

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0005979 CAF**

**VEASELETI LUPEHEKE,
Complainant**

v.

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

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Veaseleti Lupeheke (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 Nissan North America, Inc. (Respondent). A preponderance of the evidence shows that the Complainant's vehicle qualifies for warranty repair relief.

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 July 30, 2020, by telephone, before Hearings Examiner Andrew Kang. On September 2, 2020, a post-hearing conference was held to address additional exhibits and testimony. The record closed on November 17, 2020. The Complainant, represented himself. Cameron McBride, Dealer Technical Specialist, and John Howell, Dealer Technical Specialist, represented the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief Requirements

A vehicle qualifies for repurchase or replacement if the respondent cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”² In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must currently exist after a “reasonable number of attempts” at repair.³ In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a written notice of the defect to the respondent, (2) an opportunity to cure by the respondent, and (3) a deadline for filing a Lemon Law complaint.

a. Serious Safety Hazard

The Lemon Law defines “serious safety hazard” as a life-threatening malfunction or nonconformity that: (1) substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.⁴

b. Substantial Impairment of Use or Value

i. Impairment of Use

In determining substantial impairment of use, the Department considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle.” For instance, “while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”⁵

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

⁵ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

ii. Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. The reasonable purchaser standard “does not require an owner to present an expert witness or any technical or market-based evidence to show decreased value.” Instead, under this standard, “factfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle.”⁶

c. Reasonable Number of Repair Attempts

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁷

Alternatively, for serious safety hazards, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁸

⁶ *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.”).

⁷ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

⁸ TEX. OCC. CODE § 2301.605(a)(2).

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.⁹

The 30 days described above does not include any period when the owner has a comparable loaner vehicle provided while the dealer repairs the subject vehicle.¹⁰

The existence of a statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.¹¹ Furthermore, the Department adopted a decision indicating that if a consumer presents the vehicle to a dealer for repair and the dealer fails to repair the vehicle, then that visit would constitute a repair attempt unless the consumer was at fault for the failure to repair the vehicle.¹²

d. Other Requirements

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner or someone on behalf of the owner, or the Department has provided written notice of the alleged defect or nonconformity to the respondent;¹³ (2) the respondent was given an opportunity to cure the defect or nonconformity;¹⁴ and (3) the Lemon Law complaint was filed within six months after the earliest

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ TEX. OCC. CODE § 2301.605(c).

¹¹ *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ) (“[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite ‘reasonable number of attempts.’”).

¹² *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication) (Repair attempts include “those occasions when the fault for failing to repair the vehicle rests with the dealership.” Conversely, “those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.”).

¹³ TEX. OCC. CODE § 2301.606(c)(1). 43 TEX. ADMIN. CODE § 215.204 provides that “[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor.” The Department’s notice of the complaint to the Respondent may satisfy the requirement to provide notice of the defect or nonconformity to the Respondent.

¹⁴ A respondent may delegate its opportunity to cure to a dealer. A repair visit to a dealer satisfies the opportunity to cure requirement when the respondent allows a dealer to attempt repair after written notice to the

of: the warranty's expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.¹⁵

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a “defect . . . that is covered by a manufacturer's, converter's, or distributor's . . . warranty agreement applicable to the vehicle” and the vehicle owner notified the manufacturer, converter, distributor, or its authorized agent of the defect before the warranty's expiration.¹⁶ The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”¹⁷

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁸ The Complainant must prove all facts required for relief by a preponderance of the evidence. That is, the Complainant must present sufficient evidence to show that every required fact more likely than not exists.¹⁹ Accordingly, the Complainant cannot prevail where the existence of any required fact appears equally likely or unlikely.

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the relevant issues to address in this case.²⁰ The complaint must state “sufficient facts to enable the department and the party complained against to know the nature

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.

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

¹⁶ TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

¹⁷ TEX. OCC. CODE § 2301.603(a).

