

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0006727 CAF**

**KEN and KAREN SCHMITZ,
Complainants**

v.

**FORD MOTOR COMPANY,
Respondent**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Ken and Karen Schmitz (Complainants) seek relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in their 2019 Ford Escape. Complainants assert that the vehicle has a defect or nonconformity that has caused a problem with the vehicle's electrical system causing the vehicle to fall into deep sleep mode. Ford Motor Company (Respondent) argued that the vehicle has been repaired, does not have any defects, and that no relief is warranted. The hearings examiner concludes that the vehicle has been repaired, does not have an existing warrantable defect, and Complainants are not eligible for repurchase or replacement relief.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Matters of notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing in this case convened telephonically on August 19, 2020, before Hearings Examiner Edward Sandoval. Ken Schmitz, represented Complainants, Ken and Karen Schmitz, in the hearing. Anthony Gregory, Consumer Affairs Legal Analyst, represented Respondent, Ford Motor Company, in the hearing. Also present and testifying for Respondent was Sayyed Asad Bashir, Automotive Consultant. The hearing record closed on August 19, 2020.

II. DISCUSSION

A. Applicable Law

The Lemon Law provides, in part, that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of with a comparable vehicle if the following conditions are met. First, the manufacturer is not able to conform the vehicle to an applicable express warranty by

repairing or correcting a defect after a reasonable number of attempts.¹ Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle.² Third, the manufacturer has been given a reasonable number of attempts to repair or correct the defect or condition.³ Fourth, the owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.⁴ Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.⁵

In addition to these conditions, a rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same nonconformity continues to exist after being subject to repair four or more times by the manufacturer, converter, or distributor, or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the repair attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁶

If a vehicle is found to have a nonconformity that creates a serious safety hazard which continues to exist, the rebuttable presumption that a reasonable number of repair attempts have been performed can be established if the vehicle has been subject to repair two or more times by the manufacturer, converter, or distributor, or an authorized agent or franchised dealer of a manufacturer, converter, or distributor and the attempts were made before the earlier of: (A) the date the express warranty expires; or (B) 24 months or 24,000 miles, whichever occurs first, following the date of original delivery of the motor vehicle to the owner.⁷

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

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

³ *Id.*

⁴ Tex. Occ. Code § 2301.606(c)(1).

⁵ Tex. Occ. Code § 2301.606(c)(2).

⁶ Tex. Occ. Code § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a) (3) provides a third method for a complainant to establish a rebuttable presumption that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty. This section requires that the vehicle be out of service for repair for a total of 30 or more days in the 24 months or 24,000 miles, whichever occurs first, following the date of original delivery to the owner.

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

⁸ Tex. Occ. Code § 2301.601(4).

B. Complainant's Evidence and Arguments

Complainants purchased a new 2019 Ford Escape from Bill Utter Ford (Utter) in Denton, Texas on July 1, 2019, with mileage of 385 at the time of delivery.⁹ Respondent issued a new vehicle limited warranty which provides coverage for the vehicle for three (3) years or 36,000 miles from the date of delivery, whichever occurs first. In addition, Respondent provided a powertrain warranty for the vehicle providing coverage for five (5) years or 60,000 miles. The vehicle's mileage on the date of hearing was 14,036. At the time of hearing the vehicle's warranties were still in effect.

Complainants' purchased the vehicle for their daughter who is the primary driver of the vehicle. Mr. Schmitz testified that he test drove the vehicle prior to purchasing it and that he did not notice any issues with the vehicle at the time of the test drive. After the vehicle was purchased, Complainants' daughter (Ms. Schmitz) took the vehicle with her to Lubbock, Texas where she was attending college.

On September 24, 2020, Ms. Schmitz was driving the vehicle when several warning lights illuminated, including the traction control warning light. Ms. Schmitz took the vehicle for repair to Gene Messer Ford (Messer) located in Lubbock the following day, September 25, 2019. Messer's service technician determined that the traction control warning light and other warning lights on the vehicle's dashboard had illuminated because the steering wheel position sensor had set a diagnostic trouble code (DTC) indicating that the vehicle's wheels were not aligned properly.¹⁰ The technician had the vehicle's wheels realigned and recalibrated the steering wheel sensor in order to address the issue regarding the warning lights illuminating.¹¹ The vehicle's mileage at the time was 3,629.¹² The vehicle was in the dealer's possession for three (3) days. Ms. Schmitz was not provided a loaner vehicle while the vehicle was being repaired, since she was under 21 years old.

