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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

James C Williams, Jr , Circuit Court Judge

Case No 06-CP-38-1071

MARY ROBYN PRIESTER, Individually and as
Natural Mother/Next of Kin and Personal
Representative of the Estate of James
Lloyd Priester,

Appellant,

v

Preston Williams Cromer, Stage Light
Management d/b/a Showgirls(z), and
Lloyd Brown, individually and d/b/a
Showgirls(z), Nikki D's, Inc , and
Ford Motor Company, Inc ,

Defendants,

of whom Ford Motor Company, Inc , is the

Respondent

BRIEF OF *AMICUS CURIAE* CENTER FOR AUTO SAFETY
IN SUPPORT OF APPELLANTS AND SUPPORTING THE REVERSAL
OF THE DECISION OF THE LOWER COURT

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**BRIEF OF THE CENTER FOR AUTO SAFETY, AS *AMICUS CURIAE* IN
SUPPORT OF APPELLANT AND REVERSAL OF THE DECISION AFFIRMING
DISMISSAL BY THE LOWER COURT¹**

INTEREST OF THE *AMICUS CURIAE*

The Center for Auto Safety is a nonprofit consumer-advocacy organization with approximately 15,000 members. Among other things, the Center works for strong federal standards to protect drivers and passengers. The Center was founded in 1970 to provide consumers a voice for auto safety and quality in Washington and to help “lemon” owners fight back across the country. The Center advocates for auto safety, efficiency, and quality before the Department of Transportation, the Federal Trade Commission, Environmental Protection Agency, and in the courts.

Amicus curiae file this brief because it vehemently disputes the thrust of the manufacturer’s argument, supported by its *Amici*, that the ejection mitigation standard (FMVSS 205) was intended by NHTSA to make “safety optional”, thereby requiring a finding of federal preemption of the Plaintiff’s common law cause of action. That argument is, we respectfully submit, the antithesis of all federal motor vehicle safety standards. Further, as both NHTSA and the U.S. Supreme Court have repeatedly observed, the applicability of federal preemption to a minimum federal standard offering the auto industry optional methods to comply with these standards would have a dire impact upon the common law rights of the citizens of this and every other state in the union, and it would

¹ Pursuant to Rule 213, SCACR, this brief is conditionally filed and accompanied by a motion for leave to file the Brief.

undermine the intent of Congress in enacting the National Highway Traffic Safety Act

The importance of the common law in motivating and stimulating improvements in vehicle safety is a critical component of the American system of justice, and a finding of preemption under the circumstances presented here will, in our view, threaten consumer safety and protection, which should be afforded to all motorists. Accordingly, the Center for Auto Safety and its members have a strong interest in the proper resolution of this issue.

This Honorable Court found that NHTSA's decision to not mandate the use of laminated side glass to comply with FMVSS 205, and its decision to continue to allow manufacturers the option of using tempered or laminated side glass to comply with this minimum safety standard, established a preemptive barrier to the plaintiffs' common law claim.² With all due respect, that legal finding was in error. When the United States Supreme Court issued its Opinion in *Williamson v Mazda*, 131 S. Ct. 1131 (2011), this Court's decision was then in conflict with decisions of the United States Court for the Fifth Circuit Court of Appeals *O'Hara v General Motors Corp.*, 508 F.3d 753 (5th Cir. 2007), and the Texas Supreme Court *MCI Sales and Services, Inc. v Hinton*, 329 S.W.3d 475 (Tex. 2010).

² We believe it is also quite germane to consider the NHTSA's conclusions regarding the importance of using laminated side glass to meet FMVSS 226—which was not announced as a Final Rule until after the decision in this case—and that standards non-preemptive effect on common law causes of action. See discussion below.

Once it announced the holding in *Williamson*, it was, we submit, logical that the U S Supreme Court would remand this case for reconsideration³

While the Respondent, Ford Motor Company, and its *Amici* have argued that this Honorable Court's decision was correct in finding preemption of the Plaintiffs' common law action, their factual predicate for making this argument is actually unsupportable and now—in light of *Williamson*—their arguments are legally incorrect⁴ These conclusions will be documented by first analyzing the comparative history of rear seat belt standards (addressed in *Williamson*) and side window glass standards, and then demonstrating why federal preemption of the instant case is not appropriate⁵

