

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 15-0360 CAF**

**KYLE G. BRANT,
Complainant**

v.

**MERCEDES-BENZ USA, LLC,
Respondent**

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Kyle G. Brant (Complainant) filed a complaint with the Texas Department of Motor Vehicles seeking relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged warrantable defects in his vehicle warranted by Mercedes-Benz USA, LLC (Respondent). The hearings examiner concludes that the vehicle does not have a warrantable defect. Consequently, the Complainant's vehicle does not qualify for repurchase/replacement or warranty repair.

I. Procedural History, Notice and Jurisdiction

Matters of notice of hearing¹ 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 February 2, 2016, in San Antonio, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself and in addition, Meredith Brand testified for the Complainant. Collin Kennedy, attorney, represented the Respondent. Matthew (Matt) Miller, Field Technical Specialist, testified for the Respondent.

¹ TEX. GOV'T CODE § 2001.051.

II. Discussion

A. Applicable Law

1. Repurchase/Replacement Relief

A vehicle qualifies for repurchase or replacement if the manufacturer cannot “conform a motor vehicle to an applicable express warranty by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market value of the motor vehicle after a reasonable number of attempts.”² In other words, (1) the vehicle must have a defect covered by an applicable warranty (warrantable defect); (2) the defect must either (a) create a serious safety hazard or (b) substantially impair the use or market value of the vehicle; and (3) the defect must continue to exist after a “reasonable number of attempts” at repair.³ In addition, the Lemon Law imposes other requirements for repurchase/replacement relief, including (1) a mailed written notice of the defect to the manufacturer, (2) an opportunity to repair by the manufacturer, and (3) a deadline for filing a Lemon Law complaint.

a. Serious Safety Hazard

The Lemon Law defines “serious safety hazard” as a life threatening malfunction or nonconformity that: (1) substantially impedes a person’s ability to control or operate a vehicle for ordinary use or intended purposes, or (2) creates a substantial risk of fire or explosion.⁴

b. Substantial Impairment of Value

The Department applies a reasonable purchaser standard for determining whether a defect substantially impairs the value of a vehicle. Under this standard, “factfinders should put themselves in the position of a reasonable prospective purchaser of the subject vehicle and determine (based on the evidence presented) if the current condition of the vehicle would deter them from buying the vehicle or substantially negatively affect how much they would be willing to pay for the vehicle.”⁵

² TEX. OCC. CODE § 2301.604(a).

³ TEX. OCC. CODE § 2301.604(a).

⁴ TEX. OCC. CODE § 2301.601(4).

⁵ *Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 228 (Tex. App.—Austin 2012).

c. Reasonable Number of Repair Attempts

Generally, a rebuttable presumption is established that the vehicle had a reasonable number of repair attempts if:

[T]he 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: (A) two of the repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, following the date of original delivery to the owner; and (B) the other two repair attempts were made in the 12 months or 12,000 miles, whichever occurs first, immediately following the date of the second repair attempt.⁶

However, the statutory rebuttable presumption does not preclude otherwise finding a reasonable number of attempts to repair the vehicle based on different circumstances and fewer attempts.⁷ Furthermore, the Department adopted a decision implying that if the consumer takes the vehicle for a service visit then that visit would constitute a repair attempt unless the consumer was at fault for failure to repair the vehicle.⁸

d. Other Requirements

Even if a vehicle satisfies the preceding requirements for repurchase/replacement relief, the Lemon Law prohibits repurchase or replacement unless: (1) the owner mailed written notice of the alleged defect or nonconformity to the manufacturer;⁹ (2) the manufacturer was given an opportunity to cure the defect or nonconformity;¹⁰ and (3) the owner filed the Lemon Law complaint within six months after the earliest of: the warranty's expiration date or the dates on

⁶ TEX. OCC. CODE § 2301.605(a)(1)(A) and (B).

⁷ “[T]he existence of statutory presumptions does not forbid the agency from finding that different circumstances or fewer attempts meet the requisite ‘reasonable number of attempts.’” *Ford Motor Company v. Texas Department of Transportation*, 936 S.W.2d 427, 432 (Tex. App.—Austin 1996, no writ).

⁸ “[O]nly those occasions when failure to repair the vehicle was the fault of the consumer would not be considered a repair attempt under the statute.” *DaimlerChrysler Corporation v. Williams*, No. 03-99-00822-CV (Tex. App.—Austin, June 22, 2000, no writ) (not designated for publication).

