No. 97672-4

SUPREME COURT
OF THE STATE OF WASHINGTON

JANELLE HENDERSON,

Appellant,

v.

ALICIA THOMPSON

Respondent.

***AMICI CURIAE* BRIEF OF ACLU-WA, DRW, AND NLG**

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I. INTRODUCTION

In 2019, this Court took another step in lessening the effects of racial bias that are deeply embedded in jury trials. In *State v. Berhe*, 193 Wn.2d 647, 444 P.3d 1172 (2019) this Court held the standards in GR 37 apply when it is alleged that implicit racial bias was a factor in the jury's verdict. This Court made it clear that the bar for a trial court to investigate whether racial bias, as viewed by an objective observer, could have been one factor in the jury's verdict is very low. The bar must be low because the signs and symptoms of implicit racial bias can almost always be explained by reasons not involving racial bias.

Here, Plaintiff Henderson alerted the trial court to what she deemed to be a sign of racial bias – the jury specifically asked that the court remove her from the courtroom before they left the jury room. This was not just Ms. Henderson's viewpoint but also the recollection of her three attorneys. The trial court, instead of conducting a further inquiry, did just the opposite: the court, based upon its own recollection and perceptions, simply discounted the allegations.

The trial court, instead of discounting the allegations, and thus bringing its own implicit biases into play, should have followed the prescription set forth by *Berhe* and conducted a further inquiry. That is especially true here where Ms. Henderson, who was already at a high risk of having implicit bias come into play because of her race, was at an even higher risk because of the intersection of her race, gender, and disability.

This Court should take the opportunity to clearly set forth the obligations of a trial court when there is an allegation that racial bias, whether explicit or implicit, may have been one factor in the jury's deliberations. The framework for those obligations should be the following.

1. Once a party alleges that an objective observer could view race as a factor in the jury's decision the trial court must conduct a further inquiry into the allegation to determine whether a prima facie case of racial bias exists. The bar for conducting a further inquiry is low and even lower where there is the intersection of identities such as race, gender, and disability.

2. If the trial court concludes, after conducting such an inquiry, that a prima facie case exists, then it must hold an evidentiary hearing.

3. If, after conducting an evidentiary hearing the court concludes that racial bias was a factor in the jury's decision then the trial court should order a new trial.

This Court should take this opportunity to confirm that the *Berhe* requirements apply to all trials, civil as well as criminal.

II. STATEMENT OF THE CASE

Amici's interest in this appeal focuses on the conduct of the jury, and the trial court, after the jury rendered its verdict but before the jurors left the jury room. There is a dispute as to those events.

Ms. Henderson is a disabled Black woman with Tourette's syndrome. (RP at 490.) Ms. Henderson has stated that the trial court removed her from the courtroom after the jury rendered its verdict at the jury's request. The trial court denied doing this. The trial court stated that it was the court's practice to have all parties leave the courtroom after the

jury reaches its verdict.[1] (It appears that the trial judge had only presided over two previous jury trials.) At a post-judgment hearing, the following was the exchange between Mr. Fury, an attorney who argued the motion for a new trial for Ms. Henderson, and the court.

> MR. FURY: …but because the jury insisted that Janelle Henderson, who is entitled as a party to be here, leave the courtroom before they would come out of the jury room.
>
> THE COURT: and Counsel, can I just interject there? That – that was not the jury. It is the Court's practice and perhaps it's something the Court should not do anymore, but in every case the Court has asked the parties to wait in the hallway so the jury can speak to the lawyers. That has happened regardless of the race of the parties. It happens regardless of the verdict of the parties. So, that was not a request by the jury. And it is much to my own personal dismay that it was taken as an offense by Ms. Henderson.
>
> MR. FURY: Well, you're not – Your Honor not only delivered the request, Your Honor's bailiff came to ensure that Ms. Henderson had left before the jury would come out. This was deeply humiliating to not only Ms. Henderson but also to Mrs. Sargent. It – in terms of the appearance, the angry black woman trope worked.
>
> (RP Vol. 4, pages 8-9.)
>
> Mr. Fury later filed a declaration on July 15, 2019 where he testified:
>
> 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.
>
> 2. 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

[1] The defendant, Ms. Thompson, was not in the courtroom when the jury rendered its verdict.