¹⁸ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁹ *E.g.*, *Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

²⁰ “In a contested case, each party is entitled to an opportunity: (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

of the complaint and the specific problems or circumstances forming the basis of the claim for relief under the lemon law.”²¹ However, the parties may expressly or impliedly consent to hearing issues not included in the pleadings.²² Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²³ Because the complaint determines the relevant issues, the Department cannot order relief for an issue not included in the complaint unless tried by consent.²⁴

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.²⁵ Reimbursable expenses include, but are not limited to: (1) alternate transportation; (2) towing; (3) telephone calls or mail charges directly attributable to contacting the manufacturer, distributor, converter, or dealer regarding the vehicle; (4) meals and lodging necessitated by the vehicle’s failure during out-of-town trips; (5) loss or damage to personal property; (6) attorney fees, if the complainant retains counsel after notification that the respondent is represented by counsel; and (7) items or accessories added to the vehicle at or after purchase, less a reasonable allowance for use. The expenses must be reasonable and verifiable (for example, through receipts or similar written documents).²⁶ However, the Department’s rules expressly exclude compensation for “any interest, finance charge, or insurance premiums.”²⁷

B. Summary of Complainant’s Evidence and Arguments

On March 26, 2018, the Complainant, purchased a new 2018 Nissan Titan from Clay Cooley Nissan, a franchised dealer of the Respondent, in Dallas, Texas. The vehicle had 17 miles

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.”).

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

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

²³ See *Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

²⁴ See TEX. GOV’T CODE §§ 2001.141(b)-(c), 2001.051-2001.052; TEX. R. CIV. P. 301.

²⁵ TEX. OCC. CODE § 2301.604.

²⁶ 43 TEX. ADMIN. CODE § 215.209(a).

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

on the odometer at the time of purchase. The vehicle's limited warranty provides basic coverage for 36 months or 36,000 miles, whichever occurs first.

On December 13, 2019, the Complainant provided a written notice of defect to the Respondent, which the Respondent received on December 26, 2019. On December 17, 2019, the Complainant filed a complaint with the Department alleging that he took the subject vehicle to a dealer for repair of: overhead lighting issues; distorted speakers; engine/fuel cap light; electric throttle control; power seat and back window; and a safety recall (electrical harness), which were successfully addressed. The complaint also alleged currently existing issues with: the windshield auto wiper not working; the gear selector shifting into the manual first gear on its own when releasing the brake; and the ignition where the engine vibrated (hard starting), triggered by the push to start button. In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
December 16, 2019	30,133	Hard start

The Complainant testified that at least once every other week, maybe twice a month, when pushing the start button, the truck would sound like it would start and turn over but would not start. He would press the brake and the vehicle would shut off. The vehicle would start after trying again. Additionally, the whole truck would shake. He first noticed the issue at the end of summer 2019, going into the fall. The issue appeared random. He last noticed the issue in March (2020), the last day before spring break.

Regarding the gear shift issue, the Complainant described that the manual shift mode could be selected on the gear shift lever itself. But on four random occasions, the vehicle shifted into manual on its own. Coming to a stop sign, when releasing the brake and stepping on the accelerator, without touching the gear selector, the vehicle will shift (into manual mode) on its own. This happened four times, in August and December of 2019 and January and March of 2020.

In relation to the windshield wiper rain sensor, when raining before driving, the Complainant noticed that the rain-sensing auto windshield wiper would not work because the sensor did not work. So, he would have to switch the wiper on manually. He took the vehicle to Clay Cooley Nissan in Irving on two occasions. The warranty did not cover the second service visit and repair would cost \$8,000. The Complainant first noticed the rain sensor issue in the fall

of 2018. He elaborated that the rain-sensing auto wiper system worked until last summer (2019). He last noticed the rain sensor issue two days before the hearing.

