No. 97672-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JANELLE HENDERSON,

Appellant,

v.

ALICIA THOMPSON,

Respondent.

AMICUS CURIAE BRIEF OF THE LOREN MILLER BAR ASSOCIATION

Andra Kranzler, WSBA #44098
THE SHERIDAN LAW FIRM, P.S.
Hoge Building, Suite 1200
705 Second Avenue
Seattle, WA 98104
(206) 381-5949

Attorney for Loren Miller Bar Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Constitutional Provisions

Other Authorities

INTRODUCTION

"'As judges, we must recognize the role we have played in devaluing black lives.'" *Garfield Cnty. Transp. Auth. v. State*, 196 Wn.2d 378, 390 n.1, 473 P.3d 1205 (2020) (quoting Letter from the Wash. State Sup. Ct. to Members of the Judiciary and the Legal Cmty. 1 (June 4, 2020)). Unchecked racial bias is at the heart of this civil case. Ms. Henderson is a large Black woman with Tourette's Syndrome who frequently jerks, twitches, clears her throat and barks. Due to her disability, she has a loud, unmodulated voice. Her attorney and witnesses, including experts, are also Black. Ms. Thompson is a small white woman. The jury included no Black jurors. The effect of racial bias on Ms. Henderson's ability to receive a fair and impartial trial is evident and disturbing. If the Court truly wants to address the devaluing of Black lives in the legal system, it must take to heart what happened in this civil case, as well the experiences from the Bar discussed here, and take action to eliminate the effects of racial bias at trial.

STATEMENT OF INTEREST

The Loren Miller Bar Association ("LMBA") is a Washington statewide nonprofit organization and affiliate chapter of the National Bar Association. Its 500 current and past members are primarily African-American judges, attorneys, law professors, and law students. From its inception, LMBA has adopted a vigorous platform of confronting

institutionalized racism and the myriad of social and economic disparities affecting the African-American community. LMBA is submitting this amicus curiae brief to support Ms. Henderson's position that the judiciary has a critical role in preventing racial bias from affecting jury verdicts and in providing litigants relief when it does. This issue is paramount for LMBA, as attorneys have a duty to ensure civil litigation, inside and outside the courtroom, is free from prejudice and bias in any form.

LMBA is asking the Court to read past the race neutral justification for the harm caused to Ms. Henderson and hear the plea of Ms. Sargent. It is time to courageously address the issues and concerns they raise. We ask the Court to reflect on the experiences that LMBA members have shared and encourage it to act and follow through on its commitment to achieving greater justice for all by eliminating the effects of racism in the State's courtrooms. Reversal is necessary to set a precedent and enact the structural change necessary to prevent the injustices of this case from reoccurring.

ARGUMENT

A. The Failure to Check Explicit or Implicit Bias in The Courtroom Compromises the Fair and Impartial Administration of Justice

"The right to trial by jury includes the right to an unbiased and unprejudiced jury[.]" *Turner v. Stime*, 153 Wn. App. 581, 587, 222 P.3d 1243, 1246 (2009) (citation omitted). Yet, the Court recognizes the

pervasiveness of implicit bias. "[W]e all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them." *In re Marriage of Black*, 188 Wn.2d 114, 134-35, 392 P.3d 1041 (2017) (citation omitted). Thus, while we cannot eliminate all biases from the jury, the Court should do its best to mitigate against them. The judiciary has the capacity to prevent racial bias from affecting jury verdicts and to remedy the situation when it does. While this Court recognizes the judiciary's need to continually improve in this capacity, *amicus curiae*'s experience within Washington courtrooms is that, beyond rhetoric, much more must be done to address bias in the courtroom. Despite this Court's efforts, such as the adoption of GR 37, discrimination in the courtroom persists and affects the administration of justice. The judiciary must take a more active role to prevent and address bias. Everyone involved in the legal system should be educated on implicit bias and civility. Existing tools for remedying discrimination failed in this case. Additur, for example, is one tool that might have made Ms. Henderson whole.

