

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0217 CAF**

**WILLIAM T. STRUCK,
Complainant**

v.

**FORD MOTOR COMPANY,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

William T. Struck (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2015 Ford Explorer. Complainant asserts that the vehicle's transmission will downshift without warning and will not go back into the proper gear while he is driving the vehicle. Ford Motor Company (Respondent) argued that the vehicle does not have a defect and that no relief is warranted. The hearings examiner concludes that the vehicle does have an existing warrantable defect and Complainant is eligible for repurchase 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 the record closed on September 7, 2016, in Houston, Texas before Hearings Examiner Edward Sandoval. Complainant, William T. Struck, was present and was represented by Kevin Bell, attorney, at the hearing. Paul Scanlin, Mac Haik Ford's Fixed Operations Manager, and Billy G. Wilson, Complainant's friend, testified for Complainant. Also present and observing was Chandler Headington, paralegal. Respondent was represented by Amanda Bemiller, Legal Analyst.

II. DISCUSSION

A. Applicable Law

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met. First, the manufacturer is not able to conform the vehicle to an applicable express warranty by repairing or correcting a defect after a reasonable number of attempts.¹ Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.² Third, the owner must have mailed written notice of the alleged defect or

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

nonconformity to the manufacturer.³ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁴

In addition to these 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.⁵

However, if a vehicle is found to have a nonconformity that creates a serious safety hazard which continues to exist, the rebuttable presumption that a reasonable number of repair attempts have been performed can be established if the vehicle has been subject to repair two or more times and: (1) at least one repair attempt was made during the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) at least one other attempt was made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the first repair attempt.⁶

B. Complainant's Evidence and Arguments

1. William T. Struck's Testimony

Complainant purchased a new 2015 Ford Expedition demonstrator vehicle from Mac Haik Ford (Mac Haik) located in Houston, Texas on June 24, 2015, with mileage of 4,147 at the time of delivery.⁷ Respondent's bumper-to-bumper warranty for the vehicle provided coverage for three (3) years or 36,000 miles, whichever comes first. In addition, Respondent provided a powertrain warranty for the vehicle good for five (5) years or 60,000 miles. On the date of hearing the vehicle's mileage was 58,899. At this time, Respondent's bumper-to-bumper warranty for the vehicle has expired.

Complainant testified that the vehicle's transmission will intermittently downshift from sixth gear unexpectedly when he's driving and will then be stuck in first or second gear. The transmission will be stuck in the lower gear until Complainant can pull the vehicle to the side of the road and place the transmission in park. Afterwards the transmission operates normally for a while. Complainant stated that this problem may occur two (2) or three (3) times in a day and

³ Tex. Occ. Code § 2301.606(c)(1).

⁴ Tex. Occ. Code § 2301.606(c)(2).

⁵ Tex. Occ. Code § 2301.605(a)(1)(A) and (B).

⁶ Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

⁷ Complainant Ex. 2, Vehicle Purchase Order dated June 24, 2015.

then may not recur for several days. The last time that Complainant experienced the problem prior to the hearing date was on September 5, 2016. On that date, Complainant was driving the vehicle on Interstate 10 in Houston. The vehicle was traveling at 70 mph when the transmission downshifted and the vehicle's speed decreased to about 45 mph. Complainant had to try to maintain the vehicle's speed while he was pulling the vehicle over to the side of the road in order to correct the problem.

Complainant stated that the first time he had trouble with the vehicle's transmission was a few weeks after he purchased the vehicle. Complainant was in Baton Rouge, Louisiana and driving on the highway. The transmission downshifted from sixth gear to first gear. Complainant called the dealer and told Paul Scanlin, Mac Haik's Fixed Operations Manager, about the problem. Mr. Scanlin advised Complainant to turn off the vehicle and then restart it. He also advised Complainant to take the vehicle Mac Haik when he returned to Houston.

On September 8, 2015, Complainant took the vehicle to Mac Haik for repair for the transmission issue. Mac Haik's service technician could not find any problem with the vehicle's transmission nor could he find any diagnostic trouble codes (DTC's) stored on the vehicle's computers.⁸ The vehicle's mileage on this occasion was 13,928.⁹

Complainant testified that the problem with the vehicle's transmission occurred again a few days after taking the vehicle to Mac Haik. Complainant contacted Mr. Scanlin again and was told to keep driving the vehicle until an error code came up.

