

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 17-0146144 CAF**

**WAYNE W. CHILDS,  
Complainant**

v.

**JAYCO INC. and  
MERCEDES-BENZ USA, LLC,  
Respondents**

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**BEFORE THE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Wayne W. Childs (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) and/or Texas Occupations Code § 2301.204 (Warranty Performance) for alleged warrantable defects in his recreational vehicle (RV) manufactured by the Respondents, Jayco Inc. and Mercedes-Benz USA, LLC (MBUSA). 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 hearing<sup>1</sup> and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened on September 21, 2017, in Brownwood, Texas, before Hearings Examiner Andrew Kang. The record closed on October 11, 2017, the last deadline for filing any written submissions. Kameron Mazurek and Tommy Adams, attorneys, represented the Complainant. Alan Salyer of Trans Texas Tire and the Complainant himself testified for the Complainant. John Arnold, attorney, represented Jayco. Craig Newcomer, Consumer Affairs Manager, and Jim Keoogh, Jr., Managing Engineer – Exponent, testified for Jayco. Collin Kennedy, attorney, represented MBUSA. Mark Byrd, Field Technical Specialist, testified for MBUSA.

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<sup>1</sup> 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.”<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

##### 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.”<sup>5</sup>

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<sup>2</sup> TEX. OCC. CODE § 2301.604(a).

<sup>3</sup> TEX. OCC. CODE § 2301.604(a).

<sup>4</sup> TEX. OCC. CODE § 2301.601(4).

<sup>5</sup> *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.”<sup>6</sup>

**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 the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.<sup>7</sup>

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 the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.<sup>8</sup>

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:

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<sup>6</sup> *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.”).

<sup>7</sup> TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

<sup>8</sup> TEX. OCC. CODE § 2301.605(a)(2).

[A] nonconformity still exists that substantially impairs the vehicle's use or market value, the vehicle is out of service for repair for a cumulative total of 30 or more days, and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.<sup>9</sup>

The 30 days described above does not include any period when the owner has a comparable loaner vehicle provided while the dealer repairs the subject vehicle.<sup>10</sup>

The existence of 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.<sup>11</sup> 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.<sup>12</sup>

**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, someone on behalf of the owner, or the Department provided written notice of the alleged defect or nonconformity to the manufacturer;<sup>13</sup> (2) the manufacturer was given an opportunity to cure the defect or nonconformity;<sup>14</sup> and (3) the Lemon Law complaint was filed within six months after the earliest

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<sup>9</sup> TEX. OCC. CODE § 2301.605(a)(3).

<sup>10</sup> TEX. OCC. CODE § 2301.605(c).

<sup>11</sup> *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.’”).

<sup>12</sup> *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.”).

<sup>13</sup> TEX. OCC. CODE § 2301.606(c)(1).

<sup>14</sup> 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).

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.<sup>15</sup>

## 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."<sup>16</sup> The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."<sup>17</sup>

## 3. Burden of Proof

The law places the burden of proof on the Complainant.<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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."<sup>21</sup> However, the parties may expressly or impliedly consent

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<sup>15</sup> TEX. OCC. CODE § 2301.606(d)(2).

<sup>16</sup> TEX. OCC. CODE § 2301.204.

<sup>17</sup> TEX. OCC. CODE § 2301.603(a).

<sup>18</sup> 43 TEX. ADMIN. CODE § 215.66(d).

<sup>19</sup> *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

<sup>20</sup> "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 factual 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.").

<sup>21</sup> 43 TEX. ADMIN. CODE § 215.202(a)(2).

to trying issues not included in the pleadings.<sup>22</sup> Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.<sup>23</sup>

## 5. Attorney Fees

When repurchase or replacement is ordered, the Department's rules allow reimbursement of "attorney fees if the complainant retains counsel after notification that the respondent is represented by counsel." Such expense "must be reasonable and verified through receipts or similar written documents."<sup>24</sup>

### A. Summary of Complainant's Evidence and Arguments

On August 10, 2016, the Complainant, purchased a new 2016 Melbourne 24K from Camping World RV Sales, an authorized dealer of Jayco in Katy, Texas. The vehicle had 1,338 miles on the odometer at the time of purchase. Jayco's limited warranty covers the "house" portion of the RV for two years or 24,000 miles, whichever occurs first. MBUSA's limited warranty covers the chassis of the RV three years or 36,000 miles, whichever occurs first. On November 27, 2016, the Complainant provided a written notice of defect to the Respondent. On January 30, 2017, the Complainant filed a complaint with the Department alleging that the RV vibrated, making it unsafe, and a tire rubbed when making left turns.

