

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

**APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas**

**James C Williams, Circuit Court Judge
Case No 06-CP-38-1071**

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SC Supreme Court

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

**RESPONDENT'S REPLY TO CENTER FOR AUTO SAFETY'S
AMICUS CURAIE BRIEF**

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INTRODUCTION

The Center for Auto Safety (“CAS”) does not identify anything about the Supreme Court’s decision in *Williamson v Mazda Motor of America Inc*, 131 S Ct 1131 (2011), that provides any reason for this Court to alter its prior determination that Federal Motor Vehicle Safety Standard (“FMVSS”) 205 preempts Priester’s state-law tort claims *Priester v Cromer*, 388 S C 425, 697 S E 2d 567 (2010)¹ Instead, CAS largely repeats Priester’s flawed arguments and, like Priester, goes beyond this Court’s order requesting supplemental briefing on “what impact, if any, *Williamson* may have on this case” Order at 1 (Apr 7, 2011) CAS misconceives the role of a GVR order, erroneously analogizes this case to *Sprietsma v Mercury Marine*, 537 U S 51 (2002), mischaracterizes this Court’s prior ruling, and attempts to relitigate this Court’s determinations about the regulatory objectives of FMVSS 205 Those arguments fail

ARGUMENT

CAS’s arguments should be rejected

First, CAS, like Priester, misconceives the meaning of the Supreme Court’s GVR order in this case and denial of certiorari in *MCI Sales & Service Inc v Hinton*, 329 S W 3d 475, 495 n 19 (Tex 2010), *cert denied*, 131 S Ct 2903 (2011) See CAS Br at 3 n 3, Pl Supp Br 29, Pl Supp Reply 1-2 & n 3² As Ford has explained (Ford Supp

¹ This reply brief is filed in accordance with this Court’s August 29, 2011 order granting CAS leave to file its amicus brief See Order at 1 (Aug 29, 2011)

² “CAS Br” refers to the Amicus Brief of CAS conditionally filed in this case on August 9, 2011 “Pl Supp Br” refers to the Supplemental Brief of Appellant filed in this case on May 15, 2011 “Pl Supp Reply” refers to the Supplemental Reply Brief of Appellant filed in this case on July 11, 2011 “Ford Supp Br” refers to Supplemental Brief of Respondent filed in this case on June 20, 2011 “Pl Br” refers to the Final Brief of Appellant filed in this case on September 14, 2009 “Ford Br” refers to the Final Brief

Br 27-28), it is well-settled that a GVR order “d[oes] not amount to a final determination on the merits,” *Henry v City of Rock Hill*, 376 U S 776, 777 (1964), or even “suggest” that a lower court’s decision is erroneous, *Communities for Equity v Michigan High Sch Athletic Ass n*, 459 F 3d 676, 680 (6th Cir 2006) Instead, as the leading treatise on Supreme Court practice explains, “the lower court is being told merely to reconsider the entire case in light of the intervening precedent—which may or may not compel a different result ” Eugene Gressman et al , *Supreme Court Practice* 349 (9th ed 2007)

When lower courts undertake such reconsideration after a GVR order, they often reaffirm their initial decision See e g , *Communities for Equity*, 459 F 3d at 691, *Gonzalez v Justices of the Mun Court*, 420 F 3d 5, 10 (1st Cir 2005), *United States v Ogle*, 415 F 3d 382, 383-84 (5th Cir 2005) (per curiam), *United States v Dockery*, 401 F 3d 1261, 1263 (11th Cir 2005) (per curiam), *Time Warner Entmt Co v Six Flags Over Ga LLC*, 563 S E 2d 178, 185 (Ga Ct App 2002), *Hughes Aircraft Co v United States*, 140 F 3d 1470, 1477 (Fed Cir 1998), *Equality Found of Greater Cincinnati Inc v City of Cincinnati* 128 F 3d 289 292-94, 301 (6th Cir 1998) See also *Supreme Court Practice* 349 n 103 (1984 study found “that in a substantial number of the remanded cases the courts of appeals adhered to the original ruling, and that very few of these judgments were reversed by the Supreme Court ”) This Court has previously done the same See e g , *McQueen v South Carolina Coastal Council*, 354 S C 142, 151, 580 S E 2d 116, 120 (2003)

of Respondent filed in this case on July 16, 2009 “R ” refers to the Record on Appeal filed in this case on June 23, 2009

