

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0006020 CAF**

RUDY TOERCK,	§	
Complainant	§	BEFORE THE OFFICE
	§	
v.	§	OF
	§	
FORD MOTOR COMPANY,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Rudy Toerck (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2018 Ford Expedition. Complainant asserts that the vehicle is defective because the vehicle’s parking brake intermittently engages on its own (sometimes the parking brake won’t disengage and the vehicle lunges unexpectedly when it finally disengages), the driver’s side seat will intermittently fall back on its own when the vehicle is parked, the right side mirror will intermittently turn out on its own, and tenth gear will intermittently not illuminate on the vehicle’s dashboard. Ford Motor Company (Respondent) argued that the vehicle is operating as designed, 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 on August 7, 2019, in Victoria, Texas before Hearings Examiner Edward Sandoval. Rudy Toerck, Complainant, appeared and represented himself at the hearing. Karen Wright, Complainant’s sister-in-law, and Angela Dement, Complainant’s daughter, were present to offer testimony for Complainant. Respondent was represented telephonically by Anthony Gregory, Consumer Affairs Legal Analyst. Sayyed Asad Bashir, Automotive Technical Consultant, also appeared telephonically and offered testimony for Respondent.

The hearing was continued by the hearings examiner in order to obtain further testimony from the parties. The continuance was conducted telephonically by Edward Sandoval, Hearings Examiner, on August 29, 2019. Rudy Toerck, Complainant, appeared and represented himself at the continued hearing. Respondent was represented by Anthony Gregory, Consumer Affairs Legal Analyst. Sayyed Asad Bashir, Automotive Technical Consultant, also offered testimony for Respondent. The hearing record was closed on August 29, 2019.

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 manufacturer has been given a reasonable number of attempts to repair or correct the defect or condition.³ Fourth, the owner must have provided written notice of the alleged defect or nonconformity to the manufacturer.⁴ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁵

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 by the manufacturer, converter, or distributor, or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the repair 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.⁶

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 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

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

³ *Id.*

⁴ Tex. Occ. Code § 2301.606(c)(1).

⁵ Tex. Occ. Code § 2301.606(c)(2).

⁶ Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a) (3) provides a third method 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. This section 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.

⁷ Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

“Serious safety hazard” means a life-threatening malfunction or nonconformity that substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or creates a substantial risk of fire or explosion.⁸

B. Complainant’s Evidence and Arguments

Complainant purchased a new 2018 Ford Explorer on September 12, 2018, from Aztec Ford (Aztec) located in Goliad, Texas.⁹ The vehicle’s mileage at the time of delivery was 217.¹⁰ Respondent provided a new vehicle limited warranty for the vehicle which provides coverage for three (3) years or 36,000 miles, whichever comes first. On the date of hearing the vehicle’s mileage was 15,722. At the time of hearing the vehicle’s warranty was still in effect.

1. Rudy Toerck’s Testimony

Complainant testified that he feels that the vehicle is defective because the vehicle’s parking brake intermittently engages on its own, sometimes won’t disengage, and sometimes when it does disengage the vehicle jerks or lunges forward; the driver’s side seat will intermittently fall back on its own when the vehicle is parked; the right side mirror will intermittently turn out on its own; and tenth gear will intermittently not illuminate on the vehicle’s dashboard. The last time prior to the date of hearing that the parking brake engaged on its own was August 4, 2019, when he and Ms. Wright stopped at a restaurant to have dinner. The vehicle unexpectedly lunged forward when the parking brake disengaged. The other issues regarding the passenger’s side mirror moving, the driver’s seat falling back on its own, and tenth gear not being illuminated last occurred about two (2) months prior to the hearing date (approximately May or June of 2019).

