No. 21-2112

In The

Supreme Court of the State of Fremont

William Ashpool,
Petitioner,

v.

Edison Incorporated,
a Fremont corporation,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Fourteenth Circuit

BRIEF OF RESPONDENT

Team L
Counsel for Respondent

QUESTIONS PRESENTED

(1.) Did the Court of Appeals correctly affirm the trial court's denial of a motion for judgment as a matter of law on a design-defect claim under the risk-utility test when the jury found that the product design did not cause Mr. Ashpool's vehicle to crash?

(2.) Did the Court of Appeals err in imposing a duty to retrofit on manufacturers in the State of Fremont when consumers already enjoy sufficient protections under established principles of Fremont law and the legislature or other regulatory, administrative bodies are more appropriately positioned to extend such duty?

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STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Edison Incorporated ("Edison") is an automobile corporation registered in Fremont that entered the highly competitive economy sedan market in 2014. Rendigs Problem 2021 at 2 [herein referenced to as "R"]. After three years of development and market analysis, Edison released the Marconi in 2017 with a focus on safety features and ease of use. *Id.* The Marconi included a feature called Autodrive, which is a semi-autonomous driving experience where an onboard computer operates the vehicle so long as the driver keeps two hands on the steering wheel. *Id.* The onboard computer contains a GPS and receives sensory data to control the vehicle with minimal input from the driver. *Id.*

As technology advances, Edison continuously updates the Autodrive software and sends notifications to the owner of the vehicle the next time the vehicle is started. *Id.* at 3. Until the update is installed, the notification pops up on the center console—an 11-inch screen that displays the drivers' route—every time the vehicle is started. *Id.* Edison maintains the highest safety standards without having to make an entirely new vehicle because of this model of creating and sending updates. *Id.*

The Marconi comes with a manual that instructs drivers to be attentive and keep their hands on the steering wheel at all times similar to the way that a normal driver would pilot a vehicle. *Id.* The manual indicates that if a driver removes his hands from the steering wheel, a flashing light will appear on the dashboard to tell the driver to place his hands back on the steering wheel. *Id.* A driver can override the Autodrive feature as he sees fit when both hands are on the steering wheel. *Id.*

On December 20, 2019, Petitioner William Ashpool ("Mr. Ashpool") collided into a brown bear sitting in the middle of the road while driving his Edison Marconi at about 42 miles-per-hour ("mph") on Route 27 in Fremont. *Id.* at 4. Before his accident, Mr. Ashpool had not experienced any malfunctions with his Marconi. *Id.*

II. PROCEDURAL HISTORY

Mr. Ashpool brought this action against Edison on January 12, 2020, alleging improper sensor design, Edison's knowledge of such design, and failure to implement changes. *Id.* Mr. Ashpool claimed the sensors used for the Marconi's Autodrive feature failed to register the brown bear and alert him to maneuver or stop his vehicle. *Id.* Therefore, the sensors were allegedly faulty, led to Mr. Ashpool's collision, and resulted in various injuries. *Id.*

Mr. Ashpool filed suit in the Hayward County District Court and received a jury trial presided over by the Honorable Perry Mason. *Id.* at 1, 4. At trial, Mr. Ashpool and Edison presented evidence regarding the Autodrive feature and accompanying sensors. *Id.* at 4. Errol Reeve, Edison's CEO, explained at trial that Edison chose to forgo extra sensors and proprietary technology in order to keep the Marconi in the available price range for economy market customers. *Id.* at 5. Mr. Reeve explained that Autodrive does not relinquish a driver's responsibility to be attentive, keep their hands on the wheel, and keep their eyes on the road. *Id.* at 5-6.

Secondary to Mr. Ashpool's allegation that the lack of additional sensors rendered the Marconi unsafe, he argued that Mr. Reeve and Edison knew there was an increased accident rate and refused to fix the problem. *Id.* at 6. However, no evidence of this allegation was introduced by Mr. Ashpool at trial. The discovery that a software update to the already existing sensors could improve the crash rate occurred well after the release of the vehicles into the market. *Id.* at 7.

Furthermore, this update would require additional hours of work to create and implement it, possibly more than the implementation of an entirely new sensor. *Id.* Since the trial court sustained Edison's objection to the inclusion of a jury instruction recognizing a duty to retrofit, this evidence was excluded from trial. *Id.*

Mr. Ashpool presented a claim of design defect for the Marconi under the risk-utility analysis. *Id.* at 7. Despite Mr. Ashpool's allegation, the Hayward County jury returned a verdict for Edison finding no defect design in the Marconi under the risk-utility analysis and concluded that the sensors did not cause Mr. Ashpool's vehicle to crash. *Id.* Mr. Ashpool moved twice, one before verdict and once after, for judgment as a matter of law pursuant to Fremont Rule of Civil Procedure 50 which the trial court denied each time. *Id.*

