

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0234 CAF**

**DAVID VILLARREAL,
Complainant**

v.

**NISSAN NORTH AMERICA, INC.,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

David Villarreal (Complainant) filed a complaint (Complaint) with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his vehicle distributed by Nissan North America, Inc. (Respondent). The record shows that the subject vehicle does not have a defect covered under warranty. 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 August 15, 2016, in Austin, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Mike Terrill, Dealer Technical Specialist, 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 Use or Value

i. Impairment of Use

In determining substantial impairment of use, the Department considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle.” For instance, “while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”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).

ii. Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. The reasonable purchaser standard “does not require an owner to present an expert witness or any technical or market-based evidence to show decreased value.” Instead, 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.”⁶

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.⁷ The first applies generally,⁸ the second applies to serious safety hazards,⁹ and the third applies to vehicles out of service for repair for at least 30 days.¹⁰

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.¹¹

Additionally, for vehicles out of service at least 30 days, a rebuttable presumption may be established that the vehicle had a reasonable number of repair attempts if:

⁶ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“[T]he Division’s interpretation that expert testimony or technical or market-based evidence is not required to show diminished value or use is consistent with the statute’s goal of mitigating manufacturers’ economic advantages in warranty-related disputes.”).

⁷ TEX. OCC. CODE § 2301.605(a).

⁸ TEX. OCC. CODE § 2301.605(a)(1).

⁹ TEX. OCC. CODE § 2301.605(a)(2).

¹⁰ TEX. OCC. CODE § 2301.605(a)(3).

¹¹ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

[A] nonconformity still exists that substantially impairs the vehicle's use or market value and: (A) 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 (B) at least two repair attempts were made in the 12 months or 12,000 miles following the date of original delivery to an owner.¹²

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.¹³ Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle to a dealer for repair and the dealer fails to repair the vehicle, then that visit would constitute a repair attempt unless the consumer was at fault for the failure to repair the vehicle.¹⁴

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 or someone on behalf of the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;¹⁵ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹⁶ and (3) the Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration

¹² TEX. OCC. CODE § 2301.605(a)(3).

¹³ “[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).

¹⁴ “[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).

¹⁵ TEX. OCC. CODE § 2301.606(c)(1). 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). Also, 43 TEX. ADMIN. CODE § 215.204 provides that “[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor.” The Department’s notice of the complaint to the Respondent may satisfy the requirement that someone on behalf of the owner mailed notice of the defect/nonconformity to the Respondent.

¹⁶ TEX. OCC. CODE § 2301.606(c)(2). A repair visit to a dealer can satisfy the “opportunity to cure” requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt the final repair on the manufacturer’s behalf. *See Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.¹⁷

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a “defect . . . that is covered by a manufacturer’s, converter’s, or distributor’s . . . warranty agreement applicable to the vehicle.”¹⁸ The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”¹⁹

3. Burden of Proof

The law places the burden of proof on the Complainant.²⁰ The Complainant must prove all facts required for relief by a preponderance, that is, the Complainant must present evidence showing that every required fact is more likely than not true.²¹ 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 will not prevail.

4. The Complaint Identifies the Issues in this Proceeding

The Complaint identifies the issues to be addressed in this proceeding.²² The Complaint 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

¹⁷ TEX. OCC. CODE § 2301.606(d)(2).

¹⁸ TEX. OCC. CODE § 2301.204.

¹⁹ TEX. OCC. CODE § 2301.603(a).

²⁰ 43 TEX. ADMIN. CODE § 215.66(d).

²¹ *E.g.*, *Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

²² “In a contested case, each party is entitled to an opportunity . . . for hearing after reasonable notice of not less than 10 days.” TEX. GOV’T CODE §§ 2001.051; “Notice of a hearing in a contested case must include . . . a short, plain statement of the matters asserted.” TEX. GOV’T CODE § 2001.052. *See* TEX. OCC. CODE § 2301.204(b) (“The complaint must be made in writing to the applicable dealer, manufacturer, converter, or distributor and must specify each defect in the vehicle that is covered by the warranty.”); TEX. OCC. CODE § 2301.204(d) (“A hearing may be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.”).

claim for relief under the lemon law.”²³ However, the parties may expressly or impliedly consent to trying issues not included in the pleadings.²⁴ Trial by implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²⁵

A. Complainant’s Evidence and Arguments

On July 11, 2015, the Complainant, purchased a new 2015 Nissan Sentra from Clay Cooley Nissan of Austin, a franchised dealer of the Respondent, Nissan North America, Inc., in Austin, Texas.²⁶ The vehicle had 23 miles on the odometer at the time of purchase.²⁷ The vehicle’s limited warranty provides basic coverage for 36 months or 36,000 miles, whichever occurs first.²⁸ On or about April 15, 2016, the Complainant or a person on behalf of the Complainant mailed a written notice of defect to the Respondent.²⁹ On April 19, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the vehicle made a screeching noise on the right side, sometimes associated with a jerk, and that the rpms increased while on cruise control on a test drive.

