

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 21-0003463 CAF**

**ATLANTIC CLOTHING LLC,
Complainant**

v.

**JAGUAR LAND ROVER NORTH
AMERICA, LLC,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Atlantic Clothing LLC (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 its vehicle distributed by Jaguar Land Rover North America, LLC (Respondent). A preponderance of the evidence shows that the subject vehicle has a warrantable defect that qualifies for warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened on August 17, 2021, in Houston, Texas, before Hearings Examiner Andrew Kang, and recessed after the inspection due to an unforeseen closure of the hearing location. The hearing reconvened on September 16, 2021, by videoconference/teleconference, before Hearings Examiner Andrew Kang, and the record closed on the same day. Zulfiqar Prasla, attorney, represented the Complainant. Faran Momin, the Complainant's president, testified for the Complainant. John Chambless, attorney, represented the Respondent. Brandon Sangster, Customer Satisfaction Senior Technical Specialist, testified for the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief Requirements

Repurchase and replacement relief only apply to new vehicles.² 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.”³ 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.⁴ 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.⁵

b. Substantial Impairment of Use or Value

i. Impairment of Use

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs use. Under this standard, the factfinder considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle” from the perspective of a reasonable prospective purchaser. For instance, “while a vehicle with a non-functioning air

² TEX. OCC. CODE § 2301.603.

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.604(a).

⁵ TEX. OCC. CODE § 2301.601(4).

conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”⁶

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.”⁷

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.⁸

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

⁶ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

⁷ *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.”).

⁸ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

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

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.¹⁰

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.¹¹

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.¹² 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.¹³

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

⁹ TEX. OCC. CODE § 2301.605(a)(2).

¹⁰ TEX. OCC. CODE § 2301.605(a)(3).

¹¹ TEX. OCC. CODE § 2301.605(c).

¹² *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.’”).

¹³ *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.”).

to the respondent;¹⁴ (2) the respondent was given an opportunity to cure the defect or nonconformity;¹⁵ 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.¹⁶

2. Warranty Repair Relief

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”; the vehicle owner provided written notice of the defect to the manufacturer, converter, distributor, or its authorized agent before the warranty's expiration; and the owner filed a complaint with the Department specifying the defect.¹⁷ The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”¹⁸

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁹ 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.²⁰ Accordingly, the

¹⁴ 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 satisfies the requirement to provide notice of the defect or nonconformity to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).

¹⁵ TEX. OCC. CODE § 2301.606(c)(2). A respondent may delegate its opportunity to cure to a dealer. A repair visit to a dealer may satisfy the opportunity to cure requirement when the respondent authorizes 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. A respondent forgoes its opportunity to repair by replying to a written notice of defect with a settlement offer instead of arranging a repair attempt. *Id* at 2.

¹⁶ TEX. OCC. CODE § 2301.606(d)(2).

¹⁷ TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

¹⁸ TEX. OCC. CODE § 2301.603(a).

¹⁹ 43 TEX. ADMIN. CODE § 215.66(d).

²⁰ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

Complainant cannot prevail where the existence of any required fact appears unlikely or appears equally likely or unlikely.

4. The Complaint Identifies the Relevant Issues in this Case

The complaint identifies the relevant issues to address in this case.²¹ 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 for relief under the lemon law.”²² However, the parties may expressly or impliedly consent to hearing issues not included in the pleadings.²³ Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²⁴ Because the complaint determines the relevant issues, the Department cannot order relief for an issue not included in the complaint unless tried by consent.²⁵

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.²⁶ 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

²¹ “In a contested case, each party is entitled to an opportunity: (1) for hearing after reasonable notice of not less than 10 days; and (2) to respond and to present evidence and argument on each issue involved in the case.” TEX. GOV’T CODE § 2001.051; “Notice of a hearing in a contested case must include . . . either: (A) a short, plain statement of the factual matters asserted; or (B) an attachment that incorporates by reference the factual matters asserted in the complaint or petition filed with the state agency.” 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.”).

