

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0178658 CAF**

CAROL A. THATCHER,	§	BEFORE THE OFFICE
Complainant	§	
v.	§	
	§	OF
GULF STATES TOYOTA, INC.,	§	
Respondent	§	
	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Carol A. Thatcher (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2016 Toyota Avalon. Complainant asserts that the vehicle is defective because it intermittently loses power and hesitates during acceleration. Gulf States Toyota, Inc. (Respondent) argued that the vehicle does not have any defects 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 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 was closed on December 19, 2017, in San Antonio, Texas before Hearings Examiner Edward Sandoval. Bruce D. Thatcher, Complainant's husband, represented Complainant at the hearing. Complainant, Carol A. Thatcher, was also present to testify. Respondent was represented by Dan Lee, Senior Manager for Service Support.

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

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

³ *Id.*

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 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.⁶

B. Complainant's Evidence and Arguments

Complainant purchased a new 2016 Toyota Avalon on August 30, 2016, from Universal Toyota (Universal) in San Antonio, Texas.⁷ The vehicle's mileage at the time of delivery was 7.⁸ Respondent provided a new vehicle limited warranty for the vehicle which provides coverage for three (3) years or 36,000 miles, whichever comes first. Respondent has also provided a powertrain warranty for the vehicle which provides coverage for the vehicle's powertrain for five (5) years or 60,000 miles. On the date of hearing the vehicle's mileage was 18,023. The vehicle's warranties are still in effect.

1. Bruce D. Thatcher's Testimony

Bruce D. Thatcher, Complainant's husband, testified in the hearing. He testified that the concern with the vehicle had to do with it intermittently losing power or hesitating when the driver was trying to accelerate. This usually occurs when accelerating from a stop or when turning a corner. He feels that this creates a dangerous situation when driving the vehicle. The vehicle has never stalled or died when being driven.

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)(2) and (a)(3) provide alternative methods 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, and § 2301.605(a)(3) 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 Complainant Ex. 1, Motor Vehicle Buyer's Order and Motor Vehicle Retail Installment Sales Contract dated August 30, 2016.

⁸ Complainant Ex. 2, Odometer Disclosure Statement dated August 30, 2016.

Mr. Thatcher stated that his wife, Complainant, is the primary driver of the vehicle. The issue with the vehicle hesitating started occurring before the vehicle had been driven 5,000 miles. Mr. Thatcher took the vehicle to Universal for the 5,000 mile maintenance on November 18, 2016, and raised the hesitation issue with the dealer's service advisor. Universal's service technician inspected the vehicle, could not duplicate the concern, and performed no repair to the vehicle for the issue.⁹ The technician determined that the vehicle was operating as designed.¹⁰ The vehicle's mileage when Complainant took it to Universal was 4,944.¹¹ Complainant was not provided with a loaner vehicle while the vehicle was being repaired. The vehicle was in Universal's possession for one (1) day.

Mr. Thatcher testified that the vehicle continued to intermittently hesitate and lose power during acceleration. He took the vehicle to Universal on May 18, 2017, for scheduled maintenance and to raise a concern regarding the hesitation issue. In addition, the vehicle's master warning light was intermittently illuminating, blinking three (3) to five (5) times and then turning off. On this occasion, Mr. Thatcher and the dealer's service technician took a test drive in the vehicle in an attempt to duplicate the concern.¹² However, the concern could not be duplicated.¹³ The vehicle was in Universal's possession for one (1) day.¹⁴ Complainant was not provided with a loaner vehicle while her vehicle was being repaired. The mileage on the vehicle on this occasion was 10,105.¹⁵

Mr. Thatcher then started keeping a log to track the incidents as to when the vehicle hesitated. He took the vehicle to Universal for repair for the issue and for the master warning light illuminating on July 5, 2017. Universal's service technician did not find any trouble codes on the vehicle's computer concerning the issue.¹⁶ In addition, the technician took a test drive in the vehicle and could not duplicate the concern.¹⁷ The vehicle's mileage on this occasion was 12,378.¹⁸ The vehicle was in Universal's possession overnight. Complainant was not provided with a loaner vehicle while her vehicle was being repaired.

Mr. Thatcher testified that Complainant mailed a complaint letter on July 10, 2017, to Respondent outlining her dissatisfaction with the vehicle.¹⁹ Complainant indicated in the letter

⁹ Complainant Ex. 4, Repair Order dated November 18, 2016.

