

FILED
SUPREME COURT
STATE OF WASHINGTON
8/12/2020 4:02 PM
BY SUSAN L. CARLSON
CLERK

No. 97672-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JANELLE HENDERSON,

Appellant,

v.

ALICIA THOMPSON,

Respondent.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Melinda Young

BRIEF OF APPELLANT

Vonda M. Sargent
Carol Farr
The Law Offices of Vonda M. Sargent
119 First Ave. S. Suite 500
Seattle, WA 98104
206-838-4970
sisterlaw@me.com
carolfarr@gmail.com
Attorneys for Appellant

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I. INTRODUCTION

This Court is committed to dismantling systemic racism. This Court recognizes that systemic racial injustice against black Americans is the collective product of each of our individual actions – every action, every day. When racial bias appears in a courtroom action must be taken to pull it out at its roots so the seeds cannot flourish and deny litigants equal justice. In this case, the seeds were sewn at the trial court level where racial bias flourished. This case presents an opportunity for this Court to address systemic and implicit racial bias against black Americans in the civil justice system.

When a prosecutor appeals to racial bias in a way that undermines a party's credibility the court vacates the verdict unless it appears beyond a reasonable doubt that the misconduct did not affect the jury's verdict.¹ In this civil case, the court held:

“The court cannot require attorneys to refrain from using language that is tied to the evidence in the case, even if in some contexts the language has racial overtones.”

CP 181:2-4. The trial court acknowledged defendant Thompson used language with racial overtones in closing yet denied Janelle Henderson a new trial. The trial court failed to acknowledge that such language reflects

¹ *State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 551 (2011).

implicit bias which is insidious and can trigger a jury without its awareness. This Court is asked to reverse the trial court and grant Henderson a new trial, with a new judge due to attorney misconduct and discrimination.

Henderson is a black American woman with Tourette's Syndrome, suing a white woman who shook and trembled in the jury's presence, in a trial with no black jurors. Henderson moved for a new trial after Thompson's attorney closed with racial tropes which have been historically used to demean and degrade black American women. GR 37 (Appendix A). The jurors reached a wholly inadequate verdict. After reaching the tainted verdict, the jury requested the trial court to remove Henderson from the courtroom. The trial court judge enabled the on-going racially motivated conduct by ordering Henderson to be removed from the courtroom before they jury departed.

The trial court's bias is shown its improper removal of Henderson from the courtroom; its improper denial of misconduct after a racially charged closing; its improper denial of a new trial; and its improper denial of an evidentiary hearing as required by this Court in *Berhe. State v. Berhe*, 193 Wn.2d 647, 665, 444 P.3d 1172 (2019). The trial court's bias during trial is evidenced in a series of rulings which are unreasonable. The trial court's rulings include the following examples: 1) modifying then denying the spoliation instruction without a legal basis; 2) acknowledging discovery

abuse then failing to sanction Thompson; 3) prejudicially limiting Henderson from inquiring about discovery abuse; 4) granting Thompson's request for disclosure of Henderson's rebuttal; 5) admonishing Henderson's attorney, cutting her off and reprimanding her for arguing when she tried to respond to an objection.

The trial court erred by failing to sanction Thompson contrary to *Fisons* and by rewarding Thompson for withholding discovery.² The trial court erred by failing to apply the proper legal standard for granting a new trial. The trial court erred by failing to apply the proper legal standard for granting a new trial. The trial court erred by failing to conduct an evidentiary hearing pursuant to *Berhe*. 192 Wn.2d at 665.

II. ASSIGNMENTS OF ERROR AND ISSUES RAISED

1. Whether the trial court erred by denying a new trial after Thompson appealed to racial bias in closing.
2. Whether the trial court erred by denying the evidentiary hearing mandated by *Berhe* where there was *prima facie* evidence of appeals to racial bias.
3. Whether the trial court erred by reversing the spoliation instruction and by failing to sanction Thompson for discovery abuses.
4. Whether the trial court erred by acquiescing to the jurors' request to remove Henderson from the courtroom.

² *Washington State Physician Insurance Exchange & Association, v. Fisons*, 122 Wn.2d 299, 858 P.2d 1054 (1993).

III. STATEMENT OF THE CASE

A. This is an Auto Collision Case

Alicia Thompson testified she rear-ended Janelle Henderson travelling 40 mph. Henderson has Tourette's Syndrome. The whiplash injury aggravated her Tourette's symptoms to the point her pain and symptoms were persistently debilitating. Prior to the collision, Henderson had obtained Bachelor's Degrees in Apparel Design and Merchandising and a minor in business and was employed. She continued her education by completing a degree in Web Development and Web Design. RP 553:1-15. She was socially engaged, loved to dance, went to movies, to the gym, went bike-riding and attended the opera. RP 482:1-6, 498:3-16, 552:17-18, She had been able to conceal her symptoms by explaining them as allergic reactions. RP 186:21-23, 481:14-18, 499: 5-25. After the collision, her neck was in constant pain and her symptoms were exacerbated and debilitating. RP 188:15-25, 230:8-11, 348:4-19, 348:9-15, RP 476:13-14, 481:20, 482: 9-25, 983:1-9. 825:6-22. Her constant tics and vocalizing were severe to the point of becoming a public spectacle. RP 483:1-9. Despite admitting fault, Thompson offered nothing to settle, forcing Henderson to file suit.

B. Discovery Abuse and Spoliation Instruction

Trial began on April 15, 2019, went 2 days then continued on May 28, 2019, for 7 more days. RP 1-1244.

1. Thompson Withheld Discovery and Violated the Court Order Compelling Production

Thompson hired private investigators to surreptitiously watch, follow, and videotape Henderson. Thompson surveilled Henderson for 73.83 hours over a period of 13 months.³ CP 85, 289; RP 358-361. Thompson hired investigator Tyler Slaeker as her expert. CP 214-219. On 12/22/17, Henderson served Slaeker with a Subpoena Duces Tecum (“SDT”) seeking the entire investigative file. CP 221-225. Henderson deposed Slaeker on 1/18/18 where he produced no documents. CP 53-54. Slaeker testified he had surveilled Henderson for four hours on one day and recorded her for 1 hour. CP 39, 42. Thompson produced one 17-minute video clip from his one hour of recording. RP 1147:6-11. He testified that others had also surveilled Henderson. CP 39. Slaeker testified that in preparation for his deposition, he reviewed the report of the investigation (“Probe Report”), one 17-minute video clip and his notes. CP 40, 64, 67. This review took three hours. *Id.* He testified his notes were the basis for the report and he had given the notes to his employer. CP 34. Slaeker testified that Thompson directed him to withhold the report. CP 59-62.

³ Thompson produced the “Hours Calculator” showing surveillance for 78.83 hours 6/2014 through 3/2015. CP 85, 289.

During the deposition Slaeker located responsive documents on his phone and Thompson directed him to withhold the evidence.⁴ CP 62. On 2/7/18, Judge Halpert ordered Thompson to produce the notes.⁵ CP 1-2.

Thompson refused to produce the notes. But on 3/23/18, Thompson asserted “notes were not made.” CP 286; CP 82. Thompson refused to produce the “Probe Report,” claiming work product. CP 286. Henderson requested the names of the investigators who surveilled Henderson the rest of the 73.83 hours. Thompson refused to produce any names. RP 358-361. On five separate occasions Thompson said that “video recordings were made.” Her medical expert documented that Thompson provided “CDs from video surveillance.”⁶ CP 349, 357, 363; CP 72. Henderson filed a MIL to exclude Slaeker or for a spoliation instruction. CP 3, CP 15-20.

2. The Trial Court Granted Spoliation but Then Denied It Upon Receipt of an 11th Hour Report

On 4/15/19, the first day of trial, the trial court granted Henderson’s spoliation instruction. RP 55:20-21, CP 15-20. On 4/16/19, Thompson

4 Thompson’s attorney directed Slaeker to withhold his email despite that Thompson’s attorney did not represent Slaeker. CP 56-57.

5 “However, the notes taken by Tyler Slaeker on March 11, 2015 and given to Susan Wakeman to prepare her report shall be provided by March 1 2018 (See Depos. of Slaeker p.8, lines 9-12). Order, Judge Halpert, CP 1-2.

6 Thompson alleged that Slaeker took video “recordings” in a letter to plaintiff dated 12/4/17, in her witness disclosure of 12/4/17, in interrogatory answers on 12/7/17, in a letter dated 1/4/18, and in her the witness list of 1/16/18. CP 349, CP 357, CP 363, CP 72.

moved for reconsideration without legal basis and, contrary to CR 59. CP 92-100. On 5/6/19, the trial court modified the spoliation ruling to “reserved”. CP 102-103. The court acknowledged the destruction of evidence but was found it was “unclear when these notes were destroyed....” CP 103:9-10. The court found it “suspicious that no notes or documentation existed for almost 78 hours of surveillance.” CP 103:3-16. On 5/3/19, the court denied Thompson’s motion to prohibit reference to the missing Probe Report, ordering that Henderson may “cross examine Mr. Slaeker about the report and the failure to produce the report.” CP 237; 103:17-18. Ten days later, on 5/14/19, Thompson e-mailed a document alleged to be the “Probe Report” earlier designated work product. RP 157:16-19. This 11th hour document was dated 3/17/15, unverified and unsigned.⁷ RP 158:17-25, 159:1-2. The trial court accepted this “Probe Report” as genuine stating:

“I’m not going to allow some sort of fiction that says no, we never gave the report over or I never gave you the report or anything like that.”

