

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0198 CAF**

**YOLANDA FLORES and
JAIME FLORES,
Complainants**

v.

**FORD MOTOR COMPANY,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Yolanda Flores and Jaime Flores, Sr. (Complainants) seek relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for an alleged defect in their 2013 Lincoln MKX. The Complainants filed a Lemon Law complaint (Complaint) alleging that the vehicle produced a strong odor when accelerating. Ford Motor Company (Respondent) replied that relief should be denied because the condition did not continue to exist, that the vehicle was not out of service for 30 days, and the vehicle did not have two repair attempts in the first 12,000 miles. The hearings examiner concludes that the vehicle currently has a warrantable defect that substantially impairs the use of the vehicle. Consequently, the Complainants' vehicle qualifies for repurchase/replacement 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 on September 2, 2015, in Waco, Texas before Hearings Examiner Andrew Kang. The record closed on October 16, 2015, the deadline for written submissions regarding attorney fees. Andrew Ross, attorney, represented the Complainants. The Complainants testified on their own behalf and Jaime Flores, Jr. also testified for the Complainants. Maria Diaz, Consumer Legal Analyst, represented the Respondent.

II. Discussion

A. Applicable Law

1. Warrantable Defect

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.”² 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.”³ 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 Complainant must prove the existence of a warrantable defect by a preponderance, that is, the evidence must show that a warrantable defect more likely than not exists.⁴

Further, for a vehicle to qualify for replacement or repurchase, a warrantable defect must either (1) create a serious safety hazard or (2) substantially impair the use or market value of the vehicle despite a “reasonable number of attempts” at repair.⁵ 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.⁶ The Department applies a reasonable purchaser standard for determining whether the defect substantially impairs the vehicle.⁷

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

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.204.

⁴ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

⁵ TEX. OCC. CODE § 2301.604(a).

⁶ TEX. OCC. CODE § 2301.601(4).

⁷ “[F]actfinders 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.” *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

[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: (A) two of the 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 (B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.⁸

However, the statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.⁹ Furthermore, the Department adopted a decision implying that if the consumer takes the vehicle for a service visit then that visit would constitute a repair attempt unless the consumer was at fault for failure to repair the vehicle.¹⁰

2. Reimbursement for Attorney Fees

If repurchase or replacement is ordered, the Department's rules allow reimbursement of "attorney fees if the complainant retains counsel after notification that the respondent is represented by counsel."¹¹

B. Complainants' Evidence and Arguments

On September 6, 2013, the Complainants, purchased a new 2013 Lincoln MKX from Mac Haik Ford Lincoln, a franchised dealer of the Respondent, in Georgetown, Texas. The vehicle had 193 miles on the odometer at the time of purchase. The vehicle's warranty provides bumper to bumper coverage for four years or 50,000 miles, whichever occurs first.

⁸ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) and (a)(3) provide alternative methods for establishing a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. Section 2301.605(a)(2) only applies 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.

⁹ "[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.'" *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ).

¹⁰ "[O]nly those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute." *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication).

¹¹ 43 TEX. ADMIN. CODE § 215.209(a)(6).

Jose Flores, Sr., testified that he smelled a strong odor coming from the air conditioning vents when accelerating and that he had to open the windows to let the odor out. Mr. Flores noted that a salesman smelled the odor when Mr. Flores first test drove the vehicle. Mr. Flores could not remember how long he was without the car for repairs but he did have times when the vehicle was unavailable. The Complainants took the vehicle to a dealer to address the odor issue on the following dates and miles as shown on the repair orders: August 7, 2014, at 9,956 miles;¹¹ October 15, 2014, at 12,516 miles;¹² October 23, 2014, at 12,308 miles;¹³ October 24, 2014, at 12,308 miles;¹⁴ November 3, 2014, at 12,973 miles;¹⁵ November 11, 2014, at 13,333 miles;¹⁶ December 2, 2014, at 14,527 miles;¹⁷ December 16, 2014, at 14,971 miles;¹⁸ and January 13, 2015, at 16,180 miles¹⁹ (note: the October 23, 2014, and October 24, 2014, repair orders appear to incorrectly state the vehicle's mileage). The Respondent had a final repair attempt on March 19, 2015.

