

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0202 CAF**

MISAEEL CORONADO,	§	BEFORE THE OFFICE
Complainant	§	
v.	§	
	§	OF
NISSAN NORTH AMERICA, INC.,	§	
Respondent	§	
	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Misael Coronado (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2014 Nissan Sentra. Complainant asserts that the vehicle's transmission is not working properly because he feels movement on the brake pedal when stepping on the brake and because he feels movement on the gas pedal on occasion. In addition, Complainant feels that the vehicle has an electrical issue because the airbag light illuminates intermittently. Nissan North America, Inc. (Respondent) argued that the vehicle has been repaired, does not have any defects, and that no relief is warranted. The hearings examiner concludes that the vehicle does not have an existing warrantable defect and Complainant is 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 was closed on December 2, 2015, in Pharr, Texas, before Hearings Examiner Edward Sandoval. Complainant, Misael Coronado, appeared and testified. He was represented by Andrew Ross, attorney with Krohn & Moss, Ltd. Adam Sackner, Dealer Technical Specialist, represented Respondent in the hearing. Mike D. Terrill, Dealer Technical Specialist, appeared as an observer for Respondent. Kathy Gibler appeared and provided Spanish interpretive services for Complainant.

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

¹ Tex. Occ. Code § 2301.604(a).

value of the vehicle.² Third, the manufacturer has been given a reasonable number of attempts to repair or correct the defect or condition.³ Fourth, the owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.⁴ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁵

In addition to the five conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty 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.⁶

B. Complainant's Evidence and Arguments

Complainant purchased a new 2014 Nissan Sentra from Charlie Clark Nissan (Clark) in Brownsville, Texas on February 1, 2014, with mileage of 44 at the time of delivery.^{7,8} On the date of hearing the vehicle's mileage was 23,354. At this time, Respondent's warranty coverage for the vehicle remains in place, with coverage for three (3) years or 36,000 miles from the date of purchase, whichever comes first.

Complainant testified that the first problem he had with the vehicle had to do with vehicle's transmission. He felt this was evidenced by movement on the vehicle's brake pedal when he stepped on the brake.

Complainant testified that he first noticed a problem with the vehicle's brake pedal moving or jumping from the first time he drove the vehicle. The movement or jumping increased over time. On May 21, 2014, Complainant took the vehicle to Clark to address the issue of the vehicle's

² *Id.*

³ *Id.*

⁴ Tex. Occ. Code § 2301.606(c)(1).

⁵ Tex. Occ. Code § 2301.606(c)(2).

⁶ Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. However, § 2301.605(a)(2) applies only to a nonconformity that creates a serious safety hazard, and § 2301.605(a)(3) requires that the vehicle be out of service for repair for a total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner.

⁷ Complainant Ex. 1, Motor Vehicle Retail Installment Sales Contract dated February 1, 2014.

⁸ Complainant Ex. 2, MasterTech Vehicle Protection Program contract dated February 1, 2014.

brake pedal jumping or moving. Clark's service technician verified the concern.⁹ As a result, the technician replaced the vehicle's transmission.¹⁰ The vehicle's mileage at the time of the repair was 1,782.¹¹ The vehicle was in the dealer's possession for about three (3) days. Complainant did not receive a loaner vehicle from the dealer while his vehicle was being repaired.

Complainant testified that the vehicle felt better after the repair and that he did not have any problems with the vehicle's brakes.

In August of 2014, Complainant went on a trip to California. On August 14, 2014, Complainant was stopped at a red light while on his trip when the vehicle's transmission refused to change gears. Complainant took the vehicle to Autocom Nissan East Bay in San Leandro, California for repair. The dealer's service technician determined that the vehicle's left side axle had popped out of the continuously variable transmission (CVT) housing.¹² In addition, the technician found debris inside the housing.¹³ As a result, the vehicle's transmission had to be replaced again. The vehicle's mileage at the time of the repair was 5,771.¹⁴ The vehicle was in the dealer's possession for five (5) days. Complainant was provided with a rental vehicle from the dealer for this period of time.

Complainant testified that after the August 15, 2014, repair visit, the vehicle drove fine. However, he then began to notice a vibration in the vehicle's gas pedal. Complainant took the vehicle to Clark for repair on September 2, 2014. Complainant testified that he informed the dealer's service advisor of the vibration issue, as well as his concern with the vehicle's air bag light turning on and off. Complainant testified that he was informed that the vehicle's transmission was reprogrammed during the repair visit in order to address the vibration issue. However, neither the vibration complaint nor the transmission reprogramming was included in the repair order.¹⁵ Complainant did not ask the service advisor why the information was not included in the repair order. Regarding the issue of the air bag light turning on and off, Clark's service technician determined that the passenger side's occupant classification sensor (OCS) module had become disconnected; so he reconnected the module.¹⁶ The vehicle's mileage at the time of the repair was 8,318.¹⁷ The vehicle was in the dealer's possession for one (1) day. Complainant was not provided with a rental or loaner vehicle while his vehicle was being

⁹ Complainant Ex. 3, Repair Order dated May 21, 2014.

