

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 21-0011455 CAF**

**RUSSEL MCLAUGHLIN,
Complainant**

v.

**TESLA MOTORS, INC.,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Russel McLaughlin (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 Tesla Motors, INC. (Respondent). A preponderance of the evidence does not show that the subject vehicle qualifies for repurchase/replacement. However, the vehicle qualifies for warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened on December 21, 2021, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Marlyn McLaughlin, the Complainant's spouse, also testified for the Complainant. Nizam Khan, Service Manager, represented the Respondent.

¹ 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.² 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.”³ 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.⁴ 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.⁵

b. Substantial Impairment of Use or Value

i. Impairment of Use

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs use. Under this standard, the factfinder considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle” from the perspective of a reasonable prospective purchaser. For instance, “while a vehicle with a non-functioning air

² TEX. OCC. CODE § 2301.603.

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.604(a).

⁵ TEX. OCC. CODE § 2301.601(4).

conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”⁶

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.”⁷

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.⁸

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

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

⁷ *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.”).

⁸ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁹

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.¹⁰

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.¹¹

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.¹² 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.¹³

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;¹⁴ (2) the respondent was given an opportunity to cure the defect or

⁹ TEX. OCC. CODE § 2301.605(a)(2).

¹⁰ TEX. OCC. CODE § 2301.605(a)(3).

¹¹ TEX. OCC. CODE § 2301.605(c).

¹² *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.’”).

¹³ *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.”).

¹⁴ 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).

nonconformity;¹⁵ 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.¹⁶

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.¹⁷ The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”¹⁸

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁹ 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.²⁰ Accordingly, the Complainant cannot prevail where the existence of any required fact appears unlikely or appears equally likely or unlikely.

¹⁵ 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.

¹⁶ TEX. OCC. CODE § 2301.606(d)(2).

¹⁷ TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

¹⁸ TEX. OCC. CODE § 2301.603(a).

¹⁹ 43 TEX. ADMIN. CODE § 215.66(d).

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

4. The Complaint Identifies the Relevant Issues in this Case

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

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.²⁶ 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

²¹ “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.”).

²² 43 TEX. ADMIN. CODE § 215.202(a)(3).

²³ 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

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

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

²⁶ TEX. OCC. CODE § 2301.604.

or similar written documents).²⁷ However, the Department's rules expressly exclude compensation for "any interest, finance charge, or insurance premiums."²⁸

B. Summary of Complainant's Evidence and Arguments

On September 28, 2020, the Complainant, purchased a new 2020 Tesla Model X from the Respondent. The vehicle had 15 miles on the odometer at the time of purchase. The vehicle's limited warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first.

On or about July 27, 2021, the Complainant provided a written notice of defect to the Respondent. On May 18, 2021, the Complainant filed a complaint with the Department alleging that the vehicle had persistent electrical issues. The issues included: complete drivetrain failure, passenger repeater (camera) failure, the inability to roll up the driver's side window, frequent loss of GPS and mobile signal, issues recognizing key fobs, and the vehicle turning off while driving. Additionally, the vehicle vibrated during acceleration, and had multiple paint defects and window issues.

²⁷ 43 TEX. ADMIN. CODE § 215.209(a).

²⁸ 43 TEX. ADMIN. CODE § 215.208(b)(1).

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

Date	Miles	Issue
10/19/2020	291	Vehicle stated front motor was disabled. The driver's window reverses when rolling up. Driver's side reverse camera does not pop up.
10/30/2020	1,138	Black spot on driver's mirror.
11/16/2020	2,231	Driver's window has trouble going up.
12/07/2020	4,050	Driver's window squeaks. Paint cracks on passenger door and lift gate.
01/11/2021		Driver's window squeaks. Vibration when accelerating hard.
02/22/2021	8,054	Front windows squeak.
02/26/2021	8,110	Front windows squeak.
03/24/2021	10,424	Vibration when accelerating hard. Front windows squeak when wet.
08/09/2021	25,000	Window squeak. Error message stating A/C reduced and A/C stopped working. Rear seat squeaks and clicks when moved as well as triggers an error message. Trunk stops half way through closing. Vibration when accelerating hard.
10/08/2021	29,395	Driver's door fails to open. Error message stating park assist unavailable. Vibration when accelerating hard.

The Complainant testified that the individual issues with his vehicle had been resolved. But the underlying electrical and mechanical causes of those issues had not been resolved. He described that when his wife accelerated from a stop sign, the vehicle completely shut down and left her in the middle of an intersection. He confirmed that his wife was the primary driver of the vehicle. He stated that he drove the vehicle some nights and weekends, but the vehicle was mainly his wife's daily driver. Mrs. McLaughlin confirmed that she was the primary driver. She recalled that she first noticed the vehicle shut-down less than 24 hours after picking up the vehicle. She acknowledged that the issue only occurred once.

The Complainant explained he noticed the issues with the passenger repeater camera when the car was in reverse and the backup camera did not show up. He claimed they first noticed the issue in the first 24 hours after picking up the vehicle. He stated that the camera still glitched from time to time. Mrs. McLaughlin stated the last time this happened was the Friday before the hearing. She described that all the screens shut down on the same drive.

The Complainant testified that the driver's side window was rolling up three-quarters of the way up and then sliding back down. Mrs. McLaughlin added that there was a grinding and squeaking noise as well. The Complainant stated that the window only rolled backed down fully once. Mrs. McLaughlin added that after the window was repaired she would still have to push the window to make it go all the way up. She approximated that this last happened in the second week of November 2021. The Complainant estimated that they first heard the noise around December 7, 2021, and most recently heard the noise around February 2021.

The Complainant described the loss of GPS and mobile signals. He stated that the car thought it was stuck in one position and did not move for a while. He clarified that it seemed to resolve the issue on its own. He claimed that this issue occurred within the first 24 hours after he picked up the vehicle. He admitted that that was the only time the issue occurred.'

The Complainant explained that the vehicle would take a while to recognize the key fob was in the car. He added that they occasionally had to use their phone as a key to drive the vehicle. He estimated he first noticed the issue with in the first few months that he owned the vehicle and he most recently noticed the issue in April 2021.

The Complainant described the vibration in the vehicle that he felt when going from a stop to around 35 MPH. He explained that he felt a shimmy in the wheel that increased up to 65MPH. Mrs. McLaughlin added that she could feel the vibration in the pedals and the wheels. She claimed that it felt like the hood was vibrating. The Complainant stated that he first noticed the issue around January 11, 2021 and he most recently noticed the issue on October 11, 2021.

The Complainant explained that there were areas that the car was missing paint. He described that there were multiple spots and that were smaller than a dime. He explained that there were some on the driver's side mirror and a few other places. Mrs. McLaughlin listed the door trim, the trunk, and other areas as places that were also missing paint. She noted that the spots on the mirror were the most visible. The complainant mentioned that the spots on the mirror had been repaired, but the other spots had not.

The Complainant testified that the driver's side repeater camera still seems flaky. Mrs. McLaughlin added that it messes up about every five drives. She stated that the window issue happened one time in November 2021 but it is not reoccurring. The Complainant confirmed that the vehicle has not lost GPS or mobile signal since the first incident. He mentioned that the key

fob issue occurred roughly once a week for several months until April 2021. Mrs. McLaughlin stated the issue would occur roughly every three drives.

The Complainant testified that after the Lemon Law Complaint was filed, there were more issues that were still electrical and mechanical in nature. These issues included the continued vibration when accelerating, the A/C not working, and other issues. He explained that the A/C compressor failed on a trip from Florida. He noted that the compressor was successfully replaced.

The Complainant claimed that the rear passenger seat squeaked and clicked when moving forward. He stated that this issue occurred on the same trip to Florida in July 2021. He confirmed that the issue was resolved.

The Complainant explained that the driver's side falcon wing door failed to open. He claimed he first noticed the issue in October 2021. He stated that the issue became persistent and happened every time. He added that the issue was fixed when the sensor was replaced.

The Complainant claimed that the vehicle displayed error messages stating park assist was unavailable. He approximated that he first saw this issue in late September or early October 2021. He clarified that he most recently saw the issue on the drive to the hearing when the error message popped up four to five times. He added that the message was accompanied by an error message that stated auto pilot was limited.

On cross-examination, the Complainant confirmed that the vibration in the vehicle was resolved in October 2021.

C. Inspection

At the time of the inspection during the hearing, the vehicle had 34,312 miles on the odometer. When the vehicle started, the instrument panel and center touch screen remained blank for an extended time. The vehicle showed a message stating "acceleration set to chill mode". During the test drive the vehicle displayed a warning stating "park assist unavailable". The Complainant pointed out paint missing at several locations on the vehicle, specifically on the door jamb and the rear driver side quarter panel next to the liftgate, above the taillight.

