

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0212 CAF**

**SANDRA TURNER and
JASON TURNER,
Complainants**

v.

**FORD MOTOR COMPANY,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Major Sandra Turner and Mr. Jason Turner (Complainants) seek relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for an alleged defect in their 2014 Ford Edge SEL. The Complainants filed a Lemon Law complaint (Complaint) alleging that the vehicle's SYNC system screen would go blank; the vehicle heater would not function; and the vehicle would exhibit a burning smell. Ford Motor Company (Respondent) contended that the final repair attempt could not verify any issues with the vehicle. The hearings examiner concludes that the vehicle has a warrantable defect that substantially impairs the value of the vehicle. Consequently, the Complainant's 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, held by telephone, convened and the record closed on September 15, 2015, in Austin, Texas, before Hearings Examiner Andrew Kang. The Complainants, represented themselves. Maria Diaz, Consumer Legal Analyst, represented the Respondent.

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.”¹ 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.”² 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).

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.³ 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 The Department applies a reasonable purchaser standard for determining whether the defect substantially impairs the value of the vehicle.⁵ The Lemon Law provides three ways to establish a rebuttable presumption that a reasonable number of repair attempts have been undertaken.⁶ The first applies generally,⁷ the second applies to serious safety hazards,⁸ and the third applies to vehicles out of service for repair for at least 30 days.⁹ In this case, the general presumption appears most applicable.

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

¹ TEX. OCC. CODE § 2301.604(a).

² TEX. OCC. CODE § 2301.204.

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

⁵ “[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).

⁶ TEX. OCC. CODE § 2301.605(a).

⁷ TEX. OCC. CODE § 2301.605(a)(1).

⁸ TEX. OCC. CODE § 2301.605(a)(2).

⁹ TEX. OCC. CODE § 2301.605(a)(3).

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.¹⁰

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.¹¹ 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.¹²

B. Complainant's Evidence and Arguments

On April 19, 2014, the Complainant, Sandra Turner and Jason Turner, purchased a new 2014 Ford Edge SEL from Viva Ford, a franchised dealer of the Respondent, Ford Motor Company, in El Paso, Texas. The vehicle had 19 miles on the odometer at the time of purchase. The vehicle's warranty provides bumper to bumper coverage for three years or 36,000 miles.

Approximately one month after purchasing the vehicle, the SYNC screen blacked out. The Complainants also testified that the vehicle had heater issues and air conditioning issue, in which the vehicle would randomly switch settings. In one instance, on a 100 degree day, the air conditioning switched to heat. The vehicle also exhibited a plastic burning smell. Mr. Turner described the smell as burning celery and noted that the vehicle would also emit smoke. Mr. Turner explained that the transmission smoked and did not shift normally. When Mr. Turner checked the transmission fluid level, he found that the vehicle had almost no transmission fluid. Additionally, the Complainants provided three videos showing the vehicle's clock displaying the wrong time,

¹⁰ 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.

¹¹ "[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).

¹² "[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).

both slower and faster, on June 2, 2015, May 18, 2015, and on another unspecified date. One of the videos also showed that vehicle would display dashes instead of the temperature.¹³

The Complainants took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
July 7, 2014	2,865	SYNC system does not work at times; washer nozzle will not spray ¹⁴
November 13, 2014	7,160	Heater will not work ¹⁵
March 2, 2015	10,091	Plastic burning smell ¹⁶
March 10, 2015	10,091	Plastic burning smell (actual repair for issue identified on March 2, 2015) ¹⁷
April 14, 2015	11,507	Time on clock is incorrect; abnormal smell from engine compartment ¹⁸

Major Turner noted that the repair orders in evidence did not reflect all warranty repair because Casa Ford refused to provide paperwork for the last two service visits to that dealer. Both of these visits addressed the plastic burning smell and the last visit also addressed the clock issue. Ms. Diaz answered that a final repair attempt occurred sometime between June 2, 2015, and June 20, 2015. After the repair on November 13, 2014, the heater functioned temporarily but subsequently failed. On March 10, 2015, the dealer applied the repair prescribed by technical service bulletin 14-0201 to address the plastic burning smell identified during the March 2, 2015, visit. After the March 2-10, 2015, visit, the burning smell improved but would still occur intermittently and later worsened. Mr. Turner believed the burning smell related to the transmission fluid because the transmission fluid level barely showed on the dipstick. Mr. Turner also testified that the low transmission fluid was not a recurring problem. However, Mr. Turner noticed that the transmission shifted slowly and sounded rougher, making clunking sounds. After the April 14, 2015, visit, the clock malfunctioned after a couple of days. The time displayed on the SYNC screen stayed the same and the temperature would not display at all.

¹³ Complainants' Ex. 21; Complainants' Ex. 22; Complainants' Ex. 23.

¹⁴ Complainants' Ex. 13, Viva Ford Service History Detail.

¹⁵ Complainants' Ex. 14, Invoice No. 924543.

¹⁶ Complainants' Ex. 15, Invoice No. 933792.

¹⁷ Complainants' Ex. 16, Invoice No. 934512.

¹⁸ Complainants' Ex. 17, Invoice No. 937692.

On June 2, 2015, at 12,527 miles, the Complainants had the vehicle inspected at an independent repair facility by a technician with no prior knowledge of the vehicle's background. The technician found that: the air conditioner/heater would switch from the floor to vent to defrost without changing the controls and without the controls on the automatic setting; the air conditioner would shut off while driving; the vehicle exhibited a foul smell; the SYNC system would not connect to a Samsung phone; the SYNC system would not stream music from an iPhone; the clock would lose and gain time and lost a total of 30 minutes while in for service.¹⁹

C. Respondent's Evidence and Arguments

The Respondent's final repair attempt occurred between June 2nd and June 20th (2015). The final repair attempt did not reveal any issues and the complained of conditions could not be duplicated at the time.

