IN THE SUPREME COURT OF THE STATE OF FREMONT

Case No. 21-2112

WILLIAM ASHPOOL,

Petitioner,

v.

EDISON INCORPORATED, a

Fremont corporation,

Respondent.

BRIEF FOR RESPONDENT

Appeal from the Court of Appeals,
Honorable Olympus, Judge,
No. 20-1000

February 1, 2021

Attorneys for Respondent, Team F

QUESTIONS PRESENTED

1. Did the appellate court err in affirming the trial court's denial of Ashpool's motion for judgment as a matter of law on the design defect claim under the risk-utility test?
2. Should the duty to retrofit be adopted in the State of Freemont in certain strict liability design defect claims as was decided by the appellate court?

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STATEMENT OF THE CASE AND FACTS

Edison Incorporated ("Edison") is an innovative manufacturer of primarily luxury and sport electric vehicles. R. at 2. In 2014, in an effort to expand its target market, Edison announced its first economy range sedan, the Marconi. R. at 5. Edison conducted a market analysis which revealed consumers in the economy range valued safety features and ease of use over technology and performance. R. at 2. A safety feature of the Marconi not found in other economy vehicles is Autodrive, which enables a computer to operate the vehicle while the driver's hands are on the steering wheel. R. at 2. Autodrive is not a substitute for human action but functions as an additional measure to enhance safety while driving.

Autodrive utilizes twelve sensors located around the vehicle to analyze the current road conditions. R. at 2. Based upon the sensory data detected, the vehicle can stop, accelerate, or otherwise maneuver, but the driver can override Autodrive to steer manually at any time. R. at 2-3. The Marconi owner's manual emphasizes that the driver must remain attentive and keep both hands on the wheel at all times while using Autodrive. R. at 3. If the driver does not have both hands on the wheel, a flashing light appears on the dashboard to tell the driver to place both hands back on the steering wheel. R. at 3. Edison utilizes a notification system to deliver Autodrive software updates directly to the driver via the vehicle's center console. R. at 3. These notifications appear each time the car is started until the driver installs the update. R. at 3.

Prior to the Marconi's release in 2017, Edison conducted a series of crash and safety tests. R. at 4. During this internal testing, Edison discovered that when the vehicle was traveling above thirty-five miles per hour, Autodrive was less effective in detecting stationary objects than it was at lower speeds. R. at 5. Edison considered adding additional sensors to improve the Autodrive system's performance at higher speeds but ultimately did not because it would have

increased the Marconi's price by at least $5000, pushing it outside of the economy range sedan market. R. at 5.

On December 20, 2019, William Ashpool ("Petitioner"), while driving his Edison Marconi, struck a bear that was sitting in the middle of the road. R. at 4. The car was traveling approximately forty-two miles per hour, and Autodrive was engaged. R. at 4. As a result of the collision, Petitioner was hospitalized for two and a half weeks for his injuries, and the vehicle was determined to be a total loss. R. at 4. Shortly thereafter, Petitioner filed a products liability action against Edison under a theory of design defect regarding the Marconi's Autodrive system. R. at 4. Petitioner argued that Edison's implementation of a more cost-effective version of Autodrive rendered the Marconi defective, suggesting that additional sensors should have been included. R. at 5.

A jury found in favor of Edison, finding first, there was no defect in the design of the Marconi Autodrive system and second, the sensors did not cause Petitioner's crash. R. at 7. Upon announcement of the jury's verdict, Petitioner made a renewed motion for judgment as a matter of law pursuant to Fremont Rule of Civil Procedure 50(b). R. at 7. This motion was denied. R. at 7. Petitioner appealed the trial court's denial of his motion, and the Court of Appeals affirmed, finding that the Autodrive design implemented by Edison did not render the Marconi unreasonably dangerous. R. at 12.

At trial, Petitioner attempted to include a duty to retrofit in the jury instructions, which the court refused because the State of Fremont had not recognized the duty to retrofit. R. at 6-7. The Court of Appeals then adopted the duty to retrofit as the law in Fremont but held it was harmless error that the trial court did not give a jury instruction about such duty because it would not have changed the outcome. R. at 13. Petitioner now appeals to this Court. R. at 20.

SUMMARY OF THE ARGUMENT

The appellate court did not err in affirming the trial court's denial of Petitioner's renewed motion for judgment as a matter of law because Petitioner failed to show a design defect under the risk-utility test. A renewed motion for judgment as a matter of law should be denied if there was any "legally sufficient basis" upon which the jury could have reached its verdict. An application of the risk-utility test definitively shows that there was a legally sufficient basis in support of the jury's finding in favor of Edison.

The risk-utility test requires the balancing of a product's utility against its associated risks while considering the magnitude of those risks and the existence and practicability of reasonable alternative designs. In opting for a cost-effective version of its Autodrive system, Edison ensured that the safety benefits of this system were accessible to economy range consumers. This widespread consumer access to advanced safety features far outweighs any associated risks. An evaluation of the practicability of Petitioner's proposed alternative, the implementation of costly additional sensors, further supports that the Marconi did not suffer from a design defect. Specifically, Petitioner failed to demonstrate that it would have been economically feasible to implement a design that would have added at least $5000 to the price of the Marconi, pushing it well outside the price range of economy sedans. Additionally, public policy disfavors punishing the innovative efforts of cutting-edge manufacturers like Edison by imposing liability in unfounded design defect claims.

For the foregoing reasons, Petitioner failed to show the existence of a design defect under the risk-utility test. This failed showing definitively provides a legally sufficient basis in support of the jury's finding in favor of Edison. Thus, the appellate court properly affirmed the trial

court's denial of Petitioner's renewed motion for judgment as a matter of law on his design defect claim, and this Court should affirm the appellate court's ruling.

The State of Fremont should not adopt the novel "duty to retrofit" in certain strict liability design defect claims as decided by the appellate court because such a rule, in addition to being inconsistent with established legal principles, would place an unreasonable burden on manufacturers. Adopting a duty to retrofit would be contrary to public policy as it would punish innovation by forcing manufacturers to sacrifice safety for fear of ruinous liability. If Edison risks incurring a new liability whenever its new design is marginally safer than an old design, it cannot continue to innovate. Courts have routinely declined to adopt such a duty due to the drastic negative impact that turning manufacturers into de facto insurers would have on consumers. If Fremont were to adopt a duty to retrofit, Edison would be forced to act like an insurer and raise the "rates" of its vehicles.

Additionally, adopting a duty to retrofit is unnecessary as existing negligence and strict liability theories afford plaintiffs adequate protection and redress. Both the duty to warn and the duty to test already grant consumers protection against design defect claims. Further, the decision on whether to adopt this duty should be left to an administrative or legislative body as courts lack the resources to properly evaluate the risks and benefits of the decision. The appellate court failed to provide any evidence to support its assertion that the duty to retrofit would better protect the consumers of Fremont or what the ramifications would be. As the preceding reasons show, the duty to retrofit should not be adopted by the State of Fremont.

