

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0002776 CAF**

**STEPHEN and KATHY WILLIAMS,
Complainants**

v.

**FOREST RIVER, INC.,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Stephen and Kathy Williams (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 RV has warrantable defects that qualify for warranty repair only.

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 April 26, 2019, in Austin, 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.

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

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 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

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 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 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

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.

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a “defect . . . that is covered by a manufacturer’s, converter’s, or distributor’s . . . warranty agreement applicable to the vehicle” and the vehicle owner notified the manufacturer, converter, distributor, or its authorized agent of the defect 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 for relief under the lemon law.”²¹ However, the parties may expressly or impliedly consent to

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)(3).

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 October 25, 2017, the Complainants purchased a new 2018 Palomino 38 DBS Puma Park from Camper Clinic II, an authorized dealership of the Respondent, in Buda, Texas. The Complainants actually took delivery of the vehicle on November 15, 2017. The vehicle's limited warranty provided coverage of the body structure for one year from the date of purchase. On September 9, 2018, the Complainants provided a written notice of defect to the Respondent. On November 2, 2018, the Complainants filed a complaint with the Department alleging that the RV had a temperature differential in the back bedroom, a leaking slide-out, a glass door that will not stay on the track, mold in the vehicle, and a sewer smell when using the air conditioner (AC) and the washing machine at the same time. The leaking slide-out was successfully repaired.

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).

In relevant part, the Complainants had their RV serviced for the alleged issues as follows:

Date	Issue
January 4, 2018 January 24, 2018	Extreme air temperature differential of 48.9 degrees in back bedroom; sliding glass door will not stay on track
February 20, 2018 February 20, 2018	Robert investigated the air differential and taped the duct; unit continued to have the same problem
April 4, 2018 April 14, 2018	Middle slide-out was leaking and mold was found in the vehicle; sewer smell in vehicle when the front ac and washing machine are used at the same time; installed adjustable vents
May 24, 2018 May 24, 2018	Contractor adjusted the door but it broke within an hour after the repair; HepvO valve installed for the sewer smell
July 3, 2018 July 3, 2018	The slide-out rebuilt; mold reappeared in the vehicle

The Complainants took their RV to the dealership, Camper Clinic II, for repair in January 2018 and April 2018. Technicians dispatched to the Complainants' location performed the other repairs.

In January 2018, technicians attempted to fix the washing machine that was not properly installed and shook violently, the technicians replaced the washing tub, they then replaced the original washing machine with a new washing machine that was the same model, and finally the technicians upgraded the washing machine to a new Pinnacle washing machine, which broke as well. Mrs. Williams testified that the vehicle had mold growing by the washer and dryer. The leaking slide-out caused a separate mold growth, which was removed with the repair of the slide-out and had not returned.

When the vehicle was brought in for repair of the door the technicians lubricated the door. However, the door continued to malfunction and fall off the track. The door also had a two-inch gap from the floor and dripped water on the floor. The technician, Mr. Nelson, stated that there was nothing that could be done about the door. Mrs. Williams last noticed the door issue the day before the hearing.

Mr. Williams testified that the AC malfunction created a 63.8-degree difference in temperature from vents in the back bedroom compared to the vents in the rest of the vehicle. The second time the vehicle was brought in for repair of the AC unit, the technician duct taped the air ducts. The duct tape did not fix the temperature differential.

The vehicle was taken to Camper Clinic II for repair of a leaking slide-out. During the repair, the technicians also installed new closable vents to help with the temperature differential.

However, the vents also did not fix the temperature differential problem. Mr. Williams indicated that the temperature differential was first and last noticed in October 2018. The heater had not been used since October 2018. The temperature at the kitchen vent and the bedroom vent 11 feet away varied by about 60 degrees with one vent in between covered. The temperature will vary by 5 to 10 degrees between the living area and the back bedroom. When temperatures dropped, the Complainants did not go to the back bedroom because it became too cold.

