No. 103924-7

SUPREME COURT
OF THE STATE OF WASHINGTON

JOUMANA B. AL HAYEK, and NICHOLAS C. PHILLIPS, and the marital community composed thereof;

Petitioners,

v.

KATHRYN MILES, M.D., individually, and NORTHWEST OB/GYN, P.S., a Washington Corporation,

Respondents.

ANSWER TO PETITION FOR REVIEW

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A. Introduction.

Applying de novo review, the Court of Appeals correctly affirmed the trial court's denial of an evidentiary hearing under *Henderson v. Thompson*, 200 Wn.2d 417, 518 P.3d 1011 (2022), *cert. denied*, 143 S. Ct. 2412 (2023), because there was no reasonable possibility that implicit bias tainted the jury's verdict in favor of respondents Dr. Kathryn Miles and her employer, Northwest OBGYN. Neither a single, benign, statement that Dr. Miles was "from this part of the world" in introducing the defendant during opening, nor the defense's closing argument that only members of Mrs. Al Hayek's "close-knit family" testified that she did not understand English well enough to give informed consent, could allow an objective observer to find her ethnicity a factor in the defense verdict.

Division Three faithfully applied this Court's decisions in *Henderson* and *State v. Bagby*, 200 Wn.2d 777, 793, 522 P.3d 982 (2023), warranting no further

review under RAP 13.4(b)(1). Its decision is consistent with Division One's opinion in *Simbulan v. NW Hosp. & Med. Ctr.*, 32 Wn. App. 2d 164, 555 P.3d 455 (2024), RAP 13.4(b)(2), and presents no issue for this Court's review under RAP 13.4(b)(3) or (4). This Court should deny review.

B. Restatement of the Issue Presented for Review.

1. Whether the Court of Appeals, in objectively considering the possibility that implicit bias infected the defense verdict, properly denied an evidentiary *Henderson* hearing to plaintiff, who made her Palestinian ethnicity the basis for her informed consent claim, and who moved for a new trial based on 1) a single isolated statement of defense counsel in opening that the defendant physician was "from this part of the world," and 2) a closing argument that, in a neutral and non-disparaging manner, challenged the credibility of plaintiff's "close-knit family" as witnesses?

C. Restatement of the Case.

Whether the jury's verdict could have been affected by alleged implicit bias depends on the conduct and evidence at trial. Yet the petitioners' statement of the case contains no citations to the extensive trial court record, in violation of RAP 13.4(c)(6) (statement of the case should contain "appropriate references to the record"). This Court should rely upon this restatement of the underlying facts in reviewing the substantial evidence that supports the jury's verdict and the Court of Appeals decision.

1. Mrs. Al Hayek communicated with her care providers in English during her first pregnancy and in preparing for delivery of her second child, eleven years after she emigrated from Palestine.

Petitioner Joumana Al Hayek spoke only Arabic, when in 2003, at age 17, she immigrated to the United States from Palestine, settling with her family in Spokane (CP 77; RP 1357-58) and enrolled in a class to learn to speak

English. (RP 1359-60) In 2007, Mrs. Al Hayek began dating, and then married, Nicholas Phillips (Gipson RP 142),[1] a native English speaker born and raised in Spokane Valley. Mr. Phillips does not speak Arabic; he and Mrs. Al Hayek communicate only in English. (RP 164-65, 1540)

Mrs. Al Hayek gave birth to their first child in January 2009 (Gipson RP 149-50) by emergency caesarean section ("C-section"). (RP 1184, 1374-76) Mrs. Al Hayek had no trouble understanding English and did not require an interpreter for her care during her first pregnancy. (RP 2148-49) In preparing for the delivery of her second child in 2013, Mrs. Al Hayek had five appointments with Nurse Practitioner Rebecca Kent and eight appointments with Dr. Kathryn Miles. (Ex. D-101 at 8-9; RP 1390-91; CP 33) Mrs. Al Hayek's husband Mr. Phillips attended and participated

[1] Multiple court reporters prepared and separately numbered portions of the report of proceedings. Except for references to the "Gipson RP," all RP cites are to Volumes I-VI of the Korina Cox transcript.

in many of the monthly appointments with Nurse Kent and Dr. Miles (Ex. D-101 at 8-9)

At her first appointment, Mrs. Al Hayek told Nurse Kent that she wanted "to attempt a VBAC [vaginal birth after caesarean] if at all possible." (Ex. D-101 at 8; RP 2084-85) Nurse Kent discussed the potential risks of pursuing a VBAC with Mrs. Al Hayek (RP 2085-86), including the risk of uterine rupture (RP 1284, 2086,2130-31), which occurs in roughly one percent of all VBACs. (RP 1284, 2131) Nurse Kent, who is trained to assess a patient's ability to understand English, testified that Mrs. Al Hayek never asked for an interpreter, and that Mrs. Al Hayek understood English. (RP 2086, 2091-94)

Dr. Miles also discussed with Mrs. Al Hayek the major risks and benefits of pursuing a VBAC versus a second C-section (RP 2138-39) Dr. Miles "never had any indication, in my conversations with her and interactions,

that she didn't understand what we were talking about." (RP 2143)

On January 22, 2014, Dr. Miles confirmed that Mrs. Al Hayek—then just over 34 weeks pregnant—"[s]till desires VBAC." (Ex. D-101 at 8; RP 2156) Dr. Miles reviewed with Mrs. Al Hayek a consent form, reading each paragraph aloud in English to confirm that she understood the associated risks of a VBAC. (Ex. D-101 at 38-39; RP 2160-61)

Ultimately, Dr. Miles had eight months of appointments with Mrs. Al Hayek during which they had "repeated conversations and always had great discussions." (RP 2188-89) Mrs. Al Hayek was "a great patient," who "was actively involved" in her care, "was interested in learning, wanted information, and . . . was never afraid to speak up if she had more questions or didn't understand and needed clarification." (RP 2189) Dr. Miles had "no reason to think that [Mrs. Al Hayek] did not

understand" the potential risks of a VBAC, which they "had been discussing for months." (RP 2189)

2. Mrs. Al Hayek gave birth to a healthy baby boy by emergency C-section.

Mrs. Al Hayek went into labor and was admitted to Sacred Heart Hospital the night of February 28, 2014. (Gipson RP 186-87; Ex. P-71 at 2) The head labor and delivery nurse noted her preferred language was "English" and that she did not require language assistance. (Ex. D-103 at 22; Ex. P-71 at 186; RP 1923, 2197)

Mrs. Al Hayek's labor progressed normally through the morning hours until 11:49 AM, when Mrs. Al Hayek experienced a dramatic increase in her pain. (RP 2218-19; Ex. D-103 at 9) Dr. Miles told Mrs. Al Hayek that she was concerned about possible uterine rupture and recommended an emergency C-section. (RP 2219) Mrs. Al Hayek was moved to the operating room, signed a consent

form for the procedure, and the medical team prepared her for surgery. (RP 2219-22; *see also* RP 923, 1610, 1949)

Upon performing the C-section, Dr. Miles discovered that Mrs. Al Hayek's uterus had ruptured along the scar from her first C-section. (RP 2225-26) At 12:21 PM, Mrs. Al Hayek delivered a healthy baby boy (RP 2223) and Dr. Miles repaired the rupture and surgical incision. (RP 924, 2227-31, 2428)

3. The jury unanimously found for Dr. Miles on liability, and Division Three affirmed the trial court's order rejecting petitioners' claim that implicit bias could have affected the verdict.

