

70448-6

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No. 70448-6

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

ALLYN LINDEMANN AND STEVEN LINDEMANN,

Appellants,

v.

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

Respondents.

REPLY OF APPELLANTS

2014 JAN 21 PM 11:59

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON

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## I. INTRODUCTION

Allyn Lindemann's 2004 Lexus ES 330 collapsed and crushed her in a crash, causing much worse injuries than if the car had been manufactured in a reasonably safe manner. At trial and in this appeal, Toyota has argued that Ms. Lindemann's obesity would have caused her severe injuries in the crash even if her car was crashworthy, so the car's collapse does not matter. This is scientifically, legally and morally wrong.

A victim's unusual vulnerability to injury, whether it is obesity, young or advanced age or other "eggshell" conditions, has never been – and *cannot* be - a tort defense. Allowing Toyota to present the so-called "fat defense" to the jury was an error of law that infected the entire trial, requiring reversal. The trial court's rejection of the eggshell plaintiff rule permitted a verdict based on the harsh, incorrect notion that there is no duty to protect obese people from foreseeable accidents. Courts around the country have held that a defendant cannot escape liability by highlighting a plaintiff's preexisting physical vulnerability. This Court should embrace that general rule, so that innocent victims like Allyn Lindemann can hold tortfeasors accountable for their injuries.

Attempting to defend the indefensible, Toyota tries to distort the Lindemanns' arguments, contending that this case is about simple physics. It uses Newton's second law of motion as an excuse to blame Ms.

Lindemann's weight for her injuries and inflame prejudice against her. But the challenge to the fat defense has never been an attack on Newton's law, and it is not true that Ms. Lindemann's expert agreed with Toyota's expert about the cause of her injuries. Ms. Lindemann's expert concluded that a faulty car design, *not* her obesity, was the reason why she suffered catastrophic injuries that should not have occurred in her small-overlap crash. Toyota's expert opined that obesity made the injuries inevitable but relied on inapplicable studies, not Newton's law.

Toyota cannot point to any court decision or study supporting its theory that a car is reasonably safe under the Product Liability Act if it protects only normally sized people and not obese people. The Product Liability Act is designed to protect *all* foreseeable consumers. A new trial should be ordered so that a jury may decide Toyota's liability with a proper understanding that a victim's vulnerability is not a defense and that the duty to make reasonably safe products extends to all people.

## II. CLARIFICATION OF FACTS

### **A. This Was A Common Type of Accident.**

Toyota claims that Ms. Lindemann's crash was "more severe than 99% of all frontal crashes," citing testimony of its occupant kinematics expert, Elizabeth Raphael, M.D. Response, p. 4. Actually, this was not a head-on "frontal crash," nor was it extraordinary. It was a "fairly typical"

*small overlap* crash in which only the corners of the vehicles collided. VRP (March 20) at 113-114. The police investigator, David Wells, testified that he has seen “a couple hundred” similar accidents. A small overlap crash is among the most frequent kinds of frontal collisions.<sup>1</sup>

**B. Safety Was Reasonably Expected.**

Toyota misleadingly asserts, “No reasonable consumer would expect to walk away after being hit on the driver’s side by a 60-mph vehicle.” Response, p. 5. In fact, Dr. Raphael admitted that government-mandated crash tests are at the same or worse intensity as Ms. Lindemann’s crash, and that auto-makers are expected to protect occupant safety under those circumstances.

Q. So you know from being involved in full-scale crash testing that the cars that are sold in America today, and around the world, are tested at speeds that produce delta-v’s [velocity change] higher than those experienced in this crash?

A. Or as high as....

VRP (April 2) at 59-60.

Q. So in Europe, in the United States, and in Japan, they run crash tests on vehicles at delta-v’s higher than the ones experienced by the Lindemann vehicle?

A. *Yes.*

Q. And they do that because – you know as a biomechanics expert that - the governments of all these countries recognize that people are entitled to protection at

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<sup>1</sup> *Id.* at 110, lines 12-25; Trial Exhibits 114, 121, 122, 123 and 172.

crashes of delta-v's at or higher than the ones experienced by Ms. Lindemann, correct?

