No. 21-2112

IN THE

Supreme Court of Fremont

FEBRUARY TERM, 2021

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

Counsel for Respondent
Team D.

January 31, 2021

QUESTIONS PRESENTED

I. Did the Court of Appeals correctly affirm the trial court's denial of the petitioner's motion for judgment as a matter of law, as a reasonable jury could find that Autodrive was not unreasonably dangerous?

II. Did the Court of Appeals err in adopting the duty to retrofit in strict liability design defect cases, placing a new and greater burden on manufacturers than that which already existed under the duty to warn?

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Secondary Sources

ENTERPRISE RENTAL CAR COMPARISON (last visited Jan. 20, 2021), https://www.enterprise.com/en/car-rental/vehicles/us/cars.html 16

Mirage 2021, MITSUBISHI CARS (last visited Jan. 20, 2021), https://www.mitsubishicars.com/mirage/2021 16

Richard P. Console, Jr., *The Most Common Causes of Collision*, Nat. L. Rev. (Tuesday, Oct. 13, 2020), https://www.natlawreview.com/article/most-common-causes-collision. 21

STATEMENT OF THE CASE

I. The Edison Marconi

In 2017, Edison, an automobile company registered in Fremont, introduced the Marconi. R. at 2. While the company historically specialized in luxury and sport electric vehicles, the Marconi was Edison's debut into the highly competitive economy sedan market. *Id.* The Marconi was designed with safety in mind, but utilized the advanced technology Edison was known for with its Autodrive feature. *Id.*

A. The Autodrive Feature

The Marconi's Autodrive feature is a "semi-autonomous driving experience." *Id.* The driver can enable or disable Autodrive whenever the vehicle is stopped or in park. R. at 3. To use this feature, the driver enters their destination into the car's computer GPS system, which is displayed in the Marconi's center console on an eleven-inch screen. R. at 2. The Marconi will then analyze the road conditions, speed limits, and traffic lights along the route. *Id.* The computer will operate the car until it reaches its destination, but the driver must keep both hands on the steering wheel while Autodrive is in use. *Id.*

To function, Autodrive relies on twelve sensors that receive information about road conditions and other drivers. *Id.* The computer uses this information to analyze the surroundings and then controls the car in a manner similar to that of a human driver; the computer can stop the car, speed up, slow down, shift gears, and maneuver, all without driver input. *Id.* The computer also uses the information it receives to make adjustments to its path, accounting for "road work, weather . . ., the movement of another vehicle in the vicinity of the Marconi, or an obstruction of the roadway." R. at 3.

Autodrive is an exceptionally useful and advanced feature, but in order to be used properly, the driver must remain attentive. *Id.* The Marconi's user manual stresses the importance of attentive driving and instructs drivers to keep their hands on the steering wheel at all times. *Id.* If the driver removes his hands from the steering wheel, the dashboard will display a flashing light on the dashboard, instructing the driver to place his hands back on the wheel. *Id.* While Autodrive is in use, the driver can override Autodrive and steer the car, so long as the driver has both hands on the steering wheel. *Id.*

Safety is a major driving force of Autodrive, and as the technology develops and advances, and as new concepts emerge, the Autodrive software is updated. *Id.* Edison sends a notification that there is a new update to the vehicle's owner when the vehicle is started. *Id.* The notification is displayed on the center console each time the vehicle is started until the update is installed. *Id.* While some updates are purely cosmetic, most updates are for safety purposes. This model Edison uses – creating the updates and sending them to the vehicle's computer system – allows the Marconi to stay up to date and "maintain the highest of safety standards, without having to make entirely new vehicles." *Id.*

B. Manufacturing and Testing the Marconi

Safety is a key feature of the Marconi and Edison worked to ensure that the vehicle "would recognize potential obstacles and adjust accordingly" when in Autodrive. R. at 5. Edison performed the National Highway Traffic Safety Administration's required crash and safety tests. R. at 4. In addition to these required tests, Edison performed hundreds of tests that specifically focused on the vehicle's sensors. *Id.* While these tests showed that when the vehicle was traveling above thirty-five miles per hour it was difficult for the sensors to identify stationary objects, a "moderately attentive driver" would be able to avoid the stationary objects. R. at 5.

Edison had initially planned to include additional sensors and technology that would have been able to correct the difficulty identifying stationary objects at speeds above thirty-five miles per hour. *Id.* However, including these sensors was not feasible for an economy sedan. The additional sensors would increase the price of the Marconi by at least five thousand dollars, which would push the vehicle outside its target market. *Id.* Edison chose not to include these extra sensors because of the increased costs and because a "moderately attentive driver," with both hands on the wheel and both eyes on the road, would be able to avoid stationary objects at any speed. *Id.*

There were twelve accidents after the release of the Marconi, but Edison believes these accidents were most likely the fault of the drivers. R. at 6. These accidents all involved a stationary object (including a "median strip, light pole, [and] an already-deceased deer") and a Marconi traveling over thirty-five miles per hour. *Id.* Edison does not believe that the lack of additional sensors caused these incidents, rather that the incidents were the fault of drivers who did not maneuver the vehicle out of the way when approaching a stationary object in the road. *Id.* The Autodrive feature does not interfere with the "driver's ability or responsibility to maneuver the vehicle" to avoid an accident. *Id.*

II. Ashpool's Accident

In November 2019, William Ashpool, Petitioner, purchased an Edison Marconi. R. at 4. Petitioner bought the Marconi to replace his old pickup truck, as he must frequently drive for work and he found the Autodrive feature attractive. *Id.* Petitioner did not use Autodrive as much as he had initially planned, but his Marconi's Autodrive functioned properly, and he did not experience any malfunctions with it before the incident at issue. *Id.*

