

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 18-0180837 CAF**

**MINA and OLUWASEUN ALONGE,
Complainants**

v.

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

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Mina and Oluwaseun Alonge (Complainants) 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 their vehicle distributed by Jaguar Land Rover North America, LLC (Respondent). A preponderance of the evidence does not show that the subject vehicle's warranty applies to the complained of nonconformity. Consequently, the Complainants' 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 March 27, 2018, in Houston, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainants, represented and testified for themselves. 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 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 Complainants.¹⁸ The Complainants must prove all facts required for relief by a preponderance, that is, the Complainants must present sufficient evidence to show that every required fact is more likely than not true.¹⁹ If any required fact appears more likely to be untrue or equally likely to be true or untrue, then the Complainants cannot prevail.

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. Complainants' Evidence and Arguments

On December 26, 2015, the Complainants, purchased a new 2016 Land Rover Range Rover from Momentum Jaguar Volvo (Jaguar Southwest Houston), a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 361 miles on the odometer at the time of purchase. The vehicle's limited warranty provides basic coverage for four years or 50,000 miles, whichever occurs first. On November 2, 2017, the Complainants, provided a written notice of defect to the Respondent. On November 1, 2017, the Complainants filed a complaint with the Department alleging that the fuel gauge shows empty with fuel in the tank and that the check engine light was on. In relevant part, the Complainants took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
October 18, 2016	9,108	Check engine light (diesel fuel contamination)
June 19, 2017	15,589	Fuel gauge always shows empty
September 12, 2017	17,534	Check engine light (fuel pressure regulator); shows different fuel level than actual
October 4, 2017	17,852	Check engine light (fuel rail pressure sensor signal wire)
October 13, 2017	17,936	Check engine light (fuel pressure control valve)
November 3, 2017	18,253	Fuel gauge does not display full on the gauge after filling tank

Mrs. Alonge testified that they last dropped off the vehicle for service on November 13, 2017, and picked it up on January 18, 2018. The vehicle had 18,721 miles at the last service visit. She confirmed that the vehicle no longer had an issue with the check engine light after repair. The fuel gauge displaying the incorrect fuel level continues to occur intermittently but no longer occurs constantly after repair. Mrs. Alonge explained that after filling the fuel tank, the fuel gauge will show the fuel level as empty. Mr. Alonge stated that the vehicle had been in for repair about nine months. Mrs. Alonge testified that the last time the vehicle was filled up, about three days before the hearing, the fuel gauge did not show the tank as full but went to the second mark (6/8ths). The last time she saw the fuel gauge change a significant amount, about 1/3rd or 1/4th, was on November 13, 2017. She answered that the fuel gauge does not show the correct level after driving but it goes up and down. Mrs. Alonge stated that the last repair did improve the fuel gauge issue, which no longer shows the tank as empty immediately.

On cross-examination, Mrs. Alonge stated that she had never had a problem with the range displayed. She answered that she usually refueled at a quarter tank, but now refueled when the

range reached 200 or 300 miles. She affirmed that she never ran out of fuel. Mr. Alonge confirmed that over the first 15,000 miles, they did not experience any fuel gauge issues. When asked if the wrong fuel had been added, Mrs. Alonge responded no. She explained that the vehicle suddenly would not pass 35 mph and the dealer kept the vehicle and stated that the fuel had been contaminated. Also, the vehicle's fuel filler would not accept a gasoline nozzle. Mr. Alonge added that the fuel could have been sampled and analyzed but the Respondent never did this. Mr. Alonge answered that they have not added DEF (diesel exhaust fluid) before. Mrs. Alonge stated that they have not owned another diesel vehicle and have not had any other service visits for fuel contamination. She testified that they did not get an invoice for the November 13, 2017, visit. Mr. Alonge explained that they did not know whether a part was replaced at the November 13 visit because they did not get an invoice. The hearings examiner asked if water was found in the fuel and Mrs. Alonge answered no. The dealership (at the October 18, 2016, visit) did notify the Complainants that the fuel was bad. She added that she did not have any further problems until June 2017. Mrs. Alonge responded that they did not make an insurance claim regarding the contaminated fuel. She noted that in November 2017, at the last service visit, a dealer employee asked what happened to the vehicle and if she had ever submitted an insurance claim.

