

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0155 CAF**

SHAWN ALBERTI,
Complainant

v.

BMW OF NORTH AMERICA, LLC,
Respondent

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**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Shawn Alberti (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in his 2014 BMW 535i. Complainant asserts that the vehicle is defective because he hears a low groaning noise when he's driving the vehicle and because of a vibration that occurs when he's driving the vehicle at a speed of 40 mph or higher. BMW of North America LLC (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 May 18, 2016, in Tyler, Texas before Hearings Examiner Edward Sandoval. Complainant represented himself at the hearing. Respondent was represented by Daniel Lubin, After-Sales Manager. David Kaiser and Victor Cheung, Technical Support Engineers, also appeared to offer testimony for Respondent.

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 2014 BMW 535i on October 9, 2013, from North Point Auto Plaza in Little Rock, Arkansas.⁷ The vehicle's mileage at the time of delivery was 6.⁸ Respondent provided a new vehicle limited warranty for the vehicle for four (4) years or 50,000 miles, whichever comes first.⁹ On the date of hearing the vehicle's mileage was 22,601. The vehicle's warranty was still in effect at the time of hearing.

Complainant testified that in December of 2014, he began noticing that the vehicle seemed to be making a noise and was vibrating when he drove it at 40 to 45 mph or faster. He stated that it sounded like a "low, resonating" noise from the rear of the vehicle. The noise is more noticeable after accelerating hard in the vehicle and then easing off on the speed. The noise went away after a repair to the vehicle on June 23, 2015, but then began to recur in September of 2015. Complainant stated that the vibration was a "high RPM vibration" that seemed to be occurring in the vehicle's drive line. The vibration can be felt in the vehicle's seats, floorboard, gas pedal, and steering wheel. Complainant stated that the vibration does not feel like a shake or shudder that could be caused by a problem with the vehicle's tires.

On February 17, 2015, Complainant took the vehicle to Respondent's authorized dealer, Mike Pile Auto Group (Pile), in Tyler, Texas for repair for the vibration and noise issues. Complainant

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 Retail Installment Contract - Arkansas dated October 9, 2013.

⁸ *Id.*

⁹ Complainant Ex. 10, Service and Warranty Information manual, p. 20.

was informed by the service manager that one of the front tires was cupped on the inside of the tire and causing the noise and vibration. So, Complainant ordered two tires for the vehicle and had them installed. The vehicle's mileage when Complainant took it to Respondent's service center on this occasion was 4,516.¹⁰ Complainant was not provided with a loaner vehicle while his vehicle was being repaired. The vehicle was in Pile's possession for one (1) day.

Complainant testified that after having the new tires installed on the vehicle, the noise and vibration were still present. Complainant returned the vehicle to Pile for repair on March 30, 2015. On this occasion, the service technician verified hearing an unusual noise on the driver's side of the vehicle.¹¹ Pile's service manager also verified hearing a noise and decided that the driver's side wheel bearing needed replacement.¹² The replacement had to be special ordered so no repair was performed at the time.¹³ The mileage on the vehicle on this occasion was 11,828.¹⁴ Complainant was not provided with a loaner vehicle while his vehicle was being repaired.

The driver's side wheel bearing was replaced by Pile on April 9, 2015.¹⁵ The vehicle's mileage on this occasion was 12,258.¹⁶

Complainant testified that there was no change in the vehicle after the installation of the wheel bearing. Complainant took the vehicle to Pile on April 24, 2015, in order to address the noise and vibration issues. The service technician replaced the passenger side wheel bearing in order to address the noise issue.¹⁷ The mileage on the vehicle at the time Complainant took it for repair on this occasion was 12,602.¹⁸ The vehicle was in Pile's possession for three (3) days. Complainant was provided with a loaner vehicle during this repair visit.

Complainant testified that he was still hearing noise and feeling a vibration when driving the vehicle. On May 11, 2015, Complainant took the vehicle to Pile to repair the issues. Pile's service technician and a service manager test drove Complainant's vehicle and then test drove a comparable vehicle to determine if the noise and vibration were not normal.¹⁹ The technician determined that the vehicle's drive shaft was faulty.²⁰ The vehicle's mileage on this occasion was 12,943.²¹ Complainant received a loaner vehicle while his vehicle was being diagnosed.

¹⁰ Complainant Ex. 2, Repair Order dated February 17, 2015.

¹¹ Complainant Ex. 2-A, Repair Order dated March 30, 2015.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Respondent Ex. 13, Repair Order dated April 9, 2015.

¹⁶ *Id.*

¹⁷ Complainant Ex. 3, Repair Order dated April 24, 2015.

¹⁸ *Id.*

¹⁹ Complainant Ex. 4, Repair Order dated May 11, 2015.

