Nos. 20-3663 & 20-3665

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN S. HAHN,
Special Master,
BADER FARMS, INC.,
Plaintiff-Appellee,
BILL BADER,
Plaintiff,

v.

BASF CORPORATION,
Defendant-Appellant,

MONSANTO COMPANY,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Missouri
(No. 1:16-cv-00299-SNLJ)

BRIEF OF WASHINGTON LEGAL FOUNDATION AND DRI–THE VOICE OF THE DEFENSE BAR AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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INTERESTS OF *AMICI CURIAE*[*]

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[*] No party's counsel authored any part of this brief. No one, apart from *amici* and their counsel, contributed money intended to fund the brief's preparation or submission.

amicus curiae in cases that raise issues important to its members, their clients, and the judiciary.

Amici believe that there is no surer way to generate unfair and arbitrary tort awards than to remove the element of causation from tort law. This case proves the point. The district court awarded the plaintiff tens of millions of dollars in damages, even though the plaintiff failed to prove that any defendant's product harmed the plaintiff's peach trees. Jettisoning bedrock common-law protections violates the rule of law. So does expanding the bounds of proximate cause to allow nearly limitless liability for corporate defendants. The district court's decision does both those things, and more. This Court should reverse the judgment below.

INTRODUCTION & SUMMARY OF ARGUMENT

There are many sound reasons to overturn the plaintiff's $75 million award. One—the chief focus of this brief—is that the plaintiff seeks to evade or discard an ancient and critical element of tort law: causation. If there is one sacrosanct principle in the law, it is that courts impose liability only on those who cause a harm, punishment only on those who commit a wrong. Discarding that principle, divorcing

cause from effect, transforms tort law into a vehicle for arbitrary results.

Look no further than this case. Two companies have been ordered to pay tens of millions of dollars for damage to the plaintiff's peach orchard without proof that either company's product caused that damage. And the burden of remedying a harm with many antecedent and intervening causes has been unfairly cast on the defendants' shoulders. The Court should reject this novel form of judicial scapegoating.

For about as long as there have been trials, the point of most trials has been to determine whether the defendant did it—whether he caused the harm alleged. That is why Missouri law, which governs here, precludes tort liability without proof of causation. A plaintiff who "claims injury from a product" can prove causation "only by identifying the defendant who made or sold the product." *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 115 (Mo. 2007) (en banc). Yet the district court relieved the plaintiff of the burden to tie the defendants' products to the plaintiff's injury. That was reversible error.

A Missouri plaintiff also must prove that its injury is "the natural and probable consequence of the defendant's conduct." *DiCarlo v. Keller Ladders, Inc.*, 211 F.3d 465, 467 (8th Cir. 2000) (quoting *Krause v. U.S. Truck Co.*, 787 S.W.2d 708, 710 (Mo. 1990) (en banc)). This proximate-cause requirement ensures that a close connection exists between the defendant's conduct and the plaintiff's injury. Despite the intervening acts of nearby farmers, who unlawfully deployed dicamba herbicides contrary to those products' labels, the district court held that the defendants proximately caused the plaintiff's injury. This Court should reject that untethered approach to proximate causation.

If a court may impose liability on a party whose product did not cause the plaintiff's injury, serious due process problems arise. The elimination "of a well-established common-law protection against arbitrary deprivations of property" carries with it "a presumption" that it "violate[s] the Due Process Clause." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430 (1994). The district court's disregard for the common-law elements of causation, combined with the lack of fair notice of the defendants' exposure to liability, is surely an "arbitrary deprivation." Such arbitrary liability also invites unintended consequences. One of

those consequences is that if the uncertainty of the cost of producing innovative products rises, the incentive to produce those products in the first place will fall. Such unintended consequences pervade the district court's approach to tort law in this case.

ARGUMENT

I. THE DISTRICT COURT RELIEVED THE PLAINTIFF OF ITS BURDEN TO PROVE THAT THE DEFENDANTS CAUSED THE HARM ALLEGED.

"Any attempt to find liability absent actual causation," the Missouri Supreme Court has warned, "is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with." *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 862 (Mo. 1993) (en banc). Under Missouri law, the plaintiff must prove that the defendants' conduct was both a but-for and the proximate cause of the plaintiff's injury. *Id.* at 860-66. The district court unfairly relieved the plaintiff of both those burdens.

