

**TEXAS DEPARTMENT OF MOTOR VEHICLES  
CASE NO. 16-0255 CAF**

**MICHAEL ARONOFF,  
Complainant**

v.

**GULF STATES TOYOTA, INC.,  
Respondent**

§  
§  
§  
§  
§  
§

**BEFORE THE OFFICE  
  
OF  
  
ADMINISTRATIVE HEARINGS**

**DECISION AND ORDER**

Michael Aronoff (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2014 Toyota Highlander Hybrid Limited. Complainant asserts that the vehicle has a musty or moldy smell coming from the vehicle's air conditioning vents. Gulf States Toyota, Inc. (Respondent) argued that there is no defect with the vehicle and that no relief is warranted. The hearings examiner concludes that the vehicle does not have an existing warrantable defect, and Complainant is 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 and the record closed on September 29, 2016, in Austin, Texas before Hearings Examiner Edward Sandoval. Complainant was represented by Warren Wills, attorney with Wills Law PC. Complainant and his wife, Jeanie Aronoff, both offered testimony in the hearing. Respondent was represented by Dan Lee, Technical Services Manager. Also present for Respondent was Cathy McWilliams, Case Manager.

**II. DISCUSSION**

**A. Applicable Law**

The Texas Lemon Law provides that a manufacturer of a motor vehicle must repurchase or replace a vehicle complained of under the Texas Occupations Code 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

---

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

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>

In addition to the five 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 and: (1) 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 (2) 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>4</sup>

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

Complainant purchased a new 2014 Toyota Highlander Hybrid Limited from Charles Maund Toyota (Maund) in Austin, Texas on April 10, 2014, with mileage of 12 at the time of delivery.<sup>5</sup> Respondent's bumper-to-bumper warranty for the vehicle provides coverage for three (3) years or 36,000 miles, whichever comes first. On the date of hearing the vehicle's mileage was 26,676. At this time, Respondent's warranty for the vehicle is still in effect.

### **1. Jeanie Aronoff's Testimony**

Jeanie Aronoff, Complainant's wife, testified that she was the primary driver of the vehicle until April of 2015, when she stopped driving it. Ms. Aronoff stated that approximately two (2) months after purchasing the vehicle, she began noticing a musty, moldy odor in the vehicle whenever she turned on the air conditioner.

Ms. Aronoff testified that she contacted a Maund representative about the odor that she was smelling in the vehicle. The representative asked Ms. Aronoff if she was turning off the air conditioner correctly. She was told that she needed to leave the air conditioner on outside air rather than on recirculation to resolve the issue.

---

<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 § 2301.605(a)(1)(A) and (B). Texas Occupations Code § 2301.605(a)(2) provides an alternative 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. However, § 2301.605(a)(2) applies only to a nonconformity that creates a serious safety hazard.

<sup>5</sup> Complainant Ex. 7, Lemon Law Complainant Form dated April 25, 2016.

Ms. Aronoff testified that she took the vehicle to Maund on August 8, 2014, to address the issue. The service technician indicated on the repair order that no problem was found and the vehicle was operating normally, so no repairs were performed at the time.<sup>6</sup> However, Ms. Aronoff indicated that she was informed verbally that the interior of the vehicle smelled like a dead animal. The vehicle's mileage on this occasion was 7,482.<sup>7</sup>

Ms. Aronoff testified that she took the vehicle to AutoNation Toyota for repair for the issue on August 20, 2014. AutoNation's service technician cleaned the vehicle's evaporator with foam and deodorizer.<sup>8</sup> The vehicle's mileage on this occasion was 7,977.<sup>9</sup> AutoNation's service advisor provided Ms. Aronoff with a technical service bulleting (TSB) which provided information regarding odors emanating from air conditioning systems installed in Respondent's vehicles. The TSB indicated that "[d]uring use, various odors from inside and outside the vehicle may enter into and accumulate in the air conditioning system" which can then be emitted from the air conditioning vents.<sup>10</sup> In addition, the TSB indicated that odors emitted from a vehicle's air conditioning system are "a normal characteristic of automotive A/C systems."<sup>11</sup>

In late August of 2014, Ms. Aronoff contacted Respondent's main office in California to complain about the issue. She was informed that Respondent could not do anything else for her.

