

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

**QUARTERLY CASE SUMMARIES**

October 2022 - December 2022 (4th Quarter)

**NONCONFORMITY 681.102(15), F.S.**

*Soler v. Tesla Motors, Inc.*, 2022-0196/MIA (Fla. NMVAB November 1, 2022)

The Consumer complained of an unknown condition manifesting in less than expected driving range from the vehicle's battery in his 2022 Tesla Model Y. The Consumer explained that his salesperson told him that the vehicle's mileage range should be 330 miles for a fully charged battery but that he only got 100 to 150 miles per a fully charged battery. He said that his vehicle got approximately 1.3 miles per battery percentile. He said that he tested two other Model Y vehicles both of which got 2.5 miles per battery percentile. He explained that he had a co-worker and a neighbor who also had similar vehicles and who each got 260 miles per a fully charged battery. He said that, at the time of the hearing, the battery range was still only 100 to 150 miles for a fully charged battery.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative testified that "no abnormal range loss was found." When asked, he was unable to explain what a normal or abnormal range loss would be. He acknowledged that the Consumer's representation of 1.3 miles for every one percent of battery use, when compared to another similar vehicle whose battery use was 2.5 miles per one percent, would be considered abnormal. However, he was unable to say how many miles the vehicle should get per percentile of battery use. He acknowledged that Tesla's advertisements asserted that the vehicle's expected range was 330 miles for a fully charged battery.

The Board found that the evidence established that the unknown condition manifesting in less than expected driving range substantially impaired the use and value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The Manufacturer's assertion to the contrary was rejected. Accordingly, the Consumer was awarded a replacement vehicle.

*Giacaman v. Toyota Motor Sales, U.S.A., Inc.*, 2022-0229/FTL (Fla. NMVAB November 28, 2022)

The Consumer complained of a rear passenger window condition manifesting itself with the weather stripping popping out in his 2020 Toyota Tacoma. The Consumer testified that the rear weather stripping had continually popped out of place. Further, on one occasion, he testified that he could smell what he believed was mold, possibly from water intruding into the cabin

through the broken window seal. He testified that, after the final repair attempt in September of 2021, he noticed the problem again in July of 2022, so he immediately proceeded to file a Lemon Law case. At the hearing, he highlighted the problem to the Board utilizing photographs that were taken on September 28, 2022, and submitted into evidence. In addition, at the hearing during his testimony and with the Board's permission, he brought his computer's camera into his driveway where his vehicle was parked and was able to show the Board on camera the weather stripping popped out of place on the rear passenger window.

The Manufacturer asserted any nonconformity was corrected within a reasonable number of repair attempts. The Manufacturer's representative testified that he inspected the Consumer's vehicle at the final repair attempt on September 1, 2021. He stated that the window moved up and down properly, he did acknowledge that he noticed the window seal was popped out of place. Consequently, he replaced the window seal, the window regulator and the window glass. He opined that the vehicle had been repaired, referencing the fact that the vehicle had not been presented for repair since the final repair attempt. However, he did notice the window seal was popped out of place when the Consumer demonstrated the problem for the Board on camera during the hearing.

The Board found that the evidence established that the rear passenger window condition manifesting itself with the weather stripping popping out substantially impaired the use and value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The Manufacturer's assertion to the contrary was rejected. Accordingly, 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.**

*George v. Nissan Group of North America, Inc.*, 2022-0179/STP (Fla. NMVAB November 14, 2022)

The Consumer complained of an improper hood alignment in his 2022 Nissan Frontier. He testified that in December 2021, he noticed that a rubber gasket that sat between the hood and the grille was "popping up," which prompted him to take a closer look at the hood of the vehicle. According to him, the hood appeared to sit "slightly higher" on the passenger side than on the driver side of the vehicle. He explained that the authorized service agent attempted to repair the problem during the January 10 through February 5, 2022, repair visit; however, he said there appeared to be "no change" to the hood alignment following that visit. He submitted into evidence a recent photograph of the vehicle that he took in October 2022, asserting that it depicted a slightly larger gap between where the hood and the headlight met on the passenger side than on the driver side. When questioned by the Board, he acknowledged that the problem was only cosmetic, but he believed that the problem affected the value of the vehicle. He also noted that the hood had always opened and closed properly.

