

No. 21-2112

In the
Supreme Court of the State of Fremont

WILLIAM ASHPOOL

Petitioner,

v.

EDISON INCORPORATED, A FREMONT CORPORATION,

Respondent.

On Writ of Certiorari to the Court of Appeals for the State of Fremont

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

- I. A design defect claim, according to the risk-utility test, requires that a product's danger outweigh its utility to the consumer, such that the product is unreasonably dangerous. In this case, a defect is alleged in the Edison Marconi for its lack of additional safety sensors to avoid accidents. Does a valid design defect claim exist for the Marconi's lack of optional safety feature such that it is unreasonably dangerous?

- II. A minority of courts have acknowledged a duty to retrofit as an alternative to other product liability claims. The appellate court decided to impose a 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 a defect after the product was in the hands of the consumers. Should the State of Fremont adopt the duty to retrofit when there are already existing laws for consumers to remedy injuries?

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STATEMENT OF THE CASE

In 2017, Edison (hereinafter “Respondent” or “Edison”), an automobile corporation, released the Marconi sedan. (R. 2.) Included in the design of the Marconi is a feature known as Autodrive, which, upon activation by the driver, allows the vehicle to operate itself so long as the driver maintains two hands on the wheel. (R. 2.) Autodrive operates via the usage of external sensors on the vehicle connected to an onboard computer that utilizes the data to accelerate, stop, and otherwise maneuver the vehicle. (R. 2.) Upon inputting one’s desired destination, the Marconi plots a route and operates semi-autonomously until arrival at the destination. (R. 2.) Any obstacles in the roadway, such as road work, weather conditions, and other vehicles, are accounted for in real time in order to make the necessary adjustments in maneuvering the vehicle. (R. 3.)

Other than the Autodrive feature, the Marconi also employs numerous other safety features including continuous system updates and an alert system to warn an inattentive driver. (R. 3.) Updates, of both a safety and cosmetic nature, are sent directly to each vehicle and each user is notified continuously until the update is complete. (R. 3.) The Marconi further comes with a manual emphasizing the importance of attentive driving and keeping one’s hands on the wheel. (R. 3.) In fact, if one’s hands are removed, a flashing light on the dashboard warns the driver immediately. (R. 3.)

On or around November 2019, William Ashpool (hereinafter “Petitioner” or “Ashpool”) test drove and subsequently purchased the Edison Marconi. (R. 4.) From the date of purchase until December 20, 2019, the Marconi and Autodrive feature operated with no malfunctions. (R. 4.) However, on the aforementioned date, Ashpool was operating the Marconi at approximately 42 MPH on Route 27 in Fremont when he came across a brown bear sitting in the middle of the road. (R. 4.) His Marconi thereafter collided with the brown bear, resulting in several physical

and economic injuries to Ashpool. (R. 4.) These injuries resulted in a two and a half week hospital visit and total loss of the Marconi. (R. 4.) Petitioner Ashpool thenceforth filed this action against Edison, claiming that the alleged defectiveness of the Autodrive feature and sensors were the cause of his injuries. (R. 4.)

Procedural History

At trial Petitioner attempted to put forth an argument that, according to tests conducted by Edison, a safer alternative design for the Marconi existed which allegedly could reduce collisions with stationary objects by up to 13%. (R. 5.) However, it was discovered that this design was abandoned due to both feasibility concerns and a \$5,000 cost increase per vehicle (R. 5.)

Near the conclusion of the trial, Ashpool included a duty to retrofit in his submitted jury instructions. (R. 6.) However, the jury instruction was excluded since the State of Fremont does not recognize a common law duty to retrofit. (R. 6.) The trial thus proceeded and at its conclusion Petitioner moved for a judgment as a matter of law. (R. 7.) The motion was denied and the jury returned a verdict of no defect in the Marconi. (R. 7.) Petitioner Ashpool then appealed the denial of his motion for judgment as a matter of law and failure of the court to submit the duty to retrofit jury instruction. (R. 7.) The court of appeals thenceforth affirmed the judgment of the lower court. (R. 18.) A writ of certiorari was granted to review the appellate court's affirmation of the trial court and to review whether a duty to retrofit should be adopted in Fremont. (R. 20.)

