IN THE SUPREME COURT OF THE STATE OF FREEMONT

WILLIAM ASHPOOL,

Petitioner,

v.

EDISON INCORPORATED, A FREMONT CORPORATION,

Respondent.

ON WRIT OF CERTIORARI
FROM THE COURT OF APPEALS FOR THE STATE OF FREEMONT

ORIGINAL BRIEF FROM THE RESPONDENT

Team J
Counsel for Respondent

QUESTIONS PRESENTED

I. The State of Fremont recognizes the risk-utility test as the exclusive test for design defect claims. The risk-utility test features six factors the trier of fact uses to balance the danger associated with a product with its utility to the consumer. Did the appellate court properly affirm the trial court's denial of Ashpool's motion for judgement as a matter of law on his design defect claim, finding that the Marconi Autodrive was not "unreasonably dangerous" under the risk-utility test?

II. Most jurisdictions have not adopted a duty to retrofit and instead rely on existing strict liability, negligence, and duty to warn laws. In contrast, the Court of Appeals adopted a duty to retrofit in certain strict liability design defect claims. Should the Supreme Court of Fremont overrule the appellate court's adoption of the duty to retrofit?

Table of Contents

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE CASE

I. Statement of the Facts

In 2017, Edison, a luxury automobile corporation registered in Fremont, entered the economy sedan market with the release of the Marconi. R. 2. The Marconi includes Autodrive, which is a semi-autonomous driving experience which operates much like a human driver. R. 2. Autodrive assesses in real time things like road conditions, speed limits, another vehicle or obstructions on the road, and traffic lights so long as the driver has two hands on the wheel. R. 2, 3. If the driver removes his hands from the wheel, a flashing light warns the driver. R. 3. Further, the driver can turn Autodrive on and off when the vehicle is stopped. R. 2, 3. Additionally, the driver can override Autodrive as the driver sees fit when both hands are placed on the wheel. R. 3. Marconi comes with a driver's manual that emphasizes that *Autodrive does not replace an attentive driver*. R. 3.

Further, Edison continuously creates and sends software updates to the Autodrive system. R. 3. These updates include mostly safety and some cosmetic changes. R. 3. These updates are sent directly to each Marconi vehicle. R. 3. By sending software updates, Edison does not have to create new models. R. 3.

In 2019, William Ashpool, a Fremont-native, purchased a Marconi because he liked the Autodrive feature. R. 3-4. On December 20, 2019, Ashpool was driving at approximately 42 miles per hour using the Autodrive feature when he collided with a stationary bear sitting in the middle of the road. R. 4. Ashpool sustained extensive injuries and his insurer determined the car was totaled. R. 4. Before the accident, Ashpool did not experience any malfunctions with the Autodrive. R. 4.

At trial, Edison presented evidence that prior to the Marconi's release, they performed numerous crash and safety tests in accordance with the National Highway Traffic and Safety Administration (NHTSA). R. 4. Several of these tests focused specifically on the Marconi's Autodrive sensors. R. 4. These tests revealed the sensors had difficulty identifying stationary objects when the vehicle traveled over 35 miles per hour and the sensors prevented accidents caused by lane drifting and unsafe lane changes. R. 5. According to Ashpool's expert, the accident rate was 13% higher when vehicles traveled over 35 miles per hour and a stationary object remained in the road. R. 5. Further, Edison's CEO, Errol Reeve, testified that the company considered including additional sensors and proprietary sensor technology. R. 5. However, the inclusion of these extra sensors would increase the cost to consumers by at least $5,000. R. 5. Consequently, the cost increase would push the Marconi outside of Edison's target market of the economy sedan. R. 5. Therefore, the economic feasibility of the entire product line would be compromised. R. 5.

Further, Edison maintained their commitment to maintaining a safe vehicle by assessing the reports of crashes involving the Marconi and stationary objects. R. 5. As Ashpool presented into evidence, twelve accidents occurred after the Marconi's release where a Marconi was driving over 35 MPH and collided with a stationary object. R. 6. While Reeve was aware of the accidents and facts presented by Ashpool's expert, Reeve explained that the Marconi was still safe because *even a moderately attentive driver* would have avoided the accidents had the driver had their eyes on the road. R. 6. Moreso, Reeve expands by stating Autodrive technology does not remove a driver's ability nor responsibility to operate the vehicle. R. 6.`

