

IN THE SUPREME COURT

20090071

STATE OF NORTH DAKOTA

Supreme Court Case No. 20090071  
Cass County District Court No. 09-08-C-01882

Great Western Bank,

Appellant,

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

vs.

MAY 21 2009

Willmar Poultry Company,

STATE OF NORTH DAKOTA

Appellee.

APPEAL FROM DECEMBER 29, 2008, JUDGMENT OF  
THE DISTRICT COURT, EAST CENTRAL JUDICIAL DISTRICT,  
CASS COUNTY, NORTH DAKOTA

BRIEF OF APPELLEE *w attached Addendum*

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## LAW AND ARGUMENT

### I. **AGRICULTURAL SUPPLIER'S LIENS ARE TO BE LIBERALLY CONSTRUED, AND AS SUCH, POULTS QUALIFY AS "SUPPLIES" UNDER N.D.C.C. § 35-31-01.**

The paramount issue in this case is one of statutory construction. When considering this issue, one must start with the premise that North Dakota statutes are to be "liberally construed, with a view to effecting its objects and promoting justice." N.D.C.C. § 1-02-01. This is the cardinal rule of statutory construction in North Dakota. Eastburn v. C. J. A., 473 N.W.2d 439, 440 (N.D. 1991).

North Dakota Century Code § 35-31-01, North Dakota's agricultural supplier's lien statute, states:

Any person who furnishes supplies used in the production of crops, agricultural products, or livestock is entitled to a lien upon the crops, products produced by the use of their supplies, and livestock and their products . . . . As used in this chapter, the term "supplies" includes seed, petroleum products, fertilizer, farm chemicals, insecticide, feed, hay, pasturage, veterinary services, or the furnishing of services in delivering or applying the supplies.

N.D.C.C. § 35-31-01. It is a long standing tradition in North Dakota that agricultural lien statutes are liberally construed. See Stevenson v. Magill, 160 N.W. 700, 704 (N.D. 1916) (Christianson, J., dissenting); see also Lowe v. Abrahamson, 119 N.W. 241, 242 (N.D. 1908) (stating that farm laborer liens are to be liberally construed).

Liberal construction applies to present day agricultural supplier's liens as well. Agricultural supplier's liens are liberally construed so as to give effect to legislative intent. Bernstein Ranch, LLC v. United States (In re Bernstein), 230 B.R. 144, 149 (Bankr. N.D. 1999). The purpose of agricultural supplier's liens is

to provide broad liens to those that provide goods and services in the production of crops, products or livestock. Id. at 150 (emphasis added); Stockman Bank of Montana v. Agsco, Inc., 2007 ND 26, ¶18, 727 N.W.2d 742.

“Goods”, as defined under the Uniform Commercial Code, as adopted in North Dakota, “means all things that are movable when a security interest attaches.” N.D.C.C. § 41-09-02(tt) (defining “goods” to mean all things which are movable when the security attaches). In the case at bar, there is no factual dispute that Willmar Poultry’s agricultural supplier’s lien was properly filed, and if so, that it attached to the poults. (A. 0056). There is also no realistic argument that a poult is not movable. If, as the Stevenson, Lowe, Bernstein and Stockman Bank of Montana cases hold, agricultural supplier’s liens are to be liberally construed and the purpose of the lien statute is to provide a broad lien, then all “goods” should be included in the definition of “supplies.”

Although not binding on this Court, Willmar Poultry’s contention that the term “goods” should be liberally construed is supported by a North Dakota Attorney General’s opinion which analyzed the term “supplies” in the context of Section 35-31-01. 1993 N.D. Op. Atty. Gen. L-39, 1993 WL 762675 (N.D.A.G). In this opinion, the Attorney General held that an insurance policy was not included in the term “supplies.” The policy was excluded because it was not a tangible item, i.e. “good”, similar to feed or fertilizer, protected by the statute. See id. The Attorney General reasoned that where a statute lists specific examples, other items to be included under the statute must be of the same general type. Id. The poults, like seed, fertilizer, and farm chemicals, supplied

by Willmar Poultry to ABTH for use in its farming operations were tangible, movable goods, and should be included in the term “supplies.”

