

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 15-0116 CAF**

**ERNEST F. KAMENICKY,  
Complainant**

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**BEFORE THE OFFICE**

v.

**OF**

**MASSIMO MOTOR SPORTS, LLC  
Respondent**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Ernest F. Kamenicky (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for an alleged defect in his 2013 Massimo MSU-600, a utility task vehicle (UTV) purchased from Play-N-Around Motorsports (Dealer). The Complainant filed a Lemon Law complaint (Complaint)<sup>1</sup> alleging that the vehicle's rear end (differential) broke along with an axle and oil seal; the starter and wires burned; the gas leaked; and the vehicle would not shift. The Dealer successfully repaired most of the issues in the Complaint, leaving only the leaking gas and shifting issues for resolution in this proceeding. Massimo Motor Sports, LLC (Respondent) contended that the rear differential and starter had been successfully repaired and that the Respondent was ready and willing to pick up the vehicle and repair all remaining issues. The hearings examiner concludes that the vehicle has existing warrantable defects, including a defect that creates a serious safety hazard and a defect that substantially impairs the use and value of the vehicle. However, the manufacturer had not been given an opportunity to repair the vehicle. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement but still qualifies for warranty repair.

**I. Procedural History, Notice and Jurisdiction**

Matters of notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened and the record closed on

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<sup>1</sup> The complaint identifies the issues to be addressed at the hearing. See TEX. OCC. CODE § 2301.204; TEX. GOV'T CODE §§ 2001.051-2001.052.

September 2, 2015, in Waco, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself and testified on his own behalf. In addition, Charlene Kamenicky, Michael Arning, Randy Kamenicky and Clarence Dodd testified for the Complainant. Peter de la Cerda, attorney, represented the Respondent. Dylan Smith, National Sales Manager, testified for the Respondent.

## II. Discussion

### A. Applicable Law

The Lemon Law, in part, requires a manufacturer of a motor vehicle to repurchase or replace a vehicle when the manufacturer is “unable to conform a motor vehicle to an applicable express warranty.”<sup>2</sup> Additionally, warranty repair under Section 2301.204 of the Texas Occupations Code requires a “defect in a motor vehicle that is covered by a manufacturer’s . . . warranty agreement applicable to the vehicle.”<sup>3</sup> Accordingly, for a vehicle to be eligible for repurchase or replacement, or even warranty repair, the vehicle must have a defect under an applicable warranty (warrantable defect). The Complainant must prove the existence of a warrantable defect by a preponderance, that is, the evidence must show that a warrantable defect more likely than not exists.<sup>4</sup>

Further, for a vehicle to qualify for replacement or repurchase, a warrantable defect must either (1) create a serious safety hazard or (2) substantially impair the use or market value of the vehicle despite a “reasonable number of attempts” at repair.<sup>5</sup> The Lemon Law defines “serious safety hazard” as a life threatening malfunction or nonconformity that: (1) substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.<sup>6</sup> Under the Lemon Law, a rebuttable presumption is established that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if:

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<sup>2</sup> TEX. OCC. CODE § 2301.604(a).

<sup>3</sup> TEX. OCC. CODE § 2301.204.

<sup>4</sup> *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

<sup>5</sup> TEX. OCC. CODE § 2301.604(a).

<sup>6</sup> TEX. OCC. CODE § 2301.601(4).

[T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) two of the repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.<sup>7</sup>

Alternatively, for serious safety hazards, a rebuttable presumption is established that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if:

[T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) at least one attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least one other attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt.<sup>8</sup>

Additionally, for vehicles out of service at least 30 days, a rebuttable presumption may be established that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if:

[A] nonconformity still exists that substantially impairs the vehicle's use or market value and: (A) the vehicle is out of service for repair for a cumulative total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an owner.<sup>9</sup>

The statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.<sup>10</sup> Furthermore, the Department adopted a decision implying that if the consumer takes the vehicle for a service

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<sup>7</sup> TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

<sup>8</sup> TEX. OCC. CODE § 2301.605(a)(2).

<sup>9</sup> TEX. OCC. CODE § 2301.605(a)(3).