II. Procedural History

Ashpool brought this action against Edison, alleging that the failure of the vehicle's sensors to recognize a bear in the road caused the accident. R. 4. The case was tried before a jury in the Hayward County District Court. R. 1. Before the trial concluded, the court requested both parties to submit proposed jury instructions. R. 6. Ashpool submitted jury instructions on the duty to retrofit which Edison objected. R. 6. The trial court sustained the objection. R. 6. On the final day of trial, after the presentation of all evidence, Ashpool moved for a judgment as a matter of law pursuant to Fremont Rule of Civil Procedure 50(a). R. 7. The trial court denied the motion and submitted the case to the jury for consideration. R. 7. The jury returned a verdict for Edison, finding that there was no defect in the design of the product and that the sensors did not cause Ashpool to crash. Ashpool renewed his motion judgment as a matter of law pursuant to Fr.R.Civ.P. 50(b). R.7. The trial court denied the motion. R. 7. Ashpool subsequently appealed to the Court of Appeals for the State of Fremont arguing that the trial court erred in its denial of his renewed motion for judgment as a matter of law and in its refusal to include the duty to retrofit in its jury instructions. R. 7. The Court of Appeals affirmed the judgement of the district court on both accounts. R. 12, 18. This timely appeal ~~t~~o the Supreme Court of the State of Fremont now follows.

SUMMARY OF THE ARGUMENT

The appellate court correctly affirmed the trial court's denial of Ashpool's motion for judgement as a matter of law regarding his design defect claim against Edison. "A product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor … and the omission of the alternative design renders the product not reasonably safe." Restatement (Third) of Torts: Products Liability § 2(b).

Here, the risk alleged by the Plaintiff-Petitioner Ashpool was not reasonably foreseeable at the time of the Marconi's distribution. Ashpool's injury was no more severe than it would have been if he had wrecked a sedan lacking Autodrive technology. Despite the existence of an alternative design, the Marconi is as reasonably safe a product as any other vehicle. To find otherwise would be to simultaneously reward the Plaintiff-Petitioner's negligent driving and punish the manufacturer Defendant-Respondent for implementing safety innovations into its designs, thus discouraging implementation of technological advancements throughout this jurisdiction.

The Petitioner appealed the trial court's refusal to include instructions on the duty to retrofit. While the appellate court correctly upheld the denial of jury instruction on duty to retrofit, it erred when it adopted the duty to retrofit as a common law duty in the State of Fremont. The duty to retrofit is superfluous -- all of the harms and remedies it addresses are appropriately determined by existing strict liability and negligence laws for products liability. Further, the three-element duty to retrofit test the Court of Appeals adopted mirrors elements of duty to warn and one of its subsets: duty to test. The duty to retrofit adds no new standards or remedies to products liability law, nor will it entice manufacturers to produce safer products.

ARGUMENT

I. The Court Of Appeals Did Not Err In Affirming The Trial Court's Denial Of Ashpool's Motion For Judgment As A Matter Of Law On The Design Defect Claim Under The Risk-utility Test.

A. Standard of Review

When a party moves for Judgment as a matter of law (JMOL) in a case tried to a jury, the decision is reviewable "de novo by reapplying the JMOL standard." Maxwell v. J. Baker, Inc., 86 F.3d 1098 (Fed.Cir.1996). Judgment as a matter of law against a party is appropriate when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). This issue was preserved for appeal by the Plaintiff-Petitioner's motion for judgment as a matter of law.

B. Ashpool's design defect claim against Edison fails because the Marconi does not qualify as "unreasonably dangerous" under the risk-utility test.

The appellate court correctly affirmed the trial court's denial of Plaintiff-Petitioner Ashpool's motion for judgement as a matter of law, because Ashpool failed to meet the burden of proof for his design defect claim under the risk-utility test. To prevail on his design-defect claim, Ashpool had the burden to prove that his injury was caused by the Marconi, that the Marconi was without substantial change from when it was sold to him, and that his injury occurred because the Marconi was in unreasonably dangerous condition. W. Prosser, Law of Torts 671–72 (4th ed. 1970); Cf Fremont Rev. Code. The first two elements are not contested. Therefore, this dispute turns on whether or not the Marconi was "unreasonably dangerous." R. 8.

Fremont has adopted the risk-utility test as the exclusive and optimal test for determining if a product is unreasonably dangerous. *Fickell v. Toyoma Motors Inc.*, 758 XE 821, 830 (Fremont 2014). Under this test, a product is unreasonably dangerous and defective if the danger

associated with the use of the product outweighs its utility. *Bragg v. Hi-Ranger, Inc*., 462 S.E.2d 321, 328 (S.C. Ct. App. 1995); *see also Mut. Pharm. Co. v. Bartlett,* 570 U.S. 472 (2013)(affirming the risk utility test should be used to assess whether the "magnitude of the danger outweighs the utility of the product" in a design defect claim)*; see also Carter v. Massey-Ferguson, Inc*., 716 F.2d 344 (5th Cir. 1983))(affirming the risk-utility test applies when a design defect claim is at issue); *see Simien v. S. S. Kresge Co.*, 566 F.2d 551 (5th Cir. 1978)(noting a product is not "unreasonably dangerous" merely because it could have been designed with greater safety nor is a manufacturer obligated to design a completely safe product).

To prevail on his design defect claim, Ashpool must provide evidence that:

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

Peck v. Bridgeport Machs., Inc., 237 F.3d 614 (6th Cir. 2001).

