

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0051 CAF**

**ALFREDO GUERRERO,
Complainant**

v.

**GENERAL MOTORS LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Alfredo Guerrero (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 vehicle manufactured by General Motors LLC (Respondent). The hearings examiner concludes that the subject vehicle has a warrantable defect but the defect does not create a serious safety hazard or substantially impair the vehicle's use or market value. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement.

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 March 22, 2016, in Mesquite, Texas, before Hearings Examiner Andrew Kang. Homero Hernandez, the Complainant's son-in-law, represented and testified for the Complainant. Kevin Phillips, Business Resource Manager, represented the Respondent. David Piper, Field Service Engineer, 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

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) two of the 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 (B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.⁶

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.⁷ 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.⁸

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 mailed written notice of the alleged defect or nonconformity to the manufacturer;⁹ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹⁰ and (3) the owner or someone on behalf of the

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 establishing a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. Section 2301.605(a)(2) only applies 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 “[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).

⁸ “[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).

⁹ TEX. OCC. CODE § 2301.606(c)(1).

¹⁰ 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).

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.¹¹

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair under Section 2301.204 of the Texas Occupations Code if the vehicle has a "defect . . . that is covered by a manufacturer's . . . warranty agreement applicable to the vehicle."¹²

3. Burden of Proof

The law places the burden of proof on the Complainant.¹³ The Complainant must prove each fact required for relief by a preponderance, that is, the Complainant must present evidence showing that all of the required facts are more likely than not true.¹⁴ 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 equally supports the Complainant and the Respondent, the Respondent will prevail. The Complainant prevails only if the evidence shows that all of the required facts are more likely than not true.

4. The Complaint Limits the Issues in this Case

The law limits the scope of this case to the issues identified in the complaint and any amendments.¹⁵ The pleadings should state "sufficient facts to enable the department and the party complained against to know the nature of the complaint and the specific problems or circumstances which form the basis of the claim for relief under the lemon law."¹⁶

¹¹ TEX. OCC. CODE § 2301.606(d)(2).

¹² TEX. OCC. CODE § 2301.204.

¹³ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁴ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

¹⁵ 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.

¹⁶ 43 TEX. ADMIN. CODE § 215.202(b).

A. Complainant's Evidence and Arguments

On April 4, 2014, the Complainant, purchased a new 2014 Chevrolet Camaro from Van Chevrolet (now known as Five Star Chevrolet), a franchised dealer of the Respondent, General Motors LLC, in Carrollton, Texas.¹⁷ The vehicle had 10 miles on the odometer at the time of purchase.¹⁸ The vehicle's limited warranty bumper to bumper coverage lasts 3 years or 36,000 miles, whichever occurs first. Mr. Phillips stated that the vehicle warranty's bumper to bumper coverage expires on the earlier of April 4, 2017 or 36,009 miles and the powertrain coverage expires on the earlier of April 4, 2019, or 100,009 miles.

Mr. Hernandez testified that he was the primary driver of the subject vehicle and the Complainant also drove the vehicle. He explained that the vehicle leaked a red fluid from the heater core. When the leak occurred Mr. Hernandez smelled the fluid, stopped the vehicle and saw a puddle of liquid. He stated that the leak occurred twice. He alleged that the vehicle continued to leak and smell after repair. He last noticed the smell a couple of days before the hearing when turning on the air conditioning/heat. Mr. Hernandez further testified that the service advisor did not document every instance of this issue.

Mr. Hernandez also represented that the vehicle had a problem with acceleration. On a trip to Oklahoma while trying to merge onto the highway, the vehicle did not accelerate when pressing the gas pedal. Mr. Hernandez stated that the vehicle shook and stopped on the shoulder. After stalling, he could not turn on the engine and the vehicle was towed to a gas station. The acceleration problem last occurred on January 15, 2015. The vehicle made noises as if going uphill. He stated that the loaner vehicle and his prior vehicle did not do this. In response to the hearing examiner's clarifying questions, Mr. Hernandez stated that the loaner vehicle was a Chevrolet Cruze and his prior vehicle was an Audi. Mr. Hernandez confirmed that the vehicle only stalled once.

Mr. Hernandez stated that the key would occasionally become stuck in the ignition. He noted that he received a set of conventional fixed-blade keys pursuant to a recall. Though this did not happen, Mr. Hernandez stated he would have to turn the ignition on and off again to remove the key. He recalled that this last occurred about two weeks before the hearing. Mr. Hernandez represented that the key locking issue did not improve after repair.

¹⁷ Complainant's Ex. 5, Retail Installment Agreement.

¹⁸ Complainant's Ex. 11, Odometer Disclosure Statement.

The Complainant took the vehicle to a dealer for service as shown below:

Date	Miles	Issue
March 16, 2015	14,224	Application of Zaktek paint protection, multipoint inspection ¹⁹
May 22, 2015	16,908	Recall for ignition keys ²⁰
June 27, 2015	18,928	2 year scheduled maintenance ²¹
August 7, 2015	20,452	Leak on passenger side front carpet ²²
August 21, 2015	20,712	Leaking coolant ²³

The Respondent's final opportunity to repair the vehicle occurred on November 11, 2015.²⁴

On October 3, 2015, the Complainant or a person on behalf of the Complainant mailed a written notice of defect to the Respondent.²⁵ On October 13, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the vehicle had a leak under the glove compartment; car did not accelerate normally; and the key would get stuck in the ignition.²⁶

B. Respondent's Evidence and Arguments

On cross-examination, Mr. Hernandez stated that the vehicle started after stalling and being towed, although it did not initially restart. Mr. Hernandez also stated that he did not recall bringing the vehicle in for any concerns before 12,000 miles. When including the visit on November 11, 2015, with Mr. Piper, the vehicle had a total of three repair attempts for the leaking coolant issue. Mr. Piper testified that the ignition recall involved accidentally hitting the key and turning off the ignition and did not relate to the key getting stuck in the ignition. With regard to the November 11, 2015, repair visit, Mr. Piper explained that "reprogram module to latest update" addressed the stalling concern. Mr. Piper noted that the ignition locking condition was recreated with the transmission in park and the shifter was replaced to address the key locking condition. Although

¹⁹ Complainant's Ex. 10, Invoice 501846.

²⁰ Complainant's Ex. 8, Invoice 106254.

²¹ Complainant's Ex. 9, Invoice 107269.

²² Complainant's Ex. 7, Pre-Invoice 108431.

²³ Complainant's Ex. 6, Pre-Invoice 108860.

²⁴ Respondent's Ex. 3, Invoice 111109.

²⁵ Complainant's Ex. 2, Written Notice Mailed to Respondent.

²⁶ Complainant's Ex. 1, Lemon Law Complaint.

Mr. Piper noticed coolant odor in the carpet, the vehicle did not have any existing coolant leaks. On a follow up visit after two days, the coolant level remained full, indicating that the vehicle did not leak any coolant. He observed that the air sounds resulted from “feathering” the gas pedal and not any defect. In regard to the inspection and test drive at the hearing, Mr. Piper stated he did not notice any acceleration problems, the key did not get stuck, no warning lights turned on, and he did not notice any unusual smell from the air conditioning system. Mr. Piper concluded that the vehicle did not have a defect.

C. Inspection

The subject vehicle had 26,702 miles on the odometer at the inspection during the hearing. All visible components appeared dry and all components within reach felt dry to the touch. Neither the original mat nor the new mat placed on top of the original mat presented any unusual odors. Moreover, the mats did not have any stains or wet spots. Inspection of the area of the leak showed no existing leaks but some residual odor in the carpet lining the passenger side of the transmission hump under where the leak occurred prior to repair. The odor was only noticeable when smelling closely. The underside of the dash was completely dry as was the carpet and mats underneath the dash. Looking towards the heater core through the gap in the back of the glove compartment showed no visible fluid. Moreover, the reachable components behind the glove compartment felt completely dry. In sum, the vehicle showed no indications of an active leak. The air from the vents with the heater turned on did not have any unusual odors. The vehicle had a floor vent that blew air on the carpet where the residual odor from the prior leak could be smelled. The vehicle appeared to operate normally, including when accelerating, during the test drive. The key did not get locked in the ignition during the inspection.

D. Analysis

1. Coolant Leak

The evidence shows that the coolant leak has been successfully repaired. At the final repair attempt, the coolant reservoir showed no change in coolant level after two days, reflecting no leakage. Most significantly, the inspection of the vehicle at the hearing very clearly showed that no leak existed, since the vehicle showed no signs of any coolant anywhere in the cabin except for the residual odor in the carpet under where the leak occurred before repair. Any odor that continues

to exist evidently arises from the remnants of the coolant dried in the carpet and not from any active leak (which comports with Mr. Hernandez's testimony that the vehicle did not smell much after the repairs). Specifically, the floor vents blowing on the carpet where the coolant soaked in appears to circulate the residual odor, making the odor more noticeable with the air conditioning/heater on. Accordingly, no warrantable defect exists after the successful repair and the coolant leak issue does not support any relief.

