

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0175778 CAF**

**JENNIFER BONNER,
Complainant**

v.

**GENERAL MOTORS LLC,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Jennifer Bonner (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) and/or Texas Occupations Code § 2301.204 (Warranty Performance) for alleged warrantable defects in her vehicle manufactured by General Motors LLC (Respondent). A preponderance of the evidence does not show that the subject vehicle has a defect covered by 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 on January 30, 2018, in Galveston, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented herself. Kim Altamirano, the Complainant's cousin, testified for the Complainant. Kevin Phillips, Business Resource Manager, represented the Respondent. Additionally, Bobby Shreeve, Field Service Engineer, 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

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 the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.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 the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁸

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

⁸ TEX. OCC. CODE § 2301.605(a)(2).

[A] nonconformity still exists that substantially impairs the vehicle's use or market value, the vehicle is out of service for repair for a cumulative total of 30 or more days, and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁹

The 30 days described above does not include any period when the owner has a comparable loaner vehicle provided while the dealer repairs the subject vehicle.¹⁰

The existence of 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.¹¹ 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.¹²

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, someone on behalf of the owner, or the Department provided written notice of the alleged defect or nonconformity to the manufacturer;¹³ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹⁴ and (3) the 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.¹⁵

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ TEX. OCC. CODE § 2301.605(c).

¹¹ *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.’”).

¹² *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.”).

¹³ TEX. OCC. CODE § 2301.606(c)(1).

¹⁴ TEX. OCC. CODE § 2301.606(c)(2). A repair visit to a dealer satisfied the “opportunity to cure” requirement when the manufacturer authorized repairs by the dealer after written notice to the manufacturer, i.e., the manufacturer essentially authorized the dealer to attempt a repair on the manufacturer's behalf. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

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” and the vehicle owner notified the manufacturer, converter, distributor, or its authorized agent of the defect.¹⁶ The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”¹⁷

3. **Burden of Proof**

The law places the burden of proof on the Complainant.¹⁸ The Complainant must prove all facts required for relief by a preponderance, that is, the Complainant must present sufficient evidence to show that every required fact is more likely than not true.¹⁹ If any required fact appears more likely to be untrue or equally likely to be true or untrue, then the Complainant cannot prevail.

4. **The Complaint Identifies the Issues in this Proceeding**

The complaint identifies the issues to be addressed in this proceeding.²⁰ 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.”²¹ However, the parties may expressly or impliedly consent to trying issues not included in the pleadings.²² Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²³

¹⁶ TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

¹⁷ TEX. OCC. CODE § 2301.603(a).

¹⁸ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁹ *E.g.*, *Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

²⁰ “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.”).

²¹ 43 TEX. ADMIN. CODE § 215.202(a)(2).

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

²³ *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

A. Summary of Complainant's Evidence and Arguments

On May 17, 2016, the Complainant, purchased a new 2016 Chevrolet Spark from Classic Auto Group Galveston, a franchised dealer of the Respondent, in Galveston, Texas. The vehicle had 14 miles on the odometer at the time of purchase. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first. On April 19, 2017, the Complainant provided a written notice of defect to the Respondent. On May 5, 2017, the Complainant filed a complaint with the Department alleging that vehicle exhibited a rubbing noise.

The Complainant testified that the longer the vehicle sat, the more likely the vehicle would make the complained of noise. She added that the noise was louder after sitting two or three days. She explained that the dealer's repair attempts did not resolve the issue. She testified that she first noticed the noise around 3,720 miles. However, noise could have been occurring earlier and she might not have noticed because of the radio. The noise seemed random to the Complainant and appeared to occur regardless of environmental conditions. The Complainant described the noise as occurring at one to two mph, except that a "popping" noise happened when coming to a stop from a normal driving speed. The popping noise occurred about five times a month. When asked if she noticed any changes in braking performance with the complained of noise, she answered that the vehicle was going too slow to notice. She also confirmed that she had not driven any other Chevrolet Sparks. She added that none of her other vehicles, the loaner vehicles, nor Ms. Altamirano's vehicle made the noise. On cross-examination, the Complainant confirmed that her vehicle had an annual parking pass for the seawall and acknowledged the humid weather in the area. She testified that she had not seen the ABS (antilock brake system) or brake warning lights displayed—except for the brake warning light coming on when using the emergency brake. She confirmed that she did not see any check brake lamps or brakes overheating messages or indicators for low brake fluid.

