

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 19-0012780 CAF**

MAXIMO and ZOILA ISERN,	§	BEFORE THE OFFICE
Complainants	§	
	§	
v.	§	OF
	§	
GULF STATES TOYOTA, INC.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Maximo and Zoila Isern (Complainants) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in their 2017 Toyota Camry. Complainants assert that the vehicle has a defect or nonconformity which causes wind noise from the driver’s and passenger’s sides of the vehicle when it’s driven at 60 to 65 mph. 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 Complainants are 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 4, 2019, in Fort Worth, Texas before Hearings Examiner Edward Sandoval. Maximo Isern represented Complainants at the hearing. Zoila Isern was also present at the hearing. Terrell Eustice, Interpreter, provided Spanish interpretation services for Ms. Isern. Respondent was represented by Dan Lee, Senior Manager for Service Support. Also present for Respondent was Donna Plocik, Customer Experience Operations Manager.

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

¹ Tex. Occ. Code § 2301.604(a).

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 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

B. Complainant’s Evidence and Arguments

Complainants purchased a new 2017 Toyota Camry on October 9, 2017, from Family Toyota (Family) in Fort Worth, Texas.⁹ The vehicle’s mileage at the time of delivery was 302.¹⁰

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).

⁹ Complainant Ex. 1, Buyer’s Order dated October 9, 2017.

¹⁰ Complainant Ex. 2, Odometer Disclosure Statement dated October 9, 2017.

Respondent provided a new vehicle limited warranty for the vehicle which provides coverage for three (3) years or 36,000 miles, whichever comes first.¹¹ On the date of hearing the vehicle's mileage was 11,532. At the time of hearing the vehicle's warranty was still in effect.

Mr. Isern testified that he hears a wind noise from the driver's (and passenger's) closed side windows when he drives the vehicle at 60 to 65 mph. He stated that the noise occurs every time he drives the vehicle at a high rate of speed. Mr. Isern stated that he first heard the wind noise a few months after purchasing the vehicle. Mr. Isern's mother also told him that she could hear the noise from the passenger's side window.

When Mr. Isern first notice the wind noise, he took the vehicle to Family for repair for the issue. The first repair visit took place on March 20, 2018. Family's service technician verified the issue and special ordered a left front door weather strip in order to resolve the problem.¹² The service advisor informed Mr. Isern that someone from Family would contact him when the part arrived at the dealer's location. The vehicle's mileage on this occasion was 2,138 miles.¹³ Mr. Isern waited for the vehicle and did not receive a loaner vehicle at the time.

Mr. Isern testified that he did not receive a call from anyone associated with the dealership, so he called Friendly to schedule an appointment to install the special ordered part. Mr. Isern took the vehicle to Friendly to install the weather stripping on April 3, 2018. At that time, Friendly's service technician replaced the vehicle's left front weather strip (*i.e.*, door trim).¹⁴ The vehicle's mileage at the time was 2,243.¹⁵ Mr. Isern waited for the vehicle while it was being repaired. He did not get a loaner vehicle on this occasion.

Mr. Isern stated that as soon as he received the vehicle back from Friendly, he drove it to see if the wind noise recurred. Mr. Isern heard the wind noise again and took the vehicle back to Friendly for repair for the issue on April 6, 2018. Friendly's service technician replaced the vehicle's driver's side door run in order to resolve the issue.¹⁶ The vehicle's mileage on this occasion was 2,309.¹⁷ The vehicle was in Friendly's possession for a few hours. Mr. Isern waited at the dealer's location while the vehicle was being repaired. No loaner was provided to Mr. Isern at the time.

¹¹ Complainant Ex. 10, Camry 2017 Warranty and Maintenance Guide, p. 12.

¹² Respondent Ex. 1, Respondent's Evidence Packet, p. 1.

¹³ *Id.*

¹⁴ Complainant Ex. 3, Repair Order dated April 3, 2018.

¹⁵ *Id.*

¹⁶ Complainant Ex. 4, Repair Order dated April 6, 2018.

¹⁷ *Id.*

Mr. Isern stated that when he received the vehicle back from Friendly, he did not hear the wind noise any longer. Mr. Isern stated that about a year later he began to hear wind noise from the windows again. Mr. Isern took the vehicle back to Friendly for repair for the issue on April 20, 2019. On this occasion, Friendly's service manager and their general manager accompanied Mr. Isern on a test drive of the vehicle.¹⁸ They also all test drove a similar vehicle that was available.¹⁹ Friendly's representatives indicated that they could not duplicate the complained of noise.²⁰ No repair was performed, but a technical assistance (TAS) case was created documenting the complaint.²¹ The vehicle's mileage on this occasion was 7,313.²²

On May 21, 2019, Mr. Isern called Respondent's consumer help line directly to complain about the vehicle.²³ Respondent's representatives mailed a letter to Complainants asking for additional information about the vehicle.²⁴

