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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,

v.

QUINCY SCHOOL DISTRICT NO. 144, a political subdivision,

Appellant.

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**AMENDED BRIEF OF APPELLANT**

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## INTRODUCTION

This appeal arises from a damages-only trial in an admitted-liability case involving a school bus accident. In closings, plaintiffs' counsel told the jury that defense counsel "agrees" with him on a significant issue – a statement as inadmissible as it is false. This suggested to the jury that defendant Quincy School District's (QSD's) counsel did not believe in his own case. This serious misconduct severely prejudiced QSD's defense. The trial court declined to give a curative instruction, telling the jury it was just "argument."

At the end of his closing, plaintiffs' counsel read a text to the jury that he received several days earlier. It was from the Rookstools' family friend and doctor who testified during trial, calling QSD's counsel "disingenuous and petty" for asking about MRR's varying reports of when and where she had pain after the accident. Counsel read the doctor's inflammatory text without warning. The trial court struck the assertions and mildly asked the jury to disregard. But the damage was done – prejudice that no instruction could have cured.

More instances of serious misconduct occurred. Indeed, the Rookstools' entire closing theme was that QSD would not "accept responsibility" *in an admitted liability case*. This trial was not fair.

This Court should reverse and remand for a new trial.

## **ASSIGNMENTS OF ERROR**

1. The trial court erred in denying QSD's motion for mistrial due to attorney misconduct in closing arguments. CP 1764-66.
2. The trial court erred in denying QSD's motion for new trial, also based on attorney misconduct in closings. CP 1762-63.
3. The trial court erred in entering judgment based on the above erroneous rulings. CP 1759-61.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Is telling the jury that defense counsel "agrees" with plaintiffs' counsel – a statement as inadmissible as it is false – prejudicial misconduct requiring a mistrial and a new trial, particularly where the court failed to give a curative instruction, instead confirming the falsehood as a legitimate "argument" in front of the jury?
2. Is suddenly reading a former witness' unsworn, unadmitted, and inflammatory statement to the jury without warning serious misconduct that only a mistrial and new trial can cure?
3. Is the cumulative error of these first two incidents of serious misconduct, taken together with counsel's golden rule, "put yourself in her place," and "us vs. them" hometowning themes, prejudicial misconduct that requires a mistrial and new trial?

## STATEMENT OF CASE

**A. This appeal concerns improper closing arguments, not the substance of this damages-only jury trial arising from a bus accident, for which QSD admitted liability.**

On March 12, 2012, a Quincy School District No. 144 (QSD) school bus driven by its employee, Donna Eaton, was involved in an accident. CP 6, 8. At the time of the accident, there were 39 students on the bus, including MRR, MKR, and CDR. CP 6-7.

In October 2013, Shawna and Todd Rookstool, individually, and on behalf of their three minor children (the Rookstools) filed suit against Eaton and QSD, alleging that Eaton's negligence caused the accident and that QSD was vicariously liable. CP 1-12. In April 2014, the Rookstools filed an amended complaint, adding Shawna and Todd Rookstool's claim against Eaton for negligent infliction of emotional distress. CP 13-21. In August 2014, QSD answered the amended complaint, admitting liability, but denying the nature and extent of the Rookstools' alleged injuries. CP 22-29.

But this appeal concerns misconduct in closing arguments. While some portions of the transcript of the damages-only trial are relevant to counsel's misconduct, the underlying facts are of limited relevance. To the extent specific testimony is relevant, it is discussed in detail *infra*, in the Argument section.

**B. Procedure: the jury awarded the Rookstools roughly four times what QSD thought justifiable, but QSD sought a mistrial and a new trial based on attorney misconduct in closing argument, and both motions were denied.**

In August 2017, the parties submitted Motions in Limine. CP 30-154, 242-376, 400-506 (Rookstools), 155-241, 377-99, 507-42 (QSD).<sup>1</sup> The court heard argument on the motions. RP 1, 6-169, 231, 235-42, 248-57. It issued separate orders on the motions. CP 700-05 (Rookstools), 706-14 (QSD). QSD sought reconsideration of certain rulings. CP 692-99, 715-32. The trial court granted reconsideration. RP 1139-45.

Prior to trial, the parties submitted trial briefs. CP 543-53 (Rookstools), 879-83 (QSD). The parties also submitted a summary of the agreed and disputed jury instructions. CP 1110-15. The court ultimately prepared its own set of jury instructions. CP 1470-86 (authority cited), 1487-1503 (clean).

Damages were hotly disputed at trial, which lasted eight court days between October 24, and November 3, 2017. RP 231, 294-1309, 1345-1430, 1451-2036. The jury heard testimony from 16 witnesses (nine lay witnesses and seven experts). *Id.* The court admitted 47 exhibits, all of which went to the jury. CP 1516-522.

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<sup>1</sup> Specific motions *in limine* relevant to this appeal are discussed *infra*.

On Friday, November 3, 2017, the parties presented their closing arguments. RP 1892, 1909-52 (Rookstools), 1953-2001 (QSD), 2003-25 (Rookstools' rebuttal).<sup>2</sup> The Rookstools' closing arguments, which are the subject of this appeal, are detailed *infra*. As relevant here, the Rookstools variously suggested that the jury could award them (collectively) \$10 million, \$5 million, or \$10 billion (perhaps that last number was just a joke, but it was more likely an attempt to psychologically "anchor" the jury to a high number). RP 1945-47, 1950-51. The defense suggested a collective total of \$305,000. RP 1999-2000.

On Sunday, November 5, QSD moved for a mistrial based on the Rookstools' closing arguments, discussed *infra*. CP 1504-10 (motion), 1511-14 (emails between court and counsel), 1561-68 (reply/declaration). The Rookstools opposed the motion. CP 1532-56 (response), 1672-75 (motion to strike). The judge left town, so he could not hear arguments on the motion for mistrial before the jury deliberated. RP 1310-44; CP 1511-14.

On Monday, November 6, the jury returned a verdict on the Rookstools' damages (CP 1515):

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<sup>2</sup> The Rookstools' closing arguments are attached as Appendix A.

Todd Rookstool:	<u>\$50,000</u>
Shawna Rookstool:	<u>\$50,000</u>
M[RR]:	<u>\$1,000,000</u>
M[KR]:	<u>\$100,000</u>
C[DR]:	<u>\$10,000</u>
Total:	<b><u>\$1,210,000</u></b>

This is roughly four times the \$305,000 total the defense suggested.  
RP 1999-2000.

On Tuesday, November 7, QSD moved to compel production of a text the Rookstools' treating physician, Dr. Hemmerling, sent to the Rookstools' counsel on or before November 2, which counsel read to the jury at the end of his closing. CP 1523-27 (motion), 1557-60, 1681-88 (reply/declaration). The Rookstools opposed the motion. CP 1528-31 (response), 1669-71 (motion to strike).

On November 14, the trial court heard argument on the motion for mistrial. RP 1310-44. The details regarding the motion and ruling are discussed *infra*.

On November 21, the court denied a mistrial. CP 1764-66. It also compelled the Rookstools' counsel to produce the text. *Id.*

On November 27, 2017, QSD moved for a new trial. CP 1676-80 (motion), CP 1723-731 (reply). The Rookstools opposed the motion. CP 1701-22 (response).<sup>3</sup>

On January 5, 2018, the Rookstools moved for entry of judgment. CP 1689-96 (motion/declaration). On January 16, QSD responded and objected to entry of judgment. CP 1697-1700.

On January 18, 2018, the court heard argument on the motion for new trial. RP 1435-44. The court denied the motion. RP 1444-50; CP 1762-63. Also on January 18, the court entered judgment on the verdict. CP 1759-61.

QSD timely appealed. CP 1756-66.

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<sup>3</sup> The Rookstools withdrew their motion to strike, sur-reply, and declaration during argument. RP 1448-49; CP 1732-35 (motion), 1736-55 (sur-reply/declaration).

## ARGUMENT

**A. The standard of review is whether the trial court abused its discretion in concluding that attorney misconduct did not prejudice the jury and deprive QSD of a fair trial.**

The decision denying QSD's mistrial motion is reviewed for an abuse of discretion. *Adkins v. Alum. Co. of Am.*, 110 Wn.2d 128, 136, 750 P.2d 1257 (1988). A trial court abuses its discretion when it is manifestly unreasonable or based on untenable grounds or untenable reasons. *Teter v. Deck*, 174 Wn.2d 207, 222, 274 P.3d 336 (2012). A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices, including legal errors. *Id.* Courts "should grant a mistrial only when nothing the court can say or do would remedy the harm caused by the irregularity or, in other words, when the harmed party has been so prejudiced that only a new trial can remedy the error." *Kimball v. Otis Elevator Co.*, 89 Wn. App. 169, 178, 947 P.2d 1275 (1997) (citing *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979)). The reviewing court considers whether the alleged misconduct was serious or involved cumulative evidence, and whether the trial court properly instructed the jury to disregard it. *Id.*

The decision denying QSD's new-trial motion is also reviewed for an abuse of discretion. ***Gilmore v. Jefferson Cnty. Pub. Transp. Benefit Area***, 190 Wn.2d 483, 494-95, 415 P.3d 212, 218 (2018) (citing ***Alum. Co. of Am. v. Aetna Cas. Sur. Co.***, 140 Wn.2d 517, 537, 998 P.2d 856 (2000) ("***Alcoa***")); ***Smith v. Orthopedics Int'l, Ltd., PS***, 149 Wn. App. 337, 341, 203 P.3d 1066, 1068 (2009) ("denial of motions for mistrial and new trial are reviewed for abuse of discretion and, ultimately, whether the appellants were denied a fair trial").

But 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.'" ***Alcoa***, 140 Wn.2d at 537 (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))). This rule regarding abuse of discretion specific to new-trial motions stands in juxtaposition to the general test for abuse of discretion set forth in ***Gilmore*** and ***Alcoa***, *supra*. Stated affirmatively, a lesser abuse of discretion will overturn this denial of a new trial than would be required to overturn a new-trial grant. But no decision explains the practical difference.

**B. Criteria for determining attorney misconduct.**

QSD relied on CR 59(a)(2): “Misconduct of prevailing party or jury.” CP 1504-10 (motion), 1561-84 (reply). “Under CR 59(a)(2), a trial court may grant a new trial where misconduct of the prevailing party materially affects the substantial rights of the losing party.” **Teter**, 174 Wn.2d at 222 (citing **Alcoa**, 140 Wn.2d at 539). In this context, the pertinent inquiry is whether “such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial.” **Gilmore**, 190 Wn.2d 494-95 (alteration in original) (quoting **Alcoa**, 140 Wn.2d at 537). That is, whether “counsel’s [closing] statements prejudiced the jury to the extent that [QSD] did not have a fair trial.” *Id.* at 502.

The **Alcoa** Court quoted the “proper criteria for consideration” in assessing a new trial based on attorney misconduct in a civil case:

A new trial may properly be granted based on the prejudicial misconduct of counsel.

As a general rule, the movant must establish that the conduct complained of constitutes misconduct (and not mere aggressive advocacy) and that the misconduct is prejudicial in the context of the entire record. . . .

The movant must ordinarily have properly objected to the misconduct at trial . . . and the misconduct must not have been cured by court instructions. [Paraphrasing altered, other alterations in original.]

**Alcoa**, 140 Wn.2d at 539-40 (quoting 12 JAMES WM. MOORE, MOORE'S Federal PRACTICE § 59.13[2][c][I][A], at 59-48 to 59-49 (Daniel R. Coquillette et al. eds., 3d ed. 1999)).

Thus, as to each asserted act, QSD must establish (1) misconduct that is (2) prejudicial in the context of the entire record. *Id.* at 539. QSD (3) “ordinarily” must have interjected a proper objection and must show (4) that the misconduct was not cured by court instructions. *Id.* Where (unlike here) no motion for a mistrial or objection was made, the inquiry is whether the misconduct was so flagrant that no court instruction or admonition to disregard could suffice to remove the prejudice. ***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)).

Because the trial judge left town, the court could not hear the mistrial motion until after the jury began deliberations. CP 1511-14. But that is not dispositive, as the ***Teter*** Court recently explained:

The Court of Appeals held that the Teters had waived their claim to a new trial based on defense counsel’s misconduct because they did not move for a mistrial. ***Teter***, 2010 WL 4216151, at \*6, 2010 Wash. App. LEXIS 2388, at \*18. The Court of Appeals cited ***Nelson v. Martinson***, 52 Wn.2d 684, 689, 328 P.2d 703 (1958), for the premise that a party may not “wait and gamble on a favorable verdict” before claiming

error. While the basic premise is correct, the Court of Appeals ignores the exception for misconduct so flagrant that no instruction can cure it. **Warren v. Hart**, 71 Wn.2d 512, 518, 429 P.2d 873 (1967) (addressing a party's reliance on **Nelson**, 52 Wn.2d 684).

**Teter**, 174 Wn.2d at 225. Thus, misconduct that “unfairly and improperly exposed the jury to inadmissible evidence” and prejudiced a party qualifies as a material effect on the substantial right to a fair trial. **Teter**, 174 Wn.2d at 225.

In **Warren**, defense counsel's arguments that police officers who investigated an automobile collision constituted a “little baby court” and that the jury should be guided by the officers' conduct in not issuing traffic citations were such flagrant misconduct that no instruction could have cured their prejudicial effect: the plaintiff therefore did not waive the right to assert the error in a motion for a new trial by failing to seek a mistrial. 71 Wn.2d at 517-18.

And it is crucial to remember that those who have engaged in misconduct are not entitled to the benefits of calculation:

[I]t cannot be stated with certainty that all of this [discovery misconduct] would have changed the result of the case. But, as said by the Supreme Court, a litigant who has engaged in misconduct is not entitled to “the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.” **Minneapolis, St. Paul & S.S. Marie Ry. Co. v. Moquin**, 1931, 283 U.S. 520, 521-522, 51 S.Ct. 501, 502, 75 L.Ed. 1243.

**Taylor v. Cessna Aircraft Co., Inc.**, 39 Wn. App. 828, 836-37, 696 P.2d 28 (1985) (quoting **Seboldt v. Pennsylvania R.R.**, 290 F.2d 296, 300 (3d Cir. 1961); accord, **Gammon v. Clark Equip. Co.**, 38 Wn. App. 274, 282, 686 P.2d 1102 (1984)).