ARGUMENT

This Court is faced with two questions on appeal. First, did the appellate court err in affirming the trial court's denial of Petitioner's renewed motion for judgment as a matter of law

on his design defect claim under the risk-utility test? Second, should the duty to retrofit be adopted in the State of Fremont in certain strict liability design defect claims as was decided by the appellate court? For the reasons outlined below, this Court should hold that the appellate court properly affirmed the denial of Petitioner's renewed motion for judgment as a matter of law and that the duty to retrofit should not be adopted in the State of Fremont.

I. THE APPELLATE COURT DID NOT ERR IN AFFIRMING THE TRIAL COURT'S DENIAL OF PETITIONER'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW BECAUSE PETITIONER FAILED TO SHOW A DESIGN DEFECT UNDER THE RISK-UTILITY TEST.

The appellate court properly affirmed the trial court's denial of Petitioner's renewed motion for judgment as a matter of law under Fremont Rule of Civil Procedure 50(b). A renewed motion for judgment as a matter of law should be denied if there was any "legally sufficient basis" upon which the jury could have reached its verdict. *Experience Hendrix L.L.C. v. Hendrixlicensing.com Ltd.*, 762 F.3d 829, 842 (9th Cir. 2014). The State of Fremont has adopted the risk-utility test as the exclusive test for products liability claims brought under a design defect theory. *Fickell v. Toyoma Motors Inc.*, 758 XE 821, 830 (Fr. 2014). This test requires the fact finder to weigh the utility of a product against its associated risks. *Bragg v. Hi-Ranger, Inc.*, 462 S.E.2d 321, 328 (S.C. Ct. App. 1995). The fact finder should consider (1) the magnitude of foreseeable risks involved and (2) the existence and practicability of reasonable alternative

designs[1]. *Reeves v. Cincinnati, Inc.*, 439 N.W.2d 326, 329 (Mich. Ct. App. 1989); *Owens v. Allis-Chalmers Corp.*, 326 N.W.2d 372, 378-79 (Mich. 1982).

These two primary considerations are addressed in turn in the sections below, followed by a discussion of public policy, which disfavors punishing the innovative efforts of cutting-edge manufacturers like Edison. When applied to the Edison Marconi, the risk-utility test shows that there is no defect in the design of the Marconi's Autodrive system. Therefore, there was a legally sufficient basis supporting the jury's verdict in favor of Edison, and Petitioner's renewed motion for judgment as a matter of law was properly denied.

A. The benefits of implementing a cost-effective version of Autodrive in the Marconi far outweighed the risks because the cost-effectiveness of the design permitted widespread consumer access to cutting-edge safety features.

A risk-utility analysis shows that the benefits of the Marconi's Autodrive system far outweigh the risks. In applying the risk-utility test's balancing calculus, courts focus on the factual circumstances surrounding the manufacturer's implementation of the challenged design, including: whether the design provided substantial benefits, whether the evidence supports an inference of defective design, and whether there was a compelling reason for the manufacturer to opt for a design that was potentially less safe than an available alternative. *Quintana-Ruiz v. Hyundai Motor Corp.*, 303 F.3d 62, 70-71 (1st Cir. 2002); *In re Toyota Motor Corp. Unintended*

[1] The court in *Peck v. Bridgeport Machines, Inc.*, 237 F.3d 614, 617-18 (6th Cir. 2001), expanded these two considerations into the following six factors: (1) the severity and foreseeability of injury, (2) the likelihood of injury and foreseeability of this likelihood by the manufacturer at the time of distribution, (3) the availability of a reasonable alternative design, (4) the practicability of the reasonable alternative design, (5) whether the available and practicable reasonable alternative design would have reduced the risk posed by the product, and (6) whether the omission of the alternative design rendered the product not reasonably safe. These factors are applied in the arguments below, though not always by explicit reference.

Acceleration Mktg., Sales Practices, & Prods. Liab. Litig., 978 F. Supp. 2d 1053, 1101-02 (C.D. Cal. 2013); *Goodner v. Hyundai Motor Co.*, 650 F.3d 1034, 1041 (5th Cir. 2011).

When a design provides significant benefits that would be sacrificed in the adoption of a proposed alternative, the risk-utility test disfavors finding a design defect. *Quintana-Ruiz*, 303 F.3d at 70-71. In *Quintana-Ruiz*, a consumer who was injured by an airbag during a car accident brought suit against the car manufacturer under a design defect theory. *Id.* at 64. The consumer argued that the airbag should have been designed to deploy at a higher threshold velocity of impact than that of her accident. *Id.* at 65-66. Expert witnesses testified that the airbags in any American car would have deployed in the accident at issue and that the benefits of airbags that deploy at relatively low velocities outweigh the risks because lower velocity crashes can still cause significant injuries. *Id.* at 66, 67. Additionally, one expert noted that airbags have saved over six thousand lives. *Id.* at 67. The court on appeal reversed a jury verdict in favor of the consumer, asserting that the relevant question was whether the risks associated with the design outweighed its benefits. *Id.* at 70, 74. It found that no rational jury could have answered that question in the affirmative based on the evidence presented. *Id.* at 74.

Evidence supports the inference of a design defect when it tends to show that the challenged design made the product more dangerous than comparable products and that reasonable alternative designs were available. *In re Toyota*, 978 F. Supp. 2d at 1092, 1101-02. In *in re Toyota*, a consumer brought suit against a car manufacturer after suffering a car accident allegedly caused by sudden, unintended acceleration. *Id.* at 1063. The consumer claimed that she took her foot off the brake to turn at a stop sign and the car accelerated uncontrollably, causing her to collide with a sign, a tree, and a brick wall. *Id.* at 1092. Among other theories, the consumer alleged a design defect in the car's electronic throttle control system ("ETCS"),

pointing to evidence of the manufacturer's knowledge of incidents of unintended acceleration potentially caused by ETCS. *Id.* at 1093, 1094. Additionally, the consumer presented evidence of at least two available alternative designs. *Id.* at 1102. The trial court denied the manufacturer's motion for summary judgment on the design defect claim, finding that a reasonable jury could conclude that either or both of the consumer's presented alternative designs were "desirable, feasible, and not cost-prohibitive." *Id.* In light of the fact that the car was not equipped with any technology to record system failures, the court reasoned that the circumstantial evidence presented by the consumer was sufficient to allow a reasonable jury to infer the existence of a design defect. *Id.* at 1101-02.

