

FILED  
Court of Appeals  
Division III  
State of Washington  
8/6/2019 4:09 PM  
No. 35873-9

IN THE COURT OF APPEALS FOR  
THE STATE OF WASHINGTON  
DIVISION III

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SHAWNA ROOKSTOOL and TODD ROOKSTOOL, husband and  
wife, individually and in their capacity as the parents and legal  
guardians of minor children, MRR, MKR, and CDR,

Respondents,

and

QUINCY SCHOOL DISTRICT NO. 144, a political subdivision,

Appellant.

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**REPLY BRIEF OF APPELLANT**

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## INTRODUCTION

The Rookstools argue that this Court *has to defer* to the trial court throughout their Brief of Respondent (BR). No precedent says that. While it is always difficult to establish an abuse of discretion, it is, nonetheless, a standard of *review*. This Court plainly has a duty to review the trial court's decisions for abuse of discretion. And here, the standard is met.

The Rookstools' counsel falsely told the jury that Quincy School District's counsel agreed with him that MaKayla<sup>1</sup> should be afraid. No such agreement occurred. He told the jurors to close their eyes and roleplay being MaKayla. He circled the wagons, ending on his catchphrase: "Let's take care of our own."

The Rookstools unapologetically say they proved their damages. Had the trial been fair, that might matter. But where, as here, flagrant and ill-intentioned misconduct marred their closing argument, it is simply impossible to conclude that MaKayla's disproportionate verdict was unaffected by passion and prejudice.

This Court should remand for a fair trial, with strong instructions that such attorney misconduct shall not be repeated.

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<sup>1</sup> Since the Rookstools have chosen to use first names, we follow suit.

## REPLY STATEMENT OF THE CASE

The Rookstools detail their damages evidence. BR 5-12. As they note, OSD has not assigned error to the damages verdicts: it is virtually impossible to show that general damages, simply by their size, prove passion and prejudice.<sup>2</sup> But the disproportionality of the damages – with MaKayla’s damages 100 times greater than her brother’s, and ten times her sister’s, and ten times both parents’ combined – evidences the prejudicial impact of the Rookstools’ golden rule/put-yourself-in-her-place arguments, and of the inflammatory text message from the family doctor, all of which focused on MaKayla.

It is also virtually impossible to establish that a given general damages award is not “within the range of the evidence” – after all, the Rookstools’ counsel suggested \$5 million, or \$10 million, or even \$10 billion. But the disproportionality of the awards remains, evidence that passion and prejudice affected the verdict.

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<sup>2</sup> We say “virtually impossible” because, had the jury given MaKayla the \$10 billion, or even the \$10 million, her counsel used to “anchor” the jury to a high number, those awards might meet the standard. But at over \$1 million, her award is roughly four times what QSD believes the entire case is worth – not enough to prove passion or prejudice *by itself*, but certainly some evidence that counsel’s flagrant misconduct affected the verdict.

## REPLY ARGUMENT

### A. The standard of review is abuse of discretion.

The parties agree that the standard of review is abuse of discretion. But the Rookstools go to some length to distinguish criminal from civil cases involving misconduct of counsel. BR 24-25. While that distinction has little relevance here – misconduct is misconduct – the Rookstools relegate to a footnote the key standard: a “much stronger showing of abuse of discretion will be required to set aside an order granting a new trial than[, as here,] an order denying one because the denial of a new trial ‘concludes [the parties’] rights.’” Amended Brief of Appellant (ABA) 9 (quoting ***Alum. Co. of Am. v. Aetna Cas. Sur. Co.***, 140 Wn.2d 517, 537, 998 P.2d 856 (2000) (“***Alcoa***”) (emphasis added; alteration in original) (quoting ***Palmer v. Jensen***, 132 Wn.2d 193, 197, 937 P.2d 597 (1997) (quoting ***Baxter v. Greyhound Corp.***, 65 Wn.2d 421, 437, 397 P.2d 857 (1964))); see BR 23 n.1. The Rookstools cite no cases to the contrary, tacitly conceding that this is the appropriate standard.

