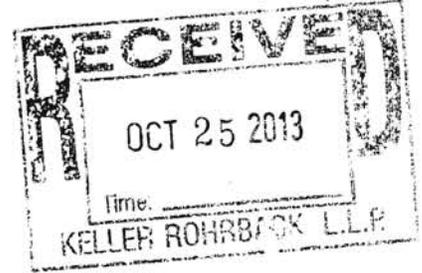


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DIVISION ONE

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No. 70448-6



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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ALLYN LINDEMANN AND STEVEN LINDEMANN,

Appellants,

v.

TOYOTA MOTOR CORP., TOYOTA MOTOR SALES, U.S.A.,  
INC., and TOYOTA MOTOR NORTH AMERICA, INC.,

Respondents.

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BRIEF OF APPELLANTS

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## I. INTRODUCTION

Allyn Lindemann was driving home from her son's high school graduation in a 2004 Lexus ES330, wearing her safety belts as usual. Suddenly a Jeep crossed the center line of the road and hit the front left corner of Ms. Lindemann's Lexus. The accident was minor for the Jeep driver but devastating for Ms. Lindemann. With broken bones all over her body, a deep gash on her leg and a ruptured artery, Ms. Lindemann lost enough blood to cause a stroke, permanently damaging her brain. She will never walk, see or feel normally again.

If Toyota had designed the Lexus ES 330 to be reasonably safe in this common kind of crash, Ms. Lindemann's injuries would have been relatively mild. At trial, the Lindemanns argued that Toyota should be strictly liable for the enhanced injuries caused by its defective design pursuant to the Washington Product Liability Act, Chap. 7.72 RCW. But Toyota was effectively shielded from liability by two errors of the trial court: 1) allowing a defense expert to tell the jury that Ms. Lindemann's obesity was the sole reason for the severity of her injuries; and 2) failing to tell the jury about the "eggshell plaintiff" rule that a tortfeasor takes its victim as it finds her, and is responsible for all damages caused by its tortious conduct even if the victim's preexisting condition (in this case, obesity) caused the damages to be greater. As a result of these errors,

Toyota evaded responsibility for its unsafe Lexus design by blaming an innocent victim just because she is overweight.

Not only did the “fat defense” lack the scientific validity required by ER 702, it allowed Toyota to exploit society’s prejudice against obese people, contrary to ER 403. Moreover, there is simply no authority supporting the trial court’s decision that the “eggshell plaintiff” rule does not apply in an enhanced injury case such as this. Nor is there any policy reason to let manufacturers off the hook for the full extent of damages caused by unsafe designs.

There are 40 million obese Americans like Ms. Lindemann. They are no less entitled to safe car designs than anyone else. If the trial court’s decision stands, auto-makers will lack incentive to protect a large class of people from preventable injuries. A new trial must be ordered so that Ms. Lindemann has a fair chance of holding the Toyota respondents accountable for failing to protect her from foreseeable harm.

## **II. ISSUES AND ASSIGNMENTS OF ERROR**

### *Assignments of Error*

1. The trial court erred by denying the Lindemanns’ motion in limine to exclude testimony of defense expert Elizabeth Raphael blaming Ms. Lindemann’s obesity for her injuries.

2. The trial court erred by denying the Lindemanns' proposed jury instruction regarding the eggshell plaintiff rule.

3. The trial court erred by granting judgment on the verdict to the defendants.

*Issues Pertaining to Error*

1. Is it unfairly prejudicial for an expert witness to testify that a plaintiff's crash injuries are due to the plaintiff's obesity, when studies show that society is prejudiced against obese people?

2. Does a trial court err by allowing expert testimony which lacks an accepted scientific basis?

3. Does a trial court commit an error of law by ruling that, when a plaintiff alleges that some injuries from a crash were caused by a defendant driver and additional ("enhanced") injuries were caused by a defendant manufacturer's unsafe design, the manufacturer is not responsible for enhanced injuries to the extent they were made worse by the plaintiff's preexisting physical condition?

4. Does public policy support holding automakers strictly liable for the full extent of injuries caused by defective car designs when the victims are already vulnerable to injuries?

5. Does a trial court err by refusing to instruct the jury that a tortfeasor is responsible for all injuries caused by its tortious conduct,

including injuries that are made worse by a preexisting physical (“eggshell”) condition, when it is undisputed that the plaintiff was obese and that obesity is associated with worsened injuries?

6. Is a car manufacturer strictly liable for an obese plaintiff’s severe crash injuries when the manufacturer acknowledges that it was foreseeable that an obese driver would be severely injured in that kind of crash, when there was no warning that the car was unsafe for obese drivers, and when the Product Liability Act imposes strict liability for failing to warn of likely harm?

7. Is a product manufacturer liable for enhanced injuries from an accident when the claimant’s preexisting condition made such injuries likely, and when the Product Liability Act imposes strict liability if “the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, outweighed the burden on the manufacturer to design a product that would have prevented those harms”?

### III. STATEMENT OF THE CASE

#### **A. Ms. Lindemann’s Car Collapsed On Her in the Crash.**

On the evening of June 7, 2009, Allyn Lindemann was driving alone in her Lexus when she was badly hurt in a head-on collision at Novelty Hill Road and 197<sup>th</sup> Court Northeast in Redmond, Wash. Trial Ex. 359 (medic report), p. 1. Paramedics found Ms. Lindemann with her

feet “stuck under [the] dash that was crumpled over her legs.” CP 582. All she remembers before losing consciousness is that “[b]lood was dripping down my head and all over the place, and I was having a really hard time breathing.” VRP (March 28, 2013) at 176, lines 1-2.

The paramedics reported “extensive damage and intrusion into [the] passenger compartment” from the crash. *Id.* They saw the steering wheel “pushed toward” Ms. Lindemann and the “driver door severely crumpled (torn away from crash).” CP 582. A King County Sheriff’s report similarly described “massive damage” to the Lexus from the front end “all the way back across the driver’s door.” CP 962. The driver’s seat was “tilted badly out to the left and forward.” *Id.* Sheriff’s Detective David Wells testified that the accident pushed the left tire of the Lexus into the lower left part of its dash. VRP (March 20, 2013) at 105, lines 10-14. The accident moved the steering column “from its normal position over towards the passenger’s side.” *Id.* at 106-107.

Rescuers had to “push [the] dash off of both legs that were pinned.” CP 582. It took more than 20 minutes to extricate Ms. Lindemann from the crushed car. Trial Ex. 359, p. 1.

