
13 client's car. That's how fast she was going. Her car
14 dipped down and went under her car and "scrunched up," were
15 her words. Scrunched up her hood.

16 So when you're talking -- when you're thinking about the
17 credibility of these witnesses, I also want you to do is --
18 if you look at Instruction No. 1, is the opportunity of the
19 witness to observe or know the things they have been
20 testifying to. And we made a chart for you -- so I'll put
21 these on -- dealing with that very issue. Here we go.
22 (Inaudible) this one right here. Okay.

23 So can you make that so the jurors can see the entire
24 (inaudible)?

25 So the first instruction you have is in considering a

1 witness's testimony you consider -- you may consider these
2 things: The opportunity of the witness to observe or to
3 know the things that they testified about.

4 Is there any way to make that -- could you (inaudible)?
5 There we go. Okay.

6 So we have a chart here, and it has all the witnesses that
7 testified, and over here are all of the plaintiff's
8 witnesses that have testified.

9 And Janelle is 44 years old. And so you have Dr. Vlcek,
10 who has known Janelle for 30 years. He's observed her and
11 he's treated her and he's had an opportunity to know her.
12 You have Dr. Wall that's known her eight years, doctor --
13 six years. Dr. Devine that's known her eight years. You
14 have her mother, or who stepped in as her mother, Pam Hinds.
15 You have her friend Kanika Green. I mean, I'm sorry.
16 Dr. -- Delaney, her cousin. You have Kanika Green and Jolyn
17 Campbell.

18 And all of these people have known Janelle, except for
19 these two doctors, for 20 years or more. They've had an
20 opportunity to observe her for 20 years or more. Take that
21 into consideration when you are deciding whether or not her
22 Tourette's was exacerbated. Take that into consideration
23 when they tell you before this collision it wasn't like
24 this, she wasn't doing this.

25 Dr. Vlcek told you he's known her 30 years, since she was

1 14 years old. It's been intensified and added to. He
2 said -- remember, he pushed back from the defense counsel
3 who called his exam a "so-called exam" when she was trying
4 to discredit his exam? And he pushed back, and he said,
5 "No, it wasn't a so-called exam." A part of a neurological
6 examination with people who have Tourette's is to observe
7 them, and that's what he has done for 30 years. And he told
8 you it's been added to and magnified. It's been
9 intensified. That she wasn't doing this.

10 Now, she's had Tourette's, and we're not saying that this
11 collision caused the Tourette's. There's no doubt that
12 she's had Tourette's. And sometimes it's been worse and
13 sometimes it's been better, but it's never been like this.
14 It's never been like this, and that's what the doctors have
15 told you.

16 And then what we do is we compare and contrast that to the
17 defendant's witnesses.

18 Tyler Slaeker, who by the hours calculated chart was in
19 the vicinity of Janelle for 4.5 hours. He testified he had
20 the camera on for one hour and he gave you 17 minutes, but
21 4.5 hours for Tyler Slaeker.

22 Then we have Doctors Rappaport and Dr. Sutton, both of
23 whom told you they know better than Dr. Vlcek, Dr. Wall, and
24 Dr. Devine. In that one hour of time that they know her
25 better. Think about that. Does that make sense? The

1 instructions tell you to use your common sense. Does that
2 make sense? You have somebody who's -- not somebody, your
3 doctor, who has known you for 30 years, and then you have a
4 hired gun that wants to come in and say, "I know her better
5 than her own doctor. I know her better than her cousin, her
6 mother, her friends." It doesn't make sense. It's not
7 credible.

8 And we know why Dr. Rappaport said what he said. At
9 \$18.33 minutes -- \$18.33 a minute, I'm kind of not mad at
10 him. That's a lot of money. That's a heck of a lot of
11 money for every minute he was speaking. And think about who
12 hired him. If you don't give your customer what they want,
13 you don't get hired again. \$18.33 a minute. Minimum wage
14 in Seattle is \$15. And think about how he was answering my
15 questions. I'd ask him a simple question, and he'd just wax
16 on and on and on. Cha-ching, Cha-ching, Cha-ching,
17 Cha-ching.

18 The same with Dr. Sutton. He was here for a full day at
19 \$425 an hour, I do believe he said. Sorry. It was \$525 an
20 hour.

21 So they have every reason to say and do what it is that
22 they did. I'm not even talking about the report that they
23 wrote and the record review. Dr. Sutton told you that he
24 got an additional 2,000 pages of records. It started out
25 with 1,600, but he said they got an additional 2,000. So

1 let's just take the 2,000 pages, give him a wash on the
2 1,600 pages. His records review at \$525 an hour, which is
3 what he testified to, just reading the records, he made
4 \$17,500.

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

6 MS. SARGENT: If we --

7 THE COURT: Hold on a second, Ms. Sargent.

8 I'll just instruct the jury to rely on your own memories
9 as to what the testimony of the witness is.

10 MS. SARGENT: If we assume that he took a minute a page,
11 that calculates out to \$17,500, just a minute a page. And
12 that's rapid. That's pretty quick reading, a minute a page
13 a record. His portion of the report was 12 pages. Once
14 again, \$525 an hour calculates out to another \$1,050 for 12
15 pages. Think about that when you think about the
16 credibility of witnesses and who came in here and told you
17 what was really going on.

18 Let's talk about Dr. Rappaport and his exam. He told you
19 during my direct of him that he charges \$550 for every 30
20 minutes with a 3-hour minimum. So you watch the video, it's
21 4 hours and 20 minutes. But it's a 30-minute when it's
22 4 and a half hours that he charged just for his deposition.
23 Just for the deposition. So the deposition, \$4,950.

24 You notice that you didn't hear a bunch of questionings
25 from Janelle's treating providers about how much money they

1 make. One doctor's (inaudible) and less than what it was
2 that he would make for an office visit. One doctor.

3 They paid two doctors. They paid for surveillance. And
4 I'll go over these numbers for you when we start talking
5 about damages. But they spent almost \$50,000 to come in
6 here to try to convince you that Janelle wasn't injured,
7 while saying that she was injured. Which one is it? She
8 wasn't injured or she was injured? Because Rappaport said,
9 "Well, she might have been injured, I think. But maybe,
10 possibly." He was all over the place. He was all over the
11 place. And you wonder why. Did his conscience start
12 getting to him? I don't think so. He had to maintain that
13 she wasn't injured because that's what his customer wanted,
14 the person who is paying him. You don't have to be a Rhodes
15 scholar to figure it out. You get what you pay for. You
16 don't pay someone \$1,100 an hour for them to tell you that
17 she's injured. That's not how that works. That's not how
18 any of this works.

19 And (inaudible) these are treating doctors. We didn't
20 have experts. We had people that have actually known her
21 and treated her.

22 So let's talk about the differences in Janelle. Remember,
23 during opening I told you: You're going to hear how she
24 loves to dance. Life of the party. Vivacious. Fun to be
25 around. And time after time after time after time the

1 people who have known her for years tell you she's
2 different. She doesn't like to do things anymore. She's
3 not fun to be around anymore.

4 And you remember her friend that came. She asked for
5 Janelle (inaudible) and she told you (inaudible) what she
6 found to be very embarrassing. You remember. You remember
7 what she said about the offer.

8 The defense wants you to believe that Janelle is not
9 entitled to recovery. Unfortunately for them, we have a law
10 that allows for that, allows for recovery for Janelle
11 specifically. And why I say Janelle specifically, and I'm
12 going to get the instruction for you, okay. Instruction
13 No. 12 and No. 10. They both deal with aggravating -- the
14 aggravation of preexisting conditions. And the reason why
15 we have those instructions is because in our society we
16 don't say, oh, you already are broken or you're already
17 compromised, so too bad, so sad. We don't allow that. The
18 law does not allow that.

19 The law specifically tells you that if before this
20 occurrence Janelle had a preexisting bodily condition that
21 was causing her pain or disability -- and everybody knows
22 that it was. Everybody knows that Janelle did have tics.
23 Everybody knows that the tics are painful. But because of
24 this occurrence, the pain or disability -- and we used the
25 word "exacerbated." The instructions say "aggravated."

1 Same thing. Same thing. If they're exacerbated, you break
2 it, you buy it. You don't get to say that, oh, she already
3 had Tourette's, so we don't have to pay anything.

4 Just like if somebody is in a wheelchair with cerebral
5 palsy and they get mowed down by a bus, you don't get to
6 come into court and say, you don't get anything. You
7 already had cerebral palsy. You couldn't possibly be hurt.
8 The law doesn't allow it. The law doesn't allow it. Our
9 society, we protect all members of our society, and the
10 strength of a society is how you treat your weakest members
11 of society. So remember Instruction No. 10 and remember
12 Instruction No. 11. You're not allowed to in and say: She
13 already had Tourette's. So what?

14 They want you to believe that she could be rear-ended at
15 40 miles an hour and not get hurt. It make no sense. Maybe
16 a professional football player. Maybe a wrestler. Maybe
17 someone who is in the prime of their life. But you heard
18 Dr. Sutton when I said, "Well, yes, she has degenerative
19 disk disease, and being rear-ended at 40 miles per hour
20 certainly couldn't have helped it." And he had to admit,
21 "No, it doesn't. It doesn't."

22 I want you to really think about that surveillance video,
23 that 17 minutes that they cherry-picked out of the 78 hours,
24 78 hours of surveillance. And Tyler Slaeker told you his
25 job is to get evidence. He got 17 minutes. Why? Why is

1 that? Why didn't we get all (inaudible)? You heard
2 Dr. Rappaport finally say, after being led to the pond by
3 the defense counsel, that it was a typographical error with
4 the comma. But when I was questioning him, he said, "Well,
5 the 17 minutes might have been on two CDs." After saying,
6 "Oh, I can't remember how many CDs I got." Because he
7 slipped up. He messed up and told the truth about the CDs.
8 It makes sense that there's CDs with 10 months of
9 surveillance, not 17 minutes. That doesn't make sense.

10 So we didn't get that surveillance because it supports
11 what we are telling you. If we'd have been able to look at
12 that 10-month span of time in Janelle's life, we would have
13 seen exactly what it is her doctors, her friends, and she,
14 herself, have been telling you in that it got worse.
15 Instead, out of the 17 minutes -- they were able to
16 cherry-pick and find 17 minutes out of 17 hours where she
17 wasn't doing this. 17 minutes.

18 And then I asked Dr. Sutton -- remember they were talking
19 about that gap in treatment? Their surveillance was in
20 March. She has Botox injections. You remember. She was
21 getting Botox injections. 2015, Janelle was getting Botox
22 injections, and he wanted to try to convince you that he
23 knew the effects of Botox. She was getting Botox and it was
24 working. So she's damned if she does and damned if she
25 doesn't. She gets the treatment and it works on her, and,

1 "Oh, look. There's no problem here."

2 Out of the 78 hours, they were able to find 17 minutes.
3 And he testified that the camera is on for 1 hour, and he
4 got 17 minutes.

5 We don't have it because it hurts their case. We didn't
6 get to see it because it supports exactly what it is that
7 Janelle said was going on with her body. That's why we
8 don't have it. There's no other reason for it. No other
9 reason. Because you can rest your bottom dollar that if the
10 whole hour that Tyler had the camera on she was calm and not
11 twitching and not jerking and not having the vocal tics, you
12 would have seen it. You would have seen 78 hours of her
13 being calm if that, in fact, was what was going on
14 (inaudible). You know that.

15 And how you know that is they went all the way back to her
16 childhood looking at her records. Dr. Rappaport said he
17 wanted to have her educational records. For a car crash
18 case -- a car crash case -- he wants to look at her
19 educational records. He wants to convince you that she has
20 psychological problems (inaudible) hour with another doctor.
21 Psychological problems. That's how far they're willing to
22 go. Psychological problems. That's what he said.

23 All of this is what you know. But if they're willing to
24 say and do all of that, if they think that that 78 hours of
25 video showed Janelle like that 17 minutes, you'd have seen

1 it. It shows this. It shows that the progression that
2 Janelle was talking about, that Dr. Devine was talking
3 about, that Dr. Vlcek told you -- Dr. Vlcek, who is actually
4 an expert in Tourette's. Not just has some patients. He's
5 an expert. He testified. He speaks. He goes to
6 conferences. He teaches. He's an expert in Tourette's, not
7 someone who is paid \$1,100 an hour to come and tell you that
8 she wasn't injured. And what I found absolutely fascinating
9 is that Dr. Vlcek and Dr. Rappaport said 1 percent of our
10 population has Tourette's and somehow, somehow Dr. Rappaport
11 has 30, 30 people, in his practice with 1 percent of our
12 population.

13 All of that (inaudible). All of that. He's not credible.
14 He was paid, and he was paid handsomely. And like I said, I
15 am kind of not mad at him. That's a heck of a lot of money.
16 It's unscrupulous, but he did it. He did it.

17 I want to talk to you about Instruction No. 12. And
18 Instruction No. 12 talks about how we measure damages. And
19 a part of measuring damages is pain and suffering, mental
20 anguish, disability.

21 And what we have here is from (inaudible). We have
22 Dr. Rappaport himself. This is what he says about having
23 Tourette's.

24 (Video played as follows:)

25 "QUESTION: And are there complications

1 associated with Tourette syndrome other than the
2 audible and visible tics?

3 "ANSWER: (Inaudible) pain associated,
4 depending on the tic and how large the amplitude
5 is. If somebody is throwing their neck or their
6 arm or their leg, you could start to develop
7 (inaudible) arthritis, degenerative joint disease,
8 and pain in that limb or extremity. And if the
9 movements are always to one side, you may build up
10 musculature on one side that's not present on the
11 other side and gives you an imbalance of bulk and
12 strength and tightness. That's -- that can be
13 very uncomfortable.

