WWR #20688143

No. 2018-0064

IN THE SUPREME COURT OF OHIO

EVANS AUTOMOTIVE REPAIR INC.,	)	
	)	
Plaintiff-Appellant,	)	On Appeal from the Franklin County Court of
	)	Appeals, Tenth Appellate District
vs.	)	
	)	Court of Appeals Case No. 16AP-390
MAURICE L. CHARLTON, JR. ET AL.	)	
	)	
Defendant-Appellee.	)	
	)	

MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEE, BMI FEDERAL CREDIT UNION

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I. THIS CASE HAS NO PUBLIC OR GENERAL INTEREST; NOR DOES IT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION

Evans Automotive Repair Inc.'s hyperbole is not a basis for the Ohio Supreme Court to accept jurisdiction here. Nor is it a persuasive response to the unanimous decisions of the trial court judge and three appellate judges that reviewed the underlying case. Nor does it constitute a basis to overturn longstanding precedent by this Court in order to enable auto repair shops to have higher lien priorities over a motor vehicle than the specific statutory priority accorded by the lien notation affixed to the title by local credit unions like Appellee BMI Credit Union, banks, and other financial institutions which provide the financing for Ohio consumers to purchase their automobiles. Indeed, if the issue in this case was truly the "dangerous" "sabotage" of "thousands" of Ohio businesses that Evans suggests, presumably Ohio would have no auto repair shops currently in business. And we would have expected an enormous outcry from Ohio car owners with no place to get their cars repaired. And that, in turn, would surely have attracted the attention of the Ohio Legislature to correct this perceived injustice created ***over fifty years ago*** when this Court resolved the issue in the cases of *Commonwealth Loan Co. v. Berry*, 2 Ohio St. 2d 169 (1965) and *Snyder v. Ryan*, 2 Ohio St. 2d 171 (1965) (collectively "*Berry*").

But none of these "parade of horribles" problems have come to pass during the past half century. And there is no evidence, beyond Evans' fiery rhetoric, to suggest the imminent extinction of auto repair businesses in Ohio. Therefore, it is evident that Evans' interest here is less about the well-being of Ohio's auto repair businesses than Evans' own fact-specific irritation at being stiffed on a repair bill for $169.95 by not being able the keep the car to the prejudice of BMI's rights as a priority title indorsed purchase money lien-holder.

Fortunately, as discussed by the Tenth Appellate District in its well-reasoned decision in this case, there is no need to panic; no justification to judicially overrule Ohio's Legislature and

more than a half century of precedent; and no reason to create the uncertainty and turmoil occasioned when long-established precedent is tossed aside for the convenience of one irate litigant. And if a favorite auto repair shop is gone tomorrow, it is not likely because its lien interest in a repaired vehicle fails to take precedence over the lien priority of the credit union or other financial institution that financed and made the purchase of the vehicle possible. This is not a case of public, great or frankly *any* general interest.

Similarly, Evans appears to argue that when this or any other court interprets a statute, and a litigant disagrees with that interpretation, that the disagreement is catapulted into a constitutional crisis between the Legislative and Judicial branches. This effort to justify Ohio Supreme Court intervention, while certainly imaginative, is not a basis for a legitimate constitutional question. If that were the case, Ohio would need dozens more Supreme Courts to hear all the cases which would arise each time a court construed a statute and the losing party was not pleased with the result. Once more, this is simply more overblown rhetoric which only serves to erode Evans' already problematic claim to this Court's jurisdictional attention.

This case does not involve any, let alone a substantial, constitutional question; nor is it a matter of public or great interest to justify this Court's attention. It is simply one auto repair shop's "sour grapes" because it apparently did not know the law and did not take proper steps to insure it was going to get paid for its work. Maybe next time Evans will require a deposit or take a valid credit card number. Regardless, this appeal should be declined.

II. STATEMENT OF THE CASE AND FACTS

The procedural and factual posture of the case described by Evans in its Memorandum, leaving aside Evans' accusations that the courts below decided the case wrongly, are essentially correct and were similarly agreed upon by BMI in its Brief before the Tenth Appellate District.

One point however that Evans declines to mention is that the cost of "repairs" in this case only consisted of a $159.95 charge for a "diagnosis" and a $10.00 fee for a "battery charge;" all in conjunction with a $10.00 a day claim for motor vehicle storage fees that, at the time of Evans, original counterclaim, totaled $2,610.00. However, the "artisan's lien" issue here is not applicable to motor vehicle storage charges.

