NO. 20-1000

In the Supreme Court of The State of Fremont

WILLIAM ASHPOOL

Petitioner,

v.

EDISON INCORPORATED,
A FREMONT CORPORATION,

Respondent

ON WRIT OF CERTIORARI FROM THE
COURT OF APPEALS, STATE OF FREMONT

BRIEF FOR RESPONDENT

TEAM R

Question Presented

1. Whether the appellate court correctly affirmed 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 when Edison was unable to add additional sensors to the Marconi without changing the vehicle's target market?

2. Whether the appellate court erred in adopting the duty to retrofit for the state of Fremont when the adoption of the duty to retrofit is antithetical to its intended purpose and the legislature is the proper avenue for its adoption?

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Statement of the Case

Factual Background

Edison. Edison is an automobile corporation registered to do business in Fremont and designs luxury sport electric vehicles. R. at 2. Edison designed the Marconi and it was released to the public in 2017. *Id*. Edison is trying to enter the highly competitive economy sedan market with the Marconi. *Id*. The Marconi's features include Autodrive, twelve sensors that analyze the road and driving conditions, GPS, and an eleven-inch center console. *Id*.

Autodrive. The Marconi's Autodrive operates by having an onboard computer maneuver the vehicle for the driver. R. at 2. The Autodrive feature only works if the driver keeps two hands on the steering wheel while operating the vehicle. *Id*. The manual that comes with the car also stresses the importance of drivers keeping both hands on the wheel. R. at 3. When a driver removes their hands while driving, a flashing light appears on the dashboard that notifies the driver to place their hands back on the wheel. *Id*. The Autodrive feature is not meant to be a replacement for an attentive drive but rather an aid and can be overridden by a driver with both hands on the wheel at any time. *Id*.

The Marconi's Autodrive feature operates in conjunction with twelve sensors on the car. R. at 2. These sensors evaluate the road condition and surrounding drivers. *Id*. The Marconi can adjust for road work, weather, and other vehicles using the information received from the sensors. R. at. 3 While the Marconi is in Autodrive and receiving evaluations from the sensors, the car is able to make necessary adjustments. R. at 3. These evaluations are then transmitted to the onboard computer to control the vehicle in real time. R. at 2. When the Marconi's Autodrive feature receives this information, it is able to stop, accelerate, change gears and maneuver obstacles without driver input. *Id*.

Other Technology. The Marconi also features GPS. R. at 2. This feature allows the driver to enter their destination and the vehicle will gage the conditions of the road, tell the driver the speed limit and assess traffic lights on the route they have imputed. *Id*. The GPS's route is displayed on a screen that takes up approximately eleven inches of the car's center console. *Id*. The Marconi's software is updated as new technology and concepts are discovered. R. at 3. The updates are done by sending a notification to the owner of the vehicle when the vehicle is turned on until it has been installed. *Id*. The purposes for the updates range from cosmetic, allowing drivers to change lights, to safety standards. *Id*. The updates, if not installed, continue to send notifications to the driver until the installation is complete. R. at. 3. By sending these updates, Edison has eliminated the need to make entirely new vehicles with the newest safety standards. R. at 3.

William Ashpool. William Ashpool, the petitioner in this matter, is a fifty-five-year-old male that had a long-time career in criminal defense work. R. at 3. When he made the decision to leave this occupation and practice social work, he began driving around the country to visit families and conduct home visits. *Id*. After beginning these drives cross country, Mr. Ashpool started car shopping in November 2019. R. at 4. During one of these shopping trips, Mr. Ashpool test drove a Marconi after learning of its Autodrive feature. *Id*. After the test drive of the Marconi, Mr. Ashpool purchased the vehicle. *Id*.

In December 2019 while driving this vehicle at approximately 42 miles-per-hour in Fremont, Mr. Ashpool collided with a brown bear in the middle of the road. R. at 4. Mr. Ashpool suffered a dislocated shoulder, broken ribs, a broken wrist, and whiplash. *Id.* Prior to this accident, Mr. Ashpool had no issues with the Autodrive feature in his Marconi. R. at 4.

***Testing*.** Edison implemented numerous crash and safety tests, all required by the National Highway Traffic Safety Administration. R. at 4. Further, Edison performed over one hundred tests that focused on the twelve sensors. *Id*. Edison tested adding additional sensors and found that comparatively there was a 13% higher likelihood of collisions when relying on Autodrive if the vehicle was traveling over 35 miles-per-hour and there was a stationary object in the road. R. at 5. These additional sensors would have cost the consumer an additional $5,000, pushing it out of the economy range of sedans. *Id*.