Mr. Isern took the vehicle to Toyota of Irving (located in Irving, Texas) for repair for the wind noise issue on June 3, 2019. Mr. Isern and Friendly's service drive manager took a test drive in the vehicle and verified that there was a wind noise.²⁵ They also test drove a similar vehicle and heard a similar noise under the same driving conditions.²⁶ On this same date, the vehicle was also inspected by Respondent's field technical specialist (FTS), Robert Zimmerman. Mr. Zimmerman, after driving Complainants' vehicle and the similar vehicle, determined that the noise heard by Mr. Isern was a "characteristic" of the vehicle.²⁷ The vehicle's mileage on this occasion was 8,207.²⁸ The vehicle was in the dealer's possession for one (1) day. Complainants were provided with a loaner vehicle while their vehicle was being inspected.

Mr. Isern returned to Toyota of Irving on June 7, 2019, in order to have the vehicle repaired for the wind noise issue.²⁹ Edwin Alvarez, the service drive manager, informed Mr. Isern that there was no repair for the issue, since it was considered to be a normal characteristic of the vehicle.³⁰

Mr. Isern took the vehicle to Texas Toyota of Grapevine (located in Grapevine, Texas) on June 8, 2019, for repair for the wind noise issue. The dealer's service technician test drove the vehicle

¹⁸ Respondent Ex. 1, Respondent's Evidence Packet, p. 6.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Complainant Ex. 5, Letter from Gulf States Toyota, Inc. dated May 22, 2019.

²⁴ *Id.*

²⁵ Complainant Ex. 6, Repair Order dated June 3, 2019.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Respondent Ex. 1, Respondent's Evidence Packet, p. 8.

³⁰ *Id.*

and determined that it was operating normally and that no repairs were necessary.³¹ The vehicle's mileage on this occasion was 8,340.³² The vehicle was in the dealer's possession for a few hours. Complainant did not receive a loaner vehicle during this repair visit.

On June 24, 2019, Respondent's representative mailed a letter to Complainants advising them that after reviewing the vehicle's repair order and warranty history and inspecting the vehicle, it was determined that the issue complained of was a normal operating characteristic of the vehicle. Complainants, thereupon, filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on June 28, 2019. Complainants also mailed a letter to Respondent on July 8, 2019, expressing their dissatisfaction with the vehicle.³³

Mr. Isern stated that he was never contacted by Respondent representative's about the need to perform a final inspection and repair attempt on the vehicle. He has not taken the vehicle to any of Respondent's authorized dealers for repair for the wind noise issue since June of 2019.

Mr. Isern testified that the wind noise still occurs daily when driving the vehicle at 60 to 65 mph. The only time he hears the noise is when he's driving the vehicle at a high rate of speed. Mr. Isern stated that it's annoying to drive the vehicle when it's so noisy. He stated that it affects the comfortableness of the vehicle. Mr. Isern also stated that the noise occurs from both the driver's and passenger's sides of the vehicle. It doesn't matter whether it's hot or cold outside or how many people are in the vehicle, the noise occurs. Mr. Isern also stated that there has not been a problem with water leaks or dust or dirt entering the vehicle when driving at a high rate of speed.

Mr. Isern stated that during the test drive taken at the time of hearing, he heard the wind noise. In addition, he felt that the vehicle was very noisy overall.

C. Respondent's Evidence and Arguments

Dan Lee, Senior Manager for Service Support, testified for Respondent. Mr. Lee has been in the automotive industry for 37 years. He has worked with Respondent for over 20 years and has been in his current position for six (6) years. He is an Automotive Service Excellence (ASE) Certified Master Technician. In addition, Mr. Lee is a Toyota Master Certified Technician.

Mr. Lee stated that, prior to the hearing, he had not seen the vehicle. Mr. Lee testified that he felt that the first repair visit on March 20, 2018, should not be counted against Respondent because no repair was performed to the vehicle. The service technician special ordered a window weather

³¹ Complainant Ex. 7, Repair Order dated June 8, 2019.

³² *Id.*

³³ Complainant Ex. 9, Letter to Toyota Customer Experience Center dated July 8, 2019.

strip for the driver's side window. Mr. Lee also verified that the window strip was installed on the vehicle on April 3, 2018. Then, on April 6, 2018, Friendly's service technician replaced the driver's side window's door run. Mr. Lee went on to state that the dealer's service technician was not able to recreate a noise problem with the vehicle on April 20, 2019. On June 3, 2019, Respondent's FTS determined that the wind noise heard by Mr. Isern was a normal characteristic of the vehicle. On June 8, 2019, the dealer's service technician determined that the vehicle was operating normally.

Mr. Lee stated that Respondent did not request for a final inspection or repair of the vehicle because Respondent's FTS had already inspected the vehicle on June 3, 2019.

