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IN THE

Supreme Court of the State of Fremont

WILLIAM ASHPOOL,

Petitioner,

v.

EDISON INCORPORATED,

Respondent.

On Writ of Certiorari to the
Fremont Court of Appeals

Brief for Petitioner

QUESTIONS PRESENTED

1. Did Mr. Ashpool meet his burden of proof under the risk utility test where he proved, without contest, that Edison foresaw the risk of his injuries, had the means to prevent them, and in refusing to do so, sold Mr. Ashpool an unreasonably dangerous product?

Suggested Answer: Yes.

2. Did the Court of Appeals correctly adopt the duty to retrofit in Fremont where a manufacturer has knowledge of a dangerous product defect and the means to fix it?

Suggested Answer: Yes.

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INTRODUCTION

Inaction ensures that history will repeat itself. This case arises from a car crash that was certain to happen. It arises after a two-year span in which there were 12 other identical crashes, all caused by Edison's refusal to implement a necessary safety feature in its self-driving cars. Petitioner William Ashpool brought this lawsuit after he was catastrophically injured in Edison's 13th accident.

The story of this case is a simple one: Edison knew the Marconi was dangerous, yet chose to put profits over safety and distributed the autonomous vehicle to unsuspecting members of the public like Mr. Ashpool. Edison was aware that without an added safety feature, the Marconi was more likely to get into serious accidents like Mr. Ashpool's. But Edison could have prevented Mr. Ashpool's injuries for a mere $5,000. This evidence was admitted without challenge at trial, and it proved that the Marconi was defective as a matter of law.

However, the appellate court found—without citation to *any* authority—that Mr. Ashpool did not meet his burden at trial because he failed to satisfy *all* of the risk utility factors. Not only has no court in the country ever required a plaintiff to satisfy all six factors, but the trial court below did not even impose such a burden on Mr. Ashpool.

The lower court's errors cannot be left undisturbed. They have insulated manufacturers from liability in all but the most egregious of products liability cases. And they have blessed manufacturers' decisions to consciously ignore the risk of a dangerous defect in their product, so long as there is *some* business justification for doing so. This Court can and should ensure that history does not continue to repeat itself, and reverse the Court of Appeals' novel ruling.

It should let stand, however, the Court of Appeals decision to adopt the duty to retrofit in a narrow circumstance: where, as here, a manufacturer maintains a continuing relationship with its

products after they are sold. The reason is simple: a manufacturer cannot use its continual customer and product relationships as both a sword and a shield—an engine for profit that imposes no burden.

STATEMENT OF THE CASE

A. Edison designs the Marconi and determines that it has a fatal flaw.

Edison is a luxury car company. In 2014, Edison decided that it wanted to cater to a larger market, for a greater profit. So, Edison created a prototype of an economy class car—one that could drive itself. (R. at 2.) To attract economy class consumers, Edison offered features in its self-driving car that were usually available only to luxury buyers. *Id.* These included cutting-edge technology and high-performance engines. *Id.* The challenge, of course, was how to offer these features at a reduced price. The answer was simple: cut costs on safety. And so, the Marconi, with its unique 'Autodrive' mode, was established/conceived.

During the Marconi's testing, Edison realized that the car had a fatal flaw. Edison learned that when the Marconi went into Autodrive at speeds above 35 mph, the car had an increased risk of failing to detect and then, subsequently crashing into stationary objects in the road. (R. at 5.) Edison also recognized that there was a simple fix to this problem: install one additional sensor to the car's existing 12 sensors. *Id.* The additional sensor would have increased the cost of the vehicle by only $5,000. *Id.* The fractional increase would not have eliminated the market for the Marconi, but it might have moved the car outside of the 'economy' class and into the 'luxury' class, thus reducing the number of cars Edison could sell. *Id.* Edison chose to include the additional, 13th sensor on its luxury version of the Marconi. *Id.* Edison released the economy class car to consumers in 2017—without the additional sensor. (R. at 2.)

Edison never alerted consumers to the Marconi's flaw. The user manual for the Marconi did not warn consumers of its design defect and increased likelihood of crashing into fixed objects laying in the middle of the road. (R. at 3.) Nor did Edison salespeople warn buyers about this known risk. (R. at 4.)

B. Edison's test-drive realizations become reality.

Unsurprisingly, the danger of the Marconi's defect had real-world consequences. From 2017, the year the car was released, to 2019, there were 12 accidents in which a Marconi failed to detect a stationary object when driving above 35 mph. (R. at 6.) In other words, a driver who was unaware of the Marconi's risk got into a dangerous high-speed accident every other month because of the car's defect. Edison and its executives were fully aware of these crashes which were caused by their decisions, or lack thereof. *Id.*

Again, there was a simple solution. The only difference was this time, the solution was cost-free. Each Marconi features an on-board computer system with which Edison regularly communicates. (R. at 3.) The computer allows Edison to send regular safety updates to the vehicles remotely and conveniently. *Id.* After the Marconi was released, and in the midst of mounting accidents, Edison learned that a simple safety update to each Marconi could help improve the cars' ability to recognize stationary objects, thereby reducing the risk of deadly crashes. (R. at 7.) This fix would have taken the Edison team hours to implement—albeit remotely—though there is no evidence that the update would have cost consumers a dime. *Id.* Still, Edison chose again to ignore the problem and reject the solution. *Id.*

C. Mr. Ashpool is injured in the exact kind of accident that Edison foresaw.

In November of 2019, William Ashpool purchased an Edison Marconi. (R. at 4.) At this point, Edison was: (a) aware of an increased incidence of high-speed crashes wherein the Marconi

failed to detect stationary objects during testing; (b) aware of a hardware fix to prevent this problem; (c) aware of 12 crashes in the field; and (d) aware of a cost-free solution to reduce this risk. (R. at 5–7.)

