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IN THE SUPREME COURT
FOR THE STATE OF NORTH DAKOTA

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SUPREME COURT APR 23 2009

Great Western Bank,)	Supreme Court Case No. 20090071
)	District Court Civil No. 09-08-C-01882
Appellant,)	
)	
vs.)	
)	
Willmar Poultry Company,)	
)	
Appellee.)	

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APR 22 2009

STATE OF NORTH DAKOTA

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF ISSUES.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS.....	2
ARGUMENT.....	3
I. Standard of Review.....	3
II. Turkeys Do Not Qualify as “Supplies” Under the North Dakota Agricultural Supplier’s Lien Statute.....	3
A. Rules of Statutory Interpretation.....	4
B. The Definition of “Supplies” Provided in N.D. Cent Code § 35-31-01 is Unambiguous.....	5
C. If N.D. Cent Code § 35-31-01 is Ambiguous, Then the Legislative History and the Doctrine of <i>Noscitur a Sociis</i> Demonstrate that Livestock and/or Poultry were Not Intended To be “Supplies.”	10
1. <i>The Legislative History of N.D. Cent Code § 35-31-01 Demonstrates That Livestock and/or Poultry were Not Intended to be Included Within the Term “Supplies.”</i>	10
2. <i>Under the Doctrine of Noscitur a Sociis, the Term “Supplies” Must be Determined by the Words Immediately Surrounding It.</i>	13
III. Even If Young Turkeys Qualify as “Supplies” Under N.D. Cent Code § 35-31-01, There is No SuperPriority Status Under N.D. Cent Code § 35-31-03.....	16
CONCLUSION.....	17
APPELLANT’S ADDENDUM	

TABLE OF AUTHORITIES

Cases

<u>Doyle ex rel. Doyle v. Sprynczynatyk.</u> 2001 ND 8, 621 N.W.2d 353.....	4
<u>Grey Bear v. [N.D] Dep't of Human Servs..</u> 2002 ND 139, 651 N.W.2d 611.....	5
<u>Harter v. North Dakota Dep't of Transp..</u> 2005 ND 70 ¶ 7, 694 N.W. 2d 677.....	3
<u>In re Bernstein.</u> 230 B.R. 144 Bankr. N.D. 1999).....	17
<u>Jarecki v. G.D. Searle & Co.,</u> 367 U.S. 303 (1961).....	13
<u>Little v. Tracy,</u> 497 N.W.2d 700 (N.D.1993).....	6
<u>McDowell v. Gillie.</u> 2001 ND 91, 626 N.W.2d 666.....	4
<u>McKinney v. Robbins.</u> 892 S.W.2d 502 (Ark. 1995).....	14
<u>Meljie v. [N.D.] Workers Comp. Bureau.</u> 2002 ND 174, 653 N.W.2d 62.....	4
<u>Salve Regina College v. Russell.</u> 499 U.S. 225 (1991).....	3
<u>Shiek v. [N.D] Workers Comp. Bureau.</u> 2002 ND 85, 643 N.W.2d 721.....	4
<u>Stein v. Workforce Safety & Ins..</u> 2006 ND 34, 710 N.W.2d 364.....	5

<u>Stockman Bank v. AGSCO.</u> 2007 ND 27, 727 N.W.2d 742.....	8
<u>T.F. James Co. V. Vakoch.</u> 2001 ND 112, 628 N.W.2d 298	13
<u>United States v. Miller.</u> 395 F.Supp.2d 875 (D.N.D. 2005).....	9
<u>Utility Elec. Supply, Inc. v. ABB Power T & D Co., Inc.,</u> 36 F.3d 737 (8 th Cir. 1994).....	14
<u>Van Klootwyk v. Baptist Home, Inc.,</u> 2003 ND 112, 665 N.W.2d 679.....	5
<u>Willmar Poultry Co., Inc. v. Sara Lee Corporation,</u> No. 34-CV-08-148 (MN Dist. Ct., Kandiyohi County, November 26, 2008).....	1

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IN THE OFFICE OF THE
CLERK OF SUPREME COURT

