

OPINION NO. 85-064

Syllabus:

When a certificate of title of a motor vehicle is presented to the clerk of the court of common pleas pursuant to R.C. 4505.13 for the purpose of having the clerk note the cancellation of a security interest appearing on the face of the certificate of title, the clerk may, in order to ascertain the genuineness of the cancellation appearing on the certificate, do whatever is reasonably necessary to determine whether the possessor of the certificate of title has the authority to present the certificate to the clerk for notation of the cancellation.

To: Lynn C. Slaby, Summit County Prosecuting Attorney, Akron, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, October 29, 1985

I am in receipt of your request for my opinion concerning the interpretation of R.C. 4505.13, which governs the discharge of liens on motor vehicles.

Before addressing your specific concern, it is necessary for me to discuss briefly the provisions of R.C. Chapter 4505, Ohio's certificate of title act. R.C. 4505.03 provides as follows:

No person. . . shall sell or otherwise dispose of a motor vehicle without delivering to the purchaser or transferee thereof a certificate of title with such assignment thereon as is necessary to show title in the purchaser; nor shall any person. . . purchase or otherwise acquire a motor vehicle without obtaining a certificate of title for it in his name. . . .

A person acquiring a motor vehicle obtains no right, title, claim or interest in or to the motor vehicle until he has issued to him a certificate of title (or a manufacturer's or importer's certificate where applicable, see R.C. 4505.05). R.C. 4505.04. Application for a certificate of title is filed with the clerk of the court of common pleas, accompanied by the certificate of title previously issued for the motor vehicle, duly assigned. R.C. 4505.06. "[I]f satisfied that the applicant is the owner of such motor vehicle and that the application is in the proper form, the clerk shall issue a certificate of title over his signature and sealed with his seal."¹ R.C. 4505.06. See R.C. 4505.07. Pursuant to R.C. 4505.08:

The clerk of the court of common pleas shall issue certificates of title in triplicate. One copy shall be retained and filed by him in his office, and the other copy shall be transmitted on the day it is issued to the registrar of motor vehicles. The clerk shall sign and affix his seal to the original certificate of title and, if there are no liens on said motor vehicle, shall deliver said certificate to the applicant. If there are one or more liens on said motor vehicle, said certificate of title shall be delivered to the holder of the first lien. (Emphasis added.)

R.C. 4505.13 governs the recording of security interests covering a motor vehicle. See R.C. 1309.21. Division (B) of R.C. 4505.13 reads in part as follows:

[A]ny security agreement covering a security interest in a motor vehicle, if a notation of the agreement has been made by the clerk of the court of common pleas on the face of the certificate of title, is

¹ Summit County has adopted a charter form of county government. Section 4.01 of Article IV of the Summit County charter currently provides, however, that the duties of the clerk of the court of common pleas "shall continue to be determined in the manner provided by general law."

valid as against the creditors of the debtor, whether armed with process or not, and against subsequent purchasers, secured parties, and other lienholders or claimants. All security interests, liens, mortgages, and encumbrances noted upon a certificate of title take priority according to the order of time in which they are noted on the certificate by the clerk. Exposure for sale of any motor vehicle by its owner, with the knowledge or with the knowledge and consent of the holder of any security interest, lien, mortgage, or encumbrance on it, does not render such security interest, lien, mortgage, or encumbrance ineffective as against the creditors of such owner, or against holders of subsequent security interests, liens, mortgages, or encumbrances upon such motor vehicle.

The secured party, upon presentation of the security agreement to the clerk of the county in which the certificate of title was issued, together with such certificate of title and the fee prescribed by section 4505.09 of the Revised Code, may have a notation of the security interest made on the face of such certificate of title. The clerk shall enter such notation and the date of it over his signature and seal of office, and he shall also note the security interest and the date thereof on the duplicate of the certificate in his files and on that day shall notify the registrar of motor vehicles, who shall do likewise. The clerk shall also indicate by appropriate notation on such agreement itself the fact that the security interest has been noted on the certificate of title.

When the security interest is discharged, the holder of it shall note its discharge on the face of the certificate of title over his signature. Prior to delivering such certificate to the owner, the holder shall present it to the clerk for the purpose of having the clerk note the cancellation of the security interest on the face of the certificate of title and upon the records of the clerk. The clerk, if such cancellation appears to be genuine, shall note such cancellation on the certificate of title, and he shall also note the cancellation on his records and notify the registrar, who shall note such cancellation. (Emphasis added.)

See R.C. 4505.01(A)(1) (defining "lien" to include "a security interest in a motor vehicle"). Your request for my opinion concerns that portion of R.C. 4505.13(B) emphasized above. Your specific question is: "Shall the clerk assume the possessor of the Certificate of Title that has a lien discharged by a lienholder noted on the face of the title, has the authority to present said Certificate of Title to the clerk to have the clerk note the cancellation of said lien on the title and on the clerk's records?"

Whenever there exists a lien covering a motor vehicle, the certificate of title rests in the possession of the first lienholder. R.C. 4505.08. When such lien is discharged, the lienholder is to note its discharge on the face of the certificate of title and present the certificate of title to the clerk in order to have him note the cancellation on the certificate of title and upon his records. R.C. 4505.13. The lienholder may then deliver the certificate of title to the owner of the motor vehicle. *Id.* R.C. 4505.13 provides that, "[t]he clerk, if such cancellation [of the security interest] appears to be genuine, shall note such cancellation on the certificate of title, and he shall also note the cancellation on his records and notify the registrar, who shall note such cancellation."²

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Once the clerk is satisfied that the cancellation is genuine, he has a mandatory duty to make the required notations on the certificate and on his records. See generally *Heid v. Hartline*, 79 Ohio App. 323, 325-26, 73 N.E.2d 524, 526 (Tuscarawas County 1946) ("whenever the word 'shall' or 'may' is used in a statute and the rights and interest of the public or third persons depend upon the exercise of the power or the performance of the duty to which such word refers, it is to be construed as mandatory and not directory"). See also 1979 Op. Att'y Gen. No. 79-097.

It is apparent from R.C. 4505.08 and R.C. 4505.13 that, in the ordinary course of events, the first lienholder will have possession of the certificate of title, and that once the security interest is discharged, the lienholder is responsible for noting the discharge of the security interest on the certificate and presenting the certificate to the clerk. You have asked about a situation in which a person other than the lienholder presents the certificate to the clerk. It appears that the focus of R.C. 4505.13 is upon assuring that the presentation is made before the certificate is delivered to the owner, so that the clerk may note the discharge on the certificate of title and so that the records of the clerk and the registrar will reflect the discharge of the security interest. I see no reason why the lienholder may not designate an agent to physically present the certificate to the clerk. See generally Arnsion v. General Motors Corp., 377 F. Supp. 209, 213 (N.D. Ohio 1974) ("in order to establish an agency relationship there must be a relationship between one party and another under which one acts for and in the place of another"); Surber v. Woodruff, 10 Ohio Misc. 2d 1, 4, 460 N.E.2d 1164, 1168-69 (C.P. Clermont County 1983) ("[u]nder Ohio law an agency relationship is a consensual relationship (between two persons) where the agent has the power to bind the principal, and the principal has the right to control the agent").

The clerk, pursuant to the provisions of R.C. 4505.13, has the authority to determine the genuineness of the cancellation, and may do whatever is reasonably necessary to assure himself that the cancellation is genuine. See generally State ex rel. Hunt v. Hildebrant, 93 Ohio St. 1, 112 N.E. 138 (1915). See also Scot Lad Foods, Inc. v. Secretary of State, 66 Ohio St. 2d 1, 8, 418 N.E.2d 1368, 1373 (1981) (public officer who is acting within the scope of his authority is not liable in his individual capacity in the absence of bad faith for the failure to properly perform a duty involving judgment and discretion; "[h]owever, it has also generally been the common law in Ohio that the rule that officers may not be held accountable for errors of judgment does not apply to ministerial acts except as such may be of a quasi-judicial nature") (citations omitted). In the discharge of this responsibility, the clerk has a great deal of discretion in determining how to ascertain the authority of one who presents a certificate of title for cancellation of a lien. See State ex rel. Hunt v. Hildebrant. The clerk may choose to assume that the possessor of the certificate has the authority to present the certificate, unless circumstances exist which indicate to the clerk that the cancellation is not genuine. It appears reasonable that the clerk may, if he desires, regularly inquire into the authority of the possessor to present the certificate, as part of his determination of the genuineness of the cancellation. The clerk, could, as you suggest, require the possessor to present written authorization from the lienholder to present the certificate. I do not believe, however, that a clerk may conclusively presume that, merely because someone other than the lienholder has presented the certificate of title, the cancellation is not genuine.

In conclusion, it is my opinion, and you are advised, that when a certificate of title of a motor vehicle is presented to the clerk of the court of common pleas pursuant to R.C. 4505.13 for the purpose of having the clerk note the cancellation of a security interest appearing on the face of the certificate of title, the clerk may, in order to ascertain the genuineness of the cancellation appearing on the certificate, do whatever is reasonably necessary to determine whether the possessor of the certificate of title has the authority to present the certificate to the clerk for notation of the cancellation.