

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0348 CAF**

**PAULA CAREY,
Complainant**

v.

**KIA MOTORS AMERICA, INC.,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Paula Carey (Complainant) seeks relief pursuant to Texas Occupations Code § 2301.204 (Warranty Performance) for an alleged defect in her 2012 Kia Sorrento. Complainant asserts that the vehicle emits smoke from the exhaust and hesitates when she drives it. Kia Motors America, Inc. (Respondent) asserts that the problems with the vehicle are not covered under the warranty because they are the result of a failure to properly maintain the vehicle. The hearings examiner concludes that the vehicle does have an existing warrantable defect and Complainant is eligible for repair relief at this time.

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 November 4, 2016, in Odessa, Texas before Hearings Examiner Edward Sandoval. Complainant represented herself. Also testifying for Complainant were Tommy Carey, husband, and William Pollard, owner of Pollard Chevrolet–Buick–Cadillac. Respondent was represented by Matt Pfeifer, District Parts and Service Manager.

II. DISCUSSION

A. Applicable Law

Occupations Code § 2301.002(24) provides that a “[n]ew motor vehicle” means a motor vehicle that has not been the subject of a retail sale regardless of the mileage of the vehicle.” Occupations Code § 2301.603(a) provides that “[a] manufacturer, converter, or distributor shall make repairs necessary to conform a **new motor vehicle** to an applicable manufacturer’s, converter’s, or distributor’s express warranty.” (Emphasis mine.) Therefore, repurchase or replacement relief for defects in a vehicle is available only for new vehicles as defined in the Code. However, relief is available for purchasers of used vehicles under Occupations Code § 2301.204(a) which 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

Complainant purchased a used 2012 Kia Sorrento on May 22, 2015, from Pollard Chevrolet-Buick-Cadillac in Big Spring, Texas with mileage of 42,176 at the time of delivery.¹ Respondent provided a bumper-to-bumper warranty for the vehicle for the first five (5) years or 60,000 miles of ownership, whichever comes first. On the date of hearing the vehicle's mileage was approximately 46,000. The warranty for the vehicle was still in effect on the date of hearing.

1. Paula Carey's Testimony

Complainant testified that she first began experiencing problems with smoke coming out of the vehicle's exhaust and with the vehicle hesitating after she had the first oil change performed on the vehicle on October 24, 2015. The oil change was performed by Express Care in Big Spring.² The vehicle's mileage was 43,704.³

When Complainant began experiencing problems with the vehicle, she took it back to Express Care for another oil change on February 3, 2016.⁴ The vehicle's mileage was 44,833.⁵ However, the problems with the vehicle continued. Complainant contacted a Pollard representative about the problems she was experiencing with the vehicle. The representative told Complainant to take it to the dealer's repair shop for an oil change. However, Complainant did not have the money or the time to take the vehicle to Pollard at the time.

Complainant had the vehicle towed to Kelly Grimsley Cadillac-Honda-Mazda-Kia (Grimsley) in Odessa, Texas for repair for the smoke and hesitation issues on April 5, 2016. The vehicle was towed because Complainant did not want to drive it on the highway for 50 miles to Grimsley's location. Grimsley's service technician determined that the vehicle's engine had "sludged up."⁶ As a result, Respondent denied warranty repair for the vehicle because they felt that the original owner had not properly maintained the vehicle.⁷ The vehicle's mileage on this occasion was

¹ Complainant Ex. 1, Motor Vehicle Purchase Order dated May 22, 2015.

² Complainant Ex. 2, Invoice from Express Care dated October 24, 2015.

³ *Id.*

⁴ Complainant Ex. 3, Invoice from Express Care dated February 3, 2016.

⁵ *Id.*

⁶ Complainant Ex. 4, Repair Order from Kelly Grimsley Cadillac-Honda-Mazda-Kia dated April 5, 2016.

⁷ *Id.*

45,452.⁸ The vehicle was in the dealer's possession until April 8, 2016.⁹ Complainant had the vehicle towed back to Big Spring after this repair visit.

Complainant testified that she took the vehicle to Pollard for repair on April 11, 2016. Pollard's service technician performed an oil change and an engine clean on the vehicle.¹⁰ The mileage on the vehicle on this date was 45,452.¹¹ The vehicle was in the dealer's possession until April 19, 2016, on this occasion.¹²

Complainant continued to drive the vehicle and continued to experience the vehicle hesitating and smoke coming out of the exhaust. On May 12, 2016, she had the vehicle towed to Gene Messer Kia (Messer) in Lubbock, Texas to see if they would repair it. Messer's representative contacted Respondent's technical assistance hotline and advised Respondent's representative that the vehicle's engine showed signs of improper maintenance.¹³ As a result, Respondent denied warranty coverage for any repair to the vehicle's engine.¹⁴ The vehicle is still at Messer. Messer has not requested Complainant pick up the vehicle nor have they been charging her storage fees.

Complainant filed a Lemon Law/Warranty Performance complaint with the Texas Department of Motor Vehicles (Department) on July 28, 2016.¹⁵

2. Tommy Carey's Testimony

Tommy Carey, Complainant's husband, testified that Complainant is the primary driver of the vehicle. He does not normally drive the vehicle, but has ridden in it as a passenger. He has been in the vehicle when it has hesitated and failed to accelerate.

Mr. Carey stated that he and Complainant test drove the vehicle before purchasing it from Pollard. There was no problem with the vehicle during the test drive. It took a while for the smoke and hesitation issues to arise. After the problems began occurring, he took the vehicle to Knowlton's Garage in Big Spring. Knowlton's technician informed Mr. Carey that the engine needed replacement. The technician thought that there was a busted piston in the engine. The technician also informed Mr. Carey that he should take the vehicle to Grimsley for repair.

⁸ *Id.*

⁹ *Id.*

¹⁰ Complainant Ex. 5, Repair Order from Pollard Chevrolet–Buick–Cadillac dated April 11, 2016.

¹¹ *Id.*

¹² *Id.*

¹³ Complainant Ex. 8, Letter from Kia Motors America, Inc. dated August 22, 2016.

¹⁴ *Id.*

¹⁵ Complainant Ex. 6, Complainant's Lemon Law/Warranty Performance complaint dated July 28, 2016. Although the complaint was signed by Complainant on July 23, 2016, it was not received by Texas Department of Motor Vehicles until July 28, 2016, which is the effective date of the complaint.

3. William Pollard's Testimony

William Pollard, owner of Pollard Chevrolet–Buick–Cadillac, testified for Complainant. He indicated that the vehicle was taken in by his dealership as a trade-in. At the time of the trade-in, Mr. Pollard's service technicians performed a full used car inspection (UCI) on the vehicle. In addition, the vehicle's Car Fax report was pulled. The technicians did not find any issues with the vehicle. They did check the vehicle's brakes and performed an oil change on it. When a vehicle is traded in, the technicians don't ask for maintenance records unless it's a high dollar vehicle. Mr. Pollard testified that if an issue had been discovered, he would not have sold the vehicle. Instead, he would have had the vehicle wholesaled. Mr. Pollard stated that he believed that Respondent provides a ten (10) year or 100,000 mile powertrain warranty for the vehicle.

During cross-examination, Mr. Pollard testified that he did perform some research on the vehicle after he became aware of the issues with it. In addition, he contacted Respondent's customer service line. Mr. Pollard stated that the dealer's technicians do not remove a trade-in vehicle's engine valve covers to check for sludge.

C. Respondent's Evidence and Arguments

Matt Pfeifer, District Parts and Service Manager, testified for Respondent. Mr. Pfeifer has been in his current position for three (3) years. He's worked in the automotive industry for 35 years. Mr. Pfeifer has worked with Respondent for the last 14 years. Mr. Pfeifer was an Automotive Service Excellence (ASE) Master Certified technician for eight (8) years.

Mr. Pfeifer's current duties require that he travel to 17 dealers in the region to provide support for them. He works with the dealers' service and parts departments. He helps provide training, part sales, and helps with customer satisfaction. Mr. Pfeifer was not involved in the current complaint until a hearing was set by the Department. He's never seen the vehicle.

Mr. Pfeifer testified that the vehicle's engine needs to be replaced. Mr. Pfeifer also stated that the repairs ordinarily would be covered under Respondent's warranty. However, Respondent feels that the problems with the engine were the result of a lack of maintenance by the original owner of the vehicle. The engine is full of sludge and the oil is breaking down. There was no record of regular maintenance by the original owner on the vehicle's Car Fax report. Mr. Pfeifer also indicated that maintenance visits are not necessarily reported to Car Fax, so there may have been maintenance visits which were not recorded.

D. Analysis

In order to determine whether Complainant has a remedy under Section 2301.204 of the Occupations Code, there first has to be evidence of a defect or condition in the vehicle that has not been repaired by Respondent. The testimony establishes that the vehicle's engine needs replacement. Although Respondent avers that the problems with the engine were caused by the vehicle's original owner, there is no evidence to substantiate their claim that the original owner failed to maintain the vehicle properly. Respondent's own witness verified that not all vehicle maintenance work is reported to Car Fax and it is common knowledge that many people do not take their vehicle to a dealer for simple maintenance. Complainant was a purchaser in good faith of the vehicle and did properly maintain the vehicle while it was in her possession. She should not be penalized for her efforts to ensure that she has a vehicle, for which she is making payments, that runs properly.

The hearings examiner holds that Complainant has met her burden of proof to establish that there is a defect or condition in the vehicle that has not been repaired by Respondent or its authorized dealers. As such, Respondent is under an obligation to repair the vehicle in order to conform it to Respondent's express warranty.

Respondent's bumper-to-bumper warranty applicable to Complainant's vehicle provides coverage for five (5) years or 60,000 miles. As of the date of hearing the vehicle's warranty was still in effect. Therefore, Respondent is still obligated to repair any defects in the vehicle.

Complainant's request for repair relief is granted. Respondent is hereby ordered to perform any necessary repairs within 20 days to conform the vehicle to Respondent's bumper-to-bumper warranty.

III. FINDINGS OF FACT

1. Paula Carey (Complainant) purchased a used 2012 Kia Sorrento on May 22, 2015, from Pollard Chevrolet-Buick-Cadillac (Pollard) in Big Spring, Texas with mileage of 42,176 at the time of delivery.
2. Respondent provided a five (5) year or 60,000 mile bumper-to-bumper warranty for the vehicle.
3. The vehicle's mileage on the date of hearing was approximately 46,000.
4. At the time of the hearing, the bumper-to-bumper warranty for the vehicle was still in effect.

5. Complainant's vehicle emits smoke from the exhaust and hesitates when she's driving it.
6. Prior to the filing of the complaint, Complainant took the vehicle to various dealers for repairs on the following dates because of her concerns regarding the smoke and hesitation issues:
 - a. April 5, 2016, at 45,452 miles;
 - b. April 11, 2016, at 45,900 miles and
 - c. May 12, 2016, at unknown miles.
7. On April 5, 2016, Kelly Grimsley Cadillac-Honda-Mazda-Kia's service manager advised Complainant that Respondent refused to provide warranty coverage for repair to the vehicle because they determined that the vehicle had not been properly maintained and that was the reason for the problems the vehicle was experiencing.
8. On April 11, 2016, Pollard's service technician performed an oil change and engine clean on the vehicle in an attempt to resolve Complainant's concerns with the vehicle.
9. On May 12, 2016, Gene Messer Kia's service manager informed Respondent's technical assistance hotline that the vehicle exhibited signs of improper maintenance. As a result, Respondent refused to provide warranty coverage for repair to the vehicle.
10. On July 28, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
13. On September 6, 2016, 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.
14. The hearing in this case convened and the record closed on November 4, 2016, in Odessa, Texas before Hearings Examiner Edward Sandoval. Complainant represented herself. Also testifying for Complainant were Tommy Carey, husband, and William Pollard, owner of Pollard Chevrolet-Buick-Cadillac. Respondent was represented by Matt Pfeifer, District Parts and Service Manager.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.204(a) (Warranty Performance).
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. Complainant 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. Complainant bears the burden of proof in this matter.
6. Complainant proved by a preponderance of the evidence that the vehicle has a verifiable defect or condition that is covered by Respondent's warranty. Tex. Occ. Code § 2301.204.
7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code § 2301.204.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for repair relief pursuant to Texas Occupations Code § 2301.204 is hereby **GRANTED**. Respondent is further **ORDERED** to **PERFORM ALL NECESSARY REPAIRS** within 20 days in order to conform the vehicle to Respondent's bumper-to-bumper warranty.

SIGNED December 7, 2016



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