

**TEXAS DEPARTMENT OF MOTOR VEHICLES
CASE NO. 16-0188 CAF**

**HALA HARPER,
Complainant**

v.

**BMW OF NORTH AMERICA LLC
and BMW FINANCIAL SERVICES
NA LLC,
Respondents**

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BEFORE THE OFFICE

OF

ADMINISTRATIVE HEARINGS

DECISION AND ORDER

Hala Harper (Complainant) filed a petition seeking relief pursuant to Texas Occupations Code §§ 2301.601-.613 (Lemon Law) for alleged warrantable defects in her 2014 BMW 328i. Complainant seeks repurchase of the vehicle due to the engine intermittently dying when she's driving, usually at highway speeds. BMW of North America LLC and BMW Financial Services NA LLC (Respondents) argued that the vehicle has been repaired and that it does not have a defect or nonconformity. The hearings examiner concludes that the vehicle has an existing warrantable defect, and Complainant is eligible for repurchase relief.

I. PROCEDURAL HISTORY, NOTICE AND JURISDICTION

Notice and jurisdiction were not contested and are discussed only in the Findings of Fact and Conclusions of Law. The hearing on the merits convened on May 19, 2016, in Mesquite, Texas before Hearings Examiner Edward Sandoval. Complainant, Hala Harper, represented herself at the hearing. Also testifying for Complainant was her father, Kamal Dides. Respondents were represented by Daniel Lubin, After-Sales Manager. David Kaiser, Technical Support Engineer, also appeared to offer testimony for Respondents.

A continuance in the hearing was conducted telephonically on June 23, 2016. Present at the continuance were Hala Harper, Complainant, representing herself. Also present was Daniel Lubin, After-Sales Manager, representing and testifying for Respondents. The hearing record was closed on June 23, 2016.

II. DISCUSSION

A. Applicable Law

Section 2301.604(a) of the Texas Occupations Code gives a motor vehicle owner the option of seeking the manufacturer's replacement or repurchase of the vehicle if: (1) the manufacturer has been unable to conform the vehicle to an applicable express warranty (2) by repairing or correcting a defect or condition that creates a serious safety hazard or substantially impairs the use or market

value of the vehicle (3) after a reasonable number of attempts. "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.¹ The vehicle owner is required to mail written notice of the alleged defect to the manufacturer and provide the manufacturer with an opportunity to cure the nonconformity.²

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 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.³

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 and: (1) at least one repair attempt was made during the 12 months or 12,000 miles, whichever comes first, following the date of original delivery to the owner; and (2) at least one other attempt was made in the 12 months or 12,000 miles, whichever comes first, immediately following the date of the first repair attempt.⁴

B. Complainant's Evidence

1. Hala Harper's Testimony

Complainant leased a 2014 BMW 328i from Classic BMW (Classic) in Plano, Texas on August 21, 2014, with mileage of 4,125 at the time of delivery.^{5,6} On the date of hearing the vehicle's mileage was 42,869.

Complainant testified that the vehicle has died several times while she's been driving on the highway. The vehicle will die without warning and without any trouble lights illuminating. Prior to the filing of the Lemon Law complaint, each time an incident took place Complainant took the vehicle to Respondent's authorized dealers for repair.

Complainant testified that the first time the vehicle died was in August of 2015. She was driving from Houston to the Dallas area. The vehicle shut down without warning outside of Ennis, Texas. The

¹ Tex. Occ. Code § 2301.601(4).

² Tex. Occ. Code § 2301.606(c).

³ Tex. Occ. Code § 2301.605(a)(1)(A) and (B).

⁴ Tex. Occ. Code § 2301.605(a)(2)(A) and (B).

⁵ Complainant Ex. 9, BMW Financial Services – Motor Vehicle Lease Agreement (Closed End) dated August 21, 2014.

⁶ Complainant Ex. 1, Odometer Disclosure Statement – Leased Vehicle dated August 21, 2014.

vehicle's power steering stopped working and the vehicle had no power at all. Complainant was able to pull the vehicle to the side of the road. She tried starting the vehicle about five (5) to ten (10) minutes later and it started immediately.