The Supreme Court's denial of certiorari in *Hinton* no more expresses a view on the merits than its GVR order in this case. As Ford has explained (Ford Supp. Br. 27-28), and the Supreme Court has repeated "many times," "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *Missouri v. Jenkins*, 515 U.S. 70, 85 (1995) (internal quotation marks and citation omitted). There are many reasons the Supreme Court may have denied certiorari in *Hinton* that have nothing to do with the merits—including that the lower court's analysis of whether FMVSS 205 preempted the plaintiffs' claims was dictum, 329 S.W.3d at 495 n.19, and its decision was interlocutory and thus not properly before the Supreme Court, *Jefferson v. City of Tarrant*, 522 U.S. 75, 77-78 (1997). The fact that the Brief in Opposition to certiorari, *Hinton*, No. 10-1148, 2011 WL 1540424 (U.S. Apr. 20, 2011), does not mention these defects does not mean the Court was unaware of them and did not base its decision on them. The Justices and their law clerks frequently find reasons for denying certiorari that are not discussed in the papers before the Court on certiorari, and the fact that a defect is not identified in a brief in no way prevents the Court from relying on it.

Second, CAS, like Priester, contends that *Sprietsma*, 537 U.S. 51, controls and requires a finding of no preemption. CAS Br. 18, Pl. Supp. Br. 28-29. This is a classic example of an effort to expand the scope of this Court's supplemental briefing order. The relevance of *Sprietsma* was fully briefed during the initial appeal, the Supreme Court's decision in *Williamson* does not cite, much less discuss, *Sprietsma*, and there is therefore no reason for this Court to reconsider the applicability of *Sprietsma*. That is especially true given that this Court properly rejected Priester's reliance on *Sprietsma* in the initial appeal. As Ford has explained, *Sprietsma* is not applicable in the circumstances here.

because it addressed a situation in which the agency decided not to regulate the relevant area *at all*, whereas here NHTSA refused to require laminated glazing in the context of a comprehensive regulatory program. *See* Ford Supp Br 27. If anything, the fact that *Williamson* did not even mention *Sprietsma* supports the Court’s decision to reject CAS’s and Priester’s misplaced reliance on *Sprietsma*. *Id.* As the Court correctly held during the initial appeal, *Geier v American Honda Motor Co.*, 529 U.S. 861 (2000) not *Sprietsma* controls this case. 388 S.Ct. at 430-31, 697 S.E.2d at 570. And *Williamson*’s unequivocal reaffirmation of *Geier*—despite calls by the plaintiffs in *Williamson* and their amici for the Court to limit to its precise facts or overrule *Geier*—only reinforces the conclusion that this Court’s prior decision was correct. *See* Ford Supp Br 19-21.

Third, CAS, like Priester, attacks a straw man by arguing that the existence of regulatory options alone does not preempt a state law claim requiring one option. *See* CAS Br 14-16, Pl. Supp Br 12-13. The “options alone” mantra of Priester and her amici is the tired refrain of their case. As Ford has explained, however, this Court did not base its prior decision on the theory that the mere existence of options alone exerts preemptive force. Ford Supp Br 15-16, 21-23. Instead, this Court found that FMVSS 205 preempts Priester’s claim because, as in *Geier*, the agency affirmatively intended to provide automobile manufacturers with a range of options for safety reasons. *Id.* at 21-23 (citing *Priester*, 388 S.Ct. at 430-33, 697 S.E.2d at 570-71). That represents an unassailable application of *Geier* to the regulatory record that was before the Court in the initial appeal—and that remains the same record before the Court today.

