No. 97672-4

SUPREME COURT OF THE STATE OF WASHINGTON

JANELLE HENDERSON, Plaintiff/Petitioner vs. ALICIA THOMPSON, Defendant/Respondent	STATEMENT OF GROUNDS FOR DIRECT REVIEW BY THE SUPREME COURT King County Superior Court # 17-2-11811-7 SEA

Presented by:

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I. THE REASONS FOR DIRECT REVIEW

The United States has a unique history, one that is rife with the exploitation and mistreatment of Africans enslaved in the United States and the continued and pervasive mistreatment of descendants of enslaved Africans. This is important at this point in time given the state of the union and our President's ill-concealed racist attitude[1]. Under the current administration norms are changing and this Court is the authority figure who can change these norms.[2]

Washington has made strides to eliminate bias in our court systems. *See State v. Saintcalle, 309 P.3d 326,* 178 Wn.2d 34(2013) and *State v. Monday,* 257 P.3d 551, 171 Wn.2d 667 (2011), and *State v. Berhe,* No. 95920-0 July 18, 2019. In 2013, this court took the opportunity to examine whether this state's *Batson* procedures were robust enough to "effectively combat race discrimination in the selection of juries". *Saintcalle at 34.* This court concluded that they were not and found over a quarter of a century after *Batson*, a "... growing body of evidence show[ed] that racial discrimination remains rampant in jury selection". *Id.* This Court has recognized implicit bias can be presented in subtle and innocent sounding statements which imply racial discrimination designed to harm, degrade and demean a specific group. See General Rule 37(i). These types of implicit racial aspersions apply no less to an African American in a courtroom that they apply during jury selection. The principles

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1 *Donald Trump's Racism: The Definitive List, Updated,* David Leonhardt and Ian Prasad Philbrick, The New York Times.

2 *How Norms Change,* Maria Konnikova, The New Yorker.

outlined in GR 37, *Monday* and *Berhe* address jury selection and deliberation, the principles in these cases are applicable to this kind of civil case.

In *Berhe* the court unanimously recognized that racial bias in the courtroom is a "common and pervasive evil that causes systemic harm to the administration of justice". *See State v. Berhe,* No. 95920-0 July 18, 2019. In these cases discriminatory statements affected jury deliberation.

The case at hand presents an opportunity to clarify that when an attorney injects racial discrimination into the trial during closing argument, through statements using implicit bias to demean, denigrate and stereotype that an African American plaintiff is denied her fundamental right to a fair trial. Where the bias is injected into closing argument, the party is entitled to a new trial, or the court is mandated to conduct an evidentiary hearing to see if the trial was unfair. *Id.*

Here, defense injected racially biased tropes in closing arguments to undermine the credibility of plaintiff and her witnesses. The jury awarded an inadequate verdict in light of the evidence and asked the court to remove plaintiff from the courtroom before they exited. The trial court complied and removed Henderson. This evidence, along with rulings the court made during trial to hamstring Henderson is ample evidence of bias in this courtroom.

II. THE NATURE OF THE CASE AND DECISIONS

Defendant Thompson rear-ended plaintiff Henderson on June 14, 2014, traveling 40 mph. Henderson, all of her lay witnesses and her attorney were the only African Americans in the courtroom. Defense counsel made

several implicitly biased statements in closing designed to undermine and diminish plaintiff's and her witnesses' credibility. The trial court denied the spoliation instruction she first granted; prohibited questions she had first permitted; required Henderson to disclose her cross to Thompson in advance; told plaintiff counsel not to argue with her; and removed plaintiff from the courtroom at the behest of the jury[3] all of which tend to reflect unconscious bias. Despite this evidence and the inadequate verdict for Henderson, the trial denied a new trial. Despite plaintiff's request for reconsideration of the order, through her Motion for an Evidentiary Hearing the court denied the evidentiary hearing required by *Berhe*.[4]

A Glimpse of the Courtroom is Relevant in this Case.

Petitioner/Appellant Henderson is African American. She has Tourette's Syndrome and frequently jerks, twitches, clears her throat, barks, and grunts. Henderson is a large woman with a loud and unmodulated voice due to her Tourette's. Thompson is a small white woman who sat with her shoulders hunched and a terrified look on her face when the jurors were present. Her attorney is a white woman and their expert a blond man.

Defense Injected Implicit Racial Bias in Closing Argument.

Defense counsel made statements that had no factual bases, but which suggested negative black stereotypes. Ex. A She argued that the only reason they were there was because Henderson wanted 3.5 million dollars, all while

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3 The citations for these actions will be provided once the trial is transcribed.

4 *State v. Berhe*, No. 95920-0, Slip Op. at 11 (Wash. Sup. Ct. July 18).

knowing defendant made no offer.[5] Closing Argument, 33:25;34:1. She argued that Henderson had "more than a physician-patient relationship." Closing Argument 38:23-25,39:1-5. Counsel mispronounced black names: she drew out the name "Kanika" and stumbled over "Schontel" whom she deposed as Dr. Delaney.[6] Defense cast aspersions on all the lay witnesses because they told "the same story". Closing Argument Closing Argument 49:22-24. The implication invokes the racist stereotype that "black folk don't testify against black folk" as was stated aloud in *Monday. See State v. Monday, 171 Wn.2d 667 (2011).*

Counsel argued that Henderson was "combative," "interested in being combative," and "quite combative."[7] She contrasted her client as "intimidated and emotional" who provided "genuine and authentic testimony." Closing Argument 59:17-25;60:1-8. The court must have agreed, as it signaled its preference of the white defendant over the black plaintiff by allowing the defendant the "leg up" by making plaintiff counsel disclose her cross in advance of Thompson's testimony which gave her time, which she used, to confer with her counsel.[8]

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5 In fact, defendant had not made any offer despite admitting fault.

6 The intonation of witness's names cannot be demonstrated in the trial transcript. Please listen to the attached audio recording of closing argument, at times _____ and _____. Dr. Delaney holds a Ph.D. in Pharmacology and manages several stores.

7 Combative means "marked by eagerness to fight or contend." Merriam Webster on-line dictionary, https://www.merriam-webster.com/dictionary/combative. There's no evidence that Henderson wanted to fight anybody or fight in any way.

8 This request occurred off the record while the jury was on break and will most likely not be on the record. Neither the defense n or the Court has addressed this in the Motion for a New Trial nor the Motion for an Evidentiary Hearing which was plaintiff's Motion for Reconsideration.

The Court Modified Rulings that Rewarded Defendant's Discovery Abuse and Which Were Prejudicial to Henderson.

Before testimony began,[9] the trial court granted the spoliation instruction Henderson requested in her MILs because defendant failed to produce any discovery related to its 80 hours of surveillance and because it defied the court order compelling production of the notes for the report that was never produced. 10 Ex. B. At defendant's request, the court modified that ruling to "reserved", without a response, and despite finding it "suspicious that no notes or documentation existed for almost 80 hours of surveillance." Ex. C. The court initially allowed Henderson to ask why the expert report had not been produced. Ex. D. But after defense provided an unverified report dated four years earlier at the 11th hour, the trial court prohibited Henderson from even mentioning that it had just been produced.[11] The trial court found the investigator credible and denied the spoliation instruction without a legal basis[12] allowing defendant to its 17-minute cherry-picked video.

The Verdict Was Inadequate

Henderson's doctors testified that the collision had aggravated her Tourette's symptoms substantially: Dr. Vlcek, neurologist,[13] said the collision had intensified her Tourette's. Ex. E. Dr. Wall, MD, testified the collision had

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9 The first day of trial was April 15, 2019. The trial was continued that day. wit

10 Defense produced a 17-minute video recording to show plaintiff's good health but provided no other documents, no report, no names of investigators, no notes of the investigator who reviewed the notes for his deposition – nothing to explain what happened in nearly 80 hours of surveillance.

11 This citation will be supplied once the trial is transcribed.

12 The court cited no basis under CR 59 for reversing this ruling.

13 Dr. Vlcek had been Henderson's neurologist for 30 years.

exacerbated her Tourette's to the extent it was debilitating. Ex. F. Dr. Devine DC testified that her symptoms were much worse and caused by the collision.[14] Defense neurologist Dr. Rappaport testified *he did not believe Henderson was faking or lying.* Ex.G.

The Court Removed the Plaintiff from the Courtroom

After the verdict was read, the judge said that the jurors wanted Henderson removed from the courtroom before they exited. The court removed all spectators to lessen the impact. Ex. H .[15] The bailiff made certain Henderson was gone before she opened the door. Henderson was devastated. This final blow is reminiscent with today's news of white people having African Americans removed from public spaces that they have the absolute right to occupy.[16]

The Court Denied a New Trial and an Evidentiary Hearing on Whether the Verdict was Tainted by Implicit Bias

The trial court denied a new trial based on the implicit racial bias defense counsel introduced in closing, and the bias shown against with changed rulings and Henderson's removal from the courtroom. Ex. I, Ex. J. *Henderson asked for reconsideration* 9 days later with her Motion for an Evidentiary Hearing, as an evidentiary hearing was required and would have given the trial court the opportunity to hear the evidence necessary before a new trial could be denied. Ex. K. The trial court denied the Motion for an

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14 This cite will be provided once the trial is transcribed.

15 The King County Superior Court appears to have no record of this hearing/decision, but Henderson and her three attorneys have testified to her removal.

16 www.npr.org/2018/06/05/616192385/people-who-say-police-were-called-for-livingwhileblack-ask-congress-to-act

Evidentiary Hearing thus entering the final judgment terminating the case. Ex.L.

ISSUES PRESENTED FOR REVIEW

ISSUE 1. Whether a civil trial court abuses its discretion in denying a motion for a new trial without an evidentiary hearing when defense counsel introduced implicit racial bias in closing.

ISSUE 2. Whether a civil trial court must conduct an evidentiary hearing after a trial where a party injected implicit bias in closing arguments and where the verdict was inadequate on the evidence.

ISSUE 3. Whether a trial court's changed rulings which prejudiced an African American plaintiff and rewarded a white defendant may be considered evidence of implicit and unconscious racial bias by the trial court.

ISSUE 4. Whether the trial court's removal of an African American plaintiff at the behest of the jury exited at the jury's request may be seen as evidence of implicit or unconscious bias on behalf of the jurors.

III. GROUNDS FOR GRANTING DIRECT REVIEW

Direct review of superior court decision by the Supreme Court is appropriate when the case raises a "fundamental and urgent issue of broad public import which requires prompt and ultimate determination." RAP 4.2(a)(4). Final judgments are appealable by right. RAP 2.2. Here, Henderson was denied her fundamental right to a fair trial by implicit bias introduced by the defendant and magnified by improper rulings by the trial court limiting plaintiff's ability to fairly present her case.

Washington law requires bias free trials. GR 37. *See also Berhe and Monday.* This requirement applies no less to civil cases than to criminal cases and it is an urgent issue of broad public import. There have been 50,015 civil

cases filed so far in 2019 in Washington Superior Courts, and there were 110,073 civil cases filed in 2018. *Caseloads of the Courts in Washington,* https://www.courts.wa.gov/caseload/. This Court has acknowledged and recognized the racial discrimination in our culture and this Court has taken a lead to show how it will not be tolerated in our halls of justice. This Court should take this case to clarify that the goal of equal justice applies to civil as well as criminal trials.

In the *Berhe* and the *Monday* cases, racial bias was present in closing argument and the jury room, and these cases address the need to give litigants a fair trial and require a court to conduct an evidentiary hearing once racial bias has been shown. General Rule 37 acknowledges the difficulty of recognizing how implicit bias is used and identifies some of the many subtle ways African Americans are disregarded. GR 37.

Washington has recognized that when implicit racial bias is a factor in a jury's verdict, the defendant is deprived of the constitutional right to a fair trial by an impartial jury. *Id.* Identifying the triggers for unconscious and implicit racial bias specifically presents unique challenges. *Id.* Courts must account for these considerations when confronted with allegations that explicit or implicit racial bias was a factor in the jury's verdict. *Id.* Racial bias is a common and pervasive evil that causes systemic harm to the administration of justice, and unlike other types of juror misconduct, racial bias is uniquely difficult to identify. Due to social pressures, many who consciously hold racially biased views are unlikely to admit to doing so. Meanwhile, implicit racial bias exists at the unconscious level, where it can influence our decisions without our awareness.

Berhe at 11. When a party raises a complaint of racial bias in a civil trial, the court must conduct further inquiry if there is a possibility that racial bias was a factor in the verdict. *Berhe* at 12. Here, defense counsel injected implicit racial bias in her closing, and the court rulings limiting Henderson's ability to present her case may have been unconscious bias. The low verdict and then the removal of plaintiff at the jury's request are evidence that bias was a factor in this verdict. The evidence of these circumstances shows on its face that Henderson was denied a fair trial.

ISSUE 1. The trial court abused its discretion by denying a motion for a new trial without an evidentiary hearing.

The trial court erred by denying Henderson's motion for a new trial in light of the defense counsel closing arguments and the jury's request to have Henderson removed from the courtroom. Where race is injected as an issue before the jury a new trial is required because "the right to a fair trial that is free of improper racial implications that infringement on the right can never be treated as harmless error". *Monday at 559.* "Even a reference that is not derogatory may carry impermissible connotations or may trigger prejudiced responses in the listeners that the speaker might neither have predicted or intended." *Monday, at 559-60.* The court erred by ignoring counsel's racially charged statements, implicitly biased statements, exactly contrary to the directives adopted in CR 37. This case is complicated by the Court's own unconscious bias when it removed Henderson and required a preview of plaintiff's cross and failed to sanction defendant for her discovery abuses.

Defense counsel called up visions of stereotypes of black women that are common and derogatory in American culture. [17] She raised the trope of angry black women who are hostile and intimidating.[18] A slur on a party's demeanor is implicit racism when used against jurors. GR 37(i). The principles of GR 37 are no less applicable in trial, where a party makes the same type of racially charged aspersions against an African American plaintiff. This Court has recognized that simple words are historically used to discriminate against African American jurors:

> "sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor, or provided unintelligent or confused answers."

GR 37(i). These assumptions are are no less powerful when used in the courtroom during a trial. They have the same effect of calling up unconscious biases. Defense arguments that Henderson was "combative" and "not interested in the search for truth" are without factual support but rely on Henderson's feeling about being put on trial and her inability to recite specific facts from her medical records. This was an argument to diminish Henderson for a "problematic attitude, a problematic demeanor, unintelligent and confused answers," all of which are discriminatory statements in GR 37(i).[19] In actual fact, *the IME neurologist Dr. Rappaport*

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17 Embodying diversity: problems and paradoxes for Black feminists, Sara Ahmed, Race Ethnicity and Education, Vol. 12, Pages 41-52 | Published online: 05 Mar 2009

18 Debunking the Myth of the "Angry Black Woman": An Exploration of Anger in Young African American Women, J. Celeste Walley-Jean, Black Women, Gender + Families, Vol. 3, No. 2 (Fall 2009), pp. 68-86.

19 Moreover, the transcripts do not capture the volume of Henderson's voice, which she cannot control due to her Tourette's. Ms. Henderson sounds like she is yelling. She cannot modulate her tone.

believed that Henderson was not faking or lying, which further undermines defense counsel's unfounded attack on Henderson's credibility.[20] This jury did not have an African American juror who could explain to the jurors what was occurring.

Defendant's argument that Henderson had more than a physician-patient relationship with Dr. Devine was insulting and raised the long-standing trope of a Black Jezebel willing to use sexual favors to gain an advantage.[21] The argument that the jurors were in court only because Henderson wanted money for nothing raises the trope of the dishonest black welfare mother. [23] Defense called Dr. Delaney by her first name[22], which has been found to be deliberate bias by our United States Supreme Court which reversed a judgment and held a prosecutor in contempt after it addressed an African American witness only by her first name. *See Hamilton v. Alabama,* 376 U.S. 650, 84 S. Ct. 982, 11 L. Ed.2d 979 (1964). Notably, the name "Schontell" is a given primarily to African American girls. Exhibit M. Denigrating black professional women by using their first names diminishes them. [23] This type of bias is subtle but no different than if a male attorney refers to a female witness as "young lady" or "sweetheart".

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20 Dr. Rappaport's testimony, deposition of __, page 147:21-23:

21 Wendy Ashley (2014), The Angry Black Woman: The Impact of Pejorative Stereotypes on Psychotherapy with Black Women, Social Work in Public Health, 29:1, 27-34, DOI: 10.1080/19371918.2011.619449

22 Of note, is that not only did defendant depose Dr. Delaney and address her as such, during closing argument, defendant lost the ability to properly pronounce her name.

23 The Modern Mammy and the Angry Black Man: African American Professionals' Experiences with Gendered Racism in the Workplace, Adia Harvey Wingfield, Race, Gender & Class, Vol. 14, No. 1/2 (2007), pp. 196-212.

ISSUE 2. Whether a civil trial court must conduct an evidentiary hearing where a party injected implicit bias in closing arguments and where the verdict was inadequate.

The court erred by denying an evidentiary hearing pursuant to *Berhe.* Plaintiff raised several examples of racially biased tropes used in closing. When an attorney intentionally appeals to racist bias in a way that undermines a party's credibility the court vacates the verdict unless it appears beyond a reasonable doubt that the misconduct did not affect the jury's verdict. In such cases the burden is on the offending party. *Monday at 558.* Of particular significance is that the jury asked that Ms. Henderson be removed from the courtroom after the verdict. These statements, along with the failure to sanction defense for discovery violations, the court's *sua sponte* requirement that Henderson disclose questions in advance while Thompson did not, and the jury's request to remove Henderson was adequate basis for an evidentiary hearing.

ISSUE 3. Whether a trial court's changed rulings which prejudiced an African American plaintiff and rewarded a white defendant for her discovery violations can considered evidence of implicit/unconscious racial bias by the trial court.

The court ruled decisively on 4/15/19 on the issue of spoliation. Both parties had the opportunity to brief and argue and the trial court found the evidence sufficient for a spoliation instruction.[24] Neither defendant nor the court identified any basis under CR 59 that would have justified modifying the ruling and there were no facts introduced. *Washington State Physician Insurance v. Fisons Corp.* 122 Wn.2d 299, 342-346. Without the spoliation

24 This cite will be provided once the trial is transcribed.

instruction, the jury was presented with a cherry-picked 17-minute video despite 80 hours of surveillance over a 9-month period. Plaintiff was denied the opportunity to question the persons who conducted the other 70 hours. Even the trial court found this "highly suspicious." This suspicion, the discovery violations and defendant's refusal to comply with a lawful Court Order may be evidence of unconscious bias.

ISSUE 4. Whether the trial court's removal of an African American plaintiff before the jury exited at the jury's request may be seen as evidence of implicit or unconscious bias.

The court's removal of Henderson is not on record, per King County Superior Court, Clerk's Office. The Court does not deny removing Henderson. The evidence of the circumstances of the removal comes from Henderson and her three attorneys, who specifically testified that the jury told the court it wanted Henderson removed before they exited. The removal of Henderson and the spectators are uncontroverted. This is evidence of jury bias. It suggests the jurors felt Henderson was threatening or intimidating. The trial court erred in honoring this request. Henderson felt degraded, disregarded, and humiliated. *See Henderson declaration.*

IV. CONCLUSION

As this court held in *Monday,* not all appeals to racial prejudice are blatant. "Perhaps more effective but just as insidious are subtle references. Like wolves in sheep's clothing a careful word here and there can trigger racial bias.[25]

25 *See generally* Elizabeth L. Earle, Note, *Banishing the Thirteenth Juror: An Approach to the Identification of Prosecutorial Racism* 92 Colum. L.Rev. 1212, 1222–23 & nn. 67, 71

As this Court has concluded implicit racial bias is real and denies a party a fair trial. This Court has the opportunity to address the injection of bias in a civil setting, and to limit the opportunities of attorneys to attack a party's credibility through implicit racial bias. The uncontroverted fact that a trial Judge forced counsel for one party to disclose her cross is more than problematic. The removal of an African American from the courtroom for the benefit of a white jury should be grounds enough for a new trial.

The Court should grant plaintiff Henderson a new trial and lay the groundwork for bias-free trials in the future. At the least, the Court should require an evidentiary hearing on the matter and not allow the arguments of counsel to explain away references to black people as wanting something for nothing, liars, cohorts, ignorant, and using sexual favors to gain an advantage, where there is no evidence.

Respectfully submitted,

THE LAW OFFICES OF VONDA M. SARGENT

September 23, 2019 _____
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September 23, 2019 _____
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(1992) (citing Joel Kovel, White Racism: A Psychohistory 32 (1984); Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964,* 37 Rutgers L.Rev. 673 (1985); Reynolds Farley, *Trends in Racial Inequalities: Have the Gains of the 1960s Disappeared in the 1970s?,* 42 Am. Soc. Rev. 189, 206 (1977)); *see also* A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences,* 65 N.Y.U. L.Rev. 479, 545–51 (1990).

A Transcript of Closing Arguments.

