

**OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD**

QUARTERLY CASE SUMMARIES

October 2004 - December 2004 (4th Quarter)

JURISDICTION:

Consumer §681.102(4), F.S.

Shaffer v. Ford Motor Company, 2004-0858/TLH (Fla. NMVAB December 14, 2004).

The Manufacturer's representative argued at the hearing that the Consumers are not "consumers" under the terms of the statute, because they purchased and used the vehicle for business purposes. The Consumers purchased the vehicle with a trailer tow package, so that they could use the vehicle in their landscaping business. The Board rejected the Manufacturer's assertion. The Board noted that the statute defines "consumer" as "any other person entitled by the terms of the warranty to enforce the obligations of the warranty." There was no dispute that, at the time of purchase and during the course of repairs, the Consumers were entitled by the terms of the Manufacturer's warranty to enforce the obligations of the warranty.

Motor Vehicle §681.102(15), F.S.

Hopkins v. DaimlerChrysler Motors Corporation, 2004-0781/TLH (Fla. NMVAB November 19, 2004).

The Manufacturer contended that the gross vehicle weight of the Consumer's truck was more than 10,000 pounds, and as such, the vehicle was not a "motor vehicle" under the terms of the statute. The Consumer purchased the truck chassis and had a bed and a water tank installed on it, in order to use the vehicle for his portable toilet business. The Consumer had the truck weighed. He submitted into evidence the Certified Automated Truck scale ticket, which indicated that the truck weighed 8,720 pounds. The water tank was empty when the truck was weighed. The water tank could hold 400 gallons of water, but it was the Consumer's habit to empty the tank before it was filled to three-quarters of the tank's capacity. The Consumer testified that water weighs eight pounds per gallon. Given these undisputed facts, the Board estimated the gross vehicle weight of the vehicle to be 10,320 pounds: the weight of the truck with an empty water tank (8,720 pounds) plus the weight of the contents of the water tank when the tank is filled to one-half of its capacity (200 gallons at 8 pounds per gallon = 1,600 pounds). Finding that the vehicle's gross vehicle weight was not less than 10,000 pounds, as the statute requires, the Board ruled that the vehicle was not a "motor vehicle" for purposes of the lemon law. Accordingly, the Consumer's case was dismissed.

Warranty §681.102(23), F.S.

Baldizzi v. Toyota Motor Sales, U.S.A., Inc., 2004-0733/STP (Fla. NMVAB December 10, 2004).

The Consumer relied upon a representation made in the owner's manual in deciding to purchase the vehicle. The Consumer sought to purchase a vehicle that was equipped with certain features, one being that the interior lights would turn-off automatically when a door was left ajar. The owner's manual for the Consumer's vehicle indicated that it was equipped with such a feature, but after purchasing the vehicle, the Consumer learned that the vehicle in fact did not have the feature. On seven occasions, the vehicle's battery was drained after sitting all night with the interior lights on. The Manufacturer contended that there was no defect in the vehicle and that the owner's manual contained a misprint. The Board ruled that the representation in the owner's manual was a warranty. Ultimately, the Consumer was awarded a refund.

NONCONFORMITY § 681.102(16), F.S.

Kelly v. Ford Motor Company, 2004-0748/JAX (Fla. NMVAB November 10, 2004).

The Consumer complained that the steering wheel in his F-150 pick-up truck vibrated. The steering wheel vibration could be felt by the driver and visually observed by passengers in the vehicle. The Manufacturer denied there was a defect in the vehicle, contending that the 2004 model year F-150s were equipped with rack-and-pinion steering, which allegedly transmitted more "road feel" than the previous steering systems utilized on the F-150s. The new steering system allegedly made the F-150 pick-up trucks steer more like corvettes than like trucks. The Board was not persuaded. The Board found the steering wheel vibration to be a defect that substantially impaired the use of the vehicle. Ultimately, the Board awarded the Consumer a refund.

Sius American, Inc. v. Mercedes-Benz USA, Inc., 2004-0714/MIA (Fla. NMVAB December 1, 2004).

The Consumer complained of a very strong and unpleasant odor that emanated from the air conditioner. The Manufacturer contended that the odor did not substantially impair the use, value, or safety of the vehicle. The Board inspected the vehicle during the hearing. A very strong musty, rubbery odor, reminiscent of a locker room, was evident upon entering the vehicle. The odor got stronger when the air conditioner was turned on and did not begin to diminish for at least three or four minutes. The Board ruled that the odor substantially impaired the use and value of the vehicle. Accordingly, the Consumer was awarded a refund.

Wacha v. Volkswagen/Audi of America, Inc., 2004-0825/JAX (Fla. NMVAB December 14, 2004).

