
IN THE
SUPREME COURT OF THE STATE OF FREMONT

Docket No. 21—2112

WILLIAM ASHPOOL,
Petitioner,

v.

EDISON INCORPORATED, A FREMONT CORPORATION,
Respondent.

On Writ of Certiorari to the
The Court Appeals for the State of Fremont.

BRIEF FOR PETITIONER

Attorneys for Petitioner

QUESTIONS PRESENTED

1. Whether the State of Fremont incorrectly denied Ashpool's motion for judgement as a matter of law on the design defect claim under the risk-utility test because the Marconi lacked additional, sensors that would have prevented it from hitting the bear on Autodrive mode.
2. Whether the State of Fremont acted properly in adopting the duty to retrofit test when that duty is created by the judiciary.

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STATEMENT OF THE CASE

Edison Incorporated (“Edison”), a Fremont automobile corporation, is traditionally known for designing luxury and sports electric vehicles. R. at 2. In 2017, Edison released the Marconi, which Edison advertised as an economy range sedan that placed a higher premium on safety features, along with ease of use over its cutting—edge technology, and high performance favored by their traditional customer base. R. at 2. The Marconi contained a feature known as “Autodrive,” which allowed the vehicle to semi-autonomously operate provided the driver kept two hands on the steering wheel. R. at 2. The system had the capability to scan the surrounding environment using sensors that then relayed obstacles to the onboard computer. R. at 2. This allowed the vehicle to make necessary stops, accelerations, gear changes, and maneuvers without any input from the driver. The driver needs to only provide their destination via GPS on the onboard computer and the vehicle would, in real time, assess road conditions, speed limits, and traffic lights based on the route. R. at 2.

As the technology advances, Edison provides numerous updates, sending notifications to the vehicle owner the next time the vehicle starts. R. at 2. The notification is displayed on the center console and conveys the information to the consumer. R. at 2. After selecting a destination, the driver’s input is minimal, and the vehicle operates semi—autonomously until arriving at the destination. R. at 2. The driver can override Autodrive to steer and must keep both hands on the wheel (otherwise a flashing light would appear). R. at 3.

William Ashpool (“Ashpool”) is a 55-year-old Fremont native. R. at 3. In November 2019, Ashpool purchased a Marconi to carry out his duties as a social worker. R. at 3–4. Impressed by the Autodrive technology, Ashpool purchased the vehicle after the salesman explained that all a

driver must do was input a GPA location and enjoy the ride, with no further action required. R. at 4.

But on December 20, 2019, after driving and enjoying the car while occasionally using the Autrodrive feature, Ashpool suffered an accident. R. at 4. At 42 mph, Ashpool's Marconi collided with a brown bear that had been sitting in the middle of the road, causing Ashpool to suffer extensive injuries, including a dislocated shoulder, five broken ribs, a broken wrist, a concussion, and whiplash, and for which he was hospitalized over two weeks. R. at 4. The vehicle was, according to Ashpool's insurer, a "total loss." R. at 4. Ashpool filed suit against Edison, alleging that the faulty sensors failed to register the brown bear or alert Ashpool to maneuver or stop the vehicle. R. at 4. Ashpool alleged that Edison knew there were problems with the sensors and did nothing to fix them. R. at 4.

At trial, it came to light that Edison learned that the sensors had difficulty identifying stationary objects when the vehicle traveled above 35 mph. R. at 5. "The accident rate" Ashpool's expert testified, "was 13% higher when the vehicle was going over 35 mph and a stationary object was present in the vehicle's path." R. at 5. Edison admitted that it had intended to include additional sensors that would have enabled the Marconi to detect stationary objects, but ultimately rejected installing additional equipment over cost concerns. R. at 5. The additional sensors, according to Edison, would have priced the Marconi outside the economy range of Sedans. R. at 5. Despite this, the company did intend to use the enhanced sensors on luxury and sports vehicles. R. at 5. Edison's CEO, Reeve, acknowledged in his testimony that the company planned to include extra sensors. R. at 4. Reeve then admitted knowing that the sensors would have assessed stationary objects at higher speeds. R. at 5.

Ashpool contended that the lack of additional sensors rendered the vehicle unsafe, especially because drivers relied on the semi-autonomous driver feature. R. at 5. There were twelve additional accidents involving stationary objects and the sensors' inability to detect them. R. at 6. Each of the accidents involved the Marconi traveling faster than 35 mph. R. at 6. In opposition, Edison stated that drivers should still be held liable because they were still required to maneuver the vehicle and have two hands on the steering wheel. R. at 6.

During the submission of jury instructions, Ashpool submitted instructions for a duty to retrofit, essentially noting that a manufacturer must take reasonable steps to ensure lessen injury for defects in their products after they had been manufactured and sold. R. at 6. Edison objected to the instructions, arguing that Fremont had not adopted a duty to retrofit, and that Edison only discovered well after the vehicle's release to the market that a software update could improve the crash rate. R. at 6–7. The trial court sustained Edison's objection, limiting Ashpool's evidence to the sensors being defective before they left the manufacturer. R. at 7.

After the closing arguments, Ashpool moved for judgment as a matter of law on the risk-utility issue, which the trial court denied, and submitted to the jury for consideration. R. at 7. The jury returned a verdict in favor of Edison, finding no design defect and that the sensors did not cause Ashpool to crash. Ashpool renewed his motion judgment as a matter of law and was denied again. R. at 7.