A new-trial order *preserves the right to a fair trial*. This trial court’s denial of mistrial or new trial *deprived QSD of its right to receive a fair trial*. That is why discretion is more easily abused in denying than in granting a new trial. It was abused here.

**B. Telling the jury that defense counsel “agrees” with plaintiffs’ counsel – an inadmissible false statement – is misconduct requiring a mistrial and a new trial, particularly where no curative instruction was given.**

QSD explained that the Rookstools’ counsel improperly told the jury that QSD’s own counsel “feels the same way I do” regarding MaKayla having surgery. BA 13-18. To the contrary, QSD’s counsel argued that MaKayla does not *need* that surgery. *See, e.g.*, RP 1995-96. Although QSD’s counsel immediately objected to the Rookstools’ falsehood, the trial court did not strike the statement or order the jury to disregard it. RP 1932. This caused overwhelming uncured prejudice to the credibility of QSD’s counsel, and thus to QSD. BA 17-18. This Court should reverse and remand for retrial.

The Rookstools do not apologize for their counsel’s misconduct in falsely telling the jury that QSD’s counsel felt the “same as I do” about the following improper argument (RP 1932):

ROOKSTOOLS’ COUNSEL: Well, why not just have the surgery? MaKayla is terrified of the surgery. I would be terrified of the surgery. If it was my daughter, I would be terrified of the surgery. Mr. McFarland and I have had conversations about that surgery, and I think he feels the same way I do.

There is so much misconduct in that one paragraph that it is easy to overlook some of it:

(1) counsel improperly obtruded his irrelevant personal feelings upon the jury;

(2) counsel talked about his own daughter, which is again completely irrelevant, but implied to the jury it would be just fine for them to put themselves in MaKayla's place, just as the Rookstools' counsel was demonstrating;

(3) counsel improperly mentioned conversations with defense counsel that – assuming they ever happened – could only have happened during settlement negotiations; and

(4) the Rookstools' counsel *lied to the jury*: defense counsel did not, *in any way*, agree with the above statement.

It is frankly shocking that the Rookstools would attempt to rationalize this magnitude of misconduct. *See, e.g.*, BR 27. It is simply false to say that this was “an innocuous way of expressing that both sides of the case wanted to avoid future surgery for MaKayla.” *Id.* Rather, it is a highly prejudicial impugning of defense counsel's veracity: if what the Rookstools' counsel said was true – and it was not – then QSD's counsel was at best a hypocrite, and at worst an outright liar for arguing that MaKalya does not need the surgery. Nothing in this record supports the Rookstools' insinuation that in fact, defense counsel thought MaKalya should be afraid.

The Rookstools argue – with no legal support – that the general jury instruction that closings are arguments, not evidence, is somehow “tantamount to a curative instruction.” BR 27-28. No case says that, including the ones they cite, ***Alcoa***, 140 Wn.2d at 539; ***Adkins v. Alum. Co. of Am.***, 110 Wn.2d 128, 142, 760 P.2d 1257

(1988); and **Carnation Co., Inc. v. Hill**, 115 Wn.2d 184, 186, 796 P.2d 416 (1990). BR 28.

The problem here is not whether counsel's statements were "evidence." The problem is that they were *lies* that impugned QSD's integrity at the most important point in the trial. That is highly prejudicial misconduct.

In a footnote, the Rookstools argue that QSD "failed" to request a "different" curative instruction. BR 28 n.3. But QSD plainly objected and asked to *strike* the statement (RP 1932):

I'm going to object, Your Honor, and ask the Court to instruct the jury to strike that comment.

Instead, the trial court overruled the objection, refused to strike the flagrant and ill-intentioned misstatement, and instead *affirmed it as legitimate argument*, telling the jury to "take" the statement "as it is":

THE COURT: Members of the Jury, at this point this is argument. And I will ask that you make sure you rely on what you believe the evidence was and go forward with that and make your decisions, which is what's in the instructions. So take that as it is.