D. Summary of Respondent's Evidence and Arguments

Nizam Khan testified for the Respondent. Mr. Khan stated that the park assist issue was a characteristic of the firmware that the Respondent was aware of and was working on an update. He claimed that the vehicle was operating as designed. He testified that the Complainant's concerns did not warrant relief because the issues did not substantially impair use or market value of the vehicle. Mr. Khan claimed that the Respondent repaired all issues as it became aware of them.

On cross-examination, Mr. Khan was unable to confirm that the Respondent received the notice letter before the vehicle reached 24,000 miles. Mr. Khan did confirm that he noticed the park assist unavailable message that appeared during the inspection. He clarified that the issue would be resolved with a firmware update. He verified that the front half shafts had to be replaced twice to repair the vibration issue. He stated that the vibration issue was not an electrical issue. Mr. Kahn opined that it was not common for a new Model X to need service 12 times in the first two years. He reiterated that software updates should fix the alerts.

E. Analysis

As explained in the discussion of applicable law, the law imposes the burden of proof on the Complainant. Accordingly, the Complainant must affirmatively prove every required element by a preponderance of the evidence. In this case, the evidence does not show that the subject vehicle qualifies for Lemon Law relief.

The subject vehicle has clearly had significant problems. However, Lemon Law relief does not apply to all problems that may occur with a vehicle but only to warrantable defects that continue to exist (i.e., currently exist) after repairs.²⁹ Further, as explained in the discussion of applicable law, the vehicle must comply with various notice and repair requirements. The Lemon Law does not require that a respondent provide any particular warranty coverage nor does the Lemon Law impose any specific standards for vehicle characteristics. Rather, the Lemon Law requires a respondent to conform its vehicles to whatever coverage the warranty provides. In part, the subject vehicle's warranty states that:

²⁹ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

Subject to separate coverage for certain parts and the exclusions and limitations described in this New Vehicle Limited Warranty, the Basic Vehicle Limited Warranty covers the repair or replacement necessary to correct defects in the materials or workmanship of any parts manufactured or supplied by Tesla that occur under normal use for a period of 4 years or 50,000 miles (80,000 km), whichever comes first.³⁰

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).³¹ 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.³² In other words, a manufacturing defect is an isolated aberration, an unintended configuration occurring only in those vehicles not produced according to the manufacturer's specifications.³³ Stated another way, a defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of a broken part. Accordingly, manufacturing defects occur during manufacturing and exist when the vehicle leaves the manufacturing plant. In contrast, design issues result from the manufacturer's design of the vehicle, even though manufactured without any flaws.³⁴ Design characteristics, including design defects, exist in the vehicle's specifications and do not arise from any error during

³⁰ Complainant's Ex. 1, New Vehicle Limited Warranty.

³¹ 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.").

³² *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.).

³³ *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].").

³⁴ *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.").

manufacturing.³⁵ Accordingly, a design characteristic exists in all vehicles of the same design, but the vehicle's intended configuration may produce unintended and unwanted results.³⁶ Unlike manufacturing defects, issues that do not arise from manufacturing, such as the vehicle's design characteristics or dealer representations and improper dealer repairs, are not warrantable defects. Because the warranty only covers manufacturing defects, the Lemon Law does not provide relief for design characteristics, design defects, or any other non-manufacturing problem. Even though an issue may be unintended and unwanted, the Lemon Law provides no relief unless the issue constitutes a manufacturing defect.

1. Complaint Issues Generally

The evidence reflects that the specific issues in the complaint were resolved, except for the paint issue addressed below. In the present case, the Complainant affirmed that the individual issues in the complaint were resolved, but believed that underlying electrical and mechanical issues persisted. As described in the discussion of applicable law, the complaint delineates the issues. However, 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."³⁷ Consequently, the general allegation of electrical issues does not provide the required specificity.

2. Paint Issue

Regarding the paint issue, the inspection at the hearing showed thinly painted or unpainted spots on the door jamb and the rear driver side quarter panel next to the liftgate, above the taillight. However, the record does not show the paint defects substantially impair the use or value of the vehicle. Accordingly, the paint defects do not qualify for Lemon Law relief but do qualify for Warranty Performance (repair) relief.

