No. 21-2112

IN THE SUPREME COURT OF THE STATE OF FREMONT

WILLIAM ASHPOOL, a

consumer

(Plaintiff Below),

Petitioner,

vs.

EDISON INCORPORATED, a

Fremont Corporation,

Respondent.

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

BRIEF FOR RESPONDENT

ORAL ARGUMENT REQUESTED

/s/ *Team N*
TEAM N
COUNSEL FOR THE RESPONDENT

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Questions Presented

1. The State of Fremont has expressly adopted the risk-utility test as the exclusive test for a design defect. The District Court found that the Marconi's Autodrive feature was not unreasonably dangerous under the risk-utility test based on the evidence. Did the Court of Appeals err in affirming the denial of Ashpools renewed motion for judgement as a matter of law?
2. The duty to retrofit addresses a design problem after a vehicle has left the manufacturer. Restatement (Third) of Torts § 11 has limited the duty to apply pursuant to government directive or when a manufacturer voluntarily recalls a product and fails to act reasonably. The State of Fremont does not recognize a duty to retrofit. Did the Court of Appeals err in adopting the duty to retrofit in strict liability design defect claims?

Statement of the Case

I. Statement of Facts

A. *The Edison Marconi's Autodrive Feature*

In 2017, Edison Incorporated ("Edison"), a luxury automobile manufacturer registered in the State of Fremont, released the Edison Marconi ("Marconi"). R. 2. The Marconi was developed with a focus in safety features and ease, cutting-edge technology, and high performance. R. 2. The Marconi included an Autodrive feature, which is a semi-autonomous driving experience where an onboard computer operates the vehicle as long as the driver maintains two hands on the steering wheel at all times. R. 2. The system receives information via twelve sensors that analyze the surroundings and the onboard computer receives the sensory data to control the vehicle. R. 2.

Before the release of the Marconi, numerous crash and safety tests were conducted in compliance with the National Highway Traffic Safety Administration. R. 5. Edison learned that the sensors had difficulty identifying stationary objects if the Marconi was driving over 35 miles per hour ("mph"). R. 5. Although extra sensors and proprietary sensor technology would have identified stationary objects at a higher speed, installing the equipment would increase the cost of the vehicle by $5,000 placing the cost on the consumer. R. 5.

The Autodrive feature requires the driver to input the destination on the GPS, and after that, the driver's input is minimal. R. 3. The Marconi Autodrive feature will stop, accelerate, change gears, maneuver the vehicle, assess road conditions, speed, and traffic lights. R. 2. The feature can be turned on and off whenever the vehicle is stopped or parked, and a driver can override the feature by steering as he sees fit. R. 3. The Marconi also comes with a manual that emphasizes the attentiveness of the driver and the importance of keeping both hands on the

wheel at all times. R. 3. Additionally, Edison updates the Autodrive software by sending vehicle owner's a notification the next time the vehicle is started. R. 3.

B. *William Ashpool's Accident*

In November 2019, William Ashpool ("Ashpool") purchased a Marconi because he enjoyed the Autodrive feature. R. 4. Unfortunately, about a month later, Ashpool sustained extensive injuries after he collided with a bear sitting in the middle of the road. R. 4.

II. Procedural History

A. *Hayward County District Court*

Ashpool filed an action against Edison in Hayward County District Court in products liability alleging that the defective sensors in the Marconi led to the accident. R. 4. Ashpool claimed that he suffered the injuries as a result of a design defect in the faulty sensors and that Edison knew of the faulty sensors and failed to fix them. R. 4.

At trial, Ashpool and Edison both presented evidence regarding the Marconi's Autodrive feature. R. 5. Ashpool presented evidence that the sensors in the feature were defective before they left the manufacturer, that Edison knew of this defect, and that Edison was liable for failing to fix them. R. 6. Errol Reeve ("Reeve"), Edison's CEO, testified that the Autodrive feature allowed the driver to maneuver the vehicle away from stationary objects and, thus, the lack of additional sensors did not render the Autodrive feature unreasonably dangerous. R. 6.