B. Summary of Respondent's Evidence and Arguments

Mr. Shreeve testified about the repairs performed during the manufacturer's repair attempts. At the May 30, 2017, visit, he found that the left side hub required resurfacing but could not duplicate the noise issue. Ordinarily, the brake shoes would be replaced and the drums resurfaced; however, he had the shoes and both drums replaced. Mr. Shreeve explained that drum brakes are not sealed systems. As a result, sand may rotate inside, scoring the drum. However, the

thickness variation of the vehicle's drum was not a safety concern. After repair, both left and right brake drums felt normal and did not exhibit abnormal noise on a test drive. The vehicle did not have any brake fluid loss and the vacuum assist appeared normal. The vehicle did not exhibit any diagnostic trouble codes. At the September 20, 2017, visit, Mr. Shreeve and a dealership technician test drove the vehicle and did not hear any noise. Mr. Shreeve instructed the technician to replace the drum backing plates and wheel cylinders (according to a technical service bulletin), and the brake shoes (for customer satisfaction purposes). Both drum brakes, the vacuum assisted braking, and parking brake worked normally and the master cylinder was full. He concluded that the vehicle did not have any abnormal brake noise. Likewise, he concluded that the vehicle did not exhibit any abnormal brake noise during the test drive at the hearing. Mr. Shreeve also confirmed that the manufacturer's documentation shows that some brake noise is normal. Further various factors can affect brake noise, such as: loading, driving style, driving patterns, weather conditions, local environment, and brake pad materials. Mr. Shreeve affirmed that the warranty did not cover damage from wear, use, or exposure. He pointed out that drum brakes, in particular, needed adjustment and cleaning, due to collecting debris and brake lining wear. On cross-examination, Mr. Shreeve confirmed that the radio was off but he could not duplicate the noise issue at either of his inspections.

C. Inspection and Test Drive

Upon inspection at the hearing before the test drive, the subject vehicle's odometer displayed 8,685 miles. The vehicle was test driven on local roads controlled by traffic lights and stop signs. The test drive included multiple instances of braking to try to duplicate the complained of noise. The vehicle did not exhibit any unusual noise and otherwise operated normally. The test drive ended at 8,686 miles.

D. Analysis

In this case, a preponderance of the evidence does not show that the noise issue constitutes a warrantable defect that qualifies for Lemon Law relief. The Lemon Law does not apply to all problems that a consumer may have with a vehicle but only to defects covered by warranty (warrantable defects).²⁴ The Lemon Law does not require that a manufacturer provide any

²⁴ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

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. In this case, the vehicle's warranty generally provides that: "The warranty covers repairs to correct any vehicle defect, not slight noise, vibrations, or other normal characteristics of the vehicle related to materials or workmanship occurring during the warranty period."²⁵ Under these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).²⁶ A manufacturing defect is an isolated aberration occurring only in those vehicles not produced according to the manufacturer's specifications. A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of a broken part. Unlike manufacturing defects, issues that do not arise from manufacturing, such as the vehicle's design characteristics are not warrantable defects. Design characteristics result from the vehicle's specified design and not from any error during manufacturing.²⁷ In sum, the warranty only covers manufacturing defects and the Lemon Law does not apply to design characteristics. Even though an issue may be undesirable or bothersome, the Lemon Law provides no relief unless the issue constitutes a manufacturing defect covered by warranty.

1. Warranty Excludes Slight Noise

As an initial matter, the warranty expressly excludes slight noise, as in the present case. The vehicle did not exhibit the complained of noise at the test drive at the hearing; however, the Complainant provided recordings of the noise.²⁸ The brake noise in the recordings were not particularly pronounced as compared to other noise captured on the recordings. For example, the noise of the shift lever moving was more distinct than the brake noise. More importantly, the

²⁵ Complainant's Exhibit 1, New Vehicle Limited Warranty.

²⁶ Courts have affirmed that warranty language covering "defects in material or workmanship" do not cover design issues. *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.").

²⁷ In contrast to manufacturing defects, "[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves." *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), writ denied, (Feb. 13, 1997).

²⁸ Complainant's Exhibit 9.

Complainant testified that she did not notice any effect on performance associated with the noise. Accordingly, the braking noise does not qualify for relief.

