

NO. 09-0048

IN THE SUPREME COURT OF TEXAS

Motor Coach Industries Mexico, S.A. de C.V.,
f/k/a Dina Autobuses, S.A. de C.V.

Petitioner/Respondent

v.

James Hinton, Individually and as Representative
of the Estate of Dolores Hinton, Deceased, *et al.*

Respondents/Petitioners

On Appeal from the Court of Appeals
For the Tenth Judicial District of Texas

REPLY BRIEF TO CROSS-PETITIONER HINTON'S RESPONSE TO THE PETITION FOR REVIEW

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioner, Motor Coach Industries Mexico, S.A. de C.V. files this Reply Brief in support of its Petition for Review and in opposition to Cross-Petitioner Hinton's Response to the Petition for Review.

I. Hinton does not Dispute the Importance of these Issues to the Jurisprudence of the State

Not once in its responsive brief does Hinton dispute that this Petition for Review involves issues of importance to the jurisprudence of this State. Not once does Hinton dispute that the Petition involves claims that have a very great potential to be raised in other lawsuits involving motor coaches and cars. And not once does Hinton dispute that this petition involves not one, but two, issues of first impression for the State of Texas.

This Court has the jurisdiction to hear this appeal for these reasons and the others stated in the Petition for Review. This Court should exercise its jurisdiction and not allow these important issues to stand resolved by a divided court of appeals.

II. *Geier* Holds that the Presumption Against Pre-emption Does Not Apply to the Motor Vehicle Safety Act.

Hinton claims that both the U.S. and the Texas Supreme Courts have recently "reemphasized" the presumption against pre-emption. This is wrong and irrelevant.

First, whether the presumption applies depends on the act being analyzed. The U.S. Supreme Court already has assessed whether the presumption applies to the Motor Vehicle Safety Act ("Safety Act"). In *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000) the Court held that the presumption against pre-emption does not apply to the Safety Act. *Geier*, 529 U.S. at 867–874. Rather, the effect of the Act's pre-emption

clause and its savings clause when read together “reflect a neutral policy, not a specifically favorable or unfavorable policy, towards the application of ordinary conflict pre-emption principles.” *Geier*, 529 U.S. at 870 – 871.

Second, even if any doubt remained after *Geier*, neither *Wyeth v. Levine* nor *Graber* is relevant to a Safety Act case because they do not involve the same interplay of variables. *Wyeth v. Levine*, ___ U.S. ___, 129 S. Ct. 1187, 173 L.Ed. 2d 51 (2009); *Graber v. Fuqua*, 279 S.W. 3d 608 (Tex. 2009).

Wyeth involved the Food, Drug and Cosmetics Act. *Wyeth* 129 S. Ct. at 1193–1196. The Court was asked if the Act pre-empted *Wyeth*’s state-court action for damages incurred as a result of an inadequate drug label warning. *Id.*

In the process of answering this question, the Court held that the presumption against pre-emption applied because the States traditionally have regulated the health and safety of their citizens, *Id.* at 1193–96, f.n. 3, and because Congress declined to enact a pre-emption provision for prescription drugs. *Id.* at 1193-1196. Thus *Wyeth* reviewed an act that contained no pre-emption clause and that legislated in an area historically reserved for the states. For these reasons the presumption applied, and for these reasons it is of no value in determining if the presumption applies to the Safety Act, which contains a pre-emption clause. *Id.*

The *Graber* decision also is irrelevant to this court’s analysis of the Safety Act. In *Graber* the court decided whether the Bankruptcy Code pre-empted a state malicious prosecution claim arising out of an adversary action filed in a bankruptcy proceeding. *Graber v. Fuqua*, 279 S.W. 3d at 610. The opinion does not reveal if the Bankruptcy

Code contains a pre-emption clause, nor does it mention a savings clause. *Id.* at 610–617. Thus, *Graber* does not address the interplay between a pre-emption and savings clause. Consequently, it has no relevance to a case in which both are involved.

III. From its Initial Rejection of a Standard Requiring Seat Belts in Motor Coaches to its Recent Implication that it Might Require Seat Belts, NHTSA has Reflected an Intent to Pre-empt for Safety Reasons.

Contrary to Hinton’s claim, NHTSA has, from 1974, reflected an intent to pre-empt. This intent can be seen when one looks at NHTSA’s actions over a span of time.

The following timeline shows the relevant events:

1973: NHTSA issues a Notice of a proposed new standard, notifying the public of new standards it will issue regarding seats in buses. The rule includes a restraint system employing seat belts. 38 Fed. Reg. 4776; MCI’s Petition, Tab 6a.

1974: NHTSA issues a new notice proposing a new motor vehicle safety standard for school buses. It concludes that seat belts are not warranted for motor coaches, stating that it “will of course, propose standards in the future *if they are found desirable*.” 39 Fed. Reg. 27585; MCI Petition, Tab 6b.

