

No. 34139

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

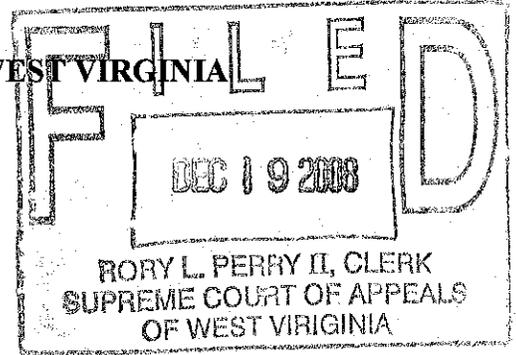
**MICHELLE ARCHULETA, as Personal Representative of
THE ESTATE OF FRANCIS ROBERT MORGAN,**

Appellant,

v.

**FORD MOTOR COMPANY,
a Delaware corporation,**

Appellee.



APPELLEE'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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¹ Throughout this brief, Ford cites to various outside and unreported case opinions. Upon review of Appellee's Brief, should the Court desire Ford to provide copies of any such materials, counsel for Ford will provide any requested materials to the Court and to opposing counsel.

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I. OVERVIEW

Appellee Ford Motor Company ("Ford") substantively agrees with the Background and Standard of Review set forth by Appellant. (Appellant's Brief, §§ I and III). While Ford disagrees with Appellant's Assignment of Error (Appellant's Brief, § II), it concurs that the issue on appeal is whether the National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, 15 U.S.C. § 1381 *et seq.*, recodified as amended, 49 U.S.C. § 30101 *et seq.* (the "Safety Act"), as implemented through Federal Motor Vehicle Safety Standard 205 ("FMVSS 205"), 49 C.F.R. § 571.205 (2003), preempts Appellant's state tort law claim that the subject 1999 Ford Expedition was defective by virtue of Ford's use of tempered safety glass in the vehicle's side window openings. Ford asserts that preemption is mandated by the Supreme Court of the United States' decision in *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000). Ford respectfully asks that the Court affirm the decision of the Circuit Court of Kanawha County and deny Appellant's appeal in its entirety.

II. ARGUMENT

Geier v. American Honda Motor Co., Inc., 529 U.S. 861 (2000), is the seminal United States Supreme Court case addressing the preemptive effect of the Safety Act on state tort law claims.² Preemption arises when a state tort law claim stands in actual conflict with a Federal Motor Vehicle Safety Standard such that it imposes an obstacle to the federal objectives sought to be accomplished by that standard. *See id.* at 881-82 (2000). When optional methods of compliance with a Federal Motor Vehicle Safety Standard are deliberately maintained by the

² Ford's previously filed Response to Petition for Appeal of Francis Robert Morgan, Section IV (A) and (B), provides a broader discussion of preemption law generally.

National Highway Traffic Safety Administration (“NHTSA”), a state tort law claim which seeks to prevent exercise of an expressly approved option cannot stand. *See id.* at 874-882.³

The rationale of the *Geier* Court compels a finding that Appellant’s claim is preempted. As demonstrated below, NHTSA has deliberately maintained the optional compliance framework of FMVSS 205 governing automotive glass and glazing applications for virtually identical reasons to its maintenance of the various passive restraint options under FMVSS 208 as addressed in *Geier*. Specifically, NHTSA determined that the various different types of glass and glazing materials permitted for use in automotive applications under FMVSS 205, including the use of tempered safety glass in side window openings, each offer unique advantages and drawbacks. After decades of study, NHTSA expressly rejected the glazing mandate sought to be imposed through Appellant’s claim and concluded that the optimal balance of cost, technology and safety concerns is struck by permitting manufacturers to choose from among the different glass and glazing materials approved by FMVSS 205. Any claim that seeks to preclude outright the use of an approved material frustrates the objectives sought to be achieved by NHTSA’s optional compliance framework and must accordingly be held preempted.

The Court of Appeals for the Fifth Circuit’s decision to the contrary in *O’Hara v General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007), is plainly wrong. The *O’Hara* court improperly discounted NHTSA’s reliance on and performance of decades of studies and analyses of glass and glazing materials and effectively disregarded NHTSA’s ultimate pronouncement that safety

³ The *Geier* opinion references the “Department of Transportation.” Administration of the Safety Act was originally conferred upon the Secretary of Commerce. Congress subsequently transferred all powers under the Safety Act to the Secretary of Transportation. 49 U.S.C. § 1655(a)(6)(A). The Secretary of Transportation delegated these powers initially to the National Highway Safety Bureau, 49 U.S.C. § 1.51, 35 Fed. Reg. 4955, and ultimately to the National Highway Traffic Safety Administration (“NHTSA”). 49 C.F.R. § 1.51. NHTSA was the agency responsible for enforcement of Federal Motor Vehicle Safety Standards at all times relevant to this appeal and retains oversight today. For simplicity, Ford utilizes the term “NHTSA” herein when referring to the agency with administrative responsibility for the Safety Act regardless of time frame.

would best be promoted through continued approval of all the various glass and glazing materials expressly permitted under FMVSS 205. Further, the *O'Hara* court justified its disregard by relying on an easily distinguished opinion involving the federal government's refusal to regulate in any fashion a certain area of marine safety, as opposed to a decision to preserve the existing optional regulatory framework in FMVSS 205. The *O'Hara* opinion is not controlling, and its flawed analysis should be rejected by this Court.

A. *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000) – Preemption of State Law Tort Claims by Federal Motor Vehicle Safety Standards.

Geier v. American Honda Motor Co., Inc., 529 U.S. 861 (2000), arose from a 1992 automobile accident in which Alexis Geier collided with a tree while driving a 1987 Honda Accord. Ms. Geier and her parents sued various Honda entities (hereinafter collectively referred to as "Honda") in the United States District Court for the District of Columbia and alleged that the subject Honda Accord was defective under District of Columbia tort law due to the absence of a driver side airbag. *See id.* at 865.