During cross-examination, Mr. Lee stated that the wind noise heard by Mr. Isern could be caused by air turbulence around the vehicle's A pillar and side mirrors. He stated that it's difficult to design a vehicle and not get some wind noise. The body style of the vehicle and the aerodynamics of the vehicle could cause wind noise to increase or lessen. The level of noise could also be affected by wind direction, wind speed, and the direction that the vehicle is being driven. Mr. Lee also stated that sometimes drivers confused road noise from the road or the vehicle's tires as wind noise.

After taking a test drive in the vehicle at the time of hearing, Mr. Lee stated that he did not hear any wind noise. He did hear a lot of outside noise, however. Mr. Lee stated that the vehicle doesn't have a lot of insulation and that may be why he could hear the road noise during the drive. Mr. Lee feels that the vehicle is operating as designed.

D. 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.

The first issue to be addressed is whether Complainants' vehicle has a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the vehicle. Mr. Isern indicates that the problem with the vehicle is that he hears a wind noise from the front

windows when driving the vehicle at 60 to 65 mph. The evidence presented at the hearing indicates that the noise heard by Mr. Isern is a normal characteristic of the vehicle. The noise is caused by the design of the vehicle, be it the amount of insulation, the thickness of the windshield glass, or the body design. Respondent's warranty only covers manufacturing defects. The Lemon Law does not apply to design characteristics or design defects. As such, the hearings examiner must find that there is no defect with the vehicle itself. Therefore, repurchase or replacement relief for Complainants are not warranted.

On the date of hearing, the vehicle's mileage was 11,532 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.

Complainants' request for repurchase or replacement relief is denied.

III. FINDINGS OF FACT

1. Maximo and Zoila Isern (Complainants) purchased a new 2017 Toyota Camry on October 9, 2017, from Family Toyota (Family) in Fort Worth, Texas with mileage of 302 at the time of delivery.
2. The manufacturer or distributor 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.
3. The vehicle's mileage on the date of hearing was 11,532.
4. At the time of hearing the vehicle's warranty was still in effect.
5. Complainants feels that the vehicle is defective because they hear wind noise from the vehicle's front windows when driving at 60 to 65.
6. Complainants took the vehicle for repair to Respondent's authorized dealers on the following dates in order to address their concerns regarding hearing excessive wind noise

from the driver's and passenger side windows when driving the vehicle between 60 to 65 mph:

- a. March 20, 2018, at 2,138 miles;
 - b. April 3, 2018, at 2,243 miles;
 - c. April 6, 2018, at 2,309 miles;
 - d. April 20, 2019, at 7,313 miles;
 - e. June 3, 2019, at 8,207 miles; and
 - f. June 8, 2019, at 8,340 miles.
7. On March 20, 2018, Family's service technician verified the concern and special ordered a new left front weather strip for the driver's side window in order to alleviate the concern.
 8. On April 3, 2018, Family's service technician installed the driver's side weather strip to address the concern of excessive wind noise from the driver's side window.
 9. On April 6, 2018, Family's service technician replaced the door run from the driver's side door in order to address Complainants' concern.
 10. On April 20, 2019, Family's service technician was unable to duplicate the problem of excessive wind noise from the driver's side window. Both Family's service manager and general manager rode with Mr. Isern in the vehicle and indicated that they did not hear anything unusual during the test drive.
 11. On June 3, 2019, Complainants took the vehicle to Toyota of Irving located in Irving, Texas for repair for the wind noise issue.
 12. During the repair visit described in Findings of Fact #11, Toyota of Irving's service manager test drove the vehicle along with Mr. Isern and verified the wind noise. They then test drove a like vehicle and heard the same noise.
 13. Also during the repair visit described in Findings of Fact #11, Respondent's field technical specialist, Robert Zimmerman, inspected the vehicle and test drove it and a like vehicle and heard the complained of wind noise.
 14. Mr. Zimmerman determined that the noise that he heard during the test drive was characteristic of the vehicle, since he heard the same noise from the similar vehicle. As a result, no repair was performed at the time.

15. On June 8, 2019, Complainants took the vehicle to Texas Toyota of Grapevine for repair for the wind noise issue.
16. During the repair visit described in Findings of Fact # 15, Toyota of Grapevine's service technician determined that the vehicle was operating normally and that no repairs were needed.
17. On June 28, 2019, Complainants filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
18. On July 8, 2019, Complainants mailed a letter to Respondent advising them of their dissatisfaction with the vehicle.
19. On July 17, 2019, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainants 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.
20. The hearing in this case convened and the record was closed on December 4, 2019, in Fort Worth, Texas before Hearings Examiner Edward Sandoval. Maximo Isern represented Complainants at the hearing. Zoila Isern was also present at the hearing. Terrell Eustice, Interpreter, provided Spanish interpretation services for Ms. Isern. Respondent was represented by Dan Lee, Senior Manager for Service Support. Also present for Respondent was Donna Plocik, Customer Experience Operations Manager.

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

SIGNED December 13, 2019.



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