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

Date	Miles	Issue
09/10/15	2,804	Winding noise from right front ³⁰
	7,424	Sound in passenger wheel like applying brakes ³¹
03/01/16	12,458	Vehicle makes a screeching sound, vehicle jerked at about 85 mph and rpms jumped from 2500 to 3500 rpms ³²

The Complainant testified that when driving from Edinburg to Austin, he would hear a noise that sounded like a screech as if braking. The noise would usually occur on cruise control, driving at 75 mph. He explained that the noise occurred more when windy, but the road always

²³ 43 TEX. ADMIN. CODE § 215.202(b).

²⁴ 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

²⁵ See *Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

²⁶ Complainant’s Ex. 1, Buyers Order.

²⁷ Complainant’s Ex. 1, Buyers Order; Complainant’s Ex. 2, Odometer Disclosure Statement.

²⁸ Complainant’s Ex. 3, 2015 Warranty Information Booklet at 6.

²⁹ Complainant’s Ex. 8, Notice of Defect.

³⁰ Complainant’s Ex. 4, Invoice NICS402576.

³¹ Complainant’s Ex. 5, RO 152819.

³² Complainant’s Ex. 6, Invoice 159078.

seemed windy that way. He did not know if the wind itself or the speed causing air to pass faster caused the condition. He noted that the noise usually did not occur in the rain. The Complainant explained that the noise would usually occur at least once driving long distance but also occurred on drives no longer than 20 minutes. He stated that, when the vehicle pulled, sometimes he felt like he just needed to hold the steering wheel tighter but he has also felt the vehicle move far enough to affect the steering. He added that he previously had a 2014 Nissan Sentra, which did not have any issues at all. After contacting Nissan Consumer Affairs, the vehicle was test driven with the dealer's service manager, but the issue could not be duplicated. The Respondent sent Mr. Terrill to inspect the vehicle at the dealer. The door seal was replaced but with no effect. Eventually, Amy of Nissan Consumer Affairs informed the Complainant that no further repairs were recommended because nothing could be done. Although the issue had been confirmed, the problem was not remedied.

B. Respondent's Evidence and Arguments

Mr. Terrill explained that the complained of noise resulted from the door frame vibrating because of the particular way the door was framed. The problem was wind noise and not a safety issue. Although the noise was a known issue, replacing parts would not have fixed the problem and a fix did not exist at the time he met with the Complainant. With regard to the transmission speed jumping, Mr. Terrill elucidated that at 85 mph, the vehicle's engine is already taxed, so even the slightest head wind would cause the vehicle's continuously variable transmission (CVT) to respond by increasing rpms (to maintain the vehicle's speed).

C. Inspection and Test Drive

The vehicle had 19,642 before the test drive at the hearing. The vehicle was driven predominantly on the highway in different directions (northwest, southeast, north and south) at speeds up to about 75 mph. The test drive ended at 19,675 miles, for a total of 33 miles driven. The vehicle performed normally and did not exhibit any unusual noise.

D. Analysis

1. Noise - Defectively Designed Door

The Lemon Law does not provide any relief in this case because the vehicle's warranty does not cover the complained of design defect. The Lemon Law only applies to defects covered by an applicable warranty. In the present case, the vehicle's warranty specifies that "[t]his warranty covers any repairs needed to correct defects in materials or workmanship of all parts and components of each new Nissan vehicle supplied by Nissan.³³ Courts have affirmed that language covering "defects in material or workmanship" did not cover design defects.³⁴ That is, defects in materials or workmanship (manufacturing defects) differ from defects in design. The courts have explained that "[a] manufacturing defect is one created by a manufacturer's failure to conform to its own specifications, i.e., the product would not have been defective if it had conformed to the manufacturer's design specifications."³⁵ For example a vehicle may not conform to specifications because of the use of a cracked bolt (a defect in material) or the inadequate tightening of a bolt (a defect in workmanship). In contrast, "[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves."³⁶ For instance, a defectively designed bolt, with a specified length too short to secure the bolted parts, may allow parts to vibrate, even though properly tightened and manufactured with no physical defects. Because design defects exist in the specifications themselves, every vehicle manufactured according to the specifications will share the same design flaw. Whereas, manufacturing defects only exist in vehicles not manufactured according to specifications and "are not identical to their mass-

³³ Complainant's Ex. 3, 2015 Warranty Information Booklet at 6 (emphasis added).

