

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOSEPHINE MORGAN,

Plaintiff,

v.

FORD MOTOR COMPANY
a Delaware corporation;
BRIDGESTONE/FIRESTONE, INC.
an Ohio corporation; and
FRANCIS ROBERT MORGAN,

Defendants

and

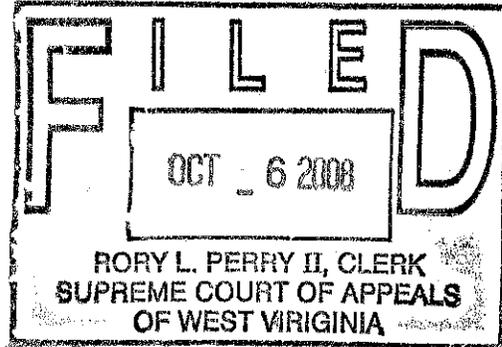
MICHELLE ARCHULETA, as Personal Representative of
THE ESTATE OF FRANCIS ROBERT MORGAN,

Petitioner, Cross-Claim Plaintiff Below,

v.

FORD MOTOR COMPANY,
a Delaware corporation,

Respondent, Cross-Claim Defendant Below.



APPELLANT'S BRIEF

Appeal from the Circuit Court of Kanawha County
Honorable Jennifer Bailey Walker, Judge
Civil Action No. 03-C-162

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No. 34139

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Appeal from the Circuit Court of Kanawha County
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Appellant Michelle R. Archuleta, as Personal Representative of the Estate of Francis Robert Morgan ("Appellant"),¹ defendant and cross-claim plaintiff below, appeals from the

¹Francis Robert Morgan died following the granting of the instant appeal. Mr. Morgan's daughter and appointed personal representative, Michelle R. Archuleta, has recently filed a

“Order Partially Granting Ford Motor Company’s Omnibus Motion for Summary Judgment Regarding Glass Claims” entered by the Circuit Court of Kanawha County on September 17, 2007 (R. at 836) (the “Final Order”), which granted Appellee and cross-claim defendant Ford Motor Company’s (“Ford”) motion for summary as to Appellant’s crashworthiness claim alleging that the injuries sustained by Mr. Morgan in an roll-over accident were the result of defects in the subject vehicle related to Ford’s use of tempered glass in the side-door windows. The Circuit Court concluded that such glass and glazing defect claims are preempted by federal law.

The sole issue raised in this appeal is whether the Circuit Court erred by concluding that Appellant’s glass and glazing claims are preempted. In ruling that Appellant’s glass and glazing claims are preempted by Federal Motor Vehicle Safety Standard 205, 49 C.F.R. § 571.205 (“FMVSS 205”), which requires automakers to use certain types of window glazing in their vehicles, the lower court relied principally upon the reasoning employed in cases such as *O’Hara v. General Motors Corp.*, 2006 WL 1094427 (N.D. Tex. 2006). The reasoning underpinning *O’Hara* and its analogs was, however, recently rejected by the Fifth Circuit Court of Appeals in the first appellate decision to consider this issue. *See O’Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007).

Addressing a factual scenario virtually indistinguishable from the present case, the Fifth Circuit in *O’Hara* held that “the text and commentary on FMVSS 205 show that it is best understood as a minimum safety standard.” *O’Hara*, 508 F.3d at 763. After thoroughly analyzing the text and history of the safety standard, the court rejected the preemption defense and concluded that the fact the regulation permits car makers to use a range of materials in

motion to be substituted as the appellant in this matter pursuant to West Virginia Rule of Appellate Procedure 27(a).

automobile windows “does not establish a federal policy which would be frustrated by a state common law rule requiring advanced glazing in side windows.” *Id.* at 758. The Fifth Circuit’s reasoning in *O’Hara* is highly persuasive and, respectfully, should be adopted by this Court in reversing the summary judgment entered by the lower court in this case.

