

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0147 CAF**

**RUBEN PEREZ and
MARIA DEL SOCORRO PEREZ,
Complainants**

v.

**GENERAL MOTORS LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Ruben and Maria Del Socorro Perez (Complainants) seek relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in their 2015 Silverado LT. Complainants assert that the vehicle has a mold or wetness smell that has not been corrected by Respondent. General Motors LLC (Respondent) argued that the vehicle has been repaired, there is no defect with the vehicle, and that no relief is warranted. The hearings examiner concludes that Complainants are not eligible for repurchase or replacement relief since they did not meet the presumption that Respondent was provided a reasonable number of repair attempts to conform the vehicle to its warranty which is required for such relief under the Texas Lemon Law.

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 April 21, 2016, in Houston, Texas before Hearings Examiner Edward Sandoval. Complainants were represented by Ruben Perez. Also testifying for Complainants was Maria Del Socorro Perez. Respondent was represented by Kevin Phillips, Business Resource Manager. Testifying for Respondent were Bill Sexton, Ron Carter Autoland's Shop Foreman, and Bruce Morris, Respondent's Field Service Engineer.

II. DISCUSSION

A. Applicable Law

The Texas Lemon Law provides that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of under the Texas Occupations Code with a comparable vehicle if five conditions are met. First, the manufacturer has not conformed the vehicle to an applicable express warranty because the manufacturer cannot repair or correct a defect or condition in the vehicle. Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Third, the manufacturer has been

given a reasonable number of attempts to repair or correct the defect or condition.¹ Fourth, the owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.² Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.³

In addition to the five 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.⁴

In addition, Complainants can establish the presumption that a reasonable number of repair attempts have been undertaken by Respondent if a nonconformity that substantially impairs the vehicle's use and market value continues to exist and (1) the vehicle is out of service for repair for a cumulative 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; and (2) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to the owner.⁵ However, the 30 days described above do not include any period during which the manufacturer or distributor lends the owner a comparable motor vehicle while the owner's vehicle is being repaired.⁶

B. Complainants' Evidence and Arguments

1. Ruben Perez' Testimony

Complainants purchased a 2015 Silverado LT from Ron Carter Autoland (Autoland), in Alvin, Texas on July 7, 2015, with mileage of 8 at the time of delivery.^{7,8} Respondent's basic bumper-to-bumper warranty for the vehicle provides coverage for three (3) years or 36,000 miles,

¹ Tex. Occ. Code § 2301.604(a)(1) and (2).

² Tex. Occ. Code § 2301.606(c)(1).

³ Tex. Occ. Code § 2301.606(c)(2).

⁴ Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) provides an alternative method 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.

⁵ Tex. Occ. Code § 2301.605(a)(3)(A) and (B).

⁶ Tex. Occ. Code § 2301.605(c).

⁷ Complainant Ex. 1, Vehicle Purchase Order, Application for Texas Title Gap Waiver, Vehicle Protection Program Agreement, Schedule Maintenance Agreement, and Financing Contract dated July 7, 2015.

⁸ Complainant Ex. 6, Odometer Disclosure Statement dated July 7, 2015.

whichever comes first.⁹ On the date of hearing the vehicle's mileage was 14,852. At this time, Respondent's warranty for the vehicle is still in effect.

Mr. Perez testified that the interior of the vehicle has an intermittent mold smell. He first noticed the smell after taking possession of the vehicle. Mr. Perez stated that the odor seemed to get stronger the longer he had the vehicle. He then noticed that the front passenger side's carpet was wet.

Mr. Perez took the vehicle to Autoland to address the mold smell and the wet carpet issues on November 4, 2015. Autoland's service technician determined that the passenger's side harness body conduit was loose and not sealing properly.¹⁰ The technician repositioned, resecured, and resealed the conduit.¹¹ The technician also removed and replaced the vehicle's seat paddings, seat covers, carpets, headliner, back cab panel insulator, the air conditioner cabin filter, seat heater elements, the HVAC case, heater core, evaporator core, the air conditioner case seals, the air conditioner ducts, the dash assembly, the air conditioner vents, the right side air bag assembly, the steering wheel air bag, the steering wheel, the steering column upper and lower covers, the left and right side roof curtain air bags, and all of the door panels in order to alleviate the mold smell.¹² The vehicle's mileage on this occasion was 8,275.¹³ Mr. Perez testified that the vehicle was in the dealer's possession for over ten weeks. Mr. Perez also stated that Complainants received three rental vehicles each for a different period of time while their vehicle was being repaired. Mr. Perez testified that the vehicle smelled fine for a few days, but then the mold smell returned.

