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Grant County Superior Court Cause No. 13-2-01463-3

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

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,

Plaintiffs-Respondents,

vs.

QUINCY SCHOOL DISTRICT NO. 144, a political subdivision,

Defendant-Appellant.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

On March 12, 2012, an employee of Defendant Quincy School District No. 144 (QSD) fell asleep while driving a bus full of 39 schoolchildren. The children ranged from kindergarten through seniors in high school, and included Plaintiffs MaKayla, MaKinna and Clark Rookstool. When the driver fell asleep, the bus was traveling at highway speeds, approximately 55-60 miles per hour. While the driver was sleeping, the bus drifted off the shoulder of the road. The wheels of the bus left the shoulder pavement, and woke the driver up. She overcorrected the steering and swerved into the oncoming lane of travel. She overcorrected again, skidded back toward the correct lane of travel, and flipped the bus onto the driver's (right) side. The bus continued to skid on its side, left the roadway, rolled down a bank, and came to rest at the bottom of a ditch on its left side, facing the opposite direction. CP 15 (Complaint, ¶¶ 3.2-3.3); CP 24 (Answer, ¶ 3.2-3.3).

It took 11 seconds from the time the bus first swerved until it came to rest. CP 16 (¶ 3.6); CP 24 (¶ 3.6). During this time, the children on the bus were thrown violently from their seats, and bounced around the interior of the bus like rag dolls or ping-pong balls, colliding with each other, backpacks and other personal effects, and the roof, seats and other parts of the bus interior. Ex. 1 (video of crash); CP 1516 (noting admission of Ex.

1); RP 766:8-14 & 806:4-13 (rag doll and ping-pong testimony); CP 16 (¶¶ 3.7-3.8); CP 24 (¶¶ 3.7-3.8). This was the third time the same driver had been in an accident while driving a school bus. CP 16 (¶ 3.4); CP 24 (¶ 3.4).

Along with their parents, Todd and Shawna Rookstool, MaKayla, MaKinna and Clark Rookstool filed this action against QSD for injuries caused by the crash. While admitting liability, QSD has consistently denied the nature and extent of their injuries. CP 1496 (Instruction 7); RP 1955:5-8 (defense closing, stating “while there is no disagreement that those kids all sustained injuries in this accident, there is, as you now know, a big disagreement as to what those injuries actually are”). QSD admitted that MaKayla has incurred \$142,014.26 in past medical expenses as a result of her injuries from the crash, but it disputed additional past medical expenses, future medical expenses, and noneconomic damages for her injuries, loss of enjoyment of life and pain and suffering. CP 1499-1500 (Instruction 10); RP 1996:16-21 (defense closing). QSD admitted that MaKinna has incurred \$6,482.01 in past medical expenses, but it disputed future medical expenses and noneconomic damages for her injuries, loss of enjoyment of life and pain and suffering. CP 1499-1500; RP 1996:22-24. QSD also disputed noneconomic damages suffered by Clark for his injuries, loss of enjoyment of life and pain and suffering, as well as noneconomic damages suffered by

Todd and Shawna for injury to their parent-child relationships. CP 1499-1500.

After an eight-day trial involving testimony from nine lay witnesses and seven expert witnesses, the parties asked the jury to award damages in closing argument. Trial counsel for QSD proposed that the jury award relatively low amounts: \$250,000 for MaKayla; \$20,000 for MaKinna; \$10,000 for Clark; and \$25,000 for Todd and Shawna; a total of \$305,000. RP 1999:5-2000:23. Trial counsel for the Rookstools proposed that the jury award higher amounts: \$4 million for MaKayla; \$750,000 for MaKinna; \$50,000 for Clark; and \$200,000 combined for Todd and Shawna; a total of \$5 million. RP 1945:23-1949:24. The jury awarded damages in between these proposals, ending up closer to QSD's proposed amounts: \$1 million for MaKayla; \$100,000 for MaKinna; \$10,000 to Clark; and \$50,000 each to Todd and Shawna; a total of \$1,210,000. CP 1515.

QSD has now appealed the judgment entered on the jury's verdict. Importantly, it has not assigned error to the superior court's instructions to the jury, thereby conceding that the jury was properly instructed. Equally important, it has not claimed that the jury's verdict is unsupported by the evidence, thereby conceding that substantial evidence supports the jury's damage award.

QSD has limited its appeal to comments made by trial counsel for the Rookstools in closing argument, asking this Court to find that the superior court abused its discretion in denying QSD's motions for mistrial and new trial on grounds of lack of prejudice. Two of the comments that are the subject of QSD's appeal were objected to, and the objections were sustained. One of them was the subject of a curative instruction. The remaining comments were not objected to, and QSD seeks to avoid its failure to preserve any error arising from these comments under the guise of the cumulative error doctrine. This Court should affirm, and hold that the superior court did not abuse its discretion. Despite the invective and hyperbolic language in QSD's briefing, the comments in closing did not prejudicially affect the verdict, either in isolation or cumulatively.

II. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the superior court abuse its discretion in denying QSD's motions for mistrial and new trial based on statements made in closing by trial counsel for the Rookstools on grounds of lack of prejudice?
2. Should the cumulative error doctrine be extended to civil cases such as this one? And, does the cumulative error doctrine excuse QSD's failure to preserve the errors of which it complains? If so, does the cumulative error doctrine warrant a new trial under the circumstances present here?

III. RESTATEMENT OF THE CASE

A. Evidence regarding the Rookstool family's damages.

1. MaKayla Rookstool.

MaKayla was sitting in the back of the bus next to her sister when the crash happened. RP 1491:14-22. During her testimony she needed time to compose herself before being able to speak about it. RP 1636:25-1637:12. As the bus came to a rest she was “folded in half” with her legs over her head. RP 1639:8-12. She could not exit the bus by herself and had to be carried out by others. RP 1492:8-23. She was then taken by ambulance to the hospital. RP 1494:22-1495:3. At the hospital she was in pain and her teeth were loose. RP 1458:20-24.

The morning after the crash, MaKayla went to Dr. Cole Hemmerling. RP 1459:9-12; RP 653:20. MaKayla “presented with neck pain and also abrasions to her face and chin. She had a headache which was presumed from a concussion. Her neck was sore As well as she had some pain in her elbow, wrist, hand, her humerus, [and] her upper arm.” RP 653:24-654:4 (ellipses & brackets added). She later returned to Dr. Hemmerling with pain in her shoulders and back and problems with her jaw. RP 654:25-625:1, 655:2-3 & 655:5-7. “She was unable to open her jaw, having difficulty eating, and she was having pain in the TMJ [i.e., temporomandibular] joint on the left side.” RP 656:1-6 (brackets added).

Dr. Hemmerling referred MaKayla to an oral maxillofacial surgeon for the jaw problems. RP 656:7-16; CP 888:18-23, 891:5-892:9. The oral surgeon operated on her jaw. CP 893:3-895:12. The surgery required a long recovery period, with physical therapy and restrictions on her activities. CP 897:18-899:9. The first surgery was not completely successful, and she had “continued pain, limited opening and spasm in her jaw muscles.” CP 902:6-16. She also had some permanent boney changes in her jaw. CP 906:11-907:8.

MaKayla eventually had to undergo a second surgery on her jaw. CP 908:18-909:3. While the second surgery is considered to have been successful, MaKayla still struggles with pain, and her jaw will never be normal again. CP 911:8-914:18 & 916:9-11. In order to manage the pain, for the rest of her life she will need to have massages, rest, and possibly acupuncture. CP 914:25-915:21. She will always have food restrictions, such as no gum or no chewing ice. CP 915:22-916:3.

