Team B

Docket No. 21-2112

IN THE

SUPREME COURT OF THE STATE OF FREMONT

February Term 2021

WILLIAM ASHPOOL,
Petitioner,

v.

EDISON INCORPORATED, A FREMONT CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS
FOR THE STATE OF FREMONT

BRIEF FOR RESPONDENT

February 1, 2021

COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

I. The risk-utility test balances the product's risk against its utility. It asks whether the benefit of using the product outweighs the risk of harm to the consumer associated with using it. Did the court correctly deny Petitioner's motion for judgment as a matter of law on the ground that the risk of the Marconi's Autodrive feature does not outweigh its utility?

II. A duty to retrofit means there is a duty for a manufacturer to upgrade existing products, whether defective or not, in light of newly discovered defects or technological advances. A majority of jurisdictions have not imposed such a duty because it is not within the role of the courts to make a decision that may chill innovation. Should the State of Fremont adopt a duty to retrofit in strict liability design defect claims?

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OPINION BELOW

The opinion of the Court of Appeals for the State of Fremont is reported at *William Ashpool v. Edison Incorporated*, Docket No. 20-1000 and appears on pages 1–19 of the record.

STANDARD OF REVIEW

A denial of a motion for judgment as a matter of law is reviewed *de novo*. *Gray v. Toshiba Am. Consumer Prods., Inc.*, 263 F.3d 595, 598 (6th Cir. 2001). A district court's ruling on a jury instruction is reviewed for abuse of discretion. *United States v. Ruan*, 966 F.3d 1101, 1166 (11th Cir. 2020).

STATEMENT OF THE CASE

Statement of Facts

Edison Incorporated ("Edison") is an automobile corporation registered in Fremont. R. at 2. Edison is renowned for its history and reputation for designing luxury and sport electric vehicles, and recently entered the highly competitive economy sedan market when it released the Marconi in 2017. R. at 2. To effectively compete in and profit from the newly targeted market, Edison included a feature known as Autodrive to the Marconi. R. at 2. Autodrive is a semi-autonomous feature where an onboard computer partially operates the vehicle while the driver keeps two hands on the steering wheel when the vehicle is in drive. R. at 2. The driver inputs the destination into a GPS in the onboard computer and, in real-time, the vehicle will assess road conditions, speed limits, and traffic lights based on the route. R. at 2. During the drive, the center console displays the route on an 11-inch screen that also contains controls for operation such as radio and temperature. R. at 2. During the drive, the driver can enable or disable the Autodrive function whenever the vehicle is stopped or placed in park. R. at 2–3. When Autodrive is engaged, the vehicle can make necessary adjustments to the route using the information it receives from the vehicle's sensors. R. at 3. The onboard computer receives the sensory data to help the driver to stop, accelerate, change gears, and maneuver the vehicle. R. at 3.

However, Autodrive technology does not take away the driver's ability or responsibility to maneuver the vehicle. R. at 6. Instead, a driver must remain engaged by keeping two hands on the steering wheel while vehicle is in Autodrive. R. at 2. The Marconi's manual advises the driver that if they remove their hands from the steering wheel, a flashing light will appear on the dashboard, telling the driver to place their hands back on the steering wheel. R. at 3. The

manual also notes that a driver can override the Autodrive to steer as the driver sees fit. R. at 3. Edison continuously updates the vehicle's software and notifies the owner. R. at 3. This notification pops up on the center console every time the vehicle is started until the updates has been installed. R. at 3. Software updates include safety, consumer convenience, GPS, and cosmetics purposes. R. at 3. For instance, a software update would allow the driver to change the lights on the sunroof of the vehicle. R. at 3.

Prior to release of the Marconi, Edison performed numerous crash and safety tests as required by the National Highway Traffic Safety Administration (NHTSA). R. at 4. As a result of these tests, Edison learned that the accident rate was 13% higher when the vehicle was going over 35 miles per hour and a stationary object was present in the vehicle's path. R. at 5. Meanwhile, the innovations incorporated in the Marconi have proven to avoid accidents, such as accidents caused by lane drifting or unsafe lane changes. R. at 5. However, installing the additional equipment to reduce the stationary object accident rate would increase the cost of the vehicle to consumers by at least $5,000 which would push the vehicle outside the economy range of sedans. R. at 5. Given these varying facts, Edison decided to forego additional sensors in the Marconi but to include the additional sensors in future models of its luxury and sport vehicles outside the economy range of sedans. R. at 5. On December 20, 2019, Petitioner, William Ashpool, was driving his Marconi at approximately 42 miles per hour on Route 27 in Fremont when his vehicle collided with a brown bear sitting in the middle of the road. R. at 4.

Procedural History

Petitioner filed a civil action against Edison claiming it improperly designed the sensors for the Macroni vehicle. R. at 4. A jury trial followed. R. at 4. At the conclusion of the trial, Petitioner sought to have a jury instruction including a duty to retrofit. R. at 6. The jury

instruction was not permitted because the state of Fremont does not recognize a common law duty to retrofit. R. at 7. On the final day of trial, Petitioner moved for judgment as a matter of law pursuant to Fremont Rule of Civil Procedure 50(a). R. at 7. The trial court denied the motion. R. at 7. The jury returned a verdict in favor of Edison by finding there was no defect in design and the sensors did not cause Petitioner to crash. R. at 7. Petitioner renewed his motion for judgment as a matter of law. R. at 7. The trial court denied the motion. R. at 7.

Petitioner appealed on two grounds. R. at 7. First, that the trial court erred in its refusal to include the duty to retrofit in its jury instructions. R. at 7. Second, that the trial court erred in its denial of his renewed motion for judgment as a matter of law. R. at 7. The Court of Appeals for the State of Fremont affirmed on two grounds. R. at 1. First, the trial court's denial of Petitioner's jury instruction on the duty to retrofit constituted a harmless error which would not have changed the outcome in the lower court. R. at 13. Second, the lower court properly denied Petitioner's motion for judgment as a matter of law because under the risk-utility test, the Macroni's Autodrive features did not render the Marconi "not reasonably safe." R. at 12.

