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FILED

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

2007 SEP 17 PM 3:08

JOSEPHINE MORGAN,

Plaintiff,

v.

Jk
CATHY S. GATSEFLIS
KANAWHA CO. CLERK

CIVIL ACTION NO. 03-C-162

Judge Jennifer Bailey Walker

FORD MOTOR COMPANY,
a Delaware corporation;
BRIDGESTONE/FIRESTONE, INC.
an Ohio corporation; and
FRANCIS ROBERT MORGAN,

Defendants.

**ORDER PARTIALLY GRANTING FORD MOTOR COMPANY'S
OMNIBUS MOTION FOR SUMMARY JUDGMENT REGARDING GLASS CLAIMS**

On July 20, 2007, came the defendant Ford Motor Company ("Ford"), by its counsel, Alonzo D. Washington, Michael Bonasso and Flaherty, Sensabaugh & Bonasso, PLLC, and Bryan Cross and Wheeler, Trigg & Kennedy; and also came the plaintiff Josephine Morgan, by her counsel, Christopher L. Brinkley and the Masters Law Firm, L.C.; and also came the defendant and cross-plaintiff Francis Robert Morgan, by his counsel, Victor S. Woods and the Segal Law Firm, and Anthony C. Sunseri and Burns, White & Hickton; and Ford brought on for a hearing *Ford Motor Company's Omnibus Motion for Summary Judgment*. After due consideration of the pleadings on file and the arguments of counsel, the Court, deeming it just and proper to do so, **GRANTS** in part, *Ford Motor Company's Omnibus Motion for Summary Judgment*, and in so doing, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. This case concerns a rollover accident involving a 1999 Ford Expedition, which incident ("subject incident") occurred on January 30, 2001.

2. On January 27, 2003, plaintiff filed her Complaint against Ford and Francis Robert Morgan seeking damages for personal injuries arising from the subject incident.

3. On January 28, 2003, plaintiff filed her First Amended Complaint.

4. Plaintiff's Complaint and First Amended Complaint both alleged that the 1999 Ford Expedition involved in the accident was defective due to the vehicle's "propensity ... to roll over and cause injury to its occupants." Such claim is also characterized throughout the case as a handling and stability defect allegation.

5. Plaintiff's First Amended Complaint added Bridgestone/Firestone, Inc., as a defendant, and added allegations that the tires on the subject vehicle were defective.

6. On January 30, 2003, Francis Robert Morgan (sometimes referred to herein as "cross claimant") filed his answer to plaintiff's First Amended Complaint and filed cross claims against Ford and Bridgestone/Firestone asserting claims similar to those made by plaintiff.

7. On October 27, 2006, the Court entered a Scheduling Order in this action. The Court's Scheduling Order required the plaintiff and the cross claimant, to identify their respective expert witnesses by February 1, 2007; required defendants to disclose their expert witnesses by April 2, 2007; and provided that discovery would close on June 1, 2007.

8. On February 14, 2007, beyond the deadline imposed by the Court for disclosures, both the plaintiff and the cross claimant disclosed the names and background information regarding the experts they intended to use at trial.

9. The February 14, 2007, disclosures filed by the plaintiff did not include the opinions that the late-disclosed experts intended to offer at trial. Further, such disclosures failed to set forth the subject matters to which the experts would opine.

10. On March 20, 2007, the plaintiff and the cross claimant filed amended and supplemental disclosures of expert witnesses.

11. Such amended and supplemental disclosures of expert witnesses set forth opinions which, in part, criticized the subject vehicle's side and rear window glass (sometimes referred to as glazing).

12. Both the plaintiff and the cross claimant contend that Ford's choice of tempered glass for use in the side and rear window openings of the subject Ford Expedition constitutes a design defect in the vehicle. Specifically, plaintiff's and cross-claimant's glass/glazing expert, Thomas Feaheny, opined that "Ford used tempered glass in the side window opening which ... was not viewed as being the proper design choice and ... by not using something other than tempered glass, Ford did something wrong." (emphasis added.)

13. The Court finds that the claim of a glass/glazing defect in the subject vehicle relates solely to the choice of tempered glass over other permitted options, and not to any application or specific design or manufacturing defect in the glass/glazing present in the subject vehicle.

