No. 103671-0

SUPREME COURT
OF THE STATE OF WASHINGTON

SHELLA SIMBULAN, married woman;
RON SIMBULAN, as an individual and as Personal Representative of THE ESTATE OF RON SIMBULAN, JR.,

Petitioners,

v.

NORTHWEST HOSPITAL & MEDICINE CENTER,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals did not "disregard" (Pet. 3) *Henderson v. Thompson*, 200 Wn.2d 417, 518 P.3d 1011 (2022), *cert. denied*, 143 S. Ct. 2412 (2023). Nor did it hold that only "purposeful" and "flagrant" misconduct (Pet. 4, 18, 33) could justify a new trial on the ground of implicit bias. Instead, the Court of Appeals held that the mere mention of race or ethnicity, free of any innuendo, let alone "dog whistles," cannot justify an evidentiary hearing under *Henderson*, particularly when the party seeking a new trial initially introduced their ethnicity into the proceedings, and repeatedly referred to it thereafter, to support their claims before the jury.

The Court of Appeals also properly reviewed the trial court's order de novo. This Court in *Henderson* engaged in de novo review, requiring courts to apply an entirely objective standard to the record at trial. The GR 37 cases upon which this Court relied in *Henderson* also did so, and

in this case the trial court relied solely on transcripts and made no findings based on credibility or its observations of counsel or the jury.

The Court of Appeals applied *Henderson* as this Court intended. This Court should deny review of Division One's thoughtful and well-reasoned decision.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals properly apply *Henderson's* objective standard by reviewing de novo the trial court's determination of whether racial bias could have impacted the jury's verdict?

2. Did the Court of Appeals correctly determine that no objective observer could conclude that racial bias was a factor in the jury's verdict here, where both parties referenced the plaintiffs' Filipino heritage in a neutral and non-disparaging manner?

III. STATEMENT OF THE CASE

The Court of Appeals' opinion accurately recites the facts underlying the defense verdict in this medical negligence case (Op. 2–3),[1] and recounts in detail each of the challenged statements relied upon by the Simbulans in their motion for a new trial under *Henderson*. (Op. 14) Those facts are summarized here:

A. A racially diverse jury found that the death of the Simbulans' baby during childbirth was not the result of medical negligence.

The Simbulans sued Northwest Hospital alleging Dr. Anita Tiwari's medical negligence caused the wrongful death of their infant. (Op. 2; CP 1–7) The Simbulans claimed that Dr. Tiwari breached the standard of care by "fail[ing] to execute maneuvers correctly, or to timely attempt secondary intervention such as a Zavanelli, an emergency Caesarean section or an abdominal rescue

[1] This Answer cites to the slip opinion.

when initial maneuvers did not resolve the shoulder dystocia." (CP 11)[2]

Before the jury was selected, the trial court instructed all potential jurors to guard against unconscious bias. (CP 524–28) Each potential juror also had either viewed, or committed to view, a video on implicit bias produced by the trial court. (CP 529–30; *see* Unconscious Bias, KingCountyTV, YouTube.com (May 13, 2020), available at http://tinyurl.com/5n88jz9r (last accessed Dec. 23, 2024)).

Fifteen jurors were seated for trial in King County Superior Court. In answering the standard Juror Questionnaire, three self-identified as Asian, one as Black,

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[2] A Zavanelli maneuver would "push the baby back to . . . bring the head back through the vagina and back into the uterus," so that an emergency Caesarean could be performed. (RP 694) In an abdominal rescue, which requires the presence of two obstetricians, a physician would "make an incision into the abdomen, into the uterus, and . . . manipulate the shoulders to push the baby out of the vagina." (RP 1020)

and one as Hispanic; three jurors were born outside the United States. (CP 522, 537)

The Simbulans presented their expert's testimony that Dr. Tiwari's failure to perform a Zavanelli maneuver "contributed to the severe hypoxic ischemic encephalopathic injury and ultimate death" of their infant son. (Op. 3; *see* RP 704–14) Neither the plaintiffs' expert nor any of the other physicians who testified had ever performed a Zavanelli, or seen one performed. (RP 698, 829–30, 1021–22) The defense was that Dr. Tiwari had complied with the standard of care and despite her heroic efforts, the infant's head and shoulders remained intractably stuck and could be freed only with the assistance of another obstetrician, who aided in this extremely difficult delivery. (RP 1691–96)

After an eight-day trial, the jury found that Dr. Tiwari was not negligent and returned a defense verdict without reaching the issue of damages. (Op. 3; CP 49–50)

B. The Simbulans sought a new trial on the ground of implicit bias under *Henderson*.

The Simbulans sought a new trial under *Henderson* on the grounds that defense references to the Philippines and their Filipino background were appeals to the jurors' implicit bias. (CP 62–63, 84–90) In ruling on the motion, the trial court considered excerpts of daily transcripts provided by the plaintiffs identifying each and every reference to "Filipino" or "the Philippines" during trial—five times from the defendant (RP 415, 1158, 1159, 1304, 1714) and ten times from plaintiffs. (RP 351, 911, 1128, 1129, 1153, 1154, 1163, 1268, 1299, 1715) The Simbulans alleged no innuendo, racial tropes or "dog whistles" by the defense, and in oral argument on their motion could not identify any additional evidence, beyond these excerpts of the verbatim report of proceedings (RP 1740–41), to be presented in a *Henderson* hearing.

The verbatim report of proceedings excerpts are summarized below and reprinted as the Appendix to this Answer.

1. The Simbulans repeatedly emphasized their Filipino heritage and ties to the Philippines.

In opening statement, plaintiffs' counsel introduced the Simbulans by referring to their Filipino heritage, telling the jury that in assessing their damages claims it should consider both lay and expert testimony regarding the "absolutely profound impact that resonates through their entire" "culturally-thoughtful, Filipino family." (RP 351)

Though they had sought the trial court's order in limine precluding comment on the use of interpreters (CP 53), plaintiffs' counsel nonetheless elicited from Shella Simbulan on direct examination that she speaks English as a "second language." (RP 1127) Ron Simbulan similarly volunteered on direct that he was testifying through an

interpreter because his "first language is not English." (RP 1145)

Ms. Simbulan testified on direct examination that she met her husband Ron "in the Philippines," where they married four years before she moved to Seattle. (RP 1128) She also volunteered that their oldest child was born "in the Philippines." (RP 1129–30) The Simbulans also offered, and the trial court admitted, a chart note containing Ms. Simbulan's medical history that identified "Place of Delivery: Philippines" in her "Obstetric History." (Ex. 3) Ms. Simbulan further explained, in response to questioning from her counsel, that she took the parties' first child "home" following her birth "in the Philippines." (RP 1128–29)

The Simbulans focus on the cross-examination of Ron Simbulan (Pet. 11), but fail to acknowledge that he cited his "Filipino culture" in his direct examination to explain why he did not seek treatment or counselling

following his child's death: "In our Filipino culture, you know, you have to show that, as a man, you're the one who needs to stand up and take it on" (RP 1153–54), and "in my Filipino culture, it was expected that the man would be strong . . . " (RP 1163)

The Simbulans also called the husband of Ms. Simbulan's sister, Ahmad Saleh, as a damages witness. He testified to the pain the Simbulans suffered over the loss of their second child, occurring over Christmas, a holiday that has significance "especially [to] the Filipino . . . because my wife, she's Filipino, and I understand that how much it's very important for them." (RP 1299)

As previewed in their opening statement, the Simbulans also called a social worker in their case in chief, and asked her on direct examination about her experience treating patients of "Filipino background" and her competency to "effectively provide services to Filipino individuals." (RP 911) She testified that the loss had a

devastating effect on the Simbulans, their lives together, and their marriage. (RP 914)

2. The defense rarely referenced the Philippines and did so only in a neutral manner in response to the Simbulans' damages claims.