Procedural History

Hayward County District Court. On January 12, 2020 William Ashpool filed an action against Edison. R. at 4. His claims allege that Edison did not design the sensors on the vehicle properly and as a result he suffered injuries in the December 2019 accident. *Id*. Particularly, Mr. Ashpool alleges that the sensors were faulty and as a result they failed to pick up the brown bear that was sitting in the road. *Id*. He further alleges that Edison did nothing to fix the problems with the sensor that they knew about. R. at 4. This issue was presented before a jury, they ruled in favor of Edison. R. at 7. Ashpool requested a directed verdict which was denied by the district court. R. at 7.

***The Court of Appeals for the State of Fremont*.** On appeal on January 1st, 2021 the court of appeals ruled in favor of Edison by affirming the lower court's decision in denying the motion for directed verdict for the design defect claim. R. at 12. Additionally, the court of appeals ruled to adopt the duty to retrofit, however they found the exclusion of the duty to retrofit to the jury harmless error. R at 16.

Summary of the Argument

For a design defect claim, a plaintiff bears the burden of proving (1) plaintiff was injured by the product; (2) the product, at the time of plaintiff's injury, was in essentially the same condition as when it left the manufacturer; and (3) the injury occurred as a result of the products defective condition being unreasonably dangerous to the consumer. While Edison concedes the first two elements, the third element remains in dispute.

The Restatement (Third) of Torts states that a product is defectively designed when an unreasonably dangerous product presents foreseeable risks that could have been avoided by the adoption of a reasonable alternative design. In evaluating the unreasonable dangerousness of a product, a majority of states, including Fremont, have adopted the risk-utility test, which requires courts to balance the dangers of a product with the benefits to the consumers and society. This test focuses on the conduct of the manufactures during the design process rather than on expectations of a reasonable consumer.

The risk utility test is broken down into two primary, conjunctive elements: (1) whether risks of the design were foreseeable by the manufacturer at the time of distribution and (2) whether a practical, reasonable alternative design was available at the time of distribution.

With regard to the first element, both the National Highway Traffic Safety Administration ("NHTSA") and the record below have acknowledged the safety benefits associated with assisted driving technology. Opposing counsel's expert witness recognized how this technology has reportedly decreased accidents regarding lane drifting and unsafe lane changes as compared to other vehicles on the market. While that expert also claimed Edison's design increased accidents by 13% under specific conditions, this figure was made in comparison

to Edison's admittedly safer design, rather than in comparison to other vehicles on the market without the Autodrive feature.

Furthermore, the Edison's Autodrive feature was used to supplement the operator's control, not replace it. Edison's manual requires that drivers remain alert and keep two hands on the steering wheel at all times. Because the Autodrive feature can be overridden by the driver at any time, the knowledge of risks associated with driving Edison's vehicle are the same as driving a standard vehicle with no Autodrive feature and should be evaluated as such. In essence, Plaintiff's claims are not based on an attribute of the product that should have been compensated for with a safety feature, but rather a safety feature that Plaintiff claims should have been safer. While that may be true, it presents a genuine issue of material fact that was, and should remain, a decision for the jury.

With regard to the second conjunctive element, courts must answer (1) whether a reasonable alternative design was available; (2) whether the reasonable alternative was practical; (3) whether the reasonable alternative would have reduced the risk of injury; and (4) whether the omission of the alternative design rendered the product unreasonably dangerous. The mere existence of an alternative design is not enough. Courts must look at the original design in juxtaposition to the costs, safety, and functionality of the alternative design.

While an alternative design was available to Edison, the cost associated with the design would eliminate Edison's ability to provide a safer vehicle to Edison's target market. Edison chose not to include the additional sensors because they would have increased the cost of the vehicle by $5,000 – effectively removing the economy market's access to the vehicle and Autodrive feature. This consequence makes the addition of the sensors impracticable, or, at the very least, a question for the jury.

Furthermore, the alternative design would not have decreased the foreseeable risk of injury for a driver operating the vehicle as intended. Edison designed the vehicle with the intent that the driver would remain attentive at all times. This includes responding to stationary objects in the road. The original Autodrive feature simply acts as a supplement to the attentive driver by responding to situations that the driver may not or cannot foresee. In these circumstances, it would be impossible for the original Autodrive design to do anything but reduce the foreseeable risk of injury. While the alternative design would have increased the vehicle's chance of recognizing a stationary object if the driver was relying solely on the Autodrive feature, the alternative design would not have increased the safety of an attentive driver operating the vehicle as foreseen by Edison. For these same reasons, the omission of the additional sensor did not make the vehicle inherently unsafe.

