

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0003217 CAF**

**DAVID AND SHIRLEY CASSELL,
Complainants**

v.

NEWMAR CORPORATION

and

**SPARTAN MOTORS, INC.,
Respondents**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

David and Shirley Cassell (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 Newmar Corporation and Spartan Motors, Inc. (Respondents). A preponderance of the evidence does not show that the subject vehicle has a defect covered by warranty. Consequently, the Complainants' vehicle does not qualify for repurchase/replacement or 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 May 21, 2019, in Houston, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainants, represented himself. Martin Blanco of the Houston Auto Appraisers testified for the Complainants. Dean Barth, attorney, represented Newmar. Doug Lown, owner and operator of Coachlight RV, Mike Miller, technician, Larry Hanke, engineer, and Doug Cameron, service manager - Holiday World of Katy, testified for the Respondent, Newmar. William (Will)

¹ TEX. GOV'T CODE § 2001.051.

Geise, attorney, represented Spartan Motors, Inc. Scott Wixson, customer and product support manager, and Patrick David, senior engineering technician, testified for Spartan Motors.

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

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

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 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

⁵ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

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).

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

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

⁸ TEX. OCC. CODE § 2301.605(a)(2).

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.

nonconformity;¹⁴ and (3) the Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.¹⁵

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a "defect . . . that is covered by a manufacturer's, converter's, or distributor's . . . warranty agreement applicable to the vehicle" and the vehicle owner notified the 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

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).

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,

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 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 July 11, 2018, the Complainants, purchased a new 2018 Dutchstar 4018 from Holiday World of Katy, an authorized dealer of the Respondent, Newmar, in Katy, Texas. The Complainants took delivery about July 15, 2018. The vehicle’s chassis warranty from Spartan provides coverage for 36 months or until 50,000 miles on the odometer, whichever occurs first;

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).

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).

however, the chassis warranty covers the frame for 20 years. The vehicle's house warranty from Newmar provides coverage for 12 months. On October 19, 2018, a person on behalf of the Complainants provided a written notice of defect to the Respondent. On November 15, 2018, the Complainants filed a complaint with the Department alleging corrosion on the undercarriage of the chassis.

Mr. Cassell testified that the vehicle had extensive corrosion, observed over several months, affecting all the undercarriage of the vehicle. Mr. Cassell testified that he first noticed the corrosion on delivery of the vehicle. Mr. Cassell explained that the vehicle looked to have big chunks of rust on the front end upon delivery. Mr. Cassell brought the vehicle in to fix an electrical issue and mentioned the corrosion issue to a salesman of Holiday World of Katy. Mr. Cassell testified that on the first trip with the vehicle the shore power failed and he had to run the generator all night for power. Mr. Cassell then hired a mechanic and the mechanic took some of the vehicle's electricals apart. The mechanic found a pin that appeared to have bent and on repair power was restored to the vehicle. On the next trip with the vehicle, the outside doors would not stay latched therefore Mr. Cassell could not travel. Mr. Cassell called a mechanic who used a crow bar to repair the issue of the door latches. On the same trip the vehicle's dishwasher also locked and Mr. Cassell was unable to open it. The problems resulted in Mr. Cassell shortening his six-week trip to three weeks.

After shortening the last trip, Mr. Cassell testified that he brought the vehicle into Holiday World of Katy to repair the issues he experienced during the trip. Mr. Cassell also testified that the vehicle would bounce up and down continuously after hitting a dip in the road and the problem could only be resolved by braking and slowing the vehicle. The vehicle was sent to Spartan for replacement of the original shocks with new adjustable shocks to eliminate the bouncing problem. The vehicle was subsequently taken back to Holiday World of Katy. Justin McDonald from Spartan in a phone conversation told Mr. Cassell that Spartan wanted to take the vehicle to Indiana for repairs and remove the corrosion at their factory. Mr. Cassell declined the offer.

After declining to send the vehicle to Indiana, Mr. Cassell took the vehicle to Auto Appraisers of Houston. Mr. Blanco inspected the vehicle and reported that the corrosion was extensive. Mr. Cassell testified that he did not feel comfortable driving the vehicle. Mr. Cassell did testify, however, that the vehicle drove fine after picking it up from Holiday World of Katy.