On December 20, 2019, history repeated itself. Mr. Ashpool put his Marconi into Autodrive while traveling at 42 mph. (R. at 4.) Mr. Ashpool had both hands on the wheel. (Clarifications at 2a.) Mr. Ashpool's Marconi failed to detect a brown bear sitting in the middle of the road and crashed. (R. at 4.) Mr. Ashpool was critically injured, suffering multiple broken bones and a head injury. *Id.* He was hospitalized for two and a half weeks. *Id.*

D. Mr. Ashpool brings a design defect claim against Edison.

Mr. Ashpool's accident was no surprise—it was the foreseeable consequence of Edison's repeated and intentional choice to ignore the risk of accidents to consumers, and to ignore two simple, cost-effective solutions. Mr. Ashpool filed suit against Edison for his injuries, alleging that the Marconi was defectively designed. (R. at 4.)

The case proceeded to trial Mr. Ashpool was required to prove, by a preponderance of the evidence, that the foreseeable risk of harm posed by the Marconi could have been avoided had Edison used an alternative design—the 13th sensor. (R. at 5.) Accordingly, Mr. Ashpool proved that:

- Edison foresaw that there was a 13% increase in high-speed accidents when the Marconi was driven in Autodrive and above 35 mph. (R. at 5);
- Edison knew there was a solution: an additional sensor, and that this additional sensor was a practical, feasible alternative to the 12 sensor-model Marconi. *Id.*;
- Edison knew of 12 accidents—averaging one every other month for two years—caused by the Marconi's defect since the car was put onto the market. (R. at 6.); and

- Edison's failure to include the additional sensor caused his accident, and had the additional sensor been included, his accident likely would not have happened. (R. at 2.)

Edison did not challenge any of these facts at trial. (R. at 5–7.) Instead, Edison argued that its product was not unreasonably dangerous without the additional sensor and that Edison chose not to include the sensor lest the car be pushed out of the 'economy' class. (R. at 5.)

E. The trial court refused to instruct the jury on the duty to retrofit.

At trial, Mr. Ashpool also sought to argue that Edison was liable for failing to fix the defect in the Marconi using the car's internal computer system, after learning that the Marconi's defect caused 12 accidents in the field. (R. at 6.) The trial court refused to admit this evidence and refused to give the jury one of Mr. Ashpool's preferred instructions. *Id.*

Specifically, Mr. Ashpool requested that the court instruct the jury that 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," particularly 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 users. *Id.*

F. The trial court improperly denies Mr. Ashpool's motion for a directed verdict.

On the final day of trial, and after having met his burden of proof under the risk utility test, Mr. Ashpool moved for judgment as a matter of law under Fremont Rule of Civil Procedure 50(a). (R. at 7.)[1] The trial court denied. Mr. Ashpool's motion. *Id.* Instead, the trial court submitted six risk utility factors to the jury and instructed them to consider the factors "holistically."

[1] Fremont Rule 50(a) is identical to Federal Rule of Civil Procedure 50(a). (R. at 7.)

(Clarifications at 3.) Contrary to the evidence, the jury found for Edison. (R. at 7.) Mr. Ashpool then moved for judgment as a matter of law a second time, which the trial court again denied. *Id.*

Mr. Ashpool appealed to the Fremont Court of Appeals, arguing that the trial court erred in denying his motions for judgment as a matter of law and erred in refusing to instruct the jury on the duty to retrofit. *Id.*

G. The Court of Appeals creates a novel and insurmountable burden for products liability plaintiffs.

The Court of Appeals came to contradictory and inconsistent rulings. It first affirmed the trial court's denials of Mr. Ashpool's motions for judgment as a matter of law. (R. at 1.) But the Court of Appeals' analysis of the risk utility factors was flawed. The court considered six factors outlined by the Sixth Circuit in *Peck v. Bridgeport Machs., Inc.*, including:

> "1) whether the severity of the injury was foreseeable by the manufacturer; 2) whether the likelihood of injury was foreseeable by the manufacturer at the time of distribution of the product; 3) whether there was a reasonable alternative design available; 4) whether the available alternative design was practicable; 5) whether the available and practicable alternative design would have reduced the foreseeable risk of harm posed by the product; and 6) whether the omission of the alternative design rendered the product not reasonably safe."

237 F.3d 614, 617 (6th Cir. 2001); (R. at 9–10.)

The court grouped these factors into two categories: foreseeability and reasonable alternative design. (R. at 10.) It found that Mr. Ashpool presented evidence as to each factor, yet determined that the likelihood of injury was not foreseeable to Edison—despite testing data showing an increased incidence of collisions with stationary objects at high speeds—because these accidents were not severe enough. (R. at 10–11.) This, despite the fact that Mr. Ashpool provided undisputed evidence as to foreseeability.

The appellate court also found that Mr. Ashpool presented a reasonable alternative design that would have reduced the foreseeable risk of harm to drivers. (R. at 11.) But the court concluded

that the alternative design was not practicable because it cost $5,000. (R. at 11–12.) Thus, the court found that Mr. Ashpool satisfied two of the three reasonable alternative design factors.