**C. 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.**

As the Court can see, the entire tone of the Rookstools’ closing argument evoked passion and prejudice at every turn. App. A. One egregious example is when their counsel told the jury that QSD’s own counsel “agrees” that MRR should be terrified of having surgery. To the contrary, QSD’s counsel argued that MRR is not even a candidate for surgery. 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. This caused overwhelming uncured prejudice to the credibility of QSD’s counsel, and thus to QSD. This Court should reverse and remand for retrial.

**1. Procedure.**

Prior to trial, the court granted QSD’s *motion in limine* six: “The Court should preclude admission of any evidence that parties have not produced in response to valid discovery requests.” CP 707-08.

During opening arguments, the Rookstools' counsel explained to the jury that MRR's claimed future specials vary widely because, while she was currently receiving Botox injections for problems in her jaw, if she had oral surgery, future specials would go down because she would no longer need the injections. RP 527. While their counsel falsely told the jury that QSD did not challenge that this alleged condition was attributable to the accident, the issue was hotly disputed at trial. *Compare, e.g.*, RP 513 (Rookstools' opening saying QSD does not dispute causation) *with* RP 1989-96 (QSD's closing explaining why MRR does not even need surgery).

During the Rookstools' closing argument, their counsel told the jury – in a highly inflammatory fashion – that QSD's counsel *agreed with him* on this issue (RP 1932):

Well, why not just have the surgery? [MRR] 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. [Emphases added.]

That final assertion is false, so QSD's counsel immediately objected and moved to strike (*id.*):

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

But the court did not strike the falsehood, instead suggesting to the jury that it was a legitimate form of argument (*id.*):

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.

Having been given leave by the court, the Rookstools' counsel proceeded to passionately insult QSD and its counsel (RP 1935):

Again, it's these little chippy things through this whole process. . . . It's passive-aggressive. And, frankly, it's garbage. And it's part of the reason that I was angry and upset and emotional during my opening and it's part of the reason that my face is probably getting red right now.

As cited above, QSD subsequently moved for a mistrial and for a new trial based on this (and other) serious misconduct expressly designed to invoke passion and prejudice from this jury.

**2. Allowing as “argument” an inadmissible false statement that impugns opposing counsel is an abuse of discretion that requires a new trial.**

Counsel's reference to a nonexistent “agreement” directly impugned QSD's counsel's credibility, suggesting that he was advocating a position he personally disagreed with: the defense's central argument was that MRR is not a candidate for the surgery.<sup>4</sup> The trial court's failure to strike that falsehood in the strongest

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<sup>4</sup> Counsel's repeated assertions regarding his own feelings and opinions (“I would be terrified”; “If she was my daughter”) are themselves improper. *Rangenier v. Seattle Elec. Co.*, 52 Wn. 401, 408, 100 P. 842 (1909) (“It is no part of the duty of the advocate to obtrude his personal opinion upon the jury, either as to the veracity of a witness or the weight of the evidence”).

possible terms sealed the dire prejudice to QSD's closing presentation. This Court should reverse and remand for retrial.

Many Washington decisions have cautioned against – and some have even reversed based on – prosecutors impugning defense counsel. *See, e.g., 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)). Mercifully, such serious misconduct apparently is rarer in Washington civil trials. *But see Jones v. City of Seattle*, 179 Wn.2d 322, 371, 314 P.3d 380 (2013) (González, J., concurring).

Although civil attorneys are generally granted broad latitude in closing arguments, “their comments must be confined to the evidence and to issues and inferences that can be drawn from the evidence.” *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)). Improper comments like these “essentially accuse the medical expert of perjury and accuse opposing counsel of unethically committing a fraud upon the court.” *Id.* (citing, *inter alia*, *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); see also ***Griffith v. Shamrock Village***, 94 So. 2d 854 (Fla. 1957) (counsel's statements suggested perjury and collusion).

In ***Sun Supermarkets***, for instance, plaintiff's counsel stated that the defendant's counsel had "lied to the jury and that he committed a fraud upon the court and jury." 568 So. 2d at 481-82. Such conduct "devastated any chance the defendant might have had to secure a fair trial in front of a jury who had been told not to trust the defendant's counsel." *Id.* And such remarks are "of the nature and type that neither rebuke nor a retraction . . . would 'destroy their prejudicial and sinister influence.'" *Id.* (quoting ***Eastern Steamship Lines, Inc. v. Martial***, 380 So. 2d 1070, 1072 (Fla. 3d Dist. Ct. App. 1980), *cert. denied*, 388 So. 2d 1115 (Fla. 1980)).

Where, as here, plaintiffs' counsel directly impugns defense counsel's integrity by falsely telling the jury "he agrees with me," no curative instruction could suffice to remove the taint – and none was even attempted here. Rather, the trial court simply assumed that QSD's objection *itself* cured the prejudice. RP 1332-33 ("The way I view this . . . is when you [defense counsel] jumped up and said, I object, it was clear you were not in agreement with whatever

statement [plaintiffs' counsel] had made"). There appears to be no legal authority in the United States to support such an inference. It is simply beyond the range of acceptable choices to give serious misconduct of this nature such a strong benefit of the doubt.

It is equally untenable to suggest that the very lawyer whose integrity was impugned somehow "cured" the taint simply by saying, "I'm going to object, Your Honor, and ask the Court to instruct the jury to strike that comment." RP 1932. The court instructed the jury to disregard counsel's objections. *Id.* And where, as here, the court failed to strike the comment despite counsel's express request to do so, it is likely the jury thought the Rookstools' counsel was not playing fast and loose with the truth, but QSD's was.

Trial is not meant to test one counsel's veracity, but rather the parties' evidence. Yet here, the Rookstools successfully impugned QSD's counsel's veracity, dooming QSD's defense, and evoking a verdict four times what the evidence justified, notwithstanding the Rookstools' outrageous demands for tens of millions (or even billions) of dollars. Only a new trial can repair the damage. This Court should reverse and remand for retrial.

**D. 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.**

Without warning, the Rookstools’ counsel read a text from Dr. Hemmerling to defense counsel at the very end of his closing. It was unsworn, unadmitted, and unrestrained in its venom for QSD. The Rookstools’ entire closing was carefully composed to lead up to this shocking climax. Only a mistrial could cure such premeditated prejudice. This Court should reverse and remand for retrial.

**1. Procedure.**

Prior to trial, the court granted QSD’s motion *in limine* six: “The Court should preclude admission of any evidence that parties have not produced in response to valid discovery requests.” CP 708.

During trial, plaintiffs brought out that Dr. Hemmerling – the Rookstools’ treating physician – was an old family friend who had interacted socially with the Rookstools over many years. RP 652. During cross, in response to questions about inconsistencies in MRR’s pain reports, Dr. Hemmerling began a theme: he did not “know how you parse out different types of pain of different pieces of people.” RP 676. On redirect, he again picked up his theme, saying that asking specific questions about where and when his patient had pain is “disingenuous and somewhat petty.” RP 689-90.

While he admitted on recross that it is not “disingenuous and petty” to be specific about patient pain complaints, he reiterated his belief that it is “disingenuous” to “parse up” a “mechanical system like the back” into “vertebral bodies and say which one was hurt when, and attempt to put a time frame on those.” RP 694-95.

Early in his closing, the Rookstools’ counsel also began a theme: while in admitting liability, QSD takes responsibility for what happened in the accident, he nonetheless asked, “What does that mean? What does ‘taking responsibility for your actions’ mean? What does it mean to be ‘held accountable for your actions?’” RP 1911. He picked up his theme again later (RP 1923-24):

So the school district is gonna accept responsibility. Right? Yep, we did ‘er. We’re gonna take care of ya. But we want to apply the strictest standard we can possibly find so we might not have to. That’s what it really boils down to.

And again: “I think we’ve all been in that place. Right? We kind of want to accept responsibility.” RP 1924. And heatedly (RP 1935):

Again, it’s these little chippy things through this whole process. We’re gonna accept responsibility and these are great kids and they’re honest and they’re hardworking, and then we’ll just pull a thread out at a time until the sweaters are all [the] way unwound and they’re standing there naked and embarrassed because you’ve been attacking them for eight days. It’s passive-aggressive. And, frankly, it’s garbage. And it’s part of the reason that I was angry and upset and emotional during my opening and it’s part of the reason that my face is probably getting red right now.

And most bluntly in his rebuttal closing (RP 2021):

We're here because the school district doesn't want to accept responsibility for their actions. They say they do, but they don't show us that. That's why we're here. And if they would have accepted responsibility for their actions in the first place, we wouldn't be here. That's why we're here.

At the very end of his closing, the Rookstools' counsel read the jury a text from Dr. Hemmerling – never entered in evidence – hammering home his “disingenuous and petty” theme, and telling the jury that QSD had not truly accepted responsibility (RP 2023):

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.

QSD's counsel strenuously objected. RP 2023-25. The trial court sustained the objection (RP 2024):

I'm [going to] sustain the objection. It's an out-of-court statement that you just said was from another party and it's not been testified to in this case.

QSD's counsel asked for a disregard instruction, but the court mildly asked, while emphasizing the inadmissible statements (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. [Emphases added.]

The court immediately read the jury closing instructions and instructed the jury to retire (at 4:20 p.m.) to select a presiding juror. RP 2025-31. The court noted that he was "flying out" Sunday and would not be present Monday for jury deliberations. RP 2032.

**2. Only a mistrial could cure the surprise admission of the doctor's unsworn, inflammatory text.**

As the trial court ruled, it was improper for counsel to read Dr. Hemmerling's inflammatory text to the jury without warning. His conscious choice to provoke the jury with inflammatory, inadmissible, and unadmitted evidence, independently justifies a mistrial. See CP 1686-88.<sup>5</sup> His entire "make it right" theme set up the jury for his scandalous "petty and disingenuous" conclusion. A mild "disregard" request could not tamp down such all-engulfing prejudice.

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<sup>5</sup> Dr. Hemmerling's text with counsel's response is attached in App. B.

Comments encouraging a jury to render a verdict on facts not in evidence are improper. **State v. Lord**, 128 Wn. App. 216, 223, 114 P.3d 1241, 1245 (2005), *aff'd*, 161 Wn.2d 276, 165 P.3d 1251 (2007). It is relevant to prejudice that counsel “made the improper statements at the very end of his closing argument . . . taking advantage of the ‘last heard longest remembered’ principle.” **Adkins**, 110 Wn.2d at 141. This was a considered attempt to incite the jury’s passion and prejudice with inadmissible inflammatory bombast. Notwithstanding the trial court’s mild disregard request, it worked.

A similar situation arose in **Battle ex. rel. Battle v. Memorial Hosp. at Gulfport**, 228 F.3d 544 (5<sup>th</sup> Cir. 2000). Counsel read a doctor’s note during closing that had not previously been admitted (albeit while giving advance warning, unlike here). **Battle**, 228 F.3d at 554-55. The trial court allowed it, but the Fifth Circuit reversed:

Defendants contend that framing an appropriate argument as a note from a defendant did not “impair the calm and dispassionate consideration of the case by the jury” and therefore it does not justify reversal. We disagree. A comment by a party made out of court and not under oath is inadmissible hearsay. We conclude that the magistrate judge abused his discretion in allowing defense counsel to circumvent the rules of evidence by reading the note to the jury verbatim in closing argument. [Citation omitted.]

*Id.* at 555. The court ordered a new trial. *Id.* at 556. Many courts agree. See, e.g., **Griffiths v. Zetlitz**, 190 N.W. 317, 318 (S.D. 1922)

(“error to read statements to the jury made by persons not under oath”); *Pyse v. Byrd*, 450 N.E.2d 1374, 1377 (Ill. Ct. App. 1983) (“statement of counsel regarding facts not in evidence is improper”).

Indeed, the entire “won’t take responsibility” theme of the Rookstools’ closing was crooked tinder for counsel’s fiery conclusion. Dr. Hemmerling directed hot anger at QSD for not truly “accepting responsibility,” a false insinuation about extra-record matters comprising the central theme of the Rookstools’ closing. He also triggered his “disingenuous and petty” bombshell – blasting away at QSD. This inflammatory rhetoric has nothing to do with the evidence, and everything to do with illicitly fueling an emotional response of passion and prejudice against QSD. Counsel’s timing – the last struck match – was rigged to ignite the jury.

Serious misconduct like this is not entitled to the benefit of calculation, which is no better than speculation: no disregard instruction could cure this coordinated assault. RP 2023; CP 1686-88 (App. B). On the contrary, the “pain resulting from an evidential harpoon frequently is exacerbated by extraction, and the prejudice may be compounded by an instruction to disregard.” *Storey v. Storey*, 21 Wn. App. 370, 375, 585 P.2d 183 (1978). Such is the case here. This Court should reverse and remand for retrial.

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

The above two errors independently are each sufficient to require a new trial. Together, they are more than sufficient. But they are not the only instances of misconduct in closing. The remaining instances were not objected to and, therefore, each independently likely would not justify mistrial or new trial. But together, and particularly together with the first two prejudicial errors, they do. Indeed, the remaining instances of misconduct exacerbate the first two instances, making even those more prejudicial to QSD.

Under the cumulative error doctrine, the appellate court will reverse a verdict when it appears reasonably probable that the cumulative effect of errors materially affected the outcome, even when no one error alone mandates reversal. ***State v. Russell***, 125 Wn.2d 24, 93, 882 P.2d 747 (1994); ***State v. Johnson***, 90 Wn. App. 54, 74, 950 P.2d 981 (1998); ***Storey***, 21 Wn. App. at 374 (applying cumulative error in civil context). It is reasonably probable that the first two prejudicial errors materially affected the outcome. But together with the following misconduct, there can be little doubt that severe prejudice infected the verdict. This Court should reverse and remand for a fair trial.

**1. Golden rule & put yourself in her place.**

**a. Procedure.**

The trial court entered an order granting two motions *in limine* barring “put yourself in her place” and “do unto others” arguments:

13. Any argument requesting the jurors to place themselves in the position of Plaintiffs must be excluded at trial. (CP 709)
21. There should be no reference to the “golden rule. [*sic*] (CP 710)

During closings, counsel violated both orders by asking the jury to close their eyes and imagine they are MRR (RP 1944-46):

I was thinking about this last night. I was up. Since this last Friday I haven't been sleeping very well and I've been trying to think about this.