The Manufacturer asserted that the complained-of improper hood alignment did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's representative explained that he personally inspected the vehicle on two occasions, January 10, 2022, and July 19, 2022. He stated that during the January 10, 2022, repair visit, the Consumer first pointed out his concern with the vehicle's hood and then they both inspected the hoods of several like vehicles on the lot for comparison purposes. According to him, regarding the Consumer's vehicle, the complained-of gap between where the hood and the headlight met on the passenger side was a little more "spacious" than on the driver side, but it was within the Manufacturer's specifications. He testified that at his directive, for customer satisfaction only, the authorized service agent removed the parts relating to the radiator support core and performed a "micro adjustment" of the hood, during the January 10, 2022, repair visit. He asserted that when he inspected the vehicle a second time on July 19, 2022, the hood again measured within the Manufacturer's allowable specifications and no repairs were deemed necessary.

The Board unanimously found the evidence failed to establish that the improper hood alignment, as complained of by the Consumer, substantially impaired the use, value or safety of the vehicle so as to constitute one or more nonconformities as defined by the statute. Accordingly, the Consumer's case was dismissed.

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

*Omega Marketing and Management LLC and Apostolou v. Jaguar Land Rover North America, LLC, 2022-0166/ORL (Fla. NMVAB October 27, 2022)*

The Consumers complained of a vibration at highway speeds in their 2020 Land Rover Range Rover. One of the Consumers testified that when the vehicle traveled at highway speeds of 60 to 79 miles per hour, the vehicle vibrated. When the vibration occurred, it could be felt by the driver and passenger from the floor, in the seats, and from the steering wheel. Approximately one year after purchasing the vehicle, in August 2021, he purchased larger tires and rims which were installed by Ultimate Auto, which was not a Manufacturer's authorized service agent. He detailed that he continued to experience the vibration following the installation of the bigger tires. Several months later, in an attempt to correct the problem, he purchased factory tires which were installed by the authorized service agent. He contended that the vibration continued to occur and acknowledged that almost all the repair work completed regarding the vibration complaint was not covered by any warranty following the initial installation of the larger after-market tires and rims.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's witness testified that he has test driven and worked on the subject vehicle multiple times. He explained that during a repair visit on November 4, 2021, the Consumers' larger after-market tires and rims that were installed in August 2021 by Ultimate Auto, were removed from the vehicle and four tires and rims that met

factory specifications and were known to be good were put on the vehicle as a test. He further explained that the test tires were road force balanced and he did not experience excessive vibration when he drove the vehicle; as a result, he concluded that any unusual noises or vibrations experienced by the Consumers were due to the larger after-market tires and rims. During a repair visit on November 30, 2021, new factory specified tires and rims were finally purchased by the Consumers and installed on the vehicle in an effort to correct the complained-of problem.

A nonconformity is defined as a “defect or condition that substantially impairs the use, value or safety of a motor vehicle, but does not include a defect or condition that results from an accident, abuse, neglect, modification or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent.” §681.102(15), Fla. Stat. (emphasis added). A “condition” is defined as “a general problem (e.g., vehicle fails to start, vehicle runs hot, etc.) that may be attributable to a defect in more than one part.” Rule 2-30.001(2)(a), F.A.C. Upon consideration of the evidence presented, the Board concluded that the greater weight of the evidence supported the Manufacturer’s contention that the vibration complained of by the Consumers was the result of unauthorized modifications or alterations of the motor vehicle by persons other than the Manufacturer or its authorized service agent. Accordingly, the problem complained of by the Consumers did not constitute a “nonconformity” as defined by the statute and the case was dismissed.