Respondent's argument downplays the harm of common bias because the "possibility of implicit bias is ever-present in our society." *See* Br. of Resp't at 55. As this case makes clear, bias unfairly tilts the scales of justice and denies participants due process and equal protection under the

law. Ultimately, judicial officers are responsible for ensuring a fair and impartial hearing and violate the judicial canons when they fail to do so. *See* CJC 1.2 ("A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."); CJC 2.3 (section on "Bias, Prejudice, and Harassment").

The Court should take to heart the experiences from members of the Loren Miller Bar Association shared in this brief and embrace its ethical and constitutional duty to eradicate racial bias in jury trials. When bias manifests without consequence, it prejudices verdicts, denies justice for societally marginalized participants, and "menaces the institutions and foundation of a free democratic state." *See* RCW 49.60.010.

B. Unconscious Bias Defined

"Unconscious biases are stereotypes, attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention … [and] can affect how we evaluate information and make decisions."[1] "At the core of research on implicit in-group favoritism is the principle that people automatically associate the in-group, or 'us,' with positive characteristics, and the out-group, or 'them,'

[1] 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 1.01 (7th ed.).

with negative characteristics."[2] "Studies show that racial bias is most influential when race is not an overt issue in the trial. … [W]here race is never mentioned but lurks in the background, e.g., where a party in a civil case, or the defendant or victim in a criminal case, or important witness in any type of case, is a person of color, that racial or ethnic bias is most likely to rear its ugly head."[3] Having unconscious bias is not tantamount to being a bad person, but it can prevent a person from recognizing another's humanity and credibility. *See* WPI 1.02. There is a need for increased awareness of racial bias and for systematically addressing its impact.

C. Experiences from LMBA

The specific biases evident in this case are similar to those experienced by many participants of color in our courts. LMBA members have experience in criminal and civil proceedings across the state. The members of LMBA have witnessed the effect of bias in Washington's courts and suffered humiliation, condescension, and contempt expressed or allowed by judges in the courtroom. They have been improperly referenced

---

[2] Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 895 (2014).

[3] Doyle, Theresa, J., *U.S. District Court Produces Video, Drafts Jury Instructions on Implicit Bias*, King County Bar Bulletin, (April 2017), http://www.kcba.org/kcba/newsevents/barbulletin/archive/2017/04/article11.htm, citing Samuel R. Sommers and Phoebe C. Ellsworth, *'Race Salience' in Juror Decision-Making: Misconceptions, Clarifications and Unanswered Questions*, 27 BEHAV. SCI. & L. 599 (2009); *accord* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1143-44 (2012).

during court proceedings, singled out, and had their expertise questioned due to bias. It is a problem, when even in 2021, many Black attorneys are perceived by clients, court participants, observers, and judicial officers as not being qualified to be an attorney or are questioned about their status when entering courtrooms—mistaken by court staff and judicial officers as the client or defendant instead of an attorney (even when the attorneys have even been in front of the judge before and practice in a community with only a few Black attorneys). These are some experiences with bias that our members reported to *amicus curiae* for this brief.

1. *Bias Projected by Jurors*

One member reported recognizing a former Black juror on the bus. The juror told the member they were impressed by the member's advocacy but shared that non-Black jurors had made comments during the initial break how the "old white lawyer" was going to run circles around the member. Such perceptions by non-Black jurors are not uncommon and particularly problematic given the known lack of diversity in the venire.[4]

[4] *See, e.g.*, *State v. Evans*, 100 Wn. App. 757, 762, 998 P.2d 373, 377 (2000) ("venires in King County are not demographically representative of jurors of color in the county"); *accord* Matthew J. Hickman & Peter A. Collins, *Juror Data Issues Affecting Diversity and Washington Jury Demographic Survey Results* (2017), at 27, 35, 39 (showing that white jurors in King County are systematically "overrepresented," while black jurors are "underrepresented"), available at https://www.courts.wa.gov/subsite/mjc/docs/2017/Juror%20Data%20Issues%20Affecting%20Diversity%20and%20WA%20Jury%20Demographic%20Survey%20Result%20-%20Judge%20Rosen%20and%20SU.pdf.