And I think if you could all just close your eyes for me for a minute.

I'm 21 years old. My name is [MRR]. And when I was 15 years old I was involved in a bad bus crash. Now I've got permanent injuries. They tell me that I'm gonna have these injuries for the rest of my life. And it's scary.

They tell me that I'm gonna have to have surgery at some point, that I may never ever be better than 80 percent of how I was before. And that scares me.

I'm afraid that when I have children I won't be able to do the things that I want to do with my children.

And I'm afraid that I'm gonna become a burden to whoever I find that will accept me as I am with my disabilities.

And I'm afraid that as I get older and this gets worse that I won't be able to care for my parents when they need me.

And I'm afraid that I won't be able to be there for my sister when she has children.

And I'm afraid that at some point the pain is gonna become overwhelming and as I age it's gonna degenerate and it's just gonna get worse and worse and worse.

And I'm scared.

That's where MRR is at right now.

That's where MKR is at right now.

That's where that family is at right now.

...

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 . . . MRR and you say you'd give me four million dollars, I'd tell you to pound sand.

[Paragraphing altered for readability.]

The jury returned a \$1 million verdict for MRR, ten times its next highest verdicts (for her sister, and for her parents) and 100 times her brother's award.

But Counsel did not stop there. He also violated the *in limine* orders as to the parents (RP 1949):

And all this added stress of wondering what – how to fix your daughter. Can you imagine your daughter's in constant pain[?] Can't chew. The doctors can't figure out what's wrong with her. All the added stress from that. [Emphasis added.]

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

Our Supreme Court has made clear that golden-rule-type arguments are improper attempts to evoke passion and prejudice:

[A]n argument in a civil case is improper which appeals to the jurors to place themselves in the position of a litigant and to decide the case based upon what they would then want under the circumstances. Where an argument is designed to affect the outcome of the case, either upon the question of liability or damages, a plaintiff’s potential recovery or a defendant’s potential success in defending is involved. Whether a plaintiff recovers at all, and the amount of a plaintiff’s recovery, if any, or whether a defendant prevails, are questions the jury must resolve solely on the evidence and the law, and not on the basis of appeals to sympathy, passion or prejudice.

**Adkins**, 110 Wn.2d at 140. It is “improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence.” *Id.* at 141.

This is the offending “golden rule” closing in **Adkins**:

Can a corporation get a fair trial? And you have all told me that they can, and *that you will treat them as if you were the landowner, and that this was a roofer going on your roof and doing a job*, whether it be a roofer or a plumber, or other special skilled contractor, who should know what he’s doing.

*If it was your roof, and if this was your attic vent and fan, you would not expect to be liable for injury to a roofer that you hired, who was injured in doing something he should know better not to do.* We ask only that you give ALCOA that same consideration. [Emphases in original.]

*Id.* at 140-41. There is no obvious reference to the “golden rule” or to “place yourself in my client’s shoes,” but common sense dictates that this is a golden rule argument.

Counsel’s arguments here were equally plainly improper. But reversal “is required only where the error was prejudicial.” *Id.* at 142. “Error is prejudicial if it affects, or presumptively affects, the outcome of the trial.” *Id.* This is normally difficult to ascertain. *Id.* Not so here.

Counsel’s arguments were flagrant and ill-intentioned attempts to inflame the jury’s passions – and they did. These sophisticated psychological techniques are designed to evade well-established restrictions against appeals to passion and prejudice, however subtle. They work. But they also violate longstanding protections courts have imposed against psychologically manipulating emotions. See, e.g., ***Pederson v. Dumouchel***, 72 Wn.2d 73, 83-84, 431 P.2d 973 (1967) (“Counsel wrung out every tear in the towel.” “We do not approve of arguments such at this”).

In any event, Washington law has long provided that when, as here, misconduct is flagrant or intentional, the court can and should presume prejudice. See, e.g., ***State v Smith***, 189 Wash. 422, 429, 65 P.2d 1075 (1937); ***State v. Johnson***, 158 Wn. App. 677, 685, 243 P.3d 936 (2010) (“such arguments are flagrant and ill intentioned and

incurable by a trial court's instruction in response to a defense objection"). A mistrial and new trial are the only cures for this sort of serious misconduct.

## **2. Hometowning.**

Hand in hand with counsel's "put yourself in her place" arguments went his "us vs. them," "they're not from 'round here," "conscience of the community," and "we're gonna take care of our own" themes. As noted, his strident attempt to "bond" with the jury is serious misconduct. *Pederson*, 72 Wn.2d at 83-84 (also discussed *infra*). The cumulative prejudice requires a new trial.

### **a. Procedure.**

From the very outset (even in *voir dire*) counsel affected an "us vs. them" atmosphere to create a "bond" with the jury. In his opening, he argued – and it *was* argument and objected to as such – that "We trust that when we send our children off to school . . . they're safe"; "we trust that the . . . school district will take care of our children"; and "we trust that the district will project a positive image to the county about who we are." RP 505. He claimed "we've all been on that bus" to school. RP 508. He called out "our doctors" – who are from around here – and their doctors – who are not. RP 514.

In closings, it was “we” this and “they” that. RP 1922-23. “We” are “farm” people who know how to work hard (*id.*); “they” are “City guy[s]” who “don’t know this family” or how to run a “pea-bine” (RP 1921, 1951); this case is about the “powerful and the powerless” (RP 1924). For “them” – the decision makers in this case<sup>6</sup> – it is “about saving a dollar.” RP 1925. While the Rookstools’ counsel would “just as soon have one million” dollars, he asked for \$10 million or \$5 million, but the Rookstools “will take care of themselves as long as we help take care of them and then we take care of us.” RP 1945.

They’re part of our community. They represent our community just as we do and we will in this decision, because we really are the conscience of the community. You’re the conscience of the community here as you sit in that box. . . .

So when you walk out of here today and you make your decision, you make your award and you give them ten billion dollars – I don’t care what the number is . . .

RP 1950-51 (emphasis added).

At the very end of his closing – after the court sustained QSD’s objection to the doctor’s text – he left no doubt (RP 2025):

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<sup>6</sup> Counsel repeatedly inserted insurance into his closing, from distinguishing QSD from “decision makers” to referencing “IMEs.” See, e.g., RP 1920 (defense expert “does some IMEs and some other things for cash”); RP 1925 (“they don’t care”); RP 1950 (“it’s just a number. It’s what they do. On to the next one.”). This violated order *in limine* 1, excluding insurance. CP 707; see also, e.g., **Williams v. Hofer**, 30 Wn.2d 253, 265, 191 P.2d 306 (1948) (insurance is “essentially prejudicial” to defendants).

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.

**b. Counsel attempted to turn the jury into a hometown rooting section.**

It is misconduct for counsel to invite the jury to decide a case based on anything other than the evidence and the law, including appeals to sympathy, prejudice, and bias. *Adkins*, 110 Wn.2d at 142. Here, counsel “attempted to turn the jury into a hometown rooting section.” *Pederson*, 72 Wn.2d at 83. The closing argument in *Pederson* is frankly quite mild compared to the haranguing in this trial. Compare 72 Wn.2d at 83-84 (a few references to out-of-town doctors) with RP 1909-52, 2002-24 (App. A). Just before he read the doctor’s “petty and disingenuous” text, counsel reminded the jury: “He’s one of our own.” RP 2023. The Supreme Court does “not approve of arguments such as this.” *Id.* at 84. “A case should be argued upon the facts without an appeal to prejudice.” *Id.*

This Court should be equally disapproving. It should reverse and remand for a fair trial.

## CONCLUSION

While some psychological persuasive techniques might well pass muster when used sparingly or in passing, here no doubt remains that counsel mustered every trick in the book in an all-out assault on the jury's emotions. Counsel's intentional use of (a) falsehood about QSD's counsel's personal view of a key issue in the case, and (b) inflammatory hearsay from the doctor, separately or together, are serious misconduct whose prejudicial effect could not be overcome even by a strong instruction to disregard – rather than the court approving (a) and merely “asking” the jury to disregard (b) without striking it. And the overall effect of the many instances of serious misconduct is so prejudicial to justice that no curative instructions would have sufficed. The Court should reverse and remand for retrial.

RESPECTFULLY SUBMITTED this 1<sup>st</sup> day of April 2019.

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# APPENDIX A

Rookstools' Closing Arguments. RP 1909-52  
(Closing), 2003-25 (Rebuttal).

1 some exhibits.

2 THE CLERK: Plaintiffs' Exhibits 171 and 175  
3 have been marked for identification.

4 THE COURT: Okay. Thank you.

5 With that, Ladies and Gentlemen of the Jury,  
6 we're gonna now begin with the closing arguments. And  
7 Plaintiff will be going first. So if you will give  
8 your full attention to Mr. Gilbert.

9 Mr. Gilbert.

10 MR. GILBERT: Thank you, Your Honor.

11 THE COURT: Thank you.

12 MR. GILBERT: Good afternoon. I picked up a  
13 cold last Friday and I'm a little horse. I hope I  
14 make it through this. I'm going to try to project as  
15 best I can so the court reporter can hear me as well.

16 First of all, I want to thank you all for  
17 sticking with us. A five-day trial turned into eight  
18 days pretty quickly. And I want to apologize for  
19 that.

20 A couple other things that happened during the  
21 trial. I told you during jury selection that I was  
22 gonna make some mistakes. And I'm going to ask you  
23 not to hold that against my clients.

24 And there were a couple things specifically.  
25 One, of course the length of the trial. And I felt

1 like I was a little hard on Dr. Coor, and that  
2 bothered me a little bit. And then also there was a  
3 moment when MaKayla Rookstool, my client, was on the  
4 stand and I asked her if she wanted to talk about the  
5 crash. It was very evident that she didn't. And then  
6 five minutes later I turned her around and put her  
7 into a place, the scariest place she's ever been in  
8 her life, upsidedown in that bus, because I needed to  
9 make something in my record. And as soon as those  
10 words went out of my mouth I felt terrible. So I want  
11 to apologize for those things.

12 I want to thank the Court for his patience and  
13 counsel for his patience.

14 And this family. It's been an honor to represent  
15 this family. You know, if we had a -- if we had a  
16 poster that we were gonna send out to show people what  
17 Grant County is really all about, this family could be  
18 on that poster.

19 And as I said to you during opening statement,  
20 it's kind of a blessing and a curse, my job. I get to  
21 do these things for these people. And these days like  
22 this are the most important days of my life because  
23 they're the most important days in their life. And  
24 before this is over this is gonna be one of the most  
25 important days of your life.

1           The curse of it is the other side of it, that the  
2 choices that we make today and that we talk about  
3 today are gonna change people's lives forever and  
4 they're gonna be stuck with us for the rest of our  
5 lives.

6           So what did we learn in the trial?

7           well, we started out with in jury selection  
8 Mr. Moberg talking about taking responsibility and the  
9 school district was gonna take full responsibility for  
10 what happened to this family in that crash. And if  
11 you remember in opening statement, I told you we're  
12 gonna take a look at that. What does that mean? What  
13 does "taking responsibility for your actions" mean?  
14 What does it mean to be "held accountable for your  
15 actions"?

16           Now, Mr. McFarland got up after I got done and he  
17 said -- he told you that this family is a tremendous  
18 family. If you remember, he told you that these are  
19 great kids; honest, hard-working kids; they're  
20 children that every one of us would be proud to have  
21 as our children. Do you remember when he said that to  
22 you in opening statement? And then he spent the next  
23 eight days trying to run down their truth, trying to  
24 discredit them.

25           They hired doctors to come in and testify. Of

1 course they're entitled to do that. Their defense  
2 doctors, Dr. Grassbaugh and Dr. Coor. And we've  
3 learned some things about all of that during the  
4 trial.

5 The primary difference, obviously, is that the  
6 defense doctor, his job is to help the lawyers with  
7 the case. The treating doctors, Dr. Ombrellaro,  
8 Dr. Singh and basically Dr. Schuster, although he  
9 started out on the case as someone that I called to  
10 help me figure out what was going on because he's one  
11 of the go-to guys in the region, their job, the  
12 treating doctors' job is to help people get better.

13 Now, the significant difference in this case is  
14 the treating doctors are the only two experts that  
15 stepped into this courtroom during the entire trial.

16 Dr. Ombrellaro and Dr. Singh are "the guys" on  
17 thoracic outlet syndrome in the region. Dr. Ombrellaro  
18 says she's got neurogenic thoracic outlet syndrome.  
19 MaKayla. Dr. Singh says MaKayla's got neurogenic  
20 thoracic outlet syndrome. Their doctors, they come in  
21 and disagree.

22 Now, this case is really simple. It really boils  
23 down to this, right? You either believe that MaKayla  
24 Rookstool and MaKinna Rookstool were injured in this  
25 crash and that those injuries are the injuries that

1 our treating doctors presented to you during this  
2 trial and that they should be compensated for those  
3 injuries for the past pain and suffering and the  
4 mental costs and everything they're gonna go through  
5 in their future in their lives, and the school  
6 district should be held responsible for that and they  
7 should be held accountable, you either believe that  
8 what Dr. Ombrellaro and Dr. Singh and Dr. Schuster  
9 told you and Dr. Hemmerling told you is true and you  
10 take care of this family, "we" take care of this  
11 family, or you believe what the defense has brought on  
12 in this case, you pay them for their past medical  
13 expenses, which the district has agreed are  
14 appropriate and you send them packing.

15 That is the case in a nutshell. It's really  
16 pretty simple. You don't have to decide liability.  
17 You don't have to decide any of that.

18 what was real, what wasn't in this trial; what  
19 happened, what didn't happen; what's right and what is  
20 wrong and what is just.

21 Now, let's take a look at some of the things that  
22 happened during the week. Of course the defense, they  
23 want this case to be all about the medicine. There  
24 were words used in this trial that I don't even begin  
25 to comprehend. I didn't have -- I thought when --

1 when -- when Dr. Grassbaugh was testifying he wasn't  
2 even speaking the same language that I speak. I told  
3 you guys that at the beginning of this trial. I'm not  
4 a doctor. I don't do the medicine. They do the  
5 medicine.