The court then prohibited Henderson from asking why the report had not been produced, reversing its 5/3/19 order. RP 172:8-13; CP 103:17-18.

On 6/6/19, the trial court denied Henderson’s spoliation instruction

⁷ The 11th hour “report” had no names, or what the other investigators did, or where, or who asked for the report and who saw it

based on the 11th hour “Probe Report.” RP 1143–1147. The court ignored the discovery abuses that supported its original grant of the spoliation instruction, violations of CR 59, CR 26(g), and sanctions required by *Fisons*. CP 250-364. In its ruling, the trial court again found “notes were destroyed....” RP 1144:10. The court wrote:

“I find it deeply suspicious that there’s 78 hours of video surveillance and 17 minutes.... But I—I don’t find that it’s enough to show that it was intentionally destroyed in this case.”

RP 1147:6-11.⁸ The trial court thus acknowledged Thompson’s discovery abuses but failed to impose any sanction.

3. The Trial Court Required Henderson to Disclose her Rebuttal in Advance and Abide Other Rulings Not Required of Thompson

Thompson requested that Henderson disclose her rebuttal in advance. RP 1060:22-23. The trial court granted this request over Henderson’s objections saying: “I just want to be sure it is in rebuttal.” RP 1112:15. The trial court said to Henderson’s attorney: “I’m not here to call into question your – your—your honesty.” 1112:22-25. Yet the trial court forced Henderson to disclose her rebuttal before presenting it to Thompson. RP 1113:1-18.

⁸ Henderson provided a letter from Thompson, the primary witness disclosure, two amended witness disclosures that said video “recordings” were made and the expert neurologist doctor’s report which said that “CD’s” were available for viewing. CP 349, CP 357, CP 363, CP 72.

The trial court cut off and admonished Henderson's attorney when she tried to respond to an objection, directing counsel: "don't argue with me in front of the jury." RP 1230:20-25, RP 1231:1-7.

4. The Evidence Supports Henderson's Injuries

All of Henderson's witnesses testified that they noticed a marked increase in her Tourette's symptoms. Henderson testified that before the collision she could often explain her Tourette's symptoms as allergies. RP 489-507, RP 499:16-25. The collision injured her neck and back and left her with increased symptoms and unrelenting pain. RP 502:13-21; RP 538:10-19. Her lay witnesses, all but one black women, testified to a changed woman in unrelenting pain and an inability to function. RP 481, 482, 394-395, 516:7-12, 516:22-25, 348:14-17. The black witnesses were Ms. Kanika Green, Ms. Jolyn Campbell, a former King County DPA and Dr. Schontel Delaney. CP 479:4-7, 343:18-25.

Henderson's neurologist Dr. Vlcek testified that her symptoms were exacerbated by the collision. RP 476:13-14. He had been treating Henderson since she was 14 years old. RP 406:6, 409:7. Dr. Devine testified that because of the collision Henderson suffered injury in her upper back, neck, shoulders, thoracic spine, that her tics and jerks had "gotten much worse." RP 186: 12-25; RP 203:8-18. Dr. Devine had occasionally hired Henderson to help at his office. RP 203:14-19. Dr. Wall testified that

the collision caused Henderson neck and shoulder pain and escalated her Tourette's to the extent it was "debilitating." RP 825:6-10. Thompson's expert Dr. Rappaport testified: "I don't believe she's lying," "I don't believe she is a faker," "I don't believe she is malingering." RP 1065:22-25, 1075:22-23. Henderson asked for \$3.5M, calculated at \$250 per day for pain and suffering and the loss of enjoyment of her life. RP 1195:16-17.

5. Gaslighting Henderson

Defense expert Dr. Rappaport testified that Henderson was unwilling to provide any information during her examination but admitted under cross examination that he told Henderson within two minutes of the exam commencing that she did not have to tell them anything. RP 1001:3-14, 1010:10-11, 1013:11-25, 1014:7-10, 1014:24-25, RP 1015:1-10. On cross examination, Henderson's first response was she could not answer questions about her medical records because she had not seen them, some 1300 pages. RP 492:20-23, 492:24-25, 493:1, 899:17-19, 900-902, 882:1-10, 882:6-12, 896:5-6, 921:23-25, 923:1-4. She also testified she could not recall specific details about historical appointments with her neurologist or chiropractor. *Id.* Over Henderson's multiple objections, Thompson continued to ask questions in this vein. RP 897:25, 898:1-8, 899:3-14; 900:12-16. After a series of such questions, Henderson explained: "I feel like I'm on trial and I didn't do anything. I—I was driving and I got hit. So,

I feel like you're, like, putting me on trial for somebody else's—for somebody else hitting me." RP 892:10-13. Thompson continued asking Henderson about decades-old notes until the court finally put a stop to it. RP 900:15-25; 901-903; 905:9-18.

C. Thompson's Closing Was Rife with Racist Tropes

Thompson's closing included age-old racist tropes that portrayed Henderson and her attorney as angry and combative. She argued that the black witnesses were collusive and dishonest. RP 1194-1230. Thompson offered untrue statements and opinions that have historically been used to demean black American women. GR 37. *Id.* The most obvious statements follow:

- **Counsel argued that the sole reason they were there was because Henderson wanted \$3M.** RP 1195:13-17. This is false. Thompson made no offer thus forcing Henderson to trial. CP 194:15-20; 199:21, 192:1-3.
- **Counsel argued that Henderson was "combative," "confrontational," "interested in being combative," "combative" and "quite combative."** RP 1195:6-8, 1222:8-15; 1223:16-18. This was false: Henderson did not combat or fight anything.⁹ Her first answer was that she was unable to answer specific details about her voluminous medical records; IME Dr. Rappaport instructed her she did not have to answer their questions. RP 1013:17-19; 1014:23-25; 1015:1-14.

⁹ **Combative** means "marked by eagerness to fight to or contend." Merriam Webster, <https://www.merriam-webster.com/dictionary/combative>, © 2020 Merriam-Webster, Incorporated. **Confrontational** means the act of confronting, the facing especially in challenge. Merriam Webster, <https://www.merriam-webster.com/dictionary/confront>, © 2020 Merriam-Webster, Incorporated

- **Counsel compared Henderson’s “combative” demeanor to Thompson’s demeanor, claiming her to be “intimidated and emotional” and “rightly so.”** RP 1222:16-18. Thompson shook and trembled while the jury was present, and she did not testify she was intimidated or emotional. RP 354-372, 1115-1118.
- **Counsel argued that Henderson was “not interested in the truth,” and compared her to Thompson who she argued “told the truth,” and was “honest” providing “genuine and authentic testimony.”** RP 1222:8-19, RP 1223:1-7.
- **Counsel belittled Henderson’s answers to questions, asserting Henderson “refused” to provide information,** and compared her to Thompson whom she vouched for claiming she “told the truth” and was “being honest.” RP 1223:9-12; 1223:3-6.
- **Counsel dismissed all black witnesses as “inherently biased”** because they “used the exact same phrase life of the party...almost like someone had told them to say that.” RP 1212:10-14, 1216:15-17. There was no evidence to support this implication of collusion, dishonesty, and fraud. RP 1213:8-14, 391-404.
- **Counsel referred to Dr. Delaney as “Schontel” and “Ms. Delaney” in closing but called her Dr. Delaney during her deposition.** RP 911:20-21, 1211:15; 1211:21-22, 350:24.
- **Counsel insinuated that Henderson’s relationship with Dr. Devine was sexual,** that Dr. Devine “threw out the tidbit” that he had “more than a doctor-patient relationship” with Henderson, adding “not to imply anything untoward.” RP 1206:18-25.
- **Counsel suggested a lesser verdict due to Henderson’s disability:** “\$250 a day, that seems-that seems exceptional, frankly, when we’re talking about someone who was severely compromised before the accident.... That’s \$60,000 for a rear end accident. That’s a lot of money.”¹⁰

RP 1221:4-6, 16-18.

¹⁰ Thompson’s \$60,000 figure was based on \$250/day for 8 months. CP 1221:1-18.

D. The Jury Demanded Henderson's Removal

The jury found Thompson liable and that Henderson had been injured and returned a verdict of \$9,200, despite Thompson's argument for a verdict of \$60,000. CP 130, RP 1221:1-18. After the verdict, the trial court conferred with the jury. The judge reported to Henderson and her counsel that the jury requested Henderson leave the courtroom before they exited. CP 171-177. When Henderson and her counsel expressed dismay, the court ordered everyone other than counsel to leave the courtroom. *Id.* After everyone had exited, the bailiff opened the jury room door, stepped out and called out, "Is Ms. Henderson out of the courtroom?" CP 173; 177. There is no transcript of these proceedings, but these events are attested to by Henderson and three attorneys. CP 171-177. Henderson was embarrassed, felt discounted and disrespected. CP 176-177. Henderson's black female attorney was humiliated. CP 172-174. Thompson does not dispute the facts of Henderson's removal. CP 146-160; RP 1249-1264.