When a consumer challenging a design shows that a safer design was available and would have had no additional costs other than a minor loss in utility, the risk-utility test favors finding a design defect. *Goodner*, 650 F.3d at 1041, 1045. In *Goodner*, a consumer whose teenage daughter was killed in an accident when ejected from the front seat of a vehicle brought a design defect claim against the manufacturer. *Id.* at 1038-39. At the time of the accident, the passenger seat was reclined. *Id.* at 1039. The consumer argued that the seat was defective because it was able to recline past 45 degrees and presented expert testimony that the seat's reclined position allowed for the deceased to be ejected despite her wearing a seatbelt. *Id.* Additionally, the consumer presented three alternative designs, one of which was a seat that did not recline past 45 degrees. *Id.* at 1043. On appeal, the court affirmed a verdict in favor of the consumer. *Id.* at 1045. It reasoned that limiting recline to 45 degrees would not seriously impair the utility of the seat or the car, noting that the car's rear seats had a limited recline and that a similar design was used in the front seats of industry competitors' vehicles. *Id.* at 1041.

Like the airbag system evaluated in *Quintana-Ruiz*, the safety benefits of the Marconi's Autodrive system substantially outweigh the corresponding risks. In *Quintana-Ruiz*, the court discussed the trade-off between the risks associated with airbags that deploy at lower velocities and the benefits of these airbags. Namely, airbags such as the one at issue in *Quintana-Ruiz* had saved thousands of lives. The court found these benefits dispositively outweighed the corresponding risks. A similar trade-off exists in the case of the Marconi. On the one hand, Edison discovered that a potentially more effective version of its already cutting-edge Autodrive technology was theoretically plausible. R. at 5. On the other hand, implementing this version would have added at least $5000 to the price of the Marconi. R. at 5. Edison recognized that such an increase would have placed the Marconi well outside its target market. R. at 5. Consequentially, the cutting-edge safety benefits of the Marconi would have been inaccessible to the average consumer. Instead, by opting for a more cost-effective version of Autodrive, Edison ensured that thousands of average, economy range consumers would have access to safety features previously unimaginable in traditional vehicles.[2] Thus, an application of the balancing calculus demonstrated in *Quintana-Ruiz* shows that the benefits of widespread consumer access to advanced safety features far outweigh the risks associated with opting for the more cost-effective version of Autodrive.

The Marconi's Autodrive system is distinguishable from the system at issue in *in re Toyota*, which was alleged to be defective in a way that rendered the vehicle more dangerous

[2] While economy range mid-size cars make up approximately 10.5% of the American market, luxury vehicles of various sizes make up only approximately 4.5-6% of the market. I. Wagner, *U.S. light vehicle market in April 2019 and 2020, by segment*, Statista (Dec. 21, 2020), https://www.statista.com/statistics/276506/change-in-us-car-demand-by-vehicle-type/. Thus, by keeping the Marconi in the economy price range, Edison ensured that it was accessible to at least twice as many consumers as it would have been in a higher price range.

than the average vehicle. In *in re Toyota*, the malfunction at issue was sudden, unintended acceleration. This malfunction undoubtedly renders a vehicle more dangerous than the average vehicle, including those with simpler or more antiquated technology. By contrast, the Marconi's Autodrive system makes it safer than traditional vehicles that provide no driver assistance and rely solely on the faculties of a human operator. R. at 5. Unlike the consumer in *in re Toyota*, Petitioner's claim is not that a design defect rendered an otherwise average vehicle more dangerous than other average vehicles. Instead, Petitioner claims that an advanced feature that makes the Marconi safer than a traditional vehicle is defective simply because the safety benefits could have been even more substantial. Setting aside the dangerous logical implications of this argument, it also fails to acknowledge that Petitioner retained ultimate responsibility for the operation of his vehicle. While the Autodrive system provides invaluable assistance to drivers, the Marconi's manual is clear that the driver is responsible for controlling the car and can override Autodrive at any time. R. at 3. Though Autodrive was unable to perform its advanced functions in Petitioner's incident, the appellate court noted that nothing prevented Petitioner from bringing the car to a stop manually, as would have been required in any traditional vehicle. R. at 12.

Additionally, and despite stronger arguments in favor of a defect than in the present case, the trial court in *in re Toyota* found that the circumstances surrounding the incident were sufficient merely to submit the design defect question to a jury. Petitioner had the opportunity to present his evidence and arguments to a jury. After weighing the relevant factors, the jury came to the same conclusion that Edison now argues to maintain: the Marconi's Autodrive system suffers from no design defect. R. at 7.

In contrast to the alternative seat design at issue in *Goodner*, the implementation of the alternative design presented by Petitioner would have had greater costs than a minor loss of utility. The consumer in *Goodner* argued that a car seat that limited recline to 45 degrees was a viable alternative design that would have prevented the deceased passenger from being ejected. In ruling for the consumer, the court stressed that this safer design would have had only a very minor effect on utility, pointing out that similar designs were used by industry competitors. Edison's decision to implement the more cost-effective version of Autodrive was based on concerns much more consequential than preserving minor utility. In *Goodner*, the evidence suggested that the presented alternative would have had substantial safety benefits while sacrificing only the seat's capability to recline past 45 degrees. Conversely, it is unclear what the reduction in the Marconi's crash rate would have been with the more expensive sensors, but it is clear that implementing these sensors would have made the Marconi significantly more expensive and thus inaccessible to economy range consumers. R. at 11-12. As explained above, this weighs heavily against a finding of defective design.

In choosing a more cost-effective design, Edison ensured that the benefits of its Autodrive system were accessible to economy range consumers. Under a risk-utility analysis, this widespread consumer access to advanced safety features far outweighs the risks associated with the design. Thus, Petitioner's renewed motion for judgment as a matter of law was properly denied.

B. Petitioner failed to demonstrate the practicability of his proposed alternative design because its implementation in the Marconi would not have been economically feasible.

Petitioner failed to demonstrate the practicability of his proposed alternative design. To show the practicability of an alternative design, a consumer must show not only that the

alternative design was technologically feasible, but that it was economically feasible as well. *E.g.*, *Smith v. Aqua-Flo, Inc.*, 23 S.W.3d 473, 477 (Tex. App. 2000); *Honda of Am. Mfg., Inc. v. Norman*, 104 S.W.3d 600, 606-07 (Tex. App. 2003). To establish economic feasibility, a plaintiff must offer sufficient evidence from which a jury could conclude that an increase in cost "would not materially affect the desirability of the product in light of the benefit derived." *Bifolck v. Philip Morris, Inc.*, 152 A.3d 1183, 1202 (Conn. 2016).