A. The plaintiff failed to prove causation.

"Mere logic and common sense dictates that there be some causal relationship between the defendant's conduct and the injury or event for which damages are sought." *Callahan*, 863 S.W.2d at 862. In all tort cases arising under Missouri law, "the plaintiff must prove that each

defendant's conduct was an actual cause, also known as the cause-in-fact, of the plaintiff's injury." *Benjamin Moore*, 226 S.W.3d at 113.

When, as here, "a plaintiff claims injury from a product, actual causation can be established only by identifying the defendant who made or sold the product." *Id.* at 115; *see Zafft v. Eli Lily & Co.*, 676 S.W.2d 241, 242 (Mo. 1984) (en banc) ("Actionable negligence requires a causal connection between the conduct of the defendant and the resulting injury to the plaintiff."). The plaintiff never met that burden here.

Under state and federal law, no herbicide may be sold unless the Environmental Protection Agency (EPA) approves it for use. Dicamba is an active ingredient in many federally and state-registered herbicides. Dicamba "had long been used as an agricultural herbicide, as it kills many plants not genetically modified to withstand its use." (Def. App. 992) It is unlawful to use a registered herbicide in a manner contrary to its label.

Monsanto released dicamba-tolerant (DT) seeds for cotton in 2015 and for soybeans in 2016. These seeds had many benefits, including increased yield. The plaintiff alleges that dicamba herbicide began

damaging its peach orchards in 2015. But Monsanto never sold dicamba herbicide until 2017, when there were "dozens of dicamba herbicides on the market." (Def. App. 1058) And BASF's only dicamba-based herbicide on the market in 2015 and 2016, Clarity, bore a label explicitly prohibiting the user, under penalty of law, from deploying it in over-the-top spraying of crops. (Def. App. 97, 184)

Unable to prove that either defendant's herbicides ever landed on its peach trees, the plaintiff simply disclaimed that burden altogether. (ECF 609 at 10) The district court agreed. "Conclusive proof" that the defendants' products "and not some other dicamba herbicide caused [the plaintiff's] damage" is "not required." (Def. App. 1010) The "product at issue," the district judge decided, is "the DT system, not the specific products that comprise the system." (*Id.*) The "DT system," in turn, consists of (1) Monsanto's DT seeds and (2) all dicamba herbicide—no matter the manufacturer. (*Id.*) According to the district court, the DT system caused area farmers to "illegally spray[ ] an old formulation of dicamba herbicide that was unapproved for in-crop, over-the-top use." (*Id.* 992) As a result, "the precise combination of brands used" is neither "legally or factually required." (*Id*. 1048)

But this is just so much wordplay—a semantic repackaging of the plaintiff's claims to hold the defendants liable for damage caused by *someone else*'s product. The defendants do not make or sell a product called the "DT system," and no farmer can buy or use such a product. Instead, the defendants make or sell, and farmers buy and use, only specific seeds or herbicides. "We must think things, not words, or at least we must constantly translate our words into fact for which they stand, if we are to keep to the real and the true." Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 460 (1889). And Missouri law is clear that "where a plaintiff claims injury from a product," that plaintiff can prove causation "*only* by identifying the defendant who made or sold *that product*." *Benjamin Moore*, 226 S.W.3d at 115 (emphasis added); *Zafft*, 676 S.W.2d at 242, 244. For that reason alone, the judgment below cannot stand.

Allowing the plaintiff to evade *Benjamin Moore* by simply recasting "the product" as a combination of individual products—some made by the defendants and some made by *others*—invites great mischief. Consider, for example, a negligence suit for an adverse drug reaction. The plaintiff names as defendants a generic drug maker, a

prescribing physician, and a pharmacist. Under the district court's reasoning, the plaintiff need not show that the drug the plaintiff ingested was made by the generic manufacturer, prescribed by the physician, or even filled by the pharmacist. All that matters, says the district court, is that the complaint alleges that the three defendants knowingly "conspired" to "participate in" a "medication-delivery system," by which generic drugs are first marketed, then prescribed, and finally supplied to consumers. True, the plaintiff cannot prove that *any* defendant caused her injury. But given the inherent risks in this "system," the theory goes, it was "foreseeable" that an adverse reaction might occur sooner or later; so every defendant must pay.

