STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

KLINGLER AUTOMATIC INDUSTRIES, INC.,
and DOUGLAS PETERSON, Trustee,

Plaintiffs,

v

File No. 01-21495-CB
HON. PHILIP E. RODGERS, JR.

DREW WAGENER d/b/a INDUSTRIAL
EQUIPMENT SERVICE,

Defendant.
/

Byron P. Gallagher, Jr. (P42996)
Attorney for Plaintiffs

James Hafke (P56656)
Attorney for Plaintiffs

Robert W. Brott (P11253)
Attorney for Defendant

DECISION AND ORDER DENYING
PLAINTIFFS' MOTION FOR POSSESSION

This is a claim and delivery action involving two bulldozers.[1] The bulldozers were owned by Z-Con, Inc. Z-Con is in receivership. The Plaintiff Douglas Peterson is the Trustee of the Z-Con Receivership Trust. The Plaintiff Klingler Automatic Industries, Inc., has a perfected security interest in the bulldozers pursuant to Financing Statements and Financing Agreements. The Plaintiffs will be collectively referred to herein as "Klingler." The bulldozers were delivered by Z-Con to the Defendant Drew Wagener d/b/a Industrial Equipment Service ("Industrial") for repairs. Industrial has refused to return the bulldozers until the charges for the repairs and storage are paid.[2]

[1]The original Verified Complaint involved only one bulldozer but the Complaint was amended on May 16, 2001 to include a second bulldozer.

[2]Although the allegations in the Plaintiffs' First Amended Complaint and the Defendant's Answer thereto are somewhat confusing, it would appear that the first bulldozer is a 1973 Caterpillar

Klingler filed a Motion for Possession Pending Judgment. The Court heard the oral arguments of counsel on June 18, 2001 and took the matter under advisement. The Court requested that counsel brief the issue of whether the common law artisan's lien was abrogated by the Garage Keeper's Lien Act. Both sides have filed their supplemental briefs. The Court now issues this written decision and order.

MOTION FOR POSSESSION PENDING JUDGMENT PURSUANT TO MCR 3.105

I.

Klingler seeks possession of the bulldozers pending judgment. MCR 3.105. The basis for Klingler's motion was that Industrial "intends to sell the bulldozer at an auction to be conducted by Darryl Dunkel in Harrison, Michigan on April 19, 2001 to satisfy his lien." In response to the motion, Industrial admitted that he at one time intended to sell the bulldozer at said auction. But, Industrial further alleges that he did not do so and will not relinquish possession because he "intends to retain possession of the Bulldozer until he is paid for the material and labor supplied, storage costs and interest as allowed under his common law artisan's lien."

II.

Industrial contends that it has a common law artisan's lien upon the bulldozers for the cost of the repairs and storage charges and thus has the right to retain possession until the charges are paid. Klingler argues that the common law artisan's lien was superseded by the Legislature's enactment of the Garage Keeper's Lien Act and that Industrial cannot assert a lien against either bulldozer in excess of $5,000 pursuant to MCL 570.303. Klingler relies upon the general principle of statutory construction that "the Legislature, in enacting a statute, is presumed to have knowledge of contrary common law rules which the statute will abrogate." *Dep't of Treasury v Campbell*, 107

Model D6D Serial Number/VIN 10K9614 with a fair market value of approximately $27,000. Industrial claims a lien on this bulldozer in the amount $6,551.98. The second bulldozer is a 1979 Caterpillar Model D6D Serial Number/VIN 4X5175 with a fair market value of approximately $39,000. Industrial claims a lien on this bulldozer in the amount of $39,255.69.

of contrary common law rules which the statute will abrogate." *Dep't of Treasury v Campbell*, 107 Mich App 561; 309 NW2d 668(1981). Industrial, on the other hand, relies upon *Nickell v Lambrecht*, 29 Mich App 191, 198; 185 NW2d 155 (1971) in which the Court of Appeals chose to "follow the lead of the courts of other jurisdictions, which, in general, have decided this question in favor of the continued viability of the common-law lien."

III.