*Acquaviva v. FCA US LLC*, 2022-0126/ORL (Fla. NMVAB December 19, 2022)

The Consumer complained of an engine oil leak at the rear main seal, a brake condition, a clutch condition, the fan always on high and the vehicle overheating at highway speeds in her 2021 Jeep Wrangler Rubicon. When questioned by the Board, the Consumer testified that she has never driven the vehicle off-road or submerged the vehicle in water. She stated that she had driven the vehicle under 20 miles per hour on clay roads and when it rained, the roads had been “loose” and “soupy.” She acknowledged that, on occasion, she had to utilize four-wheel drive on those roads. She also noted that she had a snorkel installed on the vehicle in September 2021 for aesthetic purposes.

The Manufacturer asserted the alleged nonconformities were the result of abuse or neglect of the motor vehicle by persons other than the Manufacturer or its authorized service agent. Regarding the complained-of engine oil leak at the rear main seal; the brake condition; the clutch condition; and the vehicle overheating at highway speeds, the Manufacturer’s witness testified that those problems were all caused by sand, mud and foreign debris built up on those components during off-road driving and then never properly cleaned. He explained that the authorized service agent removed the transmission and inspected the vehicle during the December 20, 2021, repair visit. He utilized photographs submitted into evidence to depict significant sand, mud and debris built up in the brake system, resulting in the inability for the calipers to move or the slide pins to move. He also showed photographs portraying considerable clutch material, sand and mud caked inside the bell housing that housed the clutch assembly, which sat about five inches above the axles. He opined that driving on a clay road, as testified to by the Consumer, would not have caused the complained-of brake and clutch conditions; rather,

he asserted that the vehicle was likely submerged in sandy water up above the axles and then not cleaned properly after the fact. In further support, he used photographs to show water marks under the hood on the hood liner, explaining that the vehicle must have been in water up to the cooling fan area, which then could have sprayed water “all over,” including on the hood liner. With respect to the oil leak complaint, he stated that the rear main seal wore prematurely due to significant sand and debris on the rear main seal, resulting in the oil leak at roughly 4,000 miles and the seal having to be replaced. He testified that an extensive amount of sand wore out the rear main seal again, requiring its replacement a second time only 3,500 miles later. Regarding the vehicle overheating at highway speeds complaint, he testified that the authorized service agent observed, during the June 13, 2022, repair visit, that the radiator and condenser were packed full of mud and dirt, causing no air to flow through the system and the vehicle to overheat. He used photographs to portray mud and dirt encased in the radiator and condenser. He noted that the Consumer declined to have the authorized service agent clean or replace the radiator and condenser during that visit. He concluded that the vehicle was not properly maintained and cleaned by a professional after the vehicle was driven off-road, with fluid or any sort of debris above the axles, as set forth in the Owner’s Manual.

In addition, the Manufacturer’s representative also opined that this was a case of abuse, concurring with the testimony of their witness. He detailed that the oil leak was caused because the vehicle was submerged in sandy water; the water was then sucked up into the rear main seal, wearing a groove in the seal and resulting in the oil leak. He testified that both the Owner’s Manual and the Warranty Guide provide that “if you go into water, you have to inspect, clean and drain your fluids, because that’s how seals work – they will suck in water. If you go and submerge the vehicle, the centrifugal force and the heat exchange difference will suck up into seals and into the engine potentially, into the transfer case, into the transmission, and into the axles.”

A nonconformity is defined as a “defect or condition that substantially impairs the use, value or safety of a motor vehicle, but does not include a defect or condition that results from an accident, abuse, neglect, modification or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent.” §681.102(15), Fla. Stat. (emphasis added). A “condition” is defined as “a general problem (e.g., vehicle fails to start, vehicle runs hot, etc.) that may be attributable to a defect in more than one part.” Rule 2-30.001(2)(a), F.A.C.

