February Term 2021
No. 21-2112

IN THE
Supreme Court of the State of Fremont

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WILLIAM ASHPOOL,
Petitioner,
v.

EDISON INCORPORATED, a
Fremont corporation,
Respondent.

On Writ of Certiorari to
the Supreme Court of the State of Fremont

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BRIEF ON BEHALF OF RESPONDENT

_____

TEAM H

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QUESTIONS PRESENTED

I. Whether the appellate court correctly affirmed the lower court's holding that, under the Risk-Utility Test, the Edison Marconi was not unreasonably dangerous?

Suggested Answer: Yes.

II. Whether the duty to retrofit, absent statutory authority and a controlling relationship, should be adopted for a semi-autonomous vehicle strict liability claim?

Suggested Answer: Yes.

SUMMARY OF THE ARGUMENT

The Court uses the risk utility test to determine if a design is unreasonably dangerous and therefore defective. Branham v. Ford Motor Co., 701 S.E.2d 5, 17-18 (S.C. 2010); *Peck v.* Bridgeport Machines, Inc., 237 F.3d 614, 617 (6th Cir. 2001); Banks v. ICI Americas, Inc., 450 S.E.2d 671, 675 (G.A. 1994). When determining if a design is unreasonably dangerous, the Court analyzes: (1) whether the severity of the injury was foreseeable by the manufacturer; (2) whether the likelihood of injury was foreseeable 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 practicable reasonable alternative design would have reduced the foreseeable risk of harm posed by the product; and (6) whether the omission of the alternative design rendered the product not reasonably safe. Peck, 237 F.3d at 617. The likelihood of injury and the severity of risk are used to determine the probability of plaintiff's specific injury. Owens v Allis-Chalmers Corp., 326 N.W.2d 372, 378-379 (Mich. 1982). The magnitude of risk is calculated by comparing the quantity of risks with the frequency of a specific injury in the same time frame. Eldridge v. Crane Valve Co., 924 F. Supp. 81 (W.D. Mich. 1996). However, this Court should only utilize pre-production evidence to determine the likelihood of injury. Branham., 701 S.E.2d at 17-18. Even if this Court decides to use post-production evidence, Petitioner has not met their burden to show that the injury sustained was statistically likely. Monahan v. Toro Co., 856 F. Supp. 955, 959 (E.D. Pa. 1994). The evidence presented at trial has not shown the probability of the accident occurring; rather, Petitioner has only presented evidence of the sensors malfunctioning. Petitioner failed to meet their burden of proving that accidents from using the Autodrive feature was likely to produce the specific injury

suffered. Even if the Court uses post-production evidence of accidents, the frequency is so low that it fails to demonstrate the Marconi as unreasonably dangerous.

Furthermore, the reasonable alternative design must be a practicable in order to hold a manufacture liable on a design defect claim. Peck, 237 F.3d at 617. Even if a design increases the safety of a product, it is not required to be implemented if the challenged design is reasonably safe. Sexton By & Through Sexton v. Bell Helmets, Inc., 926 F.2d 331, 336 (4th Cir. 1991). The heart of the risk utility test hinges on whether the alternative design is a marketable reality, analyzing cost trade-offs and marketing decisions. Banks, 450 S.E.2d at 675. Here, the Edison Marconi went above and beyond providing safety to its consumers with its innovative Autodrive feature. The cost of implementing the additional sensors made the alternative design economically unfeasibly. Therefore, the omission of this technology did not render the Marconi unreasonably dangerous.

Second, the duty to retrofit should not be adopted in the State of Fremont for semi-autonomous vehicle strict liability claims for three reasons: (1) Courts do not impose the duty to retrofit absent special circumstances or cases involving extremely dangerous equipment, transportation devices, or products; (2) autonomous vehicle regulation is the province of administrative agencies and the legislature, not the courts; and (3) the Common Law Duty to Retrofit is preempted by federal law.

First, courts do not impose the duty to retrofit absent special circumstances or cases involving extremely dangerous equipment, transportation devices, or products. Special circumstances warranting consideration include (a) administrative regulations or statutory obligations to impose post-sale duties; and (b) an assumption of a duty, controlling relationship or voluntary efforts by Edison to modify or improve the Marconi's sensors. Here, there are no statutory or administrative regulations imposing a duty to retrofit, nor was there a controlling

relationship or voluntary effort by Edison to modify or improve the Marconi. In stark contrast to other jurisdictions which have found a controlling relationship where the manufacturer installed and personally tested the product, called customers daily, traveled to customer sites to view the equipment, or created a safer alternative design and began to install them on customer's purchases, Edison only offered optional updates to customers.

Second, autonomous vehicle regulation is the province of administrative agencies and the legislature, not the courts. The majority of jurisdictions reject the common law adoption of the duty to retrofit, but the complexity, recognizing that agencies have the institutional resources to make fully informed assessments of retrofitting or recalling a specific product and are better able to consider the extensive economic impacts of a duty to recall or retrofit. Further, were every technological improvement to trigger a common law duty, manufacturers would face incalculable costs every time they sought to make their products safer, chilling innovation while thwarting the objectives of federal automobile regulatory bodies.

STATEMENT OF FACTS

Edison and the Marconi

In 2014, Edison, a car manufacturer decided to enter the economy sedan market with their new model the Marconi. (R. at 1). This market being highly competitive focuses on safety features and simplicity over a cutting edge or advanced technology. Id. Understanding the new markets needs, Edison incorporated these desires into the design of the Marconi. Id.

In 2017, the Marconi was released and to satisfy their new customer base, Edison added a safety feature to the Marconi known as Autodrive. Id. Autodrive is a semi-autonomous driver assist system in which piloting the vehicle is aided by using an onboard computer system. Id.

These computers utilize twelve sensors that monitors the cars motion, surrounding object, and other drivers on the road. Id. The computer system then processes this information and accelerate or decelerate, stop, and maneuver on the road in fashion similar to a human driver. Id. However, the Autodrive system will only "self-drive" the vehicle if the driver always maintains both hands on the steering wheel. Id. Similarly, the driver can turn this feature on and off depending on what he or she decides. (R. at 2).