To prevail under the risk-utility test, a consumer must provide affirmative evidence of the economic feasibility of a safer alternative design. *Casey v. Toyota Motor Eng'g & Mfg. N. Am., Inc.*, 770 F.3d 322, 334-35 (5th Cir. 2014); *Smith*, 23 S.W.3d at 477-78. In *Casey*, a high-speed rollover car accident prompted a consumer to sue the car manufacturer, alleging a design defect in the car's side curtain airbags, which only stayed inflated for two seconds during the accident. *Casey*, 770 F.3d at 325. The consumer presented a patent application that proposed a puncture resistant fabric for airbags, which an expert witness pointed to as evidence of a safer alternative design. *Id.* at 331. On appeal, the court affirmed judgment in favor of the manufacturer. *Id.* at 336. In addition to finding that the consumer failed to show the alternative design was actually safer, the court found that the consumer failed to establish that the alternative design was economically feasible. *Id.* at 334. The court stressed that the consumer's expert provided no support for his assertion that the alternative was cost-effective and that there was no other evidence suggesting that a vehicle equipped with the design could have been sold at a reasonable cost. *Id.* at 335. Similarly, the court in *Smith* held in favor of a jacuzzi spa manufacturer when a consumer failed to establish the economic feasibility of an alternative design. *Smith*, 23 S.W.3d at 477, 480. The consumer, whose young daughter had drowned when her hair became tangled in a spa intake valve, argued that the spa pump was defective by design because it did not

incorporate pressure sensitive shut-off technology. *Id.* at 475, 477. The court explained that while evidence of the availability of this technology at the time of the pump's design supported technological feasibility, it did not address the separate question of economic feasibility. *Id.* at 477-78.

A consumer can show the economic feasibility of an alternative design by establishing that the added expense of implementing the design would have been negligible. *Rahmig v. Mosley Mach. Co.*, 412 N.W.2d 56, 71 (Neb. 1987). In *Rhamig*, a consumer brought suit against the manufacturer of an industrial guillotine used for shearing scrap metal. *Id.* at 60. The consumer had lost four of his fingers when the upper blade of the guillotine, which was secured in the "up" position only by hydraulic pressure, fell unexpectedly. *Id.* at 62. An expert witness asserted that the machine could have been equipped with either of two alternative safety measures, an independent hydraulic interlock or a simple lockpin, to secure the blade. *Id.* at 64. Expert testimony also established that the machine, which sold for $217,000, could have been equipped with either of these measures for less than $1000. *Id.* at 64, 65. On appeal, the court held in favor of the consumer, reasoning that the added expense of the presented alternatives was "virtually nominal and posed no threat to the [machine's] marketability." *Id.* at 71.

A consumer likely can establish economic feasibility when a demonstrably safer design was available at no additional cost. *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 13-14 (S.C. 2010). In *Branham*, a consumer injured in an SUV accident brought suit against the manufacturer, alleging that a design defect gave the SUV a tendency to roll over. *Id.* at 8. Evidence suggested that the SUV's Twin I-Beam suspension system created significant handling and stability issues as compared to an economically feasible alternative system. *Id.* at 10-11. Despite the engineers' advocacy for the alternative system and the fact that its implementation

would not have increased costs, the Twin I-Beam system was chosen due to a perceived "major marketing advantage," as the system's use in other vehicles had been promoted by the manufacturer for decades. *Id.* at 10-11, 13. On appeal, the court asserted that there was ample evidence of a feasible alternative design to withstand a motion for directed verdict. *Id.* at 14, 17.

Like the consumers in *Casey* and *Smith*, Petitioner has failed to provide evidence of the economic feasibility of his proposed alternative design. In evaluating the consumer's alternative side curtain airbag design, the court in *Casey* asserted that the consumer failed to sufficiently show that the alternative design was economically feasible. The court pointed to the lack of expert testimony regarding the cost-effectiveness of the alternative airbag fabric. The court in *Smith* explained that technological feasibility and economic feasibility are different questions, and that the availability of pressure sensitive shut-off technology did not show that it would have been economically feasible for the spa manufacturer to implement. Like the consumer in *Casey*, Petitioner presented no evidence or expert testimony regarding the cost-effectiveness of the more advanced sensors. While evidence supported the technological plausibility of these sensors, Petitioner made no showing to counter Edison's assertion that implementing them would have been overly cost-prohibitive. R. at 5. Additionally, as explained in *Smith*, the availability of an alternative technology alone does not establish economic feasibility.

Unlike the negligible added expense of the alternative design presented in *Rahmig*, the high cost of implementing additional sensors into the Marconi would have severely undermined its economic feasibility. In *Rahmig*, the consumer established that the guillotine machine could have been equipped with either of two effective safety devices for less than $1000. In light of the machine's $217,000 sale price, the court asserted that the added expense of these measures would have posed no threat to the machine's marketability. The addition of $1000 to a $217,000

sale price is an increase of less than 0.5%. This stands in stark contrast to the cost increase that would have resulted from Edison's implementation of additional sensors. The average starting price for economy range sedans is approximately $25,000. *See* KBB Editors, *Best Midsize Cars for 2021*, Kelly Blue Book (Dec. 24, 2020), https://www.kbb.com/best-cars/best-midsize-cars/. Even if one assumes that the Marconi's features give it a higher starting price of $30,000, adding another $5000 to this price would be a 17% increase. In addition to pushing the Marconi well outside the economy range sedan market, Edison contends that such a steep cost increase would threaten the economic feasibility of its entire product line. R. at 11-12.

Edison's decision to opt for a cost-effective design is distinguishable from the misguided decision by the manufacturer in *Branham*. The car manufacturer in *Branham* opted for a functionally inferior suspension design despite the recommendations of its engineers. Faced with two options of virtually identical cost, the manufacturer chose the inferior option, hoping to capitalize on potential marketing advantages. Such a reckless decision clearly supports the existence of a reasonable alternative design. Edison, by contrast, made a measured decision to implement the less-expensive version of a cutting-edge safety feature to ensure that the Marconi and its innovative safety features were accessible to economy range consumers. This conscientious weighing of risks and benefits exemplifies prudent industrial decision-making.

Petitioner failed to demonstrate that it would have been economically feasible to implement an alternative design that would have added at least $5000 to the price of the Marconi. Thus, Petitioner has failed to demonstrate the practicability of his proposed alternative design. This failed showing further supports that Petitioner's renewed motion for judgment as a matter of law was properly denied.

C. Public policy disfavors imposing liability on cutting-edge manufacturers like Edison in unfounded design defect claims because doing so would hamper innovation.

Setting aside Petitioner's failure to make a legally sufficient showing of a design defect, public policy disfavors punishing Edison for its innovative efforts. Courts and commentators alike have long recognized the stifling effect that the threat of products liability can have on manufacturers at the forefront of innovation within their industries. *See, e.g.*, *White v. Ford Motor Co.*, 312 F.3d 998, 1018 (9th Cir. 2002); Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645, 647 (2003). One commentator urged that our civil justice system should reward innovation, not punish it, stating that "it is as though an anvil labeled 'potential tort liability' swings precariously over any inventor, manufacturer, or business that dares to deviate from current knowledge and technology." La Fetra, *supra*, at 647, 657. The unpredictability of this looming liability has historically hindered the development and release of beneficial products and has handicapped American firms competing in global industries. Victor E. Schwartz & Mark A. Behrens, *Federal Product Liability Reform Legislation Is Consistent with Virginia Law and Should Be Strongly Supported*, 4 Geo. Mason L. Rev. 279, 280 (1996).