These factors are not exclusive -- they are merely "illustrative." *Armentrout v. FMC Corp*., 842 P.2d 175 (Colo. 1992); *Id.* at 184 (indicating that the factors depend on the circumstances thereby favoring flexibility in deciding which factors should be applied). Direct or circumstantial evidence may be used to support these elements, including "expert testimony or evidence of similar instances." *Croskey v. BMW of N. Am., Inc*., 532 F.3d 511, 516 (6th Cir. 2008). Whether this evidence satisfies the risk-utility test is a jury question. *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 13-14 (S.C. 2010).

Fremont's adoption of the risk-utility test over the consumer expectations test is consistent with the majority of jurisdictions. *Fickell* at 830; *Branham,* 701 S.E.2d at 15 (S. C. 2010); *Gregory v. Cincinnati Inc.,* 538 N.W.2d 325, 329–30 (Mich. 1995); *Armentrout,* 842 P.2d at 183–84*; Banks v. ICI Ams., Inc.,* 450 S.E.2d 671, 674–75 (G.A 1994). The risk-utility test, unlike the consumer expectations test, "strikes the appropriate balance" between the pros and cons of a design as well as the availability of a reasonable alternative to that design. See Perkins, Cami, *The Increasing Acceptance of the Restatement (Third) Risk Utility Analysis in Design Defect Claims,* 4 Nev. L.J. 609, 614 (2004). Furthermore, the consumer expectations test does not consider whether the alternative design can be implemented by the manufacturer at a reasonable cost or provide overall safety. *Id.* Therefore, in accordance with Fremont law and that of the majority, the risk-utility test will be used by This Honorable Court to determine whether Edison's Marconi sedan was unreasonably dangerous to Ashpool.

i. The appellate court correctly found for Edison as Ashpool's injury was not reasonably foreseeable and the injury itself was no more severe than if he were operating a sedan without Autodrive.

The first two elements of the risk-utility test require an examination by the jury of Edison's knowledge as to the potential severity of injury and the likelihood of that injury actually coming to fruition. *Peck v. Bridgeport Machs., Inc.,* 237 F.3d 614 (6th Cir. 2001); *see Branham,* 701 S.E.2d at 5. The risk was not reasonably foreseeable, because knowledge of the risk was not reasonably attainable at the time of distribution. R. 10; *see* Restatement (Third) of Torts: Products Liability § 2 cmt. a. (1998). Furthermore, the likelihood and severity of Ashpool's injury was no more dangerous than that of operating an ordinary sedan without such advanced technology. R. 11. Both factors thus weigh in favor of a finding for Defendant-Respondent Edison against Plaintiff-Petitioner Ashpool.

To start, "the manufacturer has a duty to design and manufacture so as to eliminate any unreasonable risk of foreseeable injury to its occupants as a result of a collision." *Owens v. Allis-Chalmers Corp*., 326 N.W.2d 372, 375 (1982). Further, to establish if Ashpool's injury was a foreseeable risk, he must first show the "magnitude of the risk involved" through facts regarding Edison's conduct. *Id*. at 372. However, Ashpool failed to do so.

To compare, in *Owens,* plaintiff failed to provide enough supporting data showing the rollover of the forklift was a reasonably foreseeable injury because of the design of the vehicle. *Id*. at 375. In the present case, Ashpool failed to provide enough supporting data that using the Autodrive feature is any more dangerous than driving an ordinary sedan. R.12. In fact, it can be stated that the Marconi is even safer to the average driver than a sedan that lacks the Autodrive feature; Ashpool's own expert testified at trial that the Marconi Autodrive is proven to successfully avoid accidents caused by a driver's lane drifting or unsafe lane changes. R. 5. Thus, the record does not support the contention that the Autodrive feature creates more risk to its driver than any other sedan would. *Owens* reasoned that the lack of support in the record to Plaintiff's allegation that the rollover of the forklift was reasonably foreseeable could only lead the court to find for the manufacturer. *Owens*, 326 N.W.2d at 375. This Court should follow the reasoning of *Owens* by affirming the appellate court's finding that Ashpool similarly failed to provide proof in the record that the accident was a reasonably foreseeable result of Marconi's Autodrive function. The appellate court properly decided Ashpool's accident was not reasonably foreseeable nor any more dangerous than driving an ordinary sedan. Therefore, the lower court's decision to strike Ashpool's motion for a judgement as a matter of law was properly decided.

Further, the risk Ashpool alleges Edison created could only be discovered through "hindsight expert analysis and post-distribution events." R. 10. The majority of courts agree that

the assessment of product liability can only be just and efficient if knowledge of the risks and benefits of a product design are reasonably attainable *at the time of distribution. See* Restatement (Third) of Torts: Products Liability § 2 cmt. a. (1998); *see Branham*, 701 S.E.2d at 19 (stating a defective condition of a product may only be assessed by the information available at the manufacture date).

