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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

SHAHID IVAR et al., Plaintiffs and Appellants, v. VOLKSWAGEN GROUP OF AMERICA, INC. et al., Defendants and Respondents.	E078783 (Super.Ct.No. MCC2001653) OPINION

APPEAL from the Superior Court of Riverside County. Charles C. Lee, Judge. (Retired judge of the Los Angeles Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Reversed and remanded with directions.

O'Connor Law Group and Mark O'Connor; Greines, Martin, Stein & Richland, Cynthia E. Tobisman, and Joseph V. Bui for Plaintiffs and Appellants.

Squire Patton Boggs (US), Nathaniel K. Fisher, and Hannah J. Makinde for Defendants and Respondents.

Plaintiffs Shahid and Sarah Ivar leased a new car from Hoehn of Temecula, Inc., d/b/a Audi Temecula (dealership). The dealership immediately both assigned the lease and sold the car to VW Credit Leasing, Inc. (lender). Volkswagen Group of America, Inc. (VGA) was the manufacturer of the car.

The Ivars filed this action against VGA and the dealership (collectively Volkswagen), alleging that the car was a "lemon," in violation of the Song-Beverly Consumer Warranty Act. (Civ. Code, § 1790 et seq.; Song-Beverly Act or the Act.)

Volkswagen served, and the Ivars accepted, a settlement offer pursuant to Code of Civil Procedure section 998 (section 998), which thus became a settlement agreement. It provided that, if the Ivars had not already terminated the lease and surrendered the car, they would notify Volkswagen of the "lease payoff" amount; Volkswagen would "pay off the outstanding lease"; the Ivars would "transfer possession" of the car to Volkswagen; and Volkswagen would pay the Ivars $69,500, minus the "lease payoff."

The Ivars understood the "lease payoff" to mean the remaining monthly payments on the lease, which totaled $7,669.62. They duly notified Volkswagen that this was the lease payoff amount. Instead, Volkswagen paid the lender $32,817.54. The record does not include any breakdown of this figure. From the parties' arguments, however, apparently it consisted of not only the remaining monthly payments, but also the purchase price of the car and an early termination fee. Volkswagen then paid the Ivars $69,500 minus $32,817.54 — i.e., $36,682.46.

The only issue in this appeal is whether "lease payoff," as used in the settlement agreement, includes the purchase price and the early termination fee. We reach a split decision: It does not include the purchase price, but it does include the early termination fee.

I

FACTUAL BACKGROUND

The start date of the lease was January 3, 2020. The lease term was three years. The lease provided: "Early Termination. You may have to pay a substantial charge if you end this Lease early. The charge may be up to several thousand dollars. The actual charge will depend on when the Lease is terminated. The earlier you end the Lease, the greater this charge is likely to be." (Bolding omitted.) The actual early termination fee would be calculated according to a formula specified in the lease.

The lease allowed but did not require the Ivars to buy the car when the lease terminated. At the end of the full term, the purchase price would be $26,779.20. Upon early termination, the purchase price would be calculated according to a formula specified in the lease.

The Ivars filed this action in August 2020. On September 9, 2021, Volkswagen served a section 998 offer.

Paragraph 1 provided that the offer was for $69,500, "less the lease payoff amount (if any) which will be paid . . . to the lien holder"; "*i.e.*, Defendants' joint and several offer of $69,500.00 is *inclusive* of any lease payoff owed by Plaintiffs . . . ."[1]

Paragraph 4 provided that, within 14 days after acceptance, "to facilitate payoff of any outstanding lease obligation . . . and transfer of title," the Ivars would provide the lender's name and contact information, the "current payoff amount," and "an executed authorization for lease payoff and release/transfer of title"; or, alternatively, they would "confirm in writing to Defendants' counsel that there is no lease payoff . . . ."

Paragraph 5 provided that, if the Ivars had not already "sold, traded, surrendered pursuant to lease termination, or donated" the car, then within 45 days after providing Volkswagen with the lender information, they would "transfer possession of" the car to Volkswagen, with no encumbrances "other than any outstanding lease obligation," and would "execute such documents as are legally necessary to transfer possession of and title to" the car. Within three business days after that, Volkswagen would send the lender "an amount sufficient to pay off the outstanding lease," and would send the Ivars $69,500, "*minus* any lease payoff amount sent to the lender . . . ."