14 "And then there is just the -- there is a lot
15 of terrible social stigma that goes with
16 Tourette's, both with vocalizations and
17 (inaudible) vocalizations. Children in general
18 are cruel and adults are cruel, and it can be a
19 devastating stigma to go through life with people
20 avoiding you, not wanting to be around you. It
21 can be very sad."

22 (End of video playback)

23 MS. SARGENT: That's from Dr. Rappaport. Those are his
24 own words, and he ends it with "very sad." A lot of social
25 stigma, lots pain. All of that is in Instruction No. 12.

1 Pain, suffering, mental anguish, disability, emotional
2 distress, loss of society (inaudible) hanging out with
3 friends. Loss of companionship, humiliation.

4 You heard people. You heard her friends telling you, her
5 cousin telling you, Janelle telling you. Kicked out of
6 movies. Asked to leave restaurants. Parents taking their
7 children away thinking that she's contagious. Nobody said
8 that that happened before this. And you can be rest assured
9 if there were chart notes on her -- she goes to the doctors
10 frequently. If there had been any indication that that was
11 a part of Janelle's life before this collision, you would
12 have heard about it. You would know about it. They would
13 have told you.

14 They gave you a chart note from 2012. You remember that
15 chart note. Dr. Sheffield. Janelle's mother. Took the
16 overdose two weeks before she went to see Dr. Sheffield
17 (inaudible) they didn't mention any part of that. That was
18 why she went to see Dr. Sheffield, from the stress and
19 anxiety of losing her mother. And you remember when the
20 defense was asking Dr. Wall about that chart note from 2012,
21 because it had an uptick in her Tourette's, truncal
22 Tourette's, truncal tics, vocal tics, all based on the
23 stress of losing her mother. And had I not brought out why
24 she was there, you would have been left with the impression
25 that it was just Janelle being Janelle, and it goes all the

1 way back to 2012. That's the kind of stuff that the defense
2 has done. They're giving you the partial information,
3 withholding information.

4 Dr. Rappaport wanted to pat himself on his back because by
5 his estimation he missed one chart note. What's interesting
6 about the chart note that Dr. Rappaport missed, it was
7 directed to why he was hired, and that was to determine what
8 were the injuries, if any, as a result of the June 2014
9 collision and what exacerbations occurred. And that chart
10 note that Dr. Rappaport missed said this: Before the
11 collision, Janelle had been getting better. Her neck and
12 her back had been getting better, which was borne out when I
13 had Dr. Sutton on the stand and he said to you, "The month
14 before the collision" -- this is very, very important. He
15 didn't put it in the report, but he wanted you to know it
16 was very, very, important. And we went painstakingly over
17 those chart notes one by one by one, date by date by date,
18 and it showed her pain levels were 3s and 4s. She had a
19 spike of a 7. He said, "Oh, there's one at an 8." And I
20 said, "Show it," and he couldn't do it.

21 They're relentless. They're relentless in their efforts
22 to try to say that Janelle wasn't injured. I wonder why?
23 Why is that? Why are they so relentless? Because this type
24 of case, it's not a small case. Someone who is already
25 compromised doesn't get better the same way as somebody who

1 is healthy. That's why. They know that this is a big case.
2 That's why they're doing these things. You don't do it
3 otherwise. You don't spend almost \$50,000 to try to
4 convince you and give you personal information. You don't.
5 That's not how this works. It's not how any of this whole
6 system -- doesn't work like that. You're not supposed to do
7 these sorts of things. We're not supposed to come in here
8 and give you half-truths and to withhold evidence and to say
9 one thing, and then, "Oh, I didn't really mean that."
10 That's not how our system is supposed to work. All that
11 goes to all of those jokes you hear about us: Sharks. You
12 can't trust us. Terrible people. Those are stereotypes.
13 And when I was a small child, I remember my grandfather
14 telling me (inaudible) they're almost all stereotypes, so
15 you want to make certain that you don't fit into that.
16 You're not supposed to come into a court of law where what
17 we're searching for is truth and not tell the truth. It's
18 not what we're supposed to do. That's not what any of us
19 this is about. You hit somebody, you rear-end them at
20 40 miles an hour and you admit liability but take no
21 responsibility? Instead, you make them (inaudible), you
22 follow them around, you make them go to a panel where the
23 doctors say that you've got psychological problems after
24 being with you for one hour, tell you that she refused to
25 give you any information. That's what they said.

1 You heard the tape. She gave him information. She
2 thought she was there for an exam. That's what it was
3 supposed to be, independent medical examination. So they
4 spent the first half an hour chatting at her, asking her a
5 series of questions, which she eventually answered. She
6 answered and they admit it -- "No, I guess that wasn't
7 true" -- despite the fact that he told her 2 minutes and
8 28 seconds into the exam, "You don't have to answer any
9 questions." And if he was truly the Sherlock Holmes that he
10 said he was, why is he asking her questions? He knows her.
11 He told you he knows her. Remember, he said he has -- one
12 of them said they had an aerial view. "I have the view of
13 the whole forest." And the other one said that he knew
14 better, Rappaport, because he had all the reports. Then why
15 are you harassing her? Why are you asking her any
16 questions? Spend the hour examining her. Spend the hour
17 examining her.

18 They spent half the time on the oral, half the time on the
19 physical examination, an examination that the defense went
20 around and around with Vlcek. "You didn't do an
21 examination. You didn't do an examination." Rappaport has
22 never ever met this woman, never met Janelle, yet he can do
23 a full-scale neurological examination on her in his half of
24 that 30 minutes, and Dr. Sutton can do a full-scale
25 neurological -- I mean chiropractic examination of her.

1 Come on. Does that ring true? Does that make sense to
2 anybody? They went on and on and on about whether there was
3 an exam. They went on and on and on about, well, this chart
4 note didn't say this and this chart note didn't say that.

5 I want to tell you about our burden. We're not held to
6 the exacting standards of an engineer. If we were, we would
7 be here for another four months because we'd have to go
8 through every single chart note. That's not what the law
9 requires. Remember the burden of proof? Featherweight.
10 It's a featherweight. So that's why I didn't go over every
11 single chart note, just enough to let you know consistent
12 with her chart notes she was getting better. Her pain was
13 getting lower, the symptoms were decreasing, and her
14 mobility was increasing. Chart note, after chart note,
15 after chart note.

16 And then Dr. Sutton said, "Same objective findings." He
17 threw that in there. "Same objective findings." And we
18 went to the chart note right before the collision, and there
19 were four findings, objective findings. I read them off.
20 C1, C4, T2, T3. Then after the collision, there's 11. And
21 I remember he said, "Oh, those are exactly the same." Do
22 you remember that? You guys remember that. Anything, by
23 any means necessary, they're going to try to trick you and
24 fool you and convince you that she wasn't injured, that her
25 Tourette's wasn't exacerbated.

1 I was most focused on, her Tourette syndrome, her
2 tics. And, you know, if her toe hurt, I don't
3 know. Or if -- if she had some other pain where
4 there (inaudible). You're not really (inaudible)
5 you're focusing on that."

6 (End of video playback)

7 MS. SARGENT: He said that. Big. Big. He emphasized
8 that. Big increase. That's the doctor who has known her
9 and observed her for 30 years. A big increase. That's
10 consistent. It's consistent with what her family and
11 friends have said, it's consistent with what Dr. Devine
12 recorded in his chart notes, and it's consistent with
13 Dr. Wall, his letter and chart note of December 7th, 2014,
14 when he said it was debilitating. Debilitating.

15 Yes, there are days when she's -- when she has good days
16 or good 17 minutes. (Inaudible) 17 minutes out of the hour
17 that Tyler admitted that he had the camera on. But it's not
18 an exacting science. Tourette's is -- there isn't an "on"
19 and "off" switch. She doesn't get to turn this off or turn
20 it on. But all of her doctors and all of the people who
21 know her said that it was an exacerbation, and it was a big
22 exacerbation with lots of pain. Lots of pain.

23 And you heard her describe her exhalation. She's not
24 breathing. She's trying to take a breath in, and every
25 time, you hear that (makes gasping sound). The air is being

1 forced out of her body. That wasn't happening. Going
2 through life trying to breathe because someone wasn't paying
3 attention, you don't get to just say, "You already had
4 Tourette's. Too bad." You don't get to do that. It's not
5 how our system works, and that's not how we want our system
6 to work. We want our system to protect every single one of
7 us, and the law dictates and demands that it does.

8 I want to talk to you now about compensation. I'm trying
9 to be cognizant of the time, but I want to talk to you about
10 compensation. And I told you that I would help you work
11 this out, because there is -- there's nothing in the rules
12 or the law that tells you how to determine this. It's up to
13 you. But one way to do it is look at how the defense
14 values. Look at how the defense values time. For one of
15 their doctors, they value it at \$1,100 an hour. \$1,100 an
16 hour. That's how they value time. With another expert,
17 it's \$525 an hour is how they value time.

18 I've done some calculations. So if we -- Janelle -- there
19 is a mortality table, and that is used when there's a
20 situation and evidence of a situation that's not going to
21 get better. Dr. Wall said it's not getting better,
22 Dr. Devine said it's not getting better, and more
23 importantly, the neurologist, Dr. Vlcek, said it's not
24 getting better. So we have this mortality table and
25 Instruction No. 13, and it tells you that Janelle is going

1 to live another 38.67 years.

2 So if we just use how the defense values time and gave
3 Janelle, awarded Janelle, \$525 a day, not an hour, \$525 a
4 day for the rest of her life, that would be \$7,367,562.50.
5 If we use Rappaport's \$1,100 a day, that would be
6 \$15,457,750. I think that's (inaudible). I think that's
7 obscene. Janelle told you time after time she's not a
8 doctor. She told you time after time. I don't think they
9 should be getting that (inaudible). But that's how the
10 defense values it. That's how they value their time. So
11 that's one way to look at this.

12 What I am proposing that you do is that you award Janelle
13 250 a day -- not an hour, a day -- for pain, suffering, loss
14 of enjoyment of life, humiliation. She didn't sign on for
15 this. She didn't ask for this. And I don't think that
16 anybody would sign on and ask for this. No one would. None
17 of this is Janelle's fault, not any of this is Janelle's
18 fault, and she's been put through the ringer trying to get a
19 measure of justice. So at \$250 a day, that total is
20 \$3,513,125. \$250 a day (inaudible) and it's not getting any
21 better, and it's not her fault. She didn't do any of this.

22 All Ms. Thompson had to do was pay attention. And the
23 reason why the defense has done everything that they've done
24 with the surveillance and hiring the doctors and putting her
25 through the ringer and saying that she's -- it's all in her

1 head and that she's crazy and that she's got disability
2 conviction and somatoform -- they kept calling it
3 "somatome," but it's somatoform disorder -- and disability
4 conviction and all these other very humiliating things about
5 her, it's because they know, they know that if this
6 (inaudible) on this type of case it's a big case. When
7 someone has already been compromised, you start out already
8 compromised, you can't make them worse. And that's why you
9 pay attention to what you're doing. That's why we have
10 rules on this. We expect everybody when they get into their
11 car to at the very minimum pay attention. That's the least
12 we can do for one another in our society is pay attention to
13 what we're doing and what's going on.

14 But you don't spend \$49,000 -- the surveillance was
15 \$5,813, you know. Sutton testified for 7 hours. He got
16 36 -- \$3,675.

17 The other thing that was very interesting to me, one of
18 the first things out of Dr. Sutton's mouth was, "Oh, my son
19 has Tourette's." What does that have to do with anything
20 other than to try and bolster his credibility? That's all.
21 There's no proof of that. And you know that they haven't
22 been completely honest with us to begin with, so we fully
23 and fairly question what they say to you. (Inaudible)
24 fairly question all of their testimony. It's bought and
25 paid for. Bought and paid for.

1 They don't (inaudible). They wanted you to believe that
2 she was uncooperative, all of these things, where they
3 finally said, "Oh, no." The gap in treatment, even
4 Dr. Sutton on the stand would tell you, "You're right.
5 There was that Botox." He pushed that on the physical
6 therapy. "No, there was no physical therapy." But he
7 admitted that there was Botox in that so-called gap in
8 treatment. He admitted to that. There was no gap in
9 treatment. She was using Botox. She was using the modality
10 that had been prescribed to her.

11 So let's talk about justice. There is an instruction
12 there that tells you the purpose, Instruction No. 11. The
13 purpose of awarding compensation to an injured party is to
14 repair his or her injury or to make him or her whole again
15 as nearly as that may be done by an award of money. That's
16 the purpose. We're not an eye for an eye. We're not going
17 to put Alicia in a car and bang her up until she's doing
18 this. We're not doing that. We're not going to hurt her
19 until she's permanently damaged. That's not how our society
20 works. And the only thing we have is money. That's it. So
21 we have to have a full (inaudible) of justice in this case.

22 So when you're thinking about this case and you're
23 deliberating about this case, ask yourselves why the defense
24 has done everything that they've done in this case. Why
25 did -- Facebook stalking someone? Everybody knows how

1 (inaudible) in the real world works. You can't take a
2 picture and say, "Oh, look. You were over here at a
3 football game," as if Janelle can't go to a football game.
4 But notwithstanding that, the point is (inaudible) and how
5 far they went, how far they were willing to go. This is a
6 car crash case. They're happening -- right now someone just
7 got (inaudible). They happen all the time. This is a
8 simple car crash case. That's what this is. We're here for
9 a simple car crash case, and they turned it into this
10 incredible situation. Ask yourself why. It's because
11 (inaudible) like this, it's a big dollar case. That's why.
12 That's why.

13 I'm going to ask you to retire to the jury -- and I have
14 another opportunity to come back and speak to you, but I am
15 trying to be cognizant of your time. But I want you to
16 think about these things, and I want you to think about
17 these things when the defense gets up and starts telling you
18 about who said what and who said the other. Think about the
19 credibility of the witnesses. Think about who has known
20 Janelle, had the opportunity to observe her, and then think
21 about them getting paid to say what it is that they said.

