73 Md. Op. Atty. Gen. 349 (Md.A.G.), 1988 WL 482024
Office of the **Attorney General**

State of Maryland
Opinion
No.
88
-
055
December 19, 1988

***1 VEHICLE LAWS—TOWING—FEES—LIENS—CIRCUMSTANCES UNDER WHICH VEHICLE OWNER MUST PAY TOWING AND STORAGE CHARGES**

The Honorable Albert R. Wynn
8700 Central Avenue—Suite 306
Landover, Maryland 20785

Dear Senator Wynn:
You have requested our **opinion** on whether a vehicle owner who parks on private property without permission is liable for the cost when the property owner has the vehicle towed away. In addition, you ask whether a tow truck operator who tows a vehicle at the request of a property owner may retain the vehicle until the vehicle owner pays the towing and storage fees.

For the reasons set forth below, we conclude as follows:

1. A vehicle owner who parks without permission on private property and whose vehicle is towed away at the direction of the property owner is liable for reasonable towing and storage costs if (i) a conspicuously posted sign on the property provides unambiguous notice to the vehicle owner that the owner bears the liability for those costs, or (ii) a statute or ordinance imposes liability on the vehicle owner.

2. A tow truck operator who, at the request of the property owner, tows and stores a vehicle parked without permission on private property may retain the vehicle until the vehicle owner pays reasonable towing and storage costs if (i) a conspicuously posted sign on the property provides unambiguous notice to the vehicle owner that an improperly parked vehicle will be subject to such a lien, or (ii) a statute or ordinance creates a lien in favor of the tow truck operator.

I

Liability For Towing And Storage Costs

A. Common Law

There are two types of implied contracts, one implied in fact and the other implied in law. Parties who manifest their agreement by conduct create a contract implied in fact. This contract is actually no different than one in which the parties manifest their agreement by words; the law views both modes of assent as express contracts. See 1 Corbin on Contracts § 18, at 41 (1963). A contract implied in law, however, commonly referred to as a "quasi-contract," is not a true contract, but rather is "the theory of recovery by which courts give a remedy similar to that historically available for breach of contract when courts find that justice requires such a remedy." 1 Corbin on Contracts § 19A, at 34-35 (1984 Supp.). A quasi-contract is imposed "[i]f the plaintiff reasonably expected to be paid, if the defendant reasonably expected to have to pay, or if society's reasonable expectations of security of person and property would be defeated by non-payment." Id.

In our view, these contract principles logically apply to a trespassing vehicle owner's liability for the cost of towing and storage. In Capson v. Superior Court, 139 Ariz. 113, 677 P.2d 276 (1984), a towing company was charged with theft for refusing to release an automobile until the vehicle owner paid a $75 towing fee. The vehicle owner had parked in an area

where signs prohibited parking and "indicated that violators' automobiles would be towed away and a $75 towing fee incurred." 677 P.2d at 277. When the owner attempted to retrieve his vehicle, the towing company, which had been employed by the property owner, refused to return the vehicle until the fee was paid.

***2** The towing company argued that there was an implied agreement by the vehicle owner to pay the $75 towing fee, because the no-parking signs made the cost clear. The court recognized that a contract in fact might exist since the driver parked in a designated no-parking area and was placed on notice of the financial consequence of his decision. 677 P.2d at 278.

Even if such an express contract were not found, we believe that a court would find an implied contract and impose the financial burden on a trespasser who parked in defiance of a prominently posted warning sign. "Society's reasonable expectation," in Corbin's phrase, is that the trespasser ought to bear the financial burden of rectifying the trespass. After all, a property owner has the right to have his property free from trespass. See Murrell v. Trio Towing Service, Inc., 294 So.2d 331, 332 (Fla.App.1974).[1]

B. Statutory Obligation

The obligation to pay may also be statutory. In T.R. Ltd. v. Lee, 55 Md.App. 629, 465 A.2d 1186 (1983), a police officer, acting pursuant to a county ordinance, directed a towing company to "unload, right, tow and store" an overturned tractor-trailer. 55 Md.App. 630. When the vehicle owner demanded that the towing company return the tractor-trailer, the company refused "until all assessed towing and storage charges were paid." Id.

