

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 18-0182138 CAF**

**SERETTA CLARK SMALLRIDGE and
GUY SAMUEL SMALLRIDGE,
Complainants**

v.

**FOREST RIVER INC.,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Seretta and Guy Smallridge (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) for alleged warrantable defects in their recreational vehicle (RV) manufactured by Forest River Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle has a defect covered by the manufacturer's warranty. Consequently, the Complainants' vehicle does not qualify for 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 May 23, 2018, in Waco, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainants, represented and testified for themselves. Michael Locke, Warranty Relations Manager, 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 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).

5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainants 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 Complainants 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. Complainants' Evidence and Arguments

On July 5, 2017, the Complainants, purchased a new 2017 Freedom Express 192RBS from Fun Town RV, an authorized dealer of the Respondent, in Hewitt, Texas. The RV's limited warranty provides coverage for one year. On January 8, 2018, the Complainants, provided a written notice of defect to the Respondent. On December 23, 2017, the Complainants filed a complaint with the Department alleging that the RV's shower leaked water.

Mr. Smallridge testified that the water did not actually leak, but gets past the shower curtain. Mrs. Smallridge added that the Respondent could not install a glass door because the shower was too small. Water will hit the medicine cabinet and run down. Mr. Smallridge pointed out that this would happen at the point where the dealer cut the countertop to make the shower surround fit. Mrs. Smallridge explained that when the water hit the shower curtain, it would move back. They bought a heavier shower curtain, but the water still pushed the curtain out. They bought baskets to try to hold the curtain in but the curtain just bowed out. Mr. Smallridge noted that the dealer moved the shower curtain track three times. Mrs. Smallridge stated that they used both the original shower curtain and the one they subsequently purchased. Mr. Smallridge testified that water ran out from under the RV in the area by the shower. The water pooled two or three times

²⁴ TEX. OCC. CODE § 2301.604.

²⁵ 43 TEX. ADMIN. CODE § 215.209(a).

to a depth above the first knuckle of this middle finger. Mr. Smallridge confirmed that the pooling occurred prior to replacement of the shower pan. He stated that the puddle occurred behind an inspection plate at the shower base. The Complainants last experienced water coming out of the shower probably about February 2nd or 3rd of 2018. The Complainants last experienced water leaking to the exterior in early October 2017. Mrs. Smallridge stated she believed this was on October 9th.

On cross-examination, Mrs. Smallridge affirmed that the shower curtain was pushed out from the pan. She added that moving the body would move the curtain in addition to the water moving the curtain.

Mrs. Smallridge testified that they wanted to downsize RVs and they did not have a problem with the size of the shower or the bathroom. The problem was that water came out (of the shower). The Complainants knew they had problems after the first shower – they placed towels around the shower to catch the water.

On cross-examination, Mrs. Smallridge confirmed that she was notified that the curtain would bend and the water would push the curtain out.

In closing, Mrs. Smallridge asserted that the size of the shower and bathroom had nothing to do with the problem. The length of the RV was what they wanted but they did not want to worry about mold and rot.

B. Respondent's Evidence and Arguments

Mr. Locke testified that they, the Respondent, could not find the issue and the dealer could not find the issue. The Complainants called multiple times, so the Respondent considered modifying the shower. Basically, the shower did not fit their purposes. The Respondent builds the same shower surround in multiple units and used the same surround in 2019 models. The Complainants went from a larger coach with a shower enclosure to a smaller RV with a curtain. The curtain was not waterproof. The replacement shower surround was slightly larger, which was why the counter was modified. The Respondent did not recommend moving the track closer, making the area smaller, moving the shower curtain where the water pressure was higher and the body would push the curtain. Under the warranty, the shower did not have a defect and the components themselves did not have any issues. Mr. Locke explained that a house shower was

about three times larger than the shower surround in the RV. The curtain in the RV will not do the same thing as with a house shower.

Mr. Locke concluded that the RV never had an actual defect and the modification was to assist the customer. There was no way to meet the Complainant's needs because of size. The RVs are designed and built that way.

C. Inspection

Upon inspection at the hearing, the shower surround appeared slightly larger than 2 feet wide. The shower pan's interior appeared to be less than two feet wide and about four inches deep. Mr. Smallridge commented that the interior of the pan was about 18 inches wide. The bathroom sink vanity directly abutted the shower surround, with the vanity's countertop overlapping the shower surround by about half an inch.

D. Analysis

The evidence in this case shows that the complained of issue does not relate to any warrantable defects but arises from the design of the subject vehicle, which the warranty does not cover. Lemon Law relief does not apply to all problems that a consumer may have with a vehicle but only to defects covered by the manufacturer's warranty (warrantable defects).²⁶ 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 this case, the vehicle's warranty generally provides that:

Forest River Inc., . . . (Warrantor) warrants to the ORIGINAL CONSUMER PURCHASER ONLY, when purchased from an authorized Forest River Inc. dealer, for a period of one (1) year from the date of purchase (Warranty Period), that the body structure of this recreational vehicle shall be free of substantial defects in materials and workmanship attributable to Warrantor.

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

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

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 manufacturing, such as the vehicle's design characteristics (which exist before manufacturing) or improper dealer repairs (which occur after manufacturing) are not warrantable defects. Design characteristics result from the vehicle's specified design and not from any error during manufacturing.²⁸ In sum, the warranty only covers manufacturing defects and the Lemon Law does not apply to design characteristics. Even though an issue may be undesirable or problematic, the Lemon Law provides no relief unless the issue constitutes a manufacturing defect. The Lemon Law does not require the vehicle to operate/perform to the Complainant's satisfaction, but only requires the vehicle to conform to the warranty.

In the present case, the problems that the Complainant's have experienced arise from the vehicle's design, specifically, the small dimensions of the shower, and not from any defect occurring during manufacturing. Given the tight quarters of the shower, the water may contact the shower curtain, move the shower curtain, and escape past the shower curtain. Furthermore, the small dimensions increase the likelihood that the person in the shower will contact and move the shower curtain, further contributing to the escape of water. Although the Complainants may have found the shower's size acceptable, the size of the shower and other elements of the bathroom's design clearly affected the shower's performance, resulting in the water escaping outside of the shower. Even if a better design exists, the warranty does not apply to design issues, as opposed to manufacturing defects, and therefore the Lemon Law provides no relief.

("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.").

²⁸ In contrast to manufacturing defects, "[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves." *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), writ denied, (Feb. 13, 1997).

III. Findings of Fact

1. On July 5, 2017, the Complainants, purchased a new 2017 Freedom Express 192RBS from Fun Town RV, a franchised/authorized dealer of the Respondent, in Hewitt, Texas.
2. The vehicle's limited warranty provides coverage for one year.
3. On January 8, 2018, the Complainants, provided a written notice of defect to the Respondent.
4. On December 23, 2017, the Complainants filed a complaint with the Department alleging that the vehicle's shower leaked water.
5. On March 2, 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.
6. The hearing in this case convened on May 23, 2018, in Waco, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainants, represented and testified for themselves. Michael Locke, Warranty Relations Manager, represented and testified for the Respondent.
7. The vehicle's warranty was in effect at the time of the hearing.
8. Upon inspection at the hearing, the shower surround appeared slightly larger than 2 feet wide. The shower pan's interior appeared to be less than two feet wide and about four inches deep. Mr. Smallridge commented that the interior of the pan was about 18 inches wide. The bathroom sink vanity directly abutted the shower surround, with the vanity's countertop overlapping the shower surround by about half an inch.
9. Because of the size of the shower and therefore the proximity of the showerhead to the shower curtain, water sprayed by the showerhead may hit the shower curtain, cause the shower curtain to move, and escape past the shower curtain and outside the shower surround. Additionally, because of the proximity of the shower curtain to the person inside the shower, any movement by the person may in turn move the shower curtain, contributing to water escaping past the shower curtain.

10. The shower was manufactured as designed.
11. Any water escaping or leaking from the shower resulted from limitations in the vehicle's design and not from any manufacturing defects.

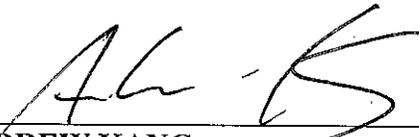
IV. Conclusions of Law

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 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 or warranty repair. The Complainants 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 Complainants' petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED July 23, 2018



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