SUMMARY OF THE ARGUMENT

The Edison Marconi is not unreasonably dangerous and as such no valid design defect claim exists with regard to the Autodrive feature. In this jurisdiction, the risk-utility test can deem a product unreasonably dangerous when the two general categories of foreseeability and the existence of a reasonable alternative design are balanced against one another. In general, if an incident is both foreseeable and if a reasonable alternative design exists then liability for a design defect may be asserted. This is not the case here. Despite evidence indicating internal testing on the part of Edison, there is not enough evidence to foresee the likelihood or severity of Petitioner's injury.

Furthermore, the increase in cost and lack of evidence indicating accident rate reduction result in a lack of existing reasonable alternative design. As such, the weighing of these factors in Edison's favor coupled with the safety of the Marconi compared to a typical sedan, result in the utility of the product outweighing the danger such that the product is not unreasonably dangerous and no design defect claim exists under the risk-utility test.

The State of Fremont should not adopt the duty to retrofit because (1) there are already product liability laws that protect consumers and (2) the burden placed on manufacturers would lead to less innovation and negatively impact consumers. Injured consumers already have sufficient ways to bring claims against manufacturers that create unsafe products. The duty to retrofit created by the appellate court leaves questions as to when a duty would be triggered by a manufacturer, especially because the court conceded that car manufacturers do not have a continued relationship with consumers. If the State of Fremont wants to protect consumers by adding a duty to retrofit to its product liability laws, the legislature is best suited to draft that law.

ARGUMENT

I. The Edison Marconi and its Autodrive feature are not unreasonably dangerous under the risk-utility test and as such the appellate court was correct in affirming the trial court’s denial of Petitioner Ashpool’s motion for judgment as a matter of law on his design defect claim.

A. Liability under a theory of design defect requires that a product’s danger outweigh its utility to the customer in order to be deemed unreasonably dangerous according to the risk-utility test.

In order to establish a claim under a theory of product liability, a plaintiff must establish that: (1) the injury was caused by the product; (2) the product, at the time of the injury, was essentially in the same condition as when it left the manufacturer; and (3) the injury occurred because the product was in a defective condition such that it was unreasonably dangerous to the driver. W. Prosser, *Law of Torts*, 671–72 (4th ed. 1970); *Cf* Fremont Rev. Code § 5552.321. In the case at hand, the point of dispute is regarding whether or not the Edison Marconi was in a defective condition such that it was unreasonably dangerous to Petitioner. In order to determine this, it is first necessary to define an ‘unreasonably dangerous’ product. In this jurisdiction, an unreasonably dangerous product is defined according to the risk-utility test. *Fickell v. Toyoma Motors Inc.*, 758 XE 821, 830 (Fremont 2014). Pursuant to the risk-utility test, a product is deemed unreasonably dangerous and defective if the danger associated with the use of the product outweighs the utility of that product to the consumer. *Bragg v. Hi-Ranger, Inc.*, 462 S.E.2d 321, 328 (S.C. Ct. App. 1995). However, it is important to note that any product can be made safer and the fact that it is not does not automatically cause the product to be categorized as unreasonably dangerous. *Id.* In applying the risk-utility test, six factors are typically analyzed, including: (1) whether the severity of the injury was foreseeable by the manufacturer; (2) whether the likelihood that injury would occur 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 actually reduced the foreseeable risk of potential harm posed by the product; and (6) whether the omission of the available and practicable reasonable alternative design rendered defendant's product not reasonably safe. *Peck v. Bridgeport Machs., Inc.*, 237 F.3d 614, 617 (6th Cir. 2001). These factors are used to determine the balance of the utility in the design of the product with the magnitude of risk and/or danger in order to determine the reasonableness of the manufacturer's action in designing the product. *Bragg*, 462 S.E.2d at 328. This balancing of factors occurs at the time the product was manufactured/sold. *Id.* at 329. As such, a product's determination as unreasonably dangerous or not depends upon the two general categories of foreseeability and the availability, practicability, and effectiveness of a reasonable alternative design. *Id.*

B. The severity and likelihood of Petitioner's injury could not have been foreseen by Respondent Edison, due to both the Marconi's safety as compared to a normal sedan and the lack of pre-distribution evidence pertaining to likelihood.