**B. Ms. Lindemann Was Hurt Catastrophically.**

Paramedics observed that Ms. Lindemann was restrained by seatbelts and that airbags in her car had deployed, yet she sustained

multiple fractures and a “deep full thickness” laceration at the hip. Trial Ex. 359, p. 1; CP 582 (“driver wearing a seatbelt”). The incident report described double femur fractures, pelvis fractures and chest injuries “from [the] steering wheel.” CP 582. Ms. Lindemann was intubated, resuscitated and airlifted to Harborview Medical Center. *Id.*

Ms. Lindemann, then 56 years old, remained at Harborview for more than six months. Trial Ex. 4 (medical history), p. 1. Harborview summarized her injuries as follows: hemorrhagic shock, acute blood loss, watershed infarcts (stroke), acute lung injury, bilateral rib fractures, left and right sacral fractures, left and right femur fractures, left tibial plateau fracture, left thigh extensive degloving (tissue loss), right pelvic fracture, right talus fracture-dislocation, spinal fracture, left elbow laceration, head fracture and aphasia (speech impairment). Trial Ex. 26 (discharge summary), pp. 1-2. Two years after the crash, she still had “ongoing pain issues” in her foot and knee, needed crutches to walk, had trouble hearing, and required a caregiver 8 hours a day. Trial Ex. 4, pp. 1-4. At trial, she testified, “it’s really hard...I really miss driving. I really miss walking.” VRP (March 28, 2013) at 179, lines 4-6.

**C. The Accident Was Not Ms. Lindemann’s Fault.**

Detective Wells, who led the investigation of the crash, testified that the Jeep driver caused the crash by crossing the centerline. VRP

(March 20, 2013) at 83, lines 11-19, and 115, lines 6-8. He testified that the westbound Jeep continued across the eastbound lane of Novelty Hill Road and hit the left front corner of Ms. Lindemann's Lexus. *Id.* at 113.

Robert Caldwell, the Lindemanns' accident reconstruction expert,<sup>1</sup> testified that the 2002 Jeep Liberty was traveling at about 60 miles an hour and Ms. Lindemann's 2004 Lexus ES330 was going at about 20 miles an hour when the crash happened. VRP (March 21, 2013) at 24 (lines 19-21), 26 (lines 7-8); Trial Ex. 165 (accident analysis), pp. 2-3.<sup>2</sup> The speed limit was 45 miles an hour. VRP (March 21, 2013) at 24, lines 17-18.

The trial court granted a default judgment against Jocelyne Wheeler, driver of the Jeep. CP 224-225. Toyota did not allege that Ms. Lindemann did anything to cause the accident. CP 403-414.

#### **D. This Was a Common Kind of Accident.**

Detective Wells called the accident "a fairly typical two-lane roadway left front corner to left front corner impact." VRP (March 20, 2013) at 113-114. As an investigator he has seen "a couple hundred" similar accidents "where one car crosses the centerline." *Id.* at 114, lines 4-6. In fact, a small overlap crash - such as this one, where the collision impact was about a foot from the outer edge of each car - is among the

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<sup>1</sup> VRP (March 21, 2013) at 16, lines 17-25.

<sup>2</sup> Mr. Caldwell testified that the impact of the crash caused a velocity change of about 35 miles an hour. VRP (March 21, 2013) at 25. The crash lasted only 150 milliseconds. *Id.* at 34, line 1.

most frequent kinds of frontal collisions. *Id.* at 110, lines 12-25; Trial Exhibits 114, 121, 122 and 123. A “very high percentage, probably a quarter to a third of the crashes where people get seriously hurt, are crashes where there is a small overlap.” VRP (March 25, 2013) at 39 (Stephen Syson), lines 16-19.

**E. Lindemanns’ Experts Blamed the Lexus Design for the Severity of Ms. Lindemann’s Injuries.**

1. The Lexus ES 330 design did not include safety features that are important in small overlap crashes.

Stephen Syson, one of the Lindemanns’ design experts,<sup>3</sup> testified that the crash missed “the primary energy management structure” of Ms. Lindemann’s Lexus and most of the energy was absorbed by the crushing of the front wheel and tire assembly into the dashboard. VRP (March 25, 2013) at 37-38. When a collision misses the energy-managing front rails as in this case, “the passenger compartment can get deformed, and what that means is you lose your survival space. You lose the ability for the restraint system to protect you.” *Id.* at 44, lines 14-19.

Mr. Syson testified that the automotive industry had studied “small overlap” crashes like Ms. Lindemann’s crash since the late 1960s. VRP (March 25, 2013) at 28, lines 20-22. He explained to the jury how a car can be designed to protect a driver in a small overlap crash, as follows:

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<sup>3</sup> VRP (March 25, 2013) at 16-17.

In order to have a high-integrity cabin, you need to design the structure of the pillars, the sills, the doors, the roof, all the parts of the passenger compartment to minimize the intrusion of a collision into the occupant survival space....[O]bviously you need a strong front bumper that can help deflect the striking vehicle around the passenger compartment. You need the front of the passenger compartment to be relatively rigid so that things like the wheel and tire don't penetrate the occupant compartment and don't reduce the survival space for the legs. And you need to make the parts in the engine compartment...organized...so that in a crash they can move relative to each other and allow for the maximum amount of deformation of the structure in front of the passenger compartment so as to minimize the deformation to the passenger compartment itself.

*Id.* at 55-58. “Essentially the basic principle of crashworthiness is to sacrifice the front structure of the vehicle so that the passenger compartment can maintain its integrity.” *Id.* at 64, lines 17-20.<sup>4</sup>

Volvo has a design that protects occupants in small overlap crashes by placing part of the unibody rail in front of the tire and widening the bumper beam to deflect the striking vehicle around the tire. *Id.* at 68, 74 and 77. Some less expensive cars by Honda and Suzuki also did well in small overlap crash tests conducted by the Insurance Institute for Highway Safety (IIHS). *Id.* at 87; Trial Ex. 63. By contrast, the Lexus ES350, which is designed like Ms. Lindemann's ES 330, did not protect the occupant space and was rated poorly in the IIHS small overlap test. VRP

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<sup>4</sup> Toyota engineers have recognized these design principles. *Id.* at 58 and 64; Trial Ex. 138.

(March 25, 2013) at 74-75, 78-80; Trial Exhibits 15 and 120. In both the IIHS test of the Lexus and Ms. Lindemann's accident, "the left front wheel and tire assembly was...crushed into the front door hinge pillar," the dashboard moved toward the driver and the airbag moved out of place and failed to protect the driver. VRP (March 25, 2013) at 81-82.

Mr. Syson concluded that the Lexus ES 330 was not reasonably safe as designed because it could not protect the occupant survival space in a small overlap frontal crash. *Id.* at 99. If Toyota had used a safer design such as Volvo and Honda have used, the Lexus would have provided better crash protection for Ms. Lindemann. *Id.* at 100.

2. The Lindemanns' biomechanics expert explained why the defective design is responsible for the severity of Ms. Lindemann's injuries.

Dr. Joseph Burton, a biomechanics expert who has investigated 10,000 crashes resulting in death or serious injury,<sup>5</sup> testified that the Lindemann accident's velocity change of 35 miles an hour was not, by itself, sufficient to cause serious injuries. VRP (March 27, 2013) at 20, lines 11-20. "[T]he average velocity change to get a serious injury is 45 miles an hour." *Id.* The velocity change in this case "is below the level that typically produces" severe injuries. *Id.* at 21, lines 1-3.

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<sup>5</sup> VRP (March 27, 2013) at 4-13.

