

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 14-0121 CAF**

<b>LEONARD REJCEK,</b>	§	<b>BEFORE THE OFFICE</b>
<b>Complainant</b>	§	
	§	
<b>v.</b>	§	<b>OF</b>
	§	
<b>GULF STATES TOYOTA, INC,</b>	§	
<b>Respondent</b>	§	<b>ADMINISTRATIVE HEARINGS</b>

**DECISION AND ORDER**

Leonard Rejcek (Complainant) seeks repurchase relief pursuant to Texas Occupations Code §§ 2301.601-.613 (Lemon Law) for an alleged defect in his 2013 Toyota RAV4. He asserts that a defect in the vehicle causes excessive vibration and noise. Gulf States Toyota, Inc. (Respondent) argues that the complained-of defect is a natural function of physics and design. The hearings examiner concludes that a preponderance of the evidence does not establish the existence of a warrantable defect in Complainant's vehicle. Accordingly, Complainant is not eligible for repurchase relief under the Texas Lemon Law.

**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 on the merits in this case convened and closed on June 18, 2014 in San Antonio, Texas, with Hearings Examiner Anne K. Perez presiding. Complainant appeared and represented himself. He offered his own testimony and that of his spouse, Caroline Rejcek. Respondent appeared through Field Technical Specialist Bobby Willis. Mr. Willis testified on Respondent's behalf.

**II. DISCUSSION**

**A. Applicable Law**

The manufacturer of a motor vehicle must repurchase or replace the vehicle with a comparable vehicle if five conditions are met. First, the manufacturer has not conformed the vehicle to an applicable express warranty because the manufacturer cannot repair or correct a defect or condition in the vehicle. Second, the defect or condition in the vehicle creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Third, the manufacturer has been given a reasonable number of

attempts to repair or correct the defect or condition.<sup>1</sup> Fourth, the owner must have mailed written notice of the alleged defect or nonconformity to the manufacturer.<sup>2</sup> Lastly, the manufacturer must have been given an opportunity to cure the defect or nonconformity.<sup>3</sup>

A “serious safety hazard” is a life-threatening malfunction or defect 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.<sup>4</sup> A rebuttable presumption exists that a reasonable number of attempts have been undertaken to conform a vehicle to an applicable express warranty if the defect creating a serious safety hazard continues to exist after being subject to repair two or more times and: (1) one of the repair attempts was made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (2) at least one other repair attempt was made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the first repair attempt.<sup>5</sup>

If a defect is not hazardous but substantially impairs the use or market value of the vehicle, a complainant may establish the same rebuttable presumption under Texas Occupations Code § 2301.605(a)(1). In the absence of controverting evidence, it is presumed that a reasonable number of attempts have been undertaken to conform a motor vehicle to an applicable express warranty if the same defect continues to exist after being subject to repair four or more times and: (A) two of the repair attempts were made in the 12 months or 12,000 miles, whichever comes 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 comes first, immediately following the date of the second repair attempt.<sup>6</sup>

## **B. Complainant’s Evidence and Arguments**

Complainant purchased a new 2013 Toyota RAV4 (the vehicle) from Stewart Motor Company (Stewart Motor) of Corsicana, Texas on January 22, 2013, with mileage of ten (10) at the time of delivery.<sup>7</sup> Respondent, the manufacturer, issued a limited warranty for the vehicle covering defects in factory-supplied materials and workmanship for 36 months or 36,000 miles, whichever occurs first.<sup>8</sup> On the date of hearing the vehicle’s mileage was 14,281, and basic limited warranty coverage was in effect.

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<sup>1</sup> Tex. Occ. Code § 2301.604(a)(1) and (2).

<sup>2</sup> Tex. Occ. Code § 2301.606(c)(1).

<sup>3</sup> Tex. Occ. Code § 2301.606(c)(2).

<sup>4</sup> Tex. Occ. Code § 2301.601(4).

<sup>5</sup> Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

<sup>6</sup> Tex. Occ. Code § 2301.605(a)(1)(A) and (B).

<sup>7</sup> Complainant Ex. 6, Lemon Law Complaint Form.

<sup>8</sup> Complainant Ex. 7, 2013 RAV4 Warranty Guide. Other limited warranties issued by Respondent cover defects in the vehicle’s powertrain, emissions and restraint systems, and perforation from corrosion.

Complainant testified that his vehicle's defect is apparent only in specific circumstances. When the car is traveling at speeds of 40 miles per hour (mph) and higher with the back windows cracked open, there is excessive vibration in the back seat, steering wheel, windows, and mirrors. The vibration is so disproportionate, he said, it feels as if the whole vehicle might fall apart. The vibration is accompanied by a loud clattering noise. Complainant is concerned that the back seat will come loose and cause an accident. He is also worried that noise and vibration issues adversely affect the vehicle's resale value.