E. The Court Denied A New Trial and Denied the Evidentiary Hearing Required by *Berhe*¹¹

Henderson moved for a new trial or additur, alleging Thompson's closing relied on racist tropes that triggered the jury's implicit bias against black Americans, as evidenced by their inadequate verdict and request for

¹¹ *Berhe*, 193 Wn.2d at 665.

Henderson's removal from the courtroom. CP 135: 13-18, 138:11-14; RP 1251-1253. Henderson also alleged that the denial of the spoliation instruction was error under CR 59, CR 26(g) and *Fisons*.¹² CP 134-145, 161-168. Thompson responded with race-neutral explanations but offered no response to rebut the implicit bias in her statements. CP 148-149.

At the 7/10/19 hearing on the motion for a new trial, Henderson's new white male lawyer¹³ explained that "a black woman could not respond to the accusation of being an angry black woman without proving it." CP 1249:17-23. During the hearing, the trial court asked Mr. Fury's permission to interject. RP 1255:3. The trial court judge denied that removing Henderson was at the jury's request. She said, "it is much to my own personal dismay that it was taken as an offense by Ms. Henderson." RP 1255:10-11. Thompson did not dispute that it was the jury who requested Henderson's removal. RP 1254:20-25; 1255:1-2; 1249-1267; CP 146-160. Thompson argued that Henderson's the issue of racial bias was "repugnant." RP 1259:15-17.

The 7/17/2019 Order denying a new trial acknowledged the racial overtones in Thompson's closing. CP 181:2-3; 178-182. The trial court

12 *Washington State Physician Insurance Exchange & Association, v Fisons Corporation*, 122 Wn.2d 299, 342 -346 (1993).

13 Attorney C. Steven Fury appeared on this case after observing the trial.

found:

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.”

CP 182:3-6. The trial court accepted Thompson’s race-neutral explanations. CP 178:16-22; RP 1249-1267. For instance, the court reasoned it was “not unfair” to call Henderson “combative” when she was “uncomfortable” being cross examined. In contrast, the court found it was “not unfair” to call Thompson “intimidated” when she was “uncomfortable” testifying. CP 180:21-25. The trial court found it fair to say that Dr. Devine had “more than” a physician/patient relationship with Henderson but did not address the mention of “the tidbit” or “untoward.” CP 181:4-5. The court found calling Dr. Delaney “Schontel” or “Ms. Delaney” did not “necessarily invoke racial stereotypes.” CP 181:6-8. The court found each statement “tied to the evidence” and not misconduct. CP 181:17-22.

The trial court found no error in the denial of the spoliation instruction but provided no legal basis for the reversal of the initial order. CP 102-103, 134-145, 179-180. The court again found it “suspicious” there was no record of 73.8 hours of surveillance beyond a 17-minute clip, but found for the first time, no proof that the notes or video even existed, or that

they “were probably destroyed with a culpable state of mind.”¹⁴ CP 179:7-12; 179:14-16, 179:22-24. The court ignored its previous findings that the notes existed and had been destroyed; it ignored testimony of one hour of recording, and production of 17 minutes; it ignored evidence of CD’s of recordings sent to its IME experts; it ignored 3 hours of review.

The court found the appropriate “penalty” for Thompson’s “failure to turn over the report or otherwise explain what occurred in the other surveillance” footage was to allow Henderson to argue “**the defense was hiding something.**” CP 180:4-6, 178-182. The order denying a new trial does not address the juror’s request for Henderson’s removal or the court’s acquiescence.

The court denied Henderson’s motion for an evidentiary hearing finding Henderson “failed to show a *prima facie* case or any specific bias.” CP 187-190. “**If this court found that defense counsel’s arguments were racist and not tied to the evidence,** the court would conduct an evidentiary hearing to determine the facts, the scope, and the extent of the bias.” CP 189:15-18. Despite declarations from three lawyers who heard the court’s instructions, the court denied that it was the jury who requested Henderson’s removal from the courtroom, writing in a footnote that this was the court’s

¹⁴ The trial court had to ignore the 2/7/18 Order compelling production and the testimony of investigator Slaeker saying he reviewed the notes.

“practice” to remove litigants. CP 188:21-25. The court apologized to Henderson for the “misunderstanding” and “how the process made her feel.” CP 188 fn.1.

IV. SUMMARY OF ARGUMENT

The constitutional promise of an “impartial jury trial” commands jury indifference to race. If justice is not equal for all it is not justice.

State v. Monday, 171 Wn.2d 667, 680 257 P.3d 551 (2011).

This Court has recognized the impact of implicit and unconscious bias against black Americans. This Court has acknowledged that systemic racial injustice against black Americans is persistent and harmful.¹⁵ It has overturned criminal cases where race has impacted the trial finding the use of racial stereotypes to affect the outcome of a trial to be repugnant. *Monday*, 171 Wn.2d at 680. The Court has recognized “racialized policing and the overrepresentation of black Americans in every stage of our criminal and juvenile justice systems.” This Court must recognize that black Americans also access our civil justice system and acknowledge that the injustices faced by black Americans are just as dynamic in the civil courtroom. Racial bias is not bound by the nature of the proceeding but on the unconscious or implicit bias against black Americans. The devaluation

¹⁵ Letter to the Judiciary and the Legal Community of June 4, 3030, The Supreme Court of the State of Washington.

and degradation of black lives is as persistent in the civil justice system. To be wholly and fairly a part of our justice system, black litigants must be afforded equal justice regardless of the forum.

This case arose because Thompson negligently collided into Henderson's car while traveling 40mph. The issue was how badly Henderson was injured. Instead of Henderson's injuries being the focus of the trial, Thompson racialized it. Henderson was denied an impartial jury due to the introduction of racial stereotypes against black Americans. Thompson used suggestion, innuendo, and "racial overtones" to degrade Henderson, her black attorney and her black witnesses. An objective observer would find these triggered biases in the jurors' minds.¹⁶

The jury's bias is evidenced by the verdict which is so inadequate as can only indicate passion or prejudice. The jury's request to remove Henderson from the courtroom before they would exit punctuated that bias. The trial's court's bias is evidenced by the humiliating and demeaning removal of Henderson. Further, several in-trial rulings were so unreasonable and prejudicial to Henderson as could only be bias. For instance, the trial court's reversal of the spoliation instruction relieved

¹⁶ Due to social pressures, many who consciously hold racially biased views are unlikely to admit to doing so. Meanwhile, implicit racial bias exists at the unconscious level, where it can influence our decisions without our awareness. *State v. Berhe* 193 Wn.2d 647, 657 (2019).

Thompson of any sanction for her admitted discovery abuses, wholly contrary to the law, and rewarded Thompson for withholding material evidence. CR 26(g), *Washington State Physician Insurance Exchange & Association, v. Fisons*, 122 Wn.2d 299, 342-346, 858 P.2d 1054 (1993).

Additionally, the trial court ignored the very nature of implicit bias ruling:

“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...”

This is a textbook definition of implicit racism.¹⁷ CP 181:2-4. The trial court ignored the meaning of “implicit” and required overt evidence of bias:

“Clearly implicit bias and unconscious bias exist. It exists for the jury. It exists for the Court. It exists for attorneys. It exists. And I am familiar with those issues. Whether or not the jury acted on unconscious bias is more difficult to say. **There is no overt action that I'm aware of**” RP 1265:15-19.

Appeals to racial bias fundamentally undermine the principle of equal justice. *Monday*, 171 Wn.2d at 680. The court applies the standards in GR 37 where there are allegations that racial bias affected a

17 Implicit bias refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases encompass both favorable and unfavorable assessments and are activated involuntarily and without an individual’s awareness or intentional control. Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness. Rather, implicit biases are not accessible through introspection. Understanding Implicit Bias, The Ohio State University. Copyright 2015, The Kirwan Institute for the Study of Race and Ethnicity. Accessed 5/26/2020 at <http://kirwaninstitute.osu.edu/>.

jury's verdict.¹⁸ Washington's Rules of Professional Conduct apply to every trial, which require honesty, facts grounded in the record, abstaining from vouching and from personal opinion.¹⁹ Thompson's coded, subtle, and racist dog whistles appealing to racial bias, false, opinion, vouching, and discrimination are improper, unethical and contrary to the public interest under RCW 48.01.030.²⁰ This misconduct denied Henderson a fair trial.

V. ARGUMENT

A. The Trial Court Erred by Denying a New Trial

Standard of Review. Where racial bias has deprived a party of her constitutional rights the standard of review is constitutional harmless error. *Monday*, 171 Wn.2d at 680, citing *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006)). Not all appeals to racial prejudice are blatant, but subtle

18 “We now hold that similar standards apply when it is alleged that implicit racial bias was a factor in the jury's verdict. The ultimate question for the court is whether an objective observer (one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State) could view race as a factor in the verdict. If there is a prima facie showing that the answer is yes, then the court must hold an evidentiary hearing. *Berhe*, 193 Wn.2d at 665.

