

IN THE SUPREME COURT  
FOR THE STATE OF NORTH DAKOTA

Great Western Bank,	)	
	)	Supreme Court Case No. 20090071
Appellant,	)	District Court Civil No. 09-08-C-01882
	)	
vs.	)	
	)	<b>FILED</b>
	)	IN THE OFFICE OF THE
Willmar Poultry Company,	)	CLERK OF SUPREME COURT
	)	
	)	JUN 04 2009
Appellee.	)	

STATE OF NORTH DAKOTA

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

**REPLY BRIEF OF APPELLANT**

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**TABLE OF CONTENTS**

	<u>Page</u>
INTRODUCTION.....	1
ARGUMENT.....	1
A.    Statutory Construction of N.D. Cent. Code §35-31-01.....	1
B.    Willmar Poultry is Not Entitled to Claim Superpriority Status Under N.D. Cent. Code §35-31-03.....	7
CONCLUSION.....	8

**TABLE OF AUTHORITIES**

**Cases**

Estate of Samuelson, 2008 ND 190, 757 N.W.2d 44.....1  
Jilek v. Berger Elec., 441 N.W.2d 660 (N.D. 1989).....7

**Statutes**

N.D. Cent. Code § 35-31-01.....*passim*  
N.D. Cent. Code § 35-31-03.....7, 8

**Other Authorities**

1993 N.D. Op, Att’y Gen. L-39, 1993 WL 462675 (N.D.A.G.).....3

## I. INTRODUCTION

The parties to this case agree there are no issues of disputed fact with respect to the events surrounding Willmar Poultry's provision of young turkeys (*i.e.*, "poults") to a farming operation named ABTH, LLP, and Willmar Poultry's subsequent filing of an agricultural supplier's lien claiming a superpriority lien in the poults. What is disputed in this case is whether Willmar Poultry actually has a *valid* lien under the North Dakota Agricultural Supplier's Lien statute codified at N.D. Cent. Code § 35-31-01, and if so, what is the *priority* of any valid agricultural supplier's lien. It is well settled in North Dakota that "[i]ssues regarding the interpretation and application of a statute are questions of law and are fully reviewable upon appeal." In re Estate of Samuelson, 2008 ND 190, ¶ 11, 757 N.W.2d 44 (citations omitted).

The Court should determine that Willmar Poultry does not have a valid lien under the North Dakota Agricultural Supplier's lien statute. Alternatively, the Court should determine that even if Willmar Poultry had a valid agricultural supplier's lien, it did not enjoy superpriority status under the North Dakota Agricultural Supplier's lien statute.

## II. ARGUMENT

### A. Statutory Construction of N.D. Cent. Code § 35-31-01.

To resolve the central issue in this case, the Court must interpret the Agricultural Supplier's Lien statute codified at N.D. Cent. Code § 35-31-01. The Agricultural Supplier's Lien statute provides in relevant part:

**§ 35-31-01. Agricultural supplier's lien authorized.**

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 the supplies, and livestock and their products including milk. *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.*

See N.D. Cent. Code § 35-31-01 (emphasis added). The District Court held the poults provided by Willmar Poultry to ABTH constituted “supplies” within the meaning of the agricultural supplier’s lien statute. In determining that poults were included within the definition of “supplies” under N.D. Cent. Code § 35-31-01, the District Court indicated it could find no rational basis to distinguish poults from seeds and declared that “[s]eed is in fact living just as poults are living.” (A.89) The District Court violated fundamental rules of statutory construction by ignoring the actual text of the statute and the clear intent of the North Dakota legislature in holding that poults constitute “supplies” under the agricultural supplier’s lien statute.

Willmar Poultry claims N.D. Cent. Code § 35-31-01 is to be liberally construed because the definition of “supplies” uses the term “*includes*”—a word of enlargement and not of limitation. See Willmar Poultry Brief at 3. Accordingly, Willmar Poultry argues the North Dakota legislature intended to broaden the availability of the supplier’s lien statute to any individuals furnishing “goods” and “tangible items.” See Willmar Poultry Brief at 2-4. Willmar Poultry points out that “goods” typically include any moveable and identifiable thing. See

Willmar Poultry Brief at 2. Likewise, it relies on a North Dakota Attorney General's opinion which suggested that only "tangible items" may constitute "supplies" within the meaning of the agricultural supplier's lien statute. See Willmar Poultry Brief at 4 *citing* 1993 N.D. Op. Att'y Gen. L-39, 1993 WL 762675 (N.D.A.G.) (opining that insurance coverage does not constitute "supplies" within the meaning of the ND Agricultural Supplier's Lien statute in that it is not a "tangible item"). Willmar Poultry's proposed test of including all "goods" or "tangible items" within the scope of the definition of "supplies" gives the Agricultural Supplier's Lien statute a reach that is far beyond what the Legislature intended.