Mr. Cassell stated that after the Holiday World of Katy repair, the vehicle experienced another problem with the battery system malfunctioning, which required Mr. Cassell to use the battery boost to start the vehicle. Mr. Cassell testified that the vehicle was plugged in before the problem occurred, therefore, the battery should have been fully charged. Mr. Cassell testified that after he got the vehicle started within 100 yards of driving the vehicle it began to bounce abnormally and made a sputtering noise. The problem occurred at speeds as low as 3 miles per hour. Subsequently, Mr. Cassell called Newmar and then Spartan about the issue. A mechanic was sent out to repair the vehicle. On repair the mechanic found that the airbags deflated. The mechanic zip-tied the airbags and got the vehicle running to take it to Holiday World of Katy for further inspection and repair. At Holiday World of Katy, technicians found extensive rust on the step motor, which required Holiday World of Katy to replace the step motor. Mr. Cassell stated that the vehicle had been at Holiday World of Katy since August 2018. Mr. Cassell also stated that much of the rust had been coated in a protective coating but there was no work order from Holiday World of Katy or Spartan for the repair. Mr. Cassell also affirmed that the warranty did not cover rust or corrosion on the vehicle.

Mr. Cassell testified that a major concern of his was diminution in resale value of the vehicle. Mr. Cassell stated that the resale value of the vehicle would be substantially impacted by the corrosion. He further stated that he believes the corrosion could lead to other issues with the vehicle that would prohibit its use.

Mr. Blanco testified that he was hired to inspect the vehicle. The inspection consisted of checking the outside of the vehicle and the undercarriage, which Mr. Blanco stated had a highly unusual amount of rust on the frame, suspension, door struts, and on top of the slide-out trays. Mr. Blanco also testified that he noticed on the driver side compartment door, the strut had corroded to the point that it disintegrated. Mr. Blanco stated that the amount of rust on the vehicle was highly unusual relative to the rust damage he had seen in the field. He further stated that the vehicle had bolts and other parts that have disintegrated. Mr. Blanco also noted that the struts and wheel hubs that experienced corrosion were high off the ground, about 1.5 to 2 feet, and it appeared that the vehicle was submerged.

Mrs. Cassell testified that the flap on the front of the vehicle was rusted and looked abnormal. The first time the rust was mentioned to Newmar or Spartan was the first time the

vehicle was taken into repair at Holiday World of Katy for the electrical issues. The Cassells did not take possession of the vehicle upon purchase but within about ten days after purchase because Holiday World of Katy did not have the vehicle ready.

On cross examination by Spartan, Mr. Cassell, testified that on August 10, 2018, he took the vehicle to Holiday World of Katy to repair the dishwasher and other issues experienced during the first trip. Mr. Cassell stated that he did not bring the vehicle in for the rust issue. Mr. Cassell also stated that he never requested anyone to fix the rust, he only expressed his concern about the corrosion. On September 14, 2018, Mr. Cassell requested a repurchase or replacement of the vehicle. The request came two days after the vehicle was taken in to replace the shocks on September 12, 2018. Mr. Cassell testified that Rick Drinkwine offered to take the vehicle to Indiana for repair at the Newmar factory but he declined. Mr. Cassell also stated that he tried to sell and trade the vehicle at a motor home show. Holiday World of Katy offered \$220,000 for a trade-in of the vehicle. Mr. Cassell had not tried to sell the vehicle except for those two occasions because he did not have physical possession of the vehicle because it was at Holiday World of Katy for repair.

On cross examination by Spartan, Mr. Blanco testified that during the inspection at the hearing on May 21, 2019, he saw frame bolts and door latch struts that had either the same amount of rust or more compared to his previous inspection of the vehicle. Mr. Blanco testified that in his experience, there should not be the amount of rust seen on the vehicle on any new vehicle. Mr. Blanco also stated that the airbag housing and steering box were both heavily corroded and could pose a safety concern. Mr. Blanco did not state in his original report that the rust posed a safety concern to the vehicle's occupants. Mr. Blanco explained that all the parts of the vehicle that had corrosion on them during the first inspection had corrosion on them during the subsequent inspection and the parts would continue to corrode until they break apart. Mr. Blanco testified that rust on the door brackets, suspension, and steering would render the vehicle unsafe. Mr. Blanco stated that he had written thousands of diminutions of value statements for individuals and insurance companies but did not write one for Mr. Cassell. Mr. Blanco testified that he could tell immediately upon the inspection on May 14, 2019, that repairs were made to the vehicle but there were still heavily rusted components. He elaborated that the vehicle appeared to be treated with a protective coating on the undercarriage. Mr. Blanco stated that the Auto Appraisers of Houston have a 100-mile radius with respect to the cars they work on. Finally, upon clarification questions,