Ashpool filed this appeal, stating that the Court of Appeals erred in refusing to include Ashpool's duty to retrofit as a jury instruction. R. at 7. Additionally, Ashpool argues that the Court erred in its denial of his renewed motion for judgment as a matter of law. R. at 7.

SUMMARY OF THE ARGUMENT

The Court of Appeals for the State of Fremont incorrectly applied the law when deciding Ashpool's motion for summary judgment and the duty to retrofit. The Court of Appeals by finding that the risk utility test was not satisfied because the risk of injury was foreseeable to Edison and a reasonable alternative design existed that would have lessened the risk of collision with a stationary object. Further, Edison had the ability to install extra sensors, which would have reduced the likelihood of a collision. Edison knew of the increased risk of the car hitting stationary objects while in Autodrive mode after it conducted its own internal testing, prior to the sedan being sold to consumers. The testing showed that the Marconi had difficulty identifying stationary objects in roadways past certain speeds. It is a foreseeable risk that a stationary object would be in the road, as debris, animals, and other objects are often found in the middle of roads. Edison had a reasonable alternative design available but refused to install it due to costs. The alternative design was reasonable and practicable and would have reduced the foreseeable risk of the Marconi crashing into stationary objects. The Marconi is unsafe because Edison failed to include additional sensors despite the likelihood of stationary objects being in roadways.

The Court of Appeals erred in failing to apply the duty to retrofit. While the Court of Appeals erroneously found that petitioner's instruction was irrelevant, this Court should adopt the test articulated by the Court of Appeals, the duty to retrofit. The test requires the Court to weigh three factors as follows: (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. The Court of Appeals erred in weighing the factors because the nature and technology of the automobile are complex. The Court of Appeals

committed a reversible error in rejecting Ashpool's jury instruction on Edison's duty to retrofit because there was a continuing relationship with the manufacturer and consumer.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN DENYING ASHPOOL'S MOTION FOR JUDGMENT AS A MATTER OF LAW BECAUSE THE RISK-UTILITY TEST IS SATISFIED.

During trial, Ashpool presented evidence sufficient to satisfy the risk-utility test, and therefore the Court of Appeals erred in affirming the trial court's denial for judgment as a matter of law. To prevail in products liability, petitioner must establish three elements: (1) the injury was caused by the product; (2) the product, at the time of the injury, was in essentially the same condition as when it left the manufacturer; and (3) the injury occurred because the product was in a defective condition such that it was unreasonably dangerous to the driver. W. Prosser, *Law of Torts* 671—72 (4th edition 1970). "A product . . . is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the seller . . . , and the omission of the alternative design renders the product not reasonably unsafe." *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b). In this matter, Edison concedes that the Marconi caused Ashpool's injury and that the Marconi was in its manufactured state when the injury occurred; therefore, the first and second elements are not at issue. The only dispute between the parties is whether the Marconi was in a defective condition so that it was unreasonably dangerous to a consumer like Ashpool.

In *Fickell v. Toyoma Motors Inc.*, this Court adopted the risk-utility test exclusively applicable to design defects. 758 XE 821, 830 (Fremont 2014). The *Fickell* Court is one of many jurisdictions to adopt the risk-utility test in design defect claims. *See Branham v. Ford Motor Co.*, 701 S.E.2d 5, 15 (S.C. 2010); *Armentrout v. FMC Corp.*, 842 P.2d 175, 183—84 (Colo. 1992);

Gregory v. Cincinnati Inc., 538 N.W. 2d. 325, 329—30 (Mich. 1995); *Banks v. ICI Ams., Inc.*, 450 S.E.2d 671, 674—75 (Ga. 1994). The risk-utility test is only applicable where a product has functioned improperly, not where products have functioned as intended. *Perkins v. Wilkinson Sword, Inc.*, 700 N.E.2d 1247, 1249 (Oh. 1998). A plaintiff ordinarily needs expert testimony to meet the burden of the risk-utility test. *Guarascio v. Drake Assocs. Inc.*, 582 F. Supp.2d 459, 463 (N.Y. 2009).

The risk-utility test balances the danger associated with the product’s use against the utility to the consumer. *Bragg v. Hi-Ranger, Inc.*, 462 S.E.2d 321, 328 (S.C. Ct. App. 1995). A product is deemed unreasonably dangerous and defective “if the danger associated with the use of the product outweighs the utility of the product.” *Id.* The risk-utility test also considers the advantages and disadvantages of the design in question and the availability of another reasonable alternative design. Cami, Perkins, *The Increasing Acceptance of the Restatement (Third) Risk Utility Analysis in Design defect Claims*, 4 Nev. L.J 609, 614 (2004). As discussed *infra*, the evidence demonstrates that the danger the Marconi’s Autodrive feature poses to the consumer outweighs its utility. Accordingly, the risk-utility test is satisfied, and the Court of Appeals’ decision should be reversed.