APR 28 2009

STATE OF NORTH DAKOTA

Statutes

N.D. Cent. Code § 1-02-02.....	4
N.D. Cent. Code § 1-02-03.....	4,5,13
N.D. Cent. Code § 1-02-05.....	4
N.D. Cent. Code § 1-02-07.....	4
N.D. Cent. Code § 1-02-38.....	4
N.D. Cent. Code § 1-02-39.....	4
N.D. Cent. Code § 35-07-01 (1985 Supp.).....	11
N.D. Cent. Code § 35-08-01 (1980).....	11
N.D. Cent. Code § 35-08-04 (1980).....	11
N.D. Cent. Code § 35-09-01 (1980).....	11
N.D. Cent. Code § 35-10-01 (1980).....	11
N.D. Cent. Code § 35-31-01.....	<i>passim</i>
N.D. Cent. Code § 35-31-03.....	1,16,17

Other Authorities

Black’s Law Dictionary (7th Ed. 1999).....13

Merriam Webster Online Dictionary, available at <http://www.merriam-webster.com/dictionary/produce>.....8

Merriam Webster Online Dictionary, available at <http://www.merriam-webster.com/dictionary/seed>.....15

STATEMENT OF ISSUES

- I. Do young turkeys qualify as “supplies” (defined as including “seed, petroleum products, fertilizer, farm chemicals, insecticide, feed, hay, pasturage, veterinary supplies, or the furnishing of services in delivering or applying the supplies”) under the North Dakota Agricultural Supplier’s Lien statute codified at N.D. Cent. Code § 35-31-01?

- II. If young turkeys qualify as “supplies” within the meaning of the North Dakota Agricultural Supplier’s Lien Statute, then is there superpriority status under N.D.Cent. Code § 35-31-03?

STATEMENT OF THE CASE

This is an appeal from the Memorandum Opinion & Order On Summary Judgment by the Honorable Stephen E. McCullough, Judge of the East Central Judicial District, Cass County, dated December 17, 2008. The District Court granted Defendant/Appellee Willmar Poultry Company, Inc.’s (“Willmar Poultry”) cross-motion for summary judgment against Appellant/Plaintiff Great Western Bank (“Great Western”) and denied Great Western’s motion for summary judgment. The District Court entered Judgment in favor of Willmar Poultry on December 29, 2008. Great Western timely appealed the District Court’s Judgment on February 23, 2009.

Concurrently, a parallel case was commenced in state district court in Kandiyohi County, Minnesota. See Willmar Poultry Co., Inc. v. Sara Lee Corporation, No. 34-CV-08-148 (MN Dist. Ct., Kandiyohi County, November 26, 2008), *appeal docketed*, No. A08-2066. Although Great Western was not made a party to that action, the same issues concerning the validity and/or priority of Willmar Poultry’s alleged agricultural supplier’s lien were before the Minnesota

district court. On November 26, 2008, the Minnesota district court held Willmar Poultry had a valid, superpriority agricultural supplier's lien under North Dakota law. That decision is currently on appeal to the Minnesota Court of Appeals.

STATEMENT OF THE FACTS

In 2006, Great Western made a loan of \$2,000,000 to ABTH, LLP ("ABTH"), a North Dakota turkey operation engaged in the business of raising turkeys. (A.13.84). This loan was secured by a Security Agreement which took an interest in all of ABTH's now existing or subsequently acquired "poultry" and accounts. (A.13.84). Great Western immediately perfected this security interest. (A.18). ABTH subsequently defaulted on its loan payments to Great Western. (A.84).

Between June 16, 2007 and July 11, 2007, Willmar Poultry made three shipments of young turkeys, or "poults," to ABTH. (A.20-22). The value of the poults Willmar Poultry sold to ABTH was \$116,544.09. (A.20-22,85). Of that amount, \$72,356.17 was never paid by ABTH to Willmar Poultry. (A.85). On October 11, 2007, Willmar Poultry filed an Agricultural Supplier's Lien under N.D. Cent. Code § 35-31-01 with the North Dakota Secretary of State against "78,132 Nicholas and Hybrid turkeys delivered...between June 16, 2007, and July 5, 2007." (A.24.85). The same turkeys that Willmar Poultry sold to ABTH were fed by ABTH to maturity and then sold to Sara Lee Corporation ("Sara Lee"). (A.23,27). On December 3, 2007, Great Western and ABTH received a check

from Sara Lee Corporation in the amount of \$1,085,355.20 for the proceeds of the turkeys. (A.27). Willmar Poultry was not listed as a payee on the check. Id.

