

IN THE COURT OF APPEALS OF MARYLAND

No. 38

September Term, 1997

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WASHINGTON FREIGHTLINER, INC.

v.

SHANTYTOWN PIER, INC.

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Bell, C.J.,  
Eldridge  
Rodowsky  
Chasanow  
Raker  
Wilner  
Karwacki, Robert L.  
(Retired, specially assigned),

JJ.

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Dissenting Opinion by Eldridge, J.,  
in which Raker and Wilner, JJ., join.

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Filed: September 8, 1998

Eldridge, J., dissenting:

The majority's analysis begins with the erroneous premise that the determination of when tender of delivery occurred in this case is a question of law. This incorrect premise leads the majority to state that “the defendants had no burden of persuading the trial court factually that accrual of the claim was not postponed until commissioning,” despite the fact that the limitations issue was raised on the defendants’ motion for judgment. (Majority opinion at 8). From this, then, the majority erroneously concludes, as a matter of law, that tender of delivery occurred in this case when the engines were physically delivered to Lydia.

As an initial matter, it would be useful to delineate those points made by the majority with which I am in agreement. I agree that Maryland Code (1975, 1997 Repl. Vol.), § 2-725 of the Commercial Law Article requires a party to bring a cause of action for breach of warranty in a sale of goods context within four years from the breach of warranty. I also agree that, in a case like this, a breach of warranty occurs when tender of delivery is made, and that tender of nonconforming goods “is sufficient to trigger the statute of limitations.” (Majority opinion at 10).

Furthermore, I agree with the majority that the definition of “tender of delivery” in § 2-503 and Official Comment 1 to § 2-503 provides the analytical framework within which to decide this case. Section 2-503(1) states:

“Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery.”

According to Official Comment 1 to § 2-503, the term “tender of delivery” can be used in two senses, what the majority labels “a narrow and a broad” definition. (Majority opinion at 9). The first, “narrow,” sense “contemplates an offer coupled with a present ability to fulfill all the conditions resting on the tendering party and must be followed by actual performance if the other party shows himself ready to proceed.” Official Comment 1 to § 2-503, second sentence. The second, “broad,” sense “is used to refer to an offer of goods or documents under a contract as if in fulfillment of its conditions even though there is a defect when measured against the contract obligation.” *Id.*, fourth sentence.

As stated in Official Comment 1 to § 2-725, the “broad” sense of “tender of delivery” means simply that the seller has offered the goods to the buyer “as if in fulfillment” of the contract. In other words, where a seller offers the goods to the buyer in the good faith belief that they conform to the contract requirements, then the seller has tendered delivery, even if it later becomes apparent that the goods are nonconforming.<sup>1</sup> As Professor Hawkland has

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<sup>1</sup> Maryland Code (1975, 1997 Repl. Vol.), § 1-203 of the Commercial Law Article states as follows:

**“§ 1-203. Obligation of good faith.**

“Every contract or duty within Titles 1 through 10 of this article imposes an obligation of good faith in its performance or

(continued...)

stated, in this “broader” sense “the term ‘tender’ is used in Article 2 of the UCC as an offer by the seller to deliver what he believes incorrectly to be conforming goods.” 2 W.D. Hawkland, *Uniform Commercial Code Service*, § 2-503:2 at 931 (1994, 1998). *See also*, e.g., *Ontario Hydro v. Zallea Systems, Inc.*, 569 F. Supp. 1261, 1267 (D. Del. 1983). It is in this sense that tender of nonconforming goods can trigger the running of the statute of limitations: where the seller offers goods in the belief that his contract obligations have thereby been fulfilled, he has tendered delivery, even if it later turns out that the goods are nonconforming.

The question then in a dispute over whether tender of delivery has occurred, is whether the seller has offered the goods to the buyer “as if in fulfillment” of the contract. Contrary to the majority's assertion that this is a legal determination, it is a factual determination involving inquiry into the terms of the contract and the reasonable beliefs of the seller. For example, it is impossible to know whether the seller believed that its delivery of the goods was in fulfillment of the contract without knowing the terms of the contract. As Professor Hawkland states (Hawkland, *Uniform Commercial Code Service, supra*, § 2-725:2 at 730 n.2, emphasis added):

*“It is always a question of fact, however, when tender of delivery has been completed. This characterization is difficult in situations which the seller agrees not only to deliver component parts but to assemble or install them. Usually, it is held that*

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<sup>1</sup> (...continued)  
enforcement.”

tender of delivery occurs when the installation or assembly is completed.”

