Case No. S229762

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

McMILLIN ALBANY, LLC, et al.
Petitioners,

v.

SUPERIOR COURT OF KERN COUNTY,
Respondent.

CARL & SANDRA VAN TASSEL, et al.,
Real Parties in Interest.

Kern County Superior Court Case No. S-1500-CV-279141
Honorable David R. Lampe, Presiding Judge, Dept. 11

From the Published Opinion of the Court of Appeal, Fifth Appellate District Civil Case No. F069370

McMILLIN'S ANSWER TO REAL PARTIES' PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

McMillin Albany, LLC et al. ("McMillin") respectfully submits this Answer to Real Parties in Interest's ("Real Parties") Petition for Review.

I. SUMMARY OF McMILLIN'S POSITIONS

McMillin agrees that as a result of the Fifth District Court of Appeal's opinion in this case ("*McMillin Albany*") there is a conflict among the Districts of the Court of Appeal as to whether SB800 (Civil Code §§ 895 et seq.) provides the exclusive remedy (precluding common law causes of action), "except as specifically set forth" therein, for residential construction defects in homes purchased after January 1, 2003, which is the first issue presented by Real Parties' Petition for Review. However, there is no need to grant review in order to resolve any confusion that may result from the contradictory case law. The most judicially efficient path to resolution of the conflicting holdings, which will also have the incidental effect of imposing the correct law throughout the state, is to deny review of *McMillin Albany*, allowing it to remain published, while simultaneously depublishing *Liberty Mutual* and *Burch* under this Court's inherent power to do so articulated in California Rule of Court ("CRC") 8.1125(c)(2) and as described in *People v. Saunders* (1993) 5 Cal.4th 580, 607-608.

If the Court elects to grant review, it should also **(1)** order that *McMillin Albany* remain published under CRC 8.1105(e)(1), **(2)** under CRC 8.1125(c)(2) and as described in *People v. Saunders* (1993) 5 Cal.4th 580, 607-608, depublish *Liberty Mutual* and *Burch* pending a final ruling in this case, and **(3)** clarify what is within the scope of the Court's review, given that Real Parties' "Issues Presented" as written could be construed too narrowly.

II. FACTUAL AND PROCEDURAL BACKGROUND

McMillin generally agrees with the "Factual and Procedural Background" section of Real Parties' Petition for Review.

The complete text of the trial court order from which this writ proceeding arises is as follows:

"IT IS ORDERED that Defendant's Motion to Stay is Denied. Pursuant to *Liberty Mutual Insurance Co. v. Brookfield Crystal Cove, LLC* (2013) 219 Cal.App.4th 98, the Plaintiffs are entitled to plead common law causes of action in lieu of a cause of action for violation of building standards set forth in Civil Code § 896 et seq. ("SB 800"). Plaintiffs need not submit to the SB 800 prelitigation process when their Complaint does not assert claims for violations of SB 800 standards. [¶] The Court also

acknowledges that its ruling here involves a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of this litigation. (See Code Civ. Proc. § 166.1.)"

A complete list of the causes of action in Real Parties' complaint, before the SB800 cause of action was unilaterally dismissed by Real Parties, is as follows: Strict Products Liability; Strict Products Liability (Component Products); Violation of Building Standards as Set Forth in California Civil Code § 896; Breach of Implied Warranty (Merchantability); Breach of Contract; Negligence; Breach of Express Warranty; and Violation of Statute.

III. SUMMARY OF THE CONFLICT IN LAW AMONG THE DISTRICTS OF THE COURT OF APPEAL AND THE EFFECT OF *LIBERTY MUTUAL'S* HOLDING ON TRIAL COURTS AND BUILDERS THROUGHOUT THE STATE, BEFORE *McMILLIN ALBANY*

McMillin does not deny that as a result of the Fifth District's *McMillin Albany* opinion (*McMillin Albany LLC v. Superior Court* (2015) 239 Cal.App.4th 1132 ("*McMillin Albany*")) there exists a conflict of case law with the Fourth and Second Districts, *Liberty Mutual Insurance Company v. Brookfield Crystal Cove* (2013) 219 Cal.App.4th 98 ("*Liberty*

Mutual") and *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411 ("*Burch*"), respectively.

McMillin Albany holds that because a cause of action for violation of the building standards found in SB800's Chapter 2 (§§ 896 and 897[1]) is the exclusive remedy for residential construction defects, no other causes of action, including common law causes of action, are permissible, except where specifically set forth in Title 7, and homeowners are consequently obligated to comply with SB800's prelitigation inspection and repair procedures under section 910 et seq., even where the plaintiffs' complaint does not contain a cause of action for violations of SB800's Chapter 2 building standards. (*McMillin Albany*, 239 Cal.App.4th 1132, 1146, 1149.) The Fourth and Second Districts hold that SB800 does not provide the exclusive remedy for residential construction defects, i.e. that common law causes of action are permitted. (*Liberty Mutual*, 219 Cal.App.4th 98, 109; *Burch*, 223 Cal.App.4th 1411, 1418.) Real Parties' first "Issue Presented" seeks to address this conflict in law. (Real Parties' Petition for Review ("Petition") at 1.)

[1] All statutory citations are to the Civil Code unless otherwise indicated.

Ostensibly, there is no conflict among the Districts of the Court of Appeal as to as to Real Parties' second issue: Whether SB800 requires a homeowner to comply with its prelitigation inspection and repair procedures where that homeowner does not "state a claim for relief under SB800," i.e. where the homeowner does not explicitly state a cause of action for violations of SB800's building standards contained in Chapter 2 (§§ 896 and 897.) This is because the Fifth District in this case is the only District in the Court of Appeal that has passed upon that specific issue. (*McMillin Albany*, 239 Cal.App.4th 1132, 1139, "McMillin's writ petition presents an issue of first impression . . . .") In neither *Liberty Mutual* nor *Burch* was the builder attempting to force the homeowner to comply with SB800's prelitigation inspection and repair procedures, and, consequently, it is impossible that either of those cases explicitly held anything with respect to a homeowner's obligation to engage in or builder's right to enforce that prelitigation process. (See *Baeza v. Superior Court* (2011) 201 Cal.App.4th 1214, 1228, "It is axiomatic that cases are not authority for propositions not considered.")

