TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 18-0181323 CAF

JILL ECKERT,	§	**BEFORE THE OFFICE**
Complainant	§	
	§	
v.	§	**OF**
	§	
DS CORP d/b/a CROSSROADS RV,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Jill Eckert (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 her recreational vehicle (RV) manufactured by DS Corp d/b/a Crossroads RV (Respondent). A preponderance of the evidence does not show that the subject vehicle continues to have a warrantable defect after a reasonable number of repair attempts. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing[1] 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 April 23, 2018, in Bryan, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented and testified for herself. Trevor Eckert, the Complainant's spouse, testified for the Complainant. Brent Giggy, Product Manager, represented and testified for the Respondent.

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[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]

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[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:

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[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]

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[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 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 Complainant 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]

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[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 July 27, 2016, the Complainant, purchased a new 2017 Cruiser CAF31BHTOU from Topper's Camping Center, an authorized dealer of the Respondent, in Waller, Texas. The Complainant took delivery on July 28, 2016. The vehicle's limited warranty provides coverage for two years. On September 14, 2017, the Complainant provided a written notice of defect to the Respondent. On November 20, 2017, the Complainant filed a complaint with the Department alleging that the vehicle leaked water. The Complainant took the vehicle to a dealer for repair of various water leaks on August 31, 2016; January 26, 2107; February 18, 2017; July 5, 2017; and March 29, 2018. The Respondent's opportunity to repair the vehicle occurred during the March 29, 2018, service visit.

The Complainant first noticed water leaking into the RV in mid-August 2016. During a rain shower, she found a large puddle in the middle of the RV. She also noticed water dripping from two windows. She took the RV to the dealership on August 31, 2016. She found the source of the leak and put towels in until the RV could be taken to the dealership. Repairs resolved the leak from the water heater but not the windows. The Complainant could not identify where the windows were leaking but the water leaked into the wall and onto the floor, leaving the carpet wet. She last noticed any leaking a few weeks before the hearing, about the end of February to the beginning of March 2018, before the last repair visit. The Complainant elaborated that water leaked at five different places: behind the water heater, on the slideout at the carpet, bedroom windows, the exterior door, and the antenna. All these issues related to the sealant. Additionally, the caulking had gaps. Mr. Eckert noted that the front of the RV had a gap with no caulk. The Complainant affirmed the successful repair of the leak behind the water heater but noted that this leak also involved water damage requiring repair. The Complainant last noticed leaking at the slideout in 2017. Mr. Eckert testified that he did not see any leaking from the windows after replacement of the windows at the July 5, 2017, repair visit. The Complainant last noticed the exterior door leaking around February or March 2017. She last noticed leaking from the antenna about February or March 2018, resulting in the most recent repair.

On cross-examination, the Complainant confirmed instances when she picked up her RV from dealer, while under repair, to use for family recreation. She acknowledged that no issues kept her from using the RV. She confirmed various repairs performed on the RV. She affirmed that she did not notice any seal voids before the dealership showed her a picture of the seals. The

Complainant testified that they had not inspected the roof in probably six months and that they had never applied sealant. However, they took the RV to the dealership every few months. She read the owner's manual where it stated to inspect the roof at least every nine months.

Mr. Eckert testified that they purchased the RV in July 2016 but the RV already had leaks by August 2016. He noted that the dealer could have inspected the RV and found the leaks. The Complainant added that the leaks essentially occurred immediately.

B. Respondent's Evidence and Arguments

Mr. Giggy emphasized the importance of sealants. Based on what he saw and had explained to him, the issues with the slideout room and water heater, and possibly the antenna, resulted from deteriorating sealant. Several of these leaks could have been avoided by inspection. Mr. Giggy pointed out that the RV was useable and the Complainant did use the RV a few weeks before the hearing.

C. Analysis

As explained in the discussion of the applicable law, to qualify for relief, a warrantable defect must continue to exist after repair of the vehicle. The complaint alleged that the RV leaked water and the record shows that multiple leaks occurred in the past. However, the record does not indicate that any leaks occurred after the March 29, 2018, service visit. Specifically, the Complainant and Mr. Eckert's testimony reflect leaks occurring before the last service visit on March 29, 2018, but not after. Accordingly, a preponderance of the evidence does not show the RV has a currently existing defect that qualifies the RV for relief.

III. Findings of Fact

1. On July 27, 2016, the Complainant, purchased a new 2017 Cruiser CAF31BHTOU from Topper's Camping Center, an authorized dealer of the Respondent, in Waller, Texas. The Complainant took delivery on July 28, 2016.

2. The vehicle's limited warranty provides coverage for two years.

3. The Complainant took the vehicle to a dealer for repair of various water leaks on August 31, 2016; January 26, 2107; February 18, 2017; July 5, 2017; and March 29, 2018. The

Respondent's opportunity to repair the vehicle occurred during the March 29, 2018, service visit.

4. On September 14, 2017, the Complainant provided a written notice of defect to the Respondent.

5. On November 20, 2017, the Complainant filed a complaint with the Department alleging that the vehicle leaked water.

6. On February 8, 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 April 23, 2018, in Bryan, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented and testified for herself. Trevor Eckert, the Complainant's spouse, testified for the Complainant. Brent Giggy, Product Manager, represented and testified for the Respondent.

8. The vehicle's warranty was in effect at the time of the hearing.

9. The vehicle did not leak after the last service visit on March 29, 2018.

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 and 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 currently existing 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 Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED June 22, 2018

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