

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 18-0184966 CAF**

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|-----------------------------|---|--------------------------------|
| DAVID AYER, | § | BEFORE THE OFFICE |
| Complainant | § | |
| | § | |
| v. | § | OF |
| | § | |
| KEYSTONE RV COMPANY, | § | |
| Respondent | § | ADMINISTRATIVE HEARINGS |

DECISION AND ORDER

David Ayer (Complainant) filed a complaint with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his recreational vehicle (RV) manufactured by Keystone RV Company (Respondent). A preponderance of the evidence shows that the subject vehicle has a warrantable defect that qualifies for 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 August 15, 2018, in Austin, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented and testified for himself. Brent Giggy, Product Manager, represented and testified for the Respondent.

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

¹ TEX. GOV'T CODE § 2001.051.

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 R-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

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

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).

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:

[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

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).

⁹ TEX. OCC. CODE § 2301.605(a)(3).

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

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

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).

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 of the evidence. That is, the Complainant must present sufficient evidence to show that every required fact more likely than not exists.¹⁹ Accordingly, the Complainant cannot prevail where the existence of any required fact appears equally likely or unlikely.

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 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 verifiable (for example, through receipts or similar written documents).²⁵

A. Summary of Complainant's Evidence and Arguments

On July 5, 2017, the Complainant, purchased a new 2017 Fuzion 423 from Crestview RV, an authorized dealer of the Respondent, in Georgetown, Texas. However, the Complainant actually took delivery on July 7, 2018. The vehicle's limited warranty provides one year of coverage from the date of purchase. On February 23, 2018, the Complainant filed a complaint with the Department alleging that the subject vehicle's air conditioning (AC) did not work properly; AC vents broke the fascia over the couch slide when opening the slide; the batteries would die; and the gas gauge did not work properly. The Complaint is the first written notice of defect to the Respondent that appears in the record.

The Complainant confirmed that the fascia was successfully repaired. He explained that the RV had an issue with the landing gears, which was a symptom of the battery issues. He elaborated that a grounding issue was damaging the batteries. The Complainant was uncertain as to the function of the gas gauge. In sum, the Complainant confirmed the continued existence of problems with the batteries and AC.

The Complainant testified that he first noticed the cooling issue from the first day. Mrs. Ayer noted that during a walk through, the RV never cooled. The Complainant testified that on a

²⁴ TEX. OCC. CODE § 2301.604.

²⁵ 43 TEX. ADMIN. CODE § 215.209(a).

trip to Lake Conroe, after turning on the AC, the temperature reached 96 to 97 degrees by the time they opened the slide. The Complainant had turned on the AC beforehand so that the RV would be cool by the time they reached their destination. He recalled that the outside temperature exceeded 100 degrees, from 102 to 103 degrees. The Complainant testified that the cooling issue happened all the time. He responded that he last experienced the cooling issue on July 19, 2018, when testing the RV at the dealer and again when picking up the RV from the dealer on August 13, 2018. When picking up the RV, the dealer had the RV running to have the batteries charged. With the AC running for six hours, the RV reached 88 degrees with the outside temperature at 91 degrees. The Complainant found that thermal imaging showed ducts leaking in the ceiling. Additionally, the new vents actually restricted air flow into the RV.

The Complainant noticed the dead battery issue from the start. When picking up the RV on July 7, 2017, the batteries were dead. He subsequently contacted the dealer and had the batteries replaced. The Complainant asserted that every time he picked up the RV from the dealer, the batteries would be dead, even with the RV plugged in to keep the batteries charged. On February 8, 2018, when picking up the RV, the batteries were dead again. The dealer placed three batteries in the RV and provided a fourth battery as a backup. The Complainant had to use the backup battery to get the RV to the hearing site. Battery use seemed excessive, though everything was powered down. The RV cannot be left for a week without the batteries dying. One battery lasted only seven months. The Complainant confirmed that the RV had deep cycle batteries. On August 13, 2018, the Complainant picked up the RV after it had been running for six hours. The dealership plugged in the RV at noon and turned on the generators at 3:00 or 4:00 p.m. with the AC units running. When entering the code on the keypad, the RV, including the generator, shut down. The dealer had a technician check the RV. The technician found the truck producing 12V with the RV plugged in. The Complainant measured 13.6V at the battery. After unplugging the RV from the truck, the Complainant measured 13.6V from the truck. Plugging in the power cord was "shorting out" the truck. The Complainant clarified that plugging the RV in had not blown the 30A fuse. Rather, the voltage goes down and the battery goes uncharged. Plugging the RV into the truck drains the truck's voltage but the voltage goes back up after unplugging. The batteries were dead on August 14, 2018, though everything was turned off. The Complainant stated: "This was from it running all day long to charge up these batteries." When leaving the RV on August 13, 2018, the Complainant felt significant heat coming from the batteries. The first battery was at 197

