STATE OF VERMONT
WINDHAM COUNTY, SS.

BRATTLEBORO SAVINGS AND LOAN ASSOCIATION, F.A.,
Plaintiff,

v.

WINDHAM SUPERIOR COURT
DOCKET NO. 90-2-02 Wmcv

LAURIE A. BALLARD and HARTLAND SERVICE CENTER, INC,
Defendants.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The focal point of this action is a 1998 Chevrolet S10 truck purchased by defendant Ballard with a purchase money security interest held by Brattleboro Savings and Loan Association, F.A., hereafter referred to as "BS&L". After the truck was found in a ditch 65 feet off Interstate 91, and at the direction of a Vermont State Trooper, defendant Hartland Service Center, Inc., hereafter referred to as "HSC", towed and stored the vehicle. Ms. Ballard never claimed the vehicle and BS&L attempted to gain possession. The bank commenced this action after HSC refused to release the vehicle for anything less than full payment of the towing and storage fees which had then accrued. The bank's complaint includes three counts: one to establish that BS&L was entitled to all the costs of collection from defendant Ballard, a second to establish that BS&L is entitled to possession of the truck, and a third for monetary and punitive damages as a result of HSC's ongoing refusal to deliver possession. HSC responded with a counterclaim against BS&L and a crossclaim against Ballard, both for the full amount of its towing and storage fees, as well as litigation costs, attorney fees and any other appropriate relief.

Currently before the court are cross motions for summary judgment from HSC and BS&L, each as to judgment on all counts as to the other.[1] In an entry order on August 5, 2002, the court requested additional briefing suggesting that the parties had relied inappropriately on municipal law and directing them to brief the general and specific applicability of 23 V.S.A. § 1004(a) and relevant traffic committee regulations to the facts of the case. Both HSC and BS&L have done so. Summary judgment is appropriate if the evidence in the record shows no genuine issue as to any material fact and any party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3). Where both parties seek summary judgment, each is entitled to the benefit of all reasonable doubts and inferences in determining whether a genuine issue of material fact exists when the opposing party's motion is being judged. Toys, Inc. v. F.M. Burlington Co., 155 Vt. 44, 48(1990). Finding that the material facts are not disputed, the court concludes as a matter of law that HSC has neither a possessory interest in the truck nor a right to recoup the costs of towing or storage against the bank. Accordingly, HSC's motion for summary judgment against BS&L is **DENIED**. As to BS&L's motion the court cannot determine as a matter of law at this time whether or not BS&L is entitled to possession as against Ms. Ballard. Assuming for purposes of judicial economy that BS&L will establish a right to possession, the court concludes as a matter of law that BS&L is not entitled to punitive damages from HSC. BS&L's motion for summary judgment against HSC is **DENIED**.

The following relevant facts are drawn from the security agreement between Ms. Ballard

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[1] To date, Ballard has made no response nor filed any appearance in the suit and the statutory time for response has lapsed. See V.R.C.P. 12(a), V.R.C.P. 56(c)(1). The original claim was filed on 2/21/02 and the crossclaim on 3/11/02. HSC moved for summary judgment on 5/1/02 and BS&L moved on 6/3/02.

and BS&L as well as HSC's motion for summary judgment and accompanying affidavits by Jeffrey Sullivan, president of HSC. They are undisputed except where noted. On July 30, 2001, Ms. Ballard financed the purchase of a 1998 Chevrolet S10 pickup truck through BS&L . Ms. Ballard executed a promissory note giving the bank a security interest in the vehicle. According to the terms of that agreement, Ms. Ballard agreed to pay all charges incurred by the pickup as they become due. The default provisions include the following:

> You may (after giving notice and waiting a period of time, if required by law): (a) Pay taxes or other charges, or purchase any required insurance, if I fail to do these things (but you are not required to do so).

Allegedly, the bank perfected its security interest in the pickup truck when it received the vehicle title reflecting its first lien. While neither the title nor any relevant testimony is in evidence, HSC relies in part on this fact in its own pleadings.

On January 6, 2002, HSC received a request from the Vermont State Police to remove and tow the pickup truck from Interstate 91 at mile marker 46 in the town of Weathersfield. A tow truck was dispatched but as the pickup truck was in a ditch, 65 feet from the roadway, a second tow was required to pull the vehicle out and transport it to HSC's garage in Hartland. The charge for towing was $450.00. HSC also charges a storage fee of $30.00 per day from the day a vehicle arrives at the garage until the day it is removed.