Mr. Flores stated that they initially took the vehicle to Marstaller Motors in Waco for repairs. At the October 23, 2014, visit, Mr. Flores reported smelling a rotten egg odor but the technician believed the brakes were the cause.²⁰ At the November 3, 2014, service visit to Stanley Ford in McGregor, Texas, Mr. Flores learned about technical service bulletin (TSB) 14-0201. TSB 14-021 addressed sulfur odor after hard acceleration.²¹ The dealer performed the repair proscribed in TSB 14-021 and reprogrammed the heating ventilation air conditioning (HVAC) module.²² At the November 11, 2014, service visit, Mr. Flores refused to leave until the service manager rode with him. The smell occurred during the test drive. Subsequently, on December 2, 2014, Mr. Flores took the vehicle for service to Mac Haik Ford Lincoln in Georgetown, Texas. The dealer resealed

¹¹ Complainants' Ex. 3, Repair Order No. 47182.

¹² Complainants' Ex. 4, Repair Order No. 48349.

¹³ Complainants' Ex. 5, Repair Order No. 48477.

¹⁴ Complainants' Ex. 6, Repair Order No. 48508.

¹⁵ Complainants' Ex. 7, Repair Order No. 132490.

¹⁶ Complainants' Ex. 8, Repair Order No. 132627.

¹⁷ Complainants' Ex. 9, Repair Order No. 518821.

¹⁸ Complainants' Ex. 10, Repair Order No. 133218.

¹⁹ Respondent's Ex. 2, Repair Order No. 522930; Complainants' Ex. 11, Repair Order No. 523807.

²⁰ Complainants' Ex. 5, Repair Order No. 48477.

²¹ Complainants' Ex. 12, Technical Service Bulletin 14-0201.

²² Complainants' Ex. 7, Repair Order No. 132490.

the air inlets and replaced the air vents.²⁴ Leading up to the January 13, 2015, service visit to Mac Haik Ford Lincoln, Mr. Flores noticed the odor more when the air recirculated. Mr. Flores testified that the last repair occurred at Mac Haik Ford Lincoln. During the test drive at the January 13, 2015, service visit, Mr. Flores smelled a very mild odor, which the dealer's personnel said was normal. Mr. Flores found that the smell persisted after the last repair. Mr. Flores characterized the odor as "pretty strong". Mr. Flores testified that he took the vehicle for a final repair attempt on March 19, 2015, at Stanley Ford. Mr. Flores stated that he has to roll down the windows to deal with the odor which comes in about 30 seconds after a "heavy start". Mr. Flores stated that he had health concerns from the odor issue, especially for Mrs. Flores, because she has allergies and asthma. Mrs. Flores testified that she has had a bad experience with the fumes and that they have had to roll down the windows every time while on the highway. She stated that she would cough because of the fumes. The Complainants stated that they wanted to have the Respondent repurchase the vehicle. During the test drive at the hearing, the hearings examiner noticed a faint sulfur-like odor when smelling the vehicle's air conditioning vents closely. This odor did not occur continuously and differed from the exhaust smell from the vehicle's tail pipe. During the test drive, Jamie Flores, Jr. stated that the odor was stronger in the rear.

C. Respondent's Evidence and Arguments

Ford argued that the vehicle only had two actual repairs, that the vehicle had been repaired leaving no nonconformity, and that a repair cannot be performed for a nonconformity that cannot be duplicated. Additionally, the vast majority of the repair orders, as well as the final inspection report, show that the Complainants' concerns could not be duplicated. During cross-examination, Mr. Flores confirmed that he did not have any carbon monoxide testing done on his vehicle. However, the Respondent's March 19, 2015, final repair attempt included carbon monoxide testing, but the testing detected no carbon monoxide. Brent Hochgraber, a field service engineer for the Respondent, inspected the Complainants' vehicle on March 19, 2015. Mr. Hochgraber could not duplicate the Complainants' concern and carbon monoxide testing did not show the presence of any carbon monoxide during 54 miles of test driving, which included heavy accelerations from a stop and while driving on various road conditions, including hills and flat

²⁴ Complainants' Ex. 9, Repair Order No. 518821.

areas.²⁵ In response to the Complainants' written submission addressing attorney fees, the Respondent argued that reimbursement for the Complainants' attorney's fees did not apply because the Respondent did not have legal counsel at any time.