As a result, Mr. Ashpool filed a timely appeal to the Fremont Court of Appeals arguing (1) that the trial court erred in denying his motion for judgment as a matter of law; and (2) that the trial court erred in refusing to include a duty to retrofit instruction to the jury. Appellate Division Judge Olympus delivered the opinion of the Court of Appeals affirming the decision of the trial court. *Id.* at 1. Judge Irish delivered a separate opinion concurring in part and dissenting in part. *Id.*

In affirming the lower court, the Court of Appeals implemented the risk-utility test ruling "the Marconi's Autodrive feature was not unreasonably dangerous at the time of distribution" therefore Edison is not liable under a design defect claim. *Id.* at 12. While affirming the trial court, the Court of Appeals concluded the State of Fremont should adopt a common law duty to retrofit. *Id.* at 13, 15. However, the trial court's decision to deny the instruction in this case constitutes harmless error. *Id.* at 13. In a separate opinion, Judge Irish dissented from imposing a duty of retrofit on manufacturers while adopting the use of the risk-utility test. *Id.* at 18.

Mr. Ashpool then filed a writ of certiorari which this Court granted limited to two questions concerning the risk-utility test and duty to retrofit. *Id.* at 20.

SUMMARY OF THE ARGUMENT

The injuries the Petitioner sustained after driving his Marconi into a stationary bear was not caused by a design defect in the vehicle. The Freemont Court of appeals correctly affirmed the trial court's denial for Petitioner's motion for judgment as a matter of law, but improperly reversed the trial court's refusal to include the duty to retrofit in the jury instructions. First, it correctly held that the Marconi's alleged design defect did not constitute and unreasonably dangerous condition. Second, it improperly held that the State of Fremont should adopt a common law duty to retrofit because the law already provides sufficient protection for consumers in the State.

The likelihood and severity of the Petitioner's injury was not reasonably foreseeable to the manufacturers at the time of product distribution. In design defect claims, foreseeability should be view in light of available technology at the time. *Brooks v. Beech Aircraft Corp.*, 902 P.2d 54, 65 (N.M. 1995). The testimony of the Petitioner's expert witness that additional sensors would reduce collision with stationary objects when the Marconi is travelling at higher speeds does not render the risk of injury foreseeable because it relies on hindsight expert analysis. Additionally, the open and obvious danger of a stationary object reduces the likelihood of harm from a product. Thus, Petitioners cannot claim that the likelihood and severity of injury was foreseeable to the Respondents.

The alternative design presented by the Petitioner was not reasonable to implement. In balancing the risk of a product with its utility, courts look at the cost effectiveness of an alternative design. The product at issue was designed for the economy sedan market. Edison targeted this new market which fell below their previous market designs of luxury and sports electric vehicles. The

Petitioner claims that adding additional sensors to the Marconi would constitute a reasonable alternative design that would have prevented his injuries. Yet, the cost of the additional sensors to the Marconi would increase the price by at least $5,000. This increase in price would push the Marconi out of the consumer market for economy sedans. Additionally, the evidence omitted by the trial record indicates that the technology was not fully developed at the time the Marconi went to market. Thus, the Petitioner cannot claim that a reasonable alternative design existed.

In addition to the risk-utility protection, Petitioner also enjoys a variety of clearly established post-sale tort law protections that sufficiently cover any negligence or liability of manufacturers. *Shane v. Smith*, 657 XE 720 (Fremont 1989). However, these protections do not extend so far as to impose a duty to retrofit on Respondent. The duty to retrofit is a costly and greater for manufacturers and a majority of jurisdictions decline to impose it. R. at 6; *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 534 (Ky. 2003). The Court of Appeals, therefore, erred in adopting this duty to retrofit for several reasons.

First, the Court of Appeals inappropriately imposed a burdensome and costly liability on manufacturers when such move is properly left to the legislature or other administrative and regulatory bodies. *Ostendorf*, 122 S.W.3d at 534. Second, Petitioner's case fails to present the limited facts and circumstances necessary to justify adopting a duty to retrofit. The Court of Appeals, however, did correctly find assuming arguendo the trial court had given a duty to retrofit instruction, that no manifest injustice occurred and any error in instruction by the trial court was harmless. *Oliver v. McCord*, 550 XE 625, 634 (Fremont 1996).

Petitioner, therefore, respectfully requests that this Court affirm the lower court's application of the risk-utility test and reverse the lower court's adoption of a costly and burdensome duty to retrofit.

ARGUMENT

I. STANDARD OF REVIEW

A motion for judgment as a matter of law is reviewed de novo. Federal appellate courts will "review the district court's denial of the plaintiff's motion for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b) de novo." *Williams v. Nashville Network,* 132 F.3d 1123, 1130 (6th Cir. 1997) (citing *K & T Enterprises, Inc. v. Zurich Ins. Co.,* 97 F.3d 171, 175 (6th Cir.1996)). Fremont Rule of Civil Procedure 50 is identical to Fed.R.Civ.P. 50. R. at 7.