degrees, the second was at 115 degrees. The third (spare) battery, which was not wired, was 95.2 degrees. The first battery's voltage was 5V. The Complainant could not start the generator so he took a photo of the batteries and sent it to the Respondent. The batteries were set up as 24V system. The respondent sent a diagram to set up the batteries as a 12V system. The Complainant wired the batteries exactly as in the diagram. One battery's cells were almost dry. He had to replace the battery with the spare to get the generator started so that he could get the RV hooked up to his truck to transport the RV to the hearing. The Complainant located the second disconnect, above the batteries, the second time he took the RV out.

Mrs. Ayer believed the landing gear first malfunctioned in January when in storage. The Complainant elaborated the malfunction occurred when picking up the RV from storage, sometime before they dropped off the RV at the dealer on March 7, 2018, for this issue. The landing gear would not retract, stopping midway, and the RV would shut down. The Complainant had to plug the RV (shore power cord) into power to get the landing gear working again. The landing gear malfunctioned again when picking up the RV from the dealer on August 13, 2018.

The Complainant first noticed the gas gauge issue the second time they took the RV out. When filling the gas tanks, he could read the gauge on the outside of the RV. The switch on one side would do the front and flipping the switch would do the back. A gauge inside the RV showed the front tank but not the back. The dealer replaced the outside gauge (which stopped functioning) but the inside gauge only showed the front tank and the replacement outside gauge only showed the back tank. The RV was first brought to the dealer for the fuel gauge on July 23, 2017.

On cross-examination, the Complainant confirmed that the AC units were operated through a share switch and only two units could be run at the same time. Mr. Giggy pointed out that during a three-hour test, the RV's interior temperature dropped from 71 to 68 degrees and from 81 to 74 degrees in the sofa area. The Complainant explained that with the new upgrades, he could not feel the air coming in until putting a hand up by the vents. When asked if the garage cooled adequately, the Complainant answered that he did not check. When asked about bedroom cooling, he responded that he did not have a chance to check. The last time they took the RV out, they had the AC running all day and when they came in at night, the conditions were livable. Mrs. Ayer noted that this was not in the heat of the day. The Complainant answered that they had intended to use the garage for massages. Regarding the landing gear – battery issue, the Complainant explained

that it would blow the 30A fuses and the batteries would die. He would use jumper cables to address the problem. On July 16, 2018, when he had the RV plugged into 30A power and opened the slide, the fuses blew again. The Complainant mentioned that the manufacture now produces RVs that allow three AC units to operate at the same time and that the RVs are no longer available in black.

B. Summary of Respondent's Evidence and Arguments

Mr. Giggy testified that with regard to the refrigerator, the owner's manual has a section discussing the battery and amp hours. He pointed out that the RV cooled a few degrees in 30 to 40 minutes. However, heat soak was a variable that can't be controlled. People in the north do not have to deal with it. The Respondent tries to provide equipment to meet the customers' needs, but this is not possible in every case with the available equipment. Batteries do go bad, sometimes relative to use. The Respondent does not install batteries or make any claims about battery life expectancy except in relation to the refrigerator. Some RVs have little amp draw, others have more. This is something that must be accounted for when storing or using an RV.

On cross-examination, Mrs. Ayer noted that the AC blew air at a certain temperature but the seams, even with the "Blizzard" package, were heating up. So even if the air blew cold, the RV would not get cold. Mr. Giggy responded that the Blizzard package was more intended for cold weather than warm weather, although it provides some advantages in warm weather. Primarily, the package extends camping in cold weather. The package includes heat strips to warm tanks in the underbelly and a radiant barrier in the roof. The package will not necessarily cool on 100 degree day. RVs are designed for a national ambient temperature of 90 degrees. RVs will not function as efficiently at higher temperatures. The Respondent builds standard RVs in mass quantities with a few options. People need to do more work on the RVs to suit their purposes. The standard RVs will not survive in North Dakota, which would require a covered bottom and heat lines. Texas is the opposite. There are additional measures that can be done, such as covering windows with foil. But conditions can hinder cooling, e.g., parking on hot asphalt; parking in sunlight. Heat that comes in may be 110 degrees by the window. However, only the AC takes the heat out. If more heat comes in than the AC takes out, the RV will not cool. Mrs. Ayer pointed out an instance when condition felt better outside than inside the RV. The Complainant added that the AC worked perfectly but the RV still did not cool.

C. Inspection

Inspection of the towing vehicle's tailgate/bumper power outlet showed a voltage of 13.6V. After plugging in the RV to the tailgate/bumper outlet, the voltage dropped to 12.5V. Most battery cells were about 1/4 full of water. Each battery had a reserve charge rating of 140 minutes. A multi-tester showed that the batteries initially had a voltage of 11.7V. After approximately seven minutes, the batteries had a voltage of 12.1V. Mr. Giggy stated that typically, the CO detector, radio, and the landing gears (auto-level system) draw power. The leveling system showed 12.2V on the battery. After auto-leveling, the panel showed 12.1V remaining on the battery. After about 48 minutes, the batteries showed a charge of 14.2V. The Complainant pointed out that the RV had a hole opening to the exterior behind the refrigerator. Mr. Giggy confirmed that the Respondent assembles the ducts. The Complainant noted that the dealer tested a Fuzion 422 for comparison and it also did not cool. A hardwired CO detector was found on the kitchen island. In about 18 minutes, the temperature in the living room dropped from 93 degrees to 89 degrees and the bedroom went from 91 degrees to 90 degrees. Mr. Giggy described the insulation between the vertical aluminum structures as Styrofoam with an R-value of about seven. The area between the rafters have batten insulation with an approximate R-value of nine. A foil barrier lays over the rafters. The Blizzard package adds heat in the underbelly to keep tanks from freezing.

D. Analysis

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).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 part, the warranty generally states that it "covers defects in materials and workmanship supplied by and attributable to Keystone's manufacturing and assembly of the RV, when the RV is used for its intended purposes of recreational camping." According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).²⁷ A manufacturing defect is generally an isolated

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

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 manufacturing, such as characteristics of the vehicle's design (which exists before manufacturing) or dealer representations and 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 or design defects. Even though an issue may be undesirable or problematic, the Lemon Law provides no relief unless the issue constitutes a manufacturing defect.

1. **Battery Discharge**

A preponderance of the evidence does not show that the described battery discharge constitutes a defect. The evidence does not support one side more than the other. Each battery has a reserve charge of 140 minutes at 25 amps, which equals 58 and 1/3-amp hours. So, with two batteries in parallel, the total amp hours is 116 and 2/3 or approximately one amp over 4.861 days. In other words, at a discharge rate of one amp per hour, the batteries will completely discharge in less than five days, which seems consistent with the evidence. On the other hand, the evidence that the battery would be discharged when picking up the RV appears compelling. However, the record does not include sufficient evidence to determine whether such discharge occurred because of a manufacturing defect or whether dealer mishandling or other conditions may have contributed to the problem. In sum, when the evidence appears equivocal, the burden of proof has not been met.

2. **AC/Cooling**

The evidence does show the existence of a defect. Specifically, the Complainant provided a video (Complainant's Exhibit 5) apparently showing cool air leaking from an air duct into an

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).

open space in the ceiling. However, the leaky duct does not appear to account for the unsatisfactory cooling, in other words, repair of the duct would not remedy the unsatisfactory cooling. Rather, the evidence indicates that the unsatisfactory cooling is a function of the vehicle's design. The record shows that the RV was not designed for higher temperatures. Although the Complainant expected greater insulation, the vehicle's actual design, as described in the record, does not provide the desired insulation. Significantly, the Complainant testified that another Fuzion, but with a different floorplan, also would not cool when tested at the dealership, indicating that their common design resulted in the unsatisfactory cooling. In sum, the vehicle qualifies for a repair of the duct, but the unsatisfactory cooling in general appears to result from the vehicle's design, which is not a warrantable defect.

3. Gas Gauge

The warranty only covers manufacturing defects. Manufacturing defects exist at the time the vehicle leaves the manufacturing fact. Regarding the gas gauge, the problem did not arise from manufacturing, but occurred because of a repair occurring after manufacturing, specifically, the replacement of a broken two-tank gas gauge with a new gauge that only displayed a single tank. Consequently, the replacement of the broken gauge with a single tank gauge is not a warrantable defect subject to Lemon Law relief.