*See also, e.g., H. Sand & Co., Inc. v. Airtemp Corp.*, 934 F.2d 450, 456 (2d Cir. 1991) (summary judgment on § 2-725 limitations grounds was improper; a material issue of fact existed as to when tender of delivery occurred); *Huron Tool & Engineering Co. v. Precision Consulting Services, Inc.*, 209 Mich.App. 365, 378, 532 N.W.2d 541, 547 (1995) (same); *Allis-Chalmers Credit Corp. v. Herbolt*, 17 Ohio App.3d 230, 235, 479 N.E.2d 293, 300 (1984) (grant of summary judgment on statute of limitations grounds was erroneous; question of how delivery was to occur under a sales contract and when it did occur were material questions of fact); *Nation Enterprises, Inc. v. Enersyst, Inc.*, 749 F. Supp. 1506, 1513 (N.D. Ill. 1990) (summary judgment on § 2-725 limitations grounds was improper where a dispute of material fact existed as to whether delivery under the contract required installation of equipment as opposed to mere physical delivery).

In this case, therefore, it was necessary to determine as a matter of fact whether, when they delivered the engines to Lydia for installation in the *O.C. Princess*, the defendants believed that they had fulfilled their contract obligations, despite the fact that the engines later proved to be nonconforming.

In light of the evidentiary record, the finding in the trial court that physical delivery to Lydia for installation did not satisfy the defendant’s contract obligations, and that no tender of delivery occurred at that time, was fully warranted. This is so because the price which Shantytown agreed to pay was for more than mere physical delivery of the engines to

Lydia for installation in the *O.C. Princess*. In fact, the price quotation introduced into evidence at trial by the defendants read as follows (emphasis added):

“The afore-mentioned price is a firm price and is *for delivery*,  
- FOB Pompano Beach, Florida  
- Including, shipping skid, excluding boxing  
- Including United States customs duty and customs charges  
- Excluding installation  
- Excluding any State or Local Sales Tax  
- *Including start up and commissioning (8 hour allowance)*  
. . . .”

Thus, the parties’ agreement stated clearly and unambiguously that “delivery” included “start up and commissioning.”

This is not a case where the seller merely had ongoing responsibilities such as repair and maintenance. Rather, in this case, the parties specifically stated that delivery *included* start up and commissioning. It would be difficult to conclude that the defendants in good faith believed that they had completed their delivery requirements before start up and commissioning had been done. When they delivered the engines to Lydia at Pompano Beach, they did not do so “as if in fulfillment” of the contract, because they knew that fulfillment of the contract required more for delivery — start up and commissioning.

Consequently, the instant case is exactly like *Wilke, Inc. v. Cummins Diesel Engines, Inc.*, 252 Md. 611, 250 A.2d 886 (1969), which the majority rejects. In *Wilke*, the seller was obligated to deliver, install and test a diesel generator in compliance with certain specifications. The seller delivered the generator before the job site was ready for the

installation, and the generator was damaged by the elements while awaiting installation. The question in that case was whether, under § 2-510(1), the risk of loss had shifted to the buyer when the generator was physically delivered, or remained in the seller until installation and testing.<sup>2</sup> This Court concluded that the risk of loss remained with the seller because “the delivery of the generator to the job site, while identifying the goods to the contract, did not amount to a delivery of goods or the performance of obligations conforming to the contract.” 252 Md. at 618, 250 A.2d at 890.

The majority states that *Wilke* is irrelevant to the instant case because § 2-510(1), under which *Wilke* was decided, “applied the narrow definition of ‘tender of delivery.’” (Majority opinion at 12). Yet, the majority also states that “[u]nder the facts in *Wilke* there was no tender of delivery in either the narrow *or the broad sense*. The goods were not conforming and the seller did not make ‘an offer of goods . . . under a contract as if in fulfillment of its conditions . . . .’” (*Ibid.*, emphasis added). I agree with this statement. But, I fail to understand how the majority reaches the conclusion that the facts in *Wilke* did not meet the broad definition of “tender of delivery” but that the facts in the instant case do.