On October 24, 2019, the vehicle went into deep sleep mode and would not start. The vehicle was towed to Messer for repair. Messer's service technician replaced the vehicle's battery in order to address the issue of the vehicle not starting. The vehicle's mileage at the time was 6,085. The vehicle was in Messer's possession for four (4) days. Ms. Schmitz was again not provided with a loaner vehicle because of her age.

⁹ Complainant Ex. 2, Hearing Packet, p. 1 – Motor Vehicle Buyer's Order dated July 1, 2019.

¹⁰ Complainant Ex. 3, Repair Orders, p. 2 – Repair Order dated September 25, 2019.

¹¹ *Id.*

¹² *Id.*

On November 12, 2019, the vehicle went into deep sleep mode again. On this occasion, Ms. Schmitz was able to jump start the vehicle and drive it to Messer for repair. Messer's service technician replaced the vehicle's battery again in order to resolve the non-start issue.¹³ The vehicle's mileage on this occasion was 6,179.¹⁴ The vehicle was in Messer's possession for two (2) days during this repair visit. Ms. Schmitz was not provided with a loaner vehicle while the vehicle was being repaired.

On January 6, 2020, the vehicle went into deep sleep mode again, would not start, and had to be towed to Bill Utter Ford for repair. Utter's service technician jump started the vehicle and checked the vehicle's battery, but did not find any problems with it.¹⁵ The service technician reprogrammed the vehicle's powertrain control module (PCM) as part of a recall.¹⁶ The vehicle's mileage on this occasion was 7,000.¹⁷ The vehicle was in Utter's possession for five (5) days. Complainants were not provided with a loaner vehicle during this repair visit.

Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on January 13, 2020.¹⁸

Mr. Schmitz testified that on February 6, 2020, the vehicle was in deep sleep mode, would not start, and had to be jump started. The vehicle would not accelerate over 40 mph after it started and the check engine light (CEL) illuminated. Ms. Schmitz took the vehicle to Messer for repair on that same date. Messer's service technician removed and replaced the vehicle's crankshaft position (CKP) sensor and reset the vehicle's keep alive memory (KAM) in order to address the concerns with the vehicle.¹⁹ The vehicle's mileage at the time was 9,527.²⁰ Complainants paid for a rental vehicle for Ms. Schmitz since it was difficult to find a rental car company who would rent a vehicle to someone under the age of 21.

In February of 2020, Complainants mailed a letter to Respondent advising them that they were dissatisfied with the vehicle.²¹

Due to the continuing issues with the vehicle, Mr. Schmitz traded vehicles with his daughter and started driving the subject vehicle regularly. On February 29, 2020, the vehicle went into deep sleep mode again. Mr. Schmitz testified that the vehicle had to be jump started as it would not start on its own. Mr. Schmitz took the vehicle to Utter for repair. While the vehicle was at Utter

¹³ Complainant Ex. 3, Repair Orders, p. 7 – Repair Order dated November 12, 2019.

¹⁴ *Id.*

¹⁵ Complainant Ex. 3, Repair Orders, p. 9 – Repair Order dated January 6, 2020.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Complainant Ex. 1, Lemon Law Complaint dated January 13, 2020.

¹⁹ Complainant Ex. 3, Repair Orders, p. 15 – Repair Order dated February 6, 2020.

²⁰ *Id.*

²¹ Complainant Ex. 2, Hearing Packet, pp. 5-6 – Letter to Ford Motor Company, undated.

it was inspected by Patrick Johnson, Respondent's field service engineer (FSE), who determined that the issue with the vehicle was caused by a power circuit for unlocking the passenger door shorting out and causing a drain on the vehicle's battery, thereby causing the vehicle to go into deep sleep mode.²² The vehicle's main body wiring harness was replaced in order to address the issue regarding the vehicle going into deep sleep mode.²³ The vehicle's mileage at the time was 10,084.²⁴ The vehicle was in Utter's possession for 21 days during this repair. Complainants were provided a loaner vehicle while their vehicle was being repaired.