2. *Bias Projected by Opposing Counsel and Colleagues*

In all cases, it must be considered who jurors will find credible. One member described how they must consider not only how the jury will perceive their civil clients but also the biases opposing counsel may seek to use to undermine a person's credibility; it is difficult when members hear colleagues say, "she is very Black—how will she come off to the jury?" Similarly, a member witnessed a female colleague who had been the lead attorney on a case being denied the opportunity to give opening argument after her male colleagues decided the jury might find her less credible because of her sex. The daily attempts at overcoming bias are a mental drain for many Black attorneys and particularly women. The manifestation of bias is often subtle, but an objective observer can see the differences in tone and tenor. *See State v. Monday*, 171 Wn.2d 667, 678–79, 257 P.3d 551 (2011).

3. *Bias Projected By Parties and Witnesses*

Non-attorneys may also doubt the attorney's expertise or experience based on skin color or hair texture. A member shared feeling less respected in the courtroom because of race, emphasizing that parties, witnesses and other non-attorneys can be the worst offenders. Members report having even clients make disparaging remarks and question if the Black attorney is knowledgeable. It is a common sentiment that despite our accomplishments,

we start at a deficit.

4. *Bias Projected By Judges*

For reasons that should be obvious by the power dynamics between a judicial officer and those appearing before them, judicial biases frequently go unchecked, and the consequences for our members' clients are immediate and serious. A member reported a disturbing incident of a judge denying their motion had been filed. The member feared the court could find them in contempt and send them to jail for questioning the judge. One member reported an experience where a judge invited opposing counsel to seek CR 11 sanctions instead of filing an answer to a meritorious complaint, causing the member to withdraw; an answer was later filed. All too often judges allow white counsel to treat Black attorneys differently and with hostility owing to race. A member shared their Spanish-speaking client being berated in English by a white male judge who said she did not need an interpreter because he "knew" she could speak English. A member also shared their experience as a Black juror in which the judge disregarded the member's stated conflicts, while excusing other jurors who had less significant conflicts.

The majority of judges are white. White judges who are blind to their own biases and those of the people in their courtroom can display ingroup favoritism and unwittingly tilt the scales of justice in favor of the

lawyer or party with whom they share characteristics. *See* Cheryl Staats, Kirwan Institute for the Study of Race and Ethnicity, *State of the Science: Implicit Bias Review* 39-40 (2013) ("White judges displayed a strong White preference" and are susceptible to an "illusion of objectivity" leading them to "act on their group-based biases more rather than less").[5]

Due to ingroup favoritism, judges may rationalize support for the position of the person sharing the same race, gender, age, or educational background, while giving less weight to the facts and arguments of "others" and overvaluing any alleged mistakes by the "other." It is not uncommon for judges to accuse Black attorneys of being argumentative, as experienced by Ms. Sargent during this case. One member shared that she was told to "sit down" by a judge and teased by this same judge for "being emotional." This type of treatment is unfortunately often used to silence Black attorneys. The LMBA has seen many members struggle to remain in the profession due to the daily harms experienced inside the courtroom. The problems are not isolated to the courtroom, but the courtroom is the place above all others where there is no room for bias and is our model for what justice looks like. There is much work that needs to occur in law schools and in the legal profession generally, but the tone is set at the top by this Court.

[5] Available at http://kirwaninstitute.osu.edu/docs/SOTS-Implicit_Bias.pdf.