Alternatively, under paragraph 6, if the Ivars *had* already "sold, traded, surrendered pursuant to lease termination, or donated" the car, all they had to do was

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[1] The offer also provided that, in addition to the $69,500, Volkswagen would pay costs and attorney fees. This additional amount is not involved in this appeal.

supply Volkswagen with documentary proof of that fact within three business days after acceptance, and they would be entitled to the full $69,500.

"[A]fter completion of the terms" of the offer, the action would be dismissed with prejudice.

On October 11, 2021, the Ivars accepted the offer and executed a release of claims.

On October 21, 2021, the Ivars' counsel sent Volkswagen's counsel the lender information. He also said the lender had quoted the current payoff amount, as of that date, as $7,669.62. He attached an account statement dated September 10, 2020, showing that the "[c]urrent [b]alance" was $8,765.28, and he explained that the Ivars had made two payments since the date of the statement.[2] However, the statement itself said, "Current balance is not a payoff. Please contact Customer Service for an accurate payoff amount."

The Ivars gave Volkswagen a signed bill of sale stating that they had sold the car to Volkswagen; the selling price was left blank. On November 30, 2021, the Ivars turned the car in to the dealership.

Volkswagen then paid the Ivars just $36,682.46. When they protested, counsel for Volkswagen initially responded, "We are tracking down the payment information and such as fast as we can. We hope to have an answer and be able to sort this out with you

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[2] The "[c]urrent [b]alance" of $8,765.28, minus two monthly payments of $547.83 each, as shown on the statement, is exactly equal to $7,669.62.

shortly." Two weeks later, however, counsel for Volkswagen said that the purchase price of the car had been deducted from the gross settlement amount. They took the position that, because the section 998 offer "require[d] transfer of title," Volkswagen was entitled to deduct the purchase price from the $69,500 amount of the section 998 offer.[3]

Matthew Birmingham, an employee of the lender, testified, "The lease payoff on or around October 18, 2021 was $32,817.54; this was the amount necessary to pay off the total balance owed for the vehicle pursuant to the lease terms."

Volkswagen's counsel testified that Volkswagen had contacted the lender and had been told that "that the lease payoff was $32,817.54 . . . ." It therefore paid this amount.

The Ivars filed a motion to enforce the settlement. (Code Civ. Proc., § 664.6.) The trial court denied the motion. It explained: "Defendant has provided admissible evidence that the 'lease payoff amount' was $32,817.54. (See, e.g., Birmingham declaration, p. 3, l[.] 13). There is no contradictory admissible evidence."

II

THE TRIAL COURT'S REASONING

The Ivars contend that the trial court's stated reason for denying the motion was erroneous. As noted, it accepted Birmingham's testimony that "[t]he lease payoff . . . was $32,817.54."

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[3] Volkswagen's counsel's response did not mention any early termination fee.

Birmingham's testimony constituted a legal opinion about the meaning of "lease payoff" as used in the settlement agreement. He added that $32,817.54 "was the amount necessary to pay off the total balance owed . . . pursuant to the lease terms." But *the* issue in dispute was whether this was actually what "the lease terms" required.

An expert is not authorized "to testify to legal conclusions in the guise of expert opinion. Such legal conclusions do not constitute substantial evidence. [Citation.] 'The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion. [Citation.]' [Citation.]" (*Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841.) For example, in *WRI Opportunity Loans II, LLC v. Cooper* (2007) 154 Cal.App.4th 525, the court held that dueling expert declarations as to whether certain loan documents did or did not create a "shared appreciation loan" did not raise a triable issue of fact. (*Id*. at p. 532, fn. 3.) A fortiori, a lay witness like Birmingham cannot testify to a legal conclusion.

"It is the role of the judge to decide purely legal issues. [Citation.]" (*City of Rocklin v. Legacy Family Adventures-Rocklin, LLC* (2022) 86 Cal.App.5th 713, 728–729.) Here, the trial court delegated its duty to interpret the settlement agreement to Birmingham. This was error.