2. Irregular Acceleration/Noise

The acceleration related issues either have been successfully resolved or were not warrantable defects. The vehicle only stalled once and did not stall after the repair, which updated the module software. During the test drive, the vehicle accelerated normally with no unusual sounds. Mr. Piper had observed that Mr. Hernandez feathered the gas pedal, which may have caused the complained of noise, but in any event, the noise was not abnormal for the vehicle. Though Mr. Hernandez noted that other vehicles he had driven did not make the same noise, but the other vehicles were not the same or even similar model as the subject vehicle. Additionally, the record only shows one repair attempt for the acceleration-related issues. In sum, the record reflects that stalling issue has been successfully repaired and the noise issue does not appear to be a warrantable defect. Therefore, the acceleration issues do not allow for any relief.

3. Key Locking In Ignition

Testimony indicated that the key/ignition issue still occurred but not as frequently after repair. Significantly, the key will come out of the ignition after turning the ignition on and off again. Consequently, this defect does not substantially impair the use of value of the vehicle. Additionally, the evidence only shows one repair attempt (at the final opportunity for repair) for the key locking issue. The repair orders do show a recall relating to the ignition, but that issue involved accidentally turning the ignition off by hitting the key, and did not relate to the key getting stuck. Accordingly, the key locking issue does not qualify the vehicle for repurchase or replacement but does qualify for warranty repair.

III. Findings of Fact

1. On April 4, 2014, the Complainant, purchased a new 2014 Chevrolet Camaro from Van Chevrolet, a franchised dealer of the Respondent, General Motors LLC, in Carrollton, Texas. The vehicle had 10 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty bumper to bumper coverage lasts 3 years or 36,000 miles, whichever occurs first.
3. The vehicle's warranty was in effect at the time of the hearing.
4. The Complainant took the vehicle to a dealer for service as shown below:

Date	Miles	Issue
March 16, 2015	14,224	Application of Zaktek paint protection, multipoint inspection
May 22, 2015	16,908	Recall for ignition keys
June 27, 2015	18,928	2 year scheduled maintenance
August 7, 2015	20,452	Leak on passenger side front carpet
August 21, 2015	20,712	Leaking coolant

5. On October 3, 2015, the Complainant or a person on behalf of the Complainant mailed a written notice of defect to the Respondent.
6. On October 13, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the vehicle had a leak under the glove compartment; car does not accelerate normally; and the key gets stuck in the ignition.
7. On January 4, 2016, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, General Motors LLC, 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.
8. The hearing in this case convened and the record closed on March 22, 2016, in Mesquite, Texas, before Hearings Examiner Andrew Kang. Homero Hernandez, the Complainant's son-in-law, represented and testified for the Complainant. Kevin Phillips, Business

Resource Manager, represented the Respondent. David Piper, Field Service Engineer, testified for the Respondent.

9. The vehicle's odometer displayed 26,702 miles at the time of the hearing.
10. The vehicle operated normally during the test drive at the hearing.
11. The coolant leak no longer exists after repairs.
12. The acceleration-stalling issue has been successfully repaired and the acceleration-noise issue is not a defect.
13. The key locking issue continues to exist but only occurs intermittently and the key releases after turning the ignition on and off.

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles 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 warrantable defect that creates a serious safety hazard or substantially impairs its use or market value. TEX. OCC. CODE § 2301.604(a).
7. The Complainant did not meet the statutory requirement for a reasonable number of repair attempts. TEX. OCC. CODE § 2301.605(a)(1).

8. The Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.
9. The Respondent has a continuing obligation to address and repair or correct any warrantable nonconformities reported to the Respondent or Respondent's franchised dealer before the warranty expires. 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**. It is **FURTHER ORDERED** that the Respondent shall make repairs necessary to correct the vehicle's ignition locking issue to the applicable warranty. The Complainant shall deliver the subject vehicle to the Respondent within 15 days after the date this Order becomes final under Texas Government Code § 2001.144.²⁷ Within 15 days after receiving the vehicle from the Complainant, the Respondent shall complete repair of the subject vehicle. However, if the Department determines the Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair, the Department may consider the Complainant to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

SIGNED May 6, 2016



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

²⁷ (1) If a party does not timely file a motion for rehearing, this Order becomes final when the period for filing a motion for rehearing expires, or (2) if a party timely files a motion for rehearing, this Order becomes final when: (A) the Department renders an order overruling the motion for rehearing, or (B) the Department has not acted on the motion within 45 days after the party receives a copy of this Decision and Order.