

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0290 CAF**

**WANDA LOVELADY and
JAMES V. LOVELADY,
Complainants**

v.

**FOREST RIVERS, INC.,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Wanda Lovelady and James V. Lovelady (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 Forest River, Inc. (Respondent). A preponderance of the evidence shows that the subject vehicle currently has a warrantable defect that substantially impairs the vehicle's market value. Consequently, the Complainants' vehicle qualifies for repurchase.

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 10, 2016, in Tyler, Texas, before Hearings Examiner Andrew Kang. The Complainants, represented themselves. Warren Murphy, Assistant Director, Parts, Service, & Warranty, represented 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

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.⁷

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.⁸ 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.⁹

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)(3).

⁸ “[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).

⁹ “[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).

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;¹⁰ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹¹ 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.¹²

2. Burden of Proof

The law places the burden of proof on the Complainants.¹³ 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.¹⁴ 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. If the Complainants fails to prove one (or more) of the required facts, the Complainants will not prevail.

¹⁰ 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.

¹¹ 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).

¹² TEX. OCC. CODE § 2301.606(d)(2).

¹³ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁴ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

3. The Complaint Identifies the Issues in this Proceeding

The Complaint identifies the issues to be addressed in this proceeding.¹⁵ 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.”¹⁶ However, the parties may expressly or impliedly consent to trying issues not included in the pleadings.¹⁷ Trial by implied consent occurs when a party introduces evidence on an unpleaded issue without objection.¹⁸

A. Summary of Complainants’ Evidence and Arguments

On October 10, 2015, the Complainants, purchased a new 2016 Forest River R-Pod 179 from Tyler R.V. Center, Inc., an authorized dealer of the Respondent, Forest River, Inc., in Tyler, Texas.¹⁹ The vehicle’s limited warranty covers the vehicle for one year from the date of purchase.²⁰ On May 9, 2016, the Complainants mailed a written notice of defect to the Respondent. On May 25, 2016, the Complainants filed a Lemon Law complaint with the Department alleging that the vehicle leaked water damaging the interior.

The Complainants took the vehicle to a dealer for repair as shown below:

Date	Issue
October 26, 2015	Leaking light fixture, rear window leaking, wood under bed delaminated (from leak) ²¹
April 5, 2016	Ceiling damage, roof leaking, wall damage from leaking, back over kitchen sink ²²

¹⁵ “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.”).

¹⁶ 43 TEX. ADMIN. CODE § 215.202(b).

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

¹⁸ See *Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

¹⁹ Complainants’ Ex. A, Purchase Agreement.

²⁰ Complainants’ Ex. A, Limited Warranty Towable Products.

²¹ Complainants’ Ex. E, Repair Order 17956.

²² Complainants’ Ex. E, Repair Order 18673.

The Respondent's final opportunity to repair the vehicle occurred immediately after the last repair attempt at the dealer.

Mr. Lovelady testified that four to five days after receiving a large amount of rain, he inspected the vehicle and found it full of water by the bed, on the floor, and by the window. He explained the vehicle "pretty much" leaked every time when raining, leaving a spot of water towards the front or back of the vehicle until they placed a tarp over it. The vehicle spent eight days out of service for the October 2015 repair visit, and about 72 days for the April 2016 visit (including the manufacturer's final repair attempt). The Complainant testified that the final repair attempt improved the cosmetics of the vehicle, but the vehicle had a leak since then (on June 28, 2016) and the vehicle had two bolts protruding from the base of the slideout and two pieces of trim not there previously.

B. Summary of Respondent's Evidence and Arguments

On cross-examination, Mr. Lovelady confirmed that he did not contact the Respondent directly about the repairs although Mr. Murphy had asked the Complainants to do so. Mr. Murphy, testified that the June 2, 2016, report²³ from the Respondent's plant shows a full pre-delivery inspection, rain bay and electrical. The June 7, 2016, report shows a rain bay only inspection, noting that the bottom of the slideout leaks when out, not in, and reflecting sealing of screws and adjusting of seals. After making repairs (replacing sidewall, sealing windows, replacing interior paneling), the Respondent tested the vehicle in a rain bay. Mr. Murphy represented that if the vehicle will not leak in the rain bay, it will not leak. However, he did not know about what may have happened between the rain bay testing and the return of the vehicle that may have caused the moisture shown in the Complainants' photos, which is why Mr. Murphy requested the Complainants to bring the vehicle back in.

C. Inspection

During the inspection at the hearing, the Mr. Lovelady noted that the last leak occurred on June 28th (2016), the last rain to have occurred before the hearing. At that time, the leak left a wet spot about the size of soccer ball near the stove at the rear door side of the vehicle. The inspection

²³ Respondent's Ex. 1, Forest River PDI Plant Reports, June 2, 2016, and June 7, 2016.

showed missing trim pieces on both sides of the slideout. Mr. Murphy noted that there should be a corner piece there. Mr. Lovelady pointed out that he had broken (cracked) the trim on the lower right of the slide during transport of the vehicle. The vehicle's rear window was sprayed with water to test for leaks. However, the window frame and surrounding areas remained dry. The rear window curtains did have some previously dried water stains near a staple's entry into the wall panel. Mr. Lovelady commented that neither a water hose nor a rain bay would adequately duplicate rain over a day or two. Mr. Lovelady stated that after he had sprayed water on top of the vehicle for two hours with a sprinkler, he only found water in the window frame "track" and moisture on the area surrounding the bottom of the frame. Mr. Murphy asked about the temperature and whether the Complainants had the air conditioning on when he noticed the water in the vehicle. Mr. Lovelady answered that the temperature was in the 90s and that he had the air conditioner off.

D. Analysis

The vehicle continues to have a defect that substantially impairs its market value after a reasonable number of repair attempts. Consequently, the vehicle qualifies for repurchase relief. The record shows that the vehicle leaked water on June 28, 2016, after the final repair attempt. Accordingly, the vehicle continues to leak water despite repairs. Under the reasonable purchaser standard, the nonconformity substantially impairs the market value of the vehicle. Specifically, given the water leak itself and the potential for damage that the water may cause, the current condition of the vehicle would deter a purchaser from buying the vehicle or would substantially reduce the sales price for the vehicle. As shown in the repair orders and testimony, the vehicle has been out of service for repair for over 30 days (80 days). Therefore, repurchase relief applies.

III. Findings of Fact

1. On October 10, 2015, the Complainants, purchased a new 2016 Forest River R-Pod 179 from Tyler R.V. Center, Inc., an authorized dealer of the Respondent, Forest River, Inc., in Tyler, Texas.
2. The vehicle's limited warranty covers the vehicle for one year from the date of purchase.

3. The Complainants took the vehicle to a dealer for repair as shown below:

Date	Issue
October 26, 2015	Leaking light fixture, rear window leaking, wood under bed delaminated (from leak)
April 5, 2016	Ceiling damage, roof leaking, wall damage from leaking, back over kitchen sink

4. The vehicle was out of service for repair for 80 days.
5. On May 9, 2016, the Complainants mailed a written notice of defect to the Respondent.
6. On May 25, 2016, the Complainants filed a Lemon Law complaint with the Department alleging that the vehicle leaked water damaging the interior.
7. On June 22, 2016, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainants and the Respondent, Forest River, 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.
8. The hearing in this case convened and the record closed on August 10, 2016, in Tyler, Texas, before Hearings Examiner Andrew Kang. The Complainants, represented themselves. Warren Murphy, Assistant Director, Parts, Service, & Warranty, represented the Respondent.
9. The vehicle's warranty was in effect at the time of the hearing.
10. During the inspection at the hearing, the vehicle did not leak after spraying water on the rear window for several minutes. However, the curtains by the rear window exhibited some water stains from a prior leak.
11. The vehicle leaked water on June 28, 2016, after the final repair attempt.

12. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license and registration	\$17,448.73
Date of delivery	10/20/15
Date of first report of defective condition	10/26/15
Date of hearing	08/10/16
Days out of service	80
Useful life determination	3,650

Purchase price, including tax, title, license and registration				\$17,448.73
<i>Unimpaired Days:</i> Date of first report of defective condition less date of delivery	10/26/15	-	10/20/15	= 6
<i>Impaired Days:</i> Date of hearing less date of first report of defective condition Less days out of service for repair	08/10/16	-	10/26/15	= 289 -80 <u>209</u>
<i>Reasonable Allowance for Use Calculations:</i> Unimpaired days	6	÷	3,650	× \$17,448.73 = \$28.68
Impaired days	209	÷	3,650	× \$17,448.73 × 50% = \$499.56
Total reasonable allowance for use deduction				\$528.24
Purchase price, including tax, title, license and registration				\$17,448.73
Less reasonable allowance for use deduction				-\$528.24
Plus filing fee refund				\$35.00
TOTAL REPURCHASE AMOUNT				\$16,955.49

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 Complainants provided sufficient notice of the defect to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).
7. The Respondent had an opportunity to cure the alleged defect. TEX. OCC. CODE § 2301.606(c)(2).
8. The Complainants' vehicle qualifies for replacement or repurchase. A warrantable defect that substantially impairs the market value of the vehicle continues to exist after a reasonable number of repair attempts. TEX. OCC. CODE § 2301.604

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 **GRANTED**. It is further **ORDERED** that the Respondent shall repair the warrantable defect(s) in the reacquired vehicle identified in this Decision. **IT IS THEREFORE ORDERED** that:

1. The Respondent shall accept the return of the vehicle from the Complainants. The Respondent shall have the right to have its representatives inspect the vehicle upon the return by the Complainants. If from the date of the hearing to the date of repurchase the vehicle is substantially damaged or there is an adverse change in its condition beyond ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in the final order;
2. The Respondent shall repurchase the subject vehicle in the amount of **\$16,955.49**. The refund shall be paid to the Complainants and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to the Respondent, then the full refund shall be paid to the Complainants. At the time of the return, the Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all

liens in full, the Complainants is responsible for providing the Respondent with clear title to the vehicle;

3. Within 20 days after the date this Order becomes final under Texas Government Code § 2001.144,²⁴ the parties shall complete the return and repurchase of the subject vehicle. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to the Complainants' refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by the Complainants and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);
4. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the vehicle prior to resale and issue a disclosure statement provided by or approved by the Department's Enforcement Division – Lemon Law Section;
5. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous place, and upon the first retail sale of the vehicle, the disclosure statement shall be completed and returned to the Department's Enforcement Division – Lemon Law Section; and
6. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide the Department's Enforcement Division – Lemon Law Section, in writing, the name, address and telephone number of the transferee (wholesale purchaser or equivalent) of the vehicle within 60 days of the transfer.

²⁴ (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 4, 2016



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