On January 5, 2016, Complainants mailed a letter to Respondent advising them of Complainants' dissatisfaction with the vehicle.¹⁴ In addition, Complainants filed a Lemon Law complainant with the Texas Department of Motor Vehicles (TxDMV) on January 12, 2016.¹⁵

Mr. Perez testified that he was contacted by an Autoland representative to take the vehicle to the dealer for an inspection by Respondent's field service engineer. Complainants took the vehicle to Autoland on January 25, 2016. The field service engineer and Respondent's district manager

⁹ Respondent Ex. 3, Global Warranty, p. 2.

¹⁰ Complainant Ex. 2, Repair Order dated November 4, 2015.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Complainant Ex. 4, Letter to Chevrolet Customer Assistance Center dated January 5, 2016.

¹⁵ Complainant Ex. 3, Lemon Law complaint dated January 12, 2016. Although the complaint was signed on January 4, 2016, the effective date of the complaint is the date that it was received by the Texas Department of Motor Vehicles, which was January 12, 2016.

inspected and test drove the vehicle.¹⁶ They were unable to detect an odor in the vehicle during the time of the inspection.¹⁷ The mileage on the vehicle on this occasion was 9,008.¹⁸

Mr. Perez stated that the smell is not constant. It occurs intermittently. It doesn't matter if the vehicle's air conditioner is off or on when the smell arises.

During cross-examination, Mr. Perez testified that he took the vehicle for repair on three separate occasions, but he didn't get a copy of one of the repair orders from Autoland. In addition, Mr. Perez stated that the vehicle does not have any after-market additions. Neither he nor his family have gotten ill because of the smell. He has not accumulated any medical bills as a result of the smell and he has not had to visit a doctor for the odor.

Mr. Perez also testified that he attempted to return the vehicle to Autoland after January 25, 2016, for repair for the odor issue which was still occurring. However, he was informed by the dealer representative that since he had filed a Lemon Law complaint, no repairs could be performed.

2. Maria Del Socorro Perez' Testimony

Maria Del Socorro Perez testified that the vehicle was delivered to Autoland on November 4, 2015, for repair for the mold smell and the wet carpet issues. The vehicle was in Autoland's possession until December 11, 2015. The vehicle was then returned to Complainants and they were told to drive it for a while to see if the odor was gone. Complainants were told that if the odor returned, then they needed to return the vehicle to Autoland for further repair. The odor returned, so Complainants returned the vehicle to Autoland on December 14, 2015. Complainants then attempted to pick up the vehicle from Autoland on December 23, 2015, but the odor was still present, so they left the vehicle with the dealer. Complainants then picked up the vehicle on January 14, 2016. After a few days, the odor returned, so they attempted to return the vehicle to Autoland for further repair, but were informed that they would have to wait until the field service engineer arrived at the dealership for the inspection of the vehicle in order to perform any repairs.

Ms. Perez testified that she still smells a mildew odor from the vehicle. The smell is not constant, but occurs intermittently.

¹⁶ Complainant Ex. 5, Repair Order dated January 25, 2016.

¹⁷ *Id.*

¹⁸ *Id.*

C. Respondent's Evidence and Arguments

1. Bill Sexton's Testimony

Bill Sexton is the Shop Foreman for Autoland. He has worked in the automotive industry since the late 1970's. He's worked for Autoland for the past 21½ years. He worked for 16 years as an automotive technician. During this period of time, Mr. Sexton was an Automotive Service Excellence (ASE) certified Master Technician. For the last five (5) years, Mr. Sexton has worked as Autoland's shop foreman and service manager.

Mr. Sexton testified that he has driven Complainants' vehicle and has ridden in it as a passenger. He stated that the Houston area has a lot of mildew complaints from vehicle owners. This is due to the high humidity in the area.

Mr. Sexton stated that Respondent has provided a bumper-to-bumper warranty for the vehicle which is good for three (3) years or 36,000 miles.

Mr. Sexton also stated that the vehicle was originally turned over to Autoland to address the issue of the odor on November 4, 2015, and returned to Complainants in December of 2015, after several items in the vehicle had been replaced. He felt the vehicle was repaired at that time, but Complainants returned the vehicle a few days later indicating that the mold odor had returned. He then had his technicians replace the HVAC case, heater core, evaporator core, the air conditioner case seals, ducts, and vents, the dash assembly, the right side air bag, the steering wheel air bag, the steering wheel, the steering column upper and lower covers, the left and right side roof curtain air bags and all of the door panels in the vehicle. He felt that condensation had built up on the vehicle's evaporator core and had developed mold which was causing the odor that Complainants were detecting.¹⁹ The repairs were an attempt to deal with the condensation issue in the air conditioning system.

Mr. Sexton feels that the vehicle no longer has any odors. He feels that there is no defect with the vehicle. He stated that he would feel comfortable driving the vehicle.