I. BACKGROUND

Francis Robert Morgan suffered a severe degloving injury to his left arm and hand on January 30, 2001 when the 1999 Ford Expedition he was driving south on Interstate 79 in Braxton County, West Virginia, rolled over. Such injury required extensive surgery and rehabilitation, and otherwise resulted in Mr. Morgan suffering permanent injury. Mr. Morgan’s wife, Plaintiff Josephine Morgan, was sitting in the second row of the vehicle and likewise sustained injuries in the accident.²

Plaintiff Josephine Morgan filed the underlying action in this matter on January 27, 2003, naming her husband and Ford as party defendants.³ Mr. Morgan filed his answer on January 31, 2003, which contained cross claims against Ford asserting, *inter alia*, causes of action for strict liability, negligence, breach of warranty, fraudulent omission, punitive damages, and intentional infliction of emotional distress. (R. at 27-40.)⁴ The claims that Appellant is currently pursuing

²Mr. Morgan’s brother-in-law, Louis Nicassio, was ejected from the front passenger seat of the vehicle during the rollover and died as a result, while his sister-in-law, JoAnn Nicassio, also sustained injuries while seated in the second row with her twin sister. The Nicassio’s were never parties to this case, having brought a separate action in Pennsylvania state court that was previously resolved.

³Plaintiff Josephine Morgan subsequently amended her complaint on January 28, 2003 to name Bridgestone/Firestone, Inc. as a defendant. (*See* R. at 4.) Mrs. Morgan previously resolved all of her claims related to the subject accident.

⁴Such answer also asserted cross claims against Bridgestone/Firestone, Inc., although such claims were subsequently voluntarily dismissed.

against Ford relate to the crashworthiness of the 1999 Expedition and are predicated on the Ford's installation of tempered glass in the side windows of the subject vehicle, which glass by design shattered during the rollover sequence thus opening the portal through which Mr. Morgan's arm was ejected.

Appellant's expert, Thomas J. Feaheny,⁵ issued a report indicating that he was prepared to testify at trial to the following opinions to the effect that the use of laminated glass in the subject vehicle, which glass provides ejection mitigation and occupant protection during a rollover, would have prevented Mr. Morgan's injuries:

- A. The incident 1999 Ford Expedition was defective and unreasonably dangerous in its design for failing to incorporate adequately supported laminated or other ejection resistant side and rear glass, which was technologically and economically feasible.
- B. Ford's use of adequately supported laminated or other ejection resistant door glass would have significantly reduced the risk of partial or complete ejection of the driver and passengers without impairing the utility of the door glass.
- C. Ford was also both negligent and grossly negligent in its failure to incorporate adequately supported ejection resistant glazing as Ford had longstanding knowledge that tempered glass subjected occupants to an extreme degree of risk of ejection or partial ejection in foreseeable accidents. Ford's sole motivation appears to be its desire to avoid a "cost penalty."
- D. Ford was also negligent in the use of a seat belt system known to be subject to self-release during foreseeable accidents and in its failure to deploy available integrated seatbelts or seatbelt pretensioners to reduce the risk of occupant ejection.

⁵Prior to leaving Ford in September 1983, Mr. Feaheny was Ford's Vice President of Vehicle Research responsible for worldwide research on cars and trucks.

- E. Each of the design deficiencies summarized in the foregoing paragraphs A through D constitute defects of design rendering the vehicle dangerous beyond the contemplation of the average consumer.
- F. All of the foregoing opinions are true to a reasonable engineering certainty.

Feaheny Report dated March 19, 2007 (attached as Exhibit A to Cross-Claimant Francis Robert Morgan's Resp. in Opp. to Def. Ford Motor Co.'s Omnibus Mot. for Summ. J. (hereinafter "Morgan Resp."), R. at 627). Mr. Feaheny testified in deposition that Petitioner's left hand and left arm were ejected through the broken tempered glass of the driver's side door window, and that had Ford used laminated glass or some other alternative glazing it would have prevented such injury in the subject accident. Feaheny Dep. at 77 & 97 (attached as Exhibit 12 to Ford Mem. in Supp. of Omnibus Mot. for Summ. J. (hereinafter "Ford Mem."), R. at 459, 464). Appellant's biomechanics expert, Paul Lewis, Jr., likewise testified in deposition that Mr. Morgan's degloving injury was sustained as a result of his "arm getting outside the confines of the vehicle" and the arm "being pinched or trapped between the ground and . . . the exterior of his . . . door panel." Lewis Dep. at 44. Mr. Lewis further testified that the injury would not have occurred had the glass in the vehicle's window contained Petitioner's arm. *Id.* at 47.

