

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 14-0238 CAF**

ANGELA M. ESCOBAR,	§	BEFORE THE OFFICE
Complainant	§	
v.	§	
	§	OF
FORD MOTOR COMPANY,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Angela M. Escobar (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-.613 (Lemon Law) for alleged defects in her 2013 Ford Fiesta. Complainant asserts that the vehicle jerks and hesitates when she's driving, the vehicle has no power, and the steering wheel makes noises intermittently. Ford Motor Company (Respondent) argued that Complainant has not met the repurchase requirements set forth in the Occupations Code and that no relief is warranted. The hearings examiner concludes that the vehicle does not have an existing warrantable defect, and Complainant is not eligible for relief.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Matters of notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened and closed on August 14, 2014, in San Antonio, Texas, before Hearings Examiner Edward Sandoval. Complainant represented herself at the hearing. Ricardo Castillo, friend, testified on Complainant's behalf. Respondent was represented by Kurt Kindler, Field Service Engineer. Also present at the hearing was Vicky Cavazos Jones who served as a Spanish interpreter for Complainant.

II. DISCUSSION

A. Applicable Law

The Texas Lemon Law provides that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of under the Texas Occupations Code with a comparable vehicle if five conditions are met. First, the manufacturer has not conformed the vehicle to an applicable express warranty because the manufacturer cannot repair or correct a defect or condition in the vehicle. Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Third, the manufacturer has been given a reasonable number of attempts to repair or correct the defect or condition.¹ Fourth, the owner must have mailed written notice of the alleged defect or nonconformity to the

¹ Tex. Occ. Code § 2301.604(a)(1) and (2).

manufacturer.² Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.³

In addition to the five conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist after being subject to repair four or more times and: (1) two of the repair attempts were made in the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) the other two repair attempts were made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the second repair attempt.⁴

B. Complainant's Evidence and Arguments

Complainant purchased a 2013 Ford Fiesta from Red McCombs Ford, in San Antonio, Texas on May 15, 2013, with mileage of 12 at the time of delivery.⁵ On the date of hearing the vehicle's mileage was 12,799. At this time, Respondent's warranty coverage for the vehicle remains in place, with "bumper to bumper" coverage for three years or 36,000 miles, whichever comes first. In addition, Respondent's powertrain warranty provides for coverage for the powertrain for five years or 60,000 miles.

Complainant testified that the vehicle has made unusual noises, hesitates, and jerks during acceleration ever since she first purchased it. In June of 2013, Complainant informed the dealer who sold her the vehicle about the noise, but the representative she spoke to said that the noises were normal. In addition, the dealer provided to Complainant a document entitled "PowerShift 6-Speed Transmission Operating Characteristics" which contained information regarding the vehicle's PowerShift transmission. The document indicated that some sounds that drivers may hear when driving this model vehicle were not unusual, including double clicking metal sounds, "coast down whine", clicking after turning off the engine, a low speed grinding, and a reverse gear whine.⁶ During this visit, a service technician did not inspect the vehicle, since the sounds were considered to be normal. Complainant was also told that there was a "break in" period for the transmission and that she needed to get used to driving the vehicle. She was also told that if,

² Tex. Occ. Code § 2301.606(c)(1).

³ Tex. Occ. Code § 2301.606(c)(2).

⁴ Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. However, § 2301.605(a)(2) applies only to a nonconformity that creates a serious safety hazard, and § 2301.605(a)(3) requires that the vehicle be out of service for repair for a total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner.

⁵ Complainant Exs. 1 and 2, Motor Vehicle Retail Installment Sales Contract dated May 15, 2013, and Odometer Disclosure Statement dated May 15, 2013.

⁶ Complainant Ex. 3, PowerShift 6-Speed Transmission Operating Characteristics dated September 27, 2012.

after some time passed, she still had concerns, then she should take the vehicle back to the dealership to ensure that it was operating as designed.

On December 11, 2013, Complainant took the vehicle to Respondent's authorized dealer in order to address her continued concerns with the vehicle. Complainant advised the dealer's service advisor that she thought that the transmission was not operating properly. In addition, she indicated that she felt that the car would hesitate during acceleration and that the vehicle did not have any power. Complainant also indicated that she heard a clunking noise when she turned left in the vehicle. Respondent had issued a Technical Service Bulletin (TSB) for the transmission on this model vehicle. The TSB advised the dealer's service technicians on steps they should take if they received complaints regarding excessive shudder from the vehicle's transmission. The service technicians followed the instruction under the TSB and reprogrammed the Powertrain Control Module (PCM) and the Transmission Control Module (TCM). The service technicians tried to determine what could be causing the clunking noise in the steering wheel, but could not duplicate the noise complained of by Complainant. They did inspect the vehicle's steering and suspension, but no problems were found that might have caused the clunking noise and the vehicle was returned to Complainant without any repairs being made regarding this issue. The vehicle was in the dealership for two days during this visit. The vehicle's mileage when it was taken to the dealership on this occasion was 5,781.⁷ Complainant was provided with a loaner vehicle during this visit.

