

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0008282 CAF**

**STEVEN L. GUZZO,
Complainant**

v.

**FORD MOTOR COMPANY,
Respondent**

§
§
§
§
§
§
§

**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Steven L. Guzzo (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 does not show that the subject vehicle has a defect that qualifies for repurchase/replacement or warranty repair.

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 August 9, 2019, in Austin, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Alfred Kay, attorney, represented the Complainant. The Complainant testified for himself. Anthony Gregory, consumer affairs legal analyst, represented and testified for the Respondent. Asad Bashir, a technical expert, 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 written notice of the defect to the respondent, (2) an opportunity to cure 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 or someone on behalf of the owner, or the Department has 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

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). 43 TEX. ADMIN. CODE § 215.204 provides that “[u]pon receipt of a complaint for lemon law or warranty performance relief, the department will provide notification of the complaint to the appropriate manufacturer, converter, or distributor.” The Department’s notice of the complaint to the Respondent may satisfy the requirement to provide notice of the defect or nonconformity to the Respondent.

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.

of: the warranty's 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 June 15, 2018, the Complainant, purchased a new 2018 Ford F-150 from Mack Haik Ford Lincoln, a franchised dealer of the Respondent, in Georgetown, Texas. The vehicle had 35 miles on the odometer at the time of purchase. On April 17, 2019, the Complainant provided a written notice of defect to the Respondent. On April 17, 2019, the Complainant filed a complaint with the Department alleging that BLIS (Blind Spot Information System) deactivated when hooked up with a trailer; the vehicle pulled (drifted)²⁷ to the left; a seat belt had glue or some discoloration;

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 Although the complaint describes the condition as “pulling” the technical term is “drifting” as explained below.

visor material was bunched up; there was a large gap above the glovebox; and paint on the roof was scratched. The Complainant only presented the pulling (drifting) issue for consideration at the hearing.

The Complainant affirmed that he noticed the “pulling” shortly after purchase. The vehicle begins pulling left at 30 to 45 mph, so that he must constantly put rightward pressure on the steering wheel. The pulling/drifting occurred in a variety of conditions. The Complainant had taken the vehicle to the selling dealer for repair on November 4th to adjust/repair the alignment, which did not correct the issue. He affirmed that the dealer had the vehicle for 30 days but he did not get a comparable loaner vehicle. He explained that he ordered the subject vehicle with a towing package, brake controller, and heavy-duty engine for towing a trailer, which he could not do with the loaner vehicle. The Complainant subsequently took the vehicle to another dealer, which also did not resolve the issue. He affirmed that the vehicle “pulled” to the left under all conditions. He concluded that the issue was a serious safety hazard and seriously impaired the vehicle’s value.

On cross-examination, the Complainant testified that he was provided a base F-150 with no comparable tow capability as a loaner vehicle. He stated that he had the loaner vehicle when the subject vehicle was in for repair from September 10th through 19th. He did not have a loaner vehicle for the second repair visit on March 16th. He explained that in the videos, the road was dry and flat and he did not see any cracks in the road. He stated that he took his hands off the wheel about a half-dozen times. The Complainant responded that when the vehicle veered left, he had to correct the steering with normal, not excessive, effort. He affirmed that he could drive the vehicle and that it never “pulled” to the right. Mac Haik adjusted the alignment, which Truck City Ford checked.

C. Inspection

Upon inspection at the hearing, before the test drive, the subject vehicle’s odometer displayed 15,335 miles. The test drive occurred primarily on major arterial roads. The test drive ended at 15,347 miles. The vehicle occasionally drifted to the left on ostensibly level parts of roads with hands off of the steering wheel. However, the leftward movement was not continual and the vehicle would drift right when on the right side of the road crowning. The vehicle did not pull when gripping the steering wheel.

D. Summary of Respondent's Evidence and Arguments

Mr. Bashir distinguished pulling and drifting. He explained that a pull would be a tugging sensation in one direction on the steering wheel, which may be caused by external conditions. On the other hand, a drift would be movement with the hands off the steering wheel. The subject vehicle had a slight leftward bias in the camber settings. However, the manufacturer sets vehicles with a slight left bias to account for the road crown and the alignment was within specifications. The technician adjusted the tires to be straight up and down (zero camber), which was still within specifications. At the March 16th service visit, the dealer reprogrammed the EPAS, Electric Power Assist Steering. EPAS does not steer for the driver but does compensate for pull/drift. The feature automatically activates over 25 mph. This system creates a power assist offset to reduce steering effort to keep the vehicle straight. This feature updates automatically and continuously but not instantly, which takes about 10 seconds to offset. EPAS only operates with hands on the steering wheel.

On cross-examination, Mr. Bashir affirmed that software controlled the pull drift compensation. However, the leftward bias in the camber settings addressed the driving on the right of the road crown.

E. Analysis

As detailed below, a preponderance of the evidence does not show that the vehicle has a warrantable defect that supports granting relief. To qualify for any relief, the vehicle must have a defect covered by warranty (warrantable defect).²⁸ The vehicle's bumper to bumper warranty was in effect at the time of the hearing.²⁹ However, repurchase/replacement relief and warranty repair relief do not apply to all issues that a consumer may have with a vehicle but only to warrantable defects.³⁰ The Lemon Law does not require that a manufacturer provide any particular warranty coverage nor does the Lemon Law impose any specific standards for vehicle characteristics. The Lemon Law only requires the manufacturer to conform its vehicles to whatever coverage the warranty provides.³¹ A defectively manufactured vehicle has a flaw because of some error in

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

²⁹ Respondent's Ex. 1, Manufacturer Response Form.

³⁰ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

³¹ Note: the Complainant did not provide the applicable warranty terms.

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 the vehicle's normal characteristics, are not warrantable defects.³² Even though the vehicle may not operate/perform to the Complainant's satisfaction, the Lemon Law provides no relief unless the complained of condition constitutes a warrantable defect. In the present case, the evidence does not show that the complained of drifting is more likely to be a defect than a normal characteristic.

a. Manufacturer's Specifications

The evidence reflects that the manufacturer intentionally sets the vehicle's alignment, specifically the camber, with a leftward bias to compensate for the rightward slope on crowned roads. Consequently, with all other conditions being equal, the subject vehicle will normally drift left.

b. External Factors

In this case, the subject vehicle had its camber adjusted to zero during one of the service visits. However, the evidence does not show that any defect internal to the vehicle more likely than not caused the drift as opposed to an external condition. During the test drive, the vehicle exhibited occasional drifting to the left on ostensibly level surfaces but also drifting to the right particularly on the rightward slope of the road crown. However, the vehicle did not exhibit any pulling while holding the steering wheel. Likewise, the Complainant's videos only showed drifting when not touching the steering wheel.³³ Significantly, during the test drive, the vehicle did not consistently drift left when driving on ostensibly flat parts of the road, indicating that external conditions (e.g., the road surface, wind, etc.) have a greater influence on the drift than any internal condition of the vehicle. In sum, a preponderance of the evidence does not show that the leftward drift constitutes a defect and instead the record reflects that the vehicle may drift left or right depending on external

³² 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.").

³³ Complainant's Ex. 1.

conditions regardless of the vehicle's present condition. Accordingly, the vehicle does not qualify for any relief.

III. Findings of Fact

1. On June 15, 2018, the Complainant, purchased a new 2018 Ford F-150 from Mack Haik Ford Lincoln, a franchised dealer of the Respondent, in Georgetown, Texas. The vehicle had 35 miles on the odometer at the time of purchase.
2. On April 17, 2019, the Complainant provided a written notice of defect to the Respondent.
3. On April 17, 2019, the Complainant filed a complaint with the Department alleging that BLIS (Blind Spot Information System) deactivated when hooked up with a trailer; the vehicle pulled (drifted) to the left; a seat belt had glue or some discoloration; visor material was bunched up; there was a large gap above the glovebox; and paint on the roof was scratched. The Complainant only presented the pulling issue for consideration at the hearing.
4. On June 5, 2019, 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.
5. The hearing in this case convened on August 9, 2019, in Austin, Texas, before Hearings Examiner Andrew Kang, and the record closed on the same day. Alfred Kay, attorney, represented the Complainant. The Complainant testified for himself. Anthony Gregory, consumer affairs legal analyst, represented and testified for the Respondent. Asad Bashir, a technical expert, testified for the Respondent.
6. The vehicle's bumper to bumper warranty was in effect at the time of the hearing.
7. Upon inspection at the hearing, before the test drive, the subject vehicle's odometer displayed 15,335 miles. The test drive occurred primarily on major arterial roads. The test drive ended at 15,347 miles. The vehicle occasionally drifted to the left on ostensibly level parts of roads with hands off of the steering wheel. However, the leftward movement was

not continual and the vehicle would drift right when on the right side of the road crowning. The vehicle did not pull when gripping the steering wheel.

8. The Respondent manufactured the subject vehicle and other like vehicles with a leftward bias to compensate for rightward sloping on crowned roads. With all other conditions equal, the vehicle will normally drift left.
9. External factors, such as the road surface and wind may cause drifting to the left or right.

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 prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(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. The Complainant's vehicle does not qualify for warranty repair. The Complainant did not prove that the vehicle has a defect. TEX. OCC. CODE §§ 2301.204 and 2301.603.

9. 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**.

SIGNED October 7, 2019



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