

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0012551 CAF**

TERI R. WYLIE,	§	BEFORE THE OFFICE
Complainant	§	
	§	
v.	§	OF
	§	
JAGUAR LAND ROVER NORTH	§	
AMERICA, LLC,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Teri R. Wylie (Complainant) 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 her vehicle distributed by Jaguar Land Rover North America, Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle continues to have a warrantable defect. Consequently, the Complainant’s 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 January 21, 2020, in Houston, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Nick Lawson, attorney, represented the Complainant. 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 the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁷

Alternatively, for serious safety hazards, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁸

Additionally, for vehicles out of service at least 30 days, a rebuttable presumption may be established that the vehicle had a reasonable number of repair attempts if:

⁶ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“[T]he Division’s interpretation that expert testimony or technical or market-based evidence is not required to show diminished value or use is consistent with the statute’s goal of mitigating manufacturers’ economic advantages in warranty-related disputes.”).

⁷ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

⁸ TEX. OCC. CODE § 2301.605(a)(2).

[A] nonconformity still exists that substantially impairs the vehicle's use or market value, the vehicle is out of service for repair for a cumulative total of 30 or more days, and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁹

The 30 days described above does not include any period when the owner has a comparable loaner vehicle provided while the dealer repairs the subject vehicle.¹⁰

The existence of a statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.¹¹ Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle to a dealer for repair and the dealer fails to repair the vehicle, then that visit would constitute a repair attempt unless the consumer was at fault for the failure to repair the vehicle.¹²

d. Other Requirements

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner or someone on behalf of the owner, or the Department has provided written notice of the alleged defect or nonconformity to the respondent;¹³ (2) the respondent was given an opportunity to cure the defect or nonconformity;¹⁴ and (3) the Lemon Law complaint was filed within six months after the earliest

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ TEX. OCC. CODE § 2301.605(c).

¹¹ *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ) (“[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite ‘reasonable number of attempts.’”).

¹² *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication) (Repair attempts include “those occasions when the fault for failing to repair the vehicle rests with the dealership.” Conversely, “those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.”).

¹³ TEX. OCC. CODE § 2301.606(c)(1). 43 TEX. ADMIN. CODE § 215.204 provides that “[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor.” The Department’s notice of the complaint to the Respondent may satisfy the requirement to provide notice of the defect or nonconformity to the Respondent.

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

of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.¹⁵

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a “defect . . . that is covered by a manufacturer's, converter's, or distributor's . . . warranty agreement applicable to the vehicle” and the vehicle owner notified the manufacturer, converter, distributor, or its authorized agent of the defect before the warranty's expiration.¹⁶ The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”¹⁷

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁸ The Complainant must prove all facts required for relief by a preponderance of the evidence. That is, the Complainant must present sufficient evidence to show that every required fact more likely than not exists.¹⁹ Accordingly, the Complainant 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 Complainant 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 Complainant’s Evidence and Arguments

On November 30, 2017, the Complainant, purchased a new 2018 Land Rover Discovery from Land Rover Houston, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 14 miles on the odometer at the time of purchase. The vehicle’s limited warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first. On or about May 6, 2019, the Complainant’s attorney on behalf of the Complainant provided a written notice of defect to the Respondent. On June 24, 2019, the Complainant filed a complaint with the Department alleging that the vehicle exhibited coolant leaks, gear slipping, and harsh “bucking”.

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).

The Complainant testified that she first encountered problems with her vehicle in July 2018 when the low coolant warning light came on during a trip to Arkansas due to a coolant leak. The core issue involved the transmission bucking. She explained that when shifting from 1st to 2nd gear going slowly, the vehicle would slowly pull back and push forward like a slingshot. Additionally, in October (2019), the vehicle slowed to 20 mph with the pedal on the floor while driving on the Beltway. Further, the vehicle would be slow to shift and would downshift hard. When picking up the vehicle after a repair visit in February (2019), after shifting into gear, the vehicle lurched and almost hit a dealership employee. Later, when picking up one of her daughters. Because of the ongoing issues, the Complainant purchased another vehicle. In June 2019, the dealership notified the Complainant that her vehicle was still at the dealership. In a March 21, 2019, letter to the Complainant, the Respondent declined to repurchase the vehicle, citing that the vehicle had been repaired. However, as far as she knew, the vehicle was at the dealer, unrepaired.