Great Western filed the present action seeking an order declaring that it had the sole rights to the proceeds of the sale and declaring invalid Willmar Poultry's claim to an Agricultural Supplier's Lien under N.D. Cent. Code § 35-31-01. (A.2-3).

ARGUMENT

I. Standard of Review.

The issues in this appeal present questions of statutory interpretation. "Statutory interpretation is a question of law subject to full review upon appeal." Harter v. North Dakota Dep't of Transp., 2005 ND 70. ¶ 7, 694 N.W.2d 677. A district court's interpretation of state law is given no deference by a reviewing court. Salve Regina College v. Russell, 499 U.S. 225, 239-240 (1991).

II. Turkeys Do Not Qualify as "Supplies" Under the North Dakota Agricultural Supplier's Lien Statute.

The primary issues in this appeal concern the validity and/or priority of competing liens in a flock of turkeys. To resolve this dispute, the Court must determine the respective rights of Willmar Poultry and Great Western in the proceeds resulting from ABTH's sale of turkeys to Sara Lee. The District Court determined that Willmar Poultry held a superpriority lien under the North Dakota Agricultural Supplier's Lien statute in the turkeys it had sold to ABTH. In holding

the turkeys qualified as “supplies” under N.D. Cent Code § 35-31-01, the District Court violated basic rules of statutory construction.

A. Rules of Statutory Interpretation.

To resolve the issues in this case, the Court must interpret the North Dakota Agricultural Supplier’s Lien statute codified at N.D. Cent. Code § 35-31-01. The statute gives the providers of certain agricultural inputs a superpriority lien in the agricultural products produced from those inputs. Accordingly, the critical issue is whether, for purposes of the statute, the inputs and the resulting products can be identical, thus in effect allowing the lien claimant to assert a lien in the inputs provided.

This Court has summarized its rules on statutory interpretation:

[O]ur duty is to ascertain the Legislature's intent, which initially must be sought from the statutory language itself, giving it its plain, ordinary, and commonly understood meaning. N.D.C.C. §§ 1-02-02 and 1-02-03. If statutory language is clear and unambiguous, the letter of the statute cannot be disregarded under the pretext of pursuing its spirit, because the Legislature's intent is presumed clear from the face of the statute. N.D.C.C. § 1-02-05. If statutory language is ambiguous, a court may resort to extrinsic aids, including legislative history, to interpret the statute. N.D.C.C. § 1-02-39. A statute is ambiguous if it is susceptible to meanings that are different, but rational. Shiek v. [N.D.] Workers Comp. Bureau, 2002 ND 85, ¶ 12, 643 N.W.2d 721.

Statutes must be construed as a whole and harmonized to give meaning to related provisions, and are interpreted in context to give meaning and effect to every word, phrase, and sentence. [N.D.C.C. §§ 1-02-07 and 1-02-38(2)]; Meljie v. [N.D.] Workers Comp. Bureau, 2002 ND 174, ¶ 15, 653 N.W.2d 62; Doyle ex rel. Doyle v. Sprynczynatyk, 2001 ND 8, ¶ 10, 621 N.W.2d 353. We presume the Legislature did not intend an absurd or ludicrous result or unjust consequences. [N.D.C.C. § 1-02-38(3) and (4)]; McDowell v. Gillie,

2001 ND 91, ¶ 11, 626 N.W.2d 666. We construe statutes in a practical manner and give consideration to the context of the statutes and the purposes for which they were enacted. [N.D.C.C. § 1-02-03]; Grey Bear v. [N.D.] Dep't of Human Servs., 2002 ND 139, ¶ 7, 651 N.W.2d 611.

Stein v. Workforce Safety & Ins., 2006 ND 34, ¶ 9, 710 N.W.2d 364 (quoting Van Klootwyk v. Baptist Home, Inc., 2003 ND 112, ¶ 12, 665 N.W.2d 679). The first question, therefore, is whether the statute is ambiguous, that is, whether it is subject to more than one rational interpretation. If the statute is deemed ambiguous, then, the second question is which interpretation better gives effect to the intent of the North Dakota Legislature.

B. The Definition of "Supplies" Provided in N.D. Cent. Code § 35-31-01 is Unambiguous.

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 the face of the statute. The North Dakota 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). As shown by the plain language of the statute, the North Dakota Legislature provided its own definition

of items that qualify as “supplies” by including an enumerated list in the statute. Notably absent from the definition of “supplies” are the terms “livestock,” “poultry,” and/or “turkeys.” Id. Willmar Poultry argued to the District Court that the statute’s failure to include “livestock” or “poultry” within the definition of “supplies” was ambiguous, and the term “supplies” should be interpreted broadly. Willmar Poultry’s argument must fail in that this is not a situation where the statute contains an ambiguity of expression; rather, this is an intentional *failure* of expression.

North Dakota courts follow the rule of statutory construction that forbids a court from adding words or meaning to a statute that were intentionally or even inadvertently left out. As stated by the North Dakota Supreme Court:

Generally, the law is what the legislature says, not what is unsaid...[and] there exists a principle of statutory interpretation that the mention of one thing implies the exclusion of another...It must be presumed that the Legislature intended all that it said, and that it said all that it intended to say. The Legislature must be presumed to have meant what it has plainly expressed. It must be presumed, also, that it made no mistake in expressing its purpose and intent. Where the language of a statute is plain and unambiguous, the court cannot indulge in speculation as to the probable or possible qualifications that might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it.’

Little v. Tracy, 497 N.W.2d 700, 705 (N.D.1993) (internal citations omitted). In the agricultural supplier’s lien statute, “livestock” is one of the categories of goods in which a lien can be claimed if the livestock are produced by the types of inputs (*i.e.*, “supplies”) listed in the statute. The North Dakota Legislature clearly could

also have included the word “livestock” within the definition of “supplies.” It chose not to do so. This is demonstrated by the fact that the term “livestock” occurs twice in the sentence immediately preceding the definition of “supplies.” See N.D. Cent. Code § 35-31-01. It is also demonstrated by the fact that the North Dakota Legislature deliberately included “veterinary services” within the definition of “supplies” but failed to mention the actual livestock which would be receiving the “veterinary services.” This was a clear and meaningful failure and/or silence of expression, and the District Court violated the most basic rule of statutory construction in re-writing N.D. Cent. Code § 35-31-01 to include terminology (*i.e.*, “livestock” or “poultry”) that was deliberately omitted by the North Dakota Legislature.

In addition to violating the plain language of N.D. Cent. Code § 35-31-01, the District Court’s interpretation of “supplies” as encompassing “livestock” is not rational. The sentence preceding the definition of “supplies” (which twice includes the term “livestock”) states as follows:

§ 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...

N.D. Cent. Code § 35-31-01. This sentence does two things. First, it describes *who* is entitled to assert an agricultural supplier’s lien (*i.e.*, “any person who furnishes supplies used in the production of crops, agricultural products, or

livestock[.]” Second, it describes *what* the lien is placed upon (*i.e.*, “the crops, products produced by the use of the supplies, and livestock and their products including milk.”) Under a plain reading of the statute, “livestock” constitute the final end product on which a lien is placed—livestock cannot also constitute the supplies that produce the livestock.

Willmar Poultry is claiming the adult turkeys ABTH sold to Sara Lee constitute products “produced” by the young turkeys. That simply does not make sense and is contrary to the plain language of the statute. Young turkeys do not “produce” adult turkeys. Rather, young turkeys *grow* into older turkeys. See Merriam Webster Online Dictionary, available at <http://www.merriam-webster.com/dictionary/produce> (defining “produce as “to give birth or rise to” or “to compose, or create...”)). The plain meaning of “produce” contemplates the creation of something independent and distinct from the entity which is doing the producing. This fits with North Dakota case law which states that “supplies” are materials or services which aid in the “production” of crops or livestock, not the crops or livestock themselves. Stockman Bank v. AGSCO, 2007 ND 27, ¶ 15, 727 N.W.2d 742. As such, an agricultural supplier’s lien can only be enforced against “products” which are “produced” by “supplies.” not the actual “supplies” themselves. Willmar Poultry’s argument that the “supplies” can also be the “products” effectively nullifies the concept of *production* which is critical to the statute. In this case, it is undisputed that the turkeys in question were not purchased for the purpose of becoming breeding stock. It is also not disputed that

the turkeys sold to ABTH did not produce offspring which were later sold to Sara Lee. That is, the turkeys themselves were the final end product which ABTH would eventually sell. Willmar Poultry's attempt to assert an agricultural supplier's lien in the turkeys themselves (*i.e.*, the inputs Willmar Poultry sold ABTH) is fatally flawed. If the distinction between "supplies" and "products" is lost, then one who sells agricultural products to a farmer that is simply speculating in the market will be entitled to claim a lien in the products without regard to the length of time the farmer holds the products.