III. ARGUMENT

Counter-Proposition of Law No. 1

AN ARTISAN'S LIEN DOES NOT TAKE PRIORITY OVER A PERFECTED SECURITY INTEREST NOTATED ON A MOTOR VEHICLE'S TITLE.

Evans correctly points out that the issue of the lien priority between a purchase-money lienholder notated on an automobile title and an automobile repair facility was decided about 53 years ago by this Court in the *Berry* decisions. So what has happened in the intervening years to justify changing this Court's decisions on the issue? Nothing.

In 2001, the Ohio Legislature (as is not uncommon) updated, renumbered and revised Ohio's Uniform Commercial Code statutes under the Ohio Revised Code. Now Evans argues that these changes occurred "[i]n response to *Commonwealth Loan Co. v. Berry, supra* and *Snyder v. Ryan, supra*, on July 1, 2001." [Evans' Memorandum at p. 8]. But this is simply untrue. Evans has never pointed to anything in the Legislative History or otherwise to support this claim.[1] And

[1] In fact, to demonstrate how plainly mistaken Evans' argument is that R.C. 1309.29 was repealed and R.C. 1309.333 enacted in 2001 as a response to the *Berry* decisions, a review of 2001 Ohio SB 74 indicates that the changes to these statutes were part of a much larger periodic updating of Ohio's Uniform Commercial Code. In addition to 1309.29, numerous other provisions were also repealed, renumbered and revised in the course of updating the Ohio Revised Code. As the Synopsis notes, the purpose of the overall Bill was to "amend sections 111.18, 317.12, 317.32, 317.321, 1301.01, 1301.05, 1301.12, 1302.01, 1302.13, 1302.39, 1302.42, 1302.43, 1302.44, 1302.46, 1302.90, 1303.02, 1304.20, 1307.14, 1307.31, 1308.02, 1308.05, 1308.16, 1308.24, 1308.27, 1308.60, 1309.08, 1309.11, 1309.13, 1309.15, 1309.16, 1309.18, 1309.20, 1309.23, 1309.25, 1309.28, 1309.30, 1309.32, 1309.35, 1309.36, 1309.401, 1309.431, 1310.01, 1310.31, 1310.35, 1310.37, 1311.55, 1317.01, 1317.12, 1317.13, 1317.16, 1321.16, 1321.58, 1321.83, 1329.68, 1336.08, 1548.11, 1701.66, 4503.31, 4505.04, 4505.10, 4505.13, and 4519.68; to amend, for the purpose of adopting new section numbers as indicated in parentheses, sections 1309.08 (1309.108), 1309.11 (1309.110), 1309.13 (1309.202), 1309.15 (1309.204), 1309.16 (1309.205), 1309.18 (1309.207), 1309.20 (1309.317), 1309.23 (1309.312), 1309.25 (1309.315), 1309.28 (1309.331), 1309.30 (1309.401), 1309.32

if this were the case, why would the Legislature have waited some 36 years since the last revisions to make those seemingly "urgent" changes based on this Court's purportedly incorrect ruling in the *Berry* cases? The answer is simple. It didn't. Evans' argument for review is meritless.

In reviewing Evans' arguments, the Tenth Appellate District in its decision below in *BMI Fed. Credit Union v. Charlton*, 2017 Ohio 8744, 2017 Ohio App. LEXIS 5183, 2017 WL 5903444, ¶¶14-15 (10th Dist. 2017) rejected Evans' efforts to rewrite the applicable statutes to Evans' benefit. It described the basis for the original decisions – the plain language of the statutes and basic principles of statutory construction – to be materially unchanged from the present statutes. Specifically:

> With the passage of legislation to repeal R.C. 1309.29 and to enact R.C. 1309.333(B), Evans argues that *Berry* no longer applies. But our comparison of the former with the current statute shows similarity in the salient language between each of them. The former statute read as is quoted by the Supreme Court in *Berry:*
>
> > When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a *lien upon goods in possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless*