The error, however, is not reversible, standing alone, because we construe the settlement agreement de novo, as a matter of law. (See part III, *post*.) If we conclude that Birmingham's interpretation was correct, then the error was harmless. And if we

conclude that Birmingham's interpretation was incorrect, then we must reverse, even aside from the error.

III

THE PURCHASE PRICE AND THE EARLY TERMINATION FEE

The Ivars contend that the settlement agreement did not allow Volkswagen to deduct either the purchase price or the early termination fee from the $69,500 gross settlement amount. This is an issue of contract interpretation.

"[I]t is 'solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence. Accordingly, "[a]n appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument without the aid of evidence [citations], where there is no conflict in the evidence [citations], or a determination has been made upon incompetent evidence [citation]." [Citation.]' [Citation.]" (*Keane v. Smith* (1971) 4 Cal.3d 932, 939.) This is true "even when conflicting inferences may be drawn from uncontroverted evidence. [Citation.]" (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 439.)

"'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.' [Citations.] 'Such intent is to be inferred, if possible, solely from the written provisions of the contract.' [Citations.] 'If contractual language is clear and explicit, it governs.' [Citation.] '"The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' [citation], controls

judicial interpretation. [Citation.]" [Citations.]' [Citation.] [¶] 'A [contract] provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable.' [Citation.]" (*State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 195.)

"We apply general contract principles in interpreting a section 998 offer when doing so does not conflict with the statute's purpose of encouraging the pretrial settlement of lawsuits. [Citation.] We interpret any ambiguity in the offer against the offeror and strictly construe the offer in favor of the party against whom section 998 is sought to be enforced. [Citation.]" (*Auburn Woods I Homeowners Assn. v. State Farm General Ins. Co.* (2020) 56 Cal.App.5th 717, 725.)

"Lease payoff," standing alone, is ambiguous, because it may or may not include the purchase price at the end of the lease. (Compare Lease Payoff, <https://www.leaseguide.com/glossary/lease-payoff> ["The term lease payoff . . . refers to the process of ending a lease before the normal end-of-lease date. . . . [¶] A car lease can be ended early by returning the vehicle and paying off the remaining lease balance . . . ."], as of Sept. 13, 2023 with Kagan, Lease Balance, <https://www.investopedia.com/terms/l/lease-balance.asp> ["The payoff amount is the amount that you would pay for the car if you were to buy it before the lease is over."], as of Sept. 13, 2023.)

Here, however, the settlement agreement specifically referred to the "lease payoff *owed by Plaintiffs* . . . ." (Italics added.) Thus, it meant the amount the Ivars would actually owe the lender under the known circumstances.

The Ivars argue that they were not required to pay the purchase price and the early termination fee because those sums were for Volkswagen's benefit, not for their benefit. However, the word "benefit" is not used in the settlement agreement. If the Ivars wanted the benefit of the overall settlement agreement, they had to do what it called for, regardless of who benefited from any individual provision.

The Ivars also argue that the lease did not require them to buy the car; they had the option to buy or not to buy. It also did not require them to pay the early termination fee. That is beside the point. The question is whether the *settlement agreement* required them to buy the car and/or to pay the early termination fee.

It did not require them to buy the car. It required them "to *facilitate* . . . transfer of title" by providing information about the *lender*. (Italics added,) It also required them to "transfer possession of" the car to Volkswagen — not to transfer title. Finally, it required them to "execute such documents as are legally necessary to transfer possession of and title to" the car. This just meant that, when Volkswagen bought the car from the lender, the Ivars had to help Volkswagen get a clear title, unencumbered by their lease.

The analysis as to the early termination fee is similar, but it leads to a different result. First, "lease payoff" unambiguously includes an early termination fee. (Early Termination Guide, <https://www.leaseguide.com/endlease> [lease payoff includes early

termination fee], as of Aug. 29, 2023; 5 Ways to Get Out of a Car Lease Early, <https://www.realcartips.com/leasing/0437-how-to-get-out-of-lease-early.shtml> ["The payoff amount will include an early termination fee"], as of Sept. 13, 2023; Terminating a New Car Lease Early, <https://www.carsdirect.com/auto-loans/terminating-a-new-car-lease-early> ["If you are in a position to just pay off the remainder of the lease, you can simply return the car to the dealer and pay the balance as well as a penalty fee (also called an early termination fee)"], as of Sept. 13, 2023.)