Ms. Lindemann was not fully protected by the driver's airbag, which comes out of the steering wheel, because the steering wheel moved in the crash to the right side of Ms. Lindemann and was not directly in front of her. *Id.* at 23 (lines 2 and 24-25) and 24, lines 6-14.<sup>6</sup> In general, the "deformation of the occupant space" caused the injuries that led to blood loss, resulting in Ms. Lindemann's strokes. *Id.* at 35, lines 13-16. As Dr. Burton summarized it, "her inability to get protection from the airbag and seat belt" and "the occupant space lost, the deformation that occurred," is what "caused her femur fractures, tore the tissue off her left thigh, fractured her pelvic ring" and tore the iliac artery. *Id.* at 40, lines 13-19. "Those fractures happened because of the loss of the occupant space crushing in on her legs." *Id.* at 41, lines 11-14.

Ms. Lindemann was "very overweight," which "would be a negative factor in any crash." *Id.* at 57, lines 9-12. "The larger the mass...the greater the force involved." *Id.* at 57, lines 12-14. However, Dr. Burton testified that the "force alone" was not enough, by itself, to cause Ms. Lindemann's severe injuries. *Id.* at 57, lines 8-16. If the safety package in the Lexus had performed in the way that Ms. Lindemann and

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<sup>6</sup> The airbag "was moving to her right at the same time that she was moving forward into it." *Id.* at 24, lines 21-24.

others would have expected, the forces of the crash “should have been survivable” rather than catastrophic. *Id.* at 58-59.

**F. The Trial Court Denied a Pre-Trial Motion to Exclude Toyota’s Fat Defense.**

Prior to trial, the Lindemanns moved “to exclude testimony by the Toyota Motor Corporation’s biomechanical expert, Elizabeth Raphael, M.D., blaming Ms. Lindemann’s weight for her pelvic fracture and stroke.” CP 285. The motion was based primarily on two arguments: 1) Dr. Raphael’s opinions lacked scientific support; and 2) the danger of unfair prejudice outweighed the probative value of the opinions because society is prejudiced against obese people. CP 285-293. The motion summary said:

Dr. Raphael’s so-called ‘fat defense’ is inadmissible because it is merely a thinly veiled attempt by Toyota to inflame prejudice against a victim of an unsafe car because she is ‘obese’... Moreover, it is irrelevant whether Ms. Lindemann’s weight worsened the impact of the crash because under the ‘eggshell plaintiff’ rule, a tortfeasor takes its victim as it finds her. Toyota cannot escape liability simply because of the foreseeable circumstance that a driver of its dangerous product, the 2004 Lexus ES 330, happened to be overweight.

CP 286. The motion was denied. VRP (March 18, 2013) at 105.

1. The motion and Toyota’s response explained the fat defense.

The pre-trial motion included deposition testimony of Dr. Raphael acknowledging that Ms. Lindemann’s injuries were unusually severe for

that kind of crash. CP 361-363.<sup>7</sup> The motion explained Dr. Raphael's opinion that Ms. Lindemann's weight, not the car design, was the reason for her "critical pelvic fracture that resulted in all her brain injuries." CP 287, 362. Citing "obesity studies," Dr. Raphael said that in a frontal crash, an obese woman experiences "increased forward excursion" and a slightly increased risk of lower extremity injury as compared to a normal woman. CP 366-67. The motion quoted the defense expert as follows:

Had she [plaintiff] been of normal weight at the time of this crash, although she may have gotten any number of AIS 3 injuries – particularly to her lower extremities – I do not believe she would have gotten a critical injury to her pelvis.

CP 363. The motion included deposition testimony that Ms. Lindemann needed to be 100 pounds lighter to avoid critical injury. CP 362.<sup>8</sup>

In response to the motion, Toyota explained its theory as follows:

[I]t should be undisputed that the forces that Ms. Lindemann's legs and pelvic bones experienced in the accident were 'amplified' by Ms. Lindemann's weight (approximately 240 pounds)...Most high school physics students are forced to memorize Newton's second law of motion and its equation ( $F=M \times A$ , or force equals mass times acceleration). Dr. Raphael...arrived at her conclusions in this case by applying Newton's second law

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<sup>7</sup> The motion included Dr. Burton's deposition testimony that with a safe car design, Ms. Lindemann's injuries would have been much less serious. CP 287, 326-328 ("we should survive crashes with no debilitating injuries...in the range we're talking about").

<sup>8</sup> In drawing conclusions, Dr. Raphael assumed that Ms. Lindemann weighed 265 pounds, but she acknowledged that there was "substantial variation" in the medical records as to what Ms. Lindemann actually weighed in the crash. CP 363, 368. At trial she used 239 pounds as Ms. Lindemann's weight. VRP (April 2, 2013) at 10, line 11.

of motion to (1) the amount of the deceleration Gs experienced by Ms. Lindemann's vehicle at the time of impact; and (2) the amount of Ms. Lindemann's body mass that continued forward as the vehicle was being pushed back, increasing the amount of force transmitted back into her legs and into her pelvis. In Dr. Burton's own words, 'the frosting on the cake is the force of [Ms. Lindemann's] body mass moving forward, not being stopped by the restraint system.' Of course, 'body mass' is another way of saying weight.

CP 613-614. Toyota asserted that it "has to design its vehicles for the general population" rather than for heavy people, and therefore Ms. Lindemann's "body mass" is relevant to whether Toyota "could have or should have designed the subject Lexus in a way that would have prevented Ms. Lindemann's pelvic injuries and associated...bleeding."

CP 617. Thus, Toyota proposed to let the jury decide if obese people should have the same safety protection as "the general population." *Id.*

2. The Lindemanns provided evidence of society's prejudice against obese people.

The Rudd Center for Food Policy and Obesity at Yale University has documented society's prejudice against obese people:

Obesity is associated with significant social consequences, and overweight and obese individuals are often the targets of weight-related stigmatization. A person who is stigmatized possesses an attribute that is linked to a devalued social identity and is ascribed stereotypes or other deviant labels that can lead to unfair treatment, prejudice and even discrimination. Multiple negative characteristics have been attributed to obese individuals, ranging from views that they are lazy and lacking in will power to

perceptions that they are incompetent, unclean and undisciplined. Weight-related stigmatization takes multiple forms, including repeated teasing, bullying, harassment and hostility. Emerging evidence suggests that weight stigma is intensifying.

CP 370 (footnotes omitted) (“Weight stigmatization and bias” article).

In fact, weight discrimination has increased 66 percent in the last decade and “is now on par with rates of racial discrimination, especially in women.” CP 383 (Journal of Health Communication article). “Prejudice and discrimination toward obese individuals have been consistently documented in a wide range of settings including health care, education, employment, and interpersonal relationships.” *Id.* According to a medical journal article, “Obesity: Pain and Prejudice”:

There are numerous social psychology studies demonstrating that people shown pictures of obese people, and then pictures of nonobese people, consistently rate the obese person as less attractive, less intelligent, lazy, weak-willed, gluttonous, and less likely to succeed.

CP 400 (Medscape General Medicine article).

In the face of these studies, the trial court said, “I certainly recognize that there is potential prejudice against obese people....But in this case, I think that it’s an essential part of the defense...and therefore, they have to be...allowed to present it.” VRP (March 18, 2013) at 106, lines 13-20.