Northwest Hospital referenced the Simbulans' ties to the Philippines after the plaintiffs did so in presenting their case to the jury. In a pre-trial ruling, the trial court allowed a defense expert to testify "with proper foundation that Ms. Simbulan had Cephalopelvic Disproportion and that . . . was a cause of difficulty in delivering" her son at Northwest Hospital, as reflected in medical records relied upon by the expert in his deposition. (CP 59; RP 295–96; Ex. 16) Anticipating their expert's testimony on this subject, defense counsel told the jury in opening statement that Ms. Simbulan's first delivery of a healthy baby girl in the Philippines had been a complicated childbirth. (RP 415)

Defense counsel also challenged the Simbulans' claim that an award of damages should reflect the harm

inflicted on a close couple with "a good marriage" and a "life . . . as good as . . . can be expected." (RP 914) The defense showed on cross-examination that Mr. Simbulan and Ms. Simbulan had lived separate and apart for a substantial portion of their marriage, with Ms. Simbulan remaining in the Philippines (including during her first pregnancy) for seven to eight years while Mr. Simbulan was living in the United States. (RP 1158–60)

The defense also cast doubt on the damages testimony of Mr. Saleh, the Simbulans' brother-in-law, who stated on cross-examination that he was not close to Ms. Simbulan because she did not live in the United States for four years after plaintiffs married. (RP 1301) He also conceded that, as he is "not from the Philippines," he had not discussed with Ms. Simbulan her pregnancy or her delivery at Northwest Hospital due to language and cultural barriers. (RP 1301–04)

In closing argument, the defense did not mention the Simbulans' race or ethnicity on the issue of liability at all. (RP 1691–1712) As to damages (which the jury never reached), the defense's only arguable reference was when counsel urged the jury to "think about what really would be the right compensation here on something that nobody can really put a number on," and that if the jury made any award, it should provide "tangible things that the Simbulans could use. College funds for their little girls, therapy for the parents if they want it, maybe family trips home to the Philippines every year to go visit their extended family and spend time with them." (RP 1713–14)

3. The jury also considered Dr. Tiwari's Indian upbringing as a neutral fact.

After moving for a new trial based on supposed negative references to the Simbulans' Filipino heritage, plaintiffs on appeal claimed that the defense had appealed to the jury's implicit bias by unfairly comparing her to Dr. Tiwari, as a "model minority." (Op. 18–19) Dr. Tiwari is of

south Asian descent. In her direct testimony, just as defense counsel asked both the nurses who had assisted in the delivery, "Why did you become a nurse?" (RP 574, 881), Dr. Tiwari was asked why she became a doctor. Dr. Tiwari cited her "early childhood" and "gr[owing] up in India" as her motivation for pursuing a medical education in the United States "to help people who don't have the resources to provide them the with the best care possible." (RP 1378)

As the Simbulans now concede (Pet. 15), however, it was the jury, not the defense, that asked Dr. Tiwari "How old were you when you left India?" (RP 1509) Neither party made any further mention of Dr. Tiwari's ethnic origin, nationality, or citizenship. The Simbulans have not renewed their "model minority" argument before this Court.

C. The Court of Appeals reversed the trial court's order granting an evidentiary hearing.

After reviewing only the transcripts attached as an Appendix here, and reciting and relying solely on each reference to the Philippines during trial, the trial court ruled that the Simbulans satisfied *Henderson's* prima facie test, holding that "an objective observer *could* conclude that testimony and argument regarding the Simbulans' [Filipino] culture, national origin, and family history made race an implicit factor in the verdict." (CP 309) (emphasis in original)[3] The trial court did not make any findings based on its observations of the jury, counsel or witnesses, made no credibility findings, and simply recited verbatim the testimony and argument contained in the transcripts provided to the court.

[3] The trial court denied the Simbulans' motion for a new trial alleging instructional error. (CP 306)

The Court of Appeals unanimously reversed, holding that the record does not "support[] an inference from which an objective observer could conclude that the verdict was affected by bias based on country of origin, race, or ethnicity." (Op. 19) The Court distinguished the "harmful" and "racist stereotypes" and "us-versus-them descriptions" perpetrated by the defense in *Henderson* (Op. 9–10) with the non-disparaging references to the Simbulans' ethnicity, invoked by the defense only "in a few isolated instances when it was directly tied to their testimony and relevant to the case." (Op. 22)

IV. ARGUMENT WHY THE COURT SHOULD DENY REVIEW

A. The Court of Appeals correctly reviewed de novo the trial court's objective determination under *Henderson*.

The Court of Appeals correctly applied de novo review to the trial court's order "[b]ecause the determination as to whether a prima facie showing has been made relies on the objective standard under GR 37

and incorporates the totality of the circumstances at trial . . . ." (Op. 11) (citing *Henderson*, 200 Wn.2d at 439, ¶¶40–41 and *Lantz v. State*, 28 Wn. App. 2d 308, 311, ¶2, 535 P.3d 501 (2023), *rev. denied*, 2 Wn.3d 1019 (2024)). The Court of Appeals properly held that the objective standard "involves no subjective trial discretion," and observed that this Court in *Henderson* "gave no deference to the trial judge in that case" (Op. 10), noting that the trial court here "made no credibility determinations that would require deference on review." (Op. 10)

The Court of Appeals' use of the de novo standard of review is consistent with all this Court's precedent, including *Henderson*, and does not present an issue of substantial public interest requiring this Court's determination. RAP 13.4(b)(1), (4).

1. *Henderson* applied de novo review.

As the Court of Appeals correctly recognized, the *Henderson* decision itself "gave no deference to the trial

judge in that case." (Op. 10) The Simbulans quote this Court's conclusion that "the trial court abused its discretion by failing to grant an evidentiary hearing" (Pet. 21), but omit the remainder of the sentence: "*and also by failing to impose any sanctions for Thompson's discovery violations.*" *Henderson*, 200 Wn.2d at 423, ¶3 (emphasis added)—a decision traditionally reviewed for abuse of discretion. (*See* Reply Br. 16–17)

The Simbulans' contention that the *Henderson* Court's reference to the "totality of the circumstances" refers to the trial court's subjective opinion of what occurred at trial is refuted by this Court's reasoning and decision in *Henderson*. This Court made its own objective assessment of the record: "An objective observer could conclude that the themes and arguments advanced by defense counsel suggested Henderson and her witnesses were not credible because of their race, and considering the totality of the circumstances of this trial, an objective

observer could therefore conclude that racism affected the verdict." *Henderson*, 200 Wn.2d at 439, ¶41 (citing *State v. Berhe*, 193 Wn.2d 647, 666, 444 P.3d 1172 (2019)). Indeed, the *Berhe* discussion cited by *Henderson* itself warns that courts must "limit themselves to determining whether the evidence . . . permits an inference that an *objective observer* . . . could view race as a factor[.]" *Berhe*, 193 Wn.2d at 666 (emphasis added). Thus, the *Henderson* test is, by its nature, premised on an objective rather than a subjective assessment of the record.

Because the *Henderson* test depends upon an objective view of the trial proceedings, the Court of Appeals correctly applied that test in noting that "whether an objective observer could conclude that racial bias was a factor in the verdict . . . involves no subjective trial court discretion." (Op. 11) (internal quotations omitted) This Court's review is not warranted.

2. Washington courts uniformly review de novo the threshold objective decision whether to grant an evidentiary hearing on a motion for new trial alleging improper bias.

The Court of Appeals' application of de novo review is also consistent with this Court's racial bias jurisprudence in cases involving jury selection and deliberations, which informs the *Henderson* test. By seeking to distinguish those cases, the Simbulans tacitly acknowledge that the Court of Appeals decision is consistent with them.

This Court reviews de novo the threshold question whether race could have played a part in jury selection under GR 37, or in the jury's deliberations, using the objective standard the Court later employed in *Henderson:*

> Whether "an objective observer could view race as a factor in the use of the peremptory challenge" is an objective inquiry. It is not a question of fact . . . It is an objective inquiry based on the average reasonable person—defined here as a person who is aware of the history of explicit race discrimination in America and aware of how that impacts our current decision making in nonexplicit, or implicit, unstated, ways. For that reason, we

> stand in the same position as does the trial court, and we review the record . . . de novo.

State v. Jefferson, 192 Wn.2d 225, 249–50, ¶62, 429 P.3d 467 (2018) (standard for review of peremptory challenges under GR 37).[4]

It is precisely because "[r]acial bias is 'uniquely pernicious'" that this Court applies an objective standard and conducts de novo review. (Pet. 26) (quoting *Henderson*, 200 Wn.2d at 433, ¶28) De novo review furthers, and does not hinder, the Court's effort to

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[4] The *Jefferson* Court cited numerous cases holding a trial court's application of an objective standard in a variety of other contexts must be reviewed de novo as a "legal characterization." 192 Wn.2d at 250, ¶62, n.15 (citing *U.S. v. Grant*, 696 F.3d 780, 785 (8th Cir. 2012) ("objective standard . . . calls for a legal characterization") (quoted source omitted), *cert. denied*, 571 U.S. 832 (2013)); *U.S. v. Bassignani*, 575 F.3d 879, 883 (9th Cir. 2009) (objective custody determination reviewed de novo); *State v. Estes*, 188 Wn.2d 450, 457–58, ¶¶19–21, 395 P.3d 1045 (2017) (ineffective assistance of counsel claims reviewed de novo and require performance that falls "below an objective standard of reasonableness"); *State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002) (de novo review of denial of self-defense instruction based on an objective assessment).

eradicate racial bias from the justice system. *Jefferson*, 192 Wn.2d at 249, ¶61 ("The evil of racial discrimination is still the evil this rule seeks to eradicate.").

De novo review is not limited to jury selection cases, as the Simbulans argue. (Pet. 23) They concede (Pet. 20) this Court followed *Jefferson* in *Berhe*, 193 Wn.2d at 657, ¶¶22–25, a case alleging implied bias in the jury's deliberations, upon which the *Henderson* Court also relied. The *Berhe* Court gave no deference to the trial court's decision on an African American juror's allegation that other jurors' statements in deliberations manifested their implicit bias, holding the trial court erred in failing to "ask[] the juror making the allegations to provide more information or to clarify ambiguous statements." 193 Wn.2d at 666, ¶48; *see also State v. Horntvedt*, 29 Wn. App. 2d 589, 601–03, ¶¶31–35, 539 P.3d 869 (2023) (applying objective standard to reverse trial court's refusal

to allow withdrawal of guilty plea made following prosecutor's race-based comments).

