Filed 3/19/18 Noflin v. Volkswagen Group of America CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

BERNICE NOFLIN, Plaintiff and Appellant, v. VOLKSWAGEN GROUP OF AMERICA, INC., Defendant and Respondent.	B275638 (Los Angeles County Super. Ct. No. BC575800)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ernest M. Hiroshige, Judge. Reversed and Remanded.

O'Connor & Mikhov and Steve Mikhov; Rosner, Barry & Babbitt, Kendra J. Woods and Hallen D. Rosner for Plaintiff and Appellant.

Squire Patton Boggs (US), Sean P. Conboy, Gonzalo C. Martinez and Nathaniel K. Fisher for Defendant and Respondent.

Appellant Bernice Noflin leased and later purchased a new 2009 Volkswagen Tiguan (vehicle) from defendant Volkswagen of Downtown L.A., L.P. (VW–DTLA). The vehicle was covered by a manufacturer's standard new vehicle warranty. Between July 2008 and September 2014, Noflin experienced numerous mechanical and electrical problems with the vehicle and delivered it on 14 occasions to VW–DTLA for repair. By November 19, 2014, Noflin had decided the vehicle was a "lemon" and demanded that defendants Volkswagen Group of America, Inc. (Volkswagen) and VW–DTLA provide her a refund or replace the vehicle under the provisions of the Song–Beverly Consumer Warranty Act, Civil Code section 1790, et seq. (Song–Beverly Act, or the Act).[1] By January 28, 2015, Volkswagen had extended three increasing offers to repurchase Noflin's vehicle. None was accepted.

Noflin sued Volkswagen alleging the company had been unable to repair the defect to conform to applicable warranties after a reasonable number of attempts, and violated the Song–Beverly Act by refusing to repurchase the vehicle. Volkswagen moved for summary judgment arguing that Noflin lacked evidence to establish an essential element of her claim, i.e., she could not show that Volkswagen had refused to repurchase the vehicle. Noflin opposed the motion on the ground that the existence and nature of the defect are disputed factual issues inappropriate for resolution by summary judgment, and the question

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[1] Undesignated statutory references are to the Civil Code.

whether Volkswagen satisfied its statutory duty promptly to repurchase the vehicle was also a question of fact for the jury. The court granted Volkswagen's motion. Noflin maintains the court erred in granting summary judgment because the existence and nature of an alleged nonconformity under the Act, and whether Volkswagen's repurchase offer complied with the Act are questions of fact for the jury. We conclude Volkswagen failed to carry its burden of persuasion that its repurchase offer satisfied the Song–Beverly Act, and thus to demonstrate that it is entitled to judgment as a matter of law. Accordingly, we reverse.

STATUTORY, FACTUAL AND PROCEDURAL BACKGROUND

The Song–Beverly Act

The Song–Beverly Act, commonly known as California's "lemon law" (*MacQuiddy v. Mercedes–Benz USA, LLC.* (2015) 233 Cal.App.4th 1036, 1043–1044 (*MacQuiddy*)), regulates warranty terms, imposes service and repair obligations on vehicle distributors and dealers, and enhances a buyer's remedies to include costs, and in some instances, attorney fees and civil penalties. (See §§ 1790, et seq.) As relevant here, the Act provides:

> "(2) If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle . . . to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle in accordance with subparagraph (A) or promptly make restitution to the buyer in accordance with subparagraph (B). However, the buyer shall be free to elect restitution in lieu of replacement . . . .

"(A) In the case of replacement, the manufacturer shall replace the buyer's vehicle with a new motor vehicle substantially identical to the vehicle replaced . . . .

"(B) In the case of restitution, the manufacturer shall make restitution in amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer–installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales or use tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.

"(C) . . . When restitution is made pursuant to subparagraph (B), the amount to be paid by the manufacturer to the buyer may be reduced by the manufacturer by that amount directly attributable to use by the buyer prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity. The amount directly attributable to use by the buyer shall be determined by multiplying the actual price of the new motor vehicle paid or payable by the buyer, including any charges for transportation and manufacturer–installed options, by a fraction having as its denominator 120,000 and having as its numerator the number of miles traveled by the new motor vehicle prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity." (§ 1793.2, subd. (d)(2); see *MacQuiddy, supra,* 233 Cal.App.4th at p. 1044.)[2]

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[2] Lessees are also defined as "buyers" of new motor vehicles. (§ 1793.2, subd. (d)(2)(D).)

