

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0123 CAF**

**THERESA HERBER,
Complainant**

v.

**FOREST RIVER, INC.,
Respondent**

§
§
§
§
§
§
§

BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Theresa Herber (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2014 Shasta Phoenix, a towable recreational vehicle. The Complainant alleged the following issues regarding her vehicle: a warped front door/screen; worn and dirty carpet; loose trim; poorly repaired cabinet crown molding; door steps were not replaced; a dealer's service manager failed to respond to the Complainant; a bedroom wall had a hole kicked in; the heater and air conditioning did not work properly; and the shower leaked. The heater/air conditioning issues had been resolved by the time of the hearing. Forest River Inc. (Respondent) argued that the vehicle had been repaired with respect to most of the issues and that the Complainant did not undertake a reasonable number of repair attempts with regard to the remaining issues. The hearings examiner concludes that only the leaking shower and loose and misaligned trim and molding constitute warrantable defects and the Complainant failed to undertake a reasonable number of repair attempts with regard to the warrantable defects. Therefore, the Complainant's vehicle is not eligible for repurchase or replacement relief. However, the vehicle is subject to 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 July 7, 2015, in San Antonio, Texas, before Hearings Examiner Andrew Kang. The Complainant, Theresa Herber, represented herself. Zenas Pilcher (Mr. Pilcher) testified for the Complainant. Mr.

Pilcher's son, Les Pilcher, also testified for the Complainant. Warren Murphy, Assistant Director of Parts, Service & Warranty, represented 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.”¹ 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.”² 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.³

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.⁴ The Lemon Law defines “serious safety hazard” as a life threatening malfunction or nonconformity that 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.⁵ 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:

[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,

¹ TEX. OCC. CODE § 2301.604(a).

² TEX. OCC. CODE § 2301.204.

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

⁴ TEX. OCC. CODE § 2301.604(a).

⁵ TEX. OCC. CODE § 2301.601(4).

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.⁶

However, the statutory presumption does not preclude otherwise finding that a reasonable number of attempts to repair the vehicle have been undertaken.⁷

B. Complainant's Evidence and Arguments

The Complainant purchased a new 2014 Shasta Phoenix, a towable recreational vehicle, from Outdoor Living RV of San Antonio, Texas, on September 11, 2014.⁸ The vehicle has a "bumper to bumper" warranty covering the first twelve months from the date of purchase.⁹ The primary users are the Complainant and Zenas Pilcher.

On September 18, 2014, the Complainant e-mailed David Bumpass of Outdoor Living to point out numerous issues that needed attention. Many of these issues apparently resulted from Outdoor Living's use of the vehicle as a demonstrator for approximately eight to nine months. On September 25, 2014, Mr. Bumpass sent an e-mail stating that Outdoor Living had: (1) emptied the vents and light fixtures of debris; (2) detailed the exterior and interior approximately three hours and two hours respectively; (3) repaired the screen door; (4) replaced the dripping faucet in the upstairs bathroom; (5) replaced the shower faucet because of a leaky connection to the hose going to the shower head; (6) scrubbed the trim on the copper colored panels; (7) tightened the legs on the dining chairs; and (8) diagnosed and turned on the non-operating water heater.¹⁰ The unresolved issues at this point included: (1) light bulbs needing replacement; (2) sofa and seat

⁶ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for establishing a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. Section 2301.605(a)(2) only applies to a nonconformity that creates a serious safety hazard, and § 2301.605(a)(3) requires that the vehicle be out of service for repair for a 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.

⁷ "[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).

⁸ Complainant's Ex. 2, Sales Order.

⁹ Complainant's Ex. 16, E-mail dated December 18, 2014.

¹⁰ Complainant's Ex. 15, E-mail dated September 25, 2014.

scratches; (3) the panels and trim in the dining slide needing replacement; (4) the front door steps needing replacement; and (5) the carpet needing cleaning after repair of the dinette slide panels.

On December 18, 2014, Chris Szymanski, Service Manager at Outdoor Living, e-mailed the Complainant a list of repairs performed since the last service visit. The e-mail outlined that the dealer: (1) sealed a water leak in slideout roof; (2) reinstalled and deep cleaned the carpeting; (3) installed new carpet padding; (4) repainted scratches on top front cap and entry door; (5) replaced the outdoor security light bulb; (6) secured a wire harness under the rear bunkhouse slideout; (7) retacked loose trim; (8) realigned the bunkhouse interior door; (9) installed realigned cabinet doors; (10) corrected cabinet crown molding trim above the kitchen counter; (11) placed skid tape on the entry door steps; (12) replaced the entry screen door; (13) replaced the Phoenix logo cap decal.¹¹ Also, the slideouts and awnings were inspected for a “popping” noise, but they operated properly, so no repairs were made. Mr. Pilcher was concerned about the water leak’s effects on the vehicle’s interior, but Outdoor Living did not allow him to inspect the interior walls, where any water-damaged wood may have been located.

The Complainant expressed dissatisfaction with Outdoor Living’s handling of the carpet, door, trim, and slideout issues. Also, the Complainant felt that Outdoor Living disregarded the cleanliness of the vehicle. As a result, the Complainant e-mailed Gary Myers, the Respondent’s employee, with her concerns.¹² On January 8, 2015, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles.¹³ On February 3, 2015, the Complainant mailed written notice of the issues to the Respondent. The written notice included two issues, regarding plumbing and air conditioning, not included in the complaint. The plumbing issue was a new leak observed in the bathroom when guests stayed in the vehicle in January of 2015.¹⁴

On March 30, 2015, Mr. Pilcher took the vehicle to the service department at Ron Hoover RV Boerne.¹⁵ Ron Hoover repaired the shower leak and other problems, but when Mr. Pilcher attempted to do a walkthrough with a Ron Hoover employee, he was told that hooking up a hose

¹¹ Complainant’s Ex. 16, E-mail dated December 18, 2014.

¹² Complainant’s Ex. 14, E-mail dated December 29, 2014.

¹³ Complainant’s Ex. 9, Lemon Law Complaint Form.

¹⁴ Complainant’s Ex. 13, Letter dated February 3, 2015.

¹⁵ Respondent’s Ex. 2, Shop Work Order 8357.

and testing the shower would take an hour. Mr. Pilcher did not have time to wait for the hose hookup and testing, so he took the vehicle back to his office. After testing the shower, Mr. Pilcher discovered that the shower still leaked.

At the hearing, Mr. Pilcher testified that the slideouts functioned properly; the loose wires were secured and the “popping” noise had not occurred recently. However, Mr. Pilcher asserted that a leak continued to exist in the bathroom. The Complainant and Mr. Pilcher also expressed concern that previous leaks had damaged the integrity of the vehicle. During the inspection of the vehicle at the hearing, water visibly leaked from the shower and various pieces of trim/molding appeared loose or misaligned.

C. Respondent’s Evidence and Arguments

The Respondent argued that the Complainant did not provide a reasonable opportunity to repair the defects, did not undertake a reasonable number of repair attempts, and did not prove that any warrantable defects existed.

On March 6, 2015, Warren Murphy, Assistant Director, Parts, Service & Warranty for the Respondent, sent a letter to the Complainant requesting clarification of the exact problems with the vehicle.¹⁶ The Complainant never provided any clarification to Mr. Murphy. Moreover, when Mr. Pilcher retrieved the vehicle from Ron Hoover, he did not do a thorough walkthrough with a Ron Hoover representative because he did not have time. The Respondent argued that it “can’t fix something [it doesn’t] know about.”¹⁷

Moreover, only one repair visit, the visit to Ron Hoover, addressed the current shower leak. A single repair attempt does not meet the statutory requirements for establishing a rebuttable presumption for a reasonable number of attempts to repair the vehicle.

The Respondent further argued that the vehicle had no warrantable defects. Most of the cosmetic issues were not warrantable defects since the manufacturer did not cause those conditions. The slideout issues were successfully repaired and the slideouts functioned properly. Only the shower leak and trim issues remained unresolved.

¹⁶ Respondent’s Ex. 1, E-mail dated March 6, 2015.

¹⁷ Complainant’s Ex. 8, E-mail dated May 4, 2015.

D. Analysis

The Complainant raised numerous issues in her complaint including: a warped front door/screen; worn and dirty carpet; loose trim; poorly repaired cabinet crown molding (color did not match and the trim nails were “all over”); door steps were not replaced; a dealer’s service manager failed to respond to the Complainant; a bedroom wall had a hole kicked in; and the heater did not work. The Complainant’s written notice of defect additionally identified issues with the plumbing (leaking shower) and air conditioning. However, repurchase, replacement, and warranty repair only apply to warrantable defects (defects resulting from the manufacturing process).¹⁸ In this case, the following issues either appear to have resulted from Outdoor Living’s use of the vehicle as a demonstrator or the evidence does not otherwise show that the issue resulted from manufacturing: warped door/screen; worn/dirty carpet, unreplaced door steps, and the hole in the wall. One issue, the service manager’s unresponsiveness, concerns the dealer’s service and not any defect or condition of the vehicle. Accordingly, these issues are not warrantable defects.