"It is a 'well-settled principle of the common law that he who by labor, skill or materials adds value to the chattel of another whether under an express or an implied agreement has a possessory lien thereon for the value of his services and may retain the chattel in his possession until the same be paid.' Brown, the Law of Personal Property (2d ed), § 107, p 511." *Nickell v Lambrecht*, 29 Mich App 191; 185 NW2d 155 (1971). The Michigan statutory artisan's lien goes back to at least 1846. R.S.1846, ch. 126, § 36; now, MCL § 570.186 (Stat. Ann.1953 Rev. § 26.402). The garage-keeper's lien act was adopted in 1915. PA1915, No. 312; now, MCL § 570.301 (Stat. Ann.1960 Rev.§ 9.1711). *Id* at 197.

In *Nickell,* a highway tractor was sold under a security agreement and the purchaser authorized the defendant to make repairs following a collision. After the repairs were made, the purchaser refused to pay for them. The registered owner of the tractor filed an action to recover possession. The circuit court gave the owner a judgment for $900 for loss of the beneficial use of the vehicle and denied the defendant's claim of lien and counterclaim for the value of repairs. The defendant appealed. The Court of Appeals held that a common-law possessory lien arises in favor of the artisan for the amount of the repairs, and such lien takes priority over the unpaid seller's security interest. In so deciding, the Court of Appeals had to resolve the question of whether the common-law artisan's lien was replaced by the enactment of the statutory artisan's lien and, as to motor vehicles, by the enactment of the Garage Keeper's Lien Act. The Court chose to "follow the lead of the courts of other jurisdictions, which, in general, have decided this question in favor of the continued viability of the common-law lien." *Id* at 198. The Court chose not to "embark on a futile search for legislative intention." *Id.*

IV.

The Legislature may choose to change a common law cause of action or to abolish a cause of action altogether. *McDougall v Sanchz*, 218 Mich App 501; 554 NW2d 56 (1996), citing *O'Brien v Hazelet & Erdal*, 410 Mich 1, 15; 299 NW2d 336 (1980), (the Legislature's constitutional power to change the common law authorizes it to extinguish common-law rights of action); *Fennell v John J. Nesbitt, Inc*, 154 Mich App 644, 649; 398 NW2d 481 (1986) (the wide-reaching power of the Legislature permits it to entirely abrogate a common-law right). See also, *Bean v McFarland*, 280 Mich 19; 273 NW 332 (1937) (constitutional retention of common law is expressly conditioned upon the right to abrogate the same or any part thereof).

However, in *Gruskin v Fisher*, 70 Mich App 117, 123-124; 245 NW2d 427 (1976), rev on other grounds, 405 Mich 51; 273 NW2d 893, the Court of Appeals said:

> Legislative amendment of the common law is not lightly presumed.
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> > The rule has been declared by the United States Supreme Court, as follows: 'No statute is to be construed as altering the common law, further than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express.' A statute may take away a common law right, but there is a presumption that the legislature has no such purpose.
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> This rule of statutory interpretation has received wide adoption, and is employed where there is reasonable doubt whether a change in the common law which is claimed to have been made by a statute should apply to a particular situation or circumstance. If a change is to be made in the common law, therefore, the legislative purpose to do so must be clearly and plainly expressed. 3 Sutherland, Statutory Construction, § 61.01, p 41 (Sands Ed, 1974).
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> See also, 73 AmJur2d, Statutes, § 185.
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> Nor will statutes be extended by implication to abrogate the established rules of common law. *McKinney v Caball*, 40 Mich App 389; 198 NW2d 713 (1972), *Silver v International Paper Co*, 35 Mich App 469; 192 NW2d 535 (1971), see also, *Yount v National Bank of Jackson*, 327 Mich 342; 42 NW2d 110 (1950).

In *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 507-508; 309 NW2d 163 (1981), our Supreme Court said:

> Although a statute which expressly extinguishes a common-law right is a proper exercise of legislative authority, *Myers v Genesee County Auditor*, 375 Mich 1; 133 NW2d 190 (1965), statutes in derogation of the common law must be strictly construed, *Morgan v McDermott*, 382 Mich 333; 169 NW2d 897 (1969), and will not be extended by implication to abrogate established rules of common law, *Bandfield v Bandfield*, [117 Mich 80; 75 NW 287 (1898)].

