OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

October 2019 - December 2019 (4th Quarter)

NONCONFORMITY 681.102(15), F.S.

Reyes v. American Honda Motor Company, 2019-0398/MIA (Fla. NMVAB December 9, 2019)

The Consumer complained of a transmission defect that manifested through jerking and abnormal noises, as well as grinding noise upon start-up, in her 2018 Honda Pilot. The Consumer testified that at approximately 5,000 miles, she began to experience intermittent jerking and abnormal noises coming from the transmission. She explained that she initially experienced a "mashing of the gears between 3rd and 4th" as if the vehicle was struggling to switch gears, but was also having problems between the 6th and 7th gears. She described one occasion in March 2019, while driving at a steady speed of 45 miles per hour, when the vehicle suddenly jerked her back as if someone had stepped on the brake, and she proceeded to hear an unusual noise three times in succession. She also testified that she heard an intermittent grinding noise upon start-up and stated that the noise stopped once the engine started running. She said that after the transmission was replaced in March 2019, the problems seemed to improve for about a month but were now occurring more frequently, as they did prior to the replacement of the transmission.

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 he inspected the vehicle in December 2018 and again in July 2019. He explained that the Consumer's vehicle had a gear reduction starter, which had an inherent noise upon start-up, and attributed the complaint of a noise upon start-up to the gear reduction starter, despite the Consumer's testimony that the complaint was intermittent. He explained that the vehicle's nine-speed transmission may cause the Consumer to believe that the vehicle had a harsher shift than the Consumer's former six-speed 2008 Honda Pilot, because a nine-speed transmission shifted more frequently at different shift points and had a firmer shift to promote the longevity and durability of the clutch mechanism. He also explained that the Consumer's transmission had adaptive learning, which tailored the vehicle's shift patterns to the primary driver but can take up to 1,000 miles of driving for the transmission to fully adapt to the driver. He admitted that in December 2018, three months before the transmission was replaced by the Manufacturer, he didn't detect any problems with the transmission during his test drive of the vehicle. He said that he assumed an internal failure of the transmission led Honda Engineering Techline to make the decision to replace the transmission, which was performed in March 2019. During a test drive at the final repair attempt in July 2019, he alleged that he wasn't able to duplicate the Consumer's complaints regarding the transmission but proceeded to perform the intensive process of enabling the transmission to reacquire its adaptive learning values. He stated that he compared the

Consumer's vehicle to a like model and found the Consumer's vehicle to be operating in the same manner as other nine-speed transmissions. He confirmed that he observed "normal nine-speed automatic operation, shift quality, characteristics and noises" in the Consumer's vehicle and concluded that the vehicle was operating as designed.

The Board found that the evidence established that the transmission defect that manifested through jerking and abnormal noises 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. A majority of the Board found that the evidence established that the grinding noise upon start-up substantially impaired the value of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. The Manufacturer's assertions to the contrary were rejected. Accordingly, the Consumer was awarded a refund.

Petgrave and Bogle v. Toyota Motor Sales, U.S.A., Inc., 2019-0279/FTL (Fla. NMVAB October 28, 2019)

The Consumers complained of excessive heat in the gas pedal area of their 2019 Toyota Highlander. One of the Consumers testified that since February 2019, after driving the vehicle for 15 to 30 minutes, she felt a gradually-increasing heat sensation on her right foot when her right foot was on the gas pedal. She explained that the heat sensation felt like hot air blowing directly onto her right foot. She also explained that it did not matter whether the air conditioner was on or off, she would continue to feel the heat sensation on her right foot until she took her foot off the gas pedal. She stated that the heat sensation would return when she returned her right foot to the gas pedal. She stated that the problem substantially impaired the use, value, and safety of the vehicle because she must periodically take her right foot off the gas pedal to cool it off when she drove long distances, which could be distracting and dangerous. The second Consumer testified that after his wife described the problem to him, he drove the vehicle and confirmed the problem.

The Board found that the evidence established that the excessive heat in the gas pedal area 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 Consumers were awarded 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.

Yarsin v. BMW of North America, LLC, 2019-0334/JAX (Fla. NMVAB October 21, 2019)

The Consumers complained of a malfunction of the passenger blind spot monitoring warning system in their 2019 BMW X3. The Consumer testified that he first noticed a problem with the blind spot monitoring system during a road trip to Miami. While driving on the highway, he noticed multiple occasions when a vehicle would pass him on the passenger side, at

times going much faster than his vehicle, but the warning light on the side view mirror did not illuminate to inform him of the vehicle in his blind spot. He explained that the problem was intermittent and had not been repaired. He added that the service manager was able to duplicate that problem twice during a test drive of the vehicle at the July 2, 2019, repair visit, and noted that fact on the repair order. He added that one of the critical reasons he purchased the subject vehicle was for the safety technology.