The Complainant testified he purchased the subject recreational vehicle on August 10, 2016, for travel but did not do anything with it because he did not feel safe. He stated that he noticed the RV vibrating. He averred that the vibration impaired the RV's use and diminished its value. When asked if the RV had a safety hazard, the Complainant responded that his wife only rode in the vehicle twice and was scared each time and refuses to get in the vehicle. The Complainant opined that the RV shook so much it barely held the road. He stated that the dealer rotated the rims but did not correct the issue. While returning to Brownwood, he noticed vibration, which was worst between Waco and Goldthwaite. Subsequently, the dealer changed and supposedly balanced the rims, which did not correct the problem. Returning to Brownwood, the Complainant noticed about the same magnitude vibration at about the same place. At the next

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<sup>22</sup> 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

<sup>23</sup> See *Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref'd).

<sup>24</sup> 43 TEX. ADMIN. CODE § 215.209(a).

repair, the dealer shortened the mud flaps in front of the tires. On the return trip to Brownwood, the RV exhibited the same vibration. The conduit box was repaired at the April 2017 visit. The Complainant testified that he has had very little use of the RV.

On cross-examination, the Complainant testified that he has driven a variety of trucks, including short beds, semis, doubles, etc. He previously owned one other motorhome, a class A, for five years during the '90s. He affirmed that he did not have another class C motorhome like the subject vehicle, which has a shorter wheelbase. The Complainant stated he did not check the junction box but the tire rub did not really appear to have been fixed. He noted that the mud flap wore out, which he attributed to the vehicle leaning to the right. He explained that he noticed the rubbing occasionally when turning. When asked if Jayco had a final repair attempt, the Complainant could not see a Jayco repair attempt (in the invoices). He affirmed that he never had any issues with the camper portion of the vehicle but he never used the camper to find out if it had any issues. The Complainant believed that the vibration diminished the value of the RV but did not have the RV appraised. He did not use the RV because he did not feel safe using it because of vibration and leaning when turning. He believed the RV was too heavy in the way it was designed, noting that the hot water heater, furnace, generator, sink, stove, microwave, refrigerator, pantry, and two wardrobes were on one side and the other side only had a propane tank, slideout, and bathroom. He confirmed that he believed the upfitting made the vehicle lean but did not have it weighed to determine whether the weight was appropriately distributed. The Complainant believed the noise from the rear may have been a bearing. He explained that he looked for another same model RV as the subject vehicle to test drive but could not find one in stock.

Mr. Salyers testified that the Complainant contacted him about the RV's vibration but he did not work on it to avoid voiding the warranty. After lifting the RV, Mr. Salyers noticed that the frame was side on the house but narrowed for the rear differential. With the leaning issue, he thought a wider stance at the rear would help. He also observed that the house did not appear centered on the chassis but he did not know if this was how it was designed. He also affirmed that he saw that the mud flap had been sawed off next to the bracket. When he initially drove the RV, it vibrated some. Subsequently, Mr. Salyers drove the RV after the Complainant drove the RV to Cross Plains and back and the RV's vibration was considerably worse and at least a nuisance. He described the vehicle as leaning hard right and uncomfortable at higher speeds.

On cross-examination, Mr. Salyers confirmed that he did not have the RV weighed. He stated that he had not previously examined a motorhome for vibration issues and had examined a motorhome for a lean issue due to a spring about seven to eight years ago. He did not see that type of (spring) problem with the subject vehicle. Mr. Salyers stated that he observed the right frame rail veer about an inch from the front of the box to the wheels. However, he acknowledged that the RV may have been engineered this way and he could not confirm whether this configuration caused the vibration or lean. He did not remove the wheels to avoid voiding the warranty but the tires and alignment looked normal. He described the steering wheel as having a “pretty good shake” when driving the RV. He stated that he was not comfortable with the vehicle leaning right when turning left. However, he acknowledged that others might be comfortable with the vehicle turning at a reasonable speed. Mr. Salyers found the relocation of the junction box to be a good, workmanlike repair and the tire no longer rubbed on the junction box. He described the RV as leaning to the right but recognized that the lean: may have resulted from the RV’s engineering; might not be a hazard; and might not contribute to the vibration or the turning issue. Mr. Salyers did not see any flaws in the assembly of the chassis. He confirmed that he did not measure the RV’s vibration or noise.