Spokane County Superior Court Judge John O. Cooney presided over an 11-day, 12-person jury trial on the claims of Mrs. Al Hayek and her husband for medical negligence and failure to secure informed consent.[2] The

[2] Petitioners' contention that the jury "appeared to be one hundred percent white" (Pet. 6), is based solely on plaintiff counsel's "own observations of what a Caucasian looks like." (App. 31)

jury found that Dr. Miles did not "fail to inform Mrs. Al Hayek of a material fact or facts relating to treatment" and that Dr. Miles did not "violate the standard of care in treatment of Mrs. Al Hayek." (CP 1694-95) In addition to other alleged errors that are no longer at issue, plaintiffs' motion for a new trial claimed that the verdict was tainted by implicit bias based on the following conduct at trial:

a. Opening statements.

Mrs. Al Hayek grounded her informed consent cause of action on her claimed inability to understand English. Plaintiffs' counsel told the jurors during voir dire that "Mrs. Al Hayek and her family" are "Christian refugees from Palestine" who are "citizens now" (RP 352), and, in opening statement discussed Mrs. Al Hayek's Palestinian roots and upbringing:

> They knew that she was from Palestine, that she was a Christian refugee who came here in the early two thousands. They had all this information available to them.

(RP 471)

> Now, another thing that these doctors knew was -- should have known, was the Palestinian culture. You have a Palestinian coming in. It's pretty rare in Spokane, you're going to hear, is that that's pretty foreign. But you're going to hear that the doctor is taking Ms. Al Hayek in just like any other patient and taking their money, and they have to treat them like any other patient. And when you treat them like a patient, you make sure they understand, you understand who they are, you understand their background, how was this person potentially culturally different than me, what they may not understand that I do know growing up here.
>
> You're going to hear about Ms. Al Hayek's raising and the culture in Palestine. You're going to hear over there it's way different than it is here, that there's no sex education, there's no talking about anatomy, knowing your organs and what's inside you. There's no talking about sex. There's no sex talk. Virgin 'til you're married. There's no sex. And you're gonna hear all these things on this language stuff. And you're going to be able to judge for yourself whether this -- this doctor and this clinic assessed this information, properly assessed it, and were safe and prudent.

(RP 473-74)

Defense counsel responded in his opening by focusing on Mrs. Al Hayek's language proficiency. (RP 506-08, *see also* RP 539) In then introducing Dr. Miles to the jury, defense counsel mentioned her local roots:

> My pleasure to talk with you now a little bit more about my client, Dr. Miles. Dr. Miles is from this part of the world. She grew up in Pullman. Her dad was a physician. . . .
>
> She went to Gonzaga. She grew up here. This is her town. Medical school at University of Washington.

(RP 515)

Plaintiffs' counsel objected to defense counsel's comments, citing *Henderson*. (RP 546) The trial court admonished defense counsel to "be careful about making comments outlining where certain people might be from or might not be from" as drawing distinctions between individuals from different parts of the world "could cause jurors to unintentionally . . . look to certain types of stereotypes." (RP 548)

Trial proceeded, over the next three weeks, with no claimed appeals to implicit bias. Petitioners do not contend that defense counsel failed to adhere to the trial court's warning about drawing distinctions based on ethnic background.

b. Closing arguments.

In closing, defense counsel pointed out to the jury that only members of Mrs. Al Hayek's "close-knit" family testified that she did not understand English well enough to give informed consent:

> [Y]ou heard testimony about the language capabilities of Ms. Al Hayek, and let's talk about who the plaintiffs called to address those issues. They called Ms. Al Hayek's mother. Ms. Al Hayek's mother . . . They were a *close-knit* family. They called her father. They called sister, Jane; twin sister Jane. They also -- we also learned that -- that Jane took the English class with Ms. Al Hayek and is now in pharmacy school. That's her twin. You heard from her brother Issa, who helped Joumana Al Hayek with language in that course she took. This was a *close-knit* family. They cared about each other, as most families do.

. . .

> With the family, the *close knit* family, there's obviously bias with how they're describing her language ability; obvious bias.
>
> But let's talk about who they didn't call. Where were the friends that see them on a daily basis and socialize with them that would tell you she doesn't understand English, she doesn't read English? Or the neighbors that live by them? Where were the coworkers? Olive Garden. The Barbers that she worked at, where she testified she didn't need an interpreter anyway. Where were the customers? Just worked as recently as 2019. Where are the customers -- where are the customers she told you about that were returning customers that wanted to have her take care of their hair? Where were the teachers at the English class? At the cosmetology school? Where were the costudents? Why didn't they testify?

(RP 2653-55) (emphases added)

4. Division Three affirmed the trial court's denial of a *Henderson* hearing, finding an objective observer could not find the verdict tainted by implicit bias.

The trial court denied petitioners' motion for a new trial motion in a letter ruling.[3] (CP 1868-73) Applying the objective observer standard, the trial court noted that plaintiffs made Mrs. Al Hayek's Palestinian heritage a cornerstone of their informed consent case and that Mrs. Al Hayek's language abilities "permeated the trial and were presented in the Plaintiffs' case-in-chief." (CP 1871)

The trial court found defense counsel appropriately argued credibility in a racially neutral manner during closing, rejecting plaintiffs' assertion that referring to Mrs. Al Hayek's family as "close-knit" provoked racial bias because the term "is an accurate reflection of the evidence presented at trial, not a racist trope." (CP 1872)

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[3] Petitioners have abandoned their other challenges to the defense verdict and grounds for new trial in seeking review in this Court.

Although the trial court characterized defense counsel's chosen words to describe Dr. Miles' background in opening statements as "unnecessary and improper," it concluded that given plaintiffs' repeated focus on Mrs. Al Hayek's Palestinian ethnicity over the course of a lengthy trial, the "statement did not create the possibility that the jury's verdict was improperly influenced by racism. Consequently, the record does not support an inference that discrimination has occurred." (CP 1872-73)

After this Court denied petitioners' request for direct review, the Court of Appeals affirmed the order denying a new trial. Division Three applied the *Henderson* standard adapted from GR 37—that of "an objective observer 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." (Op. 8,[4] underline in original, quoting *Henderson*, 200 Wn.2d at 435, ¶32)

Applying de novo review, the court believed defense counsel's statement in opening to reflect an improper "us-versus-them" argument, but concluded that because Mrs. Al Hayek's "central argument" was "that she did not understand the consent form because she is from another country, with a different language and culture," an objective observer could not view race or ethnicity as a factor in the jury's verdict based on that isolated comment. (Op. 10) The Court further held that the defense could not have elicited any implicit bias in arguing in closing that only Mrs. Al Hayek's "close knit family" supported her claim of limited English proficiency, as that challenge to credibility was the type of neutral, non-pejorative argument "made very day in court." (Op. 11)

[4] This Answer cites to the Court of Appeals' slip opinion attached to the Petition for Review.

D. Argument Why this Court Should Deny Review.

1. Division Three properly applied *Henderson* in determining that an objective observer could not conclude that implicit bias played any factor in the jury's verdict.

The Court of Appeals faithfully applied *Henderson's* standard. No objective observer could find this verdict tainted by implicit bias based on a single non-disparaging statement in opening and a closing argument, devoid of any improper innuendo, that challenged the credibility of the plaintiff's "close-knit" family members, including her Washington-born husband who speaks only English. As *State v. Bagby,* 200 Wn.2d 777, 522 P.3d 982 (2023) instructs, the court properly looked to the totality of the circumstances in holding that "an objective observer, as described in GR 37(f), could not view race or ethnicity as a factor in the jury's verdict." (Op. 11)

Division Three's well-reasoned decision does not create an "exception" to the *Henderson*/*Bagby*/GR 37 objective standard. (Pet. 14-15) Nor did the court apply a "but for" test for determining the possibility of implicit bias on the basis of ethnicity. (Pet. 15) Petitioners' contention that the lower court viewed Mrs. Al Hayek's allegations "from [its] own perspective" (Pet. 15) is refuted by the plain language of its decision. The decision below does not conflict with *Henderson* nor with any of the Court's other GR 37 cases. RAP 13.4(b)(1) and is consistent with Division One's decisions. RAP 13.4(b)(2).

a. The Court of Appeals decision is consistent with *Henderson* and *Bagby*.

