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Docket No. 21-2112

In The

Supreme Court of the State of Fremont

William Ashpool,

Petitioner,

v.

Edison, Incorporated

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FREMONT

BRIEF FOR EDISON, INC.

Attorneys for Respondent

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?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (con't)

Page(s)

TABLE OF AUTHORITIES (con't)

Page(s)

Code Provisions

Other Authorities

Docket No. 20-1000

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William Ashpool,
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Edison Incorporated,
A Fremont Corporation,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF FREMONT

BRIEF FOR EDISON, INCORPORATED

TO THE SUPREME COURT OF FREMONT:

Respondent, Edison, Incorporated, appellee in Docket No. 20-1000 before the Court of Appeals for the State of Fremont, respectfully submits this brief on the merits, and asks this Court to affirm the holding of the Court of Appeals for the State of Fremont.

CODE PROVISIONS

Fremont Rev. Code § 5552.321 is relevant to this case. It is reprinted in Appendix A. Sections 50(a) and 50(b) of the Fremont Rules of Civil Procedure are relevant to this case. They are reprinted in Appendix B.

STATEMENT OF THE CASE

Factual Background

An Evolving Market. In 2017, Edison, a Fremont-incorporated automobile company, introduced its Marconi into the increasingly competitive economy sedan market. R. at 2. Fremont has historically been known for its luxurious automobile designs and sport electric vehicles. R. at 2.

Designing the Marconi. Edison decided to include an Autodrive feature on the Marconi in attempt to capitalize on the requirements of its new target market. R. at 2. This Autodrive feature provided consumers with a semi-autonomous driving experience where an onboard computer operates the vehicle for the driver if the driver keeps two hands on the steering wheel when the automobile is in drive. R. at 2. This system receives data from twelve sensors surrounding the car, which allows the system to analyze the road and surrounding drivers. R. at 2. The system is able to cause the vehicle to stop, accelerate, change gears, and maneuver without input from the driver. R. at 2. A driver is able to input their desired destination, and the built-in GPS system works to assess road conditions, weather conditions, speed limits, and traffic lights along the route. R. at 2, 3. The GPS route is displayed on an 11-inch screen inside the Marconi, close in proximity to the radio and temperature controls. R. at 2. The GPS screen displays the automobile moving along the route, and the Marconi operates semi-autonomously until arrival at the destination the driver inputs

into the system. R. at 2. The Autodrive feature may be turned on or off when the vehicle is stopped or parked. R. at 3.

The manual that comes with the Marconi states the importance of being an attentive driver and keeping two hands on the steering wheel at all times. R. at 3. In the instance of the driver removing his or her hands from the steering wheel, the system will display a flashing light on the dashboard, which alerts the driver to put his or her hands back on the steering wheel. R. at 3. The driver can also override the Autodrive system when both of the driver's hands are on the wheel. R. at 3.

Marconi's Software. Edison updates the Marconi's software periodically as technology advances. R. at 3. These updates occur by sending a notification to the owners of the vehicle when the vehicle is started. R. at 3. This notification pops up on the screen mentioned above every time the car is started until the driver installs the update on the vehicle. R. at 3. The majority of these software updates are for safety purposes, but some are cosmetic. R. at 3. The software updates are a way for Edison to maintain the highest evolving safety standards without its consumers having to buy the newest vehicle. R. at 3.

Mr. Ashpool. Mr. Ashpool is a 55-year-old Fremont resident, who purchased the new Edison Marconi in November of 2019. R. at 3-4. Mr. Ashpool was drawn to the Edison Marconi because of its Autodrive feature. R. at 4. Mr. Ashpool had no issues with the Autodrive feature prior to December 2019. R. at 4.

Accident. Mr. Ashpool crashed his Marconi on Route 27 in Fremont. R. at 4. This crash occurred when the Marconi, traveling at 42 mph, collided with a brown bear sitting in the middle of the road. R. at 4. This accident resulted in Mr. Ashpool suffering from a dislocated shoulder, five broken ribs, a broken wrist, a concussion, and whiplash. R. at 4. He was hospitalized for two

and a half weeks. R. at 4. The bear involved suffered no injuries. R. at 4. The Marconi was totaled as a result of this accident. R. at 4. This accident prompted the filing of this action against Edison. R. at 4. Mr. Ashpool claims that Edison improperly designed the sensors on the Marconi, resulting in this crash and his injuries. R. at 4. Specifically, Mr. Ashpool alleges that he suffered various injuries as a result of the vehicle's faulty sensors, which did not alert him to the brown bear in the middle of the street. R. at 4. Mr. Ashpool further alleges that Edison knew about the issues with the sensors and did nothing to remedy the issue. R. at 4.

