OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2015 - June 2015 (2nd Quarter)

JURISDICTION

Consumer §681.102(4) F.S.

Castro v. American Honda Motor Company, 2015-0002/ORL (Fla. NMVAB April 6, 2015)

At the outset of the hearing, the Manufacturer moved that the case be dismissed, arguing that the Consumer was not qualified for relief because the vehicle was used for commercial purposes.

The Board looked at section 681.102(4), Florida Statutes, which defines a Consumer as:

> the purchaser, other than for purposes of resale, or the lessee, of a motor vehicle primarily used for personal, family, or household purposes; any person to whom such motor vehicle is transferred for the same purposes during the duration of the Lemon Law rights period; and 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 Consumer was entitled by the terms of the Manufacturer's warranty to enforce the obligations of that warranty. The plain language of the third clause in the above-quoted definition does not repeat the use restriction set out in the first two clauses, and thereby makes available the protections of Chapter 681, Florida Statutes, to anyone "entitled … to enforce the obligations of the [manufacturer's] warranty." *See, Results Real Estate, Inc. v. Lazy Days R.V. Center, Inc.*, 505 So. 2d 587, 589 (Fla. 2d DCA 1987). Accordingly, the Manufacturer's motion was denied by the Board.

NONCONFORMITY 681.102(15), F.S. (2014)

Jerome v. Hyundai Motor America, 2014-0438/WPB (Fla. NMVAB April 9, 2015)

The Consumer complained that the air conditioning system in her 2013 Hyundai Veloster was not cooling properly, and that the vehicle was pulling to the side. The Consumer testified that the vehicle was her first new car, and explained that she purchased a new vehicle because, between working and attending school, she was on the road 7 days a week and needed reliable transportation. After replacement of the evaporator in June of 2013, the air conditioning again stopped cooling the vehicle in early July of 2014. The Consumer testified that she took the vehicle to the authorized service agent at that time, but was told there were no rental vehicles available for her, so she had to continue driving the vehicle, in the south Florida heat, until the

July 22-26, 2014 repair attempt. Following that repair attempt, and after being inexplicably told there were no problems found, the Consumer had to continue to drive her vehicle seven days a week, without functioning air conditioning, in the heat of the south Florida summer, until the Manufacturer's post-notice repair of August 27-30, 2015.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle because it has been repaired. The Manufacturer's witness testified that he first became involved with the vehicle at the final repair attempt, at which time he noticed that the recirculation door for the air conditioning system seemed to get stuck in the "open" position, which would allow outside warm air to continuously enter the vehicle, taxing the ability of the air conditioner to cool the vehicle in the south Florida heat. As to the problem with the vehicle pulling, it was discovered that the front toe was out of specification after the initial alignment, and another alignment was performed to correct that problem.

The evidence established that the air conditioner not cooling properly and the vehicle pulling to the side both substantially impaired the use, value or safety 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. The vehicle in this case was out of service for multiple attempts to repair of both the vehicle pulling and the air conditioning not cooling properly nonconformities. However, the Board was particularly troubled that, with regard to the air conditioning nonconformity, the vehicle would be returned to the Consumer unrepaired, with no explanation, forcing her to drive for an extended period of time, 7 days a week, in the extreme heat of south Florida with an air conditioner that did not cool the vehicle. Accordingly, the Consumer was awarded a refund.

Holland v. American Honda Motor Company, 2015-0126/WPB (Fla. NMVAB June 26, 2015)

The Consumer complained of an offensive odor from the air conditioner that smelled like mildew in her 2014 Honda CRV-LX. The Consumer testified that she started noticing a musty odor from the air conditioner a few weeks after purchase. The smell had gone away twice in response to actions taken by the authorized service agent, only to return after a few weeks, whereupon it got progressively worse. The smell had gotten so bad that the Consumer had to open the vehicle's windows in the morning before she started the vehicle.

The Manufacturer asserted that the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. The Manufacturer's witness testified that when the problem was verified at the November 1-11, 2014 repair, even after the application of an ionizer spray at the first repair attempt, they replaced the evaporator core and recharged the unit because that would be where the smell could logically come from. He acknowledged that they do not use electronic sniffers or use any bacterial testing to investigate claims involving vehicle smells. The Manufacturer's representative testified that it was his understanding that the odor would manifest itself after 30-40 minutes of the vehicle sitting. He had the vehicle sit in the sun, but still could not verify the problem.

