

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0014964 CAF**

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| CLINTON and ANGELA HEMPHILL, | § | BEFORE THE OFFICE |
| Complainants | § | |
| | § | |
| v. | § | OF |
| | § | |
| K-Z, INC., | § | |
| Respondent | § | ADMINISTRATIVE HEARINGS |

DECISION AND ORDER

Clinton and Angela Hemphill (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 K-Z, Inc. (Respondent). A preponderance of the evidence does not show that the subject recreational vehicle (RV) has a defect covered under 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 14, 2020, by telephone, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainants represented themselves. Delbert Miller, vice president, 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 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: (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 April 26, 2017, the Complainants, purchased a new 2018 Sportsmen LE 260BHLE from Athens RV Sales, an authorized dealer of the Respondent, in Athens, Texas. The Complainants actually took delivery on April 28, 2017. The vehicle’s limited warranty provides coverage for one year from the date of purchase or placement into service, 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 August 22, 2019, the Complainants filed a complaint with the Department alleging that the siding had detached from the frame. Mrs. Hemphill testified that the Complainants took possession of the RV on April 28, 2017. They did not submit a written notice to the Respondent because the dealer contacted the Respondent on behalf of a group of buyers with the same issue. Mr. Hemphill noted that those buyers' RVs did not have warranty coverage. Mrs. Hemphill stated that a representative from the Respondent came to meet about the issue. They first noticed the issue before the warranty expired but thought the condition was normal. They noticed the issue getting worse. The dealer found a major issue during the annual inspection in April 2019. The Complainants recognized that their RV was outside the warranty but felt the Respondent should address the issue out of loyalty to the customer. Mrs. Hemphill stated that she can see the siding detachment issue every day, which has become progressively worse.

On cross-examination, Mrs. Hemphill testified that the dealer notified them about the siding issue when they had their RV inspected in April 2019 to comply with their 10-year extended warranty. The dealer contacted the Respondent on behalf of a group of buyers with the siding issue to have their RVs looked at by the Respondent. Mr. Hemphill explained that the replacement of the peeling/cracking decals was the timeframe when the siding issue was discovered. The dealer ordered new decals, which came in after the warranty expired. The dealer did not replace the decals on all sides because of the siding. Mrs. Hemphill elaborated that the decals arrived in May 2019. She clarified that the dealer did not identify the siding issue until after the decals arrived. The dealer quoted \$6,000 for repairing the siding, which the Complainants did not have done.

Mr. Hemphill testified that after having the RV for a month, the door would stick and they could hear the siding popping. The door would hardly open when the sun shined on the door, which swelled in the sun. He understood that the Respondent offered \$1,400 or some amount at the meeting with the Respondent (Respondent's representative).

On cross-examination, Mr. Hemphill affirmed that the dealer initially made an adjustment for the bent door jamb (on May 3, 2017) and subsequently took back the RV for installation of a new door at the same time as the application of the decals (in April 2019).

C. Summary of Respondent's Evidence and Arguments

Mr. Miller testified that the warranty period lasts for one year after purchase. He was present at the dealership for the July meeting that the Complainants referred to. However, the metal siding issue was not specifically identified. The dealer did show him some RVs with metal issues but other RVs had insurance related issues. Mr. Miller did not know if the dealer pointed out the Complainants' RV.

D. Analysis

As explained below, the subject recreational vehicle does not qualify for any relief. Repurchase/replacement relief and warranty repair relief only apply to defects covered by the Respondent's warranty (warrantable defect).²⁷ The law does not require that a manufacturer provide any particular warranty coverage nor does the law impose any specific standards for vehicle characteristics. Instead, the law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. In this case, the warranty generally states that:

KZRV warrants that every Sportsmen Showstopper Travel trailer purchased from an authorized KZRV dealer to the first retail customer was free from substantial defects in materials and workmanship when it arrived at the dealer's lot, except for those exclusions set forth below. Nothing contained herein shall be interpreted as a promise of future performance. This Towable Limited Warranty ["TLW"] is not transferrable and does not apply to towable recreational vehicles purchased from any other than an authorized KZRV dealer. The warranty period begins on the date of purchase or the date the unit is first placed in service, whichever is earlier, and terminates one (1) year thereafter.²⁸

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects) for a period of one year.²⁹ The Complainants purchased their RV on

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

²⁸ Complainant's Ex. 2, Warranty.

²⁹ 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.").

April 26, 2017, but took delivery on April 28, 2017. Accordingly, the warranty expired on April 28, 2018.

To maintain any claim for relief, the siding issue must have been reported no later than April 28, 2018. However, the Complainants confirmed that the siding issue was raised after the warranty expired. The evidence shows that the dealer first identified the issue when trying to apply new decals to the RV sometime during the May 15, 2019, service visit, over a year past the warranty expiration. Under either the Lemon Law or Warranty Performance Law, the siding issue is not a warrantable defect because it falls outside of the warranty period. Therefore, no relief can be granted.

Additionally, the subject RV cannot qualify for Lemon Relief because the complaint was filed after the applicable deadline. In the present case, a Lemon Law complaint must have been filed no later than six months after the warranty expired (no later than October 28, 2018). However, the Complainants filed their complaint on August 22, 2019, about 10 months after the Lemon Law filing deadline.

III. Findings of Fact

1. On April 26, 2017, the Complainants, purchased a new 2018 Sportsmen LE 260BHLE from Athens RV Sales, an authorized dealer of the Respondent, in Athens, Texas. The Complainants actually took delivery on April 28, 2017.
2. The vehicle's limited warranty provides coverage for one year from the date of purchase or placement into service, whichever occurs first.
3. The warranty generally provides that:

KZRV warrants that every Sportsmen Showstopper Travel trailer purchased from an authorized KZRV dealer to the first retail customer was free from substantial defects in materials and workmanship when it arrived at the dealer's lot, except for those exclusions set forth below. Nothing contained herein shall be interpreted as a promise of future performance. This Towable Limited Warranty ["TLW"] is not transferrable and does not apply to towable recreational vehicles purchased from any other than an authorized KZRV dealer. The warranty period begins on the date of purchase or the date the unit is first placed in service, whichever is earlier, and terminates one (1) year thereafter.

4. On August 22, 2019, the Complainants filed a complaint with the Department alleging that the siding had detached from the frame.
5. On December 13, 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 May 14, 2020, by telephone, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainants represented themselves. Delbert Miller, vice president, represented the Respondent.
7. The warranty expired on April 28, 2018.
8. The dealership first identified the detached siding issue during the May 15, 2019, service visit.
9. The Complainants did not directly contact the Respondent regarding the detached siding issue.

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). Further, 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 dates on which 24 months or 24,000 miles 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. 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.

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 13, 2020



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