On June 26, 2007, Ford filed its *Omnibus Motion for Summary Judgment*, asserting various grounds for summary judgment⁶ including the preemption issue that is the subject of this appeal. (R. at 190, 199-208.) The Circuit Court subsequently filed the subject Final Order on

⁶Appellant previously agreed to the entry of summary judgment on his claim that the subject Ford vehicle was defective based upon its stability and handling characteristics, which claims were subject to an order entered by the lower court on August 29, 2007. (R. at 832-35.)

September 17, 2007, concluding that all of Appellant's claims related to glass and glazing are preempted by federal law. (R. at 836.) This appeal followed.⁷

II. ASSIGNMENT OF ERROR

The Circuit Court erred as a matter of law in concluding that Appellant's glass and glazing defect claims conflict with, and are thus impliedly preempted by, the National Traffic and Motor Vehicle Safety Act of 1966, 49 U.S.C. §§ 30101-30501 (the "Safety Act") and its implementing regulation, Federal Motor Vehicle Safety Standard 205, 49 C.F.R. § 571.205 ("FMVSS 205").

III. STANDARD OF REVIEW

The standard of review in this case is *de novo*. See *Hartley Marine Corp. v. Mierke*, 196 W. Va. 669, 673, 474 S.E.2d 599, 603 (1996) ("preemption is a question of law reviewed *de novo*") (citing *Kollar v. United Transportation Union*, 83 F.3d 124, 125 (5th Cir.1996)); see also syl. pt. 2, *Lontz v. Tharp*, 220 W. Va. 282, 647 S.E.2d 718 (2007) (same).

⁷On January 2, 2007, Appellant filed a *Motion for Relief from Judgment Order Granting Ford Motor Company's Motion for Summary Judgment on Glass and Glazing Claims*, requesting that the lower court reconsider its prior ruling pursuant W. Va. R Civ. P. 60(b)(6) in light of the Fifth Circuit's recent holding in *O'Hara v. General Motors*. (R. at 853.) The Circuit Court did not rule upon such motion prior to the granting of the instant appeal.

IV. ARGUMENT

The Circuit Court granted summary judgment to Ford on Appellant's glass and glazing defect claims, concluding that such claims are impliedly preempted by the Safety Act and its implementing regulation, FMVSS 205.⁸ Specifically, the lower court concluded that because FMVSS 205 ostensibly permits the use of tempered glass in automobile side windows, any state tort law that forecloses such "option" must be preempted because it would necessarily frustrate the federal regulatory scheme. *See* Final Order at 7, ¶ 11 (R. at 842). In effect, the Circuit Court found that the mere existence of optional means of complying with a particular regulation,

⁸FMVSS 205 currently mandates that glazing materials in motor vehicles must conform to the standards of the American National Standards Institute ("ANSI"), American National Standard for Safety Glazing Materials, ANSI/SAE Z26.1-1996. *See* 68 Fed. Reg. 43,964-65 (July 25, 2003). This current standard provides as follows:

Except for special requirements for specific locations, safety glazing materials of seven general types *can meet some or all requirements detailed in this standard*. All seven types are commercially feasible today. Each of them possesses its own distinctive safety characteristics. The seven types are listed below and are described in Section I.