1992: NHTSA’s Chief Counsel responds to an inquiry about proposed New York State Legislation requiring seat belts in all buses. He points out that a safety standard is in effect relating to occupant crash protection on buses. It requires one of two options: either a complete passenger protection system or a belt system *for the driver only*. DX 108; MCI Petition, Tab 7.

1995–1996: The motorcoach involved in this appeal is manufactured and imported to Texas. 20 RR 59.

1999: The National Transportation Safety Board (NTSB) recommends that NHTSA study seat belts for passengers in motor coaches and that it consider the role glazings might play in preventing ejections. PX 137.

2000: NHTSA responds to the NTSB recommendation. It organizes a committee of NHTSA and industry members to study the feasibility and safety of seat belts in motor coaches. It announces it also will study the role glazing plays in preventing ejections in motor coaches. DX 40 (MCI).

2002: NHTSA issues a Notice of its intent to study motor coach safety. 67 Fed. Reg. 14903; MCI Petition, Tab 6c. Glazings are at the forefront of its efforts to reduce ejections. Restraint systems also may be an option, but issues must be answered regarding the performance of seats and seat belts to effectively restrain passengers. *Id.* at 14904–05.

2005: The Hinton jury reaches a verdict. 83 CR 19731–82.

2007: NHTSA issues “NHTSA’s Approach to Motorcoach Safety.” After 5 years of study, NHTSA concludes that improving roof strength and requiring seat belts will most effectively prevent ejections. NHTSA Docket 2007–28793; MCI Petition, Tab 8.

A. The Timeline Shows that Historically, NHTSA Has Preferred Other Options over Seatbelts.

The timeline raises five noteworthy points. First, in 1974, NHTSA rejected a specific request for seat belts. It based that rejection on the fact that no seat belts were needed in motor coaches because the motorcoaches were safe without them. At that point, according to the federal agency charged with motor vehicle safety, a passenger seat

belt standard was *not desirable*.

Second, the 1992 letter, from NHTSA's Chief Counsel explained that the New York proposed law requiring seat belts for all passengers was expressly pre-empted. But instead of stopping at that, the letter added, "NHTSA expressly determined that there is not a safety need for safety belts or another type of occupant crash protection at these seating positions." This second statement is about implied pre-emption, not express pre-emption.

Third, as late as 2002, NHTSA still did not consider a seat belt standard for passengers "desirable." NHTSA preferred other options for preventing ejections.¹ Of four options for preventing ejections from motor coaches, restraint systems were listed last.

Fourth, not until 2007 did NHTSA appear to view a seat belt standard for passengers as "desirable." NHTSA Docket 2007-28793. At that point, after at least a 5-year study on motor coach safety, NHTSA settled on several actions it thought would most effectively prevent ejections. *Id.* at 12–14, 21. Seat restraints appears to be one of those choices, but, even at this point, NHTSA was not willing to issue a standard for seat belts because the fundamental information necessary to establish standards was not available. *Id.*

Finally, while the Hinton jury deliberated over the information it received at trial,

¹ As support for its claim that NHTSA had no intent to pre-empt, Hinton referred this court to the testimony of Dr. Nash. See Hinton's Brief at p. 9. Dr. Nash was a former NHTSA employee who apparently disagrees with NHTSA's failure to require seat belts. Dr. Nash's testimony is no proof that NHTSA did or did not intend to pre-empt. Pre-emptive intent is found from the statutes Congress enacts, agency standards enacted pursuant to the enabling legislation and official statements of the Agency, and other actions by an Agency and its official spokesperson, not from statements by individual NHTSA employees. See *Geier*. 529 U.S. at 867-881.

and when it decided that Motor Coach Industries should have used one or both of the seat belt designs Hinton’s lawyers argued for,² NHTSA was considering this same issue. After at least a 5 year study of how to prevent ejections on motorcoaches, NHTSA settled on a plan and an aggressive schedule for research, testing and rule promulgation to implement the plan. NHTSA may decide that seat belts should be required, but it still could not say what design should be used because “the fundamental information ... necessary to establish adequate performance requirements ... does not exist.” *Id.* at 13–14. Thus, ironically, after one month, the jury thought it had sufficient information to require a specific belt, but after five-plus years of intensive study with Transport Canada—its Candian counterpart—NHTSA did not have enough information to specify a seat belt design.

B. *Sprietsma* Does Not Control.

The timeline also shows the flaw in Hinton’s claim that *Sprietsma v. Mercury Marine* controls this appeal. 537 U.S. 51 (2002). The *Sprietsma* holding is based on three important facts. First, the Coast Guard had no standard in place for propeller guards. *Id.* at 66–68. Second, a decision by the Coast Guard not to issue a standard meant that it intended to preserve the State’s right to act: “Indeed, history teaches us that a Coast Guard decision not to regulate a particular aspect of boating safety is fully consistent with an intent to preserve state regulatory authority pending the adoption of specific federal standards.” *Id.* at 65–66. Third, safety did not play a role in the Coast

² In Question 1A, the charge asked if the motorcoach was defective because it did not contain passenger safety belts. It did not list a specific design, but the Plaintiffs presented two alternatives as being desirable, one of which they argued was preferable. 83 CR 19733.