²² 43 TEX. ADMIN. CODE § 215.202(a)(3).

²³ 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

²⁴ *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

²⁵ *See* TEX. GOV’T CODE §§ 2001.141(b)-(c), 2001.051-2001.052; TEX. R. CIV. P. 301.

²⁶ TEX. OCC. CODE § 2301.604.

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).²⁷ However, the Department’s rules expressly exclude compensation for “any interest, finance charge, or insurance premiums.”²⁸

B. Summary of Complainant’s Evidence and Arguments

On February 25, 2020, the Complainant, purchased a new 2020 Land Rover Range Rover from Jaguar Land Rover West Houston, a franchised dealer of the Respondent, in Katy, Texas. The vehicle had 11 miles on the odometer at the time of purchase. The vehicle’s limited warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first.

On or about November 24, 2020, Zulfiqar Prasla, attorney for the Complainant, provided a written notice of defect to the Respondent. On November 24, 2020, the Complainant filed a complaint with the Department alleging that the electronic control system did not work properly, including the keyless entry, air conditioning (AC), remote start, on-screen controls for HD radio, Bluetooth, LCD panels, and seat ventilation.

In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
05/20/2020	4,019	The key and screen will occasionally not work.
06/10/2020	4,462	The key would not always lock/unlock the door.
06/22/2020	5,391	The key would not always lock/unlock the door.
08/04/2020	8,483	The screen switches settings by itself.
10/06/2020	12,598	The key will not always lock/unlock the door and the radio goes off by itself. The AC would blow the wrong temperature and sometimes switch to Celsius. The Bluetooth will not always connect to the phone and the navigation-screens are blank at startup and take a long time to load. The remote start and the cooled seats do not work. The AC button turns itself off.

Mr. Momin testified that when the Complainant first bought the vehicle, the remote features through the app did not work. The Complainant could not bring the vehicle back to the

²⁷ 43 TEX. ADMIN. CODE § 215.209(a).

²⁸ 43 TEX. ADMIN. CODE § 215.208(b)(1).

dealership to have the issue fixed until May 20, 2020. Mr. Momin explained that on that visit, the chauffeur controls were not working as well as the app features. He testified that the vehicle was in the shop for two weeks while the chauffeur console was replaced.

Mr. Momin stated that on June 10, 2020, the Complainant returned the vehicle to the dealership. He complained that the second-row seat still did not fold down and the app still did not work. He noted that the service technician found a short in the seat system. He recounted that on June 22, 2020, the vehicle was returned to the dealership for issues with the rear seat and the key fob not working properly.

Mr. Momin indicated that the vehicle was brought back to the dealership on August 4, 2020, for issues with the rear seat as well as a ticking noise in the engine when the engine shut off. He added that the touch screens were not reactive to touch. He explained that when he picked up the vehicle, all systems were working, but the issues returned after a week. He stated that he brought the vehicle back to the dealership on October 6, 2020, for multiple issues. In addition to the reoccurring issues, there was an issue with the AC blowing at the wrong temperature, as well as sensor errors, Bluetooth failing to connect, blank navigation-screens, and the seat cooling not functioning properly. Mr. Momin expressed that he had not taken the vehicle back to a dealership since the October visit because he felt like it was unproductive. He confirmed that he had emailed the Land Rover customer service department and initiated a buyback request, but he did not receive any further correspondence after the confirmation of his request.

On cross-examination, Mr. Momin clarified that he contacted Land Rover in early September. He also confirmed that he was the sole driver of the vehicle. He mentioned that he mainly used the vehicle to travel between work and home.

On redirect, Mr. Momin confirmed that the issues with the vehicle were the same repeated issues each visit to the dealer. He also confirmed that the co-owner of the vehicle also drove the vehicle on occasion. He explained that he did not return the vehicle to the dealership because he was tired of waiting and he did not believe that the dealership would fix the issue.