Ashpool may assert that Edison's awareness of Autodrive's difficulty identifying stationary objects when traveling over thirty-five mph makes his injury foreseeable. However, Edison could not reasonably attain the specific measurement of this risk prior to distribution of the Marconi. R. 10. Ashpool may rebut that holding Edison liable for a risk that was not foreseeable at the time of distribution would lead to an increase in manufacturers' investment in safety.

Accepting this argument would set dangerous precedent. It would force a manufacturer to merely guess at which safety investments were necessary to avoid liability. *See* Restatement (Third) of Torts: Products Liability § 2 cmt. a. (1998). If the manufacturer guessed incorrectly, and the wrong investments were made, the manufacturer could lose their investment entirely and face a myriad of predatory litigation. It would be nearly impossible for a manufacturer to conform to this standard. *Bragg v. Hi–Ranger, Inc.*, 462 S.E.2d 321, 331 (S.C. Ct. App. 1995) (stating that a product must be measured against a standard existing at the time of sale and that hindsight expert opinions suggesting that more measures should have been taken are not enough to refute the determination that the manufacturer met the standard of care).

As to the severity element, the court found Ashpool's injury was no more severe than it would have been if he had been operating an ordinary sedan without Autodrive or similar technology. R. 11. Ashpool presents no evidence to the contrary. Accordingly, This Honorable

Court should find that the first two elements of the risk-utility test weigh in favor of Defendant-Respondent Edison and affirm the lower court's denial of Ashpool's motion for judgement as a matter of law.

ii. The remaining elements of the risk-utility test support a finding for Edison because Edison could not have practicably implemented an alternative design.

The remaining elements of the risk-utility test require Ashpool to prove that Edison could have practicably implemented an alternative design which would have reduced Ashpool's risk of injury. Despite showing that an alternative design potentially did exist, Ashpool fails to show his injury would have been mitigated by such an alternative and that the alternative could have been feasibly implemented by Edison. R. 11. Ashpool's design defect claim against Edison consequently fails.

The alternative safe design factor has been said to be the "heart" of the risk-utility test. *Banks v. ICI Americas, Inc*., 450 S.E.2d 671, 674 (Ga. 1994). Essentially, the jury must determine the design chosen was a reasonable one amongst the feasible choices of which the manufacturer was aware or should have been aware. *Id.* at 674-675. Thus, the "mere existence of an alternative design is not enough for the fact finder to determine that a product was defective." R. 11.; *see Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519, 530 (Tex. Civ. App. 1979)(stating the manufacturer is not obligated to design the safest product nor one as safe as others, but a duty does arise for the manufacturer to refrain from allowing use of older products proven not as safe as the new, alternative design.); *see also Branham*, 701 S.E.2d 5, 16–17 (S.C. 2010)(adhering to the "longstanding principle that a product is not in a defective condition nor unreasonably dangerous merely because it 'can be made more safe."). Further, whether an alternative design

should have been implemented can be assessed by the alternative safe design factors which includes: the feasibility of an alternative design; the availability of an effective substitute for the product which meets the same need but is safer; the financial cost of the improved design; and the adverse effects from the alternative." *Banks*, 450 S.E.2d at 675.

To illustrate, in *Marchant v. Mitchell Distributing Co.*, plaintiff asserts a defective design claim after an injury was caused by the absence of the crane safety attachment which was available at an additional cost at purchase. *Marchant v. Mitchell Distribg. Co.*, 240 S.E.2d 511, 513 (S.C. 1977). In the present case, like *Marchant*, the plaintiff was injured while using an inherently safe product that was not equipped with additional safety features. R. 4, 5. *Marchant* stated that "most any product can be made more safe." *Id.* For example, vehicles would be more safe if they had steel-belted radial tires as opposed to ordinary ones, yet this does not mean the ordinary product is defective. Bicycles are more safe when equipped with a bell, but the fact that a bike is bell-less does not render that bike defective or unreasonably dangerous. *Id.* Just as ordinary tires or a bell-less bike are not unreasonably dangerous, the fact that the Marconi did not feature additional sensors does not render the vehicle unreasonably dangerous. Thus, This Honorable Court should follow *Marchant* in finding Edison *not liable* for the injury caused to Ashpool while operating the Marconi.