Petitioners gloss over the facts of *Henderson*, where this Court found "numerous instances that permit an inference that an objective observer could conclude race was a factor in the verdict," through coded appeals to racial bias. 200 Wn.2d at 436, ¶34. There, defense counsel

"repeatedly characterized [the Black plaintiff] as 'combative' and 'confrontational' . . . evok[ing] the harmful stereotype of an angry Black woman," 200 Wn.2d at 436, ¶34, and "alluded to racist stereotypes" that Black women were "untrustworthy and motivated by the desire to acquire an unearned financial windfall." 200 Wn.2d at 437, ¶36. The *Henderson* decision identified several components of defense counsel's conduct that appealed to racial bias:

First, the jury in *Henderson* was subjected to harmful negative stereotypes about Black women. 200 Wn.2d at 436, ¶34. Here, in contrast, Dr. Miles characterized Mrs. Al Hayek as a "great patient" (RP 2188-89) and alluded to no ethnic stereotypes.

Further, any statements concerning Mrs. Al Hayek's proficiency in English were not premised on "themes and arguments advanced by defense counsel," as in *Henderson*, 200 Wn.2d at 439, ¶41. The defense instead responded to

Mrs. Al Hayek's central argument—"that she did not understand the consent form because she is from another country, with a different language and culture" (Op. 10) with ethnically-neutral evidence demonstrating that she did understand English and gave her informed consent.

Counsel's implied characterization of the plaintiff as "untrustworthy, lazy, deceptive, and greedy" in *Henderson*, 200 Wn.2d at 437, ¶36, contrasts sharply with the defense in this case, which respected Mrs. Al Hayek's agency (RP 2656: "Ms. Al Hayek was thriving in the Spokane community." *See also* RP 2673), acknowledged her pain, and focused instead on liability. (RP 2694: I don't doubt that Ms. Al Hayek is experiencing these symptoms . . . [but t]hat doesn't mean that you have to find Dr. Miles did something wrong.")

Finally, defense counsel merely pointed out the bias of plaintiffs' witnesses in arguing that, despite Mrs. Al Hayek's extensive contacts and participation in the

community, no non-family member testified to her lack of English skills—a critical point, directed solely to credibility, that was well within the defense's right to make in this case that depended upon the jury's determination whether Mrs. Al Hayek understood English well enough to provide informed consent.[5] (RP 2653-55) *See Henderson*, 200 Wn.2d at 447-48, ¶59 (Gordon-McCloud, J., concurring) ("parties must be able to explore witnesses' financial and other interests that might undermine their credibility.").

Petitioners' insistence that defense counsel's single reference to Dr. Miles being "from this part of the world" in

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[5] Instruction No. 1 told the jury, without objection:

> You are the sole judges of the credibility of the witness . . . In assessing credibility, you must avoid bias, conscious or unconscious, including bias based on religion, ethnicity, race, sexual orientation, gender or disability . . . [Y]ou may consider . . . any personal interest that the witness might have in the outcome or the issues . . . .

(CP 1663-64)

opening fatally infected the jury's verdict also fails to take into account the totality of the circumstances of trial, as this Court directed the courts to consider in both *Henderson* and in *Bagby*—a decision petitioners entirely ignore. In *Bagby*, this Court held that a reviewing court, as an objective observer, must consider "the content and subject of the statements, the frequency of the remarks, the apparent purpose of the statements, and whether the comments were based on evidence or reasonable inferences in the record." 200 Wn.2d at 793, ¶38.

The pejorative "othering" of the defendant in *Bagby* is far from what occurred here. Though Bagby was a U.S. citizen born in California, the prosecutor asked nearly every witness about Bagby's "nationality," 200 Wn.2d at 784, ¶17 & n.4, and 795, ¶¶41-42, conflated nationality and race, 200 Wn.2d at 795-96, ¶¶42-43, asked witnesses to identify Bagby and others by their race over a dozen times, 200 Wn.2d at 796, ¶43, and characterized several white

bystanders as "Good Samaritans" while conspicuously excluding from this group the sole Black witness who had actively tried to deescalate the situation that led to Bagby's prosecution. 200 Wn.2d at 797-98, ¶46 (alterations omitted). The "sheer volume" of these comments, "repeated throughout the course of the trial," reinforced negative stereotypes about Black men, making "it impossible for jurors to ignore the color of Bagby's skin." *Bagby*, 200 Wn.2d at 801-02, ¶52.

Petitioners fail to address any of the factors identified by this Court that mandated an evidentiary hearing in both *Henderson* and *Bagby*. The defense here made a single statement that Dr. Miles is from "this part of the world"—a statement that was not directed to and that in no way disparaged plaintiffs, and that the trial court immediately handled with a caution that defense counsel scrupulously adhered to throughout the trial. The defense did not introduce any fact about Mrs. Al Hayek's ethnicity that the

plaintiffs themselves had not already emphasized and relied upon before the jury. (Op. 10) Simply put, neither "the content and subject of the statements, the frequency of the remarks, the apparent purpose of the statements, and [their relation to] . . . the evidence or reasonable inferences in the record" support a prima facie finding of implicit bias from the standpoint of an objective observer, aware of this state's history of institutional racism and unconscious bias. *Bagby*, 200 Wn.2d at 793, ¶38.

Petitioners would have a *Henderson* hearing mandated whenever a losing party's ethnicity or race is brought to the jury's attention, no matter the context nor circumstances. Litigants can, and should, embrace their ethnicity and culture, just as Mrs. Al Hayek did here. By the same token, litigants should be able to reference objective and material facts in a neutral and non-disparaging manner in addressing claims and defenses. That is what occurred in this case.

The Court of Appeals decision is consistent with this Court's precedent because there was no objective basis for inferring that ethnic bias against Palestinians could have infected the jury's verdict in this case. This Court should deny review. RAP 13.4(b)(1).

b. The Court of Appeals decision is consistent with Division One's decisions.

Division Three's definition of "could" as meaning that there is a "reasonable possibility" (Op. 9) that implicit bias tainted the verdict does not conflict with Division One's definition of "could" as "made possible or probable by circumstances" in *Simbulan v. NW Hosp. & Med. Ctr.*, 32 Wn. App. 2d 164, 176, ¶20, 555 P.3d 455 (2024). Review also is not warranted under RAP 13.4(b)(2).

As in this case, the plaintiffs repeatedly referred to their ethnicity ("a large, loving culturally-thoughtful Filipino family") in presenting their case of medical negligence to the jury in *Simbulan*, 32 Wn. App. 2d at 186,

¶35. Engaging in de novo review, Division One held that the Simbulans did not present a prima facie case for a new trial based on implicit bias under *Henderson's* objective standard because "NW Hospital's counsel employed limited questions and arguments based on relevant facts that the Simbulans put at issue in this case." 32 Wn. App. 2d at 186, ¶35. In deciding "whether an objective observer . . . could view race [or ethnicity] as a factor in the verdict" under *Henderson,* Division One held that "could" means "made possible or probable by circumstances." *Simbulan*, 32 Wn. App. 2d at 176, ¶20 (quoting *Webster's Third New International Dictionary* 323 (2002)).

Division One correctly recognized that "'could' as used in the *Henderson* test cannot mean always." *Simbulan*, 32 Wn. App. 2d at 177, ¶21, Similarly recognizing that "*anything* is 'possible,'" Division Three in this case clarified that "'could' means a 'reasonable possibility.'" (Op. 9, emphasis in original) Recognizing that

the standard for ordering an evidentiary hearing includes a "reasonableness" requirement conforms the definition of "could" as "made possible by circumstances," and makes clear the objective standard for determining whether bias could have tainted a verdict that *Henderson* requires.[6]

Division Three's decision is entirely consistent with Division One's acknowledgement that "the rule in *Henderson* plainly cannot mean that any time race or ethnicity is addressed in a jury trial, explicitly or otherwise, that the party challenging the verdict is automatically entitled to an evidentiary hearing on the question of whether racial biases impacted the outcome of the trial." *Simbulan*, 32 Wn. App. 2d at 176-77, ¶21; *accord*, *State v.*

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[6] The Court applies an objective standard of reasonableness in other contexts. *See, e.g.*, *In re Gomez*, 180 Wn.2d 337, 348, ¶20, 325 P.3d 142 (2014) (ineffective assistance of counsel); *State v. Barber*, 118 Wn.2d 335, 349, 823 P.2d 1068 (1992) (search and seizure); *Smith v. Shannon*, 100 Wn.2d 26, 33, 666 P.2d 351 (1983) (informed consent).

Bellerouche, __ Wn. App. 2d__, __P.3d __, 2025 WL 830775, ¶54, n.6 (Mar. 17, 2025) (acknowledging that the "reasonable possibility" standard clarifies that "'could does not mean always.'").

There is no conflict between a definition of "could" as a "reasonable possibility" and "could" as "made possible or probable." Any circumstances that are "probable" are necessarily "reasonably possible." If there were a difference, Division Three's "reasonable possibility" standard is more generous than the "possible or probable" test enunciated by Division One, and petitioners can claim no prejudice from its application here.

c. The denial of an evidentiary hearing in this case raises neither a constitutional issue nor one of substantial public interest.

There is no basis for review under RAP 13.4(b)(3) or (4). Far from denying the parties' right to an unbiased jury, petitioners' insistence on an evidentiary hearing in a case

where an objective observer could find no reasonable possibility of implicit bias in a verdict would undermine the jury's role to resolve factual disputes and subject an otherwise final decision to a collateral evidentiary hearing. And there is no basis to review Division Three's assumption that *Henderson* applies equally to ethnic, as well as racial minorities—an assumption both that Dr. Miles has never contested and that arises from the plain language of GR 37(a), whose purpose "is to eliminate the unfair exclusion of potential jurors based on race or ethnicity." Petitioners fail to identify any issue of substantial public interest concerning ethnic bias that this Court did not address in its discussion of racial bias in *Henderson* or in *Bagby*.

In redressing calls to implicit bias, this Court in *Henderson* recognized that we live in a multi-ethnic and multi-racial country, with litigants of varied backgrounds, who can and should embrace their ethnicity and culture, as

Mrs. Al Hayek did here. *See State v. Zamora*, 199 Wn.2d 698, 715, ¶26, 512 P.3d 512 (2022) ("Race or ethnicity may be relevant or even necessary to discuss within the context of trial . . . "). By the same token, an opposing party can, in a neutral and non-disparaging manner, reference objective relevant facts, just as respondent did here. *Matter of Sandoval*, 189 Wn.2d 811, 834, ¶44, 408 P.3d 675 (2018) (mention of race only improper if "in an effort to appeal to a juror's potential racial bias, i.e., to support assertions based on stereotypes rather than evidence.").

This Court's noble determination to redress implicit bias in our State's trial courts was not an invitation to every unsuccessful litigant to attack as an inevitable product of this country's history of institutional bias and racism a jury's verdict that was based on the evidence presented at trial. The trial court did not err in refusing to grant a new trial or order a *Henderson* hearing in this case.

E. Conclusion.

The Court should deny review of the Court of Appeals' thoughtful and well-reasoned decision.

I certify that this answer is in 14-point Georgia font and contains 4,718 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 2nd day of April, 2025.

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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 April 2, 2025, I arranged for service of the foregoing Answer to Petition for Review, to the Court and to the parties to this action as follows:

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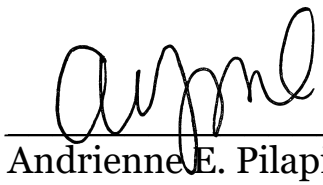

Andrienne E. Pilapil

No. 39989-3-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

JOUMANA B. AL-HAYEK, and NICHOLAS C. PHILLIPS, and the marital community composed thereof, Appellants

v.

KATHRYN MILES, M.D., individually, and NORTHWEST OB/GYN, P.S., a Washington Corporation, Respondent.

ORAL ARGUMENT ON OCTOBER 24, 2024

Before Judges Lawrence-Berrey, Fearing and Staab

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A P P E A R A N C E S

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

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JUDGE LAWRENCE-BERREY: Please be seated. Good morning. I have a new panel right now, so I'm going to go ahead and introduce it. To my right is Judge George Fearing, he's from the Southeastern District of Division III. To my left is Judge Tracy Staab, she's from the Northern District of Division III. I'm Judge Rob Lawrence-Berrey, I'm from the Southwest District from Yakima.

And the case in front of us now is Al-Hayek vs. Miles. I see the attorneys appear to be ready. If the appellants' attorney would introduce himself and tell us how much time he'd like for rebuttal, we'll be underway.

MR. HOGUE: Yes. Chris Hogue on behalf of the respon- -- or excuse me, the appellants Joumana Al-Hayek and Nicholas Phillips. And I will reserve three minutes for rebuttal.

JUDGE LAWRENCE-BERREY: Okay. Very good. You may begin.

MR. HOGUE: Thank you, Your Honor.

And today we're here about three issues in our briefing, and the predominant issue is the denial of a motion for a new trial. And that's under two bases under CR 59(a)(2) and (a)(9), the latter one being the test enunciated in Henderson v. Thompson by our Supreme Court. And there are a couple other issues with respect to exclusion of testimony

at trial and some issues with the jury instructions that we also allege were error that warrant a new trial.

But starting off with, I think Henderson, since it is the dominant issue here today. What we had at trial -- I think in our briefing explains with all of the facts -- was two parts that really stood out: Opening statements and closing arguments.

And in the opening statements, it's not just us here today telling you that this offended and violated Henderson, the trial court said it. The trial court said that Respondent's counsel's comments in opening statements -- right after opening statements said that they could lead the jury to look to and resort to stereotypes based upon what was said. And that was the "othering" and the "us versus them" type of comments --

JUDGE LAWRENCE-BERREY: It was the "us," I'm not sure how much it was to "them," though. I'm not saying I disagree necessarily, but I just want to push back just gently on that because the comment I recall had to do with that Dr. Miles, she's from here, she was born here, she was raised here, she went to school at Gonzaga. She's here, so it's us, not necessarily is it clear who the "them" was. The "them" could have been the expert witnesses from out of the area, but it certainly could have been your client too.

MR. HOGUE: Yeah. And I think that was, but I think when

you look -- and I'll -- and I'll talk to you about the "them" parts, because I think it's there. When you say that Dr. Miles is from this part of the world; well, the only other person there is the them, being my client.

JUDGE LAWRENCE-BERREY: Yeah. But the world seems to signify that we're not talking about expert witnesses, we're talking about somebody who might not appear to be from this country.

MR. HOGUE: Correct. And the last statement that I didn't hear you mention was the "this is her town" comment.

JUDGE LAWRENCE-BERREY: Um-hum.

MR. HOGUE: And that was, I think -- I think we put in our briefing that there was -- there was just simply no basis for saying that. And I think that was the point of driving home the appeal to the bias that I'm one of you, I'm a real American or my client is. And when I -- when I say that type of stuff, I'm looking at what an objective observer could interpret from that.

JUDGE LAWRENCE-BERREY: Judge Cooney seemed to put some weight on the idea that this was a -- some comments that were made in opening statements, and the trial was three, three and a half weeks or so, and so the judge seemed to think -- the trial judge seemed to think that all in all, a jury could not have based its verdict on racial stereotypes. Would you talk about that a little bit further?

MR. HOGUE: Correct. Yes. And I think the trial court contradicted itself multiple times, and that was kind of the problem. The trial court said, right after opening statements, that this could lead the jury to resort to stereotypes. And in the court's order on the denying the motion for new trial, again, stated that the comments were unnecessary, improper and that it could -- under the objective of observer standard, could have an impact or been a factor in the jury's verdict. But then simply contradicted itself by not giving us a presumption under Henderson that racial or discriminatory bias impacted --

JUDGE LAWRENCE-BERREY: I think the presumption applies at the evidentiary hearing. But at the same point that the standard to get to that hearing is a very low standard.

MR. HOGUE: Correct. And that was what I was kind of speaking to is the prima facie showing that there was an inference or a possibility that any sort of discriminatory bias could have been a factor in the verdict.

JUDGE LAWRENCE-BERREY: We're talking about could, and we're talking about a factor, not a dominant factor, substantial factor or the factor, but --

MR. HOGUE: Correct.

JUDGE LAWRENCE-BERREY: -- could and a factor.

MR. HOGUE: Yes, A possibility. And --

JUDGE LAWRENCE-BERREY: Why do you think the Supreme Court

set the standard that low?

MR. HOGUE: I think that when you look at what the Supreme Court said is that we are here, we have history of jury verdicts in Washington being affected by bias. And I think they set the standard that low because they want to eradicate racism and discrimination from our jury. They say that in Henderson: Eradication means zero tolerance. I mean, that is why the standard is there.

And back to the frequency, I kind of wanted to hit on that again, because this very court, I think in State v. Vaile and a couple other cases potentially have said that isolated remarks pollute the entire proceedings.

And when we're looking at the opening statements, you're talking about nothing happened in between. Well, when you do that in the opening statements, you contaminate and pollute the entire proceedings and what comes next.

JUDGE LAWRENCE-BERREY: I've got a question. Bagby -- State v. Bagby, the Supreme Court, you know, they set forth, I believe, three factors for courts to weigh as far as how an objective observer test is to be applied. Do we get the Bagby at the first step of the Henderson inquiry or do we wait until the evidentiary hearing to do the -- to do the three-factor analysis?

MR. HOGUE: From what I recall from Bagby, I thought it was two inquiries. But regardless --

JUDGE LAWRENCE-BERREY: That was Bear, State v. Bear talks about two, and then I think that Bagby talked about three, but obviously either could be talked about.

MR. HOGUE: Either way. Yes. So the prima facie showing is before the evidentiary hearing. We have to make the prima facie showing --

JUDGE LAWRENCE-BERREY: Right, sure.

MR. HOGUE: -- (inaudible).

JUDGE LAWRENCE-BERREY: I get that.

MR. HOGUE: Before you get to the evidentiary. If we show that, which we believe we did with the opening statements and closing arguments, then we set up an evidentiary hearing.

JUDGE LAWRENCE-BERREY: But the Bagby -- yeah, Bagby talks about repetitiveness, whether it related to the evidence, and I think there may be another one. But of course, Bear talks about that too, those factors.

MR. HOGUE: Yeah.

JUDGE LAWRENCE-BERREY: My question is: Do those factors come into play at the first part of the Henderson test, or do we wait to apply it after the evidentiary hearing?

MR. HOGUE: You know, I don't think any courts analyiced -- or analyzed that. With the frequency of the remarks, I think it probably goes more towards the (inaudible) with the prima facie showing potentially

because -- and I think you could see it with both, because once the presumption's established, you know, they have the burden of proof of showing that it did not affect the verdict. So I honestly think you could apply it at both stages because the prima facie showing is to say that could it have been a factor? And I think when they're analyzing, "could it have been a factor," they look at the frequency. You know, has it pervaded the entirety of the trial?

But I think I put in our briefing that the Bagby test, as far as when they're talking about the frequency of the remarks, that is going to prosecutorial misconduct with intentionality and misconduct (inaudible) --

JUDGE LAWRENCE-BERREY: (Inaudible) it relates the test to the objective observer, which is the same test applied in Henderson too. And, in fact, Henderson, the court seems to go out of its way to make it clear that these same standards apply from the criminal context to the state -- or to the civil context.

MR. HOGUE: Yes. And in Henderson, the court doesn't make any comments, I believe, on the frequency of the remarks. It does say that they believe it happened at multiple stages in there and that it's sort of pervaded the trial. And you know, here --

JUDGE LAWRENCE-BERREY: Would you agree that Henderson the facts were a whole lot more odious than in this case?

MR. HOGUE: I actually disagree with that assessment because when you look at the facts that we analyzed -- especially in our reply brief, if you look at the actual attorney statements in Henderson versus what they determined that an objective observer could say, it completely mirrors -- the closing arguments here completely mirror Henderson.

JUDGE STAAB: Can you -- so you're focusing on the comment about a close-knit family.

MR. HOGUE: Yeah. Close-knit family and call -- and not, it's not just about the close-knit family, the close-knit family aspect, that invokes the cultural ties.

JUDGE STAAB: How?

MR. HOGUE: Look at the Merriam Webster's dictionary definition of what "close-knit" means. It talks about people who are drawn together by social, cultural, or political ties.

So when he's calling them the close-knit family -- we talk about dog whistles, coded language that come into Henderson. When he uses those words and he uses it three times, and he only uses it with the Palestinian witnesses, and then he calls them "obviously bias" two times like the attorney in Henderson.

JUDGE LAWRENCE-BERREY: Usually when we hear the phrase "dog whistle," we think of something pejorative. Close-Knit

family, certainly in my view, isn't pejorative at all. In fact, it's a compliment that someone's family is close-knit. We've got close-knit families of color, close-knit families who are white. And regardless of the situation it doesn't seem to be pejorative. Does have to be pejorative to be a dog whistle?

MR. HOGUE: And coded language. And I'm hearing from you, potentially, that -- and this is what I think the trial court did when he called it benign and facile, that's the objective belief of the court or the trial court. That's not analyzing under the historical context of implicit and unconscious biases.

JUDGE STAAB: So in Henderson, though, when they talked about certain comments, you know, having this undertone to it, they were able to cite to very specific studies or very specific law review articles that said, here's this, you know, historical bias and here's how this word ties into that. I don't see any of that in your briefing.

MR. HOGUE: I don't think the briefing needed to analyze that. I think Judge Fearing, I believe, actually did a good job in -- it was either State v. Vail or State v. Ellis, maybe Skone recently -- analyzing the law review articles, the historical aspects of Spokane here locally.

JUDGE STAAB: So you're saying that just because it happened in Spokane, is that a factor that needs to be

considered?

MR. HOGUE: I think that because it was an all-white jury, white attorneys, a white judge, all of that is a factor. You look at the Simbulan case that just came out in Division I, one of the reasons they overturned the trial court's finding for Henderson was that there were multiple people on the jury of color. And here we have an all-white jury, just like in Henderson. So it certainly is a factor.

JUDGE FEARING: Is that part of the record, the makeup of the jury?

MR. HOGUE: Yes. I put in a declaration myself because I --

JUDGE FEARING: For the motion for new trial?

MR. HOGUE: Yes. With the demographics of the jury.

JUDGE FEARING: Is Ms. Al-Hayek asking for a new trial? Or is Ms. Al-Hayek asking for remand for a Henderson hearing?

MR. HOGUE: Well, she's -- the record is kind of unclear on the way this transpired. She's asking for a new trial altogether in the sense that the evidentiary hearing sort of already occurred, but failing to give us the presumption. And the defendants -- or the, excuse me, the respondents kind of admitted in their briefing, on page 58 and 59, is what would a new evidentiary hearing do? No one else has --

JUDGE LAWRENCE-BERREY: Well, you pull the jurors in.

That's what it sounds like Henderson says.

MR. HOGUE: I don't know that pulling the jurors in happened in Henderson or what it's --

JUDGE LAWRENCE-BERREY: Well, they told the court that's what needs to be done without the jurors being biased. And in fact they -- I think they criticized the prosecutor for actually going to the jurors first and perhaps poisoning their view of their -- the jury decision. And they say the trial court needs to take hold of the situation and not allow the parties to talk to these jurors first.

MR. HOGUE: And I don't even know if that gets to it, because when you're talking about unconscious bias, how -- when people make decisions based upon unconscious biases, even if you pull the jury in, how are they going to -- how are they going to tell you or how are they going to be truthful with you?

JUDGE STAAB: What was the remedy in Henderson?

MR. HOGUE: The remedy in Henderson was just a remand for an evidentiary hearing.

JUDGE LAWRENCE-BERREY: Um-hum Henderson hearing, yeah.

MR. HOGUE: Yeah. And we're asking for a minimum of that with a presumption in our favor; however, we believe it already kind of occurred.

JUDGE STAAB: Let me ask you something. If we were to remand for an evidentiary hearing, could evidence -- and I

don't know if there was evidence of this in this case, but as I recall, there's a preliminary jury video that talks about bias. There may have been jury instructions to attempt to mitigate any attempts -- or any bias that the jury may have. There may be instructions or something to that effect. Could that information come in at a Henderson hearing?

MR. HOGUE: I don't know that would even be relevant. I mean, sure the -- I'm sure the respondents would argue about that. But the Henderson court basically kind of, when they're now analyzing the presumption given to the appellants in that case, that those instructions are given in every case, and -- the stuff about ignore bias, you know, make sure you don't have unconscious bias, whether you're in the jury room -- I was just on a jury, so I watched that video. But it's still -- that would mean that you would never have racism or discrimination type remands, because those jury instructions are given in every civil case and people could just be as discriminatory as they wanted and say, well, I mean, there was a jury instruction.

JUDGE STAAB: I'm not saying that it would be conclusive, but isn't it at least part of the totality of circumstances?

MR. HOGUE: I'm sure the respon- -- or the respondents could argue that: Well, the jury was instructed, so that -- we believe that should be a factor in the court's

consideration.

JUDGE STAAB: Sure. Okay. Thank you.

JUDGE LAWRENCE-BERREY: We're entering rebuttal, we'll probably give you an extra minute or two, but just to let you know.

MR. HOGUE: Thank you.

JUDGE LAWRENCE-BERREY: Okay. We'll hear from the respondent's attorney.

MR. GOODFRIEND: Thank you, Judge Lawrence-Berrey. May it please the Court, Howard Goodfriend for the respondents, Dr. Miles and Northwest, OBGYN. Steve Lamberson was trial counsel, he is with me at counsel table.

So the question really under Henderson is: Could an objective observer conclude that racial bias so infected this trial that it could have driven the jury's verdict in favor of northwest OBGYN and Dr. Miles.

JUDGE LAWRENCE-BERREY: That race could have played a factor.

MR. GOODFRIEND: Yes. That's the -- that's the standard. And the trial court properly applied it. In fact --

JUDGE FEARING: When the -- when the defense counsel introduced his client as quote, from this part of the world, closed quotes, did defense counsel indicate what "this part of the world" was?

MR. GOODFRIEND: I think he did. I mean --

JUDGE FEARING: How -- what did he say in that regard?

MR. GOODFRIEND: Well, he didn't "other" Dr. -- I mean, he didn't, you know, compare the plaintiff in any way. He emphasized that Dr. Miles was engaged as a care provider to her community, that she grew up in Pullman, that she went to Gonzaga, UW Medicine, that she became a physician, like her dad, for the satisfaction of delivering babies.

He did not compare Dr. Miles in any way to the plaintiff, but he tried to center the jury on the defense theme that Dr. Miles treated Ms. Al-Hayak with the same care and respect that she gives all the patients that she cares for in her community.

And the defense theory was that Ms. Al-Hayak did not need an interpreter to approach her treatment with intelligence and agency, that she was an intelligent person, that she understood English, that she was -- in Dr. Miles' own words -- a great patient.

JUDGE LAWRENCE-BERREY: I'm going to ask you the same question I asked appellants' counsel. The test, at least the first step of the Henderson test or Bear test -- whatever you like to call it -- would you agree it sets somewhat of a low standard in order to get an evidentiary hearing?

MR. GOODFRIEND: It does set a low standard, but it --

JUDGE LAWRENCE-BERREY: And why is that? And why is that?

MR. GOODFRIEND: Well, I would agree that if you read Henderson, if you read this court's decisions, it's because of the odious history of racism in this country, in this state, in this community, and that the Supreme Court has told us in no uncertain terms: We need to be vigilant about it.

JUDGE LAWRENCE-BERREY: And part of being vigilant is to get to the root of the verdict, perhaps, and to authorize -- in fact, put a duty on the trial court, you know, if there is, I guess, a chance that the verdict was reached because of racism or that it was a factor, that we need to develop the record a bit.

And it seems that that's what the evidentiary hearing is a chance to develop the record, either to ensure everyone that racism did not play a role or to ferret out that racism did play a role.

MR. GOODFRIEND: And in doing so, you have to meet the threshold standard, which I think the Simbulan court addressed quite well in analyzing: What does "could" mean? It means made possible or probable by the circumstances. And we know from Bagby, Barry and Henderson, what those tests, what those factors are to determine what the circumstances are.

And in Skone, when Judge Fearing wrote separately, I think he put his finger on it when he said: We assume the Supreme

Court will not automatically reverse with a slight introduction of racial bias during trial, since the court listed the factors of the apparent purpose of the statements, whether they were grounded on the evidence or reasonable inferences in the record, and the frequency of the remarks.

Now, what we have here --

JUDGE LAWRENCE-BERREY: And that would lend some weight to the idea that these Bagby factors -- I call them Bagby factors --

MR. GOODFRIEND: Yes.

JUDGE LAWRENCE-BERREY: -- these three factors, that it would be applied to the first part -- perhaps the first and the second part of the Henderson test, not just the second part.

MR. GOODFRIEND: Absolutely with the burden shifting. And I think the trial court properly applied them here.

You know, the content and subject of questions to the witnesses over ten days of testimony did not once -- did not once paint the plaintiffs or Ms. Al-Hayek in a negative light.

The frequency. We're talking about an isolated statement in opening and a benign reference to close-knit families and proper argument about witness bias.

And let me point out, when we're talking about the

close-knit family, primarily including the Caucasian husband, Nick Phillips of Ms. Al-Hayak. He was the one they went after, in terms of credibility, harder than any other witness in this trial.

JUDGE LAWRENCE-BERREY: And looking at the closing argument too, you tended to also include potential witnesses that were not called as her -- I think her friends. In other words, you weren't saying non-Palestinians, you were saying just outside of the family.

MR. GOODFRIEND: We weren't saying we're the white people.

JUDGE LAWRENCE-BERREY: Right.

MR. GOODFRIEND: We said she has worked in a restaurant, she has cut hair, she has friends and neighbors who she communicates with. Why haven't we heard about her language problems from them? We only heard about it from her close-knit family. That's proper argument in any type of case, regardless of the ethnicity or racial --

JUDGE LAWRENCE-BERREY: Is that an argument to be made to the trial court in an evidentiary hearing or is that an argument to be made to us?

MR. GOODFRIEND: Well, I think, you know, you're engaging in de novo review, so any argument that was proper at the threshold stage -- and that is a proper analysis, given the Bagby factors -- it's a proper argument here.

JUDGE STAAB: So we're here -- your argument is that the

court never held a Henderson hearing, correct?

MR. GOODFRIEND: That's true.

JUDGE STAAB: Because the plaintiffs didn't meet the burden?

MR. GOODFRIEND: They didn't meet the burden. And in Simbulan where the trial court said you did meet the burden, Division I went through the record and using those factors: No, you did not, because no reasonable objective observer cognizant of the history of discrimination in this state could reasonably find that bias infected the verdict. The same is true here, even more so because in Simbulan, there were -- you know, they were pointing to questions about othering the plaintiff, about their time abroad, about living in the Philippines.

JUDGE LAWRENCE-BERREY: They tied it to the evidence, of course.

MR. GOODFRIEND: They did. And they said that -- you know, those things were tied to the evidence --

JUDGE LAWRENCE-BERREY: This part of the world, that's a little bit problematic. I guess just from the comments here, it seems that the opening seems to be a little bit more problematic than the closing. And that is somewhat troublesome and even troubled the trial court.

MR. GOODFRIEND: It troubled the trial court, it remarked on it, and nothing like that was repeated throughout the

course of the next three weeks, nothing.

JUDGE LAWRENCE-BERREY: And hence the importance of wondering if the three Bagby factors applied the first step or the second step.

MR. GOODFRIEND: Well, they -- the trial --

JUDGE LAWRENCE-BERREY: They apply throughout.

MR. GOODFRIEND: The trial court applied them and applied them properly. Because what the trial court noted was -- in its written order denying the hearing and the motion for a new trial, he -- what he said was, this was improper. But for the trial not centering in any manner on race, on her ethnicity, on her nationality, it was not repeated at all.

And in fact, what the trial court noted was to the extent there was othering being done, it was by Ms. Al-Hayek's husband, who got up on the stand and under questioning from her lawyer, characterized her non-English speaking father as intimidating and scary. That was from the plaintiff, not from the defense.

JUDGE FEARING: But that's just because he's the father-in-law, not because he's from Palestine.

MR. GOODFRIEND: Well, maybe. We don't know why Mr. Phillips thought he was intimidating and scary. You know, it's -- the point, I think, is that there was no focus by the defense on this great patient's ethnicity, her nationality. There was no argument in closing to the jury

that othered her. There was no racial ethnic tropes. There was no reference to bias, you know --

JUDGE LAWRENCE-BERREY: I know in your brief that you, in fact, talked about some very positive things, comments that your witnesses testified to about Ms Al-Hayek as far as a wonderful patient, you know, being a somewhat of a thorough person, understands things, asked appropriate questions, things of that nature.

MR. GOODFRIEND: Yeah. And I think the trial court, you know, went through the cases and compared, you know, what was happening in Bagby, in Monday, in Henderson to what happened here, where the adversary goes after the other party using racial tropes and trying to plant in the jury some type of bias.

JUDGE LAWRENCE-BERREY: Well, but intent really isn't a factor.

MR. GOODFRIEND: No.

JUDGE LAWRENCE-BERREY: Basically, it's the objective observer that --

MR. GOODFRIEND: It's objective intent. And nobody's looking into their minds. They're saying, what could a reasonable observer find based upon what's going on here? Let me mention what --

JUDGE FEARING: What does the Supreme Court contemplate happening during a Henderson hearing?

MR. GOODFRIEND: Well, that's a very good question, Judge Fearing. And we don't know. We haven't seen any cases reviewing that.

JUDGE LAWRENCE-BERREY: Didn't Henderson tell us, though?

MR. GOODFRIEND: Well, what Henderson told us was what Barry told us. And Barry said, you know, when there's bias occurring in the jury room, we're going to look beyond, you know, the curtain that is, you know, generally impenetrable, because everything that happens there usually inheres in the verdict. But they made an exception for racial bias.

And it is quite possible, I think, that what the Supreme Court had in mind was: Bringing the jurors, ask them what they talked about in terms of anything that could smack of bias. It's possible that's what they meant, but we don't have that guidance. So we don't know.

I wanted to also talk about the -- in the totality of the circumstances that what we had -- the allegation that we had was, you know, a minority side versus an all-white side, an all-white jury. We don't know what the ethnic composition of the jury is. We have an affidavit from Plaintiffs' counsel who looked at the jury and said, they're all white. But we don't have their questionnaires. We don't know where they're from. We don't know their backgrounds.

What we do know is that on the defense side the representative of Northwest OBGYN, Dr. Stephen Pakkianathan,

is an Indian male, dark male who sat there during trial. We also know that the nurse anesthetist who treated Ms. Al-Hayak and was called by the defense was of Iranian descent. And so the allegation that, you know, this is, you know, white versus --

JUDGE FEARING: How do we know those descents? Is that in the record?

MR. GOODFRIEND: It is. I think in terms of Dr. Khosravi, he testified about coming to the U.S. from Iran at age 17. I think that's at RP 1585, you could find it. And, you know, this goes also to this part of the world and the introduction, when introducing a defendant, when introducing a witness who you want the jury to sympathize with, you have them talk about their backgrounds. I mean, that is a proper thing. And I think Simbulan actually talks about this, that you're not othering the minority plaintiff just by introducing a non-minority party.

JUDGE LAWRENCE-BERREY: But the phrase, "this part of the world," that that does ring a little bit on the edge.

MR. GOODFRIEND: And I think the trial court recognized that.

JUDGE LAWRENCE-BERREY: Yes.

MR. GOODFRIEND: I mean, he absolutely recognized it.

JUDGE LAWRENCE-BERREY: Um-hum.

MR. GOODFRIEND: But what he properly did was look at the

totality of a trial, and he properly used the "could" standard when he said: To an objective observer, opening statement did not create the possibility that the jury's verdict was influenced by racism after going through everything else that happened at trial.

JUDGE LAWRENCE-BERREY: Any further questions?

JUDGE STAAB: No.

MR. GOODFRIEND: Thank you very much. If the Court has no questions --

JUDGE LAWRENCE-BERREY: Okay, very good.

MR. GOODFRIEND: We'd ask -- we'd ask that you affirm Judge Cooney got it right, and there's no need for an evidentiary hearing in this case based upon the objective Henderson's test. Thank you.

JUDGE LAWRENCE-BERREY: Thank you.

Rebuttal?

MR. HOGUE: Thank you. Maybe I'll take his extra minute here.

JUDGE FEARING: Well, Mr. Hogue, I have a number of questions.

Did Ms. Al-Hayek's team or witnesses or counsel or herself introduce to the jury the fact that she was Palestinian?

MR. HOGUE: Yes.

JUDGE FEARING: Did Ms. Al-Hayek's counsel or witnesses introduce to the jury the fact that there was a close-knit

family?

MR. HOGUE: No, we never used that phrase. We introduced pictures of her -- of her family for showing her damages.

JUDGE FEARING: What features distinguish this case from the Simbulan decision?

MR. HOGUE: The Simbulan case, I already talked about the makeup of the jury, the demographic makeup. I think, and also in that case, the evidence there was simply that they were complaining about that just because there were cultural issues or immigration issues in the case that we must get a new trial under Henderson.

Here, that's not our argument. Just because cultural or immigration issues permeated this trial, because they had to be discussed because of the client's language issues, what we're talking about, what's different from Simbulan is absolutely the othering and the us-versus-them type stereotyping in the opening statements and the closing arguments. None of that happened in Simbulan from what we've looked at.

JUDGE FEARING: If you can, list for me all of the comments by counsel or testimony of witnesses that are claimed to be racial in nature. Okay.

MR. HOGUE: The opening statements, I think the facts there are --

JUDGE FEARING: And what in the opening statement?

MR. HOGUE: Yes. So Respondent's counsel said: Dr. Miles is from this part of the world in a transition from speaking about and knowing about my client. Dr. Miles is from this part of the world. He says she grew up here two times back to back. And this is all packed in the same statement. And then he said, This is her town.

And then in the closing arguments in the background of talking about the Palestinian witnesses, he talks about the mother, says this is a close-knit family. He talks about, I believe, my client's Palestinian sister, close-knit family.

JUDGE FEARING: Did he use "Palestinian"?

MR. HOGUE: He did not. But the court -- the attorney in Henderson did not either. He didn't call them black witnesses. And then --

JUDGE FEARING: Okay. Continue.

MR. HOGUE: Yes. And then again, with respect to my client's white husband, he was not mentioned as a part of the close-knit family. That word wasn't used with him.

And then he called them inherently -- or obviously biased two times, those Palestinian witnesses, in that same context, which matches with Henderson.

And then he moved on to --

JUDGE LAWRENCE-BERREY: Was he saying that inherently -- because they're family members, they're inherently biased? Was he making that argument or was he implying that because

of their shared ethnicity they're biased? What's your position on that?

MR. HOGUE: Well, my position is you should look at it between -- in the standard of an objective observer. And I direct you to Henderson where they say -- when that lawyer there called these witnesses who said that they testified -- both -- three of them to being the life of the party. And he called them inherently biased. And the court said that could draw distinctions to race. And to say that they're not truthful because they're black.

And here when we're talking about the Palestinian witnesses and just calling them obviously biased, that's the same thing. You're drawing distinctions to their truthfulness based upon the race.

JUDGE STAAB: Isn't there -- was there a jury instruction given in this case that said: In determining the credibility of witnesses, you can consider any biases they may have?

MR. HOGUE: In determining the credibility you consider any biases? I'm not sure what the general credibility or general --

JUDGE STAAB: Was that a jury instruction?

MR. HOGUE: I don't know. I mean, the standard --

JUDGE STAAB: It's a general standard jury instruction: In considering the credibility of witness. So in any trial,

if I have a close relationship with another person, I tend to have a bias in favor of that person; whereas if my brother drives me crazy, I may not have that bias, even though we have a blood relation or something like that.

So I guess my question is: By saying the word "bias," it may have been a reference to that specific jury instruction.

MR. HOGUE: It may be, but it wasn't. They didn't say: This is what the jury instruction says.

Now, I reference you to my reply briefing on that because I do talk about when you're talking about the bias there that the idea of the jury instruction is irrelevant. But when you're saying they're biased and the credibility, Henderson, the mandate for the Supreme Court, is that as officers of the court when there's cultural or immigration or race issues in a case, that you need to look at your strategy, that the old ways of just going out and attacking a witness's credibility, you can't do that when those issues are in a case. You can attack credibility, but they left out that my client's treating provider, Lori Diricco; the physical therapist, Amy Sanderson, they talked about my client's language issues. Where was that when they're talking about the neighbors and the coworkers? They left that part out.

And I wanted to address your point about the subjective nature of the neighbors or whatever. Some people may think

that's innocuous, but again, the objective observer, when you're saying where are the neighbors? What do you mean? You mean the white people, the real Americans? These people are not even on the witness list. Who are you talking about? An objective observer could see that as being inappropriate.

JUDGE STAAB: Mr. Hogue, I have a question. You talk about the racial and ethnic makeup of the jury, and you contend that it was an all-white jury and you provided a declaration to support this. What's the basis of your declaration that this was an all-white jury?

MR. HOGUE: Well, the basis of my declaration was from my own observations.

JUDGE STAAB: And so you have no idea what the racial and ethnic makeup of that jury was?

MR. HOGUE: Based upon my own observations of what a Caucasian looks like, sure.

JUDGE STAAB: So you determined that they were all white based what they looked like?

MR. HOGUE: Based upon what I looked at, yes. I mean, there's -- I don't recall what the -- even if our demographic sheets about each juror, whether it lists their race or not -- I'm not even sure if that's on there and whether that's even in the record.

But how else do you establish that other than saying that

I tried to provide evidence of what I believed the jury makeup was. And there's nothing that ever rebutted that. They had an opportunity at the motion for a new trial to put in a declaration that says: No, there were actually people we believed were non-Caucasian. That never happened.

JUDGE FEARING: Did you look at the names before concluding it was all Caucasian?

MR. HOGUE: When I reviewed initially, when we get the entire venire you look at all of them, and I -- in the entire 40-some people in the venire, I don't recall a single non Caucasian, especially based on the names. And that's what I put in.

JUDGE FEARING: Okay. Let's go back to the list of what Ms. Al-Hayek deems to show some racial bias. Have you completed that list for us?

MR. HOGUE: Well, I do want to talk about it a little bit more. So we did talk about --

JUDGE FEARING: About what?

MR. HOGUE: A little bit more to finish that point.

JUDGE FEARING: To finish that list?

MR. HOGUE: Correct.

JUDGE FEARING: Yes, please do.

MR. HOGUE: Yes. So the opening statements and the closing arguments, I think we addressed. And you know, they've made this argument that there's nothing in between.

However, I think from the Simbulan court, where they were talking about issues of interpreter, are poignant here, because my client's father, Palestinian; my client's mother, Palestinian, both used interpreters during the trial.

And my client used an interpreter who had to read a document for her that was in English. And I think when you're looking at the opening statements and you're talking about --

JUDGE FEARING: Okay. Let's just -- instead of arguing, let's just complete the list for me.

MR. HOGUE: Well, that was the list --

JUDGE FEARING: Okay.

MR. HOGUE: -- the interpreter stuff being part of it. Because my point, it goes back to the opening about how that distinction at the beginning can pollute and contaminate how the jury's thinking the entire time. So when they're seeing my clients testify with an interpreter, that they're thinking, Well, they're from a different part of the world, they're not like us. That was the point.

JUDGE FEARING: Is it Ms. Al-Hayek's position that the physician needed to provide the informed consent forms in Ms. Al-Hayek's primary language?

MR. HOGUE: That was definitely her position in the sense that the evidence was very clear --

JUDGE FEARING: Is that her position on appeal?

MR. HOGUE: Absolutely because --

JUDGE FEARING: Could the physician have had an interpreter present to interpret the form for her?

MR. HOGUE: Yes. And I think the record shows that there is a document checked in the record that says: Does the patient request an interpreter? Yes.

JUDGE FEARING: Okay. And was an interpreter used?

MR. HOGUE: An interpreter never provided to her.

JUDGE LAWRENCE-BERREY: Did she mark that she wanted an interpreter?

MR. HOGUE: That was in the records of that, the patient had requested an interpreter at some point. Now, there was a -- there was a battle over the timing of that, and we put on evidence that it did occur prior to her going to the hospital.

JUDGE LAWRENCE-BERREY: Okay. If you'd point out maybe in a letter to the court after oral argument, the CP citation of that, because that's new to me.

MR. HOGUE: Okay. I will do that.

JUDGE LAWRENCE-BERREY: Okay. And then there's a -- you can respond to -- or the other side can respond --

JUDGE FEARING: Is there any case law that requires a physician to provide an informed consent form in the patient's primary language?

MR. HOGUE: I'm not aware of case law, but the RCW

7.70.060(1)(a) is very clear that the form itself -- while you can have a form, it only -- you know, evidence that consent was obtained if it's in a language that the patient can reasonably understand. That's what the statute says. So I don't even know that you need case law if you have that statute.

JUDGE FEARING: Well, I would assume that the legislature was, through that statute, wanting the language to be simple language that a common person can understand rather than a particular foreign -- another person's primary language. Would you agree with that?

MR. HOGUE: I could see it both ways. I could see that certainly as an issue. I mean, at some point you have to put in medical terms, but they probably do want it to where a lay person could read it and understand it, you know, better. But I think that also says a language that the patient can reasonably understand. Well, if you have limited English proficiency, you can't read English at anything other than elementary level, you can't understand the form.

JUDGE FEARING: Okay. Thank you. That's all my questions.

MR. HOGUE: Thank you.

JUDGE FEARING: Thank you for your indulgence.

JUDGE LAWRENCE-BERREY: Thank you. The case has been

submitted and we will take up the next case. I have one more.

(Conclusion of hearing)

C E R T I F I C A T E

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