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Motor Vehicles

On Second Try, Tennessee Court Still Sees Preemption in Bus Case; Appeal Brewing

Attorneys for a man who suffered a serious brain injury in a shuttle-bus accident said Nov. 22 that they will call on the Tennessee Supreme Court to review an Oct. 21 decision of the Tennessee Court of Appeals that found two claims in the case preempted (*Lake v. The Memphis Landsmen LLC*, Tenn. Ct. App., No. W2011-00660-COA-RM-CV, 10/21/11).

At the behest of the Tennessee Supreme Court, the Court of Appeals reconsidered its March 2010 opinion finding that federal safety standards preempt motor-vehicle glazing and seat-belt claims. It looked at the issues in light of a February 2011 U.S. Supreme Court decision, *Williamson v. Mazda Motor of America Inc.*, 131 S. Ct. 1131 (2011) (39 PSLR 210, 2/28/11), which found claims based on the use of a lap-only seat belt in a certain minivan seating position not impliedly preempted.

"From our reading, the *Williamson* holding is narrow," the Court of Appeals wrote, and concluded that *Williamson* did not change its analysis.

Spotted-Cow Case. Gary K. Smith, an attorney for the injured man, Clifton A. Lake, and his wife, Charleen J. Lake, told BNA Nov. 22, "I think the ruling is just absolutely wrong." Using a term for a factually very similar precedent, he said, "We think [*Williamson*] absolutely is an on-point, spotted-cow case to our own, and are, let's say, puzzled over the Court of Appeals' disagreement about the application of *Williamson*."

Molly Glover, an attorney for the shuttle-bus manufacturer, Metrotrans Corp., told BNA Nov. 29 that in the Tennessee Supreme Court, "all issues will be in play, not just the preemption issue, but the 12 issues that have never had any appellate review."

"They can just focus on the preemption issue, and if they rule against the defendants, they may well send the entire thing down," Glover said. "Or, for the sake of judicial economy, the Tennessee Supreme Court may just look at it all," which, Glover added, she hoped they would do.

On the substance of the preemption issue, Glover said, "There's a whole lot of preemption jurisprudence out there, but it looks like every case seems to rise and fall on its own facts and the particular regulation that is at issue in that case."

"I think that's been our final analysis of preemption—that you can certainly draw from other cases as far as the principles that the court will use, but it's difficult to argue that the holding in one case should

be the holding in another case because it's so fact-dependent."

Nicholas Wittner of Michigan State University's School of Law told BNA in an e-mail Nov. 29, "There were several decisions after the *Lake* court's original decision that went the other way and, of course, the Supreme Court's grant, vacate, and remand order in *Priester v. Ford Motor Co.* that made it look like [window-glazing] preemption cases were done. But the Court didn't actually reverse the South Carolina Supreme Court's decision in *Priester* and so the door is left open."

The new Tennessee Court of Appeals decision "signifies that the conclusion that the Supreme Court's decisions in *Williamson* and *Priester* sounded the death knell for preemption in automotive crashworthiness cases was premature, if not misplaced," Wittner said.

Heavyweights Collide. Clifton Lake, who had just flown into Memphis, Tenn., was in a rental-car shuttle on his way to Budget Rent A Car in March 1998, according to the appeals court's first opinion (*Lake v. Memphis Landsmen LLC*, 2010 WL 891867 (Tenn. Ct. App. March 15, 2010) (*Lake I*))(38 PSLR 298, 3/29/10). A concrete truck owned by Horn Lake Redi-Mix struck the shuttle-bus, which spun into a light pole. Lake said he was ejected from the bus and hit his head on a curb. He sustained a serious brain injury.

Lake and his wife sued the bus's manufacturer, Metrotrans; its owner, Memphis Landsmen LLC, a Budget franchisee; and Budget Rent A Car System Inc., the franchisor. They asserted claims for negligent design and strict liability, as well as for negligent driving, against Memphis Landsmen. They added a claim against Budget for negligently advising Memphis Landsmen about the design. Memphis Landsmen and Budget, arguing that they did not design the bus, eventually won summary judgment on the strict-liability claims.

All three defendants asked for summary judgment on the basis of federal preemption, but the trial court denied the motions. During a three-week jury trial in August 2008, the defendants moved for a directed verdict. But the trial court let most of the issues go to the jury, which found that the Lakes suffered more than \$8.5 million in damages. The jury ascribed 100 percent of the fault to Horn Lake Redi-Mix, a non-party.

After the trial court denied the Lakes' motion for a new trial, they appealed. Metrotrans and Budget also raised issues on appeal, including the preemption matter.

Panel Focused on Preemption. According to both Smith and Glover, preemption was not front and center in the appeal. Glover, the attorney for Metrotrans, said,

“When we initially presented that as an issue on appeal, it was not fully developed in our briefs. We wanted to preserve that issue for appeal, but . . . we primarily dealt with the 12 assignments of error from the trial.”

“Rather than take up those 12 assignments of error, the Court of Appeals really focused on [the] preemption issue, and it has become the focal point of all the appellate review so far,” Glover said.

The appeals court in *Lake I* held that Federal Motor Vehicle Safety Standard 205 preempted the Lakes’ claims based on the use of tempered, rather than laminated, glass in the side windows. Judge J. Steven Stafford wrote that the standard “provides options for the type of glass that can be used in side windows, including tempered glass . . . the stated purpose of the regulation is not only to prevent ejection, but also to prevent injuries resulting from impact with glazing surfaces.”

The National Highway Traffic Safety Administration “left the options for glass open so that manufacturers could choose the safety features that best accomplished both purposes,” Stafford wrote, comparing the situation to that in *Geier v. American Honda*, 529 U.S. 861 (2000), in which NHTSA’s desire for a mix of occupant protections gave its regulation preemptive effect in an air bag case.

The *Lake I* court also held that FMVSS 208, the seat-belt standard, preempted the Lakes’ claims that the bus should have had passenger seat belts. Based largely on a letter by the agency’s 1992 chief counsel, the court said NHTSA “determined that seat belts should not be required . . . due to both safety and cost concerns.”

The court also said, with respect to the Lakes’ claim that the shuttle-bus was defective because its seats faced the center, that they did not prove Clifton Lake was seated at the time of the collision.

The Lakes sought permission to appeal to the Tennessee Supreme Court, and informed the high court of the *Williamson* decision when it came down. The state’s top court remanded the case on March 24, 2011, for reconsideration in light of *Williamson*.

The Court of Appeals characterized *Williamson* as “narrow” and said, “it does not upset the *Geier* holding. Consequently, as a threshold matter, our reliance upon *Geier* in *Lake I* was not error.”

Court Defends Earlier Holdings. Stafford, writing again for the court, said that “the inclusion of manufacturer choice [in glazing materials] was not the sole basis of our determination of preemption in *Lake I*.” Pointing to NHTSA’s awareness of the risk of injury, in different circumstances, from both laminated and tempered

glass, he said the regulation’s purpose was “to provide the best protection against passenger ejection—a decision that the NHTSA clearly determined was best left to the manufacturer.”

On the seat-belt issue, the court defended its use of the agency counsel’s letter to determine agency policy—not the agency’s opinion on preemption.

And Stafford approved *Lake I*’s implied-preemption determination. “In short, our decision was not based upon the protection of the manufacturers’ choice of whether to install seat belts in large buses; rather, it was based upon a review of the plain language of FMVSS 208, and the policies and reasoning behind that regulation,” he wrote. “Consequently, our determination that the Lakes’ seat belt claim is preempted is not contrary to the Supreme Court’s holding in *Williamson*.”

The court declined to revisit the perimeter-seating issue, saying the supreme court limited its reconsideration to the preemption question.

Smith indicated that his office will apply to the Tennessee Supreme Court for permission to appeal in early December, and that it is “usually weeks to a few months before you hear” a response.

Wittner said that plaintiffs in other cases, including *Priester*, “argue that *Williamson* cabins *Geier* to a unique set of regulatory facts. We’ll see. My sense is that the *Priester* court’s ruling will be the key to all of this. If the court rules against preemption, then I’d expect the *Lake* case to make its way back up on appeal and result in a no preemption ruling. FMVSS 205 preemption would be finished. Conversely, a preemption ruling in *Priester* would likely end up back in the [U.S.] Supreme Court’s lap.”

Judges Alan E. Highers and David R. Farmer also served on the panel.

Smith and C. Philip M. Campbell of Apperson Crump PLC in Memphis represented the Lakes.

Kenneth R. Rudstrom of Spicer Rudstrom PLLC in Memphis, along with James E. Singer of Bovis, Kyle & Burch LLC in Atlanta, represented Memphis Landsmen.

Aaron Robert Parker, who practices in Memphis, along with Glover, Steven N. Snyder Jr., and Eric J. Lewellyn of Leitner, Williams, Dooley & Napolitan PLLC in Memphis, represented Metrotrans.

James B. Summers, Kirk A. Caraway, and Heather W. Fletcher of Allen, Summers, Simpson, Lillie & Gresham in Memphis represented Budget.

BY MARTINA S. BARASH

The opinion is at <http://op.bna.com/pslr.nsf/r?Open=mbah-8p4qcv>.