The downside of disincentivizing innovation is obvious. It runs the risk of keeping beneficial technology, some of it life-saving, out of the market. Autonomous and semi-autonomous vehicles are still a very new technology, and our legal system must remain conscious of the suffocating effect it can create for companies developing this technology. If the threat of tort liability becomes too great, companies like Edison will be discouraged from pursuing potentially life-saving technologies like Autodrive, as the risks would be simply unjustifiable from a business preservation perspective.

In 2015, the Department of Transportation and its National Highway Traffic Safety Administration ("NHTSA") announced its commitment to adopting policies that promote the innovation of autonomous vehicles. *Transportation Sec. Foxx announces steps to accelerate road safety innovation*, NHTSA (May 13, 2015), https://perma.cc/2YVK-SMNE. The NHTSA's findings in a recent investigation of a crash involving a Tesla Model S vehicle support the administration's larger policy goals. *See Special Crash Investigations: On-Site Automated Driver Assistance System Crash Investigation of the 2015 Tesla Model S 70D*, NHTSA (Jan. 2018), https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812481. In that incident, the driver had the vehicle's "Autopilot" function, described as an automated driver assistance system, engaged when the vehicle collided with a semi-trailer that had turned across the vehicle's path. *Id.* at i. Neither the Autopilot system nor the driver acted to avoid the collision. The report explained that, due to current limitations in the technology, Autopilot was not capable of recognizing potential collisions in every situation. Additionally, the report stated that the use of Autopilot "still required the full and continual attention of the driver to monitor the traffic environment, maintain ultimate control of the vehicle, and remain prepared to take evasive action." *Id.* The report closed with a finding that the driver had neglected to maintain control of the vehicle leading up to the collision. *Id.* at 25.

The parallels between the Tesla incident and Petitioner's incident in his Marconi are unavoidable. As with the Tesla, and as stated in the Marconi's manual, Petitioner was required to remain attentive and assumed ultimate responsibility for controlling his vehicle. R. at 3. Due to the reality of current limitations in the technology, the Marconi's Autodrive system, like the Tesla's Autopilot system, was simply unable to perform evasive maneuvers in every possible collision scenario. These limitations made it crucial that Petitioner remain attentive and in

control of his vehicle. Though Petitioner would like to attribute his accident to the limitations of developing technology, the reality is that he, like the Tesla driver, neglected to maintain control of his vehicle. If Petitioner succeeds in holding Edison liable, the effect will be to disincentivize Edison and similar companies from continuing to develop advanced safety features like Autodrive.

In light of public policy favoring societally beneficial innovation and Petitioner's failure to make a legally sufficient showing of a design defect, this Court should affirm the denial of Petitioner's renewed motion for judgment as a matter of law on his design defect claim.

II. THE DUTY TO RETROFIT SHOULD NOT BE ADOPTED BY THE STATE OF FREMONT BECAUSE IT WOULD PLACE AN UNREASONABLE BURDEN ON MANUFACTURERS AND IS INCONSISTENT WITH ESTABLISHED LEGAL PRINCIPLES.

The State of Fremont should not adopt the novel duty to retrofit in certain strict liability design defect claims because such a rule, in addition to being inconsistent with established legal principles, would place an unreasonable burden on manufacturers. "A duty to retrofit is a duty to upgrade or improve a product." *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 534 (Ky. 2003). The appellate court acknowledged that "the duty to retrofit has not been adopted by the majority of jurisdictions." R. at 15. There is a good reason why the majority of courts have rejected the rule: it places an unreasonable burden on manufacturers. *Lynch v. McStome & Lincoln Plaza Assoc.*, 548 A.2d 1276, 1281 (Pa. 1988); *Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 333 (Mich. 1995); Restatement (Third) of Torts: Products Liability § 11 cmt. a (Am. Law Inst. 1998). Moreover, adopting a duty to retrofit would punish innovation and turn manufacturers into de facto insurers, discouraging them from developing safer designs. *Modelski v. Navistar Int'l. Transp. Corp.*, 707 N.E.2d 239, 247 (Ill. 1999); *Ostendorf*, 122 S.W.3d at 534; Jill Wieber Lens,

Warning: A Post-Sale Duty to Warn Targets Small Manufacturers, 2014 Utah L. Rev. 1013, 1056 (2014).

Further, adopting a duty to retrofit is inconsistent with established legal principles. Products liability law focuses on the question of whether a product is defective at the time that it is placed in the stream of commerce. The law already provides plaintiffs adequate protection and redress through existing negligence and strict liability theories. *Tabieros v. Clark Equip. Co.*, 944 P.2d 1279, 1301 (Haw. 1997); *Ostendorf*, 122 S.W.3d at 535. Creating a novel duty to retrofit is not only inconsistent with existing law but invades the province of the political branches. As Judge Irish correctly noted in his dissent, "The judiciary is not the appropriate place to determine whether this duty [to retrofit] should be imposed on manufacturers. Rather, this duty lies firmly within the province of the legislature and other administrative, regulatory bodies." R. at 18. Adopting a duty to retrofit would be an inappropriate exercise of judicial power and an unwarranted act of judicial activism.

A. Adopting a duty to retrofit would place an unreasonable burden on manufacturers by punishing innovation and turning manufacturers into insurers.

Edison sought to offer consumers an inexpensive car with an emphasis on safety. The Autodrive system allowed Edison to do just that. Autodrive was shown to avoid accidents, and Edison has continually updated the Autodrive software as technology advances and new concepts are discovered. R. at 3, 5. Although it was under no legal duty to do so, Edison updated the Autodrive software in order to make the product even safer for consumers. R. at 3. Manufacturers should not be punished for improving the safety of their products. Fremont should want to encourage the practice of safety innovation, but if Fremont were to adopt a duty to retrofit, manufacturers like Edison would be punished for continuing to innovate and would effectively be treated as insurers, placing an unreasonable burden upon them.

1. A duty to retrofit would punish innovation by forcing manufacturers to sacrifice safety for fear of ruinous liability.

This Court should reverse the appellate court's decision to adopt a duty to retrofit because such a rule punishes innovation by discouraging manufacturers from developing new, safer designs. *Lynch*, 548 A.2d at 1281; *Gregory*, 538 N.W.2d at 333. As a practical matter, manufacturers who innovate and develop new technologies would incur additional liability as a result of developing those innovations. Ironically, manufacturers who fail to innovate would face no such risk. A duty to retrofit would be contrary to public policy because states should encourage manufacturers to design safer products, not punish them for developing new and safer designs. Fremont adopting a duty to retrofit would force manufacturers to choose between safety and innovation on the one hand and potentially ruinous liability on the other. Faced with these options, any rational manufacturer will choose the financially prudent option, leaving consumers to bear the risk of stifled innovation.

