

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0001304 CAF**

JUDY PETERS, Complainant	§ § § § § § §	BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
v.		
FORD MOTOR COMPANY, Respondent		

DECISION AND ORDER

Judy Peters (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 her vehicle manufactured by Ford Motor Company (Respondent). A preponderance of the evidence shows that the subject vehicle qualifies for warranty repair relief.

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 April 21, 2020, by telephone, before Hearings Examiner Andrew Kang, and the record closed on April 29, 2020. Adam Mott, attorney, represented the Complainant. Anthony Gregory, consumer affairs legal analyst, represented the Respondent.

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

¹ TEX. GOV'T CODE § 2001.051.

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

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

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).

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:

[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

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).

⁹ TEX. OCC. CODE § 2301.605(a)(3).

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 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

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.

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

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 for relief under the lemon law.”²¹ However, the parties may expressly or impliedly consent to

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.”).

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

hearing 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 April 10, 2018, the Complainant, purchased a new 2018 Ford F-150 from David McDavid Ford, a franchised dealer of the Respondent, in Fort Worth, Texas. The vehicle had seven miles on the odometer at the time of purchase. The vehicle's warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first, and powertrain coverage for five years or 60,000 miles, whichever occurs first.

On January 7, 2019, the Complainant's attorney provided a written notice of defect to the Respondent. On September 25, 2019, the Complainant filed a complaint with the Department alleging that: the transmission skipped gears; the truck failed to stop at times; the truck made grinding and popping noises when turning; and the master cylinder failed.

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).

The Complainant testified that she owned the subject vehicle but her daughter, Angela Crawford, was the primary driver. She did not feel safe in the vehicle, pointing out an instance of jerking going down the road.

Ms. Crawford testified that she previously had a Ford F-150. She did not notice any nonconformities when test driving the vehicle at the dealership before its purchase. She affirmed that the vehicle was routinely maintained and was never driven off-road and has not been in an accident. While driving the vehicle home after purchase, the dealer called Ms. Crawford because the vehicle should not have been released because of a recall related to the transmission. After picking up the vehicle from the dealer, it rattled and shook on the way to the airport. Between that time and taking the vehicle to the dealer, it continued to have the same problems: popping noise, grinding noise, and a lag in the transmission. At the next repair visit, she notified the dealership that at a stop sign, the pedal dropped to the floor and the vehicle jumped forward. The PCM (power control module) was updated. The electronic transmission required occasional reprogramming. The dealership was supposed to send the vehicle to the selling dealer. The vehicle needed reprogramming and lift kit bolts torqued after installation of larger tires or any work on the vehicle. Ms. Crawford confirmed that the pop sounds related to the lift kit. The lift kit was installed by a Ford dealership. She understood that the lift kit had to be installed through Ford to be warranted. She noted that a lock knob had pulled off twice, which was addressed by applying Loctite each time. In October, the brakes went out completely, almost causing a wreck. The master cylinder required replacement. She continued to experience popping with the transmission. The dealership could not duplicate the noise but reprogrammed the transmission. Ms. Crawford explained that the cup holders would get hot when using the heater. An improperly installed heater hose had not been connected apparently heating the console. Repositioning the air duct alleviated the heat but drinks would still get warm. Ms. Crawford recounted that after starting and turning the vehicle off, the power locks did not unlock. She had to attempt unlocking several times before the vehicle finally unlocked. She affirmed that vehicle still had problems with: thumping and pulling, touchscreen going blank—which was supposed to be addressed with a software update, and transmission jumping from 4th to 5th gear. After the repair completed on April 12th, the sunroof became stuck open, the (transmission) jerking appeared worse, noise while turning stayed the same, a USB port did not function, and the camber was an issue. Ms. Crawford described that on April 22nd, when accelerating, the vehicle started shaking, smoking, and spewing a red liquid, and the vehicle would

not go above 50 mph. This apparently related to the valve body replacement—the new transmission fluid needed to burn off. The transmission continued to be an issue. Ms. Crawford confirmed that the issues with the transmission, noise while turning, alignment, and USB port were ongoing.

On cross-examination, Ms. Crawford acknowledged that the complaint in this case did not include alignment. She represented that the lift kit and aftermarket tires were added by the dealership and Ford had them installed. She understood that the lift kit did not have a separate warranty but would be covered if purchased from the dealer. When asked if she was told that the warranty did not cover these modifications, Ms. Crawford explained that the dealer said that if she modified the vehicle, the warranty would be voided, but would be covered if bought from the dealer.

Ron Nelson, a claims adjuster/inspector, testified that he inspected and test-drove the subject vehicle. His visual inspection of the video did not reveal any abnormal wear and tear. Further, he did not find any abuse or physical damage. He test-drove the vehicle under variable road conditions and speeds for 12 or 13 miles. He attempted to get the torque converter to lock up, which should not be felt if in tune. Torque converter shuddering/judder could result from slipping clutches in the torque converter, the solenoids not applying enough pressure for the torque converter to lock up, or numerous other causes. He explained that judder would feel different from shifting and jerking but he felt both. However, judder and shifting should not be noticeable. Repair for these issues varies. A clean fluid sample would indicate reprogramming as the first response. A sample with debris would indicate a need for a fluid change or possibly a rebuild. If the issue continues, then the transmission and fluid should be changed. Mr. Nelson concluded that the transmission had an ongoing problem.

On cross-examination, Mr. Nelson confirmed that the Respondent's warranty did not cover aftermarket parts. A dealer may be responsible for aftermarket parts if installed by the dealer. He acknowledged that a lift kit and larger tires can affect drivability if the vehicle is not programmed for the modifications. The dealer was responsible for such programming.

C. Summary of Respondent's Evidence and Arguments

Mr. Gregory testified that the vehicle concerns were addressed or could not be duplicated. He asserted that the vehicle was operating as designed. The evidence did not show any repair attempts after 2019.

Asad Bashir, automotive technical specialist, testified that the vehicle's 10R80 transmission had 10 forward gears to provide the optimal gear for the situation, which may skip gears by design, for example from 1st to 3rd or from 5th to 10th, depending on the load. So, shifts may feel different. The jerking concern is essentially a hard shift. In addressing the transmission shift concern, the dealer found a technical service bulletin, simply an addition to the workshop manual, that provided instructions for diagnosis. Because the vehicle was built before May 15, 2018, the vehicle was reprogrammed, clearing the transmission shift table, changing things like shift timing and shift intensity. The vehicle will adapt to changing driving conditions. The valve body had a stuck regulator, which may affect shift quality but did not control shifts. The shuddering concern that Mr. Nelson described was not previously reported. However, the shudder may normally occur because of variable force solenoids. The solenoids modulate the force applied. The current to the solenoids is pulsed rapidly so that the torque converter may be partially or fully locked up. The torque converter locking on and off may be felt (as shudder). Mr. Bashir did not believe that this shudder was the same concern as described by Ms. Crawford. Additionally, when the vehicle stops, the auto start-stop function will stop the engine. Functions such as air conditioning will continue to run so long as the battery has sufficient charge and the engine will start if needed. The engine restarting and transmission engaging may cause a lurching feel and the electronic steering turning on may cause the steering wheel to move. Mr. Bashir stated that the field service engineer found excessive tire tread noise but could not duplicate a scraping noise. Mr. Bashir explained that the aftermarket tires on the vehicle were about 9% larger than the original tires. The current tires were 35" tall, 12.5" wide, on a 20" rim. When built, the vehicle had a 275/55R20 metric tire, which has an approximately 102" circumference as compared to the current tire with a circumference of about 110". The larger tires can cause the speedometer to read incorrectly (the speedometer will show a slower than actual speed) and the speedometer is an input to the transmission, which can affect shifting. The only way to prevent this would be to use a tire close to factory size or to use aftermarket programming. Further, the lift kit and larger tires may contribute to other concerns affecting the integrated wheel end and locking hubs. The (modified)

suspension uses aftermarket fasteners and the torque specifications will differ. Some components do not exist on the vehicle from the factory. Additionally, the installation of the lift kit may have disturbed some components. These components are not covered by the manufacturer's warranty. Some (aftermarket) parts may only be warranted for off-road use. The modifications can change operating angles for steering, tie rod ends, and front half shafts, not as intended by the factory, which can lead to noise, binding, and popping.

On cross-examination, Mr. Bashir, elaborated that a transmission problem may not necessarily set a diagnostic trouble code (DTC). There may be some indication of a fault when a vehicle does something different compared to a like vehicle with the same tire size, axle ratio, etc. Because the transmission is adaptive, it can learn and operate differently later. Mr. Bashir explained that the transmission may normally skip a gear. In sport mode, the transmission will go through each gear, shift more harshly, and delay when the shift occurs. In normal driving mode, the transmission may skip a gear, two gears, or even five gears. Additionally, a transmission may exhibit noticeable shudder resulting from the torque converter engaging on and off rapidly through the solenoids engaging. This normal operation may be distinguished from the torque converter slipping by DTCs. The gear shift ratio may also set a DTC. Also, monitoring the shifts may indicate if shifting is normal. Other issues would require comparison. The subject vehicle has 9% larger tires, so this vehicle would have to be compared with a vehicle equipped the same way or the subject vehicle would need to be returned to stock form (and compared with another same vehicle).

D. Analysis

As an initial matter, to qualify for any relief, whether warranty repair or repurchase/replacement, the law requires the vehicle to have a defect covered by the Respondent's warranty (warrantable defect) that continues to exist after repairs.²⁷ 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. In part, the warranty generally states that:

Under your New Vehicle Limited Warranty if:

²⁷ TEX. OCC. CODE §§ 2301.603(a), 2301.604(a); TEX. OCC. CODE § 2301.204.

- your Ford vehicle is properly operated and maintained, and
- was taken to a Ford dealership for a warranted repair during the warranty period, then authorized 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.²⁸

Additionally, the warranty specifies various exclusions:

The New Vehicle Limited Warranty does not cover any damage caused by:

- alterations or modifications of the vehicle, including the body, chassis, electronics or their components, after the vehicle leaves the control of Ford Motor Company

....

- the installation or use of a non-Ford Motor Company part or software (other than a certified emissions part or software) or any part or software (Ford or non-Ford) designed for off-road use only installed after the vehicle leaves the control of Ford Motor Company, if the installed part fails or causes a Ford part to fail. Examples include, but are not limited to lift kits, oversized tires, roll bars, cellular phones, alarm systems, automatic starting systems and performance-enhancing powertrain components or software and performance “chips”.

....

The New Vehicle Limited Warranty does not cover: (1) parts and labor needed to maintain the vehicle; and (2) the replacement of parts due to normal wear and tear. You, as the owner, are responsible for these items. See your Owner’s Manual. Some examples of maintenance and normal wear are:

....

- wheel alignments and tire balancing*

....

The New Vehicle Limited Warranty does not cover:

...

- Aftermarket parts or components, sometimes installed by Ford Motor Company or an authorized Ford dealership, may not be covered by the New Vehicle Limited Warranty. Any damage caused to Ford components due to the failure of aftermarket parts (other than a certified emissions part) is not covered.²⁹

²⁸ Complainant’s Ex. C, 2018 Model Year Ford Warranty Guide (emphasis added).

²⁹ Complainant’s Ex. C, 2018 Model Year Ford Warranty Guide.

According to the general terms, the warranty only applies to defects in materials or workmanship (manufacturing defects).³⁰ A defectively manufactured vehicle has a flaw because of some error in making it at the factory, such as incorrect assembly or the use of a broken part. Manufacturing defects exist when the vehicle leaves the manufacturing plant. Unlike manufacturing defects, issues that do not arise from the manufacturing of the vehicle, such as design defects, which exist before manufacturing, or negligent work by a dealer, which occurs after manufacturing, are not warrantable defects. Because the warranty only covers manufacturing defects, any non-manufacturing problems do not qualify for relief.

In the present case, the record reflects that issues with the transmission, noise while turning, USB port, and alignment continue to exist. Accordingly, these issues are addressed below.

1. Transmission

The evidence clearly shows that the gear skipping was a normal part of the transmission's operation. Furthermore, the normal function of the vehicle's auto stop-start feature may cause stalling and jerking sensations. Moreover, the installation of the lift kit and aftermarket tires obscures whether any of the transmission related issues arise of from a warranted defect or from unwarranted modifications occurring after the manufacture of the vehicle. Significantly, the warranty expressly excludes issues arising from "alterations or modifications of the vehicle" and "the installation or use of a non-Ford Motor Company part" including lift kits and oversized tires. As shown in testimony, such modifications alter the vehicle's geometry from its intended specifications, interfering with the diagnosis of any non-conformities. Further, the oversized tires will cause the speedometer to read incorrectly (slower than actual), which in turn may affect the transmission's performance, which uses the vehicle speed as an input in the transmission's shift logic. Moreover, the vehicle's adaptive transmission will be learning a shift strategy based on faulty speed information.

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.").

2. Noise While Turning

As with the transmission issues, the modifications to the subject vehicle obscure whether the complained of conditions result from a manufacturing defect or from the lift kit and aftermarket tires. As an initial matter, the warranty expressly excludes issues arising from modifications, installation or use of non-Ford parts, and aftermarket parts. Critically, the Complainant has the burden of proving that the existence of a warrantable defect. However, the installation of the lift kit creates substantial uncertainty about the origin of the noise. The lift kit obviously altered the vehicle from its factory specified design, which complicates determining whether factory materials or workmanship failed to conform to the vehicle's specifications. In particular, such modifications can change operating angles for steering, tie rod ends, and front half shafts, so that they no longer comport with the vehicle's design specifications, which can lead to noise, binding, and popping. Moreover, the dealer may have damaged components in the vehicle during the lift kit installation. In sum, the evidence does not show that the complained of noise more likely than not results from a defect in factory materials or workmanship as opposed to the installation or use of the lift kit.

3. USB Port

As explained in the discussion of applicable law, the complaint identifies the issues to be addressed in this proceeding. However, the complaint did not include the issue of the USB port not recognizing the Complainant's phone. Nevertheless, the Respondent did not object to this issue. Therefore, the USB port issue may be considered in this proceeding. However, the record does not show that written notice of the USB issue was ever provided to the Respondent. As previously stated, the complaint did not identify the USB issue. Further, the January 7, 2020, notice letter from the Complainant's attorney did not mention the USB issue or any other specific issue. Consequently, the USB issue cannot support granting repurchase or replacement relief.³¹ However, the evidence reflects that his issue continues to exist. Accordingly, this issue qualifies for warranty repair relief.

4. Alignment

As with the USB port issue, neither the complaint nor the January 7, 2020, notice letter from the Complainant's attorney mentioned the alignment issue (e.g., pulling and camber), so this

³¹ TEX. OCC. CODE § 2301.606(d)(2).

issue cannot support repurchase or replacement. More importantly, as shown above, the warranty expressly excludes alignments, so this issue cannot support any relief.

III. Findings of Fact

1. On April 10, 2018, the Complainant, purchased a new 2018 Ford F-150 from David McDavid Ford, a franchised dealer of the Respondent, in Fort Worth, Texas. The vehicle had seven miles on the odometer at the time of purchase.
2. The vehicle's warranty provides bumper to bumper coverage for three years or 36,000 miles, whichever occurs first, and powertrain coverage for five years or 60,000 miles, whichever occurs first.
3. On January 7, 2019, the Complainant's attorney provided a written notice of defect to the Respondent.
4. On September 25, 2019, the Complainant filed a complaint with the Department alleging that: the transmission skipped gears; the truck failed to stop at times; the truck made grinding and popping noises when turning; and the master cylinder failed.
5. On January 3, 2020, 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.
6. The hearing in this case convened on April 21, 2020, by telephone, before Hearings Examiner Andrew Kang, and the record closed on April 29, 2020. Adam Mott, attorney, represented the Complainant. Anthony Gregory, consumer affairs legal analyst, represented the Respondent.
7. The vehicle's odometer displayed 39,415 miles at the time of the hearing.
8. The warranty's powertrain coverage was in effect at the time of the hearing. The warranty's bumper to bumper coverage expired upon reaching 36,007 miles on the odometer.
9. The transmission, noise while turning, USB port, and alignment issues continue to exist.

10. Neither the Complainant nor anyone on her behalf provided written notice to the Respondent of the USB port or alignment issues.
11. The warranty generally covers malfunctions or failures during normal use due to a manufacturing defect in factory-supplied materials or factory workmanship.
12. The warranty expressly excludes coverage of nonconformities arising from: the alteration or modification of the vehicle, and the installation or use of a non-Ford Motor Company part (including lift kits and oversized tires). The warranty also excludes coverage of wheel alignments and aftermarket parts/components.
13. The vehicle's transmission normally skips gears by design.
14. The normal operation of the vehicle's auto stop-start feature may cause stalling and jerking sensations.
15. The dealer modified the subject vehicle by installing an aftermarket lift kit and oversized tires. The modifications altered the vehicle from its specified design.
16. The dealer-installed tires are approximately 9% larger than the factory tires. The oversized tires will cause the speedometer to read incorrectly (slower than actual). The transmission's shift logic uses the vehicle's speedometer reading as an input and the vehicle's adaptive transmission uses the speedometer's reading to learn shift strategies. Consequently, the incorrect speedometer reading may affect the transmission's performance.
17. The modifications can change operating angles for certain vehicle components, which may lead to noise, binding, and popping.

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 issues with the transmission, noise while turning, and alignment were defects covered by the Respondent's warranty. TEX. OCC. CODE §§ 2301.603 and 2301.604(a). Additionally, the Complainant or a person on behalf of the Complainant did not provide sufficient notice of the alleged USB port and alignment defects to the Respondent. This Order may not require repurchase or replacement of the vehicle without written notice of the defect/nonconformity to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).
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 does not qualify for warranty repair of the transmission, noise while turning, and alignment issues. The Complainant did not prove that the Respondent's warranty covered these alleged defects. TEX. OCC. CODE §§ 2301.204 and 2301.603.
10. The Complainant's vehicle qualifies for warranty repair of the USB port issue. The Complainant proved that the Respondent's warranty covered the USB port defect. TEX. OCC. CODE §§ 2301.204 and 2301.603. The Complainant or an agent of the Complainant notified the Respondent or Respondent's agent of the alleged defect(s). TEX. OCC. CODE §§ 2301.204 and 43 TEX. ADMIN. CODE § 215.202(b)(3).


11. 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.
12. The Respondent has a continuing obligation after the expiration date of the warranty to address and repair or correct any warrantable nonconformities reported to the Respondent or Respondent's designated agent or franchised dealer before the warranty expired. 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 to the applicable warranty; specifically, the Respondent shall resolve the USB port's failure to recognize the Complainant's phone. Upon this Order becoming final under Texas Government Code § 2001.144:³² (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).

³² 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 June 29, 2020

A handwritten signature in black ink, appearing to read "Andrew Kang", is written over a horizontal line.

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