This Court granted Petitioner's petition for a writ of certiorari. R. at 20.

SUMMARY OF ARGUMENT

Petitioner failed to prove the risk of the Marconi's safety feature outweighs its utility because the available alternative design is not reasonable, it is not cost-effective, the petitioner's use was not foreseeable, and the omission of the alternative design did not render the Marconi "not reasonably safe."

This Court should not adopt the duty to retrofit in the State of Fremont. Creating such a duty is the province of the legislative and administrative bodies, not the courts. In addition, there are already other statutes to hold manufacturers accountable. Finally, adopting a duty to retrofit

would threaten to stifle innovation. But even if this Court adopts the duty to retrofit, Edison is not liable. Edison did not have a special, controlling relationships with consumers because the Marconi can operate safely without Edison's continuous technological updates. Moreover, Edison made a conscious decision not to add additional sensors before the product was placed in the stream of commerce.

ARGUMENT

I. THE RISK OF THE MARCONI'S AUTODRIVE FEATURE DOES NOT OUTWEIGH THE FEATURE'S UTILITY BECAUSE THE SENSORS AID THE DRIVER IN SAFETY RENDERING THE MARCONI SAFE.

A plaintiff cannot hold manufacturers liable for a product causing physical harm to a consumer unless the product's design renders it "not reasonably safe." Restatement (Second) Torts: Special Liability of Seller of Product for Physical Harm to User or Consumer § 402A (1965). A manufacturer can be liable for design defect under negligence or strict liability. *Madden v. Cox*, 328 S.E.2d 108, 112 (S.C. Ct. App. 1985); *Ostendorf v. Clark Equipment Co.*, 122 S.W.3d. 530, 535 (Ky. 2003). Where a strict liability claim evaluates the condition of the product, a negligence claim evaluates the conduct of the manufacturer. *Ostendorf*, 122 S.W.3d at 535. When a manufacturer makes a conscious decision to design a product a certain way, evaluation of this action requires focus on the particular decision, rather than the product. *Id.* Strict liability should not be imposed upon manufacturers when injury to a plaintiff results from unforeseeable use of the product. *Mcgee v. Cessna Aircraft Co.*, 139 Cal. App. 3d 179, 184 (1983). The term "defect" includes products unreasonably designed absent manufacturing errors. *Ulrich v. Kasco Abrasives Co.*, 532 S.W.2d 197, 200 (Ky. 1976). However, there are limits to how far the manufacturer's liability may extend when the consumer fails to use the product in a responsible way. *Id.* at 201. To prevail on a design defect claim, a plaintiff must

show the manufacturer knew of the unreasonable danger and failed to take reasonable steps to correct it. *Ostendorf*, 122 S.W.3d. at 535.

Here, Edison learned the Marconi's sensors failed to detect objects at the same rate as the advanced sensors. R. at 4, 5. Nevertheless, Edison chose to omit additional sensors in the Marconi in order to make Autodrive safety features available to economy consumers. R. at 5. However, this model without luxury-level sensors required more driver input and attentiveness. R. at 2, 5, 6. Therefore, Edison made a design decision which was neither defective, nor "not reasonably safe." R. at 2, 5; *see* Restatement (Second) Torts § 402A (1965).

Semi-autonomous vehicles, like the Marconi, are safer than non-autonomous vehicles. R. at 2, 5. The Marconi's Autodrive features help the driver make quick decisions to stop, accelerate, and change gears when needed, but still require driver input. R. at 2, 5. Even if this Court reviews Edison's actions under strict liability, Petitioner still cannot prevail. *Ostendorf*, 122 S.W.3d at 535. Petitioner fails to meet the burden to prove the Marconi's design was defective or that Edison's decision was negligent. R. at 5.

A. <u>The Marconi's Design Renders the Vehicle Safe Because the Sensors Act as an Additional Safety Feature When the Driver Uses the Vehicle in a Manner Foreseeable to the Manufacturer.</u>

When a product is properly prepared, manufactured, packaged, and accompanied with adequate warnings and instructions, it is not defective. *Claytor v. General Motors Corp.*, 286 S.E.2d 129, 130 (S.C. 1982). Nor is a design considered defective, unless a design choice puts the consumer at *unreasonable risk* compared to the benefits of the design. *Ostendorf*, 122 S.W.3d at 535. A design defect must exist at the time of sale of the product. *Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 339 (Mich. 1995). In design defect actions, courts apply the risk-utility test. *Blue v. Environmental Engineering, Inc.*, 828 N.E.2d 1128, 1154 (Ill. 2005)

(Fitzgerald, J., concurring). The risk-utility test balances the danger of using the product with its utility. *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 21 (S.C. 2010). If the danger of using the product does not outweigh its benefits, the product is reasonably safe. *Bragg v. Hi-Ranger, Inc.*, 462 S.E.2d 321, 328 (S.C. Ct. App. 1995); *Reed v. Tiffin Motor Homes, Inc.*, 697 F.2d 1192, 1196 (4th Cir. 1982). The risk-utility test asks whether: (1) a reasonable alternative design exists; (2) the alternative design is reasonable in cost; (3) the alternative design would have reduced the foreseeable risks of harm posed by the product; and (4) omission of the alternative design by the manufacturer rendered the product "not reasonably safe." Restatement (Third) of Torts Prod. Liab. § 2(b) (1998). If a plaintiff cannot establish these risks outweigh the benefits, the defendant will prevail. *Mikolajczyk v. Ford Motor Co.*, 901 N.E.2d 329, 333 (Ill. 2008).

