

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 18-0189428 CAF**

**SANTIAGO FLORES,
Complainant**

v.

**FORD MOTOR COMPANY,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

CORRECTED DECISION AND ORDER

Santiago Flores (Complainant) filed a complaint with the Texas Department of Motor Vehicles (Department) seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his vehicle manufactured by Ford Motor Company (Respondent). A preponderance of the evidence shows that the subject vehicle has warrantable defects that qualify for warranty repair but does not qualify for repurchase/replacement.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ 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 February 12, 2019, in Houston, Texas, before Hearings Examiner Andrew Kang, and the record closed on *February 20, 2019*, the due date for written submissions from the Respondent. J. Kyle Beale, attorney, represented the Complainant. The Complainant testified for himself. Anthony Gregory, consumer affairs legal analyst, represented and testified for the Respondent. Asad Bashir, automotive consultant, also testified for the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief Requirements

A vehicle qualifies for repurchase or replacement if the respondent cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”² In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must currently exist after a “reasonable number of attempts” at repair.³ In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a mailed written notice of the defect to the respondent, (2) an opportunity to repair by the respondent, and (3) a deadline for filing a Lemon Law complaint.

a. Serious Safety Hazard

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

b. Substantial Impairment of Use or Value

i. Impairment of Use

In determining substantial impairment of use, the Department considers “whether a defect or nonconformity hampers the intended normal operation of the vehicle.” For instance, “while a vehicle with a non-functioning air conditioner would be available for use and transporting passengers, its intended normal use would be substantially impaired.”⁵

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

⁵ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

ii. Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. The reasonable purchaser standard “does not require an owner to present an expert witness or any technical or market-based evidence to show decreased value.” Instead, under this standard, “factfinders 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.”⁶

c. Reasonable Number of Repair Attempts

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 franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁷

Alternatively, for serious safety hazards, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times by the manufacturer, converter, or distributor or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁸

Additionally, for vehicles out of service at least 30 days, a rebuttable presumption may be established that the vehicle had a reasonable number of repair attempts if:

⁶ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012) (“[T]he Division’s interpretation that expert testimony or technical or market-based evidence is not required to show diminished value or use is consistent with the statute’s goal of mitigating manufacturers’ economic advantages in warranty-related disputes.”).

⁷ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

⁸ TEX. OCC. CODE § 2301.605(a)(2).

[A] nonconformity still exists that substantially impairs the vehicle's use or market value, the vehicle is out of service for repair for a cumulative total of 30 or more days, and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁹

The 30 days described above does not include any period when the owner has a comparable loaner vehicle provided while the dealer repairs the subject vehicle.¹⁰

The existence of a 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 indicating that if a consumer presents the vehicle to a dealer for repair and the dealer fails to repair the vehicle, then that visit would constitute a repair attempt unless the consumer was at fault for the failure to repair the vehicle.¹²

d. Other Requirements

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner, someone on behalf of the owner, or the Department provided written notice of the alleged defect or nonconformity to the respondent;¹³ (2) the respondent was given an opportunity to cure the defect or nonconformity;¹⁴ and (3) the Lemon Law complaint was filed within six months after the earliest of: the warranty's

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ TEX. OCC. CODE § 2301.605(c).

¹¹ *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ) (“[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.’”).

¹² *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication) (Repair attempts include “those occasions when the fault for failing to repair the vehicle rests with the dealership.” Conversely, “those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.”).

¹³ TEX. OCC. CODE § 2301.606(c)(1).

¹⁴ A respondent may delegate its opportunity to cure to a dealer. A repair visit to a dealer satisfies the opportunity to cure requirement when the respondent allows a dealer to attempt repair after written notice to the respondent. *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 221 and 226 (Tex. App.—Austin 2012); Texas Department of Transportation, *Kennemer v. Dutchman Manufacturing, Inc.*, MVD Cause No. 09-0091 CAF (Motor Vehicle Division Sept. 25, 2009) (Final Order Granting Chapter 2301, Subchapter M Relief). An opportunity to cure does not require an actual repair attempt but only a valid opportunity. *Id* at 2.

expiration date or the dates on which 24 months or 24,000 miles had passed since the date of original delivery of the motor vehicle to an owner.¹⁵

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair if the vehicle has a “defect . . . that is covered by a manufacturer’s, converter’s, or distributor’s . . . warranty agreement applicable to the vehicle” and the vehicle owner notified the manufacturer, converter, distributor, or its authorized agent of the defect before the warranty’s expiration.¹⁶ The manufacturer, converter, or distributor has an obligation to “make repairs necessary to conform a new motor vehicle to an applicable . . . express warranty.”¹⁷

3. Burden of Proof

The law places the burden of proof on the Complainant.¹⁸ The Complainant must prove all facts required for relief by a preponderance of the evidence. That is, the Complainant must present sufficient evidence to show that every required fact more likely than not exists.¹⁹ Accordingly, the Complainant cannot prevail where the existence of any required fact appears equally likely or unlikely.

4. The Complaint Identifies the Issues in this Proceeding

The complaint identifies the issues to be addressed in this proceeding.²⁰ The complaint must state “sufficient facts to enable the department and the party complained against to know the nature of the complaint and the specific problems or circumstances forming the basis of the claim

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

¹⁶ TEX. OCC. CODE § 2301.204; 43 TEX. ADMIN. CODE § 215.202(b)(3).

¹⁷ TEX. OCC. CODE § 2301.603(a).

¹⁸ 43 TEX. ADMIN. CODE § 215.66(d).

¹⁹ *E.g.*, *Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

²⁰ “In a contested case, each party is entitled to an opportunity . . . for hearing after reasonable notice of not less than 10 days.” TEX. GOV’T CODE §§ 2001.051; “Notice of a hearing in a contested case must include . . . a short, plain statement of the factual matters asserted.” TEX. GOV’T CODE § 2001.052. *See* TEX. OCC. CODE § 2301.204(b) (“The complaint must be made in writing to the applicable dealer, manufacturer, converter, or distributor and must specify each defect in the vehicle that is covered by the warranty.”); TEX. OCC. CODE § 2301.204(d) (“A hearing may be scheduled on any complaint made under this section that is not privately resolved between the owner and the dealer, manufacturer, converter, or distributor.”).

for relief under the lemon law.”²¹ However, the parties may expressly or impliedly consent to trying issues not included in the pleadings.²² Implied consent occurs when a party introduces evidence on an unpleaded issue without objection.²³

5. Incidental Expenses

When repurchase or replacement is ordered, the Lemon Law provides for reimbursing the Complainant for reasonable incidental expenses resulting from the vehicle’s loss of use because of the defect.²⁴ Reimbursable expenses include, but are not limited to: (1) alternate transportation; (2) towing; (3) telephone calls or mail charges directly attributable to contacting the manufacturer, distributor, converter, or dealer regarding the vehicle; (4) meals and lodging necessitated by the vehicle’s failure during out-of-town trips; (5) loss or damage to personal property; (6) attorney fees, if the complainant retains counsel after notification that the respondent is represented by counsel; and (7) items or accessories added to the vehicle at or after purchase, less a reasonable allowance for use. The expenses must be reasonable and verifiable (for example, through receipts or similar written documents).²⁵ However, the Department’s rules expressly exclude compensation for “any interest, finance charge, or insurance premiums.”²⁶

B. Summary of Complainant’s Evidence and Arguments

On March 16, 2017, the Complainant, purchased a new 2017 Ford Expedition from College Station Ford Lincoln, a franchised dealer of the Respondent, in College Station, Texas. The vehicle had 17 miles on the odometer at the time of purchase.²⁷ The vehicle’s limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first.

On or about July 10, 2018, the Complainant, a person on behalf of the Complainant, or the Department provided a written notice of defect to the Respondent. On August 2, 2018, the

²¹ 43 TEX. ADMIN. CODE § 215.202(a)(3).

²² 43 TEX. ADMIN. CODE § 215.42; TEX. R. CIV. P. 67.

²³ See *Gadd v. Lynch*, 258 S.W.2d 168, 169 (Tex. Civ. App.—San Antonio 1953, writ ref’d).

²⁴ TEX. OCC. CODE § 2301.604.

