

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 18-0187540 CAF**

**ROBERT LITTLEFAIR IV,
Complainant**

v.

**GENERAL MOTORS LLC,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Robert Littlefair IV (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 manufactured by General Motors LLC (Respondent). A preponderance of the evidence shows that the subject vehicle has warrantable defects that qualify for warranty repair but not repurchase/replacement.

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 October 17, 2018, in Houston, Texas, before Hearings Examiner Andrew Kang, and the record closed on November 28, 2018. The Complainant, represented himself. Haylee Littlefair testified for the Complainant. Jessica Vanderbilt and Jennifer LeRoy also appeared for the Complainant. Kevin Phillips, Business Resource Manager, represented the Respondent. Bruce Morris, Field Service Engineer, testified for the Respondent. On November 28, 2018, Order No. 3 reopened the record and admitted the corrected version of Respondent's Exhibit 1.

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 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 or someone on behalf of the owner, or the Department has 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

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). 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 to provide notice of the defect or nonconformity to the Respondent.

¹⁴ A respondent may delegate its opportunity to cure to a dealer. A repair visit to a dealer satisfies the opportunity to cure requirement when the respondent allows a dealer to attempt repair after written notice to the respondent. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 221 and 226 (Tex. App.—Austin 2012); *Texas Department of Transportation, Kennemer v. Dutchman Manufacturing, Inc.*, MVD Cause No. 09-0091 CAF (Motor Vehicle Division Sept. 25, 2009) (Final Order Granting Chapter 2301, Subchapter M Relief). An opportunity to cure does not require an actual repair attempt but only a valid opportunity. *Id* at 2.

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

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 of the evidence. That is, the Complainant must present sufficient evidence to show that every required fact more likely than not exists.¹⁹ Accordingly, the Complainant cannot prevail where the existence of any required fact appears equally likely or unlikely.

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

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

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.”).

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

5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainant for reasonable incidental expenses resulting from the vehicle’s loss of use because of the defect.²⁴ Reimbursable expenses include, but are not limited to: (1) alternate transportation; (2) towing; (3) telephone calls or mail charges directly attributable to contacting the manufacturer, distributor, converter, or dealer regarding the vehicle; (4) meals and lodging necessitated by the vehicle’s failure during out-of-town trips; (5) loss or damage to personal property; (6) attorney fees, if the complainant retains counsel after notification that the respondent is represented by counsel; and (7) items or accessories added to the vehicle at or after purchase, less a reasonable allowance for use. The expenses must be reasonable and verifiable (for example, through receipts or similar written documents).²⁵

B. Summary of Complainant’s Evidence and Arguments

On February 10, 2018, the Complainant, purchased a new 2018 Chevrolet Traverse from Robbins Chevrolet, a franchised dealer of the Respondent, in Humble, Texas. The vehicle had 16 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 May 8, 2018, the Complainant mailed a written notice of defect to the Respondent. On June 12, 2018, the Complainant filed a complaint with the Department alleging that the vehicle remained idle when attempting to accelerate from a stop; the vehicle moved backwards before moving forward; the check engine light would come on; audio controls would not function; the audio would mute; and voice assistance would not function.

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).

²⁴ TEX. OCC. CODE § 2301.604.

²⁵ 43 TEX. ADMIN. CODE § 215.209(a).

In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
02/15/18-02/16/18	458	Radio not operational, no volume
02/21/18-02/23/18	747	Volume not operational – will not change or no volume, audio shows off when on, will not switch stations
03/05/18-03/30/18	1,480	Radio has no audio
04/20/18-04/25/18	3,806	Volume not operational – will not change or no volume, shows audio off when on, will not switch stations
05/07/18-05/18/18	4,426	Would not accelerate – would not move pressing on gas pedal after stop
06/19/18-07/18/18	6,454	Radio loses audio and controls will not function, will not accelerate
07/30/18-08/03/18	7,289	Check engine light on, vehicle rolls back like in neutral/reverse, “D” light on shifter flashes

The Complainant confirmed that the vehicle had an issue with vehicle moving backwards as if in reverse. Mrs. Littlefair interjected that the opposite also occurred. Mrs. Littlefair explained that the vehicle may move forward with the vehicle shifted into reverse. She stated that the vehicle may move forward 10 feet or so, the transmission shift position indicator would flash, and the vehicle would jerk and begin moving backwards. She added that the vehicle would move when not an incline. Though the vehicle did not accelerate quickly, it did move. The Complainant noted that they had a video of this. The video showed the “R” on the shift position indicator blinking while the vehicle moved forward at 4 mph; after the blinking stopped, the vehicle slowed down to 0 mph and began moving backwards.²⁶ The Complainant stated that the check engine light would sometimes come on. The dealer cleared the code but the check engine light subsequently came back on. Mrs. Littlefair noted that the light remained on since then. She stated that she first noticed the shifting/acceleration issue in March of 2018. While in drive either at a stop light or in her driveway, she would attempt to accelerate and nothing would happen. She would have to keep pressing the accelerator or restart the engine before the vehicle would function normally. This occurred twice on the first day it occurred. Sometimes this would not happen for a week or two or may happen a few days in a row repeatedly. Mrs. Littlefair stated that she last noticed this a few days before the hearing. She was not sure how far the vehicle moved, but the vehicle would jerk

²⁶ Complainant’s Ex. 11, Malfunction Video 10-10-18.

and switch gears. When asked if this was the same whether going forward or backwards, she confirmed it did and that the lights on the gear shift and the instrument cluster would flash for whichever gear the transmission was in. Mrs. Littlefair characterized the issue as mostly random but it seemed to occur more when starting the vehicle. The instances occurring at a stop or a red light appeared completely random. Mrs. Littlefair and the Complainant confirmed that they notified the dealership about the vehicle's movement issues. Mrs. Littlefair noted one incident when the vehicle went into reverse in a parking lot and she had to slam on the brakes to avoid a car behind them. For the audio control issue, Mrs. Littlefair explained that the volume would get stuck on whatever volume or station and not function. The center infotainment screen would lose all function. The audio controls on the steering wheel can change the stations but not the volume. Mrs. Littlefair first noticed the audio control issue a few days after buying the vehicle. This issue sometimes occurred multiple times a week and usually at least once a week. She last noticed this issue the week before the hearing. She affirmed that she was provided a loaner vehicle whenever leaving the subject vehicle at the dealer for repair.

On cross-examination, Mrs. Littlefair testified that the vehicle had not been taken to the dealer since the July 30th service visit for the check engine light. She confirmed that the vehicle was last at the dealership on August 3rd. The Complainant pointed out that the vehicle actually had 6,454 miles on the odometer where Respondent's Exhibit 1, Odometer Reading, showed 6,100 miles.

C. Inspection

Upon inspection before the test drive at the hearing, the vehicle had 12,664 miles on the odometer. The check engine light was illuminated during the entire test drive, apparently due to an emissions issue. The vehicle was driven for five miles on a major arterial road and residential streets. At various times, the gear selector was shifted between park, reverse and drive. The radio was powered on and the volume was adjusted and the stations changed. The transmission and the radio appeared to operate normally. The vehicle had 12,669 miles at the end of the test drive.

D. Summary of Respondent's Evidence and Arguments

Mr. Morris testified that he did not see the vehicle's radio freeze nor the transmission malfunction during the test drive at the hearing. Mr. Morris noted that he had requested two

diagnostic tools, one for the transmission, which was placed in the vehicle (and another for the radio, which they did not have an opportunity to install). The Respondent's engineering retrieved the data recorded by the device in the vehicle, which was for a park to a drive shift or a park to a reverse shift. The engine rpms moved but the transmission did not respond to the gear change, so the vehicle essentially stayed in neutral. Based on this data, the Respondent issued a technical bulletin on October 8, 2018, entitled "Transmission May Experience a Delayed Engagement When Performing the Garage Shift, When Shifting from Park to Drive."²⁷ Mr. Morris explained that this service bulletin fit the issue as described to him at the time but he did not know of the issue occurring when stopping at traffic lights. The events captured on the vehicle led to the updated calibration for the transmission. A software update would correct this issue. Mr. Morris stated that Apple products connected to the Respondent's vehicles have had issues related to Apple not sharing code and frequent updates. He pointed out that he just received an update for his iPhone the day before the hearing. Mr. Phillips noted that the warranty excluded third party externally connected products. Mrs. Littlefair confirmed that she used an iPhone 7 Plus. Mr. Morris testified that they used an iPhone 10 and iPhone 8 with the subject vehicle, but the radio did not malfunction. Mr. Morris affirmed that the radio issue did not substantially impair the vehicle. In contrast, the transmission issue was a substantial impairment but had a fix available. Mr. Morris explained that a check engine light could have a multitude of causes. However, the codes read at AutoZone shows an emissions issue.

On cross-examination, Mr. Morris responded that they wanted to connect a diagnostic tool for the radio because the radio malfunctioned without a phone connected, as the Complainant stated. He also elaborated that though many codes can turn on the check engine light, a strategy exists for every code. Regarding the service bulletin, Mr. Morris summarized the various steps that may be involved in the release of a service bulletin, including validation and review by the EPA. Mr. Phillips added that even if the issue involved software, this was still a redesign of the vehicle that may require a week or a month of review by government agencies.