The police had directed that the tractor-trailer be towed pursuant to § 26-160 of the Prince George's County Code, which provided that "the County Police Department shall have authority to impound and remove [an unattended motor vehicle] and charge the owner thereof the costs of towing, storage and any other charges incurred in connection therewith." The court held that "a debt in the amount of reasonable towing and storage charges was incurred" by the vehicle owner under the authority of § 26-160. 55 Md.App. at 633.

Although the ordinance did not apply to a request made by a private property owner, we have no doubt that the court's rationale would apply if the General Assembly or a local jurisdiction enacted a law that authorizes property owners to remove an illegally parked vehicle and imposes the financial burden on the vehicle owner.[2] Such a law would provide the basis for holding a vehicle owner liable for the cost of towing and storing a trespasser's vehicle. See, e.g., Chapter 30C of the Montgomery County Code.

II

Creation Of A Lien

A. Common Law

In T.R. Ltd., the Court of Special Appeals defined a common law lien as " 'the right "in one man to retain that which is in his possession belonging to another till certain demands of him [by] the person in possession are satisfied." ' " 55 Md.App. at 634 (quoting Brown, The Law of Personal Property § 107 (2d ed. 1955).[3] The basis of such a lien is an express or implied agreement between the owner of the goods and the person who renders some service with respect to those goods; thus, it must be consensual. Id. In T.R. Ltd., the police authorized the towing pursuant to a county ordinance. Because the vehicle owner had neither expressly nor impliedly consented to being towed, the court held that the towing company had no common law possessory lien since "[t]he debt ... arose not out of contract but by operation of law." 55 Md.App. at 635.

***3** Similarly, in Kunde v. Biddle, 41 Ill.App.3d 223, 353 N.E.2d 410, 415 (1976), the court rejected a towing company's claim that it had a right to retain a vehicle until its owner paid for towing and storage costs: "[T]he mere towing of an automobile from a private parking lot without the owner's or lawful possessor's consent does not create a lien against that automobile. An automobile taken from a private parking lot without the lawful possessor's consent may not be withheld from him for his failure to pay the expense of the towing and storage." See also Younger v. Plunkett, 395 F.Supp. 702, 707-8 (E.D.Pa.1975); Murrell v. Trio Towing Service, 294 So.2d 331 (Fla.App.1974). The towing company must look to the property owner for payment. Murrell v. Trio Towing Service, 294 So.2d at 333 n. 3.

In all of these towing cases, the vehicle owners were not put on notice that a lien would be created if they parked improperly. Thus, they had not impliedly consented to the creation of a lien. In short, these cases suggest that a common law implied lien is not readily created.[4]

Yet T.R. Ltd. and other cases do recognize the possibility of a implied lien, presumably involving conduct by the vehicle owner from which consent to the lien's creation is to be inferred. See Re Dave Noake, 12 Bankr.Ct.Dec. (CRR) 815, 816 (Bankr.D.Vt.1984) (vehicle owner's failure to claim vehicle for two months after notice of towing is deemed consent to lien for storage charges). Cf. Association Financial Services Co. Inc. v. O'Dell, 417 A.2d 604, 606 (Pa.1980) ("nothing in the circumstances of this case suggests implied consent" by a vehicle owner to lien for garageman's expenses).

Hence, although we can find no case so holding, we conclude that a common law possessory lien in favor of a tow truck operator could arise by implication through posting of a sufficiently explicit sign plainly visible to all parkers. The sign would have to do more than notify trespassers that they will be liable for towing costs; it must also put them on notice that their improper parking will subject them to a lien for the payment of those costs.[5]

B. Statutory Lien

In T.R. Ltd., the Court of Special Appeals observed that: "Consent being an important element of a common law lien, any statutory attempt to create such a lien without the element of consent would have to be strictly construed as in derogation of the common law." 55 Md.App. at 635. The court further held that the Prince George's County ordinance authorizing the removal of an unattended motor vehicle and imposing a financial obligation on the vehicle owner "did not create or purport to create any lien as security for debts arising" under the law. Id. The court explained: "There is no mention of a lien, and none can be implied from the mere establishment of a monetary obligation on the owner of a vehicle." Id.