However, as is correctly explained by *McMillin Albany*, the holdings of *Liberty Mutual* and *Burch* had a direct and detrimental effect on

McMillin's and all other builders' attempts to enforce their "absolute right"[2] to SB800's prelitigation inspection and repair process.[3] (*McMillin Albany*, 239 Cal.App.4th 1132, 1137, 1140-1141.) As the result of *Liberty Mutual* and *Burch* allowing homeowners to plead common law causes of action instead of limiting homeowners to a cause of action for violations of SB800's building standards in Chapter 2, Real Parties in this case and homeowners around the state took the position that they were not obligated to engage in the prelitigation process. (*McMillin Albany*, 239 Cal.App.4th 1132, 1137, 1140-1141.) Their position was based on the language of SB800's section 910, which requires compliance with the prelitigation procedures only where "any party is alleged to have contributed to a

[2] Enforcement of SB800's prelitigation procedures has been consistently described as and held to be a builder's "absolute right," as long as the builder has complied with the notice and recording requirements in section 912. (*Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1079; *Anders v. Superior Court* (2011) 192 Cal.App.4th 579, 590-591; *McCaffrey Group, Inc. v. Superior Court* (2014) 224 Cal.App.4th 1330, 1345-1346; *McMillin Albany LLC v. Superior Court* (2015) 239 Cal.App.4th 1132, 1150; Assem. Com. On Judiciary, Analysis of Sen. Bill No. 800 (2001-2002 Reg. Sess.) as amended Aug 26, 2002, p. 1; Sen. Com. On Judiciary, Analysis of Sen. Bill No. 800 (2001-2002 Reg. Sess.) as amended Aug. 28, 2002, p. 4; and see generally *Standard Pacific Corp. v. Superior Court* (2009) 176 Cal.App.4th 828.)

[3] For an in depth assessment of this detrimental impact, see the amicus letters filed in this action by the CBIA, LBA, BILD and CALPASC in opposition to Real Parties' Request for Depublication of *McMillin Albany*.

violation of the standards set forth in Chapter 2 (commencing with Section 896)." Real Parties' argument is simply that if no party is explicitly alleged by the homeowners to have violated any standard in SB800's Chapter 2 (§§ 896 and 897), then, under section 910, Real Parties are not obligated to engage in the prelitigation process, and McMillin is not entitled to stay the litigation for completion of the prelitigation process.

Since, prior to *McMillin Albany*, *Liberty Mutual* and *Burch* were the only published appellate decisions, trial courts, such as the Respondent Trial Court in this case, were obliged to follow their holdings, which resulted in builders like McMillin losing motions to stay for completion of the prelitigation process. (*McMillin Albany*, 239 Cal.App.4th 1132, 1137, 1140-1141.)

The problem is that the holdings of *Liberty Mutual* and *Burch* are wrong. And because they are wrong, they led the trial courts across the state, and in this case, to deny builders their "absolute right" to the prelitigation inspection and repair process. (*Id.*) Based on the language of the SB800 code sections alone, SB800 does, and was clearly intended to, abrogate common law causes of action and otherwise provide the exclusive remedy for residential construction defects in homes purchased after

January 1, 2003, except as specifically set forth in Title 7. (*McMillin Albany*, 239 Cal.App.4th 1132, 1141-1143, 1145-1146.). This means that common law causes of action, such as those pleaded by the homeowners in this case, are impermissible and cannot serve as the basis to avoid enforcement of the prelitigation procedures. (*Id.*)

McMillin Albany, like the Respondent Trial Court, which reluctantly denied McMillin's motion to stay and *sua sponte* issued a Code of Civil Procedure section 166.1 statement (*id.* at 1140-1141), understood that in order to fairly and accurately consider the question whether McMillin was entitled to the stay, the court first necessarily had to answer the question whether SB800 is the exclusive remedy for residential construction defect claims. (*Id.*; see also *Shulman v. Group W Productions Inc.* (1998) 18 Cal.4th 200, FN13, finding it "necessary" to address a particular point "in order to state and decide fairly and accurately the legal questions inherent in the case.") If it *is* the exclusive remedy, then Real Parties *cannot* control whether McMillin could enforce its "absolute right" to the prelitigation procedures. If it *is not* the exclusive remedy, then Real Parties can simply plead common law causes of action and avoid altogether McMillin's

(suddenly ironically described) "absolute right" to the prelitigation procedures.

IV. WHY THIS COURT SHOULD NOT GRANT REVIEW

A. The Conflict of Law Can Be Resolved through this Court's Authority to Depublish *Liberty Mutual* and *Burch*

Real Parties argue that because of the conflict of law described above, this Court should grant review to resolve the discrepancy. McMillin agrees that resolving the conflict in law is of paramount importance, but does not agree that review needs to be granted in order to do so. This Court has authority to resolve the conflict by denying review in this case, allowing *McMillin Albany* to remain published, and simultaneously depublishing *Liberty Mutual* and *Burch.*

California Rule of Court 8.1125(c)(2) states "The Supreme Court may order an opinion depublished on its own motion, notifying the rendering court of its action." In her dissent in *People v. Saunders* Justice Kennard describes an instance in which this Court exercised this inherent authority. (*People v. Saunders* (1993) 5 Cal.4th 580, 607-608 ("*Saunders*").) Each of the following cases described below addressed whether jeopardy attached to the issue of the truth of a prior conviction

enhancement allegation, preventing the enhancement from being imposed, on double jeopardy grounds, if the jury was mistakenly discharged before the enhancement allegation was tried. (*Id.* at 607.)

