

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 19-0000001CAF**

<b>LLOYD DOUGLAS,</b>	§	<b>BEFORE THE OFFICE</b>
Complainant	§	
	§	
v.	§	<b>OF</b>
	§	
<b>ZERO MOTORCYCLES, INC.,</b>	§	
Respondent	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

Lloyd Douglas (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his new 2017 Zero SR motorcycle. Complainant asserts that the vehicle is defective because it intermittently fails to charge to 100%. Zero Motorcycles, Inc. (Respondent) argued that the vehicle does not have a defect and that no relief is warranted. The hearings examiner concludes that the vehicle does not have an existing warrantable defect and Complainant is not eligible for relief.

**I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION**

Matters of notice 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 January 17, 2019, in Fort Worth, Texas before Hearings Examiner Edward Sandoval. Lloyd Douglas, Complainant, represented himself at the hearing. Complainant’s wife, Karla Danila, was present and also testified. Respondent was represented by Aaron Cheatham, Director of Customer Experience. Also present and testifying for Respondent was Matthew Castloo, Service Manager for Eurosport Cycle. The hearing record was closed on January 25, 2019, after Complainant submitted a status update on a proposed resolution to his complaint.

**II. DISCUSSION**

**A. Applicable Law**

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met. First, the manufacturer is not able to conform the vehicle to an applicable express warranty by repairing or correcting a defect after a reasonable number of attempts.<sup>1</sup> Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.<sup>2</sup> Third, the manufacturer has been given a reasonable number of attempts to

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<sup>1</sup> Tex. Occ. Code § 2301.604(a).

<sup>2</sup> *Id.*

repair or correct the defect or condition.<sup>3</sup> Fourth, the owner must have provided written notice of the alleged defect or nonconformity to the manufacturer.<sup>4</sup> Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.<sup>5</sup>

In addition to these conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist after being subject to repair four or more times and: (1) two of the repair attempts were made in the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) the other two repair attempts were made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the second repair attempt.<sup>6</sup>

## **B. Complainant's Evidence and Arguments**

Complainant purchased a new 2017 Zero SR motorcycle on May 20, 2017, from Eurosport Cycle (Eurosport) in Fort Worth, Texas.<sup>7</sup> Respondent provided a limited warranty for the vehicle which provides coverage for two (2) years from its in service date.<sup>8</sup> The vehicle's warranty was still in effect on the date of hearing, January 17, 2019.

Complainant testified that the vehicle (an electric motorcycle), which needs to be charged on a daily basis, either stops charging overnight or does not charge fully. Complainant stated that in order to charge the vehicle, he has to plug it into a 110 volt electric outlet. Complainant stated that the vehicle has a power pack, as well as an auxiliary charge tank. Complainant first noticed the issue with the vehicle not charging fully about one (1) month after purchasing the vehicle. Complainant stated that on this occasion, the vehicle stopped charging and wouldn't work for about five (5) days. He could tell that the vehicle was not charging as the indicator light was indicating a less than full charge.

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<sup>3</sup> *Id.*

<sup>4</sup> Tex. Occ. Code § 2301.606(c)(1).

<sup>5</sup> Tex. Occ. Code § 2301.606(c)(2).

<sup>6</sup> Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. However, § 2301.605(a)(2) applies only to a nonconformity that creates a serious safety hazard, and § 2301.605(a)(3) requires that the vehicle be out of service for repair for a total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner.

<sup>7</sup> Complainant Ex. 1, Purchase Invoice dated May 20, 2017.

<sup>8</sup> Complainant Ex. 10, Limited Warranty Information.

Complainant took the vehicle to Eurosport for repair for the charging issue on July 22, 2017. Eurosport's service technician inspected the vehicle and verified the concern.<sup>9</sup> Complainant testified that the technician replaced the vehicle's charging cable. The vehicle's mileage when Complainant took it to Eurosport on this occasion was 542.<sup>10</sup> Complainant was not provided with a loaner vehicle while the vehicle was being repaired. The vehicle was in Eurosport's possession for two (2) to three (3) weeks.

