

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0002365 CAF**

**HORACE E. FURCHE,
Complainant**

v.

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

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Horace E. Furche (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2017 Toyota Highlander. Complainant asserts that the vehicle's transmission is defective because it intermittently hesitates or jerks when he's driving the vehicle. Gulf States Toyota, Inc. (Respondent) argued that the vehicle is operating as designed, does not have a defect, 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 was closed on April 25, 2019, in Fort Worth, Texas before Hearings Examiner Edward Sandoval. Horace E. Furche, Complainant, represented himself at the hearing. Kent Furche, Complainant's son, was present and testified for Complainant. 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

¹ Tex. Occ. Code § 2301.604(a).

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 provided 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 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

1. Horace E. Furche's Testimony

Complainant purchased a new 2017 Toyota Highlander on August 19, 2017, from Vandergriff Toyota (Vandergriff) in Arlington, Texas.⁷ The vehicle's mileage at the time of delivery was 178.⁸ Respondent provided a new vehicle limited warranty for the vehicle which provides coverage for three (3) years or 36,000 miles, whichever comes first. In addition, Respondent provided a seven (7) year or 100,000 mile warranty for the vehicle's powertrain. On the date of hearing the vehicle's mileage was 32,945. At the time of hearing the vehicle's warranties were still in effect.

Complainant testified that he feels that the vehicle's transmission does not shift correctly. He feels that the transmission hesitates or jerks as if the transmission is searching for the gear it needs to switch to.

Complainant stated that he did not test drive the vehicle prior to purchasing it. From the start, Complainant felt that the vehicle was having a hard time shifting gears. Complainant testified that whenever he took the vehicle to Vandergriff for scheduled maintenance (oil changes), he informed Vandergriff's service advisor of his concerns with the vehicle's transmission. However, no work

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).

⁷ Complainant Ex. 1, Motor Vehicle Retail Installment Sales Contract dated August 19, 2017.

⁸ Complainant Ex. 2, Odometer Disclosure Statement dated August 19, 2017.

was ever done to repair the issue and Complainant stated that he was told that he needed to use better gas in the vehicle. Complainant stated that this occurred on November 14, 2017, at

6,170 miles;⁹ February 13, 2018, at 10,897 miles;¹⁰ and May 21, 2018, at 16,416 miles.¹¹ Complainant stated that he did not leave the vehicle overnight at Vandergriff's location on the dates listed above and did not receive a loaner vehicle on any of the occasions.

On July 9, 2018, Complainant took the vehicle to Vandergriff for repair for the transmission issue. Vandergriff's service technician test drove the vehicle and checked the vehicle's computers for trouble codes and found none.¹² The technician determined that the vehicle was working to factory specifications and did not perform any repairs to the vehicle.¹³ Complainant stated that he was asked to test drive the vehicle with Vandergriff's technician to show what the vehicle was doing, but Complainant declined because he felt that the issue was too random and wouldn't manifest on a test drive that day. The vehicle's mileage at the time was 19,223.¹⁴ Complainant did not leave the vehicle with the dealer overnight. He did not get a loaner vehicle while his vehicle was being inspected.

Complainant testified that he took the vehicle back to Vandergriff for the transmission issue on September 25, 2018. The service technician performed a reset for the vehicle's transmission control module (TCM) in order to resolve the issue.

Complainant felt that the vehicle drove slightly better after the TCM was reset, but he continued to feel that the vehicle was hesitating and jerking abnormally. As a result of his concerns, Complainant mailed a letter to Respondent on September 24, 2018, informing them of his dissatisfaction with the vehicle.¹⁵ In addition, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on October 19, 2018.¹⁶

Complainant stated that he was contacted by Respondent in 2019 and requested to take the vehicle to a dealer for inspection by Respondent's representative. No repair was performed to the vehicle at the inspection.

Complainant testified that the hesitation or jerking occurs intermittently. He feels that it occurs more when he's attempting to drive conservatively and when he's in stop-and-go traffic. However,

⁹ Complainant Ex. 3 Repair Order dated November 14, 2017.