Finally, as to the overall safety of the Marconi, the appellate court found that the car was not unreasonably dangerous because its collision warning system did not vitiate the role of the driver in safely operating a car. (R. at 12.) This argument was legally meritless—comparative negligence and assumption of the risk are not recognized defenses to strict liability in Fremont. (Clarifications at 2b.) In the end, the Court of Appeals determined that satisfying three of the six risk utility factors was insufficient, without citation to law.

H. The Court of Appeals determines that the trial court erred in refusing to instruct the jury on the duty to retrofit.

The Court of Appeals did conclusively state that the trial court erred in refusing to give the jury Mr. Ashpool's proposed duty to retrofit instruction. (R. at 12–13.) It explained that "the State of Fremont should adopt this duty and impose such liability on its manufacturers." (R. at 13.) However, the appellate court found that the trial court's failure to give this instruction was harmless error for one reason: a jury would not have found that Edison had a "continuing relationship with consumers," (R. at 17.), despite the Marconi's on-board computer system which Edison uses to "continuously update its vehicles and maintain the highest of safety standards, without having to make entirely new vehicles." (R. at 3.)

The appellate court did not at all address the trial court's refusal to allow Mr. Ashpool to present evidence regarding the computer system to the jury. (R. at 17.)

SUMMARY OF THE ARGUMENT

This Court can and should grant judgment as a matter of law in Mr. Ashpool's favor. At trial, he presented evidence to meet his burden under the risk utility test. In fact, Mr. Ashpool presented evidence that satisfied each of the test's six factors.

This evidence went unchallenged by Edison. They never challenged the credibility of Mr. Ashpool's witnesses, never impeached them, never challenged their knowledge of the defect, and never meaningfully rebutted their ability to fix the problem. What they did offer were excuses—irrelevant justifications for why they had ignored an obvious risk to the safety of their customers. The excuse was that fixing the problem would have hurt their bottom line.

But the Court of Appeals erred in considering Edison's justifications for their liability. So did the jury at trial. None of Edison's excuses were legally relevant. They carry no weight in the risk utility analysis, and did not support a verdict in Edison's favor.

Beyond considering irrelevant evidence, the Court of Appeals erred by imposing a nearly insurmountable, novel burden on those injured by defective products. Although Mr. Ashpool presented evidence to satisfy each of the six risk utility factors, that was not his burden—those factors were to be considered holistically. the Court of Appeals incorrectly and impliedly held that a plaintiff must satisfy *all six* of the risk utility factors to meet their burden at trial, despite the fact that no court in the country has ever imposed such limitations on recovery, and despite the fact that the trial court below gave the jury the exact opposite instruction. The risk utility factors are to be balanced, not weighed in absolutes. This Court should not allow the lower court's potentially restrictive ruling to stand.

The Court of Appeals made three specific errors when considering Mr. Ashpool's evidence. **First**, it found that evidence of foreseeability must meet a certain quantifiable threshold—in other words, a plaintiff must show that the foreseeable risk of accidents was so frequent that no manufacturer could have looked the other way. The law imposes no such burden.

Second, the court found a manufacturer's excuse not to add a necessary safety feature to their product because it might put a dent in their sales is sufficient to rebut the feasibility of plaintiff's reasonable alternative design. That is not the law either.

Third, the court found that the Marconi was not unreasonably dangerous despite: the foreseeability of accidents when the Marconi was used for its designed purpose; knowledge of the defect; more than a dozen post-sale accidents caused by the defect; and evidence that consumers in the 'economy' class prefer safer vehicles—a relevant consideration under the risk utility test. The Court of Appeals erred in setting aside this overwhelming evidence in favor of a contorted rationale: because the Marconi might be safer than a traditional sedan, it must not be defective. But the law does not allow for such a comparison, nor was there any evidence that this conclusion was even true.

These errors, taken alone or together, are sufficient for this Court to set aside the decision below and enter judgment as a matter of law in Mr. Ashpool's favor. When manufacturers ignore foreseeable risks and forgo feasible, necessary safety features to protect their bottom line, they should be held accountable.

Additionally, this Court should affirm the lower court's decision to adopt the duty to retrofit in Fremont. Where a manufacturer like Edison voluntarily undertakes a post-sale duty of care—where it remotely communicates with its product and its customers—it has availed itself of the duty to retrofit. Where a manufacturer knows its product will cause harm in the field, has actual evidence of that real-life danger, and has the means to fix it, the manufacturer has an obligation to make their product safer. Edison had the knowledge and the means to make the Marconi safer. The duty to retrofit should undoubtedly apply in Fremont, and particularly in this case. Failing to hold Edison accountable will ensure that history repeats itself again.

ARGUMENT

I. The Court of Appeals should have entered a directed verdict for Mr. Ashpool because the Marconi is defective as a matter of law.

Both courts below failed to enter judgment as a matter of law in Mr. Ashpool's favor, despite the fact that Mr. Ashpool satisfied his burden under the risk utility test at trial.[2] No jury could have reasonably found for Edison based on the evidence Mr. Ashpool presented, and Edison's failure to legitimately challenge its admission. Instead, Edison presented only legally incognizable excuses—the kind that could not support a verdict in its favor. *See Rajala v. Allied Corp.*, 919 F.2d 610, 615 (10th Cir. 1990) (motion for judgment notwithstanding the verdict asks whether there is evidence such that the jury could have *properly* found for the party against whom the motion was made").

Mr. Ashpool proved that his accident and injuries were foreseeable, that Edison had the ability to make the Marconi safer, and that without an added safety feature (which was available to Edison), the Marconi was unreasonably dangerous. These elements satisfy each of the Third Restatement's six risk utility factors. *Peck v. Bridgeport Machs., Inc.*, 237 F.3d 614, 617 (6th Cir. 2001) (outlining six risk utility factors to be applied in jurisdictions that have adopted the Restatement (Third)); *Hollister v. Dayton Hudson Corp.*, 201 F.3d 731, 738 (6th Cir. 2000) (three categories of risk utility factors are: foreseeability, reasonable alternative design, and unreasonable danger).

Edison had no legitimate response to Mr. Ashpool's liability evidence. Federal Rule of Civil Procedure 50(a)—which is identical to Fremont Rule 50—"requires a court to render judgment as a matter of law when a party has been fully heard on an issue, and there is no legally

[2] This Court has adopted the risk utility test, as articulated in the Third Restatement, in strict liability design defect cases. *See Fickell v. Toyoma Motors, Inc.*, 758 XE 821, 830 (Fremont 2014); (R. at 8–9.)

sufficient evidentiary basis for a reasonable jury to find for the [non-moving] party on that issue." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 149 (2000). Where "the party with the burden of proof has established his case by testimony that the jury is not at liberty to disbelieve, a verdict may be directed for him[.]" *Warner Fruehauf Trailer Co., Inc. v. Boston*, 654 A.2d 1272, 1279 (D.C. Ct. App. 1995) (granting judgment as a matter of law for plaintiff as to design defect despite a jury verdict for defendant). *See also Hurd v. American Hoist & Derrick Co.*, 734 F.2d 495, 499 (10th Cir. 1984) (same); *Lanclos v. Rockwell Intern. Corp.*, 470 So.2d 924, 930–31 (La. App. 3d Cir. 1985) (same).

On appeal, the court conducts a de novo review of a denial of a post-judgment motion for judgment as a matter of law. *Muniz-Olivari v. Stiefel Laboratories, Inc.*, 496 F.3d 29, 35 (1st Cir. 2007).

A. Mr. Ashpool's evidence that his accident and injuries were foreseeable went unchallenged at trial.

The first two risk utility factors ask whether the likelihood and severity of accidents caused by the specific defect were foreseeable to the manufacturer at the time of sale. *Peck*, 237 F.3d at 617. Mr. Ashpool proved just that.

It is undisputed that Edison knew the Marconi—without an additional sensor—failed to recognize stationary objects in the road when operated in Autodrive at high speeds. Those accidents were 13% more likely to occur in the Marconi as-designed—with 12 sensors rather than 13. (R. at 10.) The accidents were also serious—they occurred only at high speeds, led to frontal impact accidents, and in Mr. Ashpool's case, caused him significant orthopedic injuries that left him hospital-bound for two weeks. (R. at 4.) This evidence alone was sufficient for Mr. Ashpool to satisfy his burden.

Merely by showing that he operated the Marconi in a foreseeable manner, Mr. Ashpool proved foreseeability. The Third Restatement is explicit that:

> a plaintiff who establishes that the product was put to a foreseeable use need not prove that the seller should have known of the risk that would materialize from such foreseeable use…There is no good reason to burden plaintiffs with proving the foreseeability of risks arising from the foreseeable uses of mechanical products. Almost by definition, once the use is foreseeable, the risks that attend such use are foreseeable.

Restatement (Third) of Torts § 2, Comment m.[3]

But Mr. Ashpool did more than just satisfy the Restatement's standard. He proved that Edison's own testing data reflected this reality, and Edison offered no rebuttal. (R. at 5; 10.) The Restatement again specifically states that the best evidence of foreseeability is pre-sale product testing data. *See* Restatement (Third) § 2(m). Mr. Ashpool presented that evidence.

He proved that Edison foresaw the likelihood of the exact kind of injury he suffered. (R. at 17) ("A jury would likely find that Edison knew the sensors were occasionally failing"). But the Court of Appeals was not satisfied. A 13% greater risk of accident and serious injury was not enough for the court. Its decision has no support in the law.

1. The Court of Appeals erred by ignoring statistical evidence of foreseeability.

The Court of Appeals cited no precedent for its decision that a plaintiff's proof of foreseeability must satisfy some quantifiable threshold. None exists. Instead, courts have regularly found, consistent with the Third Restatement, that *any* proof sufficient to show knowledge on the part of a manufacturer satisfies the foreseeability factors of the risk utility test. *See, e.g. Cacevic v. Simplimatic Eng'g Co.*, 645 N.W.2d 287, 291 (Mich. App. 2001) (mere fact

[3] The Third Restatement notes that imputed knowledge applies to durable goods, as opposed to products like pharmaceuticals. Comment m, *supra*. Cars are undoubtedly a durable good. *See* Andrew T. Hayashi, *Myopic Consumer Law*, 106 VALR 689, 692 (2020).

that manufacturer installed a safety guard on a pinch point was sufficient evidence of foreseeability under risk utility test).

Additionally, the Sixth Circuit, which the Court of Appeals relied upon in its opinion, has rejected this exact kind of foreseeability analysis. *Hollister*, 201 F.3d at 738. In *Hollister*, the Sixth Circuit found that the district court committed reversible error by commenting on the limited occurrence of injuries caused by the defective product, stating that the occurrences were "small numbers indeed." *Id.* The fact that the injuries exist, and that the manufacturer is aware of them, is all that matters.

2. The Court of Appeals erred by comparing the Marconi to a traditional sedan.

As a fallback position, the Court of Appeals explained that Mr. Ashpool could never have proven foreseeability because the Marconi is safer than a traditional sedan. (R. at 10–11.) Again, the court cited no precedent for its logic. Nor did it cite any evidence presented at trial to this end—Edison never proved that a Marconi is safer than a traditional sedan.

Common sense instructs that comparing the defective product which is foreseeably dangerous to another, unrelated product is irrelevant. But as a matter of law, the court *cannot* compare a self-driving car to a typical sedan, because the question under the risk utility test is whether the likelihood of injury from a Marconi's failure-to-detect accident "was greater as compared to other vehicles in its class." *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 21 (S.C. 2010).[4] Here, of course, there are no other vehicles in the Marconi's class.

Mr. Ashpool's proof at trial thus satisfied the foreseeability factors of the risk utility test. He proved that his use of the Marconi was foreseeable, which was alone sufficient to meet his

[4] *See also Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1075–76 (4th Cir. 1974) (lower court committed error of law by comparing the safety features of a microbus with a standard passenger automobile)

burden. The lower court's ignorance of the Third Restatement and its explicit effort to lower the bar for plaintiffs in establishing foreseeability constitutes reversible error.

B. Mr. Ashpool proved that Edison itself created a reasonable alternative design and incorporated it into other products.

To establish liability under the risk utility test, a plaintiff must prove that a reasonable alternative design existed at the time of the product's initial marketing and sale. *Branham*, 701 S.E.2d at 16. Not only did Mr. Ashpool prove that an alternative design existed at trial, he also proved that Edison itself created this design, and incorporated this design into other models of the Marconi. (R. at 5.)

Again, Edison did not challenge this evidence at trial. It admitted that it had designed and tested an additional sensor for the Marconi and used it in other versions of the Marconi. (R. at 5.) Instead, Edison argued that adding the safety feature would have hurt its bottom line.[5] In committing yet another error, the Court of Appeals adopted this argument and found that Edison's own alternative design was infeasible. (R. at 12.)

1. Where a manufacturer incorporates the proposed alternative design in its other products, it is feasible as a matter of law.

Without challenge, Mr. Ashpool proved that Edison used the 13th sensor in its other Marconi vehicles. This evidence alone was sufficient to prove that Edison's reasonable alternative design was feasible as a matter of law. *See Riley v. Ford Motor Co.*, 757 S.E.2d 422, 426–27 (S.C. Ct. App. 2014), *overruled on other grounds*, 777 S.E.2d 824 (S.C. 2015).

In *Riley v. Ford Motor Co.*, like here, plaintiff presented evidence that the manufacturer defendant had itself created a reasonable alternative design—which was safer than the design

[5] Notably, Edison did not offer any statistical evidence at trial about the loss of sales they might experience by adding the safety feature.

ultimately incorporated in the car that injured plaintiff—and that the manufacturer used the safer design in other vehicles. *Id.* at 425–26. Ford, like Edison, had decided that the reasonable alternative design was actually *safer* than the design it incorporated in plaintiff's vehicle. *Id.* at 427. This evidence, the court determined, "support[ed] that the increased costs . . . of altering the design to incorporate a cable-linkage system would have been worth the resulting safety benefits, and thus satisfies the risk-utility test." *Id.* (ellipses in original, internal citations and alterations omitted).

The *Riley* court is not alone in finding feasibility where a manufacturer has incorporated the alternative design into nearly identical products. *See Binakonsky v. Ford Motor Co.*, 133 F.3d 281, 287 (4th Cir. 1998) (evidence that Ford used the alternative design in other vehicles meant plaintiffs were "entitled to the reasonable inference that the costs of making the van safer were not prohibitive."); *Wickersham v. Ford Motor Co.*, 194 F. Supp. 3d 434, 439 (D.S.C. 2016) (the fact that manufacturers had included plaintiff's proposed alternative design in other similar products proved that the alternative was "feasible from a cost, safety, and functional perspective."); *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 674-75 (Ga. 1994) (plaintiff need only prove that alternative design "was a marketable reality and technologically feasible.").

These courts align for good reason: putting profits over safety is not a defense to strict liability. The question is not whether incorporating the safety feature would have cost Edison a few customers or whether it would have slightly reduced their profits. The question is whether the cost of the safety feature would have made it infeasible to the product as a whole.

Mr. Ashpool needed only to answer whether adding the 13th sensor would have made the Marconi *entirely* unmarketable. *Banks*, 450 S.E.2d at 675. There is no evidence whatsoever that the Marconi would have been unmarketable if it were safer. In fact, Mr. Ashpool offered evidence

that customers who buy 'economy' class cars prefer safer vehicles over high-tech, high-performance vehicles. (R. at 2.) The appellate court's decision to require, in essence, that a safety feature be nearly free and not in any way affect the manufacturer's business model imposes an unbearable burden on plaintiffs and should not stand.