#### **B. Summary of Jayco’s Evidence and Arguments**

Mr. Keoogh affirmed the importance of calculating, measuring and designing RVs with weight splits, gross weights, and wheel weights in consideration. Jayco retained Mr. Keoogh to inspect the subject vehicle and evaluate the vibration and bottoming out/thumping when turning hard left. Mr. Keoogh had the vehicle weighed and found the weight distributions to be good for a motorhome. In particular, the (unloaded) left-right split was 52% and 48%. Additionally, he analyzed the weight distribution in other scenarios. With a driver, passenger, full fuel tank, full fresh water tank, and 80 lbs. of cargo, the left right split went to 51% and 49%. With a driver, passenger, full fuel tank, half full fresh water tank, full gray tank, and 80 lbs. of cargo, the split went to 50% - 50%. With a driver, passenger, full fuel tank, half full fresh water tank, full black tank, and 80 lbs. of cargo, the split was also 50% - 50%. Mr. Keoogh affirmed that he previously test drove the same model as the subject vehicle as well as other class C RVs. Some had vibration issues, others did not. Some with aluminum wheels had a shaking vibration due to incorrect indexing/improper installation. The aluminum wheels taken from the subject RV had gouges in

the wheels, indicating improper installation. The replacement wheels currently on the RV appeared properly installed. Mr. Keoogh testified that he could not discern a lean in the RV. Upon inspection at the hearing, he found the junction box to have been properly repaired and not causing any noise. Additionally he found no flexing, bowing, or distortion of the chassis. He explained that the inch variance Mr. Salyer noticed was not significant, as compared to cars, pointing out that weights change with loading. Mr. Keoogh confirmed that the new wheels installed by the Mercedes-Benz dealership fixed the vibration caused by the improper installation by the Jayco subcontractor. On cross-examination, Mr. Keoogh answered that his longest test drive of the RV was 20 to 30 minutes. However, based on the weight distributions and his observations, he did not expect the RV to vibrate on longer test drives.

Mr. Newcomer testified that the RV used decorative aluminum wheels instead of the stock Mercedes-Benz wheels. These hub-centric (wheels centered on the hub) aluminum wheels have notches that require aligning, which if not aligned would dig in and cause vibration issues. He averred that the RV had vibration attributable to the wheel issue and Jayco had new wheels sent to the Mercedes-Benz dealer for installation on the RV. Additionally, upon hearing about flat spots, Jayco also provided a goodwill replacement with new tires. Mr. Newcomer testified that he did not notice anything abnormal during the test drive of the RV at the hearing. He noted that he had ridden in 10 to 15 like vehicles. He confirmed that Jayco had the junction box relocated after receiving a letter from the Complainant. Mr. Newcomer explained that Jayco itself did not have a final repair attempt because the vibration issue appeared to have been resolved at the Mercedes-Benz dealership. When Mr. Keoogh's inspection showed a tire contacting the junction box, Jayco hired a Waco company to move the junction box. Mr. Newcomer stated that he did not notice any abnormal noise or lean in the RV. He affirmed that the vehicle did not have any substantial impairment of use or value, or any serious safety hazard. Mr. Newcomer explained that mud flaps are typically shipped full-size and he believed that all mud flaps required trimming to fit the vehicle. On cross-examination, when asked about the subject RV's mud flap being cut all the way to the bracket, he elaborated that the mud flaps generally protect boxes in front of the wheel.

### **C. Summary of MBUSA's Evidence and Arguments**

Mr. Byrd testified that he test drove the subject RV for 25 to 30 minutes at mostly highway speeds. He explained the RV has a ride quality more like a heavy duty truck as opposed to a sedan.