Honda moved for summary judgment, arguing that the "no-airbag claim" asserted by the Geier family was preempted by the applicable version of Federal Motor Vehicle Safety Standard 208 ("FMVSS 208"). *Id.* at 864-65. That Standard permitted manufacturers to choose from various different types of restraint systems, including the use of airbags, to achieve compliance. *See* 49 CFR § 571.208 (1984); 49 Fed. Reg. 28962, 29008-010 (July 17, 1984). Compliance with the Standard did not require the use of airbags in any specific vehicle line. *Id.* The parties agreed that the subject vehicle complied with FMVSS 208 notwithstanding its lack of a driver side airbag.

Honda asserted that the "no-airbag claim" was preempted either expressly by the Safety Act's stated preemption of state standards not identical to a Federal Motor Vehicle Safety

Standard governing the same aspect of motor vehicle performance or equipment, 15 U.S.C. § 1392(d) (1988),⁴ or impliedly because a verdict in favor of the Geier family would conflict with the optional compliance framework of FMVSS 208. *See Geier v. American Honda Motor Co., Inc.*, 166 F.3d 1236, 1238 (C.A.D.C. 1999). The Geier family argued that the Safety Act's express preemption provision is limited to state statutes and regulations and that common law claims are expressly preserved by the Safety Act's savings clause, 15 U.S.C. § 1397(k),⁵ which states, "compliance with any Federal Motor Vehicle Standards . . . does not exempt any person from any liability under common law." *Geier*, 166 F.3d at 1238.

The trial court granted summary judgment for Honda, noting that the "no-airbag claim" sought to establish a *de facto* safety standard that was different than FMVSS 208 – i.e. one that required the use of air bags – and was accordingly expressly preempted by 15 U.S.C. § 1392(d). *See Geier*, 529 U.S. at 865; *see also Geier*, 166 F.3d at 1238 (explaining rationale and precedence underlying trial court's decision). The United States Court of Appeals for the District of Columbia affirmed summary judgment, but did so on the basis of implied preemption. *See Geier*, 166 F.3d at 1240-41 (discussing concerns with finding of express preemption, but avoiding question due to clear presence of implied preemption); *see also Geier*, 529 U.S. at 865-66.

Recognizing a clear split of authority between several Federal Courts of Appeal, all of which recognized preemption of "no-airbag claims" albeit on varied grounds,⁶ and a collection of state courts, all of which found no basis for preemption, the Supreme Court of the United States

⁴ 15 U.S.C. § 1392(d) was recodified without substantive change in 1994 as 49 U.S.C. § 30103(b)(1); *see also Geier v. American Honda Motor Co., Inc.*, 166 F.3d 1236, 1237 n.2 and 1238 n.4 (C.A.D.C. 1999).

⁵ 15 U.S.C. § 1397(k) was recodified at 49 U.S.C. § 30103(e) (1994).

⁶ For a detailed review of this history, please see Ford's previously filed Response to Petition for Appeal of Francis Robert Morgan, Section IV(C).

granted *certiorari* to resolve the conflict. *Geier*, 529 U.S. at 866. In reaching its ultimate conclusion that state tort law “no-airbag claims” are preempted, the Court addressed three main questions: (1) Does the Safety Act’s preemption provision act to expressly preempt “no airbag” tort claims?; (2) Notwithstanding, do ordinary preemption principles apply to the Safety Act?; and (3) Do “no airbag” tort claims actually conflict with FMVSS 208 and, thus, with the Safety Act itself? *Id.* at 867. The present appeal focuses on the applicability of the *Geier* Court’s reasoning in answering the third question affirmatively to determine whether Appellant’s claim is likewise impliedly preempted.⁷

Analyzing the issue of implied conflict preemption, the majority of the *Geier* Court rejected the dissent’s characterization of FMVSS 208 as “a minimum airbag standard” and recognized that NHTSA “deliberately provided the manufacturer with a range of choices among different passive restraint devices.” *Geier*, 529 U.S. at 874-75. The Court noted that this optional compliance framework was intended to further the safety objectives of FMVSS 208 by permitting the introduction of different systems over time, thereby lowering costs, overcoming technical safety problems and encouraging technological development. *Id.* at 875.

After reviewing the regulatory and judicial history of FMVSS 208, the Court analyzed numerous important considerations taken into account by the applicable version of FMVSS 208. Specifically, the Court discussed the fact that while airbags could address some of the risks posed by an occupant’s failure to utilize an available seat belt, it could not address all such risks. *Id.* at 877. The Court further recognized that airbags and other passive restraint systems pose

⁷ Ford does not assert that Appellant’s “no-laminated-glass claim” is expressly preempted by the Safety Act, and Appellant does not dispute that ordinary principles of implied conflict preemption must be considered in resolving the viability of her claim. Notwithstanding, please see Ford’s previously filed Response to Petition for Appeal of Francis Robert Morgan, Section IV(D) at 16-17, for a discussion of the *Geier* Court’s analysis in resolving the first two questions. *See also Geier*, 529 U.S. at 867-74.

their own unique disadvantages and safety risks. *Id.* Finally, the Court noted both the increased costs that would be imposed by an airbag mandate and the related risk of public resistance. *Id.* at 878.

The *Geier* Court explained that the above considerations were reflected by FMVSS 208 in several ways. “Most importantly, that standard deliberately sought variety – a mix of several different passive restraint systems.” *Id.* The means for achieving such desired variety was the establishment of a minimum performance requirement and “allowing manufacturers to choose among different passive restraint mechanisms, such as airbags, automatic belts, or other passive restraint technologies to satisfy that requirement.” *Id.* (citing 49 Fed. Reg. 28990, 28996 (1984)).

Explaining further, the *Geier* Court noted that NHTSA had rejected a proposed standard that would mandate the use of airbags in all vehicles due to “safety concerns (perceived or real)” associated with their use and that it believed permitting a mix of devices would both facilitate the development of data on comparative effectiveness and allow industry to overcome safety concerns and high production costs. *Id.* at 879 (citing 49 Fed. Reg. 28990, 29001-002 (1984)). NHTSA hoped that the optional compliance framework of FMVSS 208 would lead to “the development of alternative, cheaper, and safer passive restraint systems.” *Id.* In essence, FMVSS 208 reflected NHTSA’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.