B Motion in Limine #18 and Reply, Order Denying Exclusion, Dkt. #140, p. 13-18.

C Order on Reconsideration on Defendant's Motion to Reconsider, May 6, 2019, Dkt. #277.

D Order Denying Exclusion of the Probe Report, Dkt. #228, May 6, 2019

E Deposition of Dr. Brien Vlcek, February 5, 2019. Page 61:4-10.

F Deposition of Dr. Wall, May 31, 2019. Pages 14:14-25; 15:1-5; 23:12-23.

G Deposition of Dr. Rappaport. Page 147:21-22

H Declarations of C. Steven Fury, Carol Farr, Vonda Sargent and Jenelle Henderson. Dkt. 260 -263.

I Order Denying New Trial or Additur, July 17, 2019; Dkt.268

J Motion for a New Trial or Additur, 6/17/19, Dkt. # 250

K RECONSIDERATION/Motion for an Evidentiary Hearing 7/26/19, Dkt# 271.

L Order Denying Motion/Petition For Evidentiary Hearing. Dkt. 278.

M A Google search of the name Schontel.

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JANELLE HENDERSON, Plaintiff, v. ALICIA THOMPSON, Defendant.	Cause No. 17-2-11811-7 SEA PAGES 1-73

VERBATIM REPORT OF

EXCERPTS OF

DIGITALLY-RECORDED PROCEEDINGS

June 6, 2019, DR W817

HEARD BEFORE THE HONORABLE MELINDA YOUNG

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June 6, 2019, 1:52 p.m.

CLOSING ARGUMENT BY THE PETITIONER

MS. SARGENT: Thank you, Your Honor, Counsel. Members of the jury, I'd like to take this opportunity to thank you for your attention. I'm going to keep my comments as brief as possible. We've been with one another for two weeks. I'm not going to reiterate and go over all of the vast amount of evidence that has been before you. But, it is important that I go over some of it. And I'm going to work through the jury instructions because that's the law of this case.

The first thing that I want to talk to you about is the credibility of the witnesses. And that's something that you are the only ones that determine who's credible and who isn't credible. And we had a lot of witnesses. We had the treating doctors of Janelle. We had Dr. Wall and Dr. Vlcek and Dr. Devine, all of whom told you that her Tourette's has been intensified and added to. You remember Dr. Wall wrote a letter and said it was debilitating. You have the testimony from paid experts. One is Dr. Sutton, and one is Dr. Rappaport. And despite the fact that they said a whole bunch of things about Janelle, a whole bunch of things, at least Dr. Sutton understands that she was hurt. Said just a little bit. Just a little bit. He said she was hurt. He admitted it. Remember we went back and forth on it? I said, well, you said here that she wasn't hurt; then you said over here she

was. Which one is it? And he says, well, yeah, she is. So, are you changing your test—are you changing your report? You remember that. We went back and forth. But, at least Dr. Sutton says that she was injured as a direct result of this collision. And the Defendant herself told you that she was going at least 40 miles per hour before she struck my client, Ms. Henderson. She described it as her car going under my client's Volvo [sic]. That's how fast she was going. The car dipped down and went under her car and scrunched up—were her words—scrunched up her—her hood.

So, when you're talk—when you're thinking about the credibility of these witnesses, I also want you to do is when you look at Instruction No. 1 is the opportunity of the witness to observe or know the things that they're testifying to. And we made a chart for you—let's hope the TV's on—dealing with that very issue. Here we go. The opportunity to observe [inaudible]. Okay.

So, can you make that so the jurors can see entirely, please?

So, the first instruction you have is in considering a witness's testimony, you can—you may consider these things: the opportunity of the witness to observe or to know the things that they testify about.

Is there any way to make that—hit the green button?

[Off-the-record discussion.]

MS. SARGENT: There we go. Okay. So, we have a chart here, and it has all the witnesses that testified and over here all of the Plaintiff's witnesses that have testified. And Janelle is 44 years old. And so, you have Dr. Vlcek who's known Janelle for 30 years. He's observed her, and he's treated her. And he's had opportunity to know her.

You have Dr. Wall that's known her eight years, Doctor—six years. Dr. Devine that's known her eight years. You have her—her mother, or who stepped in as her mother, Pam Hinds. You have her friend Kanika Green. I mean, I'm sorry, Dr. Delaney, her cousin. You have Kanika Green and Jolyn Campbell. And all of these people have known Janelle, except for these two doctors, for 20 years or more. They have had an opportunity to observe her for 20 years or more. Take that in consideration when you are deciding whether or not her Tourette's was exacerbated. Take that in consideration when they tell you before this collision, it wasn't like this [sic]. She wasn't doing this. Dr. Vlcek told you he's known her 30 years, since she was 14 years old. It's been intensified and added to. He said, remember, he pushed back from the Defense Counsel who called his exam a so-called exam when she was trying to discredit his exam. He pushed back and said, no, it wasn't a so-called exam. A part of the neurological examination with people who have Tourette's is to observe them. And that's what he has done

for 30 years. And he told you it's been added to and magnified. It's intensified, that she wasn't doing this. Now, she's had Tourette's, and we're not saying that this collision caused the Tourette's. There's no doubt that she's had Tourette's. And sometimes it's been worse; sometimes it's been better. But, it's never been like this. It's never been like this, and that's what the doctors have told you.

And then what we do is we compare and contrast that to the Defendant's witnesses. Tyler Slaeker, who by our calculator chart, was in the vicinity of Janelle for 4.5 hours. He testified he had the camera on for one hour and gave you 17 minutes. But, 4.5 hours for Tyler Slaeker. Then we have Drs. Rappaport and Dr. Sutton, both of whom told you they know better than Dr. Vlcek, Dr. Wall, and Dr. Devine in that one hour of time, that they know her better.

Think about that. Does that make sense? The instructions say to use your commonsense. Does that make sense? You have somebody who's—your—not somebody, your doctor who's known you for 30 years, and then you have a hired gun that wants to come in and say, I know her better than her own doctor. I know her better than her cousin, her mother, her friends. It doesn't make sense. It's not credible. And we know why Dr. Rappaport said what he said at 18 dollars and 33 minutes—$18.33 a minute. I'm kind of not mad at him. That's a lot of money. That's a heck of a lot of money for every minute

[inaudible]. And think about who hired him. If you don't give your customer what they want, you don't get hired again. $18.33 a minute. Minimum wage in Seattle is $15. And think about how he's answering my questions. I'd ask him a simple question, and he'd just wax on and on and on. Cha-ching, cha-ching, cha-ching, cha-ching.

The same with Dr. Sutton. He was here for a full day at $425 an hour I do believe he said—sorry, it was $525 an hour. So, they have every reason to say and do what it is that they did. Not even talking about the report that they wrote and the records they reviewed. Dr. Sutton told you that he got an additional 2,000 pages of records. Started out with 1600. But, he said they got an additional 2,000. So, let's just take the 2,000 pages. Give him a wash on the 1600 pages. His records review, $525 an hour, which is what he testified to, just reading the records, he made $17,500.

MS. JENSEN: Objection. That's not in the record.

MS. SARGENT: If we—

THE COURT: Hold—hold on a second, Ms. Sargent. I'll just instruct the jury to rely on your own memories as to what the testimony of the witnesses is.

MS. SARGENT: If we assume that he took a minute a page, that calculates to [inaudible] $17,500. Just a minute a page, and that's rapid; that's pretty quick reading, a minute a page for a record review. His portion of the report was 12

pages. Once again, $525 an hour calculates out to another $1,050 for 12 pages. Think about that when you think about the credibility of witnesses and who came here and told you what was really going on.

Let's talk about Dr. Rappaport, his exam. He told you during my direct of him that he charges $550 for every 30 minutes with a three-hour minimum. And you watched the video. It was four hours and 20 minutes. But it's a 30-minute [inaudible] four and a half hours that he charged just for his deposition. Just for the deposition. So, the deposition, $4,950.

You notice that you didn't hear a bunch of questionings from Janelle's treatment providers about how much money they made. One doctor has charged less than what it was that he would make for an office visit. One doctor. They paid two doctors. They paid for surveillance. And I'll go over these numbers for you when we start talking about damages. But, they spent almost $50,000 to come in here to try to convince you that Janelle wasn't injured while saying that she was injured. Which one is it? She wasn't injured or she was injured, because Rappaport said, well, she might have been injured. I think, uh, but maybe, possibly. He—he was all over the place. He was all over the place. And you wonder why. Did his conscience start getting to him? I don't think so. He had to maintain that she wasn't injured because that's

what his customer needed, the person who's paying him. You don't have to be a Rhodes Scholar to figure it out. You get what you pay for. You don't pay someone $1,100 an hour for them to tell you that she's injured. That's not how that works. That's not how any of this works. And [inaudible], these are treating doctors. We didn't have experts; we had people that have actually known her and treated her.

So, let's talk about the differences in Janelle. Remember during opening I told you, you're going to hear that she loves to dance, life of the party, vivacious, fun to be around. And time after time after time after time, the people who have known her for years told you she's different. She doesn't like to do things any more. She's not fun to be around anymore. And you remember her friends that came. She asked for Janelle to leave, and she told you she did what she found to be very embarrassing. You remember. You heard what she said about the opera.

The Defense wants you to believe that Janelle is not entitled to recovery. Unfortunately for them, we have a law that allows for that, allows for recovery for Janelle specifically. And why I say "Janelle specifically," and I'm going to get the instruction for you—sorry—Instruction No. 12 and No. 10. They both deal with aggravating—the aggravation of preexisting conditions. And the reason why we have those instructions is because in our society we don't

say, oh, you already are broken or you're already compromised so too bad, so sad. We don't allow that; the law does not allow for that. The law specifically tells you that if before this occurrence Janelle has a preexisting bodily condition that was causing her pain or disability—and everybody knows that it was; everybody knows that Janelle did have tics; everybody knows that the tics are painful—but, because of this occurrence, the pain or disability—and we use the word "exacerbated." The instructions say "aggravated." Same/same. Same/same. If they're exacerbated, you break it, you buy it. You don't get to say that, oh, she already had Tourette's so we don't have to pay anything. Just like if somebody is in a wheelchair with cerebral palsy and they get mowed down by a bus, you don't get to come to the court and say, you don't get anything; you already had cerebral palsy. You couldn't possibly be hurt. The law doesn't allow it. The law doesn't allow it. Our society, we protect all members of our society. And the strength of the society is how you treat your weakest members.

So, remember Instruction No. 10 and remember Instruction No. 11. You're not allowed to come in and say, she already had Tourette's, so what? They want you to believe that she could be rear-ended at 40 miles per hour and not get hurt. It makes no sense. Maybe a professional football player. Maybe a wrestler. Maybe someone's who in the prime of their

life. But, you heard Dr. Sutton when I said, well, yeah, she has degenerative disc disease. And being rear-ended at 40 miles per hour certainly couldn't have hurt—helped it. And he had to admit, no, it doesn't. It doesn't.

I want you to really think about that surveillance video, that 17 minutes that they cherry-picked out of the 78 hours. Seventy-eight hours of surveillance. And Tyler Slaeker told you his job is to get evidence. He got 17 minutes. Why? Why is that? Why didn't—why didn't we get all the surveillance? You heard Dr. Rappaport finally say—after being led to the—to the pond by the Defense Counsel—that it was a typographical error with the comma. But, when I was questioning him, he said, well, the 17 minutes might have been on two CDs after saying, oh, I can't remember how many CDs I got, because he slipped up. They messed up and told the truth about the—about the CDs. It makes sense that there are CDs with 10 months of surveillance on them, not 17 minutes. That doesn't make sense.

So, we didn't get that surveillance because it supports what we've been telling you. If we had been able to look at that 10-month span of time in Janelle's life, we would have seen exactly what it is her doctors, her friends, and she herself have been telling you in that it got worse. Instead, out of the 17 minutes, they were able to cherry-pick and find 17 minutes out of 17 [sic] hours where she wasn't doing

this. Seventeen minutes.

And then I asked Dr. Sutton, remember I—I talked to him about that gap in treatment—the surveillance was in March. She has Botox injections. You remember. She was getting Botox injections. In 2015 Janelle was getting Botox injections. And he wanted to try to convince you that he knew the effects of Botox. She was getting Botox, and it was working. So, she's damned if she does and damned if she doesn't. She gets the treatment and it works on her, and, oh, look, there's no problem here. Out of the 78 hours they were able to find 17 minutes. And he testified that the camera is on for one hour, and we got 17 minutes.

We don't have it because it hurts their case. We didn't get to see it because it supports exactly what it is that Janelle said was going on with her body. That's why we don't have it. There's no other reason for it, no other reason. Because you can rest your bottom dollar that if the whole hour that Tyler had the camera on she was calm and not twitching and not jerking and not having the vocal tics, you would have seen it. You would have seen 78 hours of her being calm if that's, in fact, what was going on in [inaudible]. You know that. And how you know that is they went all the way back to her childhood, looking at her records.

Dr. Rappaport said he wanted to have her educational record for a car crash case. A car crash case, he wants to

look at her educational records. He wants to convince you that she has psychological problems. [Inaudible] for a hour with another doctor. Psychological problems, that's how far they're willing to go. Psychological problems, that's what he said. All of this is to let you know that if they're willing to say and do all of that, if, in fact, that 78 hours of video showed Janelle like that 17 minutes, you'd see it. It shows this. It shows the progression that Janelle was talking about, that Dr. Devine was talking about, that Dr. Vlcek told you. Dr. Vlcek, who's actually an expert in Tourette's—not just has some patients; he's an expert—he testified. He speaks. He goes to conferences. He teaches. He's an expert in Tourette's, not someone who's paid $1100 an hour to come and tell you that she wasn't injured.

And, what I found absolutely fascinating is that Dr. Vlcek and Dr. Rappaport said one percent of our population has Tourette's. And somehow, somehow Dr. Rappaport has 30, 30 people, in his practice with one percent of our population. Come on. All of that is done in [inaudible], all of that. He's not credible. He was paid, and he was paid handsomely. And, like I said, I'm kind of not mad at him. That—that's a heck of a lot of money. It's unscrupulous, but he did it. He did it.

I want to talk to you about Instruction No. 12. And Instruction No. 12 talks about how we measure damages. And

a part of measuring damages is pain and suffering, mental anguish, disability. And what we have here is from—we have Dr. Rappaport himself. This is what he says about having Tourette's.

[The following is a transcript of the portion of Dr. Rappaport's video deposition played at 2:15 p.m.]

MS. JENSEN: And are there complications associated with Tourette's syndrome other than the audible and physical tics?

DR. RAPPAPORT: Typically there can be a good deal of pain associated depending on the tic and how large the amplitude is if somebody is throwing their neck or their arm or their leg. You can start to develop arthritis, degenerative joint diseases, and pain in that limb or extremity. And if the movements are always to one side, you may build up musculature on one side that's not present on the other side and gives you an imbalance of—of bulk and strength and tightness that's—that can be uncomfortable.

And then there's just the—there's a lot of terrible social stigma that goes with Tourette's as both with vocalizations and without [sic] vocalizations. Children in general are cruel, and adults are cruel, and it can be a devastating stigma to go through life with people avoiding you, not wanting to be around you. You're very sad.

[Normal testimony resumes at 2:16 p.m.]

MS. SARGENT: That's from Dr. Rappaport. Those are his

own words. And he ends up with "very sad." A lot of social stigma, lots of pain. All of that is in Instruction No. 12. Pain, suffering, mental anguish, disability, emotional distress, loss of society, [inaudible] hang out with your friends, loss of companionship, alienation [sic]. You heard people. You heard—you heard her friends telling you, her cousin telling you, Janelle telling you: kicked out of movies; asked to leave restaurants; parents taking their children away, thinking that she's contagious. Nobody says that that happened before this. And you can be rest assured if there were chart notes or her—she goes to the doctor frequently. If there had been any indication that that was a part of Janelle's life before this collision, you would have heard about it. You would know about it. They would have told you.

They gave you a chart note from 2012. You [inaudible] that chart note, Dr. Sheffield, Janelle's mother took the overdose two weeks before she went to see Dr. Sheffield. And the Defense, they didn't mention any part of that. That was why she went to see Dr. Sheffield from the stress and anxiety of losing her mother. And you remember when the Defense was asking Dr. Wall about that chart note from 2012, because it had an uptick in her Tourette's. Truncal Tourette's—truncal tics, vocal tics, all based on the stress of losing her mother. And had I not brought out why she was there, you

would have been left with the impression that it was just Janelle being Janelle, and it goes all the way back to 2012. That's the kind of the stuff that the Defense has done. They're giving you partial information, withholding information.

Dr. Rappaport wanted to pat himself on his back because by his estimation he missed one chart note. What's interesting about the chart note that Dr. Rappaport missed goes directly to why he was hired, and that was to determine what were the injuries, if any, as a result of June [sic] 2014 collision and what exacerbations occurred. And that chart note that Dr. Rappaport missed said this: Before the collision Janelle had been getting better. Her neck and her back had been getting better, which was borne out when I had Dr. Sutton on the stand and he said to you the month before the collision—it's very important—he didn't put it in the report, but he wanted you to know it was very, very important, and we went painstakingly over those chart notes one by one by one, date by date by date, and it showed her pain levels were threes and fours. She had a spike up to seven. He said, oh, there's one at an eight, and I said, show it, and he couldn't do it.

They're relentless. They're relentless in their efforts to try to say that Janelle wasn't injured. You wonder why. Why is that? Why are they so relentless? Because this type

of case is not a small case. Someone who's already compromised doesn't get better the same way somebody who is healthy. That's why they [inaudible]. They know that this is a big case. That's why they would do these things. You don't do it otherwise. You don't spend almost $50,000 to try to [inaudible] and give you partial information. You know, that's not how this works. It's not how any of this—this whole system doesn't work like that. They're not supposed to do these sorts of things. We're not supposed to come in here and give you half-truths and to withhold evidence and to say one thing and then, oh, I didn't really mean that. That's not our system is supposed to work. All that goes to all those jokes you hear about us. Sharks. Can't trust us. Terrible people. Those stereotypes. And when I was a small child I remember my grandfather telling me, [inaudible] it's all stereotypes. So, we want to make certain that you don't fit into that. You're not supposed to come into a court of law where what we're searching for is truth and not tell the truth. It's not what we're supposed to do. That's not what any of this is about.

You hit somebody, you rear-end them at 40 miles per hour, and you admit liability, but take no responsibility; instead you make them [inaudible], you follow them around, you make them go to a panel where the doctors say that you got psychological problems after being with you for one hour,

tell you that she refused to give you any information; that's what they said. You heard the tape. She gave them information. She thought she was there for an exam; it's what it was supposed to be. Independent medical examination. Instead they spent the first half an hour chatting at her, asking her a series of questions which she eventually answered. She answered. And they admitted, no, I guess that—that wasn't true, despite the fact that he told her two minutes and 28 seconds into the exam, you don't have to answer any questions. And if he was truly the Sherlock Holmes that he said he was, why is he asking her questions? He knows her. He told you he knows her. Remember he said he has—one of them said they had the aerial view; I have the—the view of the whole forest. Another one said that he knew better, Rappaport, because he had all the reports. Then why are you harassing her? Why are you asking her any questions? Spend the hour examining her. Spend the hour examining her. They spent half the time on the oral, half the time on the physical examination, an examination that the Defense went around and around with Vlcek. You didn't do an examination; you didn't do an examination.

Rappaport has never, ever met this woman. Never met Janelle. Yet, he can do a full-scale neurological examination on her in his half of that 30 minutes. And Dr. Sutton can do a full-scale neurological—I mean, chiropractic examination

of her. Come on. Does that ring true? Does that make sense to anybody? They went on and on and on about whether there was an exam. They went on and on and on about, well, this chart note doesn't say this and this chart note didn't say that.

I want to tell you about our burden. We're not held to the exacting standards of an engineer. If we were, we would be here for another four months because we'd have to go through every single chart note. That's not what the law requires. Remember the burden of proof? Featherweight. It's a featherweight. That's why I didn't go over every single chart note, just enough to let you know consistent with her chart notes she was getting better. Her pain was getting lower. The symptoms were decreasing, and her mobility was increasing. Chart note after chart note after chart note. And then Dr. Sutton said, same objective findings; he threw that in there. Same objective findings? And we went to the chart note right before the collision, and there were four findings, objective findings. I read them off: C-1, C-4, T-2, T—T-3. Then after the collision about 11 [sic]. And I read them. He said, oh, those are exactly the same. Do you remember that? You guys remember that. Anything by any means necessary they're going to try to trick you and fool you and convince you that she wasn't injured, that her Tourette's wasn't exacerbated.

We are not held to the standard of an engineer. We don't want engineers to build a—a house and say, well, the ceiling on a more probable than not basis will stay up. And it's good that we don't have that. But, here, it's on a more probable than not basis; that's all. Hold one another to that standard. And if anybody says that the standard is higher, read the instruction. Read it together. Read it out loud. Suss it out. That's our standard, a featherweight. [Inaudible]. She told us. She told us it's a featherweight of evidence. You have scales, drop a feather, boop. Well, Dr. Vlcek tells you—this is what Dr. Vlcek told you.