Evidence at Trial. Both Edison and Mr. Ashpool presented evidence at trial relating to the Marconi's Autodrive technology. Edison produced evidence that, prior to the release of the Marconi, they performed numerous crash and safety tests as required by the National Highway Traffic Safety Administration. R. at 4. These hundreds of tests paid particular attention to the sensors placed around the Marconi. R. at 5. These tests showed that the sensors had some difficulty identifying stationary objects when the vehicle was driving over 35 mph. R. at 5. One of Ashpool's experts testified that the accident rate was 13% higher when the Marconi was travelling over 35 mph and a stationary object was present in the vehicle's path. R. at 5. This same expert also produced testimony that the innovations incorporated into the Marconi were proven to avoid accidents. R. at 5. The CEO of Edison testified that the company originally planned to include extra sensors and proprietary sensor technology that would have assessed stationary objects more effectively at higher speeds. R. at 5. These were not included because of cost concerns and feasibility. R. at 5. The additional equipment would have increased the cost of the vehicle to consumers by at least $5,000, pushing the vehicle outside the economy range of sedans, Edison's target market. R. at 5. Edison's CEO also testified that the Marconi was safe despite the potential

issues with the sensors because even a moderately attentive driver would avoid objects in the road if they still had their hands on the wheel and eyes on the road. R. at 5.

The record notes that there were approximately twelve accidents within two years before the case at hand involving the Marconi, stationary objects, and drivers travelling above 35 mph. R. at 5. The jury was informed of these accidents, over the objection of Edison. R. at 6. The jury also learned that each of these accidents involved faulty sensors and a stationary object such as a median strip, light pole, or an already-deceased deer. R. at 6. Edison's CEO maintains that the lack of an additional sensor did not result in these prior accidents because the Autodrive technology does not take away the driver's ability or responsibility to maneuver the vehicle. R. at 6.

Jury Instruction. The first issue before the court today considers a proposed jury instruction, submitted by Mr. Ashpool. R. at 6. This jury instruction instructed the jury of the duty to retrofit, which is not recognized in the State of Fremont. R. at 6. Edison thus objected to the inclusion of this jury instruction, and Mr. Ashpool informed the trial court that he planned to introduce evidence that Edison knew the sensors were failing, which resulted in numerous accidents, yet Edison refused to fix the problem. R. at 6. Ashpool claimed that this could have been resolved by Edison creating a new update to the sensors and sending the update to Marconi drivers. R. at 6. Although the CEO was aware that adding an additional sensor could possibly impact the collision rate, it was only discovered after distribution that a software update to the already existing sensors could improve the crash rate as well. R. at 7. The trial court sustained Edison's objection and Ashpool was only able to present evidence relating to his allegation that the sensors were defective before they left the manufacturer and Edison was liable for failing to fix them. R. at 7. The risk-utility analysis was used for assessing this design defect claim. R. at 7.

Procedural History

Hayward County District Court. Mr. Ashpool sued Edison, Inc. alleging a design defect under Fremont Rev. Code § 5552.321. R. at 8. On the final day of trial, after all evidence had been submitted, Mr. Ashpool moved for judgment as a matter of law pursuant to Fremont Rule of Civil Procedure 50(a). R. at 7. The trial court denied this motion and the case was submitted to the jury for consideration. R. at 7. The jury found in favor of Edison, finding that there was no design defect in the Marconi and that the sensors did not result in Ashpool's crash. R. at 7. Mr. Ashpool submitted a renewed judgment as a matter of law pursuant to Fremont Rule of Civil Procedure 50(b). R. at 7. This motion was also denied by the trial court. R. at 7.

Court of Appeals for the State of Fremont. Mr. Ashpool appealed the district court's decision to the Court of Appeals for the State of Fremont. R. at 7. In his appeal, Mr. Ashpool argued that the trial court erred in failing to include the duty to retrofit in its jury instructions. R. at 7. He also argued that the trial court erred in its denial of his renewed motion for judgment as a matter of law. R. at 7. The Court of Appeals ruled in favor of Edison, affirming the judgment of the district court. R. at 18.

STANDARD OF REVIEW

A motion for judgment as a matter of law is reviewed de novo. "We 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. 1998). The 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).