19 RPC 3.4(b) A lawyer shall not falsify evidence.

RPC 3.4(e) A lawyer shall not “allude to any matter ... that will not be supported by admissible evidence, ..., or state personal opinion as to ... the credibility of a witness....”

RPC 8.4 (c) It is professional misconduct for a lawyer to: “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

20 The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. RCW 48.01.030

implied bias is just as insidious and can be even more effective. *Monday*, 171 Wn.2d at 678. The reviewing court determines the effect of improper conduct by examining “the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.” *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Improper comments are prejudicial where “there is a substantial likelihood the misconduct affected the jury's verdict.” *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007).

This Court expanded GR 37 to apply when there are allegations that implicit racial bias is a factor in the jury’s verdict. *Berhe*, 193 Wn.2d at 665. At the *prima facie* stage courts must take the evidence as true. *Id.*, at 666. The court “shall evaluate the reasons given to justify alleged bias statements in light of the totality of circumstances.” GR 37(e). If the court determines that an objective observer could view race or ethnicity as a factor in the use of alleged bias statement, then the justification for the alleged bias statements shall be denied. *Id.* The court need not find purposeful discrimination to find that the statements were biased. *Id.*

Here, Thompson’s attorney injected age old racist stereotypes about black women. Thompson argued about their demeanor, problematic attitudes, and the way Henderson and her witnesses answered questions. Thompson insinuated Henderson used sexual favors to procure favorable

testimony from Dr. Devine. Thompson's counsel used false statements and opinion to support those tropes. The jury requested Henderson's removal. An objective observer could not say beyond a reasonable doubt the verdict was not influenced by the closing argument. *Berhe*, 193 Wn.2d at 669; *Monday* 171 Wn.2d at 681.

1. The Trial Was Fatally Tainted by Racist Tropes in Thompson's Closing Argument

Theories and arguments based upon racial, ethnic and most other stereotypes are antithetical to and impermissible in a fair and impartial trial. *Monday* 171 Wn.2d at 678. In *Monday*, the prosecutor's intentional appeal to race was so repugnant to the idea of a fair trial that the verdict was overturned. *Monday* 171 Wn.2d at 680-681. While Thompson's statements were not overtly racist, she used age old suggestion, innuendo, overtones, and misrepresentations. Thompson's counsel interjected personal opinions and vouched for her client's credibility while raising common and historical racist tropes to discredit Thompson and her witnesses. Arguing falsehoods, opinions and vouching for one's own client is improper and misconduct. RPC 3.4, RPC 8.4. Disparaging a person's demeanor as a "problematic attitude", and her lack of trust in the system based on how she answered questions are all associated with improper discrimination.²¹ GR 37(g-i).

²¹ HENDERSON: Uhm, uh, in my opinion, they were very hostile to me, and I didn't trust them. And I knew that they had the files before I went in there. And I

Yet Thompson attacked Henderson’s motivations, her demeanor, her “problematic attitude”, the way she answered questions, all of which she argued was steeped in fraud, collusion, or immoral behavior. Thompson juxtaposed this negative view of Henderson to her own ideal white female client who she attested was “authentic and genuine,” “honest” and truthful. This comparison was effective to emphasize long-held racist stereotypes of black women. Just as in *Monday*, Thompson planted the seeds in the jury’s mind that Henderson and her black witnesses were shading the truth to benefit Henderson and her black attorney working to intimidate Thompson. *Monday* 171 Wn.2d at 681. With this barrage of racist “dog whistles” an objective observer could not say that misconduct did not affect the jury’s verdict. *Id.*

a) Implicit Bias May be Unconscious

Implicit racial bias can affect the fairness of a trial as much as, if not more than, “blatant” racial bias. *Berhe*, 193 Wn.2d at 662, citing *State v. Monday* 171 Wn.2d 667. Implicit racial bias exists at the unconscious level where it can influence our decisions without our awareness. *Berhe*, 193 Wn.2d at 657. Like wolves in sheep’s clothing, a careful word here and

just did not trust them. I—I don’t know what I can and can’t say here, but it was, uh—they’re not my doctors. So, I just didn’t feel trust, I didn’t feel safe, I guess you could say. RP 922:8-12

there can trigger racial bias.²² *Monday* 171 Wn.2d at 679. Implicit racial bias can act without awareness "because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus."²³ *Berhe*, 193 Wn.2d at 662.

b) Thompson Argued Racist Tropes Which Appealed to Racial Bias.

22 Generally Elizabeth L. Earle, *Note, Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism*, 92 *Colum. L.Rev.* 1212, 1222-23 & nn. 67, 71 (1992) (citing Joel Kovel, *White Racism: A Psychohistory* 32 (1984); Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 *Rutgers L.Rev.* 673 (1985); Reynolds Farley, *Trends in Racial Inequalities: Have the Gains of the 1960s Disappeared in the 1970s?*, 42 *Am. Soc. Rev.* 189, 206 (1977)); see also A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 *N.Y.U. L.Rev.* 479, 545-51 (1990).

23 In the National Center for State Courts article, "*Addressing Implicit Bias in the Courts*," the authors note that implicit cognition yields bias without the individual's awareness. American Judges' Association, *Court Review*, Volume 49, by Pamela M. Casey, Roger K. Warren, Fred L. Cheesman, & Jennifer K. Elek. "Research shows that individuals develop implicit attitudes and stereotypes as a routine process of sorting and categorizing the vast amounts of sensory information they encounter on an ongoing basis. Implicit, as opposed to explicit, attitudes and stereotypes operate automatically, without awareness, intent, or conscious control, and can operate even in individuals who express low explicit bias. Because implicit biases are automatic, they can influence or bias decisions and behaviors, both positively and negatively, without an individual's awareness."

Thompson used falsehoods, opinions, suggestions, and innuendo in closing to appeal to implicit racial bias.^{24,25,26,27} Thompson's characterizations of the black participants mirrored the conduct identified in GR 37 as historically discriminatory. GR 37(g) recognizes that comparing answers is meaningless where the questions are disparate; GR 37(h) recognizes that discrediting a person for not trusting the system is presumptively invalid; GR 37(i) recognizes that discrediting a person based on "demeanor" or a "problematic attitude," or for providing "unintelligent or confused answers" is historically discriminatory. Thompson's racist arguments tainted the outcome of the trial.

- **The Claim that the Only Reason for the Trial Was because Henderson Wanted Millions was False**

RP 1195:13-16. Thompson admitted she rear-ended Henderson at 40 mph. Thompson made no settlement offer which forced Henderson to

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- 24 *Debunking the Myth of the "Angry Black Woman": An Exploration of Anger in Young African American Women*, J. Celeste Walley-Jean, *Black Women, Gender + Families*, Vol. 3, No. 2 (Fall 2009), pp. 68-86.
- 25 *The Angry Black Woman: The Impact of Pejorative Stereotypes on Psychotherapy with Black Women*, Wendy Ashley (2014), *Social Work in Public Health*, 29:1, 27-34, DOI: 10.1080/19371918.2011.619449.
- 26 *The Modern Mammy and the Angry Black Man: African American Professionals' Experiences with Gendered Racism in the Workplace*, Adia Harvey Wingfield, *Race, Gender & Class*, Vol. 14, No. 1/2 (2007), 24 pp. 196-212.
- 27 *Embodying diversity: problems and paradoxes for Black feminists*, Sara Ahmed, *Race Ethnicity and Education*, Vol. 12, Pages 41-52 | Published online: 05 Mar 2009

file suit. Yet, Thompson began her argument by attacking Henderson's demeanor and attitude, saying Henderson was "confrontational with me, asking to know why I was putting her on trial." RP 1195:7-10. This is a common stereotype used to against black women who deign to speak up.²⁸ And she blamed Henderson for taking the jury's time, as if the trial were Henderson's fault:

MS. JENSEN: It's just a simple car accident; it's a simple rear-end; why are we going through this exercise? And it seems pretty evident that the reason we're going through this exercise is because the ask is for three and a half million dollars.

RP 1195:13-17. Thompson invoked racial bias against Henderson by painting her as a stereotypical black person wanting compensation she did not deserve. Thompson insinuated that Henderson was trying to defraud the system and colluded with her witnesses. This argument was false, without basis, a violation of ethics and the rules of court. GR 37; RPC 3.4, RPC 8.4. This appeal to racial bias, whether intentional or unconscious,

28 *Mammy Jezebel and Sistahs*, Excerpted from Marilyn Yarbrough with Crystal Bennett, *Cassandra and the "Sistahs": the Peculiar Treatment of African American Women in the Myth of Women as Liars*. *Journal of Gender, Race and Justice* 626-657, 634-655 (Spring 2000)(254 footnotes omitted). This article notes three historical stereotypes that have been raised here: the Jezebel – a woman who snares men who have something of value to her, the Sapphire – evil, bitchy, stubborn and hateful; the Welfare Mother who shuns work and passes on bad values to her children. On the web 6/21/2020 from https://racism.org/index.php?option=com_content&view=article&id=1277:aawomen01a&catid=72&Itemid=215

racist. GR 37(i). This argument was used to paint Henderson as the “angry black woman” a stereotype long used to demean and discredit black women in general and particularly when they speak up.³⁰ The “angry black woman” trope was effective as demonstrate by the jury’s request for removal of Henderson.