Further, the additional sensors on the Marconi is not a feasible option for an alternative design. A manufacturer does not have a duty to implement a different design when the different design is not feasible. *Schaffner v. Chi. & N. W. Transp. Co.*, 515 N.E.2d 298, 310 (Il. App. Ct. 1987); *see also Kerns v. Engelke*, 390 N.E.2d 859, 863 (Ill. 1979)(stating manufacturers cannot be "faulted" if the alternative design is not feasible). For example, in *Kerns v. Engelke*, the power take off assembly was a feasible option to add to the forage blower because the expert identified

at trial multiple convincing and simple mechanisms which could have been added to make the forage blower safer. *Id*. Conversely, the financial cost of the additional sensors on the Marconi alone far outweighs the adverse effects of implementing them as the alleged alternative design. R. 5. In the present case, the additional sensors to the autodrive function would have increased the cost of each Marconi by a *minimum* of $5, 000 thereby pushing the Marconi out of the economy sedan market. R. 5. This would impair the "economic feasibility of the entire line." R. 12.; *see also Hunt v. Harley-Davidson Motor Co., Inc.*, 248 S.E.2d 15, 16 (Ga. Ct. App. 1978)(noting that there is a point at which the benefits of safer products are outweighed by the cost of attaining them); *see also Genie Industries, Inc. v. Matak*, 462 S.W.3d 1, 7 (Tex. 2015)(stating that it would be contrary to public policy to require a manufacturer to destroy the utility of his product in order to make it safer). Unlike the product in *Kerns*, several simple and feasible options to making the Marconi safer were not readily available at the time of the purchase. *Kerns*, 390 N.E.2d at 863. Hence, adding the additional sensors to the Marconi was not feasible as an alternative design. Consequently, the financial cost of the additional sensors to the Marconi is *not* feasible thereby outweighing the utility of the alternative design.

Ashpool's argument that the alternative design would limit risk to injury is furthermore unpersuasive. Edison did everything necessary to make the Marconi function properly for the purpose for which it was designed. R. 12. The Marconi had no latent defect, and its functioning does not create any more peril than the ordinary sedan. R. 11. Edison is not under the duty of making its products accident proof, and vehicular accidents are obvious common dangers. *Id*. Edison clearly expressed that Autodrive was not a substitute for an attentive human driver. R. 12. To allow a finding against Edison would be to punish the innovations of vehicular safety, and to reward Ashpool for his inattentive driving. *Id* at 5. Reeve's testimony stated that even a

moderately attentive driver would avoid the objects if they still had their hands on the wheel and eyes on the road. *Id*. Thus the Marconi's Autodrive feature was not unreasonably dangerous at the time of distribution. Accordingly, This Honorable Court should affirm the lower court's denial of Ashpool's motion for judgement as a matter of law.

To conclude, Ashpool fails to prove the Marconi is "unreasonably dangerous" under the Risk utility test. Further, Ashpool's accident was not reasonably foreseeable nor any more dangerous than any other ordinary sedan without the advanced technology. Ashpool further failed to prove that an alternative design was a feasible option. Thus, this court should uphold the appellate court's decision in affirming the denial of Ashpool's motion for judgement as a matter of law.

II. The Court Should Overturn The Appellate Court's Adoption Of A Common Law Duty to Retrofit.

A. Standard of Review

This question is reviewed de novo. The Supreme Court holds "the general rule [is] that issues of law are reviewed de novo." *Pierce v. Underwood*, 487 U.S. 552, 584 (1988). "When de novo review is compelled, no form of appellate deference is acceptable." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991). This question was preserved by the appellate court's adoption of a duty to retrofit thereby making this a question of law reviewable by This Honorable Court. Further, this is a question for which writ of certiorari was granted.

B. The appellate court erred in adopting the common law duty to retrofit

This Honorable court should not adopt the duty to retrofit and should therefore overturn the appellate court's adoption of such a duty. The duty to retrofit is superfluous because current strict liability and negligence laws already govern products liability and a manufacturer's duties. Additionally, the principles of duty to retrofit stem directly from the duty to warn. Creating separate duties is redundant. Not only can this case and other product liability cases be properly adjudicated under existing law, but the duty to retrofit will deter manufacturers from updating product designs and safety measures. Finally, as the dissent in the appellate court noted, the judiciary is not the appropriate place to impose this duty on manufacturers – it should be enacted by the legislature.

The appellate court erred in adopting a duty to retrofit, even by conditioning the duty to a limited circumstance. When drafting the duty to retrofit, the appellate court indicated it had considered why other jurisdictions declined to adopt such a duty. R. 15. One concern the appellate court cites is a need for the duty to not be unlimited. *Id.* With this concern in mind, the appellate court crafted three elements to determine if a manufacturer has a duty to retrofit: "(1) the product implicated human safety; (2) there is a continuing relationship between manufacturer and consumer; (3) the manufacturer has knowledge of a defect after the product was in the hands of the consumers." *Id.* The appellate court borrowed from the Third Circuit's reasoning that a duty to improve a product is necessary when a product involves human safety. *Id.* The appellate court, though it recognizes the need for limitations to the duty, declines to define what it means by "where human safety is involved." *Id; See also Readenour v. Marion Power Shovel*, 149 Ariz. 442 (1986)(implementing a duty to retrofit a mining shovel despite the fact that human safety was not directly implicated).

