

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0183 CAF**

MERSA S. NIETO	§	BEFORE THE OFFICE
and JOSE L. NIETO,	§	
Complainants	§	
v.	§	OF
	§	
GENERAL MOTORS LLC,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Mersa S. Nieto and Jose L. Nieto (Complainants) seek relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in their 2014 Chevrolet Silverado 1500 pickup. Complainants assert that the vehicle is defective because the vehicle vibrates when it is driven at high speeds. General Motors LLC (Respondent) argues that the vehicle has been repaired and the vehicle is performing as designed. The hearings examiner concludes that the vehicle does not have an existing warrantable defect. Therefore, Complainants are not eligible for relief.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Matters of notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened and the record closed on July 15, 2015, in Pharr, Texas, before Hearings Examiner Edward Sandoval. Complainants were represented by Mersa L. Nieto. Respondent was represented by Kevin Phillips, Business Resource Manager. Rose Crookston, District Manager of After Sales, and Robert Perez, Service Manager for Fiesta Chevrolet, appeared to offer testimony for Respondent. Kathy Gibler, interpreter, provided Spanish interpretive services for Complainants.

II. DISCUSSION

A. Applicable Law

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met. First, the manufacturer is not able to conform the vehicle to an applicable express warranty by repairing or correcting a defect after a reasonable number of attempts.¹ Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.² Third, the owner must have mailed written notice of the alleged defect or

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

nonconformity to the manufacturer.³ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁴

In addition to these conditions, Section 2301.605 of the Occupation Code specifies that there are three tests which can establish a rebuttable presumption that a reasonable number of attempts have been undertaken by a Respondent to conform a motor vehicle to an applicable express warranty. The first test provides that if the same nonconformity continues to exist after being subject to repair four or more times and: (1) two of the repair attempts were made in the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) the other two repair attempts were made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the second repair attempt, then Complainants have established that Respondent has been provided with a reasonable number of attempts to repair the vehicle.⁵ The second test applies to a nonconformity that creates a serious safety hazard as defined in Section 2301.601(4) of the Texas Occupation Code. The third test provides that Complainants can establish a rebuttable presumption that a reasonable number of attempts to conform a motor vehicle to an applicable express warranty if a nonconformity continues to exist which substantially impairs the vehicle's use or market value and (1) the vehicle is out of service for repair for a cumulative total of 30 or more days in the 24 months or 24,000 miles, whichever comes first, following the date of original delivery to the owner and (2) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an owner.⁶ However, the Occupations Code also provides that the 30 day period described by this section does not include any period during which the manufacturer or distributor lends the owner a comparable motor vehicle while the owner's vehicle is being repaired by a franchised dealer.⁷

B. Complainants' Evidence and Arguments

Complainants purchased a new 2014 Chevrolet Silverado 1500 pickup from Fiesta Chevrolet (Fiesta) in Edinburg, Texas, on February 11, 2014.⁸ The vehicle's mileage at the time of delivery was 13.⁹ Respondent provided a basic limited warranty for the first three (3) years or 36,000 miles on the odometer, whichever comes first.¹⁰ In addition, Respondent provided a five (5) year or 100,000 mile powertrain warranty for the vehicle.¹¹

³ Tex. Occ. Code § 2301.606(c)(1).

⁴ Tex. Occ. Code § 2301.606(c)(2).

⁵ Tex. Occ. Code § 2301.605(a)(1)(A) and (B).

⁶ Tex. Occ. Code § 2301.605(a)(3)(A) and (B).

⁷ Tex. Occ. Code § 2301.605(c).

⁸ Complainants Ex. 1, Motor Vehicle Installment Sales Contract dated February 11, 2014.

⁹ Complainants Ex. 2, Odometer Disclosure Statement dated February 11, 2014.

¹⁰ Respondent Ex. 1, Mileage Chart and Vehicle Summary, p. 3.

¹¹ *Id.*

Ms. Nieto testified that the first time she felt a vibration in the vehicle was when she and her husband were driving to Florida. It felt like the vehicle was bouncing. In addition, she heard an unusual noise. She believed that the trip to Florida occurred in November of 2014. However, she was not positive of the date.