If updating designs could form the bases for lawsuits, it would place an unreasonable burden on manufacturers and discourage them from developing new designs. This inescapable downside of the duty to retrofit was squarely recognized by the court in *Gregory*, 538 N.W.2d at 333. In *Gregory*, a sheet metal worker was injured on the job by a machine. *Id.* at 327. Suit was filed by the injured worker against the machine's manufacturer, alleging that the machine was defectively designed, and that the manufacturer had an ongoing duty to correct defects in the machine even *after* it was sold. *Id.* After being instructed that "a manufacturer who learns of a design defect after the product has been sold has a duty to take reasonable actions to correct the defect," the jury returned a verdict for the injured worker. *Id.* at 328. Michigan's intermediate appeals court reversed, holding that Michigan law did not impose a duty to retrofit on manufacturers after a product is released into the stream of commerce. *Id.* Affirming the

appellate court's ruling, the Supreme Court of Michigan held that imposing a duty to update technology would place an unreasonable burden on manufacturers and discourage them from developing new designs. *Id.* at 337.

Similarly, in *Lynch*, the Supreme Court of Pennsylvania rejected a duty to retrofit because the duty would punish innovation. *Lynch*, 548 A.2d at 1281. In *Lynch*, an escalator malfunctioned, injuring a woman. *Id.* at 1276. The manufacturer sold the escalator to a mall the same year it was manufactured, and the woman was injured nine years later. *Id.* at 1277. After a jury verdict in favor of the manufacturer, the woman appealed, arguing that the escalator should have been retrofitted with a new brake system developed after the initial manufacturing date and before the woman's accident. *Id.* at 1278. In rejecting the woman's request to impose on manufacturers a post-sale duty to retrofit, the Supreme Court of Pennsylvania recognized that "[t]he clear effect of imposing such a duty would be to inhibit manufacturers from developing improved designs that in any way affect the safety of their products." *Id.* at 1281.

Both the Supreme Court of Michigan and the Supreme Court of Pennsylvania recognized that a duty to retrofit would discourage manufacturers from improving and/or developing safer designs for their products. It should be noted that Michigan and Pennsylvania are two states leading the U.S. manufacturing resurgence.[3] Further, Michigan is the largest auto manufacturing state in the country and is home to the "Big Three" automobile companies.[4] The courts in these

[3] Mark Crawford, *The States Leading the U.S. Manufacturing Resurgence,* Area Development (Winter 2013), https://www.areadevelopment.com/RegionalReports/Q1-2013/states-leading-US-manufacturing-resurgence-2665542.shtml (explaining that Pennsylvania and Michigan are fifth and sixth in the United States for manufacturing jobs with 571,500 and 526,000 respectably).
[4] Kalynne McIntyre, *Michigan and the Motor City: A Manufacturing History*, 517 Business and Lifestyle Magazine, https://517mag.com/business/michigan-and-the-motor-city-a-manufacturing-history/ (stating that the "Big Three" of automotive manufacturers: Ford, Chrysler-Fiat Automobiles and General Motors, are all headquarted in Michigan).

states deal frequently with manufacturer lawsuits and understand the disastrous effects a duty to retrofit would have on manufacturers, specifically, auto manufacturers. Here, Edison sought to create an economical car that placed a premium on safety features. R. at 2. Using the Marconi, with its groundbreaking Autodrive system, Edison was able to provide economy range consumers a safety feature they previously did not have access to. R. at 2. Petitioner sought to argue that Edison owed him a duty to update the Marconi's sensors *after* it was sold to him, and because Edison failed to do so, it is liable for his injuries. R. at 6. The trial court rejected this argument for a duty to retrofit, but the appeals court found that it had merit. R. at 7, 13. The appellate court's decision should be reversed.

Like the plaintiffs in *Lynch* and *Gregory*, Petitioner seeks to impose liability based on a post-manufacturing duty to retrofit, arguing that Edison had an ongoing duty to retrofit the Marconi's sensors with new and improved sensors even after it was sold. In both *Gregory* and *Lynch*, such a duty to retrofit was rejected due to the negative effect it would have on innovation. The courts in both *Gregory*, and *Lynch*, determined that manufacturers would be punished for innovation if they were liable for injuries sustained due to products that became unsafe after newer, safer designs were developed. Here, the undisputed evidence in the record shows that Edison discovered technology updates that would make the Marconi safer only *after* the vehicle was released into the market. R. at 7. The appeals court believes that adopting a duty to retrofit would lead to safer products because manufacturers would be obligated to update products as safer designs are produced. However, the opposite is likely to happen. Edison is on the cutting-edge of technology and is updating the Autodrive software to make it safer for consumers. R. at 2-3. If Edison risks incurring a new liability whenever its new design is arguably safer than the

old design, it cannot continue to innovate. The cost of innovation cannot be ruinous liability; thus, the State of Fremont should not adopt a duty to retrofit.

Additionally, the appeals court cited to *Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519, 531-32 (Tex. Civ. App. 1979), to support finding a duty to retrofit.[5] R. at 15. However, *Bell* is distinguishable from the present case because it shows why the duty to retrofit, as applied by the appeals court, would be inappropriate in the present case. The court in *Bell* held that "once Bell produced a design which was known to be safer, the manufacturer owed a duty to person [sic] using its helicopters to refrain from allowing 102 systems to be used." *Bell*, 594 S.W.2d at 530. The record clearly indicates that Edison did not produce a safer design. Both the new sensor and software update were never produced, just theorized. R. at 6-7. Petitioner's argument is that "Edison could have created a new update to the sensors," not that Edison created an update and refused to implement it. If the State of Fremont were to adopt the duty to retrofit as decided by the appellate court, manufacturers like Edison would be punished for both innovations they make, and innovations they do not make. This lose-lose situation for manufacturers is a textbook example of an unreasonable burden. Victor Schwartz, principal author of the Uniform Product Liability Act, warned that a duty to retrofit "may discourage the very conduct society seeks to foster. Progress and innovation should not be penalized by attaching to them a duty to go out into the marketplace to find and fix old products." Victor E. Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to A Reasonable Doctrine*, 58 N.Y.U. L. Rev. 892, 901 (1983).

[5] Bell Helicopter Co. v. Bradshaw, 594 S.W.2d 519, 531-32 (Tex. Civ. App. 1979) (holding once a manufacturer produced a safer design, the manufacturer owed a duty to the person using its product to refrain from allowing that person to use the old design).

