No. 21-2112

In the

Supreme Court of the State of Fremont

WILLIAM ASHPOOL,

Petitioner,

v.

EDISON INCORPORATED, A FREMONT CORPORATION,

Respondent.

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

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

I. 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?

II. 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?

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Procedural History

In 2020, a jury trial was held in the matter of *Ashpool* v. *Edison* in the Hayward County District Court. (R. at 1.) On the "final day of trial, after the presentation of all the evidence, Ashpool moved for a judgement as a matter of law pursuant to Fremont Rule of Civil Procedure 50(a)." (*Id.*) "The trial court denied the motion and submitted the case to the jury for consideration." (*Id.)* The jury found respondent Edison Incorporated not liable for a defect design in their vehicle, the Marconi. (*Id.* at 7.) Petitioner Ashpool "renewed his motion [for] judgment as a matter of law pursuant to Fr.R.Civ.P. 50(b)." (*Id.*) "The trial court denied the motion." (*Id.*)

The Fremont Court of Appeals heard oral arguments on the matter on October 22, 2020. (*Id.* at 1.) On January 1, 2021, the Fremont Court of Appeals filed its decision affirming the District Court. (*Id.*)

The Supreme Court of the State of Fremont entered an order granting certiorari. (*Id.* at 20.) Two questions are set to be briefed and argued by the parties. (*Id.*) Those questions are listed below.

I. 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?

II. 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?

Statement of Facts

A. The Bear

In late 2019, petitioner William Ashpool was reveling in his one-month-old Edison Marconi as he cruised down Fremont's open roads. (R. at 4.) However, the Marconi's new car

smell was quickly overshadowed by the pain that shot through Ashpool's body as his Marconi smashed into a brown bear seated in the middle of the road. (*Id*.) The injuries Ashpool suffered—a dislocated shoulder, five broken ribs, a broken wrist, a concussion, and whiplash—caused him to spend two and a half weeks hospitalized. (*Id*.) And as for his brand-new Marconi? Totaled. (*Id.*) Fortunately for the bear, an Edison Marconi traveling at 42 miles-per-hour is no match. The bear walked away unscathed. (*Id.*)

B. The Lawsuit

Not long after his release from the hospital, Ashpool filed a lawsuit against Edison Incorporated—the Marconi's manufacturer. (*Id.*) Ashpool's suit was based on a claim that the Marconi's Autodrive sensors were improperly designed. (*Id.*) Ashpool claimed that those improperly designed Autodrive sensors "failed to register the brown bear and alert him to remaneuver or stop the vehicle." (*Id.*) At trial, Ashpool introduced evidence that during the two years preceding his accident, a dozen similar accidents occurred when the Marconi's Autodrive sensors malfunctioned and failed to alert the drivers of stationary objects while their cars traveled above 35 miles-per-hour. (*Id.* at 5-6.)

C. The Marconi's Autodrive Feature

Autodrive is a feature Edison hoped would propel it to the top of the "highly competitive economy sedan market . . . ." (*Id.* at 2.) Up until 2014, Edison was known for their "luxury and sport electric vehicles . . . ." (*Id.*) But in 2017—despite Edison's market analysis which indicated economy consumers prefer safety features over "cutting-edge technology"— Edison rolled out the Marconi, fully-equipped with their state-of-the-art Autodrive feature. (*Id.*)

Autodrive provides a "semi-autonomous driving experience" wherein an internal computer autonomously drives the Marconi as long as the driver has both hands on the steering wheel. (*Id.*)

To do this, twelve sensors transmit information to the Marconi's internal computer, including, among other things, road conditions, weather conditions, surrounding vehicles' movements, and stationary objects in the roadway. (*Id.* at 2-3.) The internal computer is designed to processes that information "like a human driver would—the vehicle stops, accelerates, changes gears, and maneuvers without input from the driver." (*Id.* at 2.) Or, as more simply stated by Edison's salesperson to Ashpool, Autodrive allows the driver to "input a GPA location . . . and enjoy the ride, with no further action required." (*Id.* at 4.)

If for any reason the driver wants to deactivate the state-of-the-art Autodrive feature, they can do so by touching a button on the center console whenever "the vehicle is stopped or placed in park." (*Id.* at 2-3.) Or the driver can simply leave Autodrive enabled and override it by steering the vehicle as they please with both hands on the wheel. (*Id.* at 3.) And while a new Marconi comes with a manual emphasizing "the importance of attentive driving and keeping one's hands on the steering wheel at all times" (*Id.* at 3), Edison's salespeople pitch the Marconi as a self-driving, do it all vehicle (*Id.* at 4.)

D. Edison's Continuous Updates

Unlike most vehicles, the Marconi's highly computerized nature allows Edison to continually send software updates as "technology advances and new concepts are discovered." (*Id.* at 3.) Once new software is developed, Edison sends a notification to the Marconi's computer. (*Id.*) The next time the owner enters the Marconi, they see the notification (*Id.*) on the 11-inch screen on their dashboard (*Id.* at 2.) Until the driver installs that update, the notification continues to be displayed on the dashboard monitor upon startup. (*Id.* at 3.) "Most of these updates are for safety purposes[.] (*Id.*) Though occasionally a purely cosmetic update may be developed. (*Id.*) Edison's goal with this software update model is to maintain the "highest of safety standards,

without having to make entirely new vehicles." (*Id.*) Unfortunately for Ashpool, Edison refused to implement one safety update that would have improved the performance of the Autodrive's sensors, and likely prevented Ashpool's accident. (*Id.* at 7.)

E. The Jury Trial

At trial, both Ashpool and Edison "presented evidence regarding the Marconi's Autodrive features." (*Id.* at 4.) Ashpool established that prior to the Marconi's release, "Edison performed numerous crash and safety tests as required by the National Highway Traffic Safety Administration." (*Id.*) Likewise, it was shown that hundreds of Edison's tests were specifically aimed at testing the Marconi's Autodrive sensors. (*Id.*) Edison's "goal was to ensure that if the vehicle were in Autodrive, the vehicle would recognize potential obstacles and adjust accordingly." (*Id.* at 4-5.) Edison wanted to "advanc[e] the goal of minimal driver input." (Id. at 5.)