The Manufacturer contended that the defect did not substantially impair the use, value, or safety of the vehicle, because the Manufacturer's authorized service agent had never been able to duplicate the problem. The problem complained of by the Consumer was a transmission hesitation and jerk. The transmission would intermittently hesitate and jerk while being shifted between gears. The hesitation and jerk were so severe that it physically jolted passengers inside

the vehicle. During the course of repairs, the Manufacturer's authorized service agent attempted no repairs, contending that the problem was not duplicated. The Manufacturer's Representative testified that it is the Manufacturer's policy to make no repairs where, as here, the service agent is unable to duplicate the problem. The Representative argued that it was unreasonable to expect the Manufacturer to "throw parts at a car" where a problem could not be duplicated. Upon these facts, the Board found that the problem substantially impaired the use, value, and safety of the vehicle. Ultimately, the Board awarded the Consumer a refund.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

What Constitutes a Reasonable Number of Attempts §681.104, F.S.; §681.1095(8), F.S.

Yezek v. Ford Motor Company, 2004-0725/WPB (Fla. NMVAB November 5, 2004).

The Consumer complained that the vehicle runs rough, surges forward upon acceleration, and surges forward upon a cold engine start. The surging and rough running engine problem was addressed on three repair attempts plus a final repair attempt. On the second repair attempt for the surging and rough running engine problem, the Manufacturer's authorized service agent deactivated one of the fuel injectors in an attempt to correct the problem. The deactivation of the fuel injector caused the vehicle to sound like a "noisy old dump truck." The Consumer was upset over the noisy running engine and claimed that the service agent's "fix" changed the most important selling feature of the vehicle. The Consumer presented the vehicle for repair of the noisy running engine on two occasions plus a repair attempt after written notification. The Manufacturer's witness contended at the hearing that the second repair attempt cured the surging and rough running engine problem, but he admitted that the repair increased the noise level of the engine. He testified that nothing could be done about the noisy engine. Upon these facts, the Board found that the rough running engine and the noisy engine were both nonconformities. In addition to finding that there was a presumption of reasonable number of repair attempts on the rough running engine problem, the Board also found that there was a reasonable number of attempts on the noisy engine problem. Accordingly, the Consumer was awarded a refund.

Days Out of Service & Post-Notice Opportunity to Inspect or Repair §681.104(1)(b), F.S.; §681.104(3)(b)1., F.S.

Whitacre v. DaimlerChrysler Motors Corporation & Elk Automotive, 2004-0735/FTM (Fla. NMVAB November 16, 2004)

The subject vehicle was a conversion van, manufactured by DaimlerChrysler and Elk Automotive. Elk Automotive claimed it was not afforded a "final repair attempt," because the Consumers declined to allow the vehicle to be taken to the manufacturer's factory in Indiana. The Consumers purchased the van in Florida, from Sunset Dodge, an authorized service agent for both DaimlerChrysler and Elk Automotive. Pursuant to the terms of Elk Automotive's warranty, the Consumers reported all problems to the selling dealer, Sunset Dodge. Sunset Dodge received authorization from Elk Automotive for all of the repairs. After the vehicle was

out of service for repair for more than 15 days, the Consumers sent written notification to both manufacturers. Following the manufacturers' receipt of the notification, the vehicle was subjected to inspection by Sunset Dodge. The Board concluded that Elk Automotive was not denied a "final repair attempt," because the applicable statutory provision, Section 681.104(1)(b) only requires an "opportunity to inspect or repair" by the Manufacturer or its authorized service agent following receipt of the written notification. Since the vehicle was inspected by Elk Automotive's authorized service agent, the terms of the statute were met. Finding that the vehicle was out of service for repairs of nonconformities for 34 days, the Board awarded the Consumers a refund.

Tews v. Toyota Motor Sales, U.S.A., 2004-0772/MIA (Fla. NMVAB December 13, 2004). The Consumer presented the vehicle for repair of a defective moonroof on June 29, 2004. The replacement of the moonroof also involved the replacement of the vehicle headliner, but the Manufacturer's service agent delayed ordering the headliner, causing a delay in the completion of the work. Although the Manufacturer's authorized service agent could have directed the Consumer to pick up the vehicle pending the delivery of the new headliner, the service agent chose to keep the vehicle. Upon these facts, the Board ruled that the vehicle was out of service for 36 days (the entire time that the vehicle remained at the service agent's facility) for repair of a nonconformity. Ultimately, the Consumer was awarded a refund.

MANUFACTURER AFFIRMATIVE DEFENSES §681.104(4), F.S.

Defect does not substantially impair use, value or safety of vehicle §681.104(4)(a), F.S.

Bergeron v. General Motors Corporation, Chevrolet Motor Division, 2004-0835/ORL (Fla. NMVAB December 16, 2004).

The Consumer complained of a groaning noise in the front of the vehicle that occurred every time she stopped the car. The noise was heard after she stopped the vehicle and took her foot off the brake pedal. The Consumer testified that, during the course of repairs, at several different dealerships, she was given a variety of reasons for the noise, but it was never corrected. The Manufacturer contended that the noise was not a defect or condition that substantially impaired use, value, or safety. Manufacturer witnesses testified that they had removed the wheels and tires to inspect the vehicle's brakes. They found no evidence of a defect. The witnesses also test drove the Consumer's vehicle but were unable to verify the noise that the Consumer described. During the hearing, the Board test drove the vehicle. A low-pitched groan noise was heard as the vehicle started moving after being stopped. The Board ruled that the noise did not substantially impair the use, value, or safety of the vehicle. Accordingly, the Consumer's case was dismissed.