D. Analysis

1. Warrantable Defect

a. Reasonable Number of Repair Attempts

With respect to this case, the statutory presumption for reasonable repair attempts requires two attempts in the first 12,000 miles after delivery and two attempts in the first 12,000 miles after the second repair attempt. However, the statutory presumption does not preclude otherwise finding a reasonable number of repair attempts. In this case, the repair orders show that the second repair attempt occurred 323 miles (and possibly only 193 miles) after 12,000 miles. Further, the record reflects a total of 10 repair attempts within the first 18,093 miles. Given the significant total number of repair attempts within 18,093 miles and because the second repair exceeded 12,000 miles by no more than 323 miles, the vehicle has had a reasonable number of repair attempts.

b. Serious Safety Hazard

The defect does not appear to create a serious safety hazard. The Lemon Law specifically 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. In other words, the defect must pose a catastrophic danger. Although the evidence reflects health concerns relating to the defect, those concerns do not rise to the level of a life threatening risk. For instance, carbon monoxide testing showed the presence of no carbon monoxide. Moreover, during the inspection at the hearing, the odor from the vents did not smell the same as the exhaust from the tailpipes. Although the odor may be irritating, the evidence does not show that the odor constitutes a life threatening risk that impedes the control or operation of the vehicle or poses a risk of fire or explosion.

²⁵ Respondent's Ex. 3, Vehicle Inspection Report.

c. Substantial Impairment**i. Use**

The defect appears to substantially impair the Complainants' use of the vehicle. The evidence shows that Complainants would have to roll down the vehicle's windows to clear the odor/fumes from the vehicle's cabin and that the fumes would cause Mrs. Flores to cough. Although rolling down the windows may not ordinarily pose any issues, having to do so during inclement weather or other adverse conditions may substantially impair the Complainants' use of the vehicle, in addition to any problems from Mrs. Flores adverse reaction to the fumes.

ii. Market Value

Although the Complainants, in their subjective experience, find the odor objectionable, the Department applies a "reasonable prospective purchaser" test to determine whether the vehicle's current condition would either deter such a purchaser from buying the vehicle or substantially negatively affect the amount the purchaser would pay for the vehicle. In this case, the odor would not appear to impair the value of the vehicle. The record shows that the technicians did not experience any odor issues after the last actual repair. Moreover, the hearings examiner could only discern a slight, intermittent odor (only after heavy acceleration) and even then, only when smelling close to the vents. Otherwise, the odor was imperceptible.

2. Reimbursement of Attorney Fees

The Department's rules only allow reimbursement of attorney fees "if the complainant retains counsel after notification that the respondent is represented by counsel."²⁶ However, the record does not show that the Respondent ever had representation by counsel in this case. Consequently, the Complainants do not qualify for reimbursement of attorney fees.

III. Findings of Fact

1. On September 6, 2013, the Complainants, Yolanda Flores and Jaime Flores, purchased a new 2013 Lincoln MKX from Mac Haik Ford Lincoln, a franchised dealer of the Respondent, Ford Motor Company, in Georgetown, Texas. The vehicle had 193 miles on the odometer at the time of purchase.

²⁶ 43 TEX. ADMIN. CODE § 215.209(a)(6).

2. The manufacturer's new vehicle limited warranty provides bumper to bumper coverage of the vehicle for four years or 50,000 miles, whichever occurs first.
3. The vehicle's warranty was in effect at the time of the hearing.
4. The Complainants brought the vehicle for service to address sulfur-like odor/fumes from the air conditioning vents as follows:
 - a. August 7, 2014, at 9,956 miles;
 - b. October 15, 2014, at 12,516 miles;
 - c. October 23, 2014, at 12,308 miles;
 - d. October 24, 2014, at 12,308 miles;
 - e. November 3, 2014, at 12,973 miles;
 - f. November 11, 2014, at 13,333 miles;
 - g. December 2, 2014, at 14,527 miles;
 - h. December 16, 2014, at 14,971 miles; and
 - i. January 13, 2015, at 16,180 miles;
5. The vehicle had two actual repairs: the first on November 3, 2014, consisting of resealing body parts according to TSB 14-0201 and reprogramming the HVAC module, and the second on December 2, 2014, consisting of performing the repair in TSB 14-0201, resealing and installing new vents.
6. The Respondent had a final repair attempt on March 19, 2015, at 18,286 miles. However, the field service engineer could not duplicate any of the concerns and therefore did not recommend any repairs.
7. Testing during the final repair attempt showed the presence of no carbon monoxide.
8. The Complainants continued to experience the odor issue after the repairs.
9. Mrs. Flores would cough because of the fumes.
10. The Complainants would need to roll down the vehicle's windows to clear the fumes out of the vehicle's cabin.
11. On March 18, 2015, the Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).