STATEMENT OF FACTS

Federal Motor Vehicle Safety Standards (FMVSSs) 205 and 208 were both promulgated in the late 1960s pursuant to the National Traffic and Motor Vehicle Safety Act (then codified at 15 U S C §§ 1381 *et Seq* At the time, the automotive industry was using lap belts in most seat positions and tempered glass had become the norm for side windows⁶ However, between the early 1970s and the mid-2000s, the National Highway Traffic Safety Administration (NHTSA)

³ After *Williamson supra* was decided the U S Supreme Court remanded the instant case for reconsideration However the U S Supreme Court did not accept for review or remand for reconsideration the Texas decision finding no preemption—it simply denied the Petition for Certiorari See *MCI Sales & Serv V Hinton* 131 S Ct 2903 (2011)

⁴ Your Amicus understands that this Honorable Court has spent a good deal of judicial time delving into the history and development of FMVSS 205 and for that reason we will only highlight a few very pertinent aspects of NHTSA's decisional process

⁵ We think it is also significant to observe that the arguments made by Ford's *Amici* were also made on behalf of Mazda in *Williamson* and they were rejected by the U S Supreme Court See discussion below

⁶ The industry actually used laminated glass in the side windows of its products during the 1930s 1940s and 1950s but transitioned to tempered glass thereafter

studied modifying each of these regulations to require that lap and shoulder belts be installed in the rear seat positions and that laminated glass be required in side window positions. In both instances, the agency decided *not* to require the technology based on cost considerations and minor safety concerns – a decision that *Williamson* concluded does not have preemptive effect. The same conclusion is warranted here.

Standard 205 Since 1967, NHTSA has required laminated glass in all passenger vehicles windshields. 32 Fed. Reg. 2408, 2414 (Feb. 3, 1967). FMVSS 205 is an equipment standard dealing with minimum requirements for window glazing materials. 49 C.F.R. § 571.205. Its purpose was “to reduce injuries resulting from impact to glazing surfaces, to ensure a necessary degree of transparency, and to minimize the possibility of occupants being thrown through vehicle windows in collisions.” 49 C.F.R. § 571.205, § 2. The standard incorporates by reference the ANSI specifications for auto glass materials adopted by the Society of Automotive Engineers and requires that such materials conform to these industry standards. *Id.* at §§ 3.2(a), 5.1. This industry standard provides material specifications for window glazing materials, including both tempered glass and several types of non-tempered/laminated glazing. ANSI Z26.1-1996. NHTSA refers to these non-tempered glass materials as “advanced glazing.” NHTSA, *Ejection Mitigation Using Advanced Glazing: A Status Report*, 1995, Docket No. NHTSA-1996-1782-21 (Nov. 1995).

In 1988, NHTSA published an Advance Notice of Proposed Rulemaking to consider whether to require similar advanced glazing for side windows to minimize

ejections *Side Impact Protection - Passenger Cars*, 53 Fed Reg 31,712 (Aug 19, 1988) Between 1988 and 1999, NHTSA studied the safety benefits of advanced glazing to reduce occupant ejection NHTSA, *Ejection Mitigation Using Advanced Glazing Status Report II*, 1999, Docket No NHTSA-1996-1782-21 (Aug 1999) It found that “[a]dvanced glazing could increase the number of minor (MAIS I) injuries, but the benefits from reduced fatalities and serious injuries would greatly exceed any minor disbenefits” *Status Report II*, p 55 NHTSA found that advanced glazing in side windows “could save 537 to 1,305 lives annually,” and that, by using advanced glazing, “an estimated 235 to 575 serious injuries could be reduced annually” Nevertheless, the agency decided that rather than mandate laminated side glass as a method to meet FMVSS 205, it would leave the existing optional provisions of the standard in place and move on to study other methods of ejection reduction for future products

However, NHTSA never stated that advanced glazing was unsafe, and never retracted its findings of the safety benefits of using this component NHTSA did not bar advanced side window glazing and it has continued up until today to study and laud the benefits that laminated glazing has in mitigating the risk of side window passenger ejection See, *Final Rule on Ejection Mitigation, FMVSS 226*, 3212 Fed Reg 3305 (January 19, 2011)

FMVSS 205 continues to allow use of laminated window glass to meet the requirements of that minimum standard And, manufacturers have increasingly

chosen to install laminated side window glazing⁷ The bottom line is that a manufacturer can choose its own glazing material to comply with minimum standard FMVSS 205, so long as it is formulated to comply with the ANSI standard for that material