<sup>10</sup> “[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite ‘reasonable number of attempts.’” *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ).

visit then that visit would constitute a repair attempt unless the consumer was at fault for failure to repair the vehicle.<sup>11</sup>

However, regardless of the existence of a warrantable defect, the Lemon Law prohibits repurchase or replacement unless: (1) the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;<sup>12</sup> (2) the manufacturer was given an opportunity to cure the defect or nonconformity;<sup>13</sup> and (3) the owner filed the Lemon Law complaint within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles have passed since the date of original delivery of the motor vehicle to an owner.<sup>14</sup>

### B. Complainants' Evidence and Arguments

The Complainant filed a Lemon Law complaint alleging that the vehicle's rear end broke along with an axle and oil seal; the starter and wires burned; the gas leaked; and the vehicle would not shift. The Complainant testified that during the second week after purchasing the vehicle, the vehicle's differential gears broke off. After taking the vehicle to the Dealer, the Dealer notified the Complainant that the vehicle's axle had broken. Subsequently, the Complainant found oil leaking from a differential seal, which another dealer repaired by hammering in the seal. After getting the vehicle back from the Dealer, the differential broke again. Later the starter burned. Consequently, the Complainant took the vehicle to the Dealer again. Additionally, the Complainant smelled gasoline fumes, which resulted from the engine spewing gasoline. The Complainant testified that the vehicle used more fuel than his 100 horsepower tractor, making the vehicle run hot. He testified that he could see the vehicle's manifold glowing red hot. The Complainant explained that to address the leaking fuel, the Dealer put in O-rings and tightened a screw, but the repair only lasted two to three weeks to a month before the vehicle again started leaking gas. Mr. Arning noted that only a single tab held the fuel injector, making it susceptible to vibration. During a visit to address the gas leak, the Complainant notified the Dealer about difficulty in shifting the vehicle. The Complainant explained that the clutch would get stuck so he would have to accelerate and then

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<sup>11</sup> *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication) (“only those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute”).

<sup>12</sup> TEX. OCC. CODE § 2301.606(c)(1).

<sup>13</sup> TEX. OCC. CODE § 2301.606(c)(2).

<sup>14</sup> TEX. OCC. CODE § 2301.606(d)(2).

force the shifter into gear. The Complainant also added that the gas cap broke and the parking brake did not work<sup>15</sup>. The Complainant stated that the Dealer refused to provide some repair orders. Mrs. Kamenicky stated that they did not get a repair order for the oil leak, the shifting issue, or the fuel leak. Mrs. Kamenicky and the Complainant testified that the Dealer successfully repaired the rear differential. Mrs. Kamenicky also stated that the starter was successfully repaired. Randy Kamenicky noted that the oil leak had been successfully repaired. The inspection of the vehicle at the hearing showed that vehicle sprayed a substantial amount of fuel in the engine compartment.

### C. Respondent's Evidence and Arguments

During cross examination, the Complainant confirmed that the rear differential and starter had been successfully repaired. In response to a clarifying question by the hearings examiner, Mrs. Kamenicky confirmed that the manufacturer (as opposed to a dealer) did not have an opportunity to repair the vehicle. Mr. Smith testified that the Respondent remained ready and willing to pick up the vehicle and repair all remaining issues the Complainant identified at the hearing (which would include issues not listed in the Complaint).

### D. Analysis

The vehicle clearly exhibited a fuel leak. The fuel leak poses a "serious safety hazard" as defined by the Lemon Law, which specifically includes "a life-threatening malfunction or nonconformity that . . . creates a substantial risk of fire or explosion."<sup>16</sup> Testimony, photographic evidence, as well as inspection at the hearing, clearly showed that the engine sprayed substantial amounts of fuel within the engine compartment (located under the bench seat) and the spray landed on components, specifically the exhaust manifold, which could ignite the fuel. Moreover, the vehicle's fuel tank sits next to the engine under the bench seat. Additionally, the testimony showed the vehicle continued to have a shifting problem. However, the law prohibits repurchase or replacement relief unless the manufacturer, as opposed to the dealer, has been given an opportunity to repair the vehicle.<sup>17</sup> In this case, Mrs. Kamenicky confirmed that the manufacturer, as opposed

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<sup>15</sup> The Complaint did not include these issues, leaving them outside the scope of this proceeding.

<sup>16</sup> TEX. OCC. CODE § 2301.601(4)(b).

<sup>17</sup> TEX. OCC. CODE § 2301.606(c)(2).

to a dealer, did not have an opportunity to repair the vehicle. Consequently, repurchase or replacement relief cannot be ordered in this case and only warranty repair may be ordered.

### III. Findings of Fact

1. On May 16, 2014, the Complainant, Ernest F. Kamenicky, purchased a new 2013 MSU-600, manufactured by the Respondent, Massimo Motor Sports, LLC, from Play-N-Around Motorsports, the Respondent's authorized dealer in Conroe, Texas.
2. The manufacturer's warranty covered the vehicle for one year.
3. The warranty expired on May 16, 2015.
4. The Complainant had the vehicle taken to the Dealer for service as follows:
  - a. June 24, 2014, at 98 miles, for rear differential and mounts;<sup>18</sup>
  - b. August 6, 2014, for the oil leak
  - c. August 26, 2014, for the starter, lead and solenoid;<sup>19</sup>
  - d. October 22, 2014, for the rear differential housing;<sup>20</sup>
  - e. January 8, 2015, for fuel "spitting" at the injector;<sup>21</sup>
5. The Complainant also raised the issue of difficult shifting during a visit to address the fuel leak.
6. On December 29, 2014, June 25, 2015, and an unidentified date, the Complainant mailed notices of the vehicle's defects to the Respondent.
7. On January 5, 2015, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
8. On May 7, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, Massimo Motor Sports, LLC, giving all parties not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing;

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<sup>18</sup> Complainant's Ex. 9

<sup>19</sup> Complainant's Ex. 10

<sup>20</sup> Complainant's Ex. 11

<sup>21</sup> Respondent's Ex. 5

the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the matters asserted.

9. The hearing in this case convened and the record closed on September 2, 2015, in Waco, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself and testified on his own behalf. In addition, Charlene Kamenicky, Michael Arning, Randy Kamenicky and Clarence Dodd testified for the Complainant. Peter de la Cerda, attorney, represented the Respondent. Dylan Smith, National Sales Manager, testified for the Respondent.
10. During the inspection at the hearing, the vehicle sprayed substantial amounts of fuel in the engine compartment located under the bench seat. The fuel sprayed on the exhaust manifold, the heat from which could ignite the fuel. The fuel tank sits under the passenger side of the bench seat, adjacent to the engine. The fuel leak creates a substantial risk of fire or explosion.
11. As of the date of the hearing, the fuel leak and shifting problems continued to exist.
12. Charlene Kamenicky confirmed that the Respondent (as opposed to a dealer) did not have an opportunity to repair the vehicle.

#### IV. Conclusions of Law

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. TEX. OCC. CODE § 2301.704.
3. The Complainant timely filed a sufficient complaint with the Department. TEX. OCC. CODE §§ 2301.204, 2301.606(d); 43 TEX. ADMIN. CODE § 215.202.
4. The parties received proper notice of the hearing. TEX. GOV'T CODE §§ 2001.051, 2001.052; 43 TEX. ADMIN. CODE § 215.206(2).

5. The Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 215.206.66(d).
6. The Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.606(c)(2).
7. The Respondent remains responsible to address and repair or correct any warrantable nonconformities reported to the Respondent or Respondent's franchised dealer before the warranty expired. TEX. OCC. CODE §§ 2301.204 and 2301.603.

#### V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**. Further, pursuant to Texas Occupations Code §§ 2301.204, 2301.603 and 43 Texas Administrative Code § 215.208(8), the Respondent shall repair the vehicle's fuel leak and shifting issue.

**SIGNED October 6, 2015**

  
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**ANDREW KANG**  
**HEARINGS EXAMINER**  
**OFFICE OF ADMINISTRATIVE HEARINGS**  
**TEXAS DEPARTMENT OF MOTOR VEHICLES**