Docket No. 21-2112

In the

Supreme Court of the State of Fremont

WILLIAM ASHPOOL,
Petitioner,

v.

EDISON INCORPORATED, a Fremont Corporation
Respondent.

On Petition for Review from the
Court of Appeals for the State of Fremont

BRIEF FOR PETITIONER

Team Q
Counsel for Petitioner

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ISSUES PRESENTED

I. Did the Court of Appeals err in affirming the trial court's denial of Ashpool's motion for judgment as a matter of law when the tests Edison performed on its product prior to release revealed its inability to identify stationary objects and Edison knew putting in additional sensors would have improved this issue?

II. Did the Court of Appeals err when it held that the trial court judge's refusal to give an instruction regarding the duty to retrofit was harmless even though Ashpool presented sufficient evidence to warrant such an instruction?

STATEMENT OF THE CASE

Factual Background

Edison's Marconi. Edison is an automobile manufacturer that typically designs luxury and sport vehicles. R. at 2. Edison decided to join the economy sedan market by producing a car that utilized an advanced feature known as Autodrive, while maintaining the average price point of a sedan. R. at 2. The semi-autonomous feature included in the Marconi allows drivers to input their destination into a large screen displayed on the center console and from that point on the car's sensors maintain the crucial job of assessing road conditions, speed limits, traffic lights; and making necessary adjustments based on the location of other cars and objects. R. at 2–3.

To maintain optimal levels of safety, continuously updates the Marconi's Autodrive software as technology develops and improvements become necessary. R. at 3. Edison automatically sends these updates to the Marconi's onboard computer and a notification appears directly on the owner's center console screen. R. at 3. The update notification pops up every time the owner turns on the vehicle until he completes the update. R. at 3. These software updates allow Edison to maintain contact with its consumers through advanced technology that assures its customers continued safety post-distribution. R. at 3. The Marconi includes a separate manual discussing the importance of an attentive driver and explaining that a driver can still steer the vehicle if they choose to. R. at 3. However, it also states that drivers will receive an alert in case they happen to stop paying attention. R. at 3. Thus, drivers are likely to be attracted to the Marconi despite its use of unfamiliar technological features because of Edison's continued safety assurances and the vehicle's ability to minimize the effort involved with driving. *See* R. at 2–3.

Ashpool's Search for the Right Vehicle. William Ashpool is a 55-year-old, retired criminal defense attorney, who grew up in Fremont. R. at 3. He currently works as a social worker,

which requires him to frequently drive to visit families and conduct home visits. R. at 3. Approximately one year ago, Ashpool began looking for a new car and happened upon the Edison Marconi and its cutting edge Autodrive technology. R. at 4. In November 2019, Ashpool purchased the Marconi because he liked the car and intended to use the Autodrive feature on some of his lengthy car rides. R. at 4. For approximately one month, he experienced no issues with the Marconi. R. at 4.

The Marconi's Faulty Sensors. In December 2019, William Ashpool was driving his Marconi at approximately forty-two miles per hour using Autodrive, when he crashed into a bear that was sitting in the middle of the road. R. at 4. Ashpool was hospitalized for two weeks with extensive injuries, including several broken bones and a concussion. R. at 4. Ashpool alleged that the crash was the result of faulty sensors that failed to register the bear sitting in the road and to alert him to turn or stop the vehicle. R. at 4.

Prior to the release of the Marconi, Edison performed hundreds of internal crash and safety tests that specifically focused on the car's sensors. R. at 4. This was to "ensure that if the vehicle were in Autodrive, [it] would recognize potential obstacles and adjust accordingly." R. at 4-5. At the completion of these tests, Edison learned that there was a 13% higher chance of collision when the vehicle was traveling above thirty-five miles per hour and a stationary object was in its path because it had a difficult time identifying stationary objects when moving at that speed. R. at 5. The company originally planned to include extra sensors that would have corrected this problem; however, it decided not to because it would slightly increase the cost of the vehicle. R. at 5.

After the Marconi was released to the public, there were twelve reported accidents that involved crashes into stationary objects when the vehicle was traveling at speeds above thirty-five miles per hour. R. at 5. Each of these accidents happened within the two years preceding Ashpool's.

R. at 6. All of them also involved faulty sensors that failed to detect a stationary object in the vehicle's path "such as a median strip, light pole, or an already-deceased deer." R. at 6.

Procedural History

Hayward County District Court. On January 12, 2020, William Ashpool filed a claim against Edison alleging a design defect in the Marconi, pursuant to Freemont Rev. Code § 5552.321. R. at 4, 7, 19. The evidence presented at trial established that Edison performed numerous internal tests on the Marconi and knew its sensors had difficulty identifying stationary objects when it was traveling at speeds over thirty-five miles per hour. R. at 5–6. Ashpool's expert also testified that if an additional sensor had been added to the front of the vehicle, the collision rate would have been reduced by 13%. Ashpool likewise presented evidence that Edison was aware of twelve additional accidents that preceded Ashpool's and occurred after Edison distributed the Marconi. R. at 5–6. The CEO of Edison, Errol Reeve, testified that the additional sensors would have added an extra $5,000 to the cost of the car and because their target market was that of the economical sedan, it chose not to include them. R. at 5.

Ashpool requested, over Edison's objection, that before the trial ended, the jury be read instructions that included a duty to retrofit because he intended on presenting evidence that despite having knowledge over accidents due to faulty sensors Edison chose not to set forth a new update to the Marconi. R. at 6. The court sustained Edison's objection holding that the State of Freemont did not recognize a duty to retrofit, denied Ashpool's renewed motion for judgment as a matter of law on the issue of a design defect, and submitted the case to the jury. R. at 7. The jury found in favor of Edison. R. at 7.

Court of Appeals for the State of Fremont. Ashpool appealed claiming that the trial court erred in denying his renewed motion for judgment as a matter of law and for not including a duty

to retrofit in the jury instructions. R. at 7. The court of appeals affirmed the jury's ruling on the design defect claim. R. at 12. It held that the risk-utility factors weighed in favor of Edison. R. at 11–12. It went on to adopt the duty to retrofit within the state of Freemont. R. at 16. However, it chose not to remand the case because it believed the jury would find that Edison did not maintain a continuing relationship with consumers, one of the factors the court uses in determining whether a manufacturer had a duty to retrofit. R. at 17. Therefore, it ruled that the trial court's decision to not instruct the jury on this issue constituted harmless error. R. at 16.

SUMMARY OF THE ARGUMENT

This Court should reverse the Court of Appeal's ruling affirming the trial court's denial of William Ashpool's judgment as a matter of law motion on the design defect claim. Mr. Ashpool set forth enough evidence at trial to establish that the Marconi was in an "unreasonably dangerous" condition when Edison distributed it. Firstly, the evidence proved that the foreseeability factor in the risk-utility test was satisfied. Edison performed hundreds of tests on the Marconi's Autodrive feature with a focus on the most important component, the sensors. Because of these tests, it knew that the sensors did not pick up on objects in the road when traveling over 35 miles per hours. Additionally, Ashpool's expert testified that the collision rate increased to 13% when a car was traveling this speed and an object was in its path. Based on the tests Edison performed and the evidence presented at trial, Edison knew about the increased collision rate. Consequently, the potential for injury was foreseeable.