Guard's decision not to issue a standard. *Id.* at 67. Instead, its "apparent focus was on the lack of any 'universally acceptable' propeller guard for 'all modes of boat operation.' *Id.* In fact, the court also pointed out that the Coast Guard was going to publish a pamphlet on avoiding boat/propeller strike accidents in which it would discuss available propeller guards." *Id.* at n. 11.

These represent three significant differences between *Sprietsma* and this appeal. NHTSA does have a standard in place for occupant crash protection, but the standard requires seat restraints for the driver only. *See* 49 C.F.R. 571.208. Second, NHTSA does not have a history of allowing state laws when it has not issued a standard. Third, NHTSA's decision not to issue a standard was tied to safety reasons.³ For these and other reasons, *Sprietsma* does not control.

IV. An Actual Conflict or Frustration of Purpose Exists between the Jury's Decision and NHTSA's Announced "Approach to Motor Coach Safety."

The jury's conclusion that a different glazing material would have prevented the plaintiff's ejections or would have been a better design, is the opposite of what NHTSA concluded after a 5-year study. NHTSA Docket 2007-28793; MCI Petition, Tab 8.

Its written results were entitled "NHTSA's Approach to Motorcoach Safety." NHTSA concluded that many windows give way in accidents, not because the glazing material is inferior, but because crashes cause "significant structural deformation in the window frame area." *Id.* at p. 20. This deformation compromises the ability of the

³ Hinton notes that NHTSA's initial decision to issue a standard for passengers was based on a cost-benefit analysis, implying that such an analysis will not support a claim of pre-emption. This is incorrect. Cost-benefit analyses are commonly used by agencies. For example, this court and the U.S. Supreme Court found pre-emption in two cases in which this analysis was used. *See Riegel v. Medtronic, Inc.*, ___ U.S. ___, 128 S. Ct. 999, 1008, 169 L.Ed. 2d 892 (2008); *Bic Pen Corp. v. Carter*, 251 S.W.3d 500, 506-508 (Tex. 2008).

window to retain the passenger. *Id.* For this and other reasons related to performance in crashes, NHTSA tentatively decided glazings were not the more effective means of preventing ejections. *Id.* at 10–14, 19–20.

This report reflects NHTSA’s current opinion that a specific glazing material alone is insufficient to prevent ejections. *Id.* The jury’s decision that the motorcoach in this case was defective because it did not have laminated windows, which would have prevented ejections, runs directly contrary to NHTSA’s conclusion recited above.

Finally, as Motor Coach Industries argued in its Petition for Review, this case is no different from *Geier*, in which NHTSA chose for various reasons, including safety reasons, to give choices to auto manufacturers. *Geier*, 529 U.S. at 881-882. NHTSA has chosen to give motorcoach designers a choice between tempered glass and laminated glass for passenger windows. 49 C.F.R. 571.205. It did this because each material proved to have advantages over the other in certain circumstances. *See* ANSI/SAE Z26.1–1996; MCI’s Petition, Tab 11.

In reaching its decision that the *Geier* reasoning did not control a state court suit based on the type of glazing a manufacturer used, the *O’Hara* court chose not to consider the 55-page Final Report NHTSA issued to explain the results of its 10-year study on glazing. *O’Hara v. General Motors Corp.*, 508 F.3d 753, 760–761 (5th Cir. 2007). The court did not cite the report at all, choosing instead to rely only on a much shorter explanation in which NHTSA withdrew its notice of proposed rulemaking. *Id.* Relying only on this shorter report, the *O’Hara* court held that the issue was not pre-empted because NHTSA did not give a sufficient explanation and did not rely on safety reasons for its

decision. *Id.* Motor Coach Industries submits that this result is wrong and that it conflicts with another panel’s decision in *Carden v. General Motors*.⁴ *Carden v. General Motors*, 509 F.3D 227 (5th Cir. 2007). In *Carden*, the plaintiffs alleged that a Pontiac Grand Am was defective because 1) the rear center position had only a lap belt and not a lap/shoulder belt, 2) the rear center position had only a manual adjusting device, rather than a retractor, and 3) the car had no side air bags. *Id.* at 229. The panel held that the state court suit was pre-empted because FMVSS 208 gave a car manufacturer two options of seating restraints for back seats: a lap-only belt or a lap/shoulder belt in the rear center position. *Id.* at 230–231. According to the panel, *Geier* controlled. *Id.*

CONCLUSION

For these reasons and the reasons stated in its Petition, Motor Coach Industries Mexico, S.A. de C.V. requests that this Court grant its Petition for Review.

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⁴ In addition, *O’Hara* arguably does not control because it involves window glazings in cars, not motorcoaches. Because the case involved a car, the *O’Hara* court would not have considered the 2007 study NHTSA conducted on glazings in which it preferred options other than glazing as the most effective way to prevent ejections from motorcoaches.

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing instrument has been mailed to all counsel of record by U. S. Mail, certified mail, return receipt requested on the 15th day of June, 2009, as follows:

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