The North Dakota Supreme Court has yet to interpret the scope of the term "supplies" under N.D. Cent. Code § 35-31-01. However, the United States District Court for North Dakota was confronted with competing lien claims which turned upon the question of whether cattle could be considered "supplies" under N.D. Cent. Code § 35-31-01. See United States v. Miller, 395 F.Supp.2d 875 (D.N.D. 2005). In Miller, the Court noted that "the statutory definition of 'supplies' does not include livestock, and the Millers' assertion that the cows are a 'supply' used in the production of calves is a novel one." Id. at 879. The Court indicated it was unclear "whether livestock may constitute supplies and thus, whether the agricultural supplier's lien is enforceable." Id. In that the issue was heard in the context of a motion for preliminary injunction, the Court did not definitively answer the question of whether livestock could constitute "supplies." The Court, however, based its decision on the fact that the United States had a high likelihood of success on the merits in part upon the very questionable validity

of the defendant's assertion that livestock constituted "supplies" under N.D. Cent. Code § 35-31-01.

In sum, the plain language of N.D. Cent. Code § 35-31-01 precludes the turkeys that Willmar Poultry sold to ABTH and which ABTH later sold to Sara Lee from being considered agricultural "supplies" to which an agricultural supplier's lien may attach. This Court should refuse to re-write, and thereby expand, the definition of "supplies" to include terminology that was clearly omitted by the North Dakota Legislature.

C. If N.D. Cent Code § 35-31-01 is Ambiguous, Then the Legislative History and the Doctrine of *Noscitur a Sociis* Demonstrate that Livestock and/or Poultry were Not Intended to be "Supplies."

If the Court determines that the definition of "supplies" provided in N.D. Cent. Code § 35-31-01 is ambiguous, then it must proceed to ask which interpretation better gives effect to the intent of the North Dakota Legislature. A review of the legislative history and fundamental doctrines of statutory construction are helpful in this regard. The legislative history of N.D. Cent. Ch. 35-31 demonstrates that livestock and/or poultry were not intended to be included within the term "supplies." Further, the doctrine of *noscitur a sociis* is a helpful guide in construing the North Dakota Agricultural Supplier's Lien statute.

1. *The Legislative History of N.D. Cent Code § 35-31-01 Demonstrates That Livestock and/or Poultry were Not Intended to be Included Within the Term "Supplies."*

The legislative history of N.D. Cent. Code § 35-31-01 demonstrates that “livestock” and/or “poultry” were never intended to be included within the definition of the term “supplies.” A review of the legislative history shows the North Dakota Legislature incorporated the language from various lien statutes that had been in existence for many years into the new Agricultural Processor’s Lien (Ch. 35-30) and the Agricultural Supplier’s Lien (Ch. 35-31). In so doing, it repealed the following chapters of the North Dakota Century Code:

- a) Chapter 35-07 (threshing or drying lien);¹
- b) Chapter 35-08 (crop production lien);²
- c) Chapter 35-09 (fertilizer, farm chemicals, and seed lien);³ and
- d) Chapter 35-10 (sugar beet production lien).⁴

¹ The threshing lien, codified at N.D. Cent Code § 35-07-01 (1985 Supp.), provides “the owner or lessee of a threshing machine or combine or a grain drying machine who threshes or dries grain...has a lien upon the grain threshed or dried for the reasonable value of the services[.]” (Add. 7).

