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Supreme Court of Texas.
GREAT DANE TRAILERS, INC., Petitioner,
v.
ESTATE OF Garland Fredderick WELLS, deceased, Sametrius Wells, individually and
as next friend of D. W., a minor child, and as administratrix of The Estate of
Garland Fredderick Wells, Respondent.
No. 00-0022.

January 10, 2001.

Appearances:
Robert M. Schick, Vinson & Elkins, Houston, TX, for petitioner.
Thomas K. Brown, Fisher, Boyd, Brown, Boudreaux & Huguenard, Houston, TX, for respondent.

Before:

Chief Justice, Thomas R. Phillips, Priscilla R. Owen, Harriet O'Neill, Nathan L. Hecht, Deborah Hankinson, James A. Baker, and Craig Enoch.

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SPEAKER: O yes, O yes, O yes. The honorable, the Supreme Court of Texas. All persons having business before the honorable, the Supreme Court of Texas, are admonished to draw near and give their attention, for the Court is now sitting. God save the state of Texas and this honorable Court.

JUDGE PHILLIPS: Thank you, please be seated. This morning, the Court has three matters on its oral submission docket. In the order of their presentation, they are: Great Dane Trailers, Inc. v. The Estate Of Garland Fredderick Wells, deceased, and Others from Harris County; Churchill Forge, Inc. v. JoAnn Hamilton Brown from Travis County; and in re American Homestar of Lancaster, an original mandamus proceeding. To each of these matters, the Court has allotted 20 minutes per each side to present oral argument. Petitioner or relator may reserve a portion of that time for rebuttal by advising the marshall of our Court. We will take a brief recess in between the presentation of each argument and will conclude all three submissions before lunch. These arguments are being recorded by our clerk and you may purchase a tape of any argument [inaudible] from the clerk. The Court is now ready to hear argument from petitioner in Great Dane v. Wells.

SPEAKER: May it please the Court. Mr. Robert Schick will present argument for the petitioner. Petitioner has reserved five minutes for

rebuttal.

ORAL ARGUMENT OF ROBERT SCHICK ON BEHALF OF THE PETITIONER

MR. SCHICK: May it please the Court, Counsel. My name is Bob Schick and I represent Great Dane Trailers, petitioner. We're here today to ask this Court -- the Court to reverse the holding of the Court of Appeals in Harris County and affirm the trial court's decision that the plaintiff's claim of inadequate conspicuity of the trailer is preempted by Section 108 of the Federal Motor Vehicle Safety Act of 1966.

This case arises out of an accident that occurred at about dusk on Highway 59, just north of Houston. The plaintiff's vehicle was following a truck tractor-trailer combination with a flatbed on it which jackknifed as it struck from the other car. Upon the jackknife, the trailer blocked both lanes of Highway 59. Mrs. Wells' husband was driving the car that then struck the side of the trailer resulting to his death.

JUDGE: Mr. Schick, as the recent Supreme Court case Geier, does it affect this Court's decision in the Alvarado case, meaning does it somehow undermine the reasoning of the Alvarado case and if it does, does that make a difference to your argument to that?

MR. SCHICK: It does absolutely, your Honor. In the Alvarado case, that this Court is aware, the court found that under Section 208, the seatbelt portion of the Federal Motor Vehicle Safety Act was not -- did not preempt a claim for a lap belt in the Alvarado case. And the court found that there were both expressed -- that there was neither expressed nor implied preemption in there. The U.S. Supreme Court subsequently in the Geier case has found that while there is no expressed preemption because of the savings clause in the Safety Act, there was an implied preemption.

JUDGE: So you're not -- you -- you are no longer arguing expressed preemption. You've abandoned that position in light of the United State Supreme Court's decision.

MR. SCHICK: Yes, your Honor, that is correct.

JUDGE: So that anything we need to concern ourselves is -- is implied preemption, you're particularly looking at the obstacle version of it.

MR. SCHICK: Precisely, your Honor. It is only obstacle -- the obstacle portion of implied preemption that we are arguing before this Court at this time. Because of the subsequent decision by the U.S. Supreme Court in Geier, we believe that the Alvarado decision is no longer controlling authority. We believe the plaintiff's claim in this case is preempted under Section 108 for the same reasons and logic that this Court used in its descent in Alvarado and Judge Breyer used in the majority opinion in the Geier -- in the Geier case.

JUDGE: Do you -- do you agree that in an obstacle implied preemption case, that it is a case-by-case determination looking at the specific facts alleged and the specific regulation or part of the statute at issue?

MR. SCHICK: I do, your Honor. I -- that's the second part --

JUDGE: So in fact -- so in fact, we have to look at Section 108 on its own and what you're suggesting is that we applied analysis, but you're not suggesting that by virtue of the Supreme Court's decision in

Geier, that it means as a matter of law that any claims in this case are preempted by 108?

MR. SCHICK: Exactly, your Honor. We believe that it's a logic that this Court does have to look at Section 108. In other words, this may not be the vehicle by which this Court wants to overrule if it decides to overrule its decision in Alvarado because that was a Section 208 case. But the analysis that the U.S. Supreme Court used in Geer or Geier must be applied in this case.

JUDGE: Well, the analysis that this Court used in Alvarado is -- is consistent with the analysis that United States Supreme Court used, it's just that the starting point was different under 208. And that is looking at the intent. The United States Supreme Court looked at the intent behind the specific regulations from the Department of Transportation to determine that there was an intended option period to get consumer used to it, and this Court looked at the overriding purpose of the statute which was to further safety. So the analysis in Alvarado is not inconsistent with Geier, it's that the starting point in this specific case was different. Isn't that correct?