D. Mr. Ashpool proved that the Marconi was unreasonably dangerous when used in a foreseeable manner.

A product must be safely designed "for its intended and all reasonably foreseeably uses"—here, that means operation of the Marconi in Autodrive. *Ghrist v. Chrysler Corp.*, 547 N.W.2d 272, 275 (Mich. 1996). It is undisputed that the Marconi was not safe when driven above 35 mph in Autodrive mode

1. Edison's only defense to evidence of unreasonable danger is not legally cognizable.

Edison's only response to this evidence was that drivers like Mr. Ashpool have an obligation to keep their eyes on the road when the car is in Autodrive. (R. at 5.) Edison believed—and the Court of Appeals accepted—that Mr. Ashpool's role as the car's driver absolved Edison of liability.

Factually, Edison's argument is untrue. Edison never warned drivers that they should keep their eyes on the road when in Autodrive. The Marconi's manual instructed drivers only to keep their hands on the wheel at all time. And Edison's salesperson testified that "Autodrive would allow [Mr. Ashpool] to simply input a GPS location into the Marconi and enjoy the ride, with ***no further action required***." (R. at 4.) (emphasis added). Because Edison never warned against drivers taking their eyes off the road, this practice was foreseeable and does not bar liability. *Shipman v. Fontaine Truck Equip. Co.*, 459 N.W.2d 30, 33 (Mich. Ct. App. 1990) ("where there is evidence presented of the manufacturer's knowledge of unsafe use, or that unsafe use is

foreseeable, liability is not precluded."). *See also Hansen v. Sunnyside Prod., Inc.*, 55 Cal. App. 4th 1497, 1512–13 (3d Dist. 1997) (warnings or lack thereof on a defective product are a relevant under the risk utility test for design defect).

As a matter of law, Edison's argument was meritless. It is beyond dispute that a "car manufacturer must design and produce vehicles that are not in a defective condition unreasonably dangerous to the user. Cars are designed with utility and safety in mind, ***and careless driving is a foreseeable reality***." *Branham*, 701 S.E.2d at 21 (emphasis added). As the court in *Branham* explained, car manufacturers have an obligation to design around—and account for—this fact. *Id.*

Because the jury could not have properly considered Edison's arguments, they cannot weigh in the court's analysis either. *See Wagatsum v. Patch*, 879 P.2d 572, 586-87 (Haw. Ct. App. 1994) ("We do not believe that the pool manufacturer, having knowingly put the admittedly dangerous product on the market, should be allowed to rely on the obvious foreseeability of injury to young children to relieve itself of the responsibility to protect them from that injury."). The evidence Mr. Ashpool presented, though, satisfied the final risk utility factor, and the Court of Appeals erred in ignoring it.

2. The Court of Appeals ignored Mr. Ashpool's evidence that the Marconi was unreasonably dangerous.

In concluding that the Marconi was not unreasonably dangerous, the Court of Appeals turned a blind eye to overwhelming, post-sale evidence of other accidents identical to Mr. Ashpool's. From 2017 to the date of Mr. Ashpool's accident in 2019, there were approximately 12 identical accidents caused by the Marconi's faulty sensor array. (R. at 5–6.)

But the Court of Appeals never bothered to consider this evidence in weighing whether the Marconi was unreasonably dangerous. That decision constitutes reversible error. See *Rexrode v. American Laundry Press Co.*, 674 F.2d 826, 829 n.9 (10th Cir. 1982), *cert. denied*, 459 U.S. 862

(1982) ("evidence of the occurrence of other accidents involving substantially the same circumstances as the case at issue is admissible, pursuant to strict liability theory, to establish…the existence of defect"); *Caterpillar Tractor Co. v. Beck*, 624 P.2d 790, 793-94 (Alaska 1981) (same).[6]

3. The Court of Appeals ignored evidence that consumers who buy 'economy' class cars prefer safer vehicles.

The Court of Appeals necessarily needed to consider, in weighing the danger of the product, whether a Marconi with a 13th sensor would have been more desirable to consumers. The Restatement (Third), upon which Fremont's strict liability law is based, explicitly holds that consumer expectations may be "ultimately determinative on risk-utility balancing in judging whether the omission of a proposed alternative design renders the product not reasonable safe." Restatement (Third) § 2, Comment g.

Mr. Ashpool proved—and Edison did not rebut—that buyers of 'economy' class cars prefer safer vehicles over high-tech ones. (R. at 2.) This evidence weighed in favor of finding that the Marconi was unreasonably dangerous. *See In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 767–79 (5th Cir. 2018) (under risk utility analysis, plaintiffs established proof at trial of unreasonable danger where evidence showed relevant buyers would have preferred the alternative design); *Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 254 (Tex. 1999) ("in determining whether a product is unreasonable dangerous, the product's utility to its intended market must be balanced against foreseeable risks associated with use by its intended users.").

[6] Edison's internal testing documents were also sufficient to establish the unreasonable danger posed by the Marconi. *See Branham*, 701 S.E.2d at 10–13, 21 (Ford's pre-sale internal testing data showing notice of defect was evidence of unreasonable danger).

Mr. Ashpool's evidence of unreasonable danger was overwhelming. The mere fact that the Marconi is a novel, self-driving car does not negate the weight of the evidence at trial. Simply put, the convenience of technology does not outweigh the lives of consumers.

