

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0198 CAF**

CHRISTALLIA STARKS
Complainant

v.

BMW OF NORTH AMERICA LLC
and BMW FINANCIAL SERVICES
NA LLC,
Respondent

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Christallia Starks (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2015 BMW 528i. Complainant asserts that the vehicle is defective because she feels a vibration when she's driving it. BMW of North America LLC and BMW Financial Services NA LLC (Respondents) 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 June 15, 2016, in San Antonio, Texas before Hearings Examiner Edward Sandoval. Complainant, Christallia Starks, represented herself at the hearing. Also present and testifying for Complainant were Jerry Starks, her ex-husband, and Jill Barrow, her co-worker. Respondents were represented by Stephen Soncini, After-Sales Marketing Manager. Victor Cheung, Technical Support Engineer; Lou Gatti, Service Manager for BMW of San Antonio; and William Barrow, Shop Foreman for BMW of San Antonio, 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

¹ Tex. Occ. Code § 2301.604(a).

² *Id.*

repair or correct the defect or condition.³ Fourth, the owner must have mailed 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 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

1. Christallia Starks' Testimony

Complainant leased a new 2015 BMW 528i on September 1, 2015, from BMW of San Antonio in San Antonio, Texas.⁷ The vehicle's mileage at the time of delivery was 34.⁸ Co-Respondent, BMW of North America LLC, provided a new vehicle limited warranty for the vehicle for four (4) years or 50,000 miles, whichever comes first. On the date of hearing the vehicle's mileage was 6,829. The vehicle's warranty was still in effect at the time of hearing.

Complainant testified that she noticed an unusual vibration in the vehicle during a trip to Brownsville on September 4, 2015, a few days after signing the lease for the vehicle. The vibration seemed to occur when she was driving the vehicle 40 mph or faster. She felt the driver's seat shaking and observed that the passenger's seat also seemed to shake excessively. Complainant felt that the vibration made it difficult to drive the vehicle. The vibration seemed to increase as she increased the vehicle's speed.

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)(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. 2, Motor Vehicle Lease Agreement (Closed End) dated September 1, 2015.

⁸ Complainant Ex. 3, Odometer Disclosure Statement dated September 1, 2015.

On September 15, 2015, Complainant took the vehicle to Respondent's authorized dealer, BMW of San Antonio (BMW), in San Antonio, Texas for repair for the vibration issue. William Barrow, shop foreman, drove in the vehicle with Complainant and verified the concern. BMW's technician determined that the vehicle's tires were out of balance and that was causing the vibration.⁹ The technician performed a road force match on all of the vehicle's tires and verified that there was no longer any vibration in the vehicle.¹⁰ The vehicle's mileage when Complainant took it to BMW was 958.¹¹ Complainant was provided with a loaner vehicle while her vehicle was being repaired. The vehicle was in BMW's possession for seven (7) days.

Complainant testified that after having the tires rebalanced she still felt the vibration when she drove the vehicle. Complainant returned the vehicle to BMW for repair for the vibration issue on September 22, 2015. On this occasion, Jim Braun, shop foreman, verified feeling a vibration in the vehicle. BMW's service technician removed the vehicle's tires and road force balanced them.¹² In addition, two tires were replaced because they had "excessive road disturbance."¹³ The mileage on the vehicle on this occasion was 1,117.¹⁴ Complainant was provided with a loaner vehicle while her vehicle was being repaired. The vehicle was in BMW's possession for eight (8) days.

Complainant testified that there was no change in the vehicle after the September 22, 2015 repair. She continued to feel a vibration in the vehicle when driving 40 mph or faster. Complainant took the vehicle to BMW on October 6, 2015, in order to address the vibration issue. Mr. Barrow rode with Complainant in the vehicle and verified feeling the vibration. BMW's service technician replaced a tire on the vehicle and road force balanced the tires again.¹⁵ The mileage on the vehicle at the time Complainant took it for repair on this occasion was 1,251.¹⁶ The vehicle was in BMW's possession for six (6) days. Complainant was provided with a loaner vehicle during this repair visit.

Complainant testified that she complained to Michael King, BMW's sales manager, and told him that she did not want the vehicle any longer because it had been in the shop three (3) times for repairs since she had signed the lease. Mr. King referred Complainant to Bryan Barton, BMW's general sales manager, who offered to exchange the vehicle at a cost of \$81,000. Complainant turned down the offer.

⁹ Complainant Ex. 5, Repair Order dated September 15, 2015.

¹⁰ *Id.*

¹¹ *Id.*

¹² Complainant Ex. 6, Repair Order dated September 22, 2015

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Complainant Ex. 7, Repair Order dated October 6, 2015.

