

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0112 CAF**

**WESLEY E. MANRY,
Complainant**

v.

**HEARTLAND RECREATIONAL
VEHICLES, LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Wesley E. Manry (Complainant) 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 his recreational vehicle manufactured by Heartland Recreational Vehicles, LLC (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect. 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 March 31, 2017, in Tyler, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for himself. In addition, Patricia Manry, the Complainant's spouse, testified for the Complainant. Ian Roberts, 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

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

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

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 Complainant.¹⁷ The Complainant must prove all facts required for relief by a preponderance, that is, the Complainant must present sufficient evidence to show that each required fact is more likely than not true.¹⁸ If any required fact appears equally likely or unlikely, then the Complainant has not met the burden of proof.

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

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 Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²²

A. Summary of Complainant's Evidence and Arguments

On September 20, 2015, the Complainant, purchased a new 2016 Cyclone CY4200 from Explore USA RV Supercenter, an authorized dealer of the Respondent, in Wills Point, Texas. The vehicle's limited warranty covers the vehicle for one year. On November 28, 2016, the Complainant mailed a written notice of defect to the Respondent. On December 9, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that a buzzing sound resonates throughout the vehicle (more specifically, a static noise in the Complainant's hearing aid). In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issue as follows:

Date	Issue
September 28, 2015	Static electricity in rear bathroom causing problems with customer hearing aids
June 9, 2016	Buzzing throughout vehicle

The Complainant first noticed the noise in his hearing aid when he first picked up the vehicle. He described the noise as occurring all the time. He added that all six same model vehicles on the dealer's lot caused the noise. None of the repairs improved the noise. The Complainant stated that the vehicle was out of service for repair about two to three weeks for each repair visit. The Complainant pointed out that a work order listed a problem with static electricity. Though the dealer did not report the issue to the manufacturer, the Complainant was unaware the dealer had not notified the manufacturer.

B. Summary of Respondent's Evidence and Arguments

On cross-examination, when asked about contact with the Respondent prior to the notice letter, the Complainant explained that he tried to get contact numbers from the dealership but the dealership did not respond. Mr. Roberts noted that the owner's manual included the Respondent's contact number. Mr. Roberts stated that the noise issue was first documented on June 9, 2016, for

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).

which the dealer did not submit a claim to the Respondent. On cross-examination, Mrs. Manry stated that every time they went for service, the noise issue was the first complaint and she did not know why it was not documented. Mr. Roberts confirmed that the dealer made repair attempts but the manufacturer did not have an opportunity to repair. Mrs. Manry contended that it was not their responsibility to contact the Respondent. She questioned who actually reads the warranty manual and stated that the consumer depends on the dealer to walk them through rather than looking through the owner's manual and contacting the manufacturer. The Complainant confirmed that Mr. Roberts offered to help troubleshoot after notice of the complaint and that the Complainant did not do anything to correct the issue. Mr. Roberts asserted that the Respondent did not believe the issue was a manufacturing defect because the noise should have been present for others. The Complainant explained that the noise was in his hearing aids. Mr. Roberts inquired whether the hearing aids run off of RF (radio frequency) signals. Mrs. Manry replied that they are Bluetooth. When Mr. Roberts asked if the noise occurred in the entire camper, the Complainant explained that the noise occurred in the garage and sometimes in the bedroom. Mr. Roberts noted that the camper is wired not to affect radio frequency signals. Mrs. Manry stated that they were probably at fault for not looking at the manual but they assumed that the dealer was communicating with the Respondent.

Mr. Roberts testified that, though the complaint referenced four claims with the dealer, the dealer actually documented the complained of issue only once, on a work order dated June 9, 2016. The Manrys only communicated the issue to the Respondent in their letter on November 28, 2016. At this point, the issue was not identified as a manufacturing defect with the camper. Mr. Roberts noted that the claim for a transfer relay switch was all that was submitted to the Respondent.

C. Inspection

During the inspection of the vehicle at the hearing, the Complainant's hearing aid exhibited an intermittent static noise while he stood in the bathroom of the garage area.