In addition to her jaw problems, MaKayla also has ongoing problems associated with her back, shoulder, neck, arms, and hands. RP 1626:1-1627:9. She always has one spot next to her shoulder that hurts. RP 1627:6-16. She has a lot of trouble dropping things, making simple tasks like cooking difficult. RP 1640:24-1642:23. When she raises her arms above her head, she gets numbness and tingling in her arm down to her third,

fourth, and fifth digits. RP 787:11-789:8. This makes everyday tasks like washing her hair difficult. RP 1629:8-24. MaKayla's treating physicians have diagnosed her with several conditions: neurogenic thoracic outlet syndrome (NTOS), a facet joint injury, and a traumatically induced syrinx. RP 1031:21-1032:25; 1055:6-10; 1061:4-1062:5.

Treating neurogenic thoracic outlet syndrome requires multiple ongoing therapies: Botox treatments every three months (approximately \$1,000 per visit), intramuscular stimulation (IMS) or "needling" every six weeks (\$180 plus a clinic fee), massage therapy once or twice per month (\$80 to \$150 per massage), physical therapy four to six times per year (\$100 to \$200 per visit), and chiropractic care once per month (\$560 to \$840 per year). RP 1043:24-1050:5; RP 1935:15-20. At some point she may require surgery, which will cost \$50,000-100,000. RP 1052:18-1053:18; CP 775:2-778:18.

The facet joint injury has two treatments: a neurotomy where the nerve is burned to the joint, and treatment using "platelet rich plasma" to try to heal the injury. RP 1057:22-1058:11. A neurotomy requires a second diagnostic block first, which costs \$1,000-\$2,000, and the neurotomy itself costs \$2,000-\$3,000. RP 1058:12-19. The plasma treatment costs about \$3,000. RP 1058:22-1059:5.

While the syrxinx is not currently causing problems for MaKayla, it is monitored with periodic magnetic resonance imaging studies (MRIs). RP 1062:6-1063:8. MRIs range in cost from \$500 to \$3000. RP 1063:9-18.

MaKayla's life expectancy is another 59.61 years. RP 1904:15-17. She will never regain full functionality, and will have to manage her pain for the rest of her life. RP 1043:24-1050:5. Some of that treatment will be painful. RP 1633:9-15. The IMS treatment for NTOS, in particular, is "very painful" and for about two days after needling, i.e., "it kind of feels like you've been hit by a truck." RP 1633:11-13. She is worried for the future and whether she can be a good aunt or a good mother, especially because she is at risk for dropping things. RP 1636:4-21.

2. MaKinna Rookstool.

MaKinna was sitting in the back of the bus next to her sister, knees up, and reading a book when she realized something was off. RP 1491:12-1492:13. According to her, "[t]he right felt really bumpy all of a sudden. So I looked up from my book to see what was going on, looked out my window, and all I could see was the borrow ditch on the side of the road." RP 1492:9-13 (brackets added). The bus swerved back onto the road sharply, forcing MaKinna into her sister's side of the bus. RP 1492:15-18. The bus swerved back and started to roll, launching her onto the roof. RP 1492:24-1493:1. Fortunately, she got off the bus through the emergency exit. RP 1493:5-12.

She watched her sister, MaKayla, get carried off by others, something that “freaked [her] out.” RP 1493:19-25 (brackets added). She couldn’t find her brother, Clark, at first. RP 1493:17-21.

A second bus came by to pick up those who were not picked up by ambulances to take them to the hospital. RP 1494:22-1495:1. MaKinna left the scene of the crash on the second bus, while her sister went in the ambulance. RP 1495:2-5. As MaKinna walked onto the second bus, she noticed that her upper back or neck was hurting and mentioned this to a first responder. RP 1495:6-19. The EMT or first responder immediately braced MaKinna’s neck with her hands, and when the bus arrived at the hospital a backboard was brought out to take her off the bus. RP 1495:21-24. She was examined at the hospital and released, going home that day. RP 1491:8-16.

The morning after the crash, MaKinna also went to see Dr. Hemmerling. RP 651:17-18; RP 658:21-25. “[H]er right foot hurt the most, she had tenderness in her right ankle, [and] her neck was sore She had abrasions on her knee and pain in her left knee, as well.” RP 659:15-20 (brackets & ellipses added). She also had some back pain. RP 1497:2-4. Dr. Hemmerling “felt [the injuries] to be related to abrasions and contusions from the accident” and recommended “no specific treatment other than anti-inflammatories and time.” RP 659:21-25 (brackets added).

Following the visit with Dr. Hemmerling, MaKinna had constant upper- and mid-back pain with occasional neck and lower-back pain. RP 1497:13-17. She received treatment from a massage therapist. RP 616:15-21, 625:25-626:10 & 633:11-21. She managed the pain through stretching, popping her back, icing, and taking Ibuprofen when necessary. RP 1498:2-10. She also continued with the same chores she did before the rollover, but only slower and for shorter bursts, and with greater pain later. RP 1515:22-1516:10. She did not initially go back to the doctor for her pain because she thought it would get better over time. RP 1499:16-22. She also didn't want to be "an extra burden" and "felt that there was enough pressure and stress" because of her sister's problems, especially stress for her mother. RP 1499:23-1500:17. She is known to be stoic in responding to pain. RP 660:21-661:2 & 1300:17-1301:17.

After MaKinna returned to Dr. Hemmerling and had an MRI of her back, Dr. Hemmerling diagnosed her with multi-level thoracic disk disease due to bulges at five different levels within the thoracic spine. RP 662:17-23. A board certified sports medicine and internal medicine physician, Dr. Gary Schuster, examined MaKinna and further diagnosed "strain injuries to the neck, middle back, and low back," and a facet injury in her middle back. RP 720:18-721:2, 733:6-9, 759:9-760:3. Dr. Schuster expects her pain to be permanent. RP 777:12-14. Going forward she will need a good exercise

program and chiropractic treatments 1-2 times per month for the rest of her life. RP 776:18-777:15. Her estimated life expectancy is 59.61 years. RP 1904:15-17.

3. Clark Rookstool.

Clark sat nearer the front of the bus the day of the crash than his sisters. RP 1491:25-1492:2. He saw his friend Anthony get “scalped”, and then he blacked out. RP 1820:6-12. He was taken to the hospital and later released. RP 1458:11-1459:8. He had some glass fragments embedded in his head. RP 1472:12-14. His physical wounds healed, but he had to stay with his mother at night in order to sleep for the following months. RP 1819:20-24; RP 1472:16-21. He had nightmares for years, replaying the crash and his friend’s scalped head. RP 1820:3-18. He was afraid to ride in cars, and resisted riding the bus again. RP 1820:19-24; RP 1474:16-21; RP 1484:25-1485:7. His fear and nightmares have mostly, but not completely, subsided. RP 1473:7-16, 1638:14-17 & 1820:20-16.

4. Shawna and Todd Rookstool.

Shawna Rookstool first heard of the rollover when she received a phone call from her daughter MaKinna. RP 1456:18-26. MaKinna was “frantic” and said she “could not find her brother.” RP 1457:1-3. Shawna’s “heart stopped.” RP 1457:1. She knew all three of her children were on the

bus. RP 1457:1-2. After the call with MaKinna, she called her husband, Todd. RP 1457:7.