On December 20, 2019, Petitioner was driving his Marconi and hit a bear sitting in the road. R. at 1. He was traveling at approximately forty-two miles per hour on Route 27 using Autodrive when the car collided with a brown bear sitting in the middle of the road. R. at 4. In the accident, Petitioner dislocated his shoulder, broke five ribs and his wrist. He also suffered a concussion and whiplash and was hospitalized for two and a half weeks. *Id.* The Marconi suffered enough damage for Petitioner's insurer to conclude that the car was "a total loss." *Id.*

On January 12, 2020, Petitioner filed this action, "claiming that Edison improperly designed the sensors." *Id.* He alleged his injuries were a result of "the vehicle's faulty sensors, which had failed to register the brown bear and alert him to re-maneuver or stop the vehicle." *Id.* Additionally, he alleged Edison was aware of the issues with the sensors and chose not to fix them. *Id.*

III. Proceedings

At trial, both Petitioner and Edison presented evidence concerning the Marconi's Autodrive feature. *Id.* Petitioner presented an expert who explained that the Marconi had an increased collision rate of thirteen percent whenever the vehicle was traveling above thirty-five miles per hour and a stationary object was involved. R. at 5. Petitioner further alleged that Mr. Reeves, Edison's chief executive officer, had been aware of this data and had still not added the additional sensor. R. at 6. On cross-examination, however, the expert had admitted that the Autodrive feature had improved the safety of the vehicle and prevented accidents, particularly involving lane changes and lane drifting. R. at 5. Mr. Reeves also explained that the increased collision rate had not been the fault of the Marconi sensors, since the driver likely could have easily seen and avoided such stationary obstacles. R. at 5-6.

Upon request by the court, both parties submitted jury instructions. Petitioner's instructions were as follows:

> A manufacturer has a duty to take such measures that are reasonably necessary to protect the public from foreseeable harm after a product has been manufactured and sold. If a manufacturer knows of or later becomes aware of the fact that the design of a product causes unnecessary risk of serious injury to the product driver or to the public, the manufacturer must take such reasonable steps under the circumstances that will lessen or prevent the risk of injury.

R. at 6.

Because the State of Fremont does not recognize a common law or statutory duty to retrofit, Edison objected to the jury instruction. *Id.* In addition to arguing that Edison knew of the accidents and that additional sensors could possibly affect the collision rate, yet did not retrofit the vehicles, Petitioner also sought to argue that Edison could have sent all Marconi owners a software update that also possessed the possibility of affecting the collision rate. *Id.* Such an update, Mr. Reeves admits, was possible with additional labor by Edison, as was including additional sensors, but the ability to use the cheaper update was not discovered until long after the vehicle's release into the market. R. at 6-7. The trial court sustained Edison's objection to the jury instruction. R. at 7. As a result, Petitioner only presented evidence at trial related to the existence of a defect at the time of manufacturing, under his claim using the risk-utility analysis adopted by the State of Fremont. *Id.*

At the conclusion of the trial, Petitioner moved for a judgment as a matter of law under Rule 50(a) of the Fremont Rules of Civil Procedure. *Id.* The court denied the motion, and the case was sent to the jury. *Id.* Finding that the Marconi possessed no defect at the time of manufacture, and that the Autodrive sensors did not cause Petitioner's accident, the jury returned

a verdict for Edison. *Id.* Petitioner renewed the motion for judgement as a matter of law under Rule 50(b), but this motion was also denied. *Id.*

Petitioner appealed the trial court's denial of his renewed motion for judgment as a matter of law and the refusal of the jury instruction that included the duty to retrofit not recognized by the State of Fremont. *Id.* The Court of Appeals affirmed the denial of Petitioner's motion for judgment as a matter of law, holding that the Autodrive feature was not "unreasonably dangerous at the time of distribution." R. at 12. The Court of Appeals also adopted a new continuing duty to retrofit, but determined that such a duty did not apply to Edison. *See* R. at 17. As such, the trial court's denial of the jury instruction including the duty to retrofit was harmless error. R. at 13.

Petitioner appealed the Court of Appeals' decision, and this Court granted the petition for writ of certiorari. R. at 20.

SUMMARY OF ARGUMENT

The appellate court correctly affirmed the lower court's ruling against the petitioner's renewed motion for judgment as a matter of law. Drawing all inferences and viewing the evidence in favor of the non-movant, Edison, it is clear that reasonable people could reach different decisions about whether the Marconi had a design defect. To determine whether there was a design defect, this jurisdiction uses the risk-utility test which asks whether a reasonable alternative design would reduce the product's foreseeable risks of harm and whether this omission rendered the product unreasonably safe.

The evidence presented at trial showed that the Marconi was no more dangerous than a car without Autodrive, as even a moderately attentive driver could avoid a collision if the sensors failed to recognize a stationary object in the vehicle's path. The evidence also showed that the cost of incorporating additional sensors into the Marconi's design may not have substantially reduced the risks of harm. Nor would it be practicable, as the price increase associated with additional sensors was not economically feasible. This evidence supported the jury's finding that the Marconi did not have a design defect. Therefore, it was proper to deny the petitioner's motion for renewed judgment as a matter of law.

Furthermore, the trial court did not abuse its discretion in denying Petitioner's jury instruction that contained the duty to retrofit, which was unrecognized by the State of Fremont prior to the Court of Appeals' decision. A duty to retrofit should not be adopted for strict liability design defect cases, because such a duty is unnecessary, given the current available avenues to attempt to prove liability, and it risks tainting any finding of liability.

If the Court were to adopt the duty to retrofit for strict liability design defect cases, then such a duty would not apply to Edison in this case. The Court of Appeals applied a test requiring

a continuing relationship between the manufacturer and consumer. Edison and Petitioner lack a sufficient continuing relationship to satisfy this test, as decided by the Court of Appeals. Further, a duty to retrofit should not require manufacturers to continually update their products with the advent of new technology when no defect was present at the time the product was manufactured. Therefore, a duty to retrofit would not apply to Edison.

