

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 21-0008776 CAF**

**RAY MISSILDINE,  
Complainant**

**v.**

**GENERAL MOTORS LLC,  
Respondent**

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**BEFORE THE OFFICE  
  
OF  
  
ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Ray Missildine (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.

**I. Procedural History, Notice and Jurisdiction**

Matters of notice of hearing<sup>1</sup> 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 September 21, 2021, in Texarkana, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Mark Burgess, Attorney represented the Complainant. Kevin Phillips, Business Resource Manager, represented the Respondent. David Piper, Field Service Engineer, testified for the Respondent.

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<sup>1</sup> TEX. GOV'T CODE § 2001.051.

## II. Discussion

### A. Applicable Law

#### 1. Repurchase/Replacement Relief Requirements

Repurchase and replacement relief only apply to new vehicles.<sup>2</sup> 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.”<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

##### 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

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<sup>2</sup> TEX. OCC. CODE § 2301.603.

<sup>3</sup> TEX. OCC. CODE § 2301.604(a).

<sup>4</sup> TEX. OCC. CODE § 2301.604(a).

<sup>5</sup> TEX. OCC. CODE § 2301.601(4).

vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”<sup>6</sup>

**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.”<sup>7</sup>

**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.<sup>8</sup>

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

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<sup>6</sup> *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

<sup>7</sup> *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“We find that this interpretation of the standard required for demonstrating substantial impairment is reasonable and consistent with the statute’s plain language which requires a showing of loss in market value. . . . [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.”).

<sup>8</sup> TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

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.<sup>9</sup>

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:

[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.<sup>10</sup>

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.<sup>11</sup>

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.<sup>12</sup> 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.<sup>13</sup>

**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

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<sup>9</sup> TEX. OCC. CODE § 2301.605(a)(2).

<sup>10</sup> TEX. OCC. CODE § 2301.605(a)(3).

<sup>11</sup> TEX. OCC. CODE § 2301.605(c).

<sup>12</sup> *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.’”).

<sup>13</sup> *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.”).

to the respondent;<sup>14</sup> (2) the respondent was given an opportunity to cure the defect or nonconformity;<sup>15</sup> and (3) the Lemon Law complaint was filed within six months after the earliest 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.<sup>16</sup>

## 2. Warranty Repair Relief

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”; the vehicle owner provided written notice of the defect to the manufacturer, converter, distributor, or its authorized agent before the warranty's expiration; and the owner filed a complaint with the Department specifying the defect.<sup>17</sup> The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”<sup>18</sup>

## 3. Burden of Proof

The law places the burden of proof on the Complainant.<sup>19</sup> 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.<sup>20</sup> Accordingly, the

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<sup>14</sup> 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 satisfies the requirement to provide notice of the defect or nonconformity to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).

<sup>15</sup> TEX. OCC. CODE § 2301.606(c)(2). A respondent may delegate its opportunity to cure to a dealer. A repair visit to a dealer may satisfy the opportunity to cure requirement when the respondent authorizes 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. A respondent forgoes its opportunity to repair by replying to a written notice of defect with a settlement offer instead of arranging a repair attempt. *Id* at 2.

<sup>16</sup> TEX. OCC. CODE § 2301.606(d)(2).

<sup>17</sup> TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

<sup>18</sup> TEX. OCC. CODE § 2301.603(a).

<sup>19</sup> 43 TEX. ADMIN. CODE § 215.66(d).

<sup>20</sup> *E.g.*, *Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

Complainant cannot prevail where the existence of any required fact appears unlikely or appears equally likely or unlikely.