Prior to the conclusion of trial, the trial court asked the parties to submit proposed jury instructions. Ashpool's jury instructions included a duty to retrofit. R. 6. Edison objected this instruction because the State of Fremont does not recognize a duty to retrofit and Ashpool objected. R. 6. The trial court sustained Edison's objection. R. 7.

On the last day of trial, Ashpool moved for a judgement as a matter of law pursuant to Fremont Rule of Civil Procedure 50(a). R. 7. The motion was denied, and the case was submitted for jury consideration. 7. Ultimately, the jury returned a verdict for Edison finding that there was no design defect on the Marconi and that the sensors did not cause the accident. R. 7. Ashpool renewed his motion judgement as a matter of law and the motion was denied it. R. 7. Following trial, Ashpool appealed to The Court of Appeals for the State of Fremont. R. 7.

B. ***The Court of Appeals for the State of Fremont***

On appeal, Ashpool argued that the Hayward County District Court erred (1) in denying the renewal for judgement as a matter of law, and (2) in refusing to include the duty to retrofit jury instruction. R. 7. The appellate court properly reviewed the motion for judgement as a matter of law *de novo.* R. 7. The issues on appeal were (1) whether the trial court erred in denying Ashpool's renewed motion for judgement as a matter of law, and (2) whether the trial court erred in refusing to include the duty to retrofit jury instruction. R. 7.

Regarding the renewed motion for judgement as a matter of law, The Court of Appeals held that the trial court did not err in denying the motion because the Marconi's Autodrive feature was not unreasonably dangerous. R. 12. In making this determination, the Court of Appeals applied the risk-utility test, which required balancing the danger associated with a product with its utility to consumer. R. 9. The analysis focused on whether the Marconi was "defective in an 'unreasonably dangerous' condition." R. 8. Ultimately, the failure to add the additional sensors did not render the Marconi more dangerous than a vehicle without the advanced technology. R. 12. The Autodrive was not a substitute for an attentive driver and, thus, denial of Ashpool's motion for judgment as a matter of law was proper. R. 12.

As to the refusal to include the duty to retrofit jury instruction, the Court of Appeals adopted the duty to retrofit as the law in Fremont to protect consumers. R. 13. The Court of Appeals argued that adoption of the rule would impose liability on manufactures, which increased safety for its users. R. 13. However, despite this holding, the Court of Appeals concluded that the failure to give the duty to retrofit jury instruction was harmless error because the "duty would not have changed the outcome in the lower court." R. 13.

Judge Irish concurred and dissented in part. R. 18. As to the issue of risk-utility and the final result, he concurred. R. 18. However, he dissented on the adoption of the duty to retrofit. R. 18. He argued that the "judiciary is not the appropriate place to determine whether this duty should be imposed on manufactures." R. 18. Rather, he is in agreement with the majority of jurisdictions which state that the duty lies with the legislature and administrative agencies. R. 18. In disagreement with the majority, he argued that imposing an additional duty imposes a greater burden on manufactures and that the current body of law is sufficient to cover negligence or liability on manufacturers. R. 18.

Summary of the Argument

First, this Court should affirm the Court of Appeals' decision to affirm denial of Ashpool's motion for judgement as a matter of law because there is a legally sufficient evidentiary basis for a reasonable jury to find in favor of Edison on Ashpool's design defect claim. Under Fremont's products liability statute, a plaintiff must prove the injury was caused by the product, the product was in the same condition as when it left the manufacturer, and the product was defective such that it was unreasonably dangerous to the driver. The Restatement (Third) of Torts: Products Liability § 2(b) clarifies that the standard for proving defectiveness in a design context is that the foreseeable risk of harm could have been avoided by adoption of a reasonable alternative design and the omission of such design rendered the product unreasonably safe. The State of Fremont has expressly adopted the risk-utility test as the test for making this determination.

Ashpool did not present adequate evidence to satisfy the risk-utility test. Additionally, there is a legally sufficient evidentiary basis for a reasonable jury to find for Edison on the issue of whether the Marconi Autodrive feature was unreasonably dangerous. Accordingly, Ashpool did not prove his design defect claim, and he is not entitled to judgement as a matter of law on the claim. This Court should affirm denial of Ashpool's motion.

Second, the duty to retrofit should not be adopted as law in the State of Fremont. The Court of Appeals erroneously adopted the duty to retrofit in certain strict liability design defect claims by relying on public policy. The State of Fremont cannot adopt the duty to retrofit to strict liability defect claims because established legal theories already provide adequate protection and redress to injured consumers. Imposing an additional duty places a burden on manufacturers and turns strict liability into absolute liability. Additionally, the Restatement (Third) of Torts:

Products Liability § 11 has limited the duty to two exceptions not applicable in the present case. Absent the exceptions, a majority of jurisdictions have refused to adopt the duty because it is outside the province of the judiciary. Lastly, the trial court's failure to provide the duty to retrofit jury instruction was harmless error.

Standard of Review

A motion for judgement as a matter of law is reviewed *de novo*. *Williams v. Nashville Network*, 132 F.3d 1123, 1130 (6th Cir. 1997). A grant or denial of a jury instruction is reviewed 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).

Argument

I. The Court of Appeals correctly affirmed denial of Ashpool's motion for judgement as a matter of law on the design defect claim because the Marconi Autodrive feature was not unreasonably dangerous under the risk-utility test

This Court should affirm the Court of Appeals for the State of Fremont's decision and hold that the appellate court did not err in affirming the trial court's denial of Ashpool's renewed motion for judgement as a matter of law. A moving party is entitled to judgement as a matter of law when the non-moving party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to reach a verdict in the non-moving party's favor. Fed. R. Civ. P. 50(b). *See Lane v. Hardee's Food Systems*, *Inc.*, 184 F.3d 705 (7th Cir. 1999). Because there is a legally sufficient evidentiary basis in favor of Edison and Ashpool did not present adequate evidence to establish that no reasonable jury could find for Edison, this Court should affirm the trial court's denial of Ashpool's motion for judgement as a matter of law.

To prevail on a products liability claim, a plaintiff must establish three elements: (1) the injury was caused by the product; (2) the product, at the time of the injury, was in essentially the same condition as when it left the manufacturer; and (3) the injury occurred because the product was in a defective condition such that it was unreasonably dangerous to the driver. Fremont Rev. Code § 5552.321. Ashpool did not dispute the first and second elements of liability; thus,

Ashpool had to prove the Marconi Autodrive's design was defective in an "unreasonably dangerous" condition. R. 8.

The State of Fremont has expressly adopted the risk-utility test as the exclusive test for design defect claims. *Fickell v. Toyoma Motors Inc.*, 758 XE 821, 830 (Fremont 2014). The risk-utility test requires balancing the danger associated with a product with its utility to the consumer; a product is deemed unreasonably dangerous and thus defective "if the danger associated with the use of the product outweighs the utility of the product." *Bragg v. Hi-Ranger, Inc.*, 462 S.E.2d 321, 328 (S.C. Ct. App. 1995). When the risk-utility test is applied, Edison cannot be held liable for failing to exercise reasonable care in the design process.

Under the risk-utility test, the plaintiff has the burden of proof, and thus is required to produce evidence that (1) the severity of the injury was foreseeable by the manufacturer; (2) the likelihood of the injury was foreseeable by the manufacturer at the time of distribution of the product; (3) there was a reasonable alternative design available; (4) the available alternative design was practicable; (5) the available and practicable reasonable alternative design would have reduced the foreseeable risk of harm posed by the product; and (6) the omission of the alternative design rendered the product not reasonably safe. *See Peck v. Bridgeport Machs., Inc.*, 237 F.3d 614, 617 (6th Cir. 2001) (requiring the plaintiff to produce evidence of the factors to survive a motion for summary judgement.

