

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0176278 CAF**

**ANDREW YACENDA SR.,
Complainant**

v.

**DS CORP d/b/a CROSSROADS RV,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Andrew Yacenda Sr. (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 DS Corp d/b/a Crossroads RV (Respondent). A preponderance of the evidence shows that the subject vehicle has a warrantable defect that substantially impairs the vehicle's market value after a reasonable number of repair attempts. Consequently, the Complainant's vehicle qualifies for repurchase 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 October 24, 2017, in San Antonio, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented and testified for himself. Monica Yacenda, the Complainant's spouse, also testified for the Complainant. Brent Giggy, Product Team Lead, 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 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 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

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 satisfied the “opportunity to cure” requirement when the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt a repair on the manufacturer's behalf. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

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” and the vehicle owner notified the manufacturer, converter, distributor, or its authorized agent of the defect.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 to trying issues not included in the pleadings.²² Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²³

¹⁶ TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

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).

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).

A. Complainant's Evidence and Arguments

On November 11, 2016, the Complainant, purchased a new 2016 Redwood RW38RD from Explore USA RV Supercenter, an authorized dealer of the Respondent, in Seguin, Texas. The Complainant actually took delivery of the vehicle on November 29, 2016. The vehicle's limited warranty provides coverage for two years from the date of purchase. On December 9, 2016, the Complainant provided a written notice of defect to the Respondent. On May 19, 2017, the Complainant filed a complaint with the Texas Department of Motor Vehicles alleging that the master bedroom slideout leaked. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issue as follows:

| Date | Issue |
|-----------------|---------------------------|
| January 2, 2017 | Water leak in bedroom |
| June 1, 2017 | bedroom slide out leaking |
| August 31, 2017 | bedroom slide out leaking |

The Complainant testified that on a trip in December 2016, Mrs. Yacenda found a magazine on the floor soaking wet after rain on the night before. He answered that the repairs did not improve the issue. The Complainant explained that he never actually had the RV back from the dealership because each time the leak was believed to have been fixed, water testing would show continued leaking. Mrs. Yacenda noted that the RV had been out of service for repair since January 2, 2017. The Complainant stated he picked up the RV the day before the hearing, October 23, 2017, to take to the October 24, 2017, hearing. The Complainant added that at the initial pre-delivery walkthrough, he noticed a stain in the vicinity of the leak, which was cleaned when he returned to the dealership.

On cross-examination, Mrs. Yacenda explained that the seal at the bottom of the slide was leaking. After the Norco (slide vendor) technician replaced the slide mechanism, the Yacendas asked the dealer to water test the RV. The Complainant stated that the water test showed leaking. He elaborated that he did not know exactly what water test the dealer did but the dealer's service advisor sprayed the slide with a hose. The Complainant noted that this service advisor did the same thing previously and the RV leaked within two minutes.

The Complainant explained that he may have considered the Respondent's offer to repair the RV earlier, if not for the RV already being out of service for many months. As for a replacement, the Complainant could not find a comparable RV because of differences in layout,

washer/dryer placement, TV location, storage, and size. The Complainant noted that the RV had to be short enough to store at a storage facility.

B. Respondent's Evidence and Arguments

Mr. Giggy testified the Norco slide components had been identified as the issue so the Respondent had Norco repair the RV. Mr. Giggy believed the replacement of the slide mechanism had a good chance of resolving the issue. However, when the repair turned out not to have resolved the issue, the Respondent offered to take the RV to its facilities where more of the Respondent's and vendors' personnel could work on the RV. The Respondent wanted to repair the RV at its facilities but was not given the opportunity. Mr. Giggy explained that water testing can have significant differences in variables, differences in opinion, and differences between a pressure washer, water hose, and rain booth. A rain booth is as close as possible to simulating rain. How a technician tests for leaks might not truly simulate rain. The Respondent offered the Complainant a comparable replacement, which the warranty allows.

C. Inspection

At the inspection at the hearing, the slide at issue operated normally.

D. Analysis

A preponderance of the evidence shows that the subject vehicle continues to have a water leak after the last completed repair attempt. In particular, the June 1, 2017, work order noted that on August 28, 2017, the dealer notified the Complainant that the repairs were completed but that the RV leaked when tested on August 31, 2017. The August 31, 2017, comments on the work order noted that no action had been taken on the repairs in that work order, which included the bedroom slide leaking. The record reflects that the vehicle was at the dealership from January 2, 2017, to October 23, 2017, a total of 294 days. However, as noted in the work order, the vehicle was not under repair from August 31, 2017, onward. Accordingly, the RV appears to have been out of service for repair for 240 days, which qualifies as a reasonable number of repair attempts. Under the reasonable prospective purchaser standard, the leak substantially impairs the value of the vehicle, particularly considering the potential for ongoing damage as a consequence of the water penetration.

The Respondent itself did not have a repair attempt on the vehicle. However, as noted in the discussion of the applicable law, if the Respondent authorizes repair by a dealer (or other party) after receiving notice of the alleged defect, the Respondent is deemed to have had an opportunity to repair. In this case, the Respondent engaged the slide vendor to attempt a repair after the December 2016 notice of defect. Therefore, the Respondent is considered to have had an opportunity to repair.