MR. SCHICK: That I -- I think your Honor, that's true in part.

JUDGE: Okay. In -- in --

MR. SCHICK: For example, in -- in this particular case --

JUDGE: Uh huh.

MR. SCHICK: -- I think the starting point still has to be as -- as Geier instructs or Geier instructs, taking a look at the state of purpose of Section 108 and that's why I have the handout in front of you and the [inaudible] --

JUDGE: In my -- in my point is -- is that we identified a state of purpose for 208. Supreme Court identified a different state of purpose for 208.

MR. SCHICK: Yes, your Honor.

JUDGE: But after that, the analysis is comparable.

MR. SCHICK: It is comparable except for one thing in Geier --

JUDGE: Okay. So that -- and that's why I'm trying to get you to tell us what's different --

MR. SCHICK: Okay.

JUDGE: -- about the analysis.

MR. SCHICK: I understand, Judge.

JUDGE: Okay.

MR. SCHICK: The difference is as what Judge Breyer took a look at the entire history of 208 and it wasn't merely a -- well, let's give time for us to see what the public wants to get used to or whether an interrupter is appropriate or whether air bags were appropriate. Judge Breyer took a look at the entire history and what the Secretary of Transportation have decided.

In this case, with respect to Section 108, we have the same kind of a history with respect to what the National Highway Traffic Safety Administration or NHTSA was doing from 1980 all the way to 1987 and then beyond. In those first seven-year periods, they were tested. They were inclined to decide what is it that is going to make a difference for motorists to be able to see a trailer in -- in nighttime from a distance. And that's where we disagree with some authorities that have found there is no preemption under Section 108. Uniformity, in a context of Section 108, is more important than it is anywhere else. Uniformity is important in Section 108 because what NHTSA was trying to do was to make sure that motorists at a glance would understand that that particular pattern meant there was a trailer up ahead of some sort --

JUDGE: Okay. If uniformity was important, how come -- I thought they were [inaudible] experiment.

MR. SCHICK: I'm sorry?

JUDGE: I thought they were in an experimental phase?

MR. SCHICK: They -- they were, your Honor, during the period of time from 1980 to 1987.

JUDGE: Uniformity is an order meaning in 108, in --

MR. SCHICK: It's 108 --

JUDGE: 208 --

JUDGE: The one in Nevada, there -- there was a specific governmental theory that we ought to let a thousand flowers bloom and see which one gets the greatest public compliance and then so the Supreme Court emphasizes a strong federal policy against uniformity. Here, you see in Marlboro that the thing -- I mean you say that the -- that the government was in a period of experimentation but then you say that one single uniform way was the -- was the [inaudible] --

MR. SCHICK: Well --

JUDGE: -- as the highest goal.

MR. SCHICK: That's your -- that's correct, your Honor. They were trying to experiment to determine what would be recognizable most quickly. We're talking about motorists who were traveling along at 70 miles an hour and they have to quickly understand the signal. It's why all traffic signals that we have on the roadways, you know, there's a meaning for yellow, there's a meaning for brown, for blue, and different other colors.

JUDGE: But if they were trying different ones, what's wrong with the state stating a tort policy that forces some type of marking and then you could say that the accidents there go down so that informed the federal government?

MR. SCHICK: Because, your Honor, I believe that if a manufacturer took that experimental step, it did so at its peril. And the precise language of 5.1.3 which says this is what you shall have on the side of your trailer and if you add more it may not impair the effectiveness of what we're requiring. Add that to the Geier mandate, which I believe is a mandate, which suggests that the standards while they may or are talked about as minimums, they are minimums with respect to the manufacturer only. They are not minimums with respect to state requirements. The state cannot require more so that during the experimental periods, your Honor --

JUDGE O'NEILL: But the state under common law -- under common law and isn't it the whole question we're here to decide?

MR. SCHICK: Your Honor, I don't believe that under the analysis of Geier the Supreme Court agrees with that. I believe that the Supreme Court was saying to Geier that a state may not require more than a minimum.

JUDGE: I thought it said that --

JUDGE O'NEILL: But it's under common law.

MR. SCHICK: Well, your Honor, I -- I read it as -- on the regulations and statutes, the -- the savings clause takes out expressed preemption and the state can't be upon regulation. I read Geier suggesting that even under common law, the state cannot require more. This is -- this is --

JUDGE: In Alvarado and Geier though, the national consumer and safety groups try -- push the federal government very hard to have a nationwide air bag standards and that was expressly rejected. Is there an analogous situation here when somebody push it very hard for more extensive markings that one would see whether these are safety markings

in the mornings and that was rejected with the finding by the federal government [inaudible]?

MR. SCHICK: Well, there were amendments that were proposed to -- after the -- after NHTSA put out its notice of proposed rulemaking and NHTSA rejected those and then the federal registry said that the reason for the denial is the importance of maintaining a common image of rear conspicuity while insuring the availability of appropriate cue to drivers following large trailers. That the -- the regulations that manufacturers were obliged to follow were absolute with respect to state requirements and then you --

JUDGE: And how would the -- how would the extra markings that the plaintiffs contend for -- to confuse that average motorists don't look. Help me with that.

MR. SCHICK: Well, for example, your Honor, the -- the additional lighting might have; (a) impaired the effectiveness of what was already required which under 5.1.3 means that you wouldn't be anything [inaudible]. The other problem is -- is that they may have been a color and of markings. For example, they might have been yellow and black. Well, yellow and black is typically used on bridge abutments and in other parts of the country where you've got roads going like these and -- bridge abutments or railroad crossings going on. At least a motorist can be confused if it seems that up ahead assuming that it's [inaudible] and it's gonna go underneath that railroad crossing when in fact it's a trailer that some manufacturers has decided to go under experiment with and put yellow and black marking across the side of it. The --

JUDGE: What's in -- what's in the record beyond the answer interrogatory about what the plaintiff contended ought to be added?