2. Warranty Excludes Corrosion Due to Environment

The evidence indicates that corrosion due to environmental conditions, which the warranty excludes, can cause brake noise. Specifically, moisture in humid conditions, as with the sea air in Galveston, promotes corrosion (rust) on the brakes, leading to brake noise. In this case, the Complainant testified that the brake noise would be more likely to occur and louder the longer the vehicle sat but would go away after driving. The increase in the noise's likelihood/loudness from sitting corresponds to the increase in corrosion from longer exposure to moisture, and the brake noise stopping after driving corresponds to the corrosion scraping off from driving/braking. However, the warranty excludes such environmentally caused issues. The warranty specifies that: "Damage caused by airborne fallout, rail dust, salt from sea air, salt or other materials used to control road conditions, chemicals, tree sap, stones, hail, earthquake, water or flood, windstorm, lightning, the application of chemicals or sealants subsequent to manufacture, etc., is not covered."²⁹ Consequently, any brake noise due to corrosion from environmental conditions is not a warrantable defect subject to Lemon Law relief.

3. Warranty Excludes Maintenance Items

The record shows that brakes may need cleaning or other maintenance. Drum brakes in particular may collect particulate matter causing brake noise, thereby requiring cleaning. However, the warranty excludes maintenance issues, such as abrasive matter requiring cleaning from the brakes:

All vehicles require periodic maintenance. Maintenance services, such as those detailed in the owner manual are the owner's expense. Vehicle lubrication, cleaning, or polishing are not covered. Failure of or damage to components requiring replacement or repair due to vehicle use, wear, exposure, or lack of maintenance is not covered.

Items such as:

- audio system cleaning
- brake pads/linings
- clutch linings

²⁹ Complainant's Exhibit 1, New Vehicle Limited Warranty.

coolants and fluids
filters
keyless entry (or other remote transmitter/receiver batteries)
limited slip rear axle service
tire rotation
wheel alignment/balance
wiper inserts

are covered up to the first maintenance inspection period outlined in the Owner's Manual. Any replacement at the time of, or beyond the maintenance inspection period is considered maintenance, and is not covered as part of the New Vehicle Limited Warranty.³⁰

In sum, brake noise requiring maintenance does not constitute a warrantable defect that qualifies for any relief.

4. Brake Noise May Occur Normally

As described above, a condition that may normally occur with a vehicle's design, as opposed to a manufacturing defect, is not a warrantable defect. The vehicle's owner's manual explains that: "Some driving conditions or climates can cause a brake squeal when the brakes are first applied or lightly applied. This does not mean something is wrong with the brakes."³¹ Here, the owner's manual expressly contemplates that the subject vehicle model's brakes may normally exhibit brake noise. However, such noise does not result from a warrantable manufacturing defect and therefore cannot support any relief.

III. Findings of Fact

1. On May 17, 2016, the Complainant, purchased a new 2016 Chevrolet Spark from Classic Auto Group Galveston, a franchised dealer of the Respondent, in Galveston, Texas. The vehicle had 14 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first.
3. On April 19, 2017, the Complainant provided a written notice of defect to the Respondent.

³⁰ Complainant's Exhibit 1, New Vehicle Limited Warranty.

³¹ Respondent's Exhibit 4, Vehicle Care - Brakes.

4. On May 5, 2017, the Complainant filed a complaint with the Department alleging that vehicle exhibited a rubbing noise.
5. On July 7, 2017, the Department's Office of Administrative Hearings issued a notice of hearing directed to all parties, giving them 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.
6. The hearing in this case convened on January 30, 2018, in Galveston, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Kim Altamirano, the Complainant's cousin, testified for the Complainant. Kevin Phillips, Business Resource Manager, represented the Respondent. Additionally, Bobby Shreeve, Field Service Engineer, testified for the Respondent
7. The vehicle's odometer displayed 8,685 miles at the time of the hearing.
8. The vehicle's warranty was in effect at the time of the hearing.
9. The vehicle operated normally during the test drive at the hearing and did not exhibit any complained of noise.

IV. Conclusions of Law

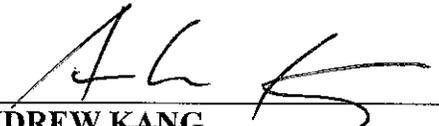
1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613; TEX. OCC. CODE § 2301.204.
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, 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 §§ 2301.603 and 2301.604(a).
7. The Complainant's vehicle does not qualify for warranty repair. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. 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 April 2, 2018



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