⁹ TEX. OCC. CODE § 2301.606(c)(1).

¹⁰ TEX. OCC. CODE § 2301.606(c)(2). Note: a repair visit to a dealer satisfies the “opportunity to cure” requirement if the manufacturer authorized repairs by the dealer after written notice to the manufacturer. *See Dutchmen Manufacturing, Inc. v. Texas Department of Transportation, Motor Vehicle Division*, 383 S.W.3d 217, 226 (Tex. App.—Austin 2012).

which 24 months or 24,000 miles have passed since the date of original delivery of the motor vehicle to an owner.¹¹

2. Warranty Repair Relief

Even if repurchase or replacement relief does not apply, a vehicle may still qualify for warranty repair under Section 2301.204 of the Texas Occupations Code if the vehicle has a “defect . . . that is covered by a manufacturer’s . . . warranty agreement applicable to the vehicle.”¹²

3. Burden of Proof

The law places the burden of proof on the Complainant.¹³ The Complainant must prove each fact required for relief by a preponderance, that is, the Complainant must present enough evidence to show that all of the required facts are more likely than not true.¹⁴ For example, the Complainant must show that a warrantable defect more likely than not exists. For any required fact, if the evidence weighs in favor of the Respondent or if the evidence supports the Complainant and the Respondent equally, the Respondent will prevail. The Complainant prevails only if the evidence shows that all of the required facts are more likely than not true.

A. Complainant’s Evidence and Arguments

On January 14, 2014, the Complainant, along with his spouse, Meredith Brant, purchased a new 2013 Mercedes ML350 from Mercedes-Benz of San Antonio, a franchised dealer of the Respondent, Mercedes-Benz USA, LLC, in San Antonio Texas. The vehicle had 78 miles on the odometer at the time of purchase.

The Complainant testified that during the summer when running the air conditioning (AC) often, leaving the vehicle parked and subsequently restarting, the vehicle will exhibit a foul, dirty sock smell that lasts five to fifteen minutes. Despite taking the vehicle to the dealer numerous times (to change the filter and clean the vents), the service was just a “Band-Aid” and the issue would reoccur. The Complainant asserted that the evaporator collected condensation and had mold. During the service visits, the dealer would change the filter and presumably rinse the

¹¹ TEX. OCC. CODE § 2301.606(d)(2).

¹² TEX. OCC. CODE § 2301.204.

¹³ 43 TEX. ADMIN. CODE § 206.66(d).

¹⁴ *E.g., Southwestern Bell Telephone Company v. Garza*, 164 S.W.3d 607, 621 (Tex. 2005).

evaporator. Mrs. Brant added that the dealer would also apply a deodorizer. However, the Complainant noted that the vehicle's manual only specified one filter change per four years.¹⁵ In contrast, the dealer changed the filter at every service visit. Mrs. Brant further explained that the dealer plugged holes and drilled holes to drain condensation; the Complainant believed this attempted repair was part of the problem. The Complainant requested replacement of every AC system part but the Respondent refused. The Complainant did not check the evaporator to see if it drained correctly. The Complainant noted his familiarity with air conditioning because of his background as a homebuilder. The Complainant confirmed that he had a loaner vehicle every time he had his vehicle out of service for repair. The Complainant testified that the odor occurred about 95% of the time. Mrs. Brant stated that the odor would occur even driving short distances and that at one service visit, the technician said to run the heat for a while—the Complainant remarked that he never saw that in the vehicle's manual. The Complainant added that they live in New Braunfels so most trips were short and their vehicle accumulated about 10,000 miles in three years. Mrs. Brant confirmed that the vehicle did not have any performance issues and the Complainant added that the vehicle drove great. However, Mrs. Brant expressed concern about what they were breathing in. The Complainant stated that they preferred repurchase of the vehicle.

The Complainant took the vehicle to a dealer for repair as shown below:

| Date | Miles | Issue |
|------------------|-------|--|
| June 5, 2014 | 3,295 | AC has bad odor ¹⁶ |
| December 2, 2014 | 5,610 | Foul odor from AC ¹⁷ |
| June 15, 2015 | 8,950 | Foul odor still coming from AC ¹⁸ |
| Aug 4, 2015 | 9,847 | Stinky feet odor ¹⁹ |

The Respondent's final opportunity to repair the vehicle occurred on

On August 10, 2015, the Complainant mailed a written notice of defect to the Respondent. On August 17, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas

¹⁵ Complainant's Ex. 12, Description of Emission System Maintenance Jobs at 11. Note: this section addresses replacing the engine air filter and not an interior air filter (e.g., dust filter, combination filter).

