**TEXAS DEPARTMENT OF MOTOR VEHICLES**
**CASE NO. 19-0006062 CAF**

| | | |
|---|---|---|
| **PAMELA K. HOLLIDAY,** **Complainant** | § | **BEFORE THE OFFICE** |
| **v.** | § | **OF** |
| **NISSAN NORTH AMERICA, INC.,** **Respondent** | § | **ADMINISTRATIVE HEARINGS** |

## DECISION AND ORDER

Pamela K. Holliday (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 her vehicle distributed by Nissan North America, Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair.

## I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing[1] 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 August 2, 2019, in San Antonio, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented and testified for herself. Rafael Mariduena, dealer technical specialist, represented and testified for the Respondent.

[1] TEX. GOV'T CODE § 2001.051.

## II. Discussion

### A. Applicable Law

#### 1. Repurchase/Replacement Relief Requirements

A vehicle qualifies for repurchase or replacement if the respondent 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 currently 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 respondent, (2) an opportunity to cure by the respondent, 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 respondent;[13] (2) the respondent 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). 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 before the warranty's expiration.[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 must 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 forming the basis of the claim

---

[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.").

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] However, the Department's rules expressly exclude compensation for "any interest, finance charge, or insurance premiums."[26]

## B. Summary of Complainant's Evidence and Arguments

On January 2, 2019, the Complainant, purchased a new 2018 Nissan Titan from Nissan of Boerne, a franchised dealer of the Respondent, in Boerne, Texas. The vehicle had 56 miles on the odometer at the time of purchase. The vehicle's limited warranty provides basic coverage for 60 months or 100,000 miles, whichever occurs first and emission coverage for three years or 36,000 miles, whichever occurs first.

On or about February 18, 2019, the Lemon Law Section of the Department's Enforcement Division provided a written notice of the alleged defects to the Respondent.[27] On February 18,

---

[21] 43 TEX. ADMIN. CODE § 215.202(a)(3).

[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).

[26] 43 TEX. ADMIN. CODE § 215.208(b)(1).

[27] 43 TEX. ADMIN. CODE § 215.204.

2019, the Complainant filed a complaint with the Department alleging that the check engine indicator light illuminated and the vehicle vibrated at 65 to 70 mph. The Complainant confirmed that the check engine light was successfully repaired but the vibration issue was not sufficiently addressed. She testified that a dealer found flat spotting in the rear tires. The tire manufacturer would not address the tire issue under its warranty because the selling dealer did not move the vehicle (causing the flat spots). The Complainant first noticed the check engine light/emissions issue the evening she drove the vehicle off the selling dealer's lot (the day of sale). On the way home, the check engine light came on and stayed on. The vehicle felt like it was losing and regaining power. The Complainant called the dealer and brought the vehicle in for service. She last noticed the check engine light/emissions issues six days after the initial repair visit on January 5, 2019. The Complainant testified that the vehicle had five repair visits with the last occurring probably in March 2019. She confirmed that the check engine light was currently off. Regarding the vibration/tire issue, the Complainant explained that the vibration was intermittent. Upon clarification questions, when asked when the Complainant last noticed the vibration issue, she responded that about four weeks before the hearing a passenger in the back seat noticed vibration. When asked if the vibration was noticeable when driving, the Complainant explained that vibration was noticeable once the flat spotted tires were rotated to the front, but the vibration was not bothersome.

### C. Inspection

Upon inspection at the hearing, before the test drive, the vehicle's odometer displayed 3,067 miles. The check engine light was not illuminated. The vehicle did not exhibit any abnormal vibrations during the test drive. The test drive ended with 3,082 miles on the odometer.

### D. Summary of Respondent's Evidence and Arguments

Mr. Mariduena testified that he believed the vehicle was repaired. Although the vehicle did have an issue with the check engine light, the light had not come on for several months. Regarding the vibration, he noted that it was comparable to like vehicles and it felt related to the (driving) environment. On cross-examination, Mr. Mariduena explained that flat spots will cause vibration until evened out. He added that the Respondent did not cover the tires but the tire manufacturer

did cover the tires. However, the flat spotting claim was disallowed because the dealer should have mitigated the issue.

## E. Analysis

To qualify for Lemon Law relief, the vehicle must have a currently existing defect covered by warranty (warrantable defect).[28] However, a preponderance of the evidence does not show that the vehicle has any currently existing defects that qualify for Lemon Law relief. 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. Instead, the Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides. In this case, the vehicle's warranty provides basic coverage as follows:

> This warranty covers any repairs needed to correct defects in materials or workmanship of all parts and components of each new Nissan vehicle supplied by Nissan subject to the exclusions listed under the heading "WHAT IS NOT COVERED" or, if the part is covered by one of the separate coverages described in the following sections of this warranty, that specific coverage applies instead of the basic coverage.[29]

For emission defects, the warranty provides the following specific coverage: "Nissan[] warrants that your vehicle was designed, built and equipped to conform at the time of sale with all applicable United States emission standards. This warranty covers any repairs needed to correct defects in materials or workmanship which would cause your vehicle not to meet these standards."[30]

Significantly, the warranty specifically excludes "[f]ailure of a component not covered by warranty."[31] The warranty elaborates that "Warranty repairs will be made at no charge for parts and/or labor (except for tires, in which case you may pay certain charges as noted above or as described in the applicable tire warranty found later in this booklet)."[32] In other words, the Respondent's warranty does not cover the tires but a separate warranty by the tire manufacturer applies to the tires. In this case, the tire manufacturer provides the following warranty:

---

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

[29] Complainant's Ex. 3, 2018 Titan Warranty Information Booklet, at 6.

[30] Complainant's Ex. 3, 2018 Titan Warranty Information Booklet, at 10 (footnote omitted).

[31] Complainant's Ex. 3, 2018 Titan Warranty Information Booklet, at 8.

[32] Complainant's Ex. 3, 2018 Titan Warranty Information Booklet, at 7.

> This Limited Warranty and Adjustment (the "Policy") is issued by Continental Tire North America, Inc. (the "Company") and is applicable for Continental and General-brand original equipment tires and is a promise of replacement under certain specified conditions. This Policy applies to tires in normal service displaying adjustable conditions (see Section 4) and does not require the existence of a workmanship or material related condition in order to qualify for adjustment. THIS POLICY IS NOT A WARRANTY THAT YOUR TIRE WILL NOT FAIL OR BECOME UNSERVICEABLE IF NEGLECTED OR MISTREATED.[33]

Under these terms, the Respondent's warranty only applies to defects in materials or workmanship (manufacturing defects) due to the Respondent.[34] 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. Manufacturing defects exist when the vehicle leaves the manufacturing plant. Unlike manufacturing defects, issues that do not arise from manufacturing, such as dealer neglect (which occur after manufacturing) are not warrantable defects. In sum, the Respondent's warranty only applies to currently existing manufacturing defects attributable to the Respondent.

### 1. Check Engine Indicator Light

A preponderance of the evidence indicates that the emissions issue has been successfully resolved. The Complainant testified that she last noticed check engine light six days after she first returned the vehicle to the dealer for repair the day after purchasing the vehicle. The issue has not recurred after the last service visit. Further, the Complainant testified that the check engine light was off at the time of the hearing. Significantly, the inspection at the hearing confirmed that the check engine indicator light was not illuminated. Because the check engine light issue does not currently exist, this issue does not qualify for any relief.

---

[33] Complainant's Ex. 3, 2018 Titan Warranty Information Booklet, at 35.

[34] 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.").

**2. Vibration**

Regarding the vibration issue, the Complainant testified that a dealer found flat spotting with the two rear tires. The record indicates that the vehicle's tires may have permanent flat spots caused by the dealer leaving the vehicle stationary for an extended time. The Complainant testified that she could not get the tires addressed under the tire manufacturer's warranty because the dealer did not move the vehicle (resulting in the flat spots). Also, the Complainant noted that a passenger riding in the back seat noticed the vibration issue. The Complainant explained that when the rear tires were rotated to the front, vibration was noticeable but not bothersome. However, the Respondent's warranty does not cover the tires, which are covered by separate warranty from the tire manufacturer. Because the Lemon Law only applies to issues covered by the Respondent's warranty, the vibration issue cannot support any relief.

## III. Findings of Fact

1. On January 2, 2019, the Complainant, purchased a new 2018 Nissan Titan from Nissan of Boerne, a franchised dealer of the Respondent, in Boerne, Texas. The vehicle had 56 miles on the odometer at the time of purchase.

2. The vehicle's limited warranty provides basic coverage for 60 months or 100,000 miles, whichever occurs first.

3. On or about February 18, 2019, the Lemon Law Section of the Department's Enforcement Division provided a written notice of the alleged defects to the Respondent.

4. On February 18, 2019, the Complainant filed a complaint with the Department alleging that the check engine indicator light illuminated and the vehicle vibrated at 65 to 70 mph.

5. On April 12, 2019, the Department's Office of Administrative Hearings issued a notice of hearing directed to all parties, giving them not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under which the hearing was to be held; particular sections of the statutes and rules involved; and the factual matters asserted.

6. The hearing in this case convened on August 2, 2019, in San Antonio, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The

Complainant, represented and testified for herself. Rafael Mariduena, dealer technical specialist, represented and testified for the Respondent.

7. The vehicle's odometer displayed 3,067 miles at the time of the hearing.

8. The vehicle's warranty was in effect at the time of the hearing.

9. Upon inspection at the hearing, before the test drive, the vehicle's odometer displayed 3,067 miles. The check engine light was not illuminated. The vehicle did not exhibit any abnormal vibrations during the test drive. The test drive ended with 3,082 miles on the odometer.

10. The check engine light/emissions issue was successfully repaired.

11. The Respondent's warranty does not cover the tires, which are instead covered by a separate warranty from the tire manufacturer.

12. Flat spotting in the tires, caused by leaving the vehicle stationary for an extended time, resulted in the complained of vibration.

## 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 Complainant's vehicle does not qualify for replacement or repurchase. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).

7. The Complainant does not qualify for reimbursement of incidental expenses because the vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE §§ 2301.603, 2301.604(a); 43 TEX. ADMIN. CODE § 215.209.

8. 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).

9. The Complainant's vehicle does not qualify for warranty repair. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.

10. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE § 2301.603.

## V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

**SIGNED October 1, 2019**

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