

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. [CMA9965-02](#)

ROBERT A. GIGLIO,

Petitioner,

v.

DAIMLER CHRYSLER MOTOR CORPORATION,

Respondent.

Howard A. Gutman, Esq. for petitioner

Beth Wallach, Esq., for respondent (Hardin, Kundla, McKeon, Poletta & Polifroni, attorneys)

Record Closed: April 4, 2003 Decided: April 11, 2003

BEFORE BARRY N. FRANK, ALJ:

statement of the case and procedural history

Robert A. Giglio filed an application for the Lemon Law dispute resolution with the New Jersey Division of Consumer Affairs on or about November 25, 2002, seeking relief from the respondent under the provisions of the New Jersey Lemon Law, [N.J.S.A. 56:12-29](#) to-49. Their application was accepted on December 3, 2002 and subsequently transferred to the Office of Administrative Law as a contested matter pursuant to [N.J.S.A. 52:14B-1](#) to -15 and [N.J.S.A. 52:14F-1](#) to -13. This matter was scheduled to be heard at the Newark location on April 4, 2003 and the hearing took place on that date. After the hearing took place on April 4, 2003, the record was closed.

Robert A. Giglio was the first to present testimony with regard to this matter. Mr. Giglio, the petitioner, testified that he purchased the vehicle in question, a 2001 Dodge Dakota, on August 25, 2001 and took delivery of the vehicle on that date. The total sales price of the vehicle was \$27,208.05 and the vehicle was financed at the time of the purchase (see Exhibit P-1).

Petitioner further testified that the present mileage of the vehicle is 15,053 miles and he then went on to proceed to testify with regard to the difficulty he has had with the vehicle since the date of purchase.

Petitioner testified that amongst the difficulties he has reported and attempted to have serviced at the dealership are the following: (1) vehicle surges forward when stopped due to erratic idle problem; (2) front passenger floor consistently fills with water due to leak problem; (3) the bed of the truck is misaligned; (4) there are paint defects on the body of the vehicle in question.

From the petitioner's testimony, it appears the largest problem is that of the consistent water leakage. Petitioner testified that on numerous occasions he has brought the vehicle in for repairs for the water problem which takes place consistently on the passenger side of the vehicle. Petitioner testified that large puddles have formed on the right front passenger side of the vehicle which creates an inundated carpet and results in a smell due to the carpet soaking up this water.

In any event before going into detail on the water problem, petitioner reiterated that he brought the vehicle on date set forth earlier in 2001, he put \$1,000 down, received a \$2,000 rebate from Daimler Chrysler and traded in a vehicle worth \$12,165. This resulted in lease payments of \$270 a month of which he has made eighteen payments to date totaling \$4,093.50.

Petitioner then proceeded to go through various work orders outlining and confirming the fact that he brought his vehicle in for repair. The first work order has to do with rough idling of the vehicle and indicates that the vehicle was serviced at the time (see Exhibit P-2). The next work order (see Exhibit P-3) indicates that on November 12, 2001 the vehicle was brought in when it had 2,569 miles. This work order indicates that there are allegedly transmission problems, erratic stalling problems and, most significantly, front area water leak problem. This invoice indicates that the car was serviced and returned to petitioner.

Petitioner next testified that on January 8, 2002 he once again brought the vehicle in for repair when it had a total of 4,516 miles on it (see Exhibit P-4). This repair order indicates the vehicle was brought in for, among other things, water leaking on the front passenger floors. The vehicle once again appears to have been serviced and returned to the petitioner.

The next repair testified to by petitioner (see Exhibit P-5) took place on January 16, 2002. The vehicle had a total mileage of 4,717 miles at this point. Among the other problems complained of was once again wet carpeting on the passenger side of the vehicle, an alleged water leak and paint issues. This invoice once again shows that apparently the vehicle was serviced and returned to petitioner.

