

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 22-0004351 CAF**

**CAMERON BROWN,
Complainant**

v.

**BENNCHE, LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Cameron Brown (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2021 Bennche X4 800 LT UTV. Complainant asserts that the vehicle stalled at least twice while it was being driven and would not restart, and the transmission is not working properly as it is difficult to shift gears. Bennche, LLC (Respondent) argued that the vehicle is repairable and that they are willing to perform such repairs. The hearings examiner concludes that the vehicle does have an existing warrantable defect and Complainant is eligible for repurchase relief.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Matters of notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case initially convened via Microsoft Teams on April 19, 2022, before Hearings Examiner Edward Sandoval. Cameron Brown, Complainant, appeared and represented himself in the hearing. Also appearing and testifying for Complainant was Ashley Brown, Complainant's wife. Respondent, Bennche, LLC., was represented by Craig Howell, Director of Technical Support. The hearings examiner determined that an inspection of the vehicle was necessary prior to issuing the decision, so the hearing was continued until June 22, 2022.

The continuance in the hearing convened on June 22, 2022, at 186 Coyote Trail, Caddo Mills, Texas, before Hearings Examiner Edward Sandoval. Cameron Brown, Complainant, appeared and represented himself in the continuance. Also appearing and testifying for Complainant was Ashley Brown, Complainant's wife. Respondent, Bennche, LLC., was represented by Craig Howell, Director of Technical Support. The hearing record closed on June 22, 2022.

II. DISCUSSION

A. Applicable Law

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met. First, the manufacturer is not able to conform the vehicle to an applicable express warranty by repairing or correcting a defect after a reasonable number of attempts.¹ Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.² Third, the manufacturer has been given a reasonable number of attempts to repair or correct the defect or condition.³ Fourth, the owner must have provided written notice of the alleged defect or nonconformity to the manufacturer.⁴ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁵

In addition to these conditions, a rebuttable presumption can be established that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the 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 repair 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.⁶

If a vehicle is found to have a nonconformity that creates a serious safety hazard which continues to exist, the rebuttable presumption that a reasonable number of repair attempts have been performed can be established if the vehicle has 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.⁷

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

³ *Id.*

⁴ Tex. Occ. Code § 2301.606(c)(1).

⁵ Tex. Occ. Code § 2301.606(c)(2).

⁶ Tex. Occ. Code § 2301.605(a)(1)(A) and (B).

⁷ Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

“Serious safety hazard” means a life-threatening malfunction or nonconformity that substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or creates a substantial risk of fire or explosion.⁸

Finally, a rebuttable presumption can be established that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist that substantially impairs the vehicle’s use or market value, the vehicle has been out of service for repair for a cumulative total of 30 or more days, and the repairs 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 day out of service requirement described in Section 2301.605(a)(3) does not include any period during which the manufacturer or distributor lends the vehicle owner a comparable motor vehicle while the owner’s vehicle is being repaired by a franchised dealer.¹⁰

B. Complainant’s Evidence and Arguments

Complainant purchased a new 2021 Bennche X4 800 LT UTV on August 16, 2021, from Lone Star Truck & Equipment (Lone Star) located in San Antonio, Texas.¹¹ The vehicle’s mileage at the time of purchase was 4.¹² Respondent provided a manufacturer’s warranty for the vehicle which provides coverage for one (1) year from the date of purchase.¹³ On the date of the initial hearing the vehicle’s mileage was 105 and the warranty was still in effect.

Complainant testified that he did not test drive the vehicle before purchasing it. He never saw the vehicle before it was delivered to him. He received the vehicle on August 17, 2021. Complainant stated that he immediately began having trouble with the vehicle’s transmission. He had trouble shifting gears in the vehicle. Then within a day or two from receiving the vehicle, the windshield latch broke and the rear passenger door would not stay closed. In addition, Complainant soon noticed that the vehicle was leaking oil. After discovering all of these issues, on October 16, 2021, Complainant took the vehicle to 5 Star Customs (5 Star) located in Quinlin, Texas for repair. However, once the vehicle was at 5 Star, the store manager advised Complainant that they did not perform warranty repair work for Respondent. As a result, the vehicle had to be transferred to RJ Trailers (RJ) in Seagoville, Texas.

⁸ Tex. Occ. Code § 2301.601(4).

⁹ Tex. Occ. Code § 2301.605(a)(3)(A) and (B).

¹⁰ Tex. Occ. Code § 2301.605(c).

¹¹ Complainant Ex. 2, Retail Buyer’s Order dated August 16, 2021.

¹² *Id.*

¹³ Complainant Ex. 4, Bennche Limited Warranty, undated.