A. *Yes.*

*Id.* at 60-61 (emphasis added). Thus, contrary to Toyota's argument, consumers absolutely should expect to be safe in a crash like Ms. Lindemann's.

In fact, Dr. Raphael testified that a person of normal weight *would have been safe* in the same crash, and that Ms. Lindemann's unusual weight is the reason why she was hurt catastrophically instead of mildly.

Q. ...Is the opinion that if Allyn Lindemann weighed 165 pounds or less and been in this crash with this deformation, she would not have suffered the femur fracture, the pelvic fracture or the brain injuries, correct?

A. *I believe that's likely, yes.*

\*\*\*

Q. ...I want everybody to understand what you're saying. You take Allyn Lindemann out of this vehicle, you replace her with me, I don't weigh 165 pounds, I weigh a little less than that, I'm in the same crash, I don't have a broken femur, I don't have a broken pelvis, I'm not in a wheelchair, I have no brain injury; that's what you're saying?

A. *I believe that's true.*

VRP (April 2) at 61-62 (italics added). If it's true that normally sized people would be fine in the same crash, Toyota cannot argue that "no reasonable consumer" would expect to be safe.

In fact, Dr. Raphael – who earns 90 percent of her income as an industry consultant - admitted that she never advised Toyota or any other

auto-maker to warn the public that obese people are not safe in severe accidents. *Id.* at 57, lines 10-13 (income) and 66, lines 6-18. Toyota's promotional materials trumpet safety features, without warning that their cars allegedly cannot protect obese occupants. Exhibits 201 to 203. Toyota offered no evidence of warning consumers that, if they are heavy, they should expect to be severely injured at crash-test speeds. In sum, contrary to Toyota's argument, the average consumer had every reason to expect the Lexus to be safe in a crash like Ms. Lindemann's.

**C. The Lindemanns' Expert Did *Not* Agree with Dr. Raphael.**

Toyota asserts that Dr. Joseph Burton, the plaintiffs' biomechanics expert, "generally agreed with Raphael on the applicable scientific principles." Response, p. 7. Again, this is a distortion. Dr. Burton testified, based on his own scientific analysis, that Ms. Lindemann should *not* have been severely hurt in a crash of that magnitude.

...[T]he average velocity change to get a serious injury is 45 miles an hour. The average g's to get a serious injury is 85 g's. Ms. Lindemann's g's were 20, according to both sides....The delta-v is below the level that typically produces what are called AIS 3 or greater severity injuries. Plus, the government sets standards, and the standards are based on what they think a car can be designed to protect us in. And the government believes that...over a 35-mile-an-hour delta-v, we ought to be able to be protected by the typical safety measures in our car from having a life-threatening injury or one that would kill us or seriously debilitate us.

VRP (March 27) at 20-21. He repeatedly emphasized that collapse of the occupant space is what caused the appellant's severe injury, contradicting Dr. Raphael's key contention that Ms. Lindemann would have been badly hurt due to her weight even without the collapse. *See, e.g., Id.* at 35, lines 13-16; 33, lines 7-8; 41, lines 11-14; 57, lines 14-16. In fact, he had a specific explanation for every one of the appellant's myriad injuries, not one of which was blamed on extra force attributed to obesity. *Id.* at 29-51. Dr. Burton testified that if the car's driver space had not collapsed, Ms. Lindemann would have had some bruises and cuts, and perhaps a couple of fractured ribs or a broken limb, but nothing severe. *Id.* at 52.

Contrary to Toyota's assertions, Dr. Burton did *not* agree that, to determine the force going into Ms. Lindemann's knees, femurs and pelvis, "you would use the part of her weight distributed to her legs and multiply it by the g." Response, p. 10. He was *not asked* about that particular assertion, nor was he asked to comment specifically on Dr. Raphael's novel methodology of multiplying Ms. Lindemann's total weight by 40 percent and then multiplying that figure by the "g" (acceleration) to determine the force affecting lower body parts. VRP (March 27) at 90-93;

VRP (April 2) at 11-12. Indeed, regarding Dr. Raphael's calculations, he said, "It's not that pure and simple." *Id.* at 92, lines 14-15.<sup>2</sup>

In general, Toyota overstates the significance of Newton's law in this case. The law is merely this: force = mass X acceleration. Exhibit 165, p. 4. Obviously, it only determines *force*. It does not determine how well a car manages force. It does not predict what injuries will result from car accident forces. Nor does the basic Newton equation indicate how much of a woman's "mass," if any, can be blamed for crash forces affecting specific parts of her own body when she is wearing a seatbelt.

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<sup>2</sup> This is the actual exchange:

Q. ...I want you to assume something that *we know is not true* for just a moment. If we did this equation with *all of Ms. Lindemann's mass* going into her knees, femurs and pelvis, you would use 239 pounds here and multiply it by the g's right?

A. Yes.

Q. But we know that because part of the weight is in her upper body and she's partially being restrained, that not all of that 239 pounds goes into her – into the knee bolster?

A. That's correct.

VRP (March 27) at 90 (emphasis added). He was not asked how much of her weight allegedly contributes to forces at the knee bolster.

After Dr. Burton testified that 1,000 pounds of force would be sufficient to cause Ms. Lindemann's pelvic fractures, and that certain higher or lower amounts would have been sufficient as well, he was asked: "can you tell the jury how much of Ms. Lindemann's 239 pounds you would multiply to get a thousand pounds of force?" *Id.* at 91. That is a far different question than how to determine how much force, if any, went specifically into her lower body parts. Still dancing around the propriety of Dr. Raphael's particular method, Toyota's attorney asked, "So if she's experiencing 25 g's of acceleration at her seat and 1,000 pounds is the maximum that you think is required to cause these pelvis injuries, you only need 40 pounds of her mass going into her knees, getting shoved back into her pelvis to cause these injuries, correct?" *Id.* at 92. Dr. Burton answered, "***It's not that pure and simple.*** She has got a seat belt on. The seat belt is trying to hold her pelvis back....So it isn't even like this 40 pounds that's loose in that seat, like that box of pizza that's going forward under 25 g's." *Id.* (emphasis added).

In fact, Toyota admits that the bases for Dr. Raphael's disputed opinion - that because of Ms. Lindemann's weight, enough accident force went directly into her lower body to cause her injuries even if the car had not collapsed and crushed her - were two crash tests, both conducted under conditions unlike Ms. Lindemann's accident, *not* Newton's law.<sup>3</sup> The Toyota expert's theory that accident forces went into Ms. Lindemann's lower extremities rather than into the seatbelt and airbag, and her methods of drawing that conclusion, were not accepted by Dr. Burton or anyone else in the science community, contrary to Toyota's argument.

First, Dr. Raphael used a frontal barrier test for a 2004 Lexus ES 330, which found that about half of a dummy's body weight went into the shoulder belt and the other half went into the lap belt in a crash. VRP (April 2) at 11, lines 12-21. She conceded that the frontal test is *not comparable* to a small overlap crash such as Ms. Lindemann's. *Id.* at 124, lines 15-25 (describing the Lindemann accident and frontal barrier tests as "apples and oranges"). She also admitted that the test used a dummy based on a 170-pound male, 70 pounds lighter than Ms. Lindemann. *Id.* at 125, lines 5-12. Most importantly, the dummy test indicated that all of the accident force *went into the belts*, not the dummy's body. VRP (April 2) at 11, lines 12-21. Yet Dr. Raphael inexplicably concluded from that test

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<sup>3</sup> Response, pp. 14, 16; VRP (April 2) at 11, lines 7-12, 17-19; and 13.

that 100 pounds of Ms. Lindemann's total weight of 239 pounds "was going into the lower body" during her accident. *Id.* at 12. That does not even make sense. There is no study – nor any testimony by Dr. Burton or anyone else - supporting the strained logic that, if 50 percent 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 (not 50 percent) of a 239-pound living person's weight goes *into the lower part of her own body* – rather than into her lapbelt – in a small overlap crash (not head-on). *Id.* at 11-12.