Here, the Marconi's sensors were an added safety benefit, which did not put any driver at more risk than a standard vehicle would. R. at 5; *see also Society of Automotive Engineers: Automation Levels*, NHTSA https://www.nhtsa.gov/technology-innovation/automated-vehicles-safety#topic-road-self-driving (last visited Jan. 24, 2021) (distinguishing levels of autonomous vehicles). Edison designed the Marconi model, targeting reasonably attentive drivers concerned with safety. R. at 5, 6. The Marconi's sensors, paired with a reasonably attentive driver, posed no additional risk and in fact, increased safety in comparison to a standard vehicle without such sensors. R. at 2, 5. As Edison's CEO stated, it is still the responsibility of the driver to drive the Marconi regardless of its additional safety features. R. at 6. Therefore, the risks of adding sensors to the Marconi do not outweigh its benefit of additional safety. R. at 5.

1. The available alternative design is not reasonable because the Marconi is still safe without additional sensors.

When a plaintiff fails to further prove a design would reduce the foreseeable risk of harm caused by the product, the entire design defect claim fails. *Branham*, 701 S.E.2d at 21. A

plaintiff must show an available, *reasonable* alternative design and prove the design would have reduced foreseeable risk of harm posed by the product used. *See Peck v. Bridgeport Machs., Inc.*, 237 F.3d 614, 617 (6th Cir. 2001) (explaining a design defect claim, absent plaintiff's proof of a reasonable alternative design, fails to withstand a defendant's dismissal motion). A plaintiff must prove the reasonable alternative design would reduce foreseeable risk of harm posed by the product due to the manufacturer's failure to make the product safe. *Id.* The risk-utility test increases the plaintiff's burden by requiring a showing of a reasonable alternative design and the design must decrease the risk of harm compared to the design used. *Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 507 (Fla. 2015). A manufacturer's job is to design a product, which is reasonably safe for intended *foreseeable* uses, not for uses unforeseeable by the manufacturer. *Woods v. A.R.E Accessories, LLC*, 815 S.E.2d. 205, 210 (Ga. Ct. App. 2018).

For example, in *Woods*, a fire department employee alleged design defect after he was injured when a truck's hatchback door fell on his head as he stood behind the raised door. *Id.* at 207. The court reasoned in choosing a product's design, manufacturers are not required to make a product safe for unintended uses. *Id.* at 210. It held the manufacturer was not liable, even though there was a reasonable alternative design available. *Id.*

Here, just because Edison chose not to use the most advanced technology, does not render the current design "not reasonably safe." R. at 5. Edison designed the Marconi, not to be a completely autonomous vehicle, but to aid drivers in safety at an affordable price for economy consumers. R. at 5. As technology advances, Edison updates its software to increase and improve vehicle safety. R. at 3. Although the installation of more advanced sensors is available, Edison intended for the Marconi model to require hands-on driving. R. at 5. In fact, a Marconi driver can only trigger the Autodrive feature if the driver places both hands on the steering

wheel, which necessitates a minimum level of attentiveness to even activate the sensors. R. at 2, 3. Edison designed the Marconi so drivers could override the Autodrive feature, knowing the sensors alone were not sufficient for a completely autonomous vehicle. R. at 3. Therefore, the Marconi was a reasonably safe vehicle without additional sensors and did not need additional or luxury-level sensors to render the vehicle reasonably safe. R. at 5, 6.

2. Additional sensors as an alternative design are neither practicable nor cost-effective because they defeat Edison's purpose of making such safety features available to the economy market.

When a reasonable alternative design is available but results in adverse consequences to the consumer, the alternative design is not necessary or practicable. *Barker v. Lull Engineering Co.*, 573 P.2d 443, 455 (Cal. 1978). Manufacturers must take *cost-effective* precautions when designing a product and a product can only be rendered defective if the manufacturer fails to take those precautions. *Kaiser v. Johnson & Johnson*, 947 F.3d 996, 1011 (7th Cir. 2020). Cost-effective precautions include consideration of instructions and warnings about the product, advantages and disadvantages from the alternative design, and the effects of the alternative design on production costs. *Ford Motor Company v. Trejo*, 402 P.3d 649, 654 (Nev. 2017).

For example, in *Kaiser*, a plaintiff alleged design defect of a medical product after an implant surgery caused her severe pain and medical complications. 947 F.3d at 1002. She claimed the manufacturer of the device had the opportunity to make the product safer but chose not to in order to suppress its cost. *Id.* at 1011. The court held the manufacturer liable because the manufacturer knew of the complications associated with the product and acted with reckless indifference. *Id.* at 1021.

Here, the safest design available to Edison does not come without cost to both the manufacturer and the consumer. R. at 5. Edison's purpose in designing the Marconi was to

make vehicles with technologically advanced safety features available to both luxury vehicle buyers and economy consumers. R. at 5. Edison did not act with any indifference to the safety of the product, rather acted to make the Marconi the safest possible without driving up the price. R. at 5. The cost of installing luxury-level sensors in the Marconi would have taken the Marconi $5,000 out of economy pricing and therefore made it unavailable to the regular consumer. R. at 5. This presented a choice for Edison to make, but either decision resulted in a safe vehicle without increased risk of harm if used correctly. R. at 5. Therefore, it was not necessary for Edison to add additional sensors to make the Marconi safe because its design is far from defective. R. at 4, 5.

Edison was entitled to make cost-effective decisions to reach the economy-level market and provide safety features at an affordable price. Edison made safety features available to a broader section of the population by designing the Marconi with the consideration of safety and safety features to cater to a market concerned with such things. R. at 2. A price increase would make this vehicle available only to those who can afford luxury vehicles and decrease the consumer market for Edison. R. at 5. The only result of Edison's decision was increased availability of safety features to a wider range of consumers. R. at 5. As readily apparent from the litany of evidence of Edison's consideration of cost-effective safety in manufacturing the Marconi, Edison is not liable for omission of additional sensors.

3. Inattentive drivers, like Petitioner, were not reasonably foreseeable by Edison because the Marconi is only semi-autonomous.

When a consumer uses a product in a manner unforeseen by the manufacturer, the manufacturer cannot be liable for a defective design. *Collins v. Navistar, Inc.*, 214 Cal. App. 4th 1486, 1500–01 (2013). Although foreseeability of the risk of harm due to an allegedly defective design of a product is a requirement for liability, manufacturers need not design products in a

way to reduce or avoid unforeseeable risk. *Hernandez v. Takai Corp.*, 2 S.W.3d 251, 257 (Tex. 1999). Courts must consider the consumer's misuse of the product when determining responsibility for injuries resulting from the product. *Id.*; *see also Branham*, 701 S.E.2d at 15 (explaining plaintiff's negligence was a factor in the rolling of her vehicle, despite Ford's decision to choose a less safe alternative for marketing purposes); *Claytor*, 286 S.E.2d at 131 (determining plaintiff did not meet the burden of proof for defective design because the wear to the product was caused by plaintiff's subsequent mishandling of it).

i. The likelihood of Petitioner's injuries was not foreseeable by Edison because the Marconi was designed to assist a reasonably attentive driver.

A seller is not liable when the product is in a safe condition and mishandling of the product by the consumer makes it harmful. *Claytor*, 286 S.E.2d at 131. Whether the risk of harm is foreseeably dangerous to the consumer depends on whether the consumer used the product in a foreseeable way. *Id.* at 130. The likelihood of injury to the consumer must have been foreseeable by the manufacturer at the time of distribution of the product. *Peck*, 237 F.3d at 617; *see also Claytor*, 286 S.E.2d at 131 (explaining a seller is not liable when the product is in a safe condition and mishandling of the product by the consumer makes the product harmful). A plaintiff cannot prevail if she fails to show a reduction or elimination of the risk of harm from the available alternative design. *Aubin*, 177 So. 3d at 505.

Here, the likelihood of Petitioner's injury was not foreseeable to Edison since the Marconi's design, even with sensors, was not meant for hands-off drivers. R. at 5. Edison added sensors to the Marconi to *increase* safety by adding to the driver's discretion, input about when to stop, accelerate, change gears, and maneuver the vehicle. R. at 2, 5. The Marconi's sensors increasing the accident rate by thirteen percent at a speed above 35 miles per hour, when a

stationary object is in its path, does not render the Marconi defective. R. at 5. Further, standard vehicles are no safer than a Marconi. The additional sensors Edison considered, although would have increased safety and lowered the accident rate, does not render the Marconi sensors defective or "not reasonably safe." R. at 5; *see also* Restatement (Second) Torts § 402A (1965). The Marconi was still safe without the additional sensors because it called for at least a "moderately attentive driver." R. at 5. Thus, the likelihood of accidents such as Petitioner's was not foreseeable when the consumer uses the vehicle correctly. R. at 5.

ii. The severity of Petitioner's injuries was not reasonably foreseeable to Edison after implementing sensors because the sensors were meant to aid in driver safety, not take away the responsibility of the driver to drive the vehicle.

If external forces of a vehicle accident are so severe as to cause injuries notwithstanding a defect in a product's design, the defect cannot be a substantial factor in the cause of the injuries. *Soule v. General Motors Corp.*, 8 Cal. 4th 548, 557 (1994). Manufacturers cannot be liable for the severity of a plaintiff's injuries that the manufacturer did not reasonably anticipate resulting from the product's design. *Branham*, 701 S.E.2d at 21. When a plaintiff cannot prove a product's design is the proximate cause of injury, and cannot show its inherent dangers outweigh its benefits, the defendant will prevail. *Armentrout v. FMC Corp.*, 842 P.2d 175, 183–84 (Colo. 1992). The severity of the consumer's injury must have been foreseeable by the manufacturer to hold it liable. *Peck*, 237 F.3d at 617. The manufacturer's conduct must be a substantial factor in causing harm to the plaintiff if the harm is not foreseeable. *Id.* Generally, design defect claims are not concerned with warnings. American Law of Products Liability 3d Treatise § 28:23. Although manufacturers must consider safety features while designing and manufacturing vehicles because careless driving is foreseeable, they cannot be liable for all injuries due to unforeseeable conduct. *Branham*, 701 S.E.2d at 21.

For example, in *Soule*, a plaintiff alleged defective design when she collided with another vehicle, causing injury to her ankles. 8 Cal. 4th at 557. The defendant argued the force of collision caused her injury. *Id.* The court explained manufacturers are liable when the product causes injury while the consumer uses it in a reasonably *foreseeable* way. *Id.* at 560. It ultimately held the defendant was entitled to a jury instruction stating the jury must find the defendant not liable if it finds the injury would have been the same without a design defect. *Id.* at 559. It reasoned manufacturers must consider the frequency and foreseeability of traffic accidents to an extent. *Id.* However, although careless drivers are foreseeable to vehicle manufacturers, manufacturers cannot be liable for actions of unreasonably inattentive drivers. *Id.*; *see also Branham*, 701 S.E.2d at 21 (explaining manufacturers are not liable for unforeseeable misuse by the consumer).

Here, Edison did not intend for the Marconi to be fully autonomous after realizing its sensors were not as accurate as the luxury sensors. R. at 5. Rather, it indented to aid attentive drivers in safety and did not foresee drivers attempting to maneuver the vehicle with *no* driver input. R. at 5, 6. The Marconi salesperson suggesting Petitioner should input his destination into the GPS, then "take no further action" did not relieve Petitioner of the duty to remain attentive to the road and drive responsibly. R. at 4. A reasonable driver would know the car purchased was not fully autonomous and necessitated driver input. R. at 5. Therefore, the severity of Petitioner's injuries was not foreseeable to Edison because Edison expected Petitioner to remain at least moderately attentive to obstacles in the road. R. at 1. In fact, the Autodrive feature can only activate when both hands are on the steering wheel, flagging to the driver the need to remain attentive and drive the vehicle, or take over when Autodrive's sensors fail to detect an obstacle. R. at 2, 4.

