TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 18-0181964 CAF

DONALD RAYMOND BRITTON, **Complainant**	§	**BEFORE THE OFFICE**
	§	
	§	
v.	§	**OF**
	§	
THOR MOTOR COACH, INC.	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Donald Britton (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 vehicle manufactured by Thor Motor Coach (Respondent). A preponderance of the evidence does not show that the subject recreational vehicle (RV) 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 June 5, 2018, in Odessa, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented and testified for himself. Virginia Britton also testified for the Complainant. John Arnold, attorney, represented the Respondent. Mark Stanley, Technical Manager, 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]

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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).

5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainant for reasonable incidental expenses resulting from the vehicle's loss of use because of the defect.[24] Reimbursable expenses include, but are not limited to: (1) alternate transportation; (2) towing; (3) telephone calls or mail charges directly attributable to contacting the manufacturer, distributor, converter, or dealer regarding the vehicle; (4) meals and lodging necessitated by the vehicle's failure during out-of-town trips; (5) loss or damage to personal property; (6) attorney fees, if the complainant retains counsel after notification that the respondent is represented by counsel; and (7) items or accessories added to the vehicle at or after purchase, less a reasonable allowance for use. The expenses must be reasonable and verified through receipts or similar written documents.[25]

A. Summary of Complainant's Evidence and Arguments

On November 22, 2016, the Complainant, purchased a new 2017 ACE 29.3 from Camping World RV Supercenter, an authorized dealer of the Respondent, in Lubbock, Texas. The Complainant took delivery of the vehicle on November 23, 2016. The vehicle had 1,264 miles on the odometer at the time of purchase. The vehicle's limited warranty provides coverage for 12 months or 15,000 miles on the odometer, whichever occurs first. On November 9, 2017, the Complainant provided a written notice of defect to the Respondent. On December 18, 2017, the Complainant filed a complaint with the Department alleging that water leaked in the cab. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
November 23, 2016	1,281	Water coming through driver's side window
January 11, 2017	1,264 [sic]	Major leak somewhere in the front cap
February 6, 2018	3,686	Window filling up with water in rail

The Complainant testified that the passenger side and driver side windows leaked at the seals and water came in the RV. He first experienced the leaking when driving the RV home from the dealer on November 23, 2016. The Complainant set up the RV on a lot belonging to his son. The Complainant stayed with his son. After rainfall overnight, the Complainant returned the next

[24] TEX. OCC. CODE § 2301.604.

[25] 43 TEX. ADMIN. CODE § 215.209(a).

morning and the RV had a pool of water around it, water under the dashboard, and water dripping from the speakers. The water pooling around the RV resulted from backed up city water in the tank (the Complainant had not been instructed to shut off the city water). The Complainant stated that leaking occurred at every rain. He last noticed leaking during a trip to Blanco State Park after approximately a half inch of rain fell over about four hours on April 25, 2017. He explained that the two videos in evidence were recorded in Blanco, on April 25, 2017, and in Kerrville on February 13th or 20th. Mrs. Britton clarified that the Kerrville video was from February 13, 2017. The Complainant testified that the leaking from the top of the RV had been repaired and only the windows leaked.

On cross-examination, the Complainant answered that when he first experienced the water leaks, the leaks came from around the window and the window. When asked if one or both windows were leaking, Mrs. Britton explained that they told the dealer that there was leaking but they did not know exactly where from. When asked if the Complainant notified the dealer in New Braunfels about weep hole blockage, he explained that he did not but just told them about the leaking (windows). The Complainant confirmed that he had auto levelled the RV when first discovered the leaks. The auto level was first adjusted two days before the hearing by Mr. Stanley.

The Complainant testified that he believed that the installation of the windows and not the windows themselves caused the failure to drain. He considered the weep hole blockage not to be a manufacturing issue but an installation issue.

In closing, the Complainant believed the (Respondent's) warranty covered everything because the Respondent can take up the individual warranty issues with Lippert

B. Summary of Respondent's Evidence and Arguments

Mr. Stanley reviewed the work orders from the Camping World dealerships in Lubbock and New Braunfels. He explained that the dealer charged .8 hours for the window repair on January 4, 2017, but the Respondent pays in flat one-hour increments. He affirmed that even replacement windows could have blocked weep holes and the technician should look for such blockage, which apparently did not occur in this case. Mr. Stanley confirmed that the window came from the window manufacturer (Lippert Components, Inc.). He explained that when bonding the window, the window manufacturer must be careful not to let sealant in. He pointed out that Lippert has its

own warranty for its defects. He confirmed that Lippert caused the blockage and not the Respondent or a dealer. Both the driver's side window and passenger side window had the same blockage. He noted that positioning the RV nose down would cause water to drain towards the (blocked) weep holes and overflow the window track. He pointed out the RV's leveling system had been programmed to be "level" with the nose down, which he reset. Leveling helps more water run to the rear of the track which has two open weep holes that help the water drain out. Mr. Stanley confirmed that environmental conditions, such as heat and cold, can affect sealants and cause cracks. Heat and cold can cause expansion, shrinkage, and voids. Further, the RV's owner manual says to check the seals. Ordinarily, the Respondent will attempt to assist the dealer (with third party components like the windows) by holding a three-way call including the component supplier. However, the dealer bypassed this assistance. Although Lippert provided its own warranty, the Respondent offered to repair the windows anyway. Mr. Stanley did not believe that the use or value of the RV was substantially impaired – the RV itself did not have any damage and window repairs would be easy, taking about an hour per window. However, to Mr. Stanley's knowledge, the Respondent had not been allowed to repair the windows.

On cross-examination, Mr. Stanley explained that the Respondent authorized repair on the windows because of a pass-through policy where the dealer can pass the claim through the Respondent, who does not assume responsibility, to Lippert.

C. Inspection

Upon inspection at the hearing, the subject vehicle's odometer displayed 4,006 miles. Mr. Stanley explained that the Respondent provided the seal between the vehicle body and the window. Lippert provided the seal inside the window frames. The exterior molding was cosmetic. Mr. Stanley pointed out that the two weep holes towards the front of the window were sealed shut with urethane. Mr. Stanley stated that during his inspection before the hearing, he found the vehicle was slightly nose down, so that water would overflow the track and run down the sides.

D. Analysis

The evidence shows that the subject vehicle had multiple water leaks. However, Lemon Law relief does not apply to all problems that a vehicle may have but only to currently existing

defects covered by warranty (warrantable defects).[26] In the present case, the RV does not have any existing warrantable defects that qualify for Lemon Law relief. The Lemon Law does not require a manufacturer to provide any particular warranty coverage. Instead, the Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the Respondent's warranty provides. The language of the warranty delineates the warranty's coverage and determines what constitutes a warrantable defect. In this case, the subject vehicle's warranty states:

> THIS LIMITED WARRANTY COVERS: (i) Only the first retail owner and any second retail owner; (ii) ONLY those portions of a NEW motorhome not excluded under the section "What is Not Covered," when sold by an authorized dealership; and, (iii) ONLY defects in workmanship performed and/or materials used to assemble those portions of your motorhome not excluded under the section "What is Not Covered." "Defect" means the failure of the workmanship performed and/or materials used to conform with the design and manufacturing specification and tolerances of Thor Motor Coach ("TMC").

Under these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects)[27] not otherwise excluded from coverage. The warranty lists "components covered by their own manufacturer's warranty" under "WHAT IS NOT COVERED." The warranty explains: "Component part and appliance manufacturers issue limited warranties covering those portions of the motorhome not covered by the Limited Warranty issued by TMC." In the section titled "SUPPLIERS PROVIDING SEPARATE WARRANTIES," the warranty states: "The following list of components has been compiled to help you know which products on your motorhome may have their own warranty." The list includes "Windows" as a separately warranted product and specifically identifies "Lippert Components" as a supplier providing a separate warranty for windows. The Complainant's testimony reflects that one issue currently remains unresolved: water leaking from the windows. In this case, the record shows that sealant used in Lippert's manufacture of the window blocked the weep holes and caused the window leaks

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[26] TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204

[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.").

(water would overflow inside from the window frame rather than drain outside through the weep holes). Because the window leaks arise from a manufacturing defect in the windows attributable to Lippert Components, the Respondent's warranty does not cover such condition. Consequently, the Lemon Law provides no relief.

III. Findings of Fact

1. On November 22, 2016, the Complainant, purchased a new 2017 Ace 29.3 from Camping World RV Supercenter, an authorized dealer of the Respondent, in Lubbock, Texas. The Complainant took delivery of the vehicle on November 23, 2016. The vehicle had 1,264 miles on the odometer at the time of purchase.

2. The vehicle's limited warranty provides coverage for 12 months or 15,000 miles on the odometer, whichever occurs first.

3. The Complainant took the vehicle to a dealer for repair of water leaks as shown below:

Date	Miles	Issue
November 23, 2016	1,281	Water coming through driver's side window
January 11, 2017	1,264 [sic]	Major leak somewhere in the front cap
February 6, 2018	3,686	Window filling up with water in rail

4. On November 9, 2017, the Complainant provided a written notice of defect to the Respondent.

5. On December 18, 2017, the Complainant filed a complaint with the Department alleging that water leaked in the cab.

6. On March 20, 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 June 5, 2018, in Odessa, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented and testified for himself. Virginia Britton also testified for the Complainant.

John Arnold, attorney, represented the Respondent. Mark Stanley, Technical Manager, testified for the Respondent.

8. The vehicle's odometer displayed 4,006 miles at the time of the hearing.

9. The warranty expired on November 23, 2017.

10. Sealant used by the window supplier in manufacturing the windows blocked weep holes in the windows' tracks. The blockage prevented water in the window tracks from draining through the weep holes to the exterior and instead allowed water to overflow the window tracks and spill inside the vehicle.

11. The Respondent's warranty does not cover "components covered by their own manufacturer's warranty." The windows' manufacturer, Lippert Components, Inc., separately warrants the windows. The Respondent's warranty does not apply to any defects in the windows.

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, repurchase, or warranty repair. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204, 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 July 31, 2018

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