Part of the Autodrive system is a feature which allows the driver to input a location and the Marconi will semi-autonomously drive to the desired location. (R. at 1). While this system is being used, the driver can minimally operate the vehicle. Id. When turned on, the Autodrive system adjust for minimal road conditions, but requires the driver to adjust for weather conditions or poor road conditions or moving vehicles near the Marconi. (R. at 2).

Frequently, Edison releases updates to the Autodrive software which improves its functionality and safety capabilities. Id.

Williams Ashpool and the Accident

William Ashpool is 55 years old and a lifelong Freemont resident who was a longtime criminal defense attorney. (R. at 3). Currently he works as a social worker which requires that he drive throughout the county to visit clients. Id. In November 2019, Mr. Ashpool test-drove and purchased a new Marconi at a local dealership. Id. The local Edison salesman instructed that by using the Autodrive feature, Mr. Ashpool could simply put in an address and get to his destination without any further requirements. Id. However, this information was incorrect as Edison provided a manual which indicated that drivers must place both hands on the wheel while using Autodrive as well as designed a warning system to alert drivers to use both hands. (R. at 1).

On the night of December 20, 2019 Mr. Ashpool was driving his Marconi as usual with the Autodrive feature engaged and functioning properly. (R. at 3). As he was driving, he collided with a brown bear which was resting in the middle of the road. Id. As a result of the impact, Mr. Ashpool suffered numerous intense yet nonlife-threatening injuries. Id. He was subsequently hospitalized for two weeks. Id.

The Trial

Following the accident, Mr. Ashpool filed an action against Edison for the injuries he suffered. Id. During the trial Edison presented evidence that during internal testing they performed numerous crash tests in strict compliance with National Highway Traffic Safety Administration standards. (R. at 4). Moreover, Edison presented evidence that they performed hundreds of safety tests with an extreme focus on the viability and functionality of their sensor while the Marconi was in Autodrive mode. Id. Edison's primary goal of these tests was to see how the Autodrive system would work with minimal driver input. (R. at 4-5). During these tests, Edison discovered that while the Autodrive system worked well throughout a vast majority of driving conditions, it had difficulty stopping when faced with a stationary object at a speed more than 35 miles per hour. (R. at 5). The fail rate was only at 13% when placed in this scenario. Id. However, Mr. Ashpool's expert testified on cross examination that the Autodrive system improved safety in instances of lane drift or unsafe lane maneuvers by other drivers. Id.

At trial Erroll Reeves, the CEO of Edison testified that the company has plans to implement new sensors fort the Autodrive system on the Marconi however the costs were too great. Id. Reeves explained that by adding the new sensors, the cost of each Marconi would be increased by $5,000 dollars per unit. Id. This drastic jump in price would push this economical

car far outside the target market defeating the purpose of offering the Marconi in the first place. Id. However, Mr. Ashpool that without these new sensors the Marconi was rendered unsafe. Id.

At the conclusion of trial, Mr. Ashpool moved for a judgment as a matter of law pursuant Freemont Rules of Civil Procedure 50(a). (R. at 7). The trial court denied this motion and put the evidence to the jury. Id. The jury returned a verdict in favor of Edison at which point Mr. Ashpool renewed his motion but the court again denied the motion. Id. Subsequently, Mr. Ashpool appealed the decision claiming that the trial court erred in presenting the jury instruction, and that the denial of his Rule 50 motion was improper. The court of appeals ruled against Mr. Ashpool finding that the design was not defective and that the jury instructions were proper. (R. at 8-18). The Supreme Court of the State of Fremont certified the two questions at issue today for appeal.

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE FREEMONT STATE COURT OF APPEALS DECISION BECAUSE THE COURT DID NOT ERR IN FINDING THE MARCONI AUTODRIVE NOT UNREASONABLY DANGEROUS UNDER THE RISK UTILITY TEST.

When a design defect claim is made, a plaintiff alleges that the product at issue was defective, thus causing an entire line of products to be unreasonably dangerous. Watson v. Ford Motor Co., 699 S.E.2d 169, 174 (S.C. 2010). To prevail on products liability claim, a plaintiff must three elements: (1) the injury was caused by the product; (2) the product, at the time of injury, was 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. *Cf* Fremont Rev. Code § 5552.321; Madden v. Cox, 328 S.E.2d 108, 13 (S.C. Ct. App. 1985). Although the first two elements are not in dispute, Petitioner has failed to prove the Edison Marconi was unreasonably dangerous at the time of production. A design is "unreasonably dangerous" only if, on balance, the danger inherent in the design outweighs the benefit derived from the product's utility. Banks v. ICI Americas, Inc., 450 S.E.2d 671, 675 (G.A. 1994). This risk utility balancing test is the heart of design defect claims. Id.. at 675. The unreasonableness of a design hinges on six factors: (1) whether the severity of the injury was foreseeable by the manufacturer; (2) whether the likelihood of injury was foreseeable 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 practicable reasonable alternative design would have reduced the foreseeable risk of harm posed by the product; and (6) whether the omission of the alternative design rendered the product not

reasonably safe. Peck v. Bridgeport Machines, Inc., 237 F.3d 614, 617 (6th Cir. 2001). This list is not exhaustive; competing cost trade-offs, federal and other regulatory restrictions, and tactical marketing decisions contribute to whether the design-making process rendered the product unreasonably dangerous. Banks, 450 S.E.2d at 675. When challenged design goes beyond the common experience of the product's user, the risks and benefits must be carefully analyzed. Soule v. Gen. Motors Corp., 882 P.2d 298, 308 (Cal. 1994). Plaintiff's must show the safety benefits from the proposed design are foreseeably greater than resulting costs. Id. Here, the Court of appeals did not err because Ashpool failed to demonstrate the foreseeable harm from the Autodrive outweighed the benefits of the safety feature.