This Court will review the grant or denial of a jury instruction for an abuse of discretion because such instructions are generally within the discretion of the trial court. *Bell v. State,* 303 So. 3d 22, 26 (Miss. Ct. App. 2020).

II. THE COURT OF APPEALS CORRECTLY APPLIED THE RISK-UTILITY TEST TO MR. ASHPOOL'S DESIGN-DEFECT CLAIM IN AFFIRMING THE TRIAL COURT'S DENIAL OF A MOTION FOR JUDGMENT AS A MATTER OF A LAW BECAUSE THE MARCONI WAS NOT IN AN UNREASONABLY DANGEROUS CONDITION.

Mr. Ashpool's Product's liability action is based on a theory of design defect with respect to the Edison Marconi Autodrive feature. Some courts allow a plaintiff to bring a design defect claim under both a theory of strict products liability and negligence. The focus of a strict products-liability based claim is the condition of the product while the focus of a negligence-based claim is the fault of the defendant in addition to the condition of the product. *Calles v. Scripto-Tokai Corp,* 864 N.E. 2d 249, 270 (2007) (citing *Coney v. J.L.G. Industries, Inc.,* 454 N.E. 2d 197 (1983). Under a negligence theory, the common-law framework is used in the products liability context. *Id.* Hence, a plaintiff must prove that (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the breach proximately caused the plaintiff's injury; and (4) the plaintiff suffered damages. 864 N.E. at 270 (citing *Ward v. Kmart Corp,* 554 N.E. 2d 223, 226 (1990)).

This court should view Mr. Ashpool's claim under both a theory of strict products liability and negligence because it permits an appropriate balancing of the six factors of the risk-utility test as adopted by the State of Fremont. Hence, other jurisdictions which have applied the risk-utility using either a theory of strict products liability and negligence are persuasive authorities for the State of Fremont.

Mr. Ashpool must establish three elements to prevail on his claim: (1) the injury was caused by the product; (2) The product at the time of the injury, was in essentially the same condition as when it left the manufacturer; and (3) the injury occurred because the product was in a defective condition such that it was unreasonably dangerous to the driver. W. Prosser, Law of Torts 671–72 (4th ed. 1970); *cf* Fremont Rev. Code § 5552.321.3. Since elements one and two of liability are undisputed, Mr. Ashpool's claim turns on whether his injuries were caused by an "unreasonably dangerous" defect in the Marconi. Furthermore, in jurisdictions that have adopted the risk-utility test, the burden of proof is on the plaintiff to show a design defect. *See Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204, 208 (N.Y. 1983) (The burden lies with the plaintiff to produce evidence that "the product, as designed, was not reasonably safe because there was a substantial likelihood of harm and it was feasible to design the product in a safe manner.").

A. The Marconi's Alleged Design Defect Was Not Unreasonably Dangerous Under the Risk-Utility Test.

This Court has adopted the risk-utility test as the exclusive test for design defect claims. *Fickell v. Toyoma Motors Inc.,* 758 XE 821, 830 (Fremont 2014). Jurisdictions that follow the risk utility test balance the danger of a particular product with its utility to the consumer. A product is deemed unreasonably dangerous and hence defective "if the danger associated with the use of a product outweighs the utility of the product." *Bragg v. Hi-Ranger, Inc.,* 462 S.E.2d 321, 328 (S.C. Ct. App. 1995).

Courts balance six factors to determine if a product's risk outweighs its utility: (1) whether the severity of the injury was foreseeable by the manufacturer; (2) whether the likelihood of injury was foreseeable by the manufacturer at the time of distribution of the product; (3) whether there was a reasonable alternative design available; (4) whether the available alternative design was practicable; (5) whether the available and 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. *E.g.*, *Peck v. Bridgeport Machs., Inc.*, 237 F.3d 614, 617 (6th Cir. 2001). Consequently, requires the plaintiff to show that a manufacturer foresaw the risk of the selected design as opposed to an alternative design, that this alternative design was practicable, and that the failure to choose this design rendered the product unreasonably unsafe.

1. The likelihood and severity of Mr. Ashpool's injury was not reasonably foreseeable to Edison at the time of distribution for Marconi

The first two factors in the risk-utility analysis requires the Court to consider whether the severity and likelihood of injury was foreseeable to the manufacturer at the time of distribution. In *Brooks v. Beech Aircraft Corp.*, the Supreme Court of New Mexico considered the weight of "foreseeability" in a design defect case in which the widow of a deceased pilot sued the airplane manufacturer upon the theories of both strict liability and negligence. 902 P.2d 54, 65 (N.M. 1995). The Court held that design defect claims can be brought under both theories and reasoned that liability should be viewed in light of available technology at the time. *Id.*at 62. In so holding, the Court looked at the then-current product liability jury instructions, SCRA 1986, 13-1401, 1433 (Repl.Pamp.1991), in light of the Restatement (Third) of Torts. *Id.*; *see* Restatement (Third) of Torts: Products Liability § 2, cmt. d, at 19–20 (Tentative Draft No. 1, 1994).