The first factors utilized in the risk-utility test concern foreseeability aspects on behalf of the manufacturer at the time of distribution. *Peck*, 237 F.3d at 617. In assessing risk versus utility, it is pertinent to determine the knowledge the manufacturer maintained with regard to the potential severity and likelihood of a future injury associated with the product. *Id.* Again, this assessment occurs in light of the knowledge of risk and avoidance techniques reasonably attainable at the time of distribution. *See* Restatement (Third) of Torts: Products Liability § 2 cmt. a. (1998). Knowledge of a foreseeable incident and a disregard of the associated risk at the time of manufacture/distribution can cause a manufacturer's decision to exploit them to liability issues. *Id.* Conversely, a lack of knowledge due to a lack of pre-distribution foreseeability can weigh in favor of supporting a manufacturer's decision in a product. *Id.* The policy here is that

manufacturers should not be exposed to liability under a design defect theory for an incident that is impossible to foresee or unlikely to occur.

In the case at hand, the likelihood and severity of Petitioner Ashpool's injury was not foreseeable at the time of distribution. There is simply no conclusive evidence that the injury sustained by Petitioner could be foreseen or prevented during the pre-distribution time period. Petitioner attempts to support his foreseeability argument by introducing evidence of Edison's own internal testing. However, this argument misconstrues the data obtained by Edison. According to the record, internal testing revealed that the Marconi had a 13% higher chance of collision when a stationary object was placed in its path. (R. 5.) However, as Petitioner's expert correctly explained, this testing does not take into account the Marconi's ability to avoid accidents associated with lane drifting or unsafe lane changes. (R. 5.) As such, the addition of more sensors on the Marconi may reduce the rate of collisions involving stationary objects but may do so at the detriment of various other types of collision. While yes, the addition of extra sensors may cause stationary objects to be avoided more regularly, this addition could result in increasing the vehicle's propensity to maneuver lanes and result in more collisions involving unsafe lane changes or lane drifting. Thus, the fact that additional sensors could potentially reduce stationary object associated collisions could result in an overall increase in the collision rate of the Marconi. Therefore, it cannot be said, based on the available evidence, that the chosen design of the Marconi caused the likelihood of an incident to increase.

Furthermore, there is always a trade-off in equipping certain safety features or selecting one product design over another. A decision to not include the additional sensors is certainly within the discretion of the manufacturer in the absence of any evidence indicating the unrivaled superiority of one design over another. Overall, the Marconi was not more dangerous than a

typical sedan and as such the likelihood and severity of any injury would be equal to or less than that of a normal vehicle without Autodrive. At the time of sale, it was made clear that the Autodrive feature was not a substitute for a normal driver. Therefore, since typical sedans are not required to add additional safety features, it follows that the Marconi should also not be required to enhance its existing safety feature. Collisions of this type are equally unlikely and severe regardless of the vehicle driven. The Marconi cannot be held to a higher standard than a typical sedan simply because it employs more safety features.

C. Evidence of purported similar accidents used in asserting liability is not admissible due to both the occurrence of the accidents after the manufacture/distribution of the Marconi and the highly prejudicial nature of such type of evidence.