#### 4. The Complaint Identifies the Relevant Issues in this Case

The complaint identifies the relevant issues to address in this case.<sup>21</sup> 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 for relief under the lemon law.”<sup>22</sup> However, the parties may expressly or impliedly consent to hearing issues not included in the pleadings.<sup>23</sup> Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.<sup>24</sup> Because the complaint determines the relevant issues, the Department cannot order relief for an issue not included in the complaint unless tried by consent.<sup>25</sup>

#### 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.<sup>26</sup> 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

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<sup>21</sup> “In a contested case, each party is entitled to an opportunity: (1) for hearing after reasonable notice of not less than 10 days; and (2) to respond and to present evidence and argument on each issue involved in the case.” TEX. GOV’T CODE § 2001.051; “Notice of a hearing in a contested case must include . . . either: (A) a short, plain statement of the factual matters asserted; or (B) an attachment that incorporates by reference the factual matters asserted in the complaint or petition filed with the state agency.” 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.”).

<sup>22</sup> 43 TEX. ADMIN. CODE § 215.202(a)(3).

<sup>23</sup> 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

<sup>24</sup> *See Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

<sup>25</sup> *See* TEX. GOV’T CODE §§ 2001.141(b)-(c), 2001.051-2001.052; TEX. R. CIV. P. 301.

<sup>26</sup> TEX. OCC. CODE § 2301.604.

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).<sup>27</sup> However, the Department's rules expressly exclude compensation for "any interest, finance charge, or insurance premiums."<sup>28</sup>

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

On February 6, 2020, the Complainant, purchased a new 2020 GMC Sierra from Sisk Motors, Inc., a franchised dealer of the Respondent, in Mount Pleasant, Texas. The vehicle had 113 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 December 4 and 29, 2020, November 13, 2020, and January 1, 26, 2021, the Complainant, through his attorney at the time, provided written notices of defects to the Respondent. On April 1, 2021, the Complainant filed a complaint with the Department alleging that the engine will die when idling too long, the collision (Side Blind Zone Alert/Lane Change Alert) warning lights flash for no reason, the locks will randomly activate, the vehicle will lunge forward when braking, the radio will randomly increase to full volume, and the vehicle shifted with difficulty from park.

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<sup>27</sup> 43 TEX. ADMIN. CODE § 215.209(a).

<sup>28</sup> 43 TEX. ADMIN. CODE § 215.208(b)(1).

The Complainant took the vehicle to a dealer for repair as follows:

<b>Date</b>	<b>Miles</b>	<b>Issue</b>
04/15/2020	6,447	Difficulty shifting out of park.
06/15/2020	12,023	<i>The vehicle would not start.</i>
06/30/2020	14,356	Difficulty shifting out of park and the blind spot warning in side mirror will come on randomly.
07/07/2020	14,967	<i>The vehicle would not start at times and would not shift out of park at times.</i>
07/16/2020	15,905	Difficulty shifting out of park and the vehicle tried to lunge forward while the brake was still depressed.
08/11/2020	17,201	Difficulty shifting out of park.
08/17/2020	18,436	<i>There was no radio or picture when in drive.</i>
08/28/2020	20,989	<i>The vehicle would not start.</i>
09/15/2020	20,553	Difficulty shifting out of park. <i>The vehicle displayed a warning the tailgate was open and the blind spot warning would come on randomly.</i>
09/30/2020	21,844	Difficulty shifting out of park and blind spot warning would come on randomly.
10/14/2020	22,098	<i>The engine would have high RPMs for the first 30 minutes or more and the blind spot warning would come on randomly.</i>
11/05/2020	22,198	Vehicle died while idling.

The Respondent had an opportunity to cure at the Respondent's inspection of the vehicle on May 18, 2021, at 38,948 miles.

The Complainant testified that the first issue he had with the vehicle was the blind spot warning lights coming on when there was nothing beside him. He stated that he also had issues with the vehicle not starting and not having power. Additionally, he claimed that the radio would change stations on its own.

The Complainant added that the engine would turn off when the vehicle idled, including while stopped at traffic lights. He stated that he could restart the engine after it turned off. He claimed that after a repair for that issue, the engine RPMs were so high that he had to mash the brake to prevent the vehicle from lunging forward and rolling through a stop sign. This issue occurred repeatedly.