Edison's tests were enlightening. "Edison learned that the sensors had difficulty identifying stationary objects when the vehicle was driving above 35 mph." (*Id.*) And Ashpool's expert testimony established that while the Marconi's sensors helped prevent "lane drifting or unsafe lane changes[,]" the Marconi's "accident rate was 13% higher when the vehicle was going over 35 mph and a stationary object was present in the vehicle's path." (*Id.*) During his testimony, Edison's CEO, Errol Reeve, conceded that Edison initially intended to include "extra sensors and proprietary sensor technology that would have assessed stationary objects at higher speeds . . . ." (*Id.*) But Edison chose not to include them "due to feasibility and cost concerns." (*Id.*) More specifically, Edison balked at the thought of installing the additional safety sensors once they learned they would "increase the cost of the vehicle to consumers by at least $5,000 which would

push the vehicle outside the economy range of sedans." (*Id.*) So, Edison decided they would only include the "additional sensors in future models of its luxury and sports vehicles." (*Id.*)

After presenting that evidence, Ashpool argued that "the lack of additional sensors rendered the vehicle unsafe." (*Id.*) Ashpool explained that "if Edison wanted to include a semi-autonomous driving feature, which drivers are unaccustomed to, Edison should not have cut costs on safety features." (*Id.*) Mr. Reeve rebutted, testifying that "the vehicle was safe despite this issue because even a moderately attentive driver would avoid the objects if they still had their hands on the wheel and eyes on the road." (*Id.*) But Reeve then also proceeded to admit that "he felt uncomfortable passing along the expense of the extra sensors to the consumer because the price of that technology remained high." (*Id.*) After all, that price increase might push the Marconi out of the economy sedan market. (*Id.* at 5.)

Following an objection from Edison, the trial court permitted Ashpool to introduce evidence that during the two years immediately preceding his accident, the Marconi had been involved in a dozen similar accidents when the Marconi's faulty sensors failed to identify a stationary object while traveling above 35 miles-per-hour. (*Id.* 5-6.) Ashpool put forth "evidence that Mr. Reeve knew about these incidents and the 13% increase in the accident rate during the production of the Marconi." (*Id.* at 6.) In response, Mr. Reeve resorted to his argument that despite a driver's ability to "input a GPS location . . . and enjoy the ride, with no further action required[]" (*Id.* at 4) in the Marconi, "the previous crashes were most likely the fault of the drivers because anyone should be able to see a stationary object in the road and avoid it, even if the vehicle is in Autodrive." (*Id.* at 6.)

Prior to the trial's conclusion, the trial court "asked both parties to submit proposed jury instructions." (*Id.*) "Ashpool's jury instructions included a duty to retrofit." (*Id.*) His instructions read:

> A manufacturer has a duty to take such measures that are reasonably necessary to protect the public from foreseeable harm after a product has been manufactured and sold. If a manufacturer knows of or later becomes aware of the fact that the design of a product causes unnecessary risk of serious injury to the product driver or to the public, the manufacturer must take such reasonable steps under the circumstances that will lessen or prevent the risk of injury.

(*Id.*)

Edison objected to Ashpool's instructions, arguing that "Fremont does not recognize a common law duty to retrofit." (*Id.*) The trial court sustained Edison's objection despite Ashpool's assurances that he "planned to introduce evidence that Edison knew the sensors were failing" and causing accidents, but still "refused to fix the problem." (*Id.*) Ashpool intended to show that following the release of the Marconi, Edison learned that they "could have created a new update to the sensors[,]" sent it to the Marconis' computers, and eliminated the sensors' stationary object detection defect. (*Id.* at 6-7.) But because of the trial court's decision to sustain Edison's objection, Ashpool could only present evidence related "to his allegation that the sensors were defective before they left the manufacturer and Edison was liable for fixing them." (*Id.* at 7.)

As a result, the jury applied Ashpool's stifled evidence to the risk-utility analysis adopted by Fremont. (*Id.*) They "returned a verdict for Edison, finding that there was no defect in the design of the product and that the sensors did not cause Ashpool to crash." (*Id.*)

SUMMARY OF THE ARGUMENT

I. Edison is liable for the Marconi sensors' design defect because Ashpool presented sufficient evidence to show that overall, the risks of the Marconi's original design far outweighed its potential and existing benefits and utilities.

The first two risk-utility factors weigh in Ashpool's favor because Ashpool established that Edison did or should have foreseen the likelihood of the Marconi causing Ashpool severe injuries. To make that showing, Ashpool presented evidence at trial that Edison performed extensive testing on the Marconi prior to its release. Through those tests—many of which focused on just the sensors themselves—Edison was made aware that the Marconi's sensors were defective and had difficulty identifying stationary objects when the vehicle exceeded 35 miles-per-hour. Ashpool also introduced evidence of a dozen other similar accidents caused by the Marconi's failure to detect stationary objects in the road while traveling above 35 miles-per-hour.

The third and fourth risk-utility factors also weigh in Ashpool's favor because there was a reasonable and practicable alternative design available for the Marconi. To demonstrate that, Ashpool introduced evidence at trial that Edison knew additional sensors would reduce the likelihood of accidents that occur because of stationary objects. He also established that Edison even considered implementing these additional sensors, but ultimately chose not to for fear that the increased cost would push the Marconi out of the economy sedan market.

Finally, the fifth and sixth risk-utility factors weigh in Ashpool's favor because the reasonable and practicable alternative design (additional sensors) would have reduced the foreseeable risk of harm posed to Ashpool and other consumers. And Edison's decision to omit the additional sensors rendered the Marconi unreasonably dangerous. To make that showing, Ashpool established that: (1) it was foreseeable the Marconi would likely cause Ashpool severe

injuries; (2) the Marconi's operating manual was inadequate; (3) that consumers, like Ashpool, had high safety expectations with regard to the Marconi; and (4) the relative advantages of the Marconi with the additional sensors far outweigh any perceived disadvantages.

II. The duty to retrofit should be adopted in certain strict liability design defect claims. And the district court's refusal to give Ashpool's jury instructions was not harmless error.

The duty to retrofit should be adopted in certain circumstances because while a duty to retrofit and a duty to warn stem from similar policy concerns, there are circumstances where the costs of warning rather than retrofitting are too great. The Edison Marconi is one of those circumstances. Every time a driver gets behind the wheel of a Marconi, their life is at risk because of the Autodrive's stationary object sensors. In circumstances where the manufacturer is aware of the life implicating risks, and they have a continuing relationship and ability to remedy the dangerous product, a duty to retrofit is the proper solution. As established at trial, Edison knew of the life implicating risks related to the Marconi. And because of the computerized nature of the Marconi, Edison had the ability to retrofit the vehicle and eliminate those risks.

Therefore, the district court's refusal to allow Ashpool's jury instruction regarding a duty to retrofit was not harmless error. And the case should be remanded.

ARGUMENT

I. Edison is Liable for the Marconi's Design Defect because Edison Foresaw the Likelihood of Severe Risks Posed by Its Design, Yet Failed to Adopt a Practicable and Reasonable Alternative Design to Eliminate those Risks.

Fremont's Rule of Liability states that "[o]ne who sells any product in a defective condition unreasonably dangerous to the driver or consumer" is subject to liability if two additional conditions are satisfied. Fremont Rev. Code § 5552.321. Under the risk-utility test, a product is deemed defective and thus unreasonably dangerous to a consumer if evidence shows that its inherent risks outweigh its potential utility to the consumer. *Calles v. Scripto-Tokai. Corp.,* 224 Ill. 2d 247, 255 (Ill. 2007). Here, the lower court used six balancing factors as articulated in *Peck v. Bridgeport Machs., Inc.*, 237 F.3d 614, 617 (6th Cir. 2001) to hold that Edison satisfied the risk-utility test and thus was not liable for the Marconi's alleged design defect. (R. at 9-12.) However, an analysis of these six balancing factors shows that the Marconi did not satisfy the risk-utility test. Thus, Edison should be held liable for manufacturing and selling the Marconi in an unreasonably dangerous and defective condition.

A. While Ashpool's Expert's Testimony Established that Edison's Decision to Forego Installing Stationary Object Sensors was Likely the Cause of the Accident, the Marconi's Autodrive Feature Still Must Undergo the Risk-Utility Test.

A person or company who manufactures and sells their product in a defective condition that is unreasonably dangerous to the consumer is liable for any physical harm caused if they are "engaged in the business of selling such a product" and the manufactured product "reach[es] the consumer without substantial change[s]." Fremont Rev. Code § 5552.321. As noted in the lower court's opinion, the only matter left to settle is whether Edison's Marconi was defective in an unreasonably dangerous condition when it was sold to Ashpool. (R. at 8.)

In a product liability cause of action, the central question is the safety and quality of the product that is alleged to be defective and unreasonably dangerous. *Pitts v. Genie Industries, Inc.*, 302 Neb. 88, 99 (Neb. 2019). " 'Unreasonably dangerous' means that the product has a propensity for causing physical harm beyond that which could be contemplated by the ordinary user or consumer." *Id.* (internal citation omitted). In *Genie Industries*, a plaintiff-electrician was injured when he fell 30 feet off a lift manufactured by the defendant. *Id.* at 91. He subsequently brought several actions against the defendant. *Id.*

Plaintiff's design defect claim accused the defendant of manufacturing its lift in a defective manner that was unreasonably dangerous to the operator. *Id.* Plaintiff relied on an expert witness who testified as to the possible causes for the lift malfunctioning. *Id.* at 101-02. But that expert failed to specifically identify what likely caused the accident. *Id.* Affirming the trial court's decision to exclude this expert witness' testimony, the Nebraska Supreme Court held that "expert testimony 'based upon possibility or speculation is insufficient [to establish causation]; it must be stated as being at least probable, [or] in other words, more likely than not.'" *Id.* at 105 (internal citation and quotation marks omitted). The court reasoned that because plaintiff's expert witness had stated "that one of six or more possibilities could have been the cause of the accident[,]" his testimony was too speculative to identify any "unreasonably dangerous" element of the lift's design. *Id.* at 104-06.

Unlike in *Genie Industries*, the facts related to Edison's Marconi show that there were no issues regarding the possible causes of the Marconi's malfunction that led to Ashpool's injuries. During the Marconi's infancy, Edison conducted extensive internal testing. (R. at 4-5.) Edison knew that the vehicle's Autodrive feature resulted in a 13% higher accident rate when the vehicle was "driving above 35 mph and a stationary object was present in the vehicle's path." (R. at 5.)

Edison also conceded that including stationary object sensors on the Marconi would have likely eliminated the dangers caused by stationary objects. (*Id.)* But unfortunately for Ashpool and at least twelve other consumers, Edison chose not to include the additional stationary object sensors because they would cost an additional $5,000. (*Id.* at 5-6.) In other words, Ashpool's expert's testimony establishing causation between the Marconi's 13% higher stationary object accident rate with Edison's decision to forego the stationary object sensors is "at least probable, [or] in other words, more likely than not." *Genie Industries,* 302 Neb. at 105.

Although Ashpool's accident was caused by Edison's decision not to install the stationary object sensors, that alone does not automatically deem the vehicle defective in an unreasonably dangerous condition. As noted by the lower court, jurisdictions across the country have adopted two different tests to determine if a product is unreasonably dangerous: the consumer expectations test and the risk-utility test. (R. at 9.) But the trend has been to favor the risk-utility test over the consumer expectations test because the risk-utility test tends to result in a more objective view of the product, any alleged defects, and the manufacturer's conduct than does the consumer expectations test. (*Id.*) Indeed, the Seventh Circuit has even declared, "[w]here the two tests yield conflicting results . . . the risk-utility test 'trumps,' and the product is deemed not unreasonably dangerous (notwithstanding consumers' expectations that the product would be safer)." *Ferraro v. Hewlett-Packard Co.,* 721 F.3d 842, 848 (7th Cir. 2013) (internal citation omitted).

Under the risk-utility test, a product in a design defect case is deemed to be defective in an unreasonably dangerous condition if "the magnitude of the danger outweighs the utility of the product." *Calles,* 224 Ill. 2d at 259 (internal citation omitted). In other words, a product's potential risks of harm must be weighed against its potential and existing benefits and utilities. *Id.* If its potential risks outweigh the sum of its potential and existing benefits and utilities, the product is

unreasonably dangerous. *Id.* This shows that a product is not necessarily unreasonably dangerous just because it could or even might have been the cause of a consumer's injury. In fact, a product could directly cause a person's injury but still be deemed not unreasonably dangerous if overall, its benefits and utilities outweigh its risks of harm. *Id.* Thus, the crux of the risk-utility test is weighing the product's risks and dangers versus its benefits and utilities. Therefore, to establish Edison's liability for designing the Marconi in a defective way that made it unreasonably dangerous to Ashpool, the Marconi's Autodrive feature must undergo the risk-utility test.

B. The Marconi Fails the Risk-Utility Test because the Six Risk-Utility Balancing Factors Weigh in Ashpool's Favor.

The risk-utility test requires balancing six factors identified by various courts. *Peck,* 237 F.3d at 617-18. Although different courts use slightly different variations of these factors, their substance remains intact. *Id.* In *Peck*, the plaintiff was injured while working on the defendant's lathe. *Id.* at 616. Plaintiff brought a design defect claim alleging that the lathe was defective in an unreasonably dangerous condition. *Id.* at 616. Affirming the district court's grant of summary judgment for the defendant, the Sixth Circuit held that the plaintiff failed to establish that the lathe was unreasonably dangerous under the risk-utility test. *Id.* at 618. In the process, the *Peck* court used six factors to weigh the alleged risks of the lathe against its utilities to decide whether the product was defective in an unreasonably dangerous condition. *Id.* at 617-18.

i. The 1st and 2nd Risk-Utility Factors Weigh in Ashpool's Favor because the Likelihood and Severity of Ashpool's Injuries were Foreseeable to Edison when Edison Distributed the Marconi to Consumers.

The first *Peck* factor asks whether the severity of the resulting injury was foreseeable by the manufacturer. *Id.* at 617. The second *Peck* factor asks whether the likelihood of the injury was foreseeable at the time of distribution of the product. *Id.* In *Peck*, the Sixth Circuit held that the plaintiff failed to establish the first two factors because he was unable to show the "magnitude of

the risks involved." *Id.* at 618 (internal citation and quotation marks omitted). The plaintiff's expert testified that "he had never heard of similar accidents occurring with lathes and did not know the probability of a similar accident happening." *Id.* In effect, the plaintiff's own expert admitted that because there was no record of similar injuries occurring with lathes, it was not foreseeable to the manufacturer that the injury in question would be severe or would even happen in the first place.

In *Hollister v. Dayton Hudson Corp.*, the plaintiff was injured when the shirt she was wearing burst into flames after it touched an electric burner on her apartment stove. *Hollister v. Dayton Hudson Corp.*, 201 F.3d 731, 733 (6th Cir. 2000). The plaintiff claimed the shirt manufacturer was liable for two reasons. *Id.* First, the shirt's design rendered it unreasonably dangerous. *Id.* Second, the shirt failed to carry a warning regarding its flammability. *Id.* Contrary to the district court's judgment, the Sixth Circuit held that both the likelihood and the severity of the plaintiff's injuries could have been foreseen by the manufacturer. *Id.* at 739-40. The plaintiff introduced evidence that showed "kitchen ranges are a common source of ignition in accidents involving burning apparel" as well as evidence of "statistics showing the number of injuries, by age group, that result from shirts' [sic] igniting on stove tops." *Id.* at 739. The plaintiff also introduced evidence that showed "[o]ver one third of all clothing-related burn victims were hospitalized. This fact becomes dramatic when compared to the 4 percent hospitalization rate for all consumer product-related injuries . . . and the 8 percent reported for all burn injuries." *Id.* (internal quotation marks omitted). The court concluded that the existence of that information in the public domain should have caused the manufacturer to foresee the likelihood and the severity of plaintiff's injuries. *Id.* at 740.

In the case at bar, Ashpool has shown that Edison foresaw, or should have foreseen the likelihood of Ashpool being severely injured by a stationary object while driving the Marconi.

First, Ashpool demonstrated that "Edison performed numerous crash and safety tests as required by the National Highway Traffic Safety Administration . . . ." (R. at 4.) Next, Ashpool demonstrated that Edison "performed hundreds of tests with particular focus on the sensors placed around the vehicle." (*Id.*) Furthermore, "[a]s a result of these tests, Edison learned that the sensors had difficulty identifying stationary objects when the vehicle was driving above 35 mph." (*Id.* at 5.) Not to mention the fact that additional evidence was introduced at trial showing that in the two years immediately preceding Ashpool's accident, the Marconi was involved in approximately a dozen accidents with stationary objects while the vehicle was moving over 35 miles per hour. (*Id.* at 5-6.)

Despite all those showings, the Court concluded that the statistic showing a 13% higher accident rate when the Marconi is moving above thirty-five mph and a stationary object is placed in its path was "the kind of hindsight expert analysis and post-distribution events that were not reasonably attainable to Edison when the Marconi went to market." (*Id.* at 10) (internal citation and quotation marks omitted). However, as noted by the district court above, Edison performed extensive testing of the Marconi and its sensor technology during its research and development. (Id. at 5-6). Plus, the Marconi was involved in a dozen accidents involving stationary objects within the two years preceding Ashpool's accident. (*Id.*) Therefore, Edison was fully aware "that the sensors had difficulty identifying stationary objects when the vehicle was driving above 35 mph." (*Id.* at 5.) Edison cannot plausibly claim that it did not foresee the likelihood of injury to Ashpool when both its own extensive internal testing and consumer usage revealed defects with the Marconi's Autodrive technology.

Even without that information however, there can be no doubt that Edison should have foreseen the likelihood of the Marconi's defective sensors causing injuries to consumers. Because

of the very nature of the product involved in this case, Edison should have foreseen that automobile accidents involving the Marconi would inevitably occur. But even more so than the typical dealer, Edison should have foreseen that faulty Autodrive sensors on a vehicle—one of the first of its kind—advertised to drive itself would lead to accidents involving the Marconi. And as a result, Edison should have foreseen the likelihood of the Marconi severely injuring its occupants and/or the public.

Because Edison was or should have been aware of the likelihood and potential severity of injuries caused by the Marconi's design defect, the first and second risk-utility factors weigh in Ashpool's favor.

ii. The 3rd and 4th Risk-Utility Factors Weigh in Ashpool's Favor because a Reasonable and Practicable Alternative Design was Available.

The third *Peck* factor asks whether there was a reasonable alternative design available. *Peck*, 237 F.3d at 617. The fourth *Peck* factor asks whether that alternative design was practicable. *Id.* In *Peck*, experts testified that a safer alternative design to the lathe in question *could* have been devised, but the consensus was that such an alternative design had never been made or seen; so nobody was sure whether it was feasible, much less practicable. *Id.* at 618 (emphasis added). The *Peck* court stated, "an expert who testifies that a product *could* have been designed differently, but who has never made or seen the alternative design he proposes, and therefore has no idea of its feasibility, utility, or cost, *does not* make out a prima facie case that a reasonable, practicable, and available alternative design was available." *Id.* (emphases added).

In *Hollister*, the plaintiff offered plentiful evidence showing that the fabric of the shirt in question was significantly more flammable than other fabrics on the market. *Hollister*, 201 F.3d at 738. However, the plaintiff "presented no evidence . . . as to the availability of alternative fabrics when the shirt was manufactured, the cost of manufacturing the shirt with such fabrics, or the effect

of a fabric change upon the wearability, durability, or appearance of the fabric." *Id.* In other words, the plaintiff did not present or even propose an alternative design to the shirt in question. Thus, the court was unable to decide whether the original shirt design was or was not unreasonably dangerous.

Unlike the plaintiffs in *Peck* and *Hollister*, the plaintiff in *Yamaha* successfully proposed a reasonable alternative design in a suit against a manufacturer of golf cars after she was thrown from a golf car designed and manufactured by the manufacturer-defendant. *Lynn ex rel. Lynn v. Yamaha Golf-Car Co.*, 894 F.Supp.2d 606, 629 (W.D. Pa. 2012). The plaintiff specifically alleged that the defective design of the hip restraint made the car unreasonably dangerous to passengers. *Id.* at 615. Under the risk-utility test, the court concluded that there was enough evidence for "a jury to conclude that a reasonable alternative design was available—in other words, technologically feasible and economically practical—at the time of sale and would have prevented the risk of passenger ejection . . . ." *Id.* at 629.

The *Yamaha* court's reasoning delineated between cases that require a showing of a reasonable alternative design, and cases that do not. *Id.* at 630. They explained that evidence of the existence and practicability of an alternative design is not required "in cases where the feasibility of a reasonable alternative design is *obvious and understandable* to laypersons to support a finding that the product *should have been designed differently and more safely*." *Id.* (emphases added). Therefore, if a product's alternative design is technologically feasible, economically practical, and its features result in obviously increased safety, then that design should have been adopted instead of the original product.

In Ashpool's case, it is undisputed that a safer alternative design for the Marconi—additional and/or improved sensors—would have reduced the 13% collision chance and made the

vehicle safer. (R. at 11.) It is also known that this alternative design was available and technologically feasible because "the company originally planned to include extra sensors and proprietary sensor technology that would have assessed stationary objects at higher speeds . . . ." (*Id.* at 5.) Because it was "obvious and understandable" to include the additional sensors to reduce the collision rate and make the vehicle safer, the Marconi "should have been designed differently and more safely. . ." with the additional sensors. *Yamaha*, 894 F.Supp.2d at 630.

The only question remaining as to whether the Marconi's alternative design with the additional sensors was practicable is its cost concerns. As noted above, the *Yamaha* court included economic feasibility as one of the factors to consider in deciding whether an alternative design is practicable or not. *Id.* at 629. Here, it has been established that Edison decided not to include the extra sensors and sensor technology because "installing the additional equipment would increase the cost of the vehicle to consumers by at least $5,000 which would push the vehicle outside the economy range of sedans." (R. at 5.) Furthermore, Edison's CEO Errol Reeve testified that "he felt uncomfortable passing along the expense of the extra sensors to the consumer because the price of that technology remained high." *Id.*

Despite Mr. Reeve's "discomfort," (*Id.*) there are several reasons it was economically practicable to include the additional sensors on the Marconi despite the $5,000 increased costs.

First, it was unreasonable for Edison to try to fit the Marconi—with its state-of-the-art Autodrive semi-autonomous driving technology—into the economy sedan market. A quick look at the auto industry shows that most cars in the economy sedan market, such as the Nissan Sentra, Hyundai Elantra, Toyota Corolla, and Volkswagen Jetta, start at around $20,000 MSRP. Alexander Stoklosa, *The 10 Cheapest Sedans You Can Buy for 2021*, MOTORTREND (Dec. 30, 2020), https://www.motortrend.com/features-collections/cheapest-new-sedans/. By modern standards,

these sedans are the basic automobiles of this generation. The proverbial car that "safely gets you from point A to point B" without significant luxury features or advanced technology. Edison's decision to propel the Marconi into the basic economy sedan market after equipping it with the highly advanced and expensive Autodrive technology was unwise at best, and irresponsibly reckless at worst.

Second, if Edison truly felt it was necessary to categorize the Marconi as an economy sedan, then it should still have included the extra $5,000 worth of stationary object sensors for safety reasons. If doing so pushed the car out of the economy market, then it should have simply eliminated or cut back on other features of the Marconi that were not integral to its safety. It is redundant and unnecessary to state the inherent dangers of driving and the ubiquity of car accidents in today's world. Nor is it necessary to state why those dangers have made safety and safety features of automobiles paramount to the public—especially the economy sedan market. If $5,000 worth of extra sensors was too expensive, Edison should have removed other non-safety features from the Marconi to make room in the price sheet for the necessary safety features. In sum, the Marconi's alternative design with additional sensors was economically feasible. And overall, the Marconi's safer alternative design was both reasonably available and practicable for Edison to adopt. Therefore, the third and fourth risk-utility factors also weigh in Ashpool's favor.

iii. The 5th and 6th Risk-Utility Factors Weigh in Ashpool's Favor because the Reasonable and Safer Alternative Design Would Have Reduced the Marconi's Foreseeable Risk of Harm. And Ignoring that Design Rendered the Marconi Unreasonably Dangerous.

The fifth *Peck* factor asks whether "the available and practicable reasonable alternative design would have reduced the foreseeable risk of harm posed by defendant's product." *Peck*, 237 F.3d at 617. The sixth *Peck* factor asks whether the "omission of the available and practicable reasonable alternative design" resulted in an unreasonably dangerous product. *Id.*

In *Yamaha*, the court held that the alternative design of the golf car with a different hip restraint would have reduced the risk of injuries. *Yamaha*, 894 F.Supp.2d at 631. They continued, stating, the "omission of this different hip restraint made the original golf car unsafe." *Id.* In reaching this conclusion, the *Yamaha* court considered four factors:

> (1) The magnitude and probability of the foreseeable risks of harm; (2) the instructions or warnings accompanying the product; (3) the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing; and (4) the relative advantages and disadvantages of the product as designed compared to as it alternatively could have been designed."

Id. (internal citation omitted).