Turning to the “no-airbag claim” asserted by the Geier family, the *Geier* Court reasoned that such a claim depended on the existence of a duty – i.e. a rule of state tort law – requiring automobile manufacturers to install airbags at the time the subject Honda Accord was

manufactured. *Id.* By its terms, such a duty would likewise have been applicable to manufacturers of all similar cars. *Id.* By mandating the use of airbags in all vehicles, this state law duty would have frustrated the objectives of NHTSA and presented an obstacle to the variety and mix of devices deliberately sought by FMVSS 208. *Id.* For that reason, the Court held the “no-airbag claim” asserted by the Geier family to be preempted. *Id.* at 881-82 (citing *Fidelity Fed. Sav. & Loan Assoc. v. de la Cuesta*, 458 U.S. 141, 156 (1982), for proposition that conflict and preemption arise where state law limits the availability of an option that a federal agency considers essential to ensure its ultimate objectives).

Geier establishes an important framework for analyzing the preemptive effect of Federal Motor Vehicle Safety Standards on state tort law claims. First, it clarifies the interplay of the Safety Act’s preemption provision and savings clause. In this respect, *Geier* rejects the argument that state tort law claims are subject to express preemption under the Safety Act; however, it equally holds that the Safety Act’s savings clause does not insulate all common law claims from preemption. Rather, traditional principles of implied conflict preemption apply, and preemption is neither favored nor disfavored under the Safety Act. *Geier*, 529 U.S. at 869-74 (Safety Act reflects a “neutral policy” toward the application of preemption).

Geier further instructs that the state of technology, comparative cost of alternatives and real or perceived safety concerns are all legitimate agency considerations when formulating a Federal Motor Vehicle Safety Standard. When NHTSA determines that its legitimate concerns about safety, technological advancement, and cost can be best promoted by permitting manufacturers to choose from among expressly approved methods, its deliberate establishment and maintenance of such an optional compliance framework is a means-related objective worthy of preemptive protection. State tort law claims that frustrate such a framework, through either

mandating or prohibiting expressly authorized options, stand in actual conflict with the Standard and must not be permitted.

B. Appellant's Claim of Product Defect Premised on Ford's Use of Tempered Safety Glass is Preempted by Federal Motor Vehicle Safety Standard 205.

The rationale of *Geier* is not limited to "no-airbag claims." While a "no-airbag claim" and the 1984 version of FMVSS 208 were specifically at issue, the *Geier* Court analyzed preemption of state tort law claims under the Safety Act generally and based its decision on the application of traditional implied conflict preemption principles. Ultimately, *Geier* establishes that NHTSA's deliberate formation of an optional compliance framework for the purpose of balancing safety, cost and technological concerns is a legitimate federal objective deserving of preemption protection from state law claims that would interfere with or frustrate such a framework.

Like FMVSS 208, FMVSS 205 reflects a deliberate optional compliance framework which seeks to balance complex technological, cost and safety considerations. Tempered safety glass is an expressly permitted option under FMVSS 205 for use in automotive side window openings. Because Appellant's claim would effectively prohibit use of this federally permitted option by operation of state tort law, it is preempted.

- 1. The rationale of *Geier* extends beyond "no-airbag claims" and mandates the preemption of state tort law claims which seek to foreclose the use of options expressly permitted under a Federal Motor Vehicle Safety Standard as part of a deliberate optional compliance framework.**

Various federal courts have correctly applied *Geier's* reasoning to find preemption of claims other than those premised on the absence of airbags. By way of example, the Court of Appeals for the Seventh Circuit interpreted *Geier* as establishing that the entire deliberate optional compliance framework established by FMVSS 208 was to be protected through

preemption – not just the option specifically at issue in *Geier* to comply with FMVSS 208 without the use of airbags. See *Hurley v. Motor Coach Indus., Inc.*, 222 F.3d 377, 382 (7th Cir. 2000) (finding preemption of claim that bus was defective due to manufacturer’s use of only a two-point driver seat belt, an option expressly permitted under the applicable Federal Motor Vehicle Safety Standard). The *Hurley* court explained, “When a Federal Motor Vehicle Safety Standard leaves a manufacturer with a choice of safety device options, a state suit that depends on foreclosing one or more of these options is preempted.” *Id.* at 383 (emphasis added).

The Court of Appeals for the Eleventh Circuit interprets *Geier* similarly. See *James v. Mazda*, 222 F.3d 1323, 1324-26 (11th Cir. 2000) (reaffirming analysis and conclusion reached in *Irving v. Mazda*, 136 F.3d 764, 768 (11th Cir. 1998), that claim of defect premised on manufacturer’s choice of “two-point passive restraint plus manual lap belt” option permitted under FMVSS 208 is preempted).⁸ The Eleventh Circuit confirmed and expounded upon its view of *Geier* even more clearly two years later, finding preemption of a defect claim premised on the manufacturer’s decision to incorporate a “lap-only” restraint in a center seating position as permitted under FMVSS 208. *Griffith v. General Motors Corp.*, 303 F.3d 1276 (11th Cir. 2002), *cert. denied* 538 U.S. 1023 (2003).

The *Griffith* court noted that FMVSS 208 expressly provides the specific optional restraint systems that may be utilized to meet its requirements and demands that manufacturers choose one such system. *Id.* at 1279. It contrasted this deliberate optional compliance framework with other provisions that merely provide minimum performance standards without

⁸ In an unpublished opinion, the Court of Appeals for the Fourth Circuit likewise found preemption of a claim under West Virginia common law premised on Ford’s choice of an authorized two-point restraint system for a 1990 Ford Escort. See *Moser v. Ford*, 28 Fed. Appx. 168 (4th Cir. 2001). In finding preemption, the *Moser* court characterizes the *Geier* opinion as requiring protection of expressly authorized options under the FMVSS in order to facilitate NHTSA’s objective to encourage a mix of technologies. *Id.* at 170-71.

identifying any approved methods of compliance. *See id.* at 1280-81. Ultimately, the court adopted the *Hurley* court's conclusion that state tort law claims that seek to preclude design options expressly authorized by federal law are preempted. *Id.* at 1282. Because the design at issue in *Griffith* was expressly authorized by FMVSS 208, the court held preempted the plaintiffs' claim that such design was inherently defective. *See id.* at 1280-81 (emphasis added) ("Because Plaintiff sued Defendants for exercising an option explicitly permitted by Congress, a conflict exists between state and federal law if Plaintiff goes forward with this state law claim of defective design.")

