

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 17-0052 CAF**

JAIME SPARKS,
Complainant

v.

BMW OF NORTH AMERICA LLC,
Respondent

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§

**BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS**

DECISION AND ORDER

Jaime Sparks (Complainant) seeks relief pursuant to Texas Occupations Code §§ 2301.601-2301.613 (Lemon Law) for alleged defects in her 2015 BMW 328i sedan. Complainant asserts that the vehicle is defective because it shakes/vibrates when being driven and because the vehicle has died twice while she was driving it. BMW of North America LLC (Respondent) argued that the vehicle has been repaired, does not have any defects, and that no relief is warranted. The hearings examiner concludes that the vehicle has been repaired, 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 April 6, 2017, in Houston, Texas, before Hearings Examiner Edward Sandoval. Complainant, Jaime Sparks, represented herself at the hearing. Respondent was represented by Scott Clark, Technical Support Engineer.

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 2015 BMW 328i sedan from Momentum BMW Mini (Momentum) in Houston, Texas on March 12, 2016, with mileage of 7,682 at the time of delivery.⁷ Respondent provided a bumper-to-bumper warranty for the vehicle good for four (4) years or 50,000 miles, whichever comes first.⁸ On the date of hearing the vehicle's mileage was 15,272. At this time, Respondent's warranty coverage for the vehicle remains in effect.

Complainant testified that she feels that the vehicle shakes/vibrates abnormally. She stated that she feels the entire vehicle shake intermittently and that she feels it in the driver's seat. She stated that the vehicle's steering wheel also shakes at times. In addition, she has had two incidents where the vehicle has died in traffic while she was driving. Complainant indicated that she wants the vehicle repurchased by Respondent.

In late June or early July of 2016, Complainant noticed that the vehicle seemed to be shaking/vibrating abnormally. She took the vehicle to Advantage BMW (Advantage) in Houston, Texas for repair on July 13, 2016. Complainant indicated to Advantage's service advisor that the air conditioner was taking a long time to cool off and that the vehicle was shaking when she turned on the air conditioner.⁹ Advantage's service technician inspected the vehicle and

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, Purchase Order dated March 12, 2016.

⁸ Complainant Ex. 11, Service and Warranty Information – 2015 3 Series, 5 Series, & 7 Series, p. 20.

⁹ Complainant Ex. 4, Repair Order dated July 13, 2016.

compared it to similar vehicles.¹⁰ He determined that the vehicle was operating normally, and that nothing was wrong with it.¹¹ The technician felt that the vehicle's outside fan turning on could have been causing the shaking/vibrating that Complainant felt.¹² The vehicle's mileage on this occasion was 11,135.¹³ The vehicle was in Advantage's possession for one day during this repair. Complainant waited for the vehicle, so she did not need a loaner vehicle at the time.

Complainant testified that she was running errands in the vehicle on August 8, 2016, when the vehicle died while she was driving. She was able to pull over to the side of the road, but the vehicle wouldn't restart. She contacted Respondent's roadside assistance service and had to wait for four (4) hours for a tow truck to arrive. Although no warning lights illuminated prior to the vehicle dying, Complainant stated that the "Drive Train Malfunction" light illuminated once she pulled over to the side of the road. Complainant had the vehicle towed to Momentum for repair. Momentum's technician found a diagnostic fault code on the vehicle's computer indicating that the vehicle's fuel pressure was low.¹⁴ He determined that the vehicle's fuel pump had failed and so he replaced it.¹⁵ The vehicle's mileage on this occasion was 11,671.¹⁶ The vehicle was in Momentum's possession until August 18, 2016.¹⁷ Complainant was provided with a loaner vehicle while her vehicle was being repaired. Complainant testified that she notified the service advisor of the vehicle intermittently shaking/vibrating, but the complaint was not on the invoice. Complainant does not know whether any repair for the shaking/vibrating issue was attempted.