- **The Comparison of Henderson as “Not Interested in the Search for Truth” to Her Client who Was “Honest” and “Told the Truth” was Improper**

Thompson said that Henderson, in her “manner of testimony” showed she was “not interested in the search for truth, she is interested in being combative.” RP 1221:19-22, 1222:9-10. This argument was inappropriate opinion about Henderson’s credibility, based on demeanor and attitude in violation of the RPC 3.4(b), 3.4(e) and racially biased under GR 37. Worse yet, Thompson compared Henderson to her own white female client, who she vouched for, saying her client “told the truth,” and “was being honest,” and provided “genuine and authentic testimony.” RP 1222:16-19; 1223:3-7. This violated the RPCs, which prohibit opinion and vouching for credibility. But this argument served to emphasize the stereotype that white people are inherently trustworthy and black people are

30 *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, Trina Jones* & Kimberly Jade Norwood, 2018 IOWA LAW REVIEW [Vol. 102:2017]

inherently dishonest. There were no black Americans on the jury to confront these arguments.

- **The Claim that Thompson was “Intimidated and Emotional” and “Rightly So” is False and Improper**

Thompson’s counsel argued her client was “intimidated” despite that Thompson did not testify she was intimidated.

MS. JENSEN: By comparison, my client took the stand, obviously feeling, I think, intimidated and emotional about the process and—and rightly so, and provided you with—with genuine and authentic testimony.

RP 1222:8-19. Thompson did not testify that she was emotional, but she trembled -- while the jury was present.³¹ Thompson used these attributes to portray her white female client as vulnerable and in need of protection. Thompson doubled down by saying “and rightly so” to say that feeling intimidated was fair and morally right in these circumstances.³² By saying “and rightly so” she sought to form a bond with the jury on grounds seeped in the stereotypes that black people are inherently dangerous and white women are in need of protection.³³ This argument

31 Thompson trembling’s was so obvious that Henderson asked her 3 times if she was okay. RP354:19-25; 355: 1-2. Thompson did not tremble outside the presence of the jury reminiscent of the actions of “Central Park Karen”.

32 And rightly so, when spoken, is used to say that a decision or action you have just described is fair and morally right. *Longman Dictionary of Contemporary English Online*, <https://www.ldoceonline.com/dictionary/and-rightly-so>, Accessed 5/13/2020.

33 For example: “Central Park Karen” aka Amy Cooper; Emmitt Till accuser Carolyn Bryant; Robin DiAngelo, *White Fragility* (2018).

served the purpose of discrediting Henderson for her demeanor, her attitude, an “angry black woman.” This argument also served to paint Henderson’s counsel as intimidating, which was bolstered by the trial court’s admonition to “not argue” “in front of the jury.” The argument did not address injuries or damages which were supposed to be the sole considerations before the jury. Thompson’s argument was effective, as the jury returned an inadequate verdict and asked the judge to remove Henderson before they would exit.

- **Thompson’s Claim that Henderson Refused to Provide Information was False**

Thompson argued that Henderson refused to provide any information on cross-examination about her condition or her care before the accident. RP 1223:8-11. This was also untrue.³⁴ The cross-examination and the IME of Henderson are examples of where the purpose of the questioning was not to obtain information related to the actual issues, but rather to set the witness up for an attack on her credibility in closing. GR 37(g). Thompson repeatedly asked Henderson about historic medical records that she could not answer. For example, “Do you remember the first time you went to a chiropractor for your neck pain?” RP 901:10-12; 895: 23-25, 903. After overruling an objection, the trial court said this line

34 RP 493: 17-25, 494: 1-17

of questioning should end. RP 900: 12-17. It did not. RP 901 – 905. On direct, Dr. Rappaport falsely testified that Henderson refused to cooperate and refused to answer questions. Dr. Rappaport admitted on cross examination that he instructed Henderson at the outset that she did not have to answer any questions that they had conducted a thorough review of her records. Henderson's answers were not obstructive. She was deliberately setup to make her appear obstructive then described as combative after her doctors and Thompson's doctors had testified. While the argument on its face was not explicit racism it had but one purpose – to suggest that she was not credible because she could not answer these questions, a typical angry black woman with a problematic attitude, trying to get something by any means. This is precisely how implicit bias is presented.

- **Thompson Implied Black Folk Lie for Black Folk**

Thompson argued all the black witnesses were untrustworthy:

MS. JENSEN: "I thought it was interesting also that all four of those witnesses used the exact same phrase when describing Ms. Henderson before the accident: life of the party. Almost like someone had told them to say that. It was-it was like a tape on repeat."

RP 1213:10-14. This was also false. Ms. Hinds, the sole white witness, did not testify Henderson was the "life of the party."³⁵ This was a

³⁵ The other three witnesses are the black women who are close friends who spent social time with Henderson and could attest to her energy and love of life. RP 344:9-25, 345-346; RP 482:1-25, RP 516:2-12, 479:11-13.

straight-up appeal to race - suggesting that “black folk don’t testify against black folk” just as the prosecutor blatantly did in *Monday*. *Monday*, 171 Wn.2d at 674. The words were not explicit but implicit to raise the specter of three black women conspiring to lie and defraud the system with the help of whomever it was who “told them to say that”. Thompson instructed the jury to “to set aside” the “inherently biased testimony of Henderson’s friends and family,” exactly what the prosecutor asked for in *Monday*, albeit more explicitly. RP 1216:15-17 One cannot say beyond a reasonable doubt that this misconduct did not contribute to the jury's wholly inadequate and biased verdict. *Monday*, 171 Wn.2d at 681.

- **Thompson Referred to Dr. Delaney By Her First Name to Undermine Her Professional Credibility**

Thompson referred to Dr. Delaney, the only black doctor who testified, by “Schontel” or “Ms. Delaney” in closing. Calling a black witness by her first name was enough for the U.S. Supreme Court to reverse a judgment. *Hamilton v. Alabama*, 376 U.S. 650, 84 S.Ct. 982 (1964) (per curiam decision reversing a judgment of contempt where it was based on discrimination by the prosecutor in addressing a black witness only by her first name). Interestingly, during her deposition, Thompson called her “Dr. Delaney.” The only reason to disregard Dr.

Delaney's education and training was to diminish her in the eyes of the jury --- all while describing her as fraudulent and dishonest. This disrespect played into the overall theme of black people being untrustworthy regardless of their station in life.

- **Thompson Falsely Implied that Henderson Had a Sexual Relationship with Dr. Devine**

JENSEN: "In terms of bias, I thought it was interesting that Dr. Devine kind of **threw out there the tidbit** that suggests that **nothing untoward**, of course, but he has more than just a patient/physician relationship with—with Ms. Henderson. You'll recall that he talked about how he actually hired her. He—he allows her to come in and work or—when she was in college, I think, and she was strapped for cash, he gave—he gave her a job."

RP 1206:18-21 (emphasis added). This winking innuendo raised the specter that Henderson used sexual favors in exchange for favorable testimony.³⁶ Saying "nothing untoward" is a common trick of persuasion to mean exactly that something was untoward.³⁷ Despite no evidence to support the sexual innuendo of an inappropriate relationship, Thompson argued for the jurors to "completely disregard" Dr. Devine's testimony. RP 1209-1210. The

36 "A half century after the American civil rights movement, it is increasingly easy to find black women depicted as Jezebels whose only value is as sexual commodities." *The Jezebel Stereotype*, Ferris State University, The Jim Crow Museum of Racist Memorabilia, © Dr. David Pilgrim, Professor of Sociology, Ferris State University. July, 2002. Edited 2012. Accessed on 5/18/2020. <https://www.ferris.edu/jimcrow/jezebel/>

37 *'I Didn't Mean It,' or 'It Didn't Mean Anything;'* *Disclaimers of wholeness*, Andrea Mathews LPC, NCC, *Traversing the Inner Terrain*, Psychology Today. Posted Feb 01, 2015., <https://www.psychologytoday.com/us/blog/traversing-the-inner-terrain/201502/i-didnt-mean-it-or-it-didnt-mean-anything>

only purpose for this argument was to discredit Dr. Devine, as the words “tidbit” and “nothing untoward” are exactly the kind of innuendo that fuels implicit bias and had no other purpose except to plant these seeds disparaging Dr. Devine and Henderson in the jurors’ minds. It is this type of “wink, wink, nod, nod” style of argument that fuels implicit bias.

c) Thompson Argued That the Jury Should not Award Full Compensation Because Henderson is Disabled

Thompson suggested a jury award of \$60,000, then argued that it was exceptional “frankly, when we’re talking about someone who was severely compromised before the accident,” “a lot of money.” RP 1221:1-6; 17-18. This argument is contrary to the law as seen in the jury instructions and triggered the widespread bias and unjust attitudes held against disabled people. CP 377, 378.