On October 20, 2014, Ms. Aronoff took an air quality sample from the vehicle's interior and submitted the sample to a lab for analysis. According to the lab results the air sample provided indicated the presence of mycotoxins in the vehicle.<sup>12</sup> Ms. Aronoff feels that she and her children have gotten ill as a result of the presence of these mycotoxins in the vehicle. She testified that she and her children all have Chronic Inflammatory Response Syndrome (CIRS) which can be caused and exacerbated by mycotoxins in the air. Ms. Aronoff testified that she feels that the vehicle is contaminated and that the odor permeates the vehicle. She stated that she and her children can't be in an area that has excessive mold. She has no idea why the vehicle may have mold in it. Ms. Aronoff stated that she has been instructed by her physician that she and her children should not ride in the vehicle.

During the winter of 2014/2015, Ms. Aronoff did not use the vehicle's air conditioner. Instead, she drove with the vehicle's windows down during this period of time. However, she stopped driving the vehicle in April of 2015. At that time, Complainant became the primary driver of the

---

<sup>6</sup> Complainant Ex. 1, Repair Order dated August 8, 2014.

<sup>7</sup> *Id.*

<sup>8</sup> Complainant Ex. 2, Repair Order dated August 20, 2014.

<sup>9</sup> *Id.*

<sup>10</sup> Complainant Ex. 3, T-SB-0142-13 HVAC Odor Maintenance dated September 12, 2013, p. 2.

<sup>11</sup> *Id.*

<sup>12</sup> Complainant Ex. 4, Certificate of Analysis dated October 31, 2014, p. 2.

vehicle. Ms. Aronoff testified that about three (3) to four (4) weeks after she stopped driving the vehicle, her illness cleared up. As a result, she no longer drives or rides in the vehicle.

On April 20, 2016, Complainant's attorney mailed a letter to Respondent advising them of Complainant's dissatisfaction with the vehicle.<sup>13</sup> In addition, Complainant filed a Lemon Law complainant with the Texas Department of Motor Vehicles (Department) on April 25, 2016.<sup>14</sup>

Ms. Aronoff testified that Respondent's representative performed an inspection on the vehicle on June 15, 2016. She was informed that the representative had found leaves in the vehicle which may have contributed to the odor. She further testified, however, that the vehicle has been parked in a garage since August of 2015.

Ms. Aronoff also testified that she and Complainant have incurred \$5,000 in attorney's fees, plus \$135 per month in insurance payments since August of 2015 when they stopped driving the vehicle, plus they accumulated additional mileage on Complainant's lease vehicle costing them \$1,000, and finally \$300 for the lab test all of which they wish to be reimbursed for.

During cross-examination, Ms. Aronoff stated that she has had CIRS since 2013.

Ms. Aronoff also stated that she was informed by one of the service technicians that she had dealt with that odors from outside of the vehicle may accumulate on the evaporator and then be emitted through the air conditioner. She was also told that since the engine components are more tightly sealed and packed closer together that mold is more apt to grow within a vehicle's air conditioning system than used to be the case years ago.

## **2. Michael Aronoff's Testimony**

Michael Aronoff, Complainant, was not the primary driver of the vehicle until April of 2015. He drove the vehicle from April to August of 2015. He does not have CIRS and has not been physically affected by driving the vehicle. When he initially purchased the vehicle, he did take it for a test drive around the block and did not notice any problems with it. Complainant also testified that the vehicle has been taken for repair on only two (2) occasions.

---

<sup>13</sup> Complainant Ex. 6, Letter to Toyota Motor Sales dated April 20, 2016.

<sup>14</sup> Complainant Ex. 7, Lemon Law complaint dated April 25, 2016. Although the complaint was signed on April 20, 2016, the effective date of the complaint is the date that it was received by the Texas Department of Motor Vehicles, which was April 25, 2016.

### C. Respondent's Evidence and Arguments

Dan Lee is Respondent's Technical Service Manager. Mr. Lee has worked in the automotive field since 1975. He worked for eleven (11) years as a technician for several dealers before being hired by Respondent in 1987. Mr. Lee initially worked for Respondent as an instructor for Toyota's technical education network for ten (10) years. Mr. Lee has been working as a technical service manager for Respondent since 2009. He is an Automotive Service Excellence (ASE) Master Technician.

Mr. Lee testified that he had never seen the vehicle prior to the hearing on September 29, 2016. The final repair attempt on Complainant's vehicle was performed on June 15, 2016, at Maund by Randy Crawford, Field Technical Specialist.

