

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0175385 CAF**

**RAYMOND BENAVIDES,
Complainant**

v.

**KEYSTONE RV COMPANY,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Raymond Benavides (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 manufactured by Keystone RV Company (Respondent). A preponderance of the evidence does not show that the subject recreational vehicle (RV) currently has a warrantable defect that creates a serious safety hazard or substantially impairs the vehicle's use or market value. Consequently, the Complainant's vehicle does not qualify for repurchase or replacement relief.

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 7, 2017, in Victoria, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Robert Harrison, attorney, represented the Complainant, who testified for himself. Christopher Lowman, attorney, represented the Respondent. Brent Giggy, Product Manager, and Matt Clark, Director of Parts and Service for Camping World RV Supercenter, 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 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. Burden of Proof

The law places the burden of proof on the Complainant.¹⁶ 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.¹⁷ If any required fact appears equally likely or unlikely, then the Complainant has not met the burden of proof.

A. Summary of Complainant's Evidence and Arguments

On June 6, 2015, the Complainant, purchased a new 2015 Dutchman Voltage from Camping World RV Supercenter, an authorized dealer of the Respondent, in Katy, Texas. The vehicle's limited warranty provides coverage for one year from the date of purchase.¹⁸ On April 18, 2017, the Complainant filed a complaint with the Department alleging that the subject vehicle leaked causing wood rot, wood buckling, cabinet delamination, wet insulation, stained walls, and roof repair.

The Complainant testified that his RV had numerous instances of water damage and leaks through the last couple of years. The RV had been in for repair about nine times, much of it repetitive, for leaks in the same areas. Water puddled by the half-bath in the garage, the front slide leaked, the front cap leaked, the front storage compartments leaked, and windows in the garage leaked. The Complainant confirmed that the leaks only occurred when raining. After eight months of no rain, he noticed water puddling in the corner of the garage when raining. He affirmed that he first contacted the dealer, Camping World RV Supercenter, in February of 2016 and then April of 2016. The leak in the garage continued for several months. After taking the RV back again for service, the leak happened another three or four times before the floor rotted. The dealer apparently did not find the cracks in the cap when the RV first went in for service. When picking up the RV in May 2016 after the April 2016 visit, the Complainant saw that the RV had dipped down towards

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

¹⁶ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁷ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

¹⁸ Respondent's Exhibit 1, Dutchmen's Owner's Manual, Chapter 2: Limited One Year Warranty.

the front, so he asked the dealership to auto-level the RV, which did not work; either the gray or black water tank valve came out; and the battery was dead. After picking up the RV, the bedroom slide would not open. Water leaked so badly that swelling wedged the slide in the camper. Water pooled in the garage in the same corner and the floor felt soft. The dealer replaced the slide and rebuilt the floor. The Complainant believed that the RV had leaking issues before the sale. He noticed that the floor had been replaced and the wall had stains. The wall was soft enough to push through the wall. Initially, the dealer believed the water came from a loose AC seal; then from the seal around the window; then possibly the hole in the roof where the cable ran through; and after that, the vents. Between January 28, 2017, and April 20, 2017, the Complainant noticed more leaks in the front. The RV had an inch of water in the driver's side and passenger side as well as water stains on the upper deck of the storage compartment. As of the hearing, the RV was at the dealer for 350 days. When camping at Coletto Creek, after hooking up the water and turning it on, the storage compartment contained water and had water stains from rain water. The driver's side drawer had water in that half, in the bottom section. With regard to the cabinets over the bed, the sealant had cracked. The front-rear transitions, attic vents, were patched with sealant.

On cross-examination, the Complainant confirmed that the RV had a one year warranty and that he filed the complaint almost two years after purchasing the RV. He agreed that the only water in the pass-through compartment leaked where the gasket was misaligned and stuck to the compartment door. He also confirmed the existence of a rip on the roof towards the front, a missing vent cap, and a broken AC housing with a twig wedged in. A branch had apparently caused the damage. On redirect, the Complainant stated that he mailed the complaint on February 2017, but did not know why the Department did not receive it until April 18, 2017.