Complainant stated that she tried not to drive the vehicle very often after the August 9 repair. On August 23, 2016, Complainant was driving the vehicle when it died again. Complainant saw the "Drive Train Malfunction" light illuminate when the vehicle died. Complainant had the vehicle towed to Momentum for repair. The technician found diagnostic fault codes on the vehicle's computers.¹⁸ The technician performed a test plan on the vehicle and found that the vehicle had no fuel pressure, although there was fuel in the tank.¹⁹ He determined that there was an issue with the fuel tank's fuel sensor.²⁰ The technician replaced the vehicle's fuel tank assembly to resolve the issue.²¹ The vehicle's mileage on this occasion was 11,711.²² The vehicle was in the dealer's possession for repair for one (1) week on this occasion. Complainant was provided with

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Complainant Ex. 5, Repair Order dated August 9, 2016.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Complainant Ex. 6, Repair Order dated August 24, 2016.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

a loaner vehicle while her vehicle was being repaired. However, Complainant did not pick up the vehicle from Momentum until October of 2016. She informed a Momentum representative that she was not happy with the vehicle and that she was exploring her options as to what action to take regarding the vehicle.

On October 7, 2016, Complainant wrote a letter to Respondent advising them of her dissatisfaction with the vehicle.²³ Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on October 17, 2016.²⁴

Complainant agreed to allow Respondent an opportunity for an inspection and final repair attempt on the vehicle. This was done on March 6, 2017, at Momentum. During the final repair attempt, Complainant spoke to Chris Gleason, Momentum's representative, about the vehicle. In addition, they also went on a test drive of the vehicle. They felt the vehicle shake and heard a rattle from the front of the vehicle. Momentum's technician discovered that the vehicle's motor mounts were cracked and replaced them. In addition, the technician found where the rattling noise was coming from (the dashboard) and placed felt tape on the location.

Complainant testified that the vehicle has not died since August 23, 2016, and that the rattling noise has not recurred. She stated that the vehicle still shakes/vibrates intermittently. Complainant has been driving the vehicle since October of 2016. She stated that she has been dealing with the issues with the vehicle for a year. She's been disappointed in Respondent's lack of reassurance regarding the vehicle.

During cross-examination, Complainant stated that the vehicle's shaking/vibration has stayed the same during the time of her ownership of the vehicle. It does not occur at any particular time. The vehicle can be parked, at a stop, or being driven. However, Complainant stated that the shaking/vibration is strongest when she's at a stop light waiting for it to change to green. She feels the shaking/vibration through the seat and through the center console.

C. Respondent's Evidence and Arguments

Scott Clark, Technical Support Engineer, testified for respondent. He has worked for respondent for 30 years, with the last 22 years in his current position. He is a BMW master certified technician.

²³ Complainant Ex. 7, Letter to BMW Manufacturing Co. dated October 7, 2016. Complainant mailed a second letter to Respondent on November 4, 2016, which contained the same information as the first letter.

²⁴ Complainant Ex. 9, Lemon Law Complaint dated October 17, 2016. Complainant signed and dated the complaint on October 14, 2016. However, the complaint was not received by the Texas Department of Motor Vehicles until October 17, 2016, which is the effective date of the complaint.

Mr. Clark testified that Respondent did receive the letters from Complainant advising them of her dissatisfaction with the vehicle. Respondent should have requested a final repair attempt at the time. However, one was not scheduled until after February 21, 2017, the date of the prehearing conference conducted by the hearings examiner. Complainant was contacted by a representative from Momentum to schedule Respondent's final repair attempt on the vehicle.

The final repair attempt was performed by Mr. Clark on March 6, 2017, at Momentum. Mr. Clark testified that he inspected Complainant's vehicle on the date in question. He performed a diagnostic scan of the vehicle's computers and no fault codes were discovered. Mr. Clark also test drove the vehicle. He determined that the vehicle was not shaking abnormally and that all of the vibrations he felt were normal for the vehicle. The vehicle did not stall or die while he was driving it. Mr. Clark pointed out that the vehicle's engine has four (4) cylinders and that the vehicle will run rougher than a vehicle that has a six (6) cylinder engine. The vehicle's mileage at the time of the final repair attempt was 14,695.²⁵

After Mr. Clark left the dealership, Momentum's service technician inspected the vehicle to determine the cause of a rattling noise from the front of the center console area and because Complainant indicated that the vehicle was sluggish and shaking.²⁶ The technician found that the dashboard was rubbing the vehicle's cage and so placed felt tape to the area to stop the noise.²⁷ In addition, the technician found that the vehicle's motor mounts were cracked and replaced them.²⁸

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.

²⁵ Complainant Ex. 10, Repair Order dated March 6, 2017.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

1. Shaking/Vibration Issue

The first issue to be addressed is the shaking/vibration issue. Complainant testified that the vehicle will intermittently shake/vibrate. Respondent's testimony indicated that some shaking/vibrating is to be expected, since the vehicle has a four (4) cylinder engine. In addition, the problem did not manifest during the test drive take at the time of hearing. As such, the hearings examiner must hold that Complainant has failed to meet her burden of persuasion to establish that the incidental shaking/vibration constitutes a defect that warrants repurchase or replacement of the vehicle.

2. Vehicle Dying Issue

The second issue to be addressed has to do with the vehicle dying when being driven. The issue arose twice and two (2) repairs were made by Momentum's service technicians. The evidence indicates that the problem was caused by the fuel sensors in the vehicle's fuel tank. The technician replaced the fuel tank assembly which seems to have resolved the issue as the vehicle has not died again since August of 2016. Since the problem was resolved by the repair performed, this issue cannot be grounds for repurchase or replacement relief.

Respondent's express warranty applicable to Complainant's vehicle provides bumper-to-bumper coverage for four (4) years or 50,000 miles whichever comes first. On the date of hearing, the vehicle's mileage was 15,272 and it remains under the warranty. As such, the Respondent is still under an obligation to repair the vehicle whenever there is a problem covered by the warranty.

Complainants' request for repurchase or replacement relief is denied.

III. FINDINGS OF FACT

1. Jaime Sparks (Complainant) purchased a new 2015 BMW 328i sedan on March 12, 2016, from Momentum BMW Mini (Momentum) in Houston, Texas, with mileage of 7,682 at the time of delivery.
2. The manufacturer of the vehicle, BMW of North America LLC (Respondent), issued a bumper-to-bumper warranty good for four (4) years or 50,000 miles, whichever occurs first.
3. The vehicle's mileage on the date of hearing was 15,272.

4. At the time of hearing the vehicle was still under warranty.
5. The vehicle has died on two (2) separate occasions while Complainant was driving it and intermittently Complainant feels the vehicle shaking/vibrating when she drives it.
6. Complainant took the vehicle for repair to Respondent's authorized dealers, Advantage BMW in Houston and Momentum, on the following dates:
 - a. July 13, 2016, at 11,135 miles;
 - b. August 9, 2016, at 11,671 miles; and
 - c. August 24, 2016, at 11,711 miles.
7. On July 13, 2016, Complainant took the vehicle to Advantage BMW due to the shaking/vibrating issue. Advantage's service technician determined that the vehicle was operating as designed and that the vehicle may have been shaking/vibrating due to the vehicle's outside fan turning on. No repairs were performed.
8. On August 9, 2016, the vehicle died while Complainant was driving it. Momentum's service technician found a fault code indicating that the fuel pressure was too low and replaced the vehicle's failed fuel pump to address the issue.
9. On August 24, 2016, the vehicle died while Complainant was driving it. Momentum's service technician performed a test plan and found that vehicle had no fuel pressure, although there was fuel in the tank. As a result, the technician replaced the vehicle's fuel tank assembly to address the issue.
10. On October 17, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).
11. On March 6, 2017, Scott Clark, Respondent's Technical Support Engineer, performed a final repair attempt on the vehicle. He determined that the vehicle was operating as designed and that there was only normal vibration in the vehicle. However, the vehicle's engine mounts were replaced as the original mounts were cracked.
12. On January 5, 2017, 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.

13. The hearing in this case convened and the record was closed on April 6, 2017, in Houston, Texas, before Hearings Examiner Edward Sandoval. Complainant, Jaime Sparks, represented herself at the hearing. Respondent was represented by Scott Clark, Technical Support Engineer.

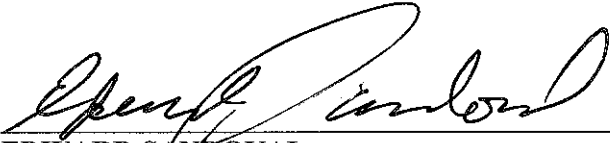
IV. CONCLUSIONS OF LAW

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

SIGNED April 27, 2017.



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