ARGUMENT

I. The Appellate Court did not err in denying Petitioner's motion for judgment as a matter of law.

The Appellate Court did not err in denying Petitioner's renewed motion for judgment as a matter of law. The denial of a judgment as a matter of law is reviewed *de novo* and the Court must apply the same standard as the trial court. *K & T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 176 (6th Cir. 1996). Under Fremont Rule of Civil Procedure 50(b), a renewed judgment as a matter of law is only appropriate where a reasonable jury could not find for the non-moving party, viewing the facts and inferences in the light most favorable to the non-moving party. Fr. R. Civ. P. 50(b); *see also K & T Enters.*, 97 F.3d at 175-76. If reasonable people could reach different conclusions, judgment as a matter of law is inappropriate and the jury's verdict must be upheld. *K & T Enters.*, 97 F.3d at 176. In this case, a reasonable jury could find that the Edison Marconi did not have a design defect.

To succeed on his design defect claim, Petitioner needed to show that the risks of using the Marconi's Autodrive feature outweighed its usefulness, as this jurisdiction uses the risk-utility test to determine whether a product has a design defect. *Fickell v. Toyoma Motors, Inc.*, 758 XE 821, 830 (Fremont 2014); *see also Branham v. Ford Motor Co.*, 701 S.E.2d 5, 13 (2010). Under the risk-utility test, if the manufacturer foresaw risks with the product design they chose compared to a reasonable alternative design that was practicable, the failure to choose that alternative design renders the product unsafe. Restatement (Third) of Torts: Prod. Liab. § 2(b) (1998); *see also Peck v. Bridgeport Machs., Inc.*, 237 F.3d 614, 617 (6th Cir. 2001).

A. The foreseeable risks associated with Autodrive were reasonable.

The foreseeable risks associated with Autodrive were not unreasonable, as the foreseeable injuries were not any more likely or severe than the foreseeable injuries from a car

without Autodrive. The risk-utility test requires the court to consider the foreseeable risks of the product's use, as a manufacturer has a duty to "eliminate any unreasonable risk of foreseeable injury." *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 181 (Mich. 1984). When considering whether the foreseeable risk was unreasonable, there are two relevant factors: (1) whether the severity of the injury was foreseeable and (2) whether the likelihood of the injury occurring was foreseeable. *Peck*, 237 F.3d at 617. These factors must be analyzed using the information available at the time of distribution. Restatement (Third) of Torts: Prod. Liab. § 2 cmt. a. To succeed on this element of the risk-utility test, Petitioner must produce sufficient evidence showing the magnitude of the risk associated with the product was unreasonable. *Peck*, 237 F.3d at 617.

In *Branham v. Ford Motor Co.*, the plaintiff alleged the Bronco II had a design defect that caused the vehicle to rollover. 701 S.E.2d 5, 8 (S.C. 2010). The plaintiff presented evidence that Ford foresaw the risk that the Bronco II could rollover and that the risk was unreasonable. *Id.* at 11. The plaintiff's expert testified that the particular suspension Ford chose for the Bronco II raised the vehicle's center of gravity and "added a rollover propensity." *Id.* A former Ford executive testified that this suspension was chosen, despite the fact that the engineers were "very concerned" about the risks associated with it. *Id.* The South Carolina Supreme Court determined that the plaintiff presented sufficient evidence to withstand the defendant's motion for judgment as a matter of law, as reasonable people could disagree over whether the risk of rollover was unreasonable. *Id.* at 12.

In *Clay v. Ford Motor Co.*, the plaintiffs also alleged that the Bronco's rollover propensity was a design defect. 215 F.3d 663, 666 (6th Cir. 2000). At trial, the plaintiffs presented evidence that the Bronco II's stability index was too low and had a high center of gravity, which could result in a rollover while driving. *Id.* at 672. The defendants presented

evidence that showed that there was no correlation between the stability index and rollover propensity. *Id.* at 670. The Sixth Circuit Court of Appeals held that "reasonable minds could come to different conclusions" about the likelihood and severity of risks associated with the Bronco II's design. *Id.*

In *Mikolajcyk v. Ford Motor Co.*, the plaintiff alleged that the Ford Escort had a design defect that caused the driver's seat to collapse when the car was struck from behind. 901 N.E.2d 329, 333 (Ill. 2008), *opinion modified on denial of reh'g* (Dec. 18. 2008). While the risk-utility test is not the sole test applied in products liability cases in Illinois, the Illinois Supreme Court held that the defendants presented evidence to show that the driver's seat design was not unreasonably dangerous under the risk-utility test. *Id.* at 554. The plaintiff presented evidence showing that while "rear-end collisions are reasonably foreseeable," an ordinary consumer would not anticipate the driver's seat to collapse and cause the injuries it did in a rear-end collision. *Id.* at 557. The court held that if the case was analyzed under the risk-utility test, the jury could consider that expectation as a relevant factor to determine whether the risk was unreasonable. *Id.*

In this case, both Edison and Petitioner presented evidence about the Marconi's sensors' ability to detect stationary objects; this evidence showed that the sensors had difficulty identifying stationary objects when the vehicle was travelling over thirty-five miles per hour. R. at 5. While the risk of hitting a stationary object while using Autodrive was foreseeable, this risk was relatively unlikely because the driver could still prevent the collision. *Id.* When considering the likelihood of injury under the risk-utility analysis, it is appropriate to consider the "user's ability to avoid danger by the exercise of care in the use of the product." *Armentrout v. FMC Corp.*, 842 P.2d 175, 184 (Colo. 1992). A Marconi driver has the ability to avoid danger while using Autodrive, as the driver can override the computer and operate the car if the sensors fail.

Even when using Autodrive, the driver has a responsibility to remain attentive and keep his hands on the steering wheel. *See* R. at 3. In the event that there was an object that the sensors did not detect, a driver who was only moderately attentive would be able to see the object and maneuver the vehicle to avoid a collision.

