

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0000145 CAF**

MAYRA MONDIK,	§	BEFORE THE OFFICE
Complainant	§	
v.	§	
	§	OF
TESLA MOTORS, INC.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Mayra Mondik (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2017 Tesla Model S 75. Complainant asserts that the vehicle’s driver’s seat will intermittently start moving forward and fail to stop at the preprogrammed distance from the steering wheel and that the vehicle’s air conditioner intermittently malfunctions when the outside temperature is over 100 degrees. Tesla Motors, Inc. (Respondent) argued that Complainant has not met the repurchase or replacement requirements set forth in the Occupations Code and that no relief is warranted. The hearings examiner concludes that Complainant is not eligible for repurchase or replacement relief since she did not meet the presumption that Respondent was provided a reasonable number of repair attempts to conform the vehicle to its warranty which is required for such relief under the Texas Lemon Law.

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, 2019, in Austin, Texas before Hearings Examiner Edward Sandoval. Complainant, Mayra Mondik, represented herself at the hearing. In addition, her husband, Lawrence Mondik, was present and testified. Respondent was represented by Ryan McCarthy, Managing Counsel.

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

In addition to these 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.⁴

If a vehicle is found to have a nonconformity that creates a serious safety hazard which continues to exist, the rebuttable presumption that a reasonable number of repair attempts have been performed can be established if the vehicle has been subject to repair two or more times and: (1) at least one repair attempt was made during the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) at least one other attempt was made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the first repair attempt.⁵

A “serious safety hazard” means a life-threatening malfunction or nonconformity that substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or creates a substantial risk of fire or explosion.⁶

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

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).

⁵ Tex. Occ. Code § 2301.605(a)(2)(A) and (B). Texas Occupations Code § 2301.605(a)(3) provides an alternative method 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, this section 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.

⁶ Tex. Occ. Code § 2301.601(4).

B. Complainant's Evidence and Arguments

Complainant purchased a new 2017 Tesla Model S 75 on February 17, 2017, with mileage of 50 at the time of delivery.⁷ Respondent provided a bumper-to-bumper limited warranty for the vehicle which provides coverage for the vehicle for four (4) years or 50,000 miles, whichever comes first.⁸ In addition, Respondent provided a warranty for the vehicle's battery and drive unit which provides coverage for eight (8) years or unlimited mileage for these components.⁹ On the date of hearing the vehicle's mileage was 33,340. At the time of hearing, Respondent's warranties were still in effect.

1. Mayra Mondik's Testimony

Complainant testified that she is the primary driver of the vehicle. Complainant states that she filed the Lemon Law complaint due to two (2) issues with the vehicle, which are: the driver's seat will intermittently move forward and not stop at the programmed position and the vehicle's air conditioning system was not cooling the vehicle adequately in the summer.

Complainant testified that the air conditioning issue had been resolved prior to the hearing. She had taken the vehicle to Respondent's service center for repair for the issue on June 8, 2017, at which time Complainant was informed that the air conditioning unit was performing as designed and that there was no problem with it.¹⁰ The vehicle's mileage was 5,437 on this occasion.¹¹ Complainant returned the vehicle to Respondent's service center for repair for the air conditioner issue on September 12, 2018, at which time the vehicle's HVAC intake actuator was replaced.¹² The vehicle's mileage on this occasion was 24,341.¹³ Complainant feels that this last repair resolved the issue of the vehicle's air conditioner not cooling the vehicle appropriately.

In late April or early May of 2018, Complainant experienced a situation where the vehicle's driver seat failed to stop at its preprogrammed spot. The vehicle's front seat is designed to be programmable by the driver so that it will adjust the seat's distance from the steering wheel based on the driver. When the vehicle is turned off, the seat moves back to allow the driver to exit the vehicle easily. When the vehicle is started, the seat will adjust to the driver's preferred settings. However, Complainant experienced a situation where the seat continued to move forward towards the steering wheel. In addition, the back of the seat moved towards the steering wheel

⁷ Complainant Ex. 2, Motor Vehicle Purchase Agreement dated February 17, 2017.

⁸ Complainant Ex. 5, Tesla Model S, Model X, Model 3 New Vehicle Limited Warranty, p. 6.

⁹ *Id.*

¹⁰ Respondent Ex. 4, Repair Invoices for the Subject Vehicle, various dates, p. 5.

¹¹ *Id.*, p. 4.

¹² *Id.*, p. 23.

¹³ *Id.*, p. 22.

and started to bend forward. Complainant had to push the stop button on the screen's display to stop the seat from moving. Complainant testified that the seat malfunctioned twice before she took it to Respondent's service center for repair.