Mr. Nieto was always responsible for taking the vehicle to the dealer for repairs. The first time that Mr. Nieto took the vehicle to Respondent's authorized dealer for repairs due to the vibration issue occurred on August 25, 2014. On that date, Complainants took the vehicle to Fiesta for repair. Mr. Nieto indicated to the dealer's service advisor that he was experiencing an unusual vibration when he drove the vehicle over 40 mph.¹² The dealer's service technician determined that three of the tires had excessive road force and replaced those tires.¹³ In addition, the technician performed a front end alignment on the vehicle.¹⁴ The vehicle's mileage on this occasion was 7,344.¹⁵

Complainants' next repair visit to Fiesta for the vibration issue was on December 8, 2014. The dealer's service technician determined that there was no unusual vibration when driving the vehicle at high speed.¹⁶ No repairs were done to address the vibration issue. However, the technician did balance and rotate the vehicle's tires for "customer enthusiasm."¹⁷ The vehicle's mileage when Complainants took it in for repair on this occasion was 10,475.¹⁸

Complainants apparently still felt the vehicle vibrating, so they returned the vehicle to Fiesta on December 11, 2014. The dealer's service technician felt the vehicle vibrate when driving over 50 mph during a test drive.¹⁹ He determined that all four tires on the vehicle had excessive road force.²⁰ The technician replaced all four tires in order to address the issue.²¹ The vehicle's mileage was 10,544 on this occasion.²²

Complainants returned the vehicle to Fiesta on January 13, 2015. Mr. Nieto felt that the vehicle was still vibrating when he drove it at high speeds. The dealer's service technician test drove the vehicle and verified that there was a vibration in the vehicle when it was driven at approximately 70 mph.²³ The technician determined that the vehicle's rear differential assembly needed to be replaced.²⁴ After replacing the assembly, the technician determined that the vehicle was

¹² Complainants Ex. 4, Repair Order dated August 25, 2014.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Complainants Ex. 5, Repair Order dated December 8, 2014.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Complainants Ex. 6, Repair Order dated December 11, 2014.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Complainants Ex. 7, Repair Order dated January 13, 2015.

²⁴ *Id.*

operating as designed.²⁵ The vehicle was in the dealer's possession for approximately a month during this repair. Complainants were provided with a rental vehicle while his vehicle was being repaired. The vehicle's mileage on this occasion was 10,983.²⁶

On March 3, 2015, Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).²⁷ Complainants also mailed a notice letter to Respondent on February 24, 2015, advising them of Complainants' dissatisfaction with the vehicle.²⁸

Ms. Nieto testified that she did not feel comfortable in the vehicle. She also feels that it is unsafe to drive. Ms. Nieto also testified that the vehicle had not been driven very much since the final repair attempt that occurred on April 20, 2015.

During cross examination, Ms. Nieto testified that the vehicle has never been involved in an accident, fire, or a flood. She does feel unsafe in the vehicle. The vehicle does not have any cracked glass, although there is a slight ding in the windshield. The only scratch on the vehicle is on the passenger side rear door. The vehicle has not suffered any flat tires, interior damage, or undercarriage damage. Complainants have not installed any after-market items in the vehicle. None of the vehicle's warning lights have illuminated while Complainants have owned the vehicle. The vehicle has not stalled nor died on Complainants. The vehicle has not been towed for any reason.

After a test drive taken at the time of hearing, Ms. Nieto testified that she still felt the vibration in the vehicle.

C. Respondent's Evidence and Arguments

Robert Perez, Service Manager for Fiesta, appeared to offer testimony on behalf of Respondent. Mr. Perez has worked with Fiesta for eight (8) years. He has worked in the automotive industry since 1999.