A. The risk-utility test is satisfied because the Marconi’s risk outweighs its utility to consumers.

Ashpool satisfies the risk-utility test because the Marconi’s risk outweighs its utility to the consumer. To determine if a product’s risk outweighs its utility, a court balances the following six factors: (1) whether the severity of the injury was foreseeable by the manufacturer; (2) whether the likelihood of injury was foreseeable by the manufacturer at the time of distribution of the product; (3) whether there was a reasonable alternative design available; (4) whether the available alternative design was practicable; (5) whether the available and practically reasonable alternative design would have reduced the foreseeable risk of harm posed by the product; and (6) whether the

omission of the alternative design renders the product not reasonably safe. *See Peck v. Bridgeport Machs., Inc.*, 237 F.3d 613, 617 (6th Cir. 2001). To meet the requirements of the risk-utility test, a plaintiff must demonstrate that the manufacturer foresaw the risks of its chosen design compared to an alternative design available, that the alternative design was practicable, and the failure to choose that alternative design made the product unreasonably unsafe.

1. *Edison foresaw the severity and likelihood of the injury because the Marconi could not reliably identify stationary objects in the roadway at the time of distribution.*

The severe injury that Ashpool suffered when his Marconi struck a brown bear in the roadway was foreseeable to Edison at the time of manufacturing. The first element a court must analyze is whether the severity of the injury was foreseeable by the manufacturer. A plaintiff meets this element by demonstrating that defendants knew or should have known about the risk of injury. *Croskey v. BMW of N. Am., Inc.*, 532 F.3d 511, 516 (6th Cir. 2008). For example, when a device is in a defective condition before it is distributed, the manufacturer is understood to have known of the foreseeable injury at the time of distribution. *Peck v. Bridgeport Machs., Inc.* 237 F.3d 613, 617 (6th Cir. 2001); *see also Hollister v. Dayton Hudson Corp.* 5 F. Supp. 2d 530, 538 (E.D. Mich. 2000) (finding the likelihood a highly flammable shirt could catch fire if worn by individuals was foreseeable to the manufacturer because it was highly flammable at the time of distribution).

In *Savage v. Peterson Dist. Co.*, the manufacturer distributed food that went bad causing many people to get sick. 150 N.W.2d 804, 809 (Mich. 1976). The proof of sale of food, coupled with proof of widespread, simultaneous and damaging aftermath, rendered the evidence admissible to show the defectiveness of the product. *Id.*; *see Berry v. Fruehauf Trailer Co.*, 124 N.W.2d 290, 291 (Mich. 1963) (allowing similar prior-accident evidence to establish a dangerous or defective condition subject to requirement of similar conditions and reasonable proximity of time).

The foreseeable risks associated with the design of a product also considers, among other factors, “the likelihood that the design would cause harm in light of the intended and reasonably foreseeable uses, modifications, or alterations of the product.” *Welch Sand & Gravel, Inc. v. O & K Trojan, Inc.*, 668 N.E.2d 529, 533 (Ohio Ct. App. 1995). A product, however, is not defective if a plaintiff’s unforeseeable misuse is the sole cause of the harm. *Woods v. A.R.E. Accessories, LLC.*, 815 S.E.2d 205, 210 (Ga. Ct. App. 2018). If the misuse of the product causes injury, the plaintiff must show that the misuse of the product or the injury was foreseeable to the manufacturer. *Id.* at 210. When a pick-up truck model had a bed extender installed into it, and the truck lacked various safety features that would have prevented from the bed extender causing injury, the court held that the likelihood of injury was foreseeable. *Id.*

Here, the evidence demonstrates Edison foresaw a likelihood of severe injury caused by Marconi’s Autodrive feature because Edison’s testing showed that the Marconi had difficulty identifying stationary objects. Like the highly flammable shirt in *Hollister*, the Marconi was in a defective condition at the time of sale. 5 F. Supp. 2d at 538. As evinced during the trial, the tests performed on the Marconi indicated that the vehicle had difficulty identifying stationary objects when the vehicle was traveling over 35 mph. R. at 5. Ashpool’s expert also testified that when the Marconi was in Autodrive traveling at 35 mph, there was a 13% increase in chance of collision when a stationary object was placed in its path. *Id.*

In this case, Ashpool was traveling at approximately 42 mph on Autodrive when he collided with the bear that was stationary in the middle of the road. R. at 4. Ashpool was also not improperly utilizing the vehicle or the Autodrive technology at the time of the collision with the bear. The vehicle simply told him to “enjoy the ride” after he input a GPS location. *Id.* As a car manufacturer, Edison should have known that stationary objects, *i.e.*, animals, highway dividers,

traffic cones, and people, are often found in roadways. Since Edison knew that there was an increased chance of collision, it was foreseeable that the Marconi could crash into a stationary object such as the brown bear in the middle of the road and that such a crash could cause severe injury. Accordingly, because Edison knew there was an increased risk of collision with stationary objects when traveling over 35 mph, the likelihood of severe injury was foreseeable to Edison. The first and second factor of the risk-utility test are therefore satisfied.

B. Edison had a reasonable alternative design available to increase safety of the Marconi, and Edison could have reasonably installed such a design on the Marconi.

