

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0233 CAF**

**ALYSON BEISERT,
Complainant**

v.

**FORD MOTOR COMPANY,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Alyson Beisert (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2013 Ford Fiesta. Complainant asserts that the vehicle shudders, hesitates, and revs up between gear shifts. 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 although the vehicle does have a currently existing warrantable defect, Complainant is not eligible for repurchase or replacement relief since she did not meet the presumption that Respondent was provided a reasonable number of repair attempts to conform the vehicle to its warranty which is required for such relief under the Texas Lemon Law.

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 9, 2015, in Houston, Texas before Hearings Examiner Edward Sandoval. Complainant was represented by John Beisert, husband, at the hearing. In addition, Complainant, Alyson Beisert, and Complainant's daughter, Katelyn Beisert, testified. Respondent was represented by Maria Diaz, Legal Analyst for Consumer Affairs.

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

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

owner must have mailed written notice of the alleged defect or nonconformity to the 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

1. John Beisert's Testimony

Complainant purchased a new 2013 Ford Fiesta from Planet Ford, in Spring, Texas on December 29, 2012, with mileage of 36 at the time of delivery.^{5,6} On the date of hearing the vehicle's mileage was 38,073. Respondent provided Complainant with a basic bumper-to-bumper warranty for the vehicle for three (3) years or 36,000 miles, whichever comes first. At this time, Respondent's basic warranty for the vehicle has expired. In addition, Respondent provided a powertrain warranty for five (5) years or 60,000 miles. This warranty is still in effect.

Mr. Beisert testified that the vehicle has transmission issues. Whenever someone drives the vehicle and has to stop or start, the vehicle shudders and hesitates (bogs down). In addition, the engine's RPM's rev up between shifting gears. The problems with the vehicle occur intermittently. Mr. Beisert testified that it seems that the transmission is stuck in a higher gear.

Mr. Beisert testified that his daughter, Katelyn Beisert, is the principal driver of the vehicle. Mr. Beisert took the vehicle to Planet Ford in order to have the vehicle's oil changed on June 5, 2013. At the time, he mentioned to the dealer's service advisor that there was a problem with the vehicle's transmission. Mr. Beisert testified that the dealer's service technician reprogrammed the vehicle's computer at the time, in addition to performing the oil change. The reprogramming

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 Ex. 1, Motor Vehicle Retail Installment Sales Contract dated December 29, 2012.

⁶ Complainant Ex. 2, Repair Order dated November 27, 2012.

of the computer was not included on the repair order.⁷ In addition, the service advisor informed Mr. Beisert that the vehicle's transmission would take some time to learn the driver's driving habits. The vehicle's mileage on this occasion was 3,068.⁸ The vehicle was in the dealer's possession for only a couple of hours.

On May 1, 2014, Mr. Beisert took the vehicle to Planet Ford for an oil change. During this visit, Mr. Beisert notified the dealer's service advisor that the vehicle was not operating properly and that they were still experiencing problems with the transmission. The vehicle's computer was reprogrammed during this visit. However, the work performed was not included on the repair order received by Complainant.⁹ The vehicle's mileage when it was taken to the dealership on this occasion was 13,251.¹⁰ Mr. Beisert was informed by the service advisor that the transmission took some time to adapt to the driver's driving habits and that there was not anything wrong with the vehicle.

Mr. Beisert testified that his family has a home in Somerville, Texas. In February of 2015, the vehicle died while the family was at the Somerville house. In addition, the vehicle's transmission trouble light illuminated. Mr. Beisert was able to drive the vehicle to Appel Ford Mercury in Brenham, Texas for repairs on February 16, 2015. Mr. Beisert testified that he was unsure if any parts were replaced during this repair visit. However, Mr. Beisert was informed that the dealer's service technician reprogrammed the vehicle's Power Control Module (PCM) and Transmission Control Module (TCM).¹¹ Mr. Beisert was told by the service advisor to give the vehicle up to 1,000 miles in order to complete the vehicle's adaptive learning process. The mileage on the vehicle when Complainant took it to the dealership on this occasion was 30,860.¹² The vehicle was returned to Complainant on February 19, 2015. Mr. Beisert was provided a rental vehicle while his vehicle was being repaired.