Complainant took the vehicle to Respondent's service center for repair for the seat issue on May 14, 2108. At this time, Respondent's service technician was unable to duplicate the issue and determined that the vehicle was functioning as designed.¹⁴ The vehicle's mileage on this occasion was 22,331.¹⁵ The vehicle was in the dealer's possession until August 11, 2018.¹⁶ Complainant received a loaner vehicle while her vehicle was in the dealer's possession.

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on September 6, 2018.¹⁷ On September 13, 2018, Complainant wrote a letter to Respondent advising them that she was dissatisfied with the vehicle.¹⁸ Complainant testified that she was not contacted by Respondent for a final opportunity to cure.

Complainant is unhappy with the vehicle and feels that she has had too many problems with it. She feels that the vehicle is not safe and doesn't want to drive it.

During cross-examination, Complainant testified that one of the reasons she left the vehicle at the service center was to have the service technicians look at it and repair it. Complainant stated that she did not take the vehicle back for repair for the seat issue after August 11, 2018. She testified that the seat issue is still occurring. The last time that the issue occurred was approximately two (2) months before the date of hearing, March 8, 2019.

2. Lawrence Mondik's Testimony

Lawrence Mondik, Complainant's husband, testified in the hearing. He stated that he drives the vehicle about 10 percent of the time.

Mr. Mondik testified that he observed the driver's seat move past its preprogrammed spot when Complainant was sitting in the driver's seat. He saw that the seat was pushing Complainant towards the steering wheel. Mr. Mondik texted Respondent's representative when the incident occurred to advise him of the problem.

¹⁴ Complainant Ex. 3, Repair Order dated May 14, 2018.

¹⁵ *Id.*

¹⁶ *Id.* Complainant refused to pick up the vehicle from Respondent's service center until August 11, 2018 as she was dissatisfied with the vehicle. The vehicle was ready for pick up on May 15, 2018.

¹⁷ Complainant Ex. 1, Lemon Law complaint dated September 6, 2018.

¹⁸ Complainant Ex. 4, Letter to Tesla Motors, Inc. dated September 13, 2018.

Mr. Mondik stated that after he and Complainant picked up the vehicle from the service center in August of 2018, he saw the problem occur again. Mr. Mondik stated that he filed the Lemon Law complaint because he was concerned for his family's safety. He feels that there's a computer issue with the vehicle and that Respondent is not addressing the issue appropriately. Mr. Mondik agreed that the air conditioning issue was resolved prior to the hearing.

C. Respondent's Evidence and Arguments

Ryan McCarthy, Managing Counsel, testified for Respondent. He stated that Complainant has failed to provide Respondent with an adequate opportunity to repair the vehicle. Mr. McCarthy stated that only one repair attempt was performed on the vehicle for the seat issue and only two (2) repair attempts were provided to Respondent for the air conditioning issue. Mr. McCarthy also stated that it appears that the air conditioner issue has been resolved. Mr. McCarthy stated that he feels that the vehicle is safe for Complainant to drive.

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.

1. Air Conditioner Issue

The evidence indicates that the vehicle's air conditioning unit did not completely cool the vehicle during the summer. Complainant provided the vehicle to Respondent's service center for repair for the issue on the following dates: June 8, 2017 and September 12, 2018. The testimony is clear that the issue was resolved on September 12, 2018, when the vehicle's intake actuator was replaced. The Lemon Law requires that in order for a vehicle to be determined to be a "lemon" the "nonconformity continues to exist" after the manufacturer has made repeated repair attempts.¹⁹ Since the issue has been repaired, it no longer provides a basis to order repurchase or replacement of the subject vehicle.

¹⁹ Tex. Occ. Code § 2301.605.

2. Driver's Seat Issue

The evidence presented in the hearing establishes that the vehicle's driver's seat does not function properly and intermittently will not return to Complainant's preprogrammed position. The seat will continue past the preprogrammed position and continue moving toward the vehicle's steering wheel. At the same time, the back of the driver's seat will fold forward and move toward the steering wheel also. In order to stop the seat, Complainant has to press the stop button on the dash display.

Complainant presented the vehicle to Respondent's service center for repair for this issue on one occasion: May 14, 2018. Occupations Code § 2301.604(a) requires a showing that Respondent was unable to conform the vehicle to an applicable express warranty "after a reasonable number of attempts." Sections 2301.605(a)(1) and (a)(2) establishing a rebuttable presumption that the manufacturer has made a reasonable number of attempts to repair a vehicle require that the vehicle be presented for a first repair for the issue complained of within the first 12 months or 12,000 miles following the date of original delivery to the owner. Complainant has not met the requirements of either test for the issues described above, as only repair attempt was performed for the issue on May 14, 2018, when the vehicle's mileage was 22,331 which was beyond 12 months or 12,000 miles from the original delivery to the owner. As such, Complainant was unable to establish that a reasonable number of attempts to repair the vehicle were made by Respondent. Since Respondent was not provided an adequate opportunity to repair the vehicle, the hearings examiner cannot award repurchase or replacement relief for these issues.