III. Findings of Fact

1. On July 5, 2017, the Complainant, purchased a new 2017 Fuzion 423 from Crestview RV, an authorized dealer of the Respondent, in Georgetown, Texas. However, the Complainant actually took delivery on July 7, 2018.
2. The vehicle's limited warranty provides one year of coverage from the date of purchase.
3. On February 23, 2018, the Complainant filed a complaint with the Department alleging that the subject vehicle's air conditioning (AC) did not work properly; AC vents broke the fascia over the couch slide when opening the slide; the batteries would die; and the gas gauge did not work properly. The Complaint is the first written notice of defect to the Respondent that appears in the record.
4. On June 1, 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.
5. The hearing in this case convened on August 15, 2018, in Austin, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented and testified for himself. Brent Giggy, Product Manager, represented and testified for the Respondent.
 6. The warranty expired on July 7, 2018.
 7. Inspection of the towing vehicle's tailgate/bumper power outlet showed a voltage of 13.6V. After plugging in the RV to the tailgate/bumper outlet, the voltage dropped to 12.5V. Most battery cells were about 1/4 full of water. Each battery had a reserve charge rating of 140 minutes. A multi-tester showed that the batteries initially had a voltage of 11.7V. After approximately seven minutes, the batteries had a voltage of 12.1V. Mr. Giggy stated that typically, the CO detector, radio, and the landing gears (auto-level system) draw power. The leveling system showed 12.2V on the battery. After auto-leveling, the panel showed 12.1V remaining on the battery. After about 48 minutes, the batteries showed a charge of 14.2V. The Complainant pointed out that the RV had an opening to the exterior behind the refrigerator. Mr. Giggy confirmed that the Respondent assembles the ducts. The Complainant noted that the dealer tested a Fuzion 422 for comparison and it also did not cool. A hardwired CO detector was found on the kitchen island. In about 18 minutes, the temperature in the living room dropped from 93 degrees to 89 degrees and the bedroom went from 91 degrees to 90 degrees. Mr. Giggy described the insulation between the vertical aluminum structures as Styrofoam with an R-value of about seven. The area between the rafters have batten insulation with an approximate R-value of nine. A foil barrier lays over the rafters. The Blizzard package adds heat in the underbelly to keep tanks from freezing.
 8. The battery will completely discharge in less than five days with a one-amp hour draw. The vehicle's battery drain does not appear inconsistent with the expected normal amp draw.

9. An air duct in the ceiling appears to be leaking air-conditioned air into a void. The overall unsatisfactory cooling results from the vehicle's design. The RV is designed to operate in up to 90-degree temperatures. However, external conditions, such as sunlight and ambient temperatures, affect the RV's ability to cool.
10. The broken gas gauge, which displayed the levels of the forward and rear tanks, was replaced with a gauge displaying only one tank. The replacement of the broken gauge with a single tank display is not a manufacturing defect but the result of a repair occurring after manufacture.

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 battery discharge, unsatisfactory AC cooling, and gas gauge issues are defects covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).
7. If the Complainant's vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e).

8. The Complainant's vehicle qualifies for warranty repair. The Complainant proved that the vehicle has a defect (leaking duct) covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.
9. 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.
10. The Respondent has a continuing obligation after the expiration date of the warranty to address and repair or correct any warrantable nonconformities reported to the Respondent or Respondent's designated agent or franchised dealer before the warranty expired. 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**. It is **FURTHER ORDERED** that the Respondent shall make any repairs needed to conform the subject vehicle's leaking air conditioning duct to the applicable warranty as specified here. Upon this Order becoming final under Texas Government Code § 2001.144:²⁹ (1) the Complainant shall deliver the vehicle to the Respondent within 20 days; and (2) the Respondent shall complete the repair of the vehicle within **45 days** after receiving it. However, if the Department determines the Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider the Complainant to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

²⁹ This Order does not become final on the date this Order is signed, instead: (1) this Order becomes final if a party does not file a motion for rehearing within 25 days after the date this Order is signed, or (2) if a party files a motion for rehearing within 25 days after the date this Order is signed, this Order becomes final when: (A) an order overruling the motion for rehearing is signed, or (B) the Department has not acted on the motion within 55 days after the date this Order is signed. Accordingly, this Order cannot become final (1) while a motion for rehearing remains pending; or (2) after the grant of a motion for rehearing.

SIGNED October 15, 2018



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