A. The severity and likelihood of Ashpool's injury was not foreseeable by Edison at the time of Distribution

The first two factors of the risk-utility test, foreseeability of severity and likelihood of the injury, require the plaintiff to demonstrate "the magnitude of the risks involved." *Owens v. Allis-Chalmers Corp.*, 326 N.W.2d 372 (Mich. 1982). Evidence of a foreseeable risk must be in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of

distribution rather than in hindsight. *See* Restatement (Third) of Torts: Products Liability § 2 cmt. a. (1998). Evidence of similar incidents may "be admitted to prove design defect and negligence." *Valente v. Oak Leaf Outdoors, Inc.*, 2015 WL 4488547 (E.D. Mich. 2015) (quoting *Croskey v. BMW of N. Am., Inc.*, 532 F.3d 511, 514 (6th Cir. 2008)).

In *Peck*, the plaintiff's hand was seriously injured when another person inadvertently activated a lathe and the plaintiff's hand was caught in the lathe. *Peck*, 237 F.3d at 616. The plaintiff subsequently brought a products liability action in federal court against the designer and distributer. *Id.* As to the designer, the plaintiff alleged that the lathe had a design defect. *Id.* The Sixth Circuit found that the plaintiff had offered virtually no evidence regarding the first two elements. *Id.* at 618. The plaintiff's expert witness even testified that he had never heard of similar accidents occurring with lathes and did not know the probability of a similar accident happening. *Id.* Additionally, the defendant's expert witness testified that they knew the risk of inadvertent activation but chose a design that would prevent the accidents from happening. *Id.* The Sixth Circuit ultimately determined plaintiff did not meet these factors. *Id.*

This case is similar to *Peck*. While there was evidence of approximately twelve other accidents with the Marconi Autodrive feature, each of them involved faulty sensors. As the appellate court noted, the only pre-distribution evidence presented by Ashpool was Marconi's own internal testing; he offered no evidence that faulty sensors were responsible for his accident as well. In fact, before the accident, the Autodrive feature functioned well and Ashpool had experienced no malfunctions with the feature. Therefore, like the plaintiff in *Peck*, Ashpool offered virtually no evidence of similar accidents. Additionally, like the defendant's expert witness in *Peck*, Edison knew of the risk to drivers like Ashpool and chose to emphasize the importance of attentive driving, to include a light on the dashboard that flashes when the driver

removes his hands rom the steering wheel, and to continuously update the Autodrive software. Because the court in *Peck* found that the plaintiff had not met the first two factors of the risk-utility test, Ashpool has not met these factors either.

Finally, when considering the evidence Ashpool did present, the Marconi's internal testing determined that, when the Marconi was traveling above thirty-five miles per hour, there was a 13% higher chance of collision when a stationary object was placed in its path as opposed to when no object was present. This percentage is not only almost marginal but also does not prove much in itself; it can ordinarily be expected that if a stationary object is in the path of a vehicle, there is a higher chance of collision than if the path is clear. Because there is sufficient evidence in Edison's favor on these factors, this Court should affirm denial of Ashpool's motion for judgement as a matter of law.

B. There was no available, reasonable, and practicable alternative design for the Autodrive feature at the time of distribution

The third and fourth factors require the plaintiff to demonstrate that a reasonable and practicable alternative design existed. *Peck*, 237 F.3d at 617. These factors, if proven, "diminish the justification for using a challenged design." *Banks v. ICI Ams., Inc.*, 450 S.E.2d 671, 674 (Ga. 1994). The reasonableness of a manufacturer adopting the safest feasible design is the "heart" of a design defect analysis under the risk-utility approach, since it is only at their most extreme that design defect cases reflect the position that a product is simply so dangerous that it should not have been made available at all. *Id.* 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. *Peck*, 237 F.3d at 618.