III. Findings of Fact

1. On November 11, 2016, the Complainant, purchased a new 2016 Redwood RW38RD from Explore USA RV Supercenter, an authorized dealer of the Respondent, in Seguin, Texas. The Complainant actually took delivery of the vehicle on November 29, 2016.
2. The vehicle's limited warranty provides coverage for two years from the date of purchase.
3. The Complainant took the vehicle to a dealer for repair as shown below:

| Date | Issue |
|-----------------|---------------------------|
| January 2, 2017 | Water leak in bedroom |
| June 1, 2017 | bedroom slide out leaking |
| August 31, 2017 | bedroom slide out leaking |

4. The vehicle remained at the dealership from January 2, 2017, through October 23, 2017. However, the vehicle was not under repair from August 31, 2017, to October 23, 2017. Accordingly, the vehicle was out of service for repair for 240 days.
5. On December 9, 2016, the Complainant provided a written notice of defect to the Respondent.
6. On May 19, 2017, the Complainant filed a complaint with the Texas Department of Motor Vehicles alleging that the master bedroom slideout leaked.
7. On July 31, 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.

8. The hearing in this case convened on October 24, 2017, in San Antonio, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented and testified for himself. Monica Yacenda, the Complainant's spouse, also testified for the Complainant. Brent Giggy, Product Team Lead, represented and testified for the Respondent.
9. The vehicle's warranty was in effect at the time of the hearing.
10. The vehicle operated normally during the inspection at the hearing.
11. The vehicle's slide continued to leak water after completion of repairs.
12. The appropriate calculations for repurchase are:

| | |
|--|-------------|
| Purchase price, including tax, title, license & registration | \$97,007.69 |
| Date of delivery | 11/29/16 |
| Date of first report of defective condition | 01/02/17 |
| Date of hearing | 10/24/17 |
| Days out of service | 240 |
| Useful life determination | 3,650 |

| | | | |
|--|----------------------------------|-------------------|--------------------|
| Purchase price, including tax, title, license & registration | | \$97,007.69 | |
| <i>Unimpaired Days:</i> Date of first report of defective condition less date of delivery | 01/02/17 - 11/29/16 = | 34 | |
| <i>Impaired Days:</i> Date of hearing less date of first report of defective condition Less days out of service for repair | 10/24/17 - 01/02/17 = | 295 -240 55 | |
| <i>Reasonable Allowance for Use Calculations:</i> Unimpaired days | 34 ÷ 3,650 × \$97,007.69 = | \$903.63 | |
| Impaired days | 55 ÷ 3,650 × \$97,007.69 × 50% = | \$730.88 | |
| Total reasonable allowance for use deduction | | | \$1,634.51 |
| Purchase price, including tax, title, license & registration | | \$97,007.69 | |
| Less reasonable allowance for use deduction | | -\$1,634.51 | |
| Plus filing fee refund | | \$35.00 | |
| Plus incidental expenses | | \$1,084.45 | |
| TOTAL REPURCHASE AMOUNT | | | \$96,492.63 |

Note: only the USPS postage (\$6.80 and \$6.31) and Holiday Inn Express room charges (\$1,071.34) meet the requirements for reimbursement of incidental expenses under 43 TEX. ADMIN. CODE § 215.209.

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 provided written notice of the alleged defect(s) to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).
7. The Respondent had an opportunity to cure the alleged defect(s). TEX. OCC. CODE § 2301.606(c)(2).
8. The Complainant timely filed the complaint commencing this proceeding. TEX. OCC. CODE § 2301.606(d).
9. The Complainant's vehicle qualifies for replacement or repurchase. A warrantable defect that substantially impairs the use or market value of the vehicle continues to exist after a reasonable number of repair attempts. TEX. OCC. CODE § 2301.604(a).

V. Order

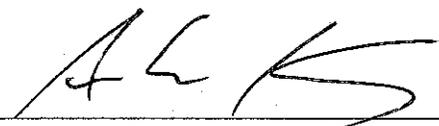
Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **GRANTED**. It is further **ORDERED** that the Respondent shall repair the warrantable defect(s) in the reacquired vehicle identified in this Order. **IT IS THEREFORE ORDERED** that:

1. The Respondent shall accept the return of the vehicle from the Complainant. The Respondent shall have the right to have its representatives inspect the vehicle upon the return by the Complainant. If from the date of the hearing to the date of repurchase the vehicle is substantially damaged or there is an adverse change in its condition beyond ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in the final order;
2. The Respondent shall repurchase the subject vehicle in the amount of **\$96,492.63**. The refund shall be paid to the Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to the Respondent, then the full refund shall be paid to the Complainant. At the time of the return, the Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all liens in full, the Complainant is responsible for providing the Respondent with clear title to the vehicle;
3. Within 20 days after the date this Order becomes final under Texas Government Code § 2001.144,²⁴ the parties shall complete the return and repurchase of the subject vehicle. Prior to returning the subject vehicle, the Complainant shall remove the washer and dryer. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to the Complainant's refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by the Complainant and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);
4. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the vehicle prior to resale and issue a disclosure statement provided by or approved by the Department's Enforcement Division – Lemon Law Section;

²⁴ (1) This Order becomes final if a party does not file a motion for rehearing within 20 days after receiving a copy of this Order, or (2) if a party files a motion for rehearing within 20 days after receiving a copy of this Order, this Order becomes final when: (A) the Department renders an order overruling the motion for rehearing, or (B) the Department has not acted on the motion within 45 days after the party receives a copy of this Order.

5. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous place, and upon the first retail sale of the vehicle, the disclosure statement shall be completed and returned to the Department's Enforcement Division – Lemon Law Section; and
6. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide the Department's Enforcement Division – Lemon Law Section, in writing, the name, address and telephone number of the transferee (wholesale purchaser or equivalent) of the vehicle within 60 days of the transfer.

SIGNED December 18, 2017



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