The Board found that the evidence established that the offensive odor from the air conditioner substantially impaired the use, value and safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. 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.

Murray v. American Honda Motor Company, 2014-0471/FTL (Fla. NMVAB April 16, 2015)

The Consumer asserted that her 2014 Honda Accord LX had imperfections in the paint and body of the vehicle. The Consumer testified that the day after she purchased the vehicle, she could see imperfections in the paint, tiny dents, and tree sap markings on the hood of the vehicle. The Consumer stated that she took the vehicle back to dealer and they cleaned, polished and buffed the car, however some dents and marking continued on the car. The Consumer explained that the Dealer informed her that the environment caused the scratches and that it would paint the hood of the vehicle for her, however she refused as painting the car would decrease its value.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle; no defect or condition existed in the subject vehicle; there had not been a reasonable number of repair attempts afforded to the Manufacturer to correct any existing nonconformity; and the Consumer refused to allow the Manufacturer to repaint the hood of vehicle, an offer which was made as a good will gesture because there was no defect or condition, but was instead a result of environmental causes. The Manufacturer's witness testified that the vehicle had been detailed, and that he could not see anything wrong with the paint. The Manufacturer's representative testified that while he could not see any defects with the paint, in November of 2014, he had observed some spots on the vehicle resulting from tree sap and offered to paint the hood; however, the Consumer refused the offer.

During the hearing, the Board inspected the vehicle. The Consumer attempted to point out all the scratches and tiny dents on the vehicle; however, she could not find all of them. The Manufacturer's representative stated that all he observed was some pollen and mineral deposits on the roof of the vehicle and some stone chips on the bumper. Scratches, swirl marks or spots on the vehicle were not observable unless the Consumer specifically pointed them out.

The Board found that the evidence failed to establish that the imperfections in the paint and body of the vehicle 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.

Prandi v. Ferrari North America Inc., 2014-0392/WPB (Fla. NMVAB May 28, 2015)

The Consumer complained of intermittent electrical issues and an electronic parking brake (EPB) malfunction in his 2013 Ferrari 458 Italia Coupe. The Consumer presented the testimony of Krzysztof Olschewski. Mr. Olschewski testified that he was the driver of the vehicle and the first issue he had with the car was that it would not start; thereafter, various warning lights started appearing on the dashboard. According to Mr. Olschewski, every time the engine light came on, he would take the vehicle to the dealer and the vehicle's computers would be reset, or he would be advised that there was an issue with the battery. On cross examination, Mr. Olschewski acknowledged he had installed several aftermarket accessories in the high performance vehicle,

including a carbon fiber dash board about a year after the vehicle was leased, which had totaled approximately $30,000.00.

The Manufacturer asserted the alleged nonconformity was the result of abuse, neglect or unauthorized modifications or alterations of the motor vehicle by persons other than the manufacturer or its authorized service agent. In support of the Manufacturer's assertions, the Manufacturer's representative testified that the installation of the aftermarket accessories performed by the Consumer had been very invasive to the vehicle, and modifications of that degree would cause problems down the "road" with this, or any, vehicle. It was the Manufacturer's position that the extensive modifications of the vehicle, performed by someone other than the Manufacturer or its authorized service agent, were at least partially the cause of the Consumer's electrical issues. The witness further stated that when the vehicle came in with the traction control light on, the shop performed a diagnostic test by swapping the coils to see which coil was defective. He opined, after reviewing the repair orders, that there had been nothing wrong with the coils; the only explanation for the traction control light coming on was that the coil was swapped prior to being brought to the authorized service agent, resulting in the illumination of the light. As to the EPB malfunction, he testified that the examination of the vehicle showed that the brake shoes were destroyed and/or disintegrated because the emergency brake was applied while the vehicle was being driven; additionally, the "on board computer" printout indicated that the engine was operating at 3600 RPM when the EPB was engaged and/or pressed.