Complainant took the vehicle to Mac Haik for repair to the transmission on December 3, 2015. Complainant informed the dealer's service advisor that the transmission did not want to shift gears and that the check engine light (CEL) was illuminated.¹⁰ In addition, Complainant informed the service advisor about the problem with the transmission downshifting and refusing to upshift.¹¹ Mac Haik's service technician verified the problem with the transmission refusing to shift and determined that the problem was being caused by the mechatronic lead frame which was replaced by the technician.¹² However, the technician could not duplicate the problem of the transmission downshifting and refusing to upshift.¹³ The vehicle's mileage when it was taken to the dealership on this occasion was 25,090.¹⁴ The vehicle was in the dealer's possession for eleven (11) days on this occasion.¹⁵ Complainant was provided a loaner vehicle while his vehicle was being repaired.

⁸ Complainant Ex. 3, Repair Order dated September 8, 2015.

⁹ *Id.*

¹⁰ Complainant Ex. 4, Repair Order dated December 3, 2015.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

Complainant testified that the problem with the vehicle's transmission recurred while he was working in College Station, Texas. In addition, the vehicle's CEL illuminated. So, on December 21, 2015, Complainant took the vehicle to Mac Haik for repair. Mac Haik's service technician determined that the vehicle's right UEGO sensor was frozen and replaced it.¹⁶ The vehicle's mileage when it was delivered to the dealer on this occasion was 26,603.¹⁷ The vehicle was in the dealer's possession for two (2) days. Complainant received a loaner vehicle while his vehicle was being repaired.

The transmission problem occurred again a few months later. On March 1, 2016, Complainant took the vehicle to Mac Haik for repair to the vehicle's transmission. Mac Haik's service technician verified the issue and indicated that the vehicle's transmission shaft speed (TSS) was showing a fault and an erratic reading.¹⁸ The technician replaced the vehicle's mechatronic lead frame in order to resolve the issue.¹⁹ The vehicle's mileage when it was delivered to the dealer on this occasion was 35,114.²⁰ The vehicle was in the dealer's possession for three (3) days.²¹ Complainant was provided with a rental vehicle while his vehicle was being repaired.

On March 28, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).²² On March 15, 2016, Complainant's attorney wrote a letter to Respondent advising them of the problems with the vehicle's transmission.²³

On April 19, 2016, Complainant took the vehicle to Mac Haik at Respondent's request for inspection by Respondent's engineer. The engineer could not duplicate Complainant's concern with the vehicle and performed no repair to it.²⁴ The vehicle's mileage on this occasion was 40,375.²⁵ Complainant did not receive a loaner or rental vehicle during this visit because he was working out of town and did not need one.

Complainant stated that several weeks after the inspection by Respondent's engineer, he was driving the vehicle to Corpus Christi, Texas. He was driving at night and it was raining heavily when the vehicle's transmission downshifted from sixth gear to third gear and refused to upshift as designed. Complainant pulled the vehicle to the side of the road and placed the transmission in

¹⁶ Complainant Ex. 5, Repair Order dated December 21, 2015.

¹⁷ *Id.*

¹⁸ Complainant Ex. 6, Repair Order dated March 1, 2016.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Complainant Ex. 7, Lemon Law Complaint dated March 28, 2016. Complainant signed the complaint on March 15, 2016, but it was not received by Texas Department of Motor Vehicles until March 28, 2016, which is the effective date of the complaint.

²³ Complainant Ex. 8, Letter to Ford Motor Company dated March 15, 2016.

²⁴ Complainant Ex. 9, Repair Order dated April 19, 2016.

²⁵ *Id.*

park which cleared the problem. Complainant continued on his journey and the problem recurred a few minutes later, but this time the transmission shifted from sixth gear to second gear and refused to upshift again. Complainant had to pull over to the side of the road and place the transmission in park in order to clear the problem.

2. Billy Wilson's Testimony

Billy Wilson, Complainant's friend, testified that he was a passenger in the vehicle driven by Complainant on August 15, 2016. They were driving to Corpus Christi on this occasion. Mr. Wilson observed that the vehicle's transmission downshifted from sixth gear to second gear for no apparent reason. He stated that the transmission refused to upshift again. Complainant had to pull the vehicle to the side of the road and place the transmission in park before it would upshift again. It was raining heavily at the time and Mr. Wilson indicated that the incident was very scary as visibility was limited.

3. Paul Scanlin's Testimony

Paul Scanlin, Fixed Operations Manager for Mac Haik, testified for Complainant. Mr. Scanlin stated that he was aware of Complainant's concerns regarding the vehicle. He saw videos and pictures provided by Complainant showing the problems that were occurring with the vehicle's transmission. Mr. Scanlin testified that the dealer's technicians could not find an error code for the transmission and they were not able to recreate the problem described by Complainant. Mr. Scanlin feels that Complainant was truthful in his complaints. He doesn't feel that the vehicle's transmission is operating normally. Mr. Scanlin believes that the problem with the transmission should not be occurring.

