

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0173708 CAF**

BROOK BINDEL,	§	BEFORE THE OFFICE
Complainant	§	
v.	§	
	§	OF
NISSAN NORTH AMERICA, INC.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Brook Bindel (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2016 Nissan Titan. Complainant asserts that the vehicle is defective because the wheel alignment has caused the vehicle's tires to feather. Nissan North America, Inc. (Respondent) argued that the vehicle has been repaired, does not have any defects, and that no relief is warranted. The hearings examiner concludes that the vehicle has been repaired, does not have an existing warrantable defect, and Complainant is not eligible for relief.

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 was closed on July 12, 2017, in Carrollton, Texas, before Hearings Examiner Edward Sandoval. Complainant, Brook Bindel, represented himself at the hearing. Respondent was represented by Anthony Panno, Dealer Technical Specialist.

II. DISCUSSION

A. Applicable Law

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met. First, the manufacturer is not able to conform the vehicle to an applicable express warranty by repairing or correcting a defect after a reasonable number of attempts.¹ Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.² Third, the manufacturer has been given a reasonable number of attempts to repair or correct the defect or condition.³ Fourth, the owner must have mailed written notice of

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

³ *Id.*

the alleged defect or nonconformity to the manufacturer.⁴ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁵

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.⁶

B. Complainant's Evidence and Arguments

Complainant purchased a new demonstrator 2016 Nissan Titan from Nissan of McKinney in McKinney, Texas (McKinney) on August 15, 2016, with mileage of 5,308 at the time of delivery.^{7,8} Complainant testified that the vehicle was a demonstrator at the dealership and had not been involved in a previous retail sale. On the date of hearing the vehicle's mileage was 23,842. At this time, Respondent's warranty coverage for the vehicle remains in place, with bumper-to-bumper coverage for three (3) years or 36,000 miles, whichever comes first. In addition, Respondent's powertrain warranty provides coverage for the vehicle's powertrain for five (5) years or 100,000 miles.

Complainant testified that he feels that the vehicle's wheel alignment is not correct and has never been correct since he's owned the vehicle. He feels that the vehicle's front tires have been "feathering" which is proof of the vehicle's poor wheel alignment.

Complainant testified that in November of 2016, he noticed that the vehicle's front tires were feathering. As a result, he took the vehicle to McKinney for repair for the issue on November 16, 2016. McKinney's service technician determined that the vehicle's wheel alignment was out of

⁴ Tex. Occ. Code § 2301.606(c)(1).

⁵ Tex. Occ. Code § 2301.606(c)(2).

⁶ Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods 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, 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.

⁷ Complainant Ex. 1, Motor Vehicle Retail Installment Sales Contract dated August 15, 2016.

⁸ Complainant Ex. 2, Odometer Disclosure Statement dated August 15, 2016.

specification.⁹ The technician performed a wheel alignment on the vehicle to resolve Complainant's concerns.¹⁰ The vehicle's mileage on this occasion was 11,401.¹¹ The vehicle was in McKinney's possession for a few hours during this repair and Complainant waited for the vehicle.

After a few weeks, Complainant noticed that the tires were feathering again. He took the vehicle to McKinney on January 2, 2017, in order to have the issue addressed. McKinney's technician verified that the tires were feathering.¹² The technician determined that the vehicle's shock absorbers were weak and replaced the left and right front shock assemblies in order to resolve the concern.¹³ Complainant stated that the tires were not rotated at the time of the repair.¹⁴ He stated that he was informed that the tires did not need to be rotated. The vehicle's mileage on this occasion was 14,515.¹⁵ The vehicle was in McKinney's possession until March 15, 2017.¹⁶ Complainant testified that he was provided with a loaner vehicle for only 34 days of the period of time that the vehicle was being repaired.

Complainant testified that after the repair, he drove the vehicle to Houston and back to his home in Melissa, Texas. Complainant also drove the vehicle to Oklahoma City and back to his home. When Complainant returned to his home after the trip to Oklahoma, he observed that the vehicle's tires were damaged.

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on February 14, 2017.¹⁷ Complainant did not provide written notice to Respondent to advise them of his dissatisfaction with the vehicle. He testified that he was informed by a Department employee that he was not required to do so as long as he had contacted Respondent in some manner.

Complainant stated that he took the vehicle to McKinney for repair on April 5, 2017. McKinney's service technician determined that the vehicle's tires were damaged and

⁹ Complainant Ex. 5, Repair Order dated November 16, 2016.

¹⁰ *Id.*

¹¹ *Id.*

¹² Complainant Ex. 6, Repair Order dated January 2, 2017.

¹³ *Id.*

¹⁴ *Id.* Although Complainant testified that the vehicle's tires were not rotated during the repair visit, the repair invoice indicates that the technician rotated the tires and that feathering of the tires was still occurring.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Complainant Ex. 3, Lemon Law Complaint dated February 14, 2017. Complainant signed and dated the complaint on February 11, 2017. However, the complaint was not received by the Texas Department of Motor Vehicles until February 14, 2017, which is the effective date of the complaint.

unrepairable. The tires were replaced and aligned with new specifications.¹⁸ The vehicle's mileage on this occasion was 17,031.¹⁹ The vehicle was in McKinney's possession until April 28, 2017. Complainant was provided with a rental vehicle while his vehicle was being repaired.

Complainant testified that even after the repair in April that the vehicle's tires were still feathering. He took the vehicle back to McKinney on June 6, 2017, for repair for the issue. McKinney's technician informed Complainant that there was nothing wrong with the vehicle. No repairs were performed and Complainant was not provided with a copy of a repair order.

Complainant stated that he feels that the tires are still feathering and that the vehicle's alignment is still off. He also said that the vehicle pulls to the right. Complainant also testified that the loaner vehicle he received in April of 2017 drove similarly and had the same issue.