*Id.* Where, as here, the trial court overrules an objection and denies a request to strike, it would be improper for counsel to argue with the judge and ask for a "stronger" curative instruction in front of the jury. QSD's objection gave the trial court a fair opportunity to act. It instead abused its discretion.

The Rookstools attempt to distinguish the cases QSD cited. Compare ABA 16-17<sup>3</sup> with BR 28-31. Perhaps ironically, they claim that **Schubert**, for instance, is inapposite, yet quote the following (BR 31, quote edited for readability):

He said, for example, that the jury was the “conscience of the community”;

that plaintiff's doctor “as he usually does, has found a permanency”; [and that]

Defense counsel finally attacked appellants’ lawyer by saying he would do “anything to advance the cause.”

The Rookstools’ counsel did all of these things and more, albeit not always in precisely the same language, and from a plaintiff’s – rather than a defendant’s – perspective. For instance, he literally did tell the jury that they are the “conscience of the community.” RP 1950. He did impugn the defense doctors as not from around here, and only interested in money. RP 514, 1919, 1925,

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<sup>3</sup> Citing **State v. Lindsay**, 180 Wn.2d 423, 326 P.3d 125 (2014) (citing, *inter alia*, **State v. Warren**, 165 Wn.2d 17, 195 P.3d 940 (2008); **Bruno v. Rushen**, 721 F.2d 1193 (9th Cir. 1983) (*per curiam*); **State v. Thorgerson**, 172 Wn.2d 483, 258 P.3d 43 (2011)); **Jones v. City of Seattle**, 179 Wn.2d 322, 371, 314 P.3d 380 (2013) (González, J., concurring); **Venning v. Roe**, 616 So. 2d 604, 605 (Fla. 2d Dist. Ct. App. 1993) (citing **Riggins v. Mariner Boat Works, Inc.**, 545 So. 2d 430 (Fla. 2d Dist. Ct. App. 1989)); **Schubert v. Allstate Ins. Co.**, 603 So. 2d 554 (Fla. 5th Dist. Ct. App.), *rev. dismissed*, 606 So. 2d 1164 (Fla. 1992); **Sun Supermarkets, Inc. v. Fields**, 568 So. 2d 480 (Fla. 3d Dist. Ct. App. 1990), *rev. denied*, 581 So. 2d 164 (Fla. 1991); **Griffith v. Shamrock Village**, 94 So. 2d 854 (Fla. 1957).

1929-30). And he suggested to the jury that defense counsel agreed with him about MaKayla's surgery – a patently false allegation.

Attempting to factually distinguish other examples of attorney misconduct is beside the point. The Rookstools cite no case approving of their counsel's flagrant and ill-intentioned misconduct. No court should do so. The trial court abused its discretion. This Court should order a new trial.

**C. Reading Dr. Hemmerling's unsworn, unadmitted, and unrestrained text to the jury without warning is misconduct that only a mistrial and new trial can cure.**

QSD explained that at the very end of his closing, without leave or warning, the Rookstools' counsel read to the jury a text he had received days earlier from Dr. Hemmerling, which was unsworn, unadmitted, and unrestrained. ABA 19-24. The entire closing led up to and heightened this inflammatory missive. ABA App. A. Only a mistrial could have prevented prejudice from this flagrant and intentional misconduct. ABA 22-24. A retrial is required.

Again, the Rookstools fail to express any regrets regarding their counsel's flagrant and intentional misconduct. Indeed, as above, they seem to double down on it. A new trial is required.

The Rookstools' first excuse is that reading an unsworn, unadmitted, and highly derogatory text to the jury without warning

caused no prejudice because “the substance of the text mirrored” his direct and cross examinations, and QSD’s closing. BR 32 (citing RP 689-90, 694-95, 1960-61). This is false.

The text went *far beyond* anything Dr. Hemmerling said (or could have said) during trial (RP 2023, emphases added):

ROOKSTOOLS’ COUNSEL: I’m gonna leave you with one more thing. You heard Mr. McFarland talking about Dr. Hemmerling. He’s one of our own. And you remember that day when Dr. Hemmerling was on the stand and Mr. McFarland was chopping at him and he talked about disingenuous and petty.

(As read): “Disingenuous and petty. I will tell you what I find disingenuous and petty. This is a farm family, not unlike the farm family I grew up in. We worked and played together on that family farm. I was taught most all of my life lessons worth knowing there. First and foremost, my mama taught me when you mess up the first thing you do is fess up. Say you’re sorry; then you make it right if you can.”

“The district has done the first two, messed up and fessed up, but failed miserably on the most important part, making it right. That has been the disingenuous and petty part of this whole affair. The district just needs to finish the apology and do what their mother taught them to do.”

I got this text at 7:56 in the morning, the morning after Cole Hemmerling testified on the stand. It kept him up all night.

It should go without saying that Dr. Hemmerling did not testify – and would never have been allowed to testify – about *his* farm family or *his* mother’s bromides, much less about ***matters that inhere in confidential settlement discussions***. His text suggested to the jury

that QSD never made a reasonable settlement offer – an irrelevant and unfounded opinion that was absolutely inadmissible.

During Dr. Hemmerling’s direct, he asked, “Can I speak frankly?” RP 689. The court correctly responded: “No. You’ve got to wait until he asks a question of you.” *Id.* Dr. Hemmerling improperly responded to the court: “Dang it.” *Id.*

The Rookstools’ counsel then invited their family friend to say whatever was on his mind. *Id.* QSD objected, and the court told counsel to rephrase. *Id.* Counsel then asked, “With respect to the treatment that you provided to MaKayla Rookstool on March 13<sup>th</sup>, 2012, is there something that you think is important that this jury knows about that treatment?” *Id.* Dr. Hemmerling then worked up to his “petty and disingenuous” insult – which obviously had nothing to do with the MaKayla’s treatment. RP 689-90. This improper exchange was nowhere near as damaging as reading an unsworn, inadmissible, irrelevant, and insulting text message to a jury about to deliberate with that text ringing in their ears.

Nor was Dr. Hemmerling’s cross as damaging (RP 694-95):

QSD COUNSEL: It’s not disingenuous and petty to be very specific about what it is that your patients are complaining about, is it?

A: No.

. . .

Q: But you're saying it's disingenuous and petty to look specifically at what complaints MaKayla has presented over time; is that your testimony?

A: Is it my -- it is my testimony that it's disingenuous to be able to take a complex art and science, mechanical system like the back, and parse it up into vertebral bodies and say which one was hurt when, and attempt to put a time frame on those.

Whatever the merits of Dr. Hemmerling's "art and science," he thus appeared to back away from his "petty" comment on the stand. *Id.*

As for QSD's closing, it plainly *rebutted* Dr. Hemmerling's trial insult – it did not "mirror" it (RP 1960-61):

QSD COUNSEL: We start off with Dr. Cole Hemmerling, who is not only the Rookstools' family doctor but he is also, as you heard, a close family friend of the Rookstools. And I have no doubt that Dr. Hemmerling is a good doctor and I have no doubt he's probably even a better person. But what you saw from Dr. Hemmerling is what happens when a friend goes from being a neutral and objective doctor into advocating for someone's position.

. . .

And because MaKayla is now claiming symptoms that she wasn't with Dr. Hemmerling and . . . because she wasn't making . . . reports consistent with thoracic outlet syndrome to Dr. Hemmerling, I asked him those details. And the response you got back, remember, was that I was being, quote, "petty and disingenuous" for asking specifics.

But you just heard this morning in Dr. Grassbaugh's deposition . . . how you diagnose thoracic outlet syndrome. Remember what she said . . . is that it's . . . necessary to take a, quote, "meticulous history". Yet, when I try to get a

meticulous history from Dr. Hemmerling he told me that I was being petty and disingenuous.