Thus, This Honorable Court should overturn the appellate court's decision to adopt a duty to retrofit because it is a matter reserved for the legislature and adopting such duty is superfluous and unnecessary.

i. Strict liability and negligence make common law duty to retrofit superfluous.

Considering existing product liability laws, a duty to retrofit is superfluous. Jurisdictions that decline to impose a duty to retrofit are able to properly adjudicate product liability issues under strict liability, negligence laws, and breach of warranty under the Uniform Commercial Code. *Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530 (Ky. 2003). The Supreme Court of Hawaii explains the rationale: "we perceive no reason to impose a duty upon manufacturers…to retrofit products because established legal duties already afford adequate protection and redress to potentially injured plaintiffs." *Tabieros v. Clark Equip. Co.*, 944 P.2d 1279, 1298 (1997); *see* Gregory, 538 N.W.2d at 325 (affirming existing legal duties in products liability make the duty to retrofit unnecessary).

The Court of Civil Appeal of Texas was properly able to resolve a case between a helicopter passenger and the manufacturer using strict liability, negligence, and a failure of duty to warn. *Bell Helicopter Co.*, 594 S.W.2d at 519. The *Bell Helicopter* court stated that in Texas recovery under strict liability for harm caused by defective and unreasonably dangerous products is controlled by Section 402 of the Restatement, Second of Torts, adopted by the Supreme Court of Texas. *Id.* at 529. This provision not only addresses recovery when a product was defective when it left the manufacturer or seller but is construed to include products that enter the market that are "so fragile that anticipated use is likely to create a dangerous condition" they constitute an unreasonably dangerous product. *Id.* Fremont Revised Code Section 5552.321 has nearly

identical text to Section 402 of the Restatement and is therefore capable of addressing strict liability claims like the case at bar. R. 19.

In *Bell Helicopter*, the manufacturer released the 102 type tail rotor in the 1950s. *Bell Helicopter Co.,* 594 S.W.2d at 526. At the time, the product was the most advanced of its time, but had in-flight fatigue fractures that caused failure in the tail rotor blades. *Id.* These failures lead to a series of other mechanical issues and can render the helicopter uncontrollable. *Id.* In response, Bell began to develop a safer rotor, the 117 type. *Id.*

Bell Helicopter manufactured and sold the helicopter at issue in this case (equipped with the 102 type rotor) in 1961 and it was eventually resold to its current owner, Ingle, in 1973. *Id.* In 1975, Ingle was contracted to charter a flight for an aerial survey of some land. *Id.* By this time, the rotor had not been upgraded to the 117 type. *Id.* During the voyage the rotor failed leading to a series of other mechanical failures and loss of control. *Id.* Despite the pilot's efforts to counteract the failures, the helicopter crashed, injuring everyone on board. *Id.* The passengers, owner, and pilot sued the manufacturer for products liability. *Id.* at 524.

Bell Helicopter explicitly declined to adopt the rule in *Noel*, where the court held that a manufacturer is under continuing duty to improve its product. *Id.* at 530. Instead, the court navigated Bell Helicopter's liability through the elements of negligence. *Id.* When Bell created the 102 type, it was not necessarily unreasonably dangerous, but it was rendered so upon the creation of the far superior 117 type in combination Bell's knowledge of the multitude of 102 type's failures. *Id.* The court made it clear that the manufacturer is under no obligation to make the safest possible product or one safer than it has already designed. *Id.* It clarified though that Bell Helicopter "assumed a duty to improve upon the safety of its helicopter by replacing the 102

system with the 117 system." *Id.* at 532. Once assumed, Bell was obligated to use reasonable means to "cause replacement of the 102 systems." *Id.* The court suggested that this duty could have been satisfied by mandating a replacement through authorized service stations or by explaining the gravity of the risk and strongly recommending consumers replace their current 102 systems. *Id.* The court determined the manufacturer breached its assumed duty. *Id.* Further, the jury found that the mere presence of the 102 system was unreasonably dangerous, and therefore the cause of the accident. *Id. at 531*.

This Court can determine liability in the case at bar with the same principles of negligence and strict liability. Applying the rationale in *Bell Helicopter*, this Court would come to the same conclusion it already has: Edison is not at fault for Ashpool's accident. R. 1. Like Bell Helicopter, Edison developed a transportation product, but from there the similarities end. R. 2. Edison's sensors are an added safety feature to a completely functioning car, where Bell Helicopter's 102 rotor system is an integral part of the helicopter's anatomy. R. 2.; 594 S.W.2d at 526. Further, Bell Helicopter manufactured a replacement specifically designed to address the failures of the 102 system and stopped using the 102 system altogether, thereby creating a duty to its consumers. 594 S.W.2d at *527.* On the other hand, while Edison's current configuration of sensors has reported failures, the solution given by both Edison and Ashpool was to add more of the same sensors. R. 5. Edison did not craft a completely new system or sensor, nor did the company even manufacture and market a product with the additional sensors. *Id.* Edison's completely opposite behavior removes the self-imposed duty to improve.