With the parking sensor (front and rear sonar system) issue, when parking, backing up or straight forward, the sensors usually beep when getting closer to an object in the front or rear. The system will beep faster as the object gets closer. But the system will not beep in safe amount of space. The system first beeps within inches, maybe two inches from the object. The sensors occasionally worked as supposed to. The Complainant first noticed the issue around September of last year. The blind spot warning (BSW) also malfunctioned. The BSW was supposed to light up on the dash and beep to warn of a car coming up on the right or left. The Complainant last noticed the parking sensor issue the week before the hearing. He first noticed the BSW issue over Christmas break of 2019. He last noticed the BSW issue the week before the hearing. Upon clarification questions, the Complainant explained that vehicle was not taken to a dealer for repair of the BSW or parking sensor issues. The Complainant stated that the vehicle currently had 38,513 miles on the odometer.

On cross-examination, the Complainant clarified that the dealer notified him that the wiper sensor was not covered under warranty. He did not have a repair order (RO) for the wiper issue but believed the vehicle was at the dealer in March 2019 and May 2019. He stated that the May 2019 visit addressed smoothness of ride and windshield wipers, and not tires but shaking in the engine or something similar. He tried to get a repair order but the dealer did not provide one. When he opened the hood (at the dealer), the wiper issue was one of things he wanted looked at. He also brought the vehicle to Grubbs Nissan on December 2019 for the wipers and hard start. The Complainant stated that the repair orders had things missing. He pointed out that the lighting concern was one of first issues, which he repeatedly raised but which did not get addressed or repaired until the last inspection by Mr. McBride. The dealer did not include the wiper issue on an RO. The dealer could not duplicate the hard start and did not attempt a repair. The Complainant affirmed that the wiper issue was still a current complaint. The shifter going into manual mode still occurred but not as badly as before. The Complainant noted that he could not get a copy of the first repair order from Clay Cooley Nissan in Dallas. The Complainant could not get ROs for the two visits to Clay Cooley Nissan in Irving and the dealer had no record of the Complainant going to Clay Cooley Nissan in Irving. He affirmed that the vehicle did not exhibit further check engine lights.

At the post-hearing conference, the Complainant testified that the rain sensor and windshield were replaced after numerous attempts (to resolve the auto wiper issue). He explained that the windshield needed to be replaced because of a crack in the windshield. A third party replaced the windshield. Clay Cooley Nissan notified the Complainant that if the windshield were replaced, the dealer could just recalibrate the sensor but could not. Clay Cooley Nissan in Irving quoted \$8,000 for the sensor repair. The Complainant also testified that in 2018, the vehicle's ride was rough and would vibrate violently on new roads at 40 to 50 mph. The vehicle longer had a rough ride. But he considered the issue to remain because the vehicle shook from hard starts. He added that about the 14th and 15th of the month before the hearing, when trying to start, the vehicle would vibrate violently and then shut down. Over time, he believed the rough ride transformed to the hard start. The Complainant believed the windshield was replaced sometime in April or May this year.

C. Summary of Respondent's Evidence and Arguments

Mr. McBride objected to consideration of the new issues (the blind spot warning and parking sensor issues, which the complaint did not include). He noted that the Respondent did not have any notice of the BSW and parking sensor issues. Additionally, the Respondent did not have an opportunity to diagnose the shifting and auto wiper issues. Mr. McBride testified that the issues regarding the ride/engine shaking and wipers were not in the ROs and any RO written at a dealer would automatically appear in the service history. Mr. McBride did not recall discussing the wipers, which was not in RO 467284. He noted that without the issue on the RO, the technician would not know what to address. Since the wiper issue did not appear in an RO, the Respondent could not address it and Mr. McBride did not believe the Respondent could have had an opportunity to address the concern. As for the starting concern, the technician could not duplicate the issue. Mr. McBride noted that the wipers would not set a diagnostic trouble code (DTC) so they would not know what to look for. He explained that a multi-point inspection addressed general issues and specific concern must specifically be identified in the RO. He pointed out that every concern involved different systems. Some issues were not even electrical in nature, such as the overhead console, which related to poor fitment. Also, the vehicle's wiring harness did not relate to a safety campaign. The speakers concerned vibration. As for the throttle body, the issue may be

electrical or mechanical. But a DTC would set if a problem existed with the throttle body. The systems underlying the concerns were separate.

Mr. McBride stated that the Respondent never had an opportunity to repair the last four complaints and had no more than two repair attempts, and the second attempt was for the overhead light, which was successfully repaired. The Respondent did not have an opportunity to address most of the issues. The first five concerns in the agreement to arbitrate were repaired and the vehicle did not have a safety hazard or a significant impact on its use. Mr. Howell reiterated that (multiple) problems were not on the ROs and the Respondent did not have an opportunity to look at them.

At the post-hearing conference, Mr. McBride explained that the rain sensor had to be replaced with the windshield. He noted that the repair orders did not show any rough ride concerns after the August 24th RO for the Clay Cooley visit. Further, the vibration was deemed a normal characteristic and was comparable to other same-model vehicles. The technician noted

D. Analysis

As detailed below, the subject vehicle does not qualify for repurchase or replacement under the Lemon Law relief but does qualify for repair relief under the Warranty Performance Law.

1. Warrantable Defect

As a threshold matter, Lemon Law relief does not apply to all problems that may occur with a vehicle but only to warrantable defects that continue to exist after repairs.²⁸ The Lemon Law does not require that a manufacturer provide any particular warranty coverage nor does the Lemon Law impose any specific standards for vehicle characteristics. The Lemon Law only requires the manufacturer 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.'"²⁹ According to these terms, the warranty only applies to defects in materials or

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

²⁹ Complainant's Ex. 9, 2018 Warranty Information Booklet.

workmanship (manufacturing defects).³⁰ Additionally, the warranty includes the following exclusions, among others, from coverage:

This warranty does not cover damage, failures or corrosion resulting from or caused by:

. . .

- Glass breakage, unless resulting from defects in material or workmanship
- Normal wear and tear, including dings, dents, chips, or scratches³¹

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.³² 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.³³ 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.³⁴ 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

³⁰ 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.").

³¹ Complainant's Ex. 9, 2018 Warranty Information Booklet.

³² *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 flawed, i.e., which do not conform to the manufacturer's own specifications, and are not identical to their mass-produced siblings.").

³³ *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.).

³⁴ *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].").

manufacturer's design of the vehicle, even though manufactured without any flaws.³⁵ Unlike manufacturing defects, issues that do not arise from manufacturing, such as the vehicle's design characteristics (which exist before manufacturing) or dealer representations and improper repairs (which occur after manufacturing), 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.

2. Relevant Issues

As explained in the discussion of applicable law, the complaint determines the relevant issues to address, unless additional issues are allowed by consent. The complaint in this case did not include the parking sensor and blind spot warning issues and the Respondent objected to consideration of these additional issues. Accordingly, the auto wiper, manual shifting, and hard starting are the only currently existing issues that remain to be addressed here.

a. Rain-sensing Auto Wiper

The inoperability of the auto wiper is not a warrantable defect that supports any relief. As shown in the record, the auto wiper ceased to function after replacement of the windshield. However, testimony shows that the rain sensor must be replaced when replacing the windshield, which reflects a design characteristic of the rain sensor as opposed to a manufacturing defect. But as explained above, the warranty only applies to manufacturing defects. Furthermore, the damage that precipitated the need for a new windshield (and a new rain sensor) was a crack in the windshield caused by a chip. Significantly, the vehicle's warranty expressly excludes any failures resulting from glass breakage or chips. In sum, the auto wiper problem is not a warrantable defect that supports any relief.

b. Manual Shift Mode

The repair history shows no repair attempts for the vehicle spontaneously entering the manual shift mode. However, the applicable presumption for reasonable repair attempts requires at least four attempts within 24 months or 24,000 miles after delivery, whichever occurs first.

³⁵ *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.").