Mrs. Williams testified that on April 14, 2018, the RV had a musty smell from what appeared to be mold. Complainants subsequently contacted Clean Environments, who collected swabs of the mold and wrote a lab report based on the mold sample. Clean Environments recommended that the Complainants clean the affected area and remove the mold but the Complainants elected not to remove the mold and instead contacted Camper Clinic II about the mold. The Complainants last noticed the mold on July 3, 2018. The mold was located behind the washing machine and dryer. Additionally, the Complainants noticed the floor rippling under the shower. Behind the inspection plate under the shower, the p-trap appeared to have been leaking.

In February and March 2018, when the Complainants used the washing machine and the AC in the bedroom, the AC unit produced a sewer smell. The vehicle was taken in for repair at Camper Clinic II and the technicians were not able to duplicate the smell. However, in May 2018, after additional complaints about the sewer smell, Camper Clinic II sent Robert, a technician, who confirmed that the AC unit produced a smell. Camper Clinic II also sent an independent technician named David on various occasions to try to fix the problem. The technician installed a HepvO valve. However, the valve did not help with the smell and Complainants could not run both the AC and the washing machine at the same time without producing the sewer smell. The Complainants were instructed to keep the black water valves closed and put bleach or a sanitizer in the black water. Following these instructions did not fix the smell. Mr. Williams conjectured that he last noticed the sewer smell two weeks before the hearing. Mrs. Williams added that they had not used the washing machine in over a month. The AC appeared normal when turning it on the day before the hearing, but they had not been in the RV. The valve to the black water tanks was closed – everything was closed. They stayed in the RV just long enough to close everything.

The Complainants believed they could not contact the Respondent about the new problems the vehicle developed after filing the Lemon Law complaint. The new problems included the

Pinnacle washing machine breaking, the shower leaking, and the lights in the living room not turning on. The Complainants testified that they did not occupy the RV full-time. Mr. Williams had provided his work shift information in support.

On cross-examination, Mr. Williams elaborated that they used the vehicle for 15-20 days a month and that the vehicle was not a full-time residence. Complainants testified that when they are not in the vehicle they are living at 201 St. Andrews Place. Mr. Williams stated that in a conference call, Mr. Jones suggested closing off the vents to give them more control over the AC unit. Mr. Jones also informed the Complainants that the vents could be enlarged to help with the temperature differential. Mr. Williams also explained that the temperature differential seemed to correlate to the outside temperature. He testified that room temperatures would vary between 5 to 10 degrees but the temperature at the vent could vary by more than 60 degrees. Mr. Williams checked the temperature differentials on multiple occasions. He also noted that trees protected the vehicle from the wind and the front glass door faced the sun. Mrs. Williams clarified that the mold test performed by Clean Environments was a cotton swab test involving swabbing surfaces in the vehicle. Clean Environments did not check behind walls because this would have required cutting the wall for access. Clean Environments also did not take an air sample. The mold seen during the inspection at the hearing was the same mold that Clean Environments took samples of. Upon clarification questions, Mrs. Williams testified that the mold had not been cleaned out as recommended by Clean Environments. Mr. Williams added that a branch had fallen and punctured the RV during a dry spell and their insurance company recommended taking the RV to Explore USA. Mr. Jones thought the mold resulted from the tree limb puncture but did not. When asked about noticing any new mold growth, Mrs. Williams responded that she did not but that she kept a close watch. She added that if the middle slide-out had not leaked badly, they would have never known about the leaking and mold. That was the only other time they noticed mold.

C. Inspection

Inspection of the vehicle at the hearing showed wear on the sliding glass door track/frame from scraping. Flexing of the door frame allowed the door to come out of alignment, even with the door locked. Stepping near the sliding glass door, either on the steps outside or on the floor inside, would cause the sliding door to come out of square with the frame, leaving a gap between the lower part of the door and the frame. A panel behind the washing machine exhibited some

mold. The AC was not tested because of the unavailability of a power source. The area under the shower exhibited some moisture.

D. Summary of Respondent's Evidence and Arguments

Mr. Murphy testified that Forest River never received the Complainant's March 2018 notice of defect. He added that the back-bedroom slide-out needed adjustment because the front corner of the slide-out was not making contact with the seal.

During cross-examination Mrs. Williams noted that the dealer had the RV for repair for 34 days and inquired what the Jeff Fossey at the dealer meant about "playing hardball." Mr. Murphy was unaware of the Mr. Fossey's thinking. When asked why the Respondent did not take the RV to the factory earlier, Mr. Murphy responded that the Respondent did not take the vehicle to the factory immediately because the Respondent ordinarily allowed the dealership to make the necessary repairs first because of transport costs to ship the vehicle to the factory. He also noted that dealerships were independent and the Respondent had no control over the actions of the dealership.

E. Analysis

The vehicle appears to qualify for Lemon Law relief in this case. The Complainants identified four outstanding issues in this case: the temperature differential between the back bedroom and other areas; sliding glass door not staying on track; mold; and a sewer smell produced when using the front AC and washing machine. At the hearing, the Complainants also noted other discovered after filing the Complaint, for which they did not provide notice because they mistakenly believed they could not contact the Respondent.²⁷

1. Applicability of Warranty

To qualify for Lemon Law relief, the vehicle must have a defect covered by warranty (warrantable defect).²⁸ 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 Any issues raised for the first time at the hearing cannot support any relief. TEX. OCC. CODE §§ 2301.204(c) and 2301.606(c); 43 TEX. ADMIN. CODE § 215.202(b)(3). Additionally, the warranty expired on November 15, 2018, so any issues arising after this date would not be covered.

²⁸ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

characteristics or performance. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. In this case, the vehicle's warranty generally provides that:

Forest River Inc., 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.²⁹

Additionally, the warranty also contains specific exclusions 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. Their respective manufacturers and suppliers may warrant some of these items. . . . This recreational vehicle is designed solely for its intended purpose of recreational camping and personal use. Warrantor makes no warranty with regard to any recreational vehicle used for commercial, rental, or business purposes, or any recreational vehicle not registered and regularly used in the United States or Canada.³⁰

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).³¹ 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, such as incorrect assembly or the use of a broken part. Unlike manufacturing defects, issues that do not arise from manufacturing are not warrantable defects.

²⁹ Complainants' Exhibit J, Forest River Travel Trailer Owner's Manual, Warranty.

³⁰ Complainants' Exhibit J, Forest River Travel Trailer Owner's Manual, Warranty.

³¹ 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.").

2. Reasonable Repair Attempts

The repair history shows five total repair attempts, with two of the attempts occurring at a dealership. The record reflects that the RV was at the dealership for repair for a total of 34 days within the first 24 months after delivery. Accordingly, the RV has had a reasonable number of repair attempts.

3. Existing Defects

To qualify for Lemon Law relief, a defect that creates a serious safety hazard or substantially impairs the use or value of the RV must still exist after reasonable repair attempts. The existence of the defects is addressed below.

a. Temperature Differential

The testimony shows that the Complainants last observed the temperature difference between the living area vent and the bedroom vent in October of 2018. The last repair attempt for this issue occurred in February of 2018, so this condition appears to still exist. Given the importance of climate control, particularly in the heat in Texas, the temperature differential constitutes a substantial impairment in the use of the back bedroom and a substantial impairment of value under the reasonable prospective purchaser standard.

b. Sliding Glass Door

The sliding glass door continues to have a defect that causes the door to go out of alignment with the door's frame. Although the complaint described the sliding glass door as not staying on track, the door never actually went off the track but instead shifted within the frame so that the door was not square with the frame. The inspection at the hearing showed that flexing of the frame, which can be caused by stepping on the floor near the frame, would cause the door to move out of alignment with the frame, leaving a gap (about a half inch at the widest) between the lower side of the door and the vertical part of the frame. Nevertheless, the door can be pulled back into alignment. Although a defect, the alignment issue with the sliding glass door does not substantially impair the use or value of the RV and therefore does not qualify for repurchase or replacement.

