TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0014096 CAF

LAWRENCE CHILDS,	**§**	**BEFORE THE OFFICE**
Complainant	**§**	
	§	
v.	**§**	**OF**
	§	
HIGHLAND RIDGE RV, INC.,	**§**	
Respondent	**§**	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Lawrence Childs (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 his recreational vehicle (RV) manufactured by Highland Ridge RV, Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle is covered by warranty. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing[1] 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 April 15, 2020, by telephone, before Hearings Examiner Andrew Kang, and the record closed on the same day. William Rice, attorney, represented the Complainant. Phil Houser, consumer affairs manager, 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]

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[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:

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[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

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[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

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[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 August 11, 2018, the Complainant, purchased a new 2019 Mesa Ridge 275RLS from RV Station Ltd, an authorized dealer of the Respondent, in Katy, Texas. The vehicle's limited warranty provides coverage for one year from delivery. On August 9, 2019, the Complainant's attorney provided a written notice of defect to the Respondent. On August 1, 2019, the Complainant filed a complaint with the Department alleging that: the RV leaked when raining; the refrigerator did not fit properly and the door opened during travel; and the slideout was not square.

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[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 he used the RV as temporary housing as many do in the oil industry. He experienced problems with the RV after his first job assignment. He affirmed that the refrigerator slide had problems from beginning, adding that the refrigerator door would open in transit. The RV continued to have problems after repairs. The refrigerator door would open and the RV would leak in the rain. The Complainant confirmed that the RV leaked every time he brought it for repair. After the fourth repair visit, the Respondent transported the RV to Indiana for repair. Previously, a master technician at the dealership in Katy assessed that the RV could not repair, concluding that either the slideout or opening was out of square and needed to go back to the manufacturer. The RV spent 201 days out of service for repair. The problems did not appear corrected after returning from the manufacturer. The Complainant stated that he worked as an integrity inspector for enterprise products: liquid and gas transmission lines. He would clean and inspect lines and ensure that they did not blow up. He explained that he did not work regular hours but received assignments through an inspection coordinator or project manager. After picking up the RV, it had a musty smell that the Complainant attributed to water infiltration and porous materials. He opened the slideout and looked at it. The refrigerator still had a gap. He noted that he did not have an opportunity to spend the night in the RV due to the pandemic. The Complainant explained that he purchased the RV, like 75% of people in industry, to avoid spending money on hotels and meals while on job assignments. Additionally, the RV allowed the Complainant's wife to stay with him.

Mrs. Kassy Childs testified that the RV was like a hotel, not a residence. She affirmed that they primarily used the RV to stay in temporarily while at a job site, noting that she may not see the Complainant for months. She added that their previous RVs functioned better than the subject RV.

C. Summary of Respondent's Evidence and Arguments

Mr. Houser testified that based on work orders and appointments and the warranty, the RV does not qualify for relief under the Lemon Law. The dealer did not submit an authorization for a leak. Apparently, the dealer found no water leaks when testing. The dealer did find a leak in the passenger side compartment but not the slide room. The Respondent corrected the leak by sealing with silicone. The Respondent also checked the compartment door and rain bay tested the RV and found no issues. The Respondent made the repairs requested, but neither the dealer nor the factory

service center could duplicate the primary concern. Mr. Houser pointed out that the warranty did not cover the RV because it was not used solely for recreational camping and travel. Moreover, the RV only had two repair attempts paid under warranty. The dealer did not submit others because they could not find or see a problem. The Respondent could not corroborate the slide room being out of square while at its facility. The slide worked and sealed properly in the rain bay.

D. Analysis

The subject RV does not qualify for relief. To qualify for any relief, whether warranty repair or repurchase/replacement, the law requires the vehicle to have a defect covered by the Respondent's warranty (warrantable defect).[27] The warranty generally states that:

> This Limited Warranty covers only RVs sold in, and that remain in, the United States, U.S. Territories, and Canada, and used for the intended purpose of recreational travel and camping. If a substantial defect in material or workmanship, attributable to Highland Ridge is found to exist and is reported to Highland Ridge or an authorized servicing dealer during the applicable warranty period, it will be repaired or replaced, at Highland Ridge's option, without charge to the RV owner, in accordance with the terms, conditions and limitations of this limited warranty.
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> . . . .
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> The duration of the Limited Warranty is 1 year. The warranty period begins on the date that the RV is delivered to the first retail purchaser by an independent, authorized dealer of Highland Ridge, or, if the dealer places the vehicle in service prior to retail sale, on the date the RV is first placed in such service. The term of this Limited Warranty is 3 years for substantial defects to any "Structure Components".[28]

Additionally, the warranty expressly excludes: "any RV used for rental or other business or commercial purposes" and "any RV not used solely for recreational travel and camping."[29]

In the present case, the Complainant affirmed that he purchased the RV for use in the oil fields in relation to his job. In particular, he used the RV instead of staying at hotels in conjunction with his work. The Complainant's use of the RV for business travel falls within the warranty's exclusion for business use as well as the exclusion for any non-recreational travel/camping.

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

[28] Complainant's Ex. I, Warranty & Service, Limited One-Year Warranty.

[29] Complainant's Ex. I, Warranty & Service, Limited One-Year Warranty.

Further, Department precedent holds that warranties excluding coverage of RVs used for business or non-recreational purposes do not cover RVs used for business travel.

> The manufacturer's warranty expressly excludes the Complainant's vehicle from coverage. The warranty states that it does not provide coverage for "[v]ehicles used for business, rental, commercial, residential, or disaster relief purposes, or any other purpose other than recreational travel and family camping." The Complainant testified that, in addition to recreational use, he used the vehicle for business travel when working in the oil fields as a directional driller. However any use other than recreational travel or family camping essentially voids the warranty. Because the Complainant used the vehicle for business travel, the warranty excludes the vehicle from coverage. Consequently, the vehicle's non-conformities are not warrantable defects eligible for relief.[30]

Likewise, in the present case, which has essentially the same facts and warranty language as the prior case, the warranty does not cover the subject RV. As a result, the RV cannot qualify for any relief.

III. Findings of Fact

1. On August 11, 2018, the Complainant, purchased a new 2019 Mesa Ridge 275RLS from RV Station Ltd, an authorized dealer of the Respondent, in Katy, Texas.

2. On August 9, 2019, the Complainant's attorney provided a written notice of defect to the Respondent.

3. On August 1, 2019, the Complainant filed a complaint with the Department alleging that: the RV leaked when raining; the refrigerator did not fit properly and the door opened during travel; and the slideout was not square.

4. On October 30, 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.

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[30] *Larkin v. Keystone RV Company*, Case No. 15-0230, Decision and Order (Office of Administrative Hearings Dec. 16, 2015) (emphasis added) (citations omitted).

5. The hearing in this case convened on April 15, 2020, by telephone, before Hearings Examiner Andrew Kang, and the record closed on the same day. William Rice, attorney, represented the Complainant. Phil Houser, consumer affairs manager, represented the Respondent.

6. The vehicle's limited warranty generally provides coverage for one year from delivery and provides coverage of substantial defects to "Structure Components" for three years.

7. The limited warranty's coverage of "Structure Components" was in effect at the time of the hearing. The limited warranty's general coverage expired on August 11, 2019.

8. The warranty expressly excludes: "any RV used for rental or other business or commercial purposes" and "any RV not used solely for recreational travel and camping."

9. The Complainant used the subject RV for business travel. Specifically, he would stay in the RV instead of hotels while on assignment inspecting liquid and gas transmission lines.

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 has 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.

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 June 16, 2020

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