D. The Right to a Jury Trial Unaffected by Racial Bias

The Court should forcefully disavow Respondent's colorblind argument that racial bias in a civil case does not affect life and liberty. *Compare* Br. of Resp't at 28 ("a criminal defendant's right to an impartial jury is constitutionally guaranteed, whereas the Washington Constitution simply guarantees civil litigants a right to trial by a jury."), *with Alexson v. Pierce Cty.*, 186 Wash. 188, 193, 57 P.2d 318 (1936) ("The right to trial by jury includes the right to an unbiased and unprejudiced jury, and a trial by a jury, one or more of whose members is biased or prejudiced, is not a constitutional trial."). When interpreting the state constitution's jury trial right, under article 1, section 21, this Court should look to "the right as it existed at the time of the constitution's adoption in 1889," including the constitutional promises that existed unfulfilled. *See Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645, 771 P.2d 711 (1989).

This country's legal system shamefully failed to make the rights of Black Americans meaningful in 1889 (and frequently fails to the present day). *Cf. Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, __ Wn.2d __, 475 P.3d 164, 170 (2020) ("As history has shown us, states routinely failed to protect racial minorities and many enacted discriminatory Jim Crow laws."). The constitutionally protected interests of life and liberty are implicated in civil cases where an allegation of racial bias is made because

"the Reconstruction Amendments, including the Fourteenth, were intended to ensure freedom for emancipated slaves." *Id*. Bias manifesting in the courtroom is one of the longstanding badges of slavery that continue to haunt Black Americans.[6]

When an allegation of racial bias implicates the adequacy of the verdict, the requirement of due process does not permit affirmance simply because the verdict was "within the range of proven damages." *Compare* Br. of Resp't at 54, *with James v. Robeck*, 79 Wn.2d 864, 870, 490 P.2d 878 (1971) (limiting judicial review when inadequacy or excessiveness are "*solely* because of the amount." (emphasis added)). A general principle in tort law is that juries should treat similarly injured plaintiffs the same by awarding similar damages, yet in reality race often determines outcome. *See* Andrew W. Bribriesco, *Latino/a Plaintiffs and the Intersection of Stereotypes, Unconscious Bias, Race-Neutral Policies, and Personal Injury*, 13 J. GENDER RACE & JUST. 373 (2010). "[A] higher value is placed upon the lives of white men and that injuries suffered by this group are worth more than injuries suffered by other less privileged groups in

[6] It is worth emphasizing that the problem of racial bias in the courtroom is not at all unique to Washington and can be life-threatening. In California, a Black attorney Jaaye Person-Lynn recently faced a year in prison after being profiled, mistreated, tased and arrested by a courtroom bailiff simply for wearing casual clothing to court. Tamar Lapin, *Black lawyer says he was racially profiled for not wearing suit in court* (Jan. 11, 2021), https://nypost.com/2021/01/11/black-lawyer-says-he-was-racially-profiled-for-not-wearing-suit/. While this Court's jurisdiction is limited, its influence is not.

society." Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 465 (1998). This Court's longstanding precedents confirm that remedial action is required in response to appeals of racial prejudice in civil cases. *See Int'l Lumber Export Co. v. M. Furuya Co.*, 121 Wash. 350, 354, 209 P. 858 (1922); *Schotis v. N. Coast Stevedoring Co.*, 163 Wash. 305, 316, 1 P.2d 221 (1931) (counsel's statements that the "Japanese people don't like us" in civil case involving a defendant Japanese corporation required new trial); *see also Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010) ("We find the risk of prejudice inherent in admitting immigration status to be great, and we cannot say it had no effect on the jury.").