22 Thank you for your time.

23 THE COURT: So, members of the jury, we need to take our
24 afternoon recess. We will complete everything today, but we
25 will take 15 minutes right now, and then we'll come back and

1 hear Ms. Jensen's closing, okay.

2 THE CLERK: Please rise.

3 (Jury absent)

4 THE COURT: All right. We will be in recess until five to
5 4:00.

6 Ms. Jensen, I will --

7 MS. SARGENT: Five to 3:00?

8 THE COURT: Sorry. Five to 3:00.

9 MS. SARGENT: Okay.

10 THE COURT: Yeah. I'm thinking of the next part.

11 So, Ms. Jensen, I will give you until five till 4:00.

12 And then, Ms. Sargent, I'll give you another ten minutes
13 after that. So we'll go past 4:00, but we -- your main
14 closing was significantly longer than you had anticipated.

15 MS. SARGENT: I understand, Your Honor. I understand.

16 THE COURT: Which is fine, but we do -- we just have to be
17 done by 4:00. So we can go a little bit past that.

18 MS. SARGENT: Understood.

19 THE COURT: But I will then start to hold to limits to
20 make sure that everybody can have the same time when we're
21 done.

22 MS. SARGENT: Understood.

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

25 MS. SARGENT: Sure.

1 (Recess)

2 (2:55:20)

3 (Jury present)

4 THE COURT: All right, members of the jury, if you could
5 please turn your attention to Ms. Jensen.

6 MS. JENSEN: Thank you, Your Honor, Counsel (inaudible),
7 members of the jury.

8 Alicia, Thompson, as you know, is here to accept
9 responsibility for the accident, and you can tell that from
10 having watched her testify and having watched her response
11 to the testimony of other witnesses and everything that's
12 happened as we've gone through the process of this trial.
13 This is no laughing matter for her. There is nothing but
14 seriousness with respect to what is happening in this
15 courtroom at it relates to my client.

16 Now, you'll recall that during my cross-examination of
17 Ms. Henderson a couple of days ago she was confrontational
18 with me, asking to know why I was putting her on trial. Her
19 point was, "I was hit. I was rear-ended. I have injuries."
20 And she wants the inquiry to end there.

21 And Ms. Sargent just spent almost 45 minutes talking to
22 you largely about the efforts that the defense has taken to
23 defend Alicia against this. "It's just a simple car
24 accident. It's a simple rear-end. Why are we going through
25 this exercise?" And it seems pretty evident that the reason

1 we're going through this exercise is because the ask is for
2 a \$3 and a half million.

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

9 So the thing about this case, and what I find interesting
10 about Ms. Henderson's challenges during my cross-examination
11 of her, was that she, in fact, carries the burden of proof,
12 and that, perhaps, is why she was feeling like she's on
13 trial. But the truth of it is she is on trial. It's her
14 burden to prove that she was injured in the accident, and if
15 you believe she was injured, it's her burden to prove
16 damages. And you know that because that's what the jury
17 instructions tell you.

18 I'm going to just click through these quickly, but in Jury
19 Instruction No. 7 it talks about the burden of proof with
20 respect to the injury. In Jury Instruction No. 12, there's
21 a section that talks about burden of proof with respect to
22 damages.

23 So let's break down what Ms. Henderson has told you in
24 terms of her theory of injury to kind of its kind of most
25 basic elements, because I think during the course of trial

1 the theory of injury was a little amorphous. Is it "the car
2 accident gave me whiplash and that exacerbated my
3 Tourette's" or is it that "the car accident caused stress
4 and exacerbated my Tourette Syndrome"? So I don't know if
5 it was ever quite coalesced, but I think Ms. Henderson did
6 during her testimony essentially say, "I have whiplash, and
7 now my Tourette's, my tics, are worse."

8 So let's know -- think about what we know about the
9 accident and Ms. Henderson's situation after the accident.
10 So we know she walked away. She drove away from the
11 accident. She did so without any fractures, bruising.
12 There was no shoulder joint injury. She didn't go to the
13 emergency room. You did not hear that -- about findings of
14 any diagnostic studies like X-rays, MRI imaging, CT scans of
15 the head. None of that happened after the accident,
16 indicating that none of her providers thought her injuries
17 warranted any kind of diagnostic workup, to the extent that
18 she had any injuries.

19 But you did hear from -- and I want to focus this next
20 part of my closing -- I want to focus on the medical
21 testimony from the medical doctors as compared to the
22 chiropractors or other types of witnesses. You heard from
23 three medical doctors.

24 Let's talk about Ms. Henderson's treating physicians,
25 Dr. Vlcek and Dr. Wall. And what you heard from both of

1 these physicians in terms of objective findings of injury is
2 not that they conducted an examination of Ms. Henderson
3 after the accident and identified objective findings of
4 injury. They relied on her report to them. She came in and
5 told them that she has a whiplash injury.

6 Speaking with respect to Dr. Vlcek specifically, her
7 neurologist for decades, Ms. Henderson goes to see Dr. Vlcek
8 three days after the accident. And she's there because her
9 Tourette's, her tics, have gotten so bad that now she is at
10 the point where she is going to be evaluated for the
11 experimental treatment of deep brain stimulation, the DBS
12 treatment that Dr. Rappaport kind of explained where you get
13 wires in your brain that send electric shocks, and those
14 shocks help to mitigate, control, or stifle the tics. That
15 is where Ms. Henderson is at the time of the accident.

16 And so she's in Dr. Vlcek's office being -- as he
17 describes, doing a comprehensive neurological evaluation to
18 determine whether or not this is appropriate. And so
19 they're going over her entire history, everything about her
20 to see if they can go into her brain, right, and implant
21 these wires, and she doesn't bother to mention that she's
22 just been in an accident that by her accounts -- but that
23 night when she got home she was on fire in terms of her
24 tics, right? And she doesn't mention that to her doctor?
25 And you have to ask yourself why. Is it because

1 \$3.5 million hadn't coalesced in her mind yet? Dr. Vlcek,
2 when he was questioned about this, also testified that if
3 she had told him about the accident he would have put it in
4 her notes.

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

9 (Video played as follows:)

10 "QUESTION: Did you form any opinions about
11 what physical injuries the accident would have
12 caused?

13 "ANSWER: My understanding was that she was
14 diagnosed as having a whiplash injury, the one
15 that -- that I had testified to earlier.

16 "QUESTION: Did you conduct any orthopedic --
17 an orthopedic exam or any tests to determine what
18 injuries were caused by the accident?

19 "ANSWER: I'm not an orthopedist. I'm not a
20 chiropractor. I'm not an emergency medicine
21 doctor. I've never been treating her for these --
22 that kind of injury or (inaudible). I was seeing
23 her in regards to her Tourette syndrome and her
24 tics. And the fact that the cervical head tic and
25 truncal tic had, by report, and I felt probably by

1 observation -- by report had greatly increased in
2 intensity and frequency following that
3 (inaudible). And I have seen that occasionally in
4 other patients, and I have seen that in some
5 patients that have had other kind of injury or
6 (inaudible) that greatly intensifies the tics.

7 "So I was not treating her arthritis, which we
8 have, or to what degree. I wasn't treating her
9 musculoskeletal pain. I wasn't doing physical
10 therapy, if she had some of that. I wasn't
11 treating chiropractic treatment. I wasn't -- so
12 I'm not (inaudible)."

13 (End of video playback)

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

16 Dr. Wall testified, you remember. And Dr. Eric Wall was
17 Ms. Henderson's primary care physician just around the time
18 of the accident. He had seen her, if you recall, two times
19 in the months leading up to the accident, and it was for
20 knee pain. Ms. Henderson has had two meniscus repairs, one
21 on each knee, one before the accident and one shortly after
22 the accident, and that's why he was seeing her before
23 June 2014.

24 The first time Dr. Wall sees Ms. Henderson in person after
25 the accident, six months later, actually, during this -- the

1 same month that she sees Dr. Vlcek, December of 2014, and it
2 was at that time that he learned that she had been in an
3 accident. And he also, like Dr. Vlcek, did not do any exam.
4 And, sure, Dr. Vlcek is a neurologist, but Dr. Wall is a
5 family physician, certainly qualified to run through a
6 physical exam to determine whether or not there's any
7 objective finding of injury, but he didn't do it. Again, he
8 relied on Ms. Henderson's testimony or report.

9 (Video played as follows:)

10 "QUESTION: (Inaudible)a summary of your
11 opinions in this case within the scope of your
12 expertise?"

13 (End of video playback)

14 MS. JENSEN: Oh. I'm sorry. I am having technical
15 difficulties, and they are my own.

16 You'll recall during his testimony that I asked Dr. Wall
17 the question:

18 "In this instance, six months after the accident,
19 Ms. Henderson is there to talk to you about the accident,
20 and she reports to you that her Tourette's has worsened,
21 which has exacerbated her neck and shoulder; is that right?
22 That's what she's reporting to you?"

23 "Yes, that's what she is reporting to me."

24 And then he was asked, "Is there documentation between
25 your first visit with Ms. Henderson and this visit with

1 Ms. Henderson about differences in her neck pain or shoulder
2 pain?"

3 And his answer is, "No."

4 And we know she has neck pain and shoulder pain because
5 well before the accident she has severe degeneration and
6 pain in her spine, in her neck, in her back, in her
7 shoulders, and that's why she's going to a chiropractor
8 constantly.

9 So Wall -- another thing I want to point out about
10 Dr. Wall's testimony is that it seems on some level he was
11 brought in to testify that, "Okay, so I had reviewed all of
12 her records. Once I found out this was going into
13 litigation I got curious, and so I did my own style of
14 investigation, and I went through the records I have access
15 to." Which did not include physical therapy, which did not
16 include chiropractic care, which did not include her
17 appointments with Dr. Vlcek. They included her primary care
18 appointments.

19 And he told you that it was his impression that her
20 primary care appointments had doubled after the accident.
21 But when I pressed him in cross-examination, "Can you name
22 one date or one time when she came to her primary care -- to
23 a primary care appointment after the accident," he couldn't
24 identify one single date. And he said, "Well, I would have
25 to go back to my notes."

1 So let's talk about the medical testimony that was
2 provided to you where people are actually conducting an
3 examination of Ms. Henderson. And that's Dr. Rappaport.
4 And you heard about, from his perspective -- and you heard
5 this from Dr. Sutton a little bit too -- but the benefit of
6 having a doctor for the defense -- and, obviously, we have
7 to hire them. No one is doing this for free, and we can't
8 just rely on the testimony of medical providers. Alicia is
9 absolutely entitled to explore her defenses in this case,
10 and if there's questions about medical records that suggest
11 that there isn't an injury related to the accident,
12 certainly we're entitled to hire professionals to take a
13 look at the records.

14 And so what did they do, Dr. Rappaport, Dr. Sutton? They
15 get the complete picture. They get almost all the medical
16 records for Ms. Henderson from when she was first diagnosed
17 with Tourette's as a teenager until, what, 2017, I think the
18 records were in this case. And then they get to examine
19 her. They get to question her. They get to actually
20 conduct the tests, observe her responses, see if there's
21 objective findings. They get the complete picture, where --
22 as compared to Dr. Vlcek, who said, "I've never seen PT
23 records. I've never seen chiro records." He's never even
24 seen primary care records. Maybe he's seen some Botox
25 records. Dr. Wall, same thing. Very limited scope.

1 Dr. Devine, he's only seen chiropractic records. But with
2 Dr. Rappaport, he gets a birds-eye view. And taking all of
3 that information into account he told you that he could not
4 conclude on a more-probable-than-not basis that
5 Ms. Henderson was injured in the accident, even though he
6 allowed that it was a possibility.

7 (Video played as follows:)

8 "QUESTION: (Inaudible) summary of your
9 opinions in this case within the scope of your
10 expertise?

11 "ANSWER: My understanding is that she did
12 develop (inaudible) neck, upper back, and low back
13 pain after the accident. It was difficult on a
14 more-probable-than-not basis to state that a
15 significant amount of neck, midback, and low back
16 pain was due to this accident, but it was possible
17 that a minor cervical (inaudible) lumbar strain
18 could have resulted from the June 2014 accident,
19 but not on a more-probable-than-not basis, and
20 that at the time I saw her on January 11th, 2018,
21 there was no objective evidence to substantiate
22 that there were ongoing concerns with strain or
23 sprain or spasms or actual tenderness in these
24 areas."

25 (End of video playback)

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

6 So Plaintiff, rather than -- the plaintiff put on her
7 chiropractor, Dr. Devine, who testified, and relied quite
8 heavily on the presentation of evidence on his testimony,
9 and both from Dr. Devine's testimony himself and on
10 cross-examination of Dr. Sutton, right? You'll recall he
11 went through -- Ms. Sargent went through page after page
12 after page of records trying to show that according to the
13 chiropractor notes before the accident Ms. Henderson was
14 improving and afterwards she took a nosedive and -- in order
15 to prove to you that she was injured.

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

21 Jury Instruction No. 1. It's kind of buried in there, the
22 discussion of credibility. But part of the instruction says
23 that you are the sole judges of the credibility of each
24 witness and of the value or weight to be given to the
25 testimony of each witness. And what this section of the

1 jury instructions does is it empowers you to actually put
2 the microscope on all of the witnesses, all of their
3 motives, all of their bias, what they said, what they didn't
4 say, and what was contradicted. And it empowers you -- if
5 you find that a witness is not credible, it empowers you to
6 disregard their testimony. Just because someone took the
7 stand, just because Dr. Devine took the stand and told you
8 she was better before and she was worse after, does not mean
9 that you have to believe it.