It is very significant to observe that while FMVSS 205 continues to allow car companies a choice between using laminated or tempered side glass, the decision to continue these optional components was *not* driven by any agency safety policy decision

**NHTSA's DECISION TO ALLOW OPTIONAL METHODS TO
COMPLY WITH FMVSS 205 AND 208 DOES NOT
CONSTITUTE A PREEMPTIVE SAFETY POLICY
"SAFETY IS NOT AN OPTION"**

On several different occasions, over the past 20 years, NHTSA has considered but then decided not to require lap/shoulder belts or laminated glass, even though the agency stated that installing laminated glass and rear seat lap/shoulder belts would provide incremental safety improvements It specifically rejected requiring lap and shoulder belts because of a concern about a risk of safety for children (using lap/shoulder belts with car seats)(See, The *Amicus* Brief of Products Liability Advisory in *Williamson v Mazda*, 2008 U S Briefs 1314 *7), and it chose not to require laminated side glass—in a decision reached several years after the Priester vehicle was manufactured—because some testing

⁷ Surveys have shown that by 2007 roughly 5 8% of all vehicles sold in the North American market have laminated front side glass When you look at SUVs the total is in the 8 9% range which comes with laminated side glass – it is not an option but vehicles are sold with it as standard fitment Now that the Dodge Ram pick up truck features [laminated side glass as standard] that by itself means some 15% of the pick up trucks sold in North America have laminated front side glass Source http://www.smartglass.com/press/JustAuto_Automotive_Glazing_Analysis.pdf

showed that some test dummy neck shear loads (side to side) were higher with advanced glazing, and because of an incremental increase in the cost of vehicles if this glass was required (See, August 2001, NHTSA Final Report Ejection Mitigation Using Advanced Glazing, p viii) ⁸

Despite NHTSA's decision not to require laminated glass, NHTSA continued to include two alternative glass products in FMVSS 205 to meet this standard And, it did so with the comments demonstrating – before the Priester vehicle was manufactured—the safety benefits of laminated glass ⁹

1 November 1995 Ejection Mitigation Using Advanced Glazing A Status Report, NHTSA ¹⁰

“An average of 7,492 people are killed and 9,211 people are seriously injured each year in passenger cars, light trucks and vans because of partial or complete ejection through glazing Of these, 4,557 fatalities are associated with vehicle rollovers Advanced ejection-mitigating glazing at the right and left front side windows could save 1,313 lives saved and 1,290 serious injuries prevented per year ”

Commenting on the absence of a risk of head and/or neck injury using advanced glazing during simulated rollovers with seat belted test dummies, the 1995 Report noted

⁸ When NHTSA made these observations—after the Priester car was manufactured—the Agency also stated that the added risk of injury was not capable of confirmation because of the absence of an acceptable injury criteria See *NHTSA Final Report Ejection Mitigation Using Advanced Glazing* (August 2001) p ix

⁹ It is very significant to observe that the only detrimental comments about laminated glazing came well after the Priester vehicle was sold

¹⁰ See 74 Fed Reg 63179 et seq (2009) which references this report found at Docket No NHTSA 1996 1782 21 (Nov 1995) Also cited by the Product Liability Advisory Council Inc at pages 11 and 14 of its Brief

¹⁰ See 74 Fed Reg 63179 et seq (2009) which references this report found at Docket No NHTSA 1996 1782 21 (Nov 1995) Also cited by the Product Liability Advisory Council Inc at pages 11 and 14 of its Brief

In simulated rollover testing with belted dummies (a typical example was)

The HIC (head injury) values obtained from the simulations without glazing, and with different types of glazings were insignificant. These HIC values do not indicate a potential for severe head injury. The severity of neck injury was estimated by comparing the maximum neck loads and moments with the Mertz's reference values. The maximum axial compression loads on the neck for tempered glass, rigid plastic and safety glass glazings, were **well below the critical value specified in the injury assessment** reference by Mertz. The maximum axial compression load on the neck was highest for the DuPont glass-plastic glazing. However, **the compression load was still below the critical value and may not produce severe neck injury**. The tension load was inflicted on the neck after the head rebounded from severe impact with the glazing (2000 msec). Again, **the neck tension loads were below the critical values** defined by Mertz for all the glazing simulations. The **neck flexion bending moment and neck extension bending moment values were also less than the Mertz's critical values** for all the glazing simulations. [pp 6-6 and 6-7][Emphasis added]