B. Respondent's Evidence and Arguments

The Respondent pointed out that the Complainants had the burden of proof. Invoice 23849 indicated that the Complainants took the vehicle to the dealership on October 18, 2016, at 9,108 miles, because the "VEHICLE WILL NOT DRIVE PAST 35MPH AND THE CHECK ENGINE LIGHT IS ALWAYS ON." The dealership found the "DIESEL FUEL CONTAMINATED", which caused the complained of problem. The invoice's notes described that the technician "TOOK A FUEL SAMPLE AND FOUND DIESEL CONTAMINATED, DRAINED FUEL, EMPTIED AND CLEANED OUT FUEL TANK, REPLACED FUEL FILTER, FLUSHED SYSTEM WITH FRESH DIESEL AND ADDITIVE, ROAD TESTED."²⁴

C. Inspection

The vehicle was refueled as part of the test drive at the hearing. Upon inspection before the test drive, the odometer showed 20,526 miles and the fuel gauge showed slightly over 5/8ths of a

²⁴ Respondent's Ex. 1, Invoice 23849.

tank of fuel with the range display showing 311 miles. Mr. Alonge dispensed 5.696 gallons of fuel and the fuel gauge showed a full tank and the range display showed 439 miles. At the end of the test drive, the range display showed 437 miles, the fuel gauge still showed a full tank, and the odometer displayed 20,528 miles.

D. Analysis

A preponderance of the evidence does not show that the warranty covers the fuel gauge nonconformity. As explained below, Lemon Law relief does not apply to all issues that a consumer may have with a vehicle but only to defects covered by warranty (warrantable defects).²⁵ 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. In part, the warranty generally states 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.” Additionally, the warranty lists “Damage Caused by Accident; Alteration or Misuse of the Vehicle,” including “Use of contaminated or improper fuel or fluids,” under “What is not Covered.”²⁶ According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).²⁷ 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. Unlike manufacturing defects, issues that do not arise from

²⁵ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204

²⁶ Complainant’s Ex. 11, Passport to Service.

²⁷ Courts have affirmed that warranty language covering “defects in material or workmanship” do not cover design issues. *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, such as damage from contaminated fuel (which occurs after manufacturing), are not warrantable defects.

Under the Lemon Law, the Complainants bear the burden of proving that the warranty covers the complained of issue. Consequently, the Complainants must show that the vehicle more likely than not has a manufacturing defect, i.e., a warrantable defect. Given the facts on record, a non-warrantable defect appears as likely as a warrantable defect to have caused the faulty fuel gauge readings. Accordingly, the burden of proof for Lemon Law relief has not been met. The evidence reflects that the faulty fuel gauge readings occurred after damage from contaminated fuel, leaving the possibility that the fuel gauge malfunction resulted from contaminated fuel. Additionally, dealership personnel inquired whether the Complainants filed an insurance claim for the damage arising from the contaminated fuel, indicating that the fuel gauge malfunction arose from a casualty covered by insurance rather than a manufacturing defect covered by warranty. Moreover, as elaborated above, the warranty expressly excludes damage from contaminated fuel. In sum, the complained of issue does not appear more likely to be a warranted manufacturing defect than a non-warranted condition (e.g., damage from contaminated fuel).

III. Findings of Fact

1. On December 26, 2015, the Complainants, purchased a new 2016 Land Rover Range Rover from Momentum Jaguar Volvo (Jaguar Southwest Houston), a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 361 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides basic coverage for four years or 50,000 miles, whichever occurs first.
3. The Complainants took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
October 18, 2016	9,108	Check engine light (diesel fuel contamination)
June 19, 2017	15,589	Fuel gauge always shows empty
September 12, 2017	17,534	Check engine light (fuel pressure regulator); shows different fuel level than actual
October 4, 2017	17,852	Check engine light (fuel rail pressure sensor signal wire)
October 13, 2017	17,936	Check engine light (fuel pressure control valve)
November 3, 2017	18,253	Fuel gauge does display full on the gauge after filling tank

4. On November 2, 2017, the Complainants, provided a written notice of defect to the Respondent.
5. On November 1, 2017, the Complainants filed a complaint with the Department alleging that the fuel gauge shows empty with fuel in the tank and that the check engine light was on.
6. On January 23, 2018, the Department's Office of Administrative Hearings issued a notice of hearing directed to all parties, giving them 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.
7. The hearing in this case convened on March 27, 2018, in Houston, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainants, represented and testified for themselves. John Chambless, attorney, represented the Respondent.
8. The vehicle's odometer displayed 20,526 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. The warranty covers defects in factory-supplied materials or factory workmanship.
11. The warranty excludes damage caused by contaminated fuel.
12. The fuel gauge malfunction occurred after damage from contaminated fuel.

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 Complainants 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 Complainants bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The Complainants' vehicle does not qualify for replacement or repurchase. The Complainants did not prove by a preponderance that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 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 Complainants' petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED May 29, 2018



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