In *State v. Tesfasilasye*, 200 Wn.2d 345, 355–56, ¶25, 518 P.3d 193 (2022) (Op. 10), this Court held that an appellate court reviews de novo whether an objective observer could view race as a factor in the State's peremptory challenges to non-white prospective jurors. As here, the Court applied an objective standard and "none of the trial court's determination apparently depended on an assessment of credibility." *Tesfasilasye*, 200 Wn.2d at 356, ¶25; *Accord, Lantz v. State*, 28 Wn. App. 2d 308, 311, 333, ¶2, ¶68, 535 P.3d 501 (2023) ("on de novo review, and applying the correct standard, we also hold that an objective observer could not view race as a factor in

challenging juror 4 and no evidentiary hearing is warranted."), *rev. denied*, 2 Wn.3d 1019 (2024).[5]

The Court of Appeals' application of de novo review to the trial court's "objective observer" decision is thus consistent not only with *Henderson* but also with this Court's broader precedent.

3. The trial court made no findings requiring appellate deference in assessing a cold record.

The Simbulans argue that "the totality of the circumstances" requires "more than reviewing transcripts" (Pet. 21), but reviewing transcripts is all the trial court itself did here. The trial court did not make findings about "the behavior and demeanor of witnesses, counsel and jurors,"

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[5] The Simbulans contend that *Lantz* "applied "the abuse of discretion standard for a trial court decision on a post-trial evidentiary hearing." (Pet. 20, n.5) Not so. The *Lantz* court cited *Berhe* to distinguish the trial court's discretion to conduct an evidentiary hearing in cases of juror misconduct from those involving "cases of alleged racial bias," which requires an objective standard. *Lantz*, 28 Wn. App. 2d at 333, ¶66.

or the "tenor of the courtroom, the tone of the trial." (Pet. 21–22) As the Court of Appeals correctly noted, "the trial court here made no credibility determinations that would require deference on review." (Op. 10) Its assessment "involve[d] no subjective trial court discretion." (Op. 11)

The Simbulans continue to confuse the deference given a trial court's ultimate findings "based on a developed record" following an evidentiary hearing on a motion for a new trial (Pet. 24), with the objective threshold determination whether the moving party has established a prima facie case requiring an evidentiary hearing to begin with.

As to the trial court's ultimate decision to grant or deny a new trial, the appellate courts defer to that decision "because the variety of fact patterns that arise require the trial court to have a measure of discretion." *Lantz*, 28 Wn. App. 2d at 328, ¶51. "The trial judge is in the best position" to compare alleged misconduct with what occurred at trial,

having "observ[ed] both the verbal and nonverbal features of the trial." *State v. Tigano*, 63 Wn. App. 336, 342, 818 P.2d 1369 (1991), *rev. denied*, 118 Wn.2d 1021 (1992). (Pet. 22) That is why courts require an evidentiary hearing to assess both whether misconduct occurred, and its effect on the verdict. *See, e.g.*, *State v. Cho*, 108 Wn. App. 315, 30 P.3d 496 (2001) (remanding for evidentiary hearing where juror failed to reveal he was retired police officer); *Berhe*, 193 Wn.2d at 665–69, ¶¶45–57.

By contrast, the *Henderson* standard for determining whether the movant has met their *prima facie* burden to obtain an evidentiary hearing in the first place is objective. *Henderson*, 200 Wn.2d at 439, ¶¶40–41. Here, the trial court's order merely recited "the particular excerpts that form the basis of Plaintiffs' motion"—which itself was apparently generated by a word search for the terms "Philippines" or "Filipino" in the transcripts. (CP 307; *see* CP 65–75 (motion for new trial)) The trial court did not

consider a "myriad" of "case-specific considerations" requiring the appellate court's deference. (Pet. 22, 23)

In sum, the Court of Appeals' de novo review of the threshold objective inquiry under *Henderson* presents no issue warranting review under RAP 13.4(b)(1) or (b)(4).

B. An objective observer could not find that bias played any role in the jury's verdict.

Regardless of the standard of review, the Court of Appeals properly held that the selected portions of the record considered by the trial court do not "support[] an inference from which an objective observer could conclude that the verdict was affected by bias based on country of origin, race, or ethnicity." (Op. 19) The Court of Appeals did not impose a requirement of "purposeful" and "flagrant" misconduct," as the Simbulans claim. (Pet. 4, 18, 33) Instead, it carefully analyzed the record and engaged in the objective determination whether an observer conscious of this State's history of racial and ethnic prejudice could find

an appeal to bias, as instructed by *Henderson*. This Court's review is not warranted under RAP 13.4(b)(1) or (4).

The Simbulans' complaint that the defense made their Filipino heritage a "theme" to "decrease a potential damages award . . . at every stage of the trial" (Pet. 26, 30) is simply not supported by the record (or the trial court's findings). The defense's only "theme" was that the Simbulans had suffered a tragic loss that was not the result of medical negligence. It was the Simbulans who "made repeated characterizations" (Pet. 26) of their Filipino heritage in seeking damages from this racially diverse jury.

The Simbulans' counsel first addressed the jury by identifying his clients as a "large, loving, culturally-thoughtful, Filipino family" (Op. 22; RP 351), and told the jury about their Tagalog interpreters. (Op. 20–21; RP 1127, 1145) As the Court of Appeals noted, the birth of the Simbulans' first child in the Philippines "was a simple fact of Shella's medical history." (Op. 20; RP 1158–60) The

defense raised the "couple's history of living apart for a significant portion of their marriage" only in response to the direct testimony of the Simbulans and their witnesses, elicited on the question of damages, that they had a strong and loving marriage, which their counsel "expressly presented to the jury in their closing argument." (Op. 20; *see* RP 1678–79)

The Court of Appeals did not hold that the Simbulans "opened the door" to cultural stereotypes "in a way that could stir up implicit bias," as petitioners argue. (Pet. 29–30) Instead, as an objective observer, the Court of Appeals could not find any hint of an appeal to bias in the isolated and neutral references by the defense to the very facts first raised by the Simbulans.

Further, the Simbulans' argument that the defense relied upon ethnicity as a "theme" to reduce damages ignores that the jury never reached the issue of damages because it found no liability. In *Henderson*, by contrast,

after the defendant "admitted fault for the collision," 200 Wn.2d at 422, ¶2, damages were the *only* contested issue at trial, and were precisely what the plaintiff challenged on appeal. Thus, the *Henderson* Court held that an objective observer could conclude that the "astonishingly small damages award," 200 Wn.2d at 434, ¶29, could have been the product of "racist stereotypes about Black women as untrustworthy and motivated by the desire to acquire an unearned financial windfall." 200 Wn.2d at 437, ¶36. In this case, by contrast, the jury never reached the damages question.

The Simbulans' characterization of the defense in this case as a "fixation" on the Simbulans' ethnicity (Pet. 27) finds no support in the trial court's order or in the record upon which the trial court relied. Their hyperbole only underscores how the defense's limited and benign references to the Simbulans' country of origin–fewer than half as many references as the Simbulans' own—come

nowhere near the type of comments that courts have identified as providing a basis to conclude that racism could have affected the verdict.

The Simbulans do not appear to take issue with the Court of Appeals' observation that "the rule in *Henderson* plainly cannot mean that *any* time race or ethnicity is addressed in a jury trial . . . the party challenging the verdict is automatically entitled to an evidentiary hearing." (Op. 12–13) (emphasis in original) Nor do they challenge the Court of Appeals' reliance on the dictionary definition of the modal verb "could" as "be made possible or probable by circumstances" (Op. 11–12), or the plain grammatical fact that "could cannot mean always." (Op. 19) But that is precisely their interpretation of *Henderson*.

The Court of Appeals contrasted Northwest Hospital's defense with the "constant irrelevant questions and arguments surrounding Bagby's race" (Op. 21), in *State v. Bagby*, 200 Wn.2d 777, 802, ¶52, 522 P.3d 982

(2023), and defense counsel's repeated use of racist stereotypes to attack the plaintiff's credibility in *Henderson* (Op. 8–10), which the Court correctly characterized as "flagrant" and evincing an "intentionally racialized framing of the arguments presented to the juries" in those cases. The Simbulans are wrong to equate that characterization with imposition of a requirement that only "intentional" and "flagrant" misconduct satisfies the threshold standard of establishing a case of implicit bias. (Pet. 4, 18, 33)

The Court of Appeals made no such holding. Instead, it recognized that an objective observer could only conclude that the defense referred to the Simbulans' Filipino heritage in a neutral and non-disparaging manner. Carefully applying the *Henderson* standard, the Court found that on this record, "no objective observer could conclude that bias based on race or ethnicity affected this verdict after consideration of the entirety of the record[.]"

