TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0006601 CAF

JUHA RAATIKAINEN, **Complainant**	§	**BEFORE THE OFFICE**
v.	§	**OF**
KEYSTONE RV COMPANY, **Respondent**	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Juha Raatikainen (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 Keystone RV Company (Respondent). A preponderance of the evidence does not show that the subject vehicle has a defect covered under 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 June 9, 2020, by telephone, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Matt Gaines, senior product manager, and Nici Morrison, retail claims assistant 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]

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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) ("We find that this interpretation of the standard required for demonstrating substantial impairment is reasonable and consistent with the statute's plain language which requires a showing of loss in market value. . . . [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, 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

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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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.

[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

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 18, 2019, the Complainant, purchased a new 2019 Montana 3854BR from Fun Country RV's & Marine, Inc., an authorized dealer of the Respondent, in Anthony, Texas. The Complainant actually took delivery on March 8, 2019. The Limited Base Warranty covers the RV for a period of one (1) year from the date of purchase by the first retail owner. On January 8, 2020, the Complainant provided a written notice of defect to the Respondent. On January 9, 2020, the

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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).

Complainant filed a complaint with the Department alleging that the battery would drain from a parasitic draw with the battery switched to the off position.

The Complainant testified that the subject RV's batteries would drain excessively. He first noticed the drain within two days of taking delivery of the RV. He had only used the RV four times. He noticed a parasitic draw with the battery in the off position. The battery drained within 36 hours. The fuse panel was checked but a draw could not be found. The dealer added a second battery at a cost of $194.45 to the Complainant, which did not resolve the problem. The draw made the RV unsuitable for camping without an external power source. The subject RV was not the first Keystone RV the Complainant owned. He did not believe the parasitic draw was normal. The only (known) draws in the battery off position was the carbon monoxide (CO)/liquid propane (LP) sensor. The dealer tested the RV and even replaced some items twice but did not resolve the issue. The Complainant stated that the issue was ongoing. He had last checked in March 2020. He noted that he could not leave the battery in the RV without the battery dying in a couple of days. He did not have a way to charge the battery where the RV was stored. On cross-examination, the Complainant elaborated that a draw of more than two amps made the RV unsuitable for camping without shore power. When asked if the draw related to any specific component, the Complainant explained that the electrical system was in the off position so that nothing should be running except for the CO/LP alarm. During rebuttal testimony, the Complainant asserted that Mr. Gaines could not confirm where the power was going. Additionally, replacing a battery would not solve the problem. Upon clarification questions, the Complainant answered that he believed the RV's batteries were rated at 70 amp-hours.

C. Summary of Respondent's Evidence and Arguments

Mr. Gaines testified that he was called to inspect the RV. He explained that the RV's built by the Respondent commonly have a parasitic draw. He had tested various Keystone RVs, including a Passport, a small lightweight unit with fewer components, which drew 0.8 to 1.0 amp, and a Fuzion toy hauler, which drew 1.0 to 1.8 amps. Mr. Gaines pointed out that the leveling system ceases to work and has a very high amp draw, needing 12.5 volts to operate. He added that the leveling system on a unit in storage for a few days may activate and the battery would need to be fully charged. He explained that because of the RV's storage location, he had to plug in a seven-way cord and had plenty of power minutes later. The Respondent provided one battery but the RV

had space for more. Mr. Gaines had seen as many as five or six batteries. The most common amperage reading was 1.2 amps, which could fluctuate either way, and would draw from the battery. Components were wired in before the isolation switch. Mr. Gaines test the subject RV and found it acceptable. The fact that the dealer found the disconnect operating as designed indicated to him that the RV did not have a short. He did offer to completely isolate the batteries by adding a disconnect so that not even the CO/LP detector could draw amperage; however, the Complainant would only accept solar panels, so the Respondent declined. On cross-examination, Mr. Gaines explained that the PC board for the hydraulic leveling system would draw amperage, even when off. He elaborated that the battery disconnect disconnects the 12-volt panel from the battery, so that everything connected to the panel should be off. However, the disconnect does not cut off everything, which was why he offered to add another disconnect to isolate everything. He pointed out that adding additional batteries does not resolve the issue but does provide additional hours of battery power. Upon clarification questions, Mr. Gaines confirmed that he had tested other Montana RVs, and the amp draw was consistent.