Petitioner's inattention to the road as even a *moderately* attentive driver is not the type of foreseeable risk of harm Edison should have reasonably prepared for or expected to eliminate. R. at 5. Edison did not owe a duty to Petitioner to provide the absolute safest, most technologically advanced vehicle at an economy rate, but to provide a reasonably safe vehicle for a reasonable price. R. at 2, 5. Edison's decision to install less sensors on the Marconi than it would have a luxury priced vehicle, did not render the vehicle "not reasonably safe." R. at 5. Instead, Edison designed and manufactured a vehicle with additional safety features, calling for reasonable driver input and attentiveness and did not foresee a likelihood of such injuries due to a driver failing to drive the vehicle. R. at 4, 5.

4. Although Edison omitted the alternative design, the Marconi is still a reasonably safe vehicle because current sensors improve overall driver safety.

When a manufacturer has access to a reasonable alternative design, but chooses to use a different design, the manufacturer is not liable for his choice if the design is still reasonably safe. *Aubin*, 177 So. 3d at 505. A reasonably safe design of a product does not require the "latest, best, or safest design be utilized." *Foglio v. Western Auto Supply*, 56 Cal. App. 3d 470, 473 (1976). A product defective in design must prove to be manifestly unreasonable, meaning the danger of using the product outweighs its social utility and no reasonable person with knowledge of the relevant facts would choose to use this product. *Id.* at 500. A prevailing design defect claim must show the manufacturer's decision to not use the alternative design renders the product "not reasonably safe." *Id.*; *see also Claytor*, 286 S.E.2d at 132 (analogizing a bicycle is safer with lights and a bell, but a bicycle not equipped with such features is neither defective nor "not reasonably safe").

Omission of the most technologically advanced and safest product does not automatically render the product used "not reasonably safe." *Reed*, 697 F.2d at 1196–97. Instead, the question requires a balancing test, and inquisition of certain factors including, usefulness of the product, the cost of additional safety features, and the risk of potential danger. *Id.* at 1197; *see Claytor*, 286 S.E.2d at 131 (holding although manufacturers could make any product safer, automobile dealers cannot be liable simply because the manufacturer did not install the safest product).

A plaintiff must prove the manufacturer's decision to omit the alternative design renders the product "not reasonably safe." *Peck*, 237 F.3d at 617. Although manufacturers could make any product safer, their decision not to, does *not* automatically make the product "not reasonably safe." *Reed*, 697 F.2d at 1196–97. Whether omission of an alternative design is inappropriate depends on factors including, mechanical feasibility of a safer design, financial cost of the improved design, and the adverse consequences to the consumer. *Barker*, 573 P.2d at 455. For example, in *Marchant v. Mitchell Distributing Co.*, a crane, which had the capacity for additional safety features at the time of use, injured the plaintiff while on the job. 240 S.E.2d 511, 512 (S.C. 1977). Plaintiff alleged the safer crane could have reduced the risk of harm, however, the court determined just because the crane could have been safer, is not sufficient to find the crane used not reasonably safe. *Id.* at 513.

Here, Edison's decision to omit the absolute safest design does not render the Marconi "not reasonably safe" because its additional safety features *add* to driver input and discretion. R. at 5. Although Edison did not use its most advanced sensors in the Marconi, it still used a reasonably safe product and in fact, made the vehicle *safer* than the standard vehicle. R. at 4, 5. The benefit of additional safety features to a well-manufactured vehicle, paired with safe driving,

renders the vehicle more than reasonably safe. R. at 2. Therefore, omission of the additional sensors to the Marconi do not render the vehicle not reasonably safe. R. at 2, 3, 5.

The court below correctly denied Ashpool's motion for judgment as a matter of law because Ashpool failed to prove a reasonable alternative design under the risk-utility test would have prevented his collision with the brown bear.

II. THE DUTY TO RETROFIT SHOULD NOT BE ADOPTED IN THE STATE OF FREMONT BECAUSE IT IS SUPERFLUOUS, IT IS NOT A QUESTION FOR THE COURTS, AND IT WOULD THREATEN TO STIFLE INNOVATION.

A. This Court Should not Adopt a Duty to Retrofit.

A duty to retrofit is a post-sale "duty to upgrade or improve a product." *Ostendorf*, 122 S.W.3d at 534. Generally speaking, "there are two retrofit scenarios: a retrofit for a latent defect or a retrofit because of a technological advance." *Id.* at 536 (citing *Gregory*, 538 N.W.2d at 328). Here, the duty to retrofit because of a technological advance is the issue. A majority of jurisdictions recognize there is no "duty to retrofit a product which was non-defective under standards existing at the time of manufacture, yet which could subsequently be made safer by a later-developed safety device or design improvement." *Romero v. Int'l Harvester Co.*, 979 F.2d 1444, 1450 (10th Cir. 1992).

Under the Third Restatement of Torts, there is a distinction between a duty to recall and a duty to retrofit. Restatement (Third) of Torts: Prod. Liab. § 11 (1998). Liability for a failure to recall a product occurs only after a government directive or agency regulation requires such a recall, or the seller voluntarily recalls a product and fails to do so reasonably. Restatement (Third) of Torts: Prod. Liab. § 11(a)–(b) (1998). The Restatement intentionally excluded a duty to retrofit a product since courts have rarely imposed such a duty on manufacturers. Restatement (Third) of Torts: Prod. Liab. § 11 (1998) (explaining the rationale for excluding the duty to

retrofit is because most courts do not recognize such a duty). When courts assess this issue, they often point out that imposing such a duty on manufacturers would "be to inhibit manufacturers from developing improved designs that in any way affect the safety of their products." *Lynch v. McStome & Lincoln Plaza Associates*, 548 A.2d 1276, 1281 (1988).

1. When a duty to retrofit is applied, it is done so in limited circumstances, and only in a minority of jurisdictions.

Throughout the United States, a majority of jurisdictions do not recognize a duty to retrofit. *See, e.g., Ostendorf*, 122 S.W.3d at 534 (in Kentucky there is no independent duty to retrofit because "in many cases, a duty to retrofit is properly the province of an administrative or legislative body"); *Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 337 (4th Cir. 1991), *cert. denied*, 502 U.S. 820 (1991) (applying West Virginia law to find "a product can only be defective if it is imperfect when measured against a standard existing at the time of sale or against reasonable consumer expectations held at the time of sale"); *Anderson v. Nissan Motor Co., Ltd.*, 139 F.3d 599, 602 (8th Cir. 1998) (no duty to retrofit under Nebraska law because states' products liability laws favor limiting liability "to acts or omissions which occur at the time of manufacture or sale"). These jurisdictions, and many others, do not recognize this duty for a variety of reasons. But principally, creating a duty to retrofit is a question best suited for administrative or legislative bodies. *Ostendorf*, 122 S.W.3d at 534. There is no reason to create this category of liability when other legal remedies are available and imposing such a liability threatens to stifle innovation among manufacturers. *Id.*

In the jurisdictions where the duty to retrofit is recognized, it is in limited circumstances which often involve the implication of human safety. *See Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519 (Tex. Civ. App. 1979) (duty to retrofit a known improved tail rotor for a helicopter); *Raedenour v. Marion Power Shovel*, 719 P.2d 1058, 1067 (Ariz. 1986) (duty to retrofit a mining

shovel because the number of units sold, 120, was so small); *Hernandez v. Badger Const. Equip. Co.*, 28 Cal.App.4th 1791 (1994) (court affirmed jury finding that crane manufacturer could be liable for failing to install later developed safety device on crane that was not defective when sold). For example, in *Braniff Airways, Inc. v. Curtiss-Wright Corporation*, the plaintiff purchased an airplane engine from the manufacturer. 411 F.2d 451, 452 (2d Cir. 1969). This engine was later installed on the plaintiff's passenger airplane, which subsequently crashed due to engine failure. *Id.* The Second Circuit reasoned that an airplane engine is a product which involves human safety and as such held "it is clear that after such a [human-safety] product has been sold and dangerous defects in design have come to the manufacturers attention, the manufacturer has a duty either to remedy these or . . . at least give users adequate warnings and instructions concerning methods for minimizing the danger." *Id.* at 453.

While in *Braniff*, the potential for danger was severe and widespread, that is not the case here. In circumstances involving something such as an airplane engine, the potential for human danger exists for the passengers of the plane, the ground crew working around the plane, and any potential individuals under the plane's flight path. In addition, when and if an airplane engine fails, there is often no chance for human intervention. In contrast, here, the potential for human danger is minimal. Drivers of a Marconi are expected to keep two hands on the steering wheel while the vehicle is in drive, even while using the semi-autonomous driving feature. R. at 2. In addition, the driver can override the Autodrive feature when they have two hands on the steering wheel. R. at 3. As such, the potential for human danger with semi-autonomous vehicles is far less than the implication of human safety with airplanes. Even so, the majority of jurisdictions recognize that creating a duty to retrofit is not a role for the judiciary, but rather the province of administrative or regulatory bodies. *Ostendorf*, 122 S.W.3d at 534; *see also* 47 A.L.R. 5th 395.

2. If Fremont wants to create a duty to retrofit, that is the role of the legislative and administrative bodies.

The judiciary is not the appropriate governmental arm to determine whether this duty should be imposed on manufacturers, rather it is a question for the legislature and other administrative and regulatory bodies. *Ostendorf*, 122 S.W.3d at 534; *see also* Victor Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U. L. REV. 892, 902 (1983) ("[t]ort law was never intended to function as a substitute for administrative agencies"). These governmental bodies are more suited to the task of making the complex decision to retrofit and consider the ramifications of such a decision. *Ostendorf*, 122 S.W.3d at 534 (citing *Gregory*, 538 N.W.2d at 334). This same principle has been recognized by numerous courts and commentators throughout the country. "[T]he duty to repair or recall is more properly a consideration for administrative agencies and the [l]egislature who 'are better able to weigh the benefits and costs involved in locating, recalling, and retrofitting products,' as well as other economic factors affecting businesses and consumers. Courts have traditionally not been suited to consider the economic effect of such repair or recall campaigns." *Gregory*, 538 N.W.2d at 334 (quoting *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1316 (Kan. 1993)). Additionally, it is better suited for the legislature because the legislatures have the ability to enact broad laws. As our society progresses into a more digital and autonomous era, rather than having piecemeal court holdings addressing different autonomous objects, the legislature would be able to enact broad laws regarding other products which are also becoming autonomous, such as robots, drones, and smart home devices. *See, e.g.*, Andrew Villanueva, *The Legal Battle with the Future of Autonomous Surgical Robotics*, 17 IND. HEALTH L. REV. 367 (2020). As these products become more prevalent in society, there will be a need for greater regulation.

In fact, in response to the popularity and widespread purchasing of autonomous vehicles, most states have already enacted legislation addressing this subject. *See Autonomous Vehicles | Self-Driving Vehicles Enacted Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Feb. 18, 2020), https://www.ncsl.org/research/transportation/autonomous-vehicles-self-driving-vehicles-enacted-legislation.aspx (as of 2020, twenty nine states have enacted legislation regarding autonomous vehicles). Outside of the state legislatures enacting legislation, the administrative and regulatory bodies which have oversight over vehicle and highway safety are making similar administrative and regulatory findings. For example, another vehicle manufacturer which creates semi-autonomous vehicles is Tesla. Several fatal crashes involving Tesla's were investigated by the National Transportation Safety Board (NTSB). In each of those crashes, the NTSB looked into the circumstances surrounding crashes where the occupants of the Tesla vehicles were injured or killed after the semi-autonomous vehicle struck a stationary object. The "NTSB makes safety recommendations but cannot compel action, while [the] [National Highway Transportation Safety Administration] NHTSA can order a recall if it deems a vehicle poses an unreasonable safety risk." 39 No. 15 Westlaw Journal Automotive 05.