It misrepresents this record to say that QSD's own closing argument "mirrors" Dr. Hemmerling's vituperative text.

The Rookstools also argue that sustaining QSD's objection and asking the jury to disregard the text "removed" the prejudice. BR 32-33. The court's mild statement did not accomplish that (RP 2025):

THE COURT: Members of the Jury, I have sustained the objection and I ask you to disregard those last statements that you just heard. And I thank you for that.

Nor did it deter the Rookstools' counsel, who twice more rang the "one of our own" bell, misleadingly calling the several-hundred-thousand dollars QSD suggested "nominal damages" (*id.*):

MR. GILBERT: So here's where we're at. You can go down this path and you can -- we can take care of our own, or you go down this path and award the nominal damages that the district wants you to award. Let's take care of our own.

The Rookstools again try to factually distinguish other cases of attorney misconduct, to little avail. BR 33-34. They go so far as to claim that **Psye** "actually supports" them. BR 34 (discussing **Psye v. Byrd**, 450 N.E.2d 1374, 1377 (Ill. App. 1983)). But in **Psye**, counsel read *deposition transcripts* that did "mirror" the trial testimony; that is, he read-in *sworn testimony that was subject to cross examination*

*and that was merely cumulative of the trial testimony.* While it was error to allow it, it was harmless.

Not so here: the Rookstools' counsel suddenly read an unsworn text that QSD's counsel had never seen, directly to the jury, sewing prejudice into the verdict. The court's mild request to disregard did nothing to "remove" that prejudice – indeed, the Rookstools' own point (that the text resonated with the plaintiffs' theme throughout the trial) seals the prejudice. The jury literally could never forget – much less disregard – the dramatic and grossly improper testimony Dr. Hemmerling reemphasized in his text. No corrective instruction can wipe a jury's collective memory.

**D. Cumulative error requires reversal and remand.**

The remaining instances of misconduct only exacerbate the first two instances, making them even more prejudicial to QSD. ABA 25-32. Asking a jury to close their eyes and roleplay being MaKayla – complete with tear-jerking details about her alleged fears for the future – is a flagrant and ill-intentioned effort to provoke passion and prejudice from the jury. ABA 26-29. Counsel's "let's take care of our own" theme – which resonated right through to his reading of Dr. Hemmerling's antagonistic text ("He's one of our own" at CP 2023) – was equally flagrant and ill-intentioned. ABA 32. The cumulative

prejudicial effect was a verdict for MaKayla 100 times her brother's verdict, ten times her sister's verdict, and ten times her parents' verdicts combined. ABA 6. None of this was or could be cured. A new trial is the only proper remedy.

The Rookstools argue that the cumulative error doctrine has not been extended to civil cases, citing a series of unpublished appellate opinions, albeit while failing to alert the Court that they are not binding or precedential, as required by GR 14.1(a). BR 37-39.<sup>4</sup> Relying on those nonprecedential opinions, they claim that this Court's **Storey** is not a cumulative error case. BR 38 (citing **Storey v. Storey**, 21 Wn. App. 370, 585 P.2d 183 (1978)). They are wrong.

In **Storey** (a civil action based on a promissory note) this Court said this (21 Wn. App. at 374):

The cumulative effect of many errors may sustain a motion for a new trial even if, individually, any one of them might not. **State v. Simmons**, 59 Wn.2d 381, 368 P.2d 378 (1962).

That is the cumulative error doctrine.

And there was a *great deal* of misconduct in **Storey**, albeit by a witness in that case – so much so, in fact, that the trial court granted

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<sup>4</sup> The Rookstools seem to imply that QSD should have cited those unpublished opinions, but there is no legal (much less ethical) requirement to cite a nonprecedential, nonbinding unpublished opinion.

a new trial based upon “the cumulative effect” of the many flagrant and intentional acts. 21 Wn. App. at 372-74. This Court affirmed the new trial order, saying this (*id.* at 377, emphasis added):

We find no abuse of discretion in the trial court’s grant of a new trial. The record discloses an experienced trial judge patiently attempting to cope with a difficult witness who was constantly unresponsive even after he had thoroughly admonished her about the impropriety of her actions. He tried to salvage a deteriorating trial, and gave as good a set of admonitory instructions as possible. The record amply supports his action in granting the plaintiff’s motion for a new trial.