On May 12, 2020, the vehicle's driver's side power seat stopped working. Mr. Schmitz took the vehicle to Utter for repair for the issue that same day. Utter's service technician determined that the seat was not working because the fuse (which was the wrong amperage) for the seat had blown.²⁵ The technician contacted replaced the fuse with the proper fuse with the correct amperage.²⁶ The vehicle's mileage on this occasion was 11,205.²⁷ The vehicle was in the dealer's possession for one (1) day during this repair.

Mr. Schmitz testified that there have not been any other issues with the vehicle since the final repair on May 12, 2020. The vehicle has not gone into deep sleep mode since the repair performed on March 2, 2020. Mr. Schmitz feels that the repeated issues indicate that the vehicle has a short in its electrical system which has caused the problems that Complainants have experienced with the vehicle.

C. Respondent's Evidence and Arguments

1. Anthony Gregory's Testimony

Anthony Gregory, Consumer Affairs Legal Analyst, testified for Respondent. Mr. Gregory stated that Respondent received Complainants' notice letter sometime prior to March 2, 2020. As a result of the complaint, an FSE, Mr. Johnson, was assigned to inspect the vehicle to determine why it kept going into deep sleep mode. This inspection was performed during the March 2, 2020 repair at Utter.

Mr. Johnson determined during his inspection of the vehicle that a door latch circuit could be shorting out causing an excessive battery drain.²⁸ As a result of this information, Mr. Johnson

²² Complainant Ex. 3, Repair Orders, p. 20 – Repair Order dated March 2, 2020. Complainant testified that the incident occurred on February 29, 2020 and that he took the vehicle to Utter for repair the same day. However, the repair order for this repair visit was dated March 2, 2020.

²³ *Id.*

²⁴ *Id.*

²⁵ Complainant Ex. 3, Repair Orders, p. 25 – Repair Order dated May 12, 2020.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Respondent Ex. 2, Field Service Engineer's Inspection Report dated March 2, 2020.

determined that the main body wiring harness should be replaced to resolve the issue.²⁹ There was no other repair performed for the vehicle for the issue.

Mr. Gregory testified that Respondent's position is that the vehicle has been fully repaired and that repurchase or replacement of the vehicle should not be ordered.

2. Sayyed Asad Bashir's Testimony

Sayyed Asad Bashir, Automotive Technical Consultant, testified for Respondent at the hearing. Mr. Bashir testified that he has worked in the automotive industry since 1999. For the first eight (8) years of his career, Mr. Bashir worked for various independent automotive repair shops. He was hired by Respondent in 2007, as a claims adjuster. In 2009, Mr. Bashir was hired in his present position. He is an Automotive Service Excellence (ASE) Master Certified Technician and is enrolled in Respondent's senior master technician certification program.

Mr. Bashir testified that he has not inspected nor seen the vehicle. He stated that the vehicle has gone into deep sleep mode in the past. When a vehicle goes into deep sleep mode, it's an effort to preserve the vehicle's battery when a vehicle sits too long or if there's a drain on the battery. Portions of the vehicle and certain features are disabled when a vehicle goes into deep sleep mode. If the battery drains excessively, then the vehicle will not start. Mr. Bashir feels that this was what was occurring with Complainants' vehicle. Mr. Bashir feels that the vehicle has been fully repaired due to the replacement of the main body wiring harness.

E. Analysis

Under the Lemon Law, Complainants bear the burden of proof to establish by a preponderance of evidence that a defect or condition creates a serious safety hazard or substantially impairs the use or market value of the vehicle. In addition, Complainants must meet the presumption that the manufacturer was given a reasonable number of attempts to repair or correct the defect or condition to conform the vehicle to an applicable express warranty. Finally, Complainants are required to serve written notice of the defect or nonconformity on Respondent, who must be allowed an opportunity to cure the defect. If each of these requirements is met and Respondent is still unable to conform the vehicle to an express warranty by repairing the defect or condition, Complainants are entitled to have the vehicle repurchased or replaced.