The only complained of conditions that appear to be warrantable defects include issues with the heating/air conditioning, trim/molding, and plumbing (leaking shower).¹⁹ However, these conditions have either been successfully repaired or do not otherwise warrant Lemon Law relief. During the inspection, the vehicle did not exhibit any issues with the air conditioning. Accordingly, the air conditioning issue appears to have been successfully repaired. Additionally, the record shows a repair of the heater with no evidence of continuing issues.²⁰ As for the plumbing issue, the inspection did reveal a leak from the shower. However, the Complainant has not satisfied the Lemon Law’s requirement for a reasonable number of repair attempts with regard to any complained of issues. To establish a rebuttable presumption that a reasonable number of repair attempts have been undertaken, the same nonconformity must continue to exist after being subject to repair four or more times.²¹ The Complainant only had the vehicle serviced once for the shower

¹⁸ TEX. OCC. CODE §§ 2301.604(a), 2301.204.

¹⁹ Note: the Complainant did not include the slideout issue in the complaint or in the written notice to the Respondent. Consequently, the slideout issue exceeds the scope of this proceeding and is not addressed in the analysis or the findings of fact and conclusions of law. Additionally, the evidence shows that the slideout issue has been resolved.

²⁰ Respondent’s Ex. 2, Shop Work Order 8357.

²¹ TEX. OCC. CODE § 2301.605(a)(1).

leak (during the visit to Ron Hoover). The inspection at the hearing did reveal loose and misaligned trim/molding, but again, the record does not show four or more repairs addressing this issue.

Although the Complainant's vehicle had numerous issues, most of those issues arose from Outdoor Living's use of the vehicle as a demonstrator and not from any warrantable defects attributable to the manufacturer. Because repurchase, replacement, and warranty repair relief only apply to warrantable defects, the issues arising from the vehicle's use as a demonstrator do not qualify for any relief. With respect to the warrantable defects, the evidence shows that the heating/air conditioning issues have been successfully repaired and that the Complainant has not satisfied the requirement for a reasonable number of repairs attempts for the plumbing and trim/molding issues. Consequently, the Complainant's request for repurchase or replacement relief is denied.

Though the vehicle is not eligible for replacement/repurchase relief, the vehicle currently remains under warranty, so the Respondent is responsible for correcting any warrantable defects. Moreover, the Respondent must repair defects that arise after the expiration of the warranty if the Complainant reported the defect to the manufacturer before the expiration of the warranty.²² In this case, the leaking shower and the misaligned/loose trim/molding qualify for warranty repair.

III. Findings of Fact

1. Theresa Herber (Complainant) purchased a new 2014 Shasta Phoenix from Outdoor Living RV of San Antonio, Texas, on September 11, 2014.
2. The vehicle came with a twelve month, bumper to bumper warranty, starting from the date of purchase.
3. The warranty remained in effect at the time of the hearing.
4. The Complainant complained of the following issues: warped front door/screen; worn and dirty carpet; loose trim; poorly repaired cabinet crown molding; door steps were not replaced; Outdoor Living RV's service manager failed to respond to the Complainant; a bedroom wall had a hole kicked in; the heater did not work; the shower leaked; and the air conditioning did not work correctly.

²² TEX. OCC. CODE § 2301.603.

5. The Complainant had the vehicle serviced on the following dates:
 - a. September of 2014;
 - b. December of 2014; and
 - c. March 30, 2015.
6. The Complainant did not undertake at least four repair attempts for any single defect.
7. The issues with the door/screen, carpet, steps, and the hole in the wall resulted from the use of the vehicle as a demonstrator by Outdoor Living RV.
8. The issue regarding the unresponsiveness of Outdoor Living RV's manager is not a defect or condition in the vehicle.
9. The heater and air conditioning issues were resolved prior to the hearing.
10. The inspection conducted at the hearing revealed water leaking from the shower and loose/misaligned trim/molding.
11. On January 8, 2015, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
12. On February 3, 2015, the Complainant mailed written notice of the issues to the Respondent.
13. On April 15, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, 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; 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.
14. The hearing in this case convened and the record closed on July 7, 2015, in San Antonio, Texas, before Hearings Examiner Andrew Kang. The Complainant, Theresa Herber, represented herself. Zenas Pilcher testified for the Complainant. Mr. Pilcher's son, Les Pilcher, testified for the Complainant. Warren Murphy, Assistant Director of Parts, Service & Warranty, represented the Respondent.

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 complaint with the Department. TEX. OCC. CODE § 2301.204; 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 failed to undertake a reasonable number of repair attempts. TEX. OCC. CODE § 2301.605(a).
7. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranties. TEX. OCC. CODE §§ 2301.204, 2301.603.
8. The Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.

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 leaking shower and the loose and misaligned trim and molding.

SIGNED September 3, 2015



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