

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 15-0181 CAF**

**DIANA C. SPEAR,  
Complainant**

v.

**FORD MOTOR COMPANY,  
Respondent**

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**BEFORE THE OFFICE  
  
OF  
  
ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Diana C. Spear (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for an alleged defect in her 2014 Ford Fiesta equipped with a PowerShift transmission. The Complainant filed a Lemon Law complaint (Complaint)<sup>1</sup> alleging that the vehicle made clicking noises, shuddered, jerked and jumped.<sup>2</sup> Ford Motor Company (Respondent) replied that the vehicle did not appear to qualify for repurchase or replacement, stating that the vehicle has not had four or more repair attempts for the same nonconformity that continues to exist, the vehicle has not been out of service for repair at least 30 days, and the complained of concern does not constitute a serious safety defect. The hearings examiner concludes that a preponderance of the evidence does not show that the vehicle has an existing 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 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 the record closed on September 3, 2015, in Austin, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented herself. Marie Spear testified for the Complainant. Maria Diaz, Consumer Legal Analyst, represented the Respondent.

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<sup>1</sup> The complaint identifies the issues to be addressed at the hearing. *See* TEX. OCC. CODE § 2301.204; TEX. GOV'T CODE §§ 2001.051-2001.052.

<sup>2</sup> Complainant's Ex. 4, Lemon Law Complaint Form.

## II. Discussion

### A. Applicable Law

The Lemon Law, in part, requires a manufacturer of a motor vehicle to repurchase or replace a vehicle when the manufacturer is “unable to conform a motor vehicle to an applicable express warranty.”<sup>3</sup> Additionally, warranty repair under Section 2301.204 of the Texas Occupations Code requires a “defect in a motor vehicle that is covered by a manufacturer’s . . . warranty agreement applicable to the vehicle.”<sup>4</sup> Accordingly, for a vehicle to be eligible for repurchase or replacement, or even warranty repair, the vehicle must have a defect under an applicable warranty (warrantable defect).

The law places the burden of proof on the Complainant.<sup>5</sup> The Complainant must prove each fact required for relief by a preponderance, that is, the Complainant must present enough evidence to show that all of the required facts are more likely than not true.<sup>6</sup> For example, the Complainant must show that a warrantable defect, among other things, more likely than not exists. For any required fact, if the evidence weighs in favor of the Respondent or if the evidence supports the Complainant and the Respondent equally, the Respondent will prevail. The Complainant prevails only if the evidence shows that all of the required facts are more likely than not true.

### B. Complainant’s Evidence and Arguments

On March 12, 2014, the Complainant purchased a new 2014 Ford Fiesta from Leif Johnson Ford, a franchised dealer of the Respondent in Austin, Texas. The Complainant testified that the vehicle would jerk while switching between 1st and 2nd gears, whether accelerating or decelerating. The Complainant explained that a technician initially believed that the vehicle’s accelerator pedal caused the problem but then a technician identified the clutch as the issue. At the September 30, 2014, service visit, the technician experienced clutch shudder but told the Complainant to give the vehicle more gas in response to the shudder. At the December 26, 2014, service visit, the dealer replaced accelerator pedal to address the jerking and jumping. The

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

<sup>4</sup> TEX. OCC. CODE § 2301.204.

<sup>5</sup> 43 TEX. ADMIN. CODE § 215.206.66(d).

<sup>6</sup> *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

Complainant testified that she took her vehicle to the dealer for service on January 19, 2015, at which the technician found transmission fluid leaking on a clutch, but no repairs were done because of a backordered part. During the service visit on February 2, 2015, the technician noted the transmission shuddered in 1st and 2nd gears and recorded the clutch slipping in excess of the manufacturer's specifications, leading to the replacement of the clutch assembly.<sup>7</sup> The Complainant would notice the shuddering more in stop and go driving as opposed to cruising at highway speeds. The Complainant stated that her commute to work did not involve driving on the highway but consisted of stop and go driving. Mrs. Marie Spears testified that the night before the hearing, she felt the vehicle shuddering four times in approximately 15 minutes of driving around the neighborhood. She noted that the intensity of the shudder varied and the neighborhood and roads were fairly flat. The Complainant stated that when trying to accelerate, the vehicle hesitated or responded slowly, causing concerns that the vehicle may collide with other vehicles that expected her vehicle to move. The vehicle exhibited clutch shudder during the test drive at the hearing.

### C. Respondent's Evidence and Arguments

The Respondent argued that all actual faults with the transmission had been repaired and that the existing condition of the vehicle did not meet specifications for repair, citing that the manufacturer's warranty only covers defects in materials and assembly (as opposed to normal characteristics of the vehicle's design). Ms. Diaz testified that the vehicle's owner's manual and quick start guide described the normal characteristics of the vehicle's transmission including the clicking noise and shifting qualities. The owner's manual indicated that the transmission may normally make clicking sounds and that releasing the accelerator may cause a braking sensation. Ms. Diaz described the vehicle's transmission as a hybrid between a manual and an automatic transmission, designed to maximize fuel economy, that does not have a torque converter but which automatically selects the gear and shifts (in essence, the transmission is like a manual transmission with the clutch and gear selection automated). Consequently, the transmission may feel like a manual transmission when shifting gears. The vehicle inspection report from May 5, 2015, stated that the vehicle drove normally, did not have any diagnostic trouble codes indicating a fault, and

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<sup>7</sup> Complainant's Ex. 9, Invoice 949690.

completed a transmission calibration procedure as expected. Accordingly, the Respondent's field service engineer did not perform any repairs, concluding that the vehicle performed as intended.<sup>8</sup>

#### D. Analysis

The Lemon Law does not apply to all problems that may occur with a vehicle, such as issues arising from the intended design of the vehicle. To qualify for replacement or repurchase or for warranty repair, the law requires the existence of a warrantable defect (a defect covered by an applicable warranty).<sup>9</sup> Under 43 TEX. ADMIN. CODE § 215.206.66(d), the Complainant bears the burden of proving by a preponderance of evidence that a warrantable defect exists. In this case, the evidence shows that the characteristics associated with the vehicle's transmission are not a warrantable defect, but result from the design of the vehicle's transmission. Accordingly, replacement/repurchase relief does not apply in this case.