²⁵ 43 TEX. ADMIN. CODE § 215.209(a).

²⁶ 43 TEX. ADMIN. CODE § 215.208(b)(1).

²⁷ Complainant’s Ex. 3, Apex Protection Plan.

Complainant filed a complaint with the Department alleging that the moonroof leaked water causing: a mold/must smell; oxidized bolts and metal; and speaker static.

In relevant part, the Complainant took the vehicle to a dealer for repair of the alleged issues as follows:

Date	Miles	Issue
August 30, 2017		
September 12, 2017	7,236	Water leaks
November 17, 2017		Water in passenger side rear door, moldy smell, speaker static
November 21, 2017	7,424	
February 27, 2018		
March 5, 2018	8,728	Water leak, odor

The Complainant testified that the moonroof leaked water into the vehicle, onto the seats, cupholders, dash, and elsewhere. He first noticed the leak two to three days before the first repair visit. The entire interior had been soaked with water. He originally took in the vehicle as an insurance claim but the dealer found a defect in the moonroof and repaired the channel. The Complainant initially went to pick up the vehicle on September 4, 2017, but did not take the vehicle due to its odor. He subsequently received the vehicle back on September 12, 2017. The Complainant took the vehicle to the dealer on November 17, 2017, because on a trip to Corpus Christi, everyone in the vehicle felt "sinusy" and had scratchy throats. He took the vehicle back next in February of 2018. The vehicle had one mold test before the November visit and one after. Testing showed mold in the vehicle. The second test was more comprehensive. The second test was performed because the Complainant still had difficulty with the vehicle and he thought he saw mold growing. However, the Respondent had not taken any of the actions recommended in the second report. The vehicle was water tested at the February 27, 2018, visit. A loaner vehicle was not provided, though the Complainant had not requested one. He had safety concerns with exposure to whatever was growing in the vehicle. The moonroof issue was not resolved. The Complainant had not turned on the sound for an extended time but he did not believe the issue would have become better.

Upon clarification questions, the Complainant answered that the vehicle had not been cleaned since the first repair attempt. He last noticed the speaker static about March of 2018. He last noticed leaking the day before the hearing. When he entered the vehicle, his pants bottom was wet, the steering wheel was spongy, he noticed an odor, and the headliner felt slightly damp.

On cross-examination, the Complainant elaborated that the vehicle was not weatherproof, he could not leave it outside, and it leaked water. He first noticed leakage around the end of August 2017. When asked if any abnormal weather occurred around the water issues, the Complainant noted Hurricane Harvey. He testified that he parked the vehicle in an uncovered driveway. Though the Complainant had filed an insurance claim he withdrew it after the dealer found a kink in the drain tube. He did not know when the speaker static first occurred and added that the issue occurred intermittently and the SYNC system would blank out and reset itself. He did not know if this resulted from water damage. He affirmed that the vehicle was not cleaned and dried out at any time.

During rebuttal testimony, the Complainant explained that he had two Expeditions (the subject vehicle and another same model vehicle), purchased days apart. The two vehicles were parked side by side on an elevated driveway. The subject vehicle leaked but the other Expedition did not. The difference between the vehicles was that the other Expedition was 2-wheel drive while the subject vehicle was 4-wheel drive.

In response to clarifying questions, the Complainant stated that he noticed water coming in between September and November. Also, the videos showed leaking during rain in March 2018. The vehicle also leaked the day before the hearing, during about two inches of rain.

C. Inspection

Upon inspection at the hearing, the odometer displayed 9,618 miles. The vehicle exhibited a strong musty smell and the seats had some patches of mold. The areas by the third-row cup holders appeared to have dried water marks. The headliner, moonroof shade, and moonroof opening all appeared dry to the touch. The speakers appeared to perform normally.