Edison had a reasonable alternative design to include additional sensors on the vehicle, and Edison could have reasonably installed the additional sensors. The third factor of the risk-utility test considers whether there was a reasonable alternative design available to the manufacturers. *Peck*, 237 F.3d at 617. The reasonableness of a manufacturer adopting the safest feasible design has been recognized as the most important aspect of the risk-utility analysis. *Banks v. ICI Ams., Inc.*, 450 S.E.2d 671, 674—75 (Ga. 1994). The availability of reasonable alternative designs is also an integral part of the analysis. *Id.* The existence of a feasible and equally efficacious design diminishes the justification for the use of the challenged design. *Id.* The appropriate analysis for a reasonable design alternative does not depend on the product’s use. *Jones v. NordicTrack, Inc.*, 550 S.E.2d 101, 104 (11th Cir. 2001). “Compliance with industry wide practices, state of the art, or federal regulations does not eliminate conclusively a manufacturer’s liability for its design of allegedly defective products” *Banks v. ICI Ams., Inc.*, 450 S.E.2d 671, 674—75 (Ga. 1994).

The court may consider a variety of factors to determine whether an alternative design is reasonable and whether the omission of the design renders the product unreasonably safe. The factors include “the magnitude and probability of the foreseeable risks of harm, the instructions

and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product . . . [in addition to the] relative advantages and disadvantages of the product as designed and as it alternatively could have been designed.” RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b). For example, in analyzing whether an alternative design was reasonable, a district court held that a retractable shield product was *not* a reasonable alternative because it creates additional hazards that otherwise would not exist. *Kordek v. Becton, Dickinson and Co.*, 921 F.Supp.2d 422, 431 (E.D. Pa. 2013).

Here, additional sensors installed on the Marconi would decrease the likelihood of a collision without creating any additional hazards. At trial, Ashpool’s expert explained that if the Marconi had additional sensors, a chance of collision would have been reduced by 13%. R. at 11. Thus, the additional sensors provided Edison with a reasonable alternative design. R. at 4. The additional sensors also would have been effective—nearly *eliminating* the risk that the Marconi collided with any stationary object—including a brown bear that was in the middle of the roadway. R. at 4. Even Edison’s CEO, Reeve, acknowledged in his testimony that the company planned to include extra sensors. R. at 4. Reeve then admitted knowing that the sensors would have assessed stationary objects at higher speeds. *Id.*

Edison did not include the additional sensors because it feared the cost of adding the additional sensors would lower their competitive advantage. *Id.* Edison sacrificed customer safety for profit. The lack of sensors made the car unsafe, especially since Edison added the semi-autonomous driving mode to the Marconi. R. at 5. Ashpool was utilizing the semi-autonomous driving mode when the car hit a brown bear. R. at 4. With the additional sensors, the collision could have been avoided altogether or the damage could have been greatly minimized. The Marconi had reasonable alternative designs—that were feasible and available—prior to releasing

the vehicle to customers but instead, Edison chose to look past safety to remain competitively priced. For those reasons, the factor of the risk-utility test is satisfied.

C. The omission of the additional sensors on the Marconi rendered the vehicle unsafe.

Edison's omission of additional sensors on the Marconi rendered the vehicle unsafe. A manufacturer may be liable for failing to use a feasible alternative design that would have prevented harm caused by an unintended but reasonably foreseeable use of its product. *Perkins v. Wilkinson Sword, Inc.*, 700 N.E.2d 1247, 1252 (Ohio,1998). A manufacturer must design their product using reasonable care in order to make it safe for its intended use. *Coleman v. Excellotextron Corp.*, 572 N.E.2d 856, 862 (Ohio,1998). The plaintiff is not required in a design defect case to prove that a product is "unreasonably dangerous." *See, e.g., Perkins v. Wilkinson Sword, Inc.*, 700 N.E.2d 1247, 1252 (Ohio,1998). A product which is unfit and unsafe for its intended use under an "implied warranty in tort" theory, would also be unreasonably dangerous under § 402A theory. *Leichtamer v. Am. Motors Corp.*, 424 N.E.2d 568, 574 (Ohio, 1998).

R.C. 2307.75 fully contemplates that a manufacturer may be liable for failing to use a feasible alternative design that would have prevented harm caused by an unintended but reasonably foreseeable use of its product. *Perkins v. Wilkinson Sword, Inc.*, 700 N.E.2d 1247, 1252 (Ohio, 1998). A defect in the design of a product results from deliberate and documentable decisions on the part of manufacturers. *Siminski v. Klein Tools, Inc.* 840 F.2d 356, 358 (6th Cir. 1988). A broad range of factors are also used to determine whether the omission of an alternative design renders the product unsafe. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) cmt. 3; *see also Robinson v. Reed-Prentice Div. of Package Mach., Co.*, 49 N.Y.2d 471, 479, (N.Y. 1980).

In this case, the omission of the reasonably alternative design rendered the Marconi reasonably unsafe because a car often encounters stationary objects. When Ashpool purchased the

Marconi, a sales associate told him that he would be able to input a GPS address into the Autodrive and enjoy the ride. R. at 4. Ashpool was traveling in his Marconi on Autodrive at approximately 42 mph when he collided with a brown bear sitting in the middle of the road causing him severe injury. *Id.* Ashpool's expert testified that the accident rate was 13% higher when the vehicle was going over 35 mph and a stationary object was present in the vehicles path. *Id.* Edison was able to incorporate additional sensors for an additional cost of \$5,000 to the vehicle. *Id.* Edison, however, refused to install additional sensors into the Marconi because of fears that the car would not remain comparatively priced. *Id.*

Despite the likelihood of a car encountering stationary objects, Edison chose profits over safety. Thus, the omission of additional sensors made the Marconi reasonably unsafe because of its inability to identify stationary objects in the roadway. Ashpool therefore presented sufficient evidence to satisfy the risk-utility test. Accordingly, this Court should reverse the Court of Appeals' decision and grant Ashpool judgment as a matter of law.