In 1984 the First Appellate District certified for publication *People v. Wojahn* (1984) 150 Cal.App.3d 1024, 1032-1035 ("*Wojahn*"), which held that jeopardy attached. This Court denied review of the *Wojahn* decision on March 21, 1984. (See *Saunders* at 607.)

"[I]n 1989 the Courts of Appeal issued decisions contrary to *Wojahn* in *People v. Laury* . . . and *People v. Casillas* . . . ." (*Saunders* at 607.) This Court denied review of the *Laury* opinion in 1989; a petition for review was not filed in *Casillas*. (*Id.*)

In 1990 "a Court of Appeal decided *People v. Hockersmith* (1990) 217 Cal.App.3d 968 . . . . The decision in *Hockersmith* adhered to the *Wojahn* holding and criticized the decision in both *Laury* and *Casillas*. (217 Cal.App.3d at pp. 973-975 . . . .) (*Saunders* at 607.)

"'Then, at one fell swoop on April 26, 1990 the Supreme Court denied review in *Hockersmith* and depublished both *Casillas* and *Laury*, which had long since become final and were not even before the court. This [left] *Hockersmith* as the only published post-*Wojahn* opinion.'"

(*Saunders* at 607-608, quoting *People v. Dee* (1990) 222 Cal.App.3d 760, 763.)

In highlighting that this Court has the authority to act under CRC 8.1125(c)(2) as it did with the *Hockersmith* line of decisions, by denying review of *McMillin Albany* and simultaneously depublishing *Liberty Mutual* and *Burch*, McMillin also recognizes Justice Kennard was dissenting in *Saunders*, and that *Hockersmith* and *Wojahn* were disapproved by the majority in the *Saunders* opinion. McMillin cites to Justice Kennard's depublication history of the *Hockersmith* line of cases only to provide an example of what the Court has done in the past and to show that it has the authority to do it.

While it is true that the practical effect of denying review in this case and depublishing *Liberty Mutual* and *Burch* would unequivocally impose *McMillin Albany's* holding on trial courts across the state, with equal regard, McMillin also recognizes that the California Rules of Court dictate that a Supreme Court order to publish or depublish is not an expression of the Court's opinion of the correctness of the result of the decision or of any law stated in the opinion. (CRC 8.1120(d) and 8.1125(d); see also *Saunders* at FN8, "[Justice Kennard's] dissent errs in concluding that by denying

review in some cases and ordering depublication of the opinions in others, this court 'endorsed' the decision in *Wojahn.*")

However, because there are no criterion provided by any authoritative source regarding why a case should or should not be depublished or be allowed to remain published by this Court[4], when faced with the task of either requesting depublication or opposing it, the parties are left with no choice but to argue the merits of the Court of Appeal's opinion, in spite of knowing full-well that this Court's action in response to those arguments will not express the Court's opinion of the correctness of the result or of any law stated therein.

Finding itself in this predicament:

(1) McMillin simply attempts here to bring to the Court's attention that it has as much authority to depublish *Liberty Mutual* and *Burch* on its own motion under CRC 8.1125(c)(2) as it does to depublish *McMillin*

[4] It is true that CRC 8.1105(c) provides nine factors to be considered when a Court of Appeal's opinion "should be certified for publication in the Official Reports," but, even on the face of that Rule, those factors do not give any guidance at all regarding when or under what circumstances a Court of Appeal's opinion that has or has not been certified for publication might qualify for depublication or publication by *this* Court. That being said, *McMillin Albany* easily qualifies for *at least* seven of the nine factors. A description of how *McMillin Albany* qualifies can be found in any one of the many letters filed in opposition to Real Parties' Request to Depublish *McMillin Albany.*

Albany pursuant to Real Parties request under 8.1125(c)(1). That the *Liberty Mutual* and *Burch* decisions have been final and published for a longer period of time than *McMillin Albany* is no reason for this Court to allow them greater deference. "[T]he mere fact that an error has been committed is no reason or even apology for repeating it, much less for perpetuating it." (*Hart v. Burnett* (1860) 15 C. 530, 600.)

(2) McMillin argues that this Court should deny review of *McMillin Albany*, allowing it to remain published, as it reaches the correct result based on correct and proper reasoning, and that the Court should simultaneously depublish *Liberty Mutual* and *Burch* because they were wrongly decided.

This is the most judicially efficient way to resolve the conflicting case law. It will also have the beneficial, albeit incidental, effect of resolving the current contradiction in published decisions by Fifth, Fourth and Second Districts of the Court of Appeal. (See *Farmers Insurance Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 108-109, "[T]hough depublication may not be an expression of disapproval by the Supreme Court, depublication orders are not without effect. . . . [N]onpublished opinions have no precedential value. . . . Without some

further act of approval or adoption by the Supreme Court, [depublished opinions are] 'of no more effect as a judgment or as a precedent to be followed in the decision of legal questions that may hereafter arise than if they had not been written,'" quoting *Knouse v. Nimocks* (1937) 8 Cal.2d 482, 484.)

B. *McMillin Albany* Was Correctly Decided; *Liberty Mutual* and *Burch* Were Wrongly Decided

McMillin Albany was correctly decided for all the reasons the Fifth District stated in its opinion. *Liberty Mutual* and *Burch* were wrongly decided for all the reasons the Fifth District stated in its opinion. Frankly, one need only read the *McMillin Albany* opinion and compare it to *Liberty Mutual* and *Burch* to come to a conclusive determination that it, as opposed to the others, reaches the correct conclusions for the correct reasons. *McMillin Albany's* soundness of logic and depth and scope of reasoning is self-evident and greatly surpasses anything found in *Liberty Mutual* or *Burch*.

Real Parties argue that in addition to the conflict of law created by *McMillin Albany*, another reason to grant review is because *McMillin Albany* "is incoherent in myriad different respects" and without review will "saddle" trial courts and litigants "with the task of trying to resolve the

many questions that are needlessly created by" it. (Petition at 6.) Real Parties' characterization of *McMillin Albany* is wrong.