As for the second issue on appeal, a duty to retrofit imposes a duty upon manufacturers to upgrade or improve a product that has already been placed on the market. While a small minority of jurisdictions, including the lower court, have adopted this duty under consumer protection theories, its adoption would be antithetical to its intended purpose.

A post-sale duty to warn already adequately protects consumers' interests. The lower court held to narrowly apply the duty to retrofit when: (1) the product implicates human safety; (2) there is a continuing relationship between manufacturer and consumer; and (3) the manufacturer had knowledge of the defect after the product was in the hands of the consumers. However, the existing post-sale duty to warn currently covers scenarios where these factors are present. A duty to retrofit would place an unlimited burden on a manufacturer, while the post-sale duty to warn places a reasonable burden on a manufacturer. Because both remedies promote human safety equally, there is no reason to impose a greater burden on the manufacturer.

Further, the implementation of a duty to retrofit would create a chilling effect on manufacturers. This becomes apparent as manufacturers could be held liable for advances in safety technology that they do not retrofit to their products. Such an imposition would likely stifle technological innovation, as manufacturers would not develop new technologies that expose them to unreasonable liability.

Finally, regardless of whether the court finds that the adoption of the duty to retrofit is warranted, the implementation of a duty to retrofit is better left up to the legislature. A retrofitting campaign is an extremely costly undertaking, and courts are not adequately equipped to handle decisions regarding whether a manufacturer should be required to implement a retrofitting campaign. Additionally, numerous safety statutes, such as National Traffic and Motor Vehicle Safety Act (49 U.S.C. § 30101, § 30118 (1998)) and the Consumer Product Safety Act (15 U.S.C. § 2051, § 2064(a) (1996)), already make recalls and even retrofitting mandatory under certain circumstances. The willingness of the legislatures to create a duty to retrofit under these circumstances illuminates their sole authority to implement this duty upon a manufacturer.

Argument

I. The appellate court did not 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.

The standard of review for all summary judgment rulings is *de novo*. *Williams v. Nashville Network*, 132 F.3d 1123, 1130-31 (6th Cir. 1997). The lower court's proceedings should not be given deference. *Id*. Instead, the evidence should be viewed in the light most favorable to the non-moving party, giving that party the benefit of all reasonable inferences. *Id*. The motion should only be granted if no reasonable jury could have found for the non-moving party. *Id*.

For a party to receive a summary judgment ruling, they must show that there is no genuine dispute as to any material fact and that they are entitled to judgment as a matter of law. Fed. R. Civ. 56. A successful products liability claim requires the following three elements to be undisputed: (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. Fremont Rev. Code § 5552.321. The first two elements of the liability claim are undisputed, the third element, however, is disputed. R. at 8.

Fremont courts have adopted the risk-utility test as the exclusive test for determining whether a product was in a defective condition such that it was unreasonably dangerous. *Fickell v. Toyoma Motors Inc.*, 758 XE 821, 830 (Fremont 2014). The risk-utility test seeks to balance the danger associated with a product and the utility it provides to the consumer, and deems a product unreasonably dangerous if the danger associated with the product's use outweighs the product's utility. *Bragg v. Hi-Ranger, Inc.*, 462 S.E.2d 321, 328 (S.C. Ct. App. 1995). The risk-

utility test balances six factors: (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; (3) whether a reasonable alternative design was available; (4) whether the alternative design was practicable; (5) whether the available and practicable reasonable alternative design would have reduced the foreseeable risk of harm; and (6) whether the omission of the alternative design rendered the product not reasonably safe. *Peck v. Bridgeport Machs., Inc.*, 237 F.3d 614, 617 (6th Cir. 2001). These six factors are divided into two general categories for the risk-utility test: (1) foreseeability of injury and (2) reasonable alternative design. *Id*. In the present case, both general categories favor Edison, and therefore Ashpool's motion for summary judgment should fail on a design defect claim under the risk-utility test.

A. The factors of foreseeability of likelihood and severity of injury favor Edison.

Under the risk-utility test used in Fremont courts, these two factors are used to analyze the manufacturer's knowledge of inherent risk in their design. *Owens v. Allis-Chalmers Corp.*, 326 N.W.2d 372, 379 (Mich. 1982). The court in *Owens* further clumps these two factors together to solve a singular question – is there evidence which can be presented to show the magnitude of the risks involved with the operation of the device? *Id*. at 378.