II. THE COURT OF APPEALS ERRED IN FAILING TO APPLY ITS PROPERLY ADOPTED DUTY TO RETROFIT.

In affirming the decision to dismiss, the Court of Appeals properly decided to adopt the Third Circuit's standard for a duty to retrofit, but improperly found Ashpool's jury instruction to be irrelevant on the basis that its omission constituted "harmless error." Ordinarily, an appellate court may disregard as harmless any error that does not affect a party's substantial rights. *State v. Warren*, 2006–Ohio–1281 at ¶ 62 (Ohio Ct. App.). Failure to give a jury instruction will be harmless error only where the appellate court cannot determine that the jury would likely have come to a different verdict had the requested instruction been given. *Oliver v. McCord*, 550 XE 625, 634 (Fremont 1996). Indeed, there must be some manifest injustice. *See id.* To rebut the

court's decision here, Ashpool must show that, on each element of the claim, a jury would *likely* reach a conclusion in his favor.

In this case, the Court of Appeals adopted its own duty to retrofit test, stating that there is a duty to retrofit when: (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 16. In doing so, the Court of Appeals decided to combine the jurisprudence from various other states, and did not assert that the exact test created was universally applied. *Id.* Adopting the Third Circuit's view, the Court of Appeals stated that a duty to improve the product was required when human safety was involved, with a mere warning being insufficient. R. at 15 (citing *Noel v. United Aircraft Corp.*, 342 F.2d 232, 236, 240 (3d Cir. 1964)).

The Court of Appeals recognized that there was “no question that the Marconi implicates human safety” and that Edison knew of the defects. R. 16—17. The evidence shows that Edison knew, before the Marconi left the manufacturer, that there was an increased potential for accidents when the driver was going over 35 mph. R. at 17 “Edison was also aware,” the Court of Appeals noted, “that prior to Ashpool's accident, there were twelve other incidents alleging failures in the sensors when the driver was going over 35 mph and collided with a stationary object,” which demonstrates that Edison possessed knowledge of the failing sensors after the product's release. R. at 17. To be clear, on the first and third elements, the Court of Appeals determined that a jury would likely find in Ashpool's favor. At issue here is only the second element, which requires “continued sale or advertising of the product” or, in this case, a continued relationship between the manufacturer and the consumer. The Court of Appeals properly adopted a duty to retrofit, however

the Court committed error when it found against Ashpool on the second element required under its fashioned duty to retrofit test.

A. The Court of Appeals properly adopted the duty to retrofit test.

This Court should adopt the duty to retrofit as articulated by the Court of Appeals. The duty to retrofit requires a manufacturer to cure a latent defect in the product that it could not have known of at the time of sale. This duty is born out of the growing body of judicial precedent regarding the post-sale duty to warn such as that identified by § 10 of the Restatement. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY, §10.

The vast majority of states recognize a post-sale duty to warn, which evolved through common law and the duty has been adopted in the most recent Restatement (3rd) of Torts. § 10 in its entirety assesses the manufacturer in its selling or distribution of products and subjects the manufacturer to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning. *Id.* A reasonable person in the seller's position must align with the following criteria: (1) the seller knew or reasonably should have known that the product posed a substantial risk of harm to persons or property; (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and (4) the risk of harm is sufficiently great to justify the burden of providing a warning. *Id.* While this post-sale duty to warn is distinct from a duty to retrofit or recall, the evolving perspective of the Restatement along with the number of courts that have adopted the post-sale duty to warn show that the duty to retrofit is an appropriate evolution of products liability law.

This Court is free to adopt the duty to retrofit. Apart from the court below, several jurisdictions have imposed the duty to retrofit from the bench without a related statute. *See, e.g.,*

Braniff Airways, Inc. v. Curtiss-Wright Corp., 411 F.2d 451 (2d Cir. 1969); *Noel v. United Aircraft Corp.*, 342 F.2d 232, 236—37 (3d Cir. 1964); *Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519 (Tex. Civ. App. 1979); *Readenour v. Marion Power Shovel*, 149 Ariz. 442, 719 P.2d 1058 (Ariz. 1986); *Hernandez v. Badger Const. Equip. Co.*, 28 Cal. App. 4th 1791, 34 Cal. Rptr. 2d 732 (1994). In so doing, these courts followed well-settled principles that prioritized human safety flowing from common law not statute. The landmark case, *Noel v. United Aircraft Corp.*, emphasized that “human safety” is the driving force behind the adopting a duty to retrofit.. 342 F.2d at 236 (3d Cir. 1964). The duty of care owed by the manufacturer of a product likely to endanger the public was extended “to injured persons making proper use of that instrumentality, regardless of contract notions of privity.” *Id.*, (citing *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (1916)). The extension of this doctrine imposed a retroactive duty upon manufacturers even if they were not in a traditional contractual relationship.