The risk of a collision if the sensors failed to detect a stationary object was not an unreasonable risk. When operating a vehicle, it is reasonably foreseeable that there could be a collision and that the driver could be severely injured. *See Jensen v. Am. Suzuki Motor Corp.*, 35 P.3d 776, 779 (Idaho 2001). This risk is not unique to the Marconi. *See, e.g.*, *Branham*, 701 S.E.2d at 11. While Petitioner did present evidence that Edison knew the sensors had difficulties identifying stationary objects above thirty-five miles per hour, R. at 5, Petitioner did not produce sufficient evidence that the magnitude of risk associated with the Marconi was unreasonable, as is required to succeed on his claim. *See Peck*, 237 F.3d at 617. In fact, Petitioner did not submit evidence at trial that the Marconi's Autodrive feature was any more likely to cause injuries or injuries that were more severe than a car without Autodrive. Therefore, reasonable jurors could properly find that the foreseeable risks associated with using Autodrive were reasonable and find for Edison in that regard.

B. There was no alternative design that was both practicable and safer.

Edison could not have adopted an alternative design that was both practicable and safer. When applying the risk-utility test, the court considers whether an available "alternative design would have made the product safer than the original design" that was also practicable. *Banks v. ICI Americas, Inc.*, 450 S.E.2d 661, 674-75 (1994). To succeed on his claim, Petitioner must prove that the "alternative design would have substantially reduced the risk of injury and that the

alternative design would have been both economically and technologically feasible." *Smith v. Aqua-Flo, Inc.*, 23 S.W.3d 473, 477 (Tex. App. 2000).

1. The evidence presented at trial was not sufficient to show the alternative design would have substantially reduced the risk of injury.

Petitioner did not present evidence at trial that demonstrated that the alternative design would have substantially reduced the risk of injury. In order to show there was an alternative design, the plaintiff must show that design would substantially reduce the risk of injury, not simply show that the product could have been "made more safe." *Branham*, 701 S.E.2d at 16.

In *Branham v. Ford Motor Co.*, the plaintiff presented evidence that an alternative design would have reduced the rollover propensity of the Bronco II. *Id.* at 13. The plaintiff argued that the MacPherson suspension system was a reasonable alternative design that would have substantially reduced the risk of injury. *Id.* A former Ford executive testified that the MacPherson suspension would have "significantly increased the handling and stability of the Bronco II, making it less prone to rollovers." *Id.* The South Carolina Supreme Court held that the evidence the plaintiff presented was "sufficient to survive a directed verdict motion." *Id.* at 14.

In *Sansom v. Crown Equipment Corp.*, the plaintiff alleged that the stock-picker the plaintiff used had a design defect. 880 F. Supp. 2d 648, 650 (W.D. Pa. 2008). The plaintiff was thrown from the operator's platform of the stock-picker and pointed to an alternative design that would have fully enclosed the platform, which the defendant company already used in Europe. *Id.* at 651. The plaintiff presented evidence that the European model would reduce the risk of injuries like his, as the European model had a gate at the rear of the platform that would prevent the operator "from falling through the load end of the platform." *Id.* at 658. The court found that the European model would be "safer overall" when compared to the design the company used for the American stock-picker. *Id.* at 663.

In this case, Petitioner presented evidence that adding additional sensors to the Marconi would have reduced the risk of the collision. R. at 5. Petitioner pointed to Edison's initial plan to include extra sensors that could have assessed stationary objects at higher speeds as the available alternative design. *Id.* Petitioner's expert testified that if these additional sensors had been included, the Marconi's accident rate, which was thirteen-percent higher when the vehicle was going over thirty-five miles per hour with a stationary object on the road, would have been reduced. R. at 11. However, Petitioner did not explain how the alternate design – an unspecified number of additional sensors – would prevent or reduce the risk of a car accident. *See Sansom*, 880 F. Supp. 2d at 658. Rather, Petitioner presented evidence that the Marconi could have been safer if additional sensors were included. But, a design is not defective "merely because it 'can be made more safe.'" *Branham*, 701 S.E.2d at 16 (internal citation omitted). This evidence was not sufficient to show that the alternative design would have substantially reduced the risk of a collision with a stationary object at speeds above thirty-five miles per hour. *See Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 258 (Tex. 1999) (holding the consumer must prove by a preponderance of the evidence that the alternative design would have prevented the risk of damage). Therefore, reasonable jurors could have properly found for Edison on this issue.

2. The available alternative design was not practicable.

The available alternative design, including additional sensors on the Marconi, was not practicable. To be practicable, an alternative design must be both technologically and economically feasible. *Honda of Am. Mfg., Inc. v. Norman*, 104 S.W.3d 600, 607 (Tex. App. 2003).

In *Honda of America Manufacturing, Inc. v. Norman*, the Texas Court of Appeals held that the evidence presented at trial was insufficient to prove the alternative designs were

economically and technologically feasible. *Id.* at 606. The plaintiffs sued Honda, alleging that the seatbelt in their daughter's care was defectively designed. *Id.* at 603. The plaintiff presented multiple available alternative designs at trial; the first was a "mouse timer" mechanism on the seat belt. *Id.* at 606. The plaintiff's expert who testified about the mouse timer only indicated that he believed that the mouse timer was economically and technologically feasible, which the court considered insufficient. *Id.* Another design used in Toyota vehicles was presented as an alternative design; the plaintiff's expert testified that it must have been technologically and economically feasible because it was used in other vehicles. *Id.* at 607. The court explained that while another manufacturer's use of an alternative design can establish technological feasibility, "as a matter of law, it does not establish economic feasibility." *Id.* The court further explained that the plaintiff must show "proof of the cost of incorporating [the] technology" to establish economic feasibility. *Id.*

In *Branham v. Ford Motor Co.*, the plaintiff presented evidence that Ford considered an alternative design for the Bronco II that was both technologically and economically feasible. 701 S.E.2d at 10. A former executive testified that Ford used the MacPherson suspension system in its bigger trucks and that the company considered using it in the Bronco II. *Id.* at 10-11. The evidence also showed that using the MacPherson suspension would not have increased costs and the "desired sport utility features of the Bronco II would not have been compromised." *Id.* at 13. The South Carolina Supreme Court held that the plaintiff presented sufficient evidence to survive a directed motion and that the issue would be decided by the jury. *Id.* at 14.

