RENDERED: AUGUST 15, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001894-MR

WOODROW WELLS, JR.
AND SHIRLEY ROGERS WELLS — APPELLANTS

v.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 12-CI-90076

KENTUCKY AIRMOTIVE, INC.;
MIDWEST AIRMOTIVE, INC.;
HILL'S AVIATION, INC.;
HILL'S FLYING SERVICE, LLC;
AND MOUNT STERLING-MONTGOMERY
COUNTY AIRPORT BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

NICKELL, JUDGE: Woodrow Wells, Jr., and his wife, Shirley Rogers Wells, have appealed from the Montgomery Circuit Court's October 29, 2012, dismissal of their claims against Kentucky Airmotive, Inc., Midwest Airmotive, Inc., Hill's

Aviation, Inc., Hill's Flying Service, LLC, and Mount Sterling-Montgomery County Airport Board. Following a careful review, we affirm.

The Wells own approximately 108 acres of property on Grassy Lick Road in Mount Sterling, Kentucky. The Mount Sterling Airport lies directly across Grassy Lick Road from the Wells' property, and its single, 5001 foot long runway runs in a southwesterly to northeasterly orientation perpendicular to Grassy Lick Road. According to the Wells, their property is situated less than 1000 feet from the northeastern end of the runway.

The Airport Board is a commission created pursuant to KRS[1] 183.132 by joint actions of the City of Mount Sterling, Kentucky, and Montgomery County, Kentucky. The Airport Board owns the airport and the real property upon which it is situated. The airport is not served by an air traffic control tower and the Airport Board does not control which planes take off and land at the airport. Kentucky Airmotive, Midwest Airmotive, Hill's Aviation, and Hill's Flying service are private businesses that operate from the airport. These businesses provide aircraft charters and rentals in addition to flight instruction lessons.

The Wells brought the instant suit asserting a nuisance claim solely against the Airport Board and trespass claims against all of the appellees. The Wells alleged they suffered damages as a result of aircraft operating at altitudes below 500 feet above their adjacent property. They sought permanent injunctive relief prohibiting the use of the first 500 feet of airspace above their property based

[1] Kentucky Revised Statutes.

on their assertion of "exclusive control over and the right to possess the property, upon which their home sits, as well as the immediate reaches of the atmosphere enveloping their home." In addition, the Wells sought damages for emotional distress and diminution in value of their property. They also requested an award of punitive damages.

Each of the appellees moved the trial court to dismiss the action pursuant to CR[2] 12.02(f), alleging the trial court was without authority to grant the requested relief. They contended the state law claims asserted in the action were "preempted by federal law as it relates to the operation of aircraft and the relief sought would conflict with federal statutes and regulations relating to the safe operation of aircraft." Memoranda in support of the motions to dismiss were tendered to the trial court. Following a hearing, the trial court entered a brief order granting the motions and dismissing the action with prejudice. This appeal followed.

On appeal, the Wells raise five allegations of error in seeking reversal. First, they contend the trial court considered facts and evidence outside the record, thereby converting the motions to dismiss into motions for summary judgment requiring completion of discovery before being entertained. Next, they argue the trial court utilized an incorrect legal standard in ruling on the motions to dismiss. The Wells' third and fourth allegations center on the assertion their claims are not preempted by federal aviation law and the relief sought does not conflict with

[2] Kentucky Rules of Civil Procedure.

applicable aviation regulations. Finally, the Wells contend that since the Airport Board's motion to dismiss failed to discuss the nuisance claim, the trial court had no basis upon which to dismiss that claim. After a careful review, we discern no merit in any of the allegations of error.

"It is well settled in this jurisdiction when considering a motion to dismiss under [Kentucky Rules of Civil Procedure (CR) 12.02], that the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." *Mims v. Western–Southern Agency, Inc.,* 226 S.W.3d 833, 835 (Ky. App. 2007) (citing *Gall v. Scroggy,* 725 S.W.2d 867, 869 (Ky. App. 1987)). In such a case, "[t]he court should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." *Pari–Mutuel Clerks' Union of Kentucky, Local 541, v. Kentucky Jockey Club,* 551 S.W.2d 801, 803 (Ky. 1977). For purposes of the motion, the facts as pleaded in the complaint are admitted; only the right to relief remains to be challenged. *Huie v. Jones,* 362 S.W.2d 287, 288 (Ky. 1962). "Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue *de novo.*" *Fox v. Grayson,* 317 S.W.3d 1, 7 (Ky. 2010) (citing *Morgan v. Bird,* 289 S.W.3d 222, 226 (Ky. App. 2009)).

The Wells first contend the trial court assumed facts set forth in the motions to dismiss were true and otherwise relied upon matters outside the

pleadings when considering the motions. In so doing, they allege the trial court converted the motions to dismiss into summary judgment motions which could not be granted until the parties had a reasonable opportunity to conduct discovery, citing CR 12.02, *Suter v. Mazyck*, 262 S.W.3d 837 (Ky. App. 2007), and other authorities. While we agree with the legal theory presented, we disagree that it applies to the matter at bar.

In ruling on the CR 12.02 motions, the trial court had before it the allegations set forth in the amended complaint and arguments set forth in memoranda of law from all parties. Although it appears the appellees' CR 12.02 motions could arguably be construed as motions for summary judgment under Rule 56—because the trial court appears to have reviewed matters outside the pleadings in making its determination—we believe this to be inconsequential, as this appeal solely involves an interpretation of the law, and our review would, thus, be *de novo* in either event. *See* CR 12.02; *Lewis v. B & R Corp.,* 56 S.W.3d 432, 436 (Ky. App. 2001). Further, the matters potentially considered by the trial court consisted of mathematical calculations and/or regulations promulgated by the Federal Aviation Administration (FAA) and published in the Federal Register, all of which are appropriate for judicial notice pursuant to Kentucky Rules of Evidence (KRE) 201. Nevertheless, we cannot determine from the face of the record whether the trial court did, in fact, rely on any matters outside the record as the order dismissing the Wells' complaint contained no findings of fact or other indication as to the reasoning behind its decision and none were required. The

Wells' bare assertion that the trial court improperly assumed as true certain facts averred in the appellees' motions garners no support from the record. A similar argument presented in their memorandum opposing the CR 12.02 motions apparently gained no traction with the trial court. Based on the facts presented, we cannot say the trial court erred in ruling on the CR 12.02 motions without permitting completion of discovery. Thus, we are unable to conclude the trial court should have treated the motions to dismiss as motions for summary judgment.

Second, the Wells contend the trial court utilized an incorrect legal standard in making its decision. They assert the trial court only considered whether they had stated a claim for which the maximum relief sought could be granted. Rather, they aver the trial court should have considered whether any relief could be granted on the claims set forth in their amended complaint. As before, the Wells offer nothing indicating the trial court acted improperly apart from their bare assertions. They concede the trial court's order contains no findings of fact, but contend the absence of such findings requires an assumption "the Court based its decision on the arguments advanced by Appellees." It appears that rather than indicating how and where the trial court erred, the Wells have taken a single sentence from an argument advanced by Kentucky Airmotive and Midwest Airmotive in their joint motion to dismiss and have attempted to attribute the totality of the trial court's ruling to that sentence. No further support is advanced in favor of this argument other than their own self-serving statements regarding

their beliefs regarding why the trial court ruled as it did, and our review of the record indicates no such support exists. "We will not engage in gratuitous speculation as urged upon us by appellate counsel, based on a silent record." *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985). In the absence of even a modicum of support for their allegation of error, the Wells' contention must necessarily fail.

Next, the Wells contend the relief they sought was not in conflict with federal aviation regulations. Similarly, they argue the trial court erred in determining their claims were wholly preempted by federal aviation law. Although advanced as two separate arguments, we have determined to dispose of both of these allegations in a single discussion as both are centered on the applicability of the doctrine of federal preemption.

> Preemption occurs under Article VI of the Constitution, the Supremacy Clause, which 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." *In re Johnson,* 460 B.R. 234, 245 (Bkrtcy. E.D. Ark., 2011).

Williams v. Chase Bank USA, N.A., 390 S.W.3d 824, 826-27 (Ky. App. 2012).

> The Supremacy Clause of the United States Constitution, Article VI, provides the basis of the doctrine of federal preemption. *Niehoff v. Surgidev Corp.* 950 S.W.2d 816, 820 (Ky. 1997). "The historic police powers of the state are not preempted in the absence of the clear and manifest purpose of Congress to do so." *Id.* (citations and quotation marks omitted). "The congressional purpose to preempt a state remedy may be determined in either of two ways. The first is whether the preemption is found in the express language of the statute. The

second is to find preemption implied from the structure and purpose of the statute." *Id.* (citations omitted).

> As a general statement, preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law[;] . . . when there is outright or actual conflict between federal and state law[;] . . . where compliance with both federal and state law is in effect physically impossible[;] . . . where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law[;] . . . or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.
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> *Commonwealth, ex rel. Cowan v. Telcom Directories, Inc.,* 806 S.W.2d 638, 640 (Ky. 1991) (citations omitted).

Zad, LLC v. Bulk Petroleum Corp., 368 S.W.3d 122, 126-27 (Ky. App. 2012). "Preemption is predicated on congressional intent. The will of Congress to monopolize an area of legislation may be expressed in the authorizing statute and in the regulations enacted pursuant to that statute." *Gustafson v. City of Lake Angelus*, 76 F.3d 778, 782 (6th Cir., 1996).

It is undisputed that the Federal Aviation Act, 49 U.S.C. §§40101-41901 (the Act), grants exclusive authority in regulating the navigable airspace over the United States to the federal government, and more particularly to the FAA. This exclusive and sovereign right includes the ability to promulgate air traffic regulations for the flight of aircraft including, but not limited to, safe operating altitudes. *See* 49 U.S.C. §40103(b)(2). Air traffic regulations are intended to protect not only the aircraft and their occupants, but also individuals

and property on the ground. *Id*. The Act contains an express statement regarding preemption in 49 U.S.C. §41713, which states in pertinent part:

> (b) **Preemption**—(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

With these standards in mind, we turn to the issues at bar.

The Wells contend their complaint asserted allegations separate and apart from the areas regulated under federal aviation laws and regulations and were, therefore not preempted by federal law. Citing *In re Air Crash at Lexington August 27, 2007*, 486 F.Supp. 2d 640 (2007), the Wells argue state law remedies and causes of action are still available even though the Act does preempt state law in some cases. They also contend under *Gustafson*, state and local authorities have the right to prohibit or restrict aircraft from entering certain navigable airspace even when federal rules are not so restrictive. Thus, the Wells believe the trial court erred in dismissing their complaint.

In contrast, the appellees contend the Wells' complaint alleges causes of action based solely on the effects of aircraft operation, a field clearly preempted by federal law under the language contained in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S.Ct.1854, 36 L.Ed.2d 547 (1973). They argue that since the field is preempted, a state court cannot enter an order attempting in any way to regulate aircraft operations. They concede federal law does not

preempt certain powers in relation to state and local land control or zoning ordinances, but argue the claims presented in the amended complaint do not fall into any exception to preemption under the Act. After carefully reviewing the arguments of the parties, the cited authorities and applicable federal statutes and regulations, we agree with the appellees.

The field of aircraft safety and operation has clearly been preempted by federal regulation. The scheme of federal regulation in these areas is sufficiently comprehensive to make it reasonable to infer Congress has left no room for supplementary state regulation.

> Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxies onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.

Northwest Airlines v. Minnesota, 322 U.S. 292, 303, 64 S. Ct. 950, 956, 88 L. Ed. 1283 (1944) (Mr. Justice Jackson, concurring). We believe this concise description of the system of federal aviation regulation remains correct to the present day. Were a trial court to grant the Wells any relief relating to the "safe and proper" operation of aircraft over their property, clearly that court would be

invading in an area of law pervasively controlled and regulated by the federal government. Such an intrusion into the federal sphere would be improper.

> Federal legislation preempts a state law if it contains an explicit preemption clause; if it implies Congressional intent to occupy the field; or if it conflicts with a state law.[3] . . . . A federal law preempts a state law implicitly when it is impossible to comply with both of them or when the state law creates an obstacle to accomplishing federal objectives.[4]

Abel Verdon Const. v. Rivera, 348 S.W.3d 749, 755 (Ky. 2011) (footnotes in original). Thus, based on the facts presented in the case *sub judice*, we conclude the Wells' claims are wholly preempted as a ruling in their favor would necessarily create "an obstacle to accomplishing federal objectives" relating to the safe and efficient operation of aircraft. The trial court thus did not err in dismissing their complaint as no relief could be granted on their claims.

Finally, the Wells contend the Airport Board's motion to dismiss failed to address the nuisance claim asserted against it, thereby depriving the trial court of the ability to dismiss that claim. They cite no authority supportive of their claim. As a general rule we will not consider bare allegations of error which are unsupported by evidence or argument on appeal. *Stewart v. Jackson*, 351 S.W.2d 53, 54 (Ky. 1961) (citations omitted). Further, to the extent the Wells' now present allegations of error for the first time, they are improper and will be disregarded.

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[3] *English v. General Electric Co.,* 496 U.S. 72, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). *See also Chamber of Commerce v. Whiting,* —— U.S. ——, 131 S.Ct. 1968, 179 L.Ed.2d 1031 (2011) (citing *C.S.X. Transp., Inc. v. Easterwood,* 507 U.S. 658, 664, 113 S.Ct. 1732, 123 L.Ed.2d 387 (1993)).

[4] *See Crosby v. Nat'l Foreign Trade Council,* 530 U.S. 363, 372, 120 S.Ct. 2288, 147 L.Ed.2d 352 (2000).

Fischer v. Fischer, 348 S.W.3d 582, 588 (Ky. 2011); *see also Kennedy v. Commonwealth*, 544 S.W.2d 219, 222 (Ky. 1976). Nevertheless, in spite of these failings we have considered the Wells' argument and perceive no error in the trial court's ruling. Clearly, all of the claims presented in the amended complaint—including the nuisance claim against the Board—allegedly arose from the operation of aircraft in and around the Mount Sterling-Montgomery County Airport and the use of the airspace above the Wells' property. As we have previously ruled, all such aircraft operations are regulated by the FAA, thereby preempting the Wells' state law trespass claims. Federal preemption likewise applies to the state law nuisance claim advanced on the same factual basis. The trial court's dismissal was proper.

For the foregoing reasons, the judgment of the Montgomery Circuit Court is affirmed.

VANMETER, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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