The trial court found that the parties agreed the transfer of title and delivery of the vehicle would occur only after the successful transfer of funds. Because neither had occurred at the time of the hailstorm, the court concluded that the risk of loss remained with the seller. Hickman appealed arguing that the risk of loss in this instance should depend on whether there had been a tender of delivery and not on whether or not title had passed.

Bryant, Judge

Where a motor vehicle identified to a purchase contract is damaged, lost or destroyed prior to the issuance of a certificate of title in the buyer's name, the risk of such damage, loss or destruction lies with either the seller or buyer as determined under section 1302.53. In relevant part section 1302.53 states "the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery." The parties here agree that defendant is not a merchant. Thus, if Hickman tendered delivery, Capshaw bore the risk of loss; if Hickman did not tender delivery, the risk of loss remained with her.

Although the trial court concluded Hickman did not tender delivery, it incorrectly focused on ownership and legal title in reaching its decision. Title is no longer of any importance in determining whether a buyer or seller bears the risk of loss. Rather, tender of delivery "requires that the seller put and hold conforming goods at the buyer's deposition and give the buyer any notification reasonably necessary to enable him to take delivery." In this context, disposition means "doing with as one wishes: discretionary control."

When tendering delivery, the seller must not limit the buyer's disposition of the goods. When, however, limitations upon a buyer's disposition of personal property do not result from the seller's activity, then the requirements for tender of delivery are met.

Hickman contends she fulfilled the statutory requirements for tendering delivery by turning over the keys to the vehicle and, after signing the certificate of title over to Capshaw's father per Capshaw's request, by placing the certificate of title in the vehicle's glove box. She asserts Capshaw chose to leave the vehicle at her residence in order to induce her to take a personal check. Hickman argues that "for all intents and purposes" Capshaw "possessed and controlled the vehicle when the keys were given to him." She thus claims not only that she tendered delivery of the vehicle, but that Capshaw was in actual possession of the vehicle at the time it was damaged. Describing the fact that the vehicle remained parked in her driveway as a "red herring," Hickman asserts she could have done "absolutely nothing else" to complete her performance with respect to the physical delivery of the vehicle.

The vehicle's continued presence in Hickman's driveway is not a red herring. Under Ohio law, a purchaser's performance under a contract generally is completed when the purchaser tenders the check. Section 1302.55(B) states "tender of payment is sufficient when made by any means or in any manner current in the ordinary course of business unless the seller demands payment in legal tender and gives any extension of time reasonably necessary to procure it." Thus upon tendering the check, Capshaw ordinarily would be free to drive away in the vehicle. Understanding why the car remained in the driveway is central to determining whether Hickman tendered delivery.

The difficulty in applying the law to this case lies in determining why the car remained on Hickman's property as the pleadings do not disclose that information. If Capshaw paid by check but Hickman refused to consider payment made until the check cleared, then Capshaw was not free to remove the vehicle from Hickman's driveway until the check cleared. Under those circumstances Hickman did not tender delivery under section 1302.47, as Capshaw lacked the discretionary control over the vehicle. As a result, the risk of loss would not have passed to Capshaw.

By contrast, if to induce Hickman to accept payment by check Capshaw offered to allow the vehicle to remain on Hickman's driveway until the check cleared, then the risk of loss passed to Capshaw who in his discretion volunteered to leave the car on Hickman's driveway in order to pay in tender most convenient to him. Because the pleadings do not reveal the underlying reasons for leaving the car in the driveway until Capshaw's check cleared, judgment on the pleadings is inappropriate.

Accordingly . . . we reverse the judgment of the trial court granting judgment on the pleadings to Capshaw, and we remand for further proceedings in accordance with this opinion.

Effect of Breach on Risk of Loss

The Code follows the trend set by earlier law of placing the risk of loss on a party who is in breach of contract. There is no necessary reason why a party in breach should bear the risk, however. In fact, shifting the risk to parties in breach sometimes produces results contrary to some of the basic policies underlying the Code's general rules on risk by placing the risk on the party who does not have possession or control of the goods. When the seller tenders goods that the buyer could lawfully reject because they do not conform to the contract description, the risk of loss remains on the seller until the defect is cured or the buyer accepts the goods [2-510(1)]. When a buyer rightfully revokes acceptance of the goods, the risk of loss is