OFFICE OF THE ATTORNEY GENERAL
FLORIDA NEW MOTOR VEHICLE ARBITRATION BOARD

QUARTERLY CASE SUMMARIES

April 2022 - June 2022 (2nd Quarter)

NONCONFORMITY 681.102(15), F.S.

Averhoff-Laurenceau v. Nissan Motor Corporation, USA, 2021-0459/FTL (Fla. NMVAB May 13, 2022)

The Consumer complained of a malfunction of the backup camera in her 2019 Nissan Pathfinder. The Consumer testified that when she put the vehicle into reverse, the backup camera would intermittently fail to operate, with the display being either completely black, or black with only the "guide lines" appearing. At the hearing, she played numerous videos for the Board demonstrating the malfunction of the backup camera. She added that she had three children utilizing car seats in the vehicle, and the car seats could obstruct her view of the back of the vehicle; consequently, she relied on the backup camera to be functional so she could safely drive in reverse.

The Manufacturer asserted the alleged defect did not substantially impair the use, value or safety of the vehicle, the Manufacturer was not provided a reasonable number of attempts for repair, and the alleged defect was the result of an accident by persons other than the Manufacturer or its authorized service agent. The Manufacturer's representative testified that he inspected the Consumer's vehicle on October 13, 2021, and added that his inspection did not find any connection or corrosion problems with the backup camera. He further testified that, upon inspection, he noticed some damage to the back of the vehicle, "liked the vehicle had backed into something" or vice versa. While he acknowledged that he did not find any evidence of any physical external damage to the backup camera, he opined there could be internal damage to the camera as a result of the damage. He acknowledged, however, that he could not prove that the damage was causing any backup camera problems, and further recognized that the Manufacturer did not raise that the alleged defect was caused by an accident by persons other than the Manufacturer or its authorized service agent as part of their defense on the Manufacturer's Answer.

The Board found that the evidence established that the malfunction of the backup camera 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. The Manufacturer's assertion to the contrary was rejected. Accordingly, the Consumer was awarded a replacement vehicle.

Erlick v. Toyota Motor Sales, USA, Inc., 2021-0417/WPB (Fla. NMVAB May 17, 2022)

The Consumer complained of a no-start condition in her 2020 Lexus ES350. The Consumer's witness testified that when she attempted to start the vehicle on August 4, 2020, the vehicle failed to start. She explained that the vehicle was towed to the dealership, where she was provided with a loaner vehicle. She said that on that occasion, the dealership replaced the battery. She testified that when she attempted to start the vehicle on February 16, 2021, the vehicle again failed to start. She explained that after jump starting the vehicle, she was able to drive the vehicle to the dealership. The Consumer alleged that after she took the vehicle to the dealership for repair on February 16, 2021, no one from the dealership ever called her to inform her that the vehicle was repaired and ready for pick up. She explained that she called the Manufacturer several times to request that a technical specialist inspect the vehicle to determine if the vehicle had been repaired, but never received any confirmation that an inspection had been performed. She stated that she told the Manufacturer that she would not pick up the vehicle from the dealership until a technical specialist inspected the vehicle and confirmed that the vehicle had been repaired. The Consumer's documentation revealed that the Manufacturer first notified the Consumer that the vehicle had been repaired in a letter sent to the Consumer on March 31, 2021. She stated that she purchased the vehicle for her 92-year-old mother and said that her mother stopped driving the vehicle when the no start condition occurred for the first time in August 2020.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle; and the alleged nonconformity was repaired within a reasonable number of repair attempts. The Manufacturer's witness testified that at the second repair attempt in February 2021, the dealership determined that a Technical Service Information Bulletin (TSIB) should be performed on the Telematics Control Module (TCM) to correct poor programing on the vehicle installed by the factory. He alleged that the flash update was performed on the TCM on February 17, 2021, which repaired the no start condition. He asserted that he instructed the service advisor to call the Consumer on February 17, 2021, to advise her to pick up the vehicle, but could not provide any documentation to support his contention that the Consumer was contacted. He also stated that he spoke with the Consumer one week later, advising her to pick up the vehicle. He claimed that she refused to pick up her vehicle, although he could not provide any documentation to support his claim. He also alleged that he was not aware of any inspection by a technical specialist ever taking place at his dealership. The Manufacturer's representative testified that due to COVID restrictions, he performed a virtual inspection on the vehicle at the dealership on March 23, 2021. He stated that as part of his inspection, he instructed a dealership employee to start the vehicle and confirm that the vehicle was functioning correctly. In contrast to the prior witness's testimony that a technical specialist had never inspected the vehicle at the dealership, he alleged that the witness had taken part in his virtual inspection on March 23, 2021, by turning on the vehicle. He stated that after performing his virtual inspection, he concluded that the vehicle was functioning correctly. He admitted that he did not know whether the Consumer was informed that an inspection had taken place or whether the Consumer had received a copy of the report from the inspection. He testified that he performed a physical inspection on the vehicle on September 13, 2021. He explained that during his physical inspection, he verified that the flash update had been performed on the vehicle and test drove the vehicle, concluding that the vehicle was operating as designed.