In *Peck*, an expert testified that he would have designed the lathe differently, with a "safer" lever mechanism, but that he had never fabricated or seen such design on a lathe anywhere. *Id.* Another expert testified that he did not know whether such design was feasible, but if it were, it would probably entail an increase in cost of approximately 15%. *Id.* The court found that there was no evidence of an available and practicable alternative design and that the experts' testimonies did not prove the design would have been safer overall, and as a result, these factors were not met. *Id.*

This case is similar to *Peck* as to these factors as well. Here, the only evidence of a pre-distribution alternative design was an additional set of sensors attached to the vehicle. Additional sensors are not necessarily an "alternative design," they are merely an addition that would have required Edison to raise the price of each Marconi by $5,000, placing it beyond what would be reasonable for similar vehicles. Without raising the price, it would not have been feasible for Edison to install additional sensors. Like the proposed alternative in *Peck*, it is not likely the additional sensors would have been feasible, and if they were, they would entail a substantial increase in cost. Therefore, it cannot be said that Ashpool proved that a "reasonable" and "practicable" alternative design existed within meaning of the fourth and fifth factors. Because an evidentiary basis for these factors in favor of Edison exists, this Court should affirm denial of Ashpools motion for judgement as a matter of law.

C. Even if there was an alternative design, it would not have made the injury more foreseeable and the Autodrive feature as distributed was not unreasonably dangerous

The fifth and sixth factors require a plaintiff to prove that the alternative design would have reduced the risk of injury described in the first two factors and that omission of the alternative design rendered the product not reasonably safe. *Peck*, 237 F.3d at 617.

In *Peck*, the court found that these factors were not met since there was no evidence of an available and practicable reasonable alternative design. *Id.* at 618. Additionally, the court found that even if the expert witness's proposed design was available, practicable, and reasonable, the plaintiff had not demonstrated that it would have reduced the foreseeable risk of harm posed by the lathe. *Id.* Although the expert testified that the alternative design would have prevented the plaintiff's particular accident from happening, he offered no experiential basis for that opinion and did not testify as to whether the design would have been safer overall.

Ashpool's case is also similar to *Peck* as to these factors. First, like the plaintiff in *Peck*, Ashpool did not provide adequate evidence proving an available, reasonable, and practicable alternative design existed, which precludes satisfaction of these factors. Additionally, even if the additional sensors were a sufficiently reasonable and practicable alternative design, Ashpool did not establish that the Autodrive feature would have been any safer. Like the expert testimony in *Peck*, Edison could not guarantee, and Ashpool did not prove, that the additional sensors would have made the Autodrive feature any safer overall. Edison's expert testimony gave no guarantee that the additional sensors would have even prevented Ashpool's accident or the twelve other accidents involving faulty sensors, let alone provide an experiential basis for that conclusion.

Finally, the Marconi's Autodrive technology does not hinder the vehicle's ability to safely stop when there is an object in the road. Instead, it hindered the vehicle's ability to warn the driver beyond what they themselves see. Even in that respect, Edison included the light on the dashboard that flashes when the driver takes his hands off of the steering wheel. Edison also made it clear that the Autodrive was not a substitute for an attentive driver and, as the appellate court noted, it would be against public policy to hold Edison liable for an imperfect safety

innovation. Accordingly, it cannot be said that the omission of the sensors necessarily rendered the Autodrive feature "not reasonably safe" within meaning of the sixth factor.

Because Ashpool did not present sufficient evidence to satisfy the risk-utility test, the appellate court correctly determined that the Marconi's Autodrive feature was not "unreasonably dangerous" at the time of distribution. Additionally, it cannot be said that the Marconi Autodrive feature is so dangerous that it should not have been made available at all. In fact, before the accident, the Autodrive feature functioned well and Ashpool had experienced no malfunctions with it. Ashpool's evidence did not diminish the justification for using the Marconi Autodrive design, and Edison therefore adopted the safest feasible design. Because Ashpool did not present adequate evidence to the contrary such that there was no legally sufficient evidentiary basis for a reasonable jury to find for Edison, Ashpool was not entitled to judgement as a matter of law. Accordingly, the Fremont Court of Appeals was correct in affirming denial of judgement as a matter of law, and this Court should affirm.