MR. SCHICK: That's all that's in the record at this point, your Honor.

JUDGE: Is this case distinguishable from Harris or is it just contrary -- is Harris just contrary to your position?

MR. SCHICK: Your Honor, Harris is contrary to our position. The Eight Circuit recently decided that case. And we believe that the Harris opinion is wrong for these reasons. First, it is contrary to the Fifth Circuit's opinion in the Lady v. Neal Glaser Marine case.

JUDGE: In which case?

MR. SCHICK: Lady v. Neal Glaser Marine says --

JUDGE: So you believe the prior cases before 2000 [inaudible]?

MR. SCHICK: For some analysis --

JUDGE: You know, I mean, both of our writings in Alvarado's, do you mean it got to be reexamined? I mean they're not worth much now but do you think this circuit case was decided eight years ago or --

MR. SCHICK: No, your Honor. That Lady v. Neal Glaser was decided post Geier.

JUDGE: Oh, it was?

MR. SCHICK: Yes, sir.

JUDGE: Does Lady get involved in this particular statute?

MR. SCHICK: No, your Honor, it didn't.

JUDGE: But Harris did involve in this particular statute?

MR. SCHICK: That's right.

JUDGE: And with Harris they're naturally being more applicable with that?

MR. SCHICK: From the standpoint of -- of examining the Federal Motor Vehicle Safety Act, but the analysis --

JUDGE: But look -- but look at it as analysis though --

MR. SCHICK: Uh huh.

JUDGE: And -- and looking at the way you're reading Geer or Geier, how do you pronounce it, isn't it true that to the extent that any common law standard that is enclosed, does not conflict with 108, then it is not inappropriate?

MR. SCHICK: That's -- that's correct if it doesn't conflict. But in this case, it does conflict for the same reason that Justice Breyer found that the imposition of a requirement of air bags conflicts just too late. What he says was, we might want more, a lot more air bags and a lot sooner and that's a great plaintiffs' claim.

JUDGE: Isn't there a -- a meaningful difference between the Alvarado and air bag situation under 208 than 108 and then under 208, was there an option for manufacturers to choose 103 or set out different options?

MR. SCHICK: That's how most courts viewed it, Judge, before here. I agree with that. In fact, they referred to it as a safe harbor. You have these three options unlike 108, many of the 108 decisions went off on, this is unlike 208 because there is a safe harbor. That's not what Justice Breyer found out in his majority opinion. He didn't focus on the fact that or -- or believed that [inaudible] --

JUDGE: Let's -- let's go back to the, I think, the fundamental analysis. You agree that there must be conflict with 108?

MR. SCHICK: Yes.

JUDGE: I still don't understand under your arguments how the proposed standard conflicts with 108.

MR. SCHICK: It conflicts because it -- it means that if this plaintiff's claim is allowed to go forward, it deprives NHTSA of the ability in 1986, or when this [inaudible] for that matter from '82 to 1991, of doing the studies that it did.

JUDGE: So, you're saying then is -- is that regardless of what the extra stripping or whatever additional reflective glasses, regardless of what they may have tried to do to the vehicle, it would've conflicted with the requirement.

MR. SCHICK: Yes, your Honor, I do. I -- and I believe that today or even at that time if a manufacturer put additional striking or additional lights, it did so at its peril. In fact in the Peters case, decided by the District Court of Indiana in 1996, the -- the opinion points out that Great Dane in fact had had time period was all in favor of -- of putting additional reflective tape on but wanted to wait for NHTSA's rulemaking to decide what the right colors were and what the right patterns were. And the reason that then goes to uniformity in the context of Section 108, uniformity is the equivalent of safety because we're talking about the entire motoring public being able to understand at a glance what that signal in a distance means.

JUDGE: Mr. -- Mr. Schick, in -- in what way is the Third Circuit's analysis in the Buzzard case different on the implied preemption issue from the Supreme Court's decision in Geier?

MR. SCHICK: A couple of things I guess, Judge. First, the Buzzard opinion goes off on a safe-harbor analysis with respect to 208. It says 108 is different from 208 because 208 applies these safe-harbor alternatives for manufacturer to follow. I read Geier as suggesting that that has nothing to do with it. Instead, what's important to Justice Breyer in the majority opinion is that there were a number of things that a manufacturer could do but a manufacturer could do more. There was no prohibition against the manufacturer adding seatbelts faster --

JUDGE: No, but there's no prohibition in this particular provision either that would -- that -- to stop a manufacturer from doing more

provided that it does not interfere with the required reflective material.

MR. SCHICK: That's right. And Justice Breyer's bottom line as a I read it [inaudible] your Honor, is that the state can't require more especially when looking at the history of what the governmental agency did reflects a very careful analysis just as what's true in the Lady v. Neal Glaser case where the court looked at the fact that the coastguard had determined that no guard was required but no guard should be forbidden either. You could have a propeller guard or you might not. Harris then reads that as somebody can to Myrick, which I suggest is improper. That's not an inappropriate reading under Geier. So what --

JUDGE: Mr. Schick, I'm sorry. I understand Geier holds that you can't create standard air bags when options are otherwise available under 208. But does Geier, I guess that's how everybody else is pronouncing it, does Geier prohibit a state from determining whether or not the option hit by the manufacturer met the standards of 208. In other words, 208 had certain standards to design to protect occupants from rollovers. If it was proven that the particular design picked by the manufacturer did not meet the federal standards for protection is rollover, does Geier -- then it has nothing to do with air bags, it has to do with meeting standards. Does Geier preempt a civil action or a failure of the option to take to meet the federal standard set out in 208?