Furthermore, the 13% increase in the collision rate also establishes that Edison knew how likely it was for an accident to occur. While not all car accidents result in serious injury, any reasonable person could see the potential for severe injury when a vehicle is moving at a high-speed and hits an object in the road. Because Edison is required to account for a driver's potential

negligence when manufacturing a vehicle, its argument that Mr. Ashpool's accident resulted from his inattentive driving does not absolve it from liability.

Second, a feasible alternative was available to Edison despite their failure to utilize it. Edison considered adding additional sensors to the Marconi and this would have only increased the product's utility. It would have done this by making the Marconi safer and easier for consumers to operate. Although Edison claims this addition would have made the vehicle too expensive, this is only because Edison wished to price its product that contained novel technology the same as an average sedan. Additionally, the fact that Edison intended on using it in future vehicles established that it would not have been impossible for them to produce and market the feature at a higher price point. The appellate court's belief that because the Autodrive feature did not prevent the vehicle from stopping the additional sensors would not have made it safer was error. A company must account for foreseeable misuse, which for an Autodrive feature was clearly inattentive driving. Mr. Ashpool's expert testified that the additional sensors would have reduced the 13% collision rate. As a result, the evidence fully established that a feasible alternative design was available to Edison.

Lastly, the risk-utility test requires a holistic case by case analysis. Therefore, petitioner asks this Court to consider the fact that Edison produced a feature that most drivers are unfamiliar with but chose to cut costs instead of account for the foreseeability of an inattentive driver. Studies indicate that people frequently quit paying attention when using the Autodrive feature due to a misunderstanding of its capabilities. Edison should be required to produce the safest possible vehicle. For these reasons, we ask this Court to reverse the appellate court's ruling on the judgment as a matter of law motion.

We also ask that this Court reverse the Court of Appeals' holding that the trial court judge's refusal to give a jury instruction regarding the duty to retrofit was harmless error. Plaintiffs in civil

suits have the right to argue more than one theory of liability in the same claim. By refusing to give this instruction to the jury, the trial court judge deprived Ashpool of his ability to recovery for serious injuries caused by choices Edison made despite the fact that Ashpool was entitled to such an instruction.

The Court of Appeals correctly adopted the duty to retrofit as the law in the State of Fremont, as it recognized that Fremont's duties to warn and to test post-sale are not sufficient protections for consumers when the product in question presents a substantial threat to human safety. The duty to retrofit is a duty to improve a product once it has been sold. Although this is not the majority approach, it is becoming increasingly necessary as manufacturers are putting more high-tech products in the hands of consumers for everyday use. These manufacturers know of the inherent dangers associated with their products and are in the best position to continue testing and making improvements to ensure those products are (and remain) fit for human use.

The duty to retrofit should be applied in a limited pool of cases like this one, where: (1) the product implicates human safety; (2) there is a continuing relationship between the manufacturer and the consumer; and (3) the manufacturer had knowledge of a defect after the product was in the hands of the consumer.

The Edison Marconi implicates human safety because it is a product that poses a risk of substantial injury to people. Cars are inherently dangerous, and these cars have the added risks associated with being a semi-autonomous vehicle using relatively new technology that drives itself with little input from the human in the driver's seat. This is undisputed by the lower court.

Where the Court of Appeals' analysis failed was the second element of this test; however, Edison does have a continuous relationship with its customers. Unlike regular manufacturers, Edison keeps in contact with purchasers of the Marconi long after they leave the dealership.

Because the Marconi is equipped with an onboard computer that operates the vehicle, it is in need of updates as bugs are found and technology is improve. As a result, Edison frequently provides these updates to its customers by automatically sending them to the cars' computers. Once the update is sent, the owner gets a notification every time the car is started until the update is installed. Most of the updates are for safety purposes and some include aesthetic and accessibility upgrades. These frequent, automatic updates and constant notifications demonstrate Edison's continued control over each Marconi, even after the vehicle has been put in the hands of its purchaser. It is likely this evidence would have been sufficient for a jury to find that a continuous relationship existed, satisfying element two.

Finally, Edison had knowledge of the Marconi's sensor-defect. Prior to the sale of the Marconi, Edison conducted internal testing that showed there was a 13% higher collision rate when the Marconi was traveling above thirty-five miles per hour with a stationary object in its path. After the Marconi was put on the market, twelve known accidents preceded Ashpool's. Each of these also alleged sensor failures when the drivers collided with stationary objects while traveling using the Autodrive feature at a speed above thirty-five miles per hour. Edison knew of these issues before the Marconi was sold and received confirmation that the sensors caused the vehicle to be dangerous soon after they went on the market; therefore, the third element is also satisfied.

Because Ashpool provided sufficient evidence of the facts in question for each factor, a jury instruction regarding the duty to retrofit was warranted. By refusing to give an instruction, the trial court judge failed to fairly and adequately cover all of the applicable law in this case. Had this instruction been given, it is likely a jury would have found in favor of Ashpool, allowing him to recover for the substantial injuries Edison caused. It is for these reasons that we ask this Court to

reverse the appellate courts' ruling that the failure to give an instruction regarding the duty to retrofit was harmless error.

ARGUMENT

I. The Court of Appeals for the State of Fremont erred in finding that the Marconi was not defective in design because the risk utility factors weigh in favor of finding that the Marconi was in an unreasonably dangerous condition when distributed.

In a products liability claim based on a design defect, courts will hold that a product was defective in design when "the foreseeable risks of harm posed by the product could have been reduced or avoided by the [manufacturer's] adoption of a reasonable alternative design. . . and the omission of the alternative design renders the product not reasonably safe." Restatement (Third) of Torts: Prod. Liab. § 2(b) (1998). To determine whether a product is unreasonably safe, courts in most jurisdictions use what is known as the risk-utility test. *Peck v. Bridgeport Mach., Inc.*, 237 F.3d 614, 617 (6th Cir. 2001); *Brochtrup v. Mercury Marine*, 2011 WL 2118644 at *1, *2 (5th Cir. 2011); *Quintana-Ruiz v. Hyundai Motor Corp.*, 303 F.3d 62, 68 (1st Cir. 2002). This test allows courts to reach a conclusion about whether a product is "unreasonably dangerous" by balancing a number of factors. Am. L. Prod. Liab. 3d § 17.32 (2020). Because the very things that makes a product useful may also render it dangerous, the risk-utility test balances the risks of a product against its usefulness to consumers. Restatement (Third) of Torts: Prod. Liab. § 2, cmt. a (1998). When the risk of a product outweighs its utility, a court must find that it is unreasonably dangerous. *Id.*

The factors used when a court applies the risk-utility test varies depending on the jurisdiction. *Id*; *See Armentrout v. FMC Corp.*, 842 P.2d 175, 184–86 (Colo. 1992). The appellate court in the state of Fremont considered the following six factors when applying the risk-utility test: (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. R. at 9-10. Ultimately, if a plaintiff establishes that a manufacturer could foresee the severity of injury attached to their product, and a practicable alternative that would reduce this risk was available to the manufacturer, then the manufacture's product presented an unreasonable risk to consumers. *See Peck*, 237 F.3d at 617–19.

In this case, the evidence shows that Edison could foresee the likelihood and severity of future injury when it distributed the Marconi with faulty sensors, and a practicable alternative design that would have reduced injuries and made the Marconi safer was available to Edison. Therefore, the factors used in applying the risk utility test weighed in favor of Ashpool, and the Court of Appeals for the state of Fremont should have granted judgment as a matter of law for Ashpool.

A. The numerous tests Edison performed on the Marconi before its release and the testimony of Ashpool's expert established that the product's risks were foreseeable, likely, and potentially life-threatening.

A plaintiff in a design defect case must present enough evidence to show that the defendant manufacturer foresaw the risk of injury. *Paul v. Henri-Line Mach. Tools, Inc.*, 557 Fed. Appx. 535, 539 (6th Cir. 2014). While plaintiffs frequently present evidence of similar accidents that occurred before the manufacturer released their product to establish foreseeability, there are other ways to establish this element. *Id.* at 539. Foreseeability of injury is commonly demonstrated by having an expert explain why deficiencies in the product makes injury foreseeable, how statistical

evidence proves that it is likely, or by describing how the product is widely known to cause serious injury. *Paul*, 557 Fed. Appx. at 540 (holding that the plaintiff's expert testimony managed to establish foreseeability of injury by discussing the operator's need to be on the machine, even though the expert failed to establish the likelihood of injury); *Reeves v. Cincinnati, Inc.*, 439 N.W.2d 326, 328 (Mich. Ct. App. 1989) (concluding that the plaintiff's expert gave sufficient testimony on the issue of foreseeability when they discussed how power presses cycle despite good maintenance).

Evidence that a manufacturer knew of inadequacies in their product can also be used to show that a manufacturer foresaw the potential for injury. *Branham v. Ford Motor Co.*,701 S.E.2d 5, 21 (S.C. 2010). For example, in *Bramham v. Ford Motor Co*., Ford Motor company performed various tests showing that its new vehicle, the Bronco II, had a tendency to rollover. *Id.* at 19, 21. The court accepted the plaintiff's exhibit proving Ford's knowledge about the Bronco's II rollover issue as helping to establish that the manufacturer knew injury was foreseeable. *See id.* The court rejected the argument that foreseeability of injury may be ignored because it can be attributed to negligent driving recognizing that "careless driving is a foreseeable realty" that manufacturers must account for. *Id.* at 21. Courts in other cases have also imposed a duty on manufacturers to account for reasonably foreseeable misuse of their product. *Brown v. U.S. Stove Co.*, 484 A.2D 1234, 1241 (N.J. 1984) (stating that misuse of the defendant's product in this case was foreseeable as established by expert testimony and that the defendant should have produced a product that accounted for this).

When considering the likelihood of injury, courts expect experts to provide information on the probability of the injury occurring. *Paul*, 557 Fed. Appx. at 540. In *Paul v. Henri Machine Tools., Incorporated*, the court stated that the plaintiff provided insufficient evidence to show that

the manufacturer knew about the likelihood of injury that its overhead gantry milling machine presented. *Id.* The court pointed out that the plaintiff's expert could not "quantify the possibility of a similar accident occurring" and that no serious accidents have ever occurred using the type of machinery at issue. *Id.*

To establish that a manufacturer foresaw the potential for injury, the court must assess the information that was "reasonably attainable" to the manufacturer at the time of manufacture. *Branham*, 390 S.C. at 226. Although a plaintiff is barred from using post-distribution evidence, "evidence of facts neither known nor available at the time of distribution", to establish liability, this does not mean that all evidence occurring after a product is distributed will be considered post-distribution evidence. *Id.* If certain information was available to a manufacturer pre-distribution of their product, then the court should not consider it post-distribution evidence. *Id.* at 227.

Edison's internal testing and Ashpool's expert testimony establishes that a driver sustaining injury because of the Marconi's inadequate sensors was both foreseeable and likely. R. at 3–4. The Court of Appeal's reference to Edison's internal testing being the only evidence of foreseeability seems to imply that internal testing is somehow unable to establish this factor. R. at 10. However, prior precedent has never held that a plaintiff may not use a manufacturer's internal testing to establish foreseeability of injury. *Branham*, 390 S.C. at 19. On the contrary, the court in *Bramham* found internal testing to be convincing evidence on the issue of foreseeability. *Id.* at 21.

The internal testing Edison performed establishes that they not only considered it important that their vehicle be able to identify stationary objects but knew of its difficulty in doing so once the vehicle reached a certain speed. *See* R. at 3–4. Edison performed "hundreds of tests with a particular focus on sensors" hoping to assure that the Marconi would "recognize potential obstacles and adjust accordingly." R. at 3–4. The fact that Edison focused its attention on assuring that its

vehicle could do the very thing it failed to when Ashpool drove it shows that Edison foresaw that a failure to identify stationary objects could lead to injury. *See* R. at 3–4; *Branham*, 390 S.C. at 21.

Even if this Court accepts the appellate court's belief that Edison's internal testing did not provide enough evidence to establish foreseeability, the Court of Appeals should have found the testimony of Ashpool's expert sufficient. *Paul*, 557 Fed. Appx. at 540; *Reeves*, 439 N.W.2d at 328. The appellate court stated that the testimony of Ashpool's expert was not sufficient because it constituted the "kind of hindsight expert analysis. . . that were not reasonably attainable to Edison when the Maconi went to market." R. at 10. However, the record indicates that Edison knew about the 13% increase in accident rate that Mr. Ashpool's expert discussed during production. R. at 6. If the statistics Ashpool's expert provided were reasonably obtainable to Edison prior to distribution, it does not qualify as post-manufacture evidence regardless of whether it was based on the expert's understanding of the sensors after distribution of the Marconi. *Branham*, 390 S.C. at 17.

As far as the likelihood and severity of injury go, the Court of Appeals should have also found the evidence presented at trial to establish these factors. R. at 5. Unlike the expert in *Paul*, Ashpool's expert stated that the accident rate increased by 13% when driving the Marconi at 35 miles per hour and faced with a stationary object as opposed to when the vehicle was traveling slower and faced with no objects. R. at 5; *Paul*, 557 Fed. Appx. at 540. Ashpool's expert witness was able to provide the kind of statics about the probability of an accident occurring that the court in *Paul* was searching for to establish the likelihood of injury. *Id.* With regard to the severity of injury, the court does not need petitioner to tell it the potential harm that can result from a car accident. R. at 4. The potential for severe injury when a car driving at over 35 miles per hour hits a potentially heavy object is common knowledge. *See* R. at 4.