On cross-examination, the Complainant acknowledged that after the May 6, 2019, notice letter, she may have called the Respondent or the someone at the Respondent called her. She confirmed that the Respondent had someone test drive the vehicle, who found that the vehicle appeared repaired. The Complainant indicated that for routine maintenance, she had her vehicle serviced closer to home. She affirmed that after the initial coolant leak, the coolant warning light did not come on again.

C. Inspection

The subject vehicle's odometer displayed 25,856 miles upon inspection before the test drive at the hearing. The vehicle was driven primarily on major arterial roads controlled by traffic lights at speeds up to 40 mph. During the test drive, Mr. Sangster stopped the vehicle in a parking lot and shifted into drive with his foot off the brake and the vehicle moved forward without hesitation. The vehicle likewise performed normally in subsequent The test drive ended with 25,865 miles on the odometer. The vehicle operated normally throughout the test drive with no hesitation or jerking.

D. Summary of Respondent's Evidence and Arguments

Brandon Sangster, customer satisfaction senior technical specialist, testified that he had driven the subject vehicle but had not sensed anything like upshifting, downshifting, or bucking.

Further, he did not find any fault codes. Mr. Sangster concluded that the subject vehicle performed comparably to other like vehicles.

E. Analysis

As explained in the discussion of applicable law, to qualify for any relief, an alleged nonconformity must continue to exist after repairs. However, the vehicle appears to have been successfully repaired, thereby resolving the issues in this case. The evidence reflects that the coolant issue was successfully repaired. The Complainant testified that she did not notice the coolant leak issue recur after the initial incident. Likewise, the evidence shows that the transmission issue was also successfully repaired. The Complainant noted that when shifting into drive from a standstill, with the foot off the brake, the vehicle would hesitate for about five seconds before moving forward. She explained that this delay would occur every time. However, during the test drive, when shifting into drive, the vehicle did not hesitate before moving forward even after multiple attempts to duplicate the issue. Further, the vehicle otherwise operated normally throughout the test drive. The record reflects the Complainant declined to retrieve the vehicle from the dealer after the vehicle's last repair. Consequently, the Complainant was apparently unaware of the successful repair until the test drive at the hearing. Because the alleged defects do not continue to exist, the subject vehicle does not qualify for repurchase or replacement and in turn, reimbursement of incidental expenses does not apply.

III. Findings of Fact

1. On November 30, 2017, the Complainant, purchased a new 2018 Land Rover Discovery from Land Rover Houston, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 14 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first.
3. On or about May 6, 2019, the Complainant's attorney on behalf of the Complainant provided a written notice of defect to the Respondent.
4. On June 24, 2019, the Complainant filed a complaint with the Department alleging that the vehicle exhibited coolant leaks, gear slipping, and harsh "bucking".

5. On September 3, 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 January 21, 2020, in Houston, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Nick Lawson, attorney, represented the Complainant. John Chambless, attorney, represented the Respondent.
7. The vehicle's odometer displayed 25,856 miles at the time of the hearing.
8. The vehicle's warranty was in effect at the time of the hearing.
9. The coolant leak issue did not recur after repair.
10. The Complainant testified that when shifting into drive from a standstill, with the foot off the brake, the vehicle would hesitate every time for about five seconds before moving forward.
11. The subject vehicle's odometer displayed 25,856 miles upon inspection before the test drive at the hearing. The vehicle was driven primarily on major arterial roads controlled by traffic lights at speeds up to 40 mph. During the test drive, Mr. Sangster stopped the vehicle in a parking lot and shifted into drive with his foot off the brake and the vehicle moved forward without hesitation. The vehicle likewise performed normally in subsequent attempts. The test drive ended with 25,865 miles on the odometer. The vehicle operated normally throughout the test drive with no hesitation or jerking.
12. The transmission issue did not recur after the final repair.

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 Complainant 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 Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
 6. The Complainant's vehicle does not qualify for replacement or repurchase. The Complainant did not prove that the vehicle continues to have a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).
 7. The Complainant 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. The Complainant's vehicle does not qualify for warranty repair. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.
 9. 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 Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED March 23, 2020

A handwritten signature in black ink, appearing to read "Andrew Kang", written over a horizontal line.

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