A. This Should Affirm The Circuit Court's Decision Because The Likelihood and Severity of Injury Was Foreseeable.

A product is not required to be risk free but must only be not "unreasonably dangerous". Caterpillar, Inc. v. Shears, 911 S.W.2d 379, 381-382. The product's manufacturer is required to design a product that only "eliminate[s] any unreasonable risk of foreseeable injury." Fisher v. Kawasaki Heavy Indus., 854 F. Supp. 467, 468-69 (E.D. Mich. 1994). The plaintiff has the burden of presenting sufficient that injury sustained was a statistical likelihood of the defective design. Fisher, 854 F. Supp. at 470 (E.D. Mich. 1994). Without doing so, the plaintiff's claims are swiftly defeated. Id

The magnitude of risk is calculated by "comparing the number of risks within a particular time frame with the number of times the specific type of injury occurs." Eldridge, 924 F. Supp. At 81. For example, in Carlson v. Bic Corp., the plaintiff claimed that Bic's cigarette lighter was defectively designed because it did not prevent a child from using the lighter which resulted in a house fire. Carlson v. Bic Corp., 840 F. Supp. 457, 466 (E.D. Mich. 1993). The plaintiff put forth

evidence that the type of injury was foreseeable by introducing the total number of occurrences that a child playing with a lighter causes fire within a given timeframe. Id The court held that despite showing the number of occurrences of child induced fire, it did not show the frequency in which this occurs over the total amount of lighters or ignitions within the same time frame. Id Absent this information it was "impossible to determine—or even to make an intelligent statement concerning—*how likely* the injuries were to occur." Id

Similarly, in Owens, the plaintiff claimed that a forklift which did not have a safety belt, nor a protective covering was defectively designed when the forklift rolled over and crushed the operator. Owens v Allis-Chalmers Corp., 326 N.W.2d 372, 374 (Mich. 1982). The plaintiff offered expert testimony that explained that he risks of a forklift rolling over and crushing the operator was foreseeable. Id at 374. The court held that absent any statics or probability analysis, the expert testimony was insufficient to determine the likelihood of injury or magnitude of risk and therefore could not show unreasonable danger. Id at 379.

Notwithstanding the statistic likelihood of an injury, there are inherent risks in various product design which do not make it unreasonably dangerous. For instance, in Shetterly v. Crown Control Corp., the plaintiff claimed that defendant manufacturer's pallet truck was defectively designed when it ran over plaintiff's foot while being in an automatic movement mode. Shetterly v. Crown Control Corp., 719 F. Supp. 385, 391-92 (W.D. Pa. 1989). The court held that design was not defective because the plaintiff could not prove the likelihood of injury. Id at 399-00. The court explained that simply because injuries occur does not mean that the product is defective. Id Because certain products "by necessity involves a certain level of unavoidable risk" a manufacturer can not be held liable for not making a product completely safe. Id

Courts have sought to discourage using evidence of injuries that occur from a product once it has left the manufacturer. For instance, the court in Clayton v. General Motors Corp., explained that the only evidence that is proper in determining the likelihood of injury must be pre-distribution information. Clayton v. General Motors Corp., 286 S.E.2d 129, 131-32 (S.C. 1982). In Clayton, the plaintiff claimed that the lug nuts on a third parties' car was defective when they cracked causing the car to impact his vehicle. Id at 130. Testimony was introduced that established that the lug nuts cracked from over tightening. Id at 131. The court, citing the Restatement (Second) of Torts § 402A, cmt. g, held that the plaintiff bears the burden to prove that at the time of delivery, the product was defective. Id at 131. Without proof, that at the time of delivery the product design was defective, they can not establish liability. Id at 132.

Moreover, excluding post-distribution evidence prevents prejudice in determining what the defendant knew prior to distribution. Branham v. Ford Motor Co., 701 S.E.2d 5, 17-18 (S.C. 2010). In Branham, the plaintiff introduced memorandums, films, and test results about defendant Ford's Bronco II general safety and performance. Branham, 701 S.E.2d at 18. This evidence was originally created in 1989, three years after the Bronco II was manufactured. Id. The court held that using this post-distribution evidence was improper because it showed facts that were not "reasonably attainable" by Ford during the production phase and therefore Ford could not foresee the likelihood of injury. Id. The court further explained that judging a defective design through "hindsight" prejudices the defendant for the design decisions made prior to new knowledge dissuading advancements in safety. Id. See also Gregory v. Cincinnati Inc., 538 N.W.2d 325, 326 (explaining that the use of post-distribution evidence inappropriately transfers attention away from pre-production decisions clouding the ability to establish liability).

When post-production evidence is used to calculate the magnitude of the risk, the plaintiff must show that the overall rates of injury for the specific product made plaintiff's specific injury likely to occur. See Monahan v. Toro Co., 856 F. Supp. 955, 959 (E.D. Pa. 1994). In Monahan, the court looked at the Consumer Product Report Commission's report on lawn mowers where it was determined that "2.5 out of 1000 ride-on mowers were associated with an injury." Id. The court held that this rate was sufficiently low to determine that the product was not necessarily defective. Id The court further reasoned that just because some injuries occur does not make a product defective. Id. See also Warnick v. NMC-Wollard, Inc.,512 F.Supp. 318, 326 (W.D. Pa. 2007) (holding that evidence of a few injuries over the course of twenty years of use does not prove the likelihood of injury for that product); Lancenese v. Vanderlans & Sons, Inc., 2007 U.S. Dist. LEXIS 37102 (E.D. Pa 2007) (holding that the plaintiff could not show injury was likely when only four accidents were reported when using the product).

Moreover, if the time of injuries that resulted were not life threatening that magnitude of the risk is reduced. See Shetterly, 719 F. Supp 385, 400 (W.D. Pa 1989). In Shetterly, besides not being able to show the likelihood of injuries the plaintiff only presented evidence that the injuries suffered were not life threatening. Id The court held that because the injuries suffered were not life threatening the design of the product was not unreasonably dangerous. Id See Pegg v. General Motors Corp., 391 A.2d 1074, 1082-83 (Pa. Super. Ct. 1978) (holding that the product danger is a function of the level of which the danger is technologically avoidable).

The court did not err in finding that the likelihood of injury was not foreseeable because Ashpool did not present sufficient evidence to determine the statical likelihood of an injury. In Carlson, the plaintiff presented the overall number of occurrences of a child causing fire through using the lighter. 840 F.Supp. 457, 466 (E.D. Mich 1993). There the court held that this overall

number was insufficient to determine likelihood of injury because it did not explain the overall number of time ignitions occur or how many people are using their lighters. Id. Here, Ashpool only presented the overall occurrences of accidents with sensor issues and stationary object failing to present how many vehicles are on the road nor frequency of accidents and general. R. at 17. By failing to pace these twelve accidents in any statistical context or rate of occurrence it is "impossible to determine -- or even to make an intelligent statement concerning -- *how likely* the injuries were to occur." Carlson, 840 F. Supp. at 266.