D. Summary of Respondent's Evidence and Arguments

Mr. Bashir testified that the vehicle has a moveable glass panel roof. He explained that the panel did not have a 100% seal to allow movement of the panel. Some water will get around the panel, so the drain trough has hoses at the corners designed to handle 1.2 gallons per minute. Uneven ground or debris may restrict the system. The moonroof is not 100% rainproof but can handle a typical car wash. When the drain is overwhelmed, water may fill and leak into the headliner. Regarding the water in doors, at the base of the windows on the doors, the belt molding,

is not 100% waterproof and is designed to leak into the door area, so there is a moisture barrier under the door panel. There are door drains on the outside of the body seal, where the door contacts the body, the drains are located outside of that seal and are designed to drain water out. They may get restricted by debris in the door. To open the drains, the drains can be poked with a small object. The door plugs can also be removed to allow more water to escape.

On cross-examination, Mr. Bashir testified that the moonroof is designed to move some water around the glass panel. He confirmed that a flat surface allows maximum drainage and an elevated surface may allow the drain to be overwhelmed. He also affirmed that the Respondent does not provide a warning in relation to the moonroof drainage.

E. Analysis

The complaint in this case identified four issues: (1) leak in the moonroof; (2) mold/must smell; (3) oxidized bolts and metal; and (4) speaker static. In the present case, the record shows that the vehicle has an existing warrantable defect. However, as detailed below, the vehicle only qualifies for warranty repair and does not qualify for repurchase or replacement because no issue had sufficient repair attempts.

1. Warrantable Defect

As an initial matter, to qualify for Lemon Law relief, the vehicle must have a defect covered by warranty (warrantable defect).²⁸ The warranty in this case generally provides that:

[A]uthorized Ford Motor Company dealers will, without charge, repair, replace, or adjust all parts on your vehicle that malfunction or fail during normal use during the applicable coverage period due to a manufacturing defect in factory-supplied materials or factory workmanship. This warranty does not mean that each Ford vehicle is defect free. Defects may be unintentionally introduced into vehicles during the design and manufacturing processes and such defects could result in the need for repairs. Ford provides the New Vehicle Limited Warranty only to remedy manufacturing defects that result in vehicle part malfunction or failure during the warranty period.²⁹

²⁸ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

²⁹ Complainant's Ex. 9, Warranty at 9.

Although the warranty acknowledges the possibility of design defects requiring repair, the warranty only applies to defects in materials or workmanship (manufacturing defects).³⁰ A manufacturing defect is generally an isolated aberration occurring only in those vehicles not produced according to the manufacturer's specifications. A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of a broken part. Unlike manufacturing defects, issues that do not arise from manufacturing, such as characteristics of the vehicle's design (which exists before manufacturing), are not warrantable defects. Design characteristics result from the vehicle's specified design and not from any error during manufacturing.³¹ In sum, the warranty only covers manufacturing defects and the Lemon Law does not apply to design characteristics or design defects. Additionally, the warranty specifically excludes coverage of damage caused by use and the environment:

The New Vehicle Limited Warranty does not cover surface rust, deterioration and damage of paint, trim, upholstery, and other appearance items that result from use and/or exposure to the elements. You, as the owner, are responsible for these items. Some examples are:

- dings, dents
- cuts, burns, punctures or tears
- road salt
- tree sap, bird and bee droppings
- windstorm, lightening, hail
- earthquake
- freezing, water or flood
- stone chips, scratches (some examples are on paint and glass)
- windshield stress cracks. However, limited coverage on windshield stress cracks will be provided for the first 12 months or 12,000 miles (whichever occurs first), even though caused by use and/or exposure to the elements.³²

³⁰ Courts have affirmed that warranty language covering "defects in material or workmanship" do not cover design issues. *E.g.*, *Whitt v. Mazda Motor of America*, 5th Dist. Stark No. 2010CA00343, 211-Ohio-3097, ¶¶ 18-21 ("The manufacturer's express warranty in the case sub judice provides: 'Mazda warrants that your new Mazda Vehicle is free from defects in material or workmanship' The trial court found the warranty did not cover claims of design defects. . . . The problems about which Appellants complained did not fall within the applicable expressed warranty."); *see GT & MC, Inc. v. Texas City Refining, Inc.*, 822 S.W.2d 252, 257 (Tex. App.—Houston [1st Dist.] 1991, writ denied) ("the language in the contract of May 12, 1980, expressly limited TCR's recovery only for defects in materials or workmanship to damages for repair or replacement value. No mention was made in the guarantee of remedies for design defects.").

