

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0101 CAF**

**NEILA OLVERA,
Complainant**

v.

**MAZDA NORTH AMERICAN
OPERATIONS,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Neila Olvera (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 her vehicle distributed by Mazda North American Operations (Respondent). The hearings examiner concludes that the subject 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 March 29, 2016, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented herself. Manuel Moncayo, the Complainant's husband, testified for the Complainant. Fernando Rea, represented the Respondent. David Sides, District Service Manager, 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 distributor 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 distributor, (2) an opportunity to repair by the distributor, 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 distributor;⁹ (2) the distributor was given an

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). Note: the Lemon Law does not define the words “mailed” or “mail”, so under the Code Construction Act, the common usage of the word applies. TEX. GOV’T CODE § 311.011. Dictionary.com defines “mail” as “to send by mail; place in a post office or mailbox for transmission” or “to transmit by email.” mail. Dictionary.com. *Dictionary.com Unabridged*. Random House, Inc. <http://www.dictionary.com/browse/mail> (accessed: April 01, 2016).

opportunity to cure the defect or nonconformity;¹⁰ and (3) the owner or someone on behalf of 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.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, converter's, or distributor's . . . warranty agreement applicable to the vehicle."¹²

3. Burden of Proof

The law places the burden of proof on the Complainant. The Complainant must prove all facts 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. For example, the Complainant must show the fact 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. If the Complainant fails to prove one (or more) of the required facts, the Complainant cannot prevail.

A. Complainant's Evidence and Arguments

On December 29, 2014, the Complainant, purchased a new 2015 Mazda CX-9 from Munday Mazda, a franchised dealer of the Respondent, Mazda North American Operations, in Houston, Texas.¹³ The vehicle had eight miles on the odometer at the time of purchase.¹⁴ The

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).

¹¹ TEX. OCC. CODE § 2301.606(d)(2).

¹² TEX. OCC. CODE § 2301.204.

¹³ Complainant's Ex. 1, Financing Statement; Complainant's Ex. 2, Odometer Disclosure Statement.

¹⁴ Complainant's Ex. 2, Odometer Disclosure Statement.

vehicle's basic limited warranty covers the vehicle for 36 months or 36,000 miles, whichever occurs first.

The Complainant testified that the vehicle's mildew odor issue began in early April of 2015 as warmer weather approached Houston. She noted that the odor would occur every time the air conditioning starts. She explained that the odor did not last the entire time the air conditioning remained on, but maybe 10 to 15 minutes or a minute or two after starting and sometimes the vehicle would exhibit the odor during a 30 minute drive. The Complainant stated that none of the repair attempts improved the condition and that the odor last occurred the day of the hearing. She added that she observed that when condensation appeared under the vehicle, the vehicle would not smell. Mr. Moncayo testified that initially at every start, the vehicle would smell. The smell would go away but come back—after turning the vehicle off and starting again, the smell would occur again.

In relevant part, the Complainant took the vehicle to a dealer for repair of the odor issue as shown below:

Date	Miles	Issue
04/21/15	7,471	A/C smells like a wet towel and smells terrible ¹⁵
04/27/15	7,829	A/C smell is back, smells like wet towel ¹⁶
07/25/15	10,542	A/C smells like wet towel when operating ¹⁷
10/14/15	12,781	Wet towel smell when A/C is first turned on ¹⁸

On November 12, 2015, the Complainant mailed a written notice of defect to the Respondent.¹⁹ On November 16, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the vehicle presented a mildew odor from the air vents.

B. Respondent's Evidence and Arguments

Mr. Rea stated that at most service visits, no odor was detected and the odor that did occur was not a warrantable defect but the result of environmental factors beyond the control of the

¹⁵ Complainant's Ex. 3, Invoice MACS241577.

¹⁶ Complainant's Ex. 3, Invoice MACS241848.

¹⁷ Complainant's Ex. 3, Invoice MACS246869.

¹⁸ Complainant's Ex. 3, Invoice W64629.

¹⁹ Complainant's Ex. 7, Letter to Respondent.

manufacturer. Mr. Rea explained that the odor was a cleaning/maintenance issue not covered under warranty. Moreover, the odor does not substantially impair the value or safety of the vehicle. Mr. Sides testified that upon his inspection the vehicle produced warm moist air for a few seconds but not a mold/mildew odor. He had the dealer verify that the condensation was draining properly and the dealer replaced the cabin filter out of good will. The dealer also replaced the evaporator out of good will.

C. Inspection

The vehicle had 23,501 miles on the odometer upon inspection at the hearing. With the air conditioner turned on, the air from the front vents did not have any mildew odor but had a humid outdoor smell. However, the rear vents did exhibit some mildew odor.

D. Analysis

The evidence shows that environmental factors, not any warrantable manufacturing defects, caused the complained of odor. Accordingly, the vehicle does not qualify for repurchase/replacement or warranty repair relief. A manufacturing defect is an unintended condition that occurs when the vehicle varies from its intended design. 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. In contrast, characteristics of the intended design do not arise from any error in the manufacturing process, but may exist in any same-model vehicle produced according to the manufacturer's specifications.²⁰ The fact that a vehicle's design could be better or that an issue would not occur with a different design does not make a vehicle defective under the Lemon Law. Regardless of how the vehicle's air conditioning may perform, a warrantable defect exists only if the vehicle is incorrectly assembled or if the vehicle contains an out-of-specification part. In this case, the evidence shows that environmental factors caused the odor.