(1309.334), 1309.35 (1309.339), 1309.36 (1309.402), 1309.401 (1309.528), and 1309.431 (1309.505); to enact sections 1109.75, 1305.18, 1309.101, 1309.102, 1309.103, 1309.104, 1309.105, 1309.106, 1309.107, 1309.109, 1309.201, 1309.203, 1309.206, 1309.208, 1309.209, 1309.210, 1309.301, 1309.302, 1309.303, 1309.304, 1309.305, 1309.306, 1309.307, 1309.308, 1309.309, 1309.310, 1309.311, 1309.313, 1309.314, 1309.316, 1309.318, 1309.319, 1309.320, 1309.321, 1309.322, 1309.323, 1309.324, 1309.325, 1309.326, 1309.327, 1309.328, 1309.329, 1309.330, 1309.332, 1309.333, 1309.335, 1309.336, 1309.337, 1309.338, 1309.340, 1309.341, 1309.342, 1309.403, 1309.404, 1309.405, 1309.406, 1309.407, 1309.408, 1309.409, 1309.501, 1309.502, 1309.503, 1309.504, 1309.506, 1309.507, 1309.508, 1309.509, 1309.510, 1309.511, 1309.512, 1309.513, 1309.514, 1309.515, 1309.516, 1309.517, 1309.518, 1309.519, 1309.520, 1309.521, 1309.522, 1309.523, 1309.524, 1309.525, 1309.526, 1309.527, 1309.529, 1309.601, 1309.602, 1309.603, 1309.604, 1309.605, 1309.606, 1309.607, 1309.608, 1309.609, 1309.610, 1309.611, 1309.612, 1309.613, 1309.614, 1309.615, 1309.616, 1309.617, 1309.618, 1309.619, 1309.620, 1309.621, 1309.622, 1309.623, 1309.624, 1309.625, 1309.626, 1309.627, 1309.628, 1309.702, 1309.703, 1309.704, 1307.705, 1309.706, 1309.707, 1309.708, and 1309.709; and to repeal sections 111.25, 1309.01, 1309.02, 1309.03, 1309.04, 1309.05, 1309.06, 1309.07, 1309.10, 1309.111, 1309.112, 1309.113, 1309.12, 1309.14, 1309.17, 1309.19, 1309.21, 1309.22, 1309.24, 1309.26, 1309.27, 1309.29, 1309.31, 1309.33, 1309.34, 1309.37, 1309.38, 1309.39, 1309.40, 1309.402, 1309.41, 1309.42, 1309.43, 1309.44, 1309.45, 1309.46, 1309.47, 1309.48, 1309.49, and 1309.50 of the Revised Code to adopt the revisions to the secured transactions portion of the Uniform Commercial Code that were recommended by the National Conference of Commissioners on Uniform State Laws and to make related changes in the Uniform Commercial Code and the Revised Code and to declare an emergency."

> *the lien is statutory and the statute expressly provides otherwise.*

(Emphasis added.) *Berry* at 169-70. Current R.C. 1309.333 contains this language:

> (A) As used in this section, "possessory lien" means an interest, other than a security interest or an agricultural lien:
>
> (1) That secures payment or performance of an obligation for services or materials furnished with respect to goods by a person in the ordinary course of the person's business;
>
> (2) That is created by statute or rule of law in favor of the person; and
>
> (3) Whose effectiveness depends on the person's possession of the goods.
>
> (B) A *possessory lien on goods has priority over a security interest in the goods unless the lien is created by a statute that expressly provides otherwise.*

(Emphasis added.) R.C. 1309.333.

Despite the slight variations in wording, we interpret that the statutes similarly require that a possessory lien obtained by someone "furnish[ing]" "services or materials" "with respect to goods" in "the ordinary course of * * * business" has "priority over" a "security interest" *unless* the lien is "statutory" (or "created by statute") and the statute "expressly provides otherwise." R.C. 1309.333 and former R.C. 1309.29 (1962). Though this Court has not previously addressed this exact issue, the Twelfth District Court of Appeals has already expressed this analysis:

> In *Berry*, the Supreme Court found that the statute governing a security interest in a motor vehicle, R.C. 4505.13, prevails over the statute governing the priority of artisan's liens, R.C. 1309.29. Since *Berry*, R.C. 1309.29 has been repealed and R.C. 1309.333, which governs the priority of possessory liens, was adopted. Although *Berry* discussed the interaction between R.C. 1309.29 and R.C. 4505.13, we find that *Berry is* still applicable to the case at bar as R.C. 1309.333 is substantially similar to R.C. 1309.29.