²⁰ *Id.*

²¹ *Id.*

On June 23, 2015, Complainant took the vehicle to Pile to complete the repair to the vehicle's drive shaft. The drive shaft had to be special ordered and was installed on this repair visit.²² The mileage on the vehicle when Complainant took it for repair on this occasion was 14,096.²³ Complainant was provided with a loaner vehicle while his vehicle was being repaired.

Complainant testified that the vehicle drove fine for awhile after the June 23, 2015 repair. However, the noise and vibration returned after a few months. On November 18, 2015, Complainant took the vehicle to Pile for repair for the noise and vibration issues. Pile's service manager and Respondent's field engineer (Victor Cheung) test drove the vehicle during this repair visit.²⁴ They also test drove a brand new 2016 BMW 535i to compare their rides.²⁵ The service manager and Mr. Cheung determined that the two vehicles drove similarly and that there was not a noticeable difference between the noise and vibration felt in the vehicles.²⁶ The vehicle's mileage on this occasion was 18,112.²⁷ The vehicle was in Pile's possession until November 20, 2015.²⁸ Complainant received a loaner vehicle while his vehicle was being repaired.

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on January 14, 2016.²⁹ In addition, Complainant mailed a complaint letter to Respondent outlining his dissatisfaction with the vehicle.³⁰

Complainant testified that no repairs have been performed to the vehicle since June 23, 2015. He has taken the vehicle for repair numerous times and did not receive repair invoices from the dealer. He cannot recall the dates he took the vehicle for repair and for which he did not receive a copy of the repair order. He still hears noise and feels a vibration when driving the vehicle. However, it's not been as extensive as before the last actual repair in June of 2015. He feels that the vehicle will prematurely fail as a result of the issues he's been experiencing.

During cross-examination, Complainant testified that when he purchased the vehicle, he had the original run-flat tires removed and installed a new set of after-market tires on the vehicle.³¹ About a month later, Complainant replaced the two rear after-market tires with a new set of tires because they were out of round and he was feeling a tire related vibration and noise when driving

²² Complainant Ex. 5, Repair Order dated June 23, 2015.

²³ *Id.*

²⁴ Complainant Ex. 6, Repair Order dated November 18, 2015.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Complainant Ex. 7, Lemon Law Complaint dated January 14, 2016. Complainant signed and dated the complaint on January 5, 2016. However, the complaint was not received by the Texas Department of Motor Vehicles until January 14, 2016, which is the effective date of the complaint.

³⁰ Complainant Ex. 8, Letter to BMW of North America, LLC, undated.

³¹ Respondent Ex. 1, Repair Order dated October 9, 2013.

the vehicle.³² On December 16, 2013, Complainant had the dealer check the vehicle's tires because he was experiencing a vibration when driving the vehicle.³³ On December 18, 2013, Complainant had the dealer rebalance the vehicle's rear tires.³⁴ On January 14, 2014, Complainant had all of the vehicle's tires replaced with after-market tires and rebalanced.³⁵ Complainant testified that when he moved to Tyler was when he started experiencing the complained of vibration and noise when driving the vehicle.

Complainant testified that a worn tire can have an affect on vehicle vibration and noise. The tires on Complainant's vehicle are currently worn and need replacement soon. Complainant also testified that after both front wheel bearings were replaced, he did not feel any difference in the vehicle.

C. Respondent's Evidence and Arguments

Victor Cheung, Technical Support Engineer, has worked with Respondent for 30 years. He's worked for 25 years as a technical support engineer. Mr. Cheung is a Level I technician for Respondent, the highest level offered by Respondent. In addition, he has had eight (8) Automotive Service Excellence (ASE) certifications. He also has undergone vocational schooling for automotive technology.

Mr. Cheung testified that he has driven the vehicle on multiple occasions. On November 19, 2015, the second time that he drove the vehicle, Mr. Cheung was accompanied by Pine's service manager, Rick Odette. Mr. Cheung and Mr. Odette then compared the drive in Complainant's vehicle with a similar test drive with a comparable vehicle. They determined that Complainant's vehicle was not making any undue noise or excessive vibration. Mr. Cheung felt that the drive in the two vehicles felt the same. Mr. Cheung also testified that he felt that the comparable vehicle had slightly more vibration than Complainant's vehicle.

Mr. Cheung performed a final repair attempt on the vehicle on February 22, 2016, at BMW of Tyler's location. Mr. Cheung testified that during the final repair attempt he checked the balance on the vehicle's tires and had them rebalanced. He then test drove the vehicle for about an hour. Complainant and Brandon Miles, BMW of Tyler's service manager, also participated in the test drive.³⁶ Mr. Cheung stated that he did not feel any abnormal vibration when driving the vehicle on this occasion.