2. The Jury’s Bias is Evidenced by its Request to Have Henderson Removed after Rendering an Inadequate Verdict

The award of \$9,200 is so inadequate as could only have been the result of passion or prejudice. CP 130; RCW 4.76.030, CR 59(5). Thompson herself argued that \$60,000, would fairly compensate Henderson if the jury found she had been injured.³⁸ RP 1221:1-18 The jury found that

³⁸ Thompson argued that there was a gap in Henderson’s treatment about 8 months after the collision, despite that her expert Dr. Sutton testified there was not.

Henderson had been injured, yet awarded only \$9,200, just 15.33% of the \$60,000 suggested by Thompson. CP 130. The jury could not have followed the jury instructions, as the evidence does not support that \$9,200 would have fully compensated Henderson's injury. CP 378.³⁹ Further, the verdict is consistent with Thompson's argument that Henderson is not entitled to full compensation given her disability.

The jurors' bias is evidenced in its demand that Henderson be removed from the courtroom before they had to exit. CP 138:10-14; CP 171-178. The trial court removed Henderson telling the courtroom this was at the jury's request. CP 138:10-14; CP 171-178. The jurors must have been convinced that Henderson was violent, dangerous or would otherwise make a scene. This belief is borne out by the bailiff's calling out to see if Henderson was gone, while standing in the jury room doorway. The bailiff could have as easily opened the door and looked and not made further spectacle of Henderson's removal. At the hearing on the motion for a new trial, the court claimed the jury made no such request, and that it was her practice to remove litigants.⁴⁰ However when Henderson alleged that the

39 Jury Instruction #11: The purpose of awarding compensation to the injured party is to repair his or her injury or to make him or her whole again as nearly as that may be done by an award of money." CP 378.

40 At the hearing on the motion for a new trial on 7/10/19, the court recalled that removing Henderson was not at the jurors' request, but it was her practice. But, the court did not record this recollection in the 7/17/19 Order Denying Motion for

jurors' request was evidence of bias in her Motion for a New Trial, Thompson did not dispute it, nor did Thompson dispute the four declarations to this fact. RP 1248-1276; CP 138:10-14, 146-160, 171-177, 178-182. This is a now is a fact of the case. CR 8(d).

When race is a key issue in a trial, societal expectations are elicited, and jurors heed popular egalitarian ideals, and tend to be less influenced by bias. Yet when the "race card" is not played, white people are more susceptible to making prejudiced decisions.⁴¹ Here, where race was not an issue before the jury, one could not say that the jurors were not susceptible to making biased decisions after race was introduced. *Monday*, 171 Wn.2d at 681.

3. The Trial Court Erred by Failing to Sufficiently Inquire or Analyze Allegations of Implicit Racism

Standard of Review. CR 59 provides for a new trial when there is misconduct or when damages are so inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice. When identifying whether the influence of racial bias was a factor in the jury's verdict, the trial court must oversee and conduct a thorough investigation

a New Trial. RP 1248-1267; CP 178-182. A month later, the court put this explanation in a footnote to the Order Denying Evidentiary Hearing. CP 188, fn1.

41 *Study Results Show White Jurors Still Demonstrate Racial Bias*, American Psychological Association, March 2001, Vol 32, No. 3, Print version: page 12.

tailored to the specific allegations presented before deciding whether to hold an evidentiary hearing and before ruling on a motion for a new trial. *Berhe* 193 Wn.2d at 656; 669. Where, as here, the alleged racial bias was implicit and introduced through suggestion and innuendo, the court must consider the entire circumstances and the unique nature of implicit bias. *Id.* at 662.

a) The Trial Court Failed to Sufficiently Inquire or Consider the Totality of Circumstances

Standard of Review. When allegations of bias are made, the trial court must analyze the entirety of the circumstances before denying a new trial. *Berhe* 193 Wn.2d at 658; GR 37(e) (“in light of the totality of circumstances”). If the court determines that an objective observer could view race or ethnicity as a factor in the use of the statements, bias is presumed. GR 37(f). The court need not find discrimination was purposeful. *Id.* Once racial bias is alleged, the burden of proof is on the non-moving party. *Monday*, 171 Wn.2d at 680. A court cannot rely on the person making the bias statements to assess the credibility of her response because “people are rarely aware of the actual reasons for their discrimination and will genuinely believe the race-neutral reason they create to mask it.” *Berhe*, 193 Wn.2d at 662. But this is precisely what occurred.

The trial court erred by failing to consider the totality of the

circumstances or conducting any further inquiry. The trial court rubber-stamped each of Thompson's race-neutral explanations where the explanations were devoid of context and circumstance. The language itself in the Denial of a New Trial is evidence that the trial court misapplied the law. The court failed to recognize or consider the suggestion, innuendo, and "racial overtones" as the bias that is implicitly used to disparage a person based on race. GR 37(f). Because Thompson's arguments were based on falsehoods, opinion and vouching, and improperly relied on demeanor and attitude, an objective observer could find that the purpose of these arguments was to trigger the implicit racial biases of the jurors. The sheer volume of racist tropes should have been enough to demonstrate implicit bias and result in a new trial. Just as in *Monday*, Thompson tainted every black person who appeared in the courtroom. The recurrent false statements, personal opinions, vouching for her client's credibility, and the focus of the arguments on demeanor, a problematic attitude, the way Henderson answered questions, and the comparison of the "combative" black Henderson to the "emotional", "genuine and authentic," "honest" white Thompson who was "rightfully" "intimidated", were not taken into consideration. The court failed to fully consider the language in the arguments made, such as how "tidbit" and "untoward" had no other

purpose but to impugn Dr. Devine with the suggestion of an illicit relationship. There was absolutely no evidence to support that argument.

The court further failed to consider whether the jurors' had properly followed the jury instruction that the purpose of damages are to make a party "whole." The court failed to explain how \$9,200 could have repaired Henderson or made her whole under any possible theory. The court failed to consider the reason the jurors' requested that *plaintiff* Henderson be removed from the courtroom.⁴² CP 138:11-14. The court did not consider or inquire why Thompson's attorney was willing to ignore the civil rules on discovery, the RPC and ignore GR 37 entirely for the foundation of her arguments, most of which addressed issues not before the jury. The court was in the unique position to examine its own decision and in doing so, found that the declarations were "untrue" and that the jury did not ask for Henderson's removal. Based on the totality of the circumstances, it is likely that an objective observer would say that this verdict was affected by implicit bias. *Berhe*, 193 Wn.2d at 656; GR 37. These are reversible errors and grounds for a new trial.

b) The Order Denying a New Trial is Biased on its Face

⁴² Thompson did not dispute Henderson's allegations that the court removed Henderson at the jurors' request. Under CR 8(d), this is a fact of the case.

“The court cannot require attorneys to refrain from using language that is tied to the evidence in the case, even if in some contexts the language has racial overtones.”

CP 181:2-3. A statement with “racial overtones” is a statement with subtle and insidious references – a textbook definition of implicit bias.⁴³ The ruling that statements with “racial overtones” are not misconduct if they are “tied to the evidence,” is not only contrary to the law on its face but in particular, in full denial of the nature and persistence of implicit racism. *Monday* 171 Wn.2d at 680; *Berhe* 193 Wn.2d at 657; GR37. There is no support in the law for allowing racist statements if they are “tied to the evidence.” In *Monday*, for example, the prosecutor’s argument about “the code” was repugnant and grounds for a new trial, despite that one of the witnesses had testified about “the code.” *Monday*, 171 Wn.2d at 671. Here there was no such corroborating testimony for the racist dog whistles argued by Thompson. Statements appealing to racism are racist whether or not they are “tied to evidence.”

Further, the arguments were not “tied to the evidence.” It is common that black women are not allowed the full panoply of emotions but are instead automatically described as angry, combative, or hostile when

43 An “overtone” is an idea or quality that is suggested without being said directly, meaning suggestion, connotation. Synonyms are denotation, mark, signal, characteristic, feature, quality, suggestion. “Overtone.” Merriam-Webster.com Dictionary, Merriam-Webster, Accessed 13 Jun. 2020. <https://www.merriam-webster.com/dictionary/overtone>.

exhibiting any emotion, whereas a white woman is described as emotional or intimidated under the same circumstances. Hence, the trial court found it was “not unfair” to find Henderson “combative” because she was uncomfortable testifying, but it was also “not unfair” to find Thompson “intimidated” because she too was “uncomfortable” testifying, this based on the way they answered dissimilar questions. RP 180:21-25; RP 181:1-2; GR 37. This Court cannot lose sight that both litigants were present when the trial court granted Thompson’s request for a preview of her cross, thereby signaling to both litigants that Thompson would be protected. These were opinions, not evidence, from two white women and it is unsurprising that the black woman lost this contest.