II. The Court of Appeals erred in adopting the duty to retrofit as law in the State of Fremont but correctly determined that the trial court's failure to give the jury instruction was harmless error.

The Court of Appeals erred in adopting the duty to retrofit as law in the State of Fremont. The duty to retrofit is a separate theory of liability within a design defect claim and considers a manufacturer's duty to upgrade or improve a product. *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 534 (Ky. 2003). The duty to retrofit assesses whether a manufacturer is liable for failing to address a design problem *after* a vehicle has left the manufacture and is in the hands of a consumer. R.12. Restatement (Third) of Torts: Products Liability § 11 (1998) has limited the duty to retrofit to two exceptions. First, when such action is required by statute or regulation requiring manufactures to recall the product. *Id.* Second, when the seller or manufacturer

undertakes to recall a product and fails to act as a reasonable person in recalling the product. *Id.* The "State of Fremont does not recognize a common law duty to retrofit." R. 6. At trial, Ashpool requested a duty to retrofit jury instruction. R. 6. Edison objected and the trial court sustained the objection. R. 6. Ashpool appealed the court's rejection of the jury instruction and the Court of Appeals for the State of Fremont held that the trial court's failure to give the jury instruction was harmless error. R. 16.

No prejudice resulted from the trial court's failure to provide the duty to retrofit jury instructions. "Prejudice will not be found if the jury instructions in their entirety state the applicable law of the case." *McAlphine v. Rhone-Poulenc Ag Co.*, 16 P.3d 1054, 1057 (Mont. 2000). An error by a trial court occurs if the rights of an aggrieved party are substantially affected because the outcome would have or may have been different had the error not occurred. *Hernandez v. Barbo Mach. Co.*, 327 Ore. 99, 113 (Or. 1998). Therefore, because a majority of jurisdictions reject to adopt the duty absent government directive, the traditional principles of strict liability suffice, and the adoption by the State of Fremont is without basis, this Court should decline to adopt the duty to retrofit in strict liability design defect claims.

A. The Court of Appeals erroneously adopted the duty to retrofit to strict liability design defect claims by relying on narrow interpretations of the products liability theory.

The Court of Appeal's adoption of the duty to retrofit is unwarranted. Restatement (Third) of Torts: Products Liability § 10 was established after a growing number of jurisdictions took the position that a "duty to warn" was warranted under certain circumstances. Restatement (Third) of Torts: Product Liability § 10 Reporters' Note, cmt. a. Joining the majority of jurisdictions, the State of Fremont recognized a post-sale duty to warn. R. 14. Even though it arises out of the duty to warn, the duty to retrofit has only been adopted by a small minority of

jurisdictions. *See* Lisa A. Meyer, *Annotation, Products Liability: Manufacturer's Postsale Obligation to Modify, Repair, or Recall Product*, 47 A.L.R.5th 395 (1997). However, the minority's reasons for adopting the duty to retrofit are inapplicable to the State of Fremont. *Id.*

Few jurisdictions such as Minnesota and California have imposed a duty to retrofit in extraordinary circumstances in which a potential danger is severe and widespread. *Gregory v. Cincinnnati Inc.*, 538 N.W.2d 325, 335 (Mich. 1995). The District of Minnesota has held that if a manufacture obtains credible information that its product may be dangerous, the manufacturer should test the product to determine the extent of the danger and then issue a warning or product recall. *Kociemba v. G.D. Searle & Co.*, 707 F.Supp. 1517, 1528 (D. Minn. 1989). Similarly, the Third Circuit found a duty to recall in the context of an airline crash because "human safety" was at issue. *Noel v. United Aircraft Corp.*, 342 F.2d 232, 241 (3d Cir. 1964).

On the other hand, a majority of jurisdictions do not acknowledge a duty to retrofit absent legal precedent or statutory requirement. *See* 47 A.L.R. 5th 395. These jurisdictions have held that the decision to implement a duty to retrofit on manufacturers is better left to administrative or legislative bodies who are better able to weight the factors, benefits, and costs of such an action. *See Ostendorf*, 122 S.W.3d at 534; *Gregory,* 538 N.W.2d at 326; *Modelski v. Mavostar Int'l Transp. Corp.*, 707 N.E.2d 239, 247 (Ill. App. Ct. 1999)*; Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1315 (Kan. 1993); *Rogers v. Clark Equip. Co.,* 744 N.E.2d 364, 370 (Ill. App. Ct. 2001). The Restatement states that, "Issues relating to product recalls are best evaluated by governmental agencies capable of gathering adequate data regarding the ramifications of such undertakings." Restatement (Third) of Torts: Products Liability § 11 cmt. a. Even Judge Irish's dissent in the Court of Appeals' decision adopting the duty to retrofit argues

that "[the duty to retrofit] lies firmly within the province of the legislature and other administrative regulatory bodies." R. 18.

Additionally, there is no reason to create a duty to retrofit a product that is not defective when sold because traditional principles of strict liability suffice. *Ostendorf,* 122 S.W.3d at 534. The court in *Ostendorf* stated that:

> There are two main reasons militating against a duty to retrofit. First, in many cases, a duty to retrofit is properly the province of an administrative or legislative body. Second, and more importantly, there is no reason to create a duty to retrofit a product not defective when sold - traditional principles of negligence and strict products liability suffice.

Id. at 534.

Even if the product was defective when sold, existing theories of strict liability allow recovery. *Id.* at 537. A strict liability theory is sufficient to access liability because liability for a design defect depends on what a manufacturer knew or should have known at the time of sale. *Id.* at 536. Therefore, a duty to retrofit is unnecessary.

As another example, the Second Circuit has refused to adopt a duty to retrofit despite the manufacturer's awareness of a defect and taking no action to remedy the problem because there was sufficient evidence of negligence. *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411 F.2d 451, 453 (2nd Cir. 1969). The court in *Braniff* stated that, "It is clear that after such a product has been sold and dangerous defects have come to the manufacture's attention, the manufacturer has a duty to remedy these, or if complete remedy is not feasible, at least to give consumers adequate *warning* and instructions methods for minimizing the danger." *Id.* In addition to Judge Irish's dissent in the Court of Appeals opinion arguing that it is up to the legislature and other administrative bodies to adopt the duty to retrofit, he also argued that a failure to warn claim is sufficient to cover any negligence of liability of manufactures. R. 18.

It is also illogical for the State of Fremont to adopt the duty under public policy grounds. The Court of Appeals argued, “In a world with such rapid technological advancements being place in the hands of everyday consumers, it is imperative that the creators of those devices are held accountable for the continued safety of its users.” R. 13. It reasoned that the common law rule would “better protect consumers” in the State of Fremont. R. 15. However, while the Court of Appeals offered public policy grounds to adopt the duty to retrofit, a majority of jurisdictions have refused to adopt the duty solely under public policy grounds. *Gregory,* 538 N.W.2d at 330. The Supreme Court of Hawaii refused to adopt a duty to retrofit in negligence and strict liability claims because manufacturers already have a duty to exercise reasonable care in designing and incorporating safety features to protect against foreseeable dangers. *Tabieros v. Clark Equip. Co.,* 944 P.2d 1279, 1297 (Haw. 1997) In *Tabieros*, the court sided with the courts that have reached the same majority conclusion:

> Given the foregoing menu of legally recognized duties or obligations -- "requiring the actor to conform to a certain standard of conduct for the protection of others against unreasonable risks," -- to which manufacturers are already subject, we do not believe that there are sufficiently "logical, sound, and compelling reasons," to justify a "public interest in the plaintiffs' proposed **duty to retrofit**. In other words, we perceive no reason to impose a duty upon manufacturers, independent of those enumerated above, to retrofit products because established legal duties already afford adequate protection and redress to potentially injured plaintiffs.

*Id.*at 1298. A prima facie case is established once the risk-utility test is satisfied; thus, it is unnecessary to impose an additional duty to recall a product on public policy grounds. *Gregory*, 538 N.W.2d at 333. *See Habecker v. Copperloy Corp.,* 893 F.2d 49 (3d Cir. 1990); *Burke v. Deere & Co.*, 6 F.3d 497, 509-510 (8th Cir. 1993); *Wallace v. Dorsey Trailers Southeast, Inc.,* 849 F.2d 341, 344 (8th Cir. 1988); *Romero v. International Harvestor Co.,* 979 F.2d 1444, 1452 (10th Cir. 1992).

Finally, Fremont's products liability statute provides sufficient remedy to a strict liability claim:

> One who sells any product in a defective condition unreasonably dangerous to the driver or consumer or to his property is subject to liability for physical harm caused to the ultimate driver or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the driver or consumer without substantial change in condition in which it is sold.

Fremont Rev. Code § 5552.321 Rule of Liability. The statute makes a manufacturer liable for a product that was defective when sold and the product physically harmed a consumer. *Id.* The statute provides sufficient remedy for a consumer without placing a burden on the manufacturer. An independent duty to retrofit places a too onerous burden on a manufacturer and turns strict liability into absolute liability. *Ostendorf*, 122 S.W.3d at 536. Therefore, the Supreme Court of the State of Fremont should not adopt the duty to retrofit because a public policy argument is unjustified.

B. The Court of Appeals correctly found that the trial court's failure to give a duty to retrofit jury instruction was harmless error.

Failure to give the duty to retrofit jury instruction was harmless error. R. 17. Error is harmless when it is not reasonably probable that the petitioner would have obtained a more favorable result. *Soule v. General Motors Corp.*, 882 P.2d 298, 310 (Cal. 1994). The standard of review for a trial court's refusal of a jury instruction is whether the instructions given are "prejudicially insufficient, erroneous, inconsistent, or misleading." *Stanford Carr Dev. Corp. v. Unity House, Inc.*, 141 P.3d 459, 470 (Haw. 2006). Adequate jury instructions "are those that fairly and reasonably convey the issues and provide correct principles of applicable law." *Sanders v. Bain*, 722 So. 2d 386 (La. Ct. App. 1998).

The Court of Appeals held that the trial court's denial in the inclusion of the jury instruction was harmless error because the duty would not have changed the outcome. R. 6. At

trial, the State of Fremont had not yet adopted the duty to retrofit and, thus, the duty was not yet applicable law. R. 6. After erroneously adopting the duty to retrofit in the State of Fremont, the appellate court still refused to remand the case to the trial court. R. 16. The Court of Appeals analyzed all three factors of the newly adopted duty to retrofit: (1) the product implicates human safety; (2) there is a continuing relationship between the manufacturer and consumer, and (3) the manufacturer had knowledge of a defect after the product was in the hands of the consumers. R. 16, 17.

Although the court held that two factors were met because the Marconi implicated human safety and Edison was aware of the faulty sensors, it failed to find that a continuous relationship existed between Edison and its consumers. R. 17. Therefore, failure to give Ashpool's requested jury instruction regarding the duty to retrofit was harmless error.

Conclusion

For the foregoing reasons, Respondent, Edison, respectfully requests that this Court affirm the decision of the Court of Appeals for the State of Fremont because (1) the Marconi Autodrive feature is not unreasonably dangerous under the risk-utility test and the petitioner is not entitled to judgement as a matter of law, and (2) the duty to retrofit should not be adopted as law in strict liability design defect claims in the State of Fremont.

Respectfully Submitted,

/s/ *Team N*
Team N
Counsel for Respondent