

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 18-0182307 CAF**

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

DECISION AND ORDER

Loretta Denkins (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her new 2015 Nissan Sentra. Complainant asserts that the vehicle is defective because the vehicle’s air bag warning intermittently illuminates and will not turn off when she’s driving the vehicle. 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 June 1, 2018, in Houston, Texas, before Hearings Examiner Edward Sandoval. Complainant, Loretta Denkins, was represented by her niece, Nikeishia Yancy, at the hearing. Ms. Denkins was also present to offer testimony. Respondent was represented by Neal Barnes, 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 2015 Nissan Sentra from Central Houston Nissan (Central) in Houston, Texas on April 30, 2016, with mileage of 12 at the time of delivery.^{7,8} On the date of hearing the vehicle's mileage was 34,116. 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 60,000 miles.⁹

1. Nikeishia Yancy's Testimony

Nikeishia Yancy, Complainant's niece is the primary driver of the vehicle. Ms. Yancy testified that on April 18, 2017, she first noticed that the vehicle's airbag warning light illuminated and stayed on while she was driving the vehicle. In normal circumstances the warning light illuminates for a couple of seconds when the vehicle is first started. However, on this occasion, the light stayed on for about an hour. Ms. Yancy was driving her mother to the hospital at the time the warning light illuminated. As a result, she was unable to take the vehicle to a dealer for repair immediately.

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, Purchase Order dated April 30, 2016.

⁸ Complainant Ex. 2, Odometer Disclosure Statement dated April 30, 2016.

⁹ Complainant Ex. 10, Warranty Coverage at a Glance, Vehicle Warranty Manual, p. 1.

Ms. Yancy took the vehicle to Central for repair for the airbag warning light issue on April 19, 2018. The light had turned off in the meantime. When Ms. Yancy presented the vehicle to the dealer's representatives for repair she was informed that there was nothing that could be done, since the light had turned off. No repair order or invoice was prepared for the repair visit.

The vehicle's airbag warning light illuminated again in May of 2017. Ms. Yancy took the vehicle to Central for repair for the issue on May 22, 2017. Ms. Yancy was informed by Central's representative that there was an empty water bottle underneath the driver's seat and that this may have set off the airbag sensor causing the warning light to illuminate. No repair was done at the time. The vehicle's mileage on this occasion was 17,097.¹⁰ The vehicle was in Central's possession for two (2) days during this repair visit. Complainant was provided with a rental vehicle while her vehicle was being repaired.

On June 21, 2017, the vehicle's airbag warning light illuminated again while Ms. Yancy was driving the vehicle. She immediately took the vehicle to Central for repair, but the light had turned off by the time she arrived at the dealership. Central's service technician inspected the vehicle and discovered two (2) diagnostic trouble codes (DTC's) stored in the vehicle's computer.¹¹ The technician replaced the vehicle's airbag module assembly and steering wire assembly (spiral cable) in order to resolve the issue.¹² The vehicle's mileage on this occasion was 18,297.¹³ The vehicle was in Central's possession for approximately a week. Complainant was provided with a rental vehicle while her vehicle was being repaired.

After the June repair visit, Ms. Yancy was contacted by Respondent's consumer affairs department because she had provided a bad review of the dealer's service advisor on a dealer survey submitted to her after the repair visit. Ms. Yancy informed the consumer affairs representative that she felt that repairs were not performed, nothing was being done about her concerns, and that she felt that the dealer's employees were not concerned for her safety.

Ms. Yancy testified that the situation seemed to be resolved. However, the airbag warning light illuminated again in August of 2017. Ms. Yancy took the vehicle to Central for repair on August 8, 2017. Central's service technician discovered the same DTC's as had been found on the June 2017 repair visit.¹⁴ The technician replaced the vehicle's airbag sensor in order to resolve the issue.¹⁵ Ms. Yancy stated that the same part was replaced as on the June 2017 repair. The repair order indicated that the vehicle's airbag module was replaced, although the part description on

¹⁰ Complainant Ex. 3, Repair Order dated May 22, 2017.

¹¹ Complainant Ex. 4, Repair Order dated June 21, 2017.

¹² *Id.*

¹³ *Id.*

¹⁴ Complainant Ex. 5, Repair Order dated August 8, 2017.

¹⁵ *Id.*

the work order states that the “sensor-side.air” was replaced.¹⁶ The vehicle’s mileage on this occasion was 20,128.¹⁷ The vehicle was in the dealer’s possession for one (1) week on this visit. Complainant was provided with a rental vehicle while her vehicle was being repaired.