Petitioner then testified with regard to another service that took place on February 8, 2002. The vehicle at this point in time had 5,218 miles (see Exhibit P-6). Once again, petitioner was complaining of smells from the carpeting on the passenger part of the car due to alleged water and other difficulties with the vehicle. The invoice seems to reflect that the vehicle was serviced and then returned.

Petitioner then testified to his last chance letter he sent to the manufacturer with regard to the variety of alleged defects (see Exhibit P-8). Petitioner testified with regard to continuing problems with the vehicle. Petitioner presented Exhibit P-9 which demonstrated the vehicle was brought back to the dealership on November 4, 2002 for the continual problem when it had 15,551 miles. On the second page of this invoice it indicates that the vehicle has been there three times and once again it appears the vehicle was serviced and returned to petitioner. Petitioner also testified to and brought into evidence Exhibit P-10 which shows that new carpeting was ordered for the vehicle in question as a result of what apparently was supposed to have been repaired, namely, the water leak in the front passenger portion of the vehicle itself.

Petitioner then emphasized that the water problem has never been fixed and to this date has not been fixed. Petitioner then went on to describe misalignment of the truck bed and testified to Exhibit P-11 which was an invoice from Nassau Collision Company which seems to indicate that this company found no collision with regard to the vehicle but found dirt spots under clear coat paint and believed that there was some kind of factory defect with regard to the paint and that the cab was out of alignment.

It should be noted, however, that petitioner merely identified this report and testified as to what he had been told that no expert was brought in to corroborate this particular document or allegation so therefore it has been given very little weight.

On cross-examination, petitioner was examined with regard to the surging of the vehicle and the water problem and still maintained that all these problems were occurring to this date.

The next person to testify on behalf of petitioner was James Cookingham who was presented to the Court as an expert in automotive vehicle repair. No objections to this individual testifying as an expert was raised by respondent and he was admitted as an expert in automotive vehicle repair.

Mr. Cookingham testified that he examined the vehicle in question on or about January 3, 2003 and identified and presented to the Court his report with the results he found after examining the vehicle (see Exhibit P-12).

Mr. Cookingham testified that he found the body and paint damage to be minimal and that he was not able to repeat nor could he confirm the alleged erratic idling of the vehicle or surging of the vehicle. Mr. Cookingham did testify, however, that he found and confirmed a significant amount of water in the right front passenger portion of the vehicle, that he believed there was a leak, that he believed the leak was not coming through the vehicle but rather was being caused by some kind of condensation or clogging problem with regard to the air conditioning system and that he believed this was the source of the problem in question.

Mr. Cookingham also testified that you could have a large amount of water caused by this condensation and that temperature was not necessarily a factor with regard to the workings of the air conditioner as it did operate during the winter when defrosters were in operation.

On cross-examination, respondent attempted to obtain a determination from this witness as to whether or not water could have been externally presented and whether or not this large amount of water could be caused by the air conditioner, and this particular witness confirmed that he felt that the leak was genuine and that although he had not been able to fully identify and trace the source, he was giving his opinion as to what caused it and felt further investigation was necessary. This witness,

however, unequivocally indicated that he felt there was a problem, that the leak was present, that there was a clear odor caused by the leak, that the water that he found in the vehicle at the time he inspected it was stagnant and he believed this certainly would go to the use, value and safety of the vehicle in question.

I should point out that on cross-examination this particular witness admitted that he did not examine the vehicle on the Court date in question but was merely relating his experience with the vehicle on the date he examined same, namely, January 3, 2003.