Real Parties' criticisms of *McMillin Albany* collectively amount to an argument that it, and by implication the SB800 code itself, takes incorrect and inconsistent positions regarding whether section 897 is a construction "standard" within the meaning of the SB800 code, and specifically within the meaning of sections 910 and 943, which leads to Real Parties to the conclusion that *McMillin Albany* was wrong to hold that SB800 was the exclusive remedy for residential construction defects, and therefore wrong to require Real Parties to engage in SB800's prelitigation procedure.

1. *McMillin Albany Is Clear that Section 897 Is an SB800 Building "Standard," which Is Correct*

i. Summary of Real Parties' argument that section 897 is not an SB800 building "standard"

Section 897, which is the only other section besides section 896 in SB800's Chapter 2, states that "The standards set forth in this chapter are intended to address every function or component of a structure. To the extent that a function or component of a structure is not addressed by these standards, it shall be actionable if it causes damage."

Real Parties assert that section 897 is not an SB800 building "standard." (Petition at 16, stating that a claim under 897 is one ". . . which, by definition, is not based on the SB800 building standards . . . .") From this premise they conclude that there are no recoverable damages for a violation of section 897 under SB800 because it is not a building "standard" within the meaning of section 944's description of damages, which are the only damages allowed under SB800. (§ 943, "Except as provided in this title, no other cause of action for a claim covered by this title or for damages recoverable under Section 944 is allowed.") (Petition at 16-21.) In pertinent part, the only damages allowed to be recovered under section 944 are those ". . . for the reasonable value of repairing any violation *of the standards* set forth in this title," and those for ". . . the reasonable cost of repairing and rectifying any damages resulting from the failure of the home to meet *the standards* . . ." (§ 944 (emphasis added).)

According to Real Parties, because the only causes of action allowed under SB800 are those seeking damages recoverable under section 944, and because no such damages are available for a violation of section 897 since it is not an SB800 building "standard," the Legislature must have intended section 897 to allow common law causes of action for plaintiffs to recover

damages where the functions or components of a structure are not addressed by the standards in section 896, but have nevertheless caused damage. (Petition at 16-21.) Consequently, as Real Parties argue, *McMillin Albany's* holding that precludes common law causes of action is wrong and the opinion is otherwise "undecipherable" because of its holdings that "A claim covered by the Act is a claim as defined in section 896 and 897," and that "The second portion of section 943 precludes a cause of action, other than one under section 896 and 897, for 'damages recoverable under section 944'." (Petition 16-17.)

ii. The SB800 code, in sections 896 and 897, answers Real Parties' contrived conundrum regarding section 897, and by so doing demonstrates why there is no rational basis for common law claims to survive and still give effect to all of SB800's statutory provisions

The simple answer to Real Parties' false conundrum is that section 897 is itself a building standard in Chapter 2. *McMillin Albany* does not go to the trouble of explicitly stating this in its own words because **(1)** the code plainly says it at section 910 and many other SB800 sections, and **(2)** this novel statutory interpretation argument was not made to the Fifth District.

Chapter 2 of SB800 (Title 7) contains only two sections, 896 and 897. Section 896 states in pertinent part that "In any action seeking recovery of damages arising out of, or related to deficiencies in, the residential construction, design, specifications, surveying, planning, supervision, testing, or observation of construction, . . . the claimant's claims or causes of action shall be limited to violation of, the following standards, except as specifically set forth in this title."

Nowhere does section 896 state that "the following standards" are limited to those in section 896 and exclude section 897. Obviously, section 897 "follows" section 896.

Again, section 897 states that "The standards set forth in this chapter are intended to address every function or component of a structure. To the extent that a function or component of a structure is not addressed by these standards, it shall be actionable if it causes damage."

This is the entirety of section 897. Nowhere does it state or otherwise indicate that it does not provide one of the "standards set forth in" Chapter 2. On the contrary, it sets out an additional construction standard to be met by builders, should the provisions of section 896 not cover a "function or component of a structure." The Legislature, through

section 897's catch-all effect, was able to definitively encompass all residential building standards necessary to protect homeowners – SB800 "occupies the field." If homeowners cannot recover under the standards articulated in section 896, then they can recover under the standard articulated in section 897. There is no conceivable residential construction defect that is not addressed by the collective building standards articulated in sections 896 and 897. Because of the exclusivity language in sections 896 and 943, the all-encompassing nature of SB800 also has the effect of circumscribing all causes of action for residential construction defects other than those explicitly allowed under SB800. Another way of saying this is that there is "no rational basis" for the position that common law claims for construction defects are still available for non-condominium conversion residences *and also* "give effect to all" provisions of the SB800 code, as is required under Code of Civil Procedure section 1858.

iii. Further statutory proof that section 897 is an SB800 building "standard"

That section 897 is a building "standard" within the meaning of the SB800 code is also evidenced by the following:

Section 910 states that "Prior to filing an action against any party alleged to have contributed to a violation of *the standards set forth in*

Chapter 2 (*commencing* with Section 896), the claimant shall initiate the following [prelitigation] procedures." Subsection (a) of section 910 goes on to state that "The claimant . . . shall provide written notice . . . to the builder . . . of the claimant's claim that the construction of his or her residence violates any of *the standards set forth in Chapter 2* (*commencing* with Section 896)." (Emphasis added.)

Section 910 refers to ". . . violations of the *standards* set forth *in Chapter 2* (*commencing* with Section 896). . . ." (Emphasis added.) Section 910 does *not* say ". . . violations of the standards set forth *in Section 896* . . . ." If the Legislature had intended SB800's many references to its building "standards" to only mean those articulated in Section 896, and not 897, then it would not have made reference in section 910 to the entirety of Chapter 2 and used the phrase "commencing with" as a qualification in the parenthetical identifying "Section 896." Section 910's reference to the entirety of "Chapter 2" and its use of the "commencing with" phrase, is explicit, plain, codified language stating that section 897 is an SB800 "standard" (the violation of which triggers the prelitigation procedures under section 910).