Complainant testified that he again began having trouble with the vehicle charging correctly in mid-2018. He stated that the vehicle refused to work for approximately two (2) to three (3) weeks in early June of 2018. He had the vehicle towed to Eurosport for repair on June 29, 2018. Complainant stated that he was told by the Eurosport representative that there were different voltages for the vehicle's power pack and charge tank and that they had to balance out in order to safely use the vehicle. Since the charges were not in balance, the vehicle wouldn't start. The vehicle was in Eurosport's possession for approximately three (3) weeks. Complainant was not provided a loaner vehicle at the time. Eurosport did not report the vehicle's mileage at the time of repair.<sup>11</sup>

Complainant stated that about a month later the vehicle refused to charge above 50%. He took the vehicle to Eurosport for repair on July 27, 2018. Complainant informed the technician that in order to charge the vehicle fully, he had to unplug it from the charging cable and plug it back in.<sup>12</sup> He was informed by Eurosport's representative that the vehicle's firmware was updated in order to correct the issue. The vehicle was in Eurosport's possession for approximately three (3) weeks. Complainant was not provided a loaner vehicle at the time. Eurosport did not report the vehicle's mileage at the time of repair.<sup>13</sup>

Complainant stated that about a month later the vehicle refused to charge above 80%. He took the vehicle to Eurosport for repair on August 24, 2018. He was informed by Eurosport's representative that the vehicle's firmware was updated in order to correct the issue. The vehicle was in Eurosport's possession for approximately three (3) weeks. Complainant was not provided a loaner vehicle at the time. The vehicle's mileage at the time of repair was 6,382.<sup>14</sup>

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<sup>9</sup> Complainant Ex. 2, Invoice dated July 22, 2017.

<sup>10</sup> *Id.*

<sup>11</sup> Complainant Ex. 3, Invoice dated June 29, 2018.

<sup>12</sup> Complainant Ex. 4, Invoice dated July 27, 2018.

<sup>13</sup> *Id.*

<sup>14</sup> Complainant Ex. 5, Invoice dated August 24, 2018.

Complainant mailed a letter to Respondent on September 1, 2018, outlining his dissatisfaction with the vehicle.<sup>15</sup> In addition, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on September 2, 2018.<sup>16</sup>

Respondent's representative, Mr. Cheatham, wrote back to Complainant and advised him of limitations on the charging speed of the vehicle.<sup>17</sup> These limitations are that the vehicle will only charge if the power pack temperature is below 50 degrees Celsius.<sup>18</sup> In addition, Mr. Cheatham informed Complainant that if the power pack and the auxiliary charge tank voltages diverge, the motorcycle cannot be driven until the voltages are brought into balance.<sup>19</sup>

Complainant took the vehicle to Eurosport for repair on November 29, 2018. Complainant informed Eurosport's representative that the charging issue was intermittent and that the vehicle's performance itself was down. Eurosport's representative determined that the vehicle did not have charging issues and that it was operating correctly. Complainant was not provided a loaner vehicle at the time. The vehicle's mileage at the time of repair was 7,717.

Complainant stated that the vehicle still has charging issues. It intermittently won't charge up to 100%. Complainant stated that the vehicle is usually parked in the garage at his home where he charges it. He stated that he has a fan blowing on the vehicle in the evening in an attempt to keep the power pack temperature down.

During cross-examination, Complainant stated that he uses the vehicle to commute to and from work. He stated that the vehicle uses approximately 40 to 45% of a charge to drive to work and the same amount on the drive back. When he arrives at his home, the vehicle will have between 7 to 20% charge left. He keeps the vehicle parked in a garage where there is sufficient space to allow air flow around it. The garage is insulated, but is not air conditioned. Complainant also stated that whenever he took the vehicle for repair and it was ready for pickup, he was not able to always get the vehicle immediately due to conflicts with his and his wife's work schedule. It sometimes would take him up to a week to pick up the vehicle from Eurosport. Complainant stated that he was aware of the possibility of a thermal cutback, but that none has occurred when he's driven the vehicle, as far as he knows.

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<sup>15</sup> Complainant Ex. 6, Letter to Zero Motorcycles, Inc. dated September 1, 2018.

<sup>16</sup> Complainant Ex. 7, Lemon Law Complaint dated September 2, 2018.

<sup>17</sup> Complainant's Ex. 8, Letter from Zero Motorcycles to Complainant dated September 24, 2018.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

## C. Respondent's Evidence and Arguments

### 1. Aaron Cheatham's Testimony

Aaron Cheatham, Director of Customer Experience, testified for Respondent. He has a degree in electrical engineering from Cornell University. He also received an MBA from UCLA.

Mr. Cheatham stated that the vehicle has a useful life expectancy of 20,000 to 30,000 miles.

Mr. Cheatham testified that the vehicle has a 1300 watt charger. The vehicle can be charged by plugging the charging cable into a 110 volt outlet. Mr. Cheatham stated that the vehicle's charger failed initially and was replaced under warranty on July 22, 2017. Mr. Cheatham stated that the vehicle's power pack has a design limitation in that it cannot charge if the temperature of the power pack rises above 50 degrees C (122 degrees F). Once it reaches 50 degrees, the battery management system (BMS) will stop charging the vehicle's power pack, so that it won't negatively affect the life of the power pack. Above 60 degrees C, a thermal event could occur which could be dangerous. If the charging system shuts off, the BMS wakes up periodically to check if the power pack temperature has decreased to a safe enough temperature to start charging the power pack again. The BMS will wake up approximately every 30 minutes to check to see if the power pack's temperature has decreased sufficiently.

Mr. Cheatham stated that as far as the issue of the vehicle not starting on the June 29, 2018 repair visit, it is possible that Complainant was trying to key cycle the vehicle on and off in order to get the vehicle to operate and, by doing so, put the vehicle in a state where it wouldn't start in order to protect itself.

Mr. Cheatham stated that during the last three (3) repair visits (August 24, 2018; September 2, 2018; and November 29, 2018) the Eurosport technician tried to determine if there were any problems with the vehicle. In each case, the technician was not able to identify any problem with the vehicle or its charging system.

Mr. Cheatham stated that the vehicle's computer logs indicate that Complainant is a good rider. Complainant has at times gotten the vehicle's motor in a "thermal cutback" (an indication in the logs that a rider is driving at a high rate of speed, usually in excess of the speed limit). On a ride home, the battery pack temperature will be up due to usage of the vehicle. It appeared from the logs that Complainant immediately plugs the vehicle into the charger once he gets home. The vehicle will charge for a period of time, then stop charging. Mr. Cheatham feels that Complainant should not plug the vehicle into the charger immediately after riding the vehicle

hard or getting the charge close to zero, as the power pack's temperature doesn't have an opportunity to cool down prior to attempting to charge it up. If Complainant doesn't allow the power pack's temperature to go down, then it could take longer than expected to charge the vehicle.

During cross-examination, Mr. Cheatham indicated Respondent has a mobile app which will allow vehicle owners to see the temperature for the power pack on their vehicle. If the user doesn't download the application, the owner will probably not be able to determine if the power pack is too hot to charge.

## **2. Matthew Castloo's Testimony**

Matthew Castloo, Service Manager for Eurosport Cycle, testified for Respondent. Mr. Castloo has worked on motorcycles for the last ten (10) years. He has been dealing with electric motorcycles for the past five (5) years. He's been the service manager for Eurosport for the past year.

Mr. Castloo testified that he worked on Complainant's vehicle. Mr. Castloo stated that Zero replaced the vehicle's charger under warranty on July 22, 2017. On June 29, 2018, the vehicle had to be towed to Eurosport because of an imbalance in the battery cells between the power pack and the auxiliary charge tank. If an imbalance exists in the voltage between the two tanks the vehicle will not start. The vehicle was not charged at 100% on this occasion. Mr. Castloo feels that the vehicle's firmware was updated more than two (2) times. Mr. Castloo stated that he could not replicate the problem with the vehicle's charging issue on the last two (2) occasions that Complainant took the vehicle for repair.

## **D. Analysis**

Under the Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainant must meet the presumption that the manufacturer was given a reasonable number of attempts to repair or correct the defect or condition to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the defect or nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect or condition, Complainant is entitled to have the vehicle repurchased or replaced.

The first issue to be addressed is whether Complainant's vehicle has a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Respondent's warranty provides that "Zero warrants that all factory manufactured 2017 Zero Motorcycles are free from defects in materials or workmanship during the period of [the] Limited Warranty."<sup>20</sup> As such, the warranty only apply to defects in materials or workmanship (manufacturing defects).<sup>21</sup> A manufacturing defect is an isolated aberration occurring only in those vehicles not produced according to the manufacturer's specifications. A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of a broken part. Unlike manufacturing defects, issues that do not arise from 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.<sup>22</sup> In sum, because the warranty only covers manufacturing defects, the Lemon Law does not apply to design characteristics or design defects.

It is clear from the testimony and evidence presented at the hearing that the charging issue is caused by the design of the vehicle and the power pack. The power pack is designed to stop charging once it reaches an internal temperature of 50 degrees C. As such, the hearings examiner must find that there is no defect with the vehicle itself. Therefore, repurchase or replacement relief for Complainant is not warranted.

On the date of hearing, the vehicle remains covered under Respondent's warranty. As such, Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranty.

Complainant's request for repurchase or replacement relief is denied.

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<sup>20</sup> Complainant Ex. 10, Limited Warranty Information, p. 1.

<sup>21</sup> 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.").

<sup>22</sup> *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. Lloyd Douglas (Complainant) purchased a new 2017 Zero SR motorcycle on May 20, 2017, from Eurosport Cycle (Eurosport) in Fort Worth.
2. The manufacturer of the vehicle, Zero Motorcycles, Inc. (Respondent), issued a limited warranty for the vehicle which provides coverage for two (2) years from its in service date.
3. At the time of hearing the vehicle's warranty was still in effect.
4. Complainant has observed that the vehicle (an electric motorcycle) intermittently fails to charge to 100%.
5. Complainant took the vehicle for repair to Respondent's authorized dealer, Eurosport, in order to address his concerns regarding the vehicle failing to charge fully on the following dates:
  - a. July 22, 2017, at 542 miles;
  - b. June 29, 2018, at unknown miles;
  - c. July 27, 2018, at unknown miles; and
  - d. August 24, 2018, at 6,382 miles.
6. On July 22, 2017, Eurosport's service technician determined that the charger had failed and replaced it.
7. On June 29, 2018, Eurosport's service technicians determined that the charging issue causing the vehicle not to operate was due to a voltage imbalance between the vehicle's power pack and the auxiliary charge tank.
8. On July 27, 2018 and August 24, 2018, Eurosport's technicians were not able to duplicate the issue, but updated the vehicle's firmware on both occasions.
9. On September 2, 2018, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
10. On November 29, 2018, Complainant took the vehicle to Eurosport for repair for the charging issue and was informed that the vehicle was operating correctly.

11. The vehicle's charging system is designed to turn off if the power pack's internal temperature rises above 50 degrees C. The vehicle will not charge until the charger's temperature drops below the above-cited threshold.
12. On October 16, 2018, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainant and Respondent, giving all parties 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 matters asserted.
13. The hearing in this case convened on January 17, 2019, in Fort Worth, Texas before Hearings Examiner Edward Sandoval. Lloyd Douglas, Complainant, represented himself at the hearing. Complainant's wife, Karla Danila, was present and also testified. Respondent was represented by Aaron Cheatham, Director of Customer Experience. Also present and testifying for Respondent was Matthew Castloo, Service Manager for Eurosport Cycle. The hearing record was closed on January 25, 2019, after Complainant submitted a status update on a proposed resolution to his complaint.

#### **IV. CONCLUSIONS OF LAW**

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (Lemon Law).
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. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 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. Complainant bears the burden of proof in this matter.

6. Complainant failed to prove by a preponderance of the evidence that Respondent was unable to conform the vehicle to an express warranty by repairing or correcting a defect or condition that presents a serious safety hazard or substantially impairs the use or market value of the vehicle. Tex. Occ. Code § 2301.604.
7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code §§ 2301.204, 2301.603.
8. Complainant's vehicle does not qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.

### ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for replacement or repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**.

**SIGNED February 20, 2019**



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**EDWARD SANDOVAL  
CHIEF HEARINGS EXAMINER  
OFFICE OF ADMINISTRATIVE HEARINGS  
TEXAS DEPARTMENT OF MOTOR VEHICLES**