During cross-examination, Complainant stated that the vehicle's tires were last rotated at 17,000 miles. He was unaware that the tires should be rotated every 5,000 miles.

C. Respondent's Evidence and Arguments

Anthony Panno, Dealer Technical Specialist, testified for Respondent. Mr. Panno stated that Respondent provides a three (3) year or 36,000 mile bumper-to-bumper warranty for all of its vehicles. In addition, Respondent provides a five (5) year or 100,000 mile powertrain warranty. However, these warranties do not cover adjustments. Respondent provides a separate one (1) year or 12,000 mile adjustment warranty which is what wheel alignments fall under. The warranty begins the date the vehicle is put in service which was April 13, 2016 for Complainant's vehicle, a dealer demonstrator.

Mr. Panno also testified that McKinney's service technicians had been using the wrong specifications for the alignment of the vehicle's wheels. Respondent issued a technical service bulletin in October of 2016 advising dealers' technicians of new specifications for wheel alignments of certain vehicle models which included Complainant's vehicle. Those specifications were not updated on McKinney's alignment tool, so Complainant's vehicle's tires were aligned to the wrong specifications the first time he took the vehicle in. When the final repair attempt was performed on the vehicle on April 5, 2017, the specifications were corrected for the wheel alignment of Complainant's vehicle. Also, during the final repair attempt, the vehicle's tires were replaced at no cost to Complainant as "goodwill."

¹⁸ Complainant Ex. 7, Repair Order dated April 5, 2017.

¹⁹ *Id.*

Mr. Panno also stated that the vehicle's tires should be rotated every 5,000 miles in order to prevent uneven wear.

During a test drive of the vehicle, Mr. Panno stated that the vehicle was operating as designed. He did not observe the vehicle inordinately pull to the right. Mr. Panno stated that the vehicle is designed to pull to the right to a certain extent and it was within Respondent's specifications during the test drive. He feels that the vehicle was repaired in April of 2017 and that there is no problem with the vehicle's alignment.

D. Analysis

Under the Lemon Law, Complainant bears 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, Complainant must meet the presumption that the manufacturer was given a reasonable number of attempts to repair or correct the defect or condition to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the defect or 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 or condition, Complainant is entitled to have the vehicle repurchased or replaced.

Occupations Code § 2301.603 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." Relief under the Lemon Law can only be granted if the manufacturer of a vehicle has been unable to conform a vehicle to the manufacturer's warranty. If a vehicle has been repaired then no relief can be possible. The Lemon Law requires that in order for a vehicle to be determined to be a "lemon" the "nonconformity continues to exist" after the manufacturer has made repeated repair attempts.²⁰ In the present case, the evidence reveals that the vehicle has been fully repaired and that it currently conforms to the manufacturer's warranty. There is no undue feathering of the tires and the alignment appears to be correct. Complainant did not produce any evidence to establish that the feathering on his tires was not due to normal usage. Therefore, the hearings examiner finds that there is no defect with the vehicle that has not been repaired and, as such, repurchase or replacement relief for Complainant is not warranted.

Respondent's express warranty applicable to Complainant's vehicle provides bumper-to-bumper coverage for three (3) years or 36,000 miles whichever comes first. In addition, the powertrain warranty provides coverage for five (5) years or 100,000 miles. On the date of hearing, the

²⁰ Tex. Occ. Code § 2301.605.

vehicle's mileage was 23,842 and it remains under the warranties. As such, Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranties.

Complainant's request for repurchase or replacement relief is denied.

III. FINDINGS OF FACT

1. Brook Bindel (Complainant) purchased a new demonstrator 2016 Nissan Titan on August 15, 2016, from Nissan of McKinney (McKinney) in McKinney, Texas, with mileage of 5,308 at the time of delivery.
2. The manufacturer of the vehicle, Nissan North America, Inc. (Respondent), issued a bumper-to-bumper warranty for the vehicle good for three (3) years or 36,000 miles, whichever occurs first and a separate powertrain warranty for five (5) years or 100,000 miles.
3. Respondent also provides a one (1) year or 12,000 mile adjustment warranty for its vehicles which covers wheel alignments.
4. The vehicle's mileage on the date of hearing was 23,842.
5. At the time of hearing the vehicle was still under the bumper-to-bumper and powertrain warranties.
6. In November of 2016, Complainant noticed that the vehicle's tires were feathering.
7. Complainant took the vehicle to McKinney for repair for the vehicle's tires feathering and the vehicle's alignment being off on the following dates:
 - a. November 16, 2016, at 11,401 miles; and
 - b. January 2, 2017, at 14,515 miles.
8. On November 16, 2016, McKinney's service technician performed a wheel alignment on the vehicle in order to address Complainant's concern.
9. On January 2, 2017, McKinney's service technician replaced the vehicle's left and right front shock assembly and rotated the vehicle's tires in order to address Complainant's concern regarding the tires feathering.

10. On February 14, 2017, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
11. On April 5, 2017, Respondent's dealer technical specialist, Anthony Panno, performed a final repair attempt on the vehicle in which all four (4) tires were replaced and a wheel alignment was performed in accordance with Respondent's new alignment specifications.
12. On April 21, 2017, 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.
13. The hearing in this case convened and the record was closed on July 12, 2017, in Carrollton, Texas, before Hearings Examiner Edward Sandoval. Complainant, Brook Bindel, represented himself at the hearing. Respondent was represented by Anthony Panno, Dealer Technical Specialist.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) 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. 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 failed to prove by a preponderance of the evidence that Respondent was unable to conform the vehicle to an express warranty by repairing or correcting a 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. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code §§ 2301.204, 2301.603.
8. Complainant's 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 Complainant's petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**.

SIGNED July 21, 2017



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