

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 20-0006824 CAF**

LINDA SEE, Complainant	§ § § § § § §	BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
v.		
GULF STATES TOYOTA, INC., Respondent		

DECISION AND ORDER

Linda See (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2018 Toyota Tundra Crewmax. Complainant asserts that the vehicle has a defect or nonconformity which causes the fuel gauge to provide inaccurate readings. 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 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 telephonically on July 1, 2020, before Hearings Examiner Edward Sandoval. Linda See, Complainant, appeared and represented herself at the hearing. Bill Mercer, Complainant’s companion, and Joe McCann, mechanic, were also present and offered testimony. Respondent was represented by Dan Lee, Senior Manager Service Support. Donna Plocek, Customer Experience Operations Manager, also appeared at the hearing for Respondent. The hearing record closed on July 1, 2020.

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

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

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

1. Linda See’s Testimony

Complainant purchased a new 2018 Toyota Tundra Crewmax on January 29, 2018, from Mike Calvert Toyota (Calvert) in Houston, Texas.⁹ The vehicle’s mileage at the time of delivery was

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. 2, Motor Vehicle Buyer’s Order dated January 29, 2018.

26.¹⁰ Respondent provided a new vehicle limited warranty for the vehicle which provides coverage for three (3) years or 36,000 miles, whichever comes first. On the date of hearing the vehicle's mileage was 22,836. At the time of hearing the vehicle's warranty was still in effect.

Complainant stated that she feels that the vehicle's fuel gauge is not accurate and that this is evidence of a defect with the vehicle. Complainant said that the fuel gauge will show the amount of fuel remaining in the tank and that, in the past, when the gauge has shown that the tank is empty she can only put 28 to 29 gallons of gas in the tank, despite the fact that the vehicle has a 38 gallon tank.

Complainant stated that her companion, Bill Mercer, is the primary driver of the vehicle. She drives the vehicle periodically, also.

2. Bill Mercer's Testimony

Bill Mercer, Complainant's companion, testified for Complainant in the hearing. He reiterated Complainant's concerns regarding the vehicle's gas gauge. Mr. Mercer testified that he was informed by Respondent's representatives that the vehicle has a 38 gallon tank and that it is normal that there will be 8-10 gallons left in the tank as a reserve, even if the gas gauge indicates that the tank is empty.

Mr. Mercer stated that he took the vehicle to Calvert on January 28, 2019, in order to have the gas gauge inspected. Bill New, Respondent's Field Technical Specialist, inspected the vehicle while it was at Calvert's.¹¹ Mr. New reset the fuel system and drained the vehicle's gas tank.¹² He then refilled the tank and determined that it held 38 gallons of fuel.¹³ Mr. New advised Mr. Mercer that since the gas gauge was reset the fuel reading was based on 16 mpg and would reset once the vehicle was refueled.¹⁴ The vehicle's mileage on this occasion was 10,892.¹⁵ The vehicle was in Calvert's possession for two (2) days. Complainant did not receive a loaner vehicle while her vehicle was being repaired.

Mr. Mercer still felt that the gas gauge was not working correctly as every time he put fuel in the vehicle, he could only put 28 to 29 gallons of gas in the tank. On April 16, 2019, Mr. Mercer took the vehicle to Calvert for repair for the gas gauge issue as Mr. Mercer did not feel that the vehicle's gas gauge was working properly. Calvert's service technician inspected the vehicle and

¹⁰ *Id.*

¹¹ Complainant Ex. 3, Repair Order dated January 28, 2019.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

determined that the vehicle was operating as designed and performed no repairs to the vehicle.¹⁶ The vehicle's mileage at the time was 12,694.¹⁷ Mr. Mercer stated that the vehicle was in Calvert's possession for three (3) to four (4) hours. Complainant did not receive a loaner vehicle while her vehicle was being repaired.

Complainant mailed a letter to Respondent on December 12, 2018, in which she indicated her dissatisfaction with the vehicle.¹⁸ In addition, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on January 15, 2020, in which she complained about the gas gauge not functioning properly.¹⁹

Mr. Mercer stated that he and Complainant continued to believe that the vehicle's gas gauge was malfunctioning. Since Complainant was still unhappy with the vehicle, Mr. Mercer called Respondent's customer service line to complain about it.

Mr. Mercer testified that they took the vehicle to Calvert for repair for the issue with the fuel gauge on February 21, 2020. Mr. New again inspected the vehicle's fuel gauge to determine whether it was malfunctioning.²⁰ Mr. New indicated that the vehicle had 17 gallons of fuel in the fuel tank and the gauge indicated that there was slightly less than half a tank of fuel when he inspected the vehicle.²¹ Mr. New stated that the fuel sender logic turns on the low fuel warning light when there is still approximately eight (8) gallons of fuel in the tank and when the vehicle is refueled only around 30 gallons can be added to the tank.²² Mr. New also stated that if the vehicle is driven until the fuel gauge needle is at empty, then only 33 to 34 gallons of fuel can be added to the tank.²³ Mr. New determined that the issue raised by Complainant is a characteristic of the fuel gauge logic and that the gauge was working as designed.²⁴ The vehicle's mileage on this occasion was 20,508.²⁵ The vehicle was in Calvert's possession overnight on this occasion. Complainant did not receive a loaner vehicle during this repair visit.

Mr. Mercer testified that the issue with the vehicle's fuel gauge has continued to occur. He feels that the vehicle's gauge is defective and that the vehicle should be repurchased by Respondent.

¹⁶ Complainant Ex. 4, Repair Order dated April 16, 2019.

¹⁷ *Id.*

¹⁸ Complainant Ex. 6, Letter to Gulf States Toyota dated December 12, 2018.

¹⁹ Complainant Ex. 1, Lemon Law Complaint dated January 15, 2020.

²⁰ Complainant Ex. 5, Repair Order dated February 21, 2020. The repair order is dated February 21, 2020, but actually covers the original date of the order, as well as March 2 to 3, 2020, and March 9, 2020, as work was also being performed on the trailer connection for the brakes which necessitated the additional visits to Calvert.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

3. Joe McCann's Testimony

Joe McCann, owner of McCannix, Inc. in Houston, Texas, has worked in the automotive industry for 50 years. He started working as a young man for his father's business and has been self-employed as the owner of McCannix.

Mr. McCann testified that he feels that there are several things wrong with the vehicle's gas gauge. However, he has not performed any diagnostics on the gauge to determine what is wrong with it. Mr. McCann has only inspected the vehicle's dashboard indicators and the information provided by Complainant and Mr. Mercer. Mr. McCann's business does not specialize in Toyota vehicles. Mr. McCann stated that even if a vehicle's fuel gauge shows that the tank is empty, there is still usually a fuel reserve in the vehicle.

C. Respondent's Evidence and Arguments

Dan Lee, Senior Manager Service Support, testified for Respondent at the hearing. Mr. Lee testified that he has worked in the automotive industry for 38 years. He began working in 1975 as a service technician for independent auto repair shops. Mr. Lee also worked as an auto mechanics instructor for eleven (11) years at Texas State Technical College in Waco, Texas. Mr. Lee has worked for Respondent for over 20 years and has been in his current position for the past six (6) years. Mr. Lee has been an Automotive Service Excellence (ASE) Master Certified Technician since 1977.

Mr. Lee testified that Complainant's vehicle was purchased with a tow package which includes a 38 gallon fuel tank. He stated that the fuel gauge is an indicator of approximately how much fuel is left in the vehicle's fuel tank. The gauge does not state exactly how much fuel is left in the tank. Mr. Lee also stated that even when a vehicle's fuel gauge indicates that the tank is empty, there is still fuel in the vehicle's tank which can be used for emergencies. Due to this built in reserve, a vehicle's fuel warning light will not always be accurate. The vehicle is designed not to include the reserve fuel to the gauge's range calculation, so that when an individual fills up a gas tank, the gas purchased may not truly indicate the size of the gas tank as the unused gas reserve will take up space in the tank.

Mr. Lee stated that the vehicle's gas gauge is working as designed. There are no repairs to be made to the gauge at this time.

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 has a defect or nonconformity which causes the fuel gauge to provide inaccurate readings. Respondent stated that the vehicle's fuel gauge is working as designed.

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 from the vehicle's specified design and not from any error during manufacturing.²⁶ In sum, because the warranty only covers manufacturing defects, the Lemon Law does not apply to design characteristics or design defects.

The evidence indicates that the issue complained of is a design issue with the vehicle. As such, the hearings examiner must find that there is no defect with the vehicle itself. No evidence was presented to indicate that the issue *substantially* impairs the use or market value of the vehicle and it does not create a serious safety hazard. Therefore, repurchase or replacement relief for Complainant is not warranted.

²⁶ *Torres v. Caterpillar, Inc.*, 928 S.W.2d 233, 239 (Tex. App.—San Antonio 1996), *writ denied*, (Feb. 13, 1997).

On the date of hearing, the vehicle's mileage was 22,836 and it remains covered under Respondent's warranty. As such, Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranty.

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

III. FINDINGS OF FACT

1. Linda See (Complainant) purchased a new 2018 Toyota Tundra Crewmax on January 29, 2018, from Mike Calvert Toyota (Calvert) in Houston, Texas with mileage of 26 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 22,836.
4. At the time of hearing the vehicle's warranty was still in effect.
5. Complainant believes that the vehicle has a defect or nonconformity which causes the vehicle's fuel gauge to be inaccurate.
6. Prior to filing a Lemon Law complaint, Complainant took the vehicle for repair to Respondent's authorized dealer, Calvert, in order to address her concerns with the vehicle's fuel gauge on the following dates:
 - a. January 28, 2019, at 10,892 miles; and
 - b. April 16, 2019, at 12,694 miles.
7. On January 28, 2019, Bill New, Respondent's Field Service Technician, inspected the vehicle while it was Calvert's location.
8. During the inspection described in Findings of Fact #7, Mr. New reset the vehicle's fuel gauge and determined that the fuel tank would hold 38 gallons of fuel.
9. On April 16, 2019, Calvert's service technician determined that the vehicle's fuel gauge was working as designed and performed no repairs to the vehicle for the issue.

10. On December 12, 2018, Complainant mailed a letter to Respondent advising them of her dissatisfaction with the vehicle.
11. On January 15, 2020, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
12. On February 21, 2020, Complainant took the vehicle to Calvert for repair for the fuel gauge issue where it was inspected again by Mr. New. The vehicle's mileage at the time was 20,508.
13. During the inspection described in Findings of Fact #12, Mr. New determined that the vehicle's fuel gauge was working as designed and that the issue complained of was due to the characteristics of the vehicle's fuel gauge logic.
14. On April 2, 2020, 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 in this case convened telephonically on July 1, 2020, before Hearings Examiner Edward Sandoval. Linda See, Complainant, appeared and represented herself at the hearing. Bill Mercer, Complainant's companion, and Joe McCann, mechanic, were also present and offered testimony. Respondent was represented by Dan Lee, Senior Manager Service Support. Donna Plocek, Customer Experience Operations Manager, also appeared at the hearing for Respondent. The hearing record closed on July 1, 2020.

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 July 8, 2020.



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