In holding that all four factors were satisfied, the *Yamaha* court reasoned that the alternative design of the golf car was reasonable and the omission of that design rendered the original golf car unreasonably dangerous. *Id.* at 632.

In Ashpool's case, analyzing the four *Yamaha* factors shows that including the additional stationary object sensors on the Marconi would have reduced or eliminated the risk of harm that befell Ashpool. And for several reasons, Edison's decision to omit the additional sensors made the Marconi unreasonably dangerous.

First, it has already been established above that it was foreseeable that the Marconi would likely cause Ashpool's severe injuries. *See supra* Part B.i. Second, the manual provided with the purchase of a Marconi is inadequate. The Marconi's manual,

> emphasizes the importance of attentive driving and keeping one's hands on the steering wheel at all times. . . [and] further advises the driver that if he removes his hands from the steering wheel, a flashing light will appear on the dashboard, telling the driver to place his hands back on the steering wheel.

(R. at 3.)

However, there is no evidence that the manual carries explicit warnings about foreseeable risks of a crash, serious bodily injury, or death when Autodrive is on and the car is going above 35

mph with a stationary object in its path. (*See Id.* 1-18.) The manual merely states the "importance of attentive driving and keeping one's hands on the steering wheel at all times . . . ." (*Id.* at 3.) There is no apparent mention of serious crashes or injuries that could occur under certain conditions, such as those involving the use of Autodrive, stationary objects, and speeds over 35 miles per hour. Thus, the Marconi's manual of instructions and warnings was clearly inadequate.

Third, it is reasonable and more likely than not to conclude that consumers had high safety expectations regarding the Marconi and its Autodrive technology. Autonomous and semi-autonomous driving features are highly advanced modern technologies that are currently being developed and refined by major corporations. As such, they are constantly mentioned in the media. *Automated Vehicles for Safety*, NHTSA (last visited Jan. 28, 2021), https://www.nhtsa.gov/technology-innovation/automated-vehicles. As Ashpool noted during trial, a semi-autonomous driving feature is a technology "which drivers are unaccustomed to . . . ." (R. at 5.) Thus, its inclusion in an automobile would warrant the highest standards of safety. (*Id.*) Additionally, Edison's own market analysis prior to releasing the Marconi showed the economy sedan market cares more about safety than "cutting-edge" technology. (*Id.* at 2.)

When people are not familiar with an inherently dangerous consumer technology because it is so new, it is paramount that a seller include the most stringent safety features—if for no other reason—because people are not accustomed to the technology. One could argue that a product or technology that has become commonplace in society could forego including the strictest safety features because a manufacturer can expect that a reasonable and prudent person would know how to use it safely. However, with a technology as new as Autodrive, it would be unreasonable to expect that consumers would be familiar enough with it to use it safely or prudently.

Mr. Reeve testified that the Marconi was safe because "even a moderately attentive driver would avoid the objects if they still had their hands on the wheel and eyes on the road . . . ." (*Id*.) And the lower court noted that "Autodrive was no substitute for an attentive human driver, and it would be contrary to public policy to hold the company liable for the shortcomings of a safety innovation." (*Id.* at 5, 12.) However, Mr. Reeve and the lower court failed to realize that with a technology as novel as Autodrive, consumers would expect autonomous or semi-autonomous driving to mean exactly what it describes—a driverless, autonomous, or semi-autonomous driving experience. And at the least, they would expect to be safer in moments of decreased attention than in other non-autonomous vehicles. Autodrive technology, like that in the Marconi, lulls a reasonable and prudent driver into an expectation that the vehicle will be autonomous or at least semi-autonomous and safer in moments of decreased attention. And as such, it would be against public policy to hold consumers liable for expecting the vehicle to do what it is advertised to do and blame him for the technology's shortcomings.

Finally, the relative advantage of Marconi with the additional stationary object sensors far outweighs any perceived disadvantage. The obvious advantage of the alternate Marconi with all the necessary sensors is its greatly increased safety. With the extra sensors, the 13% collision rate would have been reduced or eliminated completely. And Ashpool likely would not have suffered the crash that caused him devastating injuries. The disadvantage would have been the increased cost of around $5,000. (*Id.* at 5.) However, as argued above, Edison had numerous ways to avoid this trouble. Such solutions include, but are not limited to, refusing to categorize the Marconi in the economy sedan market, and removing non-safety related features from the car to make room in the price sheet for the additional sensors. The advantage of the lower cost of the original Marconi

is far outweighed by the advantage of increased safety provided by the alternately designed Marconi with the additional, but necessary sensors.

In sum, after using the *Yamaha* factors to weigh *Peck's* fifth and sixth factors, the additional sensors on Marconi would have reduced the foreseeable risk of severe harm to Ashpool. Excluding them made the vehicle unreasonably dangerous. And for those reasons, the fifth and sixth risk-utility factors also weigh in Ashpool's favor.

C. Conclusion

The risk-utility test shows that the original Marconi's risks far outweighed its utilities. Thus, Edison's Marconi fails the test. And such a failure means that the Marconi was in a defective condition that was unreasonably dangerous to consumers like Ashpool at the time it was distributed. And since Edison foresaw or should have foreseen the likelihood and severity of the risks posed by the Marconi; and could have practicably adopted a reasonably safe alternative design for its car, Edison should be held liable for the Marconi's design defect.

II. The Appellate Court's Holding that the Duty to Retrofit Should be Adopted in Limited Circumstances Should be Affirmed because a Warning Would be Insufficient Since Human Lives were at Risk.

The Appellate Court's holding that a duty to retrofit should be adopted in limited circumstances should be affirmed because the Marconi continuously puts human lives at risk. And as such, a mere warning would be insufficient to mitigate and eliminate that risk.

A. A Duty to Retrofit and a Duty to Warn Originate from Similar Policy Concerns and Share Similar Theories of Liability.

In design defect claims, most jurisdictions recognize a post-sale duty to warn. Fremont follows that majoritarian rule. "The State of Fremont has clearly recognized the post-sale duty to warn." (R. at 14) (*quoting Shane v. Smith,* 657 XE 720, 725 (Fremont 1989)). The purpose behind the imposition of such a duty is to protect the safety of customers. (R. at 14.)