Obviously, the majority does not mean to say that the seller in *Wilke* did not satisfy the broad definition of “tender of delivery” because the goods were nonconforming, since the tender of nonconforming goods is sufficient to satisfy the broad definition. The majority,

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<sup>2</sup> Section 2-510(1) states that “[w]here a tender or delivery of goods so fails to conform to the contract as to give a right of rejection the risk of their loss remains on the seller until cure or acceptance.”

then, apparently means that the seller in *Wilke* did not meet the broad definition of “tender of delivery” because the seller's delivery obligations under the contract required more than mere physical delivery—it also required installation and testing. That is, the seller in *Wilke* could not have made a tender of delivery under the broad definition (tender of goods “as if in fulfillment of the contract”) because the seller knew that fulfillment of the contract required more than mere physical delivery. As this Court pointed out (*Wilke*, 252 Md. at 617, 250 A.2d at 890):

“The narrow issue here is, whether Cummins made a ‘delivery’ of goods which conformed to the contract. It will be recalled that *Wilke*'s purchase order specifically incorporated the government specifications, which consisted of two and a half pages of single-spaced typescript which detailed the field tests to be performed prior to acceptance by the government. . . . [T]hese tests were not intended to be an empty ritual . . . .”

The instant case presents facts substantially similar to those in *Wilke*, which the majority concedes did not even satisfy the broad definition of “tender of delivery.” In the instant case, as previously pointed out, the purchase order required the seller to complete start up and commissioning as part of its delivery obligations. Like the testing required in *Wilke*, this commissioning process was “not intended to be an empty ritual.” *Ibid.* Rather, like the testing in *Wilke*, which involved operating the generator at various load rates and the “hourly recording of data during the field tests,” *ibid.*, the commissioning in this case involved “put[ting] a variety of monitoring equipment on the engines in the engine room itself to monitor operating temperatures, pressures, exhaust temperatures, engine room

depression, and record[ing] the values at a variety of speeds, including wide-open throttle.” (Majority opinion at 4). Thus, like the mere physical delivery in *Wilke*, the mere physical delivery in this case did not satisfy even the broad definition of “tender of delivery.”

The majority's treatment of *In re Automated Bookbinding Servs., Inc.*, 336 F. Supp. 1128 (D. Md.), *rev'd on other grounds*, 471 F.2d 546 (4th Cir. 1972), is similarly flawed. In that case the buyer had purchased a bookbinding machine under a contract which required the seller to “provide and install specified equipment, place it in first class running order, and train an operator.” 336 F. Supp. at 1134. The federal district court stated that “[u]nder these facts . . . [the seller] was in no position to tender delivery under its agreement until the equipment had been assembled, placed in first class running order, and an employee of [the buyer] had been trained as an operator.” *Ibid.* The majority apparently agrees with this analysis when it states that “[i]t is apparent that the seller in the *Automated Bookbinding* case had not tendered goods ‘as if in fulfillment of’ the contract’s conditions.” (Majority opinion at 13-14). Yet, the majority makes no attempt to distinguish the facts of that case from those of the instant case. If it is apparent that the seller in *Automated Bookbinding* had not tendered goods as if in fulfillment of the contract, then it is equally apparent that the seller in the instant case did not tender goods as if in fulfillment of the contract either. The defendants in this case were in no position to tender delivery under their agreement until the start up and commissioning of the engines was completed.

Similar results have been reached by other courts in cases where a seller's delivery obligations include more than mere physical delivery, such as installation, set-up and testing.

Indeed, the majority acknowledges that “[t]here is case law which stands for the proposition that the clock in § 2-725 does not begin to run until after the goods have been installed, where, under the contract, the seller is expressly obligated to install.” (Majority opinion at 15).