14. In 1966, Congress enacted the National Traffic and Motor Vehicle Safety Act (49 U.S.C. 30101 et seq.; [formerly] 15 U.S.C. 1381 et seq.) ("Safety Act"). The purpose of the Safety Act, as stated by Congress, was "to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381. The Safety Act directed the Secretary of Transportation or his delegate to issue motor vehicle safety standards that "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." *Id.* at § 1392(a). The Secretary delegated his duties to promulgate such standards to the National Highway Traffic Safety Administration ("NHTSA"). NHTSA, in turn, promulgated the Federal Motor Vehicle Safety Standards ("FMVSS").

15. The Court finds that FMVSS 205, as promulgated by NHTSA, permits a motor vehicle manufacturer to use one of several options for the materials in side and rear windows, including glass-plastic, laminates, and tempered glass. 49 C.F.R. § 571.205 (2003); *see also*, 16 ANS Z26.1-1996 (ANSI standard incorporated into FMVSS 205 by reference).

16. At the hearing on the subject *Omnibus Motion*, counsel for cross claimant confirmed to the Court that FMVSS 205 permits the use of tempered glass in side and rear windows of vehicles. At no time during the hearing did counsel for plaintiff refute or contradict such confirmation. Thus, the Court finds that FMVSS 205 permitted Ford to use tempered glass for glass/glazing in the side and rear windows of the 1999 Expedition.

17. The Court finds that Ford did in fact use tempered glass, one of the options permitted under FMVSS 205, in the side and rear windows of the 1999 Expedition.

CONCLUSIONS OF LAW

1. Article VI of the United States Constitution provides that the laws of the United States “shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2 (the “Supremacy Clause”). The Supremacy Clause empowers Congress to pre-empt state law. *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 368, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986).

2. Federal pre-emption of state law can occur in three situations: (1) where Congress explicitly pre-empts state law; (2) where pre-emption is implied because Congress has occupied the entire field; and, (3) where pre-emption is implied because there is an actual conflict between federal and state law. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300, 99 L. Ed. 2d 316, 108 S. Ct. 1145 (1988).

3. The Safety Act, under which the FMVSS regulations are promulgated, contains a preemption clause that provides that a State may establish “a [safety] standard applicable to the same aspect of performance ... only if the standard is identical to the [Federal safety] standard,” 49 U.S.C. § 30103(b). The Safety Act also contains a savings clause which provides that “compliance with a [Federal] motor vehicle safety standard ... does not exempt a person from liability at common law.” 49 U.S.C. § 30103(e).

4. The Safety Act creates neither a heightened nor reduced burden for application of preemption. *See, Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000). State law tort claims which actually conflict with Federal Motor Vehicle Safety Standards are preempted. *Id.* at 869-71.

5. Where federal pre-emption is claimed because a state law conflicts with congressional action, federal law pre-empts the conflicting state law when compliance with both the federal and the state regulations is a physical impossibility, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963), or where the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L. Ed. 581, 61 S. Ct. 399 (1941).

6. The Court concludes that FMVSS 205, which incorporated ANSI Z26.1-1996, requires laminated glass for front windshields but provides options, including tempered safety glass, for other window positions. *See*, 49 C.F.R. § 571.205 (2003). FMVSS 205 permits a manufacturer to use one of several options for the materials in side and rear windows, including glass-plastic, laminates (or laminated glass), and tempered glass. *Id.*

7. The Court concludes that the window material options set forth in FMVSS 205 were determined as part of a carefully researched and balanced regulatory scheme managed by the National Highway Traffic Safety Administration.

8. The United States Supreme Court analyzed federal preemption with respect to the Safety Act in *Geier*, and found an irreconcilable conflict between FMVSS 208 and the petitioner's claim of defect in an automobile occupant restraint system. In *Geier*, plaintiff claimed that the manufacturer should have equipped the automobile in question with airbags. The manufacturer had selected one of FMVSS 208's no-airbag, passive restraint options. The Supreme Court concluded that because FMVSS 208 was deliberately designed to provide manufacturers with options, a state court action based on allegations that the manufacturer was compelled to choose one of those options over the others available under the regulation frustrated the federal regulatory scheme and was, therefore, impliedly preempted by the federal regulation. *Geier*, 521 U.S. at 901.

9. Further, when an FMVSS provides a manufacturer with express options to achieve the desired objective of the standard, any state court design defect claim based on the failure to adopt one of the available options over another is impliedly preempted. *See Geier*, 529 U.S. at 881; *see, also, Dallas v. General Motors Corp.*, 725 F. Supp. 902, 906 (W.D. Tex. 1989) ("a state rule of common law that punishes or prohibits the exercise of a federally created option is preempted by federal law"); *Cf. Kent v. Chrysler Motors*, 200 F. Supp.2d 1208, 1215 (N.D. Cal. 2002) (recognizing that *Geier* demands preemption of state tort claims which compel choice among regulatory permitted options and distinguishing regulation which did not expressly address approved optional designs); *Griffith v. General Motors Corp.*, 303 F.3d 1276, 1279 (11th Cir. 2002) *cert. denied* 538 U.S. 1023, 123 S.Ct. 1953, 155 L.Ed.2d 868 (2003) ("Because plaintiff sued defendants for exercising an option explicitly

permitted by Congress, a conflict exists between state and federal law if plaintiff goes forward with this state law claim of defective design”).

10. The Court concludes that FMVSS 205 sets forth precisely the sort of express optional compliance framework which preempts state law claims premised on alleged improper selection among approved glazing options. A claim of design defect premised on the use of tempered glazing, an expressly permitted option under FMVSS 205, is preempted and cannot stand. *See Erickson v. Ford Motor Company*, No. 2:04-CV-88-BU-RFC (B.D. Mont. Aug. 7, 2007); *Martinez v. Ford Motor Company*, No. 8:06-cv-798-T-26MAP, ___ F. Supp. 2d ___, 2007 WL 1599013 at *2 (M.D. Fla. Apr. 26, 2007); *O’Hara v. General Motors Corp.*, No. 3:05-CV-1134-G, 2006 WL 1094427 at *5 (N.D. Tex. Apr. 25, 2006) (holding that state tort liability based on manufacturer’s choice to use tempered-glass option available under FMVSS 205 is federally preempted and granting summary judgment).

11. The Court concludes that, because tempered glass is a permitted option for manufacturers to use in vehicle side windows under FMVSS 205, the imposition of state tort liability based on the exercise of such option would frustrate the full purposes and objectives of Congress.

12. The Court concludes that plaintiff’s and cross claimant’s state law glass/glazing design defect claims are based on allegations that Ford should or should not have chosen one of several design options specifically preserved in FMVSS 205. Unless such claims are impliedly pre-empted by FMVSS and the Safety Act, such state tort claims would effectively preclude a manufacturer from exercising a specific design option that NHTSA has determined should be preserved.

13. The Court concludes that the analysis adopted by the U.S. Supreme Court in *Geier* relative to defect claims predicated on the selection of an option available under FMVSS 208 applies

in the instant action where the claim is predicated on selection of a glass option available under FMVSS 205 (i.e., tempered glass).

14. Thus, where a claimant seeks to compel a motor vehicle manufacturer to select one specifically designated option (laminated glass) over another specifically designated option (tempered glass), the application of *Geier* will preclude such claim on the basis of implied preemption.

15. The Court concludes that claims of the plaintiff and of the cross claimant that the 1999 Expedition is defective by reason of Ford's selection of glass/glazing are impliedly pre-empted by FMVSS 205 and the Supremacy Clause of the Constitution of the United States.

16. Because the plaintiff's and the cross claimant's glass/glazing design defect claims are preempted by federal law, there exists no genuine issue of material fact with respect to such claims. Thus, summary judgment in favor of defendants on all such claims is proper.

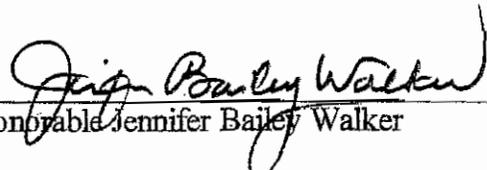
In light of the foregoing, the Court GRANTS Ford's *Omnibus Motion for Summary Judgment* regarding the glass/glazing design defect claims of plaintiff Josephine Morgan and of cross claimant Robert Francis Morgan.

This is a **FINAL ORDER**.

The Court notes the objections and exceptions of the plaintiff and of the cross claimant to the Court's ruling herein.

The Clerk is directed to send a certified copy of this Order to all counsel of record.

Entered this 14th day of September 2007.


Honorable Jennifer Bailey Walker

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 21
DAY OF September, 2007
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA 4