

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0114 CAF**

**FRANKIE HARRISON, JR.,
Complainant**

v.

**GENERAL MOTORS LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Frankie Harrison, Jr. (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 does not have an existing warrantable defect. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair in this case.

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 April 11, 2016, in Fort Worth, Texas, before Hearings Examiner Andrew Kang. The Complainant represented himself. Tina Harrison, the Complainant's spouse, testified for the Complainant. Todd Nelson, District Manager Aftersales, represented 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 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.¹⁰

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.¹¹ 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.¹²

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 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.

¹¹ “[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).

¹² “[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).

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;¹³ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹⁴ 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.¹⁵

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."¹⁶

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁷ 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.¹⁸ 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.

¹³ 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).

¹⁴ 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).

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

¹⁶ TEX. OCC. CODE § 2301.204.

¹⁷ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁸ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

A. Complainant's Evidence and Arguments

On June 9, 2015, the Complainant, purchased a new 2015 GMC Sierra 3500 from Lipscomb Auto Center, a franchised dealer of the Respondent, General Motors LLC, in Bowie, Texas. The vehicle had 18 miles on the odometer at the time of purchase.¹⁹ The vehicle's limited warranty covers the vehicle for 36 months or 36,000 miles, whichever occurs first.

The Complainant explained that during torrential rains in late June of 2015, the vehicle floorboards would completely fill with water, water would run out of the molded floor mats, water would come out of the speakers, and water would blow out of the air conditioning vents. The Complainant felt dampness on the headliner and noticed that water appeared to run down the driver's side "A" pillar down to the door. The Complainant confirmed that the vehicle would leak every time during rains, whether light or heavy. Mrs. Harrison indicated that she last noticed the vehicle leaking before the last repair on October 30, 2015. The Complainant affirmed that the vehicle has not leaked since the last repair, despite rain occurring after the repair. However, the Complainant noted that the headliner has staining, presumably from the leaking. The Complainant added that after the leaks, he began to experience some situations when he could not clear warning messages. Mrs. Harrison stated that they had not amended the Complaint. In closing, the Complainant explained that his concern with the vehicle was not the leak itself, but the consequential effects of the leak on the value of the vehicle and what would happen after the warranty expires.

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

Date	Miles	Issue
06/18/2015	721	Water leaking at top front headliner ²⁰
10/22/2015	8,553	Water leaking at top front of interior ²¹
10/22/2015	8,553	Water leak at left A pillar ²²
10/30/2015	8,947	Water leaking on drivers side corner of roof ²³

On December 3, 2015, the Complainant mailed a written notice of defect to the Respondent. On December 9, 2015, the Complainant filed a Lemon Law complaint (Complaint)

¹⁹ Complainant's Ex. 1, Purchase Order.

²⁰ Complainant's Ex. 4, RO 111255.

²¹ Complainant's Ex. 5, RO 113718.

²² Complainant's Ex. 6, RO 113738.

²³ Complainant's Ex. 7, RO 113884.

with the Texas Department of Motor Vehicles (Department) alleging that the vehicle leaked water, flooding the interior on more than one occasion.

B. Respondent's Evidence and Arguments

The Respondent argued that by definition, a lemon is a vehicle that cannot be fixed. The repair orders show that the taking out the windshield and resealing it repaired the leak. Additionally, the vehicle was out of service for repair for a total of 12 days. Even if the vehicle did have a non-conformity, it would have to substantially impair the use or value of the vehicle. However, a water leak does not fall into the category of substantially impairing the vehicle. Additionally, the vehicle was still under warranty.

C. Inspection

The Complainant and Mrs. Harrison confirmed that, at a service visit on January 27, 2016, the vehicle only had an oil change and did not ask for any other repair. At the inspection at the hearing, the vehicle's odometer displayed 25,203 miles. The inspection showed that vehicle had several water stains on the headliner around the sunroof.

D. Analysis

The record reflects that the only issue in the Complaint has been resolved, making the vehicle ineligible for repurchase or replacement. The law limits the scope of this proceeding to the issues identified in the complaint and any amendments.²⁴ In the present case, the Complaint identifies leaking water as the only issue. Mrs. Harrison confirmed that the Complainant did not amend the Complaint. Consequently, this proceeding only addresses the issue of leaking water. Both the Complainant and Mrs. Harrison testified that the leaking issue did not recur after the repair on October 30, 2015, despite subsequent rain. The Complainant affirmed that the vehicle previously leaked during every rain, whether slight or heavy. In closing, the Complainant explained that his concern with the vehicle was not the leak itself, but the consequential effects of the leak on the value of the vehicle and what may happen after the warranty expires. However, to qualify for repurchase or replacement, the Lemon Law requires that a warrantable defect (in this

²⁴ 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.

case the water leak) remains despite a reasonable number of repair attempts. But the evidence provides no indication that a leak still exists. As a result, the Lemon Law does not provide a remedy in this case.

III. Findings of Fact

1. On June 9, 2015, the Complainant, purchased a new 2015 GMC Sierra 3500 from Lipscomb Auto Center, a franchised dealer of the Respondent, General Motors LLC, in Bowie, Texas. The vehicle had 18 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty covers the vehicle for 36 months 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 repair as shown below:

Date	Miles	Issue
06/18/2015	721	Water leaking at top front headliner
10/22/2015	8,553	Water leaking at top front of interior
10/22/2015	8,553	Water leak at left A pillar
10/30/2015	8,947	Water leaking on drivers side corner of roof

5. On December 3, 2015, the Complainant mailed a written notice of defect to the Respondent.
6. On December 9, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the vehicle leaked water, flooding the interior on more than one occasion.
7. The Complainant did not amend the Complaint.
8. On February 5, 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.

9. The hearing in this case convened and the record closed on April 11, 2016, in Fort Worth, Texas, before Hearings Examiner Andrew Kang. The Complainant represented himself. Tina Harrison, the Complainant's spouse, testified for the Complainant. Todd Nelson, District Manager Aftersales, represented the Respondent.
10. The vehicle did not leak after the October 30, 2015, repair.
11. The vehicle's odometer displayed 25,203 miles at the time of the hearing.
12. The inspection at the hearing, showed that the vehicle had several water stains on the headliner around the sunroof.

IV. Conclusions of Law

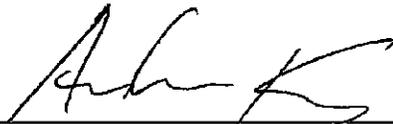
1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the 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 currently existing 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 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**.

SIGNED April 12, 2016



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