MR. SCHICK: I don't think so, Judge. I mean, I think that would be you just failed to comply with the standard, you didn't need it. You have -- that the air bag requirement is it must explode with such force and be at least two by two and yours is one and half by one and a half, then you didn't comply and you violated standards.

JUDGE: So Geier does not -- if Alvarado, as far as you know, Alvarado was -- that Alvarado was not interested in the particular option of manufacture use but only interested in whether that option met the standards for design two-way and to that extent Geier does not affect the court's decision in Alvarado.

MR. SCHICK: That's possible. If you read Geier and -- and I understand how you can read Alvarado as a rollover case potentially as opposed to a lack of additional passive restraint case. And in that sense, it's possible but I think that the court's application of implied preemption principles in the Alvarado majority opinion is now incorrect in light of the opinion of the Supreme -- U.S. Supreme Court in Geier.

JUDGE: I do believe if we apply here, she believes --

MR. SCHICK: Sure. I -- I --

JUDGE: Well --

MR. SCHICK: -- but think that Harris is incorrect for a couple of reasons.

JUDGE: Let me ask you this 'cause I -- I forgot to check, what's the sort of history of Geier's?

MR. SCHICK: It -- it hasn't run yet, Judge. It was just -- I think decision was issued in December, I wanna say December the 12th. And no petition for cert was yet due --

JUDGE: Okay. Is there a petition for re-hearing in the case?

MR. SCHICK: No, your Honor. I think that's not yet due either.

JUDGE: Is Lady v. Neal Glaser [inaudible]?

MR. SCHICK: Judge, I'm sorry, I don't know the answer on that case.

If there are no other questions, thank you.

SPEAKER: The Court is ready to hear argument from the respondents.

MR. BROWN: May it please the Court.
SPEAKER: May it please the Court.
MR. BROWN: I'm sorry.
SPEAKER: May it please the Court. Mr. Thomas Brown will present argument for the respondent.

ORAL ARGUMENT OF THOMAS BROWN ON BEHALF OF THE RESPONDENT

MR. BROWN: May it please the Court. My name is Tom Brown. I represent Sametrius Wells, who is the personal representative of the state for deceased husband, Garland Wells. And it probably goes without saying our request before the court today is that the opinion of the lower court be affirmed. The lower court did go off exclusively on Alvarado and there is an argument that Alvarado is now in opposition with Geier. As I stated ion my brief, I think that that's the debatable for the precise reason that Judge -- Justice Enoch raised. In Alvarado, the issue of compliance with 208 was never directly addressed. And so, since Geier is a classic 208 case where everyone is stipulating compliance with 208 and it was literally be nowhere bag -- air bag issue, Alvarado is a little bit substantively different. All of that I think is somewhat secondary to the issues before us.
JUDGE: If the accident had occurred today, we -- we'd be in a whole different position, wouldn't we?
MR. BROWN: If the accident occurred today, yes, we would be in a whole different situation.
JUDGE: Because the Federal Highway Administration now has cut out all the options, you have to pick one or two and that's -- that's it.
MR. BROWN: Well, the -- the Federal Highway Administration regulates existing trailers whereas --
JUDGE: No, if this very trailer --
MR. BROWN: Right.
JUDGE: -- that was manufactured in 1996, it was involved in an accident today.
MR. BROWN: It would be out of compliance, yes, your Honor.
JUDGE: It would be -- it would be out of compliance.
MR. BROWN: Yes.
JUDGE: But assuming that it had been brought up to standard and then you were contending we'll ought to have something in addition to what the Federal Highway Administration says. You'd be preempted from making that argument.
MR. BROWN: There's -- there seems to be an indication that that may be true simply from the language, for example in the Harris decision. The court there notes that -- that when NHTSA finalized its result that was in the midst of 1993 rule and Federal Highway Administration 1999 rule.
JUDGE: Nine.
MR. BROWN: Okay. That there is some indication that there may be an intent on the part of both of those agencies to consider this supplemental amendment which does call for the increased conspicuity scheme that they may consider that to be more of a standardized uniform requirement.
JUDGE: But the rule says you either do this or this. There's no option in it.
MR. BROWN: That's not necessarily true because the text of the

standard itself has not changed and the text has always invited supplemental conspicuity. Both in its -- in its introductory paragraph in --

JUDGE: As I understand, the Federal Highway Commission in '99 said you got two years to either add reflective tape --

MR. BROWN: Uh-huh.

JUDGE: -- or reflective flexible tape.

MR. BROWN: If they were --

JUDGE: And said you gotta do one of the other.

MR. BROWN: Right.

JUDGE: And so that's kind of [inaudible] of the standard now.

MR. BROWN: Well, but you have to do one of the others to meet the increased minimum.

JUDGE: Okay, what would have happened if this act, the same truck were involved in an accident post the '99 rule within the two- year window compliance. Wasn't there some balancing by the agency on the cost versus [inaudible] that might be safe so we're gonna give you a two-year window to comply. What -- what would be the -- wouldn't that fall in Geier's -- preemption analysis in Geier?

MR. BROWN: I don't believe so because none of that would change the fact that under 108, manufacturers have always been free to add additional reflective devices that they saw fit to make the trailer safer. And -- and in Geier, it would not change that. In fact, Geier goes out of its way to say we want to preserve the fact.