SUMMARY OF THE ARGUMENT

Risk-Utility Analysis. The Court of Appeals for the State of Fremont and the Hayward County District Court correctly applied the risk-utility analysis of a design defect claim. Thus, the trial court did not err when it denied Petitioner's Motion for judgment as a matter of law. Under the first two elements of the risk-utility test, the likelihood and severity of injury was not foreseeable to Respondent at the time of distribution. The remaining elements, surrounding the issue of a feasible reasonable alternative design, also weigh in favor of Respondent because a reasonable alternative design was not practicable. Additionally, there is no evidence in the record that suggests that the alternative design, even if practicable, would have reduced the foreseeable risk of harm posed by Respondent's product, the Marconi.

Jury Instruction and Duty to Retrofit. The duty to retrofit should not be adopted in the State of Fremont by this court. Additionally, even if this Court were to adopt the duty to retrofit, the trial court still did not err in rejecting Petitioner's jury instruction and refusing to impose a duty to retrofit on Respondent. The trial court did not err in refusing to admit this proposed jury instruction because the duty to retrofit has not been adopted in the State of Fremont. Additionally, this duty to retrofit should not be adopted because the post-sale duty to warn and duty to test, adopted in the State of Fremont, are sufficient to hold manufacturers liable. This case is not the appropriate vehicle to adopt a duty to retrofit because the judiciary is not equipped to decide to adopt or reject the duty to retrofit. Decisions such as these are better left to the legislature and administrative agencies.

ARGUMENT

I. The Court of Appeals for the State of Fremont Correctly Ruled that the Trial Court did not Err When it Denied Petitioner's Motion for Judgment as a Matter of Law on the Design Defect Claim Under the Risk-Utility Test.

This court should affirm the decision of the Court of Appeals for the State of Fremont's finding that the trial court did not err in denying Ashpool's motion for judgment as a matter of law on the design defect claim under the risk-utility test. R. at 12. Summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fremont R. Civ. P. 50(a), (b).

There are three types of product liability suits in which strict liability has been invoked: (1) manufacturing defect; (2) warning defects; and (3) design defects. *Anderson v. Ownes-Corning Fiberglas Corp*., 810 P.2d 549, 553 (Cal. 1991). In the case before the court today, Petitioner solely alleges a design defect. R. at 8. To prevail on a products liability design defect claim, the plaintiff must show: (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. *Bragg v. Hi-Ranger, Inc*., 462 S.E.2d 321, 326 (S.C. Ct. App. 1995); W. Prosser, Law of Torts 671-71 (4th ed. 1970); *Cf*. Fremont Rev. Code § 5552.321. The plaintiff has the burden of proving that the product, as designed, was in an unreasonably dangerous or defective condition. *Reed v. Tiffin Motor Homes, Inc.,* 697 F.2d 1192 (4th Cir. 1982). This requirement does not require the plaintiff to prove that the defendant acted negligently, "only that the product was defective and unreasonably dangerous when it was placed in the stream of commerce." *Welch v. Outboard Marine Corp*., 481 F.2d 252 (5th Cir. 1973). Thus, the jury should focus on the product itself and

not the conduct of the manufacturer. *Singleton v. International Harvester Co*., 685 F.2d 112, 114 (4th Cir. 1981).

The present case centers on the last issue, whether the Marconi was defective in an "unreasonably dangerous" condition. R. at 8. Two tests currently exist for determining the unreasonable dangerousness of a product: the consumer expectations test and the risk-utility test. *Bifolck v. Philip Morris, Inc.,* 152 A.3d 1183 (Conn. 2016). In *Fickell v. Toyoma Motors, Inc.,* the Court of Appeals for the State of Fremont adopted the risk-utility test as the exclusive test for design defect claims. 758 XE 821, 830 (Fremont 2014). Many jurisdictions have also adopted this test in recent years. *Branham v. Ford Motor Co*., 701 S.E. 2d 5, 15 (S.C. 2010); *Gregory v. Cincinnati Inc.,* 538 N.W.2d 325, 329-30 (Mich. 1995); *Armentrout v. FMC Corp.,* 842 P.2d 175, 183-84 (Colo. 1992); *Banks v. ICI Ams., Inc.,* 450 S.E.2d 671, 674-75 (Ga. 1994). The risk-utility test is especially helpful in cases where new and innovative automobile technology is at issue, such as the one currently before the court. *Pruitt v. Gen. Motors Corp*., 86 Cal. Rptr. 2d 4, 6 (Cal. Ct. App. 1999); *Quintana-Ruiz v. Hyundai Motor Corp*., 303 F.3d 62, 77 n.12 (1st Cir. 2002); cf. *Wheeler v. Chrysler Corp*., No. 98 C 3875, 2000 WL 263887, at *3-4 (N.D. III. Mar. 1, 2000).