This same Report found no evidence of an increased risk of injury with laminated glass during simulated rollover accidents even with unbelted test dummies [p 6-8]

All the simulations regardless of glazing type, produced moderate HIC values which corresponded to the head contact with the roof. The axial compression load on the neck was higher than the Mertz's critical value for all the simulations. However, neck compression load was received from the roof and front header contacts. **The plastic and glass-plastic glazings themselves did not cause any major injury to the dummy from direct contact and prevented ejection**. In the simulation with the open window the unbelted dummy came out of the vehicle in the first quarter roll. There were no major contacts of the dummy with the interior of the vehicle before ejection. All other glazings retained the dummy inside the vehicle." Id [Emphasis added]

These NHTSA findings demonstrate that at the time the Priester vehicle was manufactured, NHTSA itself took the position that advanced glazing could prevent over 1000 deaths and serious injuries **every year** and that it posed **zero**

risk of neck or head injuries This fact alone is dispositive evidence that this lawsuit is entirely consistent with federal purposes

Subsequent Agency events confirm, however, the absence of any conflict between this lawsuit and NHTSA's policies regarding advanced glazing. Thus, in 1999, two years after the Priester vehicle was made, NHTSA again concluded that advanced glazing offered substantial safety benefits

2 August 1999, Ejection Mitigation Using Advanced Glazing Status Report II NHTSA¹¹

Advanced glazing systems could save between 500 and 1,300 lives per year These estimates assume a national safety belt use rate of about 66 percent (the average between 1992 and 1996) and a 20 to 51 percent range of effectiveness for advanced glazing systems in preventing ejection. Higher safety belt use rates directly reduce the estimated benefits of advanced glazing systems. For example, a 71 percent safety belt use rate would reduce likely glazing benefits by 11 percent. An 81 percent use rate would reduce glazing benefits by 34 percent. As of the end of 1998, the U.S. national average seat belt use rate was 70 percent [p vii]

Once again, NHTSA did not express any concerns about significant safety risks from laminated glass. Specifically, discussing the issue of any potential increase in neck injury, NHTSA stated that the dummy test results were inconsistent due to dummy reliability and found that even with tempered glass, tests showed both one of the lowest and one of the highest neck readings (p 29). And, while the testing revealed that generally the neck loads were higher with advanced glazing, NHTSA did not attach any real scientific significance to those results. Commenting on the risks and benefits of advanced glazing and any risk of neck injury, the report stated (p 40)

¹¹ Docket No. NHTSA 1996 1782 21 (August 1999). Also cited by the defendant's Amicus, the Products Liability Advisory Council, Inc. at page 12 of its Brief.

The report does not yet address neck injury because lateral neck criteria have not been completed. However, even if there can be small increases in low level neck injury, it is anticipated that the fatality prevention benefit of advanced glazing would likely greatly outweigh any such disbenefits.

Thus, both in 1995 and 1999, NHTSA found that advanced glazing would substantially advance public safety and that any benefits would greatly outweigh any risks. This conclusion was reaffirmed in NHTSA's 2001 Final Report on Advanced Glazing. There, the agency stated as follows:

3 August 2001 NHTSA Final Report Ejection Mitigation Using Advanced Glazing¹²

Results showed that advanced glazing and tempered glass had similar results for potential head injuries. The neck measurements were not repeatable. The neck shear loads were higher with advanced glazing—but they were not in a significantly high range at all (see, p. viii).

Advanced glazing can have a significant safety benefit particularly in rollovers (p. ix).

The repeatability of neck loads and moments was poor. Tempered glass had one of the lowest and highest axial loads (p. 36). **No assessment was made as to the actual risk of neck injury due to no acceptable injury criteria.** *Id.*

Notably, in this 2001 Report, NHTSA further concluded that “**window air bag systems [also] showed some potential for neck injury (p. 50) (emphasis added)**.” Thus, any concerns that NHTSA may have had with regard to neck injuries from advanced glazing were also applicable to airbags.

