

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0058 CAF**

**BRENDA WILSON and
BRANDON WILSON,
Complainants**

v.

**GENERAL MOTORS LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Brenda and Brandon Wilson (Complainants) seek relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in their 2013 Chevy Malibu. Complainants assert that the vehicle has engine issues, stutters, and loses power. General Motors LLC (Respondent) argued that Complainants' concerns have been addressed and the vehicle has been repaired. The hearing examiner concludes that although the vehicle does have a currently existing warrantable defect, Complainants are not eligible for repurchase or replacement relief since the first repair attempt for Complainants' concerns was not performed until after the vehicle had been driven in excess of 12,000 miles after the date of delivery of the vehicle to Complainants.

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 February 24, 2016, in Sealy, Texas before Hearings Examiner Edward Sandoval. Complainants were represented by Brenda Wilson in the hearing. Brandon Wilson was also present to provide testimony at the hearing. Respondent was represented by Kevin Phillips, Business Resource Manager. Also present to testify for Respondent was Bruce Morris, Field Service Engineer.

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, 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.⁵

Occupations Code § 2301.204(a) provides that “[t]he owner of a motor vehicle or the owner’s designated agent may make a complaint concerning a defect in a motor vehicle that is covered by a manufacturer’s, converter’s, or distributor’s warranty agreement applicable to the vehicle.” The relief available under this section of the Code is repair of the vehicle in question.

B. Complainant’s Evidence and Arguments

1. Brenda Wilson’s Testimony

Complainants purchased a 2013 Chevy Malibu demonstrator, from Westside Chevrolet (Westside) in Katy, Texas on February 17, 2014. The vehicle had mileage of 7060 at the time of purchase.⁶ Respondent’s basic bumper-to-bumper warranty provides coverage for three (3) years or 36,000 miles, whichever comes first. In addition, Respondent has provided a five (5) year or 100,000 mile warranty for the vehicle’s powertrain. On the date of hearing the vehicle’s mileage was 39,481. At this time, Respondent’s bumper-to-bumper warranty for the vehicle has expired. However, the powertrain warranty is still in effect.

Brenda Wilson, co-Complainant, testified that in February of 2015, the vehicle in question began sputtering and died while she was driving it. In addition, the vehicle’s check engine light (CEL) illuminated. Ms. Wilson took the vehicle to respondent’s authorized dealer, Brasher Motor Company (Brasher), in Weimar, Texas on February 23, 2015. Brasher’s service technician

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). 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.

⁶ Complainant Ex. 2, Vehicle Service Contract Registration Page dated February 17, 2014.

determined that there was an issue with the vehicle's high pressure fuel pump. The technician replaced the fuel pump and also performed two (2) recalls on the vehicle.⁷ The recalls required that the vehicle's spark plugs be replaced and the engine control module (ECM) and transmission control module (TCM) be reprogrammed.⁸ The vehicle's mileage on this occasion was 23,028.⁹ Brasher retained the vehicle for two (2) days while the repairs were being performed. Complainants were provided with a loaner vehicle while their vehicle was being repaired.

Ms. Wilson testified that the vehicle drove fine for about 30 to 40 days after the fuel pump was replaced. However, sometime in late March of 2015, Ms. Wilson was driving the vehicle when it began jerking. The engine began powering down and the vehicle wouldn't accelerate over 15 mph. So, Ms. Wilson took the vehicle to Westside for repair on April 3, 2015. Westside's service technicians replaced the vehicle's turbocharger as it was determined that the turbocharger had failed.¹⁰ The mileage on the vehicle when Ms. Wilson took it to Westside was 24,479.¹¹ The vehicle was in Westside's possession for eight (8) days. Complainants were provided a loaner vehicle while their vehicle was being repaired.