Willmar Poultry's proposed "all goods or tangible items" test is flawed for several reasons. First, it must be pointed out that the Legislature provided a definition of "supplies" that consists of an enumerated list of items (*i.e.*, "seed, petroleum products, fertilizer, farm, chemicals, insecticide, feed, hay, pasturage, veterinary services, or the furnishing of services in delivering or applying the supplies"). If the Legislature had intended to allow anything tangible to qualify as "supplies," then it could have provided a more generalized definition. It chose not to do so. The "all goods or tangible items" test is also deficient in that it simply does not fit with all of the items in the Legislature's definition of "supplies," which includes veterinary services or the furnishing of services in delivering or applying the supplies.

Second, there are inherent difficulties with the scope of the interpretation proposed by Willmar Poultry. For example, under the “all goods or tangible items” test, an implement dealer that sells a tractor to a farmer which is subsequently used in the production of crops would be entitled to assert an agricultural supplier’s lien in the resulting crops. The tractor is clearly a “good” and/or “tangible item” and it is used in the production of crops. Yet it is clear the implement dealer that sells a new tractor to a farmer is left with the conventional method of protecting its interest under Article 9 of the Uniform Commercial Code. Many scenarios could be envisioned in which it becomes clear that Willmar Poultry’s argument simply goes too far. For example, what about the situation where a rancher borrows his neighbor’s herding dog in order to move cows from one pasture to another? The dog would clearly be classified as a “good” and/or “tangible item” and its services in moving the cows were used in the production of livestock. Should the neighbor be entitled to assert an agricultural supplier’s lien on the cows that were moved to a new pasture? Willmar Poultry’s proposed test would allow almost anything to be “supplies” within the meaning of the North Dakota Agricultural Supplier’s lien statute. The Court should decline to expand the definition of “supplies” to the extent suggested by Willmar Poultry.

Finally, it must be pointed out that if the Court were to adopt Willmar Poultry’s argument that “supplies” should include “all goods or tangible items,” it would effectively nullify the need for the Agricultural Processor’s Lien and/or the Agister’s Lien statutes which are codified in separate chapters of the North Dakota

Century Code. See N.D. Cent. Code Chs. 35-17 and 35-30. The test proposed by Willmar Poultry is so expansive that there would be little purpose to the other lien statutes. The existence of those other liens is clear evidence that Willmar Poultry's interpretation of the Agricultural Supplier's Lien statute is in error.

Notably absent from Willmar Poultry's argument is an explanation on how adult market turkeys are "produced by the use of" the poults, and where exactly the line should be drawn in the continuum of young turkeys vs. adult market turkeys. See N.D. Cent. Code § 35-31-01. Willmar Poultry attempts to distinguish a "60 gram poult, roughly the size of a tennis ball" from an adult market weight turkey by emphasizing that it is only the adult turkeys that have any value from a market prospective. See Willmar Poultry's Brief at 4-5. However, this distinction never answers the question of how a young turkey can "*produce*" an adult turkey, or in other words, how the supply produces the finished product—which is a requirement of the agricultural supplier's lien statute. The young turkey simply does not *produce* an adult turkey; rather, it *grows* into the adult turkey through the addition of other items that fall into the category of "supplies" such as feed and veterinary supplies. This fatal flaw in Willmar Poultry's argument is clearly demonstrated by asking what if Willmar Poultry had sold "teenage" turkeys (for lack of a better word) that were just one pound lighter than adult market turkeys to ABTH? Should the "teenage" turkeys constitute "supplies" within the meaning of the Agricultural Supplier's Lien statute? To further extrapolate, what about a situation where cattle are sold to a rancher who "fattens"



the cattle for a month and then re-sells the cattle at a livestock auction? This is exactly the type of line-drawing that courts would be required to engage in if the District Court's determination that young turkeys qualify as "supplies" under the North Dakota Agricultural Supplier's lien statute is upheld.