> they came out. The request was made on behalf of the jury, not stated as a regular practice of the court.
>
> 3. The Court then asked everyone other than counsel for the parties to leave the courtroom. ….
>
> (CP at 171.)

Carol Farr, one of the attorneys representing Ms. Henderson at trial, submitted the following declaration:

> 1. After the verdict was read, the Court went into the jury room to talk to the jurors.
>
> 2. When the Court returned, she said that the jurors wanted plaintiff to leave the courtroom before they left, and asked plaintiff to leave.
>
> 3. Plaintiff was very upset at this request.
>
> (CP at 175.)

Vonda Sargent, Ms. Henderson's primary trial attorney, submitted a declaration with the following:

> 1. 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.
>
> 2. The Court then directed everyone except the attorneys to leave the courtroom.
>
> 3. 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.
>
> 4. 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. …

(CP at 172.)

The plaintiff, Ms. Henderson, submitted a declaration that contained the following:

> 1. I was present for the verdict and recall Judge Young asking if the parties would be willing to speak with the jury.
>
> 2. I recall both sides said they would and then Judge Young went and spoke with the jurors.
>
> 3. I also remember what Judge Young that [sic] 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.
>
> 4. I recall this vividly because I immediately felt, embarrassed, hurt, bad about myself, discounted, disrespected, like I did not matter and excluded.
>
> (CP at 176.)

While not in the record, public records document that the trial judge, Judge Melinda Young, joined the King County Superior Court bench on January 2, 2019.[2] She had not previously served at any level of the judiciary.[3] The first day of the case at issue was on March 28, 2019. (CP at 106.) The jury began deliberations on June 6, 2019 at 9:00 a.m. and rendered its verdict five hours later at 2:14 p.m. (CP at 128.)

For the five-month time-period that Judge Young was on the bench prior to this trial she presided over two jury trials.[4]

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[2] https://www.kingcounty.gov/~/media/courts/superior-court/docs/judges/young-bio.ashx?la=en

[3] *Id.*

[4] Amici requested information about Judge Young's jury trials during the time-period in question from the King County Department of Judicial Administration. According to that agency, Judge Young presided over Cause No. 17-2-25739-7 where the jury rendered a verdict on March 28, 2019 and presided over Cause No. 17-2-09666-1 where the jury rendered a verdict on April 26, 2019. That agency provided this information with the

On June 17, 2019 Ms. Henderson moved for a new trial or alternatively for the trial court to increase the amount of the judgment. (CP at 134.) Her motion included the assertion that the defendant's closing argument "likely influenced the jury's unconscious bias against plaintiff." (CP at 124). Ms. Henderson related her observations that the jury had asked the court to have her leave the courtroom. She noted:

> The jurors' request that Ms. Henderson, the *party who filed a lawsuit in a court of law be asked to leave the courtroom.*
>
> (CP at 138.) (Emphasis in original.)

In her opposition to the motion for a new trial, the defendant, Ms. Thompson, was silent on the assertion by Ms. Henderson that the jury asked the court to have her leave the courtroom. (CP at 146.)

The trial court denied Ms. Henderson's motion for a new trial by an order dated July 17, 2019. (CP at 178.)

On July 26, 2019 Ms. Henderson moved for an evidentiary hearing pursuant to *State v. Berhe* where she brought to the trial court's attention this Court's direction that "as soon as a court becomes aware of allegations that racial bias may have been a factor in the verdict, this [sic] court shall take affirmative steps to oversee further inquiry in to [sic] the matter." (CP at 183.) In her motion, Ms. Henderson again raised her assertion that the "jurors requested that she be removed from the courtroom before they exited." (CP at 184.)

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following caveat: "Neither the court nor the clerk make any representations as to the accuracy and completeness of the data except for court purposes.".

In Ms. Thompson's opposition to the motion she again remained silent on Ms. Henderson's assertion that the jury had asked the court to have her removed from the courtroom. (CP at 409.)

In an order dated August 7, 2019, the trial court denied Ms. Henderson's motion for an evidentiary hearing under *Berhe*. The trial court again denied that the jury had requested to have Ms. Henderson removed from the courtroom. (CP at 187.) The trial court did not conduct any further inquiry.