The Board found that the evidence established that the no-start condition 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.

REASONABLE NUMBER OF ATTEMPTS §681.104, F.S.

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

Gallipoli v. BMW of North America, LLC, 2021-0318/WPB (Fla. NMVAB April 19, 2022)

The Consumer complained of a restraint system malfunction in her 2020 BMW XM3 Competition. The Consumer testified that since March 2020, the message "passenger restraint malfunction" intermittently appeared on the vehicle's display screen. Additionally, she testified that since October 2020, the message "driver restraint malfunction" intermittently appeared on the vehicle's display screen. She stated that when either message appeared on the vehicle's display screen, the messages were accompanied with a "bring vehicle to dealership" message.

The vehicle was out of service by reason of repair on March 18-19, 2020 (2 days); October 19-21, 2020 (3 days); November 12-17, 2020 (6 days); April 14-22, 2021 (9 days); May 12-June 30, 2021 (50 days); and November 4-8, 2021 (5 days), for a total of 75 cumulative out-of-service days.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle; and to the extent that the servicing at the dealership was delayed, it was beyond the control of the dealership and/or BMWNA because it was a result of Covid-19. With regard to the restraint system malfunction, the Manufacturer's representative testified that during his inspection of the vehicle in May 2021, he discovered loose wire connector pins in the driver's seat harness that connect to the seat belt buckle module. He stated that the loose wire connector pins disrupted the communication between the driver's seat module, the seat belt buckle module, and the air bag control unit, which triggered the restraint system malfunction messages. He explained that, in the event of a low impact collision, when the driver was buckled, the safety system was programmed to "drop the seat belt 40 millimeters" and tighten the restraint. He explained that the lack of communication between the modules consequently caused the safety system to fail and operate as if the driver's seat belt was not buckled. Additionally, he acknowledged that the technician verified the Consumer's complaint and performed repairs in March 2020, October 2020, November 2020 and April 2021. However, he stated that it was not until the May 2021, repair attempt that he discovered the loose wire connector pins in the driver's seat harness. He explained that after the driver's seat harness was replaced, the vehicle was operating as designed. The Manufacturer also asserted that to the extent that there were repair delays at the dealership, it was beyond the control of the dealership and/or the Manufacturer due to the Covid-19 global pandemic. The Manufacturer's witness explained that at the May 2021, repair attempt, upon ordering the driver's seat harness, it took 16 days to be delivered to the dealership. Additionally, at the May 2021, repair attempt, the

dealership determined that one of the control units controlling the instrument display had to be replaced and upon ordering the control unit, it took "approximately" 13 days to be delivered to the dealership. He asserted that the shipping delays for both the driver's seat harness and the control unit were a result of the Covid-19 global pandemic. However, the witness was unable to provide information about pre-pandemic shipping times, and indicated that he assumed delays in shipping were the result of Covid.