10 And that instruction provides you with different types of
11 factors that you can apply to the analysis of credibility,
12 and it's not limited to what's in the instruction. It lists
13 several different things you can consider, but it doesn't
14 say these are the only things you can consider. So if you
15 have something that you use to evaluate credibility, please
16 do so with all the witnesses that came across that witness
17 stand.

18 But with respect to Dr. Devine, I want to talk about these
19 particular points or factors for analyzing credibility:
20 Quality of the witness's memory while testifying, bias or
21 prejudice, and the reasonableness of the witness's statement
22 in light of all the other evidence.

23 So this is what I have on Dr. Devine from my notes. You,
24 frankly, may have more, and I don't want to limit you and
25 have you disregard your notes. But there are actually a lot

1 of questions about his testimony.

2 For example, I think one of the first things that he
3 talked about was that Ms. Henderson, after the accident,
4 started dragging her foot. You'll recall that, right? And
5 bumping into walls. But the evidence from all of the
6 medical doctors who evaluated Ms. Henderson and took a look
7 specifically at her gait found that she was walking
8 normally. There's no evidence in the medical records that
9 there is foot drag or a foot drop, she's dragging her foot,
10 or she's wearing out her shoes.

11 He talked about her increase -- the increased number of
12 visits ever since the accident, but he couldn't even begin
13 to put a number on it himself. He had no idea. Before the
14 accident, though, he testified that from January to, what,
15 June, I think, 10th, maybe, right before the accident, that
16 he had seen her 26 times. But Dr. Rappaport was actually in
17 the records counting, and he counted 47 visits. So
18 Dr. Devine is trying to minimize how many times
19 Ms. Henderson is seeing him before the accident to conflate
20 what's happening afterwards.

21 He testified that without chiropractic treatment she "goes
22 south," I think, is the phrase he used. But we all know,
23 and he acknowledged, that after the -- after eight months of
24 chiropractic care following the accident, there was that
25 six-month gap of care where there was nothing besides a

1 Botox injection.

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

10 He testified that he did not think she had any vocal tics
11 before the accident, but we know that her vocal tics were
12 documented. I mean, even her friends and family talked
13 about how she had vocal tics, right? And going back to
14 2004, that 2004 appointment with Dr. Vlcek, ten years before
15 the accident, at that point, the vocal tics are described as
16 loud and frequent and intense.

17 He tells you that he helped -- after the accident, he
18 helped coordinate her care, but when pressed on
19 cross-examination, and I think maybe in response to a jury
20 question, what came of that, truth of it was that he thinks
21 maybe he had a conversation with her physical therapist. He
22 can't tell you who. He can't tell you when. He can't tell
23 you what they talked about. It was just a maybe. There was
24 no coordinating care.

25 He testified that he took X-rays. He can't tell you when,

1 what the results were. And, frankly, there's no evidence
2 before you that he ever took X-rays at all.

3 He examined Ms. Henderson two days after the accident, and
4 you'll recall there was testimony about, you know, he ran
5 through all these tests and discovered, you know, she had
6 all these significant injuries, including radiating arm
7 pain. She is telling him, "I can barely write because of
8 the numbness in my arm, and I'm having trouble walking. My
9 feet and legs aren't doing what I tell them to do, and I am
10 having trouble walking." And he acknowledged that these
11 concerns -- if this is really what's happening with someone,
12 your concern is that they have a disk herniation, that, you
13 know, there's something really significant going on with the
14 structure of their spine, and what you do is you get an MRI
15 and you send someone to an orthopedic to find out what
16 really is going on. And what did he do? Nothing. He did
17 nothing different than what he had done before the accident.

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

1 guess this comes as no surprise because the Chiropractic
2 Quality Insurance Commission found that he committed
3 unprofessional conduct with respect to --

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

6 THE COURT: Okay, Ms. Sargent. The jury shall rely on
7 their own memory as to what the evidence and the testimony
8 of the witness is, showed.

9 MS. SARGENT: And you'll recall he admitted when I
10 cross-examined him about whether or not he was found to have
11 committed unprofessional conduct with respect to
12 record-keeping, and he acknowledged that.

13 So, finally, Dr. Devine's record suggests that
14 Ms. Henderson was improving in the months before the
15 accident, right? There's this theory. There's this theme.
16 She's improving. She's gaining mobility. She's getting
17 better, according to the chiropractic records, and then
18 after the accident, she's not.

19 But what does the medical evidence show about what was
20 happening in the four months before the accident? It shows
21 that Ms. Henderson -- or even six months before the
22 accident. It shows Ms. Henderson was seeing Dr. Young, an
23 orthopedic surgeon at OPA Orthopedics. And Dr. Young had --
24 there had been a recommendation for an MRI and an X-ray,
25 both of which showed severe cervical degeneration or severe

1 arthritis in the spine. She had been referred out to
2 physical therapy and gone to a handful of physical therapy
3 appointments, and Dr. Young was considering a cervical facet
4 injection. Not the Botox injections, but an injection into
5 the joints in her neck, because her neck pain had gotten to
6 the point where it was that severe.

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

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

20 The burden of proof is talked about in Jury Instruction
21 No. 12, and that says in part that the burden of proving
22 damages rests upon Ms. Henderson, and it is for you to
23 determine, based upon the evidence, whether any particular
24 element has been proved by a preponderance of the evidence.
25 Importantly, your award must be based upon evidence, not

1 speculation, guess, or conjecture. The law has not
2 furnished us with any fixed standards by which to measure
3 noneconomic damages. You'll recall during jury selection
4 people were hoping to get some kind of precedent or a chart
5 or grid or something to help guide their way, but we
6 don't -- the law doesn't provide that. So with reference to
7 these matters, you must be governed by your own judgment,
8 the evidence in this case, and these instructions. So in
9 short, any award of damages has to be based on the evidence,
10 and you have to exercise your good judgment.

11 So let's break down Ms. Henderson's theory of damages to
12 its most basic elements. Essentially, "I was managing
13 before the accident. I'm not managing now. My Tourette's,
14 my tics, have gotten much worse, and they're making my life
15 more difficult."

16 So we heard from -- in support of her damages argument, we
17 heard from friends and family. And just like all of the
18 other witnesses in this case, you get to analyze the
19 credibility of these witnesses as well, applying the factors
20 from the jury instructions. And for these witnesses, I
21 think that bias or prejudice and the reasonableness of their
22 testimony are particularly relevant in evaluating their
23 credibility.

24 So, of course, you know, we heard from Ms. Hinds, we heard
25 from Kanika Green, Jolyn Gardner Carter, I believe her name

1 is. Campbell. Excuse me. And Schontel Delaney by
2 videotape. And they were all pretty consistent in their
3 description of Ms. Henderson's Tourette's before the
4 accident. You'll recall sniffs, maybe a cough like she had
5 a cold or allergies, but otherwise, they -- that was kind of
6 the sum of their description. There were a couple of other
7 additions, I think. Schontel talked about an occasional --
8 excuse me. Ms. Delaney talked about an occasional shoulder
9 shrug. Ms. Gardner talked about on occasional light tic.
10 But Ms. Green, the witness with -- who went to Trevor Noah
11 and out to dinner and various events with Ms. Henderson,
12 said very specifically there were no truncal tics, no leg
13 tics, no kicks.

14 The friends and family who are trying to -- in this court,
15 who are trying to support someone that they love and
16 treasure, what they had to say is not supported by the
17 medical records, by the doctors, who are obligated -- whose
18 job it is to provide accurate information.

19 (Video played as follows:)

20 "QUESTION: So you saw Ms. Henderson -- and if
21 you need to refer to the chart notes, please do to
22 refresh your memory. But you saw Ms. Henderson in
23 May, May 19th of 2004. I think at the time she
24 was about 29, 28 or 29. And it's true, isn't it,
25 that at that appointment --

1 was like a tape on repeat. She was described as a model,
2 with a slender body to die for, who gained significant
3 weight after the accident. Obviously, Ms. Henderson was
4 interested in fashion. They said she loved to shop and
5 dress in colorful outfits but no longer shopped for those
6 outfits after the accident. But again, information that's
7 directly controverted by even Ms. Henderson's own medical
8 providers.

9 (Video played as follows:)

10 "QUESTION: -- addressed. One was her
11 constant -- Ms. Henderson's constant fatigue. Do
12 you see that as number one?

13 "ANSWER: Yes.

14 "QUESTION: And there was a discussion about
15 whether or not that was connected to
16 Ms. Henderson's Tourette Syndrome, perhaps because
17 she wasn't able to get restorative sleep; is that
18 right?

19 "ANSWER: Yes.

20 "QUESTION: Which is in part" --

21 (End of video playback)

22 MS. JENSEN: Actually, before we start playing this, I am
23 going to set the context. Dr. Wall is being questioned
24 about Ms. Henderson's appointment with Pamela Sheffield, who
25 was her primary care provider for a period of time, and she

1 had gone to -- the evidence was that she had gone to
2 establish care with Dr. Sheffield in 2012. And
3 Dr. Sheffield and Dr. Wall are in the same practice.
4 Dr. Wall took over -- if you recall, he took over primary
5 care after Dr. Sheffield retired, I believe. And we're
6 having Dr. Wall review that initial note with Dr. Sheffield
7 in 2012.

8 Like Ms. Sargent said, this came on the heels of
9 Ms. Henderson's mother's passing. We'll certainly
10 acknowledge that. Nonetheless, this is what -- what's being
11 talked about isn't an increase of her tics and Tourette
12 syndrome as a result of stress. It's fatigue, weight gain.
13 Fatigue and weight gain, basically, that are unrelated to
14 her mother's passing. So hopefully this will work.

15 (Video played as follows:)

16 "QUESTION: -- issues that Ms. Henderson and
17 Dr. Sheffield addressed. One was her constant --
18 Ms. Henderson's constant fatigue. Do you see that
19 as number one?

20 "ANSWER: Yes.

21 "QUESTION: And there was a discussion about
22 whether or not that was connected to
23 Ms. Henderson's Tourette syndrome, perhaps because
24 she wasn't able to get restorative sleep; is that
25 right?

1 "ANSWER: Yes.

2 "QUESTION: Which is part of the reason why she
3 was so exhausted?

4 "ANSWER: Um-hum.

5 "QUESTION: Is that right?

6 "ANSWER: Yes.

7 "QUESTION: So going on, there's -- it looks
8 like the second topic they talked about at that
9 time was weight gain?

10 "ANSWER: Yes.

11 "QUESTION: That Ms. Henderson is reporting a
12 significant gain of about 50 pounds; is that
13 right?

14 "ANSWER: Yes.

15 "QUESTION: Something obviously that
16 Dr. Sheffield noted she was unhappy about? Do you
17 see that?

18 "ANSWER: Yes.

19 "QUESTION: And then she notes that although
20 Ms. Henderson was in fashion she couldn't even go
21 shopping because of her weight? Do you see that
22 note?

23 "ANSWER: Yes.

24 "QUESTION: Also, that she was unable to
25 exercise due to significant pain in her body?

1 "ANSWER: Yes.

2 "QUESTION: And there was also a discussion in
3 the notes from Dr. Sheffield about -- perhaps in
4 relationship between Tourette syndrome and
5 Ms. Henderson's -- and Ms. Henderson being unable
6 to resist cravings for food? Do you see that?

7 "ANSWER: Yes."

8 (End of video playback)

9 MS. JENSEN: So let's set aside the well meaning but,
10 frankly, inherently biased testimony of Ms. Henderson's
11 friends and family, and let's talk about what was actually
12 going on in her life.

13 You've seen a version of this slide before, but what I
14 want to focus on is, obviously, the period from February to
15 August 2015. So Ms. Henderson has had eight months of
16 chiropractic care after the accident at this point. And
17 then she has a period of six months where she's not getting
18 chiropractic care, no massage care, no physical therapy.
19 She's not seeing Dr. Vlcek.

20 We do know what she was doing during this period of time,
21 okay. Right? We've got the 17 minutes of footage from
22 Costco. And I understand that Plaintiff takes issue with
23 this footage. I'll suggest to you that the arguments about
24 this are a red herring. This is objective evidence of what
25 Ms. Henderson was like on March 11th of 2015. Now, I

1 understand that there had been many days where surveillance
2 was conducted of Ms. Henderson. But use your common sense
3 and think about Tyler Slaeker's testimony. Just because
4 someone is out conducting surveillance doesn't mean they're
5 capturing video footage. There is not one piece of
6 information that has been presented to you that there was
7 video that existed and that has been destroyed. What is
8 before you is that people tried. They did surveillance and
9 tried to capture footage. This is the footage that was
10 caught.

11 Ms. Sargent tries to undermine that fact during her -- or
12 tried to when she was cross-examining Dr. Rappaport, right?
13 And she went on and on about CDs and the "S" on "CDs."
14 Someone had sent him a letter with the video surveillance
15 and another CD. "Why 'CDs' with an 'S'?" And, you know,
16 the interesting thing about that is Dr. Rappaport said, "If
17 we're here for a search for truth and she questions whether
18 or not Dr. Rappaport received more than 17 minutes of video
19 when everyone is burying it, she could have subpoenaed his
20 file." He told you that that happens all the time. And she
21 didn't.

22 So even if you had a suspicion about that -- and again, I
23 suggest there's no evidence of it to support it -- the video
24 and what it's showing is consistent with what else is
25 happening with Ms. Henderson during this gap in care, right?

1 This six months' gap in care. So she's -- we know she's
2 working at Costco. We know she works there, she admitted,
3 for three months. And she doesn't leave that job for a
4 period of respite at home because it's been so terrible for
5 her. She leaves that job and goes to a job where she's in a
6 standing position as a cashier at Walgreens. And she's at
7 Walgreens through October. And she leaves Walgreens, again,
8 not because she was physically incapable of doing the job,
9 but she's going back to school.