2. A duty to retrofit would turn manufacturers into insurers, increasing costs and negatively impacting consumers.

A duty to retrofit would place an unreasonable burden on manufacturers by turning them into de facto insurers. *Modelski*, 707 N.E.2d at 247; *Ostendorf*, 122 S.W.3d at 534; Jill Wieber Lens, *Warning: A Post-Sale Duty to Warn Targets Small Manufacturers*, 2014 Utah L. Rev. 1013, 1056 (2014). In *Modelski*, a consumer was killed after being struck by a rotary mower that was attached to the rear of his tractor. *Modelski*, 707 N.E.2d at 241. The consumer's estate charged the tractor manufacturer with negligent design of the tractor, alleging that the tractor manufacturer's seat design had caused the consumer's death. *Id.* at 242. The consumer's estate claimed that the tractor manufacturer had failed to retrofit the tractor with a safer seat design. *Id.* The court held that manufacturers are under no duty to retrofit products with safer designs. *Id.* at 247. The court reasoned that "[t]he consequences of imposing upon manufacturers an extrastatutory duty to recall and retrofit used products to incorporate post-sale state of the art designs would be the equivalent of mandating that manufacturers insure that their products will always comply with current safety standards." *Id.*

In *Ostendorf*, a consumer was injured when the forklift he was operating tipped over. *Ostendorf*, 122 S.W.3d at 532. The forklift manufacturer had developed a new safer seat design eleven years before the accident. *Id.* at 532-33. The forklift manufacturer had voluntarily implemented a retrofit program that would replace the old seat with the new design. *Id.* at 533. The consumer sued the forklift manufacturer claiming a breached a duty to retrofit. *Id.* The Supreme Court of Kentucky affirmed the lower court's decision, holding there was no recognized duty to retrofit under state law. *Id.* The court reasoned that a duty to retrofit "would be tantamount to making strict liability absolute *liability* and making a manufacturer an insurer." *Id.* at 536.

In the present case, the appellate court's rule effectively turns a manufacturer, Edison, into an insurer. But manufacturers are not insurers. The law requires only that they manufacture products that are not defective or unreasonably dangerous. As the court in *Modelski* warned, if manufacturers are forced to update their products with updated designs, this would turn them into insurers. Here, the appellate court stated that a duty to retrofit should be adopted by the State of Fremont in order to better protect consumers. However, courts have been hesitant to extend a duty to retrofit because of the drastic negative impact that turning manufacturers into de facto insurers would have on consumers. It is undisputed that adopting a duty to retrofit as decided by the appellate court creates a new form of liability for manufacturers. When liability increases, "insurers must respond judgmentally by adjusting their rates to reflect these changing loss-producing factors." Lens, *supra*, at 1056. In our case, because the appellate court's decision would turn manufacturers into insurers, Edison would be forced to act like an insurer. Edison saves consumers money by continuously updating its vehicles to maintain the highest safety standards. However, if the State of Fremont were to adopt a duty to retrofit, Edison, and manufacturers like it, would be forced to raise prices to cover the increased liability.

Additionally, the appellate court adopted a duty to retrofit in certain *strict liability* cases. Yet, as the *Ostendorf* court noted, adopting a duty to retrofit "would be tantamount to making strict liability *absolute liability* and making a manufacturer an insurer." *Ostendorf*, 122 S.W.3d at 536 (emphasis added). If this Court were to recognize the duty to retrofit as decided by the appellate court, then, as a practical matter, a manufacturer will be liable whenever an injury would have been prevented by a new safety feature. The development of a new safety feature converts a non-defective product at the time of manufacture into a defective product. Thus, in order hold a manufacturer liable, a plaintiff would only need to prove that a new safety feature

would have prevented or lessened the injury. This is absolute liability, not strict liability. This Court should follow the logic of the *Ostendorf* court and decline to adopt a duty to retrofit. If the State of Fremont were to adopt a duty to retrofit as decided by the appellate court, the state would place an unreasonable burden on manufacturers by turning them into insurers, and consumers would be negatively impacted.

B. Adopting duty to retrofit is inconsistent with established legal principles as it is unnecessary due to existing negligence and strict liability theories and this decision should be left to an administrative or legislative body.

The appellate court's decision to find a duty to retrofit in certain strict liability cases is inconsistent with established legal principles because it is unnecessary due to existing negligence and strict liability theories and is an inappropriate use of judicial power. *Tabieros*, 944 P.2d at 1301; *Ostendorf*, 122 S.W.3d at 534; *Patton v. Hutchinson Wil-Ruch Mfg.Co.*, 861 P.2d 1299, 1316 (Kan. 1993); Restatement (Third) of Torts: Products Liability § 11 cmt. a (Am. Law Inst. 1998); Schwartz, *supra*, 901. Aside from the public policy concerns of punishing manufacturers for innovating, the State of Fremont should not adopt a duty to retrofit as decided by the appellate court because it is inappropriate under established legal principles and an inappropriate use of judicial activism.

1. A duty to retrofit is unnecessary because existing negligence and strict liability theories afford plaintiffs adequate protection and redress.

This Court should reverse the appellate court's decision to adopt a duty to retrofit because existing negligence and strict liability theories afford plaintiffs adequate protection and redress. *Tabieros*, 944 P.2d at 1301; *Ostendorf*, 122 S.W.3d at 530. Judge Irish's dissent correctly noted that imposing a duty to retrofit "would be inappropriate under the established principles of Fremont law." R. at 18. This is because the law as it currently stands is sufficient to cover any negligence or liability of manufacturers.

A duty to retrofit is unnecessary and superfluous in light of existing negligence and product liability doctrines. *Tabieros,* 944 P.2d at 1301; *Ostendorf,* 122 S.W.3d at 530. In *Tabieros*, a dock worker was injured when a straddle carrier struck the dock worker's vehicle. *Tabieros*, 44 P.2d at 1292. The dock worker sued the straddle carrier manufacturer claiming a failure to retrofit the machine. *Id.* The court held that manufacturers are not subject to a duty to retrofit a product, "subsequent to their manufacture and sale, with post-manufacture safety devices that were unavailable at the time of manufacture." *Id.* at 1301. The court reasoned that there was no duty to retrofit because it was "persuaded that it is unnecessary and unwise to impose or introduce an additional duty to retrofit or recall a product" once the risk-utility test is proven and a prima facie case is established. *Id.* (quoting *Gregory*, 538 N.W.2d at 333 (Mich. 1995) (holding that "because a prima facie case is established once the risk-utility test is proven, we are persuaded that it is unnecessary and unwise to impose or introduce an additional duty to retrofit or recall a product")). Likewise, in *Ostendorf*, the court held there was no duty to retrofit because such a duty was "superfluous in light of existing negligence and product liability doctrines." *Ostendorf,* 122 S.W.3d at 535.