Second, Dr. Raphael relied on an April 2010 study using obese cadavers in crash tests. Response, p. 16; VRP (April 2) at 17. The study used 3 obese and 5 nonobese cadavers to determine differences in their interaction with seatbelts. CP 626. Only one obese cadaver was female, and that sole female cadaver was only 5 feet four inches tall (1.65 m), whereas Ms. Lindemann was at least 4 inches taller. CP 628; VRP (April 2) at 74 (conflicting medical records indicated appellant was 5-8 to 5-11 inches tall). Also, the female cadaver had a body mass index of 40, much higher than Ms. Lindemann's 35.9. CP 628, VRP (April 2) at 74. Notably, "an airbag was not used," and the crash test involved frontal impact, not small overlap. CP 627. The study did *not* account for the restraining effect of airbags, which was a factor in Ms. Lindemann's accident. CP 626-30. The study also did not account for real-life factors

such as active muscles, initial position, “vehicle geometry” and crash mechanics. CP 630. It did not support in any way Dr. Raphael’s novel theory that just because a person is obese, weight alone will inevitably cause severe injuries in a small overlap crash with a standard velocity change of 35, regardless of car design.

Toyota deceptively claims that the cadaver test “substantiated what Burton had already admitted,” citing his testimony that fatty tissue makes it harder for a seatbelt to restrain movement. Response, p. 17. Toyota neglects to explain that Dr. Burton never accepted Dr. Raphael’s theory that, because one obese female cadaver moved forward more than non-obese cadavers in a frontal barrier crash using an open sled with no airbags, it is certain that a *less obese* woman in a *small overlap* crash with a *deployed airbag* and a collapsed occupant space would move forward far enough to suffer severe injuries even if the occupant space had not collapsed. It is not surprising that nobody but Dr. Raphael has accepted that theory in light of its highly extenuated, speculative nature.

In general, Toyota suggests that Dr. Raphael was merely responding to Dr. Burton’s theories. That is false. Much of Dr. Burton’s testimony cited by Toyota was elicited on cross examination, not as part of appellants’ case, and he was forced to address the fat defense because the trial court improperly denied the Lindemanns’ motion to exclude it. In

sum, it is simply not true that Dr. Burton generally agreed with Dr. Raphael's scientific principles, nor does the improperly admitted fat defense rest on the accepted principle known as Newton's law.

#### IV. ARGUMENT

##### **A. Toyota Ignores the Trial Court's Error of Law in Allowing an Unfairly Prejudicial Defense, Violating ER 403, To Be Presented.**

Before the trial, when presented with studies establishing there is widespread bias in society against obese persons, the trial court said:

I certainly recognize that there is potential prejudice against obese people, but I think that if it [the fat defense] were only being introduced for reasons of inciting a prejudice, certainly I would agree with you [that it would be excluded under ER 403].<sup>4</sup> 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) at 106, lines 13-20. After acknowledging that the fat defense was likely to inflame prejudice against Ms. Lindemann, the court nevertheless denied her motion to exclude it, saying that the eggshell plaintiff rule does not apply in an enhanced injury (crashworthiness) case. VRP (March 18) at 105-106. That fundamental error of law permitted the jury to determine liability based on emotion and bias against obese persons, instead of by fairly applying the law.

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<sup>4</sup> ER 403 excludes evidence when the danger of unfair prejudice outweighs the probative value of the evidence.

Toyota utterly fails to address the pervasively unfair impact of that erroneous decision to allow a bias-based defense to reach the jury. In fact, Toyota omits ER 403 from its list of “issues” on appeal, as if it is a trivial matter that its defense was premised on bias and prejudice and that the jury was invited to decide the case on that basis. Response, pp. 2-3. It is anything but trivial. This issue of appealing to societal bias, utterly ignored by Toyota, is by itself grounds for reversal.

The trial court’s stated reasons for rejecting the ER 403 argument were that: a) the fat defense was Toyota’s only defense; and 2) the eggshell rule does not apply in an enhanced injury case. Toyota does not cite, nor can appellants find, any case law establishing that a trial court may allow an unfairly prejudicial defense to be presented simply because the defendant has failed to develop any admissible theory. If saying “this is all we’ve got” is sufficient to overcome ER 403, courts will lose their gatekeeping function, and impermissible argument, theories and evidence will have free reign in courtrooms across the state.