6 But there was so many shifty terms and this could  
7 be this or this could be that. We found out in this  
8 trial that any diagnosis from a doctor can have a  
9 difference of opinion from another doctor. And that  
10 stands true, if you think about it, for just about any  
11 diagnosis.

12 And what's great about this case and these  
13 particular experts -- "experts" -- doctors the defense  
14 hired is there's relatively no fudge factor for them.

15 The chiropractic (as stated) association has very  
16 high ethical standards for witness testimony. And I'm  
17 sure you noticed that with Dr. Grassbaugh's testimony.  
18 When Ms. Grelish started coming after him with certain  
19 issues, specific issues, some that we're gonna talk  
20 about here in a minute, "Yep, you're right", "Yep,  
21 you're right", "Yep, you're right."

22 And he's an honorable guy. He's a West Point  
23 grad. Right. I don't think anybody in this room  
24 didn't believe what Dr. Grassbaugh was talking about.  
25 But here's the easy part for him.

1 well, first of all, he eventually just said,  
2 "You know what?" And I know you guys caught this. He  
3 eventually said, (as quoted): "You know what?  
4 Neurogenic thoracic outlet syndrome is really not my  
5 gig. That's not my cup of tea. So I would probably  
6 send this to somebody that knows."

7 And I've got the actual quote here. I can read  
8 it to you when he said that about "This isn't really  
9 what I do." But he testified a lot about it before he  
10 got to there. And that's at that point he's like:  
11 Okay, I'm getting uncomfortable. We're reaching. I'm  
12 stepping out of this. Which is the right thing to do.  
13 Hand it over to Dr. Ombrellaro. Hand it over to  
14 Dr. Singh. Do what Dr. Schuster did. "I don't get  
15 it, but they will." Give it to them.

16 And it's even simpler for them because in this  
17 case what they're saying is wrong with Makayla  
18 Rookstool is part of the problem. I mean, you heard  
19 the experts, Ombrellaro and Singh, both tell you that  
20 myofascial pain is a symptom of neurogenic thoracic  
21 outlet syndrome. The pain symptoms that Makayla is  
22 experiencing, and will experience for the rest of her  
23 life, they fall into a category.

24 If you pull up the symptom checker. And I'm  
25 gonna pull up the symptoms and show you this. They

1 fall into a category.

2 It's the colored slide, Joel.

3 MR. CHAVEZ: Okay.

4 MR. GILBERT: The green/yellow.

5 MR. CHAVEZ: Okay.

6 MR. GILBERT: So myofascial pain syndrome,  
7 this slide is set out so the yellow highlighting are  
8 symptoms only of myofascial pain syndrome, green  
9 highlighting are symptoms only of neurogenic thoracic  
10 outlet syndrome and blue highlighting are the symptoms  
11 of both. And this is why it's easy for the experts to  
12 come in here and testify the way they do.

13 Now, Dr. Coor has another easy way to do it  
14 because his particular specialty, right, is basically  
15 the only specialty out there that supports the premise  
16 that you have to have a positive EMG study before you  
17 can be diagnosed with true neuracic -- neurac--  
18 thoracic outlet syndrome, neurogenic thoracic outlet  
19 syndrome.

20 I've been talking about this for years and I  
21 still fumble with the words.

22 So he -- he can fall back on that. And we saw  
23 him fall back on that. Remember he told you you just  
24 -- you have to make a choice at the outset. You're  
25 either gonna follow this path or you're gonna follow

1 this path. If you're gonna follow this path and  
2 you're gonna say it's thoracic outlet syndrome,  
3 neurogenic thoracic outlet syndrome, then you have to  
4 have the nerve conduction study. That's what his --  
5 the neurology folks believe.

6 Although, it's not really anymore. If you  
7 remember, I impeached him later. I read it right out  
8 of the textbook from neurologists who are working with  
9 the national committee on thoracic outlet syndrome who  
10 say that it's not needed, it's not required. And I  
11 think we all get that. It's not required.

12 So in regard to the pain syndrome --

13 Go ahead and slide it down.

14 So we have pain localized in the neck, the  
15 shoulder, the arms, muscle weakness, spasms. That's  
16 both. So all of this pain up here in the shoulder  
17 (indicating). I can't reach back there, but on your  
18 shoulder blade in the back. And then the spasms,  
19 that's both.

20 If we slide down, with NTOS -- so that was  
21 myofascial. NTOS, we have pain, the same place. It  
22 could be more.

23 slide down.

24 So the numbness and tingling in the arm or the  
25 hand. All right. Now, you heard Dr. Grassbaugh

1 talking about this a little bit that, yeah, you can  
2 have some -- some -- he didn't call it neuropathy. I  
3 forget the word. It was another big word. I had to  
4 look it up. You can have some of that.

5 But really what this comes down to, (indicating).  
6 Remember this test? The EAST test (indicating), where  
7 MaKayla actually grabbed a glass and (indicating).

8 And remember I asked Dr. Coor if he knew what the  
9 EAST test was and he acted like he didn't know what it  
10 was. And so then I read it to him right out of the  
11 textbook. And every time I finished a sentence I  
12 said, "Is that correct?" He said, "Yeah." Next  
13 sentence, "Is that correct?" He said, "Yeah." And  
14 when we got done with that I said, "well, you just  
15 told me you didn't know what it was." He said, "well,  
16 I just don't use it."

17 It is the most definitive test that's used in  
18 diagnosing NTOS in the industry. And the reason is  
19 because when they're up here and they're doing this  
20 (indicating), if they have the compression it cuts off  
21 the blood supply in the nerves and pretty soon they  
22 can't hold their hands up because they're getting  
23 weak. The hands get cold and they start tingling and  
24 the numbness. And we saw that in the video of  
25 MaKayla. That's not a symptom of myofascial pain

1 syndrome. That's not myofascial pain. That's NTOS.

2 The rest of this is just about pain, the  
3 headaches. Sure, the headaches is common sense. If  
4 you have muscle pain in your back and your shoulders,  
5 you're gonna -- you're gonna get headaches with it.

6 When I asked Dr. Coor if myofascial pain syndrome  
7 was a symptom of neurogenic thoracic outlet syndrome  
8 he said no. And that was after Dr. Ombrellaro and  
9 Dr. Singh both told you that it was.

10 And I don't -- I don't want to beat up on  
11 Dr. Coor. I mean, he did 15 hours of research to come  
12 in here and testify. Some of the stuff that he was  
13 researching was stuff that's written by our doctors,  
14 our treaters. This isn't what he does.

15 And when we got going on the -- on the -- on the  
16 Froment's test, that's why I felt bad after the --  
17 after I got done cross-examining him. He's not  
18 experienced in the courtroom. He recognized that he  
19 was standing in front of everybody with his pants  
20 down. He was really uncomfortable. His mouth was  
21 shaking over here. He was nervous. He was terrified.  
22 And I should have let him off the hook. And I didn't  
23 do that. I stuck in there with him and said, "No,  
24 we're gonna do this."

25 And everybody in the room saw what was going on.

1 That test has nothing to do with what he was talking  
2 about. That has nothing to do with intrinsic hand  
3 strength. That test is to test neuropathy in the  
4 forearm and the wrist. And if you do it wrong, you  
5 can brace, so it's not even effective then. That's  
6 why I put him through what I put him through.

7 And he's not a bad guy. He doesn't do this. He  
8 does some IMEs and some other things for extra cash.  
9 He probably didn't think he'd ever end up in the  
10 courtroom in a case like this. A thousand bucks an  
11 hour is easy money. But he's not the guy to make a  
12 decision in a case like this. He's not the guy that's  
13 gonna come into this community and convince us that  
14 that's what's wrong with these people, these  
15 children --

16 They're not children. They're women.

17 -- this family isn't exactly what Dr. Ombrellaro  
18 and Dr. Singh says it is.

19 So I remember he called it "the million doctor  
20 test". And I think later on he said -- after he got  
21 back on the stand remember he said, "Oh, that's just a  
22 joke." He tried to downplay that because he knew at  
23 that point that was gonna come back to haunt him at  
24 some point. And here we are.

25 So all right. What else did we learn in trial?

1 well, we learned how to drive -- to drive a pea  
2 combine. Right? We learned that when you get up in a  
3 pea combine the steering column is up here and you sit  
4 down and the steering column drops down into your lap.

5 I'm gonna steal this chair for a second.

6 And you operate it like this. And you're  
7 probably wondering why I took the time to put us in  
8 that pea combine to take a little ride. If you  
9 remember, in Mr. McFarland's opening statement he had  
10 been talking about repetitive injury, repetitive  
11 trauma, and he talked about driving farm machinery.  
12 If MaKayla's problems with the NTOS in their mind  
13 could have been brought on by repetitive injury, the  
14 fact that she was driving a pea combine for two  
15 summers to work to pay for her own college, to pay for  
16 herself to get through college was important to them.  
17 But Mr. McFarland, he's a city guy. He don't realize  
18 that when you drive a pea-bine it's down here so you  
19 can watch what you're doing. And this (indicating),  
20 that's not gonna bother MaKayla.

21 We got to take a ride in a -- in a John Deere  
22 tractor. Actually, we didn't get to take that one out  
23 because it was all done for the season. But we got to  
24 get in the cab of a John Deere tractor and wash the  
25 windows because that was a big deal. I didn't have

1 her wax the tractor, but you heard that she'd get on  
2 top of the tractor and wax the tractor.

3 we know these girls picked rock. They -- oh, we  
4 got -- we got to -- to stack some hay. We got to  
5 pound in a fence post, which I actually like the fence  
6 post thing personally because I have -- I have images  
7 of -- of people who aren't -- aren't raised in or live  
8 in communities that we live in imagining that building  
9 fence is some hypertechnical deal and these girls are  
10 out there with the big double-headed post drivers  
11 pounding in those T-posts into that hard rock ground.

12 So when that whole big parade was going on with  
13 the fence posts it was hard for me not to chuckle  
14 inside because I knew it was a single strand electric  
15 of wire and they're using the short, collapsable posts  
16 and they take the driver and they put it on there in  
17 the soil around Moses Lake and they whack it four or  
18 five times to get the post in and they stretch the  
19 wire. That's not gonna cause a repetitive injury. It  
20 might cause them to have some pain, but it sure as  
21 heck didn't cause them to have any pain before this  
22 crash.

23 And I think that there's an expectation in our  
24 society today that if someone gets hurt they just sit  
25 on the couch and watch TV. That's a whole different

1 world than where we live. We got things to do. We  
2 got people to take care of. We're not raised like  
3 that. The cows still got to get fed. The horses  
4 still got to get taken care of. You still have your  
5 FFA project. You still have your personal  
6 responsibilities. You still have to wash your hair in  
7 the morning. You still have to dry your hair and use  
8 a curling iron. Those things don't stop because  
9 you're hurt.

10 I don't think you could get -- I don't think that  
11 Makinna Rookstool, I don't think you could chain her  
12 down and keep her from doing what she needed to do.  
13 If she had cows to feed and things to take care of and  
14 responsibilities and you tried to force her not to do  
15 that, you'd have a fight. These kids just weren't  
16 raised like that. So I don't know what they expect.  
17 Sit home and watch video games? "Play" video games?

18 The L&I standards, let's talk about the L&I  
19 standards. I don't know if I need to, but I'm going  
20 to, so...

21 Try to keep my voice here.

22 All right. So the school district is gonna  
23 accept responsibility. Right? Yep, we did 'er.  
24 we're gonna take care of ya. But we want to apply the  
25 strictest standard we can possibly find so we might

1 not have to. That's what that really boils down to.

2 I mean, imagine going shopping for experts in  
3 this case if you're an attorney and doing your  
4 research before the case, before you get to that  
5 point, and you find out that there's one basic  
6 specialty field that believes that you have to have a  
7 positive neurogenic -- a positive nerve conduction  
8 study to diagnose thoracic outlet syndrome and then  
9 finding out that the Department of Labor & Industries  
10 in 2010 based upon 2008-2009 studies decided because  
11 they were having too many poor outcomes with surgeries  
12 that they were gonna put this limitation on L&I folks  
13 so they could cut back on the surgeries. I mean,  
14 imagine that. He just hit the jackpot. Right?

15 So you go hire a neurologist. You pull out the  
16 L&I standards. You slap the insurance industry's  
17 principles and standards in the case onto it and say:  
18 well, we're good. We want to accept responsibility,  
19 but you have to jump through this hoop first. I think  
20 we've all been in that place. Right? We kind of want  
21 to accept responsibility.

22 And it all comes down to the dollar. It all  
23 comes down to the almighty dollar right. That's what  
24 it's all about. It comes down to the powerful and the  
25 powerless. And they're in the powerful position and

1 we're in the powerless position.

2 And in the workers' Comp realm it's a government  
3 run insurance company. They're in the power position.  
4 We when we need it after we've been paying into it for  
5 years are in the powerless position.

6 And you heard the doctors testifying about this.  
7 And we all know this. This isn't something I really  
8 need to beat up on; although, it irritates me. They  
9 never want to do the right thing. You're just a  
10 number. You're just treated like a number. And  
11 that's what they're doing to this family. They treat  
12 them like a number. It could be anybody. They don't  
13 care. It's about saving a dollar.

14 All right. We're gonna have to talk about money.  
15 At some point here I'm gonna have to get up the  
16 gumption to talk about money, which makes everybody  
17 uncomfortable.

18 The damages in this case are substantial. We saw  
19 them in opening statement. And I'm gonna pull them up  
20 here on the screen and we're gonna talk about them a  
21 little bit. And I'm gonna start with MaKayla because  
22 it will take a little longer to get through hers,  
23 obviously. And then we'll talk about MaKinna.

24 Now, as we're going through these damages I want  
25 you to remember that the defense has taken full

1 responsibility for what happened in this crash.

2 So the past medical expenses for MaKayla, the  
3 \$142,014.26. And this won't go back with you into the  
4 jury room, so if you want to write some of it down you  
5 can. But this -- this number right here, that's the  
6 number that, like I said, if you believe their --  
7 their defense experts and -- and their position in the  
8 case, she -- you write that on the line that says  
9 "MaKayla Rookstool" and you send her packing.

