

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0002560 CAF**

**JAMES and ESTELLA NOCKROES,
Complainants**

v.

**FOREST RIVER, INC.,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

James and Estella Nockroes (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 shows that the subject vehicle has warrantable defects that qualify 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 July 18, 2019, in San Antonio, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainants, represented and testified for themselves. Warren Murphy, Assistant Director, Parts, Service, & Warranty, represented and testified for the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief Requirements

A vehicle qualifies for repurchase or replacement if the respondent 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 currently 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 written notice of the defect to the respondent, (2) an opportunity to cure by the respondent, 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 or someone on behalf of the owner, or the Department has provided written notice of the alleged defect or nonconformity to the respondent;¹³ (2) the respondent 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

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). 43 TEX. ADMIN. CODE § 215.204 provides that “[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor.” The Department’s notice of the complaint to the Respondent may satisfy the requirement to provide notice of the defect or nonconformity to the Respondent.

¹⁴ A respondent may delegate its opportunity to cure to a dealer. A repair visit to a dealer satisfies the opportunity to cure requirement when the respondent allows a dealer to attempt repair after written notice to the respondent. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 221 and 226 (Tex. App.—Austin 2012); *Texas Department of Transportation, Kennemer v. Dutchman Manufacturing, Inc.*, MVD Cause No. 09-0091 CAF (Motor Vehicle Division Sept. 25, 2009) (Final Order Granting Chapter 2301, Subchapter M Relief). An opportunity to cure does not require an actual repair attempt but only a valid opportunity. *Id* at 2.

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 manufacturer, converter, distributor, or its authorized agent of the defect before the warranty's expiration.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 of the evidence. That is, the Complainants must present sufficient evidence to show that every required fact more likely than not exists.¹⁹ Accordingly, the Complainants 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 must 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 forming the basis of the claim

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

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.").

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

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 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 However, the Department’s rules expressly exclude compensation for “any interest, finance charge, or insurance premiums.”²⁶

B. Summary of Complainants’ Evidence and Arguments

On January 25, 2018, the Complainants, purchased a new 2018 Sierra 378FB from Camping World RV Sales, an authorized dealer of the Respondent, in New Braunfels, Texas. The Complainants actually took delivery of the RV on February 3, 2018. The vehicle had Mileage miles on the odometer at the time of purchase. The vehicle’s limited warranty provides that the body structure of the vehicle shall be free of substantial defects for a period of one year from the date of purchase.

²¹ 43 TEX. ADMIN. CODE § 215.202(a)(3).

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).

²⁴ TEX. OCC. CODE § 2301.604.

²⁵ 43 TEX. ADMIN. CODE § 215.209(a).

²⁶ 43 TEX. ADMIN. CODE § 215.208(b)(1).

On October 16, 2018, the Complainants provided a written notice of defect to the Respondent. On October 26, 2018, the Complainants filed a complaint, with the Department alleging: incorrect wiring of hydraulic jacks; hydraulic jack not working properly; and hydraulic jacks leaked fluid. On January 17, 2019, the Complainants amended the complaint to add the following issues: opening at the bottom right of the refrigerator; carpet with staples that stick out; carpet trimming ripped; thinning spots on carpet under table; torn linoleum; nails/staples sticking out of slideout; linoleum patch lifting and visible; bedroom door jamb dented/scratched; shower floor flexing/squeaking; shower walls loose/flexing; shower doors leaking; broken water line; “pile up of foam & mulched/crushed of small overhang”; roof has “crunched” areas and pinholes; water from air conditioner (AC) draining in different directions and staining roof; tank monitor panel never accurate; LED light strip coming off; large compartment not properly closed – plywood visible; chip at rear; large compartment door stop broken. In addition, the October 16, 2018, notice of defect otherwise alleged that the entry door/striker plate was never fixed, AC made a humming sound; steps to the bedroom squeaked; and the control panel did not work properly. At the hearing Mrs. Nockroes confirmed that the steps had been successfully repaired.

In relevant part, the Complainants took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Issue
February 6, 2018 February 14, 2018	Leveling system not working properly - tilts to one side and leaves tires off the ground
February 15, 2018 March 21, 2018	Leveling system malfunctioning, entry door bent, door striker plate off, LED lights not working
April 10, 2018 April 25, 2018	LED strip not working, entry door hard to open
July 9, 2018 October 10, 2018	Jacks leaking fluid, kitchen slideout - can see daylight, bedroom AC is loud, tears in linoleum, shower floor flexes and water leaking, nails sticking up through carpet
October 1, 2018 November 15, 2018	Bedroom AC is loud, shower floor squeaks, shower surround is loose, tank monitor panel never reads 0% or 100%, hydraulic jacks leaking fluid, control panel will shut off

The Respondent’s opportunity to repair occurred on or about May 1, 2019, at the Respondent’s facilities in Indiana. The Complainants received their RV back from the Respondent on May 21, 2019.