These cases, some of which involve obligations by the seller in addition to installation, represent the general rule. *See, e.g., Standard Alliance Industries, Inc. v. Black Clawson Co.*, 587 F.2d 813, 819 (6th Cir. 1978), *cert. denied*, 441 U.S. 923, 99 S.Ct. 2032, 60 L.Ed.2d 396 (1979) (cause of action under § 2-725 accrues upon initial installation of product); *Val Decker Packing Co. v. Corn Products Sales Co.*, 411 F.2d 850, 851 (6th Cir. 1969) (sale of storage facilities to a food processing plant; cause of action accrued on the date when installation was completed); *Dowling v. Southwestern Porcelain, Inc.*, 237 Kan. 536, 544, 701 P.2d 954, 960 (1985) (in a sale of a grain silo, tender of delivery giving rise to the cause of action for breach of warranty under § 2-725 did not occur upon delivery of the component parts but only upon the completion of the installation; the court pointed out that it would only be then that the silo could be tested for proper functioning); *Atlas Industries, Inc. v. National Cash Register Co.*, 216 Kan. 213, 221, 531 P.2d 41, 47 (1975) (in the sale of accounting machines, tender of delivery giving rise to a cause of action for breach of warranty under § 2-725 did not occur until installation of the machines was complete); *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 475 N.W.2d 73, 81 (Minn. 1991) (delivery of component parts to be incorporated into a larger waste-water system did not constitute tender of delivery for purposes of § 2-725; tender of delivery occurred when

parts were installed and initially tested); *Dreier Co., Inc. v. Unitronix Corp.*, 218 N.J. Super. 260, 270, 527 A.2d 875, 881 (1986) (in the sale of a computer system, tender of delivery included not only physical delivery of the hardware components but also customized installation of software so that the system could be evaluated); *Shero v. Home Show U.S.A., Ltd.*, 598 N.Y.S.2d 408 (N.Y. App. Div. 1993) (sale of a solar heating unit; the cause of action for breach of warranty accrued on the date when installation was complete); *Unitron Graphics, Inc. v. Mergenthaler Linotype Co.*, 428 N.Y.S.2d 243 (N.Y. App. Div. 1980) (tender of delivery of equipment for § 2-725 purposes occurred not upon physical delivery but only upon installation); *Jandreau v. Sheesley Plumbing & Heating Co., Inc.*, 324 N.W.2d 266, 270 (S.D. 1982) (where the contract for sale of an irrigation system included installation of the equipment, tender of delivery under § 2-725 did not occur until installation); *Memorial Hospital v. Carrier Corp.*, 844 F. Supp. 712, 716 (D.Kan. 1994) (“[w]here the goods are to be installed by the seller, [§ 2-725] statute of limitations does not begin to run until the installation is complete”); *St. Anne-Nackawic Pulp Co. v. Research-Cottrell, Inc.*, 788 F. Supp. 729, 736-737 (S.D.N.Y. 1992) (contract for sale of pollution-control system provided for the testing of the system after installation; tender of delivery did not occur upon physical delivery but only upon completion of the testing as called for by the contract); *Westinghouse Elec. Corp. v. Carolina Power & Light Co.*, 1990 WL 107428 (W.D. Pa. 1990) (unreported) (sale of steam generators for use in a nuclear power plant; tender of delivery under § 2-725 occurred at the time of installation where the seller was responsible for installation under the sales contract); Hawkland, *Uniform Commercial Code Service, supra*, § 2-725:2, at 730 n.2.

*Cf. Binkley Co. v. Teledyne Mid-America Corp.*, 333 F. Supp. 1183, 1187 (E.D. Mo. 1971), *aff'd*, 460 F.2d 276 (8th Cir. 1972) (where a contract for the sale of a spot welding machine did not require the seller to set up or install the machine, tender of delivery under § 2-725 occurred when the machine was physically delivered).

The majority cites one case for a contrary position, *Long Island Lighting Co. v. Transamerica Delaval, Inc.*, 646 F. Supp. 1442 (S.D.N.Y. 1986). That case, however, does not stand for the proposition that tender of delivery always occurs upon physical delivery of goods. Rather, the court there stated that “[i]n *this case*, ‘tender’ coincided with actual delivery,” and the court specifically relied on the fact that the “contract contained no provision that the goods be tested to assure conformance with the contract before delivery was complete.” 646 F. Supp. at 1455 (emphasis added). Thus, *Long Island Lighting Co.* is not inconsistent with the above-cited cases which stand for the proposition that, when a seller specifically undertakes to install or test goods as part of its delivery obligations, then tender of delivery does not occur until the installation or testing is complete.