(Op. 23) Its decision does not incentivize "BIPOC individuals to . . . erase their background" (Pet. 29), any more than this Court's decision in *Henderson* would. The Court of Appeals instead recognized that the courts are open to all, regardless of their race and ethnicity—subjects that should be neither weaponized nor ignored. Its decision creates no conflict with this Court's jurisprudence, RAP 13.4(b)(1), and presents no issue of substantial public interest that requires this Court's determination. RAP 13.4(b)(4).

V. CONCLUSION

The Court of Appeals applied the correct standard of review and properly held that, under the objective standard established by this Court, no reasonable observer could find that this trial was tainted by implicit bias. The Court should deny review.

I certify that this answer is in 14-point Georgia font and contains 4,996 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 23rd day of December, 2024.

JOHNSON, GRAFFE, KEAY, MONIZ & WICK, LLP

By: */s/ Miranda A. Aye*
Miranda K. Aye
WSBA No. 40582
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By: */s/ Howard Goodfriend*
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Special Assistant Attorneys General for Respondent

DECLARATION OF SERVICE

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

That on December 23, 2024, I arranged for service of the foregoing Answer to Petition for Review, to the court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-File
Miranda K. Aye, Aida Babahmetovic Johnson, Graffe, Keay, Moniz & Wick, LLP 925 4th Avenue, Suite 3550 Seattle, WA 98104 Miranda@jgkmw.com aidab@jgkmw.com	____ Facsimile ____ Messenger ____ U.S. Mail _X_ E-Mail

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DATED at Seattle, Washington this 23rd day of December, 2024.

/s/ Victoria K. Vigoren
Victoria K. Vigoren

both children and adults with PTSD. She's well versed and respected in the community as a specialist in treating individuals with PTSD symptoms.

Ms. Mulligan evaluated both Ron and Shella and will testify as to the serious psychological injury that both have suffered as a result of Ronnie's death, as well as the fixes and helps that will be required to assist Ron and Shella moving forward in their lives.

Now at trial, you'll learn that family is absolutely everything to Ron and Shella. This is a photo of the Simbulan family. This photo was taken in Thanksgiving time of 2017. This was just days before Shella was preparing to deliver Ronnie. In this photo you can see Ron standing next to Shella, who is holding her belly in a striped sweater.

Phoebe Mulligan will explain the death of Ronnie has had absolutely profound impact that resonates through their entire family. You're going to learn the Simbulan family is a large, loving, culturally-thoughtful, Filipino family that has, consistent with their heritage, the focus and attention of a baby being brought into the family. It's a joyous and celebrated event.

What you're going to learn through the evidence is that this tragic and unforeseen loss of Ronnie has shaken the entire Simbulan family and compounded Ron and Shella's grief and sense of loss.

MS. SIMBULAN: Yes, I do.

THE INTERPRETER: Your Honor --

THE COURT: Ms. Calora.

SHELLA SIMBULAN: Witness herein, having first been duly sworn on oath, was examined and testified as follows:

D I R E C T E X A M I N A T I O N

BY MS. CALORA:

Q. Shella, good afternoon. Would you please tell the jury your full name.

A. I am Shella Joy Simbulan.

Q. Now, we have an interpreter here today helping you testify. Shella, do you speak English?

A. Yes.

Q. Is it your second language?

A. Yes.

Q. Why did you ask to have an interpreter to help you testify today?

A. So that I can be clear about what I feel and about what happened.

Q. Shella, let's talk a minute about your family. Are you married?

A. Yes.

Q. To whom?
A. To Ronald Simbulan.
Q. Shella, where did you meet Ron?
A. In the Philippines.
Q. When did you meet him? How did you meet him?
A. 2007.
Q. How did you meet him?
A. He was introduced to me by my brother-in-law.
Q. What drew you to him? What made you pursue a relationship?
A. Because I saw his sincerity and his love for me.
Q. When did you and he get married?
A. March 29th, 2008.
Q. At some point after that, did you move to Seattle?
A. It was after four years before I moved to Seattle.
Q. After you moved to Seattle, did you find a job?
A. Yes.
Q. Where were you working?
A. Arco Gas Station.
Q. How long did you work there for?
A. Almost six years.
Q. And what job were you doing at the Arco Gas Station?
A. The register.
Q. And, actually, you work someplace else now?
A. In Walgreens.
Q. When you've been working, is there a typical shift that you

work?
A. I work after 3:00 when my husband arrives.
Q. Now, does Ron -- does Ron have a job?
A. Yes.
Q. And where does Ron work?
A. UW school.
Q. And does he have a different shift than you?
A. In the morning.
Q. Now, Shella, I want to talk a bit about your pregnancy. Okay? In 2017, you became pregnant, right?
A. Yes.
Q. And that was your second pregnancy, correct?
A. Yes.
Q. Let's talk about your oldest child. What's her name?
A. Faith Isabelle (phonetic).
Q. When was she born?
A. October 23, 2012.
Q. Where was she born?
A. In the Philippines.
Q. And were you conscious during her delivery?
A. I was a little conscious but after that I fell asleep.
Q. Was that because they gave you a medication?
A. I'm not sure.
Q. After you delivered Faith in the Philippines, were you able to take her home?

A. Yes.
Q. Is she about to turn ten this next month?
A. Yes.
Q. Now, in 2017 when you became pregnant with your second child, where did you seek care -- medical care for the pregnancy?
A. Norwegian.
Q. Do you mean to say "Meridian"?
A. Meridian.
Q. Okay. Is Meridian part of Northwest Hospital?
A. Yes.
Q. What --
A. As far as I know.
Q. What made you select that facility for care?
A. So I was googling and I saw that it was a good hospital and then my sibling and my friends also said that it was a good hospital.
Q. Who?
A. Sister-in-law.
Q. Is your sister-in-law a nurse?
A. Yes.
Q. Where is she a nurse?
A. Northwest Hospital.
Q. Who was your doctor at Meridian?
A. Dr. Frankwick.

THE COURT: Thank you.

THE WITNESS: I do.

THE COURT: Thank you, Mr. McClure, you may proceed.

MR. MCCLURE: Thank you, Your Honor.

RON SIMBULAN: Witness herein, having first been duly sworn on oath, was examined and testified as follows:

(All questions and answers were translated by the interpreter, and all answers were given through the interpreter, unless otherwise noted)

D I R E C T E X A M I N A T I O N

BY MR. MCCLURE:

Q. Mr. Simbulan, you're the father of Ron Andrew Simbulan, the baby whose delivery we have been hearing about, correct?

A. Yes.

Q. And like your wife, you know English; is that correct?

A. Yes.

Q. But your first language is not English?

A. No.

Q. So is your easiest way to communicate effectively today through an interpreter?

A. Yes.

Q. Ron, did you and Shella have to make a decision about what to do?
A. That is right, sir.
Q. And in making that decision, do you remember how Shella was feeling or reacting?
A. She was crying and very, very sad.
Q. Can you tell the jury what decision you had to make?
A. We were asked by the doctor to choose whether we should take the life support --

MS. BABAHMETOVIC: Objection, Your Honor. Hearsay.

THE COURT: I'll sustain.

And, Mr. Simbulan, try to limit your answer to not including things that other people told you. Okay? I know -- I know this is difficult, but that's a legal rule. Okay?

THE WITNESS: Yes, sir.

THE COURT: Okay. Mr. McClure, try again.

MR. MCCLURE: Thank you, Your Honor.

Q. (By Mr. McClure) You mentioned earlier that you and Shella had to make a decision regarding Ronnie. Can you tell the jury the decision that you made?
A. We decided, sir, to pull off the machine.
Q. And I asked you how Shella was feeling during this. How were you feeling?
A. In our Filipino culture, you know, you have to show that, as

a man, you're the one who needs to stand up and take it on.
Q. And I'll ask -- I'll ask this question with -- with -- being sensitive to the Filipino culture. (Inaudible) outwardly acted strong, how were you feeling on the inside?
A. Very sad because there is now a lack.
Q. And when you say there is a lack, what do you mean by that?
A. I just lost my young boy.
Q. While you were at Swedish Hospital, did you meet with the chaplain?
A. That is correct.
Q. Do you remember that chaplain offered to baptize your child?
A. That is correct, sir.
Q. Did you and Shella talk about the decision to baptize Ronnie?
A. That is correct, sir.
Q. And what decision did you and Shella come to?
A. That we will still have him baptized there.
Q. And why (inaudible)?
A. When we made the decision to pull the plug, we still decided that he will still be baptized, even though we knew that there was nothing to look forward to.
Q. Ron, were you able to hold Ronnie before he died?
A. That is right, sir.
Q. After the visit at Swedish and you had to return Shella back to Northwest, did you go with Shella?

returned back to Northwest Hospital from Swedish, she resumed her medical care at Northwest Hospital for several days; right?