During the final repair attempt, Mr. Crawford verified smelling a musty odor from within the vehicle.<sup>15</sup> He checked the condition of the vehicle and found oak leaves and decomposing oak leaves in the corners of the vehicle's cowl and under the cowl.<sup>16</sup> Mr. Crawford also found a green dust which he felt was consistent with oak bloom sediment throughout the interior of the air conditioning ducting and the air conditioner filter.<sup>17</sup> Mr. Crawford did not attempt to perform any repairs on the vehicle nor did he suggest any repairs be performed.<sup>18</sup>

Mr. Lee stated that any bacteria within the vehicle were not introduced by Respondent or its agents. Respondent does not take responsibility for any odors within a vehicle. Mr. Lee stated that Respondent does not test for mycotoxins in their vehicles. Mr. Lee also pointed out that the vehicle may have been parked under oak trees, since there was oak pollen throughout the HVAC system. In addition, there is no extensive history of maintenance being performed on the vehicle.

During cross-examination, Mr. Lee testified that he could not determine the probable cause of the odor and that the cause was unknown. When the vehicle was inspected, there was no evidence of any water leaks in the vehicle. He also stated that any toxins that may be in the vehicle were not introduced by Respondent.

Mr. Lee did not smell an odor in the vehicle during the test drive taken by the parties at the time of hearing.

---

<sup>15</sup> Respondent Ex. 2, Final Repair Attempt Inspection Report dated June 17, 2016.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

#### **D. Analysis**

Under Texas' Lemon Law, Complainant bears 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, Complainant must meet the presumption that a reasonable number of attempts have been undertaken to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the 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, Complainant is entitled to have the vehicle repurchased or replaced.

Complainant has not met the burden of proof to establish that his vehicle has a defect which creates a serious safety hazard or which substantially impairs its use or market value. Complainant testified that there is an odor which he smells when he drives the vehicle. The odor was not detected during the test drive taken at the time of hearing. However, the fact that there is an odor that occurs when the vehicle is driven does not indicate the presence of a defect in the vehicle, since the odor could be created by outside forces. In addition, the evidence indicated that Complainant did not suffer any adverse affects from the odor during the time that he was the primary driver of the vehicle. The evidence also indicates that the odor may be created by a design issue and, as such, is not a defect. Since the evidence does not indicate the presence of a manufacturer's defect which causes the odor in question, the hearings examiner must hold that Complainant is not entitled to the requested relief.

Respondent's bumper-to-bumper warranty applicable to Complainant's vehicle provides coverage for three (3) years or 36,000 miles whichever comes first. On the date of hearing, the vehicle's mileage was 26,676 and the basic warranty coverage is still in effect. Respondent is still under an obligation to repair any issues with the vehicle that are covered under the warranty, including any odor issues.

Complainant's request for repurchase or replacement relief is denied.

### **III. FINDINGS OF FACT**

1. Michael Aronoff (Complainant) purchased a new 2014 Toyota Highlander Hybrid Limited on April 10, 2014, from Charles Maund Toyota (Maund), in Austin, Texas, with mileage of 12 at the time of delivery.

2. The manufacturer of the vehicle, Gulf States Toyota, Inc. (Respondent), issued a bumper-to-bumper warranty for the vehicle good for three (3) years or 36,000 miles, whichever occurs first.
3. The vehicle's mileage on the date of hearing was 26,676.
4. At the time of hearing the vehicle's basic warranty was still in effect.
5. Complainant feels that the vehicle's interior has a musty, moldy smell that he can detect when he's driving the vehicle.
6. Complainant took the vehicle to Respondent's authorized dealers in order to address his concerns with the vehicle, on the following dates:
  - a. August 8, 2014, at 7,482 miles; and
  - b. August 20, 2014, at 7,977 miles.
7. On August 8, 2014, Maund's service technician could not detect any unusual odors or smells and so did not perform any repairs to the vehicle.
8. On August 20, 2014, AutoNation's service technician cleaned the vehicle's air conditioner with foam and a deodorizer.
9. On April 25, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
10. On June 15, 2016, Respondent's field technical specialist performed a final repair attempt on the vehicle and did not make or suggest any repairs be made to the vehicle.
11. On June 14, 2016, 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.

12. The hearing in this case convened and the record closed on September 29, 2016, in Austin, Texas before Hearings Examiner Edward Sandoval. Complainant was represented by Warren Wills, attorney with Wills Law PC. Complainant and his wife, Jeanie Aronoff, both offered testimony in the hearing. Respondent was represented by Dan Lee, Technical Services Manager. Also present for Respondent was Cathy McWilliams, Case Manager.

#### IV. CONCLUSIONS OF LAW

1. The Texas Department of Motor Vehicles (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 bears the burden of proof in this matter.
6. 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.
7. Respondent remains responsible to address and repair or correct any defects that are covered by Respondent's warranties. Tex. Occ. Code § 2301.204.
8. 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 Complainants' petition for repurchase relief pursuant to Texas Occupations Code §§ 2301.601-.613 is hereby **DISMISSED**.

**SIGNED November 28, 2016**



---

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