In adopting *Noel’s* standard, the Court of Appeals prioritized human safety and was free to do so without legislation. The precedent illustrates the ability for the courts to adopt a duty to retrofit, providing their own substantive reasoning for why the adoption of this duty is proper. In cases where, “such rapid technological advancements being placed in the hands of everyday consumers,” as here, “it is imperative that the creators of these devices are held accountable for the continued safety of its users.” R. at 13. The Court of Appeals correctly understood that imposing a duty to retrofit holds manufacturers accountable and ensures that they do not prioritize cost efficiency at the expense of human safety. For these reasons, the duty to retrofit was properly adopted in this jurisdiction.

Even if the Court disagrees with this rationale, it should acknowledge the carve—out numerous other courts have made in establishing some form of a duty to retrofit, even if that duty

was not generally adopted in those jurisdictions. In *Gregory v. Cincinnati Inc.*, the court declined to adopt a duty to retrofit more broadly, but implied that there is a possibility for a duty to be *assumed* in certain cases, which would impose an obligation on the party that assumed the duty. 538 N.W.2d 325, 335–336 (Mich. 1995) (citing *Bell Helicopter Co. v. Bradshaw*, 594 S.W. 2d 519, 526 (Tex. Civ. App. 1979)). The court assumed, in *Bell Helicopter*, the duty to remedy the product existed where a service station had control of the helicopter after the sale and after development of the improved tail rotor system. *Id.* In *Ostendorf v. Clark Equip. Co.*, the court also declined to adopt a duty to retrofit outright, but similarly identified that there could be liability in particular circumstances, namely if the manufacturer had voluntarily undertaken a retrofit campaign. 122 S.W.3d at 537. Therefore, this Court should recognize the control various courts have exerted in employing some duty to retrofit in at least some set of circumstances without assistance from the legislature.

The concurrence's position that the question lies firmly with the legislature is misguided. R. at 17. To reiterate, even courts that refrained from adopting a duty to retrofit agreed that certain instances allowed the jury to act without legislation. Although *Ostendorf* rendered an opinion on the duty to retrofit, rejecting its adoption in Kentucky, its alleged delegation of the issue, as to whether the creation of that duty is a solely a legislative question, was less clear. In both *Ostendorf* and *Gregory*, the court retained some ability to examine post-manufacturer conduct beyond the duty to warn, even if they did not adopt generally applicable tests for the duty to retrofit. These cases demonstrate the judiciary asserting its control over these issues. The judiciary necessarily maintains discretion over the duty to retrofit to some extent and is thus permitted to engage with the issue or adopt a more generalized duty.

Moreover, the duty to retrofit burden on manufacturers is reasonable and not onerous. Contrary to the concurrence's concern, the burden is equitable, largely because there are factors narrowing the duty's application. The obligation does not apply in every negligent design case. Rather, it applies in cases involving human safety, and that adhere to the factors enumerated below and courts must be empowered to apply the duty to retrofit or recall where appropriate. This question is not left solely to the legislature, since despite some state legislatures assisting in defining or administering a post-sale duty to warn, numerous courts have evolved this doctrine through common law. The development of the duty to retrofit is merely a logical outgrowth of that precedent. The majority correctly concluded that courts may apply the duty to retrofit where appropriate.

In the case at bar, the circumstances are appropriate to apply a duty to retrofit. The product was not abandoned after being distributed to the consumer, but rather was part of a development effort that was discovered after the release of the product into the market. R. at 7. Because the Marconi's manufacture entailed novel and technical endeavors, consumers relied on Edison's assurances that the product was safe. The failure to act increased the risk of harm to the consumer.

The concurrence challenged the majority's analysis on this issue. Citing *Tabieros* which states that, "because a prima facie case is established once the risk-utility test is proven," the court there was "persuaded that it is unnecessary and unwise to impose or introduce an additional duty to retrofit or recall a product." R. at 18 (citing *Tabieros v. Clark Equip. Co.*, 85 Haw. 336, 355 (1997)). In *Tabieros*, focusing on post—manufacture conduct in a negligent design case, the court stated that a duty to retrofit would improperly shift the focus from point-of-manufacture conduct to post-manufacturer conduct and technology which has the potential "to taint a jury's verdict regarding a defect." *Id.*

The burden on manufacturers does not outweigh the benefits that the duty to retrofit grants to consumers. Despite the additional evidentiary concerns, there are few credible reasons as to why there is an additional burden. Other courts, and defendants below, argue that cost concerns are prevalent in the duty to retrofit, but this detracts from the true nature of these cases. The goal in any negligent design case is to afford relief to the injured and to ensure that no injuries happen in the future as a result of the negligent design. Imposing a duty to retrofit accomplishes this objective. The argument that the duty to retrofit would stifle innovation and make companies reluctant to introduce innovative designs if they were cognizant that doing so would mean retrofitting old products is also baseless. This argument ignores the economic realities of innovation within a capitalist, competition driven market. Innovation will still occur since companies are always trying to gain an edge in the market and to have their brand recognized as superior. For these reasons, the concerns about the burden on the manufacturer are exaggerated.