Volkswagen argued below that it was entitled to summary judgment because there was no disputed issue of material fact regarding its compliance with the Song–Beverly Act, in light of evidence that it promptly offered to repurchase (or replace)[3] Noflin's vehicle upon her demand under the Song–Beverly Act that it do so. Noflin contends that material factual questions remain as to the nature of the nonconformity and whether Volkswagen's repurchase offer complied with the Act.

The Complaint

In March 2015, Noflin filed this action against Volkswagen and VW–DTLA. She alleged a single cause of action for violation of the Song–Beverly Act jointly against Volkswagen and VW–DTLA, and a claim of negligent repair against VW–DTLA.[4] Noflin claimed the vehicle was delivered "with serious defects and nonconformities to warranty, and developed other serious defects and nonconformities to warranty including, but not limited to, electrical, engine, and brakes defects." She alleged that Volkswagen violated Song–Beverly in that it was "unable to conform [her] vehicle to the applicable express and implied warranties after a reasonable number of attempts[,]" and

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[3] Whether Volkswagen offered to replace Noflin's vehicle is not at issue.

[4] VW–DTLA and both claims against that defendant were subsequently dismissed. We have tailored our discussion accordingly.

"refused [her] demands for a refund." Noflin sought damages, civil penalties of up to twice her actual damages, and attorney fees.

The Motion for Summary Judgment and/or Adjudication

In August 2015, Volkswagen moved for summary judgment. It argued that Noflin could not establish a viable Song–Beverly claim because, once Noflin claimed she had a "lemon" and demanded a refund, Volkswagen promptly evaluated the vehicle repair records and Noflin's payment history and offered to repurchase the vehicle. Volkswagen also sought summary adjudication as to Noflin's claims for civil penalties and attorney fees, based on its purportedly prompt offer to repurchase the car, its non–willful violation of the Act, and Noflin's failure to avail herself of Volkswagen's qualified dispute resolution service. Volkswagen filed a memorandum of points and authorities, supported by evidence in the form of a declaration by Nick Cardoni, a Senior Analyst in its Customer Resolution & Retention Department, with three repurchase offers made to Noflin attached as exhibits, and a statement of undisputed material facts. Volkswagen asserted as undisputed facts:

Noflin leased and subsequently purchased a new 2009 vehicle from VW–DTLA.

On November 19, 2014, Noflin requested that Volkswagen repurchase the vehicle "because she felt it was a 'lemon.'"

On December 12, 2014, after obtaining and evaluating the repair history from the servicing dealer, Cardoni extended a written offer from

Volkswagen to repurchase the vehicle (by paying off Noflin's outstanding loan and reimbursing her $24,313.87).[5]

On January 23, 2015, after receiving documentation from Noflin reflecting additional reimbursable expenses she incurred related to the vehicle, Volkswagen sent a second letter increasing its repurchase offer to $25,737.62.[6]

On January 28, 2015, having received information from Noflin that Volkswagen had excluded loan payments she had made since her

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[5] The $24,313.87 figure was calculated as follows:

$ 721.15	Down payment/1st payment made
$28,745.08	Total monthly payments to date
$ 2,852.36	Less Mileage Offset (13,838 miles/120,000 X $24,735)
$ 2,300	Less Third Party Service Contract

[6] The $25,737.62 figure was calculated as follows:

$ 721.15	Down payment/1st payment made
$28,745.08	Total monthly payments to date
$ 1,160.42	Repairs Noflin paid for outside warranty
$ 113.33	Reimbursement for unused registration fees
$ 150	Rental car reimbursement
$ 2,852.36	Less Mileage Offset (13,838 miles/120,000 X $24,735)
$ 2,300	Less Third Party Service Contract

repurchase demand, Volkswagen sent a third letter to Noflin increasing its repurchase offer to $26,454.34.[7]

In February and March 2015, seeking to move forward with the repurchase transaction, Cardoni sent three emails to and left one voice mail message for Noflin; she did not respond.

