ROY PORCHE, BERNIE PORCHE, PAULA LOTT, AND EMILY BURRIS, AS TUTRIX OF THE MINOR CHILD, MARVIN ANTHONY LOTT	*	**NO. 2003-CA-0765**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
VERSUS	*	**STATE OF LOUISIANA**
JOHN DOE, ANTHONY JACQUES, ABC INSURANCE COMPANY, BEST CHEVROLET, INC. AND GENERAL MOTORS CORPORATION	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-11640, DIVISION "B-15"
Honorable Rosemary Ledet, Judge
* * * * * *

Charles R. Jones
Judge
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris Sr., and Judge Leon A. Cannizzaro Jr.)

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AFFIRMED

This is an appeal from the granting of a Motion for Summary Judgment. For the reasons set forth herein, we affirm.

On December 28, 1998, eighteen year-old Marvin Lott (hereinafter "Lott"), was involved in a fatal automobile accident. At the time of the accident, Lott was driving a 1998 Chevrolet Corvette, which was purchased on December 15, 1998. The used vehicle was purchased by Roy Porche, Lott's uncle from Best Chevrolet, Inc. (hereinafter "Best Chevrolet").

The accident occurred in the early morning hours when Lott and his passenger were traveling west on Interstate 10 toward downtown New Orleans. It is alleged that Lott was cut-off by another vehicle, causing his vehicle to spin out of control and hit the center retaining wall. Lott and his passenger were ejected from the vehicle. Neither man was wearing a seatbelt. Lott died as a result of the accident; his passenger survived.

On July 19, 1999, a suit was filed in the Civil District Court for the Parish of Orleans, by Bernie Porche and Paula Lott, (Lott's parents) and by the appellant, Emily Burris, as tutrix of Marvin Anthony Lott, (Lott's minor child). Named as defendants in the action were the driver and/or owner of a

second vehicle that fled the scene; General Motors Corporation, as the manufacturer of the Corvette; Best Chevrolet, as the seller of the vehicle; and various insurance companies.

On June 20, 2001, a judgment was rendered, sustaining Best Chevrolet's peremptory exception of no cause of action, dismissing the claims asserted by Bernie Porche and Paula Lott against Best Chevrolet. On December 12, 2002, the district court granted summary judgment in favor of Best Chevrolet, dismissing the claims asserted by Burris, as tutrix of the minor child, Marvin Anthony Lott. The Motion for Summary Judgment was predicated upon the assertion that Burris' state law tort action against the appellee was pre-empted by federal law, and specifically by the Federal Motor Vehicle Safety Standard No. 208, 49 CFR § 571.208 (FMVSS 208), which requires car manufacturers to place certain permanent seatbelt warning labels in all vehicles sold to the public.

On December 23, 2002, Best Chevrolet filed a Motion to Certify the Granting of the Summary Judgment as a final judgment. Before the district court acted on the Motion to Certify, Burris was granted an order for appeal on February 12, 2003. On February 20, 2003, the district court denied the Motion to Certify the Summary Judgment as final because the district court was divested of jurisdiction upon the signing of the order for appeal. In an

apparent attempt to cure the lack of a certification, on May 6, 2003, Burris dismissed her appeal without prejudice, obtained a certification based on a joint motion and the consent of the parties, then re-filed her appeal. The granting of the Motion for Summary Judgment by the district court is the subject of the appeal now before this Court

Burris' first assignment of error asserts that the district court erred in granting Best Chevrolet's Motion for Summary Judgment by determining that federal law pre-empted the appellant's negligence claim under state law. Burris' action against Best Chevrolet, as the seller of this used vehicle, is based on the argument that the vehicle did not contain the federally mandated permanent seatbelt warning label on its sun visor. Burris maintains that the vehicle was in violation of FMVSS 208, which requires that manufacturers permanently affix warning labels to the sun visor as opposed to temporary warning labels on the dashboard, in all vehicles manufactured on or after February 25, 1997.

In granting the Motion for Summary Judgment, the district court found that federal law pre-empted Burris' state law tort action against Best Chevrolet. In its Reasons for Judgment, the district court expressed the opinion that "49 U.S.C.A. § 30112(b) however provides an exemption from the requirements of the FMVSS to sellers involved in the sale of a motor

vehicle made after the first purchase of the vehicle. Thus, the FMVSS does not present any cause of action against the defendant, Best Chevrolet, as the facts establish that Best Chevrolet is not the first seller of the subject vehicle."

Burris acknowledges the fact that Best Chevrolet was neither the manufacturer nor the first seller of the vehicle, and was therefore not in violation of FMVSS 208. Burris does, however, rely on the savings clause contained in 49 U.S.C.A. § 30103(e) to support the position that federal law does not pre-empt her state law tort claim. The savings clause provides that compliance with a motor vehicle safety standard under the FMVSS does not exempt a person from liability at common law.

Burris cites the cases of Geier v. American Honda Motor Co., 529 U.S. 861, 863; 120 S. Ct. 1913, 1918 (2000), and Perry v. Mercedes Benz of North America, Inc., 957 F. 2d 1257, 1964 (5th Cir. 1992), for the position that the courts have adopted a narrow interpretation of the pre-emption clause of FMVSS 208. Specifically, Burris contends that after Geier, the only basis for pre-emption under the FMVSS 208 is "conflict pre-emption," namely that federal law pre-empts state law, only if it "actually conflicts" with federal law. 529 U.S. at 869; 120 S. Ct. at 1919. She asserts that no such actual conflict exists in the present case. Moreover, Burris submits that

the court in Perry held that state and federal laws actually conflict when "compliance with both federal and state regulations is a physical impossibility", or because the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 957 F.2d at 1264, quoting California Federal Savings and Loan Ass'n v. Guena, 479 U.S. 272, 280, 1075 S. Ct. 683. 689, 93 L.Ed 2d 613 (1987). Burris further relies on the rationale in Perry that a state common-law action can demand a higher standard of compliance than a federal standard, without operating as an obstacle or making federal compliance impossible. 957 F.2d at 1265.

In response to this appeal, Best Chevrolet argues that the state law tort action would be in direct conflict with the federal statute that provides an exemption to Best Chevrolet, as the seller of a used vehicle, from having to comply with the requirements for seatbelt warnings as set forth in FMVSS 208. The direct conflict in this case, as argued by Best Chevrolet, is that it has no obligation to comply with FMVSS 208; however, Burris seeks to impose upon Best Chevrolet that very same obligation under the auspices of state tort law. Even the jurisprudence cited by the appellant acknowledges that such a direct conflict between state and federal law would necessarily result in the federal statute pre-empting the state law. Geier, 529 U.S. at

861, 120 S. Ct. at 1913; Perry, 957 F.2d at 1257.

The present case focuses on FVMSS 208, which requires seatbelt warning labels to be permanently affixed to the sun visor of a motor vehicle sold after February 25, 1997. While 49 U.S.C.A. § 30112(b), which specifically states that FMVSS 208 "does not apply to the sale…of a motor vehicle or motor vehicle equipment after the first purchase of the vehicle or equipment in good faith other then for resale," this Court must decide whether the federal statutes, when considered together with the savings clause of 49 U.S.C.A. § 30103(e), pre-empt Burris' state-law tort action. For the reasons stated herein, we find no error in the district court finding in favor of pre-emption.

We recognize, as did the district court, that the controlling case on this issue is Geier. Pursuant to FMVSS 208, automobile manufacturers were required to equip some, but not all of their 1987 vehicles with passive restraints. In Geier, the petitioner, Alexis Geier, was injured in an accident while driving a 1987 Honda Accord that did not have such restraints. She and her parents, also petitioners, sought damages under District of Columbia tort law, claiming, inter alia, that the defendant, American Honda, was negligent in not equipping the Accord with a driver's side airbag. Ruling that their claims were expressly pre-empted by the Act, the District Court

granted American Honda's summary judgment. In affirming, the Court of Appeal concluded that, because petitioners' state tort claims posed an obstacle to the accomplishment of the objectives of FMVSS 208, those claims conflicted with that standard and that, under ordinary pre-emption principles, the Act consequently pre-empted the lawsuit. The United States Supreme Court held that petitioners' "no airbag" lawsuit conflicted with the objectives of FMVSS 208 and was therefore pre-empted by the Act.

In Geier, as in the present case, the petitioners argue that the existence of the savings clause makes clear Congress' explicit intent to preserve tort liability. The Court in Geier, however, found implied pre-emption in the savings clause and rejected the argument that the clause acted to "bar the ordinary working of conflict pre-emption principles." 592 U.S. at 869, 120 S. Ct. at 1919. The Court further stated that nothing in the savings clause suggested the intent to save tort actions that conflicted with federal regulations.

In the case at bar, it is clear that the standards set forth in FMVSS 208 and 49 U.S.C.A. § 30122(b), deliberately sought to require manufacturers and "first sellers" of motor vehicles, but not sellers of used vehicles, to place permanent seatbelt warning labels on the sun visor of motor vehicles. Burris' tort action seeks to impose upon Best Chevrolet a duty to place or

verify the placement of the seatbelt warning labels as required by FMVSS 208. However, as Best Chevrolet is not the first seller of the car, this Court finds that Burris' state law tort claim is in direct conflict with FMVSS 208, and thus, would stand as an obstacle to the very objective of the federal regulation.

DECREE

Accordingly, the judgment of the district court granting summary judgment in favor of Best Chevrolet and finding that Burris' state law tort claim is pre-empted, is hereby affirmed.

AFFIRMED