The duty to retrofit would only be applied in a narrow set of circumstances, not to every negligent design case. The concurrence acts as though this will open the proverbial floodgates to a myriad of retrofit claims. This disregards the elements and human safety requirement that the court below has imposed, which limit the cases in which this duty can be asserted. However, the test articulated below creates a narrow set of operational circumstances under which a duty to retrofit claim is valid. The cases where this duty will be applied necessarily involve human safety. Ultimately, the contentions against the duty to retrofit are unfounded and the need for increased human safety in these high-profile cases outweighs the flimsy arguments against adopting the duty.

In adopting a duty to retrofit over a mere duty to warn, courts ensure that manufacturers are taking the proper precautions in monitoring their products and preventing the market from having to deal with potentially catastrophic public safety risks. While a duty to warn is a positive

step, it is not enough. The duty to retrofit provides an obligation that better serves the consumer and ensures that, in cases regarding pioneering technological innovations, the parties are equipped with adequate safeguards that places consumer lives above company profits. The Court of Appeals properly adopted a duty to retrofit.

B. The Court of Appeals committed reversible error in rejecting Ashpool’s jury instruction on Edison’s duty to retrofit because there was a continuing relationship with the manufacturer and the consumer.

The Court of Appeals erred in finding against Ashpool on the second element of the duty to retrofit because the nature and function of the semi-autonomous automobile as a complex and novel technology, coupled with the continuous updates that primarily pertained to the safety of the vehicle, are both grounds for reversal as a jury would likely find for petitioner. Courts apply the duty to retrofit in “special cases” in which they undertake an analysis of the circumstances surrounding the technology. *Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517, 1527 (D. Minn. 1989). In identifying whether this element is satisfied under the Court of Appeal’s new test, both the technology/product itself along with the hazard present when the safety measure is omitted must be examined.

In understanding what constitutes a continuing relationship, a knowledge of these “special circumstances” is required. Initially outlined in *Hodder v. Goodyear Tire & Rubber Co.*, where K-rim tires had a manufacturing defect that had caused them to explode and injured the plaintiff who had been working on replacing that tire. 426 N.W.2d 826, 829 (Minn. 1988). The court found, on the question of a continued duty, that one existed because the manufacturer continued advertising in a campaign lasting several years. *Id.* at 833. In cases directly pertaining to the duty to retrofit, this standard of a “continuing duty” evolved to reflect the relationship between the consumer and the manufacturer. *Noel v. United Aircraft Corp.* further illustrates the

relationship between the consumer and manufacturer that constitutes a continuing duty. 42 F.2d 232, 242 (3d Cir. 1964) In *Noel*, the petitioner alleged that the failure and crash of an aircraft was due to the manufacturer's inability to install a "Pitch Lock" which is a mechanism that would limit overspeeds. *Id.* Regarding the existence of that duty itself, the court noted that:

The testimony adduced at the trial with respect to the issue of 'continuing duty' developed that there was, in accordance with normal practice, a continuing relationship between the respondent and LAV from the delivery of the propeller system on July 15, 1955 to the plane crash on June 20, 1956. In the course of that relationship the respondent's field service department advised LAV [Venezuelan Airlines Línea Aeropostal Venezuela] with regard to the maintenance, overhaul and operation of the propeller system and supplied it with service bulletins supplementing manuals of instruction.

Id. at 241. The duty existed because of the continuing relationship between the respondent and petitioner that resulted in the maintenance and supplemental assistance between the two parties, nestled in a relationship where the plane's manufacturer and the consumer were in frequent communication concerning the safety of the product.

Noel's holding was extrapolated and applied in numerous other cases that further developed the duty and its elements. In *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, the court found that there was sufficient evidence of the manufacturer Curtiss-Wright's negligence to require submission of the case to the jury. 411 F.2d 451, 453 (2d Cir. 1969). *Braniff* applied an even wider standard than in *Noel*, noting that, "It is clear that after such a product has been sold and dangerous defects in design have come to the manufacturer's attention, the manufacturer has a duty either to remedy these or, if complete remedy is not feasible, at least to give users adequate warnings." This includes instructions concerning methods for minimizing the danger. with this doctrine being extended even to cases where human safety was not involved. *Id.* While the Court of Appeals has adopted a standard that differs from *Braniff* in that it requires a human safety risk, it extends beyond a mere duty to warn. *Braniff* demonstrates the willingness of courts to adopt

more progressive policies outside of the context of human safety while also highlighting the evolution of the duty.

Jurisdictions have also found that a jury may, after having been properly instructed, still find that the manufacturer's knowledge of the injuries caused by the features (or lack thereof) imposed a duty to warn of the danger and/or a duty to conduct an adequate retrofit campaign. *Hernandez v. Badger Constr. Equip. Co.*, 28 Cal. App. 4th 1791, 1827 (1994). In *Hernandez* the court found that a crane company's failure to properly conduct a retrofit campaign for or notify owners of older cranes after equipping newer models with safety improvements constituted negligence, as a jury could find that the manufacturer did not do "everything reasonably within its power" to prevent injury to the consumer. *Id.* at 1828. In a newly issued edition of the California Model Civil Jury Instructions, §1223 was included on negligence for a failure to recall or retrofit a product. While this is not yet an official law, it puts manufacturers on notice of a possible duty in California to fix a product that it now knows has a dangerous defect. Kenneth Ross, *Post-sale Duty to Warn A Report of the Products Liability Committee* 1–138, 74 (2004). It also demonstrates that jury instructions, something outside of state legislatures, can create the duty to retrofit.