Here the defendants are being forced, in effect, to act as insurers of a whole industry's products, even if those products are unlawfully or improperly used. Yet a core principle of tort law is that companies are *not* insurers of their products, let alone the products of others, precisely because making them so would be too burdensome. *Nesselrode v. Exec. Beechcraft, Inc.*, 707 S.W.2d 371, 375 (Mo. 1986) (en banc) ("It should be clear that the manufacturer is not an insurer for all injuries caused by his products.") (cleaned up).

The Missouri Supreme Court has warned against "frittering away a meaningful causation test" to the point that, one day, "as a practical matter, 'causation in fact' would no longer be required." *Callahan*, 863 S.W.2d at 861. Courtesy of the district court, that day has unfortunately arrived.

B. The plaintiff failed to prove proximate causation.

Proximate cause is an element of every tort. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 132 (2014). Proximate cause is satisfied when the plaintiff's injury is "the natural and probable consequence of the defendant's conduct." *DiCarlo*, 211 F.3d at 467 (quoting *Krause*, 787 S.W.2d at 710).

Under Missouri's common-law rule of proximate cause, the "test is not whether a reasonably prudent person would have foreseen the [plaintiff's] injury." *Floyd v. St. Louis Pub. Serv. Co.*, 280 S.W.2d 74, 78 (Mo. 1955). Nor is the "mere fact that injury follows negligence" enough to "create liability." *Branstetter v. Gerdeman*, 274 S.W.2d 240, 245 (Mo. 1955). At the very least, proximate cause requires "a sufficiently close connection" between the alleged harm and the defendant's conduct. *Cawthorn v. State Farm Fire & Cas. Co.*, 965 F. Supp. 1262, 1266 (W.D.

Mo. 1997) (applying Missouri law). The plaintiff's tort claims flunk this test.

The plaintiff sued the defendants for dicamba-herbicide damage to its peach orchards from 2015 to 2018. Yet the causal chain from the defendants' development and marketing of DT seeds and dicamba-based herbicides to the plaintiff's alleged harm is long and riddled with imponderables. Under the district court's Rube-Goldberg theory of proximate causation:

- Monsanto began selling DT cotton seeds in 2015 and DT soybean seeds in 2016.
- Dozens of manufacturers, but not Monsanto, sold dicamba herbicides in 2015 and 2016.
- BASF's only dicamba-based herbicide on the market in 2015 and 2016 bore a label explicitly prohibiting the user, under penalty of law, from deploying it in over-the-top spraying of crops.
- Monsanto specifically warned DT-seed users in 2015 and 2016 not to apply dicamba herbicides on its DT crops, and that doing so would violate federal law.

- Some area farmers planted DT seeds in 2015 and 2016, then unlawfully sprayed dicamba herbicides on the crops, contrary to both Monsanto's explicit warnings and the third-party herbicide manufacturers' own labels.
- Some dicamba—which may or may not have come from these illegal applications (and indeed, at least some of which was *not* from them)—drifted onto the plaintiff's peach trees, damaging them.
- In 2016, Monsanto and BASF each received EPA approval for a low-volatility dicamba herbicide for use beginning in 2017.
- In 2017, DuPont received EPA approval for a low-volatility dicamba herbicide for use beginning in 2018.
- In 2017 and 2018, area farmers allegedly began using EPA-approved dicamba herbicides sold by the defendants and others, while continuing to illegally use older dicamba formulations on DT crops (and for other uses).
- According to the plaintiff's own expert, at least some of the spraying of the EPA-approved herbicides contradicted the manufacturer's label, in violation of law.

- Some of that dicamba also allegedly drifted onto the plaintiff's peach trees, damaging them.
- The plaintiff cannot show whose dicamba damaged its peach trees, when, by how much, or whether it was sprayed lawfully.
- Even so, the defendants now jointly and severally owe the plaintiff $15 million in compensatory damages, plus $60 million in punitive damages, for *all* dicamba damage to the plaintiff's peach orchards from 2015 to 2018.

This is untenable. There is no "sufficiently close connection" here of the sort that can possibly support a proximate-cause finding. *Cawthorn*, 965 F. Supp. at 1266.

Under Missouri law, it is never objectively foreseeable that a third party will use a product unlawfully or in a way prohibited by the manufacturer. *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 762 (Mo. 2011) (en banc) (product manufacturers have a right to expect purchasers will comply with their use instructions); *Erkson ex rel. Hickman v. Sears, Roebuck & Co.*, 841 S.W.2d 207, 211 (Mo. App. W.D. 1992) (misusing a lawnmower contrary to the manufacturer's instructions "do[es] not constitute a misuse or abnormal use which is objectively foreseeable").

Such an intervening cause "eclipses the role the defendant's conduct played in the plaintiff's injury." *Rayman v. Abbott Ambulance, Inc.*, 546 S.W.3d 12, 18 (Mo. App. E.D. 2018).

The injury for which the plaintiff seeks recovery "is remote indeed, the chain of causation long, . . . and the damages wickedly hard to calculate." *Int'l Broth. of Teamsters v. Philip Morris Inc.*, 196 F.3d 818, 825 (7th Cir. 1999). For the first two years of the plaintiff's claimed injury from dicamba, Monsanto did not manufacture a dicamba-based herbicide. During that time, it would have been impossible for one of Monsanto's products to have damaged the plaintiff's peach trees. And starting in 2017, the defendants' low-volatility products were but two among "dozens of dicamba herbicides on the market." (Def. App. 1058) So it would be "nearly impossible" to "disaggregate" the defendants' actions "from other potential causes" of harm to the plaintiff's peach orchard. *City of Cincinnati v. Deutsche Bank Nat'l Trust Co.*, 863 F.3d 474, 480-81 (6th Cir. 2017). That is why the proximate-cause requirement exists.

"Proximate cause is bottomed on public policy as a limitation on how far society is willing to extend liability for a defendant's actions."

Ashley County, Arkansas v. Pfizer, Inc., 552 F.3d 659, 671 (8th Cir. 2009) (manufacturer of cold medicine did not proximately cause damages when consumers used product unlawfully to make methamphetamine). Yet if the district court's decision stands, it could lead to almost limitless liability exposure for entire industries of manufacturers whose products are illegally misused. That would be a calamity.

It is "not the role of a federal court to expand state law in ways not foreshadowed by state precedent." *Id.* at 673. As it has done before, this Court should decline "to open Pandora's box to the avalanche of actions that would follow" if the award below is allowed to stand. *Id.* at 671.

C. Mere "foreseeability" is no substitute for proximate causation.

The district court insisted that "all roads in [the defendants'] causation arguments lead back to foreseeability." (Def. App. 1053) It was foreseeable, the court figured, that someone might use dicamba herbicide in a way that could cause harm. (*Id.* 1058) So the defendants are on the hook for all the plaintiff's losses.

But the test for proximate cause under Missouri law "is not whether a reasonably prudent person would have foreseen the

[plaintiff's] injury." *Floyd*, 280 S.W.2d at 78. And, as shown above, it is never reasonably foreseeable that a third party will use a product unlawfully or in a way prohibited by the manufacturer. *Ford Motor Co.*, 332 S.W.3d at 762; *Erkson*, 841 S.W.2d at 211. Simply put, it would be unreasonable to expect that the defendant's EPA-approved conduct would lead area farmers to both disregard product warnings and violate federal law, damaging the plaintiff's peach trees.

At all events, mere foreseeability of harm is no substitute for proximate causation. Foreseeability is easy. "If one takes a broad enough view, *all* consequences of a negligent act, no matter how removed in time or space, may be foreseen." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 552-53 (1994). Proximate cause demands more. Above all, proximate cause is "a necessary limitation on liability." *Exxon Co., USA v. Sofec, Inc.*, 517 U.S. 830, 838 (1996). Indeed, "there are clear judicial days on which a court can foresee forever and thus determine liability[,] but none on which that foresight alone provides a socially and judicially acceptable limit on recovery." *Thing v. La Chusa*, 771 P.2d 814, 830 (Cal. 1989).

A contrary rule—the district court's rule—wreaks havoc on tort law. If a manufacturer became liable for every unlawful third-party act for which a rival competitor supplied the instrumentality, tort liability would be limitless. A fertilizer manufacturer might be liable if someone bought a rival manufacturer's fertilizer to make a bomb. An automaker might be liable to a remote plaintiff for harm caused by the reckless driver of another make and model. The possibilities for abuse under the district court's proximate-cause rule would be endless, impacting every sector of the economy.

Some slippery slopes are real. This Court should not permit mere "foreseeability" to supplant the vital common-law element of proximate causation.