¹⁰ *Id.*

¹¹ *Id.*

¹² Complainant Ex. 4, Repair Order dated August 15, 2014.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Complainant Ex. 5, Repair Order dated September 2, 2014.

¹⁶ *Id.*

¹⁷ *Id.*

repaired. Complainant stated that he has not had any further problems with the vehicle's air bag light turning on and off.

Complainant testified that he continued to feel a vibration in the vehicle's gas pedal. He took the vehicle to Clark on February 24, 2015, to address the vibration issue. The dealer's service technician verified the concern. However, the technician determined that the vibration was due to the vehicle's secondary gear application and was part of the vehicle's normal operation. The technician did perform an update to the vehicle's transmission control module (TCM) to help address the issue to a certain extent, but Complainant was informed that the update would not improve the gear application.¹⁸ The vehicle's mileage at the time of the repair was 11,825.¹⁹ At this time, Complainant was also informed that some of the vibration that he was feeling was probably due to the fact that he had installed after-market rims on the vehicle and that the rims were not balanced properly.

Complainant testified that the vehicle drove okay after the February 2015 repair. However, he still intermittently feels a vibration in the vehicle.

On March 2, 2015, Complainant's attorney mailed a letter to Respondent informing them of Complainant's dissatisfaction with the vehicle.²⁰ Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles on March 25, 2015.²¹

After filing the Lemon Law complaint, Complainant was contacted by Respondent's representative in regard to a final repair attempt on the vehicle. The final repair attempt was conducted on May 13, 2015, at Clark. Respondent's technical specialist verified a vibration when the vehicle was driven at approximately 74 miles per hour.²² Respondent's technical specialist inspected the vehicle's after-market wheels and determined that the wheels were not mounting correctly on the vehicle's hub assembly and that this was causing a vibration in the vehicle.²³ No repairs were performed on the vehicle. The vehicle's mileage on this occasion was 17,387.²⁴

¹⁸ Complainant Ex. 6, Repair Order dated February 24, 2015.

¹⁹ *Id.*

²⁰ Complainant Ex. 8, Letter to Nissan North America, Inc. dated March 2, 2015.

²¹ Complainant Ex. 7, Lemon Law Complaint dated March 25, 2015. Complainant signed and dated the complaint on March 19, 2015. However, the complaint was not received by the Texas Department of Motor Vehicles until March 25, 2015, which is the effective date of the complaint.

²² Complainant Ex. 9, Repair Order dated May 13, 2015.

²³ *Id.*

²⁴ *Id.*

C. Respondent's Evidence and Arguments

Mike D. Terrill, Dealer Technical Specialist, has worked in the automotive industry for over 30 years. He's been employed by Respondent for the past four (4) years. He has Automotive Service Excellence (ASE) Master Technician. In addition, he is a master engine machinist.

Mr. Terrill testified that he first became involved in this case when he was contacted by Respondent's consumer affairs division to perform a final repair attempt on Complainant's vehicle. Mr. Terrill conducted the final repair attempt on May 13, 2015, at Charlie Clark Nissan. He test drove the vehicle for approximately 30 minutes in an attempt to duplicate the concern. Mr. Terrill determined that the vehicle had a slight vibration when he was driving at 74 mph or higher. However, he could not duplicate a pulsation in the gas pedal. Mr. Terrill then inspected the vehicle's wheels and had a technician remove them from the vehicle. The wheels that are on the vehicle are after-market and the hubs of the wheels don't fit the vehicle precisely which can cause vibration. Mr. Terrill recommended to Complainant that the stock wheels be put back on the vehicle in order to address the vibration issue. Mr. Terrill did not suggest any other repairs to the vehicle.

During cross examination, Mr. Terrill testified that he feels that the vibration that Complainant feels when driving the vehicle is caused by the after-market wheels.

D. Analysis

Under the Lemon Law, Complainant bears 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, Complainant must meet the presumption that the manufacturer was given a reasonable number of attempts to repair or correct the defect or condition to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the defect or nonconformity on Respondent, who must be allowed an opportunity to cure the 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 or condition, Complainant is entitled to have the vehicle repurchased or replaced.