2. Bruce Morris' Testimony

Bruce Morris is employed as a field service engineer for Respondent. He's worked in the automotive industry for 29 years. He is a certified General Motors World Class Technician. He also has three (3) master level ASE certifications. Mr. Morris has also been employed as an instructor for automotive classes at Universal Technical Institute (UTI).

¹⁹ Complainant Ex. 2, Repair Order dated November 4, 2015, p. 3.

Mr. Morris testified that he performed a final repair attempt on Complainants' vehicle on January 25, 2016, at Autoland's location. He performed a visual inspection of the vehicle and found no problems. Mr. Morris then inspected the vehicle for a mildew smell from the air conditioning vents and found no problem. He test drove the vehicle for 10 miles while running the air conditioner on fresh air mode and did not discern any problems. Mr. Morris feels that the vehicle is operating as designed.

D. Analysis

Under Texas' 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 July 7, 2015, and presented the vehicle to Autoland, Respondent's authorized dealer, due to their concerns with a mold smell in the interior of the vehicle on the following dates: November 4, 2015; and December 14, 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) goes on to specify 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." Complainants have not met the requirements of this test. Complainants presented the vehicle for repairs to an authorized dealer on only two occasions prior to filing the Lemon Law complaint.

However, Complainants could argue that they met the provisions of the 30 day test. There is no dispute that the vehicle was in the dealer's repair facility in excess of 30 days. However, the dealer provided Complainants with two comparable rental vehicles for the period from November 4, 2015 through January 14, 2016. Since Complainants were provided rental vehicles for the entire period that their vehicle was being repaired, they are not able to establish that they met the requirements of the 30 day test.

Given the entirety of the evidence, the hearings examiner must hold that Complainants were unable to establish that a reasonable number of attempts to repair the vehicle were made by Respondent. In order to grant repurchase or replacement relief, Complainants must have provided Respondent with a reasonable number of repair attempts to conform the vehicle to its warranty. Since Respondent was not provided an adequate opportunity to repair the vehicle, the hearings examiner cannot award repurchase or replacement relief.

Respondent's express warranty applicable to Complainants' vehicle provides bumper-to-bumper coverage for three (3) years or 36,000 miles whichever comes first. On the date of hearing, the vehicle's mileage was 14,852 and the basic warranty coverage is still in effect. Respondent is still under an obligation to repair any issues with the vehicle that are covered under the express warranty, including any odor issues.

Complainants' request for repurchase or replacement relief is denied.

III. FINDINGS OF FACT

1. Ruben and Maria Del Socorro Perez (Complainants) purchased a new 2015 Silverado LT on July 7, 2015, from Ron Carter Autoland, in Alvin, Texas, with mileage of 8 at the time of delivery.
2. The manufacturer of the vehicle, General Motors LLC (Respondent) issued a bumper-to-bumper warranty for the vehicle good for three (3) years or 36,000 miles, whichever occurs first.
3. The vehicle's mileage on the date of hearing was 14,852.
4. At the time of hearing the vehicle's basic bumper-to-bumper warranty was still in effect.
5. Complainants feel that the vehicle's interior has a wet, moldy smell.
6. Complainants took the vehicle to Respondent's authorized dealer in order to address their concerns with the vehicle, on the following dates:
 - a. November 4, 2015, at 8,275 miles; and
 - b. December 14, 2015, 2015, at unknown miles.
7. On November 4, 2015, Autoland's service technician verified a mold smell in the vehicle. He then repositioned, resecured, and resealed the passenger's side harness body conduit

- and also removed and replaced the vehicle's seat paddings, seat covers, carpets, headliner, back cab panel insulator, the air conditioner cabin filter, and the seat heater elements.
8. On December 14, 2015, Autoland's service technician replaced the HVAC case, heater core, evaporator core, the air conditioner case seals, ducts, and vents, the dash assembly, the right side air bag, the steering wheel air bag, the steering wheel, the steering column upper and lower covers, the left and right side roof curtain air bags and all of the door panels in the vehicle in order to address the mold odor issue.
 9. On January 12, 2016, Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
 10. On January 25, 2016, Respondent's field service engineer performed a final repair attempt on the vehicle. The engineer was unable to duplicate Complainants' concerns and determined that the vehicle's interior did not smell of mold or wetness.
 11. On February 12, 2016, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainants 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.
 12. The hearing in this case convened and the record closed on April 21, 2016, in Houston, Texas before Hearings Examiner Edward Sandoval. Complainants were represented by Ruben Perez. Also testifying for Complainants was Maria Del Socorro Perez. Respondent was represented by Kevin Phillips, Business Resource Manager. Testifying for Respondent were Bill Sexton, Ron Carter Autoland's Shop Foreman, and Bruce Morris, Respondent's 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 failed to prove 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)(1).
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**.

SIGNED May 6, 2016



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