During the test drive, he used an NVH (noise, vibration, and harshness) tool to detect the type and magnitude of vibration. He explained that different standards for acceptable vibration applied for trucks as compared to passenger cars. Mr. Keogh had previously driven and warmed up the vehicle before Mr. Byrd's inspection but he did not notice anything unusual. He found that the propeller shaft's vibration was acceptable but marginal, so he had the rear drive shaft replaced in an effort assist the Complainant. His inspection of the drive shaft did not show any improper assembly and the vehicle did not exhibit any abnormal sound or vibration during the test drive. He affirmed that vehicles cannot completely avoid ambient vibrations. He testified that the vehicle had no impairment of use, serious safety hazards, or (negative) impacts on value, and concluded that the vehicle had no warrantable defects.

Mr. Byrd explained that a differential can normally make a noise at one speed and another can make a noise at another speed.

#### **D. Inspection**

The RV had 3,209 miles on the odometer upon inspection, prior to the test drive at the hearing. The RV exhibited a whining noise at speeds over 65 mph. While cruising at 71 mph, the glass in the right rearview mirror assembly could be seen shaking. The test drive ended with 3,234 miles on the odometer.

#### **E. Analysis**

The Lemon Law does not apply to all problems that a consumer may have with a vehicle but only to defects covered by warranty (warrantable defects).<sup>25</sup> However, the complained of conditions in this case appear as likely to result from the design of the vehicle as from any warrantable defect.<sup>26</sup> Though the performance of the RV clearly troubles the Complainant, whether Lemon Law relief depends on the existence of a warrantable defect. If the manufacturer's warranty does not cover the complained of condition; the Lemon Law does not provide any relief. The Lemon Law does not require that a manufacturer provide any particular warranty coverage nor

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<sup>25</sup> TEX. OCC. CODE § 2301.603(a).

<sup>26</sup> The whining noise from the rear will not be addressed since the issue was not previously reported/noticed or included in the complaint. TEX. OCC. CODE §§ 2301.204, § 2301.606(c)(1) and 43 TEX. ADMIN. CODE § 215.202(b)(3).

does the Lemon Law specify any standards for vehicle characteristics. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. Consequently, to qualify for replacement or repurchase or for warranty repair, the vehicle must have a defect covered by warranty.<sup>27</sup> The Jayco warranty specifies in relevant part that: “In the event that a substantial defect in material or workmanship, attributable to Jayco, is found to exist during the warranty period, it will be repaired or replaced, at Jayco’s option, without charge to the RV owner, in accordance with the terms, conditions and limitations of this limited warranty.”<sup>28</sup> Similarly, the MBUSA warranty provides: “The New Vehicle Limited Warranty warrants to the original and each subsequent owner of a new Sprinter vehicle that any authorized Van Dealer will make any repairs or replacements necessary to correct defects in material or workmanship arising during the warranty period.”<sup>29</sup> Accordingly, the warranties only apply to defects in materials or workmanship. On the other hand, the warranty does not cover conditions arising from the vehicle’s design. Courts have affirmed that warranty language covering “defects in material or workmanship” do not cover design issues.<sup>30</sup> That is, defects in materials or workmanship (manufacturing defects) differ from characteristics of the design. A manufacturing defect is an isolated 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. Unlike manufacturing defects, issues that do not arise from manufacturing, such as characteristics of the vehicle’s design (which occurs before manufacturing) are not warrantable defects. Design characteristics result from the vehicle’s specified design and not from any error during manufacturing, so that the same-model vehicles made according to the manufacturer’s specifications may ordinarily exhibit the same characteristics. In contrast to

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<sup>27</sup> TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

<sup>28</sup> Complainant’s Exhibit 8, Jayco 2016 Melbourne Manual, at 11.

<sup>29</sup> Mercedes-Benz Service and Warranty Information 2016, at 6.

<sup>30</sup> *E.g., Whitt v. Mazda Motor of America*, 5th Dist. Stark No. 2010CA00343, 211-Ohio-3097, ¶¶ 18-21 (“The manufacturer’s express warranty in the case sub judice provides: ‘Mazda warrants that your new Mazda Vehicle is free from defects in material or workmanship . . . .’ The trial court found the warranty did not cover claims of design defects. . . . The problems about which Appellants complained did not fall within the applicable expressed warranty.”); see *GT & MC, Inc. v. Texas City Refining, Inc.*, 822 S.W.2d 252, 257 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (“the language in the contract of May 12, 1980, expressly limited TCR’s recovery only for defects in materials or workmanship to damages for repair or replacement value. No mention was made in the guarantee of remedies for design defects.”).

manufacturing defects, “[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves.”<sup>31</sup> Consequently, regardless of how problematic or undesirable the complained of condition may be, if the condition arises from the vehicle’s design, the Lemon Law does not apply because the warranty only covers manufacturing defects.