Similarly, Toyota has never cited a single case anywhere in the country stating that the eggshell rule does not apply in an enhanced injury case. There is no such rule. In fact, courts have declined to carve out exceptions to the eggshell rule, rejecting the approach taken here. *Gibson v. County of Washoe, Nev.*, 290 F.3d 1175, 1193 (9<sup>th</sup> Cir. 2002) (the

eggshell rule applies in Section 1983 civil rights cases); *Pierce v. Southern Pacific Transpo. Co.*, 823 F.2d 1366, 1372 (9<sup>th</sup> Cir. 1987) (the eggshell rule applies in suits under the Federal Employers' Liability Act). In sum, there is no exception to the eggshell rule for enhanced injury cases, and thus the trial court's relying on that faulty premise was an error of law.

**B. The Eggshell Rule Affects Liability and Damages Determinations.**

Toyota asserts that the “eggshell-plaintiff rule only applies to determining what damages are proximately caused *after* a tort has been established.” Response, p. 41 (emphasis in original). The rule is not so limited. Rather, it stands for the broad principle that “a tortfeasor takes his victim as he finds him.” *Buchalski v. Universal Marine Corp.*, 393 F.Supp. 246, 248 (W.D. Wash. 1975). It is true that the rule affects damage awards, making the tortfeasor liable for the full effects of the tort, even if those effects “might have been less severe but for plaintiff's preexisting condition.” *Buchalski* at 248. But that is not all it does. Courts around the country have recognized the important principle that a defendant **may not escape liability altogether** by highlighting the injured party's susceptibility to injury. *Primm v. U.S. Fidelity & Guaranty Insur. Corp.*, 922 S.W.2d 319, 321 (Ark. 1996); *Holman v. T.I.M.E. Freight, Inc.*, 235 F.Supp. 462, 469 (1964) (a “defendant cannot invoke the

previous condition of the person injured for the purpose of escaping the consequences of his own negligence”).

Toyota argues that *Primm* “did not suggest plaintiff’s fragile condition must be ignored” in a tort trial. Response, p. 46. That is true, but beside the point. The Lindemanns have never argued that Ms. Lindemann’s weight should be ignored. On the contrary, the likelihood of an obese person being injured in a crash is relevant under both the risk-utility test, RCW 7.72.030(1)(a), and the warning requirement, RCW 7.72.030(1)(b). The point of *Primm* is that a defendant cannot use a victim’s vulnerability to escape liability, which is what the trial court improperly permitted to happen in the Lindemanns’ case.

This principle is widely recognized. The Restatement (Third) of Torts, §31, says:

When an actor’s tortious conduct causes harm to a person that, because of a person’s preexisting physical or mental condition or other characteristics of the person, is of a greater magnitude or different type than might reasonably be expected, the actor is nevertheless subject to liability for all such harm to the person.

Contrary to Toyota’s arguments, the Third Restatement does *not* say that the eggshell rule applies only to damages and not to “whether the defendant had acted wrongfully or caused any injury to begin with.”

Response, p. 42. Comment b to Restatement (Third) of Torts §31, TD No 3 (2003), says:

Every United States jurisdiction adheres to the thin-skull rule...*The essence of this rule prevents a defendant from seeking to avoid or reduce liability* because some characteristic of the plaintiff, however unusual, combines with the tortious conduct of the defendant to produce physical harm that is greater than might be expected, unusual or unforeseeable.

(Italics added).