Leesburg Fed. Say. Bank v. McMurray, 12th Dist. No. CA2012-02-002, 2012- Ohio-5435, ¶ 9, fn. 3. Additionally, *Berry* has been cited after R.C. 1309.29 was repealed and R.C. 1309.333 was enacted, without any suggestion that it was superseded by the change in statute. *See Alb United States Auto, Inc. v. Modic,* 8th Dist. No. 98914, 2013-Ohio-1561, 123 (E. Gallagher, J. dissenting); *Leesburg at* ¶ 9-14; *State v. Ames,* 182 Ohio App.3d 736, 2009-Ohio-3509, ¶ 14; *Mannix v. DCB Serv.,* 2d Dist. No. 19910, 2004-Ohio-6672, ¶ 28.

Both the Tenth and Twelfth Appellate Districts have now had occasion to directly con-

strue the most recent U.C.C. statutes at issue and have unanimously concluded nothing of substance has changed to merit overturning the law established since the *Berry* decisions. The former and current statutes both contain the same operative language abnegating the general lien priority to statutes providing for more specific superior lien priority. Unquestionably, R.C. 4505.13 provides for a specific superior lien priority for motor vehicle purchase-money lenders who perfect their security interest by notating their lien on the vehicle title (and thereby providing easily determined public notice of their priority) as occurred in this case.

In its confusing statutory analysis, Evans seeks to create an argument based upon repetition and completely unsupported claims as to legislative intent that flies in the face of the original legislation. That legislation includes a host of different statutes being modified or reorganized for a variety of innocuous purposes. The stated overall purpose was to "adopt the revisions to the secured transactions portion of the Uniform Commercial Code" at that time. *See* footnote 1.

As discussed above, Evans' argument is unsupported and unconvincing.[2] If the Legislature had intended to repeal the *Berry* decisions, nothing would have stopped it from accomplishing that aim much sooner as part of its own bill or by reflecting that alleged intention in the Legislative History; but Evans' points to nothing to support this alleged intention. And the legislation itself could not be clearer that the revisions were simply to update various sections of the Ohio Revised Code to conform to the most recent iteration of the U.C.C.

The *Berry* cases and their progeny have not resulted in the demise of the auto repair business in Ohio. And with recent advances in technology, it is an even simpler matter for any motor vehicle repair shop to look up a motor vehicle's title to determine if the title contains a notated

[2] Additionally, reference is briefly made to a Texas case and a Tennessee case critical of the *Berry* decisions. However, neither case is binding on Ohio courts. And state motor vehicle title and security interest/lien priority laws vary state-to-state and represent different views of how lien priorities should be allocated; hence neither case construes Ohio's title statute and cannot be persuasive in construing Ohio's statutes.

lien and take proper precautions. Contrary to Evans' protestations, the law as it currently stands, and has stood for over half a century, creates and has created no obvious hardship to vehicle repair shops in Ohio; let alone concerns evidenced by anything other than this one instance where Evans' failed to take proper steps to protect its interests through a deposit or valid credit card number. Sour grapes is hardly a good reason to overturn over half of a century of established certainty in the law, which is depended upon by the loan underwriters of the financial institutions and others that do motor vehicle lending – and all simply to appease the crusade of one repair shop over being stiffed on one repair. This is not a matter of great, public or any other interest and does not justify further consideration by this Court.

Counter-Proposition of Law No. 2

A REASONABLE STATUTORY INTERPRETATION DOES NOT CONSTITUTE A CONSTITUTIONAL VIOLATION OF SEPARATION OF POWERS.

While BMI is mindful of Evans' passion over the alleged "gross injustice" of not being paid $169.95 in car "repair" work consisting of a $159.95 for a repair "diagnosis" and a $10.00 battery charge,[3] it is not entirely clear why this constitutes an issue of great constitutional import or justifies repetition of Evans' previously addressed unsubstantiated argument that R.C. 1309.333 "was intended to correct the erroneous interpretation by This Court in [the *Berry* cases]." As previously mentioned (*See* fn. 1), there is nothing in the Legislative history to support Evans' argument.

