

[Cite as *Ward v. Brown*, 2003-Ohio-500.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

Jonathan R. Ward, :
 :
 Plaintiff-Appellee, :
 :
 vs. : Case No. 02CA2836
 :
 Carl Brown, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. : RELEASED: 1-29-03
 :

APPEARANCES:

Michael H. Mearan, Portsmouth, Ohio, for appellant.

Jonathan Ward, West Portsmouth, Ohio, pro se appellee.

Kline, J.:

{¶1} Carl Brown appeals the judgment of the Portsmouth Municipal Court. He asserts that the trial court erred in finding that the risk of loss of the all terrain vehicle ("ATV") had not passed to the buyer because of irregularities with the title. Because the seller's failure to deliver the title is irrelevant to the risk of loss, we agree. Accordingly, we reverse the judgment of the trial court.

I.

{¶2} Jonathan R. Ward purchased an ATV from Carl Brown, but never received the paperwork so that he could get a title to obtain insurance on the ATV. Three weeks later, the ATV was stolen from Ward's driveway.

{¶3} Ward filed a claim against Brown in small claims court. After a hearing, the magistrate recommended judgment in favor of Brown. Ward filed objections to the magistrate's recommendation.

{¶4} The trial court held a hearing at which the following evidence was presented. Ward gave Brown twenty eight hundred dollars to purchase the ATV. Brown gave Ward the ATV but did not deliver his title. Instead, Brown gave Ward a title that Gary's Outdoor Motor Sports gave to him when he purchased the ATV and the application to transfer the title to Brown that was complete except for Brown's signature. According to Brown, Ward agreed to pay the taxes on this transfer to facilitate the transfer into his own name. According to Ward, he went to Brown's home to take care of the title and to get the extra key and the owner's manual, but was only able to get the owner's manual. Before the parties were able to effect the transfer of the title, the ATV was stolen from Ward's driveway. Ward had had the ATV for about three weeks. Ward claimed that he had

been unable to get insurance for the vehicle because he did not have a title for it.

{¶5} At the conclusion of the hearing, the trial court stated that Brown retained ownership of the ATV until he transferred the title and recorded it. The trial court entered judgment against Brown for the purchase price of the ATV, twenty-eight hundred dollars.

{¶6} Brown appeals and asserts the following assignment of error: "The Court erred in finding that risk of loss had not passed from seller to buyer of the ATV notwithstanding the seller delivered physical possession of the subject vehicle along with all the papers in seller's possession concerning ownership of the vehicle."

II.

{¶7} In his only assignment of error, Brown argues that the person who has physical possession of a vehicle has the risk of loss. He relies on *Hughes v. Al Green, Inc.* (1981), 65 Ohio St.2d 110.

{¶8} In *Hughes*, the Court "rejected the notion that title was relevant in determining whether the buyer or seller bore the risk of loss and, instead, adopted the contractual approach contemplated in the UCC to resolve such issues." *Saturn of Kings Automall, Inc. v. Mike Albert Leasing, Inc.*, 92 Ohio St.3d

513, 517, 2002-Ohio-481, citing *Hughes* at 114. Thus, "[w]here 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 the buyer as determined by the rules set forth in R.C. 1302.53 (U.C.C. 2-509)." *Hughes*, at the syllabus.

{¶9} R.C. 1302.53 provides:

{¶10} "(A) Where the contract requires or authorizes the seller to ship the goods by carrier: (1) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation as provided in section 1302.49 of the Revised Code; but (2) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

{¶11} "(B) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer: (1) on his receipt of a negotiable document of title covering the goods; or (2) on acknowledgment by the bailee of the buyer's right to possession of the goods; or (3) after his receipt of a

non-negotiable document of title or other written direction to deliver, as provided in division (D)(2) of section 1302.47 of the Revised Code.

{¶12} "(C) In any case not within division (A) or (B) of this section, 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.

{¶13} "(D) The provisions of this section are subject to contrary agreement of the parties and to the provisions of sections 1302.40 and 1302.54 of the Revised Code."

{¶14} Subsection (A) does not apply here because the contract did not require or authorize the seller, Brown, to ship the ATV by carrier. Subsection (B) does not apply here because the ATV was not held by a bailee to be delivered without being moved. Thus, Subsection (C) applies. Because there was no evidence that Brown was a merchant, the risk passed to Ward on the tender of delivery. Because the ATV had been "delivered" to Ward at the time of the theft, Ward bore the risk of its loss. Brown's failure to deliver the title is irrelevant. *Hughes*.

{¶15} Accordingly, we find the trial court erred in holding that Ward was entitled to a twenty eight hundred dollar judgment from Brown, sustain Brown's only assignment of error, and reverse the judgment of the trial court.

JUDGMENT REVERSED.

Harsha, J., concurring in judgment and opinion:

{¶16} I concur in judgment and opinion and write to address one contention raised by Mr. Ward both at trial and here. He believes that Mr. Brown should be responsible for the loss because he could not get insurance for the ATV without a title from Mr. Brown. That belief is legally incorrect. Both the Revised Code, see R.C. 1302.45, and the Supreme Court of Ohio, see Hughes at 116, provide that a person who obtains possession of goods under a purchase agreement has an insurable interest in those goods prior to the delivery of a certificate of title in the purchaser's name. Thus, Mr. Ward could have, and unfortunately should have, purchased insurance or an "insurance binder" on the ATV in spite of the fact he did not have title in his name. Mr. Brown should not take too much satisfaction from our decision, however. As the trial court pointed out, the Revised Code makes it illegal to sell a titled vehicle without transferring the title as soon as possible. See, R.C. 4505.03.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE REVERSED and the cause remanded to the trial court for further proceedings consistent with this opinion, costs herein taxed to appellee.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Portsmouth Municipal Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as the date of this Entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J.: Concurs in Judgment and Opinion with Opinion.
Abele, J.: Concurs in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.