Petitioner's final witness was Mrs. Laura Marie Giglio who testified that she was married to the petitioner and she was the one who most frequently rode in the passenger compartment of the vehicle in question. She testified that she does that now as infrequently as possible because the odor and mold which she claims comes from the water soaked carpeting affects her allergies and bothers her tremendously. She indicated that when her husband would give her a ride to her job as a teacher, her feet and pants would consistently get wet due to the constant leaking nature of the front passenger compartment and the fact that it was consistently wet. She testified that the water smells, was stagnant and that she maintains Tupperware buckets outside of her home for the purpose of bailing out this vehicle every time water gets into the front passenger compartment before she sits in same. She indicates that they bought the vehicle because they needed a new car that was more reliable than her older vehicle, but that she rides in it as infrequently as possible because of its condition and because the constant dampness medically affects her.

On cross-examination, the witness in question did admit she is not a doctor but said her doctor has advised her she has mold and similar allergies and that while other outside forces influence her, she immediately feels the affects of the vehicle every time she rides in it. Cross-examination was not able to change this witness' testimony in this regard.

Respondent then put on its case. David Flisler testified on behalf of respondent. Mr. Flisler is District Manager with Daimler Chrysler and by stipulation it was agreed that he was considered to be an expert with regard to repair and servicing of this type of motor vehicle.

Mr. Flisler testified that he examined the vehicle on the date of the hearing and that he was unable to observe or cause to occur any engine surges or rough idling problems.

Mr. Flisler did testify that he observed a large amount of water in the front passenger compartment, but that he found the water to be clean, that it was not stagnant, that it did not have an odor, and he did not believe that it occurred naturally. Mr. Flisler testified that in his opinion he believed that water had been externally placed there on this date and there was no way any leakage or even condensation from air conditioning system of the vehicle could have caused that large amount of water to be present. He stated that when he stepped on the carpeting in question the water that was squeezed out was clear and not discolored.

On cross-examination, Mr. Flisler reiterated his belief that a naturally occurring leak did not cause the problem in question but he could not explain all the various repair orders and treatment for the water problem that occurred at the various dealerships involved as they did not appear to spot anything other some kind of accidental occurrence of the water that was purported to be in the vehicle itself.

I found the petitioner's witnesses' testimony to be very credible. I fully believe Mr. Giglio's testimony to be truthful, I found his expert's testimony to be truthful and candid, and I found Ms. Giglio's testimony with regard to the problems she had when she rode in the vehicle to be truthful as well. I found that all three of petitioner's witnesses were entitled to tremendous credibility and I could not find any reason for disbelieving their testimony.

While I believed respondent's witness' testimony to be truthful, respondent's witness was unable to back up his allegation that the water was put there by an outside source other than his opinion. He could not explain the previous treatments for the alleged water leaks which were presented on invoices by various, not only one, dealerships and, therefore, I was able to give very little weight to respondent's expert's testimony that he felt the water was placed there by an outside force. I did give tremendous credibility and weight to this expert's testimony with regard to lack of any apparent problems with regard to the surging and minor impact of the paint defects.

discussion

The New Jersey "Lemon Law" [N.J.S.A. 56:12-29](#), *et seq.* provides relief for a consumer who purchases or leases a vehicle with a non-conformity which the dealer or manufacturer is unable to correct within the time frame set forth by the statute. A

"non-conformity" is defined by [N.J.S.A. 56:12-30](#) as a defect or condition which substantially impairs the use, value or safety of a motor vehicle.

The Lemon Law further obligates the manufacturer/dealer to make all required repairs once a consumer reports a non-conformity in the motor vehicle to said manufacturer/dealer during the first 18,000 miles of operation or during the period of two years subsequent to date of original delivery of the vehicle. [N.J.S.A. 56:12-32](#) goes on to state that if said manufacturer/dealer is unable to repair or correct the non-conformity pertaining to said motor vehicle within a reasonable time frame, then the consumer is entitled to a refund as set forth in the statute.