The Board found that the evidence established that the motor vehicle was out of service for repair of one or more nonconformities for a cumulative total of 30 or more days. After 15 or more days out of service, the required written notification was sent to the Manufacturer. Following receipt of the notification, the Manufacturer or its service agent had the opportunity to inspect or repair the vehicle. The Manufacturer argued that the May 2021, repair attempt was affected by the Covid-19 global pandemic, that the days attributable to that repair attempt should not count against the Manufacturer, and that the nonconformity should be found to have been corrected within a reasonable number of repair attempts. However, the Manufacturer's argument failed to demonstrate, with specificity, *how* the Covid-19 pandemic affected the May 2021, repair attempt, and specifically *how* the pandemic delayed the repairs performed on the vehicle during that repair attempt. The Manufacturer's argument was unanimously rejected by the Board. Accordingly, it was presumed that a reasonable number of attempts had been undertaken to conform the motor vehicle to the warranty and the Consumer was awarded a replacement vehicle.

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.

Kidd v. Kia Motors America, Inc., 2021-0335/WPB (Fla. NMVAB April 1, 2022)

The Consumer complained of a hesitation upon acceleration in three of four transmission modes of his 2019 Kia Sorento. The Consumer testified that a few weeks after delivery, he noticed that when he accelerated, he would experience a "hesitation" or "jerking." He explained that the hesitation did not occur when in sport mode, but he preferred not to drive in sport mode because the gas mileage was not as efficient as when driving in the other three transmission modes. He detailed that despite the annoyance that the hesitation has been, it had not been a safety concern for him. He further detailed that he had driven several other Kia motor vehicles and had the same experience in all but one vehicle. He acknowledged that the vehicle had been reliable, and only one software update was performed by the authorized service agent.

The Manufacturer asserted the alleged nonconformity did not substantially impair the use, value or safety of the motor vehicle. Regarding the complained-of vehicle hesitation upon acceleration in three of four transmission modes, the Manufacturer's representative testified that no repairs were performed for the complained-of hesitation because no diagnostic trouble codes were retrieved, and no malfunction indicator lamps had illuminated. He also checked to see if there were any technical service bulletins related to the Consumer's complaint and there were

none. He explained that the jerking or hesitating that the Consumer feels was a normal characteristic resulting from the vehicle's 8-speed transmission. He noted that the 8-speed transmission was designed to maximize fuel economy. He stated that with more gears, the driver may feel the shifting, depending upon driving style and concluded that the Consumer's vehicle was operating as designed.

The Board found that the evidence failed to establish that the vehicle hesitating upon acceleration in three of four transmission modes, 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.

Sessions v. Hyundai Motor America, 2021-0389/MIA (Fla. NMVAB April 5, 2022)

The Consumer complained of a knocking noise condition emitting from the engine area that resulted in a seized engine in her 2020 Hyundai Tucson. The Consumer testified that on June 26, 2021, one year after purchase, she heard a "knocking sound from under the hood"; as a result, she stopped driving the vehicle and had the vehicle towed that day to the authorized service agent, Kendall Hyundai, for repair. She stated that she was told by Kendall Hyundai that the "oil needed changing"; that the vehicle needed a new engine; and that the Manufacturer would not replace the engine under warranty. She explained that she did not authorize the performance of any repairs, asserting that the engine should be replaced under warranty since it was a "new vehicle." She said that the vehicle remained at Kendall Hyundai until July 22, 2021, when she had the vehicle towed from Kendall Hyundai to another authorized service agent, Doral Hyundai, for a second opinion. Doral Hyundai similarly advised her that the engine needed replacement and would not be replaced under warranty. The vehicle remained at Doral Hyundai, without undergoing any repairs, until she had the vehicle towed to her house on September 8, 2021. She explained that the vehicle remained undriveable and was presently parked in front of her house. When questioned by the Board as to whether regular oil changes had been performed on the vehicle, she said, "I took it in for service," but she did not specify when any oil changes had been performed. She added that the vehicle was only taken to Kendall Hyundai for service, and that she submitted into evidence all of the repair orders in her possession. For the one-year time period prior to experiencing the complained-of noise in June of 2021, she only submitted into evidence two repair orders, dated December 23, 2020, and February 15, 2021. She acknowledged that neither of these repair orders reference the performance of an oil change, only that the authorized service agent performed repairs concerning an unrelated recall. When questioned further by the Board as to why oil changes were not performed at either of these visits, she recollected that she was told by the authorized service agent that it was "not yet time for an oil change."