Complainant stated that he did not test drive the vehicle prior to purchasing it. He stated that the first issue with the vehicle occurred when it had been driven about 800 miles. Complainant stopped the vehicle and put the transmission into park and the parking brake activated. He did not notice that the parking brake was on until he returned to the vehicle and started it. The vehicle did not immediately move after Complainant put the transmission into drive. Complainant then pressed on the accelerator and the vehicle “took off.” Complainant stated that he did not activate the parking brake manually. He was not able to get the vehicle to a dealer for repair until October 11, 2018. Complainant took the vehicle to Aztec for repair on October 11, 2018. He informed Aztec’s service manager that when he put the vehicle into gear, the

⁸ Tex. Occ. Code § 2301.601(4).

⁹ Complainant Ex. 2, Purchase Order dated September 12, 2018.

¹⁰ Complainant Ex. 3, Odometer Disclosure Statement dated September 12, 2018

transmission did not engage immediately.¹¹ The service technician inspected the vehicle and was not able to duplicate the issue.¹² The vehicle's mileage was 1,475 at the time.¹³ Complainant waited for the vehicle, so he did not need a loaner vehicle on this occasion.

Complainant testified that he experienced the same problem three (3) or four (4) times after taking the vehicle for repair on October 11, 2018. As a result of the continuing issue, Complainant took the vehicle to Aztec for repair on October 16, 2018. Aztec's service technician inspected the vehicle for the issue that there was a delay in the transmission when putting it into gear and was unable to duplicate the concern or to find any diagnostic trouble codes (DTCs).¹⁴ The vehicle's mileage at the time was 1,970.¹⁵ The vehicle was in Aztec's possession for about a day and a half. Complainant received a loaner vehicle while his vehicle was being repaired.

Complainant testified that the same issue kept occurring where the parking brake was randomly activating without his knowledge and when he started the vehicle the transmission would sometimes not shift immediately, and on occasion the vehicle would lurch forward when the parking brake unexpectedly disengaged. Complainant contacted the sales person who sold him the vehicle about the issue and he referred Complainant to Respondent's customer service department.

Complainant contacted the customer service department and told the representative that he did not feel safe in the vehicle. On October 24, 2018, one of Respondent's representatives advised Complainant to take the vehicle back to Aztec to check it out again. The representative assured Complainant that the dealer would have a loaner vehicle available for him. Due to the request from the representative, Complainant took the vehicle to Aztec for repair on October 25, 2018. When Complainant arrived at Aztec, the service manager provided Complainant with a written bulletin prepared by Respondent providing information about the vehicle's transmission. Complainant felt that by being given the bulletin it was implied that he did not know how to drive a vehicle with an automatic transmission. In addition, Complainant was informed that the dealer did not have a loaner vehicle available for him. Complainant informed the service manager that he did not trust the vehicle and did not feel safe in it. The service manager informed Complainant that they would keep the vehicle for a few days and get back to him with the results of the inspection. Complainant left the vehicle with the dealer. The service manager drove Complainant back to his home, since no loaner vehicle was available. When they stopped at Complainant's home to let him out, the parking brake activated. The vehicle lunged forward unexpectedly when Complainant attempted to disengage the parking brake. Complainant

¹¹ Complainant Ex. 4, Repair Order dated October 11, 2018.

¹² *Id.*

¹³ *Id.*

¹⁴ Complainant Ex. 5, Repair Order dated October 16, 2018.

informed the service manager that this was an example of what was occurring with the vehicle. The vehicle was then inspected by Aztec's service technician who was unable to recreate the issue.¹⁶ The vehicle was in Aztec's possession until November 30, 2018. Complainant spoke to Respondent's customer service representative on October 31, 2018, about the fact that the vehicle had not been returned to him and that he had not been given a loaner vehicle while his vehicle was being repaired. The representative assured Complainant that he would be provided with a loaner vehicle. When Complainant went to the dealer the following day, November 1, 2018, he was informed by Aztec's representative that no loaners were available at the time. He was told that Respondent's representative had not contacted them about the need for a loaner vehicle for Complainant.

Complainant had several phone conversations with Respondent's representatives over the next few weeks. Complainant informed the representatives that he did not feel safe or comfortable driving the vehicle. In addition, Complainant was informed by one of the representatives that the vehicle was not eligible for buy back.