The Complainant stated that he had difficulty shifting the vehicle out of park at times and he had to pump the brakes to move the shifter. He explained that the dealership told him the issue



was a faulty bolt and they replaced it. The issue remained after the repair. This issue occurred repeatedly.

The Complainant described that when he turned on his turn signal, the blind spot warning light would flash as well, making him believe there was a vehicle beside him even though the area was clear. He claimed that this warning light would make him hesitate on the road, which made driving unsafe. This issue occurred repeatedly.

The Complainant testified that he brought the vehicle in to the dealership for repairs 19 times. He reported that when he asked for the complete set of work orders for his vehicle, the dealer only provided 14 work orders including two work orders for oil changes.

The Complainant explained that additional issues occurred, including warning messages that the towing package needed servicing and the locks rapidly locking and unlocking. He added that the right door would immediately lock after he unlocked the doors. He recounted that he attempted to use the cruise control and it would not stay on. He indicated that he had not used the cruise control since because it would not work properly. He mentioned that the radio changed to the maximum volume when he parked the truck for a short time before it turned off. He testified that there was a growling sound that came from under the dashboard. He stated that the display (Driver Information Center) by the speedometer would display different messages and he had difficulty clearing them. He stated that a system update message would come on while he was driving and would cover the display. He commented that there were so many additional issues that he could list them all.

On cross-examination the Complainant confirmed that he was provided a rental vehicle each time his vehicle was in the shop. The Complainant pointed out a dent in the front bumper from where he hit a dog. He approximated that he had the tires replaced a month before the hearing.

The Complainant claimed that none of the issues were successfully resolved. The last time he noticed the engine die while idling was a few days before the hearing. The last time he noticed the blind spot warning lights illuminate without a car beside him was the morning of the hearing. He most recently noticed the lock activate randomly a few months before the hearing. The last time the vehicle lunged forward while pressing the brake was a few days before the hearing. The last time the radio randomly went to full volume was three weeks before the hearing. The last time he had difficulty shifting from park was three or four weeks before the hearing. The last time the

display randomly changed itself was the week before the hearing. The last time the tailgate open warning appeared was within the week before the hearing. The Complainant stated that he tried the cruise control once and it stopped and he had not turned it on since; he tried to use the cruise control approximately three or four months before the hearing. He expressed a preference for a replacement of his vehicle.

### **C. Inspection**

The vehicle's odometer displayed 50,853 miles at the time of the hearing. The blind spot alert flashed at startup indicating that the system was operating. The Complainant did not have any difficulty shifting out of park. The cruise control operated normally. The vehicle did not present any warning messages. The blind spot warning lights activated when passing other vehicles. The Complainant confirmed that there were no aftermarket parts installed on the vehicle. The vehicle was driven predominantly on a freeway. The test drive ended with 50,863 miles on the odometer. An "inner tailgate open" message came on when opening the tailgate. The Complainant explained that the vehicle would make a growling noise after stopping. The vehicle was started and stopped three times, but the vehicle did not make any unusual noise. Opening the hood revealed a layer of dust covering the engine compartment.

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

David Piper, Field Service Engineer, testified for the Respondent. Mr. Piper inspected the vehicle on May 18, 2021. During his inspection Mr. Piper examined the diagnostic codes and extensively test drove the vehicle. He updated a module that controlled the radio to fix the max volume concern. He did not notice any other issues that the Complainant mentioned in his Lemon Law complaint. He stated that the blind spot warning light may be triggered by stationary objects on the side of the road or by mud or dirt on the sensor. He explained that this was not a defect but just the way the system was designed. Mr. Piper explained that if papers or other things are leaned against the buttons under the DIC (Driver Information Center), it could cause different messages to display on the screen. He elaborated that he did not find any issues with the vehicle during his inspection.