Ms. Wilson stated that after getting the vehicle back from Westside, it was still not running well. It didn't want to accelerate properly. She contacted Westside and the representative she spoke to told Ms. Wilson that it sounded as if the oil needed to be changed. She was told that it seemed as if something on the vehicle had been left unscrewed and the vehicle was losing oil. However, Ms. Wilson never saw any oil leaks under the vehicle. After a while, the vehicle's check engine and "low oil" lights illuminated. In addition, the vehicle was running rough. So, Ms. Wilson took the vehicle to Westside for repair on May 4, 2015. She was informed at this time that the only problem with the vehicle was that it needed an oil change. No other work was performed at the time. The vehicle's mileage on this occasion was 25,374.¹² The vehicle was in Westside's possession for four (4) days. Complainants were provided with a loaner vehicle while their vehicle was being repaired.

Ms. Wilson testified that the vehicle continued to run rough. About two (2) months later, the vehicle's "add oil" light illuminated. On July 6, 2015, Ms. Wilson took the vehicle to Westside for repair. Westside's technician determined that the engine ring lands on the pistons were broken.¹³ So, the technician rebuilt the vehicle's engine.¹⁴ The vehicle's mileage when Ms. Wilson took it to Westside was 28,506.¹⁵ The vehicle was in Westside's possession for 22 days

⁷ Complainant Ex. 3, Repair Order dated February 23, 2015.

⁸ *Id.*

⁹ *Id.*

¹⁰ Complainant Ex. 4, Repair Order dated April 3, 2015.

¹¹ *Id.*

¹² Complainant Ex. 5, Repair Order dated May 4, 2015.

¹³ Complainant Ex. 6, Repair Order dated July 6, 2015.

¹⁴ *Id.*

¹⁵ *Id.*

on this occasion. Complainants were provided with a loaner vehicle while their vehicle was being repaired.

Ms. Wilson stated she picked up the vehicle from Westside on a Tuesday. The following day, Ms. Wilson was driving the vehicle when the engine began sputtering and smoking. The vehicle then died while she was driving it. Ms. Wilson called her husband for help. Mr. Wilson drove the vehicle to their home and they called Westside to inform the dealer of the problem with the vehicle. The Wilsons were advised by the dealer's service manager to take the vehicle to Westside so that it could be repaired. Mr. Wilson attempted to drive the vehicle to Westside. However, before he could arrive at the dealership, the engine blew and the vehicle died. A tow truck was dispatched to pick up the vehicle from where it had died and to tow it to Westside. The vehicle was delivered to Westside on July 30, 2015. Westside's service technician determined that three of the engine's pistons were cracked and the cylinder walls were scored.¹⁶ So, the vehicle's engine had to be replaced.¹⁷ Complainants requested that the vehicle not be repaired. However, they were told that repair of the vehicle was not at their discretion. The vehicle's mileage on this occasion was 28,623.¹⁸ The vehicle was in Westside's possession until August 8, 2015. Complainants were provided with a loaner vehicle for the period of time that the vehicle was in Westside's possession.

As a result of the problems with the vehicle, Complainants decided to file a Lemon Law complaint. They filed a Lemon Law complaint with the Texas Department of Motor Vehicles (TxDMV) regarding the vehicle with an effective date of October 14, 2015.¹⁹ In addition, Complainants faxed a letter to Respondent informing General Motors that Complainants were dissatisfied with the vehicle and requesting repurchase or replacement of the vehicle.²⁰

Ms. Wilson testified that the vehicle is still running rough, but not as bad as it has in the past. She feels that the vehicle still has acceleration issues. It feels like the engine all of a sudden kicks in and is trying to accelerate. The problem is intermittent and occurs a couple of times a week.

Ms. Wilson also stated that in November of 2015, the vehicle died while she was driving it. This occurred prior to Respondent's field service engineer inspection of the vehicle which took place on November 10, 2015. The vehicle cranked up immediately after dying. Ms. Wilson could not recall if the vehicle's CEL illuminated. She has not had any problems with the vehicle dying since November of 2015.

¹⁶ Complainant Ex. 7, Repair Order dated July 30, 2015.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Complainant Ex. 8, Lemon Law complaint dated October 14, 2015. Although the complaint was signed by Complainant on October 2, 2015, it was not received by Texas Department of Motor Vehicles until October 14, 2015, which is the effective date of the complaint.

²⁰ Complainant Ex. 9, Undated Letter to GM and Fax Transmission Report dated October 2, 2015.

During cross-examination, Ms. Wilson stated that she and her husband did not have any problems with the vehicle until after it had been driven over 12,000 miles after being purchased. She is the primary driver of the vehicle. There have been no insurance claims for the vehicle. There is no cracked glass on the vehicle, although the windshield has a chip. There are also dings and dents on the vehicle's bumpers. The vehicle has never had a flat and still has its original tires. There's no interior damage to the vehicle, although there is a piece of plastic that's starting to come off the sunroof area. There have been no after-market items added to the vehicle. The vehicle's CEL has not illuminated recently. The vehicle did pass its last safety inspection.

2. Brandon Wilson's Testimony

Brandon Wilson, co-Complainant, testified that he was the individual who attempted to drive the vehicle to Westside prior to the July 30, 2015, repair attempt. He was driving on Interstate 10 at about 45-50 mph and was about 14-16 miles from the dealership when the vehicle began sputtering. The vehicle then began to jerk furiously. Mr. Wilson then heard a loud pop and white smoke began coming out of the engine compartment. He was able to pull over to the side of the road and get out of the vehicle. Mr. Wilson, a police officer, contacted his dispatcher to have a tow truck sent to his location. The vehicle was towed to Westside and Complainants received a loaner vehicle while their vehicle was being repaired.

During cross-examination, Mr. Wilson testified that he has driven the vehicle on occasion since August of 2015. While he's driven it, none of the vehicle's trouble lights have illuminated.

Mr. Wilson also stated that Respondent's field service engineer inspected the vehicle in November of 2015. The vehicle was delivered for inspection on November 10, 2015 and returned three (3) days later. Complainants were provided with a loaner vehicle while the inspection took place.

C. Respondent's Evidence and Arguments

Bruce Morris, Field Service Engineer, testified for Respondent. Mr. Morris has worked in the automotive industry for thirty (30) years. He is a GM World Class Certified Technician and has 24 Automotive Service Excellence (ASE) certifications. In addition, he has worked as an automotive instructor at Universal Technical Institute (UTI).

Mr. Morris testified that he was instructed by Respondent's customer service center to perform a final repair attempt on Complainants' vehicle. The final repair attempt was performed on November 10, 2015, at Westside. Mr. Morris was informed that Complainants' complained of

the vehicle's lack of power, stalling, and dying. Mr. Morris testified that he first performed a visual inspection of the vehicle for damage or after-market accessories. Mr. Morris observed some damage to the vehicle, but nothing major. In addition, he noted that there were no after-market items on the vehicle. Mr. Morris then performed a diagnostic trouble code (DTC) scan on the vehicle. He did not find any active codes, but did find two history codes. Neither of the codes had anything to do with the vehicle's engine. Mr. Morris reviewed the repair history of the vehicle and found that the vehicle's turbocharger and engine had been replaced. He then test drove the vehicle for about twenty (20) miles on the freeway and in stop and go traffic to determine whether the vehicle was suffering from a loss of power or to see if it stalled. Mr. Morris determined that the vehicle did not seem to be running rough and did not have any acceleration problems. He determined that the vehicle was operating as designed.

Mr. Morris further testified that when the vehicle's engine was rebuilt during the July 6, 2015, repair visit, that the service technicians missed the damage to the engine's cylinder walls. By missing the damage, this caused the engine to fail when Complainants picked up the vehicle from Westside and led to the necessity of replacing the engine on July 30, 2015.

Mr. Morris testified that the vehicle still has the fuel pump and turbocharger that were replaced during earlier repairs to the vehicle. The engine replacement did not affect those two (2) items. He does not feel that the vehicle has any defects or nonconformities.

D. Analysis

Under the 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 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 17, 2014, and presented the vehicle to Respondent's authorized dealers due to their concerns with the engine on the following dates: February 23, 2015; April 3, 2015; May 4, 2015; July 6, 2015; and July 30, 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)(1) specifies 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.” The evidence presented at the hearing establishes that Complainants have not met the requirements of this test since Complainants first presented the vehicle for repair for the engine issue on February 23, 2015, when the vehicle had been driven 23,028 miles, of which 15,968 miles was attained after Complainants purchased the vehicle. Since Complainants did not take the vehicle for repair prior to the vehicle having been driven in excess of 12,000 miles from the date of delivery, the hearing examiner must hold that Complainants have not met the presumption that Respondent has been provided with a reasonable number of attempts to repair the vehicle under Section 2301.605(a)(1) of the Occupations Code.

From the evidence presented, it is apparent that Complainants have not met the requirements for replacement or repurchase relief under the Occupations Code, since the first repair attempt occurred after the vehicle had been driven over 12,000 miles from the date of delivery. However, there does seem to be an issue with the vehicle, since it died in November for no apparent reason and there may be an acceleration issue. Although Respondent’s bumper-to-bumper warranty has expired, Respondent is still under an obligation to repair any issue that was raised prior to the expiration of the warranty. Occupations Code § 2301.603.

Complainants’ request for repurchase or replacement relief is denied.

III. FINDINGS OF FACT

1. Brenda and Brandon Wilson (Complainants) purchased a 2013 Chevy Malibu on February 17, 2014, from Westside Chevrolet (Westside) in Katy, Texas with mileage of 7060 at the time of purchase.
2. The vehicle’s mileage on the date of hearing was 39,481.
3. The manufacturer of the vehicle, General Motors LLC (Respondent), issued a bumper-to-bumper warranty for the vehicle for three (3) years or 36,000 miles. In addition, Respondent provided a five (5) year or 100,000 mile warranty for the vehicle’s powertrain.
4. At the time of hearing the bumper-to-bumper warranty for the vehicle had expired.
5. Ms. Wilson first experienced a problem in the vehicle in January of 2015, when it began to sputter and then died while she was driving it.

6. On February 23, 2015, Complainants took the vehicle to Respondent's authorized dealer, Brasher Motor Company, in Weimar, Texas, for repair because the vehicle had died while being driven. The vehicle's mileage was 23,028 at the time.
7. On February 23, 2015, the dealer's service technicians replaced the vehicle's high pressure fuel pump and line. In addition, two recalls were performed which involved replacing four (4) spark plugs and reprogramming the vehicle's engine control module (ECM) and transmission control module (TCM).
8. Complainants' vehicle was serviced by Westside on the following dates because of Complainants' concerns with the vehicle's engine:
 - a. April 3, 2015, at 24,479 miles;
 - b. May 4, 2015, at 25,374 miles;
 - c. July 6, 2015, at 28,506 miles; and
 - d. July 30, 2015, at 28,623 miles.
9. On April 3, 2015, Westside's service technician replaced the vehicle's turbocharger to address an acceleration issue.
10. On May 4, 2015, Westside's service technician determined that the vehicle needed an oil change because the vehicle was running rough and because the vehicle's "add oil" warning light had illuminated. The oil change was performed at the time.
11. On July 6, 2015, Westside's service technician rebuilt the vehicle's engine after it was determined that the engine's ring lands on the pistons had broken.
12. On July 30, 2015, Westside's service technician replaced the vehicle's engines because three (3) of the pistons had cracked and the engine cylinder walls were scored.
13. On October 14, 2015, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
14. Respondent performed a final repair attempt on the vehicle on November 10, 2015, at Westside. Respondent's field service engineer determined during the final repair attempt that the vehicle was operating as designed.
15. On November 23, 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 closed on February 24, 2016, in Sealy, Texas before Hearings Examiner Edward Sandoval. Complainants were represented by Brenda Wilson in the hearing. Brandon Wilson was also present to provide testimony at the hearing. Respondent was represented by Kevin Phillips, Business Resource Manager. Also present to testify for Respondent was Bruce Morris, Field Service Engineer.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.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 proved by a preponderance of the evidence that the vehicle has a verifiable 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. Complainants did not meet the presumption that a reasonable number of repair attempts were undertaken by Respondent prior to the filing of the Lemon Law complaint. Tex. Occ. Code § 2301.605(a).
8. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code § 2301.204.
9. 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 repurchase relief pursuant to Texas Occupations Code §§ 2301.601-.613 is hereby **DISMISSED**. Respondent is hereby **ORDERED** to repair Complainants' vehicle so that it conforms to Respondent's express warranty. Texas Occupations Code § 2301.204.

SIGNED March 2, 2016



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