On March 16, 2015, Mr. Beisert took the vehicle to Planet Ford for repair because the transmission trouble light illuminated and because the vehicle's transmission would not shift into reverse gear. The dealer's service technician determined that the vehicle's clutch engagement bearing was broken and that there was wear on the vehicle's clutch forks.¹³ As a result, the technician replaced the vehicle's clutch assembly, bearings, and seals.¹⁴ The vehicle's mileage when it was first delivered to the dealer on this occasion was 34,290.¹⁵ The vehicle was in the dealer's possession until March 20, 2015. Mr. Beisert was provided a rental vehicle while his vehicle was being repaired.

⁷ Complainant Ex. 3, Repair Order dated June 5, 2013.

⁸ *Id.*

⁹ Complainant Ex. 4, Repair Order dated May 1, 2014.

¹⁰ *Id.*

¹¹ Complainant Ex. 5, Repair Order dated February 16, 2015.

¹² *Id.*

¹³ Complainant Ex. 6, Repair Order dated March 16, 2015.

¹⁴ *Id.*

¹⁵ *Id.*

On April 14, 2015, Complainant mailed a letter to Respondent advising them of Complainant's dissatisfaction with the vehicle.¹⁶ In addition, Complainant filed a Lemon Law complainant with the Texas Department of Motor Vehicles (TxDMV) on April 20, 2015.¹⁷

Mr. Beisert testified that on April 24, 2015, Katelyn Beisert had trouble with the vehicle's driver's side door not latching. She immediately took the vehicle to College Station Ford Lincoln in College Station, Texas for repair. The vehicle's driver's side door latch assembly was replaced by the dealer's service technician.¹⁸ The mileage on the vehicle on this occasion was 35,939.¹⁹

Mr. Beisert made provisions to allow Respondent to inspect the vehicle in June of 2015. So, on June 15, 2015, Mr. Beisert took the vehicle to Planet Ford for the inspection. The vehicle was in Planet Ford's possession until June 25, 2015. He was provided with a rental vehicle while his vehicle was being repaired. On June 22, 2015, Mr. Beisert received a call from a dealer representative that there was something strange with the vehicle. Mr. Beisert was told that there were several codes stored in the vehicle's computer twenty-two of the last twenty-six times it was driven of "brake over accelerator" which would indicate that the driver was driving with two feet.²⁰ He was informed that this type of driving could interfere with the vehicle's adaptive learning program.²¹ The vehicle's mileage at the time of the final repair attempt was 37,277.²²

Mr. Beisert testified that the problems with the vehicle's transmission are intermittent. He stated that on the way to the hearing location the vehicle acted up five or six times. He stated that it feels that that the transmission is stuck in high gear and doesn't down shift properly.

Mr. Beisert testified that he was informed verbally of an extended warranty for the vehicle. He was also provided with a report indicating that the vehicle had been provided with an extended warranty for the transmission input shaft seal and TCM.²³ Mr. Beisert was of the opinion that the extended warranty was good for 100,000 miles.

¹⁶ Complainant Ex. 10, Letter to Ford Motor Company dated April 14, 2015.

¹⁷ Complainant Ex. 9, Lemon Law complaint signed April 15, 2015. Although the complaint is signed on April 15, 2015, the effective date of the complaint is the date that it was received by the Texas Department of Motor Vehicles, April 20, 2015.

¹⁸ Complainant Ex. 8, Repair Order dated April 24, 2015.

¹⁹ *Id.*

²⁰ Complainant Ex. 11, Repair Order dated June 17, 2015.

²¹ *Id.*

²² *Id.*

²³ Complainant Ex. 13, Oasis Result dated March 26, 2015.

2. Alyson Beisert's Testimony

Alyson Beisert testified that she rarely drives the vehicle. She has not been in the vehicle when the transmission has hesitated or shuddered. The vehicle was purchased for her daughter, Katelyn Beisert, to drive.

Ms. Beisert testified that she spoke to Respondent's representative about a final repair attempt on the vehicle. The vehicle was dropped off at Planet Ford on June 15, 2015. She received a call on June 22, 2015, that the vehicle was ready for pick up. However, the representatives from Planet Ford did not release the vehicle back to Ms. Beisert until June 25, 2015, because they had not received a report from Respondent's field service engineer.