Mr. Blanco testified that the rusted brackets, bolts, and latches were part of the coach and not a part of the vehicle's frame.

Upon cross examination by Newmar, Mr. Cassell testified that no one had told him that the vehicle was unsafe to drive but the vehicle's safety was a personal concern. Mr. Cassell testified that he was offered to have the vehicle taken to Indiana for repair but that was the only option he received for repair of the corrosion. Mr. Cassell explained that he could not take the vehicle into Holiday World of Katy for the undercarriage corrosion because they were not a Spartan dealer. Upon clarifying questions, Mr. Cassell explained that corrosion in the coach referred to the corrosion that he observed on the door struts, brackets, and latches. Mr. Cassell also stated that he received a work order that the door struts, brackets, and latches were replaced but upon inspection, they were rusty. Mr. Cassell stated that either the parts were not replaced or they corroded again very quickly. Mr. Cassell also testified that the extent the damage from the corrosion was unclear and there could be damage to other parts of the vehicle. Mr. Cassell stated that Newmar would not give them a forever warranty against corrosion and rust. Mr. Cassell testified that he had never made a repair request that Newmar had not attempted.

Upon cross examination by Newmar, Mr. Blanco testified that he had no expertise in metallurgy. Mr. Blanco described on his initial report that the rust on the undercarriage was surface rust. He elaborated that the struts were easy to replace but he did not know the extent of what would need to be replaced on the undercarriage. Mr. Blanco testified that the parts that had disintegrated were easy to replace. Mr. Blanco also stated that there was not any corrosion on the wiring and the investigation of the initial report did not go further than investigating the corrosion on the surface of the vehicle.

On rebuttal testimony, Mr. Blanco reiterated that the rust on the vehicle was not common and that the vehicle's undercarriage had a protective sealant applied to it.

C. Inspection

Upon inspection at the hearing, the RV's odometer displayed 3,914 miles. The rust did not appear extensive. Some of the hardware under the chassis exhibited greater rust as compared with the rest of the underbody. The compartment door struts had some corrosion but appeared to function.

D. Summary of Respondents' Evidence and Arguments

Mr. Wixson, of Spartan, testified that rust and corrosion were not covered by the express warranty and the warranty specifically stated that it did not cover rust or corrosion of the chassis. Mr. Wixson explained that Spartan did not protect against rust and corrosion because they had no control over the chassis or its components after leaving their possession. Mr. Wixson stated that on September 7, 2018, Mr. Cassell complained about the vehicle bouncing. To stop the bouncing, Spartan gave the vehicle stiffer shocks. On September 13, 2018, Spartan received notice from Rick Drinkwine concerning rust and corrosion on the vehicle but Mr. Cassell made no request for repair. Mr. Wixson also testified that Spartan was not given an opportunity to repair the rust and corrosion issue.

Mr. David, a technician for Spartan, testified that he inspected the vehicle and observed the corrosion throughout the body and transaxle. Mr. David testified that in his opinion, the corrosion was all cosmetic and did not affect the use of the vehicle. Mr. David could not comment on the corrosion's effect on the value of the vehicle. Mr. David also explained that the amount of rust on the vehicle was not unusual for vehicles in the Midwest because they put salt on the road, which leads to vehicular corrosion. Mr. David testified that the vehicle was tested, after the new shocks were installed, on the road at speeds of 70 to 75 miles per hour and the vehicle felt normal.

Mr. Miller, a service technician for Newmar, testified that Newmar purchased chassis from outside manufacturers and then Newmar would build the body of the recreational vehicle. The vehicle was comprised of many components from outside manufacturers. Mr. Miller testified that he looked at the undercarriage of the vehicle and described the corrosion as surface rust to the exterior components. Mr. Miller explained that surface rust was corrosion on the surface of the metal and did not weaken the metal. Mr. Miller elaborated that the corrosion had not eaten through the structure to affect the integrity of the vehicle. Mr. Miller also explained that surface rust was not hard to remove and removal is done by putting rust inhibitors on the rusty parts and recoating the vehicle with a protective sealant. Mr. Miller stated that the repair would take about a day to perform. He also testified that the vehicle was safe to drive and the corrosion did not substantially impair the use of the vehicle.

Mr. Hanke, an engineer, testified for Newmar that surface rust was on the outside of iron and did not affect the integrity of the metal. Mr. Hanke testified that the rust on the vehicle was

superficial. Mr. Hanke elaborated that although many components had rust on them the extent of the corrosion with respect to the integrity of the metal was negligible. Mr. Hanke stated that there was no evidence of corrosive pitting. He went on to state that from his observations at the inspection on May 14, 2019, the rust did not present a serious safety concern. Mr. Miller testified that the corrosion would not substantially impair the use of the vehicle and the vehicle could operate normally in its current state for many years. Mr. Hanke qualified the previous statement stating that he recommended the rust be removed and the vehicle recoated with a protective sealant. Mr. Hanke also testified that the vehicle was safe to drive.

Mr. Lown, Vice President of a recreational vehicle dealership, testified that he buys and sells Newmar vehicles. Mr. Lown explained that the value of a vehicle was determined by using NADA as a guide and inspecting the product itself. Mr. Lown stated that there was probably surface rust on every vehicle on his lot but he would not likely do anything about the vehicular rust for the vehicles on his lot. Mr. Lown also testified that the rust did not diminish the value of the vehicle. He explained that while minor parts might be replaced, the vehicle should retain its value as if it were rust free. Mr. Lown also stated that there was nothing unsafe about the vehicle and it would not diminish the value.

Mr. Cameron, a service manager for Holiday World of Katy, testified that he saw surface rust every day and there was nothing abnormal about the corrosion on the vehicle. Mr. Cameron testified that there had not been any cleanup of the rust by Holiday World of Katy. Mr. Cameron also stated that the corrosion did not make the vehicle unsafe.

On cross examination, Mr. David stated that although there were pictures sent from Justin McDonald from the first Spartan repair, he did not want to use them because he did not want his inspection to be influenced by anything.

On cross examination, Mr. Lown testified that he was not concerned if the vehicle was underwater. Mr. Lown also stated that the rust on the vehicle and the wheel hubs was common. Additionally, the rust on the vehicle should not interfere with its resale value.

On rebuttal testimony, Mr. Hanke testified that rust could change appearances and color from red to orange to black. He further explained that splashing of water and fluids from the road as well as being off the road for extended amounts of time could change the rust's appearance.

Mr. Hanke also testified that from his inspection on May 21, 2019, that the vehicle did not have any protective coating on the undercarriage for the corrosion.

E. Analysis

1. Warranty Coverage

The subject vehicle does not have a defect covered by warranty (warrantable defect)²⁷ that qualifies for Lemon Law relief. Lemon Law relief does not apply to all problems that a consumer may have but only to defects covered by warranty (warrantable defects).²⁸ In the present case, the vehicle does not have any currently existing defects that qualify for Lemon Law relief. 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 characteristics. Instead, the Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. In this case, the chassis warranty applies if “a nonconformity in materials or workmanship appears during normal use, maintenance or service within the limited warranty period.”²⁹ The house warranty provides that “[i]f any part of your new Newmar Corporation product fails because of a manufacturing defect within twelve (12) months from the original retail owner’s date of purchase, it will be repaired without charge.”³⁰ Under these terms, the warranties only apply 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. Additionally, and most significantly, both warranties specifically exclude corrosion from

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

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

²⁹ Spartan’s Exhibit 1, Custom Motorhome Chassis Limited Warranty.

³⁰ Newmar’s Exhibit 1, 2018 Recreational Vehicle Twelve Month Limited Warranty (emphasis added).

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.”).

coverage. The chassis warranty does not cover “[d]amage as a result of corrosion”³² and the house warranty does not cover “[a]ny normal deterioration of appearance items due to wear and/or exposure including . . . exterior paint and finish, rust and corrosion.”³³ In sum, the warranties do not cover the alleged corrosion of either the chassis or the parts of the house. Further, as stated above, the house warranty covers a failure of a part but does not cover the mere appearance of corrosion. In the present case, any corrosion of house components has not caused a currently existing failure of any parts. Although a condition may be undesirable or problematic, the Lemon Law provides no relief unless a warranty covers the condition.

2. Manufacturer’s Opportunity to Cure

As explained in the discussion of applicable law, Lemon Law relief cannot be granted unless Mr. Cassell provided the manufacturer, as opposed to a dealer, an opportunity to cure the defects. In this case, Mr. Cassell affirmed that he declined Spartan’s offer to have the corrosion addressed at its Indiana factory. Moreover, Mr. Cassell acknowledged that he never requested either Spartan or Newmar to repair the rust. Consequently, the vehicle cannot qualify for repurchase or replacement relief.

III. Findings of Fact

1. On July 11, 2018, the Complainants, purchased a new 2018 Dutchstar 4018 from Holiday World of Katy, an authorized dealer of the Respondent, Newmar, in Katy, Texas. The Complainants took delivery about July 15, 2018.
2. The vehicle’s chassis warranty from Spartan provides coverage for 36 months or until 50,000 miles on the odometer, whichever occurs first; however, the chassis warranty covers the frame for 20 years. The vehicle’s house warranty from Newmar provides coverage for 12 months.
3. The Complainants declined Spartan’s offer to have the corrosion addressed at its Indiana factory.
4. The Complainants never requested either Spartan or Newmar to repair the rust.

³² Spartan’s Exhibit 1, Custom Motorhome Chassis Limited Warranty.

³³ Newmar’s Exhibit 1, 2018 Recreational Vehicle Twelve Month Limited Warranty (emphasis added).

5. On October 19, 2018, a person on behalf of the Complainants provided a written notice of defect to the Respondent.
6. On November 15, 2018, the Complainants filed a complaint with the Department alleging corrosion on the undercarriage of the chassis.
7. On February 6, 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 May 21, 2019, in Houston, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainants, represented himself. Martin Blanco of the Houston Auto Appraisers testified for the Complainants. Dean Barth, attorney, represented Newmar. Doug Lown, owner and operator of Coachlight RV, Mike Miller, technician, Larry Hanke, engineer, and Doug Cameron, service manager - Holiday World of Katy, testified for the Respondent, Newmar. William (Will) Geise, attorney, represented Spartan Motors, Inc. Scott Wixson, customer and product support manager, and Patrick David, senior engineering technician, testified for Spartan Motors.
9. The vehicle's odometer displayed 3,914 miles at the time of the hearing.
10. The vehicle's house and chassis warranties were in effect at the time of the hearing.
11. Upon inspection at the hearing, the RV's odometer displayed 3,914 miles. The rust did not appear extensive. Some of the hardware under the chassis exhibited greater rust as compared with the rest of the underbody. The compartment door struts had some corrosion but appeared to function.
12. The chassis warranty applies if "a nonconformity in materials or workmanship appears during normal use, maintenance or service within the limited warranty period." The house warranty provides that "[i]f any part of your new Newmar Corporation product fails because of a manufacturing defect within twelve (12) months from the original retail

owner's date of purchase, it will be repaired without charge." The chassis warranty does not cover "[d]amage as a result of corrosion" and the house warranty does not cover "[a]ny normal deterioration of appearance items due to wear and/or exposure including . . . exterior paint and finish, rust and corrosion."

IV. Conclusions of Law

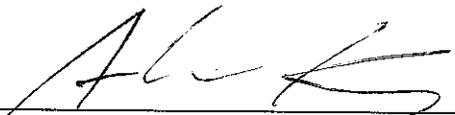
1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 and 2301.204.
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the 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. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).
7. The Complainants' vehicle cannot qualify for replacement or repurchase. The Respondent did not have an opportunity to cure the alleged defect(s). 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).
8. 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.

9. The Complainants' vehicle does not qualify for warranty repair. The Complainants did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.
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**.

SIGNED July 22, 2019



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