10 The rest of this, this is a range. We'll have to  
11 explain the range. This is future medical expenses  
12 and this is disputed. And why is there -- why is  
13 there this big deviation in this range? We're gonna  
14 get into that in a second. But the range starts  
15 basically -- basically -- it's basically \$500,000.  
16 That's where it starts for future care. And it ends  
17 -- I mean, I -- I rounded this up, so I'll round this  
18 down basically to a million bucks. So if you -- if  
19 you add in the past medical expenses, then our range  
20 is 640,000 to 1.2 million dollars. That's the range  
21 of damages in this case for MaKayla. So let's go  
22 through that.

23 Can you scroll down a little bit, Joel. Stop.

24 All right. So Botox injections. You heard  
25 Dr. Singh say that she's gonna need Botox injections

1 basically until she has to have the surgery or  
2 forever. But you also heard Dr. Ombrellaro say that  
3 probably at some point she's gonna have to have the  
4 surgery.

5 So the cost of the care for the Botox injections  
6 is a thousand to \$2,000 for every time that she goes.

7 Now, we -- and remember when we're talking this  
8 medical care this is -- this is just the cost of going  
9 in and getting the shot. I'm not gonna put anything  
10 before you that talks about how much it costs for her  
11 to take a day off work, drive to Seattle and back  
12 every three months for the rest of her life. This is  
13 just going in to get the shot.

14 And, you know, Botox is a thousand to \$2,000  
15 right now. She's 21 years old. That's gonna be a  
16 sweetheart deal in about 25 years.

17 So annually that's 4,000 to \$8,000. That's a  
18 lifetime of 59.61 years of 238,000 to 470,000 give or  
19 take.

20 Now, the IMS treatments, that's the needle  
21 treatments, \$280 a trip, 2,200 annually.

22 And if you remember these two, you remember when  
23 Dr. -- Dr. Schuster was on the stand, and Mr. McFarland  
24 was cross-examining Dr. Schuster and they were talking  
25 about Botox and IMS and Dr. Schuster agreed with

1 Dr. Singh that she was gonna need the Botox and the  
2 IMS. And what did Mr. McFarland ask him? He didn't  
3 ask him. He told him. It was cross-examination. You  
4 get to tell them.

5 what was the thing that was concerning on his  
6 mind? The Botox is more expensive. You guys remember  
7 that? The Botox is more expensive, isn't it? So if  
8 we can just have the IMS, that's what they want.  
9 Right? Well, actually, they don't want any of this.  
10 But if they could, that's what they would take.  
11 That's the myofascial pain syndrome stuff.

12 Physical therapy, 23,000 to \$71,000 range, that's  
13 based upon 100 to \$200 cost of care, annual range.

14 Massage therapy, 80 to \$150. These are all the  
15 numbers that Dr. Singh brought out and talked about  
16 during trial.

17 The chiropractic care is a little different. And  
18 this number is not a number that Dr. Singh brought  
19 out. This number is an agreed -- this number's agreed  
20 between the parties. And this is based upon  
21 Dr. Fraley's current charges rate. And that gives us  
22 this number.

23 Facet injections, two injections. That's peanuts  
24 compared to the rest of this stuff.

25 scroll down, Joel, please.

1           The blood injection. If she gets the blood  
2 injection that's two to 3,000 bucks.

3           And then the MRIs. The MRIs you remember are to  
4 check on the syrxinx. Let's talk about the syrxinx for  
5 a second. We're gonna talk about the facets too,  
6 but...

7           No doubt she's got the syrxinx. And you heard the  
8 doctors talk about it. The syrxinx is right in that  
9 section in the back where all the trauma was when she  
10 was bent over. And they explained to you -- our  
11 doctors explained to you that a traumatic experience  
12 -- or a traumatic induced syrxinx can be caused by the  
13 stretching or injury to the spinal cord.

14           And I love Dr. Grassbaugh. Bless his heart.  
15 What did he tell us today? And Dr. Coor just flat  
16 disagreed that you could ever have a traumatically  
17 induced syrxinx on your spinal cord without some form  
18 of paralysis or indication that there was injury to  
19 the spinal cord. And Dr. Grassbaugh, in a little  
20 different ethical position from his angle, he says the  
21 spinal cord -- want to protect your sheath around the  
22 spinal cord. And then he talks about you generally  
23 would see symptoms.

24           And remember in opening statement I told you it's  
25 like taking an extension cord and snapping it against

1 the ground and then the outside of the extension cord  
2 stretches but the inside is copper wire so it won't.  
3 That's kind of how that happens.

4 Now, do we care? All right. There's no sym--  
5 she's nonsymptomatic in the syrx. So who cares?  
6 why is it such a big deal? It just shows how much  
7 trauma there was in the wreck. You could see that in  
8 the video. So why does it matter? why do they make a  
9 big deal of it? why do they come up with every single  
10 one of the witnesses and attack the syrx?

11 And I'll tell you why. If something goes wrong  
12 with that syrx in the future, that's a big deal.  
13 That's a really big deal. You heard Dr. Grassbaugh  
14 talking about some of the symptoms. You lose control  
15 of your bowel and your bladder, partial paralysis of  
16 your lower limbs, trouble walking. Now, we haven't  
17 said that any of that is gonna happen. All we're  
18 saying is it's there. She's gonna have to get MRIs to  
19 check it.

20 And our doctors believe that it was trauma  
21 caused, which means if you're gonna accept  
22 responsibility you pay for the dang MRIs. And by  
23 rights if it was one of us here and we found out later  
24 that we had caused this accident and we had injured  
25 this girl and as she got older she had this syrx and

1 they found the syrinx and that something happened in  
2 that syrinx later on and that she got partial  
3 paralysis, she lost control of her bladder and her  
4 bowel movements, if it was one of us, if it was me I'd  
5 go over to her and say, "Okay, we're gonna take care  
6 of it."

7 That's not part of this case. We haven't brought  
8 that into this case at all. It's just about paying  
9 for the MRI to make sure that that syrinx isn't gonna  
10 cause problems. That's all.

11 Joel, scroll down.

12 Now here's where it gets a little more  
13 complicated. So surgery.

14 And trust me, when this is all over and done with  
15 we have a Special Verdict Form, there's just one line.  
16 There's one line for each one of the plaintiffs. And  
17 you don't have to figure out past, future, all that  
18 stuff.

19 So surgery in five to ten years and conservative  
20 care. So you have conservative care for five to ten  
21 years. And conservative care is the Botox, the IMS  
22 treatment, physical therapy, chiropractic care and  
23 that kind of thing. And then you have the surgery in  
24 five to ten years. This is your range of damages  
25 right here.

1           So the damages are actually lower if she has the  
2 surgery. So why doesn't she have the surgery, right?  
3           Will you put that one up, Joel.

4           Well, why not just have the surgery? MaKayla is  
5 terrified of the surgery. I would be terrified of the  
6 surgery. If it was my daughter, I would be terrified  
7 of the surgery. Mr. McFarland and I have had  
8 conversations about that surgery, and I think he feels  
9 the same way I do.

10           MR. MCFARLAND: I'm going to object, Your  
11 Honor, and ask the Court to instruct the jury to  
12 strike that comment.

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

18           Mr. Gilbert.

19           MR. GILBERT: So the point is there's no  
20 guaranteed outcome with that surgery. And all of the  
21 experts have told us that no matter what, no matter  
22 what, the best that MaKayla Rookstool will ever be is  
23 80 to 85 percent. So as long as she's rolling along  
24 at 60 to 80 percent with the conservative care,  
25 there's no reason to go under the knife. Right?

1           Now, the problem with that is we have probably  
2 collectively between -- we lost a juror, so we have  
3 13, and 14 of us here with me, we've got over a  
4 hundred years of wisdom and experience and we know  
5 that she's 21 years old right now, and as she gets  
6 older this ain't gonna get better. It's gonna get  
7 worse. And at some point she's gonna have to have  
8 that surgery even though it's a high risk procedure.  
9 We don't know when it's gonna be.

10           And when she has that procedure, remember that's  
11 part of the reason L&I put the new rules into play is  
12 because the surgery had poor outcomes. I can't  
13 remember what the numbers were. I know you guys wrote  
14 it down. The doctors said what it was. I want to say  
15 46 to 80 percent or something. I don't remember. I'm  
16 not even gonna guess. So maybe she goes and has the  
17 surgery and then after the surgery she's stuck at 60  
18 percent for the rest of her life.

19           Now, you've got more conservative care, of  
20 course. You've got physical therapy, chiropractic  
21 care and massage. That's what -- that's those  
22 numbers. That's the range of those numbers. And when  
23 we get done here I'm gonna give you one more.

24           All right. Let's look at MaKinna. All right.  
25 We've got the same deal going on here with MaKinna.

1 Right? She has \$6,482.01 for past medical expenses.  
2 And, again, the defense says that's it. If you want  
3 to go with the defense, you just send her back with a  
4 \$6,000 check and have a good day.

5 Past medical expenses today that are disputed.  
6 So these are expenses that they believe that she  
7 incurred after the crash, before the trial, they  
8 weren't reasonable and necessary and causally related  
9 to the crash. And the reason why -- and we all know  
10 this. I mean, this is the gap thing. Right? They  
11 believe that Makinna, the stuff -- the problems she's  
12 having can't possibly be related to that crash because  
13 they have this gap in treatment.

14 And I don't think I need to get into the gap in  
15 treatment. Everybody here knows what was going on  
16 with Makinna Rookstool, why she didn't treat, and when  
17 she decided to treat when that happened and why it  
18 happened and how it happened.

19 There's the question about the prior chiropractic  
20 care too. That got tossed out a couple times. That  
21 got cleared up by Todd, I think. But these were  
22 little girls. They were little. Growing pains. They  
23 go in with their mom and the chiropractor would look  
24 at them a couple times a year. She couldn't remember  
25 how many or when because she was seven years old. You

1 gonna fault her?

2           Again, it's these little chippy things through  
3 this whole process. We're gonna accept responsibility  
4 and these are great kids and they're honest and  
5 they're hardworking, and then we'll just pull a thread  
6 out at a time until the sweaters are all they way  
7 unwound and they're standing there naked and  
8 embarrassed because you've been attacking them for  
9 eight days. It's passive-aggressive. And, frankly,  
10 it's garbage. And it's part of the reason that I was  
11 angry and upset and emotional during my opening and  
12 it's part of the reason that my face is probably  
13 getting red right now.

14           Scroll down, Joel.

15           Now, MaKinna's futures. This is just based on  
16 chiropractic care for MaKinna. All right. So once a  
17 month is 516 to \$840 annually. 59.61 years, this is  
18 the annual. Two times a month, this is the number.  
19 This is based upon Dr. Fraley's numbers. And those  
20 are the numbers for the future.

21           Scroll down, Joel.

22           There's your totals, 37,240 to 106,626. Let's  
23 talk about that for a minute. So we've got a young  
24 lady who's 21 years old, this last month, I think.  
25 She was injured when she was 15. She has -- both the

1 girls have multilevel disk abnormalities after the  
2 crash. She has multilevel disk bulges in her T spine.  
3 And then down at her L-4 --

4 Actually, there's an impression of one right  
5 here, but that's not accurate, so...

6 Down at her L4-L5 between these two vertebrae  
7 here, here, here, she's got a bulging disk that  
8 impinges on the nerve root.

9 Now, we heard the doctors talk about that. And  
10 most of us probably already knew about bulging disks  
11 and how it can wax and wane because the disk is fluid  
12 and it can move and some days it can be on the nerve  
13 and some days not on the nerve, depending on rest and  
14 so on and so forth it can get worse.

15 At 15 years old Makinna Rookstool got this  
16 injury. At 21 today as she's sitting here it's not  
17 getting worse. I mean it's not getting better. It's  
18 getting worse. She's starting to feel more of the  
19 pain. It's starting to bother her more. Where do you  
20 suppose, again, with our hundred plus years of wisdom,  
21 where is she gonna be when she's 50?

22 Those are -- those are Makinna's numbers.

23 All right. And then we have -- we have Clark.

24 You can put the lights on.

25 You know, 10-year-old, 11-year-old little boys,

1 they're not -- they're not supposed to have nightmares  
2 about their friend's scalp hanging down off their  
3 head, blood all over themselves. They're not supposed  
4 to have to sleep with their mom for months because of  
5 the nightmares, the terrors. He still sleeps with his  
6 dog. He still has anxiety when he drives.

7 And I -- I feel terrible for Donna Eaton. You  
8 know, she has post-traumatic stress. I said post-  
9 traumatic stress disorder. She said, well, it's  
10 post-traumatic stress; she doesn't drive anymore,  
11 doesn't drive bus anymore.

12 I want you to think about that when you're  
13 thinking about Clark. This ain't over for him. The  
14 nightmares might be gone, but that anxiety is always  
15 gonna hang there. I don't know what the value of  
16 something like that is. I'm gonna give you a number  
17 in the end. But I can tell you this, a little boy  
18 like that dang sure shouldn't have to go through this.

19 Then we've got Todd and Shawna. Now, the jury  
20 instruction you've got tells you that you can award  
21 them damage for emotional pain and suffering.

22 Joel, can you fast forward. I want to make sure  
23 I get it right.

24 "Such amount as is just under all the  
25 circumstances for loss of love and companionship of

1 the child and injury to or destruction of the  
2 parent-child relationship."

3 So what does that mean? That means all of the  
4 emotional stress and mental anguish and everything  
5 that came with this crash and being a parent. That's  
6 part of "accepting responsibility".

7 All right. I'm blessed. I can't even imagine.  
8 Todd said the last five years have been hell. He's  
9 fortunate. He's got his children. We're all  
10 fortunate that none of these children were killed in  
11 this crash. That's a blessing. It doesn't take away  
12 from some of the loss that they've experienced, the  
13 kids; the loss of some of the enjoyment that they  
14 would have had when these kids were going through high  
15 school, go on more trips and do things like that.

16 And these kids didn't stop living. That's why  
17 the defense has given you 200 photos to look at. And  
18 I didn't object to any of that. Again, I think that's  
19 what they expect is if you're hurt, you know, you're  
20 just gonna stop living and go play video games.