Complainant took the vehicle to Classic on August 21, 2015, to address the issue of the vehicle dying. Complainant informed Classic's service advisor that she was driving on the highway at 70 to 80 mph when the vehicle died.⁷ Complainant also told the service advisor that the vehicle had died twice in the weeks preceding the repair visit.⁸ Classic's service technician checked the vehicle and determined that the fuel pump was intermittently "dropping out" and, as a result, replaced the fuel pump.⁹ The vehicle's mileage on this occasion was 22,404.¹⁰ The vehicle was in the dealer's possession for three (3) days.¹¹ Classic provided Complainant with a loaner vehicle while her vehicle was being repaired.

Complainant stated that soon after receiving the vehicle back from Classic, it died again while she was driving on a highway in Houston, Texas. Complainant took the vehicle to Advantage BMW (Advantage) in Houston for repair on September 1, 2015. Advantage's service technician determined that the vehicle's left fuel level sensor was defective.¹² Since the sensor was not available as a separate part, the vehicle's entire fuel tank had to be replaced.¹³ The vehicle's mileage when it was taken to the dealership on this occasion was 23,201.¹⁴ Complainant testified that the vehicle was in the dealer's possession for a week on this occasion.¹⁵ Complainant was provided a loaner vehicle while her vehicle was being repaired.

Sometime in November of 2015, the vehicle died again while Complainant was driving it. So, on December 14, 2015, Complainant took the vehicle to Classic for repair. Classic's service technician contacted Respondent's, BMW of North America LLC, technical service line for help in diagnosing the vehicle's problem.¹⁶ The technical service representative advised the technician to replace the vehicle's EKPS, the fuel pump's computer module.¹⁷ The vehicle's mileage when it was delivered to the dealer on this occasion was 34,374.¹⁸ The vehicle was in the dealer's possession for seven (7) days.¹⁹ Complainant received a loaner vehicle while her vehicle was being repaired.

⁷ Complainant Ex. 2, Repair Order dated August 21, 2015.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Complainant Ex. 8, Repair Order dated September 1, 2015.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Although Complainant testified that the dealer had possession of the vehicle for a week, the repair order indicates that the vehicle was ready for pick up on September 3, 2015, two days after Complainant took the vehicle in for repair.

¹⁶ Complainant Ex. 3, Repair Order dated December 14, 2015.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

Complainant testified that a few days after picking up the vehicle from Classic, it died while she was making a left turn in front of oncoming traffic. Complainant was able to get the vehicle started and avoided an accident. She took the vehicle to Classic on December 28, 2014, for repair for the issue. Classic's technician replaced the vehicle's high pressure fuel pump after receiving advice from Respondent's technical service line.²⁰ The technician then found that the vehicle died intermittently when the transmission was put in reverse.²¹ The technician checked the vehicle's spark plugs and found that they were wet and that the injectors were leaking causing the spark plugs to foul.²² As a result, the technician replaced the spark plugs and injectors.²³ The vehicle's mileage when it was delivered to the dealer was 34,522.²⁴ The vehicle was in the dealer's possession for almost a month on this occasion. Complainant was provided with a rental vehicle while her vehicle was being repaired.

On January 28, 2016, Complainant wrote a letter to Respondent advising them of her dissatisfaction with the vehicle.²⁵ On February 22, 2016, Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department).²⁶

Complainant testified that the vehicle has died since the repairs performed in January of 2016. She's not aware of the provisions of the vehicle's warranty. Complainant also stated that Respondent, BMW of North America LLC, inspected the vehicle on March 18, 2016. No repairs were performed at the time. Complainant was provided with a loaner vehicle while her vehicle was being inspected.

Complainant stated that she does not feel safe driving the vehicle. She doesn't know when or if the vehicle will die again. She decided to rent a vehicle at a cost of \$531.25 per month for the months of April and May of 2016.

During the continuance on June 23, 2016, Complainant testified that the vehicle had died while her father was driving it between the date of the original hearing on May 19, 2016 and the date of the continuance. He was able to get the vehicle started again, but Complainant feels that the vehicle is not repaired and remains unsafe.

2. Kamal Dides' Testimony

Kamal Dides, Complainant's father, also testified in the first hearing. He stated that he was present in the vehicle with Complainant in December of 2015, when it died while Complainant was driving and

²⁰ Complainant Ex. 4, Repair Order dated December 28, 2015.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Complainant Ex. 6, Letter to BMW of North America dated January 28, 2016.

²⁶ Complainant Ex. 7, Lemon Law Complaint dated February 22, 2016. Complainant signed the complaint on January 28, 2016. However, the complaint was actually received by Texas Department of Motor Vehicles on February 22, 2016, which is the effective date of the complaint.

taking a left turn. Mr. Dides stated that Complainant was able to put the vehicle in park and start it before she was involved in an accident. Mr. Dides also stated that he's been driving the vehicle during the last few months prior to the hearing date and that the vehicle has not died while he's been driving it. In addition, Mr. Dides testified that he drove the vehicle to Florida and back to Dallas prior to the May 19, 2016, hearing without incident.

During cross-examination, Mr. Dides stated that he has driven the vehicle at highway speeds. In fact, he drove it on an extended trip and did not have any issues with the vehicle dying while he was driving.

C. Respondent's Evidence

David Kaiser, Technical Support Engineer for BMW of North America LLC, testified in the hearing. He has been in the automotive industry for over 30 years. He has received BMW factory training during his years working for Respondent. He's been employed by Respondent as a technical support engineer for the past eleven (11) years. He is a BMW master technician and was an Automotive Service Excellence (ASE) master technician for a period of time.

Mr. Kaiser testified that he performed a final repair attempt on Complainant's vehicle on March 18, 2016, at Classic. He checked the vehicle's engine control module (ECM) for any fault codes and found none. He visually inspected the vehicle's components and battery to ensure they were connected correctly. Mr. Kaiser then drove the vehicle for an extended drive. He drove the vehicle in both the cruise and sport modes and at highway speeds. The vehicle did not exhibit any problems during the test drive conducted by Mr. Kaiser. After completing the test drive, Mr. Kaiser checked again for fault codes and did not find any. He determined that there was no problem with the vehicle.

Daniel Lubin, After-Sales Manager for BMW of North America LLC, testified that Complainant's vehicle had originally been used as a demo prior to Complainant's leasing the vehicle. He also stressed that Complainant's first issue with the vehicle occurred after she had been driving the vehicle about a year.

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 a reasonable number of attempts have been undertaken to conform the vehicle to an applicable express warranty. Finally, Complainant is required to serve written notice of the 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, Complainant is entitled to have the vehicle repurchased or replaced.

Complainant credibly testified that the vehicle has died on several occasions while she was driving it. On four of those occasions, she took the vehicle almost immediately to an authorized dealer of Respondent and reported the problem. Her testimony was consistent with, and documented by, all of the repair orders submitted as evidence. Her testimony that the vehicle died again prior to the continuance on June 23, 2016, was also extremely credible.

Although Complainant does not meet any of the “presumptive tests” in Texas Occupations Code § 2301.605(a) for determining that a reasonable number of repair attempts have been undertaken, the evidence establishes that her vehicle was serviced by an authorized dealer of Respondent on the following dates: August 21, 2015; September 1, 2015; December 14, 2015; and December 28, 2015. During each service visit, Complainant informed dealer technicians of the fact that the vehicle died while she was driving. In addition, the first two repairs were performed before the vehicle was driven over 24,000 miles and slightly over a year after the signing of the lease. Based on the evidence as a whole, the hearings examiner concludes that a reasonable number of attempts have been undertaken to conform Complainant’s vehicle to the applicable express warranty.

The evidence further demonstrates that the defect in Complainant’s vehicle creates a serious safety hazard. A vehicle that unexpectedly loses power or dies while driving on the highway creates obvious safety issues. The intermittent nature of the condition also increases the safety risk. The sudden loss of power and resulting deceleration of Complainant’s vehicle is likely to surprise and confuse other drivers and can increase the risk of traffic accidents. Complainant has met her burden of proof to establish a warrantable and existing defect or condition that creates a serious safety hazard.

Moreover, the defect in Complainant’s vehicle substantially impairs its use and market value. The vehicle’s intermittent loss of power at highway speeds renders the vehicle unfit for long-distance travel. The vehicle’s reduced capacity for use makes it less marketable than other similar vehicles.

The record also establishes that Complainant provided written notice of the defect to Respondent, and Respondent was given the opportunity to inspect the vehicle. On March 8, 2016, Complainant’s vehicle was inspected by Respondent’s technical support engineer who performed a final repair attempt on the vehicle.

When a complainant establishes that relief under the Lemon Law is appropriate, the manufacturer may be required to repurchase the motor vehicle, or replace the motor vehicle with a comparable motor vehicle. Based on the evidence and the arguments presented, the hearings examiner finds that repurchase of the vehicle is the appropriate remedy in this case.