"The legislature should speak in no uncertain manner when it seeks to abrogate the plain and long-established rules of the common law. Courts should not be left to construction to sustain such bold innovations." *Bandfield, supra.*

In *Knodzer v Wayne Co Sheriff*, 219 Mich App 632; 558 NW2d 215 (1997), quoting *Arritt v Fisher*, 286 Mich 419, 425; 282 NW 200 (1938), in turn quoting *Bandfield v Bandfield*, 117 Mich 80; 75 NW 287 (1898), in turn quoting 9 Bacon's Abridgment, title "Statute," I(4), pp 244-255, our Supreme Court noted:

> In all doubtful matters, and where the expression is in general terms, statutes are to receive such a construction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any alteration in common law, farther or otherwise than the act expressly declares.

The Garage Keeper's Lien Act does not *expressly* abrogate the common law artisan's lien with respect to motor vehicles. Nor does the statute clearly evidence such an intent. To the contrary, it affords an additional method by which a lien may be effected. *Pitrowski v Pitrowski*, 71 Mich App 213; 247 NW2d 354 (1976) (change of name statutes held not to abrogate or supersede the common law, but to affirm the common law right and afford an additional method by which a name change may be effected as a matter of public record). This Court will not extend the statute by implication to abrogate an established right of action at common law. *Zeeland Community Hosp v Vander Wal*, 134 Mich App 815; 351 NW2d 853 (1984), citing *Bandfield v Bandfield*, 117 Mich 80; 75 NW 287 (1898). See also, *Prentis v Yale Manufacturing Co,* 116 Mich App 466; 323 NW2d 444 (1982) and *Silver v International Paper Co*, 35 Mich App 469, 472; 192 NW2d 535 (1971), lv den 386 Mich 764 (1971).

Were the Court to accept Plaintiffs' argument, secured parties would receive a windfall. The equipment's value has been enhanced by the labor and materials reasonably used by Defendant to repair it. If the Legislature intended to provide a windfall to banks, finance companies and other

secured creditors on the backs of garage keepers, surely it would have stated so clearly and unambiguously. Here the windfall is substantial, as the equipment had only scrap value absent Defendant's repairs. Therefore, this Court is of the opinion that, when the bulldozers were sold under Klingler's security agreement and Z-Con authorized the repairs by Industrial, a common law possessory lien arose in favor of Industrial for the amount of the repairs. Such lien takes priority over Klingler's unpaid security interest.

V.

In order to prevail on its motion for possession pending judgment, Klingler must establish (1) that its right to possession is probably valid; and (2) that the bulldozers will be damaged, destroyed, concealed, disposed of, or used so as to substantially impair its value, before trial.[3] The Court, having decided that Industrial has a common law artisan's lien upon the bulldozers, Klingler cannot show that its right to possession is probably valid. Furthermore, Industrial must maintain possession in order to assert its common law lien. Finally, Industrial has no motivation to damage, destroy, conceal, dispose of or use the bulldozers so as to substantially impair their value because Industrial's lien will be satisfied out of whatever proceeds are realized when the bulldozers are sold.

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[3]MCR 3.105(E) provides, in pertinent part, as follows:

> (b) At the hearing, each party may present proofs. To obtain possession before judgment, the plaintiff must establish
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> **(i) that the plaintiff's right to possession is probably valid; and**
>
> (ii) that the property will be damaged, destroyed, concealed, disposed of, or used so as to substantially impair its value, before trial.

[Emphasis added.]

CONCLUSION

Industrial has a valid common law artisan's lien upon the bulldozers and must maintain possession in order to assert that lien. Plaintiffs have failed to establish that its possession is probably valid and that the bulldozers will be damaged, destroyed, disposed of, or used so as to substantially impair their value, before trial. Therefore, Plaintiffs' motion for possession pending judgment is denied.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 7/13/01