

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0029 CAF**

ESTELA M. HANKIN
Complainant

v.

NISSAN NORTH AMERICA, INC.,
Respondent

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Estela M. Hankin (Complainant) filed a complaint with the Texas Department of Motor Vehicles seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his/her vehicle manufactured by Nissan North America, Inc. (Respondent). The hearings examiner concludes that the vehicle does not have a warrantable defect. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ 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 February 4, 2016, in Pharr, Texas, before Hearings Examiner Andrew Kang. Carlos Cisneros, attorney, represented the Complainant. The Complainant and Marlon Glenn Hankin, the Complainant's spouse, testified for the Complainant. Mike Terrill, Dealer Technical Specialist, represented and testified for the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief

A vehicle qualifies for repurchase or replacement if the manufacturer cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”² In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must continue to exist after a “reasonable number of attempts” at repair.³ In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a mailed written notice of the defect to the manufacturer, (2) an opportunity to repair by the manufacturer, and (3) a deadline for filing a Lemon Law complaint.

a. Serious Safety Hazard

The Lemon Law defines “serious safety hazard” as a life threatening malfunction or nonconformity that: (1) substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.⁴

b. Substantial Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. Under this standard, “factfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle.”⁵

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

⁵ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

c. Reasonable Number of Repair Attempts

The Lemon Law provides three ways to establish a rebuttable presumption that a reasonable number of repair attempts have been undertaken.⁶ The first applies generally,⁷ the second applies to serious safety hazards,⁸ and the third applies to vehicles out of service for repair for at least 30 days.⁹ However, the statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.¹⁰ Furthermore, the Department adopted a decision implying that if the consumer takes the vehicle for a service visit then that visit would constitute a repair attempt unless the consumer was at fault for failure to repair the vehicle.¹¹

d. Other Requirements

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner or someone on behalf of the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;¹² (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹³ and (3) the owner filed the Lemon Law complaint within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles have passed since the date of original delivery of the motor vehicle to an owner.¹⁴

⁶ TEX. OCC. CODE § 2301.605(a).

⁷ TEX. OCC. CODE § 2301.605(a)(1).

⁸ TEX. OCC. CODE § 2301.605(a)(2).

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ “[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite ‘reasonable number of attempts.’” *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ).

¹¹ “[O]nly those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.” *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication).

¹² TEX. OCC. CODE § 2301.606(c)(1).

¹³ TEX. OCC. CODE § 2301.606(c)(2). Note: a repair visit to a dealer satisfies the “opportunity to cure” requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer. *See Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

¹⁴ TEX. OCC. CODE § 2301.606(d)(2).

2. Burden of Proof

The law places the burden of proof on the Complainant.¹⁵ The Complainant must prove each fact required for relief by a preponderance, that is, the Complainant must present enough evidence to show that all of the required facts are more likely than not true.¹⁶ For example, the Complainant must show that a warrantable defect more likely than not exists. For any required fact, if the evidence weighs in favor of the Respondent or if the evidence supports the Complainant and the Respondent equally, the Respondent will prevail. The Complainant prevails only if the evidence shows that all of the required facts are more likely than not true.

A. Complainant's Evidence and Arguments

On February 8, 2014, the Complainant, purchased a new 2013 Nissan Rogue from Charlie Clark Nissan, a franchised/authorized dealer of the Respondent, Nissan North America, Inc., in Brownsville, Texas.¹⁷ The vehicle had 46 miles on the odometer at the time of purchase.¹⁸

The Complainant stated that she works in Brownsville and travels to Harlingen or wherever needed and that she supervised 25 children and had 2 children of her own. She added that her husband is a heart patient and has diabetes and they needed a reliable car; her husband would go to Houston for checkups. The Complainant noted that they previously had a Yukon and a Sentra, but the Sentra was too low, so they purchased the Rogue from Charlie Clark Nissan. The Complainant testified that around February 2014, the Complainant heard a rattling noise from her vehicle and she let the dealer know the vehicle would hesitate. The Complainant explained the noise was louder and more noticeable in the morning and that the noise sounded like a diesel truck. The Complainant took the vehicle back to the dealer for the rattling after about four months but the dealer responded that the noise was just due to the way the vehicle was made and nothing could be done about it. However, the Complainant would return to the dealer because the vehicle continued to shake, rattle and hesitate. The dealership eventually discovered metal shavings in the motor and replaced the motor under warranty. Afterwards, the Complainant returned because of hesitation and the dealer serviced the transmission but the hesitation did not go away. The

¹⁵ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁶ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

¹⁷ Complainant's Ex. 1, Retail Order.