Faced with an arsenal of contrary authority, the majority attempts to distinguish the instant case by stating that “[i]n any event, in the case before us, Shantytown [sic] contracted to sell engines — not to sell engines and to install them.” (Majority opinion at 16). As noted earlier, however, the majority ignores the fact that Shantytown contracted to buy engines and for their “delivery, . . . including start up and commissioning.” This language makes it clear that the defendants in this case undertook start up and commissioning as part of their delivery obligations. As indicated previously, several of the above-cited cases involved similar

testing. The critical point is not whether the seller's obligation involved installation; it is whether the seller's obligation involved something more than physical delivery. In the case at bar, the seller's obligation did involve something more. No tender of delivery occurred until the start up and commissioning were complete.

The majority's attempts to distinguish other cases cited by Shantytown are similarly unconvincing. Specifically, the majority rejects Shantytown's reliance on *City of New York v. Pullman, Inc.*, 662 F.2d 910 (2d Cir. 1981), *cert. denied*, 454 U.S. 1164, 102 S.Ct. 1038, 71 L.Ed.2d 320 (1982). In that case the City of New York contracted with Pullman for the purchase of 754 subway cars, with an initial shipment of ten cars for a testing and inspection period. The United States Court of Appeals held that "tender of delivery could not occur, and did not occur, until the required test of the sample train was completed . . . ." 662 F.2d at 919. The majority states that "[t]he rationale of *Pullman* is not transferable to the sales transaction before us." (Majority opinion at 18-19). This is so, according to the majority, because (*id.* at 18-19)

"under the terms of the *Pullman* contract, the city and its transit authority were not obliged to take any steps by way of performance until the ten test cars, by the testing process, had been found to conform to the contract. Stated another way, the *Pullman* contract negated the possibility that the delivery of nonconforming goods could be tender of delivery. The *Pullman* contract blocked the possibility of applying the broader meaning of tender of delivery . . . ."

This analysis is incorrect. *Pullman*, is nothing more than a straight-forward application of

the broader meaning of “tender of delivery,” which is that tender of delivery occurs when the seller offers goods “as if in fulfillment of the contract.” Obviously, when Pullman delivered the first ten cars for testing, they were not offering goods as if in fulfillment of the contract because the contract required more than mere physical delivery of ten cars. With regard to the broad interpretation of “tender of delivery,” *Pullman*, like the cases cited above, is indistinguishable from the instant case. All of those cases, like the instant case, involve contracts which required more than mere physical delivery on the part of the seller.

This is also true of *St. Anne-Nackawic Pulp Co. v. Research-Cottrell, Inc.*, *supra*, 788 F. Supp. 729, relied on by Shantytown, but which the majority dismisses. In that case the buyer purchased a \$2 million pollution control system for its wood pulp plant. The contract of sale included both installation and performance/testing requirements. *Id.* at 731. The system was installed but never achieved the required performance levels, and the buyer sued. The buyer's suit was within four years of the final tests but not within four years of the installation. The seller moved for summary judgment on § 2-725 limitations grounds. The court rejected the seller's limitations argument, reasoning that tender of delivery had occurred not when the system was installed, but when the testing was completed, because, as long as testing continued, the seller was “still performing under the Contract.” *Id.* at 736. The federal court in *St. Anne-Nackawic* recognized that (*Id.* at 734-735)

“[a]lthough tender of delivery usually occurs when the seller physically delivers the goods, parties may alter by contract how or when tender of delivery occurs. . . . [D]efendant's conclusion merely begs the question, which is when the parties intended

delivery to occur.”

Like *Pullman, supra*, and the other cases cited earlier, *St. Anne-Nackawic* is merely an example of a contract where it was impossible for physical delivery by the seller to constitute tender of goods “as if in fulfillment of” the contract because the contract required more. Again, this is indistinguishable from the situation presented by the instant case, because the contract required more than mere physical delivery. It required start up and commissioning.