3. The fat defense lacked scientific support.

The Lindemanns' motion noted that Dr. Raphael failed to identify any study supporting her contention that gravity forces alone – independently of any design factors – cause obese people to suffer pelvic fractures in crashes similar to Ms. Lindemann's. CP 288. In response to the motion, Toyota referred to "extensive research on the correlation between obesity and an increased risk of injury in high speed accidents." CP 612. However, the only "research" presented was the following:

a. An April 2010 study by University of Virginia researchers entitled, *"Is There Really a "Cushion Effect?: A Biomechanical Investigation of Crash Injury Mechanisms in the Obese."* CP 626. The study involved using 3 obese and 5 nonobese cadavers in crash tests to determine "differences in restraint interaction and crash biomechanics." *Id.* Only one obese cadaver was female. CP 628. Notably, "an airbag was not used" and the crash test involved frontal impact, not small overlap. CP 627. The study was limited to comparing how far the cadavers moved forward before seatbelts stopped their movement. CP 628. The study found that hips and knees moved forward more, but torsos moved "much less," in the 3 obese cadavers as compared to the 5 nonobese cadavers. *Id.* The study concluded that "obese occupants by virtue of their greater mass and hence kinetic energy do require more work from the restraint system

before their forward motion is arrested.” CP 630. The study did not say that gravity alone would be expected to cause pelvic fractures in an obese driver in a crash similar to Ms. Lindemann’s. CP 626-30. It did not take into account the restraining effect of airbags or measure how differences in car design might affect injury risks. *Id.*

b. A 2008 article entitled, “*Crash Injury Risks For Obese Occupants Using a Matched-Pair Analysis*,” describing an analysis of 1993-2004 data from accidents involving one obese and one non-obese front occupant. CP 633. The analysis found that obese female drivers have a 119 percent higher risk of serious injury than female drivers with “normal” body mass, and the fatality risk is 97 percent higher in obese drivers than in “normal drivers.” CP 633, 636. However, the article said that some of the increased risk is due to lower seatbelt use by obese people, for whom belts can be uncomfortable. *Id.* The article did not discuss small overlap crashes, velocity changes or other accident-related factors. CP 632-37. It did not say that gravity alone would be expected to cause serious injuries, regardless of vehicle design features, when an obese female driver is in an accident like Ms. Lindemann’s. *Id.* The article emphasized the need for additional research as to how to effectively restrain obese people in accidents. CP 636.

The Lindemanns pointed out that the articles “did not establish a causal connection between weight and pelvic fractures.” CP 696. They argued that Dr. Raphael’s testimony failed the *Frye* test of scientific acceptance, as no study posited that obesity causes pelvic fractures regardless of car designs. CP 293.

4. In denying the motion, the court said the eggshell rule does not apply.

The Lindemanns had argued that, even if Dr. Raphael’s opinion was scientifically supported, it would be irrelevant because of the “eggshell plaintiff” rule that a tortfeasor takes its victim as it finds her and is responsible for the full extent of injuries resulting from the tort. CP 290, 695. In response, Toyota did not cite any case law addressing the applicability of the eggshell rule. CP 615-18. Toyota argued simply that Ms. Lindemann’s weight is relevant to whether she would have suffered lesser injuries if the sedan had been reasonably safe. CP 617.

In denying the motion to exclude Dr. Raphael’s theory that obesity caused the severity of injuries, the court said:

I think that the eggshell plaintiff rule doesn’t apply to enhanced injuries. It applies when you are talking about, you know, a standard tort, but not where you are talking about the injury being due – not to what caused the accident but, rather – to the nature of the design of the vehicle.

VRP (March 18, 2013) at 105-106.

**G. The Trial Court Declined to Instruct the Jury On the Eggshell Plaintiff Rule.**

1. The Lindemanns proposed to instruct the jury that Toyota is liable for injuries caused by its defective design, over and above injuries that would have happened in a safe car, including injuries made worse by a preexisting condition.

Both the Lindemanns and Toyota proposed to use Washington Pattern Instruction 110.02.02, which says:

A manufacturer of an automobile has a duty to design the automobile to be crashworthy, that is, the automobile must be reasonably safe in reasonably foreseeable accidents or collisions. Based on this duty, a manufacturer of an automobile is liable for that portion of the damage or injury caused by the product design defect over and above the injury or damage that probably would have occurred as a result of a reasonably foreseeable accident or collision impact even without the product defect. The manufacturer is liable for this enhanced injury or damage even though the defect did not cause the accident or collision itself.

CP 456, 1086. The Lindemanns also proposed a modified version of Washington Pattern Instruction 110.02.03 saying the Lindemanns have the burden of proving: 1) that the 2004 Lexus ES 330 was not reasonably safe in reasonably foreseeable accidents; and 2) that the defective Lexus condition “was a proximate cause of the plaintiffs’ suffering injuries that they would not have otherwise sustained...absent the product defect.” CP 1092.

In addition, the Lindemanns proposed a modified version of Washington Pattern Instruction 30.18.01, stating:

If your verdict is for the plaintiffs, and if you find that: 1) before this occurrence Allyn Lindemann had a bodily or mental condition that was not causing pain or disability; and 2) the condition made Allyn Lindemann more susceptible to injury than a person without that bodily or mental condition, then you should consider all the injuries and damages that were proximately caused by the occurrence, even though those injuries, due to the preexisting condition, may have been greater than those that would have been incurred under the same circumstances by a person without that condition.

CP 1094.

2. The trial court did not instruct the jury to consider all injuries regardless of preexisting bodily conditions.

The trial court accepted the Lindemann's proposed instructions explaining that automakers have a duty to design cars to be reasonably safe in foreseeable accidents, and that the Lindemanns had the burden of proving that a defective design caused enhanced injuries which Ms. Lindemann would not have sustained if the car was safe. CP 1015, 1018. The trial court did not include in jury instructions, however, that once the Lindemanns proved that a defective design caused enhanced injuries in the crash, *all* injuries must be considered regardless of whether they were made worse by a preexisting condition. CP 1005-1026. The Lindemanns objected to the trial court's failure to use the proffered instruction.<sup>9</sup>

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<sup>9</sup> At the close of testimony, the judge said "I will go over the instructions with the attorneys now." VRP (April 3, 2013) at 62. The ensuing discussion is missing from the complete verbatim report of all proceedings ordered by appellants. See Statement of

**H. Using Novel Methodology, Dr. Raphael Told the Jury That Ms. Lindemann's Obesity Made "Accident Forces" Too Great to Prevent Injury.**

At trial, Dr. Raphael said that Ms. Lindemann was "morbidly obese." VRP (April 2, 2013) at 16, line 9. She told the jury that, based on the University of Virginia cadaver test described above, "there's a significant amount of forward excursion of the pelvis" for an obese person in an accident "due to the fact that the seatbelt can't really restrain all that soft tissue in front." *Id.* at 19, lines 1-12. She testified that the Lexus seatbelt was not "able to manage the forces" of the accident and control Ms. Lindemann's movement while it was "interacting with the soft tissue of her body." VRP (April 1, 2013) at 215, lines 6-11. She testified that Ms. Lindemann's knees would have struck the structure in front of her, even if the structure was not deformed by the accident, because "the crash forces are so severe and the amount of soft tissue that she has is sufficient that it allows her that forward excursion into the structures in front of her." *Id.* at 215-16.

