

RENDERED: NOVEMBER 14, 2014; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-002048-MR

BRUCE MERRICK; ARTHUR MILBY;
DANT CLAYTON CORPORATION;
GEORGE MILLER; GREGG M. MURRAY;
JOSEPH M. BILLY; NANCY L. BILLY;
ROSE JOHNSON; SAMANTHA G. ALLEN BY
AND THROUGH HER ATTORNEY-IN-FACT;
AND SAMUEL JOHNSON

APPELLANTS

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 12-CI-003382

BROWN-FORMAN CORPORATION AND
HEAVEN HILL DISTILLERIES, INC.

APPELLEES

OPINION REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: CLAYTON, COMBS AND STUMBO, JUDGES.

STUMBO, JUDGE: Bruce Merrick, *et al.* appeal from an Order of the Jefferson
Circuit Court granting the CR 12.02(f) Motion of Brown-Forman Corporation

and other Appellees to dismiss Appellants' air quality nuisance and trespass action. In dismissing the action, the Circuit Court determined that the federal Clean Air Act preempts source state air quality tort claims of the type asserted by Appellants. Appellants contend that the Circuit Court erred in failing to apply the clear and manifest congressional intent required to preempt state law, and argue that the Clean Air Act does not operate to bar them from prosecuting an air quality nuisance and trespass action. For the reasons stated below, we REVERSE AND REMAND the Order on appeal.

The facts are not in controversy. Appellees operate whiskey distilleries within the Commonwealth of Kentucky. As part of the production and aging process, the distilleries emit a quantity of ethanol vapor into the atmosphere. Merrick and the other Appellants reside near the distilleries. They alleged below that the atmospheric ethanol emitted by Appellees promoted the growth of "whiskey fungus", i.e., *Baudoinia compniacensis*, which resulted in a pervasive black film covering virtually every outdoor surface. The parties contest whether the black film can be removed by cleaning and power washing. Merrick, who owns a company that manufactures stadium seating, argues that the whiskey fungus destroys any inventory that he stores out of doors, that it has doubled the cost of replacing a commercial roof, and has otherwise caused substantial and ongoing pecuniary damages. Appellants who reside near the distilleries contend that the fungus progressively destroys any personal property left out of doors and that it grows on their homes and vehicles. Appellants'

Complaint alleged negligence and nuisance claims invoking Appellees' purported duty to minimize and prevent ethanol emissions, as well as a claim for trespass and an assertion that affordable and effective technology exists to capture or otherwise prevent the release of ethanol vapor. Appellees respond that they are in compliance with all federal laws and regulations, that federal law preempts all actions arising under state statutory and common law, and that whiskey fungus occurs naturally in the environment and is not released by the distilleries.

Appellees' air emissions are governed by the federal Clean Air Act ("CAA") at 42 U.S.C. 7401 *et seq.*, Kentucky statutes, and regulations promulgated by the Louisville Metro Air Pollution Control District ("LMAPCD"). Ethanol is classified as an air pollutant and is regulated along with other volatile organic compounds ("VOCs"). Appellants did not allege that the distilleries violated any federal or state laws or regulations.

Before discovery commenced and in lieu of answering Appellants' first Complaint, Appellees filed a CR 12.02(f) Motion to Dismiss for failure to state a claim. The Motion did not allege any federal preemption issues. Appellants filed a First Amended Complaint which rendered the CR 12.02(f) Motion moot. Thereafter, Appellees filed a second CR 12.02(f) Motion to Dismiss, this time arguing that state tort claims arising from ethanol emissions are preempted by the CAA.

After Merrick, *et al.*, filed a response, oral arguments on the Motion were conducted on March 4, 2013. On July 30, 2013, the Circuit Court rendered an Order sustaining Appellees' Motion to Dismiss. As a basis for the Order, the court determined that Appellants' state law tort claims were preempted by operation of the CAA. The court pointed to *American Elec. Power Co., Inc. v. Connecticut*, 131 S.Ct. 2527, 180 L.Ed.2d 435 (2011) (holding that the CAA preempted *federal* common law claims), which the court noted had spawned three relevant federal District Court opinions. The court concluded that Appellants' instant tort claims were preempted because they had "not cited any authority decided since *American Elec. Power* that supports the argument that state tort claims are not preempted." Appellants' subsequent Motion to Reconsider was denied and this appeal followed.

Merrick, *et al.*, now argue that the trial court erred in sustaining Appellees' Motion to Dismiss. The corpus of their argument is that federal preemption of state tort claims can be found, if at all, only where there exists clear and manifest congressional intent. Such intent, Appellants claim, is wholly absent in the CAA. Additionally, Appellants contend that at the time of reconsideration below, all of the post *American Elec. Power* courts agreed that the CAA does not preempt Appellants' claims. Finally, Appellants direct our attention to federal District Court cases expressly holding that the CAA, and/or its analogue the Clean Water Act ("CWA"), do not preempt state tort claims arising from the same subject matter. In sum, Merrick, *et al.*, seek an Opinion

reversing the Jefferson Circuit Court's Order sustaining Appellees' Motion to Dismiss and remanding the matter for additional discovery and further proceedings.

In *American Elec. Power*, the United States Supreme Court held that the CAA preempted *federal* common law claims and that federal agencies were more suited than the court to make scientific, economic and technological determinations necessary to implement the federal regulations. In applying *American Elec. Power*, the Jefferson Circuit Court noted that "several district court cases have decided the CAA also preempts state tort claims." One such district court case cited by the Jefferson Circuit Court was *Bell v. Cheswick Generating Station*, 903 F.Supp.2d 314 (W.D. Penn. 2012). *Bell*, however, was subsequently considered by the Third Circuit Court of Appeals, which held as follows:

Given that we find no meaningful difference between the Clean Water Act and the Clean Air Act for the purposes of our preemption analysis, we conclude that the Supreme Court's decision in [*International Paper Co. v. Ouellette*, 479 U.S. 481, 107 S.Ct. 805, 93 L.Ed.2d 883 (1987)] controls this case, and thus, *the Clean Air Act does not preempt state common law claims based on the law of the state where the source of the pollution is located.*^{FN7} Accordingly, the suit here, brought by Pennsylvania residents under Pennsylvania law against a source of pollution located in Pennsylvania, is not preempted. (Emphasis added).

FN7. The Supreme Court's recent decision in *American Electric Power Co. v. Connecticut*, — U.S. —, 131 S.Ct. 2527, 180 L.Ed.2d 435 (2011), does

nothing to alter our analysis. There, the Court held that the Clean Air Act displaced any federal common law right to seek abatement of carbon-dioxide emissions from power plants. *Id.* at 2537. However, the Court acknowledged that “[l]egislative displacement of federal common law does not require the same sort of evidence of clear and manifest [congressional] purpose demanded for preemption of state law,” and explicitly left open the question of whether the Clean Air Act preempted state law. *Id.* at 2537, 2540; see *Gallisdorfer*, 99 Va. L.Rev. at 139 (“the displacement finding in [*American Electric*] hardly compels—or even presages—a corresponding finding of preemption”).”

Bell v. Cheswick Generating Station, 734 F.3d 188, 196 (3rd Cir. 2013).

The Jefferson Circuit Court was aware of the Third Circuit's opinion in *Bell* when it adjudicated Appellants' Motion to Reconsider. Nevertheless, the court found as more persuasive the 2010 ruling in *North Carolina, ex rel. Cooper v. Tennessee Valley Authority*, 615 F.3d 291 (4th Cir. 2010), wherein that court concluded that the CAA and "conflict preemption principles caution at a minimum against according states a wholly different role and allowing state nuisance law to contradict joint federal-state rules so meticulously crafted." *Id.* at 303.

We must first note that because this matter is before us on appeal from a CR 12.02(f) Motion to Dismiss, we examine the matter *de novo* and without deference to the trial court's conclusions of law. *Revenue Cabinet, Commonwealth of Kentucky v. Hubbard*, 37 S.W.3d 717 (Ky. 2000). In so doing, we conclude that *Bell* rather than *Cooper* is more persuasive for at least

two reasons. First, the language given in *Bell* is clear, unambiguous and subject to but one interpretation. The Third Circuit Court of Appeals held without equivocation that "the Clean Air Act does not preempt state common law claims based on the law of the state where the source of the pollution is located." *Bell*, 734 F.3d at 196. This language is contrasted with that of *Cooper*, which held with less clarity that conflict preemption principles "caution at a minimum against" allowing state nuisance law to contradict joint federal-state air quality rules. *Cooper*, 615 F.3d at 303. Additionally, and though not dispositive, *Bell* was rendered some three years after *Cooper* and may reflect the most recent iteration of this evolving field of federal case law.¹

In sustaining Appellees' Motion to Dismiss, the Jefferson Circuit Court stated that, "Plaintiffs have not cited any authority decided since *American Elec. Power* that supports the argument that state tort claims are not preempted." *American Elec. Power* did not hold that the CAA preempts *state* tort law, but even so, the party asserting federal preemption of state law bears the burden of persuasion. *Wyeth v. Levine*, 555 U.S. 555, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009). That is to say, the burden to demonstrate federal preemption rested with the Appellees. The Appellants were not required to prove the absence of preemption.

¹ While opinions rendered by the federal district and circuit courts are not binding on Kentucky trial and appellate courts, they are to be given great respect. *Cook v. Popplewell*, 394 S.W.3d 323, 346 (Ky. 2011).

Finally, we note that federal preemption may be found only where it is clearly intended by Congress.

[T]he appropriate analysis in determining if federal statutory law governs a question previously the subject of federal common law is not the same as that employed in deciding if federal law pre-empts state law. In considering the latter question we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

City of Milwaukee v. Illinois and Michigan, 451 U.S. 304, 317, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981) (quotation marks and citation omitted). We cannot discern from the CAA a clear and manifest intent to preempt state tort law, and this conclusion is bolstered by *Bell*.

A Motion to Dismiss shall be granted only where it appears that the pleading party would not be entitled to relief under any set of facts which could be proved in support of the claim. *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801 (Ky. 1977). Having considered this question of law *de novo*, and based on the unequivocal language in *Bell* holding that the Clean Air Act does not preempt state common law claims based on the law of the state where the source of the pollution is located, we conclude that Appellees did not demonstrate that Merrick, *et al.*, failed to state a claim upon which relief may be granted; therefore, Appellees were not entitled to CR 12.02(f) relief. Accordingly, we

REVERSE the Order on appeal and REMAND the matter for further proceedings consistent with this Opinion.

ALL CONCUR.

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