21 But Todd and Shawna have been through hell with  
22 this. They really have. And that's compensable. And  
23 I'm gonna put a number on that too.

24 Before I get to the numbers, I expect that when  
25 Mr. McFarland gets up here --

1           And I have a great deal of respect for him. He's  
2 a great lawyer. And he's a friend of mine.

3           -- that he's going to talk about the same things  
4 he talked about in opening statement. He's gonna lay  
5 out all of the times in the trial that MaKinna did  
6 this and MaKinna did that or didn't do this or the  
7 treatment records said this or didn't say this.

8           I will point out one thing in that respect. We  
9 have banker's boxes of medical records. How many of  
10 those medical records were used by the defendant at  
11 trial? They go through the medical records and they  
12 cherry pick out things and they want you to look at  
13 one sentence, one piece of one paragraph. They don't  
14 want you to look at the forest and see all the trees  
15 that have been chopped down to make all that paper and  
16 all the doctor's visits. They don't want you to look  
17 at that. They want you to look at the bits and pieces  
18 that they think comport with their case. Now, I  
19 understand that. But this case is bigger than that.  
20 And he's gonna talk about some of that.

21           Let's talk about some of the other things he's  
22 gonna tell you. We got the employment application.  
23 Right? Regarding the employment application, the  
24 girls said their lower back -- or I don't even  
25 remember, but there was some deviation between: well,

1 she didn't say it was her thoracic that day; it was  
2 her lumber, or whatever.

3 And then there were times she'd go in to the  
4 doctor: well, you didn't complain about your back.

5 well, that's because my jaw hurt so bad that I  
6 couldn't chew, I couldn't talk, I couldn't open it.  
7 When I went in to the doctor I wasn't thinking about  
8 my back. I wasn't thinking about my shoulder or my  
9 hands.

10 If anybody's ever had a toothache, my goodness.  
11 For 18 months they spent most of their time trying to  
12 figure out what was wrong with her so she could sleep  
13 at night, so she could talk and not have her jaw  
14 quivering like this and so she could eat. And then  
15 they wonder why after that period of time when this  
16 gets taken care of the rest of the stuff starts to  
17 come out. I mean, it goes back to the old adage.  
18 Right? Oh, my hand hurts. well, let me kick you in  
19 the knee real hard and then you'll stop thinking about  
20 your hand.

21 The brain only has the capacity to manage one  
22 emergency at a time if it's a bad emergency. And that  
23 was a bad emergency. That's where all the pain was  
24 coming from. But they want a discount for that.

25 The district wants a discount on their

1 responsibility because the girls didn't always report  
2 all of their symptoms when they went to the doctor.  
3 They want a discount because MaKinna is a tough girl  
4 who recognized the stress on her mother and the family  
5 and recognized that her sister was hurting and needed  
6 the care and didn't go to the doctor. They want a  
7 discount for that.

8 They want a discount because these kids are hard  
9 working farm kids. They want a discount because  
10 MaKayla exercised in school. They want a discount  
11 because after this wreck these kids are still seen in  
12 photos smiling and acting -- you know, just having a  
13 good time. They want a discount because Clark's not  
14 having nightmares anymore. They want a discount  
15 because the girls pound posts. They want a discount  
16 because the girls can still ride their horses;  
17 although they can't trot and do some of the things  
18 they would normally do. They want all these  
19 discounts.

20 well, I wonder if the shoe were on the other  
21 foot. Let's say Kayla and MaKinna, they're bringing a  
22 load of cows into town, the truck jumps the curb with  
23 the trailer on it and they crash into the side of the  
24 district building. And they do 10 million dollars of  
25 damage to the district building.

1           And they get together and they get some of the  
2 local contractors and say, "Oh, we're gonna" -- and  
3 tell the school district "We're gonna take care of it.  
4 we're gonna take responsibility." And they get  
5 together and they get some of the local contractors  
6 that are kind of shifty or, you know, they're gonna  
7 figure out a way to do this on the cheap. You know,  
8 it's a 10 million dollar price tag here, but we can  
9 get 'er done for five if we do this, this and this.  
10 And let's do that.

11           And they put this school building back together  
12 and they put it up and they got all the brick and  
13 mortar in place and it's beautiful. It's beautiful  
14 (indicating). And the school district, they're all  
15 excited they got their building back.

16           And they go inside and they walk over and turn  
17 the lights on. The lights flicker. And they're  
18 sitting at the computer and all of a sudden the  
19 computers will all go down because the internet's not  
20 working right. Go in the bathroom; the toilets are  
21 backing up. The drinking fountain is not working  
22 properly. The plumbing is not working. The  
23 electrical is trash. The paint's cheap.

24           All of the things that you can't see that's  
25 inside the walls that they did on the cheap to save

1 the five million dollars, what do you suppose the  
2 school district would do about that? Do you suppose  
3 that they'd give Makinna and Makayla a discount?

4 They'd want every damn penny. And they'd chase  
5 them and they'd chase them and they'd hound them and  
6 they'd hound them until they got every damn penny,  
7 until that school was just like it was before they ran  
8 into it with that truck, until all the wiring was  
9 working perfectly, until all the plumbing was working  
10 perfectly, until the structure was perfect. They  
11 wouldn't give Makinna and Makayla a discount.

12 I think the verdict forms for Todd and Shawna are  
13 separate. I don't see them that way (indicating).

14 Now, I've given a lot of thought to this part of  
15 this case. Indeed. I told you at the beginning of  
16 this case I was gonna ask (inaudible). And I asked  
17 you if you thought I was here -- I wouldn't be here if  
18 I didn't have a good reason. And I think now you  
19 understand that I have a good reason to be here.

20 Now, it's always hard because -- I would give  
21 these girls everything I have if they could have their  
22 health back. My fear is always if I put numbers up  
23 there that are too high that you punish my client. If  
24 I put numbers up there that are too low, then you're  
25 angry with me. It's kind of a no-win situation.

1 I was thinking about this last night. I was up.  
2 Since this last Friday I haven't been sleeping very  
3 well and I've been trying to think about this.

4 And I think if you could all just close your eyes  
5 for me for a minute. I'm 21 years old. My name is  
6 MaKayla Rookstool. And when I was 15 years old I was  
7 involved in a bad bus crash. Now I've got permanent  
8 injuries. They tell me that I'm gonna have these  
9 injuries for the rest of my life. And it's scary.  
10 They tell me that I'm gonna have to have surgery at  
11 some point, that I may never ever be better than 80  
12 percent of how I was before. And that scares me.

13 I'm afraid that when I have children I won't be  
14 able to do the things that I want to do with my  
15 children. And I'm afraid that I'm gonna become a  
16 burden to whoever I find that will accept me as I am  
17 with my disabilities. And I'm afraid that as I get  
18 older and this gets worse that I won't be able to care  
19 for my parents when they need me. And I'm afraid that  
20 I won't be able to be there for my sister when she has  
21 children.

22 And I'm afraid that at some point the pain is  
23 gonna become overwhelming and as I age it's gonna  
24 degenerate and it's just gonna get worse and worse and  
25 worse. And I'm scared.

1           That's where MaKinna Rookstool is at right now.  
2           That's where MaKayla Rookstool is at right now.  
3           That's where that family is at right now.

4           I thought about 10 million dollars in this case,  
5           seriously. But I thought if I put 10 million dollars  
6           up there, I'm gonna get punished. But I dang sure  
7           think that this case as a whole, this family, what's  
8           happened to them, what the district's put them through  
9           with accepting responsibility is worth five million  
10          dollars. Now, I'll just put that up. I don't know.  
11          I don't care. I'd just as soon have one million.  
12          These people will take care of themselves as long as  
13          we help take care of them and then we take care of us.

14          And if we step back just a second to that -- to  
15          that damaged school. You know what the difference is  
16          between the school district and the Rookstools? If  
17          those kids did that to that school, they would be  
18          standing there with their hats in their hands and they  
19          would take their entire savings and they would work  
20          every day until that school was put back together just  
21          like it was before they broke it. That's the  
22          difference.

23          Four million dollars for MaKayla Rookstool.  
24          She's gonna live her whole life where she's at. It's  
25          not gonna get any better. She's gonna do this

1 (indicating). And pretty soon she's just gonna go  
2 deeper and deeper. Now, we've got our battle scars,  
3 all of us. Most of us earned them. That's not how  
4 she got hers. She's lost a lot of opportunity because  
5 of that crash.

6 And as I sit here and I look at 59 years and I  
7 think about that mountain, that burden, all that stuff  
8 in front of me, if you asked me to trade places with  
9 MaKinna Roo-- or MaKayla Rookstool and you say you'd  
10 give me four million dollars, I'd tell you to pound  
11 sand.

12 And MaKinna is in a little different situation.  
13 We don't know what's gonna happen with her. We know  
14 it's gonna continue to degenerate. We know she's  
15 always going to have problems with her back. Her  
16 damages are a lot lower because she didn't require the  
17 treatment. She didn't have the jaw problem, she  
18 doesn't have the thoracic outlet syndrome, some of  
19 those things. She's just got the back of a  
20 70-year-old construction worker, and she's 21 years  
21 old. What's that worth? I don't know.

22 I kind of -- I limited myself to five million  
23 dollars, so I can't put a seven-figure number up  
24 there. So let's do this. \$750,000. And she'd hand  
25 it all back to you with dividends, this girl would, if

1 you'd give her a clean bill of health.

2 Clark. This one scares me. And it scares me  
3 because we can't see his injury. It's near my heart.  
4 If I could take that all away from him, what he went  
5 through and what he still has and packs around, I  
6 would. I can't.

7 If I put a great big number right there that --  
8 if he was my son and I put a value on that, it's a  
9 dang sure thing that what he went through and what  
10 he's gone through with his sisters and with his  
11 parents is worth \$50,000.

12 And I -- and I feel uncomfortable with that  
13 number because I love the kid. But he doesn't have a  
14 bone sticking out in his leg. He doesn't have a spine  
15 like a 70-year-old construction worker. He doesn't  
16 have thoracic outlet syndrome. What he's got is  
17 trapped up here and we can't see it.

18 And I want you to know right now before I go to  
19 Todd and Shawna that these numbers, these numbers come  
20 from my scary place. And you can make any one of  
21 those numbers as high as you want to make them.

22 So I said five million. What's that leave me?

23 UNIDENTIFIED JUROR: 200.

24 MR. GILBERT: Thank you.

25 \$200,000 for Todd and Shawna. That's another

1 number that comes from my scary place. Because they  
2 weren't in the crash. They weren't even there. They  
3 were at home. They got the phone call. Can you  
4 imagine the phone call? But that's not -- that's not  
5 the big -- the panic of it when you find out your kid  
6 is hurt, they crashed or whatever. That's just the  
7 beginning.

8 This thing started out as a little snowball at  
9 the top of the mountain and as it tumbled down it just  
10 got bigger and bigger and bigger and it took all the  
11 snow with it and pretty soon it was an avalanche and  
12 here we are. And we shouldn't be here. But that  
13 family got buried in all that snow.

14 And we heard Shawna. Shawna has got MS. Stress  
15 triggers seizures and migraine headaches. We heard  
16 that testimony. MaKayla said that. MaKayla said, "My  
17 mom has health issues." You remember that?

18 She doesn't want sympathy. This family doesn't  
19 want sympathy. But it's took its toll on Shawna,  
20 which means it took its toll on the entire family.  
21 Mom's the rock. Mom's the centerpiece of the family.  
22 She's the one that's up in the middle of the night  
23 with the little boy that's crying. She's the one  
24 that's keeping everything together, giving the  
25 lunches, giving the breakfast, trying to figure out

1 what's going on all the time. And Dad's working.

2 And all this added stress of wondering what --  
3 how to fix your daughter. Can you imagine your  
4 daughter's in constant pain. Can't chew. The doctors  
5 can't figure out what's wrong with her. All the added  
6 stress from that.

7 And then the expense. This family isn't a rich  
8 farming and ranching family. They only own 20 head of  
9 cows. Todd works his ass off. He goes to work at his  
10 job and then he comes home and works some more. They  
11 live paycheck to paycheck.

12 And to put five years of this stress on top of  
13 it, it ain't right and it ain't fair. And it had a  
14 traumatic impact on Shawna, and Todd. Todd likes to  
15 be the tough guy. I didn't get to see it, but I -- I  
16 heard about it. I heard that when MaKinna was up  
17 there testifying that for the first time ever in the  
18 history of the family that Todd broke down back there.  
19 And maybe all of you saw it. I didn't.

20 So he can come up there and he can be the tough  
21 guy and he can be the guy that takes care of business,  
22 but this has taken its toll on Todd too. And I think  
23 \$200,000 -- I mean, again, that number comes from my  
24 scary place.

25 Now, Mr. McFarland is gonna get an opportunity to

1 talk to you and present their side of the case. And  
2 just remember really it just comes down to a choice.  
3 Right? You either believe them and what their defense  
4 doctors had to say and you give the girls their past  
5 medical expenses and you send them packing, or you  
6 believe us and you take care of these people.

7 They're part of our community. They represent  
8 our community just as we do and we will in this  
9 decision, because we really are the conscience of the  
10 community. You're the conscience of the community  
11 here as you sit in that box.

12 And you remember when I talked about the  
13 McDonald's case? Do you remember that came up during  
14 jury selection? Somebody said: Oh, that was -- that  
15 McDonald's case and the big damages. And there was  
16 one juror that said, "That woman was really hurt bad."  
17 And do you remember I said, "I know the lawyer that  
18 tried that case and I know the facts of that case?"  
19 And I told you all, "would you agree with me that the  
20 only people that really know what happened in that  
21 case were the people in the box?" Do you remember  
22 when I said that? This is the box (indicating).

23 So when you walk out of here today and you make  
24 your decision, you make your award and you give them  
25 ten billion dollars -- I don't care what the number

1 is -- and somebody walks up to you and says, "How  
2 could you possibly have awarded that family that  
3 amount of money?", imagine what one of those  
4 McDonald's jurors would have said to that person on  
5 the street. "You have no idea. You have no idea.  
6 And if I could have or I would have or I should have,  
7 maybe I should have given a little bit more."

8 But we're only gonna get one opportunity here.  
9 This is it. We're gonna live with this decision for  
10 the rest of our lives, all of us. The Rookstools are  
11 gonna live with it. You're gonna live with it. I'm  
12 gonna live with it.

13 To the defense it's just a number. It's what  
14 they do. On to the next one. The people that are  
15 making the decisions in this case, they don't know  
16 this family. Five years. Five years. And if you  
17 remember when I had the district representative up on  
18 the stand, five years, not a phone call, not a card,  
19 nothing.

20 Five million dollars, and you can split it up  
21 however you want to split it up. That's my number.

22 I'm gonna sit down and shut up and let  
23 Mr. McFarland talk to you. Thank you very much for  
24 being patient with me. And I'm gonna get an  
25 opportunity to talk to you briefly before we cut you

1 loose. Thank you.

2 THE COURT: Thank you, Mr. Gilbert.

3 We're gonna take our 15-minute break at this  
4 point and then come back and allow Mr. McFarland to  
5 put on his closing argument. So let's be in recess  
6 for about 15 minutes.

7 THE BAILIFF: Five after 2:00?

8 THE COURT: Yes, by this clock. I don't  
9 know what it is inside there. But by this clock.  
10

11 (JURY ABSENT.)

12

13 THE COURT: Okay. So we'll be back in about  
14 15 minutes. By this watch, we're starting at 2:05.  
15 Thank you.

16 (RECESS TAKEN.)

17

18 THE COURT: Okay. Thank you, everyone.  
19 Are we ready to go?

20 THE BAILIFF: Ready.

21 THE COURT: Okay. Let's bring them in.  
22

23

24 (JURY PRESENT.)

25

THE COURT: Okay. Thank you, everyone. The

1 THE COURT: Sorry.

2 THE COURT REPORTER: I started somewhere in  
3 there.

4 THE COURT: You had asked me. I apologize.  
5 I realize I didn't answer. And I apologize.

6 And just by way of reference, Mr. McFarland, I've  
7 had it done in other trials. It wasn't an issue. And  
8 I don't think it was an issue on appeal, quite  
9 frankly.

10 MR. GILBERT: (Indicating.)

11 MR. MCFARLAND: Oh, I'm with you.

12 THE COURT: Okay.

13

14 (JURY PRESENT.)

15

16 THE COURT: Okay. Thank you, Everyone. And  
17 as I indicated, Mr. Gilbert will now be giving his  
18 final rebuttal closing argument. If you'll please  
19 give your attention to Mr. Gilbert.

20 MR. GILBERT: Thank you very much. I'll try  
21 to make this short, but I am a lawyer.

22 Before I begin I wanted to thank Kristine and  
23 Joel, Ashley, my law partner back there. I couldn't  
24 -- there's no way I could do what I do without their  
25 help. And -- and the hurricane here is amazing at

1 working a case up. So I wanted to give them some --  
2 some kudos before I started.

3 First of all, what's a physiatrist? Mr. McFarland  
4 told you the physiatrist is a pain doctor and he wants  
5 to give shots. A physiatrist is a -- is a  
6 rehabilitation doctor, a physical medicine  
7 rehabilitation doctor. And he works with patients  
8 with spine disorders, brain disorders, spinal cord  
9 injuries, nerve injuries, joints, ligaments, the  
10 gamut. Their job basically is to work on a human  
11 being's function and functionality. Pain's part of  
12 that. So I wanted to clarify that.

13 I don't want to go too much into the medicine  
14 because you guys have had it up over your heads with  
15 the medicine and your minds were made up before we  
16 started arguing up here in that regard anyway.

17 But I want to talk about a couple things because  
18 remember Mr. McFarland said to you that if he got up  
19 in his closing and he said anything that wasn't  
20 accurate that you were to disregard it. And there's  
21 a couple things that I want to talk about.

22 First I want to talk about Dr. Coor. If you  
23 remember when Dr. Coor was on the stand one of the  
24 first things that Dr. Coor said was MaKayla's treating  
25 providers, Dr. Singh, Dr. Ombrellaro and basically

1 Dr. Schuster, show a fundamental lack of knowledge in  
2 this area for them to diagnose her with neurogenic  
3 thoracic outlet syndrome. Do you remember him saying  
4 that? That's what he said. The two guys in the room  
5 that didn't have to do 16 hours of research that know  
6 this stuff that were probably part of the research  
7 that he was reviewing have a fundamental lack of  
8 knowledge.

9 Dr. Schuster, one of the top sports medicine guys  
10 in the Northwest, he's good enough for the FBI, he's  
11 good enough for the Seattle Seahawks, I think he's  
12 good enough to help work on MaKayla Rookstool and  
13 MaKinna Rookstool.

14 Now, we also heard some -- a couple misdirection  
15 plays here. I'll start with Dr. Ombrellaro. As soon  
16 as I find it. There we go. All right.

17 Mr. McFarland had told you that Dr. Ombrellaro  
18 when asked about symptoms in the first two years that  
19 would give him any indication that there was any  
20 thoracic outlet syndrome, he said he cornered him on  
21 -- in respect to that if there wasn't any symptoms  
22 initially within the six -- first -- well, I'll -- I'm  
23 just gonna read it to you here.

24 (As read): So "you would be hard pressed to  
25 causally relate a trauma if there were no symptoms in

1 the first 12 months, yes?"

2 "Yeah." His answer, "Yeah. Again, I also said  
3 typically 12 months completely no symptoms, yeah."

4 And then he goes on to say, "But that's a little  
5 more aggressive than what the vascular literature  
6 says. There's some documentation of two years plus,  
7 so but for me and what I see, I would say completely  
8 no symptoms, you know, being evaluated by people who  
9 would recognize symptoms for what they are and under  
10 the circumstances, no symptoms."

11 Being recognized as symptoms by someone who would  
12 recognize the symptoms, no symptoms.

13 Mr. McFarland asked him "So my question to you  
14 now is where in the first year after this accident" --  
15 "where in the first year after this bus accident did  
16 Makayla Rookstool present with any neurologic  
17 symptomatology in her hand or right arm?"

18 "Okay. So under the ER trauma visit from the  
19 accident, right arm numbness, elbow numbness,  
20 tenderness, guarding rebound. That's in her abdomen.  
21 Midthoracic" -- "Mid"-- "Midcervical point  
22 tenderness."

23 Mr. McFarland: "Remember my question, Doctor."

24 "Okay. So that's one. I'll get to some other  
25 ones here."

1           If you remember this trans-- this thing was going  
2 on and the doctor was on top of the record. He was  
3 like "I'll get you another one. You want another  
4 one." That's the way it went down.

5           On 3-13, 2012, the family doctor -- and who is  
6 that? That's Dr. Hemmerling. Mr. McFarland  
7 represented to you that we're talking about a dentist,  
8 the fasciculations in the jaw. It wasn't. It was the  
9 family doctor.

10           And what he was saying, what the family doctor  
11 says on 3-13-12: Range of motion is limited in the  
12 wrist, the hand and elbow, (as read): "So not  
13 specifically right or left. Those would all be  
14 consistent with potentially neurogenic numbness,  
15 tingling, pain. It's not described well, so we can't  
16 say yes, we can't say no, but, again, consistent."

17           "Again, part of it's contingent on a doctor who  
18 can identify and describe it. This is a family doc  
19 evaluation. It's not a detailed neurologic exam. But  
20 could that be within the window of fitting your  
21 criteria? It could. Okay." And then he goes on.

22           Okay. The point here is that, yeah,  
23 Dr. Ombrellaro looked at the records. And what he's  
24 telling us is: Look, it's been five years. The first  
25 two years you're saying she had no symptoms. No one

1 saw her in the first two years that would have had any  
2 idea what they're looking at.

3 And this takes me to the myofascial pain comment,  
4 "very common". Do you remember that? Mr. McFarland  
5 said it's "very common". If it's so dang common, why  
6 did it take five years for some of the best people in  
7 the business to figure it out? This is not myofascial  
8 pain syndrome. Myofascial pain syndrome is pain here,  
9 pain here, pain (indicating).

10 This, this (indicating), the compression, the  
11 numbness, the tingling, this (indicating) is  
12 neurogenic thoracic outlet syndrome.

13 At the beginning of his closing Mr. McFarland  
14 talked about Dr. Grassbaugh. And he said, "I don't  
15 know why they talked about Dr. Grassbaugh giving up  
16 his position in respect to NTOS. He didn't talk about  
17 NTOS." So I went and looked, and there were 47  
18 pages --

19 I mean, I thought I -- I thought I was -- there  
20 was something wrong with me. I sat here this morning  
21 and I listened to the deposition, the perpetuation  
22 testimony, and I listened to it yesterday, and I  
23 thought: I know I'm going deaf and I know I'm not  
24 that smart, but I can't be that stupid. So I went and  
25 looked. 47 pages of that deposition transcript

1 comprises of discussions about neurogenic thoracic  
2 outlet syndrome.

3           So to dodge that bullet we'll just come up and  
4 say, "well, he didn't really talk about neurogenic  
5 thoracic outlet syndrome." Yeah, he did. Yeah, he  
6 did. He tried to express all kinds of opinions about  
7 that. It might not have been his idea. It might have  
8 been counsel's idea. But in the end when Ms. Grelish  
9 cornered him he said: "You know what? This is kind  
10 of out of my league. It's not my cup of tea."

11           I'm gonna go through this from back to front  
12 because it's easier for me.

13           Some more about Dr. Coor. If you remember what  
14 the last question was that I asked him, I got him  
15 talking about what's called a care conference, a care  
16 consult. And remember, again, he acted like he didn't  
17 know what it was. And I said it's when you have a  
18 bunch of specialists and you have a patient and they  
19 can't figure out what it is so they ask for a care  
20 consult and everybody gets together to discuss it and  
21 see if they can figure it out. Remember that? He  
22 said, "Oh, yeah, I know what that is."

23           And then I said, "Okay. well, in this situation,  
24 this scenario here, you said you like to do a full  
25 history. And Shawna Rookstool was at the IME", at the

1 defense medical exam. "Did you talk to Shawna  
2 Rookstool about any of the history?"

3 "No."

4 "Well, if you would have talked to Shawna  
5 Rookstool about any of the history you would have  
6 found out that MaKayla does have a history of dropping  
7 things."

8 "But you didn't know that?"

9 "No, I didn't know that."

10 And if we had a case consult and you went and you  
11 sat down with Dr. Ombrellaro and with Dr. Singh, do  
12 you suppose you might change your mind, you might  
13 change your opinion?"

14 Do you remember when I (sic) first got up there I  
15 asked him "There's nothing I could say here or show  
16 you here today unless I showed you a positive nerve  
17 conduction study that would change your mind?" And he  
18 said, "Yes."

19 And the last question I asked him was "If you sat  
20 down with Dr. Singh and Dr. Ombrellaro and you talked  
21 about this case, do you suppose you might change your  
22 mind?" And he said, "Yes, perhaps. But maybe they  
23 would too."

24 what happened to the positive nerve conduction  
25 study, the requirement for that? And what happened to

1 that in closing? In opening statement that was the  
2 case. And now there's all these other things because  
3 that went bye-bye during the case. Right?

4 And as a lawyer, this one troubled me a little  
5 bit. Mr. McFarland commented to you that "You  
6 remember when I was asking Dr. Ombrellaro and  
7 Dr. Singh and I would point out to them literature and  
8 they would say 'No, I don't know that literature' or  
9 'No, I don't know that and I wouldn't agree with  
10 that.'" And he told you that -- that -- that they  
11 didn't even recognize the literature. And he tried to  
12 use that to establish credibility with Dr. Coor for  
13 why he had to go out and do 16 hours of research at  
14 whatever it was an hour.

15 The reason that they didn't recognize the  
16 literature and they didn't recognize the issue --

17 Dr. Ombrellaro said -- told you this in his  
18 deposition, or in his perpetuation testimony.

19 -- is because it's outdated. It's old medicine.  
20 It's not accurate. It's not what they see.

21 And of all the people in the room, who is  
22 published on -- on neurogenic thoracic outlet  
23 syndrome? I feel like I'm beating a dead horse. And  
24 I -- I know you guys got this and one way or the other  
25 nobody is gonna change your mind, but it irritates me

1 that you bring in the -- two of the best guys in the  
2 region and they bring in a neurologist who -- who  
3 doesn't even -- who tries to do a parlor trick to  
4 convince somebody that -- that there's hand weakness,  
5 but the two best guys -- two of the best doctors in  
6 the region on the subject are somehow flawed and  
7 didn't get it right.

8 Let's -- let's talk about the -- the block. I  
9 want to talk about that, the -- the -- the scalene  
10 block. There's been a lot of talk about the scalene  
11 block. That's a red herring. And I'll tell you why.  
12 The scalene muscles are right here (indicating). When  
13 they do that block they put a little "X" right here,  
14 and that injection goes right here into the muscle  
15 with the lidocaine. Yeah. Right?

16 where is the myofascial trigger point? The  
17 myofascial trigger point that they've alleged in this  
18 case --

19 Defendant's Exhibit...

20

21 (SOTTO VOCE COMMENTS HEARD.)

22

23 MR. GILBERT: It's back here (indicating).  
24 And you see how far over on the shoulder blade they  
25 put that.

1           The fasciculations, that's this with the jaw  
2           (indicating). When I asked Dr. Coor about that --  
3           remember Dr. Coor had testified "I reviewed all of the  
4           medical records, very thoroughly, because I care about  
5           this case. This case is a big deal." And he said  
6           there were no records anywhere of any fasciculations.  
7           And I don't even know if I'm saying that word right.  
8           But what it is -- is the uncontrollable vibration of  
9           the muscle. And this was in MaKayla's jaw.

10           So I took it up and showed him the record. I  
11           said, "well, you said you didn't see any. Here you  
12           go. Here's an example of one you missed."

13           Because that's cherry picking. Right? I can do  
14           that all day long. I can go through the records and  
15           find a sentence or a place just like the -- the  
16           defense did.

17           But what Dr. Singh found was that this muscle,  
18           the scalene muscle, the reason he did that block is  
19           because that muscle was spasming and that's what was  
20           causing the lights to flicker on and off (indicating).  
21           So when he put the lidocaine in, the muscle stopped  
22           spasming and the lights went on.