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. The Board found that the evidence established that the intermittent electrical issues were the result of alteration of the vehicle through the installation of aftermarket accessories by the Consumer. The evidence further established that the electronic parking brake (EPB) malfunction was the result of abuse or neglect performed by persons other than the Manufacturer or its authorized service agent. Because the complained-of defects did not constitute a "nonconformity" as defined by the statute, the Consumer was not qualified for repurchase relief under the Lemon Law and the case was dismissed.

REFUND §681.104(2)(a)(b), F.S.:

Incidental Charges §681.102(7), F.S.

Blanco-Lindsay and Lindsay v. Hyundai Motor America, 2015-0107/FTL (Fla. NMVAB May 20, 2015)

The Consumers' 2014 Hyundai Santa Fe Sport vehicle was declared a "lemon" by the Board. The Consumers requested reimbursement of $35.20 for gasoline purchased while driving a vehicle loaned to them by the authorized service agent. The Manufacturer objected to the $35.20 for gasoline, arguing that the Consumer would have had to put gas on her own vehicle. The Board rejected the Manufacturer's objection and awarded the Consumers $35.20 for gasoline purchased while driving a vehicle loaned to them by the authorized service agent.

Reasonable Offset for Use §681.102(19), F.S.

Ireland v. Ford Motor Company, 2015-0070/JAX (Fla. NMVAB April 28, 2015)

The Consumer's vehicle was found to be a lemon, and the Board proceeded to calculate the refund due them. For the purpose of calculating the statutory reasonable offset for use, mileage attributable to the Consumers up to the date of the Better Business Autoline hearing was 47,471 miles (47,751 odometer miles reduced by 51 miles at delivery, and 229 other miles not attributable to the Consumers). The Consumers argued that 9,000 miles should be subtracted from that amount because the Consumers were told by the authorized service agent, on three separate occasions, to put 3,000 miles on the vehicle to allow the transmission to adapt to his driving habits.

The Manufacturer's Attorney argued that the Consumers drove those miles anyway as part of their normal use of the vehicle; therefore, they should still count toward the miles attributable to them.

The Consumers' argument that 9,000 miles should not be attributable to them was rejected by a majority of the Board because the Consumers put those miles on the vehicle anyway through normal use.

MISCELLANEOUS PROCEDURAL ISSUES:

Peters and Kelljchian-Peters v. Ford Motor Company, 2015-0167/FTL (Fla. NMVAB June 17, 2015)

The Manufacturer's Answer was not timely filed. Pursuant to paragraph (8), *Hearings Before the Florida New Vehicle Arbitration Board*, "the Manufacturer's Answer form must be filed with the Board Administrator no later than 20 days after receipt of the Notice of Arbitration," and any affirmative defenses raised in the Manufacturer's untimely Answer "cannot be raised at the hearing, unless permitted by the Board." At the hearing, the Manufacturer's representative offered no excuse for its late filing. Upon consideration, the Board found that because the Manufacturer's Answer was not timely filed, neither its Answer, nor it's subsequently-filed Amended Answer, would be considered. The Manufacturer was not permitted to assert any defenses at the hearing or present the testimony of its witnesses. Counsel for the Manufacturer was permitted to cross-examine the Consumer and his witness, and make a closing statement on behalf of the Manufacturer.

Bell v. Toyota Motor Sales, USA, Inc., 2015-0050/MIA (Fla. NMVAB May 12, 2015)

The Manufacturer sought to introduce the Manufacturer's Prehearing Information Sheet and certain documents which had not been filed in a timely manner. Paragraph (10), Hearings *Before the Florida New Motor Vehicle Arbitration Board,* requires that the 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. The Manufacturer's representative, in attempting to explain the failure to timely file, testified that the documents had been submitted timely to the Consumer and her attorney and that inadvertently the Manufacturer did not send a copy to the Board Administrator. The Consumer objected to the Manufacturer's request, asserting she did not receive the documents. Upon review of the

Manufacturer's documents, the Consumer did not object to the admission of the Motor Vehicle Defect Notification Form and the August 19, 2014 letter from the National Center for Dispute Settlement to the Consumer. Upon consideration, the Board found that the Manufacturer did not submit the documents timely and only admitted those documents to which the Consumer did not object.