At no time during this entire history did NHTSA express any significant concerns about neck injuries from advanced glazing. Indeed, in 2009, NHTSA

¹² Docket No. NHTSA 1996-1282-21 (Aug. 2001). Also cited by Ford's Amicus the Products Liability Advisory Council, Inc. at pages 5, 6, 12, 13.

proposed a new ejection mitigation regulation -- Standard 226 -- which affirmatively encouraged car makers to utilize advanced glazing along with side curtain airbags as a means of preventing passenger ejection in car crashes

4 December 2, 2009, 49 CFR 63179, et seq , Federal Motor Vehicle Safety Standards, Ejection Mitigation, Phase-In Reporting Requirements¹³

The agency anticipates that manufacturers would meet the standard by modifying existing side impact airbag curtains, and possibly supplementing them with advanced laminated glazing (p 63180)

* * * *

We anticipate that manufacturers would likely install ejection mitigation side curtain air bags in response to this rulemaking, taking advantage of the side impact curtains already in vehicles. However, advanced glazing could have a role in complementing ejection mitigation curtain systems. NHTSA tested several vehicles' ejection mitigation side curtain air bags both with and without laminated glazing to the 18 kg impactor performance test proposed in this NPRM. In the tests, the glazing was pre-broken to simulate the likely condition of the glazing in a rollover. To encourage manufacturers to enhance ejection mitigation curtains with advanced glazing, this NPRM proposes to allow windows of advanced laminated glazing to be in position, but pre-broken to reproduce the state of glazing in an actual rollover crash. Although the glazing is pre-broken, the laminate in combination with the remaining integrity of the glazing acts as a barrier to ejection (p 63183)

Commenting further on the risk of injury from these ejection components, and explaining NHTSA's interest in encouraging the use of laminated glass, NHTSA stated

In these tests (window alone and bag alone), the ejection mitigation systems did not show a high potential for producing head and neck injury. However, head and neck loading were higher than the open window condition. The highest load with

¹³ See also *Final Rule on Ejection Mitigation FMVSS 226* 3212 Fed Reg 3305 (January 19 2011)

respect to the Injury Assessment Reference Values (IARVs) was 82 percent for the neck compression for the 5th percentile female tested with the Simula/laminate combination. The highest injury response for the 50th percentile male dummy was 59 percent for the neck compression with the TRW system alone. All HIC36 20 responses were extremely low and ranged from 8 to 90, with the maximum occurring in an open window test. Lateral shear and bending moment of the neck were also measured, although there are no established IARVs. The maximum lateral neck shear loads were 950 N (50th percentile male tested with TRW system) and 1020 N (5th percentile female tested with laminate only). Id.

We are proposing to allow windows to be in position (up and closed), but pre-broken. We are proposing to allow windows to be in position so as to not discourage the use of advanced glazing (laminated glazing) in vehicles, since **our testing has shown that advanced glazing may enhance the performance of current air bag curtain designs** [pp. 63211-12][Emphasis added]¹⁴

All of these comments demonstrate, we submit, the importance of paying attention to the government's intent offering manufacturers the option to use laminated side glass and emphasizing the safety effectiveness of that product. In light of this regulatory determination, the application of relevant legal principles dictates, we respectfully submit, that there is no basis to preemptively dismiss the plaintiffs' cause of action. In addition, as we now explain, there are substantial parallels between the history of Standard 205 and the aspect of Standard 208 that was at issue in *Williamson*.

¹⁴ NHTSA also stated that this standard—with its optional choices for safety components—would not interfere with or conflict with allowing citizens to pursue common law claims for failing to do more than install optional component listed in this standard. 49 CFR at 63223, 63224. As explained in plaintiff's supplemental brief to this Court, NHTSA issued its final regulation in January 2011. In the preamble accompanying that regulation, NHTSA affirmatively encouraged car makers to install advanced glazing and stated that its regulation would not preempt any state tort claims.

Standard 208 The history of Standard 208 is recounted in *Williamson*, and will not be repeated here¹⁵ But the parallels between the regulation at issue in *Williamson* and Standard 205 bear emphasizing In both cases, NHTSA considered requiring a particular technology and, in both cases, it ultimately decided not to impose a universal requirement In both cases, moreover, in deciding not to require the technology at issue, the agency had expressed minor safety concerns about requiring the technology in all cars In *Williamson*, part of the reason NHTSA decided not to require rear seat lap/shoulder belts was because of the concern of a risk of safety for children (using lap/shoulder belts with car seats) Indeed, in its *Amicus* Brief in *Williamson*, the Products Liability Advisory Council urged the US Supreme Court to find preemption based on the fact that NHTSA had cited safety concerns in support of its decision not to require lap/shoulder belts in the rear center and aisle seats of all passenger vehicles PLAC Br in *Williamson v Mazda*, 2008 U S Briefs 1314 *7 Despite these safety concerns, *Williamson* found no preemption of state tort claims alleging that a vehicle should have had a lap/shoulder belt in its rear seat – and it did so *unanimously*