On November 19, 2018, Complainant went to Aztec and spoke to the general manager, Alvin Shermin, to express his concerns regarding the vehicle and that he was not being updated about the vehicle by the service manager. Respondent offered several incentives to Complainant which he refused, as he indicated that he wanted the vehicle repaired.

Complainant picked up the vehicle from Aztec on November 30, 2018. Since no repair was done to the vehicle Complainant began preparations to file a Lemon Law claim.

Complainant also stated that the other issues that he had experienced with the vehicle (the side mirror issue, the dash not displaying tenth gear, and the driver's seat changing positions) were raised with Aztec but they did not put them down on the repair orders. He said that the issues began occurring sometime after October 16, 2018 and before October 25, 2018.

Complainant mailed a letter to Respondent on December 9, 2018, in which he indicated that he was dissatisfied with the vehicle.¹⁷ In addition, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on February 15, 2019.¹⁸

¹⁵ *Id.*

¹⁶ Complainant Ex. 6, Repair Order dated October 16, 2018. The repair order provided to Complainant for this repair visit was essentially the same as Complainant Ex. 5, even the vehicle's in and out mileage. The only difference was the R.O. Close Date which was November 30, 2018.

¹⁷ Complainant Ex. 8, Letter to Ford Motor Company dated December 9, 2018.

¹⁸ Complainant Ex. 1, Lemon Law Complaint dated February 15, 2019.

Complainant stated that before filing the Lemon Law complaint, he was contacted by Respondent's representative and was asked that Complainant allow Respondent's representative to inspect the vehicle. Complainant agreed to allow the inspection which took place at Weber Motor Company (Weber) located in Cuero, Texas on January 14, 2019. Respondent's representative inspected the vehicle for the issues raised by Complainant: vehicle won't move when initially put into gear, passenger side mirror won't retain setting, console won't display tenth gear, and driver's side seat won't maintain position.¹⁹ The representative did not perform any repair to the vehicle at the time.²⁰ The vehicle's mileage at the time was 5,520.²¹ The vehicle was in Weber's possession overnight. Complainant did not receive a loaner vehicle while the inspection was performed. Complainant did not receive a copy of the representative's report and was denied a copy of it until the date of hearing. Complainant stated that the vehicle's transmission was locked in park when he picked it up.

Complainant stated that on those times when the parking brake engages on its own, when he steps on the vehicle's accelerator the parking brake usually disengages. However, sometimes the parking brake won't disengage even when he steps on the accelerator. There was an incident after the January 2019 vehicle inspection where the parking brake didn't disengage after putting the vehicle in drive and stepping on the accelerator. He tried two or three times putting the transmission in reverse or in drive and the parking brake would not disengage. Not until he put the transmission in drive and throttled hard did the parking brake disengage. When the brake disengaged, the vehicle shot down the road from where he was parked.

During the continuance of the hearing conducted on August 29, 2019, Complainant stated that he was still experiencing a problem with the vehicle's parking brake setting on its own and the vehicle lunging when the brake was disengaged. He said it had occurred two to three times between the date of the original hearing and the continuance. He has not had any further problems with the vehicle's driver's seat or the side mirror.

During cross-examination, Complainant testified that he has driven a vehicle with a rotary dial shifter prior to purchasing the vehicle. Complainant stated that the issues with the vehicle are random. Regarding the issue with the tenth gear not illuminating, Complainant was told by the dealers' service advisors that the issue could not be duplicated. Complainant verified that he was not provided a loaner vehicle from Aztec when they had his vehicle for over a month in October and November of 2018.

¹⁹ Complainant Ex. 9, Repair Order dated January 14, 2019.

²⁰ *Id.*

²¹ *Id.*

2. Karen Wright's Testimony

Karen Wright, Complainant's sister-in-law, testified for Complainant. She stated that she was present with Complainant on August 4, 2019, when the vehicle's parking brake was set without Complainant's knowledge. Ms. Wright stated that on those occasions when the brake is disengaged, the vehicle lunges forward as if it is having trouble shifting gears. Ms. Wright indicated that she's noticed similar incidents about ten (10) times over the course of Complainant's ownership of the vehicle. Ms. Wright said the issue occurs randomly.

Ms. Wright has never observed the driver's side seat drop back on its own. She's never observed any issues with the passenger's side view mirror. Ms. Wright also stated that she's never observed any issue with the dashboard not displaying tenth gear.

Ms. Wright has driven the vehicle a couple of times, but she did not have any issues with the vehicle's parking brake engaging on its own. However, she said that she would not want to drive the vehicle regularly. Ms. Wright stated that she does not feel that the vehicle is safe and would not want her children or grandchildren in the vehicle.

3. Angela Dement's Testimony

Angela Dement, Complainant's daughter, testified for Complainant. Ms. Dement stated that she has observed the vehicle lunge forward after the parking brake was disengaged. Ms. Dement said that when the vehicle shifts into drive, the shift is very rough. She also said that Complainant will not drive the vehicle to pick up her children from school, as he doesn't feel safe driving the vehicle with the children inside.

Ms. Dement testified that she had not seen any of the other issues raised by Complainant in the Lemon Law complaint.

Ms. Dement also stated that she would not feel safe allowing her children to ride in Complainant's vehicle.

C. Respondent's Evidence and Arguments

1. Anthony Gregory's Testimony

Anthony Gregory, Consumer Affairs Legal Analyst, represented and testified for Respondent. Mr. Gregory stated that he has never seen the vehicle. He is aware that the vehicle has an automatic transmission which has a rotary dial (an electronic shifter) to shift gears.

Mr. Gregory stated that the vehicle was inspected by Respondent's FSE, Robert Saffle, on January 14, 2019, at Weber. Mr. Saffle addressed four (4) concerns raised by Complainant: the vehicle would not go when put into gear, the passenger side view mirror would not retain its setting, the console display would not display tenth gear at times, and the driver's seat does not maintain its settings.²² Mr. Saffle determined that there were no issues with shifting the transmission into reverse or drive after driving the vehicle 87 miles.²³ In addition, Mr. Saffle noted that the passenger side mirror can be adjusted by using a button on the driver's door and did not observe the mirror move at any time during the inspection.²⁴ Mr. Saffle observed that the vehicle did shift into tenth gear during the test drive and that the gear display illuminated properly whenever the vehicle shifted gears.²⁵ Finally, Mr. Saffle noted that driver's seat did not change positions during the inspection and that the vehicle did not have a memory seating feature.²⁶ Mr. Saffle determined that the vehicle was operating as designed and did not perform any repairs to it during the inspection.²⁷

Mr. Gregory stated that Respondent has provided a bumper-to-bumper warranty for the vehicle good for three (3) years or 36,000 miles. In addition, the powertrain warranty provides coverage for the vehicle's powertrain for five (5) years or 60,000 miles.

Mr. Gregory also stated that Respondent was not provided with a final repair attempt to repair the vehicle as the inspection performed by Mr. Saffle was before Complainant had filed the Lemon Law complaint. In addition, Mr. Gregory stated that he feels that the vehicle is operating as designed and that Complainant is not entitled to repurchase or replacement of the vehicle.

²² Respondent Ex. 1, FSE Vehicle Inspection Report, undated.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

2. Sayyed Asad Bashir's Testimony

Sayyed Asad Bashir, Automotive Technical Consultant, testified for Respondent. Mr. Bashir has worked in the automotive industry for 20 years. He has worked for Respondent since 2007. Mr. Bashir has been in his present position since 2009. Mr. Bashir is an Automotive Service Excellence Certified Master Technician.

Mr. Bashir testified that he has not seen the vehicle. Mr. Bashir stated that the vehicle's transmission has a rotary dial shifter. It is an electronic shifter that provides input to the transmission control module (TCM) which actually shifts the transmission. Mr. Bashir stated that the vehicle's owner's manual specifies that the driver of the vehicle should always fully apply the vehicle's parking brake. They are to shift the transmission into park before switching off the ignition. In addition, when the vehicle is fully stationary, the driver should keep the brake pedal fully depressed when shifting gears. The transmission has an electronic shifter, as well as an electronic parking brake and can automatically shift into park or automatically apply the parking brake. Mr. Bashir stated that the electric parking brake may apply when the driver shifts into park without the brake pedal fully pressed. The electric parking brake releases with the drive away release function or can be manually released. In other words, the parking brake can be released by accelerating in the vehicle. Mr. Bashir stated that if the vehicle's electric parking brake is applied and the vehicle is shifted into drive and the accelerator pedal is pressed, the vehicle could lunge if the driver was unaware that the parking brake was applied. It would depend on how hard the accelerator pedal is pressed. Mr. Bashir stated that he feels that the vehicle's transmission is operating as designed.

Mr. Bashir also stated that Complainant's vehicle does not have a memory seat function. He does not know how the seat would move on its own. In regards to the side mirror, Mr. Bashir said he doesn't know how the mirror would move on its own, since it is not an automatic mirror and can only be moved manually with the control on the driver's side door.

Mr. Bashir testified the vehicle has a progressive range selection (PRS) feature for the transmission which allows the driver to lock out gears from the transmission range. By pushing a button next to the gear selector, the driver can lock out the highest gears and the vehicle will not shift into those gears. In addition, the gears do not illuminate on the vehicle's dashboard indicating that they are not available. Mr. Bashir said that it is possible that Complainant could have inadvertently locked out gears by accidentally pushing the PRS button which would remove the tenth gear indicator from the instrument cluster and the transmission would not use that gear range.

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 the manufacturer was given a reasonable number of attempts to repair or correct the defect or condition to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the defect or 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 or condition, Complainant is entitled to have the vehicle repurchased or replaced.

The first issue to be addressed is whether Complainant's vehicle has a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the vehicle.

1. Emergency Brake Engaging Issue

The totality of the evidence presented at the hearing established that the vehicle intermittently lurches unexpectedly when the parking brake is disengaged. Although Complainant described the issue on the Lemon Law complaint as the parking brake automatically engages, all of the evidence and repair attempts described the issue as the vehicle intermittently and unexpectedly lurching when the parking brake is disengaged or the vehicle's transmission not engaging immediately when it is put into gear. The evidence established that there are occasions where the parking brake doesn't disengage immediately which causes the vehicle to lunge unexpectedly once it does disengage and the driver is stepping on the vehicle's accelerator pedal. In fact, on one specific occasion after the final repair of the vehicle in January of 2019, the vehicle lurched unexpectedly down the road after the parking brake failed to disengage after several attempts. The first hand testimony provided by Complainant indicates that the problem continues to occur despite several repair attempts by the dealer's service technicians. As such, the hearings examiner must hold that Complainant has met the burden of persuasion to establish the existence of a defect or nonconformity (the parking brake not disengaging immediately and the vehicle intermittently lurching unexpectedly when the parking brake does finally disengage) in the subject vehicle. The defect or nonconformity with the vehicle creates a serious safety hazard as defined in the Occupations Code.

Complainant also presented evidence to indicate that Respondent or its authorized representative was provided with a reasonable number of repair attempts to repair the defect or nonconformity with the vehicle. Complainant presented the vehicle for repair to Respondent's authorized dealer

on four (4) separate occasions prior to the filing of the Lemon Law complaint: October 11, 2018; October 16, 2018; October 25, 2018; and January 14, 2019. 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) provides that for a vehicle that 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 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. The evidence presented at the hearing establishes that Complainant has met the requirements of this test since he took the vehicle for repair more than the requisite number of times within the specified time frame and the problem continued to exist. 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 provided Respondent with written notice of the defect and a final opportunity to cure the defect. Complainant informed Respondent via letter dated December 9, 2018, of the issue with the vehicle lunging unexpectedly when the parking brake disengaged and providing Respondent with an opportunity to cure. Respondent had its field service engineer inspect the vehicle on January 14, 2019. No repairs to the vehicle were performed at the time.

Although Respondent has been provided adequate opportunity to repair the vehicle and to ensure that it operates properly, they have not been able to repair the vehicle so that it conforms to their written warranty. As such, Complainant has met his burden of proof to establish that the vehicle has a warrantable and existing defect or condition which creates a serious safety hazard. Therefore, the hearings examiner will order Respondent to repurchase the vehicle.

2. Passenger Side Mirror Issue

Complainant raised the issue that the passenger side mirror intermittently moves on its own. The vehicle is not equipped with an automatic mirror and the mirror can only be moved manually or with the control on the driver’s side door. There was no evidence presented at the hearing to indicate that the mirror was loose. In addition, during the inspection by the FSE on January 14, 2019, he indicated that the mirror was operating as designed. The hearings examiner must hold that there is no evidence to indicate that the mirror is defective. As such, repurchase or replacement of the vehicle for this issue is not warranted.

3. Dash Not Displaying Gears Issue

The evidence presented in the hearing indicates that the vehicle is equipped with a progressive range selection (PRS) feature for the transmission which allows the driver to lock out gears from the transmission range. The button to lock out gears is located on the vehicle's center console next to the gear selector. It is possible that Complainant may have accidentally activated the feature and locked out tenth gear while driving the vehicle. Since there was no evidence presented to rebut the allegation that the feature was accidentally activated, the hearings examiner must hold that this issue does not constitute a defect with the vehicle which warrants repurchase or replacement of the vehicle.

4. Driver's Side Seat Issue

Complainant raised the issue that the driver's seat falls back on its own for no apparent reason. The vehicle is not equipped with a memory seat function. There was no evidence presented at the hearing to indicate that the seat was loose or how it might fall back. In addition, during the inspection by the FSE on January 14, 2019, he indicated that the seat was operating as designed. The hearings examiner must hold that there is no evidence to indicate that the driver's seat is defective. As such, repurchase or replacement of the vehicle for this issue is not warranted.

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. Rudy Toerck (Complainant) purchased a new 2018 Ford Explorer on September 12, 2018, from Aztec Ford (Aztec) located in Goliad, Texas with mileage of 217 at the time of delivery.
2. The manufacturer or distributor of the vehicle, Ford Motor Company (Respondent), issued a new vehicle limited warranty for the vehicle which provides coverage for three (3) years or 36,000 miles, whichever occurs first.
3. The vehicle's mileage on the date of hearing was 15,722.
4. At the time of hearing the vehicle's warranties were still in effect.
5. Complainant feels that the vehicle is defective because the vehicle's parking brake

intermittently engages on its own, sometimes won't disengage, and sometimes when it does disengage the vehicle jerks or lunges forward; the driver's side seat will intermittently fall back on its own when the vehicle is parked; the right side mirror will intermittently turn out on its own; and tenth gear will intermittently not illuminate on the vehicle's dashboard.

6. Complainant took the vehicle for repair to Respondent's authorized dealers in order to address his concerns with the vehicle on the following dates:
 - a. October 11, 2018, at 1,475 miles;
 - b. October 16, 2018, at 1,970 miles;
 - c. October 25, 2018, at unknown miles; and
 - d. January 14, 2019, at 5,520 miles.
7. On October 11, 2018, Aztec's service technician was unable to recreate the issue of the vehicle's transmission not engaging immediately when put into gear.
8. On October 16, 2018, Aztec's service technician was unable to recreate the issue of a delay in the vehicle's transmission when it was put into gear.
9. On October 25, 2018, Aztec's service technician was unable to recreate the issue of a delay in the vehicle's transmission when it was put into gear.
10. On December 9, 2018, Complainant mailed a letter to Respondent advising them of his dissatisfaction with the vehicle.
11. On January 14, 2019, Respondent's field service engineer (FSE) inspected the vehicle at Respondent's request at Weber Motor Company (Weber) in Cuero, Texas.
12. During the inspection performed on January 14, 2019, Respondent's FSE found no problem with the vehicle not moving when the transmission is put into gear, the passenger side mirror not retaining its setting, the dashboard not displaying tenth gear, or driver's side seat not maintaining its position.
13. On February 15, 2019, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
14. The vehicle intermittently still fails to immediately disengage which causes the vehicle to lunge forward unexpectedly when the parking brake is finally disengaged.

15. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license and registration	\$49,827.67
Delivery mileage	217
Mileage at first report of defective condition	1,475
Mileage on hearing date	15,722
Useful life determination	120,000

Purchase price, including tax, title, license and registration					\$49,827.67
Mileage at first report of defective condition				1,475	
Less mileage at delivery				<u>-217</u>	
Unimpaired miles				1,258	
Mileage on hearing date				15,722	
Less mileage at first report of defective condition				<u>-1,475</u>	
Impaired miles				14,247	
Reasonable Allowance for Use Calculations:					
Unimpaired miles					
				<u>1,258</u>	
	120,000	X	\$49,827.67	=	\$522.36
Impaired miles					
				<u>14,247</u>	
	120,000	X	\$49,827.67	X .5	= <u>\$2,957.90</u>
Total reasonable allowance for use deduction:					\$3,480.26
Purchase price, including tax, title, license and registration					\$49,827.67
Less reasonable allowance for use deduction					-\$3,480.26
Plus filing fee refund					<u>\$35.00</u>
TOTAL REPURCHASE AMOUNT					\$46,382.41

16. On April 10, 2019, 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.

17. The hearing in this case convened on August 7, 2019, in Victoria, Texas before Hearings Examiner Edward Sandoval. Rudy Toerck, Complainant, appeared and represented

himself at the hearing. Karen Wright, Complainant's sister-in-law, and Angela Dement, Complainant's daughter, were present to offer testimony for Complainant. Respondent was represented telephonically by Anthony Gregory, Consumer Affairs Legal Analyst. Sayyed Asad Bashir, Automotive Technical Consultant, also appeared telephonically and offered testimony for Respondent. The hearing was continued by the hearings examiner in order to obtain further testimony from the parties. The continuance was conducted telephonically by Edward Sandoval, Hearings Examiner, on August 29, 2019. Rudy Toerck, Complainant, appeared and represented himself at the continued hearing. Respondent was represented by Anthony Gregory, Consumer Affairs Legal Analyst. Sayyed Asad Bashir, Automotive Technical Consultant, also offered testimony for Respondent. The hearing record was closed on August 29, 2019.

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. 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 defect or condition 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 and repurchase of his 2018 Ford Expedition under Texas Occupations Code § 2301.604(a).

IT IS THEREFORE ORDERED that:

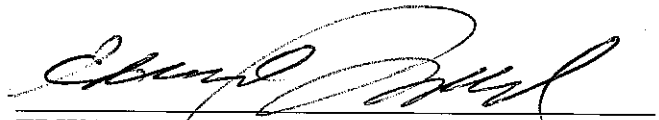
1. Respondent shall accept the return of the vehicle from Complainant. Respondent shall have the right to have its representatives inspect the vehicle upon the return by Complainant. If from the date of the hearing to the date of repurchase the vehicle is substantially damaged or there is an adverse 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 the final order;
2. Respondent shall repurchase the subject vehicle in the amount of **\$46,382.41**. The refund 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 the 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;
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, 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 Complainant's refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by Complainant 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 vehicle prior to resale and issue a disclosure statement provided by or approved by the Department's Enforcement Division – Lemon Law Section;
5. 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 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.

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, Ford Motor Company, shall repair the warrantable defect in the reacquired vehicle identified in this Decision.

SIGNED October 30, 2019.



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