A Mazda service bulletin explains that the complained of the odor results from mold growth fueled by condensation and particulate matter:

A musty/mildew type odor may come from the vents when the air conditioning (A/C) system is operating. It is most noticeable when the A/C is first turned ON.

²⁰ *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).

This odor is the result of mold growth in the A/C evaporator/cooling unit which is caused by condensation, dust, and pollen within the cooling unit. This condition is usually worse during high humidity conditions.²¹

Similarly, “[a] mildew smell is often caused by moisture or humidity that has been built up in your car”;²² “[t]he source of the smelly malady is mold, a single cell organism that grows in the dark and wet environment in your car’s air-conditioning system”;²³ “[a]n unpleasant odor emanating from the dash vents . . . can be caused by mold and bacteria growing on or around the air conditioner’s evaporator core”.²⁴ Water vapor in warm air will condense into liquid water when cooled by the vehicle’s air conditioner. Any undissipated moisture in the air conditioning system can promote growth of mold/bacteria, which feed on particulate matter, resulting in an odor.²⁵ However, as noted by the Respondent, addressing the odor is a maintenance issue: “[t]his is actually a very common automotive problem, and it’s generally caused by running your air conditioning system only on recirculate, and not blowing the fan for a minute or two after turning off the AC and shutting off the engine.”²⁶ Accordingly, before turning the vehicle off, the driver could run the vehicle’s blower—with the air conditioning turned off—to dissipate the moisture, thereby depriving the mold and bacteria of the water necessary to grow. In this case, the complained of odor is a condition normally caused by environmental factors and not any manufacturing defect, such as a defective evaporator drain.²⁷

Using the vehicle’s air conditioner in Houston’s high temperatures and extreme humidity, will cause condensation, providing water to fuel the growth of mold and bacteria along with their resulting odor. Higher humidity and greater air conditioning use necessarily means more condensation, which in turn requires greater effort to dissipate the condensed water. Although dissipating the condensed water requires active maintenance, the condensation and odor occur

²¹ Complainant’s Ex. 4, Service Bulletin No. 07-002/13, Air Conditioning Musty / Mildew Odor (emphasis added).

²² Respondent’s Ex. 5, “How to Get Rid of a Car Mildew Smell”.

²³ Respondent’s Ex. 5, “Moldy Smells Inside Car Vents”.

²⁴ Respondent’s Ex. 5, “How to Get Rid of Car Air Conditioner Odor”.

²⁵ Respondent’s Ex. 5, “Moldy Smells Inside Car Vents”.

²⁶ Respondent’s Ex. 5, “Why does the Air Coming Through My AC Vents Smell Bad?”

²⁷ Respondent’s Ex. 5, “How to Get Rid of a Car Mildew Smell”, “Moldy Smells Inside Car Vents”, “How to Remove Mildew/Musty Smell from your Car”, “How to Get Rid of Car Air Conditioner Odor”, “Why does the Air Coming Through My AC Vents Smell Bad?”.

because of environmental factors (heat and humidity, and mold, bacteria, and particulate matter in the air), and not because of any warrantable defect. Consequently, the odor issue does not warrant relief in this case.

III. Findings of Fact

1. On December 29, 2014, the Complainant, purchased a new 2015 Mazda CX-9 from Munday Mazda, a franchised dealer of the Respondent, Mazda North American Operations, in Houston, Texas. The vehicle had eight miles on the odometer at the time of purchase.
2. The vehicle had eight miles on the odometer at the time of purchase. The vehicle's basic limited warranty covers the vehicle for 36 months or 36,000 miles, whichever occurs first.
3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
04/21/15	7,471	A/C smells like a wet towel and smells terrible
04/27/15	7,829	A/C smell is back, smells like wet towel
07/25/15	10,542	A/C smells like wet towel when operating
10/14/15	12,781	Wet towel smell when A/C is first turned on

4. On November 12, 2015, the Complainant mailed a written notice of defect to the Respondent.
5. On November 16, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the vehicle presented a mildew odor from the air vents.
6. On January 12, 2016, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, Mazda North American Operations, 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.
7. The hearing in this case convened and the record closed on March 29, 2016, in Houston, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented herself.

Manuel Moncayo, the Complainant's husband, testified for the Complainant. Fernando Rea, represented the Respondent. David Sides, District Service Manager, testified for the Respondent.

8. The vehicle's odometer displayed 23,501 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. At the inspection during the hearing, the vehicle's front vents did not present any unusual odors but the rear vents exhibited some mildew smell.
11. Mold and bacteria grow in wet conditions, feeding on particulate matter, such as pollen and pieces of leaves, and producing an odor.
12. The air conditioner's cooling of humid air will cause the water vapor in the air to condense into liquid water and mold/bacteria may grow in any such condensed water that has not yet dissipated.
13. Environmental factors, specifically mold and/or bacteria growth, caused the odors from the vehicle's air conditioning system.

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 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 May 27, 2016



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