TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0013895 CAF

ROLAND IOVESCU,	§	**BEFORE THE OFFICE**
Complainant	§	
	§	
v.	§	**OF**
	§	
GENERAL MOTORS LLC,	§	
Respondent	§	**ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Roland Iovescu (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 does not show that the subject vehicle continues to have 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 originally convened on December 6, 2019, in Conroe, Texas, before Hearings Examiner Andrew Kang. However, the parties requested a continuance to allow the parties to finalize a settlement agreement. Order No. 3 continued this proceeding indefinitely and required the Complainant to file a status report by January 6, 2020. In response, the Complainant requested to proceed with the hearing in this case. The hearing reconvened and commenced on February 7, 2020; the record closed on the same day. The Complainant, represented himself. Clifton Green, business resource manager, represented 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]

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[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:

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[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

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[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

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[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 hearing 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 November 27, 2017, the Complainant, purchased a new 2017 GMC Savana from Beck & Masten Buick GMC, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 15 miles on the odometer at the time of purchase. The vehicle's limited warranty provides bumper to bumper coverage for three (3) years or 36,000 miles, whichever comes first. On August 19, 2019, the Complainant provided a written notice of defect to the Respondent. On July 29, 2019, the Complainant filed a complaint with the Department alleging that the subject vehicle would wobble nearly uncontrollably making braking almost impossible. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

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[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).

Date	Miles	Issue
08/13/18	12,141	Shake
12/18/18	15,991	Shake in steering wheel
12/22/18	16,120	Shake, excessive movement
01/29/19	20,688	Major vibration
06/04/19	23,433	Vehicle shake
09/09/19	24,256	Excessive shake

The Complainant testified that, when traveling with the vehicle loaded, the vehicle may shake/wobble uncontrollably, front to back, side to side, with no steering ability. Braking almost makes the condition worse. This shaking last happened at high speeds, about 79 mph. The shaking has happened going over a bridge, a bump, or just unlevel road. The shaking may have first happened at the end of 2017, but the condition was not severe and the Complainant did not recognize what it was. He used to drive the vehicle about every other day but now almost never drives it. He last noticed the shaking in September 2019, less than a week before the last service visit on September 9, 2019. The Complainant believed that the first severe shaking occurred around 15,000 miles. The repairs did not improve the shaking. However, the vehicle has no symptoms except when going into the "death wobble". The Complainant affirmed that about two months passed between the last two instances of the problem and that it occurred randomly. Except for the first two or three instances of shaking, which occurred locally, the issue would occur on long trips. The Complainant confirmed that the wobble would occur with the van fully occupied, including luggage. The shaking did occur once not loaded with cargo but with his whole family (a total of eight people).

On cross-examination, the Complainant elaborated that the vehicle had luggage inside and outside of the vehicle, using a cargo carrier mounted on the tow hitch. The shaking occurred on highways, always with the entire family in the vehicle. The Complainant affirmed that a converter had altered the vehicle and that he had not driven the vehicle prior to the alteration. He did not know if the vehicle had a vibration with the original 16" wheels and suspension. He had only driven the vehicle with the 20" wheels and modified suspension from the converter. When asked about impaired use between the last repair at 24,256 miles, and the mileage at the hearing, 31,929 miles, the Complainant acknowledged that he had lent the vehicles to others and he had used the vehicle locally. The Complainant added that he never received an equivalent loaner vehicle with capacity for his entire family.

C. Inspection

The subject vehicle displayed 31,916 on the odometer upon inspection at the hearing, before the test drive. The vehicle was test driven primarily on a freeway. The test drive ended with 31,929 miles on the odometer. The vehicle appeared to operate normally during the test drive.

D. Summary of Respondent's Evidence and Arguments

Bruce Morris, field service engineer, testified that he had test driven the subject vehicle with the Complainant, his wife, and other adults. A converter had installed 20" wheels on the vehicle though the Respondent manufactured the vehicle with 16" wheels. The vehicle had a dent in the frame rail, maybe from hitting road debris, but Mr. Morris did not think it affected the vehicle. The lower control arm bushings were replaced for customer satisfaction. Three of the vehicles tires were at the wear indicator. One tire had blown out and the tire warranty paid for a replacement tire and rim. The dealership's technician was instructed to redo the alignment with the new wheel but this apparently did not happen.

On cross-examination, Mr. Morris explained that the dent was rusted and appeared to have been there for a while. He elaborated that the frame rail was a block for the skid plate and the actual frame remained intact.

E. Analysis

The record reflects that the vehicle had exhibited a serious safety hazard, the wobbling resulting in a loss of control. However, as explained in the discussion of applicable law, the alleged nonconformity must continue to exist after repair to qualify for any relief. In the present case, the evidence shows that the vehicle last exhibited the complained of condition within a week before the September 9, 2019, repair visit but not after that repair. Because the record contains no evidence of the problem recurring after repair, the vehicle does not qualify for relief.

III. Findings of Fact

1. On November 27, 2017, the Complainant, purchased a new 2017 GMC Savana from Beck & Masten Buick GMC, a franchised dealer of the Respondent, in Houston, Texas. The vehicle had 15 miles on the odometer at the time of purchase.

2. The vehicle's limited warranty provides bumper to bumper coverage for three (3) years or 36,000 miles, whichever comes first, and specifies 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."

3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
08/13/18	12,141	Shake
12/18/18	15,991	Shake in steering wheel
12/22/18	16,120	Shake, excessive movement
01/29/19	20,688	Major vibration
06/04/19	23,433	Vehicle shake
09/09/19	24,256	Excessive shake

4. On August 19, 2019, the Complainant provided a written notice of defect to the Respondent.

5. On July 29, 2019, the Complainant filed a complaint with the Department alleging that the subject vehicle would wobble nearly uncontrollably making braking almost impossible.

6. On October 17, 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.

7. Matters of notice of hearing[27] and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case originally convened on December 6, 2019, in Conroe, Texas, before Hearings Examiner Andrew Kang. However, the parties requested a continuance to allow the parties to finalize a settlement agreement. Order No. 3 continued this proceeding indefinitely and required the Complainant to file a status report by January 6, 2020. In response, the Complainant requested to proceed with the hearing in this case. The hearing reconvened and commenced

[27] TEX. GOV'T CODE § 2001.051.

on February 7, 2020; the record closed on the same day. The Complainant, represented himself. Clifton Green, business resource manager, represented the Respondent.

8. The vehicle's odometer displayed 31,916 miles at the time of the hearing.

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

10. The subject vehicle displayed 31,916 on the odometer upon inspection at the hearing, before the test drive. The vehicle was test driven primarily on a freeway. The test drive ended with 31,929 miles on the odometer. The vehicle appeared to operate normally during the test drive.

11. The vehicle last exhibited the complained of wobbling before the last (September 9, 2019) repair attempt and did not reoccur after the last repair attempt.

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

9. 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 April 8, 2020

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