D. Analysis

In this case the Complainants have shown that a warrantable defect (the burning smell) that substantially impairs the value of the vehicle exists after a reasonable number of repair attempts. Generally, a complainant establishes a presumption of a reasonable number of repairs after at least two repair attempts to fix the defect in the first 12 months or 12,000 miles after delivery and at least two other repair attempts in the 12 months or 12,000 miles immediately after the second repair attempt.²⁰ In this case, the Complainants attempted to have the burning smell addressed under warranty by a dealer on: (1) March 2, 2015, at 10,091 (with warranty repairs actually performed on March 10, 2015), (2) April 14, 2015, at 11,507 miles, (3) an unspecified time and mileage after the April 14th visit, and (4) some date between June 2, 2015, and June 20, 2015. If using the April 14, 2015, visit as the second visit, the second repair visit occurred 11,488 miles and under 12 months after delivery on April 19, 2014, at 19 miles. The next two visits occurred by June 20, 2015, 67 days (approximately two months and one week) and 1,589 miles²¹ after the

¹⁹ Complainants' Ex. 19, Invoice No. 20302.

²⁰ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

²¹ Based on an average of 30.5819 miles per day calculated using the mileage on the delivery date (19 miles on April 19, 2014) and the latest available mileage (12,527 miles), which appears on the June 2, 2015, invoice. Between April 19, 2014, and June 2, 2015, a total of 409 days, the vehicle accrued 12,508 miles, or an average of 30.5819 miles per day (12,508 miles/409 days=30.5819 miles per day).

second visit. Testimony shows that the burning smell continues to exist despite the repairs. Applying the reasonable prospective purchaser standard,²² the burning smell would deter a buyer from buying the vehicle or substantially negatively affect the price a buyer would pay for the vehicle. A prospective buyer may reasonably believe that the burning plastic smell may signify the existence of a fire hazard or that the fumes may cause health issues, thereby deterring the purchase of the vehicle or substantially reducing its purchase price.

III. Findings of Fact

1. On April 19, 2014, the Complainant, Sandra Turner and Jason Turner, purchased a new 2014 Ford Edge SEL from Viva Ford, a franchised dealer of the Respondent, Ford Motor Company, in El Paso, Texas. The vehicle had 19 miles on the odometer at the time of purchase.
2. The vehicle's warranty provides bumper to bumper coverage for three years or 36,000 miles.
3. The vehicle's warranty was in effect at the time of the hearing.
4. The Complainants took the vehicle to a dealer for repair as follows:

Date	Miles	Issue
July 7, 2014	2,865	SYNC system does not work at times; washer nozzle will not spray
November 13, 2014	7,160	Heater will not work
March 2, 2015	10,091	Plastic burning smell
March 10, 2015	10,091	Plastic burning smell (actual repair for issue found on March 2, 2015)
April 14, 2015	11,507	Time on clock is incorrect; abnormal smell from engine compartment

5. The windshield washer issue was resolved prior to the hearing.
6. The Complainants took the vehicle to Casa Ford for a repair attempt after April 14, 2015, but before June 2, 2015.

²² *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

7. On June 2, 2015, at 12,527 miles, the Complainants took the vehicle to an independent repair facility for an inspection. The technician found that: the air conditioner/heater would change from the floor to vent to defrost without changing the controls and without the controls on the automatic setting; the air conditioner would shut off while driving; the vehicle exhibited a foul smell; the SYNC system would not connect to a Samsung phone; the SYNC system would not stream music from an iPhone; the clock would lose and gain time and lost a total of 30 minutes while in for service.
8. A final repair attempt occurred between June 2, 2015, and June 20, 2015.
9. The burning smell issue remains unresolved despite the repair attempts.
10. On March 31, 2015, the Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
11. On June 1, 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.
12. On August 14, 2015, the Complainants mailed a written notice of defect to the Respondent.
13. The hearing in this case, held by telephone, convened and the record closed on September 15, 2015, in Austin, Texas, before Hearings Examiner Andrew Kang. The Complainants, represented themselves. Maria Diaz, Consumer Legal Analyst, represented the Respondent.
14. The vehicle had approximately 15,738 miles at the time of the hearing.
15. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license and registration	\$36,285.81
Delivery mileage	19
Mileage at first report of defective condition	2,865
Mileage on hearing date	15,738
Useful life determination	120,000

Purchase price, including tax, title, license and registration	\$36,285.81		
Mileage at first report of defective condition	2,865		
Less mileage at delivery	<u>-19</u>		
Unimpaired miles	2,846		
Mileage on hearing date	15,738		
Less mileage at first report of defective condition	<u>-2,865</u>		
Impaired miles	12,873		
Reasonable Allowance for Use Calculations:			
Unimpaired miles			
	<u>2,846</u>		
	120,000	×	\$36,285.81 = \$860.58
Impaired miles			
	<u>12,873</u>		
	120,000	×	\$36,285.81 × 50% = <u>\$1,946.28</u>
Total reasonable allowance for use deduction:			\$2,806.86
Purchase price, including tax, title, license and registration	\$36,285.81		
Less reasonable allowance for use deduction	-\$2,806.86		
Plus filing fee refund	<u>\$35</u>		
TOTAL REPURCHASE AMOUNT	\$33,513.95		

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 bear the burden of proof in this matter. 43 TEX. ADMIN. CODE § 215.206.66(d).
6. 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 **\$33,513.95**. The refund shall be paid to the Complainants 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 Complainants are 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 Complainants 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 November 10, 2015



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