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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0517**

Oluf Johnson, et al.,
Appellants,

vs.

Consumers Cooperative Association of Litchfield,
Respondent.

**Filed March 18, 2019
Affirmed
Hooten, Judge**

Meeker County District Court
File No. 47-CV-16-464

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Association, Center for Food Safety, and Organic Farmers' Agency for Relationship
Marketing)

Considered and decided by Hooten, Presiding Judge; Reyes, Judge; and Cochran,
Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

Appellants and organic farmers Oluf and Debra Johnson filed a civil suit alleging that, because of pesticides that drifted onto their farmland as a result of respondent's spraying of an adjacent field, the organic certification of a portion of their farmland was suspended and they had to destroy the crops grown there. The district court granted summary judgment for respondent on the claims arising from the loss of appellants' organic certification. The district court based its ruling on the Minnesota Supreme Court's decision in *Johnson v. Paynesville Farmers Union Co-op. Oil Co.*, which held that organic certification could not be suspended based on pesticide drift because the phrase "applied to" in 7 C.F.R. § 205.202(b) unambiguously refers to the intentional application of prohibited substances by an organic producer. 817 N.W.2d 693, 712 (Minn. 2012). The district court held that therefore, as a matter of law, pesticide drift could not be the proximate cause of the suspension of a field's organic certification. *Id.* We are bound by the Minnesota Supreme Court's decision in *Johnson*, and thus we affirm the district court's dismissal of appellants' claims relating to the suspension of their field's organic certification.

FACTS

In early June of 2014, respondent Consumers Cooperative Association (CCA) was spraying pesticide on a conventional farm that is adjacent to appellants' organic farm when the wind caused some of the pesticide to drift onto appellants' organic alfalfa field, contaminating their organic crops. The next day, the Minnesota Department of Agriculture

(MDA) inspected appellants' farm to test for the presence of pesticides and discovered prohibited substances. The MDA ordered appellants to destroy the contaminated crops and issued a civil penalty to CCA for causing the drift. Following this instruction to destroy the contaminated crops, appellants contacted their organic certifier, OCIA International, Inc. (OCIA), and requested a determination of whether the field affected by the drift could remain certified as organic. OCIA determined that despite the fact that prohibited substances were found on the field, it would not suspend the field's organic certification.

Appellants appealed this decision to the National Organic Program (NOP), a program within the United States Department of Agriculture (USDA).¹ In October of 2015, the NOP issued its decision and overruled OCIA's determination, suspending the organic certification of appellants' field for three years.

The following June, appellants filed claims for nuisance, negligence, and declaratory judgment in district court against respondent seeking damages for the loss of their contaminated crops and for their losses in connection with the suspension of their field's organic certification. The district court granted partial summary judgment for respondent and dismissed appellants' case entirely. Upon a joint request from the parties, the district court vacated its previous order, again dismissed the claims relating to the loss of organic certification, certified that dismissal for appeal, and stayed the remaining claims related to the destruction of appellants' alfalfa crop. This appeal follows.

¹ Appellants claim that they appealed this determination because they "respect the prestige associated with organic certification and wanted to avoid the consequences of land and crop contamination."

DECISION

In their complaint, appellants alleged nuisance and negligence claims, and requested a declaratory judgment that respondent's wrongdoing caused their field's suspension of organic certification. To succeed, all of these claims require appellants to establish that respondent was the proximate cause of their damages. *Engler v. Ill. Farmers Ins. Co.*, 706 N.W.2d 764, 767 (Minn. 2005) (noting that proximate cause is an essential element of a negligence claim); *Highview N. Apartments v. Ramsey County*, 323 N.W.2d 65, 70 (Minn. 1982) (“[T]here must be some kind of conduct causing the nuisance harm”). The district court dismissed these claims on the ground that under *Johnson v. Paynesville Farmers Union Coop. Oil Co.*, appellants could not establish causation as a matter of law. 817 N.W.2d 693, 712 (Minn. 2012).

“We review the grant of summary judgment de novo to determine ‘whether there are genuine issues of material fact and whether the district court erred in its application of the law.’” *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017) (quoting *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 754 (Minn. 2005)). “We view the evidence in the light most favorable to the party against whom summary judgment was granted.” *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76–77 (Minn. 2002).

Appellants ask us to disregard binding precedent from the Minnesota Supreme Court, to defer to the NOP's determination that the pesticide drift caused their field's organic certification to be suspended, and to recognize a new remedy for organic farmers

who lose their organic certification based on pesticide drift. But we are not free to do any of those things.

Statutory background

Organic farming in the United States is regulated under the Organic Foods Production Act of 1990, 7 U.S.C. §§ 6501–6524 (2012) (OFPA), and the related federal regulations in the NOP, 7 C.F.R. § 205 (2018). One purpose of the OFPA is “to establish national standards governing the marketing of certain agricultural products as organically produced products.” 7 U.S.C. § 6501(1). States are free to adopt these federal standards, or they may impose more restrictive standards to govern food products that are labeled as organic. 7 U.S.C. § 6507(b)(1). Minnesota has adopted the OFPA and the NOP to regulate the sale of organic food products. Minn. Stat. § 31.925 (2018).

Under federal statutes and regulations, a producer may only market crops as organic if the producer is certified by an organic certifying agent. 7 U.S.C. § 6503(d) (stating that the OFPA is implemented by certifying agents authorized through the Secretary of Agriculture); 7 C.F.R. §§ 205.100, 205.102 (describing which products can be sold as “organic”). A requirement for certification is that the producer must comply with the NOP. 7 C.F.R. § 205.400(a).

Once a producer is certified to sell products labeled as organic, the OFPA and NOP set guidelines for processes (*see, e.g.*, 7 U.S.C. § 6508), farmland (*see, e.g.*, 7 C.F.R. § 205.202 (b)), and crops (*see, e.g.*, 7 U.S.C. § 6511 (c)) to ensure continued compliance. Among other requirements, and central to this case, the NOP requires that farmland where crops are grown that are intended to be sold as organic must, “Have had no prohibited

substances . . . applied to it for a period of 3 years immediately preceding harvest of the crop.” 7 C.F.R. § 205.202(b).

2012 Johnson case

All of appellants’ arguments are foreclosed by a single case—a case previously brought against another company that had sprayed pesticides in a field next to appellants’ field. *Johnson*, 817 N.W.2d at 693. *Johnson* involved a very similar claim to the one before us; it involved a claim regarding pesticide drift that resulted in appellants having to destroy a portion of their crops and temporarily losing organic certification for a portion of their farmland. *Id.* at 696–97. In relevant part, appellants raised claims for nuisance and negligence based on their farmland’s organic certification being suspended for three years, because under federal regulations when conventional pesticides drifted onto their farmland, the pesticides were “applied to” the farmland. *Id.* at 706–07 (quoting 7 C.F.R. § 205.202(b)). We had ruled that the passive phrase “applied to” in the regulation included both intentional and unintentional application of pesticides to the farmland by either the producer or third parties. *Johnson v. Paynesville Farmers Union Coop. Oil Co.*, 802 N.W.2d 383, 390 (Minn. App. 2011), *aff’d in part and rev’d in part*, 817 N.W.2d 693 (Minn. 2012).

The Minnesota Supreme Court reversed this holding, and held that the phrase “applied to” in the federal regulation unambiguously applied only to intentional behavior by the producer of organic products. *Johnson*, 817 N.W.2d at 710. In effect, the Minnesota Supreme Court held that the regulatory language “applied to” unambiguously referred to an intentional application of pesticides by the organic producer. *See id.* (holding that

“section 205.202(b) . . . unambiguously refers to prohibited substances that the producer intentionally puts on a field from which crops are intended to be sold as organic.”). The court also held that the federal regulation did not allow organic certifying agents any discretion to suspend organic certification in cases of pesticide drift. *Id.* at 712. The court concluded this issue by stating that, because the regulation unambiguously prevented the organic certifying agent from suspending organic certification based on pesticide drift, as a matter of law, pesticide drift could not be the proximate cause of an organic field’s certification being suspended. *Id.* Instead, the certifying agent was the proximate cause for erroneously suspending the certification, and the only remedy was an appeal of that decision in federal district court. *Id.* (citing 7 U.S.C. § 6520(a)2 (2018)).

We begin our analysis of the facts of this case by noting that “[t]he function of the court of appeals is limited to identifying errors and then correcting them.” *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988); *see also Lake George Park, L.L.C. v. IBM Mid-America Emps. Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998) (stating that “[t]his court, as an error correcting court, is without authority to change the law”), *review denied* (Minn. June 17, 1998).

Appellants argue that the instant case is factually distinguishable from *Johnson* and that we are not bound by the decision. Appellants base this argument on the fact that in *Johnson*, the farmland had been stripped of its organic certification by an independent agent, and they had not appealed to the NOP. They argue that the *Johnson* court based its opinion on a “hypothetical,” and that this case is different because here they have the benefit of a determination by the NOP. But appellants have failed to provide any legal

authority that would allow us to ignore binding state court precedent simply because a federal agency—that was not bound by the state court—chose not to follow the state court.

Appellants are correct that in *Johnson*, the Minnesota Supreme Court held that under 7 C.F.R. § 205.202(b), organic-certified farmland could not lose its certification because of pesticide drift, but that is exactly what happened to appellants here. While the local independent organic certifying organization made its decision as though it were bound by *Johnson*, the USDA and NOP obviously did not because they suspended appellants' field's organic certification purely based on an incident of pesticide drift. But we are definitively bound by the Minnesota Supreme Court's holding in *Johnson* regarding what it found was an unambiguous regulation which did not authorize the suspension of certification of organic farmland due to pesticide drift. *See State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018) (holding that the Minnesota Court of Appeals is bound by Minnesota Supreme Court precedent). Appellants have failed to present this court with any authority that would allow us to distinguish the facts in this case from those in *Johnson*, simply due to the NOP's final ruling on the question of certification.