Moreover, this Court should not even consider the twelve accidents as part of the determination of likelihood of injury. Despite the fact there was no objection at trial or argument on appeal, the court should still disregard this evidence in the calculating likelihood of injury. Utilizing this evidence has the exact affect that both the Branham court and the Clayton court sought to eliminate. Branham, 701 S.E.2d 5, 17-18 (S.C. 2010); Clayton v. General Motors Corp., 286 S.E.2d 129, 131-32 (S.C. 1982). In Branham, the court explained that using post-production evidence does not aid in showing what the manufacture knew during the design or pre-production phase. 701 S.E.2d at 17-18. They only have a prejudicial effect on the actual statistical likelihood of injury front the design of the Marconi. The only appropriate evidence to use is that of the 13% failure rate of the auto drive feature in situations with a stationary object and velocity over 35 miles per hour. R. at 17.

Even by using the pre-production failure rate, the plaintiff would still fail to establish the likelihood of injury because the 13% failure rate is kept in a vacuum. Id Like Carlson, where the plaintiff's data did not create an overall probability for that specific injury to occur, here the data Ashpool presented fails to do the same. Carlson, 840 F. Supp. at 266. The 13% figure is only reflective of the specific situation with a sensor issue, stationary object, and velocity of over 35

miles per hour, within a closed testing environment. R. at 6. However, Ashpool has presented no evidence to likelihood of an accident within the broader testing confines and therefore can not show that the likelihood of injury.

Additionally, because the type of injurie that Ashpool received were not life threatening and reducing the magnitude of risk that the Marconi imposes. See Shetterly, 719 F. Supp. at 400. Regardless of Ashpool's failure to address the likelihood of injury, the severity of his injuries that he suffered were not necessarily life threatening therefore the over all magnitude of risk is reduced. Eldridge v. Crane Valve Co., 924 F.Supp. 81 (W.D. Mich. 1996). Furthermore, Ashpool has not asserted that the injuries received were avoidable by the design. The Marconi has met all National Highway Traffic Safety Administration testing requirements which did not indicate any that during an accidents severity of injury would be high. (R. at 4). Like the lower court held, there has been nothing on the record that shows the severity of injury would be any more than a typical sedan. (R. 10-11).

This court should affirm the lower court's decision and hold that the risk utility test was not misapplied because the likelihood and the severity of the injury was not established the Marconi as unreasonably dangerous.

B. Edison had no duty to equip the Marconi with the additional sensors because the Autodrive feature did not render the vehicle unreasonably dangerous.

The decision to not implement the alternative design of the Marconi did not render the vehicle unreasonably dangerous. When an alternative design is not a technical or marketable possibility, the risk utility test weighs in favor of the challenged design as reasonably safe. Banks, Inc., 450 S.E.2d at 675. A manufacturer has no duty to implement the safest possible

design to prevail on a design defect claim. Sexton By & Through Sexton v. Bell Helmets, Inc., 926 F.2d 331, 336 (4th Cir. 1991). The Marconi's Autodrive feature is beyond the common experience of the average consumer, therefore careful analysis of factors such as cost trade-offs, and tactical marketing decisions determine whether the risks outweigh its utility. Banks, 450 S.E.2d at 675; Soule, 882 P.2d at 308.

The alternative design must be a marketable reality and economically feasible, not just a safer option. Banks, 450 S.E.2d at 675. When implementing a safer alternative design is infeasible, its mere existence does not render the challenged design defective. Sexton, 926 F.2d at 336. Technical issues of feasibility and cost must be considered when analyzing whether or not challenged design presented excessive preventable danger or not. Kim v. Toyota Motor Corp., 424 P.3d 290, 296 (Cal. 2018); Barker v. Lull Eng'g Co., 573 P.2d 443, 455 (1978). Implementing the alternative design is economically feasible only if the cost would not render the product impractical to purchase. Casey v. Toyota Motor Eng'g & Mfg. N. Am., Inc., 770 F.3d 322, 335 (5th Cir. 2014). In Kim, plaintiff brought a strict liability claim against Toyota Motor corporation alleging that the Toyota Tundra was defectively designed because it did not include a safety feature known as vehicle stability control ("VSC"). 424 P.3d at 294. Toyota made the VSC standard equipment in its luxury Lexus model, but defendant's expert testified that the cost increase of the new technology in the Tundra would be approximately roughly 300 dollars per vehicle. Id. at 294. Tundra's product manager testified that in following the industry custom of phasing in more expensive technology, reducing the cost of the Tundra was the most pragmatic decision. Id. at 294. The court affirmed the jury's decision that lack of the additional safety device did not render the Tundra defective under the risk utility test. Id. at 296.

The decision of a manufacturer to not implement an optional safety device does not render the product unreasonably dangerous. See Bragg v. Hi-Ranger, Inc., 462 S.E.2d at 339; Marchant v. Mitchell Distrib. Co., 240 S.E.2d 511 (S.C.1977) (affirming that a manufacturer is not required to implement an optional safety device unless the lack of the device made the product unreasonably dangerous.) Industry custom does not focus on what can be technologically achieved; rather, the focus is on what is done in the relevant industry. Kim, 424 P.3d at 297. The ordinary practice of competitors in the industry is relevant to determine whether the omission of safety features renders that may cause harm as unreasonably dangerous. See Kim, 424 P.3d at 290; Holst v. KCI Konecranes Int'l Corp., 699 S.E.2d 715, 722 (S.C. Ct. App. 2010) (finding no error when the district court weighed the crane manufacturers' compliance with the industry custom to determine the design as not unreasonably dangerous.)

Products liability law serves the goal of encouraging the design and manufacture of safe, functional products. Branham v. Ford Motor Co.,701 S.E.2d 5, 19 (S.C. 2010). The risk utility test is designed to avoid circumventing that goal by converting the manufacturer into the insurer of every harm that arises out of a product from which the consumer derives utility. Quintana-Ruiz v. Hyundai Motor Corp., 303 F.3d 62, 67 (1st Cir. 2002) (affirming verdict for manufacturer when plaintiff was injured by an airbag which properly deployed because the safety benefits outweigh the risks); Sexton, 926 F.2d at 336; Barker, 573 P.2d at 455.