23           Now, Dr. Coor says that's impossible. That can't  
24           happen. But let's look and see what Dr. Grassbaugh  
25           says. If I didn't close it.

1           So Ms. Grelish, if you recall, is questioning him  
2 about what will show up on an EMG study because  
3 they're still wrestling over this EMG deal. And the  
4 question is (as read): The nerve damage that shows up  
5 on an EMG is advanced nerve damage, right?"

6           Dr. Grassbaugh: "I don't think I would  
7 necessarily agree with that."

8           Ms. Grelish: "Do you agree it doesn't pick up  
9 intermittent nerve compression unless it's  
10 intermittently compressing at the time that the study  
11 is done?"

12           "That sounds -- that sounds accurate."

13           So what does that mean? If it's compressing on  
14 the nerve at the time, if the radio frequency waves  
15 that go through there when they're checking the nerve  
16 go through it when it's compressing, it's gonna pick  
17 it up. If it's not, it's not gonna pick it up. If  
18 it's compressing at the time, you're gonna be  
19 symptomatic. If it's not, you're not. That's the  
20 spasms. That's the compression/not compression,  
21 compression/not compression.

22           That's why right now she can stay at 80 percent,  
23 85 percent with treatment with the Botox that helps  
24 her relax and paralyzes those muscles, as Dr. Singh  
25 told you. And at some point if she deteriorates she

1 may get worse because it waxes and wanes.

2           And what Dr. Coor was talking about, if you  
3 remember, he was careful, at the very beginning of his  
4 testimony he told you "You have to make a choice." Do  
5 you guys remember that? "You have to make a choice."  
6 You have to make a choice whether or not you're going  
7 to believe that this is true neurogenic thoracic  
8 outlet syndrome or something else. And "something  
9 else" could be vascular thoracic outlet syndrome,  
10 regular thoracic outlet syndrome, whatever the things  
11 are that are in there.

12           You heard Dr. Ombrellaro say that's old  
13 terminology, old language; it's just TOS.

14           But he said that because if you make that choice  
15 and you go down that road where it has to be true  
16 neurogenic thoracic outlet syndrome, then you have to  
17 have a positive nerve conduction study to have  
18 neurogenic thoracic outlet syndrome. And the way you  
19 have a positive study is either you'll catch it when  
20 it's compressing or you've got a latent stage of  
21 thoracic outlet syndrome where the nerve is compressed  
22 to the point where you don't -- you no longer have  
23 that fasciculation. You don't have this anymore, you  
24 don't have this anymore (indicating). You got this  
25 (indicating).

1           He's safe. He's -- he's in his safety zone. The  
2 neurologists say this, we go down this road, this is  
3 what it is.

4           And they want MaKayla to take a break. As -- I  
5 mean, as Dr. Ombrellaro said, I think she's taken a  
6 break. I mean, how long are you gonna wait? It's  
7 been five years now. What kind of a break do you  
8 want?

9           Botox. The Botox comment about Dr. Singh. Yes,  
10 patients love him. And what has MaKayla told you  
11 about the Botox injections? They're helping her get  
12 better. The first one helped her marginally. The  
13 second one helped her more. We don't know what's  
14 gonna happen with the third one. But that in  
15 conjunction with the other treatment, she's getting  
16 better. She's able to lift her hands above her head.  
17 She's able to do more 80 percent she said the last  
18 time and how it wears off over time.

19           She also told you it hurts like Hades when you  
20 get one of those shots. The first couple days it's  
21 miserable. And the first couple days after you get  
22 the IMS treatments it's miserable and then it gets  
23 better. And when it gets better, it gets a lot  
24 better.

25           I got the impression that -- that -- that what we

1 were pushing for there on the defense was you stick  
2 the Botox in and, boom, you're better; it's magic.  
3 That's a lidocaine block. That's not Botox. And the  
4 lidocaine block wears off because it's a temporary  
5 fix.

6           Catching the dystonia and the scalene. And the  
7 reason that Dr. Singh is the only one that testified  
8 about that or that says that it's there and all these  
9 other doctors, as counsel stated, nobody else caught  
10 it, is nobody else checked. Nobody ever did a scalene  
11 block. Dr. Singh was the first one to do the scalene  
12 block. Slight of hand; smoke and mirrors.

13           In respect to the facet injury and Makayla, they  
14 talked about the -- it was Dr. Singh. Dr. Singh  
15 believes that the facet injury is part of the reason  
16 for the pain that she's having in her back below her  
17 shoulder blade, or her shoulder -- excuse me -- that  
18 she's showed you. They say it's trigger point. He  
19 explained to you I believe in his testimony that the  
20 -- it wasn't -- I don't believe it -- he didn't say it  
21 was right on the spine. It was off to the spine, but  
22 it's still within that dynamic area. And he talked  
23 about how far it is from the spine and that it's all  
24 interrelated in there. That was his testimony.

25           And you're gonna -- I mean, again, you're gonna

1 believe Dr. Coor and Dr. Grassbaugh or you're gonna  
2 believe Dr. Singh and Dr. Ombrellaro. But I feel like  
3 these guys are professionals and they're the best in  
4 the business, and if I don't get back up here and  
5 point this stuff out then I'm gonna struggling with  
6 that myself.

7 And there was a representation that Dr. Singh was  
8 -- was paid as an expert in this case. We paid him  
9 for his time to review all of the medical records. We  
10 didn't pay him as an expert. He's a treater. But he  
11 was paid.

12 We paid Dr. Ombrellaro too. We paid  
13 Dr. Ombrellaro I don't know how much. But that comes  
14 in through the hospital. We have to pay for his time  
15 that we take him away from the operating room. And  
16 it's a lot.

17 Dr. Schuster, as I said, started out as a -- as  
18 an expert. I wanted to know. I had a young girl who  
19 nobody could figure out what was going on, so I  
20 reached into my book and I pulled out the guy that I  
21 would go to if I had something like that going on.  
22 And I called him and I said, "Doc, we have a problem.  
23 will you look at this?"

24 Now, traditionally he would be an expert. But  
25 experts don't refer patients out for treatment. And

1 he started treating her. Not actively. He sent her  
2 on to the people who could take care of her. And that  
3 was the first time -- that was the first time since  
4 the accident that MaKayla Rookstool got in the hands  
5 of someone that recognized what was going on. And  
6 it's no fault of any of the other doctors. They just  
7 didn't recognize what was going on.

8 Now, the million dollar test. How do we get  
9 around that? Well, we get around that by saying:  
10 "well, the doctor checked this too." Don't forget  
11 about that. (Indicating.) It doesn't take away from  
12 the fact that it was a parlor trick and that if I  
13 wouldn't have caught it, it would have been like  
14 driving a nail.

15 In regard to the facet injury with Kinna,  
16 Dr. Schuster believes she's got a facet injury. I  
17 don't even remember now who in the -- in the medicine  
18 in the case said she did or didn't have one. I know  
19 that Dr. Schuster testified apparently that she did.  
20 I don't even -- I don't even know what to tell you  
21 with that because I don't -- I don't know the  
22 medicine. I don't know.

23 If Dr. Schuster testified to that, that she's got  
24 a facet injury, and Dr. Grassbaugh or somebody else,  
25 Dr. Singh, whoever, testified she doesn't have a facet

1 injury, then she needs to follow up to see if she's  
2 got a facet injury. Right? We keep going until we  
3 figure out what's wrong. If it's there, it's there.  
4 If it's not, it's not. I didn't even address it in my  
5 op-- or in my closing.

6 Now, on the bilateral TOS issue, we jumped on --  
7 on Dr. Schuster about the representation that she had  
8 bilateral TOS and then we showed him a record, his own  
9 record, his own note or something, and it just said  
10 "Right sided TOS". The bilateral TOS came in from  
11 Dr. Ombrellaro. That was a different chart note. And  
12 his report probably -- I don't know what it said, if  
13 it said right handed or whatever. But MaKayla  
14 Rookstool, we've heard testimony from Dr. Ombrellaro  
15 that she has bilateral neurogenic thoracic outlet  
16 syndrome. That's what she's got.

17 All right. So here we are. It's 4:00 o'clock.  
18 I want to give you guys an opportunity to talk.

19 I've got a couple more things I want to talk  
20 about briefly.

21 This is why the defense wants to make this case  
22 about the medicine. And this is what they do all the  
23 time. Because you can go through 5,000 pages of  
24 medical records and you can find -- you can pull out  
25 documents, one here, one here, and you can cherry pick

1 documents, pull out a sentence, pull out a paragraph,  
2 you can catch a doctor on one mistake, one error, and  
3 you can turn it into this huge dynamic: Oh, my God,  
4 and put it before the jury and say, "Remember when  
5 this doctor said this?"

6 Now, I didn't go into all that stuff I just went  
7 into. And I got a lot more I could go into with  
8 Dr. Coor and Dr. Grassbaugh. I did something a little  
9 different, if you recall. I apologized for  
10 embarrassing that doctor. That's not why we're here.

11 we're here because the school district doesn't  
12 want to accept responsibility for their actions. They  
13 say they do, but they don't show us that. That's why  
14 we're here. And if they would have accepted  
15 responsibility for their actions in the first place,  
16 we wouldn't be here. That's why we're here.

17 The numbers. Counsel told you that plaintiffs'  
18 lawyers come up and they give you this great big  
19 number thinking: well, geez, they're not gonna give  
20 me that, but if I ask for this, then maybe they'll  
21 give us that or that.

22 Huh-uh. If you remember, I didn't start at five  
23 million dollars. I told you that I would give these  
24 girls everything I have if they could have their  
25 health. And I told you my number was 10 million

1 dollars, but I thought if I put 10 million dollars up  
2 there that my clients would get punished for that.

3 A friend of mine got a 131 million dollar verdict  
4 in Seattle on a quadriplegic case earlier this week.  
5 The only people that know what happened in that case  
6 are the people that were in the box. And it was a  
7 quad case. It's a lot different. But I wonder if the  
8 lawyer in that case got up and said, "You know, they  
9 put up these big numbers thinking that you're not  
10 gonna award it."

11 If you don't think that the amount of money that  
12 I've put up there is enough money to exchange for your  
13 health, if you don't think that for the next 59 years  
14 of her life that four million dollars is enough money,  
15 you can give her more. If you think it's too much  
16 money, then you can give her less.

17 The same with Makinna. \$750,000 is what I asked  
18 you to give her. And you can give her more if you  
19 want or you can give her less. You're gonna make the  
20 decision. And you're gonna live with the decision for  
21 the rest of your life and I'm gonna live with that  
22 decision for the rest of my life, and so is the family  
23 and so is the district or the decision makers. I  
24 guarantee you I wouldn't take four million dollars to  
25 sit in that chair.

1 I'm gonna leave you with one more thing. You  
2 heard Mr. McFarland talking about Dr. Hemmerling.  
3 He's one of our own. And you remember that day when  
4 Dr. Hemmerling was on the stand and Mr. McFarland was  
5 chopping at him and he talked about disingenuous and  
6 petty.

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

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

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

24 MR. MCFARLAND: Your Honor, I would ask that  
25 you instruct the jury to disregard --

1 MR. GILBERT: Now it's your turn --

2 THE COURT: Hold on.

3 MR. MCFARLAND: That is not part of the  
4 evidence in the case.

5 MR. GILBERT: What's arguable?

6 THE COURT: Come here.

7

8 **(BENCH CONFERENCE OUT OF THE HEARING OF THE JURY BEGINS)**

9

10 THE COURT REPORTER: If you want it on the  
11 record, you have to wait.

12 MR. MCFARLAND: He is reading a text he  
13 received from a doctor about this case. That's not  
14 evidence in this case and that is not proper argument.

15 THE COURT: I'm gonna sustain the objection.

16 THE COURT REPORTER: I can't hear you,  
17 Judge.

18 THE COURT: Oh, sorry.

19 I'm gonna sustain the objection. It's an  
20 out-of-court statement that you just said was from  
21 another party and it's not been testified to in this  
22 case.

23 MR. GILBERT: Judge, he specifically talked  
24 about the issue of --

25 THE COURT: He didn't say those words. If

1 that was in the record, I would say no problem. It's  
2 not in the record.

3 MR. MCFARLAND: Will you please tell the  
4 jury to disregard the whole thing?

5 THE COURT: I will.

6

7 **(BENCH CONFERENCE OUT OF THE HEARING OF THE JURY ENDS)**

8

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

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

18 Thank you very much.

19 THE COURT: Okay. Thank you.

20 So I have a couple of closing instructions that  
21 I need to give before deliberations start. First,  
22 this is a closing instruction with regard to the  
23 deliberation procedures. And then second, I will read  
24 an instruction that's directed more to the alternates.  
25 well, although everyone will hear it, this second

# **APPENDIX B**

Dr. Hemmerling's October 26 Text to Plaintiffs'  
Counsel. CP 1686-88.



Bill



Thu, Oct 26, 7:56 AM

This has got to be a job hazard. Spent most of the night think about things I wish I had said.....this is what I wish I said after the second cross

Disingenuous and Petty—

Disingenuous and Petty—

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



iMessage





Bill



grew up in. We worked and played together on that family farm. I was taught most all of my life lessons worth knowin there. First and foremost my mama taught me....when you mess up the first thing you do is fess up....say you are 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 ....makin it right. That has been the disingenuous and petty



iMessage





Bill

right if you can. The district has done the first two (messed up and fessed up) but failed miserably on the most important part ....makin 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 there mother taught them to do.

Welcome to my world,  
 Doc ...  
 I'm going to use this quote  
 in closing !  
 Thank you



iMessage



## CERTIFICATE OF SERVICE

I certify that I caused to be filed and served a copy of the foregoing **AMENDED BRIEF OF APPELLANT** on the 1<sup>st</sup> day of April 2019 as follows:

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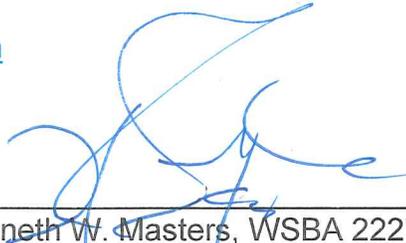
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April 01, 2019 - 3:41 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35873-9  
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