A. Correct.

Q. After your son passed away on December 10, 2017, you took some time off from work. Do you remember that?

A. Correct.

Q. And we saw a picture of your family earlier in your testimony. Those family members live nearby; is that right?

A. Correct.

Q. And you were provided with a lot of family support during that difficult time; right?

A. Correct.

Q. My understanding is you took about three months off from work but some coworkers of yours donated their PTO or time off so you didn't actually even have any unpaid time off; is that right?

A. Correct.

Q. And after your son passed away, you didn't, yourself, seek any sort of medical or health care treatment; right?

A. Correct, because in my culture, in my Filipino culture, it was expected that the man would be strong and would be the leader of his family and that he could bear all of this.

Q. How did you deal with the sadness of losing your son after it happened?

After three days from discharge home, we decided, as a family, to go to give her some support. We understand that Ronald just keep drinking. And she's, all the night, she's not (inaudible). For that, we went to the home. That time, it is just -- there is even -- there's no light. It's just in the kitchen very small light. The darkness everywhere. Sadness everywhere.

Then I decided to go to buy the Christmas tree, the decoration, the light. Bring back and try to give some happiness there. We tried to wish her to make and install the trees and to put the decoration. But even the daughters, (inaudible) she help us. She tried to do that, but in between, you know, she's just spacing.

I'm trying to give as much I can happiness. I know that Christmas for the Christian, they are very important, especially the Filipino for that, because my wife, she's Filipino, and I understand that how much it's very important for them. For that, I do it just to give some happiness for her.

MR. MCCLURE: Okay. Thank you. Those are all the questions I have.

THE COURT: Thank you, Mr. McClure.

Ms. Babahmetovic?

MS. BABAHMETOVIC: Thank you, Your Honor.

//

Q. In your clinical practice, have you worked with parents who have suffered the loss of a child?
A. Yes.
Q. Okay. And in your clinical practice, are you required to receive cultural competency training?
A. Yes.
Q. Okay. Do you have a rough estimate over the course of your career providing counseling services about how many patients you may have encountered?
A. I think I would guess it's probably -- depending on the year -- about 500 a year.
Q. In that practice, have you worked with individuals that have a Filipino background?
A. Yes.
Q. Okay. And based on your work with individuals with a Filipino background in your clinical practice as well as your cultural competency training, do you feel like you're able to effectively provide services to Filipino individuals?
A. I would -- I mean, I would say yes. I don't -- that would sort of be up to the person that I was working with whether or not they felt like I was a good fit for them or that I had a clear understanding of their family and their background. But I have not had anybody leave therapy because they said that I was not competent in terms of

immediately before the birth of their son, Ronnie?
A. They both spoke about feeling very excited that they were having a boy. They talked about going to work and feeling content and having a good marriage and that life was as good as it can be expected.
Q. Okay. And then I believe you mentioned that you did ultimately discuss the event preceding baby Ronnie's death, as well as his death. I'm hoping you could explain to the jury your understanding of the impact of baby Ronnie's death on Ron and Shella based on the information you gathered during your forensic interview.
A. I think the sense that I got when they were speaking about it was that it was a combination. So we would call it clinically "traumatic grief," that it was a combination of both a trauma occurring and also the loss of somebody, which was more complicated than either one of those separately. And there was the -- you know, the labor and the birth, which was significant. And then there was also the understanding that their son died and then the fallout of that.
Q. You just used a term that I'm hoping you can help us kind of understand. You stated "traumatic grief." Could you just provide some context of what, you know, traumatic grief is?
A. Traumatic grief is what happens when you have a trauma that causes a death. So the birth itself was the trauma and then

This was Ms. Simbulan's second baby. Her first baby had been delivered in the Philippines in 2012, and it's what can be referred to as a twilight forceps delivery where the mother is given medication that makes her not unconscious, but fairly drugged, and forceps are used to help remove the baby and deliver it. And Ms. Simbulan had a healthy baby girl.

During the second pregnancy, Ms. Simbulan was receiving her prenatal care by one of Dr. Tiwari's partners, Dr. Dawn Frankwick.

Her due date was December 7th, and so when she came in on December 9th she was two days overdue. They had planned for an induction of labor, but then she spontaneously went into labor on December 9th, and that's when she came to the hospital.

This is the admission note for Ms. Simbulan, and notes that she was 40 weeks and two days. Forty weeks is when somebody is full term. And so she was two days past her due date, and she was in active labor and was having contractions since 4:30 that morning. And she came in around 8:21 in the morning.

This is Dr. Anita Tiwari. She was the doctor on staff that day at the hospital. Dr. Tiwari is a board certified OB/GYN. She's been a partner with the Meridian Women's health group at Northwest since 2012, and continues to work

MS. BABAHMETOVIC: Thank you, Your Honor.

C R O S S - E X A M I N A T I O N

BY MS. BABAHMETOVIC:

Q. Good afternoon, Mr. Simbulan. My name is Aida Babahmetovic. We have not met yet, but I'm here to ask you a few questions. I'm so sorry for your loss.

My first question to you, Mr. Simbulan, is you and your wife, you were married in 2008; is that correct?

A. Correct.

Q. And my understanding, based on your deposition testimony and what you've testified here today, is that you and your wife weren't actually able to live in the same country for the first seven to eight years of your marriage; is that right?

A. Correct.

Q. You were living in the U.S., here in Washington, and she was living in the Philippines during that seven- to eight-year period?

A. Correct.

Q. And sounds like you guys communicated over the phone or during video calls and things like that pretty frequently; right?

A. Correct.

Q. And you did visit her periodically in the Philippines, while you were married, before she moved to the U.S.; is that

right?
A. Correct.
Q. She actually became pregnant with your first child in the Philippines while you -- during one of those visits; is that right?
A. Correct.
Q. She moved -- your wife, Ms. Simbulan, moved to the U.S., moved to Washington, in April of 2016. Does that sound correct to you?
A. Correct.
Q. And she became pregnant with your second child in March of 2017, shortly thereafter; right?
A. Correct.
Q. Okay. As for your first child, her name is Faith. Did I get that right?
A. Correct.
Q. Faith was born in the Philippines in 2012?
A. Correct.
Q. About four years into your marriage?
A. Correct.
Q. And when your wife gave birth to Faith in the Philippines, you were not living in the Philippines? You weren't present for that delivery; correct?
A. Correct.
Q. You were in Washington at the time when she gave birth to

your first child, Faith, in 2012?
A. Correct.
Q. With respect to your wife's second pregnancy, she established prenatal care with a physician by the name of Dr. Frankwick. Do you remember that?
A. Correct.
Q. And you told us at your deposition that you attended all of your wife's prenatal visits with Dr. Frankwick during that second pregnancy; is that right?
A. Correct.
Q. So fast forwarding to the actual labor and delivery of Ronnie in this case, December 9, 2017, you drove your wife to Northwest Hospital; is that right?
A. Correct.
Q. And that morning she was in labor, as far as you could tell?
A. Correct.
Q. While your wife was in labor and during the delivery, you were in the labor room with her that entire time; right?
A. Correct.
Q. And Dr. Tiwari, who is here with us today, she was in the labor room the whole time during your wife's delivery of the baby; right?
A. I'm not sure.
Q. You don't remember?
A. I don't recall because I was focused on my wife.

A. Thank you.
Q. I wanted to ask you a little bit about your family. Is it your understanding that Mr. Simbulan, Ron Simbulan, is one of eight siblings?
A. Correct.
Q. And he has several siblings that live in Washington, including your wife; is that right?
A. Correct.
Q. And when you and your wife first moved to Washington, you lived directly across the hall from Ron Simbulan and his other sister, your other sister-in-law; right?
A. Correct.
Q. I think you testified you lived across the hall from each other for about four years; is that right?
A. Correct.
Q. And during that period of time, that four-year period that you were living across the hall from each other, Mr. Simbulan was married at the time to Joy but she was not living in the U.S.; correct?
A. Correct.
Q. And she -- you don't remember her visiting at any point during that four-year time; right?
A. Correct. I don't remember.
Q. Okay. And then eventually, when you and your wife bought a home four years later, Ron actually -- Ronald Simbulan

actually came and lived with you for a while; right?
A. Correct.
Q. I think you told us about two years; is that right?
A. Correct.
Q. And at that point his wife, Shella Simbulan, had not moved to the U.S. still. So he was married but she was not living with him; correct?
A. Correct.
Q. Okay. I want to ask you, Mr. Saleh, about an event that the jury has heard about, which is the passing of Ronald Simbulan's nephew, Andrew. Do you recall that event?
A. Yes.
Q. So I want to ask you some questions about it.
A. Okay.
Q. The first question I have is, is it your understanding that Ronald Simbulan's nephew, Andrew, tragically passed away in July of 2017?
A. Correct.
Q. So just a few months before their son was born; correct?
A. Correct.
Q. And I think you testified during your deposition, that this had a very deep, significant emotional impact on Ronald Simbulan; right?
A. Correct.
Q. And Ronald actually lived with his nephew, Andrew, for a

period of time right before he passed away; correct?
A. Correct.
Q. And he actually saw Andrew the night before he passed away; right?
A. Correct.
Q. And I believe you told me during your deposition that Andrew was about between 23 and 24 when he died?
A. Yes.
Q. And he died from falling off of a building; is that right?
A. Correct.
Q. And they were very close, the two of them?
A. Very close, yes.
Q. I think you told me during your deposition that when -- when you wanted to know where Ronald was, you would ask Andrew. And when you wanted to know where Andrew was, you would ask Ronald?
A. Correct.
Q. And was it your testimony that after Andrew's passing, Ronald actually took some time off of work --
A. Correct.
Q. -- to deal with that grief?
A. Correct.
Q. Okay. Moving on, Mr. Saleh, I wanted to talk to you about the events of this case, and one thing I want to establish is that understanding that you -- you are not from the

Philippines. You don't speak the language of Mr. and Mrs. Simbulan; correct?