The trial court is presumed to understand implicit bias. But here the court required “overt” action:

“Clearly implicit bias and unconscious bias exist. It exists for the jury. It exists for the Court. It exists for attorneys. It exists. And I am familiar with those issues. Whether or not the jury acted on unconscious bias is more difficult to say. There is no overt action that I’m aware of”

RP 1265:15-19. The court required “specific evidence”:

“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 or grant additur.”

CP 182:3-6. Additionally, the court required statements that “necessarily” invoke racial stereotypes. CP 181:6-8.

These rulings and findings illustrate the trial court's misunderstanding of implicit racial bias by its requirement of some "overt" and "specific" statements or which "necessarily" invoked racism. The trial court was limited to determining whether the evidence, taken as true, permits an inference that an objective observer who is aware of the influence of implicit bias could view race as a factor in the jury's verdict. *Berhe*, 193 Wn.2d at 666. Here, the trial court failed to adhere to this directive, and merely rubber-stamped Thompson's race-neutral explanations, without inquiry or analysis. This is not justice, nor is it the law.

The trial court failed to consider the jury's demand for the removal of Henderson as racially motivated. The fact the trial court admitted it did not appreciate that the removal of a black woman, to make a white jury comfortable would humiliate and shame her is surely evidence of the trial court's unconscious bias. *Berhe* 193 Wn.2d at 665. At the time Henderson was removed, this country has seen numerous highly publicized examples of black people being removed from spaces they had an absolute right to occupy, by white people, for the comfort of white people.⁴⁴

B. The Trial Court Erred by Denying the Evidentiary Hearing Required by *Behre*

⁴⁴ For example black men waiting for their friend at Starbucks.

Standard of Review. When there is a motion for a new trial based on allegations that the jury verdict was tainted by racial bias, the question for the court is whether an objective observer could view race as a factor in the verdict.⁴⁵ *Berhe*, 193 Wn.2d at 665; GR 37(f). At the *prima facie* stage, courts must take the evidence as true. *Id.*, 666. If there is *prima facie* showing that the verdict was affected by implicit bias, then the court shall hold an evidentiary hearing. *Id.* 665. The courts must limit themselves to determine whether an objective observer could view race as a factor in the jury's verdict. *Id.*, 666. When determining whether there is *prima facie* evidence of implicit racial bias, courts cannot base their decisions on whether there are equally plausible, race-neutral explanations.⁴⁶ *Id.*, 666. "There will almost always be equally plausible, race-neutral explanations because that is precisely how implicit racial bias operates." *Id.* 666.

The facts here show *prima facie* case of implicit bias which affected the jury's verdict. The facts are unique because Henderson raised issues of implicit and unconscious bias from the trial court itself. The trial court abused its discretion by expressly adopting Thompson's race-neutral

45 Under GR 37(f), an objective is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State. Similar standards apply when it is alleged that implicit racial bias was a factor in the jury's verdict. *Berhe* 193 Wn.2d at 665.

46 There will almost always be equally plausible, race-neutral explanations because that is precisely how implicit racial bias operates. *Berhe*, 193 Wn.2d at 666.

explanations without further inquiry and without considering the entirety of the circumstances. Once the trial court heard these allegations it was obligated to conduct a fair hearing which, in this case, necessitated a different judicial officer because the trial court could not meaningfully conduct an enquiry into its own conduct. Instead, after adopting Thompson's race-neutral explanations the trial court adopted her own race-neutral conclusion for the removal of Henderson.

The court misinterpreted *Berhe* as requiring a juror's declaration for a *prima facie* case of racial bias rooted in attorney misconduct. CP 184:13-15. *Berhe* has no such requirement. Here, the unreasonable rulings, the insidiousness of implicit bias, the trial court's admonishment of Henderson's counsel in front of the jury, Thompson's racially biased argument, the inadequate verdict, the juror's request for removal, and the trial court's removal are sufficient to show that race was a factor in the jury's verdict. One cannot fairly say that the misconduct did not affect the jury's verdict. *Monday*, 171 Wn.2d at 681.

C. The Court Erred by Reversing the Spoliation Instruction, by Failing to Sanction Thompson and with Other Rulings Tainted by Bias

Standard of review. The proper standard to apply in reviewing discovery sanctions decisions is the abuse of discretion standard. *Washington State Physicians Ins. Exchange & Ass'n. v. Fisons Corp.*, 122

Wn.2d 299, 858 P.2d 1054, (1993). A court abuses its discretion when an “order is manifestly unreasonable or based on untenable grounds.” *In Re. Pero. Restraint of Rhome*, 172 Wn. 2d 654, 668, 260 P.3d 874 (2011). A trial court abuses its discretion its ruling is based on an erroneous view of the law. *Id.*, *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

The trial court’s reconsideration and denial of the grant of the spoliation instruction was without a legal basis. It is an abuse of discretion as it was based on erroneous view of the law. *Id.*, CR 59, CR 26(g). The denial of spoliation left Thompson without sanctions for discovery abuse, contrary to law. *Fisons Corp*, 122 Wn.2d at 299. The trial court erred by failing to sanction Thompson for refusing to produce surveillance discovery, for refusing to comply with a court order to produce the notes, by accepting the 11th hour “Probe Report” as authentic. Thompson cannot assert attorney-client privilege during discovery, then waive privilege at trial; such trial by ambush is inconsistent with CR 1. *Seattle Nw. Sec. Copr. SDG Holding Co.*, 61 Wn. App. 725, 743-44, 812 P.2d 488 (1991); CP 78; CP 82; RFP 4. The denial of the spoliation instruction rewarded Thompson for her discovery abuses while prejudicing Henderson for those abuses. The trial court granted Henderson’s spoliation instruction the first day of trial, 4/15/19, as a sanction for discovery abuse. RP 55:20-21; CP 15-20 (MIL #18),

The spoliation instruction was the lesser sanction of Slaeker's exclusion. The trial court heard Thompson's expert Slaeker failed to comply with the SDT, and produced no documents. Thompson instructed Slaeker to withhold the report, and during the deposition instructed him to withhold discovery that he had on his phone. Thompson produced one 17-minute cherry-picked video clip and failed to provide copies of the other CD's accounting for the remainder of the 78.8 surveillance hours or the names of any other investigators. Thompson failed to comply with the order compelling Slaeker's notes and instead asserted that "notes were not made". CP 1-2, RP 55:20-25; RP 56:1-2.; CP 82. The trial court later granted the defendant's motion for reconsideration without legal authority. CR 59; CP 102-103; RP 1143:21-24, 1146:5-7.

Civil Rule 59 provides limited basis for the court to reconsider or modify a decision. CR 59(a). A motion for reconsideration "shall identify the specific reasons in fact and law as to each ground on which the motion is based." Thompson's motion did not identify any legal basis for reconsideration. CP 92-100. The trial court did not identify a legal basis for granting reconsideration when it "reserved" the spoliation instruction or when it later denied the spoliation instruction. CP 102-103; RP 1143:21-24, 1146:5-7. The only new information generated was the 11th hour report which was itself discovery abuse and disputed by Henderson.

application of the law. The court held Henderson failed to prove destruction of evidence holding, “I don’t think that we are at the point of a rebuttable presumption that Defense has destroyed evidence.” RP 1146:5-7. The destruction of evidence is not required for a spoliation instruction, withholding evidence is sufficient. *Pier 6 v. King County*, 89 Wn.2d 379, 573 P.2d 2 (1977). RP: 1144:17-24. Even if the standard was “destruction of evidence,” Henderson met that standard – the trial court twice found “the notes were destroyed.” CP 103 9-10; RP 1144:10.

Spoliation encompasses a “broad range of acts.” *Cook v. Tarbert Logging Inc.*, 190 Wn. App 448, 461, 360 P.3d 855 (2015). Here, the notes were destroyed, and the report was never produced.⁴⁷ The trial court’s finding that there was no evidence that any additional video exists is contrary to the facts as Slaeker testified that he videotaped Henderson for an hour, yet produced a 17 minute videoclip. The trial court even contradicted its own earlier findings to conclude “plaintiff failed to show that the video, notes, or other evidence existed, much less that was withheld or destroyed.” CP 178-179.

The trial court made other rulings which indicate unconscious, implicit, and institutional racial bias. 1) The trial court accepted

⁴⁷ During trial, Thompson emailed the supposed Probe Report but only after the trial court denied her motion to exclude all references to the report. CP 104-105.

Thompson's 11th hour, previously designated work product document. The document was produced to prohibit Henderson from inquiring into the Probe Report. After its production the court refused to allow this inquiry. This was done over Henderson's objections to a document concealed for 4 years and unverified, a decision so unreasonable as could only be bias. 2) The trial court honored Thompson's request for disclosure of Henderson's rebuttal. RP 1060:22-24; RP 1112:5-10. The trial court asserted: "I just want to be sure it's in rebuttal," and *sua sponte* denied questioning counsel's "honesty." RP 1112:18-25. Both litigants were present and Thompson conferred with her attorney before testifying. Henderson was not afforded this protection. 3) The trial court, in front of the jury and without reason, admonished Henderson's counsel. When Henderson's attorney tried to respond to an objection from Thompson, the trial court cut her off and stated: "don't argue with me in front of the jury." RP 1230:20-25; 1231:1. In this way, the trial court suggested Henderson's attorney was so argumentative outside the jury's presence, that a reprimand was warranted. Thompson's attorney was allowed to freely argue her objections without interruption or admonishment. This reprimand placed Henderson's attorney in an unflattering light and Thompson's counsel later argued that her client was "intimidated" and "rightly so" albeit claiming it was by "the process." The only "process" the jury witnessed was Thompson's

trembling and weeping while being cross-examined.