Section 910 is not the only place in SB800 that uses the phrase "Chapter 2 (commencing with Section 896)." It is also used in sections 901 (twice), 902 (twice), 903 (three times), 904, 905 (twice), 906, and 942 (twice).

Under section 901, in an enhanced protection agreement, the contract between a builder and homeowner cannot relieve the potential liability of the builder that may arise under section 897 because "A builder may not limit the application of Chapter 2 (commencing with Section 896) or lower its protection through the express contract with the homeowner." (See also § 902, providing that "Chapter 2 (commencing with Section 896) . . . set[s] forth *minimum provisions* by which to judge the enforceability of the particular provisions of the enhanced protection agreement" (emphasis added).)

Under section 903, where a builder elects to use an enhanced protection agreement "in place of the provisions set forth in Chapter 2 (commencing with Section 896)" then the builder must provide the homeowner with "a *complete copy* of Chapter 2 (commencing with Section 896)," and "[i]f any provision of an enhanced protection agreement is later found to be unenforceable as not meeting *the minimum standards of*

Chapter 2 (commencing with Section 896), a builder may use this chapter in lieu of those provisions found to be unenforceable." (Emphasis added.)

Under section 904, if a homeowner claims that a provision of the enhanced protection agreement is not "greater than, or equal to, the provisions of Chapter 2 (commencing with Section 896)" then the homeowner can seek to "enforce a particular standard in lieu of a provision of the enhanced protection agreement," but must "give the builder written notice of that intent at the time the homeowner files a notice of claim" pursuant to section 910. Thus, in addition to the plain language of section 910, section 904 also considers section 897 an SB800 building "standard," the violation of which would trigger the prelitigation procedures.

There is no reason virtually the whole SB800 statutory scheme would refer to and consider section 897 a building "standard," a "protection" to homeowners, a "minimum provision," a triggering event for the prelitigation procedures, and yet *not* consider it a "standard" within the meaning of section 944's description of damages. Section 897 *does* provide an SB800 building standard. Where section 897 has in fact been violated there will be physical damages to the residential structure as the result of some function or component that is not addressed by section 896.

In such a case, a homeowner can recover "for the reasonable value of repairing any violation of the standards set forth in" Title 7, which necessarily includes a violation of section 897. It is that simple.

iv. *McMillin Albany's* holdings and reasoning contain the correct statutory interpretation analysis of section 897

McMillin Albany's holdings and reasoning contain the above analysis and do not confuse it, contrary to Real Parties' assertions. Like the SB800 code itself, *McMillin Albany* considers section 897 to be, and holds that it is, a building "standard" within the meaning of section 944. Directly after quoting section 897 in full, *McMillin Albany* states:

> Thus, the Legislature intended to create a comprehensive set of construction standards and to make the violation of any of those standards actionable under the Act. To the extent it omitted some function or component, however, a deficiency in that function or component would not be actionable in itself, but would be actionable if it caused property damage.
>
> Consistent with section 896, section 943 provides: "Except as provided in this title, no other cause of action for a claim covered by this title or for damages recoverable under Section 944 is allowed." (§ 943, subd. (a).) A claim covered by the Act is a claim as defined in sections 896 and 897. Thus, the first portion of section 943 precludes any cause of action for damages related to or arising out of a deficiency in residential construction, other than one brought pursuant to section 896 for violation of any of the standards set out in Chapter 2, or one brought pursuant to section 897, where the

alleged deficiency involves a function or component not covered in the standards set out in section 896.

The second portion of section 943 precludes a cause of action, other than one under sections 896 and 897, for "damages recoverable under section 944." [. . .]

Accordingly, the second portion of section 943 also precludes any cause of action, other than a cause of action under sections 896 and 897, for "the reasonable value of repairing any violation of the standards" or "the reasonable cost of repairing and rectifying any damages resulting from the failure of the home to meet the standards" set out in the Act. In other words, no other cause of action is allowed to recover for repair of the defect itself or for repair of any damage caused by the defect.

(*McMillin Albany*, 239 Cal.App.4th 1132, 1141-1142.) (emphasis added).)

McMillin Albany also recognizes that section 897 is an SB800 building "standard" when it addresses *Liberty Mutual's* argument regarding section 942:

> The [*Liberty Mutual*] court concluded the Legislature did not intend to eliminate the need to prove causation and damages where construction defects resulted in actual property damage, but "[t]he elimination of such basic elements of proof ... makes perfect sense when the claim is for construction defects that have not yet caused any actual damage." [Citation omitted.]
>
> Section 942, however, pertains only to proof of "violation of a standard set forth in Chapter 2." Section 896, which is part of Chapter 2, sets out standards residential construction is required to meet. A violation of any of those standards equates to a residential construction deficiency or defect. A homeowner may recover for the existence of the

> defect itself (the violation of the standard) or for damage it caused, or both. (§ 944.) Section 942 merely provides that the violation of the standard may be proved by evidence that the applicable standard has not been met; no further proof of causation or damages is needed to recover for the violation of the standard itself. Section 942 does not eliminate the need to prove causation and damages where the homeowner alleges, and seeks recovery for, the other damage or costs allegedly caused by the violation of the standard.
>
> (*McMillin Albany*, 239 Cal.App.4th 1132, 1143-1144.)

Where there is an alleged violation of the building standard articulated by section 897, the physical property damage caused by a function or component of the structure that is not addressed by section 896 is *itself* the "violation." Thus, as applied to a claimed violation of section 897, section 942 would simply require that physical damages have actually occurred as the result of a function or component of the structure that is not already "addressed" by section 896, because where section 897 violations are concerned, causation and physical damage to the structure *is* the violation of the "standard."

