

No. 34139

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

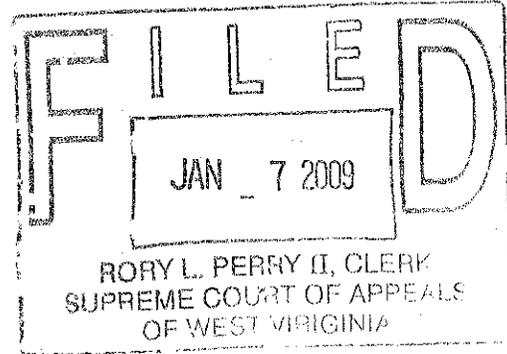
**MICHELLE ARCHULETA, as Personal Representative of
THE ESTATE OF FRANCIS ROBERT MORGAN,**

Petitioner, Cross-Claim Plaintiff Below,

v.

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

Respondent, Cross-Claim Defendant Below.



APPELLANT'S REPLY BRIEF

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

Scott S. Segal (WV Bar No. 4717)
Victor S. Wood (WV Bar No. 6984)
THE SEGAL LAW FIRM
810 Kanawha Boulevard, East
Charleston, West Virginia 25301
Telephone: (304) 344-9100
Facsimile: (304) 344-9105

Counsel for Appellant

No. 34139

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MICHELLE R. 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.

APPELLANT'S REPLY BRIEF

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

Appellant Michelle R. Archuleta, as Personal Representative of the Estate of Francis Robert Morgan ("Appellant"), defendant and cross-claim plaintiff below, submits this reply brief in support of her arguments that the Circuit Court of Kanawha County's order of September 17, 2007 should be reversed, and this case remanded for further proceedings.

I. ARGUMENT

Appellee Ford Motor Company ("Ford") asserts in its brief that under *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000), "[w]hen optional methods of compliance with a Federal Motor Vehicle Safety Standard are deliberately maintained by [NHTSA], a state tort law claim which seeks to prevent exercise of an expressly approved option cannot stand." (Ford Brief at 1-2.) This approach, however, gives weight to only one of the two prongs of analysis

that must be undertaken in response to *Geier*. In order to find implied conflict preemption under *Geier*, any agency's action in providing options to a regulated industry must not only be conscious or "deliberate," but must also serve a discernable regulatory purpose that goes beyond merely establishing a minimum safety standard. See *O'Hara v. General Motors Corp.*, 508 F.3d at 759 ("When 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.") (emphasis added) (citing *Geier*, 529 U.S. at 875, 878-79). As the Supreme Court itself summarized in *Geier*, the regulation at issue in that case, FMVSS 208, "sought a gradually developing mix of alternative passive restraint devices for safety-related reasons. The rule of state tort law for which [the plaintiffs] argue would stand as an 'obstacle' to the accomplishment of that objective." 529 U.S. at 886.

While Ford attempts to reshape FMVSS 205 to fit into the mold of the regulation at issue in *Geier*, there is nothing in the administrative record suggesting that NHTSA had any overarching policy goals in mind in promulgating and amending such regulation other than providing a minimum safety standard. The only matter of substance that can be gleaned from the regulation's history is that NHTSA wants cars to have, at a minimum, side windows made of materials that meet certain basic requirements.

Ford relies heavily upon the fact that NHTSA considered amending FMVSS 205 to require advanced glazing in side windows, but ultimately withdrew such proposed rulemaking. See Notice of Withdrawal, 67 Fed. Reg. 41,365 (June 18, 2002). While NHTSA noted that there were competing considerations bearing upon its decision on whether to require advanced side glazing, including cost and the potential for increased neck injury, the agency's primary reason

for declining to change its regulatory focus had nothing to do with maintaining a mix of optional materials for use in side windows. Rather, NHTSA concluded that a complete change in focus was appropriate given “the advent of other mitigation systems, such as side air curtains.” 67 Fed. Reg. at 41,367. NHTSA therefore concluded that “it would be more appropriate to devote research and rulemaking efforts with respect to ejection mitigation to projects other than advanced glazing.” *Id.* In short, given the development of technologies that may provide better occupant containment without any of the potential drawbacks associated with reliance upon glass and glazing materials alone, the agency simply opted not to choose between alternative glass and glazing materials. In other words, rather than evidencing a static policy regarding occupant containment tied to the use of certain glazing materials in side windows, NHTSA has proposed (and is apparently following) an entirely different approach to passenger containment based upon developing technologies. This hardly supports the notion, advanced by Ford, that NHTSA’s action (or non-action) in 2002 should be used to retrospectively¹ discern a policy that would be frustrated by a common-law defect claim as is being advanced in the current action.

Oddly, while Ford places great reliance upon NHTSA’s refusal to require advanced glazing in side windows and its reasoning in making such decision, it nevertheless takes issue with the *O’Hara* court’s reliance upon the Supreme Court’s decision *Sprietsma v. Mercury Marine Corp.*, 537 U.S. 51 (2002). In *Sprietsma*, the Court considered whether the U.S. Coast Guard’s decision not to mandate propeller guards on all recreational motor boat engines impliedly preempted common-law claims that a boat manufacturer was negligent for failing to

¹Indeed, not only was the subject vehicle (a 1999 Ford Expedition) manufactured before NHTSA terminated its proposed rulemaking, but the accident itself predates such agency action.

install a propeller guard on a particular boat. The Court held that the agency's decision not to regulate did not, in itself, exert any preemptive force. Furthermore, the Court found that nothing in the Coast Guard's stated *reasons* for declining to regulate would be undermined by a common-law claim. *See id.* at 65. On this basis, the Court held that the plaintiff's claims were not preempted.

In reaching this conclusion, the Court examined at length the history of the Federal Boat Safety Act, and, in particular, the Coast Guard's investigation and consideration of a propeller guard requirement. As the Court explained, the agency first began considering such a regulation in 1988, in response to the high number of recreational boating accidents in which people were struck and injured by propellers. *Id.* at 60-61. A subcommittee of the National Boat Safety Advisory Council was appointed to study the data and make recommendations about possible methods of preventing propeller strike injuries. *Id.*

In 1990, after 18 months of study, the subcommittee found that, "given current technology, feasible propeller guards might prevent penetrating injuries but increase the potential for blunt trauma caused by collision with the guard." *Id.* at 61. The subcommittee further determined that "it would be prohibitively expensive to retrofit all existing boats with propeller guards because no universal design suitable for all boats and motors in existence had been proved feasible." *Id.* (Internal quotations omitted). Based on these findings, the subcommittee recommended that the Coast Guard "take no regulatory action to require propeller guards." *Id.* (internal citations omitted).

The Coast Guard accepted this recommendation, agreeing that the "available accident data did not support the adoption of a regulation requiring propeller guards." *Id.* Rather than impose a new requirement, the agency decided it would "continue to review information

regarding development and testing of new propeller guarding devices or other information on the state of the art.” *Id.* However, as of the time the *Sprietsma* case reached the Supreme Court, the agency had “not yet issued any regulation either requiring or prohibiting propeller guards on recreational planing vehicles such as the boat involved in this case.” *Id.* at 62.

Based on this regulatory history, the Supreme Court found that the Coast Guard's decision in 1990 not to adopt a regulation requiring propeller guards did not preempt the plaintiff's claim. *Id.* at 65. The Court explained: “The decision in 1990 to accept the subcommittee's recommendation to ‘take no regulatory action’ left the law applicable to propeller guards exactly the same as it had been before the subcommittee began its investigation.” *Id.* at 66 (internal citations omitted).

Furthermore, the Court emphasized, none of the Coast Guard's stated reasons for declining to regulate would be undermined by the plaintiff's common-law claim. Rather, the Court noted, the Coast Guard had decided not to impose a regulation requiring propeller guards simply because “[a]vailable propeller guard accident data d[id] not support imposition of [such] a regulation.” *Id.* at 66 (quoting Coast Guard explanation). The Court noted that the agency had stopped short of “convey[ing] an ‘authoritative’ message of federal policy against propeller guards,” *id.* at 67, and concluded that the plaintiff's claims would not undermine any regulatory purposes. On these grounds, the Court held that the plaintiff's claims were not preempted, and that they must be permitted to proceed. *See id.* at 66-67.²

²The Court also emphasized that “[t]he Coast Guard's decision *not* to impose a propeller guard requirement represents a sharp contrast to the decision that was given preemptive effect in *Geier*” where the Court had found that FMVSS 208 “embodied an affirmative policy judgment.” *Sprietsma*, 537 U.S. at 67.

Exactly the same conclusion is warranted here. Just like the Coast Guard subcommittee in *Sprietsma*, NHTSA decided to study the possibility of requiring a particular type of equipment in order to address safety concerns. Just as in *Sprietsma*, some of the safety data gleaned from the study was inconclusive. Compare 2001 NHTSA Report (attached as Exhibit E to Morgan Resp., R. at 739) (nothing that, despite other safety benefits, “limited” testing with “significant variability” showed that “advanced glazing appears to increase the risk of neck injury”), with *Sprietsma*, 537 U.S. at 61 (noting subcommittee’s conclusions that “given current technology, feasible propeller guards might present penetrating injuries but increase the potential for blunt trauma caused by collision with the guard”). And just as in *Sprietsma*, the agency concluded, based on safety data and cost concerns, that it would not promulgate a requirement. See 67 Fed. Reg. 41,365. Finally, just as the Coast Guard did with respect to propeller guards, NHTSA has continued to study the possible benefits of advanced glazing in order to determine how the technology can best be used to achieve the agency’s overall safety goals. Compare, e.g., NHTSA, *Initiatives to Address the Mitigation of Vehicle Rollovers*, June 2003 at 15 (attached as Exhibit G to Morgan Resp., R. at 759) (“NHTSA hopes to significantly reduce the potential for partial and complete ejection fatalities and injuries. By having window curtains and/or advanced glazing requirements the potential for ejection through windows could be reduced”), with *Sprietsma*, 537 U.S. at 61 (noting Coast Guard’s statement that it would “continue to review information regarding development and testing” of propeller guards).

Importantly, *Sprietsma* also leaves no doubt that, in a case like this one, a federal agency's decision not to impose a *universal* regulatory requirement is not undermined by a jury verdict in a *particular* case. In *Sprietsma*, the Supreme Court emphasized that “[t]he Coast Guard’s apparent focus was on the lack of any universally acceptable propeller guard for all modes of boat operation.” 537 U.S. at 67 (internal quotations omitted). The Court went on to hold that “nothing in [the Coast Guard’s] official explanation [for its decision not to require propeller guards on all boats] would be inconsistent with a tort verdict premised on a jury’s finding that some type of propeller guard should have been installed on *this* particular kind of boat equipped with a particular type of motor.” *Id.* (emphasis added).

The same principle applies here. Like the Coast Guard, NHTSA never found that advanced glazing would increase the risk of injuries overall, or even that it would increase the risk of neck injuries in all cases. To the contrary, it merely found that advanced glazing “appears” to increase certain safety risks in “some” cases. 67 Fed. Reg. at 41,367. This case is entirely consistent with this conclusion, as it does not seek to hold *all* car makers liable for not using advanced glazing in the side windows of *all* vehicles. Instead, Appellant merely seeks to hold Ford accountable for failing to use, in the particular vehicle at issue, the permitted type of glazing that would have prevented serious injuries to Mr. Morgan—a result that is entirely consistent with NHTSA’s decision to continue to permit advanced glazing as one of the regulatory options of FMVSS 205. In short, nothing in NHTSA’s explanation for its decision not to require advanced glazing “would be inconsistent with a tort verdict premised on a jury’s finding that [side windows with advanced glazing] should have been installed on *this* particular kind of [automobile].” *Sprietsma*, 537 U.S. at 67.