Complainant also asked for reimbursement for the cost of renting a vehicle for April and May of 2016 at a cost of \$531.25 per month. Department rules do allow for the hearing examiner to award reimbursement of certain incidental expenses incurred by a Complainant. 43 Tex. Admin. Code § 215.209. However, the fact that the vehicle was drivable and was driven by Complainant’s father and

taken on a long trip without incident, seems to indicate that renting a vehicle was not necessary. So, the hearings examiner will not award reimbursement for Complainant's rental of another automobile.

Based on the above analysis, the hearings examiner orders Respondent to repurchase Complainant's vehicle, as further detailed in the Findings of Fact and Conclusions of Law.

III. FINDINGS OF FACT

1. Hala Harper (Complainant) leased a new 2014 BMW 328i from Classic BMW in Plano, Texas on August 21, 2014, with mileage of 4,125 at the time of delivery.
2. BMW of North America LLC (Respondent) manufactured the vehicle.
3. The vehicle's lessor is BMW Financial Services NA LLC.
4. At the time of hearing, the vehicle's mileage was 42,869.
5. Complainant's vehicle has a defect that causes it to intermittently die, usually at highway speeds.
6. Complainant took the vehicle to Respondent's authorized dealer in order to address her concerns with the vehicle dying while she was driving it, on the following dates:
 - a. August 21, 2015, at 22,404 miles;
 - b. September 1, 2015, at 23,201 miles;
 - c. December 14, 2015, at 34,374 miles; and
 - d. December 28, 2015, at 34,522 miles.
7. On August 21, 2015, Classic's service technician replaced the vehicle's fuel pump.
8. On September 1, 2015, Advantage BMW's service technician determined that the vehicle had a faulty fuel level sensor and replaced the entire fuel tank.
9. On December 1, 2015, Classic's service technician replaced the vehicle's EKPS, a fuel pump module.
10. On December 28, 2016, Classic's service technician replaced the vehicle's high pressure fuel pump.
11. Respondent, through its authorized dealers, undertook a reasonable number of attempts to conform Complainant's truck to an applicable express warranty, but the nonconformity in the vehicle continues to exist.

12. Complainant provided written notice of the defect to Respondent, and Respondent was given the opportunity to inspect the vehicle on March 8, 2016.

13. The appropriate calculations for repurchase are:

Purchase price, including tax, title, license and registration	\$38,714.54
Total paid at inception of lease	\$747.00
Monthly payment amount	\$475.00
Number of payments made at time of Order issuance	23
Delivery mileage	4,125
Mileage at first report of defective condition	22,404
Mileage on hearing date	42,869
Useful life determination	120,000

Purchase price, including tax, title, license and registration					\$38,714.54
Mileage at first report of defective condition					22,404
Less mileage at delivery					<u>-4,125</u>
Unimpaired miles					18,279
Mileage on hearing date					42,869
Less mileage at first report of defective condition					<u>-22,404</u>
Impaired miles					20,465
Reasonable Allowance for Use Calculations					
Unimpaired miles					
					<u>18,279</u>
	120,000	X		\$38,714.54	= \$5,897.19
Impaired miles					
					<u>20,465</u>
	120,000	X		\$38,714.54	X .5 = <u>\$3,301.22</u>
Total reasonable allowance for use deduction					\$9,198.41
Lessee's calculation:					
Total paid at inception of lease					\$747.00
Total amount for monthly payments					\$10,925.00
Less allowance for use					<u>-\$9,198.41</u>
Refund filing fee					<u>\$35.00</u>
TOTAL REPURCHASE AMOUNT TO LESSEE:					\$2,508.59
Lessor's Calculation:					
Purchase price, including tax, title, license and registration					\$38,714.54
5% allowance by Rule 215.208(B)(ii)					\$1,935.73
					=
Less total paid by Lessee					<u>\$11,672.00</u>
TOTAL REPURCHASE AMOUNT TO LESSOR:					\$28,978.27

14. Complainant filed a Lemon Law complaint with the Texas Department of Motor Vehicles (Department) on February 22, 2016.
15. On April 15, 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.
16. The hearing on the merits convened on May 19, 2016, in Mesquite, Texas before Hearings Examiner Edward Sandoval. Complainant, Hala Harper, represented herself at the hearing. Also testifying for Complainant was her father, Kamal Dides. Respondents were represented by Daniel Lubin, After-Sales Manager. David Kaiser, Technical Support Engineer, also appeared to offer testimony for Respondent. A continuance in the hearing was conducted telephonically on June 23, 2016. Present at the continuance were Hala Harper, Complainant, representing herself. Also present was Daniel Lubin, After-Sales Manager, representing and testifying for Respondents. The hearing record was closed on June 23, 2016.

IV. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this matter. Tex. Occ. Code §§ 2301.601-.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 and 2001.052; 43 Tex. Admin. Code § 215.206(2).
5. Complainant bears the burden of proof in this matter.
6. Complainant's vehicle has an existing defect or condition that creates a serious safety hazard. Tex. Occ. Code § 2301.604(a).

7. Complainant's vehicle has an existing nonconformity that substantially impairs the use and market value of the vehicle. Tex. Occ. Code § 2301.604(a).
8. After a reasonable number of attempts, Respondent, BMW of North America LLC, has been unable to repair the nonconformity in Complainant's vehicle so that it conforms to the applicable express warranty. Tex. Occ. Code §§ 2301.604(a) and 2301.605.
9. Based on the above Findings of Fact and Conclusions of Law, Complainant is entitled to relief under Texas Occupations Code § 2301.604(a).
10. Based on the above Findings of Fact and Conclusions of Law, Respondent, BMW of North America LLC, is required to repurchase Complainant's 2014 BMW 328i at the price of \$31,486.86: \$2,508.59 payable to Complainant and the balance, \$28,978.27, payable to Lessor, BMW Financial Services NA LLC. Tex. Occ. Code § 2301.604(a)(2); 43 Tex. Admin. Code § 215.208(b)(1) and (2).

IT IS THEREFORE ORDERED that:

1. Respondent shall accept the return of the vehicle from Complainant. Respondent shall have the right to have its representatives inspect the vehicle upon the return by Complainant. If from the date of the hearing to the date of repurchase the vehicle is substantially damaged or there is an adverse change in its condition beyond ordinary wear and tear, and the parties are unable to agree on an amount of an allowance for such damage or condition, either party may request reconsideration by the Office of Administrative Hearings of the repurchase price contained in the final order;
2. Respondent shall repurchase the subject vehicle in the amount of **\$31,486.86: \$2,508.59** payable to Complainant and the balance, **\$28,978.27**, payable to Lessor, BMW Financial Services NA LLC. Complainant is not entitled to reimbursement of incidental expenses. The refund shall be paid to Complainant and the vehicle lien holder as their interests require. If clear title to the vehicle is delivered to Respondent, then the full refund shall be paid to Complainant. At the time of the return, Respondent or its agent is entitled to receive clear title to the vehicle. If the above noted repurchase amount does not pay all liens in full, Complainant is responsible for providing Respondent with clear title to the vehicle;
3. Within 20 calendar days from the receipt of this order, the parties shall complete the return and repurchase of the subject vehicle. If the repurchase of the subject vehicle is not accomplished as stated above, barring a delay based on a party's exercise of rights in accordance with Texas Government Code § 2001.144, starting on the 31st calendar day from receipt of this order, Respondent is subject to a contempt charge and the assessment of civil

penalties. However, if the Office of Administrative Hearings determines the failure to complete the repurchase as prescribed is due to Complainants' refusal or inability to deliver the vehicle with clear title, the Office of Administrative Hearings may deem the granted relief rejected by Complainants and the complaint closed pursuant to 43 Texas Administrative Code § 215.210(2);

4. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall obtain a Texas title for the vehicle prior to resale and issue a disclosure statement provided by or approved by the Department's Enforcement Division – Lemon Law Section;
5. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall affix the disclosure label to the reacquired vehicle in a conspicuous place, and upon the first retail sale of the vehicle, the disclosure statement shall be completed and returned to the Department's Enforcement Division – Lemon Law Section; and
6. Respondent, pursuant to 43 Texas Administrative Code § 215.210(4), shall provide the Department's Enforcement Division – Lemon Law Section, in writing, the name, address and telephone number of the transferee (wholesale purchaser or equivalent) of the vehicle within 60 calendar days of the transfer.

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-.613 is hereby **GRANTED**. It is further **ORDERED** that Respondent, BMW of North America LLC, shall repair the warrantable defect in the reacquired vehicle identified in this Decision.

SIGNED July 19, 2016



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