Additionally, there is nothing in the statute that prevents poultts from being considered a “supply.” According to Great Western Bank (“hereinafter “Great Western”), the word “includes” used within N.D.C.C. § 35-31-01 is a limiting term which limits what may be included in the term “supplies” to those items listed in the statute. (A. 0011); see also Great Western Brief, pg. 6. This is an incorrect analysis of statutory interpretation. Unless defined in the statute or a contrary intention is clear, words in a statute are given their plain, ordinary, commonly understood meaning. N.D.C.C. § 1-02-02; In re Elken, 2007 ND 107, ¶7, 735 N.W.2d 842. The plain, ordinary, commonly understood meaning of “includes” is that it is a word of enlargement, not limitation. In re Elken, ¶8; Lucke v. Lucke, 300 N.W.2d 231, 234 (N.D. 1980). When used, the term “includes” is to be read as if the phrase ‘but not limited to’ were also set forth.” Lucke v. Lucke, 300 N.W.2d at 234. Therefore, using the clear meaning of the term “includes,” the term “supplies” as used in Section 35-31-01 “includes, but is not limited to, seeds, petroleum products, fertilizer, etc.”

Had the legislature intended to limit what “supplies” meant, it should have used the term “means” instead of “includes,” but it chose not to do so. In re Elken, ¶8 (citing the North Dakota Legislative Drafting Manual 95 (2007) for the position that an exhaustive definition uses the term “means” while a partial definition uses the word “includes”); see also N.D.C.C. § 35-05-01 (comparing language in this statute where legislature chose to limit available liens to

language in Section 35-31-03 where legislature chose not to specifically limit liens). As opined by the Attorney General, “supplies” in addition to what is listed, should include other tangible, movable items used in the production of livestock. 1993 N.D. Op. Atty. Gen. L-39, 1993 WL 762675 (N.D.A.G.). Under this analysis, and understanding that agricultural supplier’s liens are to be liberally construed, poult should be included in the term “supplies.”

Finally, Willmar Poultry’s argument that poult should be included in the term “supplies” is bolstered by an example within the statute itself. “Supplies” includes “seeds.” N.D.C.C. § 35-31-01. Whomever supplies “seeds” is entitled to a lien on the “products produced [by the seed].” *Id.* The Honorable Steven E. McCullough correctly analyzed this issue in his opinion when he stated, “using standard logic and reasoning, it is apparent that poult are to turkeys what seeds are to crops. Poult, when fed and sheltered, become adult turkeys. Seeds, when planted and cultivated, result in mature crops.” (A. 0089). Judge McCullough went on to reject Great Western’s position that a poult and a seed are not analogous because a seed is dead matter. Citing McLane v. F. H. Peavey & Co., 8 N.W.2d 308 (N.D. 1943), he correctly ruled that a seed is living, just like a poult, but only in a dormant state. (A. 0089).

Great Western argues that the poult were not “supplies” because they were the end product, i.e. they were not used to produce a product, all they did was grow and mature into a big turkey. (A. 0009–A. 0010); see also Great Western’s Brief, pp. 8-9. A poult, however, is not the end product and is easily distinguishable from the end product. If the poult was the end product, Sara Lee



would not have paid in excess of \$1,000,000 for them because poultts have no worth for processing purposes. (A. 0047–A. 0048). The end product was a mature, full grown turkey produced from the supplies provided by Willmar, which in this case happened to be poultts.

By definition the poultts produced the mature turkeys. “Produce” is defined as “the product of natural growth, labor, or capital.” Black’s Law Dictionary 1209 (6<sup>th</sup> ed. 1994) (emphasis added). What Willmar Poultry provided in this case was a 60 gram poult, roughly the size of a tennis ball. (A. 0047). As the poult matured and was fed and cared for, the poult produced, i.e. naturally grew into, a mature turkey. As analogized by Judge McCullough, a sunflower seed can only produce a sunflower. A seed of wheat can only produce wheat. Likewise, a poult can only produce an adult turkey. (A. 0090).

Agricultural supplier liens are liberally construed in North Dakota. As a tangible, movable good, the case law and the Attorney General’s opinion support Willmar Poultry’s contention that a poult is indeed a “supply” under N.D.C.C. § 35-31-01. Therefore, Willmar Poultry respectfully requests that the decision of the district court be affirmed.