A continuing relationship exists between the manufacturer and the consumer in Edison's Marconi. The Court of Appeals rejects that any such relationship exists, stating that, "Traditionally, courts have not found a continuing relationship between car manufacturers and drivers. A consumer goes to the dealership, purchases a vehicle, and once it has left the dealership, the manufacturer no longer has any control over the car." R. at 16. Despite not citing any authority to support this contention, the court draws an assumption based on the software that is provided to these vehicles, primarily regarding the updates as a convenience. *Id.* The Court of Appeals further states that the automated update system was not essential to the operation of the product,

contending “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. The Court of Appeals’ assessment however is contradictory to *Noel*. Whether or not the Marconi could operate without the sensors is irrelevant to the duty to retrofit’s second element. What is relevant for this second element is whether there is an ongoing relationship between the manufacturer and the consumer.

The automated update system in the Marconi, sufficiently establishes a continuing relationship between the manufacturer and the consumer because of its purpose in maintaining the vehicle’s safety protocols. In Court of Appeals identified the relationship in *Noel* as “continuous” because of the ongoing maintenance that airplanes required from the original manufacturer. R. at 17 (citing 342 F.2d at 240). Airplanes rely on numerous parts functioning properly and being continually updated to ensure proper and safe operation. The Court of Appeals attempts to draw a distinction between airplane and automotive maintenance, stating that the planes needed constant maintenance to function whereas the safety updates provided through the console were merely an additional safeguard that were also part of a larger series of non-safety updates. R. at 17. Yet, as proven by Ashpool’s accident and numerous other accidents, along with safety tests, the sensors were necessary for the product to effectively function. It is absurd to assume that a car that automatically drives and can detect objects in the road, adjusting its speed accordingly, but cannot detect stationary objects with accuracy, is “wholly functional.” The implementation would have been necessary for the product to work. Even if the driver is meant to maintain both hands on the wheel, this again cannot compensate for the other Autodrive features and runs almost counter to the purpose of the automated car itself. This is why the automated update system introduced by Edison is so fundamentally important, as it corrects and modifies the Marconi as technology

evolves and ensures that its principal purpose, the Autodrive feature, is functioning to the best of its ability to ensure consumer safety.

The automated update system serves to continually maintain safety protocols and update the Marconi, making it similar to other forms of maintenance. The system's purpose, in this sense, renders it as part of a continuing relationship. Edison continuously updates the Autodrive software as technology advances and new concepts are discovered. R. at 3. Most of these updates are for safety reasons. The system allows Edison to continuously update its vehicles and maintain the highest of safety standards, without having to make entirely new vehicles, allowing them to retain a larger profit. R. at 3. The purpose of this is to prevent the problem faced in *Hernandez*, where a company's failure to properly conduct a retrofit campaign for or notify owners of older cranes after equipping newer models with safety improvements constituted negligence. 28 Cal. App. 4th at 1828. The inclusion of the sensors in later sports and luxury vehicles, as Edison admitted it intended to do, could very well lead to the same result, amounting to a factual parallel to *Hernandez*. R. at 5. Ultimately, the question of jury believability can pivot on the same point forwarded in *Hernandez*, which is whether, pursuant to that relationship, the manufacturer was negligent. The purpose of the automated updates is to prevent the creation of a later product by enabling consistent development and to ensure that the current vehicle's safety protocols are maintained. A jury would likely find that this does constitute an ongoing communication, given that there are frequent updates by Edison informing the customer of the necessary precautions. The fact sensitive nature of the inquiry requires that a jury decide the issue.

The issue over whether there was a continuing relationship deserves consideration by a jury and should be remanded. As outlined in the preceding paragraphs, the question as to whether there was a continuing relationship or not necessarily relies on the facts of each case. The Court of

Appeals strains itself in trying to determine what a jury would “likely decide” in the harmless error analysis. Such analysis is unnecessary for this Court to determine. There are numerous factual elements present within this case, particularly regarding the continuous relationship between Edison and the consumer through the console updates and the series of accidents that were a result of the failed sensors. There is no need for the Court to speculate as to the likeliness that the information would be received by a jury in a specific way when the simpler solution is to remand to the jury. The factual density of this case on critical issues warrants remand so that the jury can properly and thoroughly deliberate upon them.

Finally, the nature of the technology warrants special consideration. The Marconi is not a traditional product. Rather, it is an automated vehicle with unique technology, a technology whose capabilities are likely to be less understood by the average consumer, even more so than current automobiles. This warrants special consideration and identifies why this issue must be dealt with on a case—by—case basis: unique or significantly complicated technology in which the consumer must rely on the seller’s assurances should be subject to a higher standard of scrutiny. In the immediate matter, a jury would likely find that the reliance on the company because this technology would make it necessary for all updated protocols to be in place and for that to be part of the continuing relationship between the consumer and manufacturer. As there is ample evidence for a jury to likely conclude that a continuing relationship existed between Ashpool and Edison, this Court should reverse the Court of Appeals’ decision and remand to the trial court to permit Ashpool’s jury instruction on the duty to retrofit.

CONCLUSION

In conclusion, we seek judgment to be reversed on the issue of risk utility and we seek remand for the issue of duty to retrofit, which, while being properly adopted, should have been submitted to the jury for factual considerations.

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Respectfully Submitted,
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