[The following is a transcript of the portion of Dr. Vlcek's video deposition played for the jury at 2:27 p.m.]

MS. JENSEN: So, in your note I see chronic cervical neck discomfort and neck discomfort. Is there anything else in terms of location of her pain?

DR. VLCEK: Impression and [inaudible] her Tourette's [inaudible]. This has been intensified and added to by her whiplash injury, and she also has been experiencing a lot of cervical discomfort. [Inaudible] a lot of cervical pain and discomfort. And her tics have greatly increased. And I [inaudible] was [inaudible] a big increase in intensification was that whiplash injury. And this was what I was most focused on her, her Tourette's syndrome, her tics.

And, you know, if her—if her toe hurt, I don't know. Or if—if she had some other pain here or there, could it be [inaudible] pain? And that would have been what we're focusing on there.

[Normal testimony resumes at 2:28 p.m.]

MS. SARGENT: He said that big—big, he emphasized that, that big increase. That's—that's the doctor who's known her and observed her for 30 years. A big increase. It's consistent. It's consistent with what her family and her friends have said. It's consistent with what Dr. Devine reported in his chart notes. And it's consistent with Dr. Wall, his letter and chart note of December 7th, 2014, where he said it was debilitating, debilitating. Yes, there are days when she's—when she has good days for a good 17 minutes. [Inaudible] 17 minutes out of the hour that Tyler admitted that he had the camera on her. But, it's not an exacting science, Tourette's syndrome. There isn't an on-and-off switch. She doesn't get to turn this off and turn it on.

But, all of her doctors and all the people who know her said that it was an exacerbation, and it was a big exacerbation with lots of pain, lots of pain. And you heard her describe the exhalation. She's not breathing. She's trying to take a breath in, and every time you hear that ahhhh, the air is being forced out of her body. That wasn't

happening.

Going through life trying to breathe because someone wasn't paying attention, you don't get to just say you already had Tourette's, too bad. You don't get to do that. It's not how our system works, and that's not how we want our system to work. We want our system to protect every single one of us, and the law dictates and demands that it does.

I want to talk to you now about compensation. I'm trying to be cognizant of the time. But, I want to talk to you about compensation, and I told you that I would help you work this out because there is—there's nothing in the rules or the law that tells you how to determine this. It's up to you. But, one way to do it is look at how the Defense values time. Look at how the Defense values time. For one of their experts, they valued it at $1100 an hour. $1100 an hour, that's how they value time. There's another expert, $525 an hour is how they value time.

I've done some calculations. So, if we—Janelle, there is a mortality table, and that is used when there's a situation in evidence of a situation that's not going to get better. Dr. Wall said it's not getting better. Dr. Devine said it's not getting better. And more importantly, the neurologist, Dr. Vlcek, said it's not getting better. So, we have this mortality table and Instruction No. 13. And it tells you

that Janelle is going to live another 38.67 years. So, if we just use how the Defense values time and gave Janelle—awarded Janelle $525 a day, not an hour, $525 a day for the rest of her life, that'd be $7,367,562.50 [sic]. If we use Rappaport's $1100 a day, that'd be $15,457,750. I think that's way too much. I think that's obscene. Janelle told you time after time she's not a doctor. Told you time after time. I don't think they should be paid that amount, but that's how the Defense values time. That's how they value their time. So, that's one way to look at this.

What I'm proposing that you do is that you award Janelle $250 a day, not an hour, a day for pain, suffering, loss of enjoyment of life, humiliation. She didn't sign off on this. She didn't ask for this. And I don't think that anybody would sign on and ask for this. Nobody [sic]. None of this is Janelle's fault. Not any of this is Janelle's fault. And she's been to put through the wringer trying to get a measure of justice.

So, at $250 a day, that total is $3,513,125. $250 a day. And it's not getting any better, and it's not her fault. She didn't do any of this. All Ms. Thompson had to do was pay attention. And the reason why the Defense has done everything that they've done with the surveillance and hiring of doctors and putting her through the wringer and—and saying that she's all in her head and that she's crazy and that she's got

disability [inaudible] and somatoform—I kept calling it somatome—but it's somatoform [inaudible]—and disability [inaudible] and all these other very humiliating things about her, it's because they know. They know that in this type of case, on this type of case, it's a big case. When someone's already been compromised, you start out already compromised, you can't make them worse. That's why you pay attention to what you're doing. That's why we have rules of the road. We expect everybody when they get into their car to, at the bare minimum, pay attention. That's the least we can do for one another in our society is pay attention in what we're doing and what's going on. But, you don't spend $49,000. The surveillance was $5,833, you know. Sutton testified for seven hours. He got 35—$3,675.

Another thing that was very interesting to me, one of the first things out of Dr. Sutton's mouth is, oh, my son has Tourette's. What does that have to do with anything other than to try and bolster his credibility? That's all. There's no proof of that. And they know that they haven't been completely honest with us to begin with, so we fully and fairly question what they say to you. And fully and fairly question all of their testimony. It's bought and paid for, bought and paid for. They don't [inaudible]. They wanted—wanted you to believe that she was uncooperative. All of these things where they finally said, oh, no, the gap in

treatment, even Dr. Sutton on the stand to tell you you're right, there was—there was that Botox. He pushed back on the physical therapy. No, there was no physical therapy. But, he admitted that there was Botox in that so-called gap in treatment. He admitted to that. There's no gap in treatment. She was using Botox. She was using the modality that had been prescribed to her.

So, let's talk about justice. There is an instruction here that tells you the purpose, Instruction No. 11. "The purpose of awarding compensation to an injured party is to repair his or her injury or to make him or her whole again as nearly as that may be done by an award of money." That's the purpose. We're not an eye for an eye. We're not going to put Alicia in a car and bang her up until she's doing this. We're not going to do that. We're not going to hurt her until she's permanently damaged. That's not how our society works. And the only thing we have is money. That's it. And so we have—have a [inaudible] justice in this case.

So, when you're thinking about this case and you're deliberating about this case, ask yourselves why the Defense has done everything that they've done in this case. Why did Facebook stalking somebody? Everybody knows how social media works. You can't take a picture and say, oh, look, you were over here at a football game as if Janelle can't go to a football game. But, notwithstanding that, the point is is

the steps and how far they went, how far they were willing to go. This is a car crash case. They're happening—right now someone just got [inaudible]. They happen all the time. This is a simple car crash case; that's what this is. We're here for a simple car crash case. And they've turned it into this incredible situation. Ask yourself why. And it's because of [inaudible] like this is a big dollar case. That's why. That's why.

I'm going to ask you to retire to the jury—and I have another opportunity to come back and speak to you. But, I'm trying to be cognizant of your time. But, I want you to think about these things, and I want you to think about these things when the Defense gets up and starts telling you about who said what and who said the other. Think about the credibility of the witnesses. Think about who has known Janelle, had the opportunity to observe her. And then think about who's getting paid to say what it is that they said.

Thank you for your time.

[Excerpt ends at 2:39 p.m.]

June 6, 2019, 2:55 p.m.

CLOSING ARGUMENT BY THE DEFENSE

[Jury present.]

MS. JENSEN: Thank you, Your Honor, Counsel, members of the jury. Alicia Thompson, as you know, is here to accept responsibility for the accident. And you can tell that from having watched her testify and having watched her response to the testimony of other witnesses and everything that's happened as we've gone through the process of this trial. It's no laughing matter for her. There is nothing but seriousness with respect to what is happening in this courtroom as it relates to my client.

Now, you'll recall that during my cross-examination of Ms. Henderson a couple of days ago, she was confrontational with me, asking to know why I was putting her on trial. Her point was, I was hit; I was rear-ended; I have injuries. And she wants the inquiry to end there. And Ms. Sargent just spent almost 45 minutes talking to you largely about the efforts that the Defense has taken to defend Alicia against this. It's just a simple car accident; it's a simple rear-end; why are we going through this exercise? And it seems pretty evident that the reason we're going through this exercise is because the ask is for three and a half million dollars.

There's a saying in the practice that when you have the

evidence on your side, you argue the facts. When you don't have the evidence, you attack the party. And that's largely what we just heard for the last 40 minutes. But, that's not what I'm going to talk about. I'm going to talk about the evidence.

So, the thing about this case and what I—I find interesting about Ms. Henderson's challenge during my cross-examination of her was that she, in fact, carries the burden of proof, and that perhaps is why she was feeling like she's on trial. But, the truth of it is she is on trial. It's her burden to prove that she was injured in the accident. And if you believe she was injured, it's her burden to prove damages. And you know that because that's what the jury instructions tell you. I'm going to just click through these quickly, but in Jury Instruction No. 7 it talks about the burden of proof with respect to the jury. In Jury Instruction No. 12, there's a section that talks about burden of proof with respect to damages.

So, let's break down what Ms. Henderson has told you in terms of her theory of injury to kind of its most basic elements because I think during the course of trial, the theory of injury was a little amorphous. Is it—is it the car accident gave me whiplash and that exacerbated my Tourette's? Or is it that the car accident caused stress and exacerbated my—my Tourette's syndrome? I don't know if it was quite

coalesced. But, I think Ms. Henderson did, during her testimony, essentially say, I have whiplash, and now my Tourette's—my tics are worse.

So, let's now think about what we know about the accident, Ms. Henderson's situation after the accident. So, we know she walked away—she drove away from the accident. She did so without any fractures, bruising. There was no shoulder joint injury. She didn't go to the emergency room. You did not hear that—about findings of any diagnostic studies like x-rays, MRI imaging, CT scans of the head. None of that happened after the accident, indicating that none of her providers thought her injuries warranted any kind of any diagnostic workup to the extent that she had any injuries.

But, you did hear from—and I want to focus this next part of my closing, I want to focus on the medical testimony from the medical doctors as compared to the chiropractor—chiropractors or other types of witnesses. You heard from three medical doctors. Let's talk about Ms. Henderson's treating physicians: Dr. Vlcek and Dr. Wall. And what you heard from both of these physicians in terms of objective findings and injury is not that they conducted an examination of Ms. Henderson after the—after the accident and identified objective findings of injury, they relied on her report to them. She came in and told them that she had a whiplash injury.

Speaking with respect to Dr. Vlcek specifically, her neurologist for decades, Ms. Henderson goes to see Dr. Vlcek three days after the accident. And she's there because her Tourette's, her tics have gotten so bad that now she is at the point where she is going to be evaluated for the experimental treatment of deep brain stimulation, the DBS treatment that Dr. Rappaport kind of explained where you get wires in your brain that send electric shocks, and those shocks help to mitigate, control, or stifle the tics. That is where Ms. Henderson is at the time of the accident. And so, she's in Dr. Vlcek's office being, as—as he describes, doing a comprehensive neurological evaluation to determine whether or not this is appropriate. And so, they're going over her entire history, everything about her, to see if—if they can go into her brain, right, and implant these—these wires. And she doesn't bother to mention that she's just been in an accident that, by her accounts—but that night, when she got home, she was on fire in terms of her tics, right? And she doesn't mention that to her doctor. And you have to ask yourself why? Is it because $3.5 million hadn't coalesced in her mind yet? Dr. Vlcek, when he was questioned about this, also testified that if she had told him about the accident, he would have put it in her notes.

So, Dr. Vlcek sees her six months later, and that is the appointment where he talked about during his testimony and

he confirmed that he did not independently any—any injury.

[The following is a transcript of the portion of Dr. Vlcek's video deposition being played at 3:02 p.m.]

MS. JENSEN: Did you form any opinions about what physical injuries the accident would have caused?

DR. VLCEK: My understanding was that she was diagnosed as having a whiplash injury. And [inaudible]—

MS. JENSEN: Did you conduct any ortho—an orthopedic exam or any test to determine what injuries were caused by the accident?

DR. VLCEK: Not [inaudible], not a chiropractor, not [inaudible] doctor. We never treated her for that kind of injury or [inaudible]. I was seeing her in regards to her Tourette's syndrome and her tics. And the fact that the cervical head tic and truncal tic had, by report and I felt probably by observation, by report were greatly increased in intensity and frequency following that motor vehicle accident. And I had seen that [inaudible] in other patients, and I've seen that in some patients that have other kind of injury or [inaudible], that greatly intensifies [inaudible]. So, I was not treating her arthritis, if she had or to what degree; I wasn't treating her musculoskeletal pain. I wasn't doing physical therapy if she had some of that. I wasn't doing chiropractic treatment. I wasn't—I'm not [inaudible].

[Normal testimony resumes at 3:04 p.m.]

MS. JENSEN: So, in other words, he can't tell you she was injured.

Dr. Wall testified, if you remember, and Dr. Eric Wall was Ms. Henderson's primary care physician just around the time of the accident. He had seen her, if you recall, two times in the months leading up to the accident. It was for knee pain. Ms. Henderson has had to meniscus repairs, one on each knee, one before the accident and one shortly after the accident. And that's why he was seeing her before June 2014.

The first time Dr. Wall sees Ms. Henderson in person after the accident, six months later actually during this— the same month that she sees Dr. Vlcek, December 2014, and it was at that time that he learned that she had been in accident. And he also, like Dr. Vlcek, did not do any exam. And, sure, Dr. Vlcek's a neurologist. But, Dr. Wall is a family physician, certainly qualified to run through a physical exam to determine whether or not there's any objective finding of injury, but he didn't do it. Again, they relied on Ms. Henderson's testimony.

Oh, I'm sorry. I'm having technical difficulties, and they're my own.

You'll recall during his testimony that I asked Dr. Wall the question: "In this instance, six months after the accident, Ms. Henderson is there to talk to you about the accident, and she reports to you that her Tourette's has

records. But, with Dr. Rappaport, he gets a bird's eye view. And taking all that information into account, he told you that he could not conclude on a more probable than not basis that Ms. Henderson was injured in the accident, even though he allowed that it was a possibility.

[The following is a transcript of the portion of Dr. Rappaport's video deposition being played at 3:09 p.m.]

MS. JENSEN: [Inaudible] with a summary of your opinions in this case within the scope of your expertise?

DR. RAPPAPORT: My understanding is that she did develop or at least start to complain of neck, upper back, and low back pain after the accident. It was difficult on a more probable than not basis to state that a significant amount of neck, mid-back, and low back was due to this accident, but it was possible that a minor cervical [inaudible] lumbar strain could have resulted from the June 2014 accident, but not on a more probable than not basis, and that at the time I saw her on January 11th, 2018, there was no objective evidence to substantiate that there were ongoing issues with strain or sprain or [inaudible] spasms with actual tenderness in—in these areas.

[Normal testimony resumes at 3:10 p.m.]

MS. JENSEN: So, there's no medical doctor who treated Ms. Henderson who can—who came in and could say, yes, she was injured as a result of the accident. Dr. Rappaport says

it doesn't appear that there was on a more probable than not basis even though it's a possibility.

So, Plaintiff, rather than—the Plaintiff put on her chiropractor, Dr. Devine, who testified, and relied quite heavily during the presentation of evidence on his testimony. And both from Dr. Devine's testimony himself and on cross-examination of Dr. Sutton, right, you'll recall we went through—Ms. Sargent went through page after page after page of records, trying to show that according to the chiropractor notes, before the accident Ms. Henderson was improving, and afterwards she took a nosedive and in—in order to prove to you that she was injured.

But, let's talk about Dr. Devine, and I want to do so in the context of the jury instructions regarding credibility. And Ms. Sargent shared with you the credibility instructions a little bit, but I want to go into them in a little bit more detail.

Jury Instruction No. 1, it's kind of buried in there, the discussion of credibility. But, part of the instruction says that "You are the sole judges of credibility of each witness and of the value or weight to be given to the testimony of each witness." And what this section of the—of the jury instructions does is it empowers you to actually put the microscope on all of the witnesses, all of their motives, all of their bias, what they said, what they didn't

say, what was contradicted. And it empowers you. If you find that a witness is not credible, it empowers you to disregard their testimony. Just because someone took the stand, just because Dr. Devine took the stand and told you she was better before and she was worse after does not mean that you have to believe it. And that instruction provides you with different types of factors that you can apply to the analysis of credibility. And it's not limited to what's in the instruction. It—it lists several different things you can consider, but it doesn't say these are the only things you can consider. So, if you have something you use to evaluate credibility, please do so with all the witnesses that came across that witness stand.

But, with respect to Dr. Devine I want to talk about these particular points—or factors for—in analyzing the credibility: quality of the witness's memory while testifying; bias or prejudice and the reasonableness of the witness's statement in light of all the other evidence. So, this is what I have for Dr. Devine from my notes. You, frankly, may have more, and I don't want to limit you and have you disregard your notes. But, there are actually a lot of questions about his testimony. For example, I think one of the first things that he talked about was that Ms. Henderson, after the accident, started dragging her foot. You'll recall that, right, of bumping into walls? But,

the evidence from all of the medical doctors who evaluated Ms. Henderson and took a look specifically at her gait found that she was walking normally. There's no evidence in the medical records that there is—that there is a foot drag or foot drop, she's dragging her foot, or she's wearing out her shoes.

He talked about her increase—the increased number of visits ever since the accident. But, he couldn't even begin to put a number on it himself. He had no idea. Before the accident, though, he testified that from January to, what, June I think 10th maybe, right before the accident, that he had seen her 26 times. But, Dr. Rappaport was actually in the records counting, and he counted 47 visits. So. Dr. Devine's trying to minimize how many times Ms. Henderson is seeing him before the accident to conflate what's happening afterwards.

He testified that without chiropractic treatment, she—she'd go south, I think is the phrase he used. But, we all know and he acknowledged that after the—after eight months of chiropractic care following the accident, there was that six-month gap of care where there was nothing besides a Botox injection.

In terms of bias, I thought it was interesting that Dr. Devine kind of threw out there the tidbit that suggests that nothing untoward, of course, but he has more than just

a patient/physician relationship with—with Ms. Henderson. You'll recall that he talked about how he actually hired her. He—he allows her to come in and work or—when she was in college, I think, and she was strapped for cash, he gave—he gave her a job.

He testified that he did not think she had any vocal tics before the accident. But, we know that her vocal tics were documented. I mean, even her friends and—friends and family talked about how she had vocal tics, right? And going back to 2004, the 2004 appointment with Dr. Vlcek, 10 years before the accident, at that point the vocal tics are described as loud and frequent and intense.

He tells you that he helped—after the accident he helped coordinate her care. But, when pressed on—on cross-examination, and I think maybe in response to a jury question, what came of that truth of it was that he thinks maybe he—he had a conversation with her physical therapist. He can't tell you who, he can't tell you when, he can't tell you what they talked about; it was just a maybe. There's no coordinating care.

He testified that he took x-rays. He can't tell you when, what the results were. And, frankly, there's no evidence before you that he ever took x-rays at all. He examined Ms. Henderson two days after the accident. And as you'll recall, there was testimony about, you know, he ran through

all these tests and discovered, you know, she had all these significant injuries, including radiating arm pain. She's telling him, I can barely write because of the numbness in my—in my arm, and I'm having trouble walking. My feet and legs aren't doing what I tell them to do, and I'm trouble walking. And he acknowledged that these—these concerns, if this is really what's happening with someone, your concern is that they have a disc herniation, that, you know, there's something really significant going on with the structure of their spine. And what you do is you get an MRI, and you send someone to an orthopedic referral to find out what really is going on and what did he do. Nothing. He did nothing different than what he'd done before the accident.

Dr. Devine didn't mention—there's—there's no mention of Tourette's in his chart notes until 2017. And I'll give him that, you know, he's seen Ms. Henderson so frequently that maybe he's not documenting Tourette's in every single. He documented it in one in 2017. But, more importantly, what he failed to document entirely was what her tics were like before the accident and how they changed after the accident. There's nothing in his records about that whatsoever.

And I guess this comes as no surprise because the Chiropractic Quality Assurance Commission found that he committed unprofessional conduct with respect—

MS. SARGENT: Objection, Your Honor. Objection,

Your Honor. That is not what he testified to.

THE COURT: Okay. Ms. Sargent, the jury shall rely on their own memories as to what the evidence and the testimony of the witnesses showed.

MS. JENSEN: You'll recall he admitted when I cross-examined him about whether or not he was found to have committed unprofessional conduct with respect to recordkeeping. And he acknowledged that.

So, finally, Dr. Devine's records suggest that Ms. Henderson was improving in the months before the accident, right? There's this theory, there's this theme, she's improving, she's gaining mobility, she's getting better according to the chiropractic records. And then after the accident she's not. But, what does the medical evidence show about what was happening in the four months before the accident? It shows that Ms. Henderson—or even six months before accident. It shows Ms. Henderson was seeing Dr. Young, an orthopedic surgeon at OPA Orthopedics, and Dr. Young had—there had been a recommendation for an MRI and an x-ray, both of which showed severe cervical degeneration or severe arthritis in the spine. She had been referred out to physical therapy and gone to a handful of physical therapy appointments. And Dr. Young was considering a cervical facet injection, not Botox injections, but an injection into the joints in her neck because her neck pain had gotten to the

point where it was that severe.