10 Now, you'll also recall that the plaintiff tried to muddy
11 the water about the six-month gap in care, likely because
12 it's such a powerful snapshot into how Ms. Henderson was
13 doing after this eight months of chiropractic care. And one
14 of the things she questioned Dr. Sutton about to challenge
15 him was the Botox, right? That there is a June 17th, 2015,
16 appointment where Ms. Henderson gets Botox.

17 So it's well after that March 11, 2015, surveillance
18 video, so there's no suggestion that the day the
19 surveillance video was taken -- there's no evidence to
20 support that she had just gotten a Botox injection and she
21 was feeling at her prime. That's not the evidence. The
22 evidence is that she had an injection in June, two months
23 later.

24 And importantly, the injection is not -- you know,
25 Ms. Henderson talked about how after the accident her tics

1 have gotten so much worse that she's getting injections into
2 the muscles in her neck because she's got much more violent
3 jerks, but that's not what the Botox injections are doing.

4 Per the medical report that Ms. Sargent questioned
5 Dr. Sutton about, it says that she is receiving Botox
6 injections. She's at the clinic for hoarseness, vocal tics,
7 facial spasm, and blepharospasm, which are eye tics. On
8 June 17th, 2015, she gets Botox into the left TA for her
9 voice. The TA is a muscle that controls your vocal cords.
10 She gets Botox into the lateral periorbital region around
11 her eyes, bilaterally, both sides. She gets Botox into the
12 glabellar, which is in between your eyes. She gets Botox in
13 the nasal dorsum, in her nose. She gets a left TA injection
14 for her voice. That's what the evidence says.

15 There is no -- the -- as Dr. Sutton testified, there are
16 notes here from 2013 where there were three visits; 2014,
17 where there were two visits; 2015, another three visits;
18 2016, another three visits. In none of those visits after
19 the accident is there any documentation that she's getting
20 injections, Botox injections into the muscles in her neck,
21 her traps, her scalenes, and -- I can't remember all the
22 names of the muscles in the neck, but you may recall from
23 Dr. Sutton's testimony. So this is a red herring.

24 You also recall that there was a suggestion that there had
25 been a physical therapy appointment on March 2, 2005.

1 Ms. Sargent kept referring to it as a chart note. It's not
2 a chart note. It's a letter. And the letter is from
3 Ms. Henderson's physical therapy provider, and she said that
4 Ms. Henderson was evaluated on June 17th after the accident,
5 had two visits, came back in September of 2014, and on that
6 date at that visit we determined that the schedule needs
7 that Janelle had did not match up with the hours we offered,
8 and that she would be better served in an alternate
9 facility. There was no alternate facility. There was no
10 more physical therapy. But there was also no treatment in
11 March of 2015.

12 But we're here because Ms. Henderson is seeking financial
13 compensation, so let's talk about damages. And I'll talk
14 about Exhibit No. 10. Ms. Sargent mentioned this a little
15 bit in her closing. It's an instruction about -- it said,
16 "How do you deal with a situation when you have someone who
17 is compromised before the accident?" It's absolutely true
18 that in our society if you're compromised and you get hurt,
19 you still get to recover. We're not going to disregard you
20 because you come to the scene of the accident already
21 compromised. However, you do not get extra benefit because
22 you were compromised before. You get -- you can be
23 compensated for that exacerbation, for that period of time
24 when your core condition is made worse.

25 So normally I don't suggest a number when doing closing

1 arguments, but I thought that Ms. Sargent's calculation for
2 damages, how you go about calculating damages, was pretty
3 interesting. \$250 a day. That seems -- it seems
4 exceptional, frankly, when we're talking about someone who
5 was severely compromised before the accident. But let's use
6 that number. Let's use \$250 as the method by which to
7 calculate damages.

8 My suggestion to you would be that if you believe she was
9 injured, and if you believe her condition has been
10 aggravated, that that -- you would apply that \$250 only to
11 that period of aggravation or exacerbation reflected by the
12 competent medical records, and that would be the six-month
13 period -- excuse me. That would be the eight months leading
14 up to that six-month gap, leading up to the time when she
15 felt like she was able to take on that job at Costco, take
16 on that job at Walgreens, and stopped treatment. And by
17 those numbers, that's \$60,000 for a rear-end accident.
18 That's a lot of money.

19 And the last thing I want to talk about before I sit down
20 are the credibility factors as they apply to Ms. Henderson,
21 because they do apply to her as well.

22 The first one I want to talk about is the manner of her
23 testimony. And I don't want to belabor this too much, but
24 certainly when her own attorney is asking her questions she
25 is trying to be forthcoming with information. But by the

1 time she testified and by the time I cross-examined her, she
2 had been sitting in trial for four days with witnesses,
3 watching them testify and watching how the process works,
4 right? Alicia doesn't have to roll over and accept
5 everything that's happening, right? She has an attorney
6 that gets to challenge the evidence, and Ms. Henderson saw
7 that. She saw Ms. Sargent would call witness. I would do
8 cross-examination. She would do direct. Back and forth.

9 But when it's my turn to cross-examine her, she's not
10 interested in the search for truth. She's interested in
11 being combative. "Why are you putting me on trial?" "I
12 don't know what I told my doctors." "I don't know when I
13 saw my doctors." "I don't know what they have in my
14 reports." "I didn't read the medical records." (Inaudible)
15 the medical records. You know, it was quite combative.
16 There's definitely no search for the truth there.

17 By comparison, my client took the stand, obviously feel
18 ing, I think, intimidated and emotional about the process,
19 and rightly so, and provided you with genuine and authentic
20 testimony. In fact, you know, the evidence is that
21 Ms. Henderson didn't know she was going to get hit. She was
22 looking ahead when the accident happened. She didn't see my
23 client (inaudible) she doesn't know how fast she was
24 traveling, right? My client could have gotten on the stand
25 and said, yeah, you know, I glanced away and I looked back

1 and I saw that Ms. Henderson's car was stopped, but I had
2 plenty of distance and I started to slow and, you know, I
3 bumped her 10, 15 miles on hour, maybe. And that, frankly,
4 would have benefited Alicia's case, right? That's not what
5 she did. She told the truth. She was traveling 40 to 45
6 miles an hour. She braked. But she isn't framing the
7 testimony or framing the evidence in a way that would
8 benefit her. She's being honest.

9 So let's talk about the quality of the witnesses' memory
10 while testifying. And, actually, I've talked about that a
11 little bit in terms of Ms. Henderson refusing to provide any
12 information on cross-examination about her condition or her
13 care before the accident. But you also heard this during
14 the examination by Dr. Rappaport and Dr. Sutton. You'll
15 recall we played that hourlong examination, which included
16 the -- all the parts of the examination, right? The history
17 and the physical examination. And Ms. -- like with me,
18 Ms. Henderson was quite combative.

19 (Video played as follows:)

20 "MALE SPEAKER: (Inaudible) heel flexure, 120
21 degrees on the left, 100 degrees on the right.
22 She complains of lower back pain, both right and
23 left. (Inaudible).

24 "Straighten this leg for me. Bring your --
25 your heel (inaudible) for me, just on your knee.

1 Just like --

2 "MS. HENDERSON: Yeah. I can't do that.

3 "MALE SPEAKER: And because of why?

4 "MS. HENDERSON: It's -- just kind of hurts my
5 (inaudible).

6 "MALE SPEAKER: Uh-huh. And on this side? And
7 (inaudible).

8 "MS. HENDERSON: Yeah.

9 "MALE SPEAKER: So this hurts your knees?

10 "MS. HENDERSON: Uh-huh.

11 "MALE SPEAKER: But the knees aren't from the
12 accident, or are the knees from the accident?

13 "MS. HENDERSON: I don't know, no.

14 "MALE SPEAKER: (Inaudible) is unable to be
15 performed because of knee pain, period. She is
16 unable to determine for me whether she has knee
17 pain from the auto accident or from some other
18 source, period.

19 "(Inaudible) bring this up for me. Does it
20 bother you if I bring this back?

21 "MS. HENDERSON: Yeah. It's --

22 "MALE SPEAKER: Okay. Where does that bother
23 you?

24 "MS. HENDERSON: That hurts my back.

25 "MALE SPEAKER: This hurts your back? Oh,

1 she's saying, endorse her report that her -- she was injured
2 in the accident and she's gotten so much worse in terms of
3 her Tourette's.

4 (Video played as follows:)

5 "QUESTION: But you've got positive -- well,
6 you're saying nonorganic signs.

7 "ANSWER: Right. Goes back to the
8 psychological features affecting physician
9 condition. That this is how we help determine
10 that -- if -- if I believe her, and that she's
11 really having this pain and believes these things
12 are worsening her pain, then it's a psychological
13 feature. If I don't believe that it's malingering
14 and that it's faking or lying, and I wasn't saying
15 that about her. So we don't have a lot of, you
16 know, explanations other than those two things,
17 but clearly, moving (inaudible) doesn't cause neck
18 pain. Clearly, doing a small squat doesn't hurt
19 your neck. So either you're faking it and lying,
20 or you have a psychological feature affecting her
21 condition. So that's what it tells me.

22 "QUESTION: Did you draw a conclusion between
23 those two options with respect to Ms. Henderson?

24 "ANSWER: I felt she had psychologic features
25 affecting physical condition, which is why I

1 discussed earlier that that was one of my
2 (inaudible). I don't believe she's lying.

3 "QUESTION: Not that she was lying and trying
4 to manipulate the exam?

5 "ANSWER: Yeah.

6 "QUESTION: Okay."

7 (End of video playback)

8 MS. JENSEN: And that's not what we're suggesting. We're
9 not suggesting she's lying, but she is invested in the
10 outcome of the case, and you have to question what she's
11 putting out there in support of ultimately her request for
12 financial compensation.

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

18 What I want to talk about is the first day of testimony
19 you recall she really focused on her leg tic and how that
20 was getting worse and her foot. She said, you know, "Now
21 I'm dragging -- since the accident, I'm dragging my foot,
22 and I can't wear high heeled shoes, and I'm causing -- I'm
23 rubbing holes in my shoes because I'm dragging my foot so
24 much."

25 I did mention before that that finding is totally not

1 supported by any of the medical testimony. The medical
2 doctors looking at her gait said everything was normal. Not
3 one said there was a dropped foot. And you saw that also
4 with the examination of Dr. Rappaport and Sutton.

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

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

16 (Video played as follows:)

17 "QUESTION: Defense asked you (inaudible) new
18 tics, different tics. All right. At no point in
19 any of your chart notes did you say there were new
20 or different tics, is that correct, as a result of
21 the June 14th, 2014, collision?

22 "MS. JENSEN: Objection. (Inaudible) the
23 testimony.

24 "QUESTION: And in fact, didn't you say that it
25 was an exacerbation of her tics that she already

1 has?

2 "ANSWER: I said it was primarily an
3 exacerbation of tics that she already has. It
4 wasn't that she had a bunch of (inaudible)
5 entirely different tics."

6 (End of video playback)

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

14 So, ladies and gentlemen, we discussed empathy during jury
15 selection, and there's no question that Ms. Henderson has
16 been dealt a really difficult hand. You know, she deals
17 with things that are, I think, difficult for any of us to
18 imagine. But the work that you do in the jury room can't be
19 driven by empathy or sympathy, and you'll find that in the
20 jury instructions. The work you do and the decisions you
21 make in the jury room have to be based on the evidence and
22 your good judgment. They have to be based on the facts of
23 the case, and I'd submit the facts in this case simply don't
24 support Ms. Henderson's theory of the case.

25 (Video played as follows:)

1 reason why we're here is because the defendant hit my client
2 at 40 miles per hour and then told her to "sue me," offered
3 her nothing to resolve this case.

4 MS. JENSEN: Objection. Motions in limine.

5 MS. SARGENT: Your Honor, they opened the door. They said
6 the reason why we're here is because we --

7 THE COURT: Counsel, please don't argue with me.

8 MS. SARGENT: I apologize, Your Honor.

9 THE COURT: Thank you.

10 MS. SARGENT: I apologize.

11 THE COURT: That's okay. Please just continue.

12 MS. SARGENT: Okay.

13 And that's why we're here, not because (inaudible) because
14 while they're saying that they're taking responsibility,
15 that's simply not true. We had to come here so you could
16 make them take responsibility. That's why we're here.
17 They're not taking responsibility until you make them. They
18 made no effort to take responsibility for (inaudible). None
19 whatsoever.

20 What's interesting is how far they will go with their
21 trying to (inaudible) 15 years before this collision
22 Dr. Devine had a teaching moment with the Quality Assurance
23 Board. And that's what he said about his chart notes. A
24 teaching moment. He wasn't disciplined. So because of
25 that, Janelle should suffer the harm of you not considering

1 any of his chart notes. It's ridiculous, and it goes right
2 back to what I'm telling you is how far they were willing to
3 go. How far they're willing to go to try to convince you
4 that Janelle wasn't hurt.

5 And what's so interesting is that Dr. Sutton said, "Give
6 her 12 weeks." Dr. Rappaport said, "She wasn't hurt at
7 all." And now they're saying 8 months. Really? According
8 to her, there is absolutely no medical evidence whatsoever
9 (inaudible). None. Absolutely none. None.

10 They spent \$49,000 defending this case. I think she said
11 50-. She might have said 60-. It doesn't make sense. You
12 don't spend \$50,000 to offer \$50,000. It doesn't make
13 sense. It just simply doesn't make sense, not at all.

14 We are here because the defendant hit my client and isn't
15 taking responsibility. We are here because the competent
16 medical testimony from her doctors say she's in pain, she's
17 in (inaudible) she's in pain.