Approximately two weeks later, on December 26, 2013, Complainant returned the vehicle to the dealership because Complainant felt the vehicle was still making excessive noise and because the vehicle was shuddering. The vehicle was inspected and it was determined that there was excessive shudder in the vehicle.⁸ Again, pursuant to the TSB, the technician reprogrammed the Powertrain Control Module (PCM), the Transmission Control Module (TCM) and searched for leaks in the transmission. No leaks were discovered. However, the trans axle was removed. In addition, clutch bolts and seals were replaced. The fluids were topped off. The mileage on the vehicle when Complainant took it to the dealership on this occasion was 6,278.⁹ The vehicle was returned to Complainant on December 27, 2013. Complainant was not provided with a loaner vehicle during this visit.

On February 4, 2014, Complainant was experiencing similar issues with the vehicle. When she looked at the engine, she saw what looked like an oil leak in the engine/transmission area. Complainant took the vehicle to Respondent's authorized dealership for the leak and because a service light on the dashboard had illuminated. The vehicle was inspected by a service technician who was unable to find a leak. In addition, it was determined that the service light

⁷ Complainant Ex. 4, Repair Order dated December 11, 2013.

⁸ Complainant Ex. 5, Repair Order dated December 26, 2013.

⁹ *Id.*

which had illuminated was the oil change light and it was reset. Complainant did not indicate to the service advisor any specific issues regarding the transmission during this visit, as her concern was with the oil leak. The vehicle's mileage when it was first delivered to the dealer on this occasion was 7,551.¹⁰ The vehicle was returned to Complainant the next day with no repairs having been made. Complainant was not provided with a loaner by the dealer while her car was in their shop.

On April 3, 2014, Complainant took the vehicle to Respondent's authorized dealer because she felt that the transmission was jerking and because she felt that the vehicle would hesitate when trying to accelerate. The vehicle's bell housing was inspected for fluid leaks and none were found. Pursuant to TSB 14-0131, the PCM and TCM were checked and it was determined that the calibrations were up to date. A service technician road tested the vehicle and reset the driving strategies. He also recorded the Parameter Identifiers (PIDs) to verify that the "shudder" was within an acceptable range.¹¹ It was determined by the service technician that the vehicle was operating as designed. The vehicle's mileage when it was first delivered to the dealer on this occasion was 8,917.¹² The vehicle was returned to Complainant that same day with no repairs having been made.

Respondent had made arrangements with Complainant to have the vehicle inspected in order to investigate her complaints regarding the vehicle's performance. On June 6, 2014, the vehicle was inspected by Respondent's field service engineer. No repairs were performed on the vehicle at this visit. Complainant was provided with a loaner vehicle while her vehicle was being inspected.

In July of 2014, Complainant allowed her daughter to drive the vehicle from San Antonio to Waco and back. Complainant's daughter indicated that she felt that the vehicle would "jerk" and didn't respond quickly during acceleration. In addition, she heard a "clicking" noise from the front of the vehicle. She also indicated that she felt as if the vehicle could stall, although it did not do so.¹³ Complainant indicated that she did not feel safe driving the vehicle. In addition, she feels that the vehicle has lost value and she would not be able to resell it at a fair price.

Complainant's witness, Ricardo Castillo, testified that the vehicle "pulls back" whenever the driver attempts to accelerate. It doesn't accelerate well. In addition, when they picked up the car on June 6, 2014, when they were on the interstate attempting to pass a car the vehicle started jerking at high speed.

¹⁰ Complainant Ex. 6, Repair Order dated February 4, 2014.

¹¹ Complainant Ex. 7, Repair Order dated April 3, 2014.

¹² *Id.*

¹³ Complainant Ex. 9, Notarized Statement from Ana Orozco dated July 24, 2014.

C. Respondent's Evidence and Arguments

Kurt Kindler, Field Service Engineer, testified for Respondent. He stated that there were no recalls for this model vehicle. However, there were TSB's for it. The current TSB is 14-0131, published July 22, 2014, which superseded the previous TSB's for this model of vehicle. The TSB is used to inform service technicians of procedures to follow when attempting to address common customer concerns regarding Respondent's vehicles. Respondent has received customer concerns regarding how the transmission feels in the Fiesta and Focus models. Respondent has developed a standard procedure to follow to ensure that the transmission is at a baseline before testing to see if there are any unacceptable conditions present. The transmission in the vehicle is a "standard automatic." It's not a conventional automatic transmission. The transmission for both the Focus and Fiesta models is the PowerShift 6 (DPS 6) transmission. Mr. Kindler explained that between the engine and transmission in a conventional automatic transmission there is a fluid coupling, so the engine turns a big fan in a vat of fluid and the fluid turns the case which turns the transmission. This provides a smoother operation of the vehicle, but it sacrifices fuel economy. For the DPS 6 transmission, there is no fluid coupling between the engine and the transmission. Instead, there are two friction clutch disks that are designed to slip with one another normally just to disengage the transmission from the engine. If it didn't disengage, then the engine would stall. As a result, there is more noise than in a conventional transmission. The shuddering that is felt can be considered normal, depending on its severity. This is a result of using the dual clutch system. This is why Respondent issued the documentation advising customers of the characteristics of the system.¹⁴ The document was to advise customers that the transmission would not be similar to what the customers were used to with conventional transmissions. The transmission is a standard transmission at heart. The vehicles also need a break in period. Sometimes it takes a vehicle 1000 to 1500 miles to settle in with the parts and transmission.

During the repair visit Complainant made to the dealership on December 11, 2013, the service technician performed TSB 13-9-4, as required by Respondent. The service technician checked the PID's during this visit which is information given to the scanning computer by the engine computers as to the clutch slippage. The maximum amount of clutch slippage is determined and if it exceeds the parameters determined to be acceptable, then clutch replacement and reprogramming of the TMC is required. On this occasion, no parts were replaced, so the transmission was working within the acceptable parameters. However, the TCM and PCM were both reprogrammed. Reprogramming is required by the TSB regardless of whether the transmission is working within acceptable parameters.

¹⁴ Complainant Ex. 3, PowerShift 6-Speed Transmission Operating Characteristics dated September 27, 2012.

For the December 26, 2013, repair visit to the dealership, the service technicians determined that there was an unacceptable amount of slippage. As a result, the clutch assembly was replaced. This was required under TSB 13-9-4.

For the February 4, 2014, repair visit to the dealership, the service technician could not find an oil leak. The oil accumulated on top of the transmission which is unusual. Without having seen the oil accumulation, Mr. Kindler could not determine where the oil came from.

For the April 3, 2014, repair visit to the dealership, the service technicians retrieved the Diagnostic Trouble Codes (DTC's) from the vehicle's computers to determine if there was a problem with the vehicle. No DTC's were found by the technicians. In addition, the adaptive driving strategy was reset. The transmissions in this model vehicle have adaptive controls in them which allow the transmission to adapt based on how the driver is operating the vehicle to customize the transmission for the driver's driving habits. Before the TSB is performed, the technicians want to ensure that the vehicle is at a baseline, so the driving strategies will be reset so that the transmission is at the required baseline.

Mr. Kindler did perform Respondent's final inspection of the vehicle on June 6, 2014. He took a test drive in the vehicle with Red McCombs Ford's shop manager, Jimmy Durocher. They drove the vehicle about 15 to 20 miles at both highway and regular speeds and could not duplicate Complainant's concerns regarding the vehicle. Mr. Kindler also ran a diagnostics scan on the vehicle and did not find any trouble codes.

D. Analysis

Under Texas' Lemon Law, Complainant bears the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainant must meet the presumption that a reasonable number of attempts have been undertaken to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect, Complainant is entitled to have the vehicle repurchased or replaced.

Complainant purchased the vehicle on May 15, 2013 and presented the vehicle to an authorized dealer of Respondent due to her concerns with the transmission on the following dates: December 11, 2013, December 26, 2013, and April 3, 2014. Occupations Code § 2301.604(a) requires a showing that Respondent was unable to conform the vehicle to an applicable express warranty "after a reasonable number of attempts." Section 2301.604(a) goes on to specify that a

rebuttable presumption that a reasonable number of attempts to repair have been made if “two or more repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner, and two other repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.” Complainant has not met the requirements of this test. Although Complainant did present the vehicle for repairs to an authorized dealer for Respondent on two occasions within the first year or 12,000 miles from purchase, she did not submit the vehicle to an authorized dealer for two repairs to the transmission within 12 months or 12,000 miles from the second repair attempt. (The repair visit to the dealer on February 4, 2014, was due to Complainant’s concern that there was an oil leak in the engine and not for any issues with the transmission.) As such, Complainant was unable to establish that a reasonable number of attempts to repair the vehicle were made by Respondent.