This Court counted 27 instances of striking testimony. *Id.* at 374.

It is certainly true that other courts have – in unpublished opinions – suggested that **Storey** was not a cumulative error case. See BR 37. Those nonbinding *dicta* are incorrect.

The Rookstools claim that this Court should not “extend” the cumulative error doctrine to civil cases. This is incorrect for at least two reasons: (1) **Storey** already did that; and (2) cumulative errors are just as harmful in civil cases as they are in criminal cases.

- 1. Counsel’s golden rule arguments in violation of orders in limine were improper and highly prejudicial.**

The Rookstools next rely on preservation of error arguments. BR 39-42. Yet they fail to acknowledge that where, as here, counsel’s misconduct was so flagrant, ill-intentioned, and prejudicial

that no curative instruction would suffice, there is no waiver. See, e.g., ABA 11 (citing ***Carabba v. Anacortes Sch. Dist.* 103**, 72 Wn.2d 939, 954, 435 P.2d 936 (1967); ***Kilde v. Sorwak***, 1 Wn. App. 742, 748, 463 P.2d 265 (1970) (citing ***McUne v. Fuqua***, 42 Wn.2d 65, 78, 253 P.2d 632 (1953)). The first two errors (defense agrees with me and the inflammatory text) *were* objected to, so there is no question the misconduct issue is preserved. They were also so flagrant and ill-intentioned that no instruction could have cured the prejudice.

The same is true for the golden rule, “close your eyes” – “I’m MaKayla” arguments. This was no accident. And while the Rookstools attempt to argue that this was not a golden rule argument because it did not expressly ask the jury to award a certain amount of money, that is patently false (RP 1946):

[ROOKSTOOLS’ COUNSEL]: And as I sit here and I look at 59 years and I think about that mountain, that burden, all that stuff in front of me, if you asked me to trade places with . . . MaKayla and you say you’d give me four million dollars, I’d tell you to pound sand.

It is no coincidence that counsel asked for five million dollars.

**2. Counsel turned the jury into a hometown rooting section.**

The Rookstools are heedlessly dismissive of the hometowning problem. BR 45. This is not about *one* comment. The Rookstools’ entire theme was “He’s one of our own,” “they” are

“about saving a dollar,” “conscience of the community,” and “Let’s take care of our own.” ABA 30-32. Counsel wrung every tear in the towel. The cumulative effect was devastating.

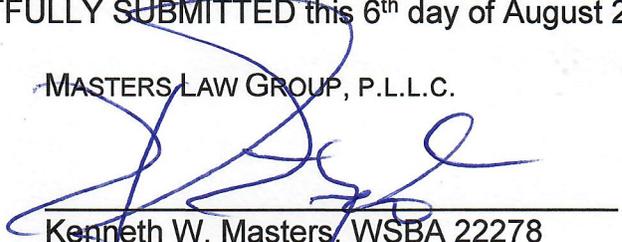
The trial court abused its discretion in turning a blind eye to the extreme tactics of the Rookstools’ counsel. This Court should draw the line.

### CONCLUSION

The Court should reverse and remand for trial.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of August 2019.

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I certify that I caused to be filed and served a copy of the foregoing **REPLY BRIEF OF APPELLANT** on the 6<sup>th</sup> day of August 2019 as follows:

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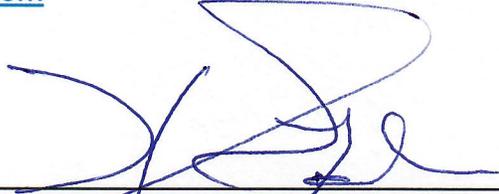
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August 06, 2019 - 4:09 PM

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