Upon consideration of the evidence presented, the Board unanimously found that the greater weight of the evidence supported the Manufacturer’s affirmative defense that the engine oil leak at the rear main seal; the brake condition that manifested itself as the calipers not functioning properly, a squeal noise, and pulling left or right while braking; the clutch condition that manifests itself as clutch chatter and the gears not engaging properly; and the fan always on high and the vehicle overheating at highway speeds, were the result of abuse or neglect of the motor vehicle by persons other than the Manufacturer or its authorized service agent, specifically the vehicle was used in such a manner off-road and then was not properly maintained and cleaned after the fact that resulted in damage to several vehicle components. As such, those complained-of problems did not constitute a “nonconformity” as defined by the statute and the case was dismissed.

**REFUND §681.104(2)(a)(b), F.S.:**

**Collateral Charges §681.102(3), F.S.**

*Giacaman v. Toyota Motor Sales, U.S.A., Inc.*, 2022-0229/FTL (Fla. NMVAB November 28, 2022)

The Consumer's 2020 Toyota Tacoma was declared a "lemon" by the Board. The Consumer requested reimbursement of \$230.57 for a bed cover purchased from *Amazon* as a collateral charge. The Manufacturer objected, stating that they did not reimburse for non-OEM equipment that had been installed by an agent not authorized by them. The Manufacturer's objection was rejected by the Board and the Consumer was awarded the \$230.57 for a bed cover purchased from *Amazon* as a collateral charge.

**MISCELLANEOUS PROCEDURAL ISSUES:**

*Iuteri v. Mitsubishi Motors North America, Inc.*, 2022-0112/JAX (Fla. NMVAB November 22, 2022)

The Manufacturer's Answer was due to be filed August 23, 2022, but was not filed until November 4, 2022. Pursuant to paragraph (8), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, the Manufacturer's Answer must be filed with the Board Administrator no later than 20 days after receipt of the Notice of Arbitration, and affirmative defenses not timely raised in a timely filed Answer cannot be raised at the hearing, unless permitted by the Board. The Manufacturer stated that the Answer was untimely due to errors within the Manufacturer's corporate facilities which delayed notification of receipt of the Request for Arbitration to the appropriate individuals. The Consumer objected to the Board accepting the untimely filed Answer. Upon consideration, a majority of the Board declined to admit the Manufacturer's Answer and the Manufacturer was not permitted to present evidence in support of its defenses. The Manufacturer was permitted to cross-examine the Consumer and her witness.

*Dar v. Mitsubishi Motors North America, Inc.*, 2022-0182/TLH (Fla. NMVAB November 1, 2022)

The Manufacturer's Answer was filed two days before the hearing, on November 7, 2022, while the deadline for filing the Manufacturer's Answer was October 17, 2022. Pursuant to paragraph (8), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, the Manufacturer's Answer must be filed with the Board Administrator no later than 20 days after receipt of the Notice of Arbitration, and affirmative defenses not timely raised in a timely filed Answer cannot be raised at the hearing, unless permitted by the Board. The Manufacturer's representative stated that she was just assigned this case last week, and did not have an explanation why the Answer was submitted late. In response to a Board member question trying to get more information, she stated that Mitsubishi's Customer Affairs Department was short staffed at the moment, which she opined may have contributed to the lateness. The Consumer

objected to the inclusion of the late filed Manufacturer's Answer. Upon consideration, the Board found that the Manufacturer's participation in the hearing would be limited to cross-examining the Consumer and his witness and giving a closing statement.

The Manufacturer's Prehearing Information Sheet was also submitted two days before the hearing, which listed Heather McGee as a witness. Paragraph (10), *Hearings Before the Florida New Motor Vehicle Arbitration Board*, provides that "[t]he original Manufacturer's Prehearing Information Sheet, with any attachments, must be *received* by the Board Administrator no later than 5 days before the hearing, and a copy with all attachments must be *received* by the consumer or their attorney no later than 5 days before the hearing." Paragraph (10) further provides that if the Manufacturer fails to provide the completed Prehearing Information Sheet to the Board Administrator and the opposing party or attorney within the specified time, witnesses may not be allowed to testify unless good cause is shown for the failure to comply. The Board, having already limited Ms. McGee's participation due to the late filed Answer as noted above, did not accept the late filed Manufacturer's Prehearing Information Sheet.