¹⁰ *Id.*

¹¹ *Id.*

¹² Complainant Ex. 5, Repair Order dated May 18, 2017.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Complainant Ex. 6, Repair Order dated July 5, 2017.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Complainant Ex. 7, Letter to Toyota Motor Manufacturing Company, Kentucky, Inc. dated July 10, 2017.

that she felt that the vehicle was dangerous to drive. In addition, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on August 7, 2017.²⁰

Mr. Thatcher stated that he began speaking to Respondent's customer service representatives and to Universal's shop manager regarding the concerns with the vehicle. Mr. Thatcher agreed to take the vehicle to Universal on August 17, 2017, to see if the concern could be duplicated by Universal's shop foreman, Dennis Dutchery. Mr. Dutchery was unable to duplicate the problem but asked if the vehicle could be left at the dealer so that Respondent could send a field engineer to look at it. Mr. Thatcher left the vehicle at Universal on August 23, 2017, so that it could be inspected. During the inspection, Respondent's field engineer ran a report from the vehicle's computers which indicated that the vehicle's accelerator pedal and brake pedal were occasionally pressed at the same time.²¹ He felt that this could be causing the hesitation being experienced by Complainant. The field engineer felt that otherwise the vehicle was operating as designed.²² The vehicle's mileage on this occasion was 14,072.²³ The vehicle was in the dealer's possession overnight. Complainant was provided with a loaner vehicle while her vehicle was being repaired.

Mr. Thatcher and Complainant were still dissatisfied with the vehicle. As a result, another inspection was scheduled with Respondent's field technical specialist, Randy Crawford. The inspection was performed on November 1, 2017, at San Marcos Toyota (San Marcos) in San Marcos, Texas. Complainant and Mr. Crawford test drove the vehicle with Mr. Thatcher, but neither of them could duplicate the concern.²⁴ Mr. Crawford indicated to Mr. Thatcher that the fact that he used both feet to operate the accelerator and gas pedals could be the cause of the hesitation problem.²⁵ The vehicle's mileage on this occasion was 16,679.²⁶ The inspection lasted a couple of hours. Complainant was not provided with a loaner vehicle during the inspection.

Mr. Thatcher testified that the hesitation problem still occurs periodically. The last time it occurred prior to the hearing was on or about November 30, 2017. Mr. Thatcher says the problem has occurred both to him and Complainant. The vehicle's check engine light (CEL) has never illuminated to indicate a problem with the vehicle. In addition, the vehicle's brakes have always worked adequately.

²⁰ Complainant Ex. 10, Lemon Law Complaint dated August 7, 2017. Complainant signed and dated the complaint on July 26, 2017. However, the complaint was not received by the Texas Department of Motor Vehicles Enforcement Division until August 7, 2017, which is the effective date of the complaint.

²¹ Complainant Ex. 9, Repair Order dated August 23, 2017.

²² *Id.*

²³ *Id.*

²⁴ Complainant Ex. 13, Repair Order dated November 1, 2017.

²⁵ *Id.*

²⁶ *Id.*

2. Carol A. Thatcher's Testimony

Carol A. Thatcher, Complainant, testified in the hearing. She is the primary driver of the vehicle. Ms. Thatcher testified that she intermittently experiences a lack of acceleration and loss of power when driving the vehicle. She feels that the vehicle sometimes hesitates when she steps on the accelerator. Ms. Thatcher testified that during these incidents she's observed that the vehicle's tachometer indicates that the engine RPM's are increasing, but the vehicle is not accelerating as it should.

Ms. Thatcher testified about a specific incident when she was driving the vehicle on Interstate 35 heading to New Braunfels, Texas. There was a sudden traffic stoppage on the interstate and she stopped the vehicle. She saw that the next lane over did not have any traffic and tried to change lanes, but the vehicle would not accelerate in order for her to get in the lane. This was a one-time incident.

Ms. Thatcher also testified that when driving she uses both of her feet in order to operate the vehicle's acceleration and brake pedals, although the vehicle has an automatic transmission. She also testified that the problem had not recurred since late November of 2017.

C. Respondent's Evidence and Arguments

Dan Lee, Senior Manager for Service Support, testified for Respondent. Mr. Lee has worked with Toyota for over 30 years and with Respondent for 20 years. He is an Automotive Service Excellence (ASE) Certified Master Technician. In addition, Mr. Lee is a Toyota Master Diagnostic Technician and a Mitsubishi Diamond Pro Technician.