For all the reasons set forth below, and in light of the parallels between Standard 205 and Standard 208, we urge this Honorable Court to find no preemption here

¹⁵ See the extensive discussion set forth in *Williamson v Mazda Motor of America Inc* 131 S Ct 1131 1137 1140 (2011)

ARGUMENT

I Federal Preemption Related To Motor Vehicle Safety

Congress passed the National Traffic and Motor Vehicle Safety Act of 1966 (“Safety Act”) to reduce motor vehicle injuries and deaths, 15 U S C §§1381 *et seq* , 49 U S C §§30101 *et seq* , empowering NHTSA to prescribe motor vehicle safety standards 49 U S C §§30101, 30104 Congress made clear, however, that it did not intend to bar the operation of state tort law, by enacting an express savings clause preserving state law claims The Safety Act provides that “[c]ompliance with a motor vehicle safety standard prescribed under this chapter **does not exempt a person from liability at common law**” 49 U S C §30103(e) (emphasis added)

In *Geier v Honda Motor Co* , 529 U S 861, 870, 120 S Ct 1913 (2000), the Court held that, in light of this savings clause, the Safety Act does not expressly preempt any state tort claims The Court recognized a very narrow exception in the context of Standard 208 airbag regulations, where the Agency itself stressed the importance of the use of different sorts of restraints to meet the passive restraint standard In the instant case, however, the federal standard in question was not written with the same policy intent, nor is there any basis to find a legitimate legal conflict between this minimum glass standard and the common law cause of action being pursued

II Standard 205 Options Framework Does Not Preempt State Tort Claims

To begin, there is no question that the existence of regulatory options in Standard 205 does not provide a basis for finding preemption here In its Brief in

support of the U S Supreme Court accepting for certiorari the *Williamson* case, the United States government not only emphasized the parallels between Standard 205 and Standard 208, but it also made clear that regulatory options do not exert any preemptive effect *and* that the lower courts had committed "widespread error" by interpreting *Geier* in that fashion (2008 U S Briefs 1314 (April 23, 2010) (emphasis added))

The analytical question presented by this case - how to apply *Geier's* reasoning to FMVSS provisions that do not affirmatively seek to foster a diversity of options - has already produced conflicts in the lower courts, even though not in the precise circumstances presented here **Thus, for instance, lower courts have reached conflicting conclusions on how to apply *Geier* to FMVSS 205, 49 CFR 571.205, which allows manufacturers to use either tempered or laminated glass in vehicle side windows** Some courts have held that FMVSS 205 does not conflict with a state common-law duty of care requiring installation of laminated glass. See, e.g., *O'Hara v General Motors Corp*, 508 F.3d 753, 762-763 (5th Cir. 2007), n4 *MCI Sales & Serv, Inc v Hinton*, 272 S.W.3d 17, 29 (Tex. Ct. App. 2008), review granted, No. 09-0048 (Tex. argued Mar. 24, 2010). Other courts have concluded that FMVSS 205 gives manufacturers the "option" to install either tempered or laminated glass, and that state common law may not penalize choosing either one. See, e.g., *Morgan v Ford Motor Co*, 680 S.E.2d 77, 94-95 (W. Va. 2009), *Lake v Memphis Landsmen, LLC*, No. W2009-00526-COA-R3-CV, 2010 WL 891867, at *6-*9 (Tenn. Ct. App. Mar. 15, 2010). **Similarly, lower courts have reached conflicting conclusions on whether the absence in FMVSS 208 of any requirement of passenger seatbelts in buses preempts common-law requirements to install such seatbelts**. Compare *MCI Sales & Serv*, 272 S.W.3d at 23-28 (common-law claim not preempted), with *Lake*, [*21] 2010 WL 891867, at *9-*11 (common-law claim impliedly preempted), and *Doomes v Best Transit Corp*, 890 N.Y.S.2d 526, 527 (App. Div. 2009) (same).