Finally, the mere presence of the 102 system made the helicopter unreasonably dangerous because a failure to the rotor led to a complete failure of the product. 594 S.W.2d at 528. In stark contrast, if the sensors in the Edison fail it does not impact any other portion of the car; the driver

still has complete control over the vehicle. R. 3, 6. Like The appellate court determined and the court's rationale in *Bell Helicopter* supports, Edison neither owed nor assumed a duty to improve its vehicle and the mere presence of the sensors was not the proximate cause of Ashpool's accident. R. 11-12.

Established common law strict liability and negligence and section 5552.321 of Fremont's revised code exists to determine product liability and the appellate court was successful able to assess Edison's liability without a common law duty to retrofit, This Honorable Court should overturn the appellate court's decision to adopt the duty to retrofit.

ii. The duty to retrofit will not achieve the goals of the appellate court because the duty to warn and duty to test already exist and perform the same function as duty to retrofit.

The appellate court incorrectly assumes that a common law duty to retrofit will prevent harms created by unreasonably dangerous products that threaten human safety because the duty to warn is a lower bar encompassed within the duty to retrofit. The court admits the rationale of its proposed duty to retrofit are based on the principles of duty to warn and duty to test. R. 14. A post-sale duty to warn requires that a distributor provide a warning if the distributor knows or has reason to know the product poses a substantial risk of harm, can identify those owed a warning, can reasonably assume those owed the warning are unaware of the risk, can effectively communicate a warning that can be acted on by those to whom the warning is owed, and the risk of harm is sufficient to justify a warning. *Restatements (Third) of Torts* Restatement (Third) of Torts: Prod. Liab. § 10 (1998)*;* R. 14. The court's proposed duty to retrofit Fremont already recognizes the post-sale duty to warn. *Shane v. Smith*, 657 XE 720, 725 (Fremont 1989). The duty to test stems from the required duty to warn. *Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517, 1528 (D. Minn. 1989). A manufacturer must test its product if the manufacturer knows the

product has a problem and continues to sell or advertise the product. *Id.* at 1528. The three elements of the proposed duty to retrofit come directly from these two propositions of law and offer nothing new to a manufacturer's duty to its consumers; a manufacturer that has a duty to retrofit will always have a duty to warn.

The appellate court asserts its intention to follow rationale for duty to retrofit adopted by the Third Circuit in *Noel v United.* The first element of duty to retrofit is that the product implicates human safety. R. 15. This is the equivalent Restatement (Third) of Torts duty to warn where "the product poses a substantial risk of harm to persons." *Restatement.* "Risk of harm to persons" and "human safety" express the same level of gravity of the risk.

Next, the appellate court explains that there must be a continuing relationship between the manufacturer and the consumer. R. 15. While the appellate court has taken this concept from *Noel*, this proposition already exists in a combination of elements from both duty to warn, where consumers can be "identified" and "effectively communicated to," and duty to test, where a manufacturer owes a duty to its customers when it "continue[s] sale or advertising of the product." *Restatement (Third) of Torts: Prod. Liab. § 10 (1998); Kociemba*, 707 F. Supp. at 1528. The continuing relationship in *Noel* was predicated on the vendor continuing to communicate with the airplane owner about "maintenance, overhaul, and operation…and supplied with service bulletins supplementing manuals of instruction" for a less than one year old propeller system. *Noel v. United Aircraft Corp.*, 342 F.2d 232, 241 (3d Cir. 1964). *Noel* concocted the concept of continuing relationship by pointing to a manufacturer that communicated with an identifiable consumer of a recent product, a relationship that is already protected by the duties to warn and to test. *Id.*

Finally, the third element of duty to retrofit is that the manufacturer has knowledge of the defect after the consumer took possession of the product. R. 16. Again, this principle already exists explicitly in duty to warn where a manufacturer is liable for harm caused by a "seller's failure to provide a warning after the time of sale or distribution." *Restatement.* Each element *Noel* and the appellate court identified as essential to a duty to retrofit already exist in the principles of duty to warn and therefore add nothing new to manufacturers' duties under products liability.

The Second Circuit Court of Appeals effectively assessed an airplane manufacturer's duty to consumers while explicitly declining to adopt the rule in *Noel* imposing a continuing duty to improve a product where human safety is involved. *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411 F.2d 451, 454 (2d Cir. 1969). There, an airplane manufacturer knew a specific engine it produced had overheating issues that lead to cylinder failures. *Id. at 543.* These cylinder failures resulted in the cylinder separating from the engine, causing the airplane to crash. *Id.* The manufacturer knew of the engine issue eight months before the plane crash on which the suit was predicated. *Id.* The court found that there was sufficient evidence of negligence to require the case be submitted to a jury. *Id.* Further, the court stated that once a manufacturer is aware of dangerous design defects in its product, "the manufacturer has a duty either to remedy these or, if a complete remedy is not feasible, at least give to users adequate warnings…for minimizing the danger." *Id. at 544.* The court recognized the correlation between the correlation between the two options: that they concentric duties with the same remedy. *Braniff* found it unnecessary to create a new common law duty to retrofit because applying the existing principles of duty to warn got the court to the correct outcome.