From an initial point of review, any evidence about similar incidents is highly prejudicial and as such is subject to a stringent standard of admissibility. *Whaley v. CSX Transp., Inc.*, 609 S.E.2d 286, 300 (S.C. 2005). However, any evidence of similar accidents in this case would not even be subject to the standard, because as the court in *Branham v. Ford Motor Co.* articulated, “Post-manufacture evidence of similar incidents is not admissible to prove liability.” 701 S.E.2d 5, 20 (S.C. 2010). All of the twelve previous accidents Petitioner attempts to assert as evidence occurred after the manufacture, distribution, and release of the Marconi and as such are not admissible. The fact that the above referenced incidents occurred within two years before the case at hand is irrelevant. These incidents all still occurred after the manufacture, distribution, and release of the Marconi in 2017. The court in *Branham* applied this same logic in finding that a determination regarding the defectiveness of a 1987 Ford Bronco II must be assessed on the evidence available as of the vehicle’s manufacture date in 1986. *Id.* at 19. As such, any evidence of similar accidents after the 2017 release of the Marconi is inadmissible.

Nevertheless, even if the stringent standard above was applied, the evidence of prior accidents would still not be admitted. In order for evidence of prior accidents to be admitted, factual demonstrations must show that the other accidents were ‘substantially similar’ to the accident at issue. *Buckman v. Bombardier Corp.*, 893 F.Supp. 547, 552 (E.D. N.C. 1995). Substantial similarity requires that the plaintiff establish that: (1) the products are similar; (2) the alleged defect is similar; (3) the causation is related to the defect in the other incidents; and (4) all reasonable secondary explanations for the cause of the other incidents are excluded. *Id.*

In applying these elements to the current case, elements three and four are not met. Petitioner’s prior accident evidence does relate to prior incidents involving the Marconi and the Autodrive feature. However, in none of these cases is the causation of the incident the allegedly defective Autodrive feature and thus reasonable secondary explanations exist.

It has been made consistently clear that the Autodrive feature was no substitute for an attentive driver. As such, in each of the prior incidents causation lied with the driver in failing to take reasonable steps to avoid the stationary object. The feature does not hinder the driver’s ability to respond or maneuver the vehicle in any way. Therefore, the reasonable secondary explanation exists of an inattentive driver in all of the prior incidents. As such, the previous accidents do not meet the ‘substantial similarity’ test such that evidence regarding them could not be admitted even if the accidents did occur pre-distribution. Thus, evidence of similar accidents is excluded firstly due to its post-manufacture nature and also due to its lack of substantial similarity.

D. A reasonable alternative design for the Marconi that is available, practicable, and effective does not exist as a result of cost concerns and the overall merchantability of the Marconi as designed.

As noted above, the remaining factors commonly utilized in the risk-utility test concern the availability of a viable and reasonable alternative design. *Peck v. Bridgeport Machs., Inc.*,

237 F.3d 614, 617 (6th Cir. 2001). In order for a reasonable alternative design to exist it must be available, practicable, effective in reducing foreseeable harm, and the omission of such a design must have rendered the product as-designed not reasonably safe. *Id.* The availability of a reasonable alternative design is essential to the risk-utility analysis because, "... the existence and feasibility of a safer and equally efficacious design diminishes the justification for using a challenged design." *Banks v. ICI Ams., Inc.*, 450 S.E.2d 671, 674 (1994). Conversely, if no alternative design exists then the manufacturer may be more than justified in using the chosen design. *Id.* As such, a plaintiff in a design defect action is required to identify a design flaw in a product, show how the available alternative design would prevent the product from being unreasonably dangerous, and take into account factors such as cost, safety, and functionality. *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 16 (S.C. 2010). In the case at hand, Petitioner Ashpool has failed to make the required showing.

1. The alternative design potentially available was not practicable due to at least a \$5,000 cost increase, per each Marconi.

While safety is consistently at the forefront of any product design created, especially the design of an automobile, cost concerns are similarly at that forefront. As the court in *Hunt v. Harley-Davidson Motor Co., Inc.* stated, "[a]lthough the benefits of safer products are certainly desirable, there is a point at which they are outweighed by the cost of attaining them." 248 S.E.2d. 15, 17 (Ga. Ct. App. 1978). The court in *Hunt* declined to require Harley-Davidson to install 'crash bars' on its motorcycles largely as a result of cost considerations. *Id.* As such, and under this standard, the increase in safety via the implementation of additional sensors on the Marconi is outweighed by the \$5,000 cost increase required to install the additional sensors. This increase in price would have reduced the revenue gained on each Edison Marconi sold, pushed the vehicle outside of the economy price range, and perhaps result in the overall Marconi product

line to be non-profitable. (R. 5.) The \$5,000 cost increase undoubtedly causes the cost of attaining the sensors to outweigh the benefits of the safer product. A safer product is essentially useless if the majority of consumers do not maintain the financial means to purchase the higher-priced Marconi.