Taking all of this into account, what I suggest to you is that you can completely disregard Dr. Devine's testimony about Ms. Henderson's pre- and post-accident condition. Every factor in terms of the credibility analysis that you apply to his testimony, he fails.

So, stepping back from Dr. Devine and talking about Ms. Henderson's obligation to prove that she was injured in the accident. And let's assume—stepping away from Dr. Rappaport's testimony and—and other medical testimony, let's assume that you're persuaded that she was, in fact, injured, that the 40-mile-an-hour hit caused injuries. Then the burden shifts to damages. Ms. Henderson still has to prove her damages. The burden of proof is talked about in Jury Instruction No. 12. And that says in part that the burden of proving damages rests upon Ms. Henderson, and it is for you to determined, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence. Importantly, your award must be based upon evidence, not speculation, guess, or conjecture. And the law has not furnished us with any fixed standards by which to measure non-economic damages. You'll recall during jury selection people were hoping to get some kind of precedent or a chart or grid or something to help guide their way. But, we don't—the law doesn't provide that.

So, with reference to these matters, you must be governed by your own judgment, the evidence in the case, and these instructions. So, in short, any award of damages has to be based on the evidence, and you have to exercise your good judgment.

So, let's break down Ms. Henderson's theory of damages in its most basic elements. Essentially, I was managing before the accident; I'm not managing now. My Tourette's, my [inaudible], my tics have gotten much worse and they're making my life more difficult. So, we heard from—in support of her damages argument, we heard from friends and family. And, just like all of the other witnesses in this case, you get to analyze the credibility of these witnesses as well, applying the—the factors and from the jury instructions. And for these witnesses, I think that bias or prejudice and the reasonableness of their testimony are particularly relevant in evaluating their credibility.

So, of course, you know, we heard from Ms. Hinds. We heard from Kanika Green, Jolyn Gardner-Carter [sic] I believe her name is—Campbell, excuse me, and Schontel Delaney by a videotape. And they were all pretty consistent in their description of Ms. Henderson's Tourette's before the accident. You'll recall sniffs, maybe a cough like she had a cold or allergies, but otherwise, they—that was kind of the sum of their description. There were a couple other

additions. I think Schontel talked about an occasional—excuse me, Ms. Delaney talked about an occasional shoulder shrug. Ms. Gardner talked about an occasional leg tic. But, Ms. Green, the witness with—with—who went to Trevor Noah and out to dinner and various events with Ms. Henderson, said very specifically there will—there were no truncal tics, no leg tics, no kicks. The friends and family who are trying to—in this courtroom are trying to support someone that they love and treasure, what they had to say is not supported by the medical records, by the doctors who are [inaudible]—whose job it is is to provide accurate information.

[The following is a transcript of the portion of Dr. Wall's video deposition being played for the jury at 3:24 p.m.]

MS. JENSEN: So, you saw Ms. Henderson—and if you need to refer to the chart notes, please do, to refresh your memory, but you saw Ms. Henderson in May—May 19th of 2004. I think at the time she was about 29, 28 or 29?

DR. WALL: Yes.

MS. JENSEN: It's true, isn't it, that at that appointment—

MS. SARGENT: I would object [inaudible] beyond the scope of the direct.

MS. JENSEN: In that—that appointment you described Ms. Henderson's tics as quite severe, that they were intense,

frequent, very loud phonic tics, with exhalations, grunts, yells, and quick exhalations. You described trunk and body jerk tics, big head jerk tics, facial tics, arm tensing, head-jerking tics, and neck muscle-tensing tics with quick head extension. These were all frequent, intense, and almost constant.

MS. SARGENT: And also I object to Counsel's testifying.

MS. JENSEN: Is that what you documented in your chart note of May 19, 2004?

DR. WALL: Yes. She said as a—as [inaudible] my experience with her, she has pretty severe Tourette's syndrome.

[Normal testimony resumes at 3:26 p.m.]

MS. JENSEN: And you wouldn't know that from the friends and family.

I thought it was interesting also that all four of those witnesses used the exact same phrase when describing Ms. Henderson before the accident: life of the party. Almost—almost like someone had told them to say that. It was—it was like a tape on repeat. She was described as a model with a slender body to die for who gained significant weight after the accident. Obviously, Ms. Henderson was interested in fashion. They said she loved to shop and dress in colorful outfits, but could not longer shop for those outfits after the accident. But, again, information that's directly controverted by even Ms. Henderson's own medical—medical

providers.

[The following is a transcript of the portion of Dr. *'s video deposition played for the jury at 3:27 p.m.]

MS. JENSEN: … failed to address. One was her constant—Ms. Henderson's constant fatigue. Can you see that as a—

DR. WALL: Yes.

MS. JENSEN: —[inaudible]? And there was a discussion about whether or not that was connected to Ms. Henderson's Tourette's syndrome perhaps because she wasn't able to get restorative sleep; is that right?

DR. WALL: Yes.

MS. JENSEN: Which is part—

[Normal testimony resumes at 3:27 p.m.]

MS. JENSEN: Actually, I'm—before we start playing this, I'm going to set the context. Dr. Wall is being questioned about Ms. Henderson's appointment with Pamela Sheffield, who was her primary care provider for a period of time. And she had gone to—the evidence was that she'd gone to establish care with Dr. Sheffield in 2012. And Dr. Sheffield and Dr. Wall are in the same practice. Dr. Wall took over—if you'll recall, he took over primary care after Dr. Sheffield retired, I believe. And we're having Dr. Wall review that initial note with Dr. Sheffield in 2012.

Like this—Ms. Sargent said, this came on the heels of Ms. Henderson's mother's passing. We'll certainly

acknowledge that. Nonetheless, this is what—what's being talked about isn't an increase in her tics and Tourette's syndrome as a result of stress; it's fatigue, weight gain—fatigue and weight gain basically that are unrelated to her mother's passing. And hopefully this will work.

[The following is a transcript of the portion of *'s video deposition being played at 3:28 p.m.]

MS. JENSEN: …is that Ms. Henderson and Dr. Sheffield addressed. One was her constant—Ms. Henderson's constant fatigue. Do you see that as a—

DR. WALL: Yes.

MS. JENSEN: —[inaudible]? And, there was a discussion about whether or not that was connected to Ms. Henderson's Tourette's syndrome perhaps because she wasn't able to get restorative sleep; is that right?

DR. WALL: Right.

MS. JENSEN: Which is part of the reason why she was so exhausted?

DR. WALL: Uh-huh. Yes.

MS. JENSEN: Is that right? So, going on there's a—it looks like the second topic they talked about at that point was weight gain—

DR. WALL: Yes.

MS. JENSEN: —that was reporting a significant gain of about 50 pounds; is that right?

DR. WALL: Yes.

MS. JENSEN: Something obviously that Dr. Sheffield noted she was unhappy about? Do you see that?

DR. WALL: Yes.

MS. JENSEN: And then she notes that although Ms. Henderson was in fashion, she couldn't even go shopping because of her weight? Do you see that note?

DR. WALL: Yes.

MS. JENSEN: Also, that she was unable to exercise due to significant pain in her body?

DR. WALL: Yes.

MS. JENSEN: There's also a discussion in the notes from Dr. Sheffield about perhaps a relationship between Tourette's syndrome and Ms. Henderson's—and Ms. Henderson being unable to resist cravings for food; do you see that?

DR. WALL: Yes.

[Normal testimony resumes at 3:30 p.m.]

MS. JENSEN: So, let's set aside the—the well-meaning, but, frankly, inherently biased testimony of Ms. Henderson's friends and family, and let's talk about what was actually going on in her life. You've seen a version of this life before. But, I want to focus on is obviously the period from February to August 2015. So, Ms. Henderson has had eight months of chiropractic care after the accident at this point. And then she has a period of six months where she's not

getting chiropractic care, no massage care, no physical therapy. She's not seeing Dr. Vlcek.

We do know what she was doing this period of time. Okay. Right? We've got the 17 minutes of footage from Costco. And I understand that Plaintiff takes issue with this footage. And I'll suggest to you that the arguments about this are a red herring. This is objective evidence of what Ms. Henderson was like on March 11th of 2015. Now, I understand that there—that there had been many days where surveillance was conducted of Ms. Henderson. But, use your commonsense and think about Tyler Slaeker's testimony. Just because someone is out conducting surveillance doesn't mean they're capturing video footage. There is not one piece of information that has been presented to you that there was video that existed and that has been destroyed. What is before you is that people tried—they did surveillance and tried to capture footage. This is the footage that was caught.

Ms. Sargent tries to—to undermine that fact during her—or tried to when she was cross-examining Dr. Rappaport, right? And she went on and on about CDs, the "S" on CDs, someone had sent him a letter with the video surveillance and another CD. Why CDs with an "S"? And, you know, the interesting thing about that is Dr. Rappaport said, if we're here for a search—search for truth, and she questions whether

or not Dr. Rappaport received more than 17 minutes of video when everyone's burying it, she could have subpoenaed his file. He tells you that happens all the time. And she didn't.

So, even if you had a suspicion about that—and, again, I suggest there's no evidence of it to support it—the video and what it's showing is consistent with what else is happening with Ms. Henderson during this gap in care, right, this six-month gap in care? So, she's—we know she's working at Costco. We know she works there, she admitted, for three months. And she doesn't leave that job for a period of respite at home because it's been so terrible for her. She leaves that job and goes to a job where she's in a standing position as a cashier at Walgreen's. And she's at Walgreen's through October. And she leaves Walgreen's, again not because she's physically incapable of doing the job, but she's going back to school.

Now, you'll also recall that the Plaintiff tried to muddy—muddy the water about this six-month gap in care, likely because it's such a powerful snapshot into how Ms. Henderson was doing after this eight months of chiropractic care. And one of the things she—she questioned Dr. Sutton about to challenge him was the Botox, right, that there is a June 17th, 2015 appointment where Ms. Henderson gets Botox? So, it's well after that March 11, 2015 surveillance video. So, there's no suggestion that the day

the surveillance video was taken, there's no evidence to support that she'd just gotten a Botox injection and she was feeling at her prime. That's not the evidence. The evidence is that she had an injection in June, two months later. And, importantly, the injection is not—you know, Ms. Henderson talked about how after the accident her tics have gotten so much worse that she's getting injections into the muscles in her neck because she's—she's got much more violent—violent jerks. But, that's not what the Botox injections are doing. Per the medical report that Ms. Sargent questioned Dr. Sutton about, it says that she is receiving Botox injections. She's at the clinic for hoarseness, vocal tics, facial spam, and blepharospasm, which are eye tics.

On June 17th, 2015, she gets Botox into the left TA for her voice. The TA is the muscle that controls your vocal chords. She gets Botox into the lateral periorbital region, around her eyes, bilaterally, both sides. She gets Botox into the glabellar, which is in between your eyes. She gets Botox in the nasal dorsum, in her nose. She gets a left TA injection for her voice. That's what this [inaudible] says.

There is no—the—the—as Dr. Sutton testified, there are notes here from 2013 where there were three visits, 2014 where there were two visits, 2015 another three visits, 2016 another three visits. In none of those visits after the accident is there any documentation that she's getting

injections—Botox injections into the muscles in her neck. Her traps, her scalenes, and I can't remember all the names of the muscles in the neck, but you may recall from Dr. Sutton's testimony. So, this is a red herring.

You also recall that there was a suggestion that there had been a physical therapy appointment on March 2, 2005. Ms. Sargent kept referring to it as a chart note. It's not a chart note; it's a letter. And the letter is from Ms. Henderson's physical therapy provider, and she said that "Ms. Henderson was evaluated on June 17th after the accident, had two visits, came back in September of 2014, and on that date at that visit we determined that the schedule needs that Janelle had did not match up" that—"with the hours we offered and that she would be better served in an alternate facility." There was no alternate facility. There was no more physical therapy. But, there was also no treatment in March of 2015.

But, we're here because Ms. Henderson is seeking financial compensation. So, let's talk about damages. And I'll talk about Exhibit No. 10. Ms. Sargent mentioned this a little bit in her closing. And it's an instruction about how do you deal with a situation when you have someone who's compromised before there's an accident. It's absolutely true that in our society if—if you're compromised and—and you get hurt, you still get to recover. We're not going to disregard

you because you—you come to the scene of the accident already compromised. However, you do not get extra benefit because you were compromised before. You get—you can compensated for that exacerbation for that period of time when your poor condition is made worse.

So, normally I don't suggest a number when doing closing arguments, but I thought that Ms. Sargent's calculation for damages, how you go about calculating damages, was—was pretty interesting. $250 a day, that seems—that seems exceptional, frankly, when we're talking about someone who was severely compromised before the accident. But, let's use that number; let's use $250 as the method by which to calculate damages. My suggestion to you would be that if you believe she was injured and if you believe her condition's been aggravated, that that—you apply that $250 only to that period of aggravation or exacerbation reflected by the competent medical evidence. And that would be the six-month period—or excuse me, that would be the eight months leading up to that six-month gap in care, leading up to the time when she felt like she was able to take on that job at Costco, to take on that job at Walgreen's and stop the treatment. And by those numbers, that's $60,000 for a rear-end accident. That's a lot of money.

And last thing I want to talk about before I sit down are the credibility factors as they apply to Ms. Henderson

because they do apply to her as well. The first one I want to talk about is the manner of her testimony. And I don't want to belabor this too much, but, you know, certainly when her own attorney is asking her questions, she is trying to be forthcoming with information. But by the time she testified and by the time I cross-examined her, she'd been sitting in trial for four days with witnesses, watching them testify and watching how the process works, right? At least she doesn't have to roll over and accept everything that's happening, right? She has an attorney that gets to challenge the evidence. And Ms. Henderson saw that. She saw Ms. Sargent would call a witness. I would do cross-examination. She would do direct, back and forth. But when it's my turn to cross-examine her, she's not interested in the search for truth; she's interested in being combative. Why are you putting me on trial? I don't know what I told my doctors. I don't know when I saw my doctors. I don't know what they have in my reports. I didn't read the medical records. [Inaudible] the medical records. You know, it was—it was quite combative. There's—there's definitely no search for the truth there.

By comparison, my client took the stand, obviously feeling, I think, intimidated and emotional about the process and—and rightly so, and provided you with—with genuine and authentic testimony. In fact, you know, the evidence is that Ms. Henderson didn't know she was going to get hit. She was

looking ahead when the accident happened. She didn't see my client coming. She doesn't know how fast she was traveling, right? My client could have gotten on the stand and said, yeah, you know, I—I glanced away and I looked back and I saw that Ms. Henderson's car was stopped, but I had plenty of distance and I started to slow and, you know, I—I bumped her 10, 15 miles an hour maybe. And that, frankly, would have benefitted Alicia's case, right? That's not what she did. She told the truth. She was traveling 40, maybe 45 miles an hour. She brakes, but she isn't framing the testimony or framing the evidence in a way that would benefit her. She's being honest.

Let's talk about the quality of the witnesses' memory while testifying. And, actually I've talked about that a little bit in terms of Ms. Henderson refusing to provide any information on cross-examination about her condition or her care before the accident. But, you also heard this during the examination by Dr. Rappaport and Dr. Sutton. You'll recall I played that hour-long examination, which included the—all the parts of the examination, right; the history and the physical examination. And Ms.—like with me, Ms. Henderson was—was quite combative.

[The following is a transcript of the portion of Ms. Henderson's IME being played for the jury at 3:43 p.m.]

MS. HENDERSON: …right.

DR. SUTTON: Okay. Hip flexion is 120 degrees both right and left. There is full internal and external rotation on the right/left—let me back up. Hip flexion, 120 degrees on left, 100 degrees on the right. She complains of lower back pain both right and left. There's full internal and external rotation to the right and left hips.

Straighten this leg for me. Bring your—your heel and put it up over here for me, just on your knee. Yeah, just like—

MS. HENDERSON: Yeah, I can't do that.

DR. SUTTON: And because of why?

MS. HENDERSON: It's just bad—it hurts my knees.

DR. SUTTON: Ah-ha. And on this side? And the—so you—

MS. HENDERSON: It's—yeah.

DR. SUTTON: Those hurt your knees.

MS. HENDERSON: Uh-huh.

DR. SUTTON: But the knees aren't from the accident. Or are the knees from your accident?

MS. HENDERSON: I don't—no, no.

DR. SUTTON: FABER's test is unable to be performed because of knee pain. She is unable to determine whether she has knee pain from the auto accident or from some other source.

Go ahead and bring this up for me. Does it bother you if I bring this back?

MS. HENDERSON: Yes.

DR. SUTTON: Okay. Where does that bother you?

MS. HENDERSON: That hurts my back.

DR. SUTTON: Those hurt your back, huh? Okay.

Extension is limited by back—rather, knee extension is limited by back pain.

Any pain when I do this?

MS. HENDERSON: Yeah. Why are you doing all of this?

DR. SUTTON: We're—

MS. HENDERSON: Because I don't understand. Like, I feel like—my neck hurts, not my knees.

DR. SUTTON: But you just told me you don't know if your knees are related to the auto accident or not.

MS. HENDERSON: I—I—you have my medical records, so.

DR. SUTTON: Right.

[Normal testimony resumes at 3:44 p.m.]

MS. JENSEN: Let's talk about personal interest that Ms. Henderson has in this lawsuit. Obviously she's got a financial interest. But, if you're persuaded by Dr. Rappaport's testimony that her physical complaints don't match up anatomically with her complaints of—of injury and there's got to be another explanation, and that explanation is probably some psychiatric or psychological feature, then, you know, arguably Ms. Henderson has an investment, whether it's subconscious or not, in having a jury endorse what she's saying, endorse her report that her—she was injured in the

accident and she's gotten so much worse in terms of her Tourette's.

[The following is a transcript of the portion of unidentified doctor's video deposition being played for the jury at 3:45 p.m.]

MS. JENSEN: … that you've got positive--[inaudible] you're seeing non-organic signs.

UNIDENTIFIED: Right. It goes back to the psychological features affecting physical conditions. But, this is how we help determine if that—if—if I believe her and that she's really having this pain and believes these things are worsening her pain, then it's a psychological feature. If I don't believe that's malinger and that's faking or lying, and I wasn't saying that about her, so we don't have a lot of, you know, explanations other than those two things. But, clearly moving from your ankles doesn't cause neck pain. Clearly doing a small squat doesn't hurt your neck. So, either you're faking it and lying, or you have a psychological feature affecting your [inaudible]. That's what it sounds [inaudible].

MS. JENSEN: Did you draw a conclusion between those two options with respect to Ms. Henderson?

UNIDENTIFIED: I felt she had psychological features affecting her physical condition, which was I discussed earlier the [inaudible] my [inaudible].

MS. JENSEN: Now—

UNIDENTIFIED: I don't believe she's lying.

MS. JENSEN: Not that she's lying and trying to manipulate the exam?

UNIDENTIFIED: No [sic].

MS. JENSEN: All right..

[Normal testimony resumes at 3:46 p.m.]

MS. JENSEN: And that's not what we're suggesting. We're not suggesting she's lying. But, she is invested in the outcome of the case, so you have to question what she's putting out there in support of ultimately her request for financial compensation.

So, finally, I wanted to review Ms. Henderson's testimony in terms of the reasonableness of—as compared to the context of the other evidence in this case. I'm not going to go through, you know, her 2004 report—or appointment with Dr. Vlcek or—or things I've talked about ad nauseum. What I wanted to talk about is the first day of testimony you'll recall she—she really focused on her leg tic and how that was getting worse and—and her foot. She said, you know, now I'm dragging—since the accident I'm dragging my foot, and I can't wear high-heeled shoes and I'm—I'm cause—I'm rubbing holes in my shoes since I'm dragging my foot so much.

I did mention before that that finding is totally not supported by any of the medical testimony. The medical

doctors looking at her gait said everything is normal. Not one said there's a dropped foot. And you saw that also with the examination of Dr. Rappaport and Sutton.

But, setting that aside, Ms. Henderson signed under penalty of perjury on September 8th, 2017 a document that was part of the litigation. And in that document under penalty of perjury she herself said, "Since the accident I have seen therapists for my neck, shoulder, and foot." The foot is not related to the accident. 2017 is when she said that.

In an effort, I think, later to explain this away on the stand, she's testified that she introduced the idea of her tics are evolving and changing. And, again, not supported by her own medical provider, Dr. Vlcek.

[The following is a transcript of the portion of Dr. Vlcek's video deposition played for the jury at 3:49 p.m.]

MS. SARGENT: Defense asked you [inaudible] no tics, different tics. All right. At no point in any of your chart notes did you say there were new or different tics; is that correct—as a result of the June 14, 2014 collision and—

MS. JENSEN: Objection, mischaracterizes the testimony.