¹⁸ Complainant's Ex. 3, Odometer Disclosure Statement.

Complainant testified, for example, that she tried to accelerate onto the expressway, but the vehicle would not accelerate and hesitated to move but she would have to let off the accelerator after the vehicle finally did accelerate. The Complainant tried to trade out of her vehicle and the dealer wanted to accommodate her but required \$200 to do so. The Complainant requested replacement relief and in the alternative, repurchase relief. Mr. Hankin testified he had congestive heart failure, lost a kidney, diabetes, neuropathy in both feet and up the legs, and bad eyes. He explained that their Yukon was too big and they needed something more economical, so they got a Sentra, but the Sentra was too low, making getting in and out difficult, so they traded the Sentra in for the Rogue, which was a good height for Mr. Hankin. Mr. Hankin testified that the vehicle lost acceleration, hesitated, and did not shift right. Mr. Hankin stated that about three months ago, the vehicle's speedometer went down to 35 before speeding up again. Mr. Hankin also stated that the vehicle would rattle about 3 to 5 seconds (in the morning), sounding like a diesel engine, and that the motor wants to die out when the air conditioning (AC) turns on. Mr. Hankin added that he would borrow a relative's vehicle for trips out of town because did not want to get stranded.

In relevant part, the Complainant had the vehicle taken to a dealer for repair as shown below:

Date	Miles	Issue
May 1, 2014	4,320	Replace windshield (windshield was broken on previous visit) ¹⁹
July 9, 2014	6,423	Engine makes a metal noise when starting at cold start ²⁰
August 4, 2014	6,712	Engine makes a metal noise when starting at cold start ²¹
September 6, 2014	7,487	Inspection found transmission oil leak ²²
April 29, 2015	13,832	RPMs increase dramatically but the vehicle is going 20 - 25 mph, engine makes a clicking noise like a diesel engine ²³
June 27, 2015	15,442	Vehicle hesitates when at a stop ²⁴
October 6, 2015	17,725	Vehicle has a hesitation on transmission when pressing gas to accelerate ²⁵

¹⁹ Complainant's Ex. 1, Invoice No. 543790.

²⁰ Complainant's Ex. 1, Invoice No. 549155.

²¹ Complainant's Ex. 1, Invoice No. 551113.

²² Complainant's Ex. 1, Invoice No. 553727.

²³ Complainant's Ex. 1, Invoice No. 571029.

²⁴ Complainant's Ex. 1, Invoice No. 575762.

²⁵ Complainant's Ex. 1, Invoice No. 583683.

On or about September 29, 2015, the Complainant or a person on behalf of the Complainant mailed a written notice of defect to the Respondent. On September 28, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that a dealer's technician broke the vehicle's windshield; the vehicle made a loud knocking sound and metal shavings were found in the oil pan, requiring engine replacement; the vehicle continues to make loud noise; and the transmission leaked requiring repair. Of the Complained of issues, only the noise is an ongoing issue.

B. Respondent's Evidence and Arguments

The Complainant confirmed that the vehicle never broke down and Mr. Hankin likewise affirmed that the vehicle never left him stranded. Mr. Terrill testified that noise on start-up was normal (due to the timing chain), noting that essentially every Rogue with a four cylinder engine does this on start-up. Mr. Terrill further testified that the nature of the way a continuously variable transmission (CVT) accelerates is why the issues exist. Mr. Terrill had previously suggested increasing the idle speed to make driving more comfortable for the Complainant but everything he saw was perfectly normal. However, he noted that he did not get to test drive the vehicle because of rain. Mr. Terrill believed that the dealer did not properly explain the transmission to the Complainant and did not treat them well. In sum, Mr. Terrill stated the Respondent resolved the engine problem and otherwise, the subject vehicle performed normally as other Rogues.