Mr. Morris clarified that the radio concern did not relate to the transmission. The different modules communicated on different buses. The vehicle did not have any codes for the

²⁷ Respondent's Ex. 3, #18-NA-298: Transmission May Experience a Delayed Engagement When Performing the Garage Shift, When Shifting from Park to Drive – (Oct 8, 2018).

transmission. A problem with the wiring harness would have been a hardware issue. In this case, the problem was part of the algorithm (software).

E. Analysis

As an initial matter, to qualify for any relief, whether warranty repair or repurchase/replacement, the law requires the vehicle to have a defect covered by the Respondent's warranty (warrantable defect).²⁸ The Lemon Law does not require that a manufacturer provide any particular warranty coverage nor does the Lemon Law impose any specific standards for vehicle characteristics. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. In part, the warranty generally provides that: "The warranty covers repairs to correct any vehicle defect, not slight noise, vibrations, or other normal characteristics of the vehicle due to materials or workmanship occurring during the warranty period."²⁹ According to these terms, the warranty only applies to defects due to materials or workmanship (manufacturing defects).³⁰ A manufacturing defect is generally 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 at the factory, such as incorrect assembly or the use of a broken part. Unlike manufacturing defects, issues that do not arise from manufacturing, such as design characteristics or design defects are not warrantable defects. Design characteristics result from the vehicle's specified design, which exists before the vehicle is manufactured, and not from any error during manufacturing.³¹ Because

²⁸ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

²⁹ Complainant's Ex. 10, 2018 Limited Warranty and Owner Assistance Information.

³⁰ 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.").

³¹ 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).

the warranty only covers manufacturing defects, any flaws in the design, or other non-manufacturing problems, do not qualify for relief.

1. Transmission

The record shows the existence of two different transmission issues: (1) a failure to accelerate and (2) spontaneously moving backwards while in drive. As explained below, the failure to accelerate does not qualify for relief but the issue of moving backwards in drive does support relief.

a. Failure to Accelerate

The record shows that the failure to accelerate resulted from the design of the vehicle's software and not any mechanical issue. Mr. Morris' testimony reflects that a flaw in the software's algorithm required a re-design and that installing the software update (i.e., re-designed software) would fix this issue. However, as previously outlined in the discussion of warrantable defects, the warranty does not cover defects in design. Consequently, this issue cannot support granting of any relief.

b. Moving Backwards While in Drive

The existing evidence indicates that the issue of moving backwards while in drive qualifies for repair relief only. The vehicle does not qualify for repurchase/replacement because it did not have a reasonable number of repair attempts for the issue of moving backwards while in drive. Ordinarily, the statutory presumption for a reasonable number of repair attempts requires four attempts. In cases of serious safety hazards, the law requires two attempts. However, the vehicle's repair history only shows one repair attempt (the July 30, 2018, service visit) for the issue of moving backwards in drive. The Lemon Law also provides an alternative presumption for vehicles out of service for repair at least 30 days; however, the record shows that a loaner vehicle was provided whenever the subject vehicle was left for repair at the dealership. Consequently, the 30-day presumption does not apply. Additionally, the facts in this case do not warrant otherwise finding a reasonable number of repair attempts based on different circumstances and fewer attempts than specified in the statutory presumption. However, the vehicle still meets the requirements for warranty repair relief. Although the Complainant's May 8, 2018, written notice of defect did not address the present issue, the complaint filed on June 12, 2018, did state that the vehicle "pulled backwards before it started pulling forward."

2. Check Engine Light (Emissions)

The evidence shows that the check engine light, which appears related to an emissions problem, turned on and remained on after the dealer reset the light at the last service visit. However, the vehicle did not have the required repair attempts to qualify for repurchase or replacement. The service history only shows one repair attempt for the check engine light and as previously noted, the 30-day presumption does not apply. Accordingly, the vehicle did not have a reasonable number of repair attempts to qualify for repurchase/replacement based on this issue. However, the vehicle still meets the requirements for warranty repair relief.

3. Audio System

As an initial matter, Department precedent holds that problems with the radio do not constitute a substantial impairment.³² Therefore, issues regarding the radio/audio system cannot support repurchase or replacement relief. Nevertheless, a vehicle that does not qualify for repurchase or replacement may still qualify for repair relief for warrantable defects. In this case, the available evidence shows that a warrantable defect more likely than not exists. Although the record reflects that phone compatibility issues may cause the audio system to malfunction, testimony shows that the malfunctions occurred without a phone connected.