More recently, the Court of Appeals for the Fifth Circuit likewise adopted the view that *Geier* stands primarily for the proposition that manufacturer choices established pursuant to deliberate optional compliance frameworks set forth by NHTSA must be protected from conflict arising from common law claims aimed at eliminating any such option. *See Carden v. General Motors Corp.*, 509 F.3d at 230-31 (5th Cir. 2007) (emphasis added) ("*Geier*, thus, compels the conclusion that a state tort suit that would foreclose a safety option intentionally left to vehicle manufacturers by Federal Motor Vehicle Safety Standards is preempted.") A case similar to *Griffith*, the *Carden* court held preempted a state tort claim that General Motors' choice to use a "lap only" rear center seat belt in a 1999 Pontiac Grand Am because such option was expressly authorized by the applicable FMVSS 208.

Geier and its progeny can be interpreted in either of two ways. Most directly, *Geier* can be interpreted as holding that implied conflict preemption will invalidate any state tort law claim that seeks to foreclose a specific "safety option"⁹ expressly authorized under the Federal Motor

⁹ The cases uniformly distinguish between claims challenging a manufacturer's right to choose an expressly authorized type of safety system and challenges to a manufacturer's specific implementation of one of those systems. *See, e.g., King v. Ford*, 209 F.3d 886, 891-93 (6th Cir. 2000) (distinguishing preempted claims that

Vehicle Safety Standards. That view is consistent with the interpretations of *Geier* expressed by the Courts of Appeal for the Seventh Circuit (*Hurley*), Eleventh Circuit (*James and Griffith*) and at least one panel of the Fifth Circuit (*Carden*) quoted above. As these Courts recognize, a state law that expressly prohibits a design option expressly authorized by federal law necessarily creates "actual conflict" and, therefore, is impliedly preempted.

Alternatively, *Geier* can be interpreted to require an analysis of NHTSA's intent and rationale in creating an optional compliance framework and a determination that such a framework was adopted to promote legitimate agency objectives. That is the apparent view expressed by the *O'Hara* appellate court. *See O'Hara v. General Motors Corp.*, 508 F.3d 753, 759 (5th Cir. 2007) ("When a federal safety standard deliberately leaves manufacturers with a choice among designated design options in order to further a federal policy, a common law rule which would force manufacturers to adopt a particular design option is preempted." (emphasis added)). As demonstrated below, Appellant's claims are preempted under either interpretation.

2. Federal Motor Vehicle Safety Standard 205 reflects a deliberate optional compliance framework to address technological, cost and safety concerns; and tempered safety glass is expressly approved for use in automotive side window openings.

Appellant suggests that the Final Order is founded on the Circuit Court's belief that "the mere existence of optional means of complying with a particular regulation, standing alone, automatically triggers a finding of implied conflict preemption." (Appellant's Brief, pp. 7-8 and 10) (citing Final Order at 7, ¶ 11). Appellant then argues that preemption does not arise solely by virtue of regulatory options. (*See id.* at Pt. IV(B)(1)).

Appellant's premise is misplaced. While a Federal Motor Vehicle Safety Standard's express authorization of optional means of compliance may indeed provide sufficient grounds to

manufacturer should have chosen different type of restraint system approved by FMVSS 208 from permitted claims that chosen type of approved restraint system should have been designed differently).

trigger preemption,¹⁰ the Circuit Court expressly concluded not only that “FMVSS 205 sets forth precisely the sort of express optional compliance framework which preempts state law claims premised on alleged improper selection among approved glazing options”, but also that “the window material options set forth in FMVSS 205 were determined as part of a carefully researched and balanced regulatory scheme managed by the National Highway Traffic Safety Administration.” (Final Order at 6-7, ¶¶ 7 and 10 (emphasis added)). In other words, the Circuit Court’s finding of preemption rests on NHTSA’s purpose and rationale in maintaining glazing options under FMVSS 205 and not just on the “mere existence” of such options. (*Accord* Ford’s Memorandum in Support of Omnibus Motion for Summary Judgment, Pt. III(C)(b)).

With a stated objective of reducing lacerations and minimizing the risk of ejection, FMVSS 205 was among the original safety standards issued pursuant to the Safety Act. 32 Fed. Reg. 2408, 2414 (February 3, 1967) (codified at 23 C.F.R. pt. 255). In establishing FMVSS 205, NHTSA relied on more than thirty years of glass and glazing safety research that had been conducted by the American Standards Association (“ASA”)¹¹ and incorporated by reference ASA’s American Standard Safety Code for Safety Glazing Materials for Glazing Motor Vehicles Operating on Land Highways (published by ASA and approved July 15, 1966) (hereinafter Z26.1-1966). *Id.* Through the years, NHTSA has continued to rely, in part, on the expertise and research of ASA and its successors to insure that FMVSS 205 meets its objectives.

¹⁰ It is undisputed that the tempered safety glass used by Ford in the subject Expedition’s side window openings was an expressly approved option for use in automotive side window openings under the applicable FMVSS 205. (*See* Final Order at 4, ¶¶ 16 and 17; *see also* Appellant’s Brief, p. 7 n. 8). To the extent this Court adopts the interpretation of *Geier* suggested by the *Hurley*, *Griffith*, *James* and *Carden* courts, a finding of preemption is axiomatic.

¹¹ By the time FMVSS 205 was promulgated, the ASA had changed its name to the American Standards Institute (“ASI”). Subsequently, the ASI changed to the American National Standards Institute (“ANSI”) by which it is currently known.

Appellant attempts to minimize the extensive research which supports FMVSS 205 by asserting that the various versions of Z26.1 issued by ASA and its successors have remained substantially similar and that the standard reflects a mere “list of materials approved by the automobile industry itself.” (Appellant’s Brief at 7 n.8 and 12). While Appellant’s statement that “both laminated and tempered glass have long been included as materials approved for use in vehicle side windows” is certainly true, her alleged implications are supported neither by this fact nor by history.

The ASA approved its first Safety Code for automotive glazing in 1935. *See Tentative American Standard Safety Code for Safety Glass for Glazing Motor Vehicles Operating on Land Highways* (published by American Engineering and Industrial Standards and approved by the ASA on December 30, 1935) (superseded by American Standard Z26.1-1938, approved March 7, 1938). It was hoped that this initial Safety Code would be adopted by the Motor Vehicle Commissioners of the various states to insure that the risk of glazing-related injury would be reduced. American Standard Z26.1-1938 (Foreword). In the absence of a uniform set of safety standards – the Safety Act would not be passed for another thirty years – government and private experts came together in an effort to improve automotive glazing safety. While employees of automobile manufacturers were certainly among the participants, they were far outnumbered by representatives of other private and government sectors. *See id.* (identifying participating individuals and entities).

Z26.1-1938 sets forth nine different tests to be met depending on the type of glass selected and the location where it was to be installed within an automobile. This original “Z26.1” standard recognized three different types of glass capable of meeting its requirements (thereafter designated by the ASA as “Safety Glass”): (1) laminated glass; (2) heat-treated glass

(a.k.a. “tempered”); and (3) wire glass. American Standard Z26.1-1938 (Foreword). The ASA noted that each form of Safety Glass possesses its own unique safety characteristics. *Id.* at 9 (“Under some accident conditions one type of safety glass may be superior, while under other accident conditions another type of safety glass may be superior. Since accident conditions are not standardized no one type of safety glass can be shown to possess the maximum degree of safety under all conditions.”).¹²

ASA revised Z26.1 over the subsequent decades, adding additional specification and testing requirements and acknowledging the development of non-glass glazing materials that might be appropriate for use in motor vehicles. *See* Z26.1-1966 (setting forth thirty-two different test procedures and recognizing “Safety Plastics,” “Multiple Glazed Unit” and “Bullet Resistance Glass” in addition to the original three types of Safety Glass). Z26.1-1966 additionally expanded the Standard’s focus on safety to include reduction of injury risk regardless of whether the Safety Glass broke during a crash -- Z26.1-1938 focused primarily on reducing injuries in the event Safety Glass was broken. Z26.1-1966, § 1.1. Despite the presence of additional testing and the recognition of more glazing alternatives, Z26.1-1966 reaffirmed its finding that “no one type of safety glazing material can be shown to possess the maximum degree of safety under all conditions.” *Id.*, 2.2.

ANSI continued to update and revise Z26.1 through the years. Likewise, NHTSA has amended FMVSS 205 over the years both to incorporate certain revised versions of Z26.1¹³ and

¹² By way of example, the ASA noted that tempered safety glass was “decidedly stronger than other kinds of glass under the impact of relative large or blunt objects” and that it was not affected by changes in temperature, whereas types of laminated glass tended to “lose some of their effectiveness at extremely high or low temperatures.” American Standard Z26.1-1938 (Foreword).

¹³ FMVSS 205 can only be amended through rulemaking. Thus, ANSI revisions to Z26.1 do not automatically become incorporated to FMVSS 205 unless adopted by NHTSA through completion of the rulemaking process and issuance of a Final Rule.

to address glazing issues on its own. *See, e.g.*, 48 Fed. Reg. 52061 (November 16, 1983) (permitting use of glass-plastic materials); 49 Fed. Reg. 6732 (February 23, 1984) (incorporating Z26.1-1977, as supplemented by Z26.1a-1980); 56 Fed. Reg. 18526 (April 23, 1991) (permitting use of annealed glass-plastic glazing and tempered glass in certain applications); 57 Fed. Reg. 40161 (July 8, 1992) (permitting certain uses of tempered glass-plastic glazing); 68 Fed. Reg. 43962 (July 25, 2003) (incorporating Z26.1-1996). NHTSA's administration of FMVSS 205 has been deliberate and continuous, not passive.

Moreover, NHTSA's decision to maintain tempered safety glass as a permitted option under FMVSS 205 has been made consciously, not due to blind deference to the automotive industry as Appellant suggests. In addition to relying upon the seventy-plus years of research conducted by ASA and its various successors, as reflected by incorporation of the various versions of Z26.1, NHTSA itself has studied glass and glazing safety for decades. (*See Ford's Memorandum in Support of Omnibus Motion for Summary Judgment, Exhibit 12 (Deposition of Thomas J. Feaheny), p. 37*)¹⁴; *see, e.g., An Evaluation of the Effects of Glass-Plastic Windshield Glazing in Passenger Cars*, NHTSA Technical Report, DOT HS 808 062 (November 1993). NHTSA has proceeded to amend FMVSS 205 whenever it felt safety would benefit, regardless of manufacturer objections. *See, e.g.*, 48 Fed. Reg. 52061 (November 11, 1983) (NHTSA amends FMVSS 205 to immediately permit the use of glass-plastic materials notwithstanding objections of automotive and glass manufacturers).

NHTSA has initiated rulemaking to amend the standard either directly or through incorporation of revised versions of Z26.1 whenever NHTSA determined motor vehicle safety would best be served by such amendments. *See, e.g.*, 64 Fed. Reg. 42330, 42331 (August 4,

¹⁴ Mr. Feaheny is Appellant's designated glass expert.

1999) (discussing proposal to adopt 1996 version of Z26.1 and noting safety reasons for doing so, including the addition of new test requirements and the deletion of a previously approved glazing material no longer thought to be safe). Although approved glazing materials for various applications have been added and deleted through NHTSA's various amendments, NHTSA has opted to retain tempered safety glass as an approved material for use in side and rear window applications through all versions of FMVSS 205. *Compare Z26.1-1966 and Z26.1-1996; see* Final Order at 4, ¶¶ 15-17, and 5, ¶ 6; *see also* Appellant's Brief at 7 n.8.

Beyond its continuous historical approval of the tempered glass option, NHTSA specifically analyzed whether FMVSS 205 should be changed to delete tempered safety glass as an approved option for use in side and rear windows and to mandate so-called "advanced glazing" – essentially the same result sought by Appellant's state tort law claim – as part of its own glazing research activities. After a decade of testing and study, NHTSA determined that the balance of cost, technology and safety concerns implicated by FMVSS 205 is best served by retaining the optional compliance framework, including the tempered safety glass option. *See* 67 Fed. Reg. 41365-41367 (June 18, 2002) (withdrawing Advance Notices of Proposed Rulemaking pertaining to advanced glazing requirements) ("Notice of Withdrawal"); *see also* Ejection Mitigation Using Advanced Glazing. A Status Report, November 1995, Docket Nos. 95-041-GR-002; 97-1782-003; Ejection Mitigation Using Advanced Glazing: Status Report II, Docket No. 96-1782-21 (August 1999); *see* Ejection Mitigation Using Advanced Glazing, NHTSA Final Report, Docket No. 96-1782-22 (August 2001) ("Final Report").

The primary safety benefit claimed for advanced glazing materials is an alleged improvement in the retention of unbelted occupants in rollover accidents. Although NHTSA's testing and research indicated that some types of advanced glazing do appear to offer enhanced

resistance to occupant ejection, it also found that advanced glazing may increase the risk of neck injury to occupants retained by seat belts. Specifically, NHTSA found that "in some cases impacts into advanced glazing resulted in higher neck shear loads . . . [and] the lowest neck injury measurements were obtained from the tempered safety glass impacts." Notice of Withdrawal at 41366-67; Final Report at viii, x, 34-36 (Section 6.0), and 54. In NHTSA's own words:

"The agency is extremely reluctant to pursue a requirement that may increase injury risk for belted occupants to provide enhanced safety benefits primarily for unbelted occupants, by preventing their ejection from the vehicle."

Final Report at 54.

In addition to rejecting this dubious safety trade-off as a matter of federal safety policy, NHTSA also found that this conflict in safety objectives might be reduced or avoided by focusing on other ejection mitigation technologies, such as side curtain airbags, instead of advanced glazing. *Id.* NHTSA further concluded that effective utilization of advanced glazing would require design modifications that would likely result in smaller windows, thereby reducing driver vision and potentially creating public backlash, as well as reduced safety. *See* Notice of Withdrawal at 41367. Moreover, these design modifications would definitely entail "significant" costs. *Id.*

NHTSA considered the above technological, cost and safety factors in its analysis and ultimately decided to preserve all the options approved by FMVSS 205.¹⁵ NHTSA expressly concluded that federal safety objectives could be promoted best by improving occupant retention through other safety technologies, while preserving the mix of glass and glazing options

¹⁵ Appellant's assertion that laminated glass is "uncontroversial" and her suggestion that a laminated glass mandate is not worthy of debate (Appellant's Brief at 12) conveniently ignores NHTSA's decade of research and study on this precise issue. A requirement under FMVSS 205 that laminated glass be used in all side windows was in fact "hotly debated" and proved controversial enough that NHTSA rejected it, just as it had the airbag mandate proposed under FMVSS 208 prior to *Geier*.

approved by FMVSS 205. See Notice of Withdrawal at 41367; Final Report at 54. In short, NHTSA deliberately retained the optional compliance framework established by FMVSS 205 based on its reasoned judgment that such retention will further its ultimate goal of improved motor vehicle safety.

As demonstrated above, FMVSS 205 reflects the same sort of deliberate optional compliance framework established by NHTSA as FMVSS 208. As with FMVSS 208, FMVSS 205 allows manufacturers to choose from among specifically approved optional types of safety systems to achieve the proper balance between competing safety objectives, while promoting technological innovation to reduce or avoid those trade-offs. Just as NHTSA rejected an airbag mandate under the FMVSS 208 at issue in *Geier* due to cost, safety and technology concerns, NHTSA likewise rejected an advanced glazing mandate under FMVSS 205, in favor of approved options, for similar reasons. The *Geier* rationale for preempting a state tort law claim that would effectively mandate the selection of a specific type of restraint system from among the various systems expressly approved by FMVSS 208 applies equally to preempt Appellant's claim to require a selection of laminated glass rather than tempered safety glass under FMVSS 205.

C. The Court of Appeals for the Fifth Circuit Wrongly Decided *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007).

Appellant relies almost exclusively on the opinion of the Court of Appeals for the Fifth Circuit in *O'Hara v. General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007). The *O'Hara* court was the first appellate court in the country to address whether FMVSS 205 preempts state tort law claims that seek to prohibit use of approved glazing materials. *O'Hara*, 508 F.3d at 758 n.3. Unfortunately, the *O'Hara* court simply got it wrong.

The court acknowledges that, "When a federal safety standard deliberately leaves manufacturers with a choice among designated design options in order to further a federal policy,

a common law rule which would force manufacturers to adopt a particular design option is preempted.” *Id.* at 759 (citing *Geier*, 529 U.S. at 875 and 878-79 and *Hurley*, 222 F.3d at 382).¹⁶ Notwithstanding, the court’s opinion is devoid of any real analysis as to whether NHTSA deliberately intended the optional compliance framework reflected in FMVSS 205 or whether such a scheme furthers a federal policy.

While the *O’Hara* court purports to examine the text and legislative history of FMVSS 205, *id.* at 759-762, it does so only in a cursory manner and ignores the long and rich history of direct and incorporated glazing research underlying NHTSA’s actions relating to FMVSS 205. Indeed, the *O’Hara* court concludes that FMVSS 205’s incorporation of Z26.1 supports the argument that it is only a “materials standard” that sets forth a “safety ‘floor’” to insure that the Safety Glass meet certain basic requirements. *Id.* at 760-62. But NHTSA has expressly rejected that characterization of FMVSS 205! *See* 64 Fed. Reg. 42330, 42332 (August 6, 1999) (emphasis added) (“[O]ur glazing standard does not operate, and never has operated, strictly as an equipment standard under the statute authorizing its issuance or under other regulations implementing that statute.”). Had the *O’Hara* court analyzed FMVSS 205 in the proper context – i.e. to determine whether the underlying optional compliance framework is both intentional and supportive of legitimate agency objectives – it would have easily uncovered the strong parallels with FMVSS 208. *See supra* pt. (B)(2).

In fairness to the *O’Hara* court, it appears the parties may have directed it away from the core fact that FMVSS 205 is a deliberate optional compliance scheme, thereby triggering an analysis as to why NHTSA decided to use such a framework, and focused the court instead on NHTSA’s decision not to mandate advanced glazing. *O’Hara*, 508 F.3d at 757-58. This

¹⁶ Strangely, the court ignored its own preemption precedent which holds simply and directly that state law which prohibits an activity expressly authorized by a federal scheme gives rise to an actual conflict. *See Carden*, 509 F.3d at 230 (recognizing and citing *Wells Fargo Bank of Texas v. James*, 321 F.3d 488, 491 n.3 (5th Cir. 2003)).

misdirection caused the court to lose sight of the straightforward preemption analysis reflected by *Geier* and to focus instead on *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). See *O'Hara*, 508 F.3d at 762 (“We find the parallels between NHTSA’s Withdrawal of Rulemaking [regarding advanced glazing] and the Coast Guard’s statements in *Sprietsma* to be compelling.”).

The *O'Hara* court’s detour into *Sprietsma* proved doubly unfortunate. First, it focused the court on advanced glazing rather than on the determinative facts that tempered safety glass is expressly authorized for use in side and rear window applications by federal law and that FMVSS 205 reflects a deliberate optional compliance scheme chosen by NHTSA for very specific reasons. Second, *Sprietsma* is wholly inapposite.

Sprietsma arose from a boating accident where a person fell overboard and suffered fatal injury after being struck by the propeller blades of an outboard engine. A survivor of the decedent sued the boat manufacturer alleging that the engine should have been equipped with a propeller guard. The manufacturer claimed preemption under the Federal Boat Safety Act of 1971 (“FBSA”), 46 U.S.C. §§ 4301-4311, by virtue of the Coast Guard’s earlier decision after considerable study not to promulgate a regulation requiring propeller guards. *Sprietsma*, 537 U.S. at 54. The case came to the Supreme Court after the Supreme Court of Illinois, relying on *Geier*, ruled that the tort claims were impliedly preempted.

The Court began by reviewing the history and provisions of the FBSA. The day after it was signed into law, the governing administrator issued a statement exempting from the Act’s preemption provision all then-existing state boating regulations pending the issuance of new federal regulations. *Id.* at 59. Subsequently, federal regulations were issued; and the administrator restricted his original blanket exemption to state regulations that addressed matters

not addressed by the new federal regulations. *Id.* at 60. The federal regulations did not address propeller guards. *Id.*

Following a rise in the incidence of boating accidents where passengers were struck by propeller blades, the Coast Guard sponsored an 18-month study into whether propeller guards should be mandated. *Id.* at 60-61. The study concluded that no federal propeller guard regulation should be pursued. *Id.* at 61. At the time the Supreme Court was considering the matter, no federal regulation regarding the use of propeller guards had been issued. *Id.*

After dispatching the manufacturer's claim of express preemption, the Court turned its attention to the claim of implied conflict preemption based on the decision to not mandate propeller blades. The Court noted that the decision to "take no regulatory action" left the law applicable to propeller guards exactly as it had been before the study – i.e. no federal law relating to it. *See id.* at 65. The Court stated that the decision not to regulate a particular aspect of boating safety was "fully consistent with an intent to preserve state regulatory authority" regarding that aspect. *Id.* The Court noted that the Coast Guard has never taken the position that litigation of state common-law claims *relating to areas of law not subject to federal regulation* would frustrate its purposes and objectives. *Id.* at 65-66. Contrasting the "no regulation" situation, the Court stated, "Of course, if a state common-law claim directly conflicted with a federal regulation promulgated under the Act . . . pre-emption would occur." *Id.* at 65.

The major difference, of course, between the Coast Guard's decision to not mandate propeller guards as analyzed in *Sprietsma* and NHTSA's decision to not require advanced glazing considered in *O'Hara* is the existence of federal regulation. Unlike the total absence of federal regulation regarding propeller guards, tempered safety glass is expressly authorized under existing federal law. While the respective "no action" decisions of the two federal agencies

resulted in the law remaining unchanged in both cases, the *status quo* in *Sprietsma* was the continued absence of any federal regulation regarding propeller guards whereas in this case it is a federal regulation governing glass in motor vehicles that specifically approves the use of tempered safety glass. Thus, preemption of a state common law claim that directly conflicts with that federally regulated design choice would be required under the *Sprietsma* dicta. *Id.*

Putting aside the inapplicability of *Sprietsma* when analyzing a matter that is expressly regulated by federal law, the *O'Hara* court seemed to go out of its way to downplay the reasons for NHTSA's rejection of an advanced glazing mandate. NHTSA's research indicates that advanced glazing increases the risk of neck injury. Notice of Withdrawal at 41366-67; Final Report at viii, x, 34-36 (Section 6.0), and 54. The *O'Hara* court twice characterizes this finding as a "slightly increased risk of minor neck injuries," citing to the Notice of Withdrawal both times. *O'Hara*, 508 F.3d at 757 and 761. Interestingly, the Notice of Withdrawal neither quantifies the increased risk posed by advanced glazing nor evaluates the severity of such potential neck injuries. *See* Notice of Withdrawal at 41366-67. In fact, NHTSA concedes that it is unable to assess actual neck injury levels because no accepted injury criteria exist for the two elevated neck force measurements observed in its testing. Final Report at 36.

NHTSA's research shows that the use of advanced glazing can increase two distinct forces imposed on the neck in crashes; and NHTSA has no way of determining how severe injuries caused by those increased forces might be in the real world. Uncertainty does not equate to minimal, and the *O'Hara* court lacks support for its characterization of NHTSA's research findings. *Cf. Geier*, 529 U.S. at 879 (recognizing real or perceived risks posed by airbags as legitimate concern for NHTSA to consider).

The *O'Hara* court erred in relying on *Sprietsma*, because *Sprietsma* did not involve any conduct expressly authorized by federal law. *See Carden*, 509 F.3d at 232. It further erred by losing sight of the fact that tempered safety glass is an expressly approved design option under FMVSS 205 and losing sight of the fact that FMVSS 205 is, in fact, an optional compliance scheme. Rather than engaging in a tedious comparison of the specific texts of FMVSS 205 and FMVSS 208, the court should have analyzed whether FMVSS 205's optional compliance scheme is deliberate and whether it serves any legitimate purpose.

Numerous courts have avoided the *O'Hara* court's unfortunate and erroneous detour into *Sprietsma*. Those that have done so have easily recognized the parallels between FMVSS 208 and FMVSS 205; and preemption pursuant to *Geier* of state tort law claims seeking to prohibit the use of tempered safety glass has proven inescapable. *See, e.g., Martinez v. Ford*, 2007 WL 1599013 at **2-3 (M.D. Fla. Apr. 26, 2007); *Brown v. Land Rover North America, Inc.*, No. 01-1923-G, slip op. (Sup. Ct., Suffolk County, Mass. Aug. 2, 2006) (granting summary judgment of glass defect claims based on preemption under FMVSS 205); *O'Hara v. General Motors Corp.*, No. 3:05-CV-1134-G, 2006 WL 1094427 at *5 (N.D. Tex. Apr. 25, 2006) (holding that state tort liability based on manufacturer's choice to use tempered-glass option available under FMVSS 205 is federally preempted and granting summary judgment); *accord Collins v. State of California*, No. CV007121, Statement of Decision and Order After Hearing re: Defendant Premier Auto Glass Corporation's Motion for Summary Judgment or, in the Alternative, Summary Adjudication of Issues, Findings para. 6 (Super. Ct., San Joaquin County, Cal. Oct. 25, 2006) (finding preemption of defect claim premised on choice among expressly approved

windshield materials).¹⁷ These courts have determined that the optional compliance framework established by FMVSS 205 is deliberate and reflects NHTSA's effort to balance safety, cost and technological concerns surrounding glazing and ejection mitigation. As such, the rationale for protecting the glass and glazing choices afforded under FMVSS 205 is identical to the rationale for protecting restraint system choices under FMVSS 208.

Moreover, at least two state trial courts have expressly rejected *O'Hara*.¹⁸ The Honorable James C. Williams considered whether a claim could be asserted under South Carolina tort law that Ford's choice of tempered safety glass for use in the side windows of a 1997 Ford F-150 pickup truck rendered that vehicle defective and unreasonably dangerous. *See Priester v. Preston Williams Cromer et al.*, Civil Action No. 06-CP-38-1071, Order Granting Def. Ford Motor Company's Mot. for Summ. J. (Court of Common Pleas, County of Orangeburg, South Carolina April 2008). In a well reasoned opinion, Judge Williams rejected *O'Hara* and determined that such a claim would effectively nullify a design option specifically preserved by FMVSS 205 and was, accordingly, preempted. *Id.* Relying primarily on the rationale of *Martinez*, a trial court in New York likewise expressly rejected *O'Hara* and held "no-laminated-glass claims" to be preempted under the *Geier* rationale. *See Alexander et al. v. Dunlop Tire Corp., et al.*, Index No. 2004-2668, RJI No. 2004-1603-C consolidated with *Williamson v. Dunlop Tire Corp. et al.*, Index No. 2005-0530, RJI No. 2005-0524-M, Decision and Order, pp. 20-22 (Sixth Judicial District Court, Broome County, New York July 2, 2008).

¹⁷ Copies of the unreported opinions, *Land Rover* and *Collins*, are attached as Exhibits 17 and 18 to Ford's Memorandum in Support of its Omnibus Motion for Summary Judgment.

¹⁸ Arguably the court below represents a third, as the Honorable Judge Jennifer Bailey Walker declined to accept Appellant's invitation to revisit the preemption issue following *O'Hara* but before this Court's acceptance of Appellant's Petition.

Although the *O'Hara* court relies on inapposite law and mischaracterizes the results of NHTSA's glazing research, it did capture NHTSA's rationale for retaining the tempered safety glass option reasonably well. As noted by *O'Hara*, the agency's deliberate decision to maintain an optional compliance framework for FMVSS 205 turned primarily on three considerations: (1) the opportunity for technological advancement; (2) safety, in the form of potential injury risks posed by advanced glazing; and (3) cost. *O'Hara* 508 F.3d at 761-62. Not coincidentally, the justifications identified by the *Geier* Court for the optional compliance framework of FMVSS 208 fit neatly into these same three general categories. *See Geier*, 529 U.S. at 875-79.

Balancing safety, cost and technological concerns is a valid objective for the deliberate formation of an optional compliance framework for compliance with a FMVSS. Increased costs and unique risks are legitimate considerations for rejecting mandate of a specific technology, whether it be airbags or advanced glazing. Similarly, affording manufacturers design choices in the hope of facilitating improved technologies and lower costs is a valid method for achieving the overall objective of greater safety. These considerations underlie NHTSA's decisions to rely on optional compliance frameworks in connection with both FMVSS 208 and 205. Accordingly, state tort law claims which risk frustrating such framework, such as Appellant's "no-laminated-glass claim," present an actual conflict and are subject to implied conflict preemption.

III. CONCLUSION

Appellant seeks to hold Ford liable under state tort law for utilizing tempered safety glass in an automotive side window application, a safety option expressly authorized under FMVSS 205. *Geier* establishes that ordinary implied conflict preemption principles are to be applied in a neutral fashion under the Safety Act and that state tort law claims that interfere with an optional compliance framework promulgated under the Federal Motor Vehicle Safety Standards and

deliberately maintained by NHTSA present an actual conflict and are preempted. FMVSS 205 reflects such a framework, and Appellant's claim cannot be permitted. Ford respectfully asks that the Court hold Appellant's claims preempted and affirm the Final Order.

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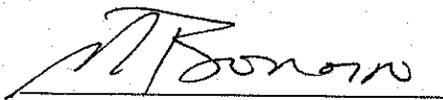
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CERTIFICATE OF SERVICE

I, Michael Bonasso, counsel for cross-claim defendant/appellee Ford Motor Company hereby certifies that I have caused the foregoing **APPELLEE'S BRIEF** to be served upon the following counsel of record, this 19th day of December, 2008, as follows:

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