The lower court correctly determined that the only pre-distribution evidence indicating any foreseeability of injury was Marconi's internal testing. Like the *Brook's* Court, the lower court also considered the Restatement when viewing liability in light of the technology available at the time. R. at 10; *See* Restatement (Third) of Torts: Products Liability § 2 cmt. a. (1998) ("[F]or the liability system to be fair and efficient, the balancing of risks and benefits in judging product design . . . must be done in light of the knowledge of risks and risk avoidance techniques reasonably attainable at the time of distribution.")

In the case at bar, Mr. Ashpool presented evidence at trial of tests performed on the Marconi which showed the car's difficulty identifying stationary objects when traveling over 35 mph. R. at 10. Additionally, Mr. Ashpool's expert witness testified that there was a 13% higher chance of collision with stationary objects in the Marconi's path when travelling over 35 mph. *Id.* This evidence does not show foreseeable risk because this information standing alone does not make Mr. Ashpool's injury foreseeable. The record does not indicate whether a 13% higher collision rate is statistically significant in the automobile industry or whether other factors contributed to this higher collision rate. Consequently, the hindsight expert analysis required to assess the likelihood of injury was not "reasonably attainable" to Edison when the Marconi went to market. *Id.*at 10.

In design defects claims pursued under a theory of negligence, some courts apply the common law "open and obvious" rule, reflected in Restatement (Second) of Torts § 343A, to assess the foreseeability of an injury. *See Bruns v. City of Centralia*, 21 N.E. 3d 684, 695 (Ill. 2014) (holding that the City of Centralia had no duty to protect the plaintiff from the open and obvious sidewalk defect because the cost is not justified given the nature of the risk). In *Gutterman v. Target Corporation*, the court applied the open and obvious rule in the context of the risk-utility

test to find that the obvious nature of a skateboard's purported defect reduced the magnitude and possibility of harm. 242 F.Supp. 3d 695, 698 (N.D. Ill. 2017). In *Gutterman*, the parents of a minor child brought negligence and products liability actions against the manufacturer and distributor of a skateboard—Bravo and Target—after the child sustained injuries from riding the skateboard in Target. *Id.*at 707. In applying the risk-utility test, the Court ruled entirely in favor of the manufacturer because of the open and obvious nature of the danger, the lack of a feasible alternative design on the record, and the lack of any indication that "Bravo did not comply with industry standards, voluntary organization guidelines, or government regulation." *Id.*at 707.

On December 20, 2019, Mr. Ashpool collided with a brown bear sitting in the middle of the road while driving at about 42 mph on Route 27. R. at 4. Mr. Ashpool should not prevail on his design defect claim against Edison because of the open and obvious nature of the danger. The bear was sitting on the road before Mr. Ashpool collided with it, therefore, the obvious nature of the risk in driving into the bear reduces the magnitude and possibility of harm. A bear is a large animal which can easily be detected by an attentive driver. Since a bear can be detected by an attentive driver, Mr. Ashpool could have avoided the collision by a quick lane change.

This is not an unreasonable burden to place upon Mr. Ashpool because attentive driving requires individuals to adjust to road conditions on a routine basis. Furthermore, there is no indication on the record that Edison failed to comply with industry standards, voluntary organization guidelines, or government regulation. Since the record is silent on the appropriate industry standard to measure the safety of the Marconi and there was very little pre-distribution data about the vehicle, the likelihood of injury was not foreseeable to the manufacturer. Finally, because a bear sitting on the road presents an open and obvious danger to a driver, the severity of

the injury was also not foreseeable to Edison. Consequently, this Court should rule in favor of Edison on the foreseeability factors of the risk balancing test.

2. The alternative design Mr. Ashpool presented is not reasonable because the cost of the design exceeds the market for economy range vehicles.

Most jurisdictions that have adopted the risk-utility test for design defect claims require the plaintiff to produce evidence of a feasible alternative design for the product at issue. *See* Mike McWilliams and Margaret Smith, *An Overview of the Legal Standard Regarding Product Liability Design Defect Claims and a Fifty State Survey on the Applicable Law in Each Jurisdiction,* 82 Def. Couns. J. 80, 85-87 (2015). In *Prentis v. Yale Mfg. Co.,* the Michigan Supreme Court found that a plaintiff cannot establish a prima facie case of design defect without producing a reasonable alternative design. 365 N.W. 2d 176, 184 (Mich. 1984). Furthermore, in *Owens v. Aliss-Chalmers Corp.,* 326 N.W. 2d 372, 378-79 (Mich. 1984) the court upheld a directed verdict for the defendant because the plaintiff failed to produce evidence of the practicality and cost-effectiveness of a proffered alternative design. The Michigan courts have correctly applied the risk-utility test because they take the cost-effectiveness of a proffered alternative design into consideration when balancing the danger of a product with its utility.