Mr. Perez testified that every time Complainants took the vehicle to Fiesta for repairs they were offered a rental vehicle. However, most times Complainants did not avail themselves of the offer. On August 25, 2014, Complainants' vehicle was in Fiesta's possession for three days, until August 27, 2014. On December 8, 2014, the vehicle was in Fiesta's possession for two days, until December 9, 2014. On December 11, 2014, the vehicle was in Fiesta's possession for approximately five days. Complainants refused a rental vehicle for all of these repair visits. The

²⁵ *Id.*

²⁶ *Id.*

²⁷ Complainants Ex. 3, Lemon Law Complaint dated March 3, 2015. Although the complaint was signed by Complainants on February 23, 2015, it was not received by the Department until March 3, 2015, which is the effective date of the complaint.

²⁸ Complainants Ex. 8, Letter to General Motors dated February 24, 2015.

only time that Complainants accepted a rental vehicle was for the January 13, 2015, repair visit. On this occasion, Fiesta had possession of the vehicle through February 17, 2015. A Fiesta representative contacted Complainants on February 12, 2015, advising them that the vehicle was ready for pick up. However, Complainants refused to pick up the vehicle and asked that it be checked again. Complainants were required to return the rental vehicle on February 12, 2015, since their vehicle was ready for pick up. So, Complainants were not provided with a rental vehicle for approximately five (5) days during this repair attempt. On February 17, Complainants picked up their vehicle and test drove it. They indicated that they were satisfied with the repairs at the time.

After Complainants filed the Lemon Law complaint on March 3, 2015, Respondent performed a final repair attempt on the vehicle. The final repair attempt was performed on April 20, 2015, at Fiesta. Steven Kuhr, Field Service Engineer, performed an inspection of the vehicle on the date in question. He determined that three of the vehicle's tires had road force above specifications.²⁹ In addition, Mr. Kuhr determined that the vehicle's right rear shock absorber had a dead spot.³⁰ As a result of Mr. Kuhr's findings, the determination was made to replace all four tires on the vehicle and the two rear shock absorbers. These items were replaced on April 28, 2015, after the parts arrived at Fiesta. The vehicle's mileage at the time of inspection was 12,070.³¹

Mr. Perez testified that road force is used by automotive technicians to determine whether tires may be causing a vibration issue with a vehicle. The higher the road force the more likely a driver is liable to feel a vibration. Respondent indicates that any measurement of road force on a tire over 15 is beyond their specifications. Road force can sometimes be caused by a vehicle not being driven often enough. If a vehicle sits for too long in hot weather, this can cause excessive road force on a tire.

Mr. Perez testified that the current vibration feeling that Complainants experience when driving the vehicle is normal. He does not believe that there is a defect with the vehicle and that it is safe to drive. He testified that the vehicle is working as designed. After the test drive taken at the time of hearing, Mr. Perez stated that he did not feel any unusual vibration when driving the vehicle.

D. Analysis

Under Texas' Lemon Law, Complainants bear the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainants must meet the presumption that a reasonable number of attempts have been undertaken to conform the vehicle to an applicable express warranty. Finally, Complainants are required to serve written notice of the nonconformity on Respondent, who must be allowed an opportunity to cure the

²⁹ Respondent Ex. 4, Vehicle Legal Inspection dated April 20, 2015.

³⁰ *Id.*

³¹ Respondent Ex. 5, Repair Order dated April 20, 2015.

defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect, Complainants are entitled to have the vehicle repurchased or replaced.

Complainants purchased the vehicle on February 11, 2014, and presented the vehicle to an authorized dealer of Respondent due to their concerns with a vibration issue on August 25, 2014; December 8, 2014; December 11, 2014; and January 13, 2015. Occupations Code § 2301.604(a) requires a showing that Respondent was unable to conform the vehicle to an applicable express warranty "after a reasonable number of attempts." Section 2301.605(a) goes on to specify that a rebuttable presumption that a reasonable number of attempts to repair have been made if "two or more repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner, and two other repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt." Complainants have met the requirements of this test.

However, it appears that the vibration issue has been addressed and the vehicle has been repaired by Respondent. The vehicle seems to be operating normally and there is no undue vibration when driving the vehicle. From the evidence presented at the hearing, the hearings examiner must hold that Complainants have not met the burden of proof to establish the vehicle has a defect or nonconformity that has not been repaired by Respondent.