The fair and impartial administration of justice requires counsel to refrain from making appeals to racial prejudice. *See Monday*, 171 Wn.2d at 678. "Social science research has made clear that a majority of Americans carry some level of subconscious or implicit bias against racial minorities and that these bias manifests itself in the application of racial stereotypes." Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1244 (2018). This record shows a white defense counsel regularly asserting that the Black plaintiff was "combative" and that her Black attorney and her Black witnesses were aggressive and biased, relying on the jury's stereotyping to

shrink the verdict. Defense counsel similarly argued her white client was "intimidated and emotional" and "rightly so." This case has many examples of coded language used to devalue Black lives. The jurors' unsubstantiated fears that lead to the plaintiff's removal from the courtroom were rooted in defense counsel's assertions at trial, and the trial court's attempt to artificially impose a race-neutral explanation is offensive. Likewise, the jurors request to not have to look at the plaintiff was in direct response to the fact that they knew they had issued an inadequate award in a case where the defendant admitted liability and medical testimony showed that the plaintiff's life had been negatively impacted.

Due process at minimum requires reversal when race is an issue that the jury irrelevantly weighs.[7] This is not a remote possibility. In deciding a motion for new trial, the subjective perspectives of the historically disenfranchised should be given their due weight by judges to combat their bias blind spots. Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369,

[7] Courts across the country have reversed civil judgments involving both express and implicit appeals to race. *See, e.g.*, *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1152 (9th Cir. 2001) ("We hold that Glacier Construction's appeal to racial prejudice in closing argument in its civil case in tribal court offended fundamental fairness and violated due process owed the Co-op."); *Texas Emp'rs' Ins. Ass'n v. Guerrero*, 800 S.W.2d 859, 866 (Tex. App. 1990) ("We hold that incurable reversible error occurs whenever any attorney suggests, either openly or with subtlety and finesse, that a jury feel solidarity with or animus toward a litigant or a witness because of race or ethnicity."). It should be noted that while sound in principle, it is possible these examples also reflect a racial double standard in the foreign jurisdictions' case law.

370 (2002). Conversely, it is not sufficient to simply acknowledge a party's concerns about implicit racial bias and then identify a race-neutral justification without meaningful action. A major issue is overcoming the stereotypes that question Black expertise and truthfulness. This questioning itself is motivated by implicit bias. This implicit bias may specifically prevent the trial judge from believing a cry of implicit racial bias. The typical reaction is to immediately offer a race-neutral justification to silence the complaining party. In Washington, most judges, attorneys, jurors, experts, people in positions of power are both white and at the same time not willing to call out their own bias or the bias of another, even if they're willing to acknowledge that implicit bias exists.

E. Due Process Requires Sufficient Judicial Oversight

Judicial oversight is integral to due process. The trial court's discretion on a motion for a new trial is limited because racial bias can deprive *any litigant* "of his or her constitutional right to a fair trial by an impartial jury." *State v. Berhe*, 193 Wn.2d 647, 649, 444 P.3d 1172 (2019). When it is alleged that implicit racial bias was a factor in the jury's verdict, the "ultimate question for the court is whether an objective observer (one who is aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have influenced jury verdicts in Washington State) *could* view race as a factor in the verdict." *Id.* at 665 (emphasis

added). *Berhe* reaffirmed the "general framework for evaluating allegations of racial bias by a juror" of *State v. Jackson*, 75 Wn. App. 537, 879 P.2d 307 (1994) and *expanded on it*. *Berhe*, 193 Wn.2d at 661. *Berhe* leaves no doubt that an evidentiary hearing is required by due process in the context of an allegation of implicit racial bias.

Berhe did not even remotely suggest that an evidentiary hearing is "reserved for exceptional circumstances: those in which a juror comes forward asserting misconduct or suspected misconduct occurred." Br. of Resp't at 56. Respondent's proposed restriction rests on the false hope that jurors will overcome their biases when they "may not be willing to admit to having such bias if asked" and may be "unlikely to be aware that [their implicit racial bias] even exists." *Berhe*, 193 Wn.2d at 663. In fact, *Berhe* directs the trial court to supervise juror questioning following a reasonable investigation. *See id.* at 661 ("It is far too easy for counsel, in their role as advocates, to taint the jurors and impede the fact-finding process.").

