SUPREME COURT OF ARKANSAS

No. CV-21-599

	Opinion Delivered: June 2, 2022
ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION, ALCOHOLIC BEVERAGE CONTROL DIVISION; AND THE ARKANSAS MEDICAL MARIJUANA COMMISSION APPELLANTS	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. 60CV-20-3658] HONORABLE TIMOTHY DAVIS FOX, JUDGE
V.	
CARROLL COUNTY HOLDINGS INC., D/B/A EUREKA GREEN APPELLEE	DISSENTING OPINION.

COURTNEY RAE HUDSON, Associate Justice

Here we go again. We are wrestling with another legal conflict involving the Medical Marijuana Commission (MMC) and its refusal to follow its constitutional mandate. Yet, the MMC is entrusted with the "comprehensive administration" of a burgeoning Arkansas industry. Because today's majority opinion dismissing this appeal for lack of subject-matter jurisdiction is inconsistent with this court's opinion in *Arkansas Department of Finance & Administration v. Carpenter Farms Medical Group, LLC.*, 2020 Ark. 213, 601 S.W.3d 111, I must respectfully dissent.

Eureka Green alleges that the MMC has failed to adopt the Attorney General's model agency rules and failed to explain why it has not done so. It claims that the model rules

"mandate that an agency will reinitiate action on an application when the requested information is returned or supplemented." Eureka Green contends that if the model rules had been adopted, it would have prevented the "arbitrary disqualification of successful applicants based on illegal and selective application of another rule." Additionally, Eureka Green argues that the MMC's decision to refund a portion of its application fee and remove it from the reserve pool violated constitutional due-process and equal-protection guarantees. According to Eureka Green, jurisdiction is proper pursuant to the Administrative Procedure Act, specifically Arkansas Code Annotated section 25-15-215(b)(1), "as allowed via Ark. Code Ann. § 25-15-207(a)." It also claims jurisdiction under the Arkansas Declaratory Judgment Act, Arkansas Code Annotated sections 16-111-101 et seq. Eureka Green is correct in both instances.

In *Carpenter Farms*, Carpenter Farms submitted an application for one of four marijuana cultivation licenses. Carpenter Farms was told that its application was complete and would be submitted for scoring. However, the application was later disqualified due to alleged discrepancies in its description of Carpenter Farms' ownership structure. As the court framed the issues in *Carpenter Farms*, "Carpenter Farms' complaint rests mainly on two legal theories: (1) the Commission violated the APA and MMC Rules and (2) the Commission violated equal protection by subjecting Carpenter Farms' application to disparate treatment." *Id.* at 4, 601 S.W.3d 116. The court described the relief sought as follows:

> Carpenter Farms requested that the circuit court reinstate its application; allow its score to stand; declare that its disqualification was ultra vires, arbitrary, capricious, and contrary to law; declare that the Commission's failure to adopt model rules was

> improper; and reject [Travis] Story's score and recalculate Carpenter Farms' score "to be five times the average of the other four scores." If the court denied its request to reinstate its score, Carpenter Farms asked the court to vacate the disqualification; order a hearing under Arkansas Code Annotated sections 25-15-207 and 25-15-212(B) (Repl. 2014 & Supp. 2019); and disqualify [Mary Robin] Casteel and Story from further participation. It also asked for an injunction prohibiting the granting of additional cultivation licenses.

Id. at 5, 601 S.W.3d 116.

Appellants filed a motion to dismiss and argued that they were entitled to sovereign immunity. Despite the invocation of sovereign immunity, this court affirmed in part the circuit court's order denying appellants' motion.

Here, Eureka Green asserts that the MMC has failed to adopt the Attorney General's model agency rules. It also contends that the MMC failed to explain why it did not adopt the model rules. This is precisely the nature of the claim that the majority allowed to proceed in *Carpenter Farms*. In *Carpenter Farms* we said,

> Carpenter Farms maintains that the MMC Rules were invalid because (i) they are not the ones promulgated by the Attorney General and (ii) the Commission failed to explain why it adopted rules different from the model. We agree that this particular claim can proceed under section 207 because it involves the applicability or validity of the Commission's rules, rather than the Commission's application of those rules to Carpenter Farms' set of circumstances.

Id. at 11, 601 S.W.3d 119.