³² Respondent Ex. 2, Repair Order dated November 5, 2013.

³³ Respondent Ex. 4, Repair Order dated December 16, 2013.

³⁴ Respondent Ex. 5, Repair Order dated December 18, 2013.

³⁵ Respondent Ex. 6, Repair Order dated January 14, 2014.

³⁶ Respondent Ex. 17, Internal Field Report dated February 22, 2016.

Mr. Cheung testified that non-approved BMW tires could increase the chance of vibration in Complainant's vehicle, as they are not designed for BMW chassis. In addition, worn tires could cause vibration issues in a vehicle.

During cross-examination, Mr. Cheung stated that he believes that the vibration Complainant is feeling is actually normal road feel. Mr. Cheung testified that the comparable vehicles he's test driven have exhibited a similar vibration as is felt in Complainant's vehicle.

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 has raised the issue that when he drives the vehicle at 40 mph or faster, he hears a groaning, resonating noise and he feels a vibration in the vehicle. Complainant has the burden of proof to establish the existence of a defect that creates a serious safety hazard or which substantially impairs the use or market value of the vehicle. In the present case, the hearings examiner must hold that Complainant did not meet this burden. Complainant has failed to establish that the noise he hears or the vibration that he feels when driving the vehicle is caused by a defect in the vehicle. The problems could be caused by the roads he's driving on or the tires on the vehicle. In addition, during the test drive taken at the time of hearing, the hearings examiner did not hear any abnormal noise nor did he feel a vibration in the vehicle.

Therefore, the hearings examiner finds that there is no defect with the vehicle and, as such, repurchase or replacement relief for Complainant is not warranted. However, the vehicle is still under warranty and if the noise or vibration recur and become severe, then Respondent is still required to perform repairs on the vehicle in order to address the issues. In addition, Respondent is still under an obligation to repair the vehicle whenever there is any other problem covered by the vehicle's warranty.

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

III. FINDINGS OF FACT

1. Shawn Alberti (Complainant) purchased a new 2014 BMW 535i from North Point Auto Plaza in Little Rock, Arkansas on October 9, 2013, with mileage of 6 at the time of delivery.
2. The manufacturer of the vehicle BMW of North America LLC (Respondent), issued a warranty for the vehicle for four (4) years or 50,000 miles, whichever occurs first.
3. The vehicle's mileage on the date of hearing was 22,601.
4. At the time of hearing the vehicle was still under warranty.
5. Complainant hears a grinding, resonating noise and feels a vibration from the vehicle when driving at 40 mph or faster.
6. Complainant took the vehicle to Respondent's authorized dealer, Mike Pile Auto Group (Pile), in order to address his concerns regarding noise and vibration when driving the vehicle on the following dates:
 - a. February 17, 2015, at 11,116 miles;
 - b. March 30, 2015, at 11,828 miles;
 - c. April 9, 2015, at 12,258 miles;
 - d. April 24, 2015, at 12,602 miles;
 - e. May 11, 2015, at 12,943 miles;
 - f. June 23, 2015, at 14,096 miles; and
 - g. November 18, 2015, at 18,112 miles.
7. On February 17, 2015, Pile's service technician inspected the vehicle, but did not perform any repairs on it. However, Complainant had the vehicle's two (2) front tires replaced because there was a concern that "cupping" on one of the tires could have been causing the noise and vibration.
8. On March 30, 2015, Pile's service technician verified hearing a noise from the driver's side of the vehicle. No repair was performed as a driver's side wheel bearing had to be special ordered.
9. On April 9, 2015, Pile's service technician replaced the driver's side wheel bearing with the part which had been special ordered.
10. On April 24, 2015, Pile's service technician replaced the passenger's side wheel bearing with a part which had been special ordered.

11. On May 11, 2015, Pile's service technician determined that the vehicle's drive shaft was faulty and causing road noise and vibration. A new drive shaft had to be special ordered so no repair was performed on this date.
12. On June 23, 2015, Pile's service technician installed the special ordered drive shaft on the vehicle.
13. On November 18, 2015, Pile's service manager could not duplicate Complainant's concern and no repairs were performed.
14. On January 14, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
15. On February 22, 2016, Respondent's technical support engineer performed a final repair attempt on the vehicle. The engineer determined that the vehicle was operating normally and no repairs were necessary.
16. On March 9, 2016, 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.
17. The hearing in this case convened and the record was closed on May 18, 2016, in Tyler, Texas before Hearings Examiner Edward Sandoval. Complainant represented himself at the hearing. Respondent was represented by Daniel Lubin, After-Sales Manager. David Kaiser and Victor Cheung, Technical Support Engineers, also appeared to offer testimony for Respondent.

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 14, 2016


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