18 I have to fall on my sword, but not on my foot. That's my
19 client. The foot not related? My fault.

20 MS. JENSEN: Objection.

21 THE COURT: Overruled.

22 MS. SARGENT: I'm responsible for that.

23 I'm sorry, Your Honor. I didn't wait for you to rule on
24 that.

25 THE COURT: That's okay. I said overruled.

1 MS. SARGENT: That's my fault, and I fall on my sword on
2 that. I absolutely fall on my sword on that. Dr. Devine
3 told you that he noticed her foot and he noticed her leg. I
4 had an absolute obligation to my client to change -- you
5 have an opportunity in the law to -- it's called
6 supplementing discovery. I didn't do it.

7 MS. JENSEN: Objection.

8 THE COURT: Sustained.

9 Please move on, Counsel.

10 MS. SARGENT: Yes, Your Honor.

11 You know, the defense wants you to think that the
12 witnesses for Janelle aren't to be believed. Who else do
13 you have in your life to come and testify if you get hurt?
14 Who else? You can't call the guy that's walking down the
15 street. You have to call your family. You have to call
16 your friends. They're who knows you. And if every time a
17 family member or a friend came and testified and the defense
18 said that they were liars, you wouldn't have anyone to come
19 in and testify.

20 And they all called Janelle the life of the party because
21 that's what you call someone who is the life of the party.
22 The person that puts the lamp shade on the head at the New
23 Year's Eve party, they're the life of the party, and
24 everybody describes them like that because that's who they
25 are. It doesn't mean that everyone is lying. It means

1 that's who that person is. And every friend group has one.
2 Every friend group has one, just like every friend group has
3 a "Downer Debbie." Everybody does. It's just part of
4 friends. That's who comes and testifies is your family and
5 your friends.

6 What the defense didn't bring up, which is quite
7 interesting to me because she's kind of intimating that
8 there's this huge conspiracy between the witnesses and the
9 doctors and they're all friends and they're all trying to
10 conspire. But in December, well before this lawsuit,
11 Dr. Wall wrote the chart note, and then wrote the followup
12 (inaudible) that said that Tourette's are debilitating as a
13 direct result of the motor vehicle collision. He wrote it
14 in December of 2014, well before any of this was going on.
15 That's what he noted, and that's what he noted in the chart
16 note, and then he reduced it to (inaudible) in December of
17 2014, before any of this process started.

18 The videotape? The surveillance? No one testified
19 anywhere in this courtroom that there was not surveill ance
20 taken on those other occasions, that other 78 hours. And
21 what's so interesting to me is this, the language that the
22 defense counsel used. She said, "Don't take issue with the
23 footage." We don't take issue with the footage. What they
24 said was that we took issue with the 17 minutes, and we
25 don't. We take issue with the missing 78 hours. And they

1 said, "There's no evidence that the video existed and had
2 been destroyed." I didn't say it had been destroyed. It's
3 been withheld. They withheld it from us, and they have an
4 obligation to give us the evidence. They have an obligation
5 to give you the evidence, all of the evidence.

6 But the language that she uses, very careful. She said
7 "destroyed." We never said it was destroyed. We never
8 argued it was destroyed. What we argued is they had
9 78 hours of video, and they didn't give it to me. And she
10 never disputed that. She just said, "We didn't destroy it."
11 That's what she said. "We didn't destroy it." So it's
12 still out there somewhere. They have an obligation to give
13 it to me. They cherry-picked 17 minutes out to try to
14 convince you that there's not an exacerbation of Janelle's
15 Tourette's. That's what they did.

16 She wants you to believe that Janelle is trying to frame
17 her evidence to try to paint a picture because Janelle is
18 interested in the outcome. Of course she is. She got
19 slammed into at 40 miles an hour. Of course she's
20 interested in the outcome. It impacts her life. It's been
21 five years. Absolutely, she is interested in the outcome.
22 She's been made to go through this process. Absolutely, she
23 is interested in the outcome, and she should be. When this
24 is over, it's over for Ms. Thompson. She goes on and she
25 moves on with her life. So absolutely she's interested in

1 the outcome.

2 She wanted to tell you that Alicia Thompson could have got
3 on the stand and framed the evidence in a particular manner
4 by saying, "Well, I hit her at 10 miles per hour." Except
5 it's not supported by the damage to Janelle's car, and
6 that's what -- the frame being bent. You can't bend a frame
7 at 10 miles per hour. 40 miles per hour (inaudible) and
8 slamming into someone's car, absolutely. And had the frame
9 not been bent, you would have heard about it. They would
10 have had somebody up here telling you that the frame wasn't
11 bent.

12 MS. JENSEN: Objection.

13 THE COURT: Overruled.

14 MS. SARGENT: Alicia Thompson doesn't have to frame any
15 issues because her agents have done it for her. She doesn't
16 know what's going on (inaudible). She didn't know there was
17 surveillance. She didn't pay them. She didn't see the
18 video. She has someone else back there, the puppet master
19 that's doing it, and it's not her. So she didn't have to do
20 it. She had one law firm that started it, then hired a
21 second law firm, and they're doing this now.

22 So it's your duty to decide here who essentially is
23 telling the truth. That's what it all boils down to. When
24 we get rid of all the little words that we use and all the
25 words that we try to say what is and what isn't, it's who is

1 telling the truth. That's what it all boils down to.
2 Whether you believe Dr. Vlcek when he says that it was a big
3 increase in her Tourette's, whether you believe Dr. Devine
4 when he says that he saw a difference in her, and whether
5 you believe Dr. Wall when, in December 17th, that he said
6 the Tourette's had worsened to the point where it was
7 (inaudible). You have to decide that. Absolutely, you have
8 to decide who it is you believe. That's what this all boils
9 down to at this point. Their whole case is don't believe
10 anything that her doctors are saying because her doctors
11 haven't read everybody's chart notes.

12 And I tell you this. Nothing would happen in this society
13 if a doctor was forced to read every single one of his
14 patients' chart notes in a legal setting. And you heard
15 Janelle either had 2,000 or 2,000 plus 1,600. If Dr. Wall
16 had to do that, he wouldn't have time to see his patients,
17 he wouldn't have time to do his work. She's not the only
18 patient of his that's been hurt. The system doesn't expect
19 that. That's why the burden of proof is a featherweight of
20 evidence. That's why the burden of proof is a
21 featherweight. If a feather drops on this side, we win.

22 Think about it. If your doctor is expected -- if you're
23 89 years old, you have 89 years' worth of medical records.
24 Do you really think that your doctor is expected to read
25 every single medical record from every single treatment

1 provider before he or she comes into court and sits down and
2 testifies? Their expectation is that doctors write down
3 what's going on with their patients, and other doctors can
4 rely upon it and can rely upon it (inaudible).

5 Dr. Rappaport told you he didn't believe it.

6 Dr. Rappaport told you that he interpreted that.

7 Dr. Rappaport told you that other doctors didn't know what a
8 shoulder was, and when pressed about the shoulder pain, he
9 said, "Well, I meant shoulder joint pain." When asked to
10 point it out in the report where he said shoulder joint
11 pain, he couldn't do it. What he said was there's no
12 evidence, and that's not true.

13 What I failed to do also in my initial closing was this
14 has gone on for five years. I have only asked you for
15 future pain and suffering, loss of enjoyment of life. I
16 forgot to ask you to award Janelle damages for what's
17 happened in the past. I'll leave that amount up to you.
18 But she is entitled under the law to past and for future
19 pain and suffering. She is absolutely entitled to those
20 damages.

21 But don't discount Dr. Devine because ten years ago he had
22 a teaching moment. They want you to discount Dr. Devine
23 because his chart notes show unequivocally that the pain has
24 been lowered, it was lessening, that she was getting more
25 movement. Increasing movement, decreasing symptoms, record

1 after record, after record, after record, after record.
2 That's why they want you to discount him, the person who has
3 seen her the most. You don't go to your neurologist to get
4 treated for the pain for your (inaudible).

5 And it is fiction that she hadn't seen her neurologist
6 since 2014 (inaudible) Dr. Ro. And when Dr. Vlcek talked
7 about Dr. Ro, getting the Botox treatments every three
8 months? And when defense told you there were three of them
9 in 2015? January, March, and June. Every --

10 MS. JENSEN: Objection.

11 MS. SARGENT: -- three months.

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

13 MS. SARGENT: Every three months. That's what they --
14 that was the testimony, every three months. And it makes
15 sense. The only one they want you to talk about, hear
16 about, though, is the one in June, and that's not what the
17 evidence showed, and that's not what the record showed, and
18 that's not what the testimony was.

19 So I've had Janelle with me for a little over five -- or
20 five years now, and I leave her to you. I leave her to you
21 for you to decide, for you to decide whether or not Janelle
22 and her doctors and her witnesses are telling you the truth.
23 I leave that to you.

24 Thank you for your time.

25 (Transcribed portion ends at 4:07:20)

C E R T I F I C A T E

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STATE OF WASHINGTON)
)
COUNTY OF KING)

I, the undersigned, do hereby certify under penalty of perjury that the foregoing court proceedings were transcribed under my direction as a certified transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability, including any changes made by the trial judge reviewing the transcript; that I received the audio and/or video files in the court format; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand this 1st day of July, 2019.

Shanna Barr, CET

Exhibit 2

Platvoet, Logan

From: Demaree Macklin, Sarah
Sent: Tuesday, April 23, 2019 1:53 PM
To: Jensen, Heather
Subject: Fwd: [EXT] Re: Trial 4/15 -- Henderson v. Thompson | 17-2-11811-7 SEA
Attachments: 2019_04_23 Henderson Response re. Spoliation.pdf

Sarah Demaree Macklin

Attorney

Seattle

206.455.7407 or x2067407

From: Vonda Sargent <sargentlaw9@gmail.com>

Date: April 23, 2019 at 11:34:36 AM PDT

To: Court, Young <Young.Court@kingcounty.gov>

Cc: Carol Farr <carolfarr@gmail.com>, Demaree Macklin, Sarah <Sarah.Macklin@lewisbrisbois.com>, Jensen, Heather <Heather.Jensen@lewisbrisbois.com>

Subject: Re: [EXT] Re: Trial 4/15 -- Henderson v. Thompson | 17-2-11811-7 SEA

Attached please find Ms. Henderson's Response re. Reconsideration Spoliation Instruction.

On Tue, Apr 23, 2019 at 8:39 AM Court, Young <Young.Court@kingcounty.gov> wrote:

Hi Ms. Sargent,

I believe the due dates for these pleadings discussed on record were today (4/23) for the response and Thursday (4/25) for the reply, with the Court considering the motion on Friday (4/26).

Please feel free to correct me if my memory is incorrect.

Best regards,

Jennifer McBeth

Bailiff to Judge Melinda J. Young

King County Superior Court

516 3rd Avenue Seattle, WA 98104

206-477-1361

<https://www.kingcounty.gov/courts/superior-court/directory/judges/young.aspx>

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Working copies shall be submitted to the Court pursuant to local court rules. The court does not accept working copies via email, absent prior authorization. Judge Young's court is paperless. Please submit working copies using the Clerk's Office e-working copies service, or deliver the working copies on a flash drive or CD to the Judges' Mailroom, C-203, with Judge Young's name and the case information clearly marked.

From: Vonda Sargent <sargentlaw9@gmail.com>

Sent: Monday, April 22, 2019 2:23 PM

To: Court, Young <Young.Court@kingcounty.gov>

Cc: Carol Farr <carolfarr@gmail.com>; Demaree Macklin, Sarah <Sarah.Macklin@lewisbrisbois.com>; Jensen, Heather <heather.jensen@lewisbrisbois.com>

Subject: Re: [EXT] Re: Trial 4/15 -- Henderson v. Thompson | 17-2-11811-7 SEA

Judge Young,

Is the court requesting a response on defendant's motion for reconsideration on the court's spoliation instruction? The rules do not allow for an response otherwise.

Sincerely,

Vonda Sargent

On Mon, Apr 15, 2019 at 3:27 PM Jensen, Heather <Heather.Jensen@lewisbrisbois.com> wrote:

Good afternoon,

Attached is the June 25, 2018 faxed letter to Ms. Sargent from former counsel Jennifer Kim requesting a copy of the audio tape of the CR 35 examination as requested by the court.

On another note, we ask that Plaintiff identify what other witnesses besides Ms. Thompson may testify tomorrow afternoon.

Regards,

Heather



Heather M. Jensen
Partner | Seattle Managing Partner
Heather.Jensen@lewisbrisbois.com

T: 206.436.2026 F: 206.436.2030

1111 Third Avenue, Suite 2700, Seattle, WA 98101 | LewisBrisbois.com

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From: Vonda Sargent [mailto:sargentlaw9@gmail.com]
Sent: Monday, April 15, 2019 11:47 AM
To: Court, Young
Cc: Carol Farr; Jensen, Heather
Subject: [EXT] Re: Trial 4/15 -- Henderson v. Thompson | 17-2-11811-7 SEA

External Email

Attached are the jury instructions, cited and uncited, in Word.

Also attached is the case Miller v Kenny, with a longer explanation of why the conscious of the community may be used in closing argument.

Thanks for this opportunity.

Carol Farr

On Fri, Apr 12, 2019 at 4:40 PM Vonda Sargent <sargentlaw9@gmail.com> wrote:

Attached please find Plaintiff's CR 60 motion, it will be filed Monday am.

On Wed, Mar 27, 2019 at 3:12 PM Court, Young <Young.Court@kingcounty.gov> wrote:

Good afternoon,

I want to confirm the length of the above-referenced trial. It was previously confirmed at five days, is this still accurate?

Thank you,

Jennifer McBeth

Bailiff to Judge Melinda J. Young

King County Superior Court

516 3rd Avenue Seattle, WA 98104

206-477-1361

<https://www.kingcounty.gov/courts/superior-court/directory/judges/young.aspx>

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Exhibit 4

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

JANELLE HENDERSON, an individual

Plaintiff,

vs.