Complainants purchased the vehicle on July 1, 2019, and experienced issues with the vehicle going into deep sleep mode on the following dates: October 24, 2019; November 12, 2019; January 6, 2020, February 6, 2020; and February 29, 2020. The evidence indicates that the vehicle was repaired for the issue of going into deep sleep mode after the vehicle's main body

²⁹ *Id.*

wiring harness during the March 2, 2020 repair visit. The issues that occurred on September 25, 2019 and May 12, 2020 were not due to the vehicle going into deep sleep mode. However, Complainants argue that the issues were consistent with an ongoing problem with the vehicle's electrical system. Complainants did not provide any evidence to substantiate the allegation that the vehicle has a current problem with its electrical system. The evidence indicates that the vehicle was fully repaired as of May 12, 2020, when the vehicle's driver's side power seat was repaired by replacing a blown fuse. This issue did not seem to be related to the issue of the vehicle going into deep sleep mode which had been the primary problem with the vehicle.

Occupations Code § 2301.603 provides that "a manufacturer, converter, or distributor shall make repairs necessary to conform a new motor vehicle to an applicable manufacturer's converter's or distributor's express warranty." Relief under the Lemon Law can only be granted if the manufacturer of a vehicle has been unable to conform a vehicle to the manufacturer's warranty. If a vehicle has been repaired then no relief can be possible. A loss of confidence in the vehicle when a defect has been cured does not warrant relief under the Lemon Law. The Lemon Law requires that in order for a vehicle to be determined to be a "lemon" the "nonconformity continues to exist" after the manufacturer has made repeated repair attempts.³⁰ In the present case, the evidence reveals that the vehicle has been fully repaired and that it currently conforms to the manufacturer's warranty. Therefore, the hearings examiner finds that there is no defect with the vehicle that has not been repaired and, as such, repurchase or replacement relief for Complainants is not warranted.

Respondent's new vehicle limited warranty applicable to Complainants' vehicle provides coverage for three (3) years or 36,000 miles whichever comes first. On the date of hearing, the vehicle's mileage was 14,036 and the vehicle remains covered under the warranties. As such, Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranties.

Complainants' request for repurchase or replacement relief is denied.

III. FINDINGS OF FACT

1. Ken and Karen Schmitz (Complainants) purchased a new 2019 Ford Escape on July 1, 2019, from Bill Utter Ford (Utter) in Denton, Texas, with mileage of 385 at the time of delivery.
2. The manufacturer or distributor of the vehicle, Ford Motor Company (Respondent), issued a new vehicle limited warranty for the vehicle providing coverage for three (3)

³⁰ Tex. Occ. Code § 2301.605.

years or 36,000 miles, whichever comes first, from the date of delivery and a powertrain warranty providing coverage for five years (5) or 60,000 miles.

3. The vehicle's mileage on the date of hearing was 14,036.
4. At the time of hearing the vehicle's warranties were still in effect.
5. Since purchasing the vehicle, Complainants have experienced five (5) incidents where the vehicle the vehicle went into deep sleep mode. In addition, the vehicle underwent two (2) other repairs for other issues (the traction control warning light illuminating and the driver's side power seat not working).
6. Complainants took the vehicle to Respondent's authorized dealers, Utter and Gene Messer Ford (Messer) located in Lubbock, Texas, for repair for the issues described in Findings of Fact #5 on the following dates:
 - a. September 25, 2019, at 3,629 miles;
 - b. October 24, 2019, at 6,085 miles;
 - c. November 12, 2019, at 6,179 miles;
 - d. January 6, 2020, at 7,000 miles;
 - e. February 6, 2020, at 9,527 miles;
 - f. March 2, 2020, at 10,084 miles; and
 - g. May 12, 2020, at 11,205 miles.
7. The last three (3) repairs listed in Findings of Fact #6 took place after Complainants filed the Lemon Law complaint with the Texas Department of Motor Vehicles.
8. On September 25, 2019, Messer's service technician determined that the traction control warning light and other warning lights on the vehicle's dashboard had illuminated because the steering wheel position sensor had set a diagnostic trouble code (DTC) indicating that the vehicle's wheels were not aligned properly.
9. In order to correct the issue described in Findings of Fact #8, Messer's service technician had the vehicle's wheels realigned and recalibrated the steering wheel position sensor.
10. On October 24, 2019, Messer's service technician replaced the vehicle's battery in order to address the concern of the vehicle not starting because it was in deep sleep mode.
11. On November 12, 2019, Messer's service technician replaced the vehicle's battery a second time in order to address the concern of the vehicle not starting because it was in deep sleep mode.