During this repair visit, Ms. Yancy spoke to Central’s service manager about her dissatisfaction with the vehicle. She informed the manager that she didn’t feel safe in the vehicle and that the dealer was more concerned with their employees not being injured than with her safety. Ms. Yancy made this comment in response to the service manager indicating that they could not just probe the airbag assembly for problems since it could possibly be activated and injure an employee.

Ms. Yancy stated that the vehicle’s airbag light illuminated again in November of 2017. This occurred over a weekend and the light stayed on all weekend; however, the light had turned off by the time she took the vehicle to Central. Ms. Yancy took the vehicle to Central for repair on November 13, 2017. Central’s service technician found the same DTC’s stored in the vehicle’s computer.¹⁸ The technician, after contacting Respondent’s technical help line for assistance, replaced the vehicle’s main wiring harness which is located under the vehicle’s dashboard.¹⁹ The vehicle’s mileage on this occasion was 20,451.²⁰ The vehicle was in Central’s possession for four (4) days. Complainant was provided with a rental vehicle while her vehicle was being repaired.

On November 13, 2017, Ms. Yancy sent an email to Respondent’s consumer affairs department advising them of her dissatisfaction with the vehicle.²¹ Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on January 4, 2018.²²

Ms. Yancy stated that she does not feel safe driving the vehicle. The vehicle’s owner’s manual indicates that if the airbag warning light illuminates, it could mean that the air bags or pretensioner systems will not operate in an accident and that, in those circumstances, the vehicle should be checked by Respondent’s dealer as soon as possible.²³

Ms. Yancy testified that the vehicle’s airbag warning light has not illuminated since the November of 2017 repair. However, she can’t say that the vehicle has been repaired. This may have been a temporary fix and the problem could recur. Ms. Yancy also stated that Respondent

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Complainant Ex. 6, Repair Order dated November 13, 2017.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Complainant Ex. 7, Email to Nissan Consumer Affairs dated November 13, 2017.

²² Complainant Ex. 8, Lemon Law Complaint dated January 4, 2018.

²³ Complainant Ex. 11, Pages 1-55 and 1-56 of the Nissan Owner’s Manual.

never asked for a final repair attempt on the vehicle. Although she was told in November of 2017 that one of Respondent's engineers was going to look at the vehicle, she never received any information that this actually occurred.

2. Loretta Denkins' Testimony

Complainant also testified in the hearing. She stated that she drives the vehicle rarely. However, she did take the vehicle to Central on at least two (2) occasions to have it repaired for the airbag warning light issue. Complainant stated that she did attempt to speak to a manager at Central about the issues and her concerns with the vehicle. She feels that Central was not concerned about her or Ms. Yancy's safety.

Complainant never observed the vehicle's airbag warning light illuminate as she was not in the vehicle on those occasions.

C. Respondent's Evidence and Arguments

Neal Barnes, Dealer Technical Specialist, testified for Respondent. Mr. Barnes has worked in the automotive industry for 41 years. He has worked for Respondent for 20 years with the last 14 years in his current position. He has worked as an automotive technical training instructor at a community college and at Saturn's (automobile) training center. Mr. Barnes is an Automotive Service Excellence (ASE) Certified Master Technician.

Mr. Barnes stated that prior to the hearing date, he had never seen Complainant's vehicle. Mr. Barnes indicated that whenever a vehicle warning light stays illuminated as described by Ms. Yancy the manufacturer recommends that the vehicle be taken to a dealer for inspection as soon as possible. The light could indicate a possibility of malfunction of the vehicle or a component.

Mr. Barnes stated that Central's service technicians performed three (3) different repairs to the vehicle in order to address the issue of the airbag warning light illuminating. He verified that the repair order for May 22, 2017, seems to indicate that no repair was performed at that time. Mr. Barnes went on to state that the vehicle's airbag module and spiral cable were replaced on June 21, 2017. After the warning light continued to illuminate, Central's technicians replaced the airbag sensor on August 8, 2017. Finally, on November 13, 2017, after the warning light continued to illuminate, Central's technicians replaced the vehicle's main wiring harness located under the dash assembly. Mr. Barnes testified that the different repairs were performed to resolve

the issue in accordance with the repair protocols established by Respondent's engineers.^{24,25} Mr. Barnes stated that Respondent's service manual protocols indicate that there are three (3) different possible repairs to correct the diagnostic trouble codes (DTC's) which appeared on the vehicle's computers during the repair attempts. Those were the three repairs performed by Central's technicians on Complainant's repair visits.

Mr. Barnes stated that he feels that the vehicle has been repaired and that repurchase or replacement of the vehicle is not warranted. He stated that the problem has not recurred since the November 2017 repair which he feels is evidence that the issue has been corrected.

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.

Complainant purchased the vehicle on April 30, 2016, and presented the vehicle to Respondent's authorized dealer for repair due to problems with the instrument cluster air bag warning intermittently illuminating on the following dates: April 19, 2017; May 22, 2017; June 21, 2017; August 8, 2017; and November 13, 2017. The vehicle was repaired in November of 2017 and Complainant testified that the air bag warning light has not illuminated improperly since that repair.

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 or distributor 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. A loss of confidence in the vehicle when a defect has been cured does not warrant relief under the Lemon Law. The Lemon Law requires that in order for a vehicle to be determined to be a "lemon" the

²⁴ Respondent Ex. 1, B0001 Driver Air Bag Module, p. SRC-45 from Respondent's Service Manual.

²⁵ Respondent Ex. 2, B0002 Driver Air Bag Module, p. SRC-49 from Respondent's Service Manual.

“nonconformity continues to exist” after the manufacturer has made repeated repair attempts.²⁶ In the present case, the evidence reveals that the vehicle has been repaired and that it currently conforms to the manufacturer’s warranty. 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 60,000 miles. On the date of hearing, the vehicle’s mileage was 34,116 and it remains covered 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. Loretta Denkins (Complainant) purchased a new 2015 Nissan Sentra on April 30, 2016, from Central Houston Nissan (Central) in Houston, Texas, with mileage of 12 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 which provided coverage for three (3) years or 36,000 miles, whichever occurs first and a separate powertrain warranty for five (5) years or 60,000 miles.
3. The vehicle’s mileage on the date of hearing was 34,116.
4. At the time of hearing the vehicle’s warranties were still in effect.
5. Nikeishia Yancy, Complainant’s niece is the primary driver of the vehicle.
6. In April of 2017, Ms. Yancy began to notice that the vehicle’s instrument panel air bag warning light would intermittently illuminate and stay on for extended periods of time.
7. Complainant took the vehicle for repair to Central for the issue described in Findings of Fact #6 on the following dates:

²⁶ Tex. Occ. Code § 2301.605.

- a. April 19, 2017, mileage unknown;
 - b. May 22, 2017, at 17,097 miles;
 - c. June 21, 2017, at 18,297 miles;
 - d. August 8, 2017, 20,128 miles; and
 - e. November 13, 2017, at 20,451 miles.
8. On April 19, 2017, Central's service technician informed Complainant that since the air bag warning light was no longer illuminated, no repair could be performed.
 9. On May 22, 2017, Central's service technician did not perform any repairs to the vehicle.
 10. On June 21, 2017, Central's service technician verified that the vehicle's computers were exhibiting diagnostic trouble codes (DTC's) and replaced the vehicle's airbag module assembly and spiral cable (steering wire assembly) in order to address Complainant's concerns.
 11. On August 8, 2017, Central's service technician verified the existence of DTC's on the vehicle's computers and replaced the vehicle's airbag sensor in order to resolve the concerns raised by Complainant.
 12. On November 13, 2017, Central's technician replaced the vehicle's main wiring harness located underneath the vehicle's dashboard to address the issue of the vehicle's airbag warning light illuminating.
 13. The vehicle's airbag warning light has not illuminated improperly since the repair performed in Findings of Fact #12.
 14. On January 4, 2018, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
 15. On March 13, 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.
 16. The hearing in this case convened and the record was closed on June 1, 2018, in Houston, Texas, before Hearings Examiner Edward Sandoval. Complainant, Loretta Denkins, was represented by her niece, Nikeishia Yancy, at the hearing. Ms. Denkins was also present

to offer testimony. Respondent was represented by Neal Barnes, Dealer Technical Specialist.

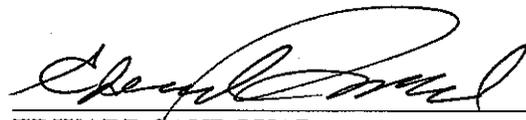
IV. CONCLUSIONS OF LAW

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 June 12, 2018.



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