Finally, CAS, like Priester, spends much of its brief trying to relitigate this Court’s prior determination about the regulatory objectives of FMVSS 205. *See* CAS Br

4-10, 16, 17-18, Pl. Supp. Br. 21-27. *Williamson* provides no reason whatsoever to revisit that determination. It addressed a different FMVSS with a different regulatory history and thus provides no reason for this Court to reopen (or revisit) its interpretation of FMVSS 205. See Ford Supp. Br. 28. CAS contends that Ford and its amici's arguments that FMVSS 205 represents a policy decision based on safety concerns are a "regurgitation" of arguments rejected by the Supreme Court in *Williamson*. CAS Br. 17-18. But the arguments rejected in *Williamson* were based on different facts—an entirely different FMVSS and regulatory record—and thus have no bearing here. *Williamson* underscores that the conflict preemption analysis called for by *Geier* must look to the particular regulatory objectives of the particular regulation at issue.

CAS implausibly asserts that it is "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." CAS Br. 18. But FMVSS 205 (at issue here) and FMVSS 208 (at issue in *Williamson*) are different regulations, with different histories, designed to address different safety concerns. Moreover, as Ford has explained, the three factors the Supreme Court relied upon to find no preemption in *Williamson* with respect to FMVSS 208 are not present as to FMVSS 205. Ford Supp. Br. 16-17, 28-34.

First, the *Williamson* Court concluded that the agency did not preserve the option of lap-only seat belts in FMVSS 208 to advance a significant safety objective and, in fact, had "encouraged manufacturers" to install lap-and-shoulder belts. 131 S. Ct. at 1138. By contrast, as this Court properly concluded, in FMVSS 205 NHTSA purposefully preserved glazing options for safety reasons and, indeed, was "extremely reluctant" to require laminated glass because it increased the risk of neck injury to belted passengers.

Priester, 388 S Ct at 430, 697 S E 2d at 570. Second, the *Williamson* Court concluded that the agency “had no interest in assuring a mix of devices” and did not preserve seat belt options to promote technological development. 131 S Ct at 1138. By contrast, NHTSA preserved glazing options, rather than requiring laminated glazing, to advance the development of ejection mitigation systems, including those with side curtain air bags. Notice of Withdrawal, 67 Fed Reg 41,365, 41,367 (June 18, 2002). And third, the *Williamson* Court concluded that the “more important” reason the agency ultimately decided not to require lap-and-shoulder seat belts was cost (not safety). 131 S Ct at 1139. By contrast, NHTSA’s stated “primary reasons” for preserving glazing options were safety and technological development. 67 Fed Reg at 41,367.

CAS’s other arguments about the regulatory objectives of FMVSS 205 are even more obviously unrelated to *Williamson*—and thus are more obviously outside this Court’s supplemental briefing order. CAS selectively isolates snippets from NHTSA’s reports. But those snippets at most demonstrate only that NHTSA was uncertain about *how much* laminated glazing increased the risk of neck injuries and that it recognized advanced glazing had substantial safety benefits for unbelted occupants. CAS Br 4-10.

Moreover, CAS, like *Priester* (Pl. Supp. Reply 5), completely ignores NHTSA’s ultimate decision to preserve *both* glazing options *despite* these uncertainties and benefits because NHTSA was “*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.” Donald Willke et al., NHTSA, Ejection Mitigation Using Advanced Glazing Final Report at x (Aug. 2001) (“Final Report”) (R p 235) (emphasis added). The potential increase in neck injuries for belted

occupants—even though uncertain in *degree*—and the desire to encourage development of new technologies to advance safety objectives outweighed the recognized benefits to unbelted occupants. *See* 67 Fed. Reg. at 41,367. None of the snippets CAS has cherry-picked changes that conclusion and CAS cannot change the fact that the agency expressed “extreme reluctance”—for safety reasons—to impose the same requirement that Priester now asks this Court to impose through this tort action.

