TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0014791 CAF

DREW MUDIE, **Complainant**	§	**BEFORE THE OFFICE**
v.	§	**OF**
K-Z, INC., **Respondent**	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Drew Mudie (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 K-Z, Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle qualifies 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 February 26, 2020, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself herself. Delbert Miller, vice president corporate, 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]

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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: (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]

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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).

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]

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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). 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 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

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[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 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 January 21, 2018, the Complainant, purchased a new 2017 KZ Sportsmen LE 260BHLE from Athens RV Sales, an authorized dealer of the Respondent, in Athens, Texas. The vehicle's limited warranty provides coverage for one year.

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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 7, 2019, the Complainant provided a written notice of defect to the Respondent. On August 19, 2019, the Complainant filed a complaint with the Department alleging that the water heater has gone out; the seats around the table have fallen apart; plug/switch faceplates have cracked/broken; the roof has come off, and the side/wall was coming off. The RV was still at the dealer for repair at the time of the hearing. Photos reflecting the wall issue were taken on the Wednesday of the week before the hearing.

The Complainant testified that the roof and water heater were successfully repaired, leaving the seats, faceplates, and side/wall issues to be resolved. He explained that the seats were coming apart because the staples were not holding which he first noticed after owning the RV for eight months. The seats were never repaired. With respect to the faceplates, the outlets themselves were pulling out of the wall, causing the faceplates to come off and break. The Complainant first noticed the issue with the faceplates when taking the RV in for repair of the walls on Memorial Day weekend 2019. On the highway, the Complainant would notice the side/wall flexing or bubbling, which he construed as an indication that air went inside the walls. He first noticed this on Memorial Day weekend of 2019. Since purchasing the RV, the it has been out of service for repair for eight months.

On cross-examination, the Complainant affirmed that he took the RV for repair on Memorial Day weekend 2019. He affirmed that he purchased the RV on January 21, 2017. The Complainant confirmed that the dinette had a problem when the RV went in for the roof replacement. Thought the dinette (seat) issue was not documented, the Complainant explained that it was addressed orally.

Sara Lenora Hernandez, a former employee of the servicing dealer, Athens RV Sales. She testified that the staples between the studs and the metal come loose over time because they are too short or they do not hold as they should.

On cross-examination, Ms. Hernandez testified that she was employed as a warranty clerk, responsible for submitting warranty claims, including detailed explanation of issues, cause, and correction. However, the service technicians actually made the determinations. When the subject RV was brought in, she noticed metal ballooning out worse than other RVs. Ms. Hernandez acknowledged that she had not seen the vehicle towed on the highway.

C. Summary of Respondent's Evidence and Arguments

The Respondent presented photographs from an inspection Wednesday, February 19 (2020). Mr. Miller testified that when inspected, the panels laid flat, with no evidence of looseness. Panels did not exhibit any signs of movement; the sealants were in place. The interior showed no signs of movement/damage at the seams.

On cross-examination, Mr. Miller explained that the receptacles themselves pushed out further at the top. The most common reason for this is the fastening to luan paneling, after use the receptacle can move. The receptacles need to be retightened, but the looseness resulted from use. There was no reason for wind to push the receptacle out since there are many places for the air to escape. Mr. Miller indicated that the lifting of the graphic decals did not equate to any air penetrating the walls. He explained that the primary cause of the decal failure, particularly in the south, was shrinkage and heat damage.

D. Analysis

As explained in the discussion of applicable law, to be eligible for Lemon Law relief in this case, the complaint must have been filed no later than six months after the warranty expired. The warranty specifies that 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." Here, the RV was purchased on January 21, 2017, and the warranty expired on January 21, 2018. Accordingly, the Lemon Law complaint must have been filed by July 21, 2018 (six months after the warranty expired). However, the complaint was filed on August 19, 2019, more than a year after the deadline passed. Although the RV cannot qualify for repurchase or replacement relief under the Lemon Law, warranty repair relief may be available if the RV has a defect covered by warranty (warrantable defect) that was reported to the manufacturer or authorized agent before the warranty expired. The evidence shows that the side/wall and receptacle faceplate issues did not arise until around Memorial Day weekend of 2019. However, these two issues occurred after the warranty had expired in January of 2018, so they cannot qualify for any relief. The Complainant testified that he first noticed the dinette seat issue after eight months of owning the RV. However, the evidence indicates the seating issue was not timely reported to the manufacturer or dealer. The complaint alleges that the first repair visit occurred on May 5, 2017, through May 25, 2017. However, the Complainant testified that he first noticed the dinette seat issue after eight months,

or about September 2017, so the dinette seat issue could not have been reported at the first repair visit. The complaint alleges that the next repair visit occurred on August 5, 2018. However, the warranty had already expired on January 21, 2018, so any issues reported at the second repair visit had already fallen out of the warranty's coverage. In sum, the warranty does not cover any of the defects alleged to currently exist. Consequently, the subject vehicle does not qualify for any relief.

III. Findings of Fact

1. On January 21, 2017, the Complainant, purchased a new 2017 KZ Sportsmen LE 260BHLE from Athens RV Sales, an authorized dealer of the Respondent, in Athens, Texas.

2. The vehicle's limited warranty provides coverage for one year from the date of purchase.

3. On August 7, 2019, the Complainant provided a written notice of defect to the Respondent.

4. On August 19, 2019, the Complainant filed a complaint with the Department alleging that the water heater has gone out; the seats around the table have fallen apart; plug/switch faceplates have cracked/broken; the roof has come off, and the side/wall was coming off. The water heater and roof issues were successfully resolved.

5. On December 11, 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 February 26, 2020, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself herself. Delbert Miller, vice president corporate, represented the Respondent.

7. The first repair visit occurred on May 5, 2017, through May 25, 2017.

8. The dinette seat issue arose about eight months after purchasing the RV, about September 2017.

9. The warranty expired on January 21, 2018.

10. The second repair visit occurred on August 5, 2018.

11. The dinette seat issue was not reported to the Respondent or Respondent's agent until after the warranty had expired.

12. The side/wall and receptacle faceplate issues did not arise until around Memorial Day weekend (May) of 2019.

13. The third repair visit occurred on June 15, 2019.

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 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 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. If the Complainant's vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e).

9. The Complainant's vehicle does not qualify for warranty repair. The Complainant did not prove that the side/wall and faceplate issues were covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.

10. The Complainant's vehicle does not qualify for warranty repair. Neither the Complainant nor an agent of the Complainant notified the Respondent or Respondent's agent of the alleged dinette seat issue before the warranty expired. TEX. OCC. CODE §§ 2301.204 and 43 TEX. ADMIN. CODE § 215.202(b)(3).

11. 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 April 28, 2020

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