Admittedly, the way section 942 is written, it appears to be geared more toward addressing situations where no physical damage to the structure has occurred, but where there is still a violation of a standard in section 896. This is not surprising since *one* of the purposes of SB800's

enactment was to allow homeowners to recover for construction defects that had not actually caused damage to the structure, abrogating the economic loss rule articulated in *Aas v. Superior Court* (2000) 24 Cal.4th 627. However, as indicated by the analysis in *McMillin Albany* above, the SB800 code explicitly contemplates a homeowner's recovery "both" for damages that are caused by a violation of an SB800 building standard, and for the violation of the building standard itself. Since section 897 *is* an SB800 building standard, recovery for a violation of section 897 reasonably fits into either one of those damages categories. For the same reasons *McMillin Albany* states above, section 942 does not exclude from SB800's scope of covered claims those that seek damages as the result of a defective function or component of a structure, including a claim of actual physical damage caused by a function or component of a structure that is not covered by section 896, i.e. a claim under the section 897 "standard."

v. Real Parties' argument regarding a claim under section 897 is only hypothetical in this case and very likely to only be theoretical under any circumstances

It should be noted **(1)** that until their Petition for Review Real Parties had never even insinuated that they were seeking, or would seek, recovery for a violation of section 897, and **(2)** even if Real Parties hypothetically

choose to do so, seeking recovery for a violation of section 897 may be only a theoretical possibility anyway.

Counsel for McMillin has yet to encounter an instance in which any person, including Real Parties, has identified a function or component of a structure that is *not* already addressed by the standards in section 896, to say nothing of one that has actually caused physical damage to a structure. Section 897 was truly meant to be a failsafe catch-all by the Legislature, so as to be sure to encompass all possible residential construction defect claims that might be made. Because the building standards in section 896 are already so all-encompassing, a claim for violation of section 897 may never actually be needed.

However, the mere fact that the Legislature included section 897 in Chapter 2, or in the SB800 code at all, supports *McMillin Albany's* conclusion that the Legislature intended to preclude common law causes of action for residential construction defects. If the Legislature did not so intend, then it would have omitted section 897 entirely and the statement in section 896 that reads "As to condominium conversions, this title does not apply to or does not supersede any other statutory or common law" would

instead read "This title does not apply to or does not supersede any other statutory or common law."[5]

Review should not be granted based on Real Parties' mischaracterization of *McMillin Albany's* holding on a topic (1) that, fortuitously, *McMillin Albany* explicitly and correctly addressed in spite of Real Parties' failure to raise it in the Fifth District, (2) that very likely will only be theoretical, and (3) that has apparently only become an issue in the case for the special purpose of convincing the Court to grant review.

2. *McMillin Albany's Analysis of and Conclusions Regarding SB800's Legislative History Are Correct and Directly and Completely Support Its Holdings*

It is not a coincidence that neither Real Parties' Petition for Review nor their Request for Depublication even mention SB800's legislative history.

As *McMillin Albany* shows throughout, *Liberty Mutual's* analysis of SB800's legislative history is, to put it generously, superficial, and as a

[5] This whole section IV. is essentially an answer to Real Parties' question in their Petition at page 17-18: "[W]hat is the basis for the Fifth District's assumption that the Legislature intended to create . . . a cause of action [for violation of section 897], as opposed to simply allowing homeowners to assert traditional common law tort causes of action for those building defects that cause damage to the home, but that do not constitute violations of the SB800 building standards?"

result its conclusions about the legislative history are wrong. To summarize, *Liberty Mutual's* cursory treatment of SB800's legislative history led it to the erroneous conclusions that "[n]owhere in the legislative history is there anything supporting a contention that the Right to Repair Act barred common law claims for actual property damage," and that the *only* purpose SB800 was enacted was to allow homeowners to recover for defects that did not cause property damage, abrogating the economic loss rule promulgated by *Aas v. Superior Court* (2000) 24 Cal.4th 627. (*Liberty Mutual*, 219 Cal.App.4th 98, 103-104.)

However, as McMillin demonstrated in approximately nine pages of its Petition for Writ of Mandate that were filled with citations to the legislative history of SB800 (McMillin's Petition for Writ of Mandate at 33-42), and as articulated by *McMillin Albany*, SB800 was also enacted for the additional purposes of **(1)** effectuating "groundbreaking reform for construction defect litigation" that "would make major changes to the substance and process of the law governing construction defects," **(2)** codifying a uniform set of construction standards by which to determine whether actionable construction defects exist in a particular residence, **(3)** imposing a "mandatory" prelitigation procedure giving the builder an

"absolute right" to attempt to repair the claimed construction defects before the homeowner could sue in court, **(4)** "reduc[ing] construction defect litigation, thereby decreasing the cost of insurance and litigation to entities involved in the construction industry, reducing the cost of construction, encouraging insurers and builders to return to the market, and making housing more affordable." (*McMillin Albany*, 239 Cal.App.4th 1132, 1147-1149.)

Accordingly, *McMillin Albany* correctly concludes as follows:

> We doubt the Legislature would have viewed the legislation as "groundbreaking reform" or a "major change[]" in the law of construction defects if its provisions were mandatory only when the defect had not yet caused damage, and the homeowner could still sue for damages under any common law theory once property damage occurred, without being subject to the statutory prelitigation procedure. Further, the codified construction standards could not constitute a uniform set of standards to comprehensively define construction defects if a homeowner could avoid their use simply by suing on common law causes of action after the construction defect has caused actual damage. Like the statutory provisions themselves, the legislative history does not contain any indication the Act was intended to exclude construction defect claims whenever the defect has caused actual property damage. In fact, by including "the reasonable cost of repairing and rectifying any damages resulting from the failure of the home to meet the standards" (§ 944) in the list of damages recoverable in an action under the Act, the Legislature expressed its intent that deficiencies that have resulted in actual property damage are to be covered by the Act. Additionally, it is unlikely the Legislature or the bill

> supporters would have expected that creating a new statutory cause of action for defects that have not yet caused damage, and leaving intact the common law causes of action available once property damage has occurred, would significantly reduce the cost of construction defect litigation and make housing more affordable.
>
> (*McMillin Albany*, 239 Cal.App.4th 1132, 1149.)