Volkswagen also sought summary adjudication as to Noflin's claim for civil penalties and attorney fees based on the same purportedly undisputed facts set forth above. In addition, Volkswagen presented evidence that at all times relevant, it was a participant in a certified third–party dispute resolution process, as required by Song–Beverly.

Noflin's Opposition

Noflin took issue with Volkswagen's statement of undisputed facts. She did not deny that Volkswagen had made several repurchase offers. However, she argued that each offer contained an excessive mileage offset of 13,838 (incorrectly calculated from her third repair visit), miscalculated her monthly payments, and improperly excluded

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[7] The $26,454.34 figure was calculated as follows:

$ 721.15	Down payment/1st payment made
$29,461.80	Total monthly payments to date
$ 1,160.42	Repairs paid outside warranty
$ 113.33	Reimbursement for unused registration fees
$ 150	Rental car reimbursement
$ 2,852.36	Less Mileage Offset (13,838 miles/120,000 X $24,735)
$ 2,300	Less Third Party Service Contract

covered repair costs, a third–party service contract and other incidental expenses she incurred.

Noflin submitted her own declaration, accompanied by service records for the vehicle. She attested to having experienced ongoing mechanical and electrical difficulties with the vehicle from July 2008 to September 2014. On each occasion she brought it to VW–DTLA for repair. Noflin presented the following repair history (we note mileage on each service date):

> July 23, 2008 (879 miles) Vehicle made a "buzzing noise" while being driven or at idle. Volkswagen performed a "R7 recall" repair to engine fuel injection system.
>
> September 8, 2008 (2,715 miles) Vehicle returned for same "buzzing noise" as in July 2008. Noise found to emanate from faulty fuel pump, which Volkswagen replaced.
>
> July 28, 2009 (13,838 miles) Right headlight malfunction. Melted fuse replaced.
>
> June 10, 2010 (25,446 miles) Left headlight malfunction. Burned–out bulb replaced.
>
> October 6, 2010 (28,653 miles) Right headlight malfunction. Burned–out bulb replaced.
>
> December 29, 2010 (29,961 miles) Intermittent starting problem and inoperable headlights, rear brake lights and back-up bulbs. Fuses, bulbs, battery, and electrical/power module replaced.
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> January 7, 2011 (30,021 miles) Left headlight, daytime running lights, rear brake and back up lights inoperable. Fuses and fuse box replaced.

September 27, 2012, at 44,212 miles ("Check Engine") Malfunction Indicator Light (MIL) illuminated, and engine misfiring. Fuel injector leak causing misfire, and valves "full of carbon." Fuel injectors replaced and fuel valve "de–carbonated."

March 4, 2013 (48,216 miles) Vehicle would not start, and required a "jump," and radio inoperative. Blown fuses replaced.

July 23, 2013 (52,271 miles) Parking brake inoperative due to a shorted–out switch; switch replaced.

February 6, 2014 (57,629 miles) Fuse box replaced with "updated new style."

June 30, 2014 (61,107 miles) MIL illuminated, and "whistling" sound when vehicle was running. Problems: PCV leaking, fuel pressure sensor malfunction, faulty ignition switch and "crankcase breather leaking vacuum causing noise." PCV, fuel pressure sensor and ignition switch replaced, and "crankcase breather" repaired.

August 27, 2014 (62,192 miles) MIL and brake warning lights illuminated. Fuel pump update installed and Volkswagen recommended replacement of electronic parking brake switch due to "internal[] short".

September 11, 2014 (62,626 miles) Jump start required; failed battery. Battery replaced.

Noflin submitted a December 26, 2014 letter she wrote to Cardoni acknowledging receipt of Volkswagen's December 12, 2014 repurchase offer, and thanking Cardoni for his "prompt response" to her request for a full refund under the Song–Beverly Act. Noflin stated her belief that the repurchase offer was insufficient. Specifically, she claimed her monthly payments were miscalculated and should have been

$30,423.84, not $28,745.08. Noflin also claimed entitlement to recovery for expenses incurred for:

Vehicle registration:	$1415.36
Manufacturer parts:	$1213.52
Rental fees:	$ 25
Recovery of wages	$ 750
Service contract	$2,800

Noflin was not satisfied with Volkswagen final repurchase offer. In opposition to Volkswagen's motion, she argued that the question whether that repurchase offer constituted a legally sufficient offer of restitution under the Act was a question of fact, as was the issue whether Volkswagen willfully refused to comply with the Act. Noflin argued Volkswagen's repurchase offer incorrectly calculated the mileage offset, which she claimed should have been calculated from the initial (July 2008) repair visit at 879 miles, when the vehicle was first presented for an electrical problem with the fuel injection system; i.e., the first presentation for the problem giving rise to the vehicle's nonconformity to warranty. (§ 1793.2, subd. (d)(2)(C).) Accordingly, the mileage offset should have been $181.18, not $2,852.36 (calculated from her third service repair visit in July 2009, and an odometer reading of 13,838 miles). Noflin also argued that material disputes remained as to whether Volkswagen's repurchase offer failed to include certain statutorily required costs and expenses, and whether Volkswagen properly itemized her monthly payments. Neither party presented evidence to substantiate its or her calculations as to the amount of total monthly payments Noflin had made.

Volkswagen's Reply

Volkswagen observed that no facts pertaining to the terms of its repurchase offer were in dispute. Rather, the issue was how Song–Beverly applied to those facts, a legal question appropriate for resolution by summary judgment.

The Trial Court's Ruling

The court found that Noflin "fail[ed] to create a triable issue of fact as to whether [Volkswagen] violated the Act," and "there [was] no evidence to suggest that [Volkswagen] [willfully] refused to comply with the Act" in light of undisputed evidence it had made "three increasing offers to [Noflin] to repurchase . . . the subject vehicle." The court found that, although Noflin claimed to have "expressed [her] concerns" about purported deficiencies with the repurchase offers, the only evidence submitted in support of that assertion was her December 26, 2014 letter to Cardoni, in response to Volkswagen's initial offer.

Further, even if Noflin had expressed concerns regarding deficiencies in Volkswagen's repurchase offers, the court found no evidence that Volkswagen violated the Act. First, Noflin was not entitled to reimbursement for her purchase of a third party service contract, because such "nonmanufacturer items" are statutorily excluded from those for which restitution is required. (§ 1793.2, subd. (d)(2)(B).) Second, Noflin presented no evidence demonstrating that Volkswagen miscalculated her monthly payments made. Finally, as for

the mileage offset, Noflin's own evidence reflected that "the nonconformity in the vehicle was electrical in nature," and the first two repairs had not involved electrical problems. They addressed problems with the fuel injection and fuel pump systems, and neither problem arose again. Accordingly, "June 10, 2010, the date from which [Volkswagen] calculated the mileage offset, was the first date that an electrical problem was repaired," and most of the "subsequent repairs involved the electrical system."[8]

Judgment was entered on March 25, 2016. Noflin appeals.

DISCUSSION

I. *Summary Judgment Standards*

The standards governing summary judgment motions are settled: A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment has the burden to show that "one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) If the defendant can make this showing, the burden shifts to the

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[8] The court found moot Noflin's claims of entitlement to civil penalties and attorney fees, given her failure to demonstrate a violation of the Act.

plaintiff to show by admissible evidence that a triable issue of material fact exists. (*Ibid*.)

In ruling on a summary judgment motion the trial court does not resolve issues of triable fact; it determines only whether such issues exist. (*EHP Glendale, LLC v. County of Los Angeles* (2011) 193 Cal.App.4th 262, 270.) The court must consider all of the evidence and inferences to be drawn from it, and determine "what any evidence or inference could show or imply to a reasonable trier of fact." (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 856 (*Aguilar*); italics omitted.) "[I]f any evidence or inference therefrom shows or implies the existence of the required element(s) of a cause of action, the court must deny a . . . motion for summary judgment . . . because a reasonable trier of fact could find for the [opposing party]." (*Smith v. Wells Fargo Bank, N.A*. (2005) 135 Cal.App.4th 1463, 1474.)

The burden of persuasion remains with the moving party. (*Aguilar, supra*, 25 Cal.4th at pp. 850, 861.) "When the defendant moves for summary judgment, in those circumstances in which the plaintiff would have the burden of proof by a preponderance of the evidence, the defendant must present evidence that would preclude a reasonable trier of fact from finding that it was more likely than not that the material fact was true (*id.* at p. 851), or the defendant must establish that an element of the claim cannot be established, by presenting evidence that the plaintiff 'does not possess and cannot reasonably obtain, needed evidence.' (*Id*. at p. 854.)" (*Kahn v. East Side Union High School Dist*. (2003) 31 Cal.4th 990, 1003 (*Kahn*).)