¹⁰ Complainant Ex. 4, Repair Order dated February 13, 2018.

¹¹ Complainant Ex. 5, Repair Order dated May 21, 2018.

¹² Respondent Ex. 1, Repair Order dated July 9, 2018.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Complainant Ex. 8, Letter to Toyota Motor Sales, USA Inc. dated September 24, 2018.

¹⁶ Complainant Ex. 7, Lemon Law Complaint dated October 19, 2018.

sometimes the vehicle's performance does seem to improve. Complainant stated that the vehicle has two (2) driving modes: Eco and Power. Complainant does not like to use Power mode as he feels that the vehicle uses more fuel when it's being driven in that mode. Complainant stated that he's aware that the vehicle has an eight (8) speed transmission installed in it. He thinks that the problem is a design issue. Complainant stated that he doesn't trust the vehicle and would not drive it on an extended trip.

During cross-examination, Complainant stated that he was never informed by a sales person that Power mode uses more fuel. He just assumed it would because of the vehicle's increased power. In addition, Complainant stated that he has never driven a vehicle with an eight (8) speed transmission prior to purchasing this vehicle. His last vehicle had a five (5) speed transmission.

2. Kent Furche's Testimony

Kent Furche, Complainant's son, testified for Complainant. Mr. Furche stated that he has driven the vehicle approximately 30 times. The last time that Mr. Furche drove the vehicle was about a month prior to the hearing date.

Mr. Furche stated that approximately six (6) or seven (7) times when driving the vehicle, he has felt that the vehicle was hesitating or that the transmission was slipping. He could tell that the transmission was going to shift to another gear before it actually did. He said that it was almost like popping a clutch in a vehicle with a manual transmission. Mr. Furche stated that it was not unsettling, but was enough to feel that something was wrong with the vehicle's transmission.

During cross-examination, Mr. Furche stated that he does not own a Toyota Highlander. His personal vehicles are a three (3) year old Toyota Avalon and a Ford truck. Mr. Furche said that Complainant's vehicle's transmission has more gears than his own vehicles' transmissions.

C. Respondent's Evidence and Arguments

Dan Lee, Senior Manager for Service Support, testified for Respondent. Mr. Lee has been in the automotive industry since 1975. He has worked with Respondent for 20 years and in his current position for five (5) years. He has been an Automotive Service Excellence (ASE) Certified Master Technician since 1977.

Mr. Lee stated that he has never inspected the vehicle. Mr. Lee testified that the vehicle has an eight (8) speed transmission which changes the way that the vehicle drives. The transmission has a wider gear range and has more shifts overall. At lower speeds the vehicle will stay in gear longer, however. The transmission was designed to provide drivers better fuel economy. Mr. Lee stated that when someone is driving conservatively in the vehicle, the transmission may have to search for the proper gear to shift to. Power mode doesn't change the number of shifts, but holds the

transmission in gear longer than it would otherwise. However, Power mode doesn't overly affect fuel consumption.

Mr. Lee testified that Respondent sent their field technical specialist, Michael McClure to inspect the vehicle. The inspection took place on March 19, 2019, at Freeman Toyota (Freeman) in Hurst, Texas. Mr. McClure test drove the vehicle with Complainant and Freeman's shop foreman in an attempt to determine if there was a problem with the transmission.¹⁷ They drove approximately seven (7) miles in the vehicle on residential streets.¹⁸ Neither Mr. McClure nor the shop foreman felt that there was anything wrong with the way the vehicle's transmission shifted.¹⁹ Mr. McClure checked the vehicle's computers for diagnostic trouble codes (DTC's) and found none.²⁰ The vehicle's mileage on this occasion was 31,597.²¹

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.