¹⁶ *Id.*

On October 15, 2015, Complainant took the vehicle to BMW to repair the vibration issue. BMW's service technician replaced all of the vehicle's tires with Goodyear tires, a different brand from the original tires on the vehicle.¹⁷ The technician determined that the vehicle was driving as designed after the tires were replaced.¹⁸ The vehicle's mileage on this occasion was 1,404.¹⁹ Complainant received a loaner vehicle while her vehicle was being repaired. Complainant refused to return the loaner to BMW until December 8, 2015, after she was informed that she was still liable on the lease for her vehicle and that if she didn't pick up her vehicle, she would be charged for the loaner. Complainant felt that the loaner, which was a newer 528i, did not have the same vibration as her vehicle.

When Complainant picked up her vehicle on December 8, 2015, she informed Lou Gatti, BMW's service manager, that she was upset and not happy with the vehicle. Mr. Gatti referred Complainant to Respondent's national resolution office. After a couple of conversations with resolution specialists, Complainant was informed that no further action would be taken on her concern because the vehicle was performing appropriately.

Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on March 1, 2016.²⁰ In addition, Complainant mailed a complaint letter to Co-Respondent, BMW of North America LLC, outlining her dissatisfaction with the vehicle.²¹

Complainant testified that she was contacted by BMW of North America LLC's representative and advised to take the vehicle to BMW on March 29, 2016, for a final repair attempt. During the repair attempt, Mr. Braun rode in the vehicle with Complainant and denied feeling any vibration, although Complainant indicated that she felt a vibration. She asked Mr. Braun to look at the vehicle's drive shaft. However, he refused and indicated that he was not aware of a drive shaft issue. BMW's service technician was instructed by Mr. Braun to perform a road force balance on the vehicle.²² The technician indicated that he did not find a balance issue with the tires.²³ The mileage on the vehicle at the time of the final repair attempt was 3,770.²⁴

¹⁷ Complainant Ex. 8, Repair Order dated October 15, 2015.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Complainant Ex. 11, Lemon Law Complaint dated March 1, 2016. Complainant signed and dated the complaint on February 26, 2016. However, the complaint was not received by the Texas Department of Motor Vehicles until March 1, 2016, which is the effective date of the complaint.

²¹ Complainant Ex. 10, Letter to BMW of North America LLC dated February 26, 2016.

²² Complainant Ex. 12, Repair Order dated March 29, 2016.

²³ *Id.*

²⁴ *Id.*

Complainant testified that she still feels a vibration when driving the vehicle. It sometimes feels very intense. She doesn't feel safe driving the vehicle and if she drives at 80 or 90 mph the vehicle is difficult to manage.

During cross-examination, Complaint testified that she's never been told that the vehicle is unsafe. However, she doesn't feel that a vehicle that vibrates is safe to drive. She doesn't have an engineering background, but her perception is that the vehicle is unsafe. She doesn't want the vehicle any longer because of her safety concerns. Her expectation as a customer is that the vehicle should not vibrate at all. She's never experienced a similar feeling in any other BMW vehicle.

2. Jerry Starks' Testimony

Jerry Starks, Complainant's ex-husband testified that he has ridden in Complainant's vehicle and that he feels that it vibrates excessively. He has owned and leased BMW's in the past and he stated that he's never felt a similar vibration in any BMW vehicle that he's driven. Mr. Starks feels that it's unnerving to feel the vibration.

Mr. Starks also stated that Complainant has complained about the vehicle's vibration since she started driving the vehicle. Mr. Starks is disappointed in BMW of North America LLC and feels that the vehicle is not the "ultimate driving machine" that it's advertised to be. He did drive the vehicle on June 4, 2016. During his drive, he observed Complainant's fingers vibrating during the ride.

During cross-examination, Mr. Starks testified that he has only driven the vehicle on one occasion. He felt that the vibration was very intense. Mr. Starks stated that he doesn't know if the vehicle's tires are out of balance, but he doesn't feel that the vibration would be normal for any vehicle.

3. Jill Barrow's Testimony

Jill Barrow, Complainant's co-worker testified that she has ridden in Complainant's vehicle twice. On May 23, 2016, she went to lunch with Complainant in the vehicle. While driving, Complainant asked Ms. Barrow to put her hand on the steering wheel. When Ms. Barrow placed her hand on the steering wheel, she felt a vibration. She feels that the vibration is worse than on her own vehicle, a Mini Cooper.

During cross-examination, Ms. Barrow stated that the vibration was more than she expected. She's not an expert in automobiles and doesn't own a 528i. Ms. Barrow also testified that she didn't know if there were any imperfections on the road when she felt the vibration.