JUDGE: But now we have a regulation that says it's got to be red and white, it can't be blue and white --

MR. BROWN: Right.

JUDGE: -- it can't be yellow, and it's got to be certain positions and you got either use that or that. Isn't that more like the options that were available in the Geier opinion now that the law has changed, regulations have changed.

MR. BROWN: Arguably, but I believe that the cause NHTSA expressly reserved and maintained in that statute, the require -- or the language that allows additional materials to be added. I think that it's a -- that's an issue still to be explored as to whether or not this minimum is now met but that essentially was the argument. I mean the argument that Great Dane has been making all along is then that a strict uniformity of what's required then frankly a minimum standard becomes a maximum standard because you can't vary from it. Now, whether or not that may be true in the future, now that they have read down the regulation, I would argue that that's -- that that's an open issue and I would lean against it because they maintained the language in the statute that's been considered so important by all the courts who looked at it. That language which says you can add additional materials.

JUDGE: Well, but even in the -- in the air bag cases, you could have added additional restraint. You could have added an air bag that that was not persuasive to the Supreme Court but the fact that you could have additional restraint doesn't mean that you're still not preempted, and when the admission says you're here with three options and if comply with one of the three, you're okay, even though you could have added an air bag.

MR. BROWN: Except I believe there's distinctive difference in Geier and this was gone -- I mean both the Supreme Court and if you look at the government's brief that they relied upon so extensively that the -- the seminal issue that they went off on was the idea that said we didn't just provide options, we literally rejected the idea

that you choose one option exclusively. They -- they looked at, considered, and rejected the idea of requiring air bags for all cars. And since they -- they decided and mandated --

JUDGE: Okay, that's -- and that's my question. Now the Federal Highway Administration looked at and rejected the idea that you have to put on the red/white reflective tapes sooner than they gave a two-year window for some trailers and a ten-year window for others. And so it made a conscious decision not to make people come into compliance if they gave them a period of time. And so, shouldn't -- should we take that into consideration what's happened afterwards, after this accident?

MR. BROWN: I don't believe so 'cause I believe that -- that both of those actions support what -- what we stand for today. For example, that ten-year window, if you will look at what happened there, NHTSA in 1993 says here's going for late 1992, says here's the new standard for new vehicles. They put a paragraph in their final rule that literally said even though we cannot control these existing trailers, the one that have already been manufactured, we think any reasonable owner-operator would immediately put on additional conspicuity case.

JUDGE: But then the Federal Highway Administration said we don't necessarily agree with that. It's -- it's a lot more problematic of retrofitting because they were taking employees away from doing maintenance and the calls. They went through all of this analysis. And they finally said, you got a two-year window for starting trucks and a ten-year window for others. And so didn't they make a balancing decision at that point that you didn't have to be in compliance immediately and if -- if this truck had been on the road during that two-year period, they could have said we were not requiring in the any [inaudible] specifically made a conscious decision not to require to use reflective tape --

JUDGE: They made a conscious decision to allow a short period for those trucks that have no conspicuity. In other words, they said you've got two years. If you don't have any of this enhanced conspicuity on your trailers, we're gonna give you two years to bring those in compliance.

MR. BROWN: Should we take that -- those regulations into account in looking at the overall federal scheme?

MR. BROWN: I suppose they could be taken into account but I don't think that they ever will change the fact that it remained before 1993 and before 1998 a minimum statute where it entered a common law. I mean you could take it into account as to whether or not compliance with a new regulatory minimum is at issue. But whether or not under the common law a plaintiff has the right to bring the case that says, because you have been free since time began with the statute in 1966 to exceed these minimums, you should have done so when technology made it obvious.

JUDGE: But you were afraid to exceed the minimums in the air bag cases so I -- I just disagree with you on that. My question specifically is, should we take into account the future regulations in trying to get an overall picture of what federal scheme or are we foreclosed from looking only what was in effect in 1990?

MR. BROWN: Well, Harris, for example, would say that you looked at it as of the day the issue occurred, which would be '91 for the injury and '86 or '87 for the date of manufacture. I think this Court would be free to take in -- take into account the subsequent developments with the Federal Highway Administration. Otherwise, I really don't believe that they would in any way compromise the findings or the ruling in

Harris or Buzzard in similar cases that would say there is no obstacle conflict preemption.

JUDGE: In Harris --

MR. BROWN: Yes.

JUDGE: -- they raised the possibility that there might be preemption based on the specific facts of the plaintiff's claim in the case that if you specifically, not just in general calling for more safety markings, but specifically said there should be more markings that would be -- that would take away from the other marking zone of trailer that might be preempted. Where is this? And they said summary judgment in Harris is too early to tell whether it is or it isn't. Where is this case in comparison to Harris in that regard?

MR. BROWN: Well, where this case developed in comparison to Harris at the time summary judgment was granted, it is much further along. And that we were just short of our trial segment, summary judgment was granted. The issue -- there was never an issue raised in the summary judgment specific preemption in terms of the scheme that plaintiffs are advancing would conflict. And the fact of the matter was the expert testimony that is produced by the plaintiffs favored the exact scheme that later became adopted as of 1993. So --

JUDGE: So it's your position and the record reflects that the additional safety reflecting information of devices that should be used to not conflict with standards in the statute?

MR. BROWN: The record doesn't necessarily reflect that at this time, not the record on appeal for summary judgment purposes because that was never reached, much likely found in Harris and Buzzard where they said let's send it back and see what happens. The fact of the matter is, yes, the record will reflect in this case that there will not be impairment because it was the exact same scheme which was already generally known by 1987, that the plaintiffs were -- that we were actually asking for and seeking.