After picking up the RV from Camping World, the Complainants took the vehicle home and used the auto-leveling system. The vehicle went through the process of deploying the jacks. However, the jacks overextended and raised the passenger side tires nine inches off the ground. When the hydraulic jack lowered, it made a crackling noise. Camping World told the Complainants to re-deploy the jacks. On the second try, the passenger side was again raised the tires in the air. Camping World customer service told the Complainants to try the jacks a third time, which resulted in the jacks overextending again. Mrs. Nockroes testified hearing the jacks strain when they overextended. Camping World sent a technician to the vehicle who discovered the wires were incorrectly connected. However, after the repair attempt, the problem remained unresolved. Forest River brought vehicle to Indiana for repair and returned on May 21, 2019, with the problem unresolved.

Mr. Nockroes stated that the striker plate had to be relocated. He explained that the door currently needed to be forcefully closed.

Mrs. Nockroes testified that the LED light at the front of the vehicle was broken the day the vehicle was purchased. When the light switch was turned on the light did not turn on. After the vehicle returned from the repair in Indiana, the light appeared fixed as far as Mrs. Nockroes could tell. The work order stated the wires controlling the light were not connected correctly.

Mrs. Nockroes testified the wall in the bathroom was loose. Camping World stapled the wall back in place; however, the staples went through the wall and did not hold the wall in place. These staples were concealed by the washer and dryer.

Mrs. Nockroes testified the bathroom floor squeaked in front of the vanities. This issue was not successfully repaired the last time the Complainants received the RV back from Camping World but Mrs. Nockroes did not know if the squeaking floor remained an issue because the vehicle was not used after the repair by Forest River in Indiana. Camping World cut through the large compartment under the bathroom/bedroom floor to repair the floor. The floor continued to squeak after the Camping World repair. Mrs. Nockroes found the visible repairs to be poorly done and had no confidence in the out-of-sight repairs. Camping World's floor repair left the plywood exposed (in the compartment). Mr. Nockroes confirmed that the shower floor still squeaked and when using hot water, the shower walls swelled. The glass door for the shower was not caulked or

properly sealed, allowing water to leak onto the floor. Mr. Nockroes did not know if the shower door still leaked. He last noticed leaking when taking the RV for repair at Camping World.

Mrs. Nockroes testified the bedroom air conditioner still made a humming noise when last checked, at the vehicle's return from the last Camping World repair visit.

When asked if the multifunction control panel was successfully repaired, Mrs. Nockroes answered that she did not know if the problem originated from the hydraulic jacks or the panel itself, which controlled the jacks. Mr. Nockroes noted that the control panel shut off randomly on its own. The issue was last noticed when the vehicle came back from the Respondent's repair attempt in Indiana.

Mrs. Nockroes testified that she could not determine whether the slideout noise was resolved. Similarly, she did not know if the staples sticking out was resolved after the Respondent's repair because they never went in the RV. She did confirm that the lavatory faucet had been fixed. Mrs. Nockroes also did not know whether the opening/gap at the refrigerator slide had been fixed but it had not been fixed after Camping World's repair attempt.

Mrs. Nockroes testified that extending the kitchen slideout ripped the linoleum. The slideout did not rip the linoleum after the last repair by Camping World. To repair the rip, Camping World patched the linoleum but the repair patch began to lift. The Respondent's repair in Indiana should have fixed the torn linoleum but Mrs. Nockroes did not know if the slideout would rip the linoleum again. Mr. Nockroes added they had not opened the slideout. Mrs. Nockroes confirmed that they had not inspected the RV after the Respondent's repair.

Mr. Nockroes testified that during a repair by Camping World, a technician broke a water line. When turning on the water after the repair, water sprayed uncontrollably in the vehicle. Mrs. Nockroes assumed the water line was repaired because the Respondent winterized the vehicle.

Mrs. Nockroes testified that the vehicle had a pile of expanding spray foam and crushed mulch. She was unaware if the foam issue was resolved. Regarding the "crunched" roof with pinholes, she did not know if the issue was fixed, but some type of silicone or something else was applied. Mr. Nockroes added that the roof droops a little bit. Mrs. Nockroes did not know if the AC drain issue had been repaired. Mr. Nockroes explained that they had not used it. Likewise, Mrs. Nockroes did not know if the tank monitor panel was resolved because they had not used it.

Mrs. Nockroes confirmed that the chip at the rear of the RV had been repaired as well as the large compartment door stop.

The Complainants testified propane leaked into the cabin. The Complainants smelled the propane and the vehicle alarm for both propane and carbon monoxide went off. Nothing was turned on at the time of the leak that should have caused a leak. The problem only occurred once and the Complainants were unaware if the problem was resolved.

On rebuttal testimony, Mrs. Nockroes noted that the ground at the Complainants' home was more level than the ground at the hearing; when the vehicle's jacks are deployed the vehicle raised the tires above the ground. The issue that the leveling system over extended and lifted the vehicle off the ground was a problem from the day the vehicle was purchased and was not resolved at the time of the hearing. The leveling system also created an unusual sound from excessive strain put on one side of the vehicle, from the jacks over extending. The strain was so excessive the leveling system leaked hydraulic fluid. Although the jacks were replaced the problem remained. The Complainants stated that she was worried the pin holes will be a future problem because they have already been resealed. The Complainants was without the vehicle because of repairs for a total of 329 days.

C. Inspection

Upon inspection at the hearing the vehicle the front LED lights on the vehicle functioned properly. Inside the large compartment accessible from the outside of the vehicle, the repair made in Indiana left no bare plywood. However, there were visible creases in the roof with sealant applied around them. Initially, the entry door would get caught on the steps. However, the steps no longer caught the door after adjusting the steps to the lowest position. After deploying the hydraulic jacks, a water bottle used as a level showed that the RV was substantially level. However, the driver side wheels were off the ground (about 2.5 inches). The slideouts squeaked while extending. Staples were observed sticking out from the floor in the kitchen slideout. Daylight was visible from the gap at the bottom front corner of the kitchen slideout. The backsplash in the kitchen was loose. There was a staple observed sticking up in front of the fireplace from the floor. The shower floor appeared normal. The wall of the shower was not tight against the wall and did not feel fully attached to the vehicle frame at the curves of the shower. The wall inside the washer/dryer closet was coming off but was not fully visible because it was behind the

washer/dryer units. The chip on the rear of the outside of the vehicle was repaired and no longer visible. The drain under the slideout was also repaired. There was black expanding foam around the pipes under the vehicle. The propane system appeared normal. The front jacks timed out when they were retracted because the jacks were inadvertently retracted in the wrong sequence. As a result, the auto leveling system had to be reset via the master control panel inside the cabin of the vehicle. The slideouts made a loud rubbing noise when retracting.

D. Summary of Respondent's Evidence and Arguments

Mr. Murphy testified that the leveling system worked properly. The leveling system raised the vehicle slightly too high but that was because the vehicle was on a slope and not because the system malfunctioned. The interior of the shower flexed and felt loose on the curve because of the design (i.e., the curve naturally cannot be flat on the wall). The shower was properly installed and did not have any issues. The pin holes in the roof were maintenance items, specifically, the vehicle had a self-leveling sealant that covered the holes. Mr. Murphy stated the sealant must be checked intermittently because the sealant deteriorates and routine maintenance reapplying the sealant is required. The folds in the roofline were part of the design and were not defects. The control panel worked as designed. The control panel ran the slideouts in and out with no issue and successfully reset the leveling system. Mr. Murphy conceded that the backsplash in the kitchen was loose and must be reglued. The air conditioner ran successfully during the repair at Indiana and there was no evidence at the inspection the air conditioner was malfunctioning. The noise from the jacks while deploying and retracting was normal. The vehicle did not have any leaks at the Indiana repair or the inspection at the hearing. Mr. Murphy concluded the vehicle had a few minor problems that should be repaired but nothing that substantially impaired the use or value of the vehicle.

E. Analysis

The record shows that the Complainants have experienced extensive problems with their vehicle. However, to qualify for any relief, whether warranty repair or repurchase/replacement, the law requires the vehicle to have an existing defect covered by the Respondent's warranty (warrantable defect).²⁷ The Lemon Law does not require that a manufacturer provide any particular warranty coverage nor does the Lemon Law impose any specific standards for vehicle

²⁷ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

characteristics. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. In part, the warranty generally provides that:

Forest River Inc., 55470 CR 1, P.O. Box 3030, Elkhart, Indiana 46515-3030 (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.