Given that semi-autonomous and autonomous vehicles are a relatively recent development, courts should not rush to create a duty when the legislature and administrative agencies have not yet spoken on this matter. Here, the Marconi was released in 2017. R. at 2. With a mere three years on the market, this is a miniscule amount of time for the legislature or administrative agencies to speak on the proper protocol for a duty to retrofit, if any. Thus, whether or not the State of Fremont should adopt a duty to retrofit in certain strict liability design defect claims is a question properly answered by the Fremont legislature.

3. Adopting a duty to retrofit is unnecessary and would threaten to stifle innovation.

Under traditional principles of negligence and strict products liability, a manufacturer can already be held liable for a design defect. *Ostendorf*, 122 S.W.3d at 534. Thus, there is "no reason to create a duty to retrofit a product not defective when sold." *Id.* In addition to creating another unnecessary layer of liability, imposing a duty to retrofit can become an extremely complex and costly undertaking, reaching costs in the millions of dollars. *Id.* (citing Douglas R. Richmond, *Expanding Products Liability: Manufacturer's Post-Sale Duties to Warn, Retrofit and Recall*, 36 IDAHO L. REV. 7, 10 (1999)). Not only would this impose a high cost to manufacturers, but this cost would also be passed onto consumers. Here, Edison's CEO testified that adding the "extra sensors and proprietary sensor technology" would have increased the cost to consumers by at least $5,000. R. at 5. Thus, not only would such a duty pass on the cost to consumers, but it also has the potential to stifle and chill innovation because "[i]t would discourage manufacturers from developing new designs if [the duty to retrofit] could form the bases for suits or result in costly repair." *Gregory*, 538 N.W.2d. at 337; *see also* Restatement (Third) of Torts: Products Liability § 11.

B. Even if This Court Adopts the Duty to Retrofit, Edison is not Liable.

Even if the duty to retrofit applies to Edison, Edison did not have duty to retrofit. A minority of jurisdictions have held that there is a duty to retrofit where there is an assumption of the duty or some special, controlling relationship between the manufacturer and the owner of the machine. *See, e.g., Ostendorf*, 122 S.W.3d at 533; *Gregory*, 538 N.W.2d at 333; *Bell Helicopter*, 594 S.W.2d at 531–32; *Noel v. United Aircraft Corp.*, 342 F.2d 232, 241 (3d Cir. 1964). Because only a minority of jurisdictions recognize a duty to retrofit, there is yet to be a universally accepted test for courts to apply. R. at 16. Acknowledging that only a minority of

jurisdictions recognize this particular duty, the Court of Appeals for the State of Fremont combined the jurisprudence from minority states to hold that this jurisdiction would adopt a duty to retrofit in cases where: (1) the product implicates human safety; (2) there is a continuing relationship between manufacturer and consumer; and (3) the manufacturer had knowledge of a defect after the product was in the hands of the consumers. R. at 15–16. However, even if this Court adopts the duty to retrofit as defined by the Court of Appeals, Edison is not liable.

1. Although automobiles like the Marconi implicate human safety, Marconi's innovations and technologies significantly reduce dangers to human safety.

First, although there is no question that automobiles like the Marconi implicate human safety, there are limitations to what "implicates human safety" for the purposes of a duty to retrofit. *See Noel*, 342 F.2d at 236. A few courts have created a duty to retrofit under limited circumstances where human safety is involved. 5 PRODUCTS LIABILITY § 57.01. However, for the purposes of establishing duty to retrofit, courts should set limits on what constitutes "implicating human safety." Without a restraint on this definition, nearly any product can fall into the sphere of "implicating human safety." Automobiles, by their nature, present a host of dangers to drivers and pedestrians alike. R. at 16. But semi-autonomous driving functions like the Marconi's Autodrive includes crash avoidance technologies that pose significantly less danger to human safety than vehicles without crash avoidance technologies. *Real World Benefits of Crash Avoidance Technologies*, INSURANCE INSTITUTE FOR HIGHWAY SAFETY (IIHS) (Dec. 2020) https://www.iihs.org/media/259e5bbd-f859-42a7-bd54-3888f7a2d3ef/shuYZQ/Topics/ADVANCED%20DRIVER%20ASSISTANCE/IIHS-real-world-CA-benefits.pdf. For instance, one of Marconi's Autodrive functions for collision warning in addition to autobrake reduces forward-to-rear collision with injury by 56%. *See supra*, *Real*

World Benefits of Crash Avoidance Technologies; R. at 12. Also, the innovations incorporated in the Marconi have proven to avoid accidents, such as accidents caused by lane drifting or unsafe lane changes. R. at 5. Therefore, although automobiles like the Marconi implicate human safety, Marconi's innovations and technologies prevent dangers to human safety.

2. Edison did not have a special, controlling relationships with consumers because the Marconi can operate safely without Edison's continuous technological updates.

Second, Edison did not have a continuing relationship with consumers. For the purposes of establishing a duty to retrofit, a manufacturer or vendor must have a special, controlling relationship with its consumers. *Gregory*, 538 N.W.2d at 335; *Bell Helicopter*, 594 S.W.2d at 531–32; *Noel*, 342 F.2d at 241. Petitioner erroneously claims that Edison had a continuing relationship with consumers because Edison provided software updates for Marconi owners. R. at 17. However, Edison's software updates did not form an adequate continuing relationship with the Marconi owners.

For example, in *Noel*, the court held that an airplane manufacturer had a special, controlling relationship with its consumers because the manufacturer has to keep the body of an airplane continuously updated for advancements in technology. 342 F.2d at 240. It reasoned that an airplane cannot operate safely without the aircraft manufacturer's continuous updates of the aircraft parts such as propeller and engine for safety. *Id.* at 236. It differentiated the aircraft manufacture's "continuing duty" from other manufacturers such as lawnmowers that can operate safely without updates to the body of the machine. *Id.* (citing *Pontifex v. Sears, Roebuck & Co.*, 226 F.2d 909 (4th Cir. 1955)).

