

**IN THE ARKANSAS SUPREME COURT**

**ARKANSAS STATE PLANT BOARD, *et al.***

**APPELLANTS**

**v.**

**No. CV 21-\_\_\_\_\_**

**GLENN HOOKS, *et al.***

**APPELLEES**

**EMERGENCY MOTION FOR A STAY PENDING APPEAL**

**I. Procedural History**

This case is about the Arkansas State Plant Board’s 2021 Rule (“Plant Board’s 2021 Rule”), which extended the timeframe during which Arkansas farmers can apply dicamba to their crops from May 25, 2021, to June 30, 2021. On May 6, 2021, Appellees filed a Complaint for Declaratory Judgment and Permanent Injunctive Relief against Appellants. (RP 4-47, 57-250). On May 15, 2021, Appellees filed a Motion for Preliminary and Permanent Injunctive Relief. (RP 253-536). The factual allegations and affidavits in support of the Motion largely mirror Appellees’ complaint. In their Motion, Appellees additionally allege that the Plant Board’s 2021 Rule will irreparably harm them and that they have a likelihood of success on the merits regarding the Appellants’ failure to follow the Arkansas Administrative Procedures Act. (RP 259-263, 496-534).

The trial court issued an *ex parte* Temporary Restraining Order (“TRO”) at 4:02 p.m. on Friday, May 21, 2021 with an expiration date of May 24, 2021, at 3:00 p.m., and set a preliminary injunction hearing for the following Monday, May 24, 2021, at 1:30 p.m. (RP 537-539). The *ex parte* TRO expired at 3:00 p.m. on May 24, 2021—more than a full day before the May 25 cutoff date for application of dicamba under the Plant Board’s 2018 Rule. (RP 539). Because the deadline to apply dicamba under the Plant Board’s 2018 Rule was May 25, the *ex parte* May 21 TRO had no real restraining effect as it expired before the cutoff date Appellees sought to enforce. The *ex parte* May 21 TRO, however, did allow the trial court to extend that *ex parte* TRO for an additional 18 days to accommodate the trial court’s request for briefing on the effect of *McCarty* without hearing any witnesses or evidence at the May 24, 2021, preliminary injunction hearing. (RP 557-559).

From the outset of hearing, the trial court signaled that it would not rule on Appellees’ requested preliminary injunction. The trial court expressed concern over this Court’s recent decision in *McCarty v. Arkansas State Plant Board*, 2021 Ark. 105, and the impact of that decision on this case. (RT 8). Later in the hearing, the trial court questioned which division of the Pulaski County Circuit Court should hear this case as well as a second, subsequently-filed case, both of which challenge the Plant Board’s 2021 Rule. (RT 8, 14, 16) The parties generally agreed at the hearing that the *McCarty* case did not have an impact here and that the two cases should be

heard by the trial court in which this case was assigned. (RT 16-17, 20-22).<sup>1</sup> Appellants' counsel also noted that trial court in the second case had not issued a TRO unlike the trial court here. (RT 16). Appellants' counsel further informed the court that she would be having surgery the next day and urged the court to move forward with the scheduled preliminary-injunction hearing. (RT 26-27, 30-31). Appellants' attorney specifically stated that she and her client were prepared to move forward with the hearing and present evidence. (RT 26-27). The trial court, however, was not inclined to conduct the hearing. After discussing the witnesses the parties anticipated calling, the trial court referenced an unrelated hearing from the previous week and informed the parties that he only had two hours and that his court reporter had to pick up her child. (RT 27, 28). In spite of the parties and witnesses appearing at the preliminary injunction hearing and the importance and urgency of the issues at stake, the trial court decided to forego testimony, set a briefing schedule on the *McCarty* issue, and extend his previously-issued *ex parte* TRO for 18 days until June 10, 2021. (RT 25-27, 33-34). The preliminary injunction hearing ostensibly did not go forward because of the trial court's concern about the effect of *McCarty* even though both parties stated that they believed it would not

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<sup>1</sup> The trial court in the second-filed case agreed and transferred that case to the trial court in this case. *See OMP Farms, Inc., et al. v. Arkansas State Plant Board, et al.*, 60CV-21-2965.

have any impact on the current case and both expressed a willingness to move forward with the hearing. (RT 26-28).

### **III. Substantive Problems with the *Ex Parte* TRO**

There are serious substantive problems with the *ex parte* May 21, 2021, TRO and the May 25, 2021, 18-day extension of the *ex parte* May 21 TRO. Under Arkansas law, a circuit court must consider two issues when issuing a preliminary injunction under Ark. R. Civ. R. 65: (1) whether irreparable harm will result in the absence of an injunction or restraining order, and (2) whether the moving party has demonstrated a likelihood of success on the merits. *Arkansas Department of Human Services v. Ledgerwood*, 2017 Ark. 308, 530 S.W. 3d 336; *Baptist Hospital v. Murphy*, 365 Ark. 115 (2007); and *Three Sisters Petroleum, Inc. v. Langley*, 348 Ark. 167, 72 S.W. 3d 95 (2002).

In this case, Appellees cannot demonstrate that irreparable harm will result in the absence of an injunction or restraining order. Irreparable harm is the touchstone of injunctive relief, and harm is normally only considered irreparable when it cannot be adequately compensated by money damages or redressed in a court of law. *Ledgerwood*, 2017 Ark. 308, at 9; *Three Sisters Petroleum, Inc.*, 348 Ark. at 175; *Kreutzer v. Clark*, 271 Ark. 243, 244 607 S.W.2d 670, 671 (1980). Appellees have not and cannot demonstrate that they have been irreparably harmed. Therefore, this Court is not required to decide whether Appellees demonstrated a likelihood of

success on the merits of their claims to stay the trial court's two *ex parte* TROs. However, if they were given an opportunity to be heard, Appellants would have demonstrated at the May 24, 2021, preliminary injunction hearing that Appellees did not have a likelihood of success on the merits of their APA claims.

Nothing in Appellees' Complaint or Motion establishes that Appellees have or will suffer actual, immediate and irreparable injury to their crops. Regardless of how they attempt to characterize the future, speculative damages they claim they may suffer, that harm can be compensated by money damages in a court of law if and when it occurs. Appellees allege that the potential damages to their crops are a chemical trespass committed by other farmers who choose to apply dicamba. (RP 415-448, 496-512). This tort and the money damages recoverable under this tort action are precisely the type of damages that are awarded in courts across Arkansas on a regular basis. *See* Restatement (Second) of Torts § 158. Appellees recognize the difficulty of establishing irreparable harm on claims based purely on future, speculative economic harm and seek to blunt the impact of this reality by claiming it will be difficult, if not impossible, to identify the tortfeasor or tortfeasors who committed a potential chemical trespass on their crops. Again, tort cases against multiple tortfeasors are also the type of cases that finders of fact are asked to sort through on a regular basis in Arkansas courts. There is nothing different about Appellees' claim that would render it incapable of being remedied by money

damages awarded by a jury. In sum, Appellees are not entitled to an injunction because they have not and cannot establish that they have been or will be irreparably harmed. *See Kreutzer v. Clark*, 271 Ark. 243, 607 S.W.2d 670 (1980) (harm is normally only considered irreparable when it cannot be adequately compensated by money damages or redressed in a court of law).

The idea that Appellees' potential future, speculative crop damages cannot be compensated by money damages is further undermined by the fact there is a federal multidistrict litigation case for money damages currently pending against Monsanto Company, a manufacturer of dicamba, in the Eastern District of Missouri. In that case, farmers from 41 purported class and individual actions claimed that their crops were allegedly damaged by dicamba when it moved off the original application site—which is the same claim Appellees raise in this action. *See In Re: Dicamba Litigation*, 1:18-md-2820-SNLJ (E.D. Mo. 2018). Appellants were prevented from cross-examining Appellees in this case to determine whether they had in fact joined that case. However, it appears from the public record that at least Appellee Coy's Honey Farm, Inc. recently filed a lawsuit in the United States District Court for the Eastern District of Arkansas against Bayer Corporation, the successor-in-interest to Monsanto, for financial losses allegedly caused by the use of dicamba. *See Coy's Honey Farm, Inc. v. Bayer Corp., et al.*, No. 3:21-CV-104-KGB (E.D. Ark. 2021). In those two cases, farmers, even one who is a party to this case, are seeking money

damages for losses to their farming operations caused by off-target dicamba. Appellees' decision to seek money damages in that case, while at the same time claiming they face irreparable harm in this action, severely undercuts Appellees' claim for injunctive relief.

For the above reasons, Appellees cannot establish that they will be irreparably harmed by the Plant Board's 2021 Rule absent injunctive relief, and this Court should immediately stay what amounts to two *ex parte* TROs issued by the trial court along with the underlying case while this Court decides this appeal.

#### **IV. Procedural Problems with the *Ex Parte* TRO**

The two TROs issued by the trial court also suffer from several fatal procedural defects. First, both TROs issued by the trial court are for all practical purposes *ex parte*. The first TRO issued on May 21, 2021, was of no value as it expired before the Plant Board's 2018 Rule allowing application of dicamba until May 25, 2021. Although there was a preliminary injunction hearing set for May 24, 2021, the trial did not allow the parties to offer witnesses or present evidence even though both parties stood ready to present their cases. (RT 26-28). The decision to order briefing on the effect of *McCarty*, which neither party believed had an impact on the present case, allowed the trial court to bootstrap an additional 18 days on to his original *ex parte* TRO. This 18-day extension amounts to an *ex parte* TRO from

May 21, 2021, to June 10, 2021, on issues of vital importance to both the State of Arkansas and its farmers in the height of the planting and growing season.

*Second*, an *ex parte* TRO must “describe the injury and state why it is irreparable.” Ark. R. Civ. P. 65. Neither of the trial court’s *ex parte* TROs in this case meet this requirement; instead, with no explanation at all, the order simply stated, “the Plaintiffs face the immediate, irreparable harm to the non-dicamba tolerant crops that they produce and to their non-crop plants because the time period for Plaintiffs to decide whether to plant dicamba-tolerant crops in order to limit the risk of dicamba damage is quickly coming to an end and any application of dicamba after May 21, 2021 *increases Plaintiffs’ risks of irreparable harm.*” (RP 558) (emphasis added). The language itself defeats the claim that Appellees will be irreparably harmed as the trial court found that allowing application of dicamba under the Plant Board’s 2021 Rule only “*increased Plaintiffs’ risk of irreparable harm.*” In sum, the trial court’s order did not explain what the actual harm would be or explain why it constitutes irreparable harm.

*Third*, the two *ex parte* TROs do not offer any reason why Appellees will succeed on the merits. The *ex parte* TROs state that “the Court finds that the Plaintiffs have a likelihood of success on the merits,” but does not explain why the trial court believed Appellees were likely to succeed on the merits of their claim. (RP 558). The trial court’s order merely states a conclusion, not the reason it reached



its decision. This omission violates Ark. R. Civ. P. 65(d), requiring a TRO to “state the reasons why it issued.”

*Fourth*, when an *ex parte* TRO is issued, the party against whom it is issued is entitled “on 2 days’ notice . . . to appear and move to dissolve the restraining order.” Ark. R. Civ. P. 65(b)(4) & Reporter’s Notes (2011 Amendment). The court must (1) hear the motion to dissolve the TRO and (2) decide it “as promptly as justice requires.” *Id.* Moreover, even without a motion to dissolve the TRO, an adversarial hearing on the injunction itself “must be set . . . at the earliest possible time, taking precedence over all other matters except hearing on older matters of the same character.” Ark. R. Civ. P. 65(b)(3). While a hearing was technically scheduled within 2 days of issuance of the *ex parte* May 21 TRO, the trial court prevented Appellants from challenging that *ex parte* TRO by requiring briefing on the effect of the *McCarty* case before ruling on the TRO. Not only were Appellants prevented from challenging the *ex parte* TRO, but the trial court extended the TRO another 18 days to accommodate its request for briefing.

Appellants appeared with witnesses at the May 24, 2021, preliminary injunction hearing prepared to present evidence as to why the TRO should be dissolved, but they were denied the opportunity to present their case. Appellees also had witnesses and exhibits they were prepared to introduce at the hearing. (RT 26-27). Neither Appellants’ nor Appellees’ attorneys believed the *McCarty* case had

any impact on this case. As the hearing progressed, it became evident that the trial court was not going to allow the parties' witnesses to testify or hear arguments regarding the validity of its *ex parte* TRO issued on May 21, 2021. After the parties informed the court of the witnesses they intended to call and the time they thought it would take to present their respective cases, the trial court informed the parties that it only had two hours and the court reporter had to pick up her child. The trial court then stated it wanted briefing on the effect of the *McCarty* case. The trial court's refusal to hear witnesses and other evidence at the May 24, 2021, preliminary injunction hearing thwarted the parties' right to be heard on issues of vital, urgent importance to both parties and many other interested parties throughout the State of Arkansas. This delay is entirely contrary to both the letter and spirit of Rule 65. Whether or not devised for this purpose, the effect of this delay would be to nullify the Plant Board's 2021 Rule for a long portion of the season in which the Rule is applicable—before even giving Appellants a chance to argue against the *ex parte* TROs.

## **V. The Stay Pending Appeal**

Appellants have explained above why they are likely to prevail on appeal. A stay pending appeal will revive the properly enacted Plant Board's 2021 Rule and protect the status quo for all Arkansas farmers. For each of the foregoing reasons, the Court should stay the *ex parte* TROs and the underlying action in its entirety.

Respectfully submitted,

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#### CERTIFICATE OF SERVICE

I, Sammie P. Strange, Jr. hereby certify that on June 2, 2021, I electronically filed the foregoing with the Clerk of the Court using the eFlex filing system, which shall send a notification of the filing to all participants.

/s/ Sammie P. Strange, Jr.  
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