This Court should find that the alternative design presented by Mr. Ashpool's expert at trial does not constitute a "reasonable alternative design" because it was not cost effective. As its name suggests, the risk-utility test requires balancing the danger associated with a product with its utility to the consumer. The cost of the Marconi to consumers would increase by at least $5,000 if the additional equipment were installed. R. at 3. This addition to the Marconi was not cost-effective because the target market of consumers would not be able to afford the extra cost of the new technology. Hence, the utility of this installation outweighs the benefit to the consumer because

this addition would push the Marconi out of the economy range of sedans, *Id.*, which was the target market. Consequently, the alternative design presented by Mr. Ashpool was not reasonable.

i. The question of whether the alternative design would have reduced the alleged foreseeable risk of harm posed by the Marconi is for the jury.

A jury could reasonably determine that the alternative design, in the form of additional sensors attached to the vehicle, *Id.*at 11, would not have reduced the foreseeable risk to harm posed by the product. *See Perez v. Ford Motor Co.,* 497 F.2d 82 (5th Cir. 1974) (whether the manufacturer was negligent in design . . . was a question for the jury; and the question of whether the collision was a reasonably foreseeable or anticipatable event was for the jury). In *Flemister v. General Motors Corp.,* the Supreme Court of Alabama upheld a jury verdict in favor of General Motors ("GM") in a "crashworthiness" suit brought by the estate of an automobile passenger who died as a result of injuries she sustained. 723 So. 2d 25 (Ala. 1998).

Prior to the accident, GM recalled selected 1988 Chevrolet Beretta to replace a "single pin" door hinge with "double hung" hinges, but not the *Flemister* vehicle. *Id.*at 26. The *Flemister* Court addressed the issue of whether the jury instructions, which required—among other elements—proof of a safer alternative design that would eliminate or reduce injury, called for an erroneous standard. Id at 27. When upholding this jury instruction, the Court found that "GM presented evidence from which the jury could reasonably conclude that the *Flemister* vehicle was not defective. *Id.*at 28. This evidence included testimony by GM witnesses that despite the double hung door hinge being stronger, the single-hinge door was not defective. *Id.*at 26.

As in *Flemister*, Edison presented evidence from which a reasonable jury could and did conclude that the Marconi was not defective. At trial, Mr. Ashpool's expert testified that the accident rate (of the Marconi) was 13% higher when the vehicle was going over 35 mph and a stationary object was present in the vehicle's path. R. at 5. The expert explained, however, that

Marconi adopted innovations that have proven to avoid accidents from lane drifting or unsafe lane changes. *Id.*

Unlike *Flemister*, there is no evidence on the record of any Marconi vehicles being recalled. However, evidence was presented to the jury that after the release of the Marconi and the new Autodrive feature, there were about twelve accidents involving stationary objects and drivers going over 35 mph. *Id.* at 5-6. The CEO of Edison, Errol Reeve, argued that these crashes were most likely the fault of the driver because most drivers should be able to avoid stationary objects. *Id.* at 6. The manual indicates that a flashing light appears on the dashboard when the driver removes his hands from the steering wheel. *Id.* at 3. Hence, the evidence of these accidents, and Mr. Reeve's knowledge of them, does not render the Marconi more dangerous because the car is designed to be driven with both hands on the steering wheel.

ii. The omission of the alternative design did not render the Marconi unreasonably unsafe because the vehicle is suited for its intended purpose.

Mr. Reeve testified that the company initially planned to include extra sensors and proprietary sensor technology that would have assessed stationary objects at higher speeds; but abandoned the plan due to feasibility and cost concerns. *Id.* The omission of the alternative design did not render the Marconi unreasonably unsafe because the vehicle was safe when used for its intended purpose. *See Chemical Co. v. Parzini*, 245 Ga. 868, 869 (1975) (holding that to recover under strict liability, a plaintiff must establish that there is a defect in the product, and the product, and "a product is not in a defective condition when it is safe for normal handling and consumption.").

In *Mann v. Coast Catamaran Corp.*, the court relied on Parzini to find for the manufacturer of a sailboat—the Hobie Cat 16—in a design defects case brought under theories of negligence and strict liability. 254 Ga. 201 (Ga. 1985). Timothy Mann was injured and his brother killed

after the mast of the sail boat came into contact with an uninsulated, electrical power line traversing Lake Hartwell. *Id.* The Supreme Court of Georgia found that the lack of insulation in a sailboat did not constitute a design defect because the boat as manufactured was reasonably suited for its intended purpose. *Id.* at 202.

