TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0352 CAF

CHRISTINE MCALLISTER AND MICHAEL MCALLISTER, **Complainants**	§	**BEFORE THE OFFICE**
v.	§	**OF**
JAYCO, INC., **Respondent**	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Christine McAllister and Michael McAllister (Complainants) filed a 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). A preponderance of the evidence does not show that the subject vehicle has a defect covered by the Respondent's warranty. Consequently, the Complainants' vehicle does not qualify for repurchase/replacement or warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing[1] 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 January 4, 2017, in San Antonio, Texas, before Hearings Examiner Andrew Kang. The Complainants, represented and testified for themselves. Angie Cox, Consumer Affairs Manager, 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]

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[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]

Alternatively, for serious safety hazards, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

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

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[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)(2).

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.[9]

However, a statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.[10] 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.[11]

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;[12] (2) the manufacturer was given an opportunity to cure the defect or nonconformity;[13] and (3) the

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[9] TEX. OCC. CODE § 2301.605(a)(3).

[10] *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ) ("[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.'").

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

[12] 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 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.

[13] 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).

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.[14]

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 distributor's . . . warranty agreement applicable to the vehicle."[15] The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."[16]

3. Burden of Proof

The law places the burden of proof on the Complainants.[17] The Complainants must prove all facts required for relief by a preponderance, that is, the Complainants must present sufficient evidence to show that every required fact is more likely than not true.[18]

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.[19] 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."[20] However, the parties may expressly or impliedly consent

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[14] TEX. OCC. CODE § 2301.606(d)(2).

[15] TEX. OCC. CODE § 2301.204.

[16] TEX. OCC. CODE § 2301.603(a).

[17] 43 TEX. ADMIN. CODE § 215.66(d).

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

[19] "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.").

[20] 43 TEX. ADMIN. CODE § 215.202(a)(2).

to trying issues not included in the pleadings.[21] Trial by implied consent occurs when a party introduces evidence on an unpleaded issue without objection.[22]

A. Complainants' Evidence and Arguments

On September 13, 2014, the Complainants, purchased a new 2015 Jayco 38FLSA from Crestview RV Superstore, an authorized dealer of the Respondent, in Selma, Texas. The vehicle's limited warranty covers the vehicle for two years. The Complainants initially mailed a written notice of defect to the wrong address on July 12, 2016. The Complainants subsequently faxed a copy of the notice to the Respondent on July 29, 2016. On July 21, 2016, the Complainants filed a Lemon Law complaint with the Department alleging that the air conditioning (AC) did not cool and the auto-leveling and middle jacks did not work. The auto-leveling and middle jacks have been successfully repaired. On or about July 22, 2016, the Department provided notice of the Complaint to the Respondent. In relevant part, the Complainants took the vehicle to a dealer for repair of the outstanding issues as follows:

Date	Issue
November 7, 2014	AC not cooling[23]
April 23, 2015	AC not cooling[24]
April 28, 2015	AC not cooling[25]
May 20, 2015	Main AC not cooling[26]
July 22, 2016	AC not cooling[27]

Mr. McAllister explained that the AC had issues with the fan, motor, and condenser fan. He testified that the vehicle would not cool below 81 degrees on a 96 degree day. He first noticed the AC issue in April of 2015. Repair attempts did not improve AC issue. The Complainants last noticed the AC cooling inadequately in September of 2016. Mr. McAllister confirmed that the auto-leveling system appeared to working and that it operated correctly on the morning of the hearing. Mr. McAllister also confirmed that the last repair attempt successfully repaired the middle

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[21] 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

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

[23] Complainant's Ex. 7, Work Order 86605.

[24] Complainant's Ex. 7, Work Order 88193.

[25] Complainant's Ex. 7, Work Order 88252.

[26] Complainant's Ex. 7, Work Order 88516.

[27] Complainant's Ex. 7, Work Order 93345.

jacks. In closing, Mr. McAllister expressed that the AC is almost dangerous and that it even has a tendency to blow hot and completely quit.

B. Respondent's Evidence and Arguments

On cross-examination, Mrs. McAllister confirmed that not all of the approximately 200 days out of service was for the AC and jacks but also included time for the refrigerator and gray tank. Mrs. McAllister confirmed that one of the repair visits for the jacks identified in the Complaint did not have a corresponding repair order. Mr. and Mrs. McAllister did note that the dealership may not have documented the visit for the jacks. Additionally, Mrs. McAllister verified that they counted a visit by a technician at the vehicle's site as a separate visit from the service visit to the dealership for the same problem (the technician inspected the vehicle but requested that the vehicle be brought to the dealership for repair because of the weather). Ms. Cox expressed the Respondent's willingness to transport the vehicle to its facilities in Indiana for repair (where the Respondent would have the benefit of working with the vendors of the components at issue), to compensate the Complainants for loss of use, and to provide extended warranty coverage.

C. Inspection

The low temperatures at the time of the hearing made testing of the air conditioning infeasible. Mr. McAllister stated that the vehicle had two Coleman air conditioning units.

D. Analysis

The Complainants confirmed that the auto-leveling and middle jack issues had been successfully repaired, leaving only the air conditioning issue outstanding. Although the malfunctioning air conditioning presents a substantial problem, reviewing the warranty indicates that it does not cover this issue and therefore neither repurchase/replacement nor repair relief applies. The Lemon Law and the related warranty repair provision only provide relief for warrantable defects, i.e., defects covered by warranty.[28] The Lemon Law only requires compliance with whatever coverage the warranty provides.[29] Therefore, if the warranty does not cover the complained of problem, then the vehicle does not qualify for relief. Under the heading "WHAT

[28] TEX. OCC. CODE §§ 2301.204, 2301.603 and 2301.604.

[29] TEX. OCC. CODE §§ 2301.603.

AND WHO IS COVERED," the warranty states that "Jayco's limited warranty only covers substantial defects in materials, components, or parts of the RV attributable to Jayco. It does not replace, modify, or apply to the warranties provided by the manufacturers that supply the products used by Jayco to assemble the RV, like the frame."[30] Additionally, under the heading "WHAT IS NOT COVERED", the warranty states that:

> By way of example only, this limited warranty does not cover any of the following: defects in materials, components or parts of the RV not attributable to Jayco . . . .
>
> In addition, this limited warranty does not cover any material, component or part of the RV that is warranted by another entity, including, by way of example, handling, braking, wheel balance, muffler, tires, tubes, batteries, gauges, generator, hydraulic jacks, inverter, converter, microwave, television, DVD/CD player, radio, speakers, television, refrigerator, range, hot water heater, water pump, stove, carbon monoxide detector, smoke detector, propane detector, furnace, or any air conditioner.[31]

Also, testimony showed that the vehicle had Coleman air conditioning units. Although an air conditioner may be covered under the component manufacturer's warranty, the warranty provided by the Respondent specifically excludes any air conditioner. Consequently, the warranty does not apply to the subject vehicle's air conditioning issue and therefore the vehicle does not qualify for any relief.[32]

III. Findings of Fact

1. On September 13, 2014, the Complainants, purchased a new 2015 Jayco 38FLSA from Crestview RV Superstore, an authorized dealer of the Respondent, in Selma, Texas.
2. The vehicle's limited warranty covers the vehicle for two years.
3. The Complainants took the vehicle to a dealer for repair as shown below:

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[30] Complainants Ex. 3, Towable Limited Warranty (emphasis added).

[31] Complainants Ex. 3, Towable Limited Warranty (emphasis added).

[32] TEX. OCC. CODE §§ 2301.604(a) and 2301.204.

Date	Issue
November 7, 2014	AC not cooling
April 23, 2015	AC not cooling
April 28, 2015	AC not cooling
May 20, 2015	Main AC not cooling
July 22, 2016	AC not cooling

4. The Complainants initially mailed a written notice of defect to the wrong address on July 12, 2016. The Complainants subsequently faxed a copy of the notice to the Respondent on July 29, 2016. Additionally, on or about July 22, 2016, the Department provided notice of the Complaint to the Respondent.

5. On July 21, 2016, the Complainants filed a Lemon Law complaint with the Department alleging that the air conditioning (AC) did not cool and the auto-leveling and middle jacks did not work.

6. The auto-leveling and middle jacks were successfully repaired, leaving only the AC issue unresolved.

7. On October 18, 2016, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainants 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.

8. The hearing in this case convened and the record closed on January 4, 2017, in San Antonio, Texas, before Hearings Examiner Andrew Kang. The Complainants, represented and testified for themselves. Angie Cox, Consumer Affairs Manager, represented and testified for the Respondent.

9. The warranty expired on September 13, 2016.

10. The warranty states that "this limited warranty does not cover any of the following: defects in materials, components or parts of the RV not attributable to Jayco" and also "does not cover any material, component or part of the RV that is warranted by another entity, including, by way of example . . . any air conditioner."

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613; TEX. OCC. CODE § 2301.204.

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 did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).

7. The Complainants' vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.

8. The Complainants' vehicle does not qualify for warranty repair. TEX. OCC. CODE §§ 2301.204 and 2301.603.

9. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603.

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**.

SIGNED February 8, 2017

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