The risk-utility test tasks the fact finder with considering the product and the conduct of the manufacturer, as opposed to consumer expectations. *Reed v. Tiffin Motor Homes, Inc.,* 697 F.2d 1192 (4th Cir. 1982); Cami Perkins, *The Increasing Acceptance of the Restatement (Third) Risk Utility Analysis in Design Defect Claims*, 4 Nev. L.J. 609, 614 (2004). This test was adopted by the Restatement (Third) of Torts. Perkins, 4 Nev. L.J. at 614. This test balances the danger associated with a product against its utility in the hands of the consumer, with a focus towards determining whether or not a product is defective. *Id.* "If the danger associated with the use of the product outweighs the utility of the product," then the product should be found to be unreasonably

dangerous. *Bragg v. Hi-Ranger, Inc*. 462 S.E.2d 321, 328 (S.C. Ct. App. 1995). By using this inquiry, the risk-utility test balances both costs and benefits of a product. *Soule v. Gen. Motors* Corp., 882 P.2d 298, 308 (Cal. 1994).

The plaintiff must show the manufacturer foresaw the risks of its chosen design compared to an alternative design, that this alternative design was practicable, and that the failure to choose this design rendered the product unreasonably unsafe. *Peck v. Bridgeport Machs., Inc.*, 237 F.3d 614, 617 (6th Cir. 2001). There are six factors that a court must balance to determine if a product's risk outweighs its utility to the consumer: (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. *Peck*, 237 F.3d at 617; *Show v. Ford Motor Co*., 659 F.3d 584, 588 (7th Cir. 2011). These factors are non-exhaustive but aim to help the jury assess the appropriate liability in any particular case. Jacob B. Jenson, Note, *Self-Driving but Not Self-Regulating: The Development of a Legal Framework to Promote the Safety of Autonomous Vehicles*, 57 Washburn L.J. 579, 592 (2018).

A. The Likelihood and Severity of Injury was not Foreseeable to Respondent

As held by the appellate court below, the first two factors weigh in favor of Respondent. R. at 10. In a product's liability suit, a court must analyze the foreseeability to the manufacturer of injury and of the severity of potential injuries. *Peck*, 237 F.3d at 617. Here, the Appellant in the trial court below presented evidence of tests performed on the Marconi indicating that the vehicle

had difficulty identifying stationary objects when the vehicle was traveling at a speed over thirty-five miles per hour. R. at 5. As the record notes, this difficulty identifying stationary objects led to a 13% higher chance of collision when a stationary object was in the path of the Marconi than when no object was placed in the path of the Marconi. R. at 5. Although this percentage may seem concerning to this Court, the record notes that this percentage is not any higher than the likelihood of collision with a normal sedan without such advanced technology as the Marconi. R. at 11.

As the record also notes, the only information presented at trial of pre-distribution evidence relating to foreseeability of injury was Respondent's own internal testing done on the Marconi. R. at 10. The remainder of the evidence presented on this issue is post-distribution. R. at 10. Since this evidence was not "reasonably attainable" to Respondent when the Marconi was distributed to consumers, this is the type of evidence that the Restatement (Third) of Torts warned against using in products liability suits: "For 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 risks-avoidance techniques reasonably attainable at the time of distribution." Restatement (Third) of Torts: Products Liability § 2 cmt. a. Since the only pre-distribution evidence presented at the trial court showed that the risk of collision with the Marconi was not any higher than the risk of collision with a normal sedan, the Appellate court below correctly held that the likelihood and severity of injury was not foreseeable to Respondent pre-distribution. R. at 10-11. Nothing in the design or technology of the Marconi should have alerted Respondent that the vehicle was unreasonably dangerous.