2. The alternative design potentially available does not render the existing design unmerchantable since the Marconi was fit for the intended purpose for which it was sold.

As noted, any alternative design needs also to have been able to reduce the foreseeable risk of harm and the omission of such design must render the product unreasonably dangerous. *Peck v. Bridgeport Machs., Inc.*, 237 F.3d 614, 617 (6th Cir. 2001). Under this piece of the analysis, the fact that a product could have been made more safe is not sufficient to support a finding that a product is unreasonably dangerous. *Marchant v. Mitchell Distributing Co.*, 240 S.E.2d 511, 513 (1977). Virtually any product can be made more safe, but that does not necessarily mean that the product is defective. *Id.* If a given product is merchantable and fit for the purpose for which it was sold then it cannot be said to be defective. *Id.* at 514. In *Marchant*, the court applied this logic in analyzing a design defect claim regarding the lack of optional anti-blocking devices on a crane. *Id.* at 512. In that case, plaintiff was injured as a result of tension causing the steel support cable of the crane to snap and the crane to collapse. *Id.* In finding no liability on behalf of the manufacturer, the court reasoned that the fact that the crane was without the optional safety device did not prove it was defective. *Id.* at 513. First and foremost, this rationale is supported since nearly any product can be made more safe. *Id.* Furthermore, the crane was merchantable and fit for the purpose for which it was sold. *Id.* at 514. It operated effectively in allowing employees to reach elevated heights and did not fail or malfunction. *Id.* Therefore, the crane was deemed not defective as designed. *Id.*

The same standard as in *Marchant* applies in the current case at hand. Respondent Edison simply cannot be found liable for a potential design defect in a product that is merchantable and fit for the intended purpose for which it was sold. The Marconi sold to Petitioner Ashpool was fit to serve as an automobile and navigate roadways. Upon sale, it was made clear that the Autodrive feature was not a substitute for a normal driver. In fact, even without the advanced Autodrive feature, the vehicle was still as safe as a typical sedan. It thus follows that the Autodrive feature as a whole, and especially the design incorporating the additional sensors, was an optional safety feature. Since Autodrive as a whole and the additional sensors are optional safety features, the fact that the Marconi was not equipped with additional sensors does not tend to prove that it was defective. At all times, the vehicle was fit to serve as an everyday transportation device and the fact that it may have been able to be made more safe does not show defectiveness.

Furthermore, any evidence attempting to establish that an alternative design would actually reduce the risk of foreseeable injury is incomplete and nonconclusive. As stated previously, Petitioner has attempted to establish that internal testing of the Marconi revealed a 13% higher chance of collision when a stationary object is in its path. This single statistic from tests conducted ignores the myriad of other dangers that could possibly be around or in the path of the Marconi. As such, the alternative design that incorporates the additional sensors could potentially increase the overall foreseeable harm of the product by causing the Marconi system to be more prone to unsafe lane shifts in the avoidance of stationary objects. It is this type of balancing that is the role of the manufacturer in the design process. One statistic cannot account for the various safety concerns and other factors pertinent to the creation of an advanced automobile.

II. The State of Fremont should not adopt the duty to retrofit as decided by the appellate court as the duty to retrofit is an unnecessary addition to other products liability duties and if it were to be implemented, the legislature is better equipped to create the law.

A minority of jurisdictions have created the common law duty to retrofit, creating a duty to “upgrade or improve the product.” *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 533-34 (Ky. 2003). Courts that have decided to enact a duty to retrofit, do so when there is a potential for dangerous defects and human safety is threatened. *E.g.*, *Noel v. United Aircraft Corp.*, 342 F.2d 232, 236 (3d Cir. 1964), *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411 F.2d 451, 453 (2d Cir. 1969). The Fremont appellate court proposed a limited duty to retrofit where: “(1) the product implicates human safety; (2) there is a continuing relationship between manufacturer and consumer; and (3) the manufacturer had knowledge of a defect after the product was in the hands of the consumers.” (R. 15-16.) Fremont does not need to adopt the appellate court’s duty to retrofit because there are already other product liability claims that protect the consumer from dangerous defects to the product. If Fremont were to adopt a duty to retrofit it would be better for the legislature to pass the law.

A. The State of Fremont already has theories established to hold manufacturers liable for product defects, including design defects and failure to warn.

Because Fremont already has legal theories that hold manufacturers accountable for products that harm consumers, an additional duty only puts more burden on manufacturers. Courts in other jurisdictions have declined to create a duty to retrofit because existing laws already allowed injured parties redress for any breach of legal duties by the manufacturer. *Tabieros v. Clark Equip. Co.*, 944 P.2d 1279, 1298 (Haw. 1997), *Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 333-34 (Mich. 1995).

The Hawaii Supreme Court used a “risk/burden” analysis to determine if a new duty should be imposed on manufacturers. *Tabieros*, 944 P.2d at 1296. The court decided if a duty to retrofit existed by “weighing the nature of the risk [to which the novel duty relates], the magnitude of the burden of guarding against the risk, and the public interest in the proposed solution.” *Id.* (citing *Hao v. Campbell Estate*, 869 P.2d 216, 219 (Haw. 1994)). Using this “risk/burden” assessment the *Tabieros* court found no compelling public interest reason to impose a higher burden on manufacturers when there are already legal avenues for an injured plaintiff to bring a claim. *Id.* at 1298.

The logic of the *Tabieros* court applies to the case at hand. First, Fremont allows a consumer to bring a claim of design defect against a manufacturer that sells a product that is defective at the time of sale. Fremont Rev. Code § 5552.321. A duty to retrofit that makes a design defective because a company develops a new design “is superfluous in light of existing negligence and product liability doctrines.” *Ostendorf*, 122 S.W.3d at 535. A court in California found that there could be a duty to retrofit even when a jury determined that the design was not originally defective. *Hernandez v. Badger Constr. Equip. Co.*, 34 Cal. Rptr. 2d 732, 754 (1994). The court found the duty because Badger changed its default crane design to include extra safety features that were only an optional addition when the crane in question was sold. *Id.* at 755. The manufacturer gained the duty to retrofit when the choice was made to change the standard design because of safety issues. *Id.*

Like the *Hernandez* case, Edison was found by a jury to not be liable for a design defect for the Marconi design. (R. 7.) However, Edison should not be given a duty to retrofit because it did not make extra sensors a standard feature for the Marconi design after the car was sold to Ashpool. (R. 5.) Edison only had a plan to include the sensors in other luxury vehicles. (R. 5.)

Finding a product defective in hindsight “shifts the focus from point-of-manufacture conduct and considers postmanufacture conduct and technology that accordingly has the potential to taint a jury's verdict regarding a defect.” *Gregory*, 538 N.W.2d at 334. Edison should not have a duty to retrofit just because the company had a plan to include more sensors on more expensive luxury cars.

Second, Fremont already has a post-sale duty to warn. *Shane v. Smith*, 657 XE 720, 725 (Fremont 1989). The court in *Braniff Airways, Inc. v. Curtiss-Wright Corp.* did not adopt a strict rule for duty to retrofit but leaves open the possibility that a manufacturer does not have to fully remedy the defect but “at least to give users adequate warnings and instructions concerning methods for minimizing the danger.” 411 F.2d 451, 453 (2d Cir. 1969). A post-sale duty to warn already creates a burden on manufacturers because the manufacturer would have to track down every consumer who currently owns the potentially dangerous product. Douglas R. Richmond, *Expanding Products Liability: Manufacturers’ Post-Sale Duties to Warn, Retrofit and Recall*, 36 Idaho L. Rev. 7, 19 (1999). There is also a question of when a post-sale duty to warn is triggered. *Cover v. Cohen*, 461 N.E.2d. 864, 871 (N.Y. 1984) (“[W]hat constitutes sufficient notice to the manufacturer or vendor to require its issuance of a warning, whether the manufacturer satisfies its obligation by notifying the vendor or must notify the user as well. . . .”).