¹⁶ Complainant's Ex. 3, Invoice 238684.

¹⁷ Complainant's Ex. 5, Invoice 249548.

¹⁸ Complainant's Ex. 6, Invoice 262119.

¹⁹ Complainant's Ex. 7, Invoice 265507.

Department of Motor Vehicles (Department) alleging that air conditioner produced a “stinky sock” or mold odor for the first five minutes after the vehicle is started.

B. Respondent’s Evidence and Arguments

On cross examination, the Complainant affirmed that he had not had the vehicle taken to determine if the vehicle had dangerous mold or other serious safety issue. The Complainant also answered that he did not have evidence of loss of value or fair market value, but he did have the trade-in value provided by a dealer.

Mr. Miller, Field Technical Specialist for the Respondent, testified he had reviewed the vehicle’s history and inspected the vehicle. Mr. Miller explained that the procedure in the LI document (referenced in Complainant’s Ex. 3) addresses cavity wax smell and not a condensation smell, which were two different smells. When inspecting the vehicle Mr. Miller explained that he wanted to smell the vehicle first thing in the morning and wanted to get the maximum amount of condensation to reproduce the smell. However, Mr. Miller testified that a slight smell was present but dissipated in less than a minute. Mr. Miller affirmed that he has observed the same odor in other vehicles and explained that the smell occurred because of the high humidity environment and that such smell was normal for this environment. He also affirmed that the dealer replaced the dust/combination filter several times as a good will and not under warranty. Mr. Miller also confirmed that replacing the evaporator would not have solve the issue. Mr. Miller explained that the vehicle’s settings he observed, 72 degrees on max cool at the lower blower speed, does not allow the vehicle to blow the condensation off the evaporator and allows the vehicle to condensate more. Mr. Miller recommended using the auto setting, which monitors air temperature and maintains the correct temperature and shuts off certain flaps and backs off the compressor and allows the vehicle to dry off. Mr. Miller confirmed that the issue is in large part an environmental phenomenon and that the air conditioning system was manufactured according to specification. Mr. Mill further explained that the air conditioning coils have a biocide coating that prevents bacteria/mold growth. Mr. Miller opined that the odor resulted from moisture. Additionally, Mr. Miller testified that the inspection revealed no mold on the evaporator coils or any other part of the system inspected. Mr. Miller explained that various components. Mr. Miller explained that the vehicle’s maintenance manual recommends replacing the interior dust/combination filter every year (as opposed to the engine air filter which has a four year replacement schedule). Moreover,

the maintenance manual specifies that the interior filters should be replaced more frequently under certain conditions. Mr. Miller further clarified that the four year filter replacement cycle on page 11 of the manual addressed the engine filter not the interior air filter. Mr. Miller also confirmed that the inspection showed no blockages of the condensation drain and the condensation drain was the lowest point. Mr. Miller also explained that the majority of condensation would occur from the evaporator but the heater case can also produce condensation, if cold enough with the right humidity.

C. Inspection

During the inspection of the vehicle at the hearing, the air conditioning was turned on and allowed to run but the vehicle did not exhibit any mold/bacteria odors. However, the weather was clear and dry at the time of the inspection.

D. Analysis

The record indicates that the vehicle does not have a warrantable defect and that the odor results from a combination of environmental factors and the particular operation of the vehicle's AC system. Consequently, the vehicle does not qualify for repurchase or replacement. A manufacturing defect is an unintended condition that occurs when the vehicle varies from its intended design. A defectively manufactured vehicle has a flaw because of some error in making it, such as incorrect assembly or the use of an out-of-specification part. In contrast, characteristics of the intended design do not arise from any error in the manufacturing process, but may exist in any same-model vehicle produced according to the manufacturer's specifications.²⁰ The fact that a vehicle's design could be better or that an issue would not occur with a different design does not make a vehicle defective under the Lemon Law. Regardless of how the vehicle's air conditioning may perform, a warrantable defect exists only if the vehicle is incorrectly assembled or if the vehicle contains an out-of-specification part. In this case, the evidence shows that vehicle's AC is operating as designed, even though its performance may be undesirable or unsatisfactory.

The transitory nature of the odor appears consistent with the absence of an ongoing, established mold growth in the air conditioning system. The Complainants testified that the odor

²⁰ *Ridgway v. Ford Motor Co.*, 82 S.W.3d 26, 31-32 (Tex. App.—San Antonio 2002), *rev'd on other grounds*, 135 S.W.3d 598 (Tex. 2004).

lasts for five to 15 minutes after turning on the air conditioning, indicating that whatever the source of the odor, it does not remain continuously. Rather, the temporary nature of the odor comports with the dissipation of any odor causing matter (e.g., moisture, dirt, mold, bacteria etc.) that may initially be present when using the air conditioning. This also appears consistent with Mr. Miller's findings that the AC system did not have any mold and the condensation drain was not blocked. Moreover, Mr. Miller testified that vehicle's air conditioning coil had an anti-microbial coating inhibiting mold/bacteria growth. Furthermore, the evidence shows certain climate control settings, in a high humidity environment such as south Texas, will result in more condensation than the vehicle can dissipate. The evidence shows that the vehicle had been set to the precise settings that would cause greater condensation than the AC system could easily dissipate. Moisture in warm air will invariably condense on contact with a cold surface. Although Mr. Miller's opinion that solely moisture caused the odor seems unlikely, assuming that the ambient air contains particulate matter, at least some particulate matter would appear to be drawn into the AC system and mixed with the condensation, which may explain the odor. However, all this results from the normal function of the AC in a hot and humid environment and not a manufacturing defect. Accordingly, replacement/repurchase relief does not apply.

III. Findings of Fact

1. On January 14, 2014, the Complainant, along with his spouse, Meredith Brant, purchased a new 2013 Mercedes ML350 from Mercedes-Benz of San Antonio, a franchised dealer of the Respondent, Mercedes-Benz USA, LLC, in San Antonio Texas. The vehicle had 78 miles on the odometer at the time of purchase.
2. The Complainant took the vehicle to a dealer for repair as shown below:

| Date | Miles | Issue |
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| June 5, 2014 | 3,295 | AC has bad odor |
| December 2, 2014 | 5,610 | Foul odor from AC |
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| Aug 4, 2015 | 9,847 | Stinky feet odor |

3. On August 10, 2015, the Complainant mailed a written notice of defect to the Respondent.

4. On August 17, 2015, the Complainant filed a Lemon Law complaint (Complaint) with the Texas Department of Motor Vehicles (Department) alleging that air conditioner produced a “stinky sock” or mold odor for the first five minutes after the vehicle is started.
5. On November 9, 2015, the Department’s Office of Administrative Hearings issued a notice of hearing directed to the Complainant and the Respondent, Mercedes-Benz USA, LLC, 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.
6. The hearing in this case convened and the record closed on February 2, 2016, in San Antonio, Texas, before Hearings Examiner Andrew Kang. The Complainant, represented himself and in addition, Meredith Brand testified for the Complainant. Collin Kennedy, attorney, represented the Respondent. Matthew (Matt) Miller, Field Technical Specialist, testified for the Respondent.
7. The vehicle’s odometer showed 11,538 miles at the time of the hearing.
8. The vehicle operated normally during the inspection at the hearing.
9. The vehicle’s air conditioning is operating normally as designed.
10. The vehicle does not have a manufacturing defect.

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. The Complainant timely filed a sufficient complaint with the Department. TEX. OCC. CODE §§ 2301.204, 2301.606(d); 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. The Complainant bears the burden of proof in this matter. 43 TEX. ADMIN. CODE § 215.206.66(d).
6. The Complainant did not prove that the vehicle has a defect covered by the Respondent's warranty. TEX. OCC. CODE § 2301.604(a).
7. The Complainant's vehicle does not qualify for replacement or repurchase. TEX. OCC. CODE § 2301.604.
8. The Respondent remains responsible to address and repair or correct any defects that are covered by the Respondent's warranties. TEX. OCC. CODE §§ 2301.204, 2301.603.

V. Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that the Complainant's petition for relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 is **DISMISSED**.

SIGNED April 1, 2016



**ANDREW KANG
HEARINGS EXAMINER
OFFICE OF ADMINISTRATIVE HEARINGS
TEXAS DEPARTMENT OF MOTOR VEHICLES**