³¹ In contrast to manufacturing defects, "[a] design defect exists where the product conforms to the specification but there is a flaw in the specifications themselves." *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

³² Complainant's Ex. 9, Warranty at 13 (emphasis added).

In the present case, the leaking moonroof and the immediate damage caused by the leaking water appear to be warranted defects. Significantly, the Complainant had another same model vehicle as the subject vehicle, parked in the same driveway and exposed to the same conditions. However, the other vehicle did not leak, indicating a manufacturing defect in the subject vehicle. Although the warranty excludes issues resulting from water, a reading of the entire section titled “Damage Caused by Use and/or the Environment” shows that such damage only relates to damage “from use and/or exposure to the elements.” In this case, the Complainant alleged that a manufacturing defect in the moonroof caused the water damage (i.e., the mold/must smell, oxidized bolts/metal, and speaker static). The record does not reflect any water damage from use. Nor does the record reflect any water damage from exposure to the elements (that is, from being left open to the environment), e.g., rain water entering through an open window or even hurricane-driven rain overflowing moonroof drains. In other words, the evidence does not show that exposure to the elements caused the water-damage. Instead, a defect in the drain system allowed water to damage the interior, despite being otherwise closed-off from the elements. However, the water leaking into the door does not appear to be a manufacturing defect but is instead the result of the vehicle’s design.

2. Reasonable Repairs

None of the defects alleged in the complaint had sufficient repairs to establish a presumption of reasonable repairs. Moreover, the facts in this case do not warrant otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.³³

a. Nonconformities Generally

A Complainant may establish the existence of reasonable repairs if “the same nonconformity continues to exist after being subject to repair four or more times.”³⁴ However, the repair history shows two visits for a water leak concern, one visit for water in a door, two visits for the smell (when considering that the Complainant did not retrieve the vehicle from the dealer

³³ *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ) (“[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.’”).

³⁴ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B) (emphasis added).

on September 4, 2018, due to the new odor issue), one visit for the speaker static, and no visits for the oxidized bolts/metal. Although the vehicle has had four total repair attempts, it has not had four repair attempts for the same nonconformity.

b. Serious Safety Hazards

Alternatively, a Complainant may establish the existence of reasonable repairs if “the same nonconformity creates a serious safety hazard and continues to exist after causing the vehicle to have been subject to repair two or more times.”³⁵ However, none of the concerns fit the Lemon Law’s definition of a serious safety hazard, which means a life-threatening malfunction or nonconformity that substantially impedes a person’s ability to control or operate a motor vehicle for ordinary use or intended purposes; or creates a substantial risk of fire or explosion.³⁶ Although the mold may cause health concerns, it does not implicate the type of catastrophic failure contemplated by the Lemon Law.

c. 30 Days Out of Service

As explained in the discussion of applicable law, if a nonconformity still exists after the vehicle has been out of service at least 30 days for repair, then the vehicle has had reasonable repair attempts. In the present case, the repair invoices show a total of 23 days out of service without a loaner vehicle.

3. Defects Continuing to Exist

The evidence shows that the leak in the moonroof; mold/must smell; oxidized bolts and metal; and speaker static continue to exist. In particular, the moonroof leaked as recently as the day before the hearing, and the smell and oxidation were noticeable during the inspection at the hearing. Although the speakers did not exhibit any static at the inspection, the Complainant testified that the static was intermittent and he believed he last heard it in March of 2018, after the November 2017 repair for this issue.

³⁵ TEX. OCC. CODE § 2301.605(a)(2)(A) and (B).

³⁶ TEX. OCC. CODE § 2301.601(4).