MS. SARGENT: And, in fact, didn't you say that it was an exacerbation of her tics that she already has?

DR. VLCEK: I said it's primarily an exacerbation of tics

that she already has. It wasn't that she had a bunch of or entirely different tics.

[Normal testimony resumes at 3:49 p.m.]

MS. JENSEN: And then I ask you, if she really has a—a new symptom, a foot drop, dragging her foot as a result of the accident that's just developing, why isn't she back seeing Dr. Vlcek? Why is it the last time that she saw her neurologist, her 30-year neurologist, is in 2014? Where are the new studies? Where is—where—where is the treat—or the—the pursuit of treatment for that new symptom?

So, ladies and gentlemen, we discussed empathy during jury selection. And there's no question that Ms. Henderson has been dealt a really difficult hand. You know, she deals with things that are I think difficult for any of us to imagine. But the work that you do in the jury room can't be driven by empathy or sympathy, and you'll that find that in the jury instructions. The work you do and the decisions you make in the jury room have to be based on the evidence and your good judgment. They have to be based on the facts of the case. And I'd submit that the facts in this case simply don't support Ms. Henderson's theory of the case.

[The following is a transcript of the portion of Dr. Vlcek's video deposition played for the jury at 3:51 p.m.]

DR. VLCEK: ...[inaudible] behaviors during the exam that

may—that were of what we call a non-organic basis; "organic" meaning that they were true, objective findings from an examination. Things like asking someone to do a squat-and-rise and she said that she could only do about 10 percent of normal because it hurt her neck. There—physically would say it's basically impossible to hurt your neck doing a squat-and-rise. And if anything—I mean, I could understand for her if—knee pain might be a reason, but neck pain does not make clinical sense as a reason to limit your ability to do that.

[Normal testimony resumes at 3:52 p.m.]

MS. JENSEN: Thank you for your time and attention.

MS. SARGENT: You know what I find—

MS. JENSEN: Your Honor, we discussed—

MS. SARGENT: She has everything.

MS. JENSEN: Okay.

THE COURT: Okay.

REBUTTAL ARGUMENT BY THE PLAINTIFF

MS. SARGENT: You know what I find interesting about Defense Counsel's closing is that the first thing she said is that I spent a lot of time talking about whether they're telling the truth. Well, actually that's not true. The first thing she said is the reason why we're here is because we're asking for $3.5 million. And that's just not true. The reason why we're here is because the Defendant hit my client at 40 miles per hour and then told her to sue me; offered her

nothing to resolve this case.

MS. JENSEN: Objection, motions in limine.

MS. SARGENT: Your Honor, they opened the door. They said the reason—

THE COURT: Sustained.

MS. SARGENT: —why we're here is because we were the—

THE COURT: Counsel, please don't argue with me in front of—

MS. SARGENT: I apologize—

THE COURT: —the jury.

MS. SARGENT: —Your Honor.

THE COURT: Thank you.

MS. SARGENT: I apologize.

THE COURT: That's okay. Please just continue.

MS. SARGENT: Okay. And that's why we're here. Not because of [inaudible] because while they're saying that they're taking responsibility, that's simply not true. We had to come here so you could make them take responsibility. That's why we're here. They're not taking responsibility until you make them. They made no effort to take responsibility in this case. None whatsoever.

What's interesting is how far they will go with their trying to besmirch. Fifteen years before this collision Dr. Devine had a teaching moment with a quality assurance [inaudible] and that's what he said about his chart notes.

A teaching moment. He wasn't disciplined. So, because of that Janelle should suffer the harm of you not considering any of his chart notes. It's ridiculous and it goes right back to what I'm telling you; is how far they're willing to go; how far they're willing to go to try to convince you that Janelle wasn't hurt. And what's so interesting is that Dr. Sutton said give her 12 weeks. Dr. Rappaport said she wasn't hurt at all. Now they're saying eight months. Really? According to her there's absolutely no medical evidence whatsoever that she was hit. None. Absolutely none. None. They spent $49,000 defending this case. I think she said 50. She might've said 60. Doesn't make sense. You don't spend $50,000 to offer $50,000. It doesn't make sense. It just simply doesn't make sense. Not at all.

So, we are here because Defendant hit my client and isn't taking responsibility. We're here because the competent medical testimony from her doctors say she's in pain, she's [inaudible], she's in pain. I have to fall on my sword. The not on my foot; that's my fault. The foot not related, my fault.

MS. JENSEN: Objection.

THE COURT: Overruled.

MS. SARGENT: I'm responsible for that.

I'm sorry, Your Honor; I didn't wait for you to rule on that.

THE COURT: That's okay. I said overruled.

MS. SARGENT: That's my fault, so I fall on my sword on that. I absolutely fall on my sword on that. Dr. Devine told you that he noticed her foot and he noticed her leg. I had an absolute obligation to my client to change—we have an opportunity in the law to—it's called supplementing discovery. I didn't do it.

MS. JENSEN: Objection.

THE COURT: Sustained. Please move on, Counsel.

MS. SARGENT: Yes, Your Honor.

You know, the—the Defense wants you to—to think that the witnesses for Janelle aren't to be believed. Who else do you have in your life to come and testify if you get hurt? Who else? You can't call the—the guy that's walking down the street. You have to call your family. You have to call your friends. They're who knows you. And if every time a family member or a friend came and testified and the defense said that they were liars, you'd never have anyone come in and testify. And they all call Janelle the life of the party because that's what you call someone who's the life of the party. The person that puts the—the lampshade on their hat—their head at the—at the New—New Year's Eve party, they're the life of the party and everyone describes them like that because that's who they are. It doesn't mean that everyone is lying. It means that's who that person is. And every

friend group has one. Every friend group has one, just like every friend group has a—a downer Debbie. Everybody does. It's just part of friends. But that's who comes and testifies, is your family and your friends.

What the Defense didn't bring up, which is quite interesting to me because she's kind of intimating that there's this huge conspiracy between witnesses and the doctors and they're all friends and they're all trying to conspire—but in December, well before this [inaudible], Dr. Wall wrote the chart note and then wrote the follow-up letter that said Tourette's are debilitating as a direct result of the motor vehicle collision. He wrote it December of 2014, well before any of this was going on. That's what he noted, and that's what he noted in a chart note and then he reduced it to a letter. In December of 2014, before any of this process started.

The videotape, the surveillance, no one testified anywhere in this courtroom that there was not surveillance taken on those other occasions, that other 78 hours. And what's so interesting to me is this: the language that Defense Counsel used. She said don't take issue with the footage. We don't take issues—we don't take issue with—with the footage. What they said was that we took issue with the 17 minutes, and we don't. We take issue with the missing 78 hours. And they said there's no evidence that the videos

existed and had been destroyed. I didn't say it'd been destroyed. It's been withheld. They withheld it from us. And they have an obligation to give us the evidence. They have an obligation to give you the evidence. All of the evidence. The language that she used was very careful. She said destroyed. We never said it was destroyed. We never argued it was destroyed. What we argued is they had 78 hours of video and they didn't give it to you. [Inaudible] she never disputed that. She just said we didn't destroy it. That's what she said; we didn't destroy it. So, it's still out there somewhere. They have an obligation to give it to you. They cherry-picked 17 minutes out to try to convince you that there's not an exacerbation of Janelle's Tourette's. That's what they did.

She wants you to believe that Janelle's trying to frame her evidence to try to paint a picture because Janelle is interested in the outcome. Of course she is. She got slammed into at 40 miles per hour. Of course she's interested in the outcome. It impacts her life. It's been five years. Absolutely she is interested in an outcome. She's been made to go through this process. Absolutely she's interested in— in the outcome. And she should be. When this is over it's over for Alicia Thompson. She goes on and moves on with her life. So, absolutely she's interested in the outcome.

She wanted to tell you that Alicia Thompson could've got

on the stand and framed the evidence in a particular manner by saying, well, I hit her at 10 miles per hour. Except it's not supported by the damage to Janelle's car, and that's with the frame caved in. You can't bend a frame at 10 miles per hour. Forty miles per hour, screaming down and slamming into someone's car, absolutely. And had the frame not been bent you would've heard about it. They would've had someone up here telling you that the frame wasn't bent.

MS. JENSEN: Objection.

THE COURT: Overruled.

MS. SARGENT: Alicia Thompson doesn't have to frame the issues because her agents have done it for her. She doesn't know what's going on [inaudible]. She didn't know there was surveillance. She didn't pay them. She didn't see the video. She has someone else back there, the puppet master that's doing it. And it's not her. So, she didn't have to. She had one law firm that started it, then hired a second law—law firm, and they're doing this now. So, it's your duty to decide who here essentially is telling the truth. That's what it all boils down to. When we get rid of all the little words that we use and all the words that we try to—to say what is and what isn't, it's who's telling the truth. That's what it all boils down to. Whether you believe Dr. Vlcek when he says that it was a big increase in her Tourette's; whether you believe Dr. Devine when says that he saw a

difference in her; and whether you believe Dr. Wall when he—December 17 he said that the Tourette's had worsened to the point where it was [inaudible]. You have to decide that. Absolutely have to decide who it is you believe. That's what this all boils down to at this point.

Their whole case is don't believe anything that her doctors have said because her doctors haven't read everybody's chart notes. And I tell you this: nothing would happen in this society if a doctor was forced to read every single one of his patient's chart notes in a legal setting. We heard Janelle either had 2,000, 2,000 plus 1600. If Dr. Wall had to do that, he wouldn't have time to see his patients. He wouldn't have time to do his work. She's not the only patient of his that's been hurt. The system doesn't expect that. That's why the burden of proof [inaudible] featherweight of evidence. That's why the burden of proof is a featherweight. If a feather drops on the side, we win. Think about it. If your doctor was expected—if you're 89 years old, you have 89 years' worth of medical records. Do you really think that your doctor is expected to read every single medical record from every single treatment provider before he or she comes in the court and sits down and testifies? Our expectation is that doctors write down what's going on with their patients, and other doctors can rely upon it and can rely upon it to [inaudible].

Dr. Rappaport told you he didn't [inaudible] it. Dr. Rappaport told you that he interpreted it. Dr. Rappaport told you that other doctors didn't know what a shoulder was. And when pressed about the shoulder pain, he said, oh, I meant shoulder joint pain. When asked to point it out in the report where he said shoulder joint pain, he couldn't do it. What he said was there's no evidence, and that's not true.

What I failed to do also in my initial closing was this has gone on for five years. I've only asked you for future pain and suffering, loss of enjoyment in life. Forgot to ask you to award Janelle damages for what's happened in the past. I'll leave that amount up to you. She is entitled under the law to ask for future pain and suffering. She's absolutely entitled to—to those damages.

But don't discount Dr. Devine because 14 years ago he had a teaching moment. They want you to discount Dr. Devine because his chart notes show unequivocally that pain was being lower—was lessening and she was getting more movement. Increase in movement, decrease in symptoms. Record after record after record after record. That's why they want to discount the person who's seen her the most. You don't go to your neurologist to get treated for the pain for your joints. Oh, and it's fiction that she hadn't seen her neurologist since 2014, except Dr. Ro. Remember when Dr. Vlcek talked about Dr. Ro, getting the Botox treatments

every three months? And the Defense told you that there were three of them in 2015? January, March, and June. Every—

MS. JENSEN: Objection.

MS. SARGENT: —three months. Every three months. That's what they—that—that was the testimony. Every three months. And it makes sense. The only one they want you to talk about—hear about though is one in June. And that's not what the evidence showed. That's not what the record showed, and that's not what the testimony was.

So, I've had Janelle—Janelle with me for a little over five—or five years now. And I leave her to you. I leave her to you, for you to decide, for you to decide whether or not Janelle and her doctors and the witnesses are telling the truth. I leave that to you. Thank you for your time.

[Excerpt ends at 4:07 p.m.]

LEGEND OF SYMBOLS USED

–	Indicates an incomplete sentence or broken thought.
...	Indicates there appears to be something missing from original sound track or a break in the testimony when switching either from Side A to Side B or switching between tapes.
[inaudible]	1. Something was said but could not be heard. 2. Speaker may have dropped their voice or walked away from microphone. 3. Coughing in background, shuffling of papers, et cetera, which may have drowned out speaker's voice.
[sic]	1. The correct spelling of that word could not be found, but is spelled phonetically, or — 2. This is what it sounded like was said.
[No response.]	There is a pause in proceedings, but no response was heard.
[No audible response.]	Possible that something was said, but word or words could not be heard.
[Off-the-record discussion.]	1. Discussion not pertaining to case. 2. Discussion between counsel and/or the Court, not meant to be on the record.

EXHIBIT B

this or any other case might have upon insurance premiums, in general, or specifically as to any particular party, is not relevant in a personal injury action, and any possible probative value would be outweighed by prejudicial effect. ER 401, 402, and 403. Furthermore, any such argument or colloquy in regard to collateral insurance coverage would be a violation of ER 411.

17. The Reduction of Economic Damages to Present Value.

Washington law is clear that economic damages are not to be reduced to present value. See WPI 34.02. The defense should not be allowed to argue or suggest that any amount received now, if invested, would receive a specified rate of return over a period of time thus resulting in plaintiff ending up with a larger amount, or that to receive a particular sum in the future only a smaller amount is needed now. Such an argument would be nothing more than an invitation to the jury to speculate.

18. Motion to Exclude Private Investigator Tyler Slaeker for failure to comply with a lawful court order.

On 1/29/18, Ms. Henderson moved to Exclude the Testimony of Tyler Slaeker for his failure to comply with his Subpoena Duces Tecum. Motion to Exclude 1/29/19, Dkt. #21. The Court denied Ms. Henderson's request, instead it ordered Mr. Slaeker to produce the notes mentioned in his deposition.

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

EXHIBIT C - Order Denying Plaintiff's Motion for Order to Exclude or Compel Witness Tyler Slaeker, 2/7/18, Dkt. #34. In the Order, the Court referenced Mr. Slaeker's deposition in which

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he testified he had relied upon his notes to prepare his report. EXHIBIT D – Deposition of Tyler Slaeker 1/18/18, page 8. Mr. Slaeker refused to comply with the Court's order and instead produced a self-serving declaration asserting there were no notes. EXHIBIT E.

Plaintiff had filed her first motion to exclude Mr. Slaeker one day after his deposition, as Mr. Slaeker produced none of the documents subpoenaed, including notes, reports, bills, invoices, communications or time logs, etc. Motion to Exclude 1/29/18, Dkt. # 21. Mr. Slaeker produced one 17-minute videotape, despite testifying he had recorded Ms. Henderson for 1 hour, surveilled her over 4 hours, and that others had surveilled her. EXHIBIT F. The jury will be mislead by the 17 minutes of cherry picked surveillance, disclosed to attempt to show Ms. Henderson's Tourette's was not exacerbated.

After defendant disclosed private investigator Tyler Slaeker as one of its witnesses plaintiff timely noted his deposition and served upon him a Subpoena Duces Tecum. EXHIBIT G. Mr. Slaeker failed to comply with any portion of the subpoena to wit he failed to produce a single requested document. EXHIBIT H. A defense lawyer was present at the deposition. Mr. Slaeker, however, testified that the lawyer did not represent him, that he knew he could have a lawyer present, and he also declined the opportunity to reset the deposition so he could have a lawyer present. EXHIBIT I. During the course of the deposition Mr. Slaeker testified that a defense paralegal directed him to not produce the report, a document specifically requested in the subpoena. EXHIBIT J. Mr. Slaeker testified several times to the existence of notes he gave to his boss to generate the report. EXHIBIT K. Mr. Slaeker testified that he had emails responsive to plaintiff's subpoena. When asked, he accessed those emails and was prepared to read the contents into the record. Before he could do so, the defense attorney stopped him and

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directed him to not read the email into the record. EXHIBIT L.

As a direct result of interference by defense counsel and the failure of the deponent to comply with the subpoena, plaintiff is prejudiced. Ms. Henderson is without any information as to when or why a private investigator was hired. She is without any information on how many days she was surveilled, nor does she know how much money was paid. Ms. Henderson also has not been provided the report of the investigation, nor has she been provided the CDs sent to Thompson's Defense Medical Experts. EXHIBIT M. All of this information is in the sole custody and control of defendant or her agents. Plaintiff subsequently sent RFPs for the missing records, and the responses produced are inconsistent with Mr. Slaeker's testimony while the sole timesheet produced is consistent with his testimony that other employees surveilled Ms. Henderson. EXHIBIT N. The sole time sheet defendant produced shows that Ms. Henderson was followed and watched on no less than 78 hours. Mr. Slaeker testified that he surveilled plaintiff on one day, but that others had surveilled her. The responses signed by defense counsel indicates that Tyler Slaeker and only Tyler Slaeker performed the surveillance. *Id. at page 2.*

The sole evidence produced by the defendant is a 17-minute surveillance video showing Ms. Henderson at work, one day, with light tics and no evidence of the audible grunts. This evidence flies in the face of Mr. Slaeker's testimony that he personally surveilled her for at least 4 hours. He claimed that his video was only on for one hour, yet he produces a mere 17 minutes of that hour. Plaintiff has never been given those CD's, nor does she have any way to access those CD's, there are in the sole possession of the defense. Of note, is that defendant produced CD's to its expert Dr. Rappaport who both reduced to writing in his report, which he swore

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under penalty of perjury was true and who also testified that there were CD's.

The trial court has broad discretion in imposing discovery sanctions under CR 26(g) or 37(b), and its determination will not be disturbed absent a clear abuse of discretion. *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wash.App. 223, 229, 548 P.2d 558 (1976). CR 37 provides a nonexclusive list of orders that a trial court may make for failing to make discovery, including that the court may order that the defendant is prohibited from presenting this evidence. CR 37(b)(2)(B). In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. CR 37(d)(3). When the trial court chooses one of the harsher remedies allowable under CR 37(b), the court must explicitly consider whether a lesser sanction would probably have sufficed, "and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial." *Burnet v. Spokane Ambulance*, 131 Wash.2d 484, 494, 933 P.2d 1036 (1997).

The Court Order requiring Mr. Slaeker to produce his notes was entered on 2/7/18. It gave a deadline of 3/1/18. No notes have been provided. The defense provided just 17 minutes of at least an hour of tape, despite ***admitting*** surveilling plaintiff for over 4 hours and claiming at least an hour of recording. Defendant also produced evidence of surveillance on no less than 10 other occasions. Mr. Slaeker produced no documents at all, not time sheets, contracts, case notes, invoices, bills, etc., documents that could have verified his testimony. See Exhibit G. After his testimony Mr. Slaeker produced documents inconsistent with his testimony. Defense,

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through this witness, has flaunted the civil rules and the Court's direct order. Mr. Slaeker and his employer were employed by defendant as her agents, and she is responsible for their failure to comply with the Court's order. Defendant should not be allowed to benefit in this way, to introduce as evidence a surveillance that was cherry-picked to show Ms. Henderson almost tic free for 17 minutes, without providing any of the standard business documents that might have provided credibility to this video recording. The video clip and the testimony should be excluded under the *Burnet* factors: (1) there is no lesser sanction, the Court has already ordered compliance to no avail and defendant has had a year to produce the notes from either Mr. Slaeker or his employer; (2) Mr. Slaeker's refusal to obey the order must be willful, as he had the notes in his possession the day before he was deposed, and as defendant had directed Mr. Slaeker not to produce the report and who, during the deposition, directed him not to read the email on his phone, despite not being Mr. Slaeker's attorney; and (3) the self-serving videotape of Ms. Henderson doing her job, standing for 17 minutes without major tics, will lead the jury to infer that she is fully able and not injured as documented by her medical providers. *Burnet* 494, Because the defendant believes others performed surveillance on Ms. Henderson, but only provided her with one CD, while providing CD's to the defense experts, he should be excluded. Because the defendant was court-ordered to produce his notes and instead produced a self-serving declaration instead, his testimony should be excluded. See Ex J. And Mr. Slaeker's ducking of the trial subpoena is further evidence of willfulness.

If the Court deems exclusion as too harsh on these facts, plaintiff should at least be allowed the following spoliation jury instruction, as a weaker remedy for the failure to produce any evidence which would justify the failure to produce the notes ordered by this Court:

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JURY INSTRUCTION ____

> Where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him.

Pier 67, Inc. v. King County, 89 Wash.2d 379, 573 P.2d 2 (1977): "where relevant evidence which would properly be a part of a case is within the control of a party whose interests it would naturally be to produce it and he fails to do so, without satisfactory explanation, the only inference which the finder of fact may draw is that such evidence would be unfavorable to him." *Ibid.*, 385-86. To remedy spoliation the court may apply a rebuttable presumption, which shifts the burden of proof to a party who destroys or alters important evidence. In deciding whether to apply a rebuttable presumption in spoliation cases, two factors control: "(1) the potential importance or relevance of the missing evidence; and (2) the culpability or fault of the adverse party." *Marshall v. Bally's Pacwest, Inc.*, 94 Wash. App. 372, 381-383, 972 P.2d 475, 480 (1999). In weighing the importance of the evidence, the court considers whether the adverse party was afforded an adequate opportunity to examine it. Culpability turns on whether the party acted in bad faith or whether there is an innocent explanation for the destruction. Here, the video recording is prejudicial against plaintiff, as it shows her doing well, which suggests to the jury she is always this well, and defendant is directly responsible for the failure to produce the evidence demanded by subpoena and ordered by the Court, normal business records that would have lent credibility to Mr. Slaeker's short video clip. If Mr. Slaeker is not excluded plaintiff should have this spoliation instruction.