On cross-examination Mr. Piper established that he reviewed the Lemon Law complaint, the service history from the dealership, and the trouble code history for this vehicle. He clarified

that the information he gathered during his inspection was only representative of the vehicle on the day of the inspection. Mr. Piper testified that he did not see any unusual trouble codes when he ran the QIS report. On cross-examination Mr. Piper confirmed that just because the codes were not triggered did not mean the issues did not occur.

### E. Analysis

As explained in the discussion of applicable law, the law requires the Complainant to prove every element under the Lemon Law, or Warranty Performance Law for repair relief, by a preponderance. To qualify for any relief, whether repurchase/replacement or warranty repair, the law requires the vehicle to have a defect covered by the Respondent's warranty (warrantable defect)<sup>29</sup> that continues to exist, even after repair.<sup>30</sup> In part, the warranty generally states that: "The warranty covers repairs to correct any vehicle defect related to materials or workmanship occurring during the warranty period, excluding slight noise, vibrations, or other normal characteristics of the vehicle. Needed repairs will be performed using new, remanufactured, or refurbished parts."<sup>31</sup> According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).<sup>32</sup> A manufacturing defect occurs when the vehicle varies from the manufacturer's design standards, causing that vehicle to differ from other vehicles of the same kind.<sup>33</sup> In contrast, design issues result from the manufacturer's design of the vehicle, even though

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<sup>29</sup> TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

<sup>30</sup> TEX. OCC. CODE § 2301.605.

<sup>31</sup> Complainant's Ex. 10, New Vehicle Limited Warranty.

<sup>32</sup> 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.").

<sup>33</sup> *Ridgway v. Ford Motor Co.*, 82 S.W.3d 26, 31-32 (Tex. App.—San Antonio 2002), *rev'd on other grounds*, 135 S.W.3d 598 (Tex. 2004) ("A manufacturing defect may be distinguished from a design defect. A manufacturing defect occurs when the product varies from the manufacturer-established design standards, causing that product to deviate from the normal safety of other products of its kind.).

manufactured without any flaws.<sup>34</sup> A design characteristic exists in all vehicles of the same design, but the vehicle's intended configuration may produce unintended and unwanted results.<sup>35</sup> Because the warranty only covers manufacturing defects, the Lemon Law does not provide relief for design characteristics or any other non-manufacturing problem. In the present case, the complaint alleged problems with: the engine dying when idling too long, the collision (Side Blind Zone Alert/Lane Change Alert) warning lights flashing for no reason, the locks randomly activating, the vehicle lunging forward when braking, the radio randomly increasing to full volume, and difficulty shifting from park. The Complainant also presented evidence of issues not in the complaint.

### **1. Engine Dying While Idling**

The record reflects that the engine continued to die when idling as late as two days before the hearing. However, the service history only shows one repair attempt for this issue. Further, the circumstances in this case do not warrant departing from the statutory presumption for reasonable repairs. Accordingly, the vehicle has not had sufficient repairs for this issue to support repurchase or replacement. Nevertheless, the vehicle still qualifies for repair relief as outlined in the discussion of applicable law.

### **2. Blind Spot Warning (Side Blind Zone Alert/Lane Change Alert)**

The evidence shows that the blind spot warning may normally activate for reasons other than a vehicle in the blind spot, such as the presence of non-vehicle objects. Further the blind spot warning may not operate as expected when the system's sensors are obscured. Accordingly, a preponderance of the evidence does not show that the blind spot warning issue arises from a warrantable defect.

### **3. Locks**

The testimony reflects that the locks continued to spontaneously lock and unlock as recently as a month before the hearing. However, the service history does not appear to show any

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<sup>34</sup> *Ford Motor Co. v. Pool*, 688 S.W.2d 879, 881 (Tex. App.--Texarkana 1985), aff'd in part on other grounds, rev'd in part on other grounds, 715 S.W.2d 629 (Tex. 1986) ("Defective design cases, however, are not based on consumer expectancy, but on the manufacturer's design of a product . . . even though not flawed in its manufacture.").

<sup>35</sup> *Harduvel v. Gen. Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989) ("This distinction between 'aberrational' defects and defects occurring throughout an entire line of products is frequently used in tort law to separate defects of manufacture from those of design. . . . Stated another way, the distinction is between an unintended configuration [a manufacturing defect], and an intended configuration that may produce unintended and unwanted results [a design defect].").

repair attempts for this issue. Consequently, the lock issue cannot support repurchase or replacement but still qualifies for repair relief.

#### **4. Cruise Control**

A preponderance of the evidence does not show that the cruise control has an existing defect. The Complainant testified that he only tried using the cruise control once, about three or four months before the hearing, but had not tried it again. However, the cruise control functioned normally during the test drive at the hearing.

#### **5. Lunging**

The evidence indicates that the lunging issue continued to occur as recently as two days before the hearing. Nevertheless, the service history only shows one repair attempt for this issue. Moreover, the circumstances in this case do not warrant departing from the statutory presumptions for reasonable repairs. However, the vehicle still qualifies for repair relief as described in the discussion of applicable law.

#### **6. Radio Volume**

The record reflects that the radio volume issues continues to exist. However, under the Department's precedents, a problem with the radio does not constitute a substantial impairment of use or value.<sup>36</sup> Nonetheless, this issue still qualifies for repair relief.

#### **7. Shifting from Park**

The evidence shows that the difficulty shifting from park continued to occur after repair with the last occurrence three or four weeks before the hearing. Though shifting out of park required greater effort, the issue occurred intermittently and the shift lever could still be moved out of park. Given these considerations, the difficulty shifting out of park does not substantially impair the use or value of the vehicle under the reasonable purchaser standard. Nonetheless, the shifting issue qualifies for repair relief.

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<sup>36</sup> Texas Department of Transportation, *Alvarez v Ford Motor Company*, MVD Cause No. 08-0440, Final Order Denying § 2301.604 Relief (Motor Vehicle Division Dec. 11, 2008); State Office of Administrative Hearings *Alvarez v Ford Motor Company*, Docket No. 601-08-4215.CAF, Proposal for Decision (Oct. 9, 2008).

**8. Issues Not in the Complaint**

The Complainant presented unpleaded issues (regarding no-start, warning indicators, messages on the Driver Information Center and a growling noise under the dash) without objection from the Respondent. Accordingly, these issues may be considered here. In any event, the unpleaded issues must still satisfy the requirements for repurchase/replacement or repair as applicable. However, the service history does not appear to show sufficient repair attempts for these issues, disqualifying them as a basis for repurchase/replacement relief. Further, the Warranty Performance Law requires the complaint to specify each defect as a prerequisite for repair relief. Since the complaint did not include these issues, they cannot support any repair relief.

**III. Findings of Fact**

1. On February 6, 2020, the Complainant, purchased a new 2020 GMC Sierra from Sisk Motors, Inc., a franchised dealer of the Respondent, in Mount Pleasant, Texas. The vehicle had 113 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 Complainant took the vehicle to a dealer for repair as shown below:

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07/07/2020	14,967	<i>The vehicle would not start at times and would not shift out of park at times.</i>
07/16/2020	15,905	Difficulty shifting out of park and the vehicle tried to lunge forward while the brake was still depressed.
08/11/2020	17,201	Difficulty shifting out of park.
08/17/2020	18,436	<i>There was no radio or picture when in drive.</i>
08/28/2020	20,989	<i>The vehicle would not start.</i>
09/15/2020	20,553	Difficulty shifting out of park. <i>The vehicle displayed a warning the tail gate was open and the blind spot warning would come on randomly.</i>
09/30/2020	21,844	Difficulty shifting out of park and blind spot warning would come on randomly.
10/14/2020	22,098	<i>The engine would have high RPMs for the first 30 minutes or more and the blind spot warning would come on randomly.</i>
11/05/2020	22,198	Vehicle died while idling.