ALICIA M. THOMPSON, an individual,

Defendant.

No. 17-2-11811-7 SEA

DECLARATION OF HEATHER M. JENSEN IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR AN EVIDENTIARY HEARING

I, HEATHER M. JENSEN, being of legal age, having personal knowledge of all facts contained herein, and being competent to testify thereof, under penalty of perjury under the laws of the State of Washington, declare and state as follows:

1. I am the attorney of record for Defendant Alicia M. Thompson in the above-captioned case.
2. Attached as Exhibit 1 is a true and correct copy of an email from the Court to all counsel on June 13, 2019 forwarding its communication with a juror.
3. Defense counsel has not attempted to contact any of the jurors after the trial except in the courtroom immediately following the conclusion of the trial. Defendant and her counsel have not retained or hired anyone to make contact with the jurors on our behalf.
4. No juror has contacted Defendant or her counsel regarding the case.

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5. Defense received service of this motion through King County E-Service which purported to include a document titled. "DECLARATION OF VONDA M. SARGENT RE EVIDENTIARY HEARING." However, the linked document served on defendant was a duplicate copy of the motion and not a supporting declaration. Defendant has not received any declaration supporting this motion.

DATED this 2nd day of August, 2019, at Seattle, Washington.

s/ Heather M. Jensen
Heather M. Jensen

Exhibit 1

Platvoet, Logan

Subject: Correspondence -- Henderson v. Thompson

From: Court, Young [mailto:Young.Court@kingcounty.gov]
Sent: Thursday, June 13, 2019 11:03 AM
To: Vonda Sargent; Carol Farr; Jensen, Heather; Demaree Macklin, Sarah
Subject: [EXT] Correspondence -- Henderson v. Thompson

Good morning counsel,

We received the email below from a juror. I'm passing it along, as well as my response, for your information.

Best regards,

Jennifer McBeth

Bailiff to Judge Melinda J. Young
King County Superior Court
516 3rd Avenue Seattle, WA 98104
206-477-1361

<https://www.kingcounty.gov/courts/superior-court/directory/judges/young.aspx>

IMPORTANT:

In order to avoid inappropriate ex parte contact, you are hereby directed to forward this communication to all other parties not already copied on this e-mail.

Any communications with the Court, other than questions regarding scheduling, pretrial management, or emergent issues, shall be done in writing and filed with the Clerk of the Court. The bailiff **shall not** be included in communications regarding issues that are not administrative in nature.

Working copies shall be submitted to the Court pursuant to local court rules. The court does not accept working copies via email, absent prior authorization. Judge Young's court is paperless. Please submit working copies using the Clerk's Office e-working copies service, or deliver the working copies on a flash drive or CD to the Judges' Mailroom, C-203, with Judge Young's name and the case information clearly marked.

From: Court, Young
Sent: Thursday, June 13, 2019 11:02 AM
To: 'Jacob Knightley' <jacob.knightley@live.com>
Subject: RE: Henderson V Thompson - Concering Call

Hi Jacob,

The court would not and did not provide your contact information to counsel, but the names and cities of residence of all prospective jurors are provided to the attorneys as part of the jury selection process. While it is uncommon for an attorney to contact you after trial, it is not prohibited. As stated after the verdict, it remains up to your discretion and it is your choice whether you wish to talk about the case at all.

Thanks very much for bringing this to our attention.

Best regards,

Jennifer McBeth

Bailiff to Judge Melinda J. Young
King County Superior Court
516 3rd Avenue Seattle, WA 98104
206-477-1361

<https://www.kingcounty.gov/courts/superior-court/directory/judges/young.aspx>

IMPORTANT:

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Working copies shall be submitted to the Court pursuant to local court rules. The court does not accept working copies via email, absent prior authorization. Judge Young's court is paperless. Please submit working copies using the Clerk's Office e-working copies service, or deliver the working copies on a flash drive or CD to the Judges' Mailroom, C-203, with Judge Young's name and the case information clearly marked.

From: Jacob Knightley <jacob.knightley@live.com>

Sent: Thursday, June 13, 2019 9:20 AM

To: Court, Young <Young.Court@kingcounty.gov>

Subject: Henderson V Thompson - Concering Call

[EXTERNAL Email Notice] External communication is important to us. Be cautious of phishing attempts. Do not click or open suspicious links or attachments.

Hi Judge Young,

I was a juror on your most recent case regarding Henderson V Thompson. I just received a phone call from a Private Investigator, on behalf of Vonda Sargent, asking questions related to the case and our "experience". I was taken off guard and declined to comment, but wanted to let you know as I'm not sure if this is normal behavior or not. My understanding was that they could only ask us questions within the court room and could not leverage our contact information.

Thanks!

Jacob Knightley

Jacob.Knightley@live.com

Exhibit 5

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

JANELLE HENDERSON, an individual,

Plaintiff,

vs.

ALICIA M. THOMPSON, an individual,

Defendant.

No. 17-2-11811-7 SEA

DEFENDANT’S OPPOSITION TO
PLAINTIFF’S MOTION FOR AN
EVIDENTIARY HEARING

I. RELIEF REQUESTED

Plaintiff essentially asks this Court reconsider its decision in denying Plaintiff’s motion for a new trial by seeking an evidentiary hearing based purely on an unsupported claim of potential of juror bias. Plaintiff relies on the decision in *State v. Berhe*, decided only two weeks ago, to request the exceptional procedure of an evidentiary hearing to investigate jury deliberations based on her speculation that the verdict may have been based on racial prejudice.¹ But the *Behre* decision does not call for the exceptional relief requested by Plaintiff; the decision supports the Court’s denial of Plaintiff’s initial motion for a new trial without an evidentiary hearing and requires the Court to reject Plaintiff’s latest attempt to undermine the sound decision of the jury. Plaintiff is displeased with the outcome of the trial, however, her displeasure with the verdict amount does not permit her or this Court to invalidate the jury’s determination when there is no evidence that racial bias played a role in the verdict, particularly in light of the weight

¹ *State v. Berhe*, No. 95920-0 (July 18, 2019).

1 of the evidence in support of the verdict.

2 **II. STATEMENT OF FACTS**

3 Following a seven day trial the jury awarded Plaintiff \$9,200 in general damages
4 following a motor vehicle accident.²

5 On June 13, 2019, the Court contacted the parties and forwarded an email it had received
6 from a juror following the conclusion of the trial. The juror wrote:

7 I just received a phone call from a Private Investigator, on behalf of Vonda
8 Sargent [Plaintiff’s counsel], asking questions related to the case and our
9 "experience". I was taken off guard and declined to comment, but wanted to let
10 you know as I'm not sure if this is normal behavior or not. My understanding was
that they could only ask us questions within the court room and could not leverage
our contact information.³

11 The Court’s bailiff responded to the juror, assuring him that the Court did not provide his contact
12 information to either party, although, some of his demographic information was given to the
13 parties as part of *voir dire*.⁴ Additionally, she wrote, “[w]hile it is uncommon for an attorney to
14 contact you after trial, it is not prohibited. As stated after the verdict, it remains up to your
15 discretion and it is your choice whether you wish to talk about the case at all.”⁵ Defense counsel
16 has not attempted to contact any juror after trial other than to make themselves available to the
17 jury in the courtroom immediately following the verdict to the extent any juror wanted to discuss
18 the case,⁶ nor have they hired any agents to do so.⁷ Additionally, no juror has reached out to
19 defense counsel to discuss the trial.⁸

20 Plaintiff then moved for a new trial or in the alternative an additur, arguing in part that the
21 verdict was so low that it could only have been based on “passion or prejudice” by the jury.⁹
22 Specifically, Plaintiff argued that the verdict amount was evidence of the juror’s implicit racial
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24 ² Dkt. 246.

25 ³ Heather M. Jensen Declaration (“Jensen Decl.”), Ex. 1 at 3.

26 ⁴ *Id.* at 2.

27 ⁵ *Id.*

⁶ Jensen Decl. at ¶3.

⁷ *Id.*

⁸ *Id.* at ¶4.

⁹ Dkt. 250.

1 biases against Plaintiff.¹⁰ The Court denied Plaintiff’s motion in its entirety.¹¹ Recognizing that
2 implicit biases exist, the Court held that the mere possibility of implicit bias is not enough to
3 order a new trial or additur.¹² Specifically, the Court distinguishing the conduct of the defense
4 and the jurors in this case from that of counsel in *State v. Monday*, 171 Wn.2d 667 (2011), noting
5 that unlike the conduct in *Monday* the conduct Plaintiff complained of in this case was “tied to
6 the evidence...rather than being raised as a racist dog whistle with no basis in the testimony.”¹³
7 The Court concluded that, “in the absence of specific evidence of impermissible racial
8 motivations by the jury, or misconduct by defense counsel, the court declines to use the
9 possibility of implicit racial bias to overturn the jury’s verdict...”¹⁴

10 Notably absent from Plaintiff’s motion for a new trial was any request for an evidentiary
11 hearing into the allegations of the racial bias. Similarly absent from that motion or this motion is
12 any declaration from any juror suggesting juror misconduct or that the amount of the verdict was
13 the result of racial bias. Additionally, while Plaintiff’s filing included a document that was titled,
14 “DECLARATION OF VONDA M. SARGENT RE EVIDENTIARY HEARING” the document
15 served on Defendant was a duplicate copy of the motion.¹⁵ Defendant has not received any
16 declaration from Ms. Sargent in support of this motion.¹⁶

17 **III. STATEMENT OF ISSUE**

18 Should the Court deny Plaintiff’s late request for an evidentiary hearing when there was
19 no evidence of any misconduct, case law does not require an evidentiary hearing, and *Behre* is
distinguishable from this case?

20 **IV. EVIDENCE RELIED UPON**

21 Defendant relies upon the pleadings and files already on record herein as well as the
22 Declaration of Heather M. Jensen and the exhibit attached thereto.
23
24

25 ¹⁰ *Id.*

¹¹ Dkt. 268.

26 ¹² *Id.* at 3.

¹³ *Id.* at 3-4.

27 ¹⁴ *Id.* at 5.

¹⁵ Jensen Decl. at ¶5.

¹⁶ *Id.*

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V. ARGUMENT

After unsuccessfully moving for a new trial, Plaintiff now seeks to invalidate jury verdict and the Court’s order denying a new trial or additur by requesting an evidentiary hearing based on *State v. Behre*. But a close reading of *Behre* reveals that this Court properly exercised its discretion to deny Plaintiff’s motion and that no evidentiary hearing is called for now because: (1) *Behre* concerned the constitutional rights afforded a criminal defendant whereas this case concerns a civil dispute, (2) Plaintiff fails to support her claim of misconduct with any competent evidence, and (3) evidentiary hearings are reserved for exceptional circumstances, not present here.

A. Overview of *State v. Behre*

Plaintiff relies exclusively on the decision in *State v. Behre* in support of her argument that she is entitled to an evidentiary hearing based on her unsupported allegation of juror misconduct via racial bias.

Behre, an African-American, was arrested and tried for first degree murder and first degree assault following a shooting in 2013.¹⁷ A jury of 13 was selected, including juror 6 who was the only African-American juror selected.¹⁸ Berhe was found guilty by a unanimous jury of all charged offenses.¹⁹ The jury was polled and all jurors affirmed that the verdict was their individual verdict and the verdict of the jury—including juror 6.²⁰

The day after the verdict was announced, juror 6 independently contacted the court and defense counsel to express concerns about her treatment as a juror, the rationale for her ultimate guilty vote, and concerns about other jurors’ potential racial bias.²¹ Ultimately, Behre moved for a new trial based on juror misconduct on the basis of an affidavit signed by juror 6 after the court sent a letter to the jurors informing them that counsel wished to discuss the trial with them and

¹⁷ *State v. Berhe*, No. 95920-0 (July 18, 2019) at 2.

¹⁸ *Id.* at 3.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 4.

1 permitted such discussions to occur.²² Juror 6 stated that she did not agree with the verdict of the
2 jury but felt “emotionally and mentally exhausted from the personal and implicit race-based
3 derision from other jurors.”²³ Juror 6 provided examples of derision from the other jurors
4 including being mocked as “stupid” and “illogical” for dissenting in the vote.²⁴ Defense argued
5 that while other jurors also expressed doubt as to Defendant’s guilty, only juror 6 who like
6 defendant was African-American, experienced backlash for her opposition.²⁵ Defense
7 specifically requested an evidentiary hearing in his motion for a new trial to determine if any
8 juror misconduct occurred.²⁶

9 In response to the motion, the State filed a response supported by six declarations from
10 other jurors disputing any racially motivated action by the jurors.²⁷ The declarations each
11 included responses by the jurors to two questions posed by the Prosecution: “(1) Did you
12 personally do anything to Juror #6 which was motivated by racial bias during deliberations? and
13 (2) Did you observe any other juror do anything to Juror #6 which appeared to be motivated by
14 racial bias during deliberations?”²⁸ The Washington Supreme Court noted that all jurors
15 predictably denied observing or doing anything motivated by racial bias.²⁹ Relying solely on the
16 written declarations by the jury, the trial court found that the only evidence supporting juror 6’s
17 subjective feelings that she was attacked while on jury was her declaration and likewise the only
18 evidence of racial bias was juror 6’s declaration which was refuted by the other jurors’
19 declarations.³⁰ The court concluded that Behre “failed to make a prima facie showing of juror
20 misconduct warranting an evidentiary hearing” and, therefore, denying the request for a hearing
21 and motion for a new trial. ³¹

22
23 ²² *Id.* at 5-6.

24 ²³ *Id.* at 7.

25 ²⁴ *Id.* at 7-8.

26 ²⁵ *Id.* at 7.