Dr. Raphael acknowledged that in the cadaver test, which used open sleds rather than cars, there was no airbag, dashboard or anything else in front of the cadavers. VRP (April 2, 2013) at 21, lines 18-22. "The only restraint they had was the seatbelt, so that they could see what the

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Arrangements; VRP (April 3, 2013) at 62; VRP (April 4, 2013) at 2. The Declaration of Felix G. Luna, attached herein, confirms that exceptions on the record were taken.

maximum forward excursion was going to be.” *Id.* Nevertheless, Dr. Raphael concluded from the cadaver test that in a real car in a real accident, an obese person would suffer worse injuries than “a normal weight occupant” because of “an increased amount of force on the lower extremities.” *Id.* at 21-22.

Dr. Raphael explained her methodology, without referring to any study indicating it is scientifically accepted. VRP (April 2, 2013) at 11-12. Relying on a frontal barrier test for a 2004 Lexus ES 330, Dr. Raphael said that about half of the body weight goes into the shoulder belt and the other half goes into the lap belt in a crash. *Id.* at 11, lines 12-21. She acknowledged that the frontal test is not comparable to a small overlap crash such as Ms. Lindemann’s, and that the test used a dummy based on a 170-pound male, 70 pounds lighter than Ms. Lindemann. *Id.* at 124, lines 15-25 (describing the Lindemann accident and frontal barrier tests as “apples and oranges”) and 125, lines 5-12. Yet she used that analysis of seatbelt loading in a frontal barrier test to calculate that 100 pounds of Ms. Lindemann’s total weight of 239 pounds “was going into the lower body” during her accident. *Id.* at 12. Dr. Raphael did not cite any study or test supporting the notion that if half of a 170-pound dummy’s weight goes into a lapbelt when a car hits a barrier head-on, that somehow means that 40 percent of an obese woman’s weight goes into the lower part of her

own body – rather than into the lapbelt – in a different kind of crash in which the left corner of the car impacts the left corner of another car. *Id.* at 11-12.

Dr. Raphael explained that she multiplied the 100 pounds (40 percent of Ms. Lindemann’s weight) by 25, which was Toyota’s estimate of the “amount of acceleration due to gravity” in the accident – to conclude that “the force on her lower body would be 2,500 pounds.” *Id.* at 7, lines 1-6, and 13, lines 1-6. She told the jury that according to medical literature, “that’s above the amount of force that’s necessary to cause the fractures that [Ms. Lindemann] sustained in her lower extremities.” *Id.* at 13-14. Dr. Raphael therefore concluded that “accident forces,” rather than deformation of the Lexus’s occupant space, caused Ms. Lindemann’s right foot fractures, left knee fracture, right and left femur fractures, and laceration of iliac arteries. *Id.* at 24-32 and 38-39. She also blamed Ms. Lindemann’s obesity for the big gash on her thigh, saying that because of the “shape of her body” and “excessive forward excursion” her thigh was “right up against that door.” *Id.* at 41, lines 7-20.

Following her testimony, the jury posed six questions to Dr. Raphael. CP 999-1000. One was, “Did the lower dash intrusion, due to its deformation, contribute in any way to the knee, femur and pelvis

injuries?” CP 999. Dr. Raphael responded that those injuries “occurred from her accelerations alone.” VRP (April 2, 2013) at 131, lines 9-10.

**I. The Jury Accepted Toyota’s Defense.**

Question 1 on the Special Verdict Form was: “Did the defendant supply a product that was not reasonably safe?” CP 1027. The jury answered “No,” and did not reach the other questions. *Id.* The court entered judgment for Toyota. CP 1059.

IV. ARGUMENT

**A. Standard of Review.**

A trial court's ruling on a motion in limine is reviewed for abuse of discretion, and is reversed “if no reasonable person would have decided the matter as the trial court did.” *State v. O'Connor*, 155 Wn.2d 335, 351, 119 P.3d 806 (2005); *see also State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995) (abuse exists when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds).

This Court reviews de novo the alleged errors of law in a trial court's instructions to the jury. *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 266, 96 P.3d 386 (2004), citing *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). A court's omission of a proposed statement of the governing law will be “reversible error where it prejudices a party.” *Barrett* at 267, quoting *Hue*, 127 Wn.2d at 92.

**B. The Trial Court Abused its Discretion By Denying the Motion to Exclude Dr. Raphael's Testimony.**

1. Dr. Raphael's testimony was unfairly prejudicial.

Evidence is relevant and admissible if it tends to make the existence of a material fact more or less probable. *Medcalf v. Department of Licensing*, 83 Wash.App. 8, 16, 920 P.2d 228 (Div. 2 1996); ER 401; ER 402. "The trial court must exclude evidence, however, when its probative value is outweighed by the potential that the evidence will unduly prejudice the other party or confuse the jury." *Medcalf* at 16-17, citing ER 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury"). "When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 671, 230 P.3d 583 (2010) (holding that the probative value of evidence that the plaintiff was an undocumented immigrant was outweighed by the danger of unfair prejudice). *Accord, Hayes v. Weiber Enterprises, Inc.*, 105 Wn.App. 611, 618, 20 P.3d 492 (2001) ("evidence may be unfairly prejudicial under ER 403 if it is evidence 'dragged in' for the sake of its prejudicial effect or is likely to trigger an emotional

response rather than a rational decision”); *Carson v. Fine*, 123 Wn.2d 206, 223-24, 867 P.2d 610 (1994).

a. *The probative value was nil.*

Here, the probative value of evidence must be determined in light of the Product Liability Act, Chap. 7.72 RCW, because that was the asserted basis for Toyota’s liability. Under RCW 7.72.030(1), “a product manufacturer is subject to liability to a claimant if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided.” A product is “not reasonably safe as designed if, at the time of manufacture, the likelihood that the product would cause the claimant’s harm or similar harms, and the seriousness of those harms, outweighed the burden on the manufacturer to design a product that would have prevented those harms.” RCW 7.72.030(1)(a) (known as the risk-utility test). A product is not reasonably safe due to inadequate warnings “if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, rendered the warnings or instructions of the manufacturer inadequate” or if, after manufacture, the manufacturer learned or should have learned about a danger and failed to warn product users. RCW 7.72.030(1)(b) and (c).

Although RCW 7.72.030(1) refers to negligence, it creates a strict liability standard for design defects. *Couch v. Mine Safety Appliance Co.*, 107 Wn.2d 232, 239 n. 5, 728 P.2d 585 (1986).