B. Summary of Respondent's Evidence and Arguments

Mr. Giggy testified that he found the pass-through compartment door seal loose and some damage to the rubber roof, an inch and a half tear, with marks on the roof from the front to the rear. In the path of the mark, an attic vent was missing and the side of the AC shroud was damaged. The vent cap not only keeps moisture from coming in but also allows moisture to go out. The shroud covering the AC mechanism had significant damage—cracks in several spots—with a stick lodged in it. He saw evidence of water in the pass-through compartment at the plastic “tub” in the floor adjacent to the bottom of the door, where water may reasonably be expected if water gets by

the door. He did not find any other evidence of water penetration. The other complaint issues appear to have been corrected.

On cross-examination, Mr. Giggy testified that if an RV sat through 56 inches of rain, if it were going to leak, it would have leaked. He did not know if the RV leaked in the past two weeks since the hurricane (Harvey).

Mr. Clark testified that the RV was outside and not under cover during the hurricane and would have been exposed to whatever fell.

A. Inspection

Inspection showed some water pooled in the plastic lined “well” of the pass-through compartment on the passenger side of the vehicle. The vehicle otherwise appeared dry. The roof exhibited damage, apparently from scraping a tree branch, including a tear in the rubber roof, a missing vent cap, and a broken AC shroud (which was cracked and had an approximately 2 inch by 1 inch piece missing from the front right corner and had a twig wedged in the right side). The roof also had various patches of sealant added around various places on the roof.

B. Analysis

As an initial matter, the Lemon Law requires a complaint to be filed no later than six months after the earliest of: the warranty’s expiration date or the date on which 24 months have passed since the date of original delivery. In this case, the Complainant purchased the RV on June 6, 2015, so the warranty expired on June 6, 2016, and 24 months after delivery fell on June 6, 2017. Accordingly, the complaint must have been filed by December 6, 2016. The complaint was actually filed on April 18, 2017, approximately four months past the deadline. Consequently, the vehicle cannot qualify for repurchase or replacement under the Lemon Law. Furthermore, although the vehicle has had significant leaks in the past, the Lemon Law requires that a substantial defect continue to exist even after repair. However, the record only reflects the continuing existence of one defect, the leaking pass-through storage compartment door caused by a dislocated seal. Even if the vehicle otherwise qualified for repurchase/replacement relief, the leak at the compartment door does not rise to the level of a serious safety hazard or a substantial impairment of the use or market value of the vehicle, particularly considering that only a limited amount of water appeared

in the plastic lined-well of the compartment. In any event, as a matter of law, the subject vehicle cannot qualify for Lemon Law relief.

III. Findings of Fact

1. On June 6, 2015, the Complainant, purchased a new 2015 Dutchman Voltage from Camping World RV Supercenter, an authorized dealer of the Respondent, in Katy, Texas.
2. The vehicle's limited warranty provides coverage for one year from the date of purchase.
3. On April 18, 2017, the Complainant filed a complaint with the Department alleging that the subject vehicle leaked causing wood rot, wood buckling, cabinet delamination, wet insulation, stained walls, and roof repair.
4. On May 22, 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.
5. The hearing in this case convened on September 7, 2017, in Victoria, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Robert Harrison, attorney, represented the Complainant, who testified for himself. Christopher Lowman, attorney, represented the Respondent. Brent Giggy, Product Manager, and Matt Clark, Director of Parts and Service for Camping World RV Supercenter, testified for the Respondent.
6. The warranty expired on June 6, 2016.
7. The subject vehicle was stored in the open during Hurricane Harvey.
8. Inspection of the subject vehicle showed some water pooled in the plastic lined "well" of the pass-through compartment on the passenger side of the vehicle. The vehicle otherwise appeared dry. The roof exhibited damage, apparently from scraping a tree branch during transport, including a tear in the rubber roof, a missing vent cap, and a broken AC shroud (which was cracked and had an approximately 2 inch by 1 inch piece missing from the

front right corner and had a twig wedged in the right side). The roof also had various patches of sealant added around various places on the roof. The vehicle otherwise appeared normal.

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 timely file the complaint for repurchase or replacement relief. The proceeding must have been commenced not later than six months after the earliest of: (1) the expiration date of the express warranty term; or (2) the date on which 24 months have passed since the date of original delivery of the motor vehicle to an owner. TEX. OCC. CODE § 2301.606(d). Further, the Complainant did not prove that the vehicle has a currently existing warrantable defect that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. TEX. OCC. CODE § 2301.604(a).

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 6, 2017



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