* * *

Review by this Court is therefore warranted even in the absence of a conflict among decisions of federal courts of appeals and state high courts concerning the preemptive effect of the particular feature of FMVSS 208 at issue here **The acknowledged confusion and, in the government's view, widespread error in the lower courts**

over the decade since *Geier* are of sufficient importance to warrant plenary review of the first question presented

Moreover, given the opposing views of the responsible agency and a number of lower courts, further percolation is not necessary for this Court to have the full benefit of the opposing perspectives [**36] on the preemptive effect of FMVSS 208 *Id*

* * *

[*9] The state appellate court characterized FMVSS 208 as giving manufacturers the "option" of installing either Type 1 or Type 2 seatbelts at any position for which a Type 2 seatbelt was not expressly required *Pet App 16* (citation omitted) As a result, the court held that state tort law is preempted under *Geier* when the state law imposes liability for choosing the less protective option **The state court's reading of *Geier* is incorrect. A Federal Motor Vehicle Safety Standard is a "minimum standard" 49 U.S.C. 30102(a)(9)** Accordingly, a state common-law duty of care that effectively sets a higher minimum does not create a conflict with federal law, in the absence of specific features of a particular FMVSS that go beyond establishing a minimum standard *Geier* held the local negligence-law duty of care preempted because the FMVSS at issue there did more than set a minimum standard. Rather, that FMVSS affirmatively encouraged the adoption of diverse forms of passive restraints, and state tort law could not be permitted to counter that encouragement by requiring that all manufacturers select the same form of passive restraint (airbags) **Where, as in this case, a FMVSS manifests no affirmative intent to foster multiple options, there is no conflict of the sort that was present in *Geier* - and hence no preemption. *Id*** [Emphasis added]

The highlighted language is highly revealing – and directly relevant here. The United States has made clear – and *Williamson* confirmed – that preemption only exists where a regulation "manifests [and] affirmative intent to foster multiple options " *Id* There is simply no such evidence with regard to Standard 205. The Assertion That NHTSA Intended To Preempt Claims Of Defective Side Glass Based Upon Its Decision Not To Require Laminated Side Glass - Because Of A Dispute Over Its Safety Benefits - Is Not Legally Supportable

Nor is there any basis for finding preemption based on NHTSA's decision not to require laminated glass in all cars. The argument in support of preemption presented by Ford and its *Amici* is a regurgitation of the arguments made—and rejected—by the Products Liability Advisory in the Brief it filed with the U.S. Supreme Court in *Williamson*. In the latter case, the Products Liability Advisory told the Court that preemption was appropriate because NHTSA had rejected a lap/shoulder belt requirement because of *safety concerns and cost issues*—just like it argues in this Court.

[I]n 1993 NHTSA rejected requiring lap shoulder belts to protect children better and allow technology to improve and costs go down. There were safety trade-offs of the alternatives. To require lap shoulder belts is to lose an opportunity to better improve vehicle safety through other means. *Amicus curiae* Brief of the Products Liability Advisory Council, 2008 U.S. Briefs 1314 *8-9.

Addressing the premise argued by the defendants in *Williamson* (and here), that NHTSA's decision not to require lap/shoulder belts—and instead to continue to allow the manufacturers to have a choice—represented a policy rationale warranting preemption, the *Williamson* Court stated [131 S. Ct. at 1138]:

Why then did DOT not require lap-and-shoulder belts in these seats? We have found some indication that it thought use of lap-and-shoulder belts in rear aisle seats could cause "entry and exit problems for occupants of seating positions to the rear" by "stretch[ing] the shoulder [***19] belt across the aisle way, *id.*, at 46258.

However, the Court then observed that DOT encouraged manufacturers to address this issue through innovation:

[I]n those cases where manufacturers are able to design and install lap/shoulder belts at seating positions adjacent to aiseways without interfering with the aisleway's purpose of allowing access to more

rearward seating positions [the agency] encourages the manufacturers to do so

Despite these safety concerns expressed by NHTSA regarding lap/shoulder harnesses, *Williamson* rejected a finding of preemption

It is, we submit, impossible to differentiate between the factual circumstances and regulatory history of FMVSS 205 and the rejection of mandatory rear seat lap/shoulder belts in FMVSS 208

This case is also factually on all fours with *Sprietsma v Mercury Marine*, 537 U S 51, 61 (2002), which rejected federal preemption of claims that a boat engine should have had a propeller guard. In that case, as here (and as in *Williamson*), the federal government had affirmatively rejected a requirement to install the technology in question. And as here, and as in *Williamson*, the federal agency expressed a concern that the technology at issue posed certain safety risks, stating that propeller guards would “increase the potential for blunt trauma caused by collision with the guard.” *Id.* at 61. The Coast Guard further found that a propeller guard requirement would be prohibitively prohibitively “expensive [and that there was] no simple universal design proven feasible.” none of these findings justified the elimination of common law rights to seek civil redress. *Id.* Despite these safety and cost concerns, a unanimous Court concluded [*Sprietsma*, 537 U S at 66-67]