Conversely, in *Pontifex*, the court held that the manufacturer, Sears, Roebuck & Co. ("Sears") did not have a continuing duty with consumers of lawnmowers to update older models

of lawnmowers with safety mechanisms of the manufacturer's latest models. 226 F.2d at 910. In *Pontifex*, the plaintiff was injured by a rope pulled to start the engine of the lawnmower. *Id.* The plaintiff alleged the design of the lawnmower was defective because the rope was not permanently attached to a spring recoil mechanism, such as those found in the latest model of the machines. *Id.* The court held that Sears had no continuing relationship with consumers because even if a manufacturer included additional safety measures in the latest models, the manufacturer does not have post-sale duty to fix or update older models that can operate safely without added safety measures. *Id.*

Here, unlike in *Noel* but as in *Pontifex*, Edison did not have a "special, controlling relationship" with its consumers. *Noel*, 342 F.2d at 240; *Pontifex*, 226 F.2d at 910. The Marconi could operate without these sensors and updates to them, as long as the driver is attentive and keeps his hands on the steering wheel. R. at 17. Petitioner erroneously claims that Edison had a continuing relationship with consumers because Edison provided software updates for Marconi owners. R. at 17. However, software updates were a mere convenience to consumers as noted by the Court of Appeals. R. at 17. Software updates include safety, consumer convenience, GPS, and cosmetics purposes. R. at 3. For instance, a software update would allow the driver to change the lights on the sunroof of the vehicle. R. at 3. In other words, even without Edison's continuous update, the Marconi can operate safely. *See Noel*, 342 F.2d at 240 (holding that there is no post-sale duty to update machines that can operate safely without continuous updates).

In fact, according to NHTSA's categorization of automated driving, the Marconi places at Level 2, Partial Automation where "the vehicle has combined automated functions, like acceleration and steering, but the driver must remain engaged with the driving task and monitor the environment at all times." *Automated Driving Systems 2.0: A Vision for Safety*, NHTSA,

https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/13069a-ads2.0_090617_v9a_tag.pdf (last visited Jan. 23, 2021). For example, Tesla's autonomous driving function called "Autopilot" also places at NHTSA's Level 2 where driver must engage with driving task and monitor the surroundings at all times. *Automated Vehicles*, STATE OF OREGON, https://www.oregon.gov/odot/Programs/Pages/CAV.aspx (last visited Jan. 23, 2021). Similar to Tesla's Autopilot function, Edison's Autodrive also requires drivers to engage while driving and monitor surroundings as required by Level 2. *See supra, Automated Vehicles.* The Marconi's Autodrive function did not take away from Petitioner's ability or responsibility to engage while driving and monitor the surroundings to spot a bear on the road and maneuver the vehicle to prevent an accident. R. at 6. Therefore, it was Petitioner's driving and not Marconi's Autodrive functions that is liable for hitting a stationary object on the road.

3. Edison knew about the alternative design *before* the product was placed in the stream of commerce and made a conscious decision to not add additional sensors.

Third, even in the minority jurisdictions that recognize a duty to retrofit, no courts have recognized a duty to retrofit where the manufacturer or vendor already had knowledge of a defect *before* the product was placed in the stream of commerce. Courts in those minority jurisdictions have recognized a duty to retrofit only when a manufacturer or vendor became aware of a dangerous defect concerning human safety after the product reached the hands of consumers and the manufacturer had a continuing relationship with the consumers. *See e.g.*, *Braniff*, 411 F.2d at 453 (holding that the engine manufacturer had a duty to retrofit where the product was sold and dangerous defects in design have come to the manufacturer's attention after); *cf. Raschke v. Carrier Corp.*, 703 P.2d 556, 557 (Ariz. Ct. App. 1985) (no duty to retrofit where the manufacturer did not use the safest alternative design but still used a safe design). In

other words, a manufacturer or vendor is not liable under the theory of duty to retrofit where it made a conscious decision not to use an alternative design by balancing risk and utility before the product reached consumers. *Raschke,* 703 P.2d at 557.

For example, in *Raschke v. Carrier Corp.*, the court held that manufacturers do not have the duty to install the "ultimate in safety features." 703 P.2d 556, 557 (Ariz. Ct. App. 1985) (citing *Rodriguez v. Besser Co.*, 565 P.2d 1315 (Ariz. Ct. App. 1977)). In *Raschke,* the plaintiff alleged that the manufacturer had a post-sale duty to upgrade its furnace by installing a sensing mechanism that would warn of danger and turn off the furnace when there was an excess of carbon monoxide in the air. *Id.* The court still held that the manufacturer did not have post-sale duty to update or "retrofit" because even though such technology was available and known to the manufacturers, the manufacturer did not have the duty to install the "ultimate in safety features." *Id.*

Here, as in *Raschke,* Edison did not have the duty to install the "ultimate in safety features." Edison already knew of the alternative design before the Marconi even reached the consumers but made a conscious decision to not add additional sensors after balancing the risk and utility. R. at 5. According to the Edison's expert witness, the accident rate was only 13% higher when the vehicle was going over 35 mph and a stationary object was present in the vehicle's path. R. at 5, 17. Installing the additional equipment would increase the cost of the vehicle to consumers by at least $5,000, which would have not appealed to the target consumer group for the Marconi model. R. at 5. Therefore, Edison knew about the alternative design *before* it decided to release the Marconi to the stream of commerce yet made a conscious decision by balancing the risk and utility of the design. Consequently, Edison is not liable under the theory of duty to retrofit.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court AFFIRM the Court of Appeal's determination that the duty to retrofit constituted harmless error which would not have changed the outcome in the lower court. Respondents also request this court AFFIRM the Court of Appeal's decision to deny Petitioner's motion for judgment as a matter of law because the risks of the Marconi do not outweigh the utility.

Dated: February 1, 2021

Respectfully Submitted,

Team B

Counsel for Respondent