19. Lay Witness Testimony concerning pain and suffering. Under ER 701, lay witnesses are permitted to costs witnesses are permitted to testify to "those opinions or

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EXHIBIT C

227 5-6-19

FILED
2019 MAY 06
KING COUNTY
SUPERIOR COURT CLERK

CASE #: 17-2-11811-7 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

JANELLE HENDERSON, an individual, Plaintiff, vs. ALICIA M. THOMPSON, an individual, Defendant.	No. 17-2-11811-7 SEA ORDER RESERVING RULING DEFENDANT'S MOTION TO RECONSIDER THE COURT'S RULING ON THE SPOLIATION INSTRUCTION UNTIL AFTER TESTIMONY

THIS MATTER having been brought duly and regularly before the undersigned Judge of the above-entitled Court upon Defendant's Motion for Reconsideration of Ruling Granting Plaintiff's Request for a Spoliation Instruction:

1. Defendant's Motion for Reconsideration of Ruling Granting Plaintiff's Request for a Spoliation Instruction;
2. Declaration of Heather M. Jensen, with exhibits;
3. Plaintiff's Response, with exhibits;
4. Defendant's Reply;
5. All other pleadings and papers in the Court file;

The Court being fully advised in all matters does herewith,

ORDER, ADJUDGE AND DECREE that Defendant's Motion for Reconsideration of Ruling Granting Plaintiff's Request for a Spoliation Instruction is RESERVED until after testimony of Mr. Slaeker. In Mr. Slaeker's deposition, he testified he reviewed his own personal notes (p 27) in preparation, as well as a report that was prepared based on his notes. He was

ORIGINAL

deposed on January 18, 2018, and was served notice of the deposition, as well as the subpoena duces tecum prior to his deposition (a prior motion indicated he was to provide the documents on December 27, 2017, then January 4, 2018, pursuant to the subpoena duces tecum). A motion to exclude Mr. Slaeker was heard February 6, 2018 and he was ordered to turn over his notes. While Mr. Slaeker was apparently consistent with his testimony that his texts had already been lost (prior briefing states that he testified in his deposition to no longer having numerous texts regarding the case because he lost his phone), he was inconsistent on whether notes concerning his surveillance existed. No notes were turned over to the plaintiff and the plaintiff was told the notes no longer existed. It is unclear when these notes were destroyed or if the entirety of the notes were contained in texts to Susan Wakeman. The report, based on his notes, was not produced and is the subject of a separate motion. While it appears suspicious that no notes or documentation from the almost 80 hours of surveillance exist, either with Mr. Slaeker or Probe Northwest, and such failure to keep the raw data is sloppy at best and manipulative at worst, the court will wait to hear the testimony from Mr. Slaeker regarding the destruction of the documentation of surveillance before making a ruling on proper closing argument or jury instructions regarding spoilation. Nevertheless, plaintiff's counsel may be permitted to cross examine Mr. Slaeker regarding the missing notes, lack of production of other video (which may not exist), and lack of report. Plaintiff's counsel may also reference such missing documents in opening statement. No argument regarding the meaning of missing notes, video, or report shall be permitted until further order of the court and would be impermissible in opening statement or cross examination, regardless.

DATED: 5/10/19.

Judge Melinda J. Young

EXHIBIT D

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5-6-19

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

JANELLE HENDERSON, an individual, Plaintiff, vs. ALICIA M. THOMPSON, an individual, Defendant.	No. 17-2-11811-7 SEA ORDER DENYING DEFENDANT'S MOTION TO PROHIBIT TESTIMONY AND REFERENCES RELATED TO THE PROBE REPORT

THIS MATTER having been brought duly and regularly before the undersigned Judge of the above-entitled Court upon Defendant's Motion To Prohibit Testimony And References Related To The Probe Report, and the Court having reviewed the following documents:

1. Defendant's Motion To Prohibit Testimony And References Related To The Probe Report;
2. Declaration of Sarah D. Macklin, with exhibits;
3. Plaintiff's Response, with declarations and exhibits attached, including excerpts of Mr. Slaeker's testimony;
4. Defendant's Reply;
5. All other pleadings and papers in the Court file;

The Court being fully advised in all matters does herewith,

ORDER, ADJUDGE AND DECREE that Defendant's Motion To Prohibit Testimony And References Related To The Probe Report is DENIED. Mr. Slaeker was listed as an expert

witness on the defendant's witness list, in his deposition he testified that he reviewed the Probe report in preparation for the deposition, and he testified that the Probe Report was created from notes that he sent to Susan Wakeman. While in briefing, Mr. Slaeker's testimony is characterized as a fact witness, and it appears the substance of his testimony is about his observations of the Plaintiff and may be characterized as more of a fact witness, he was listed as an expert witness on the witness disclosures and was hired for his expertise as a private investigator. Furthermore, although he was ordered to turn over his notes that formed the basis of the report, he later stated (through the defendant) that he no longer had his notes. Thus, the report is the only memorialization of his notes from surveillance. Because a testifying expert's report is not work product, nor are the facts gathered by the testifying expert, the Plaintiff may ask questions of Mr. Slaeker regarding the Probe Report. Regardless of the designation of Mr. Slaeker as an expert, his use of the report to refresh his memory and the lack of any other documentation of the surveillance supports allowing the Plaintiff to cross examine Mr. Slaeker about the report and the failure to produce the report. Mr. Slaeker testified that he was not the author of the Probe Report, but his deposition testimony supports that it was based substantially, if not entirely, on his surveillance of the Plaintiff, on his notes from that surveillance, and that he used the report to refresh his recollection of the surveillance for his deposition. As such, testimony concerning the report is proper.

DATED: 5/3/19.

Judge Melinda Young

EXHIBIT E

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

JANELLE HENDERSON, an individual, Plaintiff,	)	
V.	)	No. 17-2-11811-7 SEA
ALICIA M. THOMPSON, an individual, Defendant.	)	

VIDEO DEPOSITION OF BRIEN W. VLCEK, M.D.

APPEARANCES:

For the Plaintiff: VONDA M. SARGENT
Attorney at Law
119 First Avenue South, Suite 500
Seattle, Wa 98104

For the Defendant: HEATHER JENSEN
Attorney at Law
1111 Third Avenue, Suite 2700
Seattle, Wa 98101

Seattle, Washington,

February 5, 2019

ALSO PRESENT: Janelle Henderson and Carol Farr

Eric Jensen Videographer, Royal Video Productions
950 NW Firwood Blvd, Issaquah, Wa, 425-391-6809

Reported By: Pamela M. Weekley, CCR #2510

COURT REPORTING OFFICE OF
ROBERT L. T. THOMAS, SR., INC.
913 North 36th Street
Renton, Washington 98056
(425)271-0332

Q So in your note I see chronic cervical discomfort and neck discomfort. Is there anything else in terms of location of her pain?

A "Impression and plan: Certainly, her Tourette syndrome remains real problematic for her. It fluctuates. This has been intensified and added to by her whiplash injury and she also has been experiencing a lot of cervical discomfort."

So she is experiencing a lot of cervical pain and discomfort and her tics had greatly increased. And I felt more probable than not, the nidus was for that big increase in intensification was that whiplash injury. And this is what I was most focused on: her Tourette's syndrome, her tics. And, you know, if her toe hurt, I don't know. Or if she had some other pain here or there, could even be a big pain, that may not have really been what we were focusing on there.

Q If she told you --

A And I am not her primary care doctor, her chiropractor or other treating physicians involved. She may have had other pain, discomfort other -- but it didn't appear that she had other discomfort that was attributed to in a big way, by her tics or by her Tourette's superimposed on that whiplash injury.

MS. JENSEN: Thank you. I think we need to

EXHIBIT F

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR KING COUNTY

JANELLE HENDERSON, an individual, Plaintiff,

V. No. 17-2-11811-7 SEA

ALICIA M. THOMPSON, an individual, Defendant.

VIDEO DEPOSITION OF ERIC WALL, M.D.

APPEARANCES:

For the Plaintiff: VONDA M. SARGENT and CAROL FARR
Attorneys at Law
119 First Avenue South, Suite 500
Seattle, Wa 98104

For the Defendant: HEATHER M. JENSEN and SARAH D. MACKLIN
Attorneys at Law
1111 Third Avenue, Suite 2700
Seattle, Wa 98101

Seattle, Washington,

May 31, 2019

ALSO PRESENT: JANELLE HENDERSON

VIDEOGRAPHER: TONIA GRANT, Grant Legal Services 206-536-8269

Reported By: Pamela M. Weekley, CCR #2510

COURT REPORTING OFFICE OF
ROBERT L. T. THOMAS, SR., INC.
913 North 36th Street
Renton, Washington 98056
(425) 271-0332

WITNESS INDEX

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
Dr. Wall	4	27	54, 57	56

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VIDEOGRAPHER GRANT: Good afternoon. We are now on the record. My name is Tonia Grant, video Specialist representing Lakeside Reporting. The Court reporter is Pamela Weekley representing Bob Thomas reporting. Today's date is May 31, 2019. The time is now 2:41 p.m. The deponent today is Dr. Eric Wall in the matter of Janelle Henderson versus Alicia Thompson. And the cause number is 17-2-11811-7 SEA.

The location of today's deposition is 314 Northeast Thornton Place, Seattle, Washington. Will Counsel please identify yourselves and state whom you represent.

MS. SARGENT: My name is Vonda Sargent and I represent Janelle Henderson.

MS. JENSEN: I am Heather Jensen. I represent Alicia Thompson.

MS. MACKLIN: I am Sarah Macklin. I am here for Alicia Thompson.

MS. FARR: Carol Farr for Heather -- for Janelle Henderson.

VIDEOGRAPHER GRANT: The court reporter may now swear the witness.

ERIC WALL, M.D. duly sworn to tell the truth, was called and testified as follows:

DIRECT EXAMINATION

BY MS. SARGENT:

Q. Good afternoon, Dr. Wall.

A. Hi.

Q. My name is a Vonda Sargent. And before we get started, I am going to ask you if all your opinions could be stated within a reasonable degree of medical certainty?

A. Yes, they can.

Q. Dr. Wall, could you please state your full name and spell your last name for the record.

A. So my name is Eric, E-r-i-c, Wall, W-a-l-l.

And what did you want to know?

Q. That's about it.

A. That is it.

Q. Okay. And could you give us a brief description of your educational background.

A. So I have been a family physician for 39 years. I practiced most recently at the University of Washington for the last 11 years. And prior to that, I lived in Portland, Oregon and I saw patients at the Oregon Health Sciences University in Portland.

Q. And your current practice is family medicine?

A. Yes.

Q. How do you know Janelle?

A. Janelle Henderson is a patient of mine currently. I believe that I started seeing her in 2015. 2014, '15

Q. (By Ms. Sargent) All right. Do you need to read the chart note?
A. **It would help to read the chart note.**
MS. SARGENT: Mark as 4, the December 17 chart note.
(Exhibit No. 4 marked for identification)
MS. SARGENT: Here, Doctor.
MS. JENSEN: Counsel, while the Doctor is reviewing that record, I note that I have not seen that report from Dr. Ro that you marked as -- have marked as Exhibit No. 2, was that produced in discovery?
MS. SARGENT: You had 1300 pages so, yeah.
MS. JENSEN: My question is, do you know whether or not it was produced in discovery?
MS. SARGENT: How would I know whether or not you got this? You guys subpoenaed her records. So you are asking whether or not Swedish gave you the records? You subpoenaed them, correct?
MS. JENSEN: I will review what we have.
MS. SARGENT: You subpoenaed the records, defense counsel.
MS. JENSEN: I will review it.
MS. SARGENT: I am just wondering how am I supposed to know whether or not your subpoena was complied with. I don't have control of whether or not

the hospital gives you the records you want.
MS. JENSEN: I will see. Thank you.
THE WITNESS: Okay. And so your question.
Q. (By Ms. Sargent) My question to you, Doctor, is as a result of that being the December 17 encounter with your patient, you wrote a letter. Can you tell the jurors what that letter says.
A. **So the letter actually says that she had an accident.**
MS. JENSEN: Objection, hearsay.
Q. (By Ms. Sargent) Did you write that letter, Dr. Wall?
A. **Yeah.**
MS. JENSEN: The letter itself is hearsay. He can offer testimony.
A. **The letter that I wrote said she had a motor vehicle** accident in June which has exacerbated her Tourette's. She has increasing need -- increasing neck and I didn't spell this right, but neck "and shoulder pain due to her escalating Tourette's which has proved debilitating. She is seeing her neurologist specialist to address this."
Q. (By Ms. Sargent) And you used the word, "debilitating." How did you come to that conclusion?
A. **Well, by the time I was writing this, she -- her --** her -- what I guess for the layperson would be spasms, muscle spasms, tics and phonic motion, meaning her vocalizations were occurring with increasing frequency.

And so that was my intent in looking at -- you know, in using the word debilitating. And that she was -- and the reason why she was seeing her neurologist is we were giving her Botox which is basically to relax the spasm muscles to help her cope with some of the pain.
Q. And as a result of the December 17 encounter, do you recall whether you referred Janelle out to any outside treatment? Did you refer her to any other doctors, any other modalities?
A. **Well, she already had a well-established relationship** with a neurologist. So she didn't really -- had she needed the referral for insurance purposes, I would have certainly done that. I think there were a number of visits to physical therapy which I am not sure I had in my chart. But I -- and I would have to go look and see whether we actually -- I did any additional referrals for her. But I would have done that or her neurologist could have done that as well.
Q. So that was in December of 2014?
A. **2014.**
Q. Okay. Dr. Wall, are you familiar with any of the treatment that Janelle has engaged in as a result of the collision for the increase in her Tourette's symptoms?
A. **Well, the treatments -- because I do occasionally get the** notes from her neurologist, most of which have really

been the Botox for -- to reduce muscle spasm. Because you can use -- because the Botox actually works over a -- should work over a sustained period of time, that she would go in periodically to get those injections because there really -- everything other than the Botox which I believe she has tried practically everything else, really have side affects that really make it unable for her to function. Made it for her -- made her unable to function normally. It was either overly sedating or it provided complete -- I mean total body relaxation that she really couldn't get up.
Q. And returning to your letter that you wrote on December 17, do you have any medical literature or any basis to come to the medical conclusion that her Tourette's was exacerbated by this motor vehicle collision in June of 2014?
A. **You know, the only medical -- the only medical evidence** that supports this is that in terms of her Tourette's, the Tourette's alone, there is a literature base that increasing stress, anxiety and pain increases the frequency of the Tourette's tics and phonic tics as well. So it's really the frequency. Exacerbation is really pretty well established that if you increase an individual's stress, anxiety and pain, their tics will increase.

easily a doubling of her visits to specialty providers and primary care providers simply related to Tourette's and the consequences of Tourette's pre and post accident. You know, whether that is causal or not is a whole other thing. But it was curious to see that there was definitely a dramatic increase in the number of visits she made.

MS. JENSEN: I will object and move to strike that testimony.

Q. (By Ms. Sargent) Dr. Wall, are you aware of the term waxing and waning?

A. I think I am. It depends on what you are referring to.

Q. I am talking about -- so Janelle has Tourette's?

A. Yes.

Q. And sometimes her Tourette's is worse than others. That's what I mean by waxing and waning, sometimes it goes up and sometimes it goes down.

A. I think what you are referring to and I would put it in a different -- I would phrase it differently.

Q. Okay.

A. She has periods where there is an increased frequency of her tics and then a decreased frequency in her tic behavior and her phonic behavior. And that, also, I think is triggered somewhat by a lot of it by environmental issues, actually, pretty significantly by

environmental issues and that's just been my impression over time.

Q. What do you mean by environmental issues?

A. Well, I guess I get back to what I said before, if -- over the years that I have known this patient, the -- any triggers in terms of stress in her life or increase in pain that she's experiencing will seem to correlate with a higher frequency of tics and grunting behavior.

Q. Okay.

A. And it's most severe -- it is very difficult to understand what she is saying and it is difficult for her to sit in an exam chair during those times as well.

Q. Can you describe the difficulty that you have noticed by your own observation of her being unable to sit in an exam chair?

A. Well, in order to do any physical exam, if you have a patient that is constantly moving around, it's oftentimes difficult to kind of -- to actually get them to sit to do a physical exam. Oftentimes, you need -- it's like having a wild child kind of roaming around the room. It is just very difficult to kind of get them to sit still long enough to like listen to their heart, lungs, look in their ears, you know, because they are constantly moving.

Q. And is that -- Janelle's inability to sit still in an exam chair, something that you noticed post collision?

A. I noticed it more. I mean it was definitely -- it was always present, but it was certainly far more present, I think, afterwards. I didn't count how many times per minute things were going on, but it was definitely more prevalent.

Go ahead.

Q. So if I were to understand what you are saying, what you are saying is Janelle always had the tics?

A. Uh-huh.

Q. I need an answer. Sorry, sir.

A. Yes. I am sorry. So yes.

Q. Always had the tics and had difficulty sitting still. And you noticed an increase in the tics and the difficulties sitting still in the exam chair after the collision?

MS. JENSEN: Objection, leading.

Q. (By Ms. Sargent) I am asking if that is what I am understanding you are saying?

A. I noticed it in the immediate post accident period more, far more than it was -- it was certainly more. I mean I wouldn't have written -- I don't write letters like that unless I feel like someone is really, really is debilitated and having difficulty coping with their life.

Q. And Dr. Wall, do you remember at any point in time having the opinion that prior to this motor vehicle collision

that your patient had been getting mobility back in her neck and upper back?

A. You know, it was mentioned in the note that I did not write that indeed that she was. I would have to go back. I don't -- I did not, in all fairness, I did not have a long history with Janelle pre-accident. So there was maybe one or two visits. So I can't really fairly comment whether she seemed to be improving. She was getting more response from her Botox at the time or her treatments from neurology. It was really the neurologist that was managing her Tourette's.

Q. So I am going to hand you a chart note and the consultation is on 8-1-16.

MS. SARGENT: Do you have that chart note?

MS. JENSEN: I do not.

(Exhibit No. 6 marked for identification)

Q. (By Ms. Sargent) Dr. Wall, can you review that chart note, please.

A. Okay.

Q. Is that the chart note that you generated, Dr. Wall?

A. Yes.

Q. And does it include the finding that prior to the motor vehicle accident, it says, MVA --

A. (Interposing) Uh-huh.

Q. And I need you to answer it yes or no.

EXHIBIT G

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

JANELLE HENDERSON, an individual,	)	
Plaintiff,	)	
vs.	)	No. 17-2-11811-7 SEA
ALICIA M. THOMPSON, an individual,	)	
Defendant.	)	

VIDEOTAPED PERPETUATION DEPOSITION UPON ORAL EXAMINATION OF

HAROLD RAPPAPORT, M.D.

10:00 a.m.
Tuesday, July 17, 2018
1111 Third Avenue, Suite 2700
Seattle, Washington

BRANDICE L. PIVAR, CCR
NORTHWEST COURT REPORTERS
1415 Second Avenue, Suite 1107
Seattle, Washington 98101
(206) 623-6136
www.northwestcourtreporters.com

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complications of marked increased head jerk tics. As is often the case with many patients with Tourette syndrome and the case for Janelle sometimes when she has a nidus of irritation or sensory change in peri- -- paraticular (phonetic) lo- --
Q Particular.
A Oh. "Particular location that will increase her tics in that location. This occurred when she had knee surgery and is occurring with her whiplash injury. When she feels a tightness in her neck, this discomfort tends to trigger tics, tics in turn add to the neck discomfort."
Q Okay. So Dr. Vleek -- these are -- these are Dr. Vleek's words.
A Yes.
Q Not Janelle's words, right?
A Yes.
Q Okay. So Dr. Vleek made a finding that the whiplash injury resulted in neck discomfort. The neck discomfort was already complicated by the arthritic changes that you described, right?
A Yes.
Q As well as a significant complication of marked increased head jerk tics.
A Where does it say "marked"?
Q Second --

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A I see.
Q Do you see it?
A And I would change what I agreed to earlier, just that as Dr. --
Q I'm sorry. You would change what?
A What I agreed to earlier.
Q What -- what's, what's --
MS. JENSEN: Let him finish --
MS. SARGENT: Please.
MS. JENSEN: -- his answer --
MS. SARGENT: Please.
MS. JENSEN: -- Counsel.
Q What, what are you -- I'm not understanding. What did you agree to earlier?
A That you said this is Dr. Vleek's words. Just that he says, in his first paragraph, "History is provided by Janelle herself." So any information he says about tics being increased or head jerks being increased is from Janelle's description of that to him, not necessarily from anything he observed.
Q But you said you believed Janelle.
A I didn't say that. I said I don't think she's faking or lying. It does not mean that these are not psychological features affecting her physical condition and that she believes that she is so much worse and that all her current

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symptoms are from the accident as opposed to remembering what symptoms she had prior to the accident; it's world of difference.
Q Okay. So you don't believe that Janelle is lying, but you believe that this is all in her head?
A I believe that she has brought herself to believe that all her problems are from the accident.
Q It's my understanding that you have privileges at Swedish; you're employed at Swedish.
A Yes. Well, I'm not employed at Swedish.
Q You have --
A I've had --
Q -- privileges.
A -- privileges at Swedish.
Q And this chart note's from Swedish.
A Yes.
Q You could've called Dr. Vleek, couldn't you?
A In general, I don't believe that I have permission to call Dr. Vleek from a CR 35 exam.
Q In general. But let's talk about specifically. You --
A I specifically don't think I have permission to call him and have a release of information from him.
Q I'm sorry. And have a release of information from him?
A Um-hmm.
Q What does that mean?