The evidence does not indicate that the vehicle has a defect or condition which creates a serious safety hazard or substantially impairs the use or market value of the vehicle. The first issue raised by Complainant had to do with the vehicle's brake pedal (later the gas pedal) moving, jumping or vibrating when he stepped on it. The evidence indicates that the issue with the brake pedal was resolved at the time of the first repair on May 21, 2014. After that date, Complainant did not feel

the brake pedal acting abnormally. However, he did indicate that the gas pedal was acting abnormally and was vibrating and that he took it to Respondent's authorized dealer on two occasions (September 2, 2014 and February 24, 2015) for this concern. The evidence indicates that the subsequent vibration felt by Complainant may have been caused by after-market wheels which Complainant had placed on the vehicle. Since there is no direct evidence that the vibration felt in the gas pedal was caused by a defect in the vehicle and there is no evidence that the vibration was caused by the vehicle's transmission, the hearings examiner must hold that this concern cannot be the basis for replacement or repurchase relief for Complainant.

In addition, Complainant raised in his written Lemon Law complaint the issue of the vehicle's air bag sensor turning on and off which he felt evidenced an electrical problem in the vehicle. The uncontroverted testimony indicates that this issue was resolved on September 2, 2014, when Clarks' service technician discovered an air bag module which had become disconnected. The issue was resolved when the module was reconnected. So, this concern was repaired.

Respondent's express warranty applicable to Complainant's vehicle provides coverage for three (3) years or 36,000 miles whichever comes first. On the date of hearing, the vehicle's mileage was 23,354 and it remains under this warranty. As such, the Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranty.

Complainants' request for repurchase or replacement relief is denied.

III. FINDINGS OF FACT

1. Misael Coronado (Complainant) purchased a new 2014 Nissan Sentra on February 1, 2014, from Charlie Clark Nissan (Clark) in Brownsville, Texas, with mileage of 44 at the time of delivery.
2. The manufacturer of the vehicle, Nissan North America, Inc. (Respondent), issued a warranty for the vehicle for three (3) years or 36,000 miles, whichever occurs first.
3. The vehicle's mileage on the date of hearing was 23,354.
4. At the time of hearing the vehicle was still under warranty.
5. Complainant took the vehicle to Respondent's authorized dealers in order to address his concerns with movement or jumping from the vehicle's brake and gas pedals on the following dates:

- a. May 21, 2014, at 1,782 miles;
 - b. September 2, 2014, at 8,318 miles; and
 - c. February 24, 2015, at 11,825 miles.
6. On May 21, 2014, the dealer's technician duplicated Complainant's concern regarding a pulsation felt in the brake. The vehicle's transmission was replaced in order to address the issue.
 7. On August 14, 2014, while Complainant was on a trip to California, the vehicle would not shift into gear.
 8. On August 15, 2014, the service technician for Autocom Nissan East Bay (Respondent's authorized dealer) in San Leandro, California determined that the vehicle's left side axle had popped out of the continuously variable transmission (CVT) housing and that there was debris inside the housing. As a result, the vehicle's transmission was replaced for the second time. The vehicle's mileage at this time was 5,771.
 9. On September 2, 2014, Complainant presented the vehicle to Clark for repair to the airbag light which was turning on and off when he drove it and for repair for the vibration, gas pedal jumping and moving issue.
 10. During the September 2, 2014, repair, Clark's service technician found that an airbag sensor module was disconnected and reconnected it. There was no work done for the vibration, gas pedal jumping and moving issue.
 11. On February 24, 2015, the dealer's technician verified Complainant's concern that the vehicle "stuttered" when being driven between 30 to 40 miles per hour. The technician determined that the stutter Complainant felt was normal for the vehicle.
 12. On March 25, 2015, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
 13. On September 1, 2015, Respondent's Dealer Technical Specialist, Mike Terrill, performed a final repair attempt on the vehicle. Mr. Terrill determined that the vehicle did not have a defect and was operating as designed.
 14. Mr. Terrill also determined that the vibration issue Complainant raised was caused by after-market wheels which had been placed on the vehicle by Complainant.

15. On July 1, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainant 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.
16. The hearing in this case convened and the record was closed on December 2, 2015, in Pharr, Texas, before Hearings Examiner Edward Sandoval. Complainant, Misael Coronado, appeared and testified. He was represented by Andrew Ross, attorney with Krohn & Moss, Ltd. Adam Sackner, Dealer Technical Specialist, represented Respondent in the hearing. Mike D. Terrill, Dealer Technical Specialist, appeared as an observer for Respondent. Kathy Gibler appeared and provided Spanish interpretive services for Complainant.

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. Complainant 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. Complainant bears the burden of proof in this matter.
6. Complainant 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. Complainant's 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 Complainant's petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**.

SIGNED January 5, 2016.



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