Furthermore, respondent's argument that its internal testing and the 13% increase in the accident rate should be ignored because it can be attributed to drivers failing to pay attention to the road downplays the duty Edison has to manufacture a vehicle that accounts for foreseeable risks. *See Branham*, 390 S.C. at 21; *Brown*, 484 A.2d at 1241. As pointed out in the *Branham* decision "cars are designed with utility and safety in mind, and careless driving is a foreseeable reality." *Branham*, 390 S.C. at 21. A manufacturer must design its vehicle in a way that renders it reasonably safe for its foreseeable use. *Id.* Edison designed a vehicle that would appeal to buyers because it minimized their requirement to drive it themselves. R. at 3. Therefore, it should have anticipated that drivers would not only be at times negligent in driving it, as the case with a driver in any car, but that with the Marconi in particular, drivers may fail to pay close attention to the road. *See* R. at 3. The law requires Edison to manufacture a vehicle that is safe even for a potentially inattentive driver. *See Branham*, 390 S.C. at 21.

B. Edison failed to install additional equipment that would have reduced the danger the Marconi's inadequate sensors posed to consumers.

In a design defect claim, one factor that jurisdictions consider of high importance in determining whether a product was unreasonably dangerous is the existence of a feasible alternative design. *Banks v. ICI Ams., Inc.*, 450 S.E.2d 671, 674 (G.A. 1994). Because manufacturers maintain a duty to produce a product that is safe to its consumers, a defendant's failure to utilize a safer design alternative is powerful evidence that it produced a hazardous product for consumers. *Id.* However, the court considers whether an alternative design was technologically feasible, economically feasible, and available to the manufacturer pre-distribution when deciding on whether failure to implement the design rendered the vehicle "unreasonably safe." Am. L. Prod. Liab. 3d § 28.98 (2020).

In this case, the Court of Appeals erred in holding that the cost of the alternative design outweighed its potential benefits, and that the alternative would not have prevented injury. R. at 12. While the record indicates that there is no disagreement about the availability and technological feasibility of implementing a design alternative, the appellate court should have also found economic feasibility and prevention of injury to be factors weighing in Ashpool's favor. R. at 11. Additional sensors would have increased the utility of the Marconi, and the added cost would not have made the vehicle economically impracticable to purchase when considering the new technology it contained. *See* R. at 2, 5. Furthermore, expert testimony showed it would have reduced the risk of accidents. R. at 5.

1. Edison could have added additional sensors to the Marconi without interfering with the vehicle's utility.

One consideration in determining the adequacy of an alternative design is whether it would alter the utility of the original product in anyway. *General Motors Corp. v. Burry*, 203 S.W.3d 514, 533 (Tex. App.—Fort Worth 2006 pet. dism'd). The plaintiff must propose an alternative design that allows the manufacturer's product to hold onto its intended purpose and maintain all its original safety or cosmetic features. *Adamo v. Brown & Williamson Tobacco Corp.*, 872 N.Y.2d 415, 417–18 (2008) (stating that an alternative design must not functionally change the original product). An alternative design that in no way alters the original use of a product is one factor that weighs in favor of a court finding that the plaintiff proposed a feasible alternative design. Am. L. Prod. Liab. 3d § 28.98 (2020).

Edison adding additional sensors to the Marconi would have allowed the vehicle to maintain its intended use and would have even increased its utility. Edison states that its reason for creating the Marconi was to target customers that value safety and ease of driving over cutting-

edge technology and high performance. R. at 2. Therefore, the benefit of having the Autodrive feature in the Marconi was to make the driving experience safer and easier on its consumers. *See* R. at 2. Petitioner's proposed alternative would have only increased the safety and ease of driving. R. at 5. The addition of sensors to the Marconi would have in no way altered or reduced Autodrive's ability to prevent dangerous lane switches or swerving off the road. R. at 5. It only would have made the vehicle safer by reducing the accident rate for drivers faced with stationary objects while traveling at the speed required by most major roads and highways across the United States. *See* R. at 5. Additionally, drivers would have enjoyed more ease while operating the Marconi because the vehicle would have been more likely to alert drivers to hazardous objects. *See* R. at 11. The benefits of the Marconi would have only been improved if Edison had chosen to add additional sensors to its product.

2. Given that the Marconi utilizes advanced technology, the added cost to consumers would have been economically feasible.

In addition to an alternative design being technologically feasible, capable of being implemented at the time of manufacture, it should also be economically feasible. *General Motors Corp.*, 203 S.W.3d at 533. This means that if the addition of a safety feature makes production costs unreasonably expensive, the court will likely find that this weighs in favor of finding that the cost of the alternative design outweighs its benefits. Am. L. Prod. Liab. 3d § 28.98 (2020). Essentially, economic feasibility turns on whether the manufacturer would still have been able to produce the product despite the additional costs and whether consumers would have still bought the product despite the cost. *Micallef v. Miehle Co.,*39 N.Y.2d 376, 386 (1976); *Goodner v. Hyundai Motor Co., Ltd.*, 650 F.3d 1034, 1044 (5th Cir. 2011). In many cases, the plaintiff loses on the issue of economic feasibility simply because no evidence about the cost of the alternative design is presented. *Casey v. Toyota Motor Eng'g & Mfg. North Am., Inc.*, 770 F.3d 322, 334 (5th

Cir. 2014) ("No reasonable juror could find that . . . [an] alternative design could be economically feasible without any evidence of the cost of incorporating this design); *Honda of Am. Mfg., Inc. v. Norman*, 104 S.W.3d 600, 607 (Tex. App. —Houston[1st Dist.] 2003, pet. denied) (stating the importance in having the cost of incorporating an alternative design).

One way that plaintiffs can show the economic feasibility of an alternative design is by showing that other manufacturers or the defendant manufacturer have produced a similar product and implemented the alternative safety feature. *See Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998). For example, in *Unroyal Goodrich Tire Co. v. Martinez*, the plaintiffs pointed out that the defendant, Goodrich, eventually implemented a tire bead that, unlike the bead placed on the plaintiff's tire, would not allow the tire to break when inflated. *Id.* The plaintiff did this to help establish the feasibility of implementing alternate tire beads. *Id.*

The plaintiffs' expert in *Goodner v. Hyundai Motor Co. Inc,* provided useful guidance on how to determine if an alternative design is economically feasible. *Goodner v. Hyundai Motor Co., Ltd.*, 650 F.3d 1034, 1044 (5th Cir. 2011). In testifying about why Hyundai should have had car seats that did not recline to a 45-degree angle and why this was an economically feasible alternative, the plaintiff's expert stated that the essential inquiry regarding economic feasibility is whether the cost would "render the vehicle so expensive that it's impracticable to purchase it." *Id.*

Here, unlike the majority of cases that the court finds losing on the issue of economic feasibility, the court knows the cost that Edison would have incurred if it had chosen to put in additional sensors—an extra $5,000 to the price of each Marconi. R. at 5. Respondent asserts that this additional $5,000 would have raised the cost "beyond the economy range of sedan purchasers" which was Edison's target market. R. at 12. The Court of Appeals accepted Edison's reason as sufficient to show that the alternative design proposed was not economically feasible. R. at 12. It

failed to consider, however, that Edison designed a sedan with an advanced technological feature, distinguishing it from the average sedan, and that Edison intended on utilizing these additional sensors on future vehicles. R. at 4, 5.