A manufacturing defect is an isolated aberration occurring only in those vehicles not produced according to the manufacturer's specifications. A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of a broken part. Unlike manufacturing defects, issues that do not arise from manufacturing, such as characteristics of the vehicle's design (which exists before manufacturing) or dealer representations and improper dealer repairs (which occur after manufacturing) are not warrantable defects. Design characteristics result

¹⁷ Respondent Ex. 2, Case Information Printout undated.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

from the vehicle's specified design and not from any error during manufacturing.²² In sum, because the warranty only covers manufacturing defects, the Lemon Law does not apply to design characteristics or design defects.

From the testimony presented at the hearing, it is apparent that the issue complained of is a design issue with the vehicle's transmission. In fact, Complainant testified that he felt his concern was a design issue. The vehicle's transmission is designed to economize on fuel and may sometimes shift differently from a vehicle with a transmission with fewer gears. As such, the hearing examiner must find that there is no defect with the vehicle itself. Therefore, repurchase or replacement relief for Complainant is not warranted.

On the date of hearing, the vehicle's mileage was 32,945 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 warranties.

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

III. FINDINGS OF FACT

1. Horace E. Furche (Complainant) purchased a new 2017 Toyota Highlander on August 19, 2017, from Vandergriff Toyota (Vandergriff) in Arlington, Texas with mileage of 178 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. In addition, Respondent provided a powertrain warranty which provides coverage for the vehicle's powertrain for seven (7) years or 100,000 miles.
3. The vehicle's mileage on the date of hearing was 32,945.
4. At the time of hearing the vehicle's warranties were still in effect.
5. Complainant feels that the vehicle's transmission is defective because it intermittently hesitates or jerks when he's driving the vehicle.
6. Complainant took the vehicle for repair to Respondent's authorized dealer, Vandergriff, in order to address his concerns regarding the vehicle's transmission hesitating or jerking on the following dates:

²² *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), writ denied, (Feb. 13, 1997).

- a. November 14, 2017, at 6,170 miles;
 - b. February 13, 2018, at 10,897 miles;
 - c. May 21, 2018, at 16,416 miles;
 - d. July 9, 2018, at 19,223 miles;
 - e. August 22, 2018, at 21,743 miles; and
 - f. September 25, 2018, at unknown mileage.
7. On November 14, 2017; February 13, 2018; and May 21, 2018, Vandergriff's service technicians did not inspect the vehicle or test drive it to determine what was causing the vehicle's transmission to hesitate or jerk as it was felt that low grade gasoline was causing the concern.
 8. On July 9, 2018, Vandergriff's service technician determined that the vehicle was operating as designed. Complainant was asked to go on a test drive to demonstrate his concerns with the vehicle, but he refused to go on the test drive at the time.
 9. On August 22, 2018, Vandergriff's service technicians did not inspect the vehicle or test drive it to determine what was causing the vehicle's transmission to hesitate or jerk even though he raised the issue to the service advisor when he took the vehicle in for maintenance.
 10. On September 24, 2018, Complainant mailed a letter to Respondent advising them of his dissatisfaction with the vehicle.
 11. On September 25, 2018, Vandergriff's service technician reset the vehicle's transmission control module (TCM) in order to resolve the concern.
 12. On October 19, 2018, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
 13. On March 19, 2019, the vehicle was inspected at Freeman Toyota in Hurst, Texas by Respondent's field technical specialist, Michael McClure, at which time he took a test drive in the vehicle with Complainant and Freeman's shop foreman.
 14. During the inspection described in Findings of Fact #13, Mr. McClure was unable to recreate the concern and was unable to find any stored trouble codes on the vehicle's computers. Neither he nor Freeman's shop foreman noticed any issues with the vehicle's transmission during the inspection or test drive.
 15. On February 1, 2019, 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.

16. The hearing in this case convened and the record was closed on April 25, 2019, in Fort Worth, Texas before Hearings Examiner Edward Sandoval. Horace E. Furche, Complainant, represented himself at the hearing. Kent Furche, Complainant's son, was present and testified for Complainant. 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.

V. 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 May 24, 2019



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