A manufacturer must only design a product that is reasonably safe for its intended purposes; there is no duty to design "best possible product" in a design defect claim. Sexton, 926 F.2d at 336. In Sexton, the defendant manufactured a helmet designed to provide greater protection for high impact collisions. 926 F.2d at 335. Plaintiff's expert contended that the conscious decision to implement this design reduced protection for low impact collisions such as

the plaintiff's motorcycle accident, thereby rendering the design defective. Id. at 335. The Court found the helmet design complied with or exceeded three industry standards, which was strong evidence of no design defect. Sexton, 926 F.2d at 336; See Gen. *Motors* Corp. v. Burry, 203 S.W.3d 514, 529-530 (Tex. App. 2006) (finding automobile's use of side airbags which went above the standards of National Highway Transportation Safety as strong and substantial evidence of no design defect.)

Here, the cost of the additional sensors to the Autodrive feature did not outweigh the safety benefits of the Edison Marconi. To correctly apply the risk utility test, the risk associated with the Autodrive with must be weighed with its overall benefits to the consumer. See Quintana-Ruiz, 303 F.3d at 67; (R. at 5, 6). The Court of Appeals correctly applied this balancing test when finding the benefits derived from Autodrive regarding *all* accident hazards outweighed the miniscule risks posed by stationary objects. Id. at 67; (R. at 12).

Plaintiff conceded that purchasers were unaccustomed to a semi-autonomous driving feature, therefore the Court correctly analyzed all relevant factors such as cost tradeoffs, tactical marketing decisions, and industry custom. See Banks, 450 S.E.2d at 675; Soule, 882 P.2d at 308; (R. at 5). After careful review of these factors at trial, the jury found the Autodrive feature did not pose excessive preventable danger. See Barker, 573 P.2d at 455; (R. at13).

Even though the additional sensors would have made the Marconi fractionally safer, they must also be a marketable reality and technologically feasible for the product to meet the "unreasonably dangerous" threshold. See Banks, Inc., 450 S.E.2d at 675; (R. at 6). Because the implementation of the additional sensors was infeasible to the Marconi, the mere existence of the technology that potentially could have avoided Ahspool's accident does not render the Marconi defective. Sexton, 926 F.2d at 336; (R. at 4, 6). Edison does not contend the upgraded sensors

were not technologically feasible; they were included in the luxury model. (R. at 3) But the fact that the sensors were included in the luxury model is not sufficient evidence of economic feasibility. See Casey, 770 F.3d at 335; (R. at 5). The $5,000 cost increase would render the Marconi an impractical purchase for the target group, contrary to Edison's marketing design. Id. at 335; (R.5). Analogous to Kim, here Ashpool brought a strict liability claim against Edison alleging that the Marconi was defectively designed due to its lack of additional sensors on the Autodrive feature. See 424 P.3d at 294; (R. at 7). Mr. Reeves explained implementing the new Autodrive equipment would push the Marconi outside the economy range for sedans, and therefore omitted optional additional sensors for economic feasibility. See Kim, 424 P.3d at 294. This conscious decision by Mr. Reeves can hardly be said to render the Marconi unreasonably safe; rather, the additional sensors were not practical at the time of manufacture in 2017. See Bragg v. Hi-Ranger, Inc., 462 S.E.2d at 339; (R. at 1, 5).

Moreover, the ordinary practice of automobile manufacturers is relevant to determine whether the omission of the sensors rendered the Marconi unreasonably dangerous. See Kim, 424 P.3d 290; See Holst, 699 S.E.2d at 722. The focus here is not on what can technologically be achieved; rather, the focus is the standards of a sedan without such advanced technology. See Kim, 424 P.3d at 297. The decision of Edison to not implement the high-tech safety device does not render the Marconi unreasonably dangerous because it is *safer* than the average sedan in the industry. See Bragg v High-Ranger, 462 S.E.2d at 339; (R. at 11). Plaintiff demands this court require Edison to to manufacture "the best possible" technology; but this is not the burden for a design defect claim. Sexton, 926 F.2d at 336; (R. at 5, 6). The standard is to manufacture a product that is reasonably safe, and they did not meet their burden in two lower courts. Id. at 336.

Edison fulfilled his duty by designing an automobile that was not unreasonably dangerous; the Marconi Autodrive feature assessed road conditions, speed limits, and traffic lights based on route (R. at 3). Furthermore, the Autodrive feature allowed the Marconi to adjust for road work, weather conditions, movements of other vehicles in its vicinity, and adjust for road work. (R. at 4, 5). Plaintiff's expert contended that the conscious decision to implement this design reduced protection for stationary objects such as the Ashpool's accident, thereby rendering the design defective. (R. at 5, 6). However, Plaintiff's expert conceded the Autodrive innovation avoided hazards as well, such as accidents caused by lane drifting or unsafe lane changes. (R. at 5). The utility of this feature far outweighs the miniscule risk of potential collisions which is a "reasonable tradeoff." See Quintana-Ruiz., 303 F.3d at 67.

Because Reeves chose to "phase in" the new technology for luxury vehicles did not render the Marconi unreasonably dangerous. See Kim, 424 P.3d at 294. Edison went above and beyond making a safe, functional product with the Marconi and its Autodrive feature. See Branham, 701 S.E.2d at 19; (R. at 2, 3). Edison ran numerous tests in compliance with the National Highway Traffic Safety administration, which is strong evidence as to no design defect. See Gen. Motors Corp., 203 S.W.3d at 530; See Sexton, 926 F.2d at 336; (R. at 4). The Autodrive feature was no substitute for the human driver and holding Edison liable for every injury sustained goes directly against the goal of products liability law. Id. at 19. This court should affirm the lower court's decision and hold that the Edison Marconi was not unreasonably dangerous because the lack of additional sensors did not outweigh the overall benefits to the consumer.

II. THE DUTY TO RETROFIT SHOULD NOT BE ADOPTED IN THE STATE OF FREMONT FOR SEMI-AUTONOMOUS VEHICLE STRICT LIABILITY CLAIMS.