Applying these same strict requirements, the court found no lien to have been created by § 16-202(c)(2) of the Commercial Law Article, which provides as follows: "Any person who, with the consent of the owner, has custody of a motor vehicle and who, at the request of the owner, provides a service to or materials for the motor vehicle, has a lien on the vehicle for any charge incurred for ... [s]torage." The court held that, although the trooper had custody when he impounded the tractor-trailer, he did not have the "possession equivalent to ownership that is required to confer a mechanics' lien...." 55 Md.App. 636.[6]

***4** In sum, no State statute expressly creates a lien in favor of a towing company. Therefore, no statutory lien will be found unless a local ordinance creates it.[7]

III

Conclusion

In summary, it is our **opinion** that:

1. A vehicle owner who parks without permission on private property and whose vehicle is towed away at the direction of the property owner is liable for reasonable towing and storage costs if (i) a conspicuously posted sign on the property provides unambiguous notice to the vehicle owner that the owner bears the liability for those costs, or (ii) a statute or ordinance imposes liability on the vehicle owner.

2. A tow truck operator who, at the request of the property owner, tows and stores a vehicle parked without permission on private property may retain the vehicle until the vehicle owner pays reasonable towing and storage costs if (i) a conspiciously posted sign on the property provides unambiguous notice to the vehicle owner that an improperly parked vehicle will be subject to such a lien, or (ii) a statute or ordinance creates a lien in favor of the tow truck operator.[8]

Very truly yours,

J. Joseph Curran, Jr.
Attorney General
Sharon Krevor-Weisbaum
Staff Attorney

Jack Schwartz
Chief Counsel **Opinions** and Advice

Footnotes

1 In Fields v. Steyaert, 21 Ariz.App. 30, 515 P.2d 57, 61 (1974) (Stevens, J. dissenting in part and concurring in part), Judge Stevens viewed the towing company as a constructive bailee when at the request of the police it towed an illegally parked car. Judge Stevens applied the law of restitution to hold the vehicle owner liable for towing and storage costs since, "[a] person legally assuming custody over another's property for its preservation is entitled to compensation."

Like the law of contracts, a bailment relationship may be implied in fact or in law. 8 Am.Jur.2d Bailments § 62, at 798 (1980). When the law imposes a bailment, it is known as a constructive bailment. Unlike an implied contract, however, these principles may not necessarily impose liability on the owner. See Pollaro v. Borneman, 201 N.W. 525 (S.D.1924) (where there is no privity of contract between the property owner and bailee, the owner is not liable).

2 No State statute regulates private towing practices. Cf. § 26-306 of the Transportation Article (reimbursement for towing costs when government agency wrongfully authorizes towing). In the 1988 Session of the General Assembly, several bills were introduced for the purpose of regulating the towing of vehicles from private property. See, e.g., Senate Bill 534 and Senate Bill 570, House Bill 306, and House Bill 1466. None of these bills, however, was enacted.

3 At its inception, the common law lien was a very limited right in the debtor's goods. It "was limited to those circumstances where a lien creditor undertook to render his services upon the implied promise of the lien debtor to pay him." Younger v. Plunkett, 395 F.Supp. 702, 707 (E.D.Pa.1975). The lien creditor could not sell the debtor's goods to satisfy the lien nor did he have a right of present use and enjoyment. The lien only extended to the goods upon which he rendered his services, not to all of the debtor's property. 395 F.Supp. at 707 n. 6.

4 A towing company that retains a vehicle unlawfully would be liable for conversion. See Bender v. Bender, 57 Md.App. 593, 599, 471 A.2d 335 (1984).

5 In Capson v. Superior Court, the Arizona court did not find that the vehicle owner had impliedly consented to the creation of a lien even though a sign had "indicated that violators' automobiles would be towed away and a $75 towing fee incurred." 677 P.2d at 277.

6 The court also rejected the argument that the towing company had a statutory carrier's lien under § 7-307 of the Commercial Law Article.

7 Under Article 25A, § 5(S) of the Maryland Code, charter home rule counties have power to regulate the towing of vehicles from private property. 73 **Opinions** of the **Attorney General** (1988) [**Opinion** No. 88-023 (May 24, 1988)].

8 This **opinion** does not address the procedural due process issues that might arise from a statute governing towing. See DeFranks v. Mayor and City Council, 777 F.2d 185 (4th Cir.1985); Huemmer v. Mayor and City Council, 632 F.2d 371 (4th Cir.1980).