For example, in *Hollister v. Dayton Hudson Corp.*, 201 F.3d 731, 738 (6th Cir. 2000), the first element leaned in favor of the plaintiff, because the clothing material that was chosen by the defendant was found to be significantly more flammable than other clothing materials. *Id*. This showed the design chosen by the defendant had a higher likelihood of causing the clothing to catch fire. *Id*. Further, the second element leaned in favor of the plaintiffs because a research report from the Consumer Product Safety Commission showed that over one-third of those injuries resulted in hospitalization of the victim when their clothing caught fire. *Id*. at 739. The

court in *Hollister* deemed that the report properly provided the manufacturer with enough information to put that manufacturer on notice that the severity of an injury resulting from clothes catching fire was foreseeable. *Id*.

In contrast in *Peck v. Bridgeport Machines, Inc*., 237 F.3d 614, 618 (6th Cir. 2001), the first two elements were found to lean in favor of the defendant because the plaintiff's expert witness had never heard of a similar accident occurring with lathes and was unable to provide any insight as to the probability of a similar accident happening. The court in *Peck* found that there was not enough information to put the manufacturer on notice as to the foreseeability of the likelihood and severity of the injuries that resulted. *Id*.

Next, in *Scott v. Allen Bradley Co.*, 362 N.W.2d 734, 737 (Mich. Ct. App. 1984), the defendant was shown to have knowledge of the foreseeability of likelihood and severity of injury because they had produced a safety guard to be attached to their machine press that would prevent accidental activation. *Id*. The court reasoned that because the defendant had produced an optional guard that would specifically stop accidental activation, the defendant had enough information to put them on notice regarding injuries involving accidental activation and its severity. *Id*.

Finally, in *Reeves v. Cincinnati, Inc.*, 439 N.W.2d 326, 330 (Mich. Ct. App. 1989), the court found that evidence presented at trial was adequate to establish a legitimate question of fact for the jury. While the plaintiffs lacked an accurate statistical breakdown of the risk of injuries caused by the unexpected, spontaneous cycling of a power press produced by the defendant, the defendants still had knowledge that this spontaneous cycling could happen and cause serious injury through early 1950s technical literature from England. *Id*. at 328. The court found that this created a genuine issue of material fact for the jury to find as to whether the manufacturer had

enough information to put them on notice as to the foreseeability of the likelihood and severity of injuries that resulted from the use of their machines. *Id*. at 327.

Here, the present case is similar to *Hollister* in that testing was done that could help determine the likelihood of an injury occurring. However, the present case can be distinguished because the testing done in *Hollister* showed the clothing material was more flammable than other materials available and those other less flammable materials had been analyzed for frequency and severity of injury in the Consumer Product Safety Commission report. In contrast, Edison's reports showed a comparison between different scenarios of its own Autodrive feature. R. at 5. In their analysis, Edison found there was a 13% higher likelihood of an accident occurring under very specific conditions: driving over 35 miles-per-hour and a stationary object being in the road. *Id*. This comparison was only for the Autodrive feature and its ability to decrease the likelihood of an accident. *Id*. However, Autodrive was not meant to take away the responsibility or ability of the driver to maneuver the vehicle, and thus the Marconi could be found to be no more inherently dangerous than any other vehicle being operated. R. at 3. When comparing the Autodrive feature to the more flammable clothing material found in the *Hollister* case, the knowledge of risk is not the same, because the Marconi's Autodrive feature will only decrease the likelihood of an injury occurring while the more flammable clothing material served to increase the likelihood that a consumer's clothes could catch fire and result in serious injury.

At first glance, the present case seems very similar to the case in *Scott* because both manufacturers had created designs that could be used to lower the likelihood of an accident occurring which would show that the manufacturer's had knowledge of the risks associated with their design. However, the present case can be distinguished from *Scott*. The manufacturers in *Scott* knew of the risk associated with their machine because they developed a guard for an exact

situation where injury could occur, while in our case, the addition of the Autodrive feature was used as a supplement to the operator's own control over the vehicle, decreasing the likelihood of an accident. The only knowledge of risk that Edison can put on notice of is the same risk that comes with the operation of any sedan on the market.

The present case is similar to but should be distinguished from *Reeves* because in *Reeves* the knowledge of a safety feature that had been common use in a parallel portion of the industry overseas was enough to present to the jury a question of fact as to whether the defendant's knew the magnitude of the inherent risks involved in their machines. While in our case, Edison was implementing an additional safety feature in the form of Autodrive which could be used to lower the likelihood of an accident occurring when compared to a standard sedan on the road. The present case would be more like *Reeves* if the manufacturer in *Reeves* had been regularly installing an additional safety device into their machines that other manufacturers had not used, and then that safety device failed – the Autodrive feature will only ever serve to decrease the risk of an attentive driver getting into an accident. Therefore, the inherent risk and its foreseeability associated with the Autodrive feature leans in favor of Edison because it only serves to decrease the inherent risk of operating a motor vehicle.