On the contrary; as previously noted, the U.C.C. modifications, including R.C. 1309.333, were undertaken as stated in the Syllabus in the Act "to adopt the revisions to the secured trans-

[3] It should be noted that although Evans makes reference to storage charges at $10.00 a day, these charges are not subject to any artisan's lien claims or have any relevance to the issues here beyond the observation that certain auto repair shops have been known to charge outlandish storage charges which poorer clientele are unable to pay for; thereby allowing the repair shop to, under certain circumstances, secure title to the vehicle to resell it at profit..

actions portion of the Uniform Commercial Code that were recommended by the National Conference of Commissioners on Uniform State Laws and to make related changes in the Uniform Commercial Code and the Revised Code and to declare an emergency." Thus, Evans' rhetorical question on page 22 of its Memorandum asking "why did the General Assembly" enact 1309.333 in 2001 and repeal R.C. 1309.29 is answered – it was simply a routine updating of the U.C.C. There is nothing provided by Evans to support his view that the various changes throughout the code had anything whatsoever to do with the *Berry* cases or were intended in any way to modify Ohio's interpretation of its long-standing motor vehicle lien title priority law.

Moreover, for all its citation to various statutes, Evans fails to actually quote from R.C. 4505.13(B), the relevant motor vehicle title lien statute it claims does not apply here. And that omission is not inadvertent because it directly serves to undermine Evans' arguments:

> (B) Subject to division (A) of this section, ***any security agreement covering a security interest in a motor vehicle, if a notation of the agreement has been made by a clerk of a court of common pleas on the face of the certificate of title or the clerk has entered a notation of the agreement into the automated title processing system*** and a physical certificate of title for the motor vehicle has not been issued, ***is 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.*** * * *(Emphasis provided).

This language could not be any clearer or more specific as to the security interest of the title notated lien holder ***taking priority over <u>everyone</u> else***, including but not limited to "other lienholders or claimants." Time has not materially changed this language either. Hence, this Court's analysis in the *Berry* cases is as valid today as it was over fifty years ago.

Nonetheless Evans doubles down by claiming that in not adopting Evans' self-serving statutory analysis, the Tenth (and presumably the Twelfth) Appellate Districts have unconstitutionally usurped the Legislature's prerogative. This is just another example of Evans' rhetorical overreach.

There is nothing inappropriate or even remotely unconstitutional about a court construing a statute. That is what courts do. And there are plenty of rules used by the courts to undertake this responsibility as outlined by the Legislature itself. *See e.g.* R.C. §§ 1.11, 1.12, 1.47, 1.471, 1.49, 1.51, 1.54. In this context, by seeking to bootstrap a simple statutory construction issue decided by this Court over fifty years ago into some sort of constitutional argument, Evans suggests that the Tenth Appellate District was acting improperly in following well-established precedent. This argument is not tenable.

No matter how many ways Evans seeks to present its argument, there is no serious basis to adopt it because there have been no material changes to the relevant statutes since this Court ruled in the *Berry* decisions. If the content of a statute has not materially changed although the numbering or some of the language may be changed, the Court of Appeals cannot be faulted for applying the precedent of this Court's interpretation of the prior statute to the subsequent statute. And in any event, such a routine statutory analysis does not create a constitutional crisis simply because Evans' disagrees with it when multiple Ohio courts have not. Any argument at this point should be reserved to convince the Ohio Legislature, not this Court.

IV. CONCLUSION

Evans' issues were resolved over fifty years ago by this Court. In those intervening years, Evans has pointed to no evidence in the trial court, the court of appeals, or in its Memorandum before this Court to support any claim that Ohio's lien title statutory scheme is irretrievably broken, does not otherwise work or is intrinsically unfair. On the contrary; auto repair shops have had plenty of time to adjust their business practices to the motor vehicle lien laws as interpreted for the past half century to date. If Evans has a problem with the existing motor vehicle lien priority statute, it should lobby the Legislature for a change, not this Court. It is manifest there is

no substantial constitutional issue that needs to be vindicated, and the issues here are not of great public or general interest.

For the foregoing reasons, BMI respectfully requests that the Court decline to accept this case for review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing Memorandum in Opposition to Jurisdiction was electronically filed on this 15th day of February, 2018 and was sent electronically to Dominic J. Chieffo, Esq., 3688 Echo Place, Powell, Ohio 43065, Counsel for Appellant, Evans Automotive Repair, Inc., and by regular United States Mail, postage prepaid, to Defendant, Maurice Charlton, Jr. 650 Venetian Way, Columbus, Ohio 43230.

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