We independently review the record and the trial court's determination. (*Kahn, supra,* 31 Cal.4th at p. 1003.) Our review involves the same three-step process employed by the trial court. First, we identify the issues framed by the pleadings. Second, we determine if the defendant has made an adequate factual showing to justify judgment in its favor. (Code Civ. Proc., § 437c, subd. (p)(2).) Finally, upon such an initial showing, the burden shifts, and we must determine whether the plaintiff can show a material factual issue as to the cause of action at issue. (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1153–1154.) To satisfy her burden, the plaintiff cannot rely on the allegations of her complaint. Rather, she must set forth specific facts showing the existence of a triable issue of material fact. (§ 437c, subd. (o)(2); *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476–477; *Foltz v. Johnson* (2017) 16 Cal.App.5th 647, 653–654.)

II. *Volkswagen Was Not Entitled to Summary Judgment*

Volkswagen contends the court correctly granted its motion for summary judgment because it presented uncontradicted evidence to defeat an essential element of Noflin's case–that Volkswagen refused to repurchase her vehicle–and its repurchase offer satisfied the statutory provisions of the Song–Beverly Act. Volkswagen is mistaken.

The court found that Volkswagen satisfied its burden to demonstrate that Noflin did not have, nor could she obtain, admissible evidence to show that, as alleged in the complaint, Volkswagen violated Song–Beverly Act in that it "*refused [her] demands for a refund*."

(Italics added.) (§ 1793.2, subd. (d)(2); see CACI No. 3201 [element 6].) Volkswagen presented evidence that it repeatedly offered to repurchase the vehicle. Cardoni's declaration reflects his communications with or attempts to contact Noflin, both before and after three offers to repurchase were extended to Noflin between December 12, 2014 and January 28, 2015.

To shift the burden on summary judgment, the movant must present "evidence which, if uncontradicted, would constitute a preponderance of evidence that an essential element of the plaintiff's case cannot be established." (*Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 879; *Kahn, supra,* 31 Cal.4th at p. 1003.) As detailed above, the record reflects that Volkswagen made multiple, increasing offers to Noflin over the course of about six weeks to repurchase the vehicle. Nevertheless, Volkswagen failed to present evidence that its repurchase offer satisfied the requirements of the Song–Beverly Act in all respects, including the mileage offset.

A. *Material Factual Questions Remain Whether the Mileage Offset Should be Calculated From the First Repair Visit*

Noflin maintains here, as she did below, that material factual questions remain as to whether Volkswagen's repurchase offer satisfied the Song–Beverly Act. Her primary contention is that the mileage offset was improperly inflated. Song–Beverly permits a manufacturer to offset a repurchase offer by an "amount directly attributable to use by the buyer of the replaced vehicle prior to the time the buyer first

delivered the vehicle to the manufacturer . . . for correction of the problem that gave rise to the nonconformity" (according to a specific formula). (§ 1793.2, subd. (d)(2)(C).) Here, Volkswagen calculated the mileage offset from July 28, 2009, at which point the mileage was 13,838. Noflin argues the offset should have been calculated from July 23, 2008 (when the mileage was 879), the date she delivered the vehicle to Volkswagen for "repair concerning the electrical problems with the fuel injection system." Noflin's repair invoices indicate that she presented the vehicle on that date (and again in September 2008) because of a "buzzing noise" in the rear area when starting/driving the vehicle or when it was at idle. In July 2008, Volkswagen performed a factory recall repair on the fuel pump, which was subsequently replaced in September 2008 after the buzzing noise returned.

Noflin argues that a jury could find that the fuel pump problem was related to electrical problems that arose later, or that problems with the fuel injection system and/or fuel pump constituted an independent nonconformity.[9] Noflin did not raise these arguments with this degree of specificity before the trial court. On appeal, a party may not create a triable issue by presenting theories not fully developed before or factually presented to the trial court. (*North Coast Business*

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[9] Repair records indicate that a fuel intake valve full of carbon was serviced in September 2012, and a fuel pressure sensor was repaired or replaced in June 2014. A fuel pump "update" was installed in August 2014, but repair records do not reflect what, if any, relationship that "update" bore to the problem that had twice caused a "buzzing" noise in 2008.