Ms. Beisert testified that she and her daughter were returning to their home from College Station, Texas in March of 2015, in separate vehicles. Complainant's vehicle began to stall and stutter while driving through Tomball, Texas. The vehicle's transmission would not shift into reverse or drive. Ms. Beisert and her daughter had to push the vehicle off the road because it was not running. She took the vehicle to Planet Ford on March 16, 2015, for repair.

Ms. Beisert testified that her daughter had the vehicle while she was attending college in College Station. The delays in getting repairs performed on the vehicle were because her daughter was away at school. In addition, the vehicle had not accumulated the mileage that they had been informed that the vehicle needed in order to learn her daughter's driving habits. Ms. Beisert testified that it seems risky to have to wait 2,000 miles for the transmission to learn. She was informed by a dealer representative that if the vehicle's transmission continued to act up, they could be given an extended warranty on the vehicle.

3. Katelyn Beisert's Testimony

Katelyn Beisert testified that she is the primary driver of the vehicle. She began noticing issues with the way the vehicle drove shortly after it was purchased. She's never been happy with the way the vehicle drives. About a month after purchasing the vehicle, it began to jerk while she drove it. The vehicle's RPM's would rev up and the vehicle would not be moving. The vehicle acts up more in stop and go traffic. Ms. Beisert testified that there have been occasions where she's driven the vehicle and it's not been responsive. It's as if the vehicle has shifted into neutral by itself. However, the gear shift indicator indicates that the vehicle is still in drive. On those occasions, she will shift the transmission into neutral and then back into driven to get the vehicle to respond. Ms. Beisert indicated that the last time this type of incident occurred was a few weeks before the hearing. She feels that the vehicle is still acting up.

In March of 2015, Ms. Beisert was driving the vehicle on a trip from College Station to her home. She was following her mother who was in another vehicle. During this trip, whenever Ms. Beisert stopped at a stop sign or stop light, the vehicle would roll because the brakes wouldn't

work. It seemed to Ms. Beisert that the vehicle's brakes were locked. When the vehicle was taken to Planet Ford on March 15, 2015, Ms. Beisert mentioned to the dealer's service technician that the brakes did not seem to be working right. However, no brake issues were included on the repair order for this repair visit.

In April of 2015, Ms. Beisert was in College Station, Texas and was leaving a store, when the vehicle's driver's side door latch failed to work. She attempted to close the door, but the latch would not hold. As a result, Ms. Beisert had to drive the vehicle to Respondent's local authorized dealer, College Station Ford Lincoln, for repair. During the drive, Ms. Beisert was required to hold the door closed, so that it wouldn't fly open. Ms. Beisert testified that she was told that Respondent had issued a recall for the door latch for her vehicle. The door latch assembly was replaced on April 24, 2015.²⁴

Ms. Beisert testified that every time that she and her father took the vehicle to a dealer for repair, they would raise the issue of the vehicle's transmission acting unusually. However, these complaints weren't always put on the repair orders.

C. Respondent's Evidence and Arguments

Maria Diaz, Legal Analyst for Legal Affairs, testified for Respondent. She stated that she first became aware of Complainant's concerns with the vehicle when she received the Lemon Law complaint on May 15, 2015. Ms. Diaz contacted Complainant on June 3, 2015, to arrange for a final repair attempt on the vehicle. The final repair attempt was performed on June 17, 2015, at Planet Ford in Spring, Texas. Brian Jay, Field Service Engineer, performed the final repair attempt. Mr. Jay was unable to duplicate Complainant's concerns and determined that the vehicle's clutch and transmission were operating normally.²⁵ Mr. Jay concluded that the vehicle had been repaired on March 16, 2015, that the latest clutch assembly had been installed in the vehicle, and that the transmission was shifting normally.²⁶

Ms. Diaz also testified that the Respondent provided a bumper-to-bumper warranty for the vehicle for three (3) years or 36,000 miles, a powertrain warranty for five (5) years or 60,000 miles, and a transmission warranty for the DP6 transmission for five (5) years or 100,000 miles.

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

²⁴ Complainant Ex. 8, Repair Order dated April 24, 2015.

²⁵ Respondent Ex. 1, FSE Vehicle Inspection Report dated June 17, 2015.