D. Analysis

1. Warrantable Defect

The evidence shows that the manufacturer's warranty does not cover the complained of noise in the hearing aid; therefore, the Lemon Law does not provide any relief. The Lemon Law

does not apply to all problems that may occur with a vehicle, but only to warrantable defects. The Lemon Law does not require that a manufacturer provide any particular warranty coverage. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty does provide. To qualify for replacement or repurchase or for warranty repair, the law requires the vehicle to have a defect covered by warranty.²³ In this case, the vehicle's warranty specifies that:

Except as specifically excluded below, Heartland RV WARRANTS for a period of ONE (1) YEAR to the original retail purchaser, who purchases the recreational vehicle from an authorized Heartland RV dealer and who uses the recreational vehicle, under normal use, for private single family recreational travel, camping and seasonal usage, that the recreational vehicle manufactured and assembled by Heartland RV shall be free from defects in material and/or workmanship supplied and attributable to Heartland RV in the construction of the recreational vehicle. "Defect" means the failure of the unit and/or the materials used to assemble the unit to conform to Heartland's design and manufacturing specifications and tolerances.²⁴

In sum, this warranty applies to manufacturing defects but not to issues arising from the design or manufacturing specifications of the vehicle. The courts have explained that a "manufacturing defect is one created by a manufacturer's failure to conform to its own specifications, i.e., the product would not have been defective if it had conformed to the manufacturer's design specifications."²⁵ In other words, a manufacturing defect is an aberration occurring only in those vehicles not produced according to the manufacturer's specifications. A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of a broken part. As a result, a defective vehicle differs from a properly manufactured vehicle. Issues that do not arise from manufacturing but arise from the design of the vehicle (which occurs before manufacturing) are not warrantable defects. In contrast to manufacturing defects, "[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves."²⁶ Likewise, design characteristics result from the vehicle's design and not from any

²³ TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

²⁴ Respondent's Ex. C, Heartland RV Limited One Year Warranty (emphasis added).

²⁵ *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

²⁶ *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

error during manufacturing, so that the same-model vehicles made according to the manufacturer's specifications should ordinarily have the same characteristics.

In this case, a preponderance of the evidence shows that the noise from the hearing aid arises from the design of the subject vehicle. The Complainant testified that the noise from his hearing aid occurred with all six vehicles at the dealership of the same model as the Complainant's vehicle, indicating that the issue arises from the design shared by all same model vehicles as opposed to a manufacturing defect specific to the Complainant's vehicle. However, as explained above, the warranty does not apply to design issues. Consequently, the Lemon Law does not provide any relief for the hearing aid noise.

2. Opportunity to Repair

As outlined in the discussion of the applicable law, the Lemon Law requires that the manufacturer, as opposed to the dealer, be given an opportunity to cure the defect or nonconformity as a prerequisite for repurchase/replacement relief. The record in this case reflects that the Complainant declined to pursue any further repair after the Respondent received notice of the alleged defect. Accordingly, the vehicle cannot qualify for repurchase or replacement relief.

III. Findings of Fact

1. On September 20, 2015, the Complainant, purchased a new 2016 Cyclone CY4200 from Explore USA RV Supercenter, an authorized dealer of the Respondent, in Wills Point, Texas. The Complainant actually took delivery of the vehicle on September 27, 2015.
2. The vehicle's limited warranty covers the vehicle for one year.
3. In relevant part, the Complainant took the vehicle to a dealer for repair as shown below:

Date	Issue
September 28, 2015	Static electricity in rear bathroom causing problems with customer hearing aids
June 9, 2016	Buzzing throughout vehicle

4. On November 28, 2016, the Complainant mailed a written notice of defect to the Respondent.
5. On December 9, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that a buzzing sound resonates throughout the vehicle.

6. After the Respondent received the Complaint, Mr. Roberts contacted the Complainant in an attempt to resolve the issue. However, the Complainant declined any further repair attempts.
7. On February 23, 2017, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, giving all parties not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the matters asserted.
8. The hearing in this case convened and the record closed on March 31, 2017, in Tyler, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for himself. In addition, Patricia Manry, the Complainant's spouse, testified for the Complainant. Ian Roberts, Consumer Affairs Manager, represented and testified for the Respondent.
9. The warranty expired on September 25, 2016.
10. At the dealership, the Complainant experienced the complained of noise in his hearing aid in all six vehicles of the same model as the subject vehicle.
11. During the inspection of the vehicle at the hearing, the Complainant's hearing aid exhibited an intermittent static noise while he stood in the bathroom of the vehicle's garage.
12. The static noise in the Complainant's hearing aid resulted from the design of the vehicle.
13. The warranty applies to "defects in material and/or workmanship supplied and attributable to Heartland RV in the construction of the recreational vehicle."

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 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. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
 7. The Respondent did not have an opportunity to cure the alleged defect(s). This Order may not require repurchase or replacement of the vehicle without an opportunity to cure by the Respondent. TEX. OCC. CODE § 2301.606(c)(2).
 8. The Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE §§ 2301.604 and 2301.606(c)(2).
 9. The Complainants' vehicle does not qualify for warranty repair. TEX. OCC. CODE §§ 2301.204 and 2301.603.
 10. 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.

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 May 16, 2017



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