³⁴ *E.g., Whitt v. Mazda Motor of America*, 5th Dist. Stark No. 2010CA00343, 211-Ohio-3097, ¶¶ 18-21 ("The manufacturer's express warranty in the case sub judice provides: 'Mazda warrants that your new Mazda Vehicle is free from defects in material or workmanship' The trial court found the warranty did not cover claims of design defects. . . . The problems about which Appellants complained did not fall within the applicable expressed warranty."); *see GT & MC, Inc. v. Texas City Refining, Inc.*, 822 S.W.2d 252, 257 (Tex. App.—Houston [1st Dist.] 1991, writ denied) ("the language in the contract of May 12, 1980, expressly limited TCR's recovery only for defects in materials or workmanship to damages for repair or replacement value. No mention was made in the guarantee of remedies for design defects.").

³⁵ *E.g., Torres v. Caterpillar, Inc.*, 928 S.W.2d 233 (Tex. App.—San Antonio 1996), writ denied, (Feb. 13, 1997).

³⁶ *E.g., Torres v. Caterpillar, Inc.*, 928 S.W.2d 233 (Tex. App.—San Antonio 1996), writ denied, (Feb. 13, 1997).

produced siblings.”³⁷ The record shows that the vehicle has a design defect rather than a manufacturing defect. The Complainant testified that other 2015 Nissan Sentras exhibited the same problem, supporting that the flaw existed in the design rather than the materials or workmanship. Testimony also showed that the dealer could not repair the vehicle because a fix did not exist until the availability of a redesigned part³⁸ (consistent with the existence of a design defect requiring a design change). In fact, the Respondent acknowledged that the vehicle had a design flaw. Although the vehicle has a design defect, the warranty terms only cover defects in material or workmanship and not defects in design. Although the warranty itself does not cover design defects, the Respondent may provide “assistance outside of warranty.”³⁹ However, because the express terms of the warranty do not cover the complained of design defect, the Lemon Law does not provide any relief.

2. Transmission Downshifting/Revving

The jolt and increased revving experienced while on cruise control at highway speed appears to be a normal response of the vehicle’s CVT and not a defect that qualifies for relief. While driving at high speeds, the CVT will respond to even marginally higher resistance (e.g., a headwind) by downshifting (causing a jolt) and increasing rpms (to produce more power) to maintain the speed set by cruise control. Accordingly, the CVT’s downshifting and revving is not a warrantable defect.

III. Findings of Fact

1. On July 11, 2015, the Complainant, purchased a new 2015 Nissan Sentra from Clay Cooley Nissan of Austin, a franchised dealer of the Respondent, Nissan North America, Inc., in Austin, Texas. The vehicle had 23 miles on the odometer at the time of purchase.

³⁷ *Ford Motor Co. v. Pool*, 688 S.W.2d 879, 881 (Tex. App.—Texarkana 1985), aff’d in part and rev’d in part on other grounds, 715 S.W.2d 629 (Tex. 1986).

³⁸ Respondent’s Ex. 1, Service Bulletin, NTB16-075, 2015-2016 Sentra; Wind Noise from A-Pillar or Front Door Area.

³⁹ “In our continuing effort to convey our commitment to service and customer satisfaction, Nissan may occasionally offer to pay or reimburse for part or all of the cost of making certain, specific repairs beyond or outside of the terms of the warranty for some specific vehicle models. (Some states refer to such programs as “adjustment programs”).” Complainant’s Ex. 3, 2015 Warranty Information Booklet at 4.

2. The vehicle's limited warranty provides basic coverage 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
09/10/15	2,804	Winding noise from right front
	7,424	Sound in passenger wheel like applying brakes
03/01/16	12,458	Vehicle makes a screeching sound, vehicle jerked at about 85 mph and rpms jumped from 2500 to 3500 rpms

4. On or about April 15, 2016, the Complainant or a person on behalf of the Complainant mailed a written notice of defect to the Respondent.
5. On April 19, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the vehicle made a screeching noise on the right side, sometimes associated with a jerk, and that the rpms increased while on cruise control on a test drive.
6. On June 15, 2016, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, Nissan North America, Inc., 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 August 15, 2016, in Austin, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself. Mike Terrill, Dealer Technical Specialist, represented the Respondent.
8. The vehicle's odometer displayed 19,642 miles at the time of the hearing.
9. The vehicle's warranty was in effect at the time of the hearing.
10. The vehicle operated normally during the test drive at the hearing.
11. The vehicle's warranty covers "defects in materials or workmanship of all parts and components of each new Nissan vehicle supplied by Nissan."
12. The vehicle's warranty does not cover defects in design.

13. The complained of noise resulted from the defective design of the vehicle, specifically the front door weather strips.
14. The vehicle's continually variable transmission will normally downshift, causing a jolt, and increase rpms to produce more power to maintain speed while on cruise control at highway speeds.

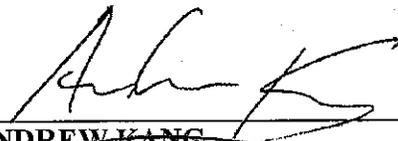
IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613.
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 §§ 2301.603 and 2301.204.

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 October 14, 2016



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