A plaintiff may demonstrate a design defect based on either the risk-utility test or the “consumer expectations” test. *Bruns v. PACCAR, Inc.*, 77 Wn. App. 201, 209, 890 P.2d 469, review denied, 126 Wn.2d 1025 (1995). The consumer expectations test requires showing that the product was “unsafe to an extent beyond that which would be contemplated by the ordinary consumer.” *Eriksen v. Mobay Corp.*, 110 Wn. App. 332, 344 (2002). Safety is judged against the reasonable expectations of the ordinary consumer, not the plaintiff personally. *Id.* It is not necessary to prove “exactly how the design was deficient” in order to recover under this theory. *Bombardi v. Pochel’s Appliance and TV Company*, 10 Wn. App. 243, 247, 518 P.2d 202 (1974). In *Bombardi*, this Court affirmed a jury verdict finding a television defective because it caught on fire,<sup>10</sup> stating, “Under these circumstances, the conclusion is inescapable that the television was defective because it performed in an unreasonably dangerous manner, and in a manner un contemplated by any user or consumer.” *Id.* at 246.

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<sup>10</sup> The *Bombardi* test does not require the product at issue to have been completely destroyed. *Potter v. Van Waters & Rogers, Inc.*, 19 Wn. App. 746, 755, 578 P.2d 859 (1978).

Based on these product liability standards, Dr. Raphael's theory had *zero* probative value. This is because, even if it was true that Ms. Lindemann's obesity prevented the Lexus seatbelts from managing the "accident forces" safely, that is purely an emotional issue and not a legal defense to strict liability for an unsafe product. The seatbelts are part of the car design which, by Dr. Raphael's own admission, was not able to protect Ms. Lindemann. The fact that the seatbelts may have been effective if Ms. Lindemann weighed less is irrelevant under RCW 7.72.030.

The question is whether the likelihood and seriousness of Ms. Lindemann's injuries outweighed the burden on Toyota to design a car that would have protected her in the crash. RCW 7.72.030(1)(a). By Dr. Raphael's own admission, it was highly likely that an obese person such as Ms. Lindemann would be seriously injured in the accident, as suggested by the cadaver test and crash-data analysis. Thus, the only possible defense under RCW 7.72.030(1)(a) is that it was too burdensome to design a car that would have protected Ms. Lindemann. Dr. Raphael's testimony had no bearing on that question and therefore had no probative value. In fact, neither Dr. Raphael nor any other expert contended that Toyota was incapable of designing a car that would be safe for obese people.

Moreover, Toyota offered no evidence that the ordinary consumer expects seatbelts to be ineffective if the driver is heavy. Just as consumers do not expect a TV to catch fire, they do not foresee that a luxury car will expose an overweight driver to permanent injuries from a common accident. *Bombardi*, 10 Wn. App. at 246. Having sold cars without any warnings related to obesity, Toyota cannot claim that 40 million Americans should expect to suffer severe injuries in collisions just because they are obese.<sup>11</sup> Thus, Dr. Raphael's theory is as irrelevant under the consumer expectation test as it is under the risk-utility test.

b. *The danger of unfair prejudice was high.*

Lacking probative value, the real purpose of Dr. Raphael's theory was to inflame the jury's prejudice and invoke an emotional reaction against a tort victim. Disdain for obese people is, unfortunately, well known in our society. As the Eighth Circuit U.S. Court of Appeals stated eloquently, "The notion that all fat people are self-indulgent souls who eat more than anyone ought appears to be no more than the baseless prejudice of the intolerant svelte." *Stone v. Harris*, 657 F.2d 210, 211 (8<sup>th</sup> Cir. 1981). Toyota exploited that prejudice by inviting the jury to conclude that Ms. Lindemann's catastrophic injuries are her own fault, not because of any negligent act on her part, but because of a physical

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<sup>11</sup> The number of obese citizens comes from the 2008 article cited by Toyota. CP 632.

condition which often attracts derision and hostility. This is precisely the kind of inflammatory testimony which ER 403 prohibits.

*Salas* is instructive. In that case, a worker was badly hurt when he slipped from an unsafe ladder erected by the defendant at a construction site. *Salas*, 168 Wn.2d at 667. The jury heard evidence that the worker's visa had expired and that his application for citizenship was never processed, resulting in illegal immigrant status. *Id.* at 667-668. The Washington Supreme Court held that the trial court abused its discretion by admitting the evidence because, although it was minimally relevant to lost earnings due to a slight chance of deportation, the probative value was substantially outweighed by the danger of unfair prejudice. *Id.* at 671-672. The Court said:

We recognize that immigration is a politically sensitive issue. Issues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation.

*Id.* at 672.

Here, like the immigration evidence in *Salas*, Dr. Raphael's testimony interfered with reasoned deliberation by inviting the jury to view Ms. Lindemann with disdain. Prejudice based on obesity is a growing, widespread problem, as explained in studies submitted with the motion in limine. Jurors are as susceptible to this prejudice as any other

segment of society. Here, Dr. Raphael claimed that the Lexus restraint system was unable to protect Ms. Lindemann because of her obesity, and her theory was designed to shift the blame to an innocent victim by emphasizing her stigmatized condition and inviting an emotional reaction from the jury. Because the probative value of the theory was substantially outweighed by the danger of unfair prejudice, the court abused its discretion in denying the motion.

2. Dr. Raphael's theory lacked scientific validity.

For expert testimony regarding novel scientific evidence to be admissible, it must satisfy the *Frye* standard and ER 702. *State v. Gregory*, 158 Wn.2d 759, 829–30, 147 P.2d 1201 (2006). Under *Frye*,<sup>12</sup> expert testimony is admissible where

- (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part; and
- (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results.

*State v. Sipin*, 130 Wn.App. 403, 414, 123 P.3d 862 (2005). Both the theory underlying the evidence and the methodology for implementing the theory must be generally accepted in the scientific community. *Gregory*, 158 Wn.2d at 829. When applying the *Frye* test, courts do not determine if

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<sup>12</sup> *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

the scientific theory underlying the proposed testimony is correct; rather, courts determine “whether the theory has achieved general acceptance in the appropriate scientific community.” *State v. Riker*, 123 Wn.2d 351, 359–60, 869 P.2d 43 (1994). Unanimous acceptance of a theory or methodology is not necessary. *State v. Gore*, 143 Wn.2d 288, 302, 21 P.3d 262 (2001). In a *Frye* analysis, courts consider expert testimony, scientific writings that have been subject to peer review and publication, secondary legal sources, and legal authority from other jurisdictions. *Eakins v. Huber*, 154 Wn.App. 592, 599–600, 225 P.3d 1041 (2010). The court acts as a gatekeeper to admit techniques accepted in the relevant scientific community even when they are novel to the court, but to exclude techniques that are novel both to the court and the relevant scientific community. *Moore v. Harley Davidson Motor Co. Group*, 158 Wn.App. 407, 418, 241 P.3d 808 (2010).

a. *Her theory was novel.*

Toyota did not present any study or article validating Dr. Raphael’s calculation that: a) because a frontal barrier test indicated that about 50 percent of a 170-pound crash dummy’s weight goes into the dummy’s lap belt in a crash, that somehow means that 40 percent of Ms. Lindemann’s 240-pound weight must have gone into her lower body (not her lap belt) in a small overlap crash; or that b) by multiplying the

'100 pounds of weight allegedly going into Ms. Lindemann's lower body by an acceleration number, 25, it is somehow possible to conclude that Ms. Lindemann would have fractured her bones even if the car had not collapsed. There simply is not any such calculation in any scientific publication presented by Toyota. Moreover, Toyota did not present any scientific study positing that gravity ("accident forces") alone would be expected to cause severe injuries in an obese driver regardless of car design, let alone predicting such injuries are scientifically certain in a small overlap crash with a velocity change of 35 miles an hour.