The majority of courts have overwhelmingly refused to impose upon manufacturers a common law duty to retrofit or recall their products. Smith v. Firestone & Rubber Co., (8th Cir. 1985); Romero v. Int'l Harvester Co., 979 F.2d 1444, 1446 (10th Cir. 1992); see also Burke v. Deere & Co., 6 F.3d 497, 508 n. 16 (8th Cir. 1993) (under Iowa law there no duty to retrofit); Patton v. Hutchinson Will-Rich Mfg. Co., 861 P.2d 1299, 1316 (Kan. 1993) (absent special circumstances there is no duty to retrofit; Tabieros v. Clark Equip. Co., 944 P.2d 1279 (Haw. 1997) (Hawaii manufacturers are not subject to an independent, continuing duty to retrofit their products); Gregory v. Cincinnati, 538 N.W.2d 325 (Mich. 1995); Ostendorf v. Clark Equip. Co., 122 S.W.3d 530 (Ky. 2003); Ford Motor Co., v. Reese, 684 S.E.2d 279 (GA. App. 2009). A duty has been recognized, however, only where there are special circumstances—including and in extreme cases.

A. Courts do not impose the duty to retrofit absent special circumstances or cases involving extremely dangerous equipment, transportation devices, or products.

1. There are no present special circumstances warranting the duty to retrofit.

State and federal courts, absent special circumstances—including federal or state statutes or administrative regulations, or a controlling relationship involving the manufacturer's voluntary efforts to modify or improve the product—do not impose the duty to retrofit. Ford Motor Co. v. Reese, 684 S.E.2d 279, 283-84 (Ga. App. 2009) ("We conclude that absent special circumstances no common law duty exists . . . to recall a product after the product has left the manufacturer's control."); see also Patton v. Hutchinson Will-Rich Mfg. Co., 861 P.2d 1299, 1316 (Kan. 1993) (finding no duty to retrofit a cultivator); Modelski v. Navistar Int'l Transp. Corp., 302 Ill. App.

3d 879 (1999)(in the absence of a statutory obligation, Illinois law does not impose a duty to retrofit a tractor seat).

a. There are no administrative regulations or statutory obligations imposing the duty to retrofit.

Absent statutory or administrative obligations, the duty to retrofit is not imposed. In Patton v. Hutchinson, the plaintiff was severely injured when the vertical wings of the defendant's cultivator unfolded. Patton, 861 P.2d at 1304. Prior to the accident, several other individuals had been injured in the same manner, there were no warning labels or decals on the wings of the cultivator—nor did the instruction manual indicate the potential hazards from the vertical wings. Id. at 1305. Further, the Vice President of Engineering was aware of these injuries seven years prior to the plaintiff's accident, recognized his company had problems with the cultivator wings, indicated that he believed it was an acceptable risk to choose not to completely retrofit the cultivators, and had knowledge of the company's progressive retrofit program to install newly developed "additional safety latches" on their cultivators. Id. The Kansas Supreme Court resoundingly rejected the duty to retrofit. "The answer to [whether Kansas products liability law places a duty to retrofit upon manufacturers] is 'no.' [The Petitioner] has provided no statute or case law to support the claim that [the company] is subject to a duty to retrofit." Id. at 1315. Both federal and state courts have echoed the Kansas Supreme Court's opinion. See Modelski v. Navistar Int'l. Transp. Corp., 302 Ill. App. 3d at 889 ("in the absence of such a statutory obligation or voluntary undertaking to retrofit, we know of no reported case imposing such a duty on a manufacturer."); Smith v. Daimler-Chrysler Corp., 2002 Del. Super. LEXIS 434 (Nov. 20, 2002) (there is "no duty under Delaware law to recall defective vehicles, so that even if Plaintiff could prove at trial that the air bag was defective, she could not prevail on the recall aspect of her negligence claim."); Smith v. Firestone Tire & Rubber Co., 755 F.2d 129, 136 (8th

Cir. 1985) ("Since no duty to recall was established, a fundamental prerequisite to establishing negligence was absent.").

Neither Federal nor Fremont law imposes upon manufacturers of semi-autonomous vehicles the duty to retrofit. In the absences of such a duty, the Court should follow the majority approach and find that no common law duty exists.

b. There was no assumption of a duty, controlling relationship or voluntary efforts by Edison to modify or improve the Marconi's sensors.

The duty to retrofit has been rejected where there is no assumption of a duty or some special, controlling relationship between the manufacturer and the owner. The court in Gregory v. Cincinnati, 538 N.W.2d 325 (Mich. 1995), found that no controlling relationship or assumption of duty to improve or repair existed prior to the plaintiff's injury using the defendant-Cincinnati's press brake. Cincinnati sent out nearly thirty mailings which documented various safety options to all of its press brake customers, did not regain control of its presses, only two service calls were performed, and there was only one request for price quotations. Id. a 336. The court found that despite these efforts, "Cincinnati never voluntarily assumed a duty as the manufacturers did in Noel and Bradshaw and certainly did not regain control of the machine." Id.

In stark contrast, the defendant manufacturer in Couch v. Astec Indus., 132 N.M. 631 (2002), took numerous steps which clearly established that it maintained a controlling relationship past the point when the product was purchased. In Couch, the manufacturer set up and tested each plant it manufactured and was available by telephone or personal visit to assist customers in its technology, the manufacturer's service personnel were available twenty-four hours a day by phone for customers to ask questions, it provided customers an opportunity to come to its annual school to discuss safety issues, its principals tried to have contact with at least five customers a day, and staff sometimes traveled to plant sites to view the equipment.

Similarly, in Bell Helicopter Co. v. Bradshaw, 594 S.W.2d 519 (Tex. Civ. App. 1979), the defendant was aware its helicopter's 102 tail rotor blade had a history of in-flight fatigue from fracture failures and knew the mandated safety inspections and replacements to the blades were not being made. In response, the company developed the 117 tail rotor series which required less maintenance, was more damage tolerant, and had a service life four times longer than its predecessor. Id. at 537. Bell distributed information regarding the availability of the 117 tail rotor blade via its mailing list and, as a practical matter, had the means to remove the 102 blades from the market but refrained from doing so until after the accident giving rise to the present case. Id. The court found the creation of the 117 tail blade and partial actions to promulgate safety materials revelatory. "Once the duty was assumed, Bell had an obligation to complete the remedy by using reasonable means available to it to cause the replacement of 102 systems with 117 systems." Id. at 532.