B. The Remaining Elements also Weigh in Favor of Respondent

The remaining elements of a product's liability design defect risk-utility analysis center on the possibility of an alternative design, other than the one used by the manufacturer, that would

have reduced the risk of the aforementioned potential injuries. *Peck*, 237 F.3d at 617. Because only the "most extreme" design defects cases "reflect the position that a product is simply so dangerous that it should not have been made available at all," the reasonableness of the manufacturer in choosing a product design among other feasible options is the "heart" of design defect cases. *Banks v. ICI Americas, Inc.,* 450 S.E.2d 732, 674 (Ga. 1994). Thus, the "existence" and "feasibility" of a reasonable alternative designs diminish the "the justification for using a challenged design." *Id.*

1. A Reasonable Alternative Design was not Practicable

As the record notes, a reasonable alternative design did exist for the Marconi. R. at 11. This alternative design was in the form of additional sensors on the vehicle, which were not included as a result of their price. R. at 11. Caselaw has held that an alternative design must not simply exist, it must be an alternative design that is reasonable and would reduce the risk of a collision. *Branham v. Ford Motor Co*., 701 S.E.2d 5, 247 (S.C. 2010). The reasonable alternative design must also not make the product line infeasible. *Id*. at 220. In the trial court, Respondent produced testimony that these additional sensors would have raised the cost of the Marconi by $5,000, which would have taken the Marconi out of the economy range of Respondent's target market, average sedan purchasers. R. at 5. Thus, the inclusion of these sensors would have endangered the feasibility of the entire product line of Marconis. R. at 5. Since they would endanger the feasibility of the Marconi, these additional sensors should not be considered a reasonable alternative design.

In *Peck v. Bridgeport Machine, Inc*. the Sixth Circuit held that, under the risk-utility test, an expert who testifies that a product could have been designed differently, but who have 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." 237 F.3d 614 (6th Cir. 2001). Thus, the testimony from

Petitioner's expert in the trial court noted in the record was not enough to sustain a motion for summary judgment.

2. There is No Evidence that the Reasonable Alternative Design, Even if Practicable, Would have Reduced the Foreseeable Risk of Harm Posed by Respondent's Product

Although Petitioner introduced evidence suggesting that the additional sensors would have decreased the aforementioned 13% chance of collision, this evidence is not immune from reconsideration. R. at 5. Petitioner presented evidence stating that the Marconi's Autodrive feature did not place any limitation on the Marconi's ability to safely stop when an object is in its path. R. at 12. The Autodrive feature simply included a limitation on the safety warning system and required that the driver be attentive to what was in front of them on the road. R. at 12. Throughout production, Respondent made it clear to consumers that the Marconi's Autodrive feature still required an attentive human driver, the system did not replace this. R. at 12. Additionally, the aforementioned 13% increase in collision is no different than the rate for an average, non-autonomous vehicle. None of the evidence produced at trial would have led a jury to believe that the alternative design would have prevented Petitioner's accident from occurring. Although Petitioner's expert hinted at this, he offered no experiential basis for that opinion and did not testify as to whether the alternative design would have been safer overall. *See Peck*, 237 F.3d at 619.

There was no evidence presented at trial to show that the lack of additional sensors, the alternative design, was the cause of Petitioner's accident. R. at 6. It is also unclear from the record if the lack of additional sensors was the cause of the twelve other Marconi accidents mentioned. R. at 6. This fact was disputed at trial, and Respondent's CEO noted that "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." R. at 6. Neither the Autodrive

technology or the lack of additional sensors takes away the driver's ability or responsibility to maneuver the vehicle. R. at 6. Throughout production and distribution, Respondent made it clear that the driver retained a responsibility to be attentive and responsible. R. at 6.

From a public policy perspective, it would be ineffective and unfair to hold Respondent liable for the shortcomings of a safety innovation, especially when the limitations of this feature were advertised upfront. R. at 12. For these reasons, under the risk-utility analysis, which this jurisdiction follows, the alternative design of additional sensors did not render the Marconi unreasonably dangerous. *Fickell v. Toyoma Motors, Inc.,* 758 XE 821, 830 (Fremont 2014). As a result, this Court should, as the appellate court below did, hold that the Marconi was not unreasonably dangerous at the time of distribution. R. at 12. Therefore, Respondent is not liable for failing to exercise reasonable due care in designing the Marconi. This Court should affirm the denial of Petitioner's motion for judgment as a matter of law.

II. The Duty to Retrofit Should not be Adopted in the State of Fremont by this Court. Additionally, even if this Court were to Adopt the Duty to Retrofit, the Trial Court Still did not err in Rejecting Petitioner's Jury Instruction and Refusing to Impose a Duty to Retrofit on Respondent.

