

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0001 CAF**

**SHANNION D. FERRELL,
Complainant**

v.

**KEYSTONE RV COMPANY,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Shannion D. Ferrell (Complainant) filed a complaint (Complaint) with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in her recreational vehicle (RV) manufactured by Keystone RV Company (Respondent). In this case, the Respondent's warranty provides no coverage of the subject vehicle. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ 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 September 13, 2016, in Amarillo, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for herself. Brent Giggy, Product Team Lead, represented and testified for the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief

A vehicle qualifies for repurchase or replacement if the manufacturer cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”² In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must continue to exist after a “reasonable number of attempts” at repair.³ In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a mailed written notice of the defect to the manufacturer, (2) an opportunity to repair by the manufacturer, and (3) a deadline for filing a Lemon Law complaint.

a. Serious Safety Hazard

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.⁴

b. Substantial Impairment of Use or Value

i. Impairment of Use

In determining substantial impairment of use, the Department considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle.” For instance, “while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”⁵

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

⁵ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

ii. Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. The reasonable purchaser standard “does not require an owner to present an expert witness or any technical or market-based evidence to show decreased value.” Instead, under this standard, “factfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle.”⁶

c. Reasonable Number of Repair Attempts

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts 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, 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.⁷

Additionally, for vehicles out of service at least 30 days, a rebuttable presumption may be established that the vehicle had a reasonable number of repair attempts 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.⁸

⁶ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“[T]he Division’s interpretation that expert testimony or technical or market-based evidence is not required to show diminished value or use is consistent with the statute’s goal of mitigating manufacturers’ economic advantages in warranty-related disputes.”).

⁷ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

⁸ TEX. OCC. CODE § 2301.605(a)(3).

However, 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.⁹ Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle to a dealer for repair and the dealer fails to repair the vehicle, then that visit would constitute a repair attempt unless the consumer was at fault for the failure to repair the vehicle.¹⁰

d. Other Requirements

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner or someone on behalf of the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;¹¹ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹² and (3) the Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.¹³

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a "defect . . . that is covered by a manufacturer's, converter's, or

⁹ "[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).

¹⁰ "[O]nly those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute." *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication).

¹¹ TEX. OCC. CODE § 2301.606(c)(1). The Lemon Law does not define the words "mailed" or "mail", so under the Code Construction Act, the common usage of the word applies. TEX. GOV'T CODE § 311.011. Dictionary.com defines "mail" as "to send by mail; place in a post office or mailbox for transmission" or "to transmit by email." mail. Dictionary.com. *Dictionary.com Unabridged*. Random House, Inc. <http://www.dictionary.com/browse/mail> (accessed: April 01, 2016). Also, 43 TEX. ADMIN. CODE § 215.204 provides that "[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor." The Department's notice of the complaint to the Respondent may satisfy the requirement that someone on behalf of the owner mailed notice of the defect/nonconformity to the Respondent.

¹² TEX. OCC. CODE § 2301.606(c)(2). A repair visit to a dealer can satisfy the "opportunity to cure" requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt the final repair on the manufacturer's behalf. See *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

¹³ TEX. OCC. CODE § 2301.606(d)(2).

distributor's . . . warranty agreement applicable to the vehicle."¹⁴ The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."¹⁵

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁶ The Complainant must prove all facts required for relief by a preponderance, that is, the Complainant must present evidence showing that every required fact is more likely than not true.¹⁷ For example, the Complainant must show the fact that a warrantable defect more likely than not exists. For any required fact, if the evidence weighs in favor of the Respondent or if the evidence equally supports the Complainant and the Respondent, the Respondent will prevail. If the Complainant fails to prove one (or more) of the required facts, the Complainant will not prevail.

4. The Complaint Identifies the Issues in this Proceeding

The Complaint identifies the issues to be addressed in this proceeding.¹⁸ The Complaint should state "sufficient facts to enable the department and the party complained against to know the nature of the complaint and the specific problems or circumstances which form the basis of the claim for relief under the lemon law."¹⁹ However, the parties may expressly or impliedly consent to trying issues not included in the pleadings.²⁰ Trial by implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²¹

¹⁴ TEX. OCC. CODE § 2301.204.

¹⁵ TEX. OCC. CODE § 2301.603(a).

¹⁶ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁷ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

¹⁸ "In a contested case, each party is entitled to an opportunity . . . for hearing after reasonable notice of not less than 10 days." TEX. GOV'T CODE §§ 2001.051; "Notice of a hearing in a contested case must include . . . a short, plain statement of the matters asserted." TEX. GOV'T CODE § 2001.052. *See* TEX. OCC. CODE § 2301.204(b) ("The complaint must be made in writing to the applicable dealer, manufacturer, converter, or distributor and must specify each defect in the vehicle that is covered by the warranty."); TEX. OCC. CODE § 2301.204(d) ("A hearing may be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.").

¹⁹ 43 TEX. ADMIN. CODE § 215.202(b).

²⁰ 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

²¹ *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref'd).

A. Complainant's Evidence and Arguments

On May 29, 2015, the Complainant, purchased a new 2015 Sprinter 269FWRLS from Jack Sizemore Traveland, an authorized dealer of the Respondent, Keystone RV Company, in Amarillo, Texas. The subject RV has a one year limited warranty starting from the date of purchase.

On August 27, 2015, the Complainant mailed a written notice of defect to the Respondent.²² On September 8, 2015, the Complainant filed a Lemon Law complaint with the Department alleging the shower door fell off, underbelly sagged, a hose leaked, and some unspecified issues with the awning, heater and circuit board. On April 22, 2016, the Complainant amended the complaint to further allege that part of the ladder fell apart, blinds in the kitchen came apart, there was a high pitch sound even when not using water, the awning hung off on one side, window knobs were not turning, medicine cabinet door was falling apart, a hole in the area of the exterior LED lights had no caulk, the tires did not look new, and the (grab) handle on the outside was loose.

In relevant part, the Complainant took the RV to a dealer for repair as shown below:

Date	Issue
6/9/2015	Shower door ²³
9/17/2015	Underbelly, window handles, shower wall, blinds, water leak, medicine cabinet door, electric fireplace, awning, entry door grab handle, LED light sealed, tires ²⁴
6/3/2016	Grab handle loose, monitor panel, replace blind in kitchen, awning sagging, replace ladder ²⁵

The Complainant testified that three complained of issues remained unresolved at the time of the hearing: the awning, leaking hose, and loose grab handle at the door.²⁶ She explained that the awning would wad up on the right; the awning appeared to wind faster on the right; the support arms were flimsy and not connected properly. She indicated that the awning looked as if the wind could take it off. The Complainant stated that the awning had problems since she got the RV and she last noticed the wadding and looseness of the arms on September 5, 2016. The Complainant stated that the leaking hose has done further damage. She thought she first noticed the hose leaking

²² Complainant's Ex. 7, Notice of Defect, Dated August 27, 2015.

²³ Complainant's Ex. 4, Invoice 133829-1; Complainant's Ex. 4A, Invoice 133829-07Y1.

²⁴ Complainant's Ex. 5, Invoice 138858-1.

²⁵ Complainant's Ex. 6, Invoice 147804.

²⁶ The Complainant also identified an issue with the tank handles not shutting the tanks but the Respondent declined to consent to trying this issue.

on September 6, 2016, when testing for leaks when shutting off with the tank handles. She found water leaking when emptying water from the storage tank. She could see that water had leaked before because wood had deteriorated and wood on the bottom had buckled. She last noticed the leaking on September 6, 2016, and had not since tried to fill the tanks with water to avoid any more water damage. With regard to the grab handle, the Complainant was notified that all grab handles were alike and the looseness could not be fixed. She added that dealing with the RV has caused her stress, and that she had a stress disorder and had to be medicated. The Complainant closed by saying that dealing with the RV (and in particular, the need for alternative housing) made life miserable, affecting her health and her ability to do what she wanted. She explained that maintaining her current residence was difficult for her, pointing out that she now has large front and back yards to mow.

B. Respondent's Evidence and Arguments

Mr. Giggy commented that the awning was not intended to be out in any wind. Upon questioning, the Complainant testified that she lived in her RV for three months and had planned to live in it but had to move out to allow for repairs. Mr. Giggy explained that the RV was designed for recreation use and living in it would require modifications. He noted that RVs will not withstand extreme cold, would need a dehumidifier, and were not intended to last for ten years of residential use. On cross-examination the Complainant confirmed that she did not request any repairs from Keystone after the September 17, 2015, repairs. She explained that she was living in the RV at the time and only had repairs at the dealer. She also answered that the Respondent did not get an opportunity to repair because she needed to get the RV to the dealer for repair and she needed to find a place to live. With regard to the leak at the LED light, the Complainant confirmed that she did not do any maintenance on it because she did not have a way to get that high but she notified the dealer about it. With respect to the leaking hose repair, the Complainant answered that she could not test the hose upon receiving the RV back from the dealer because the RV was already weatherized for freezing weather but the hose appeared satisfactory when tested in the spring. When asked if the repair in September may be unrelated to the issues at the hearing, the Complainant answered that she did not know. Mr. Giggy concluded that the Respondent tried to resolve all issues as quickly as possible. He explained that the RV was made for recreational purposes and that residing in it requires additional effort, noting that the system for repair requires

moving the RV to the dealership for service. He added that the RV was usable up until leaving at the dealer for repair. Although the RV had issues, they were resolved.

C. Inspection

During the inspection at the hearing, the RV leaked water in the storage compartment below the shower. The water leaked from the holes drilled through the oriented strand board (OSB) for the hot and cold water lines leading to the shower. Initially, no water leaked. However, after the hearings examiner placed the hand-held shower head on the wall mount. The shower head had previously been hanging down with the water directed toward the middle of the shower pan. After placing the shower head on the wall mount, water flowed from the shower head to the escutcheon covering the openings for the hot and cold water knobs. Mr. Giggy notified the hearings examiner that water began dripping into storage compartment, indicating that the escutcheon allowed water to pass by. However, the leak under the show appeared unrelated to the leaking hose identified in the complaint, which was located behind a vertical panel in the storage compartment. Inspection of the hose and surrounding area showed no visible or tangible indications of any leaking water. The awning rolled out and in normally. The awning exhibited some wrinkling towards the left and right sides. The awning support brackets are attached to the side by rivets at the top, middle, and at the bottom of each bracket. Mr. Giggy responded that this was the normal assembly of the awning bracket. Inspection of the grab bar showed that the mounts had some clearance allowing some movement of the bar. However, the clearances appeared to be part of the intended design of the mounts. Mr. Giggy confirmed that a mount with tight clearances would make the grab bar more difficult to move for stowing.

D. Analysis

Even if a defect exists, the Lemon Law does not necessarily provide a remedy. As an initial matter, to qualify for relief, the Lemon Law requires an applicable express warranty. In the present case, the warranty states that “This Limited Warranty Shall Not Apply To: . . . Trailers used for business, rental, commercial, residential, or disaster relief purposes, or any purposes other than recreational travel and family camping.”²⁷ However, the Complainant testified that she purchased the RV for the purpose of residing in it and did so until issues with her RV necessitated moving to

²⁷ Complainant’s Ex. 2, Owner’s Manual, Chapter 2: Limited One Year Warranty (emphasis added).

alternative housing. Because the Complainant used the RV for residential purposes, the warranty does not apply. As a result, the subject RV does not qualify for any relief.

III. Findings of Fact

1. On May 29, 2015, the Complainant, purchased a new 2015 Sprinter 269FWRLS from Jack Sizemore Traveland, an authorized dealer of the Respondent, Keystone RV Company, in Amarillo, Texas.
2. The subject vehicle has a one year limited warranty starting from the date of purchase.
3. On August 27, 2015, the Complainant mailed a written notice of defect to the Respondent.
4. On September 8, 2015, the Complainant filed a Lemon Law complaint with the Department alleging that the shower door fell off, underbelly sagged, a hose leaked, as well as listing some unspecified issues with the awning, heater and circuit board. On April 22, 2016, the Complainant amended the complaint to further allege that part of the ladder fell apart, blinds in the kitchen came apart, there was a high pitch sound even when not using water, the awning hung off on one side, window knobs were not turning, medicine cabinet door was falling apart, a hole in the area of the exterior LED lights had no caulk, the tires did not look new, and the (grab) handle on the outside was loose.
5. On October 14, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, Keystone RV Company, 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.
6. Order No. 6 reset the hearing for Tuesday, September 13, 2016, at 9:00 a.m. to allow the Complainant to inspect the vehicle's repairs prior to the hearing.
7. The hearing in this case convened and the record closed on September 13, 2016, in Amarillo, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for herself. Brent Giggy, Product Team Lead, represented and testified for the Respondent.

8. The warranty specifies that it does not apply to “Trailers used for business, rental, commercial, residential, or disaster relief purposes, or any purposes other than recreational travel and family camping.”
9. The Complainant purchased the subject vehicle for the express purpose of residing in it.
10. The Complainant resided in the subject vehicle for three months until problems with the vehicle necessitated moving into alternative housing.

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613.
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 § 206.66(d).
6. An express warranty does not apply to the vehicle. TEX. OCC. CODE § 2301.604(a).
7. 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**.

SIGNED September 23, 2016



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