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SUPREME COURT
STATE OF WASHINGTON
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No. 101227-6

SUPREME COURT
OF THE STATE OF WASHINGTON

MARJORIE CARROLL,
as Personal
Representative of the
Estate of LAWRENCE W.
CARROLL, Deceased,

Respondent,

and

GEORGE KIM; ERIK
KARST; THOMAS
OWENS,

Co-Respondents,

v.

AKEBONO BRAKE
CORPORATION,
et al.,

Petitioners.

RAP 10.8(c) RESPONSE
TO STATEMENT OF
ADDITIONAL
AUTHORITIES

This Court’s decision in *Henderson v. Thompson*, No. 97672-4 (Oct. 20, 2022) (cited as “Slip Op.”), confirms the Court of Appeals properly held the trial court erred by “fail[ing] to consider as a lesser sanction an adverse inference jury instruction that would have cured any prejudice resulting from the alleged discovery violations.” (Op. 1)

Nissan’s claim that *Henderson’s* facts are “far less egregious” than those here ignores that the *Henderson* defense withheld surveillance video footage and notes. The violation deprived the plaintiff of the ability to show that the 17 minutes of disclosed video “were not representative of” her injuries. *Henderson*, Slip Op. 30.

No analogous prejudice befell Nissan, which located the autopsy report in 2019. (Op. 4; CP 879) Had it been disclosed earlier, the report would not have given Nissan “any additional material [benefiting] its ability to prepare for trial.” (Op. 50)

Moreover, unlike the plaintiff in *Henderson*, who took “painstaking efforts to obtain” the withheld evidence “using multiple mechanisms provided in the civil rules,” including a subpoena and a motion to compel, Slip Op. 9, 27-28, 32, Nissan never notified the trial court or opposing counsel about the autopsy report until it filed its motion to strike just before trial. Nissan’s silence was “an apparent tactical decision to self-create prejudice” and guarantee dismissal. Slip Op. 52.

Notably, the *Henderson* Court endorsed the use of an adverse inference instruction as a sanction for missing evidence. Slip Op. 26-27. The Court of Appeals’ holding here, that the trial court committed reversible error in failing to consider such an instruction (Op. 52, n.36), is entirely consistent with *Henderson*, which remanded for sanctions because the trial court imposed no sanctions *at all*.

Finally, defense counsel's discovery misconduct in *Henderson* was consistent with "a pattern of underestimating and undervaluing the position of both Henderson and her counsel." Slip. Op. 29. Defense counsel engaged in "dog whistle" racism and manifested implicit bias throughout the proceedings. Slip. Op. 16. Nissan's contention that what occurred here is even more "egregious" misses and trivializes the entire point of the *Henderson* decision.

I certify that this response is in 14-point Georgia font and contains 345 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 28th day of October, 2022.

SMITH GOODFRIEND, P.S.

By: /s/ Howard M. Goodfriend
Howard M. Goodfriend
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SMITH GOODFRIEND, PS

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v.

AKEBONO BRAKE
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DECLARATION OF
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The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 28, 2022, I arranged for service of the previously filed RAP 10.8(c) Response to Statement of Additional Authorities, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 28th day of
October, 2022.

/s/ Eliana C. Belenky
Eliana C. Belenky

SMITH GOODFRIEND, PS

October 28, 2022 - 12:46 PM

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