The burden of establishing by a preponderance of the credible evidence that the alleged non-conformity in the vehicle is a defect or condition that substantially impairs the use, value or safety of the vehicle rests with the petitioner. See [N.J.S.A. 56:12-30](#). It is clear that petitioner must prove same in order to succeed in a claim under the Lemon Law. See *Anastasio v. Mitsubishi Motor Sales of America, Inc.*, OAL Docket CMA 2100-90 (April 23, 1990). Clearly, substantial impairment with regard to the use of the vehicle is a subjective factor and a subjective opinion set forth by the consumer when describing the condition of the vehicle in question and the complaints with regard to said vehicle by said consumer. *Herbstman v. Eastman Kodak Company*, 68 N.J. 1 (1975). The mere statement by a petitioner that he was not happy with having to have brought this vehicle back seven times for problems with said vehicle is not necessarily sufficient to satisfy the Lemon Law. There must be additional objective factual findings and evaluations to bolster this particular feeling or opinion of the consumer that the vehicle falls within the Lemon Law statute and these claims must be factually demonstrated by the petitioner in a successful fashion. See *Coppeto v. Acura Division of American Honda Motor Company, Inc.*, CMA 11149-98, Initial Decision (March 2, 1999), adopted by the Director (March 20, 1999).

Mr. Giglio's testimony with regard to the water soaked nature of the front passenger compartment and the smell that he experienced there, together with his wife's testimony confirming the smell and the testimony presented by their expert, Mr. Cookingham, and supporting documentation consisting of all the various repair invoices that they received from the dealer when the vehicle was brought back for this problem, I found to be consistent, convincing and to result in significant evidence that was not controverted by respondent regarding the numerous times the vehicle was

brought in for repairs with regard to the consistent leak which took place in the passenger side of the vehicle. It is clear that petitioner was not able to demonstrate the problem with the rough idling and the paint problem to the point where it culminated in use, safety and value of the vehicle, but the water problem itself is enough. I found Mr. Giglio's and his wife's testimony, together with the expert's testimony, Mr. Cookingham, to be credible and I was convinced by a preponderance of the evidence presented by petitioner, his wife and his expert witness that the problem complained of in regard to the consistent water leakage in said vehicle still exists and to date has not been corrected. I found and gave very little credence to respondent's expert's explanation that it appears the water was externally placed in the vehicle, because other than that being respondent's expert's opinion, no corroborated proof was demonstrated, nothing was presented that would override consistent credible evidence presented by petitioner, his wife and their expert. Most convincing was the petitioner's expert's testimony coupled with all the various invoices which consistently show clearly a water problem in the front passenger portion of this vehicle, with the replacement of what appeared to have been soggy carpet and as was testified to clearly no resolution of the problem in question. As a result, I **FIND** that petitioner's testimony, by a preponderance of the credible evidence, fully demonstrated the problem with regard to the water leakage and odors and mold that it creates at the front passenger portion of the vehicle still exist to this date, and that same has not been corrected in accordance with the parameters of the Lemon Law.

The testimony indicated that the vehicle was purchased, inclusive of finance charges, taxes and license fees, for a total of \$27,208.05. Petitioner expended \$50 in filing his Lemon Law Complaint. The mileage on the vehicle at the attempt of the first repair pertaining to the water problem was 4,150 miles. I am satisfied that these numbers reflect the actual and correct figures regarding the vehicle in question.

Subsequent to the hearing, this Court received certificate of services from petitioner's counsel, Howard A. Gutman, Esq. I have reviewed the certification of services which contains not only the time expended by the petitioner's counsel but fees charged by the expert who made an appearance at the hearing as well, together with costs, and find the hourly amount charged together with the time expended on the file to be within normal parameters for a case of this type.