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A Regarding a patient. I think that I don't have that type of patient-doctor privilege to go directly to her doctor to talk about her case. I do not believe I have that.
Q What, what leads you to that belief? Did anyone tell you that?
A I don't -- well, I wouldn't -- as a treating doctor, I would not provide a doctor who was seeing a patient of mine in a CR 35 exam access to anything other than what a release of information came in for. That's all I would release.
Q And --
A I would not talk to them about my opinions or impressions or findings. I don't think that's legal.
Q You don't think that's legal?
A I don't. I think that would be a HIPAA violation.
Q Okay. Um, you stated earlier that you've never been trained in doing forensic examinations.
A That's correct.
Q So you're basing this off of?
A My experience as a treating physician.
Q Okay. And your experience as a treating physician leads you to the conclusion of what is legal or not legal?
A What would be a violation of HIPAA.
Q Okay. So back to my original question. You didn't call Dr. Vleek --

EXHIBIT H

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7/15

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CASE #: 17-2-11811-7 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JANELLE HENDERSON, an individual, Plaintiff, vs. ALICIA M. THOMPSON, Defendant.	NO. 17-2-11811-7 SEA DECLARATION OF C. STEVEN FURY

I, C. STEVEN FURY, declare as follows:

1. Although I am one of the lawyers currently representing the plaintiff in this matter, I had not appeared to represent the plaintiff at the time of trial but attended much of the trial. I argued the motion for a new trial. At the time of the motion, the Court reported that the court asks the parties to leave when the jury comes from the jury room after a verdict in every, or nearly every case.

4. I have no knowledge concerning the court's general practice. I did hear the court's direction to Vonda Sargent, plaintiff's counsel, and the plaintiff before the jury came from the jury room after retiring from rendering their verdict. The Court said to Ms. Sargent that "the jury" asked that the plaintiff leave the courtroom before they came out. The request was made on behalf of the jury, not stated as a regular practice of the court.

5. The Court then asked everyone other than counsel for the parties to leave the courtroom. Not being counsel for one of the parties at the time, I complied with the request.

I declare under penalty of perjury under the laws of State of Washington that the foregoing is true and correct to best of my knowledge and understanding.

Dated this 15th day of July, 2019 at Bellevue, WA.

C. STEVEN FURY

FURY DUARTE PS
TRIAL LAWYERS
1600 148th Avenue SE
Suite # 200
Bellevue, WA 98007
T: (425) 643-1606
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CASE #: 17-2-11811-7 SEA

IN SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

JANELLE HENDERSON, Plaintiff,	**No.: 17-2-11811-7 SEA**
v	**DECLARATION OF CAROL FARR REGARDING EXCLUSION OF PLAINTIFF**
ALICIA M. THOMPSON, Defendant	

I, Carol Farr, attorney, hereby declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct and based upon my personal knowledge and recollection:

1. **I am over the age of eighteen years and competent to testify herein.**

2. **I am one of plaintiff's attorneys and was present during the trial in this case.**

3. **After the verdict was read, the Court went into the jury room to talk to the jurors.**

5. **When the Court returned, she said that the jurors wanted plaintiff to leave the courtroom before they left, and asked plaintiff to leave.**

6. **Plaintiff was very upset at this request.**

Signed in Seattle Washington on this 13th day of July 2019,

Carol Farr

Carol Farr

THE LAW OFFICES OF VONDA M. SARGENT
119 1st Ave. S., Suite 500
Seattle, WA 98104
206.838.4970

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KING COUNTY
SUPERIOR COURT CLERK
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CASE #: 17-2-11811-7 SEA

SUPERIOR COURT OF WASHINGTON KING COUNTY

Janelle Henderson,

Plaintiff,

v.

Alicia Thompson,

Defendant

No. 17-2-11811-7 SEA

DECLARATION OF VONDA SARGENT

I, Vonda M. Sargent, hereby declare under penalty of perjury for the laws of the state of Washington that the following statements are true and correct and based upon my personal knowledge:

1. I am over the age of eighteen years and competent to testify herein.

2. I am one of Janelle Henderson's attorneys.

3. My office sought the recording for the afternoon of the verdict and the exchange with the Court related to the removal of Ms. Henderson was not recorded.

4. I am acutely aware of the fact that the court specifically addressed me after the jury returned its verdict and the Court spoke with them, that they wanted my client to leave the courtroom before they would come out.

5. The Court then directed everyone except the attorneys to leave the courtroom.

The Law Offices of Vonda M. Sargent
119 1st Ave. S. Ste. 500
Seattle, WA 98104

6. After everyone had exited the courtroom, and the Judge retired to her chambers, the bailiff opened the jury room door, stepped out and reiterated the jury's desire to have Ms. Henderson removed from the court room. Specifically, she asked, "Is Ms. Henderson out of the courtroom?" I responded in the affirmative.

7. While I heard the Court indicate, during the Motion for a New Trial, that it was her practice to remove parties from the courtroom, that is not what was said in Ms. Henderson's case. I distinctly recall the specific request came from the jurors, as I had never had that particular experience before. I found it to be humiliating and embarrassing.

DATED and SIGNED this 12th day of July 2019, in Seattle, Washington.

VONDA M. SARGENT

The Law Offices of Vonda M. Sargent
119 1st Ave. S. Ste. 500
Seattle, WA 98104

SUPERIOR COURT OF WASHINGTON KING COUNTY

Janelle Henderson, Plaintiff, v. Alicia Thompson, Defendant	No. 17-2-11811-7 SEA **DECLARATION OF JANELLE HENDERSON**

I, Janelle Henderson, hereby declare under penalty of perjury for the laws of the state of Washington that the following statements are true and correct and based upon my personal knowledge:

1. I am over the age of eighteen years and competent to testify herein.

2. I am the plaintiff in the above captioned case.

3. I was present for my entire trial which concluded June 7, 2019.

4. I was present for the verdict and recall Judge Young asking if the parties would be willing to speak with the jury.

5. I recall both sides said they would and then Judge Young went and spoke with the jurors.

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Seattle, WA 98104

6. I also remember what Judge Young that after the Judge came back into the court room, she said, the jurors would be willing to speak with the lawyers but only if I would leave the court room.

7. I recall this vividly because I immediately felt, embarrassed, hurt, bad about myself, discounted, disrespected, like I did not matter and excluded.

8. I do not recall Judge Young directly asking me to leave the court room, but it was understood that the jurors would not speak to any of the lawyers if I remained.

9. The humiliation was made worse after finding out that none of the jurors spoke with any of the lawyers and that the court's bailiff made certain I was out of the courtroom so the jurors could file out.

DATED and SIGNED this 12th day of July 2019, in Seattle, Washington.

JANELLE HENDERSON

The Law Offices of Vonda M. Sargent
119 1st Ave. S. Ste. 500
Seattle, WA 98104

SUPERIOR COURT OF WASHINGTON KING COUNTY

Janelle Henderson,

Plaintiff,

v.

Alicia Thompson,

Defendant

No. 17-2-11811-7 SEA

DECLARATION OF VONDA SARGENT

I, Vonda M. Sargent, hereby declare under penalty of perjury for the laws of the state of Washington that the following statements are true and correct and based upon my personal knowledge:

1. I am over the age of eighteen years and competent to testify herein.

2. I am one of Janelle Henderson's attorneys.

3. My office sought the recording for the afternoon of the verdict and the exchange with the Court related to the removal of Ms. Henderson was not recorded.

4. I am acutely aware of the fact that the court specifically addressed me after the jury returned its verdict and the Court spoke with them, that they wanted my client to leave the courtroom before they would come out.

5. The Court then directed everyone except the attorneys to leave the courtroom.

The Law Offices of Vonda M. Sargent
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Seattle, WA 98104

6. After everyone had exited the courtroom, and the Judge retired to her chambers, the bailiff opened the jury room door, stepped out and reiterated the jury's desire to have Ms. Henderson removed from the court room. Specifically, she asked, "Is Ms. Henderson out of the courtroom?" I responded in the affirmative.

7. While I heard the Court indicate, during the Motion for a New Trial, that it was her practice to remove parties from the courtroom, that is not what was said in Ms. Henderson's case. I distinctly recall the specific request came from the jurors, as I had never had that particular experience before. I found it to be humiliating and embarrassing.

DATED and SIGNED this 12th day of July 2019, in Seattle, Washington.

VONDA M. SARGENT

The Law Offices of Vonda M. Sargent
119 1st Ave. S. Ste. 500
Seattle, WA 98104

EXHIBIT I

7-17-19

FILED
2019 JUL 17
KING COUNTY
SUPERIOR COURT CLERK

CASE #: 17-2-11811-7 SEA

JUDGE MELINDA J. YOUNG

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

JANELLE HENDERSON, an individual, Plaintiff, vs. ALICIA M. THOMPSON, an individual, Defendant.	No. 17-2-11811-7 SEA ORDER DENYING PLAINTIFF'S CR 59 MOTION FOR A NEW TRIAL OR IN THE ALTERNATIVE FOR ADDITUR

THIS MATTER having come before the Court upon Plaintiff's Motion for Partial Summary Judgment ("Motion") and the Court having reviewed the following:

1. Plaintiff's Motion for New Trial or in the Alternative for Additur;
2. Declaration of Vonda Sargent in Support of Motion for a New Trial;
3. Defendant Thompson's Opposition to Plaintiff's Motion for New Trial or in the Alternative for Additur;
4. Declaration of Heather M. Jensen in Opposition to Plaintiff's Motion for New Trial or in the Alternative for Additur with exhibits;
5. Plaintiff's Reply; and

The Court, having reviewed the files and records herein, and having heard oral argument, and deeming itself advised in the matter, now therefore,

ORDERS, ADJUDGES and DECREES that Plaintiff's Motion for New Trial or in the

ORIGINAL

Alternative for Additur is DENIED.

With respect to the motion for a new trial on the grounds of judicial error for failure to give a jury instruction on spoliation, the Court does not believe it was error to omit the instruction. The court set a briefing schedule on the motion to reconsider, plaintiff briefed the issue, and plaintiff was given the opportunity to argue the motion to reconsider. There was no procedural error and any argument otherwise misstates the record.

Moreover, this case had scant specific evidence that the videos, notes, or other tangible evidence from the private investigator company existed, much less was destroyed by the defendant. The case law requires the plaintiff to show the existence of the evidence, as well as show it was intentionally destroyed (or withheld). The plaintiff failed to show that videos, notes, or other evidence existed, much less that was withheld or destroyed. The addition of a 's' onto records provided to the defendant's medical expert was insufficient to show more video existed. The length of surveillance as compared to the minutes of video was suspicious, as the court already recognized, but that was also insufficient to show that other video must have existed.

Additionally, Tyler Slaeker's testimony and deposition as a whole did not support that he had notes from surveillance that he destroyed. The only item that clearly existed at some point, but no longer existed at the time of trial were texts from Tyler Slaeker to Probe Northwest. As the testimony supported that the texts were incorporated into the report and texts are not typically kept as a stand-alone evidentiary item, the loss of the texts were not grounds for a spoliation instruction in and of itself. While the defendant had control of any possible additional videos or notes, it cannot be shown that they probably existed, that they were probably destroyed, and that they were probably destroyed with a culpable state of mind. All of those circumstances were permissible inferences from the evidence before the jury. However, it would have been error to instruct the

jury that they should assume the evidence was destroyed because it was favorable to the plaintiff. The best course was to allow the plaintiff to argue the evidence showed there were hours of surveillance, minutes of video, and the juxtaposition meant the defense was hiding something. Contrary to plaintiff's argument, this is a penalty for the defense's failure to turn over the report earlier or otherwise explain what occurred in the other surveillance. It allowed the plaintiff to rebut the video that was produced and call into question the defendant's credibility. It was within the jury's province to determine if that is how they chose to interpret this evidence.

The motion for a new trial or additur based on implicit bias also fails. The Court recognizes that implicit bias exists. The Court recognizes the specific bias against African American women and the stereotypes of the "angry black woman," or "welfare queen," or "Jezebel." The court further recognizes that using the terms combative in reference to the plaintiff and intimidated in reference to the defendant can raise such bias. What makes implicit bias insidious is the subtle nature of the animus and the difficulty in determining its presence. It can be difficult for a person with implicit bias to recognize it in him or herself, much less recognize when triggered by racial stereotypes. However, there is no case that finds that the *possibility* of implicit bias is grounds for a new trial or additur.

In this case, the use of the terms that the plaintiff now complains of was not objected to when defense counsel made her argument. The terms were tied to the evidence in the case, rather than being raised as a racist dog whistle with no basis in the testimony. Ms. Henderson was very uncomfortable being cross examined and submitting to the CR 35 examination. There are a multitude of ways to describe her demeanor and it was not unfair to describe her as combative given her unwillingness to answer questions. Ms. Thompson was also uncomfortable testifying, although she did not avoid plaintiff counsel's questions. It was not unfair to describe her as

intimidated, especially when the reference was to the process and not intimidated by plaintiff's counsel. The court cannot require attorneys to refrain from using language that is tied to the evidence in the case, even if in some contexts the language has racial overtones. Dr. Devine provided Ms. Henderson with work when she needed it, which is more than a doctor-patient relationship, so asking the jury to consider that testimony to evaluate his credibility was not inappropriate. Dr. Delaney was not testifying as an expert witness and referring to her as Ms. Delaney or by her first name does not necessarily invoke racial stereotypes. The argument in this case is significantly and materially different from the prosecutor's argument in *State v. Monday,* 171 Wn.2d 667 (2011), where the prosecutor assumed an accent of the word "police" and argued about a code that "black folk don't testify against black folk", which was the impermissible interjection of racial bias into the trial. The Washington Supreme Court noted the prosecutor intentionally and improperly argued about the "antisnitch code" as belonging to African Americans only and used the racial bias to undermine the credibility of witnesses. While the court recognized the use of the word "pol-eese" was a more subtle appeal to racial bias, closer to the implicit bias argument the plaintiff makes in this case, the Supreme Court in *Monday* tied it to the overall racial overtones of the case and found the only reason to use the word "po-leese" was to call the jury's attention to the witness's race. The facts of this case, and the substance of the argument in this case, are materially different with evidentiary based reasons for defense counsel's argument. The court declines to find misconduct by defense counsel in this case.

While the amount of the verdict was well below what the plaintiff had asked for, and below what defendant had suggested would be appropriate if the jury found plaintiff's calculation of damages to be appropriate, that does not prove implicit bias. The defendant did not concede that Ms. Henderson's Tourette's worsened after the collision; indeed that fact was hotly disputed at

trial. Nor did the defendant concede that the plaintiff's method for calculating damages was the appropriate method. The court understands the plaintiff's suspicions about how race may have influenced the verdict, race can influence many things and juries are not immune to bias. However, in the absence of specific evidence of impermissible racial motivations by the jury, or misconduct by defense counsel, the court declines to use the possibility of implicit racial bias to overturn the jury's verdict or grant additur. The jury's verdict was not outside the evidence presented in the case so as to necessarily be the result of passion or prejudice. As the court noted in oral argument, the remedy of additur is only in such extraordinary circumstances in which the verdict must be the result of passion or prejudice. A court has no discretion to invade the province of the jury if the verdict was within the range of the evidence and judge cannot substitute its judgment for that of the jury. *Herriman v. May,* 142 Wn. App. 226 (2007). The evidence in this case was contested and conflicted as to whether Ms. Henderson's Tourette's was exacerbated by the motor vehicle collision, which was the basis for the higher award request by plaintiff. They jury was entitled to disbelieve the plaintiff's witnesses. The court finds it would be an abuse of its discretion to disregard the jury's verdict in this case.

IT IS SO ORDERED.

DATED this 17th day of July, 2019.

Judge Melinda J. Young

EXHIBIT J

250

6/17/19

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

JANELLE HENDERSON, an individual, Plaintiff, v. ALICIA M. THOMPSON, an individual, Defendant.	No.: 17-2-11811-7 SEA CR 59 MOTION FOR NEW TRIAL OR IN THE ALTERNATIVE FOR ADDITUR

I. RELIEF REQUESTED

Plaintiff Janelle Henderson hereby moves this court for a new trial pursuant to CR 59, or in the alternative, for an additur. Defendant's biased statements in closing likely influenced the jury's unconscious bias against plaintiff such that justice was not done. There was no other basis for the jury awarding just 1/5th of the award *deemed fair by the defendant.*

Additionally, Plaintiff asserts it was error for the court to fail to give a spoliation instruction pursuant to the law outlined in *Washington State Physician Insurance Exchange & Association, v Fisons Corporation, 122 Wn.2d 299, 342 -346.*

II. STANDARD OF REVIEW

The Court has wide discretion to grant a new trial under CR 59. Where the issue before the trial court does not involve a purely legal question, but arises from a controverted question of fact, the granting of a new trial is so largely a matter of discretion

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with the trial court that its ruling thereon will not be disturbed upon appeal except for manifest abuse of such discretion. *Barefield v. Barefield*, 69 Wn.2d 158, 417 P.2d 608 (1966); *Cox v. General Motors Corp.*, 64 Wash. App. 823, 827 P.2d 1052 (1992). The standard of review on a legal question for denying a new trial requires a much stronger abuse of discretion to set aside an order granting a new trial than one denying a new trial. *Teter v. Deck,* 174 Wash 207, 215 (2012). An order granting a motion for new trial will not be reversed unless trial court has abused its discretion. *Berry v. Coleman Sys. Co.*, 23 Wn. App. 622, 596 P.2d 1365, review denied, 92 Wn.2d 1026 (1979). The granting of a motion for a new trial is within the sound discretion of the trial court and appellate court will not intervene unless it can be shown that trial court manifestly abused its discretion. *Wise v. Farden*, 53 Wn.2d 162, 332 P.2d 454 (1959).

The Court heard the evidence and the closing arguments, during which defendant conceded that plaintiff had been injured, and that a payment of $250/day was fair for 8 months and arguing for an award of $60,000 if the jury finds plaintiff was injured. Had the jury fairly decided to rule **100%** in defendant's favor, it would have awarded the $60,000 defendant requested.

During, Defendant's closing argued that plaintiff was "combative" and that her attorney was "intimidating" which are racially biased code words frequently used to malign

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African-American women. [1,2,3,4] The jury's award of $9,300, 1/5th of the amount defendant acknowledged was fair, can only be the result of racial animus against plaintiff and her attorney, two of the five African American women who testified in the courtroom.

A trial court's grant of additur or remittitur is reviewed de novo. RCW 4.76.030; *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 176 (Wash. 2005)

III. FACTS RELEVANT TO THE MOTION

Defendant Thompson rear-ended plaintiff Henderson on June 14, 2014, traveling 40 mph, which caused plaintiff injury. The jury found that plaintiff was injured, but awarded plaintiff only $9,300, 1/5th of the award defendant argued was fair. Plaintiff and her attorney are African American. Defendant and her attorneys are white. None of the jurors were of African American descent who could have countered the inflammatory argument of defendant.

Evidence. The jurors observed plaintiff during the trial. She had frequent neck tics, jerks, shudders, and vocalizations which are the symptoms her Tourette's syndrome. The jurors must have noted that she is African American. The jurors heard testimony from plaintiff and from several long-time friends, all of whom are African American women, that

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[1] Debunking the Myth of the "Angry Black Woman": An Exploration of Anger in Young African American Women, J. Celeste Walley-Jean, *Black Women, Gender + Families,* Vol. 3, No. 2 (Fall 2009), pp. 68-86.

2 Wendy Ashley (2014) The Angry Black Woman: The Impact of Pejorative Stereotypes on Psychotherapy with Black Women, *Social Work in Public Health*, 29:1, 27-34, DOI: 10.1080/19371918.2011.619449

3 The Modern Mammy and the Angry Black Man: African American Professionals' Experiences with Gendered Racism in the Workplace, Adia Harvey Wingfield, *Race, Gender & Class,* Vol. 14, No. 1/2 (2007), pp. 196-212.

