

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0008288 CAF**

KARRY L. and BRANDON C. MOORE,	§	BEFORE THE OFFICE
Complainants	§	
	§	
v.	§	OF
	§	
FOREST RIVER, INC.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Karry L. and Brandon C. Moore (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 October 10, 2019, in Austin, Texas, before Hearings Examiner Andrew Kang, and the record closed on October 25, 2019, upon submission of a list of stipulated required repairs. 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 mailed 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, someone on behalf of the owner, or the Department 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

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).

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.

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 hearing 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 March 4, 2017, the Complainants, purchased a new 2017 Wildwood 33BHOK from Fun Town RV Giddings LP, an authorized dealer of the Respondent, in Giddings, Texas. The Complainants actually took delivery of the vehicle on March 18, 2017. The vehicle’s limited warranty provides that the body structure of this recreational vehicle shall be free of substantial defects in materials and workmanship attributable to the Respondent for a period of one year from the date of purchase. On August 6, 2018, the Complainants provided a written notice of defect to the Respondent. On April 17, 2019, the Complainants filed a complaint with the Department describing the vehicle’s alleged defects as follows:

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).

Outside kitchen door not closing securely. Large slide out not going in all the way. Motor on large slide out very slow. small slide out not going in all the way. Motor on small slide out very slow. Motor on back and front stabilizer jacks freeze up. [Linoleum] in kitchen coming up. spare tire rack not holding spare tire. Rubber on outside of camper coming off. wall panels being pulled away from [attached] walls around slide outs. Closet wall coming off. Front shell by gooseneck hitch [separating] from camper. [Adhesive] paper on trim in kitchen coming off. Water and debris coming in camper from slides. Floor inside gets soaking wet. New AC takes forever to shut off and on. all shelves in camper not cut right. center frame to back room crooked and door [doesn't] shut right. staples coming out on inside of bottom bunk. plywood on beds not cut properly. Bathroom sink not properly secured on cabinet. white tube on bottom of camper. squished between the camper and frame. cabinet where we keep the cups is not secure. Cabinet where pans are kept has [broken] due to it just being a piece of paneling not secured. Border on bottom bunk coming off and not [attached] right. Drawer below kitchen table seat not useable. Rubber on slides tearing from slide pulling. Bathroom door trim was screwed together on one side but not the other. Bathroom outside entry door does not open and close properly. Wires hanging from the rear panel of camper. Water heater does not heat properly side panels on both slides bowed. Curtain rod in backroom does not hold curtain. Trim in cabinets missing and or not cut properly. trim is loos above master bed and throughout camper. panel under DVD [player] loose-trim not stapled. Hitch will not hold air. Floors scraped due to slides dragging. outside rubber getting caught on slides and ripping off. Corner in back room paneling beside slide folding/possibly go wet from slide out. Shelves throughout camper not cut right. Bathroom wall by toilet bowed out. floor bubbling up in [front] of refrigerator. Random screws coming out of cabinets and drawers. Cabinet cracked above couch bottom left corner.

At the hearing on the merits, the parties agreed to stipulate to the issues subject to repair under the warranty.

C. Stipulation of Issues

In accordance with the parties' agreement to stipulate to the repairs required under the warranty, Order No. 3, Requiring Written Submission, issued on October 11, 2019, directed the parties to jointly file a list of the stipulated required repairs. On October 25, 2019, the Complainants, on behalf of the parties, filed their list of repairs. The list included the following items for repair:

- Replace roof
- Outside kitchen door not latching properly
- Slides need adjustment
- Slide seals need replaced
- Motor on slides slow

Motor on stabilizer [jacks] freezing up
2 kitchen cabinets broken
Replace linoleum in kitchen
Screw covers on exterior trim strips coming off
Wall paneling and seam tape over slide loose
Closet wall coming loose
Panel under upper deck loose
Outdoor kitchen fridge [won't] stay closed
Battery doesn't charge/[won't] hold charge
Hose caught under frame
Tire blowout damaged J-wrap
Dinette drawer hard to operate
Right side of closet door outside lavatory loose
Backroom door [jamb] bowed
Missing valence on back window
Wires hanging from rear of camper
Bathroom door frame screwed on one side but not the other (done by [Fun Town])
Sides of both slides bowed (per [Fun Town])
Cabinets throughout camper missing trim
Cabinets throughout camper trim and shelves not cut correctly

D. Analysis

Consistent with the parties' stipulation of issues, the repair items listed above qualify for repair relief under the vehicle's warranty.