McMillin Albany's analysis and conclusions regarding the legislative history of SB800 are unassailable, and they directly and completely support its holding that SB800 provides the exclusive remedy for residential construction defects, except as specifically set forth therein, and that as a result, homeowners, including Real Parties, cannot escape a builder's "absolute right" to proceed through SB800's "mandatory" prelitigation inspection and repair process simply by electing to plead in their complaint certain causes of action and not others. The builders' prelitigation "right" cannot be "absolute" or "mandatory" if it is only made available to builders at the election of homeowners. *McMillin Albany* understands this and its holding is consistent with it. *Liberty Mutual* and *Burch* do not even contemplate it.

V. IF THIS COURT GRANTS REVIEW IT SHOULD ALSO (1) ORDER THAT *McMILLIN ALBANY* REMAIN PUBLISHED UNDER CRC 8.1105(e)(1), (2) UNDER CRC 8.1125(c)(2), AND AS DESCRIBED IN *SAUNDERS*, DEPUBLISH *LIBERTY MUTUAL* AND *BURCH* PENDING A FINAL RULING IN THIS CASE, AND (3) CLARIFY WHAT IS WITHIN THE SCOPE OF THE COURT'S REVIEW, GIVEN THAT REAL PARTIES' "ISSUES PRESENTED" MAY BE CONSTRUED TOO NARROWLY AS WRITTEN

A. If this Court Grants Review, It should Order that *McMillin Albany* Remain Published and Simultaneously Order *Liberty Mutual* and *Burch* Depublished Pending a Final Ruling from this Court

For all of the same reasons articulated above in section IV. A. ("The Conflict of Law Can Be Resolved through this Court's Authority to Depublish *Liberty Mutual* and *Burch*") through and including section IV. B. ("*McMillin Albany* Was Correctly Decided; *Liberty Mutual* and *Burch* Were Wrongly Decided") of this Answer, this Court should allow *McMillin Albany* to remain published and should simultaneously order *Liberty Mutual* and *Burch* depublished.

This Court has the authority to order that *McMillin Albany* remain published where it would otherwise be automatically depublished upon granting of review: "Unless otherwise ordered under (2), an opinion is no longer considered published if the Supreme Court grants review . . . ." (CRC 8.1105(e)(1).) "The Supreme Court may also order publication of an

opinion, in whole or part, at any time after granting review." (CRC 8.1105(e)(2).)

If review is granted, the need for a clear rule of law is still a necessity while this Court adjudicates the issues. *McMillin Albany* provides clear direction regarding whether SB800 provides the exclusive remedy for residential construction defects. It is also the only published case that gives any direct, non-*dicta* direction as to whether and under what circumstances builders are entitled to their absolute right of engaging in the mandatory prelitigation inspection and repair procedures.

To allow *Liberty Mutual* and *Burch* to remain undisturbed while letting *McMillin Albany* go the way of automatic depublication, is to withhold from trial courts across the state much needed direction on the important prelitigation procedure issue that is only addressed by indirect implication and *dicta* in *Liberty Mutual* and *Burch*. Compared to *Liberty Mutual* and *Burch*, the simple truth is that *McMillin Albany* provides quantitatively more law, which is based on a statutory interpretation that considered quantitatively more of the SB800 code, which is directly supported by an analysis of quantitatively more of SB800's legislative

history. The depth and scope of analysis in *Liberty Mutual* and *Burch* pale in comparison to *McMillin Albany*.

This situation seems to be a very good example of why, since 1979 to the present, there have been calls from the Court of Appeal's justices themselves, and serious consideration given by this Court, to do away with the California Rule of Court automatically depublishing Court of Appeal opinions upon granting Supreme Court review. (See California Supreme Court "Invitation to Comment" document, Item No. SP15-05, requesting public comment on currently pending proposed changes to CRC 8.1105(e) and 8.1115.) It is also why adopting the currently pending proposed changes to Rules 8.1105(e) and 8.1115 would be a good idea. (*Id.*) However, regardless of whether the currently pending proposed rule changes are ultimately adopted, for the reasons already stated, this situation justifies the continued publication of *McMillin Albany* even if review is granted, and the Court has the authority to so order under *current* CRC 8.1105(e)(2).

B. If this Court Grants Review It should Clarify What Is within the Scope of the Court's Review, Given that Real Parties' "Issues Presented" May Be Construed too Narrowly as Written

1. Real Parties' First Issue Presented

Real Parties' first issue presented is: "Does Title Seven of the Civil Code, at section 895, et seq., commonly referred to as "SB800", preclude a homeowner from bringing common law causes of action for defective conditions in his or her home which have resulted in physical damage to the home?" (Petition at 1.)

If review is granted, it should be granted as to a broader scope than Real Parties have presented in their first issue. The issue should be framed so as to more accurately focus on the broad scope of *McMillin Albany's* holding and, consequently, to more accurately cover all causes of action that are potentially abrogated by SB800's exclusivity, which may include more than just common law causes of action.

For example: What is the scope of causes of action that are precluded by Title Seven of the Civil Code, at section 895, et seq., commonly referred to as "SB800", for residential construction defects in non-condominium conversion homes, where the alleged defects have resulted in physical damage to the home?

2. Sub-Issues Subsumed by the First Issue Presented

The first issue also necessarily encompasses sub-issues identified in *McMillin Albany* and in the body of Real Parties' Petition for Review. This includes, but is not limited to, whether the only issue before the Fifth District was whether McMillin's motion for a stay pending completion of the prelitigation procedures of Chapter 4 was properly denied (Petition at 15), or, conversely, whether the exclusivity issue was properly before the Fifth District independent of any analysis regarding McMillin's right to a stay under Civil Code section 930(b), and in spite of there having been no dispositive motion at the trial court (Petition at 14-15).