² The crop production lien, codified at N.D. Cent. Code § 35-08-01 and 35-08-04 (1980), distinguishes between liens for governmental entities and also for individuals. For governmental entities, it provides that any entity “which furnishes seed to any farmer...or which furnishes to him feed, gas, oil, or repairs on farm equipment necessary for crop production...shall have a lien upon the crops produced from the seed so furnished[.]” For individuals, it provides that “[a]ny person who furnishes gasoline, diesel fuel, tractor fuel, or other motor fuel to another to be used for the production of any agricultural crop shall be entitled to a lien upon all crops produced by the use of such fuel[.]” (Add. 3-4).

³ The fertilizer, farm chemicals and seed lien, codified at N.D. Cent. Code § 35-09-01 (1980), provides “[a]ny person who furnishes or applies fertilizer, farm chemicals, or seed to another to be spread, applied, sow, or planted on lands...shall have a lien upon all the crop produced from the fertilizer, farm chemicals, or seed so furnished[.]” (Add. 4-5).

⁴ The sugar beet production lien, codified at N.D. Cent. Code § 35-10-01 (1980), provides “[a]ny person entering into a contract to furnish to another sugar beet

See S.L. 1987, ch. 412. (Add. 8 - 10).

Many of the items listed in the above-repealed lien statutes (with the exception of veterinary services) were incorporated into the final definition of “supplies” in N.D. Cent. Code § 35-31-01. See N.D. Cent. Code § 35-31-01 (“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”). The addition of “veterinary supplies” to the Agricultural Lien statute appears to be anomalous at first glance. However, the 1987 Senate Standing Committee Minutes indicate that “the only new lien would be veterinary services[.]” (Add. 16). The minutes further indicate the intent was to eventually incorporate the Agister’s Lien statute (codified at N.D. Cent. Code Ch. 35-17) into N.D. Cent. Code Ch. 35-31. However, in that the Agister’s Lien statute still exists in the North Dakota Century Code, this does not appear to have occurred. In enacting the Agricultural Supplier’s Lien statute, the North Dakota Legislature created a new “agricultural supplier’s” lien from the items previously protected under the old lien statutes. The only evidence establishes the Legislature did not intend that the new “agricultural supplier’s” lien would be more expansive than the lien statutes repealed, with the exception of the addition of “veterinary services.”

seed to be planted, insecticide or fertilizer to be used upon the land so planted, or labor, material, cash advances, or services necessary in the production, harvesting, and hauling of sugar beet crops, shall be entitled to a lien upon the crop so raised[.]” (Add. 5).

2. *Under the Doctrine of Noscitur a Sociis, the Term "Supplies" Must be Determined by the Words Immediately Surrounding It.*

Statutory interpretation, from beginning to end, requires respect for the text of the statute. In addition to reviewing legislative history to determine the legislature's intent, courts use certain interpretive rules to consider text within a statutory framework and as helpful guides in construing ambiguous statutory provisions. One of the accepted rules of statutory construction is *noscitur a sociis*, which is defined as a "cannon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it. See Black's Law Dictionary 1084 (7th Ed. 1999). The United States Supreme Court has indicated the doctrine of *noscitur a sociis* is wisely applied "where a word is capable of many meanings in order to avoid the giving of unintended breadth" to legislative acts. Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961).

The Court has used the doctrine of *noscitur a sociis* to avoid giving "unintended breadth" to North Dakota statutes. See N.D. Cent. Code § 1-02-03 ("Technical words and phrases and such others as have acquired a peculiar and appropriate meaning in law, or as are defined by statute, must be construed according to such peculiar and appropriate meaning or definition."); T.F. James Co. v. Vakoch, 2001 ND 112, ¶ 16, 628 N.W.2d 298 ("evidence of debt" within the meaning of statute declaring state's public policy that an attorney's fee provision of any note, bond, security agreement, or other evidence of debt was

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void, was not intended to be “catch-all rubric” embracing any and all writings not otherwise specifically listed). Accordingly, the doctrine of *noscitur a sociis* is helpful in interpreting whether the North Dakota Legislature intended to expand the definition of the term “supplies” to include items such as “livestock and/or “poultry.”