In this case, Edison presented evidence that including the additional sensors would have increased the cost of the Marconi by at least five thousand dollars. R. at 11. This price increase would in turn push the Marconi out of the economy sedan market. R. at 12. While evidence was

presented at trial that the additional sensors would be included in Edison's luxury and sport vehicles, that evidence is not dispositive. *See Norman*, 104 S.W.3d at 607. Adding the sensors to the Marconi would result in a steep price increase,[1] which would make the vehicle so expensive for most consumers in the economy market, that it would be "impractical to purchase it." *Goodner v. Hyundai Motor Co.*, 650 F.3d 1034, 1044 (5th Cir. 2011).

At trial, Petitioner did not present evidence to suggest that the additional sensors would be economically feasible. *See Branham*, 701 S.E.2d at 13. Nor did Petitioner present evidence that the additional sensors would be technologically feasible; the evidence presented at trial reflected that the extra sensors would also include "proprietary sensor technology." R. at 5. In order to succeed on his claim, he needed to present sufficient evidence showing that the alternative design was both technologically and economically feasible. Given the evidence presented at trial, reasonable jurors could conclude that the alternative design was not practicable.

The evidence presented at trial did not support judgment as a matter of law on Petitioner's design defect claim. Viewing all the evidence and drawing all inferences in favor of the non-movant, Edison, it is clear that reasonable people could reach different decisions as to whether the utility of the Marconi's Autodrive feature outweighed the potential risks. Fr. R. Civ. P. 50(b); *see also K & T Enters.*, 97 F.3d at 175-76. The evidence could support a finding that the foreseeable risks associated with Autodrive were not unreasonable, that the risks would not

[1] An increase of $5,000 in the price of the Marconi would be steep because economy sedans generally cost about $15,000. Enterprise, a well-reputed car rental agency, identifies an economy sedan as a vehicle similar to the Mitsubishi Mirage. ENTERPRISE RENTAL CAR COMPARISON, (last visited Jan. 20, 2021) https://www.enterprise.com/en/car-rental/vehicles/us/cars.html. The starting price for a 2021 Mitsubishi Mirage is $14,295. *Mirage 2021*, MITSUBISHI CARS (last visited Jan. 20, 2021), https://www.mitsubishicars.com/mirage/2021.

be substantially reduced by an alternative design, and that the alternative design was not practicable. The jury's finding that the Marconi did not have a design defect was supported by the evidence presented by trial. Therefore, the trial court did not err in denying Petitioner's motion for renewed judgment as a matter of law and nor did the appellate court err in affirming the lower court's ruling.

II. The State of Fremont should not adopt the duty to retrofit in strict liability design defect cases, nor apply such a duty to Edison.

This Court should not impose the duty to retrofit upon manufacturers in design defect cases. If the Court were to adopt such a duty, as defined by the Court of Appeals, would not apply to Edison. Section 5552.321 of the Fremont Revised code states that "[o]ne who sells any product in a defective condition unreasonably dangerous to the driver … is subject to liability" if the driver is injured, and the vehicle reaches the driver without substantial change. Fremont Rev. Code § 5552.321. This theory of liability requires that the jury's determination be focused solely upon the conduct of the manufacturer prior to the product's sale. *Gregory v. Cincinnati Inc.*, 538 N.W.2d 325, 326 (Mich. 1995). The State of Fremont also recognizes the post-sale duty to warn. *Shane v. Smith*, 657 XE 720, 725 (Fremont 1989); R. at 14. Under this duty, a manufacturer must warn consumers if the product poses a substantial risk to consumers likely unaware of the risk, the warning can be "effectively communicated to and acted on by" the consumers, and the risk of harm is great enough "to justify the burden of providing a warning." Restatement (Third) of Torts: Prod. Liab. § 10 (1998).

The State of Fremont does not recognize a post-sale duty to retrofit, defined as "[a] duty to upgrade or improve a product" after it has reached the consumer. *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 534 (Ky. 2003). The adoption of a duty to retrofit is the responsibility of the Legislature or an administrative agency better able to ascertain the circumstances under

which such a duty should be applied. *Id.* If such a duty is adopted, however, it should apply only to design defects present at the time of manufacturing. *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1307 (Kan. 1993).

A. The trial court committed no abuse of discretion in refusing to instruct the jury on a duty to retrofit.

The trial court did not abuse its discretion by refusing to grant Petitioner a jury instruction including the duty to retrofit. "Adequate jury instructions … are those that fairly and reasonably convey the issues and provide correct principles of applicable law." *Sanders v. Bain*, 722 So. 2d 386, 388 (La. Ct. App. 1998). The court should only overturn a jury instruction and the verdict when "the instruction misled the jury to such an extent that it resulted in a manifest injustice." *Id.* Prior to the court of appeals' decision, there was no common law duty to retrofit in the State of Fremont. R. at 6. For design defect cases, the jury's determination should be focused solely upon the conduct of the manufacturer prior to the product's sale. *Gregory*, 538 N.W.2d at 326. The existence of any further post-sale duty to retrofit is the responsibility of the legislature or administrative agency able to ascertain the circumstances under which such a duty should be enforced. *Id.*

A majority of jurisdictions that have considered the issue have determined that no continuing duty to retrofit exists. *See Tabieros v. Clark Equip. Co.*, 944 P.2d 1279, 1298 (Haw. 1997); R. at 15. In *Gregory v. Cincinnati Inc.*, the Michigan Supreme Court held that no continuing duty to repair or retrofit existed, and that evidence of the manufacturer's conduct after the time of manufacture "improperly shifts the focus from the pre-manufacturing decision and has the potential to taint any finding of liability." 538 N.W.2d at 326. In 1986, the plaintiff was injured by a press brake on an industrial machine. *Id.* at 327. The machine lacked "adequate guarding" to prevent an injury when the plaintiff reached his hand under the press brake. *Id.* The

machine was manufactured in 1964, when there was no evidence any other similar machines possessed such guarding. *Id.* The court instructed the jury "that a manufacturer has a duty to incorporate new advances in technology and that a manufacturer who learns of a design defect after the product has been sold has a duty to take reasonable actions to correct the defect." *Id.* at 328 (internal quotations omitted). Such an instruction, however, risks confusion, because any continuing duty to retrofit exists only if there is "an actionable problem at the point of manufacture." *Id.* at 328. A prima facie case for liability can already be established for such a defect under the risk-utility test. Imposing an additional duty to retrofit, where post-manufacture conduct is relevant, is "unnecessary and unwise." *Id.* at 333-34. Therefore, there was no duty to retrofit.

In the State of Fremont, like many other jurisdictions, a post-sale duty to warn already exists. *Shane v. Smith*, 657 XE 720, 725 (Fremont 1989). In *Patton v. Hutchinson Wil-Rich Manufacturing Co.*, the Kansas Supreme Court held that a post-sale duty to retrofit did not exist, and the creation of any post-sale duties beyond the duty to warn "should be left to administrative agencies and the legislature." 861 P.2d 1299, 1316 (Kan. 1993); *see also Gregory*, 538 N.W.2d at 326. In that case, a company developed a cultivator without a certain safety feature that was unavailable at the time of manufacture. *Patton*, 861 P.2d at 1304. While future cultivators included this safety feature, the cultivator that injured the plaintiff did not. *Id.* The court acknowledged that there was a significant risk of injury and death. *Id.* at 750. The manufacturer had notice of that danger, they knew of a new safety device that could be installed, and the cost of making such safety devices would not be significant. *Id.* Nevertheless, the court determined that expanding a manufacturer's post-sale duties from a duty to warn to a duty to recall or retrofit was a decision best made by administrative agencies and the Legislature, as suggested by federal

law. *Id.* at 763 (citing Consumer Product Safety Act, 15 U.S.C. § 2064 (1988)). The Legislature and administrative agencies are better equipped to undertake the level of research and deliberation to determine when such a duty should be imposed. *See Gregory*, 538 N.W.2d at 326. Therefore, there was no post-sale duty to retrofit. *Id.* at 744.

In this case, Edison created the Marconi, a semi-autonomous vehicle. R. at 2. The Marconi can operate with little driver input in Autodrive when the driver has both hands on the steering wheel. R. at 3. At speeds above thirty-five miles per hour, the vehicle was less effective at detecting stationary objects. R. at 5. Nothing related to the sensors' ability to detect such objects, however, affects the driver's ability to take control of the vehicle and avoid obstacles. R. at 3. Nevertheless, if a jury had found that the limitations of the sensors qualified as a defect, Edison could be liable under traditional negligence law or under the officially recognized duty to warn. R. at 8, 13-14. In a design defect case like this one, it is necessary to analyze the manufacturer's conduct prior to the product's sale. *See* Fremont Rev. Code § 5552.321. An additional duty to retrofit would divide a jury's attention between the manufacturers' pre- and post-manufacturing conduct, risking confusion of the issues. *Gregory*, 538 N.W.2d at 326. Rather than focusing on whether Edison knew of a defect that posed a foreseeable risk of harm, the jury would have to consider whether Edison should have improved the product after its sale. *See id.* The question of whether a manufacturer should or could have improved the product might infect the jury's determination about whether a defect was present at all. *See id.*

Where "traditional principles of negligence and strict products liability" are already present, imposing an additional duty upon manufacturers is unnecessary. *Loredo v. Solvay Am., Inc.*, 212 P.3d 614, 632 (Wyo. 2009). The existing theories for liability already hold manufacturers accountable and provide relief for injured parties. A duty to retrofit goes beyond

protecting consumers, which is accomplished by the duty to warn, and requires companies to endure exorbitant costs any time safety equipment and technology improves beyond their earlier products. *See Ford Motor Co. v. Reese*, 684 S.E.2d 279, 285 (Ga. Ct. App. 2009) (citation omitted). Such costs will likely be passed on to consumers in the form of increased prices. *Id.*

Edison originally expressed such concerns with the Marconi when there was a risk it would no longer fit within the economy range of sedans. R. at 5. Requiring constant upgrades to account for the safety concerns of older technology, or to counteract a manufacturer's necessary balancing of safety and feasibility with any new products, could have serious repercussions. Besides crippling manufacturers financially, a duty to retrofit can reduce consumer access to new products, like the Marconi, that actually reduce the risks of car collisions from "lane drifting or unsafe lane changes." R. at 5. Some of the leading causes of car accidents include driver inattention and distractions,[2] both of which can be mitigated by, first of all, keeping your hands on the steering wheel and looking straight ahead, but also sensors that detect other moving vehicles. *See* R. at 5. Creating a heavier burden on manufacturers by requiring them to recall and upgrade any products that implicate human safety could increase costs to consumers, possibly even making safer technology unaffordable, but also removing the incentive to develop newer and safer technologies that would then require retrofit programs.

A continuing duty to retrofit was not recognized in the State of Fremont prior to the Court of Appeals' decision, and the existing theories of liability already satisfy the need to protect consumers from dangerous design defects. The addition of a duty to retrofit, which should remain in the hands of the Legislature and appropriate administrative agencies, would be

[2] Richard P. Console, Jr., *The Most Common Causes of Collision*, Nat. L. Rev. (Tuesday, Oct. 13, 2020), https://www.natlawreview.com/article/most-common-causes-collision.

counterproductive to the goals of product liability law. Therefore, the trial court did not abuse its discretion in refusing Petitioner's jury instruction that included the duty to retrofit.