Moreover, the settlement agreement required the Ivars to pay the early termination fee. The lease term was from January 2020 through January 2023. The settlement agreement, served on September 9 and accepted on October 11, 2020, called for Volkswagen to pay off the lease within 14 calendar days plus 45 calendar days plus 3 business days after acceptance. Under any scenario, the payoff would occur in 2020. Therefore, the settlement agreement did require the Ivars to terminate the lease early. And therefore, the "lease payoff owed by Plaintiffs" included any early termination fee.

What we find most significant is paragraph 6, which applied if the Ivars had *already* surrendered the car to the lender and terminated the lease. In that event, they were entitled to the full $69,500. They would have had to pay the early termination fee; however, they would not have had to pay the purchase price, and Volkswagen would not have gotten title to the car. If it wanted the car, it would have had to negotiate with the lender and pay whatever purchase price was agreed on. Evidently the parties considered

this scenario to be equivalent to the one that actually occurred. And in both scenarios, the Ivars paid an early termination fee but not the purchase price.

Moreover, paragraph 6 provided that the Ivars would get the full $69,500 (1) if they had already "surrendered" the car, which did not require them to pay the purchase price; or (2) if they "sold, traded, . . . or donated" the car, which did require them to pay the purchase price. Evidently Volkswagen was indifferent between these alternatives. This shows that it knew it had to pay the purchase price itself.

The Ivars argue that their interpretation of the settlement agreement is consistent with the Song-Beverly Act, because under the Act, the buyer does not have to return the vehicle to the manufacturer in order to be entitled to a remedy. (See *Crayton v. FCA US LLC* (2021) 63 Cal.App.5th 194, 206-207.) This argument relates solely to whether the lease payoff includes the purchase price. On that point, we have already agreed with the Ivars, for other reasons. It does not relate to whether the lease payoff includes the early termination fee.

The Ivars also urge us to look at the parties' course of performance. (See Code Civ. Proc., § 1856, subd. (c)). "[E]vidence of acceptance or acquiescence in a course of performance requires 'repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other.' [Citation.] (*Hewlett-Packard Co. v. Oracle Corp.* (2021) 65 Cal.App.5th 506, 543.) Here, the parties used different interpretations of the settlement agreement almost from the git-go. The Ivars took the position that the lease payoff meant the remaining

monthly payments. They also supplied a bill of sale with no purchase price. Although Volkswagen did not openly dispute this position, it also did not accept it; instead, it paid the lender the purchase price and the early termination fee, and then tried to deduct them from the gross settlement amount. When the Ivars complained, Volkswagen's counsel did not agree or disagree; they simply asked for time "to sort this out."

Finally, the Ivars argue that the section 998 offer must be construed as not allowing the deduction of the purchase price and the early termination fee, because these amounts changed over time and they could not be readily calculated at any given time; if it *did* allow the deduction of these amounts, then the value of the offer was uncertain, and the offer itself was invalid. We decline to consider this argument, because it was not raised below.[4] "'It is axiomatic that arguments not raised in the trial court are forfeited on appeal.' [Citation.]" (*Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1074.)

IV

DISPOSITION

The order appealed from is reversed. On remand, the trial court must take evidence regarding the amount of the purchase price, the amount of the early termination fee, and any other amounts that Volkswagen deducted from the gross settlement amount;

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[4] The Ivars did argue that the section 998 offer was invalid if it did not specify whether the purchase price was *deductible* from the gross settlement amount. They did not argue that it was invalid if the purchase price or the early termination fee was *uncertain*.

then it must enter judgment pursuant to the terms of the settlement and consistent with this opinion. If requested by the parties, the trial court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement. (See Code of Civ. Proc., § 664.6, subd. (a).)

The Ivars are awarded costs on appeal.

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RAMIREZ
P. J.

We concur:

McKINSTER
J.

FIELDS
J.