The State of Fremont should not adopt a duty to retrofit because doing so would be unnecessary given existing negligence and product liability theories. In the present case, the appellate court stated that the duty to retrofit "should be adopted in Fremont to better protect consumers in our State." R. at 15. Yet in the same discussion, the appellate court mentioned two existing duties that protect consumers: the duty to warn and the duty to test. As the courts in *Ostendorf* and *Tabieros* held, a duty to retrofit is unnecessary given already existing negligence and product liability theories. As with the straddle carrier in *Tabieros*, the Marconi was not updated with safety devices that were unavailable at the time of manufacture. Edison only

realized an update to the sensors, well after the release of the Marconi into the market, could also make the car safer. R. at 7. The court in *Tabieros* correctly recognized that there was no need to impose an additional duty on manufacturers in this situation because there were sufficient negligence theories available to establish a prima facie case. Similarly, in *Ostendorf*, the forklift was not installed with the new safer seat. Still, the court found no breach of duty, despite there being a voluntary retrofit program, because state law did not recognize a duty to retrofit as it would be "superfluous in light of existing negligence and product liability doctrines." In both *Ostendorf* and *Tabieros*, the manufacturers had designed and produced updated safety designs. In *Ostendorf*, the manufacturer had even implemented a retrofit program. Yet the courts in both cases declined to adopt a duty to retrofit because it would be inconsistent and unnecessary with already established legal principles. Here, Edison never produced a safer design and never implemented a retrofit program. Petitioner, and consumers like him, have sufficient theories on which to allege manufacturer negligence, such as the duty to warn and the duty to test, as the appellate court pointed out. R. at 14-15. The State of Fremont should follow the lead of the *Ostendorf* and *Tabieros* courts and decline to adopt a duty to retrofit because existing negligence and strict liability theories afford plaintiffs adequate protection and redress.

2. The judiciary is an improper province to adopt a duty to retrofit because this decision should be left to an administrative or legislative body.

The appellate court overstepped in adopting a duty to retrofit in certain design defect claims because the decision to adopt a duty to retrofit is properly the province of an administrative or legislative body. *Ostendorf*, 122 S.W.3d at 534; *Patton*, 861 P.2d at 1316; Restatement (Third) of Torts: Products Liability § 11 cmt. a (Am. Law Inst. 1998); Schwartz, *supra*, at 901. It has often been said that a judge's role is not to make law, but to interpret it.

Thus, it is not for the courts to decide whether the State of Fremont should adopt a duty to retrofit, but the legislature.

Establishing a duty to retrofit is not for courts to decide but is better left to administrative agencies and the legislature. In *Patton*, a cultivator was injured by a piece of heavy farming equipment. *Patton*, 861 P.2d at 1304. The cultivator had purchased the farming equipment from a retailer. *Id.* The cultivator contended that the retailer was aware of a retrofit program that was instituted by the farm equipment manufacturer. *Id.* The cultivator argued state law placed a duty to retrofit on the retailer. *Id.* at 1305. The court held there was no duty to retrofit, reasoning that such a duty was "properly the business of administrative agencies." *Id.* at 1315. Further noted by the court was the extensive federal legislation dealing with an automobile manufacturer's post-sale obligations. *Id.* Similarly, in *Ostendorf*, the court declined to adopt a duty to retrofit. *Ostendorf*, 122 S.W.3d at 533. The court concluded that a duty to retrofit was not the court's job to adopt but was properly the province of an administrative or legislative body. *Id.* at 534. The court further emphasized that "the complexity of the decision to retrofit and the ramifications of that decision recommend that courts should not make that determination, but rather should leave it to governmental bodies more suited to the task." *Id.* This reasoning is further endorsed in Section 11 of the Restatement, which makes it clear that even when a product is defective, a duty to retrofit should be "imposed on the seller only by a governmental directive issued pursuant to statute or regulation." Restatement (Third) of Torts: Products Liability § 11 cmt. a (Am. Law Inst. 1998). This is because product recalls or retrofits are "best evaluated by governmental agencies capable of gathering adequate data regarding the ramifications of such undertakings." *Id.*

Further, Professor Victor Schwartz, principal author of The Uniform Product Liability Act, cautions persuasively against adopting a duty to retrofit by judicial action. Schwartz, *supra*, at 892. Schwartz argues that courts that impose a duty to retrofit "arrogate to themselves a power equivalent to that of requiring product recall." *Id.* at 901. He contends that courts lack the "institutional resources to make fully informed assessments of the marginal benefits of recalling a specific product." *Id.* Schwartz notes that recalls are properly left to administrative agencies due to the "enormous" costs associated with a recall and that these costs will be passed on to consumers in the form of higher prices. *Id.* He further emphasizes that courts should not impose a duty to retrofit without extensive consideration of its economic impact. *Id.*

The court's role is to interpret the law, not make law, and the appellate court overstepped by creating a duty to retrofit. As Professor Schwartz noted, the economic impact of a duty to retrofit would be "enormous" and would be passed on to consumers in the form of higher prices. The restatement acknowledged that government agencies, not courts, are best positioned to gather the appropriate data regarding the ramifications of a duty to retrofit. In the present case, the appellate court failed to present any evidence relating to the economic impact of a duty to retrofit. Further, nowhere in the opinion does the appellate court discuss the ramifications of imposing a duty retrofit on manufacturers. The appellate court claimed that adopting a duty to retrofit will protect consumers yet provides no data or evidence to support this assertion. The courts are simply not the proper province to adopt a duty to retrofit. As the appellate court observed, the duty to retrofit would not be unlimited or universally applied. The appellate court created a test that it would use on a case-by-case basis. This would force courts that already lack the resources to investigate the benefits of a duty to retrofit to impose massive liability on

manufacturers unpredictably. This would lead to inconsistent and inequitable results for both manufacturers and consumers.

Additionally, as the *Patton* court noted, there is extensive federal legislation regarding an automobile manufacturer's post-sale obligations. If Congress felt manufacturers like Edison had a duty to retrofit, Congress would pass appropriate legislation. The State of Fremont adopting a duty retrofit as decided by the appellate court would be an inappropriate use of judicial power. Since neither Congress nor the Fremont Legislature has passed any legislation imposing a duty to retrofit, it would be inappropriate for the court to impose such a duty on manufacturers. Further, the appellate court ruled that the failure to give a jury instruction about the duty to retrofit was harmless error. The appellate court's decision was based on protecting Fremont consumers. But despite expanding manufacturer liability and judicially creating a new duty, consumers would not receive any additional protection by the appellate court's decision and would be forced to pay more for safety.

CONCLUSION

Petitioner's failure to show a defect in the design of the Marconi under the risk-utility test provides a legally sufficient basis in support of the jury's finding in favor of Edison. Thus, the appellate court properly affirmed the trial court's denial of Petitioner's renewed motion for judgment as a matter of law, and this Court should affirm the appellate court's ruling. Additionally, the State of Fremont should not adopt a duty to retrofit in certain strict liability design defect claims. To do so would place an unreasonable burden on manufacturers and would be an inappropriate exercise of judicial power as existing negligence and strict liability theories adequately protect consumers.