In the trial court below, the jury instruction submitted to the jury required the jury to consider whether Respondent was liable for not designing a safer product before the Marconi was distributed. R. at 6. In contrast, under a duty to retrofit theory, a manufacturer can be held liable for a design problem discovered after the vehicle has been distributed to the consumer, if the problem in design is not effectively addressed. R. at 6. Petitioner claims that the trial court erred when it rejected his proposed jury instruction on this issue. R. at 7. This Court should not adopt this duty, and the trial court did not err when it refused to include this jury instruction.

A. The Trial Court Did Not err in Refusing to Admit this Proposed Jury Instruction.

As a general rule, appellate courts should show restraint and set aside verdicts "only where [jury] instructions misled the jury to such an extent as to prevent it from doing justice." *Rowsey v. Jones*, 655 So.2d 560 (La. Ct. App. 1995). "Adequate jury instructions, of course, are those that fairly and reasonably convey the issues and provide correct principles of applicable law." *Sanders v. Bain*, 722 So. 2c 386, 388 (La. Ct. App. 1998). The jury instructions given by the trial court did exactly this by correctly and thoroughly conveying the law surrounding design defects and products liability. In addition, "[t]o support a jury instruction, there must be sufficient evidence presented on that issue of fact." *Udac v. Takata Corp*., 214 P.3d 1133, 1153 (Haw. Ct. App. 2009). This jurisdiction has also held that a failure to give a jury instruction should be considered harmless error if the court reviewing the issue cannot determine that the jury likely would have come to a different verdict if the jury instruction that was not included were included. *Oliver v. McCord*, 550 CE 625, 634 (Fremont 1996).

Even if this Court were to hold that the duty to retrofit should be adopted in Fremont, the lower court's holding on the jury instruction issue should be affirmed because the failure to include the proposed jury instruction on the duty to retrofit constitutes a harmless error. A plaintiff may not submit a jury instruction that is unsupported by evidence at trial. *Smith v. Firestone Tire & Rubber Co.*, 755 F.2d 129, 135 (8th Cir. 1985). Since Fremont had not adopted a duty to retrofit at trial or currently, the duty to retrofit should not have been included in the jury instructions because it was not supported by evidence and there was no legal basis for its inclusion. A party has a "general right to have instruction presenting its theory of the case," but a "plaintiff has no right to submit to the jury an instruction unsupported by the evidence adduced at trial." *Beard v. Mitchell*, 604 F.2d 485, 497 (7th Cir. 1979). In the trial court, the appropriate jury instruction

advising the jury of the risk-utility analysis was presented to the jury and the question was resolved by the jury against Petitioner. There is no legal basis for the jury instructions in this case to be overturned.

B. The Post-Sale Duty to Warn and Duty to Test, Adopted in the State of Fremont, are Sufficient to Hold Manufacturers Liable.

The appellate court below noted that the post-sale duty to warn has been adopted in a majority of jurisdictions. R. at 14. This post-sale duty to warn has been recognized in the State of Fremont. *Shane v. Smith,* 657 XE 720, 725 (Fremont 1984). The post-sale duty to warn of known dangers inherent in a product "has long been a part of the manufacturer's liability doctrine." *Comstock v. Gen. Motors Corp.*, 99 N.W.2d 627, 634 (Mich. 1959) (collection of cases). The duty to warn can also include a duty to test. *Kociemba v. GD Searle & Co.*, 707 F. Supp. 1517, 1527 (D. Minn. 1980). Courts have held that the duty to test arises in a special set of circumstances where 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. *Id.* (citing *Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 833 (Minn. 1988)). Both of these concepts are centered on maintaining the safety of consumers, especially when a problem with a product becomes known to a manufacturer.

However, this same rationale does not extend to the duty to retrofit. As the dissent below noted, the Appellate court should have ended its analysis after discussing these existing theories of liability in Fremont jurisprudence because is inappropriate to implement a new and higher burden on manufacturers in Fremont. *See Tabieros v. Clark Equip. Co*., 944 P.2d 1279, 1299 (Haw. 1997) (citing *Gregory v. Cincinnati Inc.,* 538 N.W.2d 325, 333 (Mich. 1995)). The duty to retrofit is "superfluous in light of existing negligence and product liability doctrines." *Ostendorf v. Clark Equip. Co.,* 122 S.W.3d 530, 534 (Ky. 2003). Under current Fremont law, "a party injured by a

product can bring suit for that injury under three different theories: "(1) breach of warranty under the Uniform Commercial Code, (2) negligence, or (3) strict liability in tort." *Id.* Defective design claims brought under a theory of negligence or strict liability both focus on the same central issue: was a product "unreasonably dangerous"? *Ulrich v. Kasco Abrasives Co.,* 532 S.W.2d 197, 200 (Ky. 1976). Under both of these theories, the manufacturer has a legal duty to use "reasonable care to protect against foreseeable dangers." *Ostendorf*, 122 S.W.3d 530, 536 (Ky. 2003).