It defies common sense to say that obesity would have caused enough "accident forces" to break Ms. Lindemann's pelvis even in a safely designed car. The physical evidence was that the crushed dash pinned both of her legs, the steering wheel moved to the right so that the airbag did not fully protect her and the crushed driver's door ripped part of her thigh off. Thus, it is only speculation that if the structures had remained intact, Ms. Lindemann's bones still would have broken. Notably, the cadaver test had only seatbelts and no structures interacting with the cadavers, and was comparing movement rather than injury levels. The crash-data analysis cited by Toyota did not involve any tests and acknowledged that higher injury rates for obese people could be due

to lower seatbelt use. In sum, Dr. Raphael's theory was novel and therefore the *Frye* test applies. *Gregory*, 158 Wn.2d at 829–30.

b. *Her theory was not accepted.*

Toyota offered just two scientific articles in support of Dr. Raphael's theory: the article describing a crash test in which 3 obese and 5 non-obese cadavers were placed on open sleds to determine how far they moved before seatbelts restrained them, and; the analysis of data from crashes involving one obese and one non-obese front occupant. Neither article discussed the effect of obesity in small overlap crashes such as Ms. Lindemann experienced. Neither article suggested that it is impossible for car designs to protect obese people, contrary to Dr. Raphael's reasoning. And as noted above, neither article described or validated the methodology used by Dr. Raphael.

Dr. Raphael's opinion that Ms. Lindemann suffered a pelvic fracture because she was obese is not based on any generally accepted scientific principle. While Toyota may blame obese consumers for their own injuries, the science community has not done so, and on the contrary has encouraged more research to better protect that segment of the motoring population. As the crash-data article cited by Toyota said:

At this time, it is unclear what portion of the difference in relative risk with obesity is due to differences in human tolerances, restraint performance, or other factors when an

occupant is obese as compared to normal BMI [body mass index]. Improving our understanding of these differences should lead to refined safety systems and improved protection of obese and morbidly obese occupants.

CP 636. In sum, Dr. Rafael's testimony failed the *Frye* test of scientific acceptance. Therefore the trial court abused its discretion in denying the motion in limine.

3. The trial court wrongly disregarded the eggshell plaintiff rule.

“It is a well-established precept of tort law that a tortfeasor takes his victim as he finds him.” *Buchalski v. Universal Marine Corp.*, 393 F.Supp. 246, 248 (W.D. Wash. 1975). *Accord, Moore v. The Sally J*, 27 F.Supp.2d 1255, 1263 (W.D. Wash. 1998) (defendant was liable for causing injuries even though a disease was a “parallel” cause). It does not matter if effects of an injury “might have been less severe but for plaintiff's preexisting condition,” because the tortfeasor is liable for the full effects. *Buchalski*, 393 F.Supp. at 248. Ms. Lindemann's obesity was a preexisting physical condition.

The Lindemanns have been unable to find case law anywhere in the country stating that the eggshell plaintiff rule articulated in *Buchalski* does not apply in an enhanced injury case. Courts around the country have recognized the important principle that a defendant “may not escape or reduce damages by highlighting the injured party's susceptibility to

injury.” *Primm v. U.S. Fidelity & Guaranty Insur. Corp.*, 324 Ark. 409, 922 S.W.2d 319, 321(1996), citing *Benn v. Thomas*, 512 N.W.2d 537 (Iowa 1994), *Hoffman v. Schafer*, 815 P.2d 971 (Colo.App. 1991), *Casey v. Frederickson Motor Express Corp.*, 97 N.C.App. 49, 387 S.E.2d. 177 (1990); and *Prosser and Keeton on the Law of Torts* §43, p. 292 (5<sup>th</sup> ed. 1984). Yet that is exactly what Toyota did in this case – highlighting Ms. Lindemann’s obesity in order to escape liability – as a result of the trial court’s erroneous decision that the eggshell rule did not apply.

In essence, the trial court held that an eggshell condition is a legitimate defense in a crashworthiness case. In denying the Lindemanns’ motion to exclude the obesity defense, the trial court said that when the issue is whether a defective design has enhanced injuries above what would have occurred in a safe car, the defendant is entitled to argue that the plaintiff’s preexisting condition rather than the design is to blame for the injuries at issue. This approach is patently unfair to innocent victims like Ms. Lindemann, and a clear violation of Washington law. It creates a significant loophole in Washington’s product liability scheme.

For nearly four decades, Washington courts have held manufacturers strictly liable when design defects cause enhanced injuries. *Baumgardner v. American Motors Corp.*, 83 Wn.2d 751, 758-59, 522 P.2d 829 (1974). In adopting the enhanced injury doctrine, the *Baumgardner*

court said, “[W]e have no difficulty in holding that it is reasonably foreseeable, indeed it is statistically inevitable, that automobiles will be involved in collisions.” *Id.* at 757. “Neither sound policy nor reason can be found to justify a distinction between the liability of the manufacturer whose defective item causes the initial accident and that of the manufacturer whose defective product aggravates or enhances the injuries after an intervening impact.” *Id.* at 756, quoting *Bolm v. Triumph Corp.*, 33 N.Y.2d 151, 159, 305 N.E.2d 769 (1973). As the Eighth Circuit Court of Appeals said in *Larsen v. General Motors Corp.*, 391 F.2d 495, 502 (1968), which was cited with approval in *Baumgartner* at 754-55, “The manufacturer should not be heard to say that it does not intend its product to be involved in any accident when it can easily foresee and when it knows that the probability over the life of its product is high that it will be involved in some type of injury-producing accident.” The *Larsen* court said that even though it can be difficult to separate the injury due to defective design from the injury that would have occurred absent the defect, “there is no reason to abandon the injured party to his dismal fate as a traffic statistic.” 391 F.2d at 503.

The trial court’s reasoning in this case is contrary to *Baumgardner* and *Larsen*. It is foreseeable that car accidents will involve persons who are obese or have other preexisting vulnerabilities. There is no reason to

abandon only those persons to a “dismal fate,” while allowing everyone else to recover fully for damages traceable to defective designs. As long as a plaintiff can prove that a car was not reasonably safe as designed, and that the defective condition was a proximate cause of injuries, it should not matter whether the injuries were greater due to a physical condition. In sum, this state’s courts have never held that a plaintiff’s predisposition to injury is a defense, and the trial court abused its discretion by allowing Toyota to present such a defense in this case.