Similar to the defendants in *Uniroyal Goodrich Tire Co.*, Edison's reasons for not implementing the extra sensors are undercut by the fact that Edison admits that it plans to add them to future vehicles. *See Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d at 334. If the alternative design imposed a cost that would make the Marconi impossible to produce, Edison would not be planning to utilize the additional sensors in its luxury and sports vehicles. R. at 5. While it is true that luxury and sports vehicles will be marketed at a higher price point and that the sedan is meant to economical, Edison chose to produce a sedan with top-of-the-line technology that improves safety and decreases the need for driver control. R. at 2–3. Surely, when considering the novel semi-autonomous driving features, a consumer who values "ease of use" when operating a car would not find the extra price point "so expensive that it is impracticable to purchase it." *Goodner*, 650 F.3d at 1044. The extra $5,000 would not have made it impossible for Edison to produce the Marconi or impracticable for consumers to purchase.

Furthermore, this Court should not allow Edison to cut out optimal safety features when producing a car with technology that "drivers are unaccustomed to" because it desires to keep it in the price range of a sedan that lacks these features. R. at 5. Despite Edison's claim that it did not want to impose the additional cost on its customer, it is likely that Edison also desired to sell a significant number of Marconis by placing an autodrive feature in the vehicle but keeping the price the same as your average sedan. *See* R. at 5. Of course, Edison maintains the right to market its vehicle at different price points, but this freedom does not mean that it can produce a foreseeably dangerous vehicle in exchange for profit. *See* R. at 5. Once this Court takes notice of how the

Marconi provides a significant upgrade from the average sedan, it should hold that the extra $5,000 for additional sensors was economically feasible. *See* R. at 2, 5.

3. The evidence presented at trial established that the additional sensors would have reduced the likelihood of injury.

In determining the feasibility of an alternative design, the evidence should show that if the manufacturer had implemented the alternative design, the "foreseeable risks of harm posed by the product," in this case the risk of accident, would have been reduced. Restatement (Third) of Torts: Prod. Liab. § 2(b) (1998). If an alternative design presents the same risk of injury or presents new potential for danger, the court will not accept it as a reasonable alternative. *General Motors Corp.*, 203 S.W.3d at 533 ("To establish a safer alternative design, a plaintiff must show that the alternative design would not, under other circumstances, impose an equal or greater risk of harm."). Courts have found expert testimony explaining how an alternative design could have reduced the potential for injury sufficient to establish this part of the alternative design inquiry. *Id.* at 533–36. For example, in *General Motors Corp. v. Burry*, the plaintiffs' experts explained that the addition of side airbag sensors would have caused the airbag in the plaintiffs' accident to deploy sooner, and this likely would have prevented the impact suffered by some of the passengers. *Id.* at 535.The court found that this testimony supported the jury's determination that extra sensors had the potential to change the results of the plaintiffs' accident. *Id.* at 536.

On the other hand, a failure to show that an alternative design could have actually changed the outcome of an accident will be deemed insufficient in establishing the reasonableness of an alternative feature. *Casey*, 770 F.3d at 332. In *Casey v. Toyota Motor Engineering & Manufacturing Incorporated*, the court stated that the plaintiff's expert's inability to actually compare how their proposed design was safer than the product at issue rendered her testimony

inadequate. *Id.* While the court admitted that an expert is not required to conduct extensive testing, their testimony needs to establish that the alternative design provides "superior safety." *Id.*

The statistics and evidence presented by petitioner and his expert show that additional sensors would have reduced the likelihood of injury. R. at 11. The Marconi's Autodrive feature functions because the sensors assess the driver's route for road conditions, obstacles, and weather. R. at 2–3. The additional sensors would have made the Marconi more effective in catching potential obstacles and would have alerted an inattentive driver to them. Thus, resulting in a 13% reduction in the accident rate. *See* R. at 3, 11. Like the case in *General Motors*, our expert's testimony leads to the conclusion that additional sensors would have changed the outcome of the accident in this case. *General Motors Corp.*, 203 S.W.3d at 536. If the feature had alerted Mr. Ashpool to the bear, he could have adjusted his vehicle accordingly. R. at 4. Contrary to the expert's testimony in *Casey*, the statics our expert presented at trial provides a direct statistical comparison between the proposed feature and the Autodrive feature that Edison distributed. R. at 11; *Casey*, 770 F.3d at 332. Consequently, the 13% reduction in the collision rate that the additional sensors would have provided demonstrate the "superior safety" of this alternative. *See Casey*, 770 F.3d at 332.

Furthermore, the appellate court's implication that the additional sensors would have failed to reduce injury any more than a driver stopping the vehicle would neglects to account for the foreseeability of an imperfect driver. R. at 12. Edison has a duty to produce a vehicle that accounts for negligent driving. *Branham*, 390 S.C. at 226; *Brown*, 484 A.2d at 1241. The Autodrive feature encourages a more relaxed driver but fails to adjust itself when driving far below the minimum speed on most roads and highways. R. at 2, 5. The 13% reduction that the additional sensors would

have provided would have accounted for an inattentive driver, and therefore would have prevented foreseeable accidents. R. at 11.

Based on the information provided, this Court should find that the benefits of the proposed alternative design outweigh any of its disadvantages. The additional sensors would have only improved the Marconi's safety and ability to ease the driving experience. Additionally, the extra sensors would have resulted in a 13% reduction in the collision rate, and therefore could had the potential to change the outcome of Ashpool's accident. R. at 11; *Casey*, 770 F.3d at 332. With regard to cost, when considering the Marconi's top of the line technology, the added cost to consumers seems practicable. Even if this Court finds that the issue of economic feasibility weighs in favor of Edison, the adequacy of an alternative design does not require a plaintiff to fully establish each factor as if they were elements. *See Claytor v. General Motors Corp.*, 277 S.C. 259, 264 (1982). Rather, it requires a balancing test that given the increased utility and superior safety of the alternative design weighs in favor of Edison regardless of whether this Court agrees with the lower court on the issue of cost.

C. This Court should consider the unfamiliar nature of Edison's Autodrive feature in deciding whether it is "unreasonably dangerous."

The factors that a court considers in applying the risk-utility test can change depending on the facts of the case at issue. *Armentrout v. FMC Corp.*, 842 P.2d 175, 185 (Colo. 1992). Different facts may require the court to consider different and additional factors and concerns. *See id.* Because of this, we ask this Court to consider the fact that Edison chose to produce a vehicle with advanced technology that consumers are unfamiliar with, in determining whether its product was unreasonably dangerous. R. at 5. As a matter of policy, this Court should hold a manufacturer responsible for choosing to utilize relatively new technology but failing to account for the most obvious type of negligence their feature invites—inattentive driving. *Branham*, 390 S.C. at 21;

Lewis v. American Cyanamid Co., 714 A.2d 967, 977 (N.J. 1998) ("It would frustrate the imposition of liability when a product's design fails to take into account an injured party's objectively foreseeable misuse of the product.").

Studies done on drivers of semi-autonomous vehicles show that drivers have difficulty paying attention while using this feature. Tracy Pearl, *Hands on the Wheel: A Call for Greater Regulation of Semi-Autonomous Cars*, 93 Ind. L. J. 713, 733 (2018). In 2013 a study was conducted on driving while using a semi-autonomous feature, and it found that 33% of the time drivers were looking away from the road. *Id.* At other times, drivers were reaching for food, texting, or even reading a book. *Id.* Further studies indicated that the reason for this behavior could come down to a lack of understanding about how the Autodrive feature really work and what it is really capable of. *Id.* at 734. Surely, these studies from 2013 were available to Edison at the time it was manufacturing its vehicle, and even if Edison claims they were not, it is not hard to imagine that a feature which is meant to ease the requirements of driving could induce a driver to pay less attention to the road. *See id.* Still, Edison chose to cut costs and not install additional safety features. R. at 5.

Edison and the Court of Appeals state that it would be "contrary to public policy to hold Edison liable for the shortcomings of a safety innovation." R. at 12. By this logic, however, any feature that is marketed as a safety innovation and has the ability to prevent certain accidents would be deemed safe despite its inability to prevent other foreseeable accidents. *See* R. at 12. If a person hits a heavy object at full or even moderate speed, it could easily result in their death. Edison choosing not to reduce this potentially life-threatening risk should not be overlooked because it deems Autodrive to be a "safety feature." *See* R. at 12.

This is not to say that safety features must eliminate all risk or that companies like Edison should be discouraged from implementing new features. Petitioner only asks that when a company chooses to implement new technology that it accounts for the most foreseeable consumer negligence given the type of technology at issue. *See Lewis*, 155 N.J. at 564. Here, the most foreseeable consumer negligence for an autonomous feature was an inattentive driver, and therefore Edison should have accounted for this not only when a driver switches lane or veers of the road, but also, when a driver is simply moving forward at over 35 miles per hour. Peal, *supra* at 733. Consequently, we ask this Court to consider the foreign nature of the Autodrive feature to 55-year-old consumers like William Ashpool in its balancing assignment.

II. The Court of Appeals for the State of Fremont correctly adopted the duty to retrofit as the law in the State of Fremont.

The duty to retrofit is "a duty to upgrade or improve a product." *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 534 (Ky. 2003). As the lower court stated, the difference between this issue and the one preceding it, is time; specifically, it requires courts to look at whether the manufacturer should be liable for failing to address a known design defect after the product is put into the hands of consumers, instead of whether they are liable for not implementing a safer design before the product was sold. R. at 12. The majority of jurisdictions have not yet adopted a duty to retrofit; however, "it is clear that after a product has been sold and dangerous defects in design have come to the manufacturer's attention, the manufacturer has a duty to remedy these." *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411 F.2d 451, 453 (2d Cir. 1969). This duty is necessary to better protect consumers and prevent unnecessary harm to the citizens of Fremont. R. at 13.

A. Fremont's duties to warn and to test are not sufficient to protect consumers when products present a substantial threat to human safety.

The duties to warn and to test are not at issue in this case; however, they remain important because the justifications for each parallel those for the duty to retrofit. R. at 14. The Restatement (Third) of Torts states, "one engaged in the business of . . . 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." Restatement (Third) of Torts: Prod. Liab. § 10 (1998). A reasonable person would provide such a warning if they knew the product posed a substantial risk of harm to people or property; and the consumers are unaware of the risk; and a warning can be effectively communicated to consumers; and the risk of harm is so substantial that a post-sale duty to issue the warning is justified. *Id.* The State of Fremont has long recognized this post-sale duty. *Shane v. Smith*, 657 XE 720, 725 (Fremont 1989). Likewise, the duty to test arises in cases where the manufacturer knows of a problem with a product and continues to sell or advertise that product in a jurisdiction where there is a pre-existing duty to warn consumers of the risks associated with the product. *Kociemba v. G.D. Searle & Co.*, 707 F.Supp. 1517, 1527 (D. Minn. 1989). The predominant focus is ensuring that manufacturers do all they can to maintain the safety of those consumers who purchase and use their products. R. at 14.

Courts in many jurisdictions have hesitated to expand the burden on manufacturers by imposing a post-sale duty to retrofit on manufacturers, largely because manufacturers do not usually maintain control over the product; therefore, requiring them to fix products retroactively might impose a substantial burden on them. *Gregory v. Cincinatti, Inc.*, 538 N.W.2d 325 (Mich. 1995). However, as more high-tech products are placed in the hands of consumers, increased protection and safety measures become increasingly necessary. *Noel v. United Aircraft Corp.*, 342

F.2d 232, 236 (3d Cir. 1964). When a product, such as a plane with auto pilot or a semi-autonomous automobile, poses a risk of substantial injury, death, or property damage to the consumer, the duties to warn and test do not provide sufficient levels of ongoing protection for the consumer. *Id.* This is especially true when a manufacturer knows of a problem with a particular product. *Id*. Consequently, when there is a substantial risk to human safety, manufacturers should be burdened with an additional post-sale duty to retrofit because they are knowingly placing inherently dangerous products in the hands of consumers for every-day use, and they are the people best suited to continue testing and making improvements to ensure those products are fit for human use. *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 534 (Ky. 2003).

In *Noel v. United Aircraft Corp.*, United Aircraft Corporation argued it could not be held negligent for the helicopter passenger's injuries because it had "no 'continuing duty' . . . as a manufacturer 'to develop an improvement' of its propellers, and that it's 'duty' with respect to the propeller system ended when the plane was delivered." *Noel*, 342 F.2d at 236. The Third Circuit justices noted that manufacturers "need not develop safety devices to protect against every remote possible danger"; however, in cases like *Noel*, where the manufacturer knew of a generally recognized problem (uncontrolled overspeed), a manufacturer does have a continued duty to fix it, even after the product is in the consumer's possession. *Id.* Similar to the manufacturer in *Noel*, Edison knew of the problem with the Marconi's sensors both before and after it was sold because of internal testing and accident reports. R. at 17. As a result, the only way to protect consumers of the Marconi is to impose on Edison a continuing duty to improve the sensors, even after the cars are sold. R. at 12-13.