In addition, the warranty also excludes various items/issues from coverage:

Warrantor expressly disclaims any responsibility for damage to the unit where damage is due to condensation, normal wear and tear or exposure to elements. Warrantor makes no warranty with regard to, but not limited to, the chassis including without limitation, any mechanical parts or systems of the chassis, axles, tires, tubes, batteries and gauges, optional generators, routine maintenance, equipment and appliances, or audio and/or video equipment.

from your dealer. According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).²⁸ A manufacturing defect is generally 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 at the factory, such as incorrect assembly or the use of a broken part. Manufacturing defects exist when the vehicle leaves the manufacturing plant. Manufacturing defects exist when the vehicle leaves the manufacturing plant. 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, which exists before the vehicle is

²⁸ 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.").

manufactured, and not from any error during manufacturing.²⁹ Because the warranty only covers manufacturing defects, any flaws in the design, or other non-manufacturing problems, do not qualify for relief.

1. Successfully Repaired Items

The Complainants confirmed the successful repair of the following issues: the steps to the bedroom that squeaked; faucet; chip on the rear of the vehicle; and the large compartment door stop. In addition, the inspection showed that the LED lights, squeaky bathroom floor, difficult to close entry door, and the slide ripping the linoleum were also successfully repaired.

2. Expressly Excluded Items

As explained above, the warranty specifically excludes various items, including mechanical parts or systems, gauges, routine maintenance, equipment, and appliances. As a result, issues arising from the leveling system/hydraulic jacks, control panels, slideout mechanisms, and AC are not warrantable defects that can support any relief. Likewise, issues relating to application of sealants (on the roof for instance) are also specifically excluded, since sealant application is a routine maintenance item.

3. Defects without Evidence of Current Existence

An essential requirement for relief is proof that the alleged defect currently exists. However, the record does not reflect that the following defects continued to exist at the time of the hearing: propane leak, shower door leak, AC noise, and misreading tank monitor.

4. Normal Design Characteristics

The evidence showed that the fold on the roof normally is a normal design characteristic, and not a manufacturing defect. Eliminating the fold would require cutting the roof membrane.

5. Improper Dealer Repairs

The warranty does not cover any damaged caused by the dealer since they are not defects occurring during the manufacture of the vehicle. Specifically, the exposed plywood (which was subsequently repaired) and broken water line caused by dealer repairs are not warrantable defects.

²⁹ 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).

6. Currently Existing Warrantable Defects

The record shows that the following warrantable defects continue to exist: protruding staples, loose kitchen backsplash, and gap at the slideout by the refrigerator. However, a preponderance of the evidence does not show that any of these issues substantially impair the use of the vehicle. And, under the reasonable prospective purchaser standard, these issues do not substantially impair the value of the vehicle. Further, none of these issues constitute serious safety hazards as defined by the Lemon Law.

III. Findings of Fact

1. On January 25, 2018, the Complainants, purchased a new 2018 Sierra 378FB from Camping World RV Sales, an authorized dealer of the Respondent, in New Braunfels, Texas. The Complainants actually took delivery of the RV on February 3, 2018.
2. The vehicle's limited warranty provides that the body structure of the vehicle shall be free of substantial defects for a period of one year from the date of purchase.
3. The Complainants took the vehicle to a dealer for repair as shown below:

Date	Issue
February 6, 2018 February 14, 2018	Leveling system not working properly - tilts to one side and leaves tires off the ground
February 15, 2018 March 21, 2018	Leveling system malfunctioning, entry door bent, door striker plate off, LED lights not working
April 10, 2018 April 25, 2018	LED strip not working, entry door hard to open
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October 1, 2018 November 15, 2018	Bedroom AC is loud, shower floor squeaks, shower surround is loose, tank monitor panel never reads 0% or 100%, hydraulic jacks leaking fluid, control panel will shut off

4. On October 16, 2018, the Complainants provided a written notice of defect to the Respondent.
5. On October 26, 2018, the Complainants filed a complaint, with the Department alleging: incorrect wiring of hydraulic jacks; hydraulic jack not working properly; and hydraulic jacks leaked fluid. In addition, the October 16, 2018, notice of defect attached to the