*Priel v. R.E.D., Inc.*, 392 N.W.2d 65, 67 (1986), is instructive. In that case, a jury found that the defendant was negligent, but that the negligence was not the cause of the plaintiff's injury because she was unusually frail when she fell on snow and ice that defendant had pushed into a parking lot. Because of osteoporosis, rheumatoid arthritis and diabetes, she was more susceptible to falling and fractures than the average person. *Id.* at 69. "Her counsel requested an instruction stating that the defendant could not escape liability by reason of Priel's prior condition," but the trial court refused to give it. *Id.* at 68. The Supreme Court of Nebraska reversed, saying that although the jury was adequately instructed regarding aggravation of prior injuries, "at a new trial an instruction should be given that advises the jury that Burger King cannot escape the consequences of its negligence merely because its negligence would not have caused that extent of injury to a normal person." *Id.* at 69.

The Court said, “That Priel’s prior condition does not bar damages should be more clearly indicated to the jury.” *Id.*

Here, as in *Priel*, the lack of a proper eggshell instruction allowed the jury to blame the victim for her injuries, relieving the defendant of any responsibility to meet its obligation to design a reasonably safe vehicle for all foreseeable consumers. This Court should follow *Priel* and order a new trial with instructions to clearly indicate that a customer’s obesity is not a defense to a claim under the Product Liability Act.

Also on point is *Schafer v. Hoffman*, 831 P.2d 897, 899 (Colo. 1992), in which the defendant challenged the trial court’s instruction that “you may not refuse to award nor reduce the amount of...damages because of any physical frailties of the plaintiff that may have made her more susceptible to injury, disability or impairment.” The Supreme Court of Colorado affirmed the verdict for the plaintiff, stating, “A thin skull instruction is appropriately given when the defendant seeks to avoid liability by asserting that the victim’s injuries would have been less severe had the victim been an average person.” *Id.* at 900. That is exactly what happened here, where Toyota sought to avoid liability by asserting that Ms. Lindemann would have walked away from the crash if she had an average weight. See also *McLaughlin v. BNSF Railway Co.*, 300 P.3d 925, 937-38 (Colo. 2012) (an eggshell instruction is appropriate where the

defendant attempts to eliminate its liability based on the plaintiff's preexisting condition). In sum, Toyota fails to understand that the eggshell rule is about establishing liability in the first place, as well as assessing damages after liability is found.

In fact, Toyota advocates for a new rule allowing auto-makers to escape liability by blaming vulnerable accident victims for their own injuries. Response, p. 45 (it "would make no sense" to bar a manufacturer from blaming a plaintiff's osteoporosis for the fact that a deploying airbag fractured her jaw in three places in a 3-mph accident); p. 46 ("the eggshell rule does *not* bar evidence that defendant's conduct would not have caused injury without plaintiff's special susceptibility"). Toyota goes so far as to argue that it owed no duty to Ms. Lindemann because of her obesity, underscoring why its defense was so utterly prejudicial. Response, p. 46 (Dr. Raphael's testimony about Ms. Lindemann's "fragile condition" addressed whether Toyota "owed a duty to prevent the injury"). No state in the country follows the rule advocated by Toyota, and this Court should refuse to shield manufacturers from liability for unsafe products simply because their design flaws happen to injure fragile people.

**C. Toyota Fails to Understand How Omission of the Eggshell Instruction, an Error of Law, Tainted the Entire Trial.**

Here, the trial court's rejection of the proposed eggshell instruction was based on a ruling of law and therefore is reviewed de novo. *City of Tacoma v. Belasco*, 114 Wn.App. 211, 214 (2002) (reversing verdict where denial of instruction was an error of law); VRP (March 18) at 105-106 (holding as a matter of law that the eggshell rule doesn't apply in enhanced injury cases). "Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *Anfinson v. Fedex Ground Package System*, 174 Wn.2d 851, 860 (2012), quoting *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732 (1996). "If any of these elements are absent, the instruction is erroneous," as here, where the omission of the eggshell instruction misled the jury to believe Toyota had no duty to protect obese persons and failed to properly inform the jury of the applicable law that a defendant is liable for *all* injuries caused by its tortious conduct. *Anfinson* at 860. Erroneous instructions are reversible if they prejudice a party. *Id.*

1. Toyota cites no law, policy or logic explaining why a jury is incapable of fairly applying the eggshell rule in a crashworthiness case.