When they got to the site of the rollover, they found “parents lined up The bus was flipped over and facing the opposite direction There was a lot of chaos.” RP 1457:16-20 (ellipses added). They were not able to get out and look for their kids. RP 1457:22-1458:3. First responders at the scene told them that the children on the bus were being taken to the Quincy Hospital, so they went there. RP 1458:5-10. They were not able to see their children until they reached the hospital. RP 1458:15-1459:5.

Shawna fears for the future for both of her daughters. RP 1470:10-14. She especially is worried about pregnancy and finding partners who are willing to face their medical problems. RP 1470:15-1471:8. The whole experience has increased Shawna’s stress level and emotional and physical health. RP 634:22-637:13, 1631:3-12 & 1843:15-1844:3. The injuries suffered by the children has also limited the family’s activities. RP 1284:21-1285:11, 1471:9-12 & 1852:20-1853:4.

B. The superior court’s instructions to the jury.

1. Regarding the basis for the jury’s verdict.

The superior court instructed the jury to base its decision on the testimony of witnesses and the exhibits that were admitted:

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, [and the exhibits that I have admitted], during the trial

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim.

CP 1488 (brackets in original; ellipses added).

The superior court instructed the jury to disregard evidence that was not admitted or was stricken from the record:

If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

CP 1488.

If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

CP 1489.

The superior court further instructed the jury to set aside emotion, sympathy, and prejudice in rendering its verdict:

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

CP 1490.

The law treats all parties equally whether they are government entities like school districts, or individuals. This means that

government entities like school districts and individuals are to be treated in the same fair and unprejudiced manner.

CP 1498.

Lastly, with respect to the determination of damages, the superior court instructed the jury:

Your award must be based upon evidence and not upon speculation, guess or conjecture. The law has not furnished us with any fixed standard by which to measure non-economic damages. With reference to these matters you must be governed by your own judgment, the evidence in the case and by these instructions.

CP 1450.

2. Regarding arguments by counsel.

The superior court instructed the jury as follows regarding arguments by counsel:

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

CP 1489.

C. QSD's objections in closing argument.

QSD only objected twice during closing argument: once to a statement by trial counsel for the Rookstools that "I think [QSD's trial counsel] feels the same way I do" about the prospect of future surgery for MaKayla Rookstool; and a second time to a text message from Dr.

Hemmerling. The superior court sustained both objections, reminded the jury that argument is not evidence in response to the first, and instructed the jury to disregard the text message in response to the second.

1. “I think [QSD’s trial counsel] feels the same way I do.”

One of the disputed medical issues at trial was whether MaKayla Rookstool would require surgery on her back in the future, in addition to the two surgeries she had already had on her jaw as a result of the crash. Her future medical expenses would actually be less if she had the back surgery than if she continued with conservative non-surgical care. However, the outcome of surgery was risky and she was scared by the prospect. RP 1632:19-1633:1.

Trial counsel for the Rookstools addressed the need for future back surgery in closing argument, as follows:

[By trial counsel for the Rookstools] So surgery in five to ten years and conservative care. So you have conservative care for five to ten years. And conservative care is the Botox, the IMS treatment, physical therapy, chiropractic care and that kind of thing. And then you have the surgery in five to ten years. This is your range of damages right here.

So the damages are actually lower if she has the surgery. So why doesn't she have the surgery, right?

Well, why not just have the surgery? MaKayla is terrified of the surgery. I would be terrified of the surgery. If it was my daughter, I would be terrified of the surgery. [Trial counsel for QSD] and I have had conversations about that surgery, and I think he feels the same way I do.

[By trial counsel for QSD]: I'm going to object, Your Honor, and ask the Court to instruct the jury to strike that comment.

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.

[By trial counsel for the Rookstools]: So the point is there's no guaranteed outcome with that surgery. And all of the experts have told us that no matter what, no matter what, the best that MaKayla Rookstool will ever be is 80 to 85 percent. So as long as she's rolling along at 60 to 80 percent with the conservative care, there's no reason to go under the knife. Right?

RP 1931:19-1932:25 (brackets & ellipses added; formatting in original).

Trial counsel for QSD did not request any curative instruction with respect to this statement.

In support of its motions for mistrial and new trial, trial counsel for QSD stated, during the conversation at issue, he stated that he did not want MaKayla to have the surgery because she was not a candidate for surgery. *See* CP 1507 (footnote 2); RP 1312:9-10. In response to the motions, trial counsel for the Rookstools explained:

Contrary to the defense'[s] argument that reference to defense counsel not wanting MaKayla to get the surgery does not undermine the defense; it actually falls squarely in line with the defense's case. The defense spent the entire trial arguing that MaKayla Rookstool did not need a surgery. Plaintiffs' counsel acknowledged this argument, and indicated he and defense counsel agreed, at least in part, on this premise: there should not be any surgery until the least invasive options are exhausted.

CP 1537 (brackets added); *accord* RP 1328:12-17.

The superior court denied QSD's motions for mistrial and new trial based on the foregoing comment because it was not prejudicial, explaining its reasoning as follows:

with regard to the conversation with opposing counsel, the exact quote was, "MaKayla is terrified of the surgery. I would be terrified of the surgery. If it was my daughter, I would be terrified of the surgery. Mr. McFarland and I have had conversations about that surgery, and I think he feels the same way I do."

Immediately after that statement was made, Mr. McFarland [i.e., trial counsel for QSD] jumped up and objected, asked for a curative instruction, and the court said, basically, at that point it's argument and instructed the jury to basically focus on the evidence and that was it.

The way I view this, so that you are aware, Mr. McFarland, is when you jumped up and said, I object, it was clear you were not in agreement with whatever statement Mr. Gilbert [i.e., trial counsel for the Rookstools] had made. And he didn't say, Mr. McFarland told me he feels the same way I do. He didn't say, Mr. McFarland agrees exactly with the way I do. He said, "I think he feels the same way I do." And to me that sounded like argument at the time. It still sounds like argument at the time.

In particular, when you jumped up and objected to it, it became clear that you were not in agreement with Mr. Gilbert's statement, and as a result I didn't think the jury needed a curative instruction, because right there and then they were aware that you were not in agreement with that statement. And again, I instructed the jury, it was purely argument.

So even if there was some type of misrepresentation, I believe it was harmless, because the jury at that point knew that you were not in agreement with that statement. And I instructed the jury to focus on the evidence and not just the argument of counsel.

RP 1332:6-1333:15 (brackets added; formatting in original).

2. Text message from Dr. Hemmerling.

During trial, Dr. Hemmerling believed that trial counsel for QSD was attempting to separately analyze MaKayla Rookstool's symptoms in a way that was medically improper, given her diagnosis of neurogenic thoracic outlet syndrome. After being cross examined about her symptoms, Dr. Hemmerling testified as follows on redirect examination:

Q. [By trial counsel for the Rookstools] With respect to the treatment that you provided to MaKayla Rookstool on March 13th, 2012, is there something that you think is important that this jury knows about that treatment?

A. [By Dr. Hemmerling] I do. The ultimate diagnosis of thoracic outlet syndrome is a very rare diagnosis, it was not even on my radar when I was seeing her. And the parsing up of an individual between the humerus, the shoulder, the shoulder blade when they present with back pain, with upper back pain, with shoulder pain, is almost impossible to do on a physical exam and to take it down to this detail. In my opinion, it's *disingenuous and somewhat petty*.

RP 689:18-690:6 (brackets & emphasis added; formatting in original).