The majority seeks support for its position by stating that “[f]ederal district courts, including those in the Second Circuit, have not read *Pullman* as an invitation to postpone the accrual of limitations under U.C.C. § 2-725 beyond actual delivery.” (Majority opinion at 20). As an example, the majority cites *H. Sand & Co., Inc. v. Airtemp Corp.*, 738 F. Supp. 760, 766 (S.D.N.Y. 1990), *aff'd in part, rev'd in part*, 934 F.2d 450 (2d Cir. 1991). The *Airtemp* case involved a contract for the sale of four chillers to be used as part of a cooling system. All four of the chillers were shipped from the seller to the buyer's agent, although only three of them had been tested as apparently required by the contract. The fourth chiller had not been tested because the seller was relocating its plant and the fourth chiller was completed after the seller had disconnected its testing equipment. Subsequently, after the seller's relocation was completed, the fourth chiller was shipped back to the seller at the seller's expense for testing, and was returned to the buyer. More than four years after the initial shipment of the four chillers, but less than four years after the second shipment of the fourth chiller, the buyer sued the seller for breach of warranty. The seller moved for

summary judgment on § 2-725 grounds, arguing that tender of delivery had occurred on the date of initial shipment of the chillers. The buyer argued that tender of delivery occurred only upon the second shipment of the fourth chiller.

The district court in the *Airtemp* case agreed with the seller, distinguishing *Pullman*, *supra*, stating that “the *Pullman* holding is based upon a rare and distinctive set of facts and thus we must be restrictive in our application of its rulings,” 738 F. Supp. at 766, and that “the inspection provision contained in [the] purchase order does not postpone tender of delivery (unlike the finding in *Pullman*) . . . .” *Id.* at 767. The majority seizes upon this apparent rebellion, on the part of a federal district court in the Second Circuit, against the United States Court of Appeals for the Second Circuit, as an indication that *Pullman* is a disfavored opinion. (Majority opinion at 20). Undermining the majority’s position, however is the fact that the United States Court of Appeals for the Second Circuit *reversed* the district court on the very issue of tender of delivery. *H. Sand & Co., Inc. v. Airtemp Corp.*, 934 F.2d 450, 455-456 (2d Cir. 1991). Specifically, the United States Court of Appeals reaffirmed *Pullman*, stating that “parties may by contract agree that delivery will not be made until some form of testing has been completed.” *Id.* at 455. The federal Court of Appeals looked to two letters and a memo written by various buyer and seller employees regarding the shipment and storage of the fourth chiller until such time as it could be tested, and noted that “[t]hese three documents would allow a reasonable jury to conclude [the buyer] was holding the chiller for [the seller's] convenience and at [the seller's] disposition, not [the buyer's].” *Id.* at 454. Thus, the Court of Appeals concluded that summary judgment was improper “[b]ecause there

[was] a genuine issue of material fact as to whether the [first] shipment of chiller # 4 constituted tender of delivery for purposes of the accrual of [the buyer's] cause of action.” *Id.* at 456. Consequently, whatever support the majority finds in the district court's reasoning was erased on appeal. The district court's reasoning, including its restrictive application of *Pullman, supra*, was flatly rejected by the Court of Appeals.

The other trial court cases cited by the majority also do not support the majority's position. For example, the cases of *Cincinnati, Ohio v. Dorr-Oliver, Inc.*, 659 F. Supp. 259, 262-264 (D. Conn. 1986), and *Raymond-Dravo-Langenfelder v. Microdot, Inc.*, 425 F. Supp. 614, 617-618 (D. Del. 1977), both involved arguments by the buyer that the cause of action did not accrue until the buyer accepted the goods. I agree with those cases' rejection of that argument. The cause of action accrues when the breach occurs. The breach occurs when tender of delivery is made. Tender of delivery is not contingent upon acceptance by the buyer. Rather tender of delivery occurs when the “seller put[s] and hold[s] conforming goods at the buyer's disposition,” § 2-503, that is when the seller offers goods “as if in fulfillment of the contract.” Obviously, the seller's ability to put goods at the buyer's disposition as if in fulfillment of the contract is in no way dependent upon the buyer's acceptance of those goods.

The majority's reliance on *Ontario Hydro v. Zallea Systems, Inc.*, 569 F. Supp. 1261 (D. Del. 1983), is similarly misplaced. That case involved a contract for the sale of goods which provided for the inspection of the goods by the buyer prior to acceptance. When a § 2-725 limitations issue was raised, the court there held that tender of delivery occurred at

physical delivery, not after the buyer's inspection. The court reasoned that “the inspection clause was not directed to the tender of delivery aspect but rather to . . . [the buyer's] right to reject the goods once they were delivered, for the clause focuses not on delivery but on the preservation of [the buyer's] right to reject after full delivery.” *Id.* at 1268. Again, while the *Ontario Hydro* court may have reached a proper result, that case simply does not speak to the instant case. Obviously, as mentioned above, actions taken by the *buyer* have nothing to do with the *seller's* tender of delivery. The case at bar, however, presents a situation involving certain actions specifically included in the seller's delivery obligations.

Finally, as a procedural matter, I believe that the Court of Special Appeals correctly affirmed the trial court. The defendants’ argument on appeal is that “the trial court erred in denying petitioners’ motion for judgment on the basis of limitations.” (Petitioners’ brief in this Court at 8). In ruling on the defendants' motion for judgment, the trial court was required to view the evidence in the light most favorable to Shantytown, the non-moving party, and then to consider whether, as a matter of law, judgment should be entered for the moving party, the defendants. *De Bleeker v. Montgomery County*, 292 Md. 498, 510, 438 A.2d 1348, 1355 (1982). *See also, e.g., Smith v. Aulick*, 252 Md. 268, 270, 250 A.2d 534, 535 (1969). The majority errs in concluding that “the defendants had no burden of persuading the trial court factually that accrual of the claim was not postponed until commissioning.” (Majority opinion at 8). As the Court of Special Appeals properly held, the defendants had the burden of proving that Shantytown's action was time-barred, including proving when tender of delivery was made. *See, e.g., Latham & Assoc's, Inc. v. William*

*Raveis Real Estate, Inc.*, 218 Conn. 297, 303-304, 589 A.2d 337, 340-341 (1991) (in presenting an affirmative defense on § 2-725 limitations grounds, the seller had the burden of proving the buyer's noncompliance with § 2-725; thus, the seller was also required to prove the date on which tender of delivery was made). The defendants logically could prevail on their motion only if they could show: either (1) that tender of delivery, as a matter of law, always coincides with physical delivery of the goods, or (2) if tender of delivery can be at a time other than physical delivery, that even viewing the facts in the light most favorable to Shantytown, the evidence conclusively demonstrates that tender of delivery in this case occurred upon physical delivery.

As shown by the previously discussed cases, it is clear that tender of delivery does not always coincide with physical delivery as a matter of law. Rather, it is a factual determination that must be made with reference to the agreement and actions of the contracting parties. Therefore, the defendants could not make the first showing set forth above.

Furthermore, the defendants also could not make the second showing. Viewing the facts in the light most favorable to Shantytown, it cannot reasonably be said that the Court of Special Appeals erred in affirming the trial court's determination that tender of delivery in this case occurred not when the engines were physically delivered to Lydia for assembly, but when they were finally commissioned. As discussed above, the only evidence pertinent to the tender of delivery issue admitted at the trial was the price quotation which stated clearly and unambiguously that the seller's delivery obligation included start up and

commissioning.

Thus, in my opinion, the trial court correctly denied the motion for judgment. A trial court grant of the defendant's motion for judgment would have been erroneous because the only evidence introduced at trial pertinent to the tender of delivery issue showed that tender of delivery occurred at commissioning, not at physical delivery. As this Court stated in *Impala Platinum v. Impala Sales*, 283 Md. 296, 328, 389 A.2d 887, 906 (1978) “[i]f there is any legally relevant and competent evidence . . . from which a rational mind could infer a fact in issue, then a trial court would be invading the province of the jury by declaring a directed verdict.” The Shantytown claims for breach of implied warranties were not barred by limitations. Therefore, I dissent.

Judges Raker and Wilner have authorized me to state that they concur with the views expressed herein and join this opinion.