Upon clarifying questions, Mr. Momin answered that none of the issues complained about in the Lemon Law complaint were successfully repaired. He stated that the most recent time he noticed the keyless entry malfunction was on the morning of the hearing. He added that the key fob did work to open the door. He claimed that the on-screen controls last malfunctioned the

morning of the hearing. He elaborated that he would try to turn the AC auto setting off but the system would revert to auto. He added that other on-screen controls would not work as well. He reported that the HD radio last malfunctioned the Saturday before the hearing. He explained that the HD radio would not play sound when he turned the volume high. He approximated that the Bluetooth last malfunctioned within the two weeks prior to the hearing. He described that the music would not turn off when on a phone call. He reported that the AC last malfunctioned the Sunday before the hearing. He explained that the temperature was set on 71 but the AC blew hot air. He noted that the that the blowing air temperature varied from time to time when he started the vehicle. He stated that the air would not cool down after driving. He last noticed the LCD panels not activating on August 9, 2021. He clarified that when he attempted to turn the screens on they would not turn on. He commented that he did not use the remote start feature very often so he did not know the last time it malfunctioned. He clarified that he uses the remote start feature from his phone because the key fob did not have the feature. He testified that the last time he noticed the seat ventilation not working was the Saturday before the hearing. Mr. Momin expressed a preference to have the vehicle repurchased.

C. Inspection

The vehicle's odometer displayed 26,146 miles at the time of the hearing before the test drive. The Complainant successfully opened the vehicle using the keyless entry feature. However, the vehicle would not open with the key fob too far away. The remote start feature of the InControl Remote app on the Complaint's phone would not start the vehicle with a two bar (out of five bars) wireless signal strength on the phone. Brandon Sangster, Customer Satisfaction Senior Technical Specialist, pointed out the keyless entry sensor position behind the door handles, which must be touched to open the door. The AC cooled the vehicle. The touch screen controls and radio functioned normally. During a test call made over Bluetooth, the music stopped during the call. Mr. Momin elaborated that the Bluetooth issue involved two problems, calls not going through Bluetooth and music continuing to play during a call. The LCD panels turned on normally. Mr. Sangster explained that the seat ventilation blew ambient air and did not actively cool the air. The remote start feature successfully started the vehicle when in an area with a stronger wireless signal (four out of five bars). Mr. Sangster commented that the displays needed time to boot up like a computer. The test drive ended with 26,159 miles on the odometer.

D. Summary of Respondent's Evidence and Arguments

Brandon Sangster, Customer Satisfaction Senior Technical Specialist, testified for the Respondent. Mr. Sangster explained that the term "electrical systems" is extremely broad and does not reference anything in particular. He also stated that there were two pending software updates for the Complainant's vehicle. He noted that the updates involved the telematics control system and the infotainment system.

Mr. Sangster testified that the keyless entry error was never duplicated when the vehicle was brought in for repairs, so the dealer did not submit any warranty claims for this issue. He claimed that the system was working as designed and stated that he informed the Complainant how to operate the system properly.

Mr. Sangster testified that the HD radio operated properly when he test drove the vehicle. He also commented that the AC worked properly during the test drive and it kept the vehicle cool. He explained that Bluetooth was not always reliable. He described that Bluetooth depended on many factors, including the cell phone, the carrier, the signal, and other factors.

Mr. Sangster explained that it was not uncommon for infotainment screens to freeze up and require a restart since they are essentially computers. He claimed that he did not experience that issue during the test drive of the vehicle. He stated that the remote start for the vehicle did work during the test drive once they moved to an area that had good signal. He also described that the seat ventilation functioned by blowing ambient air and did not have its own cooling system. He claimed that the system worked properly during the test drive.

Mr. Sangster expressed that the pending software updates could address the complaints that the Complainant had with the vehicle. He opined that the issues complained of do not substantially impair the use or value of the vehicle. He elaborated that he believes that because the Complainant has been able to use the vehicle extensively and the market value is mainly based on the mileage and age of the vehicle.

On cross-examination, Mr. Sangster established that the available software updates became available in May of 2021. Mr. Sangster explained that the service technicians had the ability to characterize the repairs performed as software issues. He confirmed that the AC, HD radio, and seat controls could be controlled through the touchscreens. He further explained that different software controlled the different touchscreens.

Mr. Sangster testified that the best way to get an update is to go to the dealer. He stated that the vehicle will alert the driver that an update is available if it has been downloaded to the vehicle. He clarified that a vehicle owner would not necessarily be notified of an available software update.

E. Analysis

As explained in the discussion of applicable law, the law requires the Complainant to prove every element under the Lemon Law, or Warranty Performance Law for repair relief, by a preponderance. In other words, the Complainant must prove that every required fact is more likely than not true. In this case, a preponderance of the evidence shows that the vehicle qualifies for repair relief of the AC issue.

1. Issues Not Specified in the Complaint

As explained in the discussion of applicable law, the complaint identifies the relevant issues/defects to address in this case. Accordingly, any issues not identified in the complaint will not be addressed, unless the Respondent consents to those issues. In this case, the Respondent objected to the issues not in the complaint. Accordingly, only the issues listed in the complaint will be determined here. Additionally, the Lemon Law prohibits granting repurchase or replacement unless the complainant (or someone on behalf of the complainant) provided written notice of the alleged defects to the respondent. However, the record does not show such written notice of the non-complaint issues. Moreover, the Warranty Performance Law requires filing a complaint specifying the defects. In sum, the issues not specified in the Complainant cannot support repurchase/replacement or repair relief.

2. Electronic Control System Issues Generally

The complaint's general allegation that "electronic control systems" do not work properly fails to provide sufficient notice in this case. Section 215.202(3) of the Department's rules requires complaints to "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 for relief under the lemon law." However, the term "electronic control systems" by itself broadly suggests multiple possible issues. Though "electronic control systems" may describe the

nature of the specific complaint issues, this term does not identify any additional issues separate from the issues specifically listed in the complaint.

3. Specific Complaint Issues

The complaint listed the following specific issues: keyless entry, on-screen controls and features for HD radio, AC, Bluetooth, LCD panels turn off, remote start, and seat ventilation. Lemon Law relief does not apply to all problems that may occur with a vehicle but only to warrantable defects that continue to exist (i.e., currently exist) after repairs.²⁹ The Lemon Law requires a respondent to conform its vehicles to whatever coverage the warranty provides. In part, the subject vehicle's warranty states that:

JLR warrants that during the warranty period, if a Land Rover vehicle is properly operated and maintained, repairs required to correct defects in factory-supplied materials or factory workmanship will be performed without charge upon presentment for service at a Land Rover retailer/authorized repairer; any component covered by this warranty found to be defective in materials or workmanship will be repaired, or replaced, without charge with a new or re-manufactured part distributed by JLR at its sole option.³⁰

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).³¹

A defectively manufactured vehicle has a flaw so that it does not conform to the manufacturer's specifications, and is not identical to other same model vehicles.³² A manufacturing defect occurs when the vehicle varies from the manufacturer's design standards,

²⁹ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

³⁰ Complainant's Ex. 7, Passport to Service, Warranty Statement.

³¹ 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.").

³² *Ford Motor Co. v. Pool*, 688 S.W.2d 879, 881 (Tex. App.—Texarkana 1985), *aff'd* in part on other grounds, *rev'd* in part on other grounds, 715 S.W.2d 629 (Tex. 1986) ("Manufacturing defect cases involve products which are flawed, i.e., which do not conform to the manufacturer's own specifications, and are not identical to their mass-produced siblings.").

causing that vehicle to differ from other vehicles of the same kind.³³ In other words, a manufacturing defect is an isolated aberration, an unintended configuration occurring only in those vehicles not produced according to the manufacturer's specifications.³⁴ In contrast, design issues result from the manufacturer's design of the vehicle, even though manufactured without any flaws.³⁵ Design characteristics, including design defects, exist in the vehicle's specifications, and do not arise from any error during manufacturing.³⁶ Accordingly, a design characteristic exists in all vehicles of the same design, but the vehicle's intended configuration may produce unintended and unwanted results.³⁷ Because the warranty only covers manufacturing defects, the Lemon Law does not provide relief for design characteristics, design defects, or any other non-manufacturing problem. Even though an issue may be unintended and unwanted, the Lemon Law provides no relief unless the issue constitutes a manufacturing defect.