Judgment was entered on October 29, 2019. (CP at 191.)

III. IDENTITY AND INTEREST OF AMICUS

The identities and interests of Amici are set forth in the motion for leave to file an amicus brief.

IV. ARGUMENT: THIS COURT HAS LONG PROTECTED THE RIGHT TO A JURY TRIAL FREE OF RACIAL AND OTHER IMPROPER BIASES, SUPPORTING FURTHER INQUIRY IN THIS CASE.

This Court is a leader in recognizing the harm of racism in the context of jury trials, acknowledging "that unlike most types of jury misconduct, racial bias in jury deliberations is 'a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice.'" *State v. Berhe¸ Supra*, 193 Wn.2d at 659, (2019) quoting *Pena-Rodriguez v. Colorado*, 580 U.S. _____, 137 S. Ct. 855, 868, 197 L.Ed.2d 107 (2017).

Washington courts have acknowledged that explicit and implicit racial bias exists within the jury trial process. *See, e.g., State v. Saintcalle,*

178 Wn.2d 34, 309 P.3d 326 (2013), abrogated on other grounds by *City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017) ; *State v. Jefferson,* 192 Wn.2d 225, 429 P.3d 467 (2018); *State v. Monday,* 171 Wn.2d 667, 257 P.3d 551 (2011); *State v. Jackson*, 75 Wn. App. 537, 879 P.2d 307 (1994), *review denied*, 126 Wn. 2d 1003 (1995); *Turner v. Stime*, 153 Wn. App. 581, 222 P.3d 1243 (2009).

In 2018, this Court took the proactive measure of enacting GR 37 that lessens the opportunity for a party to exclude a person from serving on a jury where racial bias could have been involved. GR 37(b) makes clear that the rule applies to civil jury trials ("This rule applies in all jury trials"), demonstrating the importance of rooting out implicit bias from civil jury trials just as much as from criminal trials. The purpose of GR 37 was "to protect Washington jury trials from intentional or unintentional, unconscious, or institutional bias in the empanelment of juries." https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplayArchive&ruleId=537. GR 37 was also informed by studies showing that racial diversity within a jury improves the quality of decisions through the process of information exchange and the individual jurors' heightened awareness of their membership in a heterogeneous group. *See State v. Saintcalle*, 178 Wn.2d at 50 (referencing studies that "confirm what seems obvious from reflection: more diverse juries result in fairer trials"); Minority and Justice Commission 2017 Symposium, Jury Diversity in Washington: A

Hollow Promise or Hopeful Future? available at https://www.courts.wa.gov/?fa=home.sub&org=mjc&page=symposium&layout=2; Shamena Anwar, et al., The Impact of Jury Race in Criminal Trials, 127 THE QUARTERLY JOURNAL OF ECONOMICS 1017 (2012); Samuel R. Sommers, Race and the Decision Making of Juries; 12 LEGAL AND CRIMINALOGICAL PSYCHOLOGY 171 (2007). These sources aid in showing how the questions about juror bias raised here, combined with there being no Black jurors, require further inquiry.

This Court addressed the issue of implicit racial bias in *Berhe:*

> As this court has recognized, implicit racial bias can affect the fairness of a trial as much as, if not more than, "blatant" racial bias. … [A]s our understanding and recognition of implicit bias evolves, our procedures for addressing it must evolve as well.

193 Wn.2d at 663.

In *Berhe,* a criminal trial, there was only Black juror on the jury – juror 6. The jury found the defendant Berhe guilty on all charged offenses. After the reading of the verdict, the trial court polled each juror asking each whether the verdict was the verdict of the entire jury and whether the verdict was their individual verdict. Juror 6 answered "yes" to both questions. *Id.* at 651.

The day after the verdict was rendered juror 6 contacted the defense attorney stating that she felt pressured during the jury deliberation process. The defense later moved for a new trial based upon juror 6's belief that racial bias had played a role in the jury deliberations. *Id.* at 653-56. Declarations were submitted by other jurors who disputed that racial bias

had been involved. The trial court did not hold an evidentiary hearing. The trial court denied the defendant's motion for a new trial. The Court of Appeals affirmed the trial court's rulings.

This Court vacated the trial court's order that had denied the motion for a new trial and remanded the matter for a further inquiry. *Id.* at 670.