Trial counsel for QSD followed up on Dr. Hemmerling's description of his questioning as "disingenuous and somewhat petty" on re-cross examination:

Q. [By trial counsel for QSD] Is it important when you're treating your patients to be very specific about what it is you're diagnosing?

A. [By Dr. Hemmerling] If it can be.

Q. It's not *disingenuous and petty* to be very specific about what it is that your patients are complaining about, is it?

A. No.

Q. You wouldn't say someone comes in and says they have right-sided pain, you wouldn't write in your chart note, left-sided pain, would you?

A. No, I would not.

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

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

Q. What bone is this that I'm pointing to?

A. That is the humerus.

Q. The humerus. What am I pointing to now?

A. Your shoulder point [i.e., joint].

Q. And so do you think that distinguishing between a shoulder and a humerus is *disingenuous and petty*; is that your testimony?

[By trial counsel for the Rookstools]: Your Honor, I let it go on a while, but it's getting badgering at this point.

THE COURT: I'm going to sustain that[.]

RP 694:7-695:11 (brackets & emphasis added; formatting in original).

QSD emphasized Dr. Hemmerling's comments in the defense closing and argued that they showed he was biased as a friend of the Rookstool family, rather than a neutral health care provider:

We start off with Dr. Cole Hemmerling, who is not only the Rookstools' family doctor but he is also, as you heard, a close family friend of the Rookstools. And I have no doubt that Dr. Hemmerling is a good doctor and I have no doubt he's probably even a better

person. But what you saw from Dr. Hemmerling is what happens when a friend goes from being a neutral and objective doctor into advocating for someone's position.

And here's what I mean by that. You remember I was asking Dr. Hemmerling about MaKayla's specific complaints. I was asking him where she said she was hurting, when she said she was hurting, what side of her body, what body part. And I did that because as you know now, all of the doctors in this case have said that in order to causally relate certain injuries or symptoms to the bus crash those injuries or symptoms have to manifest themselves within a certain period of time after the accident.

I also tried to drill down on specifics with Dr. Hemmerling in light of Dr. Ombrellaro's testimony that he would be, quote, "hard pressed" to causally relate thoracic outlet syndrome to the bus accident if those symptoms did not start until 12 months after the accident. And because MaKayla is now claiming symptoms that she wasn't with Dr. Hemmerling and she wasn't -- because she wasn't making symptoms consistent with -- or reports consistent with thoracic outlet syndrome to Dr. Hemmerling I asked him those details. And the response you got back, remember, was that I was being, quote, "*petty and disingenuous*" for asking specifics.

But you just heard this morning in Dr. Grassbaugh's deposition -- Ms. Grelish read to Dr. Hemm-- or Dr. Grassbaugh about -- or from an article about diagnosing -- on how you diagnose thoracic outlet syndrome. Remember what she said or what she read is that it's necess-- necessary to take a, quote, "meticulous history". Yet, when I try to get a meticulous history from Dr. Hemmerling he told me that I was being *petty and disingenuous*.

RP 1960:3-1961:18 (emphasis added; formatting in original).

After the defense closing, trial counsel for the Rookstools read a text message he received from Dr. Hemmerling in rebuttal:

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.

RP 2023:1-23 (brackets added; parentheses & formatting in original).

The superior court sustained QSD's objection and instructed the jury to disregard the text message from Dr. Hemmerling:

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.

RP 2025:9-12.

The superior court denied QSD's motions for mistrial and new trial based on the text message, reasoning as follows:

With regard to the reading of the text, I did give a curative instruction on that. I sustained the objection. And I have to believe that the jury took that instruction to heart and did not rely solely on that text in making a decision.

RP 1333:16-20.

In the final analysis, the superior court concluded “[s]o even if there was some type of error by Mr. Gilbert in his closing argument, I truly believe that it was harmless” based on the evidence and argument presented at trial. RP 1338:15-17.

IV. ARGUMENT

A. The superior court’s denial of QSD’s motions for mistrial and new trial is subject to review only for abuse of discretion, and deference to the superior court’s finding of no prejudice is required because it is in the best position to determine the effect of the alleged misconduct during closing on the jury.

QSD based its motions for mistrial and new trial on CR 59(a)(2), which provides:

On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted. Such motion may be granted for any one of the following causes materially affecting the substantial rights of such parties: Misconduct of prevailing party or jury[.]

(Ellipses & brackets added.) The only practical difference between a motion for mistrial and a motion for new trial is timing. *See* 4 Wash. Prac., Rules Practice CR 59 (6th ed.). A mistrial is usually requested during trial, whereas a motion for new trial is usually made at the end of trial. *See id.* Both motions are subject to review only for an abuse of discretion, as QSD acknowledges. *See* QSD Amd. App. Br., at 8-9.

The “criterion” for determining whether an abuse of discretion has occurred in this context is: “[H]as such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial?” *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn. 2d 517, 537, 998 P.2d 856, 869 (2000) (hereafter cited as *ALCOA*; quotation & brackets in original); *see also Adkins v. Aluminum Co. of Am.*, 110 Wn. 2d 128, 136, 750 P.2d 1257, 1262 (1988) (equating standard of review of motion for mistrial with standard of review of motion for new trial).¹

In reviewing the denial of motions for mistrial and new trial, the appellate court may not substitute its judgment for the judgment of the trial court because the “trial court is in the best position to most effectively determine if [counsel’s] misconduct prejudiced a party’s right to a fair trial.” *Teter v. Deck*, 174 Wn. 2d 207, 223, 274 P.3d 336 (2012) (quoting *State v. Lord*, 117 Wn. 2d 829, 887, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992); brackets in original); *accord Gilmore v. Jefferson Cty. Pub. Transp. Benefit Area*, 190 Wn. 2d 483, 503, 415 P.3d 212, 222 (2018) (stating “[u]nless some prejudicial effect is clear from the record, we must defer to

¹ QSD points out that a greater showing of abuse of discretion is required to reverse an order granting a new trial than an order denying a new trial, although “no decision explains the practical difference.” QSD Amd. App. Br., at 9. Whatever the difference, it cannot mean that something less than an abuse of discretion will suffice to overturn an order denying a new trial.

the trial court”); brackets added); *Clark v. Teng*, 195 Wn. App. 482, 492, 380 P.3d 73 (2016) (stating “[t]he trial court is ‘in the best position’ to gauge the prejudicial impact of counsels’ conduct on the jury”); brackets added), *rev. denied*, 187 Wn. 2d 1016 (2017); *Taylor v. Cessna Aircraft Co., Inc.*, 39 Wn. App. 828, 832, 696 P.2d 28, 30 (1985) (similar), *rev. denied*, 103 Wn. 2d 1040 (1985).

The standard of review is more deferential in a civil case such as this one than it is in the criminal context for several reasons. **First**, criminal prosecutions involve relatively higher stakes than civil litigation, which naturally and properly leads courts to prioritize concerns about the risk of error ahead of concerns about finality and judicial economy. *See ALCOA*, 140 Wn. 2d at 539 (stating “we note the circumstances of a civil case, where life and liberty are not at issue, militate in favor of a standard that more generally upholds trial court decisions”); *Teter*, 174 Wn. 2d at 223 (citing *ALCOA* with approval for this proposition).

Second, criminal prosecutions are subject to a higher standard of proof, which requires greater confidence in the outcome than civil litigation, again elevating concerns about the risk of error over finality and judicial economy. *Compare* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.01 (4th ed.) (beyond-a-reasonable-doubt standard applied in criminal cases),

with 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 21.01 (6th ed.) (preponderance-of-the-evidence standard applied in civil cases).

Third, a prosecutor fulfills a different role than counsel for a private litigant, which magnifies the prejudicial effect of misconduct in closing. *See State v. Reed*, 102 Wn. 2d 140, 147, 684 P.2d 699, 702 (1984) (stating “[l]anguage which might be permitted to counsel in summing up a civil action cannot with propriety be used by a public prosecutor, who is a quasi-judicial officer, representing the People of the state, and presumed to act impartially in the interest only of justice”; quotation omitted; brackets added).

Fourth, and finally, criminal prosecutions are subject to constitutional limitations that do not attach to civil litigation. For example, misconduct by a prosecutor in closing argument in a criminal trial can implicate the accused’s constitutional right to a fair trial under Wash. Const. Art. 1, § 22. *See State v. Monday*, 171 Wn. 2d 667, 679-80, 257 P.3d 551 (2011). Such misconduct is subject to the constitutional harmless error test. *See id.*, 171 Wn. 2d at 680. Under this test, appellate courts will not affirm a conviction unless it appears beyond a reasonable doubt that the misconduct did not affect the verdict. *See id.*

In light of the foregoing, the standard of review applied to a trial court's determination regarding the prejudice, if any, resulting from misconduct in closing is and should be most deferential in civil cases.²

B. The superior court did not abuse its discretion in denying QSD's motions for mistrial and new trial on grounds of lack of prejudice.

The parties appear to agree regarding the framework for determining whether misconduct occurred in closing that warrants a new trial:

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.

ALCOA, 140 Wn. 2d at 539 (quotation omitted; parentheses & ellipses in original); *accord Teter*, 174 Wn. 2d at 226 (paraphrasing standard articulated in *ALCOA*); QSD Amd. App. Br., at 10-11 (quoting same standard). Under the applicable the standard of review, the superior court did not abuse its discretion in applying this framework.

² In *MRB v. Puyallup Sch. Dist.*, 169 Wn. App. 837, 859 n.10, 282 P.3d 1124 (2012), *rev. denied*, 176 Wn. 2d 1002 (2013), the court stated "it is appropriate to analogize cases in the criminal context," citing *ALCOA*, 140 Wn. 2d at 538. However, the court did not cite or discuss the relevant portion of *ALCOA* or any of the other considerations requiring greater deference in civil cases than criminal cases, all of which limit the usefulness of the analogy.

- 1. The comment in closing that “I think [QSD’s trial counsel] feels the same way I do” about the prospect of future surgery for MaKayla Rookstool was innocuous, and the superior court essentially sustained QSD’s objection and reminded the jury that argument is not evidence.**

The comment that “I think [QSD’s trial counsel] feels the same way I do” was an innocuous way of expressing that both sides of the case wanted to avoid future surgery for MaKayla Rookstool, albeit for different reasons. CP 1507 & 1537. Makayla wanted to avoid future back surgery because of the risks involved, while QSD wanted to avoid it because it believed she was not a candidate for such surgery. *Id.*

The comment did not prejudice QSD because there was absolutely no chance, in the context of the entire record, that the jury would believe that QSD (or its lawyer) actually did believe MaKayla was a candidate for surgery. The issue was hotly disputed throughout trial. If that were not enough, trial counsel for QSD immediately objected to the comment. RP 1932:10-12. The superior court essentially sustained the objection and reminded the jury that argument by counsel was not evidence. RP 1932:13-17. Counsel for QSD then emphasized medical testimony that MaKayla “absolutely does not need surgery” in the defense closing. RP 1996:2-3.

The superior court’s reminder to the jury during closing argument that argument of counsel is not evidence, RP 1932:13-17, is tantamount to

a curative instruction and eliminates the possibility of prejudice. *See ALCOA*, 140 Wn. 2d at 539 (stating “the trial court’s issuance of a curative instruction may obviate the need for a new trial, even if there is misconduct”); *Adkins*, 110 Wn. 2d at 142 (indicating curative instruction would have removed prejudice from improper Golden Rule argument). The jury is presumed to follow curative instructions. *See Carnation Co., Inc. v. Hill*, 115 Wn. 2d 184, 186, 796 P.2d 416, 417 (1990) (holding curative instruction eliminated prejudice resulting from reference to polygraph test excluded from evidence). The curative instruction bolstered the court’s instruction to the jury regarding argument of counsel, CP 1489, which was given immediately prior to closing argument. *See ALCOA*, 140 Wn. 2d at 541 (holding court’s instructions to jury eliminated prejudice from improper comment about the number of objections). Under these circumstances, the superior court properly determined the comment was not prejudicial. RP 1332:6-1333:15 & 1338:15-17.³

The cases cited by QSD do not require or permit this Court to find that the superior court abused its discretion in finding a lack of prejudice

³ QSD maintains the superior court’s reminder that argument is not evidence was not a curative instruction. *See* QSD Amd. App. Br., at 1, 2 & 13. To the extent the instruction was insufficient, it was incumbent upon QSD to propose a different one. *See State v. Hoffman*, 116 Wn. 2d 51, 93, 804 P.2d 577, 599 (1991) (stating “[r]eversal is not required if the error could have been obviated by a curative instruction which the defense did not request”; brackets added). Its failure to propose a different curative instruction should foreclose any complaint.

here. *See* QSD Amd. App. Br., at 16. Initially, QSD cites a number of criminal cases from Washington. However, the nature of the conduct involved in these cases and the fact that they arise in the criminal context renders them distinguishable. In *State v. Lindsey*, 180 Wn. 2d 423, 442-43, 326 P.3d 125 (2014), the Court held that calling defense counsel a “crock,” among other instances of misconduct, was prejudicial, in part because “the prosecutor is held to a higher standard than defense counsel.” In *State v. Warren*, 165 Wn. 2d 17, 30, 195 P.3d 940 (2008), the Court held that a prosecutor did not commit flagrant, ill-intentioned and incurable error when he stated there were a “number of mischaracterizations” in defense counsel's argument as “an example of what people go through in a criminal justice system when they deal with defense attorneys,” or when he described defense counsel's argument as a “classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing.” In *Bruno v. Rushen*, 721 F.2d 1193, 1194 (9th Cir. 1983) (per curiam), the Ninth Circuit held that accusing defense counsel of “witness tampering” and suggesting that “**all** defense counsel in criminal cases are retained solely to lie and distort the facts and camouflage the truth in an abominable attempt to confuse the jury as to their client's involvement with the alleged crimes” was prejudicial misconduct. (Emphasis in original.) In *State v. Thorgerson*, 172 Wn. 2d

483, 451-52, 258 P.3d 43 (2011), the Court held that, while accusing defense counsel of “slight of hand” and using disparaging terms like “bogus” and “desperation” to describe the defense case constituted misconduct, it was not prejudicial. These cases are not comparable to the circumstances present here.