**C. The Trial Court Committed an Error of Law by Omitting a Jury Instruction Stating the Eggshell Plaintiff Rule.**

Instructions are inadequate if they prevent a party from arguing its theory of the case, mislead the jury, or misstate the applicable law. *Barrett*, 152 Wn.2d at 266, citing *Bell v. State*, 147 Wn.2d 166, 176, 52 P.3d 503 (2002). Failure to permit instructions on a party's theory of the case, where there is evidence supporting the theory, is reversible error. *Barrett* at 266-67, citing *State v. Williams*, 132 Wn.2d 248, 259–60, 937 P.2d 1052 (1997). Reversal of jury instructions is appropriate when instructions as a whole allow the jury to misapply the law. *Falk v. Keene Corp.*, 113 Wn.2d 645, 656, 782 P.2d 974 (1989). Parties preserve objections to jury instructions for appellate review “if they object and the trial court understands the substance of the objection.” *Washburn v. City*

*of Federal Way*, -- Wn.2d -- , 2013 WL 5652733 (2013), citing *Crossen v. Skagit County*, 100 Wn.2d 355, 359, 669 P.2d 1244 (1983).

“A party is entitled to have the jury instructed on his or her theory of the case as long as there is evidence to support the theory.” *Ramey v. Knorr*, 130 Wn.App. 672, 688, 124 P.3d 314 (2005). “Where there is substantial evidence to support a theory, a trial court *must* instruct the jury on that theory.” *Id.* (emphasis added). “The jury should be instructed in accordance with the facts.” *Allison v. Dept. of Labor and Industries*, 66 Wn.2d 263, 267, 401 P.2d 982 (1965). “Instructions are governed by the facts proved in each particular case.” *Id.*

1. The facts of the Lindemanns’ case supported their eggshell theory.

It is undisputed that Ms. Lindemann, at five foot eight inches tall and 240 pounds, was obese at the time of her accident. The evidence also established that, due to her obesity, she was especially vulnerable to injuries from a car accident. Both Dr. Raphael and the Lindemanns’ biomechanics expert, Dr. Burton, testified that obesity is a negative risk factor in car accidents. Obesity is a physical condition. In light of these undisputed facts, there was substantial evidence supporting the Lindemanns’ theory that Ms. Lindemann was an eggshell plaintiff and that Toyota was responsible for all injuries from the defective Lexus design even though her preexisting condition made the injuries worse. Therefore,

the trial court was required to instruct the jury on that theory, and committed reversible error by failing to do so. *Ramey*, 130 Wn.App. at 688; *Allison*, 66 Wn.2d at 267; *Barrett*, 152 Wn.2d at 266-67.

2. The instructions as a whole allowed the jury to misapply the law.

The Washington Pattern Jury Instructions adopted by the Washington Supreme Court include WPI 30.18.01, entitled “Particular Susceptibility,” which says:

If [your verdict is for the *[plaintiff]* *[defendant]*, and if] you find that:

(1) before this occurrence the *[plaintiff]* *[defendant]* had a *[bodily]* *[mental]* condition that was not causing pain or disability; and

(2) the condition made the *[plaintiff]* *[defendant]* more susceptible to injury than a person in normal health, then you should consider all the injuries and damages that were proximately caused by the occurrence, even though those injuries, due to the pre-existing condition, may have been greater than those that would have been incurred under the same circumstances by a person without that condition.

*[There may be no recovery, however, for any injuries or disabilities that would have resulted from natural progression of the pre-existing condition even without this occurrence.]*

The Lindemanns proposed this instruction without the inapplicable “natural progression” language.

The “Comment” to WPI 30.18.01 cites the “fundamental notion” that “a tortfeasor takes his victim as he finds him, and must bear liability for the manner and degree in which his fault manifests itself on the

individual physiology of the victim,” quoting *Buchalski*, 393 F.Supp. at 248. The Comment also says, “This instruction deals with proximate cause,” even though it is in the damages chapter. Neither the Comment nor the “Note on Use” says that the instruction should not be used in an enhanced injury case.

There is no published opinion in Washington courts applying *Buchalski*. However, the eggshell plaintiff rule was recognized in *Bennett v. Messick*, 76 Wn.2d 474, 478-479 (1969), a case involving lighting up of a latent condition rather than susceptibility, as follows:

The rule is that when a latent condition itself does not cause pain, suffering or a disability, but that condition plus an injury brings on pain or disability by aggravating the pre-existing condition and making it active, then the injury, and not the dormant condition, is the proximate cause of the pain and disability. Thus, the party at fault is held for the entire damage as the direct result of the accident. 22 Am.Jur.2d, Damages s 123 (1965).

*Accord, Reeder v. Sears, Roebuck & Co.*, 41 Wn.2d 550, 250 P.2d 518 (1952); *Greenwood v. Olympic, Inc.*, 51 Wn.2d 18, 315 P.2d 295 (1957).

According to the pattern instruction notes, the same principle applies to particular susceptibility as to lighting up a condition.

There is no authority for ignoring this principle in crashworthiness cases. In arguing against application of the eggshell plaintiff rule, Toyota suggested that the jury should decide whether its duty to design safe cars

extends only to the “general population” and not to obese motorists. But that is a policy question, not a fact-finding question for a jury. Because the trial court omitted WPI 30.18.01, the jury was allowed to misapply the law and find that Ms. Lindemann’s preexisting vulnerability to injury was a defense rather than a consideration in calculating damages.

In *Primm*, the Arkansas Supreme Court held that the trial court committed reversible error by failing to give the eggshell plaintiff instruction when there was evidence that the injured party, a partially paralyzed 6-year-old child, had brittle bones that were “susceptible to breakage” due to spina bifida. 922 S.W.2d at 320. In that case, the child’s femur was fractured when a classmate tipped over his wheelchair after the teacher left them alone. *Id.* The child’s mother “requested AMI 2203 [an eggshell plaintiff instruction] setting forth the law that she should be compensated to the full extent of her son’s injury even though the degree and extent of the injury were caused by his osteoporosis.” *Id.* at 321.

The defendant argued that failure to give the instruction was harmless error because it was just a damage instruction, and the jury did not find liability so damages were moot. *Id.* The court rejected that argument, noting that the eggshell rule “embraces definite aspects of proximate causation when it discusses...predisposition of the plaintiff to

injury to a greater extent than another person.” *Id.* In reversing the verdict, the court said:

Without AMI 2203, the inference or, indeed, the overt argument might prevail that the injured party’s predisposition to injury was a defense for the defendant. Indeed, it was emphasized throughout this trial how brittle and susceptible to broken bones Jerrod was.

*Id.* at 322.

The same reasoning should apply here, where Toyota told the jury that Ms. Lindemann was susceptible to injury due to her obesity and that seatbelts could not protect her due to her weight. Like the defendant in *Primm*, Toyota made the overt argument that the victim’s predisposition to injury was a defense. By failing to give the eggshell instruction, the trial court allowed the jury to misapply the law as to causation, and to let Toyota off the hook for the enhanced injuries caused by the admitted failure of the Lexus seatbelt to safely restrain Ms. Lindemann in the crash. Accordingly, the verdict should be reversed. *Falk*, 113 Wn.2d at 656.

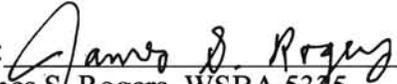
### III. CONCLUSION

For the foregoing reasons, the Court should reverse the defense verdict and order a new trial.

Dated this 25th day of October, 2013.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on October 25, 2013, I caused a copy of the foregoing document to be delivered in the manner indicated below to the following:

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