Autodrive is not more dangerous without the additional sensors because it is reasonably suited for its intended purpose. The record indicates that Autodrive is "a semi-autonomous driving experience where an onboard computer operates the vehicle for the driver so long as the driver keeps two hands on the steering wheel." R. at 2. The Marconi manual also emphasizes "attentive driving and keeping one's hands on the steering wheel at all times." *Id.* at 3. Furthermore, the manual informs the driver that a flashing light will on the dashboard when the driver removes his hands from the steering wheel. *Id.*

This light informs the driver to place his hands back on the steering wheel. *Id.* Since Edison did not design the Marconi to be fully autonomous, the inability of the vehicle to detect every single object on the road is not a design defect. Consequently, when the driver is using the Marconi consistent with its intended purpose, he bears some responsibility when driving the vehicle. Additionally, the driver has the option of overriding Autodrive as needed when both hands are placed on the steering wheel. *Id.*

III. THE COURT OF APPEALS IMPROPERLY ADOPTED THE DUTY TO RETROFIT FOR STRICT LIABILITY DESIGN DEFECT CLAIMS.

Consumers in Fremont enjoy a variety of clearly established post-sale tort law protections—such as the duty to warn and duty to test—that sufficiently cover any negligence or liability of manufacturers. R. at 18; *see Shane v. Smith*, 657 XE 720 (Fremont 1989). The State of Fremont, however, is one of the substantial majority of jurisdictions that declines to impose the new and greater burden of a duty to retrofit on manufacturers. R. at 6; *Ostendorf v. Clark Equip.*

Co., 122 S.W.3d 530, 534 (Ky. 2003). In light of this history, the Court of Appeals erred in adopting a duty to retrofit even if acknowledging the duty should be limited.

First, imposing such liability on manufacturers is properly left to the legislature or other administrative and regulatory bodies. *Ostendorf*, 122 S.W.3d at 534. Second, this is not one of the limited cases where the facts and circumstances exist to justify adopting a duty to retrofit. Finally, even if the trial court had given a duty to retrofit instruction, the Court cannot affirmatively say the jury would have found Edison liable under the duty to retrofit which constitutes harmless error for the trial court's failure to instruct. *Oliver v. McCord*, 550 XE 625, 634 (Fremont 1996). This Court, therefore, should reserve the lower court's decision to unilaterally impose this duty.

A. Well-Established Product Liability Theories Provide Sufficient Protection to Consumers and Adopting a Duty to Retrofit Imposes a Heavy Burden on Manufacturers which Lacks Deference to the Legislature or Administrative and Regulatory Agencies.

1. Fremont follows well-established product liability theories—namely the duty to warn—that provide sufficient protection to consumers like Mr. Ashpool.

The State of Fremont, like a majority of jurisdictions, follows a common law post-sale duty to warn in product liability cases. *Shane v. Smith*, 657 XE 720, 725 (Fremont 1989); *Comstock v. Gen. Motors Crop.*, 99 N.W.2d 627, 634 (Mich. 1959) (collection of cases). This common law duty to warn applies where:

> (a) One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to provide a warning after the time of sale or distribution of a product if a reasonable person in the seller's position would provide such a warning.
> (b) A reasonable person in the seller's position would provide a warning after the time of sale if:
> > (1) the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
> > (2) those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and

> (3) a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
> (4) the risk of harm is sufficiently great to justify the burden of providing a warning.

Restatement (Third) of Torts: Prod. Liab. § 10 (1998).

The duty to test, a subpart to the duty to warn, is another available consumer protection tool. A duty to test is imposed on manufacturers when there is (1) knowledge of a problem; (2) continued sale or advertising of the product; and (3) a pre-existing duty to warn of dangers associated with the product. *Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517, 1527 (D. Minn. 1989) (citing *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 833 (Minn. 1988)).

The duty to warn and the duty to test are not at issue in this case, however, the policy rationale supporting these theories is to maintain safety of consumers when a problem with a product becomes known. R. at 14. The rationale supporting the duty to warn is based on both fairness and deterrence. The "imposition of a duty on the manufacturer to warn of dangers after a product is manufactured . . . is essentially rooted in concepts of fairness." *Dixon v. Jacobson Manufacturing Co.*, 637 A.2d 915, 923 (N.J. Super Ct. App. Div. 1994). If a manufacturer knows about a danger and fails to warn, the manufacturer is liable and should be deterred from failing to act and warn consumers. Further, "the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business" once the defect is known. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring). These rationales are baked into the post-sale tort law protections and provide consumers ample means under the law to search redress for injury.