Next, QSD tries to equate the comment at issue in this case with improper comments made in several non-Washington cases. *See* QSD Amd. App. Br., at However, QSD never quotes the allegedly similar comments from these cases to justify or support the comparison. Juxtaposing the language in these cases with the comment made in this case demonstrates how inapt these cases are. *Venning v. Roe*, 616 So. 2d 604, 604 (Fla. App. 1993) (per curiam) involved the following misconduct:

During closing argument, defense counsel made several derogatory remarks about opposing counsel and a certain witness and also attacked the credibility of a witness. Defense counsel indicated that plaintiff's medical expert was “nothing more than an unqualified doctor who prostitutes himself ... for the benefit of lawyers” who is paid to perform a service by giving the “magic testimony” for plaintiff's lawyer which allows him to get the case to court. Defense counsel stated there was a “special relationship” between plaintiff's medical expert and plaintiff's lawyer and told the jury that plaintiff's counsel presented “a work of fiction” which he “created and orchestrated” with the assistance of plaintiff's medical expert. Defense counsel also told the jury that he personally had been involved in seven other cases where this particular attorney and medical expert were working together.

(Quotation marks & ellipses in original.) *Schubert v. Allstate Ins. Co.*, 603 So. 2d 554 (Fla. App.), *rev. dismiss'd*, 606 So. 2d 1164 (Fla. 1992), involved the following misconduct by defense counsel:

He said, for example, that the jury was the “conscience of the community”; that plaintiff’s doctor “as he usually does, has found a permanency”; gave his own opinion on the qualifications and truthfulness of his witnesses; told the jury that plaintiffs were seeking “not a small fortune, a large one” and “Don’t, don’t let little Nicholas [appellants’ child] think that this is the way you get from one end of life to the other.” He also said “I’m here to tell you the truth” and that plaintiff Patti Schubert “should have said thank goodness I wasn’t injured more seriously” instead of seeking recompense for what injuries she got. He said the treating health care providers had ulterior, self-interested, motives in testifying and admonished the jury not to be deceived by them.

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

(Quotation marks, brackets & formatting in original.) Lastly, in *Sun Supermarkets, Inc. v. Fields*, 568 So. 2d 480, 481 (Fla. App. 1990), *rev. denied*, 581 So. 2d 164 (1991), “[a]t trial, over the defendant’s objections, the plaintiff’s counsel was allowed to continuously remark to the jury that the defense counsel had lied to the jury and that he committed a fraud upon the court and jury.” The cases on which QSD relies are unhelpful in addressing the issues presented in this case.⁴

⁴ The only Washington civil case cited by QSD is Justice Gonzalez’s concurrence in *Jones v. Seattle*, 179 Wn. 2d 322, 371, 314 P.3d 380 (2013), which involved late disclosure of a witness. The concurrence properly emphasizes the importance of civility and professionalism in the legal profession, but is otherwise inapplicable.

2. **The text message from Dr. Hemmerling read in closing did not prejudice QSD because it mirrored Dr. Hemmerling's trial testimony and QSD's closing and the superior court sustained QSD's objection and instructed the jury not to consider it.**

The text message from Dr. Hemmerling did not prejudice QSD because the substance of the text mirrored his direct examination, RP 689:18-690:5, his cross examination, RP 694:2-695:15, and QSD's closing argument, RP 1960:3-1961:18. The text message added no new information, but simply repeated the theme of the Rookstool family's case that, despite admitting liability, QSD failed to accept responsibility for the full amount of damages caused by its conduct. RP 2023:7-23. If anything, the tone of the text helped QSD by reinforcing its closing argument that Dr. Hemmerling was not a neutral health care provider, but rather a biased family friend. RP 1960:3-1961:18.

Any prejudice was removed when the superior court sustained QSD's objection, and instructed the jury to disregard the text message. *See ALCOA*, 140 Wn. 2d at 539; *Adkins*, 110 Wn. 2d at 142. As noted above, the jury is presumed to follow curative instructions. *See Carnation*, 115 Wn. 2d at 186. In addition, the curative instruction bolstered the court's prior instructions to the jury to disregard evidence stricken from the record, CP 1488 & 1489, which were given immediately prior to closing argument. *See ALCOA*, 140 Wn. 2d at 541. Under these circumstances, the superior

court properly determined the text message was not prejudicial. RP 1333:16-20 & 1338:15-17.

QSD cites *Battle ex rel. Battle v. Memorial Hosp.*, 228 F.3d 544 (5th Cir. 2000), as involving a “similar situation.” QSD Amd. App. Br., at 23. While it is similar in that defense counsel read a doctor’s note that had not been admitted as evidence during closing argument, the case is distinguishable because, unlike this case, the trial court overruled plaintiff’s objection and no cautionary instruction was given to the jury. *See* 228 F.3d at 554-55. *Battle* does not otherwise support the position that such conduct in closing argument cannot be cured or otherwise rendered harmless. *Cf. Reikow v. Bituminous Const. Co.*, 224 N.W.2d 921, 926 (Minn. 1974) (affirming denial of motion for new trial based on counsel’s reading medical report not admitted into evidence in closing, finding no abuse of discretion).

QSD cites two additional cases, *Griffiths v. Zetlitz*, 190 N.W. 317 317, 318 (S.D. 1922), and *Pyse v. Byrd*, 450 N.E.2d 1374, 1377 (Ill. App. 1983), for the proposition that “[m]any courts agree” with *Battle*. QSD Amd. App. Br., at 23-24 (brackets added). In actuality, neither *Griffiths* nor *Pyse* cites *Battle* because both decisions predate *Battle*. Subsequent citations of *Battle* do not appear to involve this same issue.

In any event, *Griffiths* is distinguishable because, while the plaintiff’s lawyer read a magazine article that had not been admitted in

evidence during closing argument, he was “not promptly reprimanded by the trial court” and “the court in its instructions did not admonish the jury to disregard the matters referred to when considering of their verdict [sic].” 190 N.W. at 318 (brackets added). Unlike *Griffiths*, the superior court in this case sustained QSD’s objection and instructed the jury to disregard the text.

Pyse actually supports the Rookstools’ argument. While the defendant’s lawyer in *Pyse* read portions of a deposition that had not been admitted into evidence during closing argument, the court found his misconduct harmless because the deposition was cumulative of the plaintiff’s trial testimony. As in *Pyse*, even without the superior court’s sustaining QSD’s objection and instructing the jury to disregard the text message from Dr. Hemmerling, the text message was harmless because it cumulative of his testimony.

3. QSD improperly attempts to infer prejudice from the amount of the damage award in the absence of a challenge to the sufficiency of the evidence to support the damage award.

In order to establish prejudice, QSD focuses on the amount of the Rookstool family’s damages, as determined by the jury. Initially, QSD notes that “the jury awarded the Rookstools roughly four times what QSD thought justifiable[.]” QSD Amd. App. Br., at 4 (brackets added); *accord*

id. at 6 (stating the verdict “is roughly four times the \$305,000 total the defense suggested”). Then, in arguing that it was prejudiced by the alleged misconduct in closing, QSD equates what QSD itself proposed with “what the evidence justified.” *Id.* at 18. Specifically, QSD argues that the alleged misconduct “evoke[ed] a verdict four times what the evidence justified[.]” *Id.* (brackets added). This is improper because there is no basis for suggesting that QSD’s proposed award is the proper measure of damages, any more than suggesting that the Rookstool family’s proposed award is the proper measure of damages. QSD has not argued that the jury’s verdict is unsupported by substantial evidence, and it is therefore bound by the jury’s determination of damages. If anything, the amount of the jury’s verdict confirms a lack of prejudice, as noted by the superior court. *See* RP 1338:9-10 (indicating amount of verdict confirmed the jury was not “enflamed by passion”).

C. The cumulative error doctrine does not warrant a new trial based on comments in closing, to which QSD did not object, for which it did not request curative instructions, and which are not erroneous or prejudicial.