Just like the applicant in *Carpenter Farms*, Eureka Green has alleged that the MMC rules are invalid because the MMC has failed to adopt the Attorney General's model rules and failed to explain why it has not done so. Arkansas Code Annotated section 25-15-215 mandates that agencies "shall adopt . . . those model rules that are practicable" and if it does

not, the agency shall "state the reason why the relevant portions of the model rules are impracticable." Accordingly, Eureka Green's claim that the MMC rules are invalid not only vests the circuit court with jurisdiction, but it also sets forth a claim to which sovereign immunity is inapplicable. We should be consistent with our precedent and affirm the circuit court's determination that sovereign immunity does not apply to Eureka Green's section 207 claim.

Additionally, Eureka Green should be allowed to seek declaratory relief pursuant to our declaratory-judgment statute. It is well settled that circuit courts have subject-matter jurisdiction to consider declaratory relief for alleged constitutional violations. *See Ark. Dep't of Health v. Solomon*, 2022 Ark. 43 (holding that the circuit court had subject-matter jurisdiction to consider declaratory and injunctive relief for due-process and equal-protection claims). The majority wholly ignores this independent basis for jurisdiction and exception to sovereign immunity that was articulated in *Carpenter Farms*. There, after considering Carpenter Farms' equal-protection claims, a plurality[1] of the court noted that

> [t]he circuit court has subject-matter jurisdiction to determine whether the Commission violated Carpenter Farms' constitutional rights in this record. *See* Ark. Code Ann. §§ 16-111-101 et seq. (Repl. 2016). Carpenter Farms may pursue relief under the declaratory-judgment cause of action against the State.

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[1]Although only three members of the court would have allowed Carpenter Farms to pursue its equal-protection claim pursuant to our declaratory-judgment statute, *Carpenter Farms* in no way prevents a party from seeking declaratory relief as to a constitutional claim. Three other justices joined a concurring and dissenting opinion agreeing that Carpenter Farms could proceed with an equal-protection claim but concluded that judicial review of that claim was available in the context of an adjudicatory appeal pursuant to Arkansas Code Annotated section 25-15-212. Here, Eureka Green has not asserted jurisdiction pursuant to section 212.

Carpenter Farms, 2020 Ark. 213, at 14, 601 S.W.3d at 121.

Much like the applicant in *Carpenter Farms*, Eureka Green has alleged that its constitutional rights were violated by the MMC's decisions. A majority of this court concluded in *Carpenter Farms* that an equal-protection claim could be pursued in the face of a sovereign-immunity challenge. Similarly, the circuit court in this case has jurisdiction to consider declaratory relief for an alleged constitutional violation. We should not cavalierly ignore such claims.

It should also be noted that today's appeal is just the latest, and far from the last, in a long line of cases relating to the inner workings of the MMC. We would do well to remember Chief Justice Kemp's charge to the MMC almost four years ago when he wrote,

> The MMC has a constitutional duty to adopt rules necessary for its "fair, impartial, stringent, and comprehensive administration" of the Arkansas Medical Marijuana Amendment. *See* Ark. Const. amend. 98, § 8(d)(3). I urge the MMC to review its rules and procedures and to cure any deficiencies.

Arkansas Dep't of Fin. & Admin. v. Naturalis Health, LLC, 2018 Ark. 224, at 11, 549 S.W.3d 901, 908. (Kemp, C.J., concurring).

Unfortunately, the MMC has ignored the Chief Justice's admonition. From *Naturalis* to *Carpenter Farms*, to today's decision, and undoubtedly others to come, we see one appeal after another that highlights the MMC's shortcomings. Worse, we should not forget that during our consideration of the *Naturalis* case in 2018, the Attorney General advised us that a commissioner had been offered a bribe, that he did not report it, and that there were other, as-yet unsubstantiated allegations of improprieties in the scoring of cultivation licenses.

Undoubtedly, medical marijuana is big business in our state, and recreational marijuana may be in the offing. Arkansas medical marijuana sales reportedly totaled almost $265 million in 2021. Those sales are subject to heavy taxation that generates substantial tax revenue. By neglecting its duty to adopt adequate rules, the MMC is abdicating its duty to properly regulate this exploding industry. The MMC must adopt clear and necessary rules to allow for a level playing field, and we should not excuse its failure to do so. In the meantime, Eureka Green deserves more than a cursory dismissal of its complaint. Therefore, in reliance on this court's decision in *Carpenter Farms*, I would hold that the circuit court has jurisdiction to proceed to a decision on the merits of Eureka Green's complaint and affirm the circuit court's order. A system without checks and balances is ripe for at least the appearance of improper influence. The MMC should not be insulated from review.

I respectfully dissent.

WYNNE, J., joins.