C. Inspection and Test Drive

The vehicle did not exhibit the complained of start-up rattling during the inspection and test drive at the hearing. The hearings examiner asked if the start-up rattling occurred intermittently. The Complainant explained that the noise occurred when starting and that she can feel the vehicle shaking at stop signs. During the test drive the Complainant stated that she was pushing the accelerator and the vehicle was not picking up. Mr. Cisneros asked if the Complainant had the pedal all the way to the floor and the Complainant answered not all the way but the vehicle was not picking up. Mr. Terrill told the Complainant to push the pedal all the way to the floor the next time the vehicle was not picking up to see what it does. During the test drive, the Complainant commented that she felt the vibration. At that point, the hearings examiner turned off the AC and asked the Complainant if the shaking appeared worse with the AC on. The Complainant stated she

could not notice a difference. The hearings examiner turned the AC on and off and observed that the vibration increased with the AC on (consistent with the additional strain on the engine from running the AC compressor). The Complainant stated that she would start accelerating. Mr. Terrill asked if she had the pedal to the floor and she answered no. She stated she felt something like skipping for a few seconds, mimicking a whirring noise. The Complainant said she went half-way and the vehicle did not pick up. Roughly half way through the test drive, the hearings examiner began driving the vehicle. The vehicle appeared to perform normally accelerating onto the highway from the service road. While accelerating from a stop, the Complainant asked if the hearing examiner “felt that” (vibration). The hearings examiner asked if that was the level of vibration she meant. Mr. Terrill told the hearings examiner, to get a sense of what the Complainant felt, to drive the vehicle at a steady speed, about 1,000 – 1,200 rpms, something really low, and ease into the accelerator slowly. Mr. Terrill explained the vehicle will try to maintain the highest “gear ratio” possible for fuel economy. The hearings examiner likened this to accelerating in fifth gear and Mr. Terrill affirmed and stated that many people feel jerking, like on a manual transmission in high gear trying to accelerate. Mr. Terrill stated that the sensation has been described as the “fuel economy drone” with a kind of a shake. When the hearings examiner drove the vehicle at low rpm as instructed, the Complainant acknowledged the vibration. Mr. Terrill also pointed out that the AC compressor cycling on tends to put a harder strain on the engine, which could add to the vibration. When driving at low rpms, the hearings examiner observed that the vehicle did feel like straining in fifth gear with a manual transmission at lower speeds. Mr. Terrill stated that as you push harder on the throttle, the vehicle will change the “gear ratio” accordingly. However, Mr. Terrill noted that the CVT does not have gears, which makes for a very different feel when driving. Mr. Terrill remarked that the speed of pressing the accelerator affects the vehicle’s response, so pressing the accelerator down faster results in the transmission responding faster. Mr. Cisneros asked if the transmission had a lag between telling it what to do and how the transmission reacts. Mr. Terrill explained that the reaction depended on what you do and how fast you do it. Like with a conventional automatic transmission, pushing down the gas pedal really hard leads to a downshift. There is a lag for the time to shift to the next gear. The same essentially applies with the CVT, except the feel is a little different - the CVT has to change the ratio (as opposed to shifting gears in a conventional transmission). With a gentle acceleration, the transmission tries to maintain as high a ratio as it can. The hearings examiner asked if operating at

peak fuel efficiency, the engine starts vibrating because it is being taxed like when approaching the point when you would need to downshift on a manual transmission. Mr. Terrill affirmed. Mr. Cisneros asked if a CVT was as reliable as a conventional transmission and Mr. Terrill stated that were equivalent.

D. Analysis

The evidence shows that the vehicle's issues do not result from a warrantable defect but from the vehicle's design. Accordingly, replacement/repurchase and warranty repair relief do not apply in this case. As an initial matter, the complaint limits the scope of a proceeding.²⁶ The complaint in this case includes the following issues: a dealer's technician broke the vehicle's windshield; the vehicle made a loud knocking sound and metal shavings were found in the oil pan, requiring engine replacement; the vehicle continues to make loud noise; and the transmission leaked requiring repair. The windshield broken by the dealer is not a manufacturing defect and has been replaced by the dealer, and the issues with the metal shavings and transmission leak have been repaired, leaving the noise as the only currently existing issue for resolution in this case.

The Lemon Law does not apply to all problems that may occur with a vehicle, such as issues arising from the design of the vehicle or problems caused outside of the manufacturing process. To qualify for replacement or repurchase or for warranty repair, the law requires the existence of a warrantable defect (a defect covered by an applicable warranty, i.e., a manufacturing defect).²⁷ A manufacturing defect is an unintended condition that occurs when the vehicle varies from its intended design. That is, a defect is an aberration occurring only in those vehicles not produced according to the manufacturer's specifications. A manufacturing defect occurs during the manufacturing process and exists when it leaves the manufacturer. A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of an out-of-specification part.²⁸ As a result, a defective vehicle differs from a properly manufactured vehicle. In contrast, characteristics of the intended design do not arise from any error in the

²⁶ The complaint identifies the issues to be addressed in this proceeding. *See* TEX. OCC. CODE § 2301.204; TEX. GOV'T CODE §§ 2001.051-2001.052.