Although the rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts, nothing in the record warrants departing from the presumption's requirements. Because the vehicle has not had reasonable repair attempts, it cannot qualify for Lemon Law relief. Nevertheless, a vehicle that does not qualify for Lemon Law relief may still qualify for repair relief under the Warranty Performance Law, which only requires an existing warrantable defect with written notice to the dealer or Respondent. In this case, the manual shift mode problem appears to be a warrantable defect and both the written notice of defect and the complaint in this case include the issue. Accordingly, the manual shift mode issue qualifies for warranty repair relief.

c. Hard Starting

The repair history only shows one repair attempt for the hard starting issue at 30,133 miles. However, the applicable presumption for reasonable repair attempts requires at least four attempts within 24 months or 24,000 miles after delivery, whichever occurs first. Although the rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts, nothing in the record warrants departing from the presumption's requirements. Because the vehicle has not had reasonable repair attempts, it cannot qualify for Lemon Law relief. Nevertheless, a vehicle that does not qualify for Lemon Law relief may still qualify for repair relief under the Warranty Performance Law. The evidence in this case shows that the issue continued to occur after the last repair visit for this issue, as late as the month before the hearing, June 2020. Further, the notice of defect and complaint both included this issue, satisfying the notice requirement. Therefore, this issue qualifies for repair relief.

III. Findings of Fact

1. On March 26, 2018, the Complainant, purchased a new 2018 Nissan Titan from Clay Cooley Nissan, a franchised dealer of the Respondent, in Dallas, Texas. The vehicle had 17 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides basic coverage for 36 months or 36,000 miles, whichever occurs first.

3. The 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.’”
4. The warranty expressly excludes: “[g]lass breakage, unless resulting from defects in material or workmanship” and “[n]ormal wear and tear, including dings, dents, chips, or scratches.”
5. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
December 16, 2019	30,133	Hard start

6. On December 13, 2019, the Complainant provided a written notice of defect to the Respondent.
7. On December 17, 2019, the Complainant filed a complaint with the Department alleging that he took the subject vehicle to a dealer for repair of: overhead lighting issues; distorted speakers; engine/fuel cap light; electric throttle control; power seat and back window; and a safety recall (electrical harness), which were successfully addressed. The complaint also alleged currently existing issues with: the windshield auto wiper not working; the gear selector shifting into the manual first gear on its own when releasing the brake; and the ignition where the engine vibrated (hard starting), triggered by the push to start button.
8. On March 9, 2020, 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. The hearing in this case convened on July 30, 2020, by telephone, before Hearings Examiner Andrew Kang. On September 2, 2020, a post-hearing conference was held to address additional exhibits and testimony. The record closed on November 17, 2020. The Complainant, represented himself. Cameron McBride, Dealer Technical Specialist, and John Howell, Dealer Technical Specialist, represented the Respondent.

10. The vehicle's odometer displayed 38,513 miles at the time of the hearing.
11. The warranty expired 36,000 miles after delivery of the vehicle to the Complainant (at 36,017 miles on the odometer).
12. The vehicle spontaneously entered manual shift mode in August and December of 2019 and January and March of 2020.
13. The repair history shows no repair attempts for the manual shift mode issue.
14. About twice a month, when pushing the start button, the vehicle would sound like it would start but would not start (hard starting). The hard starting issue continued to occur after the last repair visit for this issue, as late as the month before the hearing, June 2020.
15. The repair history only shows one repair attempt for the hard starting issue, at 30,133 miles, and no repair attempts for this issue within the first 24,000 miles after delivery.
16. A chip in the vehicle's windshield caused it to crack, necessitating replacement of the windshield. A third party replaced the windshield but did not replace the rain sensor, making the rain-sensing auto wiper inoperable. Replacement of the windshield on the subject vehicle also requires replacement of the rain sensor as a result of the vehicle's design.

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 rain-sensing auto wiper issue does not support replacement or repurchase. The Complainant did not prove that the rain-sensing auto wiper inoperability was a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a).
7. The manual shift mode and hard starting issues do not support replacement or repurchase. The Complainant did not meet the requirement for 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 Complainant's vehicle qualifies for warranty repair. The Complainant proved that the vehicle has 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).
11. 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.
12. 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: (1) the vehicle spontaneously entering manual shift mode and (2) the hard starting. Upon this Order becoming final under Texas Government Code § 2001.144:³⁶ (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).

SIGNED January 22, 2021



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

³⁶ 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.