The doctrine of *noscitur a sociis* is simple. By way of example, the Eighth Circuit Court of Appeals used this rule of construction in affirming a district court’s holding that the term “industrial and construction equipment” did not include high-voltage electrical equipment such as transformers, reclosures, meters, cutouts and arresters. Utility Elec. Supply, Inc. v. ABB Power T & D Co., Inc., 36 F.3d 737 (8th Cir. 1994). In that case, the term “industrial and construction equipment” was not defined in the South Dakota Franchise Act statute which applied to dealers “in motor vehicles, motorcycles, industrial and construction equipment, farm tractors, or farm implements.” Id. (citation omitted). However, the fact that it was surrounded by and used in association with more specific words such as motor vehicles, motorcycles, farm tractors and farm implements indicated the more general words of “industrial and construction equipment” should take on a more restricted meaning analogous to the more specific words. Id. at 740. Accordingly, the Court of Appeals found its decision was supported by the doctrine of *noscitur a sociis*. Id.; see also McKinney v. Robbins, 892 S.W.2d 502 (Ark. 1995) (defined term of “domesticated animals” which “includes, but is not

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APR 28 2009

limited to. sheep, goats, cattle, swine, and poultry” did not extend to domestic pets such as kittens).

The definition of “supplies” under N.D. Cent. Code § 35-31-01 contains an enumerated list of items. N.D. Cent. Code § 35-31-01 (“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). Once again, the terms “livestock” and “poultry” do not occur in this list. The list of items that constitute “supplies” under the North Dakota agricultural supplier’s lien statute does not include *any* living, animate object. 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)

Great Western respectfully disagrees with the District Court’s sweeping assertion that a young turkey is akin to a seed. There is a clear distinction between a young turkey and a seed. A “seed” is defined as “the grains or ripened ovules of plants used for sowing” or the “fertilized ripened ovule of a flowering plant containing an embryo and capable normally of germination to produce a new plant.” See Merriam Webster Online Dictionary, available at <http://www.merriam-webster.com/dictionary/seed>. In order to become the crop or final end product to which the lien attaches, the seed must germinate and become the plant. In contrast, a young turkey does not undergo any changes in order to

become the end product of an adult turkey. Rather, it already is the final end product—just bigger.

By its holding that a turkey qualifies as “supplies” under the North Dakota Agricultural Supplier’s Lien statute, the District Court provided an open-end authorization of unlimited scope. The District Court’s decision violated the basic rules of statutory construction in ignoring the actual text of the statute and the clear intent of the North Dakota Legislature to exclude “livestock” and/or “poultry” from the scope of N.D. Cent. Code § 35-31-01. 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.

III. Even If Young Turkeys Qualify as “Supplies” Under N.D. Cent. Code § 35-31-01, There is No 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.

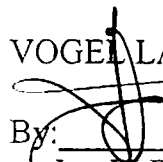
See N.D. Cent. Code § 35-31-03 (emphasis added). Thus, while Section 35-31-01 creates the agricultural lien for an individual who furnishes supplies used in the production of “crops, agricultural products, or livestock,” it is Section 35-31-03

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.” *Contra In re Bernstein*, 230 B.R. 144, 149-151 (Bankr. N.D. 1999). Accordingly, even if Willmar Poultry actually has a valid agricultural supplier’s lien under Section 35-31-01, it still does not have superpriority under Section 35-31-03.

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 22nd day of April, 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 22nd day of April, 2009, affiant served the within:

- 1. **Appendix of Appellant; and**
- 2. **Brief of Appellant**

by placing true and correct copies in an envelope addressed as follows:

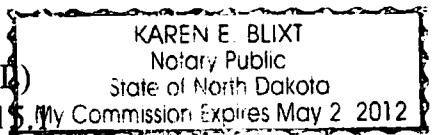
Lowell Bottrell	(1 Copy)	Supreme Court	(8 Copies)
Michael L. Gust		Judicial Wing, First Floor	
Anderson, Bottrell, Sanden & Thompson		State Capital	
4132 30 th Ave. South, Suite 100		600 E. Boulevard Ave., Dept. 180	
PO Box 10247		Bismarck, ND 58505-0530	
Fargo, ND 58106-0247			

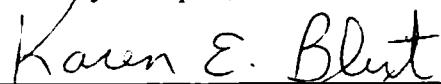
and causing them to be placed in the mail at Fargo, North Dakota with first-class postage prepaid.



Shannon Elbert

Subscribed and sworn to before me this 22nd day of April, 2009.

(SEAL)
762015




Notary Public