Accident, Abuse, Neglect, Unauthorized Modification §681.104(4)(b), F.S.

Assing v. American Suzuki Motor Corporation, 2004-0718/ORL (Fla. NMVAB October 28, 2004).

The Manufacturer contended that the blown engine was the result of accident, abuse, neglect, or unauthorized modification. The Consumers drove the vehicle to New York. Prior to departure, the Consumers took the vehicle to a friend to “check it out” for the trip. After arriving in New York, the Consumers loaned the vehicle to a relative. While the Consumers’ relative was using the vehicle, the engine started smoking. The Consumers’ relative stopped the vehicle and attempted to add oil, but the oil drained through the vehicle and onto the pavement. The vehicle was towed to a Manufacturer’s authorized service agent in New York, where it was inspected. The New York service agent determined that the oil filter was missing. He concluded that the missing oil filter caused the oil leak. The Manufacturer’s witness averred that an aftermarket oil filter not designed to Suzuki’s specifications might not fit the threads correctly, which could lead to the filter falling off the engine while it is in motion. He examined the vehicle and found that the engine oil pan plug bore wrench marks, indicating that it had been removed and replaced at some point prior to the inspection. He averred that there was no other indication of an engine oil leak. Upon these facts, the Board ruled that the blown engine was the result of accident, abuse, neglect, or unauthorized modification by persons other than the Manufacturer or its authorized service agents. Accordingly, the Consumers’ case was dismissed.

Tavarez v. Mazda Motor of America, Inc., 2004-0777/FTL (Fla. NMVAB December 9, 2004).

The Consumer complained that the engine hesitated and “bucked” upon deceleration. The Manufacturer contended that the defect was caused by unauthorized modification of the vehicle. The Consumer acknowledged that after he purchased the vehicle, he added a “turbo timer,” an air and fuel mixture gauge, and a boost gauge to the vehicle. The Consumer also installed an “air cone” under the hood which bypassed the air box. The parts were not installed by the Manufacturer or its authorized service agent. The Manufacturer’s witness testified that the engine “buck” was caused by the after-market parts. He explained that he removed the after-market parts, and the engine performed properly. Upon these facts, the Board found that the problem was caused by unauthorized modification of the vehicle by persons other than the Manufacturer or its authorized service agent. Accordingly, the Consumer’s case was dismissed.

MULTIPLE MANUFACTURERS

Whitacre v. DaimlerChrysler Motors Corporation & Elk Automotive, 2004-0735/FTM (Fla. NMVAB November 16, 2004)

The Consumers required a van that was converted to accommodate persons with disabilities. Prior to their purchase, they researched van converters and decided to purchase a Dodge van converted by Elk Automotive. A representative for Elk Automotive assured the Consumers that Elk Automotive could perform the adaptive equipment conversion necessary to meet their needs. A similar assurance was also contained on Elk Automotive’s web site. The Consumers agreed to purchase a 2003 Dodge Ram conversion van from Sunset Dodge, an authorized service agent for

DaimlerChrysler and Elk Automotive. Elk Automotive contracted with a company called Alternative Mobility to install the adaptive equipment prior to the Consumers' purchase of the vehicle. Subsequent to their purchase, it was discovered that the mobility adaptations were installed incorrectly, and in addition, the vehicle failed to start and the rear differential emitted a whining noise. The vehicle was out of service for repair of these defects for 34 cumulative days. At the hearing, DaimlerChrysler asserted that, because it had corrected the two defects for which it claimed responsibility under its warranty, and the "preponderance" of the defects were covered by Elk Automotive's warranty, the Consumers' claim should be dismissed as to DaimlerChrysler. Elk Automotive claimed it should not be liable, because the mobility adaptation defects were not substantial and it was denied a "final repair attempt." (See, previous discussion of this issue in this Summary). The Board found all of the claimed defects to be nonconformities and awarded the Consumers a refund as against both Manufacturers, jointly.

MISCELLANEOUS ISSUES

Morales v. Mercedes-Benz USA, Inc., 2004-0807/FTL (Fla. NMVAB December 10, 2004). Counsel for the Manufacturer requested permission to appear by telephone at the arbitration hearing. His request was submitted via facsimile at 5:15 pm on the day prior to the scheduled hearing. The Board found the request to be untimely and therefore denied it. Counsel for the Manufacturer did not appear at the hearing; instead, an employee of the Manufacturer appeared on behalf of the Manufacturer.

Central Florida Foot & Ankle Center, LLC, v. Mercedes-Benz USA, Inc., 2004-0811/TPA (Fla. NMVAB November 24, 2004).

The Manufacturer filed its Answer more than 15 days after the date of the Manufacturer's receipt of the Notice of Arbitration. Finding the Manufacturer's filing to be untimely, the Board did not permit the Manufacturer to raise any affirmative defenses at the hearing and did not permit the Manufacturer's witness to testify. Counsel for the Manufacturer was allowed to cross-examine the Consumer's witnesses and to give a closing argument.