A. Correct.

Q. And based on your culture and background, you don't get involved in discussions with your female family members, including Ms. Simbulan, about her pregnancies and deliveries; right?

A. Correct.

Q. Okay. With respect to Ms. Simbulan, you didn't have any direct conversations with her about her pregnancy and her delivery; right?

A. Correct. In between, she would ask some question, medical question. I would answer according to what the question medically. But not in personally.

Q. Okay. You were not present for the delivery of this baby, Ronnie Simbulan; correct?

A. No. I'm not present, correct.

Q. You didn't see any aspect of the delivery; right? You didn't personally observe it?

A. No. Correct.

Q. And I understand you visited Mr. and Mrs. Simbulan at the hospital, at Northwest, after she had delivered the baby?

A. Correct.

Q. Okay. And you didn't talk -- you didn't have any conversations with anyone at Northwest Hospital at any point

A. It's been a long time.
Q. So you've (inaudible) -- you've been with Meridian Women's Health at Northwest Hospital since you finished your training in 2012?
A. Yes.
Q. Why did you become a doctor?
A. So I think it was mostly out of just a deep need to help individuals.

I -- my early childhood, I grew up in India. My grandparents were farmers. They lived in an area that was -- just had no resources. In order for you to get any kind of medical care, you had to drive hours away. And so people died of just simple things that I consider simple now that we in this country probably consider simple, but they didn't have any access to care. And I thought that that was just an unfair -- unfair way to be.

And so out of that experience, I then moved to the U.S., and I did all my education here. And I think that's what drove me to help people, help people who don't have resources to provide them with the best care possible.

Q. And why OB-GYN?
A. So OB-GYN is -- it's -- it's a happy profession, and it is -- I see individuals from like all parts of life, right?

And in my -- any given day, I take care of teenagers who are deciding about going to college and talking about

the witness is responding to the questions that are asked. They're not telling their whole story. If questions aren't asked or things aren't followed up on, there's not a full explanation given. So it was pretty short questioning on some of those issues. And that's why you heard such a more detailed accounting of these things in trial.

All four of these witnesses that were there that have extensive experience in labor and delivery and have all seen shoulder dystocias, they all agree this was the most profound shoulder dystocia they'd ever seen. And this was Mr. Vertetis words that I took. This is what he told you in opening, "No one's going to say this was a profound shoulder dystocia."

Well, everybody that was there came in and said: I've never seen anything like this. All the things that I thought that would have worked, all the things that we normally see, that is not what was happening here.

Everybody who was there also told you, this baby was so stuck in the pelvis that it wasn't moving at all. The head wouldn't turn, the shoulders weren't moving. Nothing was moving until Dr. Tiwari managed to get out that posterior shoulder. That was right before Dr. Panighetti got there. That's why the baby could be rotated once Dr. Panighetti got there. It's not that

the baby was able to be rotated the entire time up until then.

You heard from Nurse Rachel Rodgers. She told you that the nurses aren't trained on the internal maneuvers. She told you the head would not move. She also told you about Dr. Tiwari directing everyone in the room on what to do. She saw the posterior shoulder being delivered. She saw Nurse Owens doing this maneuver that you guys heard about of pulling up on the pelvic rim, something that just speaks to how hard everybody in this room was doing whatever they could to deliver this baby. Nurse Owens knew that the ligament had some stretch during pregnancy, and so she was pulling up on the pelvis just to try to create a little bit more room so that they could get this baby out.

And Nurse Rodgers saw Dr. Tiwari, saw Dr. Panighetti working together, both with their hands inside of Ms. Simbulan's vagina trying to get this baby out, performing internal maneuvers. Dr. Gubernick tried to tell you, "Oh, that's not possible." Everybody that was there saw it. Everybody that was there told you that it was possible and it did happen.

Nurse Katie Owens, she was the main labor and delivery nurse. She said that the baby's head was very stuck, wasn't moving in any direction in any way. And she told

you -- and I think Ms. Rogers did, too -- that that's really unusual, that usually, like Dr. Gurewitsch-Allen described or Dr. Gubernick described, usually the shoulders are stuck above the bone. So usually the baby can be rotated or there's only one shoulder stuck, and so the head does move somewhat. That's how you wind up with all those brachial plexus injuries that Dr. Gurewitsch-Allen spent the focus of her time on here.

Here, this baby's head wouldn't move at all. She told you that Dr. Tiwari was calm. She was in constant communication with everybody in the room. She talked about Dr. Tiwari and Dr. Panighetti having to work together performing internal maneuvers to get this baby delivered once Dr. Panighetti got there. And she described not only this unusual maneuver that she did just in a desperate effort to try to do whatever she could to help get the baby out, but that she used so much force doing all this, she was out of work for five months. She still has injuries.

Dr. Panighetti, she was Plaintiffs' first witness. They got up in opening and told you, "This is what you're going to hear. Dr. Panighetti came in and just performed one simple maneuver. This wasn't a profound shoulder dystocia. This doctor came in and performed

one simple maneuver, and she delivered the baby no problem."

Even today they told you if she would have been there, the baby would have been delivered in a minute.

Well, even with the posterior shoulder out, it still took them a minute, two of them working together, to get this baby delivered. So what does that tell you about the idea that if this doctor had just been there, she could have delivered this baby and alleviated the shoulder dystocia in a minute?

It just doesn't add up. Dr. Panighetti completely disputed what Dr. Gubernick came in and told you. She said the posterior shoulder had been delivered once she had arrived. We looked at her dep testimony about this. She said even when she got there -- and everybody agreed to this, that once the posterior shoulder is delivered, the posterior arm should just fall out. This should be a very easy thing to get a baby out who's had a shoulder dystocia once that posterior shoulder has been delivered.

But, here, the shoulder was delivered. Dr. Panighetti still couldn't even reach the posterior arm when she there. She was trying. It took two of them working together for a full minute with multiple attempts to still get this baby out. She told you this was a

profound and atypical shoulder dystocia. She completely disagreed that she performed one simple maneuver that resulted in delivery. She disagreed that she was the delivering doctor. She talked about the multiple maneuvers that it took her and Dr. Tiwari to deliver this baby. She told you she's never seen a shoulder dystocia anything like this.

Dr. Tiwari, you got to hear from her yesterday, and she was the only one that was there for the first 23 minutes until Dr. Panighetti got there. She was the only one performing internal maneuvers. She was the only one feeling where these shoulders were. She's the only one who knew where they were impinged. Plaintiff experts have come in and said: Oh, it doesn't really make sense, I don't think the shoulders could've been impinged there.

Well, Dr. Tiwari didn't think it made sense either. Nothing about this made sense. The posterior arm should have fallen out when the posterior shoulder got delivered. But she was there. She had her hands in there, and she was the one feeling where the shoulders were. She was the one trying to rotate this baby. We went through for quite a while these different maneuvers that she was performing. Nothing moved the baby at all. She kept trying and trying and trying.

She was asked about these emergency maneuvers, the maneuvers of last resort, the heroic maneuvers. She told you she absolutely considered these, she absolutely would have performed these if she thought there was any chance that they could have helped or been successful. It wasn't that she said, "Oh, a Zavanelli, I'm not going to try that." She would have tried anything that she thought would have helped. It's not her fault that this shoulder dystocia occurred. Nobody says that it is.

She tried everything that she thought was in the best interest of her patient to try to get this baby out. She had to make a clinical judgment. She was the one in the room. She's the one who had to decide these morbid maneuvers, these more morbid and risky procedures, could those work here? Are they worth trying to perform, or am I going to just cause injury and still not be able to get the baby out?

There were some questions yesterday. I just want to clear up a couple things for you guys. This idea of whether the baby was stuck and not able to be moved or this ability to rotate. And I talked about this a minute ago, but I just want to make sure you all understand this. The baby couldn't be rotated. The baby couldn't be moved. The baby was stuck until Dr. Tiwari got that posterior shoulder out. That's

what changed things. And that's why she said, the point at which Dr. Panighetti got there -- it wasn't that she was waiting for Dr. Panighetti to perform some surgical maneuver -- once Dr. Panighetti got there, there was no need to because there was finally some movement. They were finally going to get this baby out.