C. Respondent's Evidence and Arguments

1. Lou Gatti's Testimony

Lou Gatti, Service Manager for BMW of San Antonio, testified that he has been worked for BMW for the past four (4) years. He has worked with BMW of North America LLC for 17 years in different locations in the United States. He does not have any technical training. Mr. Gatti oversees the service staff, technicians, and cashiers for the dealership.

Mr. Gatti testified that he spoke to Complainant in December of 2015, advising her to pick up the vehicle from BMW. He was informed by Tony Lugo, service advisor, that Complainant did not want to return the vehicle that had been loaned to her while her vehicle was being repaired. Mr. Gatti informed Complainant that the vehicle was repaired and that there were no existing issues with the vehicle. Complainant indicated that she was not satisfied with the repairs and did not want to return the loaner. However, she finally agreed to pick up her vehicle. When Complainant picked up the vehicle, Mr. Gatti informed her that BMW had fulfilled its obligation in repairing the vehicle and that if she had any other issues, she needed to contact BMW of North America LLC's national resolution office. Mr. Gatti did not have any other conversations with Complainant.

Mr. Gatti testified that BMW of North America LLC's vehicles are driver's cars. The driver will receive feedback from the steering wheel and suspension. Some vehicles have more or less road feel. In addition, the road feel may be affected by the driver's driving habits. He was never advised that Complainant had complained about having trouble keeping the vehicle in its lane due to the vibration when she was driving it.

Mr. Gatti testified that he would not have released the vehicle to Complainant if there was a safety concern with it. He feels that there is no safety issue with it. Mr. Gatti stated that two of BMW's shop foremen and BMW of North America LLC's technical support engineer agreed that there was no issue with the vehicle.

During cross-examination, Mr. Gatti testified that he gave Complainant the phone number for BMW of North America LLC's national resolution center because she was frustrated and wanted a resolution for her concern. Complainant never informed Mr. Gatti what she had told BMW's service advisors when she took the vehicle for repairs.

2. William Barrow's Testimony

William Barrow, Shop Foreman for BMW of San Antonio, testified that he has been working as an automobile technician since 2005. He's always worked for BMW. Mr. Barrow began his position as shop foreman in 2013 with the dealer. He did attend Universal Technical Institute (UTI) for classes in automotive technology. He does not have any Automotive Service Excellence (ASE) certifications, but has received training in BMW of North America LLC's step program, an accelerated learning course for all of their technicians. Mr. Barrow is currently a Level I BMW technician which is the highest rating offered by BMW of North America LLC.

Mr. Barrow testified that he test drove the vehicle with Complainant on September 8, 2015. He felt that the vehicle had significant vibration at the time. He had the vehicle's tires road force balanced to address the issue. The effort was to make the tires as round as they could be. After that, Mr. Barrow felt that the vehicle had normal road vibration.

On October 6, 2015, Complainant returned to BMW with a similar complaint regarding vibration in the vehicle. Mr. Barrow again went on a test drive with Complainant. He felt that the vehicle had significant vibration and that it could be improved. He again road force balanced the vehicle's tires and replaced a tire twice, because the first replacement still was out of balance.

Mr. Barrow stated that Complainant returned the vehicle to BMW on October 15, 2015, again complaining about vibration when she was driving it. Mr. Barrow felt that the vibration complained of by Complainant was different from the earlier vibrations that he felt. He wrote a case on PUMA (BMW of North America, LLC's technical support line) asking for assistance for the issue. David Kaiser, BMW of North America, LLC's technical support engineer, was visiting the dealership at the time and he advised that all of the vehicle's tires be replaced. Mr. Barrow test drove the vehicle with Complainant and Mr. Braun after replacing the tires and Complainant was still not satisfied. She still felt that there was excessive vibration in the vehicle. Mr. Barrow disagreed and felt that the vehicle was exhibiting normal road feel. The situation was then escalated to Mr. Gatti.

Mr. Barrow testified that he visually inspected the vehicle's drive and axle shafts and that he didn't see any damage to them. So he did not pursue that avenue of repair. Mr. Barrow mentioned the drive shaft on his PUMA report, but he wasn't sure if he was missing anything. He was attempting to address all possibilities in his request for assistance. After the four tires were replaced, Mr. Barrow felt that the vehicle just had normal road feel.

During cross-examination, Mr. Barrow testified that he could not recall Complainant informing him that she did not feel safe in the vehicle. He also stated that it was not normal to have a vehicle's tires road force balanced so often.

3. Victor Cheung's Testimony

Victor Cheung, Technical Support Engineer, has worked with Co-Respondent, BMW of North America LLC, for 30 years. He's worked for 27 years as a technical support engineer. Mr. Cheung is a Level I technician for BMW of North America LLC. 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 inspected Complainant's vehicle on March 29, 2016, at BMW of San Antonio during Respondent's final repair attempt. Prior to conducting the final repair attempt, Mr. Cheung reviewed the vehicle's repair history and PUMA reports. When he arrived at BMW, Mr. Cheung checked the vehicle's tire pressure. Mr. Cheung stated that during the test drives performed by him and Mr. Braun, he did not feel any abnormal vibration in the vehicle. He did experience normal road feel. Mr. Cheung stated that he compared the ride in Complainant's vehicle with a known good car and did not feel a difference. He stated that many things could cause a vibration in a vehicle, including the tires not being balanced, a bent wheel, and rough roads.

Mr. Cheung testified that he did not inspect the vehicle's drive shaft, as this is not a common problem with BMW's. He was not aware if the drive shaft had been inspected by any other technicians. Mr. Cheung does not feel that the vibration constitutes a safety issue. He thinks that the vehicle is exhibiting normal road feel. If he felt that the vehicle was unsafe, he would not release the vehicle to a customer. He doesn't feel that there is anything abnormal about the way the vehicle drives.

During cross-examination, Mr. Cheung stated that he drives a 500 series vehicle. He was not informed by any information on any of the repair orders for the vehicle that he needed to drive a long distance in the vehicle to experience the vibration. The similar vehicle that Mr. Cheung compared to Complainant's vehicle was the same year, same model, and had the same brand of tires. He experienced normal road feel in the comparable 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 she feels a vibration in the vehicle when she's driving it. 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 vibration that she feels when driving the vehicle is caused by a defect in the vehicle. The problems could be caused by the roads she's driving on or any number of outside influences. In addition, during the test drive taken at the time of hearing, the hearings examiner did not feel an abnormal 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 vibration becomes severe, then BMW of North America, LLC is still required to perform repairs on the vehicle in order to address the issue. In addition, BMW of North America, LLC 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. Christallia Starks (Complainant) leased a new 2015 BMW 528i on September 1, 2015, from BMW of San Antonio with mileage of 34 at the time of delivery.
2. The manufacturer of the vehicle BMW of North America LLC (Co-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 6,829.

4. At the time of hearing the vehicle was still under warranty.
5. Complainant feels a vibration from the vehicle when driving it at speeds in excess of 40 mph.
6. Complainant took the vehicle to BMW of North America, LLC's authorized dealer in order to address her concerns regarding vibration when driving the vehicle on the following dates:
 - a. September 8, 2015, at 958 miles;
 - b. September 22, 2015, at 1,117 miles;
 - c. October 6, 2015, at 1,251 miles; and
 - d. October 15, 2015, at 1,404 miles.
7. On September 8, 2015, BMW's service technician road force balanced the vehicle's tires to address the vibration issue.
8. On September 22, 2015, the service technician road force balanced the vehicle's tires and replaced two tires because they had excessive road disturbance.
9. On October 6, 2015, the service technician road force balanced the vehicle's tires and replaced a tire because it had excessive road disturbance.
10. On October 15, 2015, the service technician replaced all four of the vehicle's tires with a different brand of tires.
11. On March 1, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
12. On March 29, 2016, BMW of North America, LLC's technical support engineer performed a final repair attempt on the vehicle. The engineer could not duplicate the concern and no repairs were performed.
13. On April 15, 2016, the Department's Office of Administrative Hearings issued a notice of hearing directed to Complainant and Respondents, 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.

14. The hearing in this case convened and the record was closed on June 15, 2016, in San Antonio, Texas before Hearings Examiner Edward Sandoval. Complainant, Christallia Starks, represented herself at the hearing. Also present and testifying for Complainant were Jerry Starks, her ex-husband, and Jill Barrow, her co-worker. Respondents were represented by Stephen Soncini, After-Sales Marketing Manager. Victor Cheung, Technical Support Engineer; Lou Gatti, Service Manager for BMW of San Antonio; and William Barrow, Shop Foreman for BMW of San Antonio, also appeared to offer testimony for Respondent.

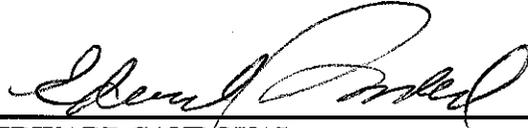
IV. CONCLUSIONS OF LAW

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 Co-Respondent, BMW of North America, LLC, 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, BMW of North America LLC, remains responsible to address and repair or correct any defects that are covered by their 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 August 1, 2016



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