### **1. Vibration**

Any currently existing vibration appears to be a normal characteristic of the vehicle’s design. Significantly, the witnesses that have ridden in other same-model RVs as the subject vehicle testified that the subject vehicle’s vibration is comparable other like vehicles. On the other hand, neither the Complainant nor Mr. Salyers has had the benefit of comparing a like model as a baseline for evaluating the level of vibration. In any event, the subjectivity of how different individuals experience the same vibration may lead to divergent opinions. On the other hand, Mr. Byrd, using an NVH analyzer found the RV’s vibration to be within accepted specifications. As explained in the discussion of warrantable defects, a defect exists when the vehicle fails to comply with specifications. Here, even if the vibration is subjectively excessive, the objective measures indicate that the vehicle does not have a defect. Furthermore, neither Mr. Salyers, Mr. Byrd, nor Mr. Keough (after replacement of the aluminum wheels) could detect any underlying manufacturing defect to cause abnormal vibration. Moreover, Mr. Salyer could not confirm a cause for the vibration. In sum, the evidence does not show that vibration is more likely the result of a manufacturing defect as opposed to design characteristic.

### **2. Left Turn Issues**

The record reflects that the tire rubbing issue has been successfully resolved. The Complainant confirmed that the tire no longer rubs after relocation of junction box. Mr. Salyer confirmed that this repair appeared to be done in a good and workmanlike manner. With regard to the leaning, the Complainant pointed to the placement of the hot water heater, furnace, generator, sink, stove, microwave, refrigerator, pantry, and two wardrobes all on the right side as imbalancing the RV. Similarly, the Complainant’s notice letter cited the mounting of the passenger-side heavy house on the relatively short Sprinter chassis as a cause of the leaning. However, the placement of

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<sup>31</sup> *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), writ denied, (Feb. 13, 1997).

these components and the use of the Sprinter Chassis are clearly design issues not subject to Lemon Law relief. And as Mr. Keough explained, variances, such as the angled right frame rail, are insignificant in the context of RVs (unlike passenger cars). Additionally, loading affects the weight distribution as well.

### III. Findings of Fact

1. On August 10, 2016, the Complainant, purchased a new 2016 Melbourne 24K from Camping World RV Sales, an authorized dealer of Jayco in Katy, Texas. The vehicle had 1,338 miles on the odometer at the time of purchase.
2. Jayco's limited warranty covers the "house" portion of the RV for two years or 24,000 miles, whichever occurs first. MBUSA's limited warranty covers the chassis of the RV three years or 36,000 miles, whichever occurs first.
3. On November 27, 2016, the Complainant provided a written notice of defect to the Respondent.
4. On January 30, 2017, the Complainant filed a complaint with the Department alleging that the RV vibrated, making it unsafe, and a tire rubbed when making left turns.
5. On May 5, 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 factual matters asserted.
6. The hearing in this case convened on September 21, 2017, in Brownwood, Texas, before Hearings Examiner Andrew Kang. The record closed on October 11, 2017, the last deadline for filing any written submissions. Kameron Mazurek and Tommy Adams, attorneys, represented the Complainant. Alan Salyer of Trans Texas Tire and the Complainant himself testified for the Complainant. John Arnold, attorney, represented Jayco. Craig Newcomer, Consumer Affairs Manager, and Jim Keough, Jr., Managing Engineer – Exponent, testified for Jayco. Collin Kennedy, attorney, represented MBUSA. Mark Byrd, Field Technical Specialist, testified for MBUSA.

7. The vehicle's odometer displayed 3,209 miles at the time of the hearing.
8. The vehicle's house and chassis warranties were in effect at the time of the hearing.
9. The vehicle operated normally during the test drive at the hearing.
10. The complained of conditions result from the design of the vehicle.
11. The warranties only apply to defects in parts or workmanships and not to the design of the 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 filed a sufficient complaint with the Department. 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's vehicle does not qualify for replacement or repurchase or warranty repair. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204, 2301.603 and 2301.604(a).
7. 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 Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

**SIGNED December 11, 2017**



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