This Court held that the standards of GR 37 apply to a situation where implicit racial bias was possibly involved in the jury deliberation.

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

The *Berhe* court did not determine whether the allegations at the trial court level were sufficient to make a prima facie case. *Id.* at 667. Instead, the Court held that the trial court must first make that determination. *Id.* at 667-68. The Court held, however, that the evidence in the record was enough requiring further inquiry by the trial court. *Id.* at 668.

A. The jury asked the trial court to remove Ms. Henderson from the courtroom before they left the jury room. The trial court granted that request.

Whether the jury asked the trial court to have Ms. Henderson leave the courtroom before they would leave the jury room is disputed – not between Ms. Henderson and Ms. Thompson but between Ms. Henderson and the trial court.

The trial court denied that a juror or jurors asked the court to have Ms. Henderson removed from the courtroom before they exited the jury room. Instead, the trial court stated that it was her customary practice to ask the parties to wait in the hallway so that the jurors can speak with the lawyers if they so choose. However, it appears that Judge Young, who had joined the bench less than five months before this trial, had presided over only two jury trials.

In contrast, three attorneys and Ms. Henderson testified that the jury asked that Ms. Henderson be removed from the courtroom before they left the jury room.[5]

Based upon the record it is likely the jury asked the court to remove Ms. Henderson from the courtroom and the trial court granted that request. Three attorneys, and Ms. Henderson, swore under oath that they distinctly recall the jury making that request. The defense attorney never filed a declaration contradicting their recollection. What is important in this case is that the allegations were made. At that point, under *Berhe*, the trial court should have inquired further. Once again, when implicit bias is alleged, the bar should be very low for the trial court to inquire further.

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[5] While there is nothing in the record regarding the racial makeup of the jurors, in Ms. Henderson's motion for a new trial she asserted that none of the jurors were African-American. CP at 136.

B. The trial court should have conducted further inquiry when Ms. Henderson raised the allegation to the trial court that she believed that one or more jurors asked the trial court to have her removed from the courtroom, and where three attorneys filed declarations supporting that belief.

In the context of a motion for a new trial based upon implicit racial bias, *Berhe* sets forth the following framework for the trial court to follow.

First, has a party made a prima facie case that the jury's deliberations involved racial bias? In making this determination, the trial court must take charge of the process and conduct any inquiry on the record. Indeed, in *Berhe* this Court did not find that a prima facie case of racial bias had been made and instead remanded the matter to the trial court to conduct an inquiry to determine whether a prima facie case existed.

Second, if a party makes a prima facie case that racial bias may have existed, then the trial court must hold an evidentiary hearing before ruling on a motion for a new trial.

C. Ms. Henderson's allegation that she believed, along with others, that the trial court granted the jury's request to exclude her from the courtroom, was sufficient to trigger the requirement that the trial court engage in a further inquiry.

The trial court did not accurately analyze *Berhe* and failed to give any credence to the Ms. Henderson's viewpoint that the jury had asked that she be removed from the courtroom.

The trial court read *Berhe* as this Court finding that "the information provided by the juror necessitated an evidentiary hearing to determine if racial bias influenced deliberations." (CP at 188.) That is incorrect.

Instead, this Court held in *Berhe* that because there was the possibility that racial bias was a factor in the jury's decision that the trial court was required to investigate to see whether there was a prima facie case that would then necessitate an evidentiary hearing.

In addition, the trial court simply discounted Ms. Henderson's and her attorneys' declarations and instead ruled that the judge's perception of the events was the accurate one. (CP at 188.) The danger of following such a course of action was that the trial court failed to recognize that her implicit biases were coming into play and that her memory was not accurate. The trial court could have inquired of the defense counsel what her recollection was. The trial court could have inquired of her bailiff. The trial court could have inquired of the jury members. While such inquiry may have been uncomfortable for those involved, rooting out implicit bias often involves discomfort.

If the trial court had conducted such an inquiry and all of the other participants agreed with the trial court's recollection, then the court would have fulfilled her duties under *Berhe*. However, if the other participants agreed with Ms. Henderson's recollection then there would have been a prima facie showing that race may have been a factor in the jury's decision and an evidentiary hearing would have been called for to determine whether race, and in this case, other identities by Ms. Henderson, was a factor in the jury's deliberations.