4. The Respondent had an opportunity to cure at the Respondent's inspection of the vehicle on May 18, 2021, at 38,948 miles.
5. The Complainant was provided a loaner vehicle for every repair visit.
6. On December 4 and 29, 2020, November 13, 2020, and January 1, 26, 2021, the Complainant, through his attorney at the time, provided written notices of the defects to the Respondent.
7. On April 1, 2021, the Complainant filed a complaint with the Department alleging that the engine will die when idling too long, the collision (Side Blind Zone Alert/Lane Change Alert) warning lights flash for no reason, the locks will randomly activate, the vehicle will lunge forward when braking, the radio will randomly increase to full volume, and the vehicle shifted with difficulty from park.
8. On June 18, 2021, 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.

9. Matters of notice of hearing<sup>37</sup> 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 September 21, 2021, in Texarkana, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Mark Burgess, Attorney represented the Complainant. Kevin Phillips, Business Resource Manager, represented the Respondent. David Piper, Field Service Engineer, also testified for the Respondent.
10. The vehicle's odometer displayed 50,853 miles at the time of the hearing.
11. The warranty expired 36,000 miles after delivery, with 36,113 miles on the odometer, between November 5, 2021, and May 18, 2021.
12. During the inspection and test drive at the hearing, the blind spot alert flashed at startup indicating that the system was operating. The Complainant did not have any difficulty shifting out of park. The cruise control operated normally. The vehicle did not present any warning messages. The blind spot warning lights activated when passing other vehicles. The vehicle operated normally during the test drive at the hearing.
13. The issues with the engine dying while idling, locks spontaneously locking and unlocking, lurching while depressing the brake pedal, radio volume spontaneously changing, and difficulty shifting out of park continued to occur after repair.

#### **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.

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<sup>37</sup> TEX. GOV'T CODE § 2001.051.



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 radio increasing volume and difficulty shifting from park do not support replacement or repurchase. These Complainant did not prove that these issues create a serious safety hazard or substantially impair the use or market value of the vehicle. TEX. OCC. CODE § 2301.604(a).
7. The engine dying when idling, locks spontaneously locking/unlocking, and lunging when depressing the brake pedal, engine not starting, warning indicators, Driver Information Center messages, and growling noise do not qualify the vehicle for replacement or repurchase. The vehicle did not have a reasonable number of repair attempts for these issues. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(a).
8. 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.
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 engine not starting, warning indicators, Driver Information Center messages, and growling noise do not support granting warranty repair. The Complainant did not specify the alleged defect(s) in the complaint. TEX. OCC. CODE §§ 2301.204 and 43 TEX. ADMIN. CODE § 215.202(b)(3).
11. The Complainant's vehicle qualifies for warranty repair of the following issues: engine dying when idling, locks spontaneously locking/unlocking, and lunging when depressing the brake pedal, radio increasing volume, and difficulty shifting from park. The Complainant proved that these issues were defects covered by the Respondent's warranty.

TEX. OCC. CODE §§ 2301.204 and 2301.603. The Complainant or an agent of the Complainant notified the Respondent or Respondent's agent of the alleged defect(s). TEX. OCC. CODE §§ 2301.204 and 43 TEX. ADMIN. CODE § 215.202(b)(3).

12. 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.
13. The Respondent has a continuing obligation after the expiration date of the warranty to address and repair or correct any warrantable nonconformities reported to the Respondent or Respondent's designated agent or franchised dealer before the warranty expired. 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 to the applicable warranty; specifically, the Respondent shall resolve the following issues: engine dying when idling, locks spontaneously locking/unlocking, and lugging when depressing the brake pedal, radio increasing volume, and difficulty shifting from park. Upon this Order becoming final under Texas Government Code § 2001.144:<sup>38</sup> (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 **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).

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<sup>38</sup> 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.

**SIGNED November 24, 2021**



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