E. The Court of Appeals found—without support—that a plaintiff must satisfy *all* of the risk utility factors.

The undisputed evidence shows that Mr. Ashpool proved the Marconi was defective under all six factors of the risk utility test. That was not his burden, though. Indeed, the trial court instructed the jury that it should consider the six factors "holistically." (Clarifications at 3.) The Court of Appeals apparently ignored this edict, and instead faulted Mr. Ashpool for not proving all six factors and for not rejecting Edison's irrelevant excuses at trial. That is not the law.

Presenting "strong evidence" in the record as to just *some* of the six risk utility factors is more than sufficient for judgment to have been entered in Mr. Ashpool's favor. *See Crawford v. ITW Food Equipment Group, LLC*, 977 F.3d 1331, 1344 (11th Cir. 2020) (applying Florida law). And the appeals court conceded just that. It agreed Mr. Ashpool presented evidence to show that: 1) Edison foresaw the likelihood of injury, (R. at 17.); 2) a reasonable alternative design was available to Edison at the time of trial (R. at 5.); and 3) that if Edison had included the reasonable alternative design, the likelihood of injury would have been reduced. (R. at 11.) Courts have uniformly held that a plaintiff meets his burden under the risk utility test by proving that at least half of the factors weigh in his favor, even where others are neutral or weigh against him.

In *Crawford*, plaintiff brough a strict liability case against the manufacturer of a commercial meat saw. *Id.* at 1336. After a verdict was entered in plaintiff's favor, the defendant appealed, challenging the sufficiency of plaintiff's evidence under the risk utility test. *Id.* at 1337–38. Like here, the Eleventh Circuit found that plaintiff proved his injury was foreseeable, that a reasonable alternative design was available to the manufacturer, and that the product was more

dangerous without the alternative design. *Id.* at 1343–44. And like here, defendant challenged the financial feasibility of the alternative design, that some accidents with the product were due to human error, and that no alternative could eliminate the risk of injury entirely. *Id.* Still, the Circuit Court found that plaintiff's evidence was sufficient to support a finding that the defendant's product failed the risk utility test.

Crawford is not alone. In *Bracisco v. Beech Aircraft Corp.*, the California Court of Appeals found that a trial court's instruction to jurors that a plaintiff must satisfy *all* the risk utility factors by a preponderance of the evidence was prejudicial error and imposed a "more onerous" burden on the plaintiff. 206 Cal. App. 3d 1101, 1102 (1984).

This severe burden would essentially require a citizen injured by a defective product to prove their case by clear and convincing evidence.[7] The standard a plaintiff like Mr. Ashpool must meet, though, "is a mere preponderance of the evidence." *Addington v. Texas*, 441 U.S. 418, 423 (1979). Mr. Ashpool carried his burden.

II. The Court of Appeals properly adopted a narrow duty to retrofit.

Where a manufacturer knows their product is dangerous, and can efficiently and cheaply fix that problem, they have an obligation to do so. The duty to retrofit, "to upgrade or improve a product," reflects this common-sense policy, and the Court of Appeals correctly adopted that duty as the law of Fremont. (R. at 15.) Fremont law has already trended toward recognizing that a manufacturer retains post-sale duties where it knows that its product causes harm in the field. *Shane v. Smith*, 657 XE 720, 725 (Fremont 1989) (adopting a post-sale duty to warn); (R. at 14.)

[7] The clear and convincing standard requires a plaintiff to provide evidence that makes existence of a fact "highly probable," or evidence that is of "extraordinary persuasiveness." *Dep't. of Human Services v. E.N.*, 359 P.3d 381, 383 (Or. App. 2015).

Extending this duty to require a manufacturer to retrofit dangerous products makes good sense, particularly where the manufacturer has a "continuing relationship" with the consumer of its product. (R. at 15.) The Court of Appeals' adoption of the duty turns on this rare and narrow relationship. Certainly, it is black letter law that a manufacturer is not an insurer of its product. But that manufacturer cannot shirk a duty it has voluntarily adopted when it avails itself of a continuing relationship to the product. That relationship cannot be both a sword and a shield—at the same time profitable and yet not liability-inducing.

The Court of Appeals' test both tracks the logic of the Third Restatement's similar duty to recall, and satisfies the concerns of those jurisdictions that have chosen not to adopt the duty.[8]

A. Defendants who voluntarily undertake a continuing relationship with their products owe a duty to retrofit.

The Court of Appeals' test is simple and will rarely be applied. The duty to retrofit is triggered 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.) The test turns on its second prong and holds that manufacturers who have consented to retrofitting their products avail themselves of a post-sale duty of care.

That same logic animated the other courts who have adopted the duty to retrofit. *See Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519, 532 (Tex. App. 1979) (imposing duty to retrofit

[8] Certiorari was granted only as to whether the duty to retrofit should be adopted generally. Appellant contends that contrary to the Court of Appeals' decision, it was harmful error for the trial court to fail to instruct the jury on the duty to retrofit, especially where the Court of Appeals has now adopted this duty as the law of Fremont. *See Wilkerson v. Wheeler*, 772 F.3d 834, 838 (9th Cir. 2014) ("prejudicial error results when, looking to the instructions as a whole, the substance of the applicable law was not fairly and correctly covered."); *United States v. Little*, 829 F.3d 1177, 1181 (10th Cir. 2016) (same); *Haffke v. Signal 88, LLC*, 947 N.W.2d 103, 112 (Neb. 2020) (same); *Locigno v. 425 W. Bagley, Inc.*, 2016-Ohio-5924, 71 N.E.3d 644, 652 (8th Dist.) (same).