D. When a party who is Black alleges that the jury's verdict may involve racial bias the trial court's duty to conduct further inquiry becomes enhanced when the party has the intersectional identities of being a woman who is also disabled.

To truly root out the evils and injustices of discrimination and implicit bias this Court must also acknowledge intersectionality[6]. Intersectionality recognizes that when a person belongs to more than one marginalized group, it is not possible to parse out the discrimination they face into separate boxes. Different categories of discrimination interact with each other and create unique forms of discrimination that are based on multiple factors. In these situations, discrimination cannot be said to solely be based on race, gender, disability[7], or other minority status. *See* Crenshaw, *supra* at fn. 6. Importantly, intersectionality explains that when someone holds multiple identities, discrimination may appear in ways that are expected based on any one of their identities and may also appear in a unique way based on the interplay of their identities, which may be unexpected. Alice Abrokwa, "'When They Enter, We All Enter': Opening the Door to Intersectional Discrimination Claims Based on Race and Disability," 24 Mich. J. Race & L. 15, 16-18, 20-21, 47 (2018). This type of intersectional discrimination and the implicit bias that accompanies it is

[6] Intersectionality is a term coined by Kimberle Crenshaw in 1989 in a paper in which she examined the intersection of multiple forms of discrimination that Black women face:"Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics," 1989 University of Chicago Legal Forum 139, available at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1052&context=uclf

[7] Subini Ancy Annamma et al., Introduction "A Truncated Genealogy of DisCrit" to DisCrit: Critical Conversations Around Race, Class, & Disability, 1-8, David J Connor et al., eds. (2016) (available at https://www.researchgate.net/publication/289529313_A_truncated_genealogy_of_DisCrit)

just as important for the Court to root out as purely racial discrimination because it is likewise counter to justice and the idea that all are equal under the law.

Ms. Henderson has multiple marginalized identities that were apparent to the jury: she is Black, she is a woman, and she is disabled in multiple ways[8]. The fact that she has multiple marginalized identities means that there was an opportunity for each of her identities to have triggered the implicit biases of the jurors; moreover, the concept of intersectionality highlights the additional implicit bias she likely experienced through the intermixing of her identities. It is possible that the jurors' biases were based on her being a Black disabled woman, such that racial discrimination may be inseparable from the discrimination based on the other factors. While discrimination based on any one of her identities would be impermissible, the fact that she has three marginalized identities makes it even more likely that she experienced discrimination based on one identity, if not all of them in concert.

Ms. Henderson's disability likely triggered the jurors' implicit biases against those with similar types of disabilities. Ms. Henderson experiences Tourette's syndrome. Tourette's syndrome is a form of neurodiversity[9]. Neurodiversity includes diagnoses such as Autism, OCD,

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[8] Ms. Henderson is a Black woman with disabilities who was represented by a Black woman.

[9] Neurodiversity/Neurodivergence are umbrella terms that refers to disabilities that are due to differences in the brain's physical and chemical structure, which results in individuals experiencing the world differently and often results in differences of social, emotional, learning, mood, and other mental development or functions. See Jason Tougaw, "Neurodiversity: The Movement," Psychology Today (Apr 18, 2020), (available at

Tourette's, ADHD, and many mental illness labels. Those who are neurodiverse often experience similar types of discrimination based on the idea that they are inherently different in a deficient and negative way. *See* Gillian Giles, "10 Everyday Ways We Shame Neurodivergence", The Body is Not an Apology (Oct. 1, 2018), (*available at* https://thebodyisnotanapology.com/magazine/10-everyday-ways-in-which-we-shame-neurodivergence/) Neurodiverse discrimination can take many forms, but some of the most common types of discrimination against these individuals results in people perceiving them as rude, lazy, awkward, unpredictable, and even frightening because of the way they move through the world differently. *Id.*

Of course, Ms. Henderson is also a Black woman, which means that any implicit bias against her Tourette's syndrome is also likely to comingle with any implicit bias against her race and gender as well. The stereotype of the "angry Black woman" was likely at play in the request for Ms. Henderson to leave the courtroom. The "angry Black woman' stereotype is an example of an intersectional type of discrimination that suggests all Black women are angry and ill-tempered by nature. Trina Jones & Kimberly Jade Norwood, "Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman", 102 Iowa L. Rev. 2017, 2049 (2017). This stereotype is so pervasive in American culture, it

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https://www.psychologytoday.com/us/blog/the-elusive-brain/202004/neurodiversity-the-movement)

has its own Wikipedia page.[10] Additionally, Ms. Henderson is not only a Black woman, she is a Black disabled woman, with a particular disability that falls under the neurodiversity umbrella. Under an intersectional analysis, these stereotypes based on Ms. Henderson's disability interplay with stereotypes about her race and gender and feed into each other, increasing the likelihood of implicit bias against her.

Implicit bias is hard even for the individual who is experiencing it to detect, call out, and name *See* David Yokum, Christopher T. Robertson, Matt Palmer, "The Inability to Self-Diagnose Bias," 96 Denv. L. Rev. 869 (2019). Therefore, the court must act as an external force that is on guard and examines individual biases. Add onto that the complexity of intersectionality, where individuals with multiple marginalized identities may experience unique discrimination, it is almost unthinkable that individual jurors, or even the jury deliberation process can find and root out implicit bias. Therefore, the job must fall on the court to investigate if implicit bias was a factor whenever there is reason to believe that the jury may be biased against a litigant.

Accordingly, this Court should emphasize to trial courts that their duty to conduct further inquiry, when there has been an allegation that race may have been a factor in the jury's decision, is enhanced when the potential bias involves intersectionality.

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[10] https://en.wikipedia.org/wiki/Angry_black_woman .

E. The protections against racial bias in jury deliberations set forth in *Berhe* apply to civil litigants.

Ms. Thompson argues that there is a different standard to be applied to a civil trial as opposed to a criminal case. Ms. Thompson argues that "a criminal defendant's right to an impartial jury is constitutionally guaranteed, whereas the Washington Constitution simply guarantees civil litigants the right to trial by a jury." (Respondent's brief at 28.) That is incorrect. Parties in civil trials are entitled to have an unbiased jury just like litigants do in criminal trials. Article I, section 21 of the Washington Constitution states that "The right of trial by jury shall remain inviolate, …." It guarantees the right to a jury trial in civil cases, especially in personal injury suits for damages, such as the one in this case. Robert F. Utter and Hugh D. Spitzer, The Washington State Constitution at 46-47. The word "inviolate" conveys strong protection for jury trials in civil cases.

The constitutional right to a civil jury trial "includes the right to an unbiased and unprejudiced jury, and a trial by a jury, one or more of whose members is biased or prejudiced, is not a constitution[al] trial." *Turner v. Stime*, supra, 153 Wn. App.at 587, a personal injury case where a new trial was granted based on jurors' biased statements about plaintiff's attorney, quoting from *Alexson v. Pierce County*, 186 Wash. 188, 193, 57 P.2d 318 (1936). *See also, Hansen v. Lemley*, 100 Wash. 444, 171 P. 255 (1918), ("[p]rejudice against client or counsel is a thing to be inquired into" when evaluating juror bias.) *Turner* explained that to effectuate this right, if there are indications of juror bias, further inquiry is necessary to determine

"whether there was sufficient misconduct to establish a reasonable doubt that the plaintiff was denied a fair trial. … [whether] it was reasonably likely that the improper conduct affected the objective deliberation of the case." 153 Wn. App. at 593.

This Court should make it explicitly clear that *Berhe* is applicable to civil jury trials.

V. CONCLUSION

This appeal provides this Court with the opportunity to make clear that the *Berhe* standards apply to all jury trials. Moreover, the Court should rule that the bar is low for a trial court conducting a further inquiry once a party alleges that racial bias could have been a factor in the jury's decision, and especially so when there is an intersection of identities that heightens the risk of implicit bias infecting the process. All involved in jury trials, including judges, are subject to having implicit bias sway their actions and justice demands further inquiry.

Respectfully submitted this 1st day of February, 2021.

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CERTIFICATE OF SERVICE

I, Sarah M. Weger, hereby certify and declare under penalty of perjury under the laws of the State of Washington that on February 1, 2021, I caused a true and correct copy of the foregoing document to be served upon the following counsel of record in the manner indicated.

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