- (1) Laminated Glass
- (2) Glass-Plastic Glazing Material
- (3) Tempered Glass
- (4) Plastic
- (5) Multiple Glazed Unit (Class 1 and Class 2)
- (6) Bullet-Resistant Glazing
- (7) Bullet-Resistant Shield

(*See* Exhibit 16 to Ford Mem., R. at 510.) At the time that the subject vehicle was manufactured, FMVSS 205 required conformity with an earlier version of this safety standard, ANSI Z26.1-1977, as supplemented by Z26.1a-1980. *See* 49 Fed. Reg. 6732 (Feb. 23, 1984). This standard was the subject of periodic supplementation by NHTSA prior to the agency's 2003 adoption of ANSI's 1996 standard. *See, e.g.,* 56 Fed. Reg. 18526 (April 23, 1991) (amending FMVSS 205 to permit three new types of glass-plastic glazing). For purposes of this appeal, however, there is no substantive difference between these standards, as both laminated and tempered glass have long been included as materials approved for use in vehicle side windows.

standing alone, automatically triggers a finding of implied conflict preemption. As set forth anon, such an approach to federal preemption in this context is erroneous as recently held by the Fifth Circuit Court of Appeals in *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007).⁹

A. ONLY THOSE STATE TORT-LAW CLAIMS THAT ACTUALLY CONFLICT WITH FEDERAL MOTOR VEHICLE SAFETY STANDARDS ARE PREEMPTED.

Preemption may be either expressly set forth by federal statute or it may be implied. *In Re: West Virginia Asbestos Litigation*, 215 W. Va. 39, 592 S.E.2d 818, 822 (2003). Implied preemption may take two forms:

[I]n the absence of explicit statutory language signaling an intent to preempt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the states to supplement federal law, or where the state law at issue conflicts with federal law, either because it is impossible to comply with both or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives[.]

Id. at 822 (quoting *Hartley*, 196 W. Va. at 674, 474 S.E.2d at 604). This case presents an issue regarding the latter form of preemption—implied conflict preemption.

Congress passed the Safety Act in 1966 to reduce motor vehicle injuries and deaths. *See* S. Rep. No. 89-1301, 89th Cong., 2nd Sess., at 10-11 (1966), reprinted in 1966 U.S.C.C.A.N. 2709 (attached as Exhibit B to Morgan Resp., R. at 643). To this end, Congress empowered the National Highway Traffic Safety Administration (“NHTSA”) to prescribe motor vehicle safety

⁹The Fifth Circuit’s reasoning in *O’Hara* was recently adopted by what appears to be the only other appellate court to consider this issue, *see MCI Sales and Services, Inc. v. Hinton*, 2008 WL 4172643 at *7-8 (Tex. App. Sept. 10, 2008), as well as by at least one federal district court, *see Spruell v. Ford Motor Co.*, 2008 WL 906648 (W.D. Ark. April 1, 2008); *Burns v. Ford Motor Co.*, 2008 WL 222711 (W.D. Ark. Jan. 24, 2008).

standards that “shall be practicable, meet the need for motor vehicle safety, and be stated in objective terms.” 49 U.S.C. § 30111(a). The Act further defines “safety standards” as “minimum standard(s) for motor vehicle performance or motor vehicle equipment performance . . .” 49 U.S.C. § 30102(a)(9).

The Safety Act includes a “savings clause” expressly providing that “compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.” 49 U.S.C. § 30103(e). A review of the legislative record of the Safety Act reveals that complete preemption of common-law damage claims was not intended despite compliance with the safety standards promulgated by NHTSA. “It is intended, and this subsection specifically establishes, that compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly those relating to warranty, contract, and tort liability.” H.R. Rep. No. 89-1776, 89th Cong. 2nd Sess., at 24 (1966).

In *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000), the United States Supreme Court construed the savings clause as evidencing Congress’ intent to “preserve” common-law tort claims “that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor.” 529 U.S. at 870. The *Grier* Court accordingly made clear that common-law claims are preempted only when they “actually conflict” with federal standards. *Id.* at 874. Thus, “[w]hen NHTSA regulations are only intended to create a ‘minimum safety standard,’ states are free to adopt common law rules which require a greater level of safety.” *O’Hara v. General Motors Corp.*, 508 F.3d at 759 (citing, *inter alia*, *Geier*, 529 U.S. at 870).

B. THERE IS NO CONFLICT BETWEEN FMVSS 205 AND APPELLANT'S COMMON-LAW PRODUCT DEFECT CLAIMS SO AS TO WARRANT A FINDING OF IMPLIED CONFLICT PREEMPTION.

In this case, the Circuit Court ruled that “because tempered glass is a permitted option for manufacturers to use in vehicle side windows under FMVSS 205, the imposition of state tort liability based on the exercise of such option would frustrate the full purposes and objectives of Congress.” Final Order at 7, ¶ 11. This conclusion misapprehends the law of implied conflict preemption as it applies to the Safety Act and the motor vehicle safety standards promulgated under such statute.

1. Geier Makes Clear that the Mere Existence of Options Under a Regulation Does Not Require a Finding of Implied Preemption.

In concluding that Appellant’s glass and glazing claims are preempted, the Circuit Court primarily relied upon *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000). *Geier* involved Federal Motor Vehicle Safety Standard 208 (“FMVSS 208”), the relevant version of which permitted automobile manufacturers to choose from among various design options for passive restraints in the front seat of cars, including airbags. The plaintiff in *Geier* alleged that Honda was negligent for failing to install a driver’s side airbag—a device that had undergone a complex and highly controversial regulatory history and was the subject of intent public debate.

In concluding that the plaintiff’s no-airbag claim was preempted, *Geier* relied on an exhaustive analysis of the standard’s regulatory history—and, in particular, the agency’s stated reasons for adopting the particular options framework at issue—not on the mere fact that FMVSS 208 gave manufacturers a choice of various passive restraint options. *See* 529 U.S. at 875-83. Among other things, the Court observed that FMVSS 208, which included both

regulatory options and a “*gradual* phase-in” period for passive restraints, had been carefully designed to encourage automobile makers to gradually begin equipping cars with airbags, thereby encouraging public acceptance of the new technology without discouraging the public from using seatbelts. *Id.* at 878-79. The regulatory preamble accompanying FMVSS 208 further made clear that the reason the federal government gave car makers the choice of installing various types of passive restraints was to ensure that car manufacturers installed a mix of different devices in the front seats of cars, in part to “build public confidence,” in airbags, *id.* at 879, and to avoid a “‘public backlash’ to an airbag mandate that consumers might not fully understand.” *Id.* at 891.

In light of these concerns about airbags, *Geier* concluded that NHTSA’s decision to give manufacturers a choice of different passive restraint options was based on the agency’s specific goal of ensuring that some cars include forms of passive restraints other than airbags, and its desire to foster a “mix of [passive restraint] devices” in cars. *Id.*

The Court also emphasized that, in issuing FMVSS 208, the federal government had expressed grave concerns about auto manufacturers installing airbags in too many cars too quickly. *Id.* at 879. *Geier* held that, in light of this unique goal, a jury verdict holding a manufacturer liable for its failure to install an airbag would undermine federal policy by pushing car makers to install airbags in all cars.

Geier is clear on the point that the existence of regulatory options, standing alone, does not possess any preemptive force. If the mere existence of options for complying with regulatory requirements were sufficient to preempt tort claims, then *Geier* would not have needed even to address the complex policies underlying FMVSS 208; it would have been sufficient to point out that the car maker in that case (Honda) had chosen to install one of several permitted regulatory

options. *Geier*, however, never purported to rely on such a simplistic approach. To the contrary, the Supreme Court's decision includes—and is based on—a detailed and exhaustive examination of the highly unusual history and framework of FMVSS 208.

Geier thus makes clear that the provision of optional means of complying with a regulation, by itself, does not exert any preemption force under the Safety Act unless the provision of such options are prompted by specific concerns that would be directly undermined if common-law claims were permitted. Rather, it is only “[w]hen a federal safety standard *deliberately* leaves manufacturers with a choice among designated design options *in order to further a federal policy*, [is] a common law rule which would force manufacturers to adopt a particular design option . . . preempted.”) *See O’Hara v. General Motors Corp.*, 508 F.3d at 759 (emphasis added) (citing *Geier*, 529 U.S. at 875, 878-79).

2. The Policy Considerations Dispositive in *Geier* Do Not Justify A Finding of Federal Preemption With Regard to FMVSS 205.

None of the policy considerations that were dispositive in *Geier* with respect to airbags are present in this case. First, in contrast to the hotly-debated technology at issue in *Geier*, this case involves an uncontroversial device—laminated glass—that has never been the subject of any sort of public outcry, and that has in fact been permitted in side windows and *mandated* for front windshields by NHTSA for nearly four decades.

Second, in contrast to the airbag-options standard at issue in *Geier*, FMVSS 205’s history contains not a single statement on NHTSA’s part that it intended to promote a diverse array of side-window technology. Instead, FMVSS 205 was nothing more than a codification of the ANSI materials standard. And the ANSI materials standard is, simply, the list of materials approved by the automobile industry itself. *See* 68 Fed. Reg. 43,964 (July 25, 2003) (attached as

Exhibit H to Morgan Resp., R. at 769) (updating FMVSS 205 to incorporate by reference the 1996 version of the ANSI standards).

Thus, unlike the circumstances in *Geier*, there was no fear of a “public backlash” against advanced glazing that prompted the options framework of FMVSS 205. *See* 529 U.S. at 891. And, unlike *Geier*, in this case there is no intended “phase in” of any particular technology, *id.* at 879, or any plan by NHTSA to “bring about a mix of different devices introduced gradually over time.” *Id.* at 875. Nor has NHTSA issued any statements implying the need to “deliberately provide the manufacturer with a range of choices,” *id.* at 874, or otherwise pronounced anything akin to *Geier*’s “policy judgment that safety would best be promoted if manufacturers installed alternative protection systems in their fleets rather than one particular system in every car.” *Id.* at 881.

Indeed, as the Fifth Circuit Court of Appeals recently observed in rejecting the argument that FMVSS 205 impliedly preempts common-law claims related to glass and glazing,

In *Geier* and later in *Hurley* [*v. Motor Coach Indus.*, 222 F.3d 377, 382 (7th Cir.2000)], federal courts held that the carefully constructed safety restraint options and timelines in FMVSS 208 preempted state common law actions which would impose liability on manufacturers for failing to adopt litigants’ proposed improvements. *Geier*, 529 U.S. at 875, 878-79, 120 S.Ct. 1913; *Hurley*, 222 F.3d at 383. The text of FMVSS 208 strongly supports the conclusion that it expresses a federal policy which would be frustrated by lawsuits seeking to establish common law rules to the contrary. *All of these factors—detailed implementation timelines, full vehicle testing procedures and “options” language—are conspicuously absent from FMVSS 205.*

O’Hara v. General Motors Corp., 508 F.3d at 760 (emphasis added).¹⁰ Relying upon such fact,

¹⁰Importantly, FMVSS 205 is purely a *materials standard*, and with one exception does not require that glass and glazing materials be tested in the frames in which they will ultimately be used. *See O’Hara*, 508 F.3d at 760 (noting that “[o]n its face, FMVSS 205 is a materials standard that sets a safety ‘floor’ to ensure that the glazing materials used by manufacturers meet certain basic requirements.”)

the *O'Hara* court concluded that “[b]ecause we find that FMVSS 205 differs significantly from FMVSS 208 and does not establish a federal policy which would be frustrated by a state common law rule requiring advanced glazing in side windows, we hold that the [plaintiffs’] suit is not preempted.” *Id.* at 758; *see also MCI Sales and Services, Inc. v. Hinton*, 2008 WL 4172643 at *8 (Tex. App. Sept. 10, 2008) (same holding).

3. NHTSA’s Statement Regarding FMVSS 205 Do Not Evidence Any Clear Policy Regarding Glazing Materials That Would Be Frustrated by Appellant’s Action.

NHTSA’s decision to adopt existing industry materials standards for side windows has *never* been accompanied by any policy statements warranting a finding that the regulatory purposes of FMVSS 205 would be hindered by permitting common-law claims alleging deficiencies in the glass and glazing materials used in automobiles. Rather, the standards set forth in FMVSS 205 are nothing more than minimum safety standards that have no preemptive effect. *See O’Hara v. General Motors Corp.*, 508 F.3d at 759 (“When NHTSA regulations are only intended to create a ‘minimum safety standard,’ states are free to adopt common law rules which require a greater level of safety.”) (citing, *inter alia*, *Geier*, 529 U.S. at 870).

In analyzing NHTSA’s final rule amending FMVSS 205 in 2003 to adopt the 1996 ANSI standards, the Fifth Circuit observed in *O’Hara* that,

There is no language in the Glazing Materials Final Rule commentary indicating that NHTSA intended to “preserve the option” of using tempered glass in side windows, or that preserving this option would serve the safety goals of FMVSS 205. *Both the text of FMVSS 205 and the Final Rule commentary support the conclusion that it is a minimum safety standard.*

O'Hara, 508 F.3d at 761 (emphasis added).¹¹

While such commentary by NHTSA in 2003 obviously postdates the manufacture of the vehicle involved in this case, neither the Circuit Court nor Ford in its arguments below have pointed to any statement made by NHTSA in the course of its earlier rulemaking on FMVSS 205 suggesting that the agency had any specific policy goals in mind, aside from establishing minimum safety standards, when it permitted manufacturers to choose among the various approved glass and glazing materials. Indeed, as recently as 1991, NHTSA was encouraging automobile manufacturers to make greater use of alternative glazing materials. *See, e.g.*, 56 Fed. Reg. 18,526 (April 23, 1991) (amending FMVSS 205 to permit three new types of glass-plastic glazing, and stating that “the agency encourages greater use of glass-plastic glazing because of its proven injury-reduction capabilities in crashes”). Consequently, there is no basis for the Circuit Court’s conclusion that Appellant’s common-law claims conflict with FMVSS 205, and accordingly the lower court’s grant of summary judgment on this issue should be reversed.

¹¹In rejecting the preemption defense advanced by Ford in this case, the Fifth Circuit in *O'Hara* also considered the effect of NHTSA’s action in June 2002, where it issued notice “terminating rulemaking in which the agency was considering advanced glazing requirements for passenger cars and other light vehicles to reduce the risk of ejections in crashes.” 67 Fed. Reg. 41,365 (June 18, 2002) (attached as Exhibit F to Morgan Resp., R. at 743). The *O'Hara* court, analyzing such action in light of *Sprietsma v. Mercury Marine Corp.*, 537 U.S. 51 (2002), concluded that “nothing in the Notice of Withdrawal undermines the conclusion, drawn from the text and Final Rule commentary, that FMVSS 205 is a minimum safety standard.” *O'Hara*, 508 F.3d at 763.

V. CONCLUSION

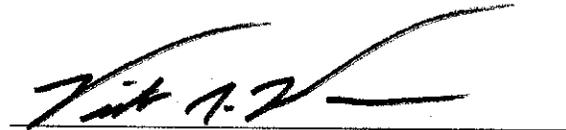
WHEREFORE, for the reasons stated above, Appellant requests that the Circuit Court's grant of summary judgment to Ford on Appellant's glass and glazing defect claims be reversed, and that this case be remanded for the trial of such claims.

Respectfully submitted,

**Michelle R. Archuleta, as Personal
Representative of the Estate of Francis
Robert Morgan,**

Appellant,

By Counsel



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No. 34139

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOSEPHINE MORGAN,

Plaintiff,

v.

FORD MOTOR COMPANY,
a Delaware corporation;
BRIDGESTONE/FIRESTONE, INC.
an Ohio corporation; and
FRANCIS ROBERT MORGAN,

Defendants

and

MICHELLE ARCHULETA, as Personal Representative of
THE ESTATE OF FRANCIS ROBERT MORGAN,

Appellant, Cross-Claim Plaintiff Below,

v.

FORD MOTOR COMPANY,
a Delaware corporation,

Appellee, Cross-Claim Defendant Below.

CERTIFICATE OF SERVICE

The undersigned counsel for Appellant hereby certifies that true and accurate copies of the *Appellant's Brief* were served upon all counsel for Appellee by United States Mail on this 24 day of October, 2008, addressed as follows:

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