**II. WHEN CONSIDERING THE ENTIRE CHAPTER, IT IS CLEAR THAT WILLMAR POULTRY HAS A SUPER PRIORITY LIEN BASED UPON ITS SUPPLY OF POULTS TO ABTH, LLP.**

The priority to be given North Dakota’s agricultural supplier’s lien is provided for in N.D.C.C. § 35-31-03. It states, “An agricultural supplier’s lien obtained under the provisions of this chapter has priority, as to the crops or agricultural products covered thereby, over all other liens or encumbrances

except any agricultural processor's lien." N.D.C.C. § 35-31-03. The "obvious purpose" of North Dakota's agricultural lien statute is to assure those furnishing supplies to North Dakota's farmers have a priority without burdening them with the obligation to investigate who else may have an interest in the resulting farm products. Norwest Bank-Jamestown v. Ostlund Chemical Co. (In re Glinz), 46 B.R. 266, 275 (Bankr. N.D. 1984) (internal citations omitted). A supplier must be secure in knowing that its interests will be given priority over all other encumbrances, including earlier perfected liens, so that creditors of this type are encouraged to deal with farmers. Id.

On its face, Section 35-31-03 does not provide priority for an agricultural supplier's lien for supplies used in the production of livestock. N.D.C.C. § 35-31-03. Although not binding on this Court, the United States Bankruptcy Court for the District of North Dakota thoroughly analyzed the interplay between Sections 35-31-01 and 35-31-03 in In re Bernstein, 230 B.R. at 150-51, and Willmar Poultry respectfully submits that this analysis is correct and should be adopted by the North Dakota Supreme Court. The Bankruptcy Court held that when read together, Sections 35-31-01 and 35-31-03 make the entire meaning of Chapter 35-31 ambiguous. Id. at 150. It is illogical that the legislature would on one hand provide a lien for supplies used in the production of livestock in Section 35-31-01 but give it no force by excluding the lien from priority standing in Section 35-31-03. Id. Recognizing that statutes are to be construed in context, giving each statute on the same subject meaningful effect, the Bankruptcy Court could not conceive that the legislature intended to distinguish between those providing crop

inputs and those providing livestock inputs. Id. (citing Interest of K.G., 551 N.W.2d 554, 556 (N.D. 1996); see also N.D.C.C. § 1-02-38 (stating that in enacting a statute the legislature intends for the entire statute to be effective and intends a just and reasonable result). The Bankruptcy Court concluded that in order to make sense of Chapter 35-31, the lien priority of Section 35-31-03 extended to all persons entitled to a lien under Section 35-31-01. Id. “Therefore, if all other prerequisites to obtaining an agricultural supplier’s lien have been met . . . then the lien, as obtained, does have priority . . . .” Id.

The logical reading of Section 35-31-03 is that there is a super priority lien for those providing supplies for the production of livestock. As such, Willmar Poultry respectfully requests that the decision of the district court be affirmed.

**III. GREAT WESTERN’S ARGUMENT THAT THE TERM “SUPPLIES” IS AMBIGUOUS WAS NOT MADE BEFORE THE DISTRICT COURT AND SHOULD NOT BE ENTERTAINED BY THE NORTH DAKOTA SUPREME COURT.**

Great Western mischaracterizes Willmar Poultry’s argument to the district court when it states that Willmar Poultry argued that the term “supplies” was ambiguous. See Great Western Brief, pg. 6. This argument was never made by Willmar Poultry and Willmar Poultry respectfully submits to the Court that such an argument cannot be found anywhere in the record. Additionally, Great Western never made this argument to the district court. In fact, Great Western argued the exact opposite. In its Brief in Support of Motion For Summary Judgment, Great Western stated, “The language of N.D. Cent. Code § 35-31-01 is clear and unambiguous, subject to only one rational meaning, and, as such, the legislative intent may be determined on its face.” (A. 0008). Now, however, after the district

court rejected Great Western's position, Great Western argues that legislative intent and the doctrine of *noscitur a sociis* should be used to interpret Section 35-31-01. As the ambiguity argument was not made to the district court, it should not be considered at the appellate level. Holden v. Holden, 2007 ND 29, ¶7, 728 N.W.2d 312 (ruling that the court will not consider an issue for the first time on appeal) (internal citations omitted); Hanson v. Boeder, 2007 ND 20, ¶15, 727 N.W.2d 280 (stating that one of the touchstones of an effective appeal is that the issue be raised before the district court so that court could intelligently rule on it) (internal citations omitted); see also Peters-Reimers v. Reimers, 2002 ND 49, ¶9, 641 N.W.2d 83 (holding that where nothing in the record indicates that a specific argument was made to the district court, that issue will not be addressed for the first time on appeal). Willmar Poultry respectfully asks the Court to not consider this argument.

If, however, the Court allows Great Western to make this argument, the Court should determine that there is no ambiguity in Section 35-31-01. Section 1-02-05 of the North Dakota Century Code addresses this exact issue. Section 1-2-05 states, "When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-05; Bragg v. Burlington Resources Oil and Gas, Co. LP, 2009 ND 33, ¶8, 763 N.W.2d 481; see also BedRoc Ltd., LLC v. U.S., 541 U.S. 176 (2004) (holding that the beginning and end of statutory analysis is with the statute itself if it is unambiguous). The mere fact that a statute as written provides for the broad definition of a term does not make that term ambiguous. Quist v. Best

Western Int'l Inc., 354 N.W.2d 656 (N.D. 1984). The term “supplies”, which is to be broadly construed in an agricultural supplier’s lien statute, is not ambiguous. The statute provides a lien to those that provide goods and services in the production of crops, products or livestock. In re Bernstein, 230 B.R. 150.

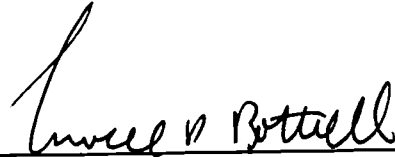
If the Court deems the term “supplies” to be ambiguous, the Court should adopt the reasoning of the Attorney General as stated in 1993 N.D. Op. Atty. Gen. L-39, 1993 WL 762675 (N.D.A.G.). Although not specifically invoking the doctrine of *noscitur a sociis*, the Attorney General basically did what Great Western is asking this court to do. As analyzed by the Attorney General, where a statute lists specific examples, other items to be included under the statute must be of the same general type. 1993 N.D. Op. Atty. Gen. L-39, 1993 WL 762675 (N.D.A.G.) Section 35-31-01 provides a lien for those which supply items which are characterized as tangible and movable goods. 1993 N.D. Op. Atty. Gen. L-39, 1993 WL 762675 (N.D.A.G.); see also N.D.C.C. § 41-09-02(tt). As a poult meets all of these requirements, the Court should construe the term “supplies” to include poult.

### **CONCLUSION**

Historically, agricultural supplier liens have been liberally construed in North Dakota. Under this interpretation of the statute a poult should be considered a “supply” and Willmar Poultry should have a valid agricultural supplier’s lien under N.D.C.C. § 35-31-01. As a “supply” in the production of livestock, the only logical reasoning of N.D.C.C. 35-31-03 is that Willmar Poultry is entitled to a super priority position under the statute. Therefore, Willmar

Poultry respectfully requests that the Court affirm the decision of the district court.

Dated this 21<sup>st</sup> day of May, 2009.



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**CERTIFICATE OF SERVICE**

The undersigned, being first sworn, says upon her oath that a copy of each of the following:

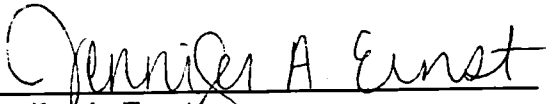
1. Appellee's Brief

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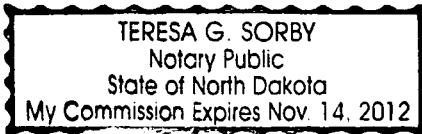
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on the 21<sup>st</sup> day of May, 2009.

Dated this 21<sup>st</sup> day of May, 2009.

  
\_\_\_\_\_  
Jennifer A. Ernst

Subscribed and sworn to before me this 21<sup>st</sup> day of May, 2009.



  
\_\_\_\_\_  
Notary Public  
My Commission Expires: \_\_\_\_\_