Park v. Nielsen Construction Co. (1993) 17 Cal.App.4th 22, 31.) However, Noflin did argue that the first two repair visits involved electrical problems. She offered no evidence to support that contention, acknowledging that she is "not a mechanic" or qualified to opine on the matter. Noflin did assert, however, that her November 2014 demand for repurchase was precipitated by "*six years* of continuous *electrical problems* [that had] caus[ed] the lights, brakes, and *engine* to fail" in her vehicle.[10] (Italics added.)

As moving party, Volkswagen bore the burden of persuasion, and was required to present evidence to support its motion for summary judgment to demonstrate its entitlement to judgment as a matter of law. (*Aguilar, supra*, 25 Cal.4th at p. 850.) To satisfy that burden, Volkswagen was required to present evidence that its offer to repurchase satisfied all requirements of Song-Beverly, and that Noflin could not prevail on her claim for relief under the Act. Such a showing requires affirmative evidence that all aspects of the repurchase offer complied with the Act, including the offset for mileage. Unless and until the movant ""'has by affidavit stated facts establishing *every element* . . . necessary to sustain a judgment in [its] favor,'"" a party opposing a motion for summary judgment has no obligation to establish

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[10] During the hearing on the motion, Noflin's counsel denied that the nature of the alleged nonconformity was strictly limited to "electrical problems."

anything by her own affidavit. (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468 (*SmileCare*).)

Here, Noflin alleged that since sometime beginning in or before July 2008, the car presented "serious defects and nonconformities to the warranty including, but not limited to, electrical, engine, and brakes defects." Under Song-Beverly, Volkswagen was entitled to reduce the amount it paid Noflin "by that amount directly attributable to use by the buyer prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility *for correction of the problem that gave rise to the nonconformity*." (§ 1793.2, subd. (d)(2)(C), italics added.) Cardoni's declaration states that "after obtaining the [service records] and evaluating the vehicle's repair history," he sent Noflin an offer of repurchase, and later sent two additional increased offers to reflect additional expenses Noflin incurred. According to Cardoni, in those offers he "subtracted the statutory mileage offset" using the statutory formula based on the "car's mileage at the time it was first delivered for repair of the alleged nonconformity." Without explanation, each offer Volkswagen made used the same mileage offset of 13,838 miles.

But Volkswagen offered no evidence to show which nonconformities alleged in the complaint ("including, but not limited to, electrical, engine, and brakes defects") were in issue. Volkswagen produced no evidence of any service records or repair history that Cardoni reviewed, and no evidence to explain how those service records and that repair history revealed that one or more identifiable

nonconformities were involved, and that the first time Noflin presented the vehicle for repair for that problem or problems was in July 2009, at which time the mileage was 13,838. There was simply no adequate evidentiary basis to conclude that the mileage offset consistently stated in Volkswagen's repurchase offers complied with the Song–Beverly Act.

Having failed to present evidence to show that its repurchase offers to Noflin included a statutorily compliant mileage offset, Volkswagen failed to shift the burden of production to Noflin, and the company was not entitled to summary judgment. Again, although Noflin presented no evidence in opposition to Volkswagen motion as to when a specific defect or nonconformity arose, there was no requirement that she do so. Unless and until the moving party ""has by affidavit stated facts establishing *every element* . . . necessary to sustain a judgment in [its] favor,"" a party opposing a motion for summary judgment has *no obligation to establish anything by her own affidavit*. (*SmileCare, supra,* 91 Cal.App.4th at p. 468.)

Even if we assume Volkswagen shifted the burden of persuasion, Noflin nevertheless satisfied her burden of raising a triable factual issue. Her declaration described the repair history of the vehicle. She also produced the service records. As here relevant, those records reveal that the car was first presented to Volkswagen for repair on July 23, 2008, when the mileage was 879. Noflin complained of a "a buzzing noise coming from [the] rear area when driving or at idle."

Volkswagen performed a recall repair to the fuel injection system. On September 8, 2008 (when the mileage was 2,715), she presented the

car for the same complaint–the service record for that date says Noflin complained about "a loud buzzing noise when starting vehicle and at idle coming from right rear." Volkswagen's service staff "found buzzing sound was coming from the fuel pump. Disconnected fuel pump while vehicle was running and found noise disappear[ed]. Checked fuel lines. Lines not contacting." Volkswagen repaired the problem by replacing the fuel pump.