III. Findings of Fact

1. On March 4, 2017, the Complainants, purchased a new 2017 Wildwood 33BHOK from Fun Town RV Giddings LP, an authorized dealer of the Respondent, in Giddings, Texas. The Complainants actually took delivery of the vehicle on March 18, 2017.
2. The vehicle's limited warranty provides that the body structure of this recreational vehicle shall be free of substantial defects in materials and workmanship attributable to the Respondent for a period of one year from the date of purchase.
3. On August 6, 2018, the Complainants provided a written notice of defect to the Respondent.
4. On April 17, 2019, the Complainants filed a complaint with the Department alleging the following nonconformities in the subject vehicle:

Outside kitchen door not closing securely. Large slide out not going in all the way. Motor on large slide out very slow. small slide out not going in all the way. Motor on small slide out very slow. Motor on back and front stabilizer jacks freeze up. [Linoleum] in kitchen coming up. spare tire rack not holding spare tire. Rubber on outside of camper coming off. wall panels being pulled away from [attached] walls around slide outs. Closet wall coming off. Front shell by gooseneck hitch [separating] from camper. [Adhesive] paper on trim in kitchen coming off. Water and debris coming in camper from slides. Floor inside gets soaking wet. New AC takes forever to shut off and on. all shelves in camper not cut right. center frame to back room crooked and door [doesn't] shut right. staples coming out on inside of bottom bunk. plywood on beds not cut properly. Bathroom sink not properly secured on cabinet. white tube on bottom of camper. squished between the camper and frame. cabinet where we keep the cups is not secure. Cabinet where pans are kept has [broken] due to it just being a piece of paneling not secured. Border on bottom bunk coming off and not [attached] right. Drawer below kitchen table seat not useable. Rubber on slides tearing from slide pulling. Bathroom door trim was screwed together on one side but not the other. Bathroom outside entry door does not open and close properly. Wires hanging from the rear panel of camper. Water heater does not heat properly side panels on both slides bowed. Curtain rod in backroom does not hold curtain. Trim in cabinets missing and or not cut properly. trim is loos above master bed and throughout camper. panel under DVD [player] loose-trim not stapled. Hitch will not hold air. Floors scraped due to slides dragging. outside rubber getting caught on slides and ripping off. Corner in back room paneling beside slide folding/possibly go wet from slide out. Shelves throughout camper not cut right. Bathroom wall by toilet bowed out. floor bubbling up in [front] of refrigerator. Random screws coming out of cabinets and drawers. Cabinet cracked above couch bottom left corner.

5. On July 16, 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.
6. The hearing in this case convened on October 10, 2019, in Austin, Texas, before Hearings Examiner Andrew Kang, and the record closed on October 25, 2019, upon submission of a list of stipulated required repairs. The Complainants, represented and testified for themselves. Warren Murphy, Assistant Director, Parts, Service, & Warranty, represented and testified for the Respondent.

7. At the hearing on the merits, the parties agreed to stipulate to the repairs required under the vehicle's warranty.
8. The parties stipulated to the repair of the following items:
 - Replace roof
 - Outside kitchen door not latching properly
 - Slides need adjustment
 - Slide seals need replaced
 - Motor on slides slow
 - Motor on stabilizer [jacks] freezing up
 - 2 kitchen cabinets broken
 - Replace linoleum in kitchen
 - Screw covers on exterior trim strips coming off
 - Wall paneling and seam tape over slide loose
 - Closet wall coming loose
 - Panel under upper deck loose
 - Outdoor kitchen fridge [won't] stay closed
 - Battery doesn't charge/[won't] hold charge
 - Hose caught under frame
 - Tire blowout damaged J-wrap
 - Dinette drawer hard to operate
 - Right side of closet door outside lavatory loose
 - Backroom door [jamb] bowed
 - Missing valence on back window
 - Wires hanging from rear of camper
 - Bathroom door frame screwed on one side but not the other (done by [Fun Town])
 - Sides of both slides bowed (per [Fun Town])
 - Cabinets throughout camper missing trim
 - Cabinets throughout camper trim and shelves not cut correctly
9. The warranty expired on March 18, 2018.

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 timely file the complaint for repurchase or replacement relief. The proceeding must have been commenced not later than six months after the earliest of: (1) the expiration date of the express warranty term; or (2) the date on which 24 months have passed since the date of original delivery of the motor vehicle to an owner. TEX. OCC. CODE § 2301.606(d).
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 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.
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 for the items listed below to conform the subject vehicle to the applicable warranty as specified here.

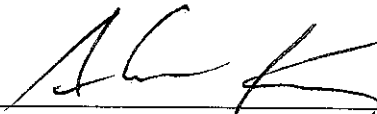
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- Wires hanging from rear of camper
- Bathroom door frame screwed on one side but not the other (done by [Fun Town])
- Sides of both slides bowed (per [Fun Town])
- Cabinets throughout camper missing trim
- Cabinets throughout camper trim and shelves not cut correctly

Upon this Order becoming final under Texas Government Code § 2001.144;²⁷ (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

²⁷ 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.

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 November 5, 2019



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