A post-manufacture duty to warn exists regardless of whether the alleged defect in the product is known at the time of manufacture. *See, e.g., Gracyalny v. Westinghouse Elec. Corp.*, 723 F.2d 1311, 1318 (7th Cir. 1983) (holding manufacturer's duty to warn extends to dangers that arise after marketing); *LaBelle v. McCauley Indus. Corp.*, 649 F.2d 46, 49 (1st Cir. 1981) (holding manufacturer's duty to warn extends to purchaser even if defects are discovered after initial sale); *Chrysler Corp. v. Batten,* 264 Ga. 723, 450 S.E.2d 208, 211-13 (Ga. 1994) (holding duty to warn arises whenever the manufacturer knows or reasonably should know of danger arising from product's use). Often independent of any underlying design defect allegation, a duty to warn is created upon the recognition that the duties a manufacturer owes to consumers do not necessarily end when the product leaves their control.

Similarly, a duty to retrofit is concerned with the duties and behaviors owed by a manufacturer after the product has been sold. When evaluating liability on a theory of a duty to retrofit, courts are not concerned with whether the manufacturer knew of the defect at the time of manufacture. Rather, the duty extends to post-sale defects and corresponding duties that may arise. Additionally, whether the defect itself existed while the manufacturer had control of the product may be of little consequence. *See Hernandez v. Badger Const. Equip. Co.*, 28 Cal. App. 4th 1791, 1828-29 (1994); *but see also Ostendorf v. Clark Equip. Co., 122 S.W.3d 530, 533-34 (Ky. 2003)* (holding a duty to retrofit is redundant of existing negligence and product liability doctrines).

Most courts do not recognize the duty to retrofit. "There is no duty to retrofit a product not defective when sold." *Ostendorf*, 122 S.W.3d. at 534. "There is no need to create an additional duty to retrofit where "traditional principles of negligence and strict products liability suffice." *Id*. In the instant case, this argument was adopted by the dissenting opinion. "The current body of law

is sufficient to cover any negligence or liability of manufacturers through clearly established theories, such as a failure to warn claim." (R. at 18) (Irish, J, dissenting).

If most courts have adopted a duty to warn, and a duty to warn and a duty to retrofit are both inquiries into post-sale/manufacture duties, the most obvious argument against adoption of a duty to retrofit is based on concerns over costs. Certainly, the costs imposed on a manufacturer to retrofit their products are not insubstantial. And they should not be unlimited. Indeed, adoption of a duty to retrofit ought not be hasty, and should be subject to constraints. "We agree that the duty to retrofit should not be unlimited." (*Id.* at 15.) However, not requiring a manufacturer to retrofit a potentially unsafe product has its own costs—including human safety. Thus, all burdens on manufacturers should be weighed against the safety of the product and the potential cost of not mandating a duty.

Further, there are no allegations in the instant case regarding Edison's warnings or lack thereof regarding either the Marconi's sensors, or the software that operates them. The question is not a factual inquiry into whether a duty to warn was given or not. Instead, the issue lies in evaluating the sufficiency of a duty to warn when applied to a product like the Marconi's Autodrive sensors.

B. Due to the Nature of the Marconi's Autodrive Sensors, a Warning would Not Suffice.

The main issue in this case is the functionality of the Marconi's Autodrive sensors. These sensors are the operative component of the Autodrive system. (R. at 2.) The sensors receive information related to things outside the Marconi, including other drivers, road conditions, etc. (*Id.)* They then transmit that information to a computer system which is amenable to updates. (*Id.)* The computer then controls all the consequential aspects of driving. (*Id.)* The sensory data ultimately works to "control the vehicle much like a human driver would—the vehicle stops,

accelerates, changes gears, and maneuvers without input from the driver." (*Id.*) Autodrive "operates the vehicle for the driver." (*Id.*)

The Marconi comes with a manual indicating the importance of keeping two hands on the wheel. (*Id.* at 5.) However, once Autodrive is engaged, "the driver's input . . . is minimal." (*Id.*) In fact, the vehicle is marketed as requiring minimal input from drivers. (*Id.* at 4.) In a deposition, Ashpool testified that the Edison salesman told him that "Autodrive would allow him to simply input a GPS location into the Marconi and enjoy the ride, with no further action required." (*Id.*)

What effect would a warning have on a product like this? If all that is required of Edison is to warn that their sensors do not adequately sense outside data, it is difficult to fathom such a warning being effective. The Marconi manual already stresses the importance of keeping one's hands on the steering wheel. (*Id.* at 3.) Yet, in addition to Ashpool's accident, twelve other accidents involving stationary objects and speeds over 35 miles per hour occurred in the two years preceding Ashpool's accident. (*Id.* at 5-6.) "In a world with such rapid technological advancements being placed in the hands of everyday consumers, it is imperative that the creators of these devices are held accountable for the continued safety of its users." (*Id.* at 13.)

C. When Human Safety is Implicated, a Duty to Retrofit Can be the Proper Test for Manufacturer Liability

The duty to retrofit has been applied in situations where products implicate human safety. *See Braniff Airways, Inc. v. Curtiss-Wright Corp.,* 411 F.2d 451 (2d Cir. 1969); *see also Noel v. United Aircraft Corp.,* 342 F.2d 232 (3d Cir. 1964) (concluding that by failing to improve the defective propeller system in an aircraft, respondent United Airline System breached a continuing duty).

Further, this duty to retrofit does not necessarily depend on any one underlying or accompanying theory of liability. "Failure to conduct an adequate retrofit campaign may constitute negligence apart from the issue of defective design." *Hernandez,* 28 Cal. App. 4th at 1827.

Apart from the defective design of the sensors themselves, Edison breached their duty to retrofit when they failed to replace the defective sensors and/or failed to upgrade the software of the sensors. Either option was reasonable and practicable. And either could have prevented Ashpool's injuries.

D. The Trial Court's Failure to Give Ashpool's Proposed Jury Instruction was Not Harmless Error

The trial court's failure to give Ashpool's proposed jury instructions was not harmless error because Edison owed their consumers a duty to retrofit the Marconi after the time of sale.

i. The Appellate Court Articulated a Standard for Court's to Use to Define When a Manufacturer Owes a Duty to Retrofit

In concluding that a duty to retrofit is proper in this State, the Appellate Court made clear that such a duty is not without limits. (*See* R. at 15.) The Appellate Court stated,

> Therefore, in fashioning this greater duty on manufacturers, we find that there is a duty to retrofit where: (1) the product implicates human safety; (2) there is a continuing relationship between manufacturer and consumer; and (3) the manufacturer had knowledge of a defect after the product was in the hands of the consumers.