Appellants also argue that this court is not bound by *Johnson* because it was wrongly decided. They argue that the Minnesota Supreme Court conflated the analysis of requirements for land that is certified to produce organic crops as compared to the requirements for organic food products. *See Johnson*, 817 N.W.2d at 712 (stating that appellants had failed to create an issue for trial regarding pesticide drift on their *land* because they did not present evidence that pesticide residues from drift exceeded the five-percent tolerance level for pesticides on organic *food*). But again, appellants have failed

to provide any legal authority that would allow us to disregard Minnesota Supreme Court precedent, even if, as argued by appellants, it were wrongly decided. *See Curtis*, 921 N.W.2d at 346. This court is not free to ignore binding precedent of the Minnesota Supreme Court, notwithstanding the fact that a federal agency has since interpreted the regulation in a manner contrary to that of the court.

Appellants next argue that this case is distinguishable from *Johnson* because the USDA has issued two instruction manuals since the *Johnson* decision that support a conclusion that accidental pesticide drift can cause farmland to lose its organic certification under 7 C.F.R. § 205.202(b). The first directs that:

The accidental application of prohibited substances to land also is considered an uncorrectable noncompliance and should result in a denial of certification or a combined Notice of Noncompliance and Proposed Suspension. . . . Land to which prohibited substances have been applied must be suspended from organic operation for three years, pursuant to § 205.202 of the regulations.

See Nat'l Organic Program, U.S. Dep't of Agric., Instruction: Enforcement of the USDA Organic Regulations: Penalty Matrix at 3 NOP 4002 (Jan. 20, 2015), <https://www.ams.usda.gov/sites/default/files/media/4002.pdf>. The second piece of guidance that was released in the interim is a guide for crop dusters. It reads that, “if a crop duster accidentally applies a synthetic fungicide to your organic field, that would be considered an application of a prohibited material, and the application for organic certification would be denied.” Pamela Coleman, U.S. Dep't of Agric., *Guide for Organic Crop Producers* at 10 (Nov. 2012), <https://www.ams.usda.gov/sites/default/files/media/GuideForOrganicCropProducers.pdf>. Appellants argue that “[b]oth of these USDA

guidelines offer relevant legal authority as to the interpretation and application of 7 C.F.R. § 205.202 and should have been considered by the district court in this case.”

Had this been a case of first impression, we may have found these interpretative sources persuasive. But again, appellants have failed to present any legal authority that would allow us to ignore the Minnesota Supreme Court’s decision in *Johnson*, even when contrary non-binding authority² has been released in the interim. See *Curtis*, 921 N.W.2d at 346.

Appellants finally argue that, because *Johnson* prevents them from recovering from respondent, they have been harmed and have no legal remedy in violation of article 1, section 8 of the Minnesota Constitution. Article 1, section 8 of the Minnesota Constitution, reads that, “Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.” Minn. Const. art. I, § 8.

But, even assuming that appellants have damages for which they have no remedy, it is not the function of the court of appeals to establish new causes of action, even when such actions appear to have merit. *Stubbs v. N. Mem’l Med. Ctr.*, 448 N.W.2d 78, 80–81 (Minn. App. 1989), *review denied* (Minn. Jan. 12, 1990); see also *LaChapelle v. Mitten*, 607 N.W.2d 151, 159 (Minn. App. 2000) (stating that “[b]ecause this court is limited in its

² Furthermore, the guidelines appellants point to are at best interpretative rules that “do not have the force and effect of law.” See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1204 (2015).

function to correcting errors it cannot create public policy”), *review denied* (Minn. May 16, 2000). And, it is not the province of the court of appeals to make “a dramatic change in the interpretation of the Minnesota Constitution” when the Minnesota Supreme Court has not done so. *Minn. State Patrol Troopers Ass’n ex rel. Pince v. State, Dep’t of Pub. Safety*, 437 N.W.2d 670, 676 (Minn. App. 1989) (quoting *State v. Herbst*, 395 N.W.2d 399, 404 (Minn. App. 1986)), *review denied* (Minn. May 24, 1989); *see also State v. Rodriguez*, 738 N.W.2d 422, 431–32 (Minn. App. 2007), *aff’d*, 754 N.W.2d 672 (Minn. 2008). Even if appellants are left without a legal remedy for the suspension of their field’s organic certification, we are not free to establish a new remedy or cause of action to make appellants whole. *See Stubbs*, 448 N.W.2d 80–81.

Because the district court, like this court, is bound by current Minnesota Supreme Court precedent interpreting federal regulations regarding suspension of a field’s organic certification, the district court did not err in its grant of summary judgment in favor of respondent.

Affirmed.