Contrary to Toyota's arguments, a jury is perfectly capable of determining both of the following questions: a) did an unsafe design cause worse injuries in an accident than would have occurred if the car had met safety expectations?; and b) if so, what is the *full* extent of damages traceable to that unsafe design? That is what the Lindemanns proposed to ask. With or without the eggshell instruction, the jury had to draw a line between injuries that would have occurred in a car that meets safety expectations, and injuries that occurred because the car did *not* meet safety expectations. The proposed eggshell instruction would not have changed that basic framework applicable in any enhanced injury case. It simply would have made clear that Toyota could not avoid or reduce damages simply because Ms. Lindemann was especially vulnerable to harm from the unsafe design.

Toyota argues that the eggshell instruction somehow would have made Toyota responsible for *all* injuries caused by the accident, not just those traceable to the unsafe design. Response, p. 50. That is patently false. The trial court delivered 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 1018 (emphasis added). The trial court also delivered a pattern instruction stating the Lindemanns had the burden of proving that the 2004 Lexus ES 330 was not reasonably safe in foreseeable accidents *and* that the defective Lexus condition proximately caused injuries which Ms. Lindemann would not have sustained, absent the product defect. CP 1015. Those instructions made clear to the jury that Toyota was *not* liable for injuries that would have occurred in a car meeting safety expectations.

The proposed eggshell instruction was entirely consistent with the enhanced injury instructions, 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. *The “occurrence” was the enhanced injury* from the unsafe design, not the trivial injury that would have occurred in a safe car, contrary to Toyota’s arguments. No other interpretation is possible,

because the other instructions were explicit that Toyota's liability hinged on enhanced injury, and no other kind of "occurrence" was at issue. In sum, there is no conflict or inconsistency between the enhanced injury instructions and the proposed eggshell instruction, and it was an error of law to omit the eggshell instruction simply because a design-induced injury was at issue.

2. Omission of the eggshell instruction was highly prejudicial.

Here, the evidence at trial proved that collapse of the car's occupant space *actually crushed* the plaintiff-appellant, causing more severe injuries than if the car's design had prevented collapse.<sup>5</sup> Toyota's defense was that this extremely harmful collapse does not matter because Ms. Lindemann would have been hurt anyway, even if the car had been safe, due to her preexisting obese condition. To allow an eggshell condition to preclude product liability under these circumstances, where a "normal" occupant would have been able to recover damages due to the collapse, is to erase any duty to eggshell plaintiffs. It is punishing Ms. Lindemann for her preexisting vulnerability, simply because of the highly prejudicial and speculative theory that she would have been hurt just as badly even in a safe car.

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<sup>5</sup> CP 582; VRP (March 28) at 176, lines 1-2.

Contrary to Toyota's arguments, the trial court's refusal to apply the eggshell doctrine tainted the entire proceeding by creating the legally wrong impression that Ms. Lindemann was not entitled to damages for injuries because she was obese at the time of the collision. Thus, the jury viewed the reasonableness of the car design through that unfair prism, which is why the verdict cannot stand. The prejudice from the incomplete instructions, coupled with the trial court's erroneous decision to allow Toyota's fat defense to be presented, rendered the entire trial unfair. Essentially, the trial court's errors wiped out Toyota's duty to protect Ms. Lindemann from foreseeable harm, simply because of her weight. This legally untenable result must be reversed.

**D. Toyota's Bare Assertion that Dr. Raphael's Opinions Met the *Frye* test<sup>6</sup> is Not Proof of Scientific Acceptance.**

1. Invoking Newton's law is not enough.

Toyota claims that the *Frye* test did not bar Dr. Raphael's opinions because they are based on Newton's law, a widely accepted principle. Response, p. 36. But merely invoking Newton's law as a general principle is not sufficient under *Frye*. *Mohney v. USA Hockey, Inc.*, 300 F.Supp.2d 556, 569-570 (N.D. Ohio 2004) (despite citing Newton's laws of physics,

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<sup>6</sup> The *Frye* test comes from *Frye v. United States*, 293 F. 1013 (1923).

a biomechanic expert in a product liability suit assumed too much, and his opinions were inadmissible.)