(*Id.*)

The first element requires human safety to be at issue. That is undisputed. The third element requires the manufacturer to be aware of the defect after the consumer has the product. This is not at issue either, as Edison was aware of both the increased risk of accidents when traveling over 35 miles per hour, as well as the history of the twelve other accidents that had occurred under similar circumstances to Ashpool's. (*Id.* at 6.)

Thus, the second element is the only element in dispute. The Appellate Court held there was no "continuing relationship" between the parties. (*Id.* at 17.) But for the reasons detailed below, the Appellate Court erred in their analysis with respect to second element. And if this Court is inclined to agree that Fremont should adopt a duty to retrofit, the question of whether there was a continuing relationship between Edison and Ashpool is dispositive. If the trial court likely would have found such a relationship, then the error cannot be said to be harmless, and the case should be remanded.

E. The Evidence that was Not Presented to the Jury in this Case Belies the Position that there was Not a Continuous Relationship.

At trial, Ashpool proposed a jury instruction that read:

> A manufacturer has a duty to take such measures that are reasonably necessary to protect the public from foreseeable harm after a product has been manufactured and sold. If a manufacturer knows of or later becomes aware of the fact that the design of a product causes unnecessary risk of serious injury to the product driver or to the public, the manufacturer must take such reasonable steps under the circumstances that will lessen or prevent the risk of injury.

(R. at 6.)

To support his instruction, Ashpool planned to introduce evidence that: (1) Edison knew the sensors were failing; and (2) Edison had the capacity to upgrade the failing sensor's software. (*Id.*) However, Edison objected to the instruction, and the objection was sustained. (*Id.*)

The Appellate Court was correct in concluding "[t]raditionally, courts have not found a continuing relationship between car manufacturers and drivers." (*Id.* at 16.) The rationale being that "[a] consumer goes to the dealership, purchases a vehicle, and once it has left the dealership, the manufacturer no longer has any control over the car." (*Id.*)

Clearly, some courts are reluctant to impose significant post-sale burdens on manufacturers. A duty to notify purchasers of an existing product "logically cannot be deemed a

continuing duty because there would be nothing to continue if the product left the manufacturer's control in a non-defective condition." *Gregory v. Cincinnati Inc.,* 538 N.W.2d 325, 330 (1995). While this position may be tenable for traditional products, it is incoherent when applied to the product at issue here, specifically the software that operates the Marconi's Autodrive sensors. Whether or not there was a continuous relationship demands looking at the technology of the product in detail.

i. The Technology Itself Defines the Continuing Relationship Between the Manufacturer and Consumer

At issue here is the software program that operates the Marconi's Autodrive function. As discussed above, Ashpool planned to introduce evidence that Edison had the capability to update that software. (R. at 6.) Ashpool planned to introduce evidence that those updates would make the vehicle safer by improving the ability of the sensors to gauge stationary objects. (*Id.* at 16.) The appellate court held that because the Marconi was operable without the software updates, the updates themselves are a mere convenience. (*Id.* at 17.) "This is different than an airplane manufacturer needing to keep an airplane continuously updated for advancements in technology." *Noel*, 342 F.2d at 240. We cannot find that a jury would likely have found that there is a continuous relationship between Edison and its consumers." (R. at 17.)

This approach is misplaced. Whether or not the vehicle operates is hardly relevant to the operability and safety of the Marconi's Autodrive sensors. This is especially true when considering Edison's marketing efforts surrounding the Marconi. The operability of the vehicle as a whole has little to do with the operability of the Marconi's sensors. Yet, the jury was precluded from hearing evidence about the operability of the sensors. (*Id.* at 7.)

More importantly, Edison's capacity to update the software itself puts the relationship of the parties into perspective. Edison currently updates software for other aspects of the vehicle. (*Id.*

at 3.) It sends notification of these updates directly to the center console. (*Id.)* It is difficult to imagine this process of information transfer between the parties as being labeled anything other than a "continuing relationship." Any of Edison's concerns regarding production costs must be viewed within the context of two key facts: (1) the life-threatening ramifications of failing to replace the defective sensors; and (2) Edison's capacity to update other aspects of the vehicle's software. And when viewed in light of those facts, Edison's concerns regarding costs are insignificant.

F. The Error was Not Harmless. The Case Should be Remanded.

"Failure to give a jury instruction will be considered harmless error if the reviewing court cannot determine that the jury would likely have come to a different verdict if the requested instruction had been given. Under these circumstances, there is no manifest injustice." (R. at 13) (*quoting Oliver v. McCord,* 550 XE 625, 634 (Fremont 1996)). To evaluate what the jury would have done, one needs to examine the evidence that was precluded with the evidence that was presented. The jury heard that "Edison knew before the Marconi left the manufacturer that there was a potential for accidents when the driver was going over 35 mph—there was an increased 13% collision rate under these circumstances." (R. at 17.) The jury also heard evidence that Edison was aware that prior to Ashpool's accident, there were twelve other accidents alleging failures in the sensors when the driver was going over 35 mph and collided with a stationary object. (*Id.* at 5-6.) Each of the previous accidents occurred within the two years preceding Ashpool's accident. (*Id.)* Each accident was allegedly caused by a failure of the Marconi's sensors. (*Id.)* The jury also heard evidence regarding hundreds of tests performed by Edison on the Marconi's sensors. (*Id.* at 4.) "As a result of these tests, Edison learned that the sensors had difficulty identifying stationary objects when the vehicle was driving above 35 mph." (*Id.* at 5.) But despite all that properly

admitted evidence, the trial court erroneously refused to allow Ashpool the opportunity to submit evidence regarding Edison's knowledge of the faulty sensors and their ability to update them.

When viewed in the light of the evidence that was properly admitted, the trial court's decision to refuse to admit Ashpool's additional evidence cannot be said to be harmless error. We respectfully request this court remand the case to the trial court in light of these findings.

CONCLUSION

For the foregoing reasons, petitioner William Ashpool respectfully requests that this high Court reverse the district and appellate courts' denial of Ashpool's motion for judgment as a matter of law on his design defect claim under the risk-utility test. Or in the alternative, petitioner requests this high Court affirm the appellate court's holding that the duty to retrofit should be applied in certain strict liability design defect claims, like Ashpool's, and remand the case with instructions on the newly established duty to retrofit.

/s/ Team K