The vehicle was presented to the Manufacturer's authorized service agent for repair of the malfunction of the passenger blind spot monitoring warning system on June 21, 2019 and July 2, 2019. No repairs had ever been performed to the blind spot monitoring system. The Manufacturer stipulated that it was afforded a final opportunity to repair the vehicle after receipt of written notification from the Consumers. On July 9, 2019, the vehicle was presented to the Manufacturer's designated repair facility for the final repair attempt. At that time, the vehicle was test driven. The malfunction of the passenger blind spot monitoring warning system continued to exist after the final repair attempt.

A majority of the Board found that the evidence established that the malfunction of the passenger blind spot monitoring warning system substantially impaired the safety of the vehicle, thereby constituting one or more nonconformities as defined by the statute and the applicable rule. While section 681.104(3), Florida Statutes creates a presumption of a reasonable number of attempts, the statute does not specifically define how many attempts are required before it can be concluded that a Manufacturer has had a reasonable number. Nor is a consumer required to prove the elements of the statutory presumption in order to qualify for relief under the Lemon Law. The evidence established that the malfunction of the passenger blind spot monitoring warning system was presented for repair to the Manufacturer's authorized service agent on two occasions, June 21, 2019, and July 2, 2019, prior to the Manufacturer's final repair attempt. The malfunction of the passenger blind spot monitoring warning system continued to exist after the final repair attempt. Accordingly, under the circumstances of this case, in light of the fact that the nonconformity was a safety impairment and was explicitly examined by the Manufacturer's representative at the final repair attempt, a majority of the Board found that the Manufacturer failed to correct that nonconformity after a reasonable number of attempts. The Manufacturer having failed to conform the motor vehicle to the warranty within a reasonable number of attempts, the Consumers were entitled to the requested relief under the Lemon Law and a refund was awarded.

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.

Hartwig v. Toyota Motor Sales, U.S.A., Inc., 2019-0315/FTL (Fla. NMVAB November 12, 2019)

The Consumer complained of a rattle noise while driving her 2017 Toyota Camry SE. The Consumer testified that since April 2018, she intermittently heard a rattle noise when she

drove the vehicle. She explained that the rattle noise was "not very loud," but that she heard the noise and it bothered her. The Consumer stated that a technician from the authorized service agent test drove the vehicle several times with her present, and that she identified the rattle noise several times for the technician. She acknowledged that during each test drive, the rattle noise could usually only be duplicated when the vehicle drove over bumps.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value, or safety of the vehicle. The Manufacturer's representative testified that he was familiar with the vehicle and that he was present for the final repair attempt. He explained that he had test driven the vehicle with the Consumer present, several times and for over 100 miles. Like the Consumer, he stated that during the test drives, the Consumer only identified the rattle noise to him each time the vehicle drove over bumps or on uneven surfaces. He acknowledged that he was able to hear the rattle noise when the Consumer identified it to him but described the noise as "minimal" and a normal characteristic of the vehicle. He explained that the vehicle's body was designed to "flex" when it drives over bumps or on uneven surfaces, and that the noise complained of by the Consumer was the sound of moving components. Based on his inspection and test drives of the vehicle and after reviewing the repair orders, he concluded that the vehicle was operating as designed.

During the hearing, the Board inspected and test drove the vehicle. The Board test drove the vehicle for four miles, on different road surfaces to duplicate the Consumer's complaint. During the test drive, the Board agreed that they heard a noise when driving the vehicle over bumps and on uneven surfaces, and that the noise they heard was "not substantial" and was not "abnormal."

The Board found that the evidence failed to establish that the rattle noise while driving 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.

REFUND §681.104(2)(a)(b), F.S.:

Johnson and Lupica v. Kia Motors America, Inc., 2019-0199/FTM (Fla. NMVAB October 10, 2019)

The Consumers' 2017 Kia Cadenza was declared a "Lemon" by the Board. In its Attachment to the written Answer, the Manufacturer asserted that, if the Board were to find in favor of the Consumers, it was "entitled to have a set off [sic] the amount already paid to consumers…." According to the Manufacturer's letter to the Consumers, dated February 28, 2019, the Manufacturer offered the Consumers $5,000.00 "as a one-time goodwill gesture," which the Consumers accepted, and a check in the amount of $5,000.00, dated April 3, 2019, was issued to the Consumers. The Manufacturer's request that it receive an additional "set off" of the $5,000.00 amount previously paid to the Consumers was denied by the Board.