Plaintiffs' counsel wants you to think that because Dr. Tiwari took seven hours, after the most horrific delivery of her career, to write her note, that that must mean there's something untrue about it. Seven hours. She was on shift that night, so she still had to go care for all the other patients on the floor after this delivery. She had to ice her hands, ice her arms, go put a smile on her face, and go talk to expectant mothers that were laboring on the floor. She just needed some time to be able to sit down and write this note after attending to her other patients.

It's hard for all of us not to use hindsight when we look at things. That's just not the standard that you can apply here. You don't get to think about, well, we know now what happened. The only way that you can judge Dr. Tiwari is based on what she knew at the time. And I'll show you the instructions on this, and we'll talk about this further.

But, first, let's talk about what the actual

criticisms that Plaintiffs' experts have against Dr. Tiwari. There's only two of them. There are only two things that they have raised in terms of criticisms: Whether Dr. Tiwari should have attempted a heroic maneuver -- and they differ on what time they think that should have been done -- and whether or not Dr. Tiwari properly tried to perform the delivery of the posterior arm. Those are the criticisms that you heard from Dr. Gubernick and Dr. Gurewitsch-Allen.

So who has the burden of proof here? And what is burden of proof? Well, the plaintiffs are the ones that brought these claims, and so they have the burden of proof to prove their claims. And this is Jury Instruction No. 8, that when a party has the burden of proof on any proposition or that it must be proved by a preponderance of the evidence, it's that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true. So it has to be more than 50 percent. You have to get further than that.

But what does that mean? And I talked about this briefly in opening, but I don't expect you guys to remember that from that many weeks ago in all the evidence that you've heard, but Plaintiff and Defendant

are not starting out on equal ground in this case, where if Plaintiff puts on a little bit of evidence, that tips the scales and then they're above 50 percent and that means they've proven their claim. That is not what burden of proof means.

They have to prove, with the evidence in this case, they have to get to that more probable than not, they have to get to greater than 50 percent. And so they show you evidence, but then you, the jury, you get to evaluate the evidence. So maybe you heard some testimony, but then it got countered, so that takes them back down. Then you hear some more evidence, some witness testimony, but there's cross examination and that brings it back down. You're the ones who get to weigh the evidence that's been presented. Plaintiffs are the ones that have to get to their more-probable-than-not threshold.

Particularly in a case like this, it can be easy to feel like, well, somebody must have done something wrong, you know, because this baby died. This is sad. It isn't what anybody wanted. But that general feeling that something must have been done wrong and then trying to look for the evidence to support the case, that's not the way to evaluate the evidence. You don't form a conclusion and work backwards based on the fact that

something bad happened. And there's a jury instruction that we'll look at on that.

So, instead, you have to look at all of that evidence and evaluate: Did Plaintiff prove their case here? Did they prove that Dr. Tiwari fell below the standard of care? It's not our burden. Defense is not the one with the burden here to prove that something didn't happen. And because of this burden of proof, Plaintiffs get to go first in the case and they get to go last. So after I've finished talking to you here today, Mr. Vertetis gets to get back up and argue whatever points he wants. I don't get that chance. I don't get to come back.

So please remember what I'm telling you. Sometimes when you know what happened, it's easy to look back and think, well, if you would have just done this, that would have avoided it. That's just not the way that it works in real life or in medicine. Every doctor wishes that they had a crystal ball and they could avoid any bad outcomes for their patients. Instead, they have to look at the information that they have at that time, and they have to make the best clinical judgment that they can, based on all of the training and experience that they have.

So we've been talking a lot about the standard of care, and you guys will have this instruction,

Instruction No. 6 about what really is the standard of care. So it's specific to an OBGYN. It's specific to Dr. Tiwari's field, and it's that an OBGYN has a duty to exercise the degree of skill, care and learning expected of a reasonably prudent OBGYN in the state of Washington acting in the same or similar circumstance -- so not just any shoulder dystocia, one like this -- at the time of the care or treatment in question. So with the knowledge that people had at that time.

This last paragraph is an important thing to look at. The degree of care -- and here I have it on the next slide -- the degree of care actually practiced by members of the medical profession is evidence of what is reasonably prudent. It's not the only evidence. It doesn't have to be the evidence, but this is what it says in your instruction, that evidence of what is reasonably prudent is what members of that medical profession, what other OBGYNs actually do, what they actually practice.

So of all the doctors that you heard from in this case, how many of them have ever performed a Zavanelli or an abdominal rescue? Absolutely none. None of them have done it. So how is that the standard of care? If somebody's required to do something that nobody in this case has done and very few people in this field have

ever done. You heard from Dr. Caughey standard of care doesn't require performing these heroic maneuvers.

And we've been saying heroic maneuver. And obviously you guys heard about two of them, the Zavanelli and the abdominal rescue. I would submit to you what we're really here talking about today is the Zavanelli. You heard Dr. Gurewitsch-Allen, you saw the look on her face. She said abdominal rescue, that's a much more morbid procedure, you know, that's really not done. And even Dr. Gubernick said, you know, really the Zavanelli -- the abdominal rescue is a bit further down the path of what people do not do. And you heard Dr. Tiwari. That's what she would have done only if the baby was deceased and she and Dr. Panighetti working together couldn't have gotten it out.

So abdominal rescue, that's not what any doctors in this field actually do when they encounter shoulder dystocia.

So for the Zavanelli, is that required to be attempted by the standard of care? You heard from Dr. Caughey, it's not required that a doctor attempt it. They have to consider it. Dr. Tiwari considered everything. She absolutely considered a Zavanelli and she would've tried it if she thought there was any chance that it would have alleviated the shoulder dystocia. You've heard

about her sitting there for 24 minutes doing everything she could, trying to get this baby out.

Do you really think that if she thought there was any chance that could be successful, that she wouldn't have tried it? This baby was so stuck, she was going to be pushing, putting incredible force on the head of a baby, knowing that with all of the might she had been trying, she hadn't been able to budge this baby at all. So she knew she couldn't start pushing on him and pushing him the other way. He wasn't moving at all. That was her clinical judgment to assess whether or not that should be performed.

And one of your jury instructions is very important on this point. It's Jury Instruction No. 12. And it says, "A physician is not liable for selecting one of two or more alternative courses of treatment if, in arriving at the judgment to follow the particular course of treatment, the physician exercised reasonable care and skill within the standard of care the physician was obliged to follow."

So if you think that Dr. Tiwari exercised reasonable care and skill of an OBGYN in assessing and deciding that a Zavanelli maneuver was not the right thing to attempt or that abdominal rescue was not the right thing to attempt, she wasn't negligent. That's what it means

when it says they're not liable, not below the standard of care. She was faced with two choices here, whether or not to try these maneuvers or not. She thought about it. She was the only one there evaluating things, and she had to exercise her clinical judgment based on all of her education, her training, her experience as an OBGYN, and she had to make that assessment of whether or not that should be done.

There's another jury instruction that you have, Jury Instruction No. 11. It could be easy in this case to think, "This baby died. Somebody must have done something wrong. She came in pregnant with a healthy baby and then this baby died." But you have an instruction here that tells you, just because there was a poor medical result, that is not evidence of negligence. So that is not what can be relied on to say that Dr. Tiwari was negligent.

We have to think about what Dr. Tiwari knew at the time she was trying to alleviate the shoulder dystocia. What did she know? Did she know it was going to take 24 minutes? She had no idea. She kept doing these maneuvers thinking at any minute she was going to get this baby out. She didn't know how long it was ultimately going to take.

What else did she know? She knew that usually when

you perform those maneuvers, shoulder dystocias resolved quickly, within a minute or two. So she kept trying, thinking that any minute one of these maneuvers, as she was moving the mom to all sorts of different positions, was going to be successful in finally getting these shoulders to move.

So we have to judge what she did based on what was known at the time by people who didn't know the outcome.

I talked about: Who has this training to perform internal maneuvers? It wasn't the nurses. There was no midwives there, but if there had been a midwife there, you've heard that when midwives have a shoulder dystocia, they have to call in an OBGYN. It's OBGYNs and maternal fetal medicine doctors, those who can perform -- that's who can perform these internal maneuvers. It's not ER doctors from other areas of the hospital. These are very specific things that these doctors get trained on. And those maneuvers of last resort, same people that have the training: OBGYNs and maternal fetal medicine.

Now, you got to hear the testimony of a few expert witnesses, including Dr. Caughey, who was able to come in, and I appreciate all of you coming in in person so that he could testify for you and demonstrate things for you on that shoulder dystocia simulation model.

But you also heard experts on the Plaintiffs' side. You don't have to accept an expert's opinion just because they're an expert. You can look at the sources for people's information. Here, is there any question in any of your minds that these experts were deprived of some information that they needed to express opinions to you in this case? They didn't hear any of this trial testimony. None of it.