Therefore, in addition to the above-referenced figures, I **FIND** the petitioner's counsel's fees and expert's costs totaling \$2,821 conform with normal parameters for a

case of this type and I **FIND** said counsel fees and expert's costs on the detailed invoice dated April 9, 2003 to be acceptable.

findings and order

Based upon the above referenced factors and the testimony described above, I **FIND** that petitioner has demonstrated by a preponderance of the credible evidence that the vehicle in question has serious defects with regard to water leakage that consistently takes place in the front passenger compartment of the vehicle and that this affects the use, value or safety of the motor vehicle itself. I further **FIND** that respondent has failed, despite numerous attempts to do so and despite given the final repair attempt to do so, to correct the problem with regard to this water problem and that it still exists to date with regard to this vehicle. I **FIND** that petitioner has given respondent every opportunity required under the Lemon Law to repair the defects complained of, that a last chance letter was forwarded to respondent in accordance with the Lemon Law and I further **FIND** that the expectation of petitioner with regard to the use, operation and safety of the vehicle has not been met and has been seriously affected by the fact that respondent has failed to repair the defects complained of in an appropriate and timely fashion and indeed has failed to repair these defects at all. Further, as a result of the problems complained of by petitioner, I **FIND** that the value of the vehicle is more than likely to be severely affected and diminished as a result of anyone seeking to purchase said vehicle. I therefore **CONCLUDE** the vehicle in question is a lemon as defined by the Lemon Law statute and pursuant to [N.J.S.A. 56:12-32A](#), the manufacturer shall be directed to give to the petitioner all remedies as set forth in said statute in terms of costs, expenses, fees, sales taxes, license and registration fees, and reasonable attorney's fees and expert witness fees, minus an appropriate allowance for vehicle use as set forth in the statute.

The following monies are due as reimbursement to petitioner and so **ORDERED** that petitioner be reimbursed accordingly. The total purchase price of the vehicle involved is \$27,208.05. Subtracted from this figure should be a total of \$1,129.13, representing the total mileage of 4,150 miles at the time the water problem was first reported and brought into a servicing dealership divided by 100,000. This equals \$1,129.13. Subtracting \$1,129.13 equals a total of \$26,078.92. Added to this total should be \$50 which constitutes return of the Lemon Law application costs, bringing the total to \$26,128.92. In addition to the \$26,128.92, petitioner is entitled to reasonable attorney's fees and reasonable expert fees. Subsequent to the trial and in a certification

of services sent via cover letter dated April 9, 2003, petitioner's counsel set forth his fees, the expert's fees and costs in great detail. Said fees and costs for both the attorney and expert total \$2,821. Upon review of these fees and costs, I found same to be reasonable and within the normal parameters for cases of this type. Therefore, it is further **ORDERED** that respondent provide petitioner with a separate check in the amount of \$2,821 to cover the cost of petitioner's attorney's fees, expert's fees and costs. Adding this total to the \$26,128.92, petitioner is entitled to total reimbursement of \$28,949.92. This total should be paid either to petitioner or the appropriate portion paid to the entity that has financed the vehicle with any difference being returned to the petitioner in the form of a separate check, once all payments have been verified and payoff of lien has been verified so that petitioner is in effect made whole. In addition, as set forth above, a separate check in the amount of \$2,821 should also be made payable to petitioner so that petitioner may be reimbursed for or forward said sums to his attorney and expert for their services and costs.

It is hereby **ORDERED** that respondent pay the petitioner the sum as calculated above and in the manner as set forth above.

It is further **ORDERED** that the respondent pay the lien holder of this vehicle the amount necessary to satisfy any lien release payments on said vehicle and any and all fees due the lien holder in accordance with the terms of the financing agreement.

It is further **ORDERED** that the petitioner shall deliver the vehicle to the respondent free and clear of damages.

It is further **ORDERED** that the parties shall comply with this Order within thirty days of the date of this Order.

I hereby **FILE** my initial decision with the **DIRECTOR OF THE DIVISION OF CONSUMER AFFAIRS** for consideration.

This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE DIVISION OF CONSUMER AFFAIRS**, who by law is authorized to make a final decision in this matter. If the Director of the Division of Consumer Affairs does not adopt, modify or reject this decision within fifteen (15) days, this recommended decision shall become a final decision in accordance with [N.J.S.A.56:12-37\(b\)](#).