Blumenson v. BMW of North America, LLC, 2019-0280/STP (Fla. NMVAB October 11, 2019)

The Consumer's 2018 BMW 540i was declared a "Lemon" by the Board. In order to lease the subject vehicle, the Consumer agreed to contribute $5,000.00 at lease-signing, and additionally paid the first month's lease payment in the amount of $721.67. In return, the leasing dealership agreed to waive any payment due for excess mileage on a prior lease. Subsequently, it was explained to the Consumer that "he would get a better price for the excess mileage" than the dealership would, so the Consumer was asked if he would pay $1,924.65 to BMW Financial Services in return for a credit toward the amount due at lease-signing on the subject vehicle. The effect of the agreement brought the amount due from the Consumer at lease-signing down to $3,797.12 (plus the first month's lease payment). The Consumer accepted the dealership's offer. At the hearing, the Consumer explained that he "saw no downside to the deal at that time" because it still resulted in him paying the $5,000.00 in cash that he had agreed to pay to lease the subject vehicle, and asserted he should receive credit for the full $5,000.00 paid at the time of lease-signing. The Manufacturer objected to a refund of the full $5,000.00, asserting that $1,924.65 of that amount constituted payment for excess mileage on a different vehicle. The Manufacturer's objection to including the $1,924.65 paid by the Consumer to BMW Financial at the request of the dealership was denied by the Board. Accordingly, the Consumer was entitled to a refund of $5,000.00 for the amount paid at lease-signing.

Incidental Charges §681.102(7), F.S.

Mathews v. Aston Martin Lagonda of North America, Inc., 2019-0256/WPB (Fla. NMVAB October 30, 2019)

The Consumer's 2017 Aston Martin V12 Vantage was declared a "Lemon" by the Board. The Consumer requested reimbursement of $600.00 spent to obtain an expert witness for the purpose of evaluating the vehicle and writing a report, as an incidental charge. The Manufacturer objected. Over the Manufacturer's objection, the Board awarded the Consumer the $600.00 spent to obtain an expert witness for the purpose of evaluating the vehicle and writing a report. §681.102(7), Fla. Stat.

Collateral Charges §681.102(3), F.S.

Melendez v. Jaguar Land Rover North America, LLC., 2019-0358/STP (Fla. NMVAB December 12, 2019)

The Consumer's 2018 Land Rover Discovery was declared a "Lemon" by the Board. The Consumer requested reimbursement of the following as collateral charges: $13.89 for an adhesive cell phone holder; $11.95 for an adhesive magnet for the dash cam; $5.99 for an adhesive magnet for the cell phone holder; and $10.33 for a second adhesive magnet for the dash cam that the Consumer purchased after the windshield was replaced, which would have to be left on the vehicle. The Manufacturer objected to those amounts as being "optional, aftermarket items that were elected to be installed in the vehicle," asserting the items "were not dealer-purchased and installed," and also that the Manufacturer would have to remove them and clean the

dashboard. The Manufacturer's objections to reimbursement for those amounts were denied by the Board, and the requested costs were awarded as reasonable collateral charges. §681.102(3), Fla. Stat.

MISCELLANEOUS PROCEDURAL ISSUES:

Johnson and Lupica v. Kia Motors America, Inc., 2019-0199/FTM (Fla. NMVAB October 10, 2019)

In an attachment to its written Answer, the Manufacturer asserted that the Consumers' claims were barred because the Consumers had signed a settlement agreement and release on or about March 5, 2019, "wherein the Consumers released Kia Motors America, Inc. ("KMA") and related entities from all past, present, future, known and known [sic] disputes regarding the Subject Vehicle." The Board treated the Manufacturer's assertion as a "Motion to Dismiss." Relying on the plain language of section 681.115, Florida Statutes, which provides that "any agreement entered into by a consumer that waives, limits, or disclaims the rights set forth in this chapter . . . is void as contrary to public policy," the Board found that the Consumers were not barred from bringing this case before the New Motor Vehicle Arbitration Board. Therefore, the Board denied the "Motion to Dismiss," and the Consumers proceeded with their case.