- complaint also alleged that the entry door/striker plate was never fixed, AC made a humming sound; steps to the bedroom squeaked; and the control panel did not work properly.
6. On January 17, 2019, the Complainants amended the complaint to add the following issues: opening at the bottom right of the refrigerator; carpet with staples that stick out; carpet trimming ripped; thinning spots on carpet under table; torn linoleum; nails/staples sticking out of slideout; linoleum patch lifting and visible; bedroom door jamb dented/scratched; shower floor flexing/squeaking; shower walls loose/flexing; shower doors leaking; broken water line; “pile up of foam & mulched/crushed of small overhang”; roof has “crunched” areas and pinholes; water from air conditioner (AC) draining in different directions and staining roof; tank monitor panel never accurate; LED light strip coming off; large compartment not properly closed – plywood visible; chip at rear; large compartment door stop broken.
 7. On February 15, 2019, the Department’s Office of Administrative Hearings issued an amended 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.
 8. The hearing in this case convened on July 18, 2019, in San Antonio, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainants, represented and testified for themselves. Warren Murphy, Assistant Director, Parts, Service, & Warranty, represented and testified for the Respondent.
 9. The warranty expired on February 3, 2019.
 10. Upon inspection at the hearing the vehicle the front LED lights on the vehicle functioned properly. Inside the large compartment accessible from the outside of the vehicle, the repair made in Indiana left no bare plywood. However, there were visible creases in the roof with sealant applied around them. Initially, the entry door would get caught on the steps. However, the steps no longer caught the door after adjusting the steps to the lowest position. After deploying the hydraulic jacks, a water bottle used as a level showed that the

RV was substantially level. However, the driver side wheels were off the ground (about 2.5 inches). The slideouts squeaked while extending. Staples were observed sticking out from the floor in the kitchen slideout. Daylight was visible from the gap at the bottom front corner of the kitchen slideout. The backsplash in the kitchen was loose. There was a staple observed sticking up in front of the fireplace from the floor. The shower floor appeared normal. The wall of the shower was not tight against the wall and did not feel fully attached to the vehicle frame at the curves of the shower. The wall inside the washer/dryer closet was coming off but was not fully visible because it was behind the washer/dryer units. The chip on the rear of the outside of the vehicle was repaired and no longer visible. The drain under the slideout was also repaired. There was black expanding foam around the pipes under the vehicle. The propane system appeared normal. The front jacks timed out when they were retracted because the jacks were inadvertently retracted in the wrong sequence. As a result, the auto leveling system had to be reset via the master control panel inside the cabin of the vehicle. The slideouts made a loud rubbing noise when retracting.

11. The Complainants confirmed the successful repair of the following issues: the steps to the bedroom that squeaked; faucet; chip on the rear of the vehicle; and the large compartment door stop. In addition, the inspection showed that the LED lights, squeaky bathroom floor, difficult to close entry door, and the slide ripping the linoleum were also successfully repaired.
12. The warranty specifically excludes various items, including mechanical parts or systems, gauges, routine maintenance, equipment, and appliances. As a result, issues arising from the leveling system/hydraulic jacks, control panels, slideout mechanisms, and AC are not warrantable defects that can support any relief. Likewise, issues relating to application of sealants (on the roof for instance) are also specifically excluded, since sealant application is a routine maintenance item.
13. The record does not reflect that the following defects continued to exist at the time of the hearing: propane leak, shower door leak, AC noise, and misreading tank monitor.
14. The evidence shows that the fold on the roof normally is a normal design characteristic, and not a manufacturing defect.

15. The warranty does not cover damage caused by a dealer since the damage is not a defect occurring during the manufacture of the vehicle. Specifically, the exposed plywood (which was subsequently repaired) and broken water line caused by dealer repairs are not warrantable defects.
16. The record shows that the following warrantable defects continue to exist: protruding staples, loose kitchen backsplash, and gap at the slideout by the refrigerator. However, a preponderance of the evidence does not show that any of these issues substantially impair the use of the vehicle. And, under the reasonable prospective purchaser standard, these issues do not substantially impair the value of the vehicle. Further, none of these issues constitute serious safety hazards as defined by the Lemon Law.

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. The Complainants did not prove that the vehicle has a defect covered by the Respondent's warranty that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).

7. The Complainants does not qualify for reimbursement of incidental expenses because the vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE §§ 2301.603, 2301.604(a); 43 TEX. ADMIN. CODE § 215.209.
8. If the Complainants' 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).
9. The Complainants' vehicle qualifies for warranty repair. The Complainants proved that the vehicle has defects covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603. The Complainants or an agent of the Complainants notified the Respondent or Respondent's agent of these alleged defect(s). TEX. OCC. CODE §§ 2301.204 and 43 TEX. ADMIN. CODE § 215.202(b)(3).
10. 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.
11. 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 Complainants' 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 protruding staples, loose kitchen backsplash, and the gap at the slideout by the refrigerator to the applicable warranty as specified here. Upon this Order becoming final under Texas Government Code § 2001.144:³⁰ (1) the Complainants shall deliver the vehicle

³⁰ 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.

to the Respondent within 20 days; and (2) the Respondent shall complete the repair of the vehicle within **40 days** after receiving it. However, if the Department determines the Complainants' refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider the Complainants to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

SIGNED September 16, 2019



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