³⁵ In contrast to manufacturing defects, "[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves." *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

³⁶ *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].").

³⁷ 43 TEX. ADMIN. CODE § 215.202(a)(3).

3. Issues Not in Complaint

As explained above, the issues that can be addressed is ordinarily limited to those specifically identified in the complaint. However, the Respondent did not object to any non-complaint issues, so they may be addressed here. Nevertheless, the unpleaded issues must still comply with the other requirements for relief.

The subject vehicle's displays appeared to turn on abnormally slowly during the inspection. Also during the inspection, the Complainant alleged issues with the air conditioning, passenger seat noise, a door failing to open, and the unavailability of park assist and autopilot limitation. However, the notice of defect did not allege any of these issues. Likewise, the repair history does not appear to address these issues. In sum, these unpleaded issues did not have the notice or repairs required for Lemon Law relief and did not have the notice required for Warranty Performance law relief. Additionally, the record reflects that the park assist issue is a software design issue not covered by the warranty.

III. Findings of Fact

1. On September 28, 2020, the Complainant, purchased a new 2020 Tesla Model X from the Respondent. 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 four years or 50,000 miles, whichever occurs first.
3. The warranty generally states that:

Subject to separate coverage for certain parts and the exclusions and limitations described in this New Vehicle Limited Warranty, the Basic Vehicle Limited Warranty covers the repair or replacement necessary to correct defects in the materials or workmanship of any parts manufactured or supplied by Tesla that occur under normal use for a period of 4 years or 50,000 miles (80,000 km), whichever comes first.

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

Date	Miles	Issue
10/19/2020	291	Vehicle stated front motor was disabled. The driver's window reverses when rolling up. Driver's side reverse camera does not pop up.
10/30/2020	1,138	Black spot on driver's mirror.
11/16/2020	2,231	Driver's window has trouble going up.
12/07/2020	4,050	Driver's window squeaks. Paint cracks on passenger door and lift gate.
01/11/2021		Driver's window squeaks. Vibration when accelerating hard.
02/22/2021	8,054	Front windows squeak.
02/26/2021	8,110	Front windows squeak.
03/24/2021	10,424	Vibration when accelerating hard. Front windows squeak when wet.
08/09/2021	25,000	Window squeak. Error message stating A/C reduced and A/C stopped working. Rear seat squeaks and clicks when moved as well as triggers an error message. Trunk stops half way through closing. Vibration when accelerating hard.
10/08/2021	29,395	Driver's door fails to open. Error message stating park assist unavailable. Vibration when accelerating hard.

5. On or about July 27, 2021, the Complainant provided a written notice of defect to the Respondent.
6. On May 18, 2021, the Complainant filed a complaint with the Department alleging that the vehicle had persistent electrical issues. The issues included complete drivetrain failure, passenger repeater failure, the inability to roll up the driver's side window, frequent loss of GPS and mobile signal, Issues recognizing key fobs, and the vehicle turning off while driving. Additionally, the vehicle vibrated during acceleration, there were multiple paint defects, and there were multiple window issues.
7. On August 9, 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.

8. The hearing in this case convened on December 21, 2021, in Carrollton, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented himself. Marlyn McLaughlin, the Complainant's spouse, also testified for the Complainant. Nizam Khan, Service Manager, represented the Respondent.
9. The vehicle's odometer displayed 34,312 miles at the time of the hearing.
10. The vehicle's warranty was in effect at the time of the hearing.
11. At the inspection during the hearing, the instrument panel and center touch screen remained blank for an extended time after turning on the vehicle. The vehicle showed a message stating "acceleration set to chill mode". During the test drive the vehicle displayed a warning stating "park assist unavailable". The Complainant pointed out paint missing at several locations on the vehicle, specifically on the door jamb and the rear driver side quarter panel next to the liftgate, above the taillight.

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 qualifies for warranty repair. The Complainant proved that the vehicle has a defect 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).

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

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**. It is **FURTHER ORDERED** that the Respondent shall make any repairs needed to conform the subject vehicle to the applicable warranty; specifically, the Respondent shall resolve the paint issues, specifically, the missing or thin paint on the door jamb and the rear driver side quarter panel next to the liftgate, above the taillight. Upon this Order becoming final under Texas Government Code § 2001.144:³⁸ (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).

³⁸ 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 February 22, 2022

A handwritten signature in black ink, appearing to read "Andrew Kang", is written over a horizontal line.

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