In *Gregory*, the Michigan Supreme Court considered and refused to adopt the duty to retrofit. 538 N.W.2d 3290. This was partly due to the fact that, much like Fremont, Michigan has already adopted a duty to warn and a risk-utility cause of action, which are more than enough to protect consumers. *Id.* at 328-29. With this in mind, "it is unnecessary and unwise to impose or introduce an additional duty to retrofit or recall a product." *Id*. at 333-34. The court specifically noted that there are only two scenarios in which a duty to retrofit is applicable: latent defects and technological advances. *Id.* at 325. A duty to retrofit is unnecessary in a latent defect case because "a negligence or strict liability theory can assess liability" for a defect that "existed undiscovered at the time of manufacture." *Ostendorf*, 122 S.W.3d at 536. In the case of a technological advance, the court there held, and this one should as well, that "imposing a duty to update technology would place an unreasonable burden on manufacturers. It would discourage manufacturers from developing new designs if this could form the bases for suits or result in a costly repair..." *Gregory*, 538 N.W.2d at 337. This extremely high duty on manufacturers would "be tantamount to making strict liability absolute liability and making a manufacturer an insurer." O*stendorf*, 122 S.W.3d at 536. If Petitioner could prove what he alleges, that Respondent's Marconi was defective when it was sold and distributed, then he should be able to recover under the currently existing theories in Fremont. However, as discussed above, Petitioner's design defect claim should fail.

C. This Court Should Not Adopt the Duty to Retrofit

A duty to retrofit, also known as "a duty to upgrade or improve a product," has only been adopted in a minority of jurisdictions. *Ostendorf.,* 122 S.W.3d at 534. Even jurisdictions that have adopted this duty only apply it in a smaller minority of circumstances. *Id.* As mentioned previously, The State of Freemont has adopted the duty to warn, which provides sufficient protection for consumers.

A majority of jurisdictions have held that there is no duty to retrofit a product not defective when it is sold. Lisa Anne Meyer, Annotation, *Products Liability: Manufacturer's Postsale Obligation to Modify, Repair, or Recall Product*, 47 A.L.R. 5th 395 (1997). There are two central reasons why courts have held this way: (1) in many cases, a duty to retrofit is the responsibility of the legislative body, and (2) "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." *Ostendorf,* 122 S.W.3d at 534.

1. This Case is not the Appropriate Vehicle to Adopt a Duty to Retrofit.

Courts which do not impose a duty, decline to do so "except where there is an assumption of the duty or some special, controlling relationship between the manufacturer and the owner of the machine." *Gregory*, 538 N.W.2d at 335; see *Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519, 531-32 (Tex. Civ. App. 1979) (finding a continuous relationship and an assumption of duty where the manufacturers continuously improved and replaced its product). The appellate court below held that there should be 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." R. at 16. Petitioner's claim does not satisfy all of these elements. Petitioner's claim does satisfy the first

element because the Marconi is an automobile, and automobiles generally pose a danger to human safety in a variety of ways. R. at 16. This is true for both ordinary vehicles and semi-autonomous vehicles. In fact, tests show that autonomous vehicles will save 21,700 lives and reduce accidents by 4,220,000 once they have penetrated the market by 90%. Jeffrey K. Gurney, *Sue My Car Not Me: Products Liability and Accidents Involving Autonomous Vehicles*, 2013 U. Ill. J. L. Tech. & Policy 247, 263 (Fall 2013).

Petitioner's claim does not satisfy the second element, a continuing relationship between manufacturer and consumer. Courts historically have found there to not be a continuing relationship between car manufacturers and drivers. R. at 16. This is because, once the consumer has bought the car and driven way from the dealership, the manufacturer has little to no control over the car. R. at 16. This particular relationship is slightly more complex in the case before the Court today, because Respondent's cars are equipped with a system that updates vehicle software periodically and sends these updates out to the drivers. R. at 16. This system is a convenience to the purchaser, and it is not required for the consumer to continue using the vehicle. R. at 16. The consumer purely benefits from these updates. R. at 16. As long as the driver of the vehicle is a responsive, attentive driver with both hands on the wheel, then the vehicles are fully capable of operating without the periodic updates.