D. The Removal of Henderson Calls for a New Trial

In Washington, the right to open court proceedings is constitutionally mandated by article I, section 10 of the state constitution, which provides: “[j]ustice in all cases shall be administered openly, and without unnecessary delay.” Washington courts have a duty to ensure “the right of the people to . . . freely observe the administration of civil and criminal justice.” *Allied Daily Newspapers of Wn. v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993). There is no dispute from Thompson that Henderson was removed from the courtroom at the jury’s request. At the hearing on the motion for a new trial the court interjected:

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

RP 1255: 3-11. The court’s written order denying a new trial did not address Henderson’s removal. CP 178-182. This was the trial court’s fourth jury trial. Appendix B. The court finally addressed Henderson’s removal in the subsequent Order Denying an Evidentiary Hearing dated 8/7/2019. CP 188: fn.1.

There is no precedent for removing a party from a courtroom where

the party is not out of control or so physically or mentally challenged that she could not meaningfully participate in the process.⁴⁸ This was not the case here. The only “evidence” of Henderson being out of control is Thompson’s false argument alleging Henderson was “combative”, “interested in being combative” “quite combative” and “confrontational.” These not so subtle and insidious statements impacted the jury to the point they refused to leave the courtroom with Henderson present. The trial court’s bailiff checked to make sure the coast was clear before letting the jury out, calling out “is Ms. Henderson out of the courtroom?” RP 1255: 13-14; CP 173; 1-5. Removing Henderson at the jury’s request reflects the institutional racism against black Americans that allows white people to demand and be granted the right to have black people removed from public spaces.⁴⁹ This is contrary to the notion of equal justice and evidence that the jury was biased. At the bare minimum, the trial court’s removal of Henderson violates the appearance of fairness for all proceedings in the trial.

48 *Exclusion of Plaintiffs from the Courtroom in Personal Injury Actions: A Matter of Discretion or Constitutional Right?* Allan P. Grunes, *Case Western Law Review*, Vol. 38, Issue 3, 1988.

49 See generally, <https://www.nytimes.com/2018/04/15/us/starbucks-philadelphia-black-men-arrest.html>; <https://www.cnn.com/2018/05/09/us/yale-student-napping-black-trnd/index.html>

VI. CONCLUSION

Henderson and her counsel ask this Court to listen to and acknowledge their experience.

As we work together to dismantle systemic racism, we ask the Court to acknowledge that it is common in our society to protect white experiences at all costs. This protection occurs at every level in society, in every interaction. It can be as blatant as murdering a 14-year old boy for allegedly whistling at a white woman, or as subtle as describing a white woman who is uncomfortable testifying in a trial with a black plaintiff as intimidated. In this way white women are seen as victims and in need of protection.

Black women are rarely seen as victims, but instead are seen as angry, argumentative, combative, and intimidating, never in need of protection. The insidiousness of implicit bias runs so deep that here, after Thompson's argument, the jury requested Henderson's removal, the judge granted the removal, and the bailiff called out from the doorway of the jury room to verify Henderson was gone.

This Court has recognized that systemic oppression of black Americans is not a relic of the past. This Court has addressed in criminal cases how racial bias can be triggered to deny a black American a fair trial. The Court adopted a comprehensive rule aimed at eliminating implicit racial bias from the courtroom. A black American in the civil courtroom faces no

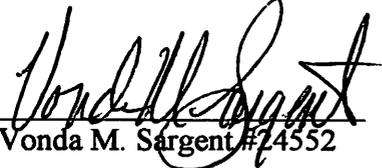
less racial injustice than the black American in the criminal courtroom. A black litigant remains black whether she is handcuffed and facing imprisonment or whether she is wearing a suit and is seeking monetary redress. She is still black, and the racial stereotypes held for hundreds of years do not stop at the door of the civil courtroom.

Henderson respectfully requests this case be reversed on the grounds of attorney misconduct and racial discrimination and remanded for a new trial. Henderson requests that Thompson be sanctioned for her discovery abuses and that a spoliation instruction issue. Finally, Henderson asks for the new trial before a judge who understands the nature and insidiousness of implicit racism. In this case an evidentiary hearing would be an exercise in futility. The trial court has evidence that would have to be examined and as such, it cannot occupy the role of an objective observer.

Respectfully submitted,

8-12-2020

Dated


Vonda M. Sargent #74552


Carol Farr #27470

VII. APPENDIX

A GR 37

B Case List for Hon. Melinda Young

APPENDIX A
GR 37

GR 37
JURY SELECTION

(a) **Policy and Purpose.** The purpose of this rule is to eliminate the unfair exclusion of potential jurors based on race or ethnicity.

(b) **Scope.** This rule applies in all jury trials.

(c) **Objection.** A party may object to the use of a peremptory challenge to raise the issue of improper bias. The court may also raise this objection on its own. The objection shall be made by simple citation to this rule, and any further discussion shall be conducted outside the presence of the panel. The objection must be made before the potential juror is excused, unless new information is discovered.

(d) **Response.** Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge shall articulate the reasons the peremptory challenge has been exercised.

(e) **Determination.** The court shall then evaluate the reasons given to justify the peremptory challenge in light of the totality of circumstances. If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.

(f) **Nature of Observer.** For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.

(g) **Circumstances Considered.** In making its determination, the circumstances the court should consider include, but are not limited to, the following:

(i) the number and types of questions posed to the prospective juror, which may include consideration of whether the party exercising the peremptory challenge failed to question the prospective juror about the alleged concern or the types of questions asked about it;

(ii) whether the party exercising the peremptory challenge asked significantly more questions or different questions of the potential juror against whom the peremptory challenge was used in contrast to other jurors;

(iii) whether other prospective jurors provided similar answers but were not the subject of a peremptory challenge by that party;

(iv) whether a reason might be disproportionately associated with a race or ethnicity; and

(v) whether the party has used peremptory challenges disproportionately against a given race or ethnicity, in the present case or in past cases.

(h) **Reasons Presumptively Invalid.** Because historically the following reasons for peremptory challenges have been associated with improper discrimination in jury selection in Washington State, the following are presumptively invalid reasons for a peremptory challenge:

(i) having prior contact with law enforcement officers;

(ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling;

(iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime;

(iv) living in a high-crime neighborhood;

(v) having a child outside of marriage;

(vi) receiving state benefits; and

(vii) not being a native English speaker.

(i) **Reliance on Conduct.** The following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers. If any party intends to offer one of these reasons or a similar reason as the justification for a peremptory challenge, that party must provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner. A lack of corroboration by the judge or opposing counsel verifying the behavior shall invalidate the given reason for the peremptory challenge.

[Adopted effective April 24, 2018.]

APPENDIX B
JUDGE YOUNG CASE LIST

QUERY

04/09/2018 18-2-0927: TAYLOR VS LH FOOT MASSAGE	JDG	Melinda	Young	07/12/2019 JVAT - Jury Verd 08/29/201 JODF - . ATT
04/09/2018 18-2-0927: TAYLOR VS LH FOOT MASSAGE	JDG	Melinda	Young	07/12/2019 JVAT - Jury Verd 08/29/201 JODF - . ATT
04/09/2018 18-2-0927: TAYLOR VS LH FOOT MASSAGE	JDG	Melinda	Young	07/12/2019 JVAT - Jury Verd 08/29/201 JODF - . ATT
04/09/2018 18-2-0927: TAYLOR VS LH FOOT MASSAGE	JDG	Melinda	Young	07/12/2019 JVAT - Jury Verd 08/29/201 JODF - . ATT
04/10/2018 18-2-0943: ZAPATA VS REYNOLDS ET ANO	JDG	Melinda	Young	04/11/2019 JVAT - Jury Verd 04/11/201 JODF - . ATT
04/10/2018 18-2-0943: ZAPATA VS REYNOLDS ET ANO	JDG	Melinda	Young	04/11/2019 JVAT - Jury Verd 04/11/201 JODF - . ATT
9/29/2017 17-2-2573: BROWN VS DIAMOND	JDG	Melinda	Young	3/28/2019 JVAT - Jury Verd 9/6/2019 JODF - . ATT
9/29/2017 17-2-2573: BROWN VS DIAMOND	JDG	Melinda	Young	3/28/2019 JVAT - Jury Verd 9/6/2019 JODF - . ATT
9/29/2017 17-2-2573: BROWN VS DIAMOND	JDG	Melinda	Young	3/28/2019 JVAT - Jury Verd 9/6/2019 JODF - . ATT

THE LAW OFFICES OF VONDA M. SARGENT, PLLC

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