With the -- the issue of Lady v. Neal Glaser opinion, I know there are some idea that says, look, you have to choose between following Harris in the Eight Circuit and Buzzard in the Third Circuit versus the Fifth Circuit with Lady v. Neal Glaser. There's a distinct difference. If I can read just from the -- the final paragraph of the -- of the Lady decision, the court says there, we do not hold it simply because the coastguard has not acted on the safety matter that state actions concluded, rather where the coastguard has been presented with an issue, studied it and affirmatively decided there's a substantive matter that it was not appropriate would pose a requirement. That decision takes on the character of a regulation and the objective of National Uniformity was mandated by preemption.

In other words, the Lady case is very much like the Geier case. And that they looked at the history what they found in that case where the coastguard was that they had literally put together subcommittee commission to look the position of propeller guards. And they didn't just not act, they literally sent back the recommendations and said we're afraid that if you add a propeller guard that's gonna make it worse. It's gonna make it both unsafe to operate above 15 miles per hour, it's gonna add bulk to the bottom of this boat, it could create more blunt injuries that would overcompensate for the reduction of the cutting injuries. So, it was very much like Geier where the court looked and said the legislative history shows that there was a true policy and affirmative policy decision behind the failure to mandate action.

JUDGE: So our decision is more withdrawn or it conflicts the

Lady?

MR. BROWN: It does conflict with Lady --

JUDGE: [inaudible] we're talking about.

MR. BROWN: Which I would certainly prefer Justice Hecht's word. Yes, I do believe there's a conflict. --

JUDGE: I mean I think withdrawn but --

MR. BROWN: -- but once again the critical issue here is that there is something present both in Geier's theory and in Lady with this whole propeller guard issue that is not present in 108.

In 108, NHTSA took a long time to make their decision such that in 1990, Congress even lit a fire under and when they amended the Motor Carrier Safety Act and said, give us a decision on this. But during that whole time period, they were not saying, hey, people hold off. Don't put things on your trailers. In fact, they were constantly -- if you look in their comments that have been submitted, they were constantly going to the industry and saying tell us what you found with your experience. Tell us what you found with yours. And even when they reached their new final standard of conspicuity, as -- as Justice Owens pointed out, they said you got ten years. Those of you who already have noncompliant conspicuity schemes on your trailers, ones that don't match our new rule, we're gonna give you ten years to let those go before you come up to speak. Now, what I would say there is a strict uniformity is so critical, as Great Dane would argue, why in the world would a Federal Highway Administration say we're gonna let noncompliance standards stay on [inaudible] opinion.

JUDGE: But uniformity aside, again, there has been a judgment like here in the -- in the Federal Register. They clearly talked about, well, with the way X number of miles per year versus the cost and taking employees away from doing anything. So, we have decided that not five years but two years is the best compliance time. So, they specifically blessed, if you will, trailers like the one in this accident being on the road for another two years without these extra requirements. So, how do we factor that in? That they specifically weighed safety versus cost in all of these and said, you got another two years.

MR. BROWN: No, I -- I would disagree with what they said there. What -- what they said there, they did not blessed noncompliant trailers, what they did bless were trailers where people had already voluntarily upgraded --

JUDGE: So that's the ten-year. I'm talking about two-year.

MR. BROWN: -- with the-ten year. But what --

JUDGE: Then people who had nothing --

MR. BROWN: Well, the two years --

JUDGE: -- they said even if you have nothing, you got two years to put something else on it. How do we factor that in? Would that make a conscious decision to let these trailers stay on the road that don't trigger with that anything?

MR. BROWN: Because every change in safety regulation must allow a period for phase-in. You got to retool with the manufacturer shop. You have to buy equipment, buy materials, train employees. Every safety improvement is going --

JUDGE: And how's that different, the phase-in and the air bag case, because in time of the Alvarado case, we knew that air bags were gonna be mandated under that specific rule. 108 said by the year such and such, you've gotta have all air bags but we're gonna give you time to phase-in air bag. But how is that different?

MR. BROWN: The Geier phase-in was a whole different matter. The

Geier phase-in was not one of these phase-ins that says, look, you can't immediately save the people tomorrow instead of walking on two legs, walking on their hands. You gotta give them time to learn which is more of what I think the Federal Highway Administration is doing the same. We're gonna give you two years to get the standard on every one of your trailers. Geier was different. Geier, the secretary came back and said I specifically want to gradually work these in because they're so afraid of a backlash among consumers similar to what we did with our ignition lockout. And so, the secretary -- as presented by the government in his amicus brief in Geier, the secretary said, let's gradually work these passive restraints in. In fact, let's work them in a variety or we miss --

JUDGE: But how is that different from the arguments that the consumers made and as a Federal Highway Administration, they said, look, people are dying thousands and hundreds of year -- every year. We want you to make this retrofitting effective immediately. And they specifically rejected that argument. They said no, that's too severe on the industry, we're gonna give them two years and other people say no give us five. And then they weighed all of that and that came out with a two-year grace period. And how do we factor all that in that subsequent to this accident, the commission, the Federal Highway Administration at least said, you got two years and you can go but you don't have to retrofit until two years. They are phasing in the requirement.

MR. BROWN: How do you factor into this decision is a hard question. I'm not sure I understand how that would affect the decision in this case in any way. Nothing about that two-year phase in should affect the existing -- preexisting, a continuing existing common law exposure for failing to despite the change in the minimum, for failing to do more than a minimum required.

JUDGE: But how is that different from the air bag? They could have -- it was a minimum standard just like this is a minimum standard under the statute and they could have done more, people did more. Yet, the -- the Supreme Court said, you don't have to do more. The common law can't make you do more.

MR. BROWN: Actually, the Supreme Court said specifically and expressly in Geier the 208, with regard to this issue, is not a minimum standard.

JUDGE: But if the statute said it is. And they said when we say minimum, we don't -- that doesn't mean minimum standard.

MR. BROWN: Well, but what the court said in Geier is, they said look, although generally these Federal Motor Vehicle Safety Regs are minimum standards, by definition they are, 208 was no longer a minimum specifically for the reasons they talked about, where the secretary would come in and said I don't want all air bags on all cars. Therefore, any common law case that says every car only having air bag is in direct conflict with my expressed will. Geier says three or four occasions in that -- in that majority opinion, they go off on the issue that says the secretary expressly considered and rejected the idea of requiring air bags --

JUDGE: And how is that different here from the Federal Highway Administration specifically considering did we make this people retrofit with tape? As I know, we're gonna give them two years in some cases and ten years for another but how -- how is that balancing any different than what went on in Geier?

MR. BROWN: Well, it's -- it's a balancing that was not necessarily made for a specific safety purpose but was made because they are always

required under the framework, under the guidelines they are given on the basic safety act that they are supposed to consider economic feasibility and when they require a new safety changes, whether anti-lock brakes, whether it's increased trailer conspicuity or any others --

JUDGE: Or air bags.

MR. BROWN: -- or air bags. You would only have to give a time for retooling the phase-in but the air bag phase-in was different. It stands out in the history in the sense of Safety Act Regulations because it was not just the sort of common place, you gotta give them time to get out to compliance. It was a specified program whereby the secretary said if we move too fast, we will make all those less safe. States are less likely to require mandatory seatbelts. People are gonna find ways to turn this off because they're gonna be irritated. Therefore, we got to move slow and we've got to move gradually. That stands alone among Federal Motor Vehicle Safety Standards. There is no other standard that has a history as unique as standard 208. It's probably why --

JUDGE: Let me ask you a question --

MR. BROWN: -- it's received more attention than in the others.

JUDGE: -- let me come at this on a different approach. Suppose that, you know, it's agreed that 108 is a minimum standard and whatever that needs is at -- you should have at least this taping across the bottom of your trailer. Now, let's suppose that the transportation probably comes in and says two years from now, we want the taping not only across the bottom of the trailer but we want a complete outline of all sides of the trailer two years from now. For all reasons you say, it's a very expensive proposition to make him do it immediately and overnight. If there's an injury during this two-year period, could a plaintiff claim that the owner of the truck should have done more to make the trailer conspicuous? Meaning they should have outlined all sides of that and would that not be in conflict with the provisions that says we considered that but we rejected it before this two-year period.

MR. BROWN: If the provision has actually said that, if there was something in those provisions that said, we have considered before this time or at this time, we have -- we have made a decision that it would be wrong to require that now, we're gonna do it two years in the future, then perhaps that argument was implied --

JUDGE: But isn't that implicit in what you said is that the agency is required to give a phase-in time. I don't believe so, because I think that the type of phase-in we're looking at with the Federal Highway Administration between '98 and 2000 or between '99 and 2001, is -- is a phase-in that is almost a matter of poor space and it's required because you got trucks out on the highway, some under lease to other companies, and what the government said is, look, we can't start ticketing these people for not being in compliance with our minimum standard, minimum required standard until we give them enough time to get all the trailers back in and retool. I don't think that is similar to what you seen in Geier and even in Neal Glaser where the -- the legislature histories shows that they have looked at the safety advancement and not just said, oh, we gotta give 'em time to get up speed but it said we literally do not want the safety advancement at this time. There's never an expression like that in the Federal Highway Administration or in -- in NHTSA's comments. What the Federal Highway Administration says is that it's unreasonable or unfair to make it happen now. We've got to give them sometime in fairness to come up to

this minimum standard. But once again none of that has ever changed the fact that if 108 is truly minimum standard then Geier says, you got to allow the state common law to continue to work. That's the common law.

JUDGE: But you're saying that -- that when minimum -- when minimum standards are established --

MR. BROWN: Yes.

JUDGE: -- that the standard operating procedure is to give the industry some time to get up to standard --

MR. BROWN: Yes.

JUDGE: -- and what you're requesting us to do is to impose perhaps an elevated minimum standard with no time for compliance.

MR. BROWN: I don't believe so, Justice Enoch, because remember that basic product liability common law will give them protection. In other words, as a plaintiff, if these were some new advancement, that it just come out, that there was no body of factual information like there would be on this trailer conspicuity, I would have to prove affirmatively that they had the -- that it was technologically feasible and I'm sure that this whole two-year issue would be raised. But remember that -- that this two-year issue, this phase-in is phasing into a new floor. In other words, they have raised the floor --

JUDGE: But the new floor, if I understood you correctly, the new floor is the standard that you are requesting in this case.

MR. BROWN: It turns out that in 1993, yes. The new floor that was adopted happens to be the same standard that we were arguing for, and the same standard that was argued for in both Buzzard and in Harris.

JUDGE: And so, when -- when the government opposes this new floor, Great Dane would have a couple of years to adjust to it. But when you're requesting this Court to impose a -- now kind of retroactively with no time to update the vehicle support --

MR. BROWN: Well, it could be argued that that's what the state -- what I -- what I believe I'm proposing is I'm proposing nothing more than what Geier has always said should be allowed and when you have a uniform standard. Okay, that true form which I believe 108 is that there is always going to be some tension between what the government is doing and what the common law can do. The Court says that it's uncompromising, it's well worth. The benefit of allowing jury to continue to act and state made common law, I don't think it would be unfair as a factual matter. I could convince the finder of fact that it was technologically feasible to exceed that voluntary standard ahead of time. What they're doing now with these two-year phase-in type deal, what they routinely do is simply say, if we as a government from a regulatory standpoint is going to establish a different floor, there in fairness, we've got to give an opportunity for the people to phase-in. That should not in any way, I believe, impact the freedom of the common law to continue to work in the presence of the uniform standard.

JUDGE: Any other questions? Thank you Counsel.

REBUTTAL ARGUMENT OF ROBERT SCHICK ON BEHALF OF THE PETITIONER

JUDGE: Mr. Schick, how do you respond to the argument that your position renders 108 as ceiling rather than a floor?

MR. SCHICK: It is what I -- I refer to Geier and to the dissent of this Court in Alvarado and say the minimums as -- at the beginning of safety acts it says the standards in this act are to be considered

minimums. Our minimums with respect to the manufacturer, they are not, however, minimums with respect -- with respect to the state acts either through the common law or through regulation. This Court citing the dissent when Justice Owen in her dissent in Alvarado's wrote that the standards are minimums with respect to manufacturer as for the state, they are absolute and they are absolute. I think that as Justice Abbott's last question and Justice Enoch's last question that counsel pointed out. The problem here --

The problem here is that asking for a common law remedy here and what the plaintiff's claims are here is to take us back in time and say even though the government was doing all the study to determine what the one proper and appropriate solution will be, you needed to do it back then. But that's not what the government -- that federal government said and it was not what the federal government's conclusion was.

JUDGE: Let me -- let me just ask the procedure of the rule I've been talking about that the Federal Highway Administration promulgate is not rule 108, it was rule 393. I forgot what the number is, it's not 108.

MR. SCHICK: That's right and --

JUDGE: -- and you didn't really rely on the Federal Highway Administration order or the regulations.

MR. SCHICK: No. And if I may, Judge, let me explain why. 393 comes out of the Federal Motor -- Federal Motor Carrier Safety Regulations. Those don't apply to a manufacturer such as Great Dane, those applied to owners, operators, people who got these trailers out that are already on the street that had been for a long time, when this -- this trailer was manufactured by Great Dane in 1986 and it left out possession. FMVSS 108 applies to us as manufacturer. 393 and its subparts apply to the carrier not to the manufacturer. But the Federal Highway Administration continued to comment through the years on what NHTSA was doing and in fact the Federal Register that we've mentioned in our brief and attached copies for the court on has referenced as many times to the fact that the Federal Highway Administration is visiting with NHTSA to understand what its purpose was in doing this rule making and its purpose cannot be made more clear.

And if I may just a couple of quick highlights, the reason for -- I'm sorry, NHTSA said while the agency is proposing two specific configurations of conspicuity treatment, this is during the test period, Judge, it anticipates the final rule, we specify only one pattern and not allow alternative treatments. And then it gives the reason and this I think is important. The principal reason for NHTSA's requirement of a red and white pattern was to make the reflective image on the side of a trailer recognizable to motorists. Since the side conspicuity treatment consists of a single line of material, a distinct color pattern less ambiguous then the solid white or yellow was established so that motorists would learn to associate it with trailers. It was important to the Federal Highway Administration who concurred with NHTSA, and it was important to NHTSA that they gathered this data during the timeframe of 1980 through 1987. What is the -- you know, can we enhance, can we limit accidents by enhancing conspicuity. We're not sure.

JUDGE: But you would agree that this is a weaker case than Geier? I mean where in Geier there was an actual statement that we do not want you to go out and -- and do this uniform enhancement. There's not that statement here that Geier was 5'4" and I believe it did say that implied preemption is not gonna be favored. So, you would agree that

this is a weaker case than Geier?

MR. SCHICK: Judge, I would, except for one thing. And that is Justice Breyer's comment during the -- the majority of discussion where he says we would've liked more air bags and people might like more air bags and sooner, but we State cannot require.

JUDGE: But you agreed there was not a clear policy choice here as there was in Geier?

MR. SCHICK: No, I think that there is. By looking at -- as Justice Owen's point, by looking at the entire history of the rulemaking including post rulemaking, post 1993 is one that actually came into effect from manufacturers under Section 108. And if you look at that and understand what the agency was looking at, how they studied it, how carefully they studied it, what was important to them, and it wasn't only a cause and effectiveness. What among us wanna be able to see and respond too quickly, that is --

JUDGE: But isn't that gonna be able to be claimed for almost any safety standard?

MR. SCHICK: I'm sorry.

JUDGE: A desire for uniformity or that same sort of history that you've set forth here, is that --

MR. SCHICK: I don't know, Judge. I don't think that it is, such as it is in 108. I mean that's why I make such a big point about raising uniformity to the equivalent -- the equivalents here of safety because it is different from air bags. It doesn't matter to me when I walk in my car whether I've got an air bag that blows out this big or much bigger. But it sure matters to me and to millions of others driving along the highway that we're able to recognize at a glance what that particular pattern is. And if the State of Texas through a plaintiff's claim requires my client to had to put on blue and yellow reflective tape back in 1986, that's gonna be confusing to motorists now in the year 2001 who we hope have gotten used to it. At least NHTSA hoped have gotten used to seeing red and white around the outline of trailers as meaning that's a trailer up ahead. It's not a billboard. It's not an emergency sign for vehicle of some sort. That is a trailer. I better slow down and be careful because I might hit it. It might be across the road lanes.

JUDGE: Any other questions? Thank you, Counsel.

JUDGE PHILLIPS: That concludes the argument and the first case will [inaudible] considered.

SPEAKER: All rise.

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