Moreover, the rejection of the duty to retrofit does not close these avenues of relief. "[A] manufacturer has no duty to 'retrofit' its products with 'after-manufacture' safety equipment, although it may be found negligent or strictly liable for failing to install such equipment—or not

otherwise making its product safer—existing at the time of manufacture." *Tabieros v. Clark Equip. Co.*, 944 P.2d 1279, 1291 (Haw. 1997). Consumers—like Mr. Ashpool—may argue more than one theory of liability in the same product liability claim. *W.M. Bashlin Co. v. Smith*, 643 S.W.2d 526, 529–30 (1982). However, the manufacturer's duty to exercise reasonable care cannot be extrapolated to encompass a duty to recall or retrofit. *See Burke v. Deere & Co.*, 6 F.3d 497, 510 (8th Cir. 1993). Mr. Ashpool had ample opportunity to make his case to a jury without placing a new, costly, and burdensome requirement on Edison.

Recognizing these existing theories of liability, the trial court properly sustained Edison's objection to the inclusion of a duty to retrofit instruction. R. at 6–7. In a remarkable move, however, the Court of Appeals decided to impose a duty to retrofit albeit in a limiting rule. *Id.* at 15. This adoption was in error.

2. Adopting the duty to retrofit would impose a new, costly, and drastic burden on manufacturers and should be reserved for the institutional competency of the legislature or administrative and regulatory agencies.

Despite these protections and the fact Fremont did not previously recognize a common law duty to retrofit, the Court of Appeals imposed this new and admittedly "greater duty" on manufacturers in Fremont. R. at 15. "A duty to retrofit is a duty to upgrade or improve a product." *Ostendorf*, 122 S.W.3d at 534. Combining jurisprudence from a collection of sister states, the intermediate court implemented this duty "where: (1) the product implicates human safety; (2) there is a continuing relationship between manufacturer and consumer; and (3) the manufacturer had knowledge of a defect after the product was in the hands of the consumers." R. at 15–16.

A manufacturer rarely owes a tort-based duty to retrofit or recall a product unless a government agency requires a recall or the right facts exist requiring recall. *See* WARREN FREEDMAN, DEFENSES TO PRODUCTS LIABILITY: A PRIMER FOR PLAINTIFFS AND

DEFENDANTS 555 (1996) (identifying federal statutes under which product recalls may be mandated). An overwhelming majority of jurisdictions decline to judicially impose this duty. *See McDaniel v. Bieffe USA, Inc.*, 35 F. Supp. 2d 735, 743 (concluding that no such duty exists under Minnesota law); *Burke v. Deere & Co.*, 6 F.3d 497, 508 n. 16 (8th Cir. 1993) (restating that no such duty exists under Iowa law); *Wallace v. Dorsey Trailers Southeast, Inc.*, 849 F.2d 341, 344 (8th Cir. 1988) (affirming district court's conclusion that Missouri does not recognize a duty to retrofit); *see also Tabieros v. Clark Equip. Co.*, 944 P.2d 1279, 1298-1300 (Haw. 1997) (citing cases and stating that "virtually every court that has confronted the issue head-on" has rejected this duty); *Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 333 (Mich.1995) (holding there is no continuing duty to repair or recall).

The decision to deny imposing this duty is based on the difficulty and extreme cost the duty to retrofit places on manufacturers. *See* Restatement (Third) of Torts: Products Liability § 11, cmt. a (1998) (stating "[d]uties to recall products impose significant burdens on manufacturers . . . [t]he duty to recall or repair should be distinguished from a post-sale duty to warn about product hazards discovered after sale."). Furthermore, "imposing a duty to update technology would place an unreasonable burden on manufacturers, [i]t would discourage manufacturers from developing new designs if this could form the bases for suits or result in costly repair." *Ostendorf*, 122 S.W.3d at 536 (citing *Gregory*, 538 N.W.2d at 337).

Due to this burden, "[t]he decision to expand a manufacturer's post-sale duty beyond implementing reasonable efforts to warn ultimate consumers who purchased the product of discovered latent life-threatening hazards unforeseeable at the point of sale *should be left to administrative agencies and the legislature*." *Patten v. Hutchinson Wil-Rich Mfg. Co.*, 253 Kan. 741, 763 (1993) (emphasis added); *see also Ostendorf*, 122 S.W.3d at 534.

At trial, Mr. Ashpool presented no arguments that the State of Fremont or federal law or regulations required Edison to recall or retrofit the Marconi. Without providing these arguments, the Court of Appeals simply lacked the justification to extend such a burden on Edison and other manufacturers in Fremont. Important policy reasons have lead a majority of jurisdictions to decline implementing the duty to retrofit and this Court should be sharp-eyed in recognizing them and further declining to impose a duty to retrofit.

B. Mr. Ashpool's Claim Does Not Present the Appropriate Facts or Circumstances for This Court to Impose a Duty to Retrofit on Edison.

The Court of Appeals offered a three-prong test for imposing a duty of retrofit on manufacturers. R. at 15–16. However, the facts and circumstances of Mr. Ashpool's case do not present an appropriate opportunity to impose liability. Notwithstanding the fact that Mr. Ashpool presented no direct evidence to the jury relating to his allegation, there is insufficient evidence to prove his claim. The decision hinges on the second factor requiring a continued relationship. The first and third prongs are undisputed and the Court of Appeals addressed these facts in detail. *Id.* at 16–17. It is not the province of this Court, however, to say what the jury may have decided based on the limited evidence presented at trial.

1. A product implicating human safety.

The first factor requires a product that implicates human safety. *Id.* at 15. Edison agrees with the Court of Appeals that "there is no question that the Marconi implicates human safety" likely satisfying the first factor for the jury. *Id.* at. 16. The Court of Appeals, however, erred in distinguishing the Marconi from "a run-of-the-mill, basic four-door vehicle." *Id.* While the Marconi is a semi-autonomous car that carries human passengers, it does not waive the responsibility of the driver to be attenuative and make responsible decisions. Mr. Reeves spoke

directly to this point at trial testifying that "even a moderately attentive driver would avoid the objects if they still had their hands on the wheel and eyes on the road." *Id.* at 5.

It is the obligation of the driver as much as the Marconi's to readily react and respond to roadway conditions. There were approximately twelve accidents involving stationary objects and drivers going over 35 mph. *Id.* No evidence was presented proving the previous crashes were due to Autodrive or that they would have been prevented with a software update rather than the fault of the drivers.

2. Edison never formed a continuing relationship with Mr. Ashpool.

The second factor requires establishing a continuing relationship between manufacturer—Edison—and consumer—Mr. Ashpool. *Id.* at 15–16. While courts have found ongoing or continuing relationships between manufacturers and car dealerships, they have not traditionally found a continuing relationship between car manufacturers and drivers because the consumer has sole control of the vehicle. This relationship is different than that of an airplane manufacturer needing to keep an airplane continuously updated for advancements in technology. *See Noel v. United Aircraft Corp.*, 342 F.2d 232, 236, 240 (3d Cir. 1964). The regulation of this relationship is instead been limited and controlled by the legislature and other administrative bodies through the use of recalls. No recall has been issued for the Marconi.

Edison never created a continuing relationship with Mr. Ashpool. Edison merely maintains a system creating and sending software updates for the Marconi. R. at 16. The software updates are provided as a convenience to the purchaser and they are not necessary for the car to function. Rather, the driver simply benefits from the safety updates at their convenience. The Marconi remained fully operational without additional sensors or updates to them. The driver needed only

to remain attentive and keep his hands on the steering wheel. For these reasons, a continuous relationship between Edison and Mr. Ashpool never took place.

3. Assuming *arguendo* that this Court finds the duty to retrofit should apply to Edison, the trial court's denial of instruction constitutes harmless error.

Under Fremont law, the failure of a trial court to give a jury instruction is considered harmless error if the reviewing court cannot determine the jury would likely have come to a different verdict if the requested instruction had been given because no manifest injustice occurred. *Oliver v. McCord*, 550 XE 625, 634 (Fremont 1996). This Court, therefore, will set aside a jury instruction and subsequent verdict only where the instruction misled the jury to such an extent that it resulted in a manifest injustice. *Sanders v. Bain*, 722 So. 2d 386, 388 (La. Ct. App. 1998). "To support a jury instruction, there must be sufficient evidence presented on that issue of fact." *Udac v. Takata Corp.*, 214 P.3d 1133, 1153 (Ct. App. 2009) (citation omitted).

Based on these rules, the Court of Appeals correctly held that any mistake the trail court made in instructing the jury was harmless error. R. at 18. This Court should affirm that finding assuming arguendo that the duty to retrofit is adopted because it cannot say that a jury would likely conclude Edison maintained a continuing relationship with consumers as required under the duty to retrofit. These software updates and sensors are not required to keep the car safe; rather, they are a mere additional convenience. Furthermore, Mr. Ashpool presented no evidence to the jury regarding the Marconi's software or any alleged continuing or ongoing relationship. A duty to retrofit jury instruction, therefore, cannot be supported by sufficient evidence on the issue of fact. *Udac*, 214 P.3d at 1153. Without this continuing relationship, a jury is not likely to have found Edison liable under the duty to retrofit. The failure to give a jury instruction about the duty to retrofit was harmless error. This Court should affirm the Court of Appeal's finding of harmless error.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this Court ***affirm*** the decision of the Court of Appeals for the State of Fremont.

Respectfully Submitted,
Counsel for Respondent
February 1, 2021