C. Respondent's Evidence and Arguments

Amanda Bemiller, Legal Analyst, testified for Respondent. Ms. Bemiller testified that Respondent received the Lemon Law complaint from the Department on April 14, 2016. Respondent contacted the Department on April 18, 2016, and indicated that they wished to proceed to hearing. A final repair attempt on the vehicle was scheduled with Complainant for April 19, 2016, at Mac Haik. Brian Jay, Field Service Engineer, performed the final repair attempt. Mr. Jay drove the vehicle for 46 miles during the repair attempt.²⁶ He determined that the vehicle was driving normally and that no repairs were needed at the time.²⁷

²⁶ Respondent Ex. 1, FSE Vehicle Inspection Report dated April 19, 2016.

²⁷ *Id.*

Ms. Bemiller also stated that the Respondent's warranty for the vehicle provided coverage for three (3) years or 36,000 miles and the powertrain warranty provided coverage for five (5) years or 60,000 miles.

During cross-examination, Ms. Bemiller stated that if the vehicle was operating as described by Complainant, that she would not drive the vehicle nor would she allow her family to ride in the vehicle.

D. Analysis

Under the 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.

The evidence establishes the existence of a defect or nonconformity in Complainant's vehicle that creates a serious safety hazard. A vehicle in which the transmission unexpectedly downshifts while it is being driven creates obvious safety issues. The intermittent nature of the condition also increases the safety risk. The sudden deceleration of Complainant's vehicle is likely to surprise and confuse other drivers and can increase the risk of traffic accidents. Complainant has met his burden of proof to establish a warrantable and existing defect or condition that creates a serious safety hazard.

Complainant purchased the vehicle on June 24, 2015, and presented the vehicle to Mac Haik due to his concerns with the vehicle's transmission on: September 8, 2015; December 3, 2015; December 21, 2015; and March 1, 2016. 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)(2) specifies that a rebuttable presumption that a reasonable number of attempts to repair a vehicle that has a defect or nonconformity that creates a serious safety hazard have been made if "at least one repair attempt to repair the nonconformity was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner, and at least one other repair attempt was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt." The evidence presented at the hearing establishes that Complainant has met the requirements of this test since he took the vehicle for repair for the transmission at 9,781 miles (September 8, 2015) after he obtained delivery of the vehicle and the second repair on December 3, 2015, was performed after the vehicle was driven an additional 11,162 miles after the first

repair attempt. As such, Complainant has established that a reasonable number of attempts to repair the vehicle were made by Respondent.

In addition, the evidence presented at the hearing indicates that Complainant also provided Respondent with a final opportunity to cure the defect. Complainant informed Respondent via letter dated March 15, 2016, of the issues with the vehicle and providing them with an opportunity to cure of which Respondent availed themselves. The vehicle was inspected and a final repair attempt was performed on April 19, 2016, by Respondent's representative who determined that the vehicle did not require any repairs. However, the problem with the vehicle's transmission still persisted after the final repair attempt.

Although Respondent has been provided several opportunities to repair the vehicle and to ensure that it operates properly, they have not been able to do so. As such, Complainant has met his burden of proof to establish that the vehicle has a warrantable and existing defect or condition that creates a serious safety hazard.

Complainant also requested that he be reimbursed \$2000 for reasonable attorney fees. This was based on eight (8) hours of work by his attorney, Kevin Bell, at \$250 per hour. However, Complainant initiated the hiring of an attorney to represent him in this matter. Respondent never was represented by counsel in the complaint process. As such, Complainant is not entitled to reimbursement for attorney fees. 43 Tex. Admin. Code § 215.209(a)(6).

Based on the evidence and the arguments presented, the hearings examiner finds that repurchase of the vehicle is the appropriate remedy in this case. Complainant's request for repurchase relief is hereby granted.

III. FINDINGS OF FACT

1. William T. Struck (Complainant) purchased a new 2015 Ford Expedition demonstrator vehicle on June 24, 2015, from Mac Haik Ford (Mac Haik), in Houston, Texas with mileage of 4147 at the time of delivery.
2. The manufacturer of the vehicle, Ford Motor Company (Respondent), issued a bumper-to-bumper warranty for the vehicle for three (3) years or 36,000 miles, whichever occurs first. In addition, Respondent provided a five (5) year or 60,000 mile warranty for the vehicle's powertrain.
3. The vehicle's mileage on the date of hearing was 58,899.
4. At the time of hearing the vehicle's bumper-to-bumper warranty was expired.