Mr. Lee testified that he had not seen the vehicle prior to the hearing date. However, he feels that the concerns raised by Complainant could be explained by the fact that she and her husband use both feet on the brake and acceleration pedals when driving. The vehicle has a brake override system which will prevent the vehicle from accelerating when the brake and acceleration pedals are pressed at the same time. This causes the driver to experience the feeling that the vehicle may be trying to accelerate, but it's not doing so. Mr. Lee also said that the vehicle's pre-collision system (PCS) may be a contributing factor for the concern. The PCS system automatically slows the vehicle down when an object or another vehicle is within a certain distance from the front of the vehicle. This will occur even if the driver is trying to accelerate. Once the driver has gotten around the obstacle in front of it, the vehicle will then accelerate normally.

Mr. Lee was able to demonstrate during a test drive taken at the hearing how the brake override system works. Mr. Lee stated that new technology and vehicle options can affect an individual driver's driving style.

D. Analysis

Under the 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 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, Complainant is 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, Complainant is entitled to have the vehicle repurchased or replaced.

The first issue to be addressed is whether Complainant's vehicle has a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Complainant feels that the vehicle intermittently hesitates when she is attempting to accelerate when she is driving it. The evidence presented at the hearing established that the vehicle is operating as designed and the hesitation issue is probably being caused by Complainant's driving style. The vehicle has an option called brake override which will not allow the vehicle to accelerate when both the brake pedal and the gas pedal are pressed simultaneously. Complainant and her husband both stated that they use both feet to operate the vehicle's pedals. In addition, Respondent's representative was able to demonstrate during the test drive of the vehicle that a slight pressure on the brake pedal while stepping on the gas pedal at the same time will cause the vehicle not to accelerate until the brake pedal is released.

As such, the hearings examiner finds that there is no defect with the vehicle. Therefore, repurchase or replacement relief for Complainant is not warranted.

On the date of hearing, the vehicle's mileage was 18,023 and it remains covered under Respondent's warranties. As such, Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the vehicle's warranties.

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

III. FINDINGS OF FACT

1. Carol A. Thatcher (Complainant) purchased a new 2016 Toyota Avalon on August 30, 2016, from Universal Toyota (Universal) in San Antonio, Texas with mileage of 7 at the time of delivery.
2. The manufacturer of the vehicle, Gulf States Toyota, Inc. (Respondent), issued a new vehicle limited warranty for the vehicle which provides coverage for three (3) years or 36,000 miles, whichever occurs first, and a powertrain warranty which provides coverage for five (5) years or 60,000 miles.
3. The vehicle's mileage on the date of hearing was 10,023.
4. At the time of hearing the vehicle's warranties were still in effect.
5. Complainant feels that the vehicle loses power and hesitates when she is attempting to accelerate while driving.
6. Complainant took the vehicle for repair to Respondent's authorized dealers in order to address her concerns regarding the vehicle's lack of power and hesitation on the following dates:
 - a. November 18, 2016, at 4,944 miles;
 - b. May 18, 2017, at 10,105 miles;
 - c. July 5, 2017, at 12,378 miles; and
 - d. August 23, 2017, at 14,072 miles.
7. On November 18, 2016, Universal's service technician could not duplicate the concern raised by Complainant regarding the vehicle's hesitation.
8. On May 18, 2017, Universal's service technician test drove the vehicle with Complainant and could not verify the concern that the vehicle would hesitate during acceleration.
9. On July 5, 2017, Universal's service technician was unable to find any trouble codes on the vehicle's engine's computers and was unable to duplicate the concern regarding the vehicle's hesitation during acceleration.
10. On August 7, 2017, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).

11. On August 23, 2017, Universal's service technician determined that the vehicle was operating as designed despite Complainant's concern that the vehicle was hesitating when she tried to accelerate.
12. On November 1, 2017, Respondent's Field Technical Specialist performed a final repair attempt on the vehicle and was not able to duplicate the concern regarding the vehicle hesitating during acceleration. He determined that the issue could be caused by Complainant and her husband using both feet when driving the vehicle which has an automatic transmission.
13. On October 10, 2017, 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.
14. The hearing in this case convened and the record was closed on December 19, 2017, in San Antonio, Texas before Hearings Examiner Edward Sandoval. Bruce D. Thatcher, Complainant's husband, represented Complainant at the hearing. Complainant, Carol A. Thatcher, was also present to testify. Respondent was represented by Dan Lee, Senior Manager for Service Support.

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. 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 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. 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 replacement or repurchase relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is hereby **DISMISSED**.

SIGNED January 4, 2018



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