c. Mold

The evidence shows that mold has not continued to occur in the RV. Mrs. Williams testified that the only mold in the RV was the pre-existing mold behind the washer/dryer and she had not

noticed any new mold growth. Although the Complainant's consultant, Clean Environments, recommended cleaning the mold behind the washer/dryer, the Complainants did not have the mold removed. Also, given the location of the mold by the washer, the washer could have been the source of the moisture feeding the mold growth. However, any defects in appliances are not covered by the Respondent's warranty. Further, the record shows that the water leak at the slide, which caused mold growth, was repaired. In sum, a preponderance of the evidence does not show any existing warrantable defects concerning the mold growth.

d. Sewer Smell

The testimony reflects that the sewer smell issue last occurred about two weeks before the hearing, while the last repair for this issue occurred on May 24, 2018. However, a preponderance of the evidence does not show that the sewer smell rises to the level of a substantial impairment of the use or value of the vehicle. The odor generally occurs with the front AC unit and the washing machine in use simultaneously. Given these factors, the sewer smell does not support repurchase or replacement.

4. Notice of Defect

The Lemon Law prohibits granting repurchase or replacement unless the Respondent was provided with written notice of the alleged defects. The Complainants mailed two notice letters to the Respondent, the first on March 12, 2018, and a second on September 9, 2018. The March letter addressed the "heater, kitchen, faucet leaking, dents in the oven door etc." but none of the issues pending here. The September letter concerned holes in the mattress, a sewer smell, mold, and the sliding door. Neither letter addressed the temperature differential; consequently, the Respondent does not appear to have received written notice of the temperature differential until receiving a copy of the complaint, which the Complainants filed on November 2, 2018. Mr. Murphy testified that the Respondent did not receive any notice in March, April, or May. However, the return receipt for the March letter showed that Sandy Stump signed for the letter, but the receipt did not state the date of delivery. The March letter appears to have been received at the Respondent's offices but for whatever did not reach the appropriate person. Mr. Murphy did acknowledge that the Respondent received the September letter.

5. Manufacturer's Opportunity to Repair

The record does not appear to show that the Respondent had an opportunity to repair the existing defects above. As previously explained, the Complainants provided written notice of sewer smell, mold, and sliding door issues in the September 9, 2018, letter received on September 13, 2018. A preponderance of the evidence does not show any opportunity to cure occurring after the September 9, 2018, notice. In any event, none of the issues identified in the September notice support repurchase or replacement. Further, the Respondent would not have had written notice of the temperature differential until receiving a copy of the complaint sometime after November 2, 2018. Of all the existing issues, only the temperature differential constitutes a substantial impairment that qualifies for repurchase or replacement relief. However, the Complainants testified that they did not contact the Respondent after filing the complaint, which indicates that the Respondent was not extended an opportunity to cure the temperature differential after written notice of this nonconformity. The Lemon Law prohibits granting of repurchase or replacement unless the manufacture had been given notice of the defect and an opportunity to cure the defect. Consequently, the vehicle does not qualify for repurchase or replacement. However, because warrantable defects do exist, the vehicle qualifies for warranty repair.

III. Findings of Fact

1. On October 25, 2017, the Complainants purchased a new 2018 Palomino 38 DBS Puma Park from Camper Clinic II, an authorized dealership of the Respondent, in Buda, Texas. The Complainants actually took delivery of the vehicle on November 15, 2017.
2. The vehicle's limited warranty provides coverage of the body structure for one year from the date of purchase.

3. The Complainants had their RV serviced for the alleged issues as follows:

Date	Issue
January 4, 2018 January 24, 2018	Extreme air temperature differential of 48.9 degrees in back bedroom; sliding glass door will not stay on track
February 20, 2018 February 20, 2018	Robert investigated the air differential and taped the duct; unit continued to have the same problem
April 4, 2018 April 14, 2018	Middle slide-out was leaking and mold was found in the vehicle; sewer smell in vehicle when the front ac and washing machine are used at the same time; installed adjustable vents
May 24, 2018 May 24, 2018	Contractor adjusted the door but it broke within an hour after the repair; HepvO valve installed for the sewer smell
July 3, 2018 July 3, 2018	The slide-out rebuilt; mold reappeared in the vehicle

4. The Complainants took their RV to the dealership, Camper Clinic II, for repair in January 2018 and April 2018. Technicians dispatched to the Complainants' location performed the other repairs.
5. The Complainants mailed two written notices of defect to the Respondent, the first on March 12, 2018, and a second on September 9, 2018. The March notice addressed the "heater, kitchen, faucet leaking, dents in the oven door etc." but none of the defects currently at issue in this case. The September notice concerned holes in the mattress, a sewer smell, mold, and the sliding door. Neither notice addressed the temperature differential; consequently, the Respondent does not appear to have received written notice of the temperature differential until receiving a copy of the complaint, sometime after November 2, 2018.
6. On November 2, 2018, the Complainants filed a complaint with the Department alleging that the RV had a temperature differential in the back bedroom, a leaking slide-out, a glass door that will not stay on the track, mold in the vehicle, and a sewer smell from the front AC when using the AC and the washing machine at the same time. The leaking slide-out was successfully repaired.
7. On January 25, 2019, 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.
8. The hearing in this case convened on April 26, 2019, in Austin, 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 November 15, 2018.
 10. Inspection of the vehicle at the hearing showed wear on the sliding glass door track/frame from scraping. Flexing of the door frame allowed the door to come out of alignment, even with the door locked. Stepping near the sliding glass door, either on the steps outside or on the floor inside, would cause the sliding door to come out of square with the frame, leaving a gap between the lower part of the door and the frame. A panel behind the washing machine exhibited some mold. The AC was not tested because of the unavailability of a power source.
 11. The Complainants last observed the temperature difference between the living area vent and the bedroom vent in October of 2018. The last repair attempt for this issue occurred in February of 2018.
 12. The sliding glass door continues to have a defect that causes the door to go out of alignment with the door's frame. Although the complaint described the sliding glass door as not staying on track, the door never actually went off the track but instead shifted within the frame so that the door was not square with the frame. The inspection at the hearing showed that flexing of the frame, which can be caused by stepping on the floor near the frame, would cause the door to move out of alignment with the frame, leaving a gap (about a half inch at the widest) between the lower side of the door and the vertical part of the frame. Nevertheless, the door can be pulled back into alignment.
 13. No new mold growth has occurred in the RV. The only mold in the RV is the pre-existing mold behind the washer/dryer. Although the Complainant's consultant, Clean Environments, recommended cleaning the mold behind the washer/dryer, the Complainants did not have the mold removed. Also, given the location of the mold by the

washer, the washer could have been the source of the moisture feeding the mold growth. However, any defects in appliances are not covered by the Respondent's warranty. Further, the record shows that the water leak at the slide, which caused mold growth, was repaired.

14. The sewer smell issue last occurred about two weeks before the hearing. The last repair for this issue occurred on May 24, 2018. The odor generally occurs with the front AC unit and the washing machine in use simultaneously.

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 Respondent did not have an opportunity to cure the alleged defects. This Order may not require repurchase or replacement of the vehicle without an opportunity to cure by the Respondent. TEX. OCC. CODE § 2301.606(c)(2). The Complainants did not prove that any mold growth was an existing defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a). The Complainants did not prove that the sliding glass door track alignment and the sewer smell were warrantable defects that create a serious safety hazard or substantially impair the use or market value of the vehicle. TEX. OCC. CODE § 2301.604(a).

7. The Complainants do 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 a defect 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 the 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.

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 climate control system (temperature differential), sliding glass door misalignment, and sewage smell to the applicable warranty as specified here. Upon this Order becoming final under Texas Government Code § 2001.144:³² (1) the Complainants shall deliver the vehicle to the Respondent within 20 days; and (2) the Respondent shall complete the repair of the vehicle within **60 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

³² 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.

relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

SIGNED June 25, 2019



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