2. Case law cited by Toyota supports the Lindemanns.

Toyota cites *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 611 (2011), for the proposition that Dr. Raphael's testimony was admissible because only her conclusions – not her techniques – were novel. Response, p. 31. Actually, *Anderson* undermines Toyota's position, and supports the Lindemanns' argument that Dr. Raphael's obesity-blaming theory should have been barred under the *Frye* test.

According to *Anderson*, “Both the scientific theory underlying the evidence, and the technique or methodology used to implement it, must be generally accepted in the scientific community for evidence to be admissible under *Frye*.” 172 Wn.2d at 603. For a scientific finding to be accepted, “it is customary to require a 95 percent probability that it is not due to chance alone.” *Anderson* at 608. And while it is true that *Frye* does not require scientific acceptance of “every deduction drawn” from generally accepted principles, “the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” *Id.* at 601, 611.

In *Anderson*, the plaintiff appealed the trial court's exclusion of her expert's opinion that workplace exposure to organic solvents in utero

caused birth defects in her son. *Id.* at 604-05. The Washington Supreme Court held that the trial court erred by requiring the expert's "theory of causation" to be generally accepted, and stated that "there is nothing novel about the theory that organic solvent exposure may cause brain damage and encephalopathy." *Id.* at 605, 611. In that case, the expert had published an article in the Journal of American Medicine describing a control-group study of 250 pregnant women which found significantly more birth defects in the group exposed to solvents. *Id.* at 604.

Here, by contrast, Dr. Raphael did not do any studies herself. Nor did she identify any study using, or replicating, her methodology. As explained above, the method she used in forming the challenged opinion was *not* force = mass X acceleration. Rather, to calculate the accident's alleged force on the lower body so as to opine about how much force was needed to cause Ms. Lindemann's injuries without a compartment collapse, Dr. Raphael multiplied Ms. Lindemann's weight by 40 percent and then multiplied that number by the car's acceleration rate of 25 g's.

There was no accepted scientific basis for using 40 percent of a person's weight in calculating force on that person's lower body.<sup>7</sup> Dr. Raphael testified that she picked that percentage based on the frontal crash

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<sup>7</sup> Toyota asserts that Dr. Raphael's calculations were "conclusions." Response, pp. 36-37. That is wrong. Calculations are a method of reaching a conclusion.

test which found that 50 percent of a 170-pound dummy's weight went into a lapbelt and 50 percent went into the shoulder belt. Of course, 40 percent is not the same as 50 percent. But more importantly, Dr. Raphael admittedly was not measuring how much of Ms. Lindemann's weight went into her lapbelt. She was measuring how much of the appellant's weight into her *own lower body*, which is different. The crash test report relied upon actually indicated that zero (0) percent, not 40 percent, was the appropriate percentage to use because *all* of the dummy's weight went into lap and shoulder belts. The test simply did not establish that a person restrained by seatbelts (plus an airbag) will experience accident forces directly on the lower extremities at all. Thus, Dr. Raphael's method was *not* scientifically accepted, and should have been excluded under *Frye*.

Toyota argues that Dr. Raphael established scientific acceptance of her theory simply by asserting "general acceptance" in a declaration. Response, p. 36. But an assertion alone is not proof of scientific acceptance by a preponderance of evidence. *State v. Kunze*, 97 Wn.App. 832, 855 (1999) (no general acceptance of latent earprint identification).

#### IV. CONCLUSION

For the foregoing reasons, the Court should order a new trial.

Dated this 17th day of January, 2014.

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 January 17, 2014, I caused a copy of the forgoing document to be delivered in the manner indicated below to the following:

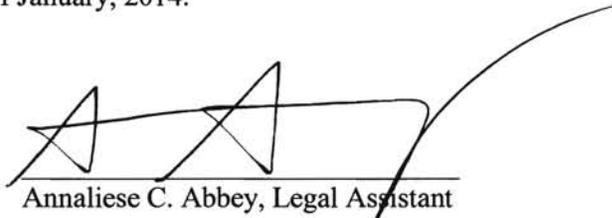
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Annaliese C. Abbey, Legal Assistant