III. Findings of Fact

1. On March 16, 2017, the Complainant, purchased a new 2017 Ford Expedition from College Station Ford Lincoln, a franchised dealer of the Respondent, in College Station, Texas. The vehicle had 17 miles on the odometer at the time of purchase.
2. The vehicle's limited warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first.
3. The Complainant took the vehicle to a dealer for repair as shown below:

Date	Miles	Issue
August 30, 2017 September 12, 2017	7,236	Water leaks
November 17, 2017 November 21, 2017	7,424	Water in passenger side rear door, moldy smell, speaker static
February 27, 2018 March 5, 2018	8,728	Water leak, odor

4. After taking the vehicle to the dealer on August 30, 2017, the Complainant initially went to pick up the vehicle on September 4, 2017, but did not take the vehicle due to its odor.
5. On or about July 10, 2018, the Complainant, a person on behalf of the Complainant, or the Department provided a written notice of defect to the Respondent.
6. On August 2, 2018, the Complainant filed a complaint with the Department alleging that the moonroof leaked water causing: a mold/must smell; oxidized bolts and metal; and speaker static.
7. On October 22, 2018, the Department's Office of Administrative Hearings issued a notice of hearing directed to all parties, giving them 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 factual matters asserted.
8. The hearing in this case convened on February 12, 2019, in Houston, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. J. Kyle Beale, attorney, represented the Complainant. The Complainant testified for himself. Anthony

Gregory, consumer affairs legal analyst, represented and testified for the Respondent. Asad Bashir, automotive consultant, also testified for the Respondent.

9. The vehicle's odometer displayed 9,618 miles at the time of the hearing.
10. The vehicle's warranty was in effect at the time of the hearing.
11. Upon inspection at the hearing, the vehicle exhibited a strong musty smell and the seats had some patches of mold. The areas by the third-row cup holders appeared to have dried water marks. The headliner, moonroof shade, and moonroof opening all appeared dry to the touch. The speakers appeared to perform normally.

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles has jurisdiction over this matter. TEX. OCC. CODE §§ 2301.601-2301.613 and 2301.204.
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. TEX. OCC. CODE § 2301.704.
3. The Complainant filed a sufficient complaint with the Department. 43 TEX. ADMIN. CODE § 215.202.
4. The parties received proper notice of the hearing. TEX. GOV'T CODE §§ 2001.051, 2001.052. 43 TEX. ADMIN. CODE § 215.206(2).
5. The Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
6. The Complainant's vehicle does not qualify for replacement or repurchase. The Complainant did not meet the requirement for a reasonable number of repair attempts. TEX. OCC. CODE §§ 2301.604(a) and 2301.605(a).
7. The Complainant does not qualify for reimbursement of incidental expenses because the vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE §§ 2301.603, 2301.604(a); 43 TEX. ADMIN. CODE § 215.209.

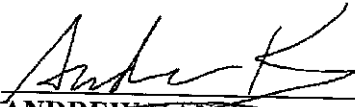
8. If the Complainant's vehicle does not qualify for replacement or repurchase, this Order may require repair to obtain compliance with the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603; 43 TEX. ADMIN. CODE § 215.208(e)
9. The Complainant's vehicle qualifies for warranty repair. The Complainant proved that the vehicle has defects covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.204 and 2301.603.
10. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranty. TEX. OCC. CODE § 2301.603.

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**. It is **FURTHER ORDERED** that the Respondent shall make any repairs needed to conform the subject vehicle's leak in the moonroof; mold/must smell; oxidized bolts and metal; and speaker static to the applicable warranty as specified here. Upon this Order becoming final under Texas Government Code § 2001.144:³⁷ (1) the Complainant shall deliver the vehicle to the Respondent within 20 days; and (2) the Respondent shall complete the repair of the vehicle within **20 days** after receiving it. However, if the Department determines the Complainant's refusal or inability to deliver the vehicle caused the failure to complete the required repair as prescribed, the Department may consider the Complainant to have rejected the granted relief and deem this proceeding concluded and the complaint file closed under 43 Texas Administrative Code § 215.210(2).

³⁷ This Order does not become final on the date this Order is signed, instead: (1) this Order becomes final if a party does not file a motion for rehearing within 25 days after the date this Order is signed, or (2) if a party files a motion for rehearing within 25 days after the date this Order is signed, this Order becomes final when: (A) an order overruling the motion for rehearing is signed, or (B) the Department has not acted on the motion within 55 days after the date this Order is signed. Accordingly, this Order cannot become final (1) while a motion for rehearing remains pending; or (2) after the grant of a motion for rehearing.

SIGNED April 22, 2019



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