B. There was not a reasonable, practicable alternative design available to Edison.

The remaining four elements in the risk-utility test all serve to answer a singular question: was there a practicable, reasonable alternative design that the manufacturer could have implemented which would reduce the risk of the injury discussed in the first two factors? To answer this question the court must answer four questions: (1) was a reasonable alternative design available; (2) was that alternative design practical; (3) would that reasonable, practical alternative design have reduced the risk of foreseeable injury; and (4) did the omission of the

design render the product not reasonably safe. *Reeves v. Cincinnati, Inc.*, 439 N.W.2d 326 (Mich. Ct. App. 1989). Here, the court should find that there was a reasonable alternative design however, that design was not practical, would not have reduced the risk of foreseeable injury, and its omission did not render the product not reasonably safe.

1. There was a reasonable alternative design available.

Under the risk-utility test, when determining the availability of an alternative design, the first thing that must be determined is whether a reasonable alternative design existed. *Reeves v. Cincinnati, Inc*., 439 N.W.2d 326, 328 (Mich. Ct. App. 1989). For example, in *Higgins v. Intex Recreation Corp.*, 99 P.3d 421, 425 (Wash. Ct. App. 2004) a plaintiff who was injured using one of the sled products produced by Intex presented to the court that an alternative design was available because Intex currently produces another product that had the design, ribs on the bottom of the sled, already implemented. The court found that this evidence of an alternative design was enough to show a reasonable alternative design for the risk-utility question. *Id*.

Here, similar to *Higgins,* Ashpool has produced evidence of a reasonable alternative design existing in the form of the additional sensors being attached to the vehicle. R. at 5. The design from Edison of including additional sensors therefore satisfies the requirement that Ashpool has to produce a reasonable alternative design.

2. The reasonable alternative design was not practical.

The mere existence of a reasonable alternative design is not enough to warrant a product defective, that reasonable alternative design must also be practical. *Peck v. Bridgeport Machs, Inc.*, 237 F.3d 614, 617 (6th Cir. 2001). When a court is determining whether a design is practicable, they must look at things such as costs, safety, and functionality associated with the alternative design. *Gardner v. Ethicon, Inc.*, No. 4:20-CV-00067-SAL, 2020 U.S. Dist. WL

5077957, at *4 (D.S.C. Aug. 27, 2020). Courts have found that while the benefit of a safer product is desirable, at a certain point the costs to increase safety outweigh the benefits making the alternative design impractical. *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 674 (GA. 1994).

For example, in *Calles v. Scripto-Tokai Corp.*, 864 N.E.2d 249, 262 (Ill. 2007) a summary judgement for the manufacturer was overturned because the plaintiffs had created a genuine issue of material fact as to whether the alternative design presented was feasible. In that case, the alternative design was shown to have cost between 0.03 and 0.40 dollars per unit, with each unit being a small utility lighter. *Id*. The court found that this was an acceptable cost increase such that it would not render the alternative design not practical. *Id*.

Next, in *Higgins*, the alternative design was deemed practical despite the manufacturer's reliance on the court's previous rulings that a design change which changes the purpose of the device would make it a fundamentally different product and thus not a design change. *Higgins v. Intex Recreation Corp.*, 99 P.3d 421, 425 (Wash. Ct. App. 2004) (citing *Thongchoom v. Graco Children's Prod., Inc.*, 71 P.3d 214 (Wash. Ct. App. 2003)). The court found that the addition of ribs on the bottom of the Extreme Sno-Tube II would not have created a fundamentally different product merely because Intex already had a similar product for sale with those additional ribs on the bottom. *Higgins*, 99 P.3d at 424.

In *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 16 (2010), the driver of a Ford Bronco alleged a design defect in the vehicle regarding the vehicles' propensity to rollover. At trial, evidence was presented that Ford knew the Bronco was unstable and made a five optioned plan to increase the stability. *Id*. at 11-12. Ultimately, Ford chose a plan with a stability index of 2.02, despite their engineers' concerns, due to a "major marketing advantage." *Id*. at 12. It was uncovered at trial that Ford could have chosen a plan that increased the Bronco's stability index

to 2.25, increasing the safety by a little over 10%. *Id*. In affirming the trial court's denial of plaintiff's motion for a directed verdict, the courts stated, "a product is not in a defective condition unreasonably dangerous merely because it 'can be made more safe.'" *Id*. at 16. The court continued in stating:

> Most any product can be made more safe. Automobiles would be more safe with disc brakes and steel-belted radial tires than with ordinary brakes and ordinary tires, but this does not mean that an automobile dealer would be held to have sold a defective product merely because the most safe equipment is not installed. *Id*. at 16 (quoting *Marchant v. Mitchell Distributing Co.*, 240 S.E.2d 511, 513–14 (S.C. 1977)).