B. The duty to retrofit devised by the Court of Appeals does not apply to Edison.

The Court of Appeals correctly held that the trial court's refusal of the jury instruction was harmless error, because Edison is not subject to the duty to retrofit, even if the duty is adopted. The Court of Appeals determined that the duty to retrofit exists only "where: (1) the product implicates human safety; (2) there is a continuing relationship between manufacturer and consumer; and (3) the manufacturer had knowledge of a defect after the product was in the hands of the consumers." R. at 15-16. In addition, the duty to retrofit should not require the incorporation of technology unavailable at the time of manufacturing, particularly where no defect existed at time of manufacture. *See Patton*, 861 P.2d at 1299, 1307.

1. There is no sufficient continuing relationship between manufacturer and consumer.

Under the test devised by the Court of Appeals, Edison is not subject to the duty to retrofit in this case. Edison does not contest that automobiles of any type implicate human safety. This is why the Marconi features advanced safety features, like Autodrive *See* R. at 15-16. Further, Petitioner has not demonstrated that a defect has existed at any time. Edison does not deny that it was aware of the limitations of the Marconi's sensors, but sufficient evidence exists for a jury to determine there was no defect. Even if a jury found that a defect existed and that Edison was aware of it after it entered the hands of Petitioner, Edison and Petitioner lacked the requisite continuing relationship to activate any potential duty to retrofit. According to this test, "there is a duty to retrofit where . . . there is a continuing relationship between manufacturer and consumer." R. at 15-16.

In *Noel v. United Aircraft Corporation*, the Court of Appeals for the Third Circuit held that there was a duty to retrofit because of the continuing relationship between the airplane manufacturer and the consumer. 342 F.2d 232, 242 (3d Cir. 1964). A defect in the propeller system caused the plane to erupt into flames when the pilot tried to dump fuel in flight. *Id.* at 234. The pilot was killed in the crash. *Id.* A safety device called a Pitch Lock could have resolved the defect; however, the Pitch Lock was not available at the time the propeller system was manufactured. *Id.* at 237. The manufacturer and consumer maintained a continuous relationship between the time of delivery and the time of the accident. *Id.* at 241. The manufacturer's "field service department advised [the consumer] with regard to maintenance, overhaul and operation of the propeller system and supplied it with service bulletins supplementing manuals of instruction." *Id.* The manufacturer's expert witness explained that the manufacturer had to examine the product's performance and any possible malfunctions, and if they detected one, they would be "obligated to take remedial action." *Id.* at 241-42. Because this continuing relationship existed between the manufacturer and the consumer at the time of the accident, the court held there was sufficient evidence for the trial court to find there was a continuing duty to retrofit the engine. *Id.* at 241-42. The duty to retrofit, therefore, did apply. *Id.*

In *Gregory v. Cincinnati Inc.*, the Michigan Supreme Court held there was an insufficient relationship between the manufacturer and consumer to trigger the continuing duty to retrofit used by the court in *Noel*. 538 N.W.2d at 336 (citing *Noel*, 342 F.2d at 241). Between the time of sale and the time of the accident, there were two service calls, attended to by service technicians rather than "safety representatives or sales persons." *Id.* During these services, the manufacturer never acquired physical control of the product. *Id.*; *see also Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519, 532 (Tex. Civ. App. 1979) (holding sufficient relationship to establish

continuing duty to retrofit when manufacturer regained control of product). Cincinnati also sent "nearly thirty mailings documenting various safety options," which had likely been sent to all Cincinnati customers. *Gregory*, 538 N.W.2d at 336. The service calls and safety information mailings, however, were insufficient to establish the necessary continuing relationship for the duty to retrofit. *See id.* Thus, the court held that the duty to retrofit did not apply. *Id.*

In this case, the only connections between Edison and Petitioner were occasional software updates sent to the vehicle to improve some safety and cosmetic features. R. at 3. Such updates allow Edison to regularly improve the safety of the vehicle's Autodrive feature. *Id.* There is no evidence, however, that any of these updates were necessary for the safe operation of the vehicle. *Id.* These updates resemble computer software updates freely provided for a customer's convenience, where the computer can often still function properly without the updates. These updates were primarily a convenience, allowing customers to enjoy vehicle updates without the need to purchase an entirely new vehicle. R. at 17. These updates did not require the vehicle to be brought into Edison's or a service technician's control. *See Gregory*, 538 N.W.2d at 336. A Marconi owner could choose to never use Autodrive, or rarely use it like Petitioner, and not need the Autodrive updates to safely operate the vehicle. R. at 4. Moreover, there was never any explicit agreement that Edison would provide any updates, much less provide all possible updates. *See id.* at 336 (finding manufacturer never "voluntarily assumed a duty" to retrofit).

Further, this is not a case where the manufacturer oversaw the basic safety and functioning of the product on a regular basis. *See Noel*, 342 F.2d at 241. The alleged defect in this case is not a faulty propeller system or helicopter blades, both of which are necessary to the survival of the vehicle operator. *See id.* at 235; *Bell Helicopter Co.*, 594 S.W.2d at 526. Rather,

Petitioner claims that the limits of the Marconi's new, advanced sensor technology for its optional Autodrive feature, which the driver can override, are a defect necessitating retrofit. R. at 4. In these circumstances, Edison did not have a continuing relationship built around maintaining a mechanism of the vehicle necessary to proper, safe operation. *See Noel*, 342 F.2d at 241. As a result, the duty to retrofit does not apply to Edison.

2. Most jurisdictions deny a duty to retrofit for new, improved technology.

If this Court were to adopt a duty to retrofit for certain strict liability design defect cases, it should refuse to adopt a duty to retrofit products with new technology unavailable at the time the product was manufactured, and where no defect existed when the product reached the customer. There is no duty to retrofit a product with new, state-of-the art-technology where there was no defect at the time of manufacture. *Patton*, 861 P.2d at 1307; *see also Ostendorf*, 122 S.W.3d at 537 (holding no duty to retrofit where product was not defective when sold). Most jurisdictions refuse to recognize a duty to retrofit "a product not defective when sold." *Ostendorf*, 122 S.W.3d at 533.