Given the evidence provided in the hearing, the hearings examiner must hold that repurchase or replacement relief for Complainants is not warranted.

Respondent's express warranty applicable to Complainants' vehicle provides coverage for 3 years or 36,000 miles whichever comes first. In addition, the powertrain warranty provides coverage for 5 years or 100,000 miles. On the date of the hearing both warranties were still in effect. Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranties.

Complainants' request for repurchase or replacement relief is denied.

III. FINDINGS OF FACT

1. Mersa S. Nieto and Jose L. Nieto (Complainants) purchased a new 2014 Chevrolet Silverado 1500 from Fiesta Chevrolet (Fiesta) of Edinburg, Texas, on February 11, 2014. The vehicle's mileage was 15 at the time of delivery.
2. The manufacturer of the vehicle, General Motors LLC (Respondent), issued a limited warranty for the vehicle for the first three (3) years or 36,000 miles on the odometer, whichever comes first.

3. The vehicle's mileage on the date of hearing was 13,158.
4. At the time of hearing the vehicle's basic express warranty was still in effect.
5. Complainants determined that the vehicle had excessive vibration at high speeds.
6. Complainants took the vehicle to Respondent's authorized dealer, Fiesta, on the following dates in order to address the vibration issue:
 - a. August 25, 2014, at 7,344 miles;
 - b. December 8, 2014, at 10,475 miles;
 - c. December 11, 2014, at 10,544 miles; and
 - d. January 13, 2015, at 10,983 miles.
7. On August 25, 2014, the dealer's service technician determined that three tires had excessive road force which was causing a vibration and replaced those tires.
8. On December 8, 2014, the dealer's service technician determined that the vehicle was operating normally. However, the vehicle's tires were rotated and balanced for "customer enthusiasm."
9. On December 11, 2014, the dealer's service technician determined that the vehicle's tires had excessive road force. As a result, the technician replaced all four tires.
10. On January 13, 2015, the dealer's service technician replaced the vehicle's rear differential assembly in order to address the vibration issue.
11. On March 3, 2015, Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
12. April 20, 2015, Steven Kuhr, Field Service Engineer, performed a final repair attempt and inspection on the vehicle.
13. During Respondent's final repair attempt, Mr. Kuhr determined that three of the vehicle's tires had excessive road force and that one of the rear shock absorbers had a dead spot. Therefore, he decided to replace all four tires and both rear shock absorbers.
14. On May 22, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainants and Respondent, giving all parties not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under

which the hearing was to be held; particular sections of the statutes and rules involved; and the matters asserted.

15. The hearing in this case convened and the record closed on July 15, 2015, in Pharr, Texas, before Hearings Examiner Edward Sandoval. Complainants were represented by Mersa L. Nieto. Respondent was represented by Kevin Phillips, Business Resource Manager. Rose Crookston, District Manager of After Sales, and Robert Perez, Service Manager for Fiesta Chevrolet, appeared to offer testimony for Respondent. Kathy Gibler, interpreter, provided interpretive services for Complainants.

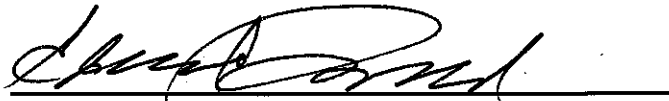
IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. Tex. Occ. Code § 2301.704.
3. Complainants timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 43 Tex. Admin. Code § 215.202.
4. The parties received proper notice of the hearing. Tex. Gov't Code §§ 2001.051, 2001.052; 43 Tex. Admin. Code § 215.206(2).
5. Complainants bear the burden of proof in this matter.
6. Complainants failed to prove by a preponderance of the evidence that Respondent was unable to conform the vehicle to an express warranty by repairing or correcting a defect or condition that presents a serious safety hazard or substantially impairs the use or market value of the vehicle. Tex. Occ. Code § 2301.604.
7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code §§ 2301.204, 2301.603.
8. Complainants' vehicle does not qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainants' petition for replacement/repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**.

SIGNED July 24, 2015



**EDWARD SANDOVAL
CHIEF HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES**