

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0059 CAF**

BROOKE TUTTLE,	§	BEFORE THE OFFICE
Complainant	§	
	§	
v.	§	OF
	§	
FORD MOTOR COMPANY,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Brooke Tuttle (Complainant) filed a complaint with the Texas Department of Motor Vehicles 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). The hearings examiner concludes that the subject vehicle continues to have an existing warrantable defect that substantially impairs the market value. Consequently, the Complainant’s vehicle 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 and the record closed on February 1, 2016, in Austin, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented herself. Maria Diaz, Consumer Legal Analyst, represented the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief

A vehicle qualifies for repurchase or replacement if the manufacturer 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 continue to exist after a “reasonable number of attempts” at repair.³ In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a mailed written notice of the defect to the manufacturer, (2) an opportunity to repair by the manufacturer, 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 Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. 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.”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).

c. Reasonable Number of Repair Attempts

The Lemon Law provides three ways to establish a rebuttable presumption that a reasonable number of repair attempts have been undertaken.⁶ The first applies generally,⁷ the second applies to serious safety hazards,⁸ and the third applies to vehicles out of service for repair for at least 30 days.⁹ In this case, the general presumption applies. 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: (A) two of the repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.¹⁰

However, the 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 implying that if the consumer takes the vehicle for a service visit then that visit would constitute a repair attempt unless the consumer was at fault for 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 mailed written notice of the alleged defect or nonconformity to the manufacturer;¹³ (2) the manufacturer was given an

⁶ TEX. OCC. CODE § 2301.605(a).

⁷ TEX. OCC. CODE § 2301.605(a)(1).

⁸ TEX. OCC. CODE § 2301.605(a)(2).

⁹ TEX. OCC. CODE § 2301.605(a)(3).

¹⁰ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

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

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

¹³ TEX. OCC. CODE § 2301.606(c)(1).

opportunity to cure the defect or nonconformity;¹⁴ and (3) the owner or someone on behalf of the owner filed the Lemon Law complaint within six months after the earliest of: the warranty's expiration date or the dates on which 24 months or 24,000 miles have 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 under Section 2301.204 of the Texas Occupations Code if the vehicle has a "defect . . . that is covered by a manufacturer's . . . warranty agreement applicable to the vehicle."¹⁶

A. Complainant's Evidence and Arguments

On May 29, 2015, Carolyn Hoppe Tuttle, the Complainant's grandmother, purchased a new 2015 Ford Mustang from Griffith Ford, a franchised dealer of the Respondent, Ford Motor Company, in San Marcos, Texas.¹⁷ Carolyn Hoppe Tuttle transferred the vehicle to the Complainant when she turned 18 years old.¹⁸ The vehicle had 130 miles on the odometer at the time of purchase.¹⁹ The vehicle's limited 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.²⁰

The Complainant testified that approximately four to six weeks after the purchase of the vehicle, the brakes started screeching and moving the gearshift would make a clink sound when shifting between park, reverse, neutral, etc. On July 23, 2015, the Complainant took the vehicle to Leif Johnson Ford. On, July 24, 2015, the dealer called the Complainant to notify her that the

¹⁴ TEX. OCC. CODE § 2301.606(c)(2). Note: a repair visit to a dealer satisfies the "opportunity to cure" requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer. *See Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

¹⁵ TEX. OCC. CODE § 2301.606(d)(2).

¹⁶ TEX. OCC. CODE § 2301.204.

¹⁷ Complainant's Ex. 1, Purchase Order.

¹⁸ The Lemon Law's definition of "owner" includes a transferee of the original retail purchaser. TEX. OCC. CODE § 2301.601(E).

¹⁹ Complainant's Ex. 2, Odometer Disclosure Statement.

²⁰ Complainant's Ex. 12, 2015 Model Year Ford Warranty Guide.

vehicle needed its driveshaft replaced but she could pick up the vehicle that day because the driveshaft was backordered. On August 17, 2015, the dealership called the Complainant to bring the vehicle in. The Complainant took the vehicle to the dealer later that day and picked it up on August 20, 2015. The dealer replaced the driveshaft, which was supposed to have addressed both the brake ringing and driveshaft clinking sounds. After picking up the vehicle from the dealership, the vehicle's brakes made a ringing noise. The Complainant did not yet hear the transmission sound, but after arriving at her apartment, the vehicle would make the noise when shifting. That same day, August 20, 2015, the service advisor at Griffith Ford told the Complainant to bring the vehicle in for diagnosis. At the dealership, the service advisor tested the brakes by accelerating to 100 mph and slamming on the brakes. The brakes apparently worked fine but the vehicle needed an appointment for the transmission issue. The Complainant scheduled a service visit to address the transmission with Griffiths Ford for September 1, 2015, but had to reschedule for September 4, 2015, because of a conflict with a class. The Complainant called the dealer about 5 p.m. on September 4, 2015, to check on the status of her vehicle. The service advisor explained the vehicle will not be looked at until the following Tuesday (September 8, 2015). The dealer did not offer a loaner vehicle but she needed a vehicle to drive to school and work, so the service advisor stated that she could pick up her vehicle and bring it back on Tuesday, September 8, 2015. After the September 8, 2015, visit, the Complainant got her car back on September 11, 2015, but the clink sound and brake screeching remained. She took the vehicle back to the dealer on September 14, 2015, and subsequently received it on September 16, 2015. The sound went away for a week but then came back randomly. The Complainant brought the car back to the dealer on September 22, 2015, and got it back the next day, September 23, 2015. At this last visit, the dealership compared the subject vehicle with a like model vehicle, but it did not make the same sound as the subject vehicle. The clunk sound also started occurring during this visit. The Complainant brought the vehicle to the dealer on September 28, 2015, to replace the brakes. She took the vehicle back one last time on October 13, 2015, to try one more repair suggested by the Respondent. She received the vehicle back on October 16, 2015. After the repairs, the clunk and clink sounds occurred randomly. The Complainant added that the brakes no longer made the loud screeching noise but still squeaked. The Complainant confirmed that she did not notice any effect on the vehicle's performance in relation to the noise. The Respondent's final opportunity to repair the vehicle

occurred on November 3, 2015, but no repairs were made because the field service engineer could not duplicate the noise.

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

Dates	Miles	Issue
07/23/15 to 07/24/15; 08/17/15 to 08/20/15	3,311	Ringling and vibration under feet when braking and brakes squeal when slowing down at speeds over 60 mph; ²¹ Clicking sound in transmission when shifting ²²
09/04/15; 09/08/15 to 09/11/15; 09/14/15 to 09/16/15; 09/22/15 to 09/23/15	5,490	Vibration under feet, pinging sound when shifting from park to drive or park to reverse, brakes make noise when braking from 60 mph ²³
10/13/15 to 10/16/15		Brake noise, transmission/gearshift noise
11/03/15		Brake noise, transmission/gearshift noise ²⁴

On October 1, 2015, the Complainant mailed a written notice of defect to the Respondent.²⁵ On October 15, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the driveshaft/transmission made a loud tone when put in gear and the brakes made noise and vibrated.

B. Respondent's Evidence and Arguments

The Respondent argued that the vehicle did not qualify for repurchase/replacement because the vehicle did not have four or more warrantable repair attempts and did not have a non-conformity. At the final repair attempt on November 3, 2015, the field service engineer (FSE) could not identify any abnormal noise, found no repairs necessary, and concluded that the noises and vibrations that the vehicle did have were normal characteristics of the vehicle that also existed in other like vehicles. In particular, the FSE explained that the transmission noise occurred, once per change in the direction of rotation, from the amount of "mechanical tolerance" in the mechanical components linked together between the engine and the rear axle.²⁶

²¹ Complainant's Ex. 3, Invoice No. 961462.

²² Complainant's Ex. 4, Invoice No. 961462C.

²³ Complainant's Ex. 5, RO No. 44717; Complainant's Ex. 6, RO No. 44717.

²⁴ Respondent's Ex. 3, Vehicle Inspection Report

²⁵ Complainant's Ex. 7, Written Notice of Defect.

²⁶ Respondent's Ex. 3, Vehicle Inspection Report.

C. Inspection and Test Drive

The vehicle's odometer had 11,322 miles at the time of inspection at the hearing. The vehicle produced a clunk noise when moving the gearshift between park, reverse, and drive. During the test drive, the vehicle performed normally and did not produce any abnormal noises and the brakes in particular did not make any discernable noise.

D. Analysis

1. Gearshift Noise

As outlined below, the gearshift noise constitutes a warrantable non-conformity that substantially impairs the value of the vehicle despite a reasonable number of repair attempts. Accordingly, the vehicle qualifies for replacement/repurchase relief.

a. Warrantable Defect

The Respondent's final inspection report asserted that the transmission noise resulted from mechanical tolerance²⁷ between the engine and the final drive assembly (rear axle). In other words, because of normal manufacturing variations resulting in clearances between the mating parts, the components can make noise as their parts initially make contact with each other. However, the testimony shows that the noise began four to six weeks after purchase of the vehicle, suggesting that the noise did not arise from variations existing since the time of manufacture. Presumably, variations existing since the time of manufacture should have been causing noise ever since the vehicle left the manufacturer rather than four to six weeks after leaving the dealership. Moreover, the record does not contain any evidence showing why tolerance-related noise would have occurred after weeks of driving, despite the variations existing from the time of manufacture. Accordingly, a manufacturing defect appears more likely than not to have caused the noise.

b. Substantial Impairment

Applying the Department's reasonable prospective purchaser test,²⁸ the gearshift noise substantially impairs the value of the vehicle. This test uses the perspective of a prospective

²⁷ Tolerance is "the allowable deviation from a standard; especially: the range of variation permitted in maintaining a specified dimension in machining a piece." *Tolerance*, [Merriam-Webster.com](http://www.merriam-webster.com/dictionary/tolerance) (March 16, 2016), <http://www.merriam-webster.com/dictionary/tolerance>.

²⁸ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

purchaser, as opposed to an appraiser or technician. If the condition of the vehicle would deter a purchaser from buying the vehicle or would substantially negatively affect the purchase price, the value is substantially impaired. Given the noise's association with the drivetrain, a prospective purchaser may very well be deterred from buying the vehicle because of a perceived potential for costly problems, e.g., transmission issues. Consequently, the vehicle's market value is substantially impaired.

c. Reasonable Number of Repair Attempts

Although a repair order/invoice does not exist for every repair visit, the record shows that vehicle has had at least the minimum of four repair visits required for the statutory presumption for a reasonable number or repairs (for both the gearshift noise and the braking noise). In part, the dealer(s) appear to have addressed more than one visit under a single invoice(s) since the Complainant would bring the vehicle back for repair shortly after a prior repair attempt.

2. Brake Noise

The evidence appears to show that any remaining brake noise appears to be normal. The Complainant testified the brakes no longer made a loud screech but did squeak intermittently. The Respondent's FSE explained that brakes may squeal after the vehicle has been sitting, particularly in humid conditions, presumably from moisture, rust, or other some other matter on the friction surfaces. During the test drive at the hearing, the vehicle did not make any braking noise and the Complainant expressed that she did not have substantial concern regarding the braking noise. Any existing braking noise appears normal and not a defect.

III. Findings of Fact

1. On May 29, 2015, Carolyn Hoppe Tuttle, the grandmother of Brooke Tuttle (Complainant), purchased a new 2015 Ford Mustang from Griffith Ford, a franchised dealer of the Respondent, Ford Motor Company, in San Marcos, Texas. The vehicle had 130 miles on the odometer at the time of purchase. Carolyn Hoppe Tuttle subsequently transferred the vehicle to the Complainant when the Complainant turned 18 years old.
2. The vehicle's limited 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. The vehicle's warranty was in effect at the time of the hearing.
4. In relevant part, the Complainant took the vehicle to a dealer for repair as follows:

Dates	Miles	Issue
07/23/15 to 07/24/15; 08/17/15 to 08/20/15	3,311	Ringling and vibration under feet when braking and brakes squeal when slowing down at speeds over 60 mph; Clicking sound in transmission when shifting
09/04/15; 09/08/15 to 09/11/15; 09/14/15 to 09/16/15; 09/22/15 to 09/23/15	5,490	Vibration under feet, pinging sound when shifting from park to drive or park to reverse, brakes make noise when braking from 60 mph
10/13/15 to 10/16/15		Brake noise, transmission/gearshift noise
11/03/15		Brake noise, transmission/gearshift noise

The final opportunity for repair occurred on November 3, 2015.

5. On October 1, 2015, the Complainant mailed a written notice of defect to the Respondent.
6. On October 15, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that the driveshaft/transmission made a loud tone when put in gear and the brakes made noise and vibrated.
7. On November 9, 2015, the Department's Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, Ford Motor Company, 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.
8. The hearing in this case convened and the record closed on February 1, 2016, in Austin, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented herself. Maria Diaz, Consumer Legal Analyst, represented the Respondent.
9. The vehicle's odometer displayed 11,322 miles at the time of the hearing.
10. During the inspection at the hearing, the vehicle produced a "clunk" noise when moving the gearshift out of park and into gear.

11. During the test drive at the hearing, the vehicle operated normally and the vehicle's brakes did not make any discernable noise.

12. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license and registration	\$26,128.00
Delivery mileage	130
Mileage at first report of defective condition	3,311
Mileage on hearing date	11,322
Useful life determination	120,000

Purchase price, including tax, title, license and registration	\$26,128.00		
Mileage at first report of defective condition	3,311		
Less mileage at delivery	-130		
Unimpaired miles	3,181		
Mileage on hearing date	11,322		
Less mileage at first report of defective condition	-3,311		
Impaired miles	8,011		
<i>Reasonable Allowance for Use Calculations:</i>			
Unimpaired miles	$3,181 \div 120,000 \times \$26,128.00$	=	\$692.61
Impaired miles	$8,011 \div 120,000 \times \$26,128.00 \times 50\%$	=	\$872.13
Total reasonable allowance for use deduction			\$1,564.74
Purchase price, including tax, title, license and registration	\$26,128.00		
Less reasonable allowance for use deduction	-\$1,564.74		
Plus filing fee refund	\$35.00		
TOTAL REPURCHASE AMOUNT	\$24,598.26		

IV. Conclusions of Law

1. The Texas Department of Motor Vehicles 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. The Complainant is an owner as defined in the Lemon Law. TEX. OCC. CODE § 2301.601(2)(E).
4. The Complainant timely filed a sufficient complaint with the Department. TEX. OCC. CODE §§ 2301.204, 2301.606(d); 43 TEX. ADMIN. CODE § 215.202.
5. The parties received proper notice of the hearing. TEX. GOV'T CODE §§ 2001.051, 2001.052; 43 TEX. ADMIN. CODE § 215.206(2).
6. The Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 206.66(d).
7. The Complainant proved that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
8. The Complainant provided sufficient notice of the defect(s) to the Respondent. TEX. OCC. CODE § 2301.606(c)(1).
9. The Respondent had an opportunity to cure the alleged defect(s). TEX. OCC. CODE § 2301.606(c)(2).
10. The Complainant's vehicle qualifies for replacement or repurchase. TEX. OCC. CODE § 2301.604.

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 **GRANTED**. It is further **ORDERED** that the Respondent shall repair the warrantable defect(s) in the reacquired vehicle identified in this Decision. **IT IS THEREFORE ORDERED** that:

1. The Respondent shall accept the return of the vehicle from the Complainant. The Respondent shall have the right to have its representatives inspect the vehicle upon the

- return by the 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. The Respondent shall repurchase the subject vehicle in the amount of **\$24,598.26**. The refund shall be paid to the Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to the Respondent, then the full refund shall be paid to the Complainant. At the time of the return, the 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, the Complainant is responsible for providing the Respondent with clear title to the vehicle;
 3. Within 20 days after the date this Order becomes final under Texas Government Code § 2001.144,²⁹ 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, starting on the 31st day after the date this Order becomes final, the 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 the Complainant's refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by the Complainant and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);
 4. The 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. The 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

²⁹ (1) If a party does not timely file a motion for rehearing, this Order becomes final when the period for filing a motion for rehearing expires, or (2) if a party timely files a motion for rehearing, this Order becomes final when: (A) the Department renders an order overruling the motion for rehearing, or (B) the Department has not acted on the motion within 45 days after the party receives a copy of this Decision and Order.

sale of the vehicle, the disclosure statement shall be completed and returned to the Department's Enforcement Division – Lemon Law Section; and

6. The 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 days of the transfer.

SIGNED March 30, 2016



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