Respondent's express warranty applicable to Complainant's vehicle provides bumper-to-bumper coverage for four (4) years or 50,000 miles whichever comes first. In addition, the battery and drive unit warranty provides coverage for eight (8) years or unlimited mileage for these components. On the date of hearing, the vehicle's mileage was 33,340 and the warranties are still in effect. In addition, the first hand testimony presented by Complainant indicates that the vehicle's driver's seat programming is still not working as designed. As such, Respondent is hereby ordered to perform any necessary repairs to conform Complainant's vehicle to the applicable warranties.

Complainant's request for repurchase or replacement relief is denied. Respondent will be ordered to repair the vehicle so that it conforms to its warranties.

III. FINDINGS OF FACT

1. Mayra Mondik (Complainant) purchased a new 2017 Tesla Model S 75 on February 17, 2017, with mileage of 50 at the time of delivery.

2. The manufacturer of the vehicle, Tesla Motors, Inc. (Respondent), issued a bumper to bumper warranty which provides coverage for the vehicle for four (4) years or 50,000 miles, whichever occurs first and a separate warranty for the vehicle's battery and drive unit which provides coverage for those components for eight (8) years or unlimited miles.
3. The vehicle's mileage on the date of hearing was 33,340.
4. At the time of hearing the vehicle's warranties were still in effect.
5. Complainant filed the Lemon Law complaint because the vehicle's driver's seat will intermittently start moving forward and fail to stop at the preprogrammed distance from the steering wheel and because the vehicle's air conditioner intermittently malfunctions when the outside temperature is over 100 degrees.
6. Complainant took the vehicle to Respondent's service center in order to address her concerns with the vehicle's air conditioning system on the following dates:
 - a. June 8, 2017, at 5,437 miles; and
 - b. September 12, 2018, at 24,341 miles.
7. On June 8, 2017, Respondent's service technician determined that the vehicle's air conditioning unit was working as designed.
8. On September 12, 2018, Respondent's service technician replaced the vehicle's intake actuator in order to address the issue with the vehicle's air conditioner.
9. The vehicle's air conditioner was repaired on September 12, 2018 and works properly at this time.
10. On May 14, 2018, Complainant took the vehicle to Respondent's service center in order to have her concerns with the vehicle's driver's seat not working properly addressed.
11. The driver's seat is designed to move into preprogrammed positions depending on the driver.
12. Intermittently, the driver's seat will move forward and go past Complainant's preprogrammed position.

13. During the repair attempt on May 14, 2018, Respondent's service technician did not find any problem with the driver's side seat.
14. The issue with the driver's side seat has reoccurred since the May 14, 2018 repair attempt.
15. Complainant has not returned the vehicle to Respondent's service center for repair for the driver's seat issue described in Findings of Fact #12.
16. On September 6, 2018, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
17. On December 14, 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.
18. The hearing in this case convened and the record closed on March 8, 2019, in Austin, Texas before Hearings Examiner Edward Sandoval. Complainant, Mayra Mondik, represented herself at the hearing. In addition, her husband, Lawrence Mondik, was present and testified. Respondent was represented by Ryan McCarthy, Managing Counsel.

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 proved 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. Complainant did not meet the presumption that a reasonable number of repair attempts were undertaken by Respondent prior to the filing of the Lemon Law complaint. Tex. Occ. Code § 2301.605(a)(1).
8. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code § 2301.204.
9. 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 Complainants' petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-.613 is hereby **DISMISSED**. It is **FURTHER ORDERED** that Respondent shall make any repairs needed to conform the vehicle to the applicable warranty. Complainant shall deliver the subject vehicle to Respondent within 20 days after the date this Order becomes final under Texas Government Code § 2001.144.²⁰ Within 40 days after receiving the vehicle from Complainant, Respondent shall complete repair of the subject vehicle. However, if the Department determines Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required

²⁰ (1) This Order becomes final if a party does not file a motion for rehearing within 20 days after receiving a copy of this Order, or (2) if a party files a motion for rehearing within 20 days after receiving a copy of this Order, this Order becomes final when: (A) the Department renders an order overruling the motion for rehearing, or (B) the Department has not acted on the motion within 45 days after the party receives a copy of this Order.

repair as prescribed, the Department may consider 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 March 19, 2019.



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