III. Findings of Fact

1. On February 10, 2018, the Complainant, purchased a new 2018 Chevrolet Traverse from Robbins Chevrolet, a franchised dealer of the Respondent, in Humble, Texas. The vehicle had 16 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. The warranty "covers repairs to correct any vehicle defect, not slight noise, vibrations, or other normal characteristics of the vehicle due to materials or workmanship occurring during the warranty period."
4. The Complainant took the vehicle to a dealer for repair as shown below:

³² Texas Department of Transportation, *Alvarez v. Ford Motor Company*, MVD Cause No. 08-0440 CAF (Motor Vehicle Division Dec. 11, 2008) (Final Order Denying § 2301.604 Relief); State Office of Administrative Hearings, *Alvarez v. Ford Motor Company*, Docket No. 601-08-4215.CAF (Oct. 9, 2008) (Proposal for Decision).

Date	Miles	Issue
02/15/18-02/16/18	458	Radio not operational, no volume
02/21/18-02/23/18	747	Volume not operational – will not change or no volume, audio shows off when on, will not switch stations
03/05/18-03/30/18	1,480	Radio has no audio
04/20/18-04/25/18	3,806	Volume not operational – will not change or no volume, shows audio off when on, will not switch stations
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06/19/18-07/18/18	6,454	Radio loses audio and controls will not function, will not accelerate
07/30/18-08/03/18	7,289	Check engine light on, vehicle rolls back like in neutral/reverse, “D” light on shifter flashes

5. On May 8, 2018, the Complainant mailed a written notice of defect to the Respondent.
6. On June 12, 2018, the Complainant filed a complaint with the Department alleging that the vehicle remained idle when attempting to accelerate from a stop; the vehicle moved backwards before moving forward; the check engine light would come on; audio controls would not function; the audio would mute; and voice assistance would not function.
7. On August 10, 2018, 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.
8. The hearing in this case convened on October 17, 2018, in Houston, Texas, before Hearings Examiner Andrew Kang, and the record closed on November 28, 2018. The Complainant, represented himself. Haylee Littlefair testified for the Complainant. Jessica Vanderbilt and Jennifer LeRoy also appeared for the Complainant. Kevin Phillips, Business Resource Manager, represented the Respondent. Bruce Morris, Field Service Engineer, testified for the Respondent. On November 28, 2018, Order No. 3 reopened the record and admitted the corrected version of Respondent’s Exhibit 1.
9. The vehicle’s odometer displayed 12,669 miles at the time of the hearing.
10. The vehicle’s warranty was in effect at the time of the hearing.

11. The vehicle operated normally during the test drive at the hearing.
12. The transmission exhibited two different issues: (1) a failure to accelerate and (2) spontaneously moving backwards while in drive.
13. A flaw in the vehicle's software design caused the failure to accelerate.
14. The spontaneous movement backwards occurred as late as a few days before the hearing on October 17, 2018.
15. The check engine light turned on and remained on after the July 30, 2018, service visit. The check engine light resulted from an emissions issue.
16. The audio system malfunctions do not substantially impair the use or value of the vehicle.

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 and 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 failure to accelerate does not support replacement or repurchase. The failure to accelerate is not a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).

7. The audio system malfunction does not support replacement or repurchase. The audio system malfunction neither creates a serious safety hazard nor substantially impairs the use or market value of the vehicle. TEX. OCC. CODE § 2301.604(a).
8. Neither the spontaneous movement backwards while in drive nor the check engine light support replacement or repurchase. The Complainant did not meet the requirement for a reasonable number of repair attempts for these issues. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(a).
9. If the Complainant's vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e).
10. The Complainant's vehicle qualifies for warranty repair. The Complainant proved that the vehicle has defects covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.
11. 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.

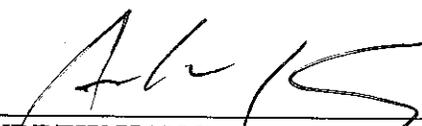
V. Order

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**. It is **FURTHER ORDERED** that the Respondent shall make any repairs needed to conform the subject vehicle's: transmission (for the spontaneous movement/change of direction), emissions issue underlying the check engine light, and audio system malfunction (freezing) to the applicable warranty as specified here. Upon this Order becoming final under Texas Government Code § 2001.144:³³ (1) the Complainant shall deliver the vehicle to the Respondent within 20 days; and (2) the Respondent shall complete the repair of the vehicle within

³³ This Order does not become final on the date this Order is signed, instead: (1) this Order becomes final if a party does not file a motion for rehearing within 25 days after the date this Order is signed, or (2) if a party files a motion for rehearing within 25 days after the date this Order is signed, this Order becomes final when: (A) an order overruling the motion for rehearing is signed, or (B) the Department has not acted on the motion within 55 days after the date this Order is signed. Accordingly, this Order cannot become final (1) while a motion for rehearing remains pending; or (2) after the grant of a motion for rehearing.

20 days after receiving it. However, if the Department determines the Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider the Complainant to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

SIGNED January 24, 2019



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