The repair visit Cardoni used to calculate the statutory mileage offset occurred on July 28, 2009, when the mileage was 13,838. On that date, Noflin presented the vehicle for a right headlight malfunction. Volkswagen replaced a melted fuse. Thereafter, Noflin presented the vehicle for the following problems, with the following repairs being made: (1) June 10, 2010–left headlight malfunction, burned–out bulb replaced; (2) October 6, 2010–right headlight malfunction, burned–out bulb replaced; (3) December 29, 2010–intermittent starting problem and inoperable headlights: rear brake lights and back–up bulbs, bulbs, battery, and electrical/power module replaced; (4) January 7, 2011–left headlight, daytime running lights, rear brake and back up lights inoperable; fuses and fuse box replaced; (5) September 27, 2012–engine MIL illuminated and engine misfiring; fuel injectors replaced and fuel valve "de–carbonated"; (6) March 4, 2013–vehicle would not start, and required a "jump," and radio inoperative; blown fuses replaced; (7) July 23, 2013 parking brake inoperative, due to a shorted–out switch; switch replaced; (8) February 6, 2014–fuse box replaced with "updated new style"; (9) June 30, 2014–engine malfunction light illuminated, and

"whistling" sound when vehicle was running; PCV, fuel pressure sensor and ignition switch replaced, and "crankcase breather" repaired; (10) August 27, 2014–engine MIL illuminated; fuel pump update installed and Volkswagen recommended replacement of electronic parking brake switch due to "internal[] short"; (11) September 11, 2014–jump start required because of a failed battery; battery replaced.

Clearly, many of the vehicle's problems and repairs from July 28, 2009 onward related to elements of its electrical system. But it is not at all clear that problems that arose or repairs performed before that date–the "buzzing noise" coming from rear of the car when the engine was running, resulting in fuel injection recall repair, or the fuel pump replacement two months later–were not also related to an electrical system nonconformity. Indeed, at least three problems and repairs after July 28, 2009 were related to the fuel system, and possibly the electrical system as well. In September 2012, after Noflin complained that the engine MIL was illuminated and the engine was misfiring, Volkswagen *replaced the fuel injectors*. In June 2014, after she brought the car in because the MIL was illuminated and there was a "whistling" sound when the vehicle was running, Volkswagen *replaced the PCV fuel pressure sensor* and ignition switch. And, in August 2014, after Noflin complained that the MIL light was illuminated, Volkswagen *installed a fuel pump update*.

A reasonable jury could conclude that the July and September 2008 visits (at which a "buzzing noise" coming from rear of the car when the engine was running, resulting in a fuel injection recall repair and a

fuel pump replacement, respectively) were simply the earliest manifestations of a the same malfunctioning electrical system involved in the July 2009 visit and several later problems and repairs. In short, if failure of the electrical system is the relevant nonconformity, there is a triable factual issue whether the problems and repairs related to the July 23 and September 8, 2008 visits were the first manifestations of that nonconformity.

Noflin has no obligation to identify or prove the nature of the defect or nonconformity giving rise to Volkswagen's duty to repurchase. Under Song-Beverly, a remedial measure intended to protect consumers (*Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 801), "[a] plaintiff is not obligated to identify or prove the cause of the car's defect. Rather, [s]he is only required to prove the car did not conform to the express warranty." (*Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138, 149.) "Nonconformity" may include a complex of related conditions (*Robertson, supra*, 144 Cal.App.4th at p. 801, fn. 11), and its "existence and nature . . . are questions of fact for the jury." (*Id.* at p. 801, fn. 12; CACI No. 3201 (2017).) The material factual disputes here are clear: whether there is a nonconformity, the nature of that defect, and the mileage at which the vehicle was first submitted to Volkswagen for repair of that defect.[11] It was error to grant summary judgment.

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[11] Our conclusion renders it unnecessary to address the merits of Volkswagen's–now moot–motion to strike arguments in Noflin's Reply brief.

DISPOSITION

The judgment is reversed and remanded for further proceedings consistent with this opinion. Noflin is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.