Finally, it should be noted that Willmar Poultry fails to address the legislative history of North Dakota's Agricultural Supplier's Lien statute and how its incorporation of then-existing lien statutes demonstrates that "livestock" and/or "poultry" were never intended to be included within the definition of "supplies" under Section 35-31-01. See Great Western's Brief at 11-12; Appellant's Addendum (explaining that the intent of the legislature in enacting the agricultural processor's and agricultural supplier's liens was to consolidate a number of existing lien statutes—*i.e.*, threshing, crop production, fertilizer, farm chemicals and seed liens—and the only expansion intended was to provide a lien for veterinary services). Willmar Poultry completely ignores the issues raised by the legislative history and instead claims that Great Western never argued that the Agricultural Supplier's Lien statute was ambiguous and this should not be heard on appeal. While both parties have argued that the *wording* of Section 35-31-01 is unambiguous, the actual *scope* of what is to be included within the definition of "supplies" is yet to be defined by the North Dakota Supreme Court.<sup>1</sup> The

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<sup>1</sup> While Great Western also argued in its primary brief that Section 35-31-01 was unambiguous, there is a clear distinction between why both parties view Section 35-31-01 as unambiguous. Great Western views Section 35-31-01 as unambiguous in that the definition of "supplies" contains an enumerated list of items (*e.g.*, seed, petroleum

legislative history of N.D. Cent. Code § 35-31-01 is helpful in determining the scope of what should be included within the definition of “supplies.” Further, it is well established that the North Dakota Supreme Court has plenary review of determinations of law concerning the proper construction of a statute. Jilek v. Berger Elec., 441 N.W.2d 660 (N.D. 1989)(citation omitted).

This Court should reverse the District Court’s Order holding Willmar Poultry had a valid lien under the North Dakota Agricultural Supplier’s Lien statute.

B. Willmar Poultry is Not Entitled to Claim Superpriority Status Under N.D. Cent. Code § 35-31-03.

Willmar Poultry claims (and the District Court agreed) that it had a superpriority lien pursuant to N.D. Cent. Code § 35-31-03. Section 35-31-03 states:

**35-31-03. Priority.**

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.

See N.D. Cent. Code § 35-31-03 (emphasis added). Thus, while Section 35-31-01 creates the agricultural lien for an individual who furnishes supplies used in the production of “crops, agricultural products, or livestock,” it is Section 35-31-03

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products, fertilizer, farm chemicals, insecticide, feed, hay, pasturage and veterinary services) and the terms “livestock” and/or “poultry” are not included on that list. In contrast, Willmar Poultry views Section 35-31-01 as unambiguous in that the term “includes” is part of the definition of “supplies” and, thus, it is an unambiguous word of expansion.

which grants superpriority status only as to liens in “crops or agricultural products” covered by a Section 35-31-01 agricultural supplier’s lien. See N.D. Cent. Code §§ 35-31-01 and 35-31-03. It is clear that the North Dakota statute establishing priority for an agricultural supplier’s lien only gives superpriority status to “crops or agricultural products.” It does not give superpriority status to “livestock.” Accordingly, even if Willmar Poultry actually has a valid agricultural supplier’s lien under Section 35-31-01, it still does not have superpriority status under Section 35-31-03.

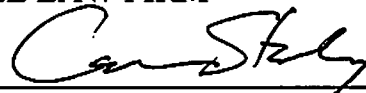
It should be noted that Willmar Poultry takes an interesting (and self-serving) tack in its assertion that the failure to extend superpriority status to “livestock” in Section 35-31-03 is merely a statutory ambiguity that should be ignored. See Willmar Poultry Brief at 5-7. At the same time, Willmar Poultry continues to argue Section 35-31-01 is unambiguous (even though the words “livestock” and/or “poultry” are not included within the definition of “supplies”). The proverb of “having your cake and eating it too” seemingly applies to Willmar Poultry’s argument on this point.

### CONCLUSION

For the above stated reasons, Appellant Great Western respectfully requests the Court find that Appellee Willmar Poultry did not have a valid lien under N.D. Cent. Code § 35-31-01 and/or superpriority status under N.D. Cent. Code § 35-31-03 and reverse the District Court’s Judgment of December 29, 2008.

Dated this 4th day of June, 2009.

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**Great Western Bank v. Willmar Poultry Company**  
**Case No. 09-08-C-01882**  
**Supreme Court No. 20090071**

STATE OF NORTH DAKOTA            )  
  ) ss       AFFIDAVIT OF SERVICE  
COUNTY OF CASS                    )       BY MAIL

Shannon Elbert, being first duly sworn on oath, does depose and say: She is a resident of Casselton, North Dakota, of legal age and not a party to or interested in the above entitled matter.

On the 4<sup>th</sup> day of June, 2009, affiant served the within:

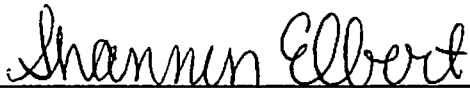
**1. Reply Brief of Appellant**

by placing true and correct copies in envelopes addressed as follows:


Lowell Bottrell                               (1 Copy)  
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and causing them to be placed in the mail at Fargo, North Dakota with first-class postage prepaid.

  
\_\_\_\_\_  
Shannon Elbert

Subscribed and sworn to before me this 4<sup>th</sup> day of June, 2009.

  
\_\_\_\_\_  
Notary Public