QSD concludes its argument by invoking the cumulative error doctrine. *See* QSD Amd. App. Br., at 25-33. “The cumulative error doctrine applies where a combination of trial errors denies the accused of a fair trial, even where any one of the errors, taken individually, would be harmless.”

In re Cross, 180 Wn. 2d 664, 690, 327 P.3d 660, 678 (2014), *abrogated on other grounds by State v. Gregory*, 192 Wn. 2d 1, 427 P.3d 621 (2018). “The test to determine whether cumulative errors require reversal of a defendant's conviction is whether the totality of circumstances substantially prejudiced the defendant and denied him a fair trial.” *Cross*, 180 Wn. 2d at 690. “To support a cumulative error claim, the appellant must demonstrate multiple errors.” *State v. Racus*, 7 Wn. App. 2d 287, 433 P.3d 830, 838 (2019) (citing *Cross*). Further, the defendant must show that “the combined effect of the accumulation of errors most certainly requires a new trial.” *State v. Clark*, 187 Wn. 2d 641, 649, 389 P.3d 462, 466 (2017) (quoting *State v. Coe*, 101 Wn. 2d 772, 789, 684 P.2d 668 (1984)); *accord State v. Moses*, 193 Wn. App. 341, 367, 372 P.3d 147, 159, *rev. denied*, 186 Wn. 2d 1007 (2016) (stating “[t]he defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary”; brackets added).

As an initial matter, the cumulative error doctrine has been limited to criminal cases and QSD has not justified extending it to civil cases. Even if the doctrine applied to civil cases such as this one, QSD is improperly using it to circumvent normal preservation of error requirements. In any event, QSD cannot satisfy its burden of proving that the “combined effect of the [alleged] accumulation of errors most certainly requires a new trial.”

The Court should hold there is no cumulative error warranting a mistrial or new trial.

1. QSD has not justified extension of the cumulative error doctrine to civil cases.

“Washington courts have not yet applied cumulative error to civil cases[.]” *Marriage of Fan & Antos*, 2019 WL 1487728, at *4 (Wn. App., Div. 1, Apr. 1, 2019) (brackets added); *accord Cavner v. Cont'l Motors, Inc.*, 2019 WL 1254015, at *13 (Wn. App., Div. 1, Mar. 18, 2019) (stating “[i]t is not clear the cumulative error doctrine applies in a civil case”; brackets added); *Allen v. Zonis*, 2018 WL 6787925, at *19 (Wn. App., Div. 1, Dec. 24, 2018) (noting “there is no authority to apply the cumulative error doctrine in a civil case”); *HBH v. State*, 197 Wn. App. 77, 95, 387 P.3d 1093, 1102 (2017) (noting lack of authority for applying cumulative error doctrine in civil cases), *aff'd*, 192 Wn. 2d 154, 429 P.3d 484 (2018); *Kave v. McIntosh Ridge Primary Rd. Ass'n*, 198 Wn. App. 812, 827, 394 P.3d 446, 453 (2017) (noting lack of authority for applying cumulative error doctrine in civil cases in unpublished portion of opinion). The court should decline to consider applying the cumulative error doctrine to civil cases in the absence of reasoned argument. *See Marriage of Fan & Antos*, 2019 WL 1487728, at *4.

QSD cites *Storey v. Storey*, 21 Wn. App. 370, 374, 585 P.2d 183 (1978), with a parenthetical comment asserting that the cumulative error doctrine applies in the civil context. *See* QSD Amd. App. Br., at 25. However, while *Storey* used the word “cumulative,” the case did not involve the cumulative error doctrine. The appellate court affirmed of a single decision of the superior court to grant a CR 59 motion. *See* 21 Wn. App. at 371-72. The affirmance was based in part on multiple instances of misconduct by the defendant. *See id.* at 374. The case did not present the question of reversal based on the cumulative effect of multiple, otherwise harmless errors committed by the superior court. The fact that *Storey* did not involve the cumulative error doctrine has previously been noted in two decisions by Division 1 of the Court of Appeals, both issued before QSD’s amended opening brief was filed, but these decisions have not been addressed by QSD. *See Cavner*, 2019 WL 1254015, at *13; *Kave, supra* (unpublished ¶ 68).

The cumulative error doctrine should be limited to criminal cases for some of the same reasons that the standard of review of an order denying a mistrial or new trial is different in criminal cases. Criminal prosecutions involve higher stakes, and are subject to a higher burden of proof and other constitutional limitations. As a result, there is a lower threshold for establishing that errors are sufficiently prejudicial to warrant a new trial in

the criminal context. The Court should continue to limit the cumulative error doctrine to criminal cases and reject QSD's attempt to extend it to civil cases.

2. Because it failed to object or request curative instructions the errors alleged by QSD are not reviewable.

Under RAP 2.5(a), a party generally may not raise an issue on appeal unless a timely objection was made in the trial court. “The rule reflects the belief that a party should be required to take measures in the trial court that will avoid the commission or consequences of an error, so that costly appeals and retrials will be necessary only to the extent that these measures have failed.” 1 Wash. St. Bar Ass’n, *Washington Appellate Practice Deskbook* § 3.3(4)(a)(i) (4th ed.); accord *In re Guardianship of Cornelius*, 181 Wn. App. 513, 533, 326 P.3d 718, 728 (2014) (noting RAP 2.5(a) “reflects a policy of encouraging the efficient use of judicial resources and refusing to sanction a party's failure to point out an error that the trial court, if given the opportunity, might have been able to correct to avoid an appeal”).

QSD acknowledges that an objection is normally required to raise alleged misconduct during closing argument on appeal. *See* QSD Amd. App. Br., at 10-11 (quoting *Alcoa*, 140 Wn. 2d at 539-40, for the proposition that the “movant must ordinarily have properly objected to the misconduct

at trial”); *see also* 14A Wash. Prac., Civil Procedure § 30:27 (3d ed.) (stating “[i]f counsel exceeds the proper scope of closing argument, or engages in other misconduct during closing argument . . . opposing counsel must object promptly and request a curative instruction to the jury in order to preserve the point for appeal”; brackets & ellipses added).

QSD does not dispute that a sustained objection and/or an appropriate curative instruction would normally eliminate any prejudice. *See ALCOA*, 140 Wn. 2d at 539 (stating “the trial court’s issuance of a curative instruction may obviate the need for a new trial, even if there is misconduct”); *see also* 14A Wash. Prac., Civil Procedure § 30:27 (3d ed.) (stating “the curative instruction usually renders the error harmless”).

Nonetheless, QSD concedes the portions of closing that are the subject of its cumulative error argument “were not objected to and, therefore, each independently likely would not justify mistrial or new trial.” QSD Amd. App. Br., at 25. QSD seems to assume—but does not justify the assumption—that the cumulative error doctrine excuses its failure to preserve the alleged errors. In actuality, QSD’s implicit and undefended assumption is incorrect because the cumulative error doctrine is not a substitute for normal preservation of error requirements.

An appellate court is limited to considering the cumulative effect of errors that have been preserved. *See State v. Barela*, noted at 196 Wn. App.