Complainant testified that when he purchased the vehicle in January 2013 he had no inkling of its defective condition. At the time, he was undergoing treatment for a serious medical condition and needed reliable transportation for his appointments. He was personally familiar with Respondent's brand, having owned an older model that was later discontinued. He was also aware of Respondent's reputation for producing high-quality cars.

Similarly, Stewart Motor, a franchised dealer for Respondent, received high marks from the Rejcek's friends. They visited the dealer's location with the expectation of purchasing a new car that day. According to Complainant, the dealer's sales manager showed them a small sports utility vehicle (SUV), boasting that it was one of only seventeen 2013 Toyota RAV4s currently available for sale the United States. Complainant took the vehicle for a test drive, accompanied by Mrs. Rejcek and the sales manager. It was cold day, and neither Complainant nor his wife thought to test the back windows during the drive. They liked the SUV's appearance and the way it handled. In the end they purchased the vehicle.

Complainant testified that the he did not learn of the car's defective condition until several months later, when the weather warmed up. He was driving about 50 mph and had a dog in the back seat. The animal tried to climb through the center console to get into the front. In order to pacify the dog, Complainant rolled down the back windows. The vehicle's back seat, steering wheel, windows, and mirrors immediately began to vibrate. The inside of the vehicle shook and rattled, and there was a loud, persistent clattering noise. He reported that the car shook so hard he was afraid it would lose parts.

Complainant said he took the vehicle home and replicated the circumstances for his wife. Mrs. Rejcek's reaction was similar to his own. As discussed below, they reported their concerns about the vehicle during several service visits. Upon learning that the issue was not subject to repair, Complainant sought redress through both Stewart Motor and Respondent's Customer Experience Center. The Rejceks even approached a Ford dealer regarding the possibility of a trade.

Complainant's vehicle was serviced for noise and vibration by both Stewart Motor and another dealer, Cowboy Toyota/Scion of Dallas, Texas. The dealers' repair orders reflect the following information:<sup>9</sup>

<b>Dates</b>	<b>Mileage</b>	<b>Reported Concern</b>	<b>Dealer's Findings</b>
5-31-13	4,040	While driving [with] back windows roll[ed] down the car vibrates like it is going to fall apart.	No problem found at this time. Routine maintenance performed (tire rotation).
10-17-13	7,827	When riding with the rear windows down the car shakes on the inside & rattles.	Will talk to Service Manager on Monday.
11-22-13	8,913	There is a cross wind problem (turbulence) with rear windows cracked at highway speeds. <u>Complainant's hand-written note:</u> "I said vibration and noise."	[Customer] has test-driven other models and conditions were consistent with this vehicle. No corrections are needed at this time.
12-3-13	9,227	No customer concerns noted.	Routine maintenance performed (oil change, tire rotation). Replaced dirty cabin filter.
12-17-13	9,716	No customer concerns noted.	Routine maintenance performed (tire rotation).

Consistent with information in the repair orders, Complainant was told by service technicians that nothing was wrong the vehicle. Dealer personnel referred to the vibration and noise he described as "characteristic of the vehicle's design."<sup>10</sup> Complainant could alleviate the problem by cracking a front window. He was also told that installing vent visors on the front windows might reduce noise and vibration. Complainant expressed frustration that Stewart Motor refused to take responsibility for the car's defective condition.

For her part, Mrs. Rejcek testified that she was dismayed to learn of the defect in their new car. The vibration is so severe, she stated, that when her husband is driving she can see the steering column shake under his hands. When this happens she is afraid the engine will fall out. She is also fearful that the vehicle will come apart on the road and cause a collision. She explained that she drives the SUV

<sup>9</sup> The repair orders were admitted as Complainants Exs. 1-5. For clarity and ease of reference, some of the information has been summarized instead of quoted.

<sup>10</sup> Complainant performed his own research by visiting Orr Toyota of Dallas, Texas, where he feigned interest in a 2013 RAV4 on the dealer's lot. Complainant reported that when he rolled down the back windows of this vehicle during a test drive, the salesperson riding beside him immediately cracked the front passenger-side window. Nonetheless, Complainant verified that the other 2013 RAV4 demonstrated the same noise and vibration pattern present in his own vehicle.

long distances on the highway, transporting Mr. Rejcek to and from his medical appointments. The car's lack of stability makes her fear for the couple's safety.