3. The First Issue Presented Regarding the Scope of SB800's Exclusivity Is Necessarily a Sub-Issue of the Second Issue Presented

Real Parties' second issue presented is: "Does SB800 require compliance with the statutory prelitigation procedure set forth at Civil Code section 910 et seq., if the homeowner does not state any claim for relief under SB800?" (Petition at 2.)

While McMillin has no objection to the wording Real Parties have used to articulate this issue, it should be explicitly noted that this issue necessarily encompasses as a sub-issue the first issue presented regarding

the scope of SB800's exclusivity. As both *McMillin Albany* and the Respondent Trial Court recognized[6], the question of SB800's exclusivity must necessarily be answered in order to fairly and accurately consider the question whether McMillin was entitled to the stay it sought pursuant to section 930(b). (*McMillin Albany*, 239 Cal.App.4th 1132, 1141; see also *Shulman v. Group W Productions Inc.* (1998) 18 Cal.4th 200, FN13, finding it "necessary" to address a particular point "in order to state and decide fairly and accurately the legal questions inherent in the case.") Again, if SB800 *is* the exclusive remedy, then Real Parties *cannot* control whether McMillin can enforce its "absolute right" to the prelitigation procedures. If it *is not* the exclusive remedy, then Real Parties can simply plead common law causes of action and avoid altogether McMillin's (suddenly ironically described) "absolute right" to the prelitigation procedures. To answer the second issue properly, one must recognize that the second issue and the first issue are inextricably intertwined.

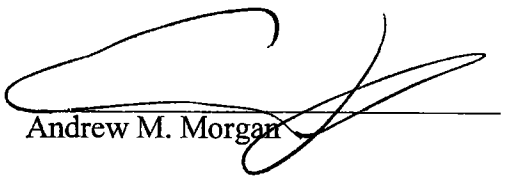
[6] The Respondent Trial Court reluctantly denied McMillin's motion to stay and *sua sponte* issued a Code of Civil Procedure section 166.1 statement, inviting appellate consideration of these issues. (*McMillin Albany*, 239 Cal.App.4th 1132, 1140-1141.)

VI. CONCLUSION

McMillin respectfully submits to the Court that there is no need to grant review in order to resolve the conflict of law that exists between *McMillin Albany* and *Liberty Mutual - Burch.* The most judicially efficient path to resolution of the conflicting holdings and any confusion that may result therefrom, which will also have the incidental effect of imposing the correct law throughout the state, is to deny review of *McMillin Albany*, allowing it to remain published, while simultaneously depublishing *Liberty Mutual* and *Burch.* The Court has the authority to do this and has done it in the past. As shown, *McMillin Albany* reaches the correct result for the correct reasons. As articulated in *McMillin Albany*, *Liberty Mutual* and *Burch* are wrongly decided.

McMillin further respectfully submits that if the Court elects to grant review, it should also **(1)** order that *McMillin Albany* remain published, **(2)** depublish *Liberty Mutual* and *Burch* pending a final ruling in this case, and **(3)** clarify what is within the scope of the Court's review, given the intertwining of Real Parties' two issues presented, and given the many important related sub-issues.

DATED: November 5, 2015

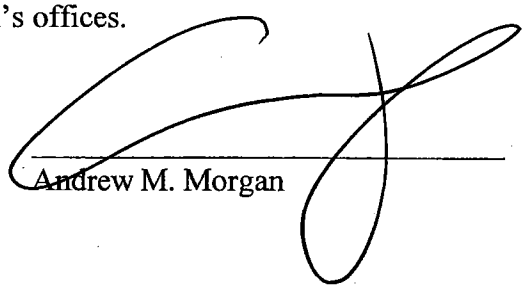


Andrew M. Morgan

CERTIFICATE OF WORD COUNT

On behalf of McMillin, I, Andrew M. Morgan, Esq., certify that in compliance with California Rules of Court 8.504(d)(1) the above Answer to Real Parties' Petition for Review is comprised of no more than 8,107 words. To verify this number I employed the word count feature made part of the Microsoft Word word processing program used by my firm's offices.

DATED: November 5, 2015



Andrew M. Morgan

PROOF OF SERVICE

I am employed in the County of KERN, State of California. I am over the age of 18 and not a party to the within action; my business address is Borton Petrini, LLP, 5060 California Avenue, Suite 700, Bakersfield, California 93309.

On **November 6, 2015** I served the foregoing document described as **McMILLIN'S ANSWER TO REAL PARTIES' PETITION FOR REVIEW**, on the other parties in this action by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

SEE ATTACHED SERVICE LIST

☐ **BY MAIL:** As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice the envelope would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Bakersfield, California in the ordinary course of business.

☐ **BY FACSIMILE:** I caused each document to be delivered by electronic facsimile to the listed above. The facsimile machine I used complied with California Rules of Court, Rule 2.301 and no error was reported by the machine. Pursuant to California Rules of Court, Rule 2.306.

☑ **BY OVERNIGHT SERVICE:** I caused each envelope with postage fully prepaid to be sent by overnight.

☐ **BY PERSONAL SERVICE:** Pursuant to C.C.P. section 1011, I caused to be delivered such envelope by hand to the offices of the addressee(s) listed on the attached mailing list.

☐ **BY ELECTRONIC SERVICE:** Pursuant to Code of Civil Procedure section 1010.6 and California Rules of Court, Rule 2.251, service shall be completed via electronic transmission to the attached person(s) transmission of such is at the e-mail address(es) indicated on the attached mailing list.

☑ **FEDERAL:** I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on this **November 6, 2015**, at Bakersfield, California.

Rozemma (Sissy) Rucker
Type or Print Name

Rozemma Rucker
Signature

SERVICE LIST

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