

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 22-0010439 CAF**

**KARLA CHAVEZ,  
Complainant**

**v.**

**NISSAN NORTH AMERICA, INC.,  
Respondent**

§  
§  
§  
§  
§  
§  
§

**BEFORE THE OFFICE  
  
OF  
  
ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Karla Chavez Garcia (Complainant) filed a complaint with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in her vehicle manufactured by Nissan North America, Inc. (Respondent). A preponderance of the evidence does not show that the subject vehicle has a warrantable defect. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair.

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

Matters of notice of hearing<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 May 24, 2022, in Pharr, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented herself. Alice Burks, Arbitration Specialist, and Rafael Mariduenia, Dealer Technical Support Specialist, represented the Respondent.

---

<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**

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

---

<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).

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 earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000

---

<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).

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 to the respondent;<sup>14</sup> (2) the respondent was given an opportunity to cure the defect or

---

<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.”).

<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).

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

---

<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); see *Vance v. My Apartment Steak House, Inc.*, 677 S.W.2d 480, 482 (Tex. 1984) (“[A] civil litigant who asserts an affirmative claim for relief has the burden to persuade the finder of fact of the existence of each element of his cause of action.”).

<sup>20</sup> *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.<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 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

---

<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.

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 18, 2022, the Complainant, purchased a new 2022 Nissan Altima from Bert Ogden Nissan, a franchised dealer of the Respondent, in McAllen, Texas. The vehicle had 10 miles on the odometer at the time of purchase. The vehicle's limited warranty provides basic coverage for 36 months or 36,000 miles, whichever comes first.

On March 10, 2022, the Complainant provided a written notice of defect to the Respondent. On March 15, 2022, the Complainant filed a complaint with the Department alleging that the vehicle exhibited: a burnt plastic smell from under the hood and noise when braking and when moving the steering wheel from side to side. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

<b>Date</b>	<b>Miles</b>	<b>Issue</b>
02/28/22	315	Brake noise

Complainant testified that smelled like overheating or melting plastic. She would notice it almost every day after long periods of use. The smell was not noticeable on short trips unless idling for a while. The smell would increase with the time used. Complainant first noticed the smell when arriving home from the dealership, about 45 minutes away. She last noticed the smell the day before the hearing.

Complainant described the brake noise as a popping noise, especially with hard braking. She also stated that the noise sounded like metal on metal, like a screech. The brakes would make different sounds. She would notice the noise when braking from both low and high speeds and backing up in parking lots. She noticed the brake noise every day, though the volume varied. However, Complainant did not notice any performance differences related to the noise. She first noticed the brake noise when initially bringing the vehicle home and last noticed the noise the day before the hearing.

---

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

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

Complainant affirmed she would hear a noise when steering from side to side, mostly while moving in reverse. The noise did not differ on different surfaces. Complainant clarified that the braking noise and steering noise were different sounds. She was not sure where the steering noise originated. She first noticed the noise the first day bringing the vehicle home and last noticed the noise the day of the hearing. The noise occurred every day. She noted that she test drove a 2021 Altima but did not notice noises as with the subject vehicle.

Complainant affirmed she had a loaner vehicle from February 28th to March 28th, which she returned after needing a tire change due to colliding with concrete.

### **C. Inspection**

Upon inspection at the hearing, the subject vehicle's odometer displayed 1,167 miles. The vehicle was test driven in a parking lot. During multiple stops, the vehicle did not exhibit the complained of brake noise. However, the vehicle made a rubbing noise when turning the steering wheel near the steering limits. The vehicle otherwise performed normally.

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

Mr. Mariduená testified that he test drove the subject vehicle and confirmed a groaning noise at almost every stop. Machining the rotors did not resolve the issue, so he directed the dealer to replace the entire braking system. He explained that noise could be heard from the suspension binding during braking. He added that the owner's manual specified that brakes normally exhibit noise. He pointed out that a burning smell was normal. He explained that metal components had a coating that took time to burn off. On cross-examination, Mr. Mariduená stated he was not advised of any predelivery problems, but the current brake parts were all new. He confirmed that the steering noise came from the suspension. Specifically, turning the steering to the limits loaded the suspension.

Ms. Burks testified that a loaner vehicle was provided from February 28th to March 28th, (which was only returned because of the collision). And Complainant declined a rental vehicle. Complainant did not have a loaner for 22 out of 50 days.



### 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. In other words, the Complainant must prove that every required fact is more likely than not true. In this case, a preponderance of the evidence does not show that the subject vehicle has a defect covered under warranty (warrantable defect).

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.<sup>29</sup> 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:

This warranty covers any repairs needed to correct defects in materials or workmanship of all parts and components of each new Nissan vehicle supplied by Nissan subject to the exclusions listed under the heading "WHAT IS NOT COVERED" or, if the part is covered by one of the separate coverages described in the following sections of this warranty, that specific coverage applies instead of the basic coverage.<sup>30</sup>

According to these terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).<sup>31</sup>

A defectively manufactured vehicle has a flaw so that it does not conform to the manufacturer's specifications, and is not identical to other same model vehicles.<sup>32</sup> A

---

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

<sup>30</sup> Complainant's Ex. 1, 2022 Nissan Warranty Information Booklet.

<sup>31</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>32</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) ("Manufacturing defect cases involve products which are

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 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.<sup>34</sup> 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.<sup>35</sup> Design characteristics, including design defects, exist in the vehicle's specifications and do not arise from any error during manufacturing.<sup>36</sup> Accordingly, a design characteristic exists in all vehicles of the same design, but the vehicle's intended configuration may produce unintended and unwanted results.<sup>37</sup> Unlike manufacturing defects, issues that do not arise from manufacturing, such as the vehicle's design characteristics, 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

---

flawed, i.e., which do not conform to the manufacturer's own specifications, and are not identical to their mass-produced siblings.”).

<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.”).

<sup>34</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].”).

<sup>35</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>36</sup> 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).

<sup>37</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].”).

and unwanted, the Lemon Law provides no relief unless the issue constitutes a manufacturing defect.

### **1. Brake Noise**

The evidence does not show that the alleged brake noise is more likely than not to arise from a manufacturing defect. A service bulletin explains that the brakes may normally produce noise in various circumstances, including: squeak noise when the brakes are cold; groan noise when slightly releasing the brakes after coming to a stop; groan noise during stopping caused by glazing of the rotor's surface from heavy or frequent braking; and brake squeal due to accumulation of brake dust and dirt between the pads/shoes and rotors or drums.<sup>38</sup> Further, the owner's manual specifies that: "Occasional brake noise during light to moderate stops is normal and does not affect the function or performance of the brake system."<sup>39</sup> Although the brake noise may be undesirable, the record reflects that the noise is still a normal characteristic.

### **2. Steering Noise**

The record indicates that the suspension may normally exhibit noise when turning the steering wheel to its far left and right limits. Specifically, turning the steering to its limits loads the suspension, i.e., puts tension on the suspension, producing noise. Given the various parts under stress while driving, some noise will normally occur, but such noise does not arise from a manufacturing defect.

### **3. Burnt Smell**

The evidence shows that the burnt smell is a normal characteristic. Metal components in the vehicle have coatings that burn off over time, producing the characteristic smell. Accordingly, the smell is not a warrantable defect.

## **III. Findings of Fact**

1. On February 18, 2022, the Complainant, purchased a new 2022 Nissan Altima from Bert Ogden Nissan, a franchised dealer of the Respondent, in McAllen, Texas. The vehicle had 10 miles on the odometer at the time of purchase.

---

<sup>38</sup> Respondent's Ex. 1, Service Bulletin, Brake Noise/Judder/Pedal Feel Diagnosis and Repair.

<sup>39</sup> Respondent's Ex. 1, Owner's Manual, Brakes.

2. The vehicle's limited warranty provides basic coverage for 36 months or 36,000 miles, whichever comes first.

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

Date	Miles	Issue
02/28/22	315	Brake noise

4. On March 10, 2022, the Complainant provided a written notice of defect to the Respondent.

5. On March 15, 2022, the Complainant filed a complaint with the Department alleging that the vehicle exhibited: a burnt plastic smell from under the hood and noise when braking and when moving the steering wheel from side to side.

6. On April 18, 2022, 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. The hearing in this case convened on May 24, 2022, in Pharr, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. The Complainant, represented herself. Alice Burks, Arbitration Specialist, and Rafael Mariduena, Dealer Technical Support Specialist, represented the Respondent.

8. The vehicle's odometer displayed 1,167 miles at the time of the hearing.

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

10. The vehicle was test driven in a parking lot. During multiple stops, the vehicle did not exhibit the complained of brake noise. The vehicle made a rubbing noise when turning the steering wheel near the steering limits. The vehicle otherwise performed normally.

11. A service bulletin explains that the brakes may normally exhibit noise in various circumstances, including: squeak noise when the brakes are cold; groan noise when slightly releasing the brakes after coming to a stop; groan noise during stopping caused by glazing of the rotor's surface from heavy or frequent braking; and brake squeal due to accumulation of brake dust and dirt between the pads/shoes and rotors or drums. Further, the owner's

manual specifies that: “Occasional brake noise during light to moderate stops is normal and does not affect the function or performance of the brake system.”

12. The suspension may normally exhibit noise when turning the steering wheel to its left and right limits. Specifically, turning the steering to its limits loads the suspension, i.e., puts tension on the suspension, producing noise.
13. Metal components in the vehicle have coatings that normally burn off over time, producing the characteristic smell.

#### **IV. Conclusions of Law**

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 and 2301.204.
2. A hearings examiner of the Department’s Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. TEX. OCC. CODE § 2301.704.
3. The Complainant filed a sufficient complaint with the Department. 43 TEX. ADMIN. CODE § 215.202.
4. The parties received proper notice of the hearing. TEX. GOV’T CODE §§ 2001.051, 2001.052. 43 TEX. ADMIN. CODE § 215.206(2).
5. The Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The Complainant’s vehicle does not qualify for replacement or repurchase. The Complainant did not prove that the vehicle has a defect covered by the Respondent’s warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).
7. Reimbursement of incidental expenses does not apply 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 has 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 July 27, 2022**



---

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