II. THE DISTRICT COURT'S ARBITRARY APPROACH TO CAUSATION VIOLATES DUE PROCESS.

Remove the element of causation and, so far as due process goes, all bets are off. There is little point in providing process, in fact, if liability can be applied without regard to causation. Permission to present an alibi is useless if proving the alibi will not change the verdict. A trial conducted heedless of causation proceeds by the Queen

of Hearts' rules: "Sentence first—verdict afterwards." Lewis Carroll, *Alice's Adventures in Wonderland* 96 (W.W. Norton 2d ed. 1996).

"The point of due process—of the law in general—is to allow citizens to order their behavior." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O'Connor, J., dissenting)). Thus, "a person [should] receive fair notice" of both "the conduct that will subject him to punishment" and "the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). Arbitrary—and thus unpredictable—tort awards violate due process. *State Farm*, 538 U.S. at 416.

In accord with these principles, the Supreme Court has repeatedly struck down excessive punitive damages awards as "arbitrary deprivation[s] of property without due process of law." *BMW*, 517 U.S. at 586 (Breyer, J., concurring); *State Farm*, 538 U.S. at 429 (striking down a $145 million punitive award as "an irrational and arbitrary deprivation of the property of the defendant."); *Philip Morris USA v. Williams*, 549 U.S. 346, 352-55 (2007) (striking down a $79.5 million punitive award because it arbitrarily punished the defendant for its

conduct toward non-parties). As the defendants have ably shown, the district court's $60 million punitive damages award, in a case alleging purely economic harm and "no malice," easily exceeds the bounds of due process. (Def. App. 1069)

But nothing in logic distinguishes an arbitrary award of punitive damages from an arbitrary award of damages in the first place. Just as an award of punitive damages may not punish a defendant "for harming persons who are not before the court," *Williams*, 549 U.S. at 349, an award of compensatory damages may not impoverish a defendant who has not harmed anyone to begin with, *cf. State Farm*, 538 U.S. at 416 ("Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered by reason of *the defendant's* wrongful conduct.") (emphasis added). Irrational awards, whether punitive or compensatory, foster undue "arbitrariness, uncertainty, and lack of notice." *Williams*, 549 U.S. at 354.

The defendants engaged in the lawful manufacture and sale of seeds and herbicides. To punish them now for that activity would require discarding common-law elements of causation and imposing liability, retroactively. That a court may not do—not without violating

due process. *See E. Enter. v. Apfel*, 524 U.S. 498, 547-50 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) ("Both stability of investment and confidence in the constitutional system . . . are secured by due process restrictions against severe retroactive legislation.").

In this context, the "foreseeability" of the scope of tort liability is crucial. From the defendants' vantage, it was not foreseeable that a federal court would unilaterally dismantle basic common-law protections for corporate tort defendants, as the district court did here. Nor is that all. Removing fair notice and fair warning introduces massive uncertainty into the cost-benefit analysis of developing a product. And if the uncertainty of the cost of producing products rises, the incentive to produce products in the first place falls.

True enough, companies faced with arbitrary and unpredictable liability might just "continue making and selling their wares, offering 'tort insurance' to those who are injured." *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 217 (7th Cir. 1990) (Easterbrook, J., concurring). But if "the judgment bill becomes too high," they are more likely to throw up their hands and leave the market. *Id.* "Products liability law as

insurance is frightfully expensive." *Id.* Eliminating that kind of foreseeability—imposing liability arbitrarily, without regard to causation—will lead to less innovation and a net loss to society.

"To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *BMW*, 517 U.S. at 573 n.19 (quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). The same can be said of punishing a person for what he has *not* done. The district court's award of $75 million in tort damages, without proof of causation, cannot stand.

CONCLUSION

The judgment below should be reversed.

March 19, 2021

Respectfully submitted,

/s/ Cory L. Andrews

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CERTIFICATE OF COMPLIANCE

I certify that:

(i) This brief complies with the type-volume limits of Fed. R. App. P. 29(a)(5) because it contains 3,920 words, excluding the parts exempted by Fed. R. App. P. 32(f).

(ii) This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in 14-point New Century Schoolbook font.

(iii) A virus detection program (Webroot Antivirus Software 2021) scanned this document and detected no virus.

March 19, 2021

/s/ Cory L. Andrews

CERTIFICATE OF SERVICE

I certify that on March 19, 2021, I filed and served the foregoing brief through the CM/ECF system. All participants in the case are registered CM/ECF users.

/s/ Cory L. Andrews