

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 18-0180804 CAF**

CLAUDIA MARIA FLORES, Complainant	§ § § § § §	BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
v.		
GENERAL MOTORS LLC, Respondent		

DECISION AND ORDER

Claudia Maria Flores (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her new 2016 Chevrolet Spark. Complainant asserts that the vehicle exhibits a gasoline odor intermittently emitting from the air conditioning vents. General Motors LLC (Respondent) argued that there is no defect with the vehicle and that no relief is warranted. The hearings examiner concludes that the vehicle does not have an existing warrantable defect and Complainant is not eligible for repurchase or replacement 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 closed on March 8, 2018, in El Paso, Texas before Hearings Examiner Edward Sandoval. Complainant, Claudia Maria Flores, appeared and testified in the hearing. Respondent, General Motors LLC, was represented by John T. Barry, District Manager for After-Sales. Mike Pritulsky, Field Service Engineer, testified for Respondent.

II. DISCUSSION

A. Applicable Law

The Texas Lemon Law provides that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of under the Texas Occupations Code with a comparable vehicle if five conditions are met. First, the manufacturer has not conformed the vehicle to an applicable express warranty because the manufacturer cannot repair or correct a defect or condition in the vehicle. Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Third, the manufacturer has been given a reasonable number of attempts to repair or correct the defect or condition.¹ Fourth, the owner must have mailed written notice of the alleged defect or nonconformity to the

¹ Tex. Occ. Code § 2301.604(a)(1) and (2).

manufacturer.² Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.³

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 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.⁴

B. Complainant's Evidence and Arguments

Complainant purchased a new 2016 Chevrolet Spark from Viva Chevrolet (Viva) in El Paso, Texas on August 19, 2016, with mileage of 19 at the time of delivery.⁵ Respondent's bumper-to-bumper warranty for the vehicle provides coverage for three (3) years or 36,000 miles, whichever comes first.⁶ On the date of hearing the vehicle's mileage was 14,099. At this time, Respondent's warranty for the vehicle is still in effect.

Complainant testified that in June of 2017 she began noticing a gasoline odor in the vehicle emitting from the air conditioning vents intermittently. The odor has been lasting longer and seems stronger every time she detects it.

On June 21, 2017, Complainant took the vehicle to Viva to address the odor issue, as well as her concerns regarding the vehicle's engine and transmission performance. Viva's service technician was unable to duplicate any of Complainant's concerns and did not perform any repairs to the vehicle.⁷ The repair order did not indicate that the gasoline odor was an issue as there was no reference to it.⁸ The vehicle's mileage on this occasion was 6,915.⁹ Complainant testified that she was informed that there was nothing wrong with the vehicle.

² Tex. Occ. Code § 2301.606(c)(1).

³ Tex. Occ. Code § 2301.606(c)(2).

⁴ 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.

⁵ Complainant Ex. 1, Cash Retail Purchase Order dated August 19, 2016.

⁶ Complainant Ex. 8, Warranty Tracker, undated.

⁷ Complainant Ex. 3, Repair Order dated June 21, 2017.

⁸ *Id.*

⁹ *Id.*

Complainant stated that she and her family continued to smell the gasoline odor in the vehicle. So, she took the vehicle back to Viva on October 4, 2017. The repair order did not indicate that the gasoline odor was an issue as there was no reference to it.¹⁰ Viva's service technician indicated that he could not detect an oil leak in the vehicle.¹¹ In addition, he performed a recall for the vehicle's airbags.¹² Complainant was told that there was nothing wrong with the vehicle. The vehicle's mileage was 9,701 on this occasion.¹³ The vehicle was in Viva's possession for the day. Complainant did not receive a loaner vehicle while her vehicle was being repaired.

Complainant returned the vehicle to Viva on October 17, 2017, for an oil change and due to Complainant's concern regarding the gasoline odor. The repair order did not indicate that the gasoline odor was an issue as there was no reference to it.¹⁴ No repair was performed for the gasoline odor.¹⁵ Complainant was informed by Viva's representative that there was nothing wrong with the vehicle. She was also told that the vehicle would have to break down in order for the technicians to determine what was wrong with it. The vehicle's mileage on this occasion was 9,993.¹⁶ The vehicle was in Viva's possession for the day. Complainant was not provided with a loaner vehicle while her vehicle was being repaired.

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on October 31, 2017.¹⁷ Complainant also mailed a letter to Respondent advising them of her dissatisfaction with the vehicle.¹⁸

Complainant testified that one of Respondent's representatives inspected the vehicle in November of 2017. Complainant was informed that the representative had run some tests on the vehicle. However, she was not informed of the outcome of the inspection.

Complainant stated that she last detected the gasoline odor on February 28, 2018, when she was driving the vehicle on the freeway. The odor lasted about ten (10) minutes and then went away. She said the odor was very strong and caused her to feel nauseous. Whenever Complainant detects the odor, she opens the vehicle's windows and turns off the air conditioner. She stated that her children have complained about the odor and that it sometimes gives them headaches.

¹⁰ Complainant Ex. 4, Repair Order dated October 4, 2017.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Complainant Ex. 5, Repair Order dated October 17, 2017.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Complainant Ex. 8, Lemon Law complaint dated October 31, 2017. Although the complaint was signed on October 20, 2017, the effective date of the complaint is the date that it was received by the Texas Department of Motor Vehicles, which was October 31, 2017.

¹⁸ Complainant Ex. 6, Letter to Chevrolet Customer Assistance Center dated October 20, 2017.

C. Respondent's Evidence and Arguments

Mike Pritulsky, Field Service Engineer, testified for Respondent. Mr. Pritulsky has worked in the automotive industry for 34 years. Most of that time has been spent working as a service technician at different General Motors dealers. Mr. Pritulsky has been in his present position for the past three (3) years. He is a GM Master Certified Technician. He has also been an Automotive Service Excellence (ASE) Master Certified Technician for the past 30 years.

Mr. Pritulsky stated that he performed a final repair attempt on the vehicle on November 16, 2017, at Viva's location. He stated that he checked all of the repair orders for Complainant's vehicle and determined that none of them indicated a concern with a gasoline odor coming from the air conditioning vents. Mr. Pritulsky questioned the service writers (two [2] individuals) who prepared the work orders whether Complainant raised the odor issue as a concern. One of the service writers indicated that she had raised the issue, while the other service writer denied it being mentioned to her.

Mr. Pritulsky then performed a visual inspection of the vehicle. He indicated that the vehicle's mileage was 11,240 at the time.¹⁹ After starting the vehicle and placing a "sniffer" on the exhaust, Mr. Pritulsky did not observe any exhaust or raw fuel odors inside the vehicle's passenger compartment, under the hood, next to the vehicle on either side, or at the back of the vehicle. Mr. Pritulsky then performed an EVAP Service Bay Test on the vehicle. The results from the test were within the manufacturer's specifications and did not indicate that there was an exhaust leak.

Mr. Pritulsky removed the vehicle's engine cover and lowered the fuel tank to access the fuel system components, lines, and connections. He inspected the vehicle's fuel injectors, fuel rail, fuel rail access port, fuel lines, fuel hoses, EVAP canister, fuel tank and fuel pump module O-ring, and fuel tank filler neck for leaks. He did not find any leaks nor did he detect a gasoline odor. Mr. Pritulsky reassembled the vehicle and test drove it for 29 miles on both city roads and on the freeway. He did not detect a gasoline odor within the vehicle. Mr. Pritulsky then test drove a similar vehicle on the same route and did not detect a gasoline odor from that vehicle.

Mr. Pritulsky stated that he was not able to recreate the gasoline odor during his inspection of the vehicle. He does not feel that there is a leak in the fuel system which may be causing the odor.

¹⁹ Respondent Ex. 1, TX DMV Vehicle Inspection Report dated November 17, 2017.

D. Analysis

Under Texas' 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 a reasonable number of attempts have been undertaken to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the 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, Complainant is entitled to have the vehicle repurchased or replaced.

Complainant has not met the burden of proof to establish that her vehicle has a defect which creates a serious safety hazard or which substantially impairs its use or market value. Complainant testified that there is a gasoline odor which she detects intermittently which she believes comes from the air conditioning vents. The fact that there is an odor that occurs when the vehicle is driven does not indicate the presence of a defect in the vehicle, since the odor could be created by outside forces. There was no evidence of a fuel leak during the final repair attempt performed by Respondent's field service engineer. Since the evidence does not indicate the presence of a manufacturer's defect which causes the odor in question, the hearings examiner must hold that Complainant is not entitled to the requested relief.

Respondent's bumper-to-bumper warranty applicable to Complainant's vehicle provides coverage for three (3) years or 36,000 miles whichever comes first. On the date of hearing, the vehicle's mileage was 14,099 and the basic warranty coverage is still in effect. Respondent is still under an obligation to repair any issues with the vehicle that are covered under the warranty.

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

III. FINDINGS OF FACT

1. Claudia Maria Flores (Complainant) purchased a new 2016 Chevrolet Spark on August 19, 2016, from Viva Chevrolet (Viva), in El Paso, Texas, with mileage of 19 at the time of delivery.
2. The manufacturer of the vehicle, General Motors LLC (Respondent), issued a bumper-to-bumper warranty for the vehicle good for three (3) years or 36,000 miles, whichever occurs first.
3. The vehicle's mileage on the date of hearing was 14,099.

4. At the time of hearing the vehicle's basic warranty was still in effect.
5. Complainant feels that the vehicle emits a gasoline odor intermittently from the air conditioning vents.
6. Complainant took the vehicle to Respondent's authorized dealer, Viva, in order to address her concerns with the gasoline odor in the vehicle, on the following dates:
 - a. June 21, 2017, at 6,915 miles;
 - b. October 4, 2017, at 9,701 miles; and
 - c. October 17, 2017, at 9,993 miles.
7. On June 21, 2017, Viva's service technician checked the vehicle for transmission and engine performance issues and was unable to recreate any problem with it. The repair order did not address the gasoline odor issue.
8. On October 4, 2017, Viva's service technician checked the vehicle to see if it had an oil leak, but could not find one. The repair order did not address the gasoline odor issue.
9. On October 17, 2017, Viva's service technician performed an oil change. The repair order did not address the gasoline odor issue.
10. Complainant did raise the issue of the gasoline odor on each of the repair visits specified in Findings of Fact #6 and was informed verbally by the dealer representatives that there was nothing wrong with the vehicle.
11. On October 31, 2017, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
12. On November 16, 2017, Respondent's field service engineer, Mike Pritulsky, performed a final repair attempt on the vehicle, but could not duplicate the concern. No repairs were performed at the time.
13. On January 10, 2018, 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 March 8, 2018, in El Paso, Texas before Hearings Examiner Edward Sandoval. Complainant, Claudia Maria Flores, appeared and testified in the hearing. Respondent, General Motors LLC, was represented by John T. Barry, District Manager for After-Sales. Mike Pritulsky, Field Service Engineer, testified for Respondent.

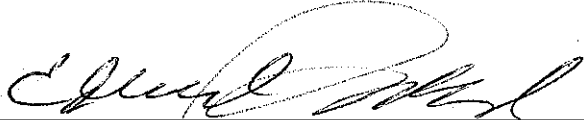
IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.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 the vehicle has a verifiable 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.
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-.613 is hereby **DISMISSED**.

SIGNED March 13, 2018



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