The Manufacturer asserted "a repurchase or replacement is not warranted, due to the vehicle's lack of maintenance." The Manufacturer's representative stated that that he reviewed all of the repair orders concerning the Consumer's vehicle in preparation for the hearing. He testified that the oil was only changed in the Consumer's vehicle on one occasion, on September 30, 2020, when the vehicle had 7,145 miles, pursuant to a Kendall Hyundai repair order that was not submitted into evidence by either party. He then explained that the vehicle had 25,827 miles

when the Consumer had the vehicle towed to Kendall Hyundai for the complained-of noise, as set forth in the June of 2021 repair order. He asserted that the Consumer had driven over 18,000 miles from the first and only oil change until she experienced the complained-of noise. He testified that the oil should be changed in the Consumer's vehicle every 7,500 miles, in accordance with the Manufacturer's recommended service intervals; as a result, the Consumer missed two recommended oil changes. He explained that, when the authorized service agent inspected the vehicle for the complained-of noise, the "engine seized" and they found evidence of "sludge in the engine," although no photographs were submitted into evidence. He said that due to evidence of "lack of maintenance," the Manufacturer determined that it would not replace the engine under warranty. He concluded that the complained-of noise was the result of neglect on the part of the Consumer in failing to have regular oil changes performed.

The Board unanimously found, based on the evidence presented, that the complained-of knocking noise condition emitting from the engine area that resulted in a seized engine, was the result of neglect, specifically a failure to perform regular oil changes on the vehicle. The complained-of condition did not constitute a "nonconformity" as defined by the statute; therefore, 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.

Gomes v. Mercedes-Benz USA, LLC, 2021-0335/WPB (Fla. NMVAB April 1, 2022)

The Consumer's 2019 Mercedes-Benz C300 was declared a "lemon" by the Board. The Manufacturer stipulated that a deformed seal popping out constituted a nonconformity and that the vehicle was out of service by reason of repair or 30 or more days. The Consumer requested reimbursement of $2,769.93 for Uber costs as an incidental charge. The Manufacturer objected to the request for Uber costs, arguing that the reimbursement of Uber costs should be limited to the number of days the vehicle was out of service for the stipulated nonconformity. The Board found that the award shall include reimbursement of $169.43 for Uber costs, as a reasonable incidental charge. The Consumer's request for reimbursement of $2,769.93 for Uber costs was denied as to those days when the vehicle was not out of service for the stipulated nonconformity. §681.102(7), Fla. Stat.

Tennant v. Jaguar Land Rover North America, LLC, 2021-0293/FTM (Fla. NMVAB April 20, 2022)

The Consumer's 2020 Land Rover Range Rover was declared a "lemon" by the Board. The Consumer requested reimbursement of $1,050.00 for towing charges incurred by the Consumer in order to have her mobile women's clothing boutique trailer towed to and from previously-scheduled events while the vehicle was at the authorized service agent for repair, as an incidental charge. The Consumer explained that the vehicle had a factory-installed hitch, which she would utilize to tow the trailer as needed; however, none of the rental vehicles provided to

her, when the vehicle was subject to repair, had a hitch. She testified, and the documents admitted into evidence supported, that each of the towing dates were corroborated by a repair order for the same period. She stated that she paid cash for these towing charges and did not have any cash receipts. The Manufacturer objected to the reimbursement of the towing charges, arguing that the charges were incurred by the Consumer's business and not by the Consumer, and that it could have been the Consumer's business that actually paid the charges. When questioned further by the Board, the Consumer testified that she personally paid these towing charges, and that they were not expenses incurred by her business. The Board found that the replacement award shall include reimbursement of $1,050.00 for towing charges incurred by the Consumer to have her mobile women's clothing boutique trailer towed to and from previously-scheduled events while the vehicle, which has a factory-installed hitch and would ordinarily be utilized to tow the trailer as needed, was at the authorized service agent for repair, as an incidental charge. §681.102(7), Fla. Stat. The Manufacturer's objection to reimbursement for the incidental charge was denied.