In addition, the transmission issues may not constitute a “serious safety hazard” as defined in the Occupations Code. Section 2301.601(4) of the Code provides that “‘serious safety hazard’ means a life-threatening malfunction or nonconformity that: (A) substantially impedes a person’s ability to control or operate a motor vehicle for ordinary use or intended purposes; or (B) creates a substantial risk of fire or explosion.” The transmission issues testified to by Complainant did not substantially impede her ability to control or operate her vehicle for ordinary uses nor did they create a substantial risk of fire or explosion. The vehicle is operable. It has not stalled out or died due to the transmission not operating as intended. Therefore, the hearings examiner finds that there is no defect with the vehicle’s transmission as defined in the Occupations Code and, as such, repurchase or replacement relief for Complainant is not warranted.

Respondent’s express warranty applicable to Complainant’s vehicle provides “bumper to bumper” coverage for 3 years or 36,000 miles whichever comes first. In addition, the powertrain warranty provides coverage for 5 years or 60,000 miles. On the date of hearing, the vehicle’s mileage was 12,799 and it remains under this warranty. As such, the Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranty.

Complainant’s request for repurchase or replacement relief is denied.

III. FINDINGS OF FACT

1. Angela M. Escobar (Complainant) purchased a new 2013 Ford Fiesta on May 15, 2013, from Red McCombs Ford, in San Antonio, Texas, with mileage of 12 at the time of delivery.

2. The manufacturer of the vehicle, Ford Motor Company (Respondent) issued a bumper to bumper warranty for 3 years or 36,000 miles, whichever occurs first and a separate powertrain warranty for 5 years or 60,000 miles.
3. The vehicle's mileage on the date of hearing was 12,799.
4. At the time of hearing the vehicle was still under warranty.
5. Ever since purchasing the vehicle, Complainant has noticed that the vehicle's engine has made unusual noises and that the vehicle would sometimes hesitate and jerk when being driven.
6. Complainant took her vehicle to Respondent's authorized dealers in order to address her concerns with the vehicle, on the following dates:
 - a. December 11, 2013 to December 13, 2013, at 5,781 miles;
 - b. December 26, 2013 to December 27, 2013, at 6,278 miles;
 - c. February 4, 2014, at 7,551 miles; and
 - d. April 3, 2014, at 8,917 miles.
7. During the December 11, 2013, visit to the dealership, the vehicle's PCM and TCM were recalibrated pursuant to a TSB issued by Respondent regarding transmissions in this model vehicle.
8. During the December 26, 2013, repair attempt, it was determined that the vehicle was suffering from excessive shuddering. The PCM and TCM were again recalibrated. In addition, clutch bolts and seals were replaced.
9. The vehicle was taken to Respondent's authorized dealer on February 4, 2014, because she thought she saw a fluid leak in the engine. However, no leak was found.
10. During the April 3, 2014, visit to the dealership, the vehicle was inspected for fluid leaks, but none were found. In addition, The PCM and TCM were recalibrated.
11. On May 7, 2014, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).

12. On June 6, 2014, Respondent had a field service engineer (Kurt Kindler) inspect the vehicle to determine if there was a problem with the transmission. Mr. Kindler determined that the vehicle's transmission was operating as designed.
13. On June 24, 2014, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainant and Respondent, giving all parties 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 matters asserted.
14. The hearing convened on August 14, 2014, in San Antonio, Texas before Hearings Examiner Edward Sandoval. Complainant represented herself in the hearing. Her friend, Ricardo Castillo, also testified. Respondent was represented by Kurt Kindler, Field Service Engineer. Providing interpreting services was Vicky Cavazos Jones, Spanish Interpreter. The hearing adjourned and the record closed on that day.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.613 (Lemon Law).
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. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 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. Complainant bears the burden of proof in this matter.
6. Complainant failed to prove by a preponderance of the evidence that the vehicle has a verifiable defect or condition that presents a serious safety hazard or substantially impairs the use or market value of the vehicle. Tex. Occ. Code § 2301.604.

7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code § 2301.204.
8. Complainant's vehicle does not qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainant's petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-.613 is hereby **DISMISSED**.

SIGNED September 23, 2014



Edward Sandoval
Chief Hearings Examiner
Office Of Administrative Hearings
Texas Department Of Motor Vehicles