As a matter of due process, before denying a motion for new trial, a trial court "must hold an evidentiary hearing" if there is prima facie evidence of implicit racial bias regardless of whether an evidentiary hearing was requested. *See id.* at 665. Respondent appears to gloss over the portion of *Berhe* expounding on what constitutes prima facie showing: *Compare id*. at 666 ("There will almost always be equally plausible, race-neutral

explanations because that is precisely how implicit racial bias operates."), *with* Br. of Resp't at 56 ("In the complete absence of evidence that a verdict was based on racial bias, *Berhe* does not require an evidentiary hearing."). In this case, the trial court did not take the allegations of implicit racial bias seriously by conducting a thorough evaluation that is specifically tailored to the allegations and did not fully appreciate the challenges posed by implicit racial bias beyond those posed by explicit racial bias. "[C]areful inquiry is necessary because implicit racial bias does not reveal itself in 'racially charged remarks or race-based derision.'" *Berhe*, 193 Wn.2d at 665. The inadequacy of the verdict alone justifies a new trial and reconsideration of plaintiff's request for additur. Reversal is necessary and reassignment to a different judge should occur. *See In re Marriage of Black*, 188 Wn.2d at 137.

F. The Court Should Take Preventative Measures

Courts should generally be less confident in verdicts without a record establishing that the factfinder was aware that implicit, institutional, and unconscious biases exist. This case presents an opportunity for the Court to exercise its inherent supervisory powers to mitigate the harm from implicit racial bias and systemic inequalities in all cases. *See State v. Bennett*, 161 Wn.2d 303, 317 n.10, 165 P.3d 1241 (2007) (citing WASH. CONST. art. IV, § 1). Among other things, mandating jury instructions on

implicit bias and guaranteeing a diverse jury pool will help minimize racial bias from affecting verdicts. *See State v. Holmes*, 334 Conn. 202, 244, 221 A.3d 407, 433 (2019) ("[I]t is important to think systemically. Important issues involving the [composition] of the venire pool… and the instructions given to the jury intersect and act together to promote, or resist, our efforts to provide all … with a fair trial"); *see also*, J. Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 CONN. L. REV. 1, 60–61 (2000) (suggesting that jury diversity is necessary to address "[d]emeanor [g]ap," which undermines accuracy of cross-racial credibility determinations). "[A]ll-white juries tend to spend less time deliberating, make more errors, and consider fewer perspectives. … In contrast, diverse juries were significantly more able to assess reliability and credibility[.]" *State v. Saintcalle*, 178 Wn.2d 34, 50, 309 P.3d 326 (2013) (citations omitted).

"A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." WASH. CONST. art. I, § 32. Requiring instructions on implicit bias in all cases will begin the process of elevating consciousness, so all actors in our system can do the work needed to keep their bias in check. *See* 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 1.01 (7th ed.) ("there is another more subtle tendency … [i]n our daily lives" to "rely upon generalities, even what might be called biases or prejudices"; "Unconscious biases are stereotypes,

attitudes, or preferences that people may consciously reject but may be expressed without conscious awareness, control, or intention"); 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 1.02 (7th ed.) ("In assessing credibility, you must avoid bias, conscious or unconscious"); and 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 1.08 (7th ed.) ("If during your deliberations, you become concerned that the discussions are being influenced by preconceived bias or prejudice, you must bring this to the attention of the other jurors so that the issue may be fairly discussed among all members of the jury."). "[T]he specific goals courts should have concerning educating jurors is two-fold: (1) educate them properly on what implicit bias is and how [it] impacts their duties as a juror and (2) what actions they can take as a juror to manage their unconscious bias." Anona Su, *A Proposal to Properly Address Implicit Bias in the Jury*, 31 HASTINGS WOMEN'S L.J. 79, 85 (2020).

Anyone who perceives racial bias in a judicial proceeding has a responsibility to alert the court. *See* Justice Mary I. Yu, *How Injustice and Inequality Have Been Addressed (and Sometimes Ignored) by the Washington Supreme Court*, 54 GONZ. L. REV. 155 (2019) ("As lawyers, each one of us bears personal responsibility for ensuring that due process is actually afforded to all, and that our justice system operates without bias.").

The Respondent's argument in its brief is a good example of how bias is allowed to continue in our courts. First, they only want criminal defendants to have impartial juries. Second, they want to alleviate civil judicial officers from having to ensure civil plaintiffs and defendants have impartial jury trials. This fractioning is intentional and based on bias. It is unacceptable to suggest that Black litigants should only be ensured the right to an impartial (anti-racist) jury in criminal proceedings in which they are criminal defendants. The right to an impartial trial must also be guaranteed in all civil proceedings. The judicial officers of both civil and criminal proceedings are required to oversee constitutional trials that guarantee a trial free of prejudice and decided by an impartial fact finder. *See Turner*, 153 Wn. App. at 587 (citing *Alexson*, 186 Wash. at 193).

Here, Ms. Henderson did not get a fair trial. The jury did not award her adequate damages for the injuries she sustained. "[A]n objective observer (one who is aware that implicit, institutional, and unconscious biases … have influenced jury verdicts in Washington State) could view race as a factor in the verdict." *Berhe*, 193 Wn.2d at 665. Yet, when Ms. Henderson objected to the outcome, she was denied all appropriate relief, including additur, a new trial, or even the evidentiary hearing required by *Behre*. The legal system failed to do justice because of the unconscious biases that endure despite our best efforts to eliminate them. The Court must

create a clear and bright line rule that is consistently adhered to like other court rules and applicable to all participants in any judicial proceeding. Cries of racial animus cannot go unanswered in the courtroom simply because race-neutral justifications have been offered.

CONCLUSION

We ask this Court to reflect on the record presented in this civil case and the experiences from the Bar described here, and to follow through on its commitment to achieving justice by addressing racial bias in civil proceedings. Reversal is necessary, but it's not sufficient. Structural changes are required to prevent the injustices of this case from reoccurring.[8]

RESPECTFULLY SUBMITTED this 29th day of January, 2021.

By: /s/ Andra Kranzler
Andra Kranzler, WSBA #44098
THE SHERIDAN LAW FIRM, P.S.
Hoge Building, Suite 1200
705 Second Avenue
Seattle, WA 98104
(206) 381-5949

Attorney for Loren Miller Bar Association

[8] *See* Ed Ronco, *Washington's new chief justice vows to 'follow through' and eradicate bias in the justice system* (Jan. 11, 2021), https://www.knkx.org/post/washingtons-new-chief-justice-vows-follow-through-and-eradicate-bias-justice-system.

CERTIFICATE OF SERVICE

I, Mark W. Rose, state and declare as follows:

1. I am over the age of 18. I am competent to testify in this matter. I make this declaration based on my personal knowledge and belief.

2. On January 29, 2021 I served a copy of this Amicus Curiae Brief on the following attorneys via the Court's e-filing application:

Vonda M. Sargent
Carol Farr
The Law Offices of Vonda M. Sargent
119 1st Avenue S., Suite 500
Seattle, WA 98104
Sisterlaw@me.com
carolfarr@gmail.com

C. Steven Fury
FURY DUARTE, PS
1606 148th Ave SE, Suite 200
Bellevue, WA 98007
steve@furyduarte.com

Attorneys for Appellant

Heather M. Jensen
Gregory S. Worden
Laura Hawes Young
LEWIS BRISBOIS BISGAARD & SMITH LLP
1111 Third A venue, Suite 2700
Seattle, WA 98101
(206) 436-2020
Heather.Jensen@lewisbrisbois.com
Gregory.Worden@lewisbrisbois.co
Laura.Young@lewisbrisbois.com

Attorneys for Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29th day of January, 2021, at Seattle, Washington.

s/Mark W. Rose
Mark W. Rose