Three days after the pickup truck was towed, Ms. Ballard contacted the garage to inquire as to the whereabouts of her vehicle and the extent of payment necessary to release it. However, she made no commitment to pick up the truck and never contacted HSC again. After several unsuccessful attempts to contact Ms. Ballard, HSC inventoried the truck locating the loan origination papers which named BS&L. A "courtesy call" was made to the bank. The following

day, Michele Hoard returned the call on behalf of BS&L, seeking information including a breakdown of towing and storage fees. This information was provided and on January 22, 2002, Ms. Hoard relayed an offer to pay HSC's outstanding tow charge.[2] HSC refused to release the truck to the bank for anything less than full payment of all outstanding towing and storage fees. After being advised by Ms. Hoard that the bank intended to send a wrecker to take possession of the vehicle with or without consent, and being notified by BS&L's attorney that the bank demanded the vehicle be released, HSC removed the truck to an undisclosed location. This suit followed.

Beginning with the counterclaim, the court considers HSC's claim to recover the full amount of towing and accrued storage fees from BS&L. Both parties originally relied on a Weathersfield town traffic ordinance to establish the limits and scope of authority for HSC's claim. Because it was not convinced that the Weathersfield ordinance was controlling given that Ballard's truck was found and towed from off the interstate, the court asked the parties to consider the application of 23 V.S.A. § 1004(a). Under that statute, a traffic committee composed of the secretary of transportation, the commissioner of public safety and the commissioner of motor vehicles, "has **exclusive** authority to make and publish, and from time to time may alter, amend or repeal, regulations pertaining to vehicular, pedestrian, and animal

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[2]Contrary to its sworn statement setting out that it did not dispute the facts set forth in either HSC's complaint or motion for summary judgment, BS&L's pleadings make some reference to an alternate version of BS&L's alleged offer on January 22, 2002. According to the bank, it offered to pay both the outstanding towing charge and all storage fees from the date BS&L was contacted by HSC until the date that BS&L was able to remove the vehicle. For reasons set out below, this fact is not material to the conclusions reached herein. In any event, the court could not have considered the bank's version because it was not given any evidentiary basis to do so.

traffic, speed limits and the public safety on the national system of interstate and defense highways and other limited access and controlled access highways within this state." (Emphasis added). The parties accepted the court's suggestion without objection. Moreover, the parties now agree that the relevant traffic committee regulation is TCR 1.7 which provides that "[n]o parking, standing, or stopping is permitted on limited access highways, except in areas designated or in cases or emergency...in no case shall the parking, standing, or stopping exceed a two-hour period....**Vehicles violating this article shall be towed away at the cost of the owner.**" Article 1.7 A, B, and D(emphasis added).[3]

The first issue raised by this regulation concerns who was the pickup's "owner" for purposes of the towing charges. HSC argues that BS&L, as lien holder, was an "owner" for this purpose. No definition of "owner" is provided in the traffic committee regulation itself, nor in any of its related sections. However, the motor vehicle statutes at 23 V.S.A. §2002(5) define "owner" for purposes of a certificate of title to be "a person, other than a lien holder, having the property in or title to a vehicle." Under this definition, Ms. Ballard was the truck's sole owner at the time the vehicle was towed. This conclusion is consistent with the notion that costs should be borne by the party that incurs them. While BS&L had an identifiable interest in the truck's whereabouts on January 2, 2002, as a nonpossessory lien holder, BS&L did not have the right or ability to control its whereabouts at that time. Until the time when it was notified by HSC that the truck had been abandoned by Ms. Ballard, it had no reason to assert its right to possession of

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[3]Both parties acknowledge that it is not known how long the pickup truck was stopped in the ditch prior to towing but neither argues that the pickup truck was towed improperly. In light of either parties' failure to contest this issue and based on the fact that two separate tow trucks had to be called out from Windsor before the vehicle could be towed, the court finds it a reasonable inference that the pickup truck was standing at least two hours prior to towing.

the vehicle nor did it begin to do so. Neither did BS&L make any agreement with Ms. Ballard to assume expenses she incurred in the use or maintenance of the pickup truck. Rather, as part of the loan agreement, Ms. Ballard agreed to pay all charges. Notwithstanding BS&L's offer to pay the outstanding towing fees once it was notified of the truck's whereabouts and condition, the court concludes as a matter of law that BS&L was not liable for any of the towing costs at issue in this case.

In the alternative, HSC argues that it is entitled to a lien on the pickup in lieu of payment. TCR 1.7 makes no mention of any authority to impose a lien on motor vehicles to insure payment of towing expenses. In its interpretation of the regulation, the court relies on the plain and ordinary meaning of the language employed. Handy v. Town of Shelburne, 171 Vt. 336, 341(2000). It cannot read something extra into the regulation which is not already there or which is not necessary to effect the purpose of the regulation. See State v. O'Neill, 165 Vt. 270, 275(1996)("It is inappropriate to read into a statute something which is not there unless it is necessary in order to make the statute effective.") HSC has not argued nor is the court of the opinion that anything requires the construction HSC desires. Neither can it adopt HSC's further contention that it is entitled to a statutory lien on Ballard's vehicle under 23 V.S.A. §1753. While that statute permits a municipality to enact an ordinance which authorizes the imposition of a lien against a motor vehicle and its owner for failure to pay reasonable towing and service charges, the statute does not apply because it is prempted by the traffic committee regulations. Even assuming that Weathersfield had expressly enacted such an ordinance (which it has not), regulations authorized by the traffic committee are exclusive of laws and regulations applicable to highways generally. See 23 V.S.A. § 1004(b).

Finally, HSC's contention that it is entitled to a lien as a supplier of services or materials is without merit. HSC has not cited any statute or case law that recognizes the right. A so-called mechanics lien, as provided by 9 V.S.A. §§ 1921-1928, relates only to improvements to real property and is intended to provide limited protection for construction project suppliers. See Newport Sand & Gravel Co., v. Miller Concrete Constr., Inc., 159 Vt. 66, 69(1992). An artisan lien, recognizes the right of one who makes, alters or repairs an article of personal property at the owner's request to assert a lien against the property until his or her reasonable charges are paid. 9 V.S.A. § 1951; Bergman v. Gay, 79 Vt. 262, 264(1906). The later provides protection only when an owner's property is improved at the owner's request. These conditions have not been met in this case where the pickup, an item of personal property, was towed and stored without the permission of its owner and where no value has been added to it.

The majority of jurisdictions have concluded that a service station cannot acquire a lien for towing or storing an automobile absent specific statutory authority. See 38 Am Jur 2d Garages, Service Stations, and Parking Facilities §§129 and 134. For example, noting that under common law a bailee or artisan lien arises only when the bailee or artisan imparts or confers value upon the automobile, the Ohio Court of Appeals rejected a garage keeper's claim that he was entitled to a lien for towing and storage fees for a car towed from the scene of an accident at police request. Candler v. Ash, 372 N.E. 2d 617, 136-37(1976); see also Capson v. Arizona, 677 P. 2d 276, 278(Ariz. 1984)("At common law, a garageman acquired no lien for towing or storage of a vehicle."); Alabama Farm Bureau Mutual Casualty Company v. Lyle Service Ambulance-Wrecker, 395 So. 2d 90, 93(Ala. App. 1987)("It has been held generally that a common-law lien is not applicable to towage and storage charges on an automobile."). These

cases support this court's conclusion that in the absence of statutory authority HSC is not entitled to claim a lien on the pickup truck for its towing fees.

Therefore, the court finds as a matter of law that HSC has no claim or interest in the truck. As a result, the court need not reach the question of whether storage fees are included in what HSC is entitled to recoup from Ms. Ballard because it has no bearing on either BS&L's liability or its claim for possession. However, the issue of BS&L's right to possession as against Ms.Ballard is not resolved and cannot be within the scope of this motion. The court was not provided with evidence material to the issue therefore it cannot determine as a matter of law BS&L's ultimate claim to possession of the pickup truck.

In deference to what appears to be a good probability that BS&L will succeed on this claim at later date and in an effort to advance judicial economy in an issue where the evidence is available, the court considers a final issue raised by BS&L's claim for punitive damages. "The purpose of punitive damages is to punish conduct which is morally culpable... [and] to deter a wrongdoer... from repetitions of the same or similar actions." Brueckner v. Norwich University, 169 Vt. 118, 129(1999)(citation omitted). Punitive damages are permitted only when the defendant is alleged to have acted intentionally and deliberately with malice. Id. They are inappropriate where the evidence shows only wrongful conduct that is not malicious. Id. at 129-30. In this matter, BS&L has done nothing to outline its justification for punitive damages. Having reviewed the evidence which establishes that HSC maintained possession of the pickup truck without a legal claim of right, the court finds no evidence that HSC was motivated by maliciousness . It sees only wrongful conduct. Accordingly, BS&L's claim for punitive damages can be denied as a matter of law.

In this and all other matters discussed herein, BS&L's motion for summary judgment is **DENIED**.

Dated at NEWFANE, Vermont, this 4th day of October, 2002.

Richard W. Norton

Hon. Richard W. Norton