The uncertainty with the post-sale duty to warn illustrates what could happen with the duty to retrofit. Undertaking a post-sale duty to warn would take time and money in order for all consumers to be adequately warned so as to not create a liability for the manufacturer. The duty to retrofit requires even more time and money from a manufacturer because not only do all the consumers of the product need to be found, but the products have to be brought back to the manufacturer so the retrofit can occur. Fremont should not impose this liability on Edison or

similar manufacturers because a post-sale duty to warn already create enough of a burden and properly safeguards the public from injury.

Third, the Fremont statute that creates liability for a manufacturer who “sells any product in a defective condition.” Fremont Rev. Code § 5552.321. The wording of the statute implies that liability is determined at the time of sale and is not a continuing relationship between the manufacturer and the consumer. There is ambiguity in the statute that allows the courts in Fremont to apply different levels of duty to manufacturers, but the duty to retrofit is one that stretches the meaning of the statute. While the State of Fremont allows for a post-sale duty to warn, the burden on the manufacturer to warn a consumer is much lesser than a duty to retrofit.

B. A duty to retrofit could create an incentive for manufacturers to not develop safer designs if it will result in a higher burden.

A duty to retrofit could lead to less innovation in companies such as Edison. If older products have to be retrofitted when new or safer improvements are made, it might deter companies from quickly creating new designs. Victor Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U L. Rev. 892, 901 (1983). When a manufacturer does not have a duty to retrofit, the manufacturer is able to continuously create safer designs without weighing the costs to retrofit all older models that are still in use. *Modelski v. Navistar Int’l Trans. Corp.*, 707 N.E.2d 239, (Ill. App. Ct. 1999).

The Fremont Court of Appeals created a duty to retrofit any time there is a danger to public safety and a continuing relationship between consumer and manufacturer. (R. 15-16). The court did not make a determination of what a continuing relationship is and if car manufacturers would have a duty to retrofit. While the court also stipulated that the duty to retrofit only attaches when the manufacturer has knowledge of a defect after the product is with the consumer, the manufacturer would most likely only know of a defeat if a safer design was created. (R. 16).

Forcing manufacturers to choose between developing safer products and avoiding a duty to retrofit.

C. If the State of Fremont wants to impose a duty to retrofit the legislature is better equipped to determine when a duty to retrofit is necessary and in what industries.

A duty to retrofit is more akin to a product recall which is in the purview of administrative agencies. Victor Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U L. Rev. 892, 901 (1983). While there are federal statutes that mandate retrofitting campaigns in specific circumstances, imposing a common law duty to retrofit would negatively impact manufacturers. *Modelski*, 707 N.E.2d at 247. Courts stepping into the role that is usually assumed by an administrative agency is a cause for concern because courts are not in a position to determine the full economic impact. *Id.* A court making a determination based on the facts of a single case, is looking at the hypothetical impact of a duty to retrofit and not the bigger impact on entire industries, such as the car manufacturing industry. *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 534-35 (Ky. 2003).

Finally, the facts of this case do not convince that a duty to retrofit would help consumers that are in the same position as Ashpool. While there is a compelling argument that courts should protect the public from dangerous products, a duty to retrofit is not the best way to achieve that goal. The appellate court expressed doubts that a jury would have found there was a continuing relationship between Edison and Ashpool that would have triggered the duty to retrofit. (R. 17-18.) This Court should not implement a new duty that leaves questions about whether it would help more consumers and would more likely negatively impact manufacturers.

CONCLUSION

For these reasons, this Court should affirm the judgment of the State of Fremont Court of Appeals in denying Petitioner's motion for judgment as a matter of law and furthermore decline to adopt the duty to retrofit outlined by the Court of Appeals.