The duty to retrofit contains the same elements as the duty to warn and therefore adds nothing new to a manufacturer's duty to its consumers. The new common law is redundant and because previous case law has shown that the remedies for the two duties are the same. The new common law will not be any more effective at deterring manufacturers from creating unreasonably dangerous products. For the foregoing reasons, this Honorable Court should overturn the appellate court's adoption of the duty to retrofit.

iii. Adopting a duty to retrofit could violate Fed. R. Evid. 407 if it imposes liability on manufacturers that voluntarily update inherently safe product designs

Finally, adopting a duty to retrofit would deter manufacturers from updating products for fear of creating additional liability for themselves. Imposing such a duty would impede manufacturers from developing improved designs and safety of their products, "since the manufacturer would then be subject to the onerous, and oftentimes impossible, duty of notifying each owner of the previously sold product that the new design is available for installation despite the fact that the already sold products that are, to the manufacturer's knowledge, safe and functioning properly." *Lynch v. McStome & Lincoln Plaza Assocs.*, 548 A.2d 1276 (1988); see *Bragg v. Hi–Ranger, Inc.*, 462 S.E.2d 321 (1995) (suggesting that additional measures that could have been taken are not enough to refute the determination that the manufacturer met the standard of care). In fact, the Federal Rules of Evidence strictly prohibits inferring liability, defect in product or design, and culpability when remedial measures are implemented. Fed. R. Evid. 407.

iv. The Court should overturn the appellate court's adoption of the duty to retrofit because adopting such duty is a legislative, not judicial decision.

The appellate court erroneously adopted a duty to retrofit because such duty is a matter best left to the legislature. A duty to retrofit is a matter most appropriately left for the legislative

and administrative agencies because the legislatures "are better able to weigh the benefits and costs involved in locating, recalling, and retrofitting products as well as other economic factors affecting businesses and consumers." *Gregory*, 538 N.W.2d at 334; *see also Ostendorf v. Clark Equip. Co.*, 122 S.W.3d 530, 534 (Ky. 2003)(stating explicitly that the duty to retrofit is an administrative or legislative matter, not a judicial matter); *see also Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1315 (Kan. 1993)(affirming the duty to retrofit is best suited for the legislature and affirms no federal statute currently exists implementing such duty). Further, safety statutes already exist for product recalls and mandatory retrofitting, even for products whose "dangerous characteristics" were not discovered until after the product's sale. *Modelski v. Navistar Int'l Transp. Corp.*, 707 N.E.2d 239, 247 (Ill. App. Ct. 1999); *see also Rogers v. Clark Equip. Co.*, 744 N.E.2d 364, 370 (2001)(affirming no duty to retrofit exists absent a statutory obligation).

To affirm this point, in *Ostendorf v. Clark Equip. Co.*, the plaintiff was seriously injured while operating a forklift manufactured by the defendant. Similarly, Plaintiff-Petitioner Ashpool was seriously injured while operating the Marconi vehicle manufactured by Defendant-Respondent Edison. *Ostendorf*, 122 S.W.3d at 534. Ostendorf claimed the defendant had an "affirmative, common law duty to retrofit existing products with the safety features that are necessary to make the product reasonably safe." *Id.* However, the court explicitly indicated they were following the majority of jurisdictions by refusing to implement a duty to retrofit because it is a matter reserved for the legislature. *Id.* Further, adopting the duty to retrofit is a complex decision as it is costly to implement with multiple parties to consider. *Id.* Thus, this Court should follow *Ostendorf* in finding the duty to retrofit too complex for the court's resources and best suited for the legislature who has the time and resources to consider such an issue.

The absence of a statutory obligation should lead This Honorable Court to reach one conclusion: no duty to retrofit exists nor should the court adopt such duty at this time. Consequently, this Court should overturn the appellate court's decision to adopt a duty to retrofit in certain strict liability design defect claims in the state of Fremont.

In conclusion, this Honorable Court should overturn the appellate court's adoption of duty to retrofit. Not only is the duty to retrofit superfluous in light of existing product liability laws, but it is also redundant to the duty to warn. Further, the duty to retrofit could deter manufacturers from updating product safety for fear of creating additional liability for themselves. Finally, creating such a duty should be left to the legislature rather than crafted by the judiciary. Therefore, This Honorable Court should overturn the adoption of the duty to retrofit.

CONCLUSION

For the foregoing reasons, this Honorable Court should AFFIRM the decision of the Appellate Court and OVERTURN the Appellate Court's adoption of the duty to retrofit.

Respectfully submitted,

Team J