B. Edison should retain a post-sale duty to improve the Marconi.

Although the duty to retrofit has not been adopted in a majority of jurisdictions, it has been applied in a limited pool of cases "where there is an assumption of the duty of some special, controlling relationship between the manufacturer and the owner of the machine." *Gregory v. Cincinatti, Inc.*, 538 N.W.2d 325 (Mich. 1995). Petitioner does not hold the position that this duty should be unlimited. R. at 15. Instead, it should be limited by the test used by the Court of Appeals for the State of Fremont. R. at 15. This test states that a post-sale duty to retrofit exists when: (1) the product implicates human safety; (2) there is a continuing relationship between the manufacturer and the consumer; and (3) the manufacturer had knowledge of a defect after the product was in the hands of the consumer. R. at 15-16.

1. The Edison Marconi is a product that implicates human safety.

The first question the appellate court had to answer was whether the product, the Edison Marconi, implicates human safety. R. at 15. A product implicates human safety when it poses a risk of substantial injury, death, or property damage to the consumer. *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530 (Ky. 2003). In *Noel*, the court stated that the manufacturer's continuing duty existed largely because "the factor of human safety [was] involved." *Noel v. United Aircraft Corp.*, 342 F.2d 232, 236 (3d Cir. 1964). In that case, an over-speeding propeller could not be controlled by the pilot, resulting in the death of a passenger in the airplane. *Id.* at 232. Because airplanes pose an inherent safety risk, it is necessary for courts to ensure that manufacturers have a high burden in making them as fit for human use as possible. *Id.*

The case at issue is not a case about a "run of the mill, basic, four-door vehicle." R. at 16. The Marconi is a semi-autonomous car, using relatively new technology, similar to that of autopilot in an airplane, that essentially drives itself and transports human passengers from place

to place without them having full control over the vehicle. R. at 2. To be effective, the Marconi must be equipped with equipment, like sensors, that allow it to react similar to, or better than, a human. R. at 16. Even standard cars themselves implicate human safety to some extent because of factors such as their size, the speed at which they travel, and their use's propensity to cause serious injury or death. The Marconi's additional features that make it a semi-autonomous car give computers more control and drivers less, resulting in more potential for trouble. Consequently, the Marconi does pose a risk to human safety and the first element of this test is satisfied.

2. Edison has a continuing relationship with its customers.

The second question is whether there is a continuing relationship between the manufacturer and the consumer. R. at 15. In most cases, courts have not found a continuous relationship between automobile manufacturers and consumers because once the car leaves the dealership lot, the manufacturer no longer maintains any sense of control over it. R. at 16. However, this case is dissimilar from most cases between automobile manufacturers and their consumers because it concerns a semi-autonomous vehicle that is unlike a run-of-the-mill car in that it requires frequent updates to maintain the utmost levels of safety, whereas, in a typical manufacturer-consumer relationship, dealings end when the car is driven off the lot. R. at 16. In these typical relationships, there are no continuous updates to the car's technology, no notifications are sent from the manufacturer to the consumer, and recalls are dealt with through various other channels.

In *Bell Helicopter Co. v. Bradshaw*, the court affirmed a judgment awarding damages to passengers who were severely injured after the helicopter they were in crashed when one of its tail rotor blades broke off and caused the loss of the tail's rotor hub and gear box. *Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519 (Tex. Civ. App.—Corpus Christi 1979). In that case, the court held that there was a continuous relationship between Bell and consumers because Bell was able to

maintain some semblance of control over its helicopters even after they were out of its possession. *Id.* at 526. Bell service stations, similar to car dealerships that deal with recalls, "were required to adhere to and comply with all Bell-issued service bulletins or safety notices . . . , the servicing of same, or the replacement thereof." *Id.* at 531. Therefore, there is a continuous relationship between manufacturers and consumers when the manufacturer continuously updates and improves the product. *Id.*

The Marconi is equipped with an onboard computer that operates the vehicle on its own so long as the driver has his hands on the steering wheel. R. at 2. The computer receives information from sensors that are able to analyze and respond to driving conditions, so it is able to stop, go faster, change gears, switch lanes, etc. without any assistance from the human driver. R. at 2. The computer also contains a GPS, which assesses things like traffic and speed limits before the car begins driving. R. at 2. "Edison maintains a system whereby it creates software updates for its vehicles and sends them to the drivers." R. at 16. It provides these updates to consumers frequently "as technology advances and new concepts are discovered." R. at 3. Once the update is sent to the vehicle, the owner gets a notification on the car's console screen each time the car is started until they update the onboard computer. R. at 3. "Most of these updates are for safety purposes." R. at 3. They allow Edison to continue to update their vehicles, even after they are sold, to ensure they are safe for human use without having to issue a recall or create a whole new car. R. at 3.

The lower court stated that "a jury could have concluded that the software updates were provided as a convenience" to purchasers so they do not have to buy a whole new vehicle. R. at 16-17. It emphasized that GPS updates and changes in the way the sunroof works are nice additions to the vehicle, but do not have a substantial enough impact to constitute a continuing relationship because they are merely for aesthetic and convenience purposes. R. at 17. The court failed to see

the safety impacts of the updates Edison provides to its customers. Specifically, the court did not recognize how similar these updates actually are to those provided by helicopter manufacturers like in *Bell* who continuously update technology in aircraft to keep them as safe as possible. Edison's updates do not provide solely aesthetic improvements as the lower court implied; they also provide improvements to the onboard computer system that help the vehicle to better assess things like driving conditions. These updates, like the updates to helicopter's tail rotor or to a desktop computer, provide enhanced safety features, faster processing, and improved accessibility, all of which demonstrate Edison's continued control over the Marconi, even after it has been placed in the hands of consumers. Considering all of these facts, it seems apparent that the second element of this test is also satisfied, and the Court of Appeals for the State of Fremont erred in determining that a jury was likely to conclude that these updates were just a convenience.

3. Edison had knowledge of a defect after the product was in the hands of consumers.

The final element of the lower court's test requires that the manufacturer know of a defect after it is sold and put into the hands of consumers. R. at 16. This is because a post-sale duty such as this one should not be imposed on companies unless they are aware of a substantial risk that their products pose to the safety and well-being of humans or their property. *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 534 (Ky. 2003).

In *Ostendorf v. Clark Equip. Co.*, a forklift operator sued when he was injured due to a forklift tipping over. The court held that Ostendorf was not entitled to damages, as it emphasized, "there is no reason to create a duty to retrofit a product not defective when sold." *Id.* It stated that this would be too hefty an economic burden to place on manufacturers when they did not know of an unknown issue prior to the product being sold or when technological advancements have made a previously sufficient product obsolete. *Id.*

Prior to the sale of the Marconi, Edison conducted internal testing on the vehicle and its sensors. R. at 4. At trial, an expert witness testified that this testing showed that there was a 13% higher collision rate when the Marconi was traveling above thirty-five miles per hour with a stationary object in its path. R. at 5. Because this testing was done internally before the Marconi ever went on the market, Edison knew of the defect long before Petitioner's accident occurred and chose to not make changes it knew would improve this collision rate. R. at 5. Similarly, before Petitioner's accident, twelve other, similar accidents occurred, which also alleged sensor failures when the drivers collided with stationary objects while traveling using the Autodrive feature at a speed above thirty-five miles per hour. R. at 5. Unlike the manufacturer in *Clark*, Edison knew of the Marconi's defect before it was sold to consumers, and the sensors were not only "defective" because technological advancements made them obsolete. R. at 5. By not using enough sensors and putting the Marconi on the market as-is, Edison made a conscious decision to not exercise reasonable care. *Ostendorf*, 122 S.W. 3d at 535. As a result, the third element of this test is satisfied.

The fact that Edison was on notice of the Marconi's design defect before it went on the market and chose not to make improvements, then was further informed of its deficiencies at least twelve times prior to Petitioner's accident, is the precise reason manufacturers should have a continued duty to improve products such as this one even after they are sold. If the Court chooses not to hold Edison liable in this situation, it would be setting a precedent that says companies are not to be held accountable for the injuries caused by their products, even when they have knowledge of a problem and choose not to fix it.

C. The trial court judge's refusal to give a jury instruction regarding the duty to retrofit was not harmless error.

Trial court judges have wide latitude in determining what instructions should be given to the jury. *Tittle v. Hurlbutt*, 497 P.2d 1354, 1357 (Haw. 1972). In order to warrant an instruction, the party requesting it must provide sufficient evidence of the facts in question. *Udac v. Takata Corp.*, 214 P.3d 1133, 1153 (Haw. Ct. App. 2009). Once instructions are given, they are only sufficient if they fairly and reasonably convey the issues before the court and provide the correct principles of the applicable law. *Sanders v. Bain*, 722 So.2d 386, 388 (La. Ct. App. 1998). "Refusing to give an instruction relevant under the evidence that correctly states the law is an error if the point has not been adequately and fully covered by other instructions." *Udac*, 214 P.3d at 1139 (citing *Sherry v. Asing*, 531 P.2d 648, 655 (1975)). The standard of review for such a refusal is whether the instructions given are "prejudicially insufficient, erroneous, inconsistent, or misleading." *Standford Carr Dev. Corp. v. Unity House, Inc.*, 141 P.3d 459, 470 (2006). Appellate courts "must exercise great restraint by setting aside the verdict only where the instructions misled the jury to such an extent as to prevent it from doing justice." *Sanders*, So.2d at 389.

In *Sanders v. Bain*, the Second Circuit Court of Appeals for the State of Louisiana found that the district court's instructions correctly and thoroughly conveyed the applicable law. *Id.* In that case, what was read to the jury differed from the precise language requested by the plaintiffs; however, "the substance of plaintiffs' special requested instructions [were] well covered (and better explained) with the given charge." *Id.* This is dissimilar to the case at bar because in *Sanders*, the trial court judge changed the wording of the instruction but conveyed the substance. *Id.* Here, the trial court judge failed to give any instruction regarding the duty to retrofit whatsoever. R. at 7.

Because the Court of Appeals erred in holding that Edison did not have a continuing relationship with its customers, it consequently erred in holding that the trial court judge's refusal to give an instruction regarding the duty to retrofit was harmless error. R. at 17. It is undisputed by the appellate court that Ashpool provided sufficient evidence that the Marconi implicates human safety and Edison had knowledge of its defect, such that a jury could reasonably find in favor of Ashpool. R. at 16-17. However, Ashpool also presented sufficient evidence that Edison has a continued relationship with its customers. He showed that Edison provides periodic updates, the updates are automatically sent to the Marconi's onboard computer, the driver received continued notifications that the update was available until it was installed, and the updates contain more than mere GPS upgrades and do impact the vehicle's overall safety. R. at 2-3. This evidence was likely enough to satisfy this element and it is reasonable to believe a jury would have likely found in Petitioner's favor on this issue; therefore, the failure to give this jury instruction was not harmless error. *Oliver v. McCord*, 550 XE 625, 634 (Fremont 1996).

Ashpool had the right to argue more than one theory of liability in the same claim against Edison. *W.M. Bashlin Co. v Smith*, 643 S.W.2d 526, 529-30 (Ark. 1982). By refusing to give this instruction to the jury, the trial court judge failed to fairly convey the issues before the court and provide the correct principles of *all* of the applicable law. It deprived Ashpool of his ability to recover for his severe injuries despite the fact that Edison knew of the defect that caused his accident and was in a position to fix the problem on more than one occasion.

CONCLUSION

The evidence Ashpool presented at trial established the Marconi was unreasonably dangerous when Edison began distributing it. Edison could foresee the potential for injury based on the internal tests it conducted. At trial, Petitioner's expert testified that the sensors' inability to

pick up on stationary objects when traveling above thirty-five miles per hour resulted in a 13% increase in the Marconi's collision rate, and Ashpool's accident alone shows the potential for severe injury. Additionally, Edison knew it could have added sensors to the vehicle and increased its utility by making it safer and easier to operate. The added cost of these sensors would not have made the Marconi impossible produce, and given the advanced technology, would still have rendered it marketable as an economical sedan. Edison should be held liable for failing to account for foreseeable, life-threatening risks associated with its products, especially when such products contain technology that is so foreign to consumers.

Even if the Court were to find that the Marconi was not unreasonably dangerous and was therefore not defective in design, Ashpool likely would have been able to recover using his second theory of liability. Because of the Marconi's advanced technology, it poses a greater risk of serious injury or death than a regular automobile. As a result, the Court of Appeals recognized the need for the State of Fremont to adopt the duty to retrofit. It; however, erred in finding that the trial court judge's failure to give a jury instruction regarding this duty was harmless. Ashpool presented sufficient evidence to show: (1) the Marconi implicated human safety, (2) there was a continuous relationship between Edison and its consumers, and (3) Edison knew of the sensors' defect. As a result, the judge's refusal to give an instruction likely resulted in Ashpool's inability to recover damages for his injury and was harmful because the case should have been remanded back to the trial court. It is for these reasons that this Court should reverse the judgment of the Court of Appeals for the State of Fremont and render judgment in favor of Petitioner.

CERTIFICATE OF SERVICE

We certify that a copy of Petitioner's brief was served upon the Respondent, Edison Incorporated, through the counsel of record by certified U.S. mail return receipt requested, on this, the 1st day of February 2021.

/s/ _____

Attorneys for Petitioner