Mrs. Rejcek believes that Stuart Motor's sales manager should have informed them of the car's issues before they bought it. Another salesman said as much to the couple the day they brought the 2013 Toyota RAV4 in to a Ford dealership to discuss a trade in.<sup>11</sup> If the sales manager at Stuart Motor had told them of the problem they would have asked to see a different car. She noted that they paid cash for the small SUV and could have purchased any vehicle on the lot that day. The car they ended up with might be "cute and comfortable," but what the couple really needed was a dependable vehicle. She is very disappointed in the dealer's lack of good faith.

Ultimately, on December 16, 2013, Complainant sent written notice to Respondent that the 2013 Toyota RAV4 was defective.<sup>12</sup> On January 7, 2014, Complainant filed a Lemon Law complaint against Respondent with the Texas Department of Motor Vehicles. Complainant's petition alleged the presence of a warrantable defect described as "Loud clattering noise and severe vibration coming from back seat when back windows are rolled down."<sup>13</sup>

### **C. Respondent's Evidence and Arguments**

Respondent offered the testimony of Field Technical Specialist Bobby Willis. Respondent also offered an article titled "Why Do Slightly Opened Car Windows Make That Awful Sound?" authored by physicist Jason Torchinsky.<sup>14</sup>

Mr. Willis testified that the noise and vibration in Complainant's 2013 Toyota RAV4 are not caused by a warrantable defect. Rather, the issue is one of aerodynamics. He explained that cars in today's market are required to meet fuel economy standards set by the Environmental Protection Agency. Fuel economy is directly related to vehicle aerodynamics. As a result, he stated, virtually all new cars are designed and tested in "wind tunnels." Auto manufacturers use this technology to test the vehicle's aerodynamics and ensure compliance with federal regulations.

Mr. Willis testified that noise and vibration in SUV-type vehicles are the result of air flow, speed, and vehicle design. If an SUV is traveling at a high rate of speed with all the windows rolled-up, the wind passes over and around the vehicle, and interior noise and vibration are minimal. When the back seat windows are rolled down, however, wind rushes inside the openings, and pockets of air form in the SUV's rear cabin. The compressed air at the rear of the vehicle creates waves of pressure, with the result

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<sup>11</sup> The same salesman implied that the resale value of the Rejcek's vehicle was reduced because the noise and vibration issue "was known in the industry."

<sup>12</sup> Complainant Ex. 8.

<sup>13</sup> Complainant Ex. 6.

<sup>14</sup> Respondent Ex. 1.

being interior noise and vibration. If there is a functional window in the rear cabin through which compressed air can escape, Mr. Willis explained, interior noise and vibration disappear. However, the 2013 RAV4 and many other SUVs do not have this design feature.

On the hearing date, Mr. Willis test drove Complainant's vehicle eight miles. He was accompanied by Complainant and the hearings examiner. While traveling between 60 and 70 mph with the back windows rolled down, there was visible vibration in the vehicle's back seat, steering wheel, windows, and mirrors. A loud "thrumming" noise was also present in the vehicle interior.

For the sake of comparison, Complainant and the hearings examiner went with Mr. Willis on a second test drive, this one involving a Toyota Highlander. The Highlander and RAV4 are similar in body style, but the Highlander is bigger and heavier. Neither vehicle is equipped with a functional rear window. While traveling at highway speeds with the back windows rolled down, the Highlander also exhibited interior noise and vibration, but compared with the RAV4 the issues were less noticeable. According to Mr. Willis, the difference is attributable to the Highlander's heftier size and weight.

Mr. Willis agreed with Complainant that the noise and vibration exhibited by the 2013 RAV4 are annoying. However, the field technical specialist insisted they do not compromise the vehicle's safety. And, because the noise and vibration are a function of air flow, speed, and the design of many SUVs, the perceived problem does not impact the market value of Complainant's vehicle. Mr. Willis concluded that Complainant's vehicle is functioning as designed and has no existing warrantable defect.

#### **D. Analysis**

In order to prevail in his request for repurchase relief, Complainant must show by a preponderance of the evidence that Respondent has not conformed his vehicle to an applicable express warranty because Respondent cannot repair a defect in the vehicle. In addition, Complainant must show that the nonconformity creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Neither of these statutory elements were established by the required standard of proof.

Both Complainant and Mrs. Rejcek credibly testified that they were surprised and upset to learn that rolling down the back windows of their new car while traveling at high speed resulted in interior noise and vibration. That they were put off by this characteristic of the vehicle is completely understandable. To make matters worse, the couple was unaware of the issue when they purchased the car. The Rejceks understood Stewart Motor to be a reputable dealer. As such, they trusted the sales manager to inform them of the SUV's important attributes, both positive and negative. Had the sales manager divulged the car's negative properties they would have chosen a different vehicle. They instead purchased the 2013 RAV4 in good faith, only to be disillusioned later.

The couple felt deceived by the dealer's lack of disclosure. They reported the situation to Respondent's Customer Experience Center, but were offered no assistance. That Respondent failed to recognize the Rejceks' dissatisfaction compounds the sense that they were wronged.

This is not a fair situation, and the couple deserves better treatment. Still, the Lemon Law does not provide a mechanism for relief under the circumstances. No evidence establishes that the interior noise and vibration in Complainant's 2013 RAV4's is the result of a warrantable defect that creates a safety hazard. Likewise, the fact that other SUVs exhibit the same characteristic indicates that the market value of Complainant's vehicle remains intact.<sup>15</sup>

In summary, a preponderance of the evidence does not demonstrate that a warrantable defect in Complainant's vehicle currently exists. Rather, the evidence supports the conclusion that the vehicle is operating as designed, that no repairs are needed, and that no safety concerns are present.

### III. FINDINGS OF FACT

1. Leonard Rejcek (Complainant) purchased a 2013 Toyota RAV4 (the vehicle) from Stewart Motor Company (Stewart Motor) of Corsicana, Texas on January 22, 2013, with mileage of ten (10) at the time of delivery.
2. The manufacturer of the vehicle, Gulf States Toyota, Inc. (Respondent) issued a limited warranty for the vehicle covering defects in factory-supplied materials and workmanship for 36 months or 36,000 miles, whichever occurs first.
3. The vehicle's mileage on the date of hearing was 14,281.
4. At the time of hearing, the vehicle was covered by Respondent's basic limited warranty.
5. Within a few months of purchase, Complainant noticed that when the vehicle was traveling at high speed with the back windows rolled down, there was vibration in the back seat, steering wheel, windows, and mirrors. The vibration was accompanied by a loud "thrumming" noise.
6. Complainant reported the vehicle's noise and vibration issues to an authorized dealer for Respondent on the following dates:
  - a. May 31, 2013, at 4,040 miles;
  - b. October 17, 2013, at 7,827 miles; and
  - c. November 22, 2013, at 8,913 miles.

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<sup>15</sup> Although a salesman for Ford implied that the "problem" with the Rejcek's vehicle was well-known and reduced the its resale value, there is reason to question his motives.

7. Dealer service technicians who inspected the vehicle on the above-referenced dates determined that the complained-of noise and vibration were a natural characteristic of the vehicle, and they performed no repairs.
8. The complained of noise and vibration in the vehicle is a function of several factors, including air flow, speed, and vehicle design.
9. The complained of noise and vibration in the vehicle is not the result of a warrantable defect.
10. The complained of noise and vibration in the vehicle does not create a safety hazard.
11. The complained of noise and vibration in the vehicle does not substantially impair the vehicle's use or market value.
12. On December 16, 2013, Complainant provided written notice to Respondent of the alleged defect in his 2013 RAV4.
13. On January 7, 2014, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department). His petition alleged the presence of a warrantable defect in the vehicle described as, "Loud clattering noise and severe vibration coming from back seat when back windows are rolled down."
14. On April 11, 2014, 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.
15. The hearing convened on June 18, 2014 in Mesquite, Texas, with Hearings Examiner Anne K. Perez presiding. Complainant appeared and represented himself. Respondent appeared through Field Technical Specialist Bobby Willis. The hearing concluded and the record closed that same day.

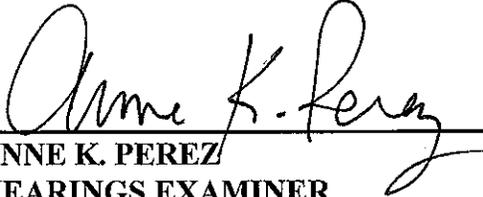
**IV. CONCLUSIONS OF LAW**

1. The Department has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.613 (Lemon Law).
2. A hearings examiner of the Department's Office of Administrative Hearings has jurisdiction over all matters related to conducting a hearing in this proceeding, including the preparation of a decision with findings of fact and conclusions of law, and the issuance of a final order. Tex. Occ. Code § 2301.704.
3. Complainant timely filed a complaint with the Department. Tex. Occ. Code § 2301.204; 43 Tex. Admin. Code § 215.202.
4. The parties received proper notice of the hearing. Tex. Gov't Code §§ 2001.051, 2001.052; 43 Tex. Admin. Code § 215.206(2).
5. Complainant failed to prove by a preponderance of the evidence that the vehicle has a verifiable 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.
6. Complainant's 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 Complainant's petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-.613 is hereby **DISMISSED**.

**SIGNED August 14, 2014.**

  
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**ANNE K. PEREZ**  
**HEARINGS EXAMINER**  
**OFFICE OF ADMINISTRATIVE HEARINGS**  
**TEXAS DEPARTMENT OF MOTOR VEHICLES**