4 Embodying diversity: problems and paradoxes for Black feminists, Sara Ahmed, *Race Ethnicity and Education*, Vol. 12, Pages 41-52 | Published online: 05 Mar 2009

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plaintiff's tics had increased substantially after the collision. Plaintiff's treating neurologist, primary care provider and chiropractor all testified that the collision had worsened plaintiff's Tourette's syndrome. Dr. Wall called it "debilitating." From defendant, the jurors heard expert Dr. Rappaport testify that plaintiff had not been injured, and expert D.C. Sutton testify that plaintiff may have suffered a slight injury such that 12 weeks of treatment would have been sufficient. D.C. Sutton acknowledged that plaintiff did not have a "gap" in treatment from February 2015 through August 2015. [5]

Spoliation Instruction. During initial hearing on MILs, the Court granted plaintiff's Motion in Limine for a spoliation instruction against defendant regarding the investigator's and the defense's withholding of discovery related to the video recording. (Oral ruling 5/15/19). Although defendant moved for reconsideration, the Court did not request a response from plaintiff. (#213, 4/16/19). At the end of evidence, the Court granted defendant's reconsideration and denied the spoliation instruction, despite finding that the defendant's failure to produce discover was "deeply suspicious." (6/6/19 oral ruling and see jury instructions).

The spoliation here was the private investigator's utter failure to produce his notes, his report, or any of the documents he relied upon or created in making the video; the defendant's failure to produce the notes made for this investigation, despite a court order to do so, the defendant's failure to provide any discovery about the investigators who surveilled plaintiff for 78.5 hours (see Hours Calculator for Bills), or any of the additional videos that were refenced by defense counsel and their expert Dr. Rappaport; and the

[5] D.C. Sutton did admit that plaintiff was receiving Botox injections during the supposed "gap."

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defendant's sudden eve-of-trial production of the "report" that had ostensibly been created in March of 2015 and withheld during the discovery period (produced to prevent testimony that the report had been withheld).

Defendant's Improper Closing Argument. In closing, defense counsel argued that if the jury found plaintiff had been injured, that fair compensation would be $250/day for 8 months, arguing a total award of $60,000.[6]

Defense counsel told the jurors that plaintiff was "combative", and her attorney was "intimidating," and asked the jury to reject plaintiff's request for compensation.

Verdict. The jury found that plaintiff had been injured. The jury awarded plaintiff $9,200. This $9,200 is 1/5th of the award *requested by the defendant* and is inexplicable. This is further evidenced by the jurors' request that Ms. Henderson, the *party who filed a lawsuit in a court of law be asked to leave the courtroom.* There is no reason for this request unless the jury bought into the idea that Ms. Henderson is "combative". It was unprecedented to request *the party whose lawsuit it is to leave the courtroom.* The court's bailiff reiterated the jurors request after the Court made plaintiff and court observers leave the courtroom. Clearly, there was something more than whether Ms. Henderson had been injured discussed in the jury room. The fact that she and her counsel were described in terms that allude to violence cannot be ignored. The fact that it was humiliating, embarrassing and a real time display of conscious and/or unconscious bias should be recognized and acknowledged.

IV. ISSUES

[6] Defense argued that the gap in treatment was evidence that she had recovered after 8 months.

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1. Should the Court order a new trial as authorized by CR 59(5) and (7)? YES

2. Was the Court's denial of the spoliation instruction prejudicial error? YES

V. EVIDENCE RELIED UPON

The evidence produced at trial; defense closing argument.

Plaintiff's motion for a spoliation instruction in her MIL (#140, 1/29/19); the Court's oral ruling granting the spoliation instruction (4/15/19); defendant's motion for reconsideration of spoliation instruction (4/16/19); the absence of a request by the Court for a response; the Court's grant of reconsideration to RESERVE ruling (#227 5/6/10);[7] the oral ruling denying the spoliation instruction (6/6/19); and plaintiff's in-court objections (5/6/10).

The pleadings and orders and records in this case are incorporated.

IV. ARGUMENT

Plaintiff requests a new trial under CR 59 on damages alone, or in the alternative, an additur for an award of $60,000.

CR 59 provides for a new trial, reconsideration, and amendment of judgments on several grounds. Here, the Court may authorize a new trial for any of the following reasons, here following the provisions in CR 59:

> (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;
>
> (2) Misconduct of prevailing party;
>
> (5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;

[7] The Court did not request a response to defendant's Motion for Reconsideration, leaving plaintiff unprepared to argue this matter.

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(9) That substantial justice has not been done.

RCW 4.76.030 authorizes additur for verdicts which are the result of passion or prejudice.

In this case substantial justice has not been done. CR 59(9). It is undisputed that plaintiff has Tourette's, and that her Tourette's worsened, defendant conceded as mush with her request that the jury award $60,000. The jury verdict affirms she was injured. Defendant herself argued that if the jury found plaintiff injured, it was fair to award her $60,000, based on $250/day for 8 months. There was no evidence or argument that $9,500 was adequate where defendant herself argued for $60,000. The jury was instructed the jury that the damages were to make plaintiff whole or to repair her injury, "as nearly as that may be done by an award of money." The jurors did not follow this instruction as there was nothing to indicate, not evidence or argument, that $9,200 would or could repair plaintiff's injury or make her whole. To the contrary, the award of $9,200 is so inadequate and dismissive of plaintiff's injury as can only indicate passion or prejudice improperly influenced the jury. CR 59(5)

Defense counsel's closing argument that plaintiff and her attorney were "combative" and "intimidating" is misconduct, a blatant and inappropriate appeal to racial prejudice and undermined the credibility of plaintiff, her attorney and the African American witnesses

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based on their race.[8, 9, 10, 11.] "When race is a key issue, societal expectations are elicited, and jurors heed popular egalitarian ideals. Yet when the "race card" is not played, whites are more susceptible to making prejudiced decisions." American Psychological Association, "*Study results show white jurors still demonstrate racial bias*", March 2001, Vol 32, No. 3, Print version: page 12. Here, plaintiff did not make race an issue, but defendant did. Note, that when describing the testimony of **Dr.** Delaney, she was referred to by her first name only and even then, there was a show of not being to pronounce her name. As there is no explanation as to how a jury could deem $9,200 fair compensation for plaintiff's injury, it can only be surmised that the jury was influenced by societal stereotypes of angry black women and welfare mothers. The National Center for State Courts Resource Guide says:

> "discrimination continues to threaten the quality within the judicial system. Instances of bias include, but are not limited to, bias towards an individual's gender, race and ethnicity."

NCSC, Gender and Racial Fairness Resource Guide, 2/27/2010. [12] In the National Center for State Courts article, "Addressing Implicit Bias in the Courts," the authors note that

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[8] Debunking the Myth of the "Angry Black Woman": An Exploration of Anger in Young African American Women, J. Celeste Walley-Jean, *Black Women, Gender + Families,* Vol. 3, No. 2 (Fall 2009), pp. 68-86.

9 Wendy Ashley (2014) The Angry Black Woman: The Impact of Pejorative Stereotypes on Psychotherapy with Black Women, *Social Work in Public Health*, 29:1, 27-34, DOI: 10.1080/19371918.2011.619449

10 The Modern Mammy and the Angry Black Man: African American Professionals' Experiences with Gendered Racism in the Workplace, Adia Harvey Wingfield, *Race, Gender & Class,* Vol. 14, No. 1/2 (2007), pp. 196-212.

11 Embodying diversity: problems and paradoxes for Black feminists, Sara Ahmed, *Race Ethnicity and Education*, Vol. 12, Pages 41-52 | Published online: 05 Mar 2009

[12] https://www.ncsc.org/Topics/Access-and-Fairness/Gender-and-Racial-Fairness/Resource-Guide.aspx.

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implicit cognition yields bias without the individual's awareness. American Judges' Association, Court Review, Volume 49, "*Addressing Implicit Bias in the Courts," by* Pamela M. Casey, Roger K. Warren, Fred L. Cheesman, & Jennifer K. Elek. "Research shows that individuals develop implicit attitudes and stereotypes as a routine process of sorting and categorizing the vast amounts of sensory information they encounter on an ongoing basis. Implicit, as opposed to explicit, attitudes and stereotypes operate automatically, without awareness, intent, or conscious control, and can operate even in individuals who express low explicit bias. Because implicit biases are automatic, they can influence or bias decisions and behaviors, both positively and negatively, without an individual's awareness." *Id.* Defense counsel's visual of "combative" and "intimidating" women was code for racial angry black women. This type of argument is wholly inappropriate and should be the basis for a new trial. CR 59(2).

Such prosecutorial misconduct is grounds for reversal if "the prosecuting attorney's conduct was both improper and prejudicial." *State v. Fisher*, 165 Wash.2d 727, 747, 202 P.3d 937 (2009) (citing *State v. Gregory*, 158 Wash.2d 759, 858, 147 P.3d 1201 (2006)). Instead of examining improper conduct in isolation, we determine the effect of a prosecutor's improper conduct by examining that conduct in the full trial context, including the evidence presented, "`the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. McKenzie*, 157 Wash.2d 44, 52, 134 P.3d 221 (2006) (quoting *State v. Brown*,132 Wash.2d 529, 561, 940 P.2d 546 (1997)). Generally, the prosecutor's improper comments are prejudicial "`only where "there is a substantial likelihood the misconduct affected the jury's

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verdict." *State v. Yates*, 161 Wash.2d 714, 774, 168 P.3d 359 (2007) (quoting *McKenzie*, 157 Wash.2d at 52, 134 P.3d 221 (quoting *Brown*, 132 Wash.2d at 561, 940 P.2d 546)). This has been the standard in this state for at least 40 years. See *State v. Music*, 79 Wash.2d 699, 714-15, 489 P.2d 159 (1971), judgment vacated in part by, 408 U.S. 940, 92 S.Ct. 2877, 33 L.Ed.2d 764 (1972). It is undisputable that defense counsel referred to plaintiff and her attorney as "combative" and "intimidating" which very likely influenced the jury verdict for which there is no other explanation. The fact the jurors then acted as though they believed Ms. Henderson was "combative" by demanding that she be removed from an open courtroom, which she had every right to be in, further strengthens Ms. Henderson's position that the verdict was based on passion and prejudice.

The Court's denial of the spoliation instruction was unfairly prejudicial to plaintiff and allowed the defendant to flout the rules without **any** sanction and instead to benefit from blatantly breaking the rules. The Court initially granted the requested spoliation instruction after reviewing the all of the facts. While defendant filed a motion for reconsideration, the Court never asked plaintiff for a response, which is required before reconsideration may be granted. LCR 59 "No response to a motion for reconsideration shall be filed unless requested by the court. No motion for reconsideration will be granted without such a request." LCR 59. As plaintiff was not asked for a response, she was not allowed to prepare an argument for the Court when the Court decided to deny the spoliation instruction. This error left plaintiff at a disadvantage and rewarded defendant for violating the rules of discovery; for ignoring the court order to produce the notes; for withholding and concealing the names of their investigators; the investigator's notes, the

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report of the investigation, which would have allowed plaintiff time to do conduct additional discovery on the surveillance videos. The Order denying spoliation is not a reversible error – with the order before the jury the jury would not have had to accept the video at face value, which likely contributed to their rejection of plaintiff's case.

VI. CONCLUSION

There is no support in the evidence to support the jury's inadequate award except passion and prejudice and bias. Defendant's call out to "combative" and "intimidating", when plaintiff, her attorney and her witnesses were strong black women, was a call for racial bias against plaintiff and could have had no other purpose. There is no explanation of a verdict 1/5th of the verdict defendant requested other than passion, prejudice, and bias against plaintiff and her attorney.

The lack of a spoliation instruction allowed defendant to profit from blatant discovery abuse, violation of court orders, withholding evidence. It allows the jury to rely upon the 17 minutes of video tape allegedly made out of 78.5 hours of surveillance, while withholding the surveillance reports, the notes, the names of the investigators, and in contradiction to several documents in which defendant noted surveillance "CDs." The absence of the spoliation instruction left defendant with no sanction for this conduct or for attempting to provide a convenient 4-year-old "report" on the eve of trial to defray truthful testimony. This willful violation of the discovery rules, and the Court's grant of reconsideration of the spoliation instruction without giving plaintiff an opportunity to respond, is contrary to the civil rules and wholly unfair and prejudicial to plaintiff and rewarded defendant for bad conduct. Plaintiff did not need to prove intent, nor is a motion to compel a prerequisite to a sanctions

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motion. See *Fisons* at 345. The clear intent of sanctions after *Fisons* meant that trials no longer needed to be carried on in the dark. *Id.* at 342. Indeed, it is the intent of CR26(g) to provide a *deterrent* to discovery abuses as well as an impetus for candor and reason in the discovery phase of litigation. *Id.* Here, there was no sanction for any of the discovery abuses of defendant.

Justice for Ms. Henderson would be a new trial with a spoliation instruction and a prohibition against raising racist tropes in closing argument. At the minimum, the Court should grant an additur and award plaintiff the $60,000 compensation acknowledged to be fair by defendant.

DATED this 17th day of June 2019.

The Law Offices of Vonda M. Sargent

/s/
Vonda M. Sargent, # 24552
Attorney for Plaintiff

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EXHIBIT K

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

JANELLE HENDERSON, an individual, Plaintiff, v. ALICIA M. THOMPSON, an individual Defendant.	CAUSE NO: 17-2-11811-7 SEA **Motion for Evidentiary Hearing pursuant to State v. Tomas Mussie Berhe**

COMES NOW Plaintiff and requests an evidentiary hearing pursuant to State v. Berhe, 95920 (2019). In that case, the court held that "as soon as a court becomes aware of allegations that racial bias may have been a factor in the verdict. this court shall take affirmative steps to oversee further inquiry in to the matter and instruct counsel not to have any further communication with the jurors unless it is on the record". *Id.*

Here, Plaintiff has raised the issue of racial bias in the jury's verdict and pointed out several instances which indicate that racial bias may have been a factor in the verdict, to wit.: defense counsel based on no evidence falsely claimed that the only reason Ms. Henderson was there was because she wanted 3.5 million dollars; falsely claimed that Ms. Henderson had an inappropriate relationship with her doctor; called the sole African-American doctor by her first name after exaggerating and dramatically mispronouncing her name; the dramatically drawn out

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the pronunciation of the name of "Kanika"; suggested that "someone" told the African-American females witnesses to collude; claimed that plaintiff was combative; asserted that defendant was intimidated by plaintiff's African-American attorney; and because of the jurors requested that Ms. Henderson be removed from the courtroom before they exited.

In addition, the Court may not have noticed that its treatment of Ms. Henderson's attorney was not fully fair. For instance, by granting a spoliation instruction based on the evidence but then granting the reconsideration without requesting a response pursuant to CR 59; supporting the reconsideration finding insufficient evidence of Mr. Sleaker's notes despite his testimony that he relied on his notes and despite the Court's earlier Order compelling production of those notes; requiring plaintiff counsel to disclose her redirect question to defendant in advance of the examination-- over plaintiff counsel's objection, thereby giving defense counsel an opportunity to advise her client; allowing defendant to produce its alleged report at the 13th hour without any sanction.

Plaintiff requests the Court convene a hearing in which the Court and the parties can develop questions for the jurors to determine whether implicit bias against this African-American plaintiff and/or her African-American attorney played a part in the verdict.

DATED this 25th day of June 2019.

VONDA M. SARGENT #24552

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SUPERIOR COURT OF WASHINGTON KING COUNTY

Janelle Henderson, Plaintiff, v. Alicia Thompson, Defendant	No. 17-2-11811-7 SEA **DECLARATION OF VONDA SARGENT**

I, Vonda M. Sargent, hereby declare under penalty of perjury for the laws of the state of Washington that the following statements are true and correct and based upon my personal knowledge:

1. I am over the age of eighteen years and competent to testify herein.

2. I am one of Janelle Henderson's attorneys.

DATED and SIGNED this 25th day of July 2019, in Seattle, Washington.

VONDA M. SARGENT

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EXHIBIT L

FILED
2019 AUG 07
KING COUNTY
SUPERIOR COURT CLERK

CASE #: 17-2-11811-7 SEA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JANELLE HENDERSON PLAINTIFF, v. ALICIA THOMPSON DEFENDANT.	No. 17-2-11811-7 SEA **ORDER DENYING MOTION FOR EVIDENTIARY HEARING** [ ] Clerk's Action Required

Plaintiff moves the court for an evidentiary hearing pursuant to *State v. Berhe*, 2019 WL 3227312, to determine if the jurors were influenced by racial bias during their deliberations.

The Plaintiff's motion is DENIED. Although the Plaintiff is concerned about implicit bias because of the discrepancy between the verdict and the request for damages, as well as Plaintiff's belief that defense counsel used language that would trigger implicit bias, the circumstances in this case are significantly different than those in *Berhe*. In *Berhe*, the sole African-American juror alleged juror misconduct due to racial bias against her. Specifically, the juror signed a declaration to the court that stated she did not agree with the verdict, that she believed her viewpoints were marginalized because of her race, and that "[she] felt emotionally and mentally exhausted from the personal and implicit race-based derision from the other

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jurors." The juror further declared that she felt mocked in a way the other dissenting jurors were not mocked and she felt physically intimidated. The trial court held a hearing where the court considered a declaration from the African-American juror, as well as several white jurors who denied racial bias against the offended juror and denied observing anything that was racially biased. The trial court essentially weighed all the jurors' credibility in finding an evidentiary hearing was unnecessary. The Washington Supreme Court found the information provided by the juror necessitated an evidentiary hearing to determine if racial bias influenced deliberations.

In this case, however, the plaintiff fails to establish a prima facie case or any specific basis for an evidentiary hearing. Other than the verdict being significantly less than plaintiff's request, and the allegation that defense used racially coded language, there is no specific evidence that implicit bias was the cause of the verdict[1]. There are no declarations from any of the jurors that raises the issue of implicit bias. The court has already found defense counsel's arguments to be tied to the evidence, rather than being used as a racist dog whistle. A low verdict is not enough to pierce the veil of jury deliberations.

> Central to our jury system is the secrecy of jury deliberations. Courts are appropriately forbidden from receiving information to impeach a verdict based on revealing the details of the jury's deliberations...[F]acts that link to the juror's motive, intent, or belief, or describe their effect upon the jury inhere in the verdict and cannot be

[1] In plaintiff's reply brief, she asserts that after the verdict the jury requested that Ms. Henderson wait outside when the jury left to allow the jury to speak with counsel if they wished. As discussed at oral argument on July 16, 2019, that is untrue. The jury did not make such a request. This court had a practice of asking all parties to wait outside after a verdict to allow the jurors to speak to counsel, if they wished. The court has done that in every jury trial, regardless of the race of the parties and regardless of the outcome of the trial. As a result of the plaintiff's prior declaration in this case explaining how she felt about that process, the court has changed its practice. The court sincerely apologizes for any misunderstanding by the plaintiff and how the process made her feel. That was not the court's intention.

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> considered. This includes facts touching on the mental processes by which individual jurors arrived at the verdict, the effect the evidence may have had on the jurors, and the weight particular jurors may have given to particular evidence.

Long v. Brusco Tug & Barge, Inc, 185 Wn.2d 127 (2016), *citations and quotations omitted.* While it is clear that the Washington Supreme Court in *Berhe* is more willing to consider the contents of juror deliberations when racial bias is alleged, there still remains the need to have evidence of racial bias existing in juror deliberations. The court cannot and will not engage in an investigation in the absence of evidence.

The court does not distinguish between civil trials and criminal trials in making this analysis. Racial bias, including implicit bias, has no place in any juror deliberations or in any trial. Although criminal defendants may have heightened due process rights, the fact that *Berhe* is a criminal case does not change this court's reasoning of when it is appropriate to conduct an evidentiary hearing. If a juror in this case had indicated that the jury acted with inappropriate racial motivations, or if this court found that defense counsel's arguments were racist and not tied to the evidence, the court would conduct an evidentiary hearing to determine the facts, the scope, and the extent of the bias. However, we do not have the threshold facts that were present in *Berhe* to justify an evidentiary hearing.

The court is sympathetic to the Plaintiff's concerns, and further recognizes that implicit bias exists and can impact a jury's deliberations. Nevertheless, the plaintiff still must meet her burden of presenting a prima facia showing that implicit bias was present. She fails to do so.

The Plaintiff's re-raising of the procedural process of how the court reconsidered the giving of the spoliation jury instruction is not well taken. Plaintiff misstates the record when she claims she was not given the opportunity to respond to the motion to reconsider. As stated

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in the court's prior order, a briefing schedule was set, counsel was given a chance to respond and plaintiff did, in fact, file a response brief to the motion to reconsider. A disagreement with the court on the result of the motion is not the same as not being permitted to respond.

DATED this 7th day of August, 2019.

Judge Melinda J. Young

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