TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0096 CAF

TONY PAUL,	§	**BEFORE THE OFFICE**
Complainant	§	
	§	
v.	§	**OF**
	§	
AMERICAN HONDA MOTOR CO., INC.,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Tony Paul (Complainant) filed a 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 American Honda Motor Co., Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle has 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 hearing[1] 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, 2017, in Carrollton, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for himself. Abigail Mathews, attorney, represented the Respondent. Jeanne Altmiller, District Parts and 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 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]

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[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

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.[7]

Alternatively, for serious safety hazards, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

> [T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and: (A) at least one attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) at least one other attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt.[8]

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[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)(1)(A) and (B).

[8] TEX. OCC. CODE § 2301.605(a)(2).

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:

> [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.[9]

However, a statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.[10] 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.[11]

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;[12] (2) the manufacturer was given an opportunity to cure the defect or nonconformity;[13] and (3) the

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[9] TEX. OCC. CODE § 2301.605(a)(3).

[10] *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ) ("[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.'").

[11] *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication) (Repair attempts include "those occasions when the fault for failing to repair the vehicle rests with the dealership." Conversely, "those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.").

[12] 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 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.

[13] 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).

Lemon Law complaint was filed within six months after the earliest of: the warranty's expiration 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.[14]

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."[15] The manufacturer, converter, or distributor has an obligation to "make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty."[16]

3. Burden of Proof

The law places the burden of proof on the Complainant.[17] The Complainant must prove all facts required for relief by a preponderance, that is, the Complainant must present sufficient evidence to show that each required fact is more likely than not true.[18] If any required fact appears equally likely or unlikely, then the Complainant has not met the burden of proof.

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.[19] 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 claim for relief under the lemon law."[20] However, the parties may expressly or impliedly consent

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[14] TEX. OCC. CODE § 2301.606(d)(2).

[15] TEX. OCC. CODE § 2301.204.

[16] TEX. OCC. CODE § 2301.603(a).

[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).

[19] "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 factual 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.").

[20] 43 TEX. ADMIN. CODE § 215.202(a)(2).

to trying issues not included in the pleadings.[21] Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.[22]

A. Complainant's Evidence and Arguments

On December 5, 2015, the Complainant, purchased a new 2015 Honda Odyssey from David McDavid Honda of Frisco, a franchised dealer of the Respondent, in Frisco, Texas. The vehicle had 56 miles on the odometer at the time of purchase. The vehicle's limited warranty covers the vehicle for three years or 36,000 miles, whichever occurs first. On October 15, 2016, the Complainant mailed a written notice of defect to the Respondent. On November 21, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the vehicle has a burning smell, like outside air mixing with engine heat, when travelling.

The Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
	4,768	Vehicle has gas smell on highway when AC is on recirculate
July 11, 2016	7,342	Burning smell in cabin when traveling 60 mph
August 15, 2016	8,424	Burning smell
September 22, 2016	9,741	Smell inside vehicle while driving at highway speeds
December 15, 2016	12,242	Bad smell coming in the cab while driving even with recirculate on

The Respondent's opportunity to repair the vehicle occurred on December 15, 2016.

The Complainant described the smell as a burning smell, which he believed came from under the hood, when outside air mixes with heat from the engine. He could not identify any particular road conditions when the smell would occur but he noted that the smell did not occur frequently. The Complainant elaborated that the smell occurred intermittently but especially on the highway and also on service roads. The smell would come in for a minute. He pointed out that he kept the air recirculating all the time. The Complainant first noticed the smell a couple of days or weeks after purchasing the vehicle. He initially believed the smell came from a skunk. He last noticed the smell on the Wednesday (April 19, 2016) before the hearing. The Complainant testified that the smell did not occur often at 40 mph but at higher speeds, with the air pushing through the

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[21] 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

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

engine (compartment), he believed the force of the air gets air under the hood and inside the cabin. He affirmed that the smell has not caused any operational problem. The Complainant also answered that the repair attempts did not improve the smell issue. The Complainant asserted that he would notice the smell even with no trucks around him. If the smell came from other vehicles, then the smell would differ, but the complained of smell was always the same.

B. Respondent's Evidence and Arguments

On cross-examination, the Complainant stated that he usually notices smell when driving 70 to 75 mph. He confirmed that his wife was the primary driver and that he and his wife would smell the odor. The Complainant expressed a health concern because of the smell but affirmed that they did not have to seek medical care. He explained that when the smell comes in, they would roll down the windows and back up. He confirmed that he had never seen smoke or anything from under the hood.

Ms. Altmiller testified that setting the air to recirculate will not eliminate all outside odors. Though the vents are shut from outside air like a trap door, at different speeds, some outside air, that may contain odors, can come in. Ms. Altmiller stated that at the dealership, with the Complainant driving, the smell could not be duplicated. She also confirmed that a smell/leak from a mechanical problem would turn on the check engine light and the technician would check for diagnostic trouble codes. However, a review of the vehicle history showed the check engine light had never illuminated. Mechanical problem appeared unlikely, since a smell from the same mechanical condition should smell consistently. Ms. Altmiller confirmed that the vehicle had vents in front of the windshield (where the hood and windshield meet) and also some down lower on the sides.

C. Inspection and Test Drive

Upon inspection at the hearing, before the test drive, the vehicle's odometer displayed 15,685 miles. Mr. Paul drove the vehicle predominantly on President George Bush Turnpike mostly between 75 and 85 mph and to a lesser extent on I-35 and local roads controlled by traffic lights. While on the turnpike Mr. Paul mentioned that he could smell the complained of odor. The hearings examiner noted that the vehicle was passing a heavy truck at the time. The test drive ended with 15,712 miles on the odometer, for a total of 27 miles driven. The vehicle had air intakes

located between the windshield and hood by the windshield wipers. The hearings examiner asked the Complainant if the odor he smelled during the test drive was the same as the complained of smell. He explained that the smell during the test drive was a milder smell, but the complained of smell sometimes gets stronger.

D. Analysis

The Lemon Law does not apply to all concerns that may occur with a vehicle but only applies to warrantable defects.[23] Here, the complained of smell does not appear to be a defect covered by the manufacturer's warranty. Therefore, the Lemon Law does not provide any relief. The Lemon Law does not require that a manufacturer provide any particular warranty coverage nor does the Lemon Law specify any standards for vehicle characteristics. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. Consequently, to qualify for replacement or repurchase or for warranty repair, the vehicle must have a defect covered by warranty.[24] In this case, the vehicle's warranty specifies that:

> Honda will repair or replace any part that is defective in material or workmanship under normal use.[25]

Accordingly, the warranty applies to conditions resulting from a defect in material or workmanship. In contrast, the warranty does not cover conditions arising from the vehicle's design. Courts have affirmed that warranty language covering "defects in material or workmanship" did not cover design issues.[26] That is, defects in materials or workmanship (manufacturing defects) differ from characteristics of the design. If the complained of condition constitutes a design characteristic or even a design defect, the Lemon Law does not apply because the warranty only covers manufacturing defects.

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[23] TEX. OCC. CODE § 2301.603(a).

[24] TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

[25] Complainant's Ex. 1, Limited Warranty, at 9 (emphasis added).

[26] *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.").

In this case, odors entering the cabin, even with the air recirculating, does not appear to be a warrantable defect. Testimony shows that even with recirculation on, outside air, along with any accompanying odors, may normally enter the vehicle. More specifically, air may seep past the doors that shut out outside air, even more so at higher speeds. The vehicle has outside air intake vents located immediately behind the hood and engine compartment, which comports with the Complainant's description of the smell as outside air mixing with engine heat. Moreover, the odor occurs more often at higher speeds, consistent with the greater likelihood of outside air seeping past the air intake doors at higher speeds. In sum, the burning smell entering the cabin does not result from a manufacturing defect, but occurs as a consequence of the vehicle's design, which the warranty does not cover.

III. Findings of Fact

1. On December 5, 2015, the Complainant, purchased a new 2015 Honda Odyssey from David McDavid Honda of Frisco, a franchised dealer of the Respondent, in Frisco, Texas. The vehicle had 56 miles on the odometer at the time of purchase.

2. The vehicle's limited warranty covers the vehicle for three years or 36,000 miles, whichever occurs first.

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

Date	Miles	Issue
	4,768	Vehicle has gas smell on highway when AC is on recirculate
July 11, 2016	7,342	Burning smell in cabin when traveling 60 mph
August 15, 2016	8,424	Burning smell
September 22, 2016	9,741	Smell inside vehicle while driving at highway speeds
December 15, 2016	12,242	Bad smell coming in the cab while driving even with recirculate on

4. On October 15, 2016, the Complainant mailed a written notice of defect to the Respondent.

5. On November 21, 2016, the Complainant filed a Lemon Law complaint with the Department alleging that the vehicle has a burning smell, like outside air mixing with engine heat, when travelling.

6. On March 1, 2017, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the 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 factual matters asserted.

7. The hearing in this case convened and the record closed on April 21, 2017, in Carrollton, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented and testified for himself. Abigail Mathews, attorney, represented the Respondent. Jeanne Altmiller, District Parts and Service Manager, testified for the Respondent.

8. The vehicle's odometer displayed 15,685 miles at the time of the hearing.

9. The vehicle's warranty was in effect at the time of the hearing.

10. Upon inspection at the hearing, before the test drive, the vehicle's odometer displayed 15,685 miles. Mr. Paul drove the vehicle predominantly on President George Bush Turnpike mostly between 75 and 85 mph and to a lesser extent on I-35 and local roads controlled by traffic lights. While on the turnpike Mr. Paul mentioned that he could smell the complained of odor. The hearings examiner noted that the vehicle was passing a heavy truck at the time. The test drive ended with 15,712 miles on the odometer, for a total of 27 miles driven. The vehicle had outside air intake vents located between the windshield and hood near the windshield wipers. The vehicle appeared to operate normally during the test drive.

11. The vehicle has outside air intake vents located immediately behind the hood of the engine, so that air flows over the engine hood to the air intake vents.

12. The doors that block outside air do not keep all outside air, and any accompanying odors, from entering the vehicle's cabin; the vehicle is not airtight as designed.

13. Outside air may normally enter the cabin of the vehicle even when recirculating the air.

14. The likelihood of outside air entering the cabin may increase with greater speed.

IV. Conclusions of Law

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

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 filed a sufficient complaint with the Department. 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's vehicle does not qualify for replacement or repurchase. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204, 2301.603(a) and 2301.604(a).

7. The Complainant's vehicle does not qualify for warranty repair. TEX. OCC. CODE §§ 2301.204 and 2301.603.

8. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE §§ 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 June 13, 2017

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