This statement reveals only a judgment that the available data did not meet the FBSA’s “stringent” criteria for federal regulation. The Coast Guard did *not* take the further step of deciding that, as a matter of policy, the States and their political subdivisions should not impose some version of propeller guard regulation, and it most definitely did not reject propeller guards as unsafe. The Coast Guard’s apparent focus was on the lack of any “universally

acceptable” propeller guard for “all modes of boat operation ” But *nothing in its official explanation 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 respondent’s particular type of motor. Thus, although the Coast Guard’s decision not to require propeller guards was undoubtedly intentional and carefully considered, *it does not convey an ‘authoritative’ message of a federal policy against propeller guards*. And nothing in the Coast Guard’s recent regulatory activities alters this conclusion [emphasis added]

This reasoning is fully applicable here. NHTSA never affirmatively “reject[ed] laminated glass as unsafe” – to the contrary, it continued to permit its installation in the windows of all passenger vehicles. NHTSA never conveyed an “authoritative” federal policy against laminated glass – if it had such a policy, surely the agency would have prohibited its use. But NHTSA did no such thing, further revealing that Ford’s preemption argument must fail.

III Geier Does Not Mandate a Finding of Preemption Here

Finally, it is important to remember that none of the policy considerations that *Geier* found dispositive with respect to airbags is present here. In contrast to the hotly-debated technology at issue in *Geier*, this case involves a non-controversial device – laminated glass – that has never been the subject of any sort of public outcry and is used in the front windshield of every vehicle and has been gradually incorporated into cars’ and trucks’ side windows over the past several years. Second, in contrast to the 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 window technology. Unlike *Geier* there was no “phase in,” *id.* at 879, of any technology, nor was there a NHTSA plan to “bring about a mix of different devices introduced gradually over time,” *id.* at 875. Nor

was there a NHTSA statement of need to “deliberately provide the manufacturer with a range of choices,” *id* at 874, or a NHTSA “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. Thus, the only fact that can be gleaned from Standard 205’s history is that NHTSA wanted cars to have, at a minimum, side windows made of an industry-approved material. That alone is plainly insufficient to preempt this lawsuit.

CONCLUSION


Every federal safety standard is intended to benefit the American public by insisting upon minimum regulations. But as Congress made clear when it expressly preserved state tort claims in the Safety Act, it is equally vital to the public’s safety that the victims of product defects have the weapon of potential common law liability to spur the industry to do much more than simply comply with these regulations.

While any lawsuit seeking compensation for catastrophic injury or wrongful death will pose the question, in this context, whether the product manufacturer did enough to protect its customers in safety design, that question—in the context of side window glazing and crashworthiness—was intended by Congress and NHTSA to be left for resolution on a case-by-case basis in courts throughout the United States. What the Congress and NHTSA have chosen to protect and not preempt should not, we respectfully submit, be eliminated in the hallowed halls of justice.

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August 8, 2011

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

AUG - 9 2011

S C Supreme Court

James C Williams, Jr , Circuit Court Judge

Case No 06-CP-38-1071

MARY ROBYN PRIESTER, Individually and as
Natural Mother/Next of Kin and Personal
Representative of the Estate of James
Lloyd Priester,

Appellant,

v

Preston Williams Cromer, Stage Light
Management d/b/a Showgirls(z), and
Lloyd Brown, individually and d/b/a
Showgirls(z), Nikki D's, Inc , and
Ford Motor Company, Inc ,

Defendants,

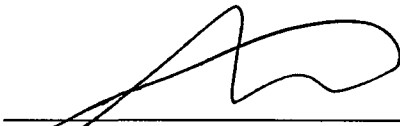
of whom Ford Motor Company, Inc , is the

Respondent

CERTIFICATE OF COUNSEL

The undersigned certifies that the Brief of *Amicus Curiae* Center for Auto Safety in Support of Appellants and Supporting Reversal of the Decision of the Lower Court complies with Rule 211(b)

August 9 2011


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PROOF OF SERVICE

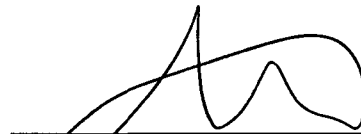
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