12. On May 7, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainants 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.
13. The hearing in this case convened on September 2, 2015, in Waco, Texas before Hearings Examiner Andrew Kang. The record closed on October 16, 2015, the deadline for written submissions. Andrew Ross, attorney, represented the Complainants. The Complainants testified on their own behalf and Jaime Flores, Jr. also testified for the Complainants. Maria Diaz, Consumer Legal Analyst, represented the Respondent.
14. The vehicle had 21,745 miles on the odometer at the time of the hearing.
15. During the test drive at the hearing, a faint sulfur-like odor could be smelled when smelling the vents closely.
16. The Respondent never retained counsel in this case.

17. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license and registration	\$43,627.30
Delivery mileage	193
Mileage at first report of defective condition	9,956
Mileage on hearing date	21,745
Useful life determination	120,000

Purchase price, including tax, title, license and registration	\$43,627			
Mileage at first report of defective condition	9,956			
Less mileage at delivery	<u>-193</u>			
Unimpaired miles	9,763			
Mileage on hearing date	21,745			
Less mileage at first report of defective condition	<u>-9,956</u>			
Impaired miles	11,789			
Reasonable Allowance for Use Calculations:				
Unimpaired miles				
	<u>9,763</u>			
	120,000	X	\$43,627.30	= \$3,549.44
Impaired miles				
	<u>11,789</u>			
	120,000	X	\$43,627.30	X 50% = <u>\$2,143.01</u>
Total reasonable allowance for use deduction:				\$5,692.45
Purchase price, including tax, title, license and registration	\$43,627.30			
Less reasonable allowance for use deduction	-\$5,692.45			
Plus filing fee refund	<u>\$35</u>			
TOTAL REPURCHASE AMOUNT	\$37,969.85			

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 Complainants 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 Complainants bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 215.206.66(d).
6. The Complainants do not qualify for reimbursement of attorney fees. 43 TEX. ADMIN. CODE § 215.209(a)(6).
7. The Complainant showed that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
8. The Complainant's vehicle qualifies for replacement or repurchase. TEX. OCC. CODE § 2301.604.

V. Order

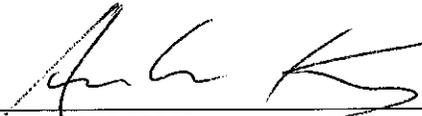
Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **GRANTED**. It is further **ORDERED** that the Respondent shall repair the warrantable defect in the reacquired vehicle identified in this Decision. **IT IS THEREFORE ORDERED** that:

1. The Respondent shall accept the return of the vehicle from the Complainant. The Respondent shall have the right to have its representatives inspect the vehicle upon the return by the Complainant. If from the date of the hearing to the date of repurchase the vehicle is substantially damaged or there is an adverse change in its condition beyond ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in the final order;
2. The Respondent shall repurchase the subject vehicle in the amount of **\$37,969.85**. The refund shall be paid to the Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to the Respondent, then the full refund shall be paid to the Complainant. At the time of the return, the Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all

liens in full, the Complainant is responsible for providing the Respondent with clear title to the vehicle;

3. Within 20 calendar days from the receipt of this order, the parties shall complete the return and repurchase of the subject vehicle. If the repurchase of the subject vehicle is not accomplished as stated above, barring a delay based on a party's exercise of rights in accordance with Texas Government Code § 2001.144, starting on the 31st calendar day from receipt of this order, the Respondent is subject to a contempt charge and the assessment of civil penalties. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to the Complainant's refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by the Complainant and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);
4. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the vehicle prior to resale and issue a disclosure statement provided by or approved by the Department's Enforcement Division – Lemon Law Section;
5. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous place, and upon the first retail sale of the vehicle, the disclosure statement shall be completed and returned to the Department's Enforcement Division – Lemon Law Section; and
6. The Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide the Department's Enforcement Division – Lemon Law Section, in writing, the name, address and telephone number of the transferee (wholesale purchaser or equivalent) of the vehicle within 60 calendar days of the transfer.

SIGNED October 30, 2015



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