²⁶ *Id.*

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 December 29, 2012 and presented the vehicle to an authorized dealer of Respondent due to her concerns with the transmission on the following dates: June 5, 2013; May 1, 2014; February 26, 2015; and March 16, 2015. 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 2301.605(a)(1) 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. Complainant did not present the vehicle for repairs to an authorized dealer for Respondent on two occasions within the first year or 12,000 miles from purchase. In addition, the third repair attempt was performed after the vehicle had been driven more than 17,000 miles after the second repair attempt. As such, Complainant was unable to establish that a reasonable number of attempts to repair the vehicle were made by Respondent. In order to grant repurchase or replacement relief, Complainant must have provided Respondent with a reasonable number of repair attempts to conform the vehicle to its warranty. Since Respondent was not provided an adequate opportunity to repair the vehicle, the hearings examiner cannot award repurchase or replacement relief.

Respondent's express warranty applicable to Complainant's vehicle provides bumper-to-bumper coverage for three (3) years or 36,000 miles whichever comes first. In addition, the powertrain warranty provides coverage for five (5) years or 60,000 miles. Also, Respondent has provided an additional warranty for the vehicle's transmission which is good for five (5) years or 100,000 miles. On the date of hearing, the vehicle's mileage was 38,073 and the basic warranty coverage has expired. However, the vehicle's powertrain and transmission warranties are still in effect. In addition, the first hand testimony presented by Complainant indicates that the vehicle is still not driving as designed. As such, Respondent is hereby ordered to perform any necessary repairs to conform Complainant's vehicle to the warranty.

Complainant's request for repurchase or replacement relief is denied. Respondent will be ordered to repair the vehicle so that it conforms to its express warranty.

III. FINDINGS OF FACT

1. Alyson Beisert (Complainant) purchased a new 2013 Ford Fiesta on December 29, 2012 from Planet Ford, in Spring, Texas, with mileage of 36 at the time of delivery.
2. The manufacturer of the vehicle, Ford Motor Company (Respondent) issued a bumper-to-bumper warranty for three (3) years or 36,000 miles, whichever occurs first, a separate powertrain warranty for five (5) years or 60,000 miles, and a five (5) year or 100,000 mile warranty for the DP6 transmission.
3. The vehicle's mileage on the date of hearing was 38,073.
4. At the time of hearing the vehicle's basic bumper-to-bumper warranty was expired.
5. Respondent's powertrain and transmission warranties are still in effect.
6. Complainant feels that the vehicle shudders, hesitates, and revs up between gear shifts.
7. Complainant took the vehicle to Respondent's authorized dealers in order to address her concerns with the vehicle, on the following dates:
 - a. June 5, 2013, at 3,068 miles;
 - b. May 1, 2014, at 13,251 miles;
 - c. February 16, 2015, at 30,860 miles; and
 - d. March 16, 2015, at 34,290 miles.
8. On June 5, 2013, Planet Ford's service technician performed an oil change on the vehicle. In addition, the technician reprogrammed the vehicle's computer.
9. On May 1, 2014, Planet Ford's service technician performed an oil change on the vehicle. In addition, the technician reprogrammed the vehicle's computer.
10. On February 16, 2015, Appel Ford Mercury's service technician reprogrammed the vehicle's power control module (PCM) and transmission control module (TCM). In addition, the technician performed adaptive learning on the vehicle.
11. On March 16, 2015, Planet Ford's service technician replaced the vehicle's clutch assembly, bearings, and seals.
12. On April 20, 2015, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).

13. On June 17, 2015, Respondent's field service engineer performed a final repair attempt on the vehicle. The engineer was unable to duplicate Complainant's concerns and determined that the vehicle's clutch and transmission were operating normally.
14. On June 12, 2015, 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.
15. The hearing in this case convened and the record closed on September 9, 2015, in Houston, Texas before Hearings Examiner Edward Sandoval. Complainant was represented by John Beisert, husband, at the hearing. In addition, Complainant, Alyson Beisert, and Complainant's daughter, Katelyn Beisert, testified. Respondent was represented by Maria Diaz, Legal Analyst for Consumer Affairs.

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 proved 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. Complainant did not meet the presumption that a reasonable number of repair attempts were undertaken by Respondent prior to the filing of the Lemon Law complaint. Tex. Occ. Code § 2301.605(a)(1).

8. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code § 2301.204.
9. 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**. Respondent is hereby **ORDERED** to repair Complainant's vehicle so that it conforms to Respondent's express warranty pursuant to Texas Occupations Code § 2301.204.

SIGNED October 12, 2015



**EDWARD SANDOVAL
CHIEF HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES**