

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0175303 CAF**

CLYDE ELMS,
Complainant

v.

**JAGUAR LAND ROVER NORTH
AMERICA, LLC,**
Respondent

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Clyde Elms (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 vehicle distributed by Jaguar Land Rover North America, 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 on September 15, 2017, in San Antonio, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Kristal Snelson, attorney, represented the Complainant. The Complainant testified for himself. John Chambless, attorney, 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

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.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 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.⁸

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:

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).

[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.⁹

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.¹⁰

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.¹¹ 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.¹²

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;¹³ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹⁴ and (3) the Lemon Law complaint was filed within six months after the earliest

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ TEX. OCC. CODE § 2301.605(c).

¹¹ *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.’”).

¹² *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.”).

¹³ TEX. OCC. CODE § 2301.606(c)(1).

¹⁴ 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.¹⁵

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

3. Burden of Proof

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

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

¹⁶ TEX. OCC. CODE § 2301.204.

¹⁷ TEX. OCC. CODE § 2301.603(a).

¹⁸ 43 TEX. ADMIN. CODE § 215.66(d).

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

²⁰ "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.").

²¹ 43 TEX. ADMIN. CODE § 215.202(a)(2).

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

A. Summary of Complainant's Evidence and Arguments

On December 22, 2015, the Complainant, purchased a new 2016 Land Rover Range Rover HSE from Land Rover San Antonio, a franchised dealer of the Respondent, in San Antonio, Texas. The vehicle had 55 miles on the odometer at the time of purchase. The vehicle's limited warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first. On March 24, 2017, the Complainant, provided a written notice of defect to the Respondent. On April 24, 2017, the Complainant filed a complaint with the Department alleging that the vehicle had an issue with acceleration, specifically, that the vehicle will initially hesitate but then accelerate strongly.

The Complainant testified that when stepping on the accelerator, the vehicle would hesitate momentarily and abruptly accelerate. He first noticed the issue in February 2016 and took the vehicle for service in March 2016. The Complainant understood that the manufacturer was working on a software fix, which was not ready. The issue appears to be getting worse, with the issue occurring in the mornings, in the first five or ten minutes, almost 98% of the time, but not as bad during the day, and worse when the weather is colder. The Complainant explained that the vehicle hesitated when pulling into traffic or leaving a stop light or stop sign, momentarily pausing and abruptly moving forward, caused problems moving into traffic and watching traffic in front of the vehicle. He noted that his office was located near high traffic areas and had to be extremely careful driving. Additionally, going towards home, Boerne Stage Road from Interstate Highway 10 is also a high traffic area. Driving on the highway (not in traffic), the vehicle does not hesitate at 65 or 70. The issue occurs when accelerating from low speed. The dealership found the vehicle to be within specifications but even so, the Complainant believed the vehicle to be dangerous.

On cross-examination, the Complainant confirmed that the subject vehicle was his daily driver and that he had not previously owned a diesel or turbocharged vehicle. He also affirmed

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

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

that the March 24, 2017, letter to the Respondent was his first contact with the company regarding the vehicle. The dealer mentioned the software fix on July 18, 2017, at the last repair visit.

On redirect-examination, the Complainant testified that he had been a licensed driver for 51 years and had never experienced an issue as in the present case with the 10 vehicles he had owned. In April or May of this year, the dealership sent two personnel for the subject vehicle's test drive, with one person riding the subject vehicle and the other following. The Complainant noted that he believed the dealership wanted him to driver another diesel vehicle to see if the vehicles drove the same.

On re-cross examination, the Complainant explained that he never test drove a comparison vehicle because the dealership personnel never came back. He confirmed that he had spoken with the dealership and not the Respondent.

The Complainant concluded that he did not get an acceptable response from the dealer or the manufacturer, which did not inspect the vehicle before the hearing. The vehicle was brand new and should not have had issues of any kind.

B. Summary of Respondent's Evidence and Arguments

The Respondent argued that the complained of condition resulted from the design of the vehicle. Moreover, the dealership did not attempt a warranty repair for the complained of condition. The standard claims list for the subject vehicle does not show any warranty claims for the acceleration issue. The Respondent further asserted that this issue was not a warranty item or a nonconformity. Software updates occur all the time and the continual upgrades were a part of the design of the vehicle.

C. Inspection and Test Drive

Upon inspection at the hearing, before the test drive, the subject vehicle's odometer displayed 28,376 miles. During the test drive, the Complainant noted times when he felt the vehicle accelerate without him controlling the acceleration. The acceleration did not appear as apparent to the hearings examiner. At the end of the test drive, the vehicle's odometer had 28,380 miles.

D. Analysis

As detailed below, the subject vehicle does not have a warrantable defect subject to Lemon Law relief. Instead, the complained of acceleration appears to result from the operation of the vehicle as designed rather than any manufacturing defect covered by warranty.

1. Warrantable Defects

The Lemon Law does not apply to all problems a consumer may have with a vehicle. Rather, the Lemon Law only applies to defects covered by warranty (warrantable defects).²⁴ 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 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.²⁵ In this case, the vehicle's warranty specifies that: "Jaguar Land Rover North America, LLC warrants that during the warranty period, if a Land Rover vehicle is properly operated and maintained, repairs required to correct defects in factory-supplied materials or factory workmanship will be performed without charge upon presentment for service; any component covered by this warranty found to be defective in materials or workmanship will be repaired, or replaced, without charge with a new or remanufactured part distributed by Jaguar Land Rover North America, LLC, at its sole option."²⁶ Accordingly, the warranty applies 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 defects.²⁷ That is, defects in

²⁴ TEX. OCC. CODE § 2301.603(a).

²⁵ TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

²⁶ Complainant's Exhibit 12, Passport to Service.

²⁷ *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.").

materials or workmanship (manufacturing defects) differ from characteristics of the design. 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.”²⁸ 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. 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 manufacturing defects, “[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves.”²⁹ If the complained of condition constitutes a design characteristic or even a design defect, the Lemon Law does not apply because the warranty only covers manufacturing defects.

2. Acceleration Issue

The hesitation and strong acceleration described by the Complainant simply reflects the normal increase in engine power from the turbocharger’s boost. In particular, the hesitation experienced by the Complainant corresponds to the turbo lag (off-boost performance) occurring before the increase in engine power from the turbocharger’s boost (on-boost performance), which corresponds to the strong acceleration experienced by the Complainant. Although the Complainant may find the performance characteristics of the turbocharged engine undesirable or disconcerting, the acceleration caused by the increase in power from the turbocharger is not a manufacturing defect but simply the normal operation of the turbocharged engine’s design.

²⁸ *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

²⁹ *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

III. Findings of Fact

1. On December 22, 2015, the Complainant, purchased a new 2016 Land Rover Range Rover HSE from Land Rover San Antonio, a franchised dealer of the Respondent, in San Antonio, Texas. The vehicle had 55 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first.
3. On March 24, 2017, the Complainant, provided a written notice of defect to the Respondent.
4. On April 24, 2017, the Complainant filed a complaint with the Department alleging that the vehicle had an issue with acceleration, specifically, that the vehicle will initially hesitate but then accelerate strongly.
5. On May 19, 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 15, 2017, in San Antonio, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Kristal Snelson, attorney, represented the Complainant. The Complainant testified for himself. John Chambliss, attorney, represented the Respondent.
7. The vehicle's odometer displayed 28,376 miles at the time of the hearing.
8. The vehicle's warranty was in effect at the time of the hearing.
9. During the test drive, the Complainant noted that he felt the vehicle accelerate without him controlling the acceleration.
10. The complained of hesitation and acceleration are normal characteristics of the vehicle's turbocharged engine.

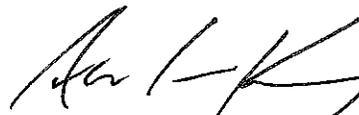
IV. Conclusions of Law

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. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603(a) 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 November 14, 2017



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