Ford's warranty states that it applies to malfunctions or failures due to a "manufacturing defect in factory-supplied materials or factory workmanship."<sup>10</sup> Accordingly, for the warranty to apply, the complained of issue must result from a manufacturing defect rather than the vehicle's design. A manufacturing defect is an unintended condition that occurs when the vehicle varies from its intended design. That is, a defect is an aberration occurring only in those vehicles not produced according to the manufacturer's specifications. A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of an out-of-specification part. As a result, a defective vehicle differs from a properly manufactured vehicle. In contrast, characteristics of the intended design do not arise from any error in the manufacturing process, but exist in every same-model vehicle produced according to the manufacturer's specifications. The evidence in this case indicates that the currently existing issues with the vehicle arise from the vehicle's intended design, specifically the design of the PowerShift transmission.

The evidence shows that the vehicle previously had a manufacturing defect, which the dealer repaired by replacing the clutch during the February 2, 2015, service visit. During this visit, the clutch slippage exceeded the manufacturer's 200 rpm specification, which constituted a

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<sup>8</sup> Respondent's Ex. 2, Vehicle Inspection Report.

<sup>9</sup> TEX. OCC. CODE § 2301.604(a); TEX. OCC. CODE § 2301.204.

<sup>10</sup> Complainant's Exhibit 2, 2014 Model Year Ford Warranty Guide at 9 (emphasis added).

warrantable defect (conversely, slippage of no more than 200 rpm would not constitute a warrantable defect, i.e., some slippage is normal for the PowerShift transmission). Subsequently, the May 5, 2015, final inspection showed that the vehicle drove normally, did not have any diagnostic trouble codes indicating a fault, and completed a transmission calibration as expected.

During the test drive, the vehicle exhibited some shuddering. However, this appears inherent to the design of the vehicle and not the result of a manufacturing defect. The evidence shows that the vehicle's transmission, described as an automatic-manual hybrid, may normally exhibit shuddering/noises and hesitation and that some clutch slippage is normal (up to 200 rpm). Although these characteristics may be undesirable, they appear to result from the vehicle's intended design and not from a manufacturing defect. Because the vehicle's warranty only applies to manufacturing defects and not characteristics arising from the intended design, the vehicle does not qualify for repurchase/replacement or warranty repair relief under TEX. OCC. CODE § 2301.604(a) and § 2301.204. However, because the Complainant reported a warrantable defect (excessive clutch shudder/slippage above 200 rpm) to the Respondent's franchised dealer before the warranty's expiration, the Respondent has a continuing obligation to repair any further occurrence of the same defect even after the expiration of the warranty.<sup>11</sup>

### III. Findings of Fact

1. On March 12, 2014, the Complainant, Diana C. Spear, purchased a new 2014 Ford Fiesta from Leif Johnson Ford in Austin, Texas. The vehicle had 28 miles on the odometer at the time of purchase.
2. The manufacturer's new vehicle limited warranty's bumper to bumper coverage lasts for three years or 36,000 miles, whichever occurs first; the powertrain coverage lasts for five years or 60,000 miles.
3. The warranty's bumper to bumper and powertrain coverage were in effect at the time of the hearing.

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<sup>11</sup> TEX. OCC. CODE § 2301.603(b)(1).

4. The Complainant took the vehicle in for service for the complained of issues as follows:
  - a. September 30, 2014, at 5,230 miles for shuddering on acceleration, clicking while moving and turning, and noise while backing and turning;
  - b. December 26, 2014, at 6,987 miles for jerking and jumping on acceleration;
  - c. February 2, 2015, at 7,341 miles for shuddering when accelerating from a stop;
  - d. February 17, 2014, at 8,808 miles for lack of power, jerking, non-responsiveness to accelerator;
5. During the February 2, 2015, the dealer replaced the vehicle's clutch assembly to address excessive clutch shudder (clutch slippage over 200 rpm).
6. On March 6, 2015, the Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
7. On May 5, 2015, the Respondent's field service engineer inspected the vehicle and found that the vehicle performed normally.
8. On May 7, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, Ford Motor Company, 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.
9. The hearing in this case convened and the record closed on September 3, 2015, in Austin, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented herself. Marie Spear testified for the Complainant. Maria Diaz, Consumer Legal Analyst, represented the Respondent.
10. The vehicle's odometer read 11,082 miles at the time of the hearing.
11. The vehicle exhibited some clutch shudder during the test drive at the hearing.
12. The vehicle's PowerShift transmission has characteristics of both manual and automatic transmissions.
13. The vehicle's transmission normally exhibits some shudder and hesitation.

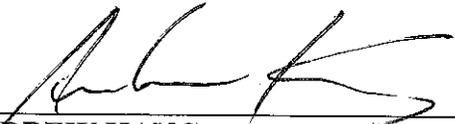
#### IV. Conclusions of Law

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 (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. The Complainant timely filed a sufficient complaint with the Department. TEX. OCC. CODE §§ 2301.204, 2301.606(d); 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 § 215.206.66(d).
6. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
7. The Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.
8. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranties. TEX. OCC. CODE §§ 2301.204, 2301.603.
9. The Respondent has a continuing obligation to address and repair or correct any warrantable nonconformities reported to the Respondent or Respondent's franchised dealer before the warranty expires. 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 October 20, 2015**



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