In *Lynch v. McStome & Lincoln Plaza Associates*, the Superior Court of Pennsylvania declined to adopt a broad duty to retrofit that required improving previously sold products with advancements in safety technology. 548 A.2d 1276, 1281 (Pa. Super. Ct. 1988). The appellant sued Montgomery Elevator Company (Montgomery) for an injury she received when an escalator manufactured by Montgomery came to a sudden halt. *Id.* at 1276. After the time the escalator was manufactured, but before the accident, Montgomery discovered and began using a new type of brake with a longer brake distance, making it safer. *Id.* at 1280. The appellant argued that Montgomery was subject to a duty to retrofit the product with the improved product design once the new technology was developed. *Id.* The court held otherwise, declining to adopt a broad

duty to retrofit that would require manufacturers to retrofit their products every time new technology was developed. *Id.* at 1281. Such a duty was not supported by precedent or "established principles of negligence liability." *Id.* As a result, the duty to retrofit did not apply. *Id.*

Similarly, the Georgia Court of Appeals concluded in *Ford Motor Co. v. Reese* that there was no common law "duty to implement alternative safer designs" after the time of manufacture. 684 S.E.2d at 284. The appellee alleged that a design defect in one of Ford's vehicles contributed to the death of the appellee's mother. *Id.* at 282. The jury instruction included a duty to recall if the product "contains a danger … the manufacturer can anticipate," even if there is no defect. *Id.* at 282-83. The court explained that such a duty would make a manufacturer the "perpetual insurer of the safety of its products," which would likely result in exorbitant costs for manufacturers and increased prices for customers. *Id.* at 285. Any duty to implement a safer alternative design "is limited to the time the product is manufactured." *Id.* at 284. Therefore, there was no duty to retrofit for advancements in technology absent a defect at the time the product was manufactured. *See id.* at 283-84.

In this case, Petitioner alleges that the Marconi's Autodrive sensors, which are less effective at detecting stationary objects when the vehicle is traveling faster than thirty-five miles per hour, are defective. R. at 5-6. While it was possible for Edison to add additional sensors to account for this limitation, it would have increased the cost of the vehicle by $5,000, taking the Marconi out of the economy class of sedans and reduced its availability for many customers. R. at 5. Further, the driver's ability to override the Autodrive feature meant that "even a moderately attentive driver" could avoid such stationary objects. R. at 5. Petitioner further argued that rather than recalling the vehicles to add the additional sensors, Edison could have sent out a new

update, unavailable at the time the car was manufactured, that could potentially reduce the collision risk. R. at 7. This software update, however, was new technology unavailable at the time the vehicle was manufactured. *Id.* Separate from the potential additional sensors, this update would improve the existing sensor technology. *See id.* But lacking the update would not imply that the vehicle had been defective at the time it was manufactured, because the update was not available when the Marconi was made. *See id.* This means that the update is not a defect repair; it is a technological upgrade, meaning most jurisdictions would not obligate the manufacturer to retrofit the product. *See Ostendorf*, 122 S.W.3d at 533. Also, no evidence suggests that any other vehicles possessed that update or even this particular Autodrive feature as a whole.

Following the majority rule, the duty to retrofit does not exist where a defect was not present at the time the product was manufactured. *See id.* The fact that the Marconi did not have the updated technology now available in a new update did not render the vehicle defective at the time it was manufactured, and there is no obligation to incorporate new technological changes to correct the limitations of past technology. *See Noel*, 342 F.2d at 236. The policy implications of such an approach would be disastrous for manufacturers and consumers alike. Businesses would refrain from developing new technologies that might improve safety when such inventions would require retrofitting all existing products in the market to avoid potential liability. *See Lynch*, 548 A.2d at 1281. While it is good policy to encourage businesses to improve the safety of their products and correct design defects prior to sale, it is dangerous and extraordinarily burdensome to obligate manufacturers to continually retrofit their products to keep them state-of-the-art. *See Patton*, 861 P.2d at 1307. Therefore, this Court should refuse to apply the duty to retrofit where there was no defect at the time of manufacture.

CONCLUSION

The appellate court did not err when it affirmed the lower court's ruling against Petitioner's motion for renewed judgment as a matter of law. The evidence presented at trial supported the jury's finding that the Edison Marconi did not have a design defect. Applying the risk-utility analysis used in this jurisdiction, it is clear that Edison did not foresee unreasonable risks with the Marconi's design compared to a practicable alternative design. Therefore, the jury could properly conclude that the Marconi was not unsafe and a motion for renewed judgment as a matter of law would be improper.

This Court should not adopt an additional post-sale duty to retrofit. The trial court did not abuse its discretion by refusing Petitioner's jury instruction containing the duty to retrofit, because the State of Fremont has not recognized such a duty. Further, the duty is unnecessary given the existing negligence law, and the duty's creation should rest in the hands of the Legislature and administrative agencies. Even if this Court adopts the duty to retrofit, it would not apply to Edison. Edison did not have a sufficient continuing relationship with Petitioner at the time of the accident, preventing the application of the duty under the Court of Appeals' test. Finally, the potential sensor update would not be required under a duty to retrofit, because Petitioner has not established that the Marconi was defective at the time it was manufactured, and the update is a technological improvement that was unavailable at the time the Marconi was manufactured. Therefore, this Court should not adopt the duty to retrofit for the State of Fremont.

For the foregoing reasons, the Respondent respectfully asks this Honorable Court to uphold the Court of Appeals' decision to deny the motion for renewed judgment as a matter of law, but also to reverse the Court of Appeals' decision to adopt the duty to retrofit for strict liability design defect cases.

Respectfully submitted,

TEAM D

COUNSEL FOR RESPONDENT

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