Finally, the court in *Rix v. Gen. Motors Corp.*, 723 P.2d 195, 202 (Mont. 1986) held that one of the main factors for determining the practicality of an alternative design of a dual brake system was whether it was technologically feasible and marketable.

Here, the present case is like *Calles*, *Rix*, and *Branham* in that, while an alternative design is available, the additional cost of the sensors on the Edison would increase the cost to consumers which could possibly make the product unmarketable. The additional cost of the sensors was estimated to be around $5,000 after labor and parts are factored in. R. at 5. This additional cost for each product would create the possibility that the entire car line becomes economically infeasible which creates a genuine issue of fact for the jury to answer, as in *Calles*.

Further, the $5,000 increase creates a similar argument to the one seen in *Higgins*, where the implementation of the alternative design would change the function of the product. Unlike in *Higgins*, where the court found that the fundamental product would not be changed, a $5,000 increase here would fundamentally alter the product from being an economy sedan to being a luxury one. Therefore, because the increased cost from implementing the alternative design threatens the marketability and practicality of the product the alternative design should be found not practical.

3. The alternative design would not reduce the risk of foreseeable injury.

The next question the court must answer is whether the alternative design would decrease the likelihood of foreseeable injury. *Reeves v. Cincinnati, Inc.*, 439 N.W.2d 326, 329 (Mich. Ct. App. 1989). The alternative design's ability to reduce the foreseeable injury is a requirement, because otherwise, the alternative design would not prevent the type of injury suffered by the plaintiff. *Id*.

For example, in *Lamkin v. Towner*, 563 N.E.2d 449, 458 (Ill. 1990), the alternative design provided by the plaintiffs showed no evidence as to how their design would make the window screens safer, and thus, the design defect claim failed the risk-utility test. In comparison, in *Higgins*, the alternative design of ribs being added to the bottom of the Extreme Sno-Tube II was shown to decrease the likelihood of injury because it would have helped allow the Extreme Sno-Tube II to continue facing forward, giving the passengers more of an ability to steer. *Higgins v. Intex Recreation Corp.*, 99 P.3d 421, 425 (Wash. Ct. App. 2004). The court reasoned that this ability would have decreased the likelihood of an injury that resulted from snow tube travelling at high speeds with no option to steer. *Id*.

Here, while the alternative design of adding more sensors would have decreased the likelihood of a collision occurring with a stationary object, the actual design does not limit the driver's ability to come to a safe stop. Instead, the current design acts as a limit on the safety system, Autodrive. A system that NHTSA praises for its ability to eliminate human error. AUTOMATED VEHICLES FOR SAFETY, https://www.nhtsa.gov/technology-innovation/automated-vehicles (last visited Jan. 31, 2021). This is similar to *Lamkin* because the additional sensors do not make the product inherently more safe for an attentive driver. This can be contrasted with *Higgins* where the addition of the ribs would have made the product inherently more safe, by

allowing riders of the Extreme Sno-Tube II to turn and face downhill, giving them the ability to maneuver. Whereas here, the extra sensors in the Edison's alternative design would not have added any additional safety capabilities beyond that of an attentive driver. The additional sensors would have only increased the likelihood of Autodrive recognizing a stationary object in the road when traveling over 35 miles-per-hour by 13%. R. at 5. Therefore, while the alternative design would have decreased the risk of a collision occurring when a driver relies solely on the Autodrive feature, it would not have increased the safety for an attentive driver.

4. The omission of the alternative design does not make the product inherently not safe.

The final question asked when analyzing the alternative design is whether the omission of the alternative design makes the product inherently not safe. *Reeves v. Cincinnati, Inc.*, 439 N.W.2d 326, 329 (Mich. Ct. App. 1989). To answer this last question, all the other factors for the alternative design must be considered to determine whether the omission of the available alternative design made the product unreasonably dangerous. *Id.*

Here, an alternative design was available, the additional sensors, however, that alternative design was neither practical nor did it reduce the risk of foreseeable injury. The alternative design was not practical because the cost increase of the additional sensors would have severely diminished the Marconi's marketability, and would have changed the Marconi from an economy sedan to a luxury one. Further, while the internal tests performed by Edison showed that the likelihood of a collision under specific conditions would have decreased with additional sensors, that is only a decrease in the failure rate of the additional safety device, Autodrive, and the lack of sensors does not inhibit an attentive driver from avoiding the collision. Therefore, the omission of the additional sensors does not make the Marconi inherently dangerous and thus a defective product.

II. This court should not adopt a duty to retrofit because the adoption is better left to traditional negligence theories

A duty to retrofit imposes a duty upon manufacturers to upgrade or improve a product that has already left their custody. *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 534 (Ky. 2003). This duty has been adopted in a small minority of jurisdictions, and the appellate court in the present case has expressed their desire that Fremont become one of those minority jurisdictions. R. at 13. The lower court's ruling is based on a desire to better protect consumers, however, standard negligence theories already adequately protect consumers, namely the duty to warn is enough to protect consumers from harm. Further, even if the court finds that the duty to warn is not adequate to protect consumers, the implementation of a duty to retrofit is something better left up to the legislature and other administrative, regulatory bodies. For these reasons, the Fremont courts should not adopt a duty to retrofit.

A. The court should not adopt the duty to retrofit because the adoption of the duty to retrofit is antithetical to its intended purpose.

The lower court recognized that only a small minority of jurisdictions implemented a duty to retrofit, and they reasoned that a narrow implementation of a duty to retrofit, under specific conditions would be more just than a broad implementation. R. at 15. Specifically, they opted to follow the example set forth by the Third Circuit in *Noel v. United Aircraft Corp.*, 342 F.2d 232, 236-40 (3d Cir. 1964), where the duty to retrofit was only implemented in cases where "human safety" is involved. The lower court further narrowed the duty by laying out the elements for when a duty to retrofit should be implied: (1) the product implicates human safety; (2) there is a continuing relationship between manufacturer and consumer; and (3) the manufacturer had knowledge of the defect after the product was in the hands of the consumers.

R. at 15 & 16. There are two scenarios where a retrofit would be implemented: (1) a retrofit for a latent defect; or (2) a retrofit for a technological advancement. *Gregory v. Cincinnati Inc.*, 538 N.W.2d 325 (Mich. 1995). In the first scenario, existing theories of negligence already adequately protect consumers, namely, the existing post-sale duty to warn. *Shane v. Smith*, 657 XE 720, 725 (Fremont 1989). And the duty to retrofit should not be adopted in the second scenario because it would place an undue burden on manufacturers and create a chilling effect. *Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 331-32 (Mich. 1995).

1. A post-sale duty to warn already adequately protects consumer safety in the scenario that a latent defect exists.

A post-sale duty to warn is implemented when: (1) the manufacturer has knowledge or reason to have knowledge that their product poses a substantial risk of harm to the consumer; (2) consumers who might be injured can be identified and can reasonably be assumed to be unaware of the risk; (3) a warning can be effectively communicated and acted upon; and (4) the risk of harm is sufficiently great to justify the providing of a warning. Restatement (Third) of Torts: Prod. Liab. § 10 (1998).

The already implemented duty to warn adequately protects consumers' interests from manufacturer's negligence. If in the instance of the first scenario, a latent defect exists in the product, then the post-sale duty to warn will protect consumers. All of the proposed elements that establish a duty to retrofit can be found in the elements of the post-sale duty to warn. First, both require that the defect is discovered after the product has already left the hands of the manufacturer. Second, some sort of continuing relationship must exist between the manufacturer and consumer; evidenced by elements two and three in the post-sale duty to warn. These elements ensure the manufacturer can effectively identify and communicate with the consumers.

Finally, the type of potential harm must be significant. Therefore, any time the duty to retrofit would exist, so does the post-sale duty to warn.

Where these two theories of negligence differ is the philosophy that the burden placed on the manufacturer must be balanced against the safety of the consumer. A duty to retrofit would place an unlimited burden on a manufacturer to improve its product if a dangerous latent defect is discovered after the product entered the consumers' hands. The post-sale duty to warn, in contrast, only requires that the manufacturer reasonably warn the consumer of the dangers of their product. Both remedies promote human safety equally, however, the duty to retrofit places a far greater burden upon the manufacturer than the duty to warn. Because the primary reason for the lower court's adoption of the duty to retrofit was to promote human safety, and human safety is equally advanced through the post-sale duty to warn, the post-sale duty to warn already adequately serves to protect consumer safety.