CAS suggests that this Court should not rely upon NHTSA’s Final Report because it was released after the vehicle at issue was manufactured (1997). *See* CAS Br. 6-7. Here again, CAS is just trying to relitigate issues outside of the Supreme Court’s GVR Order and this Court’s supplemental briefing order, which are limited to the impact of *Williamson* on this case. Moreover, Priester has never argued that the Final Report should not be considered. And this Court, 388 S. Ct. at 430, 697 S. E. 2d at 570, the Court of Common Pleas, Summary Judgment Order at 9-10, 15 (R. p. 9-10, 15), and the parties have all relied on the report, *see e.g.*, Pl. Br. 8-9, 16, Pl. Supp. Br. 25-26, Ford Br. 13-15, Ford Supp. Br. 30-33. That makes sense because, even though it was issued after 1997, the Final Report was the product of studies NHTSA conducted during the relevant time in response to a congressional directive issued in 1991, National Highway Traffic Safety Administration Authorization Act of 1991, Pub. L. No. 102-240, § 2503, 105 Stat. 1914, 2083 (1991). In addition, the Final Report unequivocally confirmed the safety tradeoff that the agency had repeatedly identified throughout the relevant period. *See* Ford Supp. Br. 6-8. For those reasons, among others, the Final Report is much more indicative of NHTSA’s safety objectives in 1997 than the 2011 regulation upon which CAS and Priester now attempt to rely. CAS Br. 11-12, Pl. Supp. Br. 17-18, 26.

CAS's final attempt to relitigate the objectives of FMVSS 205 is based on the 2011 regulation—FMVSS 226—Federal Motor Vehicle Safety Standards, Ejection Mitigation, Phase-In Reporting Requirements, Incorporation by Reference, Final Rule, 76 Fed. Reg. 3212, 3212 (Jan. 19, 2011). As Ford has explained, FMVSS 226 is obviously outside of this Court's remand order. *See* Ford Supp. Br. 36. But if anything, FMVSS 226 strongly supports a finding of preemption and thus only further bolsters the conclusion that this Court correctly reached in its initial decision. FMVSS 226 (1) explains that NHTSA previously preserved glazing options because of the increased risk of neck injury, (2) prohibits manufacturers from satisfying the new standard by using advanced glazing alone and instead allows advanced glazing to be used with side air bags, which did not exist when the vehicle at issue was manufactured, and (3) provides for a gradual phase-in period, which conflicts with state tort suits, like this one, that would *immediately* impose an advanced-glazing-only rule. *See id.* at 36-39. The fact that this tort action seeks to impose a regulatory requirement (*i.e.* a glazing-only requirement) that the agency's regulations now explicitly *prohibit* is reason enough to stick to this Court's initial decision and hold that the tort claims at issue are preempted.

CONCLUSION

CAS identifies nothing about the Supreme Court's decision in *Williamson* (or anything else) that provides a basis for this Court to alter its prior decision holding that FMVSS 205 preempts Priester's state-law tort claims. For the reasons stated herein and in Ford's supplemental brief, this Court should adhere to its prior decision.

Respectfully submitted,

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September 7, 2011

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CERTIFICATE OF COUNSEL

The undersigned certifies that Respondent's Reply To Center For Auto Safety's
Amicus Curiae Brief complies with Rule 211(b), SCACR, as well as the South Carolina
Supreme Court's Order dated August 13, 2007

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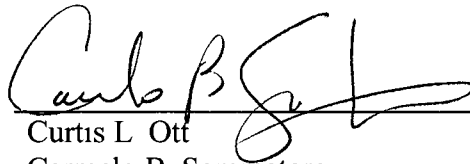
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