5. The vehicle's transmission intermittently will downshift from sixth gear to first or second gear when Complainant is driving and will not upshift again without Complainant having to place the transmission in park.
6. Complainant took the vehicle to Respondent's authorized dealer, Mac Haik, in order to address his concerns with the vehicle's transmission, on the following dates:
 - a. September 8, 2015, at 13,928 miles;
 - b. December 3, 2015, at 25,090 miles;
 - c. December 21, 2015, at 26,603 miles; and
 - d. March 1, 2016, at 35,114 miles.
7. Respondent, through its authorized dealer, undertook a reasonable number of attempts to conform Complainant's vehicle to an applicable express warranty, but the nonconformity in the vehicle continues to exist.
8. Complainant provided written notice of the defect to Respondent on March 15, 2016, and Respondent was given the opportunity to perform a final repair on the vehicle on April 19, 2016.
9. On March 28, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
10. On June 20, 2016, 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.
11. The hearing in this case convened and the record closed on September 7, 2016, in Houston, Texas before Hearings Examiner Edward Sandoval. Complainant, William T. Struck, was present and was represented by Kevin Bell, attorney, at the hearing. Paul Scanlin, Mac Haik Ford's Fixed Operations Manager, and Billy G. Wilson, Complainant's friend, testified for Complainant. Also present and observing was Chandler Headington, paralegal. Respondent was represented by Amanda Bemiller, Legal Analyst.

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's vehicle has an existing nonconformity that creates a serious safety hazard. Tex. Occ. Code § 2301.604(a).
7. After a reasonable number of attempts, Respondent has been unable to repair the nonconformity in Complainant's vehicle so that it conforms to the applicable express warranty. Tex. Occ. Code §§ 2301.604(a) and 2301.605.
8. Based on the above Findings of Fact and Conclusions of Law, Complainant is entitled to relief under Texas Occupations Code § 2301.604(a).
9. Based on the above Findings of Fact and Conclusions of Law, Respondent is required to repurchase Complainant's 2015 Ford Expedition. Tex. Occ. Code § 2301.604(a)(1).
10. Complainant is not entitled to attorney fees, since Respondent was not represented by counsel. 43 Tex. Admin. Code § 215.209(a)(6).

IT IS THEREFORE ORDERED that:

1. Respondent shall accept the return of the vehicle from Complainant. Respondent shall have the right to have its representatives inspect the vehicle upon the return by 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 this final order;

- Respondent shall repurchase the subject vehicle in the amount of **\$42,267.08** which shall be paid to Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to Respondent, then the full refund shall be paid to Complainant. At the time of return, 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, Complainant is responsible for providing Respondent with clear title to the vehicle;

Purchase price, including tax, title, license and registration	\$57,764.14
Delivery mileage	4,147
Mileage at first report of defective condition	13,928
Mileage on hearing date	58,899
Useful life determination	120,000

Purchase price, including tax, title, license and registration					\$57,764.14
Mileage at first report of defective condition					13,928
Less mileage at delivery					<u>-4,147</u>
Unimpaired miles					9,781
Mileage on hearing date					58,899
Less mileage at first report of defective condition					<u>-13,928</u>
Impaired miles					44,971
Reasonable Allowance for Use Calculations:					
Unimpaired miles					
	<u>9,781</u>				
	120,000	X	\$57,764.14	=	\$4,708.26
Impaired miles					
	<u>44,971</u>				
	120,000	X	\$57,764.14	X .5	= <u>\$10,823.80</u>
Total reasonable allowance for use deduction:					\$15,532.06
Purchase price, including tax, title, license and registration					\$57,764.14
Less reasonable allowance for use deduction					\$15,532.06
Plus filing fee refund					<u>\$35.00</u>
TOTAL REPURCHASE AMOUNT					\$42,267.08

11. Within twenty (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, 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 Complainants' refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by Complainants and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);.
4. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the reacquired vehicle prior to resale and issue a disclosure statement on a form provided or approved by the Department,²⁸
5. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous. Upon Respondent's first retail sale of the reacquired vehicle, the disclosure statement shall be completed and returned to the Department.
6. Within sixty (60) days of transfer of the reacquired vehicle, Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide to the Department written notice of the name, address and telephone number of any transferee (wholesaler or equivalent), regardless of residence.

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 **GRANTED**. It is further **ORDERED** that Respondent shall repair the warrantable defect in the reacquired vehicle identified in this Decision.

SIGNED September 29, 2016



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

²⁸ Correspondence and telephone inquiries regarding disclosure labels should be addressed to: Texas Department of Motor Vehicles, Enforcement Division-Lemon Law Section, 4000 Jackson Avenue Building 1, Austin, Texas 78731, ph. (512) 465-4076.