

TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0268 CAF

JOHN A. MORROW, JR. and
BARBARA L. MORROW,
Complainants

v.

JAYCO, INC.,
Respondent

§
§
§
§
§
§
§
§

BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

John A. Morrow, Jr. and Barbara L. Morrow (Complainants) 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 their vehicle manufactured by Jayco, Inc. (Respondent). The record shows that the manufacturer itself did not have a final opportunity to repair. Consequently, the Lemon Law prohibits granting repurchase/replacement relief. Nevertheless, warranty repair relief still applies.

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 August 12, 2016, in San Antonio, Texas, before Hearings Examiner Andrew Kang. The Complainants, represented themselves. John Arnold, attorney, represented the Respondent, Russ Draper, Manager – Consumer Affairs, testified for the Respondent by telephone.

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,

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).

or 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 Complainants.¹⁶ The Complainants must prove all facts required for relief by a preponderance, that is, the Complainants must present evidence showing that every required fact is more likely than not true.¹⁷ For example, the Complainants 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 Complainants and the Respondent, the Respondent will 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. Summary of Complainants' Evidence and Arguments

On June 29, 2015, the Complainants, purchased a new 2016 Jayco White Hawk 27DSRL from Crestview RV Superstore, an authorized dealer of the Respondent, Jayco, Inc., in Selma, Texas.²² The Complainants took delivery of the vehicle on July 8, 2015.²³ The vehicle's limited warranty covers the vehicle for 24 months.²⁴

On October 25, 2015, May 23, 2016, and July 27, 2016, the Complainants mailed written notices of defect to the Respondent.²⁵ On May 4, 2016, the Complainants filed a Lemon Law complaint with the Department alleging that water leaked from the bottom of the vehicle; water leaked from the kitchen plumbing; storage compartments leaked water; and the shower door leaked water.

In relevant part, the Complainants took the vehicle to a dealer for repair of the complained of issues as shown below:

Date	Issue
August 7, 2015- September 2, 2015	City water leaking; front compartment leaks ²⁶
January 18, 2016- February 29, 2016	Water leaks on wall panels in bathroom ²⁷
March 16, 2016	Water leak at underbelly; water line at kitchen faucet leaking ²⁸
April 25, 2016	Shower surround leaks ²⁹
May 31, 2016	Water leak from outside driver side to backdoor; door side compartment leaking; outside driver side middle compartment leaks ³⁰

Mrs. Morrow testified that they had water leakage issue every time they took the vehicle out. At first, she noticed water gushing out from under the vehicle when hooked up to city water. She explained that when the kitchen flooded, along with cabinets and the bathroom, and water

²² Complainants' Ex. 1, Purchase Contract.

²³ Complainants' Ex. 2, Delivery Receipt.

²⁴ Complainants' Ex. 1A, Warranty.

²⁵ Complainants' Ex. 5, Notice of Defect; Complainants' Ex. 11, Notice of Defect; Complainants' Ex. 13, Notice of Defect.

²⁶ Complainant's Ex. 3, WO 89462.

²⁷ Complainant's Ex. 7, WO 91028.

²⁸ Complainant's Ex. 9, WO 91728.

²⁹ Complainant's Ex. 10, WO 92207.

³⁰ Complainant's Ex. 12, WO 92631.

ran under the door to the bedroom, water sprayed in the cabinets where the pipe entered, and she believed water went into the underbelly. She noted that all three storage compartments under the vehicle leaked. She explained that the front compartment, door side leak ran under the night stand along the wall, under the door, to the bathroom wall. The shower leaked then as well. Mrs. Morrow confirmed that the leaks occurred repeatedly from the same places. Water also leaked in the kitchen to the door-side compartment, middle compartment, and bathroom floor. She last noticed leaking on June 18 through 24 of 2016, when water dripped while emptying the gray and black water. The leak grew progressively worse, leaving bigger and bigger spots. Water leaked from the underbelly on March 12 through 16, 2016, when water sprayed in the cabinets.

B. Summary of Respondent's Evidence and Arguments

On cross-examination, Mrs. Morrow confirmed that after repairs, the city water did not leak; the kitchen faucet did not leak; the fresh water pump was successfully repaired; the front compartment and shower leaks have been satisfactorily repaired; the large slide-side compartment was not leaking. However, the front slide-side compartment and shower door still leaked. Mrs. Morrow acknowledged that, aside from bulging, the underbelly could be fine with no damage. Mrs. Morrow confirmed that the vehicle currently has four outstanding issues: the shower leak, one compartment door (awaiting a part for repair), the black/gray tank leak, and cabinet damage. The items identified in the first notice to the Respondent (October 25, 2015) were successfully repaired (awning, city water leak, and large slide-side compartment leak). Mrs. Morrow affirmed that: they reported the shower issue to the dealer after a camping trip in June 2016; the compartment (with the door on order for repair) did not leak until May 2016; they first reported the black/gray tank leak to the Respondent on July 27, 2016; and they first reported the current cabinet issues to the Respondent on July 27, 2016. Mrs. Morrow acknowledged that cabinets had been satisfactorily replaced after the damage caused by the leaking faucet and she clarified that the cabinets had new damage. Mrs. Morrow explained that they declined the Respondent's August 4, 2016, offer to repair because it was too late and repairs were occurring repeatedly. Mrs. Morrow stated that the roof replacement was successful as far as they knew.

Mr. Draper testified that no underbelly insulation was visible and the underbelly was installed correctly. However, he did notice some sagging. With regard to the foam spray, Mr. Draper explained that the foam insulation protrusion might vary between units and may vary

because of the person applying the foam and that such foam could typically be seen. His review of the work orders showed no evidence of underbelly replacement or installation of foam.

Mr. Draper identified various reasons why recreational vehicles may reasonably take longer for repair longer than automobiles, including parts availability, technician and bay availability, the greater likelihood of multiple issues in one visit, the number of parts in a recreational vehicle, the additional disturbance caused by driving/towing a recreational vehicle. Additionally, the time waiting for parts may inflate the days out for repair and generally, recreational vehicles are not used every day, unlike automobiles.

C. Inspection

Inspection of the vehicle at the hearing showed water damage, such as warping and swelling, on various pieces of the cabinet trim in the kitchen as well as the nightstands/dressers. Some laminate was peeling from the base of the left nightstand. The Complainants pointed out two points in the shower enclosure that leaked water; however, any non-conformity or damage could not be identified visually. Inspection of the exterior storage compartments exhibited some water staining and warping.

D. Analysis

The subject vehicle does not qualify for repurchase or replacement but does qualify for warranty repair. The Lemon Law prohibits granting repurchase or replacement relief unless the manufacturer (not a dealer) has had a final opportunity to repair the nonconformity. Specifically, the law states “[a]n order issued under this subchapter may not require a manufacturer . . . to make a refund or to replace a motor vehicle unless . . . the manufacturer . . . has been given an opportunity to cure the alleged defect or nonconformity.”³¹ Although a dealer may have already performed repairs on the vehicle, the law nevertheless gives the manufacturer itself an opportunity to repair any defects. In this case, the record shows that the manufacturer has not had a final opportunity to repair the currently existing issues. Mrs. Morrow confirmed that they declined the Respondent’s August 4, 2016, offer to repair.³² The parties concurred that four issues remained unresolved: the shower leak; a leak at the compartment (with the door on order

³¹ TEX. OCC. CODE § 2301.606(c)(2).

³² Respondent’s Ex. 1, E-mail Dated August 4, 2016.

for repair); the black/gray tank leak; and the cabinet damage. In addition, the record included evidence that the underbelly had bulged. Because the evidence shows that the vehicle continues to have these nonconformities, repair relief still applies.³³

III. Findings of Fact

1. On June 29, 2015, the Complainants, purchased a new 2016 Jayco White Hawk 27DSRL from Crestview RV Superstore, an authorized dealer of the Respondent, Jayco, Inc., in Selma, Texas. The Complainants took delivery of the vehicle on July 8, 2015.
2. The vehicle's limited warranty covers the vehicle for 24 months.
3. The Complainants took the vehicle to a dealer for repair as shown below:

Date	Issue
August 7, 2015- September 2, 2015	City water leaking; front compartment leaks
January 18, 2016- February 29, 2016	Water leaks on wall panels in bathroom
March 16, 2016	Water leak at underbelly; water line at kitchen faucet leaking
April 25, 2016	Shower surround leaks
May 31, 2016	Water leak from outside driver side to backdoor; door side compartment leaking' outside driver side middle compartment leaks

4. On October 25, 2015, May 23, 2016, and July 27, 2016, the Complainants mailed written notices of defect to the Respondent.
5. On May 4, 2016, the Complainants filed a Lemon Law complaint with the Department alleging that water leaked from the bottom of the vehicle; water leaked from the kitchen plumbing; storage compartments leaked water; and the shower door leaked water.
6. On July 7, 2016, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainants and the Respondent, Jayco, Inc., 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.

³³ TEX. OCC. CODE §§ 2301.603(a).

7. The hearing in this case convened and the record closed on August 12, 2016, in San Antonio, Texas, before Hearings Examiner Andrew Kang. The Complainants, represented themselves. John Arnold, attorney, represented the Respondent, Russ Draper, Manager – Consumer Affairs, testified for the Respondent by telephone.
8. The vehicle's warranty was in effect at the time of the hearing.
9. Inspection of the vehicle at the hearing showed water damage on various pieces of cabinet trim in the kitchen as well as the nightstands/dressers. Some laminate was peeling from the base of the left nightstand. An exterior storage compartment exhibited some water staining and warping.
10. The following issues remained unresolved at the time of the hearing: the shower leak, a leak at the compartment (with the door on order for repair); the black/gray tank leak; and the cabinet damage. In addition, the evidence showed that the underbelly had bulged.
11. The Respondent did not have a final opportunity to repair the unresolved issues.

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 Complainants 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 Complainants bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).

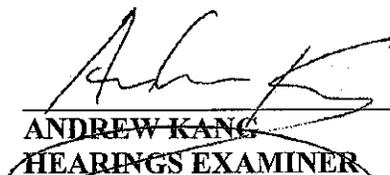
6. The Respondent did not have an opportunity to cure the alleged defect(s). TEX. OCC. CODE § 2301.606(c)(2).
7. The Complainants' vehicle does not qualify for replacement or repurchase. The Lemon Law prohibits ordering repurchase or replacement of the vehicle without mailed written notice of the defect/nonconformity to the Respondent and an opportunity to cure by the Respondent. TEX. OCC. CODE § 2301.606(c).
8. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranties. TEX. OCC. CODE §§ 2301.603 and 2301.204.
9. The Respondent has a continuing obligation after the expiration date of the warranty to address and repair or correct any warrantable nonconformities reported to the Respondent or Respondent's designated agent or franchised dealer before the warranty expired. TEX. OCC. CODE §§ 2301.603 and 2301.204.

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainants' petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**. It is **FURTHER ORDERED** that the Respondent shall repair the vehicle's leak at the shower; the leak at the compartment with the door on order for repair; the black/gray tank leak; and the cabinet damage. Additionally, the Respondent shall repair the bulging underbelly. The Complainants shall deliver the subject vehicle to the Respondent within 20 days after the date this Order becomes final under Texas Government Code § 2001.144.³⁴ Within 60 days after receiving the vehicle from the Complainants, the Respondent shall complete repair of the subject vehicle. However, if the Department determines the Complainants' refusal or inability to deliver the vehicle caused the failure to complete the required repair, the Department may consider the Complainants to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

³⁴ (1) If a party does not timely file a motion for rehearing, this Order becomes final when the period for filing a motion for rehearing expires, or (2) if a party timely files a motion for rehearing, this Order becomes final when: (A) the Department renders an order overruling the motion for rehearing, or (B) the Department has not acted on the motion within 45 days after the party receives a copy of this Decision and Order.

SIGNED October 11, 2016



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