1040, 2016 WL 6236882, at *9 (Wn. App., Div. 3, Oct. 25, 2016) (stating “[b]ecause [the defendant] did not preserve any other errors, there was no cumulative error”; brackets added); *State v. Kalebaugh*, 179 Wn. App. 414, 424, 318 P.3d 288, 292 (2014) (limiting consideration of cumulative error to errors preserved for appeal), *aff’d*, 183 Wn. 2d 578, 355 P.3d 253 (2015); *State v. Womack*, noted at 184 Wn. App. 1011, 2014 WL 5363736, at *21 n.20 (Wn. App., Div. 2, Oct. 21, 2014) (stating the defendant “may not rely on unpreserved errors to make a cumulative error claim”); *State v. Garcia*, 177 Wn. App. 769, 786, 313 P.3d 422, 431 (2013) (stating “[b]ecause we hold that [the defendant] failed to preserve the alleged error ... this doctrine [i.e., cumulative error] does not apply”; brackets & ellipses added), *rev. denied*, 179 Wn. 2d 1026 (2014); *State v. Embry*, 171 Wn. App. 714, 766, 287 P.3d 648, 674 (2012) (stating “[o]ther errors may have occurred during this lengthy trial; but, the defendants failed to preserve these issues for appeal. Neither [defendant] demonstrates that the combined effect of any trial errors denied them their right to a fair trial. Therefore, the cumulative error doctrine does not apply”; brackets added), *rev. denied*, 177 Wn. 2d 1005 (2013); *State v. Grier*, 168 Wn. App. 635, 652, 278 P.3d 225, 233 (2012) (stating “[a]t the outset, we reiterate that we do not consider the [cumulative effect of] alleged errors that [the defendant] failed to preserve for appeal”; brackets added).

An appellate court may not address unpreserved errors, cumulative or otherwise, unless the exceptions to the normal preservation of error requirements in RAP 2.5(a) have been satisfied. *See State v. Gatherer*, noted at 2 Wn. App. 2d 1016, 2018 WL 526717, at *6 (Wn. App., Div. 3, Jan. 23, 2018) (citing *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992)). RAP 2.5(a) provides that “a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.” (Parentheses in original.) In this case, QSD has made no attempt to show how any these exceptions to the normal preservation of error requirements are satisfied in this case, and they are obviously inapplicable.⁵

In keeping with the weight of authority and normal preservation of error requirements, the Court should reject QSD’s cumulative error argument because it has failed to preserve the alleged errors on which it is based.

⁵ Only one case seems to suggest that unpreserved errors can be reviewed under the guise of the cumulative error doctrine. In *State v. Davis*, 3 Wn. App. 2d 763, 418 P.3d 199, 214 & n.99 (2018), the court stated: “Under the cumulative error doctrine, a conviction must be reversed where the cumulative effect of multiple preserved and unpreserved errors below deprived the defendant of a fair trial,” citing *State v. Russell*, 125 Wn. 2d 24, 93, 882 P.2d 757 (1994). *Russell* did not address preservation of error requirements and does not support the proposition for which it is cited in *Davis*. *Davis* is otherwise contrary to the weight of authority and normal preservation of error requirements under RAP 2.5(a). For these reasons, *Davis* is unpersuasive and should not be followed.

3. QSD has not satisfied its burden of proving the alleged errors are erroneous, let alone that they combined to deprive it of a fair trial.

The cumulative error argument is based on two aspects of closing argument made by trial counsel for the Rookstools. The first consists of less than one page of the transcript of closing argument conducted in the first-person voice of MaKayla Rookstool, RP 1944:4-25, which QSD characterizes as an improper “Golden Rule” argument, QSD Amd. App. Br., at 26-30. The second consists of comments characterized by QSD as “hometowning” and creating an “‘us vs. them’ atmosphere.” *Id.* at 30-33. The superior court did not abuse its discretion in declining to grant a new trial on the basis of these un-objected to aspects of closing.

With respect to use of the first-person voice in closing, QSD cites no authority for the proposition that it is tantamount to an improper Golden Rule argument. *See* QSD Amd. App. Br., at 28-30. QSD does not explain its position other than to assert “common sense dictates that this is a golden rule argument” and “[c]ounsel’s arguments here were plainly improper.” *Id.* at 29 (brackets added).

Using first-person voice should not be considered an improper Golden Rule argument. “The biblical ‘golden rule’ states a standard of conduct for individuals: do unto others as you would have them do unto you.” *Adkins*, 110 Wn. 2d at 139. “[R]eference by counsel to the ‘golden

rule’ per se, or allusions to the rule such as ‘urging the jurors to place themselves in the position of one of the parties to the litigation, or to grant a party the recovery they would wish themselves if they were in the same position’ constitutes an improper ‘golden rule’ argument.” *Id.* (brackets added). The argument about which QSD complains is not a Golden Rule argument because it did not reference the Golden Rule per se, nor did it invite the jury to grant MaKayla Rookstool the recovery they would wish themselves if they were in the same position. If the argument were deemed to be a Golden Rule argument, then direct testimony, which is also provided by witnesses in their own, first-person voice, would run afoul of the prohibition against the Golden Rule. There is no principled limit to QSD’s approach to Golden Rule arguments, and one would expect it to argue that using the present tense in closing conveys a sense of immediacy and places the jurors *in medias res* in a way that violates the prohibition. To avoid stretching the prohibition against Golden Rule arguments beyond all recognition, the Court should reject QSD’s argument.

Even if it were improper, “reversal is not automatic” when Golden Rule arguments are made and “the prejudicial effect of such an argument can be removed by the trial court sustaining a proper and timely objection and then promptly instructing the jury to disregard the improper argument.” *Adkins*, 110 Wn. 2d at 142. By failing to object to the argument about which

it complains, QSD deprived the superior court of the opportunity to address it. *See* RP 1334:7-1335:4. As a result, QSD should be deemed to have waived the alleged error arising from the comment. *See id.*⁶

Finally, with respect to the alleged “hometowning,” the argument is counterintuitive because QSD and the bus driver were also from the same home town as the Rookstool family, and the Rookstool family relied on expert testimony by witnesses who were from out of town. QSD fails to acknowledge that the issue was introduced by its own counsel, who described himself as a “city boy.” RP 1335:9-13 & 1662:15. At that point, the issue “became open and fair game.” RP 1335:11-12. QSD did not object to or request a curative instruction for the comments about which it now complains, and it should be deemed to have waived the alleged error. In any event, the superior court properly determined that the comments were “harmless,” RP 1335:14, and do not justify a new trial.

⁶ QSD also characterizes a rhetorical question by trial counsel for the Rookstools—“Can you imagine your daughter’s in constant pain?” RP 1949:3-4—as an improper Golden Rule argument. *See* QSD Amd. App. Br., at 27. As with the first-person closing, QSD cites no authority equating such a rhetorical question with an improper Golden Rule argument, the question does not specifically invoke the Golden Rule, it does not urge the jurors to grant the recovery they would wish themselves if they were in the same position, and it was not objected to. *See Marcoux v. Farm Serv. & Supplies, Inc.*, 290 F. Supp. 2d 457, 466 & n.5 (S.D.N.Y. 2003) (holding “can you imagine?” question did not violate Golden Rule because it merely “focus[es] the jury’s attention on the grave nature and consequences of plaintiff’s injuries,” and rejecting contrary authority as being incompatible with the latitude given to counsel in closing; brackets added).

V. CONCLUSION

Based on the foregoing, the Rookstool family respectfully asks the Court to affirm the judgment of the superior court.

Respectfully submitted this 4th day of June, 2019.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

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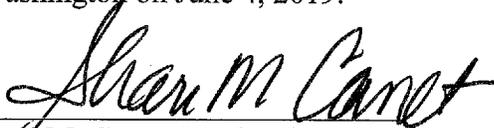
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