a. Keyless Entry

A preponderance of evidence does not show that the keyless entry has a manufacturing defect. The record reflects that the proximity/location of the key fob and hand placement may normally affect the operation of the keyless entry feature. Furthermore, technicians could not duplicate the issue and the dealer never submitted a warranty claim for keyless entry, indicating

³³ *Ridgway v. Ford Motor Co.*, 82 S.W.3d 26, 31-32 (Tex. App.—San Antonio 2002), *rev'd on other grounds*, 135 S.W.3d 598 (Tex. 2004) (“A manufacturing defect may be distinguished from a design defect. A manufacturing defect occurs when the product varies from the manufacturer-established design standards, causing that product to deviate from the normal safety of other products of its kind.”).

³⁴ *Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989) (“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].”).

³⁵ *Ford Motor Co. v. Pool*, 688 S.W.2d 879, 881 (Tex. App.—Texarkana 1985), *aff'd in part on other grounds*, *rev'd in part on other grounds*, 715 S.W.2d 629 (Tex. 1986) (“Defective design cases, however, are not based on consumer expectancy, but on the manufacturer's design of a product . . . even though not flawed in its manufacture.”).

³⁶ 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).

³⁷ *Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989) (“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].”).

that the dealer found no warrantable defects to repair. Accordingly, the keyless entry issue appears as likely to result from non-warrantable factors as a manufacturing defect.

b. On-Screen Controls and Features for HD Radio; LCD Panels Turn Off

The problems with the infotainment system's controls, radio and screens appear equally likely to arise from unwarranted design issues as from any manufacturing defect. The repair history shows that the dealer updated the infotainment master controller, reflecting a software-related issue. In addition, the subject vehicle had pending updates, including an infotainment system update, that may stabilize performance and improve the blank screen issue. Significantly, the infotainment system, essentially a computer, may stop working properly and require restarting like other computers. In sum, the available evidence does not show that a warranted manufacturing defect in the infotainment system is more likely to have caused the control and display issues as opposed to a glitch in the infotainment system's software,³⁸ which is an unwarranted design issue.

c. Air Conditioning (AC)

The evidence shows that the vehicle has a warrantable defect. The air from the AC may blow hot air though set to a temperature in the low 70s. Significantly, the evidence reflects that the air would not cool down even after driving. Further the AC malfunctioned as late as the Sunday before the hearing, when the temperature was set to 71 degrees but the AC blew hot air. However, the repair history only shows one repair attempt for the AC issue and the circumstances in this case do not warrant departing from the statutory presumptions for reasonable repair attempts.

d. Bluetooth

The record shows a variety of factors may affect Bluetooth performance, such as the phone itself, carrier related issues, and the wireless signal. In addition, the vehicle and phone must successfully negotiate various "handshakes" (signal exchanges) to ensure a proper Bluetooth connection. However, Bluetooth is not an infallible technology. The intermittent Bluetooth issues appear consistent with intermittent problems that may normally occur with Bluetooth. All things

³⁸ Software malfunctions arise from the software's design. Frances E. Zollers, Andrew McMullin, Sandra N. Hurd, and Peter Shears, *No More Soft Landings for Software: Liability for Defects in an Industry That Has Come of Age*, 21 Santa Clara Computer & High Tech. L.J. 745, 749-750 (2005) ("Software can only fail for one reason: faulty design.") (citation omitted).

considered, the evidence is indeterminate whether the complained of issues arise from a manufacturing defect or a design characteristic.

e. Remote Start

The record reflects that the remote start feature, operated using an app on the Complainant's smartphone, requires a sufficiently strong wireless signal strength to function. As demonstrated during the inspection at the hearing, the remote start functioned normally in areas with adequate signal strength but did not in places with a weak signal. In sum, a preponderance of the evidence does not show that the remote start issue arises from a warranted manufacturing defect.

4. Seat Ventilation

The evidence shows that by design, the seat ventilation does not have a cooling element and therefore cannot cool the air but only blows/recirculates the ambient air. Accordingly, the seat ventilation not cooling is not a warrantable defect.

III. Findings of Fact

1. On February 25, 2020, the Complainant, purchased a new 2020 Land Rover Range Rover from Jaguar Land Rover West Houston, a franchised dealer of the Respondent, in Katy, Texas. The vehicle had 11 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first.
3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
05/20/2020	4,019	The key and screen will occasionally not work.
06/10/2020	4,462	The key would not always lock/unlock the door.
06/22/2020	5,391	The key would not always lock/unlock the door.
08/04/2020	8,483	The screen switches settings by itself.
10/06/2020	12,598	The key will not always lock/unlock the door and the radio goes off by itself. The AC would blow the wrong temperature and sometimes switch to Celsius. The Bluetooth will not always connect to the phone and the navigation-screens are blank at startup and take a long time to load. The remote start and the cooled seats do not work. The AC button turns itself off.

4. On or about November 24, 2020, Zulfiqar Prasla, attorney for the Complainant, provided a written notice of defect to the Respondent.
5. On November 24, 2020, the Complainant filed a complaint with the Department alleging that the electronic control system did not work properly, including the keyless entry, AC, remote start, on-screen controls for HD radio, Bluetooth, LCD panels, and seat ventilation.
6. On February 4, 2021, 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.
7. The hearing in this case convened on August 17, 2021, in Houston, Texas, before Hearings Examiner Andrew Kang, and recessed after the inspection due to an unforeseen closure of the hearing location. The hearing reconvened on September 16, 2021, by videoconference/teleconference, before Hearings Examiner Andrew Kang, and the record closed on the same day. Zulfiqar Prasla, attorney, represented the Complainant. Faran Momin testified for the Complainant. John Chambless, attorney, represented the Respondent. Brandon Sangster, Customer Satisfaction Senior Technical Specialist, testified for the Respondent.
8. The vehicle's odometer displayed 26,146 miles at the time of the hearing.

9. The vehicle's warranty was in effect at the time of the hearing.
10. The vehicle operated normally during the test drive at the hearing.
11. The vehicle's air conditioning system may blow hot air even though the temperature is set to cool. The air will not cool even after driving. This malfunction last occurred on August 15, 2021.

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 vehicle did not have a reasonable number of repair attempts. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(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. 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 qualifies for warranty repair. The Complainant proved that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603. The Complainant or an agent of the Complainant notified the Respondent or Respondent's agent of the alleged defect(s). TEX. OCC. CODE §§ 2301.204 and 43 TEX. ADMIN. CODE § 215.202(b)(3).
10. 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**. It is **FURTHER ORDERED** that the Respondent shall make any repairs needed to conform the subject vehicle to the applicable warranty; specifically, the Respondent shall resolve the issue with the air conditioning continuing to blow hot air although set to cool. Upon this Order becoming final under Texas Government Code § 2001.144:³⁹ (1) the Complainant shall deliver the vehicle to the Respondent within 20 days; and (2) the Respondent shall complete the repair of the vehicle within **20 days** after receiving it. However, if the Department determines the Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider the Complainant to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

³⁹ This Order does not become final on the date this Order is signed, instead: (1) this Order becomes final if a party does not file a motion for rehearing within 25 days after the date this Order is signed, or (2) if a party files a motion for rehearing within 25 days after the date this Order is signed, this Order becomes final when: (A) an order overruling the motion for rehearing is signed, or (B) the Department has not acted on the motion within 55 days after the date this Order is signed. Accordingly, this Order cannot become final (1) while a motion for rehearing remains pending; or (2) after the grant of a motion for rehearing.

SIGNED November 19, 2021



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