The last element of this analysis requires the jury to consider whether Respondent knew of the defects with the Marconi. R. at 17. The record reflects that Respondent was aware, before that car left the manufacturer, that the Marconi had a 13% increased chance of collision when the driver was going over 35 mph and there was a stationary object in its path. R. at 6. Respondent and Petitioner were aware of this fact. Previous to Petitioner's accident, there were also twelve separate accidents alleging similar failures in the Marconi's sensors when the car was travelling over 35

mph and a stationary object was in the middle of its path. R. at 5. These twelve accidents occurred over a two-year period. R. at 5. Due to the amount of Marconi's produced and the fact that this rate is no higher than the rate of collision with ordinary sedans, these facts alone do not show that a jury would have likely concluded that Respondent was aware of the fact that its sensors were failing.

Due to the fact that the jury would likely have not concluded that Respondent knew of the issues with the Marconi's sensors and that Respondent maintained a continuing relationship with consumers, this Court should affirm the Appellate court below in holding that Respondent should not be held liable, even under a duty to retrofit, which this jurisdiction has not adopted.

2. The Judiciary is Not Equipped Decide to Adopt or Reject the Duty to Retrofit

Existing caselaw shows that most jurisdictions do not adopt a duty to retrofit as a blanket approach. Lisa Anne Meyer, Annotation, *Products Liability: Manufacturer's Postsale Obligation to Modify, Repair, or Recall Product*, 47 A.L.R. 5th 395 (1997). Instead, the jurisdictions who apply a duty to retrofit do so on a case-by-case basis. 47 A.L.R. 5th 395. Some jurisdictions have held that the duty to retrofit also does not apply in cases where post-manufacture safety devices were unavailable at the time of distribution. *Tabieros v. Clark Equipment Co.*, 944 P.2d 1279 (Haw. 1997). The circumstances in the present case before the court today certainly do not allow this Court to adopt the duty to retrofit, as either a blanket rule or on a case-to-case basis. The authority to adopt these kind of rules lies with the legislative branch and other administrative, regulatory bodies. *Ostendorf,* 122 S.W.3d at 534. The legislature is better equipped to make these types of complex decisions, and the existing law in Freemont is more than capable of holding manufacturers appropriately liable. *Gregory*, 538 N.W.2d at 334. Professor Schwartz, the principal

author of The Uniform Product Liability Act, spoke against adopting a duty to retrofit by the judiciary:

> [C]ourts that impose a post-sale obligation to remedy or replace products already in the marketplace arrogate to themselves a power equivalent to that of requiring product recall. Product recalls, however, are properly the province of administrative agencies, as the federal statutes that expressly delegate recall authority to various agencies suggest. As Congress has recognized, administrative agencies have the institutional resources to make fully informed assessments of the marginal benefits of recalling a specific product. Because the cost of locating, recalling, and replacing mass-marketed products can be enormous and will likely be passed on to consumers in the form of higher prices, the recall power should not be exercised without extensive consideration of its economic impact. Courts, however, are constituted to define individual cases, and their inquiries are confined to the particular facts and arguments in the cases before them. Decisions to expand a manufacturer's post-sale duty beyond making reasonable efforts to warn product users about newly discovered dangers should be left to administrative agencies, which are better able to weigh the costs and benefits of such action.

Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U. L. Rev. 892, 901 (1983).

This Court also should not feel required to adopt any new approach with haste because the established theories under current Fremont law are more than sufficient to cover any potential negligence or liability of manufacturer's claims. An additional theory of liability is not required or appropriate, especially in the case before this Court today. For these reasons, the lower court's judgment should be AFFIRMED, and the State of Fremont should not adopt the duty to retrofit unless the legislature or administrative bodies see fit to do so in the future.

CONCLUSION

For the foregoing reasons, Respondent respectfully request this Court affirm the judgment of the Court of Appeals for the State of Fremont.

Respectfully submitted,

Team P
Counsel for Respondent

APPENDIX A

Code Provision

Fremont Rev. Code § 5552.321 Rule of Liability

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, it

(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 the condition in which it is sold.

APPENDIX B

Code Provisions

Freemont Rule of Civil Procedure 50(a)

(a) Judgment as a Matter of Law.

(1) *In General.* If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) *Motion.* A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

Fremont Rule of Civil Procedure 50(b)

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may

include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.