27 ²⁶ *Id.* at 6.

28 ²⁷ *Id.* at 8-9.

29 ²⁸ *Id.*

30 ²⁹ *Id.* at 9.

31 ³⁰ *Id.* at 9-10.

³¹ *Id.* at 10.

1 The court of appeals affirmed the trial court’s decision and the Supreme Court reversed.³²
2 In doing so, the Court noted, “[i]t is essential to ensure that the jurors are not tainted by improper
3 questioning that is likely to elicit defensive responses and impede the fact-finding process. It is
4 also essential that before deciding whether to hold an evidentiary hearing, courts thoroughly
5 consider the evidence and conduct further inquiry if there is a possibility that racial bias was a
6 factor in the verdict.”³³ The court noted that secret jury deliberations are central to our jury
7 system and protected by the no-impeachment rule except “in cases of juror bias so extreme that,
8 almost by definition, the jury trial right has been abridged.”³⁴

9 The Court confirmed that Washington has developed a process for addressing motions for
10 a new trial based on allegations of racial bias of a juror.³⁵ Relying on *State v. Jackson*, the Court
11 endorsed that when a juror signs an affidavit after the trial alleging that jurors used racially
12 motivated terms and comments during deliberations, that ““create[s] a clear inference of racial
13 bias”” and ““a valid issue of juror misconduct.””³⁶ In such a case, ““as a matter of due process,
14 the trial court should... conduct[] an evidentiary hearing before ruling on [a] motion for a new
15 trial.”” The *Behre* Court reaffirmed the holding in *Jackson*, that a court is required to hold an
16 evidentiary hearing before ruling on a motion for a new trial when “the moving party has made a
17 prima facie showing of [racial] bias.”³⁷

18 The Court then expanded on *Jackson*, addressing the specific needs to address racial,
19 including implicit racial bias. The Court noted that investigations into potential biases must be
20 conducted on the record as “[i]t is far too easy for counsel...to taint the jurors and impede the
21 fact-finding process.”³⁸ The Court held that a trial court must determine “whether an objective
22 observer...could view race as a factor in the verdict. If there is a prima facie showing that the
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25 ³² *Id.* at 2, 10.

26 ³³ *Id.* at 12.

27 ³⁴ *Id.* at 12-13.

³⁵ *Id.* at 15.

³⁶ *Id.*; *State v. Jackson*, 75 Wn.App.537,879P.2d307(1994), review denied,126 Wn.2d 1003,891 P.2d 37(1995).

³⁷ *Id.* at 16.

³⁸ *Id.* at 17.

1 answer is yes, then the court must hold an evidentiary hearing.”³⁹ The Court noted that the trial
2 court must examine the evidence to determine if race was a factor in the verdict and if the court
3 is unsure after reviewing the evidence *Behre* suggests, “asking the juror making the allegation to
4 provide more information or to clarify ambiguous statements.”⁴⁰ Notably, the Court did not hold
5 that a prima facie case for juror misconduct had been established in *Behre*, rather, it held, “that
6 the evidence in the record is at least sufficient to require further inquiry.”⁴¹ The Court noted that
7 it was a permissible inference that the conduct described in juror 6’s declaration evidenced
8 implicit bias and found the trial court erred in not investigating that further.⁴²

9 **B. *Behre* Does not Support an Evidentiary Hearing in this Case**

10 As an initial matter, Plaintiff did not request an evidentiary hearing at the time of her
11 motion for a new trial. *Behre* was decided on July 18, 2019 and this Court denied Plaintiff’s
12 motion for a new hearing on July 16. Accordingly, the Court could not have erred in denying
13 Plaintiff’s motion without an evidentiary hearing when none was request and before the ruling in
14 *Behre*. Defendant questions whether retroactively *Behre* applies to this case, but nonetheless,
15 addresses the merits below.

16 **1) A Criminal Defendant is Afforded Different Rights than a Civil Plaintiff**

17 *Behre* is distinguished from this matter as a procedural matter. *Behre* was a criminal
18 defendant whereas this case is a civil matter. A criminal defendant's right to an impartial jury is
19 guaranteed by article I, section 22 of the Washington Constitution and the Sixth Amendment to
20 the United States Constitution,⁴³ whereas the Washington Constitution simply guarantees civil
21 litigants a right to trial by a jury.⁴⁴ Similarly, a criminal defendant’s rights related to his or her
22 trial impact his or her constitutional rights to life and liberty. By comparison, a litigant’s rights in
23 a civil case, “where life and liberty are not at issue, militate in favor of a standard that more
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25 ³⁹ *Id.* at 20-21.

26 ⁴⁰ *Id.* at 23.

27 ⁴¹ *Id.* at 25.

⁴² *Id.* at 26.

⁴³ *State v. Munzanreder*, 199 Wn. App. 162, 174, 398 P.3d 1160, review denied, 189 Wn.2d 1027 (2017).

⁴⁴ Wash. Const. Art. I, § 21.

1 generally upholds trial court decisions.”⁴⁵ On this basis, the holding in *Behre* should not be
2 extended to this civil matter.

3 **2) Plaintiff Has Not Supported Her Claim of Misconduct with Evidence**

4 If this Court is inclined to consider the standard outlined in *Behre* in the context of a civil
5 lawsuit, the case still does not require a finding that further investigation, such as an evidentiary
6 hearing, is necessary. The facts in *Behre* and the cases it relies on, differ substantially from the
7 facts in this case. Most striking is that in both *Behre*, and *Jackson*, a juror stepped forward to
8 inform a party and/or the court of potential misconduct. That has not occurred here. Despite
9 Plaintiff contacting jurors as indicated by the juror’s email to the Court,⁴⁶ Plaintiff has not
10 produced a single declaration from a juror supporting her speculation that the jury engaged in
11 misconduct or that the verdict was the product of racial bias. Like Defendant Thompson and the
12 Court, Plaintiff was not in the jury room during deliberations and has no personal knowledge of
13 any statements or conduct within that room. Plaintiff has not made a prima facie showing of
14 misconduct or racial bias because she has presented no evidence corroborating her theory that
15 misconduct occurred. Rather, Plaintiff relies exclusively on self-serving conclusions and
16 theories that do not rise to a level of possible juror misconduct.

17 If Plaintiff had received information of potential juror misconduct under *Behre*, she
18 would have been required to immediately inform the Court to allow it to investigate that claim.
19 No such evidence from a juror exists. Rather, we know Plaintiff’s counsel contacted jurors,
20 presumably to develop evidence in support of her speculation that the jury verdict was the result
21 of passion or prejudice rather than the evidence.⁴⁷ Despite these efforts, Plaintiff has not
22 uncovered any information that would prompt additional investigation into deliberations or the
23 verdict by the Court. And in the complete absence of evidence that the verdict was based on
24 racial bias, an evidentiary hearing is unnecessary and not required by *Behre*.

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27 ⁴⁵ *Alcoa v. Aetna Cas. & Sur.*, 140 Wn.2d 517, 539, 998 P.2d 856 (2000).

⁴⁶ Jensen Decl. Ex 1.

⁴⁷ *Id.*

1 **3) Evidentiary Hearings are Discretionary and Reserved for Exceptional**
2 **Circumstances**

3 In the absence of any declaration from a juror supporting Plaintiff’s contention that racial
4 bias impacted the verdict, the Court was well within its discretion to deny Plaintiff’s motion for a
5 new trial without an evidentiary hearing. Further, Plaintiff has introduced no new evidence to
6 support a hearing at this time. Only when the moving party makes a prima facie showing of
7 racial bias is the court called to investigate the claim and potentially order an evidentiary hearing
8 into the matter under *Behre*. Here, Plaintiff merely supplies the Court with a laundry list of
9 “issues” she believes have the potential for influencing the jurors’ implicit bias.⁴⁸
10 Notwithstanding the fact that most of these allegations are demonstrably false by a review of the
11 record (i.e. “falsely claim[ing] that Ms. Henderson had an inappropriate relationship with her
12 doctor,” “exaggerating and dramatically mispronouncing” Schontel Delaney’s name,
13 “dramatically draw[ing] out the pronunciation of the name of ‘Kanika,’” suggestion that the
14 “African-American female witnesses” colluded; asserting that Defendant was intimidated by
15 Plaintiff’s counsel; and that the jurors requested that Ms. Henderson be removed from the
16 courtroom before they exited),⁴⁹ these “issues” are nothing more than Plaintiff’s own self-serving
17 assertions – indeed, they are directly disproven by the transcript of the closing argument made
18 part of the record by the defense.

19 Without evidence, and as the Court noted in its denial of Plaintiff’s motion for a new trial,
20 Plaintiff’s theories amount to nothing more than a possibility for implicit bias.⁵⁰ A possibility of
21 implicit bias is ever-present in our society. But that fact alone is not enough to trigger an
22 evidentiary hearing under *Behre* – it cannot be enough, otherwise, any civil litigant of color
23 displeased with the outcome of his or her trial could call for an evidentiary hearing regardless of
24 merit.

25 “A trial court has significant discretion to determine what investigation is necessary on a

26 _____
27 ⁴⁸ Dkt. 271.

⁴⁹ See Dkt. 255; 268.

⁵⁰ Dkt. 268

1 claim of juror misconduct.”⁵¹ The Court properly exercised that discretion here. Plaintiff’s
2 claims are primarily based on the conduct and actions of defense counsel, which she asserts
3 triggered the juror’s implicit biases. Before exercising her discretion, the Court requested
4 briefing from both parties, heard oral argument, and listened to the audio of the closing
5 argument. The Court properly found that counsel’s arguments were tied to the evidence and
6 properly concluded, “in the absence of specific evidence of impermissible racial motivations by
7 the jury, or misconduct by defense counsel, the court declines to use the possibility of implicit
8 racial bias to overturn the jury’s verdict...”⁵² Plaintiff’s motion for an evidentiary hearing has
9 not introduced any new evidence suggesting the Court should reconsider its sound conclusion.
10 Rather, the procedure outlined in *Behre* is reserved for exceptional circumstances, those in which
11 a juror comes forward to announce that misconduct or suspected misconduct has occurred.
12 *Behre* does not suggest that following each trial the court should investigate the rationale behind
13 a verdict when one party is disappointed with the outcome and alleges without evidence that it
14 must be the result of bias. To permit a hearing here as Plaintiff requests would impermissibly
15 encroach on the sanctity of jury deliberations and would not “‘promote full and vigorous
16 discussion’ during jury deliberations.”⁵³ It would also work against the finality of verdicts.

17 **VI. CONCLUSION**

18 There is no basis to conduct an evidentiary hearing in this matter because no evidence of
19 misconduct in the form of racial bias has been presented. Therefore, Plaintiff’s motion should be
20 denied.

21 I certify that this memorandum contains 3,436 words, in compliance with the Local Civil
22 Rules.
23
24
25

26 ⁵¹ *State v. Berhe*, No. 95920-0 (July 18, 2019) at 16 (quoting *Turner v. Stime*, 153 Wn.App.581, 587, 222 P.3d
1243(2009)).

27 ⁵² Dkt. 268 at 5.

⁵³ *State v. Berhe*, No. 95920-0 (July 18, 2019) at 11(quoting *Pena-Rodriguez v. Colorado*, 580 U.S.____, 137 S.Ct.855,
865, 197 L.Ed.2d 107 (2017)).

1 DATED this 2nd day of August, 2019

LEWIS BRISBOIS BISGAARD & SMITH LLP

2

3

By: s/ Heather M. Jensen

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Heather M. Jensen, WA Bar No. 29635

Sarah D. Macklin, WA Bar No. 49624

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1111 Third Avenue, Suite 2700

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Seattle, Washington 98101

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Attorneys for Defendant Alicia M. Thompson

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1 **DECLARATION OF SERVICE**

2 I hereby declare under penalty of perjury under the laws of the State of Washington that I
3 caused a true and correct copy of the foregoing DEFENDANT’S OPPOSITION TO
4 PLAINTIFF’S MOTION FOR AN EVIDENTIARY HEARING, DECLARATION OF
5 HEATHER M. JENSEN, and PROPOSED ORDER to be served via the methods below on this
6
7 2nd day of August, 2019 on the following counsel/party of record:

<p>8 Vonda M. Sargent, WSBA # 24552 9 Law Offices of Vonda M. Sargent 10 119 1st Avenue S., Suite 500 11 Seattle, WA 98104 12 <i>Attorney for Plaintiff</i></p>	<p><input checked="" type="checkbox"/> via U.S. Mail, first class, postage prepaid <input type="checkbox"/> via Legal Messenger Hand Delivery <input type="checkbox"/> via Facsimile: (206) 682-3002 <input checked="" type="checkbox"/> King County E-Service <input checked="" type="checkbox"/> via E-mail: sisterlaw@me.com carolfarr@gmail.com</p>
<p>13 C. Steven Fury, WSBA # 8896 14 FURY DUARTE, PS 15 1606 148th Ave SE, Suite 200 16 Bellevue, WA 98007 17 <i>Attorney for Plaintiff</i></p>	<p><input checked="" type="checkbox"/> via U.S. Mail, first class, postage prepaid <input type="checkbox"/> via Legal Messenger Hand Delivery <input type="checkbox"/> via Facsimile: (425) 643-2606 <input checked="" type="checkbox"/> King County E-Service <input checked="" type="checkbox"/> via E-mail: steve@furyduarte.com</p>

18 Dated this 2nd day of August, 2019 at Seattle, Washington.

19 *s/ Logan Platvoet*

20 _____
21 Logan Platvoet

LEWIS BRISBOIS BISGAARD & SMITH LLP

December 23, 2019 - 4:15 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 97672-4
Appellate Court Case Title: Janelle Henderson v. Alicia M. Thompson

The following documents have been uploaded:

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A copy of the uploaded files will be sent to:

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