Dr. Gubernick and Dr. Gurewitsch-Allen, they don't agree with each other. Dr. Gubernick says Dr. Tiwari failed to deliver the posterior arm properly. Dr. Gurewitsch-Allen doesn't agree. Dr. Gubernick says a Zavanelli should have been attempted at five minutes. Dr. Gurewitsch-Allen says, no, 10 minutes. They don't even agree on the facts. Dr. Gubernick says that Dr. Tiwari didn't deliver the posterior shoulder. Dr. Gurewitsch-Allen doesn't have any dispute with that.

So what did Dr. Gubernick tell you? He doesn't believe anyone or anything in this case other than this opinions. He didn't believe the doctors. He didn't believe the nurses. He didn't believe the medical records. He's never done a Zavanelli. He's only heard of a couple being done ever in all of his years of practice. He's the only person who came in and told you he was critical of Dr. Tiwari's attempts to deliver the

posterior arm. And what did he base that on? He based that on his mistaken belief that Dr. Panighetti got there and just did one simple maneuver to try to deliver the posterior arm and she was able to do it. That's what he based his criticism of Dr. Tiwari on. And it wasn't even grounded in fact. That's not what anybody told you happened here, including their other expert.

He's the only person who has these factual disputes. Nobody was in the room. Their other expert, nobody else disagrees that Dr. Tiwari delivered the posterior shoulder. And he thinks that a Zavanelli should have been done at five minutes.

Dr. Gurewitsch-Allen, she also didn't get a chance to review any of the trial testimony. She provided some really important testimony for you guys, though. She showed you that video -- and we'll look at it in a minute -- that in order to perform a Zavanelli, the first thing you have to do is turn the baby's head to face the floor. She has a video demonstrating that. How are you going to do that when the baby's head wouldn't turn to face the floor?

She has no criticisms of the first ten minutes of Dr. Tiwari's management of the shoulder dystocia. And she agreed, too. After the posterior shoulder is out, baby should just fall out. That's what everybody told

you. That tells you how unusual the shoulder dystocia was, that all of the doctors in this case agree, well, this is what should happen after a posterior shoulder is delivered. But it didn't happen here. And you had four people that were there telling you that, that even after the shoulder was out, it took two doctors maneuvering and pulling on this baby to get it out.

She thinks the baby was stuck high in the pelvis. I went over Dr. Tiwari's testimony on this with you. That's not what Dr. Tiwari testified to.

Dr. Gurewitsch-Allen has also never performed a Zavanelli or an abdominal rescue. She knows one person who's done a Zavanelli.

And you'll know, nobody came in and said they know anybody who's ever done an abdominal rescue. That's not what either of these experts said. So

Dr. Gurewitsch-Allen said a Zavanelli should have been attempted at ten minutes, but her belief that a Zavanelli should have been attempted, that was based on her belief that this baby was so high up in the pelvis that it wouldn't have been that hard. And Dr. Tiwari told you, yeah, if the baby was where

Dr. Gurewitsch-Allen said it was, I agree, that wouldn't be that hard to push a baby in that position back up into the uterus. That's not where this baby was. This

baby was stuck way lower, in between the pubic symphysis and the sacral promontory.

When I told Dr. Gurewitsch-Allen that, she said, "I've never heard of shoulders being stuck like that, stuck there." Well, nobody had. That's why this was so unusual.

She also told you even if a Zavanelli had been done at ten minutes, this baby may have still suffered a really severe brain injury and death, so she didn't know whether this would've even saved this baby.

You heard a lot of questions about some things that I told you in my opening were not going to be issues in this case. The only criticisms of Dr. Tiwari that legally you're supposed to consider are the ones that are supported by expert witnesses saying: These were violations the standard of care. Nobody came in and told you that Dr. Tiwari fell below the standard of care in her recordkeeping, that her note was somehow below the standard of care.

And you also have to remember there's a second part to that. It also has to be a proximate cause of the injury. So not only would somebody have to say these things were a standard of care violation, they'd have to say it was somehow a proximate cause of this baby's death. Neither of Plaintiffs' experts said that there

were any issues with the recordkeeping being below the standard of care, that keeping track of the time, calling out the time, nobody said that that was below the standard of care. Nobody said Dr. Tiwari's communication with the other people in the room was below the standard of care.

And you know what Plaintiffs' experts said? They said Dr. Tiwari should have attempted a Zavanelli and she could have done these surgeries, or if she had done an abdominal rescue, she should -- she could have done this on her own.

They didn't say she fell below the standard of care by failing to bring in some other doctor from some other part of the hospital, somebody who's not specialized in OBGYN. They didn't say that. The only standard of care criticism that these experts expressed was failing to perform a heroic maneuver and Dr. Gubernick's opinion on the posterior arm delivery. All of this other stuff, it's just been white noise, trying to confuse you, trying to make you think that there are issues that aren't here.

You got to see Dr. Caughey. You got to see him explain to you and show you how these shoulders were impinged in the pelvis, why this baby couldn't be delivered. And he said, yeah, if Dr. Tiwari hadn't

considered a Zavanelli, that would have been below the standard of care, but she wasn't required by the standard of care to attempt something that nobody's actually trained to do, that nobody's actually performed.

We talked about ACOG. Dr. Caughey is one of the editors for those practice bulletins that everybody in this field relies on. So that language about a Zavanelli in that ACOG bulletin, Dr. Caughey edited that before that practice bulletin was published in May, 2017. He knew that they put "may be considered" as very specific language, that they weren't prescribing that any OBGYN would ever be required to attempt one of these heroic maneuvers in order to meet the standard of care.

He showed you in the pelvis where this baby was stuck between the pubic symphysis and the sacral promontory. He told you that these maneuvers, they've been shown to get these babies out. And if they don't work, you keep trying them, you keep putting mom in new positions. You keep trying these maneuvers, keep trying everything to try to get these shoulders dislodged and get this baby free.

And he explained to you, I thought he put it really well. He said, it's not that Dr. Tiwari took 24 minutes to alleviate the shoulder dystocia. That's how long the

shoulder distomia took to be alleviated. She didn't try to make this take 24 minutes. She wasn't twiddling her thumbs. That was just how long it took to get this baby out. And he told you that there can be a mismatch between the size of the mom's pelvis and either the size or shape of the baby. That's why this baby was so stuck.

He told you unequivocally Dr. Tiwari met the standard of care here. She tried everything and everything that she should have tried. So could a Zavanelli been performed? We're going to look at Dr. Gurewitsch-Allen's video. And she showed you, she testified about this, that when you go to do a Zavanelli, you have to turn the head to face the floor. And she even demonstrated it for you. This was a head that could not be turned. This was a baby that could not be rotated, could not be moved. So how is it that Dr. Tiwari was supposed to do this?

You've heard from Plaintiffs about the damages that they're claiming in this case. Nobody is coming in here and saying that this isn't a terrible loss for parents to suffer to lose a baby? Obviously, it is. But you, as the jurors, if you get to damages, have the job of trying to put a number on something where there's no economic numbers to look at.

I don't think you should get to damages. I think when you get your first question on the verdict form, "Was Dr. Tiwari negligent," you should answer no to that.

But if you get to damages -- I wouldn't be doing my job right if I didn't talk to you about it. So what did we hear about damages in this case? Obviously, these parents had grief after their son died. There were no economic damages whatsoever shown to you or claimed. There's no evidence of that.

We heard testimony about what a strong marriage the Simbulans have. They got through this grief together. There's a lot of parents who may not have stayed together. They stayed together and then they had another baby. They got pregnant within a year, and now they have two beautiful little girls, healthy little Girls. They never received therapy. But grief is one of those things, yeah, there can be injuries that we suffer, heartache that any of us suffer that you never totally heal from, but there are things people can do to feel better over time. You've seen the Simbulans have found a way to go on. Maybe therapy is something that would help in the future.

But if you do reach damages, you have to think about what really would be the right compensation here on something that nobody can really put a number on. So I

submit to you, you could think about things of what you could fund with a verdict that would be tangible things that the Simbulans could use. College funds for their little girls, therapy for the parents if they want it, maybe family trips home to the Philippines every year to go visit their extended family and spend time with them.

If you were to give $200,000 to the college funds for the two girls, 100,000 for each, $200,000 to fund family trips for a long time into the future, to go back to the Philippines and visit their family. And we can say up to $100,000 for therapy or to be used by the Simbulans for whatever their form of therapy is, whether that's going on other trips, doing whatever it is that helps them heal. $500,000? This is up to you guys if you get there. Maybe $750,000. It's up to you to decide.

But I submit to you, when you get to that verdict form when you're asked, "Was Dr. Tiwari negligent," that you answer no.

Thank you all so much for your time and your attention to this matter.

THE COURT: Thank you, Ms. Aye.

Mr. Vertetis, rebuttal?

MR. VERTETIS: Judge, just so I'm clear, I have two and a half minutes?

THE COURT: Approximately, yes.

SMITH GOODFRIEND, PS

December 23, 2024 - 3:29 PM

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