Collateral Charges §681.102(3), F.S.

Gomes v. Mercedes-Benz USA, LLC, 2021-0335/WPB (Fla. NMVAB April 1, 2022)

The Consumer's 2019 Mercedes-Benz C300 was declared a "lemon" by the Board. The Consumer requested reimbursement of $1,500.00 for broker fees to lease the vehicle at the agreed upon value; $1,600.00 for ceramic coating; and $200.00 for a sealant on the convertible roof, as collateral charges. The Manufacturer objected to the documentation reflecting the costs for the ceramic coating and the sealant on the convertible roof that was provided by the Consumer. The Board found that the award shall include reimbursement of $1,600.00 for a ceramic coating and $200.00 for a sealant on the convertible roof, as reasonable collateral charges. §681.102(3), Fla. Stat. The Consumer's request for reimbursement of $1,500.00 for broker fees to lease the vehicle at the agreed upon value was denied by the Board.

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

Baldini v. Tesla Motors, INC, 2021-0265/WPB (Fla. NMVAB May 17, 2022)

The base selling/sale price of the vehicle, for the purpose of calculating the statutory reasonable offset for use, was $91,790.00. Mileage attributable to the Consumer up to the date of the New Motor Vehicle Arbitration Board hearing was 10,406 miles (11,247 odometer miles reduced by 150 miles at delivery, and 691 other miles not attributable to the Consumer). Application of the statutory formula resulted in a reasonable offset for use of $7,959.72. Although Tesla did not have a Manufacturer sponsored state-certified informal dispute resolution procedure, the Consumer took part in the National Center for Dispute Settlement (NCDS) program, which the Manufacturer's warranty book stated was a requirement. The Manufacturer objected to the Board's use of the mileage, as of the NCDS hearing on June 1, 2021, to calculate the reasonable offset for use, and argued that if the Board utilized the mileage from the NCDS hearing to calculate the reasonable offset for use, any repair attempts performed on the subject vehicle after June 1, 2021, should not be considered by the Board as a day out of service. The Board rejected the Manufacturer's argument.

MISCELLANEOUS PROCEDURAL ISSUES:

Kidd v. Kia Motors America, Inc., 2021-0335/WPB (Fla. NMVAB April 1, 2022)

The Manufacturer argued that the Consumer's case should be dismissed because it was not timely filed with the Florida New Motor Vehicle Arbitration Board. Section 681.109(4), Florida Statutes, states that "[a] consumer must request arbitration before the board with respect to a claim arising during the Lemon Law rights period no later than 60 days after the expiration of the Lemon Law rights period, or within 30 days after the final action of a certified procedure, whichever date occurs later." The Lemon Law rights period is defined under 681.102(9), Florida Statutes, as "the period ending 24 months after the date of the original delivery of a motor vehicle to a consumer." In order to determine whether the Consumer's claim was timely filed, the Board must first calculate the Lemon Law rights period. In this case, the date of delivery of the subject vehicle took place on Thursday, January 31, 2019. The Board looked to Rule 2.514, Florida Rules of Judicial Administration, for instructions on how to calculate the start of the Lemon Law rights period. To first determine "the period ending 24 months after the date of the original delivery of a motor vehicle to a consumer," Rule 2.514(a)(1)(A), Florida Rules of Judicial Administration, provides that one should "begin counting from the next day that is not a Saturday, Sunday, or legal holiday." Because the date of original delivery was Thursday, January 31, 2019, the next day that is "not a Saturday, Sunday, or legal holiday" on which to begin the count is Friday, February 1, 2019. To then determine the expiration of the Lemon Law rights period, the Board looked to *Board Emergency Order 20-002*, entered on March 20, 2020, but retroactive to March 9, 2020, which states "all time frames established by Chapter 681, Florida Statutes, and the rules promulgated thereunder, as they relate to the substantive and procedural requirements of the Lemon Law, shall be and are hereby STAYED, SUSPENDED and TOLLED." The Board then looked to *Board Emergency Order 20-006*, entered on October 27, 2020, which states "[a]s of November 11, 2020, the suspension of the time frames established by Chapter 681, Florida Statutes, will cease. All time frames previously suspended will resume running on November 11, 2020." Applying the two Board Emergency Orders, the Lemon Law rights period was stayed and suspended on March 9, 2020, until it resumed on November 11, 2020, which is a 248-day period. As a result, the Consumer's Lemon Law rights period did not end on January 31, 2021; rather, it was extended 248 days from January 31, 2021, until October 6, 2021. Accordingly, the Consumer's Request for Arbitration, filed on June 15, 2021, during the Lemon Law rights period, was timely filed. The Manufacturer's assertion to the contrary was rejected.

Atkins v. Ford Motor Company, 2021-0408/ORL (Fla. NMVAB May 3, 2022)

The Manufacturer raised several affirmative defenses in its Answer, including that the Consumer's case should be dismissed because it was not timely filed with the Florida New Motor Vehicle Arbitration Board. Section 681.109(4), Florida Statutes, states that "[a] consumer must request arbitration before the board with respect to a claim arising during the Lemon Law rights period no later than 60 days after the expiration of the Lemon Law rights period, or within 30 days after the final action of a certified procedure, whichever date occurs later." The Lemon Law rights period is defined under 681.102(9), Florida Statutes, as "the period ending 24 months after the date of the original delivery of a motor vehicle to a consumer." In order to determine whether the Consumer's claim was timely filed, the Board must first calculate the Lemon Law rights period. In this case, the date of delivery of the subject vehicle took place on Thursday, December

13, 2018. The Board looked to Rule 2.514, Florida Rules of Judicial Administration, for instructions on how to calculate the start of the Lemon Law rights period. To first determine "the period ending 24 months after the date of the original delivery of a motor vehicle to a consumer," Rule 2.514(a)(1)(A), Florida Rules of Judicial Administration, provides that one should "begin counting from the next day that is not a Saturday, Sunday, or legal holiday." Because the date of original delivery was Thursday, December 13, 2018, the next day that is "not a Saturday, Sunday, or legal holiday" on which to begin the count is Friday, December 14, 2018. To then determine the expiration of the Lemon Law rights period, the Board must also look to *Board Emergency Order 20-002*, entered on March 20, 2020, but retroactive to March 9, 2020, which states "all time frames established by Chapter 681, Florida Statutes, and the rules promulgated thereunder, as they relate to the substantive and procedural requirements of the Lemon Law, shall be and are hereby STAYED, SUSPENDED and TOLLED." The Board then looked to *Board Emergency Order 20-006*, entered on October 27, 2020, which states "[a]s of November 11, 2020, the suspension of the time frames established by Chapter 681, Florida Statutes, will cease. All time frames previously suspended will resume running on November 11, 2020." Applying the two Board Emergency Orders, the Lemon Law rights period was stayed and suspended on March 9, 2020, until it resumed on November 11, 2020, which is a 248-day period. As a result, the Consumer's Lemon Law rights period did not end on December 13, 2020; rather, it was extended 248 days from December 13, 2020, until August 19, 2021. With this information, to determine the timeliness of the Consumers' filing, section 681.109(1), Florida Statutes, states "If a manufacturer has a certified procedure, a consumer claim arising during the Lemon Law rights period must be filed with the certified procedure no later than 60 days after the expiration of the Lemon Law rights period." Accordingly, the Consumer's deadline to file with the certified program was October 18, 2021. Therefore, the Consumer's claim with the certified program, made on September 14, 2021, and subsequent Request for Arbitration, filed on September 28, 2021, were both timely filed. The Manufacturer's assertion to the contrary was rejected.