Edison, in contrast to the anufacturers in Couch, Bell and Hernandez, did not maintain a controlling relationship past the point the product was purchased. Like the manufacturer in Gregory which did not regain possession of the press brakes and sent out thirty mailings with optional safety updates, Edison's Marconi offered continuous, optional updates that would appear when the driver turned on the vehicle. As the appellate court highlighted, these updates were akin to manufacturer updates of navigation systems in cars as a mere convenience. Unlike Couch, Bell, and Hernandez, Edison never assumed a duty to improve the sensors. In fact, Edison's refusal to improve the sensors suggests the opposite. "Edison abandoned the plan [to include additional sensors] due to feasibility and costs concerns." (R. at 5). There is no evidence that Edison visited the owner's vehicles for inspections, called its customers daily, or held seminars to discuss safety issues. Nor did Edison create a new model and begin installing them

on some of its products as in Bell and Hernandez. Edison's absence here strongly suggests that, like the manufacturer in Gregory, there was no controlling relationship or voluntary assumption of a duty to improve the Marconi.

Accordingly, the Court should find that that there were no special circumstances warranting the imposition of the duty to retrofit.

2. A duty to retrofit has only been considered or imposed in extreme cases involving aviation or dangerous machinery, where even slight defects in components can result in many deaths or significant harm.

The primary cases in which courts have imposed a duty to retrofit involve aviation, heavy machinery, and situations in which even slight defects have a substantial risk of causing death or great bodily harm. The court in Noel v. United Aircraft Corp., 342 F.2d 232 (3d Cir. 1964), considered whether to impose the duty to retrofit where an engine overspeed malfunction in an airplane resulted in the propeller separating and slashing through the fuselage, causing the plane to engulf in flames and crash, killing everyone on board. Similarly, in Bell Helicopter Co. v. Bradshaw, 594 S.W.2d 519 (Tex. Civ. App. 1979), the failure of the tail rotor blade caused the manufacturer's helicopter, resulting in severe injuries. As illustrated, he imposition of the duty to retrofit is considered almost exclusively where aviation or heavy machinery defects are in question. See Braniff Airways, Inc v. Curtiss-Wright Corp., 411 F.2d 451 (2d Cir. 1969) (the issue of negligence was proper to submit to the jury where the defendant's engine failed causing the crash of a DC-7C aircraft); see also Gregory v. Cincinnati, 538 N.W.2d 325 (Mich. 1995) (concerning an press brake industrial machine used for sheet metal); Modelski v. Navistar Int'l. Transp. Corp., 302 Ill. App. 3d 879 (Ct. App. 1999) (plaintiffs deceased husband was killed when the tractor seat unhinged, causing the tractor's bush hog to run over him); Torrington Co.

v. Stutzman, 46 S.W.3d 829 (Tex. 2000) (defective bearing in the defendant helicopter's tail rotor assembly caused it to crash, killing two United States marines).

In contrast, the Marconi is an autonomous vehicle, clearly distinguishable from a press brake, helicopter, airplane engine, tractor, and cultivator at issue, for which the duty to retrofit has been sparingly applied by minority jurisdictions. While the Marconi's operation implicates safety, potential slight defects in a light-passenger vehicle do not implicate the same concerns relative to heavy machinery, passenger jets carrying thousands of travelers daily, or farm equipment.

B. Autonomous vehicle regulation is the province of administrative agencies and the legislature, not the courts.

The duty to retrofit or recall is the proper business of administrative agencies and the legislature because agencies have the institutional resources to make fully informed assessments of retrofitting or recalling a specific product and are better able to consider the extensive economic impacts of a duty to recall or retrofit. The recognition that administrative agencies and legislatures are better situated in this respect reverberates among the majority of jurisdictions. See Patton v. Hutchinson Will-Rich Mfg. Co., 861 P.2d 1299, 1316 (Kan. 1993) ("We reason that product recalls are properly the business of administrative agencies as suggested by the federal statutes that expressly delegate recall authority."); see also Gregory v. Cincinnati, Inc., 538 N.W.2d 325 334 (Mich. 1995) ("Moreover, we believe the duty to repair or recall is more properly a consideration for administrative agencies and the Legislature"); In re Bridgestone/Firestone, Inc., ATX, ATX II & Wilderness Tires Prods. Liab. Litig., 153 F. Supp. 2d 935, 946 (S.D. In. 2001) ("Delay on the part of [an agency] in reaching a decision is no doubt not what Congress envisioned. . . . [b]ut the remedy for that problem lies with the [National

Highway Traffic Safety Administration] (NHTSA) and Congress and not through some unfounded rescue effort undertaken by the courts.").

The complexity of the decision to retrofit and ramifications of that decision recommends that agencies are better suited to the task because they have the institutional resources necessary to make fully informed assessments regarding a specific product. Ostendorf v. Clark Equip. Co., 122 S.W.3d 530, 534 (Ky. 2003). In Ostendorf, the plaintiff was severely injured when the forklift he was driving tipped over, pinning his right foot to the ground. Id. at 532. In one of two proffered justifications for its decision not to recognize a duty to retrofit, the court noted:

> Courts that impose a post-sale obligation to remedy or replace products already in the marketplace arrogate to themselves a power equivalent to that of requiring product recall. Product recalls, however, are properly the province of administrative agencies. Congress has recognized administrative agencies have the institutional resources to make a fully informed assessment of the marginal benefits of recalling a specific product. Because the cost of locating, recalling, and replacing mass-marketed products can be enormous and will likely be passed on to the consumer in the form of higher prices, the recall power should not be exercised without extensive consideration of its economic impact. Courts, however, are constituted to define individual cases, and their inquiries confined to the particular facts and arguments in the cases before them. Decisions [to impose the duty to retrofit, consequently] should be left to the administrative agencies which are better able to weigh the costs and benefits of such action." Id. at 534 (citing 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)).

Adding to the complexity, product lines, especially those in the evolving autonomous vehicle market, are frequently redesigned so they become safer over time. "If every improvement in product safety were to trigger a common-law duty to recall, manufacturers would face incalculable costs every time they sought to make their product safer." Modelski v. Navistar Int'l Transp. Corp., 302 Ill. App. 3d 879 (1999). This chills innovation while thwarting the objectives of Congress, the NHTSA and DOT. Gregory v. Cincinnati, 538 N.W.2d at 337 (citing Schwartz, The Post-Sale Duty to Warn, n 33) ("Attorneys who counsel manufacturers how to fulfill their

obligations and avoid liability must inform them that by developing new and safer products they may be exposed to liability for harm caused by an older product made and sold before the safety improvements were developed. This advice made a scourge the very conduct society six to Foster.").

C. The Common Law Duty to Retrofit is Preempted by Federal Law and should not be adopted by the State of Fremont in Semi-Autonomous Vehicle Strict Liability Claims.

The touchstone of federal preemption under the supremacy clause is Congressional intent. Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992). Implied obstacle preemption "preempts state law that 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of a federal law or regulation," Id. (citing Williamson v. Mazda Motor of Am., Inc., 562 U.S. 323, 330 (1941)). A federal agency may trigger implied obstacle preemption when it refuses to adopt a specific equipment standard in furtherance of a federal regulatory objective, thus deliberately leaving manufactures with equipment alternatives. Id. (citing Geier v. Am. Honda Motor Co., 529 U.S. 861, 881, 886 (2000) (state tort claims were preempted where they stood as an obstacle to the DOT's Federal Motor Vehicle Safety Standard 208 (FMVSS 208), which gave manufacturers the ability to choose from a diverse menu of passive restraint devices to best promote the development of alternative, cheaper, and safer passive restraint systems)).

1. The National Traffic and Motor Vehicle Safety Act of 1966 and National Highway Traffic Safety Administration.

Under the National Traffic and Motor Vehicle Safety Act of 1966 (the "Safety Act"), 49 U.S.C. § 30101 et seq., Congress delegated the duties to "prescribe motor vehicle safety standards" and "carry out needed safety research and development" to the National Highway Traffic Safety Administration ("NHTSA"). The NHTSA "has 'encouraged' and 'incentivized'

light-vehicle manufacturers to install automatic emergency braking ("AEB") technologies and has secured a commitment from nearly all light-vehicle manufacturers, 'representing more than 99 percent of light motor vehicle sales in the United States,' to 'voluntarily install forward crash warning and crash imminent braking' in their vehicles." Dashi, 445 P.3d 13 (Ariz. App. 2019) (citing FMVSS AEB, 8332 Fed. Reg. at 8391). The DOT and NHTSA identified two goals: (1) ensuring new technologies are developed and deployed safely, and (2) leaving room for flexibility and safety innovations." Id. at 8394.

2. The NHTSA denies rulemaking for AEB:

In denying a petition for rulemaking under 49 C.F.R. Part 552 in January 2016, which asked the NHTSA to impose regulations on AEB, NHTSA noted that its refusal to set concrete regulatory standards did not signify a lack of interest in AEB technologies, but an endorsement due to the fact that formal or informal rulemaking was not flexible or responsive enough to achieve NHTSA's AEB objectives. Given that AEB technology evolves quickly, the NHTSA noted that "formal rules and standards . . . must encourage and facilitate, rather than impede innovation, technological advancement, and introduction of successively better versions of these technologies." Id. at 8393.

3. The Common Law Duty to Retrofit would frustrate NHTSA's AEB Regulatory Objectives and would be preempted through implied obstacle preemption by the NHTSA's recent denial of proposed rulemaking.

State tort claims are preempted where they stand as an obstacle to regulatory objectives. See Geier, 529 U.S. at 881. In Dashi v. Nissan N. Am., Inc., 445 P.3d 13 Ariz. App. 2019), the court considered whether the NHTSA's refusal to set formal AEB standards in light vehicles preempts Arizona common law tort claims against Nissan for manufacturing vehicles without those safety features. The court reviewed the Safety Act's purpose, the NHTSA, and DOT's

policy documents on AEB, in addition to two key aspects of NHTSA's AEB regulations. First, the DOT maintains a bright-line position that the federal government, through the NHTSA, "remains responsible for regulating the *safety design* and *performance aspects* of motor vehicles and motor vehicle equipment; [while] States continue to be responsible for regulating the *human driver and vehicle operations*." Dashi, 445 P.3d at 14 (emphasis added) (citing U.S. Department of Transportation & National Highway Traffic Safety Administration, *Automated Driving Systems 2.0: A Vision for Safety* ('*Automated Driving Systems 2.0'*), at ii (Sept. 2017)). Second, the NHTSA's decision to set formal AEB standards for large commercial vehicles "shows the federal government will cement formal AEB standards when it deems appropriate." Dashi, 445 P.3d at 21. Answering in the affirmative, the court observed, "Dashi's claims would frustrate NHTSA's federal regulatory objectives by thrusting a jury-imposed AEB standard on Nissan inside Arizona's borders. The claims would disrupt NHTSA's careful balance, diminish its non-traditional efforts, compromise its ultimate safety goals, muzzle innovation and competition in this evolving space, and strip the federal government of leverage in the NHTSA's ongoing negotiation efforts." Id. at 22-23.

4. The NHTSA is motivated by concrete regulatory safety-related aspirations.

Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) makes clear that implied obstacle preemption is not limited to formal rules and regulations, Geier, 529 U.S. at 885, but is limited insofar as the agency actions lack concrete regulatory aspirations. See Sprietsma v. Mercury Marine, 537 U.S. 51, 67 (2002). In Sprietsma, the plaintiff sued a boat manufacturer for failing to install propeller guards, which the manufacturer moved to dismiss under implied obstacle preemption since the U.S. Coast Guard chose not regulate propeller guards. In stark contrast to Geier, the Coast Guard's judgement was based upon the belief the guards were unnecessary, and

not driven by a safety-based policy judgment. Sprietsma, 537 U.S. at 66-67. Distinguishing Geier, the Court observed that "[n]othing in the [Coast Guard's] explanation would be inconsistent with a tort verdict premised on a jury' finding that some type of propeller guard should have been installed ion this particular kind of boat." Id. at 67.

Here, the common law duty to retrofit would frustrate NHTSA's AEB Regulatory Objectives and would be preempted through implied obstacle preemption by the NHTSA's recent denial of proposed rulemaking.

CONCLUSION

This court should affirm the appellate court's decision and hold that under the Risk Utility Test, Ashpool did not show his injury was likely, nor that the reasonable alternative design was practical to implement in the Edison Marconi. Furthermore, absent statutory authority and a controlling relationship, this court should not adopt the common law duty to retrofit for a semi-autonomous vehicle strict liability claim?