12. On January 6, 2020, the vehicle was in deep sleep mode again and would not start. Utter's service technician jump started the vehicle, tested the battery which checked out fine, and reprogrammed the vehicle's powertrain control module (PCM) as part of a recall. No other work was performed at the time.
13. On January 13, 2020, Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
14. On February 6, 2020, the vehicle's check engine light (CEL) illuminated, the vehicle had to be jump started, and once started, the vehicle would not accelerate. The vehicle was taken to Messer for repair that same day.
15. During the repair visit described in Findings of Fact #14, Messer's service technician removed and replaced the vehicle's crankshaft position (CKP) sensor and reset the vehicle's keep alive memory (KAM) in order to address Complainants' concerns with the vehicle.
16. Sometime in February of 2020, Complainants mailed a certified letter to Respondent advising them that they were dissatisfied with the vehicle.
17. On February 29, 2020, the vehicle fell into deep sleep mode again and would not start. The vehicle was towed to Utter for repair.
18. The repair order for the issues described in Findings of Fact #17 was opened on March 2, 2020.
19. While the vehicle was at Utter for the repair described in Findings of Fact #18, it was inspected by Patrick Johnson, Respondent's field service engineer, who determined that the issue with the vehicle was caused by a power circuit for unlocking the passenger door shorting out and causing a drain on the vehicle's battery and thereby causing the vehicle to go into deep sleep mode.
20. The vehicle's main body wiring harness was replaced in order to resolve the issue described in Findings of Fact #17.
21. On April 24, 2020, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainant and Respondent, giving all parties not less than 10 days' notice of hearing and their rights under the applicable rules and statutes. The notice stated the time, place and nature of the hearing; the legal authority and jurisdiction under

which the hearing was to be held; particular sections of the statutes and rules involved; and the matters asserted.

22. On May 12, 2020, the vehicle's driver's side power seat stopped operating and the vehicle was taken to Utter for repair.
23. During the repair visit described in Findings of Fact #21, Utter's service technician determined that a fuse had blown which had caused the power seat to fail to operate. The fuse was replaced with a new fuse with the correct amperage in order to resolve the issue.
24. Complainants have not experienced a problem with the vehicle going in to deep sleep mode since the vehicle's main body wiring harness was replaced on February 29, 2020.
25. There have been no other issues with the vehicle since the final repair performed on May 12, 2020.
26. The hearing in this case convened telephonically on August 19, 2020, before Hearings Examiner Edward Sandoval. Ken Schmitz, represented Complainants, Ken and Karen Schmitz, in the hearing. Anthony Gregory, Consumer Affairs Legal Analyst, represented Respondent, Ford Motor Company, in the hearing. Also present and testifying for Respondent was Sayyed Asad Bashir, Automotive Consultant. The hearing record closed on August 19, 2020.

IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (Department) has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-2301.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. Tex. Occ. Code § 2301.704.
3. Complainants timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 43 Tex. Admin. Code § 215.202.
4. The parties received proper notice of the hearing. Tex. Gov't Code §§ 2001.051, 2001.052; 43 Tex. Admin. Code § 215.206(2).
5. Complainants bear the burden of proof in this matter.

6. Complainants failed to prove by a preponderance of the evidence that Respondent was unable to conform the vehicle to an express warranty by repairing or correcting a defect or condition that presents a serious safety hazard or substantially impairs the use or market value of the vehicle. Tex. Occ. Code § 2301.604.
7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code §§ 2301.204, 2301.603.
8. Complainants' vehicle does not qualify for replacement or repurchase. Tex. Occ. Code § 2301.604.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Complainants' petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**.

SIGNED **October 9, 2020**



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