D. Analysis

To qualify for Lemon Law relief, the vehicle must have a defect covered by warranty (warrantable defect).[27] Lemon Law relief does not apply to all issues that may occur with a vehicle but only to warrantable defects. The Lemon Law does not require that a manufacturer provide any particular warranty coverage nor does the Lemon Law impose any specific standards for vehicle characteristics. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. In part, the present warranty generally states that:

> The Keystone Limited Base Warranty covers this RV for a period of one (1) year from the date of purchase by the first retail owner. This Limited Base Warranty covers defects in materials and workmanship supplied by and attributable to Keystone's manufacturing and assembly of the RV, when the RV is used solely for its intended purposes of recreational camping. This Limited Base Warranty does not cover the items excluded under the section "What is Not Covered".

Additionally, the warranty expressly excludes "[d]esign defects; redesign/re-construction of any part of the RV." Under these terms, the warranty only applies to defects in materials or

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

workmanship attributable to the Respondent's manufacture of the RV (manufacturing defects).[28] A manufacturing defect is generally an isolated aberration occurring only in those vehicles not produced according to the manufacturer's specifications. A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly. Manufacturing defects occur during the manufacturing process. Unlike manufacturing defects, issues that do not arise from manufacturing, such as the vehicle's design characteristics (which exist before manufacturing), are not warrantable defects. Design characteristics result from the vehicle's specified design and not from any error during manufacturing.[29] Because the warranty only covers manufacturing defects and actually excludes design defects, the Lemon Law does not apply to problems arising from the design.

In this case, the similar amperage draws in other vehicles currently made by the Respondent indicates the existence of a common design issue as opposed to an isolated manufacturing defect. The courts have explained the distinction between a manufacturing defect and design defect as follows:

> This distinction between "aberrational" defects and defects occurring throughout an entire line of products is frequently used in tort law to separate defects of manufacture from those of design. . . . Stated another way, the distinction is between an unintended configuration [a manufacturing defect], and an intended configuration that may produce unintended and unwanted results [a design defect].[30]

In sum, a manufacturing defect is an isolated aberration occurring only in those vehicles not produced according to the manufacturer's specifications. In contrast, a design characteristic results from the vehicle's specified design so that vehicles with the same design should exhibit the same

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[28] 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.").

[29] In contrast to manufacturing defects, "[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves." *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

[30] *Harduvel v. General Dynamics Corp*., 878 F.2d 1311, 1317 (11th Cir. 1989).

design characteristic. The evidence here reflects that RVs manufactured by the Respondent, including RVs in the Montana and other lines, all exhibited a similar amperage draw, reflecting that the amperage draw is an unintended characteristic arising from the Respondent's specified design. Consequently, even if the amperage draw constitutes a defect, the Lemon Law provides no relief, since the defect arises from the RV's design which the warranty does not cover.

III. Findings of Fact

1. On January 18, 2019, the Complainant, purchased a new 2019 Montana 3854BR from Fun Country RV's & Marine, Inc., an authorized dealer of the Respondent, in Anthony, Texas. The Complainant actually took delivery on March 8, 2019.

2. The Limited Base Warranty covers the RV for a period of one (1) year from the date of purchase by the first retail owner.

3. On January 8, 2020, the Complainant provided a written notice of defect to the Respondent.

4. On January 9, 2020, the Complainant filed a complaint with the Department alleging that the battery would drain from a parasitic draw with the battery switched to the off position.

5. On February 24, 2020, 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 June 9, 2020, by telephone, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Matt Gaines, senior product manager, and Nici Morrison, retail claims assistant manager, represented the Respondent.

7. The warranty expired by March 8, 2019.

8. RVs from the Respondent, including RVs in the Montana and other lines, all exhibited a similar amperage draw. The amperage draw was not an aberration occurring only in RVs not configured according to the Respondent's design. Instead, the amperage draw in the

subject RV was common to RVs in the same Montana line as well as other lines designed by the Respondent.

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.

9. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE § 2301.603.

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED August 19, 2020

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