²⁷ TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

²⁸ *Ridgway v. Ford Motor Co.*, 82 S.W.3d 26, 31-32 (Tex. App.—San Antonio 2002), *rev'd on other grounds*, 135 S.W.3d 598 (Tex. 2004).

manufacturing process, but normally occur in the same-model vehicles produced according to the manufacturer's specifications. No matter how undesirable a design characteristic may be, the Lemon Law does not apply to characteristics of the vehicle's intended design. In the present case, the noise appears to stem from the normal operation of the vehicle's transmission.

The record reflects that the complained of noises arise from the particular design of the vehicle, specifically, the vehicle's CVT and timing chain. Unlike a conventional transmission with a set number of gears each with its own gear ratio, the subject vehicle's CVT varies the geometry of a belt and pulley system to change the CVT equivalent of gear ratios. As Mr. Terrill explained, the CVT, to maximize fuel economy, operates in the highest possible "gear". However, this also has the side-effect of laboring the engine causing the complained of vibration, noise and the sensation bogging of down, unless the driver sufficiently depresses the accelerator for the vehicle to downshift. In part, the vehicle uses the accelerator/throttle position and the rate at which the accelerator is pressed to determine when to change "gear ratios". In this case, the Complainant does not appear to be depressing the accelerator far enough and/or fast enough to reach the CVT's downshift point at the time anticipated. This comports with the Complainant's testimony that the vehicle did not accelerate enough initially but then she had to release the accelerator, because the CVT's downshift point (and the point where the acceleration picks up significantly) occurs later than the Complainant expects. Essentially, the Complainant experiences the "high gear" noise and vibration until hitting the downshift point and then experiences a surge of acceleration upon downshifting. In other words, the design of the vehicle requires greater pressure on the accelerator to achieve the acceleration that the Complainant expects. If not sufficiently depressing the accelerator, the transmission stays in the "high gear" fuel-saving mode, resulting in the noisy, shaky, labored acceleration. However, even if unexpected or undesirable, this is not a defect, but simply a characteristic of the vehicle's design. Additionally, the noise during cold starts appears consistent with noise from the timing chain before the tensioner has sufficient pressure to eliminate the slack in the chain. However, this appears to be the normal functioning of the timing chain and tensioner and not the result of any manufacturing defect.

III. Findings of Fact

1. On February 8, 2014, the Complainant, purchased a new 2013 Nissan Rogue from Charlie Clark Nissan, a franchised/authorized dealer of the Respondent, Nissan North America,

Inc., in Brownsville, Texas. The vehicle had 46 miles on the odometer at the time of purchase.

2. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
May 1, 2014	4,320	Replace windshield (windshield was broken on previous visit)
July 9, 2014	6,423	Engine makes a metal noise when starting at cold start
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June 27, 2015	15,442	Vehicle hesitates when at a stop
October 6, 2015	17,725	Vehicle has a hesitation on transmission when pressing gas to accelerate

3. On or about September 29, 2015, the Complainant or a person on behalf of the Complainant mailed a written notice of defect to the Respondent.
4. On September 28, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that a dealer's technician broke the vehicle's windshield; the vehicle made a loud knocking sound and metal shavings were found in the oil pan, requiring engine replacement; the vehicle continues to make loud noise; and the transmission leaked requiring repair.
5. On November 23, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, Nissan North America, Inc., 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.
6. The hearing in this case convened and the record closed on February 4, 2016, in Pharr, Texas, before Hearings Examiner Andrew Kang. Carlos Cisneros, attorney, represented the Complainant. The Complainant and Marlon Glenn Hankin, the Complainant's spouse, testified for the Complainant. Mike Terrill, Dealer Technical Specialist, represented and testified for the Respondent.

7. The vehicle's odometer displayed 20,995 miles at the time of the hearing.
8. The vehicle operated normally during the test drive at the hearing.
9. The complained of issues are normal characteristics of the vehicle's design.

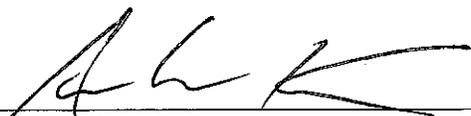
IV. Conclusions of Law

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. The Complainant timely filed a sufficient complaint with the Department. TEX. OCC. CODE §§ 2301.204, 2301.606(d); 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. The Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
7. The Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.
8. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranties. TEX. OCC. CODE §§ 2301.204, 2301.603.

V. Order

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

SIGNED March 14, 2016



ANDREW KANG
HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES