

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0010122 CAF**

**BROOKS A. and JENNIFER N.
CANNON,**

Complainants

v.

**JAGUAR LAND ROVER NORTH
AMERICA, LLC,**

Respondent

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Brooks A. and Jennifer N. Cannon (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 vehicle distributed by Jaguar Land Rover North America, LLC (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect that qualifies 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 November 12, 2019, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Tom Clark, attorney, represented the Complainants. John Chambless, attorney, represented the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief Requirements

A vehicle qualifies for repurchase or replacement if the respondent cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”² In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must currently exist after a “reasonable number of attempts” at repair.³ In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a written notice of the defect to the respondent, (2) an opportunity to cure by the respondent, and (3) a deadline for filing a Lemon Law complaint.

a. Serious Safety Hazard

The Lemon Law defines “serious safety hazard” as a life-threatening malfunction or nonconformity that: (1) substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.⁴

b. Substantial Impairment of Use or Value

i. Impairment of Use

In determining substantial impairment of use, the Department considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle.” For instance, “while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”⁵

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

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

ii. Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. The reasonable purchaser standard “does not require an owner to present an expert witness or any technical or market-based evidence to show decreased value.” Instead, under this standard, “factfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle.”⁶

c. Reasonable Number of Repair Attempts

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) two of the repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.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: (A) at least one attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least one other attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt.⁸

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).

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 and: (A) the vehicle is out of service for repair for a cumulative total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an 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 mailed written notice of the alleged defect or nonconformity to the manufacturer;¹³

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). The Lemon Law does not define the words “mailed” or “mail”, so under the Code Construction Act, the common usage of the word applies. TEX. GOV'T CODE § 311.011. Dictionary.com defines “mail” as “to send by mail; place in a post office or mailbox for transmission” or “to transmit by email.” *Mail. Dictionary.com Unabridged*. Random House, Inc. <http://www.dictionary.com/browse/mail> (accessed: April 01, 2016). Also, 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 that someone on behalf of the owner mailed notice of the defect/nonconformity to the Respondent.

(2) the manufacturer 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

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 TEX. OCC. CODE § 2301.606(c)(2). A repair visit to a dealer can satisfy the “opportunity to cure” requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt the final repair on the manufacturer's behalf. *See Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

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 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 May 27, 2017, the Complainants, purchased a new 2016 Land Rover Range Rover from Land Rover Dallas, a franchised dealer of the Respondent, in Dallas, Texas. The vehicle had 59 miles on the odometer at the time of purchase. The vehicle’s limited warranty provides basic coverage for four years or 50,000 miles, 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).

On May 22, 2019, the Complainants provided a written notice of defect to the Respondent. On May 21, 2019, the Complainants filed a complaint with the Department alleging a continuous lockdown of the engine caused by the diesel exhaust filter (diesel particulate filter (DPF)) being full. Mrs. Brooks Cannon testified that she was not made aware of any issues with the diesel engine, and the filter in particular, around the time of sale. However, the vehicle began exhibiting problems about six months after purchase. While driving the vehicle, the red diesel exhaust filter full warning light came on and the vehicle went into limp mode. Mrs. Brooks noted that sometimes the vehicle displayed a warning that the filter was almost full. In this instance, when turning the vehicle on and off, the vehicle indicated the filter was full and the warning indicator was red. The vehicle may have displayed one prior warning to see the dealer. In February, the vehicle similarly, without warning, displayed the filter full light. The vehicle did not have a gauge indicating how full the filter was. Each service visit lasted one to two weeks. The December visit lasted a month. A month after the February service visit, the warning light came on the power cut off. Mrs. Brooks explained that vehicle cuts power when the filter is full. Because of the reduced power, so she drove about 30 minutes to the dealer taking backroads. She could not accelerate to get on the highway safely. The dealer wanted to add a fuel additive every third tank full to burn off the diesel exhaust particulate at lower speeds. With the additive in, the warning light still came on. The dealer suggested taking a road trip every week, which was not practical, to clean the filter. After Christmas the warning light came on and Mrs. Brooks took the vehicle to the dealer. A full filter would cause the vehicle to reduce power every time, forcing her to take the backroads. The warning light came on again in May, accompanied by low power. The Respondent contacted the Complainants to arrange a final opportunity to cure. Afterwards, the vehicle broke down again. On June 18th, the warning light came on indicating a full filter. The repair order for the final opportunity to cure stated that the vehicle needed driving to clean the filter and burn the particulate off. The same problem recurred after the final opportunity to cure. Mrs. Brooks thought driving to Galveston helped the vehicle's filter issue. She also referred to several other trips that she believed was the only reason the vehicle did not break down again. However, she currently has reverted to city driving. She added that the trouble occurs during her normal routines. On cross-examination, Mrs. Brooks testified that she was not made aware of the driving requirements for the vehicle. She affirmed that the Complainants only drove the vehicle about 8,000 miles a year.

C. Inspection

Upon inspection at the hearing, before the test drive, the subject vehicle's odometer displayed 19,941 miles. The vehicle operated normally during the test drive.

D. Summary of Respondent's Evidence and Arguments

Brandon Sangster, customer satisfaction senior technical specialist, testified that particulate normally collects in the diesel particulate filter. The issue is whether the filter clears itself. He affirmed that the owner's guide that the filter may not regenerate (self-clean) if frequently driving short distances, at slower speeds, or at colder temperatures, the timing of when the filter will fill up is speculative because this depends on driving conditions. Ideally, the filter will never fill up. The filter is designed to clean itself driving at speeds over 40 mph or above for about 20 minutes. Mr. Sangster confirmed that the filter will fill up faster in urban driving. He acknowledged that power will cut out when in limp mode, which is part of the design to protect the vehicle. He believed any fault would be due to low speed or short drive cycle preventing regeneration. The diesel particulate filter is not covered by warranty because it is a wear item. It differed from other filters in that it would clear itself out. The dealer wanted an engineer to address the concern and the engineer concluded that the vehicle needed to be driven to clean the particulate filter.

E. Analysis

To qualify for any relief, the vehicle must have a defect covered by warranty (warrantable defect).²⁷ However, the evidence does not show that the vehicle has a warrantable defect. Lemon Law relief does not apply to all issues that a consumer may have with a vehicle but only to warrantable defects.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 characteristics. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. In part, the warranty generally provides that: "if a Land Rover vehicle is properly operated and maintained, repairs required to correct defects in factory-supplied materials or factory workmanship will be performed without charge upon presentment for

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.

service.”²⁹ According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).³⁰ 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. Manufacturing defects exist when the vehicle leaves the manufacturing plant. Unlike manufacturing defects, issues that do not arise from manufacturing, such as the vehicle’s design characteristics (which exist before manufacturing) or dealer representations (which occur after manufacturing), are not warrantable defects. Design characteristics result from the vehicle’s specified design and not from any error during manufacturing.³¹ In sum, the warranty only covers manufacturing defects so the Lemon Law does not apply to design characteristics or design defects. Consequently, although an issue may be undesirable or problematic, the Lemon Law provides no relief unless the issue constitutes a manufacturing defect.

In the present case, the diesel particulate filter issue caused significant problems with operating the subject vehicle. In particular, the vehicle would go into limp mode with reduced power. However, the clogging of the filter is a direct consequence of the vehicle’s design and not a manufacturing defect. The record reflects that the exhaust filter normally collects exhaust particles while driving. The exhaust filter, by design, self-cleans at higher speeds over longer distances (longer drive times). In contrast, driving at lower speeds over shorter distances inhibits self-cleaning. The evidence shows that the Complainants’ driving patterns match the conditions that prevent self-cleaning and promote clogging of the DPF. In sum, a preponderance of the

²⁹ Complainants’ Ex. 1, Passport to Service, Warranty Statement.

³⁰ 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.”).

³¹ In contrast to manufacturing defects, “[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves.” *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), writ denied, (Feb. 13, 1997).

evidence does not show that the complained of condition is a manufacturing defect as opposed to a design issue.

III. Findings of Fact

1. On May 27, 2017, the Complainants, purchased a new 2016 Land Rover Range Rover from Land Rover Dallas, a franchised dealer of the Respondent, in Dallas, Texas. The vehicle had 59 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides basic coverage for four years or 50,000 miles, whichever occurs first.
3. In part, the warranty generally provides that: "if a Land Rover vehicle is properly operated and maintained, repairs required to correct defects in factory-supplied materials or factory workmanship will be performed without charge upon presentment for service."
4. On May 22, 2019, the Complainants provided a written notice of defect to the Respondent.
5. On May 21, 2019, the Complainants filed a complaint with the Department alleging a continuous lockdown of the engine caused by the diesel exhaust filter (diesel particulate filter (DPF)) being full.
6. On July 17, 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.
7. The hearing in this case convened on November 12, 2019, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Tom Clark, attorney, represented the Complainants. John Chambless, attorney, represented the Respondent.
8. The vehicle's odometer displayed 19,941 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. The vehicle operated normally during the test drive at the hearing.

11. The vehicle's diesel particulate filter (DPF) normally collects exhaust particles while driving. The DPF, by design, self-cleans at higher speeds over longer distances (longer drive times). In contrast, driving at lower speeds over shorter distances inhibits self-cleaning.
12. The Complainants' vehicle is ordinarily and predominately driven on local roads over short distances, which inhibits self-cleaning and promotes clogging of the DPF.

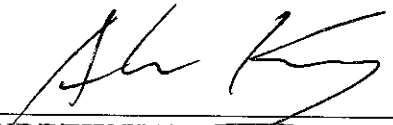
IV. Conclusions of Law

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, repurchase, or warranty repair. The Complainants did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204, 2301.603 and 2301.604(a).
7. 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 January 13, 2020



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