2. Implementing a duty to retrofit for a technological advancement would create a chilling effect on manufacturers.

In the second scenario, a product leaves a manufacturer's custody and is not defective, then, because of some technological advancement by the manufacturer, the non-defective product now becomes defective. *Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 331-32 (Mich. 1995). A duty to retrofit would place an undue burden on manufacturers in scenarios such as this. *Id*.

Some cases have implemented a requirement that a manufacturer retrofit their product when a technological advancement has occurred, such as in *Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519 (Tex. Civ. App. 1979), where the court held that the defendant had a duty to upgrade the tail rotor of a helicopter that they had repurchased and then resold. However, in that case, the duty to retrofit can be viewed extremely narrowly, because the defendant had taken

possession of the helicopter while they had already had knowledge of the product defect and then did not retrofit the product before reselling it. *Id*. This is a different scenario from a requirement that the helicopter be retrofitted if the defendant never retook possession.

Other courts, such as the one in *Tabieros v. Clark Equip. Co.*, 944 P.2d 1279 (Haw. 1997), take a different approach to technological advancements. They reasoned that a manufacturer had no duty to retrofit a product with "after-manufactured" safety equipment, but they could be found liable for not installing that equipment if it existed at the time of manufacture. *Id*.

Finally, some courts take the most pragmatic approach to technological advancements, such as in *Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 334 (Mich. 1995) where the court reasoned that implementing a duty to retrofit due to an advance in technology would create a chilling effect on manufacturers. In essence, manufacturers would be less likely to develop technological advancements that increase safety if they could then be found liable for not implementing those same advancements in their products via a retrofit. *Id*.

Fremont should adopt the reasoning of the courts in *Gregory* because the primary objective of implementing a duty to retrofit was to improve consumer safety -- however, the implementation of that duty would likely decrease consumer safety. Manufacturers would not want to waste resources developing new cutting-edge safety advancements, when those same advancements could be used to hold them liable, requiring manufacturers to then install that cutting-edge equipment into all their previous devices at a loss. While some manufacturers may continue to create more advanced safety equipment, the majority of manufacturers will likely stop improving their safety equipment altogether out of the fear of being held liable. This would result in advancements in safety coming to a standstill and make all future consumers less safe.

For these reasons, a duty to retrofit due to a technological advancement would create a chilling effect on manufacturers.

B. The adoption of the duty to retrofit is a decision that should be left up to the legislature and other administrative, regulatory bodies.

If the duty to retrofit were to be implemented in Fremont, the judiciary is not the appropriate place for this duty to be imposed. Instead, this duty should be imposed by the legislature and other administrative and regulatory bodies. *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 534 (Ky. 2003).

A retrofitting campaign is an extremely costly undertaking and is often a multi-step, multi-party process. *Id*. A retrofitting campaign is very similar to a recall campaign, which is properly the province of the administrative bodies. This is evidenced by the numerous federal statutes that expressly delegate recall authority to various governmental agencies. For example, 21 U.S.C.A. § 350l (West 2011) which delegates the process for mandatory recall authority to take place for food and drugs. These regulatory agencies have all the necessary institutional resources needed to evaluate the costs and benefits of implementing an action such as a retrofit campaign. Courts, however, are restricted to their individual cases, and their knowledge is confined to the particular facts and arguments in those individual cases. Victor E. Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to A Reasonable Doctrine*, 58 N.Y.U. L. Rev. 892, 903 (1983). For these reasons, courts are not as adequately equipped to handle decisions in regard to whether a manufacturer should be required to implement a retrofitting campaign.

Further, as noted in *Modelski v. Navistar Int'l Transp. Corp.*, 707 N.E.2d 239, 247 (Ill. App. Ct. 1999) there are numerous safety statutes, such as National Traffic and Motor Vehicle Safety Act (49 U.S.C. § 30101, § 30118 (1998)) and the Consumer Product Safety Act (15

U.S.C. § 2051, § 2064(a) (1996)), which makes recalls and even retrofitting mandatory under circumstances where the defect to be remedied is not discovered until after the product has left the manufacturer's control. Courts have decided that when legislation exists, they will not expand remedies past what is enacted. *Doyle v. City of Medford*, 337 P.3d 797 (Or. 2014). These examples of statutes requiring mandatory retrofitting, recalling, and delegating authority on recalls to various governmental agencies demonstrate how the legislative body is not unwilling to act to impose a duty to retrofit if it deems one is necessary. The willingness of the legislatures of various jurisdictions to create a duty to retrofit under certain conditions shows that the sole authority to implement a duty upon a manufacturer rests with the legislature.

Conclusion

Accordingly, this court should uphold the lower court's decision with respect to Ashpool's summary judgment claim, and not adopt the duty to retrofit in Fremont.