only where a manufacturer "assumed the duty to improve upon the safety" of its product); *O'Keefe v. Boeing Co.*, 335 F. Supp. 1104, 1130 (S.D.N.Y. 1971) (same); *Noel v. United Aircraft Corp.*, 342 F.2d 232,, 241-42 (3d Cir. 1964) (same); *Lunghi v. Clark Equip. Co.*, 153 Cal. App. 3d 485, 494 (1st Dist. 1984) (same). *Cf. Sikora v. AFD Indus., Inc.*, 319 F. Supp. 2d 872, 878 (N.D. Ill. 2004) (where manufacturer undertakes duty to inspect product after sale, it assumes a duty to adequately repair the product). A defendant who *consents* to a duty of care thus cannot later turn their back on that decision for litigation's sake.

That is exactly the tactic Edison has taken here. It is undisputed that Edison "continuously updates the Autodrive software as technology advances" through the Marconi's computer system. (R. at 3.) It is also undisputed that "[m]ost of these updates are for safety purposes," as Edison "continuously updates its vehicles and [sic] maintain the highest of safety standards, without having to make entirely new vehicles." (R. at 3.) Indeed, Edison's conduct presents the clearest possible case for adopting the duty to retrofit, and implicates none of the fears that have motivated most jurisdictions to reject the duty.

B. The test satisfies the concerns of courts that have not adopted the duty.

The duty to retrofit, as outlined by the Court of Appeals, quells three primary concerns raised by courts who have declined to adopt this duty. *See, e.g. Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 534 (Ky. 2003) (rejecting duty); *Gregory v. Cincinnati, Inc.*, 538 N.W.2d 325, 336 (Mich. 1995) (same).

First, the Court of Appeals' statement of the duty to retrofit comports with the Third Restatement's similar pronouncement: liability of a successor for harm caused by the successor's own post-sale failure to warn. *See* Restatement (Third) of Torts § 13(a). This standard imposes a duty of care only on those successor manufacturers who "undertakes or agrees to provide services

for maintenance or repair of the product," and where that undertaking gives "rise to actual or potential economic advantage" to the manufacturer. *Id.* at (a)(1). Such an undertaking imposes liability, like here, where the manufacturer can easily identify those who own the product and can easily and effectively avoid any harm to them. *Id.* at (b)(2). The Court of Appeals' decision thus tracks modern products liability law.

Second, the duty negates any concerns about the cost of such a "multi-step, multi-party process[.]" *Ostendorf*, 122 S.W.3d at 534. Where a manufacturer has already itself carried on a relationship with customers, has continued to engage them at its own expense, the cost in locating and informing customers of a defect is entirely mooted. The only cost is the addition of a necessary safety feature—a cost not outweighed by the financial benefits that maintaining an ongoing customer relationship inure to a manufacturer. *Cf.* Restatement (Third) of Torts § 13(a)(1).

Third, imposing this duty will not "discourage manufacturers from developing new designs" lest those improvements "form the bases for suits" in the future by owners of older models of the product. *Gregory*, 538 N.W.2d at 337. That thinking has not borne out in reality. For decades, plaintiffs have been able to introduce into evidence subsequent remedial measures taken by manufacturers to prove the feasibility of alternative designs under Federal Rule of Evidence 407 and its state equivalents. *See, e.g. Readenour v. Marion Power Shovel*, 719 P.2d 1058, 1063–64 (Ariz. 1986) (evidence of subsequent safety device was admissible to show the feasibility of alternative design at the time of sale); *Meller v. Heil Co.*, 745 F.2d 1297, 1299–1302 (10th Cir. 1984) (same); *Friedman v. National Presto Indus., Inc.*, 566 F. Supp. 762, 765 (E.D.N.Y. 1983) (same).

Yet the admission of this evidence has not stopped manufacturers from designing new iterations of their products year after year while profiting handsomely. The flood of litigation *Gregory* warned of has not—and will not—come to be.

C. Rejecting the Court of Appeals' decision leaves injured consumers with a defective product and no recourse.

Rejecting the duty to retrofit will have very *real* consequences for injured consumers. Those who own a dangerous and defective product are left with two options in a world without a duty to retrofit. For some, buying a newer, safer product is the natural reaction. For other, such an extravagance is impossible. This case shows how clearly that reality bears itself out.

Edison specifically targeted 'economy' class consumers. Those customers have now spent tens of thousands of dollars on a dangerous product, with no recourse other than a retrofitting claim. If they are unable to buy a new vehicle, they are forced to continue driving their Marconi, and are forced to risk their lives. Edison, on the other hand, is not impacted at all. The Court of Appeals recognized this dilemma when it adopted the duty to retrofit, and took reasonable steps to protect consumers without unnecessarily exposing manufacturers to absolute liability for their products.[9]

CONCLUSION

Petitioner, William Ashpool, respectfully requests this Honorable Court reverse the Court of Appeals below and enter a directed verdict in Mr. Ashpool's favor, and affirm the Court of Appeals' finding that the duty to retrofit applies in Fremont.

[9] The economic loss rule would not bar the claims of these consumers. *See Potomac Contractors, LLC v. EFCO Corp.*, 530 F. Supp. 2d 731, 737 (D. Md. 2008) ("a plaintiff should not 'have to wait for a personal tragedy to occur in order to recover damages to remedy or repair defects'").