There is simply no basis for concluding that any of NHTSA's safety goals will be undermined if, as a result of lawsuits like this one, more auto makers choose to use advanced glazing. The United States Supreme Court recently explained that when a state-law claim would not impose a mandatory requirement, but rather merely motivate a party to change its conduct, the state-law claim is not preempted. *Bates v. Dow Agrosciences*, 544 U.S. 431 (2005).³ Thus, even assuming that a jury verdict in this case might "motivate[] an optional decision" on Ford's part to install advanced glazing in the side windows of its vehicles, there is no basis for finding implied conflict preemption in this case.

Ford attempts to distinguish *Sprietsma*, asserting that it "did not involve any conduct expressly authorized by federal law." (Ford Brief at 23.) This is true, but it hardly detracts from the fact that *Sprietsma's* logic has direct bearing upon whether NHTSA's refusal to require the use of advanced glazing in side windows has preemptive effect. Even putting *Sprietsma* aside, we are still left with the more basic issue of whether NHTSA has otherwise articulated any substantive policy that would be undermined by permitting Appellant's common-law crashworthiness claim to proceed. And again, aside from NHTSA's expressed concern that "advanced glazing in *some* cases *appears* to increase the risk of neck injury," 67 Fed. Reg. at 41,367 (emphasis added), and that the cost of design modifications related to use of such products could be significant, *id.*, the agency has made no statements suggesting in any way that its policy aims and objectives would be frustrated by denying manufacturers an unbridled right to use any of the approved glass and glazing materials in all side window applications.

³In *Bates*, the defendant pesticide manufacturer argued, *inter alia*, that common-law claims were preempted because they would induce a manufacturer to change its federally-approved labels, thereby running afoul of a statutory prohibition against state law "requirements" that differ from federal law. In rejecting this argument, the Court emphasized that "a jury verdict . . . merely motivates an optional decision . . ." *Bates*, 544 U.S. at 443.

II. CONCLUSION

WHEREFORE, for the reasons stated above and in Appellants Brief, 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



Scott S. Segal (WV Bar #4717)
Victor S. Woods (WV Bar #6984)
THE SEGAL LAW FIRM
A Legal Corporation
810 Kanawha Boulevard, East
Charleston, West Virginia 25301
Telephone: (304) 344-9100
Facsimile: (304) 344-9105

No. 34139

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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 Reply Brief* were served upon all counsel for Appellee by United States Mail on this 7th day of January, 2009, addressed as follows:

Michael Bonasso, Esq.
Andrew B. Cook, Esq.
FLAHERTY, SENSABAUGH & BONASSO, P.L.L.C.
Post Office Box 3843
Charleston, West Virginia 25338-3843
Facsimile: (304) 345-0260
Counsel for Defendant Ford Motor Company

Alonzo D. Washington, Esq.
FLAHERTY, SENSABAUGH & BONASSO, P.L.L.C.
965 Hartman Run Road
Morgantown, West Virginia 26505
Facsimile: (304) 598-0790
Counsel for Defendant Ford Motor Company

Bryan D. Cross, Esq.

WHEELER TRIGG KENNEDY LLP

1801 California Street, Suite 3600

Denver, Colorado 80202-2617

Facsimile: (303) 244-1879

Counsel Pro Hac Vice for Defendant Ford Motor Company

Stephanie D. Taylor, Esq.

JONES DAY

500 Grant Street, Suite 4500

Pittsburgh, PA 15219

*Counsel for Amicus Curiae Product Liability Advisory
Council, Inc.*



Victor S. Woods (WV Bar #6984)

THE SEGAL LAW FIRM

A Legal Corporation

810 Kanawha Boulevard, East

Charleston, West Virginia 25301

Telephone: (304) 344-9100

Facsimile: (304) 344-9105