The vehicle was at RJ for repair from October 29, 2021, through December 3, 2021. RJ's service technician changed the vehicle's differential fluid in order to address the oil leak and transmission issues. They did fix the windshield latch and the rear passenger door so it would remain closed. In addition, the technician cleaned the vehicle's carburetor as part of the repair. Complainant was not provided with a loaner vehicle while his vehicle was being repaired.

The vehicle was returned to Complainant on December 3, 2021. He noticed body damage to the vehicle which had not been present before. Specifically, Complainant observed that the vehicle's front bumper, front hood, and winch were all damaged. In fact, the winch had been removed from the vehicle.

Complainant's wife attempted to drive the vehicle in a local Christmas parade on December 4, 2021. However, the vehicle stalled at least twice during the parade and then would not restart. In addition, the vehicle would not accelerate over 25 mph. Complainant took the vehicle back to RJ for repair on December 8, 2021. RJ indicated that the new work to be performed on the vehicle included: replacing the winch, touch up paint on the hood, replace bumper guard, secure loose wires, diagnose rear end noise, and adjust shifter to ensure smooth gear change.¹⁴ Complainant was not provided with a loaner vehicle while his vehicle was being repaired.

On December 8, 2021, Complainant wrote a letter to Respondent advising them of his dissatisfaction with the vehicle.¹⁵ Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on December 9, 2021.¹⁶

The vehicle was returned to Complainant in February of 2022. Complainant stated that when the vehicle was returned, the brakes were not working properly (he had to step down entirely on the brake pedal to get the brakes to work), the check engine light (CEL) was on, and the transmission was still not working properly, and it was hard to shift gears.

During the test drive taken on June 22, 2022, Complainant observed smoke emitting from the vehicle's transmission after the vehicle was driven for a short while. In addition, the vehicle's transmission was hard to shift into gear.

¹⁴ Complainant Ex. 5, Write Up from RJ Trailers dated December 9, 2021.

¹⁵ Complainant Ex. 6, Letter to Bennche, LLC dated December 8, 2021.

¹⁶ Complainant Ex. 1, Lemon Law Complaint dated December 9, 2021.

C. Respondent's Evidence and Arguments

Craig Howell, Director of Technical Support, testified for Respondent. Mr. Howell has worked in the automotive industry since 1987. He has worked on powersports vehicles since 1990. Mr. Howell has been in his present position for the last three (3) years. He worked for Respondent as a warranty and technical support employee for the previous seven (7) years.

Mr. Howell stated that had never seen the subject vehicle prior to the test drive on June 22, 2022. He stated that Respondent received Complainant's letter dated December 8, 2021, but Respondent did not request a final opportunity to repair the vehicle.

Mr. Howell stated that the vehicle's brakes are working appropriately, as they are designed to be a bit stiff. In addition, he testified that the vehicle is only designed to go about 25 mph due to the engine's governor. Mr. Howell specified that the driver is not supposed to change gears while the vehicle is being driven. The driver is supposed to come to a full stop before changing gears in the vehicle. Mr. Howell did observe smoke coming from the vehicle's transmission during the test drive and did verify that it was hard to shift gears in the vehicle.

Mr. Howell testified that there have been no warranty claims on the vehicle. He feels that the vehicle's useful life is about 7,000 miles. In addition, Respondent's warranty is good for one (1) year from the date of purchase.

D. Analysis

Under the Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainant must meet the presumption that the manufacturer was given a reasonable number of attempts to repair or correct the defect or condition to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the defect or nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect or condition, Complainant is entitled to have the vehicle repurchased or replaced.

1. Stalling Issue

The evidence presented at the hearing indicates that the vehicle stalled on two occasions and failed to restart on December 4, 2021. After the vehicle was repaired by RJ, the stalling issue has

not recurred. As such, the hearings examiner must hold that the issue was repaired and does not provide grounds to order repurchase or replacement of the vehicle.

2. Transmission Issue

The evidence presented at the hearing established that the transmission is not working properly, as it is difficult to change gears and smoke was observed coming out of it during the test drive taken on June 22, 2022. The problems with the transmission have not been resolved despite the vehicle being in the possession of Respondent's authorized dealer for repair for over a month on two (2) separate occasions, and there has been no adequate repair performed. As such, the hearings examiner must hold that Complainant has met the burden of persuasion to establish the existence of a defect or nonconformity (the vehicle's transmission not operating properly) in the subject vehicle. The defect or nonconformity with the vehicle substantially impairs the vehicle's value or use as it cannot be used for its intended purposes and no one would wish to purchase it from Complainant as any potential purchaser could not be assured that the vehicle would operate properly. In addition, the smoke coming from the transmission seems to indicate that there could be a potential safety hazard with the vehicle.

Complainant also presented evidence to indicate that Respondent or its authorized representative was provided with a reasonable number of repair attempts to repair the defect or nonconformity with the vehicle. Complainant presented the vehicle for repair to Respondent's authorized dealer on October 16, 2021 through December 3, 2021 and again on December 8, 2021 through February of 2022. Occupations Code § 2301.604(a) requires a showing that Respondent was unable to conform the vehicle to an applicable express warranty "after a reasonable number of attempts." Section 2301.605(a)(3) provides that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist that substantially impairs the vehicle's use or market value, the vehicle has been out of service for repair for a cumulative total of 30 or more days, and the repairs 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. In the present case, Complainant has met the requirements of this test, and, despite the repair attempts, the problem continues to exist.

In addition, the evidence presented at the hearing indicates that Complainant provided Respondent with written notice of the defect and a final opportunity to cure the defect. Complainant informed Respondent via letter dated December 8, 2021, of his concerns with the vehicle's performance and providing Respondent with an opportunity to cure. Respondent did not request a final opportunity to inspect or repair the vehicle.

Although Respondent has been provided adequate opportunity to repair the vehicle and to ensure that it operates properly, they have not been able to repair the vehicle so that it conforms to their written warranty, specifically it is still difficult to change gears in the vehicle's transmission and the transmission was emitting smoke. As such, Complainant has met the burden of persuasion to establish that the vehicle has a warrantable and existing defect or condition which substantially impairs the use or market value of the vehicle, and which creates a serious safety hazard as defined in the Occupations Code. Therefore, the hearings examiner will order Respondent to repurchase the vehicle as requested by Complainant.

Based on the evidence and the arguments presented, the hearings examiner finds that repurchase of the vehicle is the appropriate remedy in this case. Complainant's request for repurchase relief is hereby granted.

III. FINDINGS OF FACT

1. Cameron Brown (Complainant) purchased a new Bennche X4 800 LT UTV on August 16, 2021, from Lone Star Truck & Equipment (Lone Star) located in San Antonio, Texas with mileage of 4 at the time of delivery.
2. The manufacturer or distributor of the vehicle, Bennche, LLC (Respondent), issued a manufacturer's warranty for the vehicle which provides coverage for the first year after purchase.
3. The vehicle's mileage on the date of hearing was 105.
4. At the time of hearing the vehicle's warranty was still in effect.
5. Soon after purchasing the vehicle, Complainant experienced a situation where it was difficult to shift gears in the vehicle's transmission and oil was leaking from the vehicle. (In addition, the vehicle's windshield latch broke and the rear passenger door wouldn't stay closed, but these issues are not covered in this decision.)
6. On October 16, 2021, Complainant took the vehicle for repair to Five Star Customs (Five Star) in Quinlin, Texas for repair for the issues with the vehicle.
7. Once the vehicle was at Five Star, Complainant was informed by the manager of the facility that they were not an authorized warranty dealer and could not work on the vehicle.

8. Complainant transferred the vehicle to RJ Trailers (RJ) in Seagoville, Texas on October 19, 2021.
9. RJ Trailers' service technician changed the vehicle's differential fluid, cleaned the vehicle's carburetor, and repaired the windshield latch and rear passenger door.
10. The vehicle was returned to Complainant on December 3, 2021, over a month after receiving it from Complainant.
11. When he got the vehicle back from RJ, Complainant noticed damage to the front bumper, front hood, and winch which had not been there previously.
12. On December 4, 2021, the vehicle refused to accelerate over 25 mph and stalled twice while being driven by Complainant. The vehicle failed to restart.
13. The vehicle was taken to RJ for repair on December 8, 2021.
14. On December 8, 2021, Complainant mailed a letter to Respondent advising them that he was dissatisfied with the vehicle.
15. On December 9, 2021, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
16. RJ returned the vehicle to Complainant in February of 2022, about two (2) months after taking possession of it for the repair.
17. When Complainant received the vehicle back from RJ, there was still body damage on the vehicle caused by the servicing dealer, the transmission was hard to shift, and the brakes did not work properly.
18. During the test drive of the vehicle taken on June 22, 2022, smoke appeared to be coming out of the transmission and it was still hard to shift gears.
19. Also, during the test drive referred to in Findings of Fact #18, the vehicle's brakes seemed to be working appropriately.
20. The useful life of the vehicle is 7,000 miles.
21. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license and registration	\$19,303.16
Delivery mileage	4
Mileage at first report of defective condition	20
Mileage on hearing date	105
Useful life determination	7,000

Purchase price, including tax, title, license and registration	\$19,303.16				
Mileage at first report of defective condition	20				
Less mileage at delivery	<u>-4</u>				
Unimpaired miles	16				
Mileage on hearing date	105				
Less mileage at first report of defective condition	<u>-20</u>				
Impaired miles	85				
Reasonable Allowance for Use Calculations:					
Unimpaired miles					
	<u>16</u>				
	7,000	X	\$19,303.16	=	\$44.12
Impaired miles					
	<u>85</u>				
	7,000	X	\$19,303.16	X .5	= <u>\$117.20</u>
Total reasonable allowance for use deduction:	\$161.32				
Purchase price, including tax, title, license and registration	\$19,303.16				
Less reasonable allowance for use deduction	-\$161.32				
Plus filing fee refund	<u>\$35.00</u>				
TOTAL REPURCHASE AMOUNT	\$19,176.84				

22. On March 9, 2022, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainant and Respondent, giving all parties 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 matters asserted.
23. The hearing in this case initially convened via Microsoft Teams on April 19, 2022, before Hearings Examiner Edward Sandoval. Cameron Brown, Complainant, appeared and represented himself in the hearing. Also appearing and testifying for Complainant was Ashley Brown, Complainant's wife. Respondent, Bennche, LLC., was represented by

Craig Howell, Director of Technical Support. The hearings examiner determined that an inspection of the vehicle was necessary prior to issuing the decision, so the hearing was continued until June 22, 2022.

24. The continuance in the hearing convened on June 22, 2022, at 186 Coyote Trail, Caddo Mills, Texas, before Hearings Examiner Edward Sandoval. Cameron Brown, Complainant, appeared and represented himself in the continuance. Also appearing and testifying for Complainant was Ashley Brown, Complainant's wife. Respondent, Bennche, LLC., was represented by Craig Howell, Director of Technical Support. The hearing record closed on June 22, 2022.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (Lemon Law).
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. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 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. Complainant bears the burden of proof in this matter.
6. Complainant's vehicle has an existing defect or condition (the vehicle's transmission is hard to shift from gear to gear and has smoke coming out of it) that substantially impairs Complainant's use or market value of the vehicle. Tex. Occ. Code § 2301.604(a).
7. Complainant's vehicle has an existing defect or condition (the vehicle's transmission is hard to shift from gear to gear and has smoke coming out of it) that creates a serious safety hazard. Tex. Occ. Code § 2301.604(a).

8. After a reasonable number of attempts, Respondent has been unable to repair the nonconformity in Complainant's vehicle so that it conforms to the applicable express warranty. Tex. Occ. Code §§ 2301.604(a) and 2301.605.
9. Based on the above Findings of Fact and Conclusions of Law, Complainant is entitled to relief and repurchase of the Bennis X4 800 LT UTV under Texas Occupations Code § 2301.604(a).

IT IS THEREFORE ORDERED that:

1. Respondent shall accept the return of the vehicle from Complainant. Respondent shall have the right to have its representatives inspect the vehicle upon the return by Complainant. If from the date of the hearing to the date of repurchase the vehicle is substantially damaged or there is an adverse change in its condition beyond ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in the final order;
2. Respondent shall repurchase the subject vehicle in the amount of **\$19,176.84**. (This total includes the \$35.00 Lemon Law filing fee.) The total refund shall be paid to Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to Respondent, then the full refund shall be paid to Complainant. At the time of the return, Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all liens in full, Complainant is responsible for providing Respondent with clear title to the vehicle;
3. Within 20 calendar days from the receipt of this order, the parties shall complete the return and repurchase of the subject vehicle. If the repurchase of the subject vehicle is not accomplished as stated above, barring a delay based on a party's exercise of rights in accordance with Texas Government Code § 2001.144, starting on the 31st calendar day from receipt of this order, Respondent is subject to a contempt charge and the assessment of civil penalties. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to Complainant's refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by Complainant and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);

4. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the vehicle prior to resale and issue a disclosure statement provided by or approved by the Department's Enforcement Division – Lemon Law Section;
5. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous place, and upon the first retail sale of the vehicle, the disclosure statement shall be completed and returned to the Department's Enforcement Division – Lemon Law Section; and
6. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide the Department's Enforcement Division – Lemon Law Section, in writing, the name, address and telephone number of the transferee (wholesale purchaser or equivalent) of the vehicle within 60 calendar days of the transfer.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-.613 is hereby **GRANTED**. It is further **ORDERED** that Respondent, Bennche, LLC, shall repair the warrantable defect (